UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

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VOLUME XII

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Public Hearing Before:	Administrative Law Judge Jill S. Clifton
Date:	May 19, 2009
Time:	Commencing at 8:04 a.m.
Place:	Westin Cincinnati Hotel 21 East Fifth Street Cincinnati, Ohio 45202
Before:	Linda Mullen, RMR, CRR Notary Public - State of Ohio

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I N D E X

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P R O C E E D I N G S

JUDGE CLIFTON: Let's go back on record. We're back on record at 8:04 a.m. It's Tuesday, the 19th of May, 2009. This is day 12 of the milk rulemaking hearing. It is our final day.

MR. ENGLISH: We certainly hope so.

JUDGE CLIFTON: It is, indeed. I would like this to be labeled as volume XII of the transcript and the pages numbered in sequence to those of yesterday.

Now, yesterday we ended with the thought that cross-examination of Mr. Vetne would begin now. And Mr. English, you have a suggestion?

MR. ENGLISH: Well, Charles English. It's more than a suggestion, your Honor. And first, thanks for giving us the break so that we could talk. Second, thank you to Mr. Miltner for facilitating discussions. Others participated, but I think Mr. Miltner deserves the lion's share of the credit for this, for facilitating discussions, and especially between and among Mr. Vetne and myself and Mr. Beshore. Others, like Mr. Ricciardi, certainly participated as well.

I believe we have reached a bit of a

resolution, a compromise, if you will. Like any compromise, I don't think anybody is 100 percent happy, but we're trying to move forward. And I believe the compromise is -- and Mr. Vetne can speak for himself in a moment -- that a portion of Mr. Vetne's testimony, which is an exhibit, can come in as an exhibit, he is going to designate as argument.

And I believe it's the first page after comments on NMPF-IDFA Proposals and Stated Reasons Therefore, and the carryover paragraph to page 2, the paragraph with the, quote, Cornell, and the next paragraph, as shown below, together with the footnote.

That portion, I believe we've agreed to designate as argument, and I will agree, once it's designated as argument, not to cross-examine on it. Is that correct, Mr. Vetne?

MR. VETNE: That is clearly argument. Yes, I agree. And would also add that for purposes of this hearing, I claim proprietary interest in the Humpty Dumpty quote.

MR. ENGLISH: I thought I used it before you did.

MR. VETNE: Not in this hearing.

MR. ENGLISH: Not this morning, that's fine. For this hearing, I will -- the Humpty Dumpty quote can be yours. Nonetheless, you agree that's argument.

MR. VETNE: I do.

MR. ENGLISH: I agree not to cross-examine you because it's argument.

JUDGE CLIFTON: All right. Now, let me make sure, Mr. Vetne, I understand exactly what's involved. Looking at Exhibit 102, is your cover letter included in what will not be subject to cross-examination?

MR. VETNE: That is my page 1. It -- page 1 is simply a transmittal. It does not contain representations of fact. The purpose of this hearing for -- the purpose of the hearing is cross-examination on fact. Page 102, cover page, is simply a transmittal.

MR. ENGLISH: So the transmittal, I think, you're also not including, but I wasn't thinking about it necessarily. When I said page 1, your Honor, I really meant the page that starts, Comments on the NMPF-IDFA Proposal. So I guess more technically correct, page 2 of

Exhibit 102 down through the paragraph that starts, as shown below, the proposal that National Milk and IDFA claim on what is numbered page 2 on the exhibit.

MR. VETNE: Your Honor, through the signal to footnote 1 and including footnote 1, yes.

JUDGE CLIFTON: So the only thing that is subject to cross-examination on what I will call page 3, the last paragraph, which is not a full paragraph, but it begins, in the course of?

MR. VETNE: That's true.

MR. ENGLISH: That is correct.

JUDGE CLIFTON: Okay. Good. I think that will help a lot.

MR. ENGLISH: I think it does, and again thanks to all who participated in that.

JUDGE CLIFTON: All right. Mr. Vetne, since that is argument, I encourage you to include it in your brief, just so that it's not overlooked.

MR. VETNE: Oh, absolutely. What this is is a sneak preview of my brief. I would like to see -- I'll show you mine, I would like to see yours.

MR. ENGLISH: You can see a lot of mine in a prior proceeding. Then I only have a couple questions, your Honor.

JUDGE CLIFTON: All right.

MR. ENGLISH: I do -- this is as a result of the compromise, the fact this is only a couple of questions.

JUDGE CLIFTON: Now, just to make it perfectly clear, Mr. Vetne, state your name and I will remind you that you are sworn.

THE WITNESS: Yes. I'm John Vetne, I'm back here this morning. I was here yesterday.

JUDGE CLIFTON: Thank you. Mr. English, you may proceed with cross.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. On what is page 4 of Exhibit 102, but labeled page 3 of the actual comments, the page with the chart, footnote 2, do you see that page, Mr. Vetne?

A. Yes.

Q. There is a numbered paragraph, number 1 --

A. Yes.

Q. -- on that page. Trying to shorten this a little bit. We had other discussions last evening.

There are portions of that, such as the state -- actually, I guess the statement in the middle of that numbered paragraph says, Mallorie's Dairy non-Class I use of own-farm milk, for example, averaged over 30 percent in 2007.

A. Yes.

Q. That's a factual statement?

A. Yes, it was intended to be so.

Q. The remainder of that paragraph is a conclusion that you have drawn from that factual statement, is that correct?

A. It's a conclusion drawn from a combination of that factual statement and factual conclusions or assertions from the prior proceeding in the Pacific Northwest, in which NMPF introduced some facts and made some conclusions, yes.

Q. Are you not, for yourself, as to those conclusions, testifying as to the facts, other than the statement that Mallorie's made, correct? Let me backtrack.

A. Except as to characterizing my own understanding of what occurred in the Pacific Northwest proceeding, based on the transcripts and briefs filed --

Q. Fine.

A. -- that's true.

Q. Fine.

MR. ENGLISH: I have no further questions.

JUDGE CLIFTON: Who would next like to cross-examine Mr. Vetne?

THE WITNESS: I do have an addition I would like to make before we proceed any further.

JUDGE CLIFTON: All right. You may.

MR. VETNE: As you recall, yesterday I tried to provide some explanation to blend in Mr. Flanagan's supplemental proposal to limit the size of a plant that can take advantage of pool exempt own-farm milk.

So there would be two -- two caps; one in this proposal, I think it's 16 or 17, for the production, that's exempt. And then there would be a second cap for the plant size at which an exemption would apply. And I have a suggestion -- I'm not sure it's a final suggestion -- for language that would effect that, which I would like to read into the record.

JUDGE CLIFTON: Now, is it in this Exhibit 102?

MR. VETNE: It is not, I'm going to do it orally.

JUDGE CLIFTON: Okay. So go slowly, please.

MR. VETNE: I will go slowly. And for -- for those following on Exhibit 102, it would be the very last page of that exhibit. There are two lines finishing a sentence at the top of the page. It would come as a new -- it would come after that -- those two lines, where it says 61 and 71 through 76.

And at that point, instead of a period after the number 76, there would be a semicolon, followed by the -- by this language -- and, again, this is a suggestion that I believe would effect that proposal or that modification. Here it is. Ready? Okay.

Provided, all own-farm milk shall be included in calculating handler pool obligations for any plant which, during the month, has route disposition of fluid milk products in excess of 6 million pounds. That ends it.

I'll read that one more time. After the number 76, there's a semicolon, and then the following words: Provided, all own-farm milk shall be included in calculating handler pool obligations for any plant which, during the month, has route disposition of fluid milk products in excess of 6 million pounds.

JUDGE CLIFTON: Thank you, Mr. Vetne. Who would next like to ask Mr. Vetne any questions? Mr. Miltner.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. John, on numbered page 3 of Exhibit 102 --

A. Yes.

Q. -- you include a table from National Milk's testimony in a prior proceeding on producer-handlers and you've discussed it.

A. Yes, that table is basically cut and paste from the exhibit identified from the Pacific Northwest and Arizona hearing, Exhibit 26. In fact, that same table was offered as a separate exhibit earlier in this proceeding.

Q. And my question is, have you introduced the table merely to illustrate the principles and calculations that you discuss, or have you introduced it for the data that's included in it?

A. I recall that Exhibit 22 was prepared in advance of this hearing to support the proposals. And as I indicated to Mr. English, its inclusion here was to identify information, facts and analysis from the prior Pacific Northwest and Arizona hearing, as I understood them, or could copy and paste them and explain why -- and compare that to Mallorie's current factual situation and explain why the analysis applied, as I understood it, by proponents in the Pacific Northwest, do not reflect reality from Mallorie's Dairy today.

So it was provided for the fact that this was used in a prior proceeding, as I understood it, and here was the approach taken and here's why that approach does not apply to Mallorie's today. Does that answer your question?

Q. Kind of.

A. Remember that -- remember that this Table 3 is in a -- for any purpose is a prior exhibit in this proceeding. Remember the number, it's there.

Q. You talked about it -- you talked about the table being included, and I've already forgotten the exact word you used. But to -- but to explain the reality of what Mallorie's Dairy is going through or what Mallorie's Dairy faces, is that -- is that right?

A. The reality of Mallorie's Dairy operations --

Q. Okay.

A. -- in light of the assumptions underlying proponents' case, what, six years ago now.

Q. And they -- that is really the issue that I want to talk about. There are a number of assumptions and data in Table 3 that were subject to a great deal of discussion and briefing and argument and cross-examination in that hearing.

A. I assume -- I was not -- I should say, that is the case. I read the transcript. I was not invited to come to that hearing, and so I did not attend.

Q. Okay.

A. I understand you had a good time.

Q. We had a lovely time. I want to -- I would like to know specifically, is the data in Table 3 being offered by you or your clients in this hearing to suggest to the Secretary that, in fact, a producer-handler with 2 million pounds of Class I sales has a plant cost of 67.1 cents per unit?

A. Oh, absolutely not.

Q. Okay.

A. Absolutely not. I copied it here and it was referred to in a prior exhibit to show an approach that was taken that had some underlying assumptions.

And the reference to Mallorie's facts was, first of all, that those assumptions do not apply to Mallorie's. Mallorie's does not have a hundred percent Class I use. That was the primary purpose.

There's no -- there was no intention of adopting the numbers from that Table 3 and embracing them as our own. So it's not offered for that purpose.

It was an approach taken and the -- the theory underlying that approach is wrong, based on Mallorie's operation. And the numbers used there reflect an approach, but it's -- it's not -- not our numbers, you know.

And I'm surprised something similar hasn't come in here for -- for this hearing. But that was the limited purpose. Somebody did some numbers, had some assumptions, those assumptions don't apply, and you know, we don't necessarily agree with those numbers.

Q. And I think you stated Exhibit 102, if it's not clear from its face, was prepared before this hearing was noticed?

A. Oh, yes. Yes, absolutely. It was prepared in advance. It was prepared in response to the invitation to submit proposals and -- and the second -- the two documents attached, the second one was after the pre-hearing information session to -- for a little bit of clarification. It's anticipatory. USDA would like to see -- and it's in the old rules of practice and the new rules of practice. When you submit a proposal, here's the problem as we see it, here's the proposal, here's the reasons for it, here's how we think this will address the issue. And that was the function of -- of Exhibit 102.

Q. And on numbered page 4 of the statement in the first paragraph, under the heading, Mallorie's Dairy's Alternative Proposal?

A. Yes.

Q. You state that the first alternative is to maintain the status quo for producer-handlers, at least for the Pacific Northwest.

A. Yes.

Q. So this -- this document in total --

A. Yes.

Q. -- was submitted with the aim of convincing the Secretary not to notice a hearing?

A. Yes. I think that's a fair characterization.

Q. And so what you have done with Table 3 is taken data that was offered by the proponents in this proceeding that was argued in a prior proceeding because that was what was available?

A. Yes.
Q. And you argued -- well, you explained that for Mallorie's Dairy, the reality of their operations under that context, is that -- is that a fair description of what happened?
A. That's -- that's pretty fair.
Q. Okay.
A. The objective was -- Mallorie's has gone through this before. Pacific Northwest has amended. Maintain the status quo there, don't sweep us into the solution. And the Department didn't see it that way, so we're all here for all markets.
MR. MILTNER: Thanks, John.
JUDGE CLIFTON: Who next would like to question Mr. Vetne? Mr. Tosi -- Mr. Ricciardi.
CROSS-EXAMINATION
BY MR. RICCIARDI:
Q. Al Ricciardi for AIDA. Good morning, Mr. Vetne.
A. Good morning.
Q. How long have you actually been attending and participating in Federal Milk Marketing Order hearings such as this one?
A. In some capacity, since 1973. I graduated from Wayne State University Law School and

found my way to Washington D.C. to work for USDA.

Q. How long did you work for USDA?

A. Seven years, to 1980.

Q. From 1980 there on have you been in private practice?

A. Yes.

Q. And has Federal Milk Marketing Order issues and related matters been a principal part of your practice?

A. Yes. I would better characterize that as economic regulation of the dairy industry, because it's not just USDA that does it. Many states do it, and I'm involved in that.

Q. Okay. I note that in the discussions that you had with Mr. English, that there's certain agreements that were made with regard to Exhibit 102. And I wanted to ask you some specific questions about some other documents to see whether or not we can compare them. Exhibit 102, let's take a look, for example, at Exhibit 23.

MR. RICCIARDI: Do you have that, Judge?

JUDGE CLIFTON: I do.

MR. RICCIARDI: Thanks.

BY MR. RICCIARDI:

Q. You're familiar with Exhibit 23, which is the testimony of Dr. Cryan. He's thinking.

A. I'm thinking of the right word to use. I think if -- if -- if time and attention is descriptive of my familiarity, I would say intimately.

Q. That's a fair response. If, in fact, leaving aside that Dr. Cryan is an economist and you're a lawyer, we were to apply the same standard to Exhibit 23 as apparently we're applying to Exhibit 102, would Exhibit 23 contain a number of legal arguments as opposed to facts?

JUDGE CLIFTON: Mr. Beshore, I'll hear your comment before Mr. Vetne responds.

MR. BESHORE: Well, I object to the question. He's asking him to apply presumed principles which were embodied in a compromise and settlement, essentially, of objections, which Mr. English described here this morning, as far as 102 goes, taking that and asking him to apply that to Exhibit 23. And I think it's completely irrelevant and inappropriate.

MR. RICCIARDI: I think it's a fair comparison, Judge. And I think it's a fair question to ask.

JUDGE CLIFTON: But is it necessary? You know, I don't think it's necessary. And I think it takes us a little bit afield of our objective here today. Do you really persist in wanting to know an answer to that?

MR. RICCIARDI: I would like to get an answer to that question.

JUDGE CLIFTON: Do you see that it derails the bounds of the cross-examination, the compromise?

MR. RICCIARDI: No. I'm not asking him to make a distinction in his own exhibit. I'm just asking him to compare them.

JUDGE CLIFTON: You know that the AMS Dairy people can compare them. The AMS Dairy people can recognize legal argument. I don't think it helps a bit to get Mr. Vetne's opinion on that.

MR. VETNE: May I interject here, wearing my other hat?

JUDGE CLIFTON: You may, Mr. Vetne.

MR. VETNE: Okay. As much as I would like to jump on that bandwagon, I think the question asks for argument. And that's something that you and I both can do on brief.

MR. RICCIARDI: Okay.

JUDGE CLIFTON: God bless you, Mr. Vetne.

MR. RICCIARDI: Fair enough. Thank you, John.

JUDGE CLIFTON: Thank you, Mr. Ricciardi. Is there any other question for Mr. Vetne? Mr. Rower and Mr. Tosi, do you have any questions for Mr. Vetne?

MR. TOSI: No, your Honor, we don't. And, John, thank you for whatever it was that you guys did last night. We sure appreciate it.

MR. VETNE: And I assume you understand the proposal and how the modification fits in?

MR. TOSI: Yes. Yes, we do. Thank you.

MR. VETNE: Thank you.

MR. ROWER: Thank you, John.

JUDGE CLIFTON: Thank you, Mr. Vetne. You may step down. It's 8:30. Let's go off for just a moment.

(A recess was taken from 8:30 to 8:56.)

JUDGE CLIFTON: All right. Let's go back on record. We're back on record at 8:56. I have three housekeeping items that I would like to do before Mr. Hollon comes to the witness chair.

The first is, is there any objection to the admission into evidence of Exhibit 102, Mr. Vetne's exhibit? There is none. Exhibit 102 is hereby admitted into evidence.

JUDGE CLIFTON: Now, I have been given two exhibits that people wish to utilize in questioning Mr. Hollon, and I need help in numbering them. One is Mr. English's exhibit and one is Mr. Ricciardi's exhibit.

Let's start with Mr. English's exhibit. And, Mr. English, how would you propose that that be numbered?

MR. ENGLISH: 74-A. And the reason why I suggest 74-A is that it is a revision of 74. 74 was based on 12, and the revision in this document is the same numbers as appear on 74, which was based upon 12.

So I'm merely going to ask Mr. Hollon a couple of questions about it. But I think that in terms of the clarity of the record, even as we had 6-A for 6 and 7-A for 7 and 12-A for 12, this is nothing more than a handwritten version, not a typed version like 74, of using the numbers on 74 to adjust 12-A. That's the number I would propose giving, your Honor.

JUDGE CLIFTON: All right. Now, the document I'm talking about has handwritten information at the bottom of the statistics. So any --

MR. ENGLISH: Which match 74.

JUDGE CLIFTON: Which match 74. Okay. Thank you.

MR. ENGLISH: Except for the bottom line, because the net is different because the numbers are different in all markets combined. Otherwise it's identical.

JUDGE CLIFTON: All right.

MR. ENGLISH: I also note there's a point 3 missing at the very end. It should be 578.3 not 578.

JUDGE CLIFTON: Let's see what the record copy shows.

MS. FISHER: 578.

MR. ENGLISH: I can give the record copy my original.

JUDGE CLIFTON: Would you? Because I want that one to be the best. All right. So did everyone see where the correction goes? It's the very last figure at the bottom right-hand corner of the page. And, again, Mr. Vetne -- Mr. English, it should read what?

MR. ENGLISH: 578.3.

JUDGE CLIFTON: 578.3. Thank you.

MR. ENGLISH: The copy machine just cut off the point 3.

JUDGE CLIFTON: All right. Is there any objection to this being identified as 74-A? There is none, it will be identified as 74-A.

(Exhibit 74-A was marked for identification.)

MR. ENGLISH: Thank you.

JUDGE CLIFTON: You're welcome. Now, Mr. Ricciardi, if you would come to the podium? Your document is a letter on the Commonwealth of Pennsylvania letterhead over the signature of Dennis Wolff, W-o-l-f-f. How do you propose that we label that document?

MR. RICCIARDI: Let me clarify the record, Judge. This document has -- it may be used, possibly, in the cross-examination of Mr. Hollon, but it's not being used for that purpose. Let me explain the purpose.

My suggestion, Judge, is that we label it, and I guess it's your choice, either Exhibit 36-A or Exhibit 84-A. And let me explain the context. And then the decision needs to be made.

If you recall way back when in our youth, the first week of this hearing, the presentation was made on behalf of a number of states, New Hampshire, New York, Pennsylvania, Vermont and Wisconsin, by a couple of representatives. Pennsylvania was not there, but that exhibit is marked as Exhibit 36. That's in evidence.

And in addition to the information in that exhibit, there are a bunch of letters from various people from Wisconsin and other people that were appended to it that we allowed in.

When Mr. Kreider presented his testimony, which you'll find in Exhibit 84, in the second page of the written portion of his testimony, at the bottom, he states, I am aware that earlier testimony in the proceeding was offered on behalf of the Pennsylvania Department of Agriculture in support of a cap on producer-handlers at 2 million pounds of monthly Class I route disposition. I was unaware of this proposal prior to the presentation of this proposal and immediately contacted our State Secretary of Agriculture, Dennis Wolfe (sic). He was equally surprised to learn that we would be adversely affected by the proposal and has said he does not support a cap that would restrict Kreider Farms from operations, et cetera.

Proposed exhibit either 84-A or 36-A, in fact, is the letter from Mr. Wolff of the Commonwealth of Pennsylvania, Office of the Secretary, Department of Agriculture, which confirms Mr. Kreider's statements set forth in Exhibit 84, in the second paragraph.

We now recognize the adverse impact that a 2 million pound cap will have on Kreider Farms and support your efforts to retain the current producer-handler exemption. Kreider Farms is markedly different from the types of operations that we feel this exemption was intended to target. I want to assure you that we do not believe that Kreider Farms presents economic threats either to Pennsylvania or the national dairy industry.

It's a letter from the Secretary of Agriculture dated May 11th, 2009 after the first week's presentation, and to Mr. Kreider with a cc to the Secretary of Agriculture, Mr. Vilsack.

Rather than have Mr. Kreider incur the time, effort and expense away from his business to come here a second time, what we intend at this point, Judge, is to have this admitted as an exhibit for whatever number that you select, 84-A or 36-A, to complete the record on Exhibit 36 so it's not misleading, and to corroborate the statement in Exhibit 84, for completeness also.

And so our -- we would offer the letter to be marked and admitted into evidence, given the factual background I've just presented.

JUDGE CLIFTON: All right. Counsel, before I hear from you, I have looked at Exhibit 36, and it does not belong there. I have looked at Exhibit 84, and that is Mr. Kreider's statement, and it does belong there. So I would mark it, unless there's strong objection, as Exhibit 84-A. All right. That's how we'll mark it. No one indicated strong objections, so this is Exhibit 84-A.

(Exhibit 84-A was marked for identification.)

Now, did you, Mr. Ricciardi, just move its admission into evidence?

MR. RICCIARDI: If it wasn't clear, now that we have marked it for identification as

84-A, we would move the admission into evidence of Exhibit 84-A.

JUDGE CLIFTON: Now, I'll hear objections. Mr. English.

MR. ENGLISH: Charles English. First, to be clear, your Honor, as another discussion point of compromise, we agreed not to contest the authenticity. That is to say, we certainly saw no point to cause Mr. Kreider, who's already appeared, to come back a second time for the sole purpose of saying, yes, I got this letter

So we are not going -- for my part, and I believe I speak for those who are -- have a view on this, going to take a position on the authenticity. We are not challenging that. I fully agree with calling it 84-A rather than 36. I think there are a couple of differences that go to how you admit it, if you admit it.

This, of course is, you know, a letter to a private party. He had been here, obviously. I guess we could get it in in some format, but I don't want it to be given any greater weight than what is, in essence, a brief on this one point.

And it could very well be that other

Secretaries of Agriculture write in at some point as comments of the brief. And their brief should not be given less weight than this document, if that's what happens. Or for that matter if Mr. Wolff is heard from again in the form of a brief, that should not be given less weight than this document, simply because it's in the record.

JUDGE CLIFTON: Mr. Beshore?

MR. BESHORE: Yes. Marvin Beshore. I join in Mr. English's comments. We do not object to the document being proffered without a witness. It is not necessary for Mr. Kreider to come back. The document should not have any more weight than any other statement of position not made by a witness under oath. And we -- I would object to it being admitted, other than on that basis.

JUDGE CLIFTON: All right. Mr. Vetne?

MR. VETNE: John Vetne. I'm not sure of the hair we're trying to split here, but it's been authenticated, and therefore it is admissible as it -- as a letter that comes from the Secretary of Agriculture of the Commonwealth of Pennsylvania. It is a statement of position.

It differs from representations of position of some Northeast states as to a cap. And I agree it's just a statement of position; however, if it's -- I don't want to appear to concede that it should have less weight than a statement of position of a live witness. It should have the same statement of weight as the position of a live witness because it's been authenticated for what it is. That's all.

JUDGE CLIFTON: Thank you, Mr. Vetne. Mr. Ricciardi, briefly, and then I'm ready to rule.

MR. RICCIARDI: Okay. Your Honor, it should be admitted for all purposes as any other exhibit has. The determination of weight to be given to it is by the Secretary.

The fact of the matter -- let me just make one contrast and then I'll sit down and you make your decision.

But if you look at Exhibit 36, we have appended to it a number of letters which were admitted for all purposes from people who did not, in fact, show up to be cross-examined. The distinctions between those letters and this is that we do have the Commonwealth of Pennsylvania stamp on it. It is from the actual Secretary of the Department of Agriculture, and we don't have any objection with regard to its authenticity.

So what we know is that this is an authentic letter from the person in Pennsylvania who sets the policy in that state with regard to their position -- its position on this issue. And therefore it should come in for all purposes for whatever weight the Secretary deems. Thank you.

JUDGE CLIFTON: Thank you, Mr. Ricciardi. The frailty of those letters that are part of Exhibit 36 was revealed through cross-examination. There is no cross-examination of Mr. Wolff taking place because he's not here to be cross-examined. And so I do admit into evidence Exhibit 84-A. It's not merely argument, it's evidence. It may well be evidence of a position rather than factual material for the Secretary to use, but it is evidence. But it is evidence prepared by a witness who was not here to be cross-examined. I caution the Secretary to be aware that there was no cross-examination. And with that caution, Exhibit 84-A is admitted into evidence.

Now, with regard to 74-A, Mr. English, do you move its admission into evidence?

MR. ENGLISH: Not yet, your Honor.

JUDGE CLIFTON: Okay.

MR. ENGLISH: I believe that would be more appropriate either during or after Mr. Hollon's testimony.

JUDGE CLIFTON: All right. Now I would like to mark Mr. Hollon's statement as Exhibit 104. 1-0-4.

(Exhibit 104 was marked for identification.)

JUDGE CLIFTON: All right. Mr. Hollon, you may come to the witness stand. Mr. Hollon, please state and spell your name.

THE WITNESS: Elvin Hollon. E-l-v-i-n, H-o-l-l-o-n.

JUDGE CLIFTON: Thank you. If you would raise your right hand, I'll swear you in.

ELVIN HOLLON

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

JUDGE CLIFTON: Mr. Beshore, you may proceed.

DIRECT EXAMINATION

BY MR. BESHORE:

Q. Mr. Hollon, would you briefly tell us your educational and professional background?

A. I have a bachelor's of science degree in dairy manufacturing, a master of science degree in agricultural economics; both of those were granted by Louisiana State University.

I have worked for Dairy Farmers of America or one of its predecessors my whole working career, beginning in 1979. On July the 6th, I will start my 31st year, which I hope doesn't start sitting right here.

Q. I'll try to assure that. During your -- briefly, what are your current responsibilities with Dairy Farmers of America?

A. My current responsibilities involve marketing issues and economic analysis issues, pricing forecasting issues. I spend a good deal of my time working on regulatory issues, mostly with Federal Milk Marketing Orders.

I generally serve as an internal contact for our day-to-day operating areas. I'm not necessarily intimately familiar with their businesses, but where they have regulatory issues, you know, I've become acquainted, look to see if a regulation needs changing or interpretation.

I will frequently talk with Market Administrators about how something works or how we might wish it to work, and I seek their opinion and counsel. And I also frequently speak with the AMS staff in Washington, D.C. on regulatory issues.

Q. Is it fair to say that as director of fluid marketing and economic analysis, your DFA's national office milk marketing regulatory expert?

A. That would be correct.

Q. Okay. Have you testified as an expert in Federal Order hearings?

A. I have.

Q. Do you have any idea how many times?

A. 25 or 30.

MR. BESHORE: I would ask that Mr. Hollon be recognized as an expert in agricultural economics and milk marketing for purposes of his testimony, your Honor.

JUDGE CLIFTON: Is there any objection? There is none. I accept Mr. Hollon as an expert in the field of agricultural economics.

MR. BESHORE: Thank you, your Honor. Mr. Hollon's prepared statement, which has been available since first thing yesterday morning, has been marked as Exhibit 104. And we would propose at this time that the statement be received as if read verbatim, as prepared, without Mr. Hollon at this time reading it from page 1 through 10 from the witness stand.

JUDGE CLIFTON: Thank you. Would anyone like to voir dire Mr. Hollon on his ten-page statement? No one has indicated a desire to do that. Is there any objection to the admission into evidence of Exhibit 1-0-4, 104? There is none. Exhibit 104 is hereby admitted into evidence.

JUDGE CLIFTON: Mr. Beshore.

MR. BESHORE: And with that admission, will it be considered as if it had been read verbatim from the witness stand? Is it accepted in that manner?

JUDGE CLIFTON: No. It is an exhibit on the USDA website. It is not in the transcript.

MR. BESHORE: Okay.

MR. ENGLISH: Charles English. If the parties agree, can we -- there have been past proceedings where this has been done where the court reporter has then treated -- I think at this point, this is merely a time-saving device for everybody.

MR. BESHORE: Absolutely.

MR. ENGLISH: And with the consent, or at least the non-objection of all persons in the room, I would think it could be typed into the record as if he had actually read it. And I think that's what Mr. Beshore's asking.

JUDGE CLIFTON: Is that correct, Mr. Beshore?

MR. BESHORE: That is correct. That's how we want it to be -- that's how we wanted it to be received into the record, certainly, yes.

JUDGE CLIFTON: So you want it both as an exhibit and as testimony?

MR. BESHORE: Yeah, just as has been the case with the other prepared statements earlier in this hearing. I only made the proffer, as Mr. English had indicated, to save time and expedite matters here on the last day.

JUDGE CLIFTON: So what you would propose, for example, if I'm the court reporter and I'm preparing the transcript, I type underlined, capital S, Statement of, capital E, Elvin, capital H, Hollon, end underline.

Then I go to the next title and I type,

capital -- underline, Capital D, Dairy, capital F, Farmers, of, capital A, America, comma, capital I, Inc., end underline, and so forth throughout this entire document?

MR. BESHORE: Yeah, I would be -- we would certainly be satisfied that the transcription begin with, I am Elvin Hollon, which is the first text line on 104, and would not need to carry the title of the document or the heading of the document in the transcript. But it would begin as, I am Elvin Hollon, which is how he would begin if he were reading it, taking the time to read it from beginning to end.

JUDGE CLIFTON: And then do you propose that the other headings be included or not?

MR. BESHORE: I would propose that they be included, the other headings, subheadings, for clarity.

JUDGE CLIFTON: All right. First, let me ask if there are any comments on this proposal? If anyone wants to comment? No. No one does. All right. Let me find out if there is unanimous agreement to this procedure with regard to Exhibit 104.

If you are in favor of the court reporter being instructed to type this into the transcript as if read, beginning with, I am Elvin Hollon, including all the headings, please signify by standing up.

MR. RICCIARDI: I'm standing, Judge, but let me make one point.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: I didn't know we were going to have a democratic vote here, that's good. But I -- my position would be I have no objection to it, if that's -- but here's the distinction. I don't say I'm in favor of it, I just have no objection to it.

If they want to proceed in that fashion, that's fine.

JUDGE CLIFTON: I think we had unanimous standing up counsel. Mr. Miltner, you probably didn't stand but you probably have the same position as Mr. Ricciardi.

MR. MILTNER: That's correct, your Honor.

JUDGE CLIFTON: All right. I do accept your proposal to proceed in this manner. I direct the court reporters to include the language of Exhibit 104 in the transcript as if read, exactly as it is contained here. Mr. Beshore.

MR. BESHORE: Yes. Thank you very much, your Honor.

(INSERTION BY REPORTER)

A. I am Elvin Hollon. I am employed by Dairy Farmers of America as the Director of Fluid Marketing and Economic Analysis. My office is located at 10220 Ambassador Drive, Kansas City, Missouri, 64153. I am testifying today on behalf of Dairy Farmers of America, Inc.

Dairy Farmers of America (DFA) is a member-owned Capper-Volstead cooperative of approximately 10,500 farms that produce milk in 49 states. DFA pools milk on 9 of the 10 Federal Milk Marketing Orders. The majority of DFA's farmer members have fewer than 100 cows. DFA is a supporter of Federal Milk Marketing Orders and depends on them to provide orderly marketing conditions for the marketing of its members' milk.

The issue. At issue in this hearing is in what manner the Secretary should extend the limitations on producer-handlers, as initially done in Orders 124 and 131, to the other Orders in the Federal Order system. In its December 14, 2005 final decision for the Arizona and Pacific Northwest Markets, USDA stated that,"Review of the intent of the producer-handler provision and the marketing conditions arising from this provision in these orders could want 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 limit. However, the hearing notice for this proceeding constrains such a finding to a level of not less than 3 million pounds per month of Class I route dispositions." (70 FR 74186).

We also feel that the view as determined in the above-mentioned proceeding should be further defined by:

Eliminating the producer-handler provision from all Orders (except for a special class of exempt plants);

Increasing the exempt plant definition volume limitation currently in place in Federal Orders from 150,000 pounds to 450,000 pounds;

Providing that the volume measure for the exemption be based on all route disposition, in any geographic area;

Specifying that in order to maintain the exemption a plant may package only in a unique label, or labels, not used by others;

Creating, within the subset of exempt plants, a special class of plant for those operated as producer-handlers which were in business as producer-handlers in 2008. These plants could maintain that status so long as their route disposition volume is less than 3 million pounds (or a lesser number as selected by the Secretary) and subject to other business definition specifications (in the language of Proposal 26.)

These definitions and other specific language are contained in Proposals 1, 2 in the Notice of Hearing proposed by the National Milk Producers Federation (NMPF) and the International Dairy Foods Association (IDFA); and Proposal 26 offered by NMPF.

DFA-Observed Market Conditions. 1. Customer concerns. In many of the Orders in which we market milk, we face concerns with producer-handlers expressed both by our customers and our members. In some cases the issues are actual "current day" pricing issues where we have to consider price adjustments to meet competition from producer-handlers and in other cases the concern relate to the possibility of producer-handler activity. In my testimony, I'd like to outline some of the concerns we are dealing with currently.

As has already been testified to by other witnesses, the individual companies in the various segments of the milk marketing processing, distributing and retail sector are very knowledgeable and sophisticated. The dairy industry has a very transparent pricing mechanism. Federal Order regulations are publicly available and come with a ready made free tutor in the form of the Market Administrator office staff who are available to explain and interpret the Orders for interested parties.

Since the decision modifying the producer-handler provisions in the Arizona Pacific Northwest Orders, I have had conversation with many DFA fluid milk processing customers about producer-handler regulation and marketing. Several of our largest customers have inquired about competitive factors in their markets or of the status of producer-handler regulation. When many DFA customers bring a similar concern to us, it becomes an issue which we must investigate and work to address. This issue is not a "what if" issue any more; it is a day to day business concern. It is either happening to a customer's current market or the customer is concerned it will happen in the immediate future.

2. Expansion of large farms and their

potential impact. One of the specific concerns I hear frequently is how many large farms could become a producer-handler. The industry understands that it is much less costly to add a plant to an existing farm to become a producer-handler than it is to add a large farm to an existing plant. This point was well developed by Mr. Wilcox.

The concern with the actual availability of large farms is borne out by the USDA/NASS Census of Agriculture for 2007 which was released February 4, 2009. (www.agcensus.usda.gov). The census contains a detailed profile of the 57,318 U.S. dairy farms identified as primarily involved in "Dairy cattle and milk production." The summary of farms by herd size notes that there are 3,259 farms with more than 500 cows in the United States. Every state has at least one farm in this size bracket except Alaska and Rhode Island and every Federal Order has a significant number of large farms. Eight states - California, Idaho, Michigan, New Mexico, New York, Texas, Washington and Wisconsin - have other 100 farms each in this size bracket. Clearly, there are a substantial number of large farms that have the potential to be producer-handlers. This gives credence to the concern that the number of large producer-handlers could easily grow in the regulatory cloud that now exists over the longevity of the producer-handler exemption is cleared up.

A second example comes from Order 33 where DFA recently developed data for a plant expansion project. In Michigan we found that there are 115 farms with milk production of more than 1 million pounds per month. The 115 farms averaged 2.7 million pounds per month. This documents the fact that there exist a number of farms in Order 33 that have the potential to become large producer-handlers.

A large producer-handler easily has the potential to become a producer price issue within Order 30. In Wisconsin, where the Ag Census showed 272 farms with over 500 cows in their herd, it has already been testified to that a dairy has been permitted for a herd of 8,000 cows. Based on the following data:

1. 2008 NASS/Wisconsin average production per cow - 19,546 pounds;

2. (19,546/12) times 8,000 equals 13,030,667 per month - projected milk production from this farm;

3. 2008 average monthly Class I pounds in Order 30 equals 373,860,393;

4. The 8,000 cow farm, as a producer-handler and assuming a 90 percent Class I use

in a distributing plant, would result in 11,267,600 pounds of Class I use at the producer-handler facility and would account for 3 percent of an average month's Class I use in Order 30.

5. The 11,267,600 pounds would represent the Class I pounds of 490 average sized Order 30 farms. 2008 average daily production per farm in Order 30 - 4,951 pounds; 2008 Order 30 average Class I use - 15.9 percent; (4,951 times 30.5 days per month) times 15.9 percent equals 23, 934 pounds of Class I use per farm per month; is 1,267,600 pounds of/23,934 pounds per farm equals 490 farms;

The largest Order 30 pool in terms of total milk pooled in the last 12 months was the January 2009 pool with 2,750,570,460 pounds. Six farms at the 8,000 cow limit could begin to affect the volume of milk that could be pooled in the Order even given the 90 percent diversion limit in Order 30. Also with the smaller percentage of Class I use in Order 30 the impact on the blend price of large producer-handlers absorbing Class I volume will be felt sooner than in Orders with a higher Class I use. Many farms, especially the smaller ones depend on the Order for price stability and without correcting the problems we see with large producer-handlers the level of price stability could erode.

3. Current marketplace issues. A. Order 32. In Order 32 the large farm producer-handler model has been shown to be effective as noted by the rapid growth of Heartland Dairy. According to its website, Heartland Dairy started production on April 7, 1997 and experienced unprecedented growth from its original 20 cows to more than 3,000 cows at the end of 1998. Only four months after its launch, it became the largest dairy in the state. Currently the Dairy has about 4,500 cows milking, with several thousand more cows in the feeds. They began processing milk in April 2005. (www.sharpeholdingsinc.com).

This farm has become a factor in the local marketplace. We have received questions about price level from several customers who compete with Heartland Dairy and all indicate the milk price they face is very difficult to compete with. In one retail store that I am familiar with - the Hy-Vee Food Store chain - gallons of milk from Heartland Dairy appeared in the dairy case about a year ago. As is the general practice in this store, Hy-Vee had marketed three labels in this main dairy case section for many years prior. Since its inclusion in Hy-Vee, the Heartland label has always been the lowest priced brand and occasionally by a price greater than the spread between the two lower priced labels and the premium brand. There is no competitive factor noted in the dairy case other than price. Also noted on the Heartland Dairy website, their distribution ranges across four states and to more than 100 retail locations - including nearly 100 Hy-Vee Food Stores, a major Midwest regional chain.

B. Order 33. The producer-handler model is also proving to be effective in Order 33 where Country Dairy has a growing business. Detailed competitive issues relating to Country Dairy were outlined by Mr. Wernet of Bareman Dairy. I want to again point out the widespread distribution network of Country Dairy. Based on data from their website there are 10 pages listing retail locations for their product in cities throughout Michigan.

C. Order 126. In Order 126 several of the competitive issues with GH Dairy were noted by Mr. Carrejo, from Dean Foods, who outlined potential plant capacities and distribution areas in his testimony. Mr. Traweek noted price issues faced by milk suppliers in dealing with this same processor. We have had many inquiries from customers relative to pricing issues with GH Dairy. Initially the marketing place was unsure whether this facility would be a fully regulated plant or a producer-handler. It appears the plant will operate as a producer-handler. Mr. Carrejo testified to many details about the nature of price competition in the marketplace. At the cooperative level I can say that we have made price concessions that have eliminated much of the premium structure within the western markets in Order 126 and discounted premiums by at much as $1 per hundredweight in other markets within the Order. I asked our marketing/analyst group in the Southwest Area to calculate the impact on a typical month's revenue relative to competitive issues with GH Dairy being a producer-handler. They were able to compute that effect as 20 cents per hundredweight on all milk in the producer pool.

Mr. Carrejo testified to competitive issues basically ranking from El Paso County, Texas westward to the New Mexico border. We have documented sales presence east ward into Texas with product (verified by product code 48 1034). (the IMS code for GH Dairy as noted in the FDA publication located at https://info1.cfsan. fda.gov/milk/mkex/ims/imsss-sw.cfm) in the Dallas Fort Worth area at 99 Cents Only Stores. 99 Cents Only Stores is a unique deep-discount retailer of primary name-brand consumable general merchandise, http://www.99only.com/ about/index.htm.again, this demonstrates that large volume producer-handlers are not small scale, limited sales outlet, small market impact processors. Other DFA Texas - New Mexico fluid processing customers have expressed concerns to us about competitive factors relating to GH Dairy.

D. Other Orders. Braum's Dairy testified to having retail locations in Order 32, Order 126 and Order 7 with 275 stores in Texas, Oklahoma, Kansas, Arkansas, and Missouri. Their web page lists store locations. It seems clear that the producer-handler model is successful for Braum's Dairy and they compete aggressively for dairy product sales in a very wide geographic area with many retail grocery businesses in the region.

Aurora Dairy in Colorado processes organic milk from a milking herd of 15,000 cows and distributes its fluid milk customers from coast to coast in direct competition with three fully regulated national distributors of organic fluid milk products. If Aurora Dairy were to become a fully regulated distributing plant on Order 32, we estimate they would contribute more than 15 million pounds per month of Class I volume.

Labeling Limitations. The language

proposed by NMPF/IDFA that deals with the labeling limitation is a key component of the set of proposals. Without it, the essence of the size limitations proposed to solve the marketing issues as raised will be greatly debilitated. There would be a very real incentive for an integrator to daisy-chain a group of producer-handlers in order to process the same label for the same store chain. Mr. Wilcox has already testified to being "recruited" to be a producer-handler, and several existing producer-handlers have already testified to processing private labels as a part of their current distribution system. We are aware of one such integrator scheme having been discussed in Federal Order 5. This constraint will in no way prohibit a producer-handler from producing multiple labels - as long as they are not duplicated by any other processor. Several producer-handlers testifying so far have lauded the personal benefits of promoting their own brand an the loyalty of their cuss first for their brand. The language we support will not minimize that effect in any way. If the benefit of providing non-unique labels to the marketplace proves lucrative enough, any producer-handler can give up his exemption and pursue that opportunity. We request that the Secretary address this issue now by including this language in any final rule, and avoiding the need to address the problem in the future with another costly and lengthy Hearing. We intend to rely on the Market Administrator to apply this regulation so that the objective of foreclosing the integrator model is met. The burden of proving compliance will ultimately fall to the producer-handler. The Secretary may decide to propose additional constraints to define the packaging and distribution relationships to meet this standard. We would support a more stringent standard should the Secretary define and find for one.

Other Provisions of the Proposal.

1. Route sales definition. It is important that the language defining the measure of route sales apply to all the sales of a producer-handler or exempt plant and not only the sales in an individual marketing area. To allow the route sales volume measure to only be in a marketing area will give too much latitude to a plant with sales patterns purposefully subdivided into differing Order marketing areas and unregulated areas in order to avoid regulation. There are areas of the country where this is a real possibility. A single aggregate sales standard will also simplify audit and enforcement of the producer-handler status.

2. Elimination of the producer-handler category. We support the complete elimination of the producer-handler limitation (except for the inclusion of a special class for grandfathering 2008 producer-handlers) and the selection of 450,000 pounds as the proper size limitation for the newly defined exempt plant status. The elimination of the producer-handler definition will clearly define the policy intention of the Secretary - to eliminate the special class of producer-handler -- and will greatly simplify the future enforcement activities of the Market Administrator for this section of the Order. Additionally it will reduce or eliminate the need to entertain future modifications to producer-handler language. Many of the supporting reasons for the 450,000 pound limit were outlined by Dr. Cryan. I would note that Exhibit 14 makes clear that many producer-handlers have maintained their business within the 150,000 pound limit and the proposal to triple the size exemption would allow for many of these operations to have a reasonable path to expand if they choose. Furthermore, this level will provide an opportunity to test this marketing concept for the majority of dairy farmers; and if they are successful and wish to grow their business beyond this level, then they can be

regulated the same as any other handler. Exhibit 13 makes it clear that all current producer-handlers and exempt plants have been very able to meet all the requirements to maintain their regularly status. There were only two months of the five years detailed in this exhibit that a producer-handler "missed" the exemption status of being either a producer-handler or an exempt plant.

3. Preserving status of some current plants. For those above the proposed 450,000 pound limit but under the 3 million size level the proposed grandfathering provisions will give their businesses the same status as it has currently. This language creates a unique class of exempt plants that are defined by size and business history. For those that meet the size limitations and were in business as a producer-handler in 2008, as demonstrated by their historical monthly Market Administrator filings, they may elect to retain their producer-handler status. We note that the language does give the Secretary the option to choose a lesser volume for the size limitation and that several have been proposed And Testified to here.

Comments on Other Proposals.

1. Individual Handle Pools. We oppose Proposal 25 which would establish individual handler

pools within Federal Orders. We see no way that individual handler pooling proposals are compatible with the basic tenets of minimum Order prices for both producers and handlers. This view was substantiated in the Federal Order Reform process when the concept was completely eliminated from Orders. That Decision noted that the individual handler provisions in the only remaining individual handler pool that was functioning before Reform, the Michigan Upper Peninsula Order, would not be carried forward to any future reformed Order. In an individual handler pool, producers do not receive the same Federal Order announced blend price in similarly situated areas. Additionally, an individual handler pool would place considerable market power in the hands only a few handlers - those who operate Class I processing plants. They would have increased ability to pit suppliers against one another for the opportunity to supply the higher valued Class I market. This was the exact type of behavior that led to the institution of market-wide pooling provisions. It would not be beneficial to return to that type of pooling mechanism.

2. Partially regulated distributing plants. Proposal 23 suggests that producer-handlers be treated as partially regulated distributing plants. We oppose this proposal. Partially regulated handler

status should not be granted by fiat. A producer-handler can be treated like a partially regulated handler if it meets the requirements as currently outlined. If any distributing plant does not have more than 25 percent of its route disposition in a single Federal Order it is then regulated as a partially regulated handler. A producer-handler, today, who becomes a regulated pool distributing plant as a result of this Hearing, could have partially regulated status if its distribution meets the standard.

3. "Soft cap" proposals. Finally, there are proposals which suggest that a "soft cap" pricing proposal might be appropriate for the producer-handlers. A "soft cap" means that the regulated price would be waived on a portion of the milk used by that handler. We would oppose any provisions that would institute a "soft cap" in any way. With a soft cap, market buyers of milk would never have a clear reading of the Order minimum price. Milk purchasers would always think one (or many) of their direct competitors was benefiting from the price waiver of the "soft cap." Milk suppliers would continually be forced to respond to that possibility and would likely have far more concerns expressed about competitive volumes needing attention than the quantity of "soft cap milk supplies" that

actually exist.

The Need for a Proactive Response by the Secretary. Based on prior hearing deliberations and the on going one here, the issue of producer-handler regulation is a difficult one for the Secretary of Agriculture and the Order system. Order hearings deal with change and there are always divergent opinions with regard to change. In order to deal with the issues raised in this hearing the Secretary will need to act in a proactive way. Often times, that seems difficult for regulatory authorities to do. We'd ask the Secretary to take note of the following:

1. The Secretary has indicated that large producer-handlers can be disruptive to Federal Order markets.

2. He has questioned whether the producer-handler exemption is still valid and that if it is to be retained, should perhaps be no more than 150,000 pounds per month of Class I route distribution.

3. The largest processor and the largest producer organizations think the changes they have proposed are important to the dairy industry. It is unusual that both of these organizations take a similar position on marketing issues so that should alert the Secretary that the issue being addressed is of high

importance to most of the dairy industry.

4. We note that minimum and uniform pricing issues for producers and handlers, market-wide pooling and concerns over the viability of Orders are being discussed here. These are very key components of all Orders and should be critically examined by the Secretary.

5. Producers from every Order either directly or through their cooperatives or trade associations have expressed their concerns that producer-handler regulation needs to be modified.

6. Fluid milk processors from every Order either directly or through their trade associations have expressed their concerns that producer-handler regulation needs to be modified.

7. The 2007 Census of Agriculture provides data that support the contention that farms, large enough to be a disruptive producer-handler - more than 500 cows, exist in 48 out of 50 states with eight states having over 100 farms each with greater than 500 cows. These farms have the potential to become producer-handlers so the possible of an even greater impact is more than just theoretically possible.

8. Changes to producer-handler regulation have proceeded in an evolutionary manner.

This proposal is another incremental step and it should be as forward-looking as possible.

9. Most of the proposals that have been offered at this hearing detail some limitation to the size of producer-handlers. This should indicate to the Secretary that there is broad industry consensus that some limitation should be instituted.

10. The combination of these facts should be reason for the Secretary to be proactive in reviewing these proposals.

Summary. In summary, DFA supports Proposals 1, 2 and 26. We feel that these proposals will add stability to the Order system. These three proposals will help assure milk purchasers that their competitors pay Order minimum prices and that producers share more equally in the proceeds of the pool. We note that producer-handlers who may become regulated as a result of this process will be in the exact same position with regard to their farm as any other producer in the Order; they will share in the same minimum blend price. A producer-handler who may become regulated as a result of this process will be in the exact same position with regard to their plant as any other plant operator in the Order; they will pay the same minimum class prices for milk.

This record confirms the concerns of regulated handlers that producer-handlers do not pay the difference between the Class I price and the blend price and as such have different minimum prices than other similarly situated handlers with which they compete. And of equal importance, that the larger producer-handlers are not minimal competitors in the marketplace and have wide spread product distribution within many Orders, in many cases in multiple states and in some cases multiple Orders. They are active competitors in the marketplace and should draw the attention of the Secretary.

We also note that this proceeding is being held under the revised rules of practice as set about by the Farm Bill. The dairy industry is well aware of these new rules and that they call for strict timeliness for briefs from the Hearing participants and timeliness for the Dairy Programs staff and the Secretary to act on the Hearing record. We look forward to complying with the rules and seeing the results from the Hearing in the timely manner prescribed by the rules.

(END OF INSERTION BY REPORTER)

BY MR. BESHORE:

Q. Now, I have just a few additional

questions for Mr. Hollon, and then he will available for cross-examination.

Mr. Hollon, I just want to touch on a couple of subjects that have come up in the hearing, and which are not -- comments are not reflected in your prepared statement.

Kosher milk certification and production. Does DFA have member -- members that produce milk in DFA markets with kosher certification?

A. Yes, we do.

Q. Can you tell us a little bit about that?

A. Two instances which are recent, which I have familiarity with, two of our manufacturing facilities have arrangements with kosher-certifying organizations to produce products.

In one case, the certification actually comes from Israel. The certification officials come to the United States, visit our facility, visit the number of farms. In one case that I know, there are four different farms, in the other case there are more than two farms that are surveyed, meet their requirements. They stay with the facility for the duration of the processing event, and then make sure that both the plant and the milk supply meets all those requirements.

Q. Okay. So in those cases, you have been able to and, in fact, do arrange for the production from multiple farms of appropriately certified kosher milk, and through your plant facilities, kosher dairy products?

A. That is correct.

Q. Okay. Let's turn to the question that came up or some information that was offered in the testimony of Mr. Docheff from Diamond D Dairy in Longmont, Colorado. Were you here for Mr. Docheff's testimony?

A. I was.

Q. Okay. And he is at least -- you were in the room part of the time and not in the room part of the time, correct?

A. That is correct. I was in the room near the end of his testimony and I spoke with him personally afterwards.

Q. Okay. Now, is Mr. Docheff a DFA member?

A. Mr. Docheff is a DFA member.

Q. Okay. And in his -- in his testimony, and in Exhibit 83, which is the hearing exhibit reflecting his statement or a portion of his testimony, he made some assertions with respect to the price he received and the price he was charged by DFA. You're aware of that?

