
-- -- --

VOLUME II

-- -- --

Public Hearing Administrative Law Judge
Before: Jill S. Clifton

Date: May 5, 2009

Time: Commencing at 8:04 a.m.

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

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

On behalf of United States Department of Agriculture:

Garrett Stevens, Esq.
Heather Pichelson, Esq.
of United States Department of Agriculture Office of the General Counsel Marketing Division Room 2343 South Building Washington, D.C. 20250 Phone: (202) 720-5707

On behalf of Continental Dairy Products and Select Milk:

Benjamin F. Yale, Esq.
of Yale Law Office, LP 527 N. Westminster Street P.O. Box 100 Waynesfield, Ohio 45896 Phone: (419) 568-5751

On behalf of AIDA:

Alfred William Ricciardi, Esq.
of Aiken, Schenk, Hawkins & Ricciardi Suite 100 4742 North 24th Street Phoenix, Arizona 85016 Phone: (602) 248-8203

Ryan K. Miltner, Esq.
of The Miltner Law Firm, LLC 527 North Westminster Street P.O. Box 477 Waynesfield, Ohio 45896 Phone: (419) 568-2920
APPEARANCES CONT'D:

On behalf of AIDA:

Nancy S. Bryson, Esq.
of
Holland & Hart
Suite 900
975 F Street N.W.
Washington, DC  20004
Phone:  (202) 654-6921

On behalf of National Milk:

Kevin J. Brosch, Esq.
of
DTB Associates, LLP
Third Floor
901 New York Avenue, N.W.
Washington, D.C. 20001-4413
Phone: (202) 661-7097

On behalf of the Florida Milk Producers Federation and Dairy Farmers of America, Inc.:

Marvin Beshore, Esq.
of
Law Office of Martin Beshore
130 State Street
P.O. Box 946
Harrisburg, Pennsylvania  17108
Phone: (717) 236-0781

On behalf of Aurora Dairy Corporation:

Livia M. Kiser, Esq.
of
Latham & Watkins, LLP
Sears Tower, Suite 5800
233 South Wacker Drive
Chicago, Illinois
Phone: (312) 876-7700
APPEARANCES CONT'D:


Charles M. English, Esq.
of
Ober Kaler
Suite 500
1401 H Street NW
Washington, D.C. 20005-3324
Phone: (202) 326-5009

On behalf of Mallories Dairy, et al.:

John H. Vetne, Esq.
of
Law Office of John H. Vetne
11 Red Sox Lane
Raymond, New Hampshire 03077
Phone: (603) 895-4849

On behalf of the Mountain Dairy, Monument Dairy, Homestead Creamery:

John Benjamin Carroll, Esq.
of
Carroll & Carroll Lawyers, P.C.
440 South Warren Street
Syracuse, New York 13202
Phone: (315) 474-5356
On behalf of Harold Hatch:

Arend Tensen, Esq.
of
85 Mechanic Street
Lebanon, New Hampshire 03766
Phone: (603) 448-7100

APPEARANCES CONTINUED:

Bill Richmond, USDA, AMS, Dairy Programs
Veronica Douglass, USDA, AMS, Dairy Programs
Michael Johnson, USDA, AMS, Dairy Programs
Clifford Carman, USDA
Gino Tosi, USDA, AMS, Dairy Programs
Jack Rower, USDA, AMS. Dairy Programs
Kate Fisher, USDA, AMS, Dairy Programs
## INDEX

### HOWARD HATCH

- Direct Examination By Mr. Tensen: 243
- Cross-Examination By Mr. Brosch: 261
- Cross-Examination By Mr. Carroll: 264
- Cross-Examination By Mr. Vente: 269
- Cross-Examination By Mr. Miltner: 285
- Cross-Examination By Mr. Riccardi: 295
- Cross-Examination By Mr. Chaplain: 305
- Recross-Examination By Mr. Vente: 306
- Cross-Examination By Mr. Yale: 312
- Cross-Examination By Mr. Tosi: 325
- Recross-Examination By Mr. Tosi: 332
- Redirect Examination By Mr. Tensen: 334
- Recross-Examination By Mr. Carroll: 337

### THEODORE J. DUNASKI, JR.

- Direct Examination By Mr. Tensen: 339
- Cross-Examination By Mr. Vente: 358
- Cross-Examination By Mr. Yale: 366
- Cross-Examination By Mr. Carroll: 377
- Cross-Examination By Mr. Ricciardi: 381
- Cross-Examination By Mr. Tosi: 384

### ROGER CRYAN, PH.D.

- Direct Examination By Mr. Brosch: 397

### DENNIS TONAK

- Direct Examination By Mr. Beshore: 514
- Cross-Examination By Mr. Carroll: 535
- Cross-Examination By Mr. Yale: 539
- Cross-Examination By Mr. Ricciardi: 541
- Cross-Examination By Mr. Tosi: 551
- Redirect Examination By Mr. Beshore: 558
<table>
<thead>
<tr>
<th></th>
<th>MIKE ASBURY</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Direct Examination By Mr. Beshore</td>
<td>571</td>
</tr>
<tr>
<td>3</td>
<td>Cross-Examination By Mr. Ricciardi</td>
<td>580</td>
</tr>
<tr>
<td>4</td>
<td>Cross-Examination By Mr. Carroll</td>
<td>583</td>
</tr>
<tr>
<td>5</td>
<td>Cross-Examination By Mr. Miltner</td>
<td>590</td>
</tr>
<tr>
<td>6</td>
<td>Redirect Examination By Mr. Beshore</td>
<td>593</td>
</tr>
<tr>
<td>7</td>
<td>Cross-Examination By Mr. Yale</td>
<td>596</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>EXHIBITS</th>
<th>MARKED</th>
<th>ADMITTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>Exhibit 5</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>8</td>
<td>Exhibit 6</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>9</td>
<td>Exhibit 7</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>10</td>
<td>Exhibit 8</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>11</td>
<td>Exhibit 9</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>12</td>
<td>Exhibit 10</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>13</td>
<td>Exhibit 11</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>14</td>
<td>Exhibit 12</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>15</td>
<td>Exhibit 13</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>16</td>
<td>Exhibit 14</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>17</td>
<td>Exhibit 15</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>18</td>
<td>Exhibit 16</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>19</td>
<td>Exhibit 17</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>20</td>
<td>Exhibit 18</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>21</td>
<td>Exhibit 19</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>22</td>
<td>Exhibit 20</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>23</td>
<td>Exhibit 21</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>24</td>
<td>Exhibit 22</td>
<td>–</td>
<td>234</td>
</tr>
<tr>
<td>25</td>
<td>Exhibit 23</td>
<td>395</td>
<td>–</td>
</tr>
<tr>
<td></td>
<td>Exhibit 24</td>
<td>513</td>
<td>562</td>
</tr>
<tr>
<td></td>
<td>Exhibit 25</td>
<td>570</td>
<td>602</td>
</tr>
</tbody>
</table>

©Ace-Merit, LLC  (513)241-3200
30 Garfield Place, Suite 620  Cincinnati, OH 45202
JUDGE CLIFTON: Please come to order. We're a couple of minutes late. Let's go on record.

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

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

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

The decision at the end of all of the rulemaking procedure will be that of the Secretary of the United States Department of Agriculture, and the Secretary, of course, will be assisted in the decision-writing process by
people within the Department.

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

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

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

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

Exhibit 5 through 20 are admitted into evidence.

MR. STEVENS: Thank you, your Honor.

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

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

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

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

So when I call your name, I want you to
come forward, and also counsel, if you have
counsel with you that will be assisting you in
the questioning and answering. Howard Hatch,
Ted Dunajski. That's Ted Dunajski, I
mispronounced Ted. Dennis Tonak, Mike Asbury.
I don't know how to say this name, but it's Leon
Berthiaume.

    MR. BERTHIAUME: Berthiaume.

    JUDGE CLIFTON: Berthiaume, thank you.

Jim Buelow. Okay, and counsel with. All right.
Let's have Mr. Hatch. Would you and your
counsel go to the podium, please? I'd like
counsel to introduce himself fully, including
who he represents, where he's from, how to spell
his name and the like.

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

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

    MR. TENSEN: Correct.

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

    MR. HATCH: Howard Hatch, H-o-w-a-r-d,
H-a-t-c-h.

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

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

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

MR. TENSEN: Mr. Hatch is --

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

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

JUDGE CLIFTON: Good. Thank you.

MR. TENSEN: Thank you, your Honor.

JUDGE CLIFTON: All right. Next somebody
who is with counsel who would like to testify early on today. Mr. Beshore?

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

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

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

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

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

MR. BESHORE: They are.

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

MR. TONAK: My name is Dennis Tonak.

MR. ASBURY: I'm Mike Asbury, M-i-k-e,
JUDGE CLIFTON: Mr. Beshore, on behalf of Messrs. Tonak and Asbury, how soon would they like to testify today?

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

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

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

JUDGE CLIFTON: Thank you. Mr. English.

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

JUDGE CLIFTON: And how do you spell his name?
MR. ENGLISH: B-u-e-l-o-w. We mentioned him yesterday. I wanted to notify you that. I can let Dr. Yonkers speak for him. It's my understanding he is here generally throughout the hearing and is flexible, but when he testifies, while it would be ideal, I think, Dr. Cryan and Dr. Yonkers go, it's not necessary, and therefore Dr. Yonkers is conceivably available should an opening occur at another time.

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

MR. ENGLISH: Steuben Foods.

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

MR. ENGLISH: B as in boy.

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

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

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

MR. ENGLISH: I don't think he's here. I
I think he got here much later than expected last evening, so I think he is not here.

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

MR. DUNAJSKI: Ted Dunajski.

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

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

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

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

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

MR. DUNAJSKI: Okay. Thank you.

JUDGE CLIFTON: Thank you. And who else?

MR. YONKERS: Your Honor, Robert Yonkers on behalf of the International Dairy Foods Association. We co-petitioned with National Milk for Proposals 1 and 2 that led to this hearing notice. While my organization would like my testimony to go in right after Dr. Cryan's, and I have streamlined my testimony
considerably not to duplicate a lot of the arguments that Dr. Cryan makes. So it's much shorter than his. I would prefer to go on today, but as Mr. English mentioned, I am going to be here this week and next week and have a flexible schedule. But my testimony is in the back of the room this morning.

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

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

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

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

So Mr. Hatch and counsel, if you'd come forward, please? And Mr. Hatch, there is a little step on the far side of the platform. So you can get up to the witness stand that way. Please be seated and pour yourself some water,
if you'd like, and get comfortable. And then we'll begin. You're already comfortable. Good. Now, I do need you to pull the microphone just as close to your mouth as mine is to mine. Good.

All right. Counsel, you may begin.

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

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

(The witness was sworn.)

JUDGE CLIFTON: Thank you. Thank you very much.

HOWARD HATCH

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

DIRECT EXAMINATION

BY MR. TENSEN:

Q. Good morning, Howard.

A. Good morning.

Q. Howard, where did you grow up?
A. Grew up in a small town in northern New Hampshire.

Q. And what year did you start milking cows?

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

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

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

Q. Yeah.

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

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

A. Kind of, yeah.

Q. Milk from your own cows?

A. Yeah.

Q. And what high school did you graduate
from?

A. Lisbon High School.

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

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

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

A. Yes.

Q. And was that in agriculture?

A. Yes.

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

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

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

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

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

A. Just kept going. And President Johnson sent his greetings and I was sent to basic training to be a demolition specialist and sent to Vietnam for a
Q. Okay. So you were a teenager, you were drafted?
A. Yes.
Q. Did you want to go over to Vietnam?
A. No, I really didn't want to go. But I don't argue. I went, I served my time and I'm proud I did it.
Q. Okay. And you were in the field quite a bit in Vietnam?
A. Yeah, time went faster when you -- I stayed busy. I was in the field from August all the way until two days before Christmas without coming in.
Q. Okay. Now, I know you had brought a picture, if anybody cares to see it, of when you were in Vietnam. Yeah, both of those are in that picture. What did you have painted on that bulldozer?
JUDGE CLIFTON: The witness is tendering to me a photograph that's contained in the Valley News dated Friday, August 11th, 1989.
A. That was after the war. But it was the first -- the first time that I put my uniform back on.
Q. That was 20 years after the war, you left Vietnam?
A. Yeah, 22 years. We weren't really
accepted well when we came home. The issue with this picture was someone has always been fiddling with us, telling us what we can do and can't do. On the side of the dozer I had New Hampshire, in little letters, New Hampshire. Somebody would go by and they'd know where you came from. I was told to take it off because it was politically incorrect.

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

A. Yeah.

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

A. Yeah.

Q. Suffice to say you went through a lot?

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

I had issues to deal with since I came back. And to cope with those, I put a hundred percent into my farming. I don't actually have a savings account. When I got back, I started milking six cows by hand. I had enough money to buy six old scrub cows,
milked them by hand and shipped the milk in a neighbor's tank. Always had to stay busy. If I could stay busy, the issue of Vietnam didn't -- didn't really bother me.

Q. Did you need to work to the point of exhaustion to sleep?
A. I did it each day. Each day, each week, each season, from a hundred in a morning to zero at night, and I could sleep and I didn't have to deal with flashbacks, whatever, action. And farming, I haven't had to have much therapy or anything, that was my therapy.

Q. The farming was your therapy?
A. Yes.

Q. And you have a service -- I know you don't like to talk about it, but you have a pretty significant service disability?
A. Mainly PS -- PTSD. I spend most of my nights sleeping in a chair now on account of issues with Agent Orange.

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

Q. And up to that point, you had worked for others and you started milking your own cows at that
time when you came back?
   A. Well, I bought six old scrub cows.
   Q. And did you continue to milk cows through the years?
   A. Yes.
   Q. And building the farm up?
   A. Yes, I rented a farm and got up to milking 22 cows. Bought another farm in '71 with an additional 39 cows and some old Farmalls and stuff on it, back in a town that I wanted to farm in, where my father was born, in Haverhill, New Hampshire.
   Q. Is that where your operation is today?
   A. Yes.
   Q. And when did you -- did there come a time you started bottling your own milk?
   A. Yeah, it came about 20 more years later, when I shipped milk to a -- never shipped milk too much to co-ops, I'm kind of an independent-type person. But I shipped out milk for about 20 years, what I felt a quality product. And I never got paid what I figured it was worth. I always had to do supplemental work to keep the farming going. I either did custom work, or for 20 years we had a sawdust business, hauling bedding for other farmers to -- starting with nothing and wanting things faster.
And I carried quite -- my debt was pretty heavy. You have heavy debt to pay the bills, you do what it takes to keep going.

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

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

A. Yes.

Q. What year did you start bottling milk?

A. We started bottling milk in 1992.

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

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

Q. And did you -- what happened over the years with your -- where were you marketing your route to begin?
A. I was marketing around home and around the northern part of the state. And when you don't plan ahead, you got 100 cows in a -- in an area where the population is not very large, a hundred cows goes a long way, if you try to sell it and compete with other milk dealers, milk handlers, and go into a small store and there's already two other -- two other dealers in there and you have to guarantee sales. It was -- it was pretty rough.

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

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

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

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

Q. Uh-huh. And most of that glass bottle is
home delivered in the Boston area?

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

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

A. Yes.

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

A. No.

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

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

The only advertising we do is the promotion that we're required to do. And that business has grown from what I feel is taking the product all the way from the feed, the cows, to processing, to delivery. We can offer something different that other people can't.
Q. You still -- you talked about quality earlier. Do you still strive to produce high --
A. If it wouldn't go in my glass on the table, it won't go in a bulk tank.
Q. How many people do you employ today?
A. Today, we employ 23 people.
Q. And you say we. You have family members that farm with you?
A. Well, I have a son and his stepson. My daughter does the office. Wife's involved. And I have a brother that's -- a brother that's worked for me since I got out of the service; been 41 years he's been with me.

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

Q. How much milk do you ship a month right now?
A. Between 750 and 800,000.
Q. And would you be put out of business if this proposal --
A. If the 3 million proposal doesn't succeed, or something higher than what I'm producing,
and it went to an exempt plant of 450, it wouldn't work for us.

Q. Okay. And basically put your processing plants, if not dairy, right out of business?
A. We built a new -- a new processing plant in 2004 and it is not paid for yet.

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

Q. And you can't compete with the co-ops under volume or anything on their price structure?
A. No. One of the things that kind of bothers me is in a producer-handler, pretty much balanced myself. We've gone whole years before and balanced. We have run short of milk before and had to buy milk, and right now we have some extra milk.

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

Q. So you balance out your milk right now with DFA?
A. Yes. And that's one of the things you read in the papers, and the backers of this proposal to
limit us. The ones who balance me are the ones that
want to put me out of business. I talked to their
members. There are four co-ops in New England,
Agri-Mark, St. Albans, Dairylea and DFA.

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

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

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

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

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

Q. All right. And what would you like to
see -- would you like to see the rules change at all,
first of all?
A. Looking out for just myself, I'd like to see a cap put high enough so that I don't reach it.

Q. And what would you propose for a cap?

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

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

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

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

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

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

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

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

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

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

Q. Your -- I mean, you're not competitive on
the price. I mean, your price is higher and your cost
is higher than the milk that is sold by the larger co-ops in your area?

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

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

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

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

    A. We'd get by okay. I don't have -- I don't know if I stated it correctly. I really don't have a savings account. Everything I have is there. But the one thing I can say today, I haven't lost a penny on Wall Street in investing.

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

    A. Pretty much.

    Q. But you would like to -- if the rule is going to change, a monthly exemption of 3 million pounds will allow you to continue to operate?
A. It would us, yes.

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

A. Yeah.

Q. What happens if the rules are changed here?

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

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

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

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

Q. There -- is there anything else you would
like to add about -- about the proposed rules or other
comments you want to make?

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

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

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

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

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

   A. In the Army bus, I guess, going in the
service.
MR. TENSEN: Thank you, Mr. Hatch.

JUDGE CLIFTON: Thank you, Mr. Tensen.

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

MR. TENSEN: Thank you.

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

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

CROSS-EXAMINATION

BY MR. BROSCH:

Q. Good morning, Mr. Hatch.
A. Good morning.

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

Mr. Hatch, you've talked about being opposed to the proposal. I wasn't clear from your
testimony which proposal you're talking about. Could you explain to me?

A. The original Proposals of 1 and 2.

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

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

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

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

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

A. I have not read the proposal.

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

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

Q. Well, I'm not sure -- I'm here to ask
questions, sir. I'm not sure I'm privileged enough to answer questions.

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

Q. It will grandfather the people who exist.

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

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

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

Q. Let me ask you personally about your business.

A. Yes.

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

A. Right.

Q. And you were going to let other people look out for themselves. For your business, do you ever expect -- I think your testimony is you don't expect your family to ever reach the 3 million pound cap?
A. No.

MR. BROSCH: Thank you.

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

CROSS-EXAMINATION

BY MR. CARROLL:

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

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

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

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

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

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

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

Q. Yes.

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

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

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

Q. All right. Directing your attention to how you do business again, would you tell us again what your distribution is? You bottle for other people. Is
that what you're saying?

A. Yes.

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

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

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

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

A. If we're limited from doing that, again, there's not room for us. Customer base in Northern New England is not there. We'd have to -- we'd be directly
competing for the market space and cutting the price to
do it.

Q. All right. Now, in the event of your
decease, do you wish to have your family continue that
business as their livelihood?
A. Very much so.

Q. Is that an important consideration for
you?
A. That's what I've worked my life to have,
a complete operation. Not just raising the feed or
raising the feed and milking the cow or distribution
system, but we nearly -- nearly have it put together
where we are almost complete -- where we're responsible
all the way from grass to the kitchen table.

Q. Are you aware of any position taken by
the New Hampshire Agriculture Commissioner or the Office
on this -- on these proposals?
A. Yes. I was -- I've been following what
they wanted -- wanted to do. And then in -- I think it
was last Thursday or Friday, my commissioner called me
and said they'd changed their position from 3 million
pounds to 2 million pounds, to keep the Wisconsin people
on their -- their coalition or their gathering. There's
New Hampshire, Vermont, New York, Pennsylvania and
Wisconsin. Wisconsin is the only one, I think, out of
the Federal Order.

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

A. To my understanding --

MR. BROSCH: Objection. Objection.

Excuse me, sir.

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

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

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

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

JUDGE CLIFTON: Thank you.

BY MR. CARROLL:

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

MR. BROSCH: Same objection, your Honor.
JUDGE CLIFTON: You are talking about the phone call that he had with that commissioner?

MR. CARROLL: Yes.

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

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

Q. That's all right, I understand that.

If -- if you were -- if your operation was fully pooled, could you make the payments from the profits of your business?

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

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

JUDGE CLIFTON: Thank you, Mr. Carroll.

Other cross-examination? Mr. Vetne.

CROSS-EXAMINATION

BY MR. VENTE:

Q. Good morning, Mr. Hatch.

A. Good morning.

Q. It's nice to not be the only person from New Hampshire at one of these hearings.
I want to ask you a little bit about -- a little bit more about your operation. You said you had 23 people working for you. How are those people divided between working in the plants and working on the farm?

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

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

A. Plus, plus.


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

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

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

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

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

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

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

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

A. Yes.

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

A. Yeah.
Q. Do you have a board of directors, management committee, or is that your family, kitchen table kind of thing?
A. A little bit more than that. We have management meetings.
Q. And the managers are -- are part -- are your family?
A. Yes.
Q. You mentioned that you have grown, and I think I understood you to say that you have some expectation and hope of growing a bit in the future?
A. Well, we've only grown to fulfill orders. It isn't like I -- I don't want to be listed as a dog chasing his tail, but yes we have -- we have goals. We're getting -- we're getting near our goals, we'd say.
Q. When you indicated that you invested in a new processing plant in 2004 --
A. Yes.
Q. -- is that correct? What is the bottling capacity of the equipment that you purchased and installed in 2004?
A. Almost all of our equipment is used equipment. Bottle washers are 1964 vintage, the vintages, up through the vats. We do vat pasteurization which is not very efficient, but it's a whole different
product you're putting out.

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

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

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

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

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

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

But as far as my cost of operation compared to someone else's, that's their business. I just worry about my own.
Q. Okay. So you don't have information from others to compare to your own?
A. No.

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

Q. Could you identify some categories of investment?
A. I don't know how much you want me to get into it.

Q. I'm looking for categories, not line items.
A. Categories? We're a great recycler, things that I've done. We live right next to the county's farm and they were going to demolish two houses. I bought one for a dollar and quarter and I bought one for a dollar. We moved them there. One is our office, one is for the help.

Our saw mill in the next village sold out. We bought five of the -- five of the steel buildings and reconstructed them for feed barns. And we just put up a 186 x 110 foot -- it was a saw mill building, but it's the first machinery storage that I've
had. But you won't see many new tractors on my farm. Most of them are green, but they're older vintage. I --

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

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

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

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

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

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

A. I can't answer that.

Q. What season, what year, what quarter?

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

Q. Okay. Is there a reference you can give us in relation to the Federal Class I price and the
premium charged to you when you need supplemental milk?
A. We pay Class 1 price.
Q. Plus?
A. Plus handing fees, plus butterfat, plus protein, plus -- it goes on and on. But each time it changes a little bit. We were paying Class III up to June last year -- Class IV, excuse me.
Q. You were paid --
A. Yes.
Q. -- when you had surplus milk?
A. Yes.
Q. And then what happened?
A. Well, things disappeared. All of a sudden, I wasn't paying anything for butterfat. We had a 4:3 test and a 3:3 protein and I was just getting Class III price. I had to kind of go back and renegotiate with them to get my -- get that back. But I shouldn't be hammering on them too hard. It's pretty hard to get balanced in -- in northern New England.
    There are very few milk trucks that go down the road now. Most of the milk goes on one truck that comes down through. And if I didn't have them, I'd be really up a creek.
Q. Okay. Do you know whether the premiums charged to when you need supplemental milk are
comparable to premiums charged to the major processors when they need supplemental milk? Do you have any reference for that?

A. I don't.

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

A. No, I don't.

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

A. Yes.

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

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

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

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

Q. Okay. And do you know what the pallet price is compared to the truckload or -- or -- or railroad car full that your competitors might receive?
A. No, we buy it through a grocery -- a restaurant supply.

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

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

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

A. We don't handle those large volumes.

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

A. Yes.

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

JUDGE CLIFTON: Now, I'm not getting his
answer audibly. I know he said no, but I'm not sure the no shows in the typewritten form. So could we just back up? Go ahead and ask that question about the blow mold.

Q. Do you have your own blow mold?
A. No.

Q. Do you buy your plastic bottles preblown by somebody else?
A. Yes.

Q. And from whom do you acquire those preblown plastic bottles?
A. In the past, we bought from Sheldon Plastics. Right now we buy from Quality.

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

Q. Okay. And there -- can you relate a price per unit or per bottle, per other unit?
A. We're running close to 40 cents on a gallon. If you include the gallon, the cap, the label, we run pretty close to 40 cents. Now, I -- those can -- we did have a reduction of resin costs. Exactly today it may vary from that sum.

But we pay an extra cent and a quarter. Because we bottle to different people, we have to
warehouse. We don't have our own labeling equipment in our dairy, so we have quite -- quite a warehouse of labeled -- every size has to be labeled for someone else.

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

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

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

Q. Based on your estimate of your -- of your labeled milk demands?
A. Yes.

Q. The glass bottles that you talked about, you don't have labeling. Are those already prelabeled?
A. Some of them have the company name printed on them, on the cap. It gives the information that's required, plant -- plant number, where it's bottled, the company it's bottled for, what the product is, whether it's Grade A product and any additives that have to be added.
Q. Okay. And did you make your own caps or do you order those made by somebody else also?

A. They're ordered.

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

A. Yes.

Q. And shipped to you?

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.

Q. Okay. And what would that do to your business, in your estimation?
A. I haven't fully fathomed what that might do.

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

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

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

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

Q. And they're all in plastic?

A. Yes.

Q. What is a squat quart?

A. In our situation, tall skinny quarts are tippy. In our bottling operation -- and older people -- the squat quarts are the same footprint as a half gallon. And since we started using them, our sales of those has increased. Older people handling them, they
don't tip over and they're handy to handle. And in

delis, people with bigger appetites drink a quart rather
than a pint.

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

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

Q. Because?

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

Q. Are the schools all bid milk?

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

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

A. Yes.

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

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

either.

Q. And you're saying that their bid prices
for chocolate milk is 15, correct?

A. Yes.

Q. And you can't do that?

A. (Shaking head.)

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

A. Right.

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

A. Yes.

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

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

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

A. Yeah, there's been something brewing within me for quite a while that I wanted to be heard.
Probably this is a vacation for me. Pretty nice room.

Q. All right. Get out and see the town?
A. Yeah. We went and had supper last night.
Q. Did you go to Mike Finke's?
A. (Shaking head.)
Q. King of the River guy?
A. No.
Q. No. Okay.

MR. VETNE: Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Other cross-examination? Mr. Miltner.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Ryan Miltner. Good morning, Mr. Hatch.
A. Good morning.
Q. You said earlier that in all the time you've been dealing with cows, nothing has really changed since the 1950s. Can you elaborate?

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

MR. MILTNER: Sure.

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

THE WITNESS: What I meant was the
marketing of milk, not -- not the way cows are milked.

BY MR. MILTNER:

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

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

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

The cream went onto a railroad car to go to Boston. If you looked in the river down below, the skim milk used to go right straight into the river and the falls going over was white. I mean, things have changed.
Low fat and -- low fat and skim milk are some of our biggest sales, and the river is a lot cleaner now. But towards the end of that process, they thought they would try to generate some income, and they tried selling skim milk by the jug at 25 cents a jug to feed your pig. Couldn't seem to generate much. That's a pretty good value now.

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

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

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

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

Q. But generally farms are larger now --

A. (Nodding head.)

Q. -- than they were?

A. Yes.

Q. How about the number of outlets for farmers to sell their milk in New Hampshire, are there more or fewer or about the same?
A. Many -- it's much, much more narrowed now than it used to be.

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

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

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

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

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

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

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

Q. Okay. Two on the same truck?

A. (Nodding head.)

Q. The third outlet -- all cooperatives?

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

Q. And how far away from your farm is the
Hood plant?
   A. I think it'd picking up out of Hood Brothers. It's around 38 miles.

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

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

   Q. Exclusively?
   A. Yes. Oh, grains we supplement. The grain is supplement. We do not -- we pay only corn and soybean meal.

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

   Q. For your -- for your cows. Did you own all the ground that you raise crops on or do you rent ground from other people, a combination of those two?
   A. Combination of the two.
Q. In March you said your cost of production was $21. Is that still about the same today?

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

Q. That's cash out?

A. Yes.

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

A. No.

Q. -- your debt service?

A. No.

Q. Okay.

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

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

A. From my farm?

Q. Uh-huh, yes.
A. Why wouldn't it be the cost of production?

Q. Say that again.

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

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

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

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

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

Q. And you pay them for that service?

A. Yes.

Q. And when you have surplus milk, they pay
you a negotiated price for that milk, which is as you

described earlier?

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

    Q.     And they -- and they pay --

    A.     The check's been good.

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

    A.     No.

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

    A.     No.

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

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

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

    A.     It affects the bottom line.
Q. It's all one operation?
A. Yes. It has to be.
Q. And it's all one -- yeah. It has to be one operation, and at the end of the quarter on the year, you look at one profit or loss figure, correct?
A. Yeah, we look at them a lot more often than that.
Q. You said a minute ago that you make certain guarantees to your customers --
A. Yeah.
Q. -- about the milk you supply them. Do your customers find a value in getting milk from a single farm source?
A. This is -- this is a whole avenue that could be addressed. The part that's really working for dairy farmers in our location is going back to local. A while ago it was organic. Now it's -- now it's local. And a little bit of a different avenue to follow, there's a lot of milk being sold from the farms raw or at good prices that are not affected by that Order at all.
Q. And, actually looking at the letterhead on what you submitted to USDA, you've got -- you've got a logo at the top, and I apologize, the name of the statue or the rock formation?
A. That's the Old Man of the Mountain, but he's not there anymore. He fell down.

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

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

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

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

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

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

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

A. Not to my knowledge.

Q. Okay.

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

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

Mr. Ricciardi.

MR. RICCIARDI: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. RICCARDI:

Q. Good morning, Mr. Hatch.

A. Good morning.

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

A. Okay.

Q. Good deal.
A. I'll -- I won't just nod my head.
Q. Give me the best --
A. It'll be on the record.
Q. Okay. All right. A few things. You said that you had, in the past, bid for some school milk. Did I hear that correctly?
A. Yes.
Q. Okay. And you don't do that any longer because you could not compete on the price for that milk, correct?
A. Yes.
Q. Okay. Now, do you know who actually got the school milk bid that you had bid on before?
A. Yes. It's been -- it hasn't stayed the same. But it's been a couple of different companies.
Q. Okay. And those companies were not producer-handlers?
A. Right.
Q. They were part of the regulated community?
A. Yes.
Q. And you were not able to compete with them on price on those particular bids?
A. Right. They -- are you familiar with supplying school milk?
Q. I am.
A. They always call an hour before lunch and they're out of milk, you make special trips. And the
day before vacation, there's a snow day. They have all
that extra milk, they don't want to pay for it. You go
pick it up. But we did have schools. We did have
schools that -- I'll give you a price. When they were
charging 14 to 16 cents for milk and chocolate milk, we
were charging 25 and 30. And we had -- we had
schools -- our costs of the container, we're about ten
years ahead of a number of other milk companies about
getting out of cardboard and into plastic containers in
the schools. And the children accepted them.

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

Q. And because of the fact that your milk is
quality milk, single source milk, right?
A. Yeah. I'll answer that question. I'll
speak for mine. I don't want to speak for anyone else's
milk.
Q. All right. And I am speaking for yours.
A. Okay.

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

Q. And throughout that period of time you have continuously been a producer-handler?
A. No. I was pooled -- I was pooled one month and that was selling too much milk, more than 50 percent of my milk, before the Order was changed, was in the Order and I was outside the Order.

Q. Okay.

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

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

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

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

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

A. That cost to purchase milk?

Q. The cost to purchase milk or the --

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

Q. But the -- the balancing cost, the decision that you have to make if you need milk, you have to decide whether you can purchase it. On the
flip, when you've got too much milk, you have the issue
about how you get rid of it, right?
    A.    Yes.
    Q.    Okay. And that's a cost that you have to
deal with? You don't put that off to anyone else.
    A.    Right.
    Q.    I've got a copy of the March 5, 2009
letter that was sent by Hatchland Farm, LLC to Dana
Coale, the Deputy Administrator at AMS for Dairy
Programs. It was signed by you, Kendra Hatch, Preston
Hatch and Kristin May. Can you tell me who Kendra
Hatch, Preston Hatch and Kristin May are?
    A.    Kendra is my wife. Preston is my son.
Kristin is my daughter.
    Q.    Thanks. All of the members of your
family signed on to this response to the Department,
correct?
    A.    Just my brother, his wife, they didn't.
I mean, they're not part of the LLC and the ownership
of --
    Q.    I understand. And let me -- let me make
sure. You testified a lot and I don't want to have you
stay up there any more time than you need to. I just
want to confirm some things.
    In the letter you state -- make sure I
read it right. Remember, I'm from UVM. We don't think that there is a disorderly marketing condition in Federal Marketing Order Number 1 caused by producer-handlers. That is your belief on March 5th. That's your testimony today?

