

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

 In re:) Docket Nos.
 Milk in the Northeast,) AO-14-A78, AO-388-A23,
 Appalachian, Florida,) AO-356-A44, AO-366-A52,
 Southeast, Upper Midwest,) AO-361-A44, AO-313-A53,
 Central, Mideast, Pacific) AO-166-A73, AO-368-A40,
 Northwest, Southwest, and) AO-231-A72 and AO-271-A44,
 Arizona Marketing Areas) DA-09-02, AMS-DA-09-0007

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 VOLUME II
 - - -

Public Hearing Administrative Law Judge
 Before: Jill S. Clifton

Date: May 5, 2009

Time: Commencing at 8:04 a.m.

Place: Westin Cincinnati Hotel
 21 East Fifth Street
 Cincinnati, Ohio 45202

Before: S. Diane Farrell, RMR, CRR
 Notary Public - State of Ohio

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1 P-R-O-C-E-E-D-I-N-G-S

2 JUDGE CLIFTON: Please come to order.
3 We're a couple of minutes late. Let's go on
4 record.

5 We're back on record. It's 8:04 on
6 Tuesday, May 5, 2009. This is the milk
7 rulemaking hearing taking place in Cincinnati,
8 Ohio. This is day two of the hearing. I'd like
9 the transcript to be shown as Volume II and the
10 pages to be numbered in sequence after those of
11 yesterday. So, for example, if yesterday ended
12 on page 301, I'd like today to begin on 302.

13 It may be necessary for you to number
14 things like the cover page and the certification
15 page in order for that to be a smooth flow.
16 That's how I'd like it to be.

17 My name is Jill Clifton. I'm the United
18 States Administrative Law Judge who's been
19 assigned to take evidence here. So I'm here to
20 preside while we gather testimony and exhibits.

21 The decision at the end of all of the
22 rulemaking procedure will be that of the
23 Secretary of the United States Department of
24 Agriculture, and the Secretary, of course, will
25 be assisted in the decision-writing process by

1 people within the Department.

2 After we finished on the record
3 yesterday, I did -- I did about three things.
4 The first thing was that I indicated to
5 Mr. Carman that rather than have him be here
6 ready to testify today, I'd rather that we
7 continue to work on the responses to requests
8 that had been made.

9 I telephoned Mr. Brosch, who's at the
10 podium, and asked him to have Dr. Cryan prepared
11 to testify first thing this morning. And I
12 assured Mr. Stevens that before we got to any
13 testimony, I would give him the opportunity to
14 move for the admission of Exhibits 5 through 20.
15 I'd like to do that now. Mr. Stevens.

16 MR. STEVENS: Thank you, your Honor. I
17 would like to move for admission into evidence
18 of Exhibits identified as 5 through 20.

19 JUDGE CLIFTON: Is there any objection to
20 the admission into evidence of any of those
21 exhibits? There is none.

22 Exhibit 5 through 20 are admitted into
23 evidence.

24 MR. STEVENS: Thank you, your Honor.

25 JUDGE CLIFTON: Thank you, Mr. Stevens.

1 We now have in evidence Exhibits 1 through 22.
2 And so far we've had only one witness testify,
3 and that is Mr. Carman. Mr. Carman is not
4 finished. Mr. Carman will return so that the
5 additional responses to requests for data can be
6 examined through him first before they're
7 utilized in other ways.

8 We'll continue to work with the issues
9 that were raised yesterday about those responses
10 and the provision of copies here in the hearing
11 room and so forth. But I don't want to do that
12 right now.

13 Before Dr. Cryan comes to the stand, I do
14 want to quickly go over who else will testify
15 and then have Mr. Brosch and others help me
16 decide whether we really want Dr. Cryan on the
17 stand right this minute or whether we want some
18 others.

19 So I'm going to ask -- in addition to
20 Mr. Brosch, who's at the podium now -- I'm going
21 to ask the following people to come to the
22 podium, and I'll have you speak one after one to
23 tell me when you are available to testify and
24 when you would prefer to testify.

25 So when I call your name, I want you to

1 come forward, and also counsel, if you have
2 counsel with you that will be assisting you in
3 the questioning and answering. Howard Hatch,
4 Ted Dunajski. That's Ted Dunajski, I
5 mispronounced Ted. Dennis Tonak, Mike Asbury.
6 I don't know how to say this name, but it's Leon
7 Berthiaume.

8 MR. BERTHIAUME: Berthiaume.

9 JUDGE CLIFTON: Berthiaume, thank you.
10 Jim Buelow. Okay, and counsel with. All right.
11 Let's have Mr. Hatch. Would you and your
12 counsel go to the podium, please? I'd like
13 counsel to introduce himself fully, including
14 who he represents, where he's from, how to spell
15 his name and the like.

16 MR. TENSEN: Thank you, your Honor. Good
17 morning. My name is Arend Tensen. I'm from
18 Lebanon, New Hampshire, and I am here
19 representing Mr. Hatch. My name is spelled
20 A-r-e-n-d. Last name is T-e-n-s-e-n.

21 JUDGE CLIFTON: A-r-e-n-d, T-e-n-s-e-n.

22 MR. TENSEN: Correct.

23 JUDGE CLIFTON: And, Mr. Hatch, would you
24 again identify yourself?

25 MR. HATCH: Howard Hatch, H-o-w-a-r-d,

1 H-a-t-c-h.

2 JUDGE CLIFTON: All right. Mr. Tensen,
3 on behalf of Mr. Hatch, when are you available
4 to testify and when would you prefer?

5 MR. TENSEN: Our preference, your Honor,
6 would be to go first or early this morning. We
7 are available -- I'm available until mid to late
8 afternoon. Mr. Hatch is available all day. But
9 again, our preference would be that Mr. Hatch
10 would prefer to go first and have that part
11 taken care of.

12 JUDGE CLIFTON: All right. And on what
13 proposals, either for or against, do you expect
14 Mr. Hatch to testify?

15 MR. TENSEN: Mr. Hatch is --

16 JUDGE CLIFTON: You're so tall, you've
17 got to been really close to that mic.

18 MR. TENSEN: Thank you, your Honor.
19 Mr. Hatch will testify, approximately will be 20
20 minutes. He is against the proposal and
21 alternatively proposes a monthly cap or
22 exemption of 3 million pounds.

23 JUDGE CLIFTON: Good. Thank you.

24 MR. TENSEN: Thank you, your Honor.

25 JUDGE CLIFTON: All right. Next somebody

1 who is with counsel who would like to testify
2 early on today. Mr. Beshore?

3 MR. BESHORE: Yeah, other than Dr. Cryan,
4 of course, we have three witnesses that would be
5 presenting supportive testimony with respect to
6 Proposals 1, 2 and 26.

7 Dennis Tonak. He is here and prepared to
8 proceed at the convenience of your Honor.
9 His -- his statement is -- has been left on the
10 table in the back of the room as indicated under
11 the rules.

12 Mike Asbury is also here. His statement
13 is also available in the room. And he's
14 prepared to proceed, you know, anytime today at
15 your Honor's convenience.

16 Mr. Berthiaume is here. His statement is
17 not yet available and he is not available today.

18 JUDGE CLIFTON: Okay. Good. Are
19 Mr. Tonak and Mr. Asbury up here with you?

20 MR. BESHORE: They are.

21 JUDGE CLIFTON: I'd like each of them to
22 come to the podium and identify themselves and
23 spell their names.

24 MR. TONAK: My name is Dennis Tonak.

25 MR. ASBURY: I'm Mike Asbury, M-i-k-e,

1 A-s-b-u-r-y.

2 JUDGE CLIFTON: Mr. Beshore, on behalf of
3 Messrs. Tonak and Asbury, how soon would they
4 like to testify today?

5 MR. BESHORE: They're here and available
6 at any time during the day, so I -- after -- so
7 after Dr. Cryan, after Dr. Yonkers, who is also
8 available today, and then at your pleasure.

9 JUDGE CLIFTON: That sounds ambitious.
10 We can finish both Dr. Cryan and Dr. Yonkers and
11 still get them in?

12 MR. BESHORE: I don't know. But the
13 thought was that Dr. Cryan and Dr. Yonkers, who
14 are more, I mean, witnesses with respect to the
15 proposal -- and I'll let Mr. English speak with
16 respect to Dr. Yonkers -- that they would come
17 before the more regional witnesses.

18 JUDGE CLIFTON: Thank you. Mr. English.

19 MR. ENGLISH: Your Honor, two issues.
20 First, Mr. James Buelow, turns out he didn't get
21 here until very late last evening. He's
22 not prepared to go today. So he would prefer to
23 go tomorrow.

24 JUDGE CLIFTON: And how do you spell his
25 name?

1 MR. ENGLISH: B-u-e-l-o-w. We mentioned
2 him yesterday. I wanted to notify you that. I
3 can let Dr. Yonkers speak for him. It's my
4 understanding he is here generally throughout
5 the hearing and is flexible, but when he
6 testifies, while it would be ideal, I think,
7 Dr. Cryan and Dr. Yonkers go, it's not
8 necessary, and therefore Dr. Yonkers is
9 conceivably available should an opening occur at
10 another time.

11 JUDGE CLIFTON: All right. As to James
12 Buelow's testimony, is he from --

13 MR. ENGLISH: Steuben Foods.

14 JUDGE CLIFTON: Steuben Foods. And tell
15 me again, is that first letter of his name V as
16 in Victor or B as in boy?

17 MR. ENGLISH: B as in boy.

18 JUDGE CLIFTON: That's what I had
19 yesterday, but I think maybe I got it wrong.
20 And he pronounces it Buelow?

21 MR. ENGLISH: I've heard it both ways,
22 but yes.

23 JUDGE CLIFTON: Okay. Is he standing
24 here right now?

25 MR. ENGLISH: I don't think he's here. I

1 think he got here much later than expected last
2 evening, so I think he is not here.

3 JUDGE CLIFTON: Okay. Very good. And
4 who else did I call on? Who isn't at the
5 podium?

6 MR. DUNAJSKI: Ted Dunajski.

7 JUDGE CLIFTON: Good. Come forward
8 please, and please state and spell your name.

9 MR. DUNAJSKI: Name is Ted Dunajski,
10 D-u-n-a-j-s-k-i.

11 JUDGE CLIFTON: And when are you
12 available and when would you prefer to testify?

13 MR. DUNAJSKI: I'm available now until
14 2:30 this afternoon.

15 JUDGE CLIFTON: Okay. We need to put you
16 on early then.

17 MR. DUNAJSKI: Okay. Thank you.

18 JUDGE CLIFTON: Thank you. And who else?

19 MR. YONKERS: Your Honor, Robert Yonkers
20 on behalf of the International Dairy Foods
21 Association. We co-petitioned with National
22 Milk for Proposals 1 and 2 that led to this
23 hearing notice. While my organization would
24 like my testimony to go in right after
25 Dr. Cryan's, and I have streamlined my testimony

1 considerably not to duplicate a lot of the
2 arguments that Dr. Cryan makes. So it's much
3 shorter than his. I would prefer to go on
4 today, but as Mr. English mentioned, I am going
5 to be here this week and next week and have a
6 flexible schedule. But my testimony is in the
7 back of the room this morning.

8 JUDGE CLIFTON: All right. Excellent.
9 Thank you. Did I have you spell everything?

10 MR. YONKERS: No, you did not. Robert,
11 last name is Yonkers, Y-o-n-k-e-r-s.

12 JUDGE CLIFTON: All right. Good. Thank
13 you. Now, is there anyone else here besides
14 those I have called who is available to testify
15 today and would prefer to testify today? There
16 is not. That is good. All right.

17 I believe I would like to start the
18 testimony with Mr. Hatch, followed soon
19 thereafter by Mr. Dunajski. And then I'll take
20 another look at this list.

21 So Mr. Hatch and counsel, if you'd come
22 forward, please? And Mr. Hatch, there is a
23 little step on the far side of the platform. So
24 you can get up to the witness stand that way.
25 Please be seated and pour yourself some water,

1 if you'd like, and get comfortable. And then
2 we'll begin. You're already comfortable. Good.
3 Now, I do need you to pull the microphone just
4 as close to your mouth as mine is to mine.
5 Good.

6 All right. Counsel, you may begin.

7 MR. TENSEN: Would you like the court
8 reporter to swear the witness?

9 JUDGE CLIFTON: Oh. I would like to
10 swear the witness in. Thank you very much.
11 That's my main job here. Mr. Hatch, would
12 you -- thank you, but you may remain seated so
13 that your yes will be picked up by the
14 microphone. But thank you.

15 (The witness was sworn.)

16 JUDGE CLIFTON: Thank you. Thank you
17 very much.

18 HOWARD HATCH

19 of lawful age, being duly sworn, was examined and
20 deposed as follows:

21 DIRECT EXAMINATION

22 BY MR. TENSEN:

23 Q. Good morning, Howard.

24 A. Good morning.

25 Q. Howard, where did you grow up?

1 A. Grew up in a small town in northern New
2 Hampshire.

3 Q. And what year did you start milking cows?

4 A. I started milking in 1949, by hand, four
5 years old. I could fill a pail pretty easy, but I
6 couldn't lift it up from underneath the cow.

7 Q. You started milking cows 1949 by hand.
8 Did you keep milking cows right through your school
9 years?

10 A. Yeah. I had my first -- I came from a
11 farm family that always worked for other people. None
12 of them ever owned any cattle and machinery or lands or
13 anything. And I had my first calf given to me in 1958.
14 I'd raised it, and then in high school -- you want to
15 hear the history and all?

16 Q. Yeah.

17 A. I milked two cows in high school and
18 delivered milk on my way to school. And I had 50 hens,
19 delivered eggs on my way to school.

20 Q. So you did door-to-door deliveries
21 starting back in the '50s?

22 A. Kind of, yeah.

23 Q. Milk from your own cows?

24 A. Yeah.

25 Q. And what high school did you graduate

1 from?

2 A. Lisbon High School.

3 Q. And did you go on to college after that?

4 A. I came from a pretty large family and we
5 didn't really have too much. Graduation day, the
6 University of New Hampshire gave me information they'd
7 awarded me a full tuition grant for two years at the
8 agriculture school.

9 Q. And did you go on to UNH and obtain your
10 associates' degree?

11 A. Yes.

12 Q. And was that in agriculture?

13 A. Yes.

14 Q. What did you do immediately after you
15 completed your education at University of New Hampshire?

16 A. I took on a herdsman job in Bethlehem,
17 New Hampshire, on 32 Jerseys.

18 Q. I'm sorry. How long did you milk cows?

19 A. I never really stopped milking cows.
20 Even at the university, I had a job at the dairy barn.

21 Q. And how long did you work up in Lisbon as
22 a herdsman?

23 A. Just kept going. And President Johnson
24 sent his greetings and I was sent to basic training to
25 be a demolition specialist and sent to Vietnam for a

1 year.

2 Q. Okay. So you were a teenager, you were
3 drafted?

4 A. Yes.

5 Q. Did you want to go over to Vietnam?

6 A. No, I really didn't want to go. But I
7 don't argue. I went, I served my time and I'm proud I
8 did it.

9 Q. Okay. And you were in the field quite a
10 bit in Vietnam?

11 A. Yeah, time went faster when you -- I
12 stayed busy. I was in the field from August all the way
13 until two days before Christmas without coming in.

14 Q. Okay. Now, I know you had brought a
15 picture, if anybody cares to see it, of when you were in
16 Vietnam. Yeah, both of those are in that picture. What
17 did you have painted on that bulldozer?

18 JUDGE CLIFTON: The witness is tendering
19 to me a photograph that's contained in the
20 Valley News dated Friday, August 11th, 1989.

21 A. That was after the war. But it was the
22 first -- the first time that I put my uniform back on.

23 Q. That was 20 years after the war, you left
24 Vietnam?

25 A. Yeah, 22 years. We weren't really

1 accepted well when we came home. The issue with this
2 picture was someone has always been fiddling with us,
3 telling us what we can do and can't do. On the side of
4 the dozer I had New Hampshire, in little letters, New
5 Hampshire. Somebody would go by and they'd know where
6 you came from. I was told to take it off because it was
7 politically incorrect.

8 Q. So you were over there in Vietnam, and
9 somebody was worried about what you wrote on your dozer?

10 A. Yeah.

11 Q. You were out in the field almost five
12 months without coming in?

13 A. Yeah.

14 Q. Suffice to say you went through a lot?

15 A. Yeah. I can lead your next question. It
16 was -- it was -- I saw a lot of combat, but one of the
17 decisions that I feel I made in my life was one night on
18 guard duty, I kind of made a vow to myself. If I got
19 back alive, I want to try farming myself. So I don't
20 look at Vietnam as a total loss to me.

21 I had issues to deal with since I came
22 back. And to cope with those, I put a hundred percent
23 into my farming. I don't actually have a savings
24 account. When I got back, I started milking six cows by
25 hand. I had enough money to buy six old scrub cows,

1 milked them by hand and shipped the milk in a neighbor's
2 tank. Always had to stay busy. If I could stay busy,
3 the issue of Vietnam didn't -- didn't really bother me.

4 Q. Did you need to work to the point of
5 exhaustion to sleep?

6 A. I did it each day. Each day, each week,
7 each season, from a hundred in a morning to zero at
8 night, and I could sleep and I didn't have to deal with
9 flashbacks, whatever, action. And farming, I haven't
10 had to have much therapy or anything, that was my
11 therapy.

12 Q. The farming was your therapy?

13 A. Yes.

14 Q. And you have a service -- I know you
15 don't like to talk about it, but you have a pretty
16 significant service disability?

17 A. Mainly PS -- PTSD. I spend most of my
18 nights sleeping in a chair now on account of issues with
19 Agent Orange.

20 Q. So you made a decision when you were in
21 Vietnam you were going to come back and milk your own
22 cows?

23 A. Yes.

24 Q. And up to that point, you had worked for
25 others and you started milking your own cows at that

1 time when you came back?

2 A. Well, I bought six old scrub cows.

3 Q. And did you continue to milk cows through
4 the years?

5 A. Yes.

6 Q. And building the farm up?

7 A. Yes, I rented a farm and got up to
8 milking 22 cows. Bought another farm in '71 with an
9 additional 39 cows and some old Farmalls and stuff on
10 it, back in a town that I wanted to farm in, where my
11 father was born, in Haverhill, New Hampshire.

12 Q. Is that where your operation is today?

13 A. Yes.

14 Q. And when did you -- did there come a time
15 you started bottling your own milk?

16 A. Yeah, it came about 20 more years later,
17 when I shipped milk to a -- never shipped milk too much
18 to co-ops, I'm kind of an independent-type person.

19 But I shipped out milk for about 20
20 years, what I felt a quality product. And I never got
21 paid what I figured it was worth. I always had to do
22 supplemental work to keep the farming going. I either
23 did custom work, or for 20 years we had a sawdust
24 business, hauling bedding for other farmers to --
25 starting with nothing and wanting things faster.

1 And I carried quite -- my debt was pretty
2 heavy. You have heavy debt to pay the bills, you do
3 what it takes to keep going.

4 But after doing this for 20, 22 years, I
5 felt if I was ever going to get a quality product that I
6 put in a bulk tank, I can't get any more for it, I'd
7 have to try to do it on my own.

8 Q. Is that when you decided to start
9 bottling your own milk?

10 A. Yes.

11 Q. What year did you start bottling milk?

12 A. We started bottling milk in 1992.

13 Q. And tell us about your early years of
14 bottling milk and where you went with that.

15 A. I didn't ask many questions in the
16 beginning and I didn't know anything about the Federal
17 Order, probably don't know much more now than I did.
18 But it was hard in the beginning. We were milking at
19 that time about 125 cows. We were bottling a little bit
20 twice a week, and I was selling all the rest of it
21 Class IV A, which was \$9 and something, just barely \$9
22 before the hauling was taken out.

23 Q. And did you -- what happened over the
24 years with your -- where were you marketing your route
25 to begin?

1 A. I was marketing around home and around
2 the northern part of the state. And when you don't plan
3 ahead, you got 100 cows in a -- in an area where the
4 population is not very large, a hundred cows goes a long
5 way, if you try to sell it and compete with other milk
6 dealers, milk handlers, and go into a small store and
7 there's already two other -- two other dealers in there
8 and you have to guarantee sales. It was -- it was
9 pretty rough.

10 Q. Did there come a time you started
11 marketing your milk in the Boston area?

12 A. Yes. That's probably what kind of saved
13 us. There's a couple door-to-door delivery companies
14 that had been in business. One of them, Thatcher Farms,
15 had been in business since 1891, and Hornstra Farms has
16 been in business since 1915. And there are farms that
17 had cows. And over the years, the cities just -- have
18 driven them out. They lost the cows. And then they
19 have their -- they brought their milk in and they buy in
20 bottles and they still do this today.

21 Q. What kind of bottles do you sell your
22 milk in mostly?

23 A. About 60 percent of my milk is bottled in
24 glass. The rest is in plastic.

25 Q. Uh-huh. And most of that glass bottle is

1 home delivered in the Boston area?

2 A. Yes. Boston area, plus New Hampshire and
3 Burlington, Vermont.

4 Q. And I take it that's kind of a unique
5 service that you provide, supplying milk in glass
6 bottles for home delivery?

7 A. Yes.

8 Q. Is there -- none of the major co-ops are
9 in that area, doing glass bottles for door-to-door
10 delivery?

11 A. No.

12 Q. Now, what kind of operation do you have
13 today with your bottling and your farm?

14 A. Ten years ago, we were able to buy a farm
15 that I -- as a kid I never even thought I'd get to work
16 on a farm like that. It was a 250-acre field right on
17 the Connecticut River. It's nice, nice land to work,
18 and we've added on. And the business that we built, I
19 haven't spent one penny of advertising.

20 The only advertising we do is the
21 promotion that we're required to do. And that business
22 has grown from what I feel is taking the product all the
23 way from the feed, the cows, to processing, to delivery.
24 We can offer something different that other people
25 can't.

1 Q. You still -- you talked about quality
2 earlier. Do you still strive to produce high --

3 A. If it wouldn't go in my glass on the
4 table, it won't go in a bulk tank.

5 Q. How many people do you employ today?

6 A. Today, we employ 23 people.

7 Q. And you say we. You have family members
8 that farm with you?

9 A. Well, I have a son and his stepson. My
10 daughter does the office. Wife's involved. And I have
11 a brother that's -- a brother that's worked for me since
12 I got out of the service; been 41 years he's been with
13 me.

14 And these are some of the issues that are
15 put together. It works. And if the producer-handler
16 status ceased, and we weren't allowed to go on or had to
17 cut back to a 450,000 nonpool plant, exempt plant, I'd
18 have to cut everything in half.

19 Q. How much milk do you ship a month right
20 now?

21 A. Between 750 and 800,000.

22 Q. And would you be put out of business if
23 this proposal --

24 A. If the 3 million proposal doesn't
25 succeed, or something higher than what I'm producing,

1 and it went to an exempt plant of 450, it wouldn't work
2 for us.

3 Q. Okay. And basically put your processing
4 plants, if not dairy, right out of business?

5 A. We built a new -- a new processing plant
6 in 2004 and it is not paid for yet.

7 Q. And you owe -- I mean, that was a pretty
8 substantial investment for your farm?

9 A. Yes.

10 Q. And you can't compete with the co-ops
11 under volume or anything on their price structure?

12 A. No. One of the things that kind of
13 bothers me is in a producer-handler, pretty much
14 balanced myself. We've gone whole years before and
15 balanced. We have run short of milk before and had to
16 buy milk, and right now we have some extra milk.

17 But in the last two years, I have sold --
18 bought milk. It's been 27 something -- it's been \$2.47
19 a gallon purchased from DFA. And in February, we sold
20 milk to DFA, extra milk, 67 cents a gallon, \$8.11,
21 4.3 fat, 3:3 protein.

22 Q. So you balance out your milk right now
23 with DFA?

24 A. Yes. And that's one of the things you
25 read in the papers, and the backers of this proposal to

1 limit us. The ones who balance me are the ones that
2 want to put me out of business. I talked to their
3 members. There are four co-ops in New England,
4 Agri-Mark, St. Albans, Dairylea and DFA.

5 You speak to the individual farmers, and
6 they don't say they want to put me out of business.
7 They don't feel I'm a competitor. But they're being
8 represented, so I'm mixed up a little bit. The person
9 that balances me, a company that balances me is working
10 against me, so -- and I don't have many -- anywhere to
11 turn to be balanced.

12 Q. Your experience in talking to co-op
13 members, are they even aware of what their co-ops are
14 trying to do?

15 A. I don't want to speak for them. But I
16 don't know.

17 Q. Your understanding is that they're not
18 aware that they want to change the rules on you?

19 A. I've been to a Farm Credit meeting and a
20 couple of farm -- annual meetings and talked to
21 individuals that belong to co-ops, and they're not aware
22 of it.

23 Q. All right. And what would you like to
24 see -- would you like to see the rules change at all,
25 first of all?

1 A. Looking out for just myself, I'd like to
2 see a cap put high enough so that I don't reach it.

3 Q. And what would you propose for a cap?

4 A. I don't think our family would ever
5 see -- I'd like some room for expansion, but I don't
6 think we'd ever surpass the 3 million pound limit.

7 Q. Okay. How about the rule change in
8 general, would you prefer to see it stay status quo?

9 A. The more I thought about it, I'd like to
10 see it left alone. It's -- if it's competition, I want
11 to be careful because I don't want to step on anyone
12 else's toes. I'm here to look out for myself. But I
13 don't want to -- I don't want anybody to impose things
14 on me. But I don't want to set limits that are stepping
15 on someone else's toes.

16 Q. So if the rule changes to 3 million, that
17 would suffice for the foreseeable future for your farm?

18 A. Yes. In -- I can't speak for -- I can
19 look at and make assumptions of what might happen within
20 our own Order. Within -- in New England, I don't see
21 farms ever getting -- I look at it in 500 gallon
22 increments. 500 cows is a million pounds. A thousand
23 cows is two. When you get to 1,500 cows in New England,
24 you're hauling feed a long ways.

25 There are other farms near me, a couple

1 near a thousand pounds, not -- a thousand cow herds, and
2 they're hauling feed 50 to 60 miles one way. And it
3 doesn't -- I don't think it's worth it. So somewhere in
4 the vicinity of a thousand to 1,500 cows.

5 Actually, in New England -- I don't know
6 so much about New York and Pennsylvania -- but I just
7 don't see it working in New England. So the cost of
8 production is an awful lot more in New England than it
9 is in other parts of the country.

10 Q. Do you see any disorderly market
11 condition caused by your marketing of your milk?

12 A. I haven't seen it, because the ones we
13 sell it to charge much more. It's -- I don't know if
14 you want to call it a niche product, but it's -- it's
15 different. It's -- the package is different.

16 Whatever we -- if we make chocolate milk
17 or an eggnog, I use superior products. And the whole
18 route -- and so it -- sometimes I have to be competitive
19 in what I charge for it. But many of the -- the
20 delivery people and store owners, they ride a pretty
21 good wave, too. So most of the time our product is
22 priced higher, priced higher than -- than the standard
23 product in the store.

24 Q. Your -- I mean, you're not competitive on
25 the price. I mean, your price is higher and your cost

1 is higher than the milk that is sold by the larger
2 co-ops in your area?

3 A. Yes. We have dropped the low milk
4 prices. We have dropped our price to our distributors.
5 But what bothers me is they don't drop -- they don't
6 drop the price. But that's not what we're here to --

7 Q. Can you compete head-to-head with the
8 large processing plants in your area?

9 A. Well, there's no -- there's -- in New
10 England, there's only a few, and they bottle in plastic.
11 And they have their own blow molds and they're set up,
12 so I can't -- I can't compete.

13 Q. So you would like to see -- if the rule
14 is changed -- first of all, you'd like to see the rule
15 not changed?

16 A. We'd get by okay. I don't have -- I
17 don't know if I stated it correctly. I really don't
18 have a savings account. Everything I have is there.

19 But the one thing I can say today, I
20 haven't lost a penny on Wall Street in investing.

21 Q. Safe to say all your stock has four legs?

22 A. Pretty much.

23 Q. But you would like to -- if the rule is
24 going to change, a monthly exemption of 3 million pounds
25 will allow you to continue to operate?

1 A. It would us, yes.

2 Q. Howard, when you were drafted, you played
3 by the rules and you went over?

4 A. Yeah.

5 Q. What happens if the rules are changed
6 here?

7 A. What happens if the rules change?
8 Depends on how radically. I mean, the contrast. I
9 mean, I could be out of business or I could be -- they
10 could be doctored a little bit and be back here again in
11 a few years.

12 But I don't know. I -- probably not the
13 proper time to inject this, but I've watched the men
14 coming in. There's a few in here older than I am.

15 But I've watched the milk process for
16 around 60 years. And it's the same as it was in the
17 early '50s. Nothing has really changed. And until
18 someone comes along with a supply management, it's
19 going -- until someone comes together and does something
20 about supply management, it's going to continue to have
21 these waves, the ups and downs. Strike that from the
22 record, if you want.

23 JUDGE CLIFTON: No. No, that's valuable
24 testimony.

25 Q. There -- is there anything else you would

1 like to add about -- about the proposed rules or other
2 comments you want to make?

3 A. No, I think you pretty much covered it.
4 I -- I've been assured of something and Mr. Tosi has
5 walked me through it.

6 In the beginning, when this first came
7 out in January 29th or 30th, the first two proposals
8 came out, I was told that it was a done deal, we didn't
9 have a chance of even being heard.

10 And I called the Market Administrator's
11 office in Boston, got ahold of Mr. Tosi in Washington,
12 and he made -- he made a point on two or three different
13 calls to walk me through the process. And it's made me
14 feel pretty good, that the process -- there is going to
15 be a process to be heard and people that want to be
16 heard will be heard.

17 And it's not all done. So I want to
18 thank that table for that. But he took his time and
19 walked me through it and I haven't got much more. I
20 made the trip out here, I hope --

21 Q. Howard, I don't have any other questions.
22 One last question. When's the last time you were this
23 scared about your future?

24 A. In the Army bus, I guess, going in the
25 service.

1 MR. TENSEN: Thank you, Mr. Hatch.

2 JUDGE CLIFTON: Thank you, Mr. Tensen.

3 Mr. Tensen, if you want to take a seat right at
4 this table, that would be good.

5 MR. TENSEN: Thank you.

6 JUDGE CLIFTON: And if you have any
7 objection during the cross-examination, I'll
8 need you to come to a microphone. There isn't
9 one there. All right. Who would like to begin
10 cross-examination. Mr. Brosch.

11 MR. BROSCH: Thank you, your Honor. My
12 name is Kevin Brosch. I'm with National Milk
13 Producers Federation.

14 CROSS-EXAMINATION

15 BY MR. BROSCH:

16 Q. Good morning, Mr. Hatch.

17 A. Good morning.

18 Q. I found your life story pretty touching.
19 I have to say it's an emotional way to begin the
20 morning. I have a best friend in college who just died
21 about two months ago who was a Vietnam vet. So I share
22 your -- your difficulties in some ways. So I salute
23 you.

24 Mr. Hatch, you've talked about being
25 opposed to the proposal. I wasn't clear from your

1 testimony which proposal you're talking about. Could
2 you explain to me?

3 A. The original Proposals of 1 and 2.

4 Q. 1 and 2. Okay. Have you been --

5 A. They want to do away with
6 producer-handler and extend the exempt plant to
7 450,000 pounds.

8 Q. Right. Are you aware that National Milk
9 has also made a Proposal Number 26?

10 A. I've been told that -- I have not
11 received that, until I see something in writing that
12 assures me it's going to happen. You're in agreement
13 with the 3 million pounds?

14 Q. There is a proposal -- you're aware that
15 National Milk has proposed a 3 million pound cap for
16 existing producer-handlers in Proposal 26?

17 A. I have not read the proposal.

18 Q. Now, if -- if you had -- if you were
19 aware that National Milk has a proposal that is joined
20 to its Proposal Number 1 and 2 that allows for a
21 3 million pound limit for existing producer-handlers,
22 would that make you feel better?

23 A. It would make me feel better. Except can
24 you explain something for me, please?

25 Q. Well, I'm not sure -- I'm here to ask

1 questions, sir. I'm not sure I'm privileged enough to
2 answer questions.

3 A. Does it make the producer-handler name go
4 away? Does it grandfather and not let anybody else into
5 the system?

6 Q. It will grandfather the people who exist.

7 A. What about the ones that want to start
8 up?

9 Q. Mr. Hatch, are you a person who wants to
10 start up?

11 A. No, but closing the door, I wouldn't -- I
12 had an offer to me to be able to start. I wouldn't want
13 to be attached to a proposal that prevents someone else
14 from starting up.

15 Q. Let me ask you personally about your
16 business.

17 A. Yes.

18 Q. I understand your testimony was you were
19 here to look out for yourself?

20 A. Right.

21 Q. And you were going to let other
22 people look out for themselves. For your business, do
23 you ever expect -- I think your testimony is you don't
24 expect your family to ever reach the 3 million pound
25 cap?

1 A. No.

2 MR. BROSCHE: Thank you.

3 JUDGE CLIFTON: Other questions for
4 Mr. Hatch? Mr. Carroll.

5 CROSS-EXAMINATION

6 BY MR. CARROLL:

7 Q. Mr. Hatch, tell us about your family
8 that's in this business. Who are they and what do they
9 do?

10 A. I have a brother that's been with me --
11 been with me his whole life, but he's worked for me for
12 41 years. I have a son that turns 40 this year. He
13 fills in anywhere from mechanic, chopping corn,
14 spreading manure.

15 He can -- if my brother has a vacation or
16 a day off, he can fill in in the dairy, or my son-in-law
17 who drives the tractor-trailer. We send five
18 tractor-trailer loads of bottled milk to the
19 Boston/Portsmouth area every week.

20 If my son-in-law has a day off, he steps
21 in and does that. My daughter does the office work. I
22 have a sister-in-law that works in the office, a
23 grandson that's starting to help on the farm and a
24 step-grandson that helps on the farm.

25 Q. All right.

1 A. And then we have -- other than that, we
2 have, you know, 15 or 16 employees, 23 total paid. Not
3 all of the family gets paid. I don't get paid.

4 Q. Now, directing your attention to the
5 opportunity of other producers to someday become a
6 producer-handler, what was your position on that again?

7 A. I would hate to see rules written where a
8 person couldn't start up a producer-handler operation.
9 There are -- I look at -- can I go farther than what you
10 just asked?

11 Q. Yes.

12 A. I see categories of producer-handlers.
13 And with envy, I look at some of the small ones in
14 Massachusetts that have population around that, that
15 milk 40 to 60 cows, and they have a farm store and they
16 retail everything. I wished I could do that.

17 I have a nice farm, but it's the wrong --
18 it's in the wrong place. I have to go deliver it to
19 these people. And I'm not in the same position.

20 We have a small farm store that we sell
21 30 to 50 gallons a day from. It's insignificant, and we
22 really don't get full retail out of it.

23 Q. All right. Directing your attention to
24 how you do business again, would you tell us again what
25 your distribution is? You bottle for other people. Is

1 that what you're saying?

2 A. Yes.

3 Q. And would you tell us how many of those
4 there are that you bottle for?

5 A. There is four delivery people. One is a
6 little milkman in Portsmouth, New Hampshire that's been
7 a startup delivery business. They deliver door-to-door,
8 but it's more than milk. There's everything. They're
9 like a traveling Schwan's truck with milk on board.

10 We have a small distributor in
11 Burlington, Vermont, that comes and picks his milk up in
12 glass. And one of our -- he's actually my wife's
13 cousin, Hornstra. He was scheduled to maybe be heard
14 here. It was his family that's delivered for years and
15 years, and we supply them milk. It's under his -- it's
16 bottled in his bottles, our milk, with our plant number
17 on it. There's only a couple of differences. We call
18 it wicked good milk in New Hampshire. But when it gets
19 down there, it's just yummy. That's the way they
20 advertise it.

21 Q. And would you want the right to continue
22 bottling for that man or the others as well?

23 A. If we're limited from doing that, again,
24 there's not room for us. Customer base in Northern New
25 England is not there. We'd have to -- we'd be directly

1 competing for the market space and cutting the price to
2 do it.

3 Q. All right. Now, in the event of your
4 decease, do you wish to have your family continue that
5 business as their livelihood?

6 A. Very much so.

7 Q. Is that an important consideration for
8 you?

9 A. That's what I've worked my life to have,
10 a complete operation. Not just raising the feed or
11 raising the feed and milking the cow or distribution
12 system, but we nearly -- nearly have it put together
13 where we are almost complete -- where we're responsible
14 all the way from grass to the kitchen table.

15 Q. Are you aware of any position taken by
16 the New Hampshire Agriculture Commissioner or the Office
17 on this -- on these proposals?

18 A. Yes. I was -- I've been following what
19 they wanted -- wanted to do. And then in -- I think it
20 was last Thursday or Friday, my commissioner called me
21 and said they'd changed their position from 3 million
22 pounds to 2 million pounds, to keep the Wisconsin people
23 on their -- their coalition or their gathering. There's
24 New Hampshire, Vermont, New York, Pennsylvania and
25 Wisconsin. Wisconsin is the only one, I think, out of

1 the Federal Order.

2 Q. Would you state again the states, the
3 Commissioners of Agriculture that you understand have
4 come to that point of view?

5 A. To my understanding --

6 MR. BROSCHE: Objection. Objection.

7 Excuse me, sir.

8 JUDGE CLIFTON: Mr. Brosch, you may state
9 your objection.

10 MR. BROSCHE: Your Honor, I think that
11 this is hearsay about what the states are going
12 to do. I think the states are going to come and
13 speak for themselves. I'm not sure this witness
14 is qualified to speak for the states and their
15 position.

16 JUDGE CLIFTON: Thank you, Mr. Brosch.
17 Mr. Carroll, your response?

18 MR. CARROLL: I'll strike the question
19 and ask another one.

20 JUDGE CLIFTON: Thank you.

21 BY MR. CARROLL:

22 Q. Are you aware of the position of the
23 Commissioners of Agriculture -- of Agriculture of the
24 state of New Hampshire on these proposals?

25 MR. BROSCHE: Same objection, your Honor.

1 JUDGE CLIFTON: You are talking about the
2 phone call that he had with that commissioner?

3 MR. CARROLL: Yes.

4 JUDGE CLIFTON: You may relate what you
5 believe you heard in that phone call.

6 A. I've already -- I've already stated what
7 she has said. I have not read the complete proposal
8 that was changed last Thursday, Friday, and was --

9 Q. That's all right, I understand that.
10 If -- if you were -- if your operation was fully pooled,
11 could you make the payments from the profits of your
12 business?

13 A. I'm not sure if I could -- if I was
14 pooled one month in a year, probably it'd be -- would be
15 the limit. If I was -- I could not make it paying into
16 the pool.

17 MR. CARROLL: That's all. Thank you.

18 JUDGE CLIFTON: Thank you, Mr. Carroll.

19 Other cross-examination? Mr. Vente.

20 CROSS-EXAMINATION

21 BY MR. VENITE:

22 Q. Good morning, Mr. Hatch.

23 A. Good morning.

24 Q. It's nice to not be the only person from
25 New Hampshire at one of these hearings.

1 I want to ask you a little bit about -- a
2 little bit more about your operation. You said you had
3 23 people working for you. How are those people divided
4 between working in the plants and working on the farm?

5 A. Six full time in the plant, two delivery
6 drivers.

7 Q. Is that two drivers including the six or
8 is that in addition?

9 A. Plus, plus.

10 Q. Okay. Plus two. Okay.

11 A. There is a meshing because many of my
12 people are trained to do more than one job. They might
13 be in the shop working on equipment part of the day. If
14 there's a need in the barn, if there's a cow down, if
15 they need to move dry cows around, a number of things,
16 they change positions.

17 But I have a Jersey farmer that sold his
18 cows a few years ago, and he comes and helps me. He's
19 a -- he's a people person and that's something that
20 I'm -- I'm not a people person. And he does a lot to
21 hold things together because he has the ability to
22 handle people.

23 Q. Okay. So the 15 people that are not in
24 the plant or drivers, are those 15 people going back and
25 forth and have some farm responsibilities and some

1 plant?

2 A. We have two pretty much like assistant
3 herdsman. We have about four regular milkers. We milk
4 at odd times. We milk at midnight and noon, mainly on
5 account of being later in the week, being a
6 producer-handler, Monday morning, most usually we've got
7 plenty of milk.

8 But toward the end of the week, you're
9 pretty close to balancing. You don't want your dairy
10 standing around waiting for milk. So they're finished
11 milking by 5:00 in the morning, and it's just a matter
12 of operation.

13 Q. What kind of organization is that? Is it
14 a corporation organization, a limited liability,
15 partnership, what?

16 A. We operate an LLC. We have to follow the
17 right guidelines to be able to be a producer-handler.
18 We have to have full ownership. We will have full
19 ownership someday when we get it paid off.

20 Q. You're saying the bank has some equity
21 interest in -- in your business?

22 A. Yes.

23 Q. The bank doesn't make management
24 decisions, however, those are yours?

25 A. Yeah.

1 Q. Do you have a board of directors,
2 management committee, or is that your family, kitchen
3 table kind of thing?

4 A. A little bit more than that. We have
5 management meetings.

6 Q. And the managers are -- are part -- are
7 your family?

8 A. Yes.

9 Q. You mentioned that you have grown, and I
10 think I understood you to say that you have some
11 expectation and hope of growing a bit in the future?

12 A. Well, we've only grown to fulfill orders.
13 It isn't like I -- I don't want to be listed as a dog
14 chasing his tail, but yes we have -- we have goals.
15 We're getting -- we're getting near our goals, we'd say.

16 Q. When you indicated that you invested in a
17 new processing plant in 2004 --

18 A. Yes.

19 Q. -- is that correct? What is the bottling
20 capacity of the equipment that you purchased and
21 installed in 2004?

22 A. Almost all of our equipment is used
23 equipment. Bottle washers are 1964 vintage, the
24 vintages, up through the vats. We do vat pasteurization
25 which is not very efficient, but it's a whole different

1 product you're putting out.

2 Q. Okay. If you were to maximize the volume
3 you put through your plant, how much could you
4 potentially bottle in the course of a month?

5 A. We have the cooler space, total
6 operation runs between 40 and 45 hours per week. It
7 sits idle on the weekend. It sits idle at night. If we
8 put a short-time system in, it would be pretty easy to
9 exceed the 3 million.

10 Q. Okay. Based on your -- without
11 purchasing any new equipment?

12 A. Not with vats. If anybody is familiar,
13 my brother does 17 vats a day. It's a long day. And
14 the sizes we do, each machine has as many as 45
15 changeovers between gallons, half gallons, pints. It's
16 a long day.

17 Q. Do you -- do you have any information on
18 your cost of vat pasteurization per unit versus the
19 pasteurization costs of the larger processors?

20 A. That figure's per vat. We do it
21 basically comparing glass, what it costs to buy a
22 bottle, wash a bottle, compared to plastic.

23 But as far as my cost of operation
24 compared to someone else's, that's their business. I
25 just worry about my own.

1 Q. Okay. So you don't have information from
2 others to compare to your own?

3 A. No.

4 Q. Okay. Other than acquiring used
5 processing equipment in 2004, have you made any other
6 significant investments in the past five -- nine years
7 in your farm or your plant?

8 A. Definitely.

9 Q. Could you identify some categories of
10 investment?

11 A. I don't know how much you want me to get
12 into it.

13 Q. I'm looking for categories, not line
14 items.

15 A. Categories? We're a great recycler,
16 things that I've done. We live right next to the
17 county's farm and they were going to demolish two
18 houses. I bought one for a dollar and quarter and I
19 bought one for a dollar. We moved them there. One is
20 our office, one is for the help.

21 Our saw mill in the next village sold
22 out. We bought five of the -- five of the steel
23 buildings and reconstructed them for feed barns. And we
24 just put up a 186 x 110 foot -- it was a saw mill
25 building, but it's the first machinery storage that I've

1 had. But you won't see many new tractors on my farm.
2 Most of them are green, but they're older vintage. I --
3 that's --

4 Q. Okay. You talked a bit about some
5 balancing costs, your costs to acquire supplemental milk
6 and what you receive when you sell your own surplus or
7 excess milk.

8 You said you purchase supplemental milk
9 from DFA, and maybe I wrote the price down wrong. \$2
10 and what per gallon?

11 A. I think it figures 2.47. It was \$27 and
12 something a hundred. I'm not sure if that covered the
13 delivery charge.

14 Q. Okay. Is that a regular price charge or
15 was that in a particular month?

16 A. A particular month. Just like February
17 was a particular month that we --

18 Q. What particular month was the \$2.47 a
19 gallon charge?

20 A. I can't answer that.

21 Q. What season, what year, what quarter?

22 A. When I need to buy milk, it's always
23 high. If I have milk to sell, it's cheap.

24 Q. Okay. Is there a reference you can give
25 us in relation to the Federal Class I price and the

1 premium charged to you when you need supplemental milk?

2 A. We pay Class 1 price.

3 Q. Plus?

4 A. Plus handing fees, plus butterfat, plus
5 protein, plus -- it goes on and on. But each time it
6 changes a little bit. We were paying Class III up to
7 June last year -- Class IV, excuse me.

8 Q. You were paid --

9 A. Yes.

10 Q. -- when you had surplus milk?

11 A. Yes.

12 Q. And then what happened?

13 A. Well, things disappeared. All of a
14 sudden, I wasn't paying anything for butterfat. We had
15 a 4:3 test and a 3:3 protein and I was just getting
16 Class III price. I had to kind of go back and
17 renegotiate with them to get my -- get that back. But I
18 shouldn't be hammering on them too hard. It's pretty
19 hard to get balanced in -- in northern New England.

20 There are very few milk trucks that go
21 down the road now. Most of the milk goes on one truck
22 that comes down through. And if I didn't have them, I'd
23 be really up a creek.

24 Q. Okay. Do you know whether the premiums
25 charged to when you need supplemental milk are

1 comparable to premiums charged to the major processors
2 when they need supplemental milk? Do you have any
3 reference for that?

4 A. I don't.

5 Q. Okay. And do you know whether the
6 purchase price for milk from you is comparable to the
7 purchase price for surplus milk by the major processors
8 when they have extra milk?

9 A. No, I don't.

10 Q. You don't. You, I think, said a little
11 bit about your -- your costs for raw materials. You buy
12 sugar, for example, for some of your products?

13 A. Yes.

14 Q. For your nonmilk ingredients, do you --
15 are you able to purchase those at -- at a volume
16 discount? I'll start there.

17 A. We can buy at volume discounts, but not
18 really -- sugar, for instance, we buy it by the bag, by
19 the pallet.

20 Q. By the pallet. How much is in a pallet?

21 A. I think -- it's either a ton or a ton and
22 a half pallet.

23 Q. Okay. And do you know what the pallet
24 price is compared to the truckload or -- or -- or
25 railroad car full that your competitors might receive?

