

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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In re: ) [AO]  
) Docket No. 15-0071  
) )  
Milk in California )  
) )

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VOLUME XXVI

TRANSCRIPT OF PROCEEDINGS

October 29, 2015

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BEFORE U.S. ADMINISTRATIVE LAW JUDGE  
JILL S. CLIFTON

Thursday, October 29, 2015  
9:00 a.m.

Clovis Veterans Memorial District  
808 4th Street  
Clovis, California 93613

TRANSCRIPT OF PROCEEDINGS  
VOLUME 26

Reported by:  
Myra A. Pish CSR  
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LAND O'LAKES, INC.: BY: JOHN VLAHOS, ESQ.

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16 HILMAR CHEESE JOHN VETNE  
17 COMPANY: JAMES DeJONG

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19 HANDLERS ASSOCIATION: BY: BAO VU, ESQ

20 SELECT MILK PRODUCERS: MILTNER LAW FIRM, INC.  
21 BY: RYAN MILTNER, ESQ.

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1 THURSDAY, OCTOBER 29, 2015 - - MORNING SESSION

2 JUDGE CLIFTON: We're back on record on October 29, 2015.  
3 It is Thursday, it's approximately 9:00 in the morning. We're  
4 in Clovis, California and this is Day 26 of the milk hearing.  
5 My name is Jill Clifton. I'm the United States Administrative  
6 Law Judge whose been assigned to take in the evidence in this  
7 case. I would like now to take the appearances of other  
8 participants, beginning first, please, with other employees of  
9 the United States Department of Agriculture.

10 MR. FRANCIS: Good morning, Will Francis, F-R-A-N-C-I-S,  
11 Dairy Marketing Specialist USDA AMS Dairy Programs.

12 MS. MAY: Good morning, Laurel May, USDA AMS Marketing  
13 Program -- hi, John, how are you? That's like when you are in  
14 church and your kids wave at you while you are up giving a  
15 talk.

16 MS. ELLIOTT: Pamela Elliott, E-L-L-I-O-T-T. I am a  
17 Marketing Specialist with the USDA AMS Dairy Program.

18 MR. CARMAN: Good morning, Clifford Carman, C-A-R-M-A-N,  
19 Assistant to the Deputy Administrator, Dairy Programs  
20 Agriculture Marketing Service.

21 MR. MYKRANTZ: John Mykrantz, Agricultural Economist with  
22 the Pacific Northwest and Arizona Orders, on detail with Dairy  
23 Programs.

24 MR. SCHAEFER: Henry Schaefer, H-E-N-R-Y, S-C-H-A-E-F-E-R,  
25 Agricultural Economist with the Upper Midwest Milk Marketing

1 Order Federal Order 30, on detail to USDA Dairy Programs.

2 MR. HILL: Good morning, I'm Brian Hill, B-R-I-A-N,  
3 H-I-L-L, and I'm an Attorney with the Office of the General  
4 Counsel.

5 MS. CHILUKARI: Good morning, Rupa Chilukari, R-U-P-A.  
6 C-H-I-L-U-K-A-R-I, and I'm an Attorney with the Office of the  
7 General Counsel.

8 MR. BESHORE: Good morning, Marvin Beshore, M-A-R-V-I-N,  
9 B-E-S-H-O-R-E, Attorney for the Proponents of Proposal  
10 Number 1, California Dairies, Dairy Farmers of America, and  
11 Land O'Lakes.

12 MR. VLAHOS: Good morning, John Vlahos, J-O-H-N,  
13 V-L-A-H-O-S, Hanson Bridgett, H-A-N-S-O-N, B-R-I-D-G-E-T-T,  
14 co-counsel for the co-op Proponents of Proposal Number 1.

15 MR. SCHAD: Good morning, my name is Dennis Schad,  
16 S-C-H-A-D. I work for Land O'Lakes.

17 MR. VU: Good morning, I'm Bao Vu, that's B -- as in  
18 Boy -- A-O, last is Vu, V -- as in Victor -- U, and I'm with  
19 the law firm Stoel Rives, S-T-O-E-L, R-I-V-E-S, and we  
20 represent the California Producer Handlers Association and  
21 Ponderosa Dairy. Thank you.

22 MR. ENGLISH: Good morning, my name is Chip English.  
23 C-H-I-P, E-N-G-L-I-S-H, I'm an Attorney with the law firm of  
24 Davis, Wright, Tremaine with my principle office, I think, in  
25 Washington DC. And, yes, a lot people are reminding me of who

1 I'm here on behalf of. I'm here to oppose Proposal Number 1,  
2 and I am here for the Proponents of Proposal Number 2, the  
3 Dairy Institute of California. With me, although, again this  
4 morning conducting production activities, Ashley Vulin,  
5 V-U-L-I-N, also of Davis, Wright, Tremaine, our Portland,  
6 Oregon office, and she'll be here later today.

7 DR. SCHIEK: Good morning, I'm William Schiek, S-C-H-I-E-K,  
8 I'm the Economist with the Dairy Institute of California,  
9 Proponents of Proposal 2.

10 MS. KALDOR: Good morning, Rachel Kaldor, R-A-C-H-E-L,  
11 K-A-L-D-O-R, Executive Director Dairy Institute of California.

12 MR. RAMIREZ: Good morning, Miguel Ramirez, M-I-G-U-E-L,  
13 R-A-M-I-R-E-Z, with Leprino Foods in Denver, Colorado.

14 MR. FITZSIMMONS: Good morning, Lance Fitzsimmons,  
15 F-I-T-Z-S-I-M-M-O-N-S, I'm with Leprino Foods Company as well,  
16 and I'm the Chief Financial Officer.

17 MR. DeJONG: James DeJong, D-e, J-O-N-G, Dairy Policy  
18 Economic Analyst for Hilmar Cheese Company, dairy farmer-owned  
19 manufacturer of cheese, whey, and milk powders.

20 MR. VETNE: I'm John Vetne, one of the representatives for  
21 Hilmar Cheese Company.

22 MR. ZOLIN: Alan Zolin, A-L-A-N, Z-O-L-I-N, Consultant  
23 representing Hilmar Cheese Company.

24 MR. VANDENHEUVEL: Rob Vandenheuvel,  
25 V-A-N-D-E-N-H-E-U-V-E-L, here on behalf of Milk Producers



1 Council.

2 MR. MILTNER: Good morning, Ryan Miltner, M-I-L-T-N-E-R,  
3 with Miltner law firm from New Knoxville, Ohio, Counsel for  
4 Select Milk Producers, Inc.

5 JUDGE CLIFTON: Is there anyone here who has not yet come  
6 to the podium who would like to testify today? All right. Is  
7 there anyone here who has not yet come to the podium who would  
8 like to be introduced, would like us to see you and know who  
9 you represent?

10 MS. KARLIN: Good morning, my name is Marni Karlin,  
11 M-A-R-N-I, K-A-R-L-I-N, I'm observing today and I represent The  
12 Organic Trade Association.

13 JUDGE CLIFTON: Welcome. Thank you. Let's now go to  
14 announcements and preliminary issues. I would like to begin  
15 with those that the USDA has for us.

16 MS. MAY: Hello, Laurel May again. Welcome once again for  
17 another day of hearing sessions. Glad to see all of you here.  
18 We are -- stuck. We invite anybody who would like to testify  
19 to do so, and anybody who would like to ask questions of any of  
20 the witnesses to do so, and you may approach the podium if you  
21 would like to question any of the witnesses.

22 We are broadcasting this session of the hearing via  
23 live audio feed. The link is at [www.ams.usda.gov/live](http://www.ams.usda.gov/live).

24 Our very gracious court reporter is recording official  
25 transcripts of the hearing and has those available for us

1 approximately two weeks after the end of each hearing week.  
2 You can access our transcripts and exhibits at the AMS dairy  
3 website.

4 Some of the exhibits have spare copies in the back if  
5 you would like to look through the boxes and select any of  
6 those that you would like to have. And we have refreshments in  
7 the back that everyone is welcome to enjoy.

8 Yesterday at the end of the day we had Mr. Vetne on the  
9 stand being cross-examined by Mr. Miltner, and I believe that's  
10 where we're going to pick up today.

11 JUDGE CLIFTON: Thank you, Ms. May.

12 Mr. English, would you again give us a rundown of what  
13 you think might happen today?

14 MR. ENGLISH: Chip English. And thank you, your Honor.  
15 And I actually appreciate the way you put that. I think the  
16 might happen is very appropriate.

17 So we are going to start with Mr. Vetne, and then, as I  
18 previewed yesterday, Dr. Schiek intends to return to the stand  
19 for what I call his Part 2 testimony, which is conveniently  
20 Topic 2. And then after Dr. Schiek, Al Zolin will return to  
21 the stand for what is his Part 3 testimony, but also Topic 2.  
22 And then, assuming we have time, Ms. Taylor might be available  
23 to testify also as to Part 2.

24 It is our intention and goal to finish with Topic 2  
25 tomorrow sometime. And we might have some more general

1 witnesses tomorrow, I don't know any names at the moment, we're  
2 looking on things on an hour-by-hour basis. But previewing  
3 again, I think we move to Topic 6, having essentially already  
4 covered Topics 3, 4, and 5. We move to Topic 6 mostly next  
5 Monday.

6           And for those who have asked, it is my present  
7 potential expectation that we might perhaps be done with our  
8 case-in-chief, the close of business November 10th. That is my  
9 forecast. I warn you that when you get a weather forecast in  
10 Maine, I remember it is a particular time when there was a  
11 forecast everybody should take -- it was a June day --  
12 everybody should take Friday off because the temperature was  
13 going to be 90 degrees, and the temperature topped out at 56.  
14 So I think my forecast may be just as valid.

15           JUDGE CLIFTON: Mr. English, would you remain at the  
16 podium? Do you have the Topic 2 in front of you there?

17           MR. ENGLISH: Yes, I do.

18           JUDGE CLIFTON: Okay. So would you just read into the --  
19 it's a huge topic.

20           MR. ENGLISH: Well, I guess what I would say, it may be  
21 huge, but a lot of it was uniform provisions, so what we're  
22 really talking about is plant distributing plant.

23           JUDGE CLIFTON: Talk to your microphone rather than me.

24           MR. ENGLISH: Okay. What we're really talking about, your  
25 Honor, is plant, distributing plant, supply plant, pool plant,

1 producer, producer milk, because those are the real issues  
2 we're talking about with pooling. So at this point, quota  
3 we're putting a little later. We have defined it in the  
4 definitions, but how it works out really works out to be in  
5 Topic 8 how it gets dealt with on a pricing mechanism works out  
6 in Topic 8. The remainder of the things, marketing area, route  
7 disposition, actually, I should have said handler is also a  
8 9(d) issue, that's going to come later. Producer-handler,  
9 well, I guess producer-handler is also coming later. But fluid  
10 milk product, fluid cream product, cooperative association,  
11 commercial food processing establishment. Mr. Zolin, in his  
12 Part 2 testimony, already dealt with those issues. So when I  
13 say Topic 2, I am really focusing on the pooling,  
14 P-O-O-L-I-N-G, issues.

15 JUDGE CLIFTON: That's very helpful. Thank you.

16 MR. ENGLISH: Thank you. Just remember the Maine weather  
17 forecast.

18 JUDGE CLIFTON: Yes, indeed. All right. Does anyone else  
19 have anything preliminary to our resuming the testimony of  
20 Mr. Vetne?

21 I have two things. Tomorrow is casual Friday,  
22 especially make sure your shoes are comfortable and exactly  
23 what you want to wear.

24 The docket number by which the Hearing Clerk knows this  
25 case is [AO] in brackets, docket number 15-0071.

1           Mr. Vetne, you may come back to the witness stand. And  
2 Mr. Miltner, you may come to the podium.

3                                   CONTINUED CROSS-EXAMINATION

4 BY MR. MILTNER:

5           Q. Good morning, this is Ryan Miltner, Counsel for  
6 Select Milk.

7           Mr. Vetne, if we haven't already, I wanted to get  
8 esoteric with you.

9           A. Yes, we have already.

10          Q. Was it, I forget earlier in the hearing, did you  
11 categorize what we're doing here as a quasi-judicial  
12 proceeding?

13          A. Yes, I did. That was in argument on the first Friday  
14 of the first week we were here.

15          Q. Okay.

16          A. There's only one Friday in that week, but it was the  
17 first Friday we were here.

18          Q. Well, what did you mean by, when you said  
19 quasi-judicial?

20          A. That was simply a reference to the kind of proceeding  
21 that is described in Section 556 of the Administrative  
22 Procedure Act. It's a formal hearing, witnesses sworn,  
23 presided by a presiding officer, Administrative Law Judge, in a  
24 decision based on substantial record evidence.

25          Q. And unlike other administrative proceedings where you

1 have an Administrative Law Judge, and record testimony, and  
2 findings in a report or a decision, what will come out of this  
3 hearing is potentially Federal regulation. So would you agree  
4 with me that this is also a quasi-legislative proceeding?

5 A. Also, yes.

6 Q. Is my voice coming through on the microphone okay?

7 JUDGE CLIFTON: It is. That's the first time I have heard  
8 it described as that. So I'll need a little explanation.

9 MR. VETNE: Your Honor, in Administrative Law, courts  
10 frequently liken rule making to legislation, the process of  
11 creating a law by state and federal legislators after  
12 fact-finding, has some similarities to the process of creating  
13 rules by notice and comment, or in this case, formal hearing.  
14 In the end, a rule is a law, has the force and effect of law.  
15 It is the implementation usually of -- of a statutory law in  
16 which the details, the nitty-gritty, is not defined. Authority  
17 is delegated to an agency to come up with the details, so  
18 quasi-legislative, and in this case, also quasi-judicial.

19 BY MR. MILTNER:

20 Q. And obviously, the Department of Agricultural part of  
21 the Executive Branch, there's somewhat of an executive function  
22 too, since this is a proceeding which carries out Congressional  
23 intent, correct?

24 A. This proceeding does not, in my view, have an Executive  
25 function. That will come after the signature is on the final

1 rule and enforcement and implementation of the final rule takes  
2 place.

3 Q. Okay. I will agree with that answer. We talked a lot,  
4 we talked quite a bit yesterday about policies and fact  
5 finding. Would you agree that when a decision is made with  
6 respect to amendment or implementation of a Marketing Order,  
7 that the resulting decision will include both statements of  
8 policy and findings of fact?

9 A. Yes. Although --

10 Q. Please continue.

11 A. -- decisions do not always include, unfortunately, all  
12 of the statements of policy that I would like to see so that I  
13 can apply that policy to the future. So with that caveat, yes,  
14 it will include statements of policy, but sometimes you have to  
15 read way between the lines to find out what that policy is.

16 Q. And it, in your statement you refer to some Federal  
17 Milk Marketing Order hearings, where I think you have described  
18 two different decisions on a similar topic where the policy, as  
19 you interpret it, remained the same, yet the decisions were  
20 different because of different findings of fact. Have I  
21 summarized that correctly?

22 A. We're talking, your question refers to the two  
23 proceedings, the Texas proceeding on producer-handlers, the  
24 Pure Milk case as Mr. English called it, in which the Secretary  
25 said facts aren't sufficient, here's our policy. And then I

1 refer generically to subsequent proceedings which many of us  
2 are familiar, in which the Secretary determined that there were  
3 sufficient facts to implement a rule. It there was no  
4 articulation of a different policy. So I surmise on its face,  
5 that the policy had not changed. I worry that the policy had  
6 changed and I hadn't been told and the world hadn't been told,  
7 as we should have been.

8 Q. Of course, as long as the Secretary stays within the  
9 bounds laid out in the AMAA or other governing statute, would  
10 you agree that the Secretary is free to change policy as  
11 circumstances evolve?

12 A. Absolutely. As you put it, as long as it stays within  
13 the bounds of the AMAA. However, in Administrative Procedure  
14 Law, what courts like to look for is, if you are going to  
15 change your policy, tell us what your new policy is and tell  
16 the world so that we can judge it under to new policy, and  
17 participants can marshal their resources and evidence in  
18 response to the new policy. So with that caveat, yes.

19 Q. In fact, I think you would agree that for everybody in  
20 the regulated community, if the -- if the policy is changing,  
21 clear articulation of that in a decision, along with a full  
22 recitation of applicable facts, is not only preferable, but  
23 perhaps the only way that decision becomes useful precedent in  
24 the future.

25 A. I would agree with that. What you are saying is



1 Administrative Procedure at its highest quantitative and  
2 qualitative level, yeah, it ought to contain both, full  
3 description of both.

4 Q. I don't think that I have any other questions. But,  
5 your Honor, if you would indulge me for just a moment.

6 Mr. Vetne no longer practices law, he's retired, and  
7 every time I have talked to him in the past three years I have  
8 asked him how his semi-retirement is going. And the bar here  
9 is pretty collegial, and we have mentioned Mr. Yale a couple  
10 times. But I don't know if Mr. Vetne's going to be at another  
11 Federal Order hearing, and he's said a couple nice words about  
12 me before. I would like to just take a moment to thank  
13 Mr. Vetne for all he's taught me over the years and thank him  
14 for his answers to these esoteric questions.

15 A. Thank you, Ryan.

16 JUDGE CLIFTON: Who next has questions for Mr. Vetne?  
17 Mr. Vlahos?

18 CROSS-EXAMINATION

19 BY MR. VLAHOS:

20 Q. Good morning, Mr. Vetne.

21 A. You can call me John and I'll call you John.

22 Q. I'll call you John, if that's okay. You know, I was  
23 going to say that when off the record yesterday we celebrated  
24 Mr. Hill's birthday, that we were in great harmony, you and I,  
25 you singing the baritone melody and I the tenor.

1       A. It was perfect harmony, John, and I hope the end of  
2 this process will provide harmony.

3       Q. I think personal harmony, but we may differ somewhat on  
4 the subject matter. Mr. Miltner has asked a lot of the  
5 questions that I have. I only have a couple more questions,  
6 and I'm going to yield to Mr. Beshore, who has some clarifying  
7 questions.

8               A lot of the material in Mr. Vetne's testimony, in our  
9 view, is in the nature of a brief, and so we will be addressing  
10 a lot of those points in the briefing period of these  
11 proceedings, so I want to let you know that we will be doing  
12 that.

13              Mr. Vetne, the only question I'm going to ask you about  
14 is this distinction between quasi-judicial and  
15 quasi-legislative. Would you agree with me that under  
16 traditional concepts of Administrative Law, a quasi-judicial  
17 proceeding is generally one in which the rights, duties, or  
18 obligations of an individual, could be a company, are  
19 adjudicated, whereas quasi-legislative are proceedings where a  
20 rule of general application to a wide body of persons who may  
21 not even be present are adjudicated?

22       A. As a general statement, yes.

23       Q. Okay. So in that sense, what we are doing here is  
24 adopting a rule that is of general application to a wide body  
25 of persons in industry, and in that sense, it is

1 quasi-legislative.

2 A. Yes.

3 Q. Okay. Really, that's all the questions I have, and I  
4 yield to Mr. Beshore.

5 JUDGE CLIFTON: Now that sounded like Congress. Step right  
6 up, the Honorable gentleman, Mr. Beshore.

7 MR. VETNE: The gentleman from California yields to the  
8 gentleman from Pennsylvania.

9 MR. BESHORE: So that makes you the, what, the right  
10 Honorable gentleman from Maine.

11 MR. VETNE: One of the two, actually. Really bizarre out  
12 here in Fresno.

13 CROSS-EXAMINATION

14 BY MR. BESHORE:

15 Q. So I need just a couple of questions to know what I  
16 need to brief here, John.

17 JUDGE CLIFTON: And go ahead and say who you are.

18 MR. BESHORE: Marvin Beshore.

19 BY MR. BESHORE:

20 Q. So on page 6, you, in about the middle of the page, you  
21 say that "the proposals appear to create several barriers to  
22 the marketing of milk and dairy products' intention with the  
23 limits of 608c(5)(G)." So just tell me what aspects of the  
24 proposal, Proposal 1, as you would contend, creates tension  
25 with the limits of c(5)(G) so I can address them? And all I

1 want to just bing, bing, bing.

2 A. I will. I will.

3 Q. Go.

4 A. And let me start with the caveat, as I always do, the  
5 statute is for the Secretary to interpret within bounds, and  
6 the rules that result are for the Secretary to interpret within  
7 bounds.

8 Q. You have tried to give him some help, though?

9 A. But I'll try to give you some help.

10 Q. Okay.

11 A. All right. The price of milk for cheese currently in  
12 the country is set -- is set, the market sets a price in some  
13 places undergirded by regulation, which is higher in the  
14 Midwest and the east than it is at many western locations. A  
15 proposal is made to apply the same price at a western location  
16 where the market price is lower, as it is in the Midwest. Sort  
17 of like regulation which requires, ultimately requires,  
18 consumers of Florida tomatoes in Florida to pay the same that  
19 Florida tomato consumers pay in New England, or California,  
20 avocados in California. Consumers to pay the same price as we  
21 do for avocados in Boston.

22 The -- in international trade, where countries complain  
23 about trade barriers, a common kind of trade barrier is to seek  
24 to require the marketers of imported products to price their  
25 product so that it is as expensive as the local product.

1 Q. Okay. So I'm just looking for the provision that you,  
2 and I take it it is national, the Class III price?

3 A. The Class III price. By placing -- by creating a  
4 Class III price that's the same in California as it is in the  
5 Midwest, there is a barrier created to the marketing of cheese  
6 to the east, you know, and the barrier would be that you would  
7 have the same price so that the Order in which there would be  
8 barrier would be all of the eastern markets. They would  
9 essentially export their higher price to California, creating a  
10 barrier in every market to the east of the California.

11 Q. Okay. You are welcome to explain why in redirect, I'm  
12 just looking for the provisions.

13 A. The provisions.

14 Q. The provisions. Okay.

15 A. Okay. Sorry.

16 Q. Okay. That's one, the Class III price is one. Are  
17 there any others?

18 A. Okay. Well, I voluntarily went too far, I'm sorry I  
19 revealed all of that to you.

20 Another one would be the treatment of, pricing  
21 treatment of producer milk from out-of-state, treating it less  
22 favorably than in-state producers have the opportunity to have  
23 their milk be priced, you know, that would be milk from Reno,  
24 would be milk from Southern Nevada, milk from Arizona.

25 Q. Okay.

1 A. Number three would be, incorporating in the Federal  
2 FMMO, a fortification allowance that would be an advantage for  
3 California bottlers over any plant outside of California that  
4 would like to market milk in California for which a  
5 fortification allowance would not be provided. So those are  
6 three that come immediately to mind in response to your  
7 question.

8 Q. Okay. Were there any others that you had in mind in  
9 your testimony on page 6?

10 A. Those are the three I can remember right now. I may  
11 have had others in mind, but the three big ones are  
12 out-of-state producer milk, relatively minor --

13 Q. Class III price?

14 A. -- packaged milk issue. And well, not only cheese, but  
15 any manufactured product where the price level from someplace  
16 else is attempted to be exported to California.

17 Q. Okay.

18 JUDGE CLIFTON: If I might inquire. In the middle of  
19 Page 6 where you address this, Mr. Vetne, you said particularly  
20 for Class III and IV uses of milk. And what part of Class IV  
21 were you thinking about?

22 MR. VETNE: That sentence, yeah, that sentence relates to  
23 two things. It relates to the Section 608c(18) pricing  
24 standard, and then concludes with a reference to the 608c(5)(G)  
25 trade barrier provision. So Class III and IV, as I just said,

1 would be butter, powder, and cheese. For purposes of trade  
2 barrier, it would be the attempt to export a higher price  
3 elsewhere and import that higher price to California.

4 JUDGE CLIFTON: Thank you.

5 BY MR. BESHORE:

6 Q. Okay. Second question. Or do I understand correctly  
7 your testimony that you believe that in order to promulgate or  
8 amend an order, the Secretary must, or the record must  
9 establish practices which require the amendatory or  
10 promulgation action, as opposed to conditions?

11 A. I don't -- I don't see a difference. If conditions  
12 means behavior, it means transactions, means, you know, where's  
13 the beef? The beef has to be something more than some abstract  
14 observation of two different numbers. Those two different  
15 numbers have to produce something.

16 Q. Okay. Must be practices or behavior, not conditions?

17 A. Not two numbers. I think conditions includes practices  
18 and behavior. But it is more than just the difference in two  
19 numbers.

20 Q. Well, it could include circumstances that are, that  
21 have that, are likely to lead to practices or behavior,  
22 correct?

23 A. I would agree with that. I think if business, of  
24 supply and demand, we have seen people react to opportunities,  
25 and sometimes there is an opportunity created that's so

1 obvious, you can see it today, it is going to happen tomorrow,  
2 let's do something tomorrow.

3 Q. And that's good enough?

4 A. That could be good enough depending on how obvious it  
5 is and how extreme it is, yes.

6 Q. Okay. One final question. You referenced the, you  
7 reference some materials that were supportive or constituent in  
8 the Reform Decision relating to the Basic Formula Pricing  
9 Committees' work, or the Reform adoption of a new pricing  
10 system to replace the BFP. I just want to know for sure what  
11 all materials you reference, because I don't know if we caught  
12 that.

13 A. Okay. I read the recommended Reform Decision --

14 Q. Okay.

15 A. -- and incorporated that. I read the Final Reform  
16 Decision and incorporated that.

17 Q. And what beyond those?

18 A. And I read the Regulatory Impact Statement which  
19 contains a bit better explanation of the deliberative process,  
20 and those are the three.

21 Q. Okay. Is the Regulatory Impact Statement published in  
22 the Federal Register with the recommended?

23 A. I don't know if it was published at the same time, but  
24 it's currently available online, on the FMMO Reform page in the  
25 Dairy Programs archives.



1 Q. Okay. And so those are the three documents that made  
2 up your --

3 A. Yes.

4 Q. Very good. Thanks, John.

5 A. You're welcome.

6 JUDGE CLIFTON: Who next has questions for Mr. Vetne?  
7 Mr. Francis, if you will have questions, shall I invite  
8 redirect first and then you can determine whether you have  
9 questions? Mr. English.

10 REDIRECT EXAMINATION

11 BY MR. ENGLISH:

12 Q. Good morning, Mr. Vetne. Chip English.

13 A. Good morning.

14 Q. If you have Exhibit 112 in front of you --

15 A. I do.

16 Q. -- I would like to refer for a moment to the very last  
17 page which was the May 2006 spatial model flows.

18 A. Right, as reported in 2011. Yes.

19 Q. As reported in 2011, but the data is from 2006,  
20 correct?

21 A. From one month of 2006. And I should note also, for  
22 those making the comparison that the 1993 data was for a full  
23 year, so the 2006 is from one month.

24 Q. Nonetheless, the observations you have made from '93 to  
25 2006, that 2006 chart is based on pricing regulations before

1 the difficulties with respect to the whey factor have come to  
2 the floor, correct?

3 A. The date is prior to the distress of the whey factor in  
4 2007. However, I don't think the Dairy Sector Simulator  
5 incorporates distress. It incorporates production, demand and  
6 flow.

7 Q. I understand that. But to the extent there's been  
8 testimony in this hearing of how California cheese makers have  
9 allegedly had some kind of economic advantage --

10 A. Yes.

11 Q. -- this map was generated on data prior to the  
12 so-called, what I may now call the Federal Whey Premium coming  
13 into play.

14 A. Yes.

15 Q. And I think at one point yesterday you talked about the  
16 implications of regulatory mistake, that is to say in setting  
17 minimum prices. The Department obviously will do the best job  
18 it can at getting those formulas correct, but there's always  
19 some risk of regulatory error, correct?

20 A. There is. There was always that risk, yes.

21 Q. And with respect to Federal Order's minimum pricing, I  
22 believe, and I just want to clarify, that your view is that  
23 given that risk, that when we're talking about minimum pricing,  
24 it is better, and the Department has usually erred on the side  
25 of the mistake being on the too low side rather than the too

1 high side.

2 A. I think you can say that but I would like to elaborate  
3 a little bit.

4 Q. Sure.

5 A. The Nourse Committee Report in 1962 talked about  
6 minimum pricing and the role of marketplace premiums, the  
7 function of premiums. The Nourse Committee was written at a  
8 time when USDA tried to set minimum prices as close to market  
9 prices as they could, to extract every dollar out of the system  
10 to pay producers that was available through regulation and  
11 really not allowed much premium. In fact, the Nourse Committee  
12 said, if there are substantial premiums in the marketplace, the  
13 Secretary ought to consider whether the marketing orders are  
14 not functioning properly and ought to be terminated. That  
15 opinion, that policy, that conclusion, was not carried forward  
16 in USDA's application and amendment process.