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

Q. Okay.

A. My belief.

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

A. I'll stand by it.

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

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

Q. I'm not going to shoot you. All right.
I've got one more thing. I think you were asked a question by National Milk that basically said, look, you're here to take care of yourself, not here to take care of someone else.

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

A. Yeah.

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

A. You said it pretty well.

Q. Thank you.

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

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

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

There were two hands up wanting to cross-examine
Mr. Hatch. I'd like now to call on the gentleman who is seated behind Mr. Vetne.

Mr. Vetne has a light blue shirt.

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

JUDGE CLIFTON: How is Chaplain spelled?

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

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

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

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

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

And I dissolved that company, but I told Ted I wouldn't abandon him because -- so I started -- you know, continued to do his electrical maintenance. And then he said, would you like to do a little work around the farm?
So I've been spreading manure in the fields. So his daughter asked me if I'd come out here with him today, just to fly out and back with him, so he'd have a companion, and I agreed to. And I intended to just sit here and listen.

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

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

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

When we came back, a lot of people weren't -- we weren't celebrated when we came back. But as myself, I went to work and he went to work. And he developed a farm. And I
believe we have -- we have people -- we have
guys in Iraq and Afghanistan, and I'm sure
there's going to be other conflicts throughout
the next umpteen years.

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

CROSS-EXAMINATION

BY MR. CHAPLAIN:

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

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

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

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

A. Yes.

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

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

MR. CHAPLIN: P-e-a-b-o-d-y.

JUDGE CLIFTON: Thank you. Mr. Carroll?

MR. CARROLL: I believe the witness

nodded his head. I didn't hear -- I just want
to be sure they heard a spoken answer.

JUDGE CLIFTON: I heard a spoken answer.

MR. CARROLL: Okay.

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

Mr. Vetne, you had your hand up as well.

MR. VENTE: Okay.

RE CROSS-EXAMINATION

BY MR. VENTE:
Q. I count five follow-up questions here.

Mr. Hatch, I learned something new in the cross-examination. Prior to Federal Order Reform, Hatchland Dairies was a partially regulated plant, is that correct?

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

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

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

Q. Okay.

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

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

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

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

A. I became pooled one month because I went
part of 1 percent over the 50 percent.

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

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

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

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

Q. So you have a little extra surplus now?

A. Yes.

Q. And is one of the ways that you deal with surplus production from your head -- from your herd is to change some of your feeding practices, for example, use grazing rather than purchased protein?
A. What is stored on the farm, anything we don't have to purchase.

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

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

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

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

A. Zero.

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

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

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

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

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

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

Q. Ballpark?

A. Yes.

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

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

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

A. Yes.

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

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

Q. You have some revenue for -- for calves that you sell either for other farms' livestock grazing or for veal or whatever, correct?
   A. (Nodding head.)

JUDGE CLIFTON: That answer was yes.

Q. The answer was yes, I'm sorry. And do you also sell hay or other crops of the grounds to other farms in your area?
   A. We have -- we have sold some hay, limited amounts on silage. I know what my silage values are and I set them high.

Q. Okay. Are there any other products or services of your farm for which you receive revenue, that -- products that are included in the $21, the costs that you assigned to milk that were $21?
   A. No.

Q. Okay. We listed all of them?
   A. Yes. I just -- when you asked if we handle any other products, we have a little farm store. And we have a neighbor that goes to near Lancaster, Pennsylvania and he brings back some Amish meat, butter and bacon ends and pieces. And we -- when you asked me,
I'd forgotten. We -- that's not produced on our farm but we do. And we have three neighbors that bring in free range eggs.

Q. Okay. So the --
A. So the income goes to three things. That's not income --

Q. Okay. When you --
A. -- produced on the farm.

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

A. Yes.

Q. Okay. Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne. Does that conclude the -- ah, government table. Mr. Yale. I'm sorry. Everyone wants to come to the podium.

CROSS-EXAMINATION

BY MR. YALE:

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

AUDIENCE MEMBER: We won't have to
Q. Good morning.
A. Good morning.

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

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

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

Q. You don't look at it?
A. No.

Q. So that's not a factor at all in your pricing?
A. (Shaking head.)

Q. You look to cover your costs?
A. I look to cover my costs. What governs me on change of price -- most usually our price stays the same year round unless our distributors say we're getting -- we're being undersold, can you bring it down a little bit. I'll bring it down. But sometimes they don't.
Q. And you --
A. I'm in the wrong end. As I spoke before, I need to be in the retail delivery trucks that they drive around in supplying everything. But the most profit is on my milk.

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

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

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

A. Yes.

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

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

Q. Right. And you sell it in your name, not in --
A. Yes.

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

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

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

A. Short time pass, which --

Q. As opposed to your vat pasteurization.

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

Q. But to meet that 3 million, you don't have enough milk production on your farm to produce 3 million pounds?
A. No.

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

A. Yes.

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

A. Not right now.

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

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

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

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

Q. I want to change the subject and go to something else.
You testified, I think, also that you got some help from the Department and the Market Administrator's office in putting the proposal together. And there was a comment made that you heard in January and you heard that it was a done deal, that this cap of 450,000 or --

A. Yes.

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

A. The lawyer standing behind you that told me.

Q. Standing behind me?

A. Mr. Ben Carroll.

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

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

Q. You have computed the economic impact of being regulated on your operation?
A. An average, I computed 50 cents a gallon. It'd be between 45 and 50 thousand per month. I calculated 25 cents. There are figures that -- I could probably struggle through one month in pool, but not 12 months in a row. Probably the second month, I'd be borrowing money.

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

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

Q. Pardon?

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

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

A. That's correct.

Q. Now, I want to go to another -- just another topic you talked about. I was confused as to what your testimony was, but I may have been trying to multitask on something at the time. You were talking
about 40 cents a unit or 40 cents. Is that just for the packaging?

A. We run between 5 and 40 cents.

Q. Just for the packaging?

A. Yes.

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

A. No.

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

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

Are you aware of any producers in your area that went out of business? And here's the key part, because I know the answer is yes. Thousands have. But any producer-distributor that went out of business as a result of you being a producer-handler. Are you aware of any?
A. None.

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

A. In how large an area?

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

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

Q. Okay. And how big was that handler?

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

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

A. Yes.

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

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

A. Right.

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

A. Yes.

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

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

A. Everything that I've heard has been
hearsay.

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

A. Yes.

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

A. Right on. Yes.

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

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

JUDGE CLIFTON: The first one is: Mr. Hatch, are you the proponent of Proposal Number 3? And I'll allow some coaching from
your counsel, because he may know the number and you may not know the number.

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

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

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

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

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

And there aren't many milk companies that
can say that. When you have comingled milk and you have a number of producers, you got super producers, poor quality producers, and they're all mixed in the same tank. I could go on and on. And I guess the best way to explain it would be to put a glass in front of you and have you taste it.

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

THE WITNESS: Of course it does.

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

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

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

THE WITNESS: Well, it would be an
estimate. Somewhere in the vicinity of 40 to 45 percent.

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

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

JUDGE CLIFTON: You may proceed.

CROSS-EXAMINATION

BY MR. TOSI:

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

A. It's been a pleasure so far.

Q. I know that the hearing is just getting started and we haven't had the benefit of having all of the proposals presented, but there is one proposal that I thought you might have an opinion on. It's noticed as Proposal 24 and it deals with -- that would provide a regulatory exemption for producer-handlers when they're marketing their own milk through their own retail outlets, for example, through their own stores or -- and included in that would be things that have to do with home delivery.
And I take it from the -- from that proposal that -- that it would not provide for a producer-handler to engage in a business practice like I understand your testimony to be, that you sold your milk to a -- a distributor who, in turn, distributes it -- they're buying milk from you and then distributing it home deliveries, right?

A. Yes.

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


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

JUDGE CLIFTON: Mr. Vetne.

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

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

MR.MR. VENTE: It's on page 308, your
Honor.

JUDGE CLIFTON: Thank you.

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

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

THE WITNESS: Well, thank you.

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

(Off the record.)

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

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

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

Q. I think the way that the Department currently understands this proposal, and we haven't had the benefit of its presentation yet at this hearing, but at first read, I think what the proposal is saying, I
imagine that someone is currently a producer-handler and they sell their milk -- they sell all their milk in their own stores, they have their own retail outlet, if you will, that are selling to the public.

A. Yes.

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

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

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

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

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

Q. Right. I guess one of the things that -- I thought it was important to ask you some of this is because that to the extent that you're a producer-handler, and if the Department were to adopt
this proposal, for example, that because you don't have
total control over any of your milk that's home
delivered, whether that would disqualify you from being
considered a producer-handler under that future Order,
that would state that this would be a -- a requirement
for producer-handlers to meet?

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

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

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

Q. And what would be the problems. How would you characterize those problems?

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

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

MR. TOSI: Okay. Those are all the questions that I have. I would like to say that
I really appreciate the service that you have given to your country.

    THE WITNESS: Thank you.

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

    THE WITNESS: You're welcome.

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

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

    JUDGE CLIFTON: (Nodding head.)

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

    JUDGE CLIFTON: Yes. In other words, you'd be giving up the customers that are already the customers of those three distribution --
(Off the record.)

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

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

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

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

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

RECROSS-EXAMINATION

BY MR. TOSI:

Q. If the Department were to adopt your proposal, is there then a need to make any changes to
the exempt plant provision?
   A. From where it is now?
   Q. For example, right now it's at
   150,000 pounds per month. Is there a need to make that
   number larger, for example?
   A. Speaking for -- speaking for myself, I
don't see the need for it being enlarged. But, again,
speaking for someone else, Mr. Rasmussen could answer
that more clearly than I whether the need for regulation
is there for the -- for an increase in that. I don't
know.

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

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

    MR. TENSEN: Thank you, your Honor.

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

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

    JUDGE CLIFTON: You may redirect.

    REDIRECT EXAMINATION
BY MR. TENSEN:

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

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

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

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

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

A. Yes.

Q. And that repackaging is under these
different labels, it's something -- the right to do that, when you built this whole business up and built this new plant in 2004, that was all part of what you relied on in the rules, that you would continue to have that right, so to speak, going forward to repackage and sell this milk as you've been doing for years?

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

Q. Relabeling.

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

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

A. Yes, it is.

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

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

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

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

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

A. Yes.

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

A. Yes.

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

A. Yes.

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

A. Yes.
MR. TENSEN: Thank you very much, Mr. Hatch.

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

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

JUDGE CLIFTON: You're welcome.

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

JUDGE CLIFTON: Oh, Mr. Carroll. Yes.

RECROSS-EXAMINATION

BY MR. CARROLL:

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

A. That they can't sell to stores?

Q. Stores or restaurants.

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

MR. CARROLL: Thank you.

JUDGE CLIFTON: Thank you, Mr. Carroll.

Now you may step down, Mr. Hatch.

THE WITNESS: Thank you.
JUDGE CLIFTON: And, Mr. Dunajski, would you come forward to testify?

MR. TENSEN: Your Honor?

JUDGE CLIFTON: Yes.

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

JUDGE CLIFTON: Excellent.

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

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

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

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

MR. TENSEN: Correct, your Honor.

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

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

JUDGE CLIFTON: No, you might as well
give it all.


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

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

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

(The witness was sworn.)

JUDGE CLIFTON: Thank you. You may proceed counsel.

MR. TENSEN: Thank you again, your Honor.

THEODORE J. DUNAJSKI, JR. of lawful age, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TENSEN:

Q. Ted -- is it all right if I call you Ted?
A. Please do.

Q. It's much easier for everybody.
A. Yes.

Q. Ted, we met in person for the first time today in this room?
A. Yes.
Q. And I believe we were both driving a tractor the first time when we spoke the other day?
A. Yes.
Q. Ted, can you tell me where you're from?
A. Peabody, Massachusetts.
Q. And what business are you in in Massachusetts?
A. I'm a dairy farmer, producer-handler dairy farmer.
Q. And how long have you, yourself, been milking cows?
A. I really don't remember.
Q. You started as a little kid?
A. Soon as they'd let me go near the cows, as soon as they trusted me.
Q. And you've been milking cows your whole life?
A. Whole life.
Q. And how long has your farm in Peabody Mass. been in your family?
A. My grandparents settled there, I think somewhere between 1915 and 1920.
Q. And when -- and what's the name of your farm?
A. Dunajski Dairy Cooperative. First, it
was Frank Dunajski, Frank Dunajski & Sons. And then in 1952, it became Dunajski Dairy, Incorporated. Oh, it was Dunajski Brothers for a while. Things changed.

Q. And what label do you sell your milk under?
A. Presently it's sold under Pure Country Milk only. And on the label it also says Dunajski Dairy.

Q. And Dunajski Dairy is the owners of Pure Country?
A. Yes.

Q. And can you tell me who owns Dunajski Dairy?
A. I'm the president, and my two children are shareholders.

Q. All right. And the three of you own Dunajski Dairy together?
A. Yes.

Q. And what are the names and ages of your children?
A. My daughter's 44, and my son is 42.

Q. Do you have any grandchildren helping on your farm?
A. I have grandchildren, but my granddaughters will say they help, but actually not that...
much.

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

A. Yes.

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

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

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

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

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

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

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

Q. You produce your own milk?

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

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

A. Yeah. That's getting smaller and smaller, because 2005 we built a new cattle barn so we're milking more cows than we ever milked, mainly
because our leased farm, the manager there is getting older. He's in his 80s and we don't know what -- what the outcome of that's going to become. So we're kind of like moving our farm on. Even though it would not seem likely for Peabody to do this, we seem to be well-accepted there so we're taking advantage of that. We might produce a hundred percent of our milk.

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

A. 20 miles from Boston.

Q. And it's essentially Metro Boston --

A. Right. It's just unbelievable.

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

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

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

THE WITNESS: It's a co-op.

JUDGE CLIFTON: Oh. And did you name it?

THE WITNESS: Agrimart (sic).

JUDGE CLIFTON: Would you spell it,
please?

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

JUDGE CLIFTON: Thank you.

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

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

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

THE WITNESS: Yes.

JUDGE CLIFTON: Agri-Mark?

THE WITNESS: Agri-Mark, sorry.

JUDGE CLIFTON: Thank you.

BY MR. TENSEN:

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

A. Right at the farm.

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

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

Q. And how much milk do you sell approximately on a monthly basis?
A. We're -- we're selling, I think, like -- I think I looked at January was 347,000 pounds, which is well under the 450 proposal.

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

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

to address it.

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

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

A. Protect ourself for the future.

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

A. Whatever. Just leave the opportunities there.

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

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

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

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

A. Right.

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

A. Exactly.

Q. Do you sell in glass bottles or plastic?

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

Q. And --

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

Q. Okay. So it's all plastic?

A. All plastic.

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

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

Q. I'm sorry.

A. That's okay. And we do -- we do bring in a few products to balance out our -- to balance out, so
we can take care of our customers. Like -- like, if we have eight or four ounce milk for nursing homes, we buy that all packaged and we sell it, along with they'll take half gallons of our milk and other products. And we bring in byproducts, like cream ultrapasturized for the stores just so that we can be a full-service company.

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

Q. And do you have stores that are just dedicated to carrying Pure Country?
A. Yes, most of our stores.

Q. Small stores, I take it?
A. Yeah, mom-and-pop type stores.

Q. In kind of a long-established business relationship?
A. Yes.

Q. That probably almost in some cases carried on for generations?
A. After 19 -- I don't follow you.

Q. Oh. I mean, have these been stores that your -- your dad and your grandfather --
A. No, no.
Q. Oh.

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

Q. Okay.

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

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

A. Right.

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

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

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

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

We deliver milk to Boston, that's as far as we go. But I don't know what the future is going to be. But I don't like limits on the future.
Q. Would 3 million pounds a month give you sufficient expansion in Peabody?

A. Plenty.

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

A. Yes.

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

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

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

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

A. Quality niche.
Q. Market and product?
A. Yes.
Q. And that's what is important, is you maintain your quality niche?
A. Right.
Q. And do you see any disruption in the supply? You know, by your bottling milk, is there any disruption to the Class I price or anything of that nature in Federal Marketing Order 1?
A. No. I find the other companies disrupting me, only because I try to maintain my prices because I know what it costs to produce milk. And then when the price of milk drops, they're asking me why my milk is so expensive. And I have a hard job of explaining why the milk -- the milk is -- the price is controlled by the Federal government.

And I don't understand why they price it that way, because my costs haven't gone down, grain has gone up. My labor hasn't gone down. My products haven't gone down. So I don't know how it could be sold at that price, but I have to maintain my prices. So they're more disruptive to me than I think I am to them.

Q. Can you compete at their price levels?
A. No.
Q. And your costs of production are far
greater and will always -- you would anticipate being far greater than the large co-ops in your area?

A. Oh, yes.

Q. And, you know, all the management is supplied by your family for this operation?

A. Yes.

Q. Would you rather see -- would your preference be that the rules not change at all and just stay status quo?

A. Yes.

Q. And have you relied on these rules as you built your new barn and continued to develop your operation?

A. Yes.

Q. And it's been important that these -- that you have the ability to continue to operate the way you had been and continue to slowly expand?

A. Yes.

Q. Has that been something that's been going on? Rather obviously, your grandfather started, I believe, with one cow.

A. Right, right.

Q. And you have expanded over the years up to approximately 140 cows today?

A. Right.
Q. And it's hard to see what the future holds, but then again, you can only put so many cows on five acres?

A. That's right.

Q. But right now, you currently lease a farm, there might always be a farm to lease, another farm?

A. Always might be an option.

Q. And since approximately 1920, your family has been producing and selling milk?

A. That's all I know. It's a -- you know, I know nothing else. I milked cows before I went -- I went to an aggie school and we had to be there 8:30 in the morning, because we started later and we stayed later so that we could be home for chores in the morning and do chores at night. We got out in March so we could do crops, went on summer project.

The school tried to make me go to work on other farms so I could learn more knowledge. And I said, no, my family needs me. So I -- I had to go to the director, so forth, and before they'd allow me to go back on project on my own farm, not my -- my family farm. And so it's just been sort of a way of life.

It's just like living in Peabody. I know there are other ways of life because there's plenty of
other people. But it's the life I live in the city I
was born in, work at a job I've always had. And I enjoy
it. I just love what I do. And I'm proud to carry on
the business that my -- that my -- my parents struggled
with. And --

Q. This has been your life?
A. Has been my life.

Q. And the life that you chose?
A. The life I chose. Maybe chose for my
children, whether they liked it or not at some points.
One of them -- I have another child who chose to leave
it.

Q. And the children that chose to stay, this
is --
A. They're -- the ones that chose to stay
are happy at it.

Q. And this is a life that you would like to
be able to continue and your children be able to
continue?
A. That would be up to them.

Q. But if they chose to?
A. Right, yeah.

Q. And the rules as proposed, at 450, could
impair the ability of your children to continue on this
family farm?
A. It might, because I couldn't -- there was more stringent regulations put on my grandmother and her children when she was running it that I couldn't live by today. So knowing not what the future holds, I want -- I don't want limits put on -- on to my children that would limit them.

Q. At least limit that -- that you believe you could work with?

A. Right. I want there to be reasonable limits, you know.

Q. Okay.

A. Go ahead.

Q. Ted, we didn't have a chance to speak much, other than to greet each other for 30 seconds.

A. Right.

Q. Is there anything else you want to add that we haven't covered?

A. No, I think we covered it pretty much.

Q. And is it safe to say that the basic, essential reasons you are here is you support the 3 million pounds?

A. Right.

Q. You would like the ability to repackage --

A. Right.
Q. -- should need arise?

JUDGE CLIFTON: Now, let's define that, repackage. The way he expressed it was, use labels other than --


JUDGE CLIFTON: -- Pure Country.

THE WITNESS: Right.

JUDGE CLIFTON: Is that what you mean by that?

MR. TENSEN: I appreciate that clarification, your Honor, that it would be the right to relabel or repackage or put another name on it.

JUDGE CLIFTON: Now, when you say re, it sounds like it used to have a different label.

MR. TENSEN: And I should say -- I'll clarify that even further. The right to label milk with a different name.

JUDGE CLIFTON: Okay. Now ask your question.

MR. TENSEN: Thank you, your Honor.

BY MR. TENSEN:

Q. Ted, would you -- is it important for potential future needs that you have the right to label your products with different names other than just your
1    farm name?
2    A.     The answer -- the way I'd like to answer
3    that is being in -- being in a business that other
4    people are in, meaning even though I'm a
5    producer-handler and I sell against pooled plants, they
6    can -- they can label in any name they want by just
7    putting a plant's number on the label.
8    So I don't understand why a
9    producer-handler should be limited when a pooled plant
10   is not limited. I'd like the same freedoms that
11   everybody else has. I'm not asking for more, I'm not
12   asking for less. That's the way I'd like to phrase it.
13   Other than -- other than just saying I
14   have no reason to -- to have a different label, I just
15   want the same liberties that other people in the same
16   business enjoy.
17    Q.     Because there may be a need --
18    A.     There might be in the future.
19    Q.     -- to label it for the bagel store?
20    A.     For some -- whoever.
21    Q.     Yeah. And, lastly, would you prefer the
22    rules just stay the way they are right now, rather than
23    change them?
24    A.     I have no problem with the rules the way
25    they are at the moment.
Q. Thank you very much, Ted.
A. Thank you.
Q. You might get a few more questions, though.
A. That's okay.

JUDGE CLIFTON: Thank you, Mr. Tensen. I appreciate you stepping in at the late hour like that. It's very helpful to us. All right.

Cross-examination. Mr. Vetne.

CROSS-EXAMINATION

BY MR. VENTE:

Q. Mr. Dunajski, John Vetne from Raymond, New Hampshire, formerly Newberry Port, Massachusetts with a sister-in-law in Danvers, all right close to you, right?

A. Right.

Q. I think you have a competitor pretty close to you in a city called West Lynn, don't you?

A. They're not really competitors.

Q. There's a large --

A. They were a competitor. They were a competitor when it was West Lynn Creamery. They were a great competitor when it was West Lynn Creamery, which originally was Pepin Creamery. They started as Skangus Brothers. They lived -- they lived on the next street...
over. I live on Buxton Lane and there's nothing to do
with -- they lived on Gardner Park.

Q. Okay.

JUDGE CLIFTON: I do need some spellings
of cities that you just named, not to mention
the streets you just named.

MR.MR. VENTE: I'm glad nobody has
mentioned Worcester and Gloucester.

AUDIENCE MEMBER: You just did.

MR.MR. VENTE: You can forget that. That
can be off. Okay. Newberry Port,
N-e-w-b-e-r-r-y, P-o-r-t. West Lynn, West,
separate word, Lynn, L-y-n-n. I think that was
it.

JUDGE CLIFTON: Okay. And Worcester and
Gloucester.

MR.MR. VENTE: Oh, for heaven's sake.
Okay. Worcester is W-o-r-c-e-s-t-e-r.
Gloucester is G-l-o-u-c-e-s-t-e-r. Am I
correct?

THE WITNESS: I hope so.

MR.MR. VENTE: I hope so, too.

THE WITNESS: Sometimes called
Gloucester.

JUDGE CLIFTON: And, Mr. Dunajski, the
stretches you mentioned, please?

THE WITNESS: Buxton, B-u-x-t-o-n, Lane.

Gardner is G-a-r-d-e-r-n.

MR.MR. VENTE: N-e-r?

THE WITNESS: N-e-r. Gardner Park,

P-a-r-k.

JUDGE CLIFTON: Thank you.

BY MR.MR. VENTE:

Q. And do you keep your cows in a barn or a barn?

A. Loose housing.

Q. Okay. You talked about using all plastic packaging. Now, do you, like Mr. Hatch, buy your bottles, your plastic bottles, from somebody else that blows them?

A. We buy them from somebody else that blows them, but we label them ourself.

Q. You put a label on, your own label?

A. Uh-huh.

Q. What about caps, do you buy your caps?

A. Buy our caps.

Q. And the caps come printed with whatever you need to have on there, you order?

A. Our caps are generic. They're not printed because all the information is on the label.
Q. It's another label that you put on.

Okay.

JUDGE CLIFTON: Is Mr. Dunajski close enough to the microphone for those of you in the back? Yeah, you are coming through loud and clear.

Q. Mr. Hatch testified to packaging costs for the blown bottles and caps and labels of 48 cents or so per gallon. Do you have any information from your operation as to what those costs are?

A. I think they're a little lower. I think ours are a little lower. I think the bottles are somewhere in the 20, 20 to 25 cents range. The half gallons are a little less and pints are more than you think they should be in relation to the gallons.

Packaging is high. I don't question the packaging costs. The label cost is -- depending on the size of the labels, varies anywhere from 4 cents down to a cent and a half.

And the caps are -- it's generic, so I don't know whether a cent or two a piece. So I would put it more, our packaging would probably be more 30 cents than what he ordered it for, but I'm not here to debate that.

Q. You indicate you distributed in your own
trucks?

A. Own trucks.

Q. And the packages come in your own crates?

A. Yes.

Q. Okay. And the crates are recycled and returned back to you?

A. Yes.

Q. You don't distribute any boxes that are one way?

A. No, no.

Q. Okay. Do you also pasteurize by vats like Mr. Hatch?

A. No.

Q. How do you pasteurize?

A. HS -- short time. Short time as he called it. Short time pass, which --

Q. And when did you make the investment for that kind of pasteurization?

A. We've probably been -- we used to vat pasteurize. I think probably been short time pasteurizing for 15 or 20 years. I think it's got more to do with how the milk's handled and how it's pasteurized, but Howard and I would never agree on that.

Q. Do you buy ingredients like sugar?

A. Yes.
Q. In the bag or pallets, rather than truckload or carload?
A. We buy by the pallets.
Q. Okay.
A. And --
Q. Sugar, chocolate, that kind of thing?
A. All that sort of thing at a higher cost premium. The way I say it, it's the same as Howard said. If it's good enough for my grandchildren, it's good enough for anybody. And everybody else has got their grandchildren, love them just as well as I do, so I feel they ought to have what my grandchildren have.
Q. You supply your producer-handler operation with a leased herd located in Rowley, is that a fair statement, correct?
A. That's correct. That herd's more on the decline and ours is more on the increase.
Q. Is that adjoining land or do you have to transfer the milk?
A. Transfer the milk.
Q. And do you transfer it in your own truck?
A. Our own truck, yeah.
Q. You have a small tank truck of some kind?
A. Yes.
Q. What's the capacity of that tank truck?
A. The capacity is, I think, 5,600 gallons but it's never filled. We have -- we have -- we have one for water and one for -- one for milk. We actually have a -- I mean, we have three tank trucks. One sits in the field. One is always full of water. And the other one takes care of the milk.

Q. By water, do you -- do you buy spring water from someone?

A. Spring water. Yeah, we go to Brentwood, New Hampshire, get spring water, because all our juices are made with spring water, and we bottle the spring water.

Q. So you sell bottled spring water and bottled juice using spring water from Brentwood?

A. It's an ingredient, yeah.

Q. What's -- the five acres in Peabody, what's the acreage of the leased facilities in Rowley?

A. Oh. It's probably about 140 acres or so there, but that feed does not come to Peabody. Our farm is on five acres, but we probably have over a hundred acres of land that we use to produce our feed, some in Peabody, some in Danvers. I've got to think of a town I can spell. Winham. Seriously, those are the towns.

JUDGE CLIFTON: What's the last one you said?

Q. W-i-n-h-a-m?

A. Yes. Thank you.

JUDGE CLIFTON: And how do you spell the leased location that has 140 acres?

MR.MR. VENTE: Rowley, R-o-w-l-e-y.

JUDGE CLIFTON: And how is Danvers spelled?

THE WITNESS: D-a-n-v-e-r-s.

JUDGE CLIFTON: It just ends with S?

THE WITNESS: Danvers. Peabody used to be a part of Danvers.

Q. Okay. So you have two locations, on which there are cows, that you own or lease, and you own another location on which you grow some feed?

A. Yes. We grow most of the feeds for the cows in Peabody. We do -- we do purchase the grain. The corn we are purchasing at the moment. And most of the -- most of the -- most of the grass, alfalfa we grow.

Q. Okay.

MR.MR. VENTE: Thank you. That's all.

Thank you for coming.

THE WITNESS: Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne.
Other cross-examination for Mr. Dunajski?

JUDGE CLIFTON: Oh, counsel, I was hoping you wouldn't. Mr. Yale first.

CROSS-EXAMINATION

BY MR. YALE:


A. Good morning.

Q. There has been some discussion, there are some proposals out there that are called grandfather proposals that would allow you to continue to do your business without being regulated, but not allow anybody to start. Are you aware of those proposals?

A. Not in full, but I am aware of them.

Q. The concept, you are aware of the concept?

A. Right, I'm aware of the concept.

Q. All right. Do you have an opinion as to the grandfather clauses?

A. I thought America was the land of opportunity.

Q. I take it that that's an answer that it should be available for the grandchildren as well the grandfather, is that --

A. It puts in easily. I think this is a
country -- I think that's why my grandparents came here. My grandmother wanted to go home when she seen the water run out of the facet, and she thought it was witchcraft. Coming here with just a name tag on, she probably didn't know how to get back.

You know, it's a land of opportunity. So why do we have to put limits on things? Unless it's very necessary.

Q. And I take it by your testimony you sell to no chain stores?

A. No chain stores.

Q. Okay. And I also -- in your testimony -- well, let me just -- let me ask it this way. You're aware that the USDA announced minimum Class I prices for the Boston area and other markets, right?

A. Yes.

Q. Do you follow those prices?

A. I don't understand it. I don't understand how anybody could make a living at it. I don't understand where they come from. I'm aware of them, I look at them. But I have a hard job understanding why, in the year 2009, they are the way they are.

Because in 1960, I graduated from Essex Agricultural School and stood out behind the heifer barn
with a guy fixing the fence, the guy that worked there, saying, it's been tough in the dairy business up until now, but you guys going on are going to have it good because the prices are going to go up for the milk.

And they're exactly the same place -- just about the same place now. I mean, we did have a big spike last year, which I -- I don't know if they should go that high, but they shouldn't go back down to this low either. So I really think the system in whole needs to be addressed.

I mean, it's a good food item, milk. It should be marketed so in this great country that we have, that as I flew in here and I looked out over Ohio, seeing all the fields mowed just wondering what's going to grow there. I'd like to fly over again and see -- or just go down and visit and see what a great country we are. People fought for it.

I'm -- you could call me a conscientious objector, because I was asked to go to Vietnam, but I got a 2-C deferment because if I did go, my farm might not be there today. And I'm lucky that I was able to stay and farm and not go, but I appreciate the people that did go and are going now. I didn't mean to get off the track.

But I think that -- I think that the -- I
think the whole milk industry, as a whole, needs to be fixed. It needs to be fixed soon. And that's why I'm here today. Not because -- 450,000 pound limit, my life will go on and probably would go on. But I'm here today because I have the opportunity to state my case in the business that I love growing up in, so -- that's emotional as I can get. I get a little too emotional. That's exactly how I feel.

Q. And that opportunity to others, not --
A. Not just to my family. To anybody that wants to go down the road. Not to take away from the astronauts or the -- that's what's great about this country.

Q. I want to get back to this -- the pricing issue in the sense that you're aware of that price. I take it you don't use that in setting your prices?
A. No.
Q. Were you here yesterday?
A. No. Unfortunately, I didn't have the time. I got in here at 7:00 last night.

Q. Then I won't ask the question. That's all I needed to know, whether you heard some different questions.

But the price of your milk, would you say that that is consistently higher or lower than the rest
of the milk that's sold in your market, like in the
stores?

A. Sometimes it's higher and sometimes it's
a little lower when the prices go extremely high. At
present, it's higher because the other prices are lower.
I'd have a hard time, knowing what my bills are, to drop
my price -- drop my prices to what they're selling the
milk for, not only for myself. But I feel bad -- I feel
bad for the -- for the other dairy farmers. My family
struck out and sold their own milk and we always have.

And if I couldn't sell my own milk, I
don't think -- I don't think I could do -- I wouldn't do
all that hard work for somebody else. That's why I say
the system is broken.

Q. So it's safe to say, then, that you do
not compete with the largest bottlers on the price
issue?

A. No.

Q. That is a true statement, though?

A. That's a true statement.

Q. Okay. Now, there was some mention of
West Lynn Creamery and some other manufacturers, but
I -- this is a question that was asked before. But are
you aware, as being a producer-handler of your size,
that duty -- that your situation, that any regulated
plants have gone out of business in response to your status?

A. We couldn't put anybody -- let's put it this way. When the Hood blimp flies around, my cousins kid me and say -- when the Hood blimp -- Hood blimp flies around, they got advertising. They've got a blimp and it flies around the Boston area. My relatives say, why don't I get a kite? In West Lynn, one of the West Lynn salesman said, if we had a blimp, it'd be a leaker.

JUDGE CLIFTON: It would be a what?

THE WITNESS: Leaker.

MR. YALE: Leaker, l-e-a-k-e-r.

THE WITNESS: Because the worst thing is to have a bottle of milk in your truck that's leaking.

A. But the Hood blimp did take a crash landing one time.

Q. That had nothing with --

A. Nothing to do with me.

Q. Oh, very good. And it wasn't your kite, either, that did it?

A. But they do fly over my farm quite regularly to get to Beverly Airport.

Q. Coming back, the same with producers, are you aware of any producers who have been put at a
disadvantage because of your status as a producer-handler?

A. No.

Q. Now, I recall that you participated at the information center that USDA put on, right, by telephone? I think you were on.

A. Yes, I did.

Q. Okay. And have you been part of any other meetings in trying to establish some kind of producer-handler policy issues in the last year or so?

A. No. They had a meeting. I was invited but I didn't go.

Q. Where was that?

A. It was at the Wright Farm in Rhode Island.

Q. Is this part --

A. It's -- it's a New England based group. I think they call it the New England producer-handler. I don't even know their full name. Marjorie Cooper is their secretary. Mr. Carroll could fill you in on --

Q. But you weren't part of any discussions with USDA or any trade groups or anything else?

A. No, no.

JUDGE CLIFTON: And is Wright spelled W-r-i-g-h-t?
THE WITNESS: Yes, it is.

JUDGE CLIFTON: Thank you.

Q. I want to go back -- back to a comment you made before, that you believe the system is broken, that there's got to be change.

Do you see it necessary that there be a wholesale change in the system as opposed to just working on the PDs as a separate issue, or what do you mean by that?

A. What I mean by that is it's more educated people than I that run the Federal milk market. They have the figures, they work in figures all the time. And it doesn't take a genius to figure out.

If Mr. Hatch says the producers cost $21 a hundred to produce milk, whether that's true or not, that kind of scares me. You know, and I don't -- I don't go in -- in our particular farm, there was some times that we tried to figure out what it costs. It gets very complex. And I -- you know, it gets scary when you start putting figures down because you can talk yourself out of business.

And what I'm trying to say is, if you are selling milk for 12 to $13 a hundred, it's costing $20 to produce it, somebody that's in the -- in the end of regulating that ought to take a long, hard look at that.
They can't put their head in the sand and say, oh, the milk keeps coming. Because someday it ain't going to keep coming.

And it's -- I mean, do we have to get to the point where -- I mean, we regulate cigarettes to the point because it's bad for us. And we got a good product that's good for everybody. Are we going to regulate that so much so it's not here no more? So, you know, that's why I'm saying or pleading, not for me, because I'm marketing my own milk. I found a way around it. But for the rest of the industry, I think the co-ops ought to be working on how to get their producers to adjust the amount of milk for their suppliers rather than worrying about the producer-distributors who already struck out and took care of themselves.

That's the best -- that's my honest opinion. I'm not trying to belittle anybody. I -- they have awesome jobs, meaning the people that control the milk markets, and whether it's the government or USDA. But it needs to be looked at seriously.

MR. YALE: I don't have any other questions of this witness.

JUDGE CLIFTON: What did you understand Mr. Yale to mean when he talked about PDs?

THE WITNESS: Producer-distributors.
JUDGE CLIFTON: Producer-distributors?

THE WITNESS: Yes.

JUDGE CLIFTON: All right. And what you just said confused me. When you talked about how the co-ops, for example, should try to get a higher price for the farmers, what did you say they should be working on?

THE WITNESS: A market -- if the co-ops are marketing the milk, they should be getting -- they should be -- to put it simply, if you have a supply of milk coming in and you're the cooperative and you're marketing it, you should be taking care of the people that are producing it.

If you have too much of it, you should be going to the Federal Milk Market or something and say, we need to put quotas on, we need to do something so that we're not having these big influxes. I don't understand it all. It's not my job.

My job is at my farm selling my milk. But the -- the other people that control -- I hate to see a product like milk go from $13 a hundred to $24 a hundred in a matter of a year, especially in these economical times. I
understand things are down. But milk is, like I stated, being sold for prices today that it was sold in 1960.

So there's not many other products that are sold at that same level. So it really needs to be looked at. I think that's -- I think that's the biggest issue of all, rather than limit -- I think producer-distributors sell 1 percent of all the milk marketed in this country, and we're targeting that 1 percent but we're not looking at the big picture.

I think between Mr. Hatch -- maybe some other producer will come up here. We are producer-dealers but we really are farmers at heart. We sell the milk because it gets the money, so we can play at our game -- our hobby. So whether that's driving a bigger John Deere tractor or -- we don't buy new ones either. But I enjoy going out working with my children. It's not always fun. We get in heated argument sometimes. But we do run a business together at the end of the day.

I'm here because my daughter took the time to make sure I had everything, somebody to come with me. Even though she's not here,
she -- she, I guess, has the confidence that I'll come here and do a good job. So it's a team effort. So I want -- I don't go to Vietnam but I'll fight the war here. And I'll make you people aware that something should be done for all the farmers.

JUDGE CLIFTON: Mr. Carroll.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. I want to ask you if you have an opinion as to whether it's in the interest of consumers or producer-handlers that the government, as a result of this hearing, says that you cannot have an exemption from pooling if you sell to stores, nursing, homes schools, or if your distributor sell to stores, nursing homes, and schools?

A. What I don't understand about your question is, what exemption?

Q. What, sir?

A. What exemption? What exemption are you talking about?

Q. Either the producer-handler or the exempt milk provision.

A. I don't know about exempt plants so I can't speak on that. Producer-handlers, I don't mind
exemptions on producer-handlers. We've always had them. But I want realistic ones. I don't think 450,000 pounds is a realistic exemption, along with not being -- without packaging of the milk, what name it's under. I don't think those are realistic exemptions.

Q. Right. You think distributors of milk should be free to package the milk on their own label in whatever way they want and sell it wherever they want to sell?

A. With reasonable limitations.

Q. Right.

JUDGE CLIFTON: Mr. Carroll, your question was about distributors of milk?

MR. CARROLL: Both -- well, distributors, yes, that's right.

JUDGE CLIFTON: Do you -- so regardless of the producer-handler status, you're just talking about distributors?

MR. CARROLL: Well, distributors of producer-handlers.

BY MR. CARROLL:

Q. You've heard some testimony today that there's some producer-handlers who bottle milk and other people distribute it?

A. Right.
Q. And so you think they should have that right without limitation as to where they sell the milk?
A. If your reference is to Mr. Hatch, the way he's doing it, I don't have -- I -- that's fine with me.
Q. Okay.
A. Personally all my -- like I stated before, all our milk presently goes out under our label. But I'd like the ability to, if I felt it necessary, to put some of it out under another label, if I felt it necessary.
Q. Right.
A. The same as other people in the same industry have the ability to do.
Q. Right. And you think --
A. I would have to remark it with the plant number and so forth. I'm not trying to --
Q. Do you think everyone should have that same right?
A. Everybody in the same business should have the same right.
Q. Now, directing your attention to your family situation, I missed it, I'm sorry. How many members of your family are currently working with you?
A. I forgotten to mention my
daughter-in-law. I'm ashamed of that. There's four --

four direct.

Q. Right. And I take it that they'll have
children?

A. They have two children, yes.

Q. And do you want to have, for that little
family unit, the right to increase the volume in order

to carry those extra expenses?

A. If that's what they wish to do.

Q. Right.

A. Basically that's why our business has
grown. Not because -- well, some because the need --
the -- as my children got older, they got married, they
had families, so we -- we needed to have more income, so
that's why the business -- not only did people want
milk, want our milk, be we also had the need because our
family got larger to support.

Q. And do you want enough distance to that
exemption so that you can plan in the future --

A. Exactly.

Q. -- for your business --

A. Exactly.

Q. -- to grow?

A. Exactly.

Q. Thank you.
A. Thank you.

JUDGE CLIFTON: Other cross-examination for Mr. Dunajski? Mr. Tosi.

MR. RICCIARDI: Your Honor, I do have some questions here.

JUDGE CLIFTON: I'm sorry, I didn't look your direction. I apologize. As you can tell, I'm getting -- I'm feeling some urgency to get moving. But Mr. Ricciardi.

MR. RICCIARDI: Thank you.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Dunajski, good morning. I'm Al Ricciardi. I'm here on behalf of AIDA, which is a group of producer-handlers and actually some plants, too. And I have several questions, and hopefully I will be brief.

You sent a letter to the Deputy Administrator at USDA Dairy Programs on March 9th, 2009 commenting on the proposal to eliminate the producer-handler exemption, correct?

A. Correct.

Q. And you found out that National Milk and IDFA had made those proposals within just a few days prior to the time you sent this?

A. Yes.
Q. And that's the first time you're aware that that proposal was out there to eliminate the producer-handler exemption, correct, sometime in early March of 2009?

A. I think in January, we become -- we got a letter from the USDA to state that the proposal was put in front of them, I think.

Q. That's the first time you're aware of it?

A. First time I'm aware of it.

Q. Were you aware that IDFA and National Milk had been meeting as early as the spring of 2008 with the Department with regard to making a proposal to eliminate your producer-handler exemption?

A. No.

Q. You think you should have been aware back then?

A. Yes.

Q. I'm reading from your letter that you sent to the Department. Actually, you sent one and then you sent an addendum. I'm just going to talk about your first letter for a moment.

Your -- in the ultimate paragraph, almost the next to the last paragraph, you say, Also -- and I quote. Also it is my belief that producer-handlers market only 1 percent of all milk sold in the United
States of America. Because of this, I do not understand how it could disrupt the milk market. When you say it there, you're talking about producer-handlers?

A. Right.

Q. Was that your opinion when you sent this in to the Department?

A. Yes.

Q. Is that your opinion today?

A. Yes.

Q. Is that your opinion under oath today?

A. Yes.

Q. You also said in response to a question, could have been from Mr. Vetne, about disruption -- and if I get your quote wrong, you'll tell me because occasionally it happens: Other companies disrupt me. Is that about what you said?

A. Yes.

Q. And the other companies you're talking about are other companies in the milk industry and milk business that are not producer-handlers, right?

A. Right.

Q. Because one of the problems that you've got is you can't compete on price with those people in the regulated community?

A. Right.
MR. RICCIARDI: Nothing further.

JUDGE CLIFTON: Mr. Ricciardi, that was excellent and brief. Thank you. Any other cross-examination before I call on Mr. Tosi? There is none. Mr. Tosi.

CROSS-EXAMINATION

BY MR. TOSI:

Q. May I call you Ted? I have a very difficult time pronouncing your last name.

A. Please do. I love -- I like the name Ted, especially with my last name.

Q. Okay, great. Ted, how many employees are associated with your producer-handler business?

A. Just to speed it up, I'd say ten.

Q. Ten. Thank you. If the Department were to adopt your proposal, do you see a need to, in addition to adopting your proposal, to make any adjustment in the exempt plant limitation of 150,000 pounds per month?

A. I think the exempt plants are the plants that are small and they have no regulation. Is that what an exempt plant is, 150,000 pounds?

Q. Well, one of the features of the exempt plant definition, it tries to describe those people who are not subject to pricing and pooling like
producer-handlers, but it -- but it doesn't talk about ownership of -- where everything, like, in your operation has to be under your own sole ownership and risk. Where an exempt plant is somebody that, for example, can buy all their milk from another source.

A. Yeah. I think I -- I think it should be kept at 150. I don't think it should be raised to 450.

MR. TOSI: Okay. Thank you, sir. That's all I have.

THE WITNESS: That's my opinion.

MR. TOSI: And I really appreciate you taking the time. I know it was a burden for you to come here. We really appreciate this.

THE WITNESS: I appreciate the opportunity and I appreciate your help.

MR. TOSI: Thank you.

THE WITNESS: Thank you. You've been most helpful all the way through.

MR. TOSI: Thank you.

JUDGE CLIFTON: I would like to have the record reflect that Mr. Dunajski's proposal is Proposal Number 7. It's on page 16,299 of this notice of hearing. Is there any objection to that? All right.

Mr. Tensen, would you like to conduct
redirect examination?

MR. TENSEN: I think I don't have any further questions.

JUDGE CLIFTON: Thank you so much.

THE WITNESS: Thank you.

JUDGE CLIFTON: Mr. Dunajski, is there anything else you would like to say before you step down?

THE WITNESS: Thank you to everybody.

JUDGE CLIFTON: Thank you. It's 11:45. Mr. Brosch, would you please come to the podium? Should we proceed with Dr. Cryan or should we take Mr. Tonak or Mr. Asbury's statements first?

MR. BROSCH: Well, your Honor, I'm -- Mr. Cryan is going to be longer than Mr. -- the other two. But on the other hand, I think he's sort of the lead witness on those. So I think it would be appropriate to go with -- with Mr. --

JUDGE CLIFTON: Dr. Cryan.

MR. BROSCH: -- Dr. Cryan first.

JUDGE CLIFTON: Get that microphone as close to your mouth as you can.

MR. BROSCH: I think it would be appropriate to go with Dr. Cryan, if possible.
He's the witness for the proposals -- the joint proposals of National Milk.

JUDGE CLIFTON: All right. It's 11:45, roughly. Do you want to get into that right now or do you want a one-hour break first?

MR. BROSCH: Well, your Honor, what we plan to do is have Dr. Cryan essentially read his testimony. I'm not going to belabor this hearing any more than it's already been belabored by involving long cross-examination.

So I think we could put Dr. Cryan on. We could have him do his testimony. I may have one or two follow-up questions. And then if you want to break for lunch and come back for cross-examination, perhaps we could do it that way.

JUDGE CLIFTON: That sounds excellent for me. Is there anyone that has a different idea of how we might proceed? Mr. English.

MR. ENGLISH: Not so much -- not so much a different idea as I wanted to point out that there are various sandwich shops in the neighborhood. One of them, Pot Belly, will take orders over the line or by phone or fax, which would speed the process of lunch. And Subway
across the street. So I think we can hold one
hour very easily when we get to lunch.

JUDGE CLIFTON: All right, good. And
then the little store right here in the
building, Ingredients, has a lot of counters
where you can quickly get your food. Mr.
Carroll?

MR. CARROLL: I'd like to say that
fortunately we have Dr. Cryan's statement. It
consists of 21 pages and two tables. The
physical time needed to review all of those
pages is considerable.

I don't think we're, as a practical
matter, getting ahead to start that and then
take probably at least 45 minutes or an hour to
read it. And then the other matters that are
involved, it would be better to take our lunch
now and then we can have a straight set.

JUDGE CLIFTON: Mr. Brosch?

MR. BROSCH: I'm sorry that Mr. Carroll
didn't bother last night to read the statement,
but that statement has been available since
yesterday. If he wanted to read the statement,
he could have done so.

JUDGE CLIFTON: No, I don't think that
was his concern. I think his concern was, do we have to read it into the record? Is that -- am I correct, Mr. Carroll?

MR. CARROLL: If it's going to be read into the record --

JUDGE CLIFTON: Go ahead and come back to the mic, please.

MR. CARROLL: If it's going to be read into the record, or however it gets in, if it's going to be read, then obviously we should break for lunch. If it's not going to be read into the record, that's another matter. I understood that they were going to have him deliver his speech. I have read it, if there's any question about that.

JUDGE CLIFTON: All right. Let me just make a comment and then I'll hear from Mr. Vetne. If anyone wants to provide an electronic version of the statement of a witness to the court reporting service so that it will be reproduced in the transcript, you're welcome to do that rather than have it get into the transcript through a reading while we're all waiting. But I'm going to leave it up to the presenter how you want to present.
Giving out a handout does not focus attention on the contents the same way hearing it from the witness does. We're here to study this. I realize that for the people in the Department, they have to study it a lot more later.

But for those who want to ask questions, questions may occur to them during the delivery of the -- the contents of the text that they otherwise might not have thought of. So I do not resent the time that it takes to have the author of a document present it.

MR. BROSCH: I would note, your Honor, that the reason we're doing it this way is because we think it would be much more efficient than trying to extract that amount of testimony by question and answer. It would take, I would say, three or four times as long if we were to do it the way this proceeding has proceeded this thus far. So we're trying to speed things up here.

But your point is exactly the one, which is, we think there's a certain amount of knowledge and emphasis that can be gained by Dr. Cryan reading his testimony. We think
that's the most efficient way to proceed.

JUDGE CLIFTON: All right. What is it
that you have in your arm there?

MR. BROSCH: I have lots of copies of
this, your Honor.

JUDGE CLIFTON: All right. And it's
identical as to what was on the table yesterday?

MR. BROSCH: Yes, it is. Your Honor.

JUDGE CLIFTON: All right, Mr. Vetne?

MR. VENTE: John Vetne. I have an
efficiency suggestion. I agree with your Honor
that the reading of the testimony or giving
testimony allows a focus in attention that
sometimes just reading it in private does not
provide. You don't know how much attention is
going to be given to anything read in private.

However, this testimony, as is commonly
the case, includes statistical data, has some
long footnotes. It has a lot of arguments, and
it has a lot of facts.

I'm going to -- as I said yesterday, I'm
going to encourage my clients to focus on fact.
And I would hope that -- this, presumably, is
going to get marked as an exhibit and all the
argument will be in the record in some form. I
would hope that there's no compelling urgency by
the witness to read the footnotes, for example,
into the record, or a lot of the tables or
regulatory language. They're there, maybe they
can be characterized or referenced.

But to the extent that some of the
argument or footnotes or small print can by
referenced to, rather than read, we start that
practice, we will save a lot of time at this
hearing.

JUDGE CLIFTON: Well, I'm going to leave
it up to Dr. Cryan whether he wants to read
every word or whether he wants to some other way
communicate. One reason you have experts is for
their argument, which we call opinion. So --

MR. BROSCH: Well, your Honor, we're very
glad to hear that Mr. Vetne is taking the view
now that we're going to speed this hearing up.
But Dr. Cryan is going to give his testimony the
way he's going to give his testimony.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: Thank you, your Honor.
One issue I will raise, we haven't dealt with
yet this morning, is the carryover from
yesterday and the concerns represented by my
client group regarding production of data from the Department. We received some additional information, which I assume that at some point Mr. Carman is going to come up and talk about?

JUDGE CLIFTON: That Mr. Who is going to talk about?

MR. RICCIARDI: Mr. Carman.

JUDGE CLIFTON: Oh, okay. Mr. Carman, our witness from yesterday, would come?

MR. RICCIARDI: Yes. I do not know, however, whether the Department intends to produce additional data. To the extent that it does, I'd sort of like to know when. To the extent that it does and it's going to be later, we're going to be in a position where we may and probably will have to potentially recall expert witnesses if we put them on now.

Likely, what we'll have is, if additional data comes in, they may have changed their opinions or we have questions as to whether or not the data does change their opinions.

Now, both Dr. Cryan and also Dr. Yonkers are potentially employed to be here for two weeks. Their time is part of their ongoing
business operation.

One question I raise is whether or not, until we get all of the data, it makes sense to finish off fact witnesses before we get into expert witnesses, so that everybody has a full and fair opportunity to cross-examine.

JUDGE CLIFTON: Okay. When we get to cross-examination, we'll raise this again. And I'll find out what the availability of the witnesses is for recall based on the additional materials that you don't have yet. And then later we'll find out what materials are still coming and so forth. So I'm glad you raised it now, but I won't deal with it yet.

MR. RICCIARDI: I understand.

JUDGE CLIFTON: All right. Mr. Brosch, what I would like you to do is begin direct examination of Dr. Cryan. I'm anticipating that probably we would be breaking for lunch about an hour from now, probably.

MR. BROSCH: I think we could be done within that time period with direct, your Honor.

JUDGE CLIFTON: Okay. And I'd like to take just a short comfort break first so that Dr. Cryan will have our full attention. This
won't be, like, a full break. Please take ten
minutes and be back ready to go at 12:05.

(A recess was taken from 11:55 to 12:11.)
(Exhibit 23 was marked for
identification.)

JUDGE CLIFTON: We're on the record now
at 12:11. I have marked my copy of Dr. Cryan's
testimony as Exhibit 23, and I would ask that
everyone do that to keep track. And I'd like
the extra copies to go back on the back table.
People will be coming in from time to time,
including in days after today.

If you do not yet have a copy of
Dr. Cryan's testimony, then please obtain it
from the back table.

All right. Counsel, would you identify
yourself again, please?

MR. BROSCH: My name is Kevin Brosch.
I'm here representing National Milk Producers
Federation. We've -- they have a copy of my
card at the table, your Honor.

JUDGE CLIFTON: All right. Good. And
I'd like now the witness to state his full name
for the record and spell it, and then I'll swear
you.
THE WITNESS: Your Honor, my name is Roger, R-o-g-e-r, Cryan, C-r-y-a-n. And the court reporter has a copy of my card as well.

JUDGE CLIFTON: Good. Thank you. Would you raise your right hand, please?

(The witness was sworn.)

JUDGE CLIFTON: Thank you.

MR. BROSCH: Your Honor, at this time, could we ask the Court to accept Dr. Cryan as a expert witness, unless someone objects? I don't have to go through the qualifications unnecessarily. Without objection, I would like him to be accepted as a witness in agricultural economics and dairy economics.

JUDGE CLIFTON: First of all, Dr. Cryan what is your doctorate in?

THE WITNESS: Agricultural economics.

JUDGE CLIFTON: That's handy. And is it a Ph.D.?

THE WITNESS: Yes, it is.

JUDGE CLIFTON: Is there any objection to Dr. Cryan being accepted as an expert in agricultural economics/dairy? There's no objection. Dr. Cryan is so accepted.
MR. BROSCH: Thank you, your Honor. I'm going to let Dr. Cryan give his testimony without exchanging questions and answers. At the end of his testimony, I might ask one or two questions, but otherwise he can proceed.

JUDGE CLIFTON: Thank you. Dr. Cryan, I'd like you to present your testimony however you wish. Just bear in mind we're going to try to follow along, so keep abreast of page numbers. If you don't read it straight through, if you skip around a bit, that's fine. Just give us time to catch up with where you are.

ROGER CRYAN, PH.D.

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

DIRECT EXAMINATION

BY MR. BROSCH:

A. Thank you, your Honor. My intention is to just read it straight through, skipping the footnotes and the source citations in order to make it a clear narrative.

Thank you for your assistance and thank you to USDA for having this hearing.

My name is Roger Cryan. I have served the members of the National Milk Producers Federation,
also known as NMPF, for the past nine years, first as Director of Economic Research and now as Vice President for Milk Marketing and Economics. Prior to that, I worked in the Federal government as the economist in the Atlanta Milk Market Administrator's Office of the USDA. I received my M.S. and Ph.D. degrees in agricultural economics from the University of Florida. I serve on the Agricultural Advisory Committee of the Commodity Futures Trading Commission and have served as a Secretarial appointee to USDA's Advisory Committee on Agricultural Studies.

I testify today on behalf of the National Milk Producers Federation. NMPF is the voice of America's dairy farmers, representing three-fifths of America's 60,000 commercial dairy farmers through their membership in NMPF's 31 constituent cooperative associations. NMPF represents dairy farmers in all parts of the country, as demonstrated by the attached table, which shows NMPF's members among the top 50 U.S. dairy cooperatives (which Hoard's Dairyman ranks by volume).

NMPF is the proponent of Proposals 1 and 2, which we submitted jointly with the International Dairy Foods Association. Those proposals initiated this proceeding. NMPF subsequently submitted an additional
proposal, Proposal 26, which we believe complements those initial proposals. These proposals are intended to establish more equitable rules for dairy farmers in all regions and of all sizes. The small and large producers who we represent, and the cooperative businesses that they operate, are required to play by one set of rules, while large producer-handlers are able to play by another set of rules that tilts the playing field greatly to their advantage. NMPF's three proposals, taken together, will result in the additional regulation of a very small number of handlers. We estimate that our proposals would increase the regulation for just 3 to 5 of the largest producer-handlers in the nation, all of whom have annual sales of at least $10 million, in 19 -- at 2008 prices. We estimate that the 3 largest of these each have packaged fluid sales in excess of 15 million pounds per month. Our proposals would not increase regulation for any other producers or processors. There are dozens of smaller exempt plants and producer-handlers that would remain unregulated or subject to less regulation.

I would like to describe each of our proposals, provide some historical context on the producer-handler provisions, and explain what we seek to achieve.
Regarding Proposal 1, which would eliminate special status to producer-handlers.

NMPF seeks to eliminate the producer-handler provision in all Federal orders so that producer-handlers are treated like all other handlers.

The Agricultural Marketing Agreement Act of 1937 specifically authorizes the regulation of, quote, producers who are also handlers, unquote. It is clear from the legislative history the legislation reauthorized by the Agricultural Marketing Agreement Act of 1937 that Congress intended for marketing agreement and for marketing agreements and marketing orders programs to regulate producer-handlers whose volume, quote, is large enough to be an important factor in the market, unquote, since their, quote, cooperation is necessary to carry out the marketing plan, unquote. The Marketing Agreement Act of 1937 is amended with the citation that provides that for the Secretary, in order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, this subsection five, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the extent that the total sums paid in each -- by each handler shall equal the value of the milk purchases by him at the prices fixed in accordance
with paragraph (A) hereof. And the emphasis is added. But that -- that phrase, including producers who are also handlers is in the original text of the Act.

Treating producers like other handlers is equitable and consistent with both the letter and the intent of this law.

Regarding the origin of producer-handler regulation. Producer-handlers were originally given special status for administrative reasons, not on legal principles. The Federal Milk Marketing Order program itself has its origins in the Agricultural Adjustment Act of 1933, which generally authorized the Secretary of Agriculture to enter into agreements with producers and to license handlers, in order to, quote, restore normal economic conditions in the marketing of, unquote, milk and milk products. The Department combined these powers to implement marketing agreements enforced by licensing in numerous markets. These licenses are the direct antecedents of today's milk marketing orders.

Although many markets were supplied primarily by handlers who procured milk from producers and cooperative associations, in the Kansas City market producers who handled their own milk sold 50 percent of the milk and cream consumed when the market's license was instituted in 1935. The original market license was
intended to regulate these producer-handlers in the same way as other fluid milk handlers. However, the Market Administrator encountered considerable resistance from a substantial number of these producer-handlers who failed to submit reports and who refused to make payments to the equalization fund when they did submit their reports. When the Market Administrator failed to enforce the market license requirements on the original non-compliers, most of the rest followed suit. Successive amendments to the marketing agreement were made to lessen the burden on producer-handlers, but again there was no effective enforcement, so non-compliance among producer-handlers with market license requirements proliferated. In July 1935, unable or unwilling to surmount the practical difficulties of enforcement, USDA abandoned its attempts to impose regulation on these producer-handlers except for certain reporting requirements.

What began as an expedient way to avoid confrontation with a group of small producers in one Marketing Order has become institutionalized across the country. This largely unregulated status was, until recently, available to producer-handlers of all sizes in all Federal Order markets.

Over the years, a number of milk
marketing orders have incorporated a variety of producer-handler provisions, but the purpose of those provisions has been to require producer-handlers to nominally balance most of their own supply.

In 2003, proposals were made to limit the potential size of producer-handlers in the Arizona and Pacific Northwest markets. And in 2005, those proposals were accepted by USDA, which issued a final rule in 2006 that limited the producer-handler provisions in those milk marketing orders to entities that produced no more than 3 million pounds of fluid milk sales per month.

Changing industry. One of the original assumptions underlying the decision to permit a special producer-handler status was that these operators had limited supply and limited marketings, and would remain so small as to not have a significant effect on the market. Over time, this has proved to be a faulty assumption. Changes in this -- changes in the industry, in technology, and in the economics of the dairy business have drastically reduced the number of producer-handlers; these same changes have drastically increased the size and market potential of those remaining. Some producer-handlers have grown to become much larger than could have been imagined 70 years ago.

While most (87 out of 117) potential
producer-handlers today still fall under the 150,000 pound size exemption exception, this is rapidly changing. Until recently, the substantial growth in the scale and efficiency of fluid -- in this case of large fluid milk processors meant that even the largest farms were unable to take advantage of the same -- of the scale economies; with relatively high unit costs, producer-handlers did not proliferate, and in fact, they declined in number and volume processed.

But this is no longer the case. In 1998, there were only 235 dairy farms with more than 2,000 cows; less than a decade later, in 2007, however, there were 595. A 2,000-cow dairy produces near 4 million pounds per month. The average farm in this category produced 6.6 million pounds per month in 2007 (compared to 4.7 million in that same category in 1998). These 595 farms now produce over one-quarter of the U.S. milk supply, equal to nearly 80 percent of all sales of fluid milk products in the U.S.

There are 17 producer-handlers with route sales in excess of 300,000 pounds, including only 17 (sic) with route sales above 2 million pounds.

JUDGE CLIFTON: Excuse me. Mine says seven.

THE WITNESS: What did I say?
JUDGE CLIFTON: Could you read the sentence from the beginning?

A. There are 17 producer-handlers with route sales in excess of 300,000 pounds. Did I misstate that? Including only 7 with route sales above 2 million pounds. The average producer-handler has grown from an average of -- the average producer-handler has grown from 34,645 pounds of Class I sales in October 1959 which was the production from about 60 cows at that time, to an average of 1,422,080 pounds in December 2008, which is the milk -- the milk from about 720 cows. We estimate the sales of the 7 largest producer-handlers to average at least a hundred million pounds per year per plant.

Many dairy farms are now large enough to exploit both the producer-handler raw milk price advantage, which I will describe below, and to enjoy economies of scale in both milk production and fluid milk processing. Collectively, they could capture a large share of the Class I sales in an individual market or nationally, if many of them adopted this model. This would be disastrous for the small pooled dairy producers whose blend prices would be substantially cut.

The hearing on producer-handlers in the Arizona and Pacific Northwest markets demonstrated the
potential disruption that large producer-handlers can
inflict, individually and collectively, on orderly
marketing, finding specifically that large
producer-handlers in those markets were, quote, the
primary source of disruption to orderly marketing of
milk, unquote. That was the Department's finding.
Producer-handlers also have a significant and growing
share of Class I sales in the Northeast market; this was
114 million pounds in 2007, up from 69 million pounds
in -- up from 69 million pounds in 2002. This is the
only market for which such a detailed, single market
breakout is readily available; I estimate that the
market share of producer-handlers in the Central Order
is equal to between 10 percent and 15 percent of Class I
sales in that market. USDA data presented at this
hearing also show that producer-handlers make up a
growing share of sales in markets where they are present
and unaffected by recent restrictions as is demonstrated
by Exhibit 6 from the Department, from USDA.

Regarding the cost advantage of
producer-handlers and uneconomic reorganization:

A producer-handler, by avoiding full
Federal Order regulation as a distributing plant, can
pay, effectively the uniform price for milk at the
plant. (This is effectively the market price for
producer milk on the market, and is therefore the appropriate transfer price for analysis of the regulatory impact on the producer-handler plant.) Fully regulated competitors, by contrast, must pay the Class I price for the same milk. Table 1 shows selected statistics for all Federal Order markets, including a calculation of the price advantage that a producer-handler has over its fully regulated competitors in each market. That advantage is equal to the Class I price minus the uniform price. This advantage ranges from 6 cents to 15 cents per gallon, or 72 cents to a 1.74 per hundredweight, which is the difference between the Class I price and the uniform price at the base point. And that difference will equal the difference between the Class I price and the uniform price across the markets, since both prices are adjusted by the same location differential.

As producer-handlers become large enough, their advantage in terms of their cost of milk can become the primary basis for their existence as handlers. A large producer-handler can now enter the bottling business, even if it is not competitive in its processing costs, purely because the disparity in the regulatory scheme creates an advantage.

Increasingly, producer-handler provisions
undermine the principles of producer equity upon which the Federal Order system rests. In the best case, which is vertical integration of efficient milk production with efficient milk processing, the producer pool is depleted to pay producer-handlers. In the worst case, which is uneconomic reorganization of farms into producer-handlers, that is either farm, the farm or the plant, is less efficient than the average, the current system can create deadweight losses in the market whose whole cost is borne by pooled producers. For example, a producer-handler could be up to 15 cents per gallon less efficient than the competition would otherwise require, and still be viable.

Regarding orderly marketing.

Producer-handler provisions increasingly threaten orderly marketing. As stated above, about 600 farms now each produce more than 4 million pounds of milk per month, 25 percent of the U.S. milk supply and the equivalent of nearly 80 percent of U.S. fluid milk sales. 1500 farms with over 2 million pounds of monthly milk production accounts for 42 percent of U.S. production, equivalent to 140 percent of fluids -- total fluid milk sales. The number of large farms is steadily increasing, and their impact on other dairy farmers is becoming more significant. Because of the potential for
these large farms to exploit the advantages of the
current producer-handler provisions, tens of thousands
of smaller dairy farmers, and the handlers who purchase
their milk, are now potentially threatened. That is to
say that the small dairy farms and the handlers who
purchase their milk are now potentially threatened.

Further, such producer-handlers, even if
they bottle all of their milk and buy or sell no one
else's, can sell to wholesalers or large retail chains
at a significant price advantage. Such wholesalers or
retailers can either balance their own supplies of milk,
with purchases from, and at the expense of, pooled
market participants; or they can raise and lower their
prices seasonally, so that consumers will balance their
supply at other stores, also at the expense of pooled
market participants. For example, one large
producer-handler in the Pacific Northwest testified at
the hearing in that market that a large grocery
customer -- that its large grocery customers can balance
their supplies with pool sources when the
producer-handler plant did not.

The upper limit of the loss to the
majority of America's dairy farmers who participate in
the milk marketing pools is the loss of all Class I
value. This would reduce the average pooled price by
over a dollar per hundredweight.