1 A. No, we buy it through a grocery -- a
2 restaurant supply.

3 Q. Okay. And would that -- would your
4 description of how you buy ingredients be true for the
5 other nonmilk ingredients that you acquire?

6 A. Yeah. Probably not really, really
7 efficient, a lot of the large ones, liquid sugar. We
8 don't have the capacity to take volumes of liquid sugar
9 or ingredients.

10 Q. You need a place to store them and you
11 need a market, a product to put them in, don't you?

12 A. We don't handle those large volumes.

13 Q. In two or three questions by your
14 counsel, he referred to milk sold by the larger co-ops,
15 and you responded. Adopting his question that milk was
16 sold by the larger co-ops, were your answers intended to
17 be in the context of milk sold by larger processors?

18 A. Yes.

19 Q. Okay. And you talked about your
20 packaging. You have, what, 60 percent glass and
21 40 percent plastic? Or I have that turned around. And
22 you referred to some of your competitors and having your
23 own blow mold. I infer from that that you don't have
24 your own blow mold. How do you acquire --

25 JUDGE CLIFTON: Now, I'm not getting his

1 answer audibly. I know he said no, but I'm not
2 sure the no shows in the typewritten form. So
3 could we just back up? Go ahead and ask that
4 question about the blow mold.

5 Q. Do you have your own blow mold?

6 A. No.

7 Q. Do you buy your plastic bottles preblown
8 by somebody else?

9 A. Yes.

10 Q. And from whom do you acquire those
11 preblown plastic bottles?

12 A. In the past, we bought from Sheldon
13 Plastics. Right now we buy from Quality.

14 Q. And do they have to be transported at a
15 considerable distance to get to you?

16 A. Yes.

17 Q. Okay. And there -- can you relate a
18 price per unit or per bottle, per other unit?

19 A. We're running close to 40 cents on a
20 gallon. If you include the gallon, the cap, the label,
21 we run pretty close to 40 cents. Now, I -- those can --
22 we did have a reduction of resin costs. Exactly today
23 it may vary from that sum.

24 But we pay an extra cent and a quarter.
25 Because we bottle to different people, we have to

1 warehouse. We don't have our own labeling equipment in
2 our dairy, so we have quite -- quite a warehouse of
3 labeled -- every size has to be labeled for someone
4 else.

5 It isn't like you can have a trailer load
6 of gallons and a trailer load of half gallons, and as
7 the orders change you change the labels. So there's
8 another inefficiency we have in our operation.

9 Q. So when you buy plastic preblown bottles,
10 you buy them with labels already attached?

11 A. Yes.

12 Q. And that labeling order is something that
13 you instruct the blow mold people to do, correct?

14 A. Yeah.

15 Q. Based on your estimate of your -- of your
16 labeled milk demands?

17 A. Yes.

18 Q. The glass bottles that you talked about,
19 you don't have labeling. Are those already prelabeled?

20 A. Some of them have the company name
21 printed on them, on the cap. It gives the information
22 that's required, plant -- plant number, where it's
23 bottled, the company it's bottled for, what the product
24 is, whether it's Grade A product and any additives that
25 have to be added.

1 Q. Okay. And did you make your own caps or
2 do you order those made by somebody else also?

3 A. They're ordered.

4 Q. They're ordered and produced by somebody
5 else?

6 A. Yes.

7 Q. And shipped to you?

8 A. Yes.

9 Q. Based on your estimate of your glass milk
10 customer demand?

11 A. Yes.

12 Q. And that demand is made by -- in turn, by
13 four distributors, one in Portsmouth, one in Burlington
14 and two in the Boston area?

15 A. Yes.

16 Q. And each of those has their own unique
17 brand name?

18 A. Yes.

19 Q. You understand that there are some
20 proposals that would -- that would or may preclude you
21 from employing somebody else's brand in your package?
22 Do you understand that?

23 A. Yes.

24 Q. Okay. And what would that do to your
25 business, in your estimation?

1 A. I haven't fully fathomed what that might
2 do.

3 Q. Even if -- even if there were a 3 million
4 pound or a 2 million pound cap on volume, you would have
5 trouble maintaining your business if you could not
6 custom bottle for some other persons' distributing
7 needs, is that correct?

8 A. I think so. These are companies that
9 have been in existence. One of them has been in
10 existence for well over a hundred years, and they just
11 don't want to change the name and they can't have cows
12 anymore.

13 Q. Okay. Do you bottle milk in any package
14 size other than gallons, in plastic? Let's start with
15 plastic.

16 A. Yes. Gallons, half gallons, squat
17 quarts, round pints and half pints.

18 Q. And they're all in plastic?

19 A. Yes.

20 Q. What is a squat quart?

21 A. In our situation, tall skinny quarts are
22 tippy. In our bottling operation -- and older people --
23 the squat quarts are the same footprint as a half
24 gallon. And since we started using them, our sales of
25 those has increased. Older people handling them, they

1 don't tip over and they're handy to handle. And in
2 delis, people with bigger appetites drink a quart rather
3 than a pint.

4 Q. Do you, or have you had in the past nine
5 years -- I use nine years because that's when we had the
6 Federal Order reform decision go into effect. During
7 the past nine years, have you had any institutional
8 sales? By that, I mean hospitals, schools, prisons,
9 that kind of institution.

10 A. We sell to the county jail and nursing
11 home on a non-- nonbid program with a local hospital.
12 We have gotten out of the schools.

13 Q. Because?

14 A. Uh-huh. Well, the poor business. We
15 could never make any money in the schools.

16 Q. Are the schools all bid milk?

17 A. They bid. And I can't put a product out,
18 for -- a white milk out for 14 cents a half pint.

19 Q. For 10 cents a half pint? Does that
20 represent the bid price of the larger processors?

21 A. Yes.

22 Q. And you can't -- you can't do that?

23 A. I can't add chocolate to it for a penny
24 either.

25 Q. And you're saying that their bid prices

1 for chocolate milk is 15, correct?

2 A. Yes.

3 Q. And you can't do that?

4 A. (Shaking head.)

5 Q. Because your sugar and chocolate costs
6 are much higher?

7 A. Right.

8 Q. Counsel for National Milk asked you about
9 your familiarity with Proposal, I think it was 26.
10 You're here primarily to talk in opposition to Proposals
11 1 and 2, is that correct?

12 A. Yes.

13 Q. If National Milk had withdrawn or not
14 made the Proposals 1 and 2 and number 26 was the only
15 one on the table, would you have taken the time and
16 expense to come down and bring a lawyer down here?

17 A. Explain that a little bit more for me,
18 please.

19 Q. If there were no proposal to eliminate
20 producer-handlers, would you have made the trip to
21 Cincinnati? And I understand there are 20 -- 20
22 proposals, so maybe that's a question that presumes too
23 much familiarity with the others.

24 A. Yeah, there's been something brewing
25 within me for quite a while that I wanted to be heard.

1 Probably this is a vacation for me. Pretty nice room.

2 Q. All right. Get out and see the town?

3 A. Yeah. We went and had supper last night.

4 Q. Did you go to Mike Finke's?

5 A. (Shaking head.)

6 Q. King of the River guy?

7 A. No.

8 Q. No. Okay.

9 MR. VETNE: Thank you.

10 JUDGE CLIFTON: Thank you, Mr. Vetne.

11 Other cross-examination? Mr. Miltner.

12 CROSS-EXAMINATION

13 BY MR. MILTNER:

14 Q. Ryan Miltner. Good morning, Mr. Hatch.

15 A. Good morning.

16 Q. You said earlier that in all the time
17 you've been dealing with cows, nothing has really
18 changed since the 1950s. Can you elaborate?

19 JUDGE CLIFTON: Before you ask that next
20 question, let him respond to that one. He
21 started to.

22 MR. MILTNER: Sure.

23 JUDGE CLIFTON: Is that accurate? Is
24 that what you meant?

25 THE WITNESS: What I meant was the

1 marketing of milk, not -- not the way cows are
2 milked.

3 BY MR. MILTNER:

4 Q. Thank you for clarifying that. That was
5 what I wanted to explore. Can you tell us what you mean
6 by nothing has changed with the marketing of milk since
7 the 1950s?

8 A. Well, visually watching things. There
9 used to be a small creamery in my town that -- and their
10 way of dealing with milk. I can remember us -- Land Ap
11 was right next to us. My dad ran the milk group. He
12 picked up 22 farms in that town. And the largest
13 producer was eight jugs. It was a school teacher that
14 had two jugs. She had one cow, but she couldn't mix
15 night milking with morning milking, so you had to put
16 them in two different cans.

17 When that milk came back to the creamery,
18 there were producers bringing theirs in and the milk
19 truck backed up. The milk went into the creamery,
20 dumped on the scales and the separator started.

21 The cream went onto a railroad car to go
22 to Boston. If you looked in the river down below, the
23 skim milk used to go right straight into the river and
24 the falls going over was white. I mean, things have
25 changed.

1 Low fat and -- low fat and skim milk are
2 some of our biggest sales, and the river is a lot
3 cleaner now. But towards the end of that process, they
4 thought they would try to generate some income, and they
5 tried selling skim milk by the jug at 25 cents a jug to
6 feed your pig. Couldn't seem to generate much. That's
7 a pretty good value now.

8 Q. I would say. Since the 1950s how has the
9 average farm size changed in New Hampshire?

10 A. I don't think I'm qualified to give you
11 exact numbers. I know that as a kid working on a diary
12 farm, if you had 40 cows, it was a fairly large farm.

13 Q. And what's a fairly large farm in New
14 Hampshire today as you see it, as somebody who's been a
15 farmer there for 40 years?

16 A. There's very few at 40 or less. I would
17 gather an estimate maybe -- it might be covered in the
18 figures from New Hampshire. I'm not sure.

19 Q. But generally farms are larger now --

20 A. (Nodding head.)

21 Q. -- than they were?

22 A. Yes.

23 Q. How about the number of outlets for
24 farmers to sell their milk in New Hampshire, are there
25 more or fewer or about the same?

1 A. Many -- it's much, much more narrowed now
2 than it used to be.

3 Q. And if you didn't process your own milk,
4 what would your options be for marketing your milk?

5 A. If I wasn't processing our own milk now,
6 I'd probably be evicted, and I probably would not be
7 milking cows today.

8 Q. So for you, this is your only economical
9 alternative?

10 A. Unless I carried another business to
11 supplement the farm. I have a lawyer here that farms,
12 but he's a lawyer so he can keep farming.

13 Q. I'm a lawyer and I have a garden at home.
14 It's not quite the same, though, is it?

15 If you wanted to take a second job and
16 continue working the farm, how many outlets are there
17 for you to sell your milk?

18 A. I think -- I think there's three. And I
19 think two of them might be the same truck.

20 Q. Okay. Two on the same truck?

21 A. (Nodding head.)

22 Q. The third outlet -- all cooperatives?

23 A. I think -- I think I could still ship to
24 Hood.

25 Q. And how far away from your farm is the

1 Hood plant?

2 A. I think it'd picking up out of Hood
3 Brothers. It's around 38 miles.

4 Q. You had submitted -- Hatchland Farms, LLC
5 submitted a letter to the Department after the initial
6 proposals were -- were published, and you had described
7 in that letter -- you had described in that letter your
8 cost of production on the farms.

9 Can you -- before we talk specifically
10 about your cost of production, can you tell us about
11 your farm site operations a little bit? Do you -- do
12 you grow your own feed?

13 A. Yes.

14 Q. Exclusively?

15 A. Yes. Oh, grains we supplement. The
16 grain is supplement. We do not -- we pay only corn and
17 soybean meal.

18 Q. Okay. Of the 20 -- I believe it was 23
19 employees that you have, some of those people work in
20 growing and tending the crops?

21 A. Yes.

22 Q. For your -- for your cows. Did you own
23 all the ground that you raise crops on or do you rent
24 ground from other people, a combination of those two?

25 A. Combination of the two.

1 Q. In March you said your cost of production
2 was \$21. Is that still about the same today?

3 A. The guy that's the people person with me
4 also helps do the books. And he said that those were
5 compiled a few months before. And those were nothing on
6 investment. Those were costs only?

7 Q. That's cash out?

8 A. Yes.

9 Q. Doesn't include return on investment,
10 doesn't include --

11 A. No.

12 Q. -- your debt service?

13 A. No.

14 Q. Okay.

15 A. I'm not -- I mean, if you want to know
16 what that -- nothing is on -- you can ask me any
17 question.

18 Q. I don't want to pry into -- into your
19 books. If a producer-handler becomes subject to
20 regulation, the plant will be assumed to have acquired
21 the milk that it bottles at the Order 1 blend price.
22 What do you think? When you're looking at your
23 business, what's the cost of your raw milk?

24 A. From my farm?

25 Q. Uh-huh, yes.

1 A. Why wouldn't it be the cost of
2 production?

3 Q. Say that again.

4 A. Why wouldn't it be the cost of
5 production?

6 Q. I don't know. Is that what you would
7 think it is?

8 A. Well, originally when we went to bottling
9 milk, the price of milk was in the \$13 range. I wanted
10 the income to my farm. If I produced 4 percent milk,
11 \$16 a hundred, if I could generate that for the farm, I
12 knew I could make it.

13 But today, I'm in a real disadvantage
14 going to my cost of production. I could buy milk on the
15 market and save money. But I can't guarantee -- make
16 the guarantees that I can when I have my own.

17 The only way I worked with balancing is,
18 DFA has been -- they've been helpful. If I have been
19 short and need milk, they've been able to pinpoint a
20 specific farmer that has a -- doesn't use BSD low cell
21 counts, the quality milk that I want that can match --
22 nearly match ours.

23 Q. And you pay them for that service?

24 A. Yes.

25 Q. And when you have surplus milk, they pay

1 you a negotiated price for that milk, which is as you
2 described earlier?

3 A. It's -- they -- they follow the rules.
4 They pay what the Order says they can pay.

5 Q. And they -- and they pay --

6 A. The check's been good.

7 Q. Okay. Now, the blend price in Order 1
8 thus far this year has averaged about \$12.50. You don't
9 produce your milk at anything near that price, do you?

10 A. No.

11 Q. And when the Class I price is \$12.68,
12 again, you're not acquiring your milk at anywhere near
13 that price, are you?

14 A. No.

15 JUDGE CLIFTON: Just so the record's
16 clear, are you paying more or less than that
17 when you acquire milk?

18 THE WITNESS: Well, the Federal Order
19 says I cannot transfer money from my plant to my
20 farm. You can make an allowance of what's it
21 worth, what it's worth, but my cost of
22 production is what I have to work with.

23 Q. You don't pay anything. It's just
24 whatever it costs you to produce the milk?

25 A. It affects the bottom line.

1 Q. It's all one operation?

2 A. Yes. It has to be.

3 Q. And it's all one -- yeah. It has to be
4 one operation, and at the end of the quarter on the
5 year, you look at one profit or loss figure, correct?

6 A. Yeah, we look at them a lot more often
7 than that.

8 Q. You said a minute ago that you make
9 certain guarantees to your customers --

10 A. Yeah.

11 Q. -- about the milk you supply them. Do
12 your customers find a value in getting milk from a
13 single farm source?

14 A. This is -- this is a whole avenue that
15 could be addressed. The part that's really working for
16 dairy farmers in our location is going back to local. A
17 while ago it was organic. Now it's -- now it's local.

18 And a little bit of a different avenue to
19 follow, there's a lot of milk being sold from the farms
20 raw or at good prices that are not affected by that
21 Order at all.

22 Q. And, actually looking at the letterhead
23 on what you submitted to USDA, you've got -- you've got
24 a logo at the top, and I apologize, the name of the
25 statue or the rock formation?

1 A. That's the Old Man of the Mountain, but
2 he's not there anymore. He fell down.

3 Q. He did. But it's native, right?

4 A. Yeah. That was about 10, 11 miles from
5 where I was born.

6 Q. And so that -- the -- the local aspect of
7 your operation is something that you use in
8 communicating value to your customers? You said you
9 don't do advertising, but people find that important,
10 that it's native milk?

11 A. They do. We don't -- we don't advertise
12 as such in the papers, the radio. I'd rather take a
13 sample of my product and put it right in someone's hand
14 and say, this is my product; if you like it, maybe
15 you'll come back and buy it.

16 And this is something I'm doing that I
17 didn't -- when I shipped to other handlers, you lost
18 that. When the milk went out the port hole in the milk
19 room, you don't have control of that milk anymore and
20 it's in someone else's hands. And all we could do was
21 whine and cry about the price of milk.

22 Q. And so becoming a producer-handler was --
23 was your response to doing more than just whining about
24 the price of milk, as you described it?

25 A. Yeah.

1 Q. Are there any other handlers that bottle
2 milk in the same labels that you do? And I know you
3 have several different companies that you bottle milk
4 for and they have their own label. But is there anybody
5 else who uses those labels?

6 A. Not to my knowledge.

7 Q. Okay.

8 MR. MILTNER: I don't have any more
9 questions. Thank you, Mr. Hatch.

10 JUDGE CLIFTON: Thank you, Mr. Miltner.
11 Who else would like to examine Mr. Hatch?
12 Mr. Ricciardi.

13 MR. RICCIARDI: Thank you, your Honor.

14 CROSS-EXAMINATION

15 BY MR. RICCARDI:

16 Q. Good morning, Mr. Hatch.

17 A. Good morning.

18 Q. Al Ricciardi here on behalf of AIDA. I'm
19 going to ask you a few questions. Hopefully I won't
20 duplicate the questions that you've been asked before.
21 But the first thing, make sure you don't hold anything
22 against me because you're an UNH guy and I'm a UVM guy.
23 Okay?

24 A. Okay.

25 Q. Good deal.

1 A. I'll -- I won't just nod my head.

2 Q. Give me the best --

3 A. It'll be on the record.

4 Q. Okay. All right. A few things. You
5 said that you had, in the past, bid for some school
6 milk. Did I hear that correctly?

7 A. Yes.

8 Q. Okay. And you don't do that any longer
9 because you could not compete on the price for that
10 milk, correct?

11 A. Yes.

12 Q. Okay. Now, do you know who actually got
13 the school milk bid that you had bid on before?

14 A. Yes. It's been -- it hasn't stayed the
15 same. But it's been a couple of different companies.

16 Q. Okay. And those companies were not
17 producer-handlers?

18 A. Right.

19 Q. They were part of the regulated
20 community?

21 A. Yes.

22 Q. And you were not able to compete with
23 them on price on those particular bids?

24 A. Right. They -- are you familiar with
25 supplying school milk?

1 Q. I am.

2 A. They always call an hour before lunch and
3 they're out of milk, you make special trips. And the
4 day before vacation, there's a snow day. They have all
5 that extra milk, they don't want to pay for it. You go
6 pick it up. But we did have schools. We did have
7 schools that -- I'll give you a price. When they were
8 charging 14 to 16 cents for milk and chocolate milk, we
9 were charging 25 and 30. And we had -- we had
10 schools -- our costs of the container, we're about ten
11 years ahead of a number of other milk companies about
12 getting out of cardboard and into plastic containers in
13 the schools. And the children accepted them.

14 But we had a number of schools that
15 wanted our milk without going through the bid process.
16 But we do have records kept about increased consumption.
17 When we started bidding on the schools, we got the
18 contract, and we found consumption of milk had doubled
19 in some of the schools from some of the milk that's
20 being supplied.

21 Q. And because of the fact that your milk is
22 quality milk, single source milk, right?

23 A. Yeah. I'll answer that question. I'll
24 speak for mine. I don't want to speak for anyone else's
25 milk.

1 Q. All right. And I am speaking for yours.

2 A. Okay.

3 Q. You have been a producer-handler in
4 Federal Order Number 1 since 1992, am I correct in that?

5 A. Yes.

6 Q. And throughout that period of time you
7 have continuously been a producer-handler?

8 A. No. I was pooled -- I was pooled one
9 month and that was selling too much milk, more than
10 50 percent of my milk, before the Order was changed, was
11 in the Order and I was outside the Order.

12 Q. Okay.

13 A. And three years ago, I was getting close
14 to the limit of buying 150,000 pounds of milk and it was
15 going to cost me considerably. It was going to be for a
16 short period of time. I went and bought ten -- nine
17 additional heifers that were ready to milk, to get the
18 milk. And actually buying the heifers was cheaper than
19 getting pooled. But it turns out now I have 40 extra
20 heifers more than what I need, so it's a balancing act.

21 Q. Well, you used the right word because you
22 are going to where I was heading. One of the problems
23 that a producer-handler such as you have, that the
24 regulated community doesn't have to deal with, is you
25 have to balance your needs, correct?

1 A. Pretty close there.

2 Q. You just described one problem. Since
3 there's a limitation in Federal Order Number 1 on how
4 much milk you can buy, 150,000 pounds a month, in any
5 particular month where you're running short, now you've
6 got the issue to deal with, do I buy more milk and
7 potentially lose my producer-handler status for that
8 month or potentially lose a customer, right?

9 A. Yes. We have done that. We've -- when
10 the -- paid the high price, we have actually sold milk
11 at a loss, which would have been -- would have been
12 easier for us to left the -- leave the store shelf empty
13 for a few days than it would to have -- than to have
14 bought the milk.

15 Q. And that's an actual cost that you have
16 to deal with on a monthly basis, correct?

17 A. That cost to purchase milk?

18 Q. The cost to purchase milk or the --

19 A. We don't -- we -- we don't -- we have
20 gone full years before without purchasing any. And
21 we've gone full years without -- without selling any,
22 too.

23 Q. But the -- the balancing cost, the
24 decision that you have to make if you need milk, you
25 have to decide whether you can purchase it. On the

1 flip, when you've got too much milk, you have the issue
2 about how you get rid of it, right?

3 A. Yes.

4 Q. Okay. And that's a cost that you have to
5 deal with? You don't put that off to anyone else.

6 A. Right.

7 Q. I've got a copy of the March 5, 2009
8 letter that was sent by Hatchland Farm, LLC to Dana
9 Coale, the Deputy Administrator at AMS for Dairy
10 Programs. It was signed by you, Kendra Hatch, Preston
11 Hatch and Kristin May. Can you tell me who Kendra
12 Hatch, Preston Hatch and Kristin May are?

13 A. Kendra is my wife. Preston is my son.
14 Kristin is my daughter.

15 Q. Thanks. All of the members of your
16 family signed on to this response to the Department,
17 correct?

18 A. Just my brother, his wife, they didn't.
19 I mean, they're not part of the LLC and the ownership
20 of --

21 Q. I understand. And let me -- let me make
22 sure. You testified a lot and I don't want to have you
23 stay up there any more time than you need to. I just
24 want to confirm some things.

25 In the letter you state -- make sure I

1 read it right. Remember, I'm from UVM. We don't think
2 that there is a disorderly marketing condition in
3 Federal Marketing Order Number 1 caused by
4 producer-handlers. That is your belief on March 5th.
5 That's your testimony today?

6 A. I will speak -- there's parts of New York
7 and Pennsylvania that I -- I visit there, I'm not
8 fully -- I'd like to say I'm from New England. I
9 don't -- that's a number of states, not very big states,
10 but I'd like to maybe change that to addressing the New
11 England states.

12 Q. Okay.

13 A. My belief.

14 Q. Okay. Near the end, the last sentence, I
15 have built this business with family involvement. One
16 brother has worked with me for 41 years and we are not
17 ready to lose this because some big co-op doesn't like a
18 little competition. That's your statement on March 5.
19 That's your testimony today?

20 A. I'll stand by it.

21 Q. When you say, some big co-op, do you have
22 a specific co-op in mind that you're referring to?

23 A. Don't shoot me, but I think about all the
24 co-ops on the same level.

25 Q. I'm not going to shoot you. All right.

1 I've got one more thing. I think you were asked a
2 question by National Milk that basically said, look,
3 you're here to take care of yourself, not here to take
4 care of someone else.

5 Now, you were looking out for other
6 people when you went to Vietnam, right?

7 A. Yeah.

8 Q. And with regard to this particular
9 hearing and your testimony, obviously you're concerned
10 about yourself but you are also concerned about anyone
11 else in this milk business that may want to take the
12 opportunity and the risks of being a producer-handler?

13 A. You said it pretty well.

14 Q. Thank you.

15 JUDGE CLIFTON: Let me see if it's going
16 to be time for a break. They like you. Let's
17 see. This witness has been on the stand now
18 about an hour and a half. I declare a 15-minute
19 break. Please be back and -- actually, this is
20 a 19-minute break. Be back and ready to go at
21 10:00.

22 (A recess was taken from 9:41 to 10:00.)

23 JUDGE CLIFTON: All right. Let's go back
24 on record. We're back on record at 10:00.

25 There were two hands up wanting to cross-examine

1 Mr. Hatch. I'd like now to call on the
2 gentleman who is seated behind Mr. Vetne.
3 Mr. Vetne has a light blue shirt.

4 MR. CHAPLAIN: My name is George Chaplain
5 from Saugus, Massachusetts.

6 JUDGE CLIFTON: How is Chaplain spelled?

7 MR. CHAPLAIN: C-h-a-p-l-a-i-n.

8 JUDGE CLIFTON: And how is the town
9 you're from spelled?

10 MR. CHAPLAIN: S-a-u-g-u-s.

11 JUDGE CLIFTON: Thank you. And tell us
12 just a little bit about what you do or why you
13 are interested in the outcome of the hearing.

14 MR. CHAPLAIN: Basically I came here with
15 Mr. Dunajski, Dunajski, who owns a dairy farm in
16 Peabody. And I've known him for 40-odd years,
17 and his family. And I did the electrical work
18 for him. I ran a small electrical contractor
19 company for 40 years that I got into after I
20 came back from Vietnam.

21 And I dissolved that company, but I told
22 Ted I wouldn't abandon him because -- so I
23 started -- you know, continued to do his
24 electrical maintenance. And then he said, would
25 you like to do a little work around the farm?

1 So I've been spreading manure in the fields. So
2 his daughter asked me if I'd come out here with
3 him today, just to fly out and back with him, so
4 he'd have a companion, and I agreed to. And I
5 intended to just sit here and listen.

6 But after hearing Mr. Hatch testify, I
7 also am a Vietnam veteran and I came back from
8 Vietnam, and I also -- I didn't start a small
9 business, but I went to work for a small
10 business which I took over in 1975 and ran it
11 until a few years ago.

12 And one of the questions that I believe I
13 heard -- and I haven't read any of the
14 documents, so this -- it seems to me like they
15 were going to try to limit new people from
16 trying to get into the business. And I believe
17 it's an American right.

18 I mean, Mr. Hatch and I both went to
19 Vietnam, whether we wanted to or not, and fought
20 for all Americans, not just the government. And
21 it turned into a fiasco, I agree.

22 When we came back, a lot of people
23 weren't -- we weren't celebrated when we came
24 back. But as myself, I went to work and he went
25 to work. And he developed a farm. And I

1 believe we have -- we have people -- we have
2 guys in Iraq and Afghanistan, and I'm sure
3 there's going to be other conflicts throughout
4 the next umpteen years.

5 And I just believe that they should be
6 able to come back and be able to, if they want
7 to work hard -- if they want to become the, I
8 guess the new word is handler-producer or
9 whatever, if they want to start, they should
10 have the right to do it. That's why they're
11 over there. They're fighting for us and
12 basically that's my statement.

13 CROSS-EXAMINATION

14 BY MR. CHAPLAIN:

15 Q. And my question to Mr. Hatch is, does he
16 believe -- I know he believes in the same thing, so I
17 don't know whether this is a question. I'm going maybe
18 too long.

19 So my question is, Mr. Hatch, is that
20 your belief is that new people should be able to come
21 into the producer-handler business if they want to work
22 hard at it, and start a business like you did yourself?
23 Is that --

24 A. I'd like to see that, yes.

25 Q. Yes. And that's one of the reasons you

1 came here today. It wasn't just -- I heard one of the
2 people say you came here for yourself. You more or less
3 said, speak for yourself, don't worry about other
4 people. But one of the reasons you're here today is for
5 other people, the same reason you went to Vietnam, is
6 that true?

7 A. Yes.

8 MR. CHAPLAIN: And basically that's all I
9 have to say. Thank you.

10 JUDGE CLIFTON: Thank you. Before you
11 step down, Mr. Chaplain, spell Peabody for me.

12 MR. CHAPLAIN: P-e-a-b-o-d-y.

13 JUDGE CLIFTON: Thank you. Mr. Carroll?

14 MR. CARROLL: I believe the witness
15 nodded his head. I didn't hear -- I just want
16 to be sure they heard a spoken answer.

17 JUDGE CLIFTON: I heard a spoken answer.

18 MR. CARROLL: Okay.

19 JUDGE CLIFTON: Thank you. And thank you
20 for helping me with that. I appreciate that
21 very much.

22 Mr. Vente, you had your hand up as well.

23 MR. VENTE: Okay.

24 RE-CROSS-EXAMINATION

25 BY MR. VENTE:

1 Q. I count five follow-up questions here.
2 Mr. Hatch, I learned something new in the
3 cross-examination. Prior to Federal Order Reform,
4 Hatchland Dairies was a partially regulated plant, is
5 that correct?

6 A. No. I've been a producer-handler.

7 Q. You've been a producer-handler all along?

8 A. Yes. But I -- when I started, the
9 Order -- we were not in the Order. And when we got to
10 selling over 50 percent of our milk in the Order, we
11 came under their jurisdiction and that part of the
12 rules.

13 Q. Okay.

14 A. There was other rules we had, too, for --
15 but we had to follow -- we jumped another river at that
16 time.

17 Q. Okay. So it's your recollection that you
18 became regulated by virtue of a percentage of your milk
19 that you sold into the former New England marketing
20 area?

21 A. It was part of the requirements of being
22 a producer-handler.

23 Q. Okay. And you became fully regulated
24 because some requirement wasn't met?

25 A. I became pooled one month because I went

1 part of 1 percent over the 50 percent.

2 Q. I see. You said you have, what, 40 extra
3 heifers (indicating)?

4 A. Well, we have 112 bred heifers in the
5 line now that are waiting, but by having extra
6 production and not getting much milk money for it, I
7 have cut my grain amount down and gone to feeding more
8 roughage and trying to produce milk on our own feeds
9 other than purchased.

10 Q. Okay. And that is sort of my question.
11 In response to some balancing questions, you said that
12 you don't frequently buy supplemental milk and you don't
13 frequently sell surplus milk. Was that, my
14 recollection, correct?

15 A. That is right. We have been quite steady
16 since the first of the year, with especially one of our
17 distributors in Boston, below Boston, where a lot of
18 financial people have lost their jobs. They don't buy
19 quite as much milk and we've got a little extra milk.

20 Q. So you have a little extra surplus now?

21 A. Yes.

22 Q. And is one of the ways that you deal with
23 surplus production from your herd -- from your herd is
24 to change some of your feeding practices, for example,
25 use grazing rather than purchased protein?

1 A. What is stored on the farm, anything we
2 don't have to purchase.

3 Q. Your production -- you can adjust your
4 production a bit by your feeding practices, can't you?

5 A. They go down a lot easier than they go
6 back up.

7 Q. Okay. Do -- you indicated that the
8 distributor in Portsmouth distributes other food
9 products along with the glass bottles that you fill for
10 him or for -- or it.

11 When you distribute milk or sell milk on
12 your own, for your own, do you distribute any Class II
13 or other dairy products that are not made by you along
14 with that?

15 A. Zero.

16 Q. Zero. So you don't purchase any finished
17 milk products of any kinds from any other person?

18 A. No, we handle only fluid milk and we
19 really don't have a good home for our -- our excess
20 cream. We're starting to get into -- it's been a long
21 time coming, but we're starting in ice cream base, not
22 making ice cream, just making the base. And I've
23 just -- I've just purchased a butter churn.

24 Q. Okay. When you have a little extra milk
25 or cream, do you use some of it on the farm for your own

1 livestock?

2 A. Yeah. When we're short of milk, we feed
3 milk replacer. If we have extra milk at this price,
4 feed whole milk to our calves.

5 Q. That was my question. And then, finally,
6 in dialogue with Ryan Miltner, you referred to
7 production costs of about \$21 a hundredweight, which was
8 cash costs for your farm, is that -- is that correct?

9 A. That's as close as we can get it.

10 Q. Ballpark?

11 A. Yes.

12 Q. In using that number, is that all of your
13 farm costs, the cost to grow hay and to pay your
14 employees? And is that all of your farm costs applied
15 to the hundredweights of milk that you have?

16 A. As he stated, that's cash cost.

17 Q. It's cash cost. But it's -- it's for all
18 of your farm -- the farm side of your business?

19 A. Yes.

20 Q. Okay. And on the farm side of your
21 business -- just to make sure there's some balance here,
22 on the farm side of your business, you have -- you have
23 some revenue for the milk that you sell through the
24 plant as a producer-handler, correct?

25 A. Yes.

1 Q. You have some revenue for culled cows
2 that you sell or as the herd recycles, correct?

3 A. Yes.

4 Q. You have some revenue for -- for calves
5 that you sell either for other farms' livestock grazing
6 or for veal or whatever, correct?

7 A. (Nodding head.)

8 JUDGE CLIFTON: That answer was yes.

9 Q. The answer was yes, I'm sorry. And do
10 you also sell hay or other crops of the grounds to other
11 farms in your area?

12 A. We have -- we have sold some hay, limited
13 amounts on silage. I know what my silage values are and
14 I set them high.

15 Q. Okay. Are there any other products or
16 services of your farm for which you receive revenue,
17 that -- products that are included in the \$21, the costs
18 that you assigned to milk that were \$21?

19 A. No.

20 Q. Okay. We listed all of them?

21 A. Yes. I just -- when you asked if we
22 handle any other products, we have a little farm store.
23 And we have a neighbor that goes to near Lancaster,
24 Pennsylvania and he brings back some Amish meat, butter
25 and bacon ends and pieces. And we -- when you asked me,

1 I'd forgotten. We -- that's not produced on our farm
2 but we do. And we have three neighbors that bring in
3 free range eggs.

4 Q. Okay. So the --

5 A. So the income goes to three things.
6 That's not income --

7 Q. Okay. When you --

8 A. -- produced on the farm.

9 Q. When you referred earlier to your farm
10 retail store where you sell about 40 gallons a day, it's
11 at that location where you sell products from your
12 neighboring farms as well as some of the Amish meats and
13 so forth?

14 A. Yes.

15 Q. Okay. Thank you.

16 JUDGE CLIFTON: Thank you, Mr. Vetne.

17 Does that conclude the -- ah, government table.

18 Mr. Yale. I'm sorry. Everyone wants to come to
19 the podium.

20 CROSS-EXAMINATION

21 BY MR. YALE:

22 Q. Benjamin F. Yale on behalf of Select Milk
23 Producers and Continental Dairy Products. I've only got
24 about 2 or 3 hundred questions so we'll move this along.

25 AUDIENCE MEMBER: We won't have to

1 count.

2 Q. Good morning.

3 A. Good morning.

4 Q. I wanted to do some kind of follow up
5 with some points I'm trying to clarify from the
6 testimony you've already given today.

7 In pricing your milk, do you -- you know
8 there's a minimum Class I price that's announced by the
9 Market Administrator for your plants, right? I mean,
10 you don't have to pay it, but there's a price that's
11 announced for minimum Class I price. You're aware of
12 that?

13 A. I'm aware of it. I don't look at it.

14 Q. You don't look at it?

15 A. No.

16 Q. So that's not a factor at all in your
17 pricing?

18 A. (Shaking head.)

19 Q. You look to cover your costs?

20 A. I look to cover my costs. What governs
21 me on change of price -- most usually our price stays
22 the same year round unless our distributors say we're
23 getting -- we're being undersold, can you bring it down
24 a little bit. I'll bring it down. But sometimes they
25 don't.

1 Q. And you --

2 A. I'm in the wrong end. As I spoke before,
3 I need to be in the retail delivery trucks that they
4 drive around in supplying everything. But the most
5 profit is on my milk.

6 Our milk, we go through the process of
7 raising the feed, milking the cows, processing, putting
8 it in our cooler, in a glass. They take it from the
9 cooler and deliver it, and they double the price.

10 Q. The question I'm trying to lead up
11 with -- I mean, that's -- sounds like the typical farmer
12 never gets full value for his product.

13 But a question I'm trying -- I wanted to
14 deal with is, as you price your product, you do not see
15 being a producer-handler as necessary -- necessarily a
16 price advantageous position for you in the market, is
17 that a fair statement?

18 A. Yes.

19 Q. And I understand you sell to no chain
20 stores, no box stores?

21 A. We have a delivery within 25 miles of
22 home. We have one delivery person that -- we deliver
23 because the product is asked for. That's simply put.

24 Q. Right. And you sell it in your name, not
25 in --

1 A. Yes.

2 Q. Now, you testified, I think, under
3 cross-examination -- maybe have even been John Vetne's
4 first pass, that with your plant, that if you ran full
5 bore and maybe got some vats for your -- from your
6 brother or brother-in-law that does the bottling, that
7 you could process maybe 3 million pounds. Is that
8 your --

9 A. That's a quick answer. But with short
10 time, we've -- we've added two newer fillers. We're up
11 to around 1979 or '80 now in years. But the bottle
12 washer, the glass didn't build up that fast.

13 Q. Now, you say, short time. Would you
14 explain for the record what short time is?

15 A. Short time pass, which --

16 Q. As opposed to your vat pasteurization.

17 A. Vat pasteurization, we're required to
18 bring it up to 145 and hold it for 30 minutes. Flavored
19 milk and creams are at a higher temperature. And short
20 time can be from about 162 degrees up to ultra high
21 temperature, which is just a matter of being held a few
22 seconds.

23 Q. But to meet that 3 million, you don't
24 have enough milk production on your farm to produce
25 3 million pounds?

1 A. No.

2 Q. All right. So to remain a
3 producer-handler in the 3 million pounds, you also would
4 have to add to the herd, not just the plants, but you'd
5 also have to add to the herd in order to meet that
6 level?

7 A. Yes.

8 Q. And I think based on some other testimony
9 you'd had, you'd also have to have a market for that
10 product. You don't have a market for 3 million pounds?

11 A. Not right now.

12 Q. Now, you made a proposal for a 3 million
13 cap in New England. Did I understand that right?

14 A. When I originally wrote it, I didn't want
15 to speak for any farther than our own order. Since that
16 time, when you get out of New England, I don't know the
17 Order as maybe as well as I thought I did.

18 Q. Did you see that as maybe a maximum of
19 where your children would be able to reach if they want
20 to maintain the business after you retire, is that
21 right?

22 A. Yes. I'm not going to retire, though.
23 Can't afford to.

24 Q. I want to change the subject and go to
25 something else.

1 You testified, I think, also that you got
2 some help from the Department and the Market
3 Administrator's office in putting the proposal together.
4 And there was a comment made that you heard in January
5 and you heard that it was a done deal, that this cap of
6 450,000 or --

7 A. Yes.

8 Q. And how did you get the understanding
9 that it was a done deal?

10 A. The lawyer standing behind you that told
11 me.

12 Q. Standing behind me?

13 A. Mr. Ben Carroll.

14 Q. Oh, okay. You didn't hear this from any
15 other -- anybody in the Department or anybody --

16 A. No, no. The help that I told you I got
17 from the Market Administrator's office in Boston, they
18 really couldn't give me any answers and they put me in
19 contact with Gino Tosi, that -- and he walked me
20 through, and what would happen and if a hearing was
21 held, and said it always would be heard. And that's --
22 there was no -- no help in putting the proposal
23 together. I want that clear.

24 Q. You have computed the economic impact of
25 being regulated on your operation?

1 A. An average, I computed 50 cents a gallon.
2 It'd be between 45 and 50 thousand per month. I
3 calculated 25 cents. There are figures that -- I could
4 probably struggle through one month in pool, but not 12
5 months in a row. Probably the second month, I'd be
6 borrowing money.

7 Q. And based on that conversation that you
8 had with your -- the conversation you've had with your
9 distributors on pricing, you don't have the ability to
10 pass that 50 cents on?

11 A. I'm governed pretty much, but pretty
12 closely.

13 Q. Pardon?

14 A. The amount that I'm charged, I watch.
15 It's like anybody in business. If I make a mistake,
16 forget to charge something, they don't say anything
17 about it. But if I charge a nickel extra, I hear about
18 it.

19 Q. So the answer is yes, that the 50 cents
20 is something that you cannot pass along?

21 A. That's correct.

22 Q. Now, I want to go to another -- just
23 another topic you talked about. I was confused as to
24 what your testimony was, but I may have been trying to
25 multitask on something at the time. You were talking

1 about 40 cents a unit or 40 cents. Is that just for the
2 packaging?

3 A. We run between 5 and 40 cents.

4 Q. Just for the packaging?

5 A. Yes.

6 Q. Are you part of any producer-handler
7 association or trade group, informally or formally,
8 where you talk about the use of costs in the
9 manufacturing?

10 A. No.

11 Q. Now, again, these are random thoughts.
12 I'm going to change the subject here to another --
13 another issue. Everybody else has done a pretty good
14 job and your own testimony has covered things pretty
15 well.

16 Since 2000 -- I'll use that. If you want
17 to use another period of time, that's fine. But just
18 for the moment, we'll use that as a reference, since
19 2000.

20 Are you aware of any producers in your
21 area that went out of business? And here's the key
22 part, because I know the answer is yes. Thousands have.
23 But any producer-distributor that went out of business
24 as a result of you being a producer-handler. Are you
25 aware of any?

1 A. None.

2 Q. Are you aware of any plants that went out
3 of business because you were a producer-handler?

4 A. In how large an area?

5 Q. No. I mean, ballpark, a
6 producer-handler. I mean, whatever. Do you compete
7 with plants that you drove out of business by being a
8 producer-handler?

9 A. As far as I know, there was one plant in
10 Massachusetts that used to bottle for some of these
11 guys. They went out. But it was a quality problem. It
12 wasn't an issue of pricing.

13 Q. Okay. And how big was that handler?

14 A. I'm not sure. I'm not sure if it was --
15 he was a producer-handler. I think he was a
16 producer-handler, but I'm not -- not positive.

17 Q. But it was a quality issue, it wasn't a
18 price issue?

19 A. Yes.

20 Q. Now, again, to another -- another issue.
21 And I kind of got this from a answer but I just wanted
22 to make sure. You're aware that there are proposals out
23 there including your own that would impose some limits
24 on producer-handlers but would still allow you to
25 continue your business as is, is that right?

1 A. Yes.

2 Q. And some of them are referred to -- and
3 there's some that are grandfathers, grandfathers that
4 strictly address those who are in business today but not
5 those who could -- you know, prohibits anybody from the
6 future, right?

7 A. Right.

8 Q. So your proposal, the 3 million is not a
9 grandfather. It is a straight cap, right? That anybody
10 can enter the business and be a part of it, is that
11 right?

12 A. Yes.

13 Q. All right. Now, there was a question, I
14 think, early on, if you were aware of -- you said you
15 were opposed to 1 and 2 and were you aware of, I think
16 it was Proposal 26 or something. Have you been given
17 any assurances from anybody that Proposal 1 and 2 or any
18 of the proposals are going to be adopted with or without
19 grandfathering?

20 Have you received any kind of
21 knowledge -- I mean, do you have any belief that -- that
22 the grandfathering clause as proposed is going to be
23 adopted and therefore you have no need to participate in
24 this hearing or to worry about these conditions?

25 A. Everything that I've heard has been

1 hearsay.

2 Q. So but you're -- you have no assurance
3 that -- the only assurance you have is you have the
4 ability to speak and explain what your business needs
5 are, right?

6 A. Yes.

7 Q. And then you are going to leave it in the
8 hands of the Department to do the right thing to
9 preserve your family. Is that where you're at?

10 A. Right on. Yes.

11 MR. YALE: I don't have any other
12 questions of him. I'll save the other 200 for
13 somebody else.

14 JUDGE CLIFTON: I know you want to
15 redirect. I have a question -- I have three
16 questions for the witness, and then I want to
17 find out from the government table whether they
18 want redirect to happen first before you ask
19 your follow-up questions, or whether you want to
20 ask your follow-up questions before redirect.
21 So, Mr. Tosi, you think on that and I'm going to
22 ask three questions.

23 JUDGE CLIFTON: The first one is:
24 Mr. Hatch, are you the proponent of Proposal
25 Number 3? And I'll allow some coaching from

1 your counsel, because he may know the number and
2 you may not know the number.

3 MR. TENSEN: And I may not either, your
4 Honor. I'm sorry, your Honor. I believe
5 Proposal Number 3 is what he submitted for the
6 3 million pounds.

7 JUDGE CLIFTON: All right. Can someone
8 from USDA confirm that Proposal Number 3 is
9 Mr. Hatch's proposal? It seems to be unanimous.
10 It is indeed Mr. Hatch's proposal.

11 MR. TENSEN: Okay. Thank you, your
12 Honor.

13 JUDGE CLIFTON: All right. My second
14 question, Mr. Hatch, is: You are very aware of
15 the quality of the milk that's produced at your
16 farm. And I wanted to ask you, in what aspects
17 does that milk have quality?

18 THE WITNESS: You can list quality, you
19 can follow bacteria counts. You can list
20 sanitation conditions at the farm. And one
21 thing that I didn't bring up, quite consistently
22 we are state and federally inspected. And we
23 pull both a hundred on the farm and a hundred on
24 the plant.

25 And there aren't many milk companies that

1 can say that. When you have comingled milk and
2 you have a number of producers, you got super
3 producers, poor quality producers, and they're
4 all mixed in the same tank. I could go on and
5 on. And I guess the best way to explain it
6 would be to put a glass in front of you and have
7 you taste it.

8 JUDGE CLIFTON: Does what you feed the
9 animals make a difference in the milk quality?

10 THE WITNESS: Of course it does.

11 JUDGE CLIFTON: And what do you mind to
12 ensure good quality with the feed you give the
13 cows?

14 THE WITNESS: We feed no feed additives
15 at all. We don't feed -- some producers feed
16 protein with feathers, they have blood meal,
17 byproducts of distillers, brewery feed. Our
18 cows get alfalfa, native hay, corn silage. And
19 the grain they get is cornmeal and soybean meal
20 and salt and minerals to balance. We could
21 probably say our cows are vegetarian fed.

22 JUDGE CLIFTON: My third question is:
23 Can you estimate the percentage of your
24 production that has your own label on it?

25 THE WITNESS: Well, it would be an

1 estimate. Somewhere in the vicinity of 40 to
2 45 percent.

3 JUDGE CLIFTON: Mr. Tosi, does the
4 government want to ask questions now?

5 MR. TOSI: Yes, your Honor, because I
6 don't know if some of the questions that I ask
7 might affect how Mr. Tensen would want to
8 conduct his redirect.

9 JUDGE CLIFTON: You may proceed.

10 CROSS-EXAMINATION

11 BY MR. TOSI:

12 Q. Good morning, Mr. Hatch. I really
13 appreciate you coming and taking the time to come and
14 participate in this proceeding.

15 A. It's been a pleasure so far.

16 Q. I know that the hearing is just getting
17 started and we haven't had the benefit of having all of
18 the proposals presented, but there is one proposal that
19 I thought you might have an opinion on. It's noticed as
20 Proposal 24 and it deals with -- that would provide a
21 regulatory exemption for producer-handlers when they're
22 marketing their own milk through their own retail
23 outlets, for example, through their own stores or -- and
24 included in that would be things that have to do with
25 home delivery.

