USDA - FEDERAL MILK ORDER HEARING

Sheraton Hotel Station Square
300 West Station Square Drive
Pittsburgh, PA 15219

Thursday, June 23, 2005
8:00 a.m.

BEFORE: PETER M. DAVENPORT
U.S. ADMINISTRATIVE JUDGE

TRANSCRIPT OF PROCEEDINGS

VOLUME IV

Reported by:
Tricia M. Clegg
Professional Reporter

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| Dairy Farmers of America: | Elvin Hollon, Director Fluid Marketing, and Marvin Beshore, Esq. |
| General Mills: | Deb Grocholski, Associate General Counsel |
| O-AT-KA Milk Products Corp.: | Upstate Farmers Cooperative, Inc. by Timothy R. Harner, General Counsel |
| National Yogurt Association: | Cooley Godward, LLP by Aaron F. Olsen, Esq. |
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Corporation, and Unilever:

 Fonterra, USA: Blank Rome, LLP
 by Edward Farrell, Esq.

Dannon Company, Inc.: James Box

Milk Industry Foundation: Robert Yonkers

General Mills: Jeff Shapiro

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JUDGE DAVENPORT: Welcome to day four of the public hearing. When we closed last night, we had taken the statement of Mr. Tipton which has been marked as Exhibit 32 and 32(a). Mr. Tipton was previously sworn. At this time, we'll entertain examination of Mr. Tipton. Is that an indication that there is no cross of Mr. Tipton? Mr. Beshore.

MR. BESHORE: Marvin Beshore for Dairy Farmers of America.

E. LINWOOD TIPTON a witness herein, having been first duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good morning, Mr. Tipton.
A. Good morning.

Q. Let me ask you first about the statement, 32(a). Now, as I understand it from the statement, Lifeway sells over 80 percent of kefir in the United States?
A. Yes, sir.
Q. A pretty strong market position there?
A. For a very small market, yes, sir.
Q. And the markets for culture products, yogurts and kefir, kefir are growing now at five percent per year, correct?
A. That's cultured products, the market. Kefir is probably growing at a more rapid rate than that.
Q. What's the growth rate for kefir?
A. I don't know exactly, but it's approaching 10 percent.
Q. And kefir is presently a Class I product?
A. That's correct. Excuse me. Kefir by itself is Class I. There are mixtures of fruits and juices, and those are less than six and a half percent is clustered.
Q. And your request is to lower the price of milk and kefir so that dairy farmers can finance an even higher growth rate for kefir and market share for Lifeway, I take it?
A. No, sir.
Q. Okay.
E. Tipton - Cross by Mr. Beshore

A. Our proposal is that kefir be treated the same as yogurt. Yogurt is Class II, and kefir is a competitive product with yogurt, and its uses are virtually the same pattern of consumption, and the proposal is that they should be in the same class.

There are also a number of kefir products which are in the smoothie category. Instead of being called yogurt smoothies, they are called kefir smoothies, and they compete directly in the smoothie market with yogurts.

Q. Thus yogurt smoothies are Class I and kefir is Class I, so you are on a competitive par, correct?

A. I don't believe that most yogurt smoothies are Class I.

Q. Now, with respect to some of your comments in Exhibit 32, I'm always interested when processors present themselves as the champions of dairy farmers' income, and I take it that because of your analysis of elasticities and the price discrimination model that you think a lot of products should be reduced in classification in order to enhance
E. Tipton - Cross by Mr. Beshore

producer income, correct, reduced in price so that farmers get more for it?

A. No, sir, that was not my testimony. My testimony was that I presented those elasticity numbers as an indication of the changes that are occurring in the market with respect to milk, and the suggestion that it may not be working to dairy farmers' interest to have these Class I prices in the products that are in Class I, but my primary purpose for going through that exercise was to demonstrate that it certainly is not in the interest of the industry, dairy farmers, processors or consumers to attempt to classify a number of these products which contain some limited amounts of dairy products in Class I and discourage the development of that market.

And using the indication of what's happening in the fluid milk market and extrapolating that to the beverage markets that are not fluid milk but contain some dairy ingredients in them, they should not be made up in Class I.

Q. Okay. And was your testimony
E. Tipton - Cross by Mr. Beshore

prepared before the hearing this week?

A. Yes, sir.

Q. And were you targeting, if I can use that word, many of those concerns relating to Pepsico products and the like to proposals such as proposal 1 which the DFA has abandoned?

A. Yes. They weren't necessarily to proposal 1. I think that the major point of that was that the companies that I am appearing on behalf of want to maintain the six and a half percent nonfat solid standard as it currently exists in the orders. I offered a couple of modifications to that, but basically those were the proposal and are opposed to the protein standard.

Q. What products of your companies would the protein standard classify Class I that the 6.5 nonfat solids would not?

A. I'm not sure of that. I did not attempt to ascertain that.

Q. Do your --

A. But I would say in that regard that a major part of their fear, and I think that a major limitation on the protein standard is
E. Tipton - Cross by Mr. Beshore

that it attempts to limit the amount of protein
that can be contained in these products without
triggering the Class I classification, and
certainly the market for protein is an
attractive market, and they are very fearful
that by limiting that to a certain point that
they will just -- that it will force companies
who want to formulate these kind of products to
formulate them out of alternative ingredients,
particularly soy and other kinds of protein
ingredients so that they don't trigger that
level.

Q. Do the companies on this behalf you
are testifying today favor the continuation of
the federal milk order system?

A. It's not before this hearing. I
didn't ask that question, but I don't know what
their positions are in that regard.

MR. BESORE: Thank you.

JUDGE DAVENPORT: Are other
examination? Mr. Yale.

MR. YALE: Benjamin F. Yale on
behalf of Select Milk Producers, Inc. and
Continental Diary Products, Inc.
E. Tipton - Cross by Mr. Yale

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CROSS-EXAMINATION

BY MR. YALE:

Q. Good morning.

A. Good morning.

Q. The question I have is you testified in your statement that kefir continues to have a growth of about five percent. That's a pretty healthy growth, is it not, for this type of product?

A. It is, but I must emphasize that the five percent growth of a unit of one is not a very large magnitude, and this is a very, very small market. So the percentages seem large, but the actual physical growth of the market is not abnormal at all.

Q. It would be a big fish in a small pond or a small fish in a big pond?

A. Yes, sir.

Q. I guess my question is are they paying Class I for kefir?

A. Yes, sir, except for the -- I think they qualify for not paying Class I with respect to the blends or the --
E. Tipton - Cross by Mr. Yale

Q. The kefir product itself is in the dairy case, the one that's a Class I?
A. It is often not in the dairy case but maybe in a refrigerated case but separated from dairy and usually in a specialty product area.

Q. What kind of container is it in?
A. It's normally marketed in a bottle. There's no reason that it has to be that way.

The company that I'm representing has chosen because of their equipment and their -- where they want to place it to market it that way.

Q. But you have been paying -- within the marketing of the federal order you have been paying Class I?
A. Yes.

Q. And you have had the growth?
A. Yes.

Q. All right. So with -- let me go back to the other statement. Kefir is a specialty product. I mean, you say it's a small thing, but it tends to be attractive to certain ethnic groups like eastern Europe that grew up with kefir as a food and within their
E. Tipton - Cross by Mr. Yale

own culture; isn't that correct?

A. It is a very specialty product.

There's no question about that. It is identical in most of its properties to yogurt, and that's the primary direct competitive product. Now, whether kefir will be the yogurt of the future, who knows. I don't know. But they believe they are entitled to be classified and priced as the order treats their most direct competitor.

Q. My question comes back, isn't it true that much of the sales of the kefir is attractive at the ethnic groups, that this has historically been one of their foods?

A. Yes, and within that group, the competitive product is yogurt.

Q. But in spite of this disparity, you have got a faster growth than yogurt even with the higher prices?

A. Only by percentage. It's a small market, and mathematically that's the result.

Q. Any research done to show how much growth you would have had without that extra cost?
E. Tipton - Cross by Mr. Tosi

A. No, sir.

MR. YALE: No other questions.

JUDGE DAVENPORT: Other examination? Mr. Tosi.

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CROSS-EXAMINATION

BY MR. TOSI:

Q. Good morning, Mr. Tipton.

A. Good morning.

Q. I took it from your written statement that you have no objection to how it is that we -- how it would become the nonfat milk solids ingredients that would be in the product, a product that's a fluid form?

A. I'm sorry. I didn't get the first part of what you said.

Q. I got it from your statement that you are supporting the notion that any milk-derived ingredient would be counted in determining whether or not a product was at a 6.5 percent nonfat milk solids?

A. Yes, excluding whey.

Q. With the exception of whey, anything else would be fair game, if you will?
E. Tipton - Cross by Mr. Tosi

A. Yes.

Q. For inclusion in that calculation?
A. Yes.

Q. Are you aware if whether or not the Department now would consider, for example, milk protein concentrate in the calculation of a nonfat milk solid?
A. No, I -- no, I'm not. No.

Q. Okay. In differentiating something between a fluid milk product and a food, how do you make that distinction, in your own opinion?
A. Well, fluid milk has a -- most of the fluid milks have standards of identity. They are specific products. They are milk by standards of identify. They by standard of identity are authorized to add in certain ingredients such as flavorings and sweeteners and what have you. They are eligible to be fortified with various components that are approved under the standard. So there's a very definitive statement as to what constitutes milk and milk products.

Those products are generally consumed as a beverage. They are certainly
E. Tipton - Cross by Mr. Tosi

purchased as a beverage, and beverage consumption is as a beverage is, the primary use of them. Once you get past that point of that very defined group, it becomes more difficult it seems for me to ascertain what is a fluid milk product under your definitions, and the general concept of it to be a beverage is a pretty nebulous term, and we have heard testimony at this hearing about the fact that while they may be in drinkable form, they are not a beverage in the sense of thirst-quenching or in the sense of being consumed with a meal.

Frequently the products that are in these categories are consumed as a snack as a totally separate item, as a meal replacement. They are not they are not consumed as beverages. Beverages is a very nebulous term. It gives the Department a great deal of discretion. There's no question about that. But it gives them an enormous amount of regulatory responsibility, too.

Q. I'm a big fan of Starbucks' coffee.

A. Good.

Q. Would you consider this to be a food
E. Tipton - Cross by Mr. Tosi

or a beverage? I mean that I have coffee and, let's say, it's half milk as well, a cappuccino, for example.

A. Well, there's no question that it's a beverage, but when you go to other kinds of products like the frappuccino in a container, the use pattern of that product is very seldom as a beverage, per se. It's usually in the form of a snack or not in conjunction with a meal, et cetera.

So while you take coffee with same similar ingredients -- not the same ingredients, but similar ingredients, pursue it in a different way, it's uses are an entirely different situation.

Q. I also noted that in your testimony that you quoted extensively from the 74 classification decision. Are your clients aware of some of the changes that were made during reform, specifically with respect to the treatment of concentrated milk and ultra-filtered milk?

A. I think so.

Q. With respect to ultra-filtered milk,
E. Tipton - Cross by Mr. Tosi

wouldn't, perhaps, one of your clients who are buying ultra-filtered milk from the farm of the need to bring that back to the full milk equivalent?

A. Yes. I'm not sure when you say are they -- I doubt if they are familiar with that element. I wasn't quite sure what you were talking about, but I just want to correct that.

Q. Well, the appropriateness, or if you had an opinion on the appropriateness of doing that?

A. Excuse me?

Q. On the appropriateness of bringing ultra-filtered milk, concentrated milk back to its full milk equivalent when a handler is buying that --

A. Well, I believe you are talking that ultra-filtered milk that has all of the same constituents as are in milk. The filtration processes remove only the water, and for that to be milk, and it can be, you have to bring it back to -- you have to add water to it, yes, but if you -- there are other kinds of ultra-filtered products in which some of the
E. Tipton - Cross by Mr. Tosi

nutrients are removed, and the product no longer can be reconstituted and be milk by the virtue of adding water to it.

Q. But to the extent that those products are sold on the same channels as marketed as milk and tend to be used in the same way as milk, should we continue to consider those products to be food milk products?

A. Well --

Q. For federal order purposes?

A. Right. I wouldn't say they are all necessarily used the same or intended to be used the same or presented to the customer base in the way that they are the same. They are different products. They have different nutrients. They have different components.

Q. If that's the case then, isn't there a difference between whole milk and skim milk?

A. Yes, there is, and there's a standard of identity that describes that.

Q. Are you thinking that it's important for us to wait for FDA to come up with the standard identity for us to define things while
in the meantime producers are producing milk, and they are marketing their milk, handlers are using it in the ways that they are, that because of a lack of a standard of identity that we cannot determine form of use?

A. No, I wouldn't be suggesting that. However, it seems to me that the standard of identity with respect to milk, the industry, consumers, the federal government has decided that these are products that ought to be specifically defined. The parameters are clearly set, and if the product is marketed, this is the name of that product.

So that's home base for what you are doing at the dairy innovation with respect to milk quantity orders. When you start varying from that, it's the area of -- that I think you are getting into a lot of questions, and I heard a lot of discussion at this hearing about form and use.

Form and use, it seems to me, have virtually no meaning without the context for which you are talking about. Everything has got a form, and most things have a use, and so
it has to be put into some kind of a context. So the context to me, and I think that much of this discussion has been on a very narrow description of form and use, but the context in which this must be looked at is what is the purpose of this form and use classification, and when it was initially put in, it was clear that the fluid milks had a different kind of price responsiveness from consumers and that you could put a higher price on that portion of the milk, and you would be able to generate more revenue by doing so for dairy farmers, that if they were all priced the same. So there was a classification, higher price on this use and a lower price on other uses.

That puts in context then the issue of form and use, but the purpose was not just form and use. The purpose was to generate sufficient revenues to bring forth adequate supplies of pure and wholesome milk. So that's the context that it seems to me when we talk about form and use, today even, that's the context that it has to be in.

What is a revenue effect of -- to
E. Tipton - Cross by Mr. Tosi

dairy farmers, effect by meeting these
classifications, and that's the significant
part of what I think the Department had not
been looking at and has been looking especially
at the issue of use which causes it to trace a
lot of products that are not necessarily a
factor in terms of adding to revenue and, in
fact, may decrease the revenue to dairy
farmers. So that's the context, I think, that
form and use has to be viewed in.

Q. I understand that some of the
notions that you described there about
rationale from price discrimination amongst
various classes of use, but what about the
additional costs that it costs dairy farmers to
regularly supply the Class I market?

A. Well, it's pretty hard to know what
that added cost is. It's fairly minimal in the
sense that virtually all of the milk meets the
health standards and the sanitary standards and
is eligible for the fluid milk market. So if
you -- there's certainly no shortage of milk,
no potential shortage of milk for the beverage
market as compared to the other markets.
E. Tipton - Cross by Ms. Carter

MR. TOSI: That's all I have.

We need one moment, please.

(Discussion held off the record.)

MR. TOSI: Ms. Carter would like to ask some questions.

JUDGE DAVENPORT: Ms. Carter.

MS. CARTER: Antoinette Carter with USDA.

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CROSS-EXAMINATION

BY MS. CARTER:

Q. Good morning, Mr. Tipton.

A. Good morning.

Q. If I could just direct you to page 2 of your statement. The first full paragraph after the second bullet, you list, I guess, the number of categories that you suggest are specific goals that USDA should have with regards to, I guess, product classification. What types of beverages fall into these categories that are listed? It's the first -- the second full statement of that paragraph. For example, one of the categories
E. Tipton - Cross by Ms. Carter

listed is products that are positioned and
formulated to provide specific nutrients and
nutritional profiles meets specific groups of
consumers. What type of beverages are you
referencing there?

A. I must be on the wrong page. I'm sorry. I can't identify where you are --

Q. It's under the subheading, coping with driving forces of change, and there are two bullet points, two bullets.

A. Yes.

Q. The statement says -- in the paragraph that begins with the phrase, USDA should apply an acid test.

A. I have it identified now. Thank you.

Q. Okay.

A. This was a general statement that it seems to me that the whole policy that USDA applies to the classification ought to be in the context of expanding the market for dairy ingredients and for milk and dairy products, and I think it sometimes gets into a point of protecting the milk market as opposed to
E. Tipton - Cross by Ms. Carter

expanding the market is the context in which
the decisions are made. So I was suggesting
that there's an acid test that ought to be
applied; is what you are doing, does it expand
the market or does it possibly contract the
market, and I was trying to identify what some
of the elements of consideration would be.