Regular home delivery once provided the only example to support the argument that a producer-handler could balance its own supply; it is the only marketing channel that could be consistent enough to make this claim. However, home delivery has declined from 30 percent of fluid milk sales in 1963 to less than one half of one percent in 1997; and even home delivery sellers can find ways - through seasonal pricing and seasonal sales efforts, for example, to shift their balancing burden on to the rest of the market.

The reality is that no producer-handler plant can truly be made to balance its own supply, because customers always have a choice of alternative sources for fluid milk.

Regarding the need to eliminate the producer-handler provisions. There is no legal or economic justification for the producer-handler provisions, and the Federal Order objective of orderly marketing demands their elimination. In its December 14th, 2005, final decision for the Arizona and Pacific Northwest Markets, USDA stated that, quote, the review of the intent of the producer-handler provision and the marketing conditions arising from this provision in these orders could warrant finding that the original
producer-handler exemption is no longer valid or should be limited to 150,000 pounds per month Class I route disposition -- or limited to 150,000-pound per month rout Class I route disposition limit. However, the hearing notice for this proceeding constrains such a finding to a level of not less than 3 million pounds per month Class I route dispositions, unquote.

And NMPF agrees with USDA's conclusion that the producer-handler provisions are an anachronism, and urges USDA to act on this conclusion in this new hearing, whose scope is clearly defined to include the entire elimination of producer-handlers provisions.

And NMPF proposes to limit producer-handlers to the same size exemption as other processors. In some Federal Order markets, large producer-handlers already capture a significant share of Class I sales, undermining the pool value at the expense of producers and pool handlers. Reform of the system is a matter both of equity and of orderly marketing.

Although several Federal Order markets are not now substantially disrupted by the operations of large producer-handlers, it is good policy to establish uniform provisions which address this issue proactively, before such a clearly foreseeable problem develops. This proactive approach minimizes the burden of
regulation by laying out the rules in advance. The
proposed changes would simplify and clarify the
responsibilities of the current producer-handlers,
relaxing the regulatory constraints on their operations,
and directing the large effort of them to participate in
the Federal Order pool.

The original reason that the
producer-handler provisions were established, that is
the inability of Market Administrators to enforce
compliance, is certainly no longer valid. The
regulation of large producer-handlers would now be no
more difficult than that of other handlers, and would
restore the principle of marketwide pooling, upon which
the Federal orders are based.

Regarding Proposal 2, expanding and
reforming the exemption for small distributing plants.
NMPF also proposes to raise the size limit for exempt
plants from 150,000 pounds of monthly Class I sales in
an individual market to 450,000 pounds of monthly
Class I sales in all markets. This is a distinct
proposal, but effecting it concurrently with the
elimination of the producer-handler provisions can avoid
unduly affecting other producer-handlers who have a
limited individual impact on the market. Proposal 2
would exempt all but the 10 or 15 largest current
producer-handlers, as well as 30 to 35 plants that are now regulated or partially regulated.

Today, any plant with less than 150,000 pounds in monthly Class I sales is exempt from Federal Order regulation. Given the growth in average farm size, and the growing economies of size in milk processing, it is reasonable to increase the size exemption to 450,000 pounds per month -- per month. For perspective, this is equal to the production of about 260 cows, or twice the size of the average dairy herd in the United States. Plants this small have difficulty competing with large, modern plants on cost alone, with or without the pricing advantage offered by producer-handler status.

We urge USDA to consider this increase in the small plant exemption concurrently with NMPF's proposal to eliminate the producer-handlers provisions. The principle of raising the limit is sound, and the coincidence of the two proposals will mitigate for most producer-handlers the regulatory impact of eliminating the producer-handlers provisions of the orders.

Regarding the origin -- excuse me. Regarding the origin of the current exempt plant size limit. Today, any plant with fewer than 150,000 pounds in monthly Class I sales is exempt from Federal Order
regulation. This limit was made uniform for all orders
during Federal Order reform. The proposed rule,
published in 1998 stated: Options 2 and 3 both
recognize the Identical -- the Identical Provisions
Committee determination that a handler distributing less
than 150,000 pounds per month of fluid milk products
does not have a significant competitive effect on the
market, and that handlers of such size should,
therefore, be exempt from the pricing and pooling
provisions of the orders. The level of route
disposition required before an exempt plant becomes
regulated varies in the current orders. As recommended,
any plant with route disposition during the month of --
with route disposition during the month of
150,000 pounds or less would be exempt in the
consolidated orders. This limit reflects the maximum
amount of fluid milk products allowed by an exempt plant
in any current Federal Milk Order and ensures plants
that are currently exempt from regulation would remain
so, end quote.

This decision confirmed the existing
150,000 size-based exemption in the West Texas and New
Mexico Order. This limit was set in 1991, based on
proponent testimony. That decision concluded that
150,000 pounds, which was smaller than the average --
size of the average producer in the market, was small enough not to disrupt orderly marketing.

Another quote from that decision, from an earlier -- from that original decision, It is noted that the 150,000-pound monthly size limitation for an exempt plant is substantially less than the average size of producers that are currently associated with these markets. Consequently, it would appear that a plant of such size would not be a disruptive factor in the market either in terms of sales of fluid milk products or in the procurement of raw milk supplies.

Regarding setting a size limit. Based on changed conditions, we propose to raise this limit to 450,000 pounds consistent with the principles upon which the 1991 decision was made. Between 1991, the year of the West Texas-New Mexico hearing and decision, and 2007, the last year for which data was available at the time that I drafted this, average milk production per U.S. dairy farm tripled from 68,000 pounds to 214,814 pounds. Since the average 150,000 pounds limit -- I'm sorry. Since the original 150,000 pound limit was based in part on a consideration of farm sizes at that time, this tripling of average per-farm production supports a tripling of the exemption limit to 450,000 pounds.
Fluid milk bottling plants generally have increasing economies of scale. That is, the bigger they are, the lower their costs per gallon. This has been consistently demonstrated in industry and academic studies. These economies of scale flatten out, so that the advantages of increasing plant size are greater at the bottom of the range than at the top. Several published studies, including two studies at the University of Maine and a nationwide study conducted by Cornell University, all clearly demonstrate this principle.

Although exempt plants enjoy the same price advantage that producer-handlers now do, for very small plants this advantage is greatly outweighed by high processing costs; so that the price advantage is neither the primary basis for a small handler's business nor a disruptive force on the market. Given this cost structure, such a plant should have little impact on the market, and so its regulation is not necessary to maintain conditions of orderly marketing. That is, such plants will not proliferate on the basis of their regulatory cost advantage.

NMPF recognizes the difficulty of setting any bright line size limit. Nevertheless, there remain several good reasons for setting the limit at
450,000 pounds.

It seems clear that the current limit is too low. A plant processing the output of a 90-cow dairy cannot compete in the milk commodity market. If the current limit is too low, then raising it incrementally is a positive improvement in the regulation. As a matter of principle, the change should be cautious, increasing to another level that is clearly not too high.

This proposal addresses the regulatory status of the milk plants with respect to size, and does not attempt to effect -- to effect any regulation of dairy farms. However, milk plants obtain their milk from dairy farms, whether they are under the same ownership or not. Farm size has served in the past as a basis for establishing a size limit on exempt plants. In addition, a very large share of size-exempt plants bottle own-farm production, strongly suggesting that farm bottling is the primary business model for these plants, so that farm size and farm economies of scale must be an important consideration in defining their regulation.

Dairy farms have economies of scale such that there are cost disadvantages to a producer-handler with less than 500,000 pounds of monthly production.
This is the conclusion of a USDA study of farm size. In 2005, it was estimated, farms with 500 to 999 cows had a $4.75 per hundredweight cost advantage over farms with 100 to 199. This is a difference of 41 cents per gallon and represents a substantial scale economy. In addition, this study showed that 500,000 pounds per month of production (about 300 cows) is near the point where the cost curve begins to get quite steep. That is, moving towards a smaller size. That is below that -- below that size, farm cost of production is clearly high enough that the value of the regulatory exemption will not encourage uneconomic processing paired with production. Based on this data also, 450,000 pounds represents a reasonable bright line limit on regulation of an integrated farm and plant, which is one very common business model -- which is the most common business model for small exempt plants.

JUDGE CLIFTON: Now, let me just question you there, if I may. What you've written is that it is one common business model. And what did you just testify?

THE WITNESS: I just restated what I had said earlier, which is that it is the most common business model for these plants.

JUDGE CLIFTON: Okay.
A. It's a very large share of -- size of exempt plants bottle own-farm production.

Under the mandates of the Regulatory Flexibility Act of 1980 and the Small Business Regulatory Enforcement Fairness Act of 1996, Federal agencies must consider impacts of regulation on small business. The formal small business definition for dairy farms is $750,000 in sales or less. As a practical matter, and because revenue fluctuates with milk prices, USDA, the Small Business Administration, and the Office of Management and Budget have determined that regulatory flexibility analysis should be based on a small business definition of 500,000 pounds of monthly milk production. Given that a fluid milk handler can be hard pressed to achieve a Class I use rate of more than 90 percent of receipts, 400 -- 450,000 pounds represents an approximate upper limit of the Class I use for a handler within this small business definition.

The small business definition was originally intended to provide a context for consideration of alternative regulatory approaches for smaller businesses, rather than serving as the basis for exemption from meaningful or necessary regulation. Nevertheless, Federal small business definitions are used in a number of programs, such as Federal
procurement programs, where a bright line is necessary and where the limit provides one reasonable choice. Example -- and I should point out there are citations here for examples that include procurement and other -- other programs.

The small plant exemption in Federal orders was originally intended to alleviate the administrative and regulatory burden of regulating small entities. This intention was consistent with the objectives of the Regulatory Flexibility Act of 1980 and the Small Business Regulatory Enforcement Fairness Act of 1996. Those acts recognize that regulation designed with large enterprises in mind can be unfairly burdensome when applied to small businesses, and require consideration of the impacts. Combined with consideration of economies of scale, above, the small definition -- the small business definition for a dairy farm provides a reasonable bright line for the exempt plant definition. The small business definition for dairy plants, by contrast, is 500 employees; such a plant would be very large and well beyond any reasonable limit for the regulatory exemption under discussion.

Finally, the limit should be set at the same level in all markets, consistent with the decision made at Order reform. This should preclude setting the
limit in each market according to a proportional impact on the individual market. The market-by-market approach should also be avoided because the larger consideration here is whether a proliferation of exempt plants is probable and whether that proliferation could cause disorderly marketing, rather than what the impact of an individual handler may be.

Regarding unique labeling. NMPF further proposes that an exempt plant should not produce any products under brands that are also produced by other plants. Clearly associating an exempt plant's products with plant-specific brand or brands will enforce the plant's independent nature. This is intended to reduce the potential for the assembly of a supply of packaged milk by a cost-oriented "integrator" with substantial control of the exempt plant's product. Without such a limitation, a large retailer, for example, could recruit small exempt plants, organizing production in such a way as to remove the diseconomies of scale in marketing and distribution and even, through line specialization, of processing. Such an "integrator" arrangement would violate the intent and spirit of size -- of the size-based exemption which is intended to accommodate small businesses that are unlikely to affect their market, either individually or collectively. This
qualification of exemption should be included in any decision arising from this hearing.

Clarifying the exempt definition as based on total plant sales. Finally, NMPF proposes a change in the wording -- finally, with respect to Proposal 2, NMPF proposes a change in the wording of the size-based exemption, to make clear that the expanded 450,000-pound monthly allowance applies to a plant's total sales, not only to sales in an individual market. This would avoid confusion and would confirm what I believe is the current interpretation applied by the Market Administrators.

This proposal should be applied to any decision resulting from this proceeding -- this principle, I'm sorry. This principle should be applied to any decision resulting from this proceeding. That is, any size based limit on fluid sales should be applied to a plant's total fluid sales, not only sales in a particular market.

Regarding our Proposal 7, providing a conditional exemption for existing producer-handlers. I'm sorry, regarding Proposal 26. Providing a conditional exemption for existing producer-handlers.

NMPF has submitted an additional proposal that all Federal milk marketing orders be amended to ...
provide a conditional grandfather exemption from pooling for current producer-handlers, up to 3 million pounds per month.

This language would allow current producer-handlers to obtain a qualified exempt plant status. Route disposition and sales of packaged fluid milk products by such plants may be no more than 3 million pounds per month, and most of the current conditions for producer-handlers must be met. In addition, the provisions are tightened to prohibit ownership of other farms or other distributing plants by the owner of a plant exempted under this proposal. This may also require conforming language similar to that now used to classify receipts of, and from, producer-handlers.

Regulatory risk is a part of doing business, and we believe that USDA has a clear right to regulate any and all distributing plants, provided that such regulation meets the objectives of the Federal orders. NMPF believes that it is crucial to regulate all producer-handlers distributing more than 3 million pounds of fluid milk products per month and to stem the proliferation of producer-handlers marketing between 450,000 and 3 million pounds per month. NMPF -- NMPF proposes to implement this proposal simultaneously with
our previously proposed elimination of the
producer-handler provision. These provisions, in
Proposal 26, would temper the impact of NMPF's previous
proposal by reducing the regulatory impact on 10 to 15
producer-handlers with between 450,000 pounds and
3 million pounds of packaged fluid milk sales per month,
and whose businesses have relied in part upon the
current regulations.

Adoption of Proposal 26 remains fully
consistent with Proposals 1 and 2. Again, the dual
objectives of our original petition were to, 1, limit
the disruptive impact of existing producer-handlers
above 3 million pounds, and 2, to prevent the disruptive
impact of a proliferation of new producer-handlers with
sales above 450,000 pounds per month. Allowing existing
producer-handlers to maintain an exemption up to
3 million pounds per month will allow these objectives
to be achieved without undue regulatory impact on these
smaller existing operations.

I will not burden the record with the
reading of the language provisions. But I believe they
are -- have been explained in my text.

JUDGE CLIFTON: For the record, would you
tell what pages you find that?

A. On page 15 of my exhibit, of my
statement, we offer specific regulatory language to --
to effect most of the changes that we're talking about.
There may be additional conforming changes, but the
principle and the thrust of everything we're proposing
is contained in this -- in this language proposal, in
this specific regulatory proposal.

Regarding other proposals noticed for
this hearing. Most of the proposals in this hearing
either advocate or assume some limits on the exemption
of producer-handlers. In this sense, most of the
participants here seem to agree that it is appropriate
to fully regulate very large producer-handlers, and to
make some accommodation for very small plants.

Several of the additional proposals
reiterate, in whole or in part, Proposals 1 and 2, as
offered by NMPF and IDFA. These include Proposals 10,
16, 19, and 22. We appreciate this full or partial
support from Way-Har Farms, Coopers' Hilltop Farm, and
the Pennsylvania -- the Pennsylvania Association of Milk

NMPF opposes the rest of the additional
proposals, while appreciating that some have been
offered in a spirit similar to that of our own
proposals.

Proposals 3, 4, 5, 7, 8, 11, 13, 15, 18,
21, 27, and 28 each set a cap for producer-handlers and allow their unlimited proliferation. Each of these is a step in the right direction, but does not go far enough in addressing the potential of a proliferation of medium-sized producer-handlers to disorder milk markets. Although we appreciate the support from these proponents for the principle of limiting the impact of producer-handlers on milk markets, we have made clear above why we believe that producer-handler status should not be extended to any additional plants.

Proposals 6, 9, 12, and 14 would set a new size-based limit for exempt plants at a level higher than 450,000 pounds per month. Those move in the same direction as we propose, but we believe they go too far. We believe that a tripling of the current limit to 450,000 pounds is appropriately conservative, as detailed above.

Two of the proposals, Numbers 13 and 14, are offered by the New England Producer-Handlers Association, Incorporated, et al., a group of producer-handlers naturally seeking to carve out an exemption within the current proceeding for their own operations, but who we believe would not be sufficient -- substantially affected by the NMPF proposals.
Proposal Number 17 was proposed by Mallorie's Dairy, Incorporated, Country Morning Farms and Nature's Dairy, a group of middle-to-large-sized producer-handlers who are also naturally seeking to carve out an exemption for their operations, but who we believe would not be substantially affected by the NMPF proposals. Proposal Number 20 is very similar to Proposal Number 17, so I will discuss them together. These proposals are nominally a grandfathering of producer-handlers up to 3 million pounds. However, they go well beyond a simple grandfathering of existing plants with producer-handler status. These proposals would allow any handler that had both fluid milk sales and own-farm production during an historical period to exempt -- to elect to except up to 3.4 million pounds of that historical own-farm production, whether or not they had ever qualified as a producer-handler. This is, we believe, a substantial widening of the producer-handler exemption. These proposals would also drop many of the current balancing requirements of producer-handlers, allowing them to obtain pooled milk from market sources. This is also a substantial loosening of the producer-handler qualification, the requirements for producer-handler qualifications.

The effect is to grant a soft
grandfathered cap for an expanded group of would-be producer-handlers. Such a cap has been very problematic in California, where political decisions have expanded existing caps and where exempted volumes are used as a pricing weapon by large producer-handlers.

Under this proposal any milk in excess of the defined exemption would be subject to the pricing and pooling provisions of their respective order. Allocating the exempt milk to Class I, as is done in California, would exacerbate this inequity, by reducing and even -- by reducing and even reversing the pool contribution associated with the pooled balance. Allocating the exempt milk pro rata to plant utilization would still drain a substantial amount of Class I milk from the pool. And even allocating it to the lowest Classes would leave substantially unregulated any producer-distributor with up to about 3 1/2 or even 4 million gallons of monthly volume, in the competition with other regulated handlers; Proposal 23 has a similar effect, but without the 3.3 million pound limit.

Proposals 23, 24, and 25 are proposed by the American Independent Dairy Alliance, a group of seven exceptionally large producer-handlers, who are also naturally seeking to carve out an exempt space for their own operations, and four of whom may be the only
handlers whose regulation would be substantially increased under the three NMPF proposals taken together. As we indicate above, and as we believe other testimony will indicate, these large producer-handlers can each have a substantial individual impact on a milk market. They also operate at such a scale that they should not be exempt from pricing and pooling, because, they are large enough to operate on a level playing field with other producers and handlers.

Proposal Number 23 contains two apparently redundant elements. The first purports to allow a distributing plant to elect partially regulated status with respect to its own farm production, but concludes with language that would treat a plant's own-farm milk as part of an individual handler pool, which shall -- which, quote, shall not be included in the volume of milk or milk components that are subject to payments to or from the producer settlement fund pursuant to Section 71 or 72 of any Order, unquote. I will outline -- I will outline our objections to the individual handler pool shortly.

The second element of Proposal Number 23 exempts a plant's own-farm milk from pricing and pooling regulation. This exempt milk is down allocated to the plant's lowest Class uses when calculating the plant's
pool obligation for milk from producers. This would mean that the plant would pay Class I first for purchased milk. In other words, most distributing plants with substantial amounts of own-farm production would incur a Class I pooling obligation for all the milk that they purchase. The effect of this is that a plant with 95 percent own-farm production would face a pool obligation equal to a small fraction of what its obligation would be if fully regulated; but a similar plant that elects to, quote, exempt, unquote, that exempt -- pardon me. Let me take a breath. But a plant -- but a similar plant that elects exempt status for own-farm production equal to, say, 40 percent of its receipts would face a pool obligation substantially larger than its obligation as a regulated pool handler (and so would clearly not elect this status). For a large producer-handler, this amounts to a less restrictive exemption for pooling and pricing than the current producer-handler provision. And I should say than rather than that.

JUDGE CLIFTON: All right. And you're on page 18?


JUDGE CLIFTON: The next to the last paragraph.
A. Bottom of the middle paragraph. It says "pooling that" and it should say pooling than.

The next proposal, Proposal 24, would exempt milk sold directly from producer to retail customer, including through home delivery and handler-controlled retail outlets. As I described above, even handlers who sell directly to the consumer cannot be forced to completely balance their own part of the market. The plants that own retail stores can stock other handlers' milk alongside their own, forcing the burden of balancing upon the rest of the market. Even the plants that sell only their own milk, through their own retail stores or home delivery, can adjust their pricing and sales efforts seasonally so as to indirectly encourage consumers to rely on other milk outlets when the plant-retailer's supply is short; this also forces the balancing burden on to the rest of the market.

We heard a witness today who indicated that he sells milk at a loss in order to help balance his -- his supplies through the retail market.

The exemption of farm-to-retailer sales in this proposal is inequitable and so should be denied. Proposal Number 25 which would -- Proposal Number 25 would establish so-called individual
handler pools for all handlers across all orders. This is an especially pernicious proposal. It is a dagger pointed at the heart of Federal orders. Individual handler pools represent cherry-picking of higher Class I values. Because the plants and cooperatives that effectively balance the fluid milk supply do not receive equalization payments from the pool, they will be unable, in many markets, to maintain the manufacturing capacity that is necessary to balancing. Because the suppliers of fluid milk plants receive a higher price, compensation (sic) for Class I outlets --

JUDGE CLIFTON: Competition or compensation?

A. Let me start that sentence over again and make it more clear than what is written here, what I meant. Because under this proposal, the suppliers of fluid milk plants would receive a higher price, competition for Class I outlets will destroy producer over-order premiums, further undermining the compensation now paid for market balancing. Market-wide pooling of classified prices is the single most important function of the Federal Milk Marketing Order; with individual handlers pools, the orders would be fatally wounded, and producer losses would be multiples of the losses associated with producer-handlers.
The 1999 decision on Federal Order reform included that, quote, marketwide sharing of the classified use value of milk among all producers in a market is one of the most important features of the Federal Milk Marketing Order. It ensures that all producers supplying handlers in a marketing area receive the same uniform price for their milk, regardless of how their milk is used. This method of pooling is widely supported by the dairy industry and has been universally adopted for the 11 consolidated orders, unquote.

It seems beyond question that individual handler pools are inimical -- I'm sorry, are inimical to modern Federal orders.

Ultimately, of course, the problem with producer-handlers is that, under the current regulation, they are effectively individual handler pools. The farm side of the business supplies raw milk. The plant, if it is of average efficiency and is operated to maximize the return to the farm, would generate gross returns in line with the regulated Class prices, based on the plant's use of milk. Like an individual handler pool, the plant can then afford to return to the farm a price skewed by high Class I use, without sharing the higher value with the rest of the market.

The rest of the market, which balances
the milk supply, loses Class I value from the pool. As a result, other producers and manufacturing plants are less able to balance supplies, leading to disorderly marketing.

In conclusion, the current producer-handler provisions have become outmoded by a changing industry, and we believe that their underlying intent of limiting the regulatory burden on small handlers who do not substantially impact the market is better served through an expansion of the exempt handler provisions.

NMPF urges USDA to eliminate the general producer-handler provisions. USDA also asks -- I'm sorry. NMPF also asks USDA to temper these changes with a modest increase in the sized-based plant exemption and with a grandfathering of smaller existing producer-handlers, in order to avoid imposing an undue regulatory burden on small businesses that have limited impact on their markets, but whose proliferation could lead to disorderly marketing.

NMPF and -- and I thank USDA and USDA staff for holding this hearing, as well as for their diligence in providing requested data, and look forward to a positive outcome of this hearing.

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

Q. Dr. Cryan, I -- just a couple of questions to clarify some things in your -- your statement.

On page 1 of your statement, in the -- near the bottom of the page, you say "We estimate that our proposals would increase the regulation for just 3 to 5 of the largest producer-handlers in the nation." When you speak about your proposals, are you speaking about -- well, which proposals are you speaking about?

A. We're speaking collectively of Proposals 1, 2 and 26.

Q. So it would be all three proposals would have this impact?

A. All three proposals, all three proposals together, which is in sum -- the three proposals represent our position in sum.

Q. Thank you. On page 9, in the first full paragraph, the sentence, you say, Proposal 2 standing alone would exempt all but the 10 to 15 largest current producer-distributor harness. So the difference between the 10 to 15 on page 9 and the 3 to 5 on page 1 is -- is Proposal Number 26, is that correct?

A. Roughly -- right, that's correct. That's correct. And I'd also point out that for the record
copy, I struck -- I struck standing alone. I also did not read that. So for the record, stand -- Proposal 2 and 1 together would -- would exempt all but 10 to 15 percent of the largest current producer-handlers, because Proposal 2 by itself would be redundant --

Q. So --

A. -- for those -- for those handlers.

Q. So it might be more correct for that sentence to read, Proposal 1 and Proposal 2 would exempt -- taken together would exempt?

A. That would be another way to say -- another reasonable way to say it.

Q. Thank you. You also talked with respect to -- in your testimony with respect to the so-called unique labeling proposal. I believe it's on page 13 of your statement.

A. Yes.

Q. I note that you say here, this is intended -- I'm sorry. "Clearly associating an exempt plant's product" --

JUDGE CLIFTON: I'm sorry, I was making notes to myself and I don't know where you are.

MR. BROSCH: On page 13, your Honor.

JUDGE CLIFTON: Thank you.

MR. BROSCH: In the paragraph that is
entitled Unique Labeling.

JUDGE CLIFTON: Ah.

Q. I'm trying to point to the second sentence in that paragraph which reads, "Clearly associating an exempt plant's products with a plant-specific brand or brands will enforce the plant's independent nature."

There seem to have been some confusion in the earlier testimony about multiple brands. Does National Milk's proposal under Proposal 26, or these proposals put together, allow for a producer-handler to market under multiple brands?

A. Well, this is -- these are provisions for exempt plants. The producer-handlers provision itself has been -- has been stricken and replaced with the substantially exempt handler status.

Q. Correct.

A. Including the grandfathering for existing producer-handlers is also an extension of the exempt status. So these are exempt plants. But it would limit -- it would not limit them to a single brand. It would allow them to produce as many brands as they want to as long as no one else is producing the same brand.

Q. Thank you.

A. And that wouldn't necessarily have to be
the company's brand. In fact, for example, there was a relationship between a producer-handler and a -- and a -- for example, a small -- very small grocery chain. And they were supplying a label for that chain, and they were supplying all of that milk, all the milk with that labeling, that would also be accepted.

Q. Now, this morning we had testimony from two other witnesses, Mr. Hatch and Mr. Dunajski. Were you here during that testimony?

A. I was.

Q. And you were able to hear what these gentlemen had to say about their businesses?

A. Yes, I did.

Q. In your testimony on -- largely on pages 4 to 8, you express National Milk's concern about large producer-handlers impact on the market and orderly marketing. Would you consider either Mr. Hatch or Mr. Dunajski a large producer-handler?

A. I think -- I think -- I think small and large are -- are very subjective, and I wouldn't want to define too -- that too precisely. There's different objectives at different times when you describe large and small.

But I would say that they would -- I do not believe either one of them would -- would be
substantially -- their regulation would be substantially increased by our proposals.

Q. So that the operations they described don't fall within the type of operations with which you're concerned?

A. No, not as existing handlers.

Q. My understanding is that -- that the exemption, the grandfather exemption that's in 26, Proposal 26, would allow for a party to go up to the 3 million pound limit, is that correct?

A. That's right. And to be perfectly clear, it would allow an operator like Mr. Dunajski to -- to increase his -- his sales up to 3 million pounds. I don't believe any of the other proposals would allow for that flexibility.

Q. So 3 million pounds --

A. Well --

Q. I'm sorry.

A. I'm sorry. I don't believe the other grandfathering provisions would allow for that flexibility.

Q. The 3 million pounds represents approximately what size herd?

A. Oh, I should know that. I think it -- I think it's about 1,800 cows. I think that's right.
Q. If we assume -- if we assume the 2,000-pound average, which is a good average, that would be about 1,500 cows?

A. That's about right.

Q. So I think Mr. Hatch --

A. Depends on the volume, the sales -- depends on the per cow volume, obviously. We have quite a range across the country. Even the state average is something like 14,000 to 20, 24,000. So there's -- there's quite a variation. But anywhere in there, 1,500 to 1,800 is a reasonable number.

Q. I believe Mr. Hatch testified today that he has about 347 milking cows and about 750,000 pounds of volume. So is it correct that Mr. Hatch could increase his operation by, say, four times?

A. Yes.

Q. And be within that limit?

A. Yes. And I heard nothing in his description of his operation that suggested that he would be regulated under our proposals.

Q. And Mr. Dunajski said I think he had 140 cows. So Mr. Dunajski could increase his operation by about eight times and still fall within that exemption?

A. Yeah, yes.

Q. So are Mr. Hatch and Mr. Dunajski the
kinds of producers that National Milk had in mind when it proposed the exemption under Proposal 26?

A. No. Oh, under 26?

Q. Yes, 26.

A. Yes. Our membership was very active in developing that, that additional proposal. There was a very real and reasonable concern that the original proposals were -- would be unfair to existing operators of modest size who are not disrupting the market by themselves.

There was a recognition that -- that, you know, a potential business model could proliferate those 450 to 3 million pound -- 450,000 to 3 million pound plants in ways that could be disruptive to the market. But that the existing producers, they tend to be independent, they tend to operate in their own way and individually, we believe they're not disruptive to the market.

So we felt that it would be unfair to -- to impose new regulation on them with -- with -- with Proposals 1 and 2 standing alone.

Q. So based upon your understanding of their testimony this morning, are Mr. Hatch and Mr. Dunajski precisely the kinds of operators for which National Milk members were concerned?
A. Precisely.

Q. And they are precisely the kind of operators for which -- for which Proposal 26 seeks to accommodate?

A. They are exactly the kind of producers we seek to accommodate.

MR. BROSCH: Thank you. I have no more questions, your Honor.

JUDGE CLIFTON: Thank you, Mr. Brosch. I'd like to break for lunch. Let me see what time it is. It's 1:13. Do you all want to be back here at 2:00 or 2:15?

AUDIENCE MEMBER: 2:15.

JUDGE CLIFTON: I hear more 2:15s. Please be back and ready to go at 2:15. We're off record now.

(A recess was taken from 1:13 to 2:23.)

JUDGE CLIFTON: Let's go back on record. We're back on record at 2:23. It took me a little longer than I thought it would for my lunch. I appreciate everyone being so prompt. Now, let's decide how to proceed.

The first question I have, Mr. Brosch, is what is the availability of Dr. Cryan throughout this proceeding to be recalled for the purpose
of cross-examination and redirect? I mean, if we go forward with that now.

MR. BROSCH: Well, may I ask your Honor a question before I answer that question?

JUDGE CLIFTON: Yes.

MR. BROSCH: Dr. Cryan will certainly tell you what his availability is, if you want to tell him, Roger.

DR. CRYAN: Well, I'm tentatively scheduled to sit in on the hearing for at least the first two weeks.

JUDGE CLIFTON: That's great.

MR. BROSCH: Now, your Honor, my understanding is that the request to have Mr. -- Dr. Cryan to reappear to testify from Mr. Ricciardi is for the purposes of asking him the question whether any new data produced by USDA changes the opinions that he's expressed here, is that correct?

JUDGE CLIFTON: That doesn't sound like the kind of leading question I would expect.

MR. BROSCH: Well, your Honor, I think that's Mr. Ricciardi's request. I want to know whether Dr. Cryan is going to be subject to cross-examination twice on the same subjects.
JUDGE CLIFTON: The way I understood the request, and I know you and I heard the same thing.

MR. BROSCH: Yes, your Honor.

JUDGE CLIFTON: The way I understood the request is additional information is due in statistical form from USDA. When we get that, that may give rise to all kinds of questions.

MR. BROSCH: Well, your Honor, Dr. Cryan's testimony that he's given today is based upon the information that's already been available and is referenced in his opinion -- in his -- his statement. So with respect to -- he's not going to be the author or the sponsor of any additional data, that USDA is going to be the sponsor of that. So what relevance does Dr. Cryan's testimony have at that point other than to ask him whether that information that we supplied changes the opinions he's expressed?

JUDGE CLIFTON: Well, that -- that isn't the way I would examine him. If I were concerned about certain issues that are raised by additional evidence, what I would do if I had an expert before me whose opinion is based on certain things, I would want to ask him if he's
taken into account such and such and so is true
and I would want to be more pointed. But maybe
that's what you mean.

MR. BROSCH: Yes, that's what I mean,
your Honor. But what I'm saying is, are you
going to hold that second cross-examination to
the limitation of asking him questions about new
data only?

JUDGE CLIFTON: No, I don't think so. I
would think at that point -- when you have a
valuable expert like Dr. Cryan, and the ultimate
decider here would like to know what his opinion
is, considering everything that the decider has
to consider, I think you would want to take that
opportunity. So, for example, let's say that
additional data comes in from USDA; maybe we
have some of it now, maybe we'll get some of it
in the future. That's utilized by different
witnesses for different purposes. We now have
new --

MR. BROSCH: Well, then, let me ask you
this, your Honor. Does your Honor intend to
place any limitations on the second
cross-examination?

JUDGE CLIFTON: What limitations would
you suggest, for example?

MR. BROSCH: I suggest that Dr. Cryan should not be asked about the same subjects that he's going to respond to in the cross-examination the first time. He shouldn't be cross-examined twice on the same questions.

JUDGE CLIFTON: Okay. Then I believe Mr. Ricciardi was correct, we should defer his cross-examination altogether until we have all the data that might be relevant to his opinion, to his ultimate opinion. That's how I would see it.

MR. BROSCH: Well, your Honor, we don't want Dr. Cryan to have to go through the same rigmarole twice. I think that we've seen that we have a tendency in this hearing to ask a lot of questions and extend this hearing beyond what I think most people would expect. I don't want him to have to do this twice.