1 And I take it from the -- from that
2 proposal that -- that it would not provide for a
3 producer-handler to engage in a business practice like I
4 understand your testimony to be, that you sold your milk
5 to a -- a distributor who, in turn, distributes it --
6 they're buying milk from you and then distributing it
7 home deliveries, right?

8 A. Yes.

9 Q. Do you have any opinion about a proposal
10 like that, about excluding from pooling and pricing
11 producer-handlers that sold milk through their own
12 retail outlets or home delivery?

13 A. Could you explain -- you just said
14 producer-handler and distribution, home delivery. Does
15 that mean without my name on it? Someone else? I don't
16 quite understand.

17 Q. Well, I'll give you the freedom to answer
18 it in any way that you have an opinion about it.

19 JUDGE CLIFTON: Mr. Vente.

20 MR.MR. VENITE: The witness is being asked
21 a questions about Proposal 24. He doesn't seem
22 to have a copy of that in front of him.

23 JUDGE CLIFTON: You know, I have been
24 trying to find it, but it's so voluminous.

25 MR.MR. VENITE: It's on page 308, your

1 Honor.

2 JUDGE CLIFTON: Thank you.

3 MR.MR. VENITE: I'm going to hand the
4 witness a copy of that with Proposal Number 24
5 circled, so he can read the introductory
6 description.

7 JUDGE CLIFTON: Good. Thank you. I
8 appreciate that.

9 THE WITNESS: Well, thank you.

10 JUDGE CLIFTON: And let's go off record
11 for about two minutes.

12 (Off the record.)

13 JUDGE CLIFTON: All right. Let's go back
14 on record. It's now 10:33.

15 JUDGE CLIFTON: What were you starting to
16 say, Mr. Hatch?

17 A. I guess I'd have to have that explained
18 to me a little bit more. It said, including home
19 delivery and handler control retail outlets regardless
20 of volume sales. Does that exclude them from meeting a
21 3 million pound cap?

22 Q. I think the way that the Department
23 currently understands this proposal, and we haven't had
24 the benefit of its presentation yet at this hearing, but
25 at first read, I think what the proposal is saying, I

1 imagine that someone is currently a producer-handler and
2 they sell their milk -- they sell all their milk in
3 their own stores, they have their own retail outlet, if
4 you will, that are selling to the public.

5 A. Yes.

6 Q. That this proposal would exempt
7 producer-handlers from any of that milk being subject to
8 pooling and pricing under the Order.

9 And the other feature that I see in this
10 proposal is, is that not only would it include a
11 producer-handler's own retail stores, but any home
12 delivery that the producer-handler makes to its
13 customers.

14 A. Uh-huh. And he has total ownership of
15 these stores, and has home delivery?

16 Q. That's the way I understand the proposal
17 right now.

18 A. Sometimes I'm kind of like a cow and I
19 chew on my cud a while. But it sounds like I'd have a
20 tendency to lean that way, but without knowing all the
21 facts --

22 Q. Right. I guess one of the things that --
23 I thought it was important to ask you some of this is
24 because that to the extent that you're a
25 producer-handler, and if the Department were to adopt

1 this proposal, for example, that because you don't have
2 total control over any of your milk that's home
3 delivered, whether that would disqualify you from being
4 considered a producer-handler under that future Order,
5 that would state that this would be a -- a requirement
6 for producer-handlers to meet?

7 A. You're starting to lose me again. I
8 think -- I think I understand it, that -- any of it.
9 The whole thing is controlled from beginning to end and
10 owned, I'd be in favor of it. But the way it is right
11 now, with me going to distributors, I don't have to
12 guarantee their sales. I -- I bottle by order only.
13 When they order, they get what they order, or they buy
14 what they order, and there's no returns unless we have a
15 problem with that -- with the product.

16 Q. Okay. One other question. If the
17 Department were to adopt your proposal; that is, put a
18 3 million pound cap on producer-handlers on what they
19 distribute as fluid milk products, if the Department
20 were to adopt that proposal, do you have an opinion then
21 about whether or not the Department should adopt also
22 Proposal 2, or does that change how you view the need to
23 change the limitation on distribution feature for exempt
24 plants?

25 A. The exempt plant, I see the -- as -- what

1 I see is the 450,000 limit on an exempt plant create
2 more -- creates more problem in the market than the -- a
3 cap on the producer-handler. It'd be pretty easy for
4 anybody to get in the milk business and out of the milk
5 business if they had a 450,000 pound cap.

6 Q. And what would be the -- you said the
7 problems. How would you characterize those problems?

8 A. Well, I was told by -- when -- when some
9 of the rules from the Federal Order were written, the
10 exempt handler was -- was a certain number of cows and
11 they'll say, under that, we're not worried about it and
12 that -- I think it was 4,300 pounds per day. And for
13 some reason that kind of sticks in my mind. I -- don't
14 cross-examine me on that.

15 But the guy's that -- parents that helped
16 write these rules have operated -- is one of
17 Mr. Dunajski's neighbors, has operated under that as an
18 exempt plant for years. And as long as he stays under
19 the 150, he can produce his own milk, he can buy milk,
20 he can sell milk. And I think it works quite well for
21 him, his farm in Dracut, Mass, Warren Shaw. I don't
22 like getting into areas that I don't want to talk
23 about.

24 MR. TOSI: Okay. Those are all the
25 questions that I have. I would like to say that

1 I really appreciate the service that you have
2 given to your country.

3 THE WITNESS: Thank you.

4 MR. TOSI: And any words of thanks would
5 always sound trite. But I -- I think we all
6 mean that, it's the highest honor here to you,
7 sir. Thank you.

8 THE WITNESS: You're welcome.

9 JUDGE CLIFTON: I just -- before you
10 redirect, I just want to make sure I understand
11 Mr. Hatch's answer with regard to Proposal 24.
12 And you thought it would be all right, but is
13 that -- it's all right in conjunction with your
14 proposal if both of them are adopted? Or did
15 you mean it's all right as a stand-alone without
16 your proposal going along with it?

17 THE WITNESS: You mean that I'd be
18 governed under that?

19 JUDGE CLIFTON: (Nodding head.)

20 THE WITNESS: Unlimited? But I have it
21 all to my own distribution stores?

22 JUDGE CLIFTON: Yes. In other words,
23 you'd be giving up the customers that are
24 already the customers of those three
25 distribution --

1 (Off the record.)

2 THE WITNESS: I would look at it with
3 both intact, the 3 million pounds and working
4 together.

5 JUDGE CLIFTON: So your Proposal Number 3
6 plus Proposal Number 24 would that be what, in
7 your opinion?

8 THE WITNESS: Something that -- if you
9 want my opinion, something that would be -- be
10 workable, a 3 million pound cap on regular
11 producer-handlers. But if you owned your --
12 your producer-handler business with your own
13 distribution all the way through, that's quite
14 an undertaking. And you're -- more than what I
15 would want to bite off.

16 JUDGE CLIFTON: All right. Mr. Tosi, any
17 other questions before I go to counsel for
18 Mr. Hatch?

19 MR. TOSI: Just one, just to make sure
20 that -- I'm not sure if I heard something that
21 was conflicting here or not.

22 RECROSS-EXAMINATION

23 BY MR. TOSI:

24 Q. If the Department were to adopt your
25 proposal, is there then a need to make any changes to

1 the exempt plant provision?

2 A. From where it is now?

3 Q. For example, right now it's at
4 150,000 pounds per month. Is there a need to make that
5 number larger, for example?

6 A. Speaking for -- speaking for myself, I
7 don't see the need for it being enlarged. But, again,
8 speaking for someone else, Mr. Rasmussen could answer
9 that more clearly than I whether the need for regulation
10 is there for the -- for an increase in that. I don't
11 know.

12 MR. TOSI: Okay. That's all I have, your
13 Honor. Thank you very much. Appreciate it.

14 JUDGE CLIFTON: Thank you, Mr. Tosi.
15 Mr. Tensen, you may come back to the podium.

16 MR. TENSEN: Thank you, your Honor.

17 JUDGE CLIFTON: When you predicted at
18 8:00 this morning that this would be about 20
19 minutes against Proposals 1 and 2 in favor of
20 the 3 million pound proposal of Mr. Hatch's, I
21 know you were not including cross-examination.

22 MR. TENSEN: That is correct. That was
23 the direct, your Honor.

24 JUDGE CLIFTON: You may redirect.

25 REDIRECT EXAMINATION

1 BY MR. TENSEN:

2 Q. Thank you. Howard, I want to go through
3 and talk about the repackaging a little bit. When you
4 have been testifying about the monthly amounts, the
5 repackaging would be part -- you would continue to have
6 the right to repackage and put your milk under somebody
7 else's label. Was that your understanding when you made
8 that proposal?

9 A. Right now, it needs -- it needs to
10 happen. Unless I have a restructure and get those guys
11 to sell my name.

12 Q. Is it -- to continue -- and what -- when
13 I listened to your testimony during cross-examination,
14 it seems to me you really have a quality niche with the
15 glass bottles into Boston. That's pretty unique almost
16 in the country, but at least to the Class I area?

17 A. I don't think the glass adds a quality to
18 the -- to the niche. The quality has to be in what was
19 in the packaging.

20 Q. But as part of the packaging, is that
21 ultimately your milk under Hatchland Dairy or other
22 label in glass bottles delivered to the home is part of
23 the product that ends up being delivered?

24 A. Yes.

25 Q. And that repackaging is under these

1 different labels, it's something -- the right to do
2 that, when you built this whole business up and built
3 this new plant in 2004, that was all part of what you
4 relied on in the rules, that you would continue to have
5 that right, so to speak, going forward to repackage and
6 sell this milk as you've been doing for years?

7 A. Yeah. I don't know if it's the proper
8 word on repackage. It's only packaged once. It's in a
9 different label. It isn't repackaged. It's --

10 Q. Relabeling.

11 A. Not re -- it's -- it's simply put in with
12 their distinction -- distinctive name on it. Same
13 product. We don't have -- we don't put different
14 quality products -- we don't sell by price or name.

15 Q. But the right to do -- use different
16 labels or label -- put different labels on your milk is
17 essential to your business plan?

18 A. Yes, it is.

19 Q. And that's been an essential component
20 over the years as you've built this business up?

21 A. Yeah. There's just not enough people to
22 say the proper way to build a producer-handler business
23 is start with one cow and sell all the milk and always
24 have just a little bit more milk than what you need.
25 But when you start with 125 cows, it start backwards and

1 it was very hard to do.

2 So once we grew -- grew into, and then it
3 started growing faster. The -- the growing has not come
4 from advertisement, it's gained from people wanting the
5 product. I don't -- I can't tell you exactly -- I think
6 it has to do with quality.

7 But quality, the people come to visit the
8 farm, the way the farm is. It costs quite a lot to keep
9 that farm looking good. Those costs aren't really put
10 into my cost of production, but --

11 Q. When you made a proposal for 3 million
12 pounds, you understood you would continue to have the
13 right to label milk for your distributors?

14 A. Yes.

15 Q. And that's an essential component of your
16 3 million pound proposal?

17 A. Yes.

18 Q. All right. And although your preference
19 is that there be no changes in the Milk Order, if there
20 is, changes that would be the right to -- for 3 million
21 pounds a month and allowed to label it for others?

22 A. Yes.

23 Q. And that's what it all comes down to, is
24 continuing your quality niche?

25 A. Yes.

1 MR. TENSEN: Thank you very much,
2 Mr. Hatch.

3 JUDGE CLIFTON: Mr. Hatch, I appreciate
4 very much -- I appreciate very much your taking
5 time to be here and to testify today.

6 THE WITNESS: Well, thank you for letting
7 me go through the process and being heard.
8 Thank you.

9 JUDGE CLIFTON: You're welcome.

10 MR. CARROLL: Your Honor, may we have
11 recross on the Government's question?

12 JUDGE CLIFTON: Oh, Mr. Carroll. Yes.

13 RECROSS-EXAMINATION

14 BY MR. CARROLL:

15 Q. Mr. Hatch, do you want your distributors
16 to be told by the government as a result of this hearing
17 that they cannot ever sell to stores or restaurants and
18 in order for you to maintain your exemption?

19 A. That they can't sell to stores?

20 Q. Stores or restaurants.

21 A. I wouldn't be in favor of that.

22 MR. CARROLL: Thank you.

23 JUDGE CLIFTON: Thank you, Mr. Carroll.
24 Now you may step down, Mr. Hatch.

25 THE WITNESS: Thank you.

1 JUDGE CLIFTON: And, Mr. Dunajski, would
2 you come forward to testify?

3 MR. TENSEN: Your Honor?

4 JUDGE CLIFTON: Yes.

5 MR. TENSEN: Mr. Dunajski asked me if I
6 would help him with my direct examination.

7 JUDGE CLIFTON: Excellent.

8 MR. TENSEN: If that would be all right
9 with you.

10 JUDGE CLIFTON: It is. Identify yourself
11 again, please.

12 MR. TENSEN: Good morning, your Honor.
13 Arend Tensen, and this time on behalf of
14 Mr. Dunajski. I'll be here for his direct
15 examination this morning, although I may head
16 out this afternoon to the airport.

17 JUDGE CLIFTON: Well, if you are the
18 lawyer, then I will swear him in, right?

19 MR. TENSEN: Correct, your Honor.

20 JUDGE CLIFTON: Would you first state
21 your full name and spell it for the record,
22 Mr. Dunajski?

23 THE WITNESS: Theodore B. Dunajski, Jr.
24 Do you want me to spell just my last name?

25 JUDGE CLIFTON: No, you might as well

1 give it all.

2 THE WITNESS: T-h-e-o-d-o-r-e, B.,
3 D-u-n-a-j-s-k-i. Jr. J-r.

4 JUDGE CLIFTON: So it's actually not that
5 hard. It's just Dunajski.

6 THE WITNESS: Still took me to the fifth
7 grade to learn.

8 JUDGE CLIFTON: All right. Would you
9 raise your right hand, please?

10 (The witness was sworn.)

11 JUDGE CLIFTON: Thank you. You may
12 proceed counsel.

13 MR. TENSEN: Thank you again, your Honor.

14 THEODORE J. DUNAJSKI, JR.

15 of lawful age, being first duly sworn, was examined and
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. TENSEN:

19 Q. Ted -- is it all right if I call you Ted?

20 A. Please do.

21 Q. It's much easier for everybody.

22 A. Yes.

23 Q. Ted, we met in person for the first time
24 today in this room?

25 A. Yes.

1 Q. And I believe we were both driving a
2 tractor the first time when we spoke the other day?

3 A. Yes.

4 Q. Ted, can you tell me where you're from?

5 A. Peabody, Massachusetts.

6 Q. And what business are you in in
7 Massachusetts?

8 A. I'm a dairy farmer, producer-handler
9 dairy farmer.

10 Q. And how long have you, yourself, been
11 milking cows?

12 A. I really don't remember.

13 Q. You started as a little kid?

14 A. Soon as they'd let me go near the cows,
15 as soon as they trusted me.

16 Q. And you've been milking cows your whole
17 life?

18 A. Whole life.

19 Q. And how long has your farm in Peabody
20 Mass. been in your family?

21 A. My grandparents settled there, I think
22 somewhere between 1915 and 1920.

23 Q. And when -- and what's the name of your
24 farm?

25 A. Dunajski Dairy Cooperative. First, it

1 was Frank Dunajski, Frank Dunajski & Sons. And then in
2 1952, it became Dunajski Dairy, Incorporated. Oh, it
3 was Dunajski Brothers for a while. Things changed.

4 Q. And what label do you sell your milk
5 under?

6 A. Presently it's sold under Pure Country
7 Milk only. And on the label it also says Dunajski
8 Dairy.

9 Q. And Dunajski Dairy is the owners of Pure
10 Country?

11 A. Yes.

12 Q. And can you tell me who owns Dunajski
13 Dairy?

14 A. I'm the president, and my two children
15 are shareholders.

16 Q. All right. And the three of you own
17 Dunajski Dairy together?

18 A. Yes.

19 Q. And what are the names and ages of your
20 children?

21 A. My daughter's 44, and my son is 42.

22 Q. Do you have any grandchildren helping on
23 your farm?

24 A. I have grandchildren, but my
25 granddaughters will say they help, but actually not that

1 much.

2 Q. But your son and daughter work
3 side-by-side with you?

4 A. Yes.

5 Q. Okay. And how long has your farm been
6 selling milk directly?

7 A. The whole time of its existence. My
8 grandfather bought a cow, started selling milk
9 door-to-door, horse and wagon. He bought a milk group
10 from another gentleman that's in the next town. As
11 things progressed, I don't know the exact progression of
12 that.

13 Q. So since approximately 19 -- what year
14 did it start, approximately?

15 A. Somewhere between 1915 and 1920, in
16 there, I don't know how it progressed at what degree. I
17 was born in 1942, so I -- back then, it was only kind of
18 hearsay, you know, what I heard, what I know. But from
19 the best of what we can -- somewhere between 1915 and
20 1920 they settled there.

21 My grandfather worked in the leather
22 shops and bought a cow and started to sell the milk.
23 And I don't know how long after that he bought the other
24 group and progressed on to more and more.

25 And then my grandfather died at a young

1 age, in his 40s, left my grandmother and seven children
2 from one to 18. And they struggled through it until it
3 got to my father and myself. My uncles didn't enjoy a
4 long life, a lot of hardships.

5 And we're only on five acres in Peabody
6 so it's not a true farming community. Actually, on the
7 trucks today we have the saying, there are cows in
8 Peabody. And then we get a lot of questions about that.
9 People have lived in Peabody for years and say, there's
10 no cows in Peabody. I say yes, because we're on the
11 back side of a hill bordering another town. And we've
12 got a unique operation.

13 Q. You produce your own milk?

14 A. Produce our own milk and it's all bottled
15 right there on a farm, yes. And we have a leased farm
16 in Rowley. We're one of the few that have a leased farm
17 in Rowley. We sell all that milk from the Rowley farm
18 plus our farm, and we balance with some Agrimart (sic)
19 milk. So we always -- from different -- from Mr. Hatch,
20 we're always a little below. We never have a surplus.

21 Q. So you balance out by buying what milk
22 you need to buy?

23 A. Yeah. That's getting smaller and
24 smaller, because 2005 we built a new cattle barn so
25 we're milking more cows than we ever milked, mainly

1 because our leased farm, the manager there is getting
2 older. He's in his 80s and we don't know what -- what
3 the outcome of that's going to become. So we're kind of
4 like moving our farm on. Even though it would not seem
5 likely for Peabody to do this, we seem to be
6 well-accepted there so we're taking advantage of that.
7 We might produce a hundred percent of our milk.

8 Q. How close, just so people can get an
9 idea, are you to the Greater Boston Metro Area?

10 A. 20 miles from Boston.

11 Q. And it's essentially Metro Boston --

12 A. Right. It's just unbelievable.

13 Everybody that comes to the farm says, you'd never think
14 there was a farm here.

15 When we have to give directions to people
16 delivering stuff, we say ignore the surroundings, you
17 are coming to a farm.

18 JUDGE CLIFTON: Mr. Tensen, I need to
19 interrupt. I didn't understand the words you
20 used when you talked about what you used to
21 balance your total.

22 THE WITNESS: It's a co-op.

23 JUDGE CLIFTON: Oh. And did you name it?

24 THE WITNESS: Agrimart (sic).

25 JUDGE CLIFTON: Would you spell it,

1 please?

2 THE WITNESS: A-g-r-i-m-a-r-t. I think
3 that's right.

4 JUDGE CLIFTON: Thank you.

5 MR. CARROLL: M-a-r-k.

6 MR. TENSEN: I believe it's m-a-r-k.

7 JUDGE CLIFTON: Could that be right,
8 Mr. Dunajski?

9 THE WITNESS: Yes.

10 JUDGE CLIFTON: Agri-Mark?

11 THE WITNESS: Agri-Mark, sorry.

12 JUDGE CLIFTON: Thank you.

13 BY MR. TENSEN:

14 Q. And do you bottle your milk right at the
15 farm?

16 A. Right at the farm.

17 Q. And you have built your own bottling
18 plant right there on the farm?

19 A. It's the same bottling plant my -- my --
20 my uncles built and so forth. It's been much modified
21 over the years. But it's the same building. It's been
22 added to, but it's -- the physical place is where it's
23 always been.

24 Q. And how much milk do you sell
25 approximately on a monthly basis?

1 A. We're -- we're selling, I think, like --
2 I think I looked at January was 347,000 pounds, which is
3 well under the 450 proposal.

4 Q. How come you have come to testify today
5 if it's under the proposal?

6 A. Because, I don't know where -- where my
7 business is going to go in the future. And if there's
8 a -- if there's a question, now is the time to -- to --
9 to address it.

10 A hundred thousand pounds difference
11 could be a problem. We're not --

12 Q. You want to make sure -- are you trying
13 to protect yourself for the future?

14 A. Protect ourself for the future.

15 Q. In case you decide to milk and be engaged
16 in the business?

17 A. Whatever. Just leave the opportunities
18 there.

19 Q. And how many cows are you milking between
20 your two farms right now?

21 A. Probably 140. 70 at ours and 70 at the
22 other farm.

23 Q. And are your costs of production, being
24 right inside the Greater Boston Metro Area, much higher
25 than your typical dairy farmer?

1 A. Probably.

2 Q. Suffice it to say, you couldn't produce
3 milk at today's milk prices?

4 A. Right.

5 Q. And an essential component for you is to
6 to be able to market your milk directly?

7 A. Exactly.

8 Q. Do you sell in glass bottles or plastic?

9 A. Plastic, all plastic. We delivered in
10 glass bottles until 1978. After the blizzard of '78, we
11 gave up all the home delivery which we had for years.
12 And we went on to just stores and nursing homes and
13 restaurants and -- but we delivered all ours in our own
14 trucks and stuff.

15 Q. And --

16 A. That's all -- all plastic. All plastic.

17 Q. Okay. So it's all plastic?

18 A. All plastic.

19 Q. Do you relabel any of it or does it all
20 sell under Country Fresh?

21 A. Pure Country. It all sells under Pure
22 Country.

23 Q. I'm sorry.

24 A. That's okay. And we do -- we do bring in
25 a few products to balance out our -- to balance out, so

1 we can take care of our customers. Like -- like, if we
2 have eight or four ounce milk for nursing homes, we buy
3 that all packaged and we sell it, along with they'll
4 take half gallons of our milk and other products. And
5 we bring in byproducts, like cream ultrapasturized for
6 the stores just so that we can be a full-service
7 company.

8 And we also -- we also do juices and
9 milk. I mean, juices -- juices and water so that we're
10 a full -- so if we got into a store, we can take care of
11 all -- we can be the only distributor in that store.

12 Q. And do you have stores that are just
13 dedicated to carrying Pure Country?

14 A. Yes, most of our stores.

15 Q. Small stores, I take it?

16 A. Yeah, mom-and-pop type stores.

17 Q. In kind of a long-established business
18 relationship?

19 A. Yes.

20 Q. That probably almost in some cases
21 carried on for generations?

22 A. After 19 -- I don't follow you.

23 Q. Oh. I mean, have these been stores that
24 your -- your dad and your grandfather --

25 A. No, no.

1 Q. Oh.

2 A. No. This is more something that I've
3 taken on.

4 Q. Okay.

5 A. They were traditionally in glass bottles
6 going to houses.

7 Q. And you've changed it to where you are
8 more distributing through stores?

9 A. Right.

10 Q. And as you go forward, is it important
11 that your family have the right -- the ability to expand
12 if necessary?

13 A. If they deem to. If they deem necessary
14 to do it. That's why I'm here today.

15 Q. And what level would you like to see, if
16 there's any level?

17 A. I'm -- to answer -- I'm going to give
18 you -- I'm far above my grandmother's expectation. You
19 know, one of my great wishes, if she could see what
20 we're doing today, she might not approve of it. But
21 she'd say -- she thought Boston was far, far away from
22 Peabody.

23 We deliver milk to Boston, that's as far
24 as we go. But I don't know what the future is going to
25 be. But I don't like limits on the future.

1 Q. Would 3 million pounds a month give you
2 sufficient expansion in Peabody?

3 A. Plenty.

4 Q. And would you be comfortable if that was
5 the adopted level?

6 A. Yes.

7 Q. Would it be important for you to have the
8 ability to repackage in the future, if that need came
9 up?

10 A. I'm in favor of putting it under other
11 people's names, but I don't see where I want to do that.
12 But, I mean, if the opportunity -- I have a bagel shop
13 right now that sells our milk. And as a marketing
14 scheme, I'd like to put on there, specially bottled for
15 such and such a company, you know.

16 But not, you know, not as -- we're proud
17 of what we do, as Mr. Hatch is. People come and say the
18 product is great, nobody can match it. I would say --
19 as long as you don't beat Mr. Hatch, I'll agree with
20 you. But I have the same -- the same -- listening to
21 Mr. Hatch, my testimony would be about the same on
22 quality and --

23 Q. And Mr. Hatch and you have a quality
24 niche?

25 A. Quality niche.

1 Q. Market and product?

2 A. Yes.

3 Q. And that's what is important, is you
4 maintain your quality niche?

5 A. Right.

6 Q. And do you see any disruption in the
7 supply? You know, by your bottling milk, is there any
8 disruption to the Class I price or anything of that
9 nature in Federal Marketing Order 1?

10 A. No. I find the other companies
11 disrupting me, only because I try to maintain my prices
12 because I know what it costs to produce milk. And then
13 when the price of milk drops, they're asking me why my
14 milk is so expensive. And I have a hard job of
15 explaining why the milk -- the milk is -- the price is
16 controlled by the Federal government.

17 And I don't understand why they price it
18 that way, because my costs haven't gone down, grain has
19 gone up. My labor hasn't gone down. My products
20 haven't gone down. So I don't know how it could be sold
21 at that price, but I have to maintain my prices. So
22 they're more disruptive to me than I think I am to them.

23 Q. Can you compete at their price levels?

24 A. No.

25 Q. And your costs of production are far

1 greater and will always -- you would anticipate being
2 far greater than the large co-ops in your area?

3 A. Oh, yes.

4 Q. And, you know, all the management is
5 supplied by your family for this operation?

6 A. Yes.

7 Q. Would you rather see -- would your
8 preference be that the rules not change at all and just
9 stay status quo?

10 A. Yes.

11 Q. And have you relied on these rules as you
12 built your new barn and continued to develop your
13 operation?

14 A. Yes.

15 Q. And it's been important that these --
16 that you have the ability to continue to operate the way
17 you had been and continue to slowly expand?

18 A. Yes.

19 Q. Has that been something that's been going
20 on? Rather obviously, your grandfather started, I
21 believe, with one cow.

22 A. Right, right.

23 Q. And you have expanded over the years up
24 to approximately 140 cows today?

25 A. Right.

1 Q. And it's hard to see what the future
2 holds, but then again, you can only put so many cows on
3 five acres?

4 A. That's right.

5 Q. But right now, you currently lease a
6 farm, there might always be a farm to lease, another
7 farm?

8 A. Always might be an option.

9 Q. And since approximately 1920, your family
10 has been producing and selling milk?

11 A. That's all I know. It's a -- you know, I
12 know nothing else. I milked cows before I went -- I
13 went to an aggie school and we had to be there 8:30 in
14 the morning, because we started later and we stayed
15 later so that we could be home for chores in the morning
16 and do chores at night. We got out in March so we could
17 do crops, went on summer project.

18 The school tried to make me go to work on
19 other farms so I could learn more knowledge. And I
20 said, no, my family needs me. So I -- I had to go to
21 the director, so forth, and before they'd allow me to go
22 back on project on my own farm, not my -- my family
23 farm. And so it's just been sort of a way of life.

24 It's just like living in Peabody. I know
25 there are other ways of life because there's plenty of

1 other people. But it's the life I live in the city I
2 was born in, work at a job I've always had. And I enjoy
3 it. I just love what I do. And I'm proud to carry on
4 the business that my -- that my -- my parents struggled
5 with. And --

6 Q. This has been your life?

7 A. Has been my life.

8 Q. And the life that you chose?

9 A. The life I chose. Maybe chose for my
10 children, whether they liked it or not at some points.
11 One of them -- I have another child who chose to leave
12 it.

13 Q. And the children that chose to stay, this
14 is --

15 A. They're -- the ones that chose to stay
16 are happy at it.

17 Q. And this is a life that you would like to
18 be able to continue and your children be able to
19 continue?

20 A. That would be up to them.

21 Q. But if they chose to?

22 A. Right, yeah.

23 Q. And the rules as proposed, at 450, could
24 impair the ability of your children to continue on this
25 family farm?

1 A. It might, because I couldn't -- there was
2 more stringent regulations put on my grandmother and her
3 children when she was running it that I couldn't live by
4 today. So knowing not what the future holds, I want --
5 I don't want limits put on -- on to my children that
6 would limit them.

7 Q. At least limit that -- that you believe
8 you could work with?

9 A. Right. I want there to be reasonable
10 limits, you know.

11 Q. Okay.

12 A. Go ahead.

13 Q. Ted, we didn't have a chance to speak
14 much, other than to greet each other for 30 seconds.

15 A. Right.

16 Q. Is there anything else you want to add
17 that we haven't covered?

18 A. No, I think we covered it pretty much.

19 Q. And is it safe to say that the basic,
20 essential reasons you are here is you support the 3
21 million pounds?

22 A. Right.

23 Q. You would like the ability to
24 repackage --

25 A. Right.

1 Q. -- should need arise?

2 JUDGE CLIFTON: Now, let's define that,
3 repackage. The way he expressed it was, use
4 labels other than --

5 THE WITNESS: Pure Country.

6 JUDGE CLIFTON: -- Pure Country.

7 THE WITNESS: Right.

8 JUDGE CLIFTON: Is that what you mean by
9 that?

10 MR. TENSEN: I appreciate that
11 clarification, your Honor, that it would be the
12 right to relabel or repackage or put another
13 name on it.

14 JUDGE CLIFTON: Now, when you say re, it
15 sounds like it used to have a different label.

16 MR. TENSEN: And I should say -- I'll
17 clarify that even further. The right to label
18 milk with a different name.

19 JUDGE CLIFTON: Okay. Now ask your
20 question.

21 MR. TENSEN: Thank you, your Honor.

22 BY MR. TENSEN:

23 Q. Ted, would you -- is it important for
24 potential future needs that you have the right to label
25 your products with different names other than just your

1 farm name?

2 A. The answer -- the way I'd like to answer
3 that is being in -- being in a business that other
4 people are in, meaning even though I'm a
5 producer-handler and I sell against pooled plants, they
6 can -- they can label in any name they want by just
7 putting a plant's number on the label.

8 So I don't understand why a
9 producer-handler should be limited when a pooled plant
10 is not limited. I'd like the same freedoms that
11 everybody else has. I'm not asking for more, I'm not
12 asking for less. That's the way I'd like to phrase it.

13 Other than -- other than just saying I
14 have no reason to -- to have a different label, I just
15 want the same liberties that other people in the same
16 business enjoy.

17 Q. Because there may be a need --

18 A. There might be in the future.

19 Q. -- to label it for the bagel store?

20 A. For some -- whoever.

21 Q. Yeah. And, lastly, would you prefer the
22 rules just stay the way they are right now, rather than
23 change them?

24 A. I have no problem with the rules the way
25 they are at the moment.

1 Q. Thank you very much, Ted.

2 A. Thank you.

3 Q. You might get a few more questions,
4 though.

5 A. That's okay.

6 JUDGE CLIFTON: Thank you, Mr. Tensen. I
7 appreciate you stepping in at the late hour like
8 that. It's very helpful to us. All right.
9 Cross-examination. Mr. Vetne.

10 CROSS-EXAMINATION

11 BY MR. VENITE:

12 Q. Mr. Dunajski, John Vetne from Raymond,
13 New Hampshire, formerly Newberry Port, Massachusetts
14 with a sister-in-law in Danvers, all right close to you,
15 right?

16 A. Right.

17 Q. I think you have a competitor pretty
18 close to you in a city called West Lynn, don't you?

19 A. They're not really competitors.

20 Q. There's a large --

21 A. They were a competitor. They were a
22 competitor when it was West Lynn Creamery. They were a
23 great competitor when it was West Lynn Creamery, which
24 originally was Pepin Creamery. They started as Skangus
25 Brothers. They lived -- they lived on the next street

1 over. I live on Buxton Lane and there's nothing to do
2 with -- they lived on Gardner Park.

3 Q. Okay.

4 JUDGE CLIFTON: I do need some spellings
5 of cities that you just named, not to mention
6 the streets you just named.

7 MR.MR. VENITE: I'm glad nobody has
8 mentioned Worcester and Gloucester.

9 AUDIENCE MEMBER: You just did.

10 MR.MR. VENITE: You can forget that. That
11 can be off. Okay. Newberry Port,
12 N-e-w-b-e-r-r-y, P-o-r-t. West Lynn, West,
13 separate word, Lynn, L-y-n-n. I think that was
14 it.

15 JUDGE CLIFTON: Okay. And Worcester and
16 Gloucester.

17 MR.MR. VENITE: Oh, for heaven's sake.
18 Okay. Worcester is W-o-r-c-e-s-t-e-r.
19 Gloucester is G-l-o-u-c-e-s-t-e-r. Am I
20 correct?

21 THE WITNESS: I hope so.

22 MR.MR. VENITE: I hope so, too.

23 THE WITNESS: Sometimes called
24 Gloucester.

25 JUDGE CLIFTON: And, Mr. Dunajski, the

1 streets you mentioned, please?

2 THE WITNESS: Buxton, B-u-x-t-o-n, Lane.
3 Gardner is G-a-r-d-e-r-n.

4 MR.MR. VENITE: N-e-r?

5 THE WITNESS: N-e-r. Gardner Park,
6 P-a-r-k.

7 JUDGE CLIFTON: Thank you.

8 BY MR.MR. VENITE:

9 Q. And do you keep your cows in a barn or a
10 barn?

11 A. Loose housing.

12 Q. Okay. You talked about using all plastic
13 packaging. Now, do you, like Mr. Hatch, buy your
14 bottles, your plastic bottles, from somebody else that
15 blows them?

16 A. We buy them from somebody else that blows
17 them, but we label them ourself.

18 Q. You put a label on, your own label?

19 A. Uh-huh.

20 Q. What about caps, do you buy your caps?

21 A. Buy our caps.

22 Q. And the caps come printed with whatever
23 you need to have on there, you order?

24 A. Our caps are generic. They're
25 not printed because all the information is on the label.

1 Q. It's another label that you put on.
2 Okay.

3 JUDGE CLIFTON: Is Mr. Dunajski close
4 enough to the microphone for those of you in the
5 back? Yeah, you are coming through loud and
6 clear.

7 Q. Mr. Hatch testified to packaging costs
8 for the blown bottles and caps and labels of 48 cents or
9 so per gallon. Do you have any information from your
10 operation as to what those costs are?

11 A. I think they're a little lower. I think
12 ours are a little lower. I think the bottles are
13 somewhere in the 20, 20 to 25 cents range. The half
14 gallons are a little less and pints are more than you
15 think they should be in relation to the gallons.

16 Packaging is high. I don't question the
17 packaging costs. The label cost is -- depending on the
18 size of the labels, varies anywhere from 4 cents down to
19 a cent and a half.

20 And the caps are -- it's generic, so I
21 don't know whether a cent or two a piece. So I would
22 put it more, our packaging would probably be more 30
23 cents than what he ordered it for, but I'm not here to
24 debate that.

25 Q. You indicate you distributed in your own

1 trucks?

2 A. Own trucks.

3 Q. And the packages come in your own crates?

4 A. Yes.

5 Q. Okay. And the crates are recycled and
6 returned back to you?

7 A. Yes.

8 Q. You don't distribute any boxes that are
9 one way?

10 A. No, no.

11 Q. Okay. Do you also pasteurize by vats
12 like Mr. Hatch?

13 A. No.

14 Q. How do you pasteurize?

15 A. HS -- short time. Short time as he
16 called it. Short time pass, which --

17 Q. And when did you make the investment for
18 that kind of pasteurization?

19 A. We've probably been -- we used to vat
20 pasteurize. I think probably been short time
21 pasteurizing for 15 or 20 years. I think it's got more
22 to do with how the milk's handled and how it's
23 pasteurized, but Howard and I would never agree on that.

24 Q. Do you buy ingredients like sugar?

25 A. Yes.

1 Q. In the bag or pallets, rather than
2 truckload or carload?

3 A. We buy by the pallets.

4 Q. Okay.

5 A. And --

6 Q. Sugar, chocolate, that kind of thing?

7 A. All that sort of thing at a higher cost
8 premium. The way I say it, it's the same as Howard
9 said. If it's good enough for my grandchildren, it's
10 good enough for anybody. And everybody else has got
11 their grandchildren, love them just as well as I do, so
12 I feel they ought to have what my grandchildren have.

13 Q. You supply your producer-handler
14 operation with a leased herd located in Rowley, is that
15 a fair statement, correct?

16 A. That's correct. That herd's more on the
17 decline and ours is more on the increase.

18 Q. Is that adjoining land or do you have to
19 transfer the milk?

20 A. Transfer the milk.

21 Q. And do you transfer it in your own truck?

22 A. Our own truck, yeah.

23 Q. You have a small tank truck of some kind?

24 A. Yes.

25 Q. What's the capacity of that tank truck?

1 A. The capacity is, I think, 5,600 gallons
2 but it's never filled. We have -- we have -- we have
3 one for water and one for -- one for milk. We actually
4 have a -- I mean, we have three tank trucks. One sits
5 in the field. One is always full of water. And the
6 other one takes care of the milk.

7 Q. By water, do you -- do you buy spring
8 water from someone?

9 A. Spring water. Yeah, we go to Brentwood,
10 New Hampshire, get spring water, because all our juices
11 are made with spring water, and we bottle the spring
12 water.

13 Q. So you sell bottled spring water and
14 bottled juice using spring water from Brentwood?

15 A. It's an ingredient, yeah.

16 Q. What's -- the five acres in Peabody,
17 what's the acreage of the leased facilities in Rowley?

18 A. Oh. It's probably about 140 acres or so
19 there, but that feed does not come to Peabody. Our farm
20 is on five acres, but we probably have over a hundred
21 acres of land that we use to produce our feed, some in
22 Peabody, some in Danvers. I've got to think of a town I
23 can spell. Winham. Seriously, those are the towns.

24 JUDGE CLIFTON: What's the last one you
25 said?

1 THE WITNESS: Winham. Winham.

2 Q. W-i-n-h-a-m?

3 A. Yes. Thank you.

4 JUDGE CLIFTON: And how do you spell the
5 leased location that has 140 acres?

6 MR.MR. VENTE: Rowley, R-o-w-l-e-y.

7 JUDGE CLIFTON: And how is Danvers
8 spelled?

9 THE WITNESS: D-a-n-v-e-r-s.

10 JUDGE CLIFTON: It just ends with S?

11 THE WITNESS: Danvers. Peabody used to
12 be a part of Danvers.

13 Q. Okay. So you have two locations, on
14 which there are cows, that you own or lease, and you own
15 another location on which you grow some feed?

16 A. Yes. We grow most of the feeds for the
17 cows in Peabody. We do -- we do purchase the grain.
18 The corn we are purchasing at the moment. And most of
19 the -- most of the -- most of the grass, alfalfa we
20 grow.

21 Q. Okay.

22 MR.MR. VENTE: Thank you. That's all.
23 Thank you for coming.

24 THE WITNESS: Thank you.

25 JUDGE CLIFTON: Thank you, Mr. Vetne.

1 Other cross-examination for Mr. Dunajski?

2 JUDGE CLIFTON: Oh, counsel, I was hoping
3 you wouldn't. Mr. Yale first.

4 CROSS-EXAMINATION

5 BY MR. YALE:

6 Q. Benjamin F. Yale for Select Milk
7 Producers and Continental Dairy Products. Good morning.

8 A. Good morning.

9 Q. There has been some discussion, there are
10 some proposals out there that are called grandfather
11 proposals that would allow you to continue to do your
12 business without being regulated, but not allow anybody
13 to start. Are you aware of those proposals?

14 A. Not in full, but I am aware of them.

15 Q. The concept, you are aware of the
16 concept?

17 A. Right, I'm aware of the concept.

18 Q. All right. Do you have an opinion as to
19 the grandfather clauses?

20 A. I thought America was the land of
21 opportunity.

22 Q. I take it that that's an answer that it
23 should be available for the grandchildren as well the
24 grandfather, is that --

25 A. It puts in easily. I think this is a

1 country -- I think that's why my grandparents came here.
2 My grandmother wanted to go home when she seen the water
3 run out of the facet, and she thought it was witchcraft.
4 Coming here with just a name tag on, she probably didn't
5 know how to get back.

6 You know, it's a land of opportunity. So
7 why do we have to put limits on things? Unless it's
8 very necessary.

9 Q. And I take it by your testimony you sell
10 to no chain stores?

11 A. No chain stores.

12 Q. Okay. And I also -- in your testimony --
13 well, let me just -- let me ask it this way. You're
14 aware that the USDA announced minimum Class I prices for
15 the Boston area and other markets, right?

16 A. Yes.

17 Q. Do you follow those prices?

18 A. I don't understand it. I don't
19 understand how anybody could make a living at it. I
20 don't understand where they come from. I'm aware of
21 them, I look at them. But I have a hard job
22 understanding why, in the year 2009, they are the way
23 they are.

24 Because in 1960, I graduated from Essex
25 Agricultural School and stood out behind the heifer barn

1 with a guy fixing the fence, the guy that worked there,
2 saying, it's been tough in the dairy business up until
3 now, but you guys going on are going to have it good
4 because the prices are going to go up for the milk.

5 And they're exactly the same place --
6 just about the same place now. I mean, we did have a
7 big spike last year, which I -- I don't know if they
8 should go that high, but they shouldn't go back down to
9 this low either. So I really think the system in whole
10 needs to be addressed.

11 I mean, it's a good food item, milk. It
12 should be marketed so in this great country that we
13 have, that as I flew in here and I looked out over Ohio,
14 seeing all the fields mowed just wondering what's going
15 to grow there. I'd like to fly over again and see -- or
16 just go down and visit and see what a great country we
17 are. People fought for it.

18 I'm -- you could call me a conscientious
19 objector, because I was asked to go to Vietnam, but I
20 got a 2-C deferment because if I did go, my farm might
21 not be there today. And I'm lucky that I was able to
22 stay and farm and not go, but I appreciate the people
23 that did go and are going now. I didn't mean to get off
24 the track.

25 But I think that -- I think that the -- I

1 think the whole milk industry, as a whole, needs to be
2 fixed. It needs to be fixed soon. And that's why I'm
3 here today. Not because -- 450,000 pound limit, my life
4 will go on and probably would go on. But I'm here today
5 because I have the opportunity to state my case in the
6 business that I love growing up in, so -- that's
7 emotional as I can get. I get a little too emotional.
8 That's exactly how I feel.

9 Q. And that opportunity to others, not --

10 A. Not just to my family. To anybody that
11 wants to go down the road. Not to take away from the
12 astronauts or the -- that's what's great about this
13 country.

14 Q. I want to get back to this -- the pricing
15 issue in the sense that you're aware of that price. I
16 take it you don't use that in setting your prices?

17 A. No.

18 Q. Were you here yesterday?

19 A. No. Unfortunately, I didn't have the
20 time. I got in here at 7:00 last night.

21 Q. Then I won't ask the question. That's
22 all I needed to know, whether you heard some different
23 questions.

24 But the price of your milk, would you say
25 that that is consistently higher or lower than the rest

1 of the milk that's sold in your market, like in the
2 stores?

3 A. Sometimes it's higher and sometimes it's
4 a little lower when the prices go extremely high. At
5 present, it's higher because the other prices are lower.
6 I'd have a hard time, knowing what my bills are, to drop
7 my price -- drop my prices to what they're selling the
8 milk for, not only for myself. But I feel bad -- I feel
9 bad for the -- for the other dairy farmers. My family
10 struck out and sold their own milk and we always have.

11 And if I couldn't sell my own milk, I
12 don't think -- I don't think I could do -- I wouldn't do
13 all that hard work for somebody else. That's why I say
14 the system is broken.

15 Q. So it's safe to say, then, that you do
16 not compete with the largest bottlers on the price
17 issue?

18 A. No.

19 Q. That is a true statement, though?

20 A. That's a true statement.

21 Q. Okay. Now, there was some mention of
22 West Lynn Creamery and some other manufacturers, but
23 I -- this is a question that was asked before. But are
24 you aware, as being a producer-handler of your size,
25 that duty -- that your situation, that any regulated

1 plants have gone out of business in response to your
2 status?

3 A. We couldn't put anybody -- let's put it
4 this way. When the Hood blimp flies around, my cousins
5 kid me and say -- when the Hood blimp -- Hood blimp
6 flies around, they got advertising. They've got a blimp
7 and it flies around the Boston area. My relatives say,
8 why don't I get a kite? In West Lynn, one of the West
9 Lynn salesman said, if we had a blimp, it'd be a leaker.

10 JUDGE CLIFTON: It would be a what?

11 THE WITNESS: Leaker.

12 MR. YALE: Leaker, l-e-a-k-e-r.

13 THE WITNESS: Because the worst thing is
14 to have a bottle of milk in your truck that's
15 leaking.

16 A. But the Hood blimp did take a crash
17 landing one time.

18 Q. That had nothing with --

19 A. Nothing to do with me.

20 Q. Oh, very good. And it wasn't your kite,
21 either, that did it?

22 A. But they do fly over my farm quite
23 regularly to get to Beverly Airport.

24 Q. Coming back, the same with producers, are
25 you aware of any producers who have been put at a

1 disadvantage because of your status as a
2 producer-handler?

3 A. No.

4 Q. Now, I recall that you participated at
5 the information center that USDA put on, right, by
6 telephone? I think you were on.

7 A. Yes, I did.

8 Q. Okay. And have you been part of any
9 other meetings in trying to establish some kind of
10 producer-handler policy issues in the last year or so?

11 A. No. They had a meeting. I was invited
12 but I didn't go.

13 Q. Where was that?

14 A. It was at the Wright Farm in Rhode
15 Island.

16 Q. Is this part --

17 A. It's -- it's a New England based group.
18 I think they call it the New England producer-handler.
19 I don't even know their full name. Marjorie Cooper is
20 their secretary. Mr. Carroll could fill you in on --

21 Q. But you weren't part of any discussions
22 with USDA or any trade groups or anything else?

23 A. No, no.

24 JUDGE CLIFTON: And is Wright spelled
25 W-r-i-g-h-t?

1 THE WITNESS: Yes, it is.

2 JUDGE CLIFTON: Thank you.

3 Q. I want to go back -- back to a comment
4 you made before, that you believe the system is broken,
5 that there's got to be change.

