UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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

Public Hearing Administrative Law Judge
Before: Jill S. Clifton

Date: May 4, 2009

Time: Commencing at 1:06 p.m.

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

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

JUDGE CLIFTON: All right. Let's go on record, please. This record is being made in Cincinnati, Ohio on the 4th of May, 2009. This is a rulemaking hearing. This hearing is to gather evidence for the use of the Secretary of the United States Department of Agriculture.

My name is Jill Clifton. I'm the United States Administrative Law Judge who is assigned to gather that evidence.

There are two kinds of evidence, testimony and exhibits. Some of you will have prepared your testimony in advance, and you'll have it in written form.

If that is true and you want the written form to become part of the record as well as what you say from the witness stand, then copies of that exhibit need to be made so other people can see them. And please coordinate getting your copies made if you need help with the representatives who are here from the U.S. Department of Agriculture. I'll have them introduce themselves in a minute.

If you wrote your statement out just as your own guide to help you in testifying and you
don't want the written copy to be an exhibit, you don't need to make copies for everyone. You can just use it as your aid as you sit next to me and testify as a sworn witness.

Many people want both their sworn testimony, which will be part of the record in the transcript that's being prepared, and the exhibit to be in evidence. If you want them both in evidence, and you're diverging from what you wrote, please alert us as to which is the correct version. In other words, if you're testifying and you misspeak, we want to correct it. If you say 2007 and you meant to say 2008, we need to clarify that right then.

Some people write their testimony and then learn something more and they therefore want to diverge from the written material to give a better statement. And we need you to alert us, this is not exactly the same as in my written statement and what I am saying now is the evidence that I want the Secretary to consider.

Now would be good time for us to introduce those representatives from the United States Department of Agriculture that are seated
at the first table here. And as you introduce
yourself, I do want you to stand and turn around
so the people behind you can see you. And,
Ms. Pichelman, if you'll begin and we'll just go
down the line.

MS. PICHELMAN: Good afternoon. Heather
Pichelman, USDA Office of the General Counsel.

MR. STEVENS: Good afternoon. Garrett
Stevens, United States Department of Agriculture
Office of the General Counsel.

MR. TOSI: Gino Tosi, Dairy Programs,
USDA, in the Order Formulation and Enforcement
Branch.

MR. ROWER: Jack Rower, AMS, Order
Formulation and Enforcement Branch in Dairy
Programs.

MS. FISHER: Kate Fisher, Order
Formulation and Enforcement Branch, AMS Dairy
Programs.

JUDGE CLIFTON: And I'm going to have one
more person introduce himself. You are not near
a microphone, so would you come around to the
front side of the table to introduce yourself
please?

MR. CARMAN: Cliff Carman. I'm with
Dairy Programs as Assistant to the Deputy Administrator.

JUDGE CLIFTON: Because the proceedings are recorded, we need to make sure only one person speaks at a time. And if you need to interrupt to clarify or something for the good of the order, you need to catch my eye. I can go off record. I can interrupt the speaker to allow you to come forward and speak for a moment. We need an orderly proceeding, but we need it to be accurate. So I want to be flexible in that regard.

I'd like now for the Office of General Counsel representatives who are here to explain to everyone what ex-parte means and what is not permitted during this hearing. Who would like to do that for me? Garrett Stevens?

MR. STEVENS: I'll take a shot at it, your Honor.

Well, we're under the rules of practice, which -- which apply at the time the notice is issued that contact with the Department from that point on with the people designated in that part of the regulations, which are the people here at the table and the people in the
government who are involved in the
decision-making process here, contact with those
people is limited to discussion of procedural
matters, and certainly pleasantries and the
exchange of information of that nature, but
certainly not to any of the issues in the
hearing, as to the -- for or against any of the
discussion to that, as to how witnesses should
testify or anything of that nature.

So it is limited contact. It is -- it is
contact of a nature that is necessary to do
proceedings like this; that is procedural
questions that come up. And we are all
available for that to assist everyone in the
conduct of this hearing. But there are -- there
are questions, there are issues that we cannot
discuss from the time that the Notice of Hearing
is -- is issued.

JUDGE CLIFTON: Thank you, Mr. Stevens.

MR. STEVENS: Sure.

JUDGE CLIFTON: I would like someone from
that front table to explain to those assembled
here what goes on the website with regard to
this proceeding. Mr. Tosi?

MR. TOSI: Thank you, your Honor. As a
matter of policy, everything that has occurred
to date with respect to any correspondence, any
answers by the Department, all requests for
information and literally everything that has
been associated with this hearing, including the
press release, the Notice of Hearing, any and
all exhibits that will be entered into evidence
at this proceeding, together with the verbatim
transcript that's prepared by our court
reporter, any and all answers to people's
specific data requests together with those raw
requests.

JUDGE CLIFTON: If someone knew that the
way you get to the Department of Agriculture's
website is generally usda.gov, g-o-v, and that's
all that person knew, how would that person find
the website you're talking about?

MR. TOSI: I can give the exact web
address. It's www.ams.usda.gov and a forward
slash, and then the word dairy, d-a-i-r-y. That
will bring you to the Dairy Programs home page,
if you will.

And at the bottom of the page in the
center of the display, we have a title that you
can click on that will bring you to everything
that's happened that brought us to this juncture in this procedure.

And it will also be from there that you'll be able to find everything else that will be put on that -- put on our website in the future.

JUDGE CLIFTON: Some of you are concerned about the schedule we'll keep here. Beginning tomorrow, all the mornings will begin at 8:00. The evenings will routinely go until 6:00. We have this room reserved until 9:00 p.m. Monday through Thursday, and only till 5:00 on Fridays.

We may be able to break as early as 5:00 p.m. on Fridays. Whether we go to 9:00 p.m. as a routine matter depends on how much progress we're making and what people need yet to get their testimony in that day because of travel plans, business requirements or any -- any reason.

So I need to know if you have a restriction on getting your testimony in. And the best way to alert me of that is to alert all of us at the same time. That way if there are competing interests, I can hear from everyone before I decide in what order we'll proceed.
As you know, we'll begin today with the presentation through the government representatives of the statistical information that's a foundation of what comes after. I don't know how much of today that will take. So if there are people who intend to testify today briefly and need to get that in, we'll have to see just when that would best be scheduled.

Does anyone have any questions at this point? Would you come forward, please? I'd like everyone who wants to be heard to speak at the microphone, and that way the court reporter will have your name and everyone else will be able to hear you.

MR. VETNE: Is that the way I catch your eye, is by standing up?

JUDGE CLIFTON: That was perfect.

MR. VETNE: My name is John Vetne. I'm an attorney. My address is 11 Red Sox Lane, Raymond, New Hampshire. I represent Mallories Dairy, Country Morning Farms and Nature's Dairy. The first two are producer-handlers in the Pacific Northwest market, and Nature's Dairy in the Southwest market.

My clients are located a long ways from
this hearing room. I had requested the
Department to consider holding various regional
segments of this hearing. Apparently that did
not work.

I have told my clients, I will do my best
to give them a couple days' notice before they
have to be here. And when I will make that call
depends on what's happened up to that point.
And then -- and what they -- what I understand
and can tell them about what proponents of
 contrary position -- the primary proponents of
 the first few proposals have said. That way
 they'll know what they need to say in opposition
 and tie that into their alternative proposals.

JUDGE CLIFTON: Are they proponents as
 well as witnesses?

MR. VETNE: They are proponents. These
three clients are proponents of Proposal
Number 17, which is a responsive proposal.
Proposal Number 17 would not have been made if
there were no more restrictive proposals on the
table.

And maybe before we get into this much
further, we will have some idea of whether all
the proposals that were noticed are genuinely
still on the table, because it makes a
difference on how we prepare and how long the
hearing goes, if some, in fact, might be
withdrawn or not supported.

But the schedule, your Honor, that you
discussed is -- is what I found online late last
week, which followed a request from National
Milk Producers, I believe, for a similar
schedule. And as I read the National Milk
Producers' rationale for that schedule, it was
for everybody's own good.

It was not for my own good, and it's not
for the good of my clients. And nobody asked me
or my clients about that schedule. And I tell
you --

JUDGE CLIFTON: Let me just interrupt a
moment, Mr. Vetne. I just want to correct one
thing. You said my orders followed. Actually,
my order was filed the day before the request
was made. And I was unaware of the request.

MR. VETNE: Oh.

JUDGE CLIFTON: I was aware that we have
a lot of material to cover. And as I said in my
order, I'm hopeful that we'll finish much more
quickly than the three weeks that we're -- that
I've scheduled my hotel here. But we'll have to push.

MR. VETNE: I have estimated less than that. But I want to particularly address the first week, which is -- which is very critical as far as presentation of witness testimony, response and analysis of the primary proponent testimony. Your Honor, I'm a solo practitioner. Several of the lawyers in here are sole practitioners and have a little bit of things that are dangling back in the office.

JUDGE CLIFTON: Always.

MR. VETNE: Always.

JUDGE CLIFTON: I understand that.

MR. VETNE: The time that we have after the gavel falls in the evening is the time that we analyze and prepare for the next day. In the first week, it is also the time that we take the evidence that has come in -- and some of it I understand the Department is still working on.

We take the evidence as it comes in, spend the evening -- those evenings and prepare the responsive and affirmative testimony. It matters less the second week and it matters even less the third week to go to 8:00 p.m., because
by that time that information will have
coaesced.

But I for one am incapable of putting in
the hours necessary if I have to be here at
8:00 a.m. and might not get back to my room
until after 6:00. It just will not work for my
clients. There are people here, and maybe my
clients, who will be coming a long ways. They
don't have a shuttle flight from Cincinnati to
Washington or Boston, you know, like I would.
They're coming from across the country.

Having the gavel fall at 5:00 on Friday,
guaranteeing that they will not get back to
their homes until Saturday because of travel
logistics, is unreasonable for those people,
particularly in the first week.

I would suggest that we -- that we
conclude at noon on Friday so that we can have a
decent week with -- weekend with our families
and catch up on a few other critical things and
come back at 1:00 on -- on the following Monday.
We do not need this particularly intensive
schedule, I believe, the first week.

And I need, for the benefit of my
clients, not to have that demand on my time in
this hearing so I can be productive for my
clients for this hearing in the evening hours.
And so I can get back to -- back to my home at a
decent time to spend the weekend with my family.

So I suggest, your Honor -- I request
that you reconsider the schedule you have
announced for this first week of the hearing and
then see where we are at end of this week.
Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne. I
will take this day by day. I don't know whether
we'll be here until 9:00 tonight. We may be.
I'm -- I'm mindful that people have other
responsibilities that they have, businesses to
run. They have families to care for. But we
have a Congressionally-mandated time line that's
tight.

For my part, I intend to gather the
evidence as quickly as we can so everyone can
begin to work on it. The turn-around time for
the transcript is very short.

We are blessed to have the services of
Ace-Merit, LLC, the court reporter service
that's here. You'll notice they have two court
reporters working and they intend to have a very
quick turn-around time.

I know that counsel would like to be here for every minute so that you can cross-examine effectively at all times. All I can suggest is if you cannot be here and we are operating, you might consider getting a transcript for that portion of the hearing, you might want to order that so that you get it very quickly. Yes, the transcript is also going to be posted to the Web page. I don't know whether you will be able to get it more quickly by ordering portions of it yourself, but that's a -- that's a possibility.

Right now, with all due deference to Mr. Vetne's request, I don't see slowing down in the taking of the evidence. I hope we're not here the third week. I hope we finish sometime next week. I'd love to finish this week. I just don't think it's possible. Yes, please come forward.

MR. RICCIARDI: Your Honor, good afternoon. I am Al Ricciardi from Phoenix, Arizona, from the firm of Aiken, Schenk, Hawkins & Ricciardi, 4742 North Fourth Street, Suite 100, Phoenix, and I am counsel for AIDA, which is a coalition of a number of
producer-handlers throughout the country and now
also at some plants.

I would join in Mr. Vetne's concerns.

Obviously, in these proceedings we do not have
the opportunity for discovery and so on-the-fly
we are presented with a number of fairly
sophisticated points by potential experts in the
industry that we have to examine ourselves and
to come back and effectively cross-examine on
behalf of our respective clients.

My clients are potentially restricted by
some of the proposals that are made,
particularly Proposals 1 and 2, and maybe in
some cases their businesses would be affected so
much that they may no longer be able to be in
business.

So obviously this is critical to them.
They come from all parts of the country. Like
Mr. Vetne mentioned, they will have to travel in
for purposes of trying to present their
information and testimony at the time of the
hearing.

While I don't want to stand here and
spend a lot of time talking about my own
personal medical issues, I will mention that
over the last month or so, I've been in the hospital twice and there are some restrictions that I have. While I can travel, certainly the doctor has indicated he doesn't want me to have the type of hours that you are talking about.

And, unfortunately, since we're placed in this confined hearing with the restrictions that you've mentioned, my clients need me to be here to represent their interests. So I need to balance my own medical issues and the hearing parameters.

I will tell you this, Judge. In looking at the presentations and proposals that have been set forth on the website, I do believe that if we sat here and talked a little bit from the proponents and the counsel, that -- that you'll find that the likelihood is we'll be able to make all the presentations and get the evidence in within the two-week period and maybe less.

And if we sit here and go through those and talk about how we get it done -- and that would be, Judge, without having to have accelerated hearings. Now, most of the time I spend in trials in state court or federal court. And if you get 5 1/2 hours in the jury, you've
gotten a lot.

So if we do an 8:00 to 4:00 or 9:00 to 5:00 schedule, given what I believe I know about what's going to happen -- and I may be guessing so we'll need to find that out -- I still believe that within the two-week time frame, that the evidence can be gathered for purposes of closing the formal portion of this presentation.

And my suggestion, whether it's a good one or not -- at least my suggestion is that we gather now some information about the number of witnesses that the proponents intend to present, an estimate from -- from each of the groups as to how much time they would end up spending. And we may find that I'm correct, that less than two weeks or two weeks is probably a time period, even if we go at a regular, as opposed to an accelerated schedule, that we can complete this. Thank you, your Honor.

JUDGE CLIFTON: Thank you, Mr. Ricciardi. I hope you're right. I hope we finish in two weeks. I'm not that optimistic. I want to see how it goes. Your idea of having proponents work together for a more streamlined
presentation appeals to me very much. We've set aside the time today to get started on the government's statistical evidence and that's what I want to do.

But I would encourage you to begin to figure out how you might gather to discuss -- I don't know exactly how you would do it.

One thing might be, now that all of the proposals are visible, some proponents of their proposals might prefer someone else's proposal better and would give up their own proposal and champion someone else's. That's one way it might work. Mr. English, let me hear from you.

MR. ENGLISH: Thank you, your Honor. Charles English for a number of entities, the Northeast Dairy Foods Association, the Pennsylvania Association of Milk Dealers, the Dairy Institute of California, Anderson Erickson Dairy Company, Dean Foods Company, Prairie Farms Dairy, National Dairy Holdings, LP, Shamrock Foods Company, Shamrock Farms and Parker Farms.

Your Honor, I certainly sympathize and frankly am going to live through the same process as Counsels Vetne and Ricciardi.

I have a couple of comments and then I'll
try to keep it very brief.

    First, I candidly had hoped for my own
self that we would be done at noon on Friday and
therefore had scheduled a flight accordingly.
Got your court order, I've paid a change fee so
I can leave appropriately after 5:00 on Friday.
And I made that adjustment.

    But that's not the only adjustment we
made. We, who are proponents, adjusted
schedules for witnesses based upon this
scheduling. And we hope and expect to be able
to bring in, you know, most of the witnesses
this week.

    But having done so, the very same
restrictions that apply to Mr. Vetne's clients
and Mr. Ricciardi's clients -- everybody in the
industry has time constraints, everybody has
other business to conduct. And we have tried to
bring as much as possible to the table.

    But that means we have witnesses who we
expect to be testifying on Friday, and stopping
at noon on Friday would mean we need to call
somebody now and tell them not to come. And I
think that's inappropriate since they paid --
paid an airfare.
I would say that it could be, based upon cross-examination primarily, that some days we may get to a point where it would be logical to stop before 6:00, because maybe we've -- you know, the witnesses for that day, we may have run the list. It depends.

We frankly, on our side, I'm putting our list together, had to approximate how long cross-examination would take as opposed to just simply thinking about how long examination would take.

Mr. Beshore is here and -- and others, and they can talk about what other witnesses are available. We've already put out testimony, or the testimony of the proponents has put out for Mr. Cryan, in the event that USDA's testimony is finished today and Mr. Cryan is able to get on the stand.

We don't expect and would not expect but are prepared, I think if necessary, if Mr. Cryan gets done, as well as USDA, to go on with another witness. We have prepared that.

But I think, candidly, if the USDA testimony goes and Mr. Cryan -- Dr. Cryan goes, I think that will, at a minimum, finish today,
and most likely Dr. Cryan will go on.

But let me just say that --

JUDGE CLIFTON: Let me stop you.

MR. ENGLISH: Yes.

JUDGE CLIFTON: Would you spell Beshore and Cryan?

MR. ENGLISH: It's B-e-s-h-o-r-e, and Cryan, C-r-y-a-n.

JUDGE CLIFTON: Thank you.

MR. ENGLISH: So the bottom line is we're prepared to move forward. We're prepared to move forward expeditiously. We're certainly prepared to work with counsel. It's not -- it's not in our interest to go until 9. You know, we don't want to go until 9 p.m. every night, but we do want to get this hearing in, we want the record of evidence put in. We have made arrangements with witnesses, especially for the later part of this week, to make sure that we fill the slots. Because we recognize that 8:00 to 6:00 is a long day.

JUDGE CLIFTON: Thank you. Is there anyone that has any question about what I've said so far?

MR. MILTNER: Thank you. Your Honor,
this is Ryan Miltner on behalf of AIDA, and the court reporters have my contact information. I don't want to rehash the points that we've been discussing for the past few minutes, but I think that at some point it would be helpful if, as Mr. English points out, they believe they have witnesses slotted through the end of the week, so that we can advise the members of our coalition when they might need to be present as soon as possible, so they can make appropriate travel arrangements; that at some point, even if off the record you could help us get an idea as to how we're going to fill our witness slots for the next few days, that would be a good idea.

JUDGE CLIFTON: Good. That's an excellent suggestion. I think two times that we may be able to take the pulse of our gathering would be when we start in the morning at 8:00 and when we come back from lunch, and get an idea of who is going to be up. I won't have a lot of time during breaks to do anything. The reason for that is throughout the proceeding I must be here and the court reporter must be here. Everyone else can
come in and out of the room. So when we do take
a 15 or a 20-minute break, I don't personally
want to be organizing anything.

If you all can work together on that, I'd
be very appreciative. But I will take a pulse
and get feedback that everyone in the room can
hear as to what's apt to be next. And none of
us knows how it's going to work out. None of us
can anticipate how long cross-examination will
take.

But we'll take a reading and we'll see
how we're doing. So that's an excellent
suggestion, particularly when playing fair is
involved. All right. Good.

Ms. Pichelman and Mr. Stevens, is there
anything further that we should announce as a
general matter before we begin to take evidence?

MS. PICHELMAN: No, your Honor.

JUDGE CLIFTON: Thank you. Oh, there was
one other thing. We will take a break around
3:00 today. All right. Who of the
government -- of the Office of General Counsel
will be calling the first witness?

MS. PICHELMAN: Your Honor, I guess I
should say -- this is Heather Pichelman with
USDA. Before we call our first witness, we do have some preliminary exhibits that we wanted to put on the record, if we could.

JUDGE CLIFTON: All right. You may. This is a good time to proceed.

MS. PICHELMAN: All right. The first one is the Notice of Hearing, entitled milk in the Northeast and Other Marketing Areas; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreements and Orders. That was published in the Federal Register, Volume 74, Number 67, dated April 9th, 2009. We ask that one be marked as Exhibit 1.

(Exhibit 1 was marked for identification.)

JUDGE CLIFTON: Now, let's talk a little bit about the records, copy of the exhibits. I should have done this before. The rules of practice say bring four copies of your exhibits to all the hearings. Well, as a practical matter, we need one record copy. And I want the record copy to be maintained by someone at this first table, because whoever that is will be responsible for doing two things. One is getting it on to the website and the other is
delivering it to the hearing clerk.

So I want you folks to handle the record copies. So, for example, if a local dairy farmer comes in tomorrow morning and brings his exhibit, then his record copy of that exhibit goes to your table and someone there takes care of that.

I get a courtesy copy. And my courtesy copy is not the record copy, but it is so that I can follow and interpret for clarification when needed.

So these that you are announcing now, I need you folks to keep track for me of what the next exhibit number would be throughout. And so you'll keep these record copies. You've already given me my courtesy copies. I appreciate that. But that will be true for the other parties who testify as well. All right. Thank you. Go ahead.

MS. PICHELMAN: Thank you, your Honor.

Our second exhibit is the news release regarding this hearing, entitled USDA Sets Hearing on Proposed Amendments to All Federal Milk Orders. This is dated April 7th, 2009. We ask that this be marked as Exhibit 2.
(Exhibits 2 and 3 were marked for identification.)

MS. PICHELMAN: Exhibit Number 3 are several pages, Market Administrator Certificates of Mailing. I'll go through these quickly. Looks like -- yeah, there's a total of eight of them. The first one is for Order Number 1, the Northeast Marketing Area, dated April 10th, 2009.

The second is for Order Area 5, the Appalachian marketing area. And this is dated April 7th, 2009.

The third is for Order 6 and Order 7, Florida marketing area and Southeast marketing area. This is dated April 9th, 2009.

The next one is for Order 30, the Upper Midwest marketing area. That is dated April 7th, 2009.

The next one is for Order Number 32, the Central marketing area. That is dated April 7th, 2009.

The next is for Order 33, the Mideast marketing area. This is dated April 8th, 2009.

Then we have another, that's order --
Order 1126, Southeast marketing area. And a
final for Order 1124 and 1131, the Pacific
Northwest marketing area and Arizona marketing
area.

We had asked that all of those be marked
as Exhibit 3.

The final exhibit is Certificate of
Officials Notified regarding this hearing. This
is dated April 9th, 2009. And we'd ask that
that be marked as Exhibit 4.

(Exhibit 4 was marked for
identification.)

MS. PICHELMAN: And we ask that
Exhibits 1 through 4 would be received into
evidence.

JUDGE CLIFTON: Is there any objection?
Exhibit 1 through 4 are hereby admitted.

JUDGE CLIFTON: And what would be the
next order -- the next evidence?