JUDGE CLIFTON: Okay. I respect that. And I don't want to draw strict limits as to what he can be asked, because I think he is a very valuable expert. And if I were the Secretary, I would want to know what he thinks given all of the evidence that the Secretary has
to consider.

And we don't want to deprive the Secretary or anyone else of Dr. Cryan's opinions. What we don't want is that Dr. Cryan be subject to the same cross-examination twice. And if your Honor is unwilling to enforce that then perhaps that's the best choice then.

JUDGE CLIFTON: All right. Good. I am unwilling.

MR. BROSCH: Thank you, your Honor.

JUDGE CLIFTON: You're welcome. All right. Before you step down, though, Dr. Cryan, I want to look at Exhibit 23 with you. And you reached the end of your testimony on page 20.

THE WITNESS: Yes, ma'am.

JUDGE CLIFTON: And I want you just to tell me what else is here in pages 21 through 23.

THE WITNESS: Page 21 is a list of -- of publications and published statistics that were used in the preparation of my testimony. And as it says at the top -- and this was printed and put on the table yesterday morning before -- yesterday afternoon before we got started. These are a list of things that we were to
request official notice of.

JUDGE CLIFTON: Now, because you're an expert in this field and I am not, tell me why these things would be proper for official notice being taken. Why are they depended upon in the industry, and if so, how do you know that?

THE WITNESS: Would you like me to go over the items individually and explain each one and explain the relevance?

JUDGE CLIFTON: I think that would be very helpful, yes.

THE WITNESS: The first thing appears to be two items. There's a line right there that should be -- the item that begins with Erba and then the one that appears to be separate I think is the Cornell. That should be one. That should be one item altogether.

It is a study that was done about ten years ago -- I guess about 12 years ago now by Cornell University where they -- they did a survey of fluid milk plants to assess their costs in a variety of categories and laid out a relationship between the cost per gallon of processing and the size of the plant; that is, they broke out data by -- by plant size so that
it demonstrates the principle of -- of large plants having a lower cost per unit. And all we've testified to is the -- is the principle. The second item identified beginning with Dalton is a -- is an article from the Journal of Dairy Science -- that was published by some professors from the University of Maine that demonstrates this same principle, based on a similar study of plants, I believe, plants only in Maine.

And again, we are not relying on the specific numbers. We're simply relying -- demonstrating another example of the publication that expressed the principle of -- of increasing economies of scale.

The next item is Dairy Market Statistics, Annual Summary. These are -- these are statistics that are published every year by the Dairy Programs office, that summarizes the results, the statistical -- the statistics that are derived from the operations of the Federal Orders. It includes things like Class I sales, and total milk pooled in each market, I think, are probably the primary numbers that I relied on from those sources in this -- in this -- in
I'm sorry. I really just described the next item, Federal Milk Bulk Marketing Order Statistics. The previous item, Dairy Market Statistics is also published by Dairy Programs, but by their market news service in Madison, which has quite a number of -- quite a bit of information on prices and that has -- has certain tables on Federal Order summaries that are not available in other sources.

They're not available in the Federal Milk Marketing Order statistics, so both of those publication are AMS publications that are published on a regular basis and feature widely known statistics on the operations of the Federal milk marketing orders and the dairy market statistics.

JUDGE CLIFTON: And what years were of particular interest to you on both these?

THE WITNESS: The -- it's a good question. I'm sorry. I think probably the -- the Dairy Market statistics -- probably the most important item for the dairy market statistics is the annual summary for 2007, I believe, is the basis for Table 1, which is the final page.
in my -- in my exhibit.

I'm not sure if there's anything else that's not captured in Table 1 that's in the study -- I'm sorry, that's this, the paper, the exhibit.

The Federal milk marketing orders statistics there were a number of -- probably -- probably the -- effectively the 2007 annual summary, which probably hasn't been published in a final form. Can somebody indicate to me whether or not 2007 Federal Milk Marketing Order statistics has been published?

JUDGE CLIFTON: Mr. Carman, can you answer that and if so, would you come to a microphone? Or the microphone will come to you perhaps. Oh, it's tangled on this side.

MR. CARMAN: Federal Milk Order Annual Statistics, I don't believe is actually published anymore. We make it available on the website. And I believe 2007 has been published, 2008 is in preparation. It may or may not be done prior to the conclusion of this hearing.

THE WITNESS: I believe I relied on the 2007 numbers, so I would be --

MR. CARMAN: Let me ask you a question
about your Table 1, Roger. The differential
that you used for the Southeast Appalachian and
Florida Order, were they prior to or after the
change in the differentials on a temporary basis
as published -- that was effective when, Gino?

MR. TOSI: 2006.

MR. BROSCH: Your Honor, if -- perhaps if
we could just clarify these documents and that
he can hold cross-examination of Dr. Cryan until
the rest of the cross-examination.

MR. CARMAN: Well, it makes a difference
on which table, which annual year he wants.
Depending on --

THE WITNESS: This table contains average
Class I and average uniform prices for 2007. It
does not rely on any calculation by me of --
involving differentials. It is the actual --
these are the actual average Class I and uniform
prices for 2007. So they may be derived from
whichever or both or either or both class of
differentials. But in terms of statistics,
that's -- that's the relevant response to that.

JUDGE CLIFTON: All right. So what
you're telling me then, Dr. Cryan, is when I
look at table 1, which is the last document in
Exhibit 23, I know that that's 2007 information because that's labeled that way very clearly.

THE WITNESS: That's right.

JUDGE CLIFTON: When I -- and that came from?

THE WITNESS: It came from two sources. In fact, that demonstrates exactly where these two publications I'm talking about, the ones under which -- the columns under which the box reads Dairy Market Statistics Annual Summary 2007, those numbers all came from Dairy Market Statistics annual summary 2007. The shaded columns under which the box says, source is Federal Milk Marketing Order Statistics Annual Summary 2007, those numbers came from that source. And the -- and the three columns in between are calculations by -- by me based on the -- based on the rest of the numbers.


THE WITNESS: So for those two items, Dairy Market Statistics Annual Summary and the FMMOs Annual Summary, I believe the only -- the only ones we relied on were 2007. But I would -- I would correct that when I come back
if that's necessary to correct that.

JUDGE CLIFTON: All right. Now, how -- I know we're only partway through what I'm asking you about on page 21, but of what we've gone through so far, will it be difficult to make copies of these sources available here?

THE WITNESS: I think -- if you're asking for duplication of the specific pages that we relied on, I think it would be -- well, first of all, the first two items are -- are published studies, published university studies. Those are -- those are substantial documents that I think most of the people here are aware of and have -- have discussed. They're readily available. The rest of the items, even those are -- most of those are also readily available, and I'll discuss the exception.

Those -- those are a limited number of pages. I could probably assemble for the -- for the Dairy Market statistics, Federal Milk Marketing Order statistics, milk production, pool calculations and -- and the handler list that I would rely on, that I would -- that I would expect to rely on, that I believe I relied on probably -- or that I would rely on in
further discussion. I could probably put
together into -- into 15 or 20 pages that we
could make available.

The last item is the -- the third from
the bottom Early Development of Milk marketing
Plans in the Kansas City, Missouri area. This
is a USDA publication. However, it is -- it was
published in 1952. It is a very large document.
We could provide the -- the cover page and the
two or three pages that are relevant, could make
copies of that if that would be sufficient.

JUDGE CLIFTON: I think that would be
sufficient. Now, with regard to those top two
items -- well, actually, let me say it this way.
The top item includes both the Erba, Eric
reference and the Cornell program reference.

THE WITNESS: It really -- it should be
one. It should all be together. There's a --
there was a typographical error on my part to
have -- to have a --

MR. BROSCH: A space.

THE WITNESS: -- a space in there.
That's all one publication. The web page at the
bottom of that second apparent item is the web
page for the document identified in the first
two lines.

JUDGE CLIFTON: All right. So I will be entertaining at a later time any objection to my taking official notice of that without it being here since it's voluminous and since it's available on a website, the Cornell website.

Now, the second one you said had to do with a study in the state of Maine, is that correct?

THE WITNESS: The study in the state of Maine was published in the journal -- excuse me, the Journal of Dairy Science, which is a widely available academic journal that many, many people in the industry are familiar with.

JUDGE CLIFTON: All right. But it's only about seven pages, is that correct, what you relied on?

THE WITNESS: According to this, apparently it is.

JUDGE CLIFTON: Okay. So if you truly relied on only those seven pages, and this publication is available on the web at the site you show, I will be asking the people if they have any objection to my taking official notice of that without it being present here in print.
All right.

And with regard to the USDA statistics, you will be able to pull for us into one reproduced document, a copy, so that everyone can look at the pertinent statistics that you think helped you form your opinion. Is that correct, Dr. Cryan?

THE WITNESS: I believe that's what you -- I believe I understand that's what you will require of us, so that's what we will do.

JUDGE CLIFTON: Okay. Thank you.

THE WITNESS: If it's not required though, I'd sooner not do it. But I believe you directed us to do that. So I will do that.

JUDGE CLIFTON: I really do believe it helps, particularly since experts make certain assumptions about certain things in formulating their opinion.

Okay. Then tell me what's this on page 22 (sic).

THE WITNESS: Page 22 (sic) is a table that is in all but the lines at the bottom, the three bolded lines at the bottom, and the final column on the right is taken from the Hoard's Dairyman. Hoard's Dairyman Magazine which is
also a widely read trade publication for the
dairy industry aimed particularly close to dairy
farmers but read widely among the industry
generally.

This -- this is a tabulation they make
every year of the 50 largest dairy farmer
cooperatives in the United States. This listing
for 2007 was published last October and the --
the asterisks indicate members of the National
Milk Producers Federation. Those asterisks --
the Hoard's Dairyman marks -- also marks on
their list members of the National Milk
Producers Federation.

I cannot assure you that they -- their
markings in that publication were the same as
these, because these are the current members.
This marks the current members of our
cooperative -- I'm sorry, of our federation, so
that it's more up to date in that aspect than --
than the magazine might be.

In addition, I've added the -- at the
very bottom I've added the three additional
members of National Milk that are not on the top
50 list.

On the right-hand column, I have
calculated the estimated average cows per farm
simply by taking the volume of each co-op and
dividing it by the number of farms, which gives
me a volume of milk per farm and divided by a
representative milk per cow figure, which I
believe was the -- I believe I used the average
milk per cow for 2008. It might have been 2007.
But it's -- it would be -- those results are --
are -- would be almost identical.

JUDGE CLIFTON: So did you use a
nationwide average milk per cow?

THE WITNESS: I used a nationwide
average, that's right.

JUDGE CLIFTON: Is there a variability
region to region?

THE WITNESS: There's variability from
region to region but it's a -- it's an
indication of the -- of the size of the farms in
each co-op. Some of the co-ops are national or
cover relatively wide regions. Others are more
narrowly located.

But I thought the -- the simpler thing
was to use the national average rather than
assume the specificity that would be -- I do not
have the specificity to get the number exactly
right. So it was -- made more sense to use a frank approximation than -- than a phony precision.

    JUDGE CLIFTON: Well put. And how is Hoard's spelled as you've used it in the last few comments?

    THE WITNESS: H-o-a-r-d, apostrophe s, Dairyman, D-a-i-r-y-m-a-n. And on the bottom I have -- the first -- the first line is simply a toting up of the numbers in the overall table for the members of National Milk that are in the top 50.

    The next line is a toting up of all of the co-ops that are in -- all the co-ops that are in the top 50. And then the last item is a -- is a U.S. total. Again, I believe -- I believe that's for 2007, the total production. It is -- it is 2007, based on the number. I'm looking at the number. So these numbers should all be based on 2007.

    So that the U.S. -- U.S. milk production was 185.6 billion pounds. There were 59,131 licensed dairy farms in the United States in 2007. And that works out to an approximate average of 155 cows per farm.
And you can see from -- from these numbers that the -- that the National Milk average is very close to the national average. And there's a fair -- there's a clear variety -- variation among the members. I believe we are a co-op, as a federation -- National Milk actually is a qualified Capper-Volstead cooperative for a number of political reasons.

But as a federation, representing co-ops, we represent a representative -- our members are representative of the nation.

JUDGE CLIFTON: Now, is there anything else you want to say to clarify either your testimony or Exhibit 23?

THE WITNESS: I don't believe so.

JUDGE CLIFTON: All right. Mr. Brosch, do you have any questions?

MR. BROSCH: No, your Honor. I'm done with the witness.

JUDGE CLIFTON: All right. Then, Dr. Cryan, since you will be here and available for cross-examination, I would like to defer that until everybody is ready. Mr. Ricciardi, did you want to make a comment?

MR. RICCIARDI: I do, Judge. And I'll
take your guidance on this point as I would with
anything.

JUDGE CLIFTON: Well, thank you.

MR. RICCIARDI: In fact, after your
explanation, maybe I'll even let you do the
cross-examination, too.

But I have some -- some questions on voir
dire of this witness which are limited and which
would be reflective of portions of Exhibit 23.
If you would like me to defer that until it is
actually offered in evidence, I am willing to do
that when Dr. Cryan gets back on the stand. It
relates to whether portions of this report
should come in. And, obviously, you're going to
make that decision. My voir dire would be
limited. But you tell me when you want to do
that.

JUDGE CLIFTON: All right. I'll hear
from you, Mr. Brosch, on that point.

MR. BROSCH: Your Honor, I think we've
already had a good colloquy on whether you are
going to force any limitations on examinations
here, and so I think we'd be better at this
point, since Dr. Cryan is going to be called
back for the majority of his cross-examination,
to defer it to that point.

JUDGE CLIFTON: I agree because I'll be better educated then. And we may also have some hard copy of some of these documents on which I'm asked to take official notice, so --

MR. RICCIARDI: Your Honor, I understand. And that's fine, except what I would like to do is to do that first because the voir dire goes to the question of whether or not portions of this, in fact, should be admissible before we get into the substantive cross-examination.

JUDGE CLIFTON: Okay. That's a good point.

MR. RICCIARDI: Thank you.

JUDGE CLIFTON: And I appreciate all counsel bringing to everyone's attention as soon as they are aware of an issue so that people have time to think about it and be ready for it. That's very helpful. Mr. Vetne.

MR. VENTE: Your Honor, I don't want to address this witness on his testimony but I do want to comment on and -- on the policy that you've suggested on the documents to be officially noticed.

This came up a little bit before. The
practice has been -- and I know practice doesn't need to be followed everywhere -- but if -- if a document or a data set is readily available to everybody here and to the world, at an accessible online location, that official notice may be taken and people can then refer to that document. They could go to that document. The accessibility is not limited because there isn't a physical copy. And for some of the material here and documents that will be -- for which official notice will be requested, the data is rather voluminous.

And my opinion, that a paper copy of documents that are readily accessible, when we know the document to which and the table to which a witness has referred or on which counsel may rely simply on brief, if it's readily available, I know my clients probably would not want to pay for copying of -- of Federal Milk Order Market statistics.

There are many relevant tables there. More will probably come to mind as we finish the hearing and even proceed to -- to briefing.

I do think that copies ought to be made available and maybe scanned so they're
accessible online to everybody, of a document like Early Development, all of it because we don't have an opportunity to judge Mr. Cryan's judgment as to whether only three pages of a lengthy document are relevant. He found three pages relevant. I'd like to see the whole thing. I never have.

So that's -- that's my comment on the copy for official notice purposes ruling. When your Honor announced that policy, I'm not sure anybody had requested it. I, for one, don't care. If nobody cares, maybe your Honor should be less insistent. Thank you.

JUDGE CLIFTON: In other words, you're saying you don't need the hard copies here?

MR. VENTE: Not if it's available readily online.

JUDGE CLIFTON: And do you know that -- since you're interested in Early Development and that you might be interested in more than three pages, are -- are you confident that this 50 -- 56--year-old, 57-year-old -- 57-year-old document is readily available?

MR. VENTE: That one I -- the witness said it's not available anyplace. And I think
that one ought to be provided. And in addition, I think it ought to be scanned and made available on a website's, whether it's USDA's or NMMF's website, so that other people may access it online. That's the one exception to all these documents that is not available online and for which a copy of the whole thing ought to be made available.

JUDGE CLIFTON: You see, I suspect that this expert made very limited use of something that is 57 years old. And if he says he used three pages of it, I really don't think he ought to have to bring the whole thing in here because you're curious.

MR.MR. VENTE: Not because I'm curious, your Honor. But the whole -- the whole thing, like any document, was based on the data set. And -- and whether other parts -- if someone relies on a -- on a statement in a transcript, you know, and there's context for that statement, a person may do that. But the -- the document source, the transcript source should be made available for other parties to look at to see if the context is -- is misleading in some way or if there are other data sets,
conclusions, and materials in the document upon which the witness relied from which another expert or a lawyer could make the opposite conclusion.

This document is not available to anybody as far as -- well, it's not available to us. It's not available online. I'm not asking for -- for 30 copies, but I'm asking that if -- if the document or any portion of the document was relied upon by this witness to reach a conclusion, that the whole document should be made available for other experts to look at to see about the legitimacy of that notion.

MR. BROSCH: Your Honor, I think we have a lawyer that's been watching too much Cold Case, but we certainly -- we certainly will do, you know, what your Honor has requested. We will make -- or we will defer to the idea that those things that are available online are available to everyone.

It seems to me that's the new world we live in, but it's up to your Honor.

JUDGE CLIFTON: Mr. Beshore.

MR. BESHORE: Just very quickly. I don't want to comment on the issue with respect to the
1952 publication that Dr. Cryan's offered, but with respect to the general rules of notice, I would join the position that Mr. Vetne has articulated that where they are generally available to everyone online, that it should not be necessary, that it is not necessary. And I would request your Honor to consider whether it should be necessary -- necessary to have them physically available in the courtroom.

    JUDGE CLIFTON: Okay. Well, we may not -- Mr. Yale first, and then Mr. Carroll.

    MR. YALE: Benjamin F. Yale, Continental Dairy Products, Select Milk Producers. On the official notice, that has been the practice and I agree on the voluminousness. The difficulty is that it is so easy to reference a website with a plethora of information on it and never ever identify what's in that and what you're going to use or anything else.

    So I -- you know, I don't mind just being able to go to the website. That's great. I like to have electronic copies. But I think there ought to be a lot more focus. I really, really appreciated your Honor's questions of Dr. Cryan that showed that although he
1 referenced a huge amount of data, I mean, all
2 the Federal Order statistics decades -- well
3 almost a decade, 1999 to 2007, and it's really
4 basically a page and a couple of numbers off
5 them. And the same thing with the others.
6 
7 So if we can discipline ourselves -- and
8 I'll try to do the same thing. To say, oh,
9 yeah, I'd like to have all the Federal Order
10 statistics since the beginning of time through
11 today when all I need to know is the Class I
12 utilization out of the Texas Order for 2007 or
13 whatever -- I guess it wasn't the Texas Order
14 then but be that as the may. I think that ought
15 to be appropriately to be able to focus.
16 
17 And on the other hand, if they're small
18 pages, I think having the hard copies if you're
19 going to use them during cross-examination or
20 use them during the hearing, I really think
21 copies ought to be available.
22 
23 JUDGE CLIFTON: For one reason, Mr. Yale,
24 so the judge can follow along.
25 
26 MR. YALE: Right.
27 
28 JUDGE CLIFTON: Those things that are
29 perfectly understood by all of you are not
30 perfectly understood by me. And I have to
preside here. So having a hard copy is sometimes helpful.

MR. YALE: Right. I think it's helpful to all of us. And then I would make a separate but related request that I think's appropriate and that is that in, for example, Dr. Cryan's testimony and some of the others, if we can have some way that those could be electronically available quickly during the hearing, it would help some of us who are trying to avoid the paper chase.

So, I mean, I'm willing to give him my e-mail address or whatever so that they could e-mail to me if that's appropriate. That would be a help. And I would be willing to reciprocate if we should do anything as well.

JUDGE CLIFTON: Well, if USDA can put these things on the website so even those people who didn't come here can see them --

MR. YALE: Right. Well they will eventually.

JUDGE CLIFTON: -- that would be good.

MR. YALE: I'm talking about during the pendency of the hearing.

JUDGE CLIFTON: While we're here, I have
them.

MR. YALE: Thank you very much.

JUDGE CLIFTON: Thank you, Mr. Yale.

Mr. Carroll.

MR. CARROLL: I agree with -- as long as we have hard copies, I have no objections. Without hard copies, I do have an objection. I recently finished a case in the second highest court of the State of New York where the issue was raised and the court said flat out, these are not infallible means of putting things on. They're not infallible in translation. They're subject to alteration. And they are not generally admissible, at least in the state courts.

So unless we have a hard copy, I maintain my objection.

MR. BROSCH: Well, there you go, your Honor.

JUDGE CLIFTON: Yeah. I didn't have unanimity. I thought we were going to settle the whole thing. You know, we had it going. We had Beshore agreeing with Vetne, and I thought this is going to be an easy hearing from here out.
MR. BROSCH: Your Honor, I agree with everything you said except when you said that you don't understand things fully like everybody else here. I can tell you, if you think everybody else understands it all, you're being very fooled.

JUDGE CLIFTON: Okay. Then I would like to take you up on your suggestion, Dr. Cryan, that with regard to those USDA statistics that you relied on, if you would pull those together and make them available, about 30 sets of them, for those who are participating here.

And with respect to that Early Development, which is a USDA publication, I just want the pages that you relied on. If you happen to have some sort of a hard copy of that or an electronic version of that you could make available to counsel who want to peruse it, that would be great. I would appreciate it, but I'm not requiring it. And I'm not requiring you to go fetch either of the first two since you have those websites noted.

MR. BROSCH: Okay. Thank you, your Honor. We'd be glad to comply with that.

JUDGE CLIFTON: All right. Thank you,
Mr. Brosch.

You may step down. Thank you.

MR. CARROLL: Your Honor, I assumed, without thinking of course, that there's automatic reservations for any overruled decision of the chair. In other words, we don't have to keep popping up and saying I reserve or I object and I reserve?

JUDGE CLIFTON: No, you don't have to keep popping up. But as you can see by what I just did, I'm not consistent. So you have to keep letting me know what you care about.

MR. CARROLL: Just to repeat my original objection, any piece of paper which is referenced on the Internet and not produced here in hard copy is our objection, and we will take a respectful exception to any kind of ruling for the very simple reason that that does not meet proper legal standards. Thank you.

JUDGE CLIFTON: Thank you. That was well said. Mr. Brosch?

MR. BROSCH: I would just note, your Honor, I just finished a case in the Ninth Circuit Court of Appeals, and we submitted evidence with reference to websites in the Ninth
Circuit Court of Appeals. So I don't know what they're doing in the second highest appellate court or whatever it is in New York, but in the federal courts you can do this.

JUDGE CLIFTON: My concern about websites is, they do change. They do get changed. Sometimes the reason is because what was up there was an error. And so it's appropriately fixed. And if we don't have the hard copy, we don't know whether the erroneous version or the fixed version is what a person relied on. That's one of my concerns. Websites do change.

MR. BROSCH: Well, perhaps Mr. Carroll or whoever objects can go onto a website and take a look at it and see if he can come into this particular century in terms of accessibility and if he has an objection after doing that, he can come back here.

JUDGE CLIFTON: Yeah. That was not a fair cut. Mr. Beshore.

MR. BESHORE: I just want to make sure that we're not confusing taking requests for notice of websites, which I didn't have -- I didn't comment upon. But requests for notice of publications which are available on websites,
like past publications, statistical publications, I think there is little or no possibility that those publications, published documents of Federal agencies, for instance, which is primarily what we're talking about here, are different from one time to the other.

JUDGE CLIFTON: All right. Thank you.

Mr. Stevens.

MR. STEVENS: Your Honor, I know you haven't heard from enough lawyers on this, but I'll add my 2 cents, or some amount of money. My thought on this is that we have had, over the course of the years, different approaches for official notice in rulemaking hearings. As far as official notice of -- of USDA publications, of the type of documents that I'm hearing referred to that are generally available to the public in the library, online, at various sources, available from the Department by request, those documents, it seems to me are -- and I have experienced in my -- in my doing Federal Order hearings, those documents have been -- official notice has been taken of them many times and no copies were ever brought to the hearing room.
There are -- there have been occasions where -- where copies have been brought for the convenience of the parties of the hearing to see and use. My experience also tells me that over the course of the years, many parties ask for official notice of -- of many types of things. And they are noted for the record, and they become part of the record, that is, the request and the identification of the documents.

And, in fact, the Department asked for official notice of many things, prior decisions, other -- other documents which are public, readily available, and they are not made a part of the record.

If that were the case, as voluminous as these records are, they would just be that much more voluminous, with documents that are readily available to anybody to get ahold of.

And I've heard the concerns about that they're -- if they're on the web site, they might be incorrect or claims of that nature. But given all that, my experience in federal court hearings is that official publications, official notice, judicial notice, different notices are made all the time in these
rulemakings and as far as official notice is concerned, the documents are not necessarily made available.

So I just add that to the mix and it is your Honor's call, certainly.

JUDGE CLIFTON: All right. Thank you. Mr. Tosi, did you want to add anything?

MR. TOSI: (Shaking head.)

JUDGE CLIFTON: I'm not going to change what I've asked of Dr. Cryan, but I will have to confront this issue as we go on when other people ask that I take official notice of things. And I'll just have to see what I think.

I know I would want -- in trying to determine how to cross-examine Dr. Cryan, I would want the pages in front of me that were important to him out of these sources, these references.

Okay. Good. Now, since we have deferred cross-examination of Dr. Cryan until more information is available, this would be a good time for me to ask for a report on what additional information Mr. Carman has pulled together and what is the request status response, at this point. Should Mr. Carman come
forward or, Mr. Stevens, do you want --

MR. STEVENS: Well, can we take a minute, your Honor?

JUDGE CLIFTON: Yes. Let's take a five-minute stretch break. Please -- well, let's go till 3:15. We'll go back on record at 3:15.

(A recess was taken from 3:08 to 3:15.)

JUDGE CLIFTON: And let's go back on record. All right. We're back on record at 3:15. Who would like to report? Mr. Carman himself.

MR. CARMAN: First of all, your Honor, we presented some information to AIDA this morning in hard copy form and have just recently discovered that some of the tables are the incorrect tables. That's what we were just doing just now. So we will get the corrected tables to them.

In terms of item 13, in request 1, which was the recalculation of the pools, I have heard from two of the eight offices concerning recalculation of the pools. In both cases those are going to be restricted data of only one or two entities that did not pool milk because of
adverse price relationships.

Item 7 of the second request, which dealt with the cost of a producer-handler's becoming regulated if Proposal 1 is eliminated is being calculated still, but a number of orders, as we've indicated, and other data will be restricted.

So one thought is to provide some examples of various size producer-handlers times the admin for a calculated cost with that kind of an assumption.

Last night, we responded by e-mail to Wisconsin, Vermont, New Hampshire, New York and Pennsylvania Coalition of Departments of Agriculture, and particularly Mr. Will Hughes asked for a set of data. We provided by e-mail the structure data that I presented as items 14 through 20, as well as PDF of the relevant producer-handler regulations in 1000 part -- in part in each of the individual order parts.

We also indicated to Mr. Hughes where he could find a PDF searchable file of all of the regulation in part 7 concerning Federal Orders.

I believe Mr. Carroll's requests have been completed. Mr. Yale's requests are still
in progress.

The requests which were the last set of data requests that we got are last in line. We're working on those and Mr. Cryan's requests, I believe, are completed.

JUDGE CLIFTON: Dr. Cryan had requests?

MR. CARMAN: Yes. A lot of that data was information that we provided in Exhibit 5 through 20, that we would have provided anyways as information for all participants in the hearing.

JUDGE CLIFTON: All right. And did you say it is completed or is there anything more?

MR. CARMAN: I believe it's completed.

JUDGE CLIFTON: Complete.

MR. CRYAN: It's completed as far as I'm concerned, your Honor.

JUDGE CLIFTON: Dr. Cryan believes it's completed. Okay. Who did you say after Mr. Yale? Mr. Vetne, what did you say about Mr. Vetne? His were the last requests.

MR. CARMAN: Yes. His was the last request for data that we got. And we are -- some of what he has requested has been provided in previous exhibits or will be provided. And
so there is some combination -- some of his stuff has already been covered, but some of it we're working on.

JUDGE CLIFTON: Okay. Have you, to Mr. Ricciardi and his group, said no to any of the requests?

MR. CARMAN: Last night we put together a small e-mail, a hard copy indicating or correcting the letter that Mr. -- that was put in as Exhibit 21 yesterday, indicating the third item should have covered items 14 through 16 and not items 15 and 16.

Regarding your first e-mail request of April 16th, 2009, items 5 and 6, average fluid milk handler volume, that -- we don't have that. There's a possibility that we could do a selected month by the number of -- of handlers.

But as I testified in Exhibits 14 through 20, some handlers have little or no route sales because their unit's pooled.

So to divide by the total number of handlers into -- into an area Class I route sales for a particular month may or may not be an accurate set of data.

We indicated that items 8 through 12
would not be provided. And that -- and then
item number 3 was items 15 and 16. That should
have read items 14 through 16.

JUDGE CLIFTON: So you had already
identified in Exhibit 21 all of the no responses
except that we need to include 14?

MR. CRYAN: That's my understanding.

JUDGE CLIFTON: Okay. and you're working
on the rest?

MR. CRYAN: Yes.

JUDGE CLIFTON: All right. Mr. Stevens,
do you want to ask any other questions of
Mr. Carman, or do you want to say anything more?

MR. STEVENS: Well, I don't have any
questions for Mr. Carman. But what I want to
say is, first of all, the word -- the word has
been used by -- by myself and by others and the
word is "sponsored." That word, I don't think,
is the word that should be used to -- to -- to
identify the position that Mr. Carman's taking.

Mr. Carman, as a government employee, is
responding to requests. And as he testified,
when he response -- in response to the request,
it came to his mind that certain documents could
be of use to the parties and those were created
and they became Exhibit 5 through 20.

There are other requests that parties have made. And given the time constraints when they were received, and how much data was being requested, we see the results of that, that it is a voluminous amount of material and every effort is being made by every office of the Market Administrators, each of their offices, and by numerous employees in AMS Dairy Programs to complete those requests.

I want to say also that in terms of -- of the weight or of what these documents mean, there should be -- and I don't think sometimes there is, but it certainly is erroneous to believe the fact that -- that the statistics are presented by a marketing specialist or Federal Marketing Order employees in and of itself means that the Department will take any greater -- will hold those in any higher level than any other statistics requested by the government that are presented by the parties at this hearing.

So whether Mr. Carman presents this evidence or whether it's presented by any party, it will receive the same weight and
consideration by the Department. So it is erroneous to say or to suggest that there is some favoritism, some thought the fact that Mr. Carman presents this as opposed to it being presented by a party means that any greater weight will attach to whatever that material is.

If that impression is going through this hearing, that impression is erroneous and should not be counted upon.

Beyond that, when the -- when the information is provided to the parties for their use, they may choose to introduce it or not. And that is their choice, of course.

If it's important to them, I assume they're going to present it. If it's not, they may not. There are certainly instances where information is requested, where the parties requesting it determine that it is not of an importance or significance or relevance to -- to put into the record. And so it is not put into the record. On other occasions, it is put in the record.

That choice is available to every party at this hearing. So do not attach any significance to the fact that Mr. Carman puts in
evidence as opposed to parties putting it in evidence. The Secretary reviews the evidence of this hearing from all sources.

JUDGE CLIFTON: Now, every time Mr. Carman pulls together a response to a request for statistical information, AMS Dairy will put his response on its website regardless of whether there's any indication that the requesting party will use it. Is that correct?

MR. STEVENS: Yes.

JUDGE CLIFTON: So everyone can look there and determine whether to use it, is that correct?

MR. STEVENS: Yes. And your Honor makes a very good point. Which is the fact, because of -- because of the availability of the Internet, because we have gone to that format, to make information available to the public and as anyone that goes to the USDA AMS website can see, there is voluminous material on that website concerning this rulemaking and others.

And the attempt is made to put every document, every one that -- that can be put up there is put up there. And it is available to the public.
So if someone requests some material and they choose not to do it -- to use it for whatever purpose, but some other entity part -- or party, person is looking at that and wants to use it in this hearing, well of course it's up on the website and it's available for their use.

It is -- it is as open a process as the Department can make it, so that everyone has access to the same information.

JUDGE CLIFTON: Now, I had a thought yesterday after we stopped. I was going down an avenue of thinking if Exhibits 5 through 20 came in in hard copy, and there were 30 to 50 copies of them on the back table, then every response by Mr. Carman should get equal treatment. That's how I was thinking.

Now, my 5 through 20 -- gee, Exhibit 3 is the most lengthy exhibit I've got. That's all the notices. Okay, my 5 through 20 -- I'm sorry, I just want to make this point.

Okay. My 5 though 20 are an eighth of an inch tall. And so the burden was not great to duplicate those. And I'm glad it was done and I'm glad everyone has that in hard copy. I am afraid that some of these other responses may be
so voluminous that the burden of reproducing them is indeed great.

Now, I just heard a lot of argument from a lot of lawyers who said, you know, when we take official notice of documents published by USDA, we really don't need the hard copies, because they're available online.