A. Yes, I heard those comments.

Q. Okay. Now, have you had a chance to look into the transactions with Mr. Docheff -- between Mr. Docheff and DFA to provide further information and accurate information with respect to his transactions with DFA?

MR. RICCIARDI: One objection here, Judge.

JUDGE CLIFTON: Mr. Ricciardi, I'll hear your objection.

MR. RICCIARDI: The objection is, if you listen to that question, and accurate information, it assumes and the supposition is that Mr. Docheff's statements were not accurate. That's not a fair characterization, even in the introduction to this witness.

JUDGE CLIFTON: I note your objection and it has its place in the record. But if this witness is to answer this question, I certainly want accurate information from him. So the question is not objectionable. And you may answer.

A. I have examined some of the information that Mr. Docheff offered. I did take a look at the transactions in talking with our marketing personnel in

Colorado and Salt Lake City offices.

Because they involve an individual transaction, I'm not going to reveal specific information that identifies, for example, his production on his farm, his sales on his farm; that would be entirely inappropriate.

He did say from the witness stand that he was charged a Class I premium of $2.70, and that statement is accurate; however, he was also awarded the same level of discounts off of that price as any other processor in that market, and those discounts would be in the range of $1.50 per hundredweight. And I did look at more than a single month just to determine that that was the standard transaction. And, again, speaking with the marketing folks in that area.

Q. So that his net -- his net price after discounts for his -- for the milk that he purchased from DFA for his plant facility was in the range of what, in terms of an over-order premium?

A. I think I pulled the wrong line. His discounts were in the range of slightly over a dollar. And his net price was near $1.50. That's not an exact number, but it was in that range. And, again, he was subject on his processing plant to the same types of charges and the same types of discounts as any other facility.

Q. Okay. Now, that's the -- the -- you know, the sale side, so to speak, between DFA and Diamond D Dairy or Mr. Docheff, correct?

A. That's correct.

Q. Okay. Now, on --

JUDGE CLIFTON: If I could inquire, Mr. Beshore?

MR. BESHORE: Yes.

JUDGE CLIFTON: Are you unable to give us an exact amount, Mr. Hollon, when you say it was near a dollar in discounts?

THE WITNESS: I think that may reveal information about his operation that he may not, you know, feel comfortable in revealing. And he certainly had the opportunity to do that when he was sitting here.

So I think that's -- that's something that's confidential about his business. I just happen to know because I'm his supplier. But I don't think that's appropriate to put that information in the record.

JUDGE CLIFTON: Is it appropriate to indicate what else impacted the net price besides his $2.70 charge and the near a dollar discounts?

THE WITNESS: I'm sorry, I'm not following your question.

JUDGE CLIFTON: How did you get to a net price of $1.50?

THE WITNESS: In that market, and in many markets, suppliers announce a gross price and for different -- different levels of service and different competitive positions in the market, discounts from prices are offered to buyers.

So, for example, if you bought milk uniformly so that the balancing costs were less, you would -- your premium would be discounted. If you agreed to purchase on the seller's weights and tests, your premium could be discounted.

If you had sales in a wide variety of geographic areas, and perhaps other sellers had different prices in those areas, your premium may be discounted. So those would be the types of discounts. I'm not saying that this dairy hit every one of those targets, but they did hit some of them.

And the price announcement and the range of services to go with that is the information

that's known in each market and available to
every seller -- I'm sorry, available to every
buyer.

JUDGE CLIFTON: Thank you, that helps.

BY MR. BESHORE:

Q. Okay. Just for a little bit of context, did you attempt to contact Mr. Docheff in the last couple of days to discuss with him and make him aware of the fact that you were going to be presenting information with respect to, you know, to his pay price and his sales price from DFA?

A. I did leave messages with his phone that answered under his name. I have not received a return call. I have made more than one call and I've left him quite a detailed message that the type of information that I was going to speak to and the fact that I would not reveal confidential information about his particular farm and processing plant.

Q. Okay. So you wanted to make sure that as a DFA member, that he was aware of what you intended to present here, and that you would preserve the precise confidentiality of his paycheck?

A. That is correct.

Q. Okay. Now, with respect to just following up on Judge Clifton's question a little bit.

In terms of the sales price, the over-order -- gross over-order premium of 2.70, was that applicable to all -- the gross price applicable to all classes of utilization at his facility in a gross fashion?

A. In a gross fashion, yes.

Q. Okay. Were there different -- for instance, does he -- although he's primarily a Class I plant, as he testified, is there some Class II or Class III utilization there?

A. Yes, there is.

Q. Okay. Would that normally carry much -- a much lower net premium than the Class I sales that actually represents fluid -- volumes of fluid milk marketed?

A. It would.

Q. Okay. And are those price reductions off the gross premium for his Class II or III utilization part of what brings his net premium down to the $1.50 range?

A. That is correct.

Q. Okay. Now, he's charged -- by the way, I asked Mr. Docheff, did you look at any credits on your bill, off the $2.70, and he said something to the effect that he didn't notice any or he didn't note any or didn't see any. Were you in the room at that time?

A. I did hear that exchange.
Q. Okay. Now, the bill itself, the invoice itself you've seen, correct?
A. I have to side with him on that comment. Because when he made it, I thought about things that I thought should be readily apparent. And when I did look at the detail, I agree, we need some work on the way we sometimes put those -- those charges on a bill.
Once you dig through them and look at them, you can clearly find the information, but it may not be readily clear when you're sitting on the witness stand and you feel like you're under some pressure to answer the question.
Q. In other words, the $2.70 is shown as a charge at a per hundredweight rate on his invoice, is that correct?
A. That's correct.
Q. And the credits are just shown as negative figures without a per hundredweight item shown?
A. That is also correct.
Q. All right. So to get to the 1.50 net, you've got to divide the hundredweight by the -- you know, the bottom line on the bill?
A. To coin a phrase earlier in the hearing, you probably have to show more of your work than was

readily apparent to him at that time.

Q. Okay. So that's the -- the sale side, if we can call it that, of the transaction with Mr. Docheff and Double D Dairy.

Now, let's go to his -- his pay price. And this is -- this is his payment for milk as a Dairy -- DFA member in that area?

A. That's correct.

Q. Okay. First of all, was he paid -- is he paid the same basis as every other DFA member in that area?

A. He's paid the same basis. Obviously his price may not be identical to anyone else's price, but he's paid on the same basis as every single member in that area.

Q. And is the -- sort of the starting point or the gross price for that -- for those pay prices, the premiums which -- the receipts from milk sales, including premiums which DFA collects in that area, and divides over the hundredweights of member milk market, is that the gross starting point for --

A. The base starting point would be the applicable Federal Order blend price at his location. And to that would be added any premium dollars that may be earned in the marketplace. And then from that might be any deductions that would be attributable to his paycheck or his situation in that area.

Q. Okay. Now, in that area, how are -- within DFA as a cooperative and as a membership organization, how is it determined what the deductions are going to show on the milk check?

A. In some cases, those deductions are determined by national policy. For example, every dairy farmer in the country pays a 15 cent advertising and promotion deduction, so that's determined.

The remaining deductions in this particular area, and in most, are determined at the local area council, in DFA's terms. And the board of directors would review those -- those proposals made by management and accept those. And then members would be applicable.

So there may be a volume premium or a quality premium and deduction, there may be a hauling charge that might be applicable. There could be an assessment for transportation equipment or balancing equipment. But all those things would be determined at the local level.

Q. In other words, what shows on that milk check was determined by the elected board of directors for that area council in DFA?

A. That's correct. And then these would be charges that would be applied, again, in addition to the minimum blend price.

Q. Okay. So what deductions, then, are charged -- in that region, are -- and with respect to Mr. Docheff, show from -- on his milk check?

A. There is an advertising and promotion payment, there are administrative costs for the cooperative. There are a CWT deduction, and that's a Cooperatives Working Together program that DFA has chosen to be a member of.

And in this marketing area, the producers have agreed to commonly share the cost of transporting milk to the market above the minimum level. And so I think Mr. Docheff used the term intermarket haul, and that's generally what the term is in that area. And it refers to some amount of shared transportation costs. Every member pays some amount of transportation. Again, a formula has been determined for the area and approved by the appropriate board.

Also in this particular area, there is an agreed-to deduction to expand a balancing plant to handle balancing for the milk supply in that area.

Q. Okay. So in Mr. Docheff's case, what deductions are there, then? In aggregate, what's the aggregate amount, as close as you feel like you can disclose, on his check?

A. It's in the range of a dollar to $1.10.

Q. Okay. Now, he made the assertion in testimony that -- and I'm quoting Exhibit 83. DFA charges me approximately $5 a hundredweight for this service, which was to market his milk and provide it to his plant as needed. Is that an accurate figure with respect to the financial transactions between DFA and Mr. Docheff?

A. Well, first, to just the math portion, if you add up all the numbers and you assume that his assertion was correct, which I don't, you can't get to $5. You're well below -- well below that amount.

And secondly, his assertion was adding two things, one was what he was charged as a processor and the other was the things that he paid for as a producer. And I can't see that that would be an accurate representation of what he was charged to put milk into his processing plant.

Q. In other words, he was charged -- he was taking, in essence, the Class I price with premiums and comparing that to his net pay price?

A. Yes.

Q. Okay. And because of marketwide pooling and other issues, that's not really -- you know, you're saying that's not an appropriate comparison in any event?

A. No, it would not be an appropriate comparison.

Q. Okay. Of course, DFA markets the balance of his milk that he doesn't put through his own plant, correct?

A. That would be true.

Q. So that what he's charged for isn't all of his milk anyway, in any event?

A. That also would be true.

Q. Okay. Let's move on then, to, you know, the next -- next question. And you've described the particular transaction and how it works with DFA and Mr. Docheff in the Colorado area. That's all done at present with a contract, membership contract, that DFA has with Mr. Docheff and other members?

A. That is true. DFA has a membership contract that is offered to anyone who wants to become a member of DFA. They're legal documents, they define what the cooperative will do and is obligated to do on your behalf as the individual dairy farmer, and what you, as a dairy farmer, are obligated to do as a member of DFA.

Q. There have been comments made by one or more witnesses to the effect that they shouldn't have to sign cooperative contracts or something to that effect. Why do cooperatives have contracts and are they, in your opinion, necessary for the effective marketing of members' milk?

A. I would think that a contract to market anyone's milk, or a member's milk in this case, once it moves to that level is something that's -- that would be necessary to achieve the best possible return. Buyers want to be assured that there is a supply available for sale. They want to make their business plans. And they, in turn, want to be able to assure their customers that there's product.

So one of the things that a cooperative or any, you know, marketing business needs to know is how much product do they have available for sale. And so we -- we want to be -- DFA wants to be in the same position, so we take membership contracts. That gives us some assurance over a period of time of how much milk supply we're going to have available for sale, as well as, you know, what milk supplies that we may need to -- or may need or want to market in our own marketing programs, or need to have facilities to balance that supply.

Q. Are those contracts typically annual, which give the producer the option to opt out and market otherwise on an annual basis?

A. Most contracts have a time limit, most are annual. Most have a notification period that's well defined. So if, for example, you sign a contract on January 1, sometime, you know, almost a year later you have to give notice to the cooperative that you would not like to renew your contract. If you're silent, the contract renews.

Q. Okay. Let's talk a little bit about depooling. Mr. Hollon, you've heard references, you know, to depooling of milk in Federal Orders in this hearing, have you not?

A. I have.

Q. Okay. Do you have any thoughts with respect to whether -- how or whether depooling of manufacturing milk -- manufacturing class uses relates to the issues in this hearing?

A. I do not see a relationship. There are no proposals to evaluate or consider. I'm not aware that that concept was discussed at the information meeting at all. I'm a little bit mystified as to the exact arrangements or the exact connection between depooling and the producer-handler provisions that are being discussed here.

Q. Now, since the issue has -- has been raised so that the record is clear, has -- does DFA have a position and has it advocated a position with respect to the opportunist depooling of milk in Federal Orders?

A. I think our position is clear that we feel like depooling is a disorderly condition. In orders where there have been hearings on that issue, we have been proponents, in many cases the major proponent, of making those changes. We have had hearings relative to that in Orders 5, 7, 30, 32, 33 and 124; and additional proposals for perhaps even an expansion of Order 124 with depooling provisions.

We have supported more restrictive provisions in cases where there were none, put them in place and support more restrictive provisions. I would note that change in the order system generally moves in incremental fashion, and that those decisions have done that same thing. But our view is that that's an issue that needs attention, and we made proposals and supported proposals to correct it.

Q. I have just one final question on direct then, Mr. Hollon. There have been comments made, in particular by Dr. Knoblauch and Dr. Knutson in their testimony, that you know, there's no -- you know, there's no uniform price among dairy farms in the Federal Orders, there is no such thing, it's meaningless to talk about that, about a uniform price. Do you have comments with respect to that issue?

A. I took their comments, and there was a myriad of questions, that they seem to expect that in a market every producer would get the exact same price. And, in fact, I think they used that term. And I think there was questions about that. And that, to me, would be a statistical surprise if you could find maybe even a handful of producers who got the exact same price.

There's just a myriad of conditions. I think Dr. Knoblauch identified many variations in the studies he looked at, anywhere from -- certainly milk composition, milk quality, milk volume, geographic location, transportation costs and rates. And so there's a wide variety of the exact, you know, level of price.

But in all of the markets that we participate in, except those in the Idaho area, all of our producers' base price starts out with the Federal Order minimum. That's the uniform -- that's where the uniformity -- in our view, that the regulated minimum starting point should be the same for all producers in a similarly situated area. And the one market where that's not the case, we use a product price formula in some cases to price producers' milk there, and that even is based in some way on some of the formulations in Federal Milk Marketing Orders.

So the uniformity is at the regulated minimum, which I think that's the responsibility of the Secretary, to make sure that the regulated minimum is the same for all producers. And beyond that, the various compositional issues, et cetera, would determine different prices.

Q. Okay. Idaho is a non-Federally regulated area?

A. Idaho is a non-Federally regulated area at this time.

Q. So it's your testimony, then, in the federally regulated Milk Order areas, the uniform minimum price as established by the Federal Milk Order Regulations and calculated by the Market Administrator is the base price for all producer payments within those orders, and a meaningful price?

A. That's correct.

MR. BESHORE: Thank you. I have no further questions for Mr. Hollon at this time, your Honor.

JUDGE CLIFTON: Thank you, Mr. Beshore.

Mr. English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q. Good morning, Mr. Hollon.

A. Good morning.

Q. Charles English. Just a couple, two series -- still more -- hopefully, we'll get done in the morning, we'll say. Just two series of questions. Did you bring Exhibit 74-A with you?

A. I did.

Q. Is it true that Exhibit 74-A is different from Exhibit 74, only to the extent that Exhibit 12-A is different from Exhibit 12?

A. Yes.

Q. So you basically -- I transposed the numbers, took the numbers from 74 -- Exhibit 74 that had been added to Exhibit 12, to create Exhibit 74-A?

A. Yes, sir.

Q. Okay. Now --

JUDGE CLIFTON: Transposed sounds like you did something wrong.

MR. ENGLISH: I think you're right, your Honor.

BY MR. ENGLISH:

Q. I took the identical numbers from 74 and put them onto 74-A for calculation purposes, correct?

A. Correct.

Q. And the difference is that since all the markets combined total line that appears in Exhibit 12-A in handwriting. So for instance, for the year 2004, 658.8 million, to the extent that number is lower than the number that was in Exhibit 12, so, too, is the net that is written on Exhibit 74-A lower by the identical amount, correct?

A. That is correct.

Q. Now, except for a few moments when you've been out of the room and maybe part of last Friday, have you attended most of this proceeding?

A. I have.

Q. Did you also attend the proceeding in Phoenix, Seattle and Washington, D.C. in 2003 and 2004?

A. I did.

Q. And were you here when I asked Dr. Cryan the questions that went to Exhibit 74?

A. Yes, I was.

Q. And do you agree that a valid estimate for Sarah Farms, based upon what you believe you heard from Mr. Kreuger, would be 17 million pounds a month in '04, '05 and '06?

A. I do. And that question, I went back to my own notes from when Mr. Kreuger was testifying, and looked at what I wrote down and he said. And I agree that these are reasonable representations.

Q. Now, Edaleen, we put in basically at 3 million pounds a month, which is 36 million pounds a year, or for the first three months of '06, 9 million pounds. Did you have -- have you reviewed any files to indicate what Edaleen's actual volume was?

A. In terms of preparing for that hearing, I asked our DFA marketing and field personnel in Washington and Oregon to -- to take the published producer-handler list, and from the best information that they had from industry sources, from talking with suppliers, talking to contractors, looking at farm sizes, to give me estimates of what those volumes were, so that I could prepare for the hearing and make the proposals that we made.

And so in doing that, I got information at that time back, kept those records, took a look at them this week. And from our own estimates at that time -- and again, they were the best estimates we made based on the people on the ground who have the best knowledge, outside of obviously being an Edaleen employee or Smith Brothers employee -- we had estimated that the Edaleen monthly production was approximately

6 million pounds a month.

Q. Class I production?

A. Total production at that point was approximately 6 million pounds.

Q. Total production?

A. Correct.

Q. And how about Smith Brothers? Had you done a similar analysis for Smith Brothers?

A. We did a similar analysis for the Smith Brothers, and we estimated their production to be 6.5 million pounds per month.

Q. Had you done a similar analysis for Mallorie's?

A. We did a similar analysis for Mallorie's, and there we estimated 3 to 3.5 million pounds per month.

Q. And in any event, we now know from Mallorie's own testimony what their Class I is, correct?

A. That is correct.

Q. And so one could, on brief, adjust Exhibit 74-A further for at least the difference between 3 million pounds and what Mallorie's said they're doing today, correct --

A. Yes.

Q. -- and multiply that for the number of months, correct?

A. Yes.

Q. You reference soft cap proposals.

A. Yes, I do.

Q. Assume for a moment that the Kansas City report from the 1950s does say that the reason for producer-handler exemption was administrative convenience.

A. Okay.

Q. How does a soft cap fit in for administrative convenience?

A. Well, it doesn't seem to fit the idea of administrative convenience, because you have more things to try to determine as you are determining an individual producer-handler's regulation with a soft cap. So you have to ascertain their production and sales levels, and that requires another stage in auditing and verification in order to determine the accuracy of their filing. So it would, at a very minimum, require more work, not less work.

Q. In the end --

A. Typically more work doesn't rhyme with convenience.

MR. ENGLISH: I have no further questions. I move the admission of Exhibit

74-A. It would be subject to the same examination, I think, of 74, the same objections to 74. And we can spend the time on that or I can say those and hope to shortcut it. But I move the admission of 74-A.

JUDGE CLIFTON: Are there any comments or objections to the admission into evidence of Exhibit 74-A? Mr. Ricciardi.

MR. RICCIARDI: Your Honor, Exhibit 74-A is based upon, from this witness' own mouth, supposition, estimates from, quote, people on the ground, close quote, back six years ago. It is not based upon any hard evidence. In fact, it is based upon speculation and conjecture.

This expert witness can certainly have any conjecture or speculation that he wants. He's already given it to us in this record. We cannot give the imprimatur of his guesses the authority of an exhibit. And so I would object on that ground.

JUDGE CLIFTON: Other objections or comments? I think that objection is important, and I alert AMS Dairy to that objection. But I believe I remember Mr. Carman's testimony that there were no statistics available to back those numbers out. And this is an attempt to give some perspective on what those numbers might be.

I did admit into evidence Exhibit 74. I think 74-A attempts to be even more accurate. So over objection, I do admit it into evidence with the observation that it is not the USDA's statistical information and that the USDA cannot produce statistical information on this topic. With that comment, Exhibit 74-A is admitted into evidence.

All right. Mr. Vetne, you may proceed.

CROSS-EXAMINATION

BY MR. VETNE:

Q. John Vetne representing Mallorie's and others. Let's start with 74-A, Mr. Hollon. 74, as it came in originally without the handwritten additions, is Sales of Class I Fluid Milk Products, correct? Bold letters at the top of the page, title of the document.

A. It says Sales of Fluid Milk Products in Federal Milk Order Marketing Areas.

Q. So that's Class I fluid milk products, correct?

A. Yes.

Q. It's not an exhibit revealing anything about production by producer-handlers?

A. No.

Q. Okay. And the handwritten numbers at the bottom of the page, as I understand it, are simply assumptions in most cases, or a best guess in the case of Sarah Farms, of Class I distribution of fluid milk products in Federal Milk Marketing Order areas that have been subtracted from the totals to produce a temporal equivalent number all across the columns, is that correct?

A. I think that was the intention of the exhibit.

Q. Okay. So when you mentioned something about your best guess of Edaleen at 6 million pounds or Smith at 6.5, that was -- both of those answers were production of milk, not Class I sales, that's my recollection. Is that correct?

A. That is correct.

Q. And you're not offering any estimate of Class I sales by which to adjust these numbers, is that correct?

A. I think I -- actually, several of the producer-handlers, if not most, who testified said that their businesses were very predominantly Class I. And I think the last witness said his was well over 95 percent, even in a surplus month.

Q. That wasn't my question.
A. I'm sorry.
Q. My question was, you have no -- no speculation, guess, estimate or number to provide for Class I sales of Edaleen and Smith Brothers as compared to milk production?
A. No.
Q. No, that is correct?
A. That wasn't your question.
Q. My question was, you have no speculation or estimate of the Class I sales of Edaleen or Smith Brothers within their 6 or 6.5 million pounds of milk production?
A. And my answer would be yes. Do I have anything to offer? I would offer that the producer-handlers who have so testified have testified to a very high number, so in excess of 95 percent.
Q. Do you have any information which would lead you to believe that either Smith Brothers or Edaleen experienced that, other than what you believe to be a statistical pattern?
A. No, I don't.
Q. But for Mallorie's, unlike the others, you have testimony at this hearing that reveals both Class I sales before February 2006 as well as after

February 2006, so you were able to make an adjustment for that volume for review purposes, is that correct?

A. That's correct.

Q. Now, are you aware that -- let's look at the column for 2008 here to make sure we have apples to apples. The 131.1 million pounds for the Northeast, for example, that volume includes both Class I fluid milk products sold by producer-handlers located within the Northeast, as well as Class I fluid milk products sold by producer-handlers located outside of the Northeast?

A. Was that the testimony of Mr. Carman?

Q. Are you aware of that?

A. If that's what Mr. Carman testified to, then I would agree. I don't have -- I don't know, other than that.

Q. Okay. As I look at the bottom numbers written in, there's about -- almost precisely 200 million pounds per year difference throughout the Federal Order System in sales from 2004 to 2008. Is that -- am I correct in my math?

A. I haven't done that subtraction.

Q. Let's see. 578 minus 378. It's really easy. 578 is a total for 2008, and that's simply the same number that USDA produced. And 378 is the number that you adjusted.

A. 578 is in 2008?
Q. Right. And 378 is 2004.
A. Okay. Yes.
Q. Roughly 200 million pounds --
A. Yes.
Q. -- systemwide, which is roughly 17 million pounds per month.
There has been testimony that between 2004 and 2008, two producer-handlers commenced operations and grew substantially, both located in the Central market. Do you have a belief as to whether the 17 million pounds per month additional Class I fluid milk products is substantially from any source other than those two new producer-handlers during the four years?
A. I haven't studied that question, so I don't have an -- I don't have an opinion yea or nay.
Q. Would it not necessarily follow that any increase from 2004 to 2008, distribution by fluid -- by producer-handlers would include those new operations in 2008 and not include them in 2004?
A. Certainly if they were new to the market and were not in 2004 and were in 2008, that would be a conclusion that you could draw.
Q. Yes. In addition, there is a -- let's

see. Looking at the bottom of page 5, you use -- three lines up from the bottom, you use large volume producer-handlers. What is the line at which you draw to characterize a producer-handler as large volume as opposed to not large volume?

A. I think our initial thought was 450,000 pounds a month was an appropriate line to draw.

Q. Well, I -- your -- you are throwing all producer-handlers that are larger than 450,000 pounds into your characterization of large volume producer-handlers?

A. Yes, I am.

Q. And to illustrate that, you were referring in this paragraph only to a producer-handler located in El Paso, Texas. Is it your testimony that that producer-handler illustrates the competitive effect and operation of other producer-handlers that are down to 500,000 pounds a month or less?

A. The illustration in this paragraph and paragraphs are pointing out some of the effects of this particular producer-handler in this particular market.

Q. All right. In that paragraph, you indicate that some processing customers have expressed concern about competitive factors. Let's start with processing customers. Who are the processing customers that have expressed concern?

A. Actually, naming names of processing customers is a competitively sensitive piece of information that I would decline to discuss.

Q. Okay. And what are the competitive factors that the unidentified processing customers have identified.

A. The primary factor would be price level in a marketplace at a -- an amount that they question.

Q. And by price level, are you referring to the price at which milk is offered wholesale to a buyer or the price at which milk is offered to consumers on the grocery store shelf?

A. Both.

Q. To the extent it's the grocery store shelf price, how does -- how does -- how do you believe that the -- a producer-handler may control that?

A. The questions and comments take the form of XYZ Store has a price of X. When I look at what I can do, I can't match that price. In some cases, the reference is to the wholesale retail comparison. In other cases, there are comments that are made that that's below what I can even offer it to the store at.

Q. Are you testifying that you have unidentified processing customers who have observed milk priced on the grocery store shelf for less than the wholesale price that they can offer it to other customers?

A. That's our -- those are claims that are made, so we would go and try to investigate the facts as best we can, and see if we think that the claims are justifiable or if they need a response.

Q. Okay. Is there some factor in that process which would attribute the competitive factor observed on the grocery store shelf to something other than an assumed price charged by a producer-handler in wholesale?