For example, it's clear and both
DMI, Dairy Marketing, Inc. and the milk
processor, more which you are very familiar
with, has spent a lot of time and energy trying
to find ways to expand the channels of
distribution for milk. It has been very
difficult to do. The success has been minimal
unfortunately and for lots of reasons.

So one of the things is when you
have products, however, that contain dairy
ingredients and that are growing, there is a
potential expansion of the market for milk and
dairy ingredients by encouraging the
development of that product that's going
through different channels of distribution than
is milk.

So when you talk about form and use
E. Tipton - Cross by Ms. Carter

and competitiveness, one of the elements, it seems to me, is milk even in that kind of a distribution system. It can't be competitive if it's not significantly offered in that kind of a distribution system.

So that's what I was trying to get at here. I think that one of the areas of enormous growth now are "nutritional products", quote, unquote. "Nutritional products" are coming in all kinds of forms and shapes and colors and some of which contain milk and some of which don't.

A lot of them contain whey, and we had some discussion on whey yesterday, and it seems to me that -- well, let's say proteins are a driving force in most of those, and it seems to me to try to move in the direction of some of the proposals here, to put on the 2.25 percent protein limit below that, you're in Class II, and above that, you are in II or III, I guess, or whatever you are, and above that, you are in Class I, and I looked -- I have in the testimony I looked at what that 2.25 would allow you to claim if you stayed below that,
E. Tipton - Cross by Ms. Carter

and it would be the maximum you could claim under FDA rules would be a good source of protein. If you went to the level that you would have to in order to claim a high source of protein, you would have to be Class I, and I guess those are the kind of things that I think ought to really be looked at seriously because it will impede -- I think that one of the witnesses yesterday talked about the fact that once you put that level, people are going to find alternate sources of other forms of protein in order to not trigger that higher level.

The regulations for high protein don't say it has to be dairy protein. It's just protein. So that would be to substitute something else for what otherwise might have been a dairy ingredient.

Q. I guess along those lines, in terms of products that are currently excluded from the fluid M product definition with regards to meal replacements or formulas that are considered meal replacement that are packaged in hermetically-sealed containers, in your
statement you reference proposal No. 3, and, in fact, you support that proposal. That proposal was modified here at the hearing in which they supported meeting the current definition as it is now.

What's your position with regards to -- do you still support the modification that was contained in proposal 3 or what is your position?

A. We didn't endorse all of the elements that were in proposal No. 3, and our first priority is to maintain the meal replacement category, because I think there are an enormous number of products that would be -- the marketing would be severely damaged if that were changed. So we totally endorse maintaining that.

However, consistent with the conversation we have been having, it seems to me there are a lot of other products of special uses that deserve some kind of attention and possible exclusion, and among those are snacks. You know, we heard a lot of discussion at this hearing about the uses of various products in
E. Tipton - Cross by Ms. Carter

the snack category. We have been so focused on
meals, but by far, the majority -- I just want
to -- but a very large portion of the food
consumed in the United States is now consumed
in the form of snacks, and so it seems to me
that we need to refocus.

In fact, a number of the meal
replacement products have snack sizes and
components and markets because they frequently
promote the idea of consuming food more
frequently and in lesser quantities, and so
it's a part of their weight control, diet
control mechanism to encourage snacking.

So I guess we think that adding
snacks to the meal replacements would be an
appropriate move. I think that high protein
drinks is another category. They are different
than milk, and they appeal to a different
market. They are heavily into the sports area,
but they are also into just good nutrition.

So that was why we were suggesting
that there are some of these other categories
that have exactly the same reasons as meal
replacement, and the consideration ought to be
E. Tipton - Cross by Ms. Carter

given to exclusions for them as well.

Q. And one last question. On page 3 of your testimony of your statement, you talk about loss of revenue from lost sales resulting from the higher Class I price of offsetting the additional revenue generated from the higher price. Could you explain that statement, I guess, in the context that you are stating it?

A. Can you help me out?

Q. Just to clarify what you -- 

A. I'm sorry. Could you help me identify where on that page it is?

Q. Sure. It's subheading -- well, it's under the paragraph heading, the reason for price classification. It's the -- oh, it starts out on -- well, the paragraph starts out on page 2, at the very end of page 2 and ends on page 3, top of page 3.

Could you explain that paragraph in further detail? In your opinion, what's contributing to the loss of revenue? I read that, and I just didn't know where you were going with that statement, what you meant.
E. Tipton - Cross by Ms. Carter

Well, a little later in the testimony, I talk about some elasticity numbers from recent studies, and there's been a tendency to do composite analysis of elasticity, and when people talk about elasticity of fluid milk, they are normally calculated over a long period of time, multiple years, and all of the products are combined, and the price movements become less in sync.

The new analysis of elasticities which have measured shorter periods of time but still four, five years, so a significant period of time, and I measured them with respect to different types of fluid milks, have found that a number of those are, in fact, elastic. They are not just less inelastic. They are, in fact, elastic, and that would indicate that when you change the price of those products, that the change in revenue that's generated is reduced greater than the increase in the sales. So actually the revenues actually go down, and when you look at these individual products, there is a substantial question as to whether or not putting them in Class I, in fact,
E. Tipton - Cross by Mr. Cryan

increases the producer revenues or decreases.

MS. CARTER: That's all I have. Thank you.

JUDGE DAVENPORT: Dr. Cryan.

MR. CRYAN: My name is Roger Cryan.

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CROSS-EXAMINATION

BY MR. CRYAN:

Q. Good morning.

A. Good morning.

JUDGE DAVENPORT: Mr. Cryan,
your microphone needs picked up just a little.

Q. With respect to the paragraph that Ms. Carter was discussing on your acid test,
your acid test was whether the proposal or suggestion increases the demand for the product
in question. Am I correct to understand that according to that acid test, no product would
ever be moved into a higher price class; is that correct?

A. No, it's not correct.

Q. How is it not? How can you move a product into a higher price class and not have
E. Tipton - Cross by Mr. Cryan

some impact on the demand?

A. Well, I was making that statement in
the -- you are making a very technical
comparison. I was making that statement in the
context of what is the future of this product,
where is it placed in the market. As I was
saying earlier, it's not just the product.
It's the channel of distribution. It's the
placement of the product in the market. It's a
whole punch of things that come to bear as to
what is going to happen to this product on the
marketplace, and then the question is what is
the impact of the price change, the
differential on this product.

Q. So then your suggestion is in some
case bring the product in a higher price class
could increase the demand?

A. Well, I don't know. That's not my
point if that's what you are driving at.
That's not my point. The fact is that I'm not
saying that everything should be priced
according to the elasticity which is what you
are suggesting. I'm suggesting that's not the
only criteria. I think there are a number of
E. Tipton - Cross by Mr. Cryan

other elements, but I was trying to describe
generally the issue ought to be are you -- is
this a product that if given this treatment, it
is going to potentially increase the demand or
decrease it, and I don't think that the
elasticity measurement is the only
consideration in that decision.

Q. You discussed the cost associated
with Grade A production. I think you said
because practically all the milk in the U.S.
today is Grade A, that there's no substantial
cost associated with that; is that --

A. No, sir, I did not say that. I said
that there is no shortage of Grade A milk, and
it's hard to really ascertain the differential
cost because virtually all the milk meets the
Grade A requirements.

So a rationale that you have got to
have a Class I differential in order to
substantiate to sustain an adequate supply of
pure wholesome milk for the Grade A market, you
know, it could be a substantial change in the
production of Grade A milk, and there would
still be an ample supply of Grade A milk for
E. Tipton - Cross by Mr. Cryan

the market. This is not a very relevant
element anymore.

Q. Well, would the large share of U.S.
production that is Grade A suggest something
about the success as an incentive with the
Federal Order System, the opportunities in the
Federal Order System for pooling leading to the
farmers over the years to have made an
investment in Grade A milk production?

A. Well, the fact that dairy farmers
have access to the Grade A market through the
federal orders and through the pools, yes, it
makes a difference, but I believe that the
market has been a far bigger factor than has
the pooling mechanism in the market because
virtually everybody wants their product to meet
the standards that milk, the raw milk that they
are making their products from to meet the
standards that are set forth. So I think the
market itself has been a driving force on that.

Q. And the standards are required to
pool in the federal orders?

A. No. I'm talking about the standards
for production of milk on the farm, the health
E. Tipton - Cross by Mr. Cryan

and sanitation requirements on the farm and the
fact that processors want their milk to meet
those standards, and producers have converted
to do that, but that's true for products that
don't require a Grade A classification. There
are a whole bunch of products. I don't deny
that the pooling may have some impact on that,
but I think the market forces are far greater
than any of the pooling requirements or the
regulatory requirements in that regard.

Q. In your discussion of elasticities,
you did make a point of elasticities. You
indicated that the reports to congress -- with
respect to the report to congress on milk
demand issues has said that the own price
elasticity of demand for milk is around
negative .85, negative .098 in the last two
reports that have been put out?

A. Yes, sir.

Q. And then you discussed the
individual products and talk about the large
own priced demand elasticities for relatively
narrowly defined products like gallons of
flavored milk, half gallons of white milk and
E. Tipton - Cross by Mr. Cryan

half gallons of flavored milk. If the demand
elasticity for an aggregation of products, a
category of products is small but the price
elasticity of demand for the individual
products within the category are large, doesn’t
that indicate that consumers are simply
responding to price by shifting within the
category?

A. No, not necessarily. In these
studies, they measure own price elasticities as
well as cross elasticities. The cross
elasticities would have an indication of the
shifting. The own price elasticities has an
indication of what happens to that product on
which the prices changed.

Q. Are those price elasticities and the
volumes associated with the study that would
allow a measurement of impact, are they
attached? Are you offering those?

A. I have not. I didn’t put this in
the testimony, but they are in the reports that
-- or the speeches that I cited.

Q. Can you put in the volumes of milk
sold in order to calculate those overall --
E. Tipton - Cross by Mr. Cryan

A. No, the volumes are not in those speeches, but the measurements that they ended up with are.

Q. The cross price elasticities by themselves?

A. Yes. The cross elasticities and the only elasticities, and they did those with respect to other soft drinks and other competitive products as well.

Q. But I believe in order to calculate the impact within the category, change of a price from one price within the category, you would need to have both the cross price elasticities, the own price elasticities and the bulk volumes of sales that are in the study, in the calculation?

A. If you want to calculate the actual magnitude of the volume, that would be true, but I believe the elasticities give you a good indication, that was my point, that there are some of them that are very elastic, and that's a concept that people generally --

Q. They're very elastic in isolation?

A. Excuse me?
E. Tipton - Cross by Mr. Cryan

Q. In isolation they are very elastic?

A. Individual products within the category of fluid milk have very elastic elasticities.

Q. Okay. On page 5, the middle of the page, you say, one has to raise the question as to whether continuing this system might be a serious error in public policy. On the next page, page 6 at the top, you say, there is growing evidence that it may no longer be in dairy farmers' best interest to have classified milk pricing. Are you testifying in favor for abandoning the Federal Order System?

A. No, sir. I said that the clients that I represent have not taken a position on that, or I at least am not aware if they have taken a position on that. I offered, and I repeat that I offered this data on the elasticities to point out that there are some serious things that are happening with respect to the category of fluid milk and that we believe it would be an error to try to extend that category to all uses that are similar to that for milk because it is working extremely
E. Tipton - Cross by Mr. Cryan

well with respect to milk. At least sales are not improving. Sales are going down. The market share is going down. Bottled water is now greater than milk. Soft drinks are increasing every year the share of market. Juices are increasing share of market.

There's something in the real world that says, hey, we ought to look at what happening to this category of milk, and I think this is one of the elements that ought to be looked at.

Q. And the context for those remarks on the specific issues is that you have some questions to whether the system is working at all?

A. The question is, you know, look at the system. There is a question about whether or not it's really enhancing reduce of revenue which was its purpose, and don't attempt to extend it to these other products that are on the fringe and contain only a tiny bit or small amounts of milk-derived ingredients. That's an overreach, and you probably hurt the revenue potential even more because you make it more
difficult for the components of milk and the ingredients of milk to be used in these other products.

Q. Is drinkable yogurt a beverage?
A. Excuse me?

Q. Is drinkable yogurt a beverage?
A. Well, beverage is a very nebulous term. I have looked it up in several dictionaries. They all kind of have the same definition, but I don't know -- it is drinkable. I think beverage goes more to what's the purpose for which you drink it, and it seems to me that the purpose for which yogurt is consumed is quite different than the purpose for which fluid milk is consume.

It's consumed in different times. It's got different texture. We have had a lot of testimony from the experts of the yogurt companies in that regard, and I don't intend to repeat that, but that's the context that I think that's got to be looked at. You can't say if that's a beverage that's got to be Class I. It's a context of what is its real -- where does a product fit in the market structure.
E. Tipton - Cross by Mr. Cryan

Q. So is that a yes or a no?
A. Beverage could be applied to a lot of products. I don't know whether -- I don't know what in your mind what a beverage means. I don't know in my mind what it means. It's a very nebulous term.

Q. And would the same answer apply to kefir then, you don't know whether it's a beverage?
A. Well, I know kefir is not used to any great degree as milk is used. Whatever you want to call it. Its usage pattern is entirely different. It is not competitive with milk. Its uses are not substitute for milk. It's a whole different category.

Q. I'm sorry. I'm asking a relative simple yes or no question.

JUDGE DAVENTPORT: These questions are not necessarily susceptible to yes or no.

MR. CRYAN: Thank you very much.

JUDGE DAVENTPORT: Mr. Yonkers.

MR. YONKERS: Bob Yonkers,
E. Tipton - Cross by Mr. Yonkers

Y-O-N-K-E-R-S. I'm with the Milk Industry Foundation.

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CROSS-EXAMINATION

BY MR. YONKERS:

Q. I was very glad to hear that Dr. Cryan thought that cross price elasticities are relevant enough at this hearing to ask some questions about them.

I would also like to point out that he asked you a question about demand and your use of the term. In economics we think of demand as a series of prices and quantities that consumers or any user, it could be any intermediate step in the chain; is that correct?

A. Yes.

Q. So usually we think of at higher prices the quantity demand is lower. So if you change the price, if you are talking about a demand curve, as we normally call them and you move along that curve, you are changing the quantity demand, but you are not changing the demand for the product?
E. Tipton - Cross by Mr. Vetne

A. That's correct.

Q. I mean, the demand is calculated as a function of a long list of independent variables as we think in economics. So just changing the price, you would be moving along that curve that's changing the quantity demanded, and if you were to change demand, if you look at the impact on demand, you can have a new use for a dairy ingredient, and that would shift the entire demand curve one way or the other; is that correct?

A. That is correct.

MR. YONKERS: Thank you.

JUDGE DAVENPORT: Mr. Vetne.

MR. VETNE: John Vetne representing HP Hood.

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CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Tipton, let me see if I understand correctly. In discussing elasticities and demand for product, you suggested that for classification purposes and public policy, USDA ought to look at whether up...
E. Tipton - Cross by Mr. Vetne

classification, therefore, increasing a price reduces quantity of demand enough so that
deregulation, in effect, shoots itself in the foot by reducing producer revenues?

A. Yes. I'm going to substitute some other word for demand. Bob just gave me my tutorial in economics and his terminology on demand. His demand is correct. Yes. The answer is it changes consumption. If it changes consumption, it may well end up reducing producer revenue, and that is consideration that you make.

Q. That answer and that part of your statement, however, is it not true that that looks at an incomplete portion of the forest because the forest also includes demand, not just for the finished product, but a component of demand for the ingredients that go into the product, and those ingredients in turn affect the Class III price if it's a whey derivative or the Class IV price if it's some other dry component, correct?

A. That's correct.

Q. And those things combine not just
E. Tipton - Cross by Mr. Vetne

demand for the beverage, drink, pourable or suckable product, those things combined are what influence producer prices?
A. Yes, sir, absolutely.

Q. Mr. Tosi asked you some questions on deriving from the 1999 reform decision and ultra-filtered milk. Did you understand his questions to refer to the discussion on how raw milk is priced from Farmgate to processor?
A. That's what I thought he was talking about, yes.

Q. Okay. And you did not think that he was talking about how you measure the 6.5 percent solids nonfat?
A. That's correct.