17 If you look at the Exhibit 112, Attachment A, the  
18 Federal Milk Order program, towards the end talks about the  
19 role of premiums as a method by which the marketplace can  
20 quickly adjust to changing circumstance without regulation and  
21 the carry forward through the Federal Milk Order reform. The  
22 Department talked very favorably about the need for allowing  
23 premiums to work so the marketplace can adjust without  
24 distortion. So that -- that policy and that economic thought  
25 has evolved to a current place where I believe it is -- my

1 belief is that the Department does now, and did at Federal  
2 Order Reform, believe that prices ought to be set at a level so  
3 when the marketplace has to adjust itself, that the Federal  
4 Order does not stand as an obstacle to that adjustment,  
5 therefore allowing premiums to do the adjustment. Does that  
6 answer your question?

7 Q. Yes, it does.

8 A. Thank you.

9 Q. Just a couple questions on what Mr. Miltner and  
10 Mr. Vlahos discussed with you with respect to the nature of  
11 this proceeding.

12 While it's true that there will be general application,  
13 the general application also specifically regulates specific  
14 entities, correct?

15 A. It regulates every entity subject to the rule. So --

16 Q. And the quasi-judicial part of this is unlike the  
17 legislature, we have witnesses on the stand, we have an  
18 Administrative Law Judge, Judge Clifton, determining what can  
19 come in and how it comes in, and there really are findings of  
20 fact, which I fail to see always made in legislative settings.

21 A. The role of sworn testimony, and substantial record  
22 evidence, and a decision based on that record evidence, and  
23 articulated in the decision is what makes this quasi-judicial.

24 Q. Thank you.

25 A. The rest of the process, rule of general applicability

1 is quasi-legislative. The factual findings and demands of the  
2 Department in quasi-judicial are greater than those in the  
3 quasi-legislative.

4 Q. And Mr. Beshore characterized your statement as  
5 basically briefing material. Would you have any comment about  
6 that?

7 A. Yes. You're welcome. And it is very similar in the  
8 structure of this hearing, to the materials that came from the  
9 proponents, which were largely extractions of statements from  
10 prior hearings, prior decisions, all of which is in the form of  
11 a brief, but I think it's good to focus, and this hearing  
12 allows an opportunity for focus. And that was my intent, to  
13 provide a focus for context of the facts.

14 We have commented off the record that if this, if this  
15 hearing were conducted in a court, it would take a week.  
16 Because in trials, all you focus on is facts. You make your  
17 argument at the end of the case. Here we do both. Thank you.

18 Q. One final area to discuss. Mr. Beshore asked you to  
19 list those sections that you thought could be viewed as trade  
20 barriers. And I'm going to go in a slightly different order.

21 A. Yes.

22 Q. And I'm going to start with the fortification  
23 allowance.

24 A. Yes.

25 Q. And first confirm with you that that is, you know,

1 your, Mr. Vetne's position, and not the position of the  
2 Dairy Institute of California.

3 A. It is not a position. The way I characterize it,  
4 here's some things that may cause some tension the Department  
5 will have to deal with. And if it is considered to be  
6 intention with (5)(G), there's an easy fix; simply amend the  
7 other orders to provide the level playing field. It is not a  
8 difficult proposition.

9 Q. And you said yourself that it is a relatively minor  
10 issue?

11 A. Yes.

12 Q. And then, I'm going to go back to the first one, which  
13 is the Class III issue. Was there anything within that  
14 discussion when Mr. Beshore said, "Well, I just wanted the  
15 list," that you didn't get to say that you wanted to say?

16 A. No, I think I expanded.

17 Q. Fine.

18 A. I volunteered a lot more than he wanted, but I think I  
19 said my piece.

20 Q. So then I want to get to the treatment of producer milk  
21 from out-of-state. And I want to see if you can expand a  
22 little bit, if you are prepared to now, if not --

23 A. Yeah, I would be fine.

24 Q. -- we can do it separately. But would you expand on  
25 what you mean by that issue?

1       A. (5)(G) has, the way I read it, has two trade barrier  
2 standards. A really -- a really high bar for products of milk,  
3 that is, in no manner limit. That's a pretty high bar. So --  
4 so like Commerce Clause, any discrimination. Doesn't matter  
5 the quantity, you know, to quantify any discrimination  
6 whatsoever is prohibited by the Commerce Clause. But as to  
7 milk it says, don't prohibit. And the Lehigh Supreme Court  
8 case talks about that. You know, you don't need a word, you  
9 can't bring any milk from out-of-state if there is a practical  
10 impact of prohibiting. So this is a judgment call.

11               But for (5)(G) purposes only, not for purposes of other  
12 rational decision making, uniform pricing, for example.  
13 Proposal 1 would make a second, or I say third class citizen of  
14 any producer from out-of-state who wants to market into  
15 California if there's a proposed Federal Order. It would  
16 provide the worst possible price available to that producer and  
17 treat in-state producers better in many ways. That would be  
18 intention I think, with 8c(5)(G).

19       Q. Would you also, beyond the producer side, and looking  
20 at the products side, if a plant physically located outside of  
21 California ends up being fully regulated on California, and  
22 today it is paying its producers a Federal Order blend price  
23 based upon an existing Federal Order, and after the  
24 implementation of this, those producers would receive that  
25 lower price as you describe it, that third class price, would

1 that have an impact on that operation and its ability to sell  
2 products into California?

3 A. Yeah, that would have two. Good point. That would  
4 have two impacts. It would have an impact on the first bar of  
5 8c(5)(G) that is applicable to raw milk, and it would tend, in  
6 some manner, to limit the marketing of milk from that plant  
7 located outside the market into California. I could follow  
8 that reasoning to the high bar standard in 8c(5)(G).

9 Q. Thank you, Mr. Vetne. That's all I have.

10 A. Thank you.

11 JUDGE CLIFTON: Does anyone else have questions before I  
12 see if Mr. Francis has questions? No one. Mr. Francis, do you  
13 have any questions of Mr. Vetne?

14 MR. FRANCIS: Mr. Hill.

15 JUDGE CLIFTON: Mr. Hill.

16 CROSS-EXAMINATION

17 BY MR. HILL:

18 Q. Brian Hill.

19 Okay. Can you please look at your first page of your  
20 testimony? I just want a quick clarification here. In the  
21 first sentence --

22 A. Yes.

23 Q. Thank you -- under orderly and disorderly marketing of  
24 milk?

25 A. Yes.



1 Q. You have stated "the AMAA statement of Congressional  
2 policy," and you cited 7 U.S.C. Section 602(3).

3 A. Yes.

4 Q. I believe it is 602(4), and I just want to make sure  
5 that if it's -- it's right on the record if someone ends up  
6 looking for it and --

7 A. Oh, thank you. Mr. English is bringing up the book.  
8 What was I actually quoting?

9 Q. Yes.

10 A. Yes. The answer is -- the answer from United States  
11 Code Annotated is the, in answer to your question is, yes, I  
12 was quoting Section 602(4).

13 Q. Okay. Just wanted to make sure for those listening in  
14 and they want to look for it.

15 A. Yes.

16 Q. All right. Thank you.

17 JUDGE CLIFTON: Mr. Vetne, would you like Ms. Elliott to  
18 make a change on page one of your testimony in Exhibit 111?

19 MR. VETNE: If it is possible for her to do so, I would  
20 very much like to have a document in the public domain that is  
21 accurate.

22 JUDGE CLIFTON: All right. Then, Mr. Vetne, I'm going to  
23 read this to Ms. Elliott and you monitor me to make sure this  
24 is what you want.

25 Ms. Elliott, in Exhibit 111, on page 1, last paragraph,

1 first line, you will just strike the (3) that is in parentheses  
2 and instead have a (4).

3 MR. VETNE: Also in parentheses.

4 JUDGE CLIFTON: Also in parentheses.

5 MS. ELLIOTT: Okay.

6 JUDGE CLIFTON: And Mr. Vetne, that's acceptable?

7 MR. VETNE: Absolutely.

8 JUDGE CLIFTON: All right. And I don't believe it appears  
9 elsewhere in your statement. Do you think we should look,  
10 Mr. Vetne?

11 MR. VETNE: It does not.

12 JUDGE CLIFTON: All right. Good. All right. Thank you,  
13 Mr. Hill. Mr. Vandenheuvel.

14 CROSS-EXAMINATION

15 BY MR. VANDENHEUVEL:

16 Q. A very small clarification. I actually went to look up  
17 the 2006 graphic in your exhibit, and on page 7 of your  
18 testimony, the link has one letter issue that I had to change.

19 A. That is so important, because I want people to be able  
20 to hyperlink.

21 Q. It is dairymarkets.org and there's a T instead of an R,  
22 it says "matket" so I think in looking it up, any reasonable  
23 person would put dairy markets, but we can correct that link on  
24 the bottom of page 7 to say "dairy markets" and that will get  
25 folks to the correct presentation.

1 JUDGE CLIFTON: Thank you so much. Ms. Elliott, do you see  
2 on the last line of the footnote on page 7?

3 MS. ELLIOTT: I do.

4 JUDGE CLIFTON: And you see the M-A-T-K-E-T-S?

5 MS. ELLIOTT: Yes.

6 JUDGE CLIFTON: Will you strike through that and write  
7 below it, M-A-R-K-E-T-S?

8 MS. ELLIOTT: I will.

9 MR. VETNE: That is so important. I will go back and  
10 change the original. I have sent copies to some people so they  
11 can have a copy and hyperlink, so this obviously won't work.

12 JUDGE CLIFTON: Thank you, Mr. Vandenheuvel.

13 MR. VETNE: I'll fix it.

14 JUDGE CLIFTON: Good. Are there other questions for  
15 Mr. Vetne?

16 MR. VETNE: Apparently not.

17 JUDGE CLIFTON: Apparently not. Thank you, Mr. Vetne, you  
18 may step down.

19 And now that Ms. Vulin is here, and we had a couple  
20 others, Ms. Hancock, I'd just like to ask now, if you came in  
21 after we had people identify themselves, please come forward  
22 and identify yourself now.

23 MS. VULIN: Ashley Vulin, A-S-H-L-E-Y, V -- as in Victor --  
24 U-L-I-N, an Attorney with the law firm of Davis, Wright,  
25 Tremaine, representing the Dairy Institute of California.

1 Thank you.

2 MR. HOLLON: Elvin, E-L-V-I-N, Hollon, H-O-L-L-O-N,  
3 employee Dairy Farmers of America, and associated with  
4 Proposal Number 1.

5 MS. TAYLOR: Sue Taylor with the Leprino Foods,  
6 L-E-P-R-I-N-O.

7 JUDGE CLIFTON: Thank you, all. Mr. English?

8 MR. ENGLISH: We're going to recall Dr. Schiek to the  
9 stand, and I'm going to ask for just a two-minute comfort  
10 break.

11 JUDGE CLIFTON: Sure. Will there be any document to be  
12 distributed?

13 MR. ENGLISH: Yes.

14 JUDGE CLIFTON: Could -- do you want to do that after the  
15 two-minute break or do you want --

16 MR. ENGLISH: I think we can do it during.

17 JUDGE CLIFTON: All right. So please remain seated until  
18 you get your copy of what's being handed out, and we'll call it  
19 a five-minute stretch break and you may then, move around for  
20 about five minutes. We'll go off record now at 9:57.

21 (Whereupon, a break was taken.)

22 JUDGE CLIFTON: We're back on record at 10:04.

23 Ms. Elliott, will this next exhibit be Exhibit 113?

24 MS. ELLIOTT: Yes.

25 JUDGE CLIFTON: I'm marking mine as 113.

1 (Thereafter, Exhibit Number 113, was  
2 marked for identification.)

3 JUDGE CLIFTON: And Dr. Schiek, you may take the witness  
4 stand.

5 Dr. Schiek, you remain sworn. I would like you to  
6 again state and spell your name.

7 DR. SCHIEK: William, W-I-L-L-I-A-M, Schiek, S-C-H-I-E-K.

8 JUDGE CLIFTON: Thank you. Mr. English, you may proceed.

9 DIRECT EXAMINATION

10 BY MR. ENGLISH:

11 Q. Thank you, your Honor. Chip English.

12 Before we begin with Exhibit 113, I believe you, at  
13 your request, would like to make a statement about your earlier  
14 testimony and exhibits?

15 A. Yes.

16 Q. And is that with respect to Exhibit 80?

17 A. It is with respect to Exhibit 80.

18 JUDGE CLIFTON: Lets give us a minute to find it, those of  
19 us who have all ours with us. All right. Exhibit 80, the  
20 figures and tables for the testimony of Dr. William Schiek.

21 MR. ENGLISH: Yes. And I think it is a fairly simple  
22 statement that doesn't necessarily, I mean, obviously people  
23 could do it, but I think if we let Dr. Schiek say what he wants  
24 to say, it may be that people don't need to spend a lot of time  
25 looking at it. But nonetheless, certainly they have right to

1 do.

2 BY MR. ENGLISH:

3 Q. So again, you raised this issue, Dr. Schiek?

4 A. Yes.

5 Q. So would you like people to focus on a particular  
6 figure for a moment, if they have it in front of them?

7 A. Yes. It is Figure 1 on Exhibit 80.

8 Q. Which was your value -- which is a document that says  
9 whey value Class III versus Class 4b, correct?

10 A. Correct.

11 Q. And I asked you maybe an unexpected question about the  
12 source, correct?

13 A. Well, not that unexpected, but, yeah. You asked me  
14 about the source and I said I had prepared it. As I was  
15 getting ready for the hearing, it was in a folder, I was  
16 looking through materials that would be helpful explaining the  
17 whey situation. It was in a folder of materials that I had  
18 prepared and I looked at it and believed that I had prepared  
19 it. I have done similar kinds of tracking of the whey factor,  
20 but I have since discovered that the chart was actually  
21 prepared by Mrs. Annie AcMoody. And I looked at it, I fully  
22 agree with what's in it, and I just wanted to give her the  
23 credit for that chart, not me.

24 Q. We're looking at Figure 1 of Exhibit 80, so the very  
25 first page after the cover sheet entitled, "Whey Value Class

1 III versus Class 4b."

2 A. Correct.

3 JUDGE CLIFTON: Very good. I appreciate it. And I'm sure  
4 Ms. AcMoody appreciates the, what do you call that,  
5 attribution? Is that what you call that? Very good.

6 DR. SCHIEK: Sounds good.

7 JUDGE CLIFTON: Mr. English, your voice does drop off.  
8 When you get to the end of your sentence, it's as if you no  
9 longer care if we hear you.

10 MR. ENGLISH: I apologize, your Honor, I will try to do  
11 better. Maybe I'm moving away from the mic as I get to the end  
12 of a sentence, but I will try to do better.

13 JUDGE CLIFTON: Thank you.

14 MR. ENGLISH: And I know it's not the first time it's been  
15 pointed out at this proceeding.

16 BY MR. ENGLISH:

17 Q. All right. So Dr. Schiek, you are now here to testify  
18 on the plant definition issues, and basically on pooling,  
19 correct?

20 A. Correct.

21 Q. So why don't you then, provide your statement for the  
22 record that is Exhibit 113.

23 A. Okay. Beginning on page 1:

24 Introduction

25 Pool plant definitions, supply plant definitions and

1 shipping requirements, diversion limits and producer milk  
2 definitions such as touch base requirements and repooling  
3 restrictions, are elements essential to a Federal Milk  
4 Marketing Order or (FMMO) for the purpose of assuring that milk  
5 which associates with the pool will be made available for  
6 Class I uses. Under Proposal 2, the proposed language in  
7 Sections 1051.7(a) and (b) define which plants will be pool  
8 distributing plants under the FMMO. Section 1051.7(c) defines  
9 the requirements for pool, for supply plants and the qualifying  
10 shipments they must make. Definitions for producer milk, with  
11 diversion limits and repooling restrictions, are contained in  
12 Section 1051.13.

#### 13 Pooling Standards are Necessary Incentives to Direct Milk to 14 Class I Uses

15           There are two key aspects of the way these provisions  
16 direct milk to Class I uses. First, the higher value of  
17 Class I milk is available to be shared among producers through  
18 the pool because plants with Class I usage above a specified  
19 percentage are included as pool distributing plants. The  
20 availability of these Class 1 revenues creates an economic  
21 incentive to associate dairy farmers' milk with the pool. Once  
22 the milk associates with the pool, the required supply plant  
23 shipping percentages and producer milk definitions,  
24 collectively referred to by me as pooling standards, serve to  
25 direct pool milk to Class I uses. Higher Class I revenues



1 serve as the "carrot" to attract milk to participate in the  
2 pool, while the pooling standards are the "stick" that  
3 establishes the conditions by which handlers can continue to  
4 pool dairy farmers' milk and enjoy the benefits of pooling.  
5 The working of the two forces "carrot" and "stick" is central  
6 to how the Orders ensure that milk supplies will be adequate  
7 for fluid milk purposes and that the milk actually moves to  
8 Class I uses. Class I plants, in exchange for paying higher  
9 regulated prices than plants producing products in other  
10 classes the vast majority of the time, have the benefit of  
11 regulation designed to direct milk to their plants.

12 I am not aware of any other regulatory provisions that  
13 effectively attract milk to the pool and ensure that it be made  
14 available for Class I purposes. In the proposed rule stemming  
15 from a Central Order Milk Pooling hearing, the Secretary found  
16 (71 Fed. Reg. 54152 at 54157 (September 13, 2006)):

17 JUDGE CLIFTON: All right. Let us deal with those inserts  
18 at this time.

19 Ms. Elliott, we're in Exhibit 113, we're on page 2 in  
20 the first full paragraph, the last line. Are you there?

21 MS. ELLIOTT: Yes.

22 JUDGE CLIFTON: All right. So within the parentheses that  
23 show us the Federal Register cite, we are going to insert,  
24 after the word "at" 541 -- excuse me, not after the word at,  
25 before the word "at", 54152.

1 MS. ELLIOTT: Okay.

2 JUDGE CLIFTON: And then we're going to insert, now, you  
3 want this, Dr. Schiek, this full date. You want it before or  
4 after the 2006? Or do you want just the -- just the full date  
5 of September 13, 2006?

6 MR. ENGLISH: Your Honor, we want the full date, which we  
7 paren, September 13, 2006.

8 JUDGE CLIFTON: Okay. So for Ms. Elliott's purpose, does  
9 she merely need to insert before the 2006 that's already there?

10 MR. ENGLISH: Yes, September 13, comma.

11 MS. ELLIOTT: Okay.

12 MR. ENGLISH: And to be clear, what we're providing is the  
13 more typical full cite to the Federal Register, which includes  
14 the date and the insert of the page 54152 is the beginning of  
15 the decision, and then the at reference to 54157 is the  
16 specific page where you can find the quote that he's about to  
17 give.

18 JUDGE CLIFTON: Good. And then I'm going to ask you,  
19 Mr. English, to read the cite fully now as it now shows on the  
20 record copy of 2, just so Ms. Elliott can make sure she agrees,  
21 her copy agrees with what you are about to say.

22 MR. ENGLISH: 71 Fed. Reg. 54152 at 54157, (September 13,  
23 2006.)

24 JUDGE CLIFTON: Thank you both. Then, Dr. Schiek, do you  
25 want to pick up with what you are quoting from that cite?

1       A.    I do.

2               "The pooling standards of all Federal Milk  
3               Marketing Orders, including the Central Order, are  
4               intended to ensure that an adequate supply of milk  
5               is available to meet the Class I needs of the  
6               market and provide the criteria for determining  
7               the producer milk that has demonstrated service in  
8               meeting the Class I needs of the market, and  
9               thereby receive the orders blend price.  The  
10              pooling standards of the Central Order are  
11              represented in the Pool Plant, Producer, and the  
12              Producer Milk provisions of the Order, and are  
13              based on performance, specifying standards that,  
14              if met, qualify a producer, the milk of a  
15              producer, or a plant to share in the benefits  
16              arising from the classified pricing of milk.

17  
18              Pooling standards that are performance-based  
19              provide the only viable method for determining  
20              those producers eligible to share in the  
21              market-wide pool.  It is usually the additional  
22              revenue generated from the higher valued Class I  
23              use of milk that adds additional income to  
24              producers, and it is reasonable to expect that  
25              only those producers who consistently bear the

1 costs of supplying the markets' fluid needs,  
2 should share in the returns arising from the  
3 higher-valued Class I sales. An important  
4 objective of pooling standards is identifying the  
5 milk that serves the fluid milk needs of the  
6 market, a feature, which if ineffective, can  
7 result in pooling milk that is not providing such  
8 service."

9 Relying Solely on Market-Based Class I Premiums to Direct Milk  
10 Burdens Class 1 Plants.

11 There has been some discussion at this hearing in  
12 testimony supporting Proposal 1 that seemed to suggest --

13 JUDGE CLIFTON: Ms. Elliott, we're just adding "TO", do you  
14 see it?

15 MS. ELLIOTT: Yes.

16 JUDGE CLIFTON: Thank you.

17 DR. SCHIEK: That over order Class I premiums were  
18 sufficient mechanisms for directing milk to Class I uses.  
19 While over order premiums might be able to assist in moving  
20 milk to Class I plants, they are not regulatory instruments  
21 that are under control of USDA. The assumption that Class I  
22 plants will always pay the premiums necessary to attract a milk  
23 supply, ignores the fact that they are already paying higher  
24 prices through Class I minimum prices via Class I price  
25 differentials.

1           The combination of the already higher regulated prices  
2 for Class I milk and the need to pay additional over order  
3 premiums because order provisions provide insufficient  
4 incentives to direct milk to Class I plants, could also result  
5 in fluid milk prices to consumers that are higher than needed.  
6 In other words, if effective pooling standards are not in  
7 place, the effective Class I raw product cost would be higher  
8 than it would be under an order that had them. Higher raw  
9 product costs to Class I plants would likely lead to higher  
10 prices to consumers, particularly if all or the majority of  
11 competing Class I handlers in the market are experiencing  
12 increased raw product cost because they must pay additional  
13 premiums, which would likely be the case.

14           If reliance on Class I premium dollars is the primary  
15 means to attract milk to the Class I market, it raises the  
16 question as to the purpose of Class I price differentials in  
17 the market. If we are not going to use the combination of a  
18 higher regulated -- of higher regulated Class I prices and  
19 effective pooling standards to attract and move milk to Class I  
20 uses, then why do we need Class I differentials at all?

21           In his testimony at this hearing, (Hearing Exhibit 70,  
22 page 31) Mr. Dennis Schad stated that the \$1.60 per  
23 hundredweight minimum Class I differential, or base  
24 differential, is built up from three components. The first  
25 component valued at 40 cents per hundredweight is what some

1 refer to as the Grade A differential, which represents the cost  
2 to a producer to maintain his Grade A status. In 2015, I have  
3 to question the viability and relevance of this argument when  
4 just over 1 percent of California milk is Grade B. The second  
5 component in the base differential, according to Mr. Schad's  
6 testimony, is valued at 60 cents per hundredweight and meant to  
7 capture the marketing costs associated with Class I milk,  
8 which, "includes such things as seasonal and daily reserve  
9 balancing of milk supplies, transportation to more distant  
10 processing plants, shrinkage, administrative costs, and  
11 opportunity or give-up charges at manufacturing plants that  
12 service the Class I markets." The third component of the base  
13 differential, also valued at 60 cents per hundredweight, is  
14 described by Mr. Schad as representing a portion of the  
15 competitive premium required to compete with processors of  
16 manufactured milk. Probably should be manufactured milk  
17 products.

18 JUDGE CLIFTON: Yes, I agree. Ms. Elliott, are you on  
19 page 4, just before the four lines up from the last paragraph  
20 beginning?

21 MS. ELLIOTT: Yes.

22 JUDGE CLIFTON: And so after the phrase "manufactured milk"  
23 you will just insert the word "products".

24 MS. ELLIOTT: Okay.

25 JUDGE CLIFTON: Thank you.

1 DR. SCHIEK: Mr. Schad noted further that the value of the  
2 transportation credits under Proposal 1 would support an  
3 additional differential of 60 cents per hundredweight at a  
4 market Class I utilization of 15 percent, or an additional 72  
5 cents per hundredweight, at a market class utilization of 12  
6 and a half percent.

7 JUDGE CLIFTON: You skipped the "1", so start again, just  
8 read that sentence again, if you will.

9 DR. SCHIEK: Mr. Schad noted further that the value of the  
10 transportation credits under Proposal 1 would support an  
11 additional differential of 60 cents per hundredweight at a  
12 market Class I utilization of 15 percent, or an additional 72  
13 cents per hundredweight at a market Class I utilization of 12  
14 and a half percent.

15 Embedded in this discussion of what the appropriate  
16 level of the Class I differential should be is the amount of  
17 money necessary to serve the Class I market and direct milk to  
18 Class I uses. Under order provisions that have ineffective  
19 pooling standards, and that rely on over order premiums to  
20 direct milk to Class I uses, Class I processors have to pay a  
21 second time for items that were supposed to have already been  
22 paid for through the Class I differentials.

23 Dairy Institute's Proposal, Proposal 2, provides for  
24 pool plant definitions, supply plant shipping requirements,  
25 diversion limits, producer touch-base requirements, and

1 repooling restrictions. The specifics of the provisions that  
2 we proposed will be set forth in testimony from other Dairy  
3 Institute witnesses.

4 MR. ENGLISH: So, your Honor, we're going to strike the  
5 slash in has been, because we weren't sure what order this  
6 testimony was coming.

7 JUDGE CLIFTON: Very good. Thank you, Ms. Elliott. She's  
8 already on top of that.

9 DR. SCHIEK: However, we do view these provisions as an  
10 essential part of maintaining the orderly movement of milk for  
11 Class I purposes. By limiting the privilege of pooling to  
12 those that serve the Class I market, the operation of pooling  
13 standards provides a necessary incentive for producers and  
14 handlers to supply the Class I market.

15 Mandatory Pooling Removes Incentives in Regulation that Direct  
16 Milk to Class I Uses.

17 If Class I revenues can be accessed without meeting  
18 specific performance requirements, which would appear to be the  
19 case under the Cooperatives' mandatory pooling requirement  
20 contained in Section 1051.7(c) of Proposal 1, a crucial  
21 incentive to supply the Class I market is missing. There does  
22 not appear to be a compelling reason to supply milk for Class I  
23 uses under Proposal 1 because there is no penalty for failing  
24 to do so. That is, if a handler operating a manufacturing  
25 plant in California is able to pool its milk and have its



1 producers share in the higher Class I revenues in the market  
2 without actually being required to supply the Class I market,  
3 it does not have an incentive to make qualifying shipments.

4           The lure of being able to access Class I revenues  
5 encourages plants to pool and to perform or supply the Class I  
6 market. If a handler retains its ability to access Class I  
7 revenues for its producers, even when it fails to perform, then  
8 it has a viable penalty-free option in not performing, and the  
9 pooling regulations as proposed will be ineffective at  
10 directing adequate milk supplies to Class I uses. This is a  
11 fundamental problem with mandatory or "inclusive" pooling.  
12 Transportation Credits Do Not Substitute for Performance  
13 Requirements.

14           There has been testimony at this hearing that seems to  
15 suggest transportation credits will ensure that the Class I  
16 market will be served. The description of transportation  
17 credits under Proposal 1 appears to make a compensation for  
18 added transportation costs associated with bulk milk shipment  
19 to plants in deficit areas with Class I and Class 2 usage of  
20 greater than 50 percent.

21           My understanding is that these transportation credits  
22 would make producers, at best, indifferent between shipping to  
23 a qualifying plant in a deficit area or shipping to a local  
24 manufacturing plant and in many cases, there would still be a  
25 shortfall in the cost of shipping milk when compared to the

1 cost of a local haul, of the local haul. No doubt there is  
2 some close-in milk where the best alternative is to ship from  
3 the farm to a qualifying deficit plant, but close-in milk,  
4 produced within or near to deficit regions, has been declining  
5 in recent years. Milk will need to move to deficit markets but  
6 Proposal 1's pooling standards do not appear to provide the  
7 necessary incentives for dairy farmers and their cooperatives  
8 to supply the fluid market. A positive incentive to move milk  
9 to Class I uses could be constructed by using transportation  
10 credits to provide money for producers that goes beyond the  
11 actual cost of transporting the milk from surplus to deficit  
12 areas. However, such a strategy would likely lead to  
13 uneconomic milk movements. More milk than is needed would  
14 likely move to deficit markets to take advantage of the  
15 over-generous credits.

16 Mandatory Pooling Interferes with the Ability of the Market to  
17 Clear.

18 If Class III and IV prices are set above market  
19 clearing levels, manufacturers have no incentives to procure  
20 surplus milk. It must then be sent to out-of-state plants,  
21 burdening the transportation system and interfering with normal  
22 orderly marketing of milk for fluid use. Under mandatory  
23 pooling, if Class III and IV prices are above prices at which  
24 California dairy product manufacturing plants can profitably  
25 operate, there is no escape valve that allows for plants to pay

1 less than the regulated price, or under class, even if such  
2 milk would be available for purchase at prices that these  
3 plants could afford. The result of setting regulated milk  
4 prices at levels that are above the plant's ability to pay, is  
5 that some of these plants will exit the industry, plant  
6 capacity in the state will shrink, and there is a possibility  
7 that excess milk will be looking for alternative homes, either  
8 nearby, if they are available, or at more distant, or at a more  
9 distant location if no nearby location is available. Under  
10 such a scenario where milk is chasing plants, uneconomic  
11 movements of milk are likely. Dairy farm incomes could be  
12 depressed because of the loss of homes for their milk and the  
13 marketing losses associated with moving the milk longer  
14 distances.

15 Automatic Pooling on the California Order of a Nevada  
16 Manufacturing Plant is not Justified.

17           Given the low Class I utilization in the California  
18 market, there does not appear to be any policy justification  
19 for automatically granting pool status to a Nevada dairy  
20 product manufacturing plant, as proposed by the cooperatives.  
21 Milk from such plants is not needed as a reserve supply for  
22 California's fluid milk plants because adequate supplies of  
23 milk for Class I use are available within the state. The  
24 association of Nevada producers with the California market was  
25 based on historical institutional relationships and a lack of

1 local alternative outlets for the milk. With the opening of  
2 the new manufacturing plant in Churchill County, some of those  
3 market outlet concerns have now been alleviated. Under  
4 Proposal 2, a Nevada manufacturing plant would not be barred  
5 from associating with the California pool, if it performs by  
6 making qualifying shipments to fluid plants and conforms to the  
7 other pooling standards.

8 Summary.

9 Our view is that pooling standards play a central role  
10 in assuring consumers an adequate supply of wholesome milk for  
11 beverage purposes. The attraction of milk to the pool, and the  
12 need to perform in accordance with the pooling standards, are  
13 important mechanisms for assuring that Class I plants, and  
14 ultimately consumers, get the benefits of milk price regulation  
15 under the orders. Effective pooling standards justify the  
16 higher Class 1 regulated prices under the orders, by making use  
17 of that money to direct milk to fluid plants. Mandatory  
18 pooling, as proposed by the cooperatives, undermines the  
19 efficacy of pooling standards by allowing producers and  
20 handlers the benefits of pooling without imposing the important  
21 performance requirements that help ensure the Class I market is  
22 served.

23 A filing made on behalf of a group of cooperatives,  
24 which included two of the three opponents of Proposal 1, in  
25 relation to a Federal Order hearing on pooling issue in Mideast

1 Order, contained the following statement about pooling  
2 provisions: "These cooperatives wish to further commend the  
3 Department for the straightforward findings and rationale of  
4 this interim decision which makes clear that the pooling  
5 provisions of Federal Milk Orders must be related to  
6 performance for, and in the service of, the Class I market,  
7 which is the central purpose of marketing orders."

8 MR. ENGLISH: We actually added another "the".

9 JUDGE CLIFTON: Before that. Just look at the bottom of  
10 page 8, and you will notice that what is written is, "which is  
11 a central purpose" and what you read is "which is the central  
12 purpose." It changes the meaning. So would you read the quote  
13 again?

14 MR. ENGLISH: And I would note that he added another "the"  
15 in between "in" and "service" so I also want him to read the  
16 quote again.

17 DR. SCHIEK: Okay. Starting at the beginning of the quote:

18 "These cooperatives wish to further commend the  
19 Department for the straightforward findings and rationale of  
20 this interim decision which makes clear that the pooling  
21 provisions of Federal Milk Orders must be related to  
22 performance for, and in service of, the Class I market which is  
23 a central purpose of the marketing orders."

24 I did not attend that hearing, and am not familiar with  
25 all the issues that were considered as a part of that

1 proceeding. Nonetheless, the notion that pooling provisions  
2 must be related to performance for, and in the service of, the  
3 Class I market -- let's strike the "the". "And in service of  
4 the Class I market, is one with which Dairy Institute agrees."

5 JUDGE CLIFTON: Ms. Elliott, on page 9, the last full line,  
6 would you please strike the "the" before the word "service"?

7 MS. ELLIOTT: Okay.

8 BY MR. ENGLISH:

9 Q. As I begin your additional direct, Dr. Schiek, let me  
10 start where you ended. And because there were a couple of  
11 Mideast pooling decisions in the post-Federal Order reform  
12 frame, could you, for the record, and for those who might want  
13 to look, is there a date on that document or does it reference  
14 which docket number?

15 A. Docket number is AO-166-A72, and then DA-05-01.

16 Q. So that would tell us it was a proceeding that was in  
17 2005, I believe, your Honor.

18 JUDGE CLIFTON: Thank you. Thank you both.

19 BY MR. ENGLISH:

20 Q. So I want to go through a little bit of your testimony  
21 and then cover some issues with respect to Order 2 that you  
22 were asked about when you testified under Part 1. And you have  
23 already indicated that there will be other witnesses, at least  
24 Mr. Zolin and Mr. Blaufuss, who will be testifying about the  
25 specifics, correct?

1       A. Yes, this was more introductory testimony on the topic.  
2 There will be other witnesses who will address the specific  
3 provisions that are included in our proposal and the rationale  
4 for those provisions.

5       Q. And as a bit of an introduction to that, is it your  
6 understanding that when Mr. Blaufuss testifies with respect to  
7 7(a), that he will be adopting the same percentage for 7(a)  
8 that the co-ops have in Proposal 1?

9       A. That is my understanding.

10      Q. Which is 25 percent, rather than 15 percent?

11      A. Correct.

12      Q. Okay. On page 2 of your testimony, you, in the, you  
13 reference the quote that the Department has, and the second  
14 paragraph, the Department is saying, "It is usually the  
15 additional revenue generated from the higher class,  
16 higher-valued Class I use of milk that adds additional milk to  
17 producers." That's when you are looking at sort of the total  
18 value to producers before it gets divided up, correct?

19      A. Correct.

20      Q. Okay. Turning to the discussion on page 4. In  
21 essence, what you are saying is, here is how the co-ops divided  
22 up their proposed Class 1 differential, and there are elements  
23 in that, that ought to be viewed as being, dealing with the  
24 question of getting milk to the Class I plants, correct?

25      A. Correct.

1 Q. Okay. And if you calculate the Class I differential  
2 based upon the co-ops own calculation, and then say,  
3 "Congratulations, you're paying that, but you don't actually  
4 get that performance, you are either going to pay twice," or  
5 well, you have paid something for nothing, right?

6 A. Correct.

7 Q. I note that in the second piece, which is the marketing  
8 cost, the co-ops discuss transportation to more distant  
9 processing plants, correct?

10 A. Correct. And I believe that was a quote.

11 Q. Right. And yet, then they calculate, as sort of part  
12 of their justification, the transportation credits down below,  
13 is that also an element of effectively looking at the same  
14 number twice?

15 A. That would be my view.

16 Q. And in 2015, have we heard from any -- well, let me  
17 ask. You were here, or maybe you weren't because you were  
18 preparing testimony, or maybe you hear testimony it -- did you  
19 hear testimony from the Hispanic cheese makers with respect to  
20 their need for Grade A milk?

21 A. I did. I heard the witness from Marquez Brothers talk  
22 about how they needed Grade A milk.

23 Q. Okay. So the idea in 2015 of differentiating Grade A  
24 need, and then designating it to Class I is a bit archaic?

25 A. I believe it is more of historical significance than



1 actual practical significance today.

2 Q. Turning to page 6 -- two different questions. First,  
3 Mr. Beshore asked Mr. Blaufuss yesterday if the system's  
4 working in California today without performance standards, why  
5 can't we do that in a Federal Order? And do you have a  
6 response?

7 A. Well, first, I do believe that the California system  
8 was put together with the understanding that the Class I market  
9 would be served. I think I mentioned that in my earlier  
10 testimony in Exhibit 79, that in order to pass the Gonsalves  
11 Pooling Act, that was a promise made to the Class I side of the  
12 business, that they would get milk. And my view is, if we're  
13 going into a Federal Order, that kind of agreement or  
14 understanding is -- it no longer holds. That we're under a new  
15 regulation, federal regulation, and it ought to reflect the  
16 need for the regulations to provide the incentives for the milk  
17 to move to Class I uses.

18 Q. Now, you were asked some questions by Mr. Beshore when  
19 you appeared the first time about so-called grandfathered  
20 plants in Order 2, correct?

21 A. I was, yes.

22 Q. Okay. And while you are still not completely familiar  
23 with that, you have spent at least a little time looking back  
24 at the history, correct?

25 A. Correct.

1 Q. Okay. And the New York-New Jersey Order was formed in  
2 what year, 1957?

3 A. I believe it was 1957, from the documents.

4 Q. All right. So I'm going to hand out, and I don't  
5 necessarily mean to make it an exhibit, because what  
6 effectively I'm doing, your Honor, is taking a portion of the  
7 Federal Register, and he's going to read it -- he could have  
8 read it into his statement, but we had already produced the  
9 statement and so we're going to do it this way, but I have  
10 copies for people.

11 It is two paragraphs from 22 Fed. Reg. 4194 at 4205,  
12 (June 14, 1957), and it's from Column 3, the Federal Register  
13 publishes in three columns, and just in case people don't use  
14 the search function in the .pdf that Hein provides, H-E-I-N,  
15 that I'm letting people know it is in Column 3.

16 JUDGE CLIFTON: It is rare that I look at 1957 Federal  
17 Register excerpts, so I'm glad to have this chance to look at  
18 it.

19 MR. ENGLISH: Your Honor, I can say that the miracle of  
20 technology is very different from when I started practicing law  
21 and had to go to the Library of Congress to look through the  
22 indices and then go -- actually have to ask, you had to call  
23 for it, it's a different kind of call provision. And get these  
24 and then go to the copy machine and pay whatever you had to pay  
25 for a page. And this is pretty incredible today, when you can

1 just go online and bring the document down and then search the  
2 words. So -- all right. Does everybody have a copy?

3 So this is equivalent to what he did on page 2 from the  
4 2006.

5 BY MR. ENGLISH:

6 Q. So I would like you to go ahead, Dr. Schiek, and read  
7 these two paragraphs into the record.

8 A. Okay. At the top it says 1957, New York-New Jersey  
9 formation.

10 Those plants expressly designated as pool plants,  
11 should include those presently so designated, since they  
12 constitute sources of regular and reserve supply associated  
13 with the present marketing area. And in addition, should  
14 include those plants constituting sources of supply regularly  
15 associated exclusively with new territory being included in the  
16 marketing area or with the combination of that territory, and  
17 the present marketing area. Thus, provision is made herein for  
18 expressly designating plants supplying the market in a  
19 substantial way during the year ending with March 1957.

20 Present provisions of the Order relating to expressly  
21 designated plants, do not impose requirements on such plants  
22 for shipping to or supplying the market with specified  
23 quantities of milk for fluid use and no such provision should  
24 be added at this time. The designation of such plants,  
25 however, should continue to be subject to suspension and

1 cancellation if the milk is not made available to the market  
2 when needed, and the necessary safeguard should be provided to  
3 avoid including plants in the pool which actually are engaged  
4 in handling reserve supplies of milk for other markets.

5 Q. So looking at the last sentence of the first paragraph,  
6 these were plants that actually supplied the market at the time  
7 that this designation of something called regular pool plants  
8 was adopted, correct?

9 A. I was not there, but as I read that sentence, that's  
10 what it means to me.

11 Q. Okay. And the last sentence, even though there were  
12 not adopted what we call, you know, what you call the best kind  
13 of performance standards today, nonetheless there was, USDA  
14 claimed a method of cancellation if those plants did not  
15 continue to make milk available when needed?

16 A. That's what the document says.

17 Q. Yeah. So I'm not going to have you read what was nine  
18 and a half pages of the Code of Federal Regulations that had to  
19 do with how regular pool plants and other plants worked. I'm  
20 going to try to go through it and summarize it with you, if we  
21 can. I note that today, Order 1 has two and a half pages. But  
22 it was nine pages of what constituted these kinds of  
23 operations.

24 So first there were regular pool plants, which is what  
25 these plants are. Correct?

1 A. Correct.

2 Q. And that was in the then Section 24 of Order 1002. I  
3 would note, back in the old days Order 2 had 500 sections, but,  
4 so it was in Section 24 was something called regular pool  
5 plants.

6 Now, when you perused these nine and a half pages,  
7 there's another section, Section 27, for suspension and  
8 cancellation of designation, correct?

9 A. Correct.

10 Q. And a plant that was grandfathered in, so-to-speak, on  
11 this document, what you have just read into the record, could  
12 file an application with the Market Administrator, and if  
13 certain conditions were met, it could give up that status,  
14 correct?

15 A. It could. Yes.

16 Q. Okay. And there were conditions, in fact, one of those  
17 conditions was that if more than 50 percent of the milk was  
18 supplied by a cooperative, you basically had to have a  
19 co-signer.

20 A. Correct.

21 Q. Okay. Now, if you either weren't designated as a  
22 regular pool plant when regular pool plants were adopted in  
23 1957, you could, however, achieve pool status under other  
24 mechanisms, such as something called a temporary pool plant?

25 A. Yeah. Correct.

1 Q. And that was basically a mechanism by which entities  
2 could, under Section 28, supply the market formally in the way  
3 we think of it, correct?

4 A. Correct.

5 Q. And then after 12 months, you get to become a regular  
6 pool plant?

7 A. Correct.

8 Q. So it wasn't just grandfathered plants --

9 MR. BESHORE: May I?

10 JUDGE CLIFTON: Mr. Beshore?

11 MR. BESHORE: I have a question. Who is the witness?

12 MR. ENGLISH: Well, your Honor, in these proceedings, while  
13 certainly Dr. Schiek wrote his testimony, let's face it,  
14 prepared testimony is nothing more than a direct that goes -- I  
15 am actually, yes, I am directing him through this. Otherwise,  
16 we could read the entire sections into the record, and I'm  
17 trying to not do that.

18 JUDGE CLIFTON: You know, I appreciate all guidance here.  
19 We need the help of those of you who have years of experience  
20 and have researched this thing, but I'm uncomfortable with  
21 this, too. You don't need Dr. Schiek for what you are trying  
22 to do, but this is the only way you can have it in as  
23 testimony.

24 MR. ENGLISH: And the only alternative is to have him read,  
25 just as he read two paragraphs, he can sit here and read nine

1 pages, your Honor. I was trying to not do that.

2 MR. BESHORE: There is an alternative.

3 JUDGE CLIFTON: Mr. Beshore, please wait until you are at  
4 the mic.

5 MR. BESHORE: I'm sorry. I mean, there is an alternative.  
6 The nine pages of, nine and a half pages, whatever it is, of  
7 regulations can be made a document and made part of the record,  
8 or noticed for that matter, officially noticed. They, you  
9 know, they can be made part of the record for everyone to  
10 analyze and see and review without being stated verbatim.

11 JUDGE CLIFTON: Yeah. You know, we don't need more paper,  
12 and more words, we need -- we need to have our attention  
13 focused on the ones that make a difference. But, Mr. English,  
14 if you are uncomfortable with having Dr. Schiek summarize it --

15 MR. ENGLISH: If I may, your Honor, I'm not the one who  
16 introduced this extraneous subject into the record, and made an  
17 assertion on the record that it was a grandfather of mandatory  
18 status. So I'm having to correct an issue that was inserted  
19 into the record by Mr. Beshore on earlier testimony, and make  
20 it clear that it's not mandatory. And I think that this is our  
21 time to do that.

22 I can try to summarize, I'm actually mostly done with  
23 trying to summarize these nine and a half pages. But, you  
24 know, the fact of the matter is that it didn't work the way  
25 Mr. Beshore suggested, hinted, insinuated it worked when he

1 first examined Mr. -- Dr. Schiek.

2 MR. BESHORE: If I might, I was cross-examining Dr. Schiek.  
3 I don't know verbatim what I said, but certainly whatever I  
4 said was not, you know, is not evidence, and I resent the  
5 suggestion that I misstated in cross-examination, that if you  
6 -- I resent the suggestion that I misstated or misrepresented  
7 these regulations, which I know what they are quite well.

8 JUDGE CLIFTON: Can you, Mr. English, ask a more open  
9 question to Dr. Schiek and have, I assume he's read these, and  
10 he probably has an opinion without just getting yeses from him?

11 MR. ENGLISH: Okay.

12 BY MR. ENGLISH:

13 Q. Whatever Mr. Beshore asked you, if somehow I was left  
14 with the impression that Order 2 had mandatory pooling of  
15 manufacturing plants, is that your understanding of how it  
16 actually worked?

17 A. That was my understanding of the point of the question,  
18 that there was these former provisions in Order 2 that  
19 essentially worked like mandatory pooling. And looking at  
20 these documents, and the changes that were made later, suggests  
21 that, first of all, it wasn't completely like mandatory pooling  
22 in 1957, and at later dates the Order amended the provisions to  
23 require a plants to dispose of minimum percentages of receipts  
24 for Class I purposes. And I believe that was in December of  
25 1990.



1 Q. That was the result of the 28-day, until this  
2 proceeding, the second longest Federal Order proceeding that I  
3 attended. It still is the second longest, but I think it is  
4 about to fall into third place. Is that correct? That's the  
5 proceeding about Orders 1, 2, and 4 in 1988?

6 A. That's my understanding, yes.

7 Q. And just summarizing, and not my testimony in any way,  
8 what is your understanding of the reasons why that change was  
9 made -- the rule went into effect in 1991, but the final  
10 decision is issued in December of 1990.

11 A. So when I worked in Order 2, the one thing I do  
12 remember pretty clearly were the call provisions of that order,  
13 and when milk was short for fluid needs, the Market  
14 Administrator would have a call meeting, I guess that would be  
15 what I would call it, where the handlers would come in and  
16 there would be discussion about the need for call provisions,  
17 and what those essentially, like a temporary shipping  
18 requirement for the duration that the call was in place, would  
19 be.

20 My understanding is that, you know, it was never a  
21 happy time. There were a lot of unhappy people often in the  
22 room, and the question is whether call provisions alone were  
23 really all that effective as a means to direct milk to Class I  
24 purposes. You know, in the decision from the 1990 hearing --

25 Q. '88 hearing.

1       A. As I read it, the Department was concerned about the  
2 fact that some manufacturing plants were being required to  
3 supply milk to Class I uses at a very high level, whereas  
4 others were not required to do so at all and felt that that was  
5 a condition that needed to be addressed. They were also  
6 concerned about Class I plants who might have to pay much  
7 higher give-up charges to get milk than other Class I plants  
8 who had supply arrangements, either with a handler that was  
9 required to ship, or with direct, with their own producers. So  
10 there was an equity issue with Class I handlers as well, based  
11 on, again, my reading of the decision.

12       Q. Okay. And I'm not going to have you read sections of  
13 that into the record, although I could. At this time, your  
14 Honor, I move admission of Exhibit 113 and the witness is --  
15 well, after -- let's take care of that, and then the witness  
16 will be available for cross-examination.

17       JUDGE CLIFTON: Does anyone wish to question Dr. Schiek  
18 regarding Exhibit 113 before determining whether you have any  
19 objection to its being admitted? There is no one. Are there  
20 any objections to the admission into evidence of Exhibit 113?  
21 There are none. Exhibit 113 is admitted into evidence.

22               (Thereafter, Exhibit Number 113, was  
23               received into evidence.)

24       MR. ENGLISH: Thank you, your Honor.

25       JUDGE CLIFTON: Who will be the first to ask questions of

1 Dr. Schiek? Mr. Beshore.

2 CROSS-EXAMINATION

3 BY MR. BESHORE:

4 Q. Marvin Beshore.

5 Good morning, Dr. Schiek.

6 A. Good morning, Mr. Beshore.

7 Q. I would like to talk about California a little bit and  
8 then Order 2 a little bit, I guess. You know, presently in  
9 California, and let's see, how many years have you been  
10 familiar with the market here in California?

11 A. I came out here in 1997.

12 Q. Okay. But presently there are no performance  
13 requirements in the Order that amount to anything?

14 A. Right. That would be my understanding, yes.

15 Q. Okay. And there's mandatory pooling, everybody's in,  
16 right? Grade A producers?

17 A. Technically, it's not mandatory pooling per se, it's  
18 mandatory pricing of Grade A milk. So if I'm a handler who, or  
19 a plant that does not produce either Class I or mandatory  
20 Class II products, I can operate as a nonpool plant, but that  
21 doesn't alleviate my responsibility to pay the minimum  
22 regulated price for the milk I buy for the uses that I have.

23 Q. Okay. But -- I appreciate the correction. I'm, in  
24 precise language, because I'm speaking somewhat informally in  
25 terms of these words, mandatory is not in any -- we talk about

1 mandatory, it is not in Proposal 1 as a word?

2 A. True.

3 Q. It's not in CDFA regulations as a word. So I  
4 appreciate your precision.

5 But under the present California system, the producer's  
6 milk supplying even that nonpool plant is priced and pooled in  
7 the system, is that correct?

8 A. It is -- it is priced and it's pooled if it is supplied  
9 by a co-op, because a co-op is almost by definition a pool  
10 handler in the order. If you had a plant that had its own  
11 direct ship supply, they could -- they could be depooled and  
12 operate as a nonpool plant. They would be required to pay the  
13 plant blend to their producers, but that would only, again,  
14 only be an option for plants that currently -- sorry, I'm  
15 getting into a longer explanation than you want -- but plants  
16 that currently make products that are not Class I or mandatory  
17 Class II, and there's restrictions on if you depool your plant  
18 you have to stay out for a whole year before you come back in.

19 Q. Okay. So -- and the CDFA regulations do -- there are  
20 what are called again, probably not the term in the  
21 regulations, but there's a call provision in the order,  
22 correct?

23 A. There is. It's technically called the milk movement  
24 requirements.

25 Q. The milk movement requirements. Okay. So there are no

1 shipping requirements per se for Class I plants, and how do  
2 Class I plants get milk supplied presently? What gets milk to  
3 those plants?

4 A. What directs it there? In terms of the order  
5 mechanisms, we have those call provisions. We talked about the  
6 fact that there is sort of this standing agreement, this  
7 agreement from the early days of pooling, and I would say for  
8 much of the history of the -- of the California system since  
9 the inception of pooling, Class I plants in part have been  
10 supplied out of necessity, because we have had, you know, the  
11 data I presented earlier about milk production growth. Keeping  
12 ahead of the milk production wave historically in California  
13 has been one of the big reasons why you haven't needed an  
14 actual performance requirements because they needed to find  
15 homes for milk.

16 Q. There's no place else for the milk to go.

17 A. That -- that has been the case in a lot of the history  
18 of California. That -- that capacity was needed.

19 Q. And so the, basically the market has, first of all, the  
20 call has not, has that ever actually fully been used, to your  
21 knowledge?

22 A. I think in the past, I, since I have been at Dairy  
23 Institute, I can't recall if it's, if it's been used more than,  
24 it may have been used once or twice, but it is not something  
25 that's been used frequently. Again, I think because it hasn't

1 been needed because of the need to supply the market.

2 Q. Okay. So basically the Class I plants have been  
3 supplied because of an unwritten understanding relating to the  
4 passage of the 1967 Gonsalves Act, correct?

5 A. Correct.

6 Q. That's your testimony, correct?

7 A. Uh-huh.

8 JUDGE CLIFTON: The uh-huh, doesn't --

9 DR. SCHIEK: Correct.

10 MR. BESHORE: Thank you, your Honor.

11 BY MR. BESHORE:

12 Q. And simply because producers in California need an  
13 outlet for their milk, and Class I, and Class I and mandatory  
14 Class II are some of the plants that are available as outlets  
15 for milk?

16 A. True.

17 Q. Has the transportation system played any role? Does it  
18 play any role today in facilitating movements to those Class I  
19 plants?

20 A. I would say it facilitates movement by reducing the  
21 extra costs that a Class I plant one would have to pay to  
22 attract milk otherwise, but it doesn't require anybody to ship  
23 milk.

24 Q. Right. Okay. So basically under Proposal 1 you would  
25 have pretty much all of those same ingredients. You would have

1 a transportation credit system similar, not identical, to what  
2 you have today, correct?

3 A. Correct.

4 Q. And you would have a marketplace that's got the same  
5 relationship between milk and plants that you do now, correct?

6 A. Correct.

7 Q. Okay. Your concern is that the 46 year-old unwritten  
8 understanding would be displaced in the marketplace and that  
9 would, that would lead to Class I plants having trouble getting  
10 milk?

11 A. Well, that's -- that's one concern. And I think some  
12 of the witnesses that testified, dairy farmer witnesses for  
13 Proposal 1, expressed their concern that this reduction in milk  
14 production in 2015 is not just an aberration, but the beginning  
15 of a trend. And if that's the case, then the need to ship  
16 milk, the physical need to ship milk to find homes for it, is  
17 not as much of a factor, and plants in California,  
18 manufacturing plants, may decide, you know, we would rather  
19 keep the milk in our plant, we get the pool draw anyway, we  
20 would rather keep the milk in our plant and keep our  
21 flow-through costs, or our manufacturing costs, lower because  
22 we're operating more at full capacity in our manufacturing  
23 plants.

24 Q. Okay.

25 A. So that is a concern and it is a concern that's been

1 echoed by my members in conversations that they have had with  
2 their suppliers.

3 Q. Okay. So your members and you are now concerned that,  
4 in fact, the producer's testimony about challenges to producing  
5 milk in California might be fair and true and accurate?

6 A. I think we don't know whether they will come true or  
7 not, but certainly that's a factor to consider, and that's why  
8 I think performance standards are important in any Federal  
9 Order going forward, effective performance standards.

10 Q. Okay. Let's talk about the Order 2 situation a little  
11 bit now. Do you know when that particular status of plants in  
12 Order 2 was originated? That is, plants that did not have any  
13 required performance requirements in order to pool any regular  
14 routine required? Do you know when that was originated?

15 A. I don't.

16 Q. Okay. So as far as you know, it could well have been  
17 there before, in fact, the language in '57 decision suggests  
18 that it had been there nor some period of time?

19 A. It could have, yeah.

20 Q. Right. And the suspension and cancellation language  
21 that Mr. English was calling your attention to and reading and  
22 quoting, etcetera, was basically the call provision in that  
23 order. Is that your understanding? Included the call  
24 provision in the order?

25 A. Yeah, it, my understanding is it did, and it provided



1 the option to, I would call it opt out if they got permission  
2 from the co-ops supplying them, if they were co-op supplied.

3 Q. But -- okay. But -- but it had a call in it, right?

4 A. There was a call provision in Order 2, that much I  
5 know.

6 Q. Okay. Now, prior to 1987, do you know how many times,  
7 and assume with me for a moment that that provision went in  
8 there in the late '40's. Prior to 1987, do you know how many  
9 times that call provision was used?

10 A. I don't. I know while I was there, I believe we had a  
11 couple of meetings, call meetings, but I'm -- I know we had at  
12 least one, I thought we had a second one, but we had at least  
13 one.

14 Q. Okay. Do you know, testifying today, if there had ever  
15 been such a meeting prior to that one?

16 A. I don't.

17 Q. Okay. I think I have no further questions at this  
18 time. Thank you, Dr. Schiek.

19 JUDGE CLIFTON: Who next has questions for Dr. Schiek?

20 Mr. Vetne.

21 CROSS-EXAMINATION

22 BY MR. VETNE:

23 Q. John Vetne, representative for Hilmar Cheese Company.

24 Dr. Schiek, there's been some testimony prior to yours  
25 from Hilmar representative, and maybe from a Dean

1 representative, that there was at least for a moment of time,  
2 some difficulty attracting milk for Class I use in California.  
3 Is that the kind of circumstance for which you think some  
4 performance requirement ought to be institutionalized?

5 A. That would be part of it, yeah.

6 Q. Part of it? And secondly, there is a proposal on the  
7 table, maybe two, that would increase the regulated cost of  
8 milk going for manufactured uses above what has historically  
9 been in place in California, correct? Is that a correct  
10 characterization of Proposal 1 and 2?

11 A. For manufacturing plants?

12 Q. Yes, for manufacturing plants.

13 A. Yes, I would say that's accurate.

14 Q. Okay. And if manufacturing plants face increased  
15 regulated costs and can't pass, fully pass those costs onto  
16 buyers, wouldn't -- would there not be a greater incentive for  
17 those manufacturing plants to retain their milk and operate at  
18 full capacity for maximum efficiency and lower per unit costs?

19 A. I would think that there would be a stronger economic  
20 incentive to do that.

21 Q. Thank you.

22 JUDGE CLIFTON: Who next has questions for Dr. Schiek? I  
23 see none. Redirect?

24 MR. ENGLISH: I have none.

25 JUDGE CLIFTON: Last call. Any questions for Dr. Schiek on

1 this topic? There are none. Thank you, Dr. Schiek.

2 DR. SCHIEK: Thank you.

3 JUDGE CLIFTON: And Mr. English?

4 MR. ENGLISH: Well, I know we had a stretch break, but we  
5 haven't had a real morning break, your Honor. The next witness  
6 will be Mr. Zolin, but I propose we take our morning break.

7 JUDGE CLIFTON: It's 11:17. Please be back and ready to go  
8 at 11:35.

9 (Whereupon, a break was taken.)