A. Yes, there could be.

Q. Okay. Can you identify those?

A. Some may be promotional activity that's of short-term nature.

Q. By whom?

A. The retailer. Or the seller, the processor.

Q. But that's why I said by other than the wholesale price --

A. Okay. By the retailer. Also may be -- the marketing strategy of a particular retailer may play into how they price their product and how it's perceived by others.

Q. Okay. And that would not be a -- an observed competitive factor that traces back to a producer-handler or any other handler?

A. It may not be.

Q. And the term, expressed concerns, other than the discussion that we've just had and a concern about assumed wholesale prices, are there any other concerns?

A. I think that would be -- the primary concern would be at the price level.

Q. All right. During what period of time have your processing customers expressed these concerns?

A. Are you still referring to page 5?

Q. Yeah, I'm referring to the last -- last sentence of page 5.

A. I think there were questions before GH Dairy was even in existence, what type of operation would it be, would they be a distributing plant, would they be a producer-handler. And as -- in this particular case, as the plant came online, what were some of the observed price levels in the marketplace, all the way up to the point where it became clear they would be a producer-handler.

Q. Okay. Now I'm going back to page 2 of your testimony, last paragraph. You refer to a period of time since the decision for the Arizona Pacific Northwest Orders, which would be 2005, effective 2006, you had many conversations with DFA fluid milk processing customers. Again, I ask you, can you identify the customers with which DFA has had conversations?

A. My answer would be the same as before.

Q. Can you identify the processing customers served by DFA?

A. Again, I think that's a confidential piece of information.

Q. As to all customers?

A. Yes.

Q. Can you verify that DFA supplies Dean Foods, for example?

A. I think my answer will be the same.

Q. You're aware that there is reference to a raw milk supply contract filed with the Securities & Exchange Commission by Dean Foods in which it identifies DFA as a supplying -- as a milk supplier? Are you aware of that?

A. I'm aware of that.

Q. Is that true?

A. It is true that that filing is there.

Q. Is the content of that filing true?

A. That information also is above my pay grade.

Q. Is the content of that filing that refers to a liquidated damages clause -- first, liquidated damages should Dean Foods purchase without consent from somebody else, is that also true?

A. I'm aware that the filing is there. The details of the filing, I'm not going to comment on.

Q. And are the conversations that you referred to in paragraph 2 any different in nature than conversations limited to the Southwest market that you referred to on page 5?

A. Yes and no. They are conversations of a broad nature. Sometimes they are what is the regulation in my particular area that deals with producer-handlers. So I may get a question, and that would entail explaining the order provisions and how they work. I may get a question about identifying a particular handler, are they a producer-handler; are there farms that could be producer-handlers; is there a hearing process coming; could there be one; what might happen if I want to participate, how could I; if I had an opinion, what should I do. All of those are the range of conversations between myself and customers regarding these issues.

Q. DFA customers?
A. DFA customers.
Q. Following the decision for the Arizona Pacific Northwest Order, did DFA communicate with its customers to explain what had happened and what the issues were?
A. I would say that I don't know that we had a deliberate process to call Vetne Dairy and say, hey, did you hear, let me tell you this. However, if it came up in the normal course of business and the questions were asked, we would have explained what happened in those two orders.
Q. By we, you're referring to the sales staff of each of the DFA regions' councils?
A. Could be there, could be -- could be me, could be other persons in our corporate office who deal with this issue.
Q. Okay. Did you have any instruction or debriefing or information provision to the regional sales staff so that they could answer those questions?
A. We may have. I can't remember specifically.
Q. So if -- if you didn't have, how would you know that the responses to your customers were consistent from customer to customer?

A. Repeat, please.

Q. If you didn't have some sort of instruction or information session with your various sales representatives, how would you know that the responses to your customers who expressed concerns were consistent from plant-to-plant, customer-to-customer?

A. The information given from DFA to parties, is that what you're asking?

Q. Yeah. You're saying that you weren't the only one, you assumed others were involved. How would you know if your responses were consistent or if -- if the context of the concern and response was consistent?

A. First of all, I suspect we wouldn't know in every single instance, you know, if the information communicated was identical. By the time we got to the decision, many of the issues were a matter of public knowledge, whether they were in dairy industry publications, news, may have been given presentations at -- whether it be a board meeting, a management meeting or a sales force meeting. And then questions beyond that generally get referred to me.

Q. I see. So you would -- you would only know if a question were referred to you? You wouldn't know what a local marketing representative communicated, unless it were referred to you?

A. I would assume that they would have the information necessary and if they needed more, they would come back and ask for it.

Q. In the last sentence in that paragraph on page 2, you put the words, what if, in quotes and conclude that -- conclude with reference to a customer concern that it would happen in the future. What's the difference between what if and concern that it would happen in the future? You apparently intended a difference there.

A. A what-if question might involve explaining how something could happen or what the implication might be. And a day-to-day business or immediate future question, for example, would be, I have this situation, I don't understand it, what can you tell me about it.

Q. What -- what -- quote, I have this situation, close quote, problem would -- is there that applies to in-the-future scenario?

A. Sorry. Try it again.

Q. Okay. How can there be a, quote, I have this situation, close quote, problem if it's a problem that someone projects to the future?

A. I guess the best answer I can give you, Mr. Vetne, is someone may perceive a smaller operation that they're aware of, and they may know of another operation that's larger and they're trying to compare what could happen if that were to be in their market, as opposed to in a market where there's already a competitive situation that's on the street that is raising concern.

Q. Okay. So you are -- you are guessing what was in your customers' minds when they expressed concerns, essentially?

A. Most of them are pretty good at telling you what's on their mind.

Q. You are either guessing or interpreting from unidentified specific conversations from unidentified specific customers what was on their mind?

A. No, sir.

Q. No, sir? And if that is incorrect, tell me where it's incorrect.

A. Somebody brings a question, they are pretty good at explaining what they want to know and what their specific questions are.

Q. Has anybody -- has any customer of yours actually written to you or e-mailed you about these concerns?

A. I'm not -- I'm not certain.

Q. Well, wouldn't you be aware of that if that happened, if the concerns were reduced to writing?

A. I get lots and lots and lots of communications, so to refer to a specific one, I'm not sure. I do -- I have -- as I stated here, I've had many conversations with them.

Q. Is it not a practice when there's a huge issue from a customer that they really want to bring to your attention, that they try to get your attention in writing?

A. Sometimes that happens.

Q. And you're not aware if these concerns have ever been expressed in writing to DFA?

A. They may have been expressed to -- in writing to a different party, to DFA in a different place.

Q. And you earlier testified if that happened, it would probably come to your attention?

A. Questions about interpreting the provisions in the rules, you know, would most likely come to my attention.

If there was a specific competitive situation, I may -- I may get a conversation and participate in it. If somebody were to write in store XYZ, it would occasionally come to my attention. Like where you started your questioning, that was an example there where somebody actually sent me a picture of a carton in a case, said, here's an example.

Q. The producer-handler issue here has been a focus for the last -- last couple months. And did you undertake to look in your organization to see if there were written -- written expressions of concern to support the testimony that you give today? Did you look, is the question?

A. That's just the first question. Yes.

Q. And did you find any?

A. The most specific one would be perhaps the one that I referenced in -- in Order 126, the incidence of milk from GH Dairy in El Paso being in the Dallas/Fort Worth market and there I asked someone to show me the information, and they did.

Q. Someone brought that to your attention?

A. Yes.

Q. Did you ask them to go look?

A. At that point they had already gone to look and they had the information. And I followed up asking some more information about the particular, you know, location, store, et cetera.

Q. And that was when?

A. Within the last several weeks.

Q. Since the Notice of Hearing?

A. Yes.
Q. Prior to -- prior to the decision and implementation for the Pacific Northwest Order, has DFA made price adjustments to meet competition from producer-handlers?
A. I am not aware of any.
Q. Subsequent to the decision and implementation of the Pacific Northwest Order, has DFA made price adjustments to meet competition for producer-handlers?
A. After the 2005 decision?
Q. Yes.
A. Yes.
Q. In what markets?
A. Order 126.
Q. Any other markets?
A. Not that I'm aware of.
Q. With respect to the price adjustments in Order 126, which is the Southwest, Texas, New Mexico market, correct?
A. Yes.
Q. With respect to that market, are there not other competitive factors that have put pressure on -- on wholesale milk prices?
A. In any negotiation, there is always

pressure on prices.

Q. Is that a yes, there are other competitive factors other than producer-handlers?

A. Yes.

Q. And that would include, for example, more milk being supplied to processors by nonmember producers, correct?

A. If that were occurring, that would be a situation that would get part of the -- become part of the price negotiation.

Q. And, in fact, that is occurring, correct?

A. In any given day, that occurs everywhere.

Q. It has specifically occurred in the Southwest market, correct?

A. It has.

Q. Which, for the Southwest, is a fairly new occurrence? There hasn't been much independent milk during most of time since Federal Order reform?

A. That's true.

Q. When you use -- when you use the term, transparent pricing mechanism, you're referring only to the Federal Order portion of price eventually paid by a processor to producers, correct?

A. I'm sorry. One more time, please.

Q. On page 2, you use the term transparent pricing mechanism. Am I correct that you're referring to a portion of the price paid by processors to producers, the regulated portion?

A. Paid by processors?

Q. To producers or to cooperatives.

A. Yes.

Q. And you've testified that there are other components of pricing. Are those equally transparent?

A. In the industry, in a market there's typically a price announcement that has all of those components in it. Is that quite as transparent as the Federal Order announced class price that's available on the Internet to anyone who looks? No. To the particulars of the -- to the participants of the industry who have an interest, the price announcements -- to the buyers and the sellers who have an interest, the price announcements are transparent.

Q. To those in a contractual relationship with the suppliers?

A. No.

Q. Are the pricing announcements in terms of pricing provided, for example, to producer-handlers?

A. The pricing announcements are provided to buyers and sellers, so I don't think -- in that case, I'm not aware of any price announcement that goes to a producer-handler, because they're not a buyer.

Q. Okay. So other than those -- and the buyers and sellers are those that have a contractual relationship?

A. No, that's not true.

Q. You have a buyer and you have a seller. Product is provided. Money is paid. That's what I mean by contract.

A. I typically mean contract to be a written document with some specificity to it. So my definition and your definition of, I sold a load of milk on Friday that was a balancing plant load, that probably wouldn't be --

Q. A written document?

A. Correct.

Q. Okay. I'm using contract in the -- I guess lay people believe that a contract requires a writing, and I'm not using it in that narrow sense. I'm referring to a business purchase and sale, business relationship. Is there any -- any efforts made to provide those marketing terms outside of the people with whom DFA has a business relationship?

A. Sometimes, yes.

Q. An effort is made, or it slips out?

A. No, sometimes an effort is made.

Q. Okay. Are those documents provided, for example, to competitors, to -- or to USDA for publication?
A. No.
Q. And you don't have any to produce in this record to describe those various pricing terms?
A. Again, please.
Q. You don't have copies of those pricing terms to provide for the record?
A. I do not.
Q. You don't intend to provide any?
A. I do not.
Q. On page 3, the first sentence is, one of the specific concerns I hear frequently. Frequently from whom?
A. Customers who are inquiring about producer-handler status.
Q. Frequently during what period of time?
A. Since the last producer-handler hearing decision.
Q. And would you agree that this is a what-if scenario as you've used the term on the prior occasion?
A. In terms of how many large farms could become producer-handlers? Certainly not every farm

aspires to be a producer-handler, so in that sense it could be a what-if. The presence of and the number of is not a what-if. There could be a great presence of large size farms that might have the capacity to be one. And that, as much as anything, is the nature of the question.

Q. Okay. So it's basically a question of identifying large farms?

A. And -- yes.

Q. And large farms, for that purpose, is identified at what production level?

A. Everyone who asks has their own definition, so it ranges widely.

Q. When you respond, what's a large farm, where do you put the line?

A. I would -- one of the things I would use is an example I cited here, that ag census, which lists farms with 500 cows or more.

Q. When you're talking to a customer in New Mexico, do you use a different line for large farm than you do a customer in Massachusetts?

A. I generally look to see what their line is and frame my answer in their thinking.

Q. By their line, you mean the -- the average size or general size of a farm in the geographic area to which you are responding, is that correct?

A. Yes.

Q. So a large farm in New Mexico could be average of -- well, a large farm in New England could be average size for New Mexico?

A. Each questioner has their own set of reference points, so I attempt to answer in terms of their reference points.

Q. And throughout your testimony, you refer to concerns expressed and comments received. Does that include concerns and comments from your membership, from your producers?

A. Yes.

Q. Okay. And from other people for whom you market milk that are not members, also?

A. I'm sorry. Ask that again.

Q. And for other farmers for whom you market milk in addition to your members?

A. I personally don't have a lot of conversation with people who fit that definition, and I don't -- I don't recall someone who fits that definition asking me questions.

Q. DFA doesn't market milk for nonmembers, however?

A. That is correct.

Q. Now, with respect to -- we discussed announced price. Let's go back to the price of 2.70, I think, where Diamond D Dairy -- I lost track somewhere along the way. Was 2.70 the announced Class I price when you were referring to it?

A. That was the price that he mentioned in his testimony and that was the announced price in that area.

Q. It was the announced Class I price?

A. It was.

Q. An the 2.70 -- the -- whatever, the 2.70 -- $2.70 would be the premium above the federal price?

A. Yes.

Q. And that premium does not apply to Class II, III or IV milk, is that correct?

A. That is correct.

Q. With respect to that area, is that price a price that is charged by just DFA or other cooperatives who get together and determine an over-order price?

A. In that area, that's the price charged by DFA.

Q. And with respect to the Mideast, for example, is the over-order price just set by DFA or are there other cooperatives that get together to determine what an over-order price will be?

A. The Mideast. You mean --

Q. Mideast, Federal Order 133.

A. Within Federal Order 133, there are areas where DFA announces the price in conjunction with other cooperatives.

Q. And that would be for Ohio, for example, MMMA, Mideast Milk Marketing Agency?

A. That's correct.

Q. And for Order 124, that would be the Greater Southwest agency?

A. No.

Q. It would not be?

A. It would not.

Q. Greater Southwest agency does not set any -- does not coordinate pricing levels?

A. Not in Order 124.

Q. I'm sorry. 126.

A. The Greater Southwest agency coordinates pricing and announces prices in Order 126.

Q. Which is the Southwest market?

A. Yes. Just want you to know I'm listening.

Q. Thank you.

JUDGE CLIFTON: Mr. Vetne, your questioning is productive, but the pace of it is such that we need to occasionally just take a break, move around a little. And what I would like to do, I would like now to take a 15-minute break almost, 14-minute break. Come back at 10:50. And at 10:50, before you resume your cross-examination, I want to talk to everyone about transcript corrections and briefs. I want to do that before we get to the very end when often people are rushing to leave. So please be back and ready to go for continued cross-examination at 10:50.

(A recess was taken from 10:37 to 10:51.)

JUDGE CLIFTON: All right. Let's go back on record. We are back on record at 10:51. The first thing I want to address is Dr. Cryan's testimony. And Dr. Cryan's statement is Exhibit 23, and it was admitted into evidence back -- a while back.

At the time it was admitted, I anticipated that Dr. Cryan would provide a corrected copy. And I spoke with Dr. Cryan before he left, and he decided not to do that, rather to let his testimony and the record speak to that. I tell you this now so that you do not think there's a mistake, that we have no Exhibit 23-A. There is none, it was not created, and there will not be one.

So with regard to the changes that Dr. Cryan indicated would be appropriate, find those in the transcript, find those during the cross-examination and redirect.

Now, I want to talk a bit about the deadlines that I must schedule here. I have a very short leash on what I can choose. And when I read, for example, that the briefs will be not later than -- they will be due not later than 60 days from the date that the hearing concludes, which is today, and I count the 60th day and it falls on a Saturday, I am not going to go to the following Monday, which would normally be the way the lawyer would compute when something will be due. I am instead going to go to the previous Friday. So you do not have 60 days from today to file your briefs, you have 59 days. And that is Friday, July 17, 2009.

Now, the briefs have to be filed in the hearing clerk's office. That's where the official record is kept. That means you need to use FedEx or UPS or personal courier or in some other way, get that hard copy -- those hard copies, the record copy plus the four copies that go with it, to the hearing clerk before 4:30, because the hearing clerk does not accept filings after 4:30.

Although normally you can protect your filing date with a fax, to be followed by hard copies later, you may not in this case. And the reason is there's one fax line, and there are too many people and there would be too many pages. So start early -- start early. Do not miss this deadline.

The deadline for filing briefs is Friday, July 17, 2009. They must be received in the Hearing Clerk's Office in Washington, D.C. prior to 4:30.

Now, I want to talk a little bit about the courtesy that I hope you'll do when you file your briefs. And that is that I hope you will provide an electronic version to AMS Dairy. Because that's sometimes useful for them to search. You know, they will have read your brief and they'll remember that you talked about an issue and they can't find quickly flipping through it where it is, and they can, with your electronic version, go right to the page. There are lots of reasons why the electronic version is valuable.

I suggest that you send one to both Mr. Tosi and to Mr. Rower and to Ms. Fisher. It's so easy to do. I would also like you to send them to each other. And I think you probably have one another's e-mail addresses. That's not required, and it's not part of the filing. It's just a courtesy.

Now, I would like to talk to you about transcript -- transcript corrections. First thing I want to talk about is how I view them. Different judges have different attitudes about transcript corrections. Do not use the opportunity to correct the transcript to make a witness' testimony read better, grammatically or in any other way. Do not try to make complete sentences. Do not try to take the stumbling out of the statement. That's not the purpose of a transcript correction.

The transcript correction is just to correct something that the court reporter got wrong. So if it is painful to read through the testimony of a witness, so be it. Leave it that way. The ideal for me would be that nobody proposes any transcript corrections, that you overlook the small stuff, that you do not try to correct errors that have no consequence.

I do want you to make people's names right and other spellings right so that the Secretary, if anything from the record is included in the recommended decision, it's not embarrassing. So think of the transcript in that way. You want to avoid any embarrassment to the decision-maker.

But, for example, one of the things that the court reporter was told is that when you hear the reference to Class I milk, one is a Roman numeral. Well, if the transcript says Class I and 1 is an Arabic number, not a Roman numeral, but just the ordinary 1 that we normally use, let it go. Everybody can look at that and know you're talking about Class I milk.

By the same token, the term (15)(A) was utilized in this hearing, a (15)(A) proceeding. I instructed the court reporter to show that as (15)(A). That's how it will look. If you're not used to seeing it that way, if you're used to just seeing 15A with no parentheses, let it be. Everybody will know that it's a (15)(A) proceeding.

So there are judges who accept all proposals to correct the transcript. And so whatever -- for example, AMS Dairy asked to clean it up and make it read better, that would be approved. I will not. The only thing I will approve is something to correct what the court reporter did wrong. So I hope there are none.

With that said, the time to file with the hearing clerk your proposed transcript corrections is 30 days from the date the transcript becomes available.

Now, I'm not going to set a date certain. Watch the website every day and when it first contains the transcript, count to yourself 30 days. And if that 30th day falls on a Saturday or a Sunday or a holiday, go backwards so that you end up with less than 30 days, and get it in to the hearing clerk. Mr. Tosi?

MR. TOSI: Thank you, your Honor. In the past, and we would intend to do it again for the purposes of this proceeding, that when we do have the transcript posted, we will also state along with the posting of that transcript, what the due date would be for the transcripts (sic).

JUDGE CLIFTON: Okay. That will be great. If you all will do that.

MR. TOSI: And we'll follow your instruction here, in the event it falls on a weekend or a holiday, to go back to whatever that last business day was.

JUDGE CLIFTON: Good. So you may end up with less than 30 days.

MR. TOSI: Yes, we understand.

JUDGE CLIFTON: Very good. Excellent. All right. I'm going to read into the record the delivery address for the hearing clerk and then I'll hear counsel.

For both the briefs and the proposed transcript corrections, those are to be delivered to the Hearing Clerk, U.S. Department of Agriculture, South Building, Room 1031, 1400 Independence Avenue SW, Washington, D.C., 20250-9203. 9203 is a stop code that FedEx and UPS are well familiar with, the mailroom within USDA, and the FedEx people utilize that information in addition to the actual room number, South Building, Room 1031. All right.

Comments, questions? Mr. Vetne, would you begin?

MR. VETNE: John Vetne. Transcript corrections, I think, is a wonderful thing, just to limit it to substantive errors, as I understand it, in the transcripts.

As to briefings and filings, your Honor, for the past several years, parties have filed their briefs, sometimes exclusively, by e-mail transmission without a hard copy. I'm assuming, and I hope that your instructions as to these deadlines are not intended to change that protocol that has evolved with respect to electronic filings of documents, as we have experienced and as encouraged by what's called the E-Government Act. The objective is to reduce paper, make it easier to have access to this kind of proceeding, and to state your case without having to physically transmit a piece of paper.

JUDGE CLIFTON: What purpose does the hearing clerk serve in such instance?

MR. VETNE: My understanding, and folks at the government table can elaborate also, what happens when a document is e-transmitted, it would be to individuals and to the AMS Dairy comments.gov site, and that is that they receive those and make a paper copy for the hearing clerk and produce those electronic comments on the website, so that all of them are on the website. It's an easy way to get comments on the website without having to physically scan them. It's an accommodation to everybody.

JUDGE CLIFTON: Now, I frequently use e-mail for -- for working copies and courtesy copies. They -- you know, unless you're e-mailing a PDF document, they don't have the signature and all. Are you talking about using PDF?

MR. VETNE: That's what we have used for the past several years is a PDF document. That shows the origin, it gets to the destination, becomes the brief or transcript corrections that are part of the record, and quite frankly, that is all I've been doing for the past several years.

JUDGE CLIFTON: Mr. English.

MR. ENGLISH: I agree with my Brethren Vetne how it should work. I have a concern, and I think the concern shared more broadly about how things sometimes work.

The official copy is the version received by the hearing clerk. Everything else is a courtesy. The official version is the one received by the hearing clerk.

In the past, when I have e-mailed briefs to the hearing clerk, I have received somewhat intemperate responses to the effect, there is no rule that provides receipt by e-mail, we do not accept this.

JUDGE CLIFTON: This is correct. Our rules of practice do not provide for it.

MR. ENGLISH: And so I just -- I want to be clear that, I don't -- I don't want anybody caught on that. I think there is another issue, which is if it's postmarked, the general rule -- no, you're going to say no.

JUDGE CLIFTON: Absolutely not. And people have lost big cases over that. Talk to your brethren, Mr. Beshore.

MR. ENGLISH: I won't -- I'm not going to belabor the point. I don't want to spend a lot of time on this. I want to be cautious about what someone thinks is an official receipt. Because if, for instance, somebody e-mails it to the Department, to AMS, expecting them to make a hard copy and deliver it to the hearing clerk and it doesn't get delivered, I don't know what happens.

So I'm with you, Mr. Vetne. I think that the rules of practice when they got amended last year should have allowed for e-mail, but they don't. And I don't want anybody to be caught unaware of that.

JUDGE CLIFTON: What I would like to look at is what the hearing clerk has. I need to rule on the proposed transcript corrections. And once I've done that, then I certify the record, hopefully before your briefs even arrive. Hopefully, I certify the record, say what the exhibits and the transcript is, and then I'm done before your briefs even arrive.

When I go to do that, I will be relying on what the hearing clerk has. And I will expect there to be hard copies in there. Now, if you've got some arrangement whereby AMS Dairy does your work for you and relays the football to the hearing clerk, and you have their acceptance of that responsibility on your behalf, go for it like you've always done.

But my direction to you is, any party that wants to file a brief has the obligation to provide not only the original hard copy, but the four copies to the hearing clerk. I also think it's a better way to communicate a document that may have in it some Excel spreadsheets, some charts, some analysis that is not -- does not always line up through electronic transmission. Part of the reason is the printing process. If my printer is set different from your printer, sometimes it doesn't come out right even though you're using a PDF attachment to your e-mail.

All right. Other comments, questions? Mr. Ricciardi.

MR. RICCIARDI: Just a point of clarification, Judge. 30 days from the date that the transcript is posted, proposed corrections are due. I would assume at that point that those proposed corrections would go to you, and that you would make a decision as to the certification of the transcript, which would include a decision on the proposed corrections.

JUDGE CLIFTON: That's correct.

MR. RICCIARDI: And do we have any idea as to -- as to -- well, obviously it depends on the number you get and timing, but do you have any idea as to when that process may occur? Assuming that the 30th day, obviously, is the date you receive all of the proposed corrections.

JUDGE CLIFTON: The -- some of you know Fe Angeles, the hearing clerk who will be physically dealing with what comes. She won't bring the file to me until she has gotten everything in order. And if there are a lot of briefs, it will take her a while.

So if you have not received something from me -- I have no travel in June. I have no travel in June. I will be at my post waiting for that file. I would like to certify it just as quickly as possible, so that if there's any question about what the transcript shows, you have that before you submit a brief.

I would say that if you have not got something from me within a week after you've submitted proposed transcript corrections, you inquire of me. And you're welcome to use the -- the e-mail address on my business card. There are plenty of them up here.

MR. RICCIARDI: Thank you.

JUDGE CLIFTON: Other questions, points of clarification? Mr. Tosi.

MR. WOODY CARROLL: Your Honor.

JUDGE CLIFTON: Let me hear from Mr. Tosi, and then Mr. Woody Carroll, I'll hear from you.

MR. TOSI: Yes. Thank you, your Honor. Just as a matter of clarity, the briefs will be due not later than received by the Hearing Clerk's Office at 4:30 p.m. on July 17th.

JUDGE CLIFTON: Correct.

MR. TOSI: Would -- would that -- just to pose a hypothetical question, if somebody had sent something by regular mail through the U.S. Postal Service and it were dated July 16th, for example, okay, and it wasn't received in the hearing clerk's office until, for example, July 20th, would you consider that proposal to have been received on time?