Q. With respect to the 6.5 percent solids nonfat standard for whether a product is a fluid milk product and, in turn, is a fluid milk product that's classified, Mr. Tosi asked you a question to the effect that you have no objection to how we now count solids nonfat for purposes of the 6.5 percent standard. Do you recall that question?
A. My recollection of the question was
E. Tipton - Cross by Mr. Vetne

whether or not the milk-derived ingredients to be counted included all milk-derived ingredients, and I said, yes, other than whey.

Q. You have been involved in this process of federal order regulation and classification issues for a long time, correct?

A. Yes, sir.

Q. Were you involved at the time of the 1974 uniform classification hearing?

A. Yes, I was.

Q. And you are aware at that time the Department adopted the 6.5 percent solids -- milk solids nonfat standard that is identical to language on the current order?

A. Yes, sir.

Q. And you are aware that in the course of adopting that standard in 1974, the narrative discussion and the decision said that USDA will not include sodium caseinate because according to FDA, it's not a dairy product?

A. Yes.

Q. Did you have an understanding before coming to this hearing that USDA was or was not counting sodium caseinate, for example, as part
E. Tipton - Cross by Mr. Vetne

of the solids nonfat components of a product for purposes of classification?

A. No, sir, I did not know.

Q. In Exhibit 30, page 4, you don't have it, but you don't need it, but there is a memorandum from dairy programs to all the market administrators dated April 2, 2004 instructing that in determining the level of solids nonfat for purposes of the 6.5 percent standard, market administrators are to include milk derivatives such as but not limiting to, and I'm quoting, "dry milk protein concentrate, MPC, liquid MPC, milk protein isolate, protein serum whey protein concentrate, lactose casein and calcium caseinate".

Did you have an understanding before coming to this hearing that as of April -- at least as of April 2004, USDA had made some change in the ingredients counted towards 6.5 percent sales?

A. No, I was not aware of that until arriving here.

Q. If USDA is to significantly change the way it interprets an existing rule, do you
E. Tipton - Cross by Mr. Vetne

believe that the industry deserves to be informed of that so that it may respond in its product formulations?

A. Yes, sir, without question.

Q. You have indicated opposition to Proposal 7 which is a protein-based solids standard for fluid milk products that excludes whey. Are you aware as you sit here that what is proposed in Proposal 7 is essentially what USDA is now doing without benefit of an amended rule?

A. Yes. I'm generally aware of that the milk equivalent -- the calculation of the nonfat solids by the milk equivalency. I assume that's what you are talking about.

Q. No. I'm talking about using protein as the basis of determining --

A. Oh. Yes, I am aware of that now.

Q. That's as a result of sitting at this hearing?

A. Yes.

Q. And the materials you received in the course of this hearing?

A. That's correct.
E. Tipton - Cross by Mr. Vetne

Q. You talked about the desirability of not including, whether intentionally or inadvertently, nutritional drinks in Class I, correct?

A. Yes.

Q. That you believe that nutritional drinks of whatever formula should all be in the same classification?

A. Yes.

Q. Including nutritional drinks that are offered as snacks?

A. Yes.

Q. A complete meal replacement, for example, in an eight ounce package would be an incomplete meal replacement in a four ounce package and shouldn't make any difference of what the package size is?

A. That's correct.

Q. And we have heard testimony that protein-fortified drinks are apparently treated by the Department now as meal replacements even though they may not have all the vitamins added to be the, whatever, one-quarter or one-third reference for that. Did you hear that
E. Tipton - Cross by Mr. Vetne

testimony?

A. I don't recall that.

Q. Okay. Do you have an understanding of how the Department now treats protein-fortified supplements, protein-fortified drinks?

A. I don't think I ---

Q. You don't have an understanding?

A. I don't.

Q. And you had some discussion with several examiners about Grade A milk.

A. Yes.

Q. And the volume of Grade A milk. Are you aware that the quality standards for Grade B milk have been changed over the years so that they are very close now to Grade A?

A. Yes, sir.

Q. And are you aware that a number of producers who market their milk as Grade B actually produce milk that is of Grade A quality, but they elect to be considered Grade B producers?

A. I heard that and understand that to be the case.
E. Tipton - Cross by Mr. Olsen

MR. VETNE: That's all I have.

Thank you.

JUDGE DAVENPORT: Is there
other examination of this witness? Mr. Olsen.

MR. OLSON: I'm Aaron Olsen,
O-L-S-E-N, for the National Yogurt Association.

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CROSS-EXAMINATION

BY MR. OLSEN:

Q. Good morning, Mr. Tipton.

A. Good morning.

Q. Do you believe that a product can be
a food even if it is drinkable?

A. Yes, sir.

Q. Do you believe that soup is
drinkable?

A. I do drink it, yes, sir.

Q. And is soup a food or a beverage?

A. I always think of it as a food.

Q. How about suppose you can't take
solid food, and you puree up a roast beef and
mashed potatoes and some vegetables into a form
that you consume. Would you consider that a
food or a beverage?
E. Tipton - Cross by Mr. Olsen

A. I'd consider it a food.

Q. Now, Yogurt can be made into a drinkable form. Do you consider that to be a food or a beverage?

A. Food.

Q. So just because something is drinkable doesn't mean that it's a beverage?

A. Correct.

MR. OLSEN: Thank you.

JUDGE DAVENPORT: Other examination of this witness? Well, let's take a brief break at this time. Let's take five minutes, and in the meantime, Mr. Roberts, if you could, why don't you pass out copies of your statement, if you have it and make it available to the people.

(Short recess taken.)

JUDGE DAVENPORT: Let's reconvene. Raise your right hand.
M. Roberts - Direct

MARK ROBERTS

a witness herein, having been first duly sworn, was examined and testified as follows:

JUDGE DAVENPORT: Please state your full name as you are seated.

MR. ROBERTS: My name is Mark Roberts. I am product manager of technical services and regulatory affairs for Hormel Foods Corporation. In that capacity, I am responsible for the regulatory compliance for all of the product formulas of the parent company, subsidiaries and joint ventures for both import and export products.

I am also responsible for the regulatory compliance of all the labels associated with those formulas. I have to admit that my expertise resides on the FSIS regulatory side, having done regulatory affairs for approximately 20 years for meat and poultry products, not necessarily for milk-related products.

I apologize for not having a prepared statement of testimony for a handout, but I have a change in wording from that which
M. Roberts - Direct

was originally published in the federal registry, April 14, 2005, and so I prefer to read that testimony into the record. I promise it will be simple, straightforward and brief.

Hormel Foods Corporation is a manufacturer of a wide variety of products for both retail and other limited sectors of the consumer market. Hormel Health Labs is a wholly-owned subsidiary of Hormel Foods Corporation involved in the business of providing a variety of nutritious products primarily for the health care industry.

Hormel Health Labs manufactures and distributes hundreds of products that fall under the general health care categories of dysphasia, management, bowel management, malnutrition, household products, diabetic products and critical care products. A relatively limited number of the products that fall in these categories could be considered to be fluid milk according to current regulations and also classified as Class I.

It is the health care fluid milk products Hormel Health Labs feels should be
M. Roberts - Direct

exempt from Class I regardless of milk solids content. In that regard, Hormel Health Labs proposes change to 7 CFR, Section 1000.15, paragraph B(1) to read as follows: Paragraph 1, plain or sweetened evaporated milk/skim milk, sweetened condensed milk/skim milk, formulas, especially prepared for infant feeding or dietary use meal replacement that are packaged in hermetically-sealed containers, nutrient enhanced fortified formulas, especially prepared for the health care industry, any product that contains by weight less than 6.5 percent nonfat milk solids and whey, and I believe that paragraph ends with the word and.

Further, Hormel Health Labs also proposes the corresponding wording change to 7 CFR, Section 1000.40, paragraph B(2) as follows: Formulas, especially prepared for infant feeding or dietary use meal replacement that are packaged in hermetically-sealed containers add nutrient enhanced fortified formulas, especially prepared for the health care industry.
M. Roberts - Direct

Hormel Health Labs understands the intent of the milk order program to ensure that producers appropriately share market returns for high value fluid milk products. However, Hormel Health Labs feels that fluid milk products destined for the healthcare industry would not be of high value since they have limited distribution, are not sold in the retail dairy case, and they do not compete directly or substantially with fluid milk. They should, therefore, be considered exempt from Class I status.

Hormel Foods Corporation under the name of Hormel Health Labs positions a number of products that are designed to help counter the effects of malnutrition in adults with a variety of medical conditions. Such medical conditions do not allow health care residents to consume enough nutrients to maintain minimum bodily needs. Very much like infants, such adults have special requirements for consumption of many foods in fluid form. Nutrient enhanced fluid milk products help these people to attain required nutrient
M. Roberts - Direct

levels, thereby counteracting or minimizing the possibility of malnutrition and hopefully improving the quality of their existence.

Products of this nature are not marketed and are not labeled as dietary supplements. They are considered by Hormel Health Labs to be foods for special dietary use. In view of the fact that such nutrient enhanced fluid milk products are for the care of residents in health care facilities and that such residents typically have lower fixed or even nonexistent incomes, these products should remain affordable.

Beyond this, as I understand it, a great many health care nursing home residents are actually on state assistance. A situation which increasingly drains state congress, and this is something that will be of dramatic concern in years to come as the baby boomer generation reaches the geriatric age. They should, therefore, not be subject to pricing requirements of Class I category regardless of milk solids content, and this concludes my testimony.
M. Roberts - Cross by Mr. Vetne

JUDGE DAVENPORT: Examination of this witness? Mr. Vetne.

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CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Roberts, I'm John Vitne. I'm counsel for Hood. Are you aware of whether any of the products distributed by Hormel are currently deemed by USDA being Class I?

A. They are deemed being in Class I status.

Q. And none of these products that are in Class I are available to consumers in grocery or convenient stores?

A. None of them

Q. Would it be sufficient for Hormel if it simply were to exclude a product, no portion of which was distributed to consumers in retail establishments?

A. That would be convenient.

Q. Is the reason the products produced by Hormel are -- some of them are in Class I is because they are not considered meal replacements and that some of the nutrients
M. Roberts - Cross by Mr. Vetne

that USDA requires meal replacement aren't
there?

A. In part they are not considered true
meal replacements. They are foods for special
dietary use that adjunct the dietary needs of
people with special medical needs, and the
regulations currently state that meal
replacements would have to be in hermetically-
sealed containers. These are not necessarily
hermetically-sealed containers.

Q. Is there any functional and
marketing difference, in your opinion, between
products that are identical in content and
differ only in whether they are hermetically-
sealed or not?

A. Would you restate that? I'm sorry.

Q. Are there any differences in the
marketing or functional use of products which
are identical in package content, but the only
difference is whether there is hermetically-
sealed packaging?

A. I don't believe so.

MR. VETNE: That's all I have.

Thank you.
M. Roberts - Cross by Mr. Beshore

JUDGE DAVENPORT: Other examination? Mr. Beshore.

MR. BESHORE: Marvin Beshore for Dairy Farmers of America.

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CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good morning, Mr. Roberts.

A. Good morning.

Q. Taking off on that last question. Isn't there a major difference in the shelf-life of products that are packaged in hermetically-sealed containers versus those that are not?

A. That would be a functional difference in the product, yes. Hermetically-sealed products should be shelf-stable and shall be remained at ambient temperatures for extended periods of time.

Q. Does Hormel market some hermetically-sealed products?

A. For the health care industry?

Q. Yes. Of the type we're talking about here today.
M. Roberts - Cross by Mr. Beshore

A. Yes. I would -- it depends on the true definition for hermetically-sealed containers. If you are talking about a container with a metal end double seamed to a base that has been thermal stabilized through retarding, we do not make those for the health care industry.

Q. Now, can you tell us a little bit more about the products, you know, at issue here that are presently classified as Class I that Hormel makes? What types of containers are they in?

A. Some of them are in what you would consider wax-lined gusseted cartons, a lot like the old milk carton used to be, similar to that in style. Other ones may be products that are the subject of high temperature short time processing, and they would be in tempered packs or like the juice box-type containers.

Q. What are the shelf-life of those products?

A. The products that are in the gusseted cartons are typically distributed in frozen form, and as long as they remain frozen,
M. Roberts - Cross by Mr. Beshore

I believe we have reasonable shelf-life. Once they are thawed, it's just a few days.

Q. And how about the ones -- the other type of packaging?

A. The other type of container, I would say 12 months to 18 months. They are federal stabilized commercially sterile.

Q. Do they require refrigeration?

A. No.

Q. What are the levels of dairy ingredients in those products?

A. I don't have the product formulations at hand, but many of them are a great deal of milk. Probably as much as 80 percent or more.

Q. Do you know the protein levels, for instance?

A. I have one sales brochure here for a product known as Mighty Shakes, fortified milkshake. A six fluid ounce serving provides 300 calories and nine grams of protein. A four ounce serving provides 200 calories and six grams of protein and so on. They have three different levels.
M. Roberts - Cross by Mr. Beshore

Q. Is that all dairy protein?

A. I don't believe so. I think we have additional proteins that add to this because they have been nutritionally enhanced to deliver more calories and more protein for people who are at risk for malnutrition.

Q. Does your information show what the constituents are by rank, what the ingredients are by rank?

A. This information is just a sales brochure.

Q. What population is that product targeted to, what medical need or health need?

A. Primarily it is for those at risk for malnutrition, this particular guide. They can't consume other types of foods typically.

Q. Are your products -- what distribution areas are your products made available, national distribution?

A. I believe we have national distribution for many of our products.

Q. You export them as well?

A. I know we have attempted to export to Canada, but I don't believe we have
M. Roberts - Cross by Mr. Beshore

completed all the health Canada requirements
for those products yet.

Q. Are some of Hormel health care
products presently classified as Class II?

A. Not that I'm aware of. There could
be some. I don't know.

Q. So to the best of your knowledge,
all of them exceed the 6.5 percent nonfat milk
solids criteria present?

A. That's correct.

Q. And they are not in hermetically-
sealed containers?

A. Correct.

Q. What's the cost of the products -- I
mean, can you give us any idea what the price
category we're in?

JUDGE DAVENPORT: Mr. Beshore,
I'm getting an indication from the rear that
they are not hearing you.

Q. I asked what the price category for
the products was?

A. I can't give you a cost. I have to
apologize. I represent the meat and poultry
side of our business. Hormel Health Labs
M. Roberts - Cross by Mr. Beshore

people informed me during the week they could
not make it to this, and so I would represent
them. I will tell you this, that to change the
category for just one item, this Mighty Shakes,
would change the cost of the product to save in
excess of $200,000 a year.

Q. For the company?
A. For -- it would just be the cost of
manufacturing of that product which would be
passed on to the health care industry.

Q. So, in essence, Hormel is asking
United States Dairy Farmers to contribute that
$200,000 because the minimum price cost of the
milk ingredients would be lower, correct?
A. To be provided to recipients who
can't afford the higher price products.

Q. So let's assume they are Medicaid
recipients. Instead of taxpayers supporting
the cost, dairy farmers only should underwrite
the cost of that nutritional product, correct?
A. It would be -- in a sense that would
be correct, yes.

Q. Because Hormel intends just to pass
on this evidence?
MR. ROBERTS - Cross by Mr. Tosi

A. To the health care industry.

MR. BESHORE: Thank you.

JUDGE DAVENPORT: Any other examination? Mr. Tosi.

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CROSS-EXAMINATION

BY MR. TOSI:

Q. Good morning, Mr. Roberts. Thank you for appearing. I'm glad you made it here. I have a few questions. What would you consider the elasticity for your health care -- the products that you manufacture that are going in the health care industry? Would you consider them to be very elastic, meaning that almost regardless of what the price is, the consumption will stay about the same?

A. I would guess that would be the case. I'm not as familiar with the health care industry as I could be, but I don't believe that our sales would necessarily increase as a result of this change. I believe that we're being purchased at a rate that can be consumed by the people with medical difficulties.

Q. Okay. To the extent that -- let's
M. Roberts - Cross by Mr. Tosi

just use a nursing home as an example. To the extent that nursing homes also provide for their residents fluid milk, regular milk as we know it, to the extent that's Class I, and we are asking that your product to be Class II, what rationale would there be to the extent that we're talking about people that need extra care and may have other dietary and health issues that benefit from, for example, they can't eat a solid diet, they are on a liquid diet, and that liquid diet may include your product, the products that you make and, for example, with regular fluid milk we have one that we price as Class I, and others you are asking would price at Class II, how other than the emotional component that's in there, how would we rationalize that, why we should make that distinction?