6 Do you see it necessary that there be a
7 wholesale change in the system as opposed to just
8 working on the PDs as a separate issue, or what do you
9 mean by that?

10 A. What I mean by that is it's more educated
11 people than I that run the Federal milk market. They
12 have the figures, they work in figures all the time.
13 And it doesn't take a genius to figure out.

14 If Mr. Hatch says the producers cost \$21
15 a hundred to produce milk, whether that's true or not,
16 that kind of scares me. You know, and I don't -- I
17 don't go in -- in our particular farm, there was some
18 times that we tried to figure out what it costs. It
19 gets very complex. And I -- you know, it gets scary
20 when you start putting figures down because you can talk
21 yourself out of business.

22 And what I'm trying to say is, if you are
23 selling milk for 12 to \$13 a hundred, it's costing \$20
24 to produce it, somebody that's in the -- in the end of
25 regulating that ought to take a long, hard look at that.

1 They can't put their head in the sand and say, oh, the
2 milk keeps coming. Because someday it ain't going to
3 keep coming.

4 And it's -- I mean, do we have to get to
5 the point where -- I mean, we regulate cigarettes to the
6 point because it's bad for us. And we got a good
7 product that's good for everybody. Are we going to
8 regulate that so much so it's not here no more? So, you
9 know, that's why I'm saying or pleading, not for me,
10 because I'm marketing my own milk. I found a way around
11 it. But for the rest of the industry, I think the
12 co-ops ought to be working on how to get their producers
13 to adjust the amount of milk for their suppliers rather
14 than worrying about the producer-distributors who
15 already struck out and took care of themselves.

16 That's the best -- that's my honest
17 opinion. I'm not trying to belittle anybody. I -- they
18 have awesome jobs, meaning the people that control the
19 milk markets, and whether it's the government or USDA.
20 But it needs to be looked at seriously.

21 MR. YALE: I don't have any other
22 questions of this witness.

23 JUDGE CLIFTON: What did you understand
24 Mr. Yale to mean when he talked about PDs?

25 THE WITNESS: Producer-distributors.

1 JUDGE CLIFTON: Producer-distributors?

2 THE WITNESS: Yes.

3 JUDGE CLIFTON: All right. And what you
4 just said confused me. When you talked about
5 how the co-ops, for example, should try to get a
6 higher price for the farmers, what did you say
7 they should be working on?

8 THE WITNESS: A market -- if the co-ops
9 are marketing the milk, they should be
10 getting -- they should be -- to put it simply,
11 if you have a supply of milk coming in and
12 you're the cooperative and you're marketing it,
13 you should be taking care of the people that are
14 producing it.

15 If you have too much of it, you should be
16 going to the Federal Milk Market or something
17 and say, we need to put quotas on, we need to do
18 something so that we're not having these big
19 influxes. I don't understand it all. It's not
20 my job.

21 My job is at my farm selling my milk.
22 But the -- the other people that control -- I
23 hate to see a product like milk go from \$13 a
24 hundred to \$24 a hundred in a matter of a year,
25 especially in these economical times. I

1 understand things are down. But milk is, like I
2 stated, being sold for prices today that it was
3 sold in 1960.

4 So there's not many other products that
5 are sold at that same level. So it really needs
6 to be looked at. I think that's -- I think
7 that's the biggest issue of all, rather than
8 limit -- I think producer-distributors sell
9 1 percent of all the milk marketed in this
10 country, and we're targeting that 1 percent but
11 we're not looking at the big picture.

12 I think between Mr. Hatch -- maybe some
13 other producer will come up here. We are
14 producer-dealers but we really are farmers at
15 heart. We sell the milk because it gets the
16 money, so we can play at our game -- our hobby.
17 So whether that's driving a bigger John Deere
18 tractor or -- we don't buy new ones either. But
19 I enjoy going out working with my children.
20 It's not always fun. We get in heated argument
21 sometimes. But we do run a business together at
22 the end of the day.

23 I'm here because my daughter took the
24 time to make sure I had everything, somebody to
25 come with me. Even though she's not here,

1 she -- she, I guess, has the confidence that
2 I'll come here and do a good job. So it's a
3 team effort. So I want -- I don't go to Vietnam
4 but I'll fight the war here. And I'll make you
5 people aware that something should be done for
6 all the farmers.

7 JUDGE CLIFTON: Mr. Carroll.

8 CROSS-EXAMINATION

9 BY MR. CARROLL:

10 Q. I want to ask you if you have an opinion
11 as to whether it's in the interest of consumers or
12 producer-handlers that the government, as a result of
13 this hearing, says that you cannot have an exemption
14 from pooling if you sell to stores, nursing, homes
15 schools, or if your distributor sell to stores, nursing
16 homes, and schools?

17 A. What I don't understand about your
18 question is, what exemption?

19 Q. What, sir?

20 A. What exemption? What exemption are you
21 talking about?

22 Q. Either the producer-handler or the exempt
23 milk provision.

24 A. I don't know about exempt plants so I
25 can't speak on that. Producer-handlers, I don't mind

1 exemptions on producer-handlers. We've always had them.
2 But I want realistic ones. I don't think 450,000 pounds
3 is a realistic exemption, along with not being --
4 without packaging of the milk, what name it's under. I
5 don't think those are realistic exemptions.

6 Q. Right. You think distributors of milk
7 should be free to package the milk on their own label in
8 whatever way they want and sell it wherever they want to
9 sell?

10 A. With reasonable limitations.

11 Q. Right.

12 JUDGE CLIFTON: Mr. Carroll, your
13 question was about distributors of milk?

14 MR. CARROLL: Both -- well, distributors,
15 yes, that's right.

16 JUDGE CLIFTON: Do you -- so regardless
17 of the producer-handler status, you're just
18 talking about distributors?

19 MR. CARROLL: Well, distributors of
20 producer-handlers.

21 BY MR. CARROLL:

22 Q. You've heard some testimony today that
23 there's some producer-handlers who bottle milk and other
24 people distribute it?

25 A. Right.

1 Q. And so you think they should have that
2 right without limitation as to where they sell the milk?

3 A. If your reference is to Mr. Hatch, the
4 way he's doing it, I don't have -- I -- that's fine with
5 me.

6 Q. Okay.

7 A. Personally all my -- like I stated
8 before, all our milk presently goes out under our label.
9 But I'd like the ability to, if I felt it necessary, to
10 put some of it out under another label, if I felt it
11 necessary.

12 Q. Right.

13 A. The same as other people in the same
14 industry have the ability to do.

15 Q. Right. And you think --

16 A. I would have to remark it with the plant
17 number and so forth. I'm not trying to --

18 Q. Do you think everyone should have that
19 same right?

20 A. Everybody in the same business should
21 have the same right.

22 Q. Now, directing your attention to your
23 family situation, I missed it, I'm sorry. How many
24 members of your family are currently working with you?

25 A. I forgotten to mention my

1 daughter-in-law. I'm ashamed of that. There's four --
2 four direct.

3 Q. Right. And I take it that they'll have
4 children?

5 A. They have two children, yes.

6 Q. And do you want to have, for that little
7 family unit, the right to increase the volume in order
8 to carry those extra expenses?

9 A. If that's what they wish to do.

10 Q. Right.

11 A. Basically that's why our business has
12 grown. Not because -- well, some because the need --
13 the -- as my children got older, they got married, they
14 had families, so we -- we needed to have more income, so
15 that's why the business -- not only did people want
16 milk, want our milk, be we also had the need because our
17 family got larger to support.

18 Q. And do you want enough distance to that
19 exemption so that you can plan in the future --

20 A. Exactly.

21 Q. -- for your business --

22 A. Exactly.

23 Q. -- to grow?

24 A. Exactly.

25 Q. Thank you.

1 A. Thank you.

2 JUDGE CLIFTON: Other cross-examination
3 for Mr. Dunajski? Mr. Tosi.

4 MR. RICCIARDI: Your Honor, I do have
5 some questions here.

6 JUDGE CLIFTON: I'm sorry, I didn't look
7 your direction. I apologize. As you can tell,
8 I'm getting -- I'm feeling some urgency to get
9 moving. But Mr. Ricciardi.

10 MR. RICCIARDI: Thank you.

11 CROSS-EXAMINATION

12 BY MR. RICCIARDI:

13 Q. Mr. Dunajski, good morning. I'm Al
14 Ricciardi. I'm here on behalf of AIDA, which is a group
15 of producer-handlers and actually some plants, too. And
16 I have several questions, and hopefully I will be brief.

17 You sent a letter to the Deputy
18 Administrator at USDA Dairy Programs on March 9th, 2009
19 commenting on the proposal to eliminate the
20 producer-handler exemption, correct?

21 A. Correct.

22 Q. And you found out that National Milk and
23 IDFA had made those proposals within just a few days
24 prior to the time you sent this?

25 A. Yes.

1 Q. And that's the first time you're aware
2 that that proposal was out there to eliminate the
3 producer-handler exemption, correct, sometime in early
4 March of 2009?

5 A. I think in January, we become -- we got a
6 letter from the USDA to state that the proposal was put
7 in front of them, I think.

8 Q. That's the first time you're aware of it?

9 A. First time I'm aware of it.

10 Q. Were you aware that IDFA and National
11 Milk had been meeting as early as the spring of 2008
12 with the Department with regard to making a proposal to
13 eliminate your producer-handler exemption?

14 A. No.

15 Q. You think you should have been aware back
16 then?

17 A. Yes.

18 Q. I'm reading from your letter that you
19 sent to the Department. Actually, you sent one and then
20 you sent an addendum. I'm just going to talk about your
21 first letter for a moment.

22 Your -- in the ultimate paragraph, almost
23 the next to the last paragraph, you say, Also -- and I
24 quote. Also it is my belief that producer-handlers
25 market only 1 percent of all milk sold in the United

1 States of America. Because of this, I do not understand
2 how it could disrupt the milk market. When you say it
3 there, you're talking about producer-handlers?

4 A. Right.

5 Q. Was that your opinion when you sent this
6 in to the Department?

7 A. Yes.

8 Q. Is that your opinion today?

9 A. Yes.

10 Q. Is that your opinion under oath today?

11 A. Yes.

12 Q. You also said in response to a question,
13 could have been from Mr. Vetne, about disruption -- and
14 if I get your quote wrong, you'll tell me because
15 occasionally it happens: Other companies disrupt me.
16 Is that about what you said?

17 A. Yes.

18 Q. And the other companies you're talking
19 about are other companies in the milk industry and milk
20 business that are not producer-handlers, right?

21 A. Right.

22 Q. Because one of the problems that you've
23 got is you can't compete on price with those people in
24 the regulated community?

25 A. Right.

1 MR. RICCIARDI: Nothing further.

2 JUDGE CLIFTON: Mr. Ricciardi, that was
3 excellent and brief. Thank you. Any other
4 cross-examination before I call on Mr. Tosi?
5 There is none. Mr. Tosi.

6 CROSS-EXAMINATION

7 BY MR. TOSI:

8 Q. May I call you Ted? I have a very
9 difficult time pronouncing your last name.

10 A. Please do. I love -- I like the name
11 Ted, especially with my last name.

12 Q. Okay, great. Ted, how many employees are
13 associated with your producer-handler business?

14 A. Just to speed it up, I'd say ten.

15 Q. Ten. Thank you. If the Department were
16 to adopt your proposal, do you see a need to, in
17 addition to adopting your proposal, to make any
18 adjustment in the exempt plant limitation of
19 150,000 pounds per month?

20 A. I think the exempt plants are the plants
21 that are small and they have no regulation. Is that
22 what an exempt plant is, 150,000 pounds?

23 Q. Well, one of the features of the exempt
24 plant definition, it tries to describe those people who
25 are not subject to pricing and pooling like

1 producer-handlers, but it -- but it doesn't talk about
2 ownership of -- where everything, like, in your
3 operation has to be under your own sole ownership and
4 risk. Where an exempt plant is somebody that, for
5 example, can buy all their milk from another source.

6 A. Yeah. I think I -- I think it should be
7 kept at 150. I don't think it should be raised to 450.

8 MR. TOSI: Okay. Thank you, sir. That's
9 all I have.

10 THE WITNESS: That's my opinion.

11 MR. TOSI: And I really appreciate you
12 taking the time. I know it was a burden for you
13 to come here. We really appreciate this.

14 THE WITNESS: I appreciate the
15 opportunity and I appreciate your help.

16 MR. TOSI: Thank you.

17 THE WITNESS: Thank you. You've been
18 most helpful all the way through.

19 MR. TOSI: Thank you.

20 JUDGE CLIFTON: I would like to have the
21 record reflect that Mr. Dunajski's proposal is
22 Proposal Number 7. It's on page 16,299 of this
23 notice of hearing. Is there any objection to
24 that? All right.

25 Mr. Tensen, would you like to conduct

1 redirect examination?

2 MR. TENSEN: I think I don't have any
3 further questions.

4 JUDGE CLIFTON: Thank you so much.

5 THE WITNESS: Thank you.

6 JUDGE CLIFTON: Mr. Dunajski, is there
7 anything else you would like to say before you
8 step down?

9 THE WITNESS: Thank you to everybody.

10 JUDGE CLIFTON: Thank you. It's 11:45.
11 Mr. Brosch, would you please come to the podium?
12 Should we proceed with Dr. Cryan or should we
13 take Mr. Tonak or Mr. Asbury's statements first?

14 MR. BROSCH: Well, your Honor, I'm --
15 Mr. Cryan is going to be longer than Mr. -- the
16 other two. But on the other hand, I think he's
17 sort of the lead witness on those. So I think
18 it would be appropriate to go with -- with
19 Mr. --

20 JUDGE CLIFTON: Dr. Cryan.

21 MR. BROSCH: -- Dr. Cryan first.

22 JUDGE CLIFTON: Get that microphone as
23 close to your mouth as you can.

24 MR. BROSCH: I think it would be
25 appropriate to go with Dr. Cryan, if possible.

1 He's the witness for the proposals -- the joint
2 proposals of National Milk.

3 JUDGE CLIFTON: All right. It's 11:45,
4 roughly. Do you want to get into that right now
5 or do you want a one-hour break first?

6 MR. BROSCHE: Well, your Honor, what we
7 plan to do is have Dr. Cryan essentially read
8 his testimony. I'm not going to belabor this
9 hearing any more than it's already been
10 belabored by involving long cross-examination.

11 So I think we could put Dr. Cryan on. We
12 could have him do his testimony. I may have one
13 or two follow-up questions. And then if you
14 want to break for lunch and come back for
15 cross-examination, perhaps we could do it that
16 way.

17 JUDGE CLIFTON: That sounds excellent for
18 me. Is there anyone that has a different idea
19 of how we might proceed? Mr. English.

20 MR. ENGLISH: Not so much -- not so much
21 a different idea as I wanted to point out that
22 there are various sandwich shops in the
23 neighborhood. One of them, Pot Belly, will take
24 orders over the line or by phone or fax, which
25 would speed the process of lunch. And Subway

1 across the street. So I think we can hold one
2 hour very easily when we get to lunch.

3 JUDGE CLIFTON: All right, good. And
4 then the little store right here in the
5 building, Ingredients, has a lot of counters
6 where you can quickly get your food. Mr.
7 Carroll?

8 MR. CARROLL: I'd like to say that
9 fortunately we have Dr. Cryan's statement. It
10 consists of 21 pages and two tables. The
11 physical time needed to review all of those
12 pages is considerable.

13 I don't think we're, as a practical
14 matter, getting ahead to start that and then
15 take probably at least 45 minutes or an hour to
16 read it. And then the other matters that are
17 involved, it would be better to take our lunch
18 now and then we can have a straight set.

19 JUDGE CLIFTON: Mr. Brosch?

20 MR. BROSCH: I'm sorry that Mr. Carroll
21 didn't bother last night to read the statement,
22 but that statement has been available since
23 yesterday. If he wanted to read the statement,
24 he could have done so.

25 JUDGE CLIFTON: No, I don't think that

1 was his concern. I think his concern was, do we
2 have to read it into the record? Is that -- am
3 I correct, Mr. Carroll?

4 MR. CARROLL: If it's going to be read
5 into the record --

6 JUDGE CLIFTON: Go ahead and come back to
7 the mic, please.

8 MR. CARROLL: If it's going to be read
9 into the record, or however it gets in, if it's
10 going to be read, then obviously we should break
11 for lunch. If it's not going to be read into
12 the record, that's another matter. I understood
13 that they were going to have him deliver his
14 speech. I have read it, if there's any question
15 about that.

16 JUDGE CLIFTON: All right. Let me just
17 make a comment and then I'll hear from
18 Mr. Vetne. If anyone wants to provide an
19 electronic version of the statement of a witness
20 to the court reporting service so that it will
21 be reproduced in the transcript, you're welcome
22 to do that rather than have it get into the
23 transcript through a reading while we're all
24 waiting. But I'm going to leave it up to the
25 presenter how you want to present.

1 Giving out a handout does not focus
2 attention on the contents the same way hearing
3 it from the witness does. We're here to study
4 this. I realize that for the people in the
5 Department, they have to study it a lot more
6 later.

7 But for those who want to ask questions,
8 questions may occur to them during the delivery
9 of the -- the contents of the text that they
10 otherwise might not have thought of. So I do
11 not resent the time that it takes to have the
12 author of a document present it.

13 MR. BROSCHE: I would note, your Honor,
14 that the reason we're doing it this way is
15 because we think it would be much more efficient
16 than trying to extract that amount of testimony
17 by question and answer. It would take, I would
18 say, three or four times as long if we were to
19 do it the way this proceeding has proceeded this
20 thus far. So we're trying to speed things up
21 here.

22 But your point is exactly the one, which
23 is, we think there's a certain amount of
24 knowledge and emphasis that can be gained by
25 Dr. Cryan reading his testimony. We think

1 that's the most efficient way to proceed.

2 JUDGE CLIFTON: All right. What is it
3 that you have in your arm there?

4 MR. BROSCHE: I have lots of copies of
5 this, your Honor.

6 JUDGE CLIFTON: All right. And it's
7 identical as to what was on the table yesterday?

8 MR. BROSCHE: Yes, it is. Your Honor.

9 JUDGE CLIFTON: All right, Mr. Vetne?

10 MR. VENTE: John Vetne. I have an
11 efficiency suggestion. I agree with your Honor
12 that the reading of the testimony or giving
13 testimony allows a focus in attention that
14 sometimes just reading it in private does not
15 provide. You don't know how much attention is
16 going to be given to anything read in private.

17 However, this testimony, as is commonly
18 the case, includes statistical data, has some
19 long footnotes. It has a lot of arguments, and
20 it has a lot of facts.

21 I'm going to -- as I said yesterday, I'm
22 going to encourage my clients to focus on fact.
23 And I would hope that -- this, presumably, is
24 going to get marked as an exhibit and all the
25 argument will be in the record in some form. I

1 would hope that there's no compelling urgency by
2 the witness to read the footnotes, for example,
3 into the record, or a lot of the tables or
4 regulatory language. They're there, maybe they
5 can be characterized or referenced.

6 But to the extent that some of the
7 argument or footnotes or small print can be
8 referenced to, rather than read, we start that
9 practice, we will save a lot of time at this
10 hearing.

11 JUDGE CLIFTON: Well, I'm going to leave
12 it up to Dr. Cryan whether he wants to read
13 every word or whether he wants to some other way
14 communicate. One reason you have experts is for
15 their argument, which we call opinion. So --

16 MR. BROSCHE: Well, your Honor, we're very
17 glad to hear that Mr. Vetne is taking the view
18 now that we're going to speed this hearing up.
19 But Dr. Cryan is going to give his testimony the
20 way he's going to give his testimony.

21 JUDGE CLIFTON: Mr. Ricciardi.

22 MR. RICCIARDI: Thank you, your Honor.
23 One issue I will raise, we haven't dealt with
24 yet this morning, is the carryover from
25 yesterday and the concerns represented by my

1 client group regarding production of data from
2 the Department. We received some additional
3 information, which I assume that at some
4 point Mr. Carman is going to come up and talk
5 about?

6 JUDGE CLIFTON: That Mr. Who is going to
7 talk about?

8 MR. RICCIARDI: Mr. Carman.

9 JUDGE CLIFTON: Oh, okay. Mr. Carman,
10 our witness from yesterday, would come?

11 MR. RICCIARDI: Yes. I do not know,
12 however, whether the Department intends to
13 produce additional data. To the extent that it
14 does, I'd sort of like to know when. To the
15 extent that it does and it's going to be later,
16 we're going to be in a position where we may and
17 probably will have to potentially recall expert
18 witnesses if we put them on now.

19 Likely, what we'll have is, if additional
20 data comes in, they may have changed their
21 opinions or we have questions as to whether or
22 not the data does change their opinions.

23 Now, both Dr. Cryan and also Dr. Yonkers
24 are potentially employed to be here for two
25 weeks. Their time is part of their ongoing

1 business operation.

2 One question I raise is whether or not,
3 until we get all of the data, it makes sense to
4 finish off fact witnesses before we get into
5 expert witnesses, so that everybody has a full
6 and fair opportunity to cross-examine.

7 JUDGE CLIFTON: Okay. When we get to
8 cross-examination, we'll raise this again. And
9 I'll find out what the availability of the
10 witnesses is for recall based on the additional
11 materials that you don't have yet. And then
12 later we'll find out what materials are still
13 coming and so forth. So I'm glad you raised it
14 now, but I won't deal with it yet.

15 MR. RICCIARDI: I understand.

16 JUDGE CLIFTON: All right. Mr. Brosch,
17 what I would like you to do is begin direct
18 examination of Dr. Cryan. I'm anticipating that
19 probably we would be breaking for lunch about an
20 hour from now, probably.

21 MR. BROSCH: I think we could be done
22 within that time period with direct, your Honor.

23 JUDGE CLIFTON: Okay. And I'd like to
24 take just a short comfort break first so that
25 Dr. Cryan will have our full attention. This

1 won't be, like, a full break. Please take ten
2 minutes and be back ready to go at 12:05.

3 (A recess was taken from 11:55 to 12:11.)

4 (Exhibit 23 was marked for
5 identification.)

6 JUDGE CLIFTON: We're on the record now
7 at 12:11. I have marked my copy of Dr. Cryan's
8 testimony as Exhibit 23, and I would ask that
9 everyone do that to keep track. And I'd like
10 the extra copies to go back on the back table.
11 People will be coming in from time to time,
12 including in days after today.

13 If you do not yet have a copy of
14 Dr. Cryan's testimony, then please obtain it
15 from the back table.

16 All right. Counsel, would you identify
17 yourself again, please?

18 MR. BROSCH: My name is Kevin Brosch.
19 I'm here representing National Milk Producers
20 Federation. We've -- they have a copy of my
21 card at the table, your Honor.

22 JUDGE CLIFTON: All right. Good. And
23 I'd like now the witness to state his full name
24 for the record and spell it, and then I'll swear
25 you.

1 THE WITNESS: Your Honor, my
2 name is Roger, R-o-g-e-r, Cryan, C-r-y-a-n. And
3 the court reporter has a copy of my card as
4 well.

5 JUDGE CLIFTON: Good. Thank you. Would
6 you raise your right hand, please?

7 (The witness was sworn.)

8 JUDGE CLIFTON: Thank you.

9 MR. BROSCHE: Your Honor, at this time,
10 could we ask the Court to accept Dr. Cryan as a
11 expert witness, unless someone objects? I don't
12 have to go through the qualifications
13 unnecessarily. Without objection, I would like
14 him to be accepted as a witness in agricultural
15 economics and dairy economics.

16 JUDGE CLIFTON: First of all, Dr. Cryan
17 what is your doctorate in?

18 THE WITNESS: Agricultural economics.

19 JUDGE CLIFTON: That's handy. And is it
20 a Ph.D.?

21 THE WITNESS: Yes, it is.

22 JUDGE CLIFTON: Is there any objection to
23 Dr. Cryan being accepted as an expert in
24 agricultural economics/dairy? There's no
25 objection. Dr. Cryan is so accepted.

1 MR. BROSCH: Thank you, your Honor. I'm
2 going to let Dr. Cryan give his testimony
3 without exchanging questions and answers. At
4 the end of his testimony, I might ask one or two
5 questions, but otherwise he can proceed.

6 JUDGE CLIFTON: Thank you. Dr. Cryan,
7 I'd like you to present your testimony however
8 you wish. Just bear in mind we're going to try
9 to follow along, so keep abreast of page
10 numbers. If you don't read it straight through,
11 if you skip around a bit, that's fine. Just
12 give us time to catch up with where you are.

13 ROGER CRYAN, PH.D.
14 of lawful age, being duly sworn, was examined and
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. BROSCH:

18 A. Thank you, your Honor. My intention is
19 to just read it straight through, skipping the footnotes
20 and the source citations in order to make it a clear
21 narrative.

22 Thank you for your assistance and thank
23 you to USDA for having this hearing.

24 My name is Roger Cryan. I have served
25 the members of the National Milk Producers Federation,

1 also known as NMPF, for the past nine years, first as
2 Director of Economic Research and now as Vice President
3 for Milk Marketing and Economics. Prior to that, I
4 worked in the Federal government as the economist in the
5 Atlanta Milk Market Administrator's Office of the USDA.
6 I received my M.S. and Ph.D. degrees in agricultural
7 economics from the University of Florida. I serve on
8 the Agricultural Advisory Committee of the Commodity
9 Futures Trading Commission and have served as a
10 Secretarial appointee to USDA's Advisory Committee on
11 Agricultural Studies.

12 I testify today on behalf of the National
13 Milk Producers Federation. NMPF is the voice of
14 America's dairy farmers, representing three-fifths of
15 America's 60,000 commercial dairy farmers through their
16 membership in NMPF's 31 constituent cooperative
17 associations. NMPF represents dairy farmers in all
18 parts of the country, as demonstrated by the attached
19 table, which shows NMPF's members among the top 50 U.S.
20 dairy cooperatives (which Hoard's Dairyman ranks by
21 volume).

22 NMPF is the proponent of Proposals 1 and
23 2, which we submitted jointly with the International
24 Dairy Foods Association. Those proposals initiated this
25 proceeding. NMPF subsequently submitted an additional

1 proposal, Proposal 26, which we believe complements
2 those initial proposals. These proposals are intended
3 to establish more equitable rules for dairy farmers in
4 all regions and of all sizes. The small and large
5 producers who we represent, and the cooperative
6 businesses that they operate, are required to play by
7 one set of rules, while large producer-handlers are able
8 to play by another set of rules that tilts the playing
9 field greatly to their advantage. NMPF's three
10 proposals, taken together, will result in the additional
11 regulation of a very small number of handlers. We
12 estimate that our proposals would increase the
13 regulation for just 3 to 5 of the largest
14 producer-handlers in the nation, all of whom have annual
15 sales of at least \$10 million, in 19 -- at 2008 prices.
16 We estimate that the 3 largest of these each have
17 packaged fluid sales in excess of 15 million pounds per
18 month. Our proposals would not increase regulation for
19 any other producers or processors. There are dozens of
20 smaller exempt plants and producer-handlers that would
21 remain unregulated or subject to less regulation.

22 I would like to describe each of our
23 proposals, provide some historical context on the
24 producer-handler provisions, and explain what we seek to
25 achieve.

1 Regarding Proposal 1, which would
2 eliminate special status to producer-handlers.

3 NMPF seeks to eliminate the
4 producer-handler provision in all Federal orders so that
5 producer-handlers are treated like all other handlers.
6 The Agricultural Marketing Agreement Act of 1937
7 specifically authorizes the regulation of, quote,
8 producers who are also handlers, unquote. It is clear
9 from the legislative history the legislation
10 reauthorized by the Agricultural Marketing Agreement Act
11 of 1937 that Congress intended for marketing agreement
12 and for marketing agreements and marketing orders
13 programs to regulate producer-handlers whose volume,
14 quote, is large enough to be an important factor in the
15 market, unquote, since their, quote, cooperation is
16 necessary to carry out the marketing plan, unquote. The
17 Marketing Agreement Act of 1937 is amended with the
18 citation that provides that for the Secretary, in order
19 to accomplish the purposes set forth in paragraphs (A)
20 and (B) of this subsection, this subsection five,
21 providing a method for making adjustments in payments,
22 as among handlers (including producers who are also
23 handlers), to the extent that the total sums paid in
24 each -- by each handler shall equal the value of the
25 milk purchases by him at the prices fixed in accordance

1 with paragraph (A) hereof. And the emphasis is added.
2 But that -- that phrase, including producers who are
3 also handlers is in the original text of the Act.

4 Treating producers like other handlers is
5 equitable and consistent with both the letter and the
6 intent of this law.

7 Regarding the origin of producer-handler
8 regulation. Producer-handlers were originally given
9 special status for administrative reasons, not on legal
10 principles. The Federal Milk Marketing Order program
11 itself has its origins in the Agricultural Adjustment
12 Act of 1933, which generally authorized the Secretary of
13 Agriculture to enter into agreements with producers and
14 to license handlers, in order to, quote, restore normal
15 economic conditions in the marketing of, unquote, milk
16 and milk products. The Department combined these powers
17 to implement marketing agreements enforced by licensing
18 in numerous markets. These licenses are the direct
19 antecedents of today's milk marketing orders.

20 Although many markets were supplied
21 primarily by handlers who procured milk from producers
22 and cooperative associations, in the Kansas City market
23 producers who handled their own milk sold 50 percent of
24 the milk and cream consumed when the market's license
25 was instituted in 1935. The original market license was

1 intended to regulate these producer-handlers in the same
2 way as other fluid milk handlers. However, the Market
3 Administrator encountered considerable resistance from a
4 substantial number of these producer-handlers who failed
5 to submit reports and who refused to make payments to
6 the equalization fund when they did submit their
7 reports. When the Market Administrator failed to
8 enforce the market license requirements on the original
9 non-compliers, most of the rest followed suit.

10 Successive amendments to the marketing agreement were
11 made to lessen the burden on producer-handlers, but
12 again there was no effective enforcement, so
13 non-compliance among producer-handlers with market
14 license requirements proliferated. In July 1935, unable
15 or unwilling to surmount the practical difficulties of
16 enforcement, USDA abandoned its attempts to impose
17 regulation on these producer-handlers except for certain
18 reporting requirements.

19 What began as an expedient way to avoid
20 confrontation with a group of small producers in one
21 Marketing Order has become institutionalized across the
22 country. This largely unregulated status was, until
23 recently, available to producer-handlers of all sizes in
24 all Federal Order markets.

25 Over the years, a number of milk

1 marketing orders have incorporated a variety of
2 producer-handler provisions, but the purpose of those
3 provisions has been to require producer-handlers to
4 nominally balance most of their own supply.

5 In 2003, proposals were made to limit the
6 potential size of producer-handlers in the Arizona and
7 Pacific Northwest markets. And in 2005, those proposals
8 were accepted by USDA, which issued a final rule in 2006
9 that limited the producer-handler provisions in those
10 milk marketing orders to entities that produced no more
11 than 3 million pounds of fluid milk sales per month.

12 Changing industry. One of the original
13 assumptions underlying the decision to permit a special
14 producer-handler status was that these operators had
15 limited supply and limited marketings, and would remain
16 so small as to not have a significant effect on the
17 market. Over time, this has proved to be a faulty
18 assumption. Changes in this -- changes in the industry,
19 in technology, and in the economics of the dairy
20 business have drastically reduced the number of
21 producer-handlers; these same changes have drastically
22 increased the size and market potential of those
23 remaining. Some producer-handlers have grown to become
24 much larger than could have been imagined 70 years ago.

25 While most (87 out of 117) potential

1 producer-handlers today still fall under the 150,000
2 pound size exemption exception, this is rapidly
3 changing. Until recently, the substantial growth in the
4 scale and efficiency of fluid -- in this case of large
5 fluid milk processors meant that even the largest farms
6 were unable to take advantage of the same -- of the
7 scale economies; with relatively high unit costs,
8 producer-handlers did not proliferate, and in fact, they
9 declined in number and volume processed.

10 But this is no longer the case. In 1998,
11 there were only 235 dairy farms with more than 2,000
12 cows; less than a decade later, in 2007, however, there
13 were 595. A 2,000-cow dairy produces near
14 4 million pounds per month. The average farm in this
15 category produced 6.6 million pounds per month in 2007
16 (compared to 4.7 million in that same category in 1998).
17 These 595 farms now produce over one-quarter of the U.S.
18 milk supply, equal to nearly 80 percent of all sales of
19 fluid milk products in the U.S.

20 There are 17 producer-handlers with route
21 sales in excess of 300,000 pounds, including only 17
22 (sic) with route sales above 2 million pounds.

23 JUDGE CLIFTON: Excuse me. Mine says
24 seven.

25 THE WITNESS: What did I say?

1 JUDGE CLIFTON: Could you read the
2 sentence from the beginning?

3 A. There are 17 producer-handlers with route
4 sales in excess of 300,000 pounds. Did I misstate that?
5 Including only 7 with route sales above 2 million
6 pounds. The average producer-handler has grown from an
7 average of -- the average producer-handler has grown
8 from 34,645 pounds of Class I sales in October 1959
9 which was the production from about 60 cows at that
10 time, to an average of 1,422,080 pounds in
11 December 2008, which is the milk -- the milk from about
12 720 cows. We estimate the sales of the 7 largest
13 producer-handlers to average at least a hundred million
14 pounds per year per plant.

15 Many dairy farms are now large enough to
16 exploit both the producer-handler raw milk price
17 advantage, which I will describe below, and to enjoy
18 economies of scale in both milk production and fluid
19 milk processing. Collectively, they could capture a
20 large share of the Class I sales in an individual market
21 or nationally, if many of them adopted this model. This
22 would be disastrous for the small pooled dairy producers
23 whose blend prices would be substantially cut.

24 The hearing on producer-handlers in the
25 Arizona and Pacific Northwest markets demonstrated the

1 potential disruption that large producer-handlers can
2 inflict, individually and collectively, on orderly
3 marketing, finding specifically that large
4 producer-handlers in those markets were, quote, the
5 primary source of disruption to orderly marketing of
6 milk, unquote. That was the Department's finding.
7 Producer-handlers also have a significant and growing
8 share of Class I sales in the Northeast market; this was
9 114 million pounds in 2007, up from 69 million pounds
10 in -- up from 69 million pounds in 2002. This is the
11 only market for which such a detailed, single market
12 breakout is readily available; I estimate that the
13 market share of producer-handlers in the Central Order
14 is equal to between 10 percent and 15 percent of Class I
15 sales in that market. USDA data presented at this
16 hearing also show that producer-handlers make up a
17 growing share of sales in markets where they are present
18 and unaffected by recent restrictions as is demonstrated
19 by Exhibit 6 from the Department, from USDA.

20 Regarding the cost advantage of
21 producer-handlers and uneconomic reorganization:

22 A producer-handler, by avoiding full
23 Federal Order regulation as a distributing plant, can
24 pay, effectively the uniform price for milk at the
25 plant. (This is effectively the market price for

1 producer milk on the market, and is therefore the
2 appropriate transfer price for analysis of the
3 regulatory impact on the producer-handler plant.) Fully
4 regulated competitors, by contrast, must pay the Class I
5 price for the same milk. Table 1 shows selected
6 statistics for all Federal Order markets, including a
7 calculation of the price advantage that a
8 producer-handler has over its fully regulated
9 competitors in each market. That advantage is equal to
10 the Class I price minus the uniform price. This
11 advantage ranges from 6 cents to 15 cents per gallon, or
12 72 cents to a 1.74 per hundredweight, which is the
13 difference between the Class I price and the uniform
14 price at the base point. And that difference will equal
15 the difference between the Class I price and the uniform
16 price across the markets, since both prices are adjusted
17 by the same location differential.

18 As producer-handlers become large enough,
19 their advantage in terms of their cost of milk can
20 become the primary basis for their existence as
21 handlers. A large producer-handler can now enter the
22 bottling business, even if it is not competitive in its
23 processing costs, purely because the disparity in the
24 regulatory scheme creates an advantage.

25 Increasingly, producer-handler provisions

1 undermine the principles of producer equity upon which
2 the Federal Order system rests. In the best case, which
3 is vertical integration of efficient milk production
4 with efficient milk processing, the producer pool is
5 depleted to pay producer-handlers. In the worst case,
6 which is uneconomic reorganization of farms into
7 producer-handlers, that is either farm, the farm or the
8 plant, is less efficient than the average, the current
9 system can create deadweight losses in the market whose
10 whole cost is borne by pooled producers. For example, a
11 producer-handler could be up to 15 cents per gallon less
12 efficient than the competition would otherwise require,
13 and still be viable.

14 Regarding orderly marketing.
15 Producer-handler provisions increasingly threaten
16 orderly marketing. As stated above, about 600 farms now
17 each produce more than 4 million pounds of milk per
18 month, 25 percent of the U.S. milk supply and the
19 equivalent of nearly 80 percent of U.S. fluid milk
20 sales. 1500 farms with over 2 million pounds of monthly
21 milk production accounts for 42 percent of U.S.
22 production, equivalent to 140 percent of fluids -- total
23 fluid milk sales. The number of large farms is steadily
24 increasing, and their impact on other dairy farmers is
25 becoming more significant. Because of the potential for

1 these large farms to exploit the advantages of the
2 current producer-handler provisions, tens of thousands
3 of smaller dairy farmers, and the handlers who purchase
4 their milk, are now potentially threatened. That is to
5 say that the small dairy farms and the handlers who
6 purchase their milk are now potentially threatened.

7 Further, such producer-handlers, even if
8 they bottle all of their milk and buy or sell no one
9 else's, can sell to wholesalers or large retail chains
10 at a significant price advantage. Such wholesalers or
11 retailers can either balance their own supplies of milk,
12 with purchases from, and at the expense of, pooled
13 market participants; or they can raise and lower their
14 prices seasonally, so that consumers will balance their
15 supply at other stores, also at the expense of pooled
16 market participants. For example, one large
17 producer-handler in the Pacific Northwest testified at
18 the hearing in that market that a large grocery
19 customer -- that its large grocery customers can balance
20 their supplies with pool sources when the
21 producer-handler plant did not.

22 The upper limit of the loss to the
23 majority of America's dairy farmers who participate in
24 the milk marketing pools is the loss of all Class I
25 value. This would reduce the average pooled price by

1 over a dollar per hundredweight.

2 Regular home delivery once provided the
3 only example to support the argument that a
4 producer-handler could balance its own supply; it is the
5 only marketing channel that could be consistent enough
6 to make this claim. However, home delivery has declined
7 from 30 percent of fluid milk sales in 1963 to less than
8 one half of one percent in 1997; and even home delivery
9 sellers can find ways - through seasonal pricing and
10 seasonal sales efforts, for example, to shift their
11 balancing burden on to the rest of the market.

12 The reality is that no producer-handler
13 plant can truly be made to balance its own supply,
14 because customers always have a choice of alternative
15 sources for fluid milk.

16 Regarding the need to eliminate the
17 producer-handler provisions. There is no legal or
18 economic justification for the producer-handler
19 provisions, and the Federal Order objective of orderly
20 marketing demands their elimination. In its
21 December 14th, 2005, final decision for the Arizona and
22 Pacific Northwest Markets, USDA stated that, quote, the
23 review of the intent of the producer-handler provision
24 and the marketing conditions arising from this provision
25 in these orders could warrant finding that the original

1 producer-handler exemption is no longer valid or should
2 be limited to 150,000 pounds per month Class I route
3 disposition -- or limited to 150,000-pound per month
4 rout Class I route disposition limit. However, the
5 hearing notice for this proceeding constrains such a
6 finding to a level of not less than 3 million pounds per
7 month Class I route dispositions, unquote.

8 And NMPF agrees with USDA's conclusion
9 that the producer-handler provisions are an anachronism,
10 and urges USDA to act on this conclusion in this new
11 hearing, whose scope is clearly defined to include the
12 entire elimination of producer-handlers provisions.

13 And NMPF proposes to limit
14 producer-handlers to the same size exemption as other
15 processors. In some Federal Order markets, large
16 producer-handlers already capture a significant share of
17 Class I sales, undermining the pool value at the expense
18 of producers and pool handlers. Reform of the system is
19 a matter both of equity and of orderly marketing.

20 Although several Federal Order markets
21 are not now substantially disrupted by the operations of
22 large producer-handlers, it is good policy to establish
23 uniform provisions which address this issue proactively,
24 before such a clearly foreseeable problem develops.
25 This proactive approach minimizes the burden of

1 regulation by laying out the rules in advance. The
2 proposed changes would simplify and clarify the
3 responsibilities of the current producer-handlers,
4 relaxing the regulatory constraints on their operations,
5 and directing the large effort of them to participate in
6 the Federal Order pool.

7 The original reason that the
8 producer-handler provisions were established, that is
9 the inability of Market Administrators to enforce
10 compliance, is certainly no longer valid. The
11 regulation of large producer-handlers would now be no
12 more difficult than that of other handlers, and would
13 restore the principle of marketwide pooling, upon which
14 the Federal orders are based.

15 Regarding Proposal 2, expanding and
16 reforming the exemption for small distributing plants.
17 NMPF also proposes to raise the size limit for exempt
18 plants from 150,000 pounds of monthly Class I sales in
19 an individual market to 450,000 pounds of monthly
20 Class I sales in all markets. This is a distinct
21 proposal, but effecting it concurrently with the
22 elimination of the producer-handler provisions can avoid
23 unduly affecting other producer-handlers who have a
24 limited individual impact on the market. Proposal 2
25 would exempt all but the 10 or 15 largest current

1 producer-handlers, as well as 30 to 35 plants that are
2 now regulated or partially regulated.

3 Today, any plant with less than 150,000
4 pounds in monthly Class I sales is exempt from Federal
5 Order regulation. Given the growth in average farm
6 size, and the growing economies of size in milk
7 processing, it is reasonable to increase the size
8 exemption to 450,000 pounds per month -- per month. For
9 perspective, this is equal to the production of about
10 260 cows, or twice the size of the average dairy herd in
11 the United States. Plants this small have difficulty
12 competing with large, modern plants on cost alone, with
13 or without the pricing advantage offered by
14 producer-handler status.

15 We urge USDA to consider this increase in
16 the small plant exemption concurrently with NMPF's
17 proposal to eliminate the producer-handlers provisions.
18 The principle of raising the limit is sound, and the
19 coincidence of the two proposals will mitigate for most
20 producer-handlers the regulatory impact of eliminating
21 the producer-handlers provisions of the orders.

22 Regarding the origin -- excuse me.
23 Regarding the origin of the current exempt plant size
24 limit. Today, any plant with fewer than 150,000 pounds
25 in monthly Class I sales is exempt from Federal Order

1 regulation. This limit was made uniform for all orders
2 during Federal Order reform. The proposed rule,
3 published in 1998 stated: Options 2 and 3 both
4 recognize the Identical -- the Identical Provisions
5 Committee determination that a handler distributing less
6 than 150,000 pounds per month of fluid milk products
7 does not have a significant competitive effect on the
8 market, and that handlers of such size should,
9 therefore, be exempt from the pricing and pooling
10 provisions of the orders. The level of route
11 disposition required before an exempt plant becomes
12 regulated varies in the current orders. As recommended,
13 any plant with route disposition during the month of --
14 with route disposition during the month of
15 150,000 pounds or less would be exempt in the
16 consolidated orders. This limit reflects the maximum
17 amount of fluid milk products allowed by an exempt plant
18 in any current Federal Milk Order and ensures plants
19 that are currently exempt from regulation would remain
20 so, end quote.

21 This decision confirmed the existing
22 150,000 size-based exemption in the West Texas and New
23 Mexico Order. This limit was set in 1991, based on
24 proponent testimony. That decision concluded that
25 150,000 pounds, which was smaller than the average --

1 size of the average producer in the market, was small
2 enough not to disrupt orderly marketing.

3 Another quote from that decision, from an
4 earlier -- from that original decision, It is noted that
5 the 150,000-pound monthly size limitation for an exempt
6 plant is substantially less than the average size of
7 producers that are currently associated with these
8 markets. Consequently, it would appear that a plant of
9 such size would not be a disruptive factor in the market
10 either in terms of sales of fluid milk products or in
11 the procurement of raw milk supplies.

12 Regarding setting a size limit. Based on
13 changed conditions, we propose to raise this limit to
14 450,000 pounds consistent with the principles upon which
15 the 1991 decision was made. Between 1991, the year of
16 the West Texas-New Mexico hearing and decision, and
17 2007, the last year for which data was available at the
18 time that I drafted this, average milk production per
19 U.S. dairy farm tripled from 68,000 pounds to
20 214,814 pounds. Since the average 150,000 pounds
21 limit -- I'm sorry. Since the original 150,000 pound
22 limit was based in part on a consideration of farm sizes
23 at that time, this tripling of average per-farm
24 production supports a tripling of the exemption limit to
25 450,000 pounds.

1 Fluid milk bottling plants generally have
2 increasing economies of scale. That is, the bigger they
3 are, the lower their costs per gallon. This has been
4 consistently demonstrated in industry and academic
5 studies. These economies of scale flatten out, so that
6 the advantages of increasing plant size are greater at
7 the bottom of the range than at the top. Several
8 published studies, including two studies at the
9 University of Maine and a nationwide study conducted by
10 Cornell University, all clearly demonstrate this
11 principle.

12 Although exempt plants enjoy the same
13 price advantage that producer-handlers now do, for very
14 small plants this advantage is greatly outweighed by
15 high processing costs; so that the price advantage is
16 neither the primary basis for a small handler's business
17 nor a disruptive force on the market. Given this cost
18 structure, such a plant should have little impact on the
19 market, and so its regulation is not necessary to
20 maintain conditions of orderly marketing. That is, such
21 plants will not proliferate on the basis of their
22 regulatory cost advantage.

23 NMPF recognizes the difficulty of setting
24 any bright line size limit. Nevertheless, there remain
25 several good reasons for setting the limit at

1 450,000 pounds.

2 It seems clear that the current limit is
3 too low. A plant processing the output of a 90-cow
4 dairy cannot compete in the milk commodity market. If
5 the current limit is too low, then raising it
6 incrementally is a positive improvement in the
7 regulation. As a matter of principle, the change should
8 be cautious, increasing to another level that is clearly
9 not too high.

10 This proposal addresses the regulatory
11 status of the milk plants with respect to size, and does
12 not attempt to effect -- to effect any regulation of
13 dairy farms. However, milk plants obtain their milk
14 from dairy farms, whether they are under the same
15 ownership or not. Farm size has served in the past as a
16 basis for establishing a size limit on exempt plants.
17 In addition, a very large share of size-exempt plants
18 bottle own-farm production, strongly suggesting that
19 farm bottling is the primary business model for these
20 plants, so that farm size and farm economies of scale
21 must be an important consideration in defining their
22 regulation.

23 Dairy farms have economies of scale such
24 that there are cost disadvantages to a producer-handler
25 with less than 500,000 pounds of monthly production.