JUDGE CLIFTON: No.

MR. TOSI: Okay. So by receipt in the hearing clerk's office, there's no room for interpretation on that. That means that the hearing clerk has received it and stamped it as received and it's before 4:30 p.m. on Friday, July 17th?

JUDGE CLIFTON: Correct.

MR. TOSI: Thank you.

JUDGE CLIFTON: And I wouldn't wait until 4:30 because there may be a jam up at the door.

MR. TOSI: I understand, your Honor. Thank you.

JUDGE CLIFTON: Mr. Woody Carroll.

MR. WOODY CARROLL: Your Honor, I would like to make sure that everybody's e-mail addresses are in the record, so we know where to send these things, and the address of the examiner where this thing is supposed to be probably hand delivered now, under these rules, so that we don't get it to the wrong address or something and have some additional confusion over that.

JUDGE CLIFTON: Now, when you say the examiner, are you talking about the hearing clerk?

MR. WOODY CARROLL: The hearing clerk, yes, wherever we're supposed to file our briefs.

JUDGE CLIFTON: Yes, I've read it into the record and if you'll approach, I'll loan you my -- this is a copy of my order regarding the case caption for transcript and briefs. And below my signature block is the hearing clerk's mailing address. Mr. Tosi.

MR. TOSI: Yes, your Honor. It's the same one you read in.

JUDGE CLIFTON: It is.

MR. TOSI: If it would help Mr. Carroll, along with posting the date when briefs would be due, we will also post as a courtesy to everyone the hearing clerk's address that you've just read into the record.

JUDGE CLIFTON: Excellent.

MR. TOSI: Thank you.

JUDGE CLIFTON: Thank you.

MR. WOODY CARROLL: Beyond that, your Honor, I would like to say that 59 days is not the 60 days that is required and it should go over to 61 to properly comply with the 60 days.

JUDGE CLIFTON: I believe it's a: Not later than. And in this case, I'm giving the extra days to AMS Dairy to get their recommended decision prepared.

Okay. I think that concludes the comments on that. Mr. Carroll, you can give that back to me later. Was there anything else?

MR. WOODY CARROLL: That's all I have, your Honor.

JUDGE CLIFTON: Then cross-examination may resume. Oh, Mr. Miltner.

MR. MILTNER: Your Honor, I don't know if now is the time when you would like to do this. We have a list of documents for official notice, as long as we're doing procedural issues, we can do that now, or we can certainly wait until Mr. Hollon is completed.

MR. BESHORE: May I suggest that Mr. Hollon have the opportunity to have his cross taken care of --

MR. MILTNER: That's no problem at all.

MR. BESHORE: -- and any more wrap-up we can do at the end.

MR. MILTNER: That's fine with me.

JUDGE CLIFTON: All right, thank you. Have you alerted the other lawyers as to what you intend to ask?

MR. MILTNER: I have given copies, I believe I have, one to Mr. Carroll. I think everybody else has gotten a copy and can certainly get copies from the folks of the government.

JUDGE CLIFTON: Okay. Very good. If you'll do that now.

Mr. Vetne, you may resume cross-examination.

MR. VETNE: Thank you, your Honor.

CONTINUED CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Hollon, if you have any pooled milk on nine of the ten marketing orders, which one does it not pool on?

A. Order 131.

Q. Which is?

A. The Arizona Order.

Q. And within Arizona, DFA has members, is that correct?

A. Yes.

Q. And those members' milk is marketed where?

A. Some of it is marketed in Arizona, some of it in Federal Order 126.

Q. Some of it is marketed within Arizona?

A. Yes.

Q. But is not pooled?

A. Yes.

Q. Is that marketed within Arizona because it doesn't have a market elsewhere or is that the target market?

A. That -- any given day, that may be the logistically best market, best return for it.

Q. And if it's marketed within Arizona, does it go to an Arizona plant as non-pooled milk or dairy farmer for other farm milk?

A. To my knowledge, it's pooled on another order and pooled to --

Q. I see. It's diverted to a manufacturing plant within Arizona but pooled elsewhere?

A. That's my understanding.

Q. Okay. And DFA has members within Arizona whose milk is not pooled within any Federal Order but marketed to Nevada or California also?

A. Yes.

Q. And DFA also markets milk of nonmembers located within Arizona, is that correct?

A. I'm not certain if that's true.

Q. With respect to the nine of ten markets in which DFA markets milk, what portion of the milk so marketed is milk of producers who are not members of DFA?

A. I don't know the specific answer to that.

Q. Do you have a ballpark figure?

A. I can't.
Q. When you indicate DFA pools milk, does that include milk marketed by DFA through DMS?
A. Yes.
Q. And DMS is Dairy Marketing Services?
A. Yes.
Q. That's a federation of cooperatives organized in the Northeast?
A. It is a cooperative, and it's organized in the Northeast.
Q. It is a cooperative made up of cooperatives, correct?
A. Yes.
Q. And it markets milk of a substantial number of nonmember producers?
A. It does.
Q. And it markets not only in the Northeast but in the Mideast, in the Central market and in California, correct?
A. I think that is correct.
Q. Is it correct that the cooperatives that have joined together to form DMS are DFA, St. Albans and Dairylea?
A. I don't know the complete list.
Q. With respect to the -- for example, we

talked about the Mideast Milk Marketing Agency. DFA participates in that, correct?

A. Yes.

Q. And DFA participates in that with respect to its own member milk as well as nonmember milk marketed through DMS, is that correct?

A. Yes.

Q. Is the Mideast Milk Marketing Agency, in addition to being a price establishment organization, also a marketing organization that coordinates the marketing of all the participating members?

A. Do you want to give me your definition of -- a marketing agency again, please?

Q. I did not define it. The question is, in addition to getting together to establish prices, does the marketing agency coordinate its sales to customers of all of the participating cooperatives in MMMA?

A. It does.

Q. And it helps you realize transportation savings, among other things?

A. Yes.

Q. When USDA publishes for Ohio, for example, a cooperative over-order price, would that be the price announced by the MMMA cooperatives?

A. I'm not familiar with that calculation.

Some number of years ago I had something to do with it, but I haven't had anything to do with it in a number of months -- number of years.

Q. So you don't know the relationship of what's published as a cooperative price by USDA to the announced MMMA price or the Greater Southwest agency price?

A. I don't.

Q. Nor to the $2.70 that we referred to earlier for Colorado?

A. I don't.

Q. When you referred to price concessions in response to producer-handler competition, I think my recollection is -- correct me if I'm wrong -- that the only place you've made such concessions is in Order 126, the Southwest area?

A. That's the only one that I am familiar with.

Q. And when you make price concessions -- you say, we have made price concessions. Is this a concession by DFA as a cooperative supplier through the Greater Southwest Agency, or DFA as a supplier operating outside of the Greater Southwest Agency?

A. The price concession would be a part of the Greater Southwest Pricing and policy.

Q. So do you ever make price concessions on your own; that is, DFA on its own in a market where prices are coordinated through a MAC or a federation?

A. Some agencies announce a price and all participants are required to follow that price announcement. Other agencies announce a price and individual participants have additional pricing flexibility beyond that price announcement. So with regard to that, the answer to your question is yes, there are geographies where the agency price is not the final word.

Q. Okay. Which one of those categories does the Greater Southwest Agency fall under? Do you have discretion within that pricing organization?

A. I'm not intimately familiar if that's the case.

Q. Okay. One of the -- one of the discounts or adjustments to a -- an announced price, whether it's by DFA or by a pricing agency, is competitive credits, is that correct?

A. It is.

Q. And is that essentially what you're talking about, a -- when you refer to the adjustment made in order -- in Order 126, the Greater Southwest marketing area, a competitive credit for portions of that market?

A. Yes.

Q. Are competitive credits typically something that goes month to month or can they also be of longer duration?

A. Both.

Q. Has DFA, individually or through its -- the pricing organizations in which it participates, established a competitive -- any competitive credit that lasts for multiple months or multiple years?

A. In terms of multiple years, to the extent that a competitive credit may align, for example, prevailing price relationships, there could be a case. Typically, competitive credits are reviewed almost monthly for the need and if the conditions still apply.

Q. Are you aware of whether competitive credits have been applied to a customer in a lump sum in advance of marketing?

A. I'm not aware that's the procedure or manner. It's usually a price announcement, a credit letter, and then an application on the bill.

Q. What is a credit letter?

A. It's a document that goes to buyers outlining the discount terms, whether it be for manner of receiving, it may be point of sale, and reflects the prescribed discount.

Q. Okay. Would there be a credit letter to customers within the western part of Order 126, the Southwest area, reflecting the credit for competition with producer-handlers that you've identified?

A. I'm sorry, I -- the very last part of your question I didn't hear.

Q. Would there be a credit letter to customers within the western part of Order 126 identifying the competitive credit for competition with producer-handlers located in the western part of Order 126?

A. I don't routinely see the credit letters but I understand that's the general practice.

Q. And those would be decisions, transactions and documents produced by the individual councils, is that correct?

A. By and large, they're produced by the agencies themselves.

Q. By the agencies. In here, where you talked about customers coming to you with concerns, when you say, come to us, do you mean to include in us the participants in a pricing organization or the people who manage the pricing organization?

A. Both.

Q. Within the Greater Southwest Agency, is one of the cooperatives responsible for managing the over-order pricing charges?
A. No.
Q. Is one of the cooperatives responsible for coordinating shipments of milk to maximize transportation efficiencies?
A. That's done on a collective basis but no one organization has that responsibility.
Q. On a day-to-day basis, who would be the contact organization to make sure that that day's transportation is most efficient?
A. My memory tells me that the Southwest Agency has four members and there's constant communication on a day-to-day basis, how many loads do you have, what orders do you have, can we put your milk here, can we put your milk there. And they work -- work through it both on a communication basis -- some cases they use computer models to help suggest least cost solution.
Q. Is there a dispatcher?
A. There is not a single dispatcher. There are dispatchers within several of the organizations that communicate to make those arrangements.
Q. Is there a dispatcher or responsible

cooperative management unit in the other markets in which you have a pricing agency?

A. There is not a single -- to my knowledge, a single dispatcher point. But again, there is the -- it ranges from the coordinated effort, much like I just described, to no coordinated effort.

Q. Okay. Does DFA monitor the distribution of milk by competitors who do not buy milk from DFA or the agencies in which it participates?

A. To my knowledge, there's not an ongoing monitoring process. In our industry, there's a general knowledge of competitive situations. I think the Country Dairy representative referred to it as, heard on the street. And so that type of information is there. And if there's something that's unusual, we would certainly try to ascertain the facts. If somebody brings a specific piece of information to us, we try to ascertain the facts as best we could.

Q. Okay. So your facts would come from your customers, primarily?

A. Questions may come from the customers, and some of the facts may come from our customers. But then we would also want to go and see if their view of the situation was accurate. If they were claiming a new entrant to the marketplace, you know, we would want to see if that was the case. If they were claiming something had changed in a supply relationship, we would want to try to investigate that as best we could.

Q. Would it be correct to say that an objective of DFA is to secure or help secure for its customers a larger share of the Class I market?

A. I don't know that that's a necessarily stated objective.

Q. Is it not correct that DFA and its members benefit when its customers have larger shares than when they have smaller shares of the Class I market?

A. Yes, that would be true.

Q. And it is your producer responsibility to maximize revenues for your members, correct?

A. It is.

Q. Has DFA or the pricing organizations in which DFA participates offered competitive discounts or competitive credits, or agreed to competitor credits in order for a customer to acquire shelf space currently occupied by a competitor?

A. Not to my knowledge.

Q. So when you were asked for a competitive credit, whether the customer has shelf space, acquisition in mind, to your knowledge, they haven't told you that?

A. The competitive credits are reviewed based on the cost of the milk supply. So that's the end of -- that's the end of the business that we would tend to investigate. So step one would be to see, is there indeed a new entrant into the marketplace. Yes or no. And if there is, then what are their milk supplies, are they priced similarly or not. Yes or no. And then from there, investigate further if something needed to be done.

Q. Okay. So your testimony is that you do not know how a customer of DFA or of the pricing organizations intends to use a competitive credit to acquire or maintain market share, is that correct?

A. I'm not totally -- try your question one more time.

Q. Okay. Would it be correct to say that when you grant a competitive credit to a customer, you do not know and ordinarily are not told how your customer intends to use the value of that credit?

A. No, we would not know that. We would again, investigate if there was a market presence that might determine some change in price and then see if there was a change in the -- see what the milk supply costs were and attempt to verify or justify if a credit was needed.

Q. All right. In response to a question by Mr. Beshore, you used the term Idaho area. My question to you is, when you said Idaho area, did you intentionally exclude Utah? Do you recall the questions?

A. I do. And the distinction would be that in the Idaho area, producer pay prices, instead of beginning from a Federal Order blend price or a supposed blend, they begin from a product price formula. I'm thinking -- in the Idaho market, we begin our producer pay prices there with an estimate of a Federal Order price.

Q. In the Idaho market?

A. I'm sorry, Utah market.

Q. In the Utah market. Although Utah is not regulated, you employ some estimate of a Federal Order price in setting classified prices to your processing purchasers, is that a correct statement?

A. Yes, that is a correct statement.

MR. VETNE: That's all I have. Thank you.

JUDGE CLIFTON: Thank you, Mr. Vetne. Who next will cross-examine Mr. Hollon? Mr. Miltner, thank you.

CROSS-EXAMINATION

BY MR. MILTNER:

Q. Good morning, Mr. Hollon.

A. It still is, good morning.

Q. You were checking as well.

A. Yes.

Q. I believe Mr. Vetne covered a number of the points that I was going to ask you about.

A. That's really good.

Q. Afford me a few seconds as I flip through my notes here.

Let me start with the statement on page 5 of your statement about GH Dairy and sales at 99 Cent Only Stores. And you make a reference to the IMS code for GH Dairy, 48 1034. Are you familiar with the IMS codes and how they're designated?

A. In general, I am.

Q. Okay. What does it mean to be -- to have an IMS code registered for single service products?

A. Sorry, I'm not that familiar.

Q. Okay. Is there a difference between being registered for a single service product and being registered as a milk shipper?

A. I'm not that familiar. I think the answer is yes. I think there are codes, for example, assigned to a bulk tank unit as a milk supply and there are codes that are assigned to plants.

Q. Okay.

A. Further distinctions are -- I do not know.

Q. If you're not familiar, I don't want to -- I don't want to probe an area that you don't feel familiar about, so --

A. Okay.

Q. -- we'll move along a little bit. It says you have documented sales presence eastward into Texas with product by GH Dairy. How did you document that sales presence?

A. We had -- someone in our office went to the store, looked at the carton, you know, looked at the label, looked at the IMS code. In this particular case, they actually sent me a picture of it.

Q. That was a person from DFA who did that?

A. It was.

Q. Were they prompted by a customer to do so?

A. Actually, I don't know.

Q. Does DFA normally send people into stores just to check on milk and plant codes?

A. If there's a question or a concern,

that's one of the things that you do, is try to investigate it, if the concern is valid or if it's hypothetical.

Q. How would they have come up with a concern in this instance?

A. It would be a couple of ways. Someone may, indeed, as you've asked, have said, go check this out, it's here. This also may be a -- this particular store, I think, was in Colleyville, Texas and the individual who looked and who I was talking to lives in that area, so he may have noted it, you know, as he went in to buy something.

Q. What was the size package that he observed?

A. I knew, but I don't remember.

Q. It could have been a quart?

A. It could have been.

Q. At 99 cents, you would not expect gallon milk certainly to be sold at that price?

A. I would not expect it, but it's not impossible.

Q. You don't have any -- anything to offer us today about what size that package was?

A. I don't.

Q. Are you familiar with 99 Cent Only

Stores?

A. Only to the extent that's registered here. Once I saw the store -- I was not familiar with the name, so I did go out and look to see if there truly was a 99 Cent store, looked at their website, read a little bit about it, and that's the extent of my knowledge of 99 Cent Stores.

Q. And your description of the store is actually verbatim off the website, right?

A. That one sentence is verbatim off the website.

Q. Did you notice on the website that they -- they have approximately 280 stores throughout the Southwest?

A. I knew there was a number of stores through the Southwest, again from the website.

Q. And that they -- they promote on the website, at least in one section, that they offer a number of grocery items in all their stores, including dairy products?

A. Actually, I don't recall reading that, but I have no reason to think that it's not true.

Q. So all your testimony is, is that GH Dairy had a product in the case at one of these store?

A. Yes.

Q. Now, were you here for the testimony of Mr. Hettinga?
A. I was.
Q. Okay. You heard him state that they have some independent distributors they ship to or sell to?
A. I know he talked about his distribute -- his method of distribution, but my recollection is that he at that point chose to be a little more vague in his answers.
Q. Okay. If a milk bottler, producer-handler or otherwise, sold milk to a distributor, is it usually the case that the distributor is then responsible for further getting that milk onto store shelves?
A. You mean logistically responsible?
Q. I mean for finding accounts, getting milk on the shelf, logistically, pricing arrangements between the store and the distributor?
A. I'm familiar with all types of arrangements, some that would encompass that idea, others that would make the distributor be a little more than an out house -- out-of-house transportation network. So there's arrangements that run the entire gamut.
(Cell phone ringing.)

Q. I apologize.

A. Hope it wasn't a question.

Q. I hope not. The farm you refer to in Wisconsin that has been permitted for 8,000 cows, do you have any information that that dairy intends to be a producer-handler?

A. I do not.

Q. But it's your concern that farms over 500 cows and larger, if they became producer-handlers, you believe would be disruptive?

A. I wouldn't necessarily draw the line exactly at 500 cows. I think our proposal was 450,000 pounds with a unique exemption, term of grandfather exemption. So our concern is above that level, we think that could be -- could be a problem in the marketplace so that's the reason we chose that level.

Q. And 450,000 pounds per month is somewhere in the neighborhood of 225 to 250 cows, somewhere in that range?

A. I would agree.

Q. And other than the statement about the 99 Cent Only Stores, most of what is in your statement leading up to your discussion of the various provisions of the proposals is your summary and analysis of testimony from other parts of the hearing, is that right?

A. I'm not sure I understand the question.

Q. I guess, as I looked through it, I don't see -- I don't see any -- I don't see inserted in your statement or incorporated into your statement information about producer-handler activity, other than what other witnesses have offered their testimony about, with the exception of that 99 Cent Store?

A. The statement is ten pages long. Nine of the ten pages were outlined and written prior to the hearing. So the data was drawn from our market contacts prior to the hearing. In many cases, the statement was shortened by some of the testimony that was given at the hearing.

MR. MILTNER: In that case, I don't think I have anything else. Thank you, Mr. Hollon.

THE WITNESS: You're welcome.

JUDGE CLIFTON: Thank you, Mr. Miltner. Who next will cross-examine Mr. Hollon? Mr. Ricciardi.

CROSS-EXAMINATION

BY MR. RICCIARDI:

Q. Still good morning, Mr. Hollon.

A. It is.

Q. I actually have a series of questions that, as usual, when I cross-examine, I'll probably throw away and keep going.

So let's start. You wrote this statement, you said, nine of your ten pages were written prehearing before you knew about any of the testimony. Is that your statement under oath?

A. It is.

Q. Were you provided with the statement of Mr. Carrejo prior to the time this hearing started?

A. I was not.

Q. So that portion regarding Order 126, when you reference Mr. Carrejo and Dean Foods, that is information where you're basically encapsulating what he's already said in his testimony?

A. References to him and what he said, that would be correct.

Q. All right. So that wasn't written beforehand, it was written afterwards?

A. That's right. Well, again, the things that were attributed to him were not written beforehand.

Q. Okay. And the things attributed to Mr. Traweek, you didn't have that statement beforehand, did you?

A. I had conversations with Mr. Traweek prior to writing the statement.

Q. Okay. Did you have conversations with Prairie Farms before writing the statement?

A. I did.

Q. Did you have conversations with Anderson Erickson before writing the statement?

A. I did.

Q. Did you have conversations with Dean Foods before writing the statement?

A. I did.

Q. And did you have conversations with anyone else before writing the statement?

A. That's a pretty broad question.

Q. Yeah, it was meant to be.

A. Yes, there was some individuals I had conversations with prior to writing the statement.

Q. And that would be Mr. Cryan?

A. Yes, I had conversation with Dr. Cryan before writing my statement.

Q. And you had conversations with Dr. Yonkers?

A. Yes, I did.

Q. Did you discuss in those conversations what part of the analysis you were going to do, what part of the analysis they were going to do?

A. In a broad sense, yes.

Q. When did these conversations occur?
A. Over the last several months.
Q. Prior to the time that the proposals were filed by NMPF and IDFA or thereafter?
A. There were conversations both before and after.
Q. Did you have conversations back in the spring of '08, in terms of planning for the proposal and ultimately this hearing with those individuals?
A. No, not with all of those individuals.
Q. With some of them?
A. I had conversations with some of those individuals in the spring of '08 about some of the topics that are at the hearing.
Q. Planning for the proposal, planning for the hearing?
A. I don't think I can say -- characterize them as specific as that.
Q. How would you characterize them?
A. I think I already have, as discussions about the -- some of the issues that are here.
Q. All right. Now -- and you had conversations with people from the Department as early as the spring of '08, too?
A. Yes.

Q. About these producer-handler proposals that IDFA and NMPF decided to file?

A. No.

Q. About then?

A. In my day-to-day tasks, I have conversations with Market Administrator offices and with the AMS office on a wide range of milk marketing issues that fall into my job description.

Q. Okay. Then talk to me about producer-handler issues. Have conversations with anybody from the Department, AMS, Department in general about producer-handlers as early as the spring of '08?

A. Yes.

Q. Now, your position at DFA is a paid salaried position, correct?

A. It is.

Q. And you have been paid a salary to be here on behalf of DFA throughout the course of this hearing, right?

A. Yes.

Q. And the same is true with regard to Drs. Cryan and Yonkers on behalf of NMPF and IDFA, correct?

A. Generally correct.

Q. They're paid to be on the staff, and they were paid to be here?

A. They were paid to be here and the topics discussed here fall within their job responsibilities.

Q. All right. You support NMPF Order -- excuse me, Proposals 1, 2 and 26, is that right?

A. By you, you mean Dairy Farmers of America?

Q. Well, you used we and I just used you. Let's talk about DFA for a minute.

A. That's fair.

Q. And throughout the course of your statement -- by the way, I was going to ask it later, but you brought it up. When you use we, it's not the royal we. You meant DFA, correct?

A. You are correct.

Q. All right. Thanks. And so you agree with their position as articulated in this hearing with regard to those proposals I've just mentioned, correct?

A. Yes. You said 1, 2 and 26?

Q. Yeah.

A. Yes.

Q. Yeah. Now, agree or disagree with the following statement: Wholesale and retail prices are determined by market forces of supply and demand.

A. Disagree.

Q. Okay. Agree or disagree with the following statement: Farmers do not set the price of milk.

A. Not enough information to process.

Q. Don't have an opinion?

A. Not enough information to process.

Q. Agree or disagree with the following statement: There is often a huge variance in the retail price of milk from store-to-store and from city-to-city, and this has to do with the differing markups that are used by supermarkets, mass merchandisers, convenience stores and drugstores.

A. That can be true.

Q. Is it true or is it only true in some circumstances?

A. Only true in some circumstances.

Q. Agree or disagree with this statement: Retail prices increasingly are disconnected from the farm level price with a margin between what farmers receive and what consumers pay growing steadily over time.

A. Not enough information to process.

MR. RICCIARDI: Okay. Your Honor, I would like to have that marked as the next exhibit.

JUDGE CLIFTON: We'll mark this as Exhibit 105. Exhibit 105.

(Exhibit 105 was marked for identification.)

Q. Mr. Hollon, I have handed you what has now been marked as Exhibit 105 for identification in this hearing. And I will represent to you that it is a document that I pulled from the website of National Milk Producers Federation, entitled Dairy Price Talking Points, February 2009.

I have not altered the document. I have just copied it and provided it to you. I also represent to you that the statements I asked you about are contained on the National Milk Producers Foundation website and represented as their Dairy Price Talking Points, at least for February of 2009.

Now, having those before you, let's talk a little bit more about them.

A. Okay.

Q. The fifth bullet point down, I think I asked you about this statement. There's often a huge variance in the retail price of milk from store to store, and from city to city, and this has to do with differing markups that are used by supermarkets, mass merchandisers, convenience stores and drugstores.

And I think that you said that could be true, but not always necessarily true.

JUDGE CLIFTON: Before you respond, I would like to hear from Mr. Beshore.

MR. BESHORE: Thank you, your Honor. I would like to interpose an objection at this point. The topic of this hearing is not, you know, general dairy price policy nationally or conditions nationally. It's producer-handler provisions in the Federal Orders. I think we're far afield. It's taking an extended period of time. Let's get on with the hearing.

JUDGE CLIFTON: I disagree, Mr. Beshore. You may answer the question, Mr. Hollon.

A. One more time. The question?

Q. Yeah. I got you. My question was this. I read to you -- and instead of reading it back, I'll refer you to it. It's the fifth bullet point down, beginning -- it's the third sentence in that bullet point, there is often a huge variance. Do you see that?

A. I do.

Q. And I asked you -- as my recollection was from a minute or so ago, when I asked you that before giving you Exhibit 105, I think that you said that that could be true but you don't necessarily agree with it all the time.

A. Yes.

Q. All right. So you disagree, then, as a starting point, with the statement contained that I've just read from the National Milk Producers Federation. Do I understand that correctly?

A. I think my answer was, it could be true and it varies from time to time.

Q. Okay. Does this, having Exhibit 105, change your response?

A. No. It still could be true and it varies from place to place and time to time.

Q. Okay. So I guess to a certain extent, then, you disagree with National Milk at least on that issue, correct?

JUDGE CLIFTON: I think that's unfair. The sentence says, there is often.

MR. RICCIARDI: Fair enough, Judge. I got it.

JUDGE CLIFTON: Okay.