And I'm thinking, how is this different? So I may have to revise my thinking a little bit when we get to the point that someone wants to use something that Mr. Carman pulled together and is posted on the AMS Dairy website.

MR. STEVENS: Your Honor, it's been my experience that over the course of these hearings, many times this happens. Requests are made and documents are provided. Parties incorporate them into their statements, they make exhibits out of them. They use some of the information, they put it together with other things. In other words, they create maybe a new document or certainly a modified document of some kind.

Well, then, it's their document certainly. I mean, in the sense that it's their document with supporting material that they've
received from the Department.

I submit, your Honor, that that is not something that the Department should be responsible for providing copies for the use of the parties. I mean, that becomes a document that -- that a pro -- or opponent is using to -- to make their point for or against a proposal. And the documentation from the Department is used to make that point.

And so the Department is not responsible, it seems to me, to put that in. And has not, in every hearing that I've been through, has not been required to do that.

The whole attempt at the beginning of these hearings is to provide the documentation which would be useful to all the parties and to make the copies available so that the parties can use it during the course of the hearing.

With respect to these special -- I call them special ones, requests of parties, as we've had numerous ones here, and still working on it. They go up on the website. A hard copy is presented to the requester, and they are told what documents they have received and they are told what documents they will not receive and
why.

And that is what is being done. That is what will be done -- will be done. There will be no request that will not be responded to in terms of the documents or the explanation why the documents are not available.

As Mr. Carman just indicated for the record, many of these documents, they will turn out to have restricted data.

And from my mind, and certainly I'm willing to hear any other position on this, but they become of very limited value if it's just headings with R and blanks.

Now, the Department is going through the process of finding that, presenting it and incurring the cost of doing all that in the effort to assist the parties in the conduct of this hearing.

The use of the documents, of course, is up to the proponent of any proposal that they think are relevant to these requests. That's all we can do. And, I mean, that's all we should be required to do.

JUDGE CLIFTON: Now, the requests themselves are also on the website, is that
correct?

MR. STEVENS: I believe that's the case, your Honor.

JUDGE CLIFTON: So what I want to make sure we also let everyone know is when requests are refused or denied, that everyone be told why.

MR. STEVENS: Well, and I believe that is the case also. If it is not the case, it certainly should be the case and will be the case that all the postings on the website will indicate who asked for what. And, in fact, maybe -- you know, the actual document, the letter, the request.

And it will contain, as I believe it contains, our responses to those letters saying what we're providing, what we are unable to provide and the reasons why. And so the -- the request will be as transparent as it can be.

Everyone can view that on the website and know what requests have been made and what the disposition of those requests -- what the disposition of those requests has been.

JUDGE CLIFTON: Now, right this minute, is this a good time for Mr. Carman to present
any additional statistics or would it be better deferred?

MR. STEVENS: We don't have any hard copies to present at this time with respect to any of the requests. They are working on them. And then as I said, when they are completed, they are put up on the website and the hard copies are available to the parties that requested them.

JUDGE CLIFTON: All right. So right now would not be a good time to have Mr. Carman testify.

MR. STEVENS: I don't think so.

JUDGE CLIFTON: All right. Then I go back to my list. I'm thinking this is a good time for Mr. Tonak and Mr. Asbury.

MS. BRYSON: Judge, can I make one point?

JUDGE CLIFTON: You may. Let's see.

MS. BRYSON: I just want to let the record reflect that the reason for denying requests 8 through 12 from the Independent American Dairy Alliance is, was the USDA is unable to provide guidance on these -- those requests.

JUDGE CLIFTON: Wait just a second. Let
me look at Exhibit 12 -- excuse me, Exhibit 21
and read from the e-mail. It says, items 8
through 12, the information you requested will
not be provided. In addition to being beyond
the scope of providing statistical data, what
you seek cannot be articulated without the
benefit of testimony and evidence that this
hearing will examine.

MS. BRYSON: That's correct, Judge
Clifton. And I just wanted to point out that
what we had asked for is notice of the standard
of proof that Dairy Programs is going to use to
evaluate the evidence that they receive in this
formal rulemaking.

JUDGE CLIFTON: Now, by standard of
proof, are you thinking of things like, will
this be by a preponderance of the evidence or
clear and convincing or beyond a reasonable
doubt or the like, or something else?

MS. BRYSON: No, your Honor. The
definition of disorderly marketing, what kind of
statistics are going to be relied on for that,
what the tests are for determining that. The
idea of being able to present evidence that's
responsive to a proposal that the government
itself has not made is very difficult in the absence of any clear statement from the government about what the standard of proof is against which this rulemaking is going to be determined.

JUDGE CLIFTON: Now, is there case law that establishes this, to your knowledge?

MS. BRYSON: I think that's a question for the Department. You know, we had asked your Honor that this be conducted under the new rulemaking authority of the Farm Bill as an informal rulemaking, in which the government would consider this proposal and say, this is what we, the federal government, propose, and allow everybody the opportunity to comment on that.

In that kind of proceeding, the USDA gives everyone notice of what they think disorderly marketing is and creates a situation in which responsive evidence can be presented.

USDA decided not to do that here. And I just wanted to call to the -- I wanted to make explicit in the record the fact that we're proceeding here to gather evidence on proposals as to which the government has not asserted any
position or standards against which we can essentially marshal a case.

JUDGE CLIFTON: Well, that's -- that's a advantage as well as a disadvantage. It's wide open. Go for it, I think.

MS. BRYSON: I understand. I just want it to be clear on the record, because this is happening very fast under much shorter time frames than had existed in the past.

A lot of the problems, I think, people are experiencing with data here and the inability of USDA to provide data in a timely fashion is because this is being rushed in an unreasonable way.

And I simply want it to be clear on the record that we asked for articulation of what the standards are going to be in this new world and USDA has declined to provide any.

JUDGE CLIFTON: Thank you.

MS. BRYSON: Thank you.

JUDGE CLIFTON: Mr. English.

MR. ENGLISH: Good afternoon, your Honor.

JUDGE CLIFTON: Good afternoon.

MR. ENGLISH: Charles English. I wasn't sure when you would hear this. Fascinating
question you asked, of course, what's the case law proposition. And of course the answer was none. Well, that wasn't the answer.

Well, there wasn't any case law provided for the assertion. What we do have, however, is 76 years of precedence within the program. And I have with me one of the consultants in the dairy industry going back to the 1950s.

And I can unequivocally say that these kinds of interrogatories, which is what these are, directed to the Department — they are not data requests, they are interrogatories directed to an agency, are wholly inappropriate, without precedence and without case law.

And the Department, nor we who oppose the interrogatories, should have to go find the needle in the haystack that says you can't do it. It would be better if those who assert they can, could show that.

First, I believe that the requests seek to violate the level of privilege, the deliberate privilege of the Department. They seek to get the Departments to say in advance how they're going to deliberate.

Second, we frankly believe that the
procedures of informal rulemaking could not have been used in this process precisely for the controversy here.

If you noticed the comment, you don't have any evidence. What you have, of course, is what you are going to get here. You have formal rulemaking followed by a recommended decision after briefing and an opportunity to comment and have exceptions.

That is by way of saying that the very thing that those who seek to have interrogatories to the Department have provided -- will have their opportunity, if and when we ever get to a recommended decision.

As to the rush that we are under, I think this may be one instance where, at least to my knowledge, everybody in the room may be on the same side.

And that is by way of saying, the rush that we're under is because of a new Congressional mandate of how these proceedings will be pursued. I'm unaware of any counsel -- and I emphasize the word counsel, I don't know what individual parties may have done -- but I'm unaware of any counsel who regularly, or for
that matter has for the first time participated in these proceedings who advocate -- and quite frankly, I will tell you that without any authority, I certainly thought this was the worst idea around, and I think we're now seeing why.

But nonetheless, Congress said, here's the procedure, because it took too long to do these things, and they set deadlines. And what those deadlines did was put a real limit on our colleagues to the left. However that's --

JUDGE CLIFTON: The USDA employees.

MR. ENGLISH: The USDA employees. That isn't anybody's fault in this room, and it's certainly not the fault of the USDA employees who were put into this position. That is the reality of what has happened as a result of a Congressional enactment. And the enactments as I understand it, if you work the days backwards, I mean we have to have this hearing closed by Friday, June 5th. That's my understanding, that the hearing must close in Order to meet all the other time deadlines.

So whatever we all think about this proceeding, apparently Congress has told how
long we have to get it done. I will not comment on that.

As to what notice there may have been or what people have said, gee, we haven't had enough time to think about this, the Secretary quite clearly indicated in 2005 that a case could be made for eliminating the producer-handler exemption. That was published in the Federal Register. A number of the players in that procedure, in fact, are in this room today.

And no one can claim that having that been published in the Federal Register in 2005, that a case can be made to eliminate the definition of producer-handler should be surprised that the Secretary, having said that, that someone in the industry would take them up on that and propose precisely that. So there really isn't any notice issue.

But even if there is, I go back to the fact that Congress is the one that told us how long these proceedings take now, not us, that's the only point that had been raised specifically in these interrogatories. If we need to address the rest of the interrogatories, I had a series
of other documents, but that particular one has
been raised for now.

JUDGE CLIFTON: Thank you, Mr. English.
I personally want to comment how proud I am of
USDA for holding this type of rulemaking
proceeding, because I have been the subject of
rules that were made under notice and comment
that were very bad. And the way they got that
way was the mindset was pretty much set in stone
when comments were asked for. So not much
change happened.

This is a different proceeding. This is
almost a brainstorming proceeding, but
definitely a proceeding in which the Secretary
can take into account diverse viewpoints, very
complicated theory and do the best he can in
projecting what the impact of the rulemaking
would be. I like it a lot. It's a little
fluid, which makes it a little uncomfortable,
but I think it's an excellent process myself.
It's expensive. It's expensive for the
Secretary and it's expensive for the parties.
But it's effective. Ms. Bryson?

MS. BRYSON: Thank you, Judge Clifton. I
think we're delighted to hear that this is a
fluid brainstorming process. That's great.
We're behind that.

I would just say the 2005 decision of the
Secretary was about a specific order. What
we're faced with here is a request for a
national policy applicable across all orders,
even though by proponent's own admission,
there's no evidence of disorderly marketing in a
number of these areas. Thank you.

JUDGE CLIFTON: Mr. Stevens.

MR. STEVENS: Your Honor, I just want to
make sure the record reflects the response to
the requests, and the requests of this group, is
ongoing. The answer to the questions concerning
items -- I think it's 8 through 12, is that the
right number?

JUDGE CLIFTON: Yes.

MR. STEVENS: I want to be sure it's the
right number. 8 through 12, certainly in the
mind of the Department, are not the object of
fact-finding rulemaking. Which we are here to
make a record, a factual record, upon which the
Department can decide what appropriate
modifications to existing regulations should be,
if any.
And these are -- these items, 8 through 12, are the material for litigation. They are not material for rulemaking. So -- and I agree to the extent that they are called interrogatories.

What they are asking for is for the Department to predisclose it's deliberative process and its decision-making process. This is something that the courts have held sacrosanct for many years, and it's certainly not a change in any procedures or anything of that type.

This proceeding will be no different than any others in terms of how the department conducts rulemaking, formal rulemaking, in terms of making a record, evaluating the record for -- records evidence for and against various proposals and making decisions.

Everyone knows this is controversial. Everyone knows that this will probably be the object of lawsuits as the prior rule making on producer-handlers has been and continues to be.

But this is not the correct forum to air legal argument and legal issues. That's what the court system is for. So we -- we will not
respond to them. And if lawsuits ensue, then so be it. But they will -- they will be -- they will be determined in another forum, not in this forum.

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

MR. RICCIARDI: Two points quickly. First, I am a little bit concerned that Mr. Stevens has already indicated that there's going to be lawsuits. If the Department denies all of the proposals, why in the world would there be lawsuits? So I'm worried at this moment that we have a prejudged issue, number one.

MR. STEVENS: Your Honor, I object. I object. Your Honor, this is not the place for this type of argument.

JUDGE CLIFTON: The objection is sustained.

MR. STEVENS: Please.

MR. RICCIARDI: Okay. That's my first one.

JUDGE CLIFTON: Next point.

MR. RICCIARDI: Next point is this. The reality is --
JUDGE CLIFTON: By the way, there could still be lawsuits, but go ahead.

MR. RICCIARDI: Maybe. There may be, Judge, but more likely there wouldn't. That's the first point.

Second point is case law, there is actually the constitution. There is the due process clause that says that -- that a client, a person, is entitled to know objectively how to conduct themselves so that they can determine what they're going to do in operating their business. For any hearing, you need to know what the standards is. And I sit here and I'll see if I can get Mr. Miltner to go to Westlaw since I can't get my computer to open, and we can find the constitution and the cases that say that.

So having objective criteria about how it is going to be determined, what the factors are, are critical in any type of a judicial proceeding, regulatory or not.

JUDGE CLIFTON: I can't -- I can't believe you feel blind-sided in any way as to -- as to what it is that is being addressed in this rulemaking hearing.
MR. RICCIARDI: How the Department will determine, for example, the issue of disorderly marketing is something that we asked for data about. To the extent we have not received it, and we got a response that basically says we're not going to give it to you and we only know it when we see it, we are blind-sided.

MR. STEVENS: Your Honor.

JUDGE CLIFTON: Mr. Stevens.

MR. STEVENS: To that last point, I would direct Counsel to read how many years, over 50 years of administrative rulemaking. If the industries that are involved in this, everyone in this room has been involved in numerous rulemakings, or one or more. And this is something which is known, has been known for many years. Read the decisions of the Secretary of Agriculture. They tell you what disorderly marketing is, and they tell you what it's not. Read the decisions.

The courts have sustained the decisions of the Department of Agriculture and they have found some to be lacking.

But in the vast majority, they have been upheld. And the decision of the Secretary,
based on administrative records, one of which we're conducting here is done, decisions are made, court reviews are had and so the process was ongoing for many years.

In this proceeding, we are not presented with a request to tell us before we decide how you are going to decide it, how you are going to do this. No court has ever required us to do that. And if some party wants to see if they can establish that in some other forum than this, let it be done and the Department will respond and we'll see how all that works out.

We're not going to do it without being directed to do it. We've been doing it this way for all these many years and it seemed to have worked pretty well. So until directed to do it another way, I assume we're going to continue it the way we have been doing it.

JUDGE CLIFTON: Thank you, Mr. Stevens.

Mr. English.

MR. ENGLISH: Charles English. And with a fair amount of respect and otherwise to Syd Berde, who has passed on, but from which I get much of this material, the fact of the matter is, your Honor, that the Agricultural Marketing
Agreement Act does not, in our view -- and I
realize they disagree on the other side -- but
in our view, the Agricultural Marketing
Agreement Act does not establish any exemption
for producer-handlers.

It is quite clearly a creature of
administrative discretion as was held by the
judicial officer in the Independent Milk
Distributors Association in 1961.

Producer-handlers, quote, have no legal right to
be exempt from the pricing and pooling
provisions of the orders.

They have no legal right to be exempt
from regulation. Further, in 1974, it is
well-settled that the Secretary is authorized by
the Act to fully regulate producer-handlers,
even if they receive no milk from anyone else.
The Secretary is not required to provide any
exception for producer-handlers. That is from
in re: John Bertovich, B-e-r-t-o-v-i-c-h, et
al. 36 AD 133, 1977, in which --

JUDGE CLIFTON: 36 what?

MR. ENGLISH: 36 AD, Ag Decision, 133.
Which, of course, is part of what Mr. Stevens is
referencing. Is that there are 70-plus years of
ag decisions and federal court decisions that define what is necessary here.

The judicial officer there was quoting, in re: Associated Milk Producers, 33 A.G. Decisions 976 -- In re: Associated Milk Producers, 33 A.G, otherwise known as Ag Decisions, 976, 1974.

JUDGE CLIFTON: I'm glad the way we cite that now is AGRIC.DEC.

MR. ENGLISH: Well, in this case Mr. Berde may have been ahead of his time or something, so --

I would also point out that the Third Circuit, in a very relevant case called Ideal Farms, Inc. versus Benson, rejected producer-handler contentions that the AMA did not authorize the full regulation of producers in their capacity as handlers. Were we to accept appellate's construction of the Third Circuit --

MR.MR. VENTE: I would like to object.

MR. ENGLISH: Excuse me. We were -- excuse me.

We have just been challenged for what a legal standard is and whether or not the
Department feels it necessary to respond, I think the record should have real case law on the subject.

There is no necessity to prove disorderly marketing because the right to the exemption is not a right. It is a matter of administrative discretion. And I am entitled to give my cases in response as opposed to getting up and saying, oh, the constitution says that.

Well, I'm responding with real cases. And just because they don't like real cases doesn't mean I don't have the right to stand up here for a far less amount of time than anyone else has been up today to respond to that contention.

JUDGE CLIFTON: Mr. Vetne, I'm going to hear him out but, you may make your objection. But I'd like you to do it, please, when he's finished.

MR.MR. VENTE: Then my objection will be moot.

JUDGE CLIFTON: It will be moot. I'm going to hear it, but I'll still let you put it of record, if you'd like. Continue please, Mr. English.
MR. ENGLISH: Thank you, your Honor. The Third Circuit at 288 F 2nd citing Rock Royal, that they could avoid the intent of the Act if their contention were to prevail.

I will, as a matter of courtesy, not continue with umpteen citations. But the fact of the matter is, your Honor, that the exemption is one of administrative convenience and discretion. Whatever a prior Secretary has said about what may or may not be needed is, in our view, not relevant.

In fact, Judge Friedman, with an earlier case from the 2005 decision, was litigated, specifically said that another Secretary may view it differently.

Our view is disorderly marketing may -- need not be shown at all. It is merely a fact that the statute on its face says that everyone shall have uniform prices, and there is no extension, it is a creature of administrative convenience, and therefore administrative convenience can be done away with.

JUDGE CLIFTON: Before you leave, Mr. English --

MR. ENGLISH: Yes.
JUDGE CLIFTON: -- what is the response to the actual situation on the ground when a producer-handler, who has been enjoying that exemption, invests in accordance therewith, and then, as a matter of administrative convenience, loses the exemption?

MR. ENGLISH: Well, since it has long been stated there's no legal right to it, they had no right to rely on it. The Judicial Officer and the Secretary have always said that's what it is.

And since we go back to 1961 -- and I'm not sure we've heard from a producer-handler that goes back to 1961, we might talk about but that's at least 1961. I suspect, although I do have my cases here, that we can go back beyond 1961, check that the Secretary has always said, and the Judicial Officer has always said, and the Third Circuit and the Fifth Circuit, and now the D.C. Circuit have always said that this matter may be taken away because it isn't a legal right. If it's not a legal right, you are not entitled to rely on it.

JUDGE CLIFTON: Okay. Thank you, Mr. English.
Mr. Vetne, I'll hear you out on your objection, if you still want to make it.

MR.MR. VENTE: I have not -- I have not gotten up before on this topic, although when Mr. English spread his hands out he appeared to include me.

No, my objection and my standing up was I'm not sure -- I lost track of what the issue is. But I am certain that the response of Mr. English was in the nature of a lengthy argument that ought to be in the brief.

And now he's gotten, you know, whatever that time was and whatever that case is, you know, an argument in the middle of the case. You don't want everybody else to give a counterargument, and I won't.

But I would hope that if he does that again and I stand up, you will recognize me and let me say, this is argument, can we have it at the end of the case or in brief. That's it.

JUDGE CLIFTON: Thank you, Mr. Vetne.

Mr. Yale.

MR. YALE: We concur.

JUDGE CLIFTON: Thank you, sir.

Mr. Carroll?
MR. YALE: Well, let me -- there's one thing. We'd like to have a witness and move on. My client -- there will come a time when we'll argue, but we need to get the facts in the record and that adds nothing to the facts. And they're going to move later on that we need to go later in the day, which is beyond 6:00, because they're not getting anywhere. Well, they're debating and causing debate. Let's move on with the exhibits and the testimony.

JUDGE CLIFTON: You know, Mr. English has said very little thus far and what he has said has been valuable and he's not wasting my time. Mr. Carroll.

MR. CARROLL: I don't mean to impress on your time, or anyone else's also, but most of my career was developed on these cases he's talking about. As far as I know, the United States Supreme Court has never ruled in the line of what he says on what the law is. Until that happens, it's still an open question. And I'm not going to go any further than that, with the permission of the Court. Thank you very much.

JUDGE CLIFTON: Thank you, Mr. Carroll. Now, let's see. Is this the time for Dennis
Tonak and Mike Asbury to testify?

MR. RICCIARDI: Yes.

JUDGE CLIFTON: Who would be calling them?

MR. BESHORE: Sure.

JUDGE CLIFTON: Who would be calling them? Mr. Beshore. Mr. Tonak, when it's after lunch, it's very good that everyone is awake.

MR. BESHORE: Your Honor, we have made available a 12-page statement with one attachment which I would ask to be marked as -- with the next consecutive exhibit number.

(Exhibit 24 was marked for identification.)

JUDGE CLIFTON: All right. I'll need a copy, please, and the next number will be 24. Thank you very much. Does the USDA table have enough of them? You have the record copy and enough for you all to see?

MS. FISHER: Yes.

JUDGE CLIFTON: All right. Mr. Tonak, I'd like you to identify yourself and then I'll swear you.

THE WITNESS: My name is Dennis Tonak.

JUDGE CLIFTON: You've got to be very
close to the mic.

THE WITNESS: My name is Dennis Tonak, T-o-n-a-k.

JUDGE CLIFTON: Would you raise your right hand, please?

(The witness was sworn.)

JUDGE CLIFTON: Thank you.

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

DIRECT EXAMINATION

BY MR. BESHORE:

Q. Mr. Tonak, would you proceed with your statement which has been marked as Exhibit 24? Proceed to present that for the record.

JUDGE CLIFTON: Is there anyone else who needs a copy?

(Off the record.)

A. I'm the Manager of Mid-West Dairymen's Company, 4313 West State Street, Rockford, Illinois, 61102. This testimony is in support of Proposal 1 and 2 and is on behalf of Mid-West Dairymen's Company and Lakeshore Federation Dairy Cooperative.

Midwest is a qualified Capper-Volstead cooperative representing 163 dairy farms in northern
Illinois and southern Wisconsin. Mid-West is responsible for supplying an Order 30 distributing plant which is jointly owned by Mid-West and Prairie Farms Dairy. Midwest also supplies milk to other Order 30 pool and nonpool plants.

Lakeshore Federated Dairy Cooperative's member cooperatives are all qualified Capper-Volstead cooperatives. Lakeshore provides a vehicle through which its members develop direction on dairy policy, legislative activities, and Federal Order issues, along with providing additional member benefits and services. The Lakeshore members are Manitowoc Milk Producers Cooperative, Manitowoc, Wisconsin organized in 1933; Milwaukee Cooperative Milk Producers, Brookfield, Wisconsin, one of the oldest dairy bargaining and service cooperatives in the country and formed in 1961; Mid-West Dairymen's Company, Rockford, Illinois, organized in 1924 and reorganized in 1932; and Scenic Central Milk Producers Cooperative, Boscobel, Wisconsin, formed in 1998.

Lakeshore represents about 4,000 dairy farmers with an average herd size of 75 cows and who produce approximately 4,500 pounds of milk per farm per day or around 135,000 pounds per farm per month. The milk is primarily pooled on Federal Order 30. Lakeshore
and its member cooperatives have supported the Federal
Order system because the Federal Order system generally
provides fair and equitable treatment of both producers
and handlers. We want a level playing field for both
producer and handler. It is our belief that classified
pricing and the market-wide pooling of those classified
pricing proceeds contribute to the orderly market
conditions and a level playing field. The market-wide
sharing of the pool proceeds also enhances the income
for all dairy farmers participating in the pool. This
belief and philosophy provides the framework for our
support of Proposal 1 and 2.

Our concern with current producer-handler
exemption is three fold:

A: A producer-handler removes a revenue
source from the market-wide pool. The producer-handler
does not create "new" fluid milk sales or customers to
any great extent but cannibalizes already existing
sales. Since the producer-handler does not contribute
to the pool the net effect is to reduce the revenue for
all pooled producers.

B. A producer-handler has a competitive
advantage in the market that can lead to disruptive and
disorderly marketing conditions. One method of
determining the producer-handler "advantage" is to
calculate the difference between the regulated minimum
class I price and the statistical uniform price or
"blend price." Using this method the difference in the
Upper Midwest Order is approximately 14 cents per
gallon. This is a huge price advantage for the
producer-handler and can easily destabilize a market.

C. An individual producer who packages
and distributes his own milk receives much different
pricing treatment under the Order than a group of dairy
farmers who form a cooperative and package and
distribute their own milk. The group of producers takes
the raw milk production risk and, through their
cooperative, makes the investment and ownership risk of
operating the fluid plant just as a producer-handler
does. But the price risk is much different.

Muller Pinehurst. Much of our
perspective on producer-handlers and their potential
impact on the fluid market has been developed through
Mid-West's joint venture ownership of a small fluid milk
plant, Muller-Pinehurst Dairy.

In 1981, Mid-West purchased a 50 percent
ownership in Muller-Pinehurst Dairy. Muller was a
family owned business started by L. Fred Muller in 1900.
He and his horse, Old Phillip, delivered milk to area
homemakers. In 1947 Muller acquired Pinehurst Farms.
Pinehurst Farm's purebred herd of Guernesey cattle produced milk for the Pinehurst Farms milk plant. The two dairies continued to operate as separate companies with the Guernsey herd at Pinehurst Farms continuing to supply milk for the Pinehurst plant. Growth in sales necessitated the need for additional milk suppliers from area dairy farms for the Muller plant.

In the early days of Mid-West, the cooperative marketed and priced the milk of dairy farmers to 15 handlers in the Rockford area. The pricing was based on a condensery price plus a differential. There were a number of condenseries within 45 miles of Rockford. The fluid handlers attempted to buy milk from farmers at a discount to the established pricing formulas. Chaotic and disruptive market conditions ensued. A committee of three arbitrators - one representing producers, another representing the handlers, and a third person from the University of Wisconsin - worked to resolve the situation. Without a regulated price and a formula for sharing that price, extreme price competition could and did exist. An eventual result of the committee's deliberations was the Rockford Freeport Federal Order, instituted on September 1, 1949.

When Muller acquired Pinehurst in 1947,
any handler could have been a disruptive force in a small local market like Rockford. A producer milking his cows and doing home delivery with a horse and wagon would not disrupt a very large area. Home delivery was a large part of the business and the highway transportation infrastructure was not developed as it is today. Since then with better refrigeration, roads, and transportation equipment, a producer-handler can be a disruptive force over a very large area.

The Muller Dairy and Pinehurst Farm were merged in 1957 to form Muller-Pinehurst Dairy. A new milk plant was built on then Pinehurst Farm. Eventually the cows were sold. At the peak of the home delivery period, Muller-Pinehurst had 40 small trucks doing home delivery 6 days per week and 15 larger straight trucks doing retail deliveries. Over time, the home distribution business faded and then was discontinued. Muller's distribution area increased from the Rockford and Winnebago County area to include much of the Chicago suburbs. During the last years of old Order 30 - the Chicago Regional Order - Muller was among the smaller distributing plants pooled on the Order. At least it was not large enough to be the major supplier to any of the Chicago Region's large grocery lanes. The last of Fred Muller's descendants involved in the operation and
manage of Muller Pinehurst, his great grandson, retired last year.

The producer-handler advantage. A regulated handler has to account to the market-wide pool at the minimum regulated prices. Since a producer-handler has no minimum price obligation, the minimum Class I price provides a pricing umbrella that the producer-handler can use to undercut the regulated price thereby achieving a price advantage and enabling the producer-handler to gain or retain business. The producer-handler in Federal Order 30 has a 14 cent a gallon advantage over the regulated price. This advantage is calculated using the difference between the Class I price and the statistical blend price. Attachment 1 was compiled from the Order 30 price Announcements.

This potential loss to Mid-West's dairy farmer members would be devastating and could easily exceed $2.5 million annually to Mid-West. For January 2009 Mid-West paid almost $700,000 to the Market Administrator Producer Settlement Fund and the Administrative Assessment Fund. We routinely have obligations to the Market Administrator for half that amount. In fact, Mid-West maintains a $500,000 credit line for the purpose of meeting our obligation to the
Market Administrator in a timely fashion. The money Mid-West pays to the producer settlement funds would be welcome cash if it could by paid directly to Mid-West's producer members at these times of low prices.

Muller and Mid-West are not competing with any producer-handlers today however over the last decade a number of large dairy farms have been built and began operating in our area. One farm currently under construction 50 miles from our Rockford, Illinois plant has announced plans for a 7,000 head milking herd. An additional 14 cents a gallon (the producer-handler advantage) would generate an extra $2.9 million in income annually for that farm operating as a producer-handler. It would be completely unfair to the dairy farmer owners of Muller Pinehurst to have a competitor 50 miles away with that kind of price advantage.

Balancing the market. I have observed over my 30-plus years in the dairy industry a number of ways that producer-handlers can balance their surplus production.

Twenty years ago a producer-handler told me how he balanced his milk production and packaged milk sales. He had an arrangement with a small group of stores 200 miles away where he would work with the store
to undercut the established prices from the Federal Order regulated plants. He would deliver a load of product to the store and in a matter of days his surplus was gone. While these distant stores regular supplier may have been upset the stores were happy about the extra volume of business. And it did not noticeably affect the producer-handler's local competitive price.

Muller Pinehurst has variability in the day-to-day and week-to-week needs for raw milk. Muller's school business create parts of variation due to filling the school pipeline and adjusting for days that school is not in session. Another part of the variability can be due to competitive sales among grocery stores.

Many consumers perceive little difference between brands of milk and so they will shop at the store with the lowest milk price. This shifts milk volume between stores, the fluid plants that supply the stores, and the producers who supply the fluid plants. Twenty years ago in Texas my employer, a cooperative, had a full supply arrangement with a fluid plant. Whenever the large chain store supplied by that plant had a sale, the fluid plant needed more milk. Coincidentally, another cooperative supplying a different fluid plant which was supplying a different
A chain store would become long on milk. The needed balancing supplies could be purchased from that second cooperative.

A group of stores in the Rockford market receive their "store" brand milk from a distant supplier. The store brand milk has predominant positioning, shelf space, and attractive pricing. Muller, as a local dairy, has a small amount of shelf space in these stores. Store also attaches a premium price to the Muller milk. As a result of the limited shelf space and the high price the Muller sales volume is very low. Occasionally the distant supplier of the store brand milk is unable to supply these stores. Then the stores call Muller with the directive to immediately deliver a much greater than normal milk volume to the stores. Of course the Muller-labeled milk dominates the milk case and the Muller sales volume in those stores increases. It is apparent that one reason the stores maintain Muller as a secondary supplier is to help supply or balance the stores' needs when their main supplier cannot perform.

A producer handle can use price to help balance production. A producer-handler can use a secondary supplier status - especially when used in concert with pricing - to balance production. A
regulated handler can have a difficult time balancing a milk supply while a producer-handler does not have a price constraint. Allow me to illustrate. At certain times of the year fluid sales drop off. These drops are especially noticeable during the holiday period -- holiday periods and during the summer. As an example, last summer and this past Christmas, Mid-West moved loads of milk 250 miles and more to find a manufacturing outlet. A producer-handler would not be constrained by the Federal Order minimum pricing and could be very aggressive in pricing and selling his milk locally through additional packaged product sales. The producer-handler would avoid the transportation and other costs of moving excess production great distances. Regulated handlers whose sales are already in the holiday slump would lose even more fluid volume. When the volume shifts from one regulated plant to another regulated plant for any of the above reasons, the Class I value stays in the pool and is shared with all producers in the pool. When the volume shifts to a producer-handler, the Class I value is removed from the pool and the milk of all producers in the pool loses value. When a large producer-handler uses the "producer-handler advantage" to gain business, chaotic and disorderly marketing conditions exist and all
producers suffer.

Producer-handlers and the Federal Order.

When Muller and Pinehurst started business there wasn't
a producer-handler exemption since this wasn't a Federal
Order. Since then, the Federal Order has created an
artificial distinction between a dairy farm family who
bottles their own milk and a group of dairy farmer
families who bottle their milk in a plant owned by their
dairy cooperative.

In the early days of the Order program,
that distinction may have been justified. Most
producer-handlers met their labor needs from the
immediate family. The cows were milked by hand or with
a bucket mixer. Pipeline milkers did not exist.
Processing and packaging milk was labor intensive.
Every phase of the dairy operation was slow and tedious.
Milk bottles were washed by hand. Vat pasteurizers were
small and pasteurizing milk took many hours. Bottle
filling was a manual operation. Ice was used to keep
the milk cold during delivery. For many years Muller
operated its own ice plant. Distribution was often by
horse and buggy. Many producer-handlers -- handlers
operated only one route. There would be additional
reporting requirements for a handler regulated by a
Federal Order. Since most farmers packaging their own
milk operated on a small scale, the benefit to the Federal Order pool of regulating these producer-handlers was quite small compared to the cost of auditing the records and enforcing minimum payments.

At the outset of the producer-handler exemption, much of the milk distribution was done on home delivery routes and to corner store neighborhood markets. After World War II milk distribution began a noticeable shift away from home delivery. While there may be many reasons for this, the one I hear most often is that more women began working outside the home and no one was available to put the home delivery in the refrigerator. Between 1955 and 1975 home delivery virtually disappeared in the Midwest. Many of the producer-handlers discontinued their milk processing.