10 JUDGE CLIFTON: We're back on record at 11:38. Ms. Vulin?

11 MS. VULIN: Thank you, your Honor. We asked for  
12 Mr. Al Zolin as our next witness.

13 JUDGE CLIFTON: Ms. Vulin, I have two documents that I have  
14 received. How should I mark those?

15 MS. VULIN: The first is the testimony with a couple  
16 exhibits attached, and so we would mark that next in line,  
17 which I believe is Exhibit 114.

18 JUDGE CLIFTON: That is correct, Ms. Elliott?

19 MS. ELLIOTT: Yes.

20 JUDGE CLIFTON: Yes, that would be Exhibit 114.

21 (Thereafter, Exhibit Number 114 was marked  
22 for identification.)

23 MS. VULIN: And then the next we had intended to include,  
24 but through an issue of printing didn't quite get stapled with  
25 the others, so we just thought we could mark that separately

1 for ease of convenience.

2 JUDGE CLIFTON: Very good. We'll mark the one-page  
3 document as Exhibit 115.

4 (Thereafter, Exhibit Number 115, was  
5 marked for identification.)

6 JUDGE CLIFTON: Good. Mr. Zolin, you remain sworn. Again,  
7 I would like you to state and spell your name.

8 MR. ZOLIN: My name is Alan Zolin, A-L-A-N, Z-O-L-I-N.

9 JUDGE CLIFTON: Thank you. Ms. Vulin, you may proceed.

10 MS. VULIN: Thank you, your Honor.

11 DIRECT EXAMINATION

12 BY MS. VULIN:

13 Q. Mr. Zolin, I'll ask that you begin to read your  
14 testimony into the record.

15 A. Thank you.

16 My name is Alan Zolin. I have been retained by Hilmar  
17 Cheese Company to work with the Dairy Institute of California  
18 (DIC) to develop an alternative proposal to Cooperative  
19 Proposal Number 1. I have worked with a task force made up of  
20 a number of representatives from DIC member companies in order  
21 to develop and submit Proposal 2.  
22 Description of Proposal 2 Performance Standards for Pool Supply  
23 Plants.

24 My testimony is intended to focus on the provisions  
25 7(c) which identifies the performance requirements for a pool

1 supply plant. These performance requirements, along with  
2 diversion limits, establish what milk can be associated with  
3 the FMMO pool. Currently, in other FMMO's, this section refers  
4 to plants other than a distributing plant. In Proposal 2, we  
5 include a new category of plant called 9(d). I will discuss  
6 that provision at another time. DIC is proposing that the base  
7 shipping requirement for plants defined in this section be 10  
8 percent. We looked at Order 30 as a guide for performance  
9 requirements, because we believe the Class I utilization in  
10 Order 30 and the potential California Order would be similar.  
11 This similarity in Class I utilization is only one  
12 consideration in determining the performance requirements, but  
13 DIC believes it is the most important.

14 Q. And can you tell us what region Order 30 covers?

15 A. Order 30 covers the geographical region. Well, I think  
16 the name of the region is the Upper Midwest region. I think of  
17 it as covering Northern Illinois, with Chicago, Illinois as its  
18 base; most, if not all, of the State of Wisconsin; a majority  
19 of Minnesota; Northern Iowa; and I'm not sure if it stretches  
20 into South Dakota, but I'm not, I'm just not sure how far west  
21 it goes.

22 Q. Thank you. You may continue.

23 A. The type of plants that supply plant qualifying  
24 shipments can be made in order to meet the base performance  
25 requirements, are the same as Order 30. I guess I should add,

1 "in Proposal Number 2."

2 I believe it was Henry Schaefer from USDA that gave a  
3 description of the operational aspects of these shipping  
4 requirements. We thank USDA for providing that information and  
5 agree with his characterization of the operational aspects.

6 Where Proposal 2 deviates from the language of Order  
7 30, and I crossed out the word "is", and let me read that,  
8 start that sentence again.

9 Where Proposal 2 deviates from the language of Order 30  
10 that, I guess "is" is okay -- is that we describe a bracket  
11 system in order to modify the monthly base performance  
12 requirements based on changing Class I utilization in paragraph  
13 7(c)(2). I have included a summary of the brackets as an  
14 attachment to my testimony. The reason DIC has added this  
15 modification is to ensure that the Class I market is served.

16 Q. So, Mr. Zolin, let's take a look at this attachment,  
17 which is found on page 12 of this Exhibit 114.

18 A. Okay. This -- this, on page 12 towards the top, the  
19 chart that has a heading Performance Shipping Requirements is  
20 just a summary of the order language that we put in that covers  
21 the additional shipping requirement brackets. And just to  
22 explain how it's read, the columns that are labeled "brackets"  
23 are actually percentages of Class I utilization. So if the  
24 Class 1 utilization falls between, in the first line, between 0  
25 and 14.9, the shipping percentage should be 10 percent going to

1 the column, you know, the right, to the right of it.

2 Dropping down one line, if the Class I utilization is  
3 15 to 19.9 percent, then the appropriate shipping percentage  
4 for that particular month would be 15 percent.

5 That same methodology follows all the way down to the  
6 last column that says above 50 percent. So again, if the  
7 Class I utilization is greater than 50 percent, then the  
8 shipping requirement would be 50 percent for that specific  
9 month.

10 We stopped the bracketing system at that point, because  
11 we felt that once we get above a Class I utilization market of  
12 50 percent, that the appropriate shipping requirement of 50  
13 percent would be the right one. I don't think I found another  
14 order in the system that had a higher shipping percentage than  
15 50 percent, so we just stopped there and let it carry all the  
16 way through.

17 Q. So the left column, the bracket column, this would be  
18 actual shipping percentages?

19 A. Yes.

20 Q. Excuse me, actual utilization percentages?

21 A. Yes. And as we get further into my testimony and get  
22 to the chart below, we'll change how those two charts interact.

23 Q. And just to be clear, the numbers in both of these  
24 columns are all percentages?

25 A. That is correct.

1 Q. Okay. Thank you. So now we'll return back to page 2  
2 and have you continue reading your testimony.

3 A. In Proposal 2 we are recommending that the Market  
4 Administrator (MA) calculate the weighted average Class I  
5 utilization for the previous three months where information is  
6 available, and determine where that weighted average percentage  
7 falls into the bracketing system. Since the proposed date for  
8 announcement of producer prices is "before the 13th of the  
9 month" we believe there's enough time for the MA to use the  
10 three prior months. The actual weighted average of Class I  
11 utilization will be assigned to a bracket and then the  
12 appropriate performance requirements will be announced by the  
13 MA for the next month. And I would like to add to my testimony  
14 right there, that I believe we proposed that that announcement  
15 will be made by the 15th of the previous month.

16 Q. Would you like to add that into your testimony here?

17 A. At that point, yes.

18 Q. Okay.

19 JUDGE CLIFTON: So you want that entire sentence or do you  
20 want to say "by the 15th of the month?"

21 MR. ZOLIN: I would actually add a new sentence that says,  
22 "this announcement should be before the 15th of the previous  
23 month."

24 JUDGE CLIFTON: I don't know if you want "previous" so  
25 there will be announced for -- okay. They will be announced



1 for the next month.

2 MR. ZOLIN: Can I try it this way?

3 JUDGE CLIFTON: Yeah.

4 MR. ZOLIN: In the month of June, by May 15th, the Market  
5 Administrator will announce the shipping percentages for the  
6 month of June.

7 JUDGE CLIFTON: Okay. I wonder -- would this work? You  
8 have the word "announced". What if you inserted a comma, by  
9 the 15th, comma, or announced by the MA, by the 15th, for the  
10 next month. Would that work?

11 MR. ZOLIN: I think that works.

12 JUDGE CLIFTON: Okay. Let's try that. So Ms. Elliott, you  
13 see where we are?

14 MS. ELLIOTT: Yes.

15 JUDGE CLIFTON: We're in the middle of page 2. So on the  
16 line that says, "requirement will be announced by the MA" we'll  
17 put ", by the 15th,".

18 MS. ELLIOTT: Okay.

19 JUDGE CLIFTON: And then would you read that sentence that  
20 way, Mr. Zolin?

21 MR. ZOLIN: Okay. I'll start at the beginning. The actual  
22 weighted average Class I utilization will be assigned to a  
23 bracket and then the appropriate performance requirement will  
24 be announced by the MA, by the 15th of, for the next month.

25 JUDGE CLIFTON: Thank you.

1 MR. ZOLIN: I have included an example of how the MA would  
2 determine the monthly performance percentage. In the example  
3 provided, I assumed the same amount of producer milk pooled in  
4 each month to calculate the weighted average of Class I  
5 utilization.

6 BY MS. VULIN:

7 Q. So let's take a look at this example, I believe also  
8 found on page 12 of Exhibit 114.

9 A. Okay. And what I would like to do is explain this  
10 table which has the heading, "Example of MA Evaluation of Class  
11 I Utilization for May through August, Shipping Percentage."

12 What I would like to do is start with the, with the row  
13 that is for May and skipping over, well, going to Class I  
14 utilization for the month of May isn't an important number in  
15 calculation, but what we do is we skip over to the months used,  
16 and we would look at the months of January, February, and  
17 March, taking that as a weighted average, and that weighted  
18 average, the previous three-month average percent is 11.7.  
19 Taking 11.7 and going up to the bracket table above it, seeing  
20 that it falls into the first bracket category of between 0 to  
21 .14.9 we see that the appropriate shipping percentage for May  
22 should be 10 percent. And when we go back to the May row, we  
23 see the shipping percentage for May is 10 percent.

24 Q. And the reason we look at January, February, and March,  
25 for the May percentage is because that percentage is announced

1 in April?

2 A. The information for March is available to the Market  
3 Administrator in the early months of April, and he's required  
4 to do the pool computation and have it announced by April 13th.  
5 So basically, we don't know what April's utilization is yet,  
6 because that month hasn't been completed. So when we talk  
7 about the three previous months, in this case we're talking  
8 about January, February, and March, because that's where the,  
9 that's where the information is available.

10 Okay? To continue on this chart, I would like to skip  
11 down to August and just kind of walk through that calculation.  
12 And again, the months used in the calculation would be April  
13 through June, so looking at the April Class I utilization of 16  
14 percent, May would be 19 percent, and June would be 25. The  
15 average of those numbers is 20 percent. Going up to the  
16 bracketed table, 20 percent falls in the third category of  
17 brackets which has a shipping requirement of 20 percent. Going  
18 back down to the lower table, shows that the 20 percent would  
19 be the appropriate shipping requirement for the month of  
20 August.

21 Q. So this table shows that, how the actual Class I  
22 utilization changes, how you would then utilize the bracket  
23 system in order to find out what the shipping percentage should  
24 be for that following month?

25 A. And I'll get into it further in my testimony, but what

1 we're trying to do is provide an automatic adjuster to what the  
2 shipping requirement should be as Class I utilization changes  
3 in the marketplace.

4 Q. Thank you. I'll have you return to your testimony on  
5 page 2 and continue.

6 A. We have added another new set of paragraphs to address  
7 the performance requirements of a handler that pools milk from  
8 producers that have quota milk. We have added paragraphs 3 and  
9 4. These two paragraphs add additional responsibility to  
10 service the Class 1 market if the plant described in 7(c) is  
11 pooling quota milk. It is my understanding that the current  
12 California State Order (CSO) has a version of a performance  
13 requirement in the form of a call provision for quota milk if  
14 it is determined that the Class I market isn't being served.  
15 We used that concept in developing the language for paragraphs  
16 3 and 4. Proposal 2 sets a performance percentage of 60  
17 percent of the actual quota milk, or an equivalent volume to  
18 plants described in paragraph 7 (a), (b), and (d). These  
19 plants are fully regulated distributing plants or units of  
20 distributing plants. DIC felt that since these types of plants  
21 are providing bottled milk to the California market, that their  
22 Class I needs should always be met. This additional  
23 requirement, in most circumstances, should be enough to satisfy  
24 the fluid milk needs of the market.

25 It is possible that the market could require additional

1 milk to meet its fluid needs. DIC believes that again quota  
2 milk should be required to meet that obligation first.

3 Paragraph 4 is similar to the action of the current CSO call  
4 provision.

5 Q. So let's go to page 7 now, and I think that this  
6 exhibit will help demonstrate a bit by what you mean there.

7 A. Okay. Starting with, well, I guess page 7, 8, and 9,  
8 on the back of my testimony is actually the provisions from the  
9 California State Order, describing the milk movement  
10 provisions. I would like to highlight, mainly because we  
11 talked about the percentages that we have in our proposal, on  
12 page 8, for procurement region number 1 and number 2, the  
13 current call provision would require a handler to ship 100  
14 percent of their quota milk to the market, if requested.

15 On page 10, if I can go to that page. This is a call  
16 handler certification form. If a bottler in California is  
17 short of milk and cannot get that milk from the market through  
18 normal channels, it can request a call where it's been required  
19 that they fill out the call certification handler form, and in  
20 that form, and I'm looking down to the, just before the  
21 signature where it says name and signature, that there is a  
22 requirement for which, what bottling plants located in the  
23 state that can actually make this request. And the  
24 requirements are, that it has to have 80 percent more Class I  
25 utilization, and less than 5 percent Class 4a, 4b usage in the

1 immediate, in the seven-day period immediately prior to the  
2 date of making this call. So a handler or a plant has to meet  
3 those requirements before they can fill out this form.

4           Once they fill out this form, they are also stating,  
5 and I think it might be in the language in the 7, 8, and 9,  
6 that they will be monitoring that that milk is only going to  
7 Class I, that is being shipped to them at call provision.

8           Now, in order for the handler that is making this  
9 request, he has a specific supply plant that will be providing  
10 him that milk, and that would be, as we turn to page 11, this  
11 would be the description of who is responsible to supply that  
12 milk.

13           Q. Okay. So this is an interesting exhibit. Can you  
14 explain to us how this is developed? Who makes this document?

15           A. Okay. This is, again, is a document that is put  
16 together annually by California State Order folks, CDFA, I  
17 forgot the initials, and this is an, the one on page 11 is an  
18 example of the procurement region number 1. And based on the  
19 supply plants that are currently, or supplying units, that are  
20 currently in California, and this, on page 11 at the very top,  
21 towards the right, under the ranked order of designated supply  
22 handlers for period 1, it lists the name of Land O'Lakes,  
23 California Dairies, and Leprino Foods.

24           Q. So how are these three companies selected to be  
25 included in this document?

1 A. These are the three companies that are located in  
2 Region 1 to be required to provide fluid milk to the handlers  
3 in Region 1 that could be requesting a call.

4 Q. So it looks as here as during period 1, there is a set  
5 of different dates. If a handler finds himself short of fluid  
6 milk for Class I uses, he can pull this out and say, "It's  
7 September 3rd." So looking here I would call Land O'Lakes to  
8 supply this milk.

9 A. That is exactly correct. Based on the time of the  
10 year, and as you can see within the period 1, period 2, and  
11 period 3, I believe all 52 weeks of the year are included. The  
12 individual supply handler, that order changes via every one of  
13 the rotating weeks. And since there are three supplying  
14 handlers in this region, you have basically three periods, so  
15 they just keep rotating through every week.

16 Q. Interesting. So this is for Region 1. There is a  
17 second region, though, isn't there in California?

18 A. Yes, there is. There's the Northern California region,  
19 and I believe that that is been --

20 Q. Marked Exhibit 115?

21 A. Correct.

22 Q. So if we can turn to that now, this can serve as a  
23 second example of how the procurement process might work when  
24 there are more handlers involved. So can you walk us through  
25 this?

1       A. I sure can. And in the ranked, again, looking to the  
2 right hand side, the ranked order of designated supply handlers  
3 for period 1, as you can see there are six handlers listed on  
4 this form. I'll read their names. For the period 1 it is  
5 Saputo Cheese, USA, Inc., Land O'Lakes, Inc., Dairy String  
6 Cooperative, Inc., Nestle Foods, sorry, Food, Hilmar Cheese  
7 Company, California Dairies, Inc. So as we mentioned  
8 previously, in Region 1 that there's three supply units, here  
9 there are six, so we basically have six periods for the  
10 rotation of who would be the supplying handler on any given  
11 week during the year.

12       Q. And they are ranked. So that if Saputo Cheese which is  
13 number one in the first period, if they were to supply a  
14 hundred percent of their quota for Class I uses and max'd out,  
15 then you would move down the list, and Land O'Lakes would be  
16 the next person you call, correct?

17       A. Exactly. It is a -- it is, in the case of  
18 September 3rd as the example that you gave, Saputo Cheese USA  
19 would be responsible to provide a hundred percent of their  
20 quota milk to the bottler that was short of milk until it was  
21 exhausted, and then the next name on the list would be the next  
22 call. The only -- the only other issue on, or point to make on  
23 that, assuming Saputo Cheese USA had very little quota producer  
24 milk in their system, the fact that they are number 1, they  
25 have to ship at least 50,000 pounds to the bottling operation,



1 even though their quota, SNF, fat calculation might only say  
2 they only have 25,000 available. So you have to ship efficient  
3 one-load truck quantities as a minimum.

4 Q. So the 50,000 equates to one truck load?

5 A. One truck load of milk, and that's the minimum you  
6 would have to ship if you are involved in a call provision.

7 Q. Thank you. Anything else you want to share about  
8 either page 11 of Exhibit 114 or from Exhibit 115?

9 A. No, I'm fine.

10 Q. These seem like incredibly practical documents and that  
11 they are laid out very clearly, they are easy to follow, and  
12 they even provide the phone number. It is kind of a one-stop  
13 shop.

14 A. It is. I can't remember who said it, but someone did,  
15 the California State Order has been looked upon as a Gold  
16 Standard in many cases. And I would have to agree. They have  
17 thought through a number of issues and have handled them very  
18 effectively.

19 Q. Thank you. So I'll have you return to page 3 of your  
20 written testimony, I believe you were two sentences into that  
21 paragraph on page 3.

22 A. Okay. Proposal 2, add a timeframe when the performance  
23 requirements associated with quota milk may be raised up to 85  
24 percent. The months of July through February are the timeframe  
25 that these higher performance requirements could be applicable.

1 A specific request needs to be made by a distributing plant  
2 operator to the MA, that it doesn't have enough milk for its  
3 Class 1 needs. The MA then has the responsibility to evaluate  
4 market conditions, and has the authority to adjust these  
5 performance requirements based on that evaluation. These  
6 higher performance requirements must be utilized in Class I at  
7 the bottling plants. The CSO call provision has a similar  
8 requirement that bottlers must ensure the milk involved in the  
9 class, in the call, is utilized in Class 1. The way the CSO  
10 handles this test is by the, is by qualifying the handlers that  
11 can request the call. In order to qualify as a call handler,  
12 you must have 80 percent Class I utilization --

13 Q. Must have at least 80 percent Class I utilization.

14 A. Yeah, thank you. Let me read that sentence again.

15 In order to qualify as a call handler, you must have at  
16 least 80 percent Class I utilization, and a second test, is  
17 that the "call handler has to certify that the milk would be  
18 used in Class 1."

19 Q. And did you want to a close quote there?

20 A. Thank you. Close quote at the end of Class 1.

21 JUDGE CLIFTON: Ms. Elliott is right there. Thank you,  
22 Ms. Elliott.

23 BY MS. VULIN:

24 Q. Thank you.

25 A. And I found another typo. I have written, the "MA",

1 and what I would like to say, because I'm talking about the  
2 California State Order system, "the CSO would then verify the  
3 certification of milk used in Class I on audit."

4 JUDGE CLIFTON: So Ms. Elliott is right there, she and I  
5 are both striking "MA" and inserting "CSO".

6 MR. ZOLIN: Okay. Concentrated milk transferred to a  
7 distributing plant that has an agreed upon use of Class I, will  
8 also count to meet the performance requirements for the  
9 requirements described in all of Section 7(c). This provision  
10 is consistent to the order language in Order 30.

11 Intent.

12 DIC's intent is to assure that the Class I market has  
13 an adequate supply of milk in potential changing market  
14 conditions. The bracketing of the supply plant shipping  
15 percentages, percentage, and the quota performance requirements  
16 are examples of that intent.

17 Also, Proposal 2 intends to provide supply plant  
18 flexibility in the methods of meeting the performance  
19 requirements. The flexibility is critical in supply plant  
20 servicing the Class 1 -- I'm going to include "market". Class  
21 1 market.

22 JUDGE CLIFTON: All right. Let us -- let us stop to do  
23 that. We're on page 4, about five lines down, we're inserting  
24 the word "market" after "Class I".

25 MR. ZOLIN: All right. I'll start the sentence over.

1           The flexibility is critical in supply plants servicing  
2 the Class I market in a cost efficient (and efficient movements  
3 of milk) manner. The concept of supply plant systems as  
4 described in 7(e) is just one example. Allowing supply plants  
5 to create a system in order to meet the shipping requirements  
6 of the paragraph, inserting the word "the".

7           JUDGE CLIFTON: All right. Ms. Elliott?

8           MS. ELLIOTT: Yes.

9           JUDGE CLIFTON: She's there.

10          MR. ZOLIN: I'll start again.

11           Allowing supply plants to create a system in order to  
12 meet the shipping requirements of the paragraph will help with  
13 orderly marketing. The language is very close to Order 30  
14 language, except for the inclusion of a reference to a 9(d)  
15 handler.

16          JUDGE CLIFTON: So do you want us to insert "a"?

17          MR. ZOLIN: I think I have a reference to a 9(d) handler.

18          JUDGE CLIFTON: So you are fine with it as it is?

19          MR. ZOLIN: I'm fine with it as it is.

20           Proposal 2 also provides the MA with a number of  
21 opportunities to make adjustments to the performance standards  
22 to ensure the performance standards reflect supply and demand  
23 conditions. We recognize the additional performance  
24 requirements for quota milk, in effect, raise the overall  
25 performance requirements for supply plants. We rely on the

1 Department to factor all of our concerns into the appropriate  
2 set of performance requirements. We stress, again, that the  
3 need service the Class I markets, the responsibility of quota  
4 milk, and flexibility and efficiency in the supply chain,  
5 should be the guide the Department uses in their decision  
6 making.

7 Bracket system, I'm sorry, let's start again. The  
8 bracket system will provide real time automatic adjustments to  
9 the performance standards, without the need to hold a hearing  
10 or conduct exhaustive research on market conditions. DIC  
11 believes this type of automatic flexibility will result in a  
12 very responsive order to meet the needs of the marketplace.  
13 The supply and demand conditions can change -- start again.  
14 But supply and demand conditions can change rapidly. These  
15 changes can result in inefficient movements of milk due to  
16 performance requirements that are too high or the Class I  
17 market not being served because the performance requirements  
18 are set too low.

19 Proposal 2 specifically addresses this flexibility in a  
20 number of places. Within the quota performance standards of  
21 7(c)(4), the MA has the discretion to adjust the performance  
22 standards subject to market conditions. Paragraph 7(a), I'm  
23 sorry, paragraph 7(f) provides the MA with the overarching  
24 ability to increase or decrease all of the performance  
25 standards in paragraph 7(c) and 7(e). The MA ability to adjust

1 the performance requirements has worked well in other FMMO's  
2 throughout the country. This type of provision, which is  
3 included in 1033.7(g), was just recently utilized by the  
4 Mideast Order 1033. On July 29th, 2015, the Mideast MA  
5 Order 33, made an adjustment to both the performance  
6 requirements for supply plants and the diversion limitations.  
7 The MA letter specifically refers to "avoiding uneconomical  
8 movements" as the main reason for making the adjustment to the  
9 performance requirements. The adjustment will be in effect  
10 "until further notice". This is documented in a letter on the  
11 MA 33 website located under the "NEWS" tab.

12 BY MS. VULIN:

13 Q. The MA Order 33?

14 A. Yeah, every MA has its own web page, and this would be  
15 the Order 33 web page. And down the left hand column they have  
16 little tabs, and this letter would be found under the news tab.

17 I do not plan to present any testimony on provisions  
18 that haven't been changed from the language that is included in  
19 Order 30, but I want to highlight paragraph 7(g)(7). This  
20 paragraph refers to a situation where handler has a split  
21 plant. This is a pool plant and a nonpool plant in the same  
22 location. To establish a split plant, a handler must designate  
23 which portion will be the pool plant and which, I'm sorry. Let  
24 me read it again. To establish a split plant, the handler must  
25 designate what portion will be the pool plant and the nonpool

1 plant. The nonpool plant must be physically separate and  
2 operated separately from the pool plant. DI feels that in  
3 conjunction with the 125 percent rule, and the producer  
4 touch-base requirements in Proposal 2 that are similar to  
5 Order 30, the split plant provision is needed to efficiently  
6 meet the pooling requirements. DIC discussed as a group  
7 performance requirements in total as similar to the Texas Order  
8 in Section 1126. This Order does not match the market  
9 similarities of the California market. Primarily its Class I  
10 utilization is higher than what is anticipated for California.  
11 In Texas, there is no split plant provision and there is no  
12 repooling rule such as Order 30's 125 percent rule. DIC has  
13 determined the combination of Order 30 performance standards  
14 would be the best suited for the new California Order. This  
15 concludes my testimony.

16 Q. Thank you, Mr. Zolin. I ask just for one more  
17 clarification. If you could turn to page 1, please. The  
18 bottom paragraph, after, at the end of the first sentence you  
19 said, "are the same as Order 30 in Proposal 2."

20 A. I'm sorry, where is that?

21 Q. The first sentence at the last paragraph. You had  
22 mentioned that you might want to add the phrase at the end of  
23 that sentence "in Proposal 2".

24 A. Yes.

25 Q. Okay. So if you could add it and then read the whole

1 sentence for us again, so we can get a sense of how it should  
2 read.

3 A. And Ashley, it is exactly where again?

4 Q. The first sentence of the last paragraph on page 1.

5 A. Okay.

6 Q. Okay?

7 A. And then I didn't write it down, so let's -- I just  
8 lost the space again.

9 Q. No problem. After the phrase, "the same as Order 30",  
10 you had mentioned you might want to add "in Proposal 2".

11 A. Okay. I got it now.

12 Q. I wanted to confirm that that was true, and if so,  
13 would you like us to add it into to the testimony?

14 A. I'll read the sentence again.

15 The type of plant that supply plant qualifying  
16 shipments can be made in order to meet the base performance  
17 requirement are the same as Order 30 in Proposal 2.

18 JUDGE CLIFTON: Ms. Elliott has that, and I'm marking it as  
19 well.

20 BY MS. VULIN:

21 Q. Thank you. So I really appreciate this testimony, and  
22 just to summarize the approach. You're kind of trying to find  
23 a way to continually balance these changes in the market  
24 because if you are too far extreme and if your performance  
25 requirements are too high, that's not going to work. And if



1 they are too low, that's not going to work either. So this is  
2 somewhat of a dynamic system that you are proposing here that  
3 can react to the market, but still ensure that we have got  
4 effective performance requirements in place?

5 A. And that is correct. I, we use the flexibility part of  
6 our thought process is critical, servicing the Class I market,  
7 again, is critical. The requirement for quota to perform, we  
8 feel, is critical. And the prevention of an economic movement  
9 is critical. So again, I think I mentioned that the  
10 Department, as they make those evaluations, they should keep  
11 those in mind.

12 Q. Thank you. Your Honor, I move to admit Exhibit 114 and  
13 Exhibit 115.

14 JUDGE CLIFTON: Does anyone wish to question Mr. Zolin  
15 regarding Exhibit 114 before determining whether you object?  
16 No one. Are there any objections to the admission into  
17 evidence of Exhibit 114? There are none. Exhibit 114 is  
18 admitted into evidence.

19 (Thereafter, Exhibit Number 114, was  
20 received into evidence.)

21 JUDGE CLIFTON: With regard to Exhibit 115, does anyone  
22 wish to question Mr. Zolin? No one. Are there any objections  
23 to the admission into evidence of Exhibit 115? There are none.  
24 Exhibit 115 is admitted into evidence.

25 (Thereafter, Exhibit Number 115, was

1 received into evidence.)

2 MS. VULIN: Thank you, your Honor. And no further  
3 questions from me, but I think my colleague, Chip English,  
4 would like to ask a couple.

5 JUDGE CLIFTON: Mr. English?

6 CROSS-EXAMINATION

7 BY MR. ENGLISH:

8 Q. Thank you. Chip English.

9 Good afternoon, Mr. Zolin?

10 A. Good afternoon.

11 Q. Let me start with just a clarification. On page 5,  
12 just so everybody's clear, near the bottom, and this paragraph  
13 about what the requirements would be, you say "DIC feels that  
14 in conjunction with the 125 percent rule," would that be the  
15 repooling rule?

16 A. That is correct. That would be the repooling rule, I  
17 believe it's in Section 13, I was going to run to get my order,  
18 but you can confirm if I'm correct on that.

19 Q. And you sort of referenced it on page 6, but I just  
20 want to make sure that the record's clear that's what you are  
21 referring to.