1 This is the conclusion of a USDA study of farm size. In
2 2005, it was estimated, farms with 500 to 999 cows had a
3 \$4.75 per hundredweight cost advantage over farms with
4 100 to 199. This is a difference of 41 cents per gallon
5 and represents a substantial scale economy. In
6 addition, this study showed that 500,000 pounds per
7 month of production (about 300 cows) is near the point
8 where the cost curve begins to get quite steep. That
9 is, moving towards a smaller size. That is below
10 that -- below that size, farm cost of production is
11 clearly high enough that the value of the regulatory
12 exemption will not encourage uneconomic processing
13 paired with production. Based on this data also,
14 450,000 pounds represents a reasonable bright line limit
15 on regulation of an integrated farm and plant, which is
16 one very common business model -- which is the most
17 common business model for small exempt plants.

18 JUDGE CLIFTON: Now, let me just question
19 you there, if I may. What you've written is
20 that it is one common business model. And what
21 did you just testify?

22 THE WITNESS: I just restated what I had
23 said earlier, which is that it is the most
24 common business model for these plants.

25 JUDGE CLIFTON: Okay.

1 A. It's a very large share of -- size of
2 exempt plants bottle own-farm production.

3 Under the mandates of the Regulatory
4 Flexibility Act of 1980 and the Small Business
5 Regulatory Enforcement Fairness Act of 1996, Federal
6 agencies must consider impacts of regulation on small
7 business. The formal small business definition for
8 dairy farms is \$750,000 in sales or less. As a
9 practical matter, and because revenue fluctuates with
10 milk prices, USDA, the Small Business Administration,
11 and the Office of Management and Budget have determined
12 that regulatory flexibility analysis should be based on
13 a small business definition of 500,000 pounds of monthly
14 milk production. Given that a fluid milk handler can be
15 hard pressed to achieve a Class I use rate of more than
16 90 percent of receipts, 400 -- 450,000 pounds represents
17 an approximate upper limit of the Class I use for a
18 handler within this small business definition.

19 The small business definition was
20 originally intended to provide a context for
21 consideration of alternative regulatory approaches for
22 smaller businesses, rather than serving as the basis for
23 exemption from meaningful or necessary regulation.
24 Nevertheless, Federal small business definitions are
25 used in a number of programs, such as Federal

1 procurement programs, where a bright line is necessary
2 and where the limit provides one reasonable choice.
3 Example -- and I should point out there are citations
4 here for examples that include procurement and other --
5 other programs.

6 The small plant exemption in Federal
7 orders was originally intended to alleviate the
8 administrative and regulatory burden of regulating small
9 entities. This intention was consistent with the
10 objectives of the Regulatory Flexibility Act of 1980 and
11 the Small Business Regulatory Enforcement Fairness Act
12 of 1996. Those acts recognize that regulation designed
13 with large enterprises in mind can be unfairly
14 burdensome when applied to small businesses, and require
15 consideration of the impacts. Combined with
16 consideration of economies of scale, above, the small
17 definition -- the small business definition for a dairy
18 farm provides a reasonable bright line for the exempt
19 plant definition. The small business definition for
20 dairy plants, by contrast, is 500 employees; such a
21 plant would be very large and well beyond any reasonable
22 limit for the regulatory exemption under discussion.

23 Finally, the limit should be set at the
24 same level in all markets, consistent with the decision
25 made at Order reform. This should preclude setting the

1 limit in each market according to a proportional impact
2 on the individual market. The market-by-market approach
3 should also be avoided because the larger consideration
4 here is whether a proliferation of exempt plants is
5 probable and whether that proliferation could cause
6 disorderly marketing, rather than what the impact of an
7 individual handler may be.

8 Regarding unique labeling. NMPF further
9 proposes that an exempt plant should not produce any
10 products under brands that are also produced by other
11 plants. Clearly associating an exempt plant's products
12 with plant-specific brand or brands will enforce the
13 plant's independent nature. This is intended to reduce
14 the potential for the assembly of a supply of packaged
15 milk by a cost-oriented "integrator" with substantial
16 control of the exempt plant's product. Without such a
17 limitation, a large retailer, for example, could recruit
18 small exempt plants, organizing production in such a way
19 as to remove the diseconomies of scale in marketing and
20 distribution and even, through line specialization, of
21 processing. Such an "integrator" arrangement would
22 violate the intent and spirit of size -- of the
23 size-based exemption which is intended to accommodate
24 small businesses that are unlikely to affect their
25 market, either individually or collectively. This

1 qualification of exemption should be included in any
2 decision arising from this hearing.

3 Clarifying the exempt definition as based
4 on total plant sales. Finally, NMPF proposes a change
5 in the wording -- finally, with respect to Proposal 2,
6 NMPF proposes a change in the wording of the size-based
7 exemption, to make clear that the expanded 450,000-pound
8 monthly allowance applies to a plant's total sales, not
9 only to sales in an individual market. This would avoid
10 confusion and would confirm what I believe is the
11 current interpretation applied by the Market
12 Administrators.

13 This proposal should be applied to any
14 decision resulting from this proceeding -- this
15 principle, I'm sorry. This principle should be applied
16 to any decision resulting from this proceeding. That
17 is, any size based limit on fluid sales should be
18 applied to a plant's total fluid sales, not only sales
19 in a particular market.

20 Regarding our Proposal 7, providing a
21 conditional exemption for existing producer-handlers.
22 I'm sorry, regarding Proposal 26. Providing a
23 conditional exemption for existing producer-handlers.

24 NMPF has submitted an additional proposal
25 that all Federal milk marketing orders be amended to

1 provide a conditional grandfather exemption from pooling
2 for current producer-handlers, up to 3 million pounds
3 per month.

4 This language would allow current
5 producer-handlers to obtain a qualified exempt plant
6 status. Route disposition and sales of packaged fluid
7 milk products by such plants may be no more than
8 3 million pounds per month, and most of the current
9 conditions for producer-handlers must be met. In
10 addition, the provisions are tightened to prohibit
11 ownership of other farms or other distributing plants by
12 the owner of a plant exempted under this proposal. This
13 may also require conforming language similar to that now
14 used to classify receipts of, and from,
15 producer-handlers.

16 Regulatory risk is a part of doing
17 business, and we believe that USDA has a clear right to
18 regulate any and all distributing plants, provided that
19 such regulation meets the objectives of the Federal
20 orders. NMPF believes that it is crucial to regulate
21 all producer-handlers distributing more than 3 million
22 pounds of fluid milk products per month and to stem the
23 proliferation of producer-handlers marketing between
24 450,000 and 3 million pounds per month. NMPF -- NMPF
25 proposes to implement this proposal simultaneously with

1 our previously proposed elimination of the
2 producer-handler provision. These provisions, in
3 Proposal 26, would temper the impact of NMPF's previous
4 proposal by reducing the regulatory impact on 10 to 15
5 producer-handlers with between 450,000 pounds and
6 3 million pounds of packaged fluid milk sales per month,
7 and whose businesses have relied in part upon the
8 current regulations.

9 Adoption of Proposal 26 remains fully
10 consistent with Proposals 1 and 2. Again, the dual
11 objectives of our original petition were to, 1, limit
12 the disruptive impact of existing producer-handlers
13 above 3 million pounds, and 2, to prevent the disruptive
14 impact of a proliferation of new producer-handlers with
15 sales above 450,000 pounds per month. Allowing existing
16 producer-handlers to maintain an exemption up to
17 3 million pounds per month will allow these objectives
18 to be achieved without undue regulatory impact on these
19 smaller existing operations.

20 I will not burden the record with the
21 reading of the language provisions. But I believe they
22 are -- have been explained in my text.

23 JUDGE CLIFTON: For the record, would you
24 tell what pages you find that?

25 A. On page 15 of my exhibit, of my

1 statement, we offer specific regulatory language to --
2 to effect most of the changes that we're talking about.
3 There may be additional conforming changes, but the
4 principle and the thrust of everything we're proposing
5 is contained in this -- in this language proposal, in
6 this specific regulatory proposal.

7 Regarding other proposals noticed for
8 this hearing. Most of the proposals in this hearing
9 either advocate or assume some limits on the exemption
10 of producer-handlers. In this sense, most of the
11 participants here seem to agree that it is appropriate
12 to fully regulate very large producer-handlers, and to
13 make some accommodation for very small plants.

14 Several of the additional proposals
15 reiterate, in whole or in part, Proposals 1 and 2, as
16 offered by NMPF and IDFA. These include Proposals 10,
17 16, 19, and 22. We appreciate this full or partial
18 support from Way-Har Farms, Coopers' Hilltop Farm, and
19 the Pennsylvania -- the Pennsylvania Association of Milk
20 Dealers, and the Northeast Dairy Foods Association.

21 NMPF opposes the rest of the additional
22 proposals, while appreciating that some have been
23 offered in a spirit similar to that of our own
24 proposals.

25 Proposals 3, 4, 5, 7, 8, 11, 13, 15, 18,

1 21, 27, and 28 each set a cap for producer-handlers and
2 allow their unlimited proliferation. Each of these is a
3 step in the right direction, but does not go far enough
4 in addressing the potential of a proliferation of
5 medium-sized producer-handlers to disorder milk markets.
6 Although we appreciate the support from these proponents
7 for the principle of limiting the impact of
8 producer-handlers on milk markets, we have made clear
9 above why we believe that producer-handler status should
10 not be extended to any additional plants.

11 Proposals 6, 9, 12, and 14 would set a
12 new size-based limit for exempt plants at a -- at a
13 level higher than 450,000 pounds per month. Those move
14 in the same direction as we propose, but we believe they
15 go too far. We believe that a tripling of the current
16 limit to 450,000 pounds is appropriately conservative,
17 as detailed above.

18 Two of the proposals, Numbers 13 and 14,
19 are offered by the New England Producer-Handlers
20 Association, Incorporated, et al., a group of
21 producer-handlers naturally seeking to carve out an
22 exemption within the current proceeding for their own
23 operations, but who we believe would not be
24 sufficient -- substantially affected by the NMPF
25 proposals.

1 Proposal Number 17 was proposed by
2 Mallorie's Dairy, Incorporated, Country Morning Farms
3 and Nature's Dairy, a group of middle-to-large-sized
4 producer-handlers who are also naturally seeking to
5 carve out an exemption for their operations, but who we
6 believe would not be substantially affected by the NMPF
7 proposals. Proposal Number 20 is very similar to
8 Proposal Number 17, so I will discuss them together.
9 These proposals are nominally a grandfathering of
10 producer-handlers up to 3 million pounds. However, they
11 go well beyond a simple grandfathering of existing
12 plants with producer-handler status. These proposals
13 would allow any handler that had both fluid milk sales
14 and own-farm production during an historical period to
15 exempt -- to elect to except up to 3.4 million pounds of
16 that historical own-farm production, whether or not they
17 had ever qualified as a producer-handler. This is, we
18 believe, a substantial widening of the producer-handler
19 exemption. These proposals would also drop many of the
20 current balancing requirements of producer-handlers,
21 allowing them to obtain pooled milk from market sources.
22 This is also a substantial loosening of the
23 producer-handler qualification, the requirements for
24 producer-handler qualifications.

25 The effect is to grant a soft

1 grandfathered cap for an expanded group of would-be
2 producer-handlers. Such a cap has been very problematic
3 in California, where political decisions have expanded
4 existing caps and where exempted volumes are used as a
5 pricing weapon by large producer-handlers.

6 Under this proposal any milk in excess of
7 the defined exemption would be subject to the pricing
8 and pooling provisions of their respective order.

9 Allocating the exempt milk to Class I, as is done in
10 California, would exacerbate this inequity, by reducing
11 and even -- by reducing and even reversing the pool
12 contribution associated with the pooled balance.

13 Allocating the exempt milk pro rata to plant utilization
14 would still drain a substantial amount of Class I milk
15 from the pool. And even allocating it to the lowest
16 Classes would leave substantially unregulated any
17 producer-distributor with up to about 3 1/2 or even 4
18 million gallons of monthly volume, in the competition
19 with other regulated handlers; Proposal 23 has a similar
20 effect, but without the 3.3 million pound limit.

21 Proposals 23, 24, and 25 are proposed by
22 the American Independent Dairy Alliance, a group of
23 seven exceptionally large producer-handlers, who are
24 also naturally seeking to carve out an exempt space for
25 their own operations, and four of whom may be the only

1 handlers whose regulation would be substantially
2 increased under the three NMPF proposals taken together.
3 As we indicate above, and as we believe other testimony
4 will indicate, these large producer-handlers can each
5 have a substantial individual impact on a milk market.
6 They also operate at such a scale that they should not
7 be exempt from pricing and pooling, because, they are
8 large enough to operate on a level playing field with
9 other producers and handlers.

10 Proposal Number 23 contains two
11 apparently redundant elements. The first purports to
12 allow a distributing plant to elect partially regulated
13 status with respect to its own farm production, but
14 concludes with language that would treat a plant's
15 own-farm milk as part of an individual handler pool,
16 which shall -- which, quote, shall not be included in
17 the volume of milk or milk components that are subject
18 to payments to or from the producer settlement fund
19 pursuant to Section 71 or 72 of any Order, unquote. I
20 will outline -- I will outline our objections to the
21 individual handler pool shortly.

22 The second element of Proposal Number 23
23 exempts a plant's own-farm milk from pricing and pooling
24 regulation. This exempt milk is down allocated to the
25 plant's lowest Class uses when calculating the plant's

1 pool obligation for milk from producers. This would
2 mean that the plant would pay Class I first for
3 purchased milk. In other words, most distributing
4 plants with substantial amounts of own-farm production
5 would incur a Class I pooling obligation for all the
6 milk that they purchase. The effect of this is that a
7 plant with 95 percent own-farm production would face a
8 pool obligation equal to a small fraction of what its
9 obligation would be if fully regulated; but a similar
10 plant that elects to, quote, exempt, unquote, that
11 exempt -- pardon me. Let me take a breath. But a
12 plant -- but a similar plant that elects exempt status
13 for own-farm production equal to, say, 40 percent of its
14 receipts would face a pool obligation substantially
15 larger than its obligation as a regulated pool handler
16 (and so would clearly not elect this status). For a
17 large producer-handler, this amounts to a less
18 restrictive exemption for pooling and pricing than the
19 current producer-handler provision. And I should say
20 than rather than that.

21 JUDGE CLIFTON: All right. And you're on
22 page 18?

23 THE WITNESS: On page 18.

24 JUDGE CLIFTON: The next to the last
25 paragraph.

1 A. Bottom of the middle paragraph. It says
2 "pooling that" and it should say pooling than.

3 The next proposal, Proposal 24, would
4 exempt milk sold directly from producer to retail
5 customer, including through home delivery and
6 handler-controlled retail outlets. As I described
7 above, even handlers who sell directly to the consumer
8 cannot be forced to completely balance their own part of
9 the market. The plants that own retail stores can stock
10 other handlers' milk alongside their own, forcing the
11 burden of balancing upon the rest of the market. Even
12 the plants that sell only their own milk, through their
13 own retail stores or home delivery, can adjust
14 their pricing and sales efforts seasonally so as to
15 indirectly encourage consumers to rely on other milk
16 outlets when the plant-retailer's supply is short; this
17 also forces the balancing burden on to the rest of the
18 market.

19 We heard a witness today who indicated
20 that he sells milk at a loss in order to help balance
21 his -- his supplies through the retail market.

22 The exemption of farm-to-retailer sales
23 in this proposal is inequitable and so should be denied.

24 Proposal Number 25 which would --
25 Proposal Number 25 would establish so-called individual

1 handler pools for all handlers across all orders. This
2 is an especially pernicious proposal. It is a dagger
3 pointed at the heart of Federal orders. Individual
4 handler pools represent cherry-picking of higher Class I
5 values. Because the plants and cooperatives that
6 effectively balance the fluid milk supply do not receive
7 equalization payments from the pool, they will be
8 unable, in many markets, to maintain the manufacturing
9 capacity that is necessary to balancing. Because the
10 suppliers of fluid milk plants receive a higher price,
11 compensation (sic) for Class I outlets --

12 JUDGE CLIFTON: Competition or
13 compensation?

14 A. Let me start that sentence over again and
15 make it more clear than what is written here, what I
16 meant. Because under this proposal, the suppliers of
17 fluid milk plants would receive a higher price,
18 competition for Class I outlets will destroy producer
19 over-order premiums, further undermining the
20 compensation now paid for market balancing. Market-wide
21 pooling of classified prices is the single most
22 important function of the Federal Milk Marketing Order;
23 with individual handlers pools, the orders would be
24 fatally wounded, and producer losses would be multiples
25 of the losses associated with producer-handlers.

1 The 1999 decision on Federal Order reform
2 included that, quote, marketwide sharing of the
3 classified use value of milk among all producers in a
4 market is one of the most important features of the
5 Federal Milk Marketing Order. It ensures that all
6 producers supplying handlers in a marketing area receive
7 the same uniform price for their milk, regardless of how
8 their milk is used. This method of pooling is widely
9 supported by the dairy industry and has been universally
10 adopted for the 11 consolidated orders, unquote.

11 It seems beyond question that individual
12 handler pools are inimical -- I'm sorry, are inimical to
13 modern Federal orders.

14 Ultimately, of course, the problem with
15 producer-handlers is that, under the current regulation,
16 they are effectively individual handler pools. The farm
17 side of the business supplies raw milk. The plant, if
18 it is of average efficiency and is operated to maximize
19 the return to the farm, would generate gross returns in
20 line with the regulated Class prices, based on the
21 plant's use of milk. Like an individual handler pool,
22 the plant can then afford to return to the farm a price
23 skewed by high Class I use, without sharing the higher
24 value with the rest of the market.

25 The rest of the market, which balances

1 the milk supply, loses Class I value from the pool. As
2 a result, other producers and manufacturing plants are
3 less able to balance supplies, leading to disorderly
4 marketing.

5 In conclusion, the current
6 producer-handler provisions have become outmoded by a
7 changing industry, and we believe that their underlying
8 intent of limiting the regulatory burden on small
9 handlers who do not substantially impact the market is
10 better served through an expansion of the exempt handler
11 provisions.

12 NMPF urges USDA to eliminate the general
13 producer-handler provisions. USDA also asks -- I'm
14 sorry. NMPF also asks USDA to temper these changes with
15 a modest increase in the sized-based plant exemption and
16 with a grandfathering of smaller existing
17 producer-handlers, in order to avoid imposing an undue
18 regulatory burden on small businesses that have limited
19 impact on their markets, but whose proliferation could
20 lead to disorderly marketing.

21 NMPF and -- and I thank USDA and USDA
22 staff for holding this hearing, as well as for their
23 diligence in providing requested data, and look forward
24 to a positive outcome of this hearing.

25 MR. BROSCHE: Thank you, your Honor.

1 BY MR. BROSCHE:

2 Q. Dr. Cryan, I -- just a couple of
3 questions to clarify some things in your -- your
4 statement.

5 On page 1 of your statement, in the --
6 near the bottom of the page, you say "We estimate that
7 our proposals would increase the regulation for just 3
8 to 5 of the largest producer-handlers in the nation."
9 When you speak about your proposals, are you speaking
10 about -- well, which proposals are you speaking about?

11 A. We're speaking collectively of
12 Proposals 1, 2 and 26.

13 Q. So it would be all three proposals would
14 have this impact?

15 A. All three proposals, all three proposals
16 together, which is in sum -- the three proposals
17 represent our position in sum.

18 Q. Thank you. On page 9, in the first full
19 paragraph, the sentence, you say, Proposal 2 standing
20 alone would exempt all but the 10 to 15 largest current
21 producer-distributor harness. So the difference between
22 the 10 to 15 on page 9 and the 3 to 5 on page 1 is -- is
23 Proposal Number 26, is that correct?

24 A. Roughly -- right, that's correct. That's
25 correct. And I'd also point out that for the record

1 copy, I struck -- I struck standing alone. I also did
2 not read that. So for the record, stand -- Proposal 2
3 and 1 together would -- would exempt all but 10 to
4 15 percent of the largest current producer-handlers,
5 because Proposal 2 by itself would be redundant --

6 Q. So --

7 A. -- for those -- for those handlers.

8 Q. So it might be more correct for that
9 sentence to read, Proposal 1 and Proposal 2 would
10 exempt -- taken together would exempt?

11 A. That would be another way to say --
12 another reasonable way to say it.

13 Q. Thank you. You also talked with respect
14 to -- in your testimony with respect to the so-called
15 unique labeling proposal. I believe it's on page 13 of
16 your statement.

17 A. Yes.

18 Q. I note that you say here, this is
19 intended -- I'm sorry. "Clearly associating an exempt
20 plant's product" --

21 JUDGE CLIFTON: I'm sorry, I was making
22 notes to myself and I don't know where you are.

23 MR. BROSCH: On page 13, your Honor.

24 JUDGE CLIFTON: Thank you.

25 MR. BROSCH: In the paragraph that is

1 entitled Unique Labeling.

2 JUDGE CLIFTON: Ah.

3 Q. I'm trying to point to the second
4 sentence in that paragraph which reads, "Clearly
5 associating an exempt plant's products with a
6 plant-specific brand or brands will enforce the plant's
7 independent nature."

8 There seem to have been some confusion in
9 the earlier testimony about multiple brands. Does
10 National Milk's proposal under Proposal 26, or these
11 proposals put together, allow for a producer-handler to
12 market under multiple brands?

13 A. Well, this is -- these are provisions for
14 exempt plants. The producer-handlers provision itself
15 has been -- has been stricken and replaced with the
16 substantially exempt handler status.

17 Q. Correct.

18 A. Including the grandfathering for existing
19 producer-handlers is also an extension of the exempt
20 status. So these are exempt plants. But it would
21 limit -- it would not limit them to a single brand. It
22 would allow them to produce as many brands as they want
23 to as long as no one else is producing the same brand.

24 Q. Thank you.

25 A. And that wouldn't necessarily have to be

1 the company's brand. In fact, for example, there was a
2 relationship between a producer-handler and a -- and
3 a -- for example, a small -- very small grocery chain.
4 And they were supplying a label for that chain, and they
5 were supplying all of that milk, all the milk with that
6 labeling, that would also be accepted.

7 Q. Now, this morning we had testimony from
8 two other witnesses, Mr. Hatch and Mr. Dunajski. Were
9 you here during that testimony?

10 A. I was.

11 Q. And you were able to hear what these
12 gentlemen had to say about their businesses?

13 A. Yes, I did.

14 Q. In your testimony on -- largely on
15 pages 4 to 8, you express National Milk's concern about
16 large producer-handlers impact on the market and orderly
17 marketing. Would you consider either Mr. Hatch or
18 Mr. Dunajski a large producer-handler?

19 A. I think -- I think -- I think small and
20 large are -- are very subjective, and I wouldn't want to
21 define too -- that too precisely. There's different
22 objectives at different times when you describe large
23 and small.

24 But I would say that they would -- I do
25 not believe either one of them would -- would be

1 substantially -- their regulation would be substantially
2 increased by our proposals.

3 Q. So that the operations they described
4 don't fall within the type of operations with which
5 you're concerned?

6 A. No, not as existing handlers.

7 Q. My understanding is that -- that the
8 exemption, the grandfather exemption that's in 26,
9 Proposal 26, would allow for a party to go up to the
10 3 million pound limit, is that correct?

11 A. That's right. And to be perfectly clear,
12 it would allow an operator like Mr. Dunajski to -- to
13 increase his -- his sales up to 3 million pounds. I
14 don't believe any of the other proposals would allow for
15 that flexibility.

16 Q. So 3 million pounds --

17 A. Well --

18 Q. I'm sorry.

19 A. I'm sorry. I don't believe the other
20 grandfathering provisions would allow for that
21 flexibility.

22 Q. The 3 million pounds represents
23 approximately what size herd?

24 A. Oh, I should know that. I think it -- I
25 think it's about 1,800 cows. I think that's right.

1 Q. If we assume -- if we assume the
2 2,000-pound average, which is a good average, that would
3 be about 1,500 cows?

4 A. That's about right.

5 Q. So I think Mr. Hatch --

6 A. Depends on the volume, the sales --
7 depends on the per cow volume, obviously. We have quite
8 a range across the country. Even the state average is
9 something like 14,000 to 20, 24,000. So there's --
10 there's quite a variation. But anywhere in there, 1,500
11 to 1,800 is a reasonable number.

12 Q. I believe Mr. Hatch testified today that
13 he has about 347 milking cows and about 750,000 pounds
14 of volume. So is it correct that Mr. Hatch could
15 increase his operation by, say, four times?

16 A. Yes.

17 Q. And be within that limit?

18 A. Yes. And I heard nothing in his
19 description of his operation that suggested that he
20 would be regulated under our proposals.

21 Q. And Mr. Dunajski said I think he had 140
22 cows. So Mr. Dunajski could increase his operation by
23 about eight times and still fall within that exemption?

24 A. Yeah, yes.

25 Q. So are Mr. Hatch and Mr. Dunajski the

1 kinds of producers that National Milk had in mind when
2 it proposed the exemption under Proposal 26?

3 A. No. Oh, under 26?

4 Q. Yes, 26.

5 A. Yes. Our membership was very active in
6 developing that, that additional proposal. There was a
7 very real and reasonable concern that the original
8 proposals were -- would be unfair to existing operators
9 of modest size who are not disrupting the market by
10 themselves.

11 There was a recognition that -- that, you
12 know, a potential business model could proliferate those
13 450 to 3 million pound -- 450,000 to 3 million pound
14 plants in ways that could be disruptive to the market.
15 But that the existing producers, they tend to be
16 independent, they tend to operate in their own way and
17 individually, we believe they're not disruptive to the
18 market.

19 So we felt that it would be unfair to --
20 to impose new regulation on them with -- with -- with
21 Proposals 1 and 2 standing alone.

22 Q. So based upon your understanding of their
23 testimony this morning, are Mr. Hatch and Mr. Dunajski
24 precisely the kinds of operators for which National Milk
25 members were concerned?

1 A. Precisely.

2 Q. And they are precisely the kind of
3 operators for which -- for which Proposal 26 seeks to
4 accommodate?

5 A. They are exactly the kind of producers we
6 seek to accommodate.

7 MR. BROSCH: Thank you. I have no more
8 questions, your Honor.

9 JUDGE CLIFTON: Thank you, Mr. Brosch.
10 I'd like to break for lunch. Let me see what
11 time it is. It's 1:13. Do you all want to be
12 back here at 2:00 or 2:15?

13 AUDIENCE MEMBER: 2:15.

14 JUDGE CLIFTON: I hear more 2:15s.
15 Please be back and ready to go at 2:15. We're
16 off record now.

17 (A recess was taken from 1:13 to 2:23.)

18 JUDGE CLIFTON: Let's go back on record.
19 We're back on record at 2:23. It took me a
20 little longer than I thought it would for my
21 lunch. I appreciate everyone being so prompt.
22 Now, let's decide how to proceed.

23 The first question I have, Mr. Brosch, is
24 what is the availability of Dr. Cryan throughout
25 this proceeding to be recalled for the purpose

1 of cross-examination and redirect? I mean, if
2 we go forward with that now.

3 MR. BROSCH: Well, may I ask your Honor a
4 question before I answer that question?

5 JUDGE CLIFTON: Yes.

6 MR. BROSCH: Dr. Cryan will certainly
7 tell you what his availability is, if you want
8 to tell him, Roger.

9 DR. CRYAN: Well, I'm tentatively
10 scheduled to sit in on the hearing for at least
11 the first two weeks.

12 JUDGE CLIFTON: That's great.

13 MR. BROSCH: Now, your Honor, my
14 understanding is that the request to have Mr. --
15 Dr. Cryan to reappear to testify from
16 Mr. Ricciardi is for the purposes of asking him
17 the question whether any new data produced by
18 USDA changes the opinions that he's expressed
19 here, is that correct?

20 JUDGE CLIFTON: That doesn't sound like
21 the kind of leading question I would expect.

22 MR. BROSCH: Well, your Honor, I think
23 that's Mr. Ricciardi's request. I want to know
24 whether Dr. Cryan is going to be subject to
25 cross-examination twice on the same subjects.

1 JUDGE CLIFTON: The way I understood the
2 request, and I know you and I heard the same
3 thing.

4 MR. BROSCH: Yes, your Honor.

5 JUDGE CLIFTON: The way I understood the
6 request is additional information is due in
7 statistical form from USDA. When we get that,
8 that may give rise to all kinds of questions.

9 MR. BROSCH: Well, your Honor,
10 Dr. Cryan's testimony that he's given today is
11 based upon the information that's already been
12 available and is referenced in his opinion -- in
13 his -- his statement. So with respect to --
14 he's not going to be the author or the sponsor
15 of any additional data, that USDA is going to be
16 the sponsor of that. So what relevance does
17 Dr. Cryan's testimony have at that point other
18 than to ask him whether that information that we
19 supplied changes the opinions he's expressed?

20 JUDGE CLIFTON: Well, that -- that isn't
21 the way I would examine him. If I were
22 concerned about certain issues that are raised
23 by additional evidence, what I would do if I had
24 an expert before me whose opinion is based on
25 certain things, I would want to ask him if he's

1 taken into account such and such and so is true
2 and I would want to be more pointed. But maybe
3 that's what you mean.

4 MR. BROSCH: Yes, that's what I mean,
5 your Honor. But what I'm saying is, are you
6 going to hold that second cross-examination to
7 the limitation of asking him questions about new
8 data only?

9 JUDGE CLIFTON: No, I don't think so. I
10 would think at that point -- when you have a
11 valuable expert like Dr. Cryan, and the ultimate
12 decider here would like to know what his opinion
13 is, considering everything that the decider has
14 to consider, I think you would want to take that
15 opportunity. So, for example, let's say that
16 additional data comes in from USDA; maybe we
17 have some of it now, maybe we'll get some of it
18 in the future. That's utilized by different
19 witnesses for different purposes. We now have
20 new --

21 MR. BROSCH: Well, then, let me ask you
22 this, your Honor. Does your Honor intend to
23 place any limitations on the second
24 cross-examination?

25 JUDGE CLIFTON: What limitations would

1 you suggest, for example?

2 MR. BROSCHE: I suggest that Dr. Cryan
3 should not be asked about the same subjects that
4 he's going to respond to in the
5 cross-examination the first time. He shouldn't
6 be cross-examined twice on the same questions.

7 JUDGE CLIFTON: Okay. Then I believe
8 Mr. Ricciardi was correct, we should defer his
9 cross-examination altogether until we have all
10 the data that might be relevant to his opinion,
11 to his ultimate opinion. That's how I would see
12 it.

13 MR. BROSCHE: Well, your Honor, we don't
14 want Dr. Cryan to have to go through the same
15 rigmarole twice. I think that we've seen that
16 we have a tendency in this hearing to ask a lot
17 of questions and extend this hearing beyond what
18 I think most people would expect. I don't want
19 him to have to do this twice.

20 JUDGE CLIFTON: Okay. I respect that.
21 And I don't want to draw strict limits as to
22 what he can be asked, because I think he is a
23 very valuable expert. And if I were the
24 Secretary, I would want to know what he thinks
25 given all of the evidence that the Secretary has

1 to consider.

2 And we don't want to deprive the
3 Secretary or anyone else of Dr. Cryan's
4 opinions. What we don't want is that Dr. Cryan
5 be subject to the same cross-examination twice.
6 And if your Honor is unwilling to enforce that
7 then perhaps that's the best choice then.

8 JUDGE CLIFTON: All right. Good. I am
9 unwilling.

10 MR. BROSCHE: Thank you, your Honor.

11 JUDGE CLIFTON: You're welcome. All
12 right. Before you step down, though, Dr. Cryan,
13 I want to look at Exhibit 23 with you. And you
14 reached the end of your testimony on page 20.

15 THE WITNESS: Yes, ma'am.

16 JUDGE CLIFTON: And I want you just to
17 tell me what else is here in pages 21 through
18 23.

19 THE WITNESS: Page 21 is a list of -- of
20 publications and published statistics that were
21 used in the preparation of my testimony. And as
22 it says at the top -- and this was printed and
23 put on the table yesterday morning before --
24 yesterday afternoon before we got started.
25 These are a list of things that we were to

1 request official notice of.

2 JUDGE CLIFTON: Now, because you're an
3 expert in this field and I am not, tell me why
4 these things would be proper for official notice
5 being taken. Why are they depended upon in the
6 industry, and if so, how do you know that?

7 THE WITNESS: Would you like me to go
8 over the items individually and explain each one
9 and explain the relevance?

10 JUDGE CLIFTON: I think that would be
11 very helpful, yes.

12 THE WITNESS: The first thing appears to
13 be two items. There's a line right there that
14 should be -- the item that begins with Erba and
15 then the one that appears to be separate I think
16 is the Cornell. That should be one. That
17 should be one item altogether.

18 It is a study that was done about ten
19 years ago -- I guess about 12 years ago now by
20 Cornell University where they -- they did a
21 survey of fluid milk plants to assess their
22 costs in a variety of categories and laid out a
23 relationship between the cost per gallon of
24 processing and the size of the plant; that is,
25 they broke out data by -- by plant size so that

1 it demonstrates the principle of -- of large
2 plants having a lower cost per unit. And all
3 we've testified to is the -- is the principle.

4 The second item identified beginning with
5 Dalton is a -- is an article from the Journal of
6 Dairy Science -- that was published by some
7 professors from the University of Maine that
8 demonstrates this same principle, based on a
9 similar study of plants, I believe, plants only
10 in Maine.

11 And again, we are not relying on the
12 specific numbers. We're simply relying --
13 demonstrating another example of the publication
14 that expressed the principle of -- of increasing
15 economies of scale.

16 The next item is Dairy Market Statistics,
17 Annual Summary. These are -- these are
18 statistics that are published every year by the
19 Dairy Programs office, that summarizes the
20 results, the statistical -- the statistics that
21 are derived from the operations of the Federal
22 Orders. It includes things like Class I sales,
23 and total milk pooled in each market, I think,
24 are probably the primary numbers that I relied
25 on from those sources in this -- in this -- in

1 this statement.

2 I'm sorry. I really just described the
3 next item, Federal Milk Bulk Marketing Order
4 Statistics. The previous item, Dairy Market
5 Statistics is also published by Dairy Programs,
6 but by their market news service in Madison,
7 which has quite a number of -- quite a bit of
8 information on prices and that has -- has
9 certain tables on Federal Order summaries that
10 are not available in other sources.

11 They're not available in the Federal Milk
12 Marketing Order statistics, so both of those
13 publications are AMS publications that are
14 published on a regular basis and feature widely
15 known statistics on the operations of the
16 Federal milk marketing orders and the dairy
17 market statistics.

18 JUDGE CLIFTON: And what years were of
19 particular interest to you on both these?

20 THE WITNESS: The -- it's a good
21 question. I'm sorry. I think probably the --
22 the Dairy Market statistics -- probably the most
23 important item for the dairy market statistics
24 is the annual summary for 2007, I believe, is
25 the basis for Table 1, which is the final page

1 in my -- in my exhibit.

2 I'm not sure if there's anything else
3 that's not captured in Table 1 that's in the
4 study -- I'm sorry, that's this, the paper, the
5 exhibit.

6 The Federal milk marketing orders
7 statistics there were a number of -- probably --
8 probably the -- effectively the 2007 annual
9 summary, which probably hasn't been published in
10 a final form. Can somebody indicate to me
11 whether or not 2007 Federal Milk Marketing Order
12 statistics has been published?

13 JUDGE CLIFTON: Mr. Carman, can you
14 answer that and if so, would you come to a
15 microphone? Or the microphone will come to you
16 perhaps. Oh, it's tangled on this side.

17 MR. CARMAN: Federal Milk Order Annual
18 Statistics, I don't believe is actually
19 published anymore. We make it available on the
20 website. And I believe 2007 has been published,
21 2008 is in preparation. It may or may not be
22 done prior to the conclusion of this hearing.

23 THE WITNESS: I believe I relied on the
24 2007 numbers, so I would be --

25 MR. CARMAN: Let me ask you a question

1 about your Table 1, Roger. The differential
2 that you used for the Southeast Appalachian and
3 Florida Order, were they prior to or after the
4 change in the differentials on a temporary basis
5 as published -- that was effective when, Gino?

6 MR. TOSI: 2006.

7 MR. BROSCHE: Your Honor, if -- perhaps if
8 we could just clarify these documents and that
9 he can hold cross-examination of Dr. Cryan until
10 the rest of the cross-examination.

11 MR. CARMAN: Well, it makes a difference
12 on which table, which annual year he wants.
13 Depending on --

14 THE WITNESS: This table contains average
15 Class I and average uniform prices for 2007. It
16 does not rely on any calculation by me of --
17 involving differentials. It is the actual --
18 these are the actual average Class I and uniform
19 prices for 2007. So they may be derived from
20 whichever or both or either or both class of
21 differentials. But in terms of statistics,
22 that's -- that's the relevant response to that.

23 JUDGE CLIFTON: All right. So what
24 you're telling me then, Dr. Cryan, is when I
25 look at table 1, which is the last document in

1 Exhibit 23, I know that that's 2007 information
2 because that's labeled that way very clearly.

3 THE WITNESS: That's right.

4 JUDGE CLIFTON: When I -- and that came
5 from?

6 THE WITNESS: It came from two sources.
7 In fact, that demonstrates exactly where these
8 two publications I'm talking about, the ones
9 under which -- the columns under which the box
10 reads Dairy Market Statistics Annual Summary
11 2007, those numbers all came from Dairy Market
12 Statistics annual summary 2007. The shaded
13 columns under which the box says, source is
14 Federal Milk Marketing Order Statistics Annual
15 Summary 2007, those numbers came from that
16 source. And the -- and the three columns in
17 between are calculations by -- by me based on
18 the -- based on the rest of the numbers.

19 JUDGE CLIFTON: That's helpful. Very
20 good. Thank you. Now back to page 21.

21 THE WITNESS: So for those two items,
22 Dairy Market Statistics Annual Summary and the
23 FMMOs Annual Summary, I believe the only -- the
24 only ones we relied on were 2007. But I
25 would -- I would correct that when I come back

1 if that's necessary to correct that.

2 JUDGE CLIFTON: All right. Now, how -- I
3 know we're only partway through what I'm asking
4 you about on page 21, but of what we've gone
5 through so far, will it be difficult to make
6 copies of these sources available here?

7 THE WITNESS: I think -- if you're asking
8 for duplication of the specific pages that we
9 relied on, I think it would be -- well, first of
10 all, the first two items are -- are published
11 studies, published university studies. Those
12 are -- those are substantial documents that I
13 think most of the people here are aware of and
14 have -- have discussed. They're readily
15 available. The rest of the items, even those
16 are -- most of those are also readily available,
17 and I'll discuss the exception.

18 Those -- those are a limited number of
19 pages. I could probably assemble for the -- for
20 the Dairy Market statistics, Federal Milk
21 Marketing Order statistics, milk production,
22 pool calculations and -- and the handler list
23 that I would rely on, that I would -- that I
24 would expect to rely on, that I believe I relied
25 on probably -- or that I would rely on in

1 further discussion. I could probably put
2 together into -- into 15 or 20 pages that we
3 could make available.

4 The last item is the -- the third from
5 the bottom Early Development of Milk marketing
6 Plans in the Kansas City, Missouri area. This
7 is a USDA publication. However, it is -- it was
8 published in 1952. It is a very large document.
9 We could provide the -- the cover page and the
10 two or three pages that are relevant, could make
11 copies of that if that would be sufficient.

12 JUDGE CLIFTON: I think that would be
13 sufficient. Now, with regard to those top two
14 items -- well, actually, let me say it this way.
15 The top item includes both the Erba, Eric
16 reference and the Cornell program reference.

17 THE WITNESS: It really -- it should be
18 one. It should all be together. There's a --
19 there was a typographical error on my part to
20 have -- to have a --

21 MR. BROSCHE: A space.

22 THE WITNESS: -- a space in there.
23 That's all one publication. The web page at the
24 bottom of that second apparent item is the web
25 page for the document identified in the first

1 two lines.

2 JUDGE CLIFTON: All right. So I will be
3 entertaining at a later time any objection to my
4 taking official notice of that without it being
5 here since it's voluminous and since it's
6 available on a website, the Cornell website.

7 Now, the second one you said had to do
8 with a study in the state of Maine, is that
9 correct?

10 THE WITNESS: The study in the state of
11 Maine was published in the journal -- excuse me,
12 the Journal of Dairy Science, which is a widely
13 available academic journal that many, many
14 people in the industry are familiar with.

15 JUDGE CLIFTON: All right. But it's only
16 about seven pages, is that correct, what you
17 relied on?

18 THE WITNESS: According to this,
19 apparently it is.

20 JUDGE CLIFTON: Okay. So if you truly
21 relied on only those seven pages, and this
22 publication is available on the web at the site
23 you show, I will be asking the people if they
24 have any objection to my taking official notice
25 of that without it being present here in print.

1 All right.

2 And with regard to the USDA statistics,
3 you will be able to pull for us into one
4 reproduced document, a copy, so that everyone
5 can look at the pertinent statistics that you
6 think helped you form your opinion. Is that
7 correct, Dr. Cryan?

8 THE WITNESS: I believe that's what
9 you -- I believe I understand that's what you
10 will require of us, so that's what we will do.

11 JUDGE CLIFTON: Okay. Thank you.

12 THE WITNESS: If it's not required
13 though, I'd sooner not do it. But I believe you
14 directed us to do that. So I will do that.

15 JUDGE CLIFTON: I really do believe it
16 helps, particularly since experts make certain
17 assumptions about certain things in formulating
18 their opinion.

19 Okay. Then tell me what's this on page
20 22 (sic).

21 THE WITNESS: Page 22 (sic) is a table
22 that is in all but the lines at the bottom, the
23 three bolded lines at the bottom, and the final
24 column on the right is taken from the Hoard's
25 Dairyman. Hoard's Dairyman Magazine which is

1 also a widely read trade publication for the
2 dairy industry aimed particularly close to dairy
3 farmers but read widely among the industry
4 generally.

5 This -- this is a tabulation they make
6 every year of the 50 largest dairy farmer
7 cooperatives in the United States. This listing
8 for 2007 was published last October and the --
9 the asterisks indicate members of the National
10 Milk Producers Federation. Those asterisks --
11 the Hoard's Dairyman marks -- also marks on
12 their list members of the National Milk
13 Producers Federation.

14 I cannot assure you that they -- their
15 markings in that publication were the same as
16 these, because these are the current members.
17 This marks the current members of our
18 cooperative -- I'm sorry, of our federation, so
19 that it's more up to date in that aspect than --
20 than the magazine might be.

21 In addition, I've added the -- at the
22 very bottom I've added the three additional
23 members of National Milk that are not on the top
24 50 list.

25 On the right-hand column, I have

1 calculated the estimated average cows per farm
2 simply by taking the volume of each co-op and
3 dividing it by the number of farms, which gives
4 me a volume of milk per farm and divided by a
5 representative milk per cow figure, which I
6 believe was the -- I believe I used the average
7 milk per cow for 2008. It might have been 2007.
8 But it's -- it would be -- those results are --
9 are -- would be almost identical.

10 JUDGE CLIFTON: So did you use a
11 nationwide average milk per cow?

12 THE WITNESS: I used a nationwide
13 average, that's right.

14 JUDGE CLIFTON: Is there a variability
15 region to region?

16 THE WITNESS: There's variability from
17 region to region but it's a -- it's an
18 indication of the -- of the size of the farms in
19 each co-op. Some of the co-ops are national or
20 cover relatively wide regions. Others are more
21 narrowly located.

22 But I thought the -- the simpler thing
23 was to use the national average rather than
24 assume the specificity that would be -- I do not
25 have the specificity to get the number exactly

1 right. So it was -- made more sense to use a
2 frank approximation than -- than a phony
3 precision.

4 JUDGE CLIFTON: Well put. And how is
5 Hoard's spelled as you've used it in the last
6 few comments?

7 THE WITNESS: H-o-a-r-d, apostrophe s,
8 Dairyman, D-a-i-r-y-m-a-n. And on the bottom I
9 have -- the first -- the first line is simply a
10 toting up of the numbers in the overall table
11 for the members of National Milk that are in the
12 top 50.

13 The next line is a toting up of all of
14 the co-ops that are in -- all the co-ops that
15 are in the top 50. And then the last item is
16 a -- is a U.S. total. Again, I believe -- I
17 believe that's for 2007, the total production.
18 It is -- it is 2007, based on the number. I'm
19 looking at the number. So these numbers should
20 all be based on 2007.

21 So that the U.S. -- U.S. milk production
22 was 185.6 billion pounds. There were 59,131
23 licensed dairy farms in the United States in
24 2007. And that works out to an approximate
25 average of 155 cows per farm.

1 And you can see from -- from these
2 numbers that the -- that the National Milk
3 average is very close to the national average.
4 And there's a fair -- there's a clear variety --
5 variation among the members. I believe we are a
6 co-op, as a federation -- National Milk actually
7 is a qualified Capper-Volstead cooperative for a
8 number of political reasons.

9 But as a federation, representing co-ops,
10 we represent a representative -- our members are
11 representative of the nation.

12 JUDGE CLIFTON: Now, is there anything
13 else you want to say to clarify either your
14 testimony or Exhibit 23?

15 THE WITNESS: I don't believe so.

16 JUDGE CLIFTON: All right. Mr. Brosch,
17 do you have any questions?

18 MR. BROSCH: No, your Honor. I'm done
19 with the witness.

20 JUDGE CLIFTON: All right. Then,
21 Dr. Cryan, since you will be here and available
22 for cross-examination, I would like to defer
23 that until everybody is ready. Mr. Ricciardi,
24 did you want to make a comment?

25 MR. RICCIARDI: I do, Judge. And I'll

1 take your guidance on this point as I would with
2 anything.

3 JUDGE CLIFTON: Well, thank you.

4 MR. RICCIARDI: In fact, after your
5 explanation, maybe I'll even let you do the
6 cross-examination, too.

7 But I have some -- some questions on voir
8 dire of this witness which are limited and which
9 would be reflective of portions of Exhibit 23.
10 If you would like me to defer that until it is
11 actually offered in evidence, I am willing to do
12 that when Dr. Cryan gets back on the stand. It
13 relates to whether portions of this report
14 should come in. And, obviously, you're going to
15 make that decision. My voir dire would be
16 limited. But you tell me when you want to do
17 that.

18 JUDGE CLIFTON: All right. I'll hear
19 from you, Mr. Brosch, on that point.

20 MR. BROSCH: Your Honor, I think we've
21 already had a good colloquy on whether you are
22 going to force any limitations on examinations
23 here, and so I think we'd be better at this
24 point, since Dr. Cryan is going to be called
25 back for the majority of his cross-examination,

1 to defer it to that point.

2 JUDGE CLIFTON: I agree because I'll be
3 better educated then. And we may also have some
4 hard copy of some of these documents on which
5 I'm asked to take official notice, so --

6 MR. RICCIARDI: Your Honor, I understand.
7 And that's fine, except what I would like to do
8 is to do that first because the voir dire goes
9 to the question of whether or not portions of
10 this, in fact, should be admissible before we
11 get into the substantive cross-examination.