BY MR. RICCIARDI:

Q. Let me go on. If we look at the shelf price of milk in any particular location -- let's say, for example, we're in Michigan and $1.98 is a price charged by Family Fair or Meijer for a gallon of milk in

May of 2009. What does that tell us about the wholesale cost or price of that milk, anything?

A. It may tell us some things, but I would agree with you, it doesn't tell us everything.

Q. It doesn't tell us, for example, what the actual cost to the customer was from the handler, correct?

A. In your example, the cost to Meijer from the processor?

Q. Yeah, from Dean Foods.

A. No, it doesn't tell us the exact nature of that price.

Q. Okay. It doesn't tell us the raw milk price that was paid by the handler for the milk, right?

A. The fact that it is on the shelf for 1.99 does not tell us that.

Q. It doesn't tell us what the profit markup for processing was by the handler for that milk, correct?

A. That's correct.

Q. And that would be true in Michigan and that would be true in El Paso, Texas, correct?

A. Correct.

Q. And there's also a distinction between and among marketers of milk, for example, supermarket

pricing versus warehouse store pricing, correct?
A. I didn't get the question.
Q. Well, let's see if we can get it better. Let's assume that we have within the same city a warehouse store. For purposes of my discussion, let's pick a fanciful name. Costco. And then let's also assume for my question that there's a supermarket in that same location. Again, let me pick a name out of the sky. Kroger. Kroger may market a shelf price that is higher than Costco, and the shelf prices alone do not tell us anything in that competitive market about the cost of the milk that was paid by either of those retailers, correct?
A. Correct.
Q. In order to do a comparative analysis, apples to apples, oranges to oranges, milk to milk, we would need to know a lot more information about the cost that was paid, the organizational structure, the profit margin and other market issues, correct?
A. When you say cost analysis, are you referring to my comments about what we might investigate in terms of customers bringing concerns to us?
Q. My question stands.
A. Yes, in order to do a cost analysis, you would need a broad range of information gathered

over time.

Q. And what you do not have here in this hearing is any type of cost analysis of the type that you just referenced, correct?

A. You have witnesses representing their views based on their analyses of those, bringing them to the hearing and putting them in front of the Secretary.

Q. So the answer to my question is, that there isn't such a cost analysis, correct?

A. Not at all. I represented, for example, that we got concerns from customers, we investigated them, including many of the factors that you just, you know, listed, and determined that there was a competitive issue in the New Mexico, West Texas market, resulting in us reducing and giving discounts off of our price. So that type of an analysis, I'm representing that's what we did. And we considered many of the factors that you just outlined.

Q. And that cost analysis is where, what exhibit?

A. It is embodied in the testimony in Exhibit 104.

Q. And we could find it in here, 104. When the Secretary is looking for the cost analysis, the Secretary will find it in your exhibit, is that your testimony?

A. It is going to find my testimony about it, as the testimony of others.

Q. Let's assume, based upon your last answer -- that's why I've got to throw away all these notes. I'm going somewhere else. Your last answer -- let's make the following assumption. Let's assume in a Federal Milk Marketing Order area that we have a dominant processor that controls, let's call it, 80 percent of the market. Okay?

A. Yes.

Q. Let's assume that we have a new entrant into the market that's also regulated, and that the new entrant decides to try to get their foot in the door and to compete. Assume that the entrant is able to actually gain customers within that market. Isn't it true that when you increase the competitive landscape, the probability is that the previously dominant handler will have to react to the new competition, which may include price reductions?

A. Yes.

Q. Whether that entrant is a regulated entity or a producer-handler, correct?

A. Correct.

Q. Same hypothetical. Let's assume in order to get shelf space, that the new entrant -- a regulated handler, to get shelf space in that market -- let's pick a number -- decides to pay $900,000 to a customer to get shelf space currently and into the future. Would that, in your opinion, amount to a disorderly marketing condition?

A. I'm not knowledgeable of -- of that side of the business. I'm not knowledgeable of what processors and retailers do in their discussions about shelf space. So that -- I don't know if that's a normal situation, an abnormal situation, new, unusual, regular. I'm just not knowledgeable.

Q. Have you ever heard of that happening?

A. Yes, I have.

Q. Okay. And does that potentially create a disorderly marketing condition?

A. I don't -- again, I've heard of it, but I'm not knowledgeable of the situation.

Q. Flip my hypothetical around.

A. Okay.

Q. The dominant processor in the area, in order to continue to dominate in that area decides that it's going to pay a customer $900,000 for shelf space for current stores and future stores. In that circumstance, is that a potentially disorderly marketing condition in that market from your perspective?

A. Again, I'm not knowledgeable of the retail pricing arena. At that level, I simply don't know if that's normal, abnormal, part of the routine. I don't know.

Q. Whether it's normal or abnormal is not part of my question. Is it, in your opinion, if you have one, a disorderly marketing condition?

A. I don't have an opinion.

Q. So you don't -- you haven't been told by DFA to look at that kind of an issue?

A. I have not.

Q. All right. You are --

JUDGE CLIFTON: Mr. Ricciardi, you're on a roll and I hate to interrupt, but I need to take a ten-minute break.

MR. RICCIARDI: Thank you, your Honor.

JUDGE CLIFTON: Please be back and ready to go at 12:18.

(A recess was taken from 12:03 to 12:18.)

JUDGE CLIFTON: We're back on record at 12:18. Mr. Ricciardi, you may resume your cross-examination of Mr. Hollon.

BY MR. RICCIARDI:

Q. Mr. Hollon, let me follow up on an area that we were talking about when we broke for this 15-minute or so recess. I asked you a series -- to assume a series of hypotheticals, and I'm going to ask you another one now.

If you assume, again, there is a dominant handler in a market that controls at least 75 or 80 percent -- I'll change the variation -- and assume also that DFA is the principal supplier of milk to that particular handler, and assume for me the handler, in order to maintain the shelf space with the retailer in that market pays the $900,000 that I just mentioned, isn't it true that in that circumstance, that DFA would either directly or indirectly benefit?

A. That hypothetical, if they maintain the sales and someone was the supplier, the supplier would benefit from the sales at a higher price being maintained.

Q. Thank you. Let's talk -- and I apologize. You've been asked a lot of questions by a lot of different people and there's been a lot of issues raised in this hearing, so I intend to jump around. If you miss anything, if I got a brain synapse going, let me know. I'll try to see if I can go ahead and fill in the gap.

But here's my question on this next area.

Is it the position of DFA, in supporting National Milk and IDFA in this hearing, that Braum's, through its marketing activities in Federal Order 32, is causing disorder?

A. Yes.

Q. You heard the testimony from Mr. Bostwick explaining the way that Braum's is integrated and retails basically its dairy products, among other things, through its stores. You heard that?

A. I did.

Q. You also heard and testified that, in fact, they have utilized that same strategy for a number of years, correct?

A. Yes.

Q. That would include the period of time prior to 2001 when they operated as a member of the regulated community, correct?

A. Yes.

Q. So is it your testimony, then, since they are operating the same way, that they were disorderly in what was -- whatever marketing area that was denominated at that point back prior to 2001?

A. When they were in the regulated community?

Q. Yes, sir.

A. And when they were paying the same basic minimum price as everybody else?

Q. Take whatever you want from what I asked you.

A. Then to the extent that they were paying the same basic minimum price as other handlers, processors that they were competing with, they would not be in a disorderly position.

Q. Okay. So let us refine, then, your response. So your position is it's not anything that they have done in terms of how they market it. It's only because, from your position as a producer-handler, since '01, they don't, quote, pay into the pool, close quote, correct?

A. Wrong.

Q. Then tell me where I am wrong.

A. Their competitive model out in the retail environment affects other retailers and other milk suppliers. Mr. Bostwick did a good job of describing their stores. I was in one two weeks ago. And the items that they stock, milk items, eggs, fruit in a small scale, are the same items that you would go to a Hy-Vee and purchase. The only difference is that milk and dairy items are not facing the same regulated price minimum and yet on -- on the store side, they compete.

Q. So again, to go back to where we started, they were operating in the identical fashion prior to 2001, the only distinction now is that they don't pay into the pool because they have producer-handler status, and that is the disorder that you're testifying about?

A. And that they are a competitive factor within the marketplace. You have to evaluate those two items to see how they line up.

Q. They were a competitive factor prior to 2001?

A. Yes.

Q. Same competitive factor that they are now?

A. Perhaps more now. I don't know that that store format was as intense then as it is now.

Q. You don't know one way or the other?

A. I don't.

Q. Okay. And it's not a size issue, it's simply the question of the payment into the pool, correct?

A. Again, I don't know how many stores that they had in 1999. They may have had only one store. I think they had more than that. But they have 275 stores now in four states and in at least three different Federal Orders.

Q. So it is a size question, too? If they've grown, you're saying that that's a competitive problem, that's a disorderly issue?

A. The fact that they've grown doesn't make them disorderly. The fact that they compete with other milk sellers and are not regulated, you get a yes and a yes, then -- and in my mind that would be -- or in DFA's mind, that would be a disorderly problem.

Q. So if, instead of being a producer-handler today, if the facts were identical, Braum's came in here and was operating in the same number of stores, in the same number of locations, and they paid into the pool, they would not be disorderly, in your opinion, correct?

A. Yes.

Q. Heartland, you're actually fairly familiar with these folks, because DFA supplied them before January of '08, correct?

A. They were a member of DFA before January of '08.

Q. That would be true?

A. Yes.

Q. All right. Now, before January of '08 when they were a member of DFA -- and let's actually pick a specific time. In October of 2007, when they were able to obtain the Hy-Vee business in Kansas City, is it your testimony that that was as a result of any competitive advantage that Heartland had at that point?

A. I don't know the particulars of them obtaining the Hy-Vee business. Getting back to my example, they were competitive in the marketplace in some form, I don't know the volume in that particular case. And they were a part of -- they paid into the pool. So we have a yes and a yes, they're not disorderly.

Q. They weren't disorderly then, correct?

A. Correct.

Q. All right. Did they automatically become disorderly on January 1 of '08 when they became a producer-handler, in the position of DFA?

A. At that point, they did not pay into the pool?

Q. That would be true.

A. So then we have a yes and a no in my scenario. So yes, they became disorderly.

Q. And so the -- if there's -- let's take December 31st of '07 and January 1 of '08. Heartland operates identically when the clock strikes and we get into the new year with one exception, they now are a producer-handler. The fact that they don't pay into the

pool, and DFA's position is that they automatically, at the stroke of midnight, become disorderly, correct?
A. Correct.
Q. Would that be true no matter what size they were?
A. Our proposal has the 450,000 pound limit for change. So if they were smaller than 450,000 pounds, we would consider them not a competitive force in the marketplace.
Q. And that --
A. So no.
Q. That's the issue, you don't want competition in the marketplace, right?
A. We want competition that's on equal footing with all other of our customers who pay into the pool.
Q. The talking point is level playing field, isn't it?
A. We want them to pay into the pool like all other customers do. At that point we're happy --
Q. Okay.
A. -- on this issue.
Q. Hang on a second. So it's a combination of two things, then, it's that they don't pay into the pool and that they're a certain size, correct?

A. That they don't pay into the pool and they have a certain competitive factor in the marketplace.

Q. A certain size?

A. A certain competitive factor in the marketplace.

Q. All right. We're mincing words here. A competitive factor simply means --

A. If we're mincing words, you can accept mine and be just as happy then.

Q. No, I wouldn't, because I want to hear some information that's the truth from everyone.

MR. BESHORE: I object.

MR. ENGLISH: I object.

MR. RICCIARDI: Let me finish -- let me finish my question.

JUDGE CLIFTON: Don't answer it until I hear the objections, Mr. Hollon.

THE WITNESS: Yes, ma'am.

MR. RICCIARDI: Can I finish?

JUDGE CLIFTON: You may.

MR. RICCIARDI: Thanks.

BY MR. RICCIARDI:

Q. I am trying to focus down to the factors and what I'm trying to get to, is it a size issue? If it is a size issue, then I want to know that.

JUDGE CLIFTON: So what you're saying to him is that you want to know what the other factors of being competitive, besides size, are? Is that what your question is?

MR. RICCIARDI: Well, you know, that's probably a better question than mine.

BY MR. RICCIARDI:

Q. Are there other factors, objective factors, other than size?

JUDGE CLIFTON: And don't answer. Mr. English?

MR. ENGLISH: I think that question is appropriate, but I move to strike the earlier part which said, I want to hear the truth from all witnesses, implying that he's not hearing the truth from this witness. I move to strike that.

JUDGE CLIFTON: Well, that would -- that would infer the most villainous approach. And I do not think that's how Mr. Ricciardi intended it, even though that's how it might look black and white on the transcript page. So you're proper to object.

And I will hear your objection as well,

Mr. Beshore.

MR. BESHORE: My objection to this question is that it implies there's something other than the proposals themselves. I mean, they operate the way they operate. 450,000 kicks in when it kicks in, the 3 million kicks in when it kicks in. So, you know, I don't understand what the pertinence is of anything else.

JUDGE CLIFTON: Well, those aren't the only proposals the Secretary has to consider, is the problem. So -- so determining what is disorderly is relevant, and the issue of both being competitive and not paying into the pool is what this witness has identified. So now Mr. Ricciardi will break down what factors, besides size, are important to determining whether an entity is competitive. And you may answer.

A. With regard to not paying into the pool? Are we clear on that?

Q. I think that's -- that's objective. I mean, they don't pay into the pool because of their producer-handler status.

A. Okay. And with regards to being

competitive in the marketplace, it's going to be some measure and there is some value -- or some subjective judgment, but some measure of the entity's impact on the competitive situation. Are they in a single storefront on the back of their porch, are they in multiple stores, are they in multiple chains of stores, are they in more than one state, are they in 100 stores, 200 stores, 2 stores. That's the competitive factor.

Q. Okay. But then let's talk about that for a minute. Because if we look only at Proposal 2 -- let's make the following assumption and see where we go with it. If you have one location and you potentially -- and you're looking to be an exempt plant -- because producer-handlers other than those that would be grandfathered would be eliminated, correct?

A. Correct.

Q. If you want to be an exempt plant, objectively, whether you have one store that you service or you operate in a retail location or you operate in 15 states, once you cross 450,000 pounds, you can't get the exemption, right?

A. Correct.

Q. So in that circumstance, the only competitive factor is size?

A. That becomes a way to determine a

competitive factor, and that's something that the proponents make and the Secretary has to evaluate, is that the way to effectively determine a competitive factor.

Q. And so let's get back to my question, which is: If the proposal as advocated by DFA is simply a size proposal, because of all other competitive factors being eliminated, if you have one place and you're over 450,000 pounds, you can't get the exemption?

A. And I would say that the principle is the competitive factor. And the expression in this particular case is 450,000. And that's a number that the Secretary can deal with.

Q. But that's -- that is the number and the principle that DFA wants to utilize to determine whether you can be exempt, right?

A. Principle and number, yes.

Q. Now, let's go through and deal with that number because I've got a couple of ideas. Let's assume for a moment that -- we'll start small.

Let's assume for a moment that you have two exempt plants in the marketing area, Federal Marketing area -- pick one -- and they both produce 450,000 pounds. Under Proposal 2, you advocated, they would be exempt, correct?

A. Up to 450,000 pounds, they would earn the exempt status.

Q. Now, side by side with these folks is a producer-handler that unfortunately under your proposal wasn't in existence in '08 but wants to start up, and that producer-handler produces 9 million pounds of Class I route disposition in the same marketing area as the two exempt plants. Okay? Diagrammed in my head.

A. 450, 450 and 9 million?

Q. Yes.

A. Okay.

JUDGE CLIFTON: Now, I have to ask, so you're assuming that we're operating under Proposal 2 but not Proposal 1?

MR. RICCIARDI: Correct.

JUDGE CLIFTON: Okay.

Q. I apologize, change my -- change my hypothetical this way. It's 900,000 pounds and they are a producer-handler.

JUDGE CLIFTON: Okay.

MR. RICCIARDI: The other hypothetical I've got down the road.

BY MR. RICCIARDI:

Q. In that circumstance, in that marketing area, the route disposition is identical, correct?

A. Two plants, one plant.
Q. Correct.
A. Yes.
Q. In that circumstance, the 900,000 pounds in the exempt plant under Proposal 2 would not go into the pool, right?
A. The 900,000 pounds would no longer be an exempt plant.
Q. The two exempt plants would be --
A. Yes.
Q. -- combined together, that 900,000 pounds --
A. Yes.
Q. -- does not go into the pool?
A. Yes.
Q. So therefore the producers in that area did not get whatever value there was from the combined 900,000 pounds, correct?
A. Correct.
Q. But that producer-handler under your proposals, since it's not an existing producer-handler, would have to be regulated?
A. That's the 900,000 pound processor that's now greater that 450,000 pounds?
Q. That would be true.

A. Yes, that business would be regulated.

Q. In that situation, the impact to the pool is identical and yet the two exempt plants are exempt under your proposal and the producer-handler is not, right?

A. That is true. That was not a producer-handler, it's a processor with 900,000 pounds.

Q. True.

JUDGE CLIFTON: That's assuming proposal -- we're operating under both Proposals 1 and 2?

THE WITNESS: Yes.

JUDGE CLIFTON: Okay.

BY MR. RICCIARDI:

Q. So in that circumstance, the hypothetical I gave you, what you've got is simply a variation in size. You have the same identical amount of route disposition with the two plants which are exempt and under your proposal are okay, they don't have to pay into the pool. But with regard to Proposal 1 -- and actually a combination of 1 and 26, the producer-handler at 900,000 pounds is regulated and has to pay into the pool, correct?

A. Correct.

Q. Tell me a competitive factor in my

hypothetical that makes a distinction between the two groups other than size?

A. I don't know the rest of the hypothetical, so I would have to go back and look.

Q. Gave it to you.

A. I don't know.

Q. Okay. You don't have an answer?

A. I don't have an answer.

Q. How many producer-handlers in the Florida market?

A. I do not know, but there's an exhibit that has a list, think.

Q. Would zero sound right to you?

A. Yes.

Q. Okay. That would be -- you're referring to Exhibit 13? And do you want that in front of you for some of these answers --

A. Sure.

Q. -- or are you okay?

MR. RICCIARDI: Can we have Exhibit 13, Judge?

THE WITNESS: I have Exhibit 13.

MR. RICCIARDI: Thank you very much.

JUDGE CLIFTON: Before we go there, may I ask a question, Mr. Ricciardi?

MR. RICCIARDI: You can, Judge.

JUDGE CLIFTON: Mr. Hollon, with regard to the other factors of whether an entity is competitive, besides size, are any of the others easily measured by, for example, a Market Administrator?

THE WITNESS: Number of stores, geographic location. But those types of measurements tend to get difficult over time and difficult for the Market Administrator to do. But those would be two.

JUDGE CLIFTON: Number of stores, and --

THE WITNESS: Number of places where your product is available.

JUDGE CLIFTON: Are those statistics that are currently gathered by Market Administrators?

THE WITNESS: Not to my knowledge.

JUDGE CLIFTON: All right. Go ahead, Mr. Ricciardi. Thank you.

MR. RICCIARDI: Thanks.

BY MR. RICCIARDI:

Q. Mr. Hollon, you've got Exhibit 13 there --

A. I do.

Q. -- in case you need to refer to it. And you know by looking at the last page of Exhibit 13, which contains the producer-handler regulatory status currently, at least through March, that we do not have any producer-handlers now in Order 7 and we have two in Order 5, am I correct?

A. Yes.

Q. All right. Now, let's talk about a couple of issues in relationship to Florida and in relationship to Orders 5 and 7. Are those surplus or deficit markets?

A. They are generally considered to be deficit markets and --

Q. And that means what?

A. Is that the milk production in that area on most days, weeks and months is less than demand in that area.

Q. So consumers in those areas are demanding more milk products than can be supplied or be available to those areas?

A. Yes.

Q. Now, you're -- you've referenced, I think, the AMAA. You're aware that one of the purposes for the statute is to ensure the consuming public has a sufficient amount of wholesome -- good wholesome milk in the marketing areas, right?

A. I think that is correct.

Q. All right. Now, if we have producer-handlers in a marketing area that are supplying a good and wholesome product to the consumers, and we remove those producer-handlers and they were to go out of business, then we wouldn't be effectively trying to promote one of the policies behind the AMAA, would we?

A. I guess you would have to assume the sales they would represent would be picked up by someone else, so -- and I wouldn't assume that.

Q. Okay. Well, I'm -- even if they were ultimately assumed by somebody else, we wouldn't be promoting a sufficient supply of good and wholesome milk to the consuming public if we were to eliminate a source of that good and wholesome supply of milk, right?

A. Yes.

Q. I have some good hypotheticals I was going to use, but Mr. Miltner tells me I need to move on.

You testified that you were a witness in the 131 and 124 hearings. Do you remember that? Do you remember the testimony that you gave today, that you were a witness in those hearings?

A. I don't think I said that.

Q. I thought you did. But you were a

witness then in 131 and 124?

A. I was a witness at that time, I was.

Q. And you were also a witness in the 5 and 7 hearings on producer-handlers back in '04 seeking to limit producer-handlers in that -- in those marketing areas to 3 million pounds of route disposition, correct?

A. Yes.

Q. One of the things that you talked about is similar to what you've talked about here, in the sense that you were concerned in all of these marketing areas about the potential that some of the larger farms might convert to producer-handler status, right?

A. Yes.

Q. Now, you testified back in February that you were concerned that there was a 3,000-cow farm located somewhere in that market area that would become a producer-handler. Do you remember that?

A. No.

Q. Okay. Do you remember making the argument, at least that there is a potential, in February of '04, that people in this marketing area would convert their farms to producer-handler status?

A. I don't remember.

Q. Okay. This would be from Volume III of that hearing, dated February 25, '04, page 681. See if

I can refresh your recollection a bit and then I want to talk about it here.

MR. BESHORE: Your Honor, I think the witness should have the opportunity to peruse or see the transcript if it's going to be read to him.

JUDGE CLIFTON: What do you have it, electronically?

MR. RICCIARDI: No, I don't, Judge. I've got a hard copy, but only one hard copy here. All I'm going to do, Judge, is try to refresh his recollection. If that doesn't help, that's fine. I'm not going to try to impeach him on it. I just want to ask him about it.

JUDGE CLIFTON: Well, I'll let you go a little ways, but it's very hard to just listen and not see it in context.

MR. RICCIARDI: I'm also willing to share this with Mr. Hollon, if he needs to. He can have my copy. Unfortunately, it's got my highlighting on it, but that's okay.

JUDGE CLIFTON: Give him a little before and after what you want him to focus on.

MR. RICCIARDI: Sure.

Q. Actually, it was my friend, Mr. Beshore, asked you the question, and then this learned lawyer had this instructive objection that the Judge overruled, unfortunately, and then you gave a response.

And the question from Mr. Beshore back in -- on February 25, '04 was: Are there dairy farms of the size in excess of 3,000 pounds -- 3 million pounds, I'm sorry -- currently supplying these markets and situated such that it would be feasible for them to become producer-handlers and supply these markets?

And again, the objection, and the Court ruling.

And your answer: Yes, there are.

And I will allow you certainly to take my copy, that page, if you want to look at it. Does that refresh your recollection about your testimony?

A. It does not.

JUDGE CLIFTON: You asked him, did he testify that people would convert their farms to producer-handler status.

MR. RICCIARDI: And you're right, Judge. This is a -- this is a little bit different in terms of the testimony.

JUDGE CLIFTON: It's a lot different.

MR. RICCIARDI: Okay.

JUDGE CLIFTON: Is that what you wanted

him to remember, what you just read?

MR. RICCIARDI: Let me go ahead and provide that to him so he can actually see the question and answer and not take my representation.

JUDGE CLIFTON: Maybe you should start with a new question.

MR. RICCIARDI: Let's do it that way.

BY MR. RICCIARDI:

Q. Do you recall, both here and then previously back in '04, raising the concern that larger farms that are situated in the marketing area, assuming they had the feasibility to become producer-handlers and supply the marketplace?

JUDGE CLIFTON: Don't answer.

Mr. Beshore, I'll hear your objection.

MR. BESHORE: Well, my objection is that question is not a restatement of the question and answer in the transcript he read. He added, you know, additional material there, in particular, in the marketing area.

JUDGE CLIFTON: Yes, he did. Why don't you just start with asking him if he recalls having testified, and read what he said.

MR. RICCIARDI: Okay. That's fine. I

will do that.

BY MR. RICCIARDI:

Q. You do recall testifying actually in two days in the Federal Milk Marketing Order hearings on 5 and 7 about, among other things, the producer-handler issue, correct?

A. I recall being a witness at that hearing.

Q. Okay. Now, during the course of that, do you recall being asked the following question by Mr. Beshore and giving the following response? Again, 681, beginning at line 1, with an objection, and then your response on 15: Are there dairy farms of the size in excess of 3 million pounds currently supplying these markets and situated such that it would be feasible for them to become producer-handlers and supply these marketplaces? Your response: Yes, there are.

Now, do you recall, sitting here today, providing that type of testimony?

A. I don't recall.

Q. Can you tell me whether or not in the five year plus period since the time that you testified that any farm, in either Order 5 or 7, has converted from regulated status to producer-handler status, of any size?

A. Exhibit 13 shows that there are

producer-handlers in Order 5. It only goes back to 2005, though.

Q. Right. And actually, if you do go back, you will note that in '05, there was actually a producer-handler in Federal Order 7 and currently there is not?

A. That is correct, it shows that.

Q. So that at least in the five years since the time that you testified there, there has not been any increase in the number of producer-handlers in those marketing areas, let alone a proliferation of the number of producer-handlers in those marketing areas, correct?

A. Correct.

Q. Now, you would agree with me, wouldn't you, that for purposes of Federal Order regulation, a producer-handler is not similarly situated to a regulated handler?

A. I would disagree with that.

Q. Do you recall testifying on the 25th of February of '04 at the producer-handler hearing in Order 5 and 7?

A. I think we've already been through these line of questions, and I think I indicated I don't recall, but that I was a witness there.