MR. STEVENS: Your Honor, Garrett
Stevens, Office of the General Counsel. We
would like to call to the stand Clifford Carman.

JUDGE CLIFTON: If you'll approach behind
me, there's a step. You may by seated. I'll
swear you in in a seated posture.
And you may want to pour the water now. First, please tell me your full name and spell it.

THE WITNESS: Clifford, C-l-i-f-f-o-r-d, middle initial M., last name Carman, C-a-r-m-a-n.

JUDGE CLIFTON: Will you please raise your right hand?

CLIFFORD M. CARMAN

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

JUDGE CLIFTON: Thank you. You may proceed.

DIRECT EXAMINATION

BY MR. STEVENS:

Q. Good afternoon, Cliff.

A. Good afternoon, Garrett.

Q. Could you please tell us for the record, give us a brief description of your job, your employment and your work history in the dairy industry?

A. I'm currently employed with the Agricultural Marketing Service Dairy Programs as assistant to the deputy administrator. Prior to that position, I was head of order formulation and enforcement. And prior to that position, I worked as a
marketing specialist for the western region of the United States, also in order formulation.

Those three positions are from January of '94 to present. Prior to my employment with the Agricultural Marketing Service, I worked for Dairylea, headquartered near Syracuse, New York. And prior to that employment, I worked for Agway, also headquartered near Syracuse, New York.

Prior employment was with the Economic Resource Service as a dairy analyst. I did the dairy outlook situation for the ERS.

And earlier work was with econometric modeling and long-range projections also with the Economic Research Service.

Q. And you have participated in rulemaking hearings on previous cases, have you not?
A. Yes, sir.

Q. And you have performed various functions in those prior hearings. You have testified, you have participated as -- as a government employee working on hearing matters?
A. Yes.

Q. Now, in conjunction with this hearing that we're involved in today, you've been involved in this hearing since -- since its inception?
A. Yes.

Q. And as part of that, you have received requests from people. You have done your own consideration of what documents might be appropriate to enter into evidence in this hearing, and you have prepared documents, have you not?

A. Yes, I have.

Q. And you've brought them with you today?

A. Yes.

Q. Do you have a copy of those documents in front of you?

A. Yes, I do.

MR. STEVENS: And might I say, your Honor, there are copies of these documents -- some copies available at the back of the room. We are in a position to make copies if others need them, but certainly they are here for the use and availability to the parties. They are on the table at the back of the room.

JUDGE CLIFTON: Let's go off the record just a moment. This will give you a chance, if you'd like to, to obtain a copy.

(Off the record.)

THE COURT: Let's go back on record. All right. We're back on the record. It's 1:41.
MR. RICCIARDI: Thank you, your Honor. It's Al Ricciardi on behalf of AIDA. It's my understanding that the -- the documents that are being provided from the Department are in the process of being copied. There's one back room copy available. Obviously for all of the participants involved, it would be very helpful to have the actual documents to follow along in this testimony.

So my suggestion would be that we hold off on the substantive testimony at this point until we are actually able to all get copies.

JUDGE CLIFTON: Mr. Beshore, you may approach.

MR. BESHORE: Thank you. Your Honor, Marvin Beshore, B-e-s-h-o-r-e. I'd like to enter my appearance on behalf of the Florida Milk Producers Federation and Dairy Farmers of America, Inc. Perhaps for -- certainly for the first time, maybe one of the few times I've been -- I'm going to concur with Mr. Ricciardi in his request. I really would appreciate -- I think we need Mr. Carman's data in front of us to appreciate his testimony.

MR. RICCIARDI: You're going to agree
with me a lot more, I'm sure.

JUDGE CLIFTON: Mr. Stevens.

MR. GARRETT: Well, every attempt has been made -- in fact, when we discovered this morning and considered how many people would be here and would be needing to use copies, every attempt was made to produce those copies. And they are being produced at this time, and apparently have not been delivered as promised. That's not the people's problem here. That's our problem.

I also might note that all of these documents -- and correct me if I'm wrong, Mr. Carman -- have been up on the website for a goodly period of time. They are certainly available and have been available. Anyone who wanted to look at these documents can go to the website and run them off the website, and I feel confident that many of these people have done that.

So if there are people who have them, having gotten them off the website, and are not holding copies that were at the back of the room, maybe they could share those copies. I'm not making any particular point of it, other
than the fact that the Department makes every
effort to make these documents available and we
continue to do so.

And we'll make them available as quickly
as they can be gotten from the -- from -- from
the source of their making at this time. So
that -- that is my thought on the matter.

I mean, certainly everyone should have
copies to be able to review as Mr. Carman
testifies. I agree with that.

JUDGE CLIFTON: I agree with that, too,
Mr. Stevens.

I'd like to wait for the copies. And in
the meantime, I hope that those of you who
thought there might be some way to streamline
the presentation of the proponents, or even if
there isn't a way to streamline yet, because
we're so new to the process, if you want to work
together to determine in what order you might
proceed, I'm happy to do that as part of our
hearing, that I continue to preside, that we
have you identify yourselves and so forth, and
then take a break. Or if you all already know
each other, we could just take a break. You
could see in what order you think you might want
to go.

As you know, my order said we would first take the Government's statistical evidence, and then we'd start with Proposal Number 1 and then we would go to Proposal Number 2 and thereafter. I'm guided by your suggestions. And where there are conflicts, I'll decide. But where you agree, I'm very content to go that way.

So Mr. English.

MR. ENGLISH: Charles English. Your Honor, it may help, if there are witnesses that may be expected this week who have specific time constraints, who are not known to proponents, or if the -- those who have proposals at the end of the proposal list, have witnesses they need to go. Because we -- we, for our part, who either have proposed Proposals 1 and 2 or support Proposals 1 and 2, you know, have in mind who we think the witnesses are going to be.

But obviously, one of the things about these hearings is traditionally, if a dairy farmer comes in, because of the nature of the dairy farmer's business, the dairy farmer may be given, and often is given without any objection, given special priority to get on and off.
If there are going to be such witnesses who are not presently known or available for the first week, that would help us to make sure that we haven't overscheduled or underscheduled for any particular day. We certainly anticipated one or more such witnesses, but we don't know who those are. And, again, we can do that on the record or off the record, any way that might be done.

But if there are particular witnesses who need to get on this week, who might not normally get on because, say, there's a proposal, random 20, you know, it would help us if we knew who those people might be.

JUDGE CLIFTON: All right, good.

Mr. Vetne.

MR. VETNE: Thank you. I have one suggestion before we apparently go off the record, your Honor.

I'd like to make a request that your Honor chair the off-the-record discussion among the parties.

For example, I assumed that the proponents' witnesses are those that I know that are already here. And I learned for the first
time from Mr. English that he has scheduled some
people to come in on Friday, apparently not
before Friday. So I in turn am prepared to call
my clients and say, don't bother to even arrange
to come until next week.

But it would be useful for us to know the
proponents' witnesses, their names and how long
they take. I think, your Honor, you would do a
good job chairing that discussion, and all of us
in that context -- I don't want to be chair.
But, you know, it's also a bit chaotic to
suggest that, okay, you guys get together
somehow. You know, it's not going to happen
unless it's structured. Thank you.

JUDGE CLIFTON: All right. And thank you
for that vote of confidence.

MR. STEVENS: Your Honor.

JUDGE CLIFTON: Yes.

MR. STEVENS: One thing I might suggest
is that in hearings of this type, part of the
record, the beginning of the record involves
the -- the notice of appearances; that is to say
that the government has given notice of the
people here representing the government's side.

And then there is an opportunity for all
the participants to make appearances and to indicate for the record who they are representing at this hearing. And then so we might take a few minutes to have the participants identify themselves, their affiliations, and so usefully use our time here to advance the record along and take care of that matter while we await the belated completion of the -- of the copying of the materials for people to use. So I would suggest that, certainly.

And I also would add that -- I think it's certainly a very good suggestion, that off the record today we -- we attempt to get as -- as definitive a schedule of the various witnesses who will appear for or against the proposals that your Honor has -- has ably set forth. The nature -- you know, the order in which the -- starting in the beginning with the first proposal, and working through those in terms of who the potential witnesses are and about how long it would -- it would be anticipated they would take for all the proposals.

And that would certainly be a useful time -- a useful use of our time here probably
off the record, in terms of at least getting
to -- to decide how that may take place, and
then you putting it on the record when we
return.

So I would throw that out as -- as a
useful use of our time while we await the
completion of the evidence that is being copied.

JUDGE CLIFTON: All right. Thank you,
Mr. Stevens. Kate Fisher is not in the room
right now, but she forwarded to me some
information about people who had communicated
travel that caused them some scheduling
concerns. And some of these people need to
testify this week.

So let us start with Proposal Number 1,
as Mr. Stevens -- I'm going to keep this on the
record.

MR. STEVENS: That's fine.

JUDGE CLIFTON: Let's start with Proposal
Number 1 and talk about -- you've already given
us some indication that there are two witnesses
that could go today if there's time. But let's
talk about what other witnesses would be called,
that you're aware of, to testify in support of
Proposal Number 1, and then we'll see if there's
anyone here now that knows of witnesses who would be testifying in opposition to Proposal Number 1.

A lot of those people actually would be proponents of other proposals, I'm aware. But maybe -- maybe we can gather what collective knowledge and have a proceeding that way.

Let me ask first, are there present now any dairy farmers who would like to be heard today, any producers? They were smart not to come today.

All right. The other entity that I give immediate opportunity to be heard from are state officials from the governor's office or the Department of Agriculture or other entities who are on very tight time schedules. And I'm always delighted to see them come. So I would stop immediately for such representatives.

Mr. English.

MR. ENGLISH: Charles English. Not speaking for them, but I have spoken with some in-state officials who suggest -- and this is a coalition, as I understand it, I may misunderstand, so I want to be very careful.

My understanding is that there are a
group of states who would have two witnesses
testifying together. My understanding is. And
the two witnesses would be from Vermont and
Wisconsin, and I believe they would then cover
other states.

And I believe that -- because they aren't
both going to be available until Wednesday
night, that they would like to testify on
Thursday, officials from Vermont and Wisconsin.
And, again, I'm not speaking for them, because
since you raised the issue and since I'm at
least aware, have been told that's what their
intention is, I want to disclose that.

JUDGE CLIFTON: All right, good. Is
anyone else aware of state officials who might
be coming?

Mr. Tosi, you raised your hand before I
asked the question. Whatever you have to say.

MR. TOSI: That's fine, your Honor. Can
you hear me --

JUDGE CLIFTON: Yes.

MR. TOSI: -- on this mic? I might be
mistaken, but I was notified late last week that
I think Mr. Howard Hatch of New Hampshire, who's
a producer-handler under the Northeast Order,
may have some restrictions. I'm told that he
was going to try to arrive today. But I don't
know if that meant he was going to testify
today.

JUDGE CLIFTON: Mr. Hatch, if you'd come
forward, please? If you'd identify yourself and
say when you would like to testify?

MR. HATCH: Howard Hatch. My plane
leaves Wednesday morning.

JUDGE CLIFTON: Excellent, thank you. So
let's see. I'm thinking we need to have you
tomorrow or tomorrow afternoon, then, is that
correct, Mr. Hatch? I'm sorry, would you come
back?

MR. HATCH: Your Honor, I have an
attorney that's coming in tonight who is going
to be with me when I make my presentation.

JUDGE CLIFTON: Excellent. So tomorrow
sometime?

MR. HATCH: Yes.

JUDGE CLIFTON: Good. Thank you.

MR. HATCH: Thank you.

JUDGE CLIFTON: All right. Let me just
mention a few that I am aware of, and I know
Ms. Fisher has heard from others.
But Ted Dunajski, and that's spelled D-u-n-a-j-s-k-i, needs to testify tomorrow. He's arriving tonight.

Rod Daniels, he's to testify on Wednesday. Matt Shatto, that's M-a-t-t, S-h-a-t-t-o, needs to testify Thursday.

Mark, that's M-a-r-k, Kastel, K-a-s-t-e-l, needs to testify Friday morning.

All right. And is Mr. Ben Carroll here now? Good. Mr. Carroll, would you come to the microphone? I know that your clients are waiting to hear from you. Tell us who will be coming and what you know about their restrictions.

MR. CARROLL: There are two.

JUDGE CLIFTON: Oh, first tell me everything about you.

MR. CARROLL: I'm John Benjamin Carroll. I'm with the firm of Carroll & Carroll Lawyers, PC, 440 South Warren Street, Syracuse, New York, 13202. The two persons who are coming are two directly affected producer-handlers who maintain they will be put out of business if this regulation is accepted, so it's important for them to appear.
They are Mr. Willard Stearns of Stearns Dairy, Mr. John Rooney of Mountain Dairy. And they were planning to come Friday. And I believe that their reservations either have been made or are in the process of being made.

JUDGE CLIFTON: All right. Now, so that the court reporters will have their names spelled right, I show Stearns as S-t-e-a-r-n-s?

MR. CARROLL: That's correct.

THE COURT: And I show Rooney as R-o-o-n-e-y?

MR. CARROLL: That's correct.

JUDGE CLIFTON: So do you know what time they're arriving?

MR. CARROLL: They'll be here Thursday --

JUDGE CLIFTON: Okay.

MR. CARROLL: -- available for Friday.

JUDGE CLIFTON: For Friday, okay.

MR. CARROLL: Right.

JUDGE CLIFTON: Good. Thank you.

MR. CARROLL: And while I have the podium, instead of coming back and forth, I am concerned for the scheduling here. I had assumed that -- assuming the simplicity of these proposals -- they're very simple, they put our
people out of business or they don't -- that it could be put in rather quickly and that sometime by Friday, the case of both the milk producers and the dealers would have been completed.

If that's not going to happen, that's something I'll find out in later discussion, then I would have to change our dates as well.

JUDGE CLIFTON: All right. So you had a realistic expectation we could finish in one week?

MR. CARROLL: This is a very simple -- these proposals themselves are very simple. It will either eliminate these producer dealers from all opportunities to be in the market or you don't. And it doesn't take mounds of data and everything else to make that decision.

If the Department has got the documents ready, and I understand they have, then it seems to be very simple for these gentlemen to come to a decision as to what kind of proof they have to put in. Because it's basically a decision that's going to be generated on the statistics and opinions of experts, and other people probably are going to be helpful, but they aren't going to be controlling.
On the other hand, you could, with this simple issue, keep this hearing going indefinitely. Because there are plenty of people who will want to express what their thoughts are, and that may not have anything to do with a decision.

JUDGE CLIFTON: John Hornstra, H-o-r-n-s-t-r-a, may be present either Thursday or Friday. He's still trying to -- we're still trying to confirm his travel arrangements. Kathie, that's K-a-t-h-i-e, Arnold, plans to be here Friday. Looks like Friday is our shortest day and Friday looks like it's going to be -- we'll have plenty to do, so -- Mr. Tosi?

MR. TOSI: Yes, your Honor. I received an e-mail this morning from Kathie saying that -- that she and three other organic dairy farmers from the Northeastern part of the U.S. will not be coming now until the 11th.

JUDGE CLIFTON: That's helpful. Good. All right. Let us hear from someone about what witnesses are likely to be called in support of Proposal Number 1. This is for rough scheduling. This in no way limits you from calling other people. This is just so we can
get an idea of how long things might take.

MR. BESHORE: With respect to schedule one, which also covers many witnesses, would address Proposal 2 and 26 as well, not all witnesses might, but many would.

JUDGE CLIFTON: So Proposal 1, Proposal 2 and Proposal 26 might be addressed?

MR. BESHORE: Jointly.

JUDGE CLIFTON: By the witnesses you're telling me about?

MR. BESHORE: Yes.

JUDGE CLIFTON: Okay.

MR. BESHORE: The first witness, whose testimony has already been made available in the back of the room, is Dr. Roger Cryan from the National Producers Federation. Okay?

Then not a witness that is on behalf of my clients, but a witness who on behalf of the International Dairy Foods Association, which is a co-sponsor of 1 and 2, is Dr. Robert Yonkers. He will -- he's here and also prepared to testify.

Then there are a number of witnesses who are on behalf of members of the National Milk Producers Federation Member Cooperative. So I
expect them to be coming and testifying. They
are not, per se -- just so there are no
misunderstandings -- employees or -- or
witnesses of the National Milk Producers
Federation in and of itself.

But I expect them to be supportive
generally of the National Milk proposals.

Dennis Tonak from Midwest Dairyman's Company.

THE COURT: How do you spell Tonak?

MR. BESHORE: T-o-n-a-k. And he would be
available tomorrow. Mike Asbury, A-s-b-u-r-y.
He would be available tomorrow or Wednesday
certainly. Paul Rovey, R-o-v-e-y, is available
Wednesday, yeah, he is a dairy farmer.

Leon Berthiaume, B-e-r-t-h-i-a-u-m-e,
would be available tomorrow afternoon or
certainly Wednesday. We have three dairy
farmers who are members of Dairy Farmers of
America that will be available on Wednesday to
testify.

From Northwest Dairyman, which is a
member cooperative of the National Milk
Producers Association, Steve Rowe, R-o-w-e, is
available Thursday, probably Wednesday, possibly
Wednesday, depending on travel from the Pacific
Northwest. We're hoping -- we're hoping he's available Wednesday, but I'm not certain.

Elvin Hollon for Dairy Farmers of America is here and we would expect to have him testify after some of the other scheduled witnesses.

Those are the witnesses of National Milk Producers Federation Members Cooperative that I specifically am aware of coming in presently, scheduled to be here presently in support of 1, 2 or 26 or some combination thereof.

There are other witnesses who I would defer to Mr. English, who would be with his group, who maybe are supportive of some combination of those proposals.

THE COURT: Thank you, Mr. Beshore.

Mr. English?

MR. ENGLISH: Charles English, your Honor. We have a witness for the New York State Dairy Foods Association and also Steuben Foods who should be here tonight and available if there's time tomorrow. Mr. Jim Buelow, B-u-e-l-o-w.

We also have available Wednesday a witness for Prairie Farms Dairy, Mr. Gary Lee, and he's only available Wednesday. We have
another witness from New York State Dairy Foods Association, Gary Latta, who is only available Thursday. Actually, he'll be available Thursday or Friday, but Thursday is preferred.

JUDGE CLIFTON: Spell his last name for me.

MR. ENGLISH: L-a-t-t-a. We have a witness from Shamrock Foods Company, Mr. Mike Krueger, K-r-u-e-g-e-r, who is available Thursday.

We have a witness from the Pacific Northwest, preferably Thursday, could go Wednesday, so we're trying to be flexible working, depending on your timetable, your Honor.

We expect a witness from Dean Foods Company to be available, and that could start by Friday or Monday.

Then we do have witnesses hearing over this next week because they were not available this week. On Monday the 11th, a witness from Dairy Institute of California, Mr. William Schiek, spelled S-c-h-i-e-k.

On Tuesday the 12th, a witness from Anderson Erickson Dairy Company, Warren
Erickson. And a witness from Harrisburg Dairies, also on behalf of the Pennsylvania Association of Milk Dealers, Christen Dewey.

JUDGE CLIFTON: And how is Erickson spelled?

MR. ENGLISH: E-r-i-c-k-s-o-n.

JUDGE CLIFTON: And Ms. Dewey would also be on Tuesday the 12th?

MR. ENGLISH: Tuesday, the 12th. That's the only day she could make it in. And at this time those are the things I'm aware of. There are a few things in play I don't think are going to happen but that is what I'm aware of.

JUDGE CLIFTON: All right. I believe we may be at the point where I should guarantee that we will be here for two weeks. And that way people who are trying to figure out, should I come this week or should I come next week, will know that they can come next week rather than come this week and sit and wait and not get in. So as much as I appreciate Mr. Carroll's viewpoint that we ought to be able to do this in a week, I don't think we will.

Is there anyone that would strongly object to my guaranteeing that I will be here to
continue to receive evidence through at least
noon a week from Friday? There's no objection.
I will be here receiving evidence until at least
noon a week from Friday. Okay. Let me see how
close we're getting to 3. Oh, we're a long way
from 3. Mr. English.

MR. ENGLISH: I just want to say in
fairness to proponents, might we also hear from
others who witnesses may be and when they might
be here? We don't seem to have documents yet,
so I would think in fairness to those of us who
disclosed who our witnesses are likely to be,
that we have the same courtesy.

JUDGE CLIFTON: Thank you, Mr. English.
That was in fairness to them or in fairness to
you?

MR. ENGLISH: In fairness to me.

JUDGE CLIFTON: Okay. Mr. Beshore?

MR. BESHORE: Well, I would join that.
But I wonder, your Honor, if -- if the record --
I would hope the record would not reflect that
going till next Friday at noon is absolutely
cast in concrete if, in fact, you know, we run
out of witnesses before that time.

JUDGE CLIFTON: How we will know? If I
MR. BESHORE: Well, I would like you to reconsider or clarify precisely the view on that. If we invite folks now by a cast-in-concrete statement that you'll be here on Friday, we can guarantee some people are going to schedule themselves probably for Friday and things could go faster than we anticipate.

I don't know how many witnesses -- we really need to hear -- hear the numbers of witnesses that are coming from the other proponents, and both Mr. Ricciardi and Mr. Miltner and Bryson, and Mr. Carroll have perhaps provided his witnesses.

JUDGE CLIFTON: All right. Let's do this. Let me start this way, rather just proposal by proposal, to find out who's here -- and I realize a lot of people aren't here yet because they knew they would have no chance to speak today.

Let me ask this. Let me ask, if you're here as a proponent of a proposal or as counsel for a proponent of a proposal, please stand, everyone. If you are here as a proponent of a proposal or counsel for a proposal. Okay.
If you have not yet come to the podium at all today, please come forward and identify yourself.

MR. BROSCH: Thank you, your Honor. I'm Kevin Brosch. I'm outside general counsel for National Milk Producers Federation. I'm here on behalf of National Milk with Mr. Beshore.

I don't have anything to add, though, with respect to what Mr. Beshore said. He's already described National Milk's proposal and who is going to be here on behalf of National Milk, Dr. Cryan. Thank you.

MR. YONKERS: Your Honor, I'm Robert Yonkers with the International Dairy Foods Association. Mr. Beshore already mentioned that my testimony is available on Proposals 1 and 2 to follow Dr. Roger Cryan.

MR. YALE: Good afternoon. Benjamin F. Yale on behalf of Select Milk Producers and Continental Dairy Products. We support basically National Milk's proposal, as long as there's grandfathering. We may have one witness, but that will be available next week.

JUDGE CLIFTON: Mr. Yale, come back. Do you care which day next week?
MR. YALE: No. We will be very flexible.