The dairy industry has changed dramatically from those early producer-handler days. Home refrigerators are much larger than 40 years ago. My refrigerator is much larger than my parents and grandparents, and my wife can buy more milk on her trip to the store. Trucks are much larger, highways are better, raw milk (at least for Grade A) is handled in bulk tanks and not cans, most Grade A farms save labor with pipeline milkers, some farms use robotic milkers or other forms of automated milking, dairy farms and plants
use computerized record keeping and process control systems, and the processing and packaging equipment is automated and faster. In 1958 Muller's new half-pint machine could package 45 units per minute and now one machine can package 300 units per minute.

Small business impact. The Notice of Hearing states that a dairy farmer is considered a small business if he has a gross revenue of $750,000 or less. Likewise, a plant was considered a small business if the plant had less than 500 employees. Producer-handlers are currently exempt from Order regulations based on their status as a dairy farmer. A dairy farmer who in addition to producing milk is also processing that milk. Accordingly it would be appropriate to consider producer-handlers as small businesses on the same basis applied to dairy farmers in the Notice of Hearing, a gross revenue of $750,000 or less.

Virtually all Mid-West producers are small businesses. The average Mid-West dairy farm produced 4,100 pounds of milk per day for the last year. This equates to 124,900 pounds in a 30 day month, for 1 million --

JUDGE CLIFTON: Excuse me. Do that sentence again, will you, please, beginning with this equates?
A. This equates to 124,980 pounds in a 30
day month or 1,520,590 pounds in a 365 day year. The
average Mid-West producer milks between 60 and 70 cows
based on our estimates. In fact, we have only one farm
over the 500,000 pound small business level.

Changes in regulation. I have already
discussed many of the changes in milk production,
processing, and distribution that have occurred since
the inception of Federal Orders. The dairy industry has
moved from hand milking to robotic milkers, from can
milk to bulk milk, from distribution by horse and wagon
to distribution with large tractor trailer trucks.

Federal Orders themselves have changed
many times over the years. The pooling requirements
have changed, the method used to determine prices have
changed, the classes of utilization have changed, the
geographic area covered by the Orders and the numbers of
Orders themselves have changed. These changes have had
a financial impact at various times on Mid-West, on our
members, and on Muller. In 2000 we had the changes
brought about by Federal Order Reform. Since then
additional changes occurred in make allowances and the
end product pricing formulas along with pooling
participation requirements. A plaque in our office
says, quote, the only thing permanent is change, close
quote. Or to paraphrase the old saying, the only sure things in life are death and taxes and change.

    Over the years, producer-handlers have changed their operations to meet the changed Grade A regulations the same as any other dairy farm or dairy plant. I am sure they have changed their milk production and plant operations, just as the dairy farmer owners of Muller-Pinehurst have done. It is now time for a change in the Federal Order Regulation and the pricing and pooling responsibilities that go with those changes.

    There may have been valid reasons to have had a producer-handler exemption at one time during the history of the Federal Order Program. If the exemption did not already exist there would be no compelling reason to create a special producer-handler exemption today. Mid-West Dairymen's Company and Lakeshore Federated Dairy Cooperative urge the adoption of Proposals 1 and 2 as being in the best interests of the entire dairy industry. Thank you.

BY MR. BESHERE:

    Q. Mr. Tonak, I have just a few additional questions for you. Attachment 1 to Exhibit 24, can you just tell us -- first of all, did you prepare that personally?
A. I prepared that personally.

Q. And can you tell us just briefly how you prepared it?

A. I took the Federal Order 30 Class 1 and uniform price announcements and prepared them for each month, looked at the difference. Came up with an average difference for the year. Divided that average difference by 11.6 as a factor of the gallons of milk in a hundred pounds of milk.

Q. Okay. Now, the gallons per hundred pound, that figure or the amount per gallon doesn't show on attachment one, correct?

A. That is correct. It varies from year to year. In 2006, it calculates out to 12.9 cents per gallon. 2007, 13.8 cents. 2008, 18.7 cents for a three-year arithmetic average of 15.1 cents. For the three month recorded there in 2009, the average is 26.7 cents per gallon.

Q. Okay. In your -- in your testimony, you used a figure, I think, of 14 cents per gallon?

A. That is correct. I felt that producer-handlers would have a difficult time achieving 100 percent utilization in Class I milk, and so there was an adjustment made to try to come with a realistic number instead of a higher than what would be in
Q. Okay. Now, 14 cents per gallon, which is less than the number shown in most years, or is an average nevertheless a substantial price variation or price advantage in competition for the sale of fluid milk products, is it not?

A. It is. Our Muller operation loses customers for much, much less -- much lower price differentials in the bracket of pennies a gallon.

Q. And we're talking here a producer-handler having a 14 cent per gallon?

A. That is correct.

Q. Okay. Now, let me just ask you a specific question about a word you used on page 7 of your testimony. And I think perhaps the word -- you used the wrong word. In the second full paragraph, next to last sentence that begins "coincidentally" on the typed page, "coincidentally another cooperative." Do you see that?

A. Yes.

JUDGE CLIFTON: Which page?

MR. BESHORE: Page 7.

JUDGE CLIFTON: 7, thank you.

Q. I want to ask you if what you actually meant -- whether the correct thought there is
consequently?

A. Yes.

Q. Okay.

A. Consequently would be the better choice of word.

Q. That's what you meant there, as a consequence of what was going on with one supplier, another cooperative --

A. Right, that is correct.

Q. -- had the felt effects. Okay. Now, I just have two other questions on additional direct, Mr. Tonak.

You are aware, and I think you've referenced, that Proposals 1 and 2 were sponsored by or presented by the National Milk Producers Federation and the International Dairy Food Association?

A. I'm aware of that, yes.

Q. And you have testified on -- in support of those proposals on behalf of Mid-West Dairymen's Company and the Lakeshore Federated Dairy Cooperative, correct?

A. That is correct.

Q. Now, are all of those cooperatives members of the National Milk Producers Federation?

A. No, they are not.
Q. Okay. So can you just break that out for us, please?

A. Mid-West is a member of National Milk Producers Cooperative -- or Federation. And Manitowoc Milk Producers Cooperative is a member of National Milk. Milwaukee Cooperative Milk Producers and Scenic Central are not National Milk members.

Q. Okay. Roughly of the 4,000 Lakeshore members, what portion is represented by Milwaukee and Scenic which are not National Milk members?

A. I would say a thousand, maybe a little over.

Q. Okay. All right. Thank you. Now, Mr. Tonak, you have given some very interesting and detailed information both about -- about Midwest's operation and about some experiences you've had in the dairy business over the years. And one thing I didn't do at the beginning of your testimony that I want to do now, at the end, as the last question is, ask you to just tell us about your experience in the dairy industry? First of all, what's your educational background?

A. I have a bachelor of science degree in dairy science from South Dakota State University in Brooking, South Dakota. Since 1973, I've been employed
in various marketing and management positions in the dairy industry, throughout the Midwest and basically the Southwest into the Mideast and the Southeast.

For the last 12 years, I've been the manager of Mid-West Dairymen's Company there in Rockford. And we also, in addition to the 50 percent joint venture ownership of Muller-Pinehurst, we have a cheese packaging sales and distribution wholly-owned subsidiary in Shullsburg, Wisconsin. And I guess that I've testified in a few other Federal Order hearings in the past.

MR. BESHORE: Thank you very much, Mr. Tonak. We would move for the admission of Exhibit 24 with attachment 1.

JUDGE CLIFTON: Don't leave yet, Mr. Beshore. I just want to ask a question about the attachment. When you state Class I's price, I understand that. Now, is the uniform price the same thing as blend price, or is it something different?

THE WITNESS: Yes, that would be one terminology, would be the blend price, the statistical uniform price. The way the Federal Order 30 actually releases that number as the statistical uniform price.
JUDGE CLIFTON: All right. Thank you. If you have any follow up to that, go ahead Mr. Beshore.

Q. Just the only follow-up question I'd have is, your column titled Uniform is the statistical uniform price for Order 30 for those months?

A. That's correct.

MR. BESHORE: That's all I have.

JUDGE CLIFTON: All right. Thank you, Mr. Tonak.

All right. Who would like to begin cross-examination of Mr. Tonak? Mr. Carroll, you may.

CROSS-EXAMINATION

BY MR. CARROLL:

Q. Good morning, Mr. Tonak.

A. Good morning.

JUDGE CLIFTON: Oh, no, afternoon.

Q. Good afternoon. Thank you. That's where I am today. I'm correct in assuming from your speech that you haven't actually had any disruption in your market from producer-handlers?

A. That would be correct.

Q. And direct your attention to the farm that you described at page 6 of your statement. There's
some large plants -- you said large farms being built, I think, 50 miles from Rockford. Do you know the name and address of that farm?

A. I think they're calling themselves Family Tradition Dairy. I know where the farm is located. I'm trying to remember the exact road it's on, but it's just south of Warren, Illinois.

Q. How do you spell that?

A. W-a-r-r-e-n.

Q. Warren, Illinois?

A. Yes.

Q. And do you know the name of the owner of that farm?

A. I believe it would be the A.J. Bos family.

Q. How do you spell that, sir?

A. B-o-s.

Q. And can you tell me, you say it's a family. Do you know who in the family is -- how do they say it, milk the cows or turn the water on?

A. I would think that if they're milking -- or when they get to milking 7,000 cows, that Mr. Bos probably will not be personally milking the cows. But I really don't know who will be milking the cows.

Q. Assuming that's just a expression. Do
you know who's in control or management of the business?

A. Mr. Bos is.

Q. Himself?

A. Is my understanding. I do not know Mr. Boss --

Q. Right.

A. -- personally. I know the construction, I guess, going on. And I know the accounts that are in the newspapers about the operation.

Q. Right. That's a source of your information?

A. The partial source, yes.

Q. Okay. Do you know anything else about the plans for that operation?

A. No, I do not.

Q. Okay. The history of this -- of your area that you described, was that personal? I mean, when did you first get into the area itself so that you have some personal knowledge?

A. I have lived there for 12 years, been in and out of the area since 1973. In 1982, Mid-West celebrated their 50th anniversary and prepared a publication. And some of that information was gained from -- some of the information came from the great grandson.
Q. Right.
A. You know, so it's verbal from people who have been there. We've had a couple of families that are still producing milk whose roots in the dairy industry go back at least to the formation of the cooperative. We have third and fourth generation families involved there. We've got board members who are now in their -- where the family has a second generation serving on the board. And so the information is assimilated and compiled over time from all of those.

Q. All of those sources?
A. Various sources.

Q. Have you ever heard of Oberweis Dairy?
A. Yes, I have.

Q. And where is that located?
A. Aurora, Illinois.

Q. Is that anywhere near you?
A. It's 70 miles from me, maybe.

Q. Right. Did you know they started as a producer-handler? Did you know that?
A. Yes.

Q. And are they a producer-handler now?
A. They are a producer-handler. They deliver milk to grocery stores. They operate their own stores.
Q. All right.

MR. CARROLL: Thank you very much.

JUDGE CLIFTON: And do you know how to spell Oberweis?

THE WITNESS: O-b-e-r-w-e-i-s-s (sic).

JUDGE CLIFTON: Thank you. Who next for cross-examination? Mr. Yale.

CROSS-EXAMINATION

BY MR. YALE:

Q. Benjamin F. Yale for Continental Dairy Products, Select Milk. Good afternoon, Dennis.

A. Good afternoon.

Q. Just really one topic I want to discuss. You indicate support of Proposal 1 and 2. Do you support also Proposal 26 of National Milk?

A. Lakeshore did not take a position on Proposal Number 26. I know that they would not oppose it. And I don't know of any reason why they wouldn't support it. They just didn't take a position on it.

Q. Did you understand that National Milk is a package deal of Proposals 1, 2, and 26? It wasn't bits and pieces or -- did you have any understanding one way or the other on that?

A. Well, National Milk may present their proposals as a package of 1, 2 and 26. It is not listed
that way in the Notice of Hearing as being a package of all three of them. And I'm assuming that's why they were listed separately in the Notice of Hearing. And Lakeshore took the position of supporting 1 and 2.

MR. YALE: I have no other questions.

JUDGE CLIFTON: Could I have a comment from the USDA table as to why the proposals are in the Order that they're in? Mr. Tosi.

MR. TOSI: Thank you, your Honor. The proposals are listed in the hearing notice in the way that they are. Proposals 1 and 2 comprise those proposals which, if I could characterize it this way, kicked off everything that results in us being here today. Those were the proposals that initiated consideration to go into a hearing and then deciding to come to a hearing to consider the producer-handler and exempt plant issue. Okay?

JUDGE CLIFTON: Was Proposal Number 3 the next one in time that was received by AMS?

MR. TOSI: I don't know if they exactly reflect the Order in which we received them. I would characterize them that it generally does that. We were careful because of the new demands on the Federal Register that -- that we
have a lot of proposals, because they insist on us showing how the regulatory language will change. And in that regard, while many proposals may seem similar, conceptually, given how they were presented to us, had subtle differences in how things would be stated in the regulatory language.

We also had a prehearing information session that was well attended or participated by telephone and computer with everyone that had submitted a proposal. And as a result of that, or at that session, National Milk Producers Federation offered what now is referred to as Proposal 26.

JUDGE CLIFTON: Thank you. All right. Who will next cross examine Mr. Tonak?

Mr. Ricciardi. And I bet he's not the last one.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Mr. Tonak, Al Ricciardi on behalf of AIDA. It wasn't on my list of questions, but based upon a question and an answer from Mr. Carroll, I have a question of you. You're sure that Oberweis is a producer-handler, correct?

A. I didn't answer that they were a
producer-handler. Or if I did, I did so in error. I'm not aware of them being a producer-handler. I'm aware of who Oberweis is. I'm aware that they started out doing home delivery, that they're doing home delivery currently and so on. If I stated that they were a producer-handler, that was in error.

Q. Okay. That was in error. I'm glad you corrected it because they're actually a distributing pool plant in Order 30, is that correct?

A. That is correct.

Q. You are how old?

JUDGE CLIFTON: Now, is that fair?

Q. Okay. Then tell me when you were born.

A. It's easy to answer that one because sometimes I get my age wrong. 1951.

Q. Okay. So what happened in 1947 or what might have happened in 1947 was a little bit beyond the period of time that you can personally testify to, correct?

A. That is beyond the period of time in which I have hands-on experience, that is correct.

Q. Personal knowledge?

A. At the same time, I was raised on a farm in South Dakota. I milked cows by hand at a very early age. We did not milk cows with a pipeline. And I want
to say it was 1964 or '65 we got a pipeline and a bulk
tank.

Q. I'm glad for all of that. Let's go back
to my question, which was that, in terms of personal
knowledge, obviously since you were born in 1951,
whatever may have occurred in 1947, you don't have
personal knowledge of, correct?

A. We can say that, yes.

Q. We could?

A. (Nodding head.)

Q. Okay. So that I understand it -- and I
think I do. Let's see if I make sure I do. Take a look
at your attachment 1 to your statement, which is Exhibit
Number 24. What you have done here is a mathematical
computation for the years 2006, '7, '8 and into '9. You
simply took the Class I price, you took the uniform
price and you put the difference there, is that correct?

A. That is correct.

Q. Now, let's go back -- you were here
during the course of the testimony of this morning when
Mr. Hatch and Mr. Dunajski testified, correct?

A. I was here for most of it, yes.

Q. Okay. Flip over to page 2 of your
statement. You state specifically in section B near the
bottom of the page that, using this method you see a
difference of approximately 14 cents per gallon between
the regulated community and the producer-handler,
correct?

A. I'm saying that there's a potential price
advantage for the producer-handler when you look at the
difference between the Class I price and the statistical
uniform price that equates to 14 cents per gallon.

Q. Okay. You did a mathematical
computation. You have not done any analysis to
determine if that is correct? You made an assumption in
your statement, correct?

A. I said that the difference between the
Class I price and the uniform price equates to 14 cents
a gallon. My view is that is an advantage that could
accrue to a producer-handler. That is based on fact
that producers receive, as a minimum regulated price,
the uniform price.

And using that as the benchmark for
producer costs, if it is or isn't, that's what regulated
producers receive. And so therefore the advantage that
a producer-handler may have between the price that
producers receive as a regulated price and the price
that a regulated handler pays as a Class I price equates
to 14 cents a gallon.

Q. The theory I understand, but you also
talked about you wanted to be realistic. So let's be realistic together. Let's actually look at testimony from a real producer-handler, Mr. Hatch, who talked about the actual cost of production being in the range of 21 or $22. If you used the actual figures, the actual cost of production, there is no theoretical advantage. In fact, there is a disadvantage, correct?

A. I would say there's still an advantage. If Mr. Hatch's cost of production is $21 a hundred, all producers with similar costs, with similar production environment, have the same relative costs. And we have in the Midwest producers that today have a much higher cost of production than what they're being paid for their milk.

Q. And so does Mr. Hatch --

A. And --

Q. -- correct?

A. -- to say that a producer's cost affects how we should look at things differently, if he's a pooled producer receiving the blend price or the uniform price, or a producer-handler naming a number, we're talking here in my testimony about the regulated minimum prices and the type of advantage that can accrue to a producer receiving, if you will, the uniform price and charging himself, if you will, the Class I
Q. We have no evidence at this point that that's occurring at all. That's a theoretical notion that you have put together in your statement, correct?

A. Yes.

Q. Okay. Now, by the way, a question. Do all of the members in the Mid-West Dairymen's Co-op get the identical price for their milk?

A. No.

Q. There are over-order premiums?

A. There's different component tests. There's different somatic cell counts. There's some over-order premiums involved. Let's see, the way we charge for hauling varies. We'll vary the producer's costs for hauling based on how large or small the producer is.

Q. So if someone who's in the co-op who's larger, they may get a better deal than a smaller member of the co-op, correct?

A. They may.

Q. Okay. And in fact --

A. And a small producer, if he's got good quality, may get a better deal than a large producer.
Q. But the point is, they do not get the identical or equivalent or even equal price, correct?

A. That is correct.

Q. If I have a farm next to yours and we both are members of Mid-West and the truck comes to our joint right one after the other, the fact is that my milk check in my mailbox may be totally different than yours?

A. That you -- except in the case where you've got the same butterfat, the same protein, the same other solids, the same quality, the same volume, you'll get the same check.

Q. But if I don't, I won't.

A. If two producers are the same, they get the same check. We did not differentiate what a producer is paid based on some esoteric formula of where they're located or how well we like them. If they have -- if they ship the same milk they get paid the same.

Q. But if I have the same somatic cell count, if I have the same quality as you but you are a bigger producer in Mid-West, you get a bigger milk check than I do, right?

A. Gross dollars, yeah.

Q. Okay.
MR. RICCIARDI: Thanks.

JUDGE CLIFTON: Come back, Mr. Ricciardi. I don't know what you just proved there.

MR. RICCIARDI: Neither do I.

AUDIENCE MEMBER: Yeah, we do.

JUDGE CLIFTON: Did he get a bigger check because he had greater volume?

MR. RICCIARDI: He may have -- well, I can ask. He may have a bigger check because he has greater volume. They may have a better deal with him. The point is, Judge --

JUDGE CLIFTON: Well, I don't know whether you are going after the over-order pricing, if that's what you meant. But if you would go back to that?

MR. RICCIARDI: We will tie it up, Judge, as we go later on into this hearing. But what I'm trying to deal with is that there may be distinctions between even the regulated community in terms of what they receive. They do not receive identical or even equal pricing.

JUDGE CLIFTON: All right. But follow up, if you will. You've gotten an answer that if one person has a greater volume of milk, he gets a bigger check.
MR. RICCIARDI: Right.

JUDGE CLIFTON: But I want to know if it's just based on the fact he provided more milk.

MR. RICCIARDI: And I'll get to that one, Judge. I thought I had laid the foundation for it. If I didn't, I apologize. Maybe I wasn't clear enough.

BY MR. RICCARDI:

Q. Assuming everything is equal in terms of the quality of our milk, somatic cell count, quality issues, whatever. The fact is, because you are a larger volume producer the co-op will pay you a lower -- a higher price, correct?

A. We have a --

JUDGE CLIFTON: Per hundredweight?

Q. Per hundredweight.

JUDGE CLIFTON: That's your question?

MR. RICCIARDI: Yes.

JUDGE CLIFTON: You may answer.

A. We have a published premium schedule for quality and volume premiums. It also includes the quality discounts. It includes the hauling rates. And depending on where you fall within that category, you may get the same price.
Now, if we're talking a producer milking ten cows and a producer milking a hundred cows, yes, there's a difference.

MR. RICCIARDI: Fair. Thank you, Judge.

JUDGE CLIFTON: Thank you. I know that we've had testimony about the somatic cell count, not just from you, but I just want to make sure we're spelling that right. How do you spell that?

THE WITNESS: Somatic is s-o-m-a-i -- excuse me, s-o-m-a-t-i-c. Cell is c-e-l-l and count is c-o-u-n-t.

JUDGE CLIFTON: All right. And just so that the terminology is clear in the transcript, tell us what that -- how the words look for over-order pricing.

THE WITNESS: Oftentimes the words over and order are hyphenated and then pricing or price.

JUDGE CLIFTON: I guess premiums was also used in connection with over order.

THE WITNESS: Yes. They're used interchangeably.

JUDGE CLIFTON: Thank you. All right. Who next will cross-examine Mr. Tonak?
Mr. Tosi.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Mr. Tonak, do you, on behalf of the organization that you're here speaking on behalf of, Mid-West Dairymen's, are you going to be articulating any position about any of the other proposals that are under consideration in this proceeding?

A. We have positions, but we weren't going to necessarily articulate them unless asked.

Q. Okay. Then the reason I want to ask that one, first, because I did want to ask you a question.

A. Okay.

Q. You talk about marketwide pooling and its importance in your testimony. Are you aware that there's a proposal noticed that proposes to or seeks to adopt individual handler pooling for all orders?

A. Yes, I am.

Q. Does your organization have an opinion about that?

A. Lakeshore Federated Dairy Cooperative is opposed to individual handler pooling as an organization. Mid-West does not support individual handler pooling, although it would be very beneficial to us. We feel it will lead to very, very disruptive,
chaotic conditions in the marketplace. And we will very quickly have supply problems, market balancing problems. The over-order pricing that was mentioned will disappear. So we're opposed to it.

Q. I appreciate your testimony here that you're opposed to it. Do you envision a method by which the Department could implement individual handler pooling in a large orders with multiple handlers in each Order?

A. I have not been able to create a method of doing that and being fair to all participants.

Q. And when you speak of fairness, what do you mean by that?

A. Mid-West as a cooperative supplying a fluid plant under an individual handler pool would derive a large benefit from the way things exist right now if we just look at that on the basis of regulated pricing.

At the same time, part of the reason we deliver milk to nonpool plants is to balance out needs in the marketplace at that fluid plant. We would change our method of operation to the point where we would depend on other people to balance the fluid -- our fluid milk or our additional milk needs. And we would deliver our producer milk only to fluid use. That would allow
us to pay a much higher price than anybody else in the area.

   It would be difficult for cheese plants or powder plants, Class II plants, to compete against the price we were paying our producers.

   And it may, when you're working in a short -- short supply period or in a -- in an Order that historically has been shorted supplies. It may mean that the Class II operations do not receive any product. In our particular case, we would not sell to a Class II handler.

   The competitive issues would become much larger among producers. I like to think I'm a nice guy, but if I've got a big advantage because of my -- of an individual handler pool with -- competing with cheese plants, and I've got one of our producer members that looks at me crossways or I get up on the wrong side of the bed in the morning, they may not have a market for their milk because it'd be so easy to go out and gain a producer that would be more to my -- my liking.

   And I think it rips and tears at the very fabric of cooperatives to move in the direction of an individual handler pool.

Q. Thank you. Is it -- is it your testimony
that currently in Order 30 in the Upper Midwest market that producer-handlers are not a source of disruption?

A. No, it is not my testimony. In the area where we operate, and our producers come from about a 60-mile radius from Rockford, the majority of our milk is delivered to stores and customers in the Rockford area and in the Chicago suburbs. So we're operating in a very, very small and defined area.

In that area, there are no producer-handlers operating that I'm aware of, and they are not disrupting our operations.

Our concern is that the population that's available for somebody with a 14 cent a gallon price advantage could stimulate some of these large producers to put in their own bottling operations. They can become very competitive with us, with our regulated price.

In order to retain business, we'd have to lose money or the plant would go out of business or the cooperative would have to dissolve and throw the producers to the wolves.

Q. Okay. With the understanding that in your area that there are no producer-handlers, how big could a producer-handler be or what would be the -- in your opinion, when would a producer-handler become a
disruptive competitive factor in your area?

A. I've got to decide which hat I'm going to put on to answer that question perhaps. From our fluid handler standpoint, any loss of business is -- is disruptive. We and the customers we supply are smaller groups of stores, convenience stores and so on, would be our ideal targets for medium-sized producer-handlers to take business away from us and from our dairy farmer owners.

And with that in mind, I would think that the -- a -- a smaller producer-handler would be less chaotic and disruptive in the market, you know. And we like the -- to gear in around the -- where some of our large producers are at.

Like I said, we had one producer distributing over 500,000 pounds of milk. So I would think that somewhere in that bracket is the -- is the appropriate level.

Q. And is that tied, then, to your position on supporting Proposal 2, the --

A. Yes.

Q. -- the 450,000 pound exemption?

A. Yes.

Q. Okay. Regarding -- I'm trying to figure out what the issue is here. Is the issue here that
producer-handlers in Order 30 are a disruption? And please speak to your knowledge of all of Order 30, not just your -- your little geographical section of it. But is it that producer-handlers are somehow disruptive, or is it that there is a fear that large producers may, for example, break away from a co-op and become a producer-handler?

   A. In Order 30 right now there is a handful of small producer-handlers, and I'm not aware of any of those producer-handlers creating any major disruption in the market. And so I think it's fair to say that the smaller producer-handlers are not a concern. Our concern is that the potential exists for large producer-handlers -- especially over the last five years as we've seen the larger producers, we've seen the advantages that may accrue to being a producer-handler. And that these larger producers, larger producer-handlers would drastically change the marketplace.

   Q. Okay. In response to one of my -- I think it was my previous question, you kind of characterized things, a small producer-handler. You talk about a medium-sized one. Would you please, if you can, offer a number or a range that, you know, when are we talking small, when are we talking medium, when are
we talking large in looking at a producer-handler?

A. Our largest producer is under a million pounds of -- quite a bit under a million pounds of milk production a month. They have -- rely quite heavily on family labor and a little bit of outside hired help. If they were going to package, distribute their own milk, they would definitely have to add quite a few people or a few people outside of the immediate family labor pool.

And in my mind, at least, a producer-handler who grows out of the -- the family, doing it all from the cow to the marketplace, and with that in mind, I would suggest that anybody over a million pounds of milk a month would be a very large producer-handler.

Q. And a medium sized producer-handler might be?

A. Under that level on down.

Q. Under that, okay.

A. Into the 500,000-pound milk production a month.

Q. Okay. That's all I have Mr. Tonak. I really appreciate you coming and testifying here today. Thank you.

A. Thank you.

JUDGE CLIFTON: Is there any other
cross-examination of Mr. Tonak? Mr. Beshore, any redirect?

REDIRECT EXAMINATION

BY MR. BESHORE:

Q. Just one or two questions on redirect, Mr. Tonak.

In terms of producer price uniformity, as far as the Order 30 regulations go, Federal Order regulations, there is a uniform minimum price applicable to each producer dependent upon their components and volume, correct?

A. There is a --

Q. Minimum --

A. -- minimum price.

Q. Minimum uniform price, I'm sorry. A minimum price?

A. A minimum price, that is correct.

Q. And it's the same, assuming the producer's location of delivery is the same and their component levels are the same?

A. That is correct.

Q. And there's a PPD added to the component levels?

A. That is correct.

Q. Okay. Now, I want to talk -- just a
final question about the theoretical and the real, because you were asked by Mr. Ricciardi whether your -- your calculations of the producer-handlers advantage were theoretical or whether they're real.

At page 5 of your testimony, you talked about Mid-West for January having paid almost $700,000 to the Federal Market Administrator. Do you recall that?

A. Yes.

Q. Was that bill from the Market Administrator a theoretical bill or a real bill?

A. It was very real.

Q. Now, if you were a producer-handler, would you have had a bill from the Market Administrator?

A. No.

Q. If you had the very same volumes of milk, the very same sales and the very same stores, would you have had any bill from the Market Administrator?

A. No, you would not.

Q. Is that -- would that have meant that there was a difference in the operating statement and the bank account of those two handlers?

A. Yes.

Q. Is that a theoretical or a real difference?
A. It would be a real difference.

Q. Approximately, conservatively, 14 cents a gallon, as you calculated it?

A. In that 700,000, it was much more than a 14 cent a gallon difference. But on average, over three years, 14 cents a gallon.

MR. BESHORE: Thank you.

JUDGE CLIFTON: Mr. Tonak, was there anything else you wanted to add to your testimony?

THE WITNESS: No, I don't believe so.

JUDGE CLIFTON: All right. Thank you. You may step down. And Mr. Beshore, you may move for the admission of the exhibit.

MR. BESHORE: I move the admission of Exhibit 24, including the attachment.

JUDGE CLIFTON: Is there any objection to the admission of Exhibit 24?

MR. RICCIARDI: I do have an objection, Judge.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: The objection is clearly with regard to the attachment. It is a theoretical number that's based on that mathematical computation without any underlying
data to support it.

And we have testimony in the record even from Mr. Tonak that he hasn't gone through and dealt with the actual costs; that, in fact, all he's done is subtracted one number from the other. And under those circumstances, there's really no basis for the attachment. It becomes irrelevant and unnecessary for this hearing.

JUDGE CLIFTON: Mr. Beshore, your response?

MR. BESHORE: My response is the witness testified very precisely the basis of the calculations. The arithmetic is just as precise, and it's completely admissible in the proceedings.

JUDGE CLIFTON: I agree. The witness, on the bottom of page 2 subsection B, explains why he believes that differential can be a competitive advantage. That might be one way of measuring it. And I find it useful. So the objection is overruled. Is there any other objection to the admission into evidence of Exhibit 24? There are none. Exhibit 24 is admitted into evidence.

JUDGE CLIFTON: Mr. Beshore, would this
be a good time for our afternoon break?

MR. BESHORE: I think it would. I couldn't remember.

JUDGE CLIFTON: Oh, my goodness. It's 5:16. This is our evening break. Let's take 15 minutes -- 14 minutes. Please be back and ready to go at 5:30.

MR. YALE: Yes. Before we go off the record --

JUDGE CLIFTON: Your bladder is better than some people's.

MR. YALE: All right. I'll let it go. The announcement is we're going to be closing at 6:00. Are we going to be done at 6:00 or are we going to go on much later?

JUDGE CLIFTON: Come back at 5:30.

MR. YALE: All right.

(A recess was taken from 5:16 to 5:30.)

JUDGE CLIFTON: All right, folks, it's 5:30, please come to order. All right. Let's go back on record. We're back on record at 5:30. Specifically, I know how Mr. Beshore wants to proceed. He has a witness in the stand. I'd like that witness to identify himself for the record.
THE WITNESS: Mike Asbury, and that's A-s-b-u-r-y.

JUDGE CLIFTON: And, Mr. Beshore, I have two names written down. I have Mike Asbury and I have Dr. Robert Yonkers. How is it that you wish to proceed?

MR. BESHORE: Mr. Asbury.

MR. YONKERS: I'm Robert Yonkers, on behalf of International Dairy Foods Association. Your Honor, I believe I will face cross-examination issues the same as Dr. Cryan did. And I anticipate that. I don't know if anybody would have comment on that. My testimony is rather short. It's been in the back of the room since this morning. I'm not sure you want to put me on until after all the data is here. I could read that very short testimony but that won't take very long.

JUDGE CLIFTON: You are very happy to stay.

MR. YONKERS: I am here representing my organization here this week and next. I would not put it the same way your Honor did. I have my orders.

JUDGE CLIFTON: Thank you. It does
relieve a little bit of a logjam here if you can testify at a later time.

MR. YONKERS: Yes.

JUDGE CLIFTON: All right. Good. Then I suggest unless there's some objection that we plow right through, complete Mr. Asbury tonight and then call it a day.

I do want to mention, before we do that, though, these are what I have written down for tomorrow. Now, I have written down the man from Steuben Foods, who is named James Buelow, spelled B-u-e-l-o-w. I have written down Rod Daniels. I have written down John Hornstra either Wednesday or Thursday and I have written down Paul Rovey, R-o-v-e-y. I have written down three dairy farmers from DFA. I have written down Steve Rowe, R-o-w-e, either Wednesday or Thursday and he's a Northwest Dairyman.

Wednesday --

MR. BESHORE: Thursday.

JUDGE CLIFTON: Thursday for him, for Steve Rowe, that helps. I have written down Gary Lee, and that Wednesday is his only possible day. I have written down J.T. Wilcox, either Wednesday or Thursday. And I have
written down Leon Berthiaume.

MR. BESHORE: Berthiaume.

JUDGE CLIFTON: Berthiaume. I'll get it right yet.