Q. Okay. And do you recall being asked the following question by me and giving the following response, at page 715 of the transcript, lines 21 through 24.

Question: So for purposes of the Federal Order regulations, a producer-handler is not similarly situated to a regulated handler, correct?

Your response: Correct.

A. I don't recall that.

Q. Okay. So you have testified 180 degrees from that today. Can you tell me why you have changed your mind?

JUDGE CLIFTON: Let me hear the objection before you respond.

MR. BESHORE: The objection is that the context for that question and answer in that prior hearing, we know nothing about. And it's unfair to the witness to ask him, why did you change your mind from that testimony, which is completely out of context, assuming it's been read correctly. We don't know what the testimony was. What does similarly situated mean?

JUDGE CLIFTON: Would you again read your question to me, Mr. Ricciardi, back five years ago?

MR. RICCIARDI: So for purposes of the Federal Order regulation, a producer-handler is not similarly situated to a regulated handler, correct? Answer: Correct.

JUDGE CLIFTON: Is your thought on that different today, Mr. Hollon?

THE WITNESS: First, I don't know the background to then, so I would start out by, what do you consider similarly situated today? And I would say that if they compete in a similar area, they similarly -- they have a similar geographic situation, they are, for Federal Order purposes, in a common pricing area, in that case, they would be similarly situated. For example, I've heard that asked earlier in this hearing and that's what I interpreted it meant when he was asking of others.

JUDGE CLIFTON: Okay.

THE WITNESS: And had Mr. Ricciardi started there, that would have been the answer. If he asked me to define similarly situated, that's what I would reply. But I don't recall, in 2005, the line of questions.

JUDGE CLIFTON: It seems like what this

whole hearing has been about is that they are not similarly situated, in that one is fully regulated and has to pay into the pool and the other one does not. So it is important to know what you're talking about when you're talking about whether they are similarly situated.

THE WITNESS: Perhaps you should have been the first witness on the first day, your Honor.

MR. BESHORE: I would just note, if I might, that --

JUDGE CLIFTON: Closer to the microphone, please.

MR. BESHORE: I would just note, if I might, the question from the prior transcript begins with so. I've got -- and the context for the so, at least -- I only looked at two pages -- two pages of dialogue with Mr. Hollon, okay, prior to that, exploring hypothetical situations and their configuration and their differences and similarities, et cetera. So if you just take that Q and A out of context, it's not adding anything to this record whatsoever, and I object to that because it's out of context and it's misleading.

MR. RICCIARDI: Your Honor.

JUDGE CLIFTON: Mr. Ricciardi.

MR. RICCIARDI: He can have my transcript and he can try to rehabilitate the witness, but the answer is that we talked in 5 and 7 about the same kinds of issues here.

JUDGE CLIFTON: No, no, no, no, no. You don't have to tell me -- you don't have to justify your questions and your answers to me. But with regard to the objection that Mr. Beshore has voiced, I do sustain it.

I think that Mr. Hollon has explained so that I understand. We have to know what we're talking about to know whether the producer-handler is similarly situated to the regulated handlers. So -- so give him a hypothetical with some of those details filled in and he can answer.

MR. RICCIARDI: Let me do this. Let me actually read the context of the Q and A and get to that question and answer.

JUDGE CLIFTON: Mr. Ricciardi, we do not need to re-do the hearing from five years ago. We have plenty of material that's new. And if you mean by this somehow to impeach this witness, it's not working.

MR. RICCIARDI: I think I already did, but I'll move on to the next point, Judge.

JUDGE CLIFTON: Okay.

MR. RICCIARDI: As Robert Redford said in Butch Cassidy and the Sundance Kid, I'm better when I move, Judge, so let's move a little bit.

THE WITNESS: Is that the one where he jumped off the cliff at the end?

MR. RICCIARDI: Yeah, he was -- he made it in the water. Apparently it was an unlevel playing field. I wasn't sure.

BY MR. RICCIARDI:

Q. Let me ask you some questions about your statement, Exhibit 104, just for a minute. I don't want to replow ground, but I want to make sure I understand what you're going to say and what you're not going to say.

On the second page, under DFA - Observed Market Conditions, Customer Concerns, in the first sentence you talk about our customers and our members expressing concern. Are you going to tell us the customers and the members that expressed that concern?

A. I am not.

Q. The third paragraph under that same

heading, you had conversations with many DFA fluid milk processing customers about producer-handler regulations and marketing. And then you talk about several of our largest customers having inquired. You're not going to tell us the names?

A. I would consider that information competitively sensitive and would decline to provide specific names.

Q. Paragraph 4, second paragraph under heading 3, we have received questions about price level from several customers who compete with Heartland Dairy. Are you going to tell us those names?

A. Same answer.

Q. Would those be the names of Prairie Farms and Anderson Erickson?

A. Same answer.

Q. You heard their testimony?

A. Same answer.

Q. Is there anyone else, other than those two?

A. Same answer.

Q. So you're not going to tell us?

A. Same answer.

Q. Okay. You make a statement in that same paragraph, third from the bottom of page 4, I think, there is no other competitive factor noted in the dairy case other than price. What's the source of that information?

A. Me.

Q. What's that?

A. Me. I shop in that store.

Q. Did you talk to anybody at the store?

A. I observed the dairy case.

Q. Okay. So you went in there and looked at the price, and that's the source of your statement, correct?

A. I go there a couple of times a week.

Q. So you went in the store, you looked at the price, and that's the source of this information?

A. Yes.

Q. Do you think that -- let's talk about Order 126 for a minute because I do want to cover something in that area. You heard the testimony that the school milk competitive bid between GH and Dean Foods -- that the source of the school milk initially was actually from Las Vegas and tripped to El Paso. You heard that testimony?

A. I was in and out of the room during Mr. Hettinga's testimony. I heard him say that. I don't know that I heard the follow-up or the remainder of his explanation.

Q. Okay. So first of all, more generally, when you have a competitive bid situation for school milk -- and you're aware of how that's bid?

A. I don't get involved in the school milk bid situation.

Q. Well, you know if it's a public bid, that they're required to actually submit it without seeing the other bids, right?

A. Again, I don't -- I don't do that. I haven't done that in my career. That's not a situation that I'm familiar with.

Q. Let's go on a different direction. Let's talk about something else. Your position on behalf of your organization, on behalf of NMPF, on behalf of IDFA, is that there's some type of competitive advantage that a producer-handler has over the regulated community that's been described in different phrases, but somewhere in the range of 14 or 15 cents a gallon. Have I got that -- that position correct?

A. I think Dr. Cryan's statement had a number of calculations in it, so you could refer to those.

Q. 15 cents is one of them, correct?

A. Yes.

Q. Okay. And --

A. I would also say that his was an annual calculation based on 2007, so it could vary month to month, year to year.

Q. So let's assume the 15 cents for a minute. If a member of the regulated community was selling to the same customer in the same marketing area as a producer-handler, your testimony would be that the producer-handler would be able to obtain that business more readily given that pricing advantage on the raw milk cost, correct?

A. The fact that the producer-handler does not pay into the pool would, in my testimony, give them some type of advantage at the regulated minimum.

Q. So in -- and obviously if it's the same customer that they're dealing with, that customer is going to know what the price is being offered by the regulated community and the producer-handler?

A. Yes.

Q. And likely, under all circumstances, if price is the factor and if your hypothetical is correct that there is a 15 cent advantage, would --

A. That's your hypothetical.

Q. -- would always go with the producer-handler because of the cost advantage to the customer, right?

A. Not necessarily.

Q. So a producer-handler might not get the business even with a perceived 15 cent advantage?

A. The customer would have a wide range. Maybe they had a bad experience with the person that was the supplier. And I think that was one of the -- I don't remember. One of the processors said that they had a bad experience and he got some business back.

Q. Okay. Price may be a factor. It's not the only factor in decisions by customers as to whether or not to purchase their milk from a particular processor?

A. Yes.

Q. Service is important, correct?

A. Yes.

Q. Quality of product is important?

A. Yes.

Q. Relationships between -- you know, previous relationships, for example, between the customer and the processor also are important?

A. Yes.

Q. Now, once you're able to supply a customer for the first time, get your foot in the door, if your pricing is good, your service is good and you are providing a good quality product, in those circumstances, there's a good likelihood that you're going to increase, assuming the customer demand is there, the amount that you provide to the customer, right?

A. I can only agree hypothetically. And generally, I don't -- I don't do those things. I don't go to retailers and price and sell and deliver and do logistics. Many of the folks who have testified here in the last two weeks, generally applied, your hypothetical would be correct.

Q. Were you in the room when Mr. Hettinga testified and he stated that Sarah Farms in Arizona -- by the way, that's now, since 2006, a regulated plant?

A. Correct.

Q. And currently the GH plant in El Paso is a producer-handler under that order, correct?

A. Correct.

Q. Did you hear his testimony that, in fact, he was supplying the same customer now in Texas from the GH plant at 8 to 15 cents more a gallon than Sarah Farms was supplying that same customer in Arizona as a regulated plant?

A. I don't recall.

Q. Assume that to be the case. Isn't it

true that if your 15-cent price advantage were correct, that it should be the other way around?

A. If the assumption is that's the only factor, yes.

Q. Okay.

A. There may be other factors, as you identified two minutes ago, that may impact that.

Q. Okay. And I have a question, I think based upon what Mr. Vetne asked, and hopefully I'm going to get near done. DFA has members in Order 131, which is currently Arizona, correct?

A. Yes.

Q. And those members of DFA in Arizona market their milk in such a way that they don't pay into the pool for 131, right?

A. Do you mean those members -- I think the way Mr. Vetne replied and asked that -- and I'll ask if you're asking the same thing -- does DFA have members in Arizona, yes. Are those members' milk marketed in Nevada? Which I think the answer is no. But are they marketed in California? The answer was yes. Is the milk marketed in Order 126? The answer is yes. Does DFA pool milk on Order 131? The answer is no.

Q. So those -- the milk that's sold out of Arizona into other areas does not get pooled in Arizona?

A. Only in the rarest of cases.

Q. And the milk that's marketed into California doesn't get pooled on any Federal Order?

A. Correct.

Q. So that means that you have members in Arizona who are marketing milk in a way so as to reduce the blend price to the farmers in Arizona?

A. Has zero effect on the blend price on the farmers in Arizona. None whatsoever.

Q. Does the milk being sold out there get paid into any Federal Order pool?

A. The milk that's delivered or sold in California would participate in the California pools' rules, and the milk that's pooled or that's sold in the other Federal Orders would participate in those Federal Orders' rules.

Q. But with regard to the milk that's marketed into California, it doesn't go into any Federal Order or any Federal Order pool?

A. Correct.

MR. RICCIARDI: I don't have any more questions, other than this, Judge. I would move the admission of Exhibit 105.

JUDGE CLIFTON: Is there any objection to the admission into evidence of Exhibit 105?

There is none. Exhibit 105 is hereby admitted into evidence.

Thank you, Mr. Ricciardi. Who next would like to cross-examine Mr. Hollon?

MR. WOODY CARROLL: I'll do it.

JUDGE CLIFTON: Mr. Woody Carroll, you may.

CROSS-EXAMINATION

BY MR. WOODY CARROLL:

A. Mr. Carroll, you won't get to start your presentation by good morning.

Q. I'm getting there. I was going to guess what, an early afternoon now?

A. It's good afternoon now.

Q. Good afternoon. Well, hopefully we will not be doing this and saying good night.

A. I would agree with you.

Q. Could you state, for the record, what Dairy Farmers of America is?

A. It's a dairy cooperative.

Q. And how many members does it have?

A. Members would be just over 17,000.

Q. And how -- and about how many pounds or hundredweight does it make a year, does it produce a year?

A. Members produce in the 20 -- it slips my -- my memory the exact number. It's about 23 or 24 percent of the nation's milk supply is produced by DFA members.

JUDGE CLIFTON: Mr. Carroll, would you pull that microphone over so that it's closer to where your mouth is going to be?

MR. WOODY CARROLL: Like this?

JUDGE CLIFTON: Yes.

BY MR. WOODY CARROLL:

Q. What is the total poundage, do you know?

A. Again, the number slips my memory, sorry.

Q. Would between 35 and 40 billion pounds sound about right?

A. Yes.

Q. And would -- and how do you -- how is it structured? Are they divided -- what regions are they divided into?

A. DFA is divided in its day-to-day operating businesses into seven business units.

Q. And do you know what the actual production for herd would be in the Western region?

A. I do not.

Q. 19 million sounds -- pounds per farm sound about right, or producer?

A. I have no comparison. I don't know.
Q. What's your position there?
A. Director of fluid marketing and economical analysis.
Q. How would it be in that position you wouldn't know how much your producers produce at the farm level?
A. We have 10,500 farms in 49 states. It's hard to keep up with that many.
Q. But I was talking the average, or a region.
A. It's different in different regions. I just don't know the answer to that.
Q. Don't you keep track of these things?
A. Yes.
Q. And how is it that you're not familiar with it?
A. I just don't have the intimate detail of each one.
Q. Of each region?
A. Correct.
Q. Do you read your website?
A. From time to time.
Q. It's on your website.
A. Well, then you should have the answer.

Q. I do have the answer, but it's not in evidence.

A. Okay.

MR. WOODY CARROLL: Well, I would like to -- if we're going to have to get into this, I'll probably have to put that part of the website in evidence. Would that be a problem?

JUDGE CLIFTON: Do you want to mark something? Do you have a copy?

MR. WOODY CARROLL: I don't have a copy of it because I didn't expect to have a problem with it. And they shut off my downloading on the computer, so I couldn't get it at the hotel. So it's a bit of a problem.

JUDGE CLIFTON: Is this important enough to you that you want to --

MR. WOODY CARROLL: We'll keep going and see how important it becomes.

JUDGE CLIFTON: Good.

BY MR. WOODY CARROLL:

Q. Would the Southwestern region, 19 million -- would 19 million pounds be the producer average?

A. Again, I don't know the exact numbers, Mr. Carroll.

Q. Okay. How about 12 million pounds in the Mountain region?

A. I don't know the exact numbers.

Q. Do you know what the average is for the whole of Dairy Farmers of America?

A. I don't.

Q. You've recommended a 450,000 pound cap on producer-dealers, producer-handlers?

A. Yes, sir.

Q. How did you compute that?

A. I think Dr. Cryan provided the most amount of detail for that, so I would refer you to his statement. And the things that I remember was that it was relative to the 150,000 pound limit that was used in 1991, and I think it was the West Texas Order, and that certainly producers have grown since then. And that three times that amount was actually a greater rate than the average producer had gained. And it was -- also approximated the USDA small farm, small business definition for farms, that stated in most Order decisions, that that approximates that volume.

Q. So you did not actually independently compute the number, yourself, you borrowed it from somebody else?

A. The position of National Milk was

developed by the members of National Milk. I had input into that process, but it was not done unilaterally.

Q. Okay. And what investigation or study did you make of the, we'll say the smaller producer-handlers? We represent them in the Northeast, we have a group of them up there. They market less than 3 million pounds a month. And what study did you make of the various producer-handlers in the country in arriving at this?

A. We looked at data that's now in the record on distribution of producer-handlers by size. We looked at our own marketing areas in each part of the country to gather information. And we chose that number for the reasons that I gave you, as well as the thought that it would affect a small number of them.

Q. Now, is that exempt plant or is that the cap for paying into the pool that you're talking about with the 450,000?

A. It's both.

Q. Both?

A. Yes.

Q. It could be identical?

A. In our proposal, a plant would have an exemption up to 450,000 pounds of route dispositions in a month in any area, and with that exemption, they would not pay into the pool.

Q. Now, what -- now, did you look at the effect on the producers of what would happen when they started -- producer-handlers when they started paying into the pool?

A. Did not.

Q. You've done no work on that at all?

A. Other than to know that certain of them, if they were bigger than 450,000 pounds, would pay into the pool.

Q. Now, I'm not -- I'm still learning some of this. But as I understand it, after you pay into the pool, there's a producer -- I forgot what it's called -- pay back or something that goes back to the producers out of the pool, do I have that right?

A. Some.

Q. Okay. Can you explain that to us, please?

A. Milk is priced on a classified pricing basis. As a general rule, Class IV prices are the lowest, Class III is somewhat higher, Class II somewhat higher, Class I the highest. And those represent different use values of milk.

As a general rule, Class I is milk that you would drink. Class II is dairy products you would eat with a spoon, not always, but in general. Class III and IV products, Class III is cheese products and Class IV is butter and powder. So each of those carry average values. Every handler is required -- if you are a regulated handler, required to account to the pool for your poundage in those and at the appropriate price.

The Market Administrator then determines an average price for the month, and if your average is higher than that, as a business, as a processor, you would pay something into the pool. If your average is lower than that, you would take something out of the pool, such that all dairy farmers would share in the returns of the entire pool on the same minimum price basis. And that marketwide pooling principle has been part of the orders since the beginning, or almost since the beginning.

Q. So it averages out the incomes of all the farmers to be somewhat the same area?

A. It gives them all the same minimum price for the utilizations in the marketplace.

Q. Now, what was -- why did you come up with this grandfather clause idea?

A. I think Dr. Cryan explained that in his testimony, and that it was meant to provide some relief for existing businesses who might be larger than 450,000 pounds. It wasn't a preferred alternative, but nonetheless it was something that members of National Milk Producers felt was important, so they established a grandfathering provision.

Q.   Going back to my previous question for a second, would a producer-handler receive any money back from the pool after he paid in?

A.   Currently, a producer-handler does not pay into the pool, so they would also receive nothing back from the pool.

Q.   If -- under these proposals, if they started paying in, would they receive money back?

A.   Under these proposals -- first of all, remember, there would be no more producer-handler. But if they were a regulated processing plant, they would be treated like every other one, and if their utilization was such that they received a payment, yes, they would. If their utilization was such that they didn't, they would pay in.

Q.   Now, going to the grandfather clause, is that a prohibition on anybody coming into the business as a producer-handler that isn't grandfathered under that clause?

A.   Do you mean that assuming the regulations were put in effect?

Q. Yeah, assuming the regulations would go into effect as written or as your proposals wrote them.

A. If -- if Proposals 1, 2 and 26 were adopted, then there would be no new producer-handlers. Anybody who was smaller than 450,000 pounds in a month would be exempt. If you were larger, you would be a regulated plant. And there would be no more class of producer-handler, except those who had been grandfathered.

Q. So it would absolutely prohibit incorporating your own business, building a dairy and having your own herd and selling the cows?

A. Not at all. You could do all of those things, but you would do it -- if you were larger than 450,000 pounds, you would do it as a regulated handler.

Q. You would have to pay into the pool?

A. Yes, sir.

Q. What are you gaining by putting the small producer-handlers into the pool?

A. Those larger than 450,000 pounds?

Q. They're bigger than 450, which is your line, and smaller than the 3 million.

A. Well, sir, first of all, if they exist today, they -- and they had capacity, they would be grandfathered. Beyond that, the reason for the proposal is to have a competitive landscape where all processors in similarly situated conditions have the same minimum price.

Q. Did you know that originally 70 percent of the Class I milk sales were from farmers selling their own milk?

A. I did not.

JUDGE CLIFTON: Would you repeat that question, Mr. Carroll?

MR. WOODY CARROLL: Do you know originally that 70 percent of the Class I milk sales were from farmers selling their own milk?

JUDGE CLIFTON: Would you attach a date to that, if you have it?

MR. WOODY CARROLL: I would assume that if it's originally, it would be 1937 --

JUDGE CLIFTON: Well --

MR. WOODY CARROLL: -- and the '40s and through there.

JUDGE CLIFTON: And why do you assume that?

MR. WOODY CARROLL: Because my father wrote it and he wanted me to ask it. And I believe it is 19 -- if it says originally, he means when the Act was passed. That's what I would understand.

JUDGE CLIFTON: All right. Thank you.

Q. Do you expect the Secretary to rule based on your fear of what is possible instead of the facts of any alleged disorder?

A. I don't presume to estimate or guess what the Secretary will do. They will take the -- evidence -- he will take the evidence and make his decision.

Q. What evidence of market disorder do you have in Order Number 1, which is where our clients are?

A. There are businesses there who are not paying into the pool, and some of them have effect on the competitive marketplace.

Q. You realize those businesses, many of them have been there since before the order was even put in place, or the Milk Marketing Act of 1937 was passed?

A. I'm not familiar.

Q. Do you realize that the disorderly market has been disorderly like that since the inception of the Act?

A. By your question, if you're asking have they been producer-handlers in Order 1 --

Q. Are you claiming that --

JUDGE CLIFTON: Mr. Carroll --
MR. WOODY CARROLL: Sorry.
JUDGE CLIFTON: -- don't interrupt him. Let him finish.
MR. WOODY CARROLL: Okay.
JUDGE CLIFTON: Go ahead, Mr. Hollon.
A. If your question is, have there been producer-handlers in Order 1, or the predecessor orders that are now covered by Order 1's geography since the inception of the Act, yes, I do realize there have been producer-handlers since then.
Q. And how long have producer-handlers been exempt under the Act?
A. Since the beginning.
Q. Does that mean that the market has been disorderly in Order 1 since the beginning?
A. It means that now there are changes in the marketplace that we think require a hearing, or we request a hearing for the Secretary to consider them.
Q. And what are the changes in Order 1 that require any attention?
A. First of all, there are larger producer-handlers. There are -- they do not pay into the pool, they have a competitive factor in the marketplace. And we also think this is an issue that

should be dealt with on a nationwide basis.

Q. Hasn't that been the situation in Order Number 1 for 70 years?

A. It has.

Q. Do you agree with NMPF witness Roger Cryan that the studies show -- just a second here -- advantages to the -- to the larger producers in relation to the smaller units and the smaller producers in the processing units?

A. What are some of the advantages that you're referring to?

Q. I would say economy of scale by the manufacturer of milk. If you make more milk, you can process it cheaper per hundredweight?

A. Yes.

Q. Do you agree that that cost difference could have an impact on pricing?

A. Yes.

Q. Is that fact well accepted in the industry?

A. That there are economies of scale?

Q. Yes.

A. Yes, it is.

Q. Do you agree that a larger size is an advantage in marketing milk?

A. Can be.

Q. If a producer-handler is regulated and he goes out of business because he can't afford to pay in, how -- how will that benefit the pool?

A. Again, you would assume -- I would assume that those sales would be picked up by another processor who may be able to pay into the pool or who would be able to.

Q. And in the Northeast, who are the dominant processors?

A. I'm not familiar with all of the processors in the Northeast market.

Q. Who supplies most of the Class I milk?

A. You mean to processors or to consumers?

Q. To the consumers.

A. Well, that would be the major retail chains that are in the Northeast.

Q. And who are the handlers that sell to the major resource -- major chains?

A. Again, I'm not familiar with all of the processors in the market. However there's been Market Administrator data that's listed handlers, so they would be there. That's a part of the record.

Q. How many members do you have in the Northeast?

A. I don't know specifically.
Q. Do you ship milk to Dean and Hood?
A. Yes, sir.
Q. Do you know what percentage of the market Dean and Hood control?
A. I have no idea.
Q. Would 90 percent of the Class I sales surprise you?
A. I have no idea what the answer is, Mr. Carroll.
Q. What was your position at Dairy Farmers of America again?
A. Same as it was when you started your questions.
Q. Repeat it.
A. Director of fluid marketing and economic analysis.
Q. As director of fluid marketing --
JUDGE CLIFTON: Mr. Carroll, don't ask it that way.
MR. WOODY CARROLL: Don't ask it that way?
JUDGE CLIFTON: No.
MR. WOODY CARROLL: Okay.
JUDGE CLIFTON: What is your next

question?

Q. As director of fluid marketing, have you ever -- have you ever studied or looked at where your milk is being sold after it's given to Dean or Hood or any other processor in the Northeast?

A. No.

Q. Do you agree that Dean and Hood are the major marketers of fluid milk in the Northeast?

A. I know that they are marketers of the milk in the Northeast, but I'm not familiar with the -- again, all of the processors in the northeast.

Q. So do you know of any other processors besides Dean and Hood?

A. Yes.

Q. Who?

A. I think Mr. Latta and Mr. Buelow testified to other processors, I think O-AT-KA -- not O-AT-KA -- I'm drawing a blank.

Q. You have no idea how the market allocates between them?

A. That, I don't know.

Q. Do you know that there used to be eight major competitors for the fluid milk business in the Northeast?

A. No.

Q. Okay. Do you know that Dean bought Garelick Dairy?
A. Yes.
Q. Do you know anything about Garelick Dairy's market share?
A. I do not.
JUDGE CLIFTON: Mr. Carroll, would you help me with the spelling of Garelick?
MR. WOODY CARROLL: G-a-r-e-l-i-c-k.
JUDGE CLIFTON: Thank you.
A. Mr. Carroll --
Q. Yes.
A. -- Upstate Milk Producer is another processor in the Northeast. That was the name I couldn't remember a while ago.
Q. Where are they located?
A. In New York state.
Q. Do you know that Dean and Hood and their suppliers have proposed Proposals 1 and 2?
A. Dean and Hood are both members of IDFA, and DFA supplies milk to Dean, which you've asked me earlier. And we are members of National Milk Producers Federation. And both of them are the proponents of Proposals 1, 2 and 26.
Q. Okay. As to 32 percent -- 32 cents a

half pint, what does that convert to as a hundredweight? Do you know --

A. No.

Q. -- the price per hundredweight?

A. No, I do not.

Q. Can you compute it or --

A. If I had my computer and my spreadsheet opened up, I probably could. But I can't do it on my cell phone. I'm not as good as Dr. Cryan.

Q. Can we do it on paper if we all --

A. I'll let you compute that.

Q. You are aware that there are five states that oppose the -- that oppose these proposals in the Northern states -- oppose these proposals in the Northeast?