JUDGE CLIFTON: Okay. Now, let me --

MR. YALE: Like maybe Friday afternoon at 6:00, and nobody would care anyhow, so --

JUDGE CLIFTON: Okay. Now, let me --

MR. YALE: I mean, part of it just depends on how things go. I think as Mr. Carroll, I think, aptly put it, there's just a tremendous amount of duplication in these proposals.

And a lot of people, in testifying on behalf of one proposal will, in effect, will be, whether they realize it or not, providing evidence in support of other proposals that are there. But we don't intend to duplicate or add to the record any more than we need to necessary to differentiate if there's any issue we need to specifically address.

JUDGE CLIFTON: All right. Thank you Mr. Yale.

MR. METZGER: Yes. My name is Erick Metzger, M-e-t-z-g-e-r, general manager for National All-Jersey, 6486 East Main Street, Reynoldsburg, Ohio, 43025.

We do not have a proposal on this
hearing, although as a national producer member
organization, including several members who are
producer-handlers, we would provide a statement
in support of some proposals and opposed to
others.

I have the luxury of living within
130 miles of here, so within -- you know, given
half a day's notice, I can be back to provide
testimony to fill in a gap if there's perceived
to be one at some point.

JUDGE CLIFTON: All right. How do you
spell Erick?

MR. METZGER: E-r-i-c-k.

JUDGE CLIFTON: And on what phone number
should we contact you to say we need a witness?

MR. METZGER: It would be area code
(209) 613-2286.

JUDGE CLIFTON: All right. And do you
have any objection to that phone number being in
the transcript?

MR. METZGER: No. It's all over the web.

JUDGE CLIFTON: Thank you. All right.

MR. BERTHIAUME: Good afternoon, your
Honor. My name is Leon Berthiaume. And I am
the CEO and general manager of the St. Albans
Cooperative Creamery, 140 Federal Street,
St. Albans, Vermont, 45478.

JUDGE CLIFTON: Would you spell your last name?

MR. BERTHIAUME: B-e-r-t-h-i-a-u-m-e.

JUDGE CLIFTON: And tell me again how you say it.

MR. BERTHIAUME: Berthiaume.

JUDGE CLIFTON: Berthiaume?

MR. BERTHIAUME: Yes.

JUDGE CLIFTON: Thank you.

MR. BERTHIAUME: Thank you.

JUDGE CLIFTON: Oh, come back. What is your schedule, yours and your witnesses?

MR. BERTHIAUME: I am part of the witnesses that Mr. Beshore had mentioned earlier. And then I need to be completed by Wednesday afternoon.

JUDGE CLIFTON: Thank you.

MR. BERTHIAUME: All right.

JUDGE CLIFTON: All right. Is there anyone else who is here as a proponent or to testify on a particular proposal? Mr. Vetne, you may come forward.

MR. VETNE: John Vetne representing

As I indicated earlier, those three clients are West Coast clients. They're proponents of Proposal 17, opponents of Proposal 1 and 2. And either quasi supporting or quasi opposing some other proposals. They will come on two days' notice, as I indicated earlier. I'm going to tell them this afternoon that they don't have to plan to come until next week.

They will not have extensive testimony. They will try to limit their testimony uncharacteristically in these proceedings to facts rather than argument. That's what I'm going to encourage them to do. So that's it. They will give facts on their operations.

If there are questions on the -- on how the regulations that are proposed by them works, they are not regulatory experts, they're not administrative lawyers, and I will address those questions.

And the material is already in the record, the proposal's submitted. So that's all. So we have three, possibly -- possibly
four, if it gets legal and technical. And shouldn't take more than 15, 20 minutes each.

JUDGE CLIFTON: Now, when you say possibly four, you would be a witness?

MR. VETNE: If there are questions on how it works, and there frequently are. My clients, like most of the targets of the Proposal 1 and 2, Proposal 1 in particular, are small businesses.

You know, unlike the proponents of Proposal 1, they do not have economists on staff. They do not have lawyers on retainer. Pretty much like most dairy farmers that come in here, they don't have a good handle on how things work and how things fit. They do have a good handle on their own bottom line, so they will address bottom line issues. And I will -- if necessary if there are questions, I will address how it fits. Thank you.

JUDGE CLIFTON: Thank you.

MS. ORR: I'm Dr. Carolyn Orr. I am the agricultural liaison for the Eastern Regional Conference of the Council of State Governments, spelled O-r-r. And I'm here mostly as an observer, to testify if necessary. I represent
the state legislators in the Northeast that have spent considerable sums of state money to prop up and support the dairy industry the last four years, and are very concerned about issues that will affect their small producers.

JUDGE CLIFTON: Sounds to me like you should testify.

MR. MILTNER: Ryan Miltner on behalf of AIDA. Given the schedule that has been laid out and the witnesses that have been identified, we will be prepared to put on our witnesses next week, and it looks like as early as Tuesday.

Depending on the specific testimony that is presented by the proponents of 1 and 2 and 26, members of AIDA may testify, probably in the neighborhood of six representatives, and we expect their testimony to be relatively brief.

And depending on cross-examination, of course, we would also anticipate putting on two economic experts, and in total, possibly a third economic expert depending, again, what needs to be presented in rebuttal.

And we would anticipate that, including cross-examination, our testimony both in support of our proposals and in opposition to the other
proposals could be completed in 2 1/2 to 3 days.

JUDGE CLIFTON: What -- what do you think of my idea that I guarantee that I'll be here through Friday -- a week from Friday at noon?

MR. MILTNER: I think it's certainly possible. And I hope that we can conclude next week.

I understand Mr. Beshore's concern of guaranteeing that there will be somebody in this room to take testimony until noon on Friday. Because if we're able to start our witnesses on Tuesday, we could have them done on Thursday, and we're towards the ends of the line, as far as proposals as they're numbered.

Depending on what rebuttal testimony others may have, we could conceivably wrap this up on Thursday. And like Mr. Metzger, I live relatively close to Cincinnati and I would love to be home on Friday with my family, if we can avoid that.

JUDGE CLIFTON: So you think my guarantee might be better placed, say, Thursday at 6:00? That I'll be here through Thursday at 6:00?

MR. MILTNER: I would be stunned if we were done on Wednesday, but I'll leave the
guarantees up to you, your Honor.

JUDGE CLIFTON: So you think we'll be here at least part of Thursday?

MR. MILTNER: Based on what we believe we're going to have in terms of testimony and the list of the 20 or 25 people that have already been identified, many of them I believe will be short, both on the other side and ours in terms of, you know, total testimony of an hour or less. But there will be some that will be extensive and include a lot of data, and so we're going to take a good portion of next week.

JUDGE CLIFTON: Thank you. All right. Is there anyone else here who has not come to the podium? But -- Mr. Beshore, did you have something?

MR. BESHORE: Yeah, I'm sorry. I meant to try to get a question in before Mr. Miltner left the podium. The two or three economic expert witnesses were not identified, and I think that would be appropriate.

JUDGE CLIFTON: Oh.

MR. BESHORE: All our witnesses are named.

JUDGE CLIFTON: All right. Mr. Miltner,
would you return, please, to the podium? You did mention two economic experts. Who are they?

MR. MILTNER: I did. The first is Dr. Ron Knutson from Texas A&M. And the second is Dr. Wayne Knoblauch from Cornell University. And the third, because we have not confirmed his retention and because his testimony we anticipate would be chiefly in rebuttal, I don't necessarily want to promise his attendance or disclose him at this point. But we'll know before the end of this week whether he would be in attendance and once a decision is made, we'll certainly disclose that.

JUDGE CLIFTON: All right. Spell Knutson for me.

MR. MILTNER: Sure. K-n-u-t-s-o-n. And Knoblauch is K-n-o-b-l-a-u-c-h.

JUDGE CLIFTON: Thank you. All right. Is there anyone else here who has not yet been to the podium who is a proponent of one of the proposals or expects to testify on behalf of one of those proposals?

MS. ORR: I'd like to provide my phone number and I can be available next week. I'm only four hours away.
JUDGE CLIFTON: All right.

MS. ORR: (765) 893-8209.

JUDGE CLIFTON: Thank you. All right.

We'll go off record while you have an opportunity to take a copy from the back of the room of the documents that will be testified about by the witness.

(A recess was taken from 2:26 to 2:41.)

JUDGE CLIFTON: All right. Let's go back on the record. We're back on the record at 2:41. I'd like to continue with identifying people who may be testifying. Would you come forward, please?

MS. BRYSON: I'm Nancy Bryson with Holland & Hart. I'm also here for AIDA, American Independent Dairy Alliance.

JUDGE CLIFTON: And are there any witnesses that you anticipate calling that have not already been identified?

MS. BRYSON: I just -- no. I just arrived. My plane was delayed. Thank you.

MR. MILTNER: Ryan Miltner, I just announced our witnesses before Mrs. Bryson went.

JUDGE CLIFTON: All right. Mr. Carroll, would you resume position at the podium and add
to what you said?

MR. CARROLL: Yes. During the break, I advised your Honor that I will also be a witness on behalf of our proposal.

JUDGE CLIFTON: Has everyone had an opportunity to obtain a copy of the proposed exhibits from the back of the room? It appears so.

All right. Mr. Stevens, you may resume.

CONTINUED DIRECT EXAMINATION

BY MR. STEVENS:

Q. Mr. Carman, I guess you were describing for the record before we -- we went in a different direction for a while. You were describing that you had appeared in a hearing before that -- in different ways, and also that you had prepared documents that you brought with you today for the hearing, is that right?

A. Yes.

MR. STEVENS: And as I say, your Honor, now copies have been available -- made available to the parties here.

Q. Mr. Carman, could you -- could you go through the documents that you have in front of you, starting with the first one and -- well, before you -- let me --
MR. STEVENS: Let me ask, I guess, your Honor, you have copies of these documents. We have copies. They have been distributed.

I guess I would like them to be marked for identification before Mr. Carman testifies, if that would be permissible.

JUDGE CLIFTON: I think that would be helpful. And those of you who are participating in the hearing, if you'll mark your own as we go so that we're all on the same page.

Q. You have in front of you a document that at the top of the page has the title, Order Exempt Plan, right?

A. Yes that's a three-page document.

MR. STEVENS: Your Honor, I would like that marked for identification as Exhibit Number 5.

(Exhibit 5 was marked for identification.)

JUDGE CLIFTON: And I'm going to ask the witness to mark those, the ones he's testifying from will become the record copy.

MR. STEVENS: Okay. And the only comments I might have on that is, he probably has -- may have a note or two written on his,
and if that is the case, we will make sure that
the document that goes into the record is the
one that might not have any notes that he might
have written.

JUDGE CLIFTON: All right. And,
Mr. Stevens, you're going to take responsibility
for that?

MR. STEVENS: Yes.

JUDGE CLIFTON: Thank you.

MR. STEVENS: I'll be happy to take
that responsibility with my colleague, Mr. Tosi.
So a three-page document marked as
Exhibit 5.

Next document, your Honor, I'd like to
mark for identification I believe is a one-page
document has the title, Actual Route Sales by
Handler Type - Eight Orders.

JUDGE CLIFTON: Mr. Stevens, that's
actually Annual.

MR. STEVENS: Annual. Did I read the
wrong words?

JUDGE CLIFTON: You said actual.

MR. STEVENS: That shows that I'm having
trouble reading. But, in fact, annual. Thank
you.
JUDGE CLIFTON: And you want him to mark that as exhibit what?

MR. STEVENS: 6.

(Exhibit 6 was marked for identification.)

MR. STEVENS: The next document is a one-page document entitled Information on Producer-Handlers Operating in Federal Milk Orders -- Milk Order Marketing Areas, Selected Time Periods. I would like that marked for identification as Exhibit 7.

(Exhibit 7 was marked for identification.)

MR. STEVENS: The next document, and I understand a one-page document, entitled Producer-Handler List, and has plant names and some information about that. One-page document. I would like that marked as Exhibit 8.

(Exhibit 8 was marked for identification.)

MR. STEVENS: Next document, one-page document entitled, Package Dispositions of Class I Milk Products by Handlers Regulated Under Federal Milk Orders, by Product, by Order, 2000 to 2008. I would like that marked for
identification as Exhibit 9.

(Exhibit 9 was marked for identification.)

MR. STEVENS: The next document, your Honor, is a one-page document entitled Sales of Fluid Milk Products in Federal Milk Order Marketing Areas, by Producer-Handler, by Order, 2000 to 2008. I would like that marked for identification as Exhibit 10.

(Exhibit 10 was marked for identification.)

MR. STEVENS: The next document that I'd like to mark is a one-page document entitled Sales of Fluid Milk Products in Federal Milk Order Marketing Areas, by Exempt Handlers, by Order, 2000 to 2008. I would like that marked as Exhibit 11.

(Exhibit 11 was marked for identification.)

MR. STEVENS: The next document is a one-page document entitled Sales of Fluid Milk Products in Federal Milk Order Marketing Areas, by Producer-Handler, by Order, 2000 to 2008. I would like that marked as Exhibit 12.
MR. STEVENS: The next document is a five-page document entitled Producer-Handler Regulatory Status, and the first page is marked 2005. And I think after that, I think it goes through the years from 2005 through 2009 -- 2009. Five-page document, Exhibit 13, please.

MR. CARROLL: I don't believe I have a copy of either of those.

JUDGE CLIFTON: Does everyone have that? It has lots of Xs on it.

AUDIENCE MEMBER: Yeah.

JUDGE CLIFTON: Oh. Didn't you tell us, Mr. Stevens, that we only had 1 through 12 so far?

MR. STEVENS: No, now we have all the documents.

JUDGE CLIFTON: Oh. Let's go off record while you retrieve the other documents.

(Off the record.)

JUDGE CLIFTON: All right, let's go back
on record.

MR. STEVENS: Thank you, your Honor. I believe we were at Exhibit 13. The document that I would like marked as Exhibit 13, which is a five-page document entitled Producer-Handler Regulatory Status, and I think it has pages representing the years 2005 through 2009.

The next document is a one-page document which I believe -- the next document and the following documents, what I'm asking for is 14 through what will be 19, are -- I'm sorry, 20 -- are basically the same information for different years.

The document numbered -- I'd like marked as 14 is Federal Order Small Plant Structure Information for October 2002, and that I would like marked as Exhibit 14.

(Exhibit 14 was marked for identification.)

MR. STEVENS: The same information appearing on the next document I would like marked as 15, which is Federal Order Small Plant Structure information for May 2003.

(Exhibit 15 was marked for identification.)
MR. STEVENS: Then 16 is the same information, Federal Milk Order Small Plant Structure Information for October 2007, marked as Exhibit 17. I'm sorry, May 2007.

(Exhibit 16 was marked for identification.)

JUDGE CLIFTON: So Exhibit 16 is May 2007?

MR. STEVENS: Okay, I'm sorry. Just give me a minute, your Honor.

JUDGE CLIFTON: Then Exhibit 17, Mr. Stevens, will be October 2007.

(Exhibit 17 was marked for identification.)

MR. STEVENS: 17 is October 2007. Just to make sure, 16 was May of 2007, correct.

Exhibit 18 I would like marked for identification represents the month of May 2008 for Federal Milk Orders Small Plant Structure Information.

(Exhibit 18 was marked for identification.)

MR. STEVENS: All right. Next is a one-page document, Federal Milk Order Small Plant Structure Information for October 2008,
Exhibit 19.

(Exhibit 19 was marked for identification.)

JUDGE CLIFTON: Let me ask. If you're in the back of the room, when Mr. Stevens turns his head away from the microphone, can you still hear him?

AUDIENCE MEMBER: No.

JUDGE CLIFTON: These are meant for you to be close.

MR. STEVENS: Okay, sorry about that. Is there anyone missing any information that I can give you now?


(Exhibit 20 was marked for identification.)

JUDGE CLIFTON: Okay. Did anyone need Mr. Stevens to repeat anything that you might have not heard? All right. Mr. Stevens, you may resume.

MR. STEVENS: All right.
BY MR. STEVENS:

Q. Starting with the exhibit that we have marked as number 5, for identification number 5, could you go through the document and explain the information that's contained in it?

A. We were asked by a number of parties to try and put together a list of exempt plants. We don't normally have such a list in Washington. We went to the websites of a number of the Market Administrators as well as made some individual contacts and assembled this list that contains the name of the plant, the location, city, town and state of the exempt plant.

We believe that that time period is the end of 2008, beginning of 2009. Depending on the order and their website availability, it could cover the period from October 2008, November, December and January of 2009 in assembling that list.

Q. Okay. Go to the document marked as 6. Could you describe what's contained in that document?

A. We were asked to provide some information similar to what the Federal Order 1 had done in a market bulletin dealing with -- with -- with route sales by handlers, by type of handler. The original data was for 2002, 2006 and 2007 in the New York -- in the Northeast market bulletin. We've added 2008 and we've done it for
eight orders rather than all ten.

If you'll remember that on April 1 --
pardon me, on April 1 of 2004, the Western Order was
terminated. So at that time we went to ten orders.
Previous to that, we had eleven.

And then on April 1 of 2006, there were
size limitations put on producer-handlers in the Pacific
Northeast and the Arizona, Las Vegas Order.

In order to have capability or
comparability between 2002 and 2006 with 2007 and 2008
data, we are limiting it to eight orders. So it's
the -- they all have a similar status of regulation
across those four -- four selected years.

Q. All right. Could you describe for us
now -- these documents, some of them have footnotes and
some of them have, in this case, an asterisk with a note
that the document is subject to the footnotes, is it
not, or any explanatory notes on the document?
A. Yes.

Q. With that in mind, can you describe
what's contained in exhibit -- on the document marked as
Number 7?
A. Number 7 is a table that we have
attempted in the past to produce every five years to
just give a snapshot of some information on
producer-handlers. You'll note that in -- there's a break -- there's not a five-year time period between '92 and 2001. That was when we were doing Federal Order Reform, which started as a result of the 1996 Farm Bill. We did not do October or -- or didn't do October of 1997. When we finally got back to collecting the information and putting it together, it was December of 2001.

And then we have added December of 2008 in preparation for this hearing.

Q. Could you explain -- the footnotes of course are applicable to the information?
A. Correct.

Q. Could you explain what's contained in the document marked as Exhibit Number 8?
A. Number 8 is a list of producer-handlers for the end of 2008. It contains the name of the plant, the order number, the city the state and the Class I differential for that plant.

Q. Looking at the document marked as Exhibit 9, what's contained in that document?
A. That contains the packaged disposition of Class I milk producers by handlers regulated under Federal Orders for each of the eleven orders.

You will note that the Western Order is
footnoted as being terminated effective April 1 and the
data there is for the January-March period of 2004.
Also the Arizona, Las Vegas Order name changed on
April -- pardon me, May 1 of 2006, with enactment and
regulatory status under the milk -- Milk Regulatory
Equity Act.

Q. All right. Go to the document marked as
Number 10. What's in that document?
A. Number 10 is the Sales of Fluid Milk
Products in Federal Orders by Fully Regulated Handlers.
That's in-area sales for each of the eleven orders
starting in 2000 and ending in 2008. Those are annual
totals.

Q. Subject to the footnotes?
A. Yes.

Q. Please describe what's on the document
marked for identification as Exhibit 11?
A. Number 11 is the Sales of Fluid Milk
Products in Federal Marketing Order Areas, in Area Sales
by Exempt Handlers, also for the eleven orders from 2000
through 2008. There is a significant footnote of data
being restricted in a number of those years and a number
of those orders. That is footnote number 2.

Q. All right. How about the document marked
for identification as Exhibit 12, what's on that
A. This is in-area sales for producer-handlers, 2000 to 2008 by the eleven orders. Again, we have footnote 2, some restriction on release of the data.

Q. All right. Now, Exhibit 13 is a five-page document. Could you -- could you tell us what's contained in that document?

A. In preparation for this hearing, we were asked to prepare a listing of the producer-handlers' regulatory status by month for -- we began that listing from January of 2005 and it continues through March of 2009, spread across these five pages of the -- of the exhibit.

It contains the name of the plant, the city and state, the Order number. You will note that in all these five pages they're sorted by Order number, so that all of the Northeast Order producer-handlers and their regulatory status is shown together in similar fashion, Order 5, Order 7, 30 in such order.

Q. Okay. And there's some notes on there. Sometimes it says ED, Closed. Obviously that would mean the plant is closed, right?

A. ED stands for -- it's an exempt distributor for that month. An exempt distributor in
this case is one that has less than 150,000 of route sales for that designated month. So rather than being a producer-handler, they may have been an exempt distributor for that month.

In addition, there's a -- an additional footnote in 2008, page RD. One of the plants moved to a -- be a regulated distributor during two months of 2008.

Q. Well, that just -- that just describes the situation where -- where a plant can change status from month-to-month depending on its sales?

A. That's correct.

Q. Thank you.

JUDGE CLIFTON: Mr. Carman, would you clarify, when you say less than a hundred thousand?

THE WITNESS: Less than 100,000 pounds -- pounds of milk sold as Class I product during the -- during the marketing period, which is a calendar month.

JUDGE CLIFTON: Thank you.

BY MR. STEVENS:

Q. Please go to the document marked as Exhibit 14 and explain what is contained on that document.
A. Number 14 is for the year -- or, pardon me, is a snapshot of October 2002, looking at the structure of the various plants under full or partial regulation or exempt or producer-handlers.

The table is broken out into four parts on each -- on each page. Following exhibits, Numbers 15 through 20, are set up in a similar fashion. They look at, in the first part of -- of each page, the number of producer-handlers. This is strictly numbers. It does not -- does not represent actual -- or pardon me -- total sales in that category, but breaks the producer-handlers into those that are in the Eastern Orders 1, 5, 6, 7 and 33, and those that are in the Western Orders 30, 32, 124, 126 and 131. And then attempts to break those producer-handlers, for example, into various size classes; route sales of less than 150,000.

In other words, yes, they could be a producer-handler or are classified as a producer-handler in May of 2002, but could have been exempt under that condition.

Additional size classes are 150 to 300, 350 to 450, et cetera. Those size categories were broken out based on discussion that seemed to indicate different -- different desires of -- of exempt plants or
producer-handler sizes that might be discussed during this hearing.

JUDGE CLIFTON: I'm just concerned. I want to make sure that the record accurately reflects what you're teaching us here, Mr. Carman.

When you just -- could you just go back over that last thought? For example, if you say something like, 150 to 300, did you mean 150,000 to less than 300,000?

THE WITNESS: Yes, 150,000 pounds to less than 300,000 pounds during the marketing period. In this case, October of 2002.

JUDGE CLIFTON: All right. And so could you just, with clarity now, tell us what categories you have chosen for the breakout?

THE WITNESS: If -- if we go to May of 2007, which is the Exhibit Number 16, and you look down at the total of regulated pool distributing plants, you can see the 11 size classes broken out across all of that third part of that table. That's less than 150,000 pounds, 150 to 300,000.

JUDGE CLIFTON: Wait. It's the 150 bothers me. What you're saying is
150,000 pounds when you say 150, is that correct?

THE WITNESS: That's correct.

JUDGE CLIFTON: That's where I want the record to be clear, that we're just not talking about 150, we're talking about 150,000 pounds. So go ahead and show me those breakouts, but say the whole thing rather than a shorthand way of referring to it as people in the industry would do.

THE WITNESS: Category 1 breakout was less than 150,000 pounds of route sales for the calendar year -- calendar month of 2002 or any other similar snapshot.

Category 2 was 150,000 to less than 300,000 pounds during the marketing period.

Category 3 was 300,000 to less than 450,000 pounds.

Category 4 was 450,000 to less than 600,000 pounds.

Category 5 was 600,000 to less than 1 million of Class I route sales during the marketing period.

Category 6 was 1 million to less than 2 million pounds.
Category 7 was 2 million to less than 3 million pounds of Class I route sales.
Category 8 was 3 million to less than 5 million.
Category 9 is 5 million to less than 10 million pounds.
Category 10 is 10 million to less than 20 million.
And category 11 was more than 20 million pounds of route sales during the marketing period.

In each of these exhibits, 14 through 20, categories were combined in order to not disclose an individual plant's size.

Returning then back to Exhibit 14, if you're looking in the third part of that chart or table, you can see the category 3 is blank. If you go back to category 2, it is no longer 150 to 300. It now reads 150,000 to less than 450,000. That is, those two categories, 3 -- 2 and 3 were combined.

JUDGE CLIFTON: Thank you, Mr. Carman. That was very helpful. Mr. Stevens, back to you.

MR. STEVENS: Thank you, your Honor.
BY MR. STEVENS:

Q. So, Cliff, as you were describing and as you went on to describe the information in Exhibits 14 through 20, it is basic -- it is basically the same information. It is information that covers a period of years?

A. Covers selected months and selected years.

Q. Okay. Selected months and over a period of years. And it has to be modified in certain circumstances, as you described?

A. Yes.

Q. All right. Now, with respect to these Exhibits 5 through 20 -- I'm sorry, 14 through 20 -- no, actually, what I mean is 5 through 20 -- what I mean is 5 through 20, which is all the exhibits that you have just described. Those exhibits, as you -- as you have described in your testimony, you received certain requests for -- for this information?

A. Yes.

Q. And -- and then having received those requests, did you make any determination as to -- as to what this information, the use of this information at the hearing might be?

A. In support of or opposition, no.
Q. Okay. But you did look at -- you got the requests, and did it cause you to -- to -- to look at the information?
A. Yes, it did.
Q. And so documents were prepared?
A. Yes.
Q. And you brought them and we have had them identified and you've talked about them?
A. Yes.
Q. Now, they were prepared by you or pursuant to your supervision?
A. Yes.
Q. And they come from official records of the Department of Agriculture?
A. Yes, they do.
Q. And they're not presented for or against any proposal, are they?
A. That's correct, they are not.
Q. You just testified to that. In other words, they're for the use of the parties here, for their use during the course of the hearing as they will use them, and you are not here testifying for or against any of the parties?
A. That's correct.

MR. STEVENS: I submit the witness for
cross-examination on these documents.

JUDGE CLIFTON: Thank you. Who would like to begin -- or Mr. Vetne, are you ready?

MR. VETNE: Sure.

JUDGE CLIFTON: Good.

CROSS-EXAMINATION

BY MR. VETNE:

Q. Good morning, Mr. Carman -- or afternoon, I'm sorry. Let's see if I can find what I'm looking for here. Exhibits 14 --

JUDGE CLIFTON: I'm sorry. I'm sorry to interrupt you. Did you want to move their admission before cross?

MR. STEVENS: Well, I'd be happy to do that, but I found over the years it's better to let the cross-examination take place and then move them at the end of cross-examination.

JUDGE CLIFTON: Very fine. Thank you.

Go ahead then, Mr. Vetne.

BY MR. VETNE:

Q. Okay. Let me start with Exhibit 6, which did some Annual Route Sales by Handler Type. You explained why some orders were excluded from that list. The Western Order because it went away, the Pacific Northwest Order because there was a new limit that
didn't make it oranges to oranges or apples to apples, and it appears also the same thing with Arizona, is that correct?

A. Correct.

JUDGE CLIFTON: Mr. Vetne, because you're tall -- yeah, that will happen.

MR. VETNE: I'm tall and soft spoken, not just tall.

Q. Okay. This is -- this follows the same format as similar information prepared solely for the Northeast Order published by the Market Administrator, I think it was in the April 2008 Market Administrator's bulletin.

A. That's correct.

Q. I don't have my request in front of me, but I recall looking at that. Why was this information not assembled for individual orders, like it already has been for the Northeast market, or combination of orders if there's confidential information, so we can know what the impacts are market by market or region by region?

A. By individual handler type, it would have resulted in many restrictions.

Q. It did not result in restrictions for the Northeast, right?

A. No, it does not.
Q. And there are some other markets for which restrictions also would not apply?

A. That's correct.

Q. Now, I have questions -- I'm going to look at Exhibit 14, but my questions relate to each of -- each of the exhibits, 14 through 20.

Exhibits 14 through 20, do they respond to a specific data request by any party or parties?

A. They were -- the -- let me get my -- let me transfer some numbers here. Exhibit Number 16 was some work I was doing to look at relative size structure of fluid handlers under the Federal Order regulations.

While I was gathering that information from the Market Administrators, I also was asked to look at exempt plants, producer-handlers and partially regulated distributing plants with the same, similar size structure.

During a meeting with outside individuals, that May of 2007 data was shared during that -- during the discussion, during the meeting. And I was subsequently asked to add additional months to that data and that structure information, which resulted in -- if you look at the upper left -- right hand -- excuse me -- the upper left-hand corner of some of those individual charts, you can see the time frames of when
the data was put together and when it was revised.

That request resulted in five additional tables -- or five tables in total, four additional beyond May of 2007. And Dr. Cryan, in preparation for this hearing, asked that I confirm the five tables have been generated by my office. And later he asked for an extension to include October of 2008, and the most current data available for -- in a similar format, which turns out to be March of 2009.

Q. Okay. Am I correct that Dairy Programs periodically examines and publishes information on structure of regulated distributing plants?
A. Yes.

Q. Okay. So what you did, then, was expand that type of analysis to include a spectrum of unregulated or partially regulated plants?
A. Yes.

Q. Okay. And that -- okay. And that request occurred when? Let's break it up. Your interest to expand and to look at producer-handlers and exempt plants, when was that work undertaken that you -- you went off on -- on that --
A. That was in the July, August 2007 time period, and was finally all compiled and put together in a formal sheet in October of 2007. And then when the
request came in, additional -- the other four sheets
were put together and this initial sheet was updated or
revised October of 2008.

Q. To expand it to include more months, more
years?

A. Four other months and other years, yes.

Q. Okay. The title of the document says
Federal Order Small Plant Structure. The document
includes information on plants that have, for example,
10 million to 20 million, 20 million pounds per month,
and more than 20 million pounds per month.

I'm trying to figure out how the title
relates to plants of that size.

A. The request was to be all-inclusive of
all plants, so the upper-sized categories was, okay,
here they are, that's how many that are out there. But
the detail is on the smaller size plants.

Q. Okay. The term small plants as used in
the title, Small Plant Structure, is not defined here,
and you haven't described it.

First of all, when you placed that title
on there and presented it to us, did you have something
in mind for what are "small plants" for purposes of the
caption identification?

A. No.
Q. Okay. Did -- did the words "small plants" enter into this analysis? Was that your idea or were you requested to do something with small plants and put the title on there in response to a request?

A. That was my description of what the data ranges that I was looking at that there were -- we were concentrating on the smaller plants under regulation.

Q. Okay. But you do not have and weren't requested to draw a line as to what constitutes a small plant versus a nonsmall plant, be it a medium or large plant?

A. No.

Q. And you do not draw that line in your testimony?

A. That's correct.

Q. Okay. And, again, I'm looking -- looking at Exhibit 14 just for -- just to have one of these papers in front of me.

I -- the second grouping involves exempt plants and there are three identified in the category of 150,000 to less than 450,000. Is that something that's currently authorized, exempt plants between those poundage numbers?

A. The exempt plant definition contained in 1000.8 points out that an exempt plant includes a plant
that is operated by a government agency, the plant is
operated by a duly accredited college or university and
a plant from which there are charitable operations in
total.

Q. I see.
A. And then there is the size exemption of
less than 150,000 pounds of route sales?

Q. Okay. So the three not specifically
identified plants would be one of those former three
categories?

A. Yeah, those three plants have more than
150 to less than 450,000 pounds in May of -- pardon me,
in October of 2002.

Q. Okay. And then the following grouping of
plants, totally -- total of regulated pool distributing
plants (includes unit pooling plants). First, why don't
you describe for this record what "unit pooling plants"
means in this exhibit?

A. They're -- unit pooling plants is two
plants owned by the same handler. One of them qualifies
as a fluid distributing plant and the second one has
Class II sales, and they can unit pool and both be --
and in this case, they are listed as having -- they're
listed as a distributing plant -- regulated distributing
plant when, in fact, they may not even have a filler --
a bottling operation in the plant.

Q. Okay.

A. So if you look at the regulated plant in October of 2002, there were six plants with less than 150,000 pounds of route sales. In fact, may have been zero.

Q. Oh. You would put -- I see. So you would put in there, in the smallest plant category, a unit plant that is associated with a distributing plant that might have zero?

A. There would be two plants. One of them could be very large. Another one could be a stand-alone ice cream plant --

Q. Uh-huh.

A. -- that may or may not be large, but it would show up in this data as having less than 150,000 pounds of route sales, that individual plant, that ice cream plant.

Q. Okay.

A. Because it was unit pooled.

Q. And that plant would not on its own be a pool distributing plant, is that correct?

A. That's correct.

Q. But in the way that Dairy Programs compiles its data, it would show up as a pool
A. Yes. I believe, except for the early years, the total regulated distributing plants would be consistent with the total number of distributing plants that we show on our website in Federal Order statistics.

Q. And unit -- plants that are in the pooled unit, are they limited in number to two? Can it not be more than two?

A. Two --

Q. Two plants in unit pooling?

A. No, they can be more.

Q. They can be more. So it's two or more plants involving at least one distributing plant?

A. Yes.

Q. So that characteristic where they're -- where there is a soft products plant or something of that nature separate from a -- a bottling plant, and the soft product plant has little or -- well, little Class I from that plant, could -- could apply to any of the size categories across line 1 in the third category?

A. Say -- pardon me, could you repeat your question?

Q. Okay. A soft products manufacturing plant included as a pool distributing plant could apply to any one of the size categories in the individual
columns under the third grouping. In other words, for example, the grouping 150,000 to less than 450,000 may include one or more or all unit pooled plants that are soft product plants that have a little bit of Class -- Class I?

A. That's correct. They could have some -- some buttermilk that was being bottled and sold as a Class I fluid product.

Q. Right. Or some other Class I cultured products, like beverage yogurt, that kind of thing?

A. Correct.

Q. So we don't know anything specifically about whether these are bottling plants that are of the same nature and compete in the same markets as producer-handlers, for example?

A. That's correct.

Q. Okay. And we also -- we also don't know the -- from this exhibit, anything about the size of the plants to which some of this lower volume is attributed, whether these plants are otherwise large volume milk receipt plants that have some economies of scale, notwithstanding their modest distribution?

A. There is nothing in this data that relates to the receiving bay capabilities of -- of individuals plants.
Q. Capabilities or actual receipts, correct?
A. Correct.
Q. Oh. I want to go back to the first group, the producer-handlers. Some have sales in more than one marketing area. And the sizes here are based on sales in all areas. Does all areas mean the sales of the producer-handler in both Federal marketing areas and unregulated areas?
A. Well, that's my understanding.
Q. Okay.
A. That's the way the data was assembled.
Q. Okay. So it's -- in that case, it would be the size something -- it would say something about the size of the plant and its total distribution?
A. Yes.
Q. Now, going to the last category, partially regulated distributing plants, first of all, it says, none have own-farm milk. Does that mean none of the plants that are identified here have own-farm milk, or there is not a partially regulated distributing plant in the nation that has own-farm milk?
A. Partially regulated distributing plants in -- in this case would be those with sales in Federal Order marketing areas.
Q. Yes.
A. That are reporting and no -- none of those plants were recorded as having own-farm milk.

Q. Okay. Some parts -- partially regulated distributing plants in most cases have two options on how they report?

A. Or more.

Q. Well, actually, if you're in a state pool, you don't have an option, do you?

A. No.

Q. Okay.

A. If you're in a state that has a marketwide pool, yes, you have option one, or whatever it is.

Q. They don't have a choice?

A. That's correct.

Q. They report under Section 76(c)?

A. Yes.

Q. A plant that reports under Section 76(a), however, simply reports sales into a marketing area and doesn't want to open its books to you, doesn't want to tell you how much milk it received and where it's marketed, and so really all you know is what is sold in the area, and they pay a compensatory payment whenever Class I prices are higher than the blend price?

A. That's correct.
JUDGE CLIFTON: And just so it's perfectly clear, spell the words blend price.

MR. VETNE: Two words, blend (indicating) and price.

Q. Can you state whether all of the plants that are included in these numbers include plants for which you -- for which the plants report all of the receipts that they did and all of the distribution that they have? In other words, none of them are just simply 76(a) plants?

A. Could you ask that --

Q. I can. Let me -- let me ask it this way. Do you know whether any of these plants are or are not plants that report under the 76(a) option, that they just pay compensatory payments and don't reveal their out-of-area sales to you?

A. Some of them report that way, but I don't know how many.

Q. Okay. Would this include plants that report that way?

A. Yes.

Q. And you don't know what -- what ratio or part of these numbers are plants of that nature that don't report to you all of their sales everywhere?

A. I do not know.
Q. Okay. So in the case of producer-handlers -- I mean, in the case of partially regulated plants, then, the size is based on sales reported to you, not necessarily the total sales of the plant?

A. That's correct.

Q. That's all I have. Thank you very much. Oh, I did want to say -- ask one more.

I understand that there's some more data that's being assembled, is that correct?

A. That's correct.

Q. Okay. And your plans to present that -- that's additional data in response to a specific request, is that correct?

A. Yes.

Q. And what are -- just in the timing of getting that information?

A. We hope to put up three additional sets of data later today or early tomorrow. It's about 50 pages worth of stuff.

Q. Okay. Thank you.

JUDGE CLIFTON: Mr. Carman, which of the exhibits that we now have were already posted on the website?

THE WITNESS: All of the ones that you
now have been posted on the website.

JUDGE CLIFTON: All right. And is it fair to say none of the ones that are coming were posted on the website?

THE WITNESS: Well, that's correct.

JUDGE CLIFTON: All right. Mr. Beshore.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Thank you. Marvin Beshore.

Mr. Carman, I have just a number of clarifying questions, I hope on -- on your exhibits, starting with Number 6.

The total column is total in-area sales. I'm wondering if each column is limited to the in-area sales of those entities, and in particular the exempt distributors and producer-handlers?

A. I believe it is.

Q. Okay. Thank you. On Exhibit 7, I believe that more information has been requested by Dr. Cryan for March '09. Is that information that may be coming on later? Do you know?

A. We do not intend to provide March of '09 for Exhibit Number 7.

Q. Is that just un -- not feasible or is there some other difficulty?
A. I have no request out to individual market offices to -- to do March of '09.

Q. Okay. With respect to Exhibit 8 -- I may have missed this in your direct -- but is there a date? This is --

A. This is the end of 2008. The -- if you count the number on Exhibit Number 8 and match it up with the December of -- Exhibit Number 7, for December of '08, those should come to 40. The number of producer-handlers remain consistent between those two exhibits.

Q. Okay. So the Exhibit 8 should be the list of 40 for December '08 that are identified on Exhibit 7?

A. Should be.

Q. Okay. Thank you.

A. I didn't count every line.

Q. Okay. That's the intention. Thank you.

Now, Exhibit 9. I think I -- I think I understood this one when you go to later exhibits, but Exhibit 9 is total sales by these regulated handlers as opposed to in-area sales, is that correct?

A. That is correct.

Q. Okay. 10 is, then, in-area sales by the same set of regulated entities for the same time
periods?

A. Yes.

Q. Now, when you go to Exhibit 11, the exempt handler volumes, first of all, the all markets combined column, does that include an aggregation of the not disclosed entries that are shown as footnote 2?

A. Yes.

Q. And in this case, for these exempt handlers, these volumes are just in-area volumes, correct?

A. Yes.

Q. I guess the same two questions with respect to Exhibit 12. The all markets combined data would include the volumes that are not disclosed for the particular markets pursuant to footnote 2?

A. Yes.

Q. And it is only in-area sales by the producer-handlers?

A. Yes.

Q. Thank you. Okay.

Now, with respect to Exhibit 13, if you take -- for instance, taking an entity close to my home in York County, Pennsylvania, Perrydell Farm, which is about the eighth or ninth entry on the list, perhaps. Do you see that?
A. Excuse me, York --

Q. Yes, York, Pennsylvania. Perrydell Farm.

JUDGE CLIFTON: Would you spell that for the record?

MR. BESHORE: P-e-r-r-y-d-e-l-l.

Q. They're identified with an X in one -- in January, and EDs for the rest of the year.

A. Well, no. They're a producer-handler in January and also in April.

Q. I'm sorry, yes.

A. And then they're an exempt distributor.

In this case, the Market Administrator -- they flop back and forth.

Q. And is that flopping or toggling back and forth related strictly to the volume at the plant, if you know?

A. No. It could be that they received milk from a non-farm source, from not a farm source in excess of the limit, so that they would not have qualified as a producer-distributor during that marketing period. But it's probably that they moved below 150,000 in route sales for the month.

Q. So exempt distributors have -- is it correct that exempt distributors do not have any limitations on the receipt of milk from sources other
than their own farm if they have receipts from their own
farm?
  A. Right.
  Q. Now, the -- the columns or the entities
which show exempt in some months and producer-handler in
some months, just a quick look at it, it doesn't seem to
apply to every order. Is there any -- do you have any
explanation for that?
  A. Excuse me? I don't follow what you're
asking.
  Q. Well, I didn't notice in every order that
there were entities which went back and forth between
exempt and producer-handler. For instance, Order 32.
Is that just because they're all too large to be exempt?
  A. There are -- administratively, there are
some differences from order operation to order
operation. Some of the marketing administrators, once
an entity qualifies as a producer-handler, they leave
them designated as a producer-handler even though they
may move below 150,000.
Other Market Administrator operations,
they track the operation more closely on a
month-to-month basis and may change their designated
status.
  Q. For year 2008, the January and February
entries for Monument Farms in Weybridge, Vermont are RD.

I take it that that means that this entity was a fully regulated plant in those months?

A. Yes.

Q. And then in March it was back to being -- back to being a producer-handler, is that correct?

A. Correct.

Q. Now, let's look at a question or two about Exhibits 14 through 20. And let's just talk about 20.

A. Number 20?

Q. Yes. These questions generally apply to all of them. Let's use Exhibit 20 as a reference. Where you have the entry na. Is it correct that in -- well, first of all, in some cases there are zeros entered, a number of places, categories that show zero plants in that size category, such as if we're looking down at the partially regulated distributing plant. The Western Orders, 150,000 pounds to less than 300,000 pounds category shows zero, correct?

A. Right.

Q. In other -- okay. If there's a situation where there's an na, is it fair to infer that there were less -- there were more than zero plants in that box?

A. Yes.
Q. So basically there are one or two?
A. Yes.

Q. I guess that's pretty basic, for me anyway.

With respect to the partially regulated distributing plants, and look -- I was confused or not sure about some of the answers given to Mr. Vetne's question. In order to -- for the Market Administrator to determine if a plant is fully regulated or partially regulated, he needs to have two pieces of information, does he not? That is in-area sales and total sales, so that he can determine whether the proportion of the plant sales in-area are 25 percent or more?

A. Yes.

Q. So that -- and this is what I wasn't sure I was hearing right. So that the plant has got to record to the Market Administrator their in-area volume and their total route sales volume?

A. Well, but not -- but it may not report any -- some of their other uses.

Q. Okay. So the -- when you're putting -- if you got -- if you have a plant that's just reporting total route sales and in-area sales, your volume -- your bracketing here would be based on their total route sales?
A. Yes.

MR. BESHORE: Thank you very much, Mr. Carman, for all your efforts in response to our request. We appreciate that very much.

JUDGE CLIFTON: Mr. English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Charles English. Good afternoon, Mr. Carman.

A. Good afternoon, Chip.

Q. I may have missed something in this case. I'm sure it was because I wasn't paying close enough attention, and I apologize.

But on Exhibit 5, is there a specific -- does this apply to 2008?

A. We assembled, to the best of our ability, based on the web pages, where exempt plant lists were available. Not all of those web pages had the same dates. And then we also went to some individual offices and got an exempt plant list. So the time period is October, November, December 2008, January 2009.

It's not as specific as the producer-handler list was for the end of 2008.

Q. But if -- if a plant showed up on some list of a Market Administrator website for one of those
four months, October, November, December, January, as exempt, then it's on this list?

A. Yes.

Q. But it may only be one month because you have an asterisk, for instance, for plants in Order 5 called White Wave Foods?

A. Yes.

Q. That was not for the full -- you said full year, but you mean for the full period of four months.

At the very bottom, the asterisk says, "Denotes plant that was not an exempt plant for the full year." But what that really means is, was not an exempt plant for the full four months of this schedule, correct? Or what does it mean?

A. It appeared on the list as an exempt plant during that time period with some indication that it was not an exempt plant every month.

Q. I want you to hold Exhibit 5 kind of handy, and I want to turn over to Exhibit 7 and ultimately 13.

But Exhibit 7, for the time periods December 2001 and December 2008 has a footnote 4 and indicates orders reporting producer-handlers as 9 and 10.
Now, in December 2001 there would have been eleven orders at that time still, correct? The Western Order would have still been in place.

A. Yes.

Q. Okay. So nine of eleven in place, but today -- December 2008, you have order reporting producer-handlers as 10, and there's 10 orders, correct?