22 A. That is correct, the repooling rule.

23 Q. Okay. So while you were reading your testimony I was  
24 looking at the CDFA materials. And on page 9, I note that  
25 there's a penalty for the call handler if, upon audit, it turns

1 out that they didn't need the milk.

2 A. That's --

3 JUDGE CLIFTON: That they didn't what?

4 MR. ENGLISH: That they did not need the milk for the  
5 purpose that the call handler requires.

6 MR. ZOLIN: If I could restate that, Chip. If on audit it  
7 is found that there is certification that the milk would be  
8 used in Class I is in error, then there is a penalty, that's  
9 correct.

10 BY MR. ENGLISH:

11 Q. And it is \$2.00 per hundredweight penalty, correct?

12 A. That's correct.

13 Q. That's pretty substantial?

14 A. Yes, it is.

15 Q. Let me talk about call provisions. You were involved  
16 with Kraft for a number of years in Order 2 and Order 30,  
17 correct?

18 A. Kraft operated pool supply plants, well, going back to  
19 seal test days and bottling plants, in a significant number of  
20 the orders at that time. Because I forget if when I started  
21 there might have been 45 or so orders. So yes, I have been in  
22 a number of the different orders.

23 Q. And you were certainly familiar with call provisions?

24 A. I -- yes, I am familiar with call provisions.

25 Q. Is it, in your experience that it was necessary to

1 actually use a call provision to get milk to move?

2 A. The -- whenever a call -- whenever there was the rumor  
3 about a call provision because usually bottlers would call and  
4 suppliers would listen and say, no, I'm not going to make milk  
5 available. There was always that undertone in the back of your  
6 mind that we're going to end up in a call. And usually you  
7 would bluff for awhile, but you tried to prevent that from  
8 happening.

9 I was involved in a situation, I don't know if it was  
10 an actual call or just a meeting with the New York Market  
11 Administrator, and it turned out, well, it was something that  
12 at the end of the day, we walked out of there and we said we  
13 really don't want to have this happen. We'll provide the milk  
14 to the fluid market.

15 Q. So similarly, as you look at the materials that are on  
16 page 11 of Exhibit 114 and Exhibit 115, there's been  
17 discussion, questions by Cooperative proponent representatives,  
18 of "well, gee, there's no problems. It's all going to work  
19 outside the Order." You have heard that kind of examination?

20 A. I have.

21 Q. Looking at the historical piece here of a risk, say, in  
22 any particular month of different entities being required to  
23 ship a hundred percent of their quota milk, and given the  
24 economic dynamic of wanting to keep your plant running at  
25 committed volumes, does that suggest to you that an overlay to

1 what could be happening in California is, you don't want a call  
2 call? A call is very disruptive?

3 A. I would agree with that, Mr. English, and if I could  
4 add to the to the record. I believe it was put into testimony  
5 that there was a distributing plant that was short of milk last  
6 week, or I'm, I'm losing my weeks. And my, James received an  
7 e-mail on his phone about that. He showed it to me, and my  
8 first reaction was, "Where is Hilmar on the call list?" I have  
9 to admit. And we looked and we found out we weren't even in  
10 that region, but at the same time, that was my first reaction,  
11 is where am I on the call list? So if I was number one, I  
12 think I would maybe have had a very quick answer rather than  
13 deliberated an answer that took maybe a few hours to think  
14 about how to handle that.

15 Q. So in your years of experience, the worst possible  
16 outcome is to actually have the call used?

17 A. Correct.

18 Q. On page 12, for brackets, we have, you know, basically  
19 0 to 14.9 at 10 percent.

20 A. And that is correct.

21 Q. So we don't, we don't actually have a mechanism for  
22 going lower than 10 percent actually in the shipping  
23 requirement, correct?

24 A. I referred to base performance requirement in my  
25 testimony and that is referring to the 10 percent. So

1 basically anytime utilization is up to 14.9, the base shipping  
2 requirement takes effect.

3 Q. But of course, the Market Administrator has flexibility  
4 to go lower than that, correct?

5 A. If market conditions warrant that the shipping  
6 percentage should be 5 percent, they do have the ability to  
7 make that adjustment.

8 Q. And something like that happened in the Northeast this  
9 year under extraordinary circumstances, that it was lowered to  
10 very low level?

11 A. I am not close to the Northeast markets anymore. I  
12 actually am aware of that from testimony that has come up at  
13 the hearing, so, yes.

14 Q. And, finally, and I really don't want to revisit old  
15 Order 2 too much here, but given your involvement with it, are  
16 you aware that for bulk tank handlers units, bulk tank units on  
17 that Order under the old Section 25, that there was a base  
18 percentage under one provision, that was the percentage for the  
19 same month the prior year?

20 A. I am familiar with that. Actually, and let's explain  
21 why. Whenever we have some old provisions that you are not  
22 familiar with, some of us like to go back and find them. So  
23 yes, from cross-examination earlier in this hearing, there have  
24 been things that have been brought up. And, in fact, since you  
25 have mentioned that, Chip, as we talk about our bracketing

1 system and how things work, and how the MA should evaluate  
2 market conditions, the concept of using previous year's same  
3 month utilization as some type of a starting point isn't a bad  
4 idea. And if I can elaborate on that, Chip.

5 One of the flaws of a bracket system is, we try to be  
6 responsive but there's seasonality and demand. I use August  
7 through September as an example. Schools start in, there's a  
8 little bit of stronger push from the need for fluid milk  
9 supplies, and if you go previous three months back, you are  
10 actually taking some of the flush timeframes. When I say  
11 flush, the time of year when milk production is at its peak,  
12 cows are, traditionally cows are at their flush. So the  
13 utilization might be actually lower than what is needed at the  
14 time. So that indicator, looking at previous years, previous  
15 years, same month utilization, might be another good indicator  
16 that the MA and the Department could look at.

17 Q. Bottom line, you are proposing a solution, but there  
18 needs to be flexibility. And if the Department looks at other  
19 options such as what used to exist in the concept of a same  
20 month, prior year, we're not adverse to that?

21 A. I'm sorry, Chip, repeat that?

22 Q. We're not adverse to that idea?

23 A. We're not adverse to that idea -- I'm sorry, I'm  
24 talking over you. The key is flexibility. Changing market  
25 conditions warrant that type of flexibility. Basically, we

1 could just have adopted the Order 30 shipping performance of 10  
2 percent and left it at that, but we did feel that there were  
3 other things that needed to be added in, for this market in  
4 particular.

5 Q. Thank you, Mr. Zolin, that's all I have.

6 JUDGE CLIFTON: Who next will ask questions of Mr. Zolin?  
7 Mr. Beshore.

8 CROSS-EXAMINATION

9 BY MR. BESHORE:

10 Q. Marvin Beshore.

11 Good afternoon, Mr. Zolin.

12 A. Good afternoon, Marv.

13 Q. Your Honor, if I could preface my cross-examination, I  
14 have some questions I would like to ask Mr. Zolin, but I would  
15 like to factor in the noon break here sometime while he's still  
16 available so that there's some additional time to, you know,  
17 digest his testimony before --

18 JUDGE CLIFTON: Yes.

19 MR. BESHORE: -- concluding?

20 JUDGE CLIFTON: This is really important, this proposal.  
21 And would you like to break now, Mr. Beshore?

22 MR. BESHORE: I can at least pick up the loose end that's  
23 been hanging for a couple of -- I don't know, a couple of times  
24 earlier from Mr. DeJong's testimony earlier. I think I can at  
25 least pick up that now, and maybe some other questions. I'm



1 not necessarily ready to break at the moment, but I would like  
2 to break while he's still on the stand.

3 JUDGE CLIFTON: All right. Very fine. I'll rely on you,  
4 Mr. Beshore, to signal when would you like to break for lunch.  
5 Mr. Zolin, I presume you intended to come back after lunch.

6 MR. ZOLIN: I intend to be here for a long time.

7 JUDGE CLIFTON: Good. Very fine. Then, Mr. Beshore, you  
8 may proceed.

9 BY MR. BESHORE:

10 Q. Mr. Zolin, let me pick up the Hilmar Cooperatives  
11 subject that was, that I didn't ask you about the last time you  
12 testified, but which has been pending. Okay.

13 So there are two cooperatives whose names I can't  
14 recall, that are listed on USDA and/or CDFA Cooperative lists  
15 as located in Hilmar, California. And are you familiar with  
16 those?

17 A. Okay. And I will answer those questions, but I have a  
18 little preamble first, if I may, Marv. The first --

19 Q. I'll give you that prerogative. Sure?

20 A. Thank you. The first is that I wasn't present in the  
21 room, was it a week ago Friday when the discussion started.

22 Q. That's why Mr. DeJong said it was up to you to answer  
23 it, I think.

24 A. He looked around and said, oh, he's gone, but -- no,  
25 no, no. I'm sorry. So we might have to give me a little bit

1 of a background and things, and that's fine.

2 But with that said, I also, because I knew it would  
3 come up, I put a very short statement together that I would  
4 like to read first, and then we can go through the questions if  
5 that's okay.

6 Q. Even though it is cross-examination, I will yield to  
7 your direct testimony.

8 A. Thank you. And again, at the end game we will have a  
9 discussion.

10 Okay. I broke this up into a couple of paragraphs.  
11 First, questions about my clients, that would be clients of  
12 Zolin International, LLC. I have a non-disclosure agreement  
13 with all of my clients. I consider confidential, the subject  
14 matter of the project I work on for my clients. Also, I keep  
15 the identity of my clients confidential. In the efforts to  
16 keep my client's identity confidential, I must respond to all  
17 questions about my current client list, clients I have had in  
18 the past, or industry players that I most likely will never be  
19 a client of mine, all in the same manner. That is, I cannot  
20 answer that question due to confidentiality concerns.

21 Second, questions about Hilmar's business partners and  
22 how I can respond. Hilmar has a non-disclosure agreement with  
23 all of its partners. Hilmar's MDA restricts discussion about  
24 its business partners identity and relationship. In matters  
25 where I may be aware of Hilmar's business partners, I am bound

1 by their MDA.

2 Third, Hilmar has given me permission to discuss  
3 independent dairy producers, IDP in a limited capacity. A  
4 number of years ago, I was asked by Hilmar to explain to a  
5 number of dairy farmers that ship their milk to Hilmar Cheese  
6 the process of forming a dairy cooperative for the purpose of  
7 pooling milk on an FMMO. After that meeting, the group of  
8 producers decided to move forward and form a qualified  
9 Cooperative under AMS. I again was asked by Hilmar to help the  
10 group of producers to fill out the appropriate paperwork and  
11 submit the information to AMS.

12 I had numerous phone conversations with AMS -- I had  
13 numerous phone conversations with AMS to help explain the  
14 application. Then some time later, I was notified by Hilmar  
15 that IDP had received a letter stating that IDP was approved as  
16 a qualified Cooperative. I attended IDP's first annual meeting  
17 to explain the ongoing reporting requirements for a qualified  
18 Cooperative. That describes my role in the formation of IDP.

19 JUDGE CLIFTON: I understood everything except how you  
20 can't disclose information about entities that are never going  
21 to be your clients.

22 MR. ZOLIN: Well, it is, let me walk through a scenario  
23 that I have been caught in before.

24 Someone will come up to me and ask me if Great Lakes  
25 Cheese, is Great Lakes Cheese a client of yours? And I

1 responded no. Then they asked me is Agrimark a client of  
2 yours? And I said, which they happen to be one -- damn it --  
3 and I say, "I can't answer that question due to confidentiality  
4 concerns. So you, and that is the trap I fell in. So now I  
5 have gone to the extent that whenever anyone asks me about have  
6 you worked for so and so, I just have to respond, no. The  
7 confidentiality, I have confidentiality concerns about that,  
8 and the Great Lakes, Agrimark example, they are both in the  
9 same region.

10 JUDGE CLIFTON: Okay. Mr. Beshore.

11 BY MR. BESHORE:

12 Q. Do you file Federal Order reports for Independent Dairy  
13 Producers?

14 A. I do not. IDP has a service contract relationship with  
15 Hilmar.

16 Q. Does Hilmar file Federal Order reports for Independent  
17 Dairy Producers?

18 A. Yes.

19 Q. Do you perform that work under your contract with  
20 Hilmar?

21 A. I do not.

22 Q. Dairy Stream. Is that, is that a Cooperative in  
23 California located or based or headquartered in Hilmar that you  
24 are aware of?

25 A. I specifically included in Exhibit 115, Region 2,

1 because it lists Dairy Stream Cooperative.

2 I am familiar with Dairy Stream Cooperative. They were  
3 made, or they are, they were created many years before I ever  
4 had any affiliation with Hilmar Cheese and I have very limited  
5 knowledge about what and who they are.

6 Q. Do they supply Hilmar, at Hilmar, California?

7 A. To the extent that I know about them, they are made up  
8 of producers that supply Hilmar in California.

9 Q. Okay. Do the producers supply Hilmar through Dairy  
10 Stream?

11 A. I don't know the aspects of the relationship.

12 Q. With respect to Independent Dairy Producers, do they,  
13 do they operate in Texas?

14 A. They are, if and when they, I don't look at how often  
15 they are in and out of pools, but they tend to be in the  
16 Central Order is where they operate, and I think that's where  
17 they show up consistently.

18 Q. Do you know where their members are located?

19 A. I do not.

20 Q. When you say they show up in the Central Order, do you  
21 mean they -- they market milk that's pooled under the Central  
22 Order?

23 A. Thank you for the clarification. When I look into the  
24 Order 32, 32, handlers list, I see the Independent Dairy  
25 Producers name, so --

1 Q. Do you -- is the Hilmar, the Dalhart, Texas plant, has  
2 it ever been, to your knowledge, a pool plant under any  
3 Federal Order?

4 A. I doubt it. It's -- I don't think it has -- well, I  
5 won't say I don't think it has Grade A status. I don't know.  
6 I don't believe it ever has been.

7 Q. Okay. Do you know if it has split plant facility?

8 A. That I do know, yes.

9 Q. It does have split plant facilities?

10 A. I do know that.

11 Q. Is there any reason to have those other than to be a  
12 pool plant on the Federal Order?

13 A. Well, you know, you plan for the future.

14 Q. Is that a yes that that's the reason --

15 A. I'm sorry.

16 Q. -- a plant would have split plant facilities?

17 A. We talk about physically separated and different ways  
18 to have a split plant. So if you are building a plant and you  
19 say maybe down the road I may want to, let's go back. Texas  
20 has a split plant provision in it. When you are building a  
21 plant, you might as well build the flexibility into the plant  
22 to take it to utilize the order provisions that would allow for  
23 efficient pooling.

24 Q. Okay. And when you say Texas has a split plant, you  
25 mean the Texas Order, Southwest Order, I guess.

1       A. I guess technically it's called the Southwest Order,  
2       yes.

3       Q. So it's your understanding that the split plant  
4       physical facilities at Dalhart were constructed in order to  
5       have the possibility of pooling on a Federal Order?

6       A. We were planning ahead.

7       Q. You were involved in that plant?

8       A. The, actually that planning, it happened kind of after  
9       the fact. We looked at an area that was easily adaptable. So  
10      yes, I came, I think the plant started construction 2003, 2004.  
11      I don't remember when. But whenever it was, the plant was up  
12      and running by the time I was engaged with Hilmar, and I toured  
13      it and I said, hmm, you can have a split plant if you would  
14      like one.

15      Q. Okay. Have you -- have you done any studies of how  
16      your proposed performance requirements, I'll use that to  
17      encompass everything in Proposal 2, Part 7.

18      A. May I interrupt Marv, are we done with the IDP?

19      Q. For the moment, at least. I'm not guaranteeing you  
20      there aren't any other questions that come up, but I'm moving  
21      onto another subject at the moment.

22             Okay. Let me see what I was, see if I can recapture my  
23      question there. Have you done any studies with respect to how  
24      the constellation of performance requirements that you have  
25      talked about under Proposal 2, Section 7, how they might

1 function, given actual utilization percentages and  
2 potentialities?

3 A. The term studies, no. In our working group under  
4 Dairy Institute, because we had a number of companies that had,  
5 have both California and Federal Order experiences, we  
6 discussed back to which orders would work and which orders  
7 wouldn't, and having fluid milk processors in the room, and  
8 having folks that are familiar with supply plant definitions in  
9 the room, so I would say discussions more than studies.

10 Q. Okay. Who -- who were the members of the task force  
11 that's been referenced here a number of times, including in  
12 your testimony, in the introduction?

13 A. Don't put me -- I don't know them all, but I can, I can  
14 rattle down the ones that stick in my head because the most  
15 vocal ones were the ones you remember. Obviously, Dean's was  
16 part of the task force; Hilmar was part of the task force;  
17 Kraft was part of the task force. Saputo, okay, let me keep  
18 going. HP Hood, Clover Stornetta, I'm starting to draw blanks,  
19 Leprino, thank you. Anyone in the back want to raise their  
20 hand?

21 There were, let me put it this way. The producer  
22 relations committee of Dairy Institute of California, people  
23 would, I almost think it was the entire producer relations  
24 committee would come to be part of the discussions at one time  
25 or another, so --



1 Q. Okay. In -- in your in your proposal, more than one  
2 place, I think, but at least -- at least in Section 7(c)(4),  
3 which is at the top of page 47220 in Exhibit 1, the Federal  
4 Register Notice, the left column.

5 A. I see it, sir.

6 Q. Okay. There's language "or as directed by the Market  
7 Administrator". And you have talked about Market Administrator  
8 discretion in your testimony.

9 A. Correct.

10 Q. Okay. Do you say anywhere what you intend the Market  
11 Administrator, how, to do, in exercising his discretion or  
12 making those directions?

13 A. I'm sorry, Marv, could you repeat the -- back to my --  
14 I think I'm going back to those four criteria that the MA  
15 should be looking at to evaluate market conditions to make  
16 adjustments.

17 Q. Are they in the order language, proposed order  
18 language?

19 A. Are they written in here? No, they are not.

20 Q. Okay. Do you have any explicit directions here for how  
21 he should go about, he or she, should go about determining  
22 whether to, how to follow those criteria?

23 A. We have no direct directions for how the MA would make  
24 those determinations, but I would say that the provisions where  
25 a Market Administrator can adjust performance requirements, I

1 believe is common to almost all Federal Orders. I say I  
2 believe, I'm just not sure. There might be one or two out  
3 there that does not have that. So I think they know how to do  
4 it in.

5 Q. Okay. Do your provisions, pooling provisions under  
6 Section 7, allow plants under, any plant in California, any  
7 non-7(a) or 7(b) plant to permanently stay out of the pool?

8 A. I believe so.

9 Q. Okay. In other words, if Hilmar, or anybody else, not  
10 to pick on Hilmar, but --

11 A. Why not.

12 Q. You are there. Whatever. If they didn't want to pool  
13 under your proposal anytime, they would not have to.

14 A. That is correct. And again, I would like to add the  
15 but. We talked about the Hilmar Texas Dalhart plant is a  
16 nonpool plant. And so for many years I believe it was in just  
17 that situation, it just never was concerned about pooling milk  
18 in a Federal Order.

19 Q. But it buys a large majority of its milk off the pool,  
20 correct?

21 A. Again, I'm going back to inception, for a number of  
22 years when the plant was built and was operating, the market  
23 conditions were such that they were a nonpool plant buying  
24 Grade A milk not associated with any pool.

25 Q. But in recent years they are predominantly supplied by

1 pool milk, correct?

2 A. I hesitate on the word predominantly, because I don't  
3 look at things, I hate to say I'm at 10,000 foot-level rather  
4 than the reports. But it, it comes and goes, you know,  
5 depending on market conditions, it might be 100 percent nonpool  
6 milk, other times it might be 50 or 100 percent pool milk. It  
7 is just a question of how the reports are being filled out and  
8 whether or not it's required or advantageous, I'll use, to be  
9 in the pool. We tend to follow the same pattern that the major  
10 cooperatives in Texas use when they take their Southwest cheese  
11 plant on off the pool, and suddenly it is a pool plant one  
12 month, completely nonpool the next.

13 Q. But if it is never been a pool plant, it is not really  
14 up to the plant whether the milk its purchasing gets pooled or  
15 not, is it?

16 A. Could you repeat the question, Marv?

17 Q. If the plant is not a pool plant, and I think you have  
18 testified Dalhart's never been a pool plant.

19 A. Never been a pool plant.

20 Q. Okay. If its never been a pool plant, it is not up to  
21 it whether it is purchasing pool milk or not, correct?

22 A. I'll agree with that, yeah.

23 Q. So you are not, it's not making any pooling or  
24 depooling decisions, it's just buying milk?

25 A. Correct.

1 Q. Okay. Your Honor, I would propose that we break for  
2 lunch at 12:44 on the hearing room clock.

3 JUDGE CLIFTON: Mr. English?

4 MR. ENGLISH: I do not disagree. The difference, the only  
5 thing is, for production purposes, and I have no idea how long  
6 Mr. Zolin's going to be on afterwards. But I'm aware that our  
7 next witness, we have testimony, but it has not been copied.  
8 And so I would propose this one day we go an hour and a half so  
9 that whoever is engaged that copying can have lunch and be back  
10 here and listen to this. So an hour and a half.

11 JUDGE CLIFTON: Is there any objection? I see none.  
12 Please be back and ready to go at 2:15. We go off record at  
13 12:46.

14 (Whereupon, the lunch recess was taken.)

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1 THURSDAY, OCTOBER 29, 2015 - - AFTERNOON SESSION

2 JUDGE CLIFTON: We're back on record at 2:18. We have an  
3 announcement before we resume cross-examination.

4 MS. MAY: My announcement is that I -- to keep this room  
5 cool, we have to keep the doors closed otherwise they won't  
6 turn the air down for us. That's why I closed the doors.  
7 That's all. Laurel May.

8 JUDGE CLIFTON: This air may not be fresh, but it will be  
9 cool. Mr. Beshore. You may resume your cross-examination of  
10 Mr. Zolin.

11 CROSS-EXAMINATION

12 BY MR. BESHORE:

13 Q. Thank you, your Honor, Marvin Beshore.

14 Good afternoon, Alan. Thank you for the additional  
15 break time, your Honor. Although I'm still trying to work my  
16 way through this and I think Al can help.

17 Let me see if I can walk, if you can walk me through or  
18 walk with me through Section 7(c) to understand the intended  
19 performance requirements for a supply plant. And I'm  
20 interested in, among other things, the inter-relationship here  
21 of requirements imposed upon quota milk versus other milk. So  
22 if we start in (c), 1. Is the -- well, the basic 10 percent --

23 JUDGE CLIFTON: Mr. Beshore, we all want to be on the same  
24 page as you.

25 MR. BESHORE: I'm sorry.

1 JUDGE CLIFTON: You are in Exhibit 1.

2 MR. BESHORE: I am in Exhibit 1. I am on page 47219, which  
3 is part of Proposal 2, and I'm in Section 1051.7, pool plant,  
4 and I'm in part (c), the middle column, supply plant.

5 JUDGE CLIFTON: Thank you.

6 BY MR. BESHORE:

7 Q. So the opening clause sets out the basic 10 percent  
8 shipping requirement for supply plants, correct?

9 A. That is correct.

10 Q. Okay. And the denominator of that is, excludes 9(c),  
11 milk of cooperatives, or 9(d), milk of proprietary bulk tank  
12 handlers, correct?

13 A. Well, in (c) it, what it says is not less than, I'm  
14 going to start in the section that starts with "not less than  
15 10 percent of Grade A milk received from dairy farmers." Now  
16 the parentheses says, (except dairy farmers described in  
17 1051.12(b)). And then it stops. And so it does include  
18 handlers described in 9(c) and 9(d).

19 JUDGE CLIFTON: Do you have enough volume in the back?

20 MR. ZOLIN: The performance requirements for 9(c), 9(d) and  
21 supply plants are all 10 percent is what, the way I read the  
22 language, Marv.

23 BY MR. BESHORE:

24 Q. Okay. Okay. And thank you.

25 A. It is that closing of the second parentheses that might

1 be confusing.

2 Q. Yeah, well, I think it did confuse me, and I appreciate  
3 your clarification. And it goes onto also include diverted  
4 milk.

5 A. It includes the diverted milk in Section 13, it is  
6 identical, Section (c)(i) through little (iv) is identical to  
7 Order 30, except for that reference to 9(d).

8 Q. Section (c)(i) through (iv) is identical to Order 30,  
9 except for the paren small (d) references?

10 A. And to be clear again, maybe some of those paragraphs  
11 in the pool plant definition, it might be a (d) or an (e) or  
12 something else in Order 30 because they have moved around, but  
13 intent-wise, we just copied them.

14 Q. Good. So that helps. Now, when we get to 2, then  
15 (c)(ii), this is where you have your bracketed adjusted  
16 percentage language, which is depicted then, on page 12 the  
17 operation of which is depicted on page 12 of Exhibit 114.

18 A. That is correct.

19 Q. Okay. Then we go to paren 3(c)(iii), which is at the  
20 very bottom of the third column of Exhibit 1, page 47219, and  
21 (iii) describes requirements relating to quota milk, if I'm, if  
22 I'm understanding it; is that right?

23 A. You are correct.

24 Q. Okay. So is this on top of, or inside of, the 1 and 2  
25 requirements, or how does it relate to the 1 and 2 requirement?

1 A. It is, paragraph 3 is in addition to the shipping  
2 percentages that were in the brackets. So this is an  
3 additional requirement to supply the Class I market.

4 Q. Okay. So, hypothetically, a plant has, you know, has a  
5 1,000 pounds of milk, you know, 500 of those hundredweight,  
6 half of it is quota milk and half of it is non-quota milk.  
7 Okay? So what are its requirements then, to have all of its  
8 milk pooled?

9 A. Okay. And, again, it's -- I'll do it, it's 10 percent  
10 on the 1,000, so you have got 100, and then it is 60 percent on  
11 the, you said 500?

12 Q. Yes.

13 A. So that would be 300, so its performance requirement  
14 would be 400.

15 Q. Okay. So, in essence, the quota, if the hundred, if  
16 the 10 percent is prorated over the quota and non-quota, the  
17 quota milk is then delivering at what, 70 percent, the  
18 non-quota at 5?

19 A. It -- the quota milk is delivering at a higher rate, I  
20 agree with you, and it is our belief that quota milk is, should  
21 be required to perform for the Class I market.

22 Q. At a rate which is a multiple, a substantial multiple,  
23 well, it starts at six times as much as all other milk.

24 A. And, that is correct. And we use the 100 percent, we  
25 looked at the current California State Order, looking at 100



1 percent performance on a call provision, and so we adopted that  
2 to a 60 percent number in this case.

3 Q. So basically you built in a 60 percent, really, it is  
4 more than that. It is a 70 percent floor on, on quota milk  
5 being shipped, unless it is reduced down by discretion of the  
6 Market Administrator.

7 A. That was going to be my next comment, that there's  
8 always the opportunity for the adjustment to be made by the  
9 Market Administrator. And, again, just for clarifying, because  
10 I like to think of it as the quota milk performs. It's, you  
11 know, Mr. Producer A has to be shipped to a bottler. That's  
12 not the case. It is any equivalent milk that the handler has  
13 to meet that requirement. So if the quota milk is in an, in a  
14 location that is just "inefficient" to get it to a fluid  
15 market, the handler could use its most efficient milk to supply  
16 the Class I market.

17 Q. Yeah, and the quota milk might be commingled on a truck  
18 with non-quota milk, or commingled in a plant with non-quota  
19 milk.

20 A. I never thought of that. I haven't -- maybe in  
21 Northern California, but I -- the farms I see around here, the  
22 word "commingle" doesn't exist. They are four or five loads of  
23 milk a day.

24 Q. Well, I think the record makes clear, they are not, all  
25 1450 farms in California are not four or five loads a day, you

1 understand that, of course?

2 A. I'm not that familiar with Northern California, so I am  
3 assuming there must be some small ones, yeah.

4 Q. Okay. Let's go onto part four, then, on page 47220 of  
5 Exhibit 1. This is, as I understand it then, an additional  
6 requirement, this is a seasonal requirement for performance of  
7 quota milk which establishes, and tell me if I'm wrong,  
8 establishes the minimum at 85 percent during the months of July  
9 through February, unless, of course, adjusted by the Market  
10 Administrator.

11 A. I would like to correct that. It doesn't establish it  
12 as a minimum of 85, it allows it to go up to 85. So if you are  
13 at, if paragraph 3 is 60, then you can move that up to 85  
14 percent based on market conditions.

15 Q. So when it says "during the months of July through  
16 February, the operator of a supply plant under this paragraph  
17 shall make qualified shipments of up to 85 percent of the quota  
18 milk....if requested by the operator of such pool distributing  
19 plant, or as directed by the Market Administrator."

20 Is that your caveat?

21 A. Exactly, Chip -- Chip -- Marv. This is where we --

22 Q. How can you confuse us?

23 A. My peripheral vision has you both in my sight and you  
24 have, you know that X-O thing, you have a blind spot, Marv?  
25 You are in the perfect spot where you sometimes disappear.