A. No.

Q. How would a producer-handler that markets, say, 2 million pounds of milk a hundredweight a month affect the market?

JUDGE CLIFTON: Would you ask the question again, please?

Q. How would a producer-handler who markets, say, 2 million-hundredweight a month affect the market?

JUDGE CLIFTON: Now, do you mean 2 million hundredweight or 2 million pounds?

MR. WOODY CARROLL: Hundredweight.

JUDGE CLIFTON: 2 million hundredweight.

MR. WOODY CARROLL: Hundredweight, if I have that right.

JUDGE CLIFTON: All right. And what are the other circumstances you want him to consider in determining how that would impact the market?

MR. WOODY CARROLL: I just wanted him to take a look at it and see how, in relation to, for example, his sales, it would make any difference if -- to have this here or not.

A. 200 -- or 2 million hundredweight, I think would be 200 million pounds, and that would be --

Q. Did I do that wrong?

A. Well, it's your question.

Q. Yeah.

A. And so that would be almost as large as Federal Order 6 by itself.

Q. Okay. That's a mistake. Let's do 2 million pounds.

A. 2 million pounds would be -- again, marketed in a marketing area, if they marketed it as a producer-handler, they would not pay into the pool. And they would -- remain to be seen what the other potential impacts would be.

Q. Now, in the Northeast, I have you marketing 2 billion pounds, 2.5 billion. Is that about right?

A. I don't have the number off the top of my head.

Q. It doesn't have to be accurate. Let's say 2.5 to 3 million -- billion pounds a year in the Northeast, roughly.

A. Again, I don't have the specific numbers in my --

Q. I'm not holding you to the specific number. I'm not holding you to doing it to the pound.

JUDGE CLIFTON: Mr. Carroll.

Q. How many pounds of milk --

JUDGE CLIFTON: Mr. Carroll, I know that you're having trouble getting this evidence in because this witness does not know the answer to the question that you're asking.

MR. WOODY CARROLL: He's the director of fluid milk marketing and I'm asking him how much milk his company produces. One would think he would know it.

JUDGE CLIFTON: Well, I think it's unwise to try to carry around all the numbers in your head, frankly. They change, you know.

MR. WOODY CARROLL: Well, you live with them every day, you can ballpark it.

JUDGE CLIFTON: Perhaps so. Is there another witness you can call to establish that?

MR. WOODY CARROLL: I -- no, but I took it off his website. It seems that his news releases on the website know more about fluid milk than the director of the department.

JUDGE CLIFTON: Just a moment. Mr. Miltner?

MR. MILTNER: I would suggest that if there's information on the website that's been publicly posted, that it could perhaps be quicker to ask notice of that or introduce it as a document. That may save us time on cross-examination if Mr. Hollon doesn't have information at his disposal. But that's a suggestion, and I don't -- I'll leave it at that.

MR. WOODY CARROLL: I'll have to get it off the website and download it, your Honor, to do that.

JUDGE CLIFTON: Could -- could you perhaps -- I -- I don't -- I don't want to take the time for you to produce the documentation that I would like you to have in order to have me take official notice of what the current website information is.

Is there a way that you can -- rather than have that information be regarded as evidence, is there a way that you can use it in argument at briefing?

MR. WOODY CARROLL: If it's not in evidence, it's the kind of thing that's going to run into trouble if it's not in the record, I think, regrettably.

JUDGE CLIFTON: How many more questions do you have, Mr. Carroll?

MR. WOODY CARROLL: I'm winding down, actually. I've got five more my father wrote, and a handful on another topic, and there we are.

JUDGE CLIFTON: All right. Let's go on to those areas, please.

MR. WOODY CARROLL: Okay.

BY MR. WOODY CARROLL:

Q. You've been here for the testimony of the producer-handlers?

A. The majority of them I have heard.

Q. And you've heard their testimony that their customers seem to be coming for local farm product, what they, the customer perceives anyway, as a different type of milk, or that they're marketing on -- that would give their customers their own cows or various other marketing niches. If they were to go out of business, how -- do you really believe that that business would come to the mass producing cooperative, or would it go to like Aurora Dairy, for instance?

A. I think Aurora Dairy testified to all those exact same scenarios, that perhaps Monument Farm testified, other than perhaps the milk was produced in their back yard. And that may even be doable in some parts of the country, so many of the larger producer-handlers, I think, said the exact same thing.

Q. Are you familiar with the kosher market at all for milk?

A. To the extent it's been testified to here. And again in my testimony, I noted that DFA markets milk to people who produce kosher products.

Q. Are you familiar at all with the ultra Orthodox segment of the Jewish faith in New York City?

A. Well, to the extent that one of the products that we make requires rabbis from Israel, I think that's about as Orthodox as you can get.

Q. No, they're past that.

A.   Then no, I'm not familiar.

Q.   These people probably wouldn't tolerate anything less than their own herd run by rabbis.

A.   I don't know if we have any of those, but we may.

Q.   Would your grandfather clause prohibit that, if they were to try to set up their own herd?

A.   If they were -- the Proposal 26 has a requirement that they be identified in the Market Administrator records in 2008 as a producer-handler. So if they met their requirement, there would be no problem.

Q.   In 2009, they would not be able to set up their own herd?

A.   Correct.

JUDGE CLIFTON: Under an exempt scenario? That's what you're asking?

MR. WOODY CARROLL: Right, yes, under the grandfather clause.

JUDGE CLIFTON: All right.

A.   Well, now, just a minute. There would be no more producer-handlers, so they could not be a producer-handler. However, they could be an exempt plant under 450,000 pounds going forward. Was that your question, Mr. Carroll?

Q. I think that's -- that states it --

A. Okay.

Q. -- your position on it.

A. Okay.

Q. Can you give us any instance of disorderly action by Monument Dairy or Mountain Dairy, the two dairies targeted by Proposal 1 and 2?

A. First of all, I don't know that they are targeted by Proposals 1 and 2. And to the extent that they do not pay into the producer settlement fund on their bought milk, that would meet one of our definitions of disorder.

Q. Does the consumer have any interest in fostering competition in the marketplace?

A. Yes.

Q. Would you consider it a competitive market if two producers controlled 90 percent of the fluid milk in the market?

A. If two producers?

Q. I'm sorry, two handlers, my mistake. I've got to keep these things straight.

A. I would have to study that some more. If they controlled 90 percent of the market, there might be someone other than me or DFA who would raise a question.

Q. Do you believe the government has a duty to foster competition in the marketplace?

A. Yes.

Q. Do you agree that GH Dairy, when it bid on the Texas schools, was a regulated handler at the time of the bid?

A. Whatever Mr. Hettinga testified that he was, I have no reason to doubt.

Q. Do you think it's unfair that under your proposal, a person cannot obtain a herd and market its own milk and process it -- process and market its own milk?

A. I don't think our proposal would prevent that.

Q. You would require them to pay into the pool?

A. If they were larger than 450,000 pounds, they would be treated like every other regulated handler. If they were smaller than 450,000 pounds of route disposition in a month, they would be exempt and not have that requirement.

Q. Now, I'm handing you Exhibit 73, which says Producer-Handler Advantage, and without price difference here in the middle of the page. Do you see these numbers? It's these two right there.

A. Okay.

JUDGE CLIFTON: So for the rest of us, Mr. Carroll, on Exhibit 73 --

MR. WOODY CARROLL: Page 3 or 4 of Exhibit 73, with the Producer-Handler Advantage Disadvantage in big, bold type.

MR. BESHORE: What is 73, may I inquire?

MR. WOODY CARROLL: It was the one that was put in -- that one --

A. I see it.

Q. Okay.

JUDGE CLIFTON: Which page are you on, Mr. Hollon?

THE WITNESS: I am on Table 3, Cost Advantage of Producer-Handlers of Various Sizes, Pacific Northwest, September 23, 2003.

JUDGE CLIFTON: Thank you. That's the last page of Exhibit 73.

BY MR. WOODY CARROLL:

Q. After the -- you take what the producer has to pay into the pool, does he become -- at what poundage does he become cost competitive with the -- with the -- with the -- with the co-ops?

A. Mr. Carroll, it wasn't my exhibit, and it was also done six years ago, so I'm not familiar with it. So I don't know that I know the answer to your question.

Q. Okay. You haven't studied it at all then?

A. I haven't studied it in six years.

Q. Okay. When you -- when the produce -- from your scenario, 450,000 pounds, and he starts paying into the pool after -- at 4 -- at 449,000 pounds he won't be paying in at all, and at 451,000 he would be paying in, is that your proposal?

A. You mean 450,001.

Q. And 1?

A. Yes, sir.

Q. Okay. At that point in time, he incurs an additional cost of paying into the pool, does he not?

A. Yes, sir.

Q. Will that make him more or less competitive in a price-oriented market?

A. All things being equal, it would make him less competitive.

Q. If he's less -- and -- and when would that -- that extra burden be negated? Have you studied -- you haven't -- have you studied it at all?

A. Well, he would be less competitive where he was at 449,000.

Q. Right.

A. But he would be under the same competitive position with all the other regulated handlers.

Q. Now, is it true that the differences in scales of processing between the bigger handlers and the smaller handlers are such that this pay is in -- that they're not competitive anyway, they run between the two?

A. I'm sorry, try your question again.

Q. Is it true that the economies of scale between the large handlers and the small handlers, smaller producer-handlers, are such that they really can't get their price down as low as the co-op, anyway, on a given bid?

A. I don't know.

Q. You don't know?

MR. WOODY CARROLL: Your Honor, except for the amounts of production in his organization in the Northeast, I am pretty much done.

JUDGE CLIFTON: All right. And what do you propose to do about that?

MR. WOODY CARROLL: I'm going to go downstairs and complain to the Westin Hotel for having their supplier terminate me for updating my computer software, which was a 500 megabyte download, and that got their computer guys mad at me and they won't let me download anything anymore.

JUDGE CLIFTON: Mr. Miltner?

MR. MILTNER: There's a Kinko's downstairs.

MR. WOODY CARROLL: I can get --

MR. MILTNER: And for 20 cents a minute, you can download anything you need.

MR. WOODY CARROLL: Sounds good me. Fine with me.

JUDGE CLIFTON: Mr. Beshore, do you have a suggestion?

MR. WOODY CARROLL: I suggest we just have them agree and admit to what's on the website as being the production figures and we'll be all set.

JUDGE CLIFTON: Mr. Beshore, you may come to a microphone.

MR. BESHORE: If Mr. Hollon may have just a minute or two, he believes he may be able to find the number -- information with respect to the DFA member pounds in the Northeast, which I believe is the question Mr. Carroll is asking.

JUDGE CLIFTON: Thank you so much. That is very gracious. I appreciate that.

THE WITNESS: It may also not be true, but I'm going to look.

JUDGE CLIFTON: All right. Mr. Carroll, you may step down for now.

MR. WOODY CARROLL: Thank you.

JUDGE CLIFTON: Now, this -- while we're allowing Mr. Hollon to work on that, this might be a good time for Mr. Miltner to go forward with his request that we take official notice. If someone would alert him that this is a good time for that Mr. Beshore.

MR. BESHORE: At the time, just a housekeeping matter, I would like to move Dr. Cryan's official notice list at the same time as Mr. Miltner's. They weren't acted upon early on.

JUDGE CLIFTON: All right. Mr. Miltner has returned. Mr. Miltner, we're at pause right now.

MR. MILTNER: Yes. Are we on record?

JUDGE CLIFTON: Yes, we are.

MR. MILTNER: Okay.

JUDGE CLIFTON: And Mr. Tosi has shared

with me your list of requests for official notice. Do you wish to address that now?

MR. MILTNER: If we can, your Honor, that would be fine, and let me grab my copy so I can refer to it.

JUDGE CLIFTON: Certainly. And if you have an extra one for me, I want Mr. Tosi to keep his.

MR. MILTNER: I do have extra copies. Mark it as an exhibit? That's fine. We can mark it, if we could, your Honor.

JUDGE CLIFTON: All right. Let's mark this list of Mr. Miltner's as Exhibit 106.

(Exhibit 106 was marked for identification.)

I like this very much. I like it that you have it all laid out and everyone would be able to find it. And you saved us a lot of time.

MR. MILTNER: Your Honor, these are the documents and statistics we would like to take request official notice be taken. All of the information -- all of the documents that are on the exhibit were either referred to in testimony from one or more of the expert economists or referred to in discussions with Mr. Carman about alternate sources of information of USDA data and were readily available on the Web. References have been placed.

The lone exception is something that I don't know that's been referenced are the Market Administrators monthly bulletins, which are available from the Market Administrator's websites. They can be accessed on the Dairy Programs Web page.

JUDGE CLIFTON: All right. Mr. Beshore.

MR. BESHORE: Just a question on the last item. I'm wondering if those monthly bulletins are available back to the beginning of 2000 on each Market Administrator's website? I don't know, but I'm wondering if that's certain.

MR. MILTNER: I guess I don't know that they are available for that entire period for each marketing area. And I guess we would request that notice only be taken of those that are available on the websites of the various MA offices.

JUDGE CLIFTON: Excellent idea. Is there any objection to my taking official notice of everything that is contained on Exhibit 106, which has a back side, as modified by Mr. Miltner? Mr. Tosi.

MR. TOSI: I don't know that I have an objection, your Honor, but I just want something to be made really clear here. That when he's talking about Dairy Market News Data, it appears to cite a website. I'm sorry, your Honor, on the front page of Exhibit 106, it says Dairy Market News Data.

JUDGE CLIFTON: Oh, I see it now, almost the middle of the page.

MR. TOSI: And then below the cite there for the website, which is quite lengthy, there are things that talk about annual dairy market statistics. And we want to be clear here that this is the information as published by USDA and no other sources, is that correct?

MR. MILTNER: That is correct. And what I tried to -- the website, as lengthy as it is, is a direct cut and paste from the Dairy Programs page for Dairy Market News Information. And the second level bullet points are the specific area of the annual and weekly statistics that we would expect to refer to.

MR. TOSI: The reason I was asking is

that I know that there are other organizations that will sometimes say these are, you know, dairy statistics or whatever. I just wanted to make sure that we are talking about those published by USDA.

MR. MILTNER: We are. Any reference that we would put on brief would be a direct reference to a USDA source.

MR. TOSI: Okay. Thank you, your Honor. Thank you, Ryan.

JUDGE CLIFTON: All right. Any other comments or any objections? There are none. First of all, I do admit into evidence Exhibit 106.

And I take official notice of the documents itemized therein incorporating Mr. Miltner's comments. And Mr. Beshore?

MR. BESHORE: I would then ask that your Honor act on the motion to take official notice of the publications listed on page 21 of Exhibit 23, which is Dr. Cryan's testimony. We had sort of held that in abeyance. I believe that all of these documents are of the same nature as -- are publications of the same nature as cited on Mr. Miltner's Exhibit 106. And page

21 of 23 is already part of the exhibit, so I would just ask for them to be officially noticed.

JUDGE CLIFTON: Is there any objection to my taking official notice of any of the items that are contained in Dr. Cryan's report, Exhibit 23, page 21 of that report? There are none. I hereby take official notice of those items contained on page 21 of Exhibit 23.

Mr. Hollon, shall I ask Mr. Carroll to return to the podium?

THE WITNESS: Yes, ma'am.

JUDGE CLIFTON: All right. You may, Mr. Carroll. Please bring a note pad and a pen. Mr. Hollon, are you able to respond with the data that Mr. Carroll was hoping you were carrying in your head?

A. Mr. Carroll, did you ask for the approximate annual production of DFA's Northeast Council?

Q. Yes.

A. 2.8 billion pounds.

MR. WOODY CARROLL: Thank you. That's fine, your Honor.

JUDGE CLIFTON: Mr. Carroll, if you'll

return to the podium. Does that complete your cross-examination of Mr. Hollon?

MR. WOODY CARROLL: Yes, it does, your Honor.

JUDGE CLIFTON: Thank you.

MR. WOODY CARROLL: Thank you.

JUDGE CLIFTON: Does anyone else wish to cross-examine Mr. Hollon? Mr. Tosi.

MR. TOSI: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. TOSI:

Q. Good afternoon, Elvin.

A. Good afternoon, Mr. Tosi. How are you?

Q. Fine, thank you. Trying to get a few big picture questions here. Proposals 1 and 2 -- excuse me, the Proposal 1, the proposal to eliminate the producer-handler provision, is that -- is the aim of that proposal to prevent future or potential disorder, or is it to correct current disorder?

A. I would say it is both. So there is -- producer-handlers, in our view, have a certain element of disorderly to them, which I've outlined as competitive reach, and do not pay into the pool. And so the Proposal 2 would eliminate that issue and future issues revolving around producer-handlers.

Q. Okay. What is the inherent harm to disorderly -- excuse me. What is the inherent harm to orderly marketing with dairy farmers becoming producer-handlers, or is there?

A. At a certain situation where there is a competitive factor in the marketplace, milk buyers question what the minimum price is, and it's been my experience that if there is a possibility that someone else has a lower one, they always think that's true.

With the current regulation, if it extends, and especially with some of the market situations that have been identified here, that price difference in the minds of the buyer is no longer -- there's no longer an order minimum class price. So that makes it difficult to have orderly market when you don't know what the minimum price is.

And on the producer side, there are producers who are in the same order doing all the same things who also don't receive a minimum -- the same minimum price as everyone else. So that's the area of disorder.

Q. Okay. Would it be better for the Secretary to deal with regulatory exemption directly or indirectly; for example, calling for an alternative way to pool milk?

A. I don't know without giving that any thought. We have had hearings dealing with performance issues and milk pooling issues. I guess I would say in this hearing process, we think the proposals dealing with this exemption is an expedient way. And without having other alternatives to maybe consider, I don't -- I don't think there's another -- I don't have another way to evaluate.

Q. Okay. Two other questions. Do you have any counterpositions on the other proposals that have been mentioned in the -- excuse me, as published in the Hearing Notice, other than those that you articulated in your statement there in Exhibit 104, anything that you care to comment on?

A. I think the alternative proposals that deal with, for example, soft caps or individual handler pools, I think we've dealt with those questions. With the partially regulated processors, I think we've dealt with that in our statement.

And as far as the various different size limitations, I would certainly point out that Proposal 26 is worded as 3 million pounds or less. If the Secretary should find for some different volume number, that we would be acceptable of that.

I think Dr. Cryan covered the various

qualifiers for the grandfather proposal, and so unless you have some specific questions, I don't think I have anything else to offer there.

Q. Okay. Would you please refer to the first page of Exhibit 104, which is your written statement?

A. Yes, sir.

Q. In the -- about the middle of the page, where you're citing from the decision, a previous decision on the producer-handler issue in the Pacific Northwest and Arizona, if you would look at the second line? It says, this provision and these orders could -- I think you meant to use the word warrant, is that correct?

A. You are correct.

Q. Would it be correct if we make that change?

A. That would be fine with me. I probably read warrant over want a number of times.

MR. TOSI: I have no further questions for you, but my colleague, Jack Rower, does.

JUDGE CLIFTON: And Mr. Beshore, will you please be sure to initial that change with Ms. Fisher before you leave the room? I'm sorry, Mr. Hollon.

THE WITNESS: Yes, ma'am.

JUDGE CLIFTON: Thank you. Mr. Rower.

CROSS-EXAMINATION

BY MR. ROWER:

Q. Good afternoon, Mr. Hollon.

A. Good afternoon, Mr. Rower.

Q. Do you recall being a witness at the Central Order hearing in 2004?

A. Oh, geez.

Q. Let me --

A. I recall there was a Central Order hearing, and I was a witness. But as to what I recall, no, sir.

Q. Okay. I'm going to ask the question in a different way, I apologize. You've been asked a lot about what you recall about what you said in the past. Would you disagree that during the period 1999 to 2004, there was great change in the -- in the dairy industry, and you might even say that the 15 years prior to that -- you saw more change, rather, in 1999 to 2004 than in the previous 15 years?

A. Yes, sir, that would be certainly true.

Q. Okay. Has there been any more change since 2004? Has that change been accelerating, if it has -- if there has been?

A. Three things came to mind. One would certainly be Federal Order reform, that changed many things, and the regulatory marketing environment, and that hasn't changed to the extent that there have been individual hearings that have dealt with pieces of that. So that element probably has not changed as much.

The second thing that comes to mind would be maybe the consolidation in the cooperative, processor and retailer environment, and I would -- I would say that those consolidations have probably not changed quite as much. There's perhaps not been quite as much consolidation in those three arenas. And perhaps retailer has been as much as any.

In terms of the average size of producer, though, that certainly has grown steadily larger, and I think perhaps the percentage of the population of dairy farms that are bigger herds, you know, bigger percentage of the milk supply, that's probably accelerated at a faster rate. So those are the things that come to mind quickly.

Q. On the producer side you're talking about, for example, what Dr. Cryan noted in his statement, that 595 dairy farms represented approximately 25 percent of the milk value?

A. Yes, sir.

Q. Okay. Are you familiar with the NASS data from where he drew that -- that information?
A. I am.
Q. Okay. Would you agree that it's accurate that about 17,000 dairy farms produce about 82 percent of the milk in the United States?
A. I would have to go back and look at that table, but I have no reason to think that's not, you know, a general description -- give me one second.
Q. No problem.
A. Yes. I would be -- inside DFA, for example, that demographic of number of farms and farm size is not dissimilar to that.
Q. Okay. So that would be reasonable?
A. Yes, sir.
Q. Okay. Would you -- in your opinion as an expert, would you say that that represents something of a revolution in the dairy industry?
A. That's certainly a difference in -- you know, that was one of the, I guess, four areas that I keyed out --
Q. Right.
A. -- on my own as differences in the last 15 years.
Q. Okay. In your opinion, does that portend

even more change for processors for the producing community, and even for the Federal Milk Order Program?

A. Yes, that would be true. I think one of the things that I attempted to point out was that there are more and more of the large scale farms, and that has the opportunity to have more and more producer-handlers.

I think Mr. Wilcox's testimony that the -- from a cost standpoint, it's much easier to add a plant to a big farm than to add a big farm to a plant, I think abets that thought or aides that thought, and that would -- that will continue to cause opportunities for marketing and issues in the regulatory system, and that's part of the reason why we brought our proposal.

MR. ROWER: Okay. Thank you very much. And I want to thank you for your endurance today. Appreciate it.

THE WITNESS: Yes, sir, thank you.

JUDGE CLIFTON: Is there any other cross-examination before I invite redirect? There is none. I would invite redirect at this time. Mr. Beshore.

MR. BESHORE: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. BESHORE:

Q. Very quickly, just a couple of bullet points, Mr. Hollon. You mentioned two numbers in your testimony with respect to DFA composition, a 17,000 number and a 10,000 number?

A. Yes, sir.

Q. Okay. Just so there's no question, can you clarify, you know, the difference between those numbers? And 104 is 10,500 farms, I believe?

A. The 10,000 number is a farm, you know, count, and the larger number is the member count. So an individual farm can have an unlimited number of members on it.

Q. You've used the data in your testimony when you were asked about it for farm size 500 cows and higher. Is there magic to that number? Why did you use that number?

A. Any time that you, you know, begin to try to explain something to someone, they ask you for the reference for your facts. And so someone says, in that particular case, you know, how many large farms could there be? And that's a reference number that is -- you know, I didn't create it myself. It's a published USDA number, and that just happens to be the breakdown of the largest size, is 500 cows and larger.

Q. Was there a breakdown at 250?

A. I think that there was. I don't recall the breakdown, but there were four or five breakdown categories in that data set, and that -- those particular numbers from the ag census.

Q. And is 500 the largest category, 500 and up?

A. Yes.

Q. Okay. One final question. You testified to the milk in the 99 Cent Only Stores in the Dallas area. And you were asked some questions about that. Do you know what label that milk carried?

A. It carries a Sarah Farms label.

Q. Okay. Carries the Sarah Farms label. Now, Sarah Farms is a processing plant in Arizona, is it not, dairy?

A. Well, there is a plant in Arizona called Sarah Farms. But this particular store had milk with the Sarah Farms label, but the plant code was as -- identified 481034.

Q. And that plant is the GH Dairy plant in El Paso, Texas?

A. It is.

Q. Thank you.

A. Unless the IMS code is wrong.
Q. Thank you.

MR. BESHORE: I have no further questions on redirect. If 104 has not been admitted, I would ask that it be admitted?

JUDGE CLIFTON: It's already in.

MR. BESHORE: Thank you.

JUDGE CLIFTON: Thank you. Mr. Hollon, you are a remarkable witness, and I thank you for what you've contributed here today.

THE WITNESS: I was hoping at the end of my testimony I would get one of those compliments. So that's good. I would have been disappointed.

JUDGE CLIFTON: You worked very hard and you answered all the questions. And I appreciate that very much.

THE WITNESS: Thank you.

JUDGE CLIFTON: All right. Mr. Hollon will step down. And what other evidence do we have today? Brian Hill.

MR. HILL: Thank you very much, your Honor. I just want to point to Proposal Number 29, which is proposed by the Agricultural Marketing Service, Dairy Programs, is essentially a confirming change proposal to make any necessary changes to the entire marketing agreement and the Order so that they conform with any amendments that may result from this hearing.

JUDGE CLIFTON: Yes, thank you. I'm so glad that USDA has that in there, because with this many proposals, and this many directions it could go, you may need that one this time around.

All right. Is there any further evidence? Someone moved for adjournment. There is none. I want to remind you that you do not have to wait until July 17 to submit your brief, you may file it early. I also would remind you that if it does not include proposed findings and conclusions, it has not done its job. You should put yourself in the shoes of the Secretary and try to write your brief to be helpful.

All right. I have appreciated so much the hard work, the hard thought presentation and your cooperation with one another and with me. And I think everyone, when we go off record so that the court reporters do not have to record it, want to applaud our court reporters. Thank you again, we go off record at 2:17.

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PROCEEDINGS CONCLUDED AT 2:17 P.M.

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C E R T I F I C A T E

I, Linda S. Mullen, RPR, 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.

____

Linda S. Mullen, RPR, RMR, CRR