

UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:)
)
) Docket No.
 THE NORTHEAST MILK MARKETING) AO-14-A70-DA-02-01
 ORDER)
)

Virginia Room
 Embassy Suites Hotel
 1900 Diagonal Road
 Alexandria, Virginia

Wednesday,
 September 11, 2002

The above-entitled matter came on for
 hearing, pursuant to adjournment, at 8:30 a.m.

BEFORE: HONORABLE DOROTHEA BAKER
 Administrative Law Judge

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I N D E X

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8:30 a.m.

JUDGE BAKER: -- Northeast Order. It is a public hearing in which all persons who have relevant and material evidence may offer the same and may offer testimony.

If there is anyone here who was not here yesterday and would like to testify or otherwise participate in the hearing or offer evidence, please let me know.

I shall remind the participants that each time you speak, would you be kind enough to identify yourself. This is for the purposes of obtaining an accurate transcript. And the reporter, as you can see, records voices but not necessarily appearances unless you state your name.

We are ready to have cross examination of Dr. Ling -- at 11 -- excuse me, at 8:46, which isn't too far distant. I think it appropriate that we observe a moment of silence. And I will announce that at that time.

Are there any matters to come before the hearing? Any questions?

(No response)

JUDGE BAKER: Very well. Dr. Ling?

1 Whereupon,

2

CHARLES LING

3

having previously been duly sworn, was recalled as a

4

witness herein and was examined and testified as follows:

5

JUDGE BAKER: Yes, Mr. Rosenbaum?

6

MR. ROSENBAUM: May I proceed -- may I proceed,

7

Your Honor?

8

JUDGE BAKER: Yes.

9

CROSS EXAMINATION

10

BY MR. ROSENBAUM:

11

Q Dr. Ling, you -- your report -- Steve Rosenbaum
12 appearing for the International Dairy Foods Association.

13

Dr. Ling, your report that's been marked as
14 Exhibit 12 states that the Northeast region must maintain
15 a certain level of necessary reserves in order to handle
16 milk that is not needed for Class 1 at certain times, is
17 that a fair characterization?

18

A That's correct.

19

Q Okay. And what you do in your report is in
20 Table 1 determine the seasonality of producer milk
21 deliveries and fluid demand for the Northeast Orders and
22 then proceed to make certain assumptions as to what
23 operating reserves are needed and then to determine what
24 kind of plants and what kind of operations are necessary

1 to provide balancing. Is that fair in terms of your
2 methodology?

3 A I assume that -- (inaudible).

4 Q When it came to seasonality or seasonal
5 reserves, you actually did a calculation as set forth in
6 Table 1, correct?

7 A Actually, in Table 2 and 4.

8 Q No, I'm -- I'm -- I'm talking about -- well,
9 I'm trying to distinguish, initially at least, between
10 seasonal reserves and operating reserves. When it came to
11 seasonal reserves, you made that determination of what the
12 seasonal reserves were to provide balancing function based
13 upon the calculations set forth in Table 1, correct?

14 A (Inaudible) -- that is correct.

15 Q And then, when it came to operating reserves,
16 you had two different assumptions. One was a 10 percent
17 operating reserve and one was a 20 percent operating
18 reserve, correct?

19 A That's correct.

20 Q And then based upon those -- the calculated
21 seasonal reserves and the assumed operating reserves, you
22 proceeded to determine what -- that you needed in this
23 particular instance three plants of a certain size or four
24 plants of a certain size to provide balancing, correct?

1 A (Inaudible).

2 Q All right. And one of the issues you were --
3 you were dealing with was -- is the seasonal nature of
4 milk, correct?

5 A That is correct.

6 Q And in that context, you were describing both
7 the seasonality of milk production and the seasonality of
8 Class 1 demand, is that right?

9 A That is correct.

10 Q All right. Now, am I correct that as a -- as a
11 methodological matter, there's nothing unique to the
12 Northeast Orders with respect to your methodology, is that
13 right?

14 A The methodology -- (inaudible).

15 Q And -- and that's really the point I was going
16 to get at, which is other than plugging in different data
17 in Table 1 --

18 A Mm-hmm.

19 Q -- your methodology would be exactly the same,
20 correct?

21 A That's correct.

22 Q You have not identified any particular -- you --
23 -- you yourself have not identified any particular issues
24 surrounding the Northeast Order as opposed to any other

1 order, is that correct?

2 A That's correct -- (inaudible).

3 Q And -- and that, once again, would be a
4 question of what data would go in Table 1, correct?

5 A That's correct.

6 Q Okay. Now, as we've already discussed, you
7 made two different assumptions as to operating reserves,
8 one that it be 10 percent and one that it be 20 percent,
9 correct?

10 A That's correct.

11 Q And I think you stated that there was economic
12 literature to support 10 percent and some to support 20
13 percent, is that right?

14 A The -- back in 1985 -- (inaudible) -- 10
15 percent and 20 percent.

16 Q All right. Now, let me -- let me start with
17 the -- the calculations you performed based upon the
18 assumption of 10 percent op in your reserves. And I want
19 to -- want to focus on Table 3 as it appears on page five
20 of Exhibit 12. Now, you determined -- actually, before I
21 get to Table 3, let me -- let me focus on Figure 1, which
22 I'm not sure you discussed yesterday.

23 But in any event, this is your chart on page
24 four of Exhibit 12 that shows what happens with respect to

1 total milk deliveries in the Northeast Orders, is that
2 correct?

3 A That's correct.

4 Q And in this context, milk deliveries means the
5 quantity of milk pooled on the order, is that correct?

6 A That's correct.

7 Q And the fluid demand is -- appears -- well, it
8 appears in Exhibit 12 in black and so I think I probably
9 should follow that color even though the Power Point you
10 have up has a different color. It'd be confusing since
11 that's not in the record.

12 The -- the fluid demand is the bottom part,
13 correct?

14 A That's correct.

15 Q And then you've got above that operating
16 reserves, is that correct?

17 A That's correct.

18 Q And then seasonal reserves on top of that?

19 A That's correct.

20 Q And then excess reserves, right?

21 A That's correct.

22 Q Could you -- could you explain what you mean by
23 excess reserves?

24 JUDGE BAKER: Mr. Rosenbaum, I think this is

1 the time for our bowing our heads for just a moment of
2 silence. I think it's 8:46. If we could all do that,
3 please?

4 (A moment of silence was observed.)

5 BY MR. ROSENBAUM:

6 A As I -- as I explained yesterday -- (inaudible)
7 -- as a result of -- (inaudible) -- in cases of shortage
8 or crisis in the milk supply.

9 Q Well, you -- you have on top of excess reserves
10 Class 2, correct?

11 A That's correct.

12 Q And so, do I correctly interpret this figure to
13 mean that if one takes total milk pooled on the order and
14 subtracts what's called fluid demand, which would be Class
15 1, and then subtracts Class 2, that one -- what one is
16 left over with is Class 3 or Class 4?

17 A That's correct.

18 Q And am I correct that accordingly the total
19 amount of Class 3 and 4 milk that is pooled on the
20 Northeast Order is vastly in excess of what is needed to
21 provide seasonal and operating reserves as you have
22 calculated them?

23 A I don't know what you mean "vastly" --
24 (inaudible).

1 Q I -- I'm -- I'm comparing the size of the -- of
2 the wedges so to speak on Figure 1 for excess reserves
3 versus seasonal reserves and operating reserves.

4 A The differences -- (inaudible) -- if that's
5 what you mean.

6 Q Now, going to -- to Table 3, that -- that is
7 where you have calculated the reserve balancing cost
8 assuming a 10 percent operating reserve, correct?

9 A That's correct.

10 Q And Table 5 is methodologically identical
11 except that there you are assuming a 20 percent operating
12 reserve, is that correct?

13 A That's correct.

14 Q Now, let me start with Table 3. Table 3, if I
15 understand correctly, is based upon your assumption that
16 the total necessary reserves for the Northeast Order could
17 be provided by three butter powder plants with a daily
18 capacity of about 3 million pounds of milk?

19 A That's correct.

20 Q And in this context, necessary reserves is a
21 combination of both seasonal reserves and operating
22 reserves, is that correct?

23 A That's correct.

24 Q Now, I note that -- and I'm looking at page

1 four, that you are assuming that this plant would operate
2 20 hours a day, correct?

3 A That's correct.

4 Q But am I right that you are assuming that
5 operating 20 hours a day it could handle 3 million pounds
6 of milk?

7 A That's correct.

8 Q Okay. All right. Now -- and am I also correct
9 that you have sized these plants at 3 million pounds a day
10 -- a day of capacity in order to handle what you have
11 calculated to be necessary reserves -- peak daily volume
12 of necessary reserves of 8.6 million pounds of milk?

13 A That's correct.

14 Q And -- all right. Looking at Table 3 --
15 column, you have a heading called "Unused Capacity,
16 Percent of Peak Necessary Reserves," correct?

17 A That's correct.

18 Q In -- given the fact that you have sized these
19 plants to meet peak necessary reserves, would it also be
20 accurate if this heading had been titled simply, "Unused
21 Capacity"?

22 A My reasoning of why I did that was it's quite -
23 - it's just quite -- (inaudible) -- spread over the -- the
24 plant capacity. But if you want the -- (inaudible) -- we

1 can do that.

2 Q I -- that is to say, when in January you were
3 assuming or calculating that the unused capacity percent
4 of peak necessary reserves is 38 percent, am I right that
5 you're also saying that that plant is operating at 38
6 percent under capacity?

7 A Under capacity, that's correct.

8 Q All right. And so that if one wanted to
9 calculate the capacity --

10 A Mm-hmm.

11 Q -- utilization --

12 A Mm-hmm.

13 Q -- of that plant during January, one would
14 simply engage in mathematics of 100 minus 38, correct? For
15 January.

16 A That's correct.

17 Q So that -- and let me just run through the
18 months. And -- and tell me if I get any of them wrong.
19 Your calculation assumes that in January the plant would
20 operate at 62 percent capacity, in February at 73 percent
21 capacity, in March at 79 percent capacity, in April at 94
22 percent capacity, in May at 97 percent capacity, in June
23 at 100 percent capacity, in July at 75 percent capacity,
24 in August at 61 percent capacity, in September at 36

1 percent capacity, in October at 34 percent capacity, in
2 November at 38 percent capacity, and in December at 53
3 percent capacity, is that correct?

4 A (Inaudible) -- yeah, that's correct.

5 Q All those numbers were correct, is that right?

6 A Yeah.

7 Q And am I -- okay. And in -- on page five, when
8 you talk about fixed and operating costs, you describe the
9 fixed and overhead costs for the three plants as being
10 estimated at \$9 million a year, correct?

11 A That's correct.

12 Q And -- and you say that if you prorate that
13 cost to the volume represented by unused capacity, the
14 reserve balancing costs are \$3 million a year for fixed
15 and overhead costs, correct?

16 A That's correct.

17 Q And -- and do I fairly infer from that that
18 your Table 3 calculates that on an annual basis the plant
19 will operate at 67 percent capacity?

20 A I have to go through the calculation.

21 (Pause)

22

23 BY MR. ROSENBAUM:

24 A (Inaudible) -- 7 million per day. And if you

1 divide that by -- by nine million -- (inaudible) -- what I
2 get divided by 8.6. That will give you the percentage.

3 Q Well, I -- I'm trying to focus on the
4 calculation which I think you already did, which is that
5 you said the fixed operating costs for the three plants
6 total is -- were \$9 million a year, correct?

7 A That's correct.

8 Q And -- and -- and you have then prorated that
9 cost to the milk volume represented by unused capacity,
10 correct?

11 A That's correct.

12 Q And that unused capacity is the capacity that
13 is providing the balancing function, correct?

14 A That's correct.

15 Q And you say that's \$3 million, correct?

16 A Yeah.

17 Q And -- and -- and get -- I'm simply saying that
18 given the ratio of 3 million to 9 million, am I correct
19 that the necessary conclusion is that Table 3 is assuming
20 or calculating I should say that on an annualized basis
21 these plants are operating at 67 percent capacity?

22 A (Inaudible) -- percent, yeah.

23 Q I'm sorry?

24 A (Inaudible) -- 66 percent.

1 Q Sixty-six percent. All right.

2 A About that, I mean.

3 Q About that. All right. Thank you. And
4 obviously, those plants are producing very substantial
5 quantities of butter and nonfat dry milk operating at 67
6 percent capacity, correct?

7 A That's correct.

8 Q And indeed you in Footnote 2 of Table 3 make
9 certain assumptions as to -- as to how much butter and
10 nonfat dry milk can be made when that plant is actually
11 operating, correct?

12 A That's correct.

13 Q And -- and -- and -- and am I correct in
14 understanding that your calculation is that for every 100
15 pounds of milk that is processed through that plant, one
16 will produce 4.48 pounds of butter and 8.13 pounds of
17 nonfat dry milk?

18 A That's correct.

19 Q Okay. In other words, the same hundredweight
20 will produce both those products --

21 A That's correct.

22 Q -- in those quantities, correct?

23 A That's correct.

24 Q All right. And so that if I wanted to figure

1 out how much butter and how much nonfat dry milk is being
2 produced by this plant at -- at 100 percent capacity,
3 assuming it were run full out, am I correct that one would
4 on a daily basis assume that there were 33,000
5 hundredweight being run through it, correct?

6 A That's correct.

7 Q Thirty thousand hundredweight of milk, correct?

8 A That's correct.

9 Q Because 30,000 hundredweight and 3 million
10 pounds are the same thing, correct?

11 A Yeah.

12 Q And then one would for those 30,000
13 hundredweight assume that for each hundredweight one was
14 producing 4.48 pounds of butter and -- and also 8.13
15 pounds of nonfat dry milk, correct?

16 A That's correct.

17 Q And once again, that's on a daily basis, and
18 then one could annualize that to figure out what the total
19 production of that plant was assuming 100 percent capacity
20 operations by multiplying those numbers by 365 days a
21 year, correct?

22 A That's correct.

23 Q And if one then wanted to determine how much
24 butter and cheese that plant would produce at the 67

1 percent utilization that you assume is going to be
2 actually encountered due to the need to provide for
3 necessary balancing, one would simply multiply that number
4 by 67 percent, is that right?

5 A It's butter and nonfat dry milk, not cheese.

6 Q If I said cheese, I didn't mean to. I'm sorry.
7 Am I correct that one would take the annualized number of
8 how much butter and nonfat dry milk would be produced at
9 100 percent capacity based upon the approach we've just
10 discussed and then multiply that number by 67 percent to
11 determine how much butter and nonfat dry milk would be
12 produced?

13 A That's correct.

14 Q Under the assumption, as you calculated it,
15 that these plants would operate at 67 percent annual
16 capacity in order to provide both seasonal and operating
17 reserves?

18 A That's correct.

19 Q Okay. Now, let's turn if we could to Table 5,
20 which is, as we discussed earlier, the -- the table you
21 put together that -- that estimates the cost of balancing
22 assuming -- reserves are not 10 percent but 20 percent,
23 all right?

24 A That's -- that's correct.

1 Q I'm sorry. I misspoke that. Let me -- Table 5
2 is the -- is the same as Table 3 except in Table 5 you
3 have assumed 20 percent operating reserves whereas Table 3
4 had assumed 10 percent operating reserves, correct?

5 A That's correct.

6 Q The seasonality of milk production and
7 seasonality of Class 1 demand that goes into Table 3 is --
8 are -- is the exact same numbers that go into Table 5,
9 correct?

10 A That's correct.

11 Q All right. Now, I want to look at the second
12 column of Table 5 now and ask whether, as with Table 3,
13 the unused capacity percent of peak necessary reserves
14 here is also simply the unused capacity of the plants?

15 A That's correct. (Inaudible) -- Table 3.

16 Q Okay. And the difference -- a difference
17 between Table 3 and Table 5 is that for purposes of Table
18 5 you were assuming four plants with daily capacity of 3
19 million pounds a day as opposed to the three plants you
20 were assuming in Table 3?

21 A That's correct.

22 Q And accordingly, you were assuming that the
23 daily -- the daily capacity is now -- of the three plants
24 -- excuse me. Start that again.

1 You were assuming that the daily capacity of
2 the four plants combined is 12 million pounds, correct?

3 A Yeah. Twelve million pounds -- (inaudible)
4 -- 8 million pounds --

5 Q Okay.

6 A (Inaudible) -- reserves.

7 Q All right. And if one wanted to determine how
8 much -- well, let -- let -- am I correct once again, as I
9 was for Table 3, that with respect to Table 5, if one
10 wants to determine the actual capacity at which the plant
11 is assumed to be operating, one engages in the mathematics
12 of 100 minus the number set forth in Column 2?

13 A Excuse me, but can you repeat that?

14 Q Yes. If one -- if one wants to determine the
15 actual capacity utilization month by month in Table 5, one
16 deducts from 100 percent the percentage shown in Column
17 Number Two?

18 A That's correct.

19 Q And -- and once again, I'd like to go through
20 the math and just make sure I've got it correct. Tell me
21 if I've got any of these numbers wrong. My understanding
22 is that in Table 5 you were assuming that the plants are
23 operating at the following percentage of capacity: in
24 January 71 percent, in March -- in February 80 percent, in

1 March 85 percent, in April 96 percent, in May 99 percent,
2 in June 100 percent, in July 80 percent, in August 69
3 percent, in September 51 percent, in October 50 percent,
4 in November 53 percent, and in December 64 percent?

5 A That's -- (inaudible) -- you're correct.

6 Q All right. And am I correct that if you -- if
7 you compare -- if you compare Tables 3 and 5, am I correct
8 that in Table 5 in every month the plant is operating at a
9 higher percentage of capacity than in Table 3?

10 A (Inaudible).

11 Q Okay. So that although you are assuming a
12 higher operating reserve in Table 5, namely 20 percent as
13 opposed to 10 percent in Table 3, the plants are actually
14 operating at a higher percentage of capacity, correct?

15 A That's correct.

16 Q And that's really a reflection of the fact that
17 you've got four plants now --

18 A That's correct.

19 Q -- rather than three? All right. Now, I'm
20 correct, am I not, that your study nowhere addresses how
21 these necessary -- what you term to be reserve balancing
22 costs are being paid for, correct?

23 A That's correct.

24 Q Hypothetically, they could be paid for by the

1 cooperative demanding from the Class 1 handler an extra
2 service charge for the fact that the Class 1 handler is
3 not taking milk seven days a week, correct?

4 A That's a hypothetical question I -- (inaudible)
5 -- a hypothetical answer. I am not ready to -- I am not
6 ready to -- (inaudible). I'm not prepared to answer a
7 question -- (inaudible) -- you can ask co-ops for --
8 (inaudible) -- to testify to that fact.

9 Q Well, let -- let me just see if I can establish
10 this. And I don't mean by this to be criticizing in any
11 way. I just want to --

12 A I'm not saying you're criticizing.

13 Q I just want to --

14 A I just want to speak to my report, that's all.

15 Q And -- and I -- I think I do largely as well.
16 But I just want to make sure I'm right in understanding
17 that your -- the purpose of your report is not to in any
18 way address if or how the reserve balancing costs should
19 be paid for, correct?

20 A That's correct. Let me explain that --
21 (inaudible) -- they had this problem and asked me if I can
22 come up with a report for them to address this issue for
23 estimating the cost of balancing, and that's what I did.
24 I provided the methodology and put in some estimates and -

1 -

2 Q Okay.

3 A -- and that's -- that's -- that's it.

4 Q And you have in no way attempted to determine
5 the profitability of the plants that you are assuming in
6 Tables 3 and 5, correct?

7 A That's correct.

8 Q And to -- to determine the profitability of
9 these plants, one would have to look at how much money
10 they make selling their finished products and -- and
11 engage in a -- in a series of calculations, correct?

12 A That's correct.

13 Q And -- and you've not -- you were not asked to
14 do that and you have not done that, correct?

15 A I haven't done that.

16 Q Now, it is your conclusion which you testified
17 to yesterday that every one percent increase in capacity
18 utilization results in a 0.1 cent decrease in variable
19 cost per pound of product produced, correct?

20 A That's correct.

21 Q And so that a plant that operates at 80 percent
22 capacity has variable costs two cents per pound of butter
23 or nonfat dry milk higher than a plant operating at 100
24 percent capacity, is that right?

1 A That's -- that's correct.

2 Q And a plant operating at 60 percent of capacity
3 has two cents per pound of butter or nonfat dry milk
4 higher variable costs than a plant operating at 80 percent
5 capacity, is that correct?

6 A That's correct.

7 Q Let me go back now for a moment to Table 1 on
8 page one of Exhibit 12. And there you have two separate
9 pieces of information. One is producer milk deliveries
10 and the other is fluid demand, correct?

11 A That's correct.

12 Q And the producer milk deliveries determines the
13 percent by which any given month is greater than or lesser
14 than the annual average, correct?

15 A That's correct.

16 Q And as your footnote states, you got this
17 information from pool statistics from 1994 to 1999,
18 correct?

19 A That's correct.

20 Q So this is data from before the creation of the
21 existing Northeast Order, correct?

22 A That's correct.

23 Q It's a compilation of data from old Orders 1,
24 2, and 4, correct?

1 A That's correct.

2 Q Now, in looking at producer milk deliveries,
3 you are simply looking at total volumes pooled on the
4 orders, correct?

5 A That's correct.

6 Q And you have made no effort in this table to
7 determine the extent to which this seasonality reflects in
8 whole or in part the association of additional farmers
9 with these orders during certain months?

10 A It's strictly the -- (inaudible).

11 Q Do you have Exhibit 5, which was the -- the
12 data put into the record by Mr. Fredericks, I believe?

13 A Okay. I have it now.

14 Q If you could turn with me to page 87? This
15 document shows, as Mr. Fredericks explained it, the -- the
16 number of producers pooled on the order and the number of
17 those who are in states other than those covered by the
18 Northeast Order geographically. Do you see that?

19 A Yeah.

20 Q And do you see also that unlike Table 1, which
21 is based on historical data before the creation of the
22 Northeast Order -- your Table 1, I mean -- this -- page 87
23 of Exhibit 5 is based upon data since the creation of the
24 current Northeast Order? Am I right about that?

1 SPEAKER: Page 87?

2 MR. ROSENBAUM: Yes.

3 BY MR. ROSENBAUM:

4 A Yeah, that's -- that's correct.

5 Q And -- and I want to focus on 2001, which is
6 the year for which we -- the most current year for which
7 we have a whole year's information. Now, do you see that
8 -- well, let me back up. In your Table 1, the -- the
9 quantity of milk pooled on the orders is greatest in April
10 and May, correct?

11 A That's correct.

12 Q And --

13 A It's basically six years' statistics.

14 Q Right. And do you see that in page 87 of
15 Exhibit 5 we can see that in the real Northeast Order as
16 it now exists in the year for which we have the most
17 current data, we had -- and I'm going to round off
18 slightly -- 108 million pounds of milk pooled on that
19 order in both May and June separately from states other
20 than those states that are in the Northeast Order?

21 A Would you repeat that, please?

22 Q Yes. Am I correct -- we'll just -- am I
23 correct that this document shows that in May of 2001 there
24 were 108 million pounds of milk pooled on the Northeast

1 Order from states other than the states that are
2 geographically part of the Northeast Order?

3 A (Inaudible).

4 Q All right. And indeed, do you see that five
5 percent of all milk pooled on the Northeast Order came
6 from these other states in May and June and July?

7 A That's correct.

8 Q And -- and indeed, the -- those are so to speak
9 the flush months, correct? That is to say, when milk
10 production is highest? And those are also the months that
11 pool demand is the lowest according to your -- the second
12 column in your Table 1?

13 A (Inaudible).

14 Q I -- I --

15 A (Inaudible).

16 Q I appreciate that. You don't know the fluid
17 demand -- the seasonality of fluid demand has changed
18 though since you did your study. Do you know that?

19 A (Inaudible).

20 Q Okay. All right. Well, if you've seen that
21 fluid -- that the seasonality of fluid demand has not
22 changed since your study, am I right that what happened in
23 reality in the year 2001 was that a full five percent of
24 the Northeast pool was made up of milk from states outside

1 the geographic Northeast Order and that that's happening
2 during the period of time when milk production is at its
3 highest from the seasonal perspective and fluid milk
4 demand is at its lowest?

5 A (Inaudible).

6 Q Now, do you also see that in terms of what
7 really happened in 2001 -- let me back up. In your -- in
8 your study, November is the trough so to speak in terms of
9 producer milk deliveries, correct?

10 A (Inaudible) -- six years, yes.

11 Q All right. And do you see that in November of
12 2001 only 13 million pounds of milk were pooled on the
13 Northeast Order from other states?

14 A (Inaudible).

15 Q And that is less than one percent of the milk
16 pooled on the order during that month, correct?

17 A That's correct.

18 Q And -- and just to do simple mathematics, if
19 you compare May of 2001 to November of 2001, there were 95
20 million more pounds of out-of-state milk pooled on the
21 Northeast Order in the peak period, May, as compared to
22 the lowest period, November, correct?

23 A That's -- (inaudible).

24 Q The conclusion one would draw, therefore, is

1 that substantial quantities of milk from other states are
2 flooding the Northeast Order at the time when they're
3 least needed and that milk disappears at the time when
4 it's most needed? Is that a fair conclusion?

5 A (Inaudible) -- what I did in my report was --
6 (inaudible).

7 Q You certainly would not challenge the accuracy
8 of the numbers in -- on page 87, would you? They're USDA
9 numbers.

10 A I don't know what -- I don't know what -- when
11 you say "most needed" -- (inaudible).

12 Q Well -- well, let -- let me use more technical
13 terms. I mean -- what I mean is that the -- you said that
14 the -- according to your calculations that the -- the --
15 let's look at -- let's look at -- let's look at Table 3 in
16 your Exhibit 12. You calculated that in May and June your
17 plants are running almost full out, correct? They're
18 running at 97 percent capacity and at 100 percent
19 capacity, correct?

20 A That's correct.

21 Q And yet these are the months when in reality in
22 2001 you had 108 million pounds coming in from other
23 states?

24 A (Inaudible) -- I'm not prepared to speak to

1 that.

2 Q Okay. Well, I would like you simply to assume

3 --

4 A (Inaudible).

5 Q These are -- USDA put in these numbers. I have
6 nothing else to provide that's better than that. And I'm
7 simply -- since we are of course now in the post-reform
8 world trying to understand what the actual implications
9 are today and simply asking if I'm right that you said
10 that in order to handle -- you have said that the plants
11 are running at highest capacity in May and June and those
12 are the two months in which almost 108 million pounds per
13 month of other state milk is being pooled on the Northeast
14 Order in reality in 2001. Do you agree with that?

15 A That's -- that's what the statistics say, yes.

16 Q Okay.

17 A But the -- how much is actual deliveries and --
18 (inaudible) -- and so forth, I don't -- (inaudible) -- so
19 I -- I cannot concur with that conclusion. That's -- it's
20 -- (inaudible).

21 Q Well, if -- if your -- yeah. Let me be clear
22 about this. Your Table 1 is based upon how much milk was
23 pooled on the order, correct?

24 A That's correct.

1 Q And during the years 1994 through 1999,
2 correct?

3 A That's correct.

4 Q And that's the same data set as we're looking
5 at on page 87 except that on page 87 we're looking at -
6 -

7 A Eighty-seven of Exhibit -- Exhibit 5?

8 Q Yes. Except that on page 87 we're looking at
9 more recent data?

10 A Uh-huh.

11 Q Is that -- is that right?

12 MR. BESHORE: Your Honor, I don't know whether
13 Mr. Rosenbaum was intentionally attempting to confuse Dr.
14 Ling or what but --

15 MR. ROSENBAUM: This is inappropriate. He is
16 coaching the witness. And if I'm misreading Dr. Ling, he
17 will tell me or you can bring it out in your own
18 examination. I am not intentionally or otherwise
19 misleading --

20 MR. BESHORE: -- objection.

21 MR. ROSENBAUM: Page 87 does not have aggregate
22 pooled numbers for the pool. I mean, those are in Exhibit
23 5 but they're not on page 87.

24 JUDGE BAKER: Dr. Ling, are you confused?

1 (Laughter)

2 THE WITNESS: I'd rather stick to what I'm
3 stating in the report. And what I didn't study I -- I'm
4 not prepared to speak to. So that's -- I think I made
5 that point very clear.

6 BY MR. ROSENBAUM:

7 Q All right. Let me -- let me ask you this. If
8 you -- if you turn to page one of Exhibit 5?

9 (Pause)

10 BY MR. ROSENBAUM:

11 Q And if you assume with me that -- that Mr.
12 Fredericks testified that this document reflects milk
13 pooled on the Northeast Order, am I correct that that data
14 set is the same data set that you used for your Table 1
15 except that he's doing it for the period 2000 through --
16 the first few months of 2002 whereas you did it for 1994
17 through 1999?

18 A I assume that is -- (inaudible).

19 Q All right.

20 A (Inaudible) -- I have been studying --
21 (inaudible) -- statistics so I'm -- (inaudible). If you
22 want to -- (inaudible).

23 Q Well, let me just make sure that in Table 1
24 what you were using was receipts of producer milk for

1 Orders 1, 2, and 4 for the years 1994 through 1999,
2 correct?

3 A That's correct.

4 Q Okay. And to the extent that Mr. Fredericks
5 for his page one of Exhibit 5 was using producer receipts
6 for the new Northeast Order for the period 2000 through
7 2002, then you're both using the same data set except that
8 the years are different and he's using the Northeast Order
9 as it now exists whereas you were using Orders 1, 2, and 4
10 combined as they then existed?

11 A It's not exactly the same data set we're using
12 because -- (inaudible). And so the two data sets are not
13 the same because -- (inaudible) -- so it's not the same
14 data set.

15 Q What -- what you're -- okay. What you're
16 saying is economic conditions may have changed and the
17 rules of pooling may have changed but the -- but the data
18 set in both cases is pool receipts?

19 A They are both -- they are both pool receipts --
20 (inaudible) -- so they are not the same data set.

21 Q Okay. But they are both pool receipts,
22 correct?

23 A Yeah.

24 Q All right.

1 A (Inaudible).

2 Q And -- and -- and -- and yours were the old
3 rules and his are the current rules, correct?

4 A (Inaudible).

5 Q Okay. You assume or estimate that each of
6 these plants with 3 million pounds of milk a day capacity
7 that would provide balancing would cost \$28 million,
8 correct?

9 A (Inaudible).

10 Q Well, it's conservative from the perspective of
11 what a plant would cost today, is that what you mean?

12 A That's correct.

13 Q It's -- it's not conservative from the
14 perspective of what a plant actually cost at the time you
15 did that study?

16 A (Inaudible) -- basically a study I did --
17 (inaudible).

18 Q And you're pretty confident that as of that
19 time frame that was a good number, is that right?

20 A That is correct.

21 Q And there -- there -- the -- the -- your study
22 does not mean to suggest that there needs to be more
23 butter powder plants brought to the northeast to address
24 balancing, correct?

1 A (Inaudible) -- what is necessary --
2 (inaudible), okay? The best way to estimate the ultimate
3 cost is -- (inaudible) -- what I did in the report is --
4 (inaudible) -- because the cost data is very difficult --
5 (inaudible).

6 Q Please don't give me --

7 A (Inaudible).

8 Q I don't mean this as a criticism. I'm just
9 trying --

10 A (Inaudible) -- I'm trying to explain what I did
11 --

12 Q But -- but so --

13 A (Inaudible).

14 Q But you -- but you yourself said there hasn't
15 been a new butter plant built in how long?

16 A Since the early '90s -- (inaudible).

17 Q Okay. But -- but you're not -- you don't --
18 your study in no way is suggesting that in fact any new
19 plants need to be built in the northeast to provide
20 balancing?

21 A No, that's -- (inaudible).

22 Q And indeed, we know that there have been no new
23 plants built in the northeast since when? When was the
24 last new plant built in the northeast?

1 A New plants were built -- (inaudible).

2 Q Okay. Do you know when the last new one was
3 built?

4 A I think -- (inaudible) -- people should know
5 better than me.

6 Q Okay. But your \$28 million figure was current
7 as of 1994, is that right?

8 A That's correct.

9 Q All right. And -- and we certainly know that
10 there have been no new plants built in the northeast since
11 that time, correct?

12 A That's correct. As I said -- (inaudible).

13 Q Right. Now, you take that \$28 million cost
14 -- let me back up. The \$28 million is on page five
15 described as covering the total capital costs on land,
16 building, machinery, and equipment, correct?

17 A That's correct.

18 Q And -- and you apply a nine percent interest
19 rate to that \$28 million to come up with your annual total
20 capital cost, correct?

21 A That's correct.

22 Q And -- and that's the number -- that's one of
23 the numbers that then feeds into your calculation of what
24 the total cost of balancing is, correct?

1 A That's correct.

2 Q Because essentially what you're doing is
3 applying to the unused capacity of that plant its
4 proportionate share of that \$2.52 million, correct?

5 A Plus overhead.

6 Q Plus overhead, right. But -- right. Now, in
7 the real world, of course, people pay off their loans over
8 time, correct?

9 A That's correct.

10 Q I mean, if -- if someone had borrowed \$28
11 million to build a butter powder plant at nine percent
12 interest, at some point they're going to pay that loan
13 off, right?

14 A That's correct.

15 Q And that depends upon -- well, depends upon the
16 -- the loan agreement how long that takes, correct?

17 A That's correct.

18 Q But for purposes of your calculations, you
19 simply are assuming a nine percent cost forever so to
20 speak, is that right?

21 A That's an interest cost figure.

22 Q But -- but you're assuming that to be constant,
23 right?

24 A For the life of the loan, yes.

1 Q Well, but you don't in your report try to
2 determine how long the loan will last, right?

3 A That's correct.

4 Q Hypothetically, balancing in the real world
5 might be provided by a plant that's already paid off its
6 loans entirely, correct?

7 A That's possible.

8 Q Okay. In which case there would be no
9 continuing annual capital costs for the land and for the
10 plant, right?

11 A That's correct.

12 MR. ROSENBAUM: That's all I have at this time.
13 Thank you.

14 JUDGE BAKER: Thank you, Mr. Rosenbaum. Are
15 there any questions? Yes, Mr. English?

16 MR. ENGLISH: Thank you.

17 CROSS EXAMINATION

18 BY MR. ENGLISH:

19 Q Charles English. Let me follow up at first on
20 a number of questions asked by Mr. Rosenbaum.

21 With respect to the request you received and
22 the work you did on the study, did the cooperatives
23 provide you with actual data or the utilization of the
24 plants actually existing in the Northeast Orders?

1 A (Inaudible).

2 Q And the co-ops did not ask you to look at any
3 of the numerous non-Class 4 facilities that could
4 potentially provide balancing in the northeast market,
5 correct?

6 A They asked me to -- (inaudible).

7 Q And your --

8 A (Inaudible).

9 Q But -- but by your own study, that estimate was
10 based upon using exclusively butter powder operations,
11 correct?

12 A That's correct.

13 Q And you acknowledge that plants that process
14 cheese and whey could provide this service as well,
15 correct?

16 A In the real world, I think most people when
17 they -- (inaudible).

18 Q Do you -- do you have Exhibit 5 still in front
19 of you from the market administrator's -- Mr. Rosenbaum
20 asked you? If you could look for a moment at pages 74 and
21 75?

22 (Pause)

23 BY MR. ENGLISH:

24 Q Which are for May and November of 2001 total

1 volume of producer milk diverted to non-pool plants under
2 the Northeast Order. And would you agree with me that the
3 -- the number of pounds diverted in May exceeds the number
4 of pounds in November by a significant quantity?

5 A (Inaudible).

6 Q By 170 but, I mean, the math is what it is.
7 Does that not indicate that -- that there are other
8 facilities being used in actuality in the Northeast Order
9 with respect to the disposal of -- of milk in this
10 marketplace?

11 A My report estimates the cost of doing the
12 balancing. I didn't say who is actually doing the
13 balancing.

14 Q Fine. That -- that was my question. And going
15 back to the series of questions asked by Mr. Rosenbaum and
16 the issue about pre-order reform and post-order reform,
17 you have not attempted to make any study of how decisions
18 to pool milk have changed since the advent of federal
19 order reform, correct?

20 A That's correct.

21 Q And you similarly have made no study of the
22 question of how distribution of packaged milk may have
23 changed since the advent of federal order reform?

24 A That's correct.

1 Q And as to Table 1 --

2 A Exhibit --

3 Q -- Table 1 now in your Exhibit 12. In that
4 Table 1, for the period that was pre-federal order reform
5 you made no attempt to adjust for producer milk deliveries
6 for milk, for instance, produced in New York that is
7 delivered as producer milk to an order to the south for
8 that time period, 1994 to 1999, correct?

9 A (Inaudible).

10 Q And just to be clear --

11 A (Inaudible).

12 Q Yeah. There's pool statistics for Order 5 and
13 Order 7, correct? You didn't look at those pool
14 statistics and add data in from those that might be milk
15 that's produced in New York or Pennsylvania or Maryland,
16 correct?

17 A It's whatever -- (inaudible).

18 Q I realize that -- that following the federal
19 order process may not be something you do on a daily
20 basis, but are you aware or were you aware at the time you
21 prepared this study that in the mid '90s a program was put
22 in place in the southern federal orders to provide for
23 transportation credits to move milk to the southeast, both
24 producer milk and transferred milk? Were you aware of

1 that?

2 A I was not aware.

3 Q Were you aware that as a result of that
4 producer milk otherwise associated with Orders 1, 2, and 4
5 was in certain months in these years that are part of your
6 study pooled instead on orders to the south?

7 A No, I -- (inaudible).

8 Q Turning to the second column, "Fluid Demand,"
9 did you make any effort in -- in discussing the need for
10 fluid demand in these orders to adjust for changes in the
11 data from month to month for milk that was packaged in the
12 northeast and shipped into other federal orders?

13 A It's whatever the Class 1 -- whatever milk
14 pooled as Class 1 -- (inaudible) -- third party.

15 Q So that means that if a -- if a Class 1 handler
16 or -- or all the Class 1 handlers reported more sales of
17 Class 1 outside their marketing area in October than in
18 June, you didn't take that in consideration because that
19 data was not something you looked at, correct?

20 A We looked at the Class 1 milk pooled in the
21 -- (inaudible).

22 Q Okay. So that means you agree with me that you
23 didn't make an effort to alter the data -- to adjust the
24 data based upon where the sales actually occurred,

1 correct?

2 A (Inaudible).

3 Q Is it your understanding that Class 1 milk
4 pooled in the orders does not change based upon where the
5 sales are?

6 A No, I -- I didn't -- I didn't -- I mean, I --
7 (inaudible).

8 Q So you didn't look at that issue?

9 A No --

10 Q -- so you didn't --

11 A (Inaudible).

12 Q And you made simply no effort to adjust that
13 data? You just took the data they gave you and didn't
14 adjust it in any way?

15 A I took the data from the publications.

16 Q And those publications were the Order 1, Order
17 2, and Order 4 publications, correct?

18 A That's correct.

19 Q On page two of your statement, in the second
20 full paragraph you have a statement that says, "The
21 reserves also cover shrinkage and the terms of packaged
22 products ordinarily experienced by processing plants."
23 Remember that statement?

24 A Yeah, that's correct.

1 Q Is -- is -- is the two percent allowance for
2 shrinkage and -- and returns of packaged products included
3 in the "Fluid Demand" portion of Table 1?

4 A (Inaudible).

5 Q So they would not be portion -- part of the
6 "Fluid Demand" in Column 2 of Table 1, correct?

7 A That's correct.

8 (Pause)

9 BY MR. ENGLISH:

10 Q Exhibit 5, page 85 shows the actual total milk
11 receipts at butter powder plants in the northeast. And if
12 you compare that table to page five of Exhibit 5 -- to
13 page five?

14 SPEAKER: Page five of Exhibit 5?

15 BY MR. ENGLISH:

16 Q Page five, Exhibit 5 compared to page 85 of
17 Exhibit 5. Page five is producer receipts by
18 classification. Page 85 is milk powder and butter
19 production. And if you look for a moment at May of 2000
20 for -- for both those, May of 2000, would you agree that
21 on page five Class 4 milk was 249,125,390 pounds and the
22 same month, the actual milk receipts at butter powder
23 plants was 454,385,205 pounds. Would you agree with me
24 that that difference -- that some significant portion of

1 that difference represents milk coming in from outside the
2 marketing area that is being pooled as Class 4 and
3 classified that way for other orders?

4 A Which number are you talking about in --

5 Q May --

6 A (Inaudible).

7 Q Page -- I'm talking about the same month. May
8 2000 --

9 A Mm-hmm.

10 Q -- for page five, May 2000 for page 85. And
11 you can pick any month you want to. The fact of the
12 matter is that the -- the pounds of milk actually received
13 at butter powder plants is significantly different and
14 higher than the pounds of milk processed as Class 4 as
15 shown on page five.

16 (Pause)

17 BY MR. ENGLISH:

18 A (Inaudible).

19 Q Would you agree --

20 A (Inaudible).

21 Q I'm just looking at the first column, "Total
22 Milk Receipts."

23 A Okay.

24 Q Would you agree with me the total milk receipts

1 for May of 2000 for butter powder production is
2 454,385,205 pounds?

3 A That's -- (inaudible).

4 Q I understand. And I'm asking you to compare
5 that number to these -- the number that appears on page
6 five for May of 2000 for Class 4 on this order.

7 A Okay.

8 Q And -- and ask you whether you have a
9 explanation for the significant difference in those two
10 numbers?

11 A I don't -- (inaudible).

12 Q Isn't it a fact that in the real world the milk
13 that is processed at existing butter powder facilities on
14 the Northeast Order includes significant quantities of
15 milk that are pooled on other orders?

16 A I don't know that. I cannot answer that
17 question.

18 Q And for the purposes of your study, pre-federal
19 order reform, you made no attempt to look at that kind of
20 data, did you?

21 A My study is strictly to come up with a
22 methodology -- (inaudible).

23 Q And in doing that methodology, you made no
24 attempt to adjust for this kind of data that appears on

1 page five and 85, correct?

2 A (Inaudible) -- questions.

3 Q I understand, sir. But I'm simply -- I'm
4 asking you did you or did you not adjust. I think it's a
5 simple question. I think the answer is, no, you didn't
6 because you didn't even think about this part of the
7 study. And I'm simply asking you to agree with that
8 statement.

9 MR. BESHORE: Your Honor, it's -- it's
10 repetitive and I object. He already testified that he
11 didn't base his study on actual receipts and utilization
12 at any actual plants. He based it on calculated demands.
13 So it's been asked and answered several times.

14 MR. ENGLISH: I think the point, Your Honor, is
15 to understand in each instance in which there is data that
16 could have been available and is available today that
17 might have been examined but wasn't examined and just to
18 confirm that it wasn't. I mean, otherwise, I'm not even
19 sure why this witness is up here. I mean, if the study is
20 completely theoretical and has no basis in reality, that's
21 great.

22 MR. BESHORE: Oh, Your Honor, I object to that.
23 That -- I mean, the -- the reality is in Table 1, among
24 other things.

1 MR. ENGLISH: But the reality of Table 1 is
2 that it apparently doesn't reflect any real data of things
3 that were actually current in the marketplace.

4 MR. BESHORE: Well --

5 MR. ENGLISH: And it's old.

6 MR. BESHORE: The question to Dr. Ling has been
7 asked and answered several times and -- and I object to
8 it.

9 JUDGE BAKER: Well, I understand your
10 objection. I -- I think, Mr. English, if you'd sort of
11 formulate a question which would encompass what you have
12 just said you could get a response from the witness.

13 BY MR. ENGLISH:

14 Q Mr. Ling -- Dr. Ling, can you please confirm
15 that since you made a theoretical study only and didn't
16 look at actual utilization that the kind of data
17 difference that appears on page five of Exhibit 5 for May
18 of 2000 and on page 85 of Exhibit 5 for May of 2000 was
19 simply not considered in putting together your study?

20 A (Inaudible).

21 MR. ENGLISH: Your Honor --

22 THE WITNESS: Exhibit -- Exhibit 5 -- what is --
23 -- (inaudible) -- in Exhibit 5 is -- I mean it is possible
24 -- (inaudible) -- so I didn't -- I didn't look at those

1 numbers --

2 BY MR. ENGLISH:

3 Q I'm not asking post-reform, sir. If -- if you
4 had the same kind of data for May of '92, which actually
5 does appear in -- on page 85, you made no effort because
6 it wasn't part of your charge. Again, it's not a
7 criticism. I'm just understanding what it is. It's not
8 part of your charge and therefore please confirm that you
9 made no effort to look at that kind of data in making your
10 study.

11 A What I did in my report is based on market
12 order -- (inaudible) -- milk and Class 1 milk pool under
13 those three orders.

14 JUDGE BAKER: This is why the questions become
15 repetitive, because the witness is asked to respond --

16 MR. BESHORE: Your Honor --

17 JUDGE BAKER: -- and he did not -- he did not
18 respond in a very positive fashion.

19 MR. BESHORE: Well, Your Honor, it's a
20 rhetorical and -- you know, and repetitive question. And
21 I don't think Dr. Ling, you know, needs to respond in any
22 other way to --

23 MR. ENGLISH: I think cross examination --

24 MR. BESHORE: -- completely rhetorical.

1 MR. ENGLISH: It's not rhetorical. Did you
2 consider -- did you consider evidence that you've
3 testified you didn't consider? He's actually never
4 answered that question. If he would simply say that, I
5 would be able to move on.

6 MR. BESHORE: The report says it. His direct
7 testimony says it, says what he considered. It's been
8 asked and answered. He's said it many times.

9 JUDGE BAKER: It hasn't been answered that
10 directly, in my opinion.

11 MR. ENGLISH: I'll move on, Your Honor. I -- I
12 -- I agree with you, and if the answer is not in the
13 record, then the proponents won't have it.

14 (Pause)

15 MR. ENGLISH: I have no further questions at
16 this time.

17 JUDGE BAKER: Thank you, Mr. English. Are
18 there other questions for Dr. Ling? Mr. Vetne? I'll get
19 back to you, Mr. Stevens.

20 CROSS EXAMINATION

21 BY MR. VETNE:

22 Q John Vetne appearing for Friendship. Dr. Ling,
23 Table 1 of Exhibit 12 which is on the screen, you -- you
24 testified that the column labeled "Fluid Demand" is -- is

1 nothing more and nothing less simply than Class 1 milk.