MR. BESHORE: He must appear tomorrow.

JUDGE CLIFTON: Must be Wednesday. Which means it looks to me as if we will have to work until nine tomorrow night. I see no other way. If you all can make it work a different way, that's fine with me. But Thursday is full, too.

Thursday is very full. Thursday is when we see the Vermont/New Hampshire/Wisconsin people and Matt Shatto and John Hornstra, Steve Rowe, Gary Latta. He's either Thursday or Friday, and somebody named Krueger. And somebody named J.T. Wilcox. So it's just getting quite full.

Mr. Yale.

MR. YALE: Your Honor, before we make that commitment, the witnesses that you named by and large are relatively short and quick witnesses.

JUDGE CLIFTON: Well, then, that's good news.

MR. YALE: That's good news. And you know there isn't a person here who doesn't want
to get this hearing done and get it done soon and I'm one of those.

JUDGE CLIFTON: Stand closer to the microphone, please.

MR. YALE: There isn't a person here who doesn't want to get this hearing over with sooner than later. There's no advantage to anybody to delay it any further than needs to be done. But it is, for my client, very important, it's for every client here, very important, and needs to be done right. And wearing people out physically to simply meet some unrealistic schedule isn't getting it done, you know, in a way that I think is going to be conducive to creating a record.

I am fortunate in that right now, I do not have witness prep or anything else. But I can tell you that even last night I had difficulty just doing my end-of-day notes for the hearing to get done. So I think with the schedule you'll have here, I think with these witnesses, assuming we don't get into some extended discourses, which I think can be put off for brief or whatever, these -- my experience, these types of witnesses do go very,
very quickly, very, very quickly.

And I would be surprised if we would not be able to get through those, and depending, again, whether we have the testimony or not, whether we can get into Roger Cryan and his cross-examination without going to 9:00. I think 6:00 is a very reasonable number. I mean, that would be my request of -- next week maybe we have to start forcing. But I think this is really asking too much.

And there are some people who do have some serious health issues and they need rest. And I just -- I think that creating an endurance is not conducive to the hearing. But that's -- that's my opinion. You are the judge, and if you want to go, we'll be here and we'll do what we've got to do.

JUDGE CLIFTON: I like your attitude. I kind of think I should sit up here as a triumvirate and should have Mr. Carroll over here, who thought we ought to finish it in a week, was it?

MR. CARROLL: Could have been done.

JUDGE CLIFTON: Could have been, and Yale on this side. Okay. Mr. English.
MR. ENGLISH: Your Honor, we certainly, you know, are not saying let's go to nine just to go to nine, just to do it. There are witnesses. Rod Daniels, Mr. Buelow, we're going to get Mr. Asbury in today. Paul Rovey, Gary Lee, the NP dairy farmers and Leon Berthiaume that have to get done tomorrow. We just have to get them done.

JUDGE CLIFTON: Buelow was one of them.

MR. ENGLISH: Yes.

JUDGE CLIFTON: Daniels was one of them, not Hornstra?

MR. ENGLISH: Mr. Hornstra, I'll let speak for himself.

JUDGE CLIFTON: Mr. Hornstra, are you here? Okay he might be able to go Thursday.

MR. ENGLISH: But the other -- what I said, Daniels, Buelow, Rovey, Lee, the DFA dairy farmers and Leon.

JUDGE CLIFTON: Okay.

MR. ENGLISH: Because I can't mispronounce his last name. Sorry. Mr. Wilcox, again. Now, it would be preferable for Thursday, if Mr. Wilcox could get on tomorrow.

Obviously we can be somewhat flexible
with that, and I want to emphasize we'll be flexible on that. The others, I don't think we can be flexible. They have to go on. If we get all of those done, and it's, you know, 4:30, I would say let's do Mr. Wilcox. If we get all of those done and it's 7:00 p.m., we can discuss it and Mr. Wilcox could go the next day. We're here. Saying we have to go to 9:00 p.m. just to go to 9:00 p.m. -- obviously I can tell you it is going to depend entirely on the length of cross-examination how long tomorrow is.

JUDGE CLIFTON: Thank you, Mr. Ricciardi.

MR. RICCIARDI: Your Honor, I agree that obviously we need to ensure that we're getting the evidence. And I'm not going to take a long time talking because that stops us from getting the next part of the evidence.

But what Mr. Yale said is correct, that the parties and their lawyers, particularly this lawyer, do have some -- some health issues. Thankfully I'm not getting a daily report from home so I'm able to get by till 6:00. But, you know, trying to push it beyond that becomes a problem because we do have preparation requirements in terms of witnesses, preparation.
for cross-examination, and we do have to eat and
sleep and those sort of mundane things.

So we'll move it along as quickly as we
can. I'll try to get my cross in as quickly as
I can today, and I will do it throughout the
course of this.

JUDGE CLIFTON: I was very impressed with
every lawyer's work today, very impressed. This
is such a fine bar, the dairy, the milk bar is a
fine group of attorneys. And I appreciate all
of your hard work. All right. Mr. Beshore.

MR. BESHORE: Has Mr. Asbury been sworn?

JUDGE CLIFTON: No. Thank you.

(The witness was sworn.)

JUDGE CLIFTON: Thank you.

(Exhibit 25 was marked for
identification.)

MR. BESHORE: Okay. Your Honor, we have
marked a two-page document as Exhibit 25, which
is Mr. Asbury's statement. And I would just ask
him to proceed with it at this time.

JUDGE CLIFTON: All right. And mine's
front and back.

MR. BESHORE: Yeah, most of them that
were reproduced are front and back.
JUDGE CLIFTON: Front and back. Very fine. You may go ahead then.

MIKE ASBURY

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

DIRECT EXAMINATION

BY MR. BESHORE:

A. Thank you. My name is Mike Asbury and I've been the Director of Milk Accounting and Economic Analysis for Maryland & Virginia Milk Producers Cooperative Association, Inc. (Maryland & Virginia) since 2002. I have a B.A. in Business Administration from the University of Virginia at Wise and have served in various accounting and economic related positions within the dairy industry since 1978. My experience during those years includes working for the Dairy Division of Pet, Inc., and its successor companies, a proprietary fluid milk processor from 1978 to 1992 in various capacities, including Cost Accountant and Assistant Controller with responsibility for fluid milk processing. I am providing testimony on behalf of Maryland & Virginia in support of the National Milk Producers Federation Proposals 1, 2 and 26. I left 2 out there, but I want to include 2.
Maryland & Virginia was organized in 1920 to more effectively market the milk of its members dairy farmers in the Washington, D.C. metropolitan area. Today Maryland & Virginia is a milk marketing cooperative with over 1,500 member dairy farmer families spanning eleven states from Pennsylvania to Georgia to Kentucky, Tennessee, and Ohio; and producing just less than 3 billion pounds per year. The average production per month for a Maryland & Virginia farm was 160,000 pounds in 2008, approximately 100 cows per member farm. Over 1,400 of Maryland & Virginia's farms would be classified as small businesses. Over 1,000 of our member farms, more than two-thirds of our membership is in Order 1. In addition, Maryland & Virginia marketed over 1.6 billion pounds of non-member --

JUDGE CLIFTON: Excuse me, just so it's real clear. What was that 1.6 figure? 1.6 what?
THE WITNESS: 1.6 billion.
JUDGE CLIFTON: With a b as in boy?
THE WITNESS: Yeah. Did I say -- I wrote billion the first time.
JUDGE CLIFTON: I just want to make sure it was understood.
THE WITNESS: It's b, yes.
JUDGE CLIFTON: Billion with a b. You many proceed.

A. 91 percent of our member milk is rbST-Free while the remaining 9 percent is conventional.

The cooperative markets its member and non-member milk throughout the Mid-Atlantic and Southeast regions. In addition, Maryland & Virginia owns and operates three fluid processing plants. Through these plants, we serve a wide variety of the market including grocery store chains, convenience stores and local home town markets. All of our fluid milk -- all of our fluid plants are rbST-Free. Through these plants, we market our own brand names of Marva Maid and Maola, and package private label for regional and local customers. Our cooperative has been in the fluid milk processing business since 1955.

Maryland & Virginia owns and operates one powder -- one butter/powder balancing plant in Laurel, Maryland, and owns an 80 percent majority interest in an additional butter/powder balancing plant in Strasburg, Virginia. We have been in the balancing plant ownership and operation business since 1956. The Laurel, Maryland plant is a conventional supply plant with the ability to operate as a split rbST-Free/Conventional facility. Both balancing plants market cream and condensed milk in
addition to processing butter and nonfat dry milk powder. In addition, the cooperative operates a Farm Supply Warehouse for the benefits of its members.

Maryland & Virginia markets the majority of its milk in three Federal Orders: The Northeast Order, Federal Orders 1, which has a Class I utilization of 43.4 percent; the Appalachian Order, Federal Order 5, which has a Class I utilization of 68.9 percent; and the Southeast Order, Federal Order 7, which has a Class I utilization of 67.9 (sic) percent. These percentages are the averages for 2008.

There are producer handlers and exempt plants in the Federal Orders in which Maryland & Virginia operates. High Class I utilization and close proximity to major metropolitan centers provide a significant potential for more and larger producer-handlers in our marketing area. Large farms with over 3 million pounds of production per month now operate in Maryland & Virginia's marketing area. The proposed limits on a producer-handler's ability to take on Class -- to take Class I sales from the market-wide pool must be adopted. The Federal Order market-wide pool is the only way all producers, and particularly the smaller producers, and members of cooperatives, can share in the Class I price. The market-wide pools must
be protected throughout the adoption -- through the adoption of the National Milk proposals.

As previously stated, Maryland & Virginia owns and operates three fluid milk plants. Large producer handlers have a price advantage over any regulated plant in the market. In 2008, the average difference between the uniform price and the Class I price in the Federal Order 5 was $1.40 per hundred weight or 12 cents per gallon. For the same period in Federal Order 1, the difference was $2.63 or almost 23 cents per -- per gallon. No federally regulated handler, including Maryland & Virginia, would be able to compete in a market with plants with these price advantages. The desire of large national chains to be supplied at the lowest cost, which we experience every day in our fluid plants, is an open invitation to producer-handlers in any order, and particularly in our marketing area. This has already occurred in the Southwest.

Maryland & Virginia Milk Producers Cooperative Association, Inc. supports the National Milk Producers Federation's proposals number 1, 2 and 26, which allows current producer-handlers to continue to operate with a size limit of 3 million pounds per month.

BY MR. BESHORE:
Q. Thank you. Mr. Asbury, I would just ask perhaps one additional question on direct examination. Your -- you've indicated that your education and your professional background has been in the business side of the -- of organization, the financial and accounting side, is that correct?

A. That's correct, uh-huh.

Q. Okay. So you're familiar with P&Ls and and ins and outs of the flow of income and expenses for Federally regulated fluid milk plants?

A. That's correct.

Q. And Class I plants, distributing plants in the Federal Order system which are regulated, are billed by the Market Administrator every month and payments are required into the pool every month, is that correct?

A. That is correct, yes.

Q. And that's a real -- that's a real bill and real expense?

A. Yes. We settle those difference every month and pay them, yes.

Q. And producer-handlers, on the other hand, would not experience any billing from --

A. That's right.

Q. -- the Market Administrator?
A. Their expense would be their cost. That would be correct.

Q. Okay. So when you calculate the possible advantage that the producer-handlers would have in your orders, such as in Order 1, a difference of 23 cents per gallon, basically that's the -- the bill that regulated plants have to the Market Administrator which producer-handlers would not have?

A. That is correct.

MR. BESHORE: Thank you. I have no further questions for Mr. Asbury on direct.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Cross-examination? Who would like to go first?

Mr. Vetne, thank you.

CROSS-EXAMINATION

BY MR. VENTE:

Q. Mr. Asbury, my name is John Vetne. I'm an attorney from New Hampshire, and I represent a couple of producer-handlers out in Oregon and one in New Mexico.

I'm looking at the second page, next to the last paragraph. Start out with Maryland & Virginia owns and operates three fluid milk plants. The connection sentence is, Large producer-handlers have a price advantage.

You're a fluid -- or a regulated fluid
plant operator. Your testimony implies to me that there are existing large producer-handlers that currently have a price advantage over your three plants. Is that correct?

A. There's no large producer-handler in our area at this time. What I should have said: Would have.

Q. Would have, okay.

A. Yes.

Q. So this is -- you're projecting something happening in the future?

A. Yes, sir.

Q. And the same thing is true later on when you say would be able to compete. You're again projecting. It's a what-if scenario?

A. That is -- that is correct, sir.

Q. Okay. And towards the end, you talk about the desire of large national chains to be supplied at the lower cost. Am I correct in inferring that your other customers do not desire to be supplied at the lower cost?

A. The large national chains would have more effect on the total market pool than the others would, yes.

Q. You have some buyers that are indifferent
to getting a lower cost?

A. No, they all want -- they want lower than what we have to pay for it, no doubt.

Q. Okay. And finally in that same paragraph you say, this has already occurred in the Southwest. Do you have this personal knowledge of anything happening in the Southwest?

A. We do have a lot of agency meetings in the Southwest area and constantly hear the talk of the differences in the prices.

Q. So some -- you meet with -- what agency? Is this co-op organizations or processing organizations or both?

A. Both.

Q. Both. So some organizations that you have attended, there have been handlers that have complained about an occurrence in the Southwest over which you have no personal knowledge?

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

MR.MR. VENTE: Okay. Thank you.

THE WITNESS: Uh-huh.

JUDGE CLIFTON: Who would like to cross-examine Mr. Asbury next? Mr. Ricciardi.

CROSS-EXAMINATION

BY MR. RICCIARDI:
Q. Thank you. Mr. Asbury, Al Ricciardi on behalf of AIDA who represents producer-handlers and some exempt plants. And I have some questions. Were you the director of milk accounting and economic analysis for Maryland & Virginia in 2004 when there was the hearing in Federal Orders 5 and 7?

A. Yes, I was.

Q. Okay. And you were one of the proponents of a 3 million pound limitation in that particular order, correct?

A. Maryland & Virginia was, yes.

Q. Okay. And you understand we had a full hearing, that evidence was taken, and that that proposal was never adopted?

A. (Nodding head.)

MR. BESHORE: Your Honor --

JUDGE CLIFTON: Mr. Beshore, you may approach the microphone.

MR. BESHORE: Well, I just want to say --

JUDGE CLIFTON: Get closer, please. Pull it towards you.

MR. BESHORE: What occurred at that proceeding, which has been terminated by the Secretary is, you know, a matter of record.

And, you know, I don't want to have to get into
a colloquy with Mr. Ricciardi or anybody else
about characterizing what happened at that
record.

It just -- we can take notice of the
Secretary's actions, but the proceeding was
terminated. We're saying now something wasn't
adopted or, you know, it was proposed and not
pursued or something or another. It's been
terminated and there shouldn't be any more
discussion about it.

JUDGE CLIFTON: The position that this
gentleman took at a previous time might be
relevant.

MR. RICCIARDI: If you let me get there,
I'll finish this thing up, so we can actually
get home to our families.

BY MR. RICCARDI:

Q. With regard to that issue, the complaint
was that there could be competitors, producer-handlers,
that would cause a disruption in the market in Federal
Orders 5 and 7, correct?
A. That's correct.

Q. And I don't know if you've got Exhibit 13
up there. If you don't, I apologize.
A. I do not.
JUDGE CLIFTON: I can hand this to him.

MR. RICCIARDI: That would be great,

Judge.

Q. 13. Now, this has been admitted, and it's the producer-handler regulatory status by year from 2005 through 2009. In 2005 through 2009 you've been at Maryland & Virginia, correct?

A. That is correct.

Q. And you have marketed milk in Federal Orders 5 and 7, correct?

A. Yes, sir.

Q. And you will note that if you look at 2005, the first page, you will see that there's one producer-handler in Order 5 and one in 7. Am I right?

A. That's -- there's not many, so I would agree with that, yes.

Q. Two of them. And then if you go through 2006, '7, '8 and '9, it appears that we have two in Order 5 during that period of time?

A. Okay.

Q. Am I correct?

A. I'd agree with you, yes.

Q. Okay. And if you were to assume, as you have, that there is some kind of a perceived advantage, have you seen in looking at Exhibit Number 13 the
proliferation and growth of the number of
producer-handlers in Order 5 and 7 the areas you market
in?

   A. Orders 5 and 7 with the higher
utilization would not be as attractive as it would in
Federal Order 1.

   Q. So there's no basis for adopting any
limitation on producer-handlers in Federal Orders 5 and
7. Is that your testimony?

   A. No. No, sir. That was not my testimony.

   Q. Okay. So there's still a theoretical
notion even though no growth has occurred in the last
five years?

   A. That is correct. I mean, it could easily
happen.

MR. RICCIARDI: I'm sure. Thanks.

JUDGE CLIFTON: Who next would like to
cross-examine this witness. Mr. Carroll?

CROSS-EXAMINATION

BY MR. CARROLL:

   Q. I'm not going to say good morning.

   A. Okay.

   Q. I want to ask you about Order 1. You did
talk about Order 1?

   A. Yes, sir.
Q. And would you tell me, do you have plants in Order 1 or do you ship into Order 1?

A. We have a plant in Order 1.

Q. And where is that located?

A. It's located in Landover, Maryland.

Q. And in that plant -- can you tell me what the size of that plant is?

A. It runs about 18 million pounds a month.

Q. And how does it market its milk, its Class I milk?

A. It is Class I milk, yes.

Q. What I mean, though, does it market to stores or to -- on bid, or how do you do business?

A. We market it to customers, basically one big customer, yes, sir.

Q. One big customer?

A. Yes.

Q. And who is the customer?

A. It would be Giant.

Q. I'm sorry?

A. Giant. Giant Foods.

Q. Giant Foods?

A. Uh-huh.

Q. What's Giant Foods, what kind of business do they have?
A. They have grocery stores.
Q. And where are they located?
A. The ones we serve are located in the northern Virginia, Maryland area.
Q. All right. And northern -- or Giant Foods, do you get that on a bid of some kind? Is that a bid contract?
A. Yes, sir. It's a signed contract, yes.
Q. And how many stores do you serve, if you know?
A. I don't know the exact number. I couldn't say. I know we serve them 18 million pounds of milk.
Q. Would you say more than five or ten?
A. Oh, definitely.
Q. More than 20?
A. Yes.
Q. More than 50?
A. More than a hundred, I'll say.
Q. More than a hundred.
A. And I'll stop there.
Q. Okay. Now, at that plant do you also make manufactured products such as butter or --
A. We do not.
Q. You do not. No manufacturing --
A. No. Basically --
Q. -- at that plant?
A. -- gallons and half gallons.
Q. Of milk?
A. Of milk.
Q. Okay. Do you do any manufacturing anywhere in your system?
A. Yes, we sure do.
Q. And where is that located?
A. As I stated in my testimony in Laurel, Maryland and Strasburg, Virginia.
Q. Right. And what products do you make there?
A. Condensed. We make some powder, some butter, just depends on the time of the year.
Q. All right. And when you file your reports with the Market Administrator, do you take credit for the manufacturing that you do in the -- in the accounting form?
A. Yes, sir.
Q. And can you explain how that would -- how that would be done?
A. The pool works just the reverse of the Class I. You draw out of the pool instead of pay into it.
Q. You actually take money from the pool?
A. That's -- that's correct.
Q. And how -- what is the rate at which you subtract money from the pool, on an average?
A. The dollar per --
Q. Dollar figure, yeah.
A. It varies. Just depends on our utilization that month, but I would say in a dollar range.
Q. Do you know the average utilization of that plant last year?
A. The average utilization?
Q. Yeah.
A. Of which one?
Q. Well --
A. I do not know off the top of my head the average utilization, but it's -- Class III and IV would be --
Q. Well, they're Class III and IV plants, aren't they?
A. IV, yes, uh-huh.
Q. So virtually everything that goes through those two plants?
A. We do -- with the condensed we do have some that goes into ice cream, so II, III, and IV, based
on where the milk ends up when we send it out, yes.

Q. Now, 2008 can you tell us how many pounds
of manufactured products your company handled?

MR. BESHORE: Your Honor?

JUDGE CLIFTON: Mr. Beshore.

MR. BESHORE: Yes.

JUDGE CLIFTON: Pull the microphone
towards you, please.

MR. BESHORE: Mr. Carroll is asking for
proprietary information from this witness, and I
think I want to object to that, but also make
sure that the witness understands that he's
under no obligation to reveal volumes, prices
and other confidential business information in
this proceeding.

JUDGE CLIFTON: Thank you.

MR. BESHORE: In fact, I object to the
inquiry in terms of volumes and whatnot at
particular plants. It's not relevant.

JUDGE CLIFTON: And, Mr. Carroll, why is
the distinction between the Class I and the
other classes important with regard to your
questioning?

MR. CARROLL: Well, I'll withdraw that
question.
JUDGE CLIFTON: All right. Thank you.
Now, one other caution I would make -- you are
moving so fast, which I appreciate, that you're
talking over the witness.

MR. CARROLL: All right. Thank you. I
appreciate that.

JUDGE CLIFTON: Slow down just a bit.

BY MR. CARROLL:

Q. Right. A producer-handler who is only
Class I, that's all he -- he had, he would not be taking
any credit for manufactured products, would he?
A. No, sir.

Q. Do you know the names of any
producer-handlers in the areas that you sign -- I'm
sorry, that you serve?
A. I know the names of the exempt people in
our area, a couple of them, yes, sir.

Q. And can you tell us in the Order 1 who
are the people that you compete with, if any?
A. Who we compete with --

Q. Yes.

A. -- for Class I sales?

Q. Yes?

A. Green Springs would be one. Shenandoah

Pride would be one.
Q. Uh-huh.
A. And there's others.
Q. Are they producer-handlers?
A. No, they're not.
Q. All right. Do you have any producer-handlers you compete with in Order 1?
A. It's not an issue at this time, as I stated before.
Q. Right.
A. It's something we're looking at.
Q. And how about Order 5, do you have any producer-handlers you compete with there?
A. No, none at this time.

MR. CARROLL: Thank you very much.
THE WITNESS: Uh-huh.
JUDGE CLIFTON: Who next will cross-examine, Mr. Asbury? Mr. Miltner.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Ryan Miltner on behalf of AIDA.
Mr. Asbury speak about your plants if you'd like or plants in general, but bottling plants have butterfat utilization or butterfat use of about 1.8 percent on average across all products, is that about right?
A. That's low. Ours is higher than that.
Q. Okay. Around 2 percent, generally? I mean, I'm not asking for your --
A. It's a little higher than that, yes.
Q. Okay. Do you have -- I don't want to get into information about your plant, but what do you --
what's your experience as for an average on the butterfat for -- across distributing plants?
A. What is the --
Q. The average butterfat across all products.
A. I would think a 2-2.
Q. 2-2. I don't have any allusions that I'm going to get you to acknowledge that the cost of production for a producer-handler is an appropriate measure of how they acquire their milk, but I do want to suggest that your calculation of the difference between the Class I Price Order the uniform price is at 3.5 percent butterfat?
A. That is -- that is correct.
Q. And so the plants actually make pool assessments based on the skim and butterfat that goes through the plants, right? That's how the Market Administrator calculates that?
A. That is correct.
Q. And so if you had 2.2 percent on a plant,
your advantage, which, again, I don't think we're going
to go anywhere discussing that, but the advantage you
calculated could be different than what you've just
stated here?

A. Any butterfat product would be calculated
at some difference, yes.

Q. Okay.

A. It could be more. It could be less.

Q. Okay. Thank you. You mention in your
statement there are some large farms that are now
operating in your market area. Are farms of that size
relatively new to the areas where you do business?

A. We've had a few in that area that have
been large, what we'd consider large for several years.
But as -- as time goes on, the farms get larger and the
small ones go away.

Q. As a cooperative you're concerned that
those large farms would open up their own bottling
plant?

A. That would be our concern.

Q. And so the proposals that you're
supporting would -- would require that if a producer
decided to open their bottling plant, that they'd have
to be a regulated plant, right?

A. I would like them to be -- pay the same
price we pay.

Q. Does Maryland & Virginia pay volume premiums?

A. We do pay some volume premiums.

Q. Are those public knowledge at all? Do you post those?

A. I would not state them, no, sir.

MR. MILTNER: Okay. I don't have anything else. Thank you.

JUDGE CLIFTON: Thank you very much Mr. Miltner. Any other cross-examination? Mr. Tosi, do you have any cross-examination of Mr. Asbury?

MR. TOSI: No, your Honor, I have no questions. I appreciate the appearance.

JUDGE CLIFTON: Thank you. Mr. Beshore.

MR. BESHORE: Yes.

REDIRECT EXAMINATION

BY MR. BESHORE:

Q. Just one question on redirect.

Mr. Asbury, I'd just like to follow up on the questions from Mr. Ricciardi, I think, about the potential or the possibilities for producer-handlers in Orders 5 -- 5 or 7. Okay. Now, you're familiar with the -- generally familiar with the sources of milk, the milk -- the areas
from which those orders draw their milk supply?

A. Yes.

Q. Okay. And they're deficit markets, right?

A. Oh, definitely. Yes.

Q. Very much so, right?

A. Yeah. We have months where we bring in more than we produce.

Q. Okay. So the -- is that market supplied from large farms outside the geographic marketing area?

A. Yes, sir.

Q. And in the area of those large farms, is the local blend price utilization where the milk is coming from --

A. Yes.

Q. -- much lower --

A. Yes.

Q. -- than Order 5 and 7?

A. Yes.

Q. Okay. So if you've got a large farm, let's say, in northern Indiana, perhaps, that supplies milk down into orders 5 and 7, the utilization up in Indiana is much lower than it is in 5 and 7, correct?

A. Yes, it is.

Q. Okay. If it was supplying -- if farms up
there were to become -- large farms in that area were to become producer-handlers and supplied fluid milk products down into Orders 5 and 7 rather than bulk milk, they could become a producer-handler and that would be an advantage in doing it --

A. Yes.

Q. -- potentially, correct?

A. Correct.

Q. Okay. In fact, in terms of the blend price where the milk is coming from, there'd be a -- somewhat a blend price to Class I difference something in the range of what Mr. Tonak was talking about?

A. I would think so. I didn't look at those numbers, but I would think so, yes.

Q. Okay. So -- and is that sort of a possibility -- one of the possibilities that you would want the Secretary to consider in determining whether there should be limits on the size of producer-handlers in Orders 5 and 7?

A. Yes, uh-huh.

MR. BESHORE: Thank you.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Mr. Yale.

CROSS-EXAMINATION

BY MR. YALE:
Q.    Benjamin F. Yale on behalf of Continental Dairy Products and Select Milk.

        Mr. Asbury, I want to go back to that hypothetical that Mr. Beshore just talked to you about, Indiana and where the milk is located. It is true, is it not, that farms are paid based upon the markets at which they sell the milk, not where they're located, is that correct?

        A.    That would all be determined on what kind of supply agreement they signed.

        Q.    Yeah. But I'm talking about the milk that is generated by their sales, whether they're blend and they're co-op and everything, might be some other things. But by and large, as far as the Federal Order is concerned, it's the price at the plant where the milk is delivered, right?

        A.    That would be correct. If it's pooled in that area, yes.

        Q.    Now, you testified earlier that because of the high Class I utilization in Order 5 that if there is a discouragement -- or not a discouragement -- there's not quite the encouragement to be a producer-handler because the difference between a Class I utilization and the hundred percent Class I utilization is so narrow that it doesn't create the
incentive that it does in an Order such as Order 1 where the Class I utilization is much lower, right? Do you recall that?

A. There wouldn't be as many dollars to --

Q. Okay.

A. It wouldn't be as profitable.

Q. So what difference does it make if a plant is -- the farm is located in Indiana and is selling milk in Appalachia, what difference does it make that it's in Indiana. If the utilization is too high to not make that encouragement, it's too high regardless of where the farm is located, right?

A. Repeat that again.

Q. All right. It was a terrible question. Let me -- we'll start all over again.

MR. YALE: It's a good reason, by the way, your Honor, we need to be recessed.

JUDGE CLIFTON: But what I'm amazed at, you and Mr. Carroll are going 90 miles an hour all of a sudden.

MR. YALE: It's because we're tired, and we want to get to lunch or supper or whatever.

Q. All right. Coming back to this point, is that in the decision of a farm in Indiana, Ohio, or New York or wherever else that sells into the Appalachian
Order is going to be determined whether -- if they want to be PD or regulated, it's going to depend upon the Order in which they sell and not where their farm is located, is that right?

A. It would depend on where that farm is selling its milk now.

Q. That's right.

A. Yeah. If it's --

Q. Well, but --

A. Yeah.

Q. But -- okay. Okay. Let's -- so let's --

A. There could be farms there --

Q. All right.

A. -- that's not --

(Off the record.)

Q. Take a farm located in Ohio, all right? And it sells into the Mideast Order, which is a low utilization order, right?

A. That's correct.

Q. All right. So there might be an -- under your statement, there'd be an encouragement to be a -- might have an incentive to be a PD?

A. That's right.

Q. Okay. and you've testified that due to the higher utilization in Order 5 there is less of an
incentive to be a PD?

A. Well, if -- he's selling in 33.

Q. No, wait a minute. No, no, no. Wait a 
minute.

A. I've got to understand your question.

Q. No. My question is, is forget that he's 
selling in Order 33 for the moment. For any farmer to 
sell into Order 5, if he wants to sell into Order 5, he 
has a choice of either selling it and setting it up as 
being fully regulated and getting the blend price, 
right?

A. Uh-huh.

Q. Or selling it as a PD, right?

A. If he qualifies as a PD, that probably 
would be right.

Q. Right. So whether or not he's selling 
milk now in Ohio, he's going -- he has the potential of 
an advantage of selling into Order 5 either under a 
regulated scheme or a PD scheme, right?

A. If he's under regulated, he would be on a 
fair playing ground with us. That would be correct.

Q. Right.

A. Uh-huh.

Q. So the decision of whether to be a PD or 
not depends upon the market which you're selling in and
not the market where you're leaving?
A. I don't know I totally agree with you. I mean, if he's selling in that market and getting a lower price, and then he goes to another market -- I mean that's --
Q. He would have --
A. He would have a gain, yes.
Q. He would have a gain to go to Order 5?
A. That's correct.
Q. Because of the higher utilization, right?
A. That would be a part of it, in part. If he goes in as a regulated plant --
Q. Right.
A. -- yes, he would get that higher utilization. He wouldn't be a producer-handler, and it would all be fair, yes.
Q. Right. And his decision would be based upon the market that he sells in, not where he left at that point, whether he wants to stay regulated or not?
A. That would be his decision.
Q. That would be his decision?
A. Yeah. Wouldn't be mine. Yeah.
Q. If -- well, we'll leave it at that.
You're aware of who some of the members of Continental are?
A. Yes.

Q. And who are some of those members?

A. I know who McCloskey is.

Q. Do you know Fair Oaks Farms?

A. Yeah.

Q. That's a large farm in Indiana?

A. I would think that's pretty large, yes.

Q. All right. Are you aware of the fact that Continental and Select support National Milk's position?

A. That's great.

Q. I mean, you agree with that? I mean, you understand that, right?

A. Yeah. That's what I support, too. Yes.

Q. Okay. So does that not -- the fact that something large like that supports that might suggest that there are some factors that are beyond some of the theoretical opportunities that you're talking about that are entering into these business decision?

A. No. That's -- they made that decision. I don't know their background in the decision, no.

Q. And you're glad that they made that, though?

A. Yes. Uh-huh. I said that. Yes.
MR. YALE: Okay. Very good. Thank you.

JUDGE CLIFTON: Any other follow-up to what Mr. Beshore raised on redirect.

Mr. Beshore?

MR. BESHORE: I simply move the admission of Exhibit 25, your Honor.

JUDGE CLIFTON: Is there any objection to Exhibit 25 being admitted into evidence?

There is none. Exhibit 25 is hereby admitted. Now before we break I have one more order of business. And thank you for my exhibit back. And, Mr. Asbury, thank you very much for your testimony.

THE WITNESS: Thank you.

JUDGE CLIFTON: I would like, please, for Jock Gibson to come to the podium.

JUDGE CLIFTON: For right now, Mr. Gibson this one where Mr. Beshore was, if you will. Okay. And you are handing me a statement. Let's see. I got two copies. Would you hand one to Mr. Tosi?

When I talked with you earlier today, I asked if you would be willing to testify if we went into the night?
MR. GIBSON: Yes.

JUDGE CLIFTON: Now I need to ask if you are also willing to testify tomorrow instead?

MR. GIBSON: Oh, yes.

JUDGE CLIFTON: You'll still be here?

MR. GIBSON: I'll be here.

JUDGE CLIFTON: Now, you have prepared a statement and it's on the letterhead of Lochmead Dairy.

MR. GIBSON: Correct.

JUDGE CLIFTON: Do you have any copies of this on the back table?

MR. GIBSON: They're on the back table.

JUDGE CLIFTON: Great. So all of you be aware Jock Gibson will be one of tomorrow's witnesses and you may want to pick up his statement. Thank you very much.

MR. GIBSON: Thank you.

JUDGE CLIFTON: All right. Is there any objection to our closing for the day, coming back tomorrow morning at 8:00? There is none. We're off record at 6:17.

---

PROCEEDINGS ADJOURNED AT 6:17 p.m.

---
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