A. Correct.

Q. Now, when I look at Exhibit 13, for 2008 I don't see Orders 6 and 7 listed on producer-handler regulatory status, correct?

A. Correct.

Q. So bear with my simple mind for a moment. That would suggest to me that there are, in reality, producer-handlers only on eight orders, not ten orders, in its technical term, correct?

A. Exhibit Number 7 includes route sales in --

(Counsel conferring.)

A. Exhibit Number 7 includes route sales by producer-handler into more than one marketing area.

Q. So orders reporting producer-handlers, it may be the case that a producer-handler is physically located in another market but is selling milk into Order 6 and 7 --
A. Yes.

Q. -- is that correct? Whereas Exhibit 13 is the order where the entity qualifies as a producer-handler?

A. Correct.

Q. Thank you for that clarification. Let me go to Exhibit 20 and I have a couple of questions. I didn't want to contradict my colleague, Mr. Beshore. He said if it's an na, that means a one order, small plant structure or a two.

But let me suggest a different possibility. For instance, under partially regulated facilities, 450,000 to less than a million pounds, there are a total of seven in both -- in all orders, correct?

A. Yes.

Q. And then there is -- it's not available for both Eastern and Western. That would mean just -- I think just chasing what Mr. Beshore was saying, that one of those two, Eastern or Western, would be one or two. And one of those two would be five or six, is that correct?

A. Correct. Correct. One of those breakouts does not have a zero.

Q. Well, neither of those breakouts have a zero. Because if you have a zero, you would be able to
say seven as you did in another, correct?

   A.   Correct.

   Q.   Now, I thought in answer -- I may have
misheard, but I thought in answer to a question from
Mr. Vetne, you agreed with him with respect to -- I
thought he asked a question about unregulated plants and
partially regulated plants. And as to plants listed
here, would it be more correct to say that plants that
are not subject to pricing provisions are partially
regulated rather than unregulated plants?

   A.   Clarify that question.

   Q.   A producer-handler plant, is it not the
case, is exempt from pricing and pooling?

   A.   Correct.

   Q.   But the Department doesn't take the
position on unregulated, does it?

   A.   That is correct. They are regulated for
all the other parts of reporting to the Market
Administrator.

   Q.   Now, putting the pieces together for a
moment of the various documents, and looking at this
record for a moment, in 2006 there was a change
effective April 1 of 2006, correct?

   A.   There were two changes.

   Q.   Two changes? A change made in the
Pacific Northwest Orders and a change made in the Arizona Order, correct?

A. Correct, on April 1.

Q. And leaving aside -- anyway, I think that that happened on May 1, the change on April 1 for those two orders was that plants that might otherwise qualify or did otherwise qualify as producer-handlers would not qualify if they had in-area route disposition of 3 million pounds or more, correct?

A. Correct.

Q. And I note that there are three facilities listed on the 2006 listing that through March were listed producer-handler, and then they are linked to the footnote that says, subject to pricing and pooling effect of April 1, 2006, correct?

A. Yes.

Q. So if one were to look at the data on Exhibit 14 through 20 and the time periods that occurred prior to April 1 of 2006, and after -- on and after April 1, 2006 and look at the breakdowns, one would have to take into consideration that there were three facilities that ended up being subject to pricing and pooling post April 1, 2006, when a rule went into place that plants larger than -- plants with route disposition in the marketing area of more than 3 million pounds were
regulated, correct?

A. Correct.

MR. BESHORE: Thank you very much for
your efforts.

JUDGE CLIFTON: Mr. Vetne.

RECROSS-EXAMINATION

BY MR. VETNE:

Q. One of the other questions stimulated a
question or two and a realization that I forgot one.

When you presented your direct
testimony --

JUDGE CLIFTON: Would you move that
microphone closer?

MR. VETNE: I have to move my body
closer.

Q. When you presented your direct testimony,
you said that the plant sizes that are listed in the
columns here are sizes that you chose because they --
they might be discussed in the course of a hearing, if a
hearing was called at that time. There was no hearing
called. But you anticipated that interest and thought
this might be discussed.

A. My original breakouts on -- on these size
categories were more in the less than 150 to -- and then
150 to 500,000, 500,000 to a million, 1 to 2. I didn't
have as much fine detail in the breakouts.

And then there was discussions, they seemed to be ongoing in the trade, about all -- it's triple the size of the exempt plant, it's double the size of the exempt plant. What happens at 3 million?

Q. That was my question. 3 million is an oft repeated number in the 28 proposals or so. And there's no -- there's no 3 million line drawn here. Did you -- did you intentionally, for example, make a category that was 1 to 2 million rather than 1 to 3 million?

A. I had -- going back to Number 16, the 11 categories were 600,000 to a million, 1 million to 2 million, 2 million to 3 million, 3 million to 5 million. So there was -- trying to look at the population in those various categories or sizes, there was no intention to draw to scale somewhere other than -- than that.

Q. Okay. There's a huge spread between 2 million and 20 million. You'll agree with that?

A. I will agree with that. But that happens to be that you have to do that in order to not disclose individual operations.

Q. Okay. So -- so using 2 million rather -- if you use the 3 million rather than 2 million, it might
tell us a lot more about the population of plants that are under 3 million. But it may have precluded you from providing a number for plants that are over 3 million?

A. Yes.

Q. And even by not providing a number, you would be disclosing something about those that were not included, is that correct?

A. Correct.

Q. That was one.

And number two, to clarify after my questions and Marvin's questions. On partially regulated plants that are -- that are on here, first of all, we've -- we've determined, and necessarily, that the -- what this exhibit says about -- well, labeled plant size, is really about volume of distribution attributed to that plant?

A. Yes.

Q. It doesn't say, for partially regulated plants or even pool distributing plants, anything about the size of that plant?

A. The distribution is an approximation of the receipts in most cases, but it's not a direct.

Q. It's not even an approximation where there's a unit plant that has mostly Class II, correct?

A. You're dealing with less than two hands
JUDGE CLIFTON: Fewer than ten.

A. Out of -- out of 265 plants in May of 2007 --

Q. Uh-huh.

A. -- only six of them had less than 150,000

of route sales, fully regulated distributing plants.

Q. Those six -- for those six, they may be

large plants with very small route distribution

attributed to them?

A. Or zero.

Q. Or zero, okay. And the same thing could

be true -- oh, let me ask you this. If a -- if a

primarily soft products plant or manufacturing plant,

for that -- for that matter, receives into the plant

packaged fluid milk from a distributing plant, and that

soft products or manufacturing plant in turn sells that

packaged fluid milk product along with some yogurt or

cottage cheese or cheddar cheese to a customer, is that

attributed to the manufacturer or the soft product plant

as route disposition?

A. I don't know. I'll have to check.

Q. Okay. Well, you've indicated that some
plants don't have fillers and that might be included here.

A. (Nodding head.)

Q. A --

A. A fully regulated distributing plant; i.e., one that was unit pooled --

Q. Uh-huh.

A. -- if they received packaged milk and then turned around and sold it on routes, I don't know how that would be reported. I'll have to check.

Q. Is it not the case that a regular distributing plant that receives packaged fluid milk and in turn distributes it with its products, that that route distribution is attributed to the distributing plant that receives this?

A. Yes.

Q. Yes. And is there any reason why the rules would be different for anybody else?

A. I wouldn't expect that.

Q. And partially regulated distributing plants, although we're talking about volume of distribution, the ones that have small -- smaller volume in this group, they could be rather large soft product plants that have a little bit of distribution either of their own, like liquid yogurt, or for that matter
receipts of packaged fluid milk products from somebody else?

A. Yes, if that's -- if that's the way of it.

Q. Okay. So again, we don't know with respect to the last two categories whether the plants that have small volume are, in fact, small plants?

A. The last two categories?

Q. The -- there are four groupings here, first there's producer-handlers, then comes exempt, then comes regulated and then comes partially regulated.

For the regulated and partially regulated, we do not know whether the plants to which this volume data is attributed are small or not by virtue of the distribution volume attributed?

A. That's correct.

Q. Thank you.

JUDGE CLIFTON: Who next? Yes, sir. Are you Mr. Miltner?

MR. MILTNER: I am. Thank you.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Ryan Miltner, thank you. I have a couple of questions about the exhibits that have been --

JUDGE CLIFTON: Mr. Miltner, I think you
need to pull it closer to you.

Q. Okay. Thank you. A couple of questions about the documents that we've been going through and a couple of questions about the documents that are forthcoming. And then Mr. Ricciardi will have a few questions to follow me as well.

I want to look at Exhibit 9, if we could start there. And were Exhibits 9 through 12 requested by any particular party?

A. I believe Mr. Carroll.

Q. Okay. Exhibit 9 is titled, Packaged Dispositions of Class I Milk Products by Handlers Regulated Under Federal Milk Orders. Can you tell us, for the record, what types of handlers are included in that definition, handlers regulated under Federal Milk Orders?

A. I believe it is all.

Q. Okay. So that would be fully regulated handlers, right? It would include fully regulated handlers?

A. Yes.

Q. It would include producer-handlers?

A. Yes.

Q. Would it include exempt plants?

A. Yes.
Q. And would it include partially regulated plants?
   A. I believe so.
Q. Okay. And if you turn to Exhibit 10, which is titled, Sales of Fluid Milk Products in Federal Milk Marketing Areas by Fully Regulated Handlers, essentially the same structure, same chart, but this is just the volumes by fully regulated handlers, correct?
   A. Correct.
Q. It's a subset of Exhibit 9?
   A. And it would -- and it would be in-area sales.
Q. In-area sales, okay. So let's go through in-area sales. If you have a -- a plant regulated in Order 1 that has sales into multiple marketing areas, would this chart capture all those sales in one order or another?
   A. Yes. A plant in Syracuse with sales into Washington, D.C. would be captured. A plant in Syracuse with sales into Buffalo, those sales wouldn't be captured in Exhibit 10.
Q. Sales into Buffalo would not be captured?
   A. It's out-of-area sales.
Q. Okay. But if you had a plant in Syracuse with sales into -- into Order 1 area and also had sales
into Order 33, for instance, those sales would be captured?

A. Yes.

Q. And would the sales into Order 33 be reported under Order 33 or Order 1?

A. It would be reported under Order 1.

Q. If we turn, then, to Exhibit 11, titled, Sales of Fluid Milk Products in Federal Milk Marketing -- Federal Milk Order Marketing Areas by Exempt Handlers, again, the same structure of chart for the exempt handlers. So this would be, again, data that's a subset of Exhibit 9?

A. Yes.

Q. And for Exhibit 12, the same information, same structure of chart for producer-handlers. This data is included in Exhibit 9 as well?

A. Yes.

Q. So we don't have a specific exhibit -- perhaps because it wasn't requested directly, we don't have a chart like this reflecting the partially regulated sales, sales by partially regulated handlers, right?

A. Something had to be left out in order to try and avoid disclosure of individual operations.

Q. Okay.
A. If you've got the aggregate and you've got three parts, by leaving out one part, you have less disclosure issues.

Q. Okay. Let me go through some math then with you.

If we start with Exhibit 9, the number in any one cell on that spreadsheet, okay, and we subtract out the fully regulated sales, the producer-handler sales and the exempt plant sales, are we left with partially regulated sales?

A. No, because number 9 also includes sales out of area.

Q. And there's no way to --

A. 10, 11 and 12 is in-area sales.

Q. There's no way for us to ascertain this partially regulated sales. You can't disclose any of that?

A. No.

Q. Okay. So if we did the calculation that I had estimated or discussed with you, we'll have some number that includes -- it includes partially regulated sales, but also includes the out-of-area sales?

A. Yes.

Q. So at the very least, we would have an upper bound for partially regulated sales?
A. I believe that's correct.

Q. Okay. Let's change gears and go to Exhibit 14. And I'll cross off my list my questions about the numbers created on 2, because Mr. English had covered that as well. But if we look at the note in the section dealing with -- in the section dealing with regulated pool distributing plants --

A. Yes.

Q. -- this notes that nine of the plants have some own-farm milk, four have between 150,000 -- which is, I assume, pounds, for the record -- so less than 3 million pounds of sales, and five have sales between 3 million and 20 million pounds. Those plants do not -- well, can you state whether those -- those plants have only own-farm production at their plants?

A. No, they have -- they have receipts from other dairy farmers.

Q. Because otherwise they will likely qualify as a producer-handler, or at least be eligible for qualification as a producer-handler?

A. Yes.

Q. Does Dairy Programs have the ability to determine the amount of own-farm production in each marketing area that's handled by a fully regulated distributing plant?
A. And record it, no.

Q. But if we're looking to determine an upper bound, at the very highest, based on the data you have provided, we could take for October 2002, four times 3 million plus 5 times 20 million and that would give us the absolute upper end of own-farm production in plants that are not producer-handlers, right? With the exception of exempt plants.

A. That would give you the upper bound of the regulated plants that have own-farm production.

Q. Okay. Can you offer any guidance or characterization -- characterization, I think, as to the amount of own-farm production by these fully regulated handlers as compared to their other sources of milk?

A. No.

Q. Okay. All the exhibits that we have been going through thus far were all posted to the Dairy Programs' website over the past -- most over the past week, but some of them have been up there quite a while, correct?

A. Correct.

Q. Was it the intent for Dairy Programs to produce all the documents that were posted under that subheading on the page as far as USDA-provided data?

A. My belief is that we would have created
those documents and posted them.

Q. Okay. There are at least two documents that were posted to the website that weren't included in today's submission. One of which is titled -- and I hope I haven't missed them, but I have looked several times -- Total Estimated Milk Not Pooled in Federal Milk Order Markets as a Result of Disadvantageous Price Situations. That was posted on --

A. That's -- that was a set of data that individuals could put together based on the weekly dairy market and Federal Milk Order statistics data, as every time there was milk not pooled, that an estimate of that number is reported. We assembled that data and it's posted out there. But I did not present it today.

Q. Is it the intent for Dairy Programs to present that data?

A. No.

Q. Why?

A. It's not audited data. It's not -- it may not be in our books and records. It's an estimate.

Q. Okay. So you would not -- who compiled the data then that is posted on the website?

A. At my request that data was assembled and put together. But it turns out that we can't verify that those numbers are accurate.
Q. Is it your belief that it's the best data available to the Department?
   A. Yes.

Q. And it was pulled from Dairy Market News?
   A. It's an estimate at the time of the pool how much was not pooled by the eight individual market orders -- offices, and for the ten orders.

Q. There's another chart, by the way, for the record, that was posted on -- the table Mr. Carman and I have been discussing was posted on April 27th.

   A table that was posted late Friday is entitled, Packaged Disposition of Organic Fluid Milk Products by Regulated Handlers as a Percentage of Class Utilization. Is that table going to be presented by Dairy Programs at that hearing?
   A. I don't know the intent of whether or not we're going to put that up, but we believe that's accurate and true. And it was being provided somewhat following up on one of your requests, I believe request number 2.

Q. Request number 2. The additional data that Dairy Programs is in the process of compiling, you said that while you're working at it, obviously as quickly as you can, that you anticipated it to be completed today or tomorrow. Is that right?
A. Yes. We -- we anticipate putting up a set of data that relates to a recalculation of the pools per your request, or your association's request, to look at what happens if the producer-handler provision is eliminated, i.e., the most expansion of Class I route sales in the order, then leaving the producer-handler provision there and expanding the exempt plant from 150 to 450,000, Proposal Number 2, if you will, that would take the most amount of Class I route sales out of the marketing areas. And then a combination of the two scenarios.

We then are -- turned our attention to a theoretical pool as requested by Mr. Yale of taking a 3 million pound plant and dropping it in overnight and what would happen to the Class I -- to Class I route sales that went to that producer-handler and was lost to a regulated handler. Likewise, removing 3 million pounds out of the producer-distributor side of the -- of the pools.

The other request that we hope to put up later today or tomorrow is a listing of the number of producers and nonmember producers by order and the volumes of milk associated with total producers and the nonmember producers.

Q. Do you intend to provide any responses or
data that would document or estimate the amount of milk that was depooled by handlers, identifying the months in which that occurred and the estimated impact on the blend prices or uniform prices?

A. The data that we have related to depooled milk is what we -- is available on our website. The impact -- the estimated impact on the blend, I do not have.

Q. Has any request been made to the Market Administrator's offices to recompute the pools using the estimates?

A. The handlers have elected not to pool their milk. These would be Class II, III and IV handlers. They would have to be paid -- they would have to -- the reason they've elected probably not to pool is because they would have to pay into the pool. That is, the lower valued manufactured products would be higher priced than Class I. Not always is the case. There are sometimes where it's, depending on location value, within the marketing area.

But it would be an arbitrary pool. They are -- they're free to pool or not pool. Class I handlers do have to pool.

Q. We had -- and the question was, as I recall, is there going to be an estimation of the
economic impact of those handlers' decision to not pool their milk, whether they're entitled to or not? There's an economic impact to the pool, right?

    A. Yeah, the pool's less than it otherwise would be.

    Q. And so the producers that are in the pool receive less money than they would have if those handlers had participated in the pool, right?

    A. Yes.

    Q. And, in fact, USDA had at least three hearings back in 2004 and 2005 on opportunistic depooling in the Upper Midwest, the Mideast and the Central Orders, right?

    A. Yes.

    Q. And in December 2006, rules went into effect in each of those marketing areas that were intended to curtail the ability of handlers to depool their milk?

    A. It curtailed the ability to come back -- it curtailed the ability to come back onto the pool as fast. There was a percentage limit on what could come back on the pool. Notwithstanding -- well, yes, they could qualify the milk by shipping it to a pooled distributing plant and then it would be on the pool right away.
Q. Sure. But the purpose of the amendments was to provide -- to provide an economic disincentive to opportunistic depooling. Is that a fair characterization?

A. Yes.

Q. And in those hearings, the Department, each of the Market Administrators', were asked to provide some estimates about the impact of the blends price from milk that was opportunistically entering and leaving and then re-entering the pool, is that right?

A. I'm not aware of what was supplied in that hearing.

Q. Okay.

A. Those hearings. Pardon me. There's three.

Q. If you took -- if we took the figures that were provided in the document posted to the AMS website, had those numbers by Order, the Market Administrators' offices could estimate what the pool calculation would be if those volumes of milk participated in the pool rather than exiting the pool, right?

A. Theoretically, that could be done.

Q. And, in fact, AIDA asked that be done in one of our data requests, right?
A. Help me. I don't remember seeing that.

MR. MILTNTER: Could I mark a potential exhibit, your Honor?

JUDGE CLIFTON: Certainly. Now, I don't know whether the government has already chosen numbers for the rest of its exhibits. Not yet?

Should we then just continue consecutively and this would be Exhibit 21? Or do we want all the basic government statistical numbers consecutive?

MR. STEVENS: We don't have a problem if he wants to have it marked and give it a number. We don't have a problem.

JUDGE CLIFTON: Okay. I'm -- what I'm thinking is, I can give it the number 101, for example, if that would help. If it does not help, I will give it the number 21 or --

MR. MILTNTER: 21.

MR. STEVENS: I just want the record to reflect -- this is Garrett Stevens for the General Counsel -- it can have a number 21, doesn't mean it's offered by the government.

JUDGE CLIFTON: Right, okay.

MR. MILTNTER: I'm not intending to offer
anything on behalf of the government.

MR. STEVENS: I just want to make sure
the record is clear. Sometimes when they're
grouped together, some people get a
misimpression or they may take a misimpression.
So I just want to make sure the record is clear.

JUDGE CLIFTON: All right. We'll mark
this Exhibit 21.

(Exhibit 21 was marked for
identification.)

A. What is this?

Q. It's a copy of our data request and --

AUDIENCE MEMBER: None of us could hear
that.

JUDGE CLIFTON: The one you handed to
counsel over here is the government's -- is the
record copy. And if you have more than one for
that table, that would be helpful.

Q. What has been marked for identification
as Exhibit 21 is four documents. The first is an e-mail
directed to me from the Office of the Deputy
Administrator, the second is a data request sent to the
Deputy Administrator on April 16th, the third is a data
request sent April 22nd, and the last is a data request
sent on April 24th. And I want to wait until the
Department has provided all the exhibits that it intends
to address to talk about a number of issues in the
e-mail from the Deputy Administrator.

But I want to look at request number 13
on the data request that's dated April 16th. And it
says -- first of all, Clifford, you've had the
opportunity to see these data requests?

A. Yes.

Q. And did you have an opportunity to see
the e-mail from Dana Coale's office? Did you receive a
copy of that?

A. Yes.

Q. So you've seen these before?

A. Yes.

Q. And they appear to be as you've seen them
before; there's been no changes or anything as far as
you can tell?

A. As far as I can tell.

Q. Okay. And the data requests themselves
are portions from the USDA website, the AMS website, is
that correct?

A. Correct.

Q. So the only thing in here that is not
publicly available at this point is the e-mail, the
first two pages?
A. I think it's publicly available now.

Q. It's publicly available now, that's right. Okay. You're looking at request number 13 from the April 18th letter?

A. Yes. AIDA requested, for each marketing area, identify those months in 2006, 2007, 2008, and 2009 in which milk was depooled by handlers, the volumes of milk depooled, and the estimated impact on the PPD or blend price received by pooled producers. And we've been talking about depooled. Maybe the record needs to be clarified on this point.

When you talk about -- in the chart we've discussed that's titled, Total Estimated Milk Not Pooled in Federal Milk Order Markets as a Result of Disadvantageous Price Situations, is that sometimes referred to in shorthand as depooling?

A. Yes.

Q. And the disadvantageous price situation that occurs -- maybe you can just describe it from your perspective as to what is the disadvantageous price situation that occurs?

A. For those handlers that can elect to pool or not pool their milk, if the value, due to the pool, due to the -- would be greater than the current amount that they would have to pay the total produced, in other
words, they'd have to pay into the pool, it'd be to
to their -- it'd be to their advantage not to pool.

Q. And the plants that don't have to pool
are Class II, III and IV plants, right?
A. Correct.

Q. So, generally, the Class I minimum price,
it's highest of the four classified prices, correct?
A. Generally, yes.

Q. And when prices move rapidly --
A. When prices move up rapidly?

Q. Prices move up rapidly, you can have a
price incursion where the Class I price is not the
highest price, right?
A. That occurs because of advanced announced
Class I price and the advanced Class II skim price. And
as prices are -- are going up in a rising market, it
could be that the value of fat in Class I, the skim in
Class I or the skim in Class II is less than the other
values in the pool.

Q. And so when that happens, when the
Class II, III and IV price, or any of them exceed the
Class I price --
A. Exceed the blend price?

Q. I'm sorry, exceed the blend price, you're
right, the -- the handler -- manufacturing class handler
has an incentive to not pool their milk?