2 A Class 1 milk pooled under those three orders.

3 Q And it's Class 1 producer milk or Class 1
4 receipts of the plants?

5 A (Inaudible) -- Class 1 milk in the -- in
6 statistics.

7 Q Okay. The statistics report for Class 1 plants
8 for distributing plants, Class 1 utilization pounds, and
9 then they also report Class 1 producer receipt -- producer
10 receipts that are allocated to Class 1. Do you know which
11 of those Class 1 numbers were used in your report, whether
12 it's Class 1 producer milk or total Class 1 milk at pool
13 plants?

14 A It's Class 1 milk reported in the -- in your
15 statistics.

16 Q Okay. If the annual statistics report Class 1
17 milk in two -- two different ways, one as producer milk
18 and one as Class 1 utilization of pool plants, you don't
19 recall right now which one you used?

20 A No.

21 Q Okay. Now, I understand that you did not
22 analyze fluid demand by reference to receipts of milk by
23 fluid plants, correct?

24 A It's whatever -- (inaudible).

1 Q I understand. You did not -- you did not look
2 at demand in terms of the milk required by fluid plants
3 for Class 1, Class 2, you know, whatever they want?

4 A (Inaudible).

5 Q Do you -- do you have any information or any
6 judgment whatsoever on what the index under the column
7 "Fluid Demand" would look like if you examined receipts by
8 fluid milk plants as opposed to Class 1 use by fluid milk
9 plants?

10 A I didn't study that -- (inaudible).

11 Q And you don't -- don't have any opinion on
12 whether the index would be different, whether it would
13 show greater seasonality or less seasonality?

14 A That's correct.

15 Q Okay. And you also did not include Class 2
16 milk. Do you have any opinion on whether if Class 2 milk
17 uses were included in the column "Fluid Demand," whether
18 greater Class 2 use in June, for example, might offset
19 lower Class 1 use in June?

20 A (Inaudible).

21 Q Okay. As I understand it, your -- your
22 analysis does not include Class -- any Class 2 milk as
23 part of the reserves, either operating reserves, seasonal
24 reserves, or excess reserves, am I correct?

1 A That's correct.

2 Q So all of the reserves come from Class 3 and 4,
3 correct?

4 A That's correct.

5 Q Okay. But nevertheless, there are -- there are
6 -- there is substantial Class 2 use in -- in the northeast
7 both pre- and post-reform. Do you have any judgment or
8 opinion on how the seasonal costs or the operating costs
9 of handling a balancing would be affected if Class 2 uses
10 of the market were included?

11 A (Inaudible) -- opinion because I didn't study
12 that.

13 Q Would you agree that if Class 2 -- that the
14 result could cause costs to go up or could costs -- cause
15 costs to go down?

16 A I didn't study the -- (inaudible).

17 Q You can't -- you can't say that it would go in
18 either direction?

19 A That's correct.

20 Q Okay. On page one of your exhibit -- of your
21 report, Exhibit 12, you state that typically fluid
22 processing plants operate fewer than seven days a week.
23 This expression of what is typical at fluid processing
24 plants is derived from your knowledge of fluid processing

1 plants from which period of time? Pre-1994, 1994 through
2 1999, or current?

3 A It's pre-1999.

4 Q Pre-1999. And did you actually gather any data
5 from fluid processing plants for 1999 and prior years to
6 verify your statement that that is typical?

7 A I made a statement in my 1985 report and that
8 was based on my -- (inaudible) -- Milk Order Number 2 --
9 - (inaudible).

10 Q Okay. So --

11 A And I assumed that since the fluid operation --
12 (inaudible) -- customers and customers usually do weekend
13 shopping. And so it's the -- the processing schedule had
14 to cater to that.

15 Q Okay. So this statement is based on your
16 hands-on experience and working knowledge from working in
17 the Order 2 market administrator's in the mid 1980s?

18 A 1970s.

19 Q 1970s?

20 A Yeah.

21 Q Okay. Do you have any knowledge about changes
22 in distributing plant capabilities since the 1970s to
23 receive milk seven days a week and store it at the
24 distributing plant rather than having it balanced

1 elsewhere?

2 A (Inaudible).

3 Q Would you agree with me that the number of
4 distributing plants that survived post-reform are
5 substantially fewer than those that existed in the 1970s
6 and '80s?

7 A I haven't looked at the statistics.

8 Q You're not aware based on the information that
9 comes across your desk that the number of distributing
10 plants in the country have decreased?

11 A Nationally, yes.

12 Q Nationally. And -- and is there any reason for
13 you to believe that that pattern has not also reflected in
14 the northeast?

15 A I have -- I haven't studied -- (inaudible).

16 Q On page five you refer to available information
17 on the cost of operating balancing plants. From what
18 period or periods of time is that --

19 A Which -- which schedule?

20 Q On page five of your report. Your second
21 column, "Fixed and Overhead Costs." Based on available
22 information, a butter powder plant with a capacity, et
23 cetera. Your reference to available information is
24 derived from what period or periods of time?

1 A It -- (inaudible) -- includes -- (inaudible) --
2 was based on a study back in 1994.

3 Q So when you used the verb "is" as -- as present
4 tense, in fact it -- it's past tense. It's roughly a
5 decade old information?

6 A That -- 1994 -- (inaudible) -- study in 2002,
7 so that's less than a decade.

8 Q Okay. Pardon me. As we sit here, it's eight
9 years old, the -- the --

10 A That's correct. And -- (inaudible) -- what I
11 have in the -- (inaudible).

12 Q In -- let me ask you a general question about
13 operating costs because you studied that quite a bit. If
14 a plant -- a butter powder plant is operating at 90
15 percent capacity in one month and if the following month
16 drops to 90 percent capacity, is the cost of that unused
17 five percent capacity the same as if the plant dropped
18 from, say, 40 percent to 35 percent capacity?

19 A Fixed operating costs -- (inaudible) -- total
20 fixed overhead costs would be the same.

21 Q The same per extra unit of powder?

22 A (Inaudible). Not for -- (inaudible).

23 Q No, okay.

24 A For the entire plant, the total fixed and

1 overhead costs should be the same.

2 Q Okay.

3 A The direct costs in the plant of unit -- you're
4 talking about per unit?

5 A Yes.

6 Q It'd be higher because some of the direct cost
7 is variable. Some semi-fixed. And then when you --
8 (inaudible) -- those into fixed cost overhead over fewer
9 units, then the cost per unit can be higher.

10 Q Okay. So let's see if I can paraphrase back to
11 you. If -- if a plant is reducing its capacity or its
12 used capacity from 40 percent to 35 percent, the -- the
13 cost per pound of powder produced is going to be greater
14 than if the reduction is from 90 percent to 85 percent?

15 A If -- if you use the rule of thumb I used, they
16 should be the same.

17 Q The same --

18 A The reduction should be -- the (inaudible) --
19 costs should be the same.

20 Q The increase per pound of powder would be the
21 same whether you're going from 90 to 85 or 40 to 35?

22 A That's -- that's if you follow the -- what I
23 had in the report, that's correct. But --

24 Q I understand that your report assumed that.

1 But I'm asking you whether in real life operation there is
2 greater per production unit cost as used capacity goes
3 down?

4 A I think the -- when you're talking about real
5 life, you'd better ask that question to real-life
6 operators. They can answer your question better than I.

7 Q Okay. The estimated costs in Table 5 and in
8 Table 3 are indicated by footnotes to be based on an
9 assumption of the number of pounds of powder and of nonfat
10 dry milk that can be produced. You use a constant yield
11 throughout the year, correct?

12 A That's correct.

13 Q And in fact, would you agree with me that the
14 yield per hundredweight of milk is greater in the fall
15 months than it is in the spring?

16 A The -- the yield factor is -- depends on
17 composition of milk.

18 Q And -- right. And composition of milk in terms
19 of fat and nonfat solids tends to be greater in producer
20 milk in the fall months, correct?

21 A I haven't looked at that number closely so I'm
22 not prepared to answer the question.

23 Q All right.

24 A The reason I used 4.48 -- (inaudible) -- those

1 are the numbers -- those are the -- (inaudible). They are
2 convenient numbers to use.

3 Q All right.

4 A And if you don't like those numbers you can
5 -- (inaudible).

6 Q No, I'm not -- I don't -- I don't want to get
7 into how much yield there is. I'm trying to ascertain the
8 cost effect by milk that would producer a greater yield or
9 lesser yield. Let me ask it this way. If producer milk
10 is a greater density of fat and nonfat solids, that is fat
11 is higher and nonfat solids are higher, am I correct that
12 that would tend to reduce the costs to the butter powder
13 plant of producing a pound of powder and a pound of nonfat
14 dry milk versus milk that has more water in it and get the
15 best yield?

16 A I mean, it -- (inaudible) -- higher yield but -
17 - yields should be higher.

18 Q And if the yields are higher, the cost to
19 produce a pound of butter and powder is lower, correct?

20 A Considerably, yeah.

21 Q In response to a question by Steve Rosenbaum
22 concerning excess reserves, you responded that excess
23 reserves are pooled to promote orderly marketing. Can you
24 --

1 A That's my understanding.

2 Q Can you elaborate on your understanding of why
3 that is so?

4 MR. BESHORE: Could I -- I'd like to object to
5 that, Your Honor. That's -- that's a legal analysis. I
6 don't know. It's beyond the scope of Dr. Ling's study.
7 Why the secretary has -- why -- why he allows -- she
8 allows Class 3 and Class 4 milk to be pooled in various
9 orders or as a general matter, I mean, I object.

10 JUDGE BAKER: Well, the question, I think,
11 related -- (inaudible).

12 MR. VETNE: Pardon?

13 JUDGE BAKER: You were relating your question
14 to reserves.

15 MR. VETNE: To -- to excess reserves. That
16 shows a big swathe on the -- on that one -- that one
17 graph. And I'm not asking him to put himself in the mind
18 of the secretary. I'm asking him to play the role of
19 economist for which he was qualified as an expert.

20 JUDGE BAKER: But what do you want him to do?
21 Explain why he thinks --

22 MR. VETNE: Why -- why -- why as a matter of
23 economics it's a good idea to -- to do what he's testified
24 to on answer to cross examination to pooled excess

1 reserves to promote orderly market -- how as an economist
2 does pooling excess reserves promote orderly marketing.

3 MR. BESHORE: I object to that. Beyond the
4 scope of Dr. Ling's testimony. Way beyond the scope.

5 MR. ENGLISH: I join that objection.

6 JUDGE BAKER: Pardon?

7 MR. ENGLISH: I join that objection. It is
8 beyond the scope of --

9 MR. VETNE: No, it's not.

10 (Laughter)

11 JUDGE BAKER: He's asking him about what
12 factors may enter into orderly market conditions.

13 MR. VETNE: Yes.

14 JUDGE BAKER: As -- (inaudible) -- and whether
15 or not the pooling of reserves is a factor which can enter
16 into orderly marketing agreements.

17 MR. VETNE: I'm asking him about his prior
18 testimony when he said that excess reserves are pooled to
19 promote orderly marketing. Why is that so.

20 JUDGE BAKER: He made the statement to that
21 effect, that excess pools promote orderly marketing. Now
22 he can say whether he has any basis for it or he is simply
23 repeating something he's heard.

24 MR. VETNE: Yes, he can. Yes, he can.

1 THE WITNESS: That's my understanding. There's
2 -- why it's pooled and so forth, I think other people are
3 more qualified to answer that question.

4 BY MR. VETNE:

5 Q When you used the term "orderly marketing" then
6 in response to the prior question, what did you have in
7 mind as far as, you know, what is orderly marketing for
8 that purpose?

9 A What I was -- (inaudible).

10 Q Pardon?

11 A Whatever -- whatever meant -- whatever is meant
12 by orderly -- whatever "orderly marketing" meant in the
13 statutes and in market orders. I think the --
14 (inaudible).

15 Q I see. So you have no economic opinion on what
16 constitutes orderly or disorderly marketing?

17 MR. STEVENS: It's -- it's beyond the --

18 THE WITNESS: My report so I --

19 MR. STEVENS: Your Honor, I'm going to object
20 now. Is -- is -- is the question of this witness who is
21 an employee of the Department of Agriculture, now we're
22 asking for his personal opinion about things or -- or
23 his official position or what? I mean --

24 JUDGE BAKER: The question was raised as to

1 whether or not he has an opinion as to what an orderly
2 market can be.

3 MR. STEVENS: Well, I think he answered --

4 JUDGE BAKER: -- broad.

5 MR. STEVENS: -- and I think he answered it and
6 he answered correctly that -- that this is for others to -
7 - to state what the -- what the parts of orderly marketing
8 are in any given order in any given time based on
9 conditions as expressed many times by the secretary of
10 Agriculture in many decisions and rulings.

11 JUDGE BAKER: Yeah. I understand that, Mr.
12 Stevens. But his answer reflects that he did not --
13 (inaudible) -- make an analysis and a study and evaluate
14 that with respect to what are orderly marketing conditions
15 and what might or might not enter into them. He has not
16 done that. He said he just looked at -- (inaudible) --
17 and decided what he thought.

18 Now, if I misstated his testimony, I'd like it
19 corrected now.

20 MR. STEVENS: I think I agree with what you
21 said, Your Honor. And in saying that, he's answered the
22 question to the best of his ability. And we just keep
23 asking questions now about orderly marketing which I think
24 is inappropriate from this witness.

1 JUDGE BAKER: Mr. Vetne?

2 BY MR. VETNE:

3 Q We're looking at the screen here of Figure 1 in
4 Exhibit 12. And there's a large green swathe -- not green
5 in your Exhibit 12 -- there's a large green swathe that
6 says "excess reserves." Does the presence of what you
7 have identified as excess reserves affect in any way
8 positively or negatively the balancing -- the costs to
9 balance the Class 1 market in the northeast?

10 A The way I did it in my report is try to isolate
11 or -- (inaudible) -- the minimum volume of milk that's
12 necessary for balancing the Class 1 market.

13 Q Some --

14 A Anything beyond that I called excess reserve.

15 Q Some of those excess reserves may be Class 4
16 milk, correct?

17 A That's correct.

18 Q All right. Does the presence of operating
19 capacity and used capacity of excess milk in Class 4
20 operations either add to or subtract from the costs that
21 you have included in your report and your estimated costs?

22 A Could you please repeat that question?

23 Q Does the existence of capacity that is actually
24 used to make butter and powder in the excess reserve

1 category either mitigate or aggravate costs to balance
2 fluid demand?

3 A Again, I said that the reason I did it the way
4 I did was to -- to focus and isolate the function --
5 balancing function. Now -- (inaudible) -- balancing is
6 not done -- (inaudible) -- but the cost is difficult to
7 come by. So I had to use -- to isolate and assume it's
8 done by -- (inaudible) -- problem than to have other
9 witnesses speak to -- to that.

10 JUDGE BAKER: Mr. Vetne, I just want to be sure
11 I understand your question. But there are costs
12 associated with the fluid demand, is that -- we all agree.
13 Do you agree with me on that? And now it's not -- I'm not
14 questioning you. I just want to be sure I understand this
15 witness's response. There is also a cost associated with
16 making powder.

17 Now, was your question directed to the extent
18 to which and the extent, if any, the cost of making powder
19 would have on the fluid demand column, a relationship
20 between the columns?

21 MR. VETNE: Sort of.

22 JUDGE BAKER: Well, what -- what was it you
23 were speaking of?

24 MR. VETNE: The question -- the question is

1 directed to -- I'm trying to paraphrase it as many times
2 as -- different ways as I can. Does the fact that there
3 are plants that are making butter powder on a monthly
4 basis from excess reserves tend to either increase or
5 decrease the costs of those plants in handling butter and
6 powder to balance the fluid market.

7 In other words, there's butter and powder there
8 already because we have a huge swathe of excess reserves
9 which includes butter and powder operations. Those plants
10 aren't there solely to balance the fluid market because we
11 have all of those excess reserves.

12 So my question is, does the existence of plants
13 that have used capacity and are processing butter and
14 powder on a monthly basis of excess reserves, does -- does
15 that function tend to decrease their costs when they get
16 that little bit of extra milk to balance the market.

17 THE WITNESS: You have to look at the whole
18 configuration of milk volumes and the configuration of
19 plants to answer that question. I haven't done that so I
20 cannot answer the question.

21 BY MR. VETNE:

22 Q Okay --

23 A -- the cost number -- cost -- is very difficult
24 to come by. So I have -- since I didn't look at that, I

1 don't think I can answer your question.

2 Q Would I be correct in -- in assuming that
3 there's likely an effect but we don't know from what
4 you've looked at whether the effect is positive or
5 negative?

6 A It's -- it can be positive, can be negative, it
7 can be only interaction between necessary excesses.

8 MR. VETNE: Thank you.

9 JUDGE BAKER: Thank you, Mr. Vetne. Are there
10 other questions? Yes, Mr. Stevens?

11 CROSS EXAMINATION

12 BY MR. STEVENS:

13 Q Yes, Garrett Stevens, Office of General
14 Counsel, USDA. Dr. Ling, you were requested by parties at
15 the hearing to prepare the exhibit and your statement?

16 A I was asked by the Association of Dairy
17 Cooperatives in the Northeast to -- to estimate costs.

18 Q All right. And you did that? That's your --

19 A I did that.

20 Q -- that's your report, Exhibit 12?

21 A That's correct.

22 Q And you have a statement which you made into
23 the record?

24 A That's correct.

1 Q And you had the approval of your supervisors
2 there at USDA to come and appear today?

3 A (Inaudible) -- administrator.

4 Q Now -- so you prepared this document and your
5 statement. Was it prepared by you or -- did someone else
6 help you with it or did you prepare it yourself?

7 A I prepared it myself. Of course, it has to go
8 through the channels for approval.

9 Q Okay. So -- so prepared by you, then it was
10 approved by various channels in the Department?

11 A That's correct.

12 Q Various individuals in -- offices. Now, so it
13 was prepared by you and reviewed by -- in the Department?

14 A By my supervisors.

15 Q And -- and you're presenting this material here
16 today, it's not in favor or in opposition to any proposal,
17 is it?

18 A No.

19 Q It's just -- just to assist the parties in the
20 conduct of the hearing?

21 A That's correct.

22 Q And for their use as they -- as they choose to
23 use it?

24 A As they see fit.

1 JUDGE BAKER: Thank you, Mr. Stevens. Yes, Mr.
2 Tosi?

3 CROSS EXAMINATION

4 BY MR. TOSI:

5 Q Thank you, Dr. Ling, for coming back today.
6 Appreciate your patience.

7 A It's my pleasure.

8 Q On the basis of your study, by coming up with
9 the various cost estimates that you have based on a 10
10 percent reserve margin or a 20 percent reserve margin -
11 -

12 A Ten percent operating reserve.

13 Q Excuse me. Yes. I stand corrected. Would you
14 be able to use that number or could one use that number to
15 determine what the per hundredweight cost of balancing
16 would be for all milk on the market on the basis of those
17 costs? For example, if -- if -- at the 10 percent level,
18 if it's -- if the number was 9.7 million, if we divided
19 that by the total hundredweight of milk on the -- on the
20 market --

21 A If you upgrade -- (inaudible) -- assumption in
22 the cost estimate.

23 Q Right.

24 A That's correct.

1 Q Okay. I was just wondering that if -- that if
2 -- if -- if we look at it that way if that would be a
3 number that would be legitimate in the context of your
4 study?

5 A Yeah. If you agree with my assumptions on the
6 cost estimates.

7 Q Okay. Also, I guess I'm not sure which one to
8 ask first. One is, you know, should your study be used to
9 determine a measure of benefit to all members who pool
10 milk on the market because of the existence of these
11 butter powder plants that perform this balancing function.
12 You know, should the -- should it be used or can it be
13 used?

14 A Can you repeat that?

15 Q Yes. Should your study or can your study be
16 used to determine a measure of -- of the degree of benefit
17 that accrues to all producers who are pooling milk or
18 handling milk on the northeast market because we have
19 these balancing plants?

20 A It's -- it's a benefit to the entire market,
21 producers and also consumers also.

22 Q Yes. I guess looked at another way your study
23 examined costs but -- but the benefits that certain
24 entities incur -- how is that -- if they're compensated

1 for that, how -- how would producers on the entire -- how
2 are producers in the entire market benefiting from that --
3 from that balancing function?

4 For example, we can determine on a per
5 hundredweight basis -- and I'm going to use a hypothetical
6 number. Let's say your study suggests that the cost per
7 hundredweight for all milk pooled on the northeast market,
8 let's say it's four cents a hundredweight, okay?

9 A You mean for the balancing?

10 Q Yes, for balancing. If that balancing didn't
11 occur, should -- given that that balancing occurs, how
12 much -- how much more money per hundredweight results from
13 having these balancing plants perform this function and
14 incur the cost, for example, of four cents per
15 hundredweight?

16 A I -- I haven't studied that so I cannot answer
17 the question.

18 Q So you were asked -- you testified that certain
19 parties at the hearing asked you to do a study to come up
20 with an estimate of the cost of -- of balancing in the
21 northeast, is that correct?

22 A That is correct.

23 Q Okay.

24 A Let me explain. Cost study's function is to

1 provide research, technical -- not assist in education,
2 assistance to cooperatives. That's part of our charge.

3 Q Okay. And in that regard, would it be accurate
4 to say that all the information that is contained in your
5 study comes from published information? For example, the
6 only published and available milk marketing order
7 statistics or other studies that you referenced?

8 A The milk volume -- (inaudible) -- probably none
9 of the stated costs and no published numbers.

10 Q Okay. And just coming up with -- I mean,
11 you're dealing with entities that have -- that operate
12 these balancing plants. And was there a reason offered to
13 you why no actual cost data was shared with you and that
14 you had to -- the people that are asking you to determine
15 what their costs are for balancing -- I don't know if any
16 real cost information was shared with you in being able to
17 do your study.

18 A I -- I didn't ask them for that. To my
19 knowledge, no plant operators -- I mean -- (inaudible) --
20 for balancing, which -- (inaudible) -- for constant
21 production.

22 Q Okay. Next to where it's just sort of -- I'm
23 trying to test the witness of how we could perhaps rely on
24 your study. Let's say, for example, Class 1 use increases

1 dramatically or significantly for a -- let's say for a
2 year or for a very long period of time. And using your
3 study methodology, would you -- would you conclude that
4 any increase in the unused plant capacity that results
5 from the increase of Class 1 use represent an increased
6 balancing cost to the market?

7 A Would you repeat that?

8 Q Okay. Assume for a moment that Class 1 demand
9 in the northeast increases significantly for a long period
10 of time. By that I mean more than several months. On --
11 on the basis of the methodology of your study and you were
12 going to look at that period of time to come up with a
13 cost estimate for balancing, because Class 1 demand had
14 significantly increased, okay, that may result in unused -
15 - increased unused plant capacity at the balancing plants?
16 There's less milk available to keep those plants full, the
17 balancing plants?

18 A If -- I had to study that, what -- on such a --
19 (inaudible) -- if the deliveries -- (inaudible) -- might
20 result -- (inaudible). But let me backtrack. I think I
21 need to study that or perhaps -- (inaudible).

22 Q Another one is, let's say for example
23 production costs -- excuse me, milk production increases
24 and let's say the existing balancing plants, the butter

1 powder plants that we're referring to are such that they
2 really can't handle the capacity and they make a decision
3 to increase the -- the size of your balancing plants, the
4 variable they handle a much larger volume of milk, okay?

5 And let's say for example that they make a
6 decision to increase in some size to some other larger
7 capacity. And -- and if the decisions they were -- they -
8 - they -- they added too much capacity such that they're
9 not entirely able to use all that, would your study then
10 characterize that additional unused plant capacity as a
11 balancing cost of the -- across the -- that it would be a
12 -- an increase in balancing costs or that it should be
13 considered a -- part of balancing costs to the market?

14 A (Inaudible) -- used in my report -- put into
15 the -- the volume of necessary reserves.

16 Q Mm-hmm.

17 A (Inaudible).

18 Q I'm just -- I respect the methodology in your
19 study --

20 A Yeah -- yeah --

21 Q -- it is -- we have a different set of
22 information now because it's a new Northeast Order. And
23 what I'm trying to do is --

24 A (Inaudible).

1 Q -- your methodology and the same conceptual
2 ideas in terms of how do we get a handle on balancing
3 costs, that if other things change, for example, increases
4 in production. If a plant decides to grow larger, Class 1
5 demand changes, and there's an impact on the volume of
6 milk that's going to be at balancing plants, if the
7 methodology of your study can be used then to transfer --
8 excuse me, to transfer the -- the fundamentals of your
9 methodology into this new era of order reform for the
10 northeast.

11 A Well, if I understand your question correctly,
12 the balancing is -- should be done at the plant that's
13 privy to the -- (inaudible) -- order. If you --
14 (inaudible).

15 Q Also, in your conclusion -- I think it's on
16 page nine of your -- of your study. In the conclusions
17 you -- if I may quote from it, "Therefore, knowing how
18 much operating reserves are needed, it's typical for the
19 cost estimation and that this report uses 10 and 20
20 percent operating reserves above fluid demand for
21 illustration."

22 With respect to knowing how much operating
23 reserves, you know, coming up with an answer for what are
24 or what should be the operating reserves, do you have an

1 opinion with respect to how the secretary should determine
2 what -- what would be legitimate, say, for the northeast
3 marketing area?

4 A If the secretary agreed with all my
5 assumptions, cost estimates, what I have here is pretty
6 solid, I think.

7 Q Given that your outcomes are dependent upon
8 -- this doesn't depend upon -- the level of the -- what
9 percentage of operating reserves, in your opinion, should
10 -- should we be thinking more of 10 percent or 20 percent
11 or is that a number that you think perhaps might be policy
12 -- a policy determination?

13 A I don't think it's a policy determination. It
14 should be the experience of the market, of what actually
15 happened in the market.

16 Q Okay.

17 A What -- what -- what's needed to satisfy the
18 demand.

19 Q And were you here yesterday to -- to hear Mr.
20 Gallagher's testimony --

21 A I was here --

22 Q -- some of the features of the -- of the
23 northeast marketing area?

24 A I was here and I didn't pay him that much

1 attention.

2 (Laughter)

3 BY MR. TOSI:

4 Q I was just -- I was going to probe a little bit
5 about your statement there in the conclusions that in real
6 life reserve balancing is carried out among many
7 manufacturing plants. And I was going to try to relate
8 that statement in your study to some of the
9 characteristics that Mr. Gallagher offered about the --
10 the nature of manufacturing plants in the northeast. But
11 I'll let it go. It's all right.

12 A Thank you.

13 MR. TOSI: Thank you.

14 JUDGE BAKER: Very well. Thank you. That
15 brings us to the time for our morning recess. We'll take
16 a 15-minute recess.

17 (Brief recess)

18 JUDGE BAKER: We're back in order after our
19 morning recess.

20 (Pause)

21 JUDGE BAKER: The court reporter has informed
22 me that he needs three additional copies of Exhibits 10
23 and 11. Those were the -- (inaudible) -- exhibits of Mr.
24 Gallagher. Does anyone have them --

1 SPEAKER: How many copies, Your Honor? Three?

2 JUDGE BAKER: The court reporter says he needs
3 three, yes.

4 (Pause)

5 COURT REPORTER: I'm okay. He gave it to me
6 earlier.

7 JUDGE BAKER: He gave them to you?

8 COURT REPORTER: Yes. Mr. Beshore did.

9 JUDGE BAKER: Oh, all right. Thank you very
10 much, Mr. Beshore.

11 MR. BESHORE: You're welcome.

12 JUDGE BAKER: You're very helpful.

13 Very well. Dr. Ling is still on the stand.
14 Are there any additional questions?

15 (No response)

16 JUDGE BAKER: Does anyone have any additional
17 questions for Dr. Ling?

18 (No response)

19 JUDGE BAKER: There are none. Thank you very
20 much.

21 THE WITNESS: You're welcome.

22 JUDGE BAKER: Thank you.

23 (Whereupon, the witness was excused.)

24 MR. BESHORE: Our next witness is Bob

1 Wellington.

2 JUDGE BAKER: Very well. Mr. Wellington?

3 Whereupon,

4 ROBERT WELLINGTON

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

7 MR. BESHORE: Before Mr. Wellington testifies,
8 Your Honor, I'd like to move the admission of Exhibit 12,
9 Dr. Ling's study, into evidence.

10 JUDGE BAKER: Very well. Are there any
11 questions or objections?

12 (No response)

13 JUDGE BAKER: Hearing none, Exhibit 12 is
14 admitted and received into evidence.

15 (The document previously
16 marked for identification as
17 Exhibit 12 was received in
18 evidence.)

19 MR. BESHORE: I would also like to mark for
20 identification with the next two consecutive numbers which
21 I believe to be 13 and 14. Exhibit 13 is the testimony of
22 Robert D. Wellington with respect to Proposal 7. I've
23 made four copies available to the reporter and one for
24 Your Honor. And there are copies in the room for all

1 participants.

2 Exhibit 14 would be the proposed exhibits with
3 respect to Proposal 7 separately collected as presented by
4 -- prepared for presentation by Mr. Wellington.

5 JUDGE BAKER: Before -- before we continue --
6 what you gave me right now relates to Mr. Gallagher, not
7 Mr. Wellington. Do you want me to give it to the court
8 reporter?

9 COURT REPORTER: That's the same here. Mr.
10 Gallagher.

11 (Pause)

12 JUDGE BAKER: Oh, I see. I see.

13 MR. BESHORE: This is --

14 JUDGE BAKER: That's --

15 MR. BESHORE: -- this is the --

16 JUDGE BAKER: That's his testimony.

17 MR. BESHORE: That's the testimony.

18 JUDGE BAKER: That's the testimony. Here are
19 the exhibits.

20 MR. BESHORE: Right.

21 JUDGE BAKER: Right.

22 (Pause)

23 JUDGE BAKER: Mr. Beshore, according to your
24 request, the testimony of Robert Wellington shall be

1 marked for identification as Exhibit 13 and the document
2 marked "Exhibits" shall be marked for identification as
3 Exhibit 14, and the testimony Exhibit 13.

4 MR. BESHORE: Thank you, Your Honor.

5 (The documents referred to
6 were marked for identification
7 as Exhibits 13 and 14.)

8 MR. BESHORE: And there are -- there are many
9 copies available in the room if anyone else needs copies
10 of Mr. Wellington's -- proposed Exhibits 13 and 14.

11 DIRECT EXAMINATION

12 BY MR. BESHORE:

13 Q To start, Mr. Wellington, would you please give
14 us your name and business address?

15 A My name is Robert D. Wellington. My business
16 address is 100 Milk Street in -- Massachusetts.

17 Q And, Mr. Wellington, could you briefly tell us
18 about your professional background, your educational
19 degrees, and professional experience?

20 A I have a Bachelors and Masters degree in
21 agricultural economics from Rutgers University where I
22 also taught for a while. I worked for the market
23 administrator's office in New York City after I obtained
24 my Masters degree. And I worked there for approximately

1 11 years. I served as economist, senior economist, and
2 then also chief of research and cooperative relations.

3 After I left the market administrator's office,
4 I became senior vice president for AgraMark Dairy
5 Cooperative. And my role there is to work in economics,
6 communications, and legislative affairs.

7 Q For how many years have you been employed by
8 AgraMark in that capacity?

9 A Thirteen years.

10 Q Do you have any idea how many times you've
11 testified in a federal order hearing?

12 A One too many.

13 (Laughter)

14 BY MR. BESHORE:

15 A Probably -- probably eight or -- eight or --
16 eight or nine times during the time period.

17 Q You've also testified with respect to your
18 areas of expertise before Congress -- committees of
19 Congress?

20 A Several times.

21 Q And -- and other tribunals?

22 A Yes. And I also work very closely with the
23 states' departments of agriculture, state legislatures,
24 particularly in the six New England states but also in New

1 York state.

2 MR. BESHORE: I would offer Mr. Wellington for
3 testimony -- testifying as an expert in agricultural
4 economics and dairy marketing.

5 JUDGE BAKER: Are there any questions or
6 objections or voir dire with respect thereto?

7 (No response)

8 JUDGE BAKER: Let the record reflect there is
9 no response. Your request is granted, Mr. Beshore.

10 MR. BESHORE: Thank you, Your Honor.

11 BY MR. BESHORE:

12 Q Mr. Wellington, would you proceed with your
13 testimony as distributed in Exhibit 13 -- Exhibits 14?

14 A Yes, I would. My name is Robert D. Wellington.
15 I serve as senior vice president for economics,
16 communications, and legislative affairs for AgraMark Dairy
17 Cooperative. I have worked in that position for AgraMark
18 for the last 13 years.

19 Prior to that, I was employed by the office of
20 the market administrator, New York-New Jersey milk market
21 area, for 11 years. My position with the market
22 administrator's office included senior economist and chief
23 of research and cooperative relations.

24 AgraMark is a Cappra Volstead cooperative

1 headquartered in -- Massachusetts with approximately 1350
2 members located in six New England states and New York.
3 We market about 2.5 billion pounds of milk annually. Our
4 members own and operate three manufacturing plants,
5 including -- Cheese plant in Middlebury, Vermont, a cheese
6 and other dairy product plant in Cabot, Vermont, and a
7 butter and powder plant in West Springfield,
8 Massachusetts.

9 I am testifying here today in support of
10 Proposal 7, which involves payments from the pool to
11 handlers to perform marketwide services with respect to
12 all purchasers in the order. This testimony is on behalf
13 of the Association of Dairy Cooperatives of the Northeast,
14 abbreviated ADCNE.

15 ADCNE consists of the following cooperatives:
16 AgraMark, Dairy Farmers of America, Dairylea, Land O'
17 Lakes, Maryland and Virginia Milk Producers, Oatka, St.
18 Albans, and Up State Farms. These farms -- these
19 organizations represent more than 65 percent of the milk
20 pooled in the federal order -- in the Federal Order Number
21 1.

22 Q Mr. Wellington, before you go into the
23 substance or the body of your testimony, I wonder if we
24 could just briefly review the exhibits that you will be

1 referring to in your testimony which are compiled in
2 Exhibit 14. And there are nine separate documents in
3 Exhibit 14 as you identify in the index. And I wonder if
4 you could just briefly go through those so we have a
5 preview before you refer to them in more detail in your
6 testimony.

7 A Okay. Table 1 is the first table and it's
8 entitled, "Estimated Milk Receipts at Class 1 Distributing
9 Plants by Members and Non-Members of the Northeast Order,
10 January 2001 to June 2002."

11 In this table, it contains basically
12 information that was from the government exhibit and that
13 I guess is Exhibit Number 5. That's where we got the
14 information for the first column, "Class 1 Producer
15 Receipts." That's a -- that's from that Table 5. It is
16 not adjusted by any other receipts from inside the order
17 or outside the order. It's a straightforward figure, much
18 to the way that Dr. Ling used.

19 The estimated total receipts of distributing
20 plants -- distributing plants do not just receive Class 1
21 producer receipts. They also receive milk that's used for
22 other classes. Their -- their receipts are used not just
23 for Class 1 is, I guess, a better way to put that.

24 And so we have about 85 percent of the milk

1 receipt that goes to distributing plants is usually around
2 Class 1. I believe Mr. Fredericks testified to that level
3 between 85 and 90. So we chose the 85 percent level to
4 use there.

5 So what we're trying to get to on that second
6 column is the estimated total receipts of distributing
7 plants. And then we tried to put that on an average per
8 day basis because, of course, you have different days of
9 the month and we wanted to take out that variation,
10 particularly in a month like February versus a month like
11 March.

12 Non-cooperative producer receipts. That comes
13 from the appendix table that Mr. Fredericks put in. And
14 then we also, I believe -- refer back specifically to his
15 table.

16 (Pause)

17 BY MR. BESHORE:

18 A Mr. Beshore, can I get a copy? I guess I
19 didn't --

20 Q Exhibit 5?

21 A It's -- it's Exhibit 5. It's either Appendix
22 Table 15 or -- thank you -- or -- or 70. I don't recall
23 now which --

24 SPEAKER: Page 88.

1 BY MR. BESHORE:

2 A Page 88? Thank you, Bill.

3 I just pulled the straightforward numbers from
4 there on non-cooperatives. Keep in mind I start on
5 January 2000. And that's that number, for example, in
6 January of 200, 5 -- 458 million is the number there. I
7 also did it on average per day.

8 Then I looked at Appendix Tables 15, which
9 contains producer deliveries to pool distributing plants,
10 and I applied those percentages that are receipts --
11 percentage of proprietary handler producer receipts
12 delivered to distributing plants. And that is that column
13 labeled, "Percent of Proprietary Handler Producer Receipts
14 Delivered to Distributing Plants."

15 From those numbers, I estimated the volume
16 today of non-cooperative receipts delivered to
17 distributing plants. And basically, that's a simple
18 computation. It's the 85.4 percent of January 2000, and
19 that is multiplied by the 4.8 billion pounds per day
20 figure in the -- in the column -- I guess that would be
21 the fourth column of data. And I come up with 12.6
22 billion pounds, 12.6 billion pounds per day.

23 The next column shows that 12.6 billion pounds
24 as a percent of the low month. The low month in this case

1 was August. And so if we look at January of 2000 as a
2 percent of the August number -- keep in mind this is
3 rounded to one decimal place in terms of billion pounds so
4 they're not exactly the same number. They would be 101
5 percent for that month.

6 When I go to the last two columns, I get to the
7 residual amount of milk at these distributing plants, that
8 being 33.7 for January. I take away the 12.6 for the non-
9 cooperative receipts, and I end up with 21.1 million,
10 which is an estimation of the volume of cooperative
11 receipts in distributing plants.

12 I also in the last column then took that
13 percentage of the low month. The low month in this case
14 was July of 2001. And I showed January as a percentage of
15 July, and that worked out to be 117 percent. In other
16 words, two -- 21 -- 21.1 million is 117 percent of 18
17 billion.

18 That's Table 1. That is by far the most
19 complicated table I have.

20 Table 2. Table 2 is entitled, "Producer
21 Receipts Classified as Class 4 in the Northeast Federal
22 Order and Milk Used for Manufacturing at the AgraMark West
23 Springfield, Massachusetts Plant." I've sort of combined
24 a variety of information here just for simplicity's sake.

1 I used this a couple different times during the course of
2 my - my written testimony.

3 The Class 4 pounds are the pounds that come
4 from I believe it's page five of the market administrator
5 data, Class 4 pounds. Also unadjusted by any movements of
6 the orders. It's a straightforward figure.

7 The West Springfield pounds are the pounds that
8 we use in West Springfield, the -- the combined pounds of
9 product, which is basically milk and cream to make butter
10 and nonfat dry milk.

11 And the last column is putting this as a
12 percentage of the capacity. The capacity we have at the
13 plant is 2.2 million pounds per day.

14 And so we figured the number of days in each
15 month divided by -- for example, January has 31 days. 2.2
16 times 31 divided by 55.3. That's how we got an 81 percent
17 figure in that one.

18 Table 3 are indices of seasonality of producer
19 milk deliveries and milk demand. The Ling study in the
20 year 2000 and 2001 averages for the Northeast Order. This
21 duplicates what Dr. Ling had in his Table 1 of his
22 exhibit, which I believe is Number 7.

23 Q Twelve.

24 A Twelve.

1 Q Table 1 of Exhibit 12.

2 A Twelve, right. I had the wrong number.

3 I then took the producer deliveries that were
4 under the order for the year 2000 and 2001. I took the
5 average -- for example, the average for January year 2000
6 and 2001, and I divided that by the 24-month average over
7 that period to show basically how much -- how -- how those
8 supplies differed from that average. And in January it
9 was 102 percent of the average.

10 I wanted to do that to try to get some
11 comparison to the Ling study using 2000 and 2001 data.
12 But once again, that data is straightforward market
13 administrator data. The Class 1 -- on the, I'm sorry,
14 producer receipts.

15 I did the same thing in the last two columns,
16 which are fluid demand. I took Dr. Ling's numbers from
17 his Table 1 of Exhibit 12 and then I -- I also calculated
18 from page five of Exhibit 5 using the two-month -- the
19 same month two-year average divided by the average for the
20 24-month period.

21 And for example, I took the average of January
22 2000 and January 2001 and I divided that by the average of
23 the 24-month period of 2000 and 2001 on the Class 1
24 receipts and came up with a number of 100 for the month of

1 January.

2 The figures that are next, they're very
3 simplistic figures. The first one is producer receipts
4 per day classified as Class 1. And this was taken from
5 page five of Exhibit 5. And I just plotted that out
6 during the period to show the movement of milk. This is
7 sort of a graphic demonstration of the movement of
8 producer receipts over time since the order was -- the
9 current order was promulgated on January 1st of 2000.

10 The second figure, the total producer receipts
11 per day, which is basically the same number from that
12 Table 5, Exhibit 5. I'm not -- the source is the same
13 and it's producer receipts per day. Figure 3 is the
14 difference between the two, producer receipts per day not
15 classified as Class 1. Once again, all from Table 5,
16 Exhibit 5.

17 Figure 4, producer receipts classified as Class
18 4. These numbers are taken from page five of Exhibit 5,
19 the -- the exact amount of producer receipts used as Class
20 4.

21 Figure 5 is milk receipts used for
22 manufacturing at the AgraMark West Springfield,
23 Massachusetts, plant. And that's basically a graphic
24 representation of the numbers for -- for the AgraMark

1 plant in Table 2 of my exhibit.

2 Figure 6 also comes from Table 2 of my exhibit
3 and it represents the percent manufacturing capacity used
4 at the AgraMark West -- West Springfield, plant, January
5 2000 to June 2002.

6 Figure 7 shows the seasonal operating and
7 necessary reserves for the Northeast Order. And that
8 takes Dr. Ling's information and basically presents it in
9 a slightly different fashion. It -- it isolates this
10 information just on seasonal reserve and necessary
11 reserve.

12 One of the issues we had when we looked at Dr.
13 Ling's very large table, the key point we're trying to
14 make here is seasonal and necessary -- seasonal operating
15 and necessary reserves, and that got lost in the size of
16 that table. So when you graphed it, you could see the
17 extreme situation that goes on here, and that's what we
18 really tried to show in this particular table.

19 And that's my -- all the tables that are
20 figures in my exhibit. Shall I move on?

21 Q Yes, please.

22 A I structured my testimony to really answer --
23 ask a series of questions that I thought that the
24 department might be asking. I tried to anticipate some of

1 these. And basically, the -- the kind of questions that
2 we were asking ourselves as we went through this process.

3 Why did we ask for consideration of Proposal 7,
4 is the first question. The economic return for providing
5 milk under the Northeast Federal Order for producer
6 members of cooperatives who balance the Class 1 market is
7 less than that of producers who do not participate in
8 providing balancing services. This inequity has -- has
9 existed for many years but has grown since the current
10 order was promulgated on January 1st, the year 2000.

11 The Agricultural Marketing Agreement Act of
12 1937 allows for the classification of milk and the pooling
13 of the resultant value in order to create a common uniform
14 price for all producers providing milk to the federal
15 order market. Producer milk destined for Class 1 use is
16 neither better nor worse than milk destined for any other
17 class use at the time that milk is produced, at the time
18 that it is shipped from the farm, nor at the time it's
19 received at a Class 1 distributing plant. That milk only
20 receives its higher value both under the order and reality
21 when it is weighed and sold as a Class 1-assigned product.

22 Prior to the existence of federal orders,
23 producers competed in an attempt to capture that higher --
24 value and leave the lower value uses to the milk of their

1 neighbors. However, this strategy consistently failed as
2 Class 1 distributors could and did obtain supplies from
3 neighboring producers who were shipping to plants with
4 lower value usage and were willing to accept a price only
5 pennies above what they received at the manufacturing
6 plants.

7 Any producer who believes that the current
8 maximum price represents the value of his or her specific
9 milk because it is received at a Class 1 distributing
10 plant is mistaken. In the absence of the federal order,
11 he or she would receive essentially the same price as his
12 neighbor shipped -- who shipped to a manufacturing plant.

13 Assuring that the Class 1 needs of the market
14 are met is a primary purpose of the federal order as
15 defined in the Class -- in the 1937 act as well as the
16 needs to maximize the price to all farmers who provide
17 milk to the marketing area. This not only means having a
18 sufficient total volume of producer milk available
19 annually to meet the annual Class 1 sales, we also -- we
20 believe it also means having the Class 1 milk available as
21 it is needed on a daily basis all year long.

22 One of the intents of Class 1 differentials is
23 to assure adequate supply of milk. These differentials
24 tend to be higher in higher Class 1 utilization markets as

1 part of the reason they are higher is because more milk is
2 needed to assure an adequate supply each day all year
3 long.

4 Balancing is part of that assurance and to some
5 extent is included in the Class 1 differential. However,
6 the value of the higher Class 1 differential accrues from
7 all farmers in the marketplace for a higher uniform price.
8 While producers are crucial in providing for adequate
9 year-round supplies of milk to meet total Class 1 use,
10 producers do not balance Class 1 supplies in any way,
11 shape, or form.

12 Producers ship as much or as little milk as
13 they wish to make every day, and that will be shown in
14 typically produced milk in a seasonally production pattern
15 that actually runs counter to the Class 1 demand pattern.
16 It's part of higher class differentials that reflects
17 balancing costs does not go to the parties that provide
18 the -- that service to the marketplace and that problem
19 seems to be -- that problem needs to be corrected.

20 Congress and President Reagan recognized that
21 problem when they passed the Food Security Act of 1985 and
22 specifically authorized market service payments under
23 federal orders. The Dairy Division of the Agricultural
24 Marketing Service of the USDA explained it well in the

1 following excerpt from its findings and conclusions of May
2 1st, 1997.

3 "Federal Register," Volume 52, Number 84, for
4 Friday, May 1st, 1987. "Proposed Rules for Docket Number
5 AO-366828 et all, which involved a hearing on marketwide
6 service -- marketwide payments for seven orders in the
7 southern United States in 1986.

8 Quote, "Payments for services of marketwide
9 benefit are specifically authorized under the Food
10 Security Act of 1985. That law amended Section 8(c)(5) of
11 the Agricultural Adjustment Act reenacted with amendments
12 by the Agricultural Marketing Act of 1937 by adding the
13 following provisions.

14 "Subsection (j), providing for the payment from
15 the total sums payable by all handlers for milk to
16 handlers that are cooperative marketing associations
17 described in Paragraph F and to handlers with respect to
18 which adjustment payments are made under Paragraph C or
19 services of marketwide benefit, including but not limited
20 to:

21 "One, providing facilities to furnish
22 additional supplies of milk needed by handlers and to
23 handle and dispose of milk supplies in excess of
24 quantities needed by handlers;

1 "Two, handling on specific days quantities of
2 milk that exceed the quantities needed by handlers;

3 "And three, transporting milk from one location
4 to another for the purpose of fulfilling requirements for
5 milk of a higher use classification or for providing a
6 market outlet for milk of any use classification.

7 "Market balancing activities such as disposing
8 of surplus milk and obtaining supplemental supplies for
9 handlers are clearly identified in the new provisions as
10 services of marketwide benefit. The law also provides
11 that payments made under the order program for the purpose
12 of reimbursing the handlers who provide those services are
13 conveyed in the total sums payable by all handlers for
14 milk.

15 "Thus, the objective under marketwide service
16 payment provisions is that the minimum uniform price for
17 all producers who -- paren, (reduce), end paren, and all
18 would share in the cost of providing the services. In
19 this way, some market participants would not be able to
20 maintain the advantage gained by receiving benefits but
21 not having to pay the cost. Therefore, they would cease
22 to be free riders," end of quote.

23 Once again, that was a -- a quote from the
24 findings and conclusions by the Department.

1 We're here today in regard to Proposal 7
2 because all producers who pool their milk under the
3 Northeast Federal Order benefit from services that balance
4 the Class 1 market. Those services facilitate the -- to a
5 higher uniform price for all milk in the -- in the pool
6 but not all producers currently pay the fare for that
7 ride.

8 The second question we tried to address was,
9 what are balancing costs and why are they even needed to
10 be incurred. There are several types of balancing done in
11 the milk market. Proposal 7 deals exclusively with two
12 types of balancing.

13 The first is daily balancing of Class 1 needs
14 and the second is seasonal balancing of Class 1 needs.
15 Balancing does occur across the entire milk supply in a
16 marketing order because the production of milk by
17 handlers, particularly on season -- on a -- on a
18 seasonally basis -- seasonal basis varies. And that
19 production pattern must be accommodated.

20 One of our problems in the past with proposing
21 marketwide service payments was to try to separate those
22 costs of balancing the Class 1 market with the cost of
23 balancing the entire supply of milk in the market. Our
24 plants do not know whether the milk they receive or fail

1 to receive is intended to balance the Class 1 market or
2 the entire market. Plant managers just know if their
3 operations are full or empty to some degree.

4 We know what our total plant costs are but
5 attributing those costs to explicit Class 1 balancing is
6 almost impossible. That is why we turned to the approach
7 used by Dr. Ling. His analysis used real data and
8 reasonable assumptions to exclusively focus on the class-
9 related balancing cost.

10 In reality, a butter powder plant may run at a
11 little lower capacity level in the fall. That's dictated
12 by Class 1 balancing in order to accommodate the total
13 seasonal fluctuations in all producer supplies, including
14 cooperative members.

15 The Ling study does not encounter any of those
16 costs, nor should it. If such producer supply fluctuation
17 resulted in the need for additional butter powder plants
18 to facilitate constant volumes of milk at the Class 3
19 plants all year long, that cost would also not be included
20 in the Ling study.

21 The attached Figure 1 shows producer receipts
22 per day classified as Class 1 under the federal order for
23 January 1st, 2000, through June 2002. Figure 2 shows
24 total receipts per day during the same period. And Figure

1 3 shows the difference between the two. These figures use
2 the data presented by Mr. Fredericks of the market
3 administrator's office, page five of Exhibit 5 and divide
4 each monthly volume by the number of days in each month.

5 The monthly variation is apparent in these
6 graphs. Clearly, there are times in the year when the
7 volume of milk in excess of Class 1 needs is far greater
8 than other times of the year and that month -- that milk
9 must find a home.

10 Cooperatives have been providing balancing
11 services for so long in the northeast that most people
12 take them for granted and are not concerned with their
13 importance until, of course, if they disappeared one day
14 our distributors are asked to pay for them.

15 The electricity utility sector provides an
16 analogy that I believe is useful in understanding our
17 problems in balancing milk supplies. This past summer,
18 the New England region and many other areas of the country
19 recorded record -- record -- record levels of electricity
20 usage on a daily basis. The utility companies had to
21 maintain sufficient electricity-producing capacity to meet
22 the higher needed usage throughout the year even though
23 that meant that on just about all other days they would
24 have to have available and current fixed costs of unused

1 capacity. They could not look at the annual average
2 amount of electricity per day. That figure is meaningless
3 for capacity purposes. Even the monthly average per day
4 provided little value for capacity purposes.

5 They must have the capacity to provide enough
6 electricity on the peak day. Sure, they could try to buy
7 some power from neighboring utilities to get them through
8 the peak periods. But chances are that those other
9 utilities are also facing -- facing -- demands and have
10 little capacity to spare at the time it is needed.

11 The same happens in the dairy industry. Milk
12 is highly perishable and must be processed quickly.
13 Farmers cannot store it because the next milking must be
14 accommodated. You cannot keep it in pendency very long.
15 Plus, the pending trailers are usually needed to pick up
16 the next day's milking. Storage capacity at plants is
17 limited by health regulations and cost.

18 In the past several years, several Class 1
19 plants in the northeast have closed and further reduced
20 the storage capacity of Class 1 milk in the market. Just
21 like the peak of electricity, the peak of milk supply
22 relative to the dam must be handled quickly.

23 Balancing milk in the northeast involves
24 providing consistent and immediate outlets for surplus

1 milk as well as the ability to release or obtain
2 additional milk when needed. Market balances in the
3 northeast provide these services over a large volume of
4 milk. Buying and selling a few spot loads of milk is not
5 the same.

6 Next question is, why do cooperatives play a
7 unique role in balancing in the northeast. Cooperatives
8 have played the primary role in balancing the northeast
9 market for more than 60 years. Ed Gallagher has already
10 explained the unique marketing characteristics we face in
11 this region.

12 I again want to highlight that a key issue
13 cooperatives face is that the northeast has a huge number
14 of milk producers who do not belong to a cooperative. I
15 will refer to them as "non-members."

16 They -- they number in excess of 4000 according
17 to market administrator -- to the market administrator and
18 market about 6 billion pounds of milk annually. I believe
19 this can be seen in Appendix Table 16 of Exhibit 5.

20 There are dramatic differences in the northeast
21 relative to how cooperative member and non-member milk is
22 used. Most of the non-cooperative milk is dedicated to
23 supplying distributing plants on a year-round basis. As
24 shown in Appendix Table 15 and Market Administrator

1 Exhibit 5, the average classification of non-member milk
2 in the Northeast is about 80 percent Class 1 despite the
3 fact that the northeast is less than a 45 percent Class 1
4 utilization market year-round.

5 The milk from those non-member farms is
6 received at Class 1 distributing plants just about all the
7 time. Non-member farms shipping to Class 1 processors
8 make no special efforts to balance the seasonal or daily
9 needs of their handler or the Class 1 market. To my
10 knowledge, Class 1 handlers do not limit the volume of
11 milk picked up by those non-members in any way.

12 Class 1 handlers do not ask those shippers to
13 store milk below the mandate -- behind the mandates.
14 Those handlers don't refuse to accept their milk when
15 schools go out of session or demand producers expand their
16 herds in the fall and reduce it in the spring.

17 What Class 1 producers providing milk from non-
18 members usually do is buy a volume of milk that is no
19 longer in the low month needs and use cooperative milk to
20 balance their needs in the high -- in the high usage
21 month. Table 1 takes the market -- market administrator
22 data from page five of Exhibit 5 regarding producer
23 receipts classified as Class 1 and shows a column
24 representing 118 percent of those Class 1 volumes and

1 total and on an average daily basis. This suggestion
2 represents one divided by -- this suggestion represents
3 one divided by 0.85 and it's made because distributing
4 plants have approximately 85 percent Class 1 milk on
5 average.

6 This table then compares that with the product
7 of multiplying the volume of non-cooperative producer
8 receipts from Appendix Table 17 of the same market
9 administrator's exhibit, Exhibit 5, times the percentage
10 of proprietary handler producer milk receipts delivered to
11 distributing plants. Once again, from Appendix Table 15
12 of the same market administrator's Exhibit 5. The
13 difference is an estimate for the amount of Class 1 milk
14 that is supplied by non-members each month.

15 Table 1 also gives the volume per day for non-
16 cooperative and cooperative producers as a percent of the
17 low month during the 18-month period. The non-cooperative
18 producers -- a low point of receipt per day and uses Class
19 1 milk from August 2001. The level of milk provided per
20 day ranged from that low point to a 12 percent -- to 12
21 percent higher in March and April of 2002. It is
22 significant that the high point of deliveries of non-
23 members was in the spring when Class 1 sales tend to be
24 less than in the fall.

1 Cooperative member -- member receipts in the
2 Class 1 market was at a low point in July 2001. However,
3 the deliveries needed for the Class 1 market peaked in
4 November and needed to be 29 percent above the July low
5 point. The seasonal high of the cooperative receipts for
6 the Class 1 market was more than double that of non-member
7 receipts and occurred at a point when total milk producer
8 receipts was usually at a seasonally low point. Clearly,
9 cooperative milk does far more balancing of the Class 1
10 market.

11 The next question is, how do we balance the
12 Class 1 market. The Northeast Federal Order is an
13 extremely large milk production and Class 1 demand area,
14 as also indicated by Mr. Gallagher's testimony. Some
15 areas, such as the upper midwest, have a large enough
16 Class 2 industry -- Class 3 industry that their smaller
17 Class 1 market can be balanced by slightly reducing the
18 amount of milk received by a large number of cheese
19 plants. Many of those plants, by the way, are owned by
20 cooperatives.

21 However, even that market must have at least
22 one or two powder plants. In the northeast, the Class 1
23 market is too large -- large to be predominantly balanced
24 by cheese plants on an economic basis. Cheese plants play

1 an important role, as I believe Mr. Gallagher will
2 indicate in his testimony. However, butter and powder
3 plants still play a dominant role in balancing the dairy -
4 - the daily and seasonal needs of the market.

5 As previously noted, AgraMark operates a large
6 Cheddar -- Cheddar cheese plant in Middlebury, Vermont --
7 plant due to costs involved in doing so and the type of
8 market we have for the products produced there. The cost
9 and market type of product produced at West Springfield
10 are much preferable for balancing. The marketing and
11 operations staff we do at our current -- that's AgraMark's
12 marketing and operations staff --our current overhead
13 costs at both our Middlebury and West Springfield
14 operations.

15 The overhead costs -- taking out the word
16 "complete," the overhead costs per hundredweight are \$1.02
17 per hundredweight of milk at our cheese facility and 61
18 cents per hundredweight at our West Springfield plant. In
19 other words, if we remove a hundredweight of milk from
20 Middlebury served to the Class 1 market, we have \$1.02 in
21 fixed costs that cannot be recovered. If we remove that
22 same hundredweight of milk from West Springfield, we incur
23 a 61 cent cost that cannot be recovered. Our cost of
24 balancing are lower by 41 cents per hundredweight when we

1 use our butter powder facility. In addition, butter and
2 powder are far more generic products than our award-
3 winning Cheddar cheese produced at Middlebury.

4 Figure 4 shows the Class 4 -- time out for a
5 commercial.

6 (Laughter)

7 BY MR. BESHORE:

8 A Figure 4 shows the Class 4 volume of milk in
9 the federal order. The data from this table originates
10 from page five of the Market Administrator 5. I have
11 duplicated that data in Table 2 because of its importance
12 relative to this hearing. The extreme volatility -- can
13 clearly be seen in both the figure and Table 2.

14 Class 2, our produce receipts are at or
15 significantly 249 million pounds for the first five months
16 of 2000, or at or below 100 million pounds during August
17 and November of 2000. Based on our experiences at West
18 Springfield, December 2000 likely has producer receipts in
19 Class 4 at below 50 million pounds for the first half of
20 the month. Those receipts then likely rose above 100
21 million pounds for the second half as schools close and
22 Class 1 and other plants reduce their bottling schedules
23 during the holiday season.

24 In the year 2001, Class 4 receipts peaked at

1 230 million pounds in the spring and was below 150 million
2 pounds throughout the late summer and fall. The
3 volatility was less in 2001 because volatility of total
4 milk receipts were less.

5 In 2000, total receipts in the Northeast Order
6 were 1 billion 76 million pounds higher in the first six
7 months of the year than in the last six months. This was
8 a 9.4 percent difference. During the same year, Class 4
9 receipts were 901 pounds higher than the two time periods.
10 Class 4 plants absorb 84 percent, which is 901 divided by
11 1076 -- keep in mind that's a million pounds -- of the
12 difference of producer receipts even though Class 4 milk
13 averaged less than 10 percent of the total producer
14 receipts during the year.

15 Class 4 volume had to fluctuate by 126 percent
16 between the two halves of the year in order to accommodate
17 the change in total producer receipts.

18 In -- in the year 2001, total milk receipts in
19 the order were only 266 million pounds higher during the
20 first six months of the year than in the last six months.
21 That was a 2.2 percent difference. During the same era,
22 Class 1 receipts were 250 million pounds higher during the
23 same time periods. Class 4 milk once again absorbed more
24 than 80 percent of the difference in producer receipts

1 even though it averaged less than nine percent of total
2 producer receipts in 2001. Class 4 volume had to
3 fluctuate by only 22 percent between the two halves of the
4 year.

5 While that may look like a better economic
6 situation for Class 4 plants in 2001, it was actually a
7 far worse year since total Class 4 volume was down 200
8 million pounds during the year and plants had far less
9 volume to spread their fixed costs over.

10 Looking at the year 2002 so far, it is good
11 that we did not reduce Class 4 capacity last year.
12 According to the table on page five of the market
13 administrator's Exhibit 5, Class 4 pounds during the first
14 six months of 2002 are around 469 million pounds above the
15 same months in 2001 and even 35 million pounds above 2000.

16 Table 2 also contains information on volume of
17 milk manufactured at AgraMark's West Springfield,
18 Massachusetts, plant. This plant has a manufacturing
19 capacity of about 2.2 million pounds of milk per day. We
20 were essentially at full capacity in April 2000 when we
21 used 65.4 million pounds of milk in that 30-day period.

22 The low point that year and for the past two --
23 years was 19.4 million pounds in November of 2000. We
24 were operating at less than 30 percent of capacity that

1 month.

2 Appendix Table 4 of market administrator
3 Exhibit 5 shows total receipts of milk and cream at the
4 seven plants operated by the cooperative members of ADCNE.
5 These plants include AgraMark's West Springfield facility.
6 Information for the months of May and November between
7 1992 and May of 2002 is provided. These plants do a
8 variety of activities, including reloading milk -- skim
9 milk into a -- cream for sales to other handlers. Those
10 activities as well as the production of specialized
11 products, including on-demand specialized milk powders,
12 tend to be more valuable products and are priorities to
13 plants.

14 The least priority is making skim milk powder
15 and butter. Those are the two products that balance the
16 Class 1 market. When one averages the amount of product
17 into nonfat dry milk in each May since 1992, the average
18 is 220 million pounds. The amount in November is about 97
19 million pounds. But actually, it's closer to 100 million
20 pounds when the 30 days in November are adjusted to 31
21 days, such as in May.

22 The amount of product used for nonfat dry milk
23 is clearly more than double the production in May as it is
24 in November over time. The extremes during this time were

1 60 million pounds in November of 1993 and 286 million
2 pounds in May of 2002.

3 Butter production tends to have somewhat less
4 volatility. Class 1 sales average about 2 percent
5 butterfat needs to balance accordingly more skim milk than
6 butterfat and producer milk since producer milk averages
7 nearly twice the butterfat level. For example, when Class
8 1 sales peak in the fall and the larger amounts of milk
9 are needed for that classification, the producer milk
10 received at distributing plants must be separated to
11 generate milk averaging two percent butterfat. The
12 separation produces a large volume of cream that is not
13 needed for Class 1.

14 The column marked, "Total Cream Receipts" in
15 market administrator Appendix 14, Exhibit 5, reflects that
16 occurrence. Most -- is coming from Class 1 distributing
17 plants.

18 Product manufacturing of butter at the ADCNE
19 plants averages -- averaged 14.2 million pounds in May and
20 8.3 million pounds in November, or 8.6 million pounds in
21 November when adjusted for a 31-day month. Thus, there
22 were 60 percent more -- 66 percent more butter made in May
23 than in November on average at ADCNE plants.

24 Cooperatives seek the lowest cost method to

1 balance reserve milk supplies in their areas. The use of
2 supply arrangements with cheese plants may work in New
3 York due to the proximity and number of such plants. That
4 cost -- that cost increases in New England because we do
5 not have a concentrated cheese industry and the high
6 transportation costs of bringing the milk against federal
7 order zones back into New York.

8 We have predominantly always used butter powder
9 plants to balance the Class 1 market. At one point we had
10 several small butter powder plants in New England, but now
11 we operate only one large plant. For AgraMark, we do this
12 at the least cost possible. However, based on the -- on
13 their available -- availability thereby -- on their
14 available nearby plants and other factors, other co-ops
15 may employ other options.

16 How can we measure the cost of balancing? It
17 is very difficult to measure the cost of Class 1 balancing
18 in an operating plant because it's almost impossible to
19 isolate those costs and allocate them back to Class 1
20 balancing functions.

21 Butter and powder manufacturing plants do many
22 functions. They often reload for longer distance travel.
23 They can separate milk and sell skim milk or cream. They
24 can condense skim and sell that product directly. They

1 can combine condensed skim milk and cream in many
2 combinations and sell them as blends. They can
3 manufacture butter and they can manufacture dry milk
4 powder. The powder also can be heightened -- for whole
5 milk powder. Some operations, such as Oatka, also produce
6 evaporated milk and package various milk-based drinks.

7 At the AgraMark plant, we also package butter
8 in retail size containers in addition to the many
9 functions I just mentioned. However, we do not make any
10 whole milk powder nor do we produce any -- or package any
11 milk-based drinks. We also do a tremendous amount of
12 balancing with the Class 1 market at our plant in West
13 Springfield.

14 Table 2 shows the volume of milk manufactured
15 in West Springfield as a percentage of full capacity. In
16 year 2000, we ranged from running at 99 percent capacity
17 in April to 29 percent capacity in November. In 2002, our
18 spring peak was 75 percent capacity in May but we later
19 peaked even higher, 81 percent in December.

20 Q Do you mean 2001?

21 A I'm sorry. 2001. Thank you.

22 In 2001 -- I'll repeat that -- our spring peak
23 was 75 percent capacity in May, but we later peaked even
24 higher at 81 capacity -- 81 percent capacity in December.

1 The low point was September 2001 at 37 percent capacity.

2 Our peak so far in 2002 was at 92 percent
3 capacity in June. Figure 6 reflects that information
4 shown in Table 2.

5 When we do our overhead costs as they relate to
6 Dr. Ling's study at various levels of capacity, our cost
7 data show that the cost per pound of product increases
8 about 0.11 cents per pound for each one percent drop in
9 plant capacity use. This further verifies the information
10 used by Dr. Ling in his study.

11 As already noted, there are so many complex
12 activities taking place at a balancing -- at balancing
13 facilities, it is very difficult to pinpoint what should
14 be associated with balancing and to what degree. At
15 AgraMark's West Springfield operation, the least valuable
16 activities that involve balancing include receiving,
17 condensing, and drying and churning milk. Other
18 activities such as selling condensed milk, cream, and --
19 usually generate more value and would have a higher value
20 than drying and churning.

21 If you look at the plant running at full
22 capacity and then remove milk volume from that plant, the
23 removed product at West Springfield will impact the dryer
24 and churn first. Therefore, we can look at the --

1 costs of reduced powder and butter production as a --
2 measure of the costs of balancing in the matter reflected
3 -- in the manner reflected in Ling's study.

4 Next question is, why is Dr. Ling's study so
5 useful. Ling's study isolates the cost of balancing at a
6 plant from all other activities occurring at the plant.
7 His analysis uses real data and reasonable assumptions to
8 exclusively focus the Class 1-related balancing cost. The
9 Ling study is the least cost -- actual cost of balancing.
10 It assume a best-case, least-cost balancing scenario for
11 several large efficient butter powder plants handling the
12 entire northeast market balancing needs.

13 In the real world, the system is not so perfect
14 and there are additional costs. These additional costs
15 include the extra hauling costs needed to move milk to the
16 already established locations abounding -- of balancing
17 plants, decided several years ago while the milk supply
18 area of the order has shifted.

19 Dr. Ling begins his report with a discussion of
20 the seasonal nature of milk in the marketplace. Table 1
21 of his report, Exhibit 12, shows indices of seasonality of
22 producer milk deliveries and fluid demand. Clearly, this
23 table reflects the pattern we have seen in the
24 marketplace. I have duplicated Ling's table using here

1 2000 and 2001 data from page five of the market
2 administrator's exhibit, Exhibit 5.

3 In my Table 3, I use Class 1 volume per day as
4 my measure for demand. I use producer milk deliveries per
5 day for my production index. This is the same information
6 used to generate my Figures 1 and 2 of this statement,
7 although it only uses 24 months of the year 2000 and 2001.
8 This table mirrors Dr. Ling's table to a great degree.

9 Dr. Ling discusses three categories of milk
10 reserves: operating reserves, seasonal reserves, and
11 excess reserves. Operating reserves are seasonal --
12 operating reserves and seasonal reserves are necessary to
13 the function of the Class 1 market. Hence, Dr. Ling
14 correctly refers to them in the combined categories of
15 necessary reserves.

16 Milk production above the level of necessary
17 reserves are referred to by Dr. Ling as excess reserves.
18 This term was used because Dr. Ling's study focused on the
19 Class 1 market exclusively. In reality, excess reserves
20 are the milk supplies that are for the most part a crucial
21 part of the manufacturing sector in the northeast. Most
22 of the excess reserves -- Class 3 cheese uses. However,
23 some go to Class 4.

24 However, those excess reserves are not a factor

1 in Dr. Ling's study nor in the ADCNE proposal. All of Dr.
2 Ling's cost factors involve necessary reserves for the
3 Class 1 market.

4 Further testimony by -- by Mr. Dennis Schad of
5 Land O' Lakes will document the reasons why we believe
6 that the northeast market conditions warrant the use of a
7 20 percent operating reserve as discussed in Table 4 and 5
8 of Dr. -- of Dr. Ling's report, Exhibit 12.

9 Figure 1 in Dr. Ling's report, Exhibit 12,
10 contains a tremendous amount of information. The key
11 numbers, however, are the seasonal operating and necessary
12 reserves. Figure 7 isolates those amounts. The operating
13 reserve in Figure 7 is the area between the seasonal and
14 necessary reserves. The key issue here is the large
15 amount of reserves needed and their volatility.

16 Dr. Ling's cost estimate are conservative. When
17 he considers the balancing costs of handling reserve
18 supply, he assumes a cost of \$28 million for a butter
19 powder plant with a capacity of manufacturing 3 million
20 pounds of milk per day. In 1999, when relocating our West
21 Springfield plant, an estimated cost of \$33 million if we
22 move much of the equipment to the new location. If we
23 provided it with new equipment, the cost would approach
24 \$40 million.

1 Dr. Ling also estimates total fixed and
2 overhead costs at about \$3 million. Total fixed and
3 overhead costs at our West Springfield plant are in excess
4 of \$4 million per year.

5 Dr. Ling uses an estimate that -- that for
6 every one percent decrease in the plant capacity use
7 product cost would increase one-tenth of one -- one-tenth
8 of a cent per pound. Our costs at our West Springfield
9 facility increase slightly over that, approximately 0.11
10 cents per pound.

11 Based on our information, we believe that Dr.
12 Ling's estimate for the costs of balancing necessary
13 reserves, assuming a 20 percent operating reserve, are low
14 and therefore conservative. We are not suggesting
15 adjusting his estimates since each plant is different and
16 the Department has consistently learned -- leaned to
17 conservative estimates in the past.

18 Next question, why can't we recoup those costs
19 from the marketplace. Why do we need to go to the order
20 to get the job done. Cooperatives who balance the Class 1
21 market have been -- have been unable to recoup the cost of
22 balancing these markets. Class 1 processors will not pay
23 any more than they have to for -- milk supply and many
24 believe that they pay a high enough price with the Class 1

1 differential, particularly after Option 1-A became
2 effective in place of the recommended Option 1-B on
3 January 1st, 2000.

4 As already expressed by Mr. Gallagher in his
5 testimony and touched upon by mine, Class 1 processors
6 have alternatives to procuring the milk from cooperatives.
7 There are more than 4000 non-members in the region and
8 those producers supply more milk than -- pooled in certain
9 orders. Class 1 processors could balance their seasonal
10 needs by adding -- producers when needed. This is what
11 occurred prior to the AMAA of 1937. It created disorderly
12 marketing as -- as it then would again. However, even if
13 processors behaved in that manner, it would merely shift
14 the burden within the market and the costs would still
15 exist.

16 One of the greatest problems we face in the
17 industry is that the very price settings that -- that
18 dairy price setting is extremely sensitive to the last
19 hundredweight of milk in the market. If that milk does
20 not have a -- home, it will depress all milk prices, both
21 over-order and class prices. We see this both nationally
22 and regionally when current milk production is just over
23 two percent above a year ago and the market faces stagnant
24 demand.

1 At most, the -- the supply-demand situation
2 reflects from two to five percent more milk and milk
3 products than last year, yet milk prices have fallen more
4 than 25 percent as those additional suppliers of milk and
5 dairy products have sought a home.

6 Federal -- federal order prices are
7 specifically meant to be minimum prices. When small
8 amounts of milk are without a home, any existing old order
9 prices are the first to go. Class 1 prices are set
10 nationally, but if no one is willing to provide a ready
11 home for the milk, that milk is sold below the class
12 price. The only thing worse than a low price for milk is
13 no price for milk.

14 Cooperatives provide a home that protects the
15 integrity of class prices to the greatest degree possible.
16 All producers benefit from this orderly marketing. If not
17 for the investments that AgraMark members have made in
18 areas other than balancing, our members would face -- on a
19 regular basis. We keep our members well informed
20 concerning order minimum prices and any deviation from the
21 minimum -- would be noticed immediately.

22 Why have cooperatives done balancing in the
23 past and why do we need reimbursement of those costs under
24 the order now. Cooperatives have balanced in the past

1 because it helped create an orderly marketing environment
2 that allowed us to sell milk at or above federal order
3 minimums. Our members did benefit from that action, but
4 that action came at a cost that was not shared equitably
5 with farmers in the order who encouraged milk balancing
6 costs.

7 In 1985 Congress passed the Food Security Act
8 of 1985 that specifically allowed marketwide service
9 payments. These service payments were first sought by
10 Dairy -- Incorporated, the largest cooperative serving
11 seven southeast federal orders involved in the hearing.
12 Marketwide service payments were denied to those seven
13 orders because substantial volumes of milk moved between
14 those relatively small orders as well as nearby orders.
15 There was no way to assure that the producers in one order
16 did not pay more than their share of balancing the other
17 markets.

18 Equitable sharing of costs was the problem
19 issue and according to USDA findings and conclusions,
20 quote, "So -- that proceeding that it was concluded that
21 further consideration of the proposal would serve no
22 purpose," "Federal Register," Volume 52, Number 84, May
23 1st, 1987, page 15959.

24 Proposal 7 differs from the marketwide service

1 proposal made for the seven northeast orders in many
2 regards. However, the primary difference is in regard to
3 size and marketing characteristics of the Northeast Order.

4 The Northeast Order is one extremely large
5 market that is far more regionally contained than the
6 southeast orders were in 1986. In fact, the current
7 Northeast Order is not only the largest federal order in
8 terms of both producer receipts and Class 1 receipts as
9 noted by Mr. Gallagher, it is larger than all the former
10 sever -- seven federal orders combined. This is -- this
11 is relatively -- there is relatively very little movement
12 of milk between the Northeast and other orders on a
13 percentage basis.

14 From the late 1950s until January 2000,
15 cooperative service payments existed in the New York-New
16 Jersey Federal Order. AgraMark and other cooperatives
17 that operate in the northeast but not in the New York-New
18 Jersey regularly discussed getting marketwide payments but
19 cooperatives in the region could not agree on a way to
20 proceed. We did all agree to seek them as part of the
21 Fair Act processed -- orders effective on January 1st,
22 2000. However, the Department denied our request.

23 In addition to cooperative payments in the
24 former New York-New Jersey Order, we also had seasonal

1 price adjustments in all three northeast orders that
2 lowered the Class 3 and Class 4 prices in the spring and
3 raised them in the fall. This reduced our balancing cost
4 by a small degree, however other organizations did not see
5 the same benefits and the Department denied them also.

6 The specifics of the ADCNE proposal, under
7 Proposal 1, qualifying organizations performing marketwide
8 services of balancing the Class 1 market would receive six
9 cents per hundredweight on qualified milk volumes which
10 they pool. Each month the market administrator would make
11 payments to the Producer Settlement Fund. Both
12 cooperative and proprietary handlers who performed those
13 duties would be eligible for payment.

14 The six cents a hundredweight rate was
15 determined using Dr. Ling's cost of balancing for the
16 northeast. At a 20 percent operating reserve, total
17 balancing on a conservative basis is estimated to be
18 11,567,210. Cooperatives and other handlers who -- who
19 provide balancing have approximately 76 percent, Market
20 Administrator Exhibit 5 and 17, of total producer receipts
21 of about two -- 24.5 billion pounds of milk annually, page
22 five of the same exhibit. This represents about 18.6
23 billion pounds of milk annually. When one divides one's
24 cost by this milk volume, it results in a rate of 6 point

1 -- of 0.0622 dollars per hundredweight.

2 In order to qualify for payments, the handler
3 would be required to first, number one, pool three percent
4 of a -- of the market's milk or, two, pool 1 million
5 pounds of milk per day and operate a pool manufacturing
6 plant, Class 3 or Class 4, located in the states of the
7 marketing area or a pool distributing plant as defined in
8 Section 7-A of Northeast Order. These percentages and
9 volumes of milk are supported as minimums because any
10 handler, cooperative or otherwise, who balances milk on a
11 daily or seasonal balance must have sufficient volume and
12 non-Class 1 designations for milk in order to meet market
13 needs.

14 A three percent minimum of the total milk
15 volume in the order for the month represents about 60
16 million pounds of milk per month. This handler must have
17 significant marketing relationships with at least one
18 manufacturing plant but the Class 1 plants -- it's much
19 more -- at least 20 percent of that volume or 12 million
20 pounds per month at a Class 1 -- Class 1 milk in the fall.

21 Handlers who operate Class 3 or Class 4 plants
22 and pool milk can qualify at a lesser milk volume of 1
23 million pounds of milk per day each month. This million
24 pound per day minimum was used in the cooperative payment

1 provisions of the former New York-New Jersey Order. It
2 also represents about 20 -- of milk, which is a
3 significant volume also.

4 Under Subsection A(2) of the provision of
5 Proposal 7, a qualifying handler could not deliver more
6 than 65 percent of his pooled milk to a distributing
7 plant. A handler who delivers 65 percent or more of his
8 milk to a Class 1 plant is not balancing to a great
9 degree. That milk is likely coming from a designated
10 source of non-member producers who's already discussed in
11 my testimony.

12 Adjustments A and B are included to limit the
13 ability of a handler to merely move around milk to qualify
14 for payment without balancing those supplies.

15 Under Subsection (b), a qualifying handler can
16 be required by the market administrator to ship extra
17 volumes of milk to Class 1 plants if market conditions
18 warrant. Such extra shipments would not necessarily be
19 required of other handlers pooled in the Northeast Orders.
20 Qualifying handlers who receive a marketwide balancing
21 payment who would be going to take on additional
22 responsibilities -- should be willing to take on
23 additional responsibilities and additional costs when
24 needed by the market.

1 The rate of the payment in Subsection (c) was
2 previously discussed. Under this section, cooperatives --
3 cooperatives can only receive payments on the milk of
4 their members or the members of another qualified
5 cooperative association. Those cooperative handlers can
6 only receive payments on non-member milk that they pool.
7 This --

8 Q Bob? Is that --

9 A -- non-cooperative --

10 Q I'm sorry.

11 A Non-cooperative handlers. Getting a little
12 tongue-tied. None -- non-cooperative handlers can only
13 receive payments on non-member milk that they pool. This
14 will assist with accounting from the market administrator
15 perspective and assure that the milk receiving payments is
16 under the marketing control of the -- of the handler
17 receiving the payment.

18 We would like to add a provision at the end of
19 Subsection C that modifies our proposal and reads as
20 follows:

21 Provided further that no payment shall be made
22 on the milk of any producer until such producer's milk has
23 been pooled for three consecutive months.

24 The intent of this provision is to assure that

1 any milk receiving a marketwide service payment is
2 committed to serving the northeast market. Milk that is
3 moved to another market on a seasonal basis without a
4 waiting period before qualifying for a marketwide service
5 payment. This provision further addresses the primary
6 problem issue based on the former southeast orders in
7 1986.

8 In summary, large Class 1 markets such as the
9 northeast require a substantial amount of balancing that
10 benefits all producers. There is no question that
11 balancing is needed given the pattern of Class 1 demand
12 and sales as well as the pattern of producer receipts
13 during the course of the year and even within a week.

14 There should also be no questions as to who
15 performs the balancing and that there's a cost to that
16 important service. Finally, there is also no question
17 that the payment of marketwide services from the pool is
18 allowed under the Agricultural Marketing Agreement of 1937
19 and its subsequent amendments.

20 The key issues for the proponents of Proposal 7
21 is that the economic returns for providing milk under the
22 federal -- Northeast Federal Order for producer members of
23 cooperatives who balance the Class 1 market are less than
24 that of producers who do not participate in providing

1 those balancing services.

2 There have been problems in the past in
3 considering marketwide service payments. Prior to January
4 1, 2000, there were three federal orders with a combined
5 marketing area less than the one -- less than the one
6 Northeast Order has today. Although the issue of producer
7 equity between orders was not as significant as in the
8 former southeast orders, it was still a factor.

9 A second issue was the largest former -- was
10 that the largest former order of the northeast, the New
11 York-New Jersey Order, had provisions known as cooperative
12 service payments that were linked to balancing.

13 The consolidation and expansion of the former -
14 - of the three former orders in the Northeast into the
15 largest federal order in the country addressed the
16 producer equity issue between orders. Although the
17 cooperatives both inside and outside of the New York-New
18 Jersey Order all supported the continuation and expansion
19 of cooperative payments under the order, the decision by
20 the Department did not include those provisions and pushed
21 the co-ops into working closer together to develop a fair
22 workable marketwide service proposal.

23 Plants which perform significant Class 1
24 balancing functions also perform many other functions -

1 - plant costs and other costs that specifically relate to
2 Class 1 balancing would be extremely difficult and, I
3 would add, almost impossible, probably impossible. Many
4 times the costs associated with balancing relate to not
5 having milk and it's difficult to propose a payment on
6 milk that is not in one's plant. Dr. Ling's study
7 provided a way to isolate and quantify the costs using
8 real-world data and a low-cost, high-economic efficiency
9 model.

10 The Class 1 market is different in the
11 northeast from all other markets. It is the largest in
12 terms of both maximum sales volumes and producer receipts.
13 However, the Northeast Order also has more than 4000 non-
14 member producers that ship almost exclusively to Class 1
15 distributing plants. The Order has more than 70
16 cooperatives of all sizes that compete in the marketplace
17 to sell their members' milk. Handlers such as
18 cooperatives that balance Class 1 needs are unable to get
19 reimbursed for the full cost of balancing due to
20 competition in the marketplace among alternative suppliers
21 of milk available to Class 1 distributors.

22 Class distributors already -- one of the
23 highest Class 1 differentials in the order system and
24 often pay those higher prices as -- and also often

1 consider those higher prices as covering the costs of
2 providing milk to the Class 1 milk both as an aggregate
3 supply and time-sensitive supply.

4 To the extent that the Class 1 differential is
5 meant to encourage supply of milk to the Class 1 market,
6 there is already revenue in the pool relating to that
7 function. However, that revenue is distributed to all
8 producers equally even though it is not the individual
9 producer who balances the Class 1 market. That revenue
10 should go to the groups that actually perform the services
11 that benefits the market.

12 The Association of Dairy Cooperatives of the
13 Northeast, ADCNE, proposal calls for a six cent per
14 hundredweight payment to those producers who balance the
15 Class 1 market. It would be available to both
16 cooperatives and proprietary handlers who qualify. The
17 proposal provisions provide adequate criteria and
18 qualifications so that payments only go to handlers that
19 truly balance the Class 1 market. Handlers who receive
20 this payment will be required to have additional
21 responsibilities under the order relative to serving the
22 Class 1 market they needed -- when needed.

23 ADCNE has also proposed a provision that
24 mandates a three-month waiting period before producer milk

1 would qualify for the six cent per hundredweight payment.
2 This additional provision is to assure that qualifying
3 producer milk is dedicated to serving the northeast market
4 on a consistent basis.

5 We ask that the Department implement Proposal 7
6 as soon as possible. Thank you.

7 JUDGE BAKER: Mr. Beshore, did you have any
8 questions before we -- him for cross examination?

9 MR. BESHORE: Just -- just one or two.

10 JUDGE BAKER: All right.

11 BY MR. BESHORE:

12 Q Bob, you've identified and explained AgraMark's
13 operations a bit in this statement. Could you provide
14 some information for the record about one of the other
15 ADCNE members that is in the New -- New England region
16 that you're familiar with? And I'm speaking of St. Albans
17 Cooperative Creamery.

18 A I can provide some marginal information
19 regarding that. St. Albans Cooperative is based out of
20 St. Albans, Vermont, which is in Franklin County, Vermont,
21 very close to the Canadian border. They operate one --
22 one plant that's -- is -- it's a -- it's a powder plant.
23 It's not a butter plant. They do not churn butter. They
24 separate milk.

1 They're our major -- one of their major
2 suppliers and one of the reason they can separate and
3 operate in that manner is Ben and Jerry's. I believe
4 they're exclusive supplier to cream for their ice cream
5 for Ben and Jerry's. So they use the cream in that
6 manner.

7 They separate and then they sell the skim milk
8 often to Class 1 markets. I don't know exactly who their
9 customers are. If they were here, I'd ask them. But I
10 don't know who their customers are, but they have a
11 variety of customers, as we do.

12 They -- like I said, they do -- they do not
13 make butter at their plant. It's really exclusively for
14 balancing. They have a very inefficient plant. Their --
15 their dryer, my understanding is something -- about 25 or
16 30 years old. And they use it when they have to but they
17 really don't want to have to make that commitment for
18 their -- for their milk.

19 They have about 500 members and they market
20 approximately a billion -- a little over a billion pounds
21 of milk a year.

22 Q Their -- the -- the plant at St. Albans was one
23 of the plants which was included in the data assembled by
24 the market administrator and reflected in Appendix 14 of

1 Exhibit 5, is that your understanding?

2 A I believe so.

3 MR. BESHORE: Don't have any other further
4 questions for Mr. Wellington on -- on direct, and he's
5 available for cross examination.

6 JUDGE BAKER: Very well. Thank you, Mr.
7 Beshore. Are there any questions for Mr. Wellington?
8 Yes, Mr. Rosenbaum?

9 CROSS EXAMINATION

10 BY MR. ROSENBAUM:

11 Q Mr. -- Steven Rosenbaum for the International
12 Dairy Foods Association. Mr. Wellington, if you could
13 turn to Table 2 of your Exhibit 14?

14 A Yes.

15 Q Which in the second and third column shows for
16 your West Springfield plant the pounds received as a
17 percentage of capacity, is that right?

18 A Yes.

19 Q And those are --

20 A It's pounds used for butter. It's for skim
21 milk and butter production. It's not total pounds
22 received by the plant.

23 Q And what other uses are made of that milk?

24 A Of that -- of that -- that milk goes into --

1 goes into nonfat dry milk production and butter. We -- we
2 -- we do receive additional milk at the plant and that
3 milk will go to a variety -- it could go into condensed
4 skim sales, it might go into cream sales. It might be
5 reloaded and sold somewhere else. Usually if we do that,
6 it's either sold to a Class 1 processor or else it's sold
7 because we have issues at the plant on -- on balancing
8 a particular day or so and we need to find another home
9 for it.

10 Q And you have here some monthly averages. Do
11 you know what the -- ranging from 81 percent of capacity
12 in January of 2000 for example to 54 percent in December
13 of that same year. Do you know if the --

14 A Fifty-three percent in August.

15 Q I didn't mean to be --

16 A Oh, I'm sorry.

17 Q -- talking about ranges.

18 A Oh, I'm sorry.

19 Q I was going from the beginning of the year to
20 the end of the year.

21 A Yes.

22 Q My simple question is whether you in fact know
23 what the annual average is?

24 A I don't have that -- I could calculate that

1 number. I don't have that right -- in front of me.

2 Q Okay. It -- does -- does 67 percent sound
3 about right?

4 A Probably. I was about to say around two-
5 thirds.

6 Q Okay.

7 A It depends on -- it depends on the year
8 involved. That year it's probably around two-thirds. I
9 think in January it's probably around 60 percent. I'm
10 sorry. In 2001 it was probably around 60 percent.

11 Q Okay. Now, I believe you've testified that the
12 eight cooperatives that are members of ADCNE account for
13 65 percent of the milk pooled in Order 1?

14 A Approximately, yes.

15 Q And I think you've also testified that
16 independent milk is about 25 percent?

17 A Yes, I think those are -- I think those are --
18 the 25 percent is reflected in the market administrator
19 data and the 65 percent is from looking at our own pounds
20 of our members.

21 Q So those two combined are 90 percent?

22 A Of 90 -- correct.

23 Q Just adding those together. Now, Allied is not
24 a member of your organization, correct?

1 A No.

2 Q But do they represent some portion of the --

3 A Oh, certainly.

4 Q -- remaining 10 percent?

5 A Certainly.

6 Q Do you know how much?

7 A No.

8 Q Okay. There was testimony by Mr. Gallagher
9 yesterday about there being 78 cooperatives in the
10 northeast, do you recall that?

11 A Yes.

12 Q And -- and am I right that your eight that are
13 members of your group make up -- well, as you've already
14 testified, about 65 percent right there, correct?

15 A Correct.

16 Q So those remaining 73 co-ops combined cannot
17 exceed 10 percent?

18 A Approximately, yes.

19 Q And -- and -- and one of those is Allied, which
20 is a relatively major cooperative?

21 A Allied is a federation of cooperatives composed
22 of a lot of much smaller cooperatives. But yes, that is
23 true.

24 Q Okay.

1 A Most of those co-ops, by the way, tend to be
2 much smaller co-ops.

3 Q Right. And so the quantity of milk that they
4 could provide to a handler is relatively modest?

5 A The quantity of milk, yes, it is. And in fact,
6 we view that in some of the smaller co-ops -- I think Mr.
7 Gallagher referred them to sort of almost like independent
8 co-ops. I don't necessarily like that term, but they
9 almost operate as one large partnership of farms without -
10 - when they market their milk. But yes, they can't
11 provide too much of the milk although they can be used as
12 leverage against other supplies.

13 Q That leverage being limited by the amount of
14 milk they have --

15 A It's -- of course it's limited. Absolutely.

16 Q Am I correct that in your proposal the only
17 costs that you are trying to have covered in Proposal 7
18 are the costs of balancing?

19 A Costs of balancing the Class 1 market, that's
20 correct.

21 Q And the -- the -- the costs that you've
22 identified as -- in that respect are seasonal balancing
23 and necessary reserves, correct?

24 A The seasonal and operating and then the combine

1 to the necessary ones, yes.

2 Q So there are two elements, seasonal and
3 operating, which combine --

4 A Yes.

5 Q -- are necessary?

6 A Yes.

7 (Pause)

8 BY MR. ROSENBAUM:

9 Q On -- on Table 3 -- no, excuse me. One moment.

10 (Pause)

11 BY MR. ROSENBAUM:

12 Q On Table 1 you have a column toward the right.
13 It's the next-to-the-last column that reads, "Estimated
14 Volume Per Day of Non-Co-Op Receipts Delivered to
15 Distributing Plants," correct?

16 A Correct.

17 Q And am I reading that correctly to show that
18 in, say, April and May those non-co-op receipts are in
19 excess of the low month?

20 A In April and May --

21 Q Of 2001, excuse me.

22 A Yes, because they're at the 104 and 105
23 percent.

24 Q Okay. And for 2002, they are 112 percent and

1 108 percent of the low month, is that right?

2 A Yes. That -- that basically occurs because the
3 -- the volume of milk by those non-cooperative producers
4 is seasonally adjusted by their production, and their
5 production tends to be higher in those particular months
6 in the fall than it does in other parts of the year.

7 Q And as a result of delivering more -- more milk
8 during those months?

9 A In those months, yes. In the spring months.

10 Q On Table 3 you have -- have in essence
11 attempted to replicate for the years 2000 and 2001 the
12 data that -- that Dr. Ling had in his report for the years
13 1994 through '99, is that correct?

14 A That's correct. It's a -- it's a rough
15 estimate because Dr. Ling used a much longer period of
16 time which actually smooths out the fluctuations. We
17 wanted to focus in on the -- the -- the information we
18 had. He used a rolling average, I believe. We only had
19 two years so I couldn't roll anything. It had to be a
20 very simple average.

21 Q All right. And what -- what you're showing
22 here is that -- with respect to producer milk deliveries
23 you have 104 percent of the simple average in May of -- in
24 May, is that right?

1 A In -- in May, yes, for -- for my numbers for
2 the year 2000 and 2001. That's what we're referring to,
3 correct?

4 Q Now, in that respect, are you combining May of
5 2000 and May of 2001?

6 A Yes, I am. I'm taking the average of both.

7 Q Okay. And I'm sure, since I've asked other
8 witnesses, you have looked at Appendix 16 in Exhibit 5
9 which provides data as to how much milk in each month is
10 coming from other states, correct?

11 A I'm -- I'm aware of that table and it's not
12 factored into this table, though.

13 Q It's not factored into in what sense?

14 A I didn't make any adjustments on producer
15 deliveries --

16 Q So that --

17 A -- to account for that.

18 Q -- your producer deliveries include this,
19 correct?

20 A Yes.

21 Q And -- and you'll agree with me, I'm sure, that
22 in 2001, which is one of the periods that's included in
23 your Table 3, there were over 100 million pounds of other
24 state milk brought in to be pooled on the Northeast Order

1 in each of the months of May, June, and July?

2 A Only because I'm forced to agree because the
3 numbers are actually in the report.

4 Q And as compared to a -- to a low of only 13
5 million pounds in November of 2001, correct?

6 A Yes, that is correct.

7 Q And so, the seasonality portrayed in your Table
8 3 reflects in part the fact that more -- other state milk
9 is being pooled on the order?

10 A It certainly would impact those numbers.

11 Q Okay. And -- and impact it in the sense that
12 it -- it -- it amplifies the seasonality?

13 A Amplifies the seasonality, I guess, on my
14 particular numbers that are there. I don't know if it
15 amplifies the seasonality of the amount of milk available
16 in the market because not all that milk comes to this
17 market. It might be pooled in the market but it might not
18 be here. But in terms of those numbers, yes, it does have
19 an adjustment. I think it would amplify it but I'd have
20 to look at it.

21 Actually, you can recalculate these numbers
22 with those, I would -- you know, your witness or a brief
23 could do that.

24 Q Do you -- if you could -- if you could turn in

1 Exhibit 5 to -- and do you see there a list of supply
2 plants operating under the Northeast Order?

3 A Yes.

4 Q And I'd like you to tell me if you could, if
5 you know, when each of those plants was -- was built?

6 A When each of those plants was built?

7 Q Right.

8 A That I couldn't tell you. To be honest with
9 you, I couldn't even tell you when our plants were built
10 because they were well before my time. They've -- I
11 can -- I can tell you, for example, if we go through the
12 AgraMark Cabot facility -- actually, that plant was built
13 in 1919 because we used it in an advertisement for Cabot.
14 Although I imagine it has changed quite a bit since then,
15 but I wasn't around to see it.

16 The Middlebury plant in Middlebury, Vermont,
17 that was essentially rebuilt in about 1991. That plant
18 was a Kraft Swiss cheese plant prior to that and then
19 Kraft decided to close it and I guess get their product
20 from elsewhere in the country. And we had an opportunity
21 to purchase that plant and -- but Swiss cheese did not
22 look like the appropriate market. So we spent quite a bit
23 of money converting it to a Cheddar cheese plant at that
24 point.

1 So to the extent that -- the building was still
2 there. It was -- much of it was rebuilt at that point.

3 The West Springfield facility has changed over
4 time. But to my knowledge, that has been there for at
5 least 40 years or more. At one point we had several small
6 balance -- butter powder plants. We even had one in
7 Andover, Massachusetts, about 25 miles outside of Boston.
8 But those were closed for efficiency purposes so we could
9 balance out of one butter and powder plant.

10 But I'm sorry. I can't give you exact -- I
11 really have -- don't have any knowledge of anybody else.

12 MR. ROSENBAUM: Thank you very much. That's
13 all I have at this time.

14 JUDGE BAKER: Thank you, Mr. Rosenbaum. Are
15 there other questions of Mr. Wellington? Yes, Mr.
16 English?

17 CROSS EXAMINATION

18 BY MR. ENGLISH:

19 Q Mr. Wellington, turning to your Exhibit 14 and
20 starting with Table 2 for a second.

21 A Is that -- I -- is -- is -- are my exhibits
22 with my tables for 14?

23 Q Yes. Yes.

24 A Okay. I'm sorry. I didn't write that down.

1 Q Glad to provide that for you, Bob.

2 A Thank you. What -- what table again, please?

3 Q Table 2.

4 A Table?

5 Q Two.

6 A Two. Yes.

7 Q The first question is a clarification question.
8 Did the quantities included on Table 2 include purchased
9 cream for butter production?

10 A It included all the -- the product that went
11 into the -- the dryer and the churn. And so to the extent
12 that we purchased cream that month, I couldn't segregate
13 whether it was purchased cream or our own or whatever.
14 But it did add to the supply. There was a total supply
15 available to the plant.

16 It's another reason why we need -- it's very
17 difficult to try to isolate these costs because we have so
18 much -- so many things happening.

19 Q Do you have producer receipts -- I -- strike
20 that.

21 Do you have receipts of milk at that plant that
22 are not counted as producer receipts? Other than
23 purchases of -- purchased cream?

24 A We have -- we have transfers of milk from other

1 handlers. Is that what you're saying?

2 Q Yes.

3 A In essence? Yes. Yes, we will have that.

4 Q Is that included in this chart?

5 A No, not specifically included except to the
6 extent that if you could -- that that added to the supply
7 available, that would also go into the butter and powder
8 churn.

9 Q I guess what we're getting at is the first
10 column is the total Class 4 pounds pooled on this order,
11 correct?

12 A Yes.

13 Q But that might not be the total of product that
14 would be classified as Class 4 somewhere that is produced
15 in all the facilities that are represented on this,
16 correct?

17 A Say that again. I've got to listen to that
18 twice.

19 Q The quantity of milk that is classified as
20 Class 4 under this Order 1.

21 A Okay.

22 Q Does not include product that may be processed
23 at one or more facilities here that are classified as
24 Class 4 under another order? Pooled under another order.

1 A I don't -- I -- I think -- I think you're
2 correct. But I'll -- I'll be honest with you. I don't --
3 we don't receive at Springfield very much milk from --
4 from other orders. I know they do -- that might be a good
5 question to ask Mr. Schad, for example, in Pennsylvania.

6 Q But for your purposes, to your knowledge, you
7 receive some but not a lot, is that --

8 A Some but -- yeah, relatively little milk. We
9 do -- we receive producer milk directly. We might have
10 milk that's -- that's sent to that plant, weekend milk or
11 something, from a proprietary handler, you know, who wants
12 to get rid of milk. And I believe that -- that would be
13 producer milk. That wouldn't be included in what you're
14 asking.

15 Q That's correct. It sounds to me that -- that
16 would be milk that would be included on Column 1?

17 A Yes.

18 Q Okay.

19 A Keep in mind, we're talking about milk included
20 on Column 1. There's a -- there's a volume of milk that
21 comes into the plant, okay. And it comes from all
22 different sources. And then there's a volume of milk that
23 makes its way through the plant to the butter -- to the
24 powder and butter churn, okay, and that's what I'm trying

1 to show here.

2 Now, I can't say this milk went to the churn,
3 this milk didn't, this milk's Class 4. I can't do that.
4 I can just say, here's what we tried to do.

5 And once again, you get to the point of trying
6 to isolate what our costs were, I -- I -- in a way I can't
7 do that because I can't say this milk should -- this cost
8 should go to this milk, this cost should go to that milk.
9 So Dr. Ling's study helps us to isolate those costs.
10 That's really why -- why it's very, very important and one
11 of the reasons we can be here today to look at this
12 particular issue.

13 Q I guess what I'm trying to get at, though, and
14 maybe -- and what you're telling me is maybe you're not
15 the right person to ask. But let me ask a different type
16 of question, which is --

17 A Sure.

18 Q -- do you have non-pool plant -- non-pooled
19 milk at that plant?

20 A Do we have non-pool milk at that plant?

21 Q Is -- is this -- let me back up. Is this a
22 split plant?

23 A No.

24 Q Is any portion of it non-pool plant?

1 A No. I mean, we -- do we have -- do we have
2 non-pool milk at that plant. I'm trying to think because
3 back when Maine had plants that were non-pool -- that
4 were non-pool plants, we would -- we would take milk from
5 Maine and -- and -- and to some extent balance those
6 plants. Now they're in the order.

7 Q And that occurred pretty much January of --
8 January and February of 2001, pretty much all those plants
9 are in the order?

10 A As of the change in the order I think just
11 about everyone came in. I hope -- there's three plants in
12 Maine, one in -- one in Portland. That's a hood plant,
13 and that clearly was in the order. There's one in Bangor,
14 Maine. That used to be called Grant's Dairy. It's now
15 owned by Dean Foods. That's in the order. That's been in
16 the order back then. And Oakhurst I think was in the
17 order then. They are now. They have been for a period of
18 time. I guess maybe some of the statistics you got from
19 Mr. Fredericks would show that.

20 Q Correct. I guess what I'm getting at is I'm
21 trying to compare again page 85 --

22 A Sure.

23 Q -- of Exhibit 5, which is milk powder and
24 butter production, and the first column, which is total

1 milk receipts. And I'm happy to look at any particular
2 months. So I mean, just by example, looking at May of
3 2000 --

4 A Sure.

5 Q -- which had 454,395,205 pounds of milk
6 receipts.

7 A Okay. So we're at the bottom.

8 Q Versus May of 2000 Class 4 production of 249
9 million pounds. So that there is -- what -- what's the
10 source of that number?

11 A I'm -- I'm confused now.

12 Q The last number that was -- the last number I
13 just read off Table 2 of Exhibit 14.

14 A Well, let's -- let's -- let's -- okay. We're
15 looking at May --

16 Q May of 2000.

17 A May of 2000. Let me just focus in on that.
18 Okay. Yep. We have 317 million pounds of Class 4 milk.
19 Okay. You can also get that from Table 5 of Exhibit 5
20 because that was my original source for that number.

21 Now, okay. So we have that number. Where are
22 we going?

23 Q Well, okay. Now you confused me because you've
24 given me a number that doesn't match with what I just

- 1 looked at.
- 2 A I'm sorry.
- 3 Q Where did you just get 317 million from?
- 4 A I thought you were looking at my Table 2.
- 5 Q I am looking at your Table 2 for May of 2000.
- 6 A Oh, I'm sorry. I'm -- I'm sorry. May of 2000.
- 7 Okay. It's 249.
- 8 Q Thank you. Okay.
- 9 A I was looking at 2002.
- 10 Q All right. So now we have 249 million pounds
- 11 of Class 4.
- 12 A Okay.
- 13 Q Okay.
- 14 A Yep.
- 15 Q You're on that same page?
- 16 A You got it.
- 17 Q Now I'm looking at page 85 of Exhibit 5.
- 18 A Okay.
- 19 Q For May of 2000.
- 20 A 454 million pounds.
- 21 Q Correct.
- 22 A Are we good? Okay.
- 23 Q Yes.
- 24 A Yep.

1 Q I'm asking, to the extent you know, what is the
2 difference between those two numbers?

3 A That's -- this is milk that is received at
4 those plants. And that milk can be -- a variety of things
5 can happen with that milk. It can be reloaded and -- and
6 sent back out. It -- it -- in our case, it's very rarely
7 reloaded and leaving the area. If we do in the month of
8 May, it's a very costly proposition.

9 That milk could be made into condensed skim,
10 for example, or cream and it could be sold off. It
11 obviously wasn't going to a Class 4 product so it was
12 going elsewhere.

13 May -- I don't think it's a coincidence, by the
14 way, that when you look at that May number and you look at
15 the month before, which is April, and you look at the
16 third column of Table 2, Exhibit 14, we're at 99 percent
17 of capacity in April, which means we were busting at the
18 seams when we're at 99 percent of capacity. We went down
19 to 85 percent probably because we had some issues in the -
20 - part of the week.

21 Last time -- at one point back several years
22 ago I went through the numbers and I questioned our staff
23 why we were at 106 or 107 percent of capacity and I was
24 reminded that that was the time the plant blew up and we

1 had a serious problem.

2 So I think what happened that -- I can tell you
3 what happened in our case for that month is that we
4 probably -- because we had so much milk available clearly
5 in April and I believe in May that we were reloading milk,
6 we were selling condensed.

7 One of the biggest problems, by the way, of a
8 balancing plant is if we sell condensed, we don't have a
9 market for it. It's sort of the "we got you" principle,
10 then. You have to -- if you've got it -- your milk's in,
11 you've got to do something with it. You've got to get it
12 off the trucks and you've got to move it, and condensing
13 is a faster way because our limitation occurs at the
14 dryer, not at the condenser. So we can bring the milk in.
15 We can bring in about probably 90 million pounds of milk
16 if we have to into our plant. And -- but we have to then
17 either reload it, right, reload it, condense it, since we
18 couldn't put it through the -- the dryer because we can
19 only do 2.2 million pounds.

20 So I think that's part of the issue. There are
21 a lot of things happening with the plant. There are a lot
22 of things happening with our plant. We had quite a bit of
23 milk that we received at the plant and then we try to do
24 various things with those -- that milk.

1 Q Do you purchase milk from outside sources?

2 A Yes.

3 Q When you purchase milk from outside sources, is
4 that sort of "got you" during April and May and you pay
5 less than the order price for the milk from those outside
6 sources?

7 A It depends. If we have a contract with those
8 outside sources such as, you know, I have a contract with
9 a Class 1 processor, then I wouldn't be a "got you"
10 because we have an arrangement with them on that.

11 If it's somebody who's looking to pedal some,
12 you know, a spot load of milk, we got them. I mean, it
13 depends on -- it depends on --

14 Q So just like on the condensed on your side,
15 then you've got them. And -- and if they're pedalling a
16 spot load, you're going to pay them, you know, whatever --

17 A Right. Because chances are if we're taking
18 that milk in and we can't handle it because we're near
19 capacity that we're going to condense it and unload it at
20 a very low cost. So I mean, I'm not saying -- we as an
21 economic entity would try to make some money on that -- of
22 course. But I mean, a lot of times even though we're
23 paying them less, we're also getting less.

24 Q So if -- if somebody who is balancing their own

1 supply comes to you with a spot load of milk, that's an
2 example where they may end up getting less than the order
3 price for the milk, correct?

4 A Yes, that's true.

5 Q In 1991, going back now what -- you had a bad
6 time, apparently -- the policy to pay somewhere in the
7 neighborhood of between 50 cents and a dollar
8 hundredweight under the class price for milk you purchased
9 from other sources. Do you recall that?

10 A I've never -- (inaudible) -- pricing.

11 Q That's why I know about it.

12 A Yes. Yes, we did, because we were losing money
13 on every hundredweight of milk that went through that
14 plant, our own milk and everything else, and we had -- we
15 had a 20 -- across our membership. Any milk that we were
16 putting in, if we paid the class price with whose money?
17 We just wouldn't -- why bother putting it in other than
18 we've got the plant, we've got the fixed costs, and
19 everything else. So yes, we did -- we did pay that
20 amount.

21 I'll be honest with you. I don't recall the
22 exact amount but I know we were paying well under and that
23 certainly is well under.

24 Q If that's what -- what USDA in the published

1 decision said you said at the hearing, that would be, you
2 know -- let me back up. You testified --

3 A Yes, I did testify. If you ask me what I --
4 exactly what I said in 1991, I would say I'd have to
5 reread it. But if -- if it's in that record, then yes, I
6 said it.

7 Q Does -- does any member of ADCNE have
8 agreements with large cheese plants to -- that help ADCNE
9 balance through supply milk?

10 A I believe they do. We don't at AgraMark. I
11 believe that Mr. Gallagher will address that issue in his
12 testimony because I believe his organization does. But we
13 do not.

14 Q Turning to Table 3, and I know you described
15 this as a straightforward table but let me see in which
16 way it's a straight table.

17 A I'm an economist.

18 Q Yeah. Well, let me see as a lawyer in which
19 ways it is not perhaps so straightforward.

20 A Okay. I think these answers are fairly obvious
21 but just to make it clear for the record, the -- the
22 column for your study that is admittedly for a limited
23 time frame of 2000, 2001, that column of producer milk
24 deliveries would include milk that is pooled under this

1 order but was transferred or diverted to a plant -- a non-
2 pool plant or to a plant outside the order, is that
3 correct?

4 A Producer receipts pooled under this order, yes,
5 it is included in this.

6 Q And that column does not include milk produced,
7 for instance, in the state of New York that shows up on
8 the -- market statistics as having been pooled on that
9 order for a particular month, correct?

10 A If it was pooled on that order, then it is not
11 included in these numbers.

12 Q And for the purposes of a fluid demand column,
13 again, your study for 2000, 2001, the fluid demand would
14 include packaged Class 1 distribution into other federal
15 orders, correct? It doesn't matter. It includes all
16 Class 1 packaged distribution regardless whether it's
17 Order 1 or going down, say --

18 A By -- by a 7(a) distributing plant?

19 Q Yes.

20 A Yes. When I did this, Chip, my intentions were
21 to try to use the easiest available data. You can make --
22 you can recalculate this table with those other numbers.
23 I --

24 Q To the extent they're available.

1 Unfortunately, sometimes they're restricted and that makes
2 it tough --

3 A That's -- that's the problem. When I first
4 looked at this, I did this a little bit of time ago. And
5 that's one of the issues that we had, too.

6 Q Well, let me get to that -- that very question
7 and let me ask you if you would turn to Exhibit 5, the
8 market administrator's statistics, pages 79 and 80?

9 A Yes.

10 Q And before I ask the question, I'm going to
11 preface it by saying I'm about to ask you for confidential
12 information and I know that. And I'm asking though as
13 proponents of the proposal whether you're prepared to, you
14 know, answer the questions. If you're not, you're not.
15 That's -- that would be fine.

16 But can you tell me whether, for instance, on
17 page 79 for any month for which data is restricted either
18 for transfers to other order plants or transfers from
19 other order plants whether AgraMark made or received such
20 a transfer?

21 A I don't know. I mean that's very detailed,
22 okay. I mean, to be honest with you, I have it right
23 here. I don't -- there's a lot of other things I would
24 say is proprietary that I wouldn't give, but this I'd

1 probably give. It's not -- it's not -- and keep in mind
2 that one of the reasons I might be able to give it to you
3 is because we don't do very much of that given our
4 location.

5 Q But -- but you don't know --

6 A I -- I don't -- I don't have that. I'd have to
7 go back into our reports to see what that one is.

8 Q And turning to page 80 for a moment, which is
9 the diversions, and in essence the only restricted data is
10 diversions to other order plants. Would that be the same
11 answer, you don't know?

12 A I don't know. Sorry.

13 Q You discussed with Mr. Rosenbaum the -- some of
14 the history of some of the facilities to the extent you
15 knew them.

16 A Yes.

17 Q For the Springfield facility, again, if the
18 Class 3-A decision reveals that an AgraMark witness, who I
19 believe to be you, testified that that plant was expanded
20 in 1984, whatever that testimony is, that would be
21 accurate?

22 A Yes. In fact, I believe it was expanded in
23 1984. I knew it was expanded at the time. I came to
24 AgraMark in 1989 so prior to that I have just secondary

1 knowledge.

2 Q But nonetheless, that decision was made to
3 expand that plant as opposed to make other decisions --

4 A I think at the time -- I'm not sure whether we
5 closed any of the smaller plants at that time. I know we
6 looked at the balancing issues on that. We're constantly
7 looking at that.

8 I'll give you an example. Last June we looked
9 at it and said, you know, West Springfield was operating
10 at a much lower percent of capacity. There was less milk
11 out there. Can we operate some other way.

12 One of the -- one of the unusual things about
13 our West Springfield plant, that it's located in the town
14 of West Springfield. For anyone who's been in West
15 Springfield, it's above -- just above the Connecticut
16 border near Hartford. And our plant is located right
17 across from a huge shopping mall next to a 12- or 14-
18 cinema complex by -- surrounded by four motels. We were
19 there first, by the way, okay. And you would look at it
20 and say, why would you want to be there, okay.

21 We are there because if you also look within a
22 mile of the plant is the entrance to Route 91, which runs
23 from the Canadian border down to New Haven, Connecticut.
24 Also within a mile of the plant is the Massachusetts

1 Turnpike that runs from eastern New York to Boston, okay.
2 We -- we were trying to be efficient and have one plant to
3 balance our New England market at the time. That was the
4 place to put it.

5 We could -- at other times we've had smaller
6 plants but -- and the efficiencies of that. That has -
7 - that -- that was the best way to go. But when that
8 happens, you're still spending a lot of money moving milk
9 around.

10 Q But you nonetheless made that economic decision
11 --

12 A Absolutely we -- we made that. And in fact,
13 Chip, if we made a bad economic decision, they also
14 believe that that's one of the reasons we should look at
15 Dr. Ling's study. Because the order shouldn't pay for bad
16 economic decisions. We've got to look at it and say
17 what's -- what's an economic, efficient way to look at it,
18 focusing in on Class 1, not just did AgraMark do something
19 or, you know, poor -- do we have higher costs or other
20 factors.

21 Q Well, let's talk about Dr. Ling's study for one
22 more moment.

23 A Sure.

24 Q AgraMark doesn't pay an interest rate anywhere

1 close to nine percent on its debt, does it?

2 A No, not -- not today. We -- we did in fact at
3 points in the past but not today.

4 Q Okay. But -- but can you tell me what your
5 interest rates actually are --

6 A Boy, that's a -- that's a good question. It
7 depends on -- I'll try and go back and look at the last
8 time I looked at those particular issues. I would say
9 probably right now around four, five percent, somewhere in
10 that area.

11 I would say at certain -- certain -- probably
12 about half of the nine percent, somewhere in that
13 vicinity, Chip.

14 Q Turn to page 13 of your testimony. And the
15 statement in the -- just above the summary, the proposal
16 to add a provision at the end of Subsection (c).

17 A Okay. Let me get there.

18 (Pause)

19 BY MR. ENGLISH:

20 A Yes. Which paragraph again? I'm --

21 Q The -- the paragraph that says, "We would like
22 to add a provision at the end of Subsection (c)."

23 A Yes.

24 Q I take it you recognize that there is risk that

1 a producer could be pooled on order -- at the very
2 critical time of the year when the milk is most needed in
3 Order 1 and nonetheless come right back in a future month
4 and receive marketwide service payment. That's --
5 that's the underlying purpose of this --

6 A Well, it's not that we -- we perceive a risk.
7 It occurs. It occurs and whether -- and it occurs
8 throughout different times of the year. We're saying that
9 you need a regular commitment to this order in order to do
10 that.

11 The cooperative service payments, I think, had
12 a year waiting period on it. But this -- this we looked
13 at three months and the group agreed as a group to have
14 three months.

15 Q And I was going to get at that. Why not a full
16 year?

17 A Hmm?

18 Q Why not a full year for regular --

19 A Because it was a group consensus that they felt
20 three months would be sufficient time.

21 Q Would you agree with me that as written -- and
22 you were in the room yesterday for the testimony of Mr.
23 Fredericks, right?

24 A Not -- only a small amount.

1 Q Do you recall a discussion that I had with him
2 with respect to the fact that producers can be -- can be
3 pooled in the same month on two different orders?

4 A No, I wasn't in for that discussion.

5 Q Were you aware of that fact?

6 A I knew because we were -- we were -- we're
7 addressing some of those issues. In -- in our order can
8 they be done? No, I wasn't aware of that. I -- we don't
9 do it. And we don't have -- in our area we haven't done
10 it in New England --

11 Q To the extent the purpose of your proviso is to
12 make sure that someone has -- you know, is maintaining a
13 real connection with this market, wouldn't it make more
14 sense to -- you know, it's not just be pooled on this
15 order but it's pooled on this order and not pooled
16 somewhere else?

17 A Same producer?

18 Q Same producer -- same producer managing the
19 pool on two different orders in the same month.

20 A It -- I'd have to go back to my group, but it
21 makes sense to me. I mean, I can't say it's my group's
22 position.

23 MR. ENGLISH: That's all I have. Thank you.

24 JUDGE BAKER: Very well. I realize there are

1 additional questions for Mr. Wellington, but this does
2 bring us to our time for our luncheon recess. We'll take
3 an hour for our luncheon recess.

4 (Whereupon, at 12:45 p.m., the proceedings were
5 adjourned for lunch, to reconvene at 1:45 p.m., the same
6 day.)

7 A F T E R N O O N S E S S I O N

8 1:45 p.m.

9 JUDGE BAKER: Could we all take our seats,
10 please?

11 Whereupon,

12 ROBERT WELLINGTON

13 having previously been duly sworn, was recalled as a
14 witness herein and was examined and testified as follows:

15 JUDGE BAKER: The hearing is in order after our
16 luncheon recess.

17 I have been informed that there are two
18 individuals who will need to be heard later on today. Are
19 those individuals in the hearing room now?

20 MR. ENGLISH: Are these the dairy farmers I
21 mentioned earlier?

22 JUDGE BAKER: Yes.

23 MR. ENGLISH: No, they're not in the room right
24 this minute.

1 JUDGE BAKER: Very well.

2 MR. ENGLISH: I thought maybe after the
3 afternoon break or something.

4 JUDGE BAKER: Very well. We'll hear them then,
5 Mr. English.

6 Are there any others in the room who wish to be
7 heard today or need to be heard today?

8 MR. ENGLISH: I have one other person if
9 possible at the very end of the last -- Butch Miller of
10 Queensboro Farms. He was here yesterday and today. He's
11 --

12 JUDGE BAKER: Very well. Those who have to be
13 heard, we'll hear them after the break then, our afternoon
14 recess.

15 Now, Mr. English, I have here a note that
16 Exhibit 9 was identified only and it relates to data from
17 June to October you were to obtain from Ms. Ely.

18 (Laughter)

19 JUDGE BAKER: You have obtained it, I see.

20 MR. ENGLISH: She identified it yesterday.

21 JUDGE BAKER: Yes.

22 MR. ENGLISH: I had to make copies.

23 JUDGE BAKER: Very well.

24 MR. ENGLISH: And so I have done so. If this

1 is a convenient time, if you want to do it later, that's
2 fine.

3 JUDGE BAKER: Well, why don't we do it now
4 while it's on our minds.

5 This has been identified. Are there going to
6 be any objections with respect to the admission into
7 evidence?

8 MR. ENGLISH: It was my understanding
9 yesterday, Your Honor, no, that -- that people had an
10 opportunity to look at it.

11 JUDGE BAKER: Very well. Then Exhibit 9 is
12 admitted and received into evidence. Four copies for him,
13 the court reporter, please. Thank you.

14 (The document previously
15 marked for identification as
16 Exhibit 9 was received in
17 evidence.)

18 JUDGE BAKER: Mr. Wellington is on the stand
19 and is subject to cross examination. Are there any
20 questions for him?

21 (Pause)

22 JUDGE BAKER: Mr. Vetne?

23 MR. VETNE: John Vetne appearing for
24 Friendship.

1 (Pause)

2 CROSS EXAMINATION

3 BY MR. VETNE:

4 Q Let's see. Mr. Wellington, can you please turn
5 to your Table 1 and have handy Exhibit 5?

6 A All right.

7 (Pause)

8

9 BY MR. VETNE:

10 Q As I understand it, data on your Table 1 is
11 taken to some degree from Exhibit 5, page 86, which is
12 Appendix 15?

13 A Yes.

14 Q Okay. And you identify that milk -- sorry.
15 Milk from Appendix 15, Column -- numerical column two as
16 non-cooperative milk, correct? That that column in Table
17 5 is entitled, "Percentage of Proprietary Handler Producer
18 Milk"?

19 A Yes.

20 Q Were you here when Mr. Fredericks described
21 that -- that column as also including cooperative milk
22 that for whatever reason was not marketed as 9(c)
23 cooperative milk?

24 A No, I wasn't. In fact, I wasn't aware of that.

1 Q Okay. Which of your columns would be affected
2 by their characterization if you were to assume that
3 Appendix 15, the last column, included some cooperative
4 milk that happened not to be 9(c) milk?

5 A Of course, it's the original column that I used
6 it from, which is Column 6. That's the percent of
7 proprietary handlers. And then that -- that percentage is
8 used in the next column, which is the milk pounds of
9 estimated volume, day of non-co-op receipts delivered to
10 distributing plants. The next column of course is a
11 percentage of that, the average, so if that number
12 changed, that number would change.

13 Then the last -- I guess all the rest of the
14 columns. The next-to-the-last column is the difference
15 between the total amount of receipts at distributing
16 plants that I've estimated and the -- the non -- what I
17 call non-co-op receipts. So that column of course would
18 change. And the percentage one.

19 If -- if these changed, all those -- rest of
20 those numbers would change.

21 Q Okay. To the extent that your Table 1 were to
22 be -- be redesignated -- the columns redesignated as --
23 where it says, "Cooperative Receipts" we designate them as
24 "9(c) Handler Receipts," and the non-cooperative receipts

1 designated as "Non-9(c) Milk," that -- the numbers would
2 be -- would be accurate? Is that essentially what you
3 intended to do?

4 A I think essentially, yes, that's what I
5 intended to do. I have no issue with characterizing it
6 that way.

7 Q Your -- in Table 1 also my impression from your
8 prior testimony, which I want to clarify because I'm not
9 quite sure. The columns labeled, "Estimate of Total
10 Receipts" is not based on any data that identifies
11 receipts at distributing plants but it's imputed receipts
12 based on an assumed percentage of Class 2?

13 A Class 1. Yes.

14 Q It's Class 1 plus an assumed percentage?

15 A Yes, it's -- well, okay. It's -- it's the
16 Class 1 producer receipts, and I'm -- and it's adjusted to
17 reflect that I'm making an assumption that 85 percent of
18 the milk at a distributing plant is -- is a -- is assigned
19 to Class 1.

20 Q Okay. And in -- in the amount that you assume
21 is Class 2, is it merely an exercise in arithmetic or did
22 you do any comparison to the seasonality of Class 2 use in
23 the market?

24 A I did nothing on the seasonality of Class 2.

1 Q Has there been any change in the capacity of
2 the Springfield plant since 1999? I'm sorry. The nonfat
3 dry milk and butter manufacturing capacity.

4 A No. There's been some changes at the plant but
5 not on capacity of nonfat dry milk.

6 Q Okay. During the period of January 2000 to
7 date, has the plant been either out of service or
8 partially out of service in any month?

9 A Normally so. When you say "out of service"
10 -- we have not operated.

11 Q Has it been out of service for reasons other
12 than low -- low milk? For reasons of shut down,
13 construction, improvement, that kind of thing?

14 A Not for any extended period of time, more than
15 a couple days. We have made some changes. We had some
16 problems with our silos and we had to put a -- a new --
17 replacement of the silos involved. So I mean, there were
18 some issues on that but not more so than a couple days, if
19 they were that much.

20 Q In your Table 2, you've -- under -- under the
21 "West Springfield" column and a million pounds, you've
22 indicated that that represents milk used to produce nonfat
23 dry milk and butter?

24 A Yes.

1 Q Is that milk equivalent pounds or is that
2 product pounds received? The distinction that I have in
3 mind is if you received, for example, a load of condensed
4 skim from some source or if you received a load of cream,
5 would -- would the million pounds here be product pounds
6 of your receipts or would it be milk equivalent receipts?

7 A I believe it was milk equivalent receipts.
8 That's what I asked for.

9 Q Okay. And there are occasions when West
10 Springfield would receive skim condensed from other
11 sources, for example?

12 A Receive skim condensed, possibly but not on any
13 kind of regular basis or to a -- to a large amount.

14 Q But regularly, it would receive loads of cream?

15 A Yes, definitely.

16 Q And to the extent that's included, you believe
17 it's converted to milk equivalent?

18 A Yes.

19 Q The production of West Springfield in -- in
20 butter and nonfat dry milk, if you -- if you make an
21 assumption of normal yields to which -- which Dr. Ling
22 addressed, would West Springfield make more powder than --
23 than butter than you would expect from normal yields or
24 more butter than powder than you would expect from normal

1 yields?

2 A That really depends on the time of the year,
3 okay, whether we're buying cream in and moving it to
4 butter. But I would say on average -- I haven't done a
5 calculation on that. My tendency would say probably a
6 slightly more butter than proportion of nonfat dry milk.
7 Because we do buy cream in on top of bringing milk that we
8 buy in. We very rarely buy skim in.

9 I think it's a relatively small factor but I
10 would say it would be a factor.

11 Q Okay. Let's see. Would it be the case that
12 during the late spring and summer when the plant is
13 operating at greater capacity it's proportionate use of --
14 its proportionate use for making butter is lower because
15 of ice cream demand?

16 A Yes, that's -- that's definitely possible.

17 Q And would the converse be true in the winter
18 months? You would be making more condensed skim into
19 powder than cream into butter? No, the other way around.

20 A Other way around.

21 Q Other way around, yeah. The other way around.

22 A Yes, I believe so.

23 Q Okay.

24 (Pause)

1 BY MR. VETNE:

2 Q Your Figure 6. You may have answered this and
3 I apologize if you have. The percent of -- manufacturing
4 capacity is the capacity limited to your nonfat dry milk
5 and butter capacity, correct?

6 A Yes. We have a capacity to receive about 3
7 million pounds a milk about a day, about 90 million pounds
8 or so at the plant. But then something else has to be
9 done with that milk. Sometimes it's reloaded,
10 particularly if it's going to be traveling a greater
11 distance because the trucks have to get back to the farm.
12 Or it could be condensed products. We don't really get
13 that level in but we have that capacity if we have to.
14 But we can only process about 2.2 million pounds a day.

15 Q Okay. Since Kraft sold its Middlebury plant to
16 AgraMark, does AgraMark have a supply commitment to any
17 other cheese plant?

18 A Yes.

19 Q Is the Springfield butter powder plant also
20 used to balance the demands of the cheese plants, both
21 AgraMark cheese plants and other cheese plants?

22 A Yes, it is. That's -- that's one of the
23 reasons why we just couldn't look at our -- our -- our
24 costs at our plant, because it does -- a lot of other

1 factors.

2 Q During the year 2000 and the first part of
3 2001, was the Springfield plant used to receive milk as an
4 accommodation to producers in New York so that those
5 producers would be eligible for dairy compact
6 participation?

7 A It might have been to a small degree. That was
8 an issue at the very beginning of the compact, early 1997
9 and 1998. By the time we got further into the compact, it
10 wasn't used as much because there was direct shipments and
11 New York producers found -- found markets in New England.

12 So it wasn't -- it was to a small degree,
13 though, John.

14 Q Were there also accommodation shipments to a
15 small degree or any degree to the AgraMark plants in
16 Vermont?

17 A To the Middlebury and Cabot plants?

18 Q Yeah. The Middlebury and Cabot plants from New
19 York sources.

20 A Cabot, no, not to my knowledge. Middlebury,
21 probably yes to some small degree. Mainly milk from up
22 that northern tier of New York.

23 Q All right.

24 (Pause)

1 BY MR. VETNE:

2 Q Your proposal includes the possibility and
3 intention that folks that receive marketwide service
4 payments would have first line responsibility to supply
5 supplemental milk when it's needed. Is that a fair
6 characterization?

7 A Yes.

8 Q In your experience, may it occur that parts of
9 the northeast have a need for supplemental milk while
10 other parts of the northeast may not have the same need?

11 A That is my understanding at times.

12 Q Okay. For a very large market, geographically
13 large --

14 A Yes.

15 Q -- and other things. Would it be consistent
16 with your intention for the market administrator to be
17 able to call on supplies from market service-qualified
18 organizations on a geographic basis fitting -- fitting the
19 need wherever it might be?

20 A Formally do that?

21 Q Pardon?

22 A Former -- a formal request? I mean, to raise
23 that percentage?

24 Q Yes, to raise that percentage for plants --

1 A That's not what we had -- we had considered in
2 doing that. I can tell you right now that we -- the -- I
3 can at least talk to my co-op. If we have a Class 1 need
4 that needs to be fulfilled and there's a problem in the
5 marketplace and the market administrator talks to us about
6 it, we try to help out that situation. If we had co-op
7 service payments, I think we would probably even try
8 harder because we would feel a further obligation.

9 So in that sense, informally I think, you know,
10 the market administrator could do that. But on a formal
11 basis, no, we have not considered that.

12 Q All right. Would you agree with me, for
13 example, that the need may arise for supplemental milk to
14 Baltimore, Washington, Philadelphia area when there's no
15 comparable need in Boston, for example?

16 A Yes, that's true.

17 Q And if there were an across-the-board
18 percentage increase in everybody, you might have to
19 scramble to -- to -- to find a way to comply with that
20 even though your milk is not economically or logically
21 located to meet that demand?

22 A There is that possibility.

23 Q Would you suggest that the market administrator
24 should have authority to be geographically discreet in

1 exercising this provision?

2 A I -- we don't have a -- I don't have a position
3 on that.

4 (Pause)

5 BY MR. VETNE:

6 Q In the northeast, cooperatives serve as the
7 marketing agent for considerable non-member milk, is that
8 correct?

9 A We do not, but other -- some other co-ops do.

10 Q Okay. In the middle of page 13 of your
11 statement you would appear to preclude the payment of
12 marketwide service funds to cooperatives who have
13 marketing control of non-member milk?

14 A That's exactly what it does.

15 Q That's what it does. And yet, in the last
16 sentence of the middle paragraph, you want to assure that
17 milk receiving payments is under the marketing control of
18 the handler receiving the payment. What I want to ask you
19 is, if a cooperative association markets non-member milk
20 and includes that milk in supplying Class 1 customers when
21 needed and it goes into surplus uses when not needed, why
22 should it not be included in the volume of milk for which
23 service payments are eligible?

24 A Because we feel that the control and the

1 commitment is stronger when you have a relationship
2 through membership than when you have it just through a
3 marketing arrangement. With membership, it's a marketing
4 arrangement and a membership. We have -- we have annual
5 contracts so we -- we feel that that's a closer tie to
6 what's involved.

7 And like I said, from my perspective, I don't -
8 - I don't do any of that so it wasn't really an issue.

9 Q All right. If -- if in aggregate a cooperative
10 association performs balancing functions and includes in
11 its marketing and balancing non-member milk, why should
12 not some provision be made for those non-members who are
13 part of the cooperative's marketing supply to receive some
14 of the payments?

15 A Well, keep in mind, the members do not receive
16 payments, okay. It's the -- it's the -- the -- the
17 handler who qualifies that receives the payments. So the
18 question is, should they receive payments on that milk --

19 Q Yes.

20 A -- doing balancing. And that -- that is an
21 option under this. I can tell you that our position was
22 that that -- that that should not occur, that we believe
23 that there should have been a membership commitment is
24 that stronger tie that's needed. That's our position,

1 John.

2 Q In the market that you're most intimately
3 familiar with, New England, has there been a reduction in
4 the percentage of milk that is marketed independently
5 since 1999?

6 A You're not asking for a reduction in the
7 percentage of independent producers or non-members.
8 You're saying market --

9 Q I'm sorry. Yeah. Let me -- let me ask both
10 questions. Good point.

11 Okay. Has there been a reduction in -- in the
12 percentage of the market represented by non-member
13 producers?

14 A Non-member producers, I don't believe so.
15 There's been no rush to co-ops -- for members to join
16 cooperatives.

17 Q How about since 1995?

18 A I don't recall a particular incident.

19 Q Maybe it's not your milk but you probably do
20 know. Weren't a lot of the Garelic plants independently -
21 - supplied by independent producers?

22 A Yes.

23 Q Okay. And at some point since they've become
24 totally supplied by cooperatives?

1 A But, no, that milk still goes -- is marketed by
2 those cooperatives. Those independents are still
3 independents. They're not members of cooperatives and few
4 of them have joined cooperatives, to my knowledge. They
5 haven't joined my cooperative.

6 Q Okay. So the plants now have a -- have a
7 supply commitment with a cooperative but the cooperative
8 markets at least some of that milk as in -- by independent
9 producers through the cooperative, is that correct?

10 A Yes. They might -- I'm don't -- I'm not
11 familiar with those because we don't do that. In my role
12 of a witness whose cooperative is involved with that,
13 there might be a better person to ask the questions of.

14 Q And who's that?

15 A -- suggestion. Mr. Gallagher.

16 Q Okay.

17 (Pause)

18 BY MR. VETNE:

19 Q Who -- who -- what cooperative, any -- if any,
20 is responsible for marketing milk up to Bangor, Maine?

21 A That plant is -- is part of the dean system.

22 Q Yeah.

23 A So I gather it's the Dairy Market Services,
24 which is Mr. Gallagher's group, that -- that does that.

1 They have -- they have -- they were -- they were
2 previously almost exclusively supplied by independent
3 producers. There was a co-op group called Boston Market
4 Shippers. I'm not even sure -- I don't think they were
5 Cappra Volstead-qualified. I'm not sure. They were sort
6 of a rough independent kind of group.

7 Q Maine -- Maine Market -- Maine Dairy Farm --
8 what's that name?

9 A The Boston Market Shippers was the name of
10 them.

11 Q Uh-huh.

12 A So there was a group there that went to
13 Westland Creamery, okay, and part of that milk also
14 started going back to the plant in Bangor when Westland
15 was purchased by Dean.

16 But primarily, that plant in Bangor, Maine, was
17 -- was supplied by independents. We did some of it.
18 Usually, it ended up being some type of balancing or
19 whatever if we did something involved.

20 Q There's a cooperative that operates in Maine
21 exclusively?

22 A No, not that I'm aware of. A dairy
23 cooperative, no. Exclusively, you mean?

24 Q Well, virtually exclusively.

1 A No. I mean, virtually exclusively. I -- no,
2 we operate in Maine. The Dairy Market Services, DFA,
3 Dairylea group operate in Maine. And I know NFO at one
4 point did. I'm not sure if they do anymore, though that
5 probably is marketed by that DMS group. And then is there
6 somebody else? Like I said, there's those Boston Market
7 Shippers, but that's a very loose-knit group. I'm not
8 even sure if I would call them a cooperative. I'm not
9 sure -- you have to look on the list. I'm not sure if the
10 market administrator calls them a cooperative, but they're
11 the only ones I'm aware of, John.

12 Q Okay.

13 A Oakhurst Dairy is supplied by primarily
14 independents, non-members, if that's a help.

15 Q You refer on page 14 to the preexisting New
16 York-New Jersey Order and describe that as being linked to
17 balancing.

18 A Cooperative service payments.

19 Q Cooperative service payments, yes.

20 A Yes.

21 Q Was there a requirement under the prior order,
22 to your recollection, and forgive me for not looking it up
23 or having it in front of me. Was there a requirement that
24 organization that received those payments be willing to

1 accept surplus milk when there is a surplus?

2 A No, I don't think there was a requirement they
3 had to receive surplus milk. They had -- there -- there
4 was two levels or tiers, and I hope I'm correct on this
5 because I haven't done this in a long time. And we didn't
6 receive them -- in -- for them.

7 But I believe it was four cents all total,
8 three cents and a penny. And the -- the extra penny was
9 if you owned a -- a cheese or nonfat dry milk plant, okay,
10 at -- that could process at least a million pounds a day.
11 So that was -- that piece of it was linked to balancing.

12 Q Okay. You don't recall whether there was a
13 condition of receipt to -- to make your plant available to
14 --

15 A No, I don't --

16 Q -- surplus production?

17 A -- I don't believe so, okay. However, there
18 was a provision with -- that if a producer lost his market
19 that you had to -- you had to have a market available and
20 the same conditions you would do for a member for a
21 limited period of time. I mean, in other words, if they
22 lost their market because of poor quality, you weren't
23 required to do that. But if they were dropped by a
24 handler and their quality was fine and all the health

1 restrictions, the market administrator could ask you to
2 pick up that producer for a certain period of time.

3 So there was that --

4 Q Okay.

5 A -- piece but I don't believe there was any
6 other piece.

7 Q Okay. And with respect to Proposal 7 at this
8 hearing, if a handler, including a cooperative association
9 that doesn't operate plants -- manufacturing plants, if a
10 handler has surplus milk that it needs to dispose of and
11 comes knocking at the door of AgraMark or anybody else
12 that's receiving marketwide service payments, the
13 marketwide service payment recipient could refuse to
14 process that milk even though they had available capacity
15 and still not become ineligible to receive payments for
16 marketwide services?

17 A Well, John, everything -- when someone is
18 knocking at the door, okay, one of the first things you
19 discuss is price. Now, what -- if -- if we have capacity,
20 they can find a home. Now, the question is -- I think
21 would be would they get a discount price. Is that what
22 you're asking?

23 Q Maybe my question has two tiers.

24 A Okay. Maybe I'm helping you too much.

1 Q Okay.

2 A The answer to that, by the way, is "no." I
3 mean, if we -- you know, I mean to the extent that if we
4 needed to do more for the Class 1 market or other things,
5 yes, we would do that. But if -- if -- if this amount is
6 going to be used as a leverage to lower handling charges
7 and other charges, okay, then we have some issues with
8 that. We're already incurring these costs.

9 So, no, I don't believe that's the case. That
10 wasn't our intention, in -- in all honesty.

11 (Pause)

12 BY MR. VETNE:

13 Q Both you and -- and Mr. Gallagher made
14 reference to what you believe to be a large -- relatively
15 large proportion of non-cooperative members in the
16 northeast. Is there -- geographical concentration of non-
17 members in the northeast or is it fairly uniform, the
18 percentage identified throughout the northeast?

19 A In New England it's fairly uniform.

20 Q And is it --

21 A In the rest of the northeast, I'm not sure.
22 You might have to ask somebody who has more members out in
23 those areas.

24 Q In New England is it the same percentage

1 approximately or a greater percentage or a lesser
2 percentage than the rest of the northeast?

3 A I would say it's probably the same percentage.
4 If you ask me geographically if there is, I'd be inclined
5 to say that because we tend to go to Class 1 processors,
6 they're probably closer to the Class 1 market. Producers
7 who are out in the north country of New York, for -- for
8 example above the Adirondacks, tend to be more co-op
9 members because the Class 1 processors don't get a large
10 volume. They may get some volume of milk but they don't
11 get a large volume. So there may be some geographic
12 nature to that.

13 We don't have that nature because we don't have
14 that large a geographic area, excluding Maine, in New
15 England. So that's never really been an issue.
16 Operations are fairly spread out.

17 I don't think we're a higher percentage than
18 the rest of the northeast, though.

19 Q Okay. Now I want to address for a while your
20 qualification threshold of a million pounds a day.

21 A Sure.

22 Q A million pounds a day -- let's -- let's say
23 that an organization is supplying a single distributing
24 plant. A million pounds a day would represent operations

1 of a fairly large distributing plant, correct?

2 A Above average, I believe.

3 Q Above average somewhat. The three plants in
4 Maine are about 10 million pounds each, not more, right?

5 A No, they're more than that now. I think you're
6 about five -- five years behind.

7 Q Pardon?

8 A You're about five years behind on extensions
9 that have -- Hood has now more sales, for example. I
10 don't know the exact amount. Probably couldn't tell you
11 if I did. But you know, they have a plant in Boston,
12 Charlestown -- some of those sales. Same types of
13 expansions. I think Oakhurst business is doing well. I'm
14 not sure about the Grant's business. But I would say
15 they're probably closer to 15 to 20 million pounds.

16 Q They who?

17 A The three plants up there.

18 Q Okay. I -- I notice in the market --

19 A But still less than a million pounds a day.

20 Q Less than a million pounds --

21 A Yes.

22 Q And I do note that the producer milk by state
23 of origin data for -- in Exhibit 5 for early 2001, which
24 was the -- the period in which Oakhurst became regulated,

1 increased by about 8 million pounds. That doesn't seem
2 like a lot. So, is Oakhurst smaller than Garelic or --

3 A Well, keep in mind that Oakhurst already had
4 non-pool -- had sales in the order, okay, but it was less
5 than the 25 percent --

6 Q Yes.

7 A -- that would trigger them in. So there could
8 have been another 2 million pounds or something like that
9 that would -- maybe --

10 Q Well --

11 A I thought -- that's a good point. I -- I don't
12 know what Oakhurst's volume is. I know what Hood is. And
13 Oakhurst is a major presence. I -- I happen to live in
14 New Hampshire and Oakhurst is a presence in New Hampshire.
15 I assumed that they were somewhere around Hood's size
16 based upon other information I saw, but they could be 10
17 million pounds.

18 Q Okay. But even when applied as partially
19 regulated, it has two, three percent of its sales in the
20 markets, it's still one of -- its producer supply is
21 included in the market data.

22 A Okay, yeah. I have -- for that. I believe
23 Oakhurst clearly is over 8 million pounds from everything
24 I've seen. That would surprise me very much if it wasn't,

1 but I don't have any proprietary information on that.

2 Q Okay. Would you not agree that a -- an
3 organization can balance a plant say the size of Oakhurst?

4 A What size organization? When you're saying an
5 organization can balance?

6 Q A -- a supplier to Oakhurst, whether it's a co-
7 op dedicated to Oakhurst or a proprietary supplier or --
8 or Oakhurst itself, can take care of balancing that plant.
9 In a smaller way, the same way that Agramark, for example,
10 balances many plants.

11 A Well, they could possibly do that. They -- if
12 you're talking about a co-op you mentioned that has
13 dedicated supply, then I'm not sure how they're going to
14 do that unless they go out and find a home for that milk
15 such -- you know, in another plant or something when they
16 don't need it. But when you see the seasonality of it, I
17 don't know if Oakhurst is any different from the rest of
18 the Class 1 processors, but I -- I believe it probably is
19 not.

20 So there are -- I mean, there are ways -- other
21 ways to balance if -- you know.

22 Q One way of balancing, for example, would be to
23 put a small dryer some place to take care of balancing any
24 small Class 1 or 2 operation?

1 A Absolutely. And if Class 1 processors want to
2 put in dryers and churns and do their own balancing, I
3 think it's a great idea.

4 Q Yeah. And that performs the same service to
5 the whole market on a small scale as the service that
6 you've described to the market on a large scale, correct?

7 A Yes, and I think they should get six cents if
8 they do that and they -- less than 65 percent.

9 Q Okay.

10 A I'm saying -- I'm not -- we're not against them
11 getting it if they serve that. If -- if -- if you're --
12 if you have a Class 1 operation and you balance your
13 operation, particularly putting in a dryer or something
14 like that, they haven't done that because it's not very
15 cost effective to do it.

16 Q Okay. Well, my -- okay. My -- my question
17 -- is let's say that that is done on a smaller scale than
18 three percent of the market or a million pounds a day.
19 Why shouldn't such an organization also receive modest
20 marketwide service payments?

21 A That's a good point. We had long discussions
22 of that within our lone group on that. We needed to come
23 up with some area we felt that was a significant volume of
24 milk serving the market that had -- that had, like you

1 said, multiple customers that could balance in that
2 degree. And we felt that a million represented it. It
3 was a million pounds -- I was also familiar with the order
4 before because we had a million pound requirement.

5 So we used that as the number, okay, and that
6 became our group consensus and we thought that that was a
7 fair number. If you said to me, should it be 900,000
8 pounds, why not? I mean, I could just tell you that our
9 group consensus was here. We had some history with that
10 number. It's a significant number, and that's what we
11 were really looking at.

12 Q Okay. My -- another of my questions then is,
13 why does it have to be a significant number if the service
14 actually provided is a balancing service? Whether it's a
15 pound or 2 million pounds, if -- if the -- if a balancing
16 is made, it's still a balance. It is something that --

17 A We think that -- because our -- our issue is
18 that if it becomes very small and you're just balancing a
19 few loads a month that -- we don't think that really
20 serves the market, particularly a market of this size,
21 that you need to have some large presence to do that.

22 Q Well, it -- it's -- it's a few loads per month
23 that -- that you wouldn't have to balance, for example.
24 You know, or Dairylea or Land O' Lakes. It's -- it's --

1 if we're looking at the aggregate market, they either
2 burden the market with -- with your surplus to dispose of
3 it or with supplemental milk or you don't. And if you
4 avoid burdening the total market, you're providing a
5 service, correct?

6 A Yes, to a degree. Yes. I guess our -- our
7 -- our issue here was that we felt that you should have
8 the -- if you have -- you should have relationships with
9 Class 1 processors, with -- with -- with manufacturers
10 that can balance, and so you need to move a sufficient
11 volume of milk to have that.

12 If in a circumstance like this you have a
13 smaller volume of milk, there's a case in point on that.
14 I don't know too many of those. Perhaps your client's one
15 of them. But that's -- you know, I'm not -- I'm not aware
16 of that.

17 I can just tell you that we looked at this and
18 we had to come up with a position and our position was
19 that we felt that that would be a level of significance in
20 the marketplace.

21 Q All right. Let me -- let me go to another
22 supply scenario. A small cooperative association or
23 supply plant for that matter commits to supply and balance
24 a single plant. It does not operate a manufacturing

1 facility but it takes upon itself the burden to --
2 supplemental milk were needed or to sell surplus milk when
3 the fluid plant doesn't need it. And as you described,
4 that would frequently be at a loss, at a price discount.
5 Why shouldn't such an organization who has assumed the
6 economic burden of balancing by marketing to somebody else
7 or receiving supplemental from somebody else, why
8 shouldn't such an organization receive some benefit for
9 their balancing service?

10 A A key issue, John, is that -- that they
11 balance. You're saying this is somebody who does balance,
12 okay. They balance to a smaller degree. We -- you
13 know, like I said, our position is on -- that they have to
14 be significant in the marketplace. If -- if that's -- if
15 the Department decides it should be a different level than
16 that based on testimony of someone who comes in and says
17 they do balance, perhaps they should take that in
18 consideration. I'm sure they will.

19 I'm just -- I -- I don't think I can give much
20 more than that's our position on it and I explained why we
21 came out with that position.

22 Q Some of the balancing that your organization
23 and other -- in fact include not something manufacturing
24 milk locally but also sometimes sending milk far away from

1 here in order to find a manufacturing home for it,
2 including the -- the midwest, correct?

3 A That's true. We -- we do that very rarely. We
4 try not to do that. I know some other areas, probably
5 other co-ops, do that more. But we don't. But yes, that
6 does occur.

7 Q Then AgraMark has in fact on occasion sent milk
8 to Ohio or --

9 A Absolutely.

10 Q -- even Wisconsin?

11 A Absolutely.

12 MR. VETNE: Okay. Thank you.

13 JUDGE BAKER: Thank you. Are there other
14 questions for Mr. Wellington? The -- the -- Mr. Tosi?

15 CROSS EXAMINATION

16 BY MR. TOSI:

17 Q A few questions regarding your testimony. The
18 -- at the top of page two, your testimony indicates that
19 in the absence of a federal order, a dairy farmer would
20 likely receive the same price as his neighbor who ships to
21 a manufacturing -- in the absence of a federal order.

22 A Yes.

23 Q Okay. Over -- on page one at the bottom, at
24 the same time you're saying that in the four orders,

1 producers competed, and I assume that you mean here with
2 each other, to capture a higher Class 1 value.

3 A Yes. And they were -- they were really not
4 able to do that. They would try to get a Class 1 customer
5 if they could because they tended to have more value for
6 their milk.

7 Q I understand that. I guess the -- the point
8 is, is that your testimony suggests that in the absence of
9 an order a Class 1 handler would not pay something more
10 than the manufacturing price when all this competition
11 that producers engaged with with each other was to get a
12 higher price. So somebody was paying a higher price.

13 A That's why I say I believe it was -- when I say
14 he would receive essentially the same price, okay. Yes,
15 that Class 1 processor in the absence of an order would
16 still get their milk. It might be five cents a
17 hundredweight, it might be 10 cents a hundredweight. It
18 would not be \$3.25 Class 1 differential.

19 Q Why would the handler pay -- why would -- in
20 the absence of an order, why would the handler pay --
21 Class 1 handler be willing to pay more?

22 A Because they need to procure a supply of milk.
23 And so competition would drive that price. It'd be -- and
24 it would be really what the manufacturers would be willing

1 to pay for that to drive that price, particularly -- and a
2 lot of it would -- depends on the time of the year and how
3 much milk was available.

4 If there was plenty of milk available, the
5 processor may not pay a premium. If -- if the milk was --
6 was supply -- supplies were tight and someone came to his
7 producer and said, I want to pool your milk into a cheese
8 plant, there's no federal order, I'll give you 20 cents.
9 And maybe he will give them 25 cents.

10 I'm just saying that that happens right now
11 with over-order premiums to procure a supply of milk on
12 top of the order. I'm just saying that the underlying
13 order piece would -- would be gone and I don't think you
14 can retrieve that. You would still have competition to
15 procure a supply of milk.

16 Did that answer your question? I don't mean to
17 be -- it.

18 Q I -- I -- I'll read through that later.

19 A Okay.

20 Q Now, given that before federal orders Class 1
21 handlers were known to pay more for milk than the
22 manufacturing price, albeit with all the caveats that you
23 just indicated, now, bingo, we have milk marketing orders
24 and we set class prices and we have the Class 1 price that

1 has a differential. And that differential when we set up
2 orders was intended to capture and reflect the prevailing
3 marketing conditions of what it took to get milk from
4 where it was produced to where it was needed for Class 1
5 use. Would that be your understanding of -- of that?

6 A You need to keep in mind that one of the things
7 they were looking at was the distance from reserve supply
8 areas during parts of the year when you had -- when milk
9 was the tightest. That's why those crises were -- the
10 differentials were often tied into the Eau Claire,
11 Wisconsin, mentality of the distance there. That -- that
12 was the home of the ultimate reserve supplies that you --
13 if you had to go get milk, you could go there. Class 1
14 processors didn't necessarily always have to do that, that
15 distance.

16 Q Okay. If you'd please look at the bottom of
17 page two of your testimony when you quote from the act?

18 A Yes.

19 Q Is it -- is -- is the word "producer" ever used
20 in the act, that a handler can charge producers for
21 something for marketwide benefit?

22 A They can charge the pool and when you charge
23 the pool it comes from producers who participate in the
24 pool.

1 Q But --

2 A The language of "producers," I don't know,
3 Gino.

4 Q Well, if your proposal is going to take money
5 off the top of the pool that would otherwise go to --
6 equitably to all members in the market, whether they be
7 co-op or independent, in essence cooperatives in their
8 capacity as handlers are charging producers for a service,
9 that -- that you are asserting has marketwide benefit.

10 A There's a transfer of money, yes.

11 Q And I'm just wondering how you come to the
12 conclusion that there's an authority for a handler to
13 charge a producer for a service that they assert is a
14 marketwide benefit.

15 A Because I think that's in this document right
16 here on page two when it says that by -- it adds the
17 following provisions, providing for the payment from the
18 total sums payable by all handlers for milk to handlers
19 that are cooperative market associations and to handlers
20 with respect to adjustments and payments for services of
21 marketwide benefit, including but not limited to. It says
22 that you can -- that you can take these sums that are
23 payable by all handlers for milk. By payable for all
24 handlers, that's coming from the pool.

1 Q No. Excuse me. I'm sorry. Let me resay that.

2 By taking money out of the pool, we're removing
3 money that would ultimately be distributed to producers.
4 And I'm puzzled by the lack of the word "producers" when
5 the language of the act seems to suggest that we're
6 talking about services that are provided for handlers for
7 the benefit of the market and we're talking about handler
8 and handler, not handler and producer.

9 A I think one of the interpretations that I
10 talked about was that the Class 1 differential is -- is
11 one of the reasons behind it is to bring forth an adequate
12 supply of milk. And the Class 1 differential of \$3.24,
13 one of the factors the Class 1 processors are paying into
14 that I think is -- is relating back to these balancing.
15 That's sort of my interpretation of part of that cost that
16 goes to the pool from those Class 1 processors. And it
17 should go to the organizations who actually do that
18 balancing and provide that adequate supply on a timely
19 basis.

20 Q Well, in the -- the handler --

21 A But --

22 Q -- goes to producers. The handler is paying or
23 accounts to the pool at the Class 1 price. So the handler
24 is paying already even though the factor is perhaps not as

1 specific that you can say out of a \$2.00 differential, you
2 know, 12.5 cents is a balancing function, okay?

3 But we know and your testimony even admits
4 that, that the notion of balancing is built in there.

5 A Right.

6 Q So that other handlers or producers would be
7 willing to pool milk up to make it available for Class 1
8 use where it's demanded.

9 A That's true. I don't understand --

10 Q So why are handlers charging producers for --
11 for something that handlers have already paid for in the
12 price -- in the classified price that they're charged for
13 milk?

14 A The -- they're paying -- they're paying that
15 money into the pool, okay. That money is -- the higher
16 Class 1 differential accrues to all producers. We're
17 saying that there's specific functions of balancing that -
18 - that we're allowed to under the law to charge. And so
19 that's -- and it should come from the pool. I mean, I
20 thought it was -- I thought it was pretty clear that the
21 law allows this and the act allows it.

22 Q I would say that here it's pretty clear that
23 the act says that there's a provision for marketwide
24 services. I'm just struck by the interpretation, how you

1 can arrive at the interpretation that -- the word
2 "producer" is never used in that provision and we're
3 talking about handlers being able to charge other handlers
4 for a service that they're providing --

5 A I mean --

6 Q -- make a compelling argument that somehow the
7 entire market benefits from.

8 A We're -- we're asking to make a charge against
9 the pool, okay. And the pool's a clearinghouse between
10 handlers and producers. So to the extent that it's a
11 clearinghouse that handlers put in and producers take out,
12 before that process is complete from handlers to
13 producers, we're asking for these market service payments
14 to go to cover the -- the cost of this service.

15 That's why I say, it's not a -- it's not a
16 charge against producers. It's a charge against the pool.
17 Maybe it's just a formal way of doing it. There's no
18 doubt that this will affect the pool. There's no doubt
19 that it will lower the amount of money in the pool. I'm
20 not trying to get around that. And that the producers
21 will be receiving a lower uniform price as a result of
22 this.

23 So I mean, I'm not trying to get around saying
24 that they're not going to be impacted by this. But the --

1 we talk about taking the money from the pool because
2 that's where the money is coming in from. In from the
3 pool and before it goes out to producers it comes out to -
4 - to compensate for that service.

5 Q Okay. I'd like to move on, then. Who benefits
6 from the balancing function that's provided by
7 cooperatives in the northeast market?

8 A I think all producers benefit by this in that
9 it allows for us to use the term of orderly marketing,
10 which allows us to remove milk from the market when it's -
11 - when it's needed to be removed from the market. It also
12 facilitates the higher Class 1 use of this -- Class 1 use
13 available to Class 1 processors.

14 Q Okay. Do handlers benefit from this?

15 A Class 1 processors certainly do.

16 Q Okay. In what way do they benefit?

17 A This is a service that -- that allows them to
18 basically have available I would say low-cost alternatives
19 for their milk supplies, ways to balance out their milk
20 supplies. So certainly, they benefit by it. We have a
21 difficult time charging them directly back for that cost
22 to it because of competition in the marketplace. But they
23 certainly do benefit by it.

24 But we also believe producers benefit by it,

1 including our own producers. I'm not saying this is a
2 benefit that only accrues to non-members. This is a
3 benefit that accrues to all producers. Our issue has been
4 it's only our members who are paying the price of that
5 issue.

6 Q Are you able to determine how much more the
7 blend price is enhanced by cooperatives? The blend price
8 that's paid to all producers. How much more is the blend
9 price enhanced because of the balancing function? Are you
10 able to -- the type -- the record so far has a lot of
11 information about costs. We haven't talked yet about
12 benefits yet.

13 A I think that there are two types of benefits
14 that accrue back to farmers. One is to make sure that the
15 balancing needs of Class 1 processors are met. If they're
16 not met, there's problems with having, for example, Class
17 1 milk on the supermarket shelf on the weekend. That
18 would lower the utilization.

19 Can I calculate that from that point of view?
20 No, that's very difficult to calculate. I know -- it's
21 like one of those things I know -- you know when you see
22 it. But you know, what -- what it is and how do you
23 calculate it.

24 I could more easily calculate over-order or at

1 least get a better handle on over-order. The orders are
2 supposed to be minimum prices. And on the over-order side
3 of this, all it takes -- look at the situation we have
4 right now when we have -- milk production over last year
5 is a little over two percent. But we have stagnant
6 demand. So we have at most two to four percent more
7 demand relative to supply than a year ago and we have
8 prices that are 10-year record lows or have fallen 25, 30
9 percent because we have that small additional volume of
10 milk setting the price.

11 So that -- I mean, that -- the same thing
12 happens on the over-order price side, although not to that
13 large a degree because there aren't that many handler
14 premiums to that large degree out there. It's the same
15 type of principle to the tune of, can it be -- those over-
16 order premiums could be 10, 20, 30, 40 cents, okay. That
17 would draw off the amount of co-op service payments.

18 To the tune of what it would do to blend price,
19 I haven't made a calculation on that. I think it has some
20 benefits. Can I calculate it per -- per hundredweight,
21 no. I don't have a -- I can't think of a way to do that,
22 Gino.

23 Q To the extent that you can't determine benefit,
24 then, how is the secretary in fully considering Proposal 7

1 going to be able to -- be able to determine that there's
2 some marketwide benefit that's -- that's occurring here?

3 A Well, I think that's where you have to -- you
4 have to look at the -- what our case has been in terms of
5 putting together our -- the amount of balancing that's
6 being done and the amount of servicing to the Class 1
7 market, what kind of case that we've made in that regard.
8 Is it -- can you say that we should do this provision
9 because it's going to cost producers five cents and
10 they're going to gain 10? No, I think you should do this
11 provision because there's a service toward producers and
12 to orderly marketing, okay. And I know that's a nebulous
13 term.

14 But to making sure there's outlets for milk
15 that -- that need to be -- that need to be accommodated,
16 okay. And yes, it comes at a cost but we need to
17 accommodate that even though there may not be a net
18 benefit at the end of the month in the pool to it. There
19 are a lot of other secondary benefits one can make. It's
20 up to the Department whether they want to factor those in
21 or not.

22 But clearly, in terms of being able to balance
23 the market, producer supplies -- producers -- here's a
24 benefit. Producers are -- are free to basically produce

1 any pattern of milk they want. And -- and no one tells
2 them, you have -- you have to produce less milk, I'm only
3 going to pick up 90 percent of your milk in the spring and
4 I want you to put on some cows in the fall or I'm not
5 going to pick up your milk.

6 The producer basically is free to market any
7 amount of milk he wants, okay. But we know that we have
8 producer receipt patterns on a seasonal basis. We know we
9 have Class 1 sales patterns on a seasonal basis, okay.
10 There has to be some way to -- to allow the producer the
11 freedom to do that and accommodate the Class 1 sales at
12 the same time. That's what I'm trying to do.

13 Q Let's go down that road for a second.

14 A Sure.

15 Q Are you able or your organization -- over-order
16 premiums for servicing in Class 1 market?

17 A Yes, we do.

18 Q And in being able to enjoy being able to
19 negotiate for those things. Is any of that part of an
20 attempt to offset your balancing costs?

21 A Absolutely. All -- all attempts to offset all
22 our costs, okay. That's what we're trying to do, Gino.
23 The problem has been that -- the handling charges that we
24 do charge, okay, will cover transportation costs. We

1 apply those against those first. And they assist us to
2 help be competitive in the field with our members. That's
3 a -- that's problem that we have with making sure there's
4 a competitive pay price out there.

5 At the end, there is -- our -- our losses at
6 our West Springfield plant on that -- on that balancing --
7 it depends on where you want to apply it. We have a cost
8 here. You could apply it against all different costs, all
9 different pieces at a time. But it -- it depends --
10 really, it depends on where you want to apply that --
11 apply that cost.

12 Q Let me make sure that I understand this to make
13 sure that this is part of your testimony.

14 A Sure.

15 Q When a Class 1 handler does not need milk
16 because of daily changes in demand, the reality is, is
17 that that Class 1 handler's, for example, non-member
18 producers, that milk still has to go somewhere because of
19 its perishability.

20 A Correct.

21 Q And so would it be correct to say then that
22 that Class 1 handler diverts to -- milk to -- to you?

23 A Not -- not necessarily. Not necessarily. If
24 you look at the daily patterns -- and Dennis Schad from

1 Land O' Lakes will be putting some numbers in on that.

2 We're not saying that -- for example, that
3 producer handlers don't take -- I'm sorry, distributing
4 plants don't take any milk. Like on Sunday's the low day.
5 They don't take -- it's not as if they're taking no milk
6 on Sunday, okay. They -- they -- they would probably just
7 put their own milk into their plant on a Sunday and not
8 buy from outside.

9 So you -- there can be diversions. That's
10 certainly a possibility.

11 Q Okay. Let's -- let's talk about where there
12 can be, okay? When that -- when that Class 1 handler
13 submits its report at the end of the month, when it
14 reports on its report a diversion of milk that -- that
15 ends up going to, for example, a butter powder plant.

16 A Okay.

17 Q Okay. At what price does that plant account to
18 the pool for? The Class 1 plant, I'm sorry.

19 A The Class 1 plant?

20 Q Right.

21 A The -- what was the assignment back to it? I
22 don't -- Class 4?

23 Q Okay. I'll accept that.

24 A Okay.

1 Q Okay. Now, since the Class 1 handler is
2 accounting to the pool at that class price given how the
3 milk was used, what -- what are you paying? What -- do
4 you -- do you pay Class 4 back to the Class 1 handler or
5 do you charge something or are you able to force a payment
6 that's --

7 A It depends on --

8 Q -- less than the limit -- less than the minimum
9 class prices?

10 A It depends on the market conditions that are
11 out there and it depends on our arrangement with that -
12 - that handler. Some handlers we have arrangements that
13 we will supply them with some balancing.

14 And if we -- for example, if our plant is empty
15 and we have all these fixed costs to cover, okay, we may
16 pay them a premium to get that milk. I mean, what's
17 happening in the marketplace.

18 If milk supplies are -- are in surplus and we
19 don't -- you know, the plant's operating at some very high
20 level of capacity, then they might receive under the class
21 price. It really depends on the market conditions, Gino.

22 Q To the extent that you're able to buy milk at
23 below class, wouldn't that in essence -- one of the
24 reasons that you would be -- able to do that would be that

1 you're being inconvenienced by performing balancing
2 function for the market?

3 A Absolutely. Absolutely.

4 Q And that would be a way of recouping some of
5 that cost?

6 A That is. It's a very small -- let me tell you,
7 it's a few percentage points of the -- of what goes into
8 our plant in terms of volume. But certainly, we would try
9 to do that. Absolutely.

10 Q Okay. One minute. Let me check my questions.

11 (Pause)

12 BY MR. TOSI:

13 Q This kind of steps -- takes a little bit of
14 -- goes back to an earlier question about the level of the
15 Class 1 differentials being designed in some way to
16 attract a supply of milk for Class 1 use. And reflected
17 in that would be the notion that a balancing plant incurs
18 a cost to give that milk up to have it go service the
19 Class 1 market because your plant's not operating now at
20 full capacity. Is that a fair characterization?

21 A Can -- can you repeat that?

22 Q Okay. We discussed earlier here that the Class
23 1 differential -- the level of the differential is
24 designed to attract an adequate supply of milk for fluid

1 use, okay. And when the balancing plant responds to that
2 by shipping milk for Class 1 use, isn't its cost of
3 balancing already implied in -- that they in fact have
4 covered their costs to go out and do this service to the
5 Class 1 market. Otherwise, you wouldn't have given the
6 milk up, I would think.

7 A No. Our -- our problem is that it's not just a
8 question of giving milk up. If it's spot loads, yes,
9 okay. Those are small arrangements with that.

10 We try to have -- because of the order and
11 having a minimum of 20 percent in the fall plus serving
12 the Class 1 market, we have an arrangement with customers
13 to balance their needs. We give them -- for pool supply
14 customers, some of our processors -- our 7(a) plants. So
15 we supply their needs.

16 We try to put our handling cost in to cover
17 that, but if that handling cost gets to be too high and we
18 try to put it to a point where we can cover those costs,
19 we're unable to do that because they can go to somebody
20 else and get milk. They can go balance -- on the seasonal
21 basis, they could balance with producers if they want.
22 There are other cheaper alternatives out there if we try
23 to pass that cost along.

24 That -- that's our problem. On a -- what

1 you're talking about, Gino, is -- is on the margin, okay.
2 A load of milk that comes in. Can we get it on the class
3 market conditions are right. Sure. We're going to get it
4 under class, okay. Milk supplies are tight. Someone who
5 never uses us for balancing says, I'm really tight and I
6 need a hundredweight of milk. And we say, well, plant's
7 empty. I want to -- we're going to charge an extra buck a
8 hundredweight or something. That happens. Absolutely,
9 okay.

10 We have more costs when we try to do those
11 things and that -- maybe that smaller volumes will help
12 contribute to balancing. But for the -- when we look at
13 our total amount of dollars available and what we are --
14 our costs that we incur and our payment back to our
15 farmers to be competitive, we -- we don't have sufficient
16 money -- in fact, we don't have sufficient money even at
17 the end even if we apply nothing toward balancing. We end
18 up being a net loss on that.

19 That's a problem for us in our -- I don't want
20 to get into detailed proprietary stuff. But what happens
21 with us is that we have a very successful cheese business
22 with our Cabot cheese. And what happens is that the --
23 the benefits of that go to end up covering these other
24 costs involved in the balancing.

1 Q So your butter powder operations lose money?

2 A Yes. Yes.

3 Q Okay.

4 A I mean, overall it does. We try to minimize
5 the losses, so we try to do other things and do whatever
6 you can business-wise to do it. But those take other
7 investments, too. That's why, Gino, we try to say, let's
8 look at Dr. Ling's study and try to isolate those costs.
9 If we could isolate what those costs are.

10 And if you're making -- whatever business
11 decisions you're making at the plant, good, bad,
12 indifferent, okay, they're your decisions, okay. But if
13 you can show that you are doing the balancing, that --
14 that's the important -- balancing -- you're doing it as a
15 cost and we can reflect back on those costs.

16 Q Speaking of that, that's the other thing that
17 kind of troubles me. I really enjoyed your written
18 testimony and you have very good numbers. You're like my
19 boss. He wants numbers.

20 And you're able to adjust numbers back to
21 calendar composition and everything else. Yet, when you
22 talk about what it costs for you to balance, that's nearly
23 impossible. And -- but yet, at the same time, you
24 identify what all those other factors are that make it

1 difficult. So I mean, did you really expect that -- that
2 the secretary would believe that the lack of primary cost
3 information, the impossibility of that can be somehow
4 created using secondary data from the study that Charlie
5 Ling has done?

6 The basis here is --

7 A I can --

8 Q -- plant capacity. And to the extent that you
9 have unused plant capacity, that's the basis for your
10 costs. And it seems to me that you would be able to know
11 what your unused plant capacities are from month to month
12 over a period of time and then attribute to that's
13 AgraMark's cost of balancing my operating -- your plant at
14 West Springfield.

15 A A problem with that is having to then go over
16 and allocate those costs when we do a lot of other things
17 at our plant. It's probably a little easier to do it at
18 Springfield than it would be at Oatka and some of the
19 other locations. And that's the problem, because there's
20 so many different activities.

21 If I stood here before you and said, here are
22 my costs at West Springfield, we would then spend a few
23 days going over, well, how'd you allocate this cost.
24 Don't you do this, and that's not balancing. Don't you do

1 that, and that's not balancing.

2 We've strived to do a variety of things because
3 we don't want to have these losses from balancing. But
4 we'd love to get them from the marketplace, we can't do
5 it. We'd love to find other ways to -- find ways to
6 minimize the losses available at it. You know, one of the
7 things we've done is if you look at our plant -- butter
8 powder plants.

9 I mean, if you walk through our plant, you're
10 going to see two or three people. And it's -- you know,
11 it can handle, you know, 2.2 million pounds a day at its
12 peak. And you're going to see hardly anybody there
13 because we've tried to lower those costs.

14 So we've tried to do that. But our problem is
15 that to try to get back and allocate it, we need to go
16 back and say, here's a uniform way to do that. Plus, I
17 believe you asked somebody, one of the other witnesses,
18 about bad marketing. If you make a bad decision.

19 So we could sit there and say, if we make a bad
20 decision, should the order pay for the bad decision.
21 We're saying in Charlie Ling's study -- we're not --
22 trying not to say it focuses in on a bad decision. It
23 says, whatever your decisions are, we look at it -- we're
24 looking at a review. And Charlie used the time as an

1 efficient operation and here's the costs involved for that
2 efficient operation.

3 Beyond that, whatever decisions we make, good,
4 bad, or indifferent, we get to live with. But the -- we --
5 -- we can show we do balancing. We -- we -- we show the
6 benefit involved. We use -- Dr. Ling's study to show
7 there's a cost on it.

8 That's really why -- that's one of the reasons
9 we came back to this hearing, because we felt we had a way
10 to try to address some of these issues that we've had in
11 the past because we were looking at the -- some of the
12 reasons why the Department said we didn't get it last
13 time.

14 Why didn't we get it. Actually, some of the
15 wording I thought the Department said was kind of
16 encouraging. I believe their final decision said you
17 shouldn't get them at this time, okay, which is like
18 hanging, you know, a little law in front of you. And --
19 and we tried to address those issues, and one of which was
20 the cost issue. What's the cost of balancing when you
21 have so many other activities going on. That -- that's
22 our problem, Gino.

23 Q Thank you. One last question. On page four of
24 your testimony in the paragraph that begins with, "This

1 happens in the dairy industry." Your testimony indicates
2 that in the past several years, several Class 1 plants in
3 the northeast have closed and further reduced the storage
4 capacity of Class 1 milk in the market.

5 A Sure.

6 Q Can -- any of the plants that survived, have
7 any them gotten larger?

8 A To my knowledge, yes, one of them has gotten
9 larger. But not to the extent that he's making up the
10 difference for all the other plants that went out. My
11 understanding is that the Dean's Food plant in Franklin,
12 who used to be Garelic Farms, has gotten larger. I don't
13 know to the degree it's gotten larger. But I also know
14 that there were eight or 10 plants that shut down.

15 Q Your response to this is that -- is that your
16 intention to increase your storage capacity at your
17 balancing plants?

18 A Our -- our -- our concern is that, particularly
19 the daily balancing, that because we don't have that
20 available place to put the milk that it becomes a problem.
21 And so do we have plans on doing that? No. I mean, we
22 actually have done some work on our silos but we have not
23 expanded.

24 I'm not sure. I think Land O' Lakes has done

1 some changes and some other things but we have not in our
2 market, no.

3 Q Okay. I do have another question. When a
4 Class 1 handler is buying milk from a non-member,
5 negotiates a price with that non-member for whole milk,
6 and to the extent that the Class 1 handler cannot receive
7 a class price for what he diverts, nevertheless that Class
8 1 handler is accounting to the pool at class. Would it --
9 do you think it would be fair or that it would be
10 reasonable to conclude that in that price that the Class 1
11 handler comes up with takes into account the costs it
12 can't recover because it's selling milk for less than what
13 it has to account to the pool for?

14 A Are you saying it should pay less than the
15 Class 1 price?

16 Q What I'm saying is, is that the Class 1 handler
17 is going to pay Class 1 for what it uses at Class 1. And
18 on those days that it diverts milk, okay, and it cannot
19 gain a -- they cannot sell that milk to a butter powder
20 plant at the Class 4 price, they have to sell it for
21 something less, --

22 A I can just --

23 Q -- don't you think that -- that in the price
24 then that the Class 1 handler is negotiating to pay his

1 independent supplier, it kind of factors in that you know
2 there are times when I can't recover all of my costs
3 either because, you know, gee, three days a week I've got
4 to divert my milk and I'm getting a buck below class. But
5 I'm having to account to everybody at a buck higher.

6 A I don't --

7 Q I mean, in that regard -- I mean, I -- could --
8 could that argument be made that in effect the independent
9 shippers are -- are incurring some of the costs of the
10 balancing function because the Class 1 handler is
11 accounting for a price different than what it -- what it
12 can receive?

13 A The class handler pays the price and use to
14 procure a supply of milk, okay. I don't think -- I've
15 never known of a Class 1 handler to go back to a producer
16 and say, gee, I've got to balance your milk, I'm not going
17 to pay you the premium and you're going to allow me to pay
18 you under the cooperative but isn't that okay, buddy,
19 because I incur this cost. No. He pays what he -- what
20 he pays.

21 Okay. I -- so I don't think the -- I don't
22 think the proprietary producer -- I mean, to -- to the
23 extent that you're saying how much money does that handler
24 have available, okay. I mean, like there's a pool of

1 money that he's willing to give producers. He's going to
2 give producers only what he needs to do to procure a
3 supply of milk. I guess that's -- that's really where our
4 issue is, that I don't -- I don't believe it goes back and
5 impacts it.

6 Plus, there's -- our operations and what we
7 pay. I can't talk about the other organizations.

8 But it's a very small relative quantity of milk
9 that we would pay under the class price, okay. It might
10 happen at certain times of the year when the plant is
11 full. But particularly, looking at some of the numbers,
12 we -- you know, we don't -- it's not a regular basis that
13 any milk that a Class 1 processor wants to give us we pay
14 under class. No. No, we pay the class, okay, when it's -
15 - when it's involved.

16 There are times when that happens. I won't
17 deny that. But it's a relatively small percentage at our
18 operation, okay. I -- you'd have to ask the other
19 witnesses at theirs.

20 MR. TOSI: Okay. Thanks for your patience,
21 Robert. Appreciate it.

22 JUDGE BAKER: Thank you, Mr. Tosi. Mr.
23 Rosenbaum, did you have some questions?

24 MR. ROSENBAUM: I do not, Your Honor.

1 JUDGE BAKER: Very well. Are there other
2 questions for Mr. Wellington? Yes? Yes, sir.

3 MR. ARMS: David Arms, economic consultant.
4 One thing -- just sitting back, Your Honor, a little bit
5 further is that I find that when Gino Tosi was asking
6 questions the -- the discussion going back and forth was
7 such that it was very difficult to hear in the back of the
8 room.

9 JUDGE BAKER: Oh, I'm sorry. I --

10 MR. ARMS: At least it was for me. And so I
11 would ask that the witness speak into the microphone if
12 possible.

13 JUDGE BAKER: Actually, that isn't a
14 microphone. I don't believe it is.

15 SPEAKER: It is.

16 JUDGE BAKER: Is it a microphone? Oh, all
17 right.

18 MR. ARMS: It was an interaction between Gino
19 and -- (inaudible).

20 MR. TOSI: What couldn't you hear? Was it --
21 was it -- was it my questions or was it Bob's --

22 MR. ARMS: No, Bob's responses.

23 THE WITNESS: Oh, I'm sorry. Want to do it
24 again, Gino?

1 (Laughter)

2 THE WITNESS: I'll -- I'll -- is this better?

3 Can you hear me now?

4 MR. ARMS: Yes.

5 THE WITNESS: Okay.

6 (Pause)

7 CROSS EXAMINATION

8 BY MR. ARMS:

9 Q I'm looking for the table -- here it is. Table
10 1 of your exhibit, Exhibit 14.

11 A I have it.

12 Q Specifically and for clarification of the
13 record, Bob, it's my understanding that you used a factor
14 of 85 percent as a general application of all milk
15 received at pool distributing plants?

16 A Yes, as an estimate. Yes.

17 Q Okay. In your own operation, one of the
18 handlers that you -- your organization supplies is located
19 in New York, mainly the -- plant in Vernon, New York?

20 A Yes.

21 Q And serving that handler you are aware of what
22 is produced at that plant?

23 A For the most part, yes.

24 Q And could you tell -- put on the record what --

1 what you think that is?

2 A Vernon, I believe, is a soft product
3 manufacturer, basically a Class 2 plant.

4 Q Basically a Class 2 plant.

5 A That's what I understand.

6 Q So, would you agree with me then that most of
7 the milk received at the Hood Vernon plant then is
8 classified in a class something other than Class 1?
9 Mainly Class 2?

10 A I'm really uncomfortable testifying about what
11 happens at one of my customers' plants.

12 Q Okay. I'm just saying --

13 A -- representative. If you want them to come up
14 --

15 Q Okay. Well, again, for clarification of the
16 record, are you aware that the plant is in fact classified
17 as a pool distributing plant?

18 A I understand that it has -- does have some
19 Class 1 sales. I know Nider was, but I wasn't sure on
20 Vernon. I would have to look it up on Vernon.

21 Q So -- but would you agree with me that perhaps
22 to the extent there are some plants that are classified as
23 pool distributing plants that their receipts could be much
24 less than the 85 percent assignment to Class 1?

1 A Oh, yes. Absolutely.

2 Q And to the extent that happens, it tends to
3 affect your -- your calculations here?

4 A Absolutely. I was going -- this is sort of
5 looking at the market -- the entire market, not an
6 individual. I imagine there are some handlers --
7 distributing plants who are 90 percent or more. I was --
8 I believe that Mr. Fredericks answered 85 or 90 percent to
9 that question, and so I was trying to use that response.

10 Q I believe you testified or responded on cross
11 that in the calculations you made in the table showing
12 capacities, your relative capacities --

13 A You're referring to Table 2 of my exhibit?

14 Q Table 2, yes. Am I correct in assuming here
15 that your capacity then has to be pretty close to the 65
16 million that is shown that and -- and was discussed for
17 April 2000?

18 A In April of 2000 -- what are you -- what are
19 you -- our capacity in April would be 66 million based
20 upon our --

21 Q 66 million. So that was pretty close?

22 A Yes, absolutely.

23 Q Now, in determining the capacity level, is that
24 based on your production capacity of making butter out --

1 where's the bottleneck forming. On this -- on this
2 bottleneck it's the dryer. And it's -- you do 130 pounds
3 of milk an hour.

4 A I -- I talked to our -- reminded myself --
5 about this last week. But it's -- it's -- the capacity is
6 right there, Dave, on -- on it.

7 Q Okay. So are you saying that your evaporator
8 runs at a faster rate of capacity than the dryer?

9 A Yes.

10 Q Okay. That being the case, that enables you,
11 AgraMark -- AgraMark's West Springfield plant to move
12 extra amounts of condensed milk that you might make on
13 that evaporator?

14 A It does, but condensed is a two-edged sword.
15 If you've got a customer for condensed, it could be a good
16 sale. If you have to move condensed for other reasons,
17 they've got you.

18 Q Okay. But is it true that where you are coming
19 up close to your capacity butter powder operations that at
20 times when there is a very large flush that you may have
21 to run your condenser extra --

22 A Absolutely.

23 Q -- and move the milk on sometimes at a loss?

24 A Oh -- oh, absolutely. Probably -- I don't have

1 -- good monthly figures here for that -- for that month.
2 But if we were at 99 percent capacity, keep something in
3 mind. That's like running full out, almost no break
4 during the month other than for cleaning and other things.

5 So if that's the case, we had daily
6 fluctuations of other stuff coming into that plant, we had
7 to find -- we had to -- and that was not just the total
8 amount of milk coming into that plant. There was
9 additional milk -- so, absolutely, we did condense. In
10 that kind of market environment, usually condensed goes at
11 a loss.

12 Q So to the extent you have or are forced by
13 surplus conditions to move a lot of condensed, then you in
14 effect are increasing your capacity -- number one,
15 increasing your capacity limits, and number two,
16 exacerbating your losses, is that correct, on -- on the
17 handle, the surplus?

18 A In this table I tried to focus in just on
19 butter powder because that relates to the balancing that
20 we did. That's what I -- that's what my focus was. I
21 don't disagree with your statement, okay.

22 Q From your experience in the marketing situation
23 in New England, did you find that when the regional
24 compact was in effect that the payments under that compact

1 provision enabled AgraMark to have a premium charge to
2 their handlers at a somewhat lower rate than prevailed in
3 New York-New Jersey area?

4 A I know that there were higher premiums to keep
5 milk from entering into the compact in New York. I don't
6 know about Pennsylvania.

7 Q So, no.

8 A And I don't know what our -- I don't know what
9 our customers paid relative to other people. I know there
10 was discussion on higher premium levels to do that.

11 Q I guess my question is, was it your experience
12 that the level of premiums charged to handlers in New
13 England was considerably lower than that charged by -- in
14 New York-New Jersey by other cooperatives?

15 A I don't believe we charged their customers any
16 different. Others may have.

17 Q Others may have? Probably to meet the
18 competition --

19 A I would -- I don't -- I would say that probably
20 occurred. If you ask me who did it and how much, I
21 couldn't --

22 Q Okay. I understand. Also from your experience
23 at AgraMark operations, is it fair to say that the great
24 majority of your milk that your members produce is in fact

1 utilized at your own plants?

2 A It is not the majority of -- of our milk. It
3 is a very high proportion of our milk but it is not the
4 majority.

5 Q Can you -- would you care to tell us, you know,
6 what percentage that might be?

7 A It probably -- it's over 40 percent. Keep in
8 mind that we have 40 percent Class 1 utilization, 35, 40
9 percent depending on the month. So we -- we're a large
10 supplier to Class 1 bottling plants. And then we have --
11 it was mentioned that there was a cheese plant that we --
12 we work with. We work with other Class 2 plants and
13 others.

14 So, probably, I would say it isn't -- it isn't
15 the majority. It's over a third -- clearly over a third.

16 Q The fact then that you are an operating
17 cooperative with a large -- a very large quantity of milk
18 that you're utilizing yourself, do you find at times then
19 that if there's a race on premium -- that you wind up
20 paying -- having to pay it for your own milk?

21 A We pay our -- we have to beat the competitive
22 premiums across all our membership.

23 Q Mm-hmm.

24 A So, yes, it ends up being charged back to our

1 operations. It's another thing if we're making butter and
2 powder. Our -- skim milk making powder -- selling to the
3 government and those premiums out there. We could -- we
4 have to pay that cost even though we're balancing.

5 Q It is a factor in your determination on
6 premiums that you do have to pay them yourself on milk you
7 utilize in your own operation?

8 A Right. Like I said, we -- we pay it across for
9 all our members equally. We don't say, your milk goes to
10 our plant so you don't get the same -- we don't -- we do
11 not say that.

12 MR. ARMS: Okay. Thank you very much.

13 JUDGE BAKER: Thank you, Mr. Arms. Are there
14 other questions for Mr. Wellington? There appear to --
15 oh, Mr. Buelow?

16 MR. BUELOW: Yes, Your Honor. Jim Buelow with
17 Elmhurst Dairy.

18 CROSS EXAMINATION

19 BY MR. BUELOW:

20 Q Turning to Table 2 of your exhibit, am I
21 interpreting this right in looking at the percentages of
22 utilization of your plant that in the last two and a half
23 years there has been four times to -- there has been only
24 two times where the plant has been utilized more than 90

1 percent?

2 A On a monthly basis. Keep that in mind. If I
3 were to look at it over shorter periods of time. We just
4 happen to be looking at a month where it could be very
5 cool for a week or two or three weeks, okay. And there
6 might be some holiday or other things involved. But on a
7 monthly basis that is correct.

8 Q Okay. Over the same period of time, is it
9 correct that the plant monthly utilization only four times
10 has been 85 percent or higher?

11 A I'd have to count the numbers. I would say if
12 you've counted them already, I'll -- whatever the numbers
13 show -- I -- I would say -- if this might help, Jim,
14 whenever -- whenever we're above 80 percent capacity, it
15 means we are running at full capacity for a good part of
16 the month, okay. And then what we -- then what -- what
17 happens is the main days for Class 1 sales are usually
18 Thursdays and Fridays. We might be running at 80 percent
19 of capacity, meaning full capacity for five days and then
20 we're running at just partial capacity for those two days.

21 Q There seems to be a lot of attention paid in
22 your testimony to costs associated with not running at
23 full capacity. Could you share with us -- you run two
24 other plants. Could you share with us maybe not as

1 precisely as these numbers but what capacity does
2 Middlebury Center run month-in and month-out and does it
3 vary throughout the year?

4 A It does vary throughout the year. I would say
5 generally we try to run Middlebury on the demand, almost
6 like those cheese plants. Usually we try to do -- in our
7 market. Not all do but most do.

8 Middlebury usually runs about six days a week.
9 If we -- if have additional supplies of milk such as we
10 mentioned have to be condensed at distressed prices,
11 Middlebury will pick up and run seven days a week, okay.
12 If there's a short, we might run five days a week. But we
13 don't -- we don't consider Middlebury a balancing.

14 Cabot is not a balance-share at all. Cabot
15 does soft products, small amounts of specialty cheese.
16 Cabot does not balance the market at all. Cabot gets the
17 milk it needs.

18 Q I understand that, but that's not really the
19 point of my question.

20 A Okay.

21 Q I'll try asking it another way. Every plant
22 that you run I'm sure you try to assess the cost of
23 running that plant --

24 A Yes.

1 Q -- correct? And I don't believe that there's
2 many plants or there are no plants or -- or anywhere in
3 the country that truly run at 100 percent of capacity all
4 the time. Is that correct?

5 A That's correct.

6 Q Okay. In looking at your cost of operations
7 for instance of the Middlebury plant, if it should run at
8 85 percent of capacity, wouldn't you take your total
9 operating costs and spread that over those -- those type
10 of pounds that would be most associated with what would go
11 through that plant?

12 A Yes, that's what we would do. I guess it
13 depends on your definition of capacity. When I say, for
14 example, that we work -- we use Middlebury six days a
15 week, in many ways we would consider that to be capacity
16 for labor reasons and other reasons. And then suddenly we
17 run over capacity when we run seven. So a lot of it
18 depends on your definition of what that capacity is.

19 I -- at West Springfield, we handle that a
20 little bit -- it -- it's handled differently in terms of
21 we're not a determinant -- I want to say this right.
22 We're not a determinant of capacity so much at West
23 Springfield as we are at the other plants. We make
24 conscious decisions at the other plants.

1 West Springfield, you know, I was -- I was
2 talking to our plant manager a couple days ago and they
3 had a week when they thought they would be getting -- a
4 few weeks ago they were getting about 15 million pounds of
5 milk. And they got a call and they had 11 million pounds
6 of milk after they had scheduled everything and -- and we
7 had to -- so capacity is sort of a -- a rough target to
8 shoot at. I had to shoot at it. I had to come up with a
9 number.

10 Q Okay. The point of my question, the -- this
11 type of question, wouldn't it be more realistic in
12 accounting for your costs at -- at the butter powder plant
13 in West Springfield to use a number that -- that is more
14 consistent with the pounds of milk that would normally go
15 through that plant, not the maximum capacity?

16 A Well, we do. Normally we get 60 or 65 percent
17 and we have a loss. So, yeah, we -- we -- we do look at
18 that. How -- how do you attribute that loss? I mean,
19 that really becomes the issue. It's another reason why we
20 went back to the Ling study, so we could really just focus
21 in on what the balancing needs were.

22 Yeah, -- can account for costs ultimately.

23 That's --

24 MR. BUELOW: Thank you.

1 JUDGE BAKER: Thank you, Mr. Buelow. Are there
2 other questions for Mr. Wellington? Yes, Mr. Beshore?

3 REDIRECT EXAMINATION

4 BY MR. BESHORE:

5 Q Bob, you were asked a question by Mr. English
6 with respect to whether you were aware a producer could be
7 pooled on more than one order at the same time.

8 A Okay.

9 Q Now, with respect to the modification in -- in
10 language that you have advanced on behalf of ADCNE to
11 exclude the payment of marketwide -- marketwide -- the
12 eligibility for marketwide service payments --

13 A Right.

14 Q -- of a producer who is just coming on to the
15 order for a three-month period of time, was it your intent
16 to exclude and are you willing to adapt the language in
17 whatever way is necessary to exclude all of the producer's
18 milk during that three-month period of time?

19 A If he's not fully on the order and -- and if
20 he's on another order, I don't think he should be on. I
21 said I didn't have an issue with that. We had to go back
22 to the -- I went back to the group and discussed that and,
23 yes, I think we would -- we clearly agree the Department
24 should do that. They have to be -- they -- they have to

1 be fully and exclusively on the order for that three-month
2 period.

3 Q Okay. So just as we're proposing to eliminate
4 the split-plant provision and other --

5 A Right.

6 Q -- provisions here, you'd -- you're not
7 advocating a split producer pool of milk?

8 A I don't -- no. I don't have split producers in
9 my organization, but the more I hear about it, the more
10 I'm going to look at it.

11 (Laughter)

12 BY MR. BESHORE:

13 A But I don't -- we don't have -- that's one of
14 my issues, was I -- I don't deal with them, so.

15 Q Along -- along that same line, is it -- you
16 were -- the pool of milk from outside the defined
17 geographic marketing area was -- was called to your
18 attention by Mr. Rosenbaum and perhaps Mr. English also.
19 Would it be your view -- well, are there other proposals
20 advanced by ADCNE in this hearing which would have some --
21 which, if adopted, would have some impact on the ability
22 of -- of any handlers to pool milk from any area that is
23 not performing year-round on the market?

24 A Yes. There are proposals. And in fact,

1 basically, that's one of the reasons our proposal was
2 written the way it was. You have -- Mr. Gallagher will be
3 testifying in -- in support of those proposals.
4 Basically, our -- our hope is that they will limit some of
5 those pounds that are coming onto the pool.

6 Q At least if the pounds are not performing --

7 A The pounds are not performing and serving the
8 market, yes.

9 Q Okay. Presently, for instance, there is the
10 language in the order at least that allows milk associated
11 with supply plants to be pooled from January through July
12 without any performance requirements whatsoever if the
13 plant has been pooled the previous August through
14 December?

15 A At 20 percent, correct.

16 Q Correct. And -- and those provisions would be
17 -- if -- if in fact they accommodated any of the large
18 volumes of milk in prior flushes, that would be subject to
19 different rules going forward if those proposals are
20 adopted?

21 A Our -- our -- our intent is not to exclude that
22 milk. It's to make sure that milk is actually serving the
23 market.

24 Q Now, the -- you were asked a question or two by

1 Mr. Vetne, I think, with respect to the language in the
2 marketwide service payment -- Proposal 7 which
3 disqualifies or excludes from payment non-member milk
4 that's pooled by a co-op or cooperative member milk that's
5 pooled by a proprietary handler. You're -- you're aware
6 of that?

7 A Yes.

8 Q And the -- the prohibition in -- in Proposal 7
9 as it's written applies to -- applies both ways? That is,
10 a cooperative handler cannot collect on non-member milk
11 and a proprietary handler cannot collect on cooperative
12 member milk, correct? It was one of the intents of that
13 language to prohibit in essence the arrangement that could
14 be entered into solely for the purpose of collecting money
15 and not for the purpose of balancing?

16 A Yes.

17 Q You were asked a few questions with respect to
18 the seasonal indices which Dr. Ling calculated and which -
19 - which you calculated also with respect to either
20 producer receipts or Class 1 demand. And you noted, I
21 think, that those indices could be -- could be
22 recalculated with any adjustments that may be deemed
23 appropriate by the recalcuator, whether it be an
24 interested party on a brief or -- or the Department.

1 A There's a tremendous amount of data in the
2 record that we could -- you certainly could do that.

3 Q And -- and those -- any such recalculations
4 could also then be input into -- into Dr. Ling's tables if
5 one chose to to determine what impact, if any, that might
6 have upon the isolated cost of balancing the Class 1 milk?

7 A Something like the indices, yes. Other members
8 I'm not sure. But the indices certainly --

9 Q Would you turn to page 85 of Exhibit 5 briefly?
10 You were asked a couple questions about it. And that's
11 the 7(a) plant aggregate receipts and utilization
12 information that's -- was prepared by the market
13 administrator --

14 A Yes.

15 Q -- on the basis of the handler reports of the
16 plants indicated in the -- in the footnotes on the
17 exhibit.

18 A (Inaudible).

19 Q Okay. Now, West Springfield is one of the
20 plants that's involved, correct?

21 A Yes.

22 Q So that, as you've testified, your total
23 receipts at West Springfield of milk and cream do not go -
24 - do not all go into skim milk powder or butter, correct?

1 A Correct.

2 Q Okay. The -- the shaded column to the right on
3 this exhibit is essentially just the pounds used to
4 produce Class 4 products at those facilities?

5 A Yes.

6 Q And to the extent that West Springfield, for
7 instance, and any of these other plants have production of
8 condensed that's marketed elsewhere, the volumes that went
9 into that are on the receipt side but they're not showing
10 as skim milk or -- or other powder or butter manufacturer
11 because they didn't go to that end use, correct?

12 A Unless they ended up in that end use. If we
13 moved skim to another powder plant. That's the only thing
14 I can say in that -- that that happens.

15 Q Well, if you moved -- if you moved condensed to
16 another powder plant, it wouldn't -- those volumes
17 wouldn't show up in the used to produce --

18 A Yes, that's true. That is true.

19 Q -- information which is what Mr. Fredericks
20 testified is the gray columns?

21 A That's true. This isn't total amount of
22 product this is used to produce, yes.

23 Q Okay. And so in effect, it's just the -- it's
24 the residual volumes that get -- at these plants that go

1 to the least -- essentially the balancing and true
2 balancing uses. The last -- as you testified, the last
3 uses you make of it or the first uses that milk gets taken
4 out of it when it's demanded from the commercial market?

5 A That's true.

6 Q Would you turn to page three of your testimony,
7 please? Exhibit 13.

8 (Pause)

9 BY MR. BESHORE:

10 Q Page three?

11 A Yep.

12 Q Exhibit 13. Okay. Now, I want to draw your
13 attention to the first full paragraph on page three of
14 your testimony. And going back to page -- the bottom of
15 page two for a moment, is it not correct that you are in
16 your testimony there quoting the decision of the secretary
17 from the 1986 decision?

18 A Yes, I am quoting.

19 Q Okay. So that in the first full paragraph on
20 page three, which begins, "Market balancing activities,"
21 those are not your words, those are words of the secretary
22 in explaining what the statute provides for?

23 A The secretary's finding and conclusions, yes.

24 Q And the secretary found that market balancing

1 activities such as disposing of surplus milk and obtaining
2 supplementals from Class 1 handlers are clearly identified
3 in the new provisions as services of marketwide benefit,
4 correct?

5 A Yes.

6 Q And the secretary also found that the law,
7 which is the law we're proceeding under here with respect
8 to Proposal 7, also provides that payments made under the
9 order program for the purpose of reimbursing the handlers
10 who provide those services are to be made from the total
11 sums payable by all handlers for milk, correct?

12 A Correct.

13 Q And that's pooled, correct?

14 A Yes.

15 Q And the secretary went on to find thus the
16 objective under marketwide service payment provisions is
17 that the minimum uniform price to all producers would be
18 evenly affected, reduced, and all would share the cost of
19 providing those services. That wasn't your interpretation
20 of what would happen; it was the secretary's finding with
21 respect to how these types of provisions would work?

22 A Yes, that's true.

23 Q And the secretary also found that in this way
24 some market participants would not be able to maintain an

1 advantage gained by receiving benefits but not having to
2 pay the costs therefore, correct?

3 A Correct.

4 Q And that's the objective of Proposal 7 --

5 A Exactly.

6 Q -- is it not?

7 MR. BESHORE: Thank you. That's all I have.

8 JUDGE BAKER: Very well. Are there any other
9 questions? If -- determine how long they're going to be.
10 Yes, Mr. Rosenbaum?

11 MR. ROSENBAUM: Less than two minutes.

12 JUDGE BAKER: All right. Go ahead.

13 MR. BESHORE: He's on the clock.

14 RE CROSS EXAMINATION

15 BY MR. ROSENBAUM:

16 Q Just to follow up on the last question from Mr.
17 Beshore, you agree that the language in the statute
18 provides that the order shall contain one or more of the
19 following provisions, one of which is marketwide service
20 payments? That's the way the structure is set up,
21 correct?

22 A I don't know.

23 Q You -- okay. You're not -- you're not
24 suggesting that it's required that there be marketwide

1 service payments, only that the secretary has the
2 discretion if he deems them appropriate to put in place,
3 is that right?

4 A -- say they're required by my interpretation --
5 required. Certainly, the secretary has the option.

6 MR. ROSENBAUM: That's all I have.

7 JUDGE BAKER: Thank you. Are there any other
8 questions for Mr. Wellington?

9 (No response)

10 JUDGE BAKER: Let the record reflect that there
11 are none. Thank you very much, sir.

12 (Whereupon, the witness was excused.)

13 JUDGE BAKER: That does bring us to the time
14 for our afternoon recess, after which we will hear from
15 those two individuals who have to be heard today.

16 MR. BESHORE: May I move the admission of
17 Exhibits 13 and 14 before we break?

18 JUDGE BAKER: Are there any questions or
19 otherwise or objections with respect to 13 and 14?

20 (No response)

21 JUDGE BAKER: Let the record reflect there's no
22 response. Exhibits 13 and 14 are admitted and received
23 into evidence.

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(The documents previously
marked for identification as
Exhibits 13 and 14 were
received in evidence.)

JUDGE BAKER: Yes, Mr. --

MR. ENGLISH: I just wanted -- you said there
were two people that need to be heard today. There's
really three. There are two dairy farmers who I'd like to
take up after the afternoon recess and there's one other
person, Mr. Miller of Queensboro Farms, who's been here
both days. And if I could accommodate him, he can be at
the end of the day today. I -- it's a fairly short
statement. I don't think it's overly complicated. Maybe
-- I don't think so. And hopefully we can accommodate him
as well.

But at least the two dairy farmers now, and if
you want to take Mr. Miller right afterward, that's fine.
But I don't want to continue interrupting the flow of Mr.
Beshore's --

MR. BESHORE: Well, we're certainly prepared to
yield to the dairy farmers and accommodate Mr. Miller as
well.

JUDGE BAKER: Thank you -- we'll take a 15-

1 minute recess at this time and come back to proceed.

2 (Brief recess)

3 (The document referred to was
4 marked for identification as
5 Exhibit 15.)

6 JUDGE BAKER: Are there any questions or
7 objections -- yes, Mr. English?

8 MR. ENGLISH: I understand there are none, so I
9 was going to move the its submission.

10 JUDGE BAKER: All right. Well, I -- I --

11 MR. ENGLISH: (Inaudible).

12 JUDGE BAKER: -- consideration now -- not going
13 to object.

14 SPEAKER: We did have the opportunity to review
15 it and to not have any objection to its admission.

16 JUDGE BAKER: Very well. Thank you. I -- take
17 Mr. English's word. I just wanted to be -- (inaudible).

18 MR. BESHORE: Thank you, Your Honor.

19 (The document previously
20 marked for identification as
21 Exhibit 15 was received in
22 evidence.)

23 MR. ENGLISH: Your Honor, I would call Mr.
24 Travis Finn --

1 JUDGE BAKER: Very well.

2 MR. ENGLISH: -- to the stand.

3 Whereupon,

4 TRAVIS J. FINN

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

7 DIRECT EXAMINATION

8 BY MR. BESHORE:

9 Q Mr. Finn, could you state your full name and
10 spell it for the record, please?

11 A Travis J. Finn. T-R-A-V-I-S, "J" as in James,
12 Finn, "F" as in Frank-I-N-N.

13 Q And what is your address? Would you speak in
14 the microphone?

15 A Sure. I can do that.

16 Q Pull it to you.

17 A I live at 9195 Jones Road, Holland Patent, New
18 York. Holland Patent is a little town northeast of
19 Syracuse, home of the Syracuse Orangemen. And --

20 Q You're here today -- are you here on your own
21 behalf as well as on behalf of an entity?

22 A On behalf of several organizations I would
23 include.

24 Q The --

1 A The first thing, my own farm, -- Farms. The
2 second being Holland Patent Farmers Co-Op, of which I'm
3 vice president. And that is the cooperative that we
4 market our farm's milk through. Also, on behalf of
5 Elmhurst Dairy, who has purchased our co-op's milk for the
6 last few years.

7 Q And for the record, Elmhurst Dairy will also
8 have a -- a witness for themselves, correct?

9 A Correct.

10 Q Before you give your -- your statement that
11 you'd like to give, there was a witness yesterday from the
12 New York Farm Bureau who testified. Are -- are you or is
13 your farm a member of New York Farm Bureau?

14 A Yes, we are.

15 Q And were you, to your knowledge, consulted
16 about the proposals at issue here today by the New York
17 Farm Bureau as to taking a position?

18 A To my knowledge, I wasn't aware of any trying
19 on their part to get our opinion.

20 Q And do you have some things you'd like to say
21 today about marketwide service payments?

22 A Yes, I do -- I do.

23 Q Why don't you go ahead and have your say?

24 A First of all, Your Honor, I'd like to thank you

1 for -- and the -- the people from the Department of
2 Agriculture for holding this hearing and -- and giving me
3 a chance to -- to come and give my -- my feelings on it --
4 (inaudible) -- the order.

5 I won't take much of your time. I realize
6 everybody's time is valuable, but I just thought it may be
7 of some benefit to hear what some of the producers that
8 are actually out there in the farms milking the cows feel
9 about this proposal.

10 I stated where I was from. I -- I farm there
11 with my brother and father. We milk 420 cows. It's still
12 very much a family operation.

13 And I guess -- this wouldn't be my first choice
14 of places to be today. But I expect to be farming for the
15 next 30 years and I realize that this is probably the most
16 important place for me to be today.

17 I have two small children, six and four, that I
18 think maybe some day will take the farm over. If they do,
19 I would be happy to feel that I maybe encouraged a better
20 environment for them to farm in.

21 At any rate, that's how I got here and why I'm
22 here. And I'm just going to give you my quick take on it.

23 Kind of -- to put it bluntly, I -- I just don't
24 think it's a very realistic amendment to the Northeast

1 Marketing Order because I see it as being discriminatory
2 in a couple of different senses. The first being that
3 we're taking money from farmers here in the northeast and
4 putting it in the hands of larger cooperatives whose scope
5 of operation extends from coast to coast.

6 Now, were the tables turned and we were going
7 to skim money off of all the other federal order pools and
8 return that to an organization that I was part of, I would
9 be very much in favor of that. But one -- wondering why
10 they dipped into my pool to support organizations that go
11 well beyond the Northeast Marketing Order. Doesn't look
12 like such a great deal to me.

13 Feeling why these -- these co-ops are
14 supposedly providing a marketing service, it's kind of a
15 vague term and -- and not a real lot of hard evidence that
16 -- that I have seen as to exactly what they're doing for
17 this service. Then, to make it even harder is to put the
18 numbers on -- of the services they are supposedly
19 supplying to us.

20 Granted, they handle a large volume of the milk
21 but I feel the small cooperatives and proprietary
22 organizations are -- are also contributing to balancing
23 the -- the fluid one pool. One sure example, we signed a
24 contract with Elmhurst Dairy last -- last fall and agreed

1 to send our milk to three different locations. The
2 markets change substantially during the year and we were
3 contacted and they asked if it would be okay to send it to
4 some other locations. The reason they contacted us was
5 because we always agreed to take care of our own hauling.
6 So that had an impact on us once it starts moving
7 location.

8 But in the end we agreed to do that. And by
9 the time the end of the year had rolled around, we had
10 shipped our milk to eight different locations. But we got
11 what we had wanted. The contract was -- the way we
12 intended it to, and I feel that the combination of our own
13 co-op and Elmhurst Dairy both contributed in trying to
14 balance the market.

15 We didn't necessarily make dry powder and
16 butter out of it per se, but we had to alter the locations
17 to soft product manufacturing plants. Who's to say that's
18 not a service provided within the order to balance the
19 marketing?

20 Then -- a little more on the -- the dollars and
21 cents issue. It's -- it's a huge amount of money that's
22 taken out of the pool. We're just a small producer in a
23 very large pool. But that still means \$3500 a year to me
24 on my farm. Thirty-five hundred to me is the difference

1 between funding my retirement and not. Being able to
2 afford health insurance so that my wife can stay home and
3 raise our kids. I just need -- I need some very good
4 evidence and support that this is a necessary thing before
5 I'm going to stand up and say, yeah, you can have my four
6 cents or six cents or whatever it boils down -- coming to.

7 One of my final points will be that I kind of
8 feel that this -- these milk handlers are running the
9 business, much as I run my business. And they should know
10 going into this how they're going to cover their expenses.

11 Kind of an analogy, if I don't think I'm
12 capable of running a cropping operation, I'd better not
13 buy a full line of equipment to put behind my dairy to
14 feed my cows if I don't think I can manage that aspect of
15 it. I'd better buy feed or custom hire somebody else to
16 come manage it.

17 And I kind of feel the same way about this.
18 These handlers know when they sit down and talk to me and
19 want to buy my milk what the deal is. And it's their
20 problem there on out. And to this point, I feel like
21 they've met it. I've never had anybody leave me with a
22 tank full of milk yet.

23 In conclusion, I'd just like to say that I
24 almost feel like this proposal -- it's kind of an

1 enticement to encourage people to participate in balancing
2 the fluid market. When I look back at history, I'm not
3 sure we need that. As far as I can see, the -- the market
4 is being balanced. I don't -- I've never had trouble
5 getting a gallon of milk out a grocery store. I've never
6 had a problem with milk being left in my bulb tank.

7 So I have to ask myself, why are we doing the -
8 - skimming money off the top of the market pool to perform
9 some service that has, to me, obviously been happening
10 along the way. And I'm sure it's much more complicated
11 than I just reiterated it, but I'm just giving you my
12 layman's view of what's happening from the farm.

13 With that, I'd just like to say thank you for
14 your time.

15 JUDGE BAKER: Thank you for appearing and
16 participating in the hearing. I shall now ask for
17 questions. Are there any questions for Mr. Finn?

18 BY MR. BESHORE:

19 Q Thank you for -- for your testimony, Mr. Finn.
20 How you alluded to, I guess, hearing some of the testimony
21 or -- have you been -- have you been here -- how -- how
22 much testimony have you heard?

23 A Just today. I got on a flight at 6:00 this
24 morning and what I've got so far is what I've got. I

1 tried to educate myself as best I could before I got here,
2 but I -- (inaudible) -- to do.

3 Q How many members does Holland Patent have in --
4 cooperative have?

5 A We currently have 47 members shipping milk. It
6 was established back in the early 1930s and did have a
7 bottling plant of its own. The bottling plant closed up.
8 I don't know the exact date. I'm going to say in the mid
9 '60s, so we've basically been -- well, not totally a paper
10 co-op. We still own the land, the buildings, and run a
11 farm store out of the old bottling plant. But we don't --
12 we don't actually bottle any milk or manufacture any milk
13 of our own. It's strictly set up to gain market clout and
14 try to negotiate milk prices.

15 Q What monthly volume do the 47 farms produce?

16 A We do about 40 million pounds a year. So break
17 that down. Three and a half million pounds a month.

18 Q Is -- is all of your production contracted to
19 Elmhurst?

20 A Yes, it is right now.

21 Q Your -- your farm with 420 cows, how much milk
22 do you produce a year? Around 20,000 per cow?

23 A Seven and a half million pounds. Probably
24 closer to 8 million pounds this year.

1 Q So your -- your 8 million is about 20 percent
2 of the co-op?

3 A We figure around six.

4 Q Are you -- you're the vice president I think
5 you said?

6 A Yes.

7 Q And you bargain in selling the 40 million
8 pounds a year to Elmhurst. Do you receive an over-order
9 premium for the -- the -- your milk?

10 A Yes.

11 Q And does that premium vary with respect to
12 where it's sold -- where it's delivered?

13 A Somewhat.

14 Q Does it vary by the class of utilization?

15 A I guess that's a question that's beyond my
16 scope of knowledge.

17 Q Okay. How many plants does Elmhurst have?

18 A That I don't know either. But I'm sure there's
19 somebody here that could help you with that one.

20 Q The Elmhurst witness, I assume.

21 A I would think so.

22 Q Okay.

23 A I would hope so.

24 Q Now, you don't supply Elmhurst all its needs?

1 A Not even close.

2 Q But Elmhurst -- your milk is all -- your
3 cooperative's milk is all under contract to Elmhurst and
4 they direct you where to deliver the milk?

5 A Yeah.

6 Q You have -- do you contract on a yearly basis -
7 - the cooperative, that is -- for your milk?

8 A Yeah.

9 Q Previously you've contracted with some to --
10 some of the cooperatives in the market -- one other
11 question. Are you -- do you hold any elected position in
12 the New York Farm Bureau?

13 A No.

14 Q But it does have a structure of board members -
15 -

16 A Oh, a very sound structure. It's my brother's
17 department. He is an elected official. I proposed to him
18 what I was going to do and he said, sound all right to me
19 -- so. He stayed home. I guess maybe he didn't know a
20 Farm Bureau stake was -- (inaudible).

21 MR. BESHORE: Thank you very much.

22 JUDGE BAKER: Thank you. Are there any other
23 questions for Mr. Finn? Mr. Vetne?

24 CROSS EXAMINATION

1 BY MR. VETNE:

2 Q I'm John Vetne. I represent Friendship. The
3 market administrator gave us some information at the
4 beginning of the hearing showing all the co-ops for the
5 producers pooled in the order. Holland Patent doesn't
6 appear in that list of some 40 or 50 or 90 co-ops. Do you
7 have any idea why? HP Farmers Cooperative, is that it?
8 Never mind.

9 A That's good because I didn't have any idea why.
10 (Laughter)

11 MR. VETNE: Okay.

12 JUDGE BAKER: I don't think the -- (inaudible).

13 MR. BESHORE: For the record, there's a "H
14 period P period Farmers Cooperative." And is that the
15 same as Holland Patent?

16 THE WITNESS: Yeah, that's shorthand for
17 Holland Patent.

18 JUDGE BAKER: Very well. Thank you. Are there
19 any other questions for Mr. Finn?

20 (No response)

21 JUDGE BAKER: There appear to be none. Thank
22 you again.

23 THE WITNESS: Okay.

24 MR. BESHORE: Thank you again.

1 JUDGE BAKER: (Inaudible).

2 (Whereupon, the witness was excused.)

3 MR. ENGLISH: The next witness --

4 (Pause)

5 JUDGE BAKER: Do you want to call the next
6 witness?

7 MR. ENGLISH: Mr. Scholte.

8 JUDGE BAKER: Very well.

9 Whereupon,

10 ARIE SCHOLTE

11 having been first duly sworn, was called as a witness
12 herein and was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. ENGLISH:

15 Q Mr. Scholte, would you please state your full
16 name and spell it for the record?

17 A My name is Arie W. Scholte. A-R-I-E, W, S-C-H-
18 O-L-T-E.

19 Q And would you please tell us why you're here
20 today?

21 A Last week -- Wednesday, I guess -- I was
22 informed the six cents per hundredweight marketing balance
23 charge for the payment imposed by a milk handler, Mr. --
24 (inaudible) -- suggested that I get together with dairy --

1 (inaudible) -- Council of New York Association and see if
2 I would come down and testify as an independent producer.
3 And that's what I'm doing here today.

4 Q It was your choice to come down, correct?

5 A Oh, absolutely.

6 Q And the statement you're to give today is your
7 statement, correct?

8 A Absolutely.

9 Q Now, could you please speak into the
10 microphone?

11 A Sorry. How's this?

12 Q Pull it towards you.

13 A All right?

14 Q Go ahead. Why don't you proceed -- I'm sorry.
15 What's the -- do you operate a dairy farm?

16 A Yes, I do.

17 Q And where is that dairy farm?

18 A Located in Balmville, New York, which is about
19 seven miles outside of Syracuse, close to Syracuse.

20 Q Why don't you proceed with your statement then?

21 A Basically, the same as Travis. Yesterday I was
22 out in the field chopping corn. Today, on 9/11, I'm
23 sitting here before you expressing my opposition to this
24 six cents market service charge.

1 I'll give you a brief history of myself.
2 Married, one daughter, dairy farmer all my life. I owned
3 a farm supply business for five years. Presently serving
4 my second term -- (inaudible).

5 My family started farming in Orange County, New
6 York, on a farm -- farming career started in Orange
7 County, New York, when my parents came to the U.S. from
8 Holland in 1954. We also farmed in Middlebury, Vermont,
9 for six years before moving to our present farm, which is
10 located in Balmville, New York, near Syracuse.

11 Dairy consists of 300 acres -- 300 cows, 300
12 head of young stock, a farm about 1000 acres. And for the
13 past 17 years, Vernon Dairy has been coming to our yard
14 every day to pick up our milk.

15 My reason for traveling here today on 9/11 is
16 to express my opposition to the six cent per hundred
17 marketwide service payment that is being proposed by 7(a)
18 markets and dairy co-ops.

19 Paying -- northeastern dairy co-ops six cents
20 per hundred on the members' volume would reduce our -- our
21 -- our net farm price by four and a half cents per
22 hundred. This equates to \$2700 per year. That would -
23 - that would be subtracted from our farm's bottom line.
24 \$2700 is not a huge sum of money, but on a yearly basis,

1 for example, it pays for Christmas bonuses for our
2 employees, school taxes on my house, a nice IRA
3 contribution for myself, or my life insurance payment.

4 These are examples on a yearly basis. I think
5 what is important -- more important to look at in this
6 issue is the long term. For example, investing \$2700 in a
7 conservative mutual fund, even taking the downturn in the
8 market today, we could easily be looking at a 90- to
9 100,000 dollar nest egg which could be used to fund
10 retirement or to pay off debt in the future.

11 Now, this is just our farm. Let's look at the
12 big picture. Four and a half percent -- four and half
13 cents assessed over the whole Northeast Order, we're
14 looking at 2 billion pounds per month -- per month, which
15 means that the farmers in the Northeast Order would pay
16 these 7(a) co-ops \$1 million per month or \$12 million per
17 year or -- in the long term, 120 million over 10 years.
18 This is for providing unspecified market balancing
19 services.

20 In my opinion, this brings us to the real issue
21 -- (inaudible), their documented need for providing this
22 proposed marketing service. Would there be financial
23 reports detailing use of the money? Would the money be
24 held in escrow accounts if it's not needed? Will there be

1 some sort of third party oversight? That's how -- that's
2 how -- as to how this money is spent. Would this four and
3 a half cent charge would be better spent on advertising?
4 I think that's a real good question.

5 How will this four and a half cent benefit the
6 independent producers like myself which make up 25 percent
7 of the milk production in the Northeast Order? What will
8 be our return on investment? These are fair questions
9 and, in my opinion, should be answered.

10 I think my testimony shows that if this
11 marketwide service payment is adopted, northeast farmers
12 will just be investing millions of dollars into a program
13 that has no proof of return on investment. And with no
14 proof of return, shouldn't this money stay on a farm where
15 it can be put to use keeping future generations on the
16 farm.

17 In closing, I want to thank the representatives
18 of the USA for your time. I hope my testimony will help -
19 - help you make a good decision.

20 JUDGE BAKER: Thank you very much, Mr. Scholte.
21 Are there any questions for Mr. Scholte? Yes, Mr.
22 Beshore?

23 CROSS EXAMINATION

24 BY MR. BESHORE:

1 Q Mr. Scholte, I just have one question. I think
2 -- your milk -- you sell your milk to Vernon Dairy?

3 A Right.

4 Q Is that correct? Which is in Syracuse?

5 A Right.

6 Q Did you say they -- you're on a daily pickup
7 schedule with them?

8 A Right.

9 Q Okay. Do you know where your milk goes?

10 A Vernon Dairy.

11 Q And that's a bottling plant in Syracuse?

12 A Right.

13 Q They pick it up every day at your farm?

14 A (Inaudible).

15 Q Take it to the plant in Syracuse every day?

16 A Right.

17 Q Three hundred sixty-five days a year?

18 A Three hundred sixty-five days, snow, wind,
19 storm, whatever.

20 MR. BESHORE: Thank you.

21 JUDGE BAKER: Thank you. Are there any other
22 questions?

23 (No response)

24 JUDGE BAKER: There appear to be none. Thank

1 you very much.

2 (Whereupon, the witness was excused.)

3 (Discussion held off the record.)

4 MR. ENGLISH: Your Honor, the parties' pleasure
5 is, again, Mr. Miller can get done some time before the
6 close of business today. And I don't know when that is,
7 either. But if -- if Mr. Gallagher wants to go now --

8 JUDGE BAKER: Why don't we have -- why don't
9 you --

10 MR. ENGLISH: Okay. Is that all right, Mr.
11 Beshore?

12 MR. BESHORE: Yes.

13 MR. ENGLISH: Mr. Miller is going to testify
14 both on Proposal 7 and on some of the pooling proposals.

15 JUDGE BAKER: Very well. Thank you.

16 MR. ENGLISH: I would emphasize on those that
17 the technical people will be coming later.

18

19

20 Whereupon,

21 LEWIS BUTCH MILLER

22 having been first duly sworn, was called as a witness
23 herein and was examined and testified as follows:

24 MR. ENGLISH: There's two statements -- two and

1 a half page and one under one page, but it seems like we
2 may have run out of the one-pager.

3 (Pause)

4 DIRECT EXAMINATION

5 BY MR. ENGLISH:

6 Q Mr. Miller, would you state your full name for
7 the record?

8 A Lewis Butch Miller.

9 Q And by whom are you employed?

10 A I'm employed by Queensboro Farm Products. I'm
11 the executive vice president. And I'm here today also
12 representing New York Dairy Foods, of which I'm the vice
13 president.

14 Q And it's, again, your understanding that there
15 will be other factual witnesses on these proposals and --
16 and also some technical people to talk about the
17 technical. You're going to talk about both Proposal 7 and
18 Proposal 1, is that correct?

19 A Yes, sir.

20 Q Why don't you proceed with both statements?

21 A Start with Proposal Number 1. That's the one-
22 page.

23 In regard to the required timing for market
24 administrator reporting dates, we believe that the

1 reporting dates ought to be moved back one day to the 10th
2 of the month. Simply stated, we do not have enough
3 information supplied to us in a timely manner to report
4 accurately on the 9th of the month.

5 Four of the last six months, we did not receive
6 the necessary data in time. The information has arrived
7 at our office at about noon or after on the 9th of the
8 month.

9 We're a small business and a manufacturer. Our
10 market administrator department consists of one extremely
11 competent employee who must disseminate all of the -- all
12 of the information at the last minute in order to file a
13 complex market administration report on time. This
14 rushing leads to error, estimating on occasion, and
15 compromises the accuracy and veracity of such important
16 information.

17 This in turn leads to orders adjustments, more
18 work for the Department, and more time for producers and
19 handlers to get accurate financial accounting with pool
20 information and funds. This makes no sense.

21 If the reporting date and the other payment
22 dates were to be adjusted accordingly as per the New York
23 State Dairy-approved proposal which you'll hear later, the
24 reporting and financial dissemination of information and

1 funds would be handled in a more orderly and consistent
2 manner. Both the producer and the handler would benefit
3 from this small change.

4 JUDGE BAKER: Very well. Are there any
5 questions with respect to this testimony relative to
6 Proposal 1?

7 MR. ENGLISH: I'd ask a few additional
8 questions.

9 JUDGE BAKER: Oh, all right.

10 BY MR. ENGLISH:

11 Q Mr. Miller, as it happens, this week was pool
12 reporting, correct?

13 A That's correct.

14 Q And in fact Monday was the deadline for getting
15 information to the market administrator, correct?

16 A That's correct.

17 Q At what time did you receive the information?
18 Actually -- start -- what date did you receive information
19 from this fund?

20 A Monday the 9th, after the close of business,
21 around 5:30 p.m.

22 Q And you've discovered that this is fairly
23 typical since federal order reform?

24 A Yes, sir.

1 MR. ENGLISH: That's the only questions I have.

2 JUDGE BAKER: Thank you. Are there any other
3 questions to respect -- with respect to Proposal 1?

4 (No response)

5 JUDGE BAKER: Let the record reflect that there
6 are none. (Inaudible) -- Proposal 7.

7 (Pause)

8 THE WITNESS: Queensboro Farm Products is a
9 diversified dairy manufacturer and distributor. The
10 company operates a pool supply manufacturing plant in
11 Canastota, New York, an economically depressed area on the
12 outskirts of Syracuse, New York, as well as a distribution
13 business in Jamaica, New York, another economically
14 depressed area.

15 We're a small business with 75 employees but
16 provide much needed employment in the geographic locations
17 in which we operate. Our company was established in 1909
18 and has been providing an outlet for independent dairy
19 farmers and small co-ops ever since.

20 We are a seller and therefore a balancer of
21 Class 1 milk and skim milk in excess of needs of the
22 bottling plants as well as a manufacturer of a variety of
23 non-Class 1 dairy products.

24 Our company is fundamentally opposed to any

1 proposal that removes money from the pool and in effect
2 from the checks of independent producers, which are the
3 lifeblood of our existence. The way the proposal for
4 marketwide service payments is now worded, all producers
5 would lose about four and a half cents a hundred from
6 their milk chips. The only participants able to qualify
7 for the six cent per hundredweight marketing service
8 payments would be the cooperatives, the architects of the
9 proposal.

10 This would create a procurement advantage for
11 qualified cooperatives and a procurement disadvantage for
12 proprietary plants sourcing milk from independent dairy
13 farms. These independent dairy farmers are an integral
14 part of Order 1 milk shed. And the proprietary handlers
15 that receive and balance these Class 1 supplies should not
16 be discriminated against.

17 As an independent handler in the business for
18 many years, we must object to the language as proposed.
19 They've already made significant investments in our plants
20 and equipment. Although we have fewer than 500 employees,
21 we still incur the same volatile costs of running a milk
22 manufacturing plant and suffer the same burdens of unused
23 capacity.

24 We too know the cost of idle capacity in the

1 middle of each and every week, only to work around the
2 clock on weekends and holidays when our Class 1 customers
3 are shut down.

4 We ceaselessly balance the flush Class 1 milk
5 in central New York. If the three major cooperatives and
6 proprietary handlers in that general area have too much
7 milk can come to us to process that milk so that their
8 truckers can empty their milk tanks.

9 When schools shut down for the summer vacation
10 and for holidays, we balance Class 1 supply. By
11 manufacturing non-Class 1 products, the cooperatives would
12 qualify for marketwide service payments, but we would not
13 even though we are the ones providing the balancing
14 function.

15 The proposal for marketwide service payments as
16 proposed excludes my company and lets cooperatives who
17 have no investment in the bricks and mortar of milk
18 manufacturing facilities qualify for six cents a
19 hundredweight from the pool. This discriminates against
20 small business that cannot qualify because they do not
21 pool a quantity of milk equal to three percent of the
22 total volume of milk pooled on the order for the month or
23 they do not pool a million pounds of milk per day.

24 We believe the qualification level should be

1 changed and lowered to 400,000 pounds of milk per day and
2 the wording in Part 2 be modified to say, "Class 1
3 transfers and diversions assigned to Class 1 pool
4 distributing plants shall be not more than 80 percent of
5 the total quantity of producer milk which such handler
6 pools."

7 This change is warranted because of the
8 preponderance of non-Class 1 transfers to pool
9 distributing plants that have emerged under the new
10 order. In this manner, perhaps smaller plants that
11 balance Class 1 needs of the marketplace shall be
12 recognized as well. When Class 1 plants cannot receive
13 producer milk, that milk must go some place. We are able
14 to handle that milk just as larger cooperatives do. It is
15 not reasonable to preclude smaller plants performing
16 similar functions from the same entitlement as larger
17 ones. The playing field should be a level one.

18 JUDGE BAKER: Thank you, Mr. Miller. Mr.
19 English?

20

21 BY MR. ENGLISH:

22 Q Now, Mr. Miller, just to be clear, you've
23 indicated that you have 75 employees. And for the record,
24 that is under the standard set by the Department for what

1 qualifies as a small business. So one of your points is
2 that you qualify as a small business under the Regulatory
3 Flexibility Act, correct?

4 A Yes.

5 Q And were you here earlier today when Mr.
6 Wellington testified and stated that while the proposal
7 was for a million pounds, he himself was prepared to
8 listen to proposals that -- that altered that number in
9 some way?

10 A (Inaudible) -- I heard that.

11 Q And you agree?

12 A Certainly I agree.

13 MR. ENGLISH: The witness is available for
14 cross examination.

15 JUDGE BAKER: Very well. Are there any
16 questions for Mr. Miller? Mr. Vetne?

17 CROSS EXAMINATION

18 BY MR. VETNE:

19 Q Mr. Miller, John Vetne for Friendship. Could
20 you identify the non-Class 1 products that Queensboro
21 manufactures?

22 A Condensed milk, whole condensed milk, sour
23 cream, cottage cheese, cream cheese, farmers cheese,
24 butter. That's it. Cream.

1 Q Do you have any capacity to produce dried milk
2 products?

3 A No, we do not.

4 Q Have you had that capacity in the past?

5 A Perhaps -- yes, we did. Not in the last 22
6 years. I've been doing this too long.

7 (Laughter)

8 BY MR. VETNE:

9 Q Your choice of 400,000 pounds of milk per day,
10 is that intended to be an average?

11 A I think that the way it's worded it's on a
12 monthly basis that this proposal is to be evaluated, so
13 it's a per month figure -- 400,000.

14 Q And your choice of 400,000 milk -- pounds of
15 milk per day is motivated by the fact that Queensboro
16 would qualify if that's -- if that were the threshold?

17 A Yes, that's correct.

18 Q You don't have any other reason to choose
19 400,000 pounds over 300,000 pounds, for example?

20 A No.

21 Q You wouldn't object to 300,000 pounds if other
22 companies performing similar balancing -- balancing
23 service would also qualify?

24 A No, we would not object.

1 Q What -- what is the intent of your discussion
2 here of a preponderance of non-Class 1 transfers to pool
3 distributing plants? That has emerged under the new
4 order. What are you trying to target there and to
5 apparently exclude from qualifying percentage?

6 A Apparently, we believe the way this was written
7 was to target Class 1 milk. And the way -- the way this
8 is -- the way we read this, and we're not 100 percent
9 certain we're right, is that if there's a transfer of milk
10 to a non-Class 1 distributing plant, it counts the same as
11 if it were Class 1 the way that's written. If we're
12 wrong, then I guess there's not a need for this. But if
13 we're right, we believe there should be a need for this.

14 Q You mean a plant that is pooled as part of a
15 unit of distributing plants? That is actually an ice
16 cream plant, for example?

17 A I think the wording as it was given to -- to me
18 by our market administrator -- the individual said that if
19 there was a non-Class 1 transfer we're in effect covered.
20 And if -- if -- if it's not put in there, then transfers
21 to pool distributing plants that are not Class 1 count the
22 same as -- as if it is Class 1. If I'm repeating myself,
23 that's my understanding.

24 So therefore, it would change the percentage if

1 the wording were not changed.

2 Q So, under your proposed modification, the
3 volume credited as a condition for marketwide service
4 payments would be only that volume that's assigned to
5 Class 1, the 80 percent?

6 A Eighty percent.

7 Q And if your customer happens to be a plant with
8 20 percent Class 2 and 80 percent Class 1 and it's
9 allocated equally, you get credit for only 80 percent of
10 both shipments. You'd have to ship 88 percent -- you
11 could go up to 88 percent, is that correct? Is that your
12 intent?

13 A No, I'm not -- I'm not sure that that's true.

14 Q Is it -- is it your intention that if you ship
15 a load of milk to a distributing plant any portion of
16 which is allocated to Class 1, that the whole load ought
17 to be counted?

18 A I'm not prepared to answer that.

19 MR. VETNE: Thanks.

20 JUDGE BAKER: Are there any other questions of
21 Mr. Miller? Yes, Mr. Beshore?

22

23

24

CROSS EXAMINATION

1 BY MR. BESHORE:

2 Q Thank you. Good afternoon, Mr. Miller. Tell -
3 - tell us a little bit more about Queensboro Farm
4 Products. The -- I understand you operate a pool supply
5 manufacturing plant in Canastota which is listed on -- on
6 Proposal 5. What is the nature of the distribution
7 business at Jamaica?

8 A It's a milk route -- byproduct distribution
9 business operating in New York City. And -- operating
10 there probably since the 1920s.

11 Q So you're what's probably called a New York sub
12 dealer?

13 A That's correct.

14 Q Your distribution business, you acquire
15 packaged products from other manufacturers or processing
16 package plant or handlers, perhaps some of your own. Do
17 you -- do you distribute any of your own products?

18 A Yes, we do.

19 Q You -- some of your own non-Class 1 products --
20 by the way, do you make any Class 1 products at -- at
21 Canastota?

22 A -- buttermilk.

23 Q And you distribute your own buttermilk?

24 A Well, we distribute some of it.

1 Q Some of the buttermilk. So your distribution
2 business is not regulated by Order 1, correct?

3 A No. It is regulated by Order 1.

4 Q You're not a pool handler. The Jamaica
5 facility --

6 A The Jamaica facility is but it's a -- we're a
7 sub-dealer of a pool handler.

8 Q Do you file monthly reports on the Jamaica
9 distribution business with the market administrator?

10 A We -- we file them all in one report. It's
11 -- it's filed -- (inaudible).

12 Q I guess my confusion is, I don't see the
13 Jamaica business listed in the market administrator's
14 documents anywhere as a plant or a handler or -- or any
15 other entity on the order.

16 A Maybe I should clarify. We're a sub-dealer of
17 Elmhurst Dairy. Does that make it clear?

18 Q I -- yeah. Who you deal with I don't --
19 doesn't really matter. I just wanted to know whether that
20 was a regulated facility or not. And I take it it's not.
21 That is -- the sub -- oh, is -- is your location as a sub-
22 dealer operator at the Elmhurst plant in -- in Jamaica?

23 A Yes.

24 Q Okay. But Elmhurst distributes products

1 through other -- through its own dealers or other sub-
2 dealers as well or through you?

3 A (Inaudible).

4 Q Okay. Okay. Now -- now I think I -- I
5 understand. How many independent producers do you have?

6 A In the vicinity of 200.

7 Q And what is -- what's the monthly -- your
8 monthly volume that you require of those independent
9 producers?

10 A Nineteen million pounds.

11 Q Now, that -- let's assume that's roughly
12 600,000 pounds a day, sound right?

13 A Yeah.

14 Q How much of -- what proportion of the
15 independent producer milk that you require is processed at
16 your Canastota facility?

17 A (Inaudible).

18 Q Do you -- does your supply plant qualify as a
19 supply plant through sales of milk to the Elmhurst plant
20 in Jamaica, New York?

21 A Is your question is that the basis for which
22 your qualify? The answer to that is "no."

23 Q Well, it wasn't exactly is it the basis. Do
24 you sell -- do you supply milk from the supply plant to

1 the Elmhurst distributing plant in Jamaica?

2 A (Inaudible).

3 Q Do you sell milk from your supply plant to
4 other Class 1 handlers?

5 A Yes.

6 Q What portion on an annual basis of the 19
7 million pounds a month that you require from producers do
8 you sell to Class 1 distributing plants?

9 A I don't have that figure -- (inaudible).

10 Q Can you give us your best information with
11 respect to that number? You have some idea, I assume?

12 A I think it's somewhere between 9 and 10 million
13 pounds.

14 Q A year?

15 A A month.

16 Q A month. Okay. So 40 to 50 percent of your 19
17 million pounds of monthly receipts from producers is
18 resold to distributing plants, correct?

19 A Yes.

20 Q Now I'm puzzled as to what your concern with
21 the 65 percent qualification criteria for marketwide
22 services payments might be. If you're -- you're -- you're
23 doing -- you're providing balancing services to your
24 distributing plant customers as you testified, I believe,

1 correct?

2 A Correct.

3 Q And so there's --

4 A Well, again, I'm not certain that my figures
5 are -- are 100 percent accurate as far as how that milk is
6 broken up between Class 1 sales and Class 2 supply.

7 Q I'm not asking Class 1 sales or Class 2 sales.
8 I'm just asking for sales to the distributing plants
9 because that's the way the proposal's written. It's just
10 written in terms of sales to distributing plants.

11 Is that a -- the 9 to 10 million a month on
12 average, is that an average approximate portion of your
13 milk supply that's sold to distributing plants?

14 A I believe that is the figure.

15 Q Does that vary from spring to fall?

16 A Yes, it does.

17 Q Less in the spring?

18 A Yes, it's normally less in the spring.

19 Q Okay. And greater in the fall.

20 A Certainly greater in the fall.

21 Q Okay. And does it vary -- I think your
22 testimony reflects it but I want to be certain. It varies
23 by day of the week quite substantially?

24 A Yes, very much.

1 Q And you have to meet your customer's demands
2 for -- for milk when they need it?

3 A Yes, certainly we do.

4 Q And backs -- they back milk out of their
5 distributing plants back into your manufacturing plant on
6 the weekends I think you've indicated?

7 A That's correct.

8 Q At your distributing plant you said you make
9 butter but you do not dry any skim solids. What's your
10 ultimate disposition for skim solids if you've got more
11 supply than you need for your commercial sales of
12 perishable Class 2 products?

13 A Class 3 condensed.

14 Q Okay. So you condense it and sell it to a
15 cheese plant?

16 A That's correct.

17 (Pause)

18 BY MR. BESHORE:

19 Q Do you -- do you purchase sales from --
20 purchase raw milk from other suppliers at your Canastota
21 plant from time to time?

22 A Yes, we do.

23 Q Does your purchase price vary as Mr. Wellington
24 testified theirs does on the basis of market conditions at

1 the time of sale?

2 A Sometimes it does.

3 Q Some -- some of your purchases might be on
4 long-term contracts as stated --

5 A That's correct.

6 Q -- price?

7 A -- stated price.

8 Q And others would be at spot market prices
9 depending on market conditions, correct?

10 A That's correct.

11 Q Sometimes you have to pay a premium and
12 sometimes you get the milk in at a discount, I assume?

13 A No, it's always class price as a floor.

14 Q Well, when you're buying from other handlers it
15 doesn't have to always be class price, does it?

16 A The cooperative's class price. For handlers
17 that's correct.

18 Q Okay. And -- and if you buy it from other
19 handlers, you can acquire it at less than class price if
20 marketing conditions make that possible?

21 A If that's the case.

22 Q At what level of -- let's see. You have a --
23 an evaporator but not a dryer at Canastota, I take it?

24 A That's correct.

1 Q What's the capacity of the plant to -- what's
2 the capacity of the condenser in terms of handling --
3 (inaudible)?

4 A Three to four loads a day -- (inaudible).

5 Q 150- to 200,000 pounds a day?

6 A -- it's probably about -- (inaudible).

7 Q 135,000 pounds of condensed goes out. How much
8 raw milk would go in to generate that volume of condensed?

9 A About four -- four to one in relationship.

10 Q So you could -- four times 130,000 is 520,000
11 pounds of raw milk you could take in?

12 A We can take in more than that -- we can process
13 into condensed.

14 Q How much could you take -- take in?

15 A We've taken in over a million pounds a day on
16 many occasions.

17 Q Do you have some -- some storage capacity then
18 to --

19 A Yes.

20 Q process what you receive over more than one
21 day?

22 A That's true.

23 Q Within the limits established by the regulatory
24 authorities for -- for how long you can hold milk before

1 it has to be processed?

2 A Correct.

3 Q Those Class 2 products that you manufacture,
4 are -- they all require Grade A milk?

5 A Yes.

6 Q What level of capacity does your plant -- your
7 condenser generally run at? Do you know?

8 A It would vary seasonally. We have some
9 preexisting business as a core and then depending on the
10 milk supply and the market conditions. There are days it
11 doesn't run at all in the fall and there are days in the
12 spring it's running around the clock. Weekends it's
13 running almost all the time.

14 Q Do you have -- do you have any business which -
15 - referred to as Tollman milk?

16 A We do.

17 Q Okay. On a regular basis?

18 A Some is regular, some is subject to market
19 conditions.

20 Q Okay. Now, those -- those volumes are over and
21 above your -- your producer milk volumes?

22 A That's correct.

23 Q Okay. What are the volumes of regular --
24 tolling business -- volumes which would be received and

1 processed through your plant over and above the -- the
2 volumes for your producers?

3 A That varies. It could be 15 million pounds a
4 month.

5 Q Okay. Now, if you assume with me -- if those
6 15 million pounds a month are received at your plant and
7 processed for a fee, correct? That's what we mean by
8 tolling?

9 A Yes, but this is not necessarily always
10 condensed.

11 Q Any --

12 A Any product.

13 Q Okay. Any product?

14 A Yes.

15 Q I'm not limiting it to any product. But it
16 would be milk that would be received at your plant and
17 processed. Now -- okay. So if that averages around 15
18 million pounds, you've got 19 million of your own producer
19 milk, you've got more than a million a day, do you not,
20 Mr. Miller?

21 A Some of that is co-op milk which doesn't
22 qualify. And some of that is pooled by other handlers,
23 which we believe doesn't qualify.

24 Q Okay. So you wouldn't -- you don't have a

1 million --

2 A The way this is written.

3 Q You don't have a million pounds a day that you
4 pool under your own pool report?

5 A That's correct.

6 Q Okay.

7 (Pause)

8 MR. BESHORE: Thank you very much.

9 JUDGE BAKER: Very well. Are there any other
10 questions for Mr. Miller? Yes -- (inaudible).

11 MR. ENGLISH: We'll -- (inaudible).

12 JUDGE BAKER: All right.

13 REDIRECT EXAMINATION

14 BY MR. ENGLISH:

15 Q Just to clarify a question from -- from before
16 with respect to the pool handler status, the Queensboro
17 Farm Products location in Canastota is a pool supply
18 plant?

19 A Right.

20 Q And that files a pool report?

21 A Yes.

22 Q And with reference to the statement on page two
23 of your statement that when -- when the three major
24 cooperatives of proprietary handlers in that area -- milk

1 and come to us to process that milk, under the provision
2 as presently written that milk that you would purchase
3 from co-ops would be eligible to receive the six cents at
4 their end but you'd be ineligible to receive it at your
5 end, correct?

6 A That's correct.

7 Q And with respect to the discussion you were
8 having with Mr. -- Beshore, the whole point about this --
9 the 80 percent provision that you put in is your concern
10 that 65 percent may be too low and would apply to all
11 transfers or diversions to a distributing plant could
12 capture circumstances which other -- nonetheless --
13 (inaudible).

14 A (Inaudible).

15 MR. ENGLISH: That's all I have. Thank you.

16 JUDGE BAKER: Thank you, Mr. English.

17 MR. ARMS: David Arms for New York State Dairy
18 Foods.

19 RE CROSS EXAMINATION

20 BY MR. ARMS:

21 Q Mr. Miller, could you identify for the record -
22 - you mentioned that you do tolling, considerable tolling,
23 in your bank. Could you identify for the record
24 cooperatives that might be involved in that such tolling?

1 A DMS, Allied, AgraMark.

2 Q To the extent that you handle this extra milk
3 for the cooperatives, are you in effect greatly extending
4 their capacities?

5 A I guess the answer to that is "yes." They come
6 when they need the help to balance milk. I don't know if
7 -- I don't know which order they take to which facilities.
8 But when we're asked if we can handle the milk, we comply.

9 Q They do come to you, do they not, Mr. Miller,
10 when they are -- their plants are tending to go toward
11 full capacity and they just simply don't have enough room
12 themselves?

13 A I believe that to be the case.

14 Q So the milk that you -- would you agree with me
15 then that the milk that you would be tolling for them
16 would be subject to cooperative service payments for them
17 --

18 A For them.

19 Q -- but not for you?

20 A I think I said that -- testified --

21 Q I just wanted to clarify for the record. Your
22 principal outlet for the tolled milk for cooperatives is
23 condensed milk, is it not?

24 A That's correct.

1 Q And in the marketing of that condensed milk,
2 which is, I assume, handled by the cooperatives, is it?
3 Do they direct the market --

4 A Yes. They pick it up at our plant.

5 Q Do you know if that condensed product moves out
6 of the market to another cheese plant, large cheese plant,
7 operated by another cooperative?

8 A Some have gone there. I don't think every one
9 goes there.

10 Q Is it your opinion that the tolled Class 3
11 condensed moves to the ultimate outlet at the pool class
12 price?

13 A We don't get involved in the marketing of that
14 condensed so it would be just be conjecture on my part.

15 Q So you don't know? Thank you.

16 JUDGE BAKER: Thank you, Mr. Arms. Are there
17 any other questions for Mr. Miller? (Inaudible).

18 MR. TOSI: Excuse me, Your Honor. I wasn't
19 sure if you were looking at me.

20 JUDGE BAKER: Oh, I'm sorry. I was looking at
21 you.

22 MR. TOSI: Okay. Thank you.

23 RECROSS EXAMINATION

24 BY MR. TOSI:

1 Q Mr. Miller, I guess this is a little bit of a
2 follow-up to what Mr. Beshore was asking you. Your --
3 your Canastota plant is a pool supply plant. And in that
4 regard, all your milk receipts at that plant Queensboro
5 Farm has attained an obligation to producers?

6 A Yes, that's correct.

7 Q And can you just explain a little bit for the
8 record here, at Jamaica, that's primarily a Class 1
9 facility where you're processing Class 1 milk?

10 A That's correct.

11 Q So -- and you receive milk from dairy farmers
12 or from cooperatives?

13 A That's correct.

14 Q And in that regard, all your milk receipts
15 there, you also are incurring payment obligation under the
16 order to producers?

17 A That is correct.

18 Q What -- what do you pay for milk -- what do you
19 pay your non-members for -- for milk? For example, you --
20 are you paying just the Class 1 price? Do you pay
21 something more than that?

22 A You mean do we pay our producers a premium?

23 Q Yes.

24 A Is that your question?

1 Q Yes.

2 A When necessary, we pay our producers a premium.

3 Q And when you receive milk from co-ops when they
4 have too much milk, are you in fact buying milk then or
5 are you just tolling?

6 A There are times that we do both. Most of the
7 time it's tolling. There are times that we buy it.

8 Q And when you buy from co-ops, are you buying at
9 class or are you buying at something less than class?

10 A No, we're buying at class.

11 MR. TOSI: Thank you. That's all I have.

12 JUDGE BAKER: Thank you, Mr. Tosi. Are there
13 any other questions?

14 (No response)

15 JUDGE BAKER: Apparently there are none.

16 MR. BESHORE: Your Honor?

17 JUDGE BAKER: Yes?

18 MR. BESHORE: I'm sorry.

19 JUDGE BAKER: Oh -- (inaudible).

20 MR. BESHORE: Thank you.

21 RECROSS EXAMINATION

22 BY MR. BESHORE:

23 Q Just a couple of other questions, Mr. Miller.
24 Do you -- does Queensboro Farm Products, Inc., have an

1 ownership interest in Elm -- Elmhurst Dairy in Jamaica?

2 A No.

3 Q So Elmhurst Dairy is a separate -- do you
4 personally have an ownership interest in Elmhurst Dairy?

5 A No.

6 Q All right. So it's a completely separate
7 entity?

8 A That's correct.

9 Q Jamaica. You just operate a distribution sub-
10 dealer business --

11 A That's correct.

12 Q -- out of the same location, correct?

13 A Yes.

14 Q Could you give us a -- tolling is processing
15 milk for a fee. You don't buy the milk, you just run it
16 through your plant and process it for a fee, correct?

17 A Yes, that's correct.

18 Q Now, when you're condensing -- condensing is
19 the primary tolling service that you provide I think
20 you've indicated, correct?

21 A Well, normally, the way that is -- is
22 instructed is they get both the condensed and the cream.

23 Q Condensed skim?

24 A Yeah.

1 Q And the cream. Okay. And then the owner of
2 the milk, which you've indicated is primarily cooperatives
3 in the tolling arrangements --

4 A Not only cooperatives, but -- but cooperatives
5 certainly are a part of it.

6 Q Okay. They own the condensed and the cream
7 from out of your plant at the other end, correct?

8 A Yes.

9 Q Can you provide information for the record with
10 respect to what the charge might be for tolling milk in
11 that fashion for a customer?

12 A I just don't remember what -- what that figure
13 -- (inaudible). I don't remember.

14 Q You don't have any idea what you charge per
15 hundredweight?

16 A I don't remember the toll, no.

17 Q At your small business? You -- you're the
18 operator and you do not --

19 A I don't want to give you an erroneous figure.

20 Q Well, how about a range that would capture some
21 accurate information for the record? In excess of a
22 dollar a hundredweight?

23 A (Inaudible).

24 Q Thank you. And when you find it -- by the way,

1 do you currently find it necessary -- I think you said you
2 pay premiums to your independent producers when you find
3 it necessary. Is it currently necessary to -- to be
4 paying premiums to your independent producers?

5 A It's -- the answer is "yes" as a function of
6 what our competition has done.

7 Q And what is the current necessary range of --
8 or necessary premium prevailing in the -- in the market
9 where you -- milk from producers?

10 A That's proprietary information.

11 Q You don't -- you don't care to provide
12 information for the record with respect to what you're
13 paying your two other independent producers to supply -
14 - maintain a supply relationship with Queensboro rather
15 than anyone else?

16 A I think that question implies something that's
17 unnecessary, especially from a non-proponent, especially
18 in terms of the fact that it's competitive information.
19 There's some stigma attached to that question. I --

20 Q I didn't mean to imply anything.

21 A -- but --

22 Q I wonder what the -- I just wonder -- A
23 -- information. I'm sure you and your clients would
24 like to know.

1 Q Well, you're assuming -- the record doesn't
2 --

3 JUDGE BAKER: (Inaudible) -- the pending
4 question relates to whether or not the -- (inaudible) -
5 - to respond to the amount paid -- (inaudible) -- is that
6 not correct?

7 THE WITNESS: That's correct.

8 JUDGE BAKER: And you are declining to answer?

9 THE WITNESS: I am.

10 JUDGE BAKER: Very well.

11 MR. ENGLISH: Thank you. That's all I have.

12 JUDGE BAKER: Are there any other questions?

13 (No response)

14 JUDGE BAKER: There are none. Thank you very
15 much, Mr. Miller.

16 (Pause)

17 JUDGE BAKER: Mr. Beshore, do you have another
18 witness we can do for tonight?

19 MR. BESHORE: We have two further witnesses.
20 Mr. Schad is our next witness, and he's prepared to -- to
21 go forward with his testimony.

22 JUDGE BAKER: Very well. Thank you.

23 (Pause)

24 MR. BESHORE: Your Honor, while the -- Mr.

1 Schad's testimony and the exhibits which accompany it are
2 being distributed in the room, I would like to request
3 that the statement of testimony be marked as the next
4 consecutive exhibit number.

5 JUDGE BAKER: Sixteen.

6 MR. BESHORE: Sixteen?

7 JUDGE BAKER: Yes.

8 (The document referred to was
9 marked for identification as
10 Exhibit 16.)

11 MR. BESHORE: And the testimony is with respect
12 to Proposal 7, although there's a typo on the cover sheet
13 where it says Proposal 4. The exhibits are with respect
14 to Proposal 7, and I would ask that they -- the seven
15 exhibits numbered one through six be marked as Proposed
16 Exhibit 17.

17 JUDGE BAKER: Very well. They shall be so
18 marked.

19 (The documents referred to
20 were marked for identification
21 as Exhibit 17.)

22 JUDGE BAKER: Are these -- (inaudible) -- the
23 testimony should be marked as 16 and the exhibits would be
24 17.

1 MR. BESHORE: That --

2 JUDGE BAKER: (Inaudible).

3 MR. BESHORE: That is what I intended, Your
4 Honor.

5 JUDGE BAKER: Thank you.

6 MR. BESHORE: Thank you.

7 Whereupon,

8 DENNIS SCHAD

9 having been first duly sworn, was called as a witness
10 herein and was examined and testified as follows:

11 JUDGE BAKER: The witness has been sworn.

12 MR. BESHORE: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. BESHORE:

15 Q Mr. Schad, could you please identify yourself
16 and state your business address, please?

17 A My name is Dennis J. Schad. I -- my business
18 address is 405 Park Drive, Carlisle, Pennsylvania.

19 Q Mr. Schad, could you briefly tell us about your
20 educational and professional background?

21 A Professionally, I've worked for Land O' Lakes
22 and its predecessor cooperatives for the last 21 years.
23 I'm currently -- current title is economist and director
24 of mid-atlantic marketing. I have worked transportation,

1 regulatory affairs, and marketing within the cooperative
2 for that period of time.

3 I have a bachelors degree in history from the
4 College of William and Mary and also a masters degree in
5 business administration from Virginia Tech.

6 Q Have you previous -- previously testified in
7 federal order hearings?

8 A Yes.

9 Q And in other governmental regulatory
10 proceedings?

11 A In the state -- state for milk marketing order
12 -- (inaudible) -- state legislator.

13 MR. BESHORE: We ask that Mr. Schad's -- Mr.
14 Schad be recognized as an expert witness in dairy
15 economics and milk marketing and that his testimony be
16 received as an expert in those fields.

17 JUDGE BAKER: Very well. Dairy economist, is
18 that what you said?

19 MR. BESHORE: Yes.

20 JUDGE BAKER: And milk --

21 MR. BESHORE: Marketing.

22 JUDGE BAKER: -- marketing? An expert as a
23 dairy economist and milk marketing. Is that what you want
24 him --

1 MR. BESHORE: Yes.

2 JUDGE BAKER: Very well. Are there any
3 questions or objections with respect thereto?

4 (No response)

5 JUDGE BAKER: Let the record reflect that there
6 are none. He shall be so recognized, Mr. Beshore.

7 MR. BESHORE: Thank you, Your Honor.

8 BY MR. BESHORE:

9 Q Now, before you proceed with the body of your
10 testimony, could you briefly describe for us the six
11 tables which are assembled in the seven exhibits
12 identified as Proposed Exhibit 17?

13 A Yes. Tables 1-A and 1-B are very similar.
14 Table 1-A is for the month of May 2001. The deliveries to
15 7(a) plants by six cooperatives who are mentioned in the
16 body of my testimony.

17 What I do is -- aggregated -- each of the
18 cooperatives sent the information to me on their 7(a)
19 deliveries -- Order 1 7(a) deliveries. For each day I've
20 aggregated it and I've found the monthly average.

21 So -- in Column 3 you'll see the daily
22 aggregate for the six cooperatives. Column 4 is the ratio
23 of each day to the monthly average.

24 Q Okay. And that's --

1 A -- in Table 1-D except we do it for the month
2 of November 2001.

3 Q Thank you. And Table 2?

4 A Table 2. Table 2 is a graph of those -- of
5 those same daily deliveries for both May and November
6 2001.

7 Q Okay.

8 A Table 3. Table 3 is the -- is, what, four
9 pages long. Four pages long. And is an -- an exhaustive
10 estimate by our engineering department on the cost of the
11 3 million pound per day butter powder plant.

12 Table 4. I'll read from the table of contents.
13 It's manufacturing costs at Land O' Lakes' Carlisle butter
14 powder plant. And it's the monthly per pound total solids
15 cost and percent plant capacity.

16 Table -- a second to explain a little bit
17 there. We used -- we defined 100 percent capacity by the
18 month in which we -- we delivered milk equal to the
19 designed capacity of the plant. We took the total solids
20 of that month, and that's what is 100 percent capacity.

21 The 19 other months during the specified time,
22 we took -- the percent capacity was the percentage of the
23 -- of that month against that -- the 100 percent capacity
24 month, which was actually May 2002.

1 And Table 5 is a listing of the percent
2 capacity for -- for the Land O' Lakes plant over -- over
3 the 19 months.

4 Q Okay. With that, would you proceed with your
5 testimony with respect to Proposal 7, Mr. Schad?

6 A I'll start with the second paragraph. Land O'
7 Lakes is a Cappa Volstead cooperative with a nationally
8 known ship base. In the northeast, Land O' Lakes has over
9 2200 members who are pooled under Order 1. The
10 cooperative owns and operates an Order 1 pool butter
11 powder plant located in Carlisle, Pennsylvania.

12 I am testifying at this hearing on behalf of
13 the Association of Dairy Farmers of the Northeast.

14 And this is under the heading, "ADCNE
15 demonstrates a 20 percent operating reserve in Order 1."

16 In its report, the "Cost of Balancing Milk
17 Supplies, Northeast Regional Market," Charles Ling defines
18 two levels of reserves required for the efficient
19 operation of the northeast Class 1 market. Dr. Ling
20 defines those reserves as operating reserves and seasonal
21 reserves. He defines operating reserves as those milk
22 reserves that ensure sufficient supply of milk for the
23 daily fluctuating fluid demands encountered by
24 distributing companies. Exhibit 12, page two.

1 The daily deliveries of milk to Class 1 plants
2 reflect the daily purchasing behavior of consumers. In
3 the northeast, market -- market cooperatives -- in the
4 northeast market, cooperatives balance the Class 1 plants
5 by delivering varying daily volumes to those plants. Dr.
6 Ling was specific and stated that the operating reserve
7 must carry -- cover the daily fluctuations of fluid milk
8 processing.

9 The concept of operating reserves in a dairy is
10 much like the requirements of the electrical industry.
11 The electrical industry must have sufficient power
12 reserves for its highest day usage. The consequences of
13 inadequate reserves of electricity power are brownouts and
14 blackouts. The consequence of inadequate reserve milk
15 supply is empty store shelves.

16 Dr. Ling's study calculates the market costs of
17 balancing the northeast market under two assumptions.
18 First, that the required operating reserve is 10 percent.
19 And another assumption is that the required operating
20 reserve is 20 percent.

21 While Dr. Ling could calculate the seasonal
22 reserve from published monthly market data, no such data
23 exists for the day of the week milk deliveries in Federal
24 Order 1.

1 Data from the proponent cooperatives show that
2 the northeast market requires a 20 percent operating
3 reserve. The market administrator has presented data
4 which shows that -- that milk from non-members is
5 disproportionately delivered to distributing plants.
6 Market Administrator Appendix 15 reveals that as much as
7 80 percent of the non-member milk associated with Order 1
8 is delivered to Order 1 distributing plants -- (inaudible)
9 -- non-member milk supply Order 1 provides little of the
10 operating reserves for the market. If receipts --
11 (inaudible) -- daily basis, then the extent of those
12 fluctuations, the operating reserves, are accommodated by
13 the cooperatives.

14 (Inaudible) -- recognizing that there is no
15 published day of the week delivery data for the Northeast
16 Order, ADCNE surveyed its members for day of the week
17 distributing plant delivery demands. Each cooperative
18 sent to me its daily deliveries to Order 1 pool
19 distributing plants for May and November 2001. Exhibit
20 17, page 1-A and 1-B.

21 Table 1 lists the aggregate deliveries to
22 distributing plants by the cooperatives: AgraMark; Dairy
23 Marketing Services, which include Dairylea and DFA, Land
24 O' Lakes; Maryland and Virginia; and St. Albans. Column 4

1 of the table compares each day's deliveries to the monthly
2 daily average.

3 On Thursday, May 17th, distributing plants
4 ordered from our cooperative 19 million pounds of milk,
5 which was 16.6 percent greater than the daily average of
6 16.4 million pounds for the month.

7 On Monday, November 19th, the cooperatives
8 delivered 21.8 million pounds to Order 1 distributing
9 plants, which was 17.5 percent greater than the daily
10 monthly average of 18.6 million pounds.

11 The extremes of Class 1 balancing are shown
12 -- range of cooperative deliveries to distributing -- to
13 the distributing -- distributing plants for a month.

14 During both months, the cooperatives -- plant
15 customers required a 70.5 million pound swing between a
16 low delivery day and a high delivery day.

17 On May 27, the -- the distributing plant
18 demanded 11.5 million pounds, while on May 17th -- while
19 the May 17th high delivery day was 19.5. Similarly, the
20 low demand date in November was the 22nd, when
21 distributing plants required only 15.3 million pounds
22 compared to the 21.8 million pounds demanded on the 19th.

23 Moreover, the cooperatives are expected to
24 accommodate their Class 1 customers. The difference

1 between the low day -- the low day in May, 11.5 million
2 pounds, and the high day in November, 21 -- 21.8 million
3 pounds. Again, Exhibit 7 -- 17, Table 2.

4 This 11.5 million pound range in deliveries
5 roughly equal to the four 3 million pound per day butter
6 powder plants identified by Dr. Ling is required to
7 balance the northeast market with a 20 percent operating
8 reserve.

9 Next heading. "Land O' Lakes" -- that should
10 read, "Experience" -- supports Dr. Ling's estimates for a
11 balancing plant. Land O' Lakes operates a butter powder
12 plant in Carlisle, Pennsylvania -- plants pool -- is a
13 supply plant. There are three operational dryers and
14 three evaporators located in the plant. It has a design
15 throughput of about 165 million pounds of milk per month
16 and a storage capacity of around 5 million pounds of milk.

17 During the last two and a half years, the
18 period since the commissioning of the new dryers, milk
19 receipts have ranged from a low 62.5 million pounds during
20 October of 2000 to a higher of 165.7 million pounds during
21 May of 2002.

22 Dr. Ling estimates that the cost of --
23 (inaudible) -- butter powder plant with the capacity to
24 dry 3 million pounds of milk per day would be \$28 million.

1 Land O' Lakes' engineering staff estimates that such a
2 plant today would cost \$47 million. Exhibit 17, Table 3.

3 Land O' Lakes' estimate is confirmed by west --
4 Idaho. As reported in the August 6, 2002, edition of the
5 "Cheese Reporter," a West Farm representative stated that
6 their 3.3 million pound per day powder drying plant
7 recently opened in July cost \$50 million. The Land O'
8 Lakes estimate includes the purchase of land, the
9 evaporator, the dryer for 3 million pounds of milk per
10 day, and a churn capacity for 15,000 pounds of butter per
11 hour.

12 Additionally, with butter we would have -- I'm
13 sorry. Additionally, the plant would have three loading
14 bays and adequate -- (inaudible) -- treatment plant and
15 silo capacity for 3 million pounds.

16 Dr. Ling defines -- manufacturing costs as the
17 costs directly associated with manufacturing milk to its
18 end products, butter and powder. Those costs include
19 labor, electricity, fuel, water, sewage, plant and
20 cleaning supplies, repair and maintenance, depreciation,
21 taxes and insurance, and miscellaneous expenses.

22 He knows that the union -- I'm sorry, that the
23 unit costs increase as plant volume decreases. In
24 previous studies -- (inaudible) -- product, Dr. Ling

1 estimates that for every one percent decrease in plant
2 capacity there is a corresponding increase -- increase to
3 product cost of one-tenth per pound. That's Exhibit 12,
4 page six.

5 Q One-tenth of a cent per pound?

6 A Yes. While the Ling study compares the
7 relationship between plant capacity and product costs,
8 Land O' Lakes tracks the same costs as Ling's, in quotes,
9 "semi-variable and semi-fixed costs," as he -- as he calls
10 it, on a per pound of milk solids basis. Additionally,
11 the USDA's study assumes that a butter powder plant with
12 no immediate product inputs or sales.

13 The Land O' Lakes plant at Carlisle buys and
14 sells cream, condensed, and milk. During the year 2000,
15 the Land O' Lakes plant in Carlisle sold about 20 percent
16 of its total solids as condensed skim or cream -- and/or
17 cream.

18 Exhibit 17, Table 4 is a graph that plots the
19 Land O' Lakes experience at Carlisle for the period of
20 January 2001 through July 2002. The period was chosen for
21 the depreciation of the 2000 -- 2000 expansion starting to
22 be fully charged against the plant in January 2001. The
23 months -- the months cost per pound of solids is plotted
24 against the relationship of plants receipts over plant

1 capacity, and I defined that earlier.

2 For instance, as already noted, Carlisle
3 processed over 165 million pounds, 100 percent capacity,
4 on a -- (inaudible) -- basis -- of milk during May 2002.
5 During that month, the cost per pound of solids was just
6 over 10 cents per pound. Thus, the furthest -- a further
7 -- (inaudible) -- right data pool plant graph represents
8 May 2002.

9 Similarly, the other 18 months were so plotted.
10 The best-fit line -- realizes the variations between
11 plants was also plotted. The line estimates that for
12 every one percent change in Carlisle plant capacity, there
13 is a 7.7 hundredths cent increase in cost per pound in
14 total size.

15 Again, the Land O' Lakes report substitutes the
16 relationship of capacity utilization to cost -- substitute
17 the relationship of capacity utilization to cost per pound
18 of product for the relationship of capacity to cost per
19 pound of total solids. Also, the Carlisle plant buys and
20 sells -- products while the Ling study addressed the cost
21 change for hard -- products only.

22 Dr. Ling had modeled the most efficient method
23 to balance the seasonal and operating reserves of the
24 Order 1 Class 1 market. He has calculated that it would

1 require three butter powder plants with a capacity of 3
2 million pounds per day to accomplish the balancing of the
3 necessary reserves for the northeast market.

4 Dr. Ling's optimal balancing model does not
5 reflect the actual balancing operations of the northeast.
6 There are seven balancing plants in the northeast of
7 varying sizes. Dr. Ling assumes that each plant receives
8 an equal volume of milk. Due to the ownership and
9 logistics -- due to ownership and logistic reasons, that
10 assumption does not reflect reality in the northeast.
11 Other testimony will show that the balancing capacity of
12 the -- of the -- of the order is not equally utilized.

13 Land O' Lakes' relatively high capacity
14 utilization does not reflect the operations of the other
15 northeastern balancing plants. Thus, costs at the Land O'
16 Lakes plant are probably lower than other Order -- less
17 utilized northeastern balancing plants.

18 Land O' Lakes replicated Dr. Ling's methodology
19 for finding the cost of unused capacity at Carlisle during
20 the last 19 months and compared that cost to the amount
21 Land O' Lakes would have received had Proposal 7 been in
22 effect during that period. The cost of unused capacity
23 was 2.3 times greater than the amount Land O' Lakes would
24 have received.

1 ADCNE believes that the experience at Land O'
2 Lakes' Carlisle plant provides a real-world validation for
3 Dr. -- Dr. Ling's observations relative to the effect of
4 plant capacity and -- costs.

5 Q Mr. Schad, I'd just like to ask -- ask you a
6 couple additional questions on direct. Is -- one of the
7 members of the Association of Dairy Cooperatives in the
8 Northeast is Maryland and Virginia Milk Producers
9 Association Co-Op. One producers cooperative association.
10 Are you familiar and can you describe for us the
11 operations of -- of Maryland and Virginia -- (inaudible)?

12 A Yes, I can describe the operations generally.
13 Maryland and Virginia Milk Producers Cooperative brings
14 two balancing plants. One pool -- one in -- one supply
15 plant at Laurel, Maryland. The second one they own in
16 partnership with a -- a group called -- (inaudible).
17 That's -- Strasburg, Virginia. That is pooled on --
18 (inaudible) -- processing plant.

19 Both plants are butter powder and skim
20 condensed. Also, both plants try very hard to dry as
21 little powder as necessary and try to do as much skim
22 condensed as possible.

23 Q Does Maryland and Virginia also own and operate
24 a distributing plant which shows up as a partially

1 regulated handler from time to time in Order 1?

2 A Yes.

3 Q (Inaudible) -- operation?

4 A Morganmaid --

5 Q Approximately how many members does Maryland
6 and Virginia have or what milk volume do they
7 approximately represent in Order 1?

8 A I'd say over -- (inaudible) pounds.

9 Q (Inaudible). Now, Land O' Lakes -- you just
10 indicated Maryland and Virginia has an Order 5 --
11 processing plant. Obviously, markets some milk on Order
12 5, correct?

13 A Yes.

14 Q Okay. Land O' Lakes, does it also market milk
15 on Order 5 as well as Order 1?

16 A Land O' Lakes -- markets milk in Order 5 as
17 pool shippers and -- (inaudible).

18 Q Now, earlier today Bob Wellington testified to
19 the proposed modification of Proposal 7. The language
20 that was to be added that ADCNE -- at the end of Proposal
21 7 to exclude payment of marketwide service payments on
22 producers who on -- pooled on Order 1 until they have been
23 pooled for three consecutive months, fully pooled for
24 three consecutive months. You know what I'm talking

1 about?

2 A Yes.

3 Q Okay. Now, you market in both Order 5 and
4 Order 1 and you've heard -- you've been here through the
5 entire hearing so far, have you not?

6 A Yes.

7 Q And you've noted that there is some interest in
8 the hearing record with respect to whether milk from the
9 Order 1 marketing area is sometimes pooled on Order 5 or
10 may be pooled on Order 5?

11 A Correct.

12 Q Now, can you indicate from your knowledge as a
13 marketer of milk in both orders what impact there will be
14 if the marketwide service payments cannot be made from
15 Order 1 for three consecutive months as we have proposed?

16 A There is a tradition in Order 5 which allows
17 dairy farmers basically within the entire milk shed of the
18 northeast to collect market service payments in the period
19 of July through December, which are called transportation
20 credits -- market service payments. In order to be
21 eligible for that -- for those payments, the -- the -- the
22 dairy -- the dairy farmer cannot be pooled on the -- on
23 Order 5 for all 12 months. They must during the February,
24 March, April, and May period, they must be pooled on

1 another order other than Order 5 in order for that dairy
2 farmer to be eligible for the transportation credits.

3 So there is a -- an incentive for marketers who
4 are -- who are connected with Order 5 to take dairy
5 farmers off Order 5 and possibly put them on Order 1
6 during that period of time to make them dairy farmer
7 transportation credit-eligible. Again, you've got to be
8 off two months out of four.

9 Our proposal recognizes that there is a --
10 there is that incentive between two orders and that any --
11 any dairy -- any -- and we use the three months, which is
12 one more than the two months, to basically say any
13 producers who are pooled on Order 1 during that period of
14 time they've got -- that they would be ineligible on --
15 for the Order 1 market service fees because they're pooled
16 for a shorter period.

17 Q So essentially, that language was intended to
18 and would generally eliminate the possibility that
19 producers could draw supplemental transportation credits
20 out of Order 5 during the fall and come back to Order 1
21 and draw marketwide service payments -- that a handler
22 could arrange their -- their milk pooling in a manner
23 that, you know, you'd reap payments out of Order 5 in the
24 fall and you'd reap payments out of Order 1 in the spring.

1 That wouldn't be possible?

2 A It would not be possible.

3 MR. BESHORE: Thank you. I have no other
4 questions on direct of Mr. Schad. He is available for
5 cross examination.

6 JUDGE BAKER: Very well. Are there any
7 questions? Yes, Mr. Rosenbaum?

8 CROSS EXAMINATION

9 BY MR. ROSENBAUM:

10 Q Mr. Schad, in Table 3 you provided what you
11 describe as a cost estimate for building a 3 million pound
12 per day milk powder butter plant, correct?

13 A Correct.

14 Q Was that prepared for purposes of this hearing?

15 A It was.

16 Q Does Land O' Lakes have any current plans to
17 build such a plant in the northeast?

18 A (Inaudible).

19 Q The -- Land O' Lakes has three supply plants
20 currently pooled on the Northeast Order, correct?

21 A I would take issue with the word "currently."
22 The -- if you had the order statistics for the month of
23 August, you would see that there is more -- (inaudible).

24 Q All right. As of May 2002, you have three --

1 A That's correct.

2 Q -- data provided by USDA Exhibit 5, page 45,
3 correct?

4 A That's correct.

5 Q And those plants are located in Greenwood,
6 Wisconsin; Mount Olive Springs, Pennsylvania; and Fernham,
7 Minnesota; is that right?

8 A (Inaudible) -- Fernham.

9 Q Fernham, I appreciate that.

10 A Okay.

11 Q -- correction. Could you tell me when the
12 Greenwood, Wisconsin, plant was constructed?

13 A No, I can't.

14 Q How long have you been with Land O' Lakes?

15 A I've been with Land O' Lakes since the
16 predecessor cooperatives for 21 years. I was employed by
17 a -- (inaudible) -- Dairy Cooperative which merged with
18 Land O' Lakes in 1997. So I have been with Land O' Lakes
19 since 1997.

20 Q And do you have a rough idea as to when
21 Greenwood was built?

22 A No, sir, I do not.

23 Q Is it decades and decades old or you don't
24 know?

1 A I can't answer your question.

2 Q And do you know whether that facility has paid
3 off the entirety of its construction costs at this point
4 in time?

5 A I have no idea.

6 Q All right. The Mount Olive Springs,
7 Pennsylvania plant.

8 A I also refer to that as Carlisle.

9 Q All right. The Carlisle plant. Do you know
10 how old that plant is?

11 A It was built just before my tenure as -- in the
12 20- to 25-year range.

13 Q Is that a plant that used to be owned by --

14 A (Inaudible).

15 Q -- Dairy?

16 A Yes.

17 Q And do you know when that plant is paid off
18 -- strike that. Do you know whether that plant was built
19 with a loan from a bank?

20 A No, I do not.

21 Q This next question may be obvious, but do you
22 know whether if there was a bank loan it's been paid off
23 by now?

24 A It's been expanded, and I refer to the

1 expansion in my testimony and tell you that the expansion
2 -- I -- Land O' Lakes is a large corporation. I don't
3 know that the -- there are specific bonds that are --
4 specific to that -- to that expansion project or not.

5 Q All right. And -- and then the firm, I think,
6 you said is -- (inaudible). When -- do you know when --
7 (inaudible)?

8 A No, I didn't.

9 Q And these are the three plants that would be
10 actually receiving marketwide service payments if that
11 provision -- Proposal 7 were approved?

12 A No. Plants don't receive -- (inaudible).
13 Again, as of August 1st, there is no -- there are no
14 supply plants up in the upper midwest -- Land O' Lakes nor
15 are there -- nor are there any dairy farmers pooled on the
16 order -- (inaudible).

17 So Land O' Lakes is a handler -- (inaudible).
18 The Department -- (inaudible) -- Proposal 7 on January
19 1st, Land O' Lakes is a handler -- (inaudible) --
20 collecting marketwide service payments on any -- any milk
21 in the upper midwest as it stands today.

22 Q Today. And --

23 A (Inaudible).

24 Q As it stood as recently as May, you would have,

1 correct?

2 A Had the proposal been in effect in May, yes.

3 Q And you --

4 A (Inaudible).

5 Q And the milk handled by all three of these
6 supplies plants would have qualified for marketwide
7 service payments?

8 A The dairy farmers pooled on the order would
9 -- would --

10 Q Right. The dairy farmers pooled on the order
11 qualify for --

12 A (Inaudible) -- would define the payment.

13 Q All right.

14 A The volume that the dairy farmers pooled on the
15 order.

16 Q You probably have seen some statistics showing
17 that there was a lot of out-of-state milk pooled on Order
18 1 in the May-June time period 2001.

19 A I -- I think you pointed that out.

20 Q I'll do it again. Just ask you --

21 A I'm -- I --

22 Q Are --

23 A Are you going to point me to the page?

24 Q Sure. It's Exhibit 5, page 87.

1 A Yes.

2 Q Land O' Lakes -- (inaudible) -- principally
3 responsible for that?

4 A I do not know.

5 (Pause)

6 BY MR. ROSENBAUM:

7 Q This -- this -- in Table 3 of your Exhibit 15
8 where -- which is the estimated cost of a butter powder
9 plant -- a new butter powder plant, is the -- did the
10 people who prepared it know it would be prepared for
11 purposes of this hearing?

12 A Yes.

13 Q And I notice that one of the line items on page
14 -- on the first page is \$9.1 million for what's called
15 "general and land." Do you see that?

16 A "General and land" under "contract" --
17 (inaudible).

18 Q Right.

19 A (Inaudible). I think it was page three.

20 (Pause)

21 BY MR. ROSENBAUM:

22 Q And you've included over \$6 million of costs
23 for what you call contingency, is that right?

24 A My engineering department has experienced --

1 (inaudible).

2 Q Meaning there's a possibility but not the
3 projected expenditure of that much money?

4 A My -- my engineering department would probably
5 tell you it was a high probability.

6 Q And -- has Land O' Lakes considered actually
7 building a new plant in the northeast?

8 A As I -- as I -- as my testimony says, Land O'
9 Lakes expanded our current plant at Mount Olive Springs in
10 May 2000.

11 Q And so you're not thinking about building a new
12 plant, is that right?

13 A I have -- I have to say something here that
14 Land O' Lakes has bonds and is registered by SEC --
15 (inaudible) -- things that I can say. They can't tell me
16 about insider trading and such. So I'm afraid to answer.
17 They keep telling me about forward-looking statements. I
18 think I've answered that once.

19 Q Now, in Table 4 you presented -- strike that.
20 Table 4 shows -- among other things, I think it shows the
21 percent --

22 A The X-axis is the percent capacity as defined
23 by when I -- when I introduced the exhibit. And price per
24 pound -- (inaudible) -- solids.

1 Q And -- and am I right that the -- do the dots,
2 if you will, represent actual experience?

3 A (Inaudible).

4 Q Yes. And are they on a -- on a -- are those
5 particular months?

6 A There are 19 months that I -- I looked through
7 2001 through July 2002.

8 Q All right. And so do I correctly conclude that
9 -- and -- and this is one plant you're applying here, is
10 that right?

11 A That's correct. The Carlisle plant.

12 Q The Carlisle plant, which is also called the
13 Mount Olive Springs plant, correct?

14 A (Inaudible).

15 Q And am I correct in interpreting this as
16 showing that there has never been a month in the 19 months
17 covered where plant capacity fell below 50 percent?

18 A During that 19 months, that's correct.

19 Q And you actually show some months and month
20 data on the next page, Table 5. And am I -- am I correct
21 that the annual average capacity -- percent of capacity is
22 64 percent?

23 A I do not know the answer. On -- if you're
24 telling me you averaged those numbers to get the number --

1 (inaudible) -- it might be stated that it's -- it is the
2 average -- the arithmetic average of -- we're saying
3 January 2001 through December 2002? I'm not -- I'm not
4 sure that that -- without thinking about it for a long
5 time whether that describes anything other than the
6 arithmetic average.

7 Q How would you calculate it if you were asked
8 what the annual average capacity utilization was at that
9 plant during the year 2001?

10 A Well, I think I'd sit down with about three or
11 four different people and I'd get their input before I
12 would just -- just -- (inaudible).

13 Q That -- those numbers aren't far off the
14 utilization that Dr. -- Mr. Wellington testified to for
15 the AgraMark plant -- (inaudible)?

16 A I believe he said this -- he -- he calculated --
17 -- (inaudible) -- I believe he said that he would --
18 (inaudible) -- the 60 to 70 percent range. (Inaudible).

19 Q Okay. And in -- in -- let me look at Table 1-A
20 if I could for a minute. Am I correct in interpreting
21 this to show that Class 1 handlers deliver -- strike that.
22 Let me start from the beginning.

23 Am I right in interpreting this to show that
24 Class 1 handlers receive at their Class 1 plants the

1 lowest percentage of milk on Sundays?

2 A I think you're probably correct in that. And
3 again, just so -- just so the record's clear, it's data
4 from six cooperatives. They're 7(a) plant deliveries for
5 two specific months.

6 Q But even on Sundays they receive 70 percent or
7 more --

8 A Of the monthly average.

9 Q -- of the monthly average. Is that right?

10 A Yes, sir.

11 Q How do you calculate the monthly average, by
12 the way?

13 A The monthly average is the sum -- the total
14 divided by the days in the month.

15 Q Your -- your Carlisle plant sells butter, is
16 that right?

17 A My Carlisle plant produces butter.

18 Q Okay. And -- and who sells that?

19 A Organizationally, there is a division called
20 Value Added within Land O' Lakes. They are in charge of
21 the marketing logistics. They are -- the industrial
22 division sells it to the value added division and it
23 creates the price which is pretty much equal to what the
24 value added can buy it outside because we do buy it from

1 sources other than our own plants.

2 MR. ROSENBAUM: That's all I have for now.

3 Thank you.

4 JUDGE BAKER: Thank you, Mr. Rosenbaum. Are
5 there other questions? Yes, Mr. English?

6

7

8

CROSS EXAMINATION

9

BY MR. ENGLISH:

10 Q Following up on that last question, if the
11 product is cold -- is sold in the value added division,
12 does that mean that when it's sold in the marketplace it
13 is sold for something other than commodity prices?

14 A Land O' Lakes butter -- (inaudible) -- higher
15 than commodity prices, yes, sir.

16 Q That product is a -- is a well known, well
17 recognized, well regarded brand that commands a price -
18 - a premium price above commodity, correct?

19 A Mr. Wellington had to do his own commercial.
20 And I can rely on that, thank you.

21 Q I'll send you both a bill.

22 (Laughter)

23

BY MR. ENGLISH:

24 Q Following up the question for -- from Mr.

1 Beshore about the proposed modification, if -- and the
2 availability of the pool milk on Order 5 or Order 7 and
3 Order 1. Is three months really enough? I guess I ask
4 that in the context of if a producer ships milk down to
5 Order 5 and collects -- or his handler collects a
6 transportation credit for the fall months and then that
7 producer comes back on in January and February and March -
8 - in May -- (inaudible) -- June. The first few months
9 from this proposal they wouldn't be eligible. But for the
10 very months that Dr. Ling discussed and your statement
11 shows -- (inaudible) -- testimony from Mr. Wellington
12 shows -- (inaudible) -- May, June, July, they still would
13 be able to -- to receive a payment?

14 A A handler would more than likely put that
15 producer back on Order 5 after they became transportation
16 credit-eligible so that the -- you only had to have -- you
17 would really have to exclude that producer from the Order
18 5 market for two months.

19 Q Is there any follow-up with a safety valve
20 making sure that in case they've decided not to it's not
21 there? You know, okay, if you're going to say they would
22 go back and take it back and it's not going to matter, the
23 volume's not going to be there. But what if the handler
24 decides to -- (inaudible) -- up on Order 1, having

1 collected the transportation credit for the -- for the
2 five or six months of the previous year?

3 A I would say that as that -- as that handler
4 leaves -- (inaudible) -- the order, especially given the
5 fact that we are the group proposing tighter restriction
6 on the pool, then that milk pooled under the order would
7 have to perform. The handler who has that milk pooled on
8 the order would have to perform.

9 Q Nonetheless, it's going to be eligible for the
10 very months that the greatest supply --

11 A You're assuming that they -- I don't know which
12 of the two months of the four that the handler would
13 choose not to -- would choose to exclude a possible pool
14 on Order 1.