12 JUDGE CLIFTON: Okay. That's a good
13 point.

14 MR. RICCIARDI: Thank you.

15 JUDGE CLIFTON: And I appreciate all
16 counsel bringing to everyone's attention as soon
17 as they are aware of an issue so that people
18 have time to think about it and be ready for it.
19 That's very helpful. Mr. Vente.

20 MR. MR. VENITE: Your Honor, I don't want
21 to address this witness on his testimony but I
22 do want to comment on and -- on the policy that
23 you've suggested on the documents to be
24 officially noticed.

25 This came up a little bit before. The

1 practice has been -- and I know practice doesn't
2 need to be followed everywhere -- but if -- if a
3 document or a data set is readily available to
4 everybody here and to the world, at an
5 accessible online location, that official notice
6 may be taken and people can then refer to that
7 document. They could go to that document. The
8 accessibility is not limited because there isn't
9 a physical copy. And for some of the material
10 here and documents that will be -- for which
11 official notice will be requested, the data is
12 rather voluminous.

13 And my opinion, that a paper copy of
14 documents that are readily accessible, when we
15 know the document to which and the table to
16 which a witness has referred or on which counsel
17 may rely simply on brief, if it's readily
18 available, I know my clients probably would not
19 want to pay for copying of -- of Federal Milk
20 Order Market statistics.

21 There are many relevant tables there.
22 More will probably come to mind as we finish the
23 hearing and even proceed to -- to briefing.

24 I do think that copies ought to be made
25 available and maybe scanned so they're

1 accessible online to everybody, of a document
2 like Early Development, all of it because we
3 don't have an opportunity to judge Mr. Cryan's
4 judgment as to whether only three pages of a
5 lengthy document are relevant. He found three
6 pages relevant. I'd like to see the whole
7 thing. I never have.

8 So that's -- that's my comment on the
9 copy for official notice purposes ruling. When
10 your Honor announced that policy, I'm not sure
11 anybody had requested it. I, for one, don't
12 care. If nobody cares, maybe your Honor should
13 be less insistent. Thank you.

14 JUDGE CLIFTON: In other words, you're
15 saying you don't need the hard copies here?

16 MR. VENITE: Not if it's available readily
17 online.

18 JUDGE CLIFTON: And do you know that --
19 since you're interested in Early Development and
20 that you might be interested in more than three
21 pages, are -- are you confident that this 50 --
22 56--year-old, 57-year-old -- 57-year-old
23 document is readily available?

24 MR.MR. VENITE: That one I -- the witness
25 said it's not available anyplace. And I think

1 that one ought to be provided. And in addition,
2 I think it ought to be scanned and made
3 available on a website's, whether it's USDA's or
4 NMMF's website, so that other people may access
5 it online. That's the one exception to all
6 these documents that is not available online and
7 for which a copy of the whole thing ought to be
8 made available.

9 JUDGE CLIFTON: You see, I suspect that
10 this expert made very limited use of something
11 that is 57 years old. And if he says he used
12 three pages of it, I really don't think he ought
13 to have to bring the whole thing in here because
14 you're curious.

15 MR.MR. VENITE: Not because I'm curious,
16 your Honor. But the whole -- the whole thing,
17 like any document, was based on the data set.
18 And -- and whether other parts -- if someone
19 relies on a -- on a statement in a transcript,
20 you know, and there's context for that
21 statement, a person may do that. But the -- the
22 document source, the transcript source should be
23 made available for other parties to look at to
24 see if the context is -- is misleading in some
25 way or if there are other data sets,

1 conclusions, and materials in the document upon
2 which the witness relied from which another
3 expert or a lawyer could make the opposite
4 conclusion.

5 This document is not available to anybody
6 as far as -- well, it's not available to us.
7 It's not available online. I'm not asking
8 for -- for 30 copies, but I'm asking that if --
9 if the document or any portion of the document
10 was relied upon by this witness to reach a
11 conclusion, that the whole document should be
12 made available for other experts to look at to
13 see about the legitimacy of that notion.

14 MR. BROSCHE: Your Honor, I think we have
15 a lawyer that's been watching too much Cold
16 Case, but we certainly -- we certainly will do,
17 you know, what your Honor has requested. We
18 will make -- or we will defer to the idea that
19 those things that are available online are
20 available to everyone.

21 It seems to me that's the new world we
22 live in, but it's up to your Honor.

23 JUDGE CLIFTON: Mr. Beshore.

24 MR. BESHORE: Just very quickly. I don't
25 want to comment on the issue with respect to the

1 1952 publication that Dr. Cryan's offered, but
2 with respect to the general rules of notice, I
3 would join the position that Mr. Vetne has
4 articulated that where they are generally
5 available to everyone online, that it should not
6 be necessary, that it is not necessary. And I
7 would request your Honor to consider whether it
8 should be necessary -- necessary to have them
9 physically available in the courtroom.

10 JUDGE CLIFTON: Okay. Well, we may
11 not -- Mr. Yale first, and then Mr. Carroll.

12 MR. YALE: Benjamin F. Yale, Continental
13 Dairy Products, Select Milk Producers. On the
14 official notice, that has been the practice and
15 I agree on the voluminousness. The difficulty
16 is that it is so easy to reference a website
17 with a plethora of information on it and never
18 ever identify what's in that and what you're
19 going to use or anything else.

20 So I -- you know, I don't mind just being
21 able to go to the website. That's great. I
22 like to have electronic copies. But I think
23 there ought to be a lot more focus. I really,
24 really appreciated your Honor's questions of
25 Dr. Cryan that showed that although he

1 referenced a huge amount of data, I mean, all
2 the Federal Order statistics decades -- well
3 almost a decade, 1999 to 2007, and it's really
4 basically a page and a couple of numbers off
5 them. And the same thing with the others.

6 So if we can discipline ourselves -- and
7 I'll try to do the same thing. To say, oh,
8 yeah, I'd like to have all the Federal Order
9 statistics since the beginning of time through
10 today when all I need to know is the Class I
11 utilization out of the Texas Order for 2007 or
12 whatever -- I guess it wasn't the Texas Order
13 then but be that as the may. I think that ought
14 to be appropriately to be able to focus.

15 And on the other hand, if they're small
16 pages, I think having the hard copies if you're
17 going to use them during cross-examination or
18 use them during the hearing, I really think
19 copies ought to be available.

20 JUDGE CLIFTON: For one reason, Mr. Yale,
21 so the judge can follow along.

22 MR. YALE: Right.

23 JUDGE CLIFTON: Those things that are
24 perfectly understood by all of you are not
25 perfectly understood by me. And I have to

1 preside here. So having a hard copy is
2 sometimes helpful.

3 MR. YALE: Right. I think it's helpful
4 to all of us. And then I would make a separate
5 but related request that I think's appropriate
6 and that is that in, for example, Dr. Cryan's
7 testimony and some of the others, if we can have
8 some way that those could be electronically
9 available quickly during the hearing, it would
10 help some of us who are trying to avoid the
11 paper chase.

12 So, I mean, I'm willing to give him my
13 e-mail address or whatever so that they could
14 e-mail to me if that's appropriate. That would
15 be a help. And I would be willing to
16 reciprocate if we should do anything as well.

17 JUDGE CLIFTON: Well, if USDA can put
18 these things on the website so even those people
19 who didn't come here can see them --

20 MR. YALE: Right. Well they will
21 eventually.

22 JUDGE CLIFTON: -- that would be good.

23 MR. YALE: I'm talking about during the
24 pendency of the hearing.

25 JUDGE CLIFTON: While we're here, I have

1 them.

2 MR. YALE: Thank you very much.

3 JUDGE CLIFTON: Thank you, Mr. Yale.

4 Mr. Carroll.

5 MR. CARROLL: I agree with -- as long as
6 we have hard copies, I have no objections.
7 Without hard copies, I do have an objection. I
8 recently finished a case in the second highest
9 court of the State of New York where the issue
10 was raised and the court said flat out, these
11 are not infallible means of putting things on.
12 They're not infallible in translation. They're
13 subject to alteration. And they are not
14 generally admissible, at least in the state
15 courts.

16 So unless we have a hard copy, I maintain
17 my objection.

18 MR. BROSCH: Well, there you go, your
19 Honor.

20 JUDGE CLIFTON: Yeah. I didn't have
21 unanimity. I thought we were going to settle
22 the whole thing. You know, we had it going. We
23 had Beshore agreeing with Vetne, and I thought
24 this is going to be an easy hearing from here
25 out.

1 MR. BROSCH: Your Honor, I agree with
2 everything you said except when you said that
3 you don't understand things fully like everybody
4 else here. I can tell you, if you think
5 everybody else understands it all, you're being
6 very fooled.

7 JUDGE CLIFTON: Okay. Then I would like
8 to take you up on your suggestion, Dr. Cryan,
9 that with regard to those USDA statistics that
10 you relied on, if you would pull those together
11 and make them available, about 30 sets of them,
12 for those who are participating here.

13 And with respect to that Early
14 Development, which is a USDA publication, I just
15 want the pages that you relied on. If you
16 happen to have some sort of a hard copy of that
17 or an electronic version of that you could make
18 available to counsel who want to peruse it, that
19 would be great. I would appreciate it, but I'm
20 not requiring it. And I'm not requiring you to
21 go fetch either of the first two since you have
22 those websites noted.

23 MR. BROSCH: Okay. Thank you, your
24 Honor. We'd be glad to comply with that.

25 JUDGE CLIFTON: All right. Thank you,

1 Mr. Brosch.

2 You may step down. Thank you.

3 MR. CARROLL: Your Honor, I assumed,
4 without thinking of course, that there's
5 automatic reservations for any overruled
6 decision of the chair. In other words, we don't
7 have to keep popping up and saying I reserve or
8 I object and I reserve?

9 JUDGE CLIFTON: No, you don't have to
10 keep popping up. But as you can see by what I
11 just did, I'm not consistent. So you have to
12 keep letting me know what you care about.

13 MR. CARROLL: Just to repeat my original
14 objection, any piece of paper which is
15 referenced on the Internet and not produced here
16 in hard copy is our objection, and we will take
17 a respectful exception to any kind of ruling for
18 the very simple reason that that does not meet
19 proper legal standards. Thank you.

20 JUDGE CLIFTON: Thank you. That was well
21 said. Mr. Brosch?

22 MR. BROSCH: I would just note, your
23 Honor, I just finished a case in the Ninth
24 Circuit Court of Appeals, and we submitted
25 evidence with reference to websites in the Ninth

1 Circuit Court of Appeals. So I don't know what
2 they're doing in the second highest appellate
3 court or whatever it is in New York, but in the
4 federal courts you can do this.

5 JUDGE CLIFTON: My concern about websites
6 is, they do change. They do get changed.
7 Sometimes the reason is because what was up
8 there was an error. And so it's appropriately
9 fixed. And if we don't have the hard copy, we
10 don't know whether the erroneous version or the
11 fixed version is what a person relied on.
12 That's one of my concerns. Websites do change.

13 MR. BROSCHE: Well, perhaps Mr. Carroll or
14 whoever objects can go onto a website and take a
15 look at it and see if he can come into this
16 particular century in terms of accessibility and
17 if he has an objection after doing that, he can
18 come back here.

19 JUDGE CLIFTON: Yeah. That was not a
20 fair cut. Mr. Beshore.

21 MR. BESHORE: I just want to make sure
22 that we're not confusing taking requests for
23 notice of websites, which I didn't have -- I
24 didn't comment upon. But requests for notice of
25 publications which are available on websites,

1 like past publications, statistical
2 publications, I think there is little or no
3 possibility that those publications, published
4 documents of Federal agencies, for instance,
5 which is primarily what we're talking about
6 here, are different from one time to the other.

7 JUDGE CLIFTON: All right. Thank you.
8 Mr. Stevens.

9 MR. STEVENS: Your Honor, I know you
10 haven't heard from enough lawyers on this, but
11 I'll add my 2 cents, or some amount of money.
12 My thought on this is that we have had, over the
13 course of the years, different approaches for
14 official notice in rulemaking hearings.

15 As far as official notice of -- of USDA
16 publications, of the type of documents that I'm
17 hearing referred to that are generally available
18 to the public in the library, online, at various
19 sources, available from the Department by
20 request, those documents, it seems to me are --
21 and I have experienced in my -- in my doing
22 Federal Order hearings, those documents have
23 been -- official notice has been taken of them
24 many times and no copies were ever brought to
25 the hearing room.

1 There are -- there have been occasions
2 where -- where copies have been brought for the
3 convenience of the parties of the hearing to see
4 and use. My experience also tells me that over
5 the course of the years, many parties ask for
6 official notice of -- of many types of things.
7 And they are noted for the record, and they
8 become part of the record, that is, the request
9 and the identification of the documents.

10 And, in fact, the Department asked for
11 official notice of many things, prior decisions,
12 other -- other documents which are public,
13 readily available, and they are not made a part
14 of the record.

15 If that were the case, as voluminous as
16 these records are, they would just be that much
17 more voluminous, with documents that are readily
18 available to anybody to get ahold of.

19 And I've heard the concerns about that
20 they're -- if they're on the web site, they
21 might be incorrect or claims of that nature.
22 But given all that, my experience in federal
23 court hearings is that official publications,
24 official notice, judicial notice, different
25 notices are made all the time in these

1 rulemakings and as far as official notice is
2 concerned, the documents are not necessarily
3 made available.

4 So I just add that to the mix and it is
5 your Honor's call, certainly.

6 JUDGE CLIFTON: All right. Thank you.
7 Mr. Tosi, did you want to add anything?

8 MR. TOSI: (Shaking head.)

9 JUDGE CLIFTON: I'm not going to change
10 what I've asked of Dr. Cryan, but I will have to
11 confront this issue as we go on when other
12 people ask that I take official notice of
13 things. And I'll just have to see what I think.

14 I know I would want -- in trying to
15 determine how to cross-examine Dr. Cryan, I
16 would want the pages in front of me that were
17 important to him out of these sources, these
18 references.

19 Okay. Good. Now, since we have deferred
20 cross-examination of Dr. Cryan until more
21 information is available, this would be a good
22 time for me to ask for a report on what
23 additional information Mr. Carman has pulled
24 together and what is the request status
25 response, at this point. Should Mr. Carman come

1 forward or, Mr. Stevens, do you want --

2 MR. STEVENS: Well, can we take a minute,
3 your Honor?

4 JUDGE CLIFTON: Yes. Let's take a
5 five-minute stretch break. Please -- well,
6 let's go till 3:15. We'll go back on record at
7 3:15.

8 (A recess was taken from 3:08 to 3:15.)

9 JUDGE CLIFTON: And let's go back on
10 record. All right. We're back on record at
11 3:15. Who would like to report? Mr. Carman
12 himself.

13 MR. CARMAN: First of all, your Honor, we
14 presented some information to AIDA this morning
15 in hard copy form and have just recently
16 discovered that some of the tables are the
17 incorrect tables. That's what we were just
18 doing just now. So we will get the corrected
19 tables to them.

20 In terms of item 13, in request 1, which
21 was the recalculation of the pools, I have heard
22 from two of the eight offices concerning
23 recalculation of the pools. In both cases those
24 are going to be restricted data of only one or
25 two entities that did not pool milk because of

1 adverse price relationships.

2 Item 7 of the second request, which dealt
3 with the cost of a producer-handler's becoming
4 regulated if Proposal 1 is eliminated is being
5 calculated still, but a number of orders, as
6 we've indicated, and other data will be
7 restricted.

8 So one thought is to provide some
9 examples of various size producer-handlers times
10 the admin for a calculated cost with that kind
11 of an assumption.

12 Last night, we responded by e-mail to
13 Wisconsin, Vermont, New Hampshire, New York and
14 Pennsylvania Coalition of Departments of
15 Agriculture, and particularly Mr. Will Hughes
16 asked for a set of data. We provided by e-mail
17 the structure data that I presented as items 14
18 through 20, as well as PDF of the relevant
19 producer-handler regulations in 1000 part -- in
20 part in each of the individual order parts.

21 We also indicated to Mr. Hughes where he
22 could find a PDF searchable file of all of the
23 regulation in part 7 concerning Federal Orders.

24 I believe Mr. Carroll's requests have
25 been completed. Mr. Yale's requests are still

1 in progress.

2 The requests which were the last set of
3 data requests that we got are last in line.
4 We're working on those and Mr. Cryan's requests,
5 I believe, are completed.

6 JUDGE CLIFTON: Dr. Cryan had requests?

7 MR. CARMAN: Yes. A lot of that data was
8 information that we provided in Exhibit 5
9 through 20, that we would have provided anyways
10 as information for all participants in the
11 hearing.

12 JUDGE CLIFTON: All right. And did you
13 say it is completed or is there anything more?

14 MR. CARMAN: I believe it's completed.

15 JUDGE CLIFTON: Complete.

16 MR. CRYAN: It's completed as far as I'm
17 concerned, your Honor.

18 JUDGE CLIFTON: Dr. Cryan believes it's
19 completed. Okay. Who did you say after
20 Mr. Yale? Mr. Vetne, what did you say about
21 Mr. Vetne? His were the last requests.

22 MR. CARMAN: Yes. His was the last
23 request for data that we got. And we are --
24 some of what he has requested has been provided
25 in previous exhibits or will be provided. And

1 so there is some combination -- some of his
2 stuff has already been covered, but some of it
3 we're working on.

4 JUDGE CLIFTON: Okay. Have you, to
5 Mr. Ricciardi and his group, said no to any of
6 the requests?

7 MR. CARMAN: Last night we put together a
8 small e-mail, a hard copy indicating or
9 correcting the letter that Mr. -- that was put
10 in as Exhibit 21 yesterday, indicating the third
11 item should have covered items 14 through 16 and
12 not items 15 and 16.

13 Regarding your first e-mail request of
14 April 16th, 2009, items 5 and 6, average fluid
15 milk handler volume, that -- we don't have that.
16 There's a possibility that we could do a
17 selected month by the number of -- of handlers.

18 But as I testified in Exhibits 14 through
19 20, some handlers have little or no route sales
20 because their unit's pooled.

21 So to divide by the total number of
22 handlers into -- into an area Class I route
23 sales for a particular month may or may not be
24 an accurate set of data.

25 We indicated that items 8 through 12

1 would not be provided. And that -- and then
2 item number 3 was items 15 and 16. That should
3 have read items 14 through 16.

4 JUDGE CLIFTON: So you had already
5 identified in Exhibit 21 all of the no responses
6 except that we need to include 14?

7 MR. CRYAN: That's my understanding.

8 JUDGE CLIFTON: Okay, and you're working
9 on the rest?

10 MR. CRYAN: Yes.

11 JUDGE CLIFTON: All right. Mr. Stevens,
12 do you want to ask any other questions of
13 Mr. Carman, or do you want to say anything more?

14 MR. STEVENS: Well, I don't have any
15 questions for Mr. Carman. But what I want to
16 say is, first of all, the word -- the word has
17 been used by -- by myself and by others and the
18 word is "sponsored." That word, I don't think,
19 is the word that should be used to -- to -- to
20 identify the position that Mr. Carman's taking.

21 Mr. Carman, as a government employee, is
22 responding to requests. And as he testified,
23 when he response -- in response to the request,
24 it came to his mind that certain documents could
25 be of use to the parties and those were created

1 and they became Exhibit 5 through 20.

2 There are other requests that parties
3 have made. And given the time constraints when
4 they were received, and how much data was being
5 requested, we see the results of that, that it
6 is a voluminous amount of material and every
7 effort is being made by every office of the
8 Market Administrators, each of their offices,
9 and by numerous employees in AMS Dairy Programs
10 to complete those requests.

11 I want to say also that in terms of -- of
12 the weight or of what these documents mean,
13 there should be -- and I don't think sometimes
14 there is, but it certainly is erroneous to
15 believe the fact that -- that the statistics are
16 presented by a marketing specialist or Federal
17 Marketing Order employees in and of itself means
18 that the Department will take any greater --
19 will hold those in any higher level than any
20 other statistics requested by the government
21 that are presented by the parties at this
22 hearing.

23 So whether Mr. Carman presents this
24 evidence or whether it's presented by any party,
25 it will receive the same weight and

1 consideration by the Department. So it is
2 erroneous to say or to suggest that there is
3 some favoritism, some thought the fact that
4 Mr. Carman presents this as opposed to it being
5 presented by a party means that any greater
6 weight will attach to whatever that material is.

7 If that impression is going through this
8 hearing, that impression is erroneous and should
9 not be counted upon.

10 Beyond that, when the -- when the
11 information is provided to the parties for their
12 use, they may choose to introduce it or not.
13 And that is their choice, of course.

14 If it's important to them, I assume
15 they're going to present it. If it's not, they
16 may not. There are certainly instances where
17 information is requested, where the parties
18 requesting it determine that it is not of an
19 importance or significance or relevance to -- to
20 put into the record. And so it is not put into
21 the record. On other occasions, it is put in
22 the record.

23 That choice is available to every party
24 at this hearing. So do not attach any
25 significance to the fact that Mr. Carman puts in

1 evidence as opposed to parties putting it in
2 evidence. The Secretary reviews the evidence of
3 this hearing from all sources.

4 JUDGE CLIFTON: Now, every time
5 Mr. Carman pulls together a response to a
6 request for statistical information, AMS Dairy
7 will put his response on its website regardless
8 of whether there's any indication that the
9 requesting party will use it. Is that correct?

10 MR. STEVENS: Yes.

11 JUDGE CLIFTON: So everyone can look
12 there and determine whether to use it, is that
13 correct?

14 MR. STEVENS: Yes. And your Honor makes
15 a very good point. Which is the fact, because
16 of -- because of the availability of the
17 Internet, because we have gone to that format,
18 to make information available to the public and
19 as anyone that goes to the USDA AMS website can
20 see, there is voluminous material on that
21 website concerning this rulemaking and others.

22 And the attempt is made to put every
23 document, every one that -- that can be put up
24 there is put up there. And it is available to
25 the public.

1 So if someone requests some material and
2 they choose not to do it -- to use it for
3 whatever purpose, but some other entity part --
4 or party, person is looking at that and wants to
5 use it in this hearing, well of course it's up
6 on the website and it's available for their use.

7 It is -- it is as open a process as the
8 Department can make it, so that everyone has
9 access to the same information.

10 JUDGE CLIFTON: Now, I had a thought
11 yesterday after we stopped. I was going down an
12 avenue of thinking if Exhibits 5 through 20 came
13 in in hard copy, and there were 30 to 50 copies
14 of them on the back table, then every response
15 by Mr. Carman should get equal treatment.
16 That's how I was thinking.

17 Now, my 5 through 20 -- gee, Exhibit 3 is
18 the most lengthy exhibit I've got. That's all
19 the notices. Okay, my 5 through 20 -- I'm
20 sorry, I just want to make this point.

21 Okay. My 5 though 20 are an eighth of an
22 inch tall. And so the burden was not great to
23 duplicate those. And I'm glad it was done and
24 I'm glad everyone has that in hard copy. I am
25 afraid that some of these other responses may be

1 so voluminous that the burden of reproducing
2 them is indeed great.

3 Now, I just heard a lot of argument from
4 a lot of lawyers who said, you know, when we
5 take official notice of documents published by
6 USDA, we really don't need the hard copies,
7 because they're available online.

8 And I'm thinking, how is this different?
9 So I may have to revise my thinking a little bit
10 when we get to the point that someone wants to
11 use something that Mr. Carman pulled together
12 and is posted on the AMS Dairy website.

13 MR. STEVENS: Your Honor, it's been my
14 experience that over the course of these
15 hearings, many times this happens. Requests are
16 made and documents are provided. Parties
17 incorporate them into their statements, they
18 make exhibits out of them. They use some of the
19 information, they put it together with other
20 things. In other words, they create maybe a new
21 document or certainly a modified document of
22 some kind.

23 Well, then, it's their document
24 certainly. I mean, in the sense that it's their
25 document with supporting material that they've

1 received from the Department.

2 I submit, your Honor, that that is not
3 something that the Department should be
4 responsible for providing copies for the use of
5 the parties. I mean, that becomes a document
6 that -- that a pro -- or opponent is using to --
7 to make their point for or against a proposal.
8 And the documentation from the Department is
9 used to make that point.

10 And so the Department is not responsible,
11 it seems to me, to put that in. And has not, in
12 every hearing that I've been through, has not
13 been required to do that.

14 The whole attempt at the beginning of
15 these hearings is to provide the documentation
16 which would be useful to all the parties and to
17 make the copies available so that the parties
18 can use it during the course of the hearing.

19 With respect to these special -- I call
20 them special ones, requests of parties, as we've
21 had numerous ones here, and still working on it.
22 They go up on the website. A hard copy is
23 presented to the requester, and they are told
24 what documents they have received and they are
25 told what documents they will not receive and

1 why.

2 And that is what is being done. That is
3 what will be done -- will be done. There will
4 be no request that will not be responded to in
5 terms of the documents or the explanation why
6 the documents are not available.

7 As Mr. Carman just indicated for the
8 record, many of these documents, they will turn
9 out to have restricted data.

10 And from my mind, and certainly I'm
11 willing to hear any other position on this, but
12 they become of very limited value if it's just
13 headings with R and blanks.

14 Now, the Department is going through the
15 process of finding that, presenting it and
16 incurring the cost of doing all that in the
17 effort to assist the parties in the conduct of
18 this hearing.

19 The use of the documents, of course, is
20 up to the proponent of any proposal that they
21 think are relevant to these requests. That's
22 all we can do. And, I mean, that's all we
23 should be required to do.

24 JUDGE CLIFTON: Now, the requests
25 themselves are also on the website, is that

1 correct?

2 MR. STEVENS: I believe that's the case,
3 your Honor.

4 JUDGE CLIFTON: So what I want to make
5 sure we also let everyone know is when requests
6 are refused or denied, that everyone be told
7 why.

8 MR. STEVENS: Well, and I believe that is
9 the case also. If it is not the case, it
10 certainly should be the case and will be the
11 case that all the postings on the website will
12 indicate who asked for what. And, in fact,
13 maybe -- you know, the actual document, the
14 letter, the request.

15 And it will contain, as I believe it
16 contains, our responses to those letters saying
17 what we're providing, what we are unable to
18 provide and the reasons why. And so the -- the
19 request will be as transparent as it can be.

20 Everyone can view that on the website and
21 know what requests have been made and what the
22 disposition of those requests -- what the
23 disposition of those requests has been.

24 JUDGE CLIFTON: Now, right this minute,
25 is this a good time for Mr. Carman to present

1 any additional statistics or would it be better
2 deferred?

3 MR. STEVENS: We don't have any hard
4 copies to present at this time with respect to
5 any of the requests. They are working on them.
6 And then as I said, when they are completed,
7 they are put up on the website and the hard
8 copies are available to the parties that
9 requested them.

10 JUDGE CLIFTON: All right. So right now
11 would not be a good time to have Mr. Carman
12 testify.

13 MR. STEVENS: I don't think so.

14 JUDGE CLIFTON: All right. Then I go
15 back to my list. I'm thinking this is a good
16 time for Mr. Tonak and Mr. Asbury.

17 MS. BRYSON: Judge, can I make one point?

18 JUDGE CLIFTON: You may. Let's see.

19 MS. BRYSON: I just want to let the
20 record reflect that the reason for denying
21 requests 8 through 12 from the Independent
22 American Dairy Alliance is, was the USDA is
23 unable to provide guidance on these -- those
24 requests.

25 JUDGE CLIFTON: Wait just a second. Let

1 me look at Exhibit 12 -- excuse me, Exhibit 21
2 and read from the e-mail. It says, items 8
3 through 12, the information you requested will
4 not be provided. In addition to being beyond
5 the scope of providing statistical data, what
6 you seek cannot be articulated without the
7 benefit of testimony and evidence that this
8 hearing will examine.

9 MS. BRYSON: That's correct, Judge
10 Clifton. And I just wanted to point out that
11 what we had asked for is notice of the standard
12 of proof that Dairy Programs is going to use to
13 evaluate the evidence that they receive in this
14 formal rulemaking.

15 JUDGE CLIFTON: Now, by standard of
16 proof, are you thinking of things like, will
17 this be by a preponderance of the evidence or
18 clear and convincing or beyond a reasonable
19 doubt or the like, or something else?

20 MS. BRYSON: No, your Honor. The
21 definition of disorderly marketing, what kind of
22 statistics are going to be relied on for that,
23 what the tests are for determining that. The
24 idea of being able to present evidence that's
25 responsive to a proposal that the government

1 itself has not made is very difficult in the
2 absence of any clear statement from the
3 government about what the standard of proof is
4 against which this rulemaking is going to be
5 determined.

6 JUDGE CLIFTON: Now, is there case law
7 that establishes this, to your knowledge?

8 MS. BRYSON: I think that's a question
9 for the Department. You know, we had asked your
10 Honor that this be conducted under the new
11 rulemaking authority of the Farm Bill as an
12 informal rulemaking, in which the government
13 would consider this proposal and say, this is
14 what we, the federal government, propose, and
15 allow everybody the opportunity to comment on
16 that.

17 In that kind of proceeding, the USDA
18 gives everyone notice of what they think
19 disorderly marketing is and creates a situation
20 in which responsive evidence can be presented.

21 USDA decided not to do that here. And I
22 just wanted to call to the -- I wanted to make
23 explicit in the record the fact that we're
24 proceeding here to gather evidence on proposals
25 as to which the government has not asserted any

1 position or standards against which we can
2 essentially marshal a case.

3 JUDGE CLIFTON: Well, that's -- that's a
4 advantage as well as a disadvantage. It's wide
5 open. Go for it, I think.

6 MS. BRYSON: I understand. I just want
7 it to be clear on the record, because this is
8 happening very fast under much shorter time
9 frames than had existed in the past.

10 A lot of the problems, I think, people
11 are experiencing with data here and the
12 inability of USDA to provide data in a timely
13 fashion is because this is being rushed in an
14 unreasonable way.

15 And I simply want it to be clear on the
16 record that we asked for articulation of what
17 the standards are going to be in this new world
18 and USDA has declined to provide any.

19 JUDGE CLIFTON: Thank you.

20 MS. BRYSON: Thank you.

21 JUDGE CLIFTON: Mr. English.

22 MR. ENGLISH: Good afternoon, your Honor.

23 JUDGE CLIFTON: Good afternoon.

24 MR. ENGLISH: Charles English. I wasn't
25 sure when you would hear this. Fascinating

1 question you asked, of course, what's the case
2 law proposition. And of course the answer was
3 none. Well, that wasn't the answer.

4 Well, there wasn't any case law provided
5 for the assertion. What we do have, however, is
6 76 years of precedence within the program. And
7 I have with me one of the consultants in the
8 dairy industry going back to the 1950s.

9 And I can unequivocally say that these
10 kinds of interrogatories, which is what these
11 are, directed to the Department -- they are not
12 data requests, they are interrogatories directed
13 to an agency, are wholly inappropriate, without
14 precedence and without case law.

15 And the Department, nor we who oppose the
16 interrogatories, should have to go find the
17 needle in the haystack that says you can't do
18 it. It would be better if those who assert they
19 can, could show that.

20 First, I believe that the requests seek
21 to violate the level of privilege, the
22 deliberate privilege of the Department. They
23 seek to get the Departments to say in advance
24 how they're going to deliberate.

25 Second, we frankly believe that the

1 procedures of informal rulemaking could not have
2 been used in this process precisely for the
3 controversy here.

4 If you noticed the comment, you don't
5 have any evidence. What you have, of course, is
6 what you are going to get here. You have formal
7 rulemaking followed by a recommended decision
8 after briefing and an opportunity to comment and
9 have exceptions.

10 That is by way of saying that the very
11 thing that those who seek to have
12 interrogatories to the Department have
13 provided -- will have their opportunity, if and
14 when we ever get to a recommended decision.

15 As to the rush that we are under, I think
16 this may be one instance where, at least to my
17 knowledge, everybody in the room may be on the
18 same side.

19 And that is by way of saying, the rush
20 that we're under is because of a new
21 Congressional mandate of how these proceedings
22 will be pursued. I'm unaware of any counsel --
23 and I emphasize the word counsel, I don't know
24 what individual parties may have done -- but I'm
25 unaware of any counsel who regularly, or for

1 that matter has for the first time participated
2 in these proceedings who advocate -- and quite
3 frankly, I will tell you that without any
4 authority, I certainly thought this was the
5 worst idea around, and I think we're now seeing
6 why.

7 But nonetheless, Congress said, here's
8 the procedure, because it took too long to do
9 these things, and they set deadlines. And what
10 those deadlines did was put a real limit on our
11 colleagues to the left. However that's --

12 JUDGE CLIFTON: The USDA employees.

13 MR. ENGLISH: The USDA employees. That
14 isn't anybody's fault in this room, and it's
15 certainly not the fault of the USDA employees
16 who were put into this position. That is the
17 reality of what has happened as a result of a
18 Congressional enactment. And the enactments as
19 I understand it, if you work the days backwards,
20 I mean we have to have this hearing closed by
21 Friday, June 5th. That's my understanding, that
22 the hearing must close in Order to meet all the
23 other time deadlines.

24 So whatever we all think about this
25 proceeding, apparently Congress has told how

1 long we have to get it done. I will not comment
2 on that.

3 As to what notice there may have been or
4 what people have said, gee, we haven't had
5 enough time to think about this, the Secretary
6 quite clearly indicated in 2005 that a case
7 could be made for eliminating the
8 producer-handler exemption. That was published
9 in the Federal Register. A number of the
10 players in that procedure, in fact, are in this
11 room today.

12 And no one can claim that having that
13 been published in the Federal Register in 2005,
14 that a case can be made to eliminate the
15 definition of producer-handler should be
16 surprised that the Secretary, having said that,
17 that someone in the industry would take them up
18 on that and propose precisely that. So there
19 really isn't any notice issue.

20 But even if there is, I go back to the
21 fact that Congress is the one that told us how
22 long these proceedings take now, not us, that's
23 the only point that had been raised specifically
24 in these interrogatories. If we need to address
25 the rest of the interrogatories, I had a series

1 of other documents, but that particular one has
2 been raised for now.

3 JUDGE CLIFTON: Thank you, Mr. English.
4 I personally want to comment how proud I am of
5 USDA for holding this type of rulemaking
6 proceeding, because I have been the subject of
7 rules that were made under notice and comment
8 that were very bad. And the way they got that
9 way was the mindset was pretty much set in stone
10 when comments were asked for. So not much
11 change happened.

12 This is a different proceeding. This is
13 almost a brainstorming proceeding, but
14 definitely a proceeding in which the Secretary
15 can take into account diverse viewpoints, very
16 complicated theory and do the best he can in
17 projecting what the impact of the rulemaking
18 would be. I like it a lot. It's a little
19 fluid, which makes it a little uncomfortable,
20 but I think it's an excellent process myself.
21 It's expensive. It's expensive for the
22 Secretary and it's expensive for the parties.
23 But it's effective. Ms. Bryson?

24 MS. BRYSON: Thank you, Judge Clifton. I
25 think we're delighted to hear that this is a

1 fluid brainstorming process. That's great.
2 We're behind that.

3 I would just say the 2005 decision of the
4 Secretary was about a specific order. What
5 we're faced with here is a request for a
6 national policy applicable across all orders,
7 even though by proponent's own admission,
8 there's no evidence of disorderly marketing in a
9 number of these areas. Thank you.

10 JUDGE CLIFTON: Mr. Stevens.

11 MR. STEVENS: Your Honor, I just want to
12 make sure the record reflects the response to
13 the requests, and the requests of this group, is
14 ongoing. The answer to the questions concerning
15 items -- I think it's 8 through 12, is that the
16 right number?

17 JUDGE CLIFTON: Yes.

18 MR. STEVENS: I want to be sure it's the
19 right number. 8 through 12, certainly in the
20 mind of the Department, are not the object of
21 fact-finding rulemaking. Which we are here to
22 make a record, a factual record, upon which the
23 Department can decide what appropriate
24 modifications to existing regulations should be,
25 if any.

1 And these are -- these items, 8 through
2 12, are the material for litigation. They are
3 not material for rulemaking. So -- and I agree
4 to the extent that they are called
5 interrogatories.

6 What they are asking for is for the
7 Department to predisclose it's deliberative
8 process and its decision-making process. This
9 is something that the courts have held
10 sacrosanct for many years, and it's certainly
11 not a change in any procedures or anything of
12 that type.

13 This proceeding will be no different than
14 any others in terms of how the department
15 conducts rulemaking, formal rulemaking, in terms
16 of making a record, evaluating the record for --
17 records evidence for and against various
18 proposals and making decisions.

19 Everyone knows this is controversial.
20 Everyone knows that this will probably be the
21 object of lawsuits as the prior rule making on
22 producer-handlers has been and continues to be.

23 But this is not the correct forum to air
24 legal argument and legal issues. That's what
25 the court system is for. So we -- we will not

1 respond to them. And if lawsuits ensue, then so
2 be it. But they will -- they will be -- they
3 will be determined in another forum, not in this
4 forum.

5 JUDGE CLIFTON: Thank you, Mr. Stevens.
6 Mr. Ricciardi.

7 MR. RICCIARDI: Two points quickly.
8 First, I am a little bit concerned that
9 Mr. Stevens has already indicated that there's
10 going to be lawsuits. If the Department denies
11 all of the proposals, why in the world would
12 there be lawsuits? So I'm worried at this
13 moment that we have a prejudged issue, number
14 one.

15 MR. STEVENS: Your Honor, I object. I
16 object. Your Honor, this is not the place for
17 this type of argument.

18 JUDGE CLIFTON: The objection is
19 sustained.

20 MR. STEVENS: Please.

21 MR. RICCIARDI: Okay. That's my first
22 one.

23 JUDGE CLIFTON: Next point.

24 MR. RICCIARDI: Next point is this. The
25 reality is --

1 JUDGE CLIFTON: By the way, there could
2 still be lawsuits, but go ahead.

3 MR. RICCIARDI: Maybe. There may be,
4 Judge, but more likely there wouldn't. That's
5 the first point.

6 Second point is case law, there is
7 actually the constitution. There is the due
8 process clause that says that -- that a client,
9 a person, is entitled to know objectively how to
10 conduct themselves so that they can determine
11 what they're going to do in operating their
12 business. For any hearing, you need to know
13 what the standards is. And I sit here and I'll
14 see if I can get Mr. Miltner to go to Westlaw
15 since I can't get my computer to open, and we
16 can find the constitution and the cases that say
17 that.

18 So having objective criteria about how it
19 is going to be determined, what the factors are,
20 are critical in any type of a judicial
21 proceeding, regulatory or not.

22 JUDGE CLIFTON: I can't -- I can't
23 believe you feel blind-sided in any way as to --
24 as to what it is that is being addressed in this
25 rulemaking hearing.

1 MR. RICCIARDI: How the Department will
2 determine, for example, the issue of disorderly
3 marketing is something that we asked for data
4 about. To the extent we have not received it,
5 and we got a response that basically says we're
6 not going to give it to you and we only know it
7 when we see it, we are blind-sided.

8 MR. STEVENS: Your Honor.

9 JUDGE CLIFTON: Mr. Stevens.

10 MR. STEVENS: To that last point, I would
11 direct Counsel to read how many years, over 50
12 years of administrative rulemaking. If the
13 industries that are involved in this, everyone
14 in this room has been involved in numerous
15 rulemakings, or one or more. And this is
16 something which is known, has been known for
17 many years. Read the decisions of the Secretary
18 of Agriculture. They tell you what disorderly
19 marketing is, and they tell you what it's not.
20 Read the decisions.

21 The courts have sustained the decisions
22 of the Department of Agriculture and they have
23 found some to be lacking.

24 But in the vast majority, they have been
25 upheld. And the decision of the Secretary,

1 based on administrative records, one of which
2 we're conducting here is done, decisions are
3 made, court reviews are had and so the process
4 was ongoing for many years.

5 In this proceeding, we are not presented
6 with a request to tell us before we decide how
7 you are going to decide it, how you are going to
8 do this. No court has ever required us to do
9 that. And if some party wants to see if they
10 can establish that in some other forum than
11 this, let it be done and the Department will
12 respond and we'll see how all that works out.

13 We're not going to do it without being
14 directed to do it. We've been doing it this way
15 for all these many years and it seemed to have
16 worked pretty well. So until directed to do it
17 another way, I assume we're going to continue it
18 the way we have been doing it.

19 JUDGE CLIFTON: Thank you, Mr. Stevens.
20 Mr. English.

21 MR. ENGLISH: Charles English. And with
22 a fair amount of respect and otherwise to Syd
23 Berde, who has passed on, but from which I get
24 much of this material, the fact of the matter
25 is, your Honor, that the Agricultural Marketing

1 Agreement Act does not, in our view -- and I
2 realize they disagree on the other side -- but
3 in our view, the Agricultural Marketing
4 Agreement Act does not establish any exemption
5 for producer-handlers.

6 It is quite clearly a creature of
7 administrative discretion as was held by the
8 judicial officer in the Independent Milk
9 Distributors Association in 1961.
10 Producer-handlers, quote, have no legal right to
11 be exempt from the pricing and pooling
12 provisions of the orders.

13 They have no legal right to be exempt
14 from regulation. Further, in 1974, it is
15 well-settled that the Secretary is authorized by
16 the Act to fully regulate producer-handlers,
17 even if they receive no milk from anyone else.
18 The Secretary is not required to provide any
19 exception for producer-handlers. That is from
20 in re: John Bertovich, B-e-r-t-o-v-i-c-h, et
21 al. 36 AD 133, 1977, in which --

22 JUDGE CLIFTON: 36 what?

23 MR. ENGLISH: 36 AD, Ag Decision, 133.
24 Which, of course, is part of what Mr. Stevens is
25 referencing. Is that there are 70-plus years of

1 ag decisions and federal court decisions that
2 define what is necessary here.

3 The judicial officer there was quoting,
4 in re: Associated Milk Producers, 33 A.G.
5 Decisions 976 -- In re: Associated Milk
6 Producers, 33 A.G, otherwise known as Ag
7 Decisions, 976, 1974.

8 JUDGE CLIFTON: I'm glad the way we cite
9 that now is AGRIC.DEC.

10 MR. ENGLISH: Well, in this case
11 Mr. Berde may have been ahead of his time or
12 something, so --

13 I would also point out that the Third
14 Circuit, in a very relevant case called Ideal
15 Farms, Inc. versus Benson, rejected
16 producer-handler contentions that the AMA did
17 not authorize the full regulation of producers
18 in their capacity as handlers. Were we to
19 accept appellate's construction of the Third
20 Circuit --

21 MR.MR. VENITE: I would like to object.

22 MR. ENGLISH: Excuse me. We were --
23 excuse me.

24 We have just been challenged for what a
25 legal standard is and whether or not the

1 Department feels it necessary to respond, I
2 think the record should have real case law on
3 the subject.

4 There is no necessity to prove disorderly
5 marketing because the right to the exemption is
6 not a right. It is a matter of administrative
7 discretion. And I am entitled to give my cases
8 in response as opposed to getting up and saying,
9 oh, the constitution says that.

10 Well, I'm responding with real cases.
11 And just because they don't like real cases
12 doesn't mean I don't have the right to stand up
13 here for a far less amount of time than anyone
14 else has been up today to respond to that
15 contention.

16 JUDGE CLIFTON: Mr. Vetne, I'm going to
17 hear him out but, you may make your objection.
18 But I'd like you to do it, please, when he's
19 finished.

20 MR.MR. VENITE: Then my objection will be
21 moot.

22 JUDGE CLIFTON: It will be moot. I'm
23 going to hear it, but I'll still let you put it
24 of record, if you'd like. Continue please,
25 Mr. English.

1 MR. ENGLISH: Thank you, your Honor. The
2 Third Circuit at 288 F 2nd citing Rock Royal,
3 that they could avoid the intent of the Act if
4 their contention were to prevail.

5 I will, as a matter of courtesy, not
6 continue with umpteen citations. But the fact
7 of the matter is, your Honor, that the exemption
8 is one of administrative convenience and
9 discretion. Whatever a prior Secretary has said
10 about what may or may not be needed is, in our
11 view, not relevant.

12 In fact, Judge Friedman, with an earlier
13 case from the 2005 decision, was litigated,
14 specifically said that another Secretary may
15 view it differently.

16 Our view is disorderly marketing may --
17 need not be shown at all. It is merely a fact
18 that the statute on its face says that everyone
19 shall have uniform prices, and there is no
20 extension, it is a creature of administrative
21 convenience, and therefore administrative
22 convenience can be done away with.

23 JUDGE CLIFTON: Before you leave,
24 Mr. English --

25 MR. ENGLISH: Yes.

1 JUDGE CLIFTON: -- what is the response
2 to the actual situation on the ground when a
3 producer-handler, who has been enjoying that
4 exemption, invests in accordance therewith, and
5 then, as a matter of administrative convenience,
6 loses the exemption?

7 MR. ENGLISH: Well, since it has long
8 been stated there's no legal right to it, they
9 had no right to rely on it. The Judicial
10 Officer and the Secretary have always said
11 that's what it is.

12 And since we go back to 1961 -- and I'm
13 not sure we've heard from a producer-handler
14 that goes back to 1961, we might talk about but
15 that's at least 1961. I suspect, although I do
16 have my cases here, that we can go back beyond
17 1961, check that the Secretary has always said,
18 and the Judicial Officer has always said, and
19 the Third Circuit and the Fifth Circuit, and now
20 the D.C. Circuit have always said that this
21 matter may be taken away because it isn't a
22 legal right. If it's not a legal right, you are
23 not entitled to rely on it.

24 JUDGE CLIFTON: Okay. Thank you,
25 Mr. English.

1 Mr. Vetne, I'll hear you out on your
2 objection, if you still want to make it.

3 MR.MR. VENTE: I have not -- I have not
4 gotten up before on this topic, although when
5 Mr. English spread his hands out he appeared to
6 include me.

7 No, my objection and my standing up was
8 I'm not sure -- I lost track of what the issue
9 is. But I am certain that the response of
10 Mr. English was in the nature of a lengthy
11 argument that ought to be in the brief.

12 And now he's gotten, you know, whatever
13 that time was and whatever that case is, you
14 know, an argument in the middle of the case.
15 You don't want everybody else to give a
16 counterargument, and I won't.

17 But I would hope that if he does that
18 again and I stand up, you will recognize me and
19 let me say, this is argument, can we have it at
20 the end of the case or in brief. That's it.

21 JUDGE CLIFTON: Thank you, Mr. Vetne.
22 Mr. Yale.

23 MR. YALE: We concur.

24 JUDGE CLIFTON: Thank you, sir.
25 Mr. Carroll?

1 MR. YALE: Well, let me -- there's one
2 thing. We'd like to have a witness and move on.
3 My client -- there will come a time when we'll
4 argue, but we need to get the facts in the
5 record and that adds nothing to the facts. And
6 they're going to move later on that we need to
7 go later in the day, which is beyond 6:00,
8 because they're not getting anywhere. Well,
9 they're debating and causing debate. Let's move
10 on with the exhibits and the testimony.

11 JUDGE CLIFTON: You know, Mr. English has
12 said very little thus far and what he has said
13 has been valuable and he's not wasting my time.
14 Mr. Carroll.