A. My familiarity with nursing care has increased dramatically in the last six months because I have put both my parents into that situation. So observing from that standpoint, Class I fluid milk is distributed within nursing care facilities at feeding time.
N. Roberts - Cross by Mr. Tosi

circumstances. You see that at nearly every
table. Our product is not necessarily
distributed for those people at feeding time.
It is more likely to be contained on a med pass
cart that is going through the nursing care
portion of the facility.

My mother is in nursing care. My
dad is in assisted living. He doesn't see that
kind of product. That's not on his table for
feeding. It doesn't come to his room, but my
mother would have it come to her room on a med
pass cart. So there is a distinction as to how
it's distributed within the nursing facility.

Q. I'm with you on that because I also
care for an aunt of mine that's also in a
nursing home. And one of the reasons that I
asked was I have noticed things go both ways --

A. Uh-huh.

Q. -- at feeding time. Milk is always
served, and there are some that even at feeding
time will also have, for lack of a better way
of describing, part of their meal is products
that are similar to the products that you are
making, and in that regard, I understand what
M. Roberts - Cross by Mr. Tosi

you are getting at. But with respect to
differentiating why they should be priced
differently when I understand what you are
talking about there out of a consumer level,
but the primary thing here is that with respect
to what that transaction price needs to be
between dairy farmers and that first person
that's buying milk from them?

A. I guess I don't know enough about
the pricing structure to comment on that except
for the fact that these products are typically
only distributed in the nursing care side. The
nursing care side of a facility has specific
costs for packages or for programs compared to
assisted living. It's considerably more
expensive to be in nursing care, and something
like this kind of a product contributes to that
additional cost, and to me, like I say, a large
number of residents in health care facilities
are on assistance, state assistance. Certainly
it's just one small portion of what their total
costs are, but I think any difference can help.

MR. TOSI: Thank you. That's
all I have. I appreciate your patience.
E. Hollon - Redirect

JUDGE DAVENPORT: Other examination of this witness? Well, thank you, Mr. Roberts for your testimony here today. You may step down.

Mr. Beshore, is Mr. Hollon ready to take the stand?

MR. BESHORE: Yes, he is.

JUDGE DAVENPORT: The supplemental statement has been marked as Exhibit 33.

(Exhibit No. 33 was marked for identification.)

JUDGE DAVENPORT: Mr. Hollon, you were previously sworn. Let's just make you still under oath.

MR. HOLLON: Yes, sir.

JUDGE DAVENPORT: Please be seated.

ELVIN HOLLON a witness herein, having been first duly sworn, was examined and testified as follows:

REDIRECT EXAMINATION

BY MR. BESHORE:

MR. BESHORE: In addition to
E. Hollon - Redirect

Mr. Hollon's statement which has been marked as --

JUDGE DAVENPORT: Exhibit 33.

MR. BESHORE: -- Exhibit 33, we have seven additional --

JUDGE DAVENPORT: Attachments.

MR. BESHORE: -- attachments.

JUDGE DAVENPORT: We'll mark those as A through the appropriate letter.

(Exhibit Nos. 33(a) through 33(g) were marked for identification.)

BY MR. BESHORE:

Q. And before you read your supplemental statement, Mr. Hollon, let's go through the attachments and identify them, if you would, please.

JUDGE DAVENPORT: Mr. Beshore, I don't believe I have the attachments.

A. Due to the lateness of the evening, there are not a tremendous number of the attachments. Each of them represent an Internet site. They are all printed in their entirety. The site is listed in the testimony, and it is attempted to be written on each of
E. Hollon - Redirect

the copies.

The first one is titled -- I
numbered them instead of lettering them, but
No. 1 or A would be titled, Whey Products
Definition, Composition and Functions. It's a
publication of the U.S. Dairy Export Council.
This is as it printed off the site. It's a
reference manual. It's a multi-page. This is
pages 28 through 40, and if you were to click
on the link as written, it would take you to
this document. It's a general description of
whey processing and products and specifications
about whey products.

The second listing is a publication
with dairy proteins on the title. It was
prepared by the Wisconsin Center for Dairy
Research and the Wisconsin Milk Marketing
Board. Pages 1 through 14. It is, again, a
general listing of whey, it's processing, what
type of products are produced from the stream
and some specification data in it.

The third listing which would be
Exhibit C in this stream is a listing from the
US Dairy Export Council. It's entitled, Whey
E. Hollon - Redirect

Products, Milk, Minerals and Dairy Calcium, New Findings Benefits Application. It's a document of eight pages. It lists some specific technical specs about whey. This is intended as are the first three to be a technical support or a sales brochure-type support.

The fourth listing which would be D is published by the Wisconsin Center For Dairy Research and is composed of two pages. It's titled Quick Guide to Choosing the Best Type of Whey. It lists several different whey products and then begins to characterize them as they benefit in use in various food uses from bakery products, breads, beverages, cheese, confectionary items, dry mixes, salad dressings, a wide number of products with which you might choose whey and which particular whey product you would use.

The fifth item or item E is entitled Whey Protein. It comes from a source wheyprotein.com everything you need to know about whey protein. It is four pages. This is section 9 of this particular document, and it lists under the individual proteins within the
E. Hollon - Redirect

whey protein complex. In specific page 3 lists a product -- or I'm sorry -- a protein, glycomacropeptide.

Item 6 which would be F in the stream is a publication out of the Journal of Dairy Science. It's a technical publication. I'm going to reference it only for the purpose of indicating that there are specific tests that can identify the glycomacropeptide.

And finally, the seventh one is G. It's off of the Web Site DoItWithDairy.com which is a DMI publication, and it has several composition statistics for types of whey. Each of these links are in the testimony. They would be in the record. They are not excerpted. I'm not editing them in any way. They are produced in their entirety, and from each of them, I would point to a particular conclusion that distinguishes between certain types of whey, that's their intended use.

Q. Now, with that identification of exhibits, could you proceed with your supplemental statement which has been marked as
E. Hollon - Redirect

Exhibit 33.

A. Additional comments concerning the use of whey. I presented a supplemental statement for Dairy Farmers of America, Inc. Our proposal requires using all milk proteins in the determination of the 2.25 protein standard. However, for pricing purposes, whey and whey products, which are the by-products of cheese-making are not priced.

JUDGE DAVENPORT: Mr. Hollon, I understand we have a statement. It makes it easier for the hearing reporter if can you slow your delivery.

THE WITNESS: Yes, sir.

A. Given the possibility, which has been raised at this hearing that whey proteins derived from processes other than cheese-making, which would be priced, could be used as protein in fluid milk products. It is important to know and to be able to demonstrate that the whey proteins from various sources are distinguishable.

The following U.S. Dairy Export Council publication, Whey Products Definition,
E. Hollon - Redirect

Composition and Functions, is a general summary of the whey manufacturing process and contains a product description and composition guide. This site is http://www.usdec.org/files/pdfs/us08d 04.pdf.

Whey proteins resulting from cheese-making and casein manufacturing have several different characteristics that make them distinguishable from one another. The whey from cheese-making is commonly known as sweet whey, while the whey from casein manufacture is termed acid whey. DFA makes and markets both products. The source for the terms sweet whey and acid whey, the publication site is http://144.92.196.21/pdf/resources/whey/dairyproteins.pdf.

Q. Could you just indicate is that Exhibit 33(b)?
A. Yes.

Q. And the prior Internet address which for the U.S. Dec publication was the publication you have previously identified as Exhibit 33(a); is that correct?
A. Correct.
E. Hollon - Redirect

Q. Okay. As you continue through, just link the exhibit to the address for additional clarity of the record.

JUDGE DAVENPORT: Unless there's an objection from the audience, I don't know that he needs to read the site itself, but merely reference it to his statement.

A. Those different characteristics include: A difference in pH - acid whey has a more acidic pH measure while sweet whey is lower in pH. However, the manufacturer can offset this factor after the whey is manufactured. So this difference is not a certain identifier.

2, a difference in the calcium content - according to the U.S. Dec Publication whey products, milk, minerals and dairy calcium, sweet whey has a calcium content of 700 to 800 milligrams per 100 grams while acid whey has 2,000 milligrams per 100 grams. This would be Exhibit C.

3, a difference in ash content - according to the DMI publication, Do It With Dairy, sweet whey has an 8.4 percent ash
composition, while acid whey is 10.8 percent. This would be sourced in Exhibit G.

4, the flavor and functionality profile of sweet whey is superior. A Wisconsin center for dairy research publication, Quick Guide to Choose the Best Type of Whey, lists 60 function and flavor product application characteristics for which sweet whey has 21 desirable attributes and acid whey, 7. This would be attachment D.

5, a difference in titratable acidity - however, the manufacturer can offset this factor after the whey is manufactured so this difference is not an identifier.

6, the protein glycomacropeptide, valued for medicinal benefits is found only in sweet whey. This would be noted in Exhibit E.

The journal of Dairy Science, Volume 87:1 --

Q. Excuse me. That's actually F, isn't it?

A. You are correct, that's F. No. No. I'm sorry. The journal article, yes. The journal article is F.

No. 6, the protein glycomacropeptide
E. Hollon - Redirect

valued for medicinal benefits is found only in
sweet whey, and that is in reference 5 which is
E. The Journal of Dairy Science, Volume 87:174
through 177 describes three laboratory methods
to recover this protein from or determine if it
is present in whey protein isolates, and that
would be reference -- or that would be
attachment F.

These various characteristics make
it possible to distinguish between the whey
produced from cheese-making, yielding sweet
whey, and acid whey which is produced from
casein or cottage cheese manufacture. The whey
component of MPC, milk protein concentrate, is
more akin to the sweet whey than to the acid
whey. While it is technically feasible to
produce whey from milk protein concentrate,
there is no domestic producer of whey from MPC
of which we are aware, nor is there an
international supplier. Our investigation into
this possibility indicates that this process
would be expensive, and the product produced
would not be competitive with sweet whey
produced from cheese-making.
E. Hollon - Redirect

If any question arises with respect to whether the whey protein in a fluid milk product should be priced, it is the handler's responsibility to provide any and all proof satisfactory to the market administrator of the source of whey protein the handler has utilized in the fluid milk products.

Additional comments concerning discretion afforded the secretary in product classification.

After additional consideration, we would offer this modification to our proposal to provide the secretary some discretion and latitude in classification of future products that are a result of new technological advances. Our criteria for offering this modification is:

There will be new products and advances that challenge the classification provisions.

There should be some mechanism to deal with new products that provides some relief to the maker, the industry and the secretary.
E. Hollon - Redirect

There should be some parameters around the discretionary authority so that it is reviewed in a prompt hearing to consider the need for amending the Order language.

Our language to accomplish this is as follows: We would add in paragraph C which would read, products of new technology. The classification of any product which meets the criteria of paragraph A of this section, and which is produced through the use of milk processing or packaging technology not commercially utilized, and I'm going to insert the words here, and the United States, at the time of promulgation of this regulation shall be determined by the deputy administrator, Dairy Programs, AMS by applying the purposes and intentions of paragraphs A and B.

This determination shall be effective until a permanent classification of the product is established after a hearing pursuant to the Act is held to consider amendments to this subpart. Such hearing shall be held no later than one year after the interim determination of the deputy.
E. Hollon - Redirect

Administrator is made.

I have two additional comments that are not a part of my statement that I would like to make. Yesterday there was some line of questioning about would or could this proposal make U.S. produced whey be more competitive for a marketed product, and at least one or two witnesses said that while they thought it would be the case, they weren't necessarily sure they would include that in their marketing programs.

I think we would include that in our marketing programs to promote to beverage makers that use of a domestically-produced -- or not domestically-produced, but a sweet whey would be a product that could be used in making beverages and would have some price advantages to some of the other milk proteins.

And lastly, there was some line of questioning back and forth about the price impact at the consumer level, and while none -- that question was offered, no one offered any particular data, and while I do not have the exact data, I don't have access to anyone else's product formulations, and the specific
E. Hollon - Redirect

Product formulations that we make are confidential in the same manner offered by some of the other witnesses. I would offer a comparison that should be a reasonable proxy, and I'm going to read through the math, and the logic is to take the difference in Class I skim versus Class II skim, add a differential and simply divide down to a package level, and while I realize, again, that's not an exact formulation measure, it should be a reasonable proxy of when the consumer reaches for a carton of product X, what kind of price difference would there be if the dairy ingredients there were priced as Class I instead of Class II.

For 2003 and 2004 the Class I mover, the skim price of the Class I mover averaged $8.0087. One of yesterday's witnesses mentioned a particular product that they sell in an 11-ounce container. They noted for the record that they produce product in Michigan, and Michigan has a $2.00 differential. So I've added $2.00 to my $8.0087.

For 2002 and 2003 the Class II price was $6.8125 per 100 weight. The difference in
those two would be $3.1962 per 100 weight.
That would be for 100 pounds. So one pound
would be .0320. So if I had a carton, a
consumer item that weighed a pound and it was
100 percent dairy ingredients, then the
difference between Class I and Class II would
be 3.2 cents. If I had an 11-ounce carton
which was the size mentioned yesterday in this
particular product, then 11-sixteenths of 3.2
cents would be 2.2 cents, and if I had an
eight-ounce container, that difference would be
8-sixteenths or half. So it would be 1.6
cents, and that would assume that there was no
vegetable, no puree, no stabilizer, no
emulsifier, nothing in the container other than
dairy, a dairy ingredient.

I would say that it would be a
stretch to say that a consumer would reach into
the dairy case or into any case, and in terms
of picking which product they were going to
consume, that a difference of 1.6 cents would
cause their hand to go this way or to the right
instead of to the left to pick a product.

That concludes my additional
E. Hollon - Redirect

statement.

Q. Just for clarification with respect to the language modification or proposal that you have made, that would be added to the definition of fluid milk product, correct?

A. That would be correct. I would note that this modification is offered by DFA.

Q. One final question. The possibility that adoption of Proposal 7 would lead to new paperwork for some handlers or the processors out there has been raised, and, in fact, the paperwork itself might be enough to scare off some use of dairy ingredients. You have indicated DFA would be a seller -- is a seller of ingredients.

If you were selling to someone who was not -- to a possible purchaser who was not presently regulated in any way by the Federal Order System, would your sales force offer them technical assistance in that respect?

A. We would certainly be willing to help explain to them what requirements they need, get them in touch with the various people, explain to them how easy it is to
E. Hollon - Cross by Mr. Vetne

comply, get them in touch with the appropriate personnel to help them in whatever way they needed to be able to comply.

Q. In your view and experience with those requirements, would it be unduly burdensome?

A. It would not be unduly burdensome in our experience.

MR. BESHORE: Thank you.

JUDGE DAVID: Let's defer examination until after the break. Let's take a 15 minute break at this time and come back at 10:15.

(Short recess taken.)

JUDGE DAVID: Let's come back to order, if we can. Mr. Vetne, you wish to exercise some examination of Mr. Hollon.

MR. VETNE: John Vetne for HP Hood.

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CROSS-EXAMINATION

BY MR. VETNE:

Q. Mr. Hollon, the attachments or accompaniments to your supplemental statement,
E. Hollon - Cross by Mr. Vetne

Exhibit 33 describes a number of products and a number of uses for whey. Is it your intention that these be illustrative rather than exhaustive?

A. Yes.

Q. There are other uses, special formulations that are specific to a particular manufacturer and/or user?

A. The purpose for including these into this statement was there were questions on Monday about how could you tell this protein from that protein. So the purpose was to look through what was available and point out that there ways to tell, that there could be tests that would show differences between protein sources.

So anyone who uses, you know, a milk protein and claims a pricing exemption for whey would be on the honor system, but every so often it's good to check the honor system.

Q. As used in Proposal No. 7, whey, as I now understand it, is not just whey but means sweet whey?

A. Whey from the product of cheese-
E. Hollon - Cross by Mr. Vetne

making which is termed in the literature as sweet whey.

Q. But it would exclude the product of cottage cheese-making?

A. Yes, sir.

Q. Which produces acid whey?

A. Yes, sir.

Q. And are you aware that there are some Class III cheese varieties, hundreds of which are described in the publication called Cheese Varieties and Description, there are some Class III specialty cheese varieties that result in acid whey from the cheese production rather than sweet whey?