1 Q. Thank you, Mr. Zolin.

2 A. Now I lost where I was.

3 Q. Explaining part 4, how it's supposed (c)4 explaining  
4 the that (c)4 at the top of 47220.

5 A. I remember my spot. This paragraph 4, is the area that  
6 we tailored very closely to the California State Order call  
7 provision. That was our model for drafting the language in  
8 paragraph 4, (i), (ii). I think it stops there.

9 Q. So since you used that as a model, you like the way  
10 that California state provision works if it's applied, I take  
11 it?

12 A. We found it -- it was interesting. And based upon the  
13 way Federal Orders operate on call provisions and other things,  
14 we, this was a new twist and we thought, and I to use the  
15 Proponent 1's terms, California handlers and producers are  
16 familiar with it.

17 Q. Okay. So, let me -- let me see if I understand how  
18 this could work. If the, let's just talk about the Market  
19 Administrator directing it. If the Market Administrator  
20 directs, a handler could be required to supply 85 percent of  
21 its quota volume to a distributing plant, and that's in  
22 addition to the basic 10 percent performance that presumably is  
23 in place that month?

24 A. Yeah. The basic 10 is always there. 3 is there,  
25 unless it gets superseded by 4 during those months, but it is,

1 you know, obviously you can't go over 100. So it is whatever 3  
2 says, or in the months of July through February, what is  
3 determined for those months, and then that would supplant what  
4 was in 3.

5 Q. Okay. Now, here's my next question on 4. The clause  
6 right before "or as directed by the Market Administrator",  
7 says, and I'm got ellipses here, "...that supply plant shall  
8 may u[ to 85 percent of the quota milk or equivalent amount...  
9 if requested by the operator of such pool distributing plant."  
10 So does that mean that the pool distributing, and then it says  
11 "or directed by the Market Administrator." Does that mean that  
12 under this language, a pool distributing plant may request that  
13 delivery level and the pool supply plant must, at that request,  
14 deliver that amount?

15 A. A simple answer is yes. Mimicking the California  
16 system where a distributing plant makes the call handler sort  
17 of fills out the call handler certification form saying that  
18 they specifically need milk.

19 Q. Okay. Now, let's -- let me ask you some questions  
20 about how the, how the bracket system would function. So, and  
21 I'm looking at page 12 of Exhibit 114, and the language of  
22 c(2), 1051.7c(2), on page 47219 of Exhibit 1.

23 If the shipping percentage for the prior three months,  
24 now, if the Class 1 utilization percentage in the pool for the  
25 prior three months was greater than, averaged more than 15

1 percent, this provision would kick in to increase the base  
2 level shipping requirement, correct?

3 A. Correct.

4 Q. And that three-month average would be determined by  
5 approximately the 13, and announced by the 13th of the month,  
6 the following month?

7 A. No. The 13th is the date that the pool will have been,  
8 the blend price would have been calculated. So the Market  
9 Administrator at that point, let's use months. Like the 13th  
10 of May, the Market Administrator will know what the Class 1  
11 utilization is for April because they have completed the entire  
12 pool. And sometimes, most times, they are two, three days  
13 early. But our statement is that the announcement of, so the  
14 blend price for that month will go out on the 13th or earlier,  
15 the announcement for your shipping requirements will go out by  
16 the 15th.

17 Q. Okay. And that is the announcement of the shipping  
18 requirements for June?

19 A. If you are talking May, it will be June that that would  
20 be the shipping requirements for June.

21 Q. Okay.

22 A. Yes.

23 Q. Now, if -- how does that interact, if it does, with the  
24 Market Administrator's discretion under (f), this is 1051.7(f),  
25 which starts at the bottom of the middle column on page 47220

1 of Exhibit 1.

2 A. I consider paragraph (f) to be the overarching  
3 authority for the Market Administrator to adjust all the  
4 percentages in Section (c). So, for example, if we were  
5 looking at a situation where the averaging comes to 55 percent  
6 for a specific month, and let's say the month is December that  
7 it's going to be, and I know Christmas is in December, the  
8 Market Administrator may say a 50 percent shipping requirement  
9 for December is inappropriate based on the supply demand  
10 conditions, knowing the channels. We are going to announce a  
11 35 percent shipping requirement for the month of December.

12 Q. Okay. So is the, where does it in the language, if it  
13 is here, does it tell the, do you tell the Market Administrator  
14 to make a bracket adjustment correction on his or her own  
15 motion?

16 A. Well, it, Marv, it says the shipping percentages -- may  
17 be increased or decreased by the Market Administrator.

18 Q. Which provision are you reading?

19 A. (F).

20 Q. Okay. But that's my, this is my question. (F) says at  
21 the top of, in the first, I don't know, first full sentence I  
22 think, on the top of the third column.

23 A. Starting with the word "before".

24 Q. Yeah, before.

25 A. Okay.

1 Q. The request has to be made in writing at least 15 days  
2 prior to the month for which it would be effective. Well, go  
3 ahead and read that sentence. Maybe I don't understand how  
4 it's supposed to work.

5 JUDGE CLIFTON: So you want Mr. Zolin to start with before  
6 making?

7 MR. BESHORE: Actually, why don't you start, start at the  
8 beginning of (f) and go through the sentence that begins  
9 "before making", there's about three sentences there, two or  
10 three sentences.

11 MR. ZOLIN: I see what you are saying, Marv, and it does  
12 say that the interested parties would make a request 15 days  
13 prior to the month of the requested revision to take effect.  
14 So I think we do have somewhat of a timing issue there.

15 BY MR. BESHORE:

16 Q. Okay. I think -- yeah, I think there is a timing issue  
17 there. Since they wouldn't know what the shipping requirements  
18 are on the 15th, until the 15th, and that's the last day to  
19 request any possible consideration of an adjustment, and the  
20 Market Administrator has to ask for information, make findings,  
21 etcetera. Correct?

22 A. I'm reading it, and I agree, I think one of the issues  
23 when you pool Order 30 language, and I agree, this one talks  
24 about the timing. I guess a modification would be in response  
25 to the brackets, the Market Administrator will have the ability

1 to adjust those brackets when they announce on the 15th based  
2 upon supply and demand.

3 Q. So the brackets could be completely discretionary,  
4 basically, with the Market Administrator?

5 A. Our intent was to give the ability to make automatic  
6 adjustments to the shipping requirements based on supply and  
7 demand, and if, for some reason, that automatic methodology was  
8 creating an issue, instead of going to a hearing or exhaustive  
9 research by the MA, if they could make, in their discretion,  
10 make an adjustment to those percentages. That's our intent.

11 Q. Okay. And I understand that. And appreciate that.  
12 But now you say on the basis of supply and demand, but when you  
13 are operating in an environment of open depooling, you are  
14 really talking, these ratios are all, not really based on  
15 supply and demand, they are based on pooled milk. Are they  
16 not?

17 A. It is a combination of a number of things, and non,  
18 milk not pooled would be one of the, one of the equations.

19 Q. Okay. And what I'm thinking about here is, the Class  
20 I, the brackets work off the Class I utilization, but that can  
21 vary on the basis of Class I demand, can and does vary, not on  
22 the basis of milk pooled and depooled, I mean, that's the way  
23 it works in the Federal Order 30 or any of the orders, right?

24 A. Exactly. Yes.

25 Q. Yeah. So I was looking at Exhibit 100, which



1 Mr. DeJong provided, which is statistics from Order 124,  
2 actually, you don't need to have a copy in front of you, let me  
3 just say --

4 JUDGE CLIFTON: Let me just hand him a copy. Mr. Zolin?  
5 Let him look at it before you ask, please.

6 BY MR. BESHORE:

7 Q. Sure. So Exhibit 100 doesn't have Class I utilization  
8 on it, but it has a lot of other figures from the market. And  
9 you can, you can see, and it was presented to illustrate how  
10 Class III milk can vary markedly from month to month when  
11 depooling is basically free and open, correct?

12 A. I didn't hear the last few words.

13 Q. When depooling is permissible?

14 A. Yes. I think almost every order, well, I won't say  
15 that. Yes, the producer milk that's pooled, and the Class III  
16 utilization does change when there is the incentive to depool  
17 based on the class prices and the blend prices.

18 Q. So if you look at, for instance, I just went to the, or  
19 had one of our team go to the website and just put Class I  
20 utilization percentages on these months.

21 A. Do I have that?

22 Q. No, you don't. But let me just give you two, okay? So  
23 in August, the Class I utilization percentage was 21.7, and  
24 then --

25 A. I don't want to write on the Judge's copy.

1 Q. Well, I'm going to give you three numbers, you can  
2 probably hear them, remember them, or just note them. So in  
3 August it was 21.7, and then in October, which in the bottom  
4 you can see, in October and November there were big amounts of  
5 large depoolings, and Class III utilization went way down on  
6 the order. The class I utilization jumped to 35.8 and in  
7 October and 38.0 in November.

8 And let me throw in the September number just so we  
9 have the four months in a row there, 23.9. So under a system,  
10 if Proposal 2 were in effect in this order, and you had those  
11 kind of changes and utilization relating to depooling, the  
12 Market Administrator in December would be announcing a  
13 performance requirement for January that would be, you know,  
14 what up about three brackets from what it would have been back  
15 in August or September, right?

16 A. Well, I kind of understand the math, but in order to  
17 announce December, what you are saying is you are averaging the  
18 August, September, and October utilization.

19 Q. Well, I was saying September, October, November?

20 A. Well, you couldn't, you wouldn't have November, so it  
21 would have to be August, September, October, so, you know, it  
22 is kind of catchy. It took me awhile to get the chart right.

23 Q. Well, I was -- yeah, I was saying in December for  
24 January is what I meant to say. I'm sorry.

25 A. Okay.

1 Q. Okay. So in December for January, he would be,  
2 obviously with those months, the utilization being high, you  
3 know, the performance requirement would be, under the brackets,  
4 would be ratcheted up significantly, correct?

5 A. And even, Marv, the answer is yes. And in the example,  
6 I, in the May through August timeframe on page 12, I basically  
7 doubled the shipping requirement from 10 to 20 percent.  
8 Obviously the, I started, I could have used 20 and 27 and 30  
9 percent numbers, I just happened to use the numbers that we  
10 started to talk about.

11 Q. But wouldn't that, aren't you just building in a system  
12 that asks, almost demands, uneconomic shipments of milk because  
13 you have an artificially high shipping percentage generated by  
14 these artificially high utilization percentages which are a  
15 product of open depooling?

16 A. If, well, I'll deny, I'll disagree with the open  
17 depooling comment. But if the Market Administrator does not  
18 make a determination that those percentages are inappropriate  
19 and make an adjustment. And so that's -- that's the  
20 flexibility caveat that we give to the Market Administrator to  
21 look at market conditions and manage the California Order so  
22 there aren't those inefficient movements.

23 Q. Okay. So, let's -- now, walk with me through how the  
24 Market Administrator is going to be thinking about that. He's  
25 in the middle of December, he's trying to figure out -- the

1 bracket, let's say the bracket calls for -- those three months  
2 average to roughly 30, I'll just say 30 -- so that under yours  
3 it would call for 30 percent shipping, you know. You know that  
4 the that universe of milk here is only about 15 percent  
5 Class I, but let's say it calls for 30 percent shipping. This  
6 is in the middle of December.

7 Now, the 30 percent shipping, of course, is just the 30  
8 percent, for each handler, it is just 30 percent of the milk  
9 the handler wants to pool.

10 A. Correct.

11 Q. Now, to figure out how much milk, what the right  
12 percentage is, the Market Administrator in the middle of  
13 December is going to have to project how much milk the handlers  
14 would pool in January, right?

15 A. Uh-huh, correct.

16 Q. In order to then apply a numerator to get the right  
17 amount of milk to Class I plants, correct?

18 A. Correct.

19 Q. But you don't know how much milk is going to be pooled  
20 in January until reports are filed sometime after the end of  
21 January, in early February, by that what, 8th or 9th, I forget  
22 what it is on your proposal. I think we're at the 9th now,  
23 right?

24 A. I'm sorry I was, I was thinking of an answer to your  
25 question and you kept talking.

1 Q. You are ahead of me, I'm sure. You know, you really  
2 aren't going to know how much milk going to be pooled until  
3 those decisions are made in the early part of February,  
4 correct?

5 A. I think the word is you won't know exactly. But again,  
6 at the same time, you have estimates of what will and will not  
7 happen. We have futures markets today that describe where  
8 prices may be going, and there is an opportunity for a judgment  
9 to step in.

10 Q. Okay. So the Market Administrator in the middle of  
11 December is going to have to check the futures markets for  
12 January for cheese, butter, and powder, and assuming that they  
13 are correct, calculate an anticipated PPD for January, and then  
14 assuming he's got that in the ballpark or he's got, he or she  
15 has got that right, they are going to have to then make a  
16 guesstimate of how much milk the handlers are going to pool or  
17 depool or not pool based on that projected PPD, projected off  
18 the futures market, correct?

19 A. That would be a, yes, they would have to do that. And  
20 in today's world, many offices, Market Administrator offices,  
21 provide estimates of PPD's one, two, three months out, and they  
22 are quite good at it.

23 Q. Publish estimates of PPD's, 1, 2, 3 months out?

24 A. I tend to call them. We have a conversation.

25 Q. I haven't seen any of those published, but they -- they

1 provide them to you?

2 A. I call and ask.

3 Q. And you get them?

4 A. I have.

5 Q. Regularly?

6 A. When I'm interested what other people think the future  
7 is going to hold for the Class III in relationship to a PPD,  
8 yes, I do.

9 Q. Okay. What do you, what do you expect under -- under  
10 your proposal is going to happen to quota, let's say three,  
11 four, six months in to Proposal 2?

12 A. I'll answer that question if I can hand this back,  
13 because I keep being afraid I'm going to write on it.

14 Q. You have my permission, not that you needed it.

15 A. Marv, I am an accountant, not an Economist, and I am  
16 not that familiar with the quota system to begin with, so I  
17 really don't have an opinion. Other, I have heard testimony  
18 here that I would just be repeating what other people have  
19 said. That's not truly my opinion, because I don't have one.

20 Q. Since, if quota, basically, went away, was wiped out as  
21 projected by the, by the AMS Economic Impact Analysis, as well  
22 as testified to by Mr. Hatamiya, if that happened, the reliance  
23 on quota milk to meet the needs of the market under, or to  
24 perform or deliver under Proposal 2, would sort of be moot,  
25 right?

1 A. The answer to your question is yes. If there is no  
2 quota milk, III and IV is a provision that will no longer  
3 function. You mentioned a name I'm not familiar with, so I  
4 don't know who -- I was not here for this entire hearing, so I  
5 don't know who this person is that talks about the demise of  
6 quota. I know that I was here for the first week, but I don't  
7 know who the other person is.

8 Q. You heard the testimony then, of the, of Ms. Stremix,  
9 the Economist for AMS?

10 A. Yes.

11 Q. Okay. Okay. That's all. I don't have any other,  
12 thank you, Al, I don't have any other questions.

13 JUDGE CLIFTON: Who next has questions for Mr. Zolin?  
14 Mr. English?

15 CROSS-EXAMINATION

16 BY MR. ENGLISH:

17 Q. Minor direct follow ups -- Chip English -- minor direct  
18 follow ups on the discussion you just had with Mr. Beshore.  
19 And while you were having the conversation with him, I was  
20 looking through Order 30 and Order 124. And he showed you the  
21 Order 124 data with some pretty dramatic moves. And he -- he  
22 used the word "open depooling", correct?

23 A. I heard the term and I disagreed with that term, yes.

24 Q. Okay. So what do you think he meant by that term?

25 A. That there were no provisions or there are no

1 restrictions on milk being removed from the pool.

2 Q. Okay. And I'm not sure how familiar you are with the  
3 Pacific Northwest Order 124, but do you know whether or not  
4 they have any repooling provisions in Order 124? You are  
5 welcome to look.

6 A. I can look --

7 Q. 124 -- if I represented to you --

8 A. I do not know off the top of my head, if they have any  
9 repooling provisions or not.

10 Q. Well, if producer milk for Class III goes, in February,  
11 from 58 million to 318 million, that would suggest a lack of  
12 repooling restrictions?

13 A. Mathematically you wouldn't be able to bring that much  
14 milk on, yes, I understand. So they must not have any.

15 Q. Okay.

16 A. Or there --

17 Q. But we do, or our Proposal 2 does have repooling  
18 provision restrictions, correct? There are --

19 A. Proposal 2 does have repooling restrictions, yes.

20 Q. So the Market Administrator would know how much milk  
21 can be repooled in a subsequent month based upon what happened,  
22 correct?

23 A. That is correct, Mr. English. And the Judge and I were  
24 discussing the lighting in here, and when you read something  
25 with the light, sometimes you miss things. And with



1 Mr. Beshore, we were talking about the timing that the  
2 Market Administrator has, and I did notice the phrase "on the  
3 Market Administrator's own initiative or at the request of  
4 interested parties," so I think the Market Administrator, on  
5 their own initiative, can pick things up a little bit faster  
6 than an interested party sending in a letter.

7 Q. You don't need me, I'm going there next.

8 A. It is hard to see, especially with the microphone, you  
9 know, you are close, you miss things.

10 Q. All right. So number 1, the Market Administrator can  
11 investigate, correct?

12 A. Correct.

13 Q. And it's really not supply and demand conditions, it is  
14 the Market Administrator finds that adjustment is necessary to  
15 encourage needed shipments or to prevent uneconomic shipments?

16 A. Right. It goes both ways, supply the market or make  
17 sure that there are not uneconomic shipments being moved with  
18 surplus milk.

19 Q. So the Market Administrator could, even before he  
20 announces a percentage, as your own example for a December, if  
21 the run up in November, of August, September, October, was a  
22 very high Class I percentage, looking at December, and the fact  
23 that there's Christmas, the Market Administrator would  
24 certainly be able to adjust that?

25 A. I agree. And, Mr. English, if I can even add, and I'm

1 making sure it is still in my testimony that I didn't remove  
2 it. I left the Michigan Order, and the Market Administrator in  
3 Michigan, and I'm sorry, it's Order 33, I use the old Orders,  
4 the Mideast Order, they adjusted provisions for shipping and  
5 diversion until further notice. So they -- they had some  
6 incite into, not just next month, but down the road to make  
7 those types of decisions.

8 Q. And looking at the request to be made in writing, at  
9 least 15 days prior to the month, and maybe we'll adjust that  
10 to 10 days, we can make that change, correct?

11 A. Correct.

12 Q. Or alternatively, the people in the industry will be  
13 using the same incites and guidance that the  
14 Market Administrator has, and so they will know, you know,  
15 leading into December, they will have some idea at least, based  
16 upon pricing relationships, of what was going on in August,  
17 September, October, of whether they might have a problem coming  
18 to December, and they could make that request?

19 A. I agree with that.

20 Q. And finally, just going back to my earlier questions,  
21 it may be that the Secretary, in his wisdom, in looking at  
22 this, could say, "you know, rather than using the prior three  
23 months, I'm going to look at the same month last year," and  
24 then the Market Administrator could use that. So we have  
25 flexibility. We're asking for flexibility.

1 A. Correct. The intent is flexibility and automatic  
2 adjustment to conditions, that's what we're looking for. The  
3 bracketing system was the one our task force agreed to.

4 Q. That's all I have.

5 JUDGE CLIFTON: Mr. Vetne?

6 CROSS-EXAMINATION

7 BY MR. VETNE:

8 Q. John Vetne, representative for Hilmar Cheese Company.

9 Let's go back to your review, let's say of Exhibit 115.  
10 It's easier. I think you, I think you made a comment, and I  
11 think it was in error, and I want you to agree with me. That  
12 all 52 weeks of the year are accounted for in these designated  
13 supply handlers for procurement Region 2 in this case, and also  
14 1. I'm reading this, and the first date I see on Exhibit 115  
15 is September 1. And going forward chronologically to the back  
16 of that page that's for period 5, the last date in sequence  
17 would be April 30. Do you see that?

18 A. I do see that.

19 Q. And the period between September 1 and April 30 does  
20 not count 52 weeks?

21 A. That is correct, John, it is not a full year.

22 Q. So the current call provision applies during some  
23 historical short supply or increased Class I demand period in  
24 California?

25 A. That is correct.

1 Q. Okay. And your understanding of the current system is  
2 that supply handlers must perform on the basis of the quantity  
3 of quota milk that they -- that they pool, essentially.

4 A. Yes, that is my understanding.

5 Q. Okay. Now, quota milk, let's see, before there was  
6 quota, there were producers who got a better price based on the  
7 handlers use of their milk. They sold milk to Class I buyer  
8 and got a better price on the basis of that handler's use. Do  
9 you understand that?

10 A. Going before quota, I'm thinking you are referring to,  
11 like a, God, I'm trying to think of the terminology.

12 Q. Handler pool?

13 A. Handler pool, yeah. Thank you.

14 Q. So they got a better price based on the handlers use.

15 A. Correct.

16 Q. And then after quota, some producers got a better  
17 price, quota, based on historical handler use of their milk,  
18 correct?

19 A. Correct.

20 Q. And although a lot of time has lapsed, it's a  
21 continuation of producers receiving, some producers receiving  
22 better price based on an historical pattern of handler's use of  
23 that milk?

24 A. Correct.

25 Q. Or of generation's precedent milk. But when a handler

1 is performing on the basis of quota milk they receive, it's not  
2 the quota milk that must perform, it is the handler buying the  
3 milk, correct?

4 A. Correct. The handlers are regulated here in this  
5 situation. The producers that own the quota are basically  
6 shipping into the handler, and then the handler has to deal  
7 with the type of milk supply he has coming in.

8 Q. So whatever cost there is involved in, in performing  
9 and making a shipment is borne by the handler, not the  
10 quota-owning producer?

11 A. It is borne by the handler with the one proviso, John,  
12 is we give the flexibility to the handler to use any source of  
13 milk to meet the requirements, but it is driven by how much  
14 quota milk that handler has.

15 Q. So in your, in Proposal 2 and in the existing system as  
16 you understand it, the performing handler can perform with any  
17 supply of milk available to that handler, as long as the  
18 quantity equals the quantity of quota milk subject to the call  
19 that the handler buys?

20 A. Exactly.

21 Q. Okay. There haven't been many calls in California so  
22 we don't know what might happen in the future with a  
23 Federal Order, but if there is a real, if there is a real  
24 prospective threat of call, would not handlers have a  
25 marketplace disincentive to buy milk from producers that hold

1 quota?

2 A. Assuming we have a Federal Order in California, I  
3 would, as a consultant, I would probably be recommending to  
4 clients to buy milk from producers that does not have quota  
5 because of the complication and the well, there's a  
6 disincentive for me to buy because I'll be performing on that  
7 milk.

8 Q. All right.

9 A. If I may, John?

10 Q. Please continue while I find my place here.

11 A. I'll give you a second. But it, I have been here maybe  
12 half the time as everyone else has been here, so I apologize  
13 for that. But it seems every time we're looking to make  
14 provisions fit, we run up into quota. And it creates some type  
15 of a mechanism we have to figure out how to fit it in. And I  
16 struggle, our Dairy Institute team struggled with it, I sensed  
17 Proponent of Number 1 struggled with it a little bit. It seems  
18 the quota system is something that causes a lot of concern and  
19 problems.

20 Q. Okay. Thank you. And then there's one question here  
21 that nobody else has covered. In response to a couple  
22 questions concerning performance levels and they need to  
23 adjust, they need to set them right. I think you said to the  
24 effect, and I'm going to read my own notes, that if they are  
25 too high, it's not going to work. And if they are too low,

1 it's not going to work. I think you responded in the  
2 affirmative to both of those scenarios. Now, too high, it is  
3 not going to work because -- you answer the question.

4 A. Because there will be, if they are set too high it will  
5 be difficult to supply enough milk to, you know, you won't be  
6 able to get enough milk into the fluid market because they just  
7 won't need it. Your performance levels are too high. So  
8 that's going to be create the inefficient movements of trying  
9 to chase a Class I market. As a supplier, let me look at my  
10 list, you know, just read the first period; Saputo,  
11 Land O'Lakes, Dairy Stream, Nestle, Hilmar, and  
12 California Dairies are all going to be fighting for the same  
13 Class I utilization, trying to find a home.

14 Q. So there's too much milk, too much supply of milk  
15 mandated by regulation to meet a demand that is smaller than  
16 regulation would demand?

17 A. Correct.

18 Q. Okay. And your comment that if they are too low it is  
19 not going to work, let me suggest that that might be erroneous.  
20 Because if they are set too low, supplies still might be made  
21 available as indeed we have had testimony of availability,  
22 supplies made available last week, simply by a call between  
23 folks if the dairy industry and folks that were not subject to  
24 any state call that week.

25 A. I understand the marketplace has a more impact when the

1 performance levels are set too low. I agree with what you are  
2 saying, John.

3 Q. So if they are too low, or let's say if they are set  
4 lower than somebody would like the market, they still might  
5 work, because the marketplace will respond, correct?

6 A. I agree with that.

7 Q. Thank you.

8 JUDGE CLIFTON: Mr. Beshore.

9 CROSS-EXAMINATION

10 BY MR. BESHORE:

11 Q. Thank you. Marvin Beshore.

12 Couple of quick follow ups, Al. Not to quibble about  
13 terms or whatever here, but I used the phrase open depooling.  
14 The fact is, unless I have missed it, tell me I have, there's  
15 no limit on depooling in Proposal 2.

16 A. Other than, there's, to answer the specific question --

17 Q. That's what I asked.

18 A. -- I was, I think I heard we have been instructed to  
19 use the word nonpooling, or nonpooled. In the month that a  
20 handler would be making a decision, there is no restrictions on  
21 that decision, but there are consequences of that decision,  
22 because you cannot, then, bring all that milk back the next  
23 month. So that decision to be non -- what's the term?

24 Q. Not to pool, election not to pool, has --

25 A. Not to pool.



1 Q. Has no express limits in Proposal 2.

2 A. But has consequences, so when you make that decision,  
3 you have to be thinking three months at least out, if you want  
4 to be bringing that milk back.

5 Q. Well, doesn't the thought process relate to the  
6 universe of milk that that handler is managing?

7 A. I'm sorry, I don't understand the question.

8 Q. Well, you said you have to think at least three months  
9 out, and that's because you are projecting 125, times 125,  
10 times 125, correct?

11 A. It is the simple yep, yep, yep.

12 Q. Okay.

13 A. The simple math of the 125, yes.

14 Q. But the handler that's depooling milk that's, you know,  
15 that it makes sense for him to financially to depool, okay?  
16 That may not be a hundred percent of that handler's milk?

17 A. Oh, exactly. And I'm going to -- in the Upper Midwest  
18 where I have most of my familiarity with, very seldom does a  
19 hundred percent of any handler's milk get depooled. It's a  
20 percentage. It might be 50, it might be 75, it might be 25.

21 Q. Hypothetically, if a handler's got 50 percent III, IV  
22 use, 50 percent butter powder, Class IV Federal Order, Class 4a  
23 California, okay? If you got 50 percent Class IV utilization  
24 and 50 percent Class III utilization or roughly --

25 A. I know where you are going, Marv.

1 Q. Okay. Okay. And one month it's, you know, the PPD is  
2 such that it's worthwhile, it's financially beneficial to  
3 depool the Class III, you can come back, depending on your  
4 ratio, you can come back the next month and repool if it's then  
5 financially beneficial to depool Class IV, you can, you could  
6 repool all your Class III and depool the Class IV without any  
7 limitation being effective, because your same amount of milk is  
8 still pooled?

9 A. I agree with the III, IV analysis. Again, let me go to  
10 the Upper Midwest. There are very few operators that have that  
11 50/50 split of Class III and Class IV. In California, well, in  
12 the rest of the country, let's go there, especially as you head  
13 west. It becomes more and more likely that there are handlers  
14 in that situation. In California today, because we have had a  
15 lot of talk about the cooperatives are all butter powder, and  
16 proprietaries are all cheese, that will change, but it still,  
17 it's not going to be 50/50, Marv, it is going to be 90/10  
18 cheese versus powder, with the one handler I'm thinking about.

19 Q. Well, did you, you heard Mr. Hollon's testimony early  
20 on? Maybe you didn't.

21 A. No.

22 Q. Okay. Okay. One other question, I wonder if in  
23 setting the base performance requirements under Proposal 2, did  
24 you, did you actually just pencil out what they would generate  
25 in terms of required deliveries?

1 A. Well, four billion pounds of milk a month.

2 Q. Twelve and a half percent Class I?

3 A. I'm sorry, I was just going to go with -- I thought you  
4 asked what the shipping percentage would be.

5 Q. Well, no. What I was asking, trying to ask, was  
6 whether you had actually determined whether your minimum  
7 shipping requirements would under supply, just supply, or over  
8 supply, the demand for which they're generated. And here's  
9 what I'm looking at. You've got about 20 percent quota milk,  
10 correct?