15 MR. CARROLL: I don't mean to impress on
16 your time, or anyone else's also, but most of my
17 career was developed on these cases he's talking
18 about. As far as I know, the United States
19 Supreme Court has never ruled in the line of
20 what he says on what the law is. Until that
21 happens, it's still an open question. And I'm
22 not going to go any further than that, with the
23 permission of the Court. Thank you very much.

24 JUDGE CLIFTON: Thank you, Mr. Carroll.
25 Now, let's see. Is this the time for Dennis

1 Tonak and Mike Asbury to testify?

2 MR. RICCIARDI: Yes.

3 JUDGE CLIFTON: Who would be calling
4 them?

5 MR. BESHORE: Sure.

6 JUDGE CLIFTON: Who would be calling
7 them? Mr. Beshore. Mr. Tonak, when it's after
8 lunch, it's very good that everyone is awake.

9 MR. BESHORE: Your Honor, we have made
10 available a 12-page statement with one
11 attachment which I would ask to be marked as --
12 with the next consecutive exhibit number.

13 (Exhibit 24 was marked for
14 identification.)

15 JUDGE CLIFTON: All right. I'll need a
16 copy, please, and the next number will be 24.
17 Thank you very much. Does the USDA table have
18 enough of them? You have the record copy and
19 enough for you all to see?

20 MS. FISHER: Yes.

21 JUDGE CLIFTON: All right. Mr. Tonak,
22 I'd like you to identify yourself and then I'll
23 swear you.

24 THE WITNESS: My name is Dennis Tonak.

25 JUDGE CLIFTON: You've got to be very

1 close to the mic.

2 THE WITNESS: My name is Dennis Tonak,
3 T-o-n-a-k.

4 JUDGE CLIFTON: Would you raise your
5 right hand, please?

6 (The witness was sworn.)

7 JUDGE CLIFTON: Thank you.

8 DENNIS TONAK

9 of lawful age, being first duly sworn, was examined and
10 testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BESHORE:

13 Q. Mr. Tonak, would you proceed with your
14 statement which has been marked as Exhibit 24? Proceed
15 to present that for the record.

16 JUDGE CLIFTON: Is there anyone else who
17 needs a copy?

18 (Off the record.)

19 A. I'm the Manager of Mid-West Dairymen's
20 Company, 4313 West State Street, Rockford, Illinois,
21 61102. This testimony is in support of Proposal 1 and 2
22 and is on behalf of Mid-West Dairymen's Company and
23 Lakeshore Federation Dairy Cooperative.

24 Midwest is a qualified Capper-Volstead
25 cooperative representing 163 dairy farms in northern

1 Illinois and southern Wisconsin. Mid-West is
2 responsible for supplying an Order 30 distributing plant
3 which is jointly owned by Mid-West and Prairie Farms
4 Dairy. Midwest also supplies milk to other Order 30
5 pool and nonpool plants.

6 Lakeshore Federated Dairy Cooperative's
7 member cooperatives are all qualified Capper-Volstead
8 cooperatives. Lakeshore provides a vehicle through
9 which its members develop direction on dairy policy,
10 legislative activities, and Federal Order issues, along
11 with providing additional member benefits and services.
12 The Lakeshore members are Manitowoc Milk Producers
13 Cooperative, Manitowoc, Wisconsin organized in 1933;
14 Milwaukee Cooperative Milk Producers, Brookfield,
15 Wisconsin, one of the oldest dairy bargaining and
16 service cooperatives in the country and formed in 1961;
17 Mid-West Dairymen's Company, Rockford, Illinois,
18 organized in 1924 and reorganized in 1932; and Scenic
19 Central Milk Producers Cooperative, Boscobel, Wisconsin,
20 formed in 1998.

21 Lakeshore represents about 4,000 dairy
22 farmers with an average herd size of 75 cows and who
23 produce approximately 4,500 pounds of milk per farm per
24 day or around 135,000 pounds per farm per month. The
25 milk is primarily pooled on Federal Order 30. Lakeshore

1 and its member cooperatives have supported the Federal
2 Order system because the Federal Order system generally
3 provides fair and equitable treatment of both producers
4 and handlers. We want a level playing field for both
5 producer and handler. It is our belief that classified
6 pricing and the market-wide pooling of those classified
7 pricing proceeds contribute to the orderly market
8 conditions and a level playing field. The market-wide
9 sharing of the pool proceeds also enhances the income
10 for all dairy farmers participating in the pool. This
11 belief and philosophy provides the framework for our
12 support of Proposal 1 and 2.

13 Our concern with current producer-handler
14 exemption is three fold:

15 A: A producer-handler removes a revenue
16 source from the market-wide pool. The producer-handler
17 does not create "new" fluid milk sales or customers to
18 any great extent but cannibalizes already existing
19 sales. Since the producer-handler does not contribute
20 to the pool the net effect is to reduce the revenue for
21 all pooled producers.

22 B. A producer-handler has a competitive
23 advantage in the market that can lead to disruptive and
24 disorderly marketing conditions. One method of
25 determining the producer-handler "advantage" is to

1 calculate the difference between the regulated minimum
2 class I price and the statistical uniform price or
3 "blend price." Using this method the difference in the
4 Upper Midwest Order is approximately 14 cents per
5 gallon. This is a huge price advantage for the
6 producer-handler and can easily destabilize a market.

7 C. An individual producer who packages
8 and distributes his own milk receives much different
9 pricing treatment under the Order than a group of dairy
10 farmers who form a cooperative and package and
11 distribute their own milk. The group of producers takes
12 the raw milk production risk and, through their
13 cooperative, makes the investment and ownership risk of
14 operating the fluid plant just as a producer-handler
15 does. But the price risk is much different.

16 Muller Pinehurst. Much of our
17 perspective on producer-handlers and their potential
18 impact on the fluid market has been developed through
19 Mid-West's joint venture ownership of a small fluid milk
20 plant, Muller-Pinehurst Dairy.

21 In 1981, Mid-West purchased a 50 percent
22 ownership in Muller-Pinehurst Dairy. Muller was a
23 family owned business started by L. Fred Muller in 1900.
24 He and his horse, Old Phillip, delivered milk to area
25 homemakers. In 1947 Muller acquired Pinehurst Farms.

1 Pinehurst Farm's purebred herd of Guernesey cattle
2 produced milk for the Pinehurst Farms milk plant. The
3 two dairies continued to operate as separate companies
4 with the Guernsey herd at Pinehurst Farms continuing to
5 supply milk for the Pinehurst plant. Growth in sales
6 necessitated the need for additional milk suppliers from
7 area dairy farms for the Muller plant.

8 In the early days of Mid-West, the
9 cooperative marketed and priced the milk of dairy
10 farmers to 15 handlers in the Rockford area. The
11 pricing was based on a condensery price plus a
12 differential. There were a number of condenseries
13 within 45 miles of Rockford. The fluid handlers
14 attempted to buy milk from farmers at a discount to the
15 established pricing formulas. Chaotic and disruptive
16 market conditions ensued. A committee of three
17 arbitrators - one representing producers, another
18 representing the handlers, and a third person from the
19 University of Wisconsin - worked to resolve the
20 situation. Without a regulated price and a formula for
21 sharing that price, extreme price competition could and
22 did exist. An eventual result of the committee's
23 deliberations was the Rockford Freeport Federal Order,
24 instituted on September 1, 1949.

25 When Muller acquired Pinehurst in 1947,

1 any handler could have been a disruptive force in a
2 small local market like Rockford. A producer milking
3 his cows and doing home delivery with a horse and wagon
4 would not disrupt a very large area. Home delivery was
5 a large part of the business and the highway
6 transportation infrastructure was not developed as it is
7 today. Since then with better refrigeration, roads, and
8 transportation equipment, a producer-handler can be a
9 disruptive force over a very large area.

10 The Muller Dairy and Pinehurst Farm were
11 merged in 1957 to form Muller-Pinehurst Dairy. A new
12 milk plant was built on then Pinehurst Farm. Eventually
13 the cows were sold. At the peak of the home delivery
14 period, Muller-Pinehurst had 40 small trucks doing home
15 delivery 6 days per week and 15 larger straight trucks
16 doing retail deliveries. Over time, the home
17 distribution business faded and then was discontinued.
18 Muller's distribution area increased from the Rockford
19 and Winnebago County area to include much of the Chicago
20 suburbs. During the last years of old Order 30 - the
21 Chicago Regional Order - Muller was among the smaller
22 distributing plants pooled on the Order. At least it
23 was not large enough to be the major supplier to any of
24 the Chicago Region's large grocery lanes. The last of
25 Fred Muller's descendants involved in the operation and

1 manage of Muller Pinehurst, his great grandson, retired
2 last year.

3 The producer-handler advantage. A
4 regulated handler has to account to the market-wide pool
5 at the minimum regulated prices. Since a
6 producer-handler has no minimum price obligation, the
7 minimum Class I price provides a pricing umbrella that
8 the producer-handler can use to undercut the regulated
9 price thereby achieving a price advantage and enabling
10 the producer-handler to gain or retain business. The
11 producer-handler in Federal Order 30 has a 14 cent a
12 gallon advantage over the regulated price. This
13 advantage is calculated using the difference between the
14 Class I price and the statistical blend price.
15 Attachment 1 was compiled from the Order 30 price
16 Announcements.

17 This potential loss to Mid-West's dairy
18 farmer members would be devastating and could easily
19 exceed \$2.5 million annually to Mid-West. For
20 January 2009 Mid-West paid almost \$700,000 to the Market
21 Administrator Producer Settlement Fund and the
22 Administrative Assessment Fund. We routinely have
23 obligations to the Market Administrator for half that
24 amount. In fact, Mid-West maintains a \$500,000 credit
25 line for the purpose of meeting our obligation to the

1 Market Administrator in a timely fashion. The money
2 Mid-West pays to the producer settlement funds would be
3 welcome cash if it could be paid directly to Mid-West's
4 producer members at these times of low prices.

5 Muller and Mid-West are not competing
6 with any producer-handlers today however over the last
7 decade a number of large dairy farms have been built and
8 began operating in our area. One farm currently under
9 construction 50 miles from our Rockford, Illinois plant
10 has announced plans for a 7,000 head milking herd. An
11 additional 14 cents a gallon (the producer-handler
12 advantage) would generate an extra \$2.9 million in
13 income annually for that farm operating as a
14 producer-handler. It would be completely unfair to the
15 dairy farmer owners of Muller Pinehurst to have a
16 competitor 50 miles away with that kind of price
17 advantage.

18 Balancing the market. I have observed
19 over my 30-plus years in the dairy industry a number of
20 ways that producer-handlers can balance their surplus
21 production.

22 Twenty years ago a producer-handler told
23 me how he balanced his milk production and packaged milk
24 sales. He had an arrangement with a small group of
25 stores 200 miles away where he would work with the store

1 to undercut the established prices from the Federal
2 Order regulated plants. He would deliver a load of
3 product to the store and in a matter of days his surplus
4 was gone. While these distant stores regular supplier
5 may have been upset the stores were happy about the
6 extra volume of business. And it did not noticeably
7 affect the producer-handler's local competitive price.

8 Muller Pinehurst has variability in the
9 day-to-day and week-to-week needs for raw milk.

10 Muller's school business create parts of variation due
11 to filling the school pipeline and adjusting for days
12 that school is not in session. Another part of the
13 variability can be due to competitive sales among
14 grocery stores.

15 Many consumers perceive little difference
16 between brands of milk and so they will shop at the
17 store with the lowest milk price. This shifts milk
18 volume between stores, the fluid plants that supply the
19 stores, and the producers who supply the fluid plants.
20 Twenty years ago in Texas my employer, a cooperative,
21 had a full supply arrangement with a fluid plant.
22 Whenever the large chain store supplied by that plant
23 had a sale, the fluid plant needed more milk.
24 Coincidentally, another cooperative supplying a
25 different fluid plant which was supplying a different

1 chain store would become long on milk. The needed
2 balancing supplies could be purchased from that second
3 cooperative.

4 A group of stores in the Rockford market
5 receive their "store" brand milk from a distant
6 supplier. The store brand milk has predominant
7 positioning, shelf space, and attractive pricing.
8 Muller, as a local dairy, has a small amount of shelf
9 space in these stores. Store also attaches a premium
10 price to the Muller milk. As a result of the limited
11 shelf space and the high price the Muller sales volume
12 is very low. Occasionally the distant supplier of the
13 store brand milk is unable to supply these stores. Then
14 the stores call Muller with the directive to immediately
15 deliver a much greater than normal milk volume to the
16 stores. Of course the Muller-labeled milk dominates the
17 milk case and the Muller sales volume in those stores
18 increases. It is apparent that one reason the stores
19 maintain Muller as a secondary supplier is to help
20 supply or balance the stores' needs when their main
21 supplier cannot perform.

22 A producer handle can use price to help
23 balance production. A producer-handler can use a
24 secondary supplier status - especially when used in
25 concert with pricing - to balance production. A

1 regulated handler can have a difficult time balancing a
2 milk supply while a producer-handler does not have a
3 price constraint. Allow me to illustrate. At certain
4 times of the year fluid sales drop off. These drops are
5 especially noticeable during the holiday period --
6 holiday periods and during the summer. As an example,
7 last summer and this past Christmas, Mid-West moved
8 loads of milk 250 miles and more to find a manufacturing
9 outlet. A producer-handler would not be constrained by
10 the Federal Order minimum pricing and could be very
11 aggressive in pricing and selling his milk locally
12 through additional packaged product sales. The
13 producer-handler would avoid the transportation and
14 other costs of moving excess production great distances.
15 Regulated handlers whose sales are already in the
16 holiday slump would lose even more fluid volume. When
17 the volume shifts from one regulated plant to another
18 regulated plant for any of the above reasons, the
19 Class I value stays in the pool and is shared with all
20 producers in the pool. When the volume shifts to a
21 producer-handler, the Class I value is removed from the
22 pool and the milk of all producers in the pool loses
23 value. When a large producer-handler uses the
24 "producer-handler advantage" to gain business, chaotic
25 and disorderly marketing conditions exist and all

1 producers suffer.

2 Producer-handlers and the Federal Order.
3 When Muller and Pinehurst started business there wasn't
4 a producer-handler exemption since this wasn't a Federal
5 Order. Since then, the Federal Order has created an
6 artificial distinction between a dairy farm family who
7 bottles their own milk and a group of dairy farmer
8 families who bottle their milk in a plant owned by their
9 dairy cooperative.

10 In the early days of the Order program,
11 that distinction may have been justified. Most
12 producer-handlers met their labor needs from the
13 immediate family. The cows were milked by hand or with
14 a bucket mixer. Pipeline milkers did not exist.
15 Processing and packaging milk was labor intensive.
16 Every phase of the dairy operation was slow and tedious.
17 Milk bottles were washed by hand. Vat pasteurizers were
18 small and pasteurizing milk took many hours. Bottle
19 filling was a manual operation. Ice was used to keep
20 the milk cold during delivery. For many years Muller
21 operated its own ice plant. Distribution was often by
22 horse and buggy. Many producer-handlers -- handlers
23 operated only one route. There would be additional
24 reporting requirements for a handler regulated by a
25 Federal Order. Since most farmers packaging their own

1 milk operated on a small scale, the benefit to the
2 Federal Order pool of regulating these producer-handlers
3 was quite small compared to the cost of auditing the
4 records and enforcing minimum payments.

5 At the outset of the producer-handler
6 exemption, much of the milk distribution was done on
7 home delivery routes and to corner store neighborhood
8 markets. After World War II milk distribution began a
9 noticeable shift away from home delivery. While there
10 may be many reasons for this, the one I hear most often
11 is that more women began working outside the home and no
12 one was available to put the home delivery in the
13 refrigerator. Between 1955 and 1975 home delivery
14 virtually disappeared in the Midwest. Many of the
15 producer-handlers discontinued their milk processing.

16 The dairy industry has changed
17 dramatically from those early producer-handler days.
18 Home refrigerators are much larger than 40 years ago.
19 My refrigerator is much larger than my parents and
20 grandparents, and my wife can buy more milk on her trip
21 to the store. Trucks are much larger, highways are
22 better, raw milk (at least for Grade A) is handled in
23 bulk tanks and not cans, most Grade A farms save labor
24 with pipeline milkers, some farms use robotic milkers or
25 other forms of automated milking, dairy farms and plants

1 use computerized record keeping and process control
2 systems, and the processing and packaging equipment is
3 automated and faster. In 1958 Muller's new half-pint
4 machine could package 45 units per minute and now one
5 machine can package 300 units per minute .

6 Small business impact. The Notice of
7 Hearing states that a dairy farmer is considered a small
8 business if he has a gross revenue of \$750,000 or less.
9 Likewise, a plant was considered a small business if the
10 plant had less than 500 employees. Producer-handlers
11 are currently exempt from Order regulations based on
12 their status as a dairy farmer. A dairy farmer who in
13 addition to producing milk is also processing that milk.
14 Accordingly it would be appropriate to consider
15 producer-handlers as small businesses on the same basis
16 applied to dairy farmers in the Notice of Hearing, a
17 gross revenue of \$750,000 or less.

18 Virtually all Mid-West producers are
19 small businesses. The average Mid-West dairy farm
20 produced 4,100 pounds of milk per day for the last year.
21 This equates to 124,900 pounds in a 30 day month, for
22 1 million --

23 JUDGE CLIFTON: Excuse me. Do that
24 sentence again, will you, please, beginning with
25 this equates?

1 A. This equates to 124,980 pounds in a 30
2 day month or 1,520,590 pounds in a 365 day year. The
3 average Mid-West producer milks between 60 and 70 cows
4 based on our estimates. In fact, we have only one farm
5 over the 500,000 pound small business level.

6 Changes in regulation. I have already
7 discussed many of the changes in milk production,
8 processing, and distribution that have occurred since
9 the inception of Federal Orders. The dairy industry has
10 moved from hand milking to robotic milkers, from can
11 milk to bulk milk, from distribution by horse and wagon
12 to distribution with large tractor trailer trucks.

13 Federal Orders themselves have changed
14 many times over the years. The pooling requirements
15 have changed, the method used to determine prices have
16 changed, the classes of utilization have changed, the
17 geographic area covered by the Orders and the numbers of
18 Orders themselves have changed. These changes have had
19 a financial impact at various times on Mid-West, on our
20 members, and on Muller. In 2000 we had the changes
21 brought about by Federal Order Reform. Since then
22 additional changes occurred in make allowances and the
23 end product pricing formulas along with pooling
24 participation requirements. A plaque in our office
25 says, quote, the only thing permanent is change, close

1 quote. Or to paraphrase the old saying, the only sure
2 things in life are death and taxes and change.

3 Over the years, producer-handlers have
4 changed their operations to meet the changed Grade A
5 regulations the same as any other dairy farm or dairy
6 plant. I am sure they have changed their milk
7 production and plant operations, just as the dairy
8 farmer owners of Muller-Pinehurst have done. It is now
9 time for a change in the Federal Order Regulation and
10 the pricing and pooling responsibilities that go with
11 those changes.

12 There may have been valid reasons to have
13 had a producer-handler exemption at one time during the
14 history of the Federal Order Program. If the exemption
15 did not already exist there would be no compelling
16 reason to create a special producer-handler exemption
17 today. Mid-West Dairymen's Company and Lakeshore
18 Federated Dairy Cooperative urge the adoption of
19 Proposals 1 and 2 as being in the best interests of the
20 entire dairy industry. Thank you.

21 BY MR. BESHORE:

22 Q. Mr. Tonak, I have just a few additional
23 questions for you. Attachment 1 to Exhibit 24, can you
24 just tell us -- first of all, did you prepare that
25 personally?

1 A. I prepared that personally.

2 Q. And can you tell us just briefly how you
3 prepared it?

4 A. I took the Federal Order 30 Class 1 and
5 uniform price announcements and prepared them for each
6 month, looked at the difference. Came up with an
7 average difference for the year. Divided that average
8 difference by 11.6 as a factor of the gallons of milk in
9 a hundred pounds of milk.

10 Q. Okay. Now, the gallons per hundred
11 pound, that figure or the amount per gallon doesn't show
12 on attachment one, correct?

13 A. That is correct. It varies from year to
14 year. In 2006, it calculates out to 12.9 cents per
15 gallon. 2007, 13.8 cents. 2008, 18.7 cents for a
16 three-year arithmetic average of 15.1 cents. For the
17 three month recorded there in 2009, the average is 26.7
18 cents per gallon.

19 Q. Okay. In your -- in your testimony, you
20 used a figure, I think, of 14 cents per gallon?

21 A. That is correct. I felt that
22 producer-handlers would have a difficult time achieving
23 100 percent utilization in Class I milk, and so there
24 was an adjustment made to try to come with a realistic
25 number instead of a higher than what would be in

1 practicality.

2 Q. Okay. Now, 14 cents per gallon, which is
3 less than the number shown in most years, or is an
4 average nevertheless a substantial price variation or
5 price advantage in competition for the sale of fluid
6 milk products, is it not?

7 A. It is. Our Muller operation loses
8 customers for much, much less -- much lower price
9 differentials in the bracket of pennies a gallon.

10 Q. And we're talking here a producer-handler
11 having a 14 cent per gallon?

12 A. That is correct.

13 Q. Okay. Now, let me just ask you a
14 specific question about a word you used on page 7 of
15 your testimony. And I think perhaps the word -- you
16 used the wrong word. In the second full paragraph, next
17 to last sentence that begins "coincidentally" on the
18 typed page, "coincidentally another cooperative." Do
19 you see that?

20 A. Yes.

21 JUDGE CLIFTON: Which page?

22 MR. BESHORE: Page 7.

23 JUDGE CLIFTON: 7, thank you.

24 Q. I want to ask you if what you actually
25 meant -- whether the correct thought there is

1 consequently?

2 A. Yes.

3 Q. Okay.

4 A. Consequently would be the better choice
5 of word.

6 Q. That's what you meant there, as a
7 consequence of what was going on with one supplier,
8 another cooperative --

9 A. Right, that is correct.

10 Q. -- had the felt effects. Okay. Now, I
11 just have two other questions on additional direct,
12 Mr. Tonak.

13 You are aware, and I think you've
14 referenced, that Proposals 1 and 2 were sponsored by or
15 presented by the National Milk Producers Federation and
16 the International Dairy Food Association?

17 A. I'm aware of that, yes.

18 Q. And you have testified on -- in support
19 of those proposals on behalf of Mid-West Dairymen's
20 Company and the Lakeshore Federated Dairy Cooperative,
21 correct?

22 A. That is correct.

23 Q. Now, are all of those cooperatives
24 members of the National Milk Producers Federation?

25 A. No, they are not.

1 Q. Okay. So can you just break that out for
2 us, please?

3 A. Mid-West is a member of National Milk
4 Producers Cooperative -- or Federation. And Manitowoc
5 Milk Producers Cooperative is a member of National Milk.
6 Milwaukee Cooperative Milk Producers and Scenic Central
7 are not National Milk members.

8 Q. Okay. Roughly of the 4,000 Lakeshore
9 members, what portion is represented by Milwaukee and
10 Scenic which are not National Milk members?

11 A. I would say a thousand, maybe a little
12 over.

13 Q. Okay. All right. Thank you. Now,
14 Mr. Tonak, you have given some very interesting and
15 detailed information both about -- about Midwest's
16 operation and about some experiences you've had in the
17 dairy business over the years. And one thing I didn't
18 do at the beginning of your testimony that I want to do
19 now, at the end, as the last question is, ask you to
20 just tell us about your experience in the dairy
21 industry? First of all, what's your educational
22 background?

23 A. I have a bachelor of science degree in
24 dairy science from South Dakota State University in
25 Brookings, South Dakota. Since 1973, I've been employed

1 in various marketing and management positions in the
2 dairy industry, throughout the Midwest and basically the
3 Southwest into the Mideast and the Southeast.

4 For the last 12 years, I've been the
5 manager of Mid-West Dairymen's Company there in
6 Rockford. And we also, in addition to the 50 percent
7 joint venture ownership of Muller-Pinehurst, we have a
8 cheese packaging sales and distribution wholly-owned
9 subsidiary in Shullsburg, Wisconsin. And I guess that
10 I've testified in a few other Federal Order hearings in
11 the past.

12 MR. BESHORE: Thank you very much,
13 Mr. Tonak. We would move for the admission of
14 Exhibit 24 with attachment 1.

15 JUDGE CLIFTON: Don't leave yet,
16 Mr. Beshore. I just want to ask a question
17 about the attachment. When you state Class I's
18 price, I understand that. Now, is the uniform
19 price the same thing as blend price, or is it
20 something different?

21 THE WITNESS: Yes, that would be one
22 terminology, would be the blend price, the
23 statistical uniform price. The way the Federal
24 Order 30 actually releases that number as the
25 statistical uniform price.

1 JUDGE CLIFTON: All right. Thank you.

2 If you have any follow up to that, go ahead

3 Mr. Beshore.

4 Q. Just the only follow-up question I'd have
5 is, your column titled Uniform is the statistical
6 uniform price for Order 30 for those months?

7 A. That's correct.

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

9 JUDGE CLIFTON: All right. Thank you,
10 Mr. Tonak.

11 All right. Who would like to begin
12 cross-examination of Mr. Tonak? Mr. Carroll,
13 you may.

14 CROSS-EXAMINATION

15 BY MR. CARROLL:

16 Q. Good morning, Mr. Tonak.

17 A. Good morning.

18 JUDGE CLIFTON: Oh, no, afternoon.

19 Q. Good afternoon. Thank you. That's where
20 I am today. I'm correct in assuming from your speech
21 that you haven't actually had any disruption in your
22 market from producer-handlers?

23 A. That would be correct.

24 Q. And direct your attention to the farm
25 that you described at page 6 of your statement. There's

1 some large plants -- you said large farms being built, I
2 think, 50 miles from Rockford. Do you know the name and
3 address of that farm?

4 A. I think they're calling themselves Family
5 Tradition Dairy. I know where the farm is located. I'm
6 trying to remember the exact road it's on, but it's just
7 south of Warren, Illinois.

8 Q. How do you spell that?

9 A. W-a-r-r-e-n.

10 Q. Warren, Illinois?

11 A. Yes.

12 Q. And do you know the name of the owner of
13 that farm?

14 A. I believe it would be the A.J. Bos
15 family.

16 Q. How you do you spell that, sir?

17 A. B-o-s.

18 Q. And can you tell me, you say it's a
19 family. Do you know who in the family is -- how do they
20 say it, milk the cows or turn the water on?

21 A. I would think that if they're milking --
22 or when they get to milking 7,000 cows, that Mr. Bos
23 probably will not be personally milking the cows. But I
24 really don't know who will be milking the cows.

25 Q. Assuming that's just a expression. Do

1 you know who's in control or management of the business?

2 A. Mr. Bos is.

3 Q. Himself?

4 A. Is my understanding. I do not know
5 Mr. Boss --

6 Q. Right.

7 A. -- personally. I know the construction,
8 I guess, going on. And I know the accounts that are in
9 the newspapers about the operation.

10 Q. Right. That's a source of your
11 information?

12 A. The partial source, yes.

13 Q. Okay. Do you know anything else about
14 the plans for that operation?

15 A. No, I do not.

16 Q. Okay. The history of this -- of your
17 area that you described, was that personal? I mean,
18 when did you first get into the area itself so that you
19 have some personal knowledge?

20 A. I have lived there for 12 years, been in
21 and out of the area since 1973. In 1982, Mid-West
22 celebrated their 50th anniversary and prepared a
23 publication. And some of that information was gained
24 from -- some of the information came from the great
25 grandson.

1 Q. Right.

2 A. You know, so it's verbal from people who
3 have been there. We've had a couple of families that
4 are still producing milk whose roots in the dairy
5 industry go back at least to the formation of the
6 cooperative. We have third and fourth generation
7 families involved there. We've got board members who
8 are now in their -- where the family has a second
9 generation serving on the board. And so the information
10 is assimilated and compiled over time from all of those.

11 Q. All of those sources?

12 A. Various sources.

13 Q. Have you ever heard of Oberweis Dairy?

14 A. Yes, I have.

15 Q. And where is that located?

16 A. Aurora, Illinois.

17 Q. Is that anywhere near you?

18 A. It's 70 miles from me, maybe.

19 Q. Right. Did you know they started as a
20 producer-handler? Did you know that?

21 A. Yes.

22 Q. And are they a producer-handler now?

23 A. They are a producer-handler. They
24 deliver milk to grocery stores. They operate their own
25 stores.

1 Q. All right.

2 MR. CARROLL: Thank you very much.

3 JUDGE CLIFTON: And do you know how to
4 spell Oberweis?

5 THE WITNESS: O-b-e-r-w-e-i-s-s (sic).

6 JUDGE CLIFTON: Thank you. Who next for
7 cross-examination? Mr. Yale.

8 CROSS-EXAMINATION

9 BY MR. YALE:

10 Q. Benjamin F. Yale for Continental Dairy
11 Products, Select Milk. Good afternoon, Dennis.

12 A. Good afternoon.

13 Q. Just really one topic I want to discuss.
14 You indicate support of Proposal 1 and 2. Do you
15 support also Proposal 26 of National Milk?

16 A. Lakeshore did not take a position on
17 Proposal Number 26. I know that they would not oppose
18 it. And I don't know of any reason why they wouldn't
19 support it. They just didn't take a position on it.

20 Q. Did you understand that National Milk is
21 a package deal of Proposals 1, 2, and 26? It wasn't
22 bits and pieces or -- did you have any understanding one
23 way or the other on that?

24 A. Well, National Milk may present their
25 proposals as a package of 1, 2 and 26. It is not listed

1 that way in the Notice of Hearing as being a package of
2 all three of them. And I'm assuming that's why they
3 were listed separately in the Notice of Hearing. And
4 Lakeshore took the position of supporting 1 and 2.

5 MR. YALE: I have no other questions.

6 JUDGE CLIFTON: Could I have a comment
7 from the USDA table as to why the proposals are
8 in the Order that they're in? Mr. Tosi.

9 MR. TOSI: Thank you, your Honor. The
10 proposals are listed in the hearing notice in
11 the way that they are. Proposals 1 and 2
12 comprise those proposals which, if I could
13 characterize it this way, kicked off everything
14 that results in us being here today. Those were
15 the proposals that initiated consideration to go
16 into a hearing and then deciding to come to a
17 hearing to consider the producer-handler and
18 exempt plant issue. Okay?

19 JUDGE CLIFTON: Was Proposal Number 3 the
20 next one in time that was received by AMS?

21 MR. TOSI: I don't know if they exactly
22 reflect the Order in which we received them. I
23 would characterize them that it generally does
24 that. We were careful because of the new
25 demands on the Federal Register that -- that we

1 have a lot of proposals, because they insist on
2 us showing how the regulatory language will
3 change. And in that regard, while many
4 proposals may seem similar, conceptually, given
5 how they were presented to us, had subtle
6 differences in how things would be stated in the
7 regulatory language.

8 We also had a prehearing information
9 session that was well attended or participated
10 by telephone and computer with everyone that had
11 submitted a proposal. And as a result of that,
12 or at that session, National Milk Producers
13 Federation offered what now is referred to as
14 Proposal 26.

15 JUDGE CLIFTON: Thank you. All right.
16 Who will next cross examine Mr. Tonak?
17 Mr. Ricciardi. And I bet he's not the last one.

18 CROSS-EXAMINATION

19 BY MR. RICCIARDI:

20 Q. Mr. Tonak, Al Ricciardi on behalf of
21 AIDA. It wasn't on my list of questions, but based upon
22 a question and an answer from Mr. Carroll, I have a
23 question of you. You're sure that Oberweis is a
24 producer-handler, correct?

25 A. I didn't answer that they were a

1 producer-handler. Or if I did, I did so in error. I'm
2 not aware of them being a producer-handler. I'm aware
3 of who Oberweis is. I'm aware that they started out
4 doing home delivery, that they're doing home delivery
5 currently and so on. If I stated that they were a
6 producer-handler, that was in error.

7 Q. Okay. That was in error. I'm glad you
8 corrected it because they're actually a distributing
9 pool plant in Order 30, is that correct?

10 A. That is correct.

11 Q. You are how old?

12 JUDGE CLIFTON: Now, is that fair?

13 Q. Okay. Then tell me when you were born.

14 A. It's easy to answer that one because
15 sometimes I get my age wrong. 1951.

16 Q. Okay. So what happened in 1947 or what
17 might have happened in 1947 was a little bit beyond the
18 period of time that you can personally testify to,
19 correct?

20 A. That is beyond the period of time in
21 which I have hands-on experience, that is correct.

22 Q. Personal knowledge?

23 A. At the same time, I was raised on a farm
24 in South Dakota. I milked cows by hand at a very early
25 age. We did not milk cows with a pipeline. And I want

1 to say it was 1964 or '65 we got a pipeline and a bulk
2 tank.

3 Q. I'm glad for all of that. Let's go back
4 to my question, which was that, in terms of personal
5 knowledge, obviously since you were born in 1951,
6 whatever may have occurred in 1947, you don't have
7 personal knowledge of, correct?

8 A. We can say that, yes.

9 Q. We could?

10 A. (Nodding head.)

11 Q. Okay. So that I understand it -- and I
12 think I do. Let's see if I make sure I do. Take a look
13 at your attachment 1 to your statement, which is Exhibit
14 Number 24. What you have done here is a mathematical
15 computation for the years 2006, '7, '8 and into '9. You
16 simply took the Class I price, you took the uniform
17 price and you put the difference there, is that correct?

18 A. That is correct.

19 Q. Now, let's go back -- you were here
20 during the course of the testimony of this morning when
21 Mr. Hatch and Mr. Dunajski testified, correct?

22 A. I was here for most of it, yes.

23 Q. Okay. Flip over to page 2 of your
24 statement. You state specifically in section B near the
25 bottom of the page that, using this method you see a

1 difference of approximately 14 cents per gallon between
2 the regulated community and the producer-handler,
3 correct?

4 A. I'm saying that there's a potential price
5 advantage for the producer-handler when you look at the
6 difference between the Class I price and the statistical
7 uniform price that equates to 14 cents per gallon.

8 Q. Okay. You did a mathematical
9 computation. You have not done any analysis to
10 determine if that is correct? You made an assumption in
11 your statement, correct?

12 A. I said that the difference between the
13 Class I price and the uniform price equates to 14 cents
14 a gallon. My view is that is an advantage that could
15 accrue to a producer-handler. That is based on fact
16 that producers receive, as a minimum regulated price,
17 the uniform price.

18 And using that as the benchmark for
19 producer costs, if it is or isn't, that's what regulated
20 producers receive. And so therefore the advantage that
21 a producer-handler may have between the price that
22 producers receive as a regulated price and the price
23 that a regulated handler pays as a Class I price equates
24 to 14 cents a gallon.

25 Q. The theory I understand, but you also

1 talked about you wanted to be realistic. So let's be
2 realistic together. Let's actually look at testimony
3 from a real producer-handler, Mr. Hatch, who talked
4 about the actual cost of production being in the range
5 of 21 or \$22. If you used the actual figures, the
6 actual cost of production, there is no theoretical
7 advantage. In fact, there is a disadvantage, correct?

8 A. I would say there's still an advantage.
9 If Mr. Hatch's cost of production is \$21 a hundred, all
10 producers with similar costs, with similar production
11 environment, have the same relative costs. And we have
12 in the Midwest producers that today have a much higher
13 cost of production than what they're being paid for
14 their milk.

15 Q. And so does Mr. Hatch --

16 A. And --

17 Q. -- correct?

18 A. -- to say that a producer's cost affects
19 how we should look at things differently, if he's a
20 pooled producer receiving the blend price or the uniform
21 price, or a producer-handler naming a number, we're
22 talking here in my testimony about the regulated
23 minimum prices and the type of advantage that can
24 accrue to a producer receiving, if you will, the uniform
25 price and charging himself, if you will, the Class I

1 price.

2 Q. We have no evidence at this point
3 that that's occurring at all. That's a theoretical
4 notion that you have put together in your statement,
5 correct?

6 A. Yes.

7 Q. Okay. Now, by the way, a question. Do
8 all of the members in the Mid-West Dairymen's Co-op get
9 the identical price for their milk?

10 A. No.

11 Q. There are over-order premiums?

12 A. There's different component tests.
13 There's different somatic cell counts. There's some
14 over-order premiums involved. Let's see, the way we
15 charge for hauling varies. We'll vary the producer's
16 costs for hauling based on how large or small the
17 producer is.

18 Q. So if someone who's in the co-op who's
19 larger, they may get a better deal than a smaller member
20 of the co-op, correct?

21 A. They may.

22 Q. Okay. And in fact --

23 A. And a small producer, if he's got
24 good quality, may get a better deal than a large
25 producer.

1 Q. But the point is, they do not get the
2 identical or equivalent or even equal price, correct?

3 A. That is correct.

4 Q. If I have a farm next to yours and we
5 both are members of Mid-West and the truck comes to our
6 joint right one after the other, the fact is that my
7 milk check in my mailbox may be totally different than
8 yours?

9 A. That you -- except in the case where
10 you've got the same butterfat, the same protein, the
11 same other solids, the same quality, the same volume,
12 you'll get the same check.

13 Q. But if I don't, I won't.

14 A. If two producers are the same, they get
15 the same check. We did not differentiate what a
16 producer is paid based on some esoteric formula of where
17 they're located or how well we like them. If they
18 have -- if they ship the same milk they get paid the
19 same.

20 Q. But if I have the same somatic cell
21 count, if I have the same quality as you but you are a
22 bigger producer in Mid-West, you get a bigger milk check
23 than I do, right?

24 A. Gross dollars, yeah.

25 Q. Okay.

1 MR. RICCIARDI: Thanks.

2 JUDGE CLIFTON: Come back, Mr. Ricciardi.
3 I don't know what you just proved there.

4 MR. RICCIARDI: Neither do I.

5 AUDIENCE MEMBER: Yeah, we do.

6 JUDGE CLIFTON: Did he get a bigger check
7 because he had greater volume?

8 MR. RICCIARDI: He may have -- well, I
9 can ask. He may have a bigger check because he
10 has greater volume. They may have a better deal
11 with him. The point is, Judge --

12 JUDGE CLIFTON: Well, I don't know
13 whether you are going after the over-order
14 pricing, if that's what you meant. But if you
15 would go back to that?

16 MR. RICCIARDI: We will tie it up, Judge,
17 as we go later on into this hearing. But what
18 I'm trying to deal with is that there may be
19 distinctions between even the regulated
20 community in terms of what they receive. They
21 do not receive identical or even equal pricing.

22 JUDGE CLIFTON: All right. But follow
23 up, if you will. You've gotten an answer that
24 if one person has a greater volume of milk, he
25 gets a bigger check.

1 MR. RICCIARDI: Right.

2 JUDGE CLIFTON: But I want to know if
3 it's just based on the fact he provided more
4 milk.

5 MR. RICCIARDI: And I'll get to that one,
6 Judge. I thought I had laid the foundation for
7 it. If I didn't, I apologize. Maybe I wasn't
8 clear enough.

9 BY MR. RICCARDI:

10 Q. Assuming everything is equal in terms of
11 the quality of our milk, somatic cell count, quality
12 issues, whatever. The fact is, because you are a larger
13 volume producer the co-op will pay you a lower -- a
14 higher price, correct?

15 A. We have a --

16 JUDGE CLIFTON: Per hundredweight?

17 Q. Per hundredweight.

18 JUDGE CLIFTON: That's your question?

19 MR. RICCIARDI: Yes.

20 JUDGE CLIFTON: You may answer.

21 A. We have a published premium schedule for
22 quality and volume premiums. It also includes the
23 quality discounts. It includes the hauling rates. And
24 depending on where you fall within that category, you
25 may get the same price.

1 Now, if we're talking a producer milking
2 ten cows and a producer milking a hundred cows, yes,
3 there's a difference.

4 MR. RICCIARDI: Fair. Thank you, Judge.

5 JUDGE CLIFTON: Thank you. I know that
6 we've had testimony about the somatic cell
7 count, not just from you, but I just want to
8 make sure we're spelling that right. How do you
9 spell that?

10 THE WITNESS: Somatic is s-o-m-a-i --
11 excuse me, s-o-m-a-t-i-c. Cell is c-e-l-l and
12 count is c-o-u-n-t.

13 JUDGE CLIFTON: All right. And just so
14 that the terminology is clear in the transcript,
15 tell us what that -- how the words look for
16 over-order pricing.

17 THE WITNESS: Oftentimes the words over
18 and order are hyphenated and then pricing or
19 price.

20 JUDGE CLIFTON: I guess premiums was also
21 used in connection with over order.

22 THE WITNESS: Yes. They're used
23 interchangeably.

24 JUDGE CLIFTON: Thank you. All right.
25 Who next will cross-examine Mr. Tonak?

1 Mr. Tosi.

2 CROSS-EXAMINATION

3 BY MR. TOSI:

4 Q. Mr. Tonak, do you, on behalf of the
5 organization that you're here speaking on behalf of,
6 Mid-West Dairymen's, are you going to be articulating
7 any position about any of the other proposals that are
8 under consideration in this proceeding?

9 A. We have positions, but we weren't going
10 to necessarily articulate them unless asked.

11 Q. Okay. Then the reason I want to ask that
12 one, first, because I did want to ask you a question.

13 A. Okay.

14 Q. You talk about marketwide pooling and its
15 importance in your testimony. Are you aware that
16 there's a proposal noticed that proposes to or seeks to
17 adopt individual handler pooling for all orders?

18 A. Yes, I am.

19 Q. Does your organization have an opinion
20 about that?

21 A. Lakeshore Federated Dairy Cooperative is
22 opposed to individual handler pooling as an
23 organization. Mid-West does not support individual
24 handler pooling, although it would be very beneficial to
25 us. We feel it will lead to very, very disruptive,

1 chaotic conditions in the marketplace. And we will very
2 quickly have supply problems, market balancing problems.
3 The over-order pricing that was mentioned will
4 disappear. So we're opposed to it.

5 Q. I appreciate your testimony here that
6 you're opposed to it. Do you envision a method by which
7 the Department could implement individual handler
8 pooling in a large orders with multiple handlers in each
9 Order?

10 A. I have not been able to create a method
11 of doing that and being fair to all participants.

12 Q. And when you speak of fairness, what do
13 you mean by that?

14 A. Mid-West as a cooperative supplying a
15 fluid plant under an individual handler pool would
16 derive a large benefit from the way things exist right
17 now if we just look at that on the basis of regulated
18 pricing.

19 At the same time, part of the reason we
20 deliver milk to nonpool plants is to balance out needs
21 in the marketplace at that fluid plant. We would change
22 our method of operation to the point where we would
23 depend on other people to balance the fluid -- our fluid
24 milk or our additional milk needs. And we would deliver
25 our producer milk only to fluid use. That would allow

1 us to pay a much higher price than anybody else in the
2 area.

3 It would be difficult for cheese plants
4 or powder plants, Class II plants, to compete against
5 the price we were paying our producers.

6 And it may, when you're working in
7 a short -- short supply period or in a -- in an Order
8 that historically has been shorted supplies. It may
9 mean that the Class II operations do not receive any
10 product. In our particular case, we would not sell to a
11 Class II handler.

12 The competitive issues would become much
13 larger among producers. I like to think I'm a nice guy,
14 but if I've got a big advantage because of my -- of an
15 individual handler pool with -- competing with cheese
16 plants, and I've got one of our producer members that
17 looks at me crossways or I get up on the wrong side of
18 the bed in the morning, they may not have a
19 market for their milk because it'd be so easy to go out
20 and gain a producer that would be more to my -- my
21 liking.

22 And I think it rips and tears at the very
23 fabric of cooperatives to move in the direction of an
24 individual handler pool.

25 Q. Thank you. Is it -- is it your testimony

1 that currently in Order 30 in the Upper Midwest market
2 that producer-handlers are not a source of disruption?

3 A. No, it is not my testimony. In the area
4 where we operate, and our producers come from about a
5 60-mile radius from Rockford, the majority of our milk
6 is delivered to stores and customers in the Rockford
7 area and in the Chicago suburbs. So we're operating in
8 a very, very small and defined area.

9 In that area, there are no
10 producer-handlers operating that I'm aware of, and they
11 are not disrupting our operations.

12 Our concern is that the population that's
13 available for somebody with a 14 cent a gallon price
14 advantage could stimulate some of these large producers
15 to put in their own bottling operations. They can
16 become very competitive with us, with our regulated
17 price.

18 In order to retain business, we'd have to
19 lose money or the plant would go out of business or the
20 cooperative would have to dissolve and throw the
21 producers to the wolves.

22 Q. Okay. With the understanding that in
23 your area that there are no producer-handlers, how big
24 could a producer-handler be or what would be the -- in
25 your opinion, when would a producer-handler become a

1 disruptive competitive factor in your area?

2 A. I've got to decide which hat I'm going to
3 put on to answer that question perhaps. From our fluid
4 handler standpoint, any loss of business is -- is
5 disruptive. We and the customers we supply are smaller
6 groups of stores, convenience stores and so on, would be
7 our ideal targets for medium-sized producer-handlers to
8 take business away from us and from our dairy farmer
9 owners.

10 And with that in mind, I would think that
11 the -- a -- a smaller producer-handler would be less
12 chaotic and disruptive in the market, you know. And we
13 like the -- to gear in around the -- where some of our
14 large producers are at.

15 Like I said, we had one producer
16 distributing over 500,000 pounds of milk. So I would
17 think that somewhere in that bracket is the -- is the
18 appropriate level.

19 Q. And is that tied, then, to your position
20 on supporting Proposal 2, the --

21 A. Yes.

22 Q. -- the 450,000 pound exemption?

23 A. Yes.

24 Q. Okay. Regarding -- I'm trying to figure
25 out what the issue is here. Is the issue here that

1 producer-handlers in Order 30 are a disruption? And
2 please speak to your knowledge of all of Order 30, not
3 just your -- your little geographical section of it.
4 But is it that producer-handlers are somehow disruptive,
5 or is it that there is a fear that large producers may,
6 for example, break away from a co-op and become a
7 producer-handler?

8 A. In Order 30 right now there is a handful
9 of small producer-handlers, and I'm not aware of any of
10 those producer-handlers creating any major disruption in
11 the market. And so I think it's fair to say that the
12 smaller producer-handlers are not a concern. Our
13 concern is that the potential exists for large
14 producer-handlers -- especially over the last five years
15 as we've seen the larger producers, we've seen the
16 advantages that may accrue to being a producer-handler.
17 And that these larger producers, larger
18 producer-handlers would drastically change the
19 marketplace.

20 Q. Okay. In response to one of my -- I
21 think it was my previous question, you kind of
22 characterized things, a small producer-handler. You
23 talk about a medium-sized one. Would you please, if you
24 can, offer a number or a range that, you know, when are
25 we talking small, when are we talking medium, when are

1 we talking large in looking at a producer-handler?

2 A. Our largest producer is under a million
3 pounds of -- quite a bit under a million pounds of milk
4 production a month. They have -- rely quite heavily on
5 family labor and a little bit of outside hired help. If
6 they were going to package, distribute their own milk,
7 they would definitely have to add quite a few people or
8 a few people outside of the immediate family labor pool.