A. That's correct.

Q. Whatever by-product is produced, that acid whey would not be eligible for exemption under your proposal?

A. Yes.

Q. If a food beverage manufacturer finds a use for what we have talked about, and we have talked about as acid whey, from protein derived from acid whey, whether it's from a Class III cheese use or Class II cheese use or
E. Hollon - Cross by Mr. Vetne

Class IV casein use originally, first of all, the protein has already been priced if it comes from the Federal Order source?

A. Correct.

Q. Some method must be employed under your proposal to convert that protein to a solids nonfat equivalent or skim milk equivalent, correct?

A. Correct.

Q. And with respect to that whey protein, acid whey protein source, describe the process, and not necessarily the numbers, the process you believe USDA should employ for the upcharge on that nonfat solid --

A. I don't have one to offer at this time. We would have to deal with that on break.

Q. The modification that you offer on the last page of your supplemental testimony, when you refer to new milk processing or packaging technology, do you intend to include in that term not only processing and packaging technology by makers of consumer products, but also, processing and packaging technology by
E. Hollon - Cross by Mr. Vetne

makers of milk-derived ingredients?

A. You have to give me some more examples. I have not necessarily considered that.

Q. Let's say somebody buys a fraction of a protein or finds some new combination of milk-derived ingredients that currently does not exist, but that, as we have heard, in 2010 will not meet our assumptions in 2005 the same way our 1999 reform assumptions -- reform reality did not meet the assumptions from 1974. My question has to do with the ingredients going into the manufacturer, and the question is, does new milk processing packaging technology apply to both the ingredients side as well as the consumer product side?

A. Yes, it would.

Q. And what you are proposing by this new language -- are you aware that the FDA as well as its California equivalent have a procedure for temporary standards of identity for new milk products?

A. I am not aware of it, but I would be surprised if there is one.
E. Hollon - Cross by Mr. Vetne

Q. Well, for purposes of Federal Order Standards, this proposal serves as essentially that kind of function, a temporary standard until one that can be made more permanent?

A. Yes.

Q. I haven't had a chance, of course, to study the attachments that you provided, but you represent that there are laboratory methods to distinguish sweet whey protein from acid whey protein?

A. Yes.

Q. And without reading them, can you tell me if those attachments also provide equally clear distinction between either form of whey protein and undifferentiated milk protein?

A. I'm not sure I know what undifferentiated milk protein is.

Q. Milk protein that comes -- the kind of milk protein that you find in milk protein concentrate for which the serum proteins and casein proteins have not been segregated.

A. No, I cannot tell you if they provide a differentiation between the two. The
E. Hollon - Cross by Mr. Vetne

Journal article itself talks about testing for the GMP, glycomacropeptide, which was present in the sweet whey but not present in acid whey.

Q. The methods that are used or described in these articles to distinguish and the equipment that was used by those testers described in the article, are those methods and is that equipment, to your knowledge, generally available to any use by dairy manufacturers and milk processors?

A. The testing procedures described in the article, familiar with them but they are available. One of the articles mentioned a commercial laboratory that does do them, and our own whey salespeople has me that we have run those types of tests. It's not something as normal as a butter fat test or a protein test that you might do on an incoming month supply, and it's not something that's cheap or inexpensive. The cost of the test has some value.

Q. What about time?

A. Actually I do not know about time. I didn't inquire about that. However, the
thought process here is not every instance would the test be run. Just like today, not -- and an audit doesn't look at every single transaction, unless there's some thought that there's reason to. So the fact that there is a distinguishable test and it can be done is what I was attempt to demonstrate.

Q. On page 3 you refer to the hand with responsibility as it always is to provide records to the market administrator, in this case, the source of whey proteins that the handlers utilized?

A. Right.

Q. It's true, is it not, that if a handler buys an ingredient of mixed proteins from an ingredient manufacturer that you won't determine simply by identifying the supplier what the whey proteins are?

A. That burden of proof goes with the reported requirement. So if there's a desire to get an ingredient, use it in a beverage formulation, it would be exempt from Class I, or it's going to have to go all the way down the chain. We have many customers that have
E. Hollon - Cross by Mr. Vetne

very strict requirements on what they wish to purchase and many specifications around it. So as a seller, we have to meet those requirements.

Q. And is it not true that the manufacturers of food mixes that include milk proteins in turn get their subcomponents of the mix from other manufacturers?

A. Yes.

Q. And that can go several links down the chain?

A. It can certainly be a multiple chain or maybe one chain, and, again, we, the supplier, are involved in those chain links and have demands that we meet in order to make a sale. So I would not view that as an impossible standard to have to meet.

Q. But the proof satisfactory that you are referring to would require the ultimate maker of a consumer product to follow that chain through all of the component suppliers of the ingredient back to the one that received the milk from a cow than segregated away from other proteins?
E. Hollon - Cross by Mr. Vetne

A. It would have to be a determination that the product met the spec and standard and periodically the ability to test that to make sure it happened.

Q. Do you believe that a handler who has undergone that process should be able to rely on whey protein versus other milk protein or other dairy protein contents in their ingredients as provided by the manufacturers and ingredient specifications in the classification of a product as opposed to the handler having an additional responsibility of testing and confirming that mix of composition of proteins?

A. Much of the answer to that question is going to be embodied in the relationship of the supplier and the buy/sell arrangement. We have, for example, buyers who want to make sure that some product that they buy from us doesn't have a gluten product in it because someone down the chain has a need for a gluten-free product. So part of the specs is you will provide A, B, C, D, and it's up to you to provide it.
E. Hollon - Cross by Mr. Vetne

So if there's a default somewhere, there's a penalty that comes back to the supplier, not the person in the middle. So if a handler can demonstrate they have those types of agreements and somehow the fault is not theirs, I would think it reasonable that a burden would be -- they might still have to provide whatever penalties are required to the pool, but they should be able to turn around the other way and say, supplier, you didn't provide me what we agreed to, I have some penalty that you need to pay.

Q. So it's the intention of your proposal that if the protein composition in the finished product is met but it is met through inadvertence rather than intent, that the handler ought nevertheless be assessed an upcharge by Class I classification?

A. Yes.

MR. VETNE: All right. Thank you.

JUDGE DAVENPORT: Other examination? Mr. Yale.

MR. YALE: Real quick just to
E. Hollon - Cross by Mr. Yale

kind of follow up on some other things. Ben F. Yale for Select Producers, Inc. and Continental Dairy Products.

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CROSS-EXAMINATION

BY MR. YALE:

Q. Have you given an indication whether there's any other cooperatives that support the testimony of the National Milk and the DFA in this hearing?

A. I have been. I have been receiving some communication from Select Milk Producers and Continental Farms, Inc. that they would also support the proposals by National Milk and DFA.

MR. YALE: And for that, let the record reflect that that proposal is withdrawn. Thank you.

JUDGE DAVENPORT: Other examination? Mr. Tosi.

MR. TOSI: I'm Gino Tosi with Dairy Programs in Washington, D.C.
E. Hollon - Cross by Mr. Tosi

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CROSS-EXAMINATION

BY MR. TOSI:

Q. Elvin, I wanted to ask questions of you on the new modification that you are making here to allow the Department to have some flexibility in making determinations on whether or not something is a fluid milk product.

As I read the proposal, I take away from it that there would be an interim classification of any new product and that, in essence, any new product would require a hearing before we make a final classification?

A. It would not be any new product, and the secretary is going to have some discretion in saying how it falls. So just because I walk in the door and say, I have got a product with these ingredients and my new ingredient that's new technology is I just scrambled the name of the old ingredient and called it new, there's going to have to be some judgment that's there, but if that new ingredient is a result of some technology that was unforeseen, today or whenever these rules become final, then the
E. Hollon - Cross by Mr. Tosi

secretary is going to have some discretion rather than being caught in limbo, and the secretary would say, using, you know, the criteria set out in section A and B, I'm going to consider this product to be in Class I, II, III or IV, and obviously, if everybody agrees, there would be no dispute and no need to do anything. If there was some dispute and some disagreement and the secretary felt like he or she needed to enforce the new classification, then they could do so with the interim possibility and then have a hearing to say there's a new technology, it was an unforeseen, we're going to call this product Class I, we are opened to proposal from the industry about what to do.

Q. But the order language doesn't say to the extent that the person or the product being classified in the Department agreed, then we don't need to have a hearing. It doesn't say that. It just says a new product, the determination shall be effective until a permanent classification of the product is established after a hearing pursuant to the
E. Hollon - Cross by Mr. Tosi

act, and it continues on that we have to hold a hearing within one year after an interim determination is made.

A. We'll take that question into consideration when we're reading it.

Q. Are you aware that on our product classification list that we treat products that have been -- that we have to classify as a confidential matter between the department and the company making the product?

A. You mean if DFA comes into the local market with products, and they say, explain to us what classification is?

Q. No. I'm talking about current products.

A. Elaborate a little bit.

Q. We maintain a product classification list that describes the product, its composition, who makes it. Are you aware that that list to be kept confidential?

A. Yes.

Q. And to the extent that people here that have come to the hearing will not reveal confidential information, what purpose would a
E. Hollon - Cross by Mr. Tosi

hearing serve to have someone come and say, well, anything that we're going to ask of that is confidential?

A. The product itself by brand name and description would probably not be the necessary focus, but whatever the distinguishing characteristic that the maker seemed to think deserves a different classification would be.

Q. Are you aware that they are able to come back in the Department and do that now?

A. Yes. But there seems to be a desire to have some degree of flexibility in the fluid milk product standard that says this was our attempt to try to provide some -- that would meet the test, and the secretary can find amendment C, you know, not included in the language.

MR. TOSI: Thank you. I appreciate it.

JUDGE DAVENPORT: Mr. Hollon, it's unusual for me to have to ask a question. But what level of a hearing are you talking about? Are you talking about an internal hearing at the Department or are you talking
E. Hollon - Cross by Mr. Tosi

about a hearing before an administrative law judge?

THE WITNESS: A hearing before an administrative law judge.

JUDGE DAVENPORT: And typically you realize those hearings are open to the public?

THE WITNESS: Again, it would be if DFA wouldn't want to bring -- with the understanding of the confidentiality, wouldn't bring product X and say this is it, but in attempt to convince the Department that somehow product X meets a new classification, there would have to be some reasons why, and so those reasons would somehow be incorporated into the order provisions.

JUDGE DAVENPORT: Other agencies, of course, do have provisions for dealing with privileged information and trade secret information. Our current rules of practice don't have very much in there. So in other words, that is probably something that you may wish to at least envision in your proposal.
E. Hollon - Cross by Mr. Shapiro

THE WITNESS: Okay.

JUDGE DAVENPORT: Is there
other examination of Mr. Hollon? Yes, sir.
Please identify yourself and spell your last
name for the reporter.

MR. SHAPIRO: Jeff Shapiro,

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CROSS-EXAMINATION

BY MR. SHAPIRO:

A. Good morning.

Q. I wondered, if I could, to talk a
little bit about whey. Currently is it your
understanding that whey is not included in the
calculation to determine product
classification?

A. I've not read all the memos attached
to Mr. Vetne's brief, but I think that at times
it has been and hasn't been. At the beginning
of the standard, it was -- whey was considered
a beverage drinkable, and there's been some
confusion. That's been the purpose of the
hearing is to try to make it clear. I can't
tell you all the particulars of the current
E. Hollon - Cross by Mr. Shapiro

classification.

Q. If a product right now has below six and a half percent milk solids nonfat, under the proposal that you support, let's say that would roughly convert to, let's say, two percent protein, you would agree that that product then under the proposal you support would remain in Class II?

A. If all of the proteins from the dairy source were two percent as you described it, yes, that product would remain in Class II or a new product created would be Class II.

Q. Now, under current classifications, it's my understanding that whey is not included.

A. Okay.

Q. But under the proposal you support, let's say of that product that it has below two percent protein, I'm going to add in the whey for either functionality purposes or protein purposes, and let's say we add in enough to get the total protein content of that product, now up to two and half percent protein. That product would then move from Class II to Class
E. Hollon - Cross by Mr. Shapiro

I under the proposal you support; is that correct?

A. Yes, it would.

Q. Have you run an assessment of all the products of the marketplace today and the amount of whey that they might use?

A. I have no idea.

Q. So it's definitely possible that there might be several wheys that move from one class to another under the proposal you support?

A. It's entirely possible.

Q. I wanted to move a little bit to the discussion that you had on pricing, if we could.

A. Okay.

Q. First just to clarify for the record, could you reiterate the source of your data for the alleged impact on price?

A. The Class I Mover is published every month by the market administrators. It's the first hearing I have ever been to where not a listed price was put in, and that's because it wasn't part of the classification hearing, but
E. Hollon - Cross by Mr. Shapiro

every month the Class I prices of skim and fat are published, and every month the Class II price skim and fat are published and every Federal Order source, if you go down to some of your product accounting guys at General Mills, I'm sure they have those documents.

Q: I'm sure they do. I'm glad I don't have to see them all the time. You reference -- on product specifically you used the data from one particular MA; is that correct?

A: Yesterday I think one of your three witnesses mentioned that you have a plant in Michigan. So I used $2.00 for the differential added on top of the Class I group because that's the base differential for 33.

Q: And you use that in your discussion with respect to Nouri ceh today?

A: Yes.

Q: I would just like to clarify for the record that we do not manufacture Nouri ceh in Michigan. I want to walk you through a hypothetical. If we say that you, let's pretend, purchased 500 million pounds of milk every year. Now, under the math, as I
E. Hollon - Cross by Mr. Shapiro

understand it, if I have this right, that you
presented, you would be paying roughly one and
a half million dollars more every year for that
milk to be Class I than to be class 2; is that
correct?

A. Yes, that would be correct.

Q. Does DFA not believe that one and a
half million dollars would have a significant
impact on its manufacturing practices and
operations?

A. I have no comment one way or the
other other than to say that thus far, all of
the reasons for why this proposal would be bad
is that when the consumer reaches their hand in
the dairy case, somehow their behavior is going
to be changed by a price difference of one and
a half cents.

There's been no evidence at all --
evidence is the wrong word, but no claims at
all about, you know, where, in your case, the
1.5 million does it show up on General Mills'
book and on Dairy Farmers' books. I don't
think anybody has said that it's beneficial --
more beneficial one way or another.
E. Hollon - Cross by Mr. Shapiro

Q. I didn't want to suggest that that was the amount of milk that we necessarily presented.

A. No. I understand. That was as a hypothetical.

Q. But you would agree that one and a half million dollars could have a significant impact on, perhaps, a manufacturer's decisions with respect to their operations in general?

A. It may, indeed, but, again, I would say that no one mentioned that until now, and every witness who has said this is a bad thing to do has said that when consumers reach for that product, that a difference in price is going to make a difference to whether they buy.

Q. That's assuming that the impact on price to the manufacturer would have still allowed that product to get to the shelf in the first place, correct?

A. Yes, that's true.

Q. Finally, with respect to the discussion on technology. We're a company that is constantly innovating. It would be your suggestion under your proposal that every time
E. Hollon - Cross by Mr. Shapiro

a new manufacturing innovation basically hits the marketplace, that an eventuality of that would be a hearing similar to this?

A. No, that would not be the case. Only if there became a desire to change the classification through something that's not already embodied in the rules. If the current rules will allow product to be classified, then we would see no reason to change the process now, but there appears to be a concern exactly as you have noted that what do we do with something new. So our only goal was to attempt to provide some language that might help to deal with that.

MR. SHAPIRO: I appreciate the clarification. J.

JUDGE DAVENPORT: Other examination? Thank you, Mr. Hollon. Excuse me. Mr. Beshore.

MR. BESHORE: Thank you, Your Honor. Just a question or two on redirect, Elvin.
E. Hollon - Redirect

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REDIRECT EXAMINATION

BY MR. BESHORE:

Q. The examples of possible tests for differentiating among whey proteins that are provided, is there any contention that those are the only tests or the --

A. No.

Q. -- that those are exhaustive of the technology available?

A. It was only meant to provide the knowledge that there was a way to do it.

Q. Now, with respect to the questions from Mr. Shapiro of General Mills, in your price impact calculations, you used the differential for Michigan, but you could -- if you used another differential, you could go through the same math that you described in your testimony and come up with a different price impact, correct?

A. There are more differentials than $2.00. So obviously if you have a lower differential, you have a lower impact and a higher differential, a higher impact. I simply
E. Hollon - Redirect

picked that location because somebody testified they had a manufacturing plant there and it was for example?

Q. In any event, it's going to be pennies regardless of where it's produced?
A. That would be true.

Q. By the way, with respect to the proposed language C, the trigger on that is twofold, that it must be a product of technology that's not presently commercially utilized, correct?
A. Correct.

Q. And secondly, it's got to be a beverage product?
A. Yes, that would be true.

Q. Meeting the form and use test?
A. Yes.

MR. BESHORE: Thanks.

JUDGE DAVIDSON: Other examination? Very well. Mr. Hollon, you may step down.

MR. BESHORE: Has his exhibit been accepted and its attachments? Has it been accepted? If not, I would move them
E. Hollon - Redirect

JUDGE DAVENPORT: At this time to the extent that I have not previously admitted in the Exhibits 1 through 33 with all attachments, it would be admitted into the record at this time.

MR. BESHORE: Thank you.

(Exhibit Nos. 1 through 33 were admitted into the record.)

JUDGE DAVENPORT: Dr. Cryan, I understand you have an additional exhibit.

MR. CRYAN: Yes, sir. Thank you. My name is Roger Cryan, C-R-Y-A-N.

JUDGE DAVENPORT: Give your exhibit to me and to the hearing reporter as well as to the government representatives. This will be marked for identification as Exhibit 34.

(Exhibit No. 34 was marked for identification.)

MR. CRYAN: I presented some information, Exhibit 14(c) when I gave my testimony which offered the data from a market research study commissioned by DMI, commissioned IRI Market Research to do a study.
on the carb countdown. Hood's subsequent
presentation of another version of that may be
recognized that there was some confusion about
which elements of the presentation were from
that third party market research firm and which
were not.

So I obtained this presentation, power point presentation. This was the
presentation that was directly presented by the market research firm to DMI, and I offer this
as an exhibit in order to clarify which parts of the material are directly from the market
research firm and which parts may or may not have been added by DMI.

JUDGE DAVENPORT: Mr. Vetne.

MR. VETNE: John Vetne for
Hood. Your Honor, I would simply refer back to
my prior objections for all of this survey data in all forms. However, I do not object to the receipt of this third version as a
clarification of what was presented to the DFA people in January of 2005.

MR. CRYAN: Thank you.

JUDGE DAVENPORT: With that
being the case, Exhibit 34 will be admitted into the record.

(Exhibit No. 34 was admitted into the record.)

MR. CRYAN: Thank you.

JUDGE DAVENPORT: Is there anyone else that is wishing to offer their testimony before we go to Mr. Wilson? Well, Mr. Wilson, it looks like you are up. Raise your right hand.

TODD WILSON

A witness herein, having been first duly sworn, was examined and testified as follows:

JUDGE DAVENPORT: Most of the people in the audience have already heard you, but would you, please, tell us again your full name.


JUDGE DAVENPORT: And that's T-O-D-D, W-I-L-L-S-O-N?

THE WITNESS: That's correct.

JUDGE DAVENPORT: Very well.

Mr. Stevens has also provided me with an exhibit which, I gather, that you are going to
T. Wilson - Direct

use during your testimony. It has been marked as Exhibit 35 for identification.

(Exhibit No. 35 was marked for identification.)

MR. STEVENS: Thank you, Your Honor. My name is Garrett Stevens. I'm general counsel for the U.S. Department of Agriculture.

DIRECT EXAMINATION

BY MR. STEVENS:

Q. Todd, during the course of the hearing, you were asked to provide certain information relative to some calculations that might be done under your marketing order; is that correct?

A. That's correct.

Q. And have you made an attempt to do an example of those calculations?

A. Yes, I have.

Q. Have you brought that with you today?

A. Yes, I have.

MR. STEVENS: Your Honor,
T. Wilson - Direct

Thank you for marketing the Exhibit No. 35.

Q. I'm now referring to that, Todd.

This is a three page document, am I correct?

A. Yes, it is.

Q. And this seeks to provide for the record information that has been requested of you during the course of the hearing?

A. Yes, it is.

Q. Could you now go through the exhibit page by page and please describe for the record what is contained therein.

A. The first page as identified is an example of reconstitution of nonfat dry milk with water. When nonfat dry milk is added with water, there's some inherent factors that we apply. As nonfat dry milk -- kind of just go through the columns in the row, if you will.

Nonfat dry milk is included in a product by its pounds. It also has a weight factor. In this particular case, it's the pounds per gallon column, 13.24. If you divide the pounds of 9.33, you get .7 gallons.

The same could be applied with water, except usually water is used in forms of
T. Wilson - Direct

gallons. So applying the weight factor from
gallons to pounds, you end up with the amount
of pounds. Also, nonfat, I have in here pounds
of butter fat, percent protein, pounds of
protein, percent SNF and SNF pounds.
The next column is a column I
have entitled with volume factor. Volume
factor is simply the weight of an unmodified
milk product weight of 8.62 divided by the
pounds per gallon of that individual
ingredient. In the case of nonfat dry milk,
it's 13.24. In this example, it gives us a
.651 volume factor. This volume factor can be
applied to the pounds of the product to yield
that ingredients Class I displacement pounds.
In this example, it's 6.07.

When nonfat is added to water to
reconstitute back to the level of protein and
solids that was in its original form, in this
example, it was 90.67 pounds of water. It's
weight though as reflected by this, its
unmodified milk equivalent or milk equivalent
volume would be a 1.034 weight volume factor.
This is simply, again, the 8.62 divided by
8.33. So its Class I displacement weight for the water is 93.73. Those two numbers combined give us the total volume of the reconstituted product weight of 99.8 pounds. If you divide the 99.8 back by its total gallons of 11.58, it give us an 8.62 weight per gallon.

The fluid equivalent factor, the next column over, is a factor that is computed by taking the percent SNF, 96.2 and dividing by the percent SNF and the skim milk portion of original milk of 9, adding to that the level of fat in the product, in this example it's 10.697.

This factor applied to the pounds of 9.33 also gives us a pounds volume, fluid equivalent pounds of 99.8. In this example, this product, this nonfat dry milk has been fully reconstituted back to its fluid form with the water. So there's no fortification under the Federal Order.

The next page, again, this is an example using nonfat dry milk, but in this case, I'm showing the example of fortification and what the effect of putting nonfat dry milk
T. Wilson - Direct

Into milk has. In this particular case, we have 98 pounds of milk, two pounds of nonfat dry milk. Again, we have got a volume factor for milk as 1 volume. The volume factor for nonfat dry milk is 13.24. I'm sorry. The volume factor is .651. Doing the math the same way as the other previous example gives us a Class I displacement pounds of 99.3. This, again, is the weight of the modified complete product.

In this example though, we have a significant amount of increased protein and increased solids. In a product we apply our fluid equivalent factors to the nonfat dry milk. We actually end up with 20 pounds more of equivalent weight of the product. This equivalent weight is not priced at Class I. Rather, it's priced at Class IV. This is what we sometimes use in our market as termination -- or the term fortification.

The next example, again, this is a reconstitution example and fortification example. We're reconstituting water -- or we're using water to reconstitute a concentrated product that I have labeled UF.
T. Wilson - Direct

concentrate. I have taken this example of the
50/50 ratio, 50 pounds of UF concentrate, 50
pounds of water. In this example, protein
percent of the UF is 9.9, solid nonfat is
16.71, equivalent solids nonfat is 28.74. The
volume factor in this example is the 8.62 that
I referenced in the previous examples divided
by the 8.886 in UF concentrate to be a .973.

It's Class I displaced pounds is
48.65. Added to the water displaced pounds is
51.7 and would yield 100.35. Divide this back,
it, again, yields a 8.62, the weight for the
modified product. However, there is increased
protein and increased solids in the product
because of the fluid equivalent factor. Again,
this factor is referenced in the next to the
last column as 3.197. In this example, it's
the 9.9 percent protein divided by the protein
test of skim milk of 3.1 that is used in the
Federal Order. This will yield 3.194. Adding
the fat from that product of .003 percent, we
yield 3.197. Applying that to the 50 pounds in
the product will then yield a fluid equivalent
pounds of 159 pounds and 86. So in this
example, the equivalent pounds 159.86
 subtracted from 100.35 pounds of Class I, we
 yield fortification pounds of 59.51.

Q. Todd, these are illustrated
 examples, I mean, they are hypothetical
 examples, and they don't reflect any real
 calculations that you have done under your
 order with respect to any particular products?

A. That is correct.

Q. And they are done in accordance with
 the application of the order revisions in the
 same way that you would do it for any products
 that you were evaluating under the Federal
 Order?

A. That is correct.

Q. Let me just make sure the record
 reflects, Todd, you are employed by the market
 administrators office?

A. Yes, I am

Q. And you've worked in that capacity
 for how many years?

A. 17.

Q. 17 years. And during the course of
 the 17 years in the market administrators
T. Wilson - Direct

office, briefly for the record could you tell us what your duties have been?

A. I have been involved in the pooling process for 15 years. I have been involved in the auditing process for 17 years, dealing with the code of regulations and different things for that entire time.

Q. So during the course of your employ with the market industry, you have had occasions to apply your provisions of the marketing order to various products, reports and the products that they represent that have come into your office?

A. Yes, I have.

Q. And these examples are offered by you for the use of the parties here at the hearing?

A. Yes, they are.

Q. They are not offered for or against any proposal, are they?

A. No, they are not. You are correct.

MR. STEVENS: That's what we have on direct, Your Honor. We offer the witness for cross-examination.
T. Wilson - Cross by Mr. Yale

JUDGE DAVENPORT: Very well.

Cross-examination? Mr. Yale.

MR. YALE: Benjamin F. Yale on behalf of Select Milk Producers, Inc. and Continental Dairy Products, Inc.

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CROSS-EXAMINATION

BY MR. YALE:

Q. Good morning, Todd.

A. Good morning.

Q. And on behalf of my clients, I want to thank you for making this available for the record. Using these formulas, one can take any of the products in which protein or solids nonfat are present, plug them into the appropriate thing and do the same math and arrive at a number that the market administrator would find for pricing purposes; is that correct?

A. In our market, in the area, yes.

Q. Yes. This is a Class I product.

The fortification volume would be priced at Class IV, and the rest would be priced at Class I; is that correct?
T. Wilson - Cross by Mr. Vetne

A. That's correct. The third example?
Q. Right, the third example.
A. Yes.

MR. YALE: I have no other questions.

JUDGE DAVENPORT: Thank you, sir. Other questions? Mr. Vetne.

MR. VETNE: John Vetne for HP Hood.

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CROSS-EXAMINATION

BY MR. VETNE:

Q. Thank you for preparing these examples, Mr. Wilson. In response to the last question from Ben Yale and looking at Exhibit 35, he asked you, I think, if you could apply a similar approach to any protein, milk protein and come up with a fluid milk equivalent. Do you recall that question and answer?
A. Yes.

Q. And your response was in our market in the area, yes. Now, I note that on the top of this exhibit the words Southwest Milk Marketing Order No. 1126 is indicated. Does
T. Wilson - Cross by Mr. Vetne

your testimony illustrate how reconstituted products from milk sources are converted to an SNF equivalent and a skim milk equivalent only in the southwest marketing order, or is your testimony that this is the way it's done in the Federal Milk Marketing Order system?

A. My testimony is specific to the Southwest Milk Marketing Order as indicated in the exhibits.

Q. Can there be variability between market administrator offices, on their approach to this kind of thing?

A. I'm here just to explain the procedures used in our ordinary marketing area.

Q. That wasn't my question. My question is can there be variability from market to market where -- one of the markets at issue in the hearing is the Southwest, but all of the others are also in the notice. I expressed an interest in finding out how it's being done now for the record, and if it's being done not the same in other marketing orders, we won't get that from you. So my question --
T. Wilson - Cross by Mr. Vetne

A. That's correct.
Q. That's correct. And do you know whether there may be variability?
A. I do not know.
Q. Now, Exhibit 34 -- 35. I'm sorry.
Page 3, example of reconstitution of UF with water. Let me see if I understand. The UF concentrate that we're dealing with here, this is an illustrative product made up of simply two components, UF concentrate and water, and the finished product is a combination of those two; is that correct?
A. That is correct.
Q. And the UF concentrate ingredient used in that product started out with 50 pounds of UF concentrate of which 4.95 pounds of protein were protein? Am I reading this correctly?
A. That's correct.
Q. All right. And then of the UF concentrate, 8.38 pounds of the 50 pounds were solids nonfat pounds?
A. Correct.
Q. And that would be the protein as
T. Wilson - Cross by Mr. Vetne
well as some lactose as well as trace minerals
in the 50 pounds of UF concentrate; am I
correct.
A. Yes.
Q. And then we move over two more
columns. Well, we move over one more column.
There's a term; percent SNF equivalent. Now,
that's a term that's not in the Federal Orders
currently; am I correct?
MR. STEVENS: Your Honor, I
think the question was it's not in the Federal
Orders currently. He's testifying about the
Southwest Order.
Q. It's not in the general provisions
of the Federal Orders as applied in the
Southwest Order?
A. There are a lot of terms on this
form that's not in the Federal Order.
Q. I'm just asking about this
particular term, SNF equivalent.
A. Okay.
Q. It's not in the order that you
administer?
A. That is correct.
T. Wilson - Cross by Mr. Vetne

Q. Okay. And the order that you administer for purposes of fluid milk product definition uses exactly the same general provisions that are used in all Federal Market Orders, correct?

A. That's correct.

Q. There's nothing unique to the Southwest here?

MR. STEVENS: Your Honor, every order -- this is Garrett Stevens from the general counsel office. Every order stands on its own record. Every provision, every order stands on the record made for that provision. So I'm instructing the witness to answer the question in that context.

Q. My question was simply whether there's anything in the fluid milk product definition applied in the Southwest Order that's different from all the other Federal Orders?

A. Again, I stated I'm here to testify on the Southwest Order, examples that's explained in this exhibit.

Q. The exhibit illustrates the approach
T. Wilson - Cross by Mr. Vetne

that the Southwest market administrator took in
classifying carb countdown, correct?

MR. STEVENS: Your Honor, I
object to the question. It assumes something
that's not in evidence certainly in this
hearing, some computation that may have been
made by a market administrator. If he wants to
ask him a question about how the provisions are
applied in the order as to specific products, I
think that's okay, but, you know, let's put a
foundation in there and let's ask the question.

JUDGE DAVIDPORT: Do you want
to restate your question, Counsel.

Q. The hypothetical illustration in
Exhibit 35, page 3 illustrates the approach
taken by the Southwest Milk Marketing Order
Administration in classifying carb countdown
and other low carb milk beverages; is that
correct?

A. The classification of products is a
confidential matter between the handler and --

Q. For purposes of carb countdown
there's already data in the record, there's
already testimony that it contains UF milk, and
T. Wilson - Cross by Mr. Vetne

for purposes of this answer, I represent Hood.

Now, can you answer the question?

A. I'm not sure that what's in the

record indicates where carb countdown is

manufactured.

MR. STEVENS: John, I think we
can short-step this. If you'll stipulate, I
guess, and we can agree that carb countdown has
been evaluated by the market administrators in
the Southwest Order and that he has applied the
marketing order provisions of the Southwest
Order to carb countdown. I think we'll
stipulate to that.

MR. VETNE: If that's the
case.

MR. STEVENS: Fine. Then you
don't need to ask him the question.

MR. VETNE: Yes, I do. I need
to ask him -- we're here find out -- to amend
the orders. Part of that process is to find
out how they are not being applied. Now, I'm
asking how they were being applied for very
specific purpose to a product.

MR. STEVENS: Your Honor, I
T. Wilson - Cross by Mr. Vetne

would object because it's a matter of record. Anyone can go to the hearing clerk's office of the United States Department of Agriculture and determine in a proceeding filed by Mr. Vetne's client how that determination was made. We don't need to repeat all that in this record.

MR. VETNE: On the contrary, the secretary cannot go to the 15A record and make a decision here that is record-based as a part of my statute.

MR. STEVENS: And what is relevant of that, Your Honor?

JUDGE DAVENPORT: I'll allow you to ask him if the same type of computation was made with respect to the classification of your product and whether that is illustrative of the same type of procedure that was done with respect to your client's product.

BY MR. VETNE:

Q. Did you hear the judge's restatement of my question?

A. Yes, I did.

Q. Can you answer it that way, please?

A. I can answer it to the extent that
T. Wilson - Cross by Mr. Vetne

carb count down is not manufactured in the
Southwest Marketing Order and that
classification determinations are made through
those marketing orders where a product is
manufactured.

Q. Nevertheless, the market
administrators office for the Southwest did
some tests on carb count down as well as other
carbohydrate-reduced milk beverages, correct?

A. That is correct.

Q. And nevertheless, you as well as
Mr. Fleming from the Southwest market
administrators office testified in support of
the manner in which USDA classified carb
count down at the 58 percent?

MR. STEVENS: We will
stipulate to that, Your Honor.

Q. And it was the basis and analysis
and application of what USDA believes to be the
current rules by your office that provided the
foundation for a Class I classification of carb
count down as well as low carb as indicated in
that 15A record, correct?

MR. STEVENS: Your Honor, the
T. Wilson - Cross by Mr. Vetne
department would stipulate that as represented
in the record, the 15A proceeding that we are
referring to, that information is available and
is out there in the public record.

MR. VETNE: Again, Your Honor,
that's not the point. I do not understand the
government's desire to exclude from this public
record --

JUDGE DAVIDSON: Let's take a
recess at this time. Let's let you and
Mr. Stevens confer, and let's see if you can
come to a stipulation, and we'll be in recess
for at least five minutes. Let me know whether
you need more time.

(Short recess taken.)

JUDGE DAVIDSON: Let's come
back into session, if we could. Mr. Vetne,
have you and Mr. Stevens been able to reach any
common ground at all?

MR. VETNE: Your Honor, very
little, but I would like Mr. Stevens to correct
me if I state this wrong.

JUDGE DAVIDSON: Very well.

MR. VETNE: My objective as I
indicated a couple days ago is to have somebody from USDA with reference to the general provisions, Section 1000.15, explain how it works, how USDA is currently applying that section and the 6.5 percent solids nonmilk fat standard in particular in the administration of the orders so that we might know for this hearing what we are changing, how the proposals would affect that and what would be different and to provide a reference point for that change.

Mr. Stevens has indicated to me that section -- the general provision Section 1000.15, with respect to that, this witness cannot testify as to how the Department and all of its market administrator's office administers it, but he can testify as to how it's applied by the Southwestern market administrator's office, and I guess the rest of us may infer from that that it would be applied similarly, but we have no assurance that it is.

So my intention is, because I don't want repeated objections to interrupt my examination, to try to focus my question on how
the Southwest Milk Market Administrators Order would apply to section 1000.15 to the determination of what is and is not a fluid milk product.

JUDGE DAVENPORT: Very well.

MR. STEVENS: I don't have any problem with what he stated so far.

JUDGE DAVENPORT: Very well.

Let's proceed.

BY MR. VETNE:

Q. Mr. Wilson, in your Southwest Milk Market Order, you have evaluated whether certain milk-based beverages which include an ultra-filtered ingredient are or are not Class I, correct?

A. Correct.

Q. This would include products which are marketed or offered in the market as carbohydrate-reduced beverages, correct?

A. Correct.

Q. And with respect to such products made from ultra-filtered milk, Exhibit 35, page 3 shows us how your office arrives at a solids nonfat percentage to apply the 6.5 percent...
T. Wilson - Cross by Mr. Vetne

standard in the general provision 1000.15,
correct?

A. Correct.

Q. Section 1000.15 with reference to
the 6.5 percent solids nonfat refers to solids
nonfat contained in the product, correct?

A. Will you repeat the question, please?

Q. The general provision Section
1000.15, in context of the 6.5 percent milk
solids nonfat standard refers to such solids
nonfat as contained in the product or
equivalent words; is that correct?

A. That is correct.

Q. In the general provision concerning
Class I and Section 40, first in Class I, has
products disposed in the form of fluid milk
products, correct?

A. Correct.

Q. So milk that's in Class I is
products that are disposed of in the form of
products, the content of which is 6.5 percent
solids nonfat or more unless otherwise
specifically accepted? Did I combine those two
T. Wilson - Cross by Mr. Vetne

sections accurately?

A. I think you rephrased it.

Q. Yes, I did. Do you have any problem with the way I phrased it, the content of which?

A. Yes.

Q. And what is your problem with my rephrasing, that contain is not the same in your mind as --

A. Containing?

Q. Containing is not the sometime as content of which?

A. I don't believe so.

Q. You don't believe so. Okay. And you, in fact, looked beyond the content of the product for solids nonfat for purposes of administering general provision 1000.15 in your marketing order?

MR. STEVENS: Your Honor, I would instruct the witness to answer the question that implies the order provisions that apply. That's my instruction to the witness.

A. As the order provisions apply, that is how we --
T. Wilson - Cross by Mr. Vetne

Q. Okay. And the two columns in Exhibit 35 that are headed percent solids nonfat equivalent and equivalent solids nonfat pounds, is that the bottom line of how you apply this 6.5 percent standard in the Southwest Market Marketing Order?

MR. STEVENS: I direct the witness to answer the question as the order provisions apply.

A. As the order provisions apply.

Q. He didn't tell you to use those words. He told you to explain to me how they apply.

MR. STEVENS: No, I didn't.

This witness is an employee of the Department of Agriculture, and he works in the market administrators office. He applies the provisions to the marketing order to any products, reports the come in his office. There is obviously a dispute between Mr. Vetne's client and the Department about how certain calculations were made.

As I said, those are a matter of public record. He is instructed as any
T. Wilson - Cross by Mr. Vetne

employee is to apply the market order provisions.

Q Mr. Wilson, I understand based on counsel's objections that I may not have an answer to that question, but let me ask you this. To use Mr. Stevens' words, marketing order provisions that apply, can you please point me to a marketing order provision that you rely on in reference in any matter to the percent solids nonfat equivalent columns in Exhibit 35, page 3?

MR. STEVENS: Your Honor, can I have the question repeated for the record?

(Question read back.)

MR. STEVENS: Can we have a minute, Your Honor?

(Discussion held off the record.)

MR. STEVENS: Your Honor, in order to shorten this, and I'll offer this as a stipulation, the Department uses the order provisions, that is market administrator use the various order provisions to classify milk products that come in. Not only do they use
the marketing orders and their provisions in the general provisions, but they also base their interpretations upon decisions that the Department has made that have been referenced to in this hearing, certainly, concerning issues such as form and use, considering other issues as to how these individual provisions are interpreted.

So when the question is asked of a witness, show me the order provision, well, it's the order provision -- it's specific order provisions of the Texas Order, Southwest Order. It is combination of that with the application of the general provisions, and it's a combination of the all the rule-makings that have gone into the formulation of those regulations.

MR. VETNE: Mr. Stevens, can we, perhaps, add to that, that combination, the manner in which USDA on a case-by-case basis has classified individual products so as to be consistent with one product to another?

MR. STEVENS: I don't know that I'm willing to stipulate to that. That
T. Wilson - Cross by Mr. Vetne

go beyond what I'm willing to stipulate to.

MR. VETNE: My question was

whether you would be willing to include it, and

apparently you are not?

MR. STEVENS: No.

MR. VETNE: So we have a

representation of counsel that, perhaps, we

won't find those words solid that's nonfat

equivalent.

BY MR. VETNE:

Q. But nevertheless, Mr. Wilson, in
deciding in the Southwest Order what is a Class
1 product or fluid milk product, you ascertain

a solids nonfat equivalent from the product

made with UF milk?

A. That is correct.

Q. And that attributes for purposes of

the 6.5 percent standard in your order to the

product -- or to that standard the lactose that

had been removed?

A. That is correct.

Q. You periodically receive guidelines

and memoranda, instructions at your office from

Dairy Programs, formerly the Dairy Division
T. Wilson - Cross by Mr. Vetne

concerning interpretation of the order, correct?
A. Correct.
Q. And one of those guidelines was issued in 2004 concerning particularly the 6.5 percent standard and how to arrive at 6.5 percent ingredients which was included in Exhibit 30(c). Are you familiar with that?
A. I believe so.

MR. STEVENS: Your Honor, the Department could stipulate to that, that such a thing was issued on the date as given by Mr. Vetne, but the document speaks for itself and any interpretation that he would put on it is his interpretation.

MR. VETNE: We're trying to find out what the Southwest Order does, Your Honor, as indicated.

MR. STEVENS: That's fine.
Q. Prior to April of 2004, you have been there long enough, there was a memorandum addressed to the same subject but specifically included -- excluded rather -- things such as milk protein concentrate, whey protein
T. Wilson - Cross by Mr. Vetne

concentrate from the tally of things to add up
to the 6.5 percent. Are you familiar with
that?

A That one?

Q Yes.

MR. STEVENS: I'm sorry, Your
Honor. I'm having a little trouble. What
specific document are you referring to now,
John?

MR. VETNE: I'm not referring
to an exhibit. I'm asking referring to -- I'm
asking if he's familiar with a November 22,
1995 memorandum which addressed the same 6.5
percent standard, but it instructed market
administrators not to include milk derivatives
such as casein, sodium caseinate, lactose, whey
solids, whey protein concentrate or milk
protein concentrate in the tally of things to
add up if you look for 6.5 percent solids
nonfat. Are you familiar with that 1995 memo?

A I'm aware of that, yes.

MR. STEVENS: Your Honor, if
he has a document that he's referring to, first
of all, I would like to see it, and if it's a
T. Wilson - Cross by Mr. Vetne

document issued by the Department that we can stipulate to, we would be happy to stipulate to it, but any interpretation that he puts on it is Mr. Vetne.

Q. Now, currently at least as of April 2004, the Southwest office of the market administrator follows the directive of Dairy Programs and looks to all of these ingredients including but not limited to milk protein concentrate, milk protein isolate, whey protein concentrate, protein serum et cetera, for purposes of determining whether a milk beverage has 6.5 percent solids nonfat?

A. We follow the direction of the deputy administrator.

Q. Okay. Now, with respect to that type of product, do you in administration of your order apply a similar approach to that described in Exhibit 35, page 3 to come back from protein to a percent solids nonfat equivalent?

A. On what product?

Q. On the products that are the subject of the April 2, 2004 memorandum.
T. Wilson - Cross by Mr. Vetne

A. Those products are not -- those products included milk products?

Q. No. These are ingredients. I handed the witness a copy of Exhibit 30, table C, a memorandum of April 2004. At the bottom of that memorandum in my yellow highlight are certain ingredients which your office among others were instructed to be included in the tally of 6.5 percent solids nonfat.

MR. STEVENS: Your Honor, the Department will stipulate that this memo was sent to the field offices, and we will represent that this employee of the market administrator follows the directives of the dairy division as each market administrator's office does.

Q. My question, Mr. Wilson, goes to the next step. With respect to those milk-derived ingredients, which, if any or all or not does your office -- with respect to which, if any or all or not, does your office apply an approach that's similar to Exhibit 35, page 3 to determine a solids nonfat equivalent from a milk protein ingredient?
T. Wilson - Cross by Mr. Vetne

A. Yes.

Q. You do to all of them?

A. I didn't say that.

Q. Okay. Can you identify though which of those products that go into determining 6.5 percent solids nonfat to which you in turn determine skim milk equivalent or solids nonfat equivalent?

MR. STEVENS: I instruct the witness to answer the question in application of the present order provisions of the Southwest Order.

A. In application of the provisions of the Southwest Order, we follow the directives of the deputy administrator.

Q. Thank you. Turn the paper around if you face it away from you. And look at those dairy-derived ingredients to which you apply an approach similar to Exhibit 35, page 3 to calculate in turn a solids nonfat equivalent.

A. It appears that these are -- as indicated in the letter, they each have a level of protein in them. The same approach can be used in determining a solids nonfat equivalent.
T. Wilson - Cross by Mr. Vetne

as you stipulate.

Q. Okay. And, in fact, does your office or would your office, if provided with the product that contained any one of those as the only milk ingredient, would your office make an approach that is similar in order to arrive at a percent solids nonfat equivalent?

A. As I have said before, we follow the directives of the deputy administrator.

Q. Well, my client and every interested party would like to know if there's a directive that's in addition to that with respect to what milk ingredients enjoy a solids nonfat equivalent calculation and which might add to the total solids in the product but do not have a milk equivalent calculation? That's the thrust of my question.

For example, whey protein isolates, if that were the only product, the only ingredient in a beverage and its composition were 6.5 percent or more, would your office under the current fluid milk product definition and Southwest rules apply a skim or SNF equivalent approach?
T. Wilson - Cross by Mr. Vetne

A. I don't know how to answer this any better than I have already answered it. The deputy administrator directs us from time to time, as you've stipulated, the ways that the programs would have to be done. When that is done, our market administrator applies those directives, and I follow his direction.

Q. What directives does your office operate under with respect to which milk-derived ingredients to apply the solids nonfat equivalent procedure?

A. The directives are from the deputy administrator.

Q. With respect to each of those milk-derived ingredients, what are the directives as you understand them?

JUDGE DAVENPORT: Counsel,

Mr. Stevens went through a discussion of that with you, and there was offered a statement as to what directives are used. At this time what I'm going to do is I'm going to declare a recess of 20 minutes. I would remind the people in the audience that check-out time for the hotel is 12:00. If any of you want to
T. Wilson - Cross by Mr. Vetne

check out during this period of time, you would
be able to do so, and let's be back at 10
minutes after 12:00.

(Short recess taken.)

JUDGE DAVIDSON: We are back
in session. Mr. Wilson, you are still under
oath.

THE WITNESS: Yes, sir.

JUDGE DAVIDSON: Mr. Vetne.

BY MR. VETNE:

Q. Mr. Wilson, with respect to the
dairy-derived ingredient, calcium caseinate, a
beverage containing that ingredient as offered
on the market, is it the practice of the
Southwest market administrators office,
directives from market administrator and/or
Dairy Programs to employ an approach similar to
the example on Exhibit 35, page 3 to derive
from protein in calcium caseinate a solids
nonfat equivalent?

JUDGE DAVIDSON: Mr. Vetne,
your voice is sort of tapering off.

Q. Did you hear my question?

A. Not toward the end.
T. Wilson - Cross by Mr. Vetne

Q. Is it your practice with respect to calcium caseinate to employ an approach to determine a solids nonfat equivalent for that dairy ingredient?

A. If marketed on the Southwest Order.

Q. Of course.

A. If a product was introduced that used calcium caseinate and was put into a container, we would use a similar approach.

Q. Okay. That was my question. Thank you. So if a product contains roughly three percent protein exclusively from calcium caseinate, would you agree with me that it would end up -- excluding other exceptions, a beverage containing three percent protein exclusively from calcium caseinate, that that would produce a solids nonfat equivalent in excess of 6.5 percent?

A. I would stipulate to that yes.

Q. Now, we have covered calcium caseinate. Would you take a similar approach to casein?

A. Are we going through the list?

Q. Yes, we are.
T. Wilson - Cross by Mr. Vetne

A. What was the product?

JUDGE DAVENPORT: Mr. Wilson, if you wish, you could indicate that all the items on the list would be similar to read.

A. I would so stipulate.

Q. All right.

JUDGE DAVENPORT: Not stipulate, but testify.

Q. Let me go through the list again.

With respect to each of these items, milk protein concentrate, liquid milk protein concentrate, milk protein isolate, protein serum, whey protein concentrate, and I stop there, in all of those -- the other one is not a protein product, but with respect to all of those ingredients, you would seek to arrive at a solids nonfat equivalent for purposes of assessing solids nonfat under the 6.5 percent standard in Section 1000.15?

A. Not knowing exactly what that complete list of products, actually their makeup or their -- what they are, yes, the similar approach can be made to compute a solids nonfat equivalent.
T. Wilson - Cross by Mr. Vetne

Q. That wasn't quite my question. My question was under current rules as applied by your office on directives from the market administrator of Dairy Programs, if presented with a beverage which contains any one of those, the protein content, per se, three percent, exclusively from that, would you make a similar calculation to determine solids nonfat equivalent?

A. Yes.

Q. Okay. In what way, if any, is the approach to the 6.5 percent standard in the fluid milk product definition currently pursuant by a directive and interpretation from Dairy Programs, in what way is that different from proposal No. 7?

MR. STEVENS: Your Honor, if he knows. If you know.

A. Yeah. I don't know. I'm not prepared to answer that.

Q. As in proposal No. 7, you do look at milk-derived ingredients including those in the April 2, 2004 memo, correct?

A. I believe that's in the record as
T. Wilson - Cross by Mr. Vetne

Proposal 7. I don't have proposal 7 in front of me.

Q  Proposal 7 is the MMPA proposal.
A  I understand.

Q  You currently look at ingredients, milk-derived ingredients containing milk proteins, correct, for purposes of the standard?

MR. STEVENS: Your Honor, asked and answered. I think he already testified that he interprets the provisions of the Dairy Program directives in implementing the order and applying the order, the Southwest order as all the market administrators do.

MR. VETNE: My objective, Your Honor, as you know is to try to find out how that --

JUDGE DAVENPORT: It's kind of hard to tell which questions have been asked and which questions haven't been asked, Mr. Vetne. We seem to be going back over the same area in different words, but certainly in the same particular area. Can you focus us more sharply and then move on.
T. Wilson - Cross by Mr. Vetne

MR. VETNE: My objective here, Your Honor, we have gone through the general approach and not getting a general answer to find out how the current application differs from that proposal, and I don't have a general answer, but maybe I can do it with specific answers.

JUDGE DAVENPORT: As long as we don't go through an exhaustive encyclopedia of each and every ingredient.

MR. STEVENS: Your Honor, I think that the record has to clearly reflect that this is an employee of the market administrators office. He acts pursuant to the direction of the market administrator who acts in conjunction with the director of the Dairy Programs branch in Washington, D.C.

For Mr. Vetne to ask this witness how he would interpret it, the only proper answer he could give is subject to the direction of my supervisors and how the various directives apply. We know what the latest directive is from the Dairy Program. We know that he interprets --
T. Wilson - Cross by Mr. Vetne

JUDGE DAVENPORT: It appears the answer goes beyond that. He has also testified that if faced with particular components that he would employ calculations similar to that contained on Exhibit 35, page 3.

MR. STEVENS: Subject to limitations that I just outlined, Your Honor, with all due respect.

JUDGE DAVENPORT: Such other limitations as, in other words, might be directed by his supervisor. I don't know, Mr. Vetne, that we can go beyond that. If you wish, I will allow you to submit questions which, in other words, we will allow to be forwarded to the director of this program, and, in other words, if they -- they can respond to those questions. In other words, I will allow you to tend to those questions more specifically.

MR. VETNE: Let's see if I can finish and do this question through this witness.

BY MR. VETNE:
T. Wilson - Cross by Mr. Vetne

Q. Without specific reference to proposal 7, is the application of a milk order definition by your office currently one that takes proteins in milk-derived ingredients and converts them to a solids nonfat equivalent to assess whether or not the product meets the 6.5 percent standard?

A. We look at the level protein, and we do compute an equivalent as I have demonstrated in these exhibits, and these exhibits explain how these concentrated-type products have an SNF equivalent.

Q. Okay. So it's not these exhibits? We're only talking about page 3 of Exhibit 35, right? That's the one that explains that?

A. It's part of the entire exhibit.

Q. That's the one page of the exhibit that explains how you come to an SNF equivalent. You don't use the word SNF equivalent in any of the other two pages?

A. No. Correct.

Q. So page 3 of Exhibit 35 generally explains what you do, what your office does under the current provisions by direction of
T. Wilson - Cross by Mr. Vetne

your superiors when faced with a beverage that contains a milk protein in some concentrated form?

A. Yes.

Q. And in making that solids nonfat equivalent, you have some reference to the protein content of the ingredient, correct? For example, casein, calcium caseinate contains about 91 percent protein, correct?

A. I think it's been testified that it's close to the 90 percent. So 91 is pretty close to 90, I believe, yes.

Q. You know that for a fact as you testified to that effect previously at another hearing? You are not guessing now? You have done this before?

A. I have looked at a lot of different products, and calcium caseinate, I believe, is in that range of 90, 91 percent.

Q. And there are various products, dairy-derived products containing protein of whey protein concentrate of various protein concentrations 40, 60, 90 -- maybe not 90 -- milk protein concentrate, whey protein isolate,
T. Wilson - Cross by Mr. Vetne

milk protein isolate. They all have various either off-the-shelf protein concentrations which are targeted or buyer-specific protein concentrations, and that's the protein concentration you use to come back to a solids nonfat equivalent; is that correct?

A. Typically the protein concentration as exhibited by those ingredients as was testified earlier is a total nitrogen protein. The protein that is in this example of UF concentrate isn't a true protein measurement.

Q. So say we have whey protein concentrate at 40 percent protein. That's what you refer to as gross protein or total protein?

A. Whatever you want to call it.

Q. Are we talking about the same thing? Something other than true protein?

A. If you want to call it gross protein, that's fine.

Q. All right. Whatever term we're using, gross protein or total protein, we're talking about some of which the difference between that and true protein and some of which as measured by most testing equipment is
T. Wilson - Cross by Mr. Vetne

actually a measure of nonprotein nitrogen, correct?

A. Yes.

Q. And the relationship between true protein and nonprotein nitrogen in milk varies from producer to producer, cow to cow, region to region, although maybe not very much, but there is variation, correct?

A. Yes.

Q. And there's variation between nonprotein nitrogen and true protein, between these various product types as well as within batches of products, correct?

A. I would presume so.

Q. And when products are offered, say, off the shelf whey protein concentrate at 40 percent, there's also variation in manufacturing some allowance, plus or minus, correct?

A. That's my understanding.

Q. Okay. Do you apply those allowances and variations both in manufacturing as well as between nonprotein nitrogen and nitrogen to account for those variances when you calculate
T. Wilson - Cross by Mr. Vetne

back to solids nonfat equivalent?

A. Probably not because typically whenever we look at the ingredients, we're looking at formulations, batch records, and typically we'll test the actual ingredient and use that as a basis and try to come back and see if that -- if the test that we got on that result matched up with what the supplier of the ingredient says that it's supposed to be. So there's variations as you pointed out.

Q. And if it was a close case on the 6.5 percent solids nonfat equivalent calculation and a test you did from one batch, from one sample of the ingredient from the ingredient manufacturer would bring that above 6.5 percent because of the manufacturing variation, how would you apply that result to your classification determination?

A. Well, I'll certainly check with my supervisors and market administrators and ultimately go on to deputy administrator, but as I look at the language, it's a pretty hard number, but I would certainly check with --

Q. It's a hard number, meaning it's 6.5
T. Wilson - Cross by Mr. Vetne

percent contained in or product-containing, and there's no room for discretion with respect to that 6.5 percent?

A. Well, I don't know if I want to go to that extent, but I would -- ultimately if I'm looking at a product, I'm not the one making the determination. I refer that up to market administrator who then refers it up to the deputy administrator, and we have then direction from Washington to the final determination of that product.

Q. Do you currently test and distinguish between whey-derived proteins and casein proteins?

A. Could you repeat?

Q. Do you currently test milk products to distinguish between whey-derived proteins and casein proteins?

A. Not that I'm aware of, but I'm not a chemist. I don't know.

Q. Okay. Do the tests that you currently perform on your equipment distinguish between milk-derived proteins and nonmilk-derived proteins?
T. Wilson - Cross by Mr. Vetne

Q. Nonmilk-derived?
A. Nonmilk proteins.
Q. As in?
A. As in soy protein isolate.
Q. I don't think the methods that we employ currently offer any distinction similar to butter fat.
Q. Do you know whether food components other than proteins give off nitrogen?
A. I have heard a lot of things give off nitrogen.
Q. Does your testing equipment, if this happens, distinguish between nitrogen from a nonprotein source and nitrogen from a protein source?
A. I don't know.
Q. And in your office in making classification determinations, it was alluded to by statement of your counsel, do you also look at other things that have been described characteristically in decisions such as the form of the package, placement of the package, the significance of competition, whether there is product substitution, in your opinion, or
not? What role do those things play in determinations of classification in your office?

A. Well, as we have said before, there's -- in the code of regulations, there is descriptions. There are guidance that leads us to form a -- to offer a -- I would characterize it as an opinion at the point of market administrator, at my level anyway. For instance, if we had a product that has something in it and we think, you know, we need to be doing some testing on it, if it's -- I heard one testimony talking about soup. If it looks like a soup, we have in regulations that that is not a fluid milk product effectively classified as Class II. So there's many things we look at as you pointed out.

Q. Product characteristics or market characteristics, if I might phrase it this way, that might not be stated with pinpoint precision in the regulations but which apply some intuition?

A. Intuition?

Q. Intuition or conclusion.
T. Wilson - Cross by Mr. Vetne

A. Could you -- I'm sorry. I got lost.

Q. For example, let's say -- let's just say that a --

JUDGE DAVENPORT: Give him an example like similarly to a soup. Would that be an intuitive conclusion?

Q. Yes. Similar to a soup would be an intuitive conclusion, correct?

A. Okay.

Q. And an intuitive conclusion of the same kind contributing to a classification determined might be a low carb dairy beverage were sold in gabled containers or jugs and placed in the dairy case some place close to milk?

A. And it was called soup?

Q. No. It's called a dairy beverage, it can't be called milk, but it's there. Would that factor have some role, -- does not that factor have some role?

A. Certainly.

Q. Yes. And does not your office also make some conclusions as part of that process on product substitution by consumers, whether
T. Wilson - Cross by Mr. Vetne

it's intuitive or measured?

A. I don't know if it would make any

conclusions by substitutions, except from our

own personal standpoint of us maybe

substituting our own preferences.

Q. You don't recall that Mr. Flemming

at one point said that one of the factors

entered into for his judgment of classification

was that was consumer substitution?

A. I don't recall that.

Q. Between a low carb product and milk?

MR. STEVENS: Your Honor,

Garrett Stevens, U.S. Department of

Agriculture.

MR. VETNE: He doesn't recall.

MR. STEVENS: If we're going
to go into what records was -- now he's

referring to the market administrator,

Mr. Flemming and what he testified to in a 15A

proceeding.

MR. VETNE: I didn't say that.

MR. STEVENS: That's what you

just said. You said, didn't Mr. Flemming

testify such and such, and we can read it back
T. Wilson - Cross by Mr. Vetne

if we would like to hear it, but that's what I heard, and if we're going to redo that, in other words, put that record on there, why don't you take official notice, and we'll have all of it in, and we won't have to go through all of these questions.

MR. VETNE: The witness said he doesn't remember.

BY MR. VETNE:

A. I don't recall Mr. Flemming being at this hearing and testifying.

Q. Okay. No, I wasn't -- I was, in fact, referring to the 15A hearing at which you were present when Mr. Flemming talked about his classification determination. And my question to you was whether you recall him saying that?

JUDGE DAVENPORT: Asked and answered. Let's move on.

MR. VETNE: I'm going to sit down for a minute so that I can consult with my client.

JUDGE DAVENPORT: Very well.

Other examination? Mr. Stevens.

MR. STEVENS: Your Honor, I
have a few redirect, if I could.

JUDGE DAVENPORT: You may want to defer that until we decide whether or not there's going to be additional cross.

MR. STEVENS: I'll be happy to do that.

JUDGE DAVENPORT: Is there anyone else that is going to exercise cross of this witness? I take that as no. While they are conferring, this might be a good time -- it's my understanding that the transcript will be coming in fairly short order. What is your pleasure with respect to the period of time for corrections to the transcript, Mr. Tosi.

MR. TOSI: Yes. Your Honor, we're expecting that we would have the transcript up on the Internet on or about July the 11th and then allowing for the usual two week time period for folks to offer corrections.

JUDGE DAVENPORT: Rather than targeting July 11, in other words, let's put it on as to the date it actually is posted on the Web Site.
MR. TOSI: Yes, Your Honor.

JUDGE DAVENPORT: And allowing two weeks after that date for corrections to the transcripts.

MR. TOSI: And then for every day that we may go beyond July 11, all other dates would be adjusted accordingly.

JUDGE DAVENPORT: Would be adjusted accordingly. How long for initial briefs, Mr. Stevens?

MR. STEVENS: I have no number, Your Honor. I leave it to the parties, but certainly the sooner the briefs are in, the sooner the process moves along.

JUDGE DAVENPORT: Very well.

Mr. Yale.

MR. YALE: Two weeks.

JUDGE DAVENPORT: Mr. Beshore.

MR. BESHORE: Two weeks after the corrections.

JUDGE DAVENPORT: Two weeks after the corrections?

MR. BESHORE: Yes.

JUDGE DAVENPORT: Mr. Vetne.
MR. VETNE: Four weeks. I got
the biggest --

JUDGE DAVENPORT: Very well.

Mr. Tipton.

MR. TIPTON: I suggest at
least five to six weeks. This is the summer
holidays. There is no --

JUDGE DAVENPORT: I'm a little
reluctant to go beyond the four weeks,

Mr. Tipton.

MR. TIPTON: At least the four
weeks then.

JUDGE DAVENPORT: Four weeks.
How does that sound? And then reply briefs 14
days after that.

MR. STEVENS: Your Honor, I
don't believe anybody has requested reply
briefs, and I know that in many of the previous
hearings I have been in, it only has been one
brief, and in looking at this record, I don't
know that we need reply briefs.

JUDGE DAVENPORT: Very well.

No reply briefs then. That alleviates that
problem. Mr. Vetne, is there additional cross
T. Wilson - Redirect

of this witness?

MR. VETNE: I'm through, Your Honor. Thank you very much.

JUDGE DAVENPORT: Mr. Stevens, redirect.

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REDIRECT EXAMINATION

BY MR. STEVENS:

Q. Just to clarify, Mr. Wilson, you are an employee of the market administrators office of the Southwest Order?

A. That's correct.

Q. You work pursuant to the supervision of your department administrator?

A. Yes.

Q. Who is that illustrious individual?

A. Richard Flemming.

Q. And he works and you work in conjunction with the Dairy Programs branch for the Agriculture Marketing Service at the U.S. Department of Agriculture in Washington, D.C.?

A. Correct.

Q. From time to time you receive directives from the officials in Washington
T. Wilson - Redirect

about interpretations of the various order
provisions, and some of those have been alluded
to in your direct testimony -- I'm sorry -- in
your cross-examination just past?

A. That is correct.

Q. And you are aware of the latest one,
right, that has been described for the record?

A. Correct.

Q. And is it your testimony that you in
your office through the direction of your
supervisors apply that directive in operating
the Southwest Marketing Order?

A. Yes.

Q. And any testimony that you may have
given today which might be considered
inconsistent with that would not be correct,
would it?

A. Correct.

MR. STEVENS: That's all I
have.

JUDGE DAVENPORT: Very well.
Any recross? We have talked about the posting
of the transcript on the Web Site. I'm sure
that most people, at least most of the
attorneys certainly know where that Web Site is, but Mr. Tosi, for the benefit of anyone else and for the purpose of its inclusion in the transcript, would you give me the --

    MR. TOSI: It's www.USDA.gov/DAIRY. If you go there, it brings you to a menu, and it's pretty obvious to click on things that have to do with rule-makings and things, what this proceeding is, and it will be located there.

    JUDGE DAVENPORT: Mr. Stevens.

    MR. STEVENS: Your Honor, I just note for the record that the last proposal as is traditional in these hearings is a proposal by the Dairy Programs Agricultural Marketing Service for the Federal Marketing Orders to make such changes as necessary to make the entire agreements and orders conform with any amendments that may result in a hearing.

    As I say, this is posed at virtually every hearing that I have been to, and I just want to note for the record that the Dairy Programs proposes that, and we'll implement
that unless there are comments from the
participants in the hearing today.

JUDGE DAVENPORT: Very well.
I had previously announced that the exhibits
through 33 were admitted into evidence. At
this time Exhibit 34 and 35 are admitted to the
record as part of this transcript.

(Exhibit Nos. 34 and 35 were
admitted into the record.)

JUDGE DAVENPORT: Are there
any other administrative matters that need to
be touched upon before we recess? That being
the case, I declare the hearing closed, and I
look forward to reading the briefs.

(At this juncture, the hearing
was concluded at 12:45 p.m.)
CERTIFICATE

I hereby certify that the proceedings and evidence are contained fully and accurately in the stenographic notes taken by me on the hearing of the within cause and that this is a correct transcript of the same.

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