11 A. Roughly. I don't know it as a percentage, I kind of  
12 have it in my head as a number, but okay. I'm sure you are  
13 right.

14 Q. Let's assume it's in that ballpark. Okay? You are  
15 going to require quota to ship at the earlier arithmetic, the  
16 60 percent plus 10 percent minimum, so that's, you know, that's  
17 14 percent of the milk in the order right there.

18 A. Right.

19 Q. Okay. And a twelve and a half utilization order,  
20 Class I. Now, you have got 10 percent of all the other milk at  
21 supply plants that's also required to ship. You are starting  
22 out way over the top, aren't you?

23 A. Somewhere in my testimony I said I, we, Dairy Institute  
24 knows where the combination of the brackets and the quota  
25 exceeds, provides more milk going to the fluid market than is

1 necessary, and that's why we're instructing the, wishing we can  
2 get the flexibility for the Market Administrator to adjust it.

3 Q. Or you could let it work as Mr. Vetne just went through  
4 with you, right?

5 A. There's so many options that we could have picked, and  
6 this is the one we picked.

7 Q. Okay. Good. Thanks.

8 JUDGE CLIFTON: Who else has questions for Mr. Zolin?  
9 Mr. English?

10 CROSS-EXAMINATION

11 BY MR. ENGLISH:

12 Q. You have Exhibit 1 in front of you?

13 A. I do.

14 Q. This is Chip English.

15 If you could go to 47223, and I'm looking at Section 13  
16 now, and this is the repooling language. The last paragraph  
17 before Section 14, other source milk, could you read that  
18 paragraph quickly? Paragraph 4?

19 A. It is the one that starts with a block of milk?

20 Q. Yes. Yes.

21 A. Paragraph 4, "A block of milk may be considered  
22 ineligible for pooling if the Market Administrator determines  
23 that handlers altered the reporting of such milk for the  
24 purpose of evading the provisions of this paragraph."

25 Q. And that's the repooling paragraph, correct?

1       A. That is the, it is the producer, it is the producer  
2 milk definition paragraph.

3       Q. But, well, okay. But the paragraph is F, which is the  
4 repooling paragraph, correct?

5       A. Correct.

6       Q. Okay. So is it the intent of the Dairy Institute, and  
7 if the language needs to be modified, it needs to be modified.  
8 But intent for the Dairy Institute that that would deal with  
9 the circumstances where a handler both Class III and IV milk  
10 tries to just sort of keep the same volume of milk on, but one  
11 month calls it Class III and the next month calls it Class IV?

12       A. The Market Administrator would have the, be able to  
13 determine, and if it's -- he can make that adjustment for the  
14 provisions.

15       Q. You agree?

16       A. Yes.

17       Q. Thank you.

18       JUDGE CLIFTON: Who else has questions for Mr. Zolin? Is  
19 there any redirect?

20       MS. VULIN: No, your Honor.

21       JUDGE CLIFTON: Thank you, Ms. Vulin. Are there any  
22 questions from USDA on this topic?

23                                   CROSS-EXAMINATION

24       BY MR. FRANCIS:

25       Q. Will Francis, USDA. Just a quick -- we have a couple

1 questions, but one question on the -- on your Exhibit 114 you  
2 included a document that has three pages that is from CDFA, the  
3 milk movement provisions pursuant to the Stabilization and  
4 Marketing Plans, and I believe it was Mr. English pointed out  
5 the penalty toward the back, it is on page 9 of your statement.

6 A. That is correct.

7 Q. Do you have some language that would at least allow  
8 something like that to happen in Proposal 2?

9 A. We do not have language that imputes a penalty. I  
10 would say I disagree with the way the California State Order,  
11 where they put the proceeds. It's my understanding that they  
12 put the proceeds back into the pool. They should read, they  
13 should reimburse the handler that shipped the milk, in my  
14 opinion. But so, I like the idea of a penalty. We don't have  
15 language, but I don't like the language California uses. It's  
16 the handler that shipped the milk that has been injured, in my  
17 opinion in this case, not the other producers in the  
18 marketplace, unless I'm reading it wrong.

19 Q. Okay. But it was my understanding that at least in  
20 recent history, the call provision has not been used. And so  
21 do you know if this penalty provision has ever kicked in?

22 A. I don't believe the call provision has ever been used.  
23 I don't believe the penalty provision has ever been used. But  
24 I don't agree the way it is written, because the way I  
25 understand the penalty, the monies then go back into the

1 Producer Equalization Fund. I believe the money should be  
2 returned to the handler that was required to ship milk that was  
3 in excess of the Class I needs, because that's the handler that  
4 incurred the lost efficiencies of the plant, incurred the  
5 transportation cost, the list goes on and on. So I disagree  
6 with the way the state works. But it's never been, it's never  
7 been utilized, as far as I know.

8 Q. Okay. On the split plant designation, I believe you  
9 mentioned, and this is, I'm going to follow up. An earlier  
10 witness said you might be the one to respond to questions about  
11 the facility in Texas.

12 A. I am able to respond to the about the facility in  
13 Texas, yes.

14 Q. And so I believe you indicated earlier that the Hilmar  
15 plant has a split plant designation. Maybe I misunderstood.

16 A. You misunderstood. When the Hilmar plant was under  
17 construction, I -- let me back up. The Hilmar plant was  
18 constructed in such a way that it would qualify as a split  
19 plant. It has the physical separation to be able to meet the  
20 requirements of the Order in 126.

21 Q. Okay. And we're talking about the Dalhart, Texas  
22 plant?

23 A. The Hilmar Dalhart, Texas plant, correct.

24 Q. Okay. And I think you indicated that you are not the  
25 one that files a report, but you have knowledge of how some of

1 the operations work, both in the Texas facility and in the  
2 California facility?

3 A. And to be specific, Will, there is no reports filed in  
4 the Dalhart plant or for the Dalhart plant, it is a nonpool  
5 plant. I was involved in filing the reports for IDP its first  
6 few months of operation, and since then, I haven't seen a  
7 report in a couple years. And I have no knowledge of who fills  
8 out reports to the California State Order. I shouldn't say  
9 that. I know who does it, but I have never seen that report.

10 Q. Okay. Then maybe my questions wouldn't be fruitful.  
11 So I think all of our other questions have been answered or  
12 addressed through other dialogue, so I think that's all we have  
13 at this time.

14 JUDGE CLIFTON: Are there any questions for Mr. Zolin, any  
15 further questions? I don't see any. I'm just going to voice a  
16 concern I have.

17 I know that we have to have our public officials have  
18 discretion. I know that there is case law that holds if  
19 there's not adequate guidelines upon which that discretion is  
20 to operate it can cause problems. A specific example, I don't  
21 even know where you would find this case, but a raisin  
22 administrator here in California had the authority to allow the  
23 harvesting of grapes on the weekend, and he denied the request.  
24 And that was overturned because there weren't adequate  
25 guidelines for the choosing whether to grant or deny the



1 request. So I was a little surprised. I thought what  
2 discretion meant was, you use your own best judgment, but  
3 apparently there have to be guidelines so that, I guess, so  
4 that people have some disclosure ahead of time as to what the  
5 decision will be based on. So I just voice that as a concern.  
6 Mr. English?

7 MR. ENGLISH: I guess -- Chip English -- I guess that maybe  
8 then, a concern for the entire industry and the entire Federal  
9 Milk Order system, because this form of discretion in  
10 Paragraph 7(f) exists throughout the Federal Order system. It  
11 may be applied a little differently here because of some unique  
12 circumstances we have to deal with, but for instance, the  
13 Market Administrator in the Northeast regarding matters that we  
14 have already discussed with extraordinary circumstances  
15 occurring, some of which were producers who were cut off  
16 suddenly from a processor and were having difficulties  
17 reassociating. The Market Administrator made a number of  
18 decisions which were made based upon market conditions. And so  
19 I mean, I, maybe we, at some point we can talk about those  
20 cases are and see. But boy, we have this discretion built into  
21 the Market Administrators throughout the system.

22 JUDGE CLIFTON: And I applaud that and I am in favor of  
23 that, and it could be that no court will meddle with it because  
24 it's just too complicated.

25 MR. ENGLISH: That would be a smart court.

1 MR. BESHORE: Marvin Beshore. If I might. I mean, just  
2 not to get into big legal argument about what there is or  
3 isn't. But all the Orders presently require notice and  
4 comment. And some of the things that we talked about here were  
5 judgments to be made without notice and comment, I think.

6 MR. ENGLISH: I guess I could go look at the language. If  
7 we need to add that language, if it is in the other, we  
8 certainly don't intend it not to have notice and comment. But  
9 if somehow we left something out, but I thought we were  
10 mimicking as many other sections as possible.

11 JUDGE CLIFTON: And of course that's a good start.

12 MR. ENGLISH: I mean, I'm looking, actually, we do have  
13 that. We have that language, Mr. Beshore, "the  
14 Market Administrator shall issue a notice stating that  
15 adjustment is being considered and invite data, views, and  
16 arguments." So that's the identical language that's in  
17 Order 1, so that's notice and comment.

18 MR. BESHORE: I understand that, but it can't apply to an  
19 announcement that's being made on the 13th of the month.

20 JUDGE CLIFTON: And at any rate, I don't have any  
21 solutions. I just throw out a caution. All right.

22 Any other questions for Mr. Zolin? Mr. Zolin, thank  
23 you so much. You may step down.

24 MR. ENGLISH: As long as the court reporter is okay, we're  
25 prepared to proceed. So I would call to the stand, Sue Taylor

1 for Leprino Foods.

2 JUDGE CLIFTON: Ms. Elliott, will this be 116?

3 MS. ELLIOTT: Yes.

4 JUDGE CLIFTON: All right. 116.

5 (Thereafter, Exhibit Number 116, was  
6 marked for identification.)

7 MR. ENGLISH: This is Chip English. What's being  
8 distributed is a five-page plus two, like six-page statement  
9 and two figures, total of eight pages all in one document.

10 JUDGE CLIFTON: Please raise your hand if you do not yet  
11 have a copy of 116. It appears that everyone has a copy.  
12 Ms. Taylor, is this your first time to testify in this  
13 proceeding?

14 MS. TAYLOR: Yes, it is.

15 JUDGE CLIFTON: Would you raise your right hand, please,  
16 and I'll swear you in.

17 Do you solemnly swear or affirm under penalty of  
18 perjury that the evidence you will present will be the truth?

19 MS. TAYLOR: Yes, I do.

20 JUDGE CLIFTON: Thank you. Please state and spell your  
21 name.

22 MS. TAYLOR: My name is Sue Taylor. S-U-E, T-A-Y-L-O-R.

23 JUDGE CLIFTON: Thank you. Mr. English, you may proceed.

24 MR. ENGLISH: Thank you, your Honor.

25 /////

1 DIRECT EXAMINATION

2 BY MR. ENGLISH:

3 Q. Good afternoon, Ms. Taylor.

4 A. Good afternoon, Mr. English.

5 Q. Would you proceed to read your Exhibit 116, through the  
6 end of your expertise, and before position.

7 A. Certainly.

8 I am Sue Taylor, Vice President of Dairy Economics and  
9 Policy for Leprino Foods Company ("Leprino"), headquartered in  
10 Denver, Colorado. Our business address is 1830 West 38th  
11 Avenue, Denver, Colorado 80211. Leprino operates nine plants  
12 in the United States, manufacturing Mozzarella cheese and whey  
13 products domestically, and marketing our products both  
14 domestically and internationally. Three of the nine plants are  
15 located in the State of California and will be directly  
16 impacted by the outcome of this hearing if a Federal Milk  
17 Marketing Order (FMMO) is subsequently adopted through a  
18 producer referendum. Therefore, Leprino has a strong interest  
19 in the decision by USDA as a result of this hearing.

20 Expertise

21 In my role as Vice President of Dairy Economics and  
22 Policy at Leprino Foods, I am responsible for developing the  
23 company's economic policy positions and advocating those  
24 positions in appropriate forums, such as today's hearing. I  
25 have represented the company at all FMMO and California

1 Stabilization and Marketing Plan hearings that have related to  
2 cheese milk pricing over the last 20 years.

3 My professional responsibilities have focused on dairy  
4 economics and policy issues since 1989, when I joined Sorrento  
5 Cheese as a Production Analyst and developed the Dairy  
6 Economist role. From 1992 through 1994, I was a principal in a  
7 dairy economics and management consulting business, Dairy  
8 Management Concepts, which provided consulting services to a  
9 broad spectrum of dairy companies, most of whom operated  
10 processing or manufacturing plants. I have been at Leprino  
11 since January 1995, leading the dairy economics, policy and  
12 milk procurement efforts for roughly 20 years before  
13 transitioning the milk procurement responsibilities to our  
14 broader procurement group over the last year.

15 My educational background includes both Bachelor's and  
16 Master's degrees from Cornell University in Agricultural  
17 Education, with heavy emphasis on Agricultural Economics.  
18 Immediately after my Bachelor degree, I taught High School  
19 Agriculture. Immediately after my Master's degree, I worked as  
20 an Agricultural Loan Officer within the Farm Credit System,  
21 managing a portfolio of dairy farm loans and mortgages on  
22 behalf of Production Credit and Federal Land Bank.

23 Q. So just going back for a moment to the bottom of  
24 Page 1, in addition to Federal Milk Order hearings, you had  
25 joined Leprino just prior -- lucky you -- to Federal Milk Order

1 Reform, correct?

2 A. Correct.

3 Q. And were you involved in that, that's not a hearing,  
4 were you involved in that entire effort as well for Leprino?

5 A. Correct. I engaged in the informal rule making process  
6 that was part of the Reform.

7 Q. And that certainly involved cheese issues even as we're  
8 discussing today, correct?

9 A. Yes.

10 Q. Continue with your statement, please.

11 A. Position

12 Leprino supports the adoption of Proposal Number 2  
13 developed by Dairy Institute of California if USDA promulgates  
14 an FMMO that includes California. I'll be testifying later in  
15 the hearing on issues specifically related to the Class III  
16 formula and other aspects of the Dairy Institute proposal.

17 My testimony today will focus upon Leprino's opposition  
18 to mandatory regulated minimum price application to all milk  
19 manufactured from Grade A milk within a geographic market.  
20 Specifically, I am speaking in opposition to the pool plant  
21 definition found in Section 1050.7(c) of the Cooperative  
22 proposal (Proposal 1).

23 Q. And let me interrupt you there. And the Gremlins have  
24 migrated completely over to us now. The proposal that were  
25 submitted were 1050, but I think the Department, the published

1 notice is 1051. So that would be correct to be 1051.7(c).

2 A. Thank you, I referred back to --

3 Q. We all read it for days and missed it.

4 JUDGE CLIFTON: All right. Ms. Elliott's right there. So  
5 we're correcting on page 2, up four lines, we're striking the  
6 "0" just before the decimal point and making it be "1".

7 MR. ENGLISH: Please continue, Ms. Taylor.

8 MS. TAYLOR: This section defines a "plant that is located  
9 in the marketing area which during the month receives milk from  
10 a producer located in the marketing area or from a cooperative  
11 marketing the milk of a producer located in the market area,  
12 pursuant to Section --" and I suspect that this also requires a  
13 correction, 105, I believe that should be corrected to 1.9.

14 JUDGE CLIFTON: Thank you, and Ms. Elliott already has it.  
15 Thank you.

16 MS. TAYLOR: -- (c)" as a pool plant under the Order.  
17 Although the effect of this provision has been referred to as  
18 "mandatory pooling" or "inclusive pooling", I think of it as  
19 mandatory pricing since pricing and pooling are separate  
20 activities and it is the market effects of mandatory  
21 participation in minimum regulated pricing for all milk within  
22 a geography that is at the root of my concern.

23 Although the California State Order has applied minimum  
24 regulated pricing to all Grade A milk produced and processed in  
25 the state for decades, it has not been without negative market

1 impacts. The risks of setting the minimum regulated milk price  
2 too high in a system of bidding minimum prices are significantly  
3 amplified. These include, amongst other things, threats to the  
4 financial viability of manufacturers in the plant capacity they  
5 provide, and inefficient movement of milk in order to clear the  
6 market to out-of-area entities that are not subject to binding  
7 minimum regulated prices. This inefficient movement of milk in  
8 order to clear surpluses, also results in lower producer  
9 returns due to increased cost to transport. I and others will  
10 speak in greater detail on these issues in later testimony,  
11 supporting the class prices provisions of Proposal 2.

12 Another less obvious --

13 JUDGE CLIFTON: Let me ask, is the pace at which the  
14 witness is reading just about right? Good. Thank you. You  
15 may proceed.

16 MS. TAYLOR: Thank you.

17 Another less obvious negative market consequence of  
18 mandatory price and pooling is a reduction of competition  
19 across manufacturing product classes. In the context of a  
20 largely manufacturing, of largely manufacturing milk sheds with  
21 low Class I utilization and value, under a normally constructed  
22 FMMO, marginal milk would tend to be bid into the higher valued  
23 manufacturing complex.

24 Q. Let me interrupt you there, if I may, what do you mean  
25 by "manufacturing complex"?



1       A. I'm referring to the combination of products made from  
2 the same hundred pounds of milk typically within a plant. So  
3 on the cheese side, I'm referring to that combination of cheese  
4 and whey, with some butter, and I will go through in greater  
5 detail a graph that I have later in the presentation. But I  
6 have valued essentially the same products that are in the  
7 Class III formula using the Class III yields. So it is the  
8 combination of cheddar, whey, and butter, versus the nonfat dry  
9 milk butter combination. So I think of it as the cheddar/whey  
10 complex versus the butter/powder complex.

11       Q. Thank you. Please continue.

12       A. Can you remind me where I left off?

13       Q. Well, I interrupted you at the very end of the fourth  
14 line at the word "complex" on page 3, and you are at the bottom  
15 paragraph.

16       A. Thank you.

17       JUDGE CLIFTON: But before you continue I just want you to  
18 tell me whether you want us to strike the "A" that's at the  
19 beginning of the sentence. You read it as if the A were not  
20 there. "You said in the context of largely "

21       MS. TAYLOR: Yes, I would like to you strike the "A"  
22 please, preceding largely.

23       JUDGE CLIFTON: All right. Ms. Elliott, thank you. So now  
24 you are starting with "this".

25       MS. TAYLOR: Yes.

1           This happens today in areas without binding regulation,  
2 such as Idaho. The competition for milk between cheese and dry  
3 milk plants in Idaho results in the bidding away of marginal  
4 milk from the lower valued use when there is a large price  
5 disparity. The resulting increased production of the higher  
6 valued use product as a dampening effect on the product prices  
7 in that complex. The reduction in production within plants  
8 with a lower valued use reduces the product surplus and  
9 contributes to affirming of finished product prices in that  
10 complex.

11           However, in a regulatory scenario in which Grade A milk  
12 cannot exist outside the regulated pricing system, and in which  
13 the margins are neutralized across manufacturing complexes by  
14 end product price formulas specific to the respective  
15 complexes, there's little incentive to move milk to the higher  
16 valued complex. I believe that the California State Order  
17 adoption of split prices for the manufacturing classes of  
18 Class 4a and 4b in 1989 within the confines of mandatory  
19 pricing and pooling, contributed to the divergence of values  
20 and increased volatility for the cheese and butter, dry milk  
21 complexes thereafter. The divergence of product value later  
22 resulted in USDA adopting split manufactured classes first,  
23 through the Class III-A mechanism in the early '90's, and later  
24 with the establishment of Class IV in Federal Order Reform.

25           Figure 1 (attached) shows the gross product values on a

1 milk equivalent basis using the yield factors that exist in the  
2 current FMMO Class III and IV formulas for the two complexes.  
3 Figure 2 (attached) shows the difference as defined by  
4 subtracting the gross Class IV value from the gross Class III  
5 value. Make allowances are omitted from the analysis for  
6 simplicity. Prior to California's establishment of separate  
7 milk prices for the cheese complex and the butter, dry milk  
8 complex in the late 1980's, marginal volumes of milk more  
9 easily moved to the complex yielding the higher returns. In so  
10 doing, the reduced production of the lower valued complex  
11 resulted in an increase in prices for its products while the  
12 increased production of the higher valued complex resulted in a  
13 decrease in price for its product, driving toward price  
14 convergence across the uses. Wholesale shifts of milk between  
15 the complexes were not required to effectuate the convergence  
16 on committed milk moving on the margins was sufficient. The  
17 disparate values across the two complexes that developed after  
18 California split the manufacturing class pricing, eventually  
19 led to pressure to similarly split the manufacturing complex in  
20 FMMO's.

21           Within the regulated milk supply, which includes all  
22 Grade A milk under the existing Federal Order and under  
23 Proposal 1, market signals --

24           JUDGE CLIFTON: Would you begin again with that sentence,  
25 please?

1 MS. TAYLOR: Within the regulated milk supply which  
2 includes all Grade A milk under the existing California Order  
3 and under Proposal 1, market signals that ordinarily would  
4 compel a manufacturer to adjust output, increasing production  
5 when higher price signals, higher prices signal shortages, and  
6 decreasing production when lower prices signal surpluses, are  
7 negative -- or are negated by the parallel movement of cost  
8 with finished product values. The lack of a margin-driven  
9 incentive to adjust production volumes results in a slower  
10 adjustment to market surpluses and deficits of specific  
11 finished products. This lack of timely adjustment contributes  
12 to a higher priced volatility for those finished products. The  
13 result is that milk from lower valued uses whose margins are  
14 protected by the same system, remains more competitive than the  
15 market would otherwise dictate. In essence, road blocks exist  
16 that dissuade milk from moving to its "highest and best"  
17 manufactured use.

18 The ultimate consequence is that one class of  
19 manufactured products may be in shortage at the same time that  
20 another class of manufactured products may be in surplus. That  
21 inability to attract milk from lower valued manufacturing uses  
22 to higher valued manufacturing uses, results in prices of  
23 manufactured products pushing to greater extremes (both on the  
24 high and the low side). These prices are sustained for a  
25 longer period of time than would be the case if differentials

1 in the economic value of those manufactured products allowed  
2 markets to move milk. This volatility hurts producers,  
3 processors, and consumers, and the sustained disconnects are  
4 troublesome both at the producer and processor levels. The  
5 different price levels create very different returns for  
6 producers across regions in the country depending upon  
7 investment in Class III and IV capacity in the region, and  
8 create challenges for processors, particularly in the export  
9 markets.

10           Although I'm critical of the market impacts of the  
11 split manufacturing classes that exist both in California and  
12 existing FMMO's, I'm not advocating a change in that structure  
13 at this time. But it is very important that if USDA  
14 promulgates a California Federal Milk Marketing Order as a  
15 result of this proceeding, mandatory minimum pricing of milk  
16 for manufacturing not be adopted. Adopting the same discretion  
17 regarding the regulated price application in milk for  
18 manufacturing that exists in all other FMMO's, will allow the  
19 marketplace to work across greater volumes of milk, and I  
20 believe, will result in the greater movement of milk into the  
21 higher valued product complex at any given time. That  
22 increased responsiveness to market forces on 20 percent of the  
23 US milk supply and of volume roughly equivalent to  
24 New Zealand's total milk production will benefit the entire US  
25 industry, including producers, processors, and consumers.

1 Q. Thank you. Thank you, Ms. Taylor. Could you just turn  
2 to page 7 and Figure 1, and I know you have discussed the  
3 figure in your table. Why don't you tell us what you did and  
4 what the chart shows here.

5 A. Certainly. What we did was took the CME cheddar block,  
6 the CME AA butter, and the central whey price series for the  
7 period from January of 1985, actually, I should clarify that  
8 the CME didn't trade cheddar for a part of that, so in the  
9 earlier years it would be the National Cheese Exchange Cheddar  
10 Price. But we translated it into a hundredweight of milk gross  
11 value by using the same yields that exist in the current  
12 Class III formula. And we did the same thing for the nonfat  
13 dry milk and butter complex.

14 Q. And what is Figure 2, on page 8?

15 A. If I look at Figure 1, I identify that the differences  
16 are not as clear just because of the scale on Figure 1. And so  
17 we added Figure 2 so that you could more clearly see the  
18 differences between the Class III complex values and the  
19 Class IV complex values. And you can see that the differences  
20 got over \$6.00 just in one month, in 2004, with cheese being  
21 above the butter powder values, and have almost reached \$4.00  
22 to the negative at times as well. So this is simply to look at  
23 those differences more clearly.

24 Q. Even as I looked at Figure 1 initially, I sort of saw,  
25 it sort of looked like they all tracked very closely. But when

1 you do the subtraction and the scale, it gives you a different  
2 picture, correct?

3 A. Yes.

4 Q. Does Leprino have a practical ability to use Grade B  
5 milk?

6 A. No, we don't. The products that we make, and the  
7 customers who we serve, require a Grade A milk supply.

8 Q. This testimony has addressed mandatory pooling. Do you  
9 have any comments about disorderly marketing in California?

10 A. At this point, I do not believe that disorderly  
11 marketing exists. To the extent that there has been market  
12 dysfunction, it's been largely associated with periods when the  
13 California Department of Food and Agriculture set a minimum  
14 regulated price that exceeded the market clearing level, at  
15 times stimulating overproduction at the dairy farm level, at  
16 the same time as constraining plant capacity. And that was,  
17 that's been the cause of any market dysfunction, but on an  
18 ongoing basis, I wouldn't consider that to be disorderly  
19 marketing.

20 Q. Turning to page 3 of Exhibit 116, in the carry over  
21 paragraph when you say you think of mandatory pooling or  
22 inclusive pooling as being mandatory pricing, and you say since  
23 pricing and pooling are separate activities, could you explain  
24 a little further what that concept means to you?

25 A. Sure. The point that I was trying to clarify there is

1 the potential confusion that might come along with somebody  
2 thinking that if you are part of the system, that, first of  
3 all, you have an option of whether to be in or not, but that  
4 the mandatory pooling would only apply to those who opt in. So  
5 thinking about it in terms of clarifying between an individual  
6 handler pool and a market-wide pool, and I wanted to  
7 specifically address the, we're also talking about mandatory  
8 pricing that manufacturers are not being given the option of  
9 whether to be in or out.

10 Q. Okay. And also on page 3, could you elaborate, in the  
11 second paragraph you have a statement that says, "this  
12 inefficient movement of milk in order to clear surpluses also  
13 results in lower producer returns due to increased cost to  
14 transport." Do you have any additional thoughts? Could you  
15 elaborate on that sentence?

16 A. Certainly. I'm aware at periods, of periods in the  
17 same context as I already referred to, where the regulated  
18 price overstimulated production beyond what willing plant  
19 capacity would absorb in California, where milk was sold into  
20 other states at a discount, and in addition to the delivered  
21 price being at a discount below which a California plant could  
22 buy that milk. The producers also were absorbing the  
23 transportation cost to get that milk out-of-state. And so in  
24 some cases it may be a return back to producers that's \$5.00 or  
25 \$6.00 below what they could have gotten in California, had



1 there been flexibility in the California system to sell that at  
2 a market clearing price in California.

3 Q. Your Honor, I move the admission of Exhibit 116.

4 JUDGE CLIFTON: Does anyone wish to question Ms. Taylor  
5 before determining whether you have any objection to the  
6 admission into evidence of Exhibit 116? Mr. Miltner?

7 CROSS-EXAMINATION

8 BY MR. MILTNER:

9 Q. Good afternoon, Ms. Taylor.

10 A. Good afternoon, Mr. Milton.

11 Q. Perhaps these questions could come on cross, but I  
12 think they speak to the construction of the tables, and so I  
13 thought maybe this would be a better opportunity to talk about  
14 it. So am I correct that both Figures 1 and 2 you prepared, or  
15 they were prepared under your direction?

16 A. They were prepared under my direction.

17 Q. And when the tables were prepared, were they prepared  
18 using standard composition of milk, 3531?

19 A. The Standard composition of milk which doesn't include  
20 31, I believe, and on the protein side it is 2.99 and some  
21 change. But it is the standard composition at which  
22 Federal Order prices are typically stated.

23 Q. Okay. I wanted to get a little bit more detail on the  
24 yield you used to calculate that. So for butter, what was the  
25 yield per hundredweight that was used?

1       A. Are you referring to the Class III or the Class IV  
2 formula?

3       Q. Let's start with -- well, let's do both.

4       A. Okay. And I apologize, I did not bring up the yields  
5 for Class IV, so I may have to ask for a break to get those,  
6 but the Class III formula, the yield should be 9.6393 for  
7 cheddar block.

8       Q. Okay.

9       A. 5.843 for whey.

10      Q. Okay.

11      A. And .4238 for butter.

12      Q. Okay. Thank you.

13           JUDGE CLIFTON: Does anyone else wish to ask questions of  
14 Ms. Taylor about Exhibit 116 before determining whether to  
15 object? No one. Is there any objection to the admission into  
16 evidence of Exhibit 116? There are none. Exhibit 116 is  
17 admitted into evidence.