A. Correct.

Q. And, of course, those plants are under no obligation to pool their milk? Otherwise, this would not occur, right?

A. Well, as we talked earlier, there's some disincentive that's been put in to create more of an economic harm. They can't get back on the pool as fast.

Q. To get back to the specific request in 13, now we've talked about what depooling is. Does Dairy Programs intend to respond to that request?

A. The depooled milk table that's out on our website was put together in Washington. No request was made to Market Administrator offices for the ten pools to recalculate.

Q. This was never passed on to the Market Administrator's offices?

A. I don't believe so.

Q. How does that decision get made? You get the data requested. And USDA had requested, in response to this national hearing, the data request be sent to the Washington office, right?

A. Yes.

Q. And a hearing that affects one marketing order, is it usually the case that those requests for
data, sometimes they go to Washington, but they could equally be sent to one of the economists or people at the -- the individual MA offices, correct?

A. Correct.

Q. So in this hearing, to facilitate the request for information on the individual marketing areas, USDA requested that the request go to D.C.?

A. Yes.

Q. Okay. So when a request got sent into D.C., what happened to it?

A. It came in to Dana usually, and then it was shared among the government table, as well as myself.

Q. Okay. When you say the government table, are you referring to the folks over to my left, the representatives from USDA, the marketing specialists --

A. Yes.

Q. -- and general counsel? Was the general counsel involved as well?

A. No.

Q. Okay. So just the marketing specialists?

A. Yes.

Q. Okay.

MR. STEVENS: Your Honor, I'm going to object, and the reason I'm going to object is
relevance. This question and answer and this -- this area has absolutely, absolutely nothing to do with any of the proposals that are in this hearing.

Now, we're not here -- anyone can ask the Department how they make decisions, how they do whatever they do. But in terms of this proposal and this rulemaking, why are we wasting time asking these questions?

That is my objection. Relevance.

JUDGE CLIFTON: Well, he didn't get the data that he asked for, and he needs it for this hearing.

MR. MILTNER: I would be happy to explain for the record why this is relevant, why the data that hasn't been provided is relevant to the hearing.

JUDGE CLIFTON: You may.

MR. MILTNER: Thank you. There are two reasons why the information on depooled milk, both in terms of its occurrence after changes were made to the marketing areas to provide a disincentive for it to occur, the continuance of it occurring, and the impact on producers is relevant to the request or the proposal from
AIDA to adopt individual handler pools in all marketing areas.

    We have economists who will testify about individual handler pools and why they provide some superior benefits to the current marketwide pooling, one of which is that it eliminates the opportunity to depool milk as a result of the disadvantageous price situation and eliminates the impact on the producers resulting from that opportunity.

    Our economists would like to have this information so they can provide a full opinion as to whether individual handler pools, in fact, offer some superior benefits to marketwide pooling. So I'm not trying to go down a road that is irrelevant.

    It's also relevant because we have an example of an area where USDA has held hearings to address what was characterized as a problem with the marketing areas. They made an attempt to do so, adopted a solution that many people thought was appropriate and others thought was not a sufficient solution, and there continues to be negative impacts on pooled producers.

    So the magnitude of the continuing harm
to producers is extremely relevant to the Department in whether they determine that producer-handlers and exempt plants, if in fact there is any -- any effect on producers, the magnitude of those harms is relevant to the decision the Department has to make.

So I don't intend to go down this road for much longer, but I do want to find out how we might be able to get this information.

JUDGE CLIFTON: What proposals are -- either contemplate the individual pooling or oppose it?

MR. MILTNER: Proposal 25.

JUDGE CLIFTON: Proposal 25?

MR. MILTNER: Yes.

MR. STEVENS: All right. And I appreciate your remarks, Ryan, and I'll take them at face value as offered by you as a proponent of a proposal.

On the other hand, you have put in the record a document of your request and our response. And in the response, it clearly tells why that information, you know, is not being made available. Now, you may disagree with that certainly, which is your right. But the
Department has -- has made its decision with respect to this.

That, of course, does not prevent you or any of the proponents or opponents from using any of the material that is up on the website for your own purposes.

This gentleman does not have to introduce it and have it become evidence in this hearing. If you think it's appropriate for the Secretary to hear this on behalf of your client, by all means testify to it, enter it in and let it be considered in conjunction with all the evidence that the Secretary will consider in this hearing.

JUDGE CLIFTON: However, it is appropriate to continue to question this witness with regard to the reliability of some of the documents that have been posted, as indeed you have.

MR. MILTNER: I can summarize. I appreciate what you're saying, Garrett. And if I could offer, your Honor, a couple of responses?

First of all, the response from the Department in -- in response to the specific
requests in the April 16th letter makes no reference at all to my request 13. It says items 8 through 12, and it refers to items 15 and 16, makes no reference at all to the information about depooled milk.

Secondly, that e-mail states that -- I'm going to quote this. Quote -- on the second page -- Additionally, please know that every data request regarding this hearing will be posted, together with the data we are able to provide, on our website. As always, we satisfy all data requests to the extent we are able and the decision to enter prepared data into the record is ultimately at the discretion of the party requesting the data.

I think that that last item is not necessarily consistent with how data has been entered in the past.

But what I want to find out, I want to find out if, in fact, this data is not available, or if the request was just simply not made to the Market Administrators' offices.

MR. STEVENS: Well, I think clearly you have the answer to that. Do we have any more questions?
MR. MILTNER: I'd like to have that answer stated again.

MR. STEVENS: No, he already stated it. Asked and answered. Asked and answered. I heard the witness say it. Everyone in this room heard it, I believe.

MR. MILTNER: Then I have a follow-up.

Q. Which is, who made the decision not to request the information -- not to forward this information to the individual MA offices?

JUDGE CLIFTON: Before you answer, let me hear if there's an objection.

MR. STEVENS: I would only tell the witness, if he knows. If he doesn't know, I guess he doesn't know.

A. Well, I don't know.

Q. So the data came to Dana, came to you, came to another marketing specialist and you don't know where it -- where it died?

MR. STEVENS: Objection, asked and answered. We are repeating the same thing. Ryan, he answered your question. You can ask it ten times. I assume you'll get the same answer.

MR. MILTNER: And I will ask until I am told not to ask anymore, because it is extremely
relevant to the kind of information that we need to evaluate all the proposals, Garrett. I'm not trying to --

MR. STEVENS: Well, you are trying to force an answer out of him that he's not willing to give you apparently, and I'm asking the judge to not allow you to continue to ask -- ask the same question, which has already been answered.

MR. MILTNER: Then I will move on.

MR. STEVENS: Thank you.

JUDGE CLIFTON: I didn't even have to rule. This is easy. Thank you.

BY MR. MILTNER:

Q. If I may ask -- and I do not believe that this has been asked and answered. Will the Department submit in this hearing any additional evidence or statistical data in response to item 13 in my letter from AIDA dated April 16th?

A. I will have to contact the marketing area offices for the ten orders and determine whether or not they can recalculate the blends and how long it will take.

Q. I would appreciate if you could check on that immensely, and so would the members of my alliance.

MR. MILTNER: Your Honor, is a -- first
of all, at this point I'd like to move the admission of Exhibit 21.

JUDGE CLIFTON: Is there any objection of the admission into evidence of Exhibit 21?

Mr. English.

MR. ENGLISH: I don't want to object to the admission of Exhibit 21, but I also don't want this whole colloquy to pass without an opportunity for some others to be heard.

We join in the government's objection about the whole discussion of depooling and the relevance to this proceeding.

JUDGE CLIFTON: For what reason?

MR. ENGLISH: For the reason that the issues that are at hand here regarding producer-handler regulation are a Class I issue, and the regulation and the statute and the Agricultural Agreement Act have to do with uniform price as to handlers and as to producers regarding Class I.

The Department then had an order for manufactured milk orders that it has never exercised and has not been requested to exercise in this hearing, and that is an entirely different issue as opposed to the issue about
Class I, and that's what's at issue here, and
the issue of depooling is irrelevant for that.

JUDGE CLIFTON: Do you want to respond
that that?

MR. MILTNER: Well, I would state I don't
need to respond directly. I would rely on my
prior statement about why it's relevant. It is
relevant to whether our proposal on individual
handler pools is an appropriate alternative for
the Federal Order system. It's been thoroughly
noticed.

And so to the extent that avoiding
depooling is a benefit of individual handler
pools, which a number of people have testified
to, including some of Mr. English's clients, in
the past, I think it's completely relevant.

JUDGE CLIFTON: Could you respond more
specifically to Mr. English's point that this is
all about Class I, and to use information about
incentives to Class II, III, IV milk to depool
is not helpful?

MR. MILTNER: Sure. Individual -- the
individual handler pool proposals clearly affect
Class I distributing plants. Individual handler
pools are an alternative to marketwide pooling,
which the Federal Order is currently employing. The Department has to make a policy decision as to which of the two is superior. During Federal Order reform, they had that discussion.

It's been noticed and so the issue has been reopened in this hearing, and the truth is all classes of milk is relevant to how -- what pooling model is adopted in the Federal Order. It's not -- pooling of milk by its very nature is not just a Class I matter. You have pool returns from all uses of milk, or in some models not all milk gets pooled.

And so the effects of manufacturing handlers under a marketwide pool and their impact on a producer return is relevant to examining why an individual handler pool offers benefits over a marketwide pool.

JUDGE CLIFTON: Thank you. Would you yield to Mr. Vetne for a moment?

MR. MILTNER: I would.

JUDGE CLIFTON: Mr. Vetne.

MR. VETNE: My -- my clients are not proponents of and may not support an individual handler pool, but they also might because in essence producer-handlers currently have their
own individual handler pools.

Having an individual handler pooling for everybody simply extends the benefits and burdens that producer-handlers, which are mostly small, already enjoy.

I confess to the word gobbledygook coming into my head when Mr. English addressed the manufacturing order issue. I don't get it. But what I do get is that this -- the proposals that brought us here brought us here because the proponents of Proposal Number 1 said that the producers in the market are not getting enough of a pool blend. It's unfair to producers. That's National Milk Producers' primary concern, that they take the burden of Class III and IV and producer-handlers over here, just -- they're not sharing in that burden, it's not a Class I issue.

And clearly the Secretary noticed individual handler pools. The question, I think it's clearly relevant. But it's even more relevant, if I might point to an oft overlooked provision of the statute, and that's Section 608c(13) of the statute, which says, whenever the Secretary adopts an order with which -- to
which handlers do not consent and -- handlers
have not consented to milk orders for the past
five or six decades -- the Secretary must make a
finding that this is the only practical
alternative, that -- you know, there must be a
weighing of options. And the option chosen must
be one that is inevitable. That's my read of
those words.

To my knowledge, it's never been
discussed in a milk order decision before. But
those are what the words say. And this
proposal, among other things, presents an
option. The proponents of Proposal Number 1
present an option. But the Secretary may adopt
any option only upon a determination that
there's no other practical alternative.

Having information on the impact of the
depooling probably permits some sort of a
comparative analysis, I certainly would think
so, that if depooling hurts the pool by 5 cents
and producer-handlers hurt the pool by a penny
and the Secretary does nothing to mitigate
5 cents, why is it the only practical
alternative to have a one penny solution?

So -- but I understand that the
witness -- that Dairy Programs is going to look into this to see if it's available. I was there at each of those three depooling hearings a few years ago, and that identical, precise kind of information was produced by the marketing areas for each of those markets. Thank you.

JUDGE CLIFTON: The requests for information to me are overwhelming. But, Mr. Carman, I will appreciate you doing your best on that issue.

MR. MILTNER: And I agree that there's been voluminous data requested, but that the data requested in support of our alternatives is no more critical than the data that's been requested in support of the other proposals, and that's why I trust that they will see what they can do to provide it for us. And we appreciate that.

JUDGE CLIFTON: When you said no more critical, that were no less critical.

MR. MILTNER: That were no less critical. Thank you. And I believe the motion before your Honor is to admit Exhibit 21.

JUDGE CLIFTON: Oh, yes. And I had asked for objection. But I'll entertain any other
comments about Exhibit 21. Mr. Beshore.

MR. BESHORE: I just want to make a brief comment on the request in Exhibit 21, which has -- which is embodied in Exhibit 21 for all this depooling and related information.

I think this is an example of the classic age-old tactic in dialectics, okay, of erecting a straw man so that one can strike it down. Pooling or depooling of manufactured milk has nothing to do with this hearing.

The subject is whether the Class I proceeds of producer-handlers and exempt plants, when they get pooled and when they don't. We've gone on a huge tangent, and Mr. Miltner is requesting Dairy Programs to go on a huge tangent to strike down or erect or deal with the straw man that has nothing to do with the proceeding.

So I don't object to the exhibit, it's communication. But the requests which are -- our requests don't even come anywhere near. I mean, I can't even put them in the same ballpark as the requests they made in terms of the impact upon the parties being requested, in terms of the work that would be required. They're not
even close.

It's an attempt to -- to divert the subject of the hearing. And I don't think we should go down that road, and I hope, your Honor, as we go forward, will constrain us not to go down that road.

MR. MILTNER: Since they don't object, I'd like to move the admission of Exhibit 21 and also note for the record that his characterization of our request is his own characterization, and we've already gone down that path twice now.

JUDGE CLIFTON: All right. Any further comment or objection to Exhibit 21 being admitted into evidence? You know there isn't a single sleepy person in here.

Exhibit 21 is hereby admitted.

MR. MILTNER: I don't believe that for a second. Your Honor, I would note, depending on what exhibits and what information is provided by Dairy Programs, which Mr. Carman has given his belief as to what may or may not be there, we would reserve the right to review what we've requested, and clearly identify what has not been requested -- or not been provided once
Dairy Programs has provided -- admitted or provided for the record all of the information that it will introduce at this hearing.

And, finally, usually at the end of these proceedings, we have the parties request official notice of various documents, and we will do the same.

And I don't intend to -- to interject requests for official notice throughout the proceeding, but I would at this point request official notice of the document regarding the volumes of milk not pooled due to the disadvantageous price situation as it posted on the USDA website, subject to the qualifications that Mr. Carman discussed, that it's not audited data, and subject to Mr. Stevens' statement that we're still free to use that information as we see fit on brief and in cross-examination.

JUDGE CLIFTON: Now, I do have a request with regard to any requests that official notice be taken, and that is that you produce a hard copy. And you bring it here and you submit it like any other exhibit, when you can.

Because, as we all know, items on websites are subject to change and so forth.
I'm not saying this one is going to get changed. But taking official notice of anything is more practical if we've got a copy of it.

MR. MILTNER: I would be happy to provide a tangible copy tomorrow morning.

JUDGE CLIFTON: That would be great. All right. So we'll deal with the request that I take official notice of that tomorrow.

So, Mr. Miltner, in follow up, you'll have enough copies for all assembled?

MR. MILTNER: Probably.

JUDGE CLIFTON: Thank you. Yes, Mr. Ricciardi.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Good afternoon, Mr. Carman. I'm Al Ricciardi, here on behalf of AIDA.

MR. RICCIARDI: And I want to make one note for the record. And that is Mr. Miltner and I have now been attending these hearings together for six years or more, and it's great that he's apparently taken over my spot as a lightening rod for this afternoon, so --

A. Which we haven't completed yet.

Q. Oh, yeah. I'm going to follow up and see
if I can do the best I can.

   Mr. Carman, you mentioned during the
course of now your lengthy testimony that there had
been -- and I'll see if I got my quotation correct --
discussion in the trade essentially about
producer-handlers for the last year or so?
   A. Longer than that.
   Q. Okay. Let me ask you more specifically.
At Dairy Programs, isn't it true that as early as the
spring of '08, representatives of IDFA or National Milk
have met with Dairy Programs to talk about making these
kind of proposals?
   A. I believe so.
   Q. And those -- these proposals, at least
Proposals 1 and 2 and 26, were noticed along with all of
the other proposals in the Federal Register as of
April 9, 2009, correct?
   A. Correct.
   Q. Which is less than a month from the date
we started this hearing?
   A. A few days less than a month, yes.
   Q. Okay. With regard to the various
requests that have been made by AIDA for data, those
requests were submitted on April 16th, April 22nd,
April 24th, correct?
A. Correct.

Q. And I think Mr. Miltner went through this a little bit with you, but let me see if I can understand quickly the process. When the data requests come in, they go through Dana Coale's office. Are they then given to you to be submitted to the various MAs' offices for response?

A. Generally, yes.

Q. And who makes the decision to -- whether to submit or not to submit the responses as evidence at the hearing?

A. I'm --

MR. STEVENS: I'm going to object because I think this may be beyond the purview of this witness' knowledge. But -- but I don't -- again, what -- what the process is in terms of how decisions are made in the Department that counsel's now inquiring about is something that is internal to the operations of the Department. It is an institution. It operates with employees, and decisions are made by officials of the Department, and the process of the decision is something which is institutional and is not limited to any one individual, sir.

JUDGE CLIFTON: Your response,
Mr. Ricciardi?

MR. RICCIARDI: It may be institutional, your Honor, but I have the institutional representative here that they've presented. I'm entitled to know -- because of the short duration of time that we have been shoehorned into with regard to my clients responding to these proposals, we need the data.

Mr. Miltner said the economists would like it, they need it. And I want to know whether we're going to get it and who makes the decision as to whether we are getting it or not getting it.

MR. STEVENS: Well, didn't we just go through that with Mr. Miltner?

MR. RICCIARDI: We did. I'd like to know specifically, however, what -- whether we're going to actually get a response from the Department to our reasonable requests so that we can actually have our clients represented in a due process fashion at this hearing.

JUDGE CLIFTON: Now, you've just asked a different question.

MR. RICCIARDI: I think so. That --

JUDGE CLIFTON: This question now, rather
than how was that decision made, is, am I going
to get the data. Now, that's a much more
productive question and I'm glad you switched.

MR. RICCIARDI: Good.

JUDGE CLIFTON: But I like Mr. Miltner's
approach. He said, I want to wait and see what
it is the Department is going to give us, and I
reserve the right, basically, to bring this
subject up again if my requests have not been
met. Do you have a particular request in mind?

MR. RICCIARDI: No. You know what,
Judge? I will -- I think that is a fair way of
proceeding. And I will move on to another
question that I have.

JUDGE CLIFTON: Thank you.

BY MR. RICCIARDI:

Q. Thank you. Mr. Carman, let me ask you
some questions about a particular exhibit, if you could
find it. I know you've got a mass of them in front of
you now. Take a look for me at Exhibit Number 13 for a
moment.

A. I have a copy.

Q. Thank you. Some basic questions first
and then I have some other follow-ups. If, in fact --
and I apologize if this has been asked before. If, in
fact, there's an X on the document for a particular month, what does that mean?

A. An X in a cell indicates that that plant was -- had producer-handler regulatory status.

Q. As of that particular month?

A. For that month.

Q. And let's take the first page for 2005. There are references to at least three plants in different months where they say Closed. What does that mean?

A. Operations ceased.

Q. The producer-handler went out of business?

A. Yes.

Q. Okay. On that point, let's flip to the last page for 2009. It says, Producer-Handler Regulatory Status. On the other hand, I think it might have been Mr. Beshore or English or both, you noted that in some months, if it says ED, it means it's an exempt distributor for that month, which means that it's an exempt plant that produced 150,000 pounds or less?

A. Yes.

Q. So in reality, for example, take 2009, the second reference, Dutchway Farm Market. For January, February and March, it's an exempt plant, it's
not a producer-handler plant, correct?
   A. Correct.
   Q. So for 2009, we would take that off the number of producer-handlers?
   A. So far, yes.
   Q. Okay. Same thing would be true with Ronnybrook Farm Dairy?
   A. Yes.
   Q. And I know I just skipped over one. Same would be true for Mapleline Farm Home Delivery Service, Inc.?
   A. Yes.
   Q. All right.

JUDGE CLIFTON: Mr. Ricciardi, so the record is clear, if you'll spell Dutchway?

MR. RICCIARDI: Hang on a second, Judge.

D-u-t-c-h-w-a-y.

JUDGE CLIFTON: All right. And if you'll spell Mapleline?

MR. RICCIARDI: M-a-p-l-e-l-i-n-e.

JUDGE CLIFTON: And if you'll spell Ronnybrook?

MR. RICCIARDI: Go back and find it again, Judge. R-o-n-n-y-b-r-o-o-k.

JUDGE CLIFTON: Thank you.
MR. RICCIARDI: You're welcome.

Q. With regard to the same page, Wholesome Milk Products, LLC, as of March that producer-handler operation closed, correct?

A. Yes.

Q. So if we were to actually add up, physically, the number of producer-handlers as of 2009 on this chart, part of Exhibit Number 13, we would have to, at least from our math, the three distributing -- exempt distributing plants, and we would have to also, currently at least, take Wholesome Milk Products, LLC out of that addition, correct?

A. Correct.

Q. What would we do with Bush River Jerseys? Because as you see in March it's a -- an --

A. Distributing plant or exempt plant, 150,000 pounds or less. It was not a producer-handler during March.

Q. Okay. And do you know whether or not it's a producer-handler as of April?

A. No.

Q. Because you haven't done the market report yet?

A. Right.

Q. So if we were to look at any page where
there is a reference to a closed plant, we would have to delete that particular producer-handler from our addition for that year, and we'd do the same thing if it was a distributing -- exempt distributing plant on any page, wouldn't we?

A. Yes. I would point out that there are -- there are times when there is no indication of what the facility is, and then the next month it shows up as a producer-handler; i.e., it went from not existing to being a producer-handler.

Q. Okay. Can you -- thank you very much. Can you tell me, currently we have ten orders that remain, correct, in the Federal Order System?

A. Yes.

Q. Of those ten orders, how many of them do not allow a producer-handler to buy any milk and retain its status for that month?

A. I believe there's three, Appalachian, Southeast and Florida.

Q. Okay. And the largest amount that a producer-handler can purchase in any one month in any of the orders is 150,000 pounds, correct?

A. Correct.

Q. And with that, is 150,000 pounds the amount that a producer-handler is able to purchase in
the other seven orders?

A. I believe that's correct.

Q. So it's either zero in three of the orders or 150,000 pounds in seven of the orders?

A. Yes.

MR. RICCIARDI: I think I'm done for the moment.

JUDGE CLIFTON: Thank you, Mr. Ricciardi. How's my witness doing? Are you wearing out?

THE WITNESS: I'm all right.

JUDGE CLIFTON: Okay. We'll keep going until you holler uncle. Who else would have questions for this witness? Please come forward.

CROSS-EXAMINATION

BY MR. YALE:

Q. Benjamin F. Yale on behalf of Select Milk Producers and Continental Dairy Products. Good afternoon.

A. Good afternoon, Ben.

Q. First off, I'd like to draw your attention on your Exhibit Number 9 in the heading. And I'd just draw your attention to the words or the phrase, by Product in that title. Is there a products breakdown in addition to Order and year?
A. Not -- not in this table. But in the past, we have produced a table with similar -- that looks at all milk, 2 percent, whole milk.

Q. Okay. So that -- that would be the kind of product one would be referring to, which would still be a Class I product, is it not?

A. Yes.

Q. Okay, thank you. Now, in addition to the information that you provided based on requests, there is a -- a whole host of data available, made available by USDA, on its website regarding dairy, is that correct?

A. In Washington as well as the eight market administrative offices.

JUDGE CLIFTON: Excuse me, Mr. Yale. You are not quite as close to the microphone as you were, Mr. Carman.

Q. He's getting away from me. And this information is -- that you said is available by the Market Administrator is available on the websites. And by and large this information is audited, is that correct?

A. By and large.

Q. Now, in addition to -- now, each month the Market Administrators collect data from the
handlers, the co-ops and the producers, and they prepare ultimately minimum prices that have to be paid by the plants and paid to the producers. And the result of all that spawns a whole lot of information, doesn't it?

A. Yes.

Q. And that includes the minimum prices by order, is that correct?

A. By type of use.

Q. By type of use. It includes the pounds, and depending on the various orders, the components of each of the classes that is pooled --

A. Yes.

Q. -- is that right? And then it also includes minimum prices that producers are to receive, either in the form of a uniform skim -- or skim uniform and uniform butterfat price or a component price, is that right?

A. Four of the orders have fat and skim uniform pricing. The other six would have a PPD.

Q. All right. And the result of that is just a plethora of information in terms of number of producers, pounds of milk, how it's used, what it's paid for, by month and by year, is that correct?

A. It's a very rich data source.

Q. Now, those are reports that are kind of
routinely generated by the Market Administrators in the
furtherance of the specific task at hand in the AMS;
that is, to establish minimum prices and paid
producer-handler's price, right?
   A.  Yes.
   Q.  Now, in addition to that, there's other
    reports, other research and other information that
    either the Market Administrators perform or your office
    performs for the benefit of the industry, is that
    correct?
   A.  That's correct.
   Q.  One of those is a document called a
    Packaged Fluid Milk Sales in Federal Milk Order Markets
    by Size and Type of Container.  Are you aware of that
    report?
   A.  Yes, I'm aware of it.
   Q.  And what is that report?
   A.  Historically, every other year in, I
    believe November, the Market Administrators are tasked
    with assembling sales by type of container from each of
    the regulated handlers.
   Q.  Okay.  And this would indicate, like, the
    size of the container, like whether it's a pint or a
    gallon, is that correct?
   A.  Half pint.
Q. Half pint, right?
A. Bag in a box.
Q. Glass?
A. Whole -- yeah, gallons, half gallons, yes.
Q. Flavored?
A. Yes.
Q. Okay. And on your website you have information that goes back to the 1999 report, is that -- do you know? If you don't know, I mean, does that --
A. I haven't looked to see which -- what data sets are out there, yes.
Q. If there was one for 1999, there would be one for 2001, 2003, 2005 and 2007?
A. I think you need to stop at 2005.
Q. You do. And why is that?
A. 2007 hasn't been posted yet.
Q. Oh. So it's based on November of the even years. You cut it off and report it through 2007, is that the --
A. I don't think we've posted --
Q. As I look at my notes, I do not have a 2007, so you're correct. Thank you.

Now, one of those -- I have an exhibit
here I'd like to have marked as Exhibit Number 22.

JUDGE CLIFTON: All right. Let's go off record while you hand those around.

(Off the record.)

JUDGE CLIFTON: All right, let's go back on record. We're back on record. It's 5:27.

Mr. Yale, have we marked your exhibit yet?

(Exhibit 22 was marked for identification.)

MR. YALE: Yes, we have. It's Exhibit Number 22 and it's entitled Factors for Converting Volumes Sold Into Number of Container Units Sold.

JUDGE CLIFTON: And make sure that microphone is very close to your mouth.

BY MR. YALE:

Q. Mr. Carman, you have in front of you Exhibit Number 22?

A. Yes, I do.

Q. Have you seen this before?

A. Yes, I have.

Q. And what is this?

A. If you've got total weight, this is a way of estimating the number of cartons, containers, based on that total weight.
Q. And this -- this is found in one of the volumes of the packaged fluid milk prices that I had -- or fluid milk sales on the containers that we had talked about?

A. Yes.

Q. And so that if I, for example, look at whole milk in gallon, if I have -- we talk in terms in the producers and with plants and most of the Federal Order statistics, most of the milk is referenced in terms of a hundred pounds, is that correct?

A. Correct. So you take the hundred pounds and divide by 8.6, would give you approximately the number of containers of milk in a hundred pounds.

Q. And this is a fairly common ratio that's used in the Market Administrators -- in these reports and stuff that we see. If there is a conversion from pounds to gallons, that's used, is that correct?

A. Right.

Q. All right.

MR. YALE: Now, I would move, while we're at it so I don't forget, for Exhibit 22. If people want to object later, that's fine. But I want to get my motion in before I forget.

JUDGE CLIFTON: Let me ask now. Is there any objection or any potential objection lurking
to Exhibit 22?

    Exhibit 22 is hereby admitted.

Q. While we're talking about this data, sometimes some numbers get adjusted going from what we used to see with the Market Administrator to maybe gallons and the like. There's another problem when we look at totals, particularly in the month of February, as we go from one year to the next, or comparing sometimes month to month of February because of 28 to 29 days, is that correct?

    A. That's correct.

Q. And does the Department have -- it does, does it not, have a policy of adjusting fluid milk sales data for calendar composition?

    A. Yes.

Q. And that's on the website? That's published on the website?

    A. Yes.

Q. And that is used by the Department to make those conversions so that we can more or less compare apples to apples as we're looking at the data?

    A. That's correct.

Q. Is there any other purpose for that?

    A. I -- the software package is really from the Bureau of Labor Statistics, so they may use it.
Q. Okay. Now, in addition to the data that we talk about to compute the blend and the minimum price and what the pool would be and what producers get, there's also reports generated by the Market Administrator that talk of the actual fluid milk products sold in their market area or gross area, they'll actually break it down by gallons of milk, white milk and chocolate milk and 2 percent and that type of thing, is that correct?

A. In that package?

Q. Yes. And that is what is found in the sales of fluid milk products in all Federal marketing orders, if we would go to one of those reports, is that what shows up there?

A. I'm not familiar with what you're talking about.

Q. Okay. Well, then, we won't go any further. Don't make that a habit to answer that question from now on, please.

We've talked about, within the Federal Order, there are minimum prices that the Department establishes for milk that plants have to pay, but I think it's recognized in the industry that, in most cases, that Class I handlers often pay more than those minimum prices, is that right?
A. Yes.

Q. All right. And the -- does the Market Administrator's office collect data regarding those prices over the minimum prices?

A. There are two sets of data, if you will, the co-op announced prices. That data is a little questionable in the sense that there may not be a verification that the handler actually paid that co-op announced price.

There was also a set of information that's collected that talks about the amount of milk -- or not the amount of milk, the incidence of the overall premiums paid and what portion of the milk carried a premium or some milk didn't have a premium.

Q. And that would be the over-order price report?

A. Yes.

Q. And that would include like the high -- the low and the high and the average over-order price in that market?

A. Yes.

Q. And then it would actually take the total over-order money collected for Class I and divide that by the total Class I sales to come up with an average Class I over-order charge, is that right?
A. Yes.

Q. Now, what does -- these order-over charges, what do those generally include or cover?

A. Some of them may include services performed by the cooperative for the handler, such as check writing, field services, weight and tests. A co-op may be doing some or all of those. They stand ready to provide an extra load of milk if needed that there may be a charge or service for that, or it may be just because that's the customer, so that's incorporated in some of those charges.

Q. Now, this information on this -- these announced Class I price and the others are based on a -- wherever the data is available, because there may be some administrative reasons you can't display it, were basically done on an order-by-order basis, is that right?

A. Yes.

Q. And then you also have selected cities, where you identify what those prices are?

A. Yeah. There's -- there's about 40 metropolitan areas that -- that contain the co-op announced Class I price, and there's about 30 or 35 retail price series collected by the Market Administrator. And when you put the two together, you
come up with about 25 or 26 where it's the co-op announced price plus the retail fluid prices collected by the market administrative offices.

Q. You do want to get out of here quicker because you are about three questions ahead. So let me just take that. In addition to the over-order prices, you also have the Market Administrators collecting retail price at each of the selected stores on a regular basis, is that correct?

A. I believe it's the first ten days of the month, not including Friday, Saturday or Sunday. They identify the largest retail outlet, the second largest retail outlet and the largest convenience store outlet and identify an individual store for each of those three entities, and then each month they go back to the same store and collect the retail price.

JUDGE CLIFTON: Excuse me, Mr. Yale, can those of you in the back still hear Mr. Carman?

AUDIENCE MEMBER: Yes.

JUDGE CLIFTON: Okay. Good.

MR. BROSCH: Are these in reference to a particular document that he sponsored? Because I lost track of how this is connected to the documents that he sponsored, because you hadn't mentioned the document number.
MR. YALE: No, the purpose of this is to identify documents and get into the record information from an expert from the Department of stuff that they publish on a regular basis that we will use in this hearing.

MR. BROSCH: Our cross-examination doesn't have anything to do what he's testifying in direct.

MR. YALE: It has nothing to do so with the direct testimony.

MR. BROSCH: That's a little unusual, your Honor.

JUDGE CLIFTON: It's probably his only chance to -- to give credibility to the documents.

MR. BROSCH: I don't want to stop Mr. Yale. I was just trying to follow him and I was having trouble following him.

MR. YALE: It's a common practice. I'm just trying to follow that. It's data that's going to be out there from the Department and I think it's fair to the proponent or to the hearing records to understand the source of this data and how it's handled and the view of the Department on it, because it's that it is not
prepared for anybody's side one way or the other, it's just data that's out there.

BY MR. YALE:

Q. Now, this retail data, you've been keeping that since what, January of 2001 in most cities, is that about right, on a monthly basis?

A. In some cases, earlier than that.

Q. Okay. And that information is reported on the website of USDA, is that right?

A. Correct.

Q. All right. And it collects that for whole milk and 2 percent? Go ahead.

A. Whole milk, low fat milk.

Q. Okay. And when we talk about whole milk, what is the butterfat content of that? Do you know, what is the standards that you use?

A. The Food and Drug standard minimum is 3.25 percent milk fat. So to be within the standards it's going to be a 3.25 or a little bit higher.

Q. And the reduced fat is?

A. 2 percent. I.e., 1.95 and 1 percent would be .95, or approximately 1 percent. And I think skim is not more than .25 percent fat.

Q. Okay. Now, I'm going to pose to you one of the more difficult questions I have for you for the
rest of the night, so I phrase that, and that is, if we have a -- we talked about a minimum Class I price that's announced and we talked about these over-order premiums that are there, that are out there by city, and we match one of the two dozen cities that have both over-order pricing published and retail pricing published, right?

If we wanted to convert, so that we can compare on a gallon-by-gallon basis, the cost of the milk under the minimum Federal Order price and the over-order price combined as compared to the retail price, how would one make that conversion to a gallon price under the Federal Order prices for those minimum prices that we stated?

A. The first adjustment would be to get the raw milk down to a per gallon basis or to -- or the other way, to inflate the per gallon price to a hundredweight value. So the 8.6 for whole milk --

Q. Okay.

A. -- would be used 100 pounds of producer raw milk, minimum price, divided by 8.6, would give you the number of gallons there, so that dollar value converted down to a cents per gallon of whole milk.

Q. All right. So you would either bring the Federal Order price on to a gallon base and compare that to the retail or take the retail and multiply that to a
per hundredweight basis?

A. Yes.

Q. And you would also have to adjust for the fat to make sure that the minimum prices for the fat are appropriately allocated, right?

A. Correct. Those are not the only costs between the retail and the farm.

Q. We understand that.

A. Right.

Q. But you know there's -- there'll be costs, for example, of transportation and costs for the store operation and overhead and just a whole host of --

A. And other mandated costs.

Q. Right.

A. Such as national fluid milk --

Q. Right. Now, one cannot say that's all profit to the retailer. That is -- that's just a spread that would give some indication of what it cost to get it from the farm to the retail consumer?

A. You have maximized the difference by taking the minimum farm price of a hundredweight of milk compared to the over-the-counter sale price of a gallon of whole milk. All of that margin, there's a whole lot of costs between there.

Q. That's right, and I would agree. We're
not trying to say that that can be identified to any one thing. There's a whole lot of that goes on, hauling it to the plant, processing at the plant, moving it to the store, handling at the store, cash registers, retail cashiers, all of that?

A. All of the various jobbers between the plant, yes.

Q. Okay. But that computation, that's not on the website. One would have to do that on their own, is that right?

A. Yes.

Q. And I'm not making that data request, by the way.

A. That's because my spreadsheet is not up to date.

Q. All right. I want to move on to some other data that's out there regarding some of these, so we have -- but we do have a series of reports out there that one could obtain for those years by specific city, these retail prices?

A. As collected by the Market Administrator.

Q. Right.

A. They're not as robust as Bureau of Labor Statistics retail price.

Q. What do you mean by "not as robust"?
A. They are a very specific time of the month for an individual outlet. There may be differences for a -- in the Washington area, walking into a giant store, the prices could be different from one counter to another. Doesn't -- just because the outlet, they may have a different price between Maryland and Virginia --

Q. Right.

A. -- or the District of Columbia.

Q. But it provides a number that, over the periods of years, gives you some kind of -- at least to be able to identify trends and some general information?

A. It's a good indication of trends. It does -- it may not be an absolute.

Q. Right. One would not be able to say that this is what milk is, I guess, being sold for in this market in this period of time as an absolute?

A. It will tell you what milk was being sold for in that outlet on that day.

Q. That day, right. Okay. Now, I want to go to some other information that's reported by the Market Administrator. We said the Market Administrator, in the collecting of the data as regards what not only just the minimum prices the plants have to pay, but is also able to obtain the over-order prices?
Let's look at the producer side. It has the minimum prices that plants must pay producers because of the data that it receives. It's also -- the Market Administrators are able to collect what is called a mailbox price, is that correct?

A. Correct.

Q. And how would you define a mailbox price?

A. It's what -- the net value for the sale of a hundredweight of milk received at the mailbox.

Q. And there is -- that is available for all of the marking areas other than Arizona, is that correct?

A. Be careful with the mailbox series. It does not match up with the marketing area. For example, the Appalachian is five Appalachian states. It does not relate to the mail -- the marketing area of Appalachian.

Q. It talks about the -- it talks about the average price paid to suppliers that supply the market area, which could be from outside of those five states?

A. Yes. Well, in fact, there are two mailbox prices for the Appalachian. There's a mailbox price that's generated by the Appalachian on their website. It is not the same as the Appalachian state marketing areas published from Washington. They're different.
Q. And who computes the one -- does the Market Administrator compute both of them, or just the one?

A. The data for the Appalachian states would be assembled in Washington. It would include milk that was produced and marketed on other orders, but within those five states.

For example, the Southeast or the Mideast could well have had milk that was reported to those and pooled on those two orders, but produced in that five-state region.

Q. And the one -- the other one, like for milk for Appalachian that's produced by the Market Administrator, that reflects the average price received by producers supplying?

A. Yes.

Q. So that could include states outside of the Appalachian marketing area?

A. Outside of those five states, yes.

Q. Okay.

A. Wisconsin might be included.

Q. Right. I see that is out of another department, but I just wanted to see whether you -- Dairy Programs is aware of and uses or has any knowledge of it. And that a sister agency within USDA is the
Economic Research Service?

A. I'm aware of that organization, yeah.

Q. And one of the things that it produces is a number reflecting the monthly cost of production by various -- certain states for producing milk. Are you aware of that?

A. Yes.

Q. All right. There is no cost of production or any numbers prepared by USDA at this time by marketing area that would reflect what -- any number that shows what the cost of production for milk going into a marketing area?

A. Not that I'm aware of.

Q. So the best data that would be available is the data from the states that are in that particular marketing area for the moment that's produced by ERS?

A. It's data available. There may be some other farm accounting cost data that the extension service of an individual state may put together. Or there may be some panel surveys, for example, the FAPRI that Texas A&M runs.

MR. YALE: So I think that's it, your Honor. I think based upon your announcement, I've prepared to do it a different way. We'll try to have copies of the documents we want, the
notice made available, and then we'll make that request at that time.

JUDGE CLIFTON: Good. Thank you very much, Mr. Yale. I know it's a burden on the person that wants the Secretary to take official notice or judicial notice, but I think it's practical.

MR. YALE: Yeah, it is. Well, it's not impractical. But I think its gives better notice to the parties of, really, where the data is as opposed to kind of a carte blanche. Thank you, very much.

JUDGE CLIFTON: Very good. You're welcome. All right. We need to take our temperature. It's 5:49 and all we have yet to do is finish this witness and finish Dr. Cryan and start Dr. Yonkers, so -- and that's just to keep up with what we thought we'd do this morning.

Let me ask. What's the status of the remaining USDA exhibits?

MR. STEVENS: Are we on the record?

JUDGE CLIFTON: We are.

MR. STEVENS: Give me a minute, your Honor.
JUDGE CLIFTON: Let's go off record for just a moment.

(Off the record.)

JUDGE CLIFTON: Let's go back on record. We're back on the record at 5:52. Mr. Stevens.

MR. STEVENS: All of the exhibits that --

JUDGE CLIFTON: Move the microphone closer.

MR. STEVENS: All of the exhibits that Mr. Carman has prepared up to this point we have here and he has introduced them, with the exception of a couple of items that he has prepared that either are now or very soon going up on the website.

The additional requests that have been made of parties, the present thinking is from the government --

JUDGE CLIFTON: Before you go to that, before you go to those --

MR. STEVENS: Yes.

JUDGE CLIFTON: -- talk to me a little more about the ones that are going to be here today. Are those the same ones that you are saying are about to go on the website?

MR. STEVENS: No. The ones that we have
in front of us, 5 through 20, we are going to
move into admission at the appropriate time at
the completion -- I was waiting for the
completion of the cross-examination. If there
is more cross-examination, then we will wait and
move those in.

That is the state of the presentation of
the government witness. There are other
outstanding requests for information, which as I
understand it from talking with the witness
earlier, are being completed as quickly as he is
able to do them. He's certainly not able to
complete them when he's up here on the stand.
That's number one.

JUDGE CLIFTON: Well, now, wait. I
misunderstood an earlier representation you had.

MR. STEVENS: All right.

JUDGE CLIFTON: I thought there was a
representation by Mr. Carman, in answer to
somebody's question, that we were getting more
copies today of things that he had prepared,
that they were being copied.

MR. STEVENS: Let me clarify that. Let
me clarify that. As I understand it, the
additional copies that were being made -- all
the copies that were being made today are now in
the hearing room and have been used by the
parties. We are talking about Exhibits 5
through 20.

There are no additional copies of any
other exhibits, other than exhibits -- well,
documents that are the result of requests of
parties that Mr. Carman has completed work on,
and that will either be up on the website -- I
doubt that they will be up today, but they may
well be up tomorrow, and so those websites
become in the public area and they will be
available for anyone here or anyone else to view
and to use as they choose.

There are other requests which are in --
are being worked on as we speak and are not
completed yet, and I understand those to be some
of the materials that Mr. Miltner is talking
about, that the Department is trying to get
those completed as quickly as possible. And
when they are completed, they will be put up on
the website and they will be available for the
parties for their use as they choose.

It is not our intention to introduce any
more evidence other than what we have introduced
to this point.

JUDGE CLIFTON: All right. Now, let me ask a question. If something shows up on the website that, for example, Mr. Miltner wants to use, will he be permitted to call Mr. Carman as to what went into compiling the information that's -- that's represented there and how it is to be interpreted?

MR. STEVENS: It is our intention to make the information available to the parties for their use in this hearing. It is also our intention that Mr. Carman may well be available at a future time to explain the future documents that they may use with the understanding that they are not going to be a government witness -- I mean, they are not going to be government exhibits.

Let me correct what I said. They are not going to be exhibits that we enter into evidence, but if they need explanation to the extent Mr. -- Mr. Carman is available -- I mean, is available, because he is working on exhibits and he's trying to complete this material, exhibit -- I keep saying exhibits. I'm talking about data requests, voluminous data requests
that he is working on and others are working on to try and complete.

And that is ongoing. And certainly we want the record to reflect what is contained in those documents with Mr. Carman's view being expressed, but not as the sponsoring witness.

JUDGE CLIFTON: So as soon as we finish cross-examination of Mr. Carman on what we have so far, then he may step down as your witness?

MR. STEVENS: That is our intention, that he step down and he go and complete the rest of the information requests as quickly as it can be done and get them up on the website.

JUDGE CLIFTON: All right. Now, I will ask, any other questions that are appropriate for me to ask Mr. Stevens, if you will ask them to me. Mr. Carroll.

MR. CARROLL: I would.

JUDGE CLIFTON: Oh, yes, please go to the podium and identify yourself again.

MR. CARROLL: I think if I might say so, this is a bit of a loose arrangement. I'm not being critical at all because I realize this is a massive job, and I have great confidence in Mr. Carman, but nevertheless, it is a problem
for us at the hearing to be at this stage with this problem.

Number one, I think he should be -- he would be available as a witness at our call if we find that we need him so we do not have to wait for his determination as to how he thinks his work is going. I'm a little bit concerned about websites as being a source. As we all know, it may not be admissible as such.

And I would think that the Department would produce requisite copies of whatever these requests have been in hard copy form so that we can all have them available and everybody knows what we're talking about.

Thank you very much, your Honor.

JUDGE CLIFTON: Thank you, Mr. Carroll.

MR. STEVENS: Your Honor, may I just -- he makes a very interesting point, and I did neglect to say that when the -- when the materials would be going up on the website, copies of those materials will be presented to the -- to the requester, so that there is a hard copy. It is going to the requester. It is not a document that we're going to sponsor admission of in the hearing.
If the requester wants to bring the copies, make the copies, distribute the copies and do that, that's fine. We have no problem with that.

JUDGE CLIFTON: I have a question that doesn't relate to this at all that occurred to me. How quickly is each day's transcript going to be on the website? I'll come back to that question when we're off the record.