9 And in my mind, at least, a
10 producer-handler who grows out of the -- the family,
11 doing it all from the cow to the marketplace, and with
12 that in mind, I would suggest that anybody over a
13 million pounds of milk a month would be a very large
14 producer-handler.

15 Q. And a medium sized producer-handler might
16 be?

17 A. Under that level on down.

18 Q. Under that, okay.

19 A. Into the 500,000-pound milk production a
20 month.

21 Q. Okay. That's all I have Mr. Tonak. I
22 really appreciate you coming and testifying here today.
23 Thank you.

24 A. Thank you.

25 JUDGE CLIFTON: Is there any other

1 cross-examination of Mr. Tonak? Mr. Beshore,
2 any redirect?

3 REDIRECT EXAMINATION

4 BY MR. BESHORE:

5 Q. Just one or two questions on redirect,
6 Mr. Tonak.

7 In terms of producer price uniformity, as
8 far as the Order 30 regulations go, Federal Order
9 regulations, there is a uniform minimum price applicable
10 to each producer dependent upon their components and
11 volume, correct?

12 A. There is a --

13 Q. Minimum --

14 A. -- minimum price.

15 Q. Minimum uniform price, I'm sorry. A
16 minimum price?

17 A. A minimum price, that is correct.

18 Q. And it's the same, assuming the
19 producer's location of delivery is the same and their
20 component levels are the same?

21 A. That is correct.

22 Q. And there's a PPD added to the component
23 levels?

24 A. That is correct.

25 Q. Okay. Now, I want to talk -- just a

1 final question about the theoretical and the real,
2 because you were asked by Mr. Ricciardi whether your --
3 your calculations of the producer-handlers advantage
4 were theoretical or whether they're real.

5 At page 5 of your testimony, you talked
6 about Mid-West for January having paid almost \$700,000
7 to the Federal Market Administrator. Do you recall
8 that?

9 A. Yes.

10 Q. Was that bill from the Market
11 Administrator a theoretical bill or a real bill?

12 A. It was very real.

13 Q. Now, if you were a producer-handler,
14 would you have had a bill from the Market Administrator?

15 A. No.

16 Q. If you had the very same volumes of milk,
17 the very same sales and the very same stores, would you
18 have had any bill from the Market Administrator?

19 A. No, you would not.

20 Q. Is that -- would that have meant that
21 there was a difference in the operating statement and
22 the bank account of those two handlers?

23 A. Yes.

24 Q. Is that a theoretical or a real
25 difference?

1 A. It would be a real difference.

2 Q. Approximately, conservatively, 14 cents a
3 gallon, as you calculated it?

4 A. In that 700,000, it was much more than a
5 14 cent a gallon difference. But on average, over three
6 years, 14 cents a gallon.

7 MR. BESHORE: Thank you.

8 JUDGE CLIFTON: Mr. Tonak, was there
9 anything else you wanted to add to your
10 testimony?

11 THE WITNESS: No, I don't believe so.

12 JUDGE CLIFTON: All right. Thank you.
13 You may step down. And Mr. Beshore, you may
14 move for the admission of the exhibit.

15 MR. BESHORE: I move the admission of
16 Exhibit 24, including the attachment.

17 JUDGE CLIFTON: Is there any objection to
18 the admission of Exhibit 24?

19 MR. RICCIARDI: I do have an objection,
20 Judge.

21 JUDGE CLIFTON: Mr. Ricciardi.

22 MR. RICCIARDI: The objection is clearly
23 with regard to the attachment. It is a
24 theoretical number that's based on that
25 mathematical computation without any underlying

1 data to support it.

2 And we have testimony in the record even
3 from Mr. Tonak that he hasn't gone through and
4 dealt with the actual costs; that, in fact, all
5 he's done is subtracted one number from the
6 other. And under those circumstances, there's
7 really no basis for the attachment. It becomes
8 irrelevant and unnecessary for this hearing.

9 JUDGE CLIFTON: Mr. Beshore, your
10 response?

11 MR. BESHORE: My response is the witness
12 testified very precisely the basis of the
13 calculations. The arithmetic is just as
14 precise, and it's completely admissible in the
15 proceedings.

16 JUDGE CLIFTON: I agree. The witness, on
17 the bottom of page 2 subsection B, explains why
18 he believes that differential can be a
19 competitive advantage. That might be one way of
20 measuring it. And I find it useful. So the
21 objection is overruled. Is there any other
22 objection to the admission into evidence of
23 Exhibit 24? There are none. Exhibit 24 is
24 admitted into evidence.

25 JUDGE CLIFTON: Mr. Beshore, would this

1 be a good time for our afternoon break?

2 MR. BESHORE: I think it would. I
3 couldn't remember.

4 JUDGE CLIFTON: Oh, my goodness. It's
5 5:16. This is our evening break. Let's take 15
6 minutes -- 14 minutes. Please be back and ready
7 to go at 5:30.

8 MR. YALE: Yes. Before we go off the
9 record --

10 JUDGE CLIFTON: Your bladder is better
11 than some people's.

12 MR. YALE: All right. I'll let it go.
13 The announcement is we're going to be closing at
14 6:00. Are we going to be done at 6:00 or are we
15 going to go on much later?

16 JUDGE CLIFTON: Come back at 5:30.

17 MR. YALE: All right.

18 (A recess was taken from 5:16 to 5:30.)

19 JUDGE CLIFTON: All right, folks, it's
20 5:30, please come to order. All right. Let's
21 go back on record. We're back on record at
22 5:30. Specifically, I know how Mr. Beshore
23 wants to proceed. He has a witness in the
24 stand. I'd like that witness to identify
25 himself for the record.

1 THE WITNESS: Mike Asbury, and that's
2 A-s-b-u-r-y.

3 JUDGE CLIFTON: And, Mr. Beshore, I have
4 two names written down. I have Mike Asbury and
5 I have Dr. Robert Yonkers. How is it that you
6 wish to proceed?

7 MR. BESHORE: Mr. Asbury.

8 MR. YONKERS: I'm Robert Yonkers, on
9 behalf of International Dairy Foods Association.
10 Your Honor, I believe I will face
11 cross-examination issues the same as Dr. Cryan
12 did. And I anticipate that. I don't know if
13 anybody would have comment on that. My
14 testimony is rather short. It's been in the
15 back of the room since this morning. I'm not
16 sure you want to put me on until after all the
17 data is here. I could read that very short
18 testimony but that won't take very long.

19 JUDGE CLIFTON: You are very happy to
20 stay.

21 MR. YONKERS: I am here representing my
22 organization here this week and next. I would
23 not put it the same way your Honor did. I have
24 my orders.

25 JUDGE CLIFTON: Thank you. It does

1 relieve a little bit of a logjam here if you can
2 testify at a later time.

3 MR. YONKERS: Yes.

4 JUDGE CLIFTON: All right. Good. Then I
5 suggest unless there's some objection that we
6 plow right through, complete Mr. Asbury tonight
7 and then call it a day.

8 I do want to mention, before we do that,
9 though, these are what I have written down for
10 tomorrow. Now, I have written down the man from
11 Steuben Foods, who is named James Buelow,
12 spelled B-u-e-l-o-w. I have written down Rod
13 Daniels. I have written down John Hornstra
14 either Wednesday or Thursday and I have written
15 down Paul Rovey, R-o-v-e-y. I have written down
16 three dairy farmers from DFA. I have written
17 down Steve Rowe, R-o-w-e, either Wednesday or
18 Thursday and he's a Northwest Dairyman.
19 Wednesday --

20 MR. BESHORE: Thursday.

21 JUDGE CLIFTON: Thursday for him, for
22 Steve Rowe, that helps. I have written down
23 Gary Lee, and that Wednesday is his only
24 possible day. I have written down J.T. Wilcox,
25 either Wednesday or Thursday. And I have

1 written down Leon Berthiaume.

2 MR. BESHORE: Berthiaume.

3 JUDGE CLIFTON: Berthiaume. I'll get it
4 right yet.

5 MR. BESHORE: He must appear tomorrow.

6 JUDGE CLIFTON: Must be Wednesday. Which
7 means it looks to me as if we will have to work
8 until nine tomorrow night. I see no other way.
9 If you all can make it work a different way,
10 that's fine with me. But Thursday is full, too.
11 Thursday is very full. Thursday is when we see
12 the Vermont/New Hampshire/Wisconsin people and
13 Matt Shatto and John Hornstra, Steve Rowe, Gary
14 Latta. He's either Thursday or Friday, and
15 somebody named Krueger. And somebody named J.T.
16 Wilcox. So it's just getting quite full.
17 Mr. Yale.

18 MR. YALE: Your Honor, before we make
19 that commitment, the witnesses that you named by
20 and large are relatively short and quick
21 witnesses.

22 JUDGE CLIFTON: Well, then, that's good
23 news.

24 MR. YALE: That's good news. And you
25 know there isn't a person here who doesn't want

1 to get this hearing done and get it done soon
2 and I'm one of those.

3 JUDGE CLIFTON: Stand closer to the
4 microphone, please.

5 MR. YALE: There isn't a person here who
6 doesn't want to get this hearing over with
7 sooner than later. There's no advantage to
8 anybody to delay it any further than needs to be
9 done. But it is, for my client, very important,
10 it's for every client here, very important, and
11 needs to be done right. And wearing people out
12 physically to simply meet some unrealistic
13 schedule isn't getting it done, you know, in a
14 way that I think is going to be conducive to
15 creating a record.

16 I am fortunate in that right now, I do
17 not have witness prep or anything else. But I
18 can tell you that even last night I had
19 difficulty just doing my end-of-day notes for
20 the hearing to get done. So I think with the
21 schedule you'll have here, I think with these
22 witnesses, assuming we don't get into some
23 extended discourses, which I think can be put
24 off for brief or whatever, these -- my
25 experience, these types of witnesses do go very,

1 very quickly, very, very quickly.

2 And I would be surprised if we would not
3 be able to get through those, and depending,
4 again, whether we have the testimony or not,
5 whether we can get into Roger Cryan and his
6 cross-examination without going to 9:00. I
7 think 6:00 is a very reasonable number. I mean,
8 that would be my request of -- next week maybe
9 we have to start forcing. But I think this is
10 really asking too much.

11 And there are some people who do have
12 some serious health issues and they need rest.
13 And I just -- I think that creating an endurance
14 is not conducive to the hearing. But that's --
15 that's my opinion. You are the judge, and if
16 you want to go, we'll be here and we'll do what
17 we've got to do.

18 JUDGE CLIFTON: I like your attitude. I
19 kind of think I should sit up here as a
20 triumvirate and should have Mr. Carroll over
21 here, who thought we ought to finish it in a
22 week, was it?

23 MR. CARROLL: Could have been done.

24 JUDGE CLIFTON: Could have been, and Yale
25 on this side. Okay. Mr. English.

1 MR. ENGLISH: Your Honor, we certainly,
2 you know, are not saying let's go to nine just
3 to go to nine, just to do it. There are
4 witnesses. Rod Daniels, Mr. Buelow, we're going
5 to get Mr. Asbury in today. Paul Rovey, Gary
6 Lee, the NP dairy farmers and Leon Berthiaume
7 that have to get done tomorrow. We just have to
8 get them done.

9 JUDGE CLIFTON: Buelow was one of them.

10 MR. ENGLISH: Yes.

11 JUDGE CLIFTON: Daniels was one of them,
12 not Hornstra?

13 MR. ENGLISH: Mr. Hornstra, I'll let
14 speak for himself.

15 JUDGE CLIFTON: Mr. Hornstra, are you
16 here? Okay he might be able to go Thursday.

17 MR. ENGLISH: But the other -- what I
18 said, Daniels, Buelow, Rovey, Lee, the DFA dairy
19 farmers and Leon.

20 JUDGE CLIFTON: Okay.

21 MR. ENGLISH: Because I can't
22 mispronounce his last name. Sorry. Mr. Wilcox,
23 again. Now, it would be preferable for
24 Thursday, if Mr. Wilcox could get on tomorrow.

25 Obviously we can be somewhat flexible

1 with that, and I want to emphasize we'll be
2 flexible on that. The others, I don't think we
3 can be flexible. They have to go on. If we get
4 all of those done, and it's, you know, 4:30, I
5 would say let's do Mr. Wilcox. If we get all of
6 those done and it's 7:00 p.m, we can discuss it
7 and Mr. Wilcox could go the next day. We're
8 here. Saying we have to go to 9:00 p.m. just to
9 go to 9:00 p.m -- obviously I can tell you it is
10 going to depend entirely on the length of
11 cross-examination how long tomorrow is.

12 JUDGE CLIFTON: Thank you, Mr. Ricciardi.

13 MR. RICCIARDI: Your Honor, I agree that
14 obviously we need to ensure that we're getting
15 the evidence. And I'm not going to take a long
16 time talking because that stops us from getting
17 the next part of the evidence.

18 But what Mr. Yale said is correct, that
19 the parties and their lawyers, particularly this
20 lawyer, do have some -- some health issues.
21 Thankfully I'm not getting a daily report from
22 home so I'm able to get by till 6:00. But, you
23 know, trying to push it beyond that becomes a
24 problem because we do have preparation
25 requirements in terms of witnesses, preparation

1 for cross-examination, and we do have to eat and
2 sleep and those sort of mundane things.

3 So we'll move it along as quickly as we
4 can. I'll try to get my cross in as quickly as
5 I can today, and I will do it throughout the
6 course of this.

7 JUDGE CLIFTON: I was very impressed with
8 every lawyer's work today, very impressed. This
9 is such a fine bar, the dairy, the milk bar is a
10 fine group of attorneys. And I appreciate all
11 of your hard work. All right. Mr. Beshore.

12 MR. BESHORE: Has Mr. Asbury been sworn?

13 JUDGE CLIFTON: No. Thank you.

14 (The witness was sworn.)

15 JUDGE CLIFTON: Thank you.

16 (Exhibit 25 was marked for
17 identification.)

18 MR. BESHORE: Okay. Your Honor, we have
19 marked a two-page document as Exhibit 25, which
20 is Mr. Asbury's statement. And I would just ask
21 him to proceed with it at this time.

22 JUDGE CLIFTON: All right. And mine's
23 front and back.

24 MR. BESHORE: Yeah, most of them that
25 were reproduced are front and back.

1 JUDGE CLIFTON: Front and back. Very
2 fine. You may go ahead then.

3

4 MIKE ASBURY

5 of lawful age, being duly sworn, was examined and
6 deposed as follows:

7

DIRECT EXAMINATION

8 BY MR. BESHORE:

9 A. Thank you. My name is Mike Asbury and
10 I've been the Director of Milk Accounting and Economic
11 Analysis for Maryland & Virginia Milk Producers
12 Cooperative Association, Inc. (Maryland & Virginia)
13 since 2002. I have a B.A. in Business Administration
14 from the University of Virginia at Wise and have served
15 in various accounting and economic related positions
16 within the dairy industry since 1978. My experience
17 during those years includes working for the Dairy
18 Division of Pet, Inc., and its successor companies, a
19 proprietary fluid milk processor from 1978 to 1992 in
20 various capacities, including Cost Accountant and
21 Assistant Controller with responsibility for fluid milk
22 processing. I am providing testimony on behalf of
23 Maryland & Virginia in support of the National Milk
24 Producers Federation Proposals 1, 2 and 26. I left 2
25 out there, but I want to include 2.

1 Maryland & Virginia was organized in 1920
2 to more effectively market the milk of its members dairy
3 farmers in the Washington, D.C. metropolitan area.
4 Today Maryland & Virginia is a milk marketing
5 cooperative with over 1,500 member dairy farmer families
6 spanning eleven states from Pennsylvania to Georgia to
7 Kentucky, Tennessee, and Ohio; and producing just less
8 than 3 billion pounds per year. The average production
9 per month for a Maryland & Virginia farm was
10 160,000 pounds in 2008, approximately 100 cows per
11 member farm. Over 1,400 of Maryland & Virginia's farms
12 would be classified as small businesses. Over 1,000 of
13 our member farms, more than two-thirds of our membership
14 is in Order 1. In addition, Maryland & Virginia
15 marketed over 1.6 billion pounds of non-member --

16 JUDGE CLIFTON: Excuse me, just so it's
17 real clear. What was that 1.6 figure? 1.6
18 what?

19 THE WITNESS: 1.6 billion.

20 JUDGE CLIFTON: With a b as in boy?

21 THE WITNESS: Yeah. Did I say -- I wrote
22 billion the first time.

23 JUDGE CLIFTON: I just want to make sure
24 it was understood.

25 THE WITNESS: It's b, yes.

1 JUDGE CLIFTON: Billion with a b. You
2 many proceed.

3 A. 91 percent of our member milk is
4 rbST-Free while the remaining 9 percent is conventional.

5 The cooperative markets its member and
6 non-member milk throughout the Mid-Atlantic and
7 Southeast regions. In addition, Maryland & Virginia
8 owns and operates three fluid processing plants.
9 Through these plants, we serve a wide variety of the
10 market including grocery store chains, convenience
11 stores and local home town markets. All of our fluid
12 milk -- all of our fluid plants are rbST-Free. Through
13 these plants, we market our own brand names of Marva
14 Maid and Maola, and package private label for regional
15 and local customers. Our cooperative has been in the
16 fluid milk processing business since 1955.

17 Maryland & Virginia owns and operates one
18 powder -- one butter/powder balancing plant in Laurel,
19 Maryland, and owns an 80 percent majority interest in an
20 additional butter/powder balancing plant in Strasburg,
21 Virginia. We have been in the balancing plant ownership
22 and operation business since 1956. The Laurel, Maryland
23 plant is a conventional supply plant with the ability to
24 operate as a split rbST-Free/Conventional facility.
25 Both balancing plants market cream and condensed milk in

1 addition to processing butter and nonfat dry milk
2 powder. In addition, the cooperative operates a Farm
3 Supply Warehouse for the benefits of its members.

4 Maryland & Virginia markets the majority
5 of its milk in three Federal Orders: The Northeast
6 Order, Federal Orders 1, which has a Class I utilization
7 of 43.4 percent; the Appalachian Order, Federal Order 5,
8 which has a Class I utilization of 68.9 percent; and
9 the Southeast Order, Federal Order 7, which has a
10 Class I utilization of 67.9 (sic) percent. These
11 percentages are the averages for 2008.

12 There are producer handlers and exempt
13 plants in the Federal Orders in which Maryland &
14 Virginia operates. High Class I utilization and close
15 proximity to major metropolitan centers provide a
16 significant potential for more and larger
17 producer-handlers in our marketing area. Large farms
18 with over 3 million pounds of production per month now
19 operate in Maryland & Virginia's marketing area. The
20 proposed limits on a producer-handler's ability to take
21 on Class -- to take Class I sales from the market-wide
22 pool must be adopted. The Federal Order market-wide
23 pool is the only way all producers, and particularly the
24 smaller producers, and members of cooperatives, can
25 share in the Class I price. The market-wide pools must

1 be protected throughout the adoption -- through the
2 adoption of the National Milk proposals.

3 As previously stated, Maryland & Virginia
4 owns and operates three fluid milk plants. Large
5 producer handlers have a price advantage over any
6 regulated plant in the market. In 2008, the average
7 difference between the uniform price and the Class I
8 price in the Federal Order 5 was \$1.40 per hundred
9 weight or 12 cents per gallon. For the same period in
10 Federal Order 1, the difference was \$2.63 or almost 23
11 cents per -- per gallon. No federally regulated
12 handler, including Maryland & Virginia, would be able to
13 compete in a market with plants with these price
14 advantages. The desire of large national chains to be
15 supplied at the lowest cost, which we experience every
16 day in our fluid plants, is an open invitation to
17 producer-handlers in any order, and particularly in our
18 marketing area. This has already occurred in the
19 Southwest.

20 Maryland & Virginia Milk Producers
21 Cooperative Association, Inc. supports the National Milk
22 Producers Federation's proposals number 1, 2 and 26,
23 which allows current producer-handlers to continue to
24 operate with a size limit of 3 million pounds per month.

25 BY MR. BESHORE:

1 Q. Thank you. Mr. Asbury, I would just ask
2 perhaps one additional question on direct examination.
3 Your -- you've indicated that your education and your
4 professional background has been in the business side of
5 the -- of organization, the financial and accounting
6 side, is that correct?

7 A. That's correct, uh-huh.

8 Q. Okay. So you're familiar with P&Ls and
9 and ins and outs of the flow of income and expenses for
10 Federally regulated fluid milk plants?

11 A. That's correct.

12 Q. And Class I plants, distributing plants
13 in the Federal Order system which are regulated, are
14 billed by the Market Administrator every month and
15 payments are required into the pool every month, is that
16 correct?

17 A. That is correct, yes.

18 Q. And that's a real -- that's a real bill
19 and real expense?

20 A. Yes. We settle those difference every
21 month and pay them, yes.

22 Q. And producer-handlers, on the other hand,
23 would not experience any billing from --

24 A. That's right.

25 Q. -- the Market Administrator?

1 A. Their expense would be their cost. That
2 would be correct.

3 Q. Okay. So when you calculate the possible
4 advantage that the producer-handlers would have in your
5 orders, such as in Order 1, a difference of 23 cents per
6 gallon, basically that's the -- the bill that regulated
7 plants have to the Market Administrator which
8 producer-handlers would not have?

9 A. That is correct.

10 MR. BESHORE: Thank you. I have no
11 further questions for Mr. Asbury on direct.

12 JUDGE CLIFTON: Thank you, Mr. Beshore.
13 Cross-examination? Who would like to go first?
14 Mr. Vetne, thank you.

15 CROSS-EXAMINATION

16 BY MR.MR. VENTE:

17 Q. Mr. Asbury, my name is John Vetne. I'm a
18 attorney from New Hampshire, and I represent a couple of
19 producer-handlers out in Oregon and one in New Mexico.

20 I'm looking at the second page, next to
21 the last paragraph. Start out with Maryland & Virginia
22 owns and operates three fluid milk plants. The
23 connection sentence is, Large producer-handlers have a
24 price advantage.

25 You're a fluid -- or a regulated fluid

1 plant operator. Your testimony implies to me that there
2 are existing large producer-handlers that currently have
3 a price advantage over your three plants. Is that
4 correct?

5 A. There's no large producer-handler in our
6 area at this time. What I should have said: Would
7 have.

8 Q. Would have, okay.

9 A. Yes.

10 Q. So this is -- you're projecting something
11 happening in the future?

12 A. Yes, sir.

13 Q. And the same thing is true later on when
14 you say would be able to compete. You're again
15 projecting. It's a what-if scenario?

16 A. That is -- that is correct, sir.

17 Q. Okay. And towards the end, you talk
18 about the desire of large national chains to be supplied
19 at the lower cost. Am I correct in inferring that your
20 other customers do not desire to be supplied at the
21 lower cost?

22 A. The large national chains would have more
23 effect on the total market pool than the others would,
24 yes.

25 Q. You have some buyers that are indifferent

1 to getting a lower cost?

2 A. No, they all want -- they want lower than
3 what we have to pay for it, no doubt.

4 Q. Okay. And finally in that same paragraph
5 you say, this has already occurred in the Southwest. Do
6 you have this personal knowledge of anything happening
7 in the Southwest?

8 A. We do have a lot of agency meetings in
9 the Southwest area and constantly hear the talk of the
10 differences in the prices.

11 Q. So some -- you meet with -- what agency?
12 Is this co-op organizations or processing organizations
13 or both?

14 A. Both.

15 Q. Both. So some organizations that you
16 have attended, there have been handlers that have
17 complained about an occurrence in the Southwest over
18 which you have no personal knowledge?

19 A. That's -- that's correct.

20 MR.MR. VENTE: Okay. Thank you.

21 THE WITNESS: Uh-huh.

22 JUDGE CLIFTON: Who would like to
23 cross-examine Mr. Asbury next? Mr. Ricciardi.

24 CROSS-EXAMINATION

25 BY MR. RICCIARDI:

1 Q. Thank you. Mr. Asbury, Al Ricciardi on
2 behalf of AIDA who represents producer-handlers and some
3 exempt plants. And I have some questions. Were you the
4 director of milk accounting and economic analysis for
5 Maryland & Virginia in 2004 when there was the hearing
6 in Federal Orders 5 and 7?

7 A. Yes, I was.

8 Q. Okay. And you were one of the proponents
9 of a 3 million pound limitation in that particular
10 order, correct?

11 A. Maryland & Virginia was, yes.

12 Q. Okay. And you understand we had a full
13 hearing, that evidence was taken, and that that proposal
14 was never adopted?

15 A. (Nodding head.)

16 MR. BESHORE: Your Honor --

17 JUDGE CLIFTON: Mr. Beshore, you may
18 approach the microphone.

19 MR. BESHORE: Well, I just want to say --

20 JUDGE CLIFTON: Get closer, please. Pull
21 it towards you.

22 MR. BESHORE: What occurred at that
23 proceeding, which has been terminated by the
24 Secretary is, you know, a matter of record.
25 And, you know, I don't want to have to get into

1 a colloquy with Mr. Ricciardi or anybody else
2 about characterizing what happened at that
3 record.

4 It just -- we can take notice of the
5 Secretary's actions, but the proceeding was
6 terminated. We're saying now something wasn't
7 adopted or, you know, it was proposed and not
8 pursued or something or another. It's been
9 terminated and there shouldn't be any more
10 discussion about it.

11 JUDGE CLIFTON: The position that this
12 gentleman took at a previous time might be
13 relevant.

14 MR. RICCIARDI: If you let me get there,
15 I'll finish this thing up, so we can actually
16 get home to our families.

17 BY MR. RICCARDI:

18 Q. With regard to that issue, the complaint
19 was that there could be competitors, producer-handlers,
20 that would cause a disruption in the market in Federal
21 Orders 5 and 7, correct?

22 A. That's correct.

23 Q. And I don't know if you've got Exhibit 13
24 up there. If you don't, I apologize.

25 A. I do not.

1 JUDGE CLIFTON: I can hand this to him.

2 MR. RICCIARDI: That would be great,
3 Judge.

4 Q. 13. Now, this has been admitted, and
5 it's the producer-handler regulatory status by year from
6 2005 through 2009. In 2005 through 2009 you've been at
7 Maryland & Virginia, correct?

8 A. That is correct.

9 Q. And you have marketed milk in Federal
10 Orders 5 and 7, correct?

11 A. Yes, sir.

12 Q. And you will note that if you look at
13 2005, the first page, you will see that there's one
14 producer-handler in Order 5 and one in 7. Am I right?

15 A. That's -- there's not many, so I would
16 agree with that, yes.

17 Q. Two of them. And then if you go through
18 2006, '7, '8 and '9, it appears that we have two in
19 Order 5 during that period of time?

20 A. Okay.

21 Q. Am I correct?

22 A. I'd agree with you, yes.

23 Q. Okay. And if you were to assume, as you
24 have, that there is some kind of a perceived advantage,
25 have you seen in looking at Exhibit Number 13 the

1 proliferation and growth of the number of
2 producer-handlers in Order 5 and 7 the areas you market
3 in?

4 A. Orders 5 and 7 with the higher
5 utilization would not be as attractive as it would in
6 Federal Order 1.

7 Q. So there's no basis for adopting any
8 limitation on producer-handlers in Federal Orders 5 and
9 7. Is that your testimony?

10 A. No. No, sir. That was not my testimony.

11 Q. Okay. So there's still a theoretical
12 notion even though no growth has occurred in the last
13 five years?

14 A. That is correct. I mean, it could easily
15 happen.

16 MR. RICCIARDI: I'm sure. Thanks.

17 JUDGE CLIFTON: Who next would like to
18 cross-examine this witness. Mr. Carroll?

19 CROSS-EXAMINATION

20 BY MR. CARROLL:

21 Q. I'm not going to say good morning.

22 A. Okay.

23 Q. I want to ask you about Order 1. You did
24 talk about Order 1?

25 A. Yes, sir.

1 Q. And would you tell me, do you have plants
2 in Order 1 or do you ship into Order 1?

3 A. We have a plant in Order 1.

4 Q. And where is that located?

5 A. It's located in Landover, Maryland.

6 Q. And in that plant -- can you tell me what
7 the size of that plant is?

8 A. It runs about 18 million pounds a month.

9 Q. And how does it market its milk, its
10 Class I milk?

11 A. It is Class I milk, yes.

12 Q. What I mean, though, does it market to
13 stores or to -- on bid, or how do you do business?

14 A. We market it to customers, basically one
15 big customer, yes, sir.

16 Q. One big customer?

17 A. Yes.

18 Q. And who is the customer?

19 A. It would be Giant.

20 Q. I'm sorry?

21 A. Giant. Giant Foods.

22 Q. Giant Foods?

23 A. Uh-huh.

24 Q. What's Giant Foods, what kind of business
25 do they have?

1 A. They have grocery stores.

2 Q. And where are they located?

3 A. The ones we serve are located in the
4 northern Virginia, Maryland area.

5 Q. All right. And northern -- or Giant
6 Foods, do you get that on a bid of some kind? Is that a
7 bid contract?

8 A. Yes, sir. It's a signed contract, yes.

9 Q. And how many stores do you serve, if you
10 know?

11 A. I don't know the exact number. I
12 couldn't say. I know we serve them 18 million pounds of
13 milk.

14 Q. Would you say more than five or ten?

15 A. Oh, definitely.

16 Q. More than 20?

17 A. Yes.

18 Q. More than 50?

19 A. More than a hundred, I'll say.

20 Q. More than a hundred.

21 A. And I'll stop there.

22 Q. Okay. Now, at that plant do you also
23 make manufactured products such as butter or --

24 A. We do not.

25 Q. You do not. No manufacturing --

1 A. No. Basically --

2 Q. -- at that plant?

3 A. -- gallons and half gallons.

4 Q. Of milk?

5 A. Of milk.

6 Q. Okay. Do you do any manufacturing
7 anywhere in your system?

8 A. Yes, we sure do.

9 Q. And where is that located?

10 A. As I stated in my testimony in Laurel,
11 Maryland and Strasburg, Virginia.

12 Q. Right. And what products do you make
13 there?

14 A. Condensed. We make some powder, some
15 butter, just depends on the time of the year.

16 Q. All right. And when you file your
17 reports with the Market Administrator, do you take
18 credit for the manufacturing that you do in the -- in
19 the accounting form?

20 A. Yes, sir.

21 Q. And can you explain how that would -- how
22 that would be done?

23 A. The pool works just the reverse of the
24 Class I. You draw out of the pool instead of pay into
25 it.

1 Q. You actually take money from the pool?

2 A. That's -- that's correct.

3 Q. And how -- what is the rate at which you
4 subtract money from the pool, on an average?

5 A. The dollar per --

6 Q. Dollar figure, yeah.

7 A. It varies. Just depends on our
8 utilization that month, but I would say in a dollar
9 range.

10 Q. Do you know the average utilization of
11 that plant last year?

12 A. The average utilization?

13 Q. Yeah.

14 A. Of which one?

15 Q. Well --

16 A. I do not know off the top of my head the
17 average utilization, but it's -- Class III and IV would
18 be --

19 Q. Well, they're Class III and IV plants,
20 aren't they?

21 A. IV, yes, uh-huh.

22 Q. So virtually everything that goes through
23 those two plants?

24 A. We do -- with the condensed we do have
25 some that goes into ice cream, so II, III, and IV, based

1 on where the milk ends up when we send it out, yes.

2 Q. Now, 2008 can you tell us how many pounds
3 of manufactured products your company handled?

4 MR. BESHORE: Your Honor?

5 JUDGE CLIFTON: Mr. Beshore.

6 MR. BESHORE: Yes.

7 JUDGE CLIFTON: Pull the microphone
8 towards you, please.

9 MR. BESHORE: Mr. Carroll is asking for
10 proprietary information from this witness, and I
11 think I want to object to that, but also make
12 sure that the witness understands that he's
13 under no obligation to reveal volumes, prices
14 and other confidential business information in
15 this proceeding.

16 JUDGE CLIFTON: Thank you.

17 MR. BESHORE: In fact, I object to the
18 inquiry in terms of volumes and whatnot at
19 particular plants. It's not relevant.

20 JUDGE CLIFTON: And, Mr. Carroll, why is
21 the distinction between the Class I and the
22 other classes important with regard to your
23 questioning?

24 MR. CARROLL: Well, I'll withdraw that
25 question.

1 JUDGE CLIFTON: All right. Thank you.
2 Now, one other caution I would make -- you are
3 moving so fast, which I appreciate, that you're
4 talking over the witness.

5 MR. CARROLL: All right. Thank you. I
6 appreciate that.

7 JUDGE CLIFTON: Slow down just a bit.

8 BY MR. CARROLL:

9 Q. Right. A producer-handler who is only
10 Class I, that's all he -- he had, he would not be taking
11 any credit for manufactured products, would he?

12 A. No, sir.

13 Q. Do you know the names of any
14 producer-handlers in the areas that you sign -- I'm
15 sorry, that you serve?

16 A. I know the names of the exempt people in
17 our area, a couple of them, yes, sir.

18 Q. And can you tell us in the Order 1 who
19 are the people that you compete with, if any?

20 A. Who we compete with --

21 Q. Yes.

22 A. -- for Class I sales?

23 Q. Yes?

24 A. Green Springs would be one. Shenandoah
25 Pride would be one.

1 Q. Uh-huh.

2 A. And there's others.

3 Q. Are they producer-handlers?

4 A. No, they're not.

5 Q. All right. Do you have any
6 producer-handlers you compete with in Order 1?

7 A. It's not an issue at this time, as I
8 stated before.

9 Q. Right.

10 A. It's something we're looking at.

11 Q. And how about Order 5, do you have any
12 producer-handlers you compete with there?

13 A. No, none at this time.

14 MR. CARROLL: Thank you very much.

15 THE WITNESS: Uh-huh.

16 JUDGE CLIFTON: Who next will
17 cross-examine, Mr. Asbury? Mr. Miltner.

18 CROSS-EXAMINATION

19 BY MR. MILTNER:

20 Q. Ryan Miltner on behalf of AIDA.
21 Mr. Asbury speak about your plants if you'd like or
22 plants in general, but bottling plants have butterfat
23 utilization or butterfat use of about 1.8 percent on
24 average across all products, is that about right?

25 A. That's low. Ours is higher than that.

1 Q. Okay. Around 2 percent, generally? I
2 mean, I'm not asking for your --

3 A. It's a little higher than that, yes.

4 Q. Okay. Do you have -- I don't want to get
5 into information about your plant, but what do you --
6 what's your experience as for an average on the
7 butterfat for -- across distributing plants?

8 A. What is the --

9 Q. The average butterfat across all
10 products.

11 A. I would think a 2-2.

12 Q. 2-2. I don't have any allusions that I'm
13 going to get you to acknowledge that the cost of
14 production for a producer-handler is an appropriate
15 measure of how they acquire their milk, but I do want to
16 suggest that your calculation of the difference between
17 the Class I Price Order the uniform price is at
18 3.5 percent butterfat?

19 A. That is -- that is correct.

20 Q. And so the plants actually make pool
21 assessments based on the skim and butterfat that goes
22 through the plants, right? That's how the Market
23 Administrator calculates that?

24 A. That is correct.

25 Q. And so if you had 2.2 percent on a plant,

1 your advantage, which, again, I don't think we're going
2 to go anywhere discussing that, but the advantage you
3 calculated could be different than what you've just
4 stated here?

5 A. Any butterfat product would be calculated
6 at some difference, yes.

7 Q. Okay.

8 A. It could be more. It could be less.

9 Q. Okay. Thank you. You mention in your
10 statement there are some large farms that are now
11 operating in your market area. Are farms of that size
12 relatively new to the areas where you do business?

13 A. We've had a few in that area that have
14 been large, what we'd consider large for several years.
15 But as -- as time goes on, the farms get larger and the
16 small ones go away.

17 Q. As a cooperative you're concerned that
18 those large farms would open up their own bottling
19 plant?

20 A. That would be our concern.

21 Q. And so the proposals that you're
22 supporting would -- would require that if a producer
23 decided to open their bottling plant, that they'd have
24 to be a regulated plant, right?

25 A. I would like them to be -- pay the same

1 price we pay.

2 Q. Does Maryland & Virginia pay volume
3 premiums?

4 A. We do pay some volume premiums.

5 Q. Are those public knowledge at all? Do
6 you post those?

7 A. I would not state them, no, sir.

8 MR. MILTNER: Okay. I don't have
9 anything else. Thank you.

10 JUDGE CLIFTON: Thank you very much
11 Mr. Miltner. Any other cross-examination?
12 Mr. Tosi, do you have any cross-examination of
13 Mr. Asbury?

14 MR. TOSI: No, your Honor, I have no
15 questions. I appreciate the appearance.

16 JUDGE CLIFTON: Thank you. Mr. Beshore.

17 MR. BESHORE: Yes.

18 REDIRECT EXAMINATION

19 BY MR. BESHORE:

20 Q. Just one question on redirect.

21 Mr. Asbury, I'd just like to follow up on the questions
22 from Mr. Ricciardi, I think, about the potential or the
23 possibilities for producer-handlers in Orders 5 -- 5 or
24 7. Okay. Now, you're familiar with the -- generally
25 familiar with the sources of milk, the milk -- the areas

1 from which those orders draw their milk supply?

2 A. Yes.

3 Q. Okay. And they're deficit markets,
4 right?

5 A. Oh, definitely. Yes.

6 Q. Very much so, right?

7 A. Yeah. We have months where we bring in
8 more than we produce.

9 Q. Okay. So the -- is that market supplied
10 from large farms outside the geographic marketing area?

11 A. Yes, sir.

12 Q. And in the area of those large farms, is
13 the local blend price utilization where the milk is
14 coming from --

15 A. Yes.

16 Q. -- much lower --

17 A. Yes.

18 Q. -- than Order 5 and 7?

19 A. Yes.

20 Q. Okay. So if you've got a large farm,
21 let's say, in northern Indiana, perhaps, that supplies
22 milk down into orders 5 and 7, the utilization up in
23 Indiana is much lower than it is in 5 and 7, correct?

24 A. Yes, it is.

25 Q. Okay. If it was supplying -- if farms up

1 there were to become -- large farms in that area were to
2 become producer-handlers and supplied fluid milk
3 products down into Orders 5 and 7 rather than bulk milk,
4 they could become a producer-handler and that would be
5 an advantage in doing it --

6 A. Yes.

7 Q. -- potentially, correct?

8 A. Correct.

9 Q. Okay. In fact, in terms of the blend
10 price where the milk is coming from, there'd be a --
11 somewhat a blend price to Class I difference something
12 in the range of what Mr. Tonak was talking about?

13 A. I would think so. I didn't look at those
14 numbers, but I would think so, yes.

15 Q. Okay. So -- and is that sort of a
16 possibility -- one of the possibilities that you would
17 want the Secretary to consider in determining whether
18 there should be limits on the size of producer-handlers
19 in Orders 5 and 7?

20 A. Yes, uh-huh.

21 MR. BESHORE: Thank you.

22 JUDGE CLIFTON: Thank you, Mr. Beshore.

23 Mr. Yale.

24 CROSS-EXAMINATION

25 BY MR. YALE:

1 Q. Benjamin F. Yale on behalf of Continental
2 Dairy Products and Select Milk.

3 Mr. Asbury, I want to go back to that
4 hypothetical that Mr. Beshore just talked to you about,
5 Indiana and where the milk is located. It is true, is
6 it not, that farms are paid based upon the markets at
7 which they sell the milk, not where they're located, is
8 that correct?

9 A. That would all be determined on what kind
10 of supply agreement they signed.

11 Q. Yeah. But I'm talking about the milk
12 that is generated by their sales, whether they're blend
13 and they're co-op and everything, might be some other
14 things. But by and large, as far as the Federal Order
15 is concerned, it's the price at the plant where the milk
16 is delivered, right?

17 A. That would be correct. If it's pooled in
18 that area, yes.

19 Q. Now, you testified earlier that because
20 of the high Class I utilization in Order 5 that if there
21 is a discouragement -- or not a discouragement --
22 there's not quite the encouragement to be a
23 producer-handler because the difference between a Class
24 I utilization and the hundred percent Class I
25 utilization is so narrow that it doesn't create the

1 incentive that it does in an Order such as Order 1 where
2 the Class I utilization is much lower, right? Do you
3 recall that?

4 A. There wouldn't be as many dollars to --

5 Q. Okay.

6 A. It wouldn't be as profitable.

7 Q. So what difference does it make if a
8 plant is -- the farm is located in Indiana and is
9 selling milk in Appalachia, what difference does it make
10 that it's in Indiana. If the utilization is too high to
11 not make that encouragement, it's too high regardless of
12 where the farm is located, right?

13 A. Repeat that again.

14 Q. All right. It was a terrible question.
15 Let me -- we'll start all over again.

16 MR. YALE: It's a good reason, by the
17 way, your Honor, we need to be recessed.

18 JUDGE CLIFTON: But what I'm amazed at,
19 you and Mr. Carroll are going 90 miles an hour
20 all of a sudden.

21 MR. YALE: It's because we're tired, and
22 we want to get to lunch or supper or whatever.

23 Q. All right. Coming back to this point, is
24 that in the decision of a farm in Indiana, Ohio, or New
25 York or wherever else that sells into the Appalachian

1 Order is going to be determined whether -- if they want
2 to be PD or regulated, it's going to depend upon the
3 Order in which they sell and not where their farm is
4 located, is that right?

5 A. It would depend on where that farm is
6 selling its milk now.

7 Q. That's right.

8 A. Yeah. If it's --

9 Q. Well, but --

10 A. Yeah.

11 Q. But -- okay. Okay. Let's -- so let's --

12 A. There could be farms there --

13 Q. All right.

14 A. -- that's not --

15 (Off the record.)

16 Q. Take a farm located in Ohio, all right?
17 And it sells into the Mideast Order, which is a low
18 utilization order, right?

19 A. That's correct.

20 Q. All right. So there might be an -- under
21 your statement, there'd be an encouragement to be a --
22 might have an incentive to be a PD?

23 A. That's right.

24 Q. Okay. and you've testified that due to
25 the higher utilization in Order 5 there is less of an

1 incentive to be a PD?

2 A. Well, if -- he's selling in 33.

3 Q. No, wait a minute. No, no, no. Wait a
4 minute.

5 A. I've got to understand your question.

6 Q. No. My question is, is forget that he's
7 selling in Order 33 for the moment. For any farmer to
8 sell into Order 5, if he wants to sell into Order 5, he
9 has a choice of either selling it and setting it up as
10 being fully regulated and getting the blend price,
11 right?

12 A. Uh-huh.

13 Q. Or selling it as a PD, right?

14 A. If he qualifies as a PD, that probably
15 would be right.

16 Q. Right. So whether or not he's selling
17 milk now in Ohio, he's going -- he has the potential of
18 an advantage of selling into Order 5 either under a
19 regulated scheme or a PD scheme, right?

20 A. If he's under regulated, he would be on a
21 fair playing ground with us. That would be correct.

22 Q. Right.

23 A. Uh-huh.

24 Q. So the decision of whether to be a PD or
25 not depends upon the market which you're selling in and

1 not the market where you're leaving?

2 A. I don't know I totally agree with you. I
3 mean, if he's selling in that market and getting a lower
4 price, and then he goes to another market -- I mean
5 that's --

6 Q. He would have --

7 A. He would have a gain, yes.

8 Q. He would have a gain to go to Order 5?

9 A. That's correct.

10 Q. Because of the higher utilization, right?

11 A. That would be a part of it, in part. If
12 he goes in as a regulated plant --

13 Q. Right.

14 A. -- yes, he would get that higher
15 utilization. He wouldn't be a producer-handler, and it
16 would all be fair, yes.

17 Q. Right. And his decision would be based
18 upon the market that he sells in, not where he left at
19 that point, whether he wants to stay regulated or not?

20 A. That would be his decision.

21 Q. That would be his decision?

22 A. Yeah. Wouldn't be mine. Yeah.

23 Q. If -- well, we'll leave it at that.

24 You're aware of who some of the members of Continental
25 are?

1 A. Yes.

2 Q. And who are some of those members?

3 A. I know who McCloskey is.

4 Q. Do you know Fair Oaks Farms?

5 A. Yeah.

6 Q. That's a large farm in Indiana?

7 A. I would think that's pretty large, yes.

8 Q. All right. Are you aware of the fact
9 that Continental and Select support National Milk's
10 position?

11 A. That's great.

12 Q. I mean, you agree with that? I mean, you
13 understand that, right?

14 A. Yeah. That's what I support, too. Yes.

15 Q. Okay. So does that not -- the fact that
16 something large like that supports that might suggest
17 that that there are some factors that are beyond some of
18 the theoretical opportunities that you're talking about
19 that are entering into these business decision?

20 A. No. That's -- they made that decision.
21 I don't know their background in the decision, no.

22 Q. And you're glad that they made that,
23 though?

24 A. Yes. Uh-huh. I said that. Yes.

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MR. YALE: Okay. Very good. Thank you.

JUDGE CLIFTON: Any other follow-up to what Mr. Beshore raised on redirect. Mr. Beshore?

MR. BESHORE: I simply move the admission of Exhibit 25, your Honor.

JUDGE CLIFTON: Is there any objection to Exhibit 25 being admitted into evidence?

There is none. Exhibit 25 is hereby admitted. Now before we break I have one more order of business. And thank you for my exhibit back. And, Mr. Asbury, thank you very much for your testimony.

THE WITNESS: Thank you.

JUDGE CLIFTON: I would like, please, for Jock Gibson to come to the podium.

JUDGE CLIFTON: For right now, Mr. Gibson this one where Mr. Beshore was, if you will. Okay. And you are handing me a statement. Let's see. I got two copies. Would you hand one to Mr. Tosi?

When I talked with you earlier today, I asked if you would be willing to testify if we went into the night?

1 MR. GIBSON: Yes.

2 JUDGE CLIFTON: Now I need to ask if you
3 are also willing to testify tomorrow instead?

4 MR. GIBSON: Oh, yes.

5 JUDGE CLIFTON: You'll still be here?

6 MR. GIBSON: I'll be here.

7 JUDGE CLIFTON: Now, you have prepared a
8 statement and it's on the letterhead of Lochmead
9 Dairy.

10 MR. GIBSON: Correct.

11 JUDGE CLIFTON: Do you have any copies of
12 this on the back table?

13 MR. GIBSON: They're on the back table.

14 JUDGE CLIFTON: Great. So all of you be
15 aware Jock Gibson will be one of tomorrow's
16 witnesses and you may want to pick up his
17 statement. Thank you very much.

18 MR. GIBSON: Thank you.

19 JUDGE CLIFTON: All right. Is there any
20 objection to our closing for the day, coming
21 back tomorrow morning at 8:00? There is none.
22 We're off record at 6:17.

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PROCEEDINGS ADJOURNED AT 6:17 p.m.

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C E R T I F I C A T E

I, S. Diane Farrell, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

S. Diane Farrell, RMR, CRR