

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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

VOLUME IV  
CORRECTED on 3/3/04

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Legal Video

CONTRACTOR (NOT PRESENT):

R & S TYPING SERVICE

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## E X H I B I T S

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Exhibit No. 28	994	994
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## P R O C E E D I N G S

8:30 a.m.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. YALE: Can you hear me? Better? All right.  
14 Benjamin F. Yale, Yale Law Office, P.O. Box 100,  
15 Waynesfield, Ohio 45896. I'm here on behalf of Etteline  
16 Dairy (phon.), Mallory's Dairy (phon.), and Smith Brothers  
17 Farms.

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

20 MR. RICCIARDI: Good morning. I'm Al Ricciardi.  
21 It's R-i-c-c-i-a-r-d-i, 1440 East Missouri Avenue in  
22 Phoenix. The zip is 85014, and I represent Sarah Farms.

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

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

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

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

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

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

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

1 that respect.

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

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

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

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

20 Yes, Mr. Cherry? You objecting?

21 MR. CHERRY: 28 and 29? No.

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

23 MR. CHERRY: Right.

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

1 MR. UNIDENTIFIED: 28 is the notice?

2 THE COURT: Huh?

3 MR. UNIDENTIFIED: 28 is the notice?

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

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

9 THE COURT: Thanks, Mr. Cherry.

10 MR. CHERRY: You're welcome.

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

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

1 Albright.

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

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

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

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

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



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

6           Q.    2003?

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

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

15          A.    Yes, they are.

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

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

22                (Exhibit 30 is marked.)

23                BY MS. DESKINS:

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

1 A. No, I don't.

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

4 A. Correct.

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

6 A. Yes, I have.

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

8 A. Yes, it is.

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

11 A. It was prepared under my supervision.

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

14 THE COURT: Any objection?

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

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

20 MR. UNIDENTIFIED: Okay.

21 THE COURT: Any objection? Okay.

22 MR. UNIDENTIFIED: I have no objection.

23 THE COURT: Okay.

24 MR. UNIDENTIFIED: I have questions

25 (indiscernible).

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

3 (Exhibit 30 is received.)

4 BY MS. DESKINS:

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

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

12 A. Yes, I was.

13 (Exhibit No. 31 is marked)

14 BY MS. DESKINS:

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

17 A. Yes, it was.

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

19 A. Yes, it is.

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

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

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

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

5 THE COURT: Any objection to that?

6 (No response)

7 THE COURT: Exhibit 31 is admitted into evidence.

8 (Exhibit 31 is received.)

9 BY MS. DESKINS:

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

13 A. Yes, I do.

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

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

21 Q. Okay.

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

1 there.

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

4 A. It should be removed.

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

6 A. It was a similar question on Exhibit 6, page six.  
7 Again, Anderson Dairy appears under the heading, "Partially  
8 Regulated Distributing Plants." That is also an error, and  
9 it should be removed.

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

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

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

19 A. Correct.

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

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

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

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

7 A. Yes, they are.

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

11 A. No, it is still incorrect.

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

14 A. Yes, it is.

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

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

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

25 A. Not that I'm aware of.

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

3 THE COURT: Okay. All right. Who has questions?  
4 If you will, stand, Mr. Yale.

5 BY MR. YALE:

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

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

11 A. They do not.

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

13 THE COURT: Any other questions for Mr. Mykrantz?  
14 (No response)

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

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

19 MR. UNIDENTIFIED: Yes. (Indiscernible)

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

22 ELVIN HOLLON

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

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

1 then spell your name for the record.

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

5 THE COURT: That's good.

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

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

10 MR. BESHORE: Marvin Beshore.

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

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

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

1 both marked.

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

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

4 THE COURT: Okay.

5 BY MR. BESHORE:

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

9 A. Correct.

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

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

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

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

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

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

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

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

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

21 BY MR. BESHORE:

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

1           A.    That is correct.

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

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

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

17          A.    That's correct.

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

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

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

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

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

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

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

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

1 administrator.

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

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

12           A.    That is correct.

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

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

16           THE COURT:  Okay.

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

19 BY MR. BESHORE:

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

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

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

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

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

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

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

14 Q. Okay. And the columns on --

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

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

21 A. That's correct.

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

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

1 designation. The second block, which is two columns talks  
2 -- starts out, if you have a ten million pound producer  
3 milk and the whole table, you know, drives off percentages.  
4 So you could have one pound or 100 million pounds. I've  
5 just simply used ten million pounds for ease of  
6 calculation, but you would get the same per hundredweight  
7 result.

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

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

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

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

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

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

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

10 The remainder would be the surplus that would  
11 need to be marketed, sold, balanced, where we're trying to  
12 configure the worst alternative under regulated prices. So  
13 there'd be that many pounds of the lowest alternative left.  
14 The values come from the skim fat and butter fat values as  
15 published by the market administrator, multiplied out.

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

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

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

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

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

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

20 A. Correct.

21 Q. Okay. Now, --

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

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

3 A. That's correct.

4 Q. And --

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

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

10 A. That is correct.

11 Q. -- class one utilization?

12 A. That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14           Q.    Okay.

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

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

25           The average monthly class one volume for the

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

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

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

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

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

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

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

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

7 A. 14,849,743.

8 Q. Thank you.

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

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

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

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

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

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

8 Q. You mean the noticed exhibits --

9 A. Yes.

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

11 A. At the end? Okay.

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

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

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

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

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

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

19 MR. BIRDIE: Your Honor?

20 THE COURT: Mr. Birdie?

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

25 THE COURT: Fine.

1           THE WITNESS: "The issue of large, unregulated  
2 producer/handlers is very serious. If not corrected, it  
3 has the potential to completely undermine the federal order  
4 system. Large, unregulated producer/handlers have a  
5 distinct, competitive advantage that they will naturally  
6 move to exploit unless the provisions we offer are adopted.  
7 Regulated handlers will not be able to maintain market  
8 share, and will force suppliers to reduce prices in order  
9 to maintain the viability of their operations.

10           "The problems we will outline are not an industry  
11 secret. The expansion of this loophole is growing rapidly.  
12 In some cases, retailers have become sophisticated enough  
13 to understand the advantage, and seem to be recruiting  
14 producer/handlers for supply. Just as in the initial  
15 hearing in Phoenix, there are likely some individual in  
16 this room today who are here to get schooled on how to  
17 exploit these provisions and to learn whether this loophole  
18 will be there in the future for them to exploit.

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

1 nature of the provisions are causing disorderly marketing.

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

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

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

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

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

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

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

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

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

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

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

1 handlers.

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

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

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

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

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

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

1 MR. UNIDENTIFIED: 33.

2 THE WITNESS: 33.

3 THE COURT: Yeah, 33 was the tables.

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

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

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

25 "Milk marketing and pricing is a process of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 "The order of allocation for provisions attempt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 during the month.' This language is --

2 MR. UNIDENTIFIED: I --

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

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

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

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

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

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

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

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

1 section.

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

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

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

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

3 "Paragraph (C), cancellation. The designation as  
4 a producer/handler shall be canceled upon determination by  
5 the market administrator that any of the requirements of  
6 paragraph (A)(1) through" -- scratch '(5),' insert '(6),' "  
7 of this section are not" -- scratch 'continuing to be,'  
8 "met, or under any of the conditions described in  
9 paragraphs (C)(1), (2) or (3) of this section.

10 Cancellation of a producer/handler status, pursuant to this  
11 paragraph shall be effective on the first day of the  
12 month," -- scratch the word, 'following the month' -- "in  
13 which the" -- scratch the words 'requirements were not met  
14 or the conditions for cancellation occurred,' insert the  
15 words 'conditions were not met.'

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

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

1 enforced from that point and not a later point.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 BY MR. BESHORE:

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

18 A. That is correct.

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

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

24 Q. The date is for 2001.

25 A. 2001.

1 Q. May 2001.

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

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

6 A. That's correct.

7 Q. -- market information page?

8 A. Correct.

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

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

17 Q. 38 and 39, I think.

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

21 Q. Okay.

22 A. -- so this

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

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

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

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

5 THE COURT: Okay. Any objection?

6 (No response)

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

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

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

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

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

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

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

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

24 THE COURT: And we will take a break till 10:30.  
25 (Off the record and reconvened.)

1 THE COURT: On the record.

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

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

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

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

10 BY MR. MARSHALL:

11 Q. Good morning, Elvin.

12 A. Good morning, Doug.

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

16 A. Correct.

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

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

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

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

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

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

14          A.     Correct.

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

18          A.     Yes.

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

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

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

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

7 A. That is correct.

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

10 A. No, they are not.

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

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

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

21 A. That is correct.

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

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

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

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

7 A. Yes, that is correct.

8 Q. Is that --

9 A. Yes -- yes.

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

19 A. Would you point to the page again?

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

21 A. Okay.

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

23 A. Okay.

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

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

4 A. Okay.

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

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

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

13 A. Thank you.

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

16 BY MR. YALE:

17 Q. Good morning.

18 A. Good morning, Ben.

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

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

1 of the investment in processing in Order 124?

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

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

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

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

10 A. Yes.

11 Q. -- and provide capital?

12 A. Yes.

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

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

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

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

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

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

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

4 A. Yes.

5 Q. We're talking about 124?

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

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

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

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

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

16 A. I just have the number.

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

19 A. Exhibit 33, Table G.

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

22 A. That would be proprietary information.

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

25 A. I do not know.

1 Q. Does Wilcox Dairy compete with Etteline Dairy?

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

4 Q. And the same situation with Smith Farms?

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

7 Q. And what about Mallory's?

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

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

12 A. No, I'm not.

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

15 A. To my knowledge, there is not.

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

17 A. To my knowledge, they are not.

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

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

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

25 A. 30/40.

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

4 A. My birthday was yesterday so --

5 Q. Huh?

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

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

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

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

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

19 A. Correct.

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

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

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

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

17 A. Not off the top of my head.

18 Q. Is it NDA --

19 A. It is not NDA.

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

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

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

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

6 A. I'm aware of --

7 Q. And what is Dairy Marketing Services?

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

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

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

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

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

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

1 Does DFA supply any milk to the Wilcox plants?

2 A. Yes.

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

5 A. No.

6 Q. Who else supplies that milk.

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

9 Q. Are there independents?

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

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

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

16 Q. You have no supplies to Safeway?

17 A. Not to my knowledge.

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

20 A. I do not know.

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

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

1 Q. Is it more than 25 percent?

2 A. In Order 124?

3 Q. Yes.

4 A. No.

5 Q. Is it more than 15 percent?

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

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

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

12 Q. What is National Dairy holdings?

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

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

24 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

5           A.    Yes.

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

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

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

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

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

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

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

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

6 A. I have not.

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

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

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

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

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

1 in the northwest?

2 A. No.

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

6 A. Yes.

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

9 A. Yes.

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

13 A. No, they will not.

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

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

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

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

22 Q. Retail or however they market.

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

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

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

6 A. All meaning?

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

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

11 Q. On every, single interaction they had?

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

14 Q. -- was it not?

15 A. What"

16 Q. Anecdotal, was it not?

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

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

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

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

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

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

19 A. Correct.

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

24 A. No.

25 Q. And --

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

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

8           A.    I do not know.

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

11          A.    I do.

12          Q.    And what is a skew?

13          A.    Like a product code identification number.

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

17          A.    I do not.

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

20          A.    Come again.

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

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

1 producer/handlers.

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

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

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

7 A. Oh. Okay.

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

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

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

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

15 A. In general, I am.

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

18 A. No.

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

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

23 Q. Okay. And --

24 A. They're supposed to anyway.

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

1 home consumption, I think, is the --

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

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

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

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

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

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

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

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

5 A. Correct.

6 Q. -- right?

7 A. That's correct.

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

11 A. Yes.

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

13 A. Correct.

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

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

19 Q. Okay.

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

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

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

1 be all.

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

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

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

11 A. Yes.

12 Q. -- right? Okay.

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

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

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

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

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

25 A. Uh-huh.

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

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

4 Q. Okay.

5 A. -- and --

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

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

11 Q. More definition in terms of what?

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

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

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

24 Q. And then --

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

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

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

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

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

16 A. Are they like -- meaning?

17 Q. Huh?

18 A. Meaning?

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

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

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

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

8 A. Yes.

9 Q. All right.

10 A. Yes.

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

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

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

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

1 right?

2 A. That's correct.

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

5 A. Correct.

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

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

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

13 A. Yes, it has.

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

18 A. It has.

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

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

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

1 many?

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

4 Q. How many in 124?

5 A. I do not know.

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

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

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

13 A. Meaning --

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

16 A. Yes.

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

19 A. Large stores?

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

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

25 Q. There were certainly retailers in this market?

1 A. Yeah.

2 Q. Large retails in this market?

3 A. Yes -- well, yes.

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

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

8 Q. Okay.

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

16 Q. Arbuthnot.

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

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

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

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

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

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

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

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

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

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

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

10 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

20 BY MR. YALE:

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

23 A. I do not --

24 Q. -- in the record?

25 A. I don't know.

1 Q. Did you hear it?

2 A. I don't know.

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

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

7 Q. Okay. What about 2003?

8 A. Don't have it.

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

13 A. No.

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

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

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

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

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

1 record that identifies for Order 124 --

2 A. Uh-huh.

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

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

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

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

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

17 A. Yes.

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

21 A. Come again.

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

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

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

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

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

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

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

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

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

1 that he and his staff could come up with was that the  
2 competitive bidder was not having to pay regulated prices.  
3 Again, I think --

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

6 A. Well, I think you have to go -- again, go back to  
7 the -- you know, people have the day-to-day, hands-on  
8 business, and you know, you have to assess the weight of  
9 their knowledge of market conditions and the knowledge of,  
10 you know, the intimacies and intricacies of their business.  
11 And I guess you can draw the conclusion that they just made  
12 it up as they went along, or they had a pretty good  
13 knowledge of their business, and that was their assessment  
14 of it.

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

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

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

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

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

25 A. I do not know.

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

4 A. Come again.

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

7 A. Uh-huh.

8 Q. You understand what I mean by that?

9 A. Yes.

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

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

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

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

1 pounds?

2 Q. I'm talking about a customer.

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

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

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

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

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

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

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

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

19 A. Correct.

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

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

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

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

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

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

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

15 Q. Yeah.

16 A. -- you're asking?

17 Q. Yes.

18 A. Yes.

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

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

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

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

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

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

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

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

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

1 enough.

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

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

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

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

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

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

18 A. I am not.

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

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

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

1           A.    I don't know of any.

2           Q.    Like to take your -- just kind of go through  
3 another question on one of your statements you made. At  
4 page three of your testimony, you make this comment about  
5 multiple retail accounts. I think I got that right, or is  
6 that point three? That may be point three of your summary.  
7 I'm sorry. On page four. Is it your position that  
8 producer/handlers should not have more than one account?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Q. Door-to-door sales.

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

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

12 A. I do not. I do not.

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

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

20 A. Correct.

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

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

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

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

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

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

7           Q.    Of the regulated?

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

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

12          A.    4.7 million.

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

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

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

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

1 producer --

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

4 A. Yes.

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

7 A. Yes.

8 Q. The market works.

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

12 Q. So --

13 A. So that's our point here.

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

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

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

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

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

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

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

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

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

16          (Pause)

17 BY MR. YALE:

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

19          A.    Okay.

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

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

1 they will negate that advantage in some way?

2 A. Yes.

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

5 A. Yes.

6 Q. -- right?

7 A. Yes.

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

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

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

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

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

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

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

9 Q. What percentage in Pacific Northwest?

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

13 Q. What about New Mexico as an example?

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

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

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

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

3 A. Yes, I am.

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

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

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

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

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

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

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

18 (Pause)

19 BY MR. YALE:

20 Q. You don't know?

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

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

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

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

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

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

10 Q. In what markets?

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

13 Q. And how big is that market?

14 A. How big is?

15 Q. How big is that PD?

16 A. Oh, maybe 200 cows.

17 Q. Where's it located?

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

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

24 A. I don't.

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

1 is something that creates disorderly marketing?

2 A. Probably not on its own right.

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

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

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

17 A. That --

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

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

1 you know, many pages of detail on that.

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

4 A. I'm not aware of that.

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

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

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

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

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

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

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

24 MR. UNIDENTIFIED: 33.

25 THE WITNESS: 33.

1 BY MR. YALE:

2 Q. 33. Thank you.

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

6 A. Okay.

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

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

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

13 A. Table B?

14 Q. Yes.

15 A. Okay. Okay.

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

18 A. Yes.

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

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

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

1           A.    Well, go back, for example, to Table -- and I  
2 would say that, you know, that was just a random number.  I  
3 could've picked 40; I could've picked 20.  So I mean, my --  
4 the 30 million wasn't designed to be anything more than a  
5 number out of the air to show the number of loads per day.  
6 But it just so happens that I could go back to Table, I  
7 think it's, G, be the very last page.  And Table G is the  
8 recap of 7A plants, data all federal orders, May of 2003.  
9 You can see that the largest one third grouping of plants  
10 in Federal Order 1 is 31,549,168 plants to -- so there is a  
11 block of plants, and I think those particular plants are in  
12 New York City, who are 30 million pounds per day, plus.

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

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

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

1 concept really applies to the remaining ones on --

2 A. It does.

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

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

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

10 A. The information there I did discuss with some  
11 folks in Order 131, and in Order 124 we buy milk  
12 occasionally from producer/handlers in the marketplace.  
13 Can't say that we bought from every, single one, but we've  
14 bought from many, and actually our -- I can only speak to  
15 our, you know, purchasing arrangements, but that's what we  
16 pay, the lower class three or four.

17 Q. You don't discount it --

18 A. Only to the extent of the promotion assessment,  
19 because the -- that's a screwy law, and we're -- you guys  
20 listen to that --

21 Q. (Indiscernible)

22 A. That's a screwy law, and we have to account to  
23 the promotion funds for the monies we buy -- milk we buy  
24 from producer/handlers that we discount. That's what we  
25 do, we discount it by the --

1 Q. You don't discount it by a \$1 or \$1.50 or \$2?

2 A. We do not, and I'm not saying that others may or  
3 may not do that. The -- primarily the uses that we  
4 purchase it for, we pay that amount. There are also some  
5 cases where producer/handlers sell their surplus into  
6 California, and so I did take a look at that as a  
7 possibility, and look at 40 plus months and the Federal  
8 Order values were the lower options were 25 of those 43  
9 months. And again, this would be the lower -- lowest  
10 value, so you would assume, you know, any rational business  
11 would try to sell for higher -- a higher value than this if  
12 they could.

13 Q. Which comes back -- I think right. A rational  
14 business wants to sell at the highest price, right?

15 A. That's correct.

16 Q. So if a producer/handler is out there, and they  
17 -- and there's a handler that are 7A plants, and they pay  
18 the minimum price, I think the assumption is, the  
19 producer/handler's going to know approximately what that  
20 price is, right, with that minimum handler (phon.). So  
21 he's going to know what that cost is. Why would a  
22 producer/handler sell for anything significantly less than  
23 that?

24 A. I suppose to gain market share. There appeared  
25 to be ample evidence that there were lots of sales in the

1 market at less than, you know, what the regulated handler  
2 could --

3 Q. On a long term basis?

4 A. There appeared to be evidence again that long-  
5 term basis --

6 Q. Is that rational?

7 A. If you had -- you have to know the full range of  
8 costs, and it appears that when you don't have to account  
9 to the pool for the minimum class prices, you can do that.  
10 That I think is our chief concern. Seems like pretty  
11 rational if I don't have to put that cost into my equation,  
12 and I can discount my product and sell more. That's a  
13 pretty rational decision.

14 Q. But also you wouldn't have to sell them as cheap  
15 as you're suggesting either, right?

16 A. It appears again, from, you know, evidence that's  
17 been entered and people that we've talked to that many  
18 producer/handlers' price lists bounces up and down with the  
19 Federal Order, but at a value that approximates this  
20 difference. That's also probably a pretty good business  
21 strategy because the price moves up and down each month.

22 Q. Now, I want to -- back here on this Exhibit C.  
23 If, in fact, their actual costs were less than class, that  
24 would change that blend equation, right?

25 A. You mean, if their surplus return was something

1 less than class --

2 Q. Yes.

3 A. -- three or class four?

4 Yes, it would.

5 Q. And nothing in your tables reflect that, right?

6 A. It does not in my statement or in my testimony.

7 I did indicate that also this -- these tables do not  
8 include any premium values that regulated handler may pay  
9 for balancing, and that would be some offset to the values  
10 that you're talking about.

11 Q. Then I want to move on to your table to get some  
12 clarifying questions (phon.) that we had. You mentioned  
13 the number of 101 producer/handlers. Is that the sum of  
14 all the numbers here; is that adding in the -- you estimate  
15 of what the situation is in these --

16 A. No, that's the sum of all those on the page. And  
17 then -- in cases of, for example, in Order 5 where they did  
18 not give me a number, but you can go to their published,  
19 you know, data, and they -- once a year, there's a list of  
20 names. And so I was able to get those numbers, and the  
21 same with Order 33 for whatever their reason --

22 Q. Right. But does that 101 reflect --

23 A. No.

24 Q. So it's more than that?

25 A. It's more than 101, and I indicated what that

1 number was. I think it's 17 more.

2 Q. Okay. And so the rest of these numbers are the  
3 same way; is that correct?

4 A. With regard to restricted and non-restricted?

5 Q. Yeah, they don't factor into your computation?

6 A. That is correct, and in no other case, in terms  
7 of the number of producers/handlers, I added 17 more. In  
8 no other case did I make any other additions or  
9 subtractions.

10 Q. Do you know if Braums (phon.) was pooled on Order  
11 32 in May, or was there a producer/handler --

12 A. I think Mr. DuPey (phon.) testified in Phoenix  
13 that Braums had not been a pooled handler for well -- well,  
14 I think for a number of years.

15 Q. Okay. Why we were talking about surplus (phon.),  
16 I want to move on to something else.

17 Is Alaska part of the marketing area of Order  
18 124?

19 A. I don't think so.

20 Q. Your proposal would regulate sales from a PD to  
21 Alaska?

22 A. Yes.

23 Q. It went to a bottler?

24 A. Would.

25 Q. Even though that bottler's not sharing its

1 proceeds with any other, and it has not minimum prices?

2 A. I think our -- you know, the language in our  
3 proposal says if you have Class 1 sales in an area, it  
4 counts towards your three million. Certainly if a  
5 producer/handler paid regulated prices on their sales that  
6 ultimately ended up in Alaska, those values would get into  
7 the pool.

8 Q. In other words --

9 A. So I think -- I think there was testimony from a  
10 regulated handler. I think Mr. Vanderpool, part of his  
11 testimony said that he used to have sales in Alaska that  
12 were pooled and lost that business, I think, to a  
13 producer/distributor over a price concern.

14 Q. I want to move to another topic. You talked  
15 about your experience in marketing milk, and bottlers would  
16 call up and say, hey, I just got a call from my customer,  
17 and they're getting an offer to buy, sell milk or whatever  
18 at some other price, and I need help. Isn't it true, Mr.  
19 Hollon, that that's just kind of the game that's being  
20 played by buyers all the time now --

21 A. Absolutely. This is -- so it's part of, you  
22 know, our job to try to interrogate those claims and see if  
23 they're reasonable to the best extent that we can.

24 Q. And, you know, the other part of it is that with  
25 the producer/handler, you can't purchase more than 150,000

1 pounds from a, you know, from other sources, right?

2 A. That's correct.

3 Q. So there's a -- the order has imposed a limit on  
4 how much milk they can sell as a producer/handler, right,  
5 because they can only sell --

6 A. They can sell all the milk they can --

7 Q. -- produce?

8 A. They can sell all the milk that they can produce,  
9 --

10 Q. All they can produce, but you can't turn that  
11 production over --

12 (Tape changed)

13 BY MR. YALE:

14 Q. -- the point that comes up that doesn't, the fact  
15 that a -- the fact that they are a limited in their size.  
16 Shouldn't that factor into that decision of how viable that  
17 they're going to be able to supply all the milk at those  
18 prices?

19 A. I think our -- you know, like I said, our answer  
20 to that would be, up to three million pounds and have quite  
21 a bit of latitude. Over three million pounds, they should  
22 have the same latitude or regulator exposure that every  
23 other handler has.

24 Q. Q. Now, at page seven you talk about a  
25 temporary loss leader. It's true, is it not, Mr. Hollon,

1 that there are grocery chains and other retails that will  
2 consistently sell milk below cost as a permanent loss  
3 leader?

4 A. Yes.

5 Q. And would you -- you would agree, would you not,  
6 that those prices should -- would not be one to reflect  
7 what milk is actually being sold by processor to those  
8 stores, because you don't know how much of a hit that  
9 store's willing to take on their milk, right?

10 A. For the most part, I'll agree with you, not 100  
11 percent, but for the most part, I agree with your  
12 assessment.

13 Q. Now, you have --

14 A. I would add, Mr. Yale, that in most cases that  
15 retail strategy is well-known in the marketplace, and so in  
16 the Columbus market, if there's five different retailers,  
17 most of the retailers know, you know, have a good idea of  
18 the marketing strategy of their competitors. And so if it  
19 changes, then that's where this question would come in.

20 If somebody had been a, for example, another  
21 retail strategist, same price every day, you know, I think  
22 HEB Grocers in Texas, for example, that's part of their  
23 marketing strategy. Gallon of milk is going to cost \$3 or  
24 \$2, 362 days a year. So if all of a sudden, gallons of  
25 milk in HEB started costing a \$1, then Kroger would say,

1 well, something has changed here. So then they would begin  
2 this process of interrogation.

3 Q. You mentioned on page seven that you had a  
4 contract with Institutional Resources, Incorporated, right?

5 A. Yes.

6 Q. Did they prepare a report?

7 A. They did.

8 Q. Is that report an exhibit in this hearing?

9 A. Conclusions from that report are. We contracting  
10 with them to do some research for us, and they provided us  
11 some sales and, --

12 Q. Is that --

13 A. -- sales information --

14 Q. Is that --

15 A. -- on their store database.

16 Q. Is anybody from that -- that prepared that report  
17 going to be available for examination?

18 A. They will not.

19 Q. And will that report itself be made available as  
20 an exhibit?

21 A. Only to the extent of what's in Exhibit -- oh,  
22 no, only -- what's in our -- what's in our testimony. We  
23 reported on the smallest universe, the smallest 25 percent  
24 of their store base and the remaining 75 percent of their  
25 store base, what -- how many gallons of milk those stores

1 sold per week.

2 Q. As I understand it, that this -- this study  
3 rejected all of the Wal-Mart?

4 A. Rejected?

5 Q. Well, I mean, it doesn't include -- I shouldn't  
6 say "rejected." It doesn't include the Wal-Mart sales?

7 A. It does not.

8 Q. Does not include Sam's Club?

9 A. It does not.

10 Q. Cosco?

11 A. Does not -- oh, well, I don't know specifically  
12 about Cosco. Can't tell you.

13 Q. And it doesn't include Starbucks?

14 A. I don't think so.

15 Q. Do you know if you ever heard what the percentage  
16 of retail milk is sold through Wal-Mart and other  
17 superstores nation-wide today?

18 A. Not the substantial percent.

19 Q. You had -- have you heard -- you don't know any  
20 number?

21 A. No. One less glass of milk.

22 Q. Pardon?

23 A. The kitchen just dropped a glass, so it's one  
24 less glass of milk.

25 Q. Oh. Now, this study was done nation-wide?

1 A. Yes, it reflected their store base nation-wide.

2 Q. So it doesn't reflect the store base in Order  
3 124?

4 A. It does not.

5 Q. Are you aware of -- you're talking about this  
6 bottom 25 -- smallest 25 percent. First of all, that  
7 doesn't include door-to-door sales, right?

8 A. No, it does not.

9 Q. All right. And of this smallest 25 percent, do  
10 you know how many stores are in Order 124 that fit that  
11 standard?

12 A. No.

13 Q. Do you know --

14 A. We asked them to do a nation-wide cut of their  
15 data, and that's what -- that was the data that we asked  
16 for and we got.

17 Q. So if it were to show that the ratio for that  
18 smallest percentage was much higher, then your three  
19 million would have to be different in Order 124, right?

20 A. Uh-huh. That would be true. We portrayed it as  
21 a national average. We didn't attempt to portray it as  
22 just Order 131 or just Order 124.

23 Q. And this hearing for 120 -- this -- for 124 is --  
24 this isn't a national hearing, right?

25 A. It is not, but it does give the secretary an

1 indication of the ability of a various sized retailer --  
2 I'm sorry, various sizes of processor to service various  
3 sizes of retailers.

4 Q. On a national average, but not in Order 124?

5 A. On a national average, but would be typical --  
6 again, a national average would be typical of various  
7 segments of the country.

8 Q. And is an average size typical of producers  
9 nationwide? Is the nationwide average typical of the size  
10 of producers in the Pacific Northwest?

11 A. You mean is the average size --

12 Q. Of a producer nationwide average or size of  
13 producer, is that typical of the producer in the Pacific  
14 Northwest?

15 A. I would -- haven't looked, but I would guess that  
16 the Pacific Northwest producers are perhaps a little larger  
17 than the nation average, but I don't have a, you know, it  
18 wouldn't be too hard to go determine --

19 Q. It's a different market, right? The secretaries  
20 determine that the Pacific Northwest is a different market  
21 than the rest of the country, right?

22 A. Well, that's a different marketing order, and --

23 Q. Different marketing order, different marketing  
24 area --

25 A. There are different characteristics, but

1 nonethless, of a pool of retailers, this is an impact in a  
2 -- a reason to determine the three million pound threshold.  
3 One of the reasons we offer is the ability to impact retail  
4 markets by processors of a certain size.

5 Q. So to summarize it, do you propose to the  
6 secretary to change and impose a limit in Order 124 based  
7 upon a national average, that you do not know whether or  
8 not it actually represent what's available in Order 124,  
9 right?

10 A. Correct.

11 Q. And I take it by your knowledge of not knowing  
12 what's here, you cannot indicate how many -- I think down  
13 here you made a comment, if I can find the term. You have  
14 the statement right in the middle of the paragraph there on  
15 page 80 -- you have a statement that says, "The stores that  
16 make up this subset could easily be a metropolitan, retail  
17 grocery chain with a reasonable market share."

18 A. Yep. Yes.

19 Q. What's a reasonable market share?

20 A. That statement was predicated on, you know,  
21 knowledge of markets. For example, where I live in Kansas  
22 City, the Cosentino's Price Choppers chain has about -- has  
23 nine to ten stores. If you go -- they advertise in the  
24 papers. They're well-known on media outlets. If you, you  
25 know, if people shop -- so they're not regional. They're

1 not, you know, national. They're not in ten different  
2 states, but in the Kansas City market, they have a market  
3 share that may be, you know, five to ten percent.

4 Q. So we establish a three million cap in Order 124  
5 because there's eight or nine stores of a chain in Kansas  
6 City?

7 A. No, you would establish a cap of three million  
8 because that size can service a retail chain of that size  
9 that could have an impact in the marketplace. And that  
10 retail chain could go to -- and force other processors to  
11 request a reduction in price or seek a producer/handler  
12 supply.

13 Q. How many metropolitan retail grocery chains of  
14 that reasonable market share exists in the Pacific  
15 Northwest --

16 A. I do not know.

17 THE COURT: Mr. Yale, just for scheduling  
18 purposes, do you have a sense of how much longer your cross  
19 is going to be?

20 MR. YALE: Well, I'm not done. I mean, I -- and  
21 it's going to be a little while longer, not nearly as much  
22 as --

23 THE COURT: I'm thinking that's -- it's --

24 MR. YALE: I mean, this would be good -- it's  
25 fine. I'm at a break.

1 THE COURT: Okay. Let's -- it's six minutes  
2 after 12:00 by my watch. Why don't we just reconvene at  
3 1:15; would that work out okay?

4 MR. UNIDENTIFIED: Yes.

5 THE COURT: We'll be back at 1:15. Off the  
6 record.

7 (Off the record and reconvened.)

8 THE COURT: On the record.

9 Mr. Yale, you can get back in your position  
10 behind the rostrum over there, and we can go on.

11 MR. YALE: Very good. Thank you, Your Honor.

12 BY MR. YALE:

13 Q. Mr. Hollon, I -- we were kind of talking about  
14 this metropolitan retail grocery chains. I want to take  
15 you -- you know, you indicated that the size of three  
16 million could absorb or handle, I guess, you know, this  
17 reasonably sized metropolitan retail chain. I think that's  
18 your testimony, right?

19 A. Yes.

20 Q. Now, would that be -- if all their milk went to  
21 there, they wouldn't have any other markets; they'd be  
22 relying strictly on that market?

23 A. Yes, in -- for the purposes of the analogy, yes,  
24 the entirety of 2.5 trailer loads per day would go to a  
25 particular customer that could effect that.

1 Q. And then if that grocery chain added another  
2 store, then they would -- or two, then they would be put  
3 over the limit, and they would have to be fully regulated,  
4 or they'd lose that customer; is that right?

5 A. Unless they expanded, or if, in case of our  
6 proposal and went through, and they reached the three  
7 million pound threshold.

8 Q. That's my point. If they meet your three million  
9 pound threshold as part of the issue, --

10 A. Yep.

11 Q. -- and this -- they have a single store, they  
12 have all their eggs in one basket, which isn't a very good  
13 analogy for dairy, but we'll try it, --

14 A. A good point.

15 Q. Oh, there -- curds in the whey. I don't know.  
16 But if they have all of theirs with one customer, and that  
17 customer grows, then they lose the PD position, right?

18 A. Under the constraint -- the scenario you're  
19 setting up, yes. They would have to make a decision then  
20 to either become fully regulated and compete that way, or  
21 give up the customer, or diversify their sales based some  
22 other way.

23 Q. Now, this report you received, did it talk about  
24 any trends and the size of retail markets for milk?

25 A. No.

1 Q. Do you have knowledge of --

2 A. We did not ask them for that. We strictly asked  
3 them for, you know, sales by store size.

4 Q. Do you have any sense of whether the discounters,  
5 big box stores, club stores are getting a larger or smaller  
6 share of the bottled retail market?

7 A. That actually moves from market to market to  
8 market. The general trend is that the box stores have a  
9 bigger percentage of the market, but that's not true in  
10 every, single market. There's a report called the "Shelby  
11 Report," for example, that displays retail market share.  
12 There's a publication called Supermarket News that provides  
13 some data about a variety of commodities in -- it's not  
14 true that in every case the only person that's growing is a  
15 box store.

16 Q. Now, under your scenario, the box stores would  
17 not be available to a three million pound? The large  
18 discounters would not be available to this three million  
19 pound producer/handler? They wouldn't --

20 A. I'm not following that line of thinking.

21 Q. Well, I mean, are box stores -- are their sales  
22 in excess of the three million pounds per month?

23 A. I don't have any -- they were not in the data set  
24 from IRI. So I can't tell you, you know, exactly what  
25 their sales levels are, but I would say that a

1 producer/handler could certainly have a slice of the retail  
2 shelf space in a box store.

3 Q. Assuming that they only purchase for one store or  
4 two stores, and break it up, right? I mean, are you --  
5 you're not familiar with box store sales or Coscos or Sam's  
6 Club or anything in terms of dealing for dairy -- bottled  
7 dairy sales. Do you have any knowledge --

8 A. I don't do that line of business directly, but I  
9 mean, it is -- you know, most stores have one or two, or  
10 occasionally three different milk labels in their shelves.  
11 The stores I'm familiar with in Kansas City just as a  
12 consumer generally have two or three retail labels in their  
13 store.

14 Q. The -- you also testify in page eight that you  
15 rely on Carl Herbine's exhibits.

16 A. Yes.

17 Q. To the extent that his testimony is rejected by  
18 the secretary, would yours also be rejected on that issue?

19 A. Guess we'd have to ask the secretary that.

20 Q. Looking at page eight, you make this statement.  
21 "One rationale given for not regulating producers/handlers  
22 is that they have costs that absorb any potential gain for  
23 not paying regulated prices." Is that really what the  
24 rationale is that's being expressed?

25 A. As I have looked in other decisions, that line of

1 thinking has been expressed, not the sole -- you know,  
2 there would've been more than one reason for denying other  
3 proposals and other hearings to regulate producer/handlers.  
4 That's been one of the reasons.

5 Q. But isn't it really saying that the "advantage"  
6 between the class one and the uniform price isn't as great  
7 as you would say or others, because there are some other  
8 costs that would influence that number and make it narrower  
9 number? It's not a policy justification for the exemption,  
10 it's just that the statement that they have this advantage  
11 isn't accurate; isn't that really what's being said?

12 A. I don't think I would characterize it that way.

13 Q. And also you talked repeatedly through the --  
14 your testimony about the idea that the producer/handlers  
15 need this exemption to compete, and is it your  
16 understanding that the exemption is created for the  
17 purposes allowing them to compete, that that's its  
18 fundamental policy rationale?

19 A. Need to rephrase your question.

20 Q. Is it the department's policy -- is the policy  
21 that drives the producer/handler exemption because the  
22 department desires the producer/handlers be able to  
23 compete?

24 A. I'm not sure I can answer that question directly.  
25 In some of the historical data that you read, you come

1 across, you know, a variety of reasons for why the  
2 exemption is in place. You know, one of them, like,  
3 clearly in the early days was that of sheer volume, that  
4 there were quite a large number of producer/handlers that  
5 were small, did not appear to have an impact on the  
6 marketplace. The cost of regulating them would be greater  
7 than cost of gain.

8           There was actually a cap put on. You asked me  
9 that earlier, and I'd forgotten about that, but there was a  
10 cap put on producer/handlers by size. I think it was in  
11 the Kansas City market of 500 pounds per day, I think.  
12 Perhaps it was 500 pounds per month, but --

13           Q. Well, when was that?

14           A. In the '50s, but there was a historical precedent  
15 for cap, and there was talk about -- in subsequent hearing  
16 records, some in this market, some in the Texas market  
17 where there was talks about -- there was a discussion about  
18 advantages that producer/handlers had in the retail -- in  
19 the competitive marketplace that were absorbed by other  
20 costs so that shouldn't be a reason to change the  
21 exemption.

22           Q. But the argument that if producer/handlers were  
23 small when the orders were created, also applied that coops  
24 were small when the orders were created, right? Was there  
25 any coop in 1940 or 1950 that had producers in 47/48

1 states?

2 A. No. There were coops --

3 Q. Were there --

4 A. -- in 47 or 48.

5 Q. Huh?

6 A. There were coops --

7 Q. Oh, there were coops, right.

8 A. -- in 47 or 48 states.

9 Q. They were much smaller than they are today,  
10 right?

11 A. Yes.

12 Q. And what about plants? Were there plants that  
13 were located in, like, Dean Foods or something and covering  
14 virtually every federal order one way or another in a lot  
15 of the state orders?

16 A. There were some entities then that had pretty  
17 wide reaches, and none of them are around any more, but --

18 Q. Right.

19 A. -- there was Hawthorne Melody had a pretty wide  
20 reach, you know, multiple region. Sealtest had a wide,  
21 multi-reach region, Carnation --

22 Q. But not the percentage of the market that you see  
23 today?

24 A. I would say, probably no.

25 Q. And the size of producers themselves are much

1 bigger today than they were?

2 A. Correct. I agree.

3 Q. Now, the bottom of page nine, you say this seems  
4 -- you're talking about the idea the cost curve lens  
5 (phon.) of volume grows, and then you say, "This seems to  
6 describe the retail markets scenario in Order 31 and is the  
7 concern in Order 124 as well." And I just want to draw  
8 your attention, you use the word "concern." Does that mean  
9 you do not have any evidence that describes that scenario  
10 actually occurring in Order 124 at this point?

11 A. Again, the two witnesses that testified in  
12 Phoenix talked about their perception and meeting that  
13 competition in the marketplace, and that over their  
14 careers, their day-to-day business routines, they felt like  
15 that they were meeting more and more of it.

16 Q. In preparing your testimony, did you do any  
17 analysis of the risk a producer/handler, a business risk?  
18 You know what I mean by business risk, when, you know, a  
19 risk of loss of money in terms of not being able to be  
20 profitable in that terms, I mean?

21 A. I did not.

22 Q. Did you do any risk of producers?

23 A. I did not.

24 Q. Okay. Now, you also stated that -- you talked  
25 about that the -- you know, this idea of terminate the

1 orders and that the advantage of being a producer/handler  
2 would terminate. Is it your testimony that the only  
3 advantage of being a producer/handler is the existence of  
4 the class one blend differential?

5 A. You mean the dollar advantage --

6 Q. Right. Whatever the -- whatever you perceive the  
7 advantage to be.

8 A. Is that -- that is a key difference. I'm not  
9 sure if it's the only difference, but that is certainly a  
10 key difference.

11 Q. I mean, isn't it possible that the termination of  
12 the orders would create producer/handlers?

13 A. It may.

14 Q. Did you do any analysis or any economic study to  
15 look at that aspect?

16 A. I did not.

17 Q. Because isn't it true, Mr. Hollon, that the  
18 regulation of producer/handlers limits their growth and  
19 limits producers/handlers, and we experience that in the  
20 history of the federal orders?

21 A. I suppose if you were to measure like they were  
22 "X" then and there's "X" now, and there's less, so that  
23 must be the conclusion. But there are still a viable base  
24 -- it appears to be of producer/handlers, there are still  
25 producer/handlers seem to be growing.

1           The larger ones seem to be the one that's  
2 growing, they're -- in markets where I hear and have  
3 discussions, you know, with our marketing personnel that --  
4 on this particular issue, no one ever mentions the, you  
5 know, 100,000 pound, the most typical size, as being a  
6 competitive concern. It's, you know, in Order 1, you know,  
7 in Order 33 and Order 32, in Southwest Order and Order 131  
8 and Order 124, the mention is made of the larger than  
9 average size producer/handlers and the competitive issues  
10 that they bring. And those was where the business share  
11 seems to be growing.

12           Q.    And the only example you have is 131 where that  
13 growing has actually occurred?

14           A.    In terms of testimony in the record, yes. In  
15 terms of discussions with other either DFA persons or, you  
16 know, persons with job responsibilities concerned --  
17 comparable to mine, have discussions in Order 1 where there  
18 is a problem similar to what we've described with  
19 producer/handlers. Same in Order 33, a similar concern.  
20 Same in Order 32, a similar concern, and the same in Order  
21 126, a Texas order.

22           Q.    So at this point, that situation does not exist,  
23 right? It's --

24           A.    What situation does not exist?

25           Q.    The situation that they are being discussed do

1 not exist? The growth do not exist, they're being  
2 discussed? You're having discussions --

3 A. No, you're -- no, perhaps I didn't say it  
4 clearly, or you misunderstood. The -- there are problems  
5 with existing producer/handlers and their interaction in  
6 the day-to-day marketplace. There is a parallel concern  
7 that there are larger producers who are looking to see if  
8 this exemption is going to remain in place, and if it does,  
9 then they are considering doing the same thing.

10 Q. All right. And have you identified who those  
11 producers are?

12 A. We've had discussions. I told you earlier this  
13 morning, we've had discussions with some of those  
14 producers. They have, you know, come into the office and  
15 said, what about if I do this, what would happen?

16 Q. But are you aware of any ground being broken on a  
17 new plant?

18 A. No, but that doesn't necessarily mean that  
19 somebody wouldn't like to break some.

20 Q. Now -- so we don't know -- the market conditions  
21 that exist today, there is not this producer/handler  
22 growing, is this being discussed?

23 A. No, there are existing producer/handlers,  
24 business is impacting sales in markets today, and at the  
25 same time, there are people who are looking at that as a

1 business model and saying, gee, I wonder if I want to go  
2 and do that business model?

3 Q. But they -- the ones that are impacting today  
4 were impacting at the same level three, five, and ten years  
5 ago?

6 A. No, that's not the case. They weren't at the  
7 same level three, five, and ten years ago.

8 Q. Okay. You're saying in Order 124, there -- that  
9 there's more activity today by producer/handlers than there  
10 were three years ago.

11 A. That was the -- yes, that was the impression that  
12 I get from talking to like marketing personnel as well as  
13 the testimony of -- in Phoenix, people who were and are in  
14 the market on a day-to-day basis.

15 Q. And yet the market administrator's numbers  
16 reflect otherwise?

17 A. There could be, you know, changes in sales, there  
18 could be price -- proposals made that impact bottom lines  
19 that will never show up in the market administrator's  
20 numbers.

21 Q. So as I understand it, you're saying the  
22 secretary should change the producer/handlers, not because  
23 of what might happen, but what is actually happening in the  
24 124 right now?

25 A. There -- both cases and as well as we've tried to

1 present a number of reasons for why this change should be  
2 made and, the threshold that we've presented should be  
3 chosen.

4 Q. But we don't know -- you know, if somebody -- if  
5 a new large PD was to create, which you don't have any  
6 knowledge of one being created at this point in your  
7 discussions, but you're not aware of any, right?

8 A. That's correct.

9 Q. All right. So you can't even testify what the  
10 market conditions will be at that time, can you? The  
11 market conditions when that large PD were to exist that  
12 doesn't exist today -- we don't know what those market  
13 conditions are, do we?

14 A. Oh, the best we can do is to look at some of the  
15 situations we have now and the disruption that we see from  
16 those, and say that it would only be that or worse.

17 Q. Now, you talk again about, you know, the size of  
18 units and the profitability of the smaller farms. Isn't it  
19 true that the larger farms are not receiving a full MILC  
20 payment when that's available?

21 A. What are you talking about here?

22 Q. -- the MILC, the --

23 A. You prefaced your question, and then you --

24 Q. All right. Let me back up. Remember when they  
25 had you talk about -- later on about the fact that the

1 smaller producers and larger producers and the price  
2 advantage that a smaller producer has -- or, a larger  
3 producer has in terms of efficiency --

4 A. You on page 15 --

5 Q. Yeah. Right.

6 A. -- referring to the ERS study?

7 Q. Right, but --

8 A. Okay.

9 Q. -- isn't it true that the CCC distributes to the  
10 smaller producers a higher rate of MILC payment than the  
11 larger ones to make up that difference, right?

12 A. Well, everyone is capped out at 2.9 or 2.4/2.9 --

13 Q. 2.4

14 A. 2.4 million pounds. So to the extent that a  
15 producer is smaller than 2.4 million pounds, it will get a  
16 payment on the entireties of his -- well, his production up  
17 to 2.4 million, and a large producer is going to get no  
18 more than. So a large producer is going to get as many  
19 total dollars as a small producer, but on a per  
20 hundredweight basis measured across the operation, and it's  
21 true, these are per hundredweight numbers. You know, they  
22 would not be the same rate. I agree with that. But I  
23 think the federal milk market orders don't have much say so  
24 over MILC policy.

25 Q. In other words, we're talking about federal

1 policy, though, right?

2 A. You are correct.

3 Q. Now, you also mentioned using this idea that the  
4 promotion order only -- fluid promotion order only applies  
5 to plants at three million or larger.

6 A. Yes.

7 Q. The -- but the PDs pay the fluid promotion,  
8 right? Those above the three million, the ones that you're  
9 wanting to impose this limitation on, do pay the full fluid  
10 promotion, right?

11 A. They pay the 15 cents assessment. I don't think  
12 -- depending on their size, I don't know that they pay the  
13 process or assessment.

14 Q. Do -- if they're over three million, do they pay  
15 the process --

16 A. Yes, I assume they do.

17 Q. But that's the point. I mean, if they're less  
18 than three million, then they would -- they wouldn't have  
19 to pay, and they wouldn't be regulated by your proposal.

20 My point is, is that if any of -- the PDs that  
21 are larger than three million pounds today are paying the  
22 full assessment, right?

23 A. You know, I assume, yes. I'm not in the day-to-  
24 day business of collecting and transmitting. I am  
25 knowledgeable about the 15 cents that's assessed on

1 producers and that we do collect that when we -- when we  
2 buy a load of milk from a producer/handler, regardless of  
3 their size, you know, we are required to pay the 15 cents  
4 per hundredweight.

5 To the extent that they make a payment to the  
6 processor fee, I don't deal with that fee, other than to  
7 know that the law said that there's a threshold of three  
8 million pounds. So I would assume a producer/handler of  
9 three million pounds or greater would pay that fee, and one  
10 less smaller would not.

11 Q. Have you done any analysis on small businesses --  
12 on the impact on small plants on this proposal -- small  
13 business analyses? Have you done any --

14 A. I have not.

15 Q. Have you done any civil rights analysis on the  
16 impact of this decision?

17 A. I have not.

18 Q. Have you done any -- made any determination --  
19 or, let me back up on that size issue. As you understand,  
20 a small plant is defined as anyone with less than 500  
21 employees; are you aware of that?

22 A. I think that's the definition.

23 Q. All right. And have you made any proposals to  
24 the Department of Labor to change that, or Department of  
25 Commerce to change that definition?

1 A. No, have not.

2 MR. YALE: That's what I got.

3 THE COURT: Okay. Thank you. Who's going to go  
4 next? Mr. Ricciardi.

5 BY MR. RICCIARDI:

6 Q. Mr. Hollon, good afternoon. I'm Al Ricciardi on  
7 behalf of Sarah Farms.

8 A. Good afternoon, Mr. Ricciardi.

9 Q. Does Dean Foods currently have a full milk supply  
10 arrangements with Dairy Farmers of America?

11 A. That's a proprietary, you know, question for us.

12 Q. So you decline to answer it?

13 A. Yes, sir. We sell milk to Dean Foods. We sell a  
14 lot of milk to Dean Foods and in a lot of locations, but  
15 the -- you know, that particular aspect of that  
16 relationship is proprietary.

17 Q. Might I assume from your answer that you do have  
18 such a full supply of milk -- supply arrangement with Dean  
19 Foods?

20 A. You can make all the assumptions you want.

21 Q. You've been with DFA, you said, since about 1977,  
22 is that your testimony?

23 A. '79.

24 Q. '79. Dean Foods -- excuse me, I apologize. DFA  
25 is a result of mergers of a number of large cooperatives,

1 including Dairymen, Inc., Mid-American Dairy, Southern  
2 Region of Associated Milk Producers, and others, correct?

3 A. Your list wasn't quite right, but your first  
4 assertion was that DFA is a merger of four regional  
5 cooperatives.

6 Q. And those cooperative have, in the past, actually  
7 since 1940 been accused of a variety of anti-trust  
8 violations, correct?

9 A. There have been litigations for anti-trust  
10 violations, that is correct.

11 Q. And there have been a number of reported  
12 decisions with regard to findings of anti-competitive  
13 behavior on behalf of those cooperatives or consent decrees  
14 entered into by those cooperatives.

15 A. DFA operates under a consent decree today. It's  
16 a matter of record.

17 Q. And I can go through -- I've got about five  
18 different reported cases, but you'd acknowledge that there  
19 are a number of cases in the past, in 1940 and currently,  
20 in which DFA has had some issues with regard to anti-  
21 competitive behavior?

22 A. That is true.

23 Q. Does anti-competitive behavior have an effect on  
24 whether a market is orderly or disorderly?

25 A. I suppose it's kind of like beauty. It's in the

1 eye of the beholder.

2 Q. And one of the things that may happen if there's  
3 anti-competitive conduct is, the pricing that a customer  
4 may pay may be higher, correct?

5 A. Yes.

6 Q. And the pricing ultimately that the consumer may  
7 pay may be higher, correct?

8 A. Yes.

9 Q. And with regard to the most recent proposed  
10 merger -- by the way, did you testify before the judiciary  
11 committee on the proposed merger back in the summer of this  
12 year?

13 A. I did not.

14 MR. UNIDENTIFIED: Your Honor, I'd like to  
15 interpose an objection to the line of questioning at this  
16 point. This is not an anti-trust tribunal for the Federal  
17 Trade Commission. You know, the history of alleged anti-  
18 trust violations and testimony before Congress about the  
19 anti-trust issues has nothing to do with this proceeding,  
20 and I think questions about it are beyond the scope and  
21 irrelevant, and I object to it.

22 MR. RICCIARDI: A direct --

23 MR. UNIDENTIFIED: Your Honor, may I raise an  
24 additional objection before Mr. Ricciardi responds, that  
25 there's no foundation that Mr. Hollon has any background in

1 anti-trust analysis.

2 MR. RICCIARDI: Doesn't need any background --

3 THE COURT: He's already admitted that there were  
4 certain decisions in our public record, so any -- and the  
5 question was whether he had testified, but I'll let you  
6 answer specifically the objection --

7 MR. RICCIARDI: Issue is this, Your Honor. A  
8 couple of different issues. First, on the question of  
9 whether or not, in fact, anti-competitive behavior results  
10 in disorderly marketing, that's one of the direct issues in  
11 this case. The second is that we have the major mono-lists  
12 in the dairy industry, including Dean Foods and DFA,  
13 attempting at this point for reasons of their own to come  
14 into this setting and try to change policy while not  
15 acknowledging that the real problem in this industry may  
16 have to do with their own actions and their own creation of  
17 disorderly marketing. And I think all of those issues go,  
18 not only to the question of substance, but also to  
19 credibility, and I see --

20 THE COURT: You know --

21 MR. RICCIARDI: And I think I'm allowed to go  
22 into those.

23 THE COURT: I'll let Mr. Berde respond, then I'll  
24 rule.

25 MR. BERDE: Your Honor, the proponents of

1 proposal number three in this hearing is United Dairymen of  
2 Arizona, which has never been involved in the anti-trust  
3 litigation of which Counsel has described here. That issue  
4 is narrowly tailored to address the question of whether  
5 producer/handlers and their exemption create a disorderly  
6 marketing condition in the area in which they operate. And  
7 that, in turn, is -- in turn, it relates to the question of  
8 whether the act requires the regulation of producer/handler  
9 as a handler, because the act requires that the crisis be  
10 uniform as among handlers and among producers. That's the  
11 sole issue that this hearing is intended to address. Now  
12 --

13 THE COURT: Thank you.

14 MR. BERDE: -- the attempt --

15 THE COURT: I think --

16 MR. BERDE: -- to bury this record in anti-trust  
17 litigation going back to the '40s and '50s and '60s is  
18 certainly beyond the pail (phon.).

19 THE COURT: Okay. That was a little -- I mean, I  
20 consider Mr. Ricciardi was doing his background. There's  
21 been some testimony on direct about what constitutes  
22 disorderly marketing. I will let Mr. Ricciardi probe this  
23 area for a few questions in terms of, presumably if it's  
24 focus on the issue of what constitutes disorderly marketing

25 Mr. Beshore, go ahead.

1           MR. BESHORE: Well, on that point, I'm glad it's  
2 focused on that point because I want to make this point.  
3 Disorderly marketing is statutory language in the  
4 Agricultural Marketing Agreement Act, no other acts. There  
5 is no court precedent, administrative precedent, or any  
6 other precedent which links that statutory language and its  
7 meaning to the Sherman Act, the Clayton Act, the  
8 Hartscot/Rodino (phon.) Act, the Federal Trade Commission  
9 Act, or any other act of the United States anti-trust laws,  
10 which is what he wants to get into.

11           THE COURT: Okay. I don't know what he's going  
12 to get into because he hasn't had a chance to get into it,  
13 but I'm going to ask you just to focus on how his testimony  
14 relates to the issues that we have at hand today. And --  
15 but that last question you asked, which is whether he  
16 testified, as a legitimate question, I'm directing you to  
17 answer it, if you remember what the question was.

18           THE WITNESS: He asked me, did I testify in a  
19 judicial proceeding this summer, and I did not.

20 BY MR. RICCIARDI:

21           Q. Did you attend the hearings?

22           A. A judicial proceeding this summer?

23           THE COURT: I think he said -- I don't think he  
24 said judicial hearings. I think he said before the House  
25 Judiciary Committee --

1 MR. RICCIARDI: That's what I said.

2 THE WITNESS: Oh, I'm -- no, I did not, nor did I  
3 testify.

4 BY MR. RICCIARDI:

5 Q. Can you tell me, in 2002 the amount of sales in  
6 dairy products that DFA had?

7 A. In 2002, can tell you that we marketed milk  
8 approximately (indiscernible) if that answers -- marketed  
9 47.8 billion pounds of milk on behalf of its member/owners,  
10 for other cooperatives, and non-member farms. Does that --

11 Q. Would that equate to about 1.585 billion in sales  
12 in 2002?

13 A. You mean, DFA's dollar sales?

14 Q. Yes, sir.

15 A. No, it would not. Our dollar sales is published  
16 in our annual report. For that period would be between  
17 seven and eight billion.

18 Q. Seven and eight billion?

19 A. Yes, sir.

20 Q. Okay. And would you agree with me based upon the  
21 relationship between DFA and Dean Foods, that Dean Foods  
22 had sales in the amount of about \$8.1 or \$8.2 billion?

23 A. I'm sorry, I'm not familiar with Dean's, you  
24 know, financials or sales data. Again, they're a public  
25 company so it's a public record.

1 Q. Does DFA or any of its members have any  
2 agreements to sell milk to any of the warehouse stores in  
3 the United States?

4 A. When you say, or its members, what, individual  
5 producers?

6 Q. That would work.

7 A. Okay. The answer to that question is no, to that  
8 part, and DFA does sell directly products to some warehouse  
9 stores, and not fluid milk, but we do sell some products.

10 Q. So your testimony is that neither DFA nor any of  
11 its members, as far as you're aware, has any contract with  
12 any warehouse stores which would include Cosco and Sam's  
13 Club, et cetera, to sell fluid milk, correct?

14 A. That would be correct. I -- let me ask you a  
15 clarifying question. You know, when you say "member," that  
16 means a specific thing to me. That means a dairy farm. Is  
17 that what that means to you?

18 Q. No.

19 A. Okay.

20 Q. Does Dean Foods, to your knowledge, have any  
21 agreements --

22 A. But Dean Foods is not member of DFA.

23 Q. Understand.

24 A. Okay.

25 Q. But, in fact, DFA has agreements with Dean Foods

1 to supply milk, correct?

2 A. Yes.

3 Q. Okay. Do you know whether or not Dean Foods has  
4 any agreements with any warehouse stores in this country?

5 A. Only to the extent that it's been reported in  
6 business press or a speech by Dean management or a  
7 financial press.

8 Q. Wilcox Dairies in the northwest, is that a member  
9 of DFA?

10 A. No, they're not a member of DFA.

11 Q. Do they have any milk supply arrangements with  
12 DFA?

13 A. Yes, we supply milk to Wilcox Dairies.

14 Q. Do you know whether or not Wilcox Dairies has any  
15 agreements in the northwest with Cosco or any kind of  
16 warehouse stores?

17 A. I'm not intimate with their business. I do know  
18 that they do business with Cosco, but that's the extent of  
19 my knowledge. I don't know their day-to-day transactions  
20 --

21 Q. You --

22 A. -- or what type of business they do.

23 Q. Okay. Are you familiar in the last four to five  
24 years with the growth of milk sales nationally in warehouse  
25 stores?

1           A.    You mean, percentage of market share held by --  
2 not --

3           Q.    Percentage of market share.

4           A.    Not to an exact number, other than to say it's  
5 grown.

6           Q.    It's growing, correct?

7           A.    Yes.

8           Q.    Can you tell me whether it's the fastest growing  
9 area of the fluid milk market?

10          A.    I cannot.

11          Q.    Can you tell me whether or not the fluid milk  
12 sales in the last four to five years have -- has grown,  
13 stayed the same, or decreased?

14          A.    Fluid milk sales in the last four or five, I  
15 would say would have a say small percentage increase, you  
16 know, year to year. That again there's quite a bit of, you  
17 know, data on that, so we could go look it up.

18          Q.    Did you look it up?

19          A.    You know, I do that off and on. In fact, I --  
20 last week I spoke about sales of various products, and so  
21 for this year compared to last year, year-to-date, it's  
22 fractionally, maybe plus or minus a tenth of a percent up  
23 or down. Earlier in the year it was greater. In the  
24 middle of the year, it's been lesser.

25          Q.    Are you aware that in the 131 area that a new

1 dairy, a 10,000 cow milking facility has just been  
2 constructed?

3 A. I'm not aware.

4 Q. Are you aware that Shamrock Farms has, in fact,  
5 constructed that dairy facility?

6 A. I'm not.

7 Q. That's not something you looked at?

8 A. No, it's not.

9 Q. You weren't concerned about that?

10 A. You asked me, was I aware of it. I was not  
11 aware. I didn't know about it.

12 Q. I think overall I'm sure I can find it in your  
13 testimony, you would agree that your position as a  
14 participant at this hearing is that we need to have change  
15 in the regulation of producer/handlers, correct?

16 A. Yes.

17 Q. And that would include the 131 area, correct?

18 A. Yes, that -- this hearing is for two Federal  
19 Orders, Order 131 and 124. So those would be the only two  
20 that this hearing would speak to.

21 Q. Of course, that's just the beginning, isn't it?  
22 I mean, ultimately if this prevails, then you mentioned, I  
23 think, in testimony on cross-examination of Mr. Yale that  
24 you feel that there are other problems in other areas,  
25 correct, with producer/handlers?

1 A. Yes.

2 Q. And that that will be the next thing?

3 A. That's possible.

4 Q. Okay. And that's probable, isn't it?

5 A. That -- you know, we have discussed that some,  
6 and you know, we haven't reached that conclusion yet.

7 Q. Who's "we?"

8 A. DFA.

9 Q. Okay.

10 A. Intra-DFA.

11 Q. By the way, since I obviously struck a nerve  
12 recently, your involvement in 131, and I mean DFA's, --

13 A. Yes.

14 Q. -- is what? You're not a proponent, Mr. Berde  
15 said. What are you?

16 A. Actually, I would characterize us as a proponent  
17 of the proposals.

18 Q. We have, and I'm quoting, "an extensive marketing  
19 arrangements with the dairy farmer members of United  
20 Dairymen of Arizona for the purchase of supplemental milk  
21 supplies and to provide seasonal balancing services to  
22 DFA." What does that mean?

23 A. It means that during some months of the year, we  
24 buy milk from Dairy -- or United Dairymen of Arizona and  
25 sell it to other DFA customers in other parts of the

1 country. And in other times of the year, we have milk that  
2 is excess of our ability to balance in the southwest, and  
3 we make arrangements with United Dairymen of Arizona to  
4 process that milk for us in their plants.

5 Q. Excess of your ability, meaning DFA's to balance  
6 in the southwest. What does that mean?

7 A. Means that certain times of the year, we have  
8 more milk production in the southwest than we have either  
9 sales or balancing capacity for, and that -- but not on a  
10 year-round basis. And so it's a cost efficient decision  
11 for us to contract with United Dairymen of Arizona when  
12 they have capacity in their plant to process that milk for  
13 us.

14 Q. So if you have excess milk, you sell to them, and  
15 they process it?

16 A. That's correct.

17 Q. What does that cost you?

18 A. Whatever the negotiated current rate is at the  
19 time.

20 Q. Okay. So that's an additional cost -- balancing  
21 cost to DFA and DFA's members, correct?

22 A. Yes, that is correct.

23 Q. Now, if, in fact, DFA wasn't a cooperative, but  
24 DFA was a producer/handler, you wouldn't have the option to  
25 go to UDA to balance the milk. You'd have to balance it

1 yourself, correct?

2 A. I don't think that's correct.

3 Q. Okay. Well, I guess you could go to DFA,  
4 assuming they were willing to take it, but under the  
5 current regulations, could you do that and still be a  
6 producer/handler?

7 A. Are you asking me, can a producer/handler sell  
8 its surplus to DFA?

9 Q. I guess that's one question.

10 A. The answer is yes, we buy milk -- I've testified  
11 earlier that we buy milk from producer/handlers.

12 Q. Those balancing costs to the producer/handler are  
13 actual costs, correct?

14 A. Yes.

15 Q. And that would have to be factored in as an  
16 economist to what it costs the producer/handler to actually  
17 stay in business, correct?

18 A. Correct.

19 Q. Is it your testimony, because I'm unsure, that  
20 there's currently a problem with producer/handlers, or that  
21 there will be a problem with producer/handlers?

22 A. Both. We went through this line of questioning  
23 with Mr. Yale extensively. It's in the records, so I'm not  
24 sure that we need to go through it again, though.

25 Q. Well, I'm not going to go -- I'll go through what

1 questions I have, and I'm just sort of trying to get your  
2 testimony straight in my own mind.

3 A. Okay.

4 Q. So if I could ask you the next question.

5 There are two producer/handlers in Order 131,  
6 correct?

7 A. Depending on the month that you look at, there  
8 are two, and in some months, there have been three.

9 Q. And Order No. 131 has the least amount in numbers  
10 that we can share anyway, based upon your data, of any  
11 other order area in the country, correct?

12 A. Sorry, you need to say that again.

13 Q. Sure. Let me be hopefully better at this.

14 A. Okay.

15 Q. There are two producer/handlers in Order 131  
16 which is the least amount of producer/handlers in any other  
17 order area, correct?

18 A. I think Federal Order 5 may also only have two.

19 Q. Okay. So they're tied?

20 A. Okay. And in some months, Order 131 would have  
21 three.

22 Q. Okay. This -- and you described it variously,  
23 loophole, competitive advantage, et cetera, et cetera, et  
24 cetera, that exists if, in fact, it was a significant  
25 advantage, then you would expect that there would be a

1 larger number of producer/handlers than there are currently  
2 correct?

3 A. It is a significant advantage, and there are  
4 producer/handlers and, there was a question again by Mr.  
5 Yale that there -- there is interest in other large  
6 producers about possibly becoming producer/handlers, and in  
7 fact, they, from my point of view, are looking at this  
8 proceeding to see what the end result may be, and may,  
9 indeed, go that route.

10 Q. Of course, we're not here to be soothsayers or  
11 here to deal with the current market in the market as it  
12 existed since 1999, correct?

13 A. Well, I think you asked me my interpretation of  
14 the facts, and I was simply answering your question.

15 Q. No, I don't think I did, but I'll see if I can be  
16 better at my questions.

17 A. Okay.

18 Q. Do you know -- well, let me ask it this way  
19 because I know you don't. You didn't interview Mr.  
20 Hannigah (phon.), correct?

21 A. No, I did not.

22 Q. You did not interview Ellen Hannigah, correct?

23 A. I did not.

24 Q. Do you know who she is?

25 A. I do not.

1 Q. Do you know if she has any interest in Sarah  
2 Farms?

3 A. Not of my direct knowledge.

4 Q. You don't know what the costs are for Sarah Farms  
5 to market its milk, correct?

6 A. That's correct.

7 Q. You don't know at this point directly who the  
8 current customers are for Sarah Farms, correct?

9 A. I know some of them to the extent that they were  
10 testified to in this hearing in Phoenix.

11 Q. Are you talking about the testimony that came  
12 from Shamrock?

13 A. And others, yes, sir.

14 Q. Okay. You haven't interviewed any of the  
15 customers?

16 A. Actually, I've had discussions with Mr. Hitchell,  
17 Kroger.

18 Q. Have you interviewed any of the customers of  
19 Sarah Farms?

20 A. I have not.

21 Q. Thank you. Do you know what costs Sarah Farms  
22 has to assemble its product from the dairy to the  
23 production facility?

24 A. Of a general nature --

25 Q. You don't know what their costs are, right?

1 A. No, not specifically, no, I do not.

2 Q. And you specifically don't know what  
3 transportation costs, if any, they have from the dairy to  
4 the production facility, correct?

5 A. Again, of a general nature, I'm familiar with  
6 statistics that are published on that, plus we pay those  
7 costs in our cooperative. So I have some general knowledge  
8 of those.

9 Q. General stuff you don't know what the actual  
10 costs are for Sarah Farms, correct?

11 A. I do not.

12 Q. Okay. And I believe in looking at your testimony  
13 that it's your position that a producer/handler essentially  
14 can increase its market share at will, correct?

15 A. They appear to have latitude, and based on the  
16 exemption granted them in the pricing provisions, that  
17 provides quite a bit of range to increase market share.

18 Q. Let me get back to my question.

19 Is it your testimony, sir, that a  
20 producer/handler can increase its market share "at will?"

21 A. Yes.

22 Q. And that would include the ability to increase  
23 its market share over and above the three million pounds  
24 per month limit, correct?

25 A. Why don't you be more specific with that

1 question?

2 Q. Again, go ahead and answer mine.

3 A. I said, you'll need to be more specific with that  
4 question.

5 Q. Can you answer my question?

6 A. No, I cannot -- under the way that you asked it,  
7 I didn't quite understand what you were asking..

8 Q. Okay. What it means is that a producer/handler  
9 can increase its market share at will over and above the  
10 three million pounds per month proposed limitation or  
11 ceiling that you're talking about, correct?

12 A. I'm sorry, Mr. Ricciardi, I'm not --

13 Q. Does a producer/handler have the ability to  
14 increase its market share beyond three million pounds a  
15 month at will?

16 A. Yes, there are abilities there based on the cost  
17 differential that would provide the ability to increase its  
18 market share, whether it be at a smaller volume or at a  
19 larger volume.

20 Q. Which would include three million pounds or more  
21 each month, correct?

22 A. Yes. Yes.

23 Q. And so if there's a competitive advantage that  
24 exists, a producer/handler can increase at will, including  
25 beyond three million pounds a month, then that would

1 increase exponentially, one, the number of  
2 producer/handlers, and the volume that a producer/handler  
3 is putting out, correct?

4 A. There would -- we expect at this exemption, if  
5 our proposals are denied, that there will be more  
6 producer/handlers in markets.

7 Q. And from 1999 through 2003, tell me the number of  
8 producer/handlers that have come into the market in 131.

9 A. I'm not aware of any.

10 Q. Tell me the number of producer/handlers that have  
11 come into the market in 124.

12 A. I'm not aware of any.

13 Q. Tell me the number of producer/handlers that have  
14 come into the market nationally in any of the other market  
15 areas.

16 A. There are some.

17 Q. How many?

18 A. I don't know the number, but Mr. Yale asked me  
19 that same question, and I pointed to at least one that I  
20 know. However, I think the testimony in Phoenix pointed  
21 out extensively that there have been sales change hands,  
22 that the intimate knowledges of the market of both those  
23 witnesses and the witnesses from 124 pointed repeatedly to  
24 a distinct price advantage that they faced in competitive  
25 factors, and that effected their business, and we're

1 concerned about that.

2 Q. You know, I asked you a question, you answered  
3 it. I don't need a speech from you, and the record doesn't  
4 need any more of this stuff in it. If I have a question,  
5 I'll ask it, and answer --

6 A. Uh-huh.

7 Q. -- it, please. I would appreciate it.

8 A. Well, if you paint the answer to where -- paint  
9 the question to where --

10 THE COURT: Well, Mr. Hollon --

11 THE WITNESS: -- there's only one possible answer  
12 --

13 THE COURT: -- look, it'll -- I think your time  
14 on the stand will go faster if you answer direct questions  
15 when you can, just will --

16 MR. UNIDENTIFIED: Your Honor?

17 THE COURT: What?

18 MR. UNIDENTIFIED: I object to Mr. Ricciardi  
19 lecturing Mr. Hollon --

20 THE COURT: Well, okay.

21 MR. UNIDENTIFIED: -- as well.

22 THE COURT: Yeah, fine, you shouldn't lecture,  
23 but the point is that sometimes it's easier to answer  
24 direct. Let me ask you, or is it a true question or is it  
25 true, yes or no. If you can answer it, it's sometimes --

1 you might find -- might be easier to answer it that way, if  
2 you can. And if you can't, you're entitled to say why you  
3 can't.

4 THE WITNESS: Your Honor, I respect that, but  
5 sometimes when you're asked, you know, did you quit beating  
6 your wife, --

7 THE COURT: Yeah. Okay.

8 THE WITNESS: -- there's not a good answer to  
9 that, and yet --

10 THE COURT: Okay.

11 THE WITNESS: -- whatever answer you give shows  
12 up in the record.

13 THE COURT: Go ahead, Mr. Ricciardi.

14 MR. RICCIARDI: I'll leave it alone, Your Honor,  
15 and there were two or three that I had, but that's fine.

16 BY MR. RICCIARDI:

17 Q. Exhibit 33, Table D, you've got a list of three  
18 producer/handlers in 131, and you have an estimate of plant  
19 size. Actually, you've got producer/handlers and exempt.

20 A. Yes.

21 Q. The source is "DFA competitive estimates." What  
22 does that mean?

23 A. Yes, sir. That means that we surveyed our coop  
24 brethren in the marketplace, customers that we serve in  
25 other markets that have markets there, dairy farmers that

1 we have relationships with in those markets, and  
2 interrogated them as to what they thought these volumes  
3 were, and then reached these conclusions.

4 Q. You did it?

5 A. Yes.

6 Q. Okay. And you talked to UDA?

7 A. Yes.

8 Q. And you talked to who else?

9 A. Again, talked to Dairy Farmers, for which we have  
10 relationships with. We talked to customers that we service  
11 in other markets, and we talk to employees that we may have  
12 who had perhaps worked in that market at one time or  
13 another.

14 Q. Who?

15 A. That's the extent of the description.

16 Q. What do you mean, it's the extent? To the extent  
17 that you remember, or the extent that you're willing to  
18 give?

19 A. The extent that I'm willing to give. I see no  
20 bearing to say we talked to Tom Jones and Dick and Fred  
21 and.

22 Q. You know, it's amazing that we're having  
23 testimony where I ask specific questions about the source  
24 of that testimony, and you're unwilling to provide it. But  
25 I, you know, I go on.

1           Take a look at Table F in Exhibit 33, if you  
2 would, for a moment.

3           A.    Yes, sir.

4           Q.    Actually, I apologize.  I want to go to G, which  
5 is --

6           A.    G.  Okay.

7           Q.    -- G -- I guess it would be G-1.

8           A.    Okay.

9           Q.    And I don't quite understand this, so explain  
10 this to me.

11          A.    Okay.

12          Q.    In the third -- actually the fourth column where  
13 it says "Average monthly class one volume for all 7A plants  
14 in the market."

15                Do you see that?  The --

16          A.    The median sized, or the -- fourth column, yeah.  
17 Okay.

18          Q.    Do you have the column that I'm looking at?

19          A.    Yes, sir.

20          Q.    Okay.  Take a look at Federal Order 131.  You've  
21 got about 29,595,104 in that column, correct?

22          A.    Yes.

23          Q.    Is that total; does that mean all of the class  
24 one volume plants in the market?

25          A.    Yes, that's all of the 7A that -- that's plants

1 defined at the regulation of 131-7(A). There's a  
2 definition there. It described a certain plant, and then  
3 the market administrator would compile statistics on the  
4 average size volume of those 7A plants.

5 Q. And there are how many in the 131 market?

6 A. Three.

7 Q. So on an average month, you're saying that the  
8 average volume would be around 30 million total?

9 A. Yes, sir. Of the three plants, each would have  
10 an average of 30 million pounds of class one sales.

11 Q. Did you look at Exhibit No. 6 that was prepared  
12 for this hearing in preparing these averages?

13 A. I did not. I asked the market administrator  
14 directly for these numbers.

15 Q. Did you look at any historical, United States  
16 Department of Agriculture -- Agricultural data regarding  
17 producer/handler sales of milk in the United States?

18 A. Yes, I have looked at some.

19 Q. Did you look at the data from 1980 to 1998 to  
20 look at the volume in the United States by  
21 producer/handler?

22 A. I've seen some of those reports.

23 Q. And isn't it true that for that period of time  
24 the amount of milk produced by producer/handlers actually  
25 declined?

1           A.    You know, I've seen the reports.  I don't  
2 remember what the numbers are.

3           Q.    That it went from 1.47 billion pounds to 1.16.

4           A.    That could be true.  Again, I've not seen the --  
5 I don't remember exactly what the numbers are.

6           Q.    And that the percentage of milk produced by  
7 producer/handlers during that period of time.  1.1 -- went  
8 from 1.14 percent to 0.73 percent of production?

9           A.    If that's what the report shows, I'll accept  
10 that.

11          Q.    And that actually the volume in 2003 of  
12 producer/handler milk stayed at about 1.16 pounds?

13          A.    If that's what the report shows, I'll accept  
14 that.

15          Q.    And this is the rapidly growing producer/handler  
16 area?

17          A.    Uh-huh.  Yes.

18          Q.    Okay.  Would you also agree with me that the  
19 producer/handler doesn't purchase any milk?

20          A.    You mean -- sorry, you have to be more specific  
21 in your question.

22          Q.    The producer/handler does not purchase any milk  
23 from his production facility to his processing facility,  
24 correct?  There's no actual purchase.  They don't buy milk  
25 from themselves, do they?

1           A.    Well, it's an integrated business, so however  
2 they choose to account for it, I would suspect that most --  
3 set them up as stand alone business units, and have a  
4 transfer price assigned in order to evaluate the  
5 profitability of their businesses.

6           Q.    Isn't your assumption that every time there's an  
7 increase in competition, that that will be reflected in  
8 disorderly marketing?

9           A.    No, that's not my assumption.

10          Q.    You'd agree with me that there can be an increase  
11 in competition in a particular market without there being  
12 disorderly marketing, correct?

13          A.    Yes.

14          Q.    For example, a regulated handler may lose a  
15 customer to another regulated handler, correct?

16          A.    Yes.

17          Q.    And one of the reasons may be because the first  
18 regulated handler has some problems with regard to service  
19 issues with a customer.

20          A.    There could be a wide range of issues that  
21 business changes hands.

22          Q.    Without there being any type of a competitive  
23 advantage or disadvantage, correct?

24          A.    You mean without there being some difference in  
25 the price of milk that would stimulate that?

1 Q. That would be one thing.

2 A. Then in that case, yes, that could -- there could  
3 be instances where business changes hands and that not be  
4 the problem.

5 Q. It's also normal in the milk marketing area that  
6 there's going to be new competition that's going to arise,  
7 correct?

8 A. Yes.

9 Q. It's also normal in the milk marketing area that  
10 there's going to be account switching, which we just talked  
11 about, --

12 A. Going to be --

13 Q. -- account switching?

14 A. Yes.

15 Q. And in those situations, either new competition  
16 or account switching, that doesn't equate directly to  
17 evidence of disorderly marketing or payouts, correct?

18 A. Doesn't always.

19 Q. Now, there are inefficient, regulated producers  
20 or handlers, correct?

21 A. There may be.

22 Q. And in your past experience, you've seen both  
23 inefficient producers and inefficient handlers?

24 A. Yes, that's correct.

25 Q. And those people who are inefficient shouldn't be

1 given any benefit for their inefficiency, correct?

2 A. That is correct.

3 Q. The market recognizes and you also recognize that  
4 if someone is doing something better or more efficiently,  
5 that they should be able to prosper by that, correct?

6 A. I think you're going to need to be more specific  
7 in your question. I can't qualify my answer. You need to  
8 have to be more specific in your question.

9 Q. You fly the airlines?

10 A. I do.

11 Q. Every fly Southwest?

12 A. I do.

13 Q. Southwest has been the so-called low cost  
14 carrier, and it's had certain efficiencies, such as flying  
15 the same jets throughout the United States, correct?

16 A. Yes.

17 Q. And by doing that, they're able through their  
18 efficiencies to go ahead and actually fly a regulated mile  
19 for less cost than somebody else can?

20 A. In that scenario where they lower their capital  
21 costs by having the same plane on all their fleets and all  
22 their routes, they capture an efficiency, and they should  
23 be able to capture that. I would not disagree.

24 Q. And if somebody who is a producer/handler has  
25 lowered their cost in terms of production by being more

1 efficient at their plant, they should be rewarded also,  
2 correct?

3 A. If in the example you gave that they are more  
4 efficient in their plant, and there's some gains to  
5 capture, I would agree.

6 Q. As I understand in reading your testimony, you  
7 rely upon Mr. Herbine's data and testimony, correct?

8 A. Yes, sir.

9 Q. And I also understand that you also rely upon Mr.  
10 Kryon's (phon.) testimony and data, correct?

11 A. Yes, sir.

12 Q. I think Mr. Yale asked you a couple of questions,  
13 and let me follow up on those. If a member of DFA who has  
14 a membership agreement has a problem with a load or loads  
15 of milk, and those loads of milk are not accepted, or they  
16 have to be basically flushed, does that member have any  
17 kind of guarantee as to whether he's going to get paid for  
18 those loads of milk?

19 A. I'm not familiar with all the intimacies of those  
20 arrangements, but as a general rule -- and sometimes it  
21 depends on the problem. For example, there's a storm, the  
22 power goes out, and his vault (phon.) tank doesn't cool.  
23 There are provisions that provide payment for that.

24 On the other hand, if there's a quality problem  
25 of some sort that may be dealt with his treatment of some

1 cow medicines, and then depending on how that gets -- how  
2 that reports -- if he self-reports that, there may be some  
3 provisions that will provide some benefit for that.

4 In other cases, if that doesn't take place, if a  
5 customer rejects a load of milk for some particular quality  
6 reason that can be tied back to an individual producer, he  
7 may have to bear those costs.

8 Q. But in every situation, not just exceptions or  
9 some of the things that you've described, --

10 A. Uh-huh.

11 Q. -- a producer/handler has to bear the risk for  
12 every load, correct?

13 A. Yes.

14 Q. So if, in fact, there's a problem, whether the  
15 power goes out or whether there's a problem with  
16 contamination of a load, that producer/handler has the  
17 economic loss to deal with on his own, correct?

18 A. Correct.

19 Q. You have no knowledge as to whether Sarah Farms  
20 has better trucks than other people in the 131 area,  
21 correct?

22 A. I do not.

23 Q. You don't have any information as to whether or  
24 not they provide better service to their customers and  
25 other people in the 131 area, correct?

1           A.    Only to the extent that Mr. Kruger's comments  
2 about those business relationships. My first-hand  
3 knowledge, I do not.

4           Q.    You don't know whether they had better fillers,  
5 for example, than any other person in the 131 area,  
6 correct?

7           A.    Correct.

8           Q.    You don't know whether or not they have better  
9 customer relationships in the other people, regulated  
10 handler or otherwise --

11          A.    I do not. I do not.

12          Q.    You don't have any information with regards they  
13 have smarter or better packaging designs, correct?

14          A.    Correct.

15          Q.    And you don't know whether or not Sarah Farm in  
16 1999 has lost sales or customers to a regulated handler,  
17 correct?

18          A.    Only to the extent that was testified to in  
19 Phoenix.

20          Q.    Did anybody provide you with any information that  
21 since 1999 there has been any type of lack of supply of  
22 milk in the 131 area?

23          A.    No one provided me with any information as such.

24          Q.    And you have -- there's none of that information,  
25 therefore, in your testimony, correct?

1 A. Correct.

2 Q. I think your testimony in questions by Mr. Yale  
3 was, and I going to get it as close as I can, it was not  
4 good for a majority of the dairy farmers to have a  
5 producer/handler that produces more than three million  
6 pounds of milk per month, correct?

7 A. Not sure if you got that close enough to agree  
8 with, so.

9 Q. Well, do you agree with that?

10 A. As you stated it, I don't think I would agree  
11 with that.

12 Q. Is it good for a majority of the dairy farmers  
13 for Dean Foods to control 20 or 30 percent of the dairy  
14 sales in this country?

15 A. I do not have an opinion as to that.

16 Q. How about if it was 50 percent?

17 A. Still no opinion.

18 Q. Ten percent?

19 A. Still no opinion.

20 Q. Is it good for a majority of the dairy farmers in  
21 the United States for DFA to control as large a percentage  
22 of the dairy sales as it controls?

23 A. If individual producers want to join DFA, that's  
24 a good thing.

25 Q. Is it good for a majority of the dairy farmers in

1 the United States for DFA to control the percentage of  
2 dairy sales it controls in this country?

3 A. The end result of your question, the percentage,  
4 is driven by the fact that producers join DFA.

5 Q. Producers join DFA for a variety of reasons, --

6 A. Yes.

7 Q. -- correct?

8 A. Yes.

9 Q. DFA wants to make money, correct?

10 A. Yes.

11 Q. And DFA wants --

12 A. -- its members, it's owned by membership (phon.).

13 Q. It wants to make money for its members, correct?

14 A. Yes, sir.

15 Q. And you're not against -- God forbid, you're not  
16 against people making money in this country, are you?

17 A. Absolutely not. No, sir.

18 Q. And you certainly don't want to make -- want to  
19 have some over-regulation. That might take away somebody's  
20 ability to make money, do you?

21 A. Our intent in that regard is that handlers  
22 compete on the same level of regulation to the extent that  
23 they have the same pricing structure. You know, that's our  
24 goal. If some are more efficient than others, you know,  
25 that's good. If some have better trucks or better

1 packaging, those are good things.

2 Our concern in this proceeding is that they  
3 compete on the same price term and have the same minimum  
4 price. All those entities that you've identified as  
5 potential sources of improvements, those are good for the  
6 industry. Our industry -- no one has an advantage for very  
7 long because they, you know, if somebody has a better  
8 package, somebody's going to copy that, that'll be good.

9 Q. Take a look, if you would, again at Exhibit 33,  
10 G-1 for me.

11 A. Okay.

12 Q. Same -- in the same column, the average monthly  
13 class one volume for the 7A plants in the market.

14 A. Yes, sir.

15 Q. Would you agree with me that the largest average  
16 volume for 7A plants in any Federal Order market is in 131,  
17 correct?

18 A. Yes, sir.

19 Q. And it's your testimony that there's then some  
20 competitive advantage for Sarah Farms, which is in the 131  
21 area, correct?

22 A. I'm sorry, would you say that again?

23 Q. Sure. Your testimony has been that Sarah Farms  
24 has had some kind of competitive advantage as a  
25 producer/handler in the 131 area, correct?

1 A. Yes, that's correct.

2 Q. And your testimony has been that they sort of  
3 exploited that competitive advantage since 1999?

4 A. Yes, that's correct.

5 Q. Then wouldn't you agree with me that in looking  
6 at the average, monthly class one volume for the 7A plants  
7 in the market, that given your testimony that you would  
8 actually look to see volumes that would be less than the  
9 other Federal Order areas as opposed to more than the  
10 average Federal Order areas?

11 A. No, I wouldn't.

12 Q. Okay. Do you know whether or not Shamrock sells  
13 any surplus milk into California?

14 A. I do not.

15 Q. Did you ever interview anybody from Shamrock for  
16 your work in this area?

17 A. I have not.

18 Q. Do you have a copy of the Institutional  
19 Resources, Incorporated data that you rely upon?

20 A. I have a copy in my office of the request that we  
21 made from them and the data that they provided back to us,  
22 from which I drew the conclusions that I wrote about in my  
23 testimony.

24 Q. Is that competitive?

25 A. Is that competitive?

1 Q. Yes, the -- is the information in that report, in  
2 your opinion, somehow contain some kind of competitive  
3 information that you're not willing to share with us?

4 A. I've shared the information that they gave. They  
5 said there was this many stores, there was -- this was the  
6 universe. This is how they determine the store sales.  
7 They provided me national data to -- there was no more  
8 numbers than I have. There were 12,000 stores roughly of  
9 one size, 3,000 of another. The average delivery of this  
10 -- of the group that was the smallest was this much. The  
11 average deliveries of the entire universe was that much.  
12 You subtract the two, and you get the difference.

13 Q. That wasn't what I asked you. Is there --

14 A. Oh, well, -- but I don't think I need more data  
15 to give you.

16 Q. Well, you have -- there's the report to give us,  
17 and I'm asking you why it wasn't provided. Is it  
18 competitive information?

19 A. I'd have to -- in a sense, no. I don't remember  
20 the agreement. I think there were some confidentiality-  
21 type arrangements that defined my -- our relationship with  
22 them as to, you know, can I give you a document that I get  
23 -- came from them. It may say that, but if I were to give  
24 it to you, other than the fact that you have it in your  
25 hand, there would no other numbers on it than the ones that

1 I've given you.

2 Q. I don't have it.

3 A. I understand.

4 THE COURT: Do you want to see the report, Mr.  
5 Ricciardi? Is that what you're getting at?

6 MR. RICCIARDI: It would be nice, but that's  
7 fine, Judge. I'll go on.

8 BY MR. RICCIARDI:

9 Q. Did you set the limitations for the report  
10 regarding the exclusion of superstores, club stores, --

11 A. I did not.

12 Q. Do you know why they were excluded?

13 A. That was their universe of stores. They do not  
14 get data from that universe of stores, is my understanding.

15 Q. Did you request that they actually go into the  
16 131 or 124 markets rather than the national markets to get  
17 this data?

18 A. I considered that, you know, that possibility,  
19 but chose not to do it.

20 Q. Since the hearing had to do with 124 and 131, is  
21 there a reason you decided to get national as opposed to  
22 specific data?

23 A. There was. The cost of getting sub-regional data  
24 was pretty good sized. I chose not to do that.

25 Q. You didn't want to spend the money?

1           A.    The cost was pretty excessive, so to (phon.)  
2 getting the national data we felt was representative.

3           Q.    Is there a reason why in getting that data you  
4 limited the fastest growing segment of the milk market, the  
5 warehouse stores?

6           A.    They did not have that data to give me.

7           Q.    Does DFA or any of its members have agreements to  
8 provide fluid milk to Wal-Mart in any of the other order  
9 areas other than 131 or 124?

10          A.    Again, at the risk of being repetitive, when you  
11 say "members," I assume that means dairy farmers.  Is that  
12 what you mean?

13          Q.    What do you mean?

14          A.    When -- you asked me does DFA or any of its  
15 members, --

16          Q.    I did.

17          A.    -- and when I hear the word "members," I consider  
18 that to be individual dairy farmers, and in that case, the  
19 answer would be no.  Individual dairy farmers who are DFA  
20 members market all of their milk through the cooperative.

21          Q.    Does DFA have any agreements with Wal-Mart in any  
22 order areas to provide fluid milk?

23          A.    Some of our joint ventures have sales  
24 relationships with Wal-Mart, and I think some of them do  
25 sell.  I don't know intimately, but I think some of them do

1 sell Wal-Mart.

2 Q. Do any of your joint ventures between DFA and  
3 whoever sell fluid milk to Cosco, in any order area in the  
4 United States?

5 A. I think the answer is yes. I'm not, again,  
6 intimately familiar, but I think the answer is yes.

7 Q. So if that's the case that there is an agreement  
8 or agreements with Cosco, then DFA would have information  
9 as to the cost structure between itself or this joint  
10 venture and Cosco, correct?

11 A. On the surface, that sounds like that would be  
12 reasonable, but that's not the marketing agreement. And in  
13 every case of the joint ventures that we have, and I think  
14 we have about a dozen of them, the other entity is the  
15 managing partner, and we are not the managing partner in  
16 any of those entities. So the specific relationships of  
17 how milk is sold to grocery stores XYZ is not, you know,  
18 not -- we're not privy to that. We don't set that, we  
19 don't determine that.

20 Q. Okay. So help me understand this.

21 A. Okay.

22 Q. There's at least a dozen agreements that you're  
23 aware of with joint ventures in which DFA is a member --

24 A. That is correct.

25 Q. -- between the joint venture and Cosco to sell

1 fluid milk throughout this country, correct?

2 A. I don't think you said that right.

3 Q. I will -- are there --

4 A. We have about a dozen joint ventures where a DFA  
5 is a partner and Prairie Farms is a partner.

6 Q. Okay.

7 A. And that joint venture owns Roberts Dairy, which  
8 is a dairy fluid milk processing firm, and they make some  
9 ice cream, and there are three or four plants primarily in  
10 the midwest.

11 Another example with Prairie Farms is we own  
12 Hiland Dairy, and there's about a half a dozen plants.  
13 With National Dairy Holdings, there are, you know 30  
14 plants. In every one of those cases, we are not the  
15 majority owner, but we are an owner. The managing partner  
16 is the other side of that.

17 So in the Roberts Dairy example, Prairie Farms is  
18 the managing partner. They run the businesses on a day-to-  
19 day basis. They execute all of the retail relationships.  
20 We don't do any of those. We negotiate with them for the  
21 sale of raw milk, and we sell, you know, where we can. Our  
22 members milk into those plants.

23 Q. But you can get information from your managing  
24 partner in the joint venture regarding the relationship  
25 with Cosco, correct?

1           A.    Not -- no, not always.  And in that particular  
2 case -- well, I don't know about that particular case, but  
3 no, we don't get that type of information.

4           Q.    Did you provide the Cosco information in the  
5 contracts to Mr. Herbine?

6           A.    I did not.

7           Q.    Did he ask you for them?

8           A.    He did not.  However, he has other principals in  
9 his firm who have had those type of relationships before.  
10 He has -- as in his testimony, he mentioned he has over 200  
11 dairy client customers for which he does that exact type of  
12 analysis, and for which he is -- as -- at his relationship  
13 with them, he is allowed to use that data and information.

14          Q.    But, sir, one of the issues that's been raised  
15 during the course of this hearing is alleged costs  
16 concerning Cosco agreements with Sarah Farms, correct?

17          A.    Yes, sir.

18          Q.    And your testimony is that DFA is a joint venture  
19 in at least a dozen agreements with Cosco --

20          A.    No, no, no, no, now you --

21          Q.    With Cosco or Wal-Mart --

22          A.    No.

23                THE COURT:  Let him finish asking you his  
24 question.

25                BY MR. RICCIARDI:

1 Q. Okay. Then tell me then of the dozen that we're  
2 talking about, agreements that you have, who are the  
3 ultimate customers, Cosco?

4 A. The customers are almost any supermarket chain in  
5 the country.

6 Q. Is Cosco one of them?

7 A. They could be. Our joint ventures are with --  
8 are entities that run fluid milk processing plants.

9 Q. I understand that.

10 A. Okay.

11 Q. Is -- Does Cosco have agreements with those joint  
12 ventures?

13 A. With at least one of them that I'm aware of, and  
14 there may be others, or there may be no more, but with at  
15 least one of them, one of the joint ventures sells milk to  
16 Cosco.

17 Q. Does one of the joint ventures sell milk to Wal-  
18 Mart?

19 A. I think the answer is yes, but I'm not -- I don't  
20 know for certain, but I think --

21 Q. Does one of the joint ventures sell to BJ's  
22 Wholesale in the East Coast?

23 A. I don't think so.

24 Q. And so --

25 A. With the extent that -- let me rephrase that.

1 National Dairy Holdings does have plants in the East, so  
2 they may, indeed, sell to BJ's.

3 Q. So DFA at least has access to information  
4 concerning contracts with -- let me finish.

5 A. Oh. Okay. I'm sorry.

6 Q. Either Cosco, Wal-Mart or other warehouse stores,  
7 correct?

8 A. That is not the case. The other entity is the  
9 managing partner, and they manage those relationships, and  
10 we don't manage those relationships.

11 Q. And you --

12 A. And they're deliberately set that way.

13 Q. And you don't have access to the information that  
14 the managing partner has with regard to contracts, with  
15 Cosco, et cetera?

16 A. It's my understanding that is correct.

17 Q. So they're limited, and they don't even tell you  
18 that information?

19 A. For the most part, yes.

20 Q. Do you ever inquire about it?

21 A. Well, I don't, and I suspect from time to time  
22 someone may, but for various other legal reasons, they've  
23 been set up in that particular entity.

24 Q. Is there a reason you don't want to share that  
25 type of information in this hearing so that the secretary

1 can rely upon it?

2 A. I don't have it.

3 Q. Okay. Done. Thanks.

4 A. Yes, sir.

5 THE COURT: Ms. Deskins, you or your colleagues  
6 have questions at this time?

7 MS. DESKINS: I believe we do. Could we take a  
8 ten minute break before we start our questions?

9 THE COURT: Well, let me see if anyone else has  
10 questions. I wasn't -- this is a little bit early.

11 Does anyone else have questions at this point?

12 Go ahead.

13 BY MR. MILTNER:

14 Q. Ryan Miltner for Etteline Dairy, Smith Brothers  
15 Farms, and Mallory's Dairy.

16 Mr. Hollon, you testified that DFA pools milk on  
17 10 of the 11 orders, --

18 A. Yes, sir.

19 Q. -- one of which is -- the one that you don't pool  
20 on is 131; is that correct?

21 A. Yes, sir.

22 Q. So you do pool on the Western order?

23 A. The Western order, correct.

24 Q. Order 135, right?

25 A. Correct, yes.

1 Q. Okay. Good, I've got that.

2 Does that also mean that you then have member  
3 farmers that are located in that geographic area?

4 A. Of the Western order, --

5 Q. Of the Western order.

6 A. -- Order 135?

7 Q. Yes.

8 A. Do you intend the Western order or the Pacific  
9 Northwest order?

10 Q. I intend the Western order.

11 A. Okay. Yes, we do.

12 Q. Okay. And also in your testimony is a statement  
13 that you believe the Federal Order system to be the best  
14 way -- or, I should quote you. "The most fair and  
15 equitable manner to market dairy farmers' milk." Is that  
16 --

17 A. That is correct.

18 Q. Okay. And is it my also -- am I also correct in  
19 the understanding that DFA has recently voted to repeal the  
20 Western order?

21 A. Well, the intent of your question is correct.  
22 The way you actually asked it, I'm not sure if that's  
23 right, but there's been a referendum on an order proceeding  
24 in the Western order, and DFA has voted its shares, if you  
25 will, in both the coop pool and the producer referendum as

1 no.

2 Q. Okay. And that would effectually terminate the  
3 Western order; is that correct?

4 A. That's unknown at this point.

5 Q. Okay. If that -- if the changes to the --  
6 proposed changes to the order are voted down in total, that  
7 would terminate the Western order?

8 A. Under the rules of an order termination, if a  
9 certain percentage of the production on the order votes no  
10 on an order amendment, that would terminate the order. So  
11 there's a possibility that that would happen.

12 Q. Okay. Does DFA alone control enough of that --  
13 enough of a presence in that market to make that  
14 determination on its own?

15 A. It's a proprietary question. I'm sorry.

16 Q. Okay. But I suppose that the intent in voting  
17 the way you did would be that DFA would prefer to have no  
18 order at all rather than the order as the secretary has  
19 proposed?

20 A. I think that's the same answer as the question  
21 before that, so I'm going to decline to answer that.

22 Q. Okay. Do you think that voting the way you did  
23 is somehow inconsistent with your statement that the orders  
24 are the best and most fair and equitable manner to market  
25 dairy farmers' milk?

1           A.     Our situation in Order 135 where we evaluated the  
2 facts and the results of that hearing led us to the  
3 conclusion to vote the way that we did.  Since 2000 I think  
4 there have been at least a dozen opportunities to vote on  
5 Federal Orders one way or another, and we have voted to  
6 support federal orders all the way through with the  
7 exception of the referendum in 135.

8           Q.     And if the secretary makes a decision that does  
9 not implement the changes that you are the proponents of,  
10 or one of the proponents of, will DFA vote to terminate the  
11 Pacific Northwest and Arizona/Las Vegas orders?

12          A.     I don't have an answer for that question.

13          Q.     Didn't you suggest that in your testimony on, I  
14 believe it was, page ten?

15          A.     I don't know.

16          Q.     I may be referring to the wrong page.  No, I  
17 think it is page ten.

18          A.     Okay.

19          Q.     So if I read that in that way, I'm incorrect?

20          A.     Well, in Order 131, we would have no votes.

21          Q.     You're right.

22          A.     And in the Pacific Northwest order, we would have  
23 a small amount of votes, and I don't think we have any  
24 intent to vote no.

25          Q.     Okay.  On page two of your testimony, Exhibit 32,

1 you make a statement that "in some cases, retailers have  
2 become sophisticated enough to understand the advantage and  
3 seem to be recruiting producer/handlers for supply."

4 A. Yes.

5 Q. Are you willing to offer any specific examples of  
6 retailers in the Pacific Northwest who are, indeed,  
7 recruiting producer/handlers for supply?

8 A. No, as far as naming names, but we have had  
9 discussions with several other cooperatives and other  
10 marketing folks, if you will, that indicate to us that some  
11 retailers have, indeed, begun to seek out  
12 producer/handlers.

13 Q. But you don't have anything specific to add to  
14 the record on that --

15 A. I'm not willing to provide any specific names.

16 Q. Okay. There's another statement you make on page  
17 two, and I'm not quite sure what you mean by it. It's the  
18 first line of the next paragraph. It says, "The drive to  
19 exploit this loophole is or will create organized,  
20 disorderly marketing." And at first blush, it seems that  
21 orderly disorganized marketing is an oxymoron.

22 A. Organized disorderly marketing, in that we expect  
23 to see if the provisions that we are supporting are not  
24 found for, that there will be a concerted interest in more  
25 producer handlers in other markets to take advantage of the

1 loophole. And as I indicated in earlier lines of  
2 questioning, we have had large producers who have come to  
3 us and asked questions about being a producer/handler.

4 Q. Okay.

5 A. And one of the key lines of that question is,  
6 will this exemption continue or not?

7 Q. Again, in your statement there is -- it's on page  
8 nine. You say that the majority of producer/handlers, the  
9 90,000 pound per month monthly volume, --

10 A. Yes.

11 Q. -- they say that represents the majority of  
12 producer/handlers, --

13 A. Correct.

14 Q. -- and that was based on your own proprietary  
15 research, that some of the information that the market  
16 administrators had provided to you; is that correct?  
17 That's where you came up with that?

18 A. I'm sorry, I didn't -- you said, was that based  
19 on our own research and the data we got from the market  
20 administrator?

21 Q. Yes.

22 A. Yes, that's correct.

23 Q. Okay. And that is summarized in Exhibit 33,  
24 Table D and E, correct?

25 A. No, it would be in Table F.

1 Q. Table F. Okay.

2 And so that statistic that the majority of  
3 producer/handlers produced less than 90,000 pounds is based  
4 on a nation-wide average?

5 A. Yes, the average for Federal Order 1, Federal  
6 Order 6 and 7, and Federal Order 32 was 96,807. So I guess  
7 the 90,000 is, you know, 5,000 on the low side, --

8 Q. Right.

9 A. -- but that's where that statistic comes from,  
10 and out of 101 producers/handlers or additional 117, if you  
11 count the other ones, that would be more than half of them.

12 Q. And I have not taken the time to calculate these  
13 myself, --

14 A. Okay.

15 Q. -- but assuming that the estimates you have on  
16 Tables D and E are correct, as far as the plant size and  
17 pounds --

18 A. Okay.

19 Q. -- would it be fair to state that the average  
20 producer/handler in orders 124 and 134 is -- I'm sorry, 131  
21 are significantly larger than 90,000 pounds?

22 A. Yes, that would be correct.

23 Q. And looking at order 124, again, I'm just doing a  
24 quick guess off the top of my head, but it's probably over  
25 one million, maybe two million pounds per month?

1 A. I would agree with that.

2 Q. Okay. So in the affected orders, the majority of  
3 producer/handlers are actually far larger than that 90,000  
4 pounds; that's the, I guess, the conclusion that we can  
5 make?

6 A. In orders 131 and 124, yes.

7 Q. Okay. And am I correct in interpreting your  
8 testimony to say that Mr. Herbine's study suggests that the  
9 prices observed in the warehouse and box stores in Phoenix  
10 are unobtainable by regulated handlers?

11 A. Are --

12 Q. Unobtainable by regulated handlers.

13 A. The prices?

14 Q. The --

15 A. The regulated handler could not serve those  
16 customers at a margin and pay regulated prices.

17 Q. Okay.

18 A. That would be the conclusion.

19 Q. Going back to your testimony on page 12. Toward  
20 the bottom, you state that "the large-sized  
21 producer/handlers has operational costs that are lower than  
22 the averaged sized Federal Order regulated plant."

23 A. Yes.

24 Q. How did you come to that conclusion?

25 A. Mr. Herbine's data outlines some cost data for

1 various sizes of plants, and the operational cost data for  
2 plants of a certain size, like the 18,000 pound large size  
3 -- largest size producer/handler was lower than that of the  
4 average Federal Order plant, which would be the 3,000 pound  
5 plant and the 12,000 pound plant.

6 Q. In this statement, when you use the phrase "large  
7 sized producer/handler," is that referring to a specific  
8 producer/handler or larger producer/handlers in general?

9 A. Well, it would be those that were larger than the  
10 average size Federal Order, 7A handler. Larger than the 12  
11 million pounds, but in some cases even the, you know, the  
12 five and six million pound based on some of Mr. Herbine's  
13 work would have a lower cost than the three million pound,  
14 which was a third of the Federal Order plants.

15 Q. And to the extent that Mr. Herbine's research  
16 would be flawed or had overstated the costs and the  
17 processing, would that affect your conclusions?

18 A. I think I'll leave that judgment up to the  
19 secretary.

20 Q. You don't know how your conclusion would be  
21 affected if his data was bad?

22 A. That presumes, I think, his data might be bad,  
23 and I think his data is --

24 THE COURT: -- should answer the question. If  
25 his data's bad, does that affect your conclusion? That's

1 all he's asking you --

2 THE WITNESS: And I answered that. I told him I  
3 would leave that conclusion up to the secretary.

4 THE COURT: So you won't answer it. Okay.

5 BY MR. MILTNER:

6 Q. Throughout your testimony you talk about a drive  
7 to exploit the loophole.

8 A. Yes, sir.

9 Q. And you talk about -- oh, well, I think it's  
10 sufficient to say you talk about a drive to exploit a  
11 loophole. Is it correct that the regulations governing  
12 producer/handlers have been essentially unchanged, let's  
13 say, even from the 1960s?

14 A. Yes.

15 Q. And you say that in the recent past, you have  
16 been approached by producers who are expressing an interest  
17 in becoming a producer/handler, or at least exploring that  
18 option?

19 A. Yes.

20 THE COURT: You know, I just want to interject  
21 here a second. I'm hearing a lot of the same questions  
22 that I've heard before over the last hour and a half or so,  
23 and I am allowed to stop redundant, repetitive testimony  
24 and questioning. And I think we've -- you know, if you  
25 have something new or different to ask about, please go

1 ahead, but don't -- just don't ask him the same questions  
2 he just answered?

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

4 BY MR. MILTNER:

5 Q. I did not hear you answer as to what changes in  
6 the marketplace have occurred in recent years --

7 A. Okay.

8 Q. -- that would justify a change in a policy that  
9 has been in existence for at least 40 years.

10 A. I may want to come back to that question because  
11 I wrote down the answer to that, and I don't have it  
12 sitting here. But I will give you some of the things that  
13 I would observe. You know, one is that, you know,  
14 producers are extremely larger than they were 40 years ago  
15 or even ten years ago. The largest sized producers now are  
16 much larger. Those large sized producers have different  
17 economies of scale than they had several years ago.

18 The retail sector has changed dramatically, even  
19 in the last ten years. And if you look at data from 1990  
20 that surveyed the retail sector and looked at the top ten  
21 retailers, you know, that list is dramatically different,  
22 and the market share is dramatically different.

23 The position of the large warehouse-type stores  
24 and the segments of the market that they command is much  
25 different than it was 40 years ago, or even 10 years ago.

1 Some of the technologies that are available in terms of on  
2 farm fractionization (phon.) of milk components,  
3 transportation efficiencies. Those are far different than  
4 they were 40 years or even 10 years ago.

5 It's not uncommon for milk to move hundreds of  
6 miles, even to thousands of miles to a fluid customer.  
7 That was not, you know, the same even as recently as ten  
8 years ago.

9 Q. Have those conditions changed in the past three  
10 years drastically?

11 A. Some of those conditions have changed.

12 Q. Which ones?

13 A. The fact that the increasing market share by  
14 fewer and larger retailers has changed.

15 Q. What -- do you have statistics that demonstrate  
16 that, any evidence?

17 A. I think if you go back and look at Supermarket  
18 News' reports on market share held by major retailers, you  
19 would find some change.

20 Q. I want to question you about a couple of  
21 statements you made. You suggested that Mr. Herbine's  
22 study was based on a pool of 200 plant observations that he  
23 had made.

24 A. I think he said there were 200 different  
25 businesses, so it could be even more than 200 plants, I

1 think, but the record will bear out what he said.

2 Q. Okay.

3 A. The 200 was right. I don't know if it referred  
4 to a plant or to businesses.

5 Q. Is it correct that his actual study prepared for  
6 Dairy Farmers of America was based on 20 plant  
7 observations?

8 A. I don't remember the number, but that may well be  
9 true. In fact, I think that's in his exhibit. I think you  
10 could go back and add up the number of observations in each  
11 of the costs, groupings.

12 Q. So if the record reflected 20, you would agree  
13 with that?

14 A. Yes.

15 Q. And you also made a statement from Mr.  
16 Vanderpool. I believe he was the representative from --

17 A. Vitamilk?

18 Q. -- Vitamilk. Yes. That he lost sales to Alaska  
19 to producer/handlers?

20 A. I -- if I said that directly, that may have been  
21 wrong. However, somewhere in this presentation someone has  
22 said they had business in Alaska and lost that business to  
23 a producer/handler. If it wasn't Mr. -- if it wasn't  
24 Vitamilk and Mr. Vanderpool, it was perhaps another entity.

25 Q. Okay. So if Mr. Vanderpool's testimony actually

1 showed that he lost business in Alaska to Safeway, you  
2 wouldn't argue with that?

3 A. No.

4 Q. And is Safeway a regulated handler?

5 A. Yes, they are.

6 MR. MILTNER: Okay. I don't have anything  
7 further, Your Honor.

8 THE COURT: Thank you. Let's take that ten  
9 minute break now. Come on back about five after the hour.  
10 (Off the record and reconvened.)

11 THE COURT: Okay. Let's get back on the record.

12 Ms. Deskins, you and your colleagues had a few  
13 questions first?

14 MS. DESKINS: Yes, I think Mr. Rower is going to  
15 go first.

16 THE COURT: Okay.

17 MR. ROWER: Can you hear me? Okay.

18 BY MR. ROWER:

19 Q. Jack Rower, USDA.

20 A. Yes, sir.

21 Q. Mr. Hollon, I want to start off with some small  
22 business questions where --

23 A. Okay.

24 Q. Does DFA have members, and when I say "members,"  
25 I mean dairy farmers.

1 A. Okay.

2 Q. Who would be considered to be small businesses?

3 A. Yes.

4 Q. Okay. With matters before this, or under  
5 consideration, in this hearing have an impact on those  
6 small businesses?

7 A. Yes, they would.

8 Q. Could you elaborate briefly?

9 A. Well, the small business dairy farmer  
10 member/owners of DFA, you know, a part of their financial  
11 picture every month is the blend price in the Federal  
12 Order, and to the extent that there are some dollars that  
13 are not shared in the blend pool in the Federal Order due  
14 to a producer/handler business, then they would be  
15 negatively impacted by that. So to the extent that those  
16 dollars got in the pool, they would gain access to those  
17 through the market-wide pool.

18 Q. Thank you. Just a quick question on over-order  
19 premiums. In Order 124 are over-order premiums charged?

20 A. Yes, they are.

21 Q. Okay. And 131 as well?

22 A. Yes.

23 Q. Okay. Thank you. I had a concern about transfer  
24 prices that were discussed in the hearing when we met in  
25 Phoenix --

1 A. Okay.

2 Q. -- by Dr. Kryon, and I didn't ask the question  
3 then, but would you in your position agree that the -- that  
4 a producer/handler is a single, continuous operation as  
5 opposed to a producer and a handler under the definition of  
6 producer/handler in, for example, 131.10?

7 A. Yes, I would agree that they are continuous,  
8 seamless operation.

9 Q. Okay. And then the same would apply for Order  
10 124, --

11 A. Yes.

12 Q. -- wouldn't you agree?

13 A. Yes.

14 Q. Okay. One of my concerns that I haven't been  
15 able to put to rest and isn't on the record, and I was  
16 hoping you could get it on here so that if not you today,  
17 others who've testified before may be able to answer in  
18 briefs or comments later. This notion that the optimal  
19 transfer price that Dr. Kryon had talked about as the  
20 market price, in a seamless, single operation it's not  
21 clear to me that the transfer price is anything more than  
22 literally the market price that the entity as a whole would  
23 be collecting in the marketplace. For example, Mr. DuPey  
24 from Braums talked about his market price being the retail  
25 price rather than, say, the Federal Order Class 1 or any

1 other Federal Order class price, plus or minus any premium.

2 A. Okay.

3 Q. Do you understand what I'm saying?

4 A. I thought I did. I'm getting foggier now.

5 Q. Okay.

6 A. I interpret a transfer price to be, you know,  
7 when one business has multiple business lines, --

8 Q. Right.

9 A. -- and it moves product from one line to another  
10 line. There is some price that gets transmitted back and  
11 forth.

12 Q. Yeah. I agree with you, and I even went back to  
13 one of my old textbooks. I had to --

14 A. All right.

15 Q. -- and my colleagues laughed at me because it was  
16 from 1966, but the key thing here -- because some of them  
17 weren't born yet -- the key thing here, though, is if it's  
18 a single, seamless operation by definition, --

19 A. Uh-huh.

20 Q. -- the definition is fiat. It's a regulation.

21 A. Yes.

22 Q. Then the market price that applies is the market  
23 price that the entity as a whole will receive and not its  
24 parts. For example, the producer/handler in its capacity  
25 as a producer and its capacity as a handler is one. So

1 really it's the final price, the end price, the handler  
2 price that will be the price, we would call it his market  
3 price, as producer/handler. Do you understand?

4 A. Yeah, that's going to --

5 Q. The reason -- there aren't two prices there.

6 There's --

7 A. That's going to define his income strain.

8 Q. And there'll only be one to consider, not two as  
9 though he were a producer and a handler, because here he's  
10 a seamless, single entity. That's where -- that's why I  
11 had to go back to my textbooks.

12 A. Okay.

13 Q. And I was hoping that -- if you couldn't get to  
14 it, we got it on the record so that others --

15 A. Okay.

16 Q. -- might be able to respond to that.

17 A. We'll look at it in that light.

18 MR. ROWER: Okay. I appreciate that. Ms.

19 Deskins had a question or two here.

20 BY MS. DESKINS:

21 Q. Okay. I wanted to ask you some questions about  
22 some of this language that you proposed.

23 A. Yes, ma'am.

24 Q. Okay. Let's start with page 17.

25 A. Okay.

1 Q. Okay. You've changed this to cut out the milk  
2 market administrator designating someone as a  
3 producer/handler?

4 A. Yes.

5 Q. Okay. So I'm just trying to figure out how this  
6 section is going to work. In order for someone to be a  
7 producer/handler, once they meet all the conditions, what  
8 happens next?

9 A. Okay. I think I understand your question. When  
10 we read that, it read to us as if there was some discretion  
11 in the market administrator, and we viewed that as, here  
12 are the hurdles, or here are the qualifications, and the  
13 producer/handler, the responsibility's up to them to show  
14 the market administrator that they meet those particular  
15 qualifications.

16 And once that's done, they would be a  
17 producer/handler. And so from the standpoint of your  
18 question, okay, how does the rest of the world know they  
19 are one? Then you're right, that there would be some type  
20 of publication they would be listed as a producer/handler,  
21 but the burden of proof is up to the individual to show  
22 that they meet all the standards. They bring the proof to  
23 the market administrator. The market administrator simply  
24 audits or looks at that proof.

25 Q. Okay. Let's say that someone brings in their

1 proof.

2 A. Yes.

3 Q. And the market administrator has a question about  
4 it.

5 A. Yes.

6 Q. Under the way you have it now, there's no way for  
7 him to ask for additional information, correct, because if  
8 he brings in -- from what you've said, a producer/handler  
9 brings in certain documents.

10 A. Okay.

11 Q. All the MA does is verify it, he's a  
12 producer/handler?

13 A. I don't think any market administrators would  
14 stand for that. If they had a question about a particular  
15 aspect, they would want to be made certain in their own  
16 right that that's what it would be.

17 You know, we're certainly open to -- I'm not  
18 quite sure I know the direction that you're headed, but  
19 we're certainly open to having some give and take between  
20 the market administrator to find out, you know, the answers  
21 to the various -- you know, are you more or less than three  
22 million pounds? Did you buy more or less than 150,000  
23 pounds of milk? Did you sell milk to a distribute (phon.)  
24 plant, whether they be pool or non-pool?

25 Those kind of things, you know, should be

1 presented by the person who wants to be a producer/handler.  
2 The market administrator would check and see, and if  
3 something's not clear, then certainly they're going to have  
4 to, you know, investigate them.

5 So if the language needs some changing to provide  
6 them the latitude to investigate those, then, you know, I'm  
7 not opposed to that. I just want to make sure that it's  
8 clear where the burden of proof falls, and it's not on the  
9 market administrator.

10 Q. Okay. So you're -- so the changes you're  
11 proposing here, you're not proposing that the market  
12 administrators just automatically, --

13 A. Accept?

14 Q. -- if someone's a producer/handler based on  
15 whatever they submit?

16 A. No.

17 Q. So there should be some discretion in there for  
18 the MA to review it --

19 A. Yes.

20 Q. -- and to see if there's additional information  
21 that he might need?

22 A. Correct.

23 Q. Okay. So would you propose any changes to that  
24 section to allow the MA to do that, or do you need to think  
25 about it and get back to us later on?

1           A.    Okay.  I think we may need a little bit more, you  
2 know, definition of, you know, where we fell short.  I  
3 mean, but yes, we can ponder that.

4           Q.    Okay.  Okay.  I have a similar question.  I have,  
5 on page 18, where you have -- I'm trying to find the spot  
6 where you have the milk market administrator verifying the  
7 information that they presented?

8           A.    Okay.  On page 18?

9           Q.    Right up here, page 18.

10          A.    Okay.

11          Q.    There's a line in here I have in my notes where  
12 you have the -- oh, here it is.  "The market  
13 administrator's responsible to verify what is presented."  
14 And as we just discussed here, this roll is more than just  
15 to verify?

16          A.    Correct.

17          Q.    Okay.  Because also if he needs more information,  
18 as you -- as we've discussed, he should be able to ask for  
19 it?

20          A.    Yes.

21          Q.    And that producer/handler would have to produce  
22 it before getting the status?

23          A.    Correct.

24          Q.    Okay.  You wouldn't envision there be -- being  
25 someone getting, say, a provisional producer/handler status

1 while they get the additional information --

2 A. No.

3 Q. Okay.

4 A. No, would not envision that.

5 Q. Okay. So they would have to have everything  
6 first. Then they would get the designation of  
7 producer/handler?

8 A. Correct.

9 Q. Okay. Okay. On page 19, and too, you struck the  
10 word "ownership."

11 A. Yes.

12 Q. And you did give some testimony as to why, and  
13 I'm just wondering, isn't ownership important for the  
14 determination of producer/handler?

15 A. We had quite an extensive discussion over, you  
16 know, the words, you know, to pick, and in our discussions  
17 -- you know, and this discussion had been going on for a  
18 long time, not just in the last two or three months. That  
19 we felt like that there were various forms of management  
20 control that didn't always include ownership, and yet, the  
21 entity would be in -- would be making the management  
22 decisions, and that would be enough.

23 And there was also cases where I think Mr.  
24 Ricciardi talked about maybe their package filler was  
25 better than everybody else's, but maybe they don't own

1 that, they lease that particular -- and that's pretty  
2 common in our business.

3 Or there's even cases where producers lease cows,  
4 but yet they manage the herd. And so we felt like that in  
5 those cases, the market administrator would have the  
6 latitude and the ability to seek that out rather than have  
7 ownership of every entity, and we didn't want somebody to  
8 say that, well, you know, I don't own them so you can't say  
9 that, so I'm not a producer/handler, even though in every  
10 other way maybe they acted like they were.

11 Q. Okay. So you're not trying to get rid of  
12 ownership as a way of determining producer/handler status,  
13 but you just don't want that to be the limiting one?

14 A. Yes, I think that's a fair characterization.

15 Q. Okay. Is there any way if a, say, an "or" was  
16 put in there, "or ownership," that that might cover what  
17 you were saying?

18 A. Wouldn't be opposed to that if we had, I think in  
19 Congress, you call it legislative history. If there's  
20 enough, you know, detail supporting that to give some, you  
21 know, the broad latitude. You know, a lot of times what  
22 seems to happen is that, you know, we get up to a point  
23 where we think things are good, and then some technicality  
24 just blows us out of the water.

25 So if -- you know, or ownership perhaps would not

1 be, you know, we wouldn't totally object, but the reason  
2 why we struck it was we felt like that there was enough  
3 broad in terms of complete and exclusive control  
4 management. I mean, some of those words gave the market  
5 administrator enough latitude to decide that.

6 Q. Okay. Okay. Page 20.

7 A. Okay.

8 Q. I'm just looking at my notes. Oh, you used the  
9 term "total risk."

10 A. Yes.

11 Q. Could you tell us what you mean when you use that  
12 term?

13 A. There are a variety of different ways that a  
14 business can be, and I'm not expert in this, that a  
15 business structure can be put together. And so we felt  
16 like if the person who wanted to be a producer/handler,  
17 they had to have the total risk. You know, of that, they  
18 had to stand the chance to make all the money or lose all  
19 the money, and that they had to demonstrate that they had  
20 that in order to be. And if they couldn't, then they  
21 wouldn't be able to be a producer. In other words, if they  
22 were sharing that risk with somebody else, then it wouldn't  
23 work.

24 Q. So -- by total risk, you mean the economic  
25 burden?

1 A. Yes.

2 Q. Okay. Okay. Page 21. Actually, I don't have a  
3 question on page 21.

4 Let's look at page 24. Okay I have in my notes  
5 here that -- would eliminate "sole risk in enterprise;" is  
6 that right?

7 A. Uh-huh.

8 Q. Okay. I'm just trying to understand, why do you  
9 want to eliminate those terms from the definition?

10 A. On page 24?

11 Q. Yeah, if you look at 23, you're -- are you  
12 looking at -- if you look on 23, you're cutting out "under  
13 the sole and exclusive ownership of the producer/handler."

14 A. Uh-huh.

15 Q. And I'm just trying to understand why you want to  
16 eliminate that phrase there.

17 A. I think because we felt like that somebody could  
18 have management control over an entity. Again, that was  
19 leased, for example, where they wouldn't necessarily own it  
20 entirely, or they might have a, you know, a structure where  
21 they might have -- they might be making all the decisions  
22 or perhaps a herd was partially owned by someone else.

23 Q. Okay.

24 A. But if they had the management, you know,  
25 interests and controlled where that -- where those milk

1 supplies went, and then they would have to -- again, they  
2 would have to designate all of those pieces to the market  
3 administrator. These are all the cows that I'm, you know,  
4 I have an interest in. And if the market administrator  
5 were to do some type of search of various UCC, you know,  
6 filings and find some that weren't, you know, that -- some  
7 that they didn't list, then they wouldn't be able to be a  
8 producer/handler.

9 Q. I guess I'm just wondering. I mean, sometimes  
10 I've heard of things where people have a joint operating  
11 agreement, but they're separate businesses.

12 A. Uh-huh.

13 Q. Under this definition, if someone has an  
14 agreement like that, they wouldn't be able to be a  
15 producer/handler?

16 A. Right.

17 Q. Could you explain to us why that would be?

18 A. Well, again, we think that the exemption is a  
19 pretty big deal, and so in order to get that ability to be  
20 exempt from the pricing and at a part where even at three  
21 million pounds, you can have some impact in the  
22 marketplace, you ought to have to show, you know, show some  
23 pretty strong relationships -- business relationships.

24 So we're not interested in having somebody split  
25 out the risk with somebody else. If you want that

1 exemption, you're going to have to bear it. And if you  
2 don't want to do that, then you would be -- you couldn't be  
3 a producer/handler.

4 Q. Okay. And then also going back to earlier  
5 question to have. In order for someone to determine if  
6 it's considered an integrated operation, wouldn't that then  
7 be the milk market administrator needs to do that?

8 A. Yes.

9 Q. Okay. So that would be another reason to say  
10 he's the one, or she's the one who needs to make that  
11 determination?

12 A. Yes.

13 Q. Okay. Okay. Okay. And also on page 25. I  
14 notice in that one you left in "designations of  
15 producer/handlers shall be canceled upon determination by  
16 the market administrator."

17 A. Uh-huh.

18 Q. So in this section you did want the milk market  
19 administrator to make the determination?

20 A. Well, at some point if somebody doesn't meet the  
21 standards, it would have to be, you know, published in the  
22 list of handlers of who is and who isn't. Then the market  
23 administrator would be the person to do that, and if I'm  
24 doing business with you and you were a producer/handler,  
25 that may or may not define my business relationship as if

1 you were a regulated handler. So there does need to be,m  
2 you know, something published in the monthly statistical  
3 information of who is or who isn't a producer/handler.

4 Q. Okay. And also in this section where you have  
5 that -- you've changed it in this last sentence to say,  
6 "Cancellation of producer/handler status pursuant to  
7 paragraph shall be effective on the first day of the month  
8 in which the conditions were met."

9 A. Were not met?

10 Q. "Were not met."

11 A. Right.

12 Q. As a practical matter, how would the market  
13 administrator's office be able to determine that?

14 A. I think what we had in mind there -- I'll just  
15 give the analogy of a sale between, you know, any two  
16 parties, and a year later on audit, there's a determination  
17 made that something didn't work out. You know, something  
18 wasn't right, and that maybe, you know, we sold milk to  
19 somebody at a class two price, and that handler didn't have  
20 any class two utilization at that point, and it all became  
21 class one.

22 We would receive a bill, you know, say, or we'd  
23 do funds, but they would go back to the point where the  
24 audit said something changed. And so there was some  
25 language that seemed to indicate that when a

1 producer/handler status was changed, it wouldn't  
2 necessarily be in the month that the change occurred, but  
3 the following month, and we couldn't line that up with  
4 other order practices, where again under example of an  
5 audit, if you discover that there's something changed in  
6 January, then, you know, Party A and Party B have to make  
7 financial settlement for January's business. So we felt  
8 like that needed to be the same in terms of these  
9 relationships.

10 Q. Okay. So just so I understand. So the way this  
11 would work is, someone could have producer/handler status  
12 for December. January they change their practices  
13 slightly. They don't have that status then, but the milk  
14 market administrator's office doesn't find it out till they  
15 do an audit in March. So for January then they would not  
16 have been a producer/handler?

17 A. That is correct.

18 Q. Okay.

19 A. Because --

20 Q. And they might not know it until months later  
21 when --

22 A. That is correct.

23 Q. -- an audit is determined that they didn't meet  
24 the conditions?

25 A. That is correct. However, I would point out

1 that's true in any other, you know, buy/sell arrangement in  
2 milk commerce, that it's frequent occurrence that an audit  
3 adjustment occurs for some particular change, and there's  
4 no skip or forgiveness, you know, that's given, the proper  
5 financial settlements are made.

6 Q. Okay. I'm just trying to find out -- make sure I  
7 understand how this works.

8 Okay. Then also you've been relying on saying  
9 that if a producer/handler produces less than three million  
10 pounds a month, then they should not -- they wouldn't --  
11 they could still have the status of producer/handler --

12 A. That's class one sales of less than three million  
13 pounds, they could still have the status of  
14 producer/handler is correct.

15 Q. Okay. And you said the reason for that is based  
16 on the requirements in the fluid milk research and  
17 promotion ad?

18 A. That's just one of the things that we tried to  
19 point out, that, you know, Congress has decided that at  
20 three million pounds, you know, a producer -- a processor  
21 is able to afford and receive benefit from. But we've  
22 tried to point out a number of other reasons for the three  
23 million pound threshold.

24 Q. Okay. And just -- I'm sorry. I didn't -- what  
25 would the other reasons be, just quickly?

1           A.    Okay.

2           Q.    If you've said them before, we don't need to go  
3 through them --

4           A.    We talked about positions on a cost curve where  
5 economies of scale begin to come into play. We've talked  
6 about the impact in a retail market where of a certain  
7 size, a customer could -- a processor could service a  
8 certain number of customers and have an impact on retail  
9 price transactions. We've talked about economies of scale  
10 on the farm, where at a certain size there is differences  
11 in cost of production as outlined in the ERS reports. So  
12 those would be at least four of the reasons that I've  
13 outlined in my testimony and in questions.

14          Q.    Okay. And for all those reasons you've outlined,  
15 would -- is three million pounds appropriate, or would 2.5  
16 million be appropriate or four million be appropriate?

17          A.    You know, the subject of every hearing is where  
18 do you draw the line?

19          Q.    Right.

20          A.    And so, you know, we've chosen 3 million pounds,  
21 and we tried to provide some reasons for why that's an  
22 appropriate number. I don't know that there's a magic  
23 bullet that says absolutely, you know, this is it, and so  
24 certainly there's some discretion the secretary will have  
25 to provide, and we've tried to provide, you know, reasons

1 why that number is reasonable.

2 Q. Okay. Another reason I'm asking that is because  
3 the fluid milk ad is a research and promotion on, --

4 A. Uh-huh.

5 Q. -- and their criteria for setting a limit is a --  
6 based on different things for milk orders. So I'm just  
7 trying to --

8 A. I understand. That's --

9 Q. Understand --

10 A. -- we just want to try to provide more than one  
11 reason. Yet that is one spot where, you know, Congress has  
12 said, well, there's some threshold here that seems to have  
13 a bearing. So we've adopted their wisdom at least for  
14 that.

15 Q. Okay. Next question I had was, in your testimony  
16 a couple of times, you rely on the Herbine study.

17 A. Yes, ma'am.

18 Q. And I was just wondering if -- and in particular,  
19 when you're asked a question, you made some conclusions  
20 based on the Herbine study about the effect the large  
21 producer/handler would have on the market.

22 A. Yes.

23 Q. I think that was on page -- was that page ten  
24 that you made that conclusion?

25 A. Okay.

1 Q. It was page ten, that's right?

2 A. Well, I don't know what your question is.

3 Q. Okay. Well, I'm just trying to -- you made a  
4 conclusion here, "But if the large producer/handler can  
5 enter return and grow his business, pressure" --

6 A. Yes, that's on page ten.

7 Q. Okay. And I believe you were asked a question.  
8 You said that was based on your conclusion it was based on  
9 the Herbine study.

10 A. Correct.

11 Q. Okay. I was just wondering. Can you explain to  
12 us how you use the Herbine study to support this?

13 A. We discussed with Mr. Herbine the various levels  
14 at which the not paying the regulated price would affect  
15 ability to make or lose. And at the 18 million pound  
16 limit, I'm -- this is memory now. That -- we said, if we  
17 factored in the difference between the regulated and  
18 unregulated price, that that volume would come close to  
19 breaking even. And in this particular case, the estimates  
20 of that volume is about that limit, so it seems possible to  
21 us that perhaps a producer/handler who doesn't have to pay  
22 the regulated price could have a margin or break even at  
23 that point.

24 Q. Okay. Part of the reason I'm asking that is  
25 because when Mr. Herbine testified, he said the database he

1 used only had one producer/handler in it, --

2 A. Yes.

3 Q. -- and it was -- and the one that was defined as  
4 a producer/handler was under the state order in  
5 Pennsylvania.

6 A. Uh-huh.

7 Q. So I'm just trying to understand how that  
8 database then is used to make conclusions about  
9 producer/handlers as defined under the Federal Orders.

10 A. That -- the logic that you're proceeding on is  
11 not, I don't think, in the right direction.

12 Q. Okay.

13 A. At the limit of 18, or Plant E, I think, on  
14 Exhibit --

15 Q. 25?

16 A. -- 25-J, at that spot, I think Plant E was an 18  
17 million pound plant.

18 Q. I'm turning to it.

19 A. That's okay.

20 Q. Okay. Go ahead.

21 A. And at 18 million pounds and under this type of  
22 sale, the loss would be \$1.25 per hundredweight to a  
23 regulated handler.

24 Q. Okay.

25 A. So if you were an unregulated handler, you would

1 not be paying the difference between the regulated price  
2 and the blend price. And that dollar amount is not far  
3 from an average cost. So the basis for this statement is  
4 that if you were at 18 million pounds, and you didn't have  
5 to pay regulated prices, then you're -- you would have a  
6 piece of business that might make money. And in order 131,  
7 the handler that fits that description, the Sarah Farms  
8 plant, is a -- has been attributed to be about 20 million  
9 pounds, and so --

10 Q. Is that a month or a year?

11 A. A month.

12 Q. A month.

13 A. A month.

14 Q. Okay.

15 A. And so they would closely approximate the plant  
16 described here, and if by not paying the regulated price,  
17 that \$1.25 loss might possibly go to a margin. If you went  
18 back up the curve to the D sized plant, which was --

19 Q. Exhibit I on Exhibit 20 --

20 A. Just back up. That's right, --

21 Q. Yeah.

22 A. -- Exhibit I, that was a 12 million pound, and  
23 they're the bottom loss per hundredweight was \$2.10. That  
24 would not be able to overcome, in many cases, the  
25 difference in paying the regulated price versus not paying

1 the regulated price.

2 Q. Okay. And also just to clarify, when you  
3 referred to J that's part of Exhibit 25, and you said 18  
4 million pounds, it's 18 million pounds a month?

5 A. Correct.

6 MS. DESKINS: I don't have any more questions,  
7 but Mr. Tosi has some. Thank you.

8 BY MR. TOSI:

9 Q. Hi, Elvin. Thank you for appearing.

10 A. Yes, sir.

11 Q. The questions that I want to ask you --

12 THE COURT: Would you identify yourself?

13 MR. TOSI: Yes. Hi, I'm Gino Tosi, T-o-s-i, with  
14 the USDA.

15 BY MR. TOSI:

16 Q. Elvin, the questions I want to ask, build a  
17 little bit off the some of the concerns that were expressed  
18 by Charlene on the -- some of your intents here on --

19 A. Okay.

20 Q. -- the language of -- that you're proposing here  
21 for the producer/handler definition.

22 A. Okay.

23 Q. Do you think it's important that -- in  
24 considering an adequate producer/handler definition, in  
25 addition to the things that you have articulated here, one

1 of the things that I'm concerned about is that during the  
2 times when we have a price inversion, where we've had a  
3 quick run up on either the class three or four price, such  
4 that it's higher than the effective class one price, that  
5 to the extent that a producer/handler could decide to  
6 disqualify himself as a producer/handler that month and by  
7 doing, select for example, will receive the milk of a  
8 neighboring dairy farmer.

9 A. Yes.

10 Q. Now, he becomes a -- he loses his  
11 producer/handler status in -- by doing that, and that in  
12 theory here we could have a situation now that he becomes a  
13 fully regulated handler --

14 A. Uh-huh.

15 Q. -- by engaging in that behavior. And then in the  
16 time of a price inversion, rather than having to make a  
17 payment to the producer settlement fund that it would, in  
18 effective, qualify themselves for a draw from the pool.  
19 Are you concerned about that --

20 A. That seems to be an unfair or an unreasonable  
21 chance for that to happen. So it would be nice for that  
22 not to be able to happen.

23 Q. Okay. And do you -- would you be of the opinion  
24 that there's something about the quality of your proposed  
25 definition for producer/handler that would address that

1 concern?

2 A. Now, we discussed that off and on, but I don't  
3 think we came to a conclusion on that. So I guess the --  
4 part of it would be, if you're going to be -- you know, if  
5 you meet the criteria, and you're going to be a  
6 producer/handler for some time, seems like -- perhaps there  
7 ought to be some calendar duration. Or if you, you know --  
8 if you choose not to be for some time, maybe you should not  
9 be for a while. We'll have to discuss that as a language  
10 alternative.

11 MR. TOSI: Okay. That's all I have. Thank you.

12 THE WITNESS: Okay.

13 THE COURT: Okay. Let's have questions from this  
14 -- from the, what I'll call the proponents' side of the  
15 room.

16 Go ahead, Mr. English.

17 MR. ENGLISH: Charles English for Shamrock Foods  
18 Company and Dean Foods Company.

19 BY MR. ENGLISH:

20 Q. Good afternoon, Mr. Hollon.

21 A. Good afternoon, Mr. English.

22 Q. I'd like to start with the language of the  
23 proposals again, and following up on some of the questions  
24 just asked by department. Maybe put in the record at least  
25 one example where the status of an entity may change upon

1 audit some months thereafter.

2 Are you familiar with the provision for partially  
3 regulated plants?

4 A. Yes.

5 Q. And that provision is based on the idea that a  
6 plant that sells into a marketing area may not meet the  
7 minimum route disposition requirements for a particular  
8 month to be fully regulated, but will nonetheless have to  
9 meet the requirements of partially regulated plants,  
10 correct?

11 A. Correct.

12 Q. And do you know of instances in the last several  
13 years in which some time after filings, entities have ended  
14 up showing up on marketing administrator reports as having  
15 been fully regulated for months in the past?

16 A. Yes, that has happened from time to time.

17 Q. And that isn't for the month, you know,  
18 afterwards or the month when discovered if the first month  
19 when an entity has met the route disposition requirement,  
20 correct?

21 A. That's correct.

22 Q. And so when you discuss this issue on page 25  
23 with respect to producer/handlers, you're really tying it  
24 to that kind of determination --

25 A. Yes.

1 Q. -- that is made similarly for partially regulated  
2 plants?

3 A. Yes.

4 Q. And on page 23, referring to discussion on page  
5 24, that you're deleting the option for producer/handler  
6 declare parts of an operation included or excluded, I  
7 confess, I'm confused when I look at 23(b)(1), which  
8 references in the middle of the pages, which the  
9 producer/handler has designated as a source of supply --  
10 milk supply for the producer/handler's plant operation.

11 A. Uh-huh.

12 Q. How is that language in (b)(1) consistent with  
13 the concept that we're deleting the option for a  
14 producer/handler declare parts of the operation as included  
15 or excluded?

16 A. I think that there's no opportunity to say parts  
17 are excluded. You're either all in or all out, but you  
18 still have to be the one to bring your information to the  
19 market administrator and say, this is my milk supply, this  
20 is my plant, this is my distribution, but you don't have an  
21 option of saying, this herd is, and this herd isn't.

22 Q. So you have -- the idea is that the  
23 producer/handler -- it's not so much what he's designated  
24 so much as has available as a milk supply?

25 A. Say that again.

1 Q. Isn't it what a producer/handler has available as  
2 a milk supply as opposed to designated?

3 A. Well, again, they're going to say this -- these  
4 are the cows I own, the farms that -- the farms I have an  
5 interest in, this is part of my milk supply. Market  
6 administrator, here is the farm, here's the address, you  
7 know, here's where you get the production records, and so  
8 you'll know of all that information. But there's not the  
9 option to say, you know, this farm is in, or this farm is  
10 out, or this plant on this side of the state line is in,  
11 and this plant on a different side of the state line is  
12 out.

13 Q. As we're discussing legislative history, then the  
14 point is that after such designation, the market  
15 administrator certainly should have the power to go  
16 determine whether or not that designation was full and  
17 complete, correct?

18 A. Correct, yes.

19 Q. And if the market administrator shall determine  
20 that there is some farm over there that is part of this  
21 producer/handler operation that's not being included, the  
22 market administrator would have the power to effectively  
23 designate it for the producer/handler, correct?

24 A. Either that or deny producer/handler status.

25 Q. Right. You were asked a series of questions by

1 Mr. Yale having to do with regulating handler size, or  
2 limiting -- I'm sorry, limiting handler size. Is there  
3 anything in the proposals that actually limits a handler  
4 size?

5 A. No.

6 Q. Is there any attempt to limit the ability of a  
7 handler to have any size in any of these markets?

8 A. The only intent is if you're bigger than three  
9 million pounds, you should be regulated, but if you want to  
10 be a three million pound handler or a 23 million pound  
11 handler, you can certainly try to grow your business to  
12 either size.

13 Q. Mr. Yale had some discussion with you concerning  
14 Safeway and the idea of an integrated operation.

15 A. Yes.

16 Q. First, you understand that Safeway in many  
17 instances also chooses to sell to stores that are not owned  
18 by Safeway?

19 A. I have to admit, I did not know that.

20 Q. Regardless, is any advantage that Safeway obtains  
21 by being integrated have anything to do with the Federal  
22 Milk Order System regulation?

23 A. Not with regards in any way that I know, with  
24 minimum price. That was -- this is where our, you know,  
25 our argument hones in on. If -- outlined in Mr. Ricciardi,

1 if they have a better packaging filler machine or a better  
2 package or any economies, you know, they are due those, and  
3 you know, should earning get the benefit from them, but our  
4 proposal deals strictly with the price minimums.

5 Q. And then you were asked a series of questions by  
6 Mr. Yale concerning what may or may not have changed since  
7 2000, and guess I would ask a series of questions about  
8 that.

9 In last three years, before we had this hearing,  
10 did USDA have the benefit of Mr. Herbine's analysis?

11 A. It did not.

12 Q. Did USDA have the benefit of Roger Kryon's  
13 testimony?

14 A. It did not.

15 Q. Did it have the benefit of Mr. Kruger's  
16 testimony?

17 A. It did not.

18 Q. Did it have the benefit of the testimony of the  
19 two Order 124 witnesses today?

20 A. It did not.

21 Q. Had Vitamilk gone out of business?

22 A. It had not.

23 Q. You were asked questions as an economist  
24 concerning the costs of doing business as a  
25 producer/handler -- the regulated costs. If the costs of

1 the things that the producer/handler has to do in order to  
2 maintain producer/handler status exceeded the benefits of  
3 not being pooled, as an economist, what is your opinion of  
4 what a rational producer/handler would do?

5 A. It would cease being a producer/handler, and they  
6 would be pooled. In fact, I think Mr. DuPey testified to  
7 that, that his company did those analyses, and from time to  
8 time, they chose to be pooled, and time to time they chose  
9 not to be.

10 Q. You were also asked a series of questions by two  
11 or three questioners concerning disorderly marketing.

12 A. Yes.

13 Q. And were you -- did you participate in a Federal  
14 Order hearing back in April of 2002 regarding the Western  
15 and Pacific Northwest markets?

16 A. Yes.

17 Q. And did that proceeding include a question of  
18 disorderly marketing with respect to relatively small  
19 processors that were not paying regulated minimum prices?

20 A. It did.

21 Q. And do you recall what USDA's determination was  
22 with respect to the very fact that entities, whatever size,  
23 had that kind of situation where they were not paying  
24 regulated minimums?

25 A. The recommended decision or the interim, final

1 decision in that order eliminated the ability for the  
2 proprietary bulk tank handler unit to exist at, and in  
3 effect, erase those provisions in the order, and one of the  
4 reasons that they gave was the fact that it had created an  
5 equity in handler prices.

6 Q. And, in fact, did the secretary in that August  
7 2003 final interim said that a provision gives rise to  
8 disorderly marketing conditions because the order is unable  
9 to establish minimum prices that are uniform among  
10 regulated handlers?

11 A. Yes.

12 Q. And do you agree with that statement?

13 A. I do.

14 Q. And, in fact, those entities were far smaller  
15 than three million pounds, correct? Do you remember the  
16 testimony --

17 A. I do --

18 Q. -- from that hearing?

19 A. I do not remember the testimony from that  
20 hearing, not with regard to the size of those two plants.

21 Q. And finally, you were asked some questions and  
22 sort of discussed with Mr. Ricciardi the idea of the  
23 airline industry and Southwest Airlines. If Southwest  
24 Airlines were the only airline that did not have to pay  
25 airport fees for landing, --

1           A.    Yes.

2           Q.    -- and Southwest Airlines was then offering  
3 cheaper seats to passengers, would you conclude as an  
4 economist that at least one of the reasons why they were  
5 able to do so was the fact that they, unlike every other  
6 airline, were not having to pay those kinds of airline  
7 fees?

8           A.    Yes, I would draw that conclusion.

9           MR. ENGLISH:  Thank you.

10          MR. BERDE:  Sydney Berde.

11 BY MR. BERDE:

12          Q.    I'm going to ask you some questions that relate  
13 to Mr. Yale's testimony -- cross-examination, rather.

14          A.    Yes.

15          Q.    I think almost at the opening of his examination,  
16 he asked you to explain what would happen to a  
17 producer/handler if the handler became regulated.  Would he  
18 be selling milk to the pool?

19          A.    Yes, I remember those.

20          Q.    And had some query about what the exact  
21 relationship would be between his milk and his relationship  
22 to the pool.  Wouldn't the short answer to that question be  
23 simply that he'd be regulated the same as every other  
24 handler and be subject to the same provisions of the order  
25 as supplied to every other handler?

1 A. That would be true.

2 Q. You're aware that a producer/handler is a  
3 handler?

4 A. Yes.

5 Q. Does the term producer/handler appear anywhere in  
6 the act?

7 A. In the act. I do not know. I do not know.

8 Q. Do you recall the testimony of Mr. Kryon  
9 concerning the reasons why the producer/handler concept was  
10 invented by the Dairy Division in the first place?

11 A. Yes.

12 Q. As a matter of administrative convenience?

13 A. Yes.

14 Q. And you also recall that in the course of his  
15 testimony, he referred to the Kansas City order?

16 A. Yes.

17 Q. And it's 500 pound limitation, when that  
18 administrative convenience idea was adopted?

19 A. That is correct.

20 MR. UNIDENTIFIED: Your Honor, at some point, the  
21 question from Mr. Berde, all he's asking him to do is  
22 recite what's already in the record. He said he has no  
23 basis for this testimony, so what we're having is argument  
24 (phon.) (indiscernible).

25 THE COURT: Okay. Why don't you ask him some

1 questions other than --

2 MR. BERDE: Yeah.

3 THE COURT: -- if he agrees that what was already  
4 testified to.

5 BY MR. BERDE:

6 Q. You were also asked the question by Mr. Yale as  
7 to whether the secretary should also regulate the size of  
8 producers. Do you recall that?

9 A. Yes.

10 Q. Does the secretary have any authority to regulate  
11 the producers in their capacity as producers?

12 A. No.

13 MR. RICCIARDI: Objection, Your Honor. Now he's  
14 asked for legal conclusion (phon.).

15 MR. UNIDENTIFIED: That was a question.

16 MR. RICCIARDI: It's not -- first of all, it may  
17 be a question, but it's a legal conclusion --

18 THE COURT: Well, he can -- you can examine him  
19 on his basis for -- I agree it's a legal conclusion, but he  
20 asked it, and --

21 BY MR. BERDE:

22 Q. You were also asked whether it would be  
23 appropriate for the secretary to regulate the size of a  
24 handler's plant. Do you recall that?

25 A. Yes.

1 Q. Isn't that a problem for the Justice Department  
2 in its capacity as the regulator of anti-competitive  
3 problems and monopoly problems?

4 A. I thought that, but I didn't want to go there  
5 because I assumed it would spawn a lot more questions.

6 Q. You were also asked what the concern was at the  
7 present time inasmuch as there has been no explosive growth  
8 in the number of producer/handlers in the country. Do you  
9 recall that?

10 A. That's correct.

11 Q. Do you recall the testimony in the record of the  
12 explosive growth of multi-thousand cow herds in the past  
13 five years?

14 A. Yes.

15 MR. RICCIARDI: Objection, Your Honor. What's in  
16 the record is in the record. (Indiscernible) question and  
17 answer that has nothing to do with other than reciting the  
18 question?

19 MR. BERDE: This is addressed to the adverse  
20 cross-examination of another counsel opposing these  
21 regulations. I have an absolute right to draw out in the  
22 record the reasons why those questions were inappropriate  
23 and irrelevant to the proceeding from this witness.

24 THE COURT: What do you have to say, Mr. Beshore?

25 MR. BESHORE: Well, I think Mr. Berde should be

1 allowed to examine without Mr. Ricciardi's repeated  
2 interruptions.

3 MR. RICCIARDI: Mr. -- Your Honor, my objection  
4 is, he's asking him whether or not this is in the record.  
5 It's either in the record, or it's not.

6 THE COURT: I'm assuming, perhaps erroneous, that  
7 he's asking that so that he can ask him a question about it  
8 at some point that will tie to --

9 MR. RICCIARDI: I haven't seen any --

10 THE COURT: Well, we -- you know, I'm trying to  
11 give him the benefit of the doubt, and I'm assuming that  
12 he's going to tie it up with a question. I may be wrong,  
13 but I don't know until he gets to that, so I'm going to let  
14 him ask the question, and I'm going to let him answer it,  
15 and --

16 MR. RICCIARDI: And if he --

17 THE COURT: -- hope that it addresses the --

18 MR. RICCIARDI: (Indiscernible)

19 THE COURT: -- points you made in cross-  
20 examination. So go ahead, Mr. Berde.

21 I think you already answered that last question,  
22 did you not.

23 THE WITNESS: I think so.

24 THE COURT: Okay.

25 BY MR. BERDE:

1 Q. Now, relating to the issue of whether there  
2 should be any present concern inasmuch as there has not  
3 been a great increase of the number of producer/handlers in  
4 the market. Do you recall that?

5 A. Yes. Yes.

6 Q. And is the concern, in fact, the fact that the  
7 number of multi-thousand cow herds have arisen in the past  
8 five years to the extent of accounting for 15 percent of  
9 total class -- of total milk production of the country?

10 A. That is correct. I think one of Mr. Miltner's  
11 concern -- questions was about that, or perhaps Mr. Yale,  
12 of the growth of large sized herds and what size they were,  
13 and certainly the potential for both additional interest  
14 and the ability to carry out those interests is a concern.

15 Q. As a matter of fact, you recall that the notion  
16 of keeping options open was a concern of Mr. Marsh during  
17 his testimony, that is, a certain client of Mr. Yale's  
18 wanted to keep his options open.

19 A. Yes, I remember that --

20 Q. And is the fact of that option being open the  
21 reason why we're here?

22 MR. UNIDENTIFIED: Objection, Your Honor, --

23 THE COURT: Yea, let him answer that one. That's  
24 not a real -- that's not a legitimate question. We're here  
25 because some -- his people filed petitions and --

1 MR. UNIDENTIFIED: Yeah.

2 THE COURT: Yeah.

3 MR. UNIDENTIFIED: But the question was -- Mr.  
4 Berde's question was, wasn't that one of the base -- one of  
5 the reasons the petitions --

6 THE COURT: He said, wasn't that the reason he's  
7 -- he asked whether something that someone testified to was  
8 the reason that we were here.

9 MR. UNIDENTIFIED: Which is a question of whether  
10 that wasn't why the proposals were filed.

11 THE COURT: I don't know that we know, you know,  
12 why. It's just not a question that's worth having an  
13 answer to.

14 So why don't you continue? Move on.

15 MR. BERDE: One minute.

16 THE COURT: Sure.

17 (Pause)

18 BY MR. BERDE:

19 Q. You were also asked the question of whether a  
20 producer/handler purchases his milk from his own herd. Do  
21 you --

22 A. Yes.

23 Q. -- recall that?

24 A. Yes.

25 Q. And isn't it a fact that a producer/handler who

1 acquires milk as a bay-lee (phon.) for example, not  
2 purchases it at all, but just happens to receive milk from  
3 a source other than his own farm production --

4 A. Okay.

5 Q. -- for whatever reason, would be disqualified as  
6 a producer/handler?

7 MR. UNIDENTIFIED: Objection, Your Honor.

8 THE COURT: Let him answer it, if he knows the  
9 answer to the question.

10 THE WITNESS: I think the regulations require, if  
11 you get milk greater than a certain quantity, you lose your  
12 exemption. That's one of the subsections.

13 MR. BERDE: I think that's all I have. Thank  
14 you.

15 THE COURT: Okay. Mr. Beshore, did you have some  
16 follow-up?

17 BY MR. BESHORE:

18 Q. Mr. Hollon, I want to just clarify perhaps a  
19 couple of factual questions with respect to DFA operations,  
20 which Mr. Ricciardi asked you about.

21 MS. DESKINS: Judge, I hate to interrupt. I  
22 think you need to identify yourself for the record.

23 MR. BESHORE: I'm sorry. Marvin Beshore. Thank  
24 you.

25 BY MR. BESHORE:

1 Q. DMS, Dairy Marketing Services, LLC, is a joint  
2 venture between Dairy Farmers of America and I think you  
3 just said Dairy Lee (phon.).

4 A. Yes.

5 Q. Okay. That's -- you're talking about Dairy Lee  
6 Cooperative, Inc., --

7 A. Yes.

8 Q. -- which is headquartered in Syracuse, correct?

9 A. That's correct.

10 Q. Okay. I don't think Dairy Lee's been identified  
11 before.

12 A. Okay.

13 Q. We should make that clear.

14 Secondly, you used the number 12 at one point  
15 when being asked about servicing Cosco or Wal-Mart, I  
16 think, and with respect to joint ventures --

17 A. Attempting to quantify the number of joint  
18 ventures that DFA had with fluid bottling -- with -- that  
19 involved the business of fluid bottling operations, and I  
20 said about 12 because that's how many I think there are.

21 Q. Okay. So the number 12 was the number of joint  
22 -- DFA joint ventures relating to --

23 A. Yes.

24 Q. -- fluid milk processing plants?

25 A. Yes, it could be 11, it could be 13, but we have

1 about a dozen of them.

2 Q. Okay. And it -- 12 had nothing to do with the  
3 number of agreements with supermarket chains or wholesale  
4 clubs or anything of that sort?

5 A. That is correct. I thought I had communicated  
6 that.

7 Q. I just want to make sure that's --

8 A. I understand.

9 Q. -- clear because there was some --

10 A. Several questions --

11 Q. I thought there might have been some confusion  
12 with that colloquy.

13 Okay. You were also asked, and this doesn't  
14 relate to DFA now. You were also asked whether -- what  
15 would be the result of -- if your proposal was adopted and  
16 a producer/handler became -- had more than three million  
17 pounds per month of class one sales?

18 A. Correct.

19 Q. Okay. And I think this is either -- probably Mr.  
20 Yale, said they'd have to then pay some amount into the  
21 pool, correct?

22 A. Yes.

23 Q. Okay. Would they not also be entitled to draw  
24 from the pool the blend price on any milk that they had  
25 which was not a class one --

1 A. Yes.

2 Q. -- usage?

3 A. That would be true.

4 Q. Okay. So that in essence, becoming regulated  
5 means equalizing with all other producers and handlers in  
6 the order?

7 A. Correct.

8 Q. Equalizing minimum class prices for raw milk with  
9 all the -- all other handlers in the order, correct?

10 A. Yes.

11 Q. And being on an equal basis for minimum blend  
12 price on all your milk is --

13 A. That is correct --

14 Q. -- other producers in the order?

15 A. Yes.

16 Q. Okay. And that dynamic, I think, is what you  
17 referred to with respect to Braums, Mr. -- the witness for  
18 Braums who said that at times it was advantageous for them  
19 to become pooled, even if they are a producer/handler.

20 A. Yes.

21 Q. Because they draw money from the pool?

22 A. Yes.

23 Q. -- if the pool utilization was --

24 A. That was his testimony.

25 Q. -- was higher.

1 (Someone sneezes)

2 THE WITNESS: Bless you.

3 (Second sneeze)

4 THE WITNESS: Bless you.

5 MR. UNIDENTIFIED: Thank you.

6 BY MR. BESHORE:

7 Q. Now, with respect to a question from Ms. Deskins,  
8 and maybe Mr. Rower also, regarding your elimination on  
9 page 23, or the strike-out on page 23 of Exhibit 32, of the  
10 language under the sole and exclusive ownership of the  
11 producer/handler. Is -- did you not explain that on page  
12 24 in the second bolded sentence at the top where you said,  
13 "We have deleted the references to ownership control solely  
14 risk and enterprise since we consider that language an  
15 intent covering Section A."

16 A. Yes.

17 Q. Okay. And the elimination of the ownership  
18 language was, in fact, intended to be permissive, if you  
19 will, toward producer/handlers in that it would allow  
20 qualification if they did not hold legal title to assets,  
21 but, in fact, had sole risk in enterprise with respect to  
22 those assets?

23 A. That's what I tried to explain.

24 Q. Okay. And, indeed, where ownership is crossed  
25 out in your language at more than one point, sole risk is

1 inserted to be the determining factor?

2 A. Correct.

3 Q. Now, if there -- you've indicated that you would  
4 think about the question of whether any additional language  
5 would need -- might be needed to be provided or clarified  
6 with respect to the market administrator's role in the  
7 process.

8 A. Uh-huh.

9 MR. BESHORE: Okay. Your Honor, we would like to  
10 reserve the possibility of recalling Mr. Hollon later if  
11 when he has the opportunity to ponder, as he requested,  
12 that issue of language that the Department's counsel  
13 addressed.

14 THE COURT: Sure.

15 MR. BESHORE: And with that, I have no further  
16 questions.

17 THE COURT: Okay. (Indiscernible) few more  
18 questions on this side, then I'm going to turn it over --  
19 just sort of go (indiscernible) any more questions from the  
20 proponent side?

21 Okay. Go ahead.

22 MR. BERDE: Well, my only --

23 MR. UNIDENTIFIED: One question.

24 THE COURT: Oh, sorry.

25 MR. BERDE: Again, Sydney Berde.

1 BY MR. BERDE:

2 Q. During the course of Mr. Yale's cross-  
3 examination, he asked you whether a producer/handler was  
4 more regulated or regulated to some extent greater than is  
5 apparently indicated by our proposal.

6 A. I recall that line.

7 Q. Do you recall that?

8 A. Yes, I do.

9 Q. And isn't it fact that a handler is not regulated  
10 in his capacity as a handler with respect to classified  
11 pricing or obligations to the pool?

12 MR. UNIDENTIFIED: Objection, Your Honor.

13 THE COURT: I'll let him answer if he knows the  
14 answer. It's --

15 THE WITNESS: I'm not --

16 THE COURT: -- regulations say what the  
17 regulations say anyway, so I'll let him give  
18 (indiscernible)

19 BY MR. BERDE:

20 Q. Isn't it a fact that with respect to the reasons  
21 why we're here, a producer/handler is not regulated with  
22 respect to the classified pricing required and obligation  
23 of the pool required of all other handlers with whom he  
24 competes?

25 A. That is correct.

1 MR. UNIDENTIFIED: Objection, Your Honor.

2 THE WITNESS: You know, --

3 THE COURT: I know, it's -- the regulations say  
4 what the they say. I going to let him -- it's going to be  
5 easier to let him answer it than to go back and forth. I'm  
6 going to let him answer the question.

7 Please answer the question.

8 THE WITNESS: Yes.

9 THE COURT: Okay. Thank you. Anything else?

10 MR. BERDE: That's it.

11 THE COURT: Okay. Now, I'm going to let Mr.  
12 Ricciardi go. He's standing up first.

13 MR. RICCIARDI: I'm not (indiscernible) Mr. Yale  
14 can go with that, but with regard to the request that the  
15 reservation of this witness being allowed to come up and  
16 provide some additional testimony, my only point would be  
17 that that issue has to happen prior to the time that the  
18 opponents, for want of a better word, put on their  
19 testimony. I want this witness to come in if he's going to  
20 give any additional testimony prior to the time that  
21 anybody on this side has to provide any kind of testimony  
22 or (indiscernible)

23 THE COURT: And why is that? Why -- I mean, --

24 MR. RICCIARDI: I want --

25 THE COURT: It would be his --

1 MR. RICCIARDI: -- their entire issue, Judge, so  
2 that we can address it.

3 THE COURT: Well, I mean, this issue of  
4 interpretation just came up for the first time half an hour  
5 ago, I mean.

6 MR. RICCIARDI: Well, I understand that, Judge,  
7 but I think my point would be, you have the right to decide  
8 on the order, and we would request that they be provided  
9 with that -- we provided this information prior to the time  
10 we start any kind of a testimony on --

11 THE COURT: Would you have that opinion by  
12 tomorrow, you think, Mr. Hollon?

13 THE WITNESS: I do not know, but I disagree with  
14 Mr. Ricciardi's --

15 THE COURT: Okay. I'm not asking -- I didn't ask  
16 you that question. Well, you going to point to --

17 MR. ENGLISH: Yeah, Your Honor, Charles English  
18 for Shamrock Foods and Dean Foods. And I'll be glad to  
19 hand Mr. Ricciardi a copy of the rules. There is nothing  
20 in the rules that says that you go proponents then --

21 THE COURT: I know that. He's just talking about  
22 doing it as a --

23 MR. ENGLISH: Well, I mean, --

24 THE COURT: I'm just going to reserve --

25 MR. ENGLISH: He needs to put somebody on

1 afterwards --

2 THE COURT: I'm not even going to -- I'm not  
3 going --

4 MR. ENGLISH: Yeah.

5 THE COURT: -- to rule on it now.

6 MR. ENGLISH: Yeah. Fine.

7 THE COURT: Okay? And we'll see what -- you  
8 know, we'll see how things are --

9 MR. RICCIARDI: And I don't need the rules,  
10 Judge.

11 THE COURT: Okay. We'll see how things are  
12 tomorrow, how we're going.

13 Mr. Yale, do you have any questions of the  
14 witness?

15 MR. YALE: Yes, some follow-up from the  
16 Department's questions, Your Honor.

17 BY MR. YALE:

18 Q. I -- let's talk about this --

19 MR. UNIDENTIFIED: State whom you represent.

20 MR. YALE: Ben Yale on behalf of Smith Dairy --  
21 Smith Brothers Dairy, Etteline Dairy, and Mallory's Dairy.

22 BY MR. YALE:

23 Q. Post-month audit, it turns out based on a weekend  
24 sale of milk that it gets posted to the next month, and it  
25 should've been posted to Sunday, the previous month, and it

1 puts them over the three million by a pound. And this is  
2 discovered in an audit, which, by the way, audits can be up  
3 to two years later?

4 (No verbal response)

5 MR. YALE: Okay.

6 THE COURT: You got to use words like "yes, sir."

7 THE WITNESS: Oh, I'm sorry. You're right. Yes,  
8 that is correct, audits can be up to two years later.

9 BY MR. YALE:

10 Q. All right. So let's say it's a year later, and  
11 the department comes in, they do their audits, and they  
12 discover that for that month a year earlier that there was  
13 a sale that left, you know, the plant or however that works  
14 out, that looked like it could've been on Sunday, but it  
15 ended up being on Monday, and it was a new year -- or new  
16 month, and therefore, it created for one of these months a  
17 higher sale than three million pounds.

18 So according to you, that would make that month  
19 -- they would be ineligible for being producer/handler?

20 A. Correct.

21 Q. And they'd have to settle with the pool for that  
22 volume of milk based on their class utilization, right?

23 A. Correct. Yes, sir.

24 Q. All right. Now, what about all the subsequent  
25 months up to the audit?

1           A.    The same, general procedure that would follow any  
2 other audit.  If there's a, you know, a ripple affect, you  
3 know, it would ripple right on through.

4           I've been -- just to give you an example, it's  
5 not unusual at all for a producer to not touch base in an  
6 appropriate month.  Maybe in spite of everybody's best  
7 intentions, that producer didn't get pooled properly, and  
8 that's not discovered until a year later.  You know, the  
9 market administrator goes through his duties, goes through  
10 his audit procedures, comes back and says, not only in  
11 month one was that producer not pooled, but in month two,  
12 three, four, five, six, you collected funds from the pool  
13 for that producer.  Pay them back.

14          Q.    So it's your position that if in month one he --  
15 they were under three million, month 2, they're over by one  
16 pound, and 3, 4, 5, 6, 7, 8, 9, 10, and 11, they're under  
17 three million, and then on the 13th month, they do an audit  
18 and find out that month 2, they're off, that all of 3, 4,  
19 5, 6, 7, and 8, 9, 10, 11, they've got to pay into the pool  
20 until they are qualified again; is that correct?

21          A.    Correct.  No different than any other audit  
22 procedure.

23          Q.    Now, somebody brought up the issue of partially  
24 regulated handlers.  Is that the case for a partially  
25 regulated handler?

1 A. Yes.

2 Q. That once that they are off one month, then  
3 they're off all the rest of the months?

4 A. If whatever that requirement was in month one had  
5 corollary, you know, incidents in month two through month  
6 last, then yes.

7 Q. But it doesn't on producer -- on partially  
8 regulated clients?

9 A. I'm sorry.

10 Q. Partially regulated clients it's a month-to-month  
11 determination, right?

12 A. Okay. Then the same case would apply. You know,  
13 in the examples that I gave, that example, the producer  
14 didn't touch base in this particular month, and then in --  
15 perhaps there was only one month touch base. But if there  
16 was an every month touch base, in month one, they didn't,  
17 month two, they did. Then in month two, they would be  
18 qualified again.

19 Q. I want to talk about this ownership issue that  
20 was raised, and I --

21 A. Okay.

22 Q. -- just want to ask this kind of hypothetical to  
23 see where we're at on this.

24 A. Okay.

25 Q. Dairy -- an individual dairy farmer has the dairy

1 farm, and let's say it's two and a half million pounds, and  
2 he sells that, and decided -- he bills them, has --  
3 operates another dairy farm some place else. And the  
4 buyer, who's some kind of land contractor or whatever,  
5 desires to be a PD. Is the ownership broken between the  
6 first producer, or is that still part of the issue?

7 A. I'm -- I do not know.

8 Q. What about a dairy farmer sells cows to a  
9 producer/handler, and the producer/handler has not yet paid  
10 for the cows. Does that interfere, does that deprive the  
11 producer/handler of being a producer/handler? And the  
12 terms of the sale are, you pay me next month.

13 A. Again, you'd have to work your way through some  
14 of the various pieces and try to determine, you know, did  
15 those cows get into the milk supply, yes or no, you know?  
16 Did they take possession? Did they milk them? You know,  
17 did they move from farm to farm? You know, some of those  
18 are going to have to be determined, you know, using some  
19 degree of, you know, decision-making, some degree of  
20 discretion.

21 I don't know that I can answer every possible  
22 hypothetical that would come out.

23 Q. But isn't fundamentally the approach is, is if  
24 you're going to be antagonistic towards producer/handlers,  
25 you take one view, and if you're going to be more

1 permissive, you take another; isn't that really the  
2 dividing line?

3 A. Well, I, you know, hopefully you would try to  
4 make as fair a decision as you can possibly make. And, you  
5 know, and the intent, you know, is that, if you want the  
6 benefit that comes, then you try to -- you justify all of  
7 the requirements that they are, and justify those to the  
8 market administrator.

9 Q. A question, again, going back to this three  
10 million and, you know, the timing and the issue. Let's say  
11 the secretary adopts your proposal. Is there any  
12 transition period to allow the producer/handlers to make  
13 the adjustments necessary?

14 A. That's a good question, and I have to note we did  
15 not discuss that amongst ourselves. So I don't have a, you  
16 know, a collective opinion. I guess I would have to say  
17 that some transition time would not be totally  
18 unreasonable.

19 I can't -- you know, I can't speak for the other  
20 proponents on that. That would only be, you know, my  
21 opinion representing DFA.

22 Q. Now, there was a question brought about this  
23 transfer costs and the idea of a single entity and the  
24 purchase and all that other, right?

25 A. Yes, Mr. Rower asked that question.

1 Q. So if the sale and the amount of purchase takes  
2 place between the retailer and the producer, does that make  
3 the retailer a handler?

4 A. I'm sorry, I'm not following your line of  
5 question.

6 Q. As a producer/handler a sale, you know, is with  
7 the retailer, you know, Harry's Grocery. Okay?

8 A. Okay. Harry's Grocery buys milk from  
9 producer/handler X --

10 Q. From the producer/handler, does that make then  
11 the grocery then the handler, because that's the moment of  
12 the purchase?

13 A. I don't have an opinion.

14 Q. Does that take you, in a situation where the  
15 Department begins to regulate the retailer as a retailer as  
16 opposed to a handler?

17 A. I don't think that the department can regulate  
18 under federal orders the retailer.

19 Q. In a follow-up on that same point is, is that if  
20 evidence -- we've had none of the buyers of milk come in?  
21 I'm talking about the stores haven't come in and said, hey,  
22 I've got -- you know, the producer/handler came in on  
23 Friday, and he sold it to me at this price, and the  
24 regulated handler came in on Monday, and he sold it in this  
25 price, and they were so much lower, I'm going with the

1 producer/handler. We don't have any of that testimony,  
2 right?

3 A. Well, now, we did have Mr. Hitchell was a  
4 witness, --

5 Q. But --

6 A. -- and so he testified --

7 Q. But he doesn't buy milk as a retailer from  
8 processors. He doesn't buy any milk from a  
9 producer/handler, does he?

10 A. I don't think that he does, but I think his  
11 testimony was based on the competition that he faces in the  
12 marketplace.

13 Q. Competition, but I'm just saying, we don't have  
14 -- you talked about Cosco.

15 A. Uh-huh.

16 Q. We don't have Cosco. They haven't testified,  
17 right?

18 A. No, Cosco has not testified.

19 Q. And Wal-Mart hasn't testified?

20 A. Wal-Mart has not testified.

21 Q. And Albertson's hasn't testified?

22 A. No, sir, they have not.

23 Q. All right. Now, if it were to be that the  
24 testimony, or that there was evidence that showed that the  
25 producer/handlers that were selling to those plants, were

1 selling it at prices that were consistent with minimum  
2 class one prices and reasonable processing fees, doesn't  
3 that undermine your whole premise that it's disruptive of  
4 the market?

5 A. If there were evidence that showed that, we'd  
6 certainly have to consider that.

7 MR. YALE: With that, Your Honor, I'm done.

8 THE COURT: Okay. Anyone else?

9 Are you getting up to ask questions, Mr.  
10 Ricciardi, or are you just moving around in your seat over  
11 there? I can't quite tell.

12 MR. RICCIARDI: Well, you know, Judge, I couldn't  
13 make up my mind, but you know what, I'm going to sit in my  
14 seat and not ask --

15 THE COURT: Okay. In that case -- did you have  
16 any more questions over there?

17 You may step down.

18 THE WITNESS: Thank you.

19 THE COURT: And let me -- before we move on, I  
20 just want to check with -- is Mr. Van Treek here?

21 (No response)

22 THE COURT: I guess he won't be testifying till  
23 tomorrow morning then anyway, given the opportunity.

24 Are you going to call Dr. Smith next, and I -- do  
25 you want to take a five minute break before we do that just

1 to --

2 MR. UNIDENTIFIED: I think we should take a five  
3 minute break, and I -- and Dr. Smith is here prepared to  
4 testify. I'd like to -- if we started him, I'd like to get  
5 done with him --

6 THE COURT: That's fine by me. When we come  
7 back, I was going to discuss a few things about the  
8 calendar over the next couple of days.

9 Let's take a five minute break.

10 (Off the record and reconvened.)

11 THE COURT: Okay. We're back on the record.

12 You can have a seat, and let me swear you in.  
13 Please raise your right hand.

14 TERRY SMITH

15 having been previously duly sworn, was examined and  
16 testified as follows:

17 THE COURT: Okay. And if you could please state  
18 your name and spell it.

19 THE WITNESS: Terry, T-e-r-r-y, middle initial,  
20 R, last name Smith, S-m-i-t-h.

21 MR. UNIDENTIFIED: Your Honor, before I ask Mr.  
22 Smith any questions, I'd like to --

23 THE COURT: I need you to identify -- I know --

24 MR. BESHORE: Marvin Beshore.

25 THE COURT: (Indiscernible) by now, but --

1 MR. BESHORE: I'm sorry.

2 THE COURT: Okay. You can proceed.

3 MR. BESHORE: Marvin Beshore. I'd like to ask  
4 that Dr. Smith's statement, seven pages with his C.V. as  
5 the eighth, be marked for identification as the next  
6 consecutive exhibit number.

7 THE COURT: Okay. I believe that would be 34.  
8 Correct me if I'm wrong.

9 MR. BESHORE: I think so. Thank you.

10 THE COURT: Marking this as Exhibit 34.

11 (Exhibit No. 34 was marked.)

12 BY MR. BESHORE:

13 Q. Dr. Smith, would you give us your address and --  
14 for the record, please, your business address?

15 A. Yes, 2801 International Lane, Suite 210, company  
16 name is Dairy Strategies, LLC, based in Madison, Wisconsin  
17 53704-3152.

18 Q. Okay. Now, Dr. Smith, would you -- you've  
19 attached your curriculum vitae to Exhibit 34. Would you  
20 briefly review your profession -- your education and  
21 professional experience?

22 A. My -- I grew up in the state of New York. I went  
23 to Cornell University, a bachelors degree in animal science  
24 and agricultural economics, a masters degree at the  
25 University of Maine, and emphasis in dairy manure

1 management, animal nutrition, computer science and  
2 economics, and my Ph.D. is from Michigan State University  
3 in dairy science and agricultural economics. I met the  
4 requirements for a Ph.D. in both those departments of dairy  
5 science and agricultural economics. My Ph.D. is in dairy  
6 farm management.

7 Q. And could you --

8 A. Background?

9 Q. -- tell us about your professional background --

10 A. I've held -- well, immediately following, or  
11 actually during my graduate program in Michigan State  
12 University, I managed the university dairy farm with 45  
13 employees, mostly students. And following that and the  
14 completion of my degree, I took a position in the  
15 Department of Dairy Science at Ohio State -- the Ohio State  
16 University, excuse me, in the Department of Dairy Science  
17 and also held a joint appointment in the Department of  
18 Agricultural Economics at Ohio State.

19 Following Ohio State, I joined the faculty at  
20 Cornell University in Ithaca, New York where I had an  
21 research extension in teaching appointment focused on dairy  
22 farm management system, similar to what I did at the Ohio  
23 State University. And following that, I was -- became the  
24 first director of the University of Wisconsin Center for  
25 Dairy Profitability, which is a multi-campus center,

1 includes the University of Wisconsin-Madison, University of  
2 Wisconsin-Platteville/River Falls, and University of  
3 Wisconsin Extension. Coordinated the center as well as  
4 holding a full professorship in the Department of Dairy  
5 Science at the University of Wisconsin, and I own the  
6 visiting professor at the University of Wisconsin. I just  
7 don't visit as often as I used to when I got paid there.

8 I took a sabbatical leave with AgriBank, a farm  
9 credit bank, which is the wholesale bank for the middle  
10 part of the U.S. and one of the -- one of my tasks as part  
11 of that sabbatical leave was to develop business plans for  
12 financially related service companies by commodity, and one  
13 that I know something about is the dairy industry.

14 That resulted in the formation of Dairy  
15 Strategies, and I formed that company in 1997, and today  
16 have 15 staff domestically. 80 percent of our business is  
17 in the U.S. We have clients in about 25 states in the U.S.  
18 with offices in Wisconsin, California, Texas, and  
19 Minnesota. And then we have international consulting  
20 associates in Argentina, Australia, Brazil, China and New  
21 Zealand.

22 Q. Have you testified, Dr. Smith, as an expert  
23 witness in courts and other tribunals in the United States  
24 and in other countries around the world?

25 A. Yes, I have, both in the U.S. and most recently

1 in the High Court of New Zealand.

2 MR. BESHORE: Okay. At this time, Your Honor, I  
3 do offer Dr. Smith as an expert witness in dairy science,  
4 agricultural economics, with an emphasis in dairy science  
5 production economics and farm management, so that he may  
6 present his opinions in those areas to the secretary.

7 THE COURT: Okay. That's fine. He's an expert;  
8 he's qualified.

9 MR. BESHORE: Thank you.

10 BY MR. BESHORE:

11 Q. Dr. Smith, have you been retained by Dairy  
12 Farmers of America to present testimony in this proceeding,  
13 and have you prepared a statement?

14 A. Yes, I have been retained by Dairy Farmers of  
15 America, and I've prepared a statement that I believe has  
16 been distributed.

17 Q. It has. Would you proceed with it, please?

18 A. Yes. "I am Terry R. Smith, the Ph.D., and have  
19 attached my brief curriculum vitae. I'm president and CEO  
20 of Dairy Strategies, LLC, a dairy business consulting firm  
21 based in Madison, Wisconsin, with offices in California,  
22 Minnesota, Texas, and Wisconsin.

23 "Dairy Strategies, LLC has clients in over 25  
24 states in the U.S. and seven foreign countries. Our  
25 clients are dairy producers and dairy related agri-

1 businesses. In the context of this matter, our clients  
2 include dairy farm businesses that range in size from 40  
3 cows to over 10,000 cows.

4 "I have been engaged by Dairy Farmers of America  
5 to provide my dairy business management and economics  
6 expertise to the issues relevant to this hearing.

7 "Dairy industry overview, challenges and  
8 opportunities. Long-run returns, excluding appreciation  
9 and agriculture have been quite low over time, and  
10 therefore it has often been difficult for many producers to  
11 justify making the necessary capital investments needed to  
12 take advantage of new technology and improved production  
13 and management systems.

14 "Capital investments in the dairy sector have  
15 typically resulted in low returns, two to four percent  
16 return on assets are away, due in great part to the over-  
17 investment in machinery, buildings, equipment, and land.

18 "The challenge for the future as margins continue  
19 to tighten is to focus on the operational systems that  
20 produce cost-effective levels of milk output while  
21 employing assets that provide the greatest returns and  
22 reduce investments in the lower return assets. In many  
23 situations, this may mean increasing the level of  
24 specialization within the dairy farm business and having  
25 other businesses provide inputs and services, for example,

1 feed, heifers, contract veterinary services, contract  
2 manure hauling, et cetera, to the business.

3 "Profitable dairy farm businesses can be  
4 characterized by high production efficiencies, reasonable  
5 income levels, and excellent cost control. A business'  
6 expectations of the possible future gains from an  
7 investment or change in management practices or technology  
8 must be based in part on past performance and in part, on  
9 forecasts of expected future performance.

10 "The dairy profit equation is quite simple;  
11 profit equals price, minus costs, times volume. Therefore,  
12 there are three ways to increase profitability. One,  
13 increase the price. Two, decrease costs. Three, increase  
14 volume. These are the dairy manager's three primary  
15 control factors for maintaining or increasing profits.  
16 Management is challenged to find the best balance among  
17 these three factors. A change in the cost, volume, or  
18 price will likely affect both -- one or both of the other  
19 two factors.

20 "The best a business can do is to make some  
21 estimate of the range of possible future costs and expected  
22 returns, and the relative chances of earning a high or low  
23 profit on the particular investment or investments. The  
24 producer/handler faces this complex of operational  
25 investment decisions as they position their businesses for

1 the future, the same as does any business.

2 "Characteristics of U.S. dairy operations  
3 operating in total cost. The following figures, which have  
4 been referred to previously, from a recent USDA ERS  
5 publication, McElroy, et al, 2002, Agricultural Income and  
6 Finance Outlook, USDA Economic Research Service, Bulletin  
7 AIS-79, September 26, 2002, depict the average estimated  
8 operating and full cost of production by size of business.  
9 These average costs and relationships reinforce the well-  
10 known economies of size characteristic of the U.S. dairy  
11 farming sector."

12 And the following tables, or figures demonstrate,  
13 or are taken directly from AIS-79, small dairy operations  
14 less than 50 cows, medium dairy operations with 50 to 199  
15 cows, large dairy operations with 200 to 499 cows, and then  
16 what they characterize as industrial scale dairy operations  
17 of 500 cows or more. And depicted in the graphs are from  
18 the arm (phon.) survey -- the year 2000 dairy arm survey,  
19 the percent of operations and the corresponding operating  
20 costs, and operating and ownership costs are what I've  
21 referred to as total economic costs.

22 "The well-managed, smaller sized operations can  
23 be very cost effective with larger sized dairies in  
24 relationship to operating costs or operating efficiencies  
25 as depicted in the four figures above, figures 24 through

1 27 from McElroy, et al 2002. Note in particular that the  
2 percent of farms with operating costs below, say, ten  
3 percent, that's \$10 per hundredweight are reasonably  
4 similar across herd size ranges.

5 "However, the advantage is typically reduced when  
6 ownership costs and other fixed costs are added to arrive  
7 at total economic costs of production. Operating and  
8 ownership costs, see figures above. Therefore, the short  
9 run survivability of many dairy farm businesses is  
10 achievable while not being concerned with capital  
11 replacement costs, which, of course, are real costs, and  
12 must also be accounted for when planning for the longer  
13 term viability and sustainability of the business.

14 "In the short run, a focus on improving  
15 operational efficiencies, for example, using operating  
16 expense ratio as a measure of operating efficiency, will  
17 help improve operating profits. However, a dairy business  
18 with high capital investments per cow or pound of milk  
19 produced will negatively impact the ability of the business  
20 to grow, which is characteristic of many average sized  
21 dairy operations in the U.S. Many dairy farm businesses  
22 are over capitalized and/or have invested in lower return  
23 assets that dramatically impact the ability of the business  
24 to produce competitive returns.

25 "Taking a critical look at both the operating

1 efficiency and capital efficiency of any business are  
2 important to the future success and sustainability of the  
3 business. Businesses return on -- business with returns --  
4 return on assets are away greater than the average cost of  
5 capital, have the opportunity to use leverage debt capital  
6 effectively to enhance the opportunity for the business to  
7 grow, which is a characteristic challenge for many average  
8 sized dairy businesses across the U.S.

9 "Challenges and opportunities facing  
10 producer/handlers. The median sized producer/handler sells  
11 approximately 100,000 pounds of milk per month, as you've  
12 heard in previous testimony. This approximates a 50 to 70  
13 cow herd with average, annual milk sold per cow of 17,000  
14 to 20,000 pounds per cow. The table below depicts some  
15 realistic yet hypothetical size ranges, levels of output,  
16 and projected return -- returns."

17 And what I've -- I'm depicting in Table One that  
18 I've titled "Hypothetical Producer/Handler Examples By  
19 Size," are again, arbitrary but somewhat representative of  
20 the diversity, and certainly the diversity of clients that  
21 we deal with in our business, of a more typical the average  
22 herd size, depending on whose numbers you look at or use in  
23 the U.S. is something -- somewhere around 73 cows, I  
24 believe.

25 So typical being somewhat near the average, mid-

1 sized dairy operation. I've suggested at 900 cows and then  
2 larger operations, and for those that think in terms of  
3 milk sold per month, at 20,000 pounds of milk sold per cow,  
4 that would be 1.5 million per month. And then an 1,800 cow  
5 herd would be selling about three million pounds, which is  
6 similar to the -- well, is the number that we've been  
7 talking about in the context of this proposed new  
8 regulation.

9 "Across these" -- and what I've also done is just  
10 to characterize profit per pound of milk sold, capturing  
11 some of the economies of size associated with the larger  
12 units, particularly attributable to improvements in capital  
13 efficiency.

14 "Across these hypothetical size ranges, 90 to  
15 1,800 cows, the structure and organization of these  
16 businesses is typically quite different. The typical 90  
17 cow dairy operation will have a work force of two to three  
18 full-time equivalents, comprised of the owner and family  
19 members providing all labor and management to the business.  
20 In contrast, the typical 1,800 cow dairy operation will  
21 have a work force of 15 to 20 full-time equivalents,  
22 comprised of one or two full-time herd managers, the dairy  
23 operations manager and/or general manager, outsider feed  
24 manager and a parlor manager.

25 "The ability of these businesses to specialize in

1 specific areas of responsibility is quite different. The  
2 larger business, in addition to being able to capture the  
3 economies of size, will typically also achieve greater  
4 levels of specialization, due in great part to the depth of  
5 management. The smaller sized dairy businesses will  
6 typically be more diversified operations, often raising  
7 their own forages, raising their own replacement heifers,  
8 and in the case of a producer/handler, also processing and  
9 distributing finished dairy products, thereby spreading  
10 their management thin across the respective cost and profit  
11 centers under their control.

12 "More and more of the larger dairy operations are  
13 specialized milking operations, and are typically have their  
14 replacement heifers custom raised, or sell heifer calves  
15 and buy springing (phon.) replacements as needed.

16 "If and when there are seasonal milk production  
17 needs that are somewhat predictable within their annual  
18 marketing plan, there is obviously a greater opportunity to  
19 adjust herd inventories and number of cows milked by  
20 managing within herd milk production levels and herd  
21 numbers.

22 "A larger specialized dairy operation can more  
23 easily decide to milk a portion of their herd three times  
24 per day and the balance of their herd two times per day,  
25 thereby adjusting their level of output and also managing

1 operating expenses, particularly milking labor. This level  
2 of management control is also more easily applied to a  
3 larger herd managing cows in large groups when utilizing a  
4 technology such as BST, bovine somatotropin, as a tool to  
5 manage production efficiency quite effectively.

6 "Due to the fact that the larger producer uses  
7 primarily purchased feeds versus home-raised feeds or  
8 pasture in many cases, the seasonality of milk production  
9 is usually less -- should say 'of a management challenge,'  
10 "as there is a greater ability to target the feed purchase  
11 decisions to the herd and milk market needs from a planning  
12 standpoint. Similarly, the ability of a larger herd where  
13 cows are managed in groups, typically with groups of larger  
14 size than the median producer/handler represents, has a  
15 labor and production efficiency advantage over the smaller  
16 herd sizes.

17 "The ability to implement feeding and management  
18 strategies designed to directly impact the milk composition  
19 of the overall herd or a group is certainly more feasible  
20 in a larger operation. This would, of course, be a  
21 potential advantage for the larger operator to effectively  
22 balance the milk components to better meet their particular  
23 marketing needs, particularly since the producer/handler  
24 producing for a fluid market will be less concerned with  
25 butter fat depression than the non-producer/handler.

1           "The larger dairy operation has the ability to  
2 market tanker load quantities of milk every day, which is a  
3 clear, competitive advantage from a milk marketing  
4 standpoint, than the typically sized producer/handler that  
5 might produce a tenth of a tanker load per day.

6           "The larger dairy operation is much -- is in a  
7 much more favorable position to consider the application of  
8 on-farm milk concentration technologies, reverse osmosis,  
9 and ultrafiltration as another means of effectively  
10 matching their milk production more closely with their  
11 local market needs, while having the flexibility to move  
12 concentrated milk to more distant markets in a cost-  
13 effective manner.

14           "The larger, more specialized operations have a  
15 much lower risk exposure in most situations to the risk  
16 associated with farming or cropping operations, and are  
17 typically forward contracting both forages and concentrates  
18 and by-product feeds often a year in advance, thereby  
19 having much more control over the variability of input  
20 costs than the diversified operations, usually the smaller  
21 dairies that are producing their forage and even some of  
22 their grain.

23           "While any dairy business has the ability, often  
24 through their milk marketing organization, to take  
25 advantage of the price risk management tools available to

1     them, the larger operations with more depth of management  
2     and/or with greater ability and willingness to hire  
3     consultants to assist with the development and  
4     implementation of a comprehensive marketing and risk  
5     management program are more likely to have an input and  
6     output price risk management program.

7             "The milk futures and options markets available  
8     on the CME, Chicago Mercantile Exchange, while available to  
9     all dairy producers to manager their milk price risk, have  
10    contract sizes of 200,000 pounds, which are more compatible  
11    with the larger producer than average sized producers. The  
12    minimum contract size, coupled with the transactions costs  
13    and management time required to manage milk price risk  
14    tends to favor the larger dairy operation's ability to  
15    implement them.

16            "A producer/handler, large or small, has made the  
17    commitment to market their own milk and therefore has  
18    positioned their business for the value ad opportunities  
19    and associated risks of producing and marketing a  
20    perishable product.

21            "The capital intensiveness of the dairy farming  
22    business represents a challenge for all dairy producers.  
23    However, the corresponding economies of size in milk  
24    production are real and certainly favor the larger  
25    operation -- the larger dairy operations that are in a

1 position to make the level of investment needed to capture  
2 these economies while still maintaining a high level of  
3 operational efficiency.

4 "The management structure of a large dairy -- of  
5 larger dairy operations certainly provides a capacity for  
6 these operations to leverage this more specialized  
7 management expertise throughout the business from  
8 operations, dairy, and processing, through to the marketing  
9 of a quality, finished product. In addition to capturing  
10 the economies of size at the milk production level, other  
11 testimony will or has" -- it has, "demonstrated the  
12 economies of size associated with the greater -- of the  
13 larger processing capacities as well.

14 "The ability of producer/handlers producing and  
15 marketing milk in excess of the proposed three million  
16 pounds per month limit before becoming regulated should not  
17 present a large economic disincentive for those  
18 producer/handlers that will be affected."

19 Thank you.

20 Q. Now, Dr. Smith, I'd like to focus on -- with you  
21 for a couple of questions with respect to a more than three  
22 million pound per month dairy production unit that is  
23 vertically integrated into milk processing and is a  
24 producer/handler. What techniques are available for that  
25 entity to match its components -- milk component production

1 with the needs of its fluid milk market?

2 MR. UNIDENTIFIED: Your Honor, we're going to  
3 object. He has not established any expertise dealing with  
4 producer/handlers. He's a farmer expert, which is a  
5 wonderful thing. I'm not belittling that, but he has no  
6 evidence of knowing what the swings are in  
7 producer/handlers, no evidence, nothing in his curriculum  
8 vitae, that he's done any processing or anything else.  
9 It's out of his expertise.

10 THE COURT: Well, I'm going to let him answer it  
11 and the Secretary can give it weight that he -- she feels  
12 is necessary, given his expertise. Although, if you want  
13 to -- in answering the question, if you want to discuss  
14 your expertise on that question, that's fine, sir. Go  
15 ahead.

16 BY MR. BESHORE:

17 Q. I think the question was, and I'll phrase it  
18 briefly to indicate what techniques are available for three  
19 million plus producer to match components with the known  
20 component demands of the fluid milk market?

21 A. Well, there's certainly a number of techniques,  
22 and it's -- there are techniques that'll -- producers that  
23 are concerned about butter fat and protein specifically,  
24 and I do have expertise in this area, are fighting against  
25 so that they are concerned about depressing the components.

1           In the case of a fluid marketer where the -- that  
2 the butter fat requirement of the marketplace is probably  
3 closer than a two percent cow, which we haven't genetically  
4 bred yet, there are abilities to manage that components,  
5 particularly as it relates to fat, and worrying less about  
6 fat depression, and in fact, having the ability to, in many  
7 cases, feed a less expensive ration because the energetics  
8 of producing fat are such that it -- you don't get  
9 something for nothing. The feed input's required to  
10 produce fat are greater than if you're producing lower  
11 levels of fat.

12           And in the context of expertise, we have clients  
13 that are not classified as producer/handlers, but we have  
14 clients that market their own milk. We have clients that  
15 are proprietary dairy plants that are cooperative dairy  
16 plants. So to suggest I have no expertise in milk  
17 marketing as it relates specifically to producer/handler, I  
18 think is a little bit of a stretch.

19           Q.    Okay. Now, you heard Mr. Hollon's testimony  
20 today, which was drawn apart from some of the statistics of  
21 demand in these particular milk markets. And you know that  
22 he testified drawing from the market administrators  
23 exhibits, which I've been previously presented, that the  
24 fat percentage demanded of the fluid milk market in Order  
25 124 or Order 131 is around two percent, correct?

1           A.    Yes.

2           Q.    Now, is that the level of butter fat that the  
3 average herd produces?

4           A.    No, it wouldn't be.   A --

5           Q.    I'm sorry.  So that it would not be.  The average  
6 is more like what, 3.7, 3.6?

7           A.    Yeah, 3.67 I think is the market average.  We  
8 typically are concerned -- and again, the -- there's  
9 obviously a clear difference between the producer/handler  
10 who is selling that specific product of that specific  
11 component level versus a typical dairy producer that's  
12 getting paid for pounds of solid, pounds of fat, pounds of  
13 protein, and then a quality adjustment around that.  So  
14 there's certainly differences there.

15                    But, you know, typically we would be concerned if  
16 a herd were running an average butter fat at two percent.  
17 The cows would not be very healthy, and it would be  
18 difficult to achieve.  Not that it doesn't happen, but as I  
19 said, we haven't bred that cow yet.

20                    There certainly are cows in the, or sires in the  
21 genetic pool that are well-known to cause reduced butter  
22 fat output, and strategically there would certainly be an  
23 advantage.  They tend not to be the most expensive bulls,  
24 to be an advantage to utilize those low-testing bulls in a  
25 breeding program for a producer/handler that's looking for

1 that lower fat percentage.

2 Q. So if I understand you, Dr. Smith, as a dairy  
3 farmer, if your market is a fluid market that demands low  
4 butter fat tests, you can actually -- and you're a  
5 producer/handler producing your own milk input for your  
6 processing plant, you can manage your production so that  
7 it's a lower fat level, and therefore you have less excess  
8 butter fat coming out of your production system?

9 A. Yes, with -- the caveat would be within reason,  
10 and I think within reason would be, we're talking about a  
11 herd that might be testing in the 2.9 to 3.1 to 3.2 percent  
12 butter fat versus the 3.5 or .6 more typically expected.

13 Q. And therefore, if your herd's at 2.9 or 3.0,  
14 you've got -- and you've managed it with cheaper feed  
15 inputs actually, you've managed it to be 2.9 or 3.0 rather  
16 than 3.5 or 3.6, you have less surplus butter fat to be  
17 sold in possibly a distressed marketing circumstance?

18 A. Yes.

19 Q. Correct?

20 A. Yes.

21 Q. Okay. Are there ways that a larger farm  
22 producing more than with -- how many cows do you have to  
23 produce roughly three million a month, 1,800 --

24 A. -- 1,800 I showed --

25 Q. Okay.

1           A.    -- at 20,000 pounds a month sold per cow.

2           Q.    Okay.  If you've got -- if you're milking 1,800  
3 or more cows, are there ways that, in the short and long  
4 run, you can tailor the production to the demands of your  
5 end product market if you're a producer/handler, to the  
6 volume you need for your fluid production?

7           A.    Well, I certainly think you can, again, within  
8 reason, within reason, but I truly believe that every dairy  
9 farmer is challenged with taking more control of their  
10 marketing.  And so I don't think that -- I don't think the  
11 marketing of milk is unique to the producer/handler.  The  
12 challenges -- as I suggest, there's risk management tools  
13 available to all dairy producers and processors and  
14 marketer to take advantage of managing some of that  
15 volatility and price risk that's so characteristic of the  
16 marketplace today.

17          Q.    Now, if -- in terms of just milk production  
18 volume, what tools are available nutritionally or in terms  
19 of management technics to tailor that production to your  
20 end market demands?

21          A.    Production in terms of output per cow or per --

22          Q.    Just --

23          A.    Output per cow?

24          Q.    Total aggregate volume in your operation.

25          A.    Well, probably one of the most basic

1 opportunities is to feed a total mixed ration, which is a  
2 little more difficult than our typical 70 or 80 cow  
3 stall/barn operation than it is in an 1,800 cow dairy. The  
4 ability to use lower cost commodities and by-product feeds  
5 in a total mixed ration, the -- every bite the cow takes is  
6 balanced usually by a professional nutritionist. So the  
7 ability to manage production by group and across the herd  
8 is certainly more feasible in a larger operation -- 1,800  
9 cow dairy that's not using a total mixed ration, I'm not  
10 sure I could find one.

11 That coupled with technologies like bovine  
12 somatotropin, as I suggested before, a typical response is  
13 eight or nine pounds of milk increase in milk output on  
14 average across a herd following the label recommendations  
15 --

16 Q. Per cow per day?

17 A. Per cow per day. We're well-known, the expected  
18 increase in production in the 13 to 15 percent range, going  
19 from 2X milking to 3X milking. Probably expect another ten  
20 percent increase to go to 4X milking. There's a few 4X  
21 milking herds in the U.S.

22 Q. Well, can you just explain what you mean for the  
23 record by 2X, 3X, 4X milking?

24 A. Okay. I'm sorry. 2X milking would be the most  
25 prominent frequency of milking cows over the course of the

1 day.

2 THE COURT: By 2X, you mean two times a day?

3 THE WITNESS: Two times a day, you know,  
4 typically 12 hours apart, and a 3X herd would be milking  
5 every eight hours, and to be perfectly honest, the labor  
6 issues of milking three times a day or four times a day are  
7 real on a -- particularly on a single, or even a two-family  
8 operation.

9 We often see a trend when milk prices are down in  
10 the basement, a typical response because producer knows  
11 that they'll get a response will be to go to 3X milking.  
12 The usual challenge is who's going to get the midnight  
13 shift, and it represents a labor challenge for a typical  
14 average sized dairy in the U.S. And then, of course, four  
15 time a day milking would be every six hours.

16 Another option is to -- that has been pitted as  
17 an opportunity for average sized operations is by using  
18 robotics, and a typical robotic milker, which actually goes  
19 in -- the cow walks into a stall, the -- there's a picture  
20 of the cow electronically in the computer. The milking  
21 machine comes up and attaches itself all robotically, just  
22 same kind of robots that paint cars, and there doesn't need  
23 to be an operator there.

24 It's a capital efficiency issue, a trade-off  
25 between labor and capital because they cost about \$150,000

1 a stall, but they do provide an opportunity to reduce labor  
2 costs and improve milking efficiency. A typical cow in a  
3 robot installation will be milked three and a half or four  
4 times a day.

5 BY MR. BESHORE:

6 Q. Are those -- would those technics allow the large  
7 farm operator, in your opinion, to closely tailor the  
8 output of their production unit to the demands of their own  
9 fluid milk market?

10 A. Oh, I think absolutely. I mean, there's -- we  
11 have clients that are matching their production on a  
12 regular basis to what they feel is the most profitable mix  
13 of resources. So there's no question about it. The  
14 ability to milk a group of cows, the more efficient cows  
15 three times a day, as I mentioned as an example, and the  
16 rest of the herd two times a day is a fairly common  
17 practice. Again, it has some logistics issues that -- and  
18 practical issues of how to implement it, but it's certainly  
19 done and done quite successfully.

20 It's -- just as an example, if you talk to the  
21 folks in Canada who are under, of course, a supply  
22 management system, these technics are used quite commonly  
23 to comply with their quota requirements because the over-  
24 quota price is well below the operating costs of  
25 production.

1 Q. Okay. So that if a producer/handler in any of  
2 these markets was experiencing distressed returns for their  
3 milk, such as the over-quota prices in Canada, they could  
4 manage their output to avoid that loss?

5 A. They have that ability, as does any dairy  
6 producer.

7 MR. BESHORE: May I have just a second?

8 (Pause)

9 MR. BESHORE: I have no further questions for Dr.  
10 Smith on direct. I would ask that Exhibit 34 be received  
11 into the record, Your Honor.

12 THE COURT: Any objection to that exhibit?

13 MR. UNIDENTIFIED: What was the request that --

14 THE COURT: Exhibit 34 be admitted into evidence.

15 MR. UNIDENTIFIED: (Indiscernible)

16 THE COURT: His statement -- his testimony  
17 coupled with --

18 MR. UNIDENTIFIED: -- objections, Your Honor,  
19 because there's some inaccuracies (indiscernible)

20 THE COURT: Well, you can bring it out. I still  
21 -- I don't think it's going to make it any less admissible,  
22 just --

23 MR. UNIDENTIFIED: (Indiscernible)

24 THE COURT: -- goes to the weight. So I'm going  
25 to admit it.

1 (Exhibit No. 34 was received.)

2 THE COURT: (Indiscernible) examine next?

3 MR. YALE: (Indiscernible)

4 THE COURT: You're all done, right, Mr. Beshore?

5 MR. BESHORE: Yes.

6 THE COURT: Okay.

7 MR. YALE: I'm ready.

8 THE COURT: Okay. Then go ahead, Mr. Yale.

9 MR. YALE: Thank you.

10 BY MR. YALE:

11 Q. Benjamin F. Yale on behalf of Smith Brothers  
12 Farmers, Etteline Dairy, and Mallory's Dairy.

13 Mr. -- Dr. Smith, let me ask this question. Are  
14 you here testifying in favor of limiting the size of a  
15 producer/handler exemption under the Federal Orders?

16 A. No.

17 Q. What are you here for?

18 A. I'm here to provide my expertise on the issues at  
19 hand here. I'm -- I've been retained by Dairy Farmers of  
20 America, but when you say limit the size, I -- you know,  
21 you're talking about something that I don't think this  
22 proposed change has really anything to do with.

23 Q. You --

24 A. You're putting -- if you're suggesting -- I'm not  
25 going to agree with something that --

1 Q. All right. Well, let me ask this question then.  
2 Do you understand that a producer/handler of -- that exceed  
3 three million pounds per month under the proposal will  
4 cease to be a producer/handler under the order?

5 A. Yes, I understand that as its proposed --

6 Q. And beginning at 3,000,001 pound will have to pay  
7 the difference between the blend and the class one price  
8 into the Federal Order?

9 A. Well, making that assumption as a certainty, I  
10 wouldn't agree with.

11 Q. Well, what do you understand the impact of  
12 regulating a producer/handler over --

13 A. I do that they would become regulated.

14 Q. And do you know what the impact of them being  
15 regulated would be?

16 A. Yes, they would become regulated and receive the  
17 uniform blend price as a producer like other regulated  
18 processors and the producers that supply those plants are  
19 receiving.

20 Q. And --

21 A. And what it does is, in my -- from my standpoint,  
22 it levels the playing field in terms of the opportunity to  
23 take advantage of what are obviously some historical law  
24 that was designed to stay away from the administrative  
25 requirements associated with producer/handlers.

1 Q. I -- well --

2 A. So if you're asking me to -- is three million  
3 pounds the magic number or not, I don't have an opinion  
4 about that.

5 Q. No, that's not my question. My question is, what  
6 is your understanding of the economic impact of a farmer  
7 that's a producer/handler that moves under this proposal  
8 that has in excess of three million pounds of class one  
9 sales per month? What is the economic impact on that  
10 farmer?

11 MR. UNIDENTIFIED: He just answered the question,  
12 Your Honor.

13 THE COURT: Well, I think he -- it's -- it was  
14 difficult to see exactly what question he was answering.  
15 He went on a little bit, so I'm going to allow that  
16 clarification, because I was sort of thinking the same  
17 thing.

18 If you could answer his specific question, it  
19 will make it a little bit easier, I think.

20 THE WITNESS: Okay. Could you ask it again?

21 BY MR. YALE:

22 Q. What is the economic impact on a producer/handler  
23 that it produces and markets more than three million pounds  
24 of milk as class one per month as a result of the adoption  
25 of the proposal that's before the secretary at capping that

1 at three million? What is that economic impact?

2 A. I'd be happy to answer that in work with  
3 producer/handlers to better understand their cost and  
4 returns. I can't generalize that, and I won't generalize  
5 that across the population of producer/handlers.

6 I don't know the impact it'll have on each one of  
7 these individual businesses. It may be a positive impact  
8 in terms of their business opportunities and profitability.  
9 So I won't make a blanket statement that's negatively  
10 impacting or positively impacting all producer/handlers  
11 because I know what the diversity of cost and returns are  
12 for dairy producers across the population. We make our  
13 living understanding that for businesses.

14 Q. Is there anything as a producer/handler that you  
15 would recommend that would be different from a regular  
16 farmer that would maximize that amount of money -- or  
17 amount of money they would return over, if they produce  
18 more than three million pounds?

19 A. Absolutely. I'd take a look at their operating  
20 efficiency. I'd separate them into cost and profit  
21 centers, their dairy operation, their processing and  
22 marketing operations, and look at how they are contributing  
23 to the overall performance of that combined business, and  
24 see what opportunities exist for taking advantage of the  
25 risk management tools that are out there, and marking --

1 marketing their milk in an aggressive and business-like  
2 manner.

3 Q. Let me make this a little more specific. There's  
4 been testimony that indicates -- I think Mr. Hollon today  
5 testified that if their proposal is adopted, and the  
6 producer/handler had a access of three million pounds, that  
7 that producer would pay into the producer settlement fund  
8 the classified price and receive back a blend price, right?  
9 Do you understand that?

10 A. Yes.

11 MR. UNIDENTIFIED: I'm going to object to the  
12 form of the question, Your Honor. I'm sorry it's already  
13 been answered.

14 THE COURT: I don't --

15 MR. UNIDENTIFIED: Mr. Yale's referring to three  
16 million pounds, and it's critically important not just to  
17 refer to three million pounds, but to refer to three  
18 million pounds of production and/or three million pounds of  
19 route dispositions within the order. And the distinction  
20 is important, and as these questions come, sometimes it's  
21 been asked one way, and sometimes it's been asked the  
22 other. And I think he needs to be clear which he's  
23 speaking to because the answers will differ.

24 THE COURT: All right. Okay. Do you want to  
25 clarify that?

1 MR. YALE: Your Honor, I'll clarify that.

2 BY MR. YALE:

3 Q. We're going to talk about three million pounds of  
4 class one --

5 A. Sales.

6 Q. All right. So he's got in excess of three  
7 million pounds of class one, and he markets that milk. And  
8 he has to pay into the Federal Order pool the classified  
9 price on all that milk, and return back a blend price,  
10 right?

11 A. Yes.

12 Q. Do you know what the economic impact that is?

13 A. On all producer/handlers?

14 Q. On a producer/handler, how would you figure that?

15 Let me ask --

16 A. It'd be very easy to figure. If I had three  
17 years of balance sheets, two years of income statements, I  
18 could answer that question with great specificity for the  
19 individual.

20 MR. UNIDENTIFIED: Your Honor, I would also  
21 object to the question. It's a hypothetical without  
22 complete foundation. How much surplus is -- how much non-  
23 class one production does the producer have because that's  
24 part of the equation also? I don't know whether Mr. Yale  
25 --

1 THE COURT: Well, he can answer -- he can ask the  
2 questions, and he can answer them. If you want to modify  
3 them on redirect, then that's fine, but, I mean, unless he  
4 doesn't understand the question, the question stands. And  
5 I think he's answered it, actually.

6 MR. UNIDENTIFIED: Well, actually here's an  
7 additional objection to this line of question. Dr. Smith  
8 was not offered as an expert in the operation of the order,  
9 and that is the examination --

10 THE COURT: He asked him if he knew what the  
11 impact of something would be, and he's -- and that -- the  
12 question stands, and the answer stands, and let's go on to  
13 --

14 MR. UNIDENTIFIED: All right.

15 THE COURT: -- the next thing.

16 BY MR. YALE:

17 Q. I want to make a -- I want to go to a specific  
18 example.

19 A. Uh-huh.

20 Q. I want you to assume for a moment that there's a  
21 farm out there that produces four million pounds of milk  
22 per month, has for a long time. Well managed, uses many of  
23 the management tools that you -- always can use more. We  
24 can always be better. We can always be more efficient, but  
25 is doing that well as a farmer. And is also a processor,

1 and he produces all that and turns all that milk into  
2 bottled milk and sells it. All is class one.

3 A. Uh-huh.

4 Q. All right. Under the current situation, when he  
5 sells that milk, and I'm going to ask this as a form of a  
6 question, he has no obligation to the pool for any of the  
7 sales that he gets back, right?

8 A. What level of --

9 Q. He's at four million today without any -- no --

10 A. (Indiscernible)

11 Q. He gets to keep all that money, right?

12 A. I would agree with that.

13 Q. All right. Now, if tomorrow this order proposed  
14 amendment took effect, and we're into a new month, and  
15 everything else stays the same. Now he's over the three  
16 million, he's fully regulated, right, is your understanding  
17 of this proposal?

18 A. That's my understanding.

19 Q. All right. Now, you would agree then that he has  
20 to pay into the pool for that four million of class one,  
21 the class one price, right?

22 A. Yes.

23 Q. And he would get back a blend price, right?

24 A. Yes.

25 Q. On all that milk, right?

1 A. That's a 100 percent of his --

2 Q. Right.

3 A. -- of his marketing? Uh-huh.

4 Q. All right. So now I think you can do this math.

5 If the average difference between that class one and that  
6 blend for that four million pounds or class one sales in,  
7 you know, that's all that they're selling. There's no  
8 other blend in that, is \$1.70 a hundredweight, what is his  
9 monthly contribution to the pool? It'd be four million  
10 turned into hundredweights, right? What, 40,000, --

11 A. Uh-huh.

12 Q. -- times \$1.70, right?

13 A. Uh-huh.

14 Q. 680,000 or -- wait -- huh? 68,000, right?

15 A. Somebody did a calculator on it.

16 MR. UNIDENTIFIED: (Indiscernible)

17 THE WITNESS: You did it in your head.

18 MR. UNIDENTIFIED: (Indiscernible)

19 BY MR. YALE:

20 Q. Okay. It's \$1.70 a hundredweight --

21 A. Yeah.

22 Q. -- on four million pounds a month.

23 A. Yeah.

24 Q. What's that effect?

25 A. 68,000.

1 THE COURT: It's (indiscernible) \$1.70, so --

2 BY MR. YALE:

3 Q. 68 -- okay. And then for 12 months. Let's say  
4 it's 70,000 for 12 months. How much is that?

5 A. 816,000.

6 Q. Okay. That he wasn't paying before, and now he's  
7 paying, right?

8 A. Uh-huh.

9 Q. That's what this proposal's about. Do you  
10 understand that?

11 A. Well, potentially.

12 Q. Well, how's he going to change that number? How  
13 can he change that class one and that blend price?

14 A. You tell me where the \$1.70 comes from. Is that  
15 coming --

16 Q. Do you have the exhibits available  
17 (indiscernible)

18 A. Yeah. Well, they're at my seat, --

19 Q. 34. I'm going to show you --

20 A. --but I'll go ahead with your line of  
21 questioning.

22 Q. I'm going -- no, I want to show you  
23 (indiscernible) yeah, this is Elvin's. 33, I want to show  
24 you Exhibit 33. And I want to point to you, to Exhibit --  
25 Table A-2 and page five. Now, when you were here -- you've

1 set through some of that testimony today, right?

2 A. I did.

3 Q. Did you -- were you here when he explained that  
4 table?

5 A. Yes.

6 Q. All right. Do you understand that to explain  
7 that that's the difference that the producer/handler would  
8 be required to pay into the pool if they went from a  
9 producer/handler to a fully regulated?

10 MR. UNIDENTIFIED: If they were 100 percent

11 BY MR. YALE:

12 Q. 100 percent class one.

13 A. That's my understanding.

14 Q. All right. Now, coming back to that again, you  
15 -- day one, or today, there are four million pounds class  
16 one. They don't pay anything in the pool, and tomorrow  
17 they begin, and they have to pay at this rate of 800,000  
18 plus per year. What can they do to change that number?  
19 Not in their operations or profitability. What can they do  
20 to change that number?

21 MR. UNIDENTIFIED 1: Now, Your Honor, I object to  
22 the question. He says, what can they do to change the  
23 number, not change any of their operations. I mean, it's  
24 nonsense.

25 MR. UNIDENTIFIED 2: No, it's not --

1 MR. UNIDENTIFIED 1: How can they change a number  
2 if --

3 THE COURT: You -- okay. Do you understand the  
4 question?

5 THE WITNESS: I do. If -- it's -- I mean, it's  
6 so hypothetical, it's -- you know, it gets a little bit  
7 ridiculous at some point, but what I will say, using your  
8 hypothetical, never-to-exist-probably example, he has the  
9 ability to go into another business, to make changes in his  
10 business. If he decides that the dairy production part of  
11 the business is more profitable than the processing part of  
12 the business, which one he's going to grow? There -- or,  
13 rational business person going to grow, and vice versa.

14 You're giving me a hypothetical example across a  
15 integrated business and saying, you know, what choices does  
16 he have? He has a number of choices, just like every dairy  
17 farmer has choices to make every day as they're faced with  
18 either record low milk prices or pretty favorable milk  
19 prices.

20 BY MR. YALE:

21 Q. But you answered the question. You indicate that  
22 based on this change and being faced with 800,000, they've  
23 got to -- they have to consider changes in their operation,  
24 right?

25 A. Sure, it's change in the business climate.

1 Q. Possibly the sale of their herd, or sale of their  
2 plant, or maybe both?

3 A. No, no. Possibly -- anything's possible. You're  
4 painting a worse case scenario that I don't think is  
5 necessarily realistic.

6 Q. You don't --

7 A. Because I also know that -- I also know something  
8 about the margins that a business the size that you just  
9 described are likely to generate. Now, is this change  
10 going to impact them? Of course it can impact a business,  
11 and it might impact a business quite dramatically, but  
12 we're not talking about -- we're talking about a really  
13 statistical outliers in terms of what the intent initially  
14 was from an administrative standpoint.

15 So, I mean, --

16 Q. Do you have --

17 A. -- I could easily -- I'll just give you my  
18 opinion. I could easily argue that there should be no  
19 exemptions, and I know the hardship that that will present  
20 to this -- the average 70-cow producer/handler, but the  
21 cleanest and easiest thing to do would be to provide no  
22 exemptions, and then we don't -- we're not talking about  
23 these hypotheticals. That's reality then.

24 Q. So, in other words, an ongoing -- you have no  
25 concern that an ongoing operation affected by government

1 regulation imposed with -- in excess of a million dollars  
2 in new costs --

3 A. No, I mean, you said --

4 Q. 800,000, that's not something that they should be  
5 worried about?

6 MR. UNIDENTIFIED: Objection, Your Honor. Object  
7 to the form of the question. He's asking -- in terms of  
8 the relevance of the thing, does he have concern on a human  
9 level for whether somebody --

10 THE COURT: Well, he can answer --

11 MR. UNIDENTIFIED: -- has a change in their  
12 operations?

13 THE COURT: I see where it's not real relevant  
14 (phon.), but I'm -- I don't know if he's asking on a human  
15 level or a --

16 MR. UNIDENTIFIED: (Indiscernible) concern.

17 MR. YALE: I -- we --

18 THE COURT: Well, --

19 THE WITNESS: Let me just add this. We have  
20 clients right now that are asking the very question that  
21 you're posing on a hypothetical, saying we're designing and  
22 implementing some large scale operations in the Midwest.  
23 And the question that's being asked is, how close do we get  
24 to the consumer in the product that we product and market?  
25 Do we stop at the farm gate, or do we go further?

1           And they're exactly asking the question that  
2 you're talking about, but they're going to make it -- based  
3 on whether the regulation gets changed or doesn't get  
4 changed, they're going to make it based on good, sound  
5 business decision.

6 BY MR. YALE:

7           Q.   How many producer/handlers do you represent or  
8 consult?

9           A.   Have as clients currently?

10          Q.   Yes.

11          A.   No producer/handlers currently.

12          Q.   How many producer/handlers have you had in the  
13 last five years?

14          A.   Two.

15          Q.   What was their largest size?

16          A.   It would be about 150 to 200 cows.

17          Q.   Did you make any representations to them on how  
18 to operate their processing site?

19          A.   What are you specifically asking? How to --

20          Q.   I'm going to withdraw the question. I'm going to  
21 take it another way.

22                   Have you had -- so I take it by that, you have  
23 not had a full entity, a producer/handler that's three  
24 million pounds or bigger per month as a client?

25          A.   That would be fair to say.

1 Q. And you have not analyzed their total enterprise  
2 from the moment that they produced or buy the feed until  
3 they market the milk, to know it's -- where their  
4 profitability and their costs are; is that correct?

5 A. That's correct.

6 Q. And you've not made recommendations to them on  
7 how to improve their profitability; is that correct?

8 A. Well, if we didn't have them as clients, it's  
9 hard to make recommendation.

10 Q. Right. Now, if I -- you've got a web site, and  
11 I've looked at the web site, and you got some stuff, and I  
12 think your C.V. comes off your web site, it looks like it.  
13 You're in the business to make farmers profitable, right?

14 A. Farmers and agri-businesses. Half --

15 Q. Farmers and agri-businesses, right?

16 A. Yes, half our clients are farmers, half of them  
17 are agri-businesses.

18 Q. So you look at -- for the farm -- let's talk  
19 about the farmers, for example. Okay?

20 A. Sure.

21 Q. You look at what -- how they can control their  
22 risk in pricing of their product, right?

23 A. Yes.

24 Q. And pricing of their costs, right?

25 A. Yes, inputs, outputs.

1 Q. Right. And by your talk of the 2X and the 3X and  
2 the 4X and the BST. You even make recommendations and talk  
3 to them about the opportunities they may have in changing  
4 management style to increase costs, right?

5 A. Well, not increase --

6 Q. Or, not increase costs, increase profitability?

7 A. Yes, profitability. Yes.

8 Q. All right. And do you do this in a full-scale  
9 thing? I mean, you sit down and do a full representation  
10 to them, like, you know, here's all the opportunities and  
11 the narrative and business plans and stuff like that?

12 A. Absolutely.

13 Q. Okay. How many of those have you recommended  
14 become a producer/handler in the last two years?

15 A. If you -- producer/handler as defined by this --  
16 definition of producer/handler --

17 Q. As it exists today. As it exists today.

18 A. None that I -- well, when you say "recommend,"  
19 one of the recommendations being that you should consider  
20 and evaluate based on our evaluation, whether  
21 producer/handler's an option?

22 Q. That's right.

23 A. Two.

24 Q. And those were the ones that are 150 cows?

25 A. Right.

1 Q. All right. How many farmers do you have that  
2 have three million pounds of milk or month -- or more per  
3 month in your clientele?

4 A. Oh, a large number.

5 Q. And you've never recommended to any of them to be  
6 producer/handlers?

7 A. Not under this definition. Have we recommended  
8 that they do on-farm processing, or that they consider  
9 certified organic or other marketing opportunities?  
10 Absolutely.

11 Q. Now, you have a newsletter that goes out, right?  
12 You know, a general thing to your --

13 A. We have a global newsletter.

14 Q. Global newsletter. And it talks about trends and  
15 things you can do, to look at to be more profitable, right?

16 A. Yes.

17 Q. How many articles have you talked to them about  
18 becoming a bottler and selling their milk as bottled milk?

19 A. I don't recall -- you asking me personally?

20 Q. Yes.

21 A. I don't recall writing an article to that effect.

22 Q. But isn't it your job and your advertisement that  
23 you're trying to make producers as profitable as they  
24 possibly can be?

25 A. Absolutely.

1 Q. And isn't it --

2 A. And more importantly, to reach their business and  
3 personal goals, which in some cases isn't just strictly  
4 return on assets. We also are concerned about quality of  
5 life and other things that are not quantified in return on  
6 assets.

7 Q. Now, you talk about this fad and three percent.  
8 Do you know what the definition of grade A milk is?

9 A. The official definition, I can't -- if you're  
10 asking me to repeat it, I can't repeat it --

11 Q. Is there a minimum amount of butter fat that's to  
12 be in that milk to qualify as grade A milk?

13 A. Oh, there probably is, but I don't know what it  
14 is.

15 Q. Now, you talked about this two percent, and you  
16 had these questions with Marv about the 1.8 and the two  
17 percent and all this other stuff. The assumption is, is  
18 that that cream is a cost to a producer/handler, right?  
19 The excess cream is a cost item, it's a burden, needs to be  
20 --

21 A. Oh, it -- well, no, not -- I never said that.  
22 You might have implied that. But I never said that. He  
23 was specifically asking whether there's any flexibility  
24 within management programs, breeding programs, to change  
25 the composition of milk, and I answered yes.

1 Q. And what is the normal cycle of doing that, you  
2 know, increasing components and reducing and increasing  
3 through a lactation? How long can you keep a cow, reduce  
4 the butter fat for a few months, and then bring it up and  
5 then bring it down again? Can you do that?

6 A. Well, remember, in a herd of cows, you don't have  
7 the whole herd going through the same stage of lactation --

8 Q. I understand that.

9 A. -- at any one point in time.

10 Q. But as a herd --

11 A. Can I change the components of my herd --

12 Q. On a monthly --

13 A. -- on a monthly basis? You bet I can. Have  
14 clients that do it on a regular basis, most cases  
15 unintentionally.

16 Q. I want to turn your attention to page five of  
17 your statement.

18 A. Yes.

19 Q. Says profit per pound of milk sold. Where did  
20 that come from?

21 A. I said hypothetical.

22 Q. So --

23 A. I can tell you where it came from in terms of a  
24 validation. We benchmark a lot of herd across those size  
25 ranges, and I know something about the means and standard

1 deviation or variation in profit per pound of milk sold.  
2 So I picked some numbers that, you know, in the current  
3 milk marketing situation are somewhat representative of, I  
4 think, a realistic relationship.

5           You can argue the absolute numbers up and down,  
6 but the -- when we look at the difference primarily in  
7 capital replacement costs between a 90-cow dairy, a 900-cow  
8 dairy, and an 1,800-cow dairy, I've characterized most of  
9 that in those profits -- profit per pound of milk sold.

10           Q.   How did you qualify the costs and the capital  
11 associated with the processing?

12           A.   I took my best estimate at what I thought it was.

13           Q.   Because you don't -- you have --

14           A.   You already told -- you already have reinforced  
15 that, and we probably don't need to do that again.

16           Q.   But, I mean, you don't do -- you don't have any  
17 knowledge of the process or costs --

18           A.   Other than what I've read from other testimony.  
19 I absolutely spent time with Mr. Herbine's analysis, and so  
20 I do have an understanding second-hand, not directly,  
21 working with clients that have these facilities.

22           Q.   Now, I want to move back here earlier on. You  
23 have these charts, and looking at page three, figure 26,  
24 "Large Dairy Operations." Now, a three million cow, or  
25 three million pound per month, if it all went to class one,

1 where would that cut-off be in terms of average size of a  
2 cow? How many cows would you have to have?

3 A. Well, you know, I suggested that 20,000 pound  
4 sold, 1,800 cows.

5 Q. Well, I'm looking at figure 26 on page three.

6 A. Well, figure 26 wouldn't be covered there because  
7 you got 200 of the 500 cows. And so your ability to shift  
8 three million pounds of milk a month is not possible, well,  
9 at least not today, at those -- at that size.

10 Q. So really you need to look at the, what, 50 to  
11 199?

12 A. No, I would suggest -- unfortunately, the BRS  
13 stops at 500 cows, but I would suggest, you're at -- on  
14 page four, figure 27. And, you know, if you understand my  
15 table on page five to shift three million pounds of milk  
16 per month, selling 20,000 pounds of milk per cow, which is  
17 not an unrealistic and close to average and below average  
18 in a state like Washington, then you got about 1,800 cows  
19 to do that.

20 So even -- the problem with the ERS data is that  
21 it's -- it doesn't segment the population above 500. They  
22 used to cut it at 200 cows. You know, made it very  
23 difficult --

24 Q. So we really don't know where that cut-off is?  
25 We don't know the impact, for example, of the 10,000-cow

1 herds or the 500 or anything in this data, right?

2 A. Well, I wouldn't say that. I think the important  
3 thing about the tables as presented is that we show the  
4 efficiencies primarily on the ownership cost side. You  
5 look at the operating cost, we've got some very efficient,  
6 small operations. They know how to get milk out of cows.  
7 They know how to do it cost effectively.

8 But that efficiency doesn't go on forever because  
9 you look at these larger operations, and their operating  
10 costs are actually fairly similar. What you see is the  
11 compression of the total cost line coming closer to the  
12 operating cost line at the larger herd sizes, and that's  
13 because they've spread their fixed costs out, and their  
14 investment -- their capital efficiency is that much  
15 greater. That's the economies of size principal in black  
16 and white, very characteristic of the dairy industry.

17 Q. I want to move your attention over to page six  
18 where you talk about reverse osmosis.

19 A. Okay.

20 Q. What do you know about on-farm or reverse  
21 osmosis?

22 A. What do I know about it? We have a client that  
23 we've helped -- are in the process of helping do a  
24 feasibility analysis on it. We're using a variety of  
25 industry and proprietary data to analyze the feasibility of

1 on-farm concentration.

2 Q. What volume is necessary for on-farm?

3 A. That's the \$64 question. Studies have been done  
4 that show there's opportunities at, you know, 1,000-cow  
5 herd size. We believe that's probably a bit too small,  
6 given the capital investment associated with equipment and  
7 the level of maintenance and management required to manage  
8 the equipment. We think it's probably closer to the five  
9 or six thousand cow size, but I don't have a specific  
10 answer. It obviously is, depends on the situation.

11 Q. And that's all that milk going through that  
12 reverse osmosis, right, at the five or six thousand-cow  
13 size?

14 A. I'm saying it's somewhere in that range, between  
15 probably 1,000 and 5,000, yes.

16 Q. So where would they have the opportunity to sell  
17 milk as class one? They'd have to have additional cattle,  
18 right, and additional production?

19 A. Well, that's certainly an option, but what I'm  
20 suggesting is the ability to have the flexibility of moving  
21 milk greater distances as obviously it's a different  
22 product. There is a capability to reconstitute it, but  
23 moving that milk by taking the water out, or two thirds of  
24 it, and being able to move it the greater distance provides  
25 some marketing flexibility.

1 Q. All right. You mentioned in here earlier that a  
2 tanker load a day kind of necessary to reach some kind of  
3 level of efficiency, is that -- or sell it in tanker units,  
4 right?

5 A. I believe there's an advantage from a marketing  
6 standpoint to be working in tanker load quantities in milk.  
7 We design dairies that are centered around tanker load  
8 quantities of milk.

9 Q. All right. On ultrafiltration or filtration,  
10 that's a concentration, right, --

11 A. Yes.

12 Q. -- approximately three times?

13 A. Yes.

14 Q. So if you have a tanker load of milk, you have to  
15 have three tankers of milk coming off the cows -- harvested  
16 from the cows that goes into the --

17 A. To send a tanker of concentrated, --

18 Q. Right.

19 A. -- right. Yeah, about.

20 Q. And if you deliver that every day, then you're  
21 going to have to have three loads of milk a day, right,  
22 just for the concentration, right?

23 A. Well, you're suggesting -- you're assuming that  
24 you're using the same transport technology for concentrated  
25 milk as you are for fluid milk. That's --

1 Q. No, I'm not. No, I'm not.

2 A. Oh. Okay.

3 Q. I'm saying that, you know, basically on this, you  
4 actually are going to have to run it most of the time,  
5 right, to make -- get the efficiencies to make it  
6 worthwhile, right?

7 A. How's that different than running a milking  
8 parlor --

9 Q. Why --

10 A. -- all the time? I don't think it is different.

11 Q. Well, I know it's not. Okay.

12 A. Okay.

13 Q. So a farm --

14 A. Yes.

15 Q. -- that has reverse osmosis --

16 A. Yes.

17 Q. -- that delivers one load of reverse osmosis  
18 three times concentration per day, --

19 A. Yes.

20 Q. -- one load will have to produce three loads a  
21 day off the cows just into the reverse osmosis, right?

22 A. You're assuming they're moving the milk every  
23 day.

24 Q. Right.

25 A. Not necessarily the case, but sure.

1 Q. You don't think that would be the case with  
2 reverse osmosis, with the --

3 A. -- have to be.

4 Q. Have you done an analysis of a producer/handler  
5 who both markets bottled milk and operates a producer, or a  
6 reverse osmosis plant?

7 A. No.

8 Q. So you really don't know whether it would work  
9 for three million pounds, right?

10 A. Well, I think it's in the range of possibilities,  
11 based on the analysis that we're currently doing. So no, I  
12 wouldn't agree with that.

13 Q. You -- on your last line of your statement, you  
14 make this comment, "The ability of producer/handlers  
15 producing and marketing milk in excess of the proposed  
16 three million pounds per month limit before becoming  
17 regulated should not present a large economic disincentive  
18 for those producer/handlers that will be affected."

19 Now, the question I have is, who are those PH  
20 that will be affected in your sentence?

21 A. Who -- well, my understanding from previous  
22 testimony that it would be a small number of  
23 producer/handlers.

24 Q. So this would be ones that have an excess of  
25 three million per month; --

1 A. Correct.

2 Q. -- is that right?

3 A. Correct.

4 Q. And you're saying that -- forcing them to three  
5 million will not affect them?

6 A. What I said was -- I didn't say it wouldn't  
7 affect them. I said it should not present a large,  
8 economic disincentive.

9 Q. And at what point does it become a large,  
10 economic disincentive?

11 A. Where they maybe haven't captured the economies  
12 of size of their existing business and their, you know,  
13 opportunities to change a business under a different  
14 pricing structure are going to be unique to that particular  
15 business. I'm just suggesting, based on the data that's --  
16 and the analysis that's been done, that I've reviewed up to  
17 this point in time, I don't see evidence that there's a  
18 large, economic disincentive for producer/handlers that  
19 would be (phon.) over three million pounds of class one  
20 sales a month that will impact them significantly.

21 Q. Being ongoing?

22 A. On an ongoing basis.

23 Q. All right. Let's turn back to your Table 1. And  
24 you've got an annual -- total, annual profit of \$522,000,  
25 right?

1 A. For my hypothetical 800 --

2 Q. Right.

3 A. Yeah.

4 Q. All right. Now, as you understand it, you add a  
5 pound and make that three million pounds -- bear with me  
6 one second.

7 All right. Going back to that exhibit that I  
8 showed you, the \$1.60 -- I think it says \$1.69 for Order  
9 124 for -- average for 2003. You round it to \$1.70, right?

10 A. It's the one that ranges from 74 cents to \$3.12?

11 Q. Right. Okay. The average \$1.70 -- on three  
12 million pounds, that's \$51,000, right, per month on a  
13 hundredweight basis?

14 A. Yeah, I think we got -- did we do it at 1.70 at  
15 68,000 before?

16 Q. Yeah, so three million, about 51,000, right?

17 A. Keep going.

18 Q. All right. Now, times 12, what's 51 times 12?

19 A. 612,000.

20 Q. And that exceeds your profit at \$522,000, doesn't  
21 it, on your --

22 A. Sure. Yeah.

23 MR. YALE: I have no other questions, Your Honor.

24 MR. RICCIARDI: Al Ricciardi for Sarah Farms.

25 BY MR. RICCIARDI:

1 Q. Mr. Smith, you have not analyzed three years of  
2 profit and loss statements for Sarah Farms, correct?

3 A. I have not, never been asked to.

4 Q. You have not analyzed three years of financial  
5 statements for Sarah Farms, correct?

6 A. Have not.

7 Q. You have not analyzed any financial statements  
8 for Sarah Farms, correct?

9 A. I have not.

10 Q. So with regard to what type of an economic impact  
11 the regulation proposed would have on Sarah Farms, you  
12 don't have any specific information or opinion that you can  
13 give today, correct?

14 A. No, I don't. I'd welcome the opportunity.

15 Q. DFA's your client currently?

16 A. Yes, in this matter.

17 Q. Were they your client before this matter?

18 A. We keep our client lists confidential. If you're  
19 asking whether DFA's been a client of ours in the past,  
20 I'll breach our confidentiality and say yes.

21 Q. And by you, I mean Dairy Strategies, LLC --

22 A. Dairy Strategies.

23 Q. Is Dean Foods a current client --

24 A. No.

25 Q. -- of Dairy Strategies, LLC?

1           A.    Are you going to go through a list of companies  
2 and ask me to disclose who our clients are?  Are --

3           Q.    Going to -- I am going to go through a list of  
4 some of these major companies in the United States in the  
5 agri-business area to find out if they're your clients so  
6 that I can test some issues with regard to your testimony,  
7 yes.

8           A.    The standards and ethics of the American Society  
9 of Agricultural Consultants prevents me from disclosing  
10 clients in a public forum for -- upon questioning as you're  
11 suggesting here without advance permission from the  
12 clients.  So you can go through the list, but I will not  
13 tell you whether they're a client currently or have been a  
14 client.  I already breached it with respect to Dairy  
15 Farmers of America.

16          Q.    Well, you told us in your statement that Dairy  
17 Farmers had asked you to present this statement, says on  
18 behalf of Dairy Farmers, Inc.

19          A.    Excuse me.  I was talking in terms of previous  
20 relationships with Dairy Farmers of America.

21          Q.    Do you have a client at this point currently in  
22 the Order 131 area?

23          A.    Several.

24          Q.    Do you have any -- and you told us, I think, in  
25 response to Mr. Yale's question, you have no current

1 producer/handler clients, correct?

2 A. That's correct.

3 Q. You won't tell me if Shamrock Farms is a client,  
4 for example?

5 A. No. We have clients in both orders under  
6 discussion here.

7 Q. And you are being paid, I assume, for the time  
8 that you spent and the preparation of the statement, and  
9 for your testimony today?

10 A. Yes, that's the nature of our business.

11 Q. Understand. And how much is that?

12 A. Well, you're asking for my rates?

13 Q. That's correct, for --

14 A. Yes.

15 Q. -- this particular issue that we're here for  
16 today.

17 A. My rate is \$195 an hour for professional time and  
18 \$250 an hour for testimony, plus expenses port to port.

19 Q. What did you review in order to prepare your  
20 statement?

21 A. I can get my folder and go through what I  
22 reviewed. I principally reviewed Mr. Herbine's statement.  
23 I reviewed the Texas Order Federal Register entry of 1980  
24 -- I'm going to say '88/'87 something like that. I  
25 reviewed the Puget Sound discussion around this similar

1 matter. I reviewed the testimony from the Phoenix portion  
2 of this hearing. I reviewed Mr. Hollon's statement and  
3 exhibits. Let's see. I'm sure there were some other  
4 things. My folder's fairly thick, but that -- those are  
5 the ones that come to mind.

6 Q. Have you ever published any articles regarding  
7 producer/handlers?

8 A. No.

9 Q. And I assume you never operated as a  
10 producer/handler?

11 A. That's actually an interesting question. I  
12 suspect that, although unique, Michigan State University  
13 dairy farm might have been a producer/handler and I managed  
14 that.

15 Q. May have been, and that is -- in terms of looking  
16 at your resume in terms your background, the only time that  
17 you've operated or managed a dairy farm was at Michigan  
18 State, correct?

19 A. Correct. Well, --

20 Q. In '79/'80?

21 A. Yeah. Excuse me, but I had management positions  
22 at two other dairy farms.

23 Q. Okay. Do you know whether or not Sarah Farms  
24 uses BST technology at its farm?

25 A. I don't.

1 Q. And I think you've said, but let me make it  
2 clear, you have no information regarding either the  
3 operation of the dairy portion of Dairy Farms or the  
4 production facility, correct?

5 A. No, I don't.

6 THE COURT: You said "Dairy Farms." Did you mean  
7 Sarah Farms just now, where you just said -- that last  
8 question of yours?

9 MR. RICCIARDI: Well, I --

10 THE WITNESS: -- Sarah Farms.

11 MR. RICCIARDI: I said Sarah Farms --

12 MR. UNIDENTIFIED: I don't think you said it, but  
13 I think you meant it.

14 THE WITNESS: Oh, I answered it as though you  
15 were talking specifically about Sarah Farms.

16 THE COURT: I may be hearing things, I don't  
17 know, at this time --

18 MR. RICCIARDI: And I understand, Your Honor.  
19 Let me make it clear.

20 BY MR. RICCIARDI:

21 Q. With regard to Sarah Farms, you have no specifics  
22 regarding either the dairy portion or the production  
23 facility for Sarah Farms, correct?

24 A. I do not.

25 Q. Okay.

1           A.     Correct.

2           MR. RICCIARDI:  I don't have anything further,  
3 Judge.

4           THE COURT:  Okay.  Let me ask -- I'm trying to do  
5 a little rotation here.  I want to ask Ms. Deskins and her  
6 colleagues if they have any questions of this witness.

7           MS. DESKINS:  We don't have any questions.

8           THE COURT:  Okay.  Go ahead, Mr. English.  And  
9 don't forget to identify yourself.

10          MR. ENGLISH:  I did it last time.  Charles  
11 English for Dean Foods Company and Shamrock Foods Company.

12 BY MR. ENGLISH:

13          Q.     Dr. Smith, just a clarifying question or series  
14 of questions based upon the questions asked by Mr. Yale.

15                 On Table 1, page five, the total, annual profit  
16 that you listed, \$522,000, that is at the farm, correct?

17          A.     Yes.

18          Q.     That would not include any processing profit,  
19 correct?

20          A.     Right.  That is correct.

21          MR. ENGLISH:  That's all I have.  Thank you.

22          THE COURT:  Go ahead, Mr. Berde.

23          MR. BERDE:  Sydney Berde.

24 BY MR. BERDE:

25          Q.     Dr. Smith, you're aware of the opponents of

1 proposals to regulate producer/handlers who distribute more  
2 than three million class one in a marketing area, contend  
3 that their balancing costs outweigh whatever gains or  
4 savings that they might realize on the class one blend  
5 obligation to the pool.

6 A. I'm aware of that comment.

7 Q. And is your testimony designed to show that such  
8 a claim is, in fact, specious because other strategies are  
9 available to them to minimize their balancing costs?

10 MR. UNIDENTIFIED: Objection for the  
11 (indiscernible) beyond his direct and cross-examination,  
12 and we're going into a different area.

13 THE COURT: I'll, you know, I'm going to let him  
14 answer the question (indiscernible), if you know the answer  
15 to the question --

16 THE WITNESS: I think there's flexibility to do  
17 their own balancing.

18 BY MR. BERDE:

19 Q. And that's essentially what the burden and thrust  
20 of your testimony is today, is it not?

21 A. It's a portion of --

22 MR. UNIDENTIFIED: (Indiscernible) testimony is  
23 whatever his testimony is. I mean, that's (indiscernible)

24 THE COURT: (Indiscernible)

25 THE WITNESS: It's a portion of my testimony --

1 THE COURT: Don't --

2 THE WITNESS: I'm sorry.

3 THE COURT: -- answer the question. When I say  
4 don't answer the question, I --

5 THE WITNESS: Oh, did you say -- I didn't hear  
6 you say don't answer it.

7 THE COURT: (Indiscernible) in so many words.

8 THE WITNESS: Yeah. Okay. You can slap me.

9 MR. BERDE: What was the answer?

10 THE COURT: He doesn't get -- no, no, no, no. I  
11 said that was an improper question. So I told him -- I'm  
12 telling him he shouldn't answer that question. So go on to  
13 your next question.

14 MR. BERDE: (Indiscernible) he shouldn't answer  
15 what the purpose --

16 THE COURT: He shouldn't answer the question  
17 about what the purpose -- his testimony is what his  
18 testimony is. You're asking him now, well, isn't the  
19 purpose of your testimony to assume -- to whatever.

20 MR. BERDE: Oh.

21 THE COURT: He already testified. Whatever his  
22 testimony was, that's what it is.

23 BY MR. BERDE:

24 Q. Would you agree that the claimed balancing costs  
25 that the producer/handlers claim they incur is not, in

1 fact, at a level which overlays the savings realized on  
2 their exemption from paying into the pool of class one  
3 blend obligation?

4 MR. UNIDENTIFIED: Objection for a variety of  
5 reasons --

6 THE COURT: In a -- okay. Look, I'm going to let  
7 him answer the question. So everyone sit down.

8 Answer the question, if you know the answer to  
9 the question, if you understand the question.

10 THE WITNESS: I don't believe -- my opinion is  
11 that they are not put at a competitive advantage strictly  
12 based on their inability or the costs associated with  
13 blending excess production --

14 MR. BERDE: Thank you.

15 THE COURT: Are there any other questions in the  
16 proponents side of the isle?

17 Yes, Mr. Beshore.

18 MR. BESHORE: Just one question.

19 THE COURT: Identify yourself.

20 MR. BESHORE: Marvin Beshore.

21 BY MR. BESHORE:

22 Q. One question in terms of hypothetical affects.  
23 Mr. Yale asked you, you know, somebody goes, you know, a  
24 pound over the three million or whatever, they'd have a big  
25 bill. Of course -- and you said they could -- there are a

1 lot of things you could think about, and one of those that  
2 may not have been mentioned is to consider the pricing of  
3 your product if you've got a different regulated, minimum  
4 cost than you do now in your revenue side, might need to  
5 change a little bit. Fair enough?

6 A. Absolutely. I think it's like any business  
7 decision. The environment changes, whether it's low milk  
8 price, or whether it's a increased regulation in the  
9 marketplace. We make the best sound business decisions,  
10 and I would suggest the management depth on a  
11 producer/handler of the size that we're talking about is  
12 there to make an informed decision.

13 MR. BESHORE: Okay. Thank you.

14 THE COURT: Go ahead, Mr. -- Mr. Yale, do you  
15 have another question.

16 MR. YALE: (Indiscernible) follow-up.

17 BY MR. YALE:

18 Q. I wanted you to go back to Table 1. You call  
19 this a hypothetical producer/handler, right?

20 A. Right.

21 Q. And your -- and you testified, did you not, that  
22 to come to this .0145, that you read Carl Herbine's  
23 testimony?

24 A. Right.

25 Q. And that you factored in the profit from the

1 marketing of that milk?

2 A. No, but if I said that, I misspoke. It really is  
3 focused on the production -- milk production side of the  
4 business, not the processing side of the business.

5 But my -- the context of reviewing Mr. Herbine's  
6 work is looking at the economies of size at both  
7 corresponding producer/handler sizes and seeing a very  
8 similar relationship with respect to economies of size for  
9 the processing side of the producer/handler as well as the  
10 production side. And I look at them as cost and profit  
11 centers within an integrated business, and they have to --  
12 whether we call them transfer costs and how we compute them  
13 is -- some of it's an academic discussion, but  
14 realistically, I focused in Table 1 on the dairy production  
15 side of the hypothetical.

16 Q. So this has nothing to do with any processing  
17 sales or profits or payments into the pool --

18 A. No.

19 Q. -- or anything?

20 A. No.

21 Q. So it's not a producer/handlers, it's just a  
22 producer?

23 A. Well, that's why I use the word "hypothetical  
24 producer/handler." Producer/handlers have cows, produce  
25 milk, and then process milk --

1 Q. But you could've called it a hypothetical  
2 producer examples by herd size, and it wouldn't change a  
3 thing?

4 A. Well, except that the subtitle of the section I  
5 was talking about was the challenges and opportunities  
6 facing producer/handlers. So I think it was an appropriate  
7 title for the table.

8 Q. Well, my question is, is that by making it to  
9 say, if you change the title to just producer, it would not  
10 change the content of the table?

11 A. Correct.

12 Q. Now, balancing costs. What are balancing costs?

13 A. What are balancing costs?

14 Q. Yes.

15 A. The processing of surplus milk in times of  
16 surpluses into products because of the perishable nature of  
17 milk typically in butter and powder.

18 Q. Okay. And your testimony talks about the costs  
19 of making butter and powder?

20 A. No.

21 MR. BERDE: I don't have any other questions,  
22 Your Honor.

23 THE COURT: Anyone else?

24 (No response)

25 THE COURT: Okay. You may step down.

1 THE WITNESS: Thank you.

2 THE COURT: It's 5:50. Would this be a logical  
3 time to stop, or do we want to do a few more witnesses  
4 tonight?

5 (Everyone talks)

6 THE COURT: One of the few times we have  
7 agreement from everybody. Okay. We're going to start --  
8 we're going to reconvene tomorrow at 8:30, and we're going  
9 to plan to go till as late as 7:30 or so tomorrow. Okay?

10 Off the record.

11 (Whereupon, the proceedings were concluded at 5:50 p.m., to  
12 resume November 18, 2003.)

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