18                   (Thereafter, Exhibit Number 116, was  
19                   received into evidence.)

20           MR. ENGLISH: Your Honor, I suspected, and it turns out to  
21 be correctly from the court reporter, that it appears to be  
22 time for our afternoon break.

23           JUDGE CLIFTON: Good. And that -- that allows the  
24 retrieval of the yield information on Class IV. All right.

25                   Let's take 15 minutes. It's almost 4:00. I mean, it

1 is almost 5 minutes 4:00. Please be back and ready to go at 10  
2 minutes after 4:00. 4:10.

3 (Whereupon, a break was taken.)

4 JUDGE CLIFTON: We're back on record at 4:10. Mr. English?

5 MR. ENGLISH: Thank you, your Honor.

6 BY MR. ENGLISH:

7 Q. Ms. Taylor, perhaps, did you rattle off a number a  
8 little too fast and want to correct the record and also add  
9 Class IV?

10 A. Yes, certainly. Thank you. The Class III whey yield  
11 that I quoted, I skipped a number. And the correct yield  
12 factor that was used in 5.8643. I had omitted the 6. And on  
13 the Class IV yield, the butter yield that we used is 4.2385,  
14 and the nonfat dry milk yield is 8.5982. And I'll clarify on  
15 the component levels as well. So the component levels, at  
16 standard assumption, the protein is 2.9915, which is the 3.1  
17 protein in 100 pounds the skim, times .965, to get it to 100  
18 pounds of standard milk with 3.5 fat. And the other solids is  
19 5.6935, again, 5.9 percent other solids in 100 pounds of skim,  
20 multiplied by .965.

21 Q. Okay. We are going to have a test now and see who can  
22 repeat that back, other than court reporter. At this time,  
23 your Honor, the witness is available for further examination by  
24 others.

25 JUDGE CLIFTON: Thank you. Who would like to go first with

1 questions for Ms. Taylor? Mr. Miltner?

2 CROSS-EXAMINATION

3 BY MR. MILTNER:

4 Q. Ryan Miltner, counsel for Select Milk Producers.

5 My first question is, pertains to the last paragraph on  
6 page 3, in particular, the second half of that paragraph. And  
7 without quoting the entirety of it, it seems to me that what  
8 you are describing I would lump in the category of simple  
9 supply and demand responses.

10 A. That would be correct.

11 Q. Okay. Moving on to, actually it starts in that  
12 paragraph and carries over, and I appreciate your explanation  
13 of what you meant by complex, because that was a question I had  
14 as well.

15 To delve into that a little bit more, when you, when  
16 you think of a manufacturing complex in this context, is it a  
17 single plant or is it more of an aggregate of all the plants in  
18 a particular market or does it not matter?

19 A. I'm thinking of it more in aggregate and some plants  
20 may have more flexibility to alter volumes and through-put than  
21 others. I'm thinking of it in a broader market context.

22 Q. Okay. Looking at the Figure 2, obviously, the figure  
23 represents what it, what it purports to be the difference  
24 between the Class III gross value and the Class IV gross value  
25 as you have calculated it. What is the take away you want the

1 Secretary and the rest of us to pull from that?

2 A. That the variance between the two returns has increased  
3 over time, and that that difference, that disconnect between  
4 the butter powder value and the cheese value can be sustained  
5 for longer periods. And my contention, there are several  
6 factors that have contributed to this over this time, and there  
7 are lots of things going on in the market. But my contention  
8 is that with the volume of milk that in 1989 started to get  
9 isolated from the market forces by the split manufactured value  
10 pricing, in the context of mandatory pooling, these disconnects  
11 are both greater in value, as well as more sustained over a  
12 period than you would have if we didn't have the mandatory  
13 application of pricing and pooling in California. And my  
14 encouragement for a take away for the Secretary would be not to  
15 make the same mistake in the promulgation of a Federal Order  
16 rule.

17 Q. In preparing your testimony, were there other  
18 variations on this chart that you considered presenting other  
19 than this one?

20 A. No.

21 Q. You stated in your testimony that you excluded the  
22 impact of make allowances for simplicity. I don't want to put  
23 a word in your mouth. Was it simplicity was the word that you  
24 chose? Yes. Make allowances are omitted from the analysis for  
25 simplicity.

1 A. Correct.

2 Q. Did you or anyone else undertake the complexity of  
3 looking at this with the make allowances in it?

4 A. We did not.

5 Q. Did you or anyone else calculate what the net effect of  
6 make allowances are on the gross value for either Class III or  
7 Class IV, aside from this chart?

8 A. No, that is easily calculable under the present  
9 formula. Quite honestly, given the timeframe at which we were  
10 putting this together, for one, we didn't have explicit make  
11 allowances for all of those product complexes going back to the  
12 beginning of the period, and the additional complexity I didn't  
13 think would add any value.

14 Q. Let's talk about dairy math. If one were to take the  
15 current make allowances and multiply times the yields that you  
16 have testified to, and aggregated those for each class, would  
17 that, would you believe that would provide us with the overall  
18 make allowance impact for the gross values in your figure?

19 A. It would for recent times, it doesn't necessarily, it  
20 may change the intersection on the axis. It doesn't  
21 necessarily change the conclusion.

22 Q. And obviously as you go back and make allowances  
23 change, or perhaps make allowances don't go back all the way to  
24 '85, my history doesn't go back quite that far, but I don't  
25 think they go back that far. So you would have to do that, if

1 for the -- let me back up. To incorporate that for the  
2 entirety of the period in your figure, there would be multiple  
3 make allowances for the same product, right?

4 A. Correct. And then we would get into an argument on  
5 what the appropriate make allowance is, and whether a policy  
6 was incorrect at a given time, so we're keeping it simple.

7 Q. We won't do that today. I have done some back of the  
8 envelope calculations, and it seems to me that the aggregate  
9 make for Class III is somewhere in the neighborhood of \$3.20  
10 plus or minus, and that the aggregate make allowance for  
11 Class IV is somewhere around \$2.20. Does that sound reasonable  
12 to you?

13 A. I have not looked at them in sometime. So if you have  
14 done the math, I'll start with that framework. But I cannot  
15 confirm them at this point.

16 Q. Okay. Without confirming them, and assuming my math is  
17 in the ballpark, and there's somewhere between 90 cents and a  
18 dollar's difference in the make costs between the two classes,  
19 that would reduce the spread between the two by that same  
20 amount, correct?

21 A. Yes.

22 Q. Would if you were to reduce the spread by that 90 cents  
23 to a dollar, does that change at all what you would like us to  
24 take away from the figure?

25 A. The variability would continue to be the same. The

1 percent of the time that it's positive versus negative would  
2 shift, the X-axis, or the Y-axis intersect would shift, but I  
3 don't believe that the conclusion would shift.

4 Q. Okay. Thank you. That's all I have.

5 JUDGE CLIFTON: Mr. Vetne?

6 CROSS-EXAMINATION

7 BY MR. VETNE:

8 Q. John Vetne for Hilmar Cheese.

9 I'm just trying to understand. Bottom of page 5, last  
10 paragraph, second sentence, "but it's very important that if  
11 USDA promulgates a California Federal Milk Marketing Order as a  
12 result of this proceeding, mandatory minimum pricing of milk  
13 for manufacturing not be adopted."

14 You are there, as I read that, essentially, you are  
15 referring to mandatory pooling of all milk and manufacturing  
16 classes; is that correct?

17 A. Correct.

18 Q. Okay. Which essentially is what the California State  
19 Order system has now, correct?

20 A. Correct.

21 Q. And under a system where all manufacturing milk is  
22 mandatorily pooled, the movement of raw producer milk to  
23 highest and best manufacturing uses is inhibited; is that  
24 correct? Am I reading that correctly?

25 A. Yes.



1 Q. Okay. So let me -- good, my understanding so far is  
2 good. Let me continue.

3 So if in a regulated system with two manufacturing  
4 classes, you would expect as a matter of pure economic  
5 incentive, for milk to seek a market outlet in a class where  
6 the revenue exceeds the blend price, that would be the depooled  
7 class, correct?

8 A. Yes.

9 Q. Okay. And in milk moving towards that higher revenue  
10 class because of the availability of those revenues, eventually  
11 there would be more of that product produced and the market  
12 value of those products would adjust, and eventually come down;  
13 is that also correct?

14 A. Correct.

15 Q. And at the same time, with respect to the less valuable  
16 class, economic incentive would be to draw milk, raw producer  
17 milk, away from the less remunerative class and put it into the  
18 class where you can get a premium market price above the blend,  
19 correct?

20 A. Correct.

21 Q. And as a result, there would be a relative shortage  
22 there would be less available milk for that less remunerative  
23 class, and the prices of product in that class would go up, and  
24 eventually there would be some kind of closer convergence, and  
25 it would happen sooner, correct?

1 A. Correct.

2 Q. I got it. Thank you.

3 JUDGE CLIFTON: Who next has questions for Ms. Taylor?  
4 Mr. Beshore?

5 CROSS-EXAMINATION

6 BY MR. BESHORE:

7 Q. Marvin Beshore. Good afternoon, Ms. Taylor.

8 A. Good afternoon, Mr. Beshore.

9 Q. Just some basic background, and probably not much more  
10 here.

11 Leprino has nine plants in the United States, as you  
12 have indicated. Three are in California. The other six, could  
13 you tell us where they are?

14 A. Certainly. One straddles the New York-Pennsylvania  
15 border, Waverly, New York-Sayre, Pennsylvania, I believe it is,  
16 combination, one plant. One is in Remus, Michigan; one is in  
17 Allendale, Michigan; one is in Ft. Morgan, Colorado; one is in  
18 Greeley, Colorado; one is in Roswell, New Mexico. And the  
19 three in California are, there's one in Tracy and two in  
20 Lemoore.

21 Q. Okay. So I just want to talk about the non-California  
22 plants, briefly. Those are all nonpool plants, correct?

23 A. Correct.

24 Q. Okay. In relation to the Federal Order system?

25 A. Yes, correct.

1 Q. And they are supplied by contracts with Cooperative  
2 associations?

3 A. That's correct.

4 Q. Okay. And those contracts are long-term contracts, are  
5 they not?

6 A. They are.

7 Q. And for specified volumes of milk required at the  
8 plants?

9 A. Yes, with some nuances.

10 Q. Okay. With some ranges of --

11 A. Seasonal balancing is provided.

12 Q. Okay. And while they are nonpool plants, the contracts  
13 are based on Federal Order prices, are they not?

14 A. Yes.

15 Q. Class prices.

16 A. Yes.

17 Q. Without getting going any further than this, they are  
18 at least minimum class prices, federally, correct?

19 A. We are also from time to time offered milk at below  
20 Federal Order minimums by that supplying cooperative.

21 Q. Okay. So the average price paid by your plants on, you  
22 know, throughout the year, year-to-year, is at least Federal  
23 Order minimum price, is it not?

24 A. Yes, it is.

25 Q. Okay.

1 JUDGE CLIFTON: Might I interrupt for some spellings,  
2 Mr. Beshore?

3 MR. BESHORE: Absolutely.

4 JUDGE CLIFTON: I don't know all the towns that you  
5 mentioned for the plants that are not in California. I do know  
6 how to spell Ft. Morgan, and Greeley, Colorado, and Roswell,  
7 New Mexico. But the others I need help with all of them.

8 MS. TAYLOR: Certainly. Waverly is W-A-V-E-R-L-Y; and  
9 Sayre, Pennsylvania, where the southern part of the plant is,  
10 is S-A-Y-R-E; Remus, R-E-M-U-S; Allendale, A-L-L-E-N-D-A-L-E.

11 JUDGE CLIFTON: Thank you.

12 BY MR. BESHORE:

13 Q. Now, with respect to the, you know, your comments about  
14 milk moving to higher value and lesser valued circumstances.  
15 Lesser value uses. If butter and powder is a really strong  
16 market at a really good price, you don't expect your  
17 Cooperatives supplying your cheese plants for the volumes you  
18 need to move that volume to the higher valued use, do you?

19 A. There are times -- we work very closely with our  
20 Cooperative to try TO accommodate both their needs while they  
21 accommodate our needs, depending upon the overall supply and  
22 demand balance. So there is some flexibility at times,  
23 depending upon our inventory levels and customer needs.

24 Q. Well, I appreciate that. But when we're talking about  
25 the market moving in ways that, that reflects substantial

1 differences in those prices, I mean, you don't want your  
2 supplier to just play that market back and forth, you need a  
3 committed supply of milk for your product needs; isn't that  
4 correct?

5 A. Certainly we need a committed that coordinates with our  
6 overall business. But there are, at times, when you have  
7 significant surpluses in the base commodity products of cheddar  
8 and butter powder. There are times when there's some marginal  
9 milk available across the system, across the marketplace at  
10 large that can move, and we don't need wholesale plant shut  
11 downs. It is incremental milk supplies that need to move, and  
12 that will force the price convergence.

13 Q. Okay. So that milk moves if there's capacity to move  
14 it to, correct?

15 A. Correct.

16 Q. Okay. And when you are talking about butter powder  
17 capacity, the Federal Order system, basically you are talking  
18 about Cooperative investments; isn't that correct?

19 A. There has been some proprietary investment as well, in  
20 the powder side in particular in more recent years. What I  
21 would observe on the butter powder capacity side outside of  
22 California, is once California adopted the split manufacturing  
23 classes, there was an extended period where the overall returns  
24 on the butter powder complex fell short of the cheese and whey  
25 complex, and it was increasingly difficult for entities to

1 maintain that butter powder capacity. And I would say part of  
2 that was, you know, an artifact of the California change.  
3 Therefore, there has not been as much capacity, flex capacity,  
4 to move milk back and forth until very recent years when world  
5 market prices pulled that complex up to a point where it  
6 incited additional capacity.

7 Q. But just to be clear, the years you are talking about  
8 there were like the '80's and the '90's when the III-A issues  
9 were, arose in the Federal Order system because of California  
10 pricing?

11 A. It would be in the '90's.

12 Q. Early '90's?

13 A. Right. California shifted over. My understanding is  
14 that they had designated a separate class for cheese milk  
15 versus butter powder milk, but they were setting it on a single  
16 price until a period in 1989.

17 Q. Okay. So in the Federal Order system, not talking  
18 about California now, in the Federal Order system, the great  
19 majority of the butter powder capacity, until maybe some very  
20 recent proprietary investment of which I'm not sure I'm aware,  
21 but it has been on the Cooperative side; is that correct?

22 A. Yes, is largely been maintained by cooperatives.

23 Q. Okay. I think that's all I have. Thank you.

24 JUDGE CLIFTON: Who else has questions for Ms. Taylor?  
25 Dr. Schiek?

1 CROSS-EXAMINATION

2 BY DR. SCHIEK:

3 Q. William Schiek.

4 Good afternoon, Ms. Taylor.

5 A. Good afternoon, Dr. Schiek.

6 Q. I know we're talking a little bit here about pooling  
7 issues, not pricing per se, but I guess I wanted to ask you  
8 about the importance of market clearing prices, setting prices  
9 on a regulated system that are market clearing. Is that just  
10 an issue that is important in the mandatory pooling environment  
11 or is it important in other voluntary pooling environments as  
12 well, and what's the difference?

13 A. I believe it is universally important, but probably  
14 even more critical in a mandatory pooling scenario. But it is  
15 still important under voluntary scenarios, because you have  
16 manufactured capacity that is needed to balance the Class I  
17 market in some regions of the country where you need to  
18 participate in the regulated system in order, and get the pool  
19 draw in order to be competitive at the farm level. And so  
20 setting the price level in areas above the market clearing  
21 level, you know, even if it is voluntary. And as a practical  
22 matter, in order to compete in the marketplace, you need to  
23 participate. So it, it's important to be market clearing  
24 regardless, but it is even more critical in a mandatory system.

25 Q. And why is that more critical in a mandatory system?

1       A. If you over value the milk, you are going to have a  
2 scenario similar to what California experienced in 2007, where  
3 you over stimulate milk production at the same time as plant  
4 capacity is at risk. And we had, we'll go into more detail  
5 next week in my testimony. But several cheese plants that were  
6 at financial risk, some closed, some defaulted on their  
7 producer payments for a period and were at risk of closure, and  
8 so you are sending a market signal that's completely  
9 inappropriate that, you know, essentially ends up with a lot of  
10 inefficient movement of milk.

11       Q. Okay. In your discussion about market clearing in a  
12 voluntary pooling system, I, just make sure, maybe I didn't  
13 understand but just to make sure I got it right. Are you, is  
14 it, is what you said, if I could say it differently, basically,  
15 if you are in a voluntary system and the system isn't market  
16 clearing, even if you have the option to opt out, you are being  
17 basically shut out from the pool draw so it's kind of like a  
18 choice between two bad choices, right? Is that accurate?

19       A. Correct.

20       Q. Okay. On page 5 of your testimony you mention, you  
21 talk about roadblocks existing to dissuade milk from moving to  
22 its highest and best manufactured use. And I wondered if you  
23 could explain a little bit more about why having milk moved to  
24 its highest best manufactured use is important or desirable?

25       A. Certainly from the producer perspective, having a



1 higher percentage of the milk that's moving into the higher  
2 valued class increases the blend price and the pay out to  
3 producers. From an overall market perspective, if you think  
4 about the impact on volatility, and this goes back to my  
5 argument that if you don't have the milk moving to the higher  
6 and best use, you end up with higher price levels on the  
7 product in shortage that kills off demand in this volatility.  
8 If -- if you don't have it moving and have that increased  
9 volatility, essentially you start killing off demand, both  
10 domestically and internationally. And so overall, I would  
11 argue that it is not just processors who lose as they have  
12 difficulty managing that volatility and satisfying the customer  
13 needs, ultimately it is also the producers, because they lose  
14 the market due to that -- that damage that comes from the  
15 extremely high prices. You just don't have the market  
16 adjusting and moderating in a way that can continue to drive  
17 demand forward.

18 Q. Okay. So is this, is that what you were referring to  
19 when you said this volatility hurts producers, processors, and  
20 consumers a little bit farther down on the page?

21 A. It is.

22 Q. Okay. Kind of following up on one Mr. Miltner's  
23 questions. He was talking about the difference in the  
24 manufacturing allowance on a per hundredweight basis. And I  
25 frankly, haven't look at the numbers recently either. But I

1 was wondering, do you have kind of a, some knowledge of the  
2 cost of building a plant that handles a specified volume of  
3 milk, let's say if I was talking about a five million, four  
4 million pound a day plant, that wondering about the relative  
5 costs of building a butter powder facility versus a cheese whey  
6 facility, do you have any, can you enlighten me on that  
7 difference?

8 A. Well, I can tell you that Jim Leprino thinks we spend  
9 too much money on every plant, but beyond that, my  
10 understanding is for a more generic cheddar plant even, the  
11 cost of the facility is significantly higher than for a butter  
12 powder plant of the same capacity. I don't have, off the top  
13 of my head, the specific factor, but it's significantly higher  
14 cost of capital, as well as higher technical resources  
15 typically required in order to operate the plant.

16 Q. Okay. Okay. I think that's all I had. Thank you.

17 JUDGE CLIFTON: Who next will question Ms. Taylor? Shall I  
18 invite redirect before I ask if you have questions? Is there  
19 any redirect?

20 MR. ENGLISH: Good invitation, but no.

21 JUDGE CLIFTON: There is none. Mr. Francis, do you have  
22 questions?

23 CROSS-EXAMINATION

24 BY MR. FRANCIS:

25 Q. Will Francis, USDA. Just a couple questions to follow

1 up. On page 5, I think I know the answer, but I want to make  
2 sure. In that middle paragraph, you make a statement about  
3 "these prices are sustained for a long period of time then  
4 would be the case if differentials in economic value of those  
5 manufactured products allowed markets to move milk." When you  
6 refer to move, you are not necessarily referring to a physical  
7 transportation, but the choice to go into, as you describe it,  
8 the cheese complex versus the butter powder complex?

9 A. Correct.

10 Q. Okay. And in other areas, you used the similar terms  
11 but I think I could understand the context of that choice.

12 A. That's correct.

13 Q. Okay. And earlier on you were asked a question about  
14 disorderly marketing in California, and you made a distinction  
15 between disorder or disorderly and dysfunction. Can you  
16 elaborate a little more on the distinction and why you used  
17 that word?

18 A. I'm not sure it was so well-intentioned as to explain  
19 it. Other than not wanting to get tangled up in the whole  
20 debate on the statute and disorderly marketing. You know, the,  
21 I think you could use the two words interchangeably. I don't  
22 think that at this time there's disorder in the California  
23 market. But in 2007, whether you call it dysfunction or  
24 disorderly marketing, there was -- there were some real issues  
25 where there were inefficiencies and incorrect market signals.

1 But again, that was associated with setting of regulated price  
2 above market clearing levels in the context of mandatory  
3 participation in the regulated price.

4 Q. Fair enough. That's all we have at this time.

5 Thank you.

6 JUDGE CLIFTON: Mr. Beshore?

7 CROSS-EXAMINATION

8 BY MR. BESHORE:

9 Q. Okay. Thank you. Marvin Beshore.

10 Do I understand your testimony, Ms. Taylor, to be that  
11 the periodic, the occasional movement of milk out of California  
12 that's been referenced here back in '07, '08, and maybe, maybe  
13 some in 2012, I'm not sure, but the occasional times when  
14 milk's moved out, your testimony is that that's been a product  
15 of the overpricing of milk to producers in California?  
16 Regulated minimum price being too high causing an excess  
17 production of milk in California?

18 A. Milk can move out of California for a variety of  
19 reasons. There were particular times, and particularly in  
20 2007, when it was a period of surplus, and the combination of  
21 strong milk production with reduced plant capacity, willing  
22 plant capacity, would lead me to believe that yes, it was the  
23 over valuation of milk at that point 4b level that flowed  
24 through to producers and provided that incentive for them to  
25 continue to produce higher levels of milk than was demanded in

1 this market.

2 Q. Okay. So if you are looking at those, if you are  
3 evaluating whether the regulatory prices are too high, or out  
4 of line, in that context, would you also want to evaluate  
5 whether the regulatory system is creating uneconomic incentives  
6 for milk to be coming into the state and taking up plant  
7 capacity because of regulatory price differences and factors?

8 A. Certainly. Particularly when you get into the Class I  
9 market, for which I'm not an expert, the competitive dynamic  
10 with surrounding areas is very important.

11 Q. And -- okay. So in fact, if in-state milk was,  
12 in-state capacity was being taken up by out-of-state milk  
13 coming in because of distortions in that market, you have to  
14 look at that with respect to the milk going out in terms of the  
15 total operation of that regulatory system of prices? Fair?

16 A. Yes, I would think you would want to understand what's  
17 going on and milk flows all directions.

18 Q. Okay. Thank you.

19 JUDGE CLIFTON: Mr. Francis.

20 CROSS-EXAMINATION

21 BY MR. FRANCIS:

22 Q. Will Francis, USDA.

23 Just on Figure 1 I just had one other additional  
24 question about the prices that you used. I think you said for  
25 the Class III you used the CME block cheddar and the CME butter

1 price, but I didn't catch what you used for a whey price.

2 A. I believe that that was the central whey, central  
3 state's whey price.

4 Q. As reported by Dairy Market News?

5 A. As reported by Dairy Market News and picked up through  
6 the annual statistics.

7 Q. And --

8 A. A monthly average basis.

9 Q. Okay. And for the Class IV nonfat dry milk price?

10 A. I believe that was also Central State's. I probably  
11 should go back and confirm that it's a consistent price series,  
12 that's a price series that I had embedded in another  
13 spreadsheet. I think Dairy Market News has defined the region  
14 slightly differently over time, and so if you would like, I can  
15 provide at a different time the specifics segments of time, if  
16 it did, in fact, change.

17 Q. But for the whey and the powder, nonfat dry milk, you  
18 used basically the Dairy Market News data with some potential  
19 variation depending on the region that was surveyed?

20 A. Correct. With an attempt to be consistent in the  
21 application to the extent we could.

22 Q. Yep. Thank you.

23 JUDGE CLIFTON: Who else has questions for Ms. Taylor?

24 Mr. Francis, do you want her to retrieve that information for  
25 you for tomorrow as to what regions might have been involved in

1 the pricing of the whey?

2 MR. FRANCIS: I think we're very familiar with Dairy Market  
3 News and I think I understand from the response, so I'm  
4 sufficient. We don't need any further follow up thank you.

5 JUDGE CLIFTON: Thank you. Are there any other questions  
6 for Ms. Taylor? There are none. You may step down. Thank you  
7 so much. Thank you. And it is time for our nightly report.  
8 Chip English speaking.

9 MR. ENGLISH: Remember that Maine weather forecast. So,  
10 your Honor, we have made it through, almost through six weeks  
11 of the hearing, and I think, if I don't waive any privilege,  
12 people on my side of the aisle, or at least on my tables, would  
13 probably tell you that I have begged, flogged, done what I can,  
14 I just don't have a lot of witnesses for tomorrow. And I  
15 mentioned as to a couple people off record, and even while  
16 Ms. Taylor was on the stand, one of my witnesses moved from  
17 Friday to Monday.

18 JUDGE CLIFTON: And you wanted flow to go the other way?

19 MR. ENGLISH: And I wanted the flow to go the other way,  
20 yes. The flow of witnesses has been inefficient. Inefficient  
21 movement of witnesses. And, of course, you know, you can't  
22 ever predict the cross-examination. I might have predicted  
23 that Ms. Taylor wasn't done today. So I have two witnesses for  
24 tomorrow, down from three or four.

25 I have a Mr. Barry Murphy with BESTWHEY, all one word,

1 all caps, B-E-S-T-W-H-E-Y. And I have returning to the stand,  
2 Mr. Rob Blaufuss from Dean Foods with respect to the issue of  
3 plant definitions. So --

4 JUDGE CLIFTON: And Mr. Barry, what's his last name?

5 MR. ENGLISH: Barry Murphy, M-U-R-P-H-Y.

6 JUDGE CLIFTON: M-U-R-P-H-Y. And his first name is spelled  
7 how?

8 MR. ENGLISH: I believe B-A-R-R-Y. And I understand we  
9 might have -- I understand he has quite the Irish brogue. So  
10 Mr. English will be directing Mr., the Irish Murphy.

11 JUDGE CLIFTON: You said Mr. English will.

12 MR. ENGLISH: Yeah, Mr. English will be directing the Irish  
13 Murphy. And your Honor, all I can say is after six weeks, if  
14 we have one short day as a result, you know, I apologize. I  
15 have done what I can. At least it's a Friday, and I can assure  
16 you I have done everything, including losing sleep, sending  
17 e-mails at 5:00 a.m., making phone calls, and at some point I  
18 am not at all in control of the circus.

19 JUDGE CLIFTON: Now, I have a witness for tomorrow, and  
20 that is Tom Van Nortwick, T-O-M, V-A-N, space, N-O-R-T-W-I-C-K.  
21 This is the gentleman that I have asked to testify. I don't  
22 think his testimony will be long. But he is the publisher of  
23 "Agribusiness Publications". So, when he comes, he often  
24 comes, takes some pictures, makes sure we have chocolate milk.  
25 When he comes, I would like to try to put him on so that we



1 don't keep him too long. So hopefully that will work out.

2 MR. ENGLISH: Your Honor, with my witness list, I think  
3 that isn't going to be an issue now. Again, remember the Maine  
4 weather forecast, it is a beautiful Friday so look for fog.

5 JUDGE CLIFTON: All right. Are there any announcements  
6 about tomorrow or, since tomorrow is Friday, any reminders  
7 about next week or anything further out than that?

8 Laurel May, we always like to hear it from you.

9 MS. MAY: Laurel May. Monday we're -- Monday we're going  
10 to the auditorium. Facilities are limited there. Also, we  
11 will not be having refreshments that day, and we are not  
12 allowed to eat in that room, so kind of plan to drink ahead and  
13 snack outside or something.

14 JUDGE CLIFTON: Very fine. And those of you who did go in  
15 there, know that there are very few electrical plugs, so you  
16 will need to come with your laptops fully charged. And if you  
17 have any opportunity to recharge them during lunch, that will  
18 be smart. Okay. Good. Is there anything else before we go  
19 off record? Nothing. We go off record at 4:53.

20 (Whereupon, the evening recess was taken.)

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COURT REPORTERS CERTIFICATE

STATE OF CALIFORNIA )  
  )    ss.  
COUNTY OF FRESNO   )

I, MYRA A. PISH, hereby certify:

I am a duly qualified Certified Shorthand Reporter, in the State of California, holder of Certificate Number CSR 11613, issued by the Court Reporters Board of California and which is in full force and effect.

I am not financially interested in this action and am not a relative or employee of any attorney of the parties, or of any of the parties.

I am the reporter that stenographically recorded the testimony in the foregoing proceeding and the foregoing transcript is a true record of the testimony given.

DATED: December 9, 2015  
FRESNO, CALIFORNIA



MYRA A. PISH, CSR  
Certificate No. 11613

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