Mr. Ricciardi.

MR. RICCIARDI: Your Honor, let me reiterate the concern. First of all, I'll join in some of the comments that were made by Mr. Carroll, but let me reiterate some of the concerns that I raised, and Mr. Miltner also raised.

It's clear from this testimony that the proponents of Proposals 1 and 2 have basically been talking to the Department for a year. We've had notice of this hearing for less than a month. We've requested the documents that are needed for us to both bring in evidence regarding those proposals and to support our own counterproposals.

And we're sitting here, as I stand up, at
6:00 p.m. Eastern Daylight Time, if I know where
I am today, and I do not have any representation
made concerning, one, whether the documents are
going to be provided, and two, when they're
going to be provided.

I also am concerned about what I hear
from the government table, because the purpose
in the past and the procedure in the past has
always been that the government was providing
the data requested by the various proponents or
interested parties. The government wasn't
sponsoring anything, the government wasn't
taking any position. They were providing the
data for use by the proponents,
counterproponents in the hearing itself. It
sounds like I'm hearing something different than
that.

And my clients are at risk of potentially
being put out of business. They have due
process rights. And I don't care what we're
using as the regulatory basis for what we're
doing here, the constitution occurs and is in
place in this building. And we are very
consciously about what's going on.

JUDGE CLIFTON: Mr. Stevens, in that
regard, let me just ask. Is it odd to mass produce the responses to the requests that are represented in 5 through 20 and not to do the same for the others? And let's go off record for just a moment.

(Off the record.)

JUDGE CLIFTON: Okay, let's go back on record. We're back on record at 6:07.

Mr. Stevens.

MR. STEVENS: Your Honor, I guess I -- I just want the record to clearly reflect that the Department gets requests from many people in terms of rulemaking hearings, and this hearing is a perfect example where when -- when -- and even before a hearing. Because of course, as we described ex parte, and as we described the way -- as everyone in this room knows how the Department operates in term of rulemaking, there are discussions before a Notice of Hearing is issued.

But there was a listening session here. There was a lot of exchange in the industry about this issue prior to the issuance of this hearing. And so it wasn't like anyone was particularly surprised that this issue was under
consideration and may well be coming up. So we
are now in -- in that area.

Requests were made. As Mr. Carman
testified, he responded by looking at data and
then made determinations as to what exhibits the
Department would put together to assist the
parties in this hearing.

Requests were made which are being --
have been answered, are being answered and will
all be -- all the requests will be answered.
The information will either be given over or an
explanation will be given as to why it is not
being given over. And as to the information
that is on the website, which is all of the
information, that is available for all of the
parties to use as they choose.

The fact that Mr. Carman puts in certain
exhibits is only based on the fact that he and
the Department have determined that this
information seems to be appropriate for this
hearing and would help the parties to assist
them in the conduct of the hearing.

As to the requests of others that are
responded to, as Mr. Miltner suggested and as
the Exhibit, I guess, 21 shows, a request was
made. Certain data is being prepared. Certain data, there are some concerns or difficulties with it, and those are expressed in that e-mail. The information will be provided. It will be put up on the website. It will be made available in hard copy to the requesters.

What they choose to do with that information is -- is clearly up to them in terms of this hearing. The timing of it is just a matter of -- of the voluminous nature of the request and the attempts of the Department to answer all the requests of the parties, to provide the information it asked for.

That is the sum and total of it. And so the eventuality is, all of that information will be up on the website. Hard copies will be delivered and responses will be given to the requesters as to what information will not be made available. That's it. One minute.

And so we -- we offer that as an explanation of why the exhibits that we have now on the table are ones that we would move into admission at the completion of cross-examination, and further that Mr. Carman and the people of the Department will be working
to complete, as quickly as they can, the
information requests. And they will respond to
the requesters, and they will put the
information up on the website.

JUDGE CLIFTON: Thank you, Mr. Stevens.
Mr. English, before I call on you, hold on just
a second. I want to just announce something
about when the transcript will be available on
the website.

The contract between the court reporter
company, which is Ace-Merit, LLC, and AMS is
that five business days following the end of the
hearing the electronic version of the transcript
in searchable PDF format will be provided to
AMS. Now, it'll take a practical amount of time
then for AMS to check it all out, make sure it's
all PDF searchable and put it on the website.

So if any of you need, for the purpose of
this hearing, any portion of the transcript on
an expedited basis, please make that request of
the court reporter here and make your own
contract with them for that expedited portion of
the transcript.

If you can wait until it goes on the
website because all you need it for is your
brief, great. But if you need it for your experts or you need it to prepare cross-examination or anything of the like, you'll need to make arrangements with the court reporter.

If you need to make those arrangements and we're not stopping -- we're not going off the record so that you can talk to the court reporter, alert me that you need to make a request of the court reporter, and we'll take a little two-minute, stand-up break so that you can do that. Mr. English.

MR. ENGLISH: Thank you, your Honor. Charles English. I let it pass once, this coincidence, but the second suggestion it's not a coincidence, the second time.

Counsel for AIDA has now twice intimated that their due process rights are being violated and has twice emphasized the concept of the hearing notice being published in the Federal Register on April 9th. I would note, of course, that it was signed before that. It was up on the website for public inspection before it's published in the Federal Register. It's well known the Federal Register takes some time to
get it in. It was actually signed on April 3rd.

But going back in time, I believe the Department notified the members of the industry as early as February 4th that they had received proposals from IDFA and from National Milk Producers, and there was a public proceeding of which counsel of AIDA appeared on March 20th, well before April 9th.

I would note, in addition, that Counsel John Carroll here submitted on March 16th his request for data. That is to say, he didn't wait a month until April 16th to submit a request, which is probably why his data requests are already responded to. Get them in, they get responded to a little more quickly. It is the case that the due process rights have not been violated. People have known long enough. They've had an opportunity to make requests.

To wait a week after the hearing notice is published to submit three voluminous, and frankly unprecedented requests, for data and the other things, is not what is contemplated. And we disagree strongly with that characterization.

JUDGE CLIFTON: Ms. Bryson.

MS. BRYSON: Thank you, your Honor. I'd
just like to make it clear for the record, as we all know, that the purpose of this Federal rulemaking proceeding is to collect evidence. We have been told repeatedly that USDA has not made a decision about any of the alternatives that have been noticed and that's entirely appropriate.

We have also been advised repeatedly that USDA will make a decision based on the fair market value information that is introduced at this hearing. And so we have many people who are coming here to present evidence in order to make sure that there's a complete record. We have no definition from the Department about what constitutes disorderly marketing condition. We are told that the government will make the decision based on what is presented in this record.

In those situations, it is really important, I think, for all of the alternatives that have been noticed to be entitled to factual information that is vetted by -- prepared by the Department and presented at this hearing.

The idea that there might be some information that's posted on a website, which we
do not have the opportunity to talk with the
USDA about, cross-examine in the process that's
been happening here this afternoon, is -- makes
it virtually impossible to create a record which
fairly presents to the Department, as it says it
desires, the information that's relevant to this
subject.

We are here at this hearing today because
this is the date that USDA picked to schedule
it. All of our requests for data were very
appropriate in terms of being submitted on time,
given the decision by USDA to notice our
alternatives as proposals that would be
considered on a factual basis at this hearing.

Our request is that we have the same
quality of evidence provided in response to our
data requests as has been provided and produced
so far this afternoon for Proposals 1 and 2.
Thank you.

JUDGE CLIFTON: Thank you, Ms. Bryson.
Mr. Stevens, do you wish to respond?

MR. STEVENS: Not in any other way than
to say that the information will be provided to
the requesters.

JUDGE CLIFTON: Mr. Carroll.
MR. CARROLL: I just want to be certain that I haven't misunderstood what's just happened. The -- the Department has submitted evidence for some proposals and failed to submit evidence for other proposals. And I'm just wondering what that means for the fairness of the hearing? If they want to respond to that?

JUDGE CLIFTON: Mr. Stevens, I have to add my concern. I haven't been to very many milk rulemaking hearings, but in every one, the government witness provided all the government statistics, no matter who asked for them. Copies of all of the handouts, the proposed exhibits, were available for everyone who came to the hearing to pick up in the back of the room.

I understand that one reason this hearing is so difficult is that it is so controversial. But that makes it even more important that it be evenly handled.

So I request that -- I know Mr. Carman is going to have tremendous demands on his time. He can't both be compiling data and testifying. He'll have to give us his schedule. I think all proponents have a right if they want to wait
until all of the government's statistics are in evidence before they proceed. It may make a difference to their experts.

I understand that the -- that Dairy Programs was comfortable with just using 5 through 20, but I'm not comfortable with the other statistical data gathered by Dairy Programs being treated in a different way than 5 through 20 have been treated.

So it may slow us down a bit to have Mr. Carman having to do -- and I -- I've said, I think the requests are overwhelming, and I do. But unless you can persuade me, Mr. Stevens, that the reason a request is not being responded to is that it's irrelevant and that it's merely designed for delay or some other inappropriate reason, then I think we need to have Mr. Carman present it the same way he's presented the others.

If, for example, let's say, some of the experts, Dr. Cryan or Dr. Yonkers, present what they have prepared and reserve the right to come back and testify again when the rest of the data is available, in that way we can keep moving. But if, for example, Dr. Cryan said, well, I've
prepared my statement, but I want to wait to see what the other evidence is before I commit myself as an expert, then I would understand that.

So, Mr. Stevens, I'll entertain any comments you have. I may be mistaken, but that's how it looks to me.

MR. STEVENS: I appreciate that, your Honor. My -- my thought as you were speaking was that it is true that -- that certain requests were made and certain information is -- is before us now in exhibits and other information is still being prepared. There is something to the point that if you do ask for it earlier, it will be provided. That is a point which is -- I don't think can be rebutted.

But that's fine. Let's just accept it for what it is and say that we should all postpone the hearing until all of this evidence is presented by Mr. -- Mr. Carman that has been requested by the parties.

Well, the first point is that if people request information from the Department of the nature that we're speaking of now, it doesn't mean necessarily that it -- that they will
introduce -- that they will want it introduced into evidence in this proceeding.

In other words, I am certainly aware of instances where parties have asked the Department to prepare -- prepare special runs of information from the Market Administrators from the data of the Department and, having received it, decide not to use it in a hearing.

That's their choice. That's their right, certainly. And so some of that is involved here, I believe. But I don't -- but I don't know. And I don't want to speak for any party. And it may be that all of the information that Mr. Miltner has requested, they want it to be put on this record and to present it and to have a government witness present it of the same nature that this other evidence has come up.

I think it is true that -- it is true that not only the requests of Mr. Miltner, but other requests that may have come in at a later time, with respect to other requests in time, are being respond -- are being responded to in the same way that we are now speaking about Mr. Miltner's request, that it goes up on the website, that it -- that it is available, that
they get a hard copy, that they are available to use it in the hearing as they wish.

It is, I think as much as anything, a matter of the timing of when it is received and how long it takes to prepare it and what should then be done with it. Because if we -- if we are in the position now of stopping this hearing for every request that might even come up in this hearing, that it then has to be prepared and Mr. Carman has to get up and testify about it, and if it has to be admitted through him as opposed to through the proponent or opponent who wants to use the testimony, I submit to you, your Honor, that this hearing will never end, it will never end.

JUDGE CLIFTON: I'd have to agree with you there.

MR. STEVENS: All right. And if we take those points into -- what I'm saying, and take those into mind, there are reasons why some requests are treated somewhat differently than others because of the timing of them, because of the voluminous nature of them, because of the constraints of, one, on the conduct of the hearing in terms of Congressional mandates or
any other -- any other constraints that are put
on these rulemaking hearings. So we have this
reality that we're dealing with.

The Department, for its part, I think,
and I certainly concur in saying that any -- any
implication that the Department is not engaging
in due process in this is -- is giving the
characterization of a suer patent (phonetic).
All it is is just as a matter of putting on this
record something that is not necessary.

Everyone here wants to look at the facts
on the record. Above all, Mr. Carman wants to
respond to the requests of the parties and get
the information in this record that the
Department needs to make a decision.

It isn't all presented by him. It can be
presented by the individual parties. The point
is that it goes in the record, that it is
here -- that it is here for the Department to
review.

JUDGE CLIFTON: I think, however, if
Mr. Carman is the author of a report, only
Mr. Carman can answer questions about what does
this mean, where did this data come from, is
this reliable and so forth.
MR. STEVENS: And we have offered him up to do that. He is available to do that.

JUDGE CLIFTON: Okay. All right.

Mr. Miltner.

MR. MILTNER: I will be brief. My understanding, and the understanding of the people with which I am working, is that we will proceed exactly as you described, Judge, that Mr. Carman will be available to explain the information that's presented. Whether it is technically sponsored by the Department or sponsored by the party who's requested it, I think is immaterial as long as we have somebody to talk about the fact that it has been compiled, how it's been compiled or if there's no response to the request, why that response has not been provided. That needs to be part of the record in every instance.

And that's what we want. But I think it's important to talk about the timing here just once more because it's been suggested, or at least implied, that we sat on our requests or we should have gotten them in sooner. Until the hearing notice was made available -- and yes, I was noticed by USDA on April 7th that the
hearing notice was going to be posted to their website that day, but until that time, all that was before the Department were requests from National Milk Producers Federation, IDFA, to eliminate producer-handlers and to put -- expand the exempt plant limitation.

There were counterproposals that were heard at a prehearing session, and USDA maintained that no decision had been made to go for a hearing. They were weighing all of the options and would make a decision as to whether a hearing should be held.

So to waste my client's time and money and effort to submit data requests before we even knew that our three alternatives were going to be noticed for hearing would have been imprudent. And as soon as we had notice that our proposals were going to -- first we had notice that a hearing was going to be called at all, and, second, that our counterproposals were going to be offered. And we moved expeditiously within the time frames that were set forth.

And I understand under the Farm Bill we have different time frames and they're making everybody work a little bit differently than
they used to.

But I take exception to the suggestion that we should have moved quicker or differently because we're trying, believe it or not, to get this done as quickly as we can, but we need to have a full record. Thank you.

JUDGE CLIFTON: All right. Don't leave yet. Is your client then willing to pay for the mass reproduction if you want to use the data?

MR. MILTNER: Yeah, I don't think that that's consistent with how it's ever been done in the past. Before, requests of parties have been compiled by USDA, they've been printed by USDA. They've been testified to by the party who's compiled them and available for examination.

And so no, I don't think that's appropriate to put the cost of reproduction on the party requesting it. And I think it's thoroughly inconsistent with how it's been done in the past.

JUDGE CLIFTON: Thank you. All right. Does anybody else want -- Mr. Vetne.

My next topic after we finish this topic is going to be how long do we work tonight.
MR. VETNE: Since we don't have any data -- since there's data outstanding, I move to adjourn.

Besides that, I am -- I am disturbed by some -- some parts of this. In the past -- unfortunately, in the past the opportunity to ask USDA for data specific to a hearing, data that your client might want to see, is something that was known only to a small group of regular practitioners. It wasn't something that was known generally to the public.

Now we have it, you know, available to everybody and people can finally take advantage of it. There's not just a few that can exploit a process that only they know about. That -- that is good.

And I think, you know, the Department's done -- done a heck of a job in preparing for this hearing and Mr. Carman has done a heck of a job in explaining his exhibits. I'm very pleased with that.

I have some data requests outstanding. What concerns me the most -- and yes, these data requests in the past have always been if it's available and we can do it in the time, we'll
get it for you and we will introduce it so that everybody can ask the questions.

In fact, the risk in the past has been, once you ask for a piece of information, you don't have a choice. It's going to be in the record. And if it turns out to be -- have a bad result to your client, you know, that's the risk you take when you ask for that information.

JUDGE CLIFTON: I was thinking that. I was thinking if it's not good for Mr. Miltner's clients, it's good for somebody else.

MR. VETNE: Exactly. But what concerns me most about this, the dialogue -- and the dialogue that we've had here is that Exhibits 5 through 20 have been -- been characterized as okay, we think these are important and the government is sponsoring these exhibits. Which leads -- leads me to wonder whether the government has determined that Exhibits 5 through 20 are more important for the process that they're just beginning to undertake than whatever comes later. Well, what -- there has -- there is a difference, by the way, in the Notice of Hearing here.

I mean, Mr. Carman is one of the people
who's going to be involved in the
decision-making process, as is Garrett Stevens,
as is everybody on this table off to my left, I
believe.

The hearing notices for about 30 years
now have said, here are the people that are
going to be involved in making decisions and you
can't have ex-parte communication with these
decision-making people.

For the first time in 30 years, that
paragraph was not introduced with the phrase
that said, these people are going to be involved
in decision making. It just says, don't talk to
these people ex parte. So now I don't even know
what that means, if some of these people are
involved or not involved.

What I -- what does disturb me is that
people who might be involved have judged that
some exhibits prepared by the government are
going to be weightier and more important and
more relevant than something that other people
requested. Thank you.

JUDGE CLIFTON: Don't leave. Is your
client prepared to pay for the duplicating so
that everyone can have a copy of the response to
your requests?

MR. VETNE: I had not come to this

hearing prepared for that. I have three small

business clients. The way it's always been done

in the past, and the way I anticipated it would

be done, is the copies would be prepared, the

government would introduce them all at once or

when they got around to it, and it'd be -- that

everybody would be treated the same.

Some of these exhibits, 5 through 20,

we've been told are in response to industry

requests, proponents' requests. We have

requests outstanding. We don't have those yet.

I haven't gotten an e-mail saying they can't do

it, which I usually get, or parts of it, or it

would be too hard to do this on an annual basis,

but how about we give you a representative

month. That's fine. Okay. I want to cut down

your work, but I want to know sort of how this

looks. That's been the dialogue in the past

him.

So I'm assuming, since I didn't get the

kind of e-mail that Ryan got, that the

information I requested on behalf of my clients

will eventually get here. And I'm hoping that
the Department -- oh, oh, I've got a skeptical
look from him, my peripheral vision. You know.
And I'm hoping that the Department will make
that available to us and everybody the same way
they've made these available and have done so in
the past.

JUDGE CLIFTON: Thank you. Mr. Beshore.

MR. BESHORE: I just want to make one
comment in response specifically to something
Mr. Vetne said, and it's the way -- the
direction of this dialogue, whatever it is, has
gone and I'm very concerned about it.

Mr. Carman has testified under oath that
none of these exhibits were prepared for or
against any proposal in this hearing. That's
the testimony under oath. Mr. Vetne just said
that it appears that these have been presented
for or against certain proposals, that they've
been slanted in some way in terms of what was
prepared. And I think that's completely
uncalled for. And it's a -- you know, an insult
to the witness. And I think it's very
inappropriate.

That's the direction that has gone, the
Department in some way is slanting what they're
doing. And that's not -- that's not the case.

Just one other note. This -- the fact that information prepared by the Market Administrator offices or the Department has been required to be offered by parties as opposed to the government has occurred in more than one hearing that I've been a part of. And that's not something that is -- you know, that's never happened or that's out of -- out of bounds or whatever.

Usually there is a statistical witness from the Market Administrator's office who presents, you know, exhibits, or from Washington, D.C. in some cases, in national hearings who presents exhibits.

But it's not unheard of that data is presented, having been prepared by the Market Administrators or AMS by industry witnesses who say they received it, here it is.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Mr. Yale.

MR. YALE: I have a proposal, and the proposal is that we finish for the day and we see how this all plays out in actual delivery of data and the like, rather than -- seems like
we're kind of on a theoretical basis right now. That's not going to get us anywhere.

And I think many of us, at least myself, I'm starting to get tired and hungry, which means I don't think as well as I do otherwise. Not to suggest I'm not thinking well, but I'm thinking it may go downhill pretty quick here and I think we need to move on. You said 6:00. It's 6:30. I would suggest, however, sometime either tomorrow morning or in two minute -- at some point during these -- the session, I think that you realistically need to look at the witnesses who want to testify on certain days and start to plug those in.

I did some rough there and it looks like maybe Thursday and Friday is already filled up overwhelmingly. And I think we need to look at that and start playing this thing through, that we may be agreeing to more witnesses than we can handle. I don't know, maybe we can handle them. But I think we need to kind of start actually saying they're here, what time they're going to take. I think that's really what we ought to be doing in this case and go from there.

JUDGE CLIFTON: All right. Thank you,
Mr. Yale. Mr. English, would you come to the podium for a minute?

MR. ENGLISH: Yes, your Honor. Charles English.

JUDGE CLIFTON: Do you want to present any more evidence tonight, assuming that we stop questioning Mr. Carman?

MR. ENGLISH: Well, actually, I think the next witness is National Milk Producers. So I will let them speak for themselves.

JUDGE CLIFTON: Mr. Brosch.

MR. BROSCH: Well, we have Dr. Cryan. Dr. Cryan is here and he's ready to testify and we'll move to go on. It depends on your Honor and everyone else in the room. But we certainly don't want to hold up the hearing. I don't even want to talk very much. Because your Honor, I think I've calculated about 85 percent of the discussion today has been by lawyers and not by witnesses. So I want to stop that. I want to move on.

JUDGE CLIFTON: All right. Thank you. I'm about to take a vote as to whether we take a short break and then come back and proceed with Dr. Cryan's testimony after we see if there is
any more cross-examination for Mr. Carman. But let's do that first. Does anyone else have any more questions tonight for Dr. Carman -- for Mr. Carman? Are you a doctor?

THE WITNESS: No.

JUDGE CLIFTON: Mr. Carman.

AUDIENCE MEMBER: Honorary degree.

JUDGE CLIFTON: Mr. Carroll.

MR. CARROLL: I have no questions for Mr. Carman, but I have a comment on the last suggestion. I don't think this is the time of day to start the most major witness on a proponent. And we couldn't do justice to it tonight. I move we adjourn.

JUDGE CLIFTON: Okay. We have a motion to adjourn. You know, I'm particularly in favor of it, because even though I would really like to push, I know most of the people here did not get lunch before we started at 1:00. And therefore, it's getting late. All in favor of adjournment raise your hands. All opposed?

We will adjourn. We'll go off record. I'll see you tomorrow morning at 8:00. We now go off record at 6:41.
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PROCEEDINGS ADJOURNED AT 6:41 p.m.

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CERTIFICATE

I, S. Diane Farrell, RMR, CRR, the undersigned, a court reporter for the State of Ohio, do hereby certify that at the time and place stated herein, I recorded in stenotypy and thereafter had transcribed into typewriting under my supervision the foregoing pages, and that the foregoing is a true, complete and accurate report of my said stenotype notes.

S. Diane Farrell, RMR, CRR