15 Q With respect to the facility in Carlisle that
16 was expanded in October -- expanded in 2000, 165 million
17 pounds, prior to that time -- was it expanded at all in
18 the 1990s?

19 A There was a -- late '80s we -- we started off
20 with one -- one evaporator, one dryer.

21 Q When you built the plant in 1977?

22 A Yes. Or thereabouts. I'm not sure it was '77,
23 but thereabouts. Started off with one dryer and one
24 evaporator. I would say in the '80s there was -- there

1 was the inclusion of a second evaporator. The plan was to
2 build a dryer --

3 Q (Inaudible)?

4 A I would think that we probably got into the
5 '90s when we built the -- the dryer, put the second dryer
6 in. There was a -- an expansion to the -- to the butter
7 side of the business -- (inaudible).

8 Q And so, starting with the facility being built
9 in the '70s and expansion of the evaporator which the
10 documents I'm looking at indicate added in 1984, a dryer
11 which you think was probably added in the '90s, a butter
12 capacity, and then the capacity in 2000. Land O' Lakes --

13 A Do you also have our press releases from the
14 time? I just need to know -- go on. I'm sorry.

15 Q Land O' Lakes has made a series of investment
16 decisions with respect to that facility, correct?

17 A Yes.

18 Q And I take it Land O' Lakes has a -- a business
19 venture with the SEC, you know, makes various reviews
20 first before they make those decisions concerning the
21 financial consideration for -- for those investment
22 decisions?

23 A Every prudent business organization does.

24 Q And without the existence of these marketwide

1 service payments Land O' Lakes chose to make those
2 investments in 1977, 1984, the early '90s, the butter -
3 - in the late '90s, and then the expansion in 2000,
4 correct?

5 A That's correct.

6 Q You -- you answer to questions from Mr. Beshore
7 indicated that you also had some information, and --
8 (inaudible) -- that's probably not all the information.
9 But you have some information regarding Maryland and
10 Virginia. Do you have information --

11 A I have a general knowledge --

12 Q General knowledge. The plants in rural
13 Virginia, do you know what happened --

14 A I'm sorry. Rural Maryland.

15 Q Rural Maryland. Sorry. Rural Maryland. Do
16 you know what -- (inaudible)?

17 A The -- (Inaudible) -- very old. Could you --
18 (inaudible)?

19 Q Yeah. It predates the 1977 facility that Land
20 O' Lakes built in -- in Mount Olive, right?

21 A The genesis of -- (inaudible).

22 Q And Maryland and Virginia serves a variety of
23 customers in the southeast in addition to being pooled on
24 Order 1, correct?

1 A Yes.

2 Q And do you know whether Maryland and Virginia
3 causes milk to be either transferred or reverted back
4 from, say, Orders 5 or 7 to their facility in Maryland
5 from time to time?

6 A I can't answer that question but -- but I'd
7 like to -- I'd like to say -- (inaudible) -- the plant
8 that they are part-owners of, which is a reserve
9 processing plant in Order 5, there are provisions in Order
10 5 which make it advantageous for Order 5 milk to be
11 delivered to Order 5 pool plant. In this case, a pool
12 supply plant.

13 So my guess -- and I'm not speaking for
14 Maryland and Virginia in any way, shape, or form. My
15 guess is that they would put those who dealt Order 5 milk
16 into their -- their plant in Strasburg, Virginia.

17 Q But it is a fact, is it not, that at times that
18 fills up and they -- the milk into --

19 A Right.

20 Q -- the plant in Maryland?

21 A You'd have to have a Maryland -- (inaudible) --
22 representative to answer that.

23 Q Does Land O' Lakes have agreements with cheese
24 facilities on Order 1 with regard to supply --

1 (inaudible)?

2 A What is -- what are cheese facilities on Order
3 1?

4 Q Located in Order 1. Cheese plants that are
5 located in the marketing area that is Order 1.

6 A The -- is the question, does Land O' Lakes sell
7 milk to cheese plants --

8 Q Yes.

9 A -- whose plants are -- is located in the
10 marketing area of Order 1?

11 Q Yes.

12 A Yes.

13 Q And are those contracts for committed supply of
14 milk?

15 A Again, what is your definition of "committed"?

16 Q Do those agreements provide for Land O' Lakes
17 to provide a set supply of milk each month of the year?

18 A There -- there -- as I think about it, the two
19 plants that are -- are -- have agreements that have
20 parameters around monthly delivery. Does that answer your
21 question?

22 Q The parameters would be that --

23 A That's a --

24 Q -- you would buy sort of a minimum and maximum

1 amount? Minimum that you would supply and they could ask
2 for a certain amount, up to a certain amount, and --

3 A I think that -- yes. I would agree to that.

4 Q And you say that's two facilities that -- two
5 facilities that you -- Land O' Lakes provide, to your
6 knowledge?

7 A Yes.

8 MR. ENGLISH: That's all the questions I have.
9 Thank you.

10 JUDGE BAKER: Thank you, Mr. English. Are
11 there any other questions for Mr. Schad? Mr. Vetne?

12 CROSS EXAMINATION

13 BY MR. VETNE:

14 Q Mr. Schad, I -- I may have spaced out, but did
15 you identify those two facilities that you supply? Maybe
16 you did, but well, would you do it again?

17 A I don't -- I don't think there's any problem
18 doing it. They're the two -- cheese facilities in --
19 well, one's in Maryland, one's in Pennsylvania.

20 Q And -- and do the parameters work in such a way
21 that if the plant falls above or falls below or demands
22 above the parameter that there's simply an additional
23 cost? Extra parameter cost?

24 A Well, if their requirements are greater than

1 the specified maximum, it is at a rate higher than that --
2 (inaudible).

3 Q Are there distributing plants in the northeast
4 that are supplied exclusively by Land O' Lakes?

5 A Yes, there are.

6 Q Did you identify which -- (inaudible)?

7 A Sure. Wawa Dairy Farms and Dutch Valley Foods.

8 Q Wawa and Dutch Valley?

9 A (Inaudible).

10 Q Pardon?

11 A Dutch Valley Foods.

12 Q And you have pool supply agreements with those
13 plants?

14 A Yes.

15 Q And you balance their needs, right?

16 A Yes.

17 Q Do those plants have any unique marketing
18 practices which makes their supply either more seasonal or
19 less seasonal than the average distributor?

20 A One -- one -- (inaudible) -- market. I think
21 their -- their seasonal demands probably peak the same as
22 the demands -- the typical market demand.

23 The other is -- (inaudible) -- recognize that
24 because they have a lot of stores on the -- along the

1 Jersey shore -- (inaudible).

2 Q So the -- the Wawa customer actually would help
3 balance your -- your corequirements because they require
4 more when the market as a whole requires less?

5 A Except that the -- the cows usually react to
6 the -- to the heat the same as the consumers. (Inaudible)
7 -- the cows lower the production. So to that extent, it's
8 not only the sales side. You have to look at the supply
9 side.

10 Q And that -- that summer bump in sales would
11 start in about May?

12 A Probably more when schools are out.

13 Q Middle of June?

14 A Yeah.

15 Q You -- do you ever supply those two customers
16 with milk marketed through Land O' Lakes from any other
17 producer or producer organization?

18 A Ask me the question again?

19 Q Is your supply to either Wawa or Dutch Valley
20 ever supplemented by milk from any other producer or
21 cooperative association?

22 A We market the milk of another cooperative
23 called Cumberland Valley. If they possibly -- (inaudible)
24 -- some of their milk would be on our trucks to go to

1 those plants. That would be the only instance. A year-
2 round agreement that we had for -- (inaudible).

3 Q Is Cumberland Valley a -- a cooperative that
4 does not operate manufacturing facilities?

5 A That's correct.

6 Q And is Land O' Lakes the -- the pooling handler
7 for that milk?

8 A No.

9 Q They pool their own milk?

10 A They do their own handler report.

11 Q They do their own handler report.

12 A Which means they pool their own milk.

13 Q Do they market some of their milk outside of
14 Land O' Lakes?

15 A Not to my knowledge.

16 Q Does Land O' Lakes direct that --

17 A No.

18 Q Do the other -- the other members of ADCNE, to
19 your knowledge, also supply pooling plants, distributing
20 plants that receive milk pool supply contracted by --
21 (inaudible)?

22 A You'll have to ask them on those -- on those
23 answers. I -- I don't know the answer and can't speak --
24 ADCNE is more a -- it's not a marketing agency requirement

1 so we're not trending that kind of information --
2 (inaudible). We find joint positions like slave labor or
3 regulatory and try to find joint positions on those.

4 Q All right. And -- and beyond your
5 participation with ADCNE, you have no knowledge, direct or
6 indirect?

7 A I probably have confidentiality agreements --
8 (inaudible) -- Mr. Rosenbaum's group. I don't -- you'll
9 have to ask them.

10 Q They're not all here though, are they?
11 Maryland and Virginia?

12 A I see -- I see no representatives from Maryland
13 and Virginia.

14 Q (Inaudible). With respect to Table 1, Sub-
15 Parts A and B.

16 A Yes.

17 Q You identified those as deliveries by the six
18 agency cooperatives to 7(a) plants. Those are cold pounds
19 delivered to and retained by distributing plants, am I
20 correct?

21 A They're 7(a) deliveries. I don't know what
22 "retained by" means.

23 Q Well, what I mean is it doesn't involve any
24 milk that's pumped in and pumped out. Or might it include

1 such milk?

2 A I -- I don't even know where things like that
3 happen.

4 (Laughter)

5 BY MR. VETNE:

6 Q Okay. All right. So, to your knowledge, these
7 are end -- these are end receipts retained by the
8 distributing plant?

9 A Yes, sir.

10 Q And -- and the two plants that are supplied by
11 Land O' Lakes are included in those volumes?

12 A Sure, yes. Plants -- these were partial
13 suppliers --

14 Q Okay. If -- (inaudible) -- suppliers, do they
15 include plants that are supplied by other ADCNE
16 cooperatives?

17 A Yes, I believe so. I believe that's --
18 (inaudible) -- in all instances all over -- (inaudible).

19 Q All right. Your supply -- any partial supply
20 through plants that are primarily supplied by independent
21 producers, non-member producers?

22 A Land O' Lakes?

23 Q Yes. Does Land O' Lakes supply any
24 distributing plant where the plant is primarily supplied

1 by the farmers who are not members of any dairy
2 cooperative?

3 A On a seasonal basis, yes. I can't think of any
4 on a regular basis.

5 Q On a seasonal basis. Are you referring to spot
6 requests for milk?

7 A Yes.

8 Q Do you have any contractual commitment to
9 plants that are supplied primarily by non-member
10 producers?

11 A I'm trying to -- (inaudible). I -- as I think,
12 I do have also deliver to plants that -- that do have
13 their own -- probably better safe. I'll stick with my --
14 my earlier characterization. On a seasonal basis --
15 (inaudible).

16 Q The plants that Land O' Lakes supplies that you
17 share in supply obligations to -- (inaudible), is
18 balancing of those plants also shared with the other
19 cooperatives?

20 A Yes and no. Not -- not in all cases.

21 Q Okay. So there's -- there's -- there may be
22 some cases, for example, where Land O' Lakes has a
23 committed supply and another cooperative balances
24 supplemental and surplus milk?

1 A Yeah.

2 Q And vice versa? Does that also happen?

3 A Probably, yes.

4 Q The deliveries to (7)a plants on Tables 1-A and
5 1-B, to the extent that they represent Land O' Lakes milk,
6 what percentage of those deliveries is classified as Class
7 1?

8 A I do not know.

9 Q You don't have any -- any function in either
10 filling out or reviewing the reports that are filed on a
11 monthly basis with the market administrator?

12 A No.

13 Q And with respect to the total volume of
14 deliveries to 7(a) plants by the six cooperatives, do you
15 have any -- any knowledge or a good estimate as to what
16 the Class 1 utilization of those deliveries are?

17 A No, sir, I don't know -- (inaudible) -- on the
18 partial, I surely don't know -- (inaudible).

19 Q Do you have any reason to believe that it would
20 be any different than it had previously been testified
21 that Class 1 typically is in excess of 85 or 90 percent?

22 A No. I think Mr. Fredericks' characterization -
23 - speaks for itself.

24 Q There is a provision in the -- the order for

1 what's called a 7(b) plant, which is a -- a locked-in UHT
2 plant, as I recall?

3 A No, I understand it is not.

4 Q Do the six cooperatives -- any of the six
5 cooperatives market milk through any locked-in 7(b) plant?

6 A To my knowledge, there are no 7(b) plants --
7 (inaudible).

8 Q Some of the 7(a) plants, however, do make UHT
9 milk products?

10 A (Inaudible).

11 Q To --

12 A To answer your question, not to my knowledge.

13 Q All right.

14 (Pause)

15 MR. VETNE: I don't have any more questions
16 right now.

17 JUDGE BAKER: Are there any other questions for
18 Mr. Schad? Yes, Mr. English?

19 CROSS EXAMINATION

20 BY MR. ENGLISH:

21 Q Going back to the question about what happens -
22 - Order 5, there's two different ways that the money is to
23 be paid out of the Order 5 pool for milk delivery to the
24 southeast, correct? (Inaudible) -- orders have -- one is

1 producer milk and another is transferred milk, correct?

2 A My understanding under the transfer
3 transportation credit, both -- both are eligible for
4 transportation credits.

5 Q And so to the extent milk is transferred,
6 received first at an Order 1 plant and then transferred to
7 an Order 5 or an Order 7 plant and receives a
8 transportation credit for that, if that occurs in the
9 fall, that has effectively increased the quantity of milk
10 needed for Class 1 in Order 1 while drawing a
11 transportation credit for the different pool, correct?

12 A I'm not -- if part of your question stated that
13 the -- the Class 1 utilization of the -- of the
14 transferred milk from the Order 1 pool plant should be --
15 to the Order 5 or Order 7 plant, yes, the -- yes, indeed
16 the Class 1 revenues come back to the Order 1 pool.

17 Q But --

18 A I mean, that's probably a question that --

19 Q I understand the revenues come back, but the
20 milk -- the milk went somewhere else?

21 A The milk went somewhere else.

22 Q And --

23 A And that milk -- and assuming that they crossed
24 all the other T's, the milk -- it would be eligible for

1 the transportation credit.

2 Q Correct. And -- and simultaneously in this
3 crossroads, it is not being -- (inaudible) -- marketwide
4 service payment -- (inaudible) -- it is nevertheless going
5 to draw a marketwide service payment under your proposal,
6 is that correct?

7 A I think you're -- you mischaracterize our need
8 for that. Our need for the marketwide service payment has
9 to do with unused capacity, so I don't think -- think
10 you'll find -- (inaudible) -- we don't have that issue --
11 (inaudible).

12 Q But isn't the -- the reason behind these
13 capacity in reverse, that the milk wasn't available in the
14 fall because it got routed down to the southeast?

15 A In -- in my case, when -- when I -- (inaudible)
16 -- solids, I include the -- (inaudible).

17 Q I understand, and that's my point. It didn't
18 actually -- it doesn't use the Class 1 to serve the Order
19 1 market, did it?

20 A The -- the revenue came back to the Order 1
21 market. From that extent -- from -- from the producer
22 pool standpoint, it's all the same whether it's delivered
23 on the ramps in Lancaster County or sent to a plant in
24 Atlanta, Georgia.

1 Q But it nonetheless has created a -- (inaudible)
2 -- unused capacity in the four months for Order 1 for
3 which you're asking Order 1 producers to pay, correct?

4 A Again, I -- simplistically, yes. But there's
5 more to it than that. And you're not even looking at, you
6 know, the Charlie Ling study. And we're basing it on the
7 theoretical model, not the -- the experience of each of
8 the plants.

9 The things that I -- I brought to you, the
10 experiences of the plants, the Carlisle plant --
11 (inaudible) -- some numbers to try and -- (inaudible).

12 Q And you've also told us that Land O' Lakes
13 sells milk into Order 5, correct?

14 A Land O' Lakes -- (inaudible) -- pool on Order
15 5, correct.

16 Q And you're familiar with the fact that in -- in
17 at least Order 5 and perhaps many other market orders the
18 -- does Order 5 have a -- (inaudible) -- place --
19 (inaudible) -- for deliveries of milk to Class 1 handlers?

20 A There's a DCNA premium.

21 Q And does the DCNA premium have a provision in
22 it for receiving credit for the purpose of encouraging
23 Class 1 handlers to receive milk on a basis that is much -
24 - that is more uneven than what it shown on Table 1-A of

1 Exhibit 17?

2 A Yes.

3 Q (Inaudible) -- place for your milk delivered to
4 Order 1 Class 1 processors?

5 A Yes.

6 Q And does that include receiving credit for
7 receiving milk on a uniform basis?

8 A In most cases, no.

9 Q And the Class 1 premium -- there's a Class 2
10 premium in -- in this order, Order 1, correct? Is there a
11 premium for deliveries of -- premium Class 2?

12 A I do not believe there is a published --
13 (inaudible) -- much of the agency -- publishes Class 2
14 premium.

15 Q Do you know whether Class 2 premiums are
16 charged, whether -- whether premiums are charged for Class
17 2 milk?

18 A I -- yes, Class 2 -- Class 2 is sold above
19 federal order minimums.

20 Q Do you know whether the Class 1 premium is
21 higher than the Class 2 premium above order minimums on a
22 general basis in Order 1?

23 A In my experience with Order 1, Class 1 premiums
24 are -- they are geographically defined so that I can

1 answer that question "yes" and "no." In some places the
2 Class 1 premiums are higher. In other places in my
3 experience in the Order 1 marketing area -- (inaudible)
4 -- of Class 2.

5 Q Are those places in your experience where the
6 Class 1 premium is higher -- is part of the justification
7 for that in order to compensate for costs of balancing?

8 A (Inaudible) -- Pennsylvania Milk Marketing
9 Board which sets the milk order premium. And there's a
10 regulatory over-order premium in Pennsylvania.

11 Q Well, you beat me to it. For instance, on the
12 milk that you deliver to Wawa, to the extent that's
13 Pennsylvania produced and Pennsylvania processed and
14 Pennsylvania distributed milk, there is an over-order
15 premium presently in place at \$1.65 a hundredweight for
16 Class 1 milk, correct?

17 A That's correct.

18 Q Do you have Exhibit 5, the market administrator
19 exhibit?

20 A (Inaudible) -- yes, I do.

21 Q Would you open to page 79 and 80?

22 A (Inaudible).

23 Q Seventy-nine and 80.

24 (Pause)

1 BY MR. ENGLISH:

2 A Seventy-nine and 80.

3 Q Starting on page 79 and -- almost a "yes" or
4 "no" answer if at all possible. And again, as I prefaced
5 with Mr. -- Dr. Wellington, I'm -- I know I'm asking for
6 confidential information. If that's the answer, that's
7 the answer.

8 But could you tell me whether in any month on
9 page 79 were transfers to other order plants -- whether
10 Land O' Lakes transfers milk to plants rated under Order
11 6, which is Florida?

12 A I think that's confidential information.

13 Q And so if I asked further detailed questions
14 like quantities, you -- you would say that that's
15 confidential?

16 A I think that would follow from my earlier
17 question.

18 Q And if I asked you about page 80 similar
19 questions, the answer would be confidential? Questions
20 about diversions to other order plants? If I asked
21 questions about details about the numbers for months for
22 which there's restricted data, you would -- it would be
23 confidential?

24 A Yes, sir.

1 Q That's fine.

2 MR. ENGLISH: I have no further questions.

3 JUDGE BAKER: Are there any other questions for
4 Mr. Schad? Let the record -- Mr. Arms?

5 CROSS EXAMINATION

6 BY MR. ARMS:

7 Q In response to a question raised by Mr. Vetne
8 regarding plants --

9 A I'm sorry. Mr. Vetne --

10 Q Asked you about 7(b) plants. You, I believe --
11 (inaudible) -- the term as ESL plants?

12 A No, I --

13 Q Expanded shelf-life plants?

14 A His question was were there any other UHT
15 plants. I said I -- I stated I thought there were ESL
16 plants. Then I came back and I said in response to your
17 specific question of UHT, not to my knowledge --
18 (inaudible).

19 Q No UHT plants?

20 A Not to my knowledge.

21 Q You do supply, do you not, plants -- a plant
22 located in Winchester, Virginia, operated by --
23 (inaudible)?

24 A Yes, I do.

1 Q And in your -- since you've been doing that,
2 how would you classify that plant? Is it a 7(a) plant?

3 A Yes.

4 Q Located outside the marketing area?

5 A Yes.

6 Q In other words, a distributing plant -- 7(a)
7 distributing plant?

8 A It's my understanding that's how it is.

9 Q But you're not aware whether or not their
10 output is extended shelf-life or UHT product?

11 A It's my understanding that it's ESL, it is not
12 -- (inaudible) -- they do non-refrigerated stuff --
13 (inaudible) -- store shelves next to cereal.

14 Q Okay. So you are saying that it's an ESL 7(a)
15 plant basically, is that correct?

16 A To my knowledge -- that's how it is classified,
17 to my knowledge.

18 Q And the other --

19 A That is a -- (inaudible) -- the products that
20 they make.

21 Q They are in Federal Order 1?

22 A I -- (inaudible).

23 Q Likewise, there's an ESL plant, is there not --
24 (inaudible) -- Steuben Foods in Elwood, New York?

1 A I have no knowledge of Steuben Foods.

2 Q On your table showing capacities --

3 A Table 5 --

4 (Pause)

5 BY MR. ARMS:

6 Q Did you run a special situation this year with
7 regard to a major supply into your plant that affected --
8 greatly affected your capacities -- capacity levels
9 influencing -- influencing this table?

10 A We could play cat and mouse, but I think you're
11 alluding to the fact that Hershey Foods --

12 Q Hershey Foods -- (inaudible).

13 A -- (inaudible) -- dairy market used to --

14 Q Correct.

15 A -- (inaudible) -- a supply --

16 Q But that's why --

17 A -- Hershey --

18 Q -- this table --

19 A And -- yes.

20 Q Affected the -- (inaudible) -- capacity?

21 A In the -- due to the strike, Land O' Lakes
22 basically lost that customer for the duration of the
23 strike.

24 Q Can you -- can you identify the months involved

1 there, the period?

2 A I can identify just like -- I mean, all you
3 have to do is read the newspaper. I believe it was April,
4 part of April, all of May, part of June.

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

6 JUDGE BAKER: Very well. Mr. Tosi --
7 (inaudible).

8 MR. TOSI: Yes, I do, Your Honor. Thank you.

9 CROSS EXAMINATION

10 BY MR. TOSI:

11 Q Dennis, thank you for in your testimony trying
12 to relate the -- the costs applicable to Carlisle and
13 comparing and contrasting them to Dr. Ling's study.

14 You -- you related your costs back to so many -
15 - (inaudible) -- product.

16 A I -- I did pounds of total size. Dr. Ling did
17 pounds of -- (inaudible).

18 Q Okay. Excuse me. I stand corrected. Did you
19 -- could you or would you know if you wanted to convert
20 that back to the hundredweight cost?

21 A Historians do it. And because of the --
22 (inaudible) -- products sold and the different costs --
23 (inaudible) -- starting to look really, really strange.
24 Our accounting is set up for the total size. We do total

1 -- (inaudible) -- accounting, yes. That's the way we --
2 (inaudible) -- California. (Inaudible).

3 So, could I do it? I'm -- I'm just not sure
4 what happens when you start to do cream and do condensed
5 milk coming in and out. You know, I think it's better
6 that I don't.

7 Q Okay. Also in your testimony, you indicated
8 that other testimony will show that the balancing capacity
9 of the -- of the order is not equally realized. Are --
10 are there going to be more witnesses to --

11 A Mr. Gallagher is going to testify.

12 Q -- come back? Okay. Who in the northeast
13 market benefits from the existence of butter powder plants
14 that are performing the balancing function?

15 A I think all participants in the market benefit
16 in that -- (inaudible) -- market sort of speaks -- that's
17 -- (inaudible) -- not out chasing -- (inaudible). Mr.
18 Wellington said he -- (inaudible). I think that it
19 enhances the credibility of the class prices in a -- in a
20 large, large sense in the marketwide sense and also
21 enhances the ability for all to -- (inaudible).

22 Q Do you think it's a good policy to --
23 (inaudible) -- to charge producers for services that
24 you're providing?

1 A Handlers charge producers -- getting back to --
2 if you're asking if the legislation allows us to do it --
3 (inaudible) -- to be compensated from the pool prior to
4 the -- to the disposition to producers.

5 If handlers are providing a service to the
6 benefit of all, this is a way to -- to get that --
7 (inaudible) -- back to the handlers who are providing that
8 service. It is the place where we all draw from, the
9 pool.

10 Q I want to probe that just a little bit more.
11 Do you have an opinion about whether or not the act
12 provides us the authority to regulate producers in this
13 capacity as producers?

14 A I'm -- I'm not sure of the question. Can you
15 expand on the question?

16 Q Marketing orders or the -- the act -- the
17 Agricultural Marketing Agreement Act of 1937 that
18 authorizes milk orders. Are you of the opinion that the
19 act provides us the authority to regulate producers in
20 their capacity as producers?

21 A I thought that the underlying theory is you
22 regulate handlers.

23 Q Okay. To the extent then that you --
24 (inaudible) -- the law authorizes handlers to charge

1 producers for a service that they're providing, would it
2 be reasonable to conclude that if you're an independent
3 producer you -- whether you like it or not, you're being
4 forced to pay for a service in that regard? You're being
5 regulated?

6 A It's not -- (inaudible) -- it's not a --
7 (inaudible). Is there much difference between --
8 (inaudible) -- independent producer and -- and requiring
9 them to pay for the services -- (inaudible).

10 Q I'm sorry. I -- I didn't hear you.

11 A I -- I said it -- I think it's a semantic
12 argument. But I -- I -- I question is there any
13 difference between the -- the Department going to
14 independent pools and requiring them to pay a fee for the
15 services of the market administrator.

16 Q I can't imagine there is.

17 (Laughter)

18 BY MR. TOSI:

19 Q Okay. One other thing. To the extent that
20 -- this kind of builds off of -- (inaudible) -- Mr.
21 Gallagher suggested that maybe you would be the one better
22 able to answer this question.

23 Mr. Gallagher's testimony indicated that there
24 was about 184 non-pool plants scattered throughout the

1 northeast marketing area. And while any one of them may
2 have the singularly meaningful -- and I guess in that
3 context it would probably come out of Queensboro --
4 Queensboro Farms that perhaps taken as a whole that the
5 existence of -- of those plants providing outputs. Is a
6 very significant balancing function being performed by
7 those entities as well?

8 A I -- I -- (inaudible) -- to Mr. Gallagher.

9 (Laughter)

10 BY MR. TOSI:

11 A I think -- (inaudible) -- Land O' Lakes
12 operation is centered around investment in Carlisle.
13 (Inaudible) -- to this in my testimony here. I think Mr.
14 Gallagher may have a different methodology -- (inaudible).
15 I think that to the extent that he plays -- (inaudible).
16 I think he's better answering. And, Gino, I promise --
17 (inaudible).

18 Q Okay. Going a little bit off of Mr.
19 Wellington's testimony, should the Department --

20 JUDGE BAKER: (Inaudible) -- speak a little
21 more loudly -- (inaudible).

22 THE WITNESS: Okay.

23 JUDGE BAKER: Thank you.

24 BY MR. TOSI:

1 Q Should we tend to discount the -- (inaudible) -
2 - the role of cheese plants in balancing the northeast
3 market?

4 A I think Mr. Wellington probably could answer
5 that question better, and I think he did.

6 Q Yeah. I know -- I know that he did. I'm just
7 asking your -- another participant in all this and I was
8 hoping to hear the Land O' Lakes slant.

9 A I think in -- in this marketplace there are
10 -- there are cheese plants that probably -- (inaudible).
11 But the -- the -- (inaudible) -- of their 21 years I've
12 had in the dairy cooperative in this market, you don't
13 balance with cheese.

14 The example of Lehigh Dairy Farms as the owner
15 of the cheese plant in Allentown, Pennsylvania. They sold
16 -- (inaudible). It's very hard for a cooperative entity
17 to balance with cheese. That doesn't say that to some
18 extent they do have the ability to -- to work the extra
19 day to -- (inaudible). Mr. Miller talked about tolling --
20 (inaudible) -- that to do a tolling arrangement you need
21 the milk processed and the price won't -- price won't
22 cover -- (inaudible).

23 Q Can you tell me how all producers in the market
24 benefit by the existence of butter powder plants to

1 perform the balancing function? Can you put a value on
2 that, how much the blend price is enhanced, for example?

3 A How much is the blend price enhanced on -- by
4 butter powder plants. I guess -- during his -- during Mr.
5 Ling's study he says that you can give -- you could have
6 done a whole thing for cheese -- an equal number of cheese
7 plants. If he had input a different set of numbers into
8 the cost -- cost relationship.

9 Mr. Wellington's testimony said that it's too
10 expansive -- (inaudible) -- to balance the butter powder.

11 So butter powder is the more efficient way of
12 doing it. However, there have been cases of producer
13 prices that when -- (inaudible) -- secretary, she rates
14 market service payments and it will be based on the Ling
15 study of butter powder plants rather than cheese plants.

16 Q That's assuming she fully considers it this
17 time.

18 A That assumption -- (inaudible).

19 Q Okay. So to the extent that the secretary may
20 believe that she needs to be shown how the market
21 benefits, you have no measure to offer her other than your
22 costs? So we're -- we're very well indicated here on the
23 costs.

24 A It's again --

1 Q -- ask the secretary to make the pool a little
2 light on benefits?

3 A If you agree there is a market benefit to
4 balancing -- (inaudible) -- to the extent that the -- the
5 market needs to be balanced, we show that the cooperatives
6 are doing it, and that -- that is a factor. I can't --
7 (inaudible) -- activities that we're doing. We can put a
8 cost on -- if we agree that all benefit because the -- the
9 -- (inaudible) -- the whole incur several costs. That's -
10 - that's the best we can do.

11 Q Thank you. Just a little bit here on your
12 marketwide service payments -- excuse me, the
13 transportation credit payments, the former marketwide
14 service from Order 5. Did I understand your testimony to
15 say that -- that the payments from the transportation fund
16 somehow goes back to the Order 1 pool given certain
17 conditions?

18 A No. No, it wasn't the transportation dollars.
19 I was talking about the Class 1 value. If milk is taken -
20 - taking a hypothetical, if milk is transferred out of
21 Carlisle, which is a pool supply plant, to an Order 1 --
22 I'm sorry, to an Order 5 plant in North Carolina, the --
23 the higher -- the plant with the lower utilization --
24 (inaudible) -- would go back to the Order 1 pool.

1 Q I understand. I'm sorry. I misunderstood you
2 before. Under the southeast transportation credit
3 provisions, are producers' fee prices at all reduced
4 because of the marketwide service fee for transportation
5 credits?

6 A It's my understanding that the -- the amount is
7 financed by the increase in the Class 1 price over a
8 period of months in the year. If -- if you can -- if you
9 -- if you want to make the jump that the -- the dairy
10 farmers -- document value, in the absence of
11 transportation credit there would be over-order premiums
12 or through the Department providing a different Class 1
13 price. And if you say that there was that opportunity.
14 But to answer the specific question, it does not come out
15 of it.

16 Q (Inaudible) -- would be an example of handlers
17 charging other handlers for a service that's for
18 marketwide benefit? Handler to handler?

19 A Yes.

20 Q The producer is left out -- (inaudible).

21 A Except for the opportunity.

22 MR. TOSI: Thank you. That's all I have.

23 Thank you. I appreciate it.

24 JUDGE BAKER: Does that complete your

1 questioning, Mr. Beshore?

2 MR. BESHORE: Yes. I -- I do have a few
3 questions for Mr. Schad on redirect.

4 REDIRECT EXAMINATION

5 BY MR. BESHORE:

6 Q Mr. Schad, on the -- picking up on that last
7 question, are you familiar at all with the marketwide
8 service payments paid out of the Order 30 pool?

9 A I am generally familiar.

10 Q There's no -- there's no supplemental -- you
11 would be -- you might know then that there's no
12 supplemental assessment on handlers in Order 30 to -- to
13 raise a fund to make marketwide service payments?

14 A That's correct.

15 Q But the --

16 A (Inaudible).

17 Q -- handlers who assemble milk in the Class 1
18 market are paid eight cents a hundredweight on those
19 assembled volumes?

20 A That's my understanding.

21 Q Okay. Out of the pool, reducing the price?

22 A That's my understanding.

23 Q Okay. And handlers who move milk for Class 1
24 purposes within the order from one point to another are

1 reimbursed out of the pool for supplemental transportation
2 charges in Order 30?

3 A My understanding is that's correct.

4 Q Okay. And that's -- Mr. Wellington testified
5 that's what the act specifically authorizes with respect
6 to marketwide service provisions?

7 A Correct.

8 Q Okay. Now, if you just think about those
9 provisions for -- for a minute -- you probably don't know
10 the answer to this question but let me ask you. Do you
11 know whether the -- before eight cents a hundredweight was
12 allowed, what -- when it was promulgated to be paid out of
13 the pool to handlers who assemble milk for Class 1 use in
14 Order 30, a benefit -- a benefit was quantified with
15 respect to what benefit that was to the producers in the
16 market?

17 A I -- I have no knowledge that such a study was
18 done or such evidence was put into the hearing --
19 (inaudible). That provision -- (inaudible).

20 Q Okay. Now, let's stay in the upper midwest
21 just a little bit then. I think you testified but I want
22 it to be absolutely clear that the Land O' Lakes plants at
23 Greenwood, Wisconsin, and Fernham, Minnesota, are not
24 supply plants on Order 1 commencing in August of 2002?

1 A That's correct.

2 Q Keeping -- keeping mindful of the SEC, are
3 there any present intentions to repool those plants as
4 pool supply plants on Order 1?

5 A We have no -- no intentions that I know of.

6 Q Okay. The -- the handler list reflects that
7 over -- since 2000 of the -- you know, I guess maybe three
8 plants, Minnesota, Wisconsin -- pooled on the order, the
9 two -- (inaudible) -- plants and a -- and a DFA plant for
10 some period of time in Burks Falls, Minnesota, I think?

11 A That's correct.

12 Q Is -- does Order 1 require under its provisions
13 those -- milk assembled through those units to perform for
14 the market from plant -- from states outside the market?

15 A (Inaudible) -- and it has -- it's a state by
16 state regulation -- (inaudible) -- milk from within the
17 marketing area qualifies. Each state, Minnesota and
18 Wisconsin, had to qualify shipments from those particular
19 -- (inaudible).

20 Q To your knowledge, during the spring months of
21 2001 with respect to the Land O' Lakes milk from Minnesota
22 or Wisconsin, was the minimum 10 percent required shipping
23 percentage under the order met with physical deliveries
24 from Minnesota and Wisconsin into Order 1 during those

1 periods of time?

2 A The record would show that those -- those --
3 all three of those plants were not pooled on the order I
4 guess it would have been August of 2000 until December of
5 2000, which meant that those plants would not have been
6 under what we're calling today the lock-in provision. So
7 throughout the entire year of 2001, those plants performed
8 at -- at the percentages specified in the order or as
9 amended by the market administrator.

10 Q And those percentages -- when you say
11 "perform," that means deliveries from those plants was --
12 supplies to those plants to Order 1 distributing plants?

13 A That's correct.

14 Q Mr. Schad, I think the -- let's look at Table 5
15 of Exhibit 17 for a minute. You were asked several
16 questions about the utilization of Land O' Lakes' plant at
17 Carlisle in Mount Olive Springs, Pennsylvania. You
18 provided some -- much -- much information in your
19 testimony and in your exhibits.

20 By the way, this is probably the largest
21 balancing plant in the northeast, to the best of your
22 knowledge?

23 A I would -- I would -- yes. The answer to that
24 is "yes."

1 Q You don't know anybody else -- any other plants
2 in the northeast that have the capability of -- of
3 handling over 5 million pounds a day?

4 A No.

5 Q Do the capacity figures shown -- the monthly
6 capacity figures shown on Table 5 of Exhibit 17 mask the
7 daily and -- and weekly fluctuations in capacity
8 utilization at the plant?

9 A Yes. There are -- these are monthly numbers.
10 If you took Table 1-A and 1-B, deliveries to Carlisle
11 probably -- (inaudible) -- we also have Class 2 and Class
12 2 customers which would -- (inaudible). But the answer to
13 your question is, yes, they would mask the daily and
14 weekly fluctuations of received -- (inaudible).

15 Q Okay. And they probably -- you know, something
16 like the delivery patterns shown on the inverse or the --
17 the other side of the delivery patterns shown on Tables 1-
18 A and 1-B probably?

19 A Sure. Yes.

20 Q Now, let's talk about benefit to the market of
21 this -- your balancing services which are reflected on
22 Table 1-A and 1-B. If the ADCNE cooperatives did not
23 deliver on the 19th of November 2001, 21.8 million pounds
24 of milk to those -- those distributing plants but -- by

1 the way, in November I assume there would have been plant
2 capacity at -- at Carlisle and other facilities in the
3 market to retain that 21.8 million pounds?

4 A Yes.

5 Q Now, if that was not the least delivered to
6 those 7(a) plants, would there have been losses suffered
7 in the marketplace? Your Order 1 market, would there have
8 been some marketing challenges?

9 A Sure. As -- as hypothesized with --
10 (inaudible) -- instead of the trucks going to the Class 1
11 plants, they were -- they could only go to the balancing
12 plants. Those sales would be lost.

13 Q Let's say there wasn't -- let's say the weather
14 was fine but the plants ordered the milk and you just
15 decided to -- keep it and manufacture it. What would --
16 what would happen to the marketplace?

17 A What would happen? In the short term, sales
18 would be lost. On a longer term, handlers would have to
19 go beyond the -- the market we own. Given the -- part of
20 the things we're talking about in -- (inaudible) -- right,
21 I would think it would be harder to have the -- the pool
22 to pay for milk coming across the distance. I don't think
23 it -- (inaudible) -- of Minnesota -- (inaudible) -- of the
24 order would pay for the transportation. I think we're

1 looking at -- (inaudible) -- the amount that -- taking the
2 qualification -- (inaudible) -- the handler would have to
3 pay more out of pocket. So -- (inaudible).

4 I guess the question would be whether the --
5 the marketplace, if he's in it, would pay the higher
6 prices for that. And if not, maybe the -- the handler
7 would go to his independent supplier and tell him that
8 there's a -- I'm going to pay the same dollars to get the
9 same milk but it's going to cost me to get it from the
10 further plants.

11 Q By the way, are premiums paid to -- over-order
12 premiums paid to independent producers in the area of the
13 Order 1 milk shed that you're familiar with?

14 A Yes, they are.

15 Q Very substantial premiums?

16 A Yes, they are.

17 Q So a handler who had independent suppliers
18 wasn't provided -- if the cooperatives didn't release milk
19 from -- from their milk supplies to meet those surge needs
20 of the handlers on the -- you know, on that Monday in
21 November when they were the highest, they have to possibly
22 go out in the area and replace that milk at higher
23 expense, correct?

24 A Yes.

1 Q Or if they were going to try to get the milk
2 somewhere else in the Order 1 marketplace, where might
3 they go to get it and at what cost?

4 A I guess they would get the -- the alternative
5 answer is what Mr. Ling calls the excess supply. And you
6 would go to a --

7 Q Cheese plants?

8 A -- the cheese plants and look for --
9 (inaudible) -- milk, and we'd be talking -- give up
10 charges to a -- for a corporation.

11 Q Give up charges to a corporation. In other
12 words, if you're going to -- if you have to take milk out
13 of Kraft's cheese plant and now they're not going to be
14 able to make their brand and value added cheese products
15 but they're going to give it up for -- for a fluid
16 processor, it's going to cost them money?

17 A Yes.

18 Q Okay. Substantial money?

19 A That would be my -- that would be my -- my
20 expectation, yes.

21 Q In all likelihood, in your judgment and on the
22 basis of your experience, more money than you're able to
23 get on a regular basis for your Class 1 sales?

24 A Sure.

1 Q Now, let's look at the flip side. In May, the
2 27th of May 2001, ADCNE cooperatives had 10 million-plus
3 less pounds of requests for deliveries to those 7(a)
4 plants. First of all, let's assume that you all insisted
5 that --

6 A Just so the record's clear, 10 million -- I
7 think you made a comparison. Ten million less than?

8 Q Than the Monday, November 19th volume that I
9 was previously referring to, okay? What if you insisted
10 that the -- you know, you want that 10 million pounds
11 back, so to speak. You wanted the handlers -- somebody
12 else in the market to handle that 10 million pounds that
13 were required by the pool market in November. What would
14 happen in the marketplace?

15 A I guess your --

16 Q -- pounds of -- milk a day?

17 A You're asking --

18 Q I'm asking you to use your market experience
19 and your judgment to tell us what would happen in the
20 marketplace so we can understand the benefit in as --

21 A -- crash.

22 Q What prices would crash?

23 A The prices that would be -- milk would be sold,
24 given -- given the volume we're talking about, at a

1 substantial discount to the -- to the class price.

2 Q Would there be the same funds available to pay
3 the available order premiums to independent producers in
4 the Order 1 milk shed that there are today?

5 A No, I wouldn't expect so.

6 Q Is that a benefit that's tangible that's in the
7 -- in the milk check of those producers every month under
8 the present marketing conditions?

9 A Yes.

10 Q With respect to LOL's -- Land O' Lakes'
11 capacity at Carlisle, what -- Bob Wellington talked about
12 evaluating capacity in terms of the plant bottle neck.
13 What -- what's the limitation at Carlisle?

14 A I guess that'd be evaporating.

15 Q And what's the maximum evaporation capacity?

16 A Five -- 5 million pounds per day. Closer to 5
17 to 5.5 million pounds per day.

18 Q Now, you referred to -- I think Mr. English
19 perhaps asked you some questions about premiums in Order 5
20 and you referred to DCMA.

21 A Yes.

22 Q Can you tell us what DCMA is?

23 A I think it's Dairy Cooperative Marketing
24 Agency.

1 Q And that's -- it's an over-order --

2 A A marketing --

3 Q Agency -- (inaudible). Which is opposed to
4 cooperatives marketing milk in -- in order -- in the
5 southeastern United States?

6 A Five, seven, probably six as well.

7 Q Is there DCMA in Order 1 or its equivalent?

8 A (Inaudible) -- northeast marketing agency.

9 Q Is it established --

10 A Which --

11 Q -- pool and account for premiums and over-order
12 payments and daily delivery -- daily milk delivery
13 credits, et cetera, the same way DCMA does?

14 A Yeah, yeah.

15 Q Has that ever been possible in the northeastern
16 United States?

17 A No.

18 Q In your -- in your lifetime?

19 A In my lifetime, no.

20 Q Has it been tried and been unsuccessful?

21 A I don't even know if it got to the point of
22 trying. The parties -- the parties -- (inaudible).

23 Q And you've got a large proportion of
24 independent producers in the marketplace?

1 A Absolutely, sure.

2 Q (Inaudible).

3 A (Inaudible) -- would include any other federal
4 order or -- or unregulated -- (inaudible).

5 MR. BESHORE: May I have just a moment, Your
6 Honor?

7 (Pause)

8 MR. BESHORE: I'm being directed to cease
9 further questions by my clients.

10 JUDGE BAKER: By -- by your clients.

11 (Laughter)

12 JUDGE BAKER: Are there any other questions?

13 (No response)

14 JUDGE BAKER: Let the record reflect that there
15 are none. Thank you very much, Mr. Schad.

16 (Whereupon, the witness was excused.)

17 JUDGE BAKER: It's now 7:12 and we shall recess
18 until 8:30 -- (inaudible).

19 Mr. Beshore, you have one more witness?

20 MR. BESHORE: Yes, I do. Mr. Gallagher.

21 JUDGE BAKER: (Inaudible).

22 MR. BESHORE: Yes.

23 JUDGE BAKER: All right. Then -- (inaudible).

24 MR. BESHORE: I would assume it would lead to

1 any other -- non-proponent testimony with respect to
2 Proposal 7 which --

3 JUDGE BAKER: (Inaudible)

4 MR. BESHORE: -- maybe there won't be any and
5 then we could move to the other proposals.

6 JUDGE BAKER: Very well. (Inaudible) -- going
7 to be able to take up the rest of these proposals.

8 (Laughter)

9 MR. ENGLISH: Another month.

10 MR. BESHORE: I think we could -- perhaps we
11 could just bypass the opposition to Proposal 7 --

12 MR. ENGLISH: Or turn down Proposal 7.

13 JUDGE BAKER: All right. (Inaudible).

14 (Laughter)

15 JUDGE BAKER: (Inaudible) -- witness and --
16 (inaudible) -- any other testimony on Proposal 7. Again,
17 I think -- (inaudible) -- Proposals 1, 2, 3, 4, 5.

18 MR. ENGLISH: That's fine, Your Honor. I -- I
19 guess I'm just wondering in advance, given the term, I
20 think -- (inaudible) -- get done on Friday. Whether it
21 makes sense to plan in advance to go even a little later
22 tomorrow than seven -- than 10 after seven, say to eight
23 or 8:30 to try to push everybody. My experience was the
24 Thursday session comes and we go all day, it tends to make

1 sure we get done on Friday.

2 And so I guess I would advocate planning our
3 schedule tomorrow being even lunch a little later so that
4 people won't get -- aren't going to be hungry and then
5 pushing at least until, say, 8:30 tomorrow if we could.

6 SPEAKER: Can we start at eight?

7 MR. ENGLISH: I can start at eight.

8 SPEAKER: What's the witness schedule for
9 tomorrow?

10 MR. ENGLISH: We've got -- we've got a number.

11 SPEAKER: What's the order?

12 MR. ENGLISH: I'm not sure. We'll discuss that
13 this evening. There's -- there's plenty of witnesses.

14 MR. BESHORE: We -- Mr. Gallagher would be
15 prepared to go, you know, at 8:00 if that were the
16 convenience of everyone.

17 JUDGE BAKER: Is there any objection to
18 starting at 8:00?

19 (No response)

20 JUDGE BAKER: No objection. We shall reconvene
21 tomorrow at 8 a.m. And we shall -- (inaudible) --

22 MR. ENGLISH: Thank you, thank you.

23 (Whereupon, at 7:20 p.m., on September 11,
24 2002, the proceedings were adjourned, to reconvene at 8:00

1 a.m., on September 12, 2002.)

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