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MIDEAST FEDERAL MILK ORDER NO. 33

PUBLIC HEARING

DOCKET NO. AO-166-A72; DA-05-01

VOLUME IV

- - -

BE IT REMEMBERED, that upon the hearing of the above-entitled matter, held at the Shisler Conference Center, Ohio Agricultural Research and Development Center, Wooster, Ohio, before Peter M. Davenport, US Administrative Law Judge, and commencing on Thursday, the 10th day of March, 2005, at 8:28 o'clock a.m., at which time the following proceedings were had.

- - -

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2

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1       ALSO PRESENT:     Tim Demland, Executive  
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3       Director, Milk Sales, Michigan Milk Producers  
4       Association; Erick Metzger, General Manager,  
5       National All-Jersey, Inc.; Gary Lee, Prairie  
6       Farms Dairy, Inc.; Joe Weis, Foremost Farms  
7       Cooperative; Charles Lausin, Producer in Geauga  
8       County, Trustee of Ohio Farm Bureau; Paul  
9       Rohrer, Wayne County farmer; Eddie Steiner,  
10      Smith Dairy Products Company; Bruce Bloom,  
11      Michigan dairy farmer; Gregory Speck, Operations  
12      Manager, Continental Dairy Products

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1 JUDGE DAVENPORT: Ladies and  
2 gentlemen, let's come to Order. Mr. Vetne, do  
3 you want to bring your witness back up?

4 MR. TOM VETNE: Thank you, Your  
5 Honor.

6 MR. LEEMAN: Good morning.

7 JUDGE DAVENPORT: Mr. Leeman, you're  
8 still under oath.

9 THE WITNESS: Yes, sir.

10 JEFFREY LEEMAN

11 of lawful age, a Witness herein, having been  
12 previously duly sworn, as hereinafter certified,  
13 further testified and said as follows:

14 REDIRECT EXAMINATION

15 BY MR. TOM VETNE:

16 Q. Jeff, I want to clear up some things from  
17 cross-examination yesterday. Let's start with  
18 your statement.

19 Your statement, Exhibit 30, that was  
20 prepared under your supervision?

21 A. Yes.

22 Q. At your direction?

23 A. Yes.

24 Q. It was reviewed by White Eagle Cooperative  
25 members?

1 A. By the members and myself, yes.

2 Q. Okay. They provided factual input?

3 A. Yes.

4 Q. It also contains information from public  
5 sources?

6 A. Yes.

7 Q. Government sources?

8 A. Yes.

9 Q. Were you here for Mr. Gallagher's  
10 testimony?

11 A. Yes.

12 Q. He was here because apparently Mr. Hollon  
13 couldn't be here?

14 A. Yeah. His wife, I understand, is very  
15 sick.

16 Q. Okay. The statement that Mr. Gallagher  
17 presented was actually prepared by Mr. Hollon.  
18 Is that your understanding?

19 A. That is my understanding. I believe he had  
20 some additional input into it, also.

21 Q. Okay. You adopted your statement under  
22 oath?

23 A. Yes.

24 Q. It's 100 percent yours, warts and all?

25 A. It was prepared, written by Mr. Vetne, but

1 it was a culmination of everyone within White  
2 Eagle Federation, their words. And --

3 Q. I'm sorry. I said "warts," not words.

4 A. Oh.

5 Q. Warts and all, it's your statement?

6 A. Oh, yes. I thought you said "words."

7 Q. It's yours, even the glitches?

8 A. Yes.

9 Q. Let's talk about some of these glitches.

10 On page 6 you referred to the Mideast PPD and  
11 Class III price?

12 A. Yes.

13 Q. Do you recall where that is?

14 A. Uh-huh.

15 Q. I think there was some confusion about  
16 that. Can you explain that?

17 A. The confusion there was the Mideast PPD.

18 And I believe the question was along the lines  
19 of the PPD minus the Class III.

20 What was meant there was the blend price of  
21 Federal Order 33 minus the PPD and that can be  
22 explained. That was put in as an assumption.

23 Q. Okay. What else? The -- I think you were  
24 asked the question, perhaps by Mr. Beshore, I  
25 could be mistaken here, about whether or not

1 White Eagle pools independents milk just as DMS  
2 pools independents milk, and I think your answer  
3 to that question was "No." Do you recall that?  
4 A. I don't completely recall the question, but  
5 White Eagle does pool -- show on their pool  
6 report independent milk.  
7 Q. Okay. Let's talk about the table on page 3  
8 for a minute. You were asked a bunch of  
9 questions about this table.  
10 A. Yes.  
11 Q. Where does the information, the data that  
12 goes into line 1 of that table come from?  
13 A. Line 1 would be the total 9(c) milk.  
14 Q. And what is that -- yes. And what is that?  
15 A. Those numbers came from the Market  
16 Administrator.  
17 Q. Okay. The same thing for line 2?  
18 A. Line 2 would be a DMS/DFA.  
19 Q. No. I'm sorry. Line 2 being -- meaning  
20 the total of 9(c) milk?  
21 A. Yes.  
22 Q. So the total pool comes from Market  
23 Administrator data, that's line 1?  
24 A. Line 1 comes from Market Administrator  
25 data.

- 1 Q. The same thing for line 2?
- 2 A. Yes.
- 3 Q. Let's jump down to the very last line. All  
4 other 9(c) milk. Is that the same source?
- 5 A. That was Market Administrator data.
- 6 Q. Okay. Line 5, White Eagle information.
- 7 A. That is information from White Eagle  
8 reporting.
- 9 Q. Okay. From your own hard data?
- 10 A. Yes.
- 11 Q. All right. Line 4 then, MMPA?
- 12 A. That was derived from the MMPA website as  
13 far as volumes that they marketed.
- 14 Q. Okay. Dairymen as well?
- 15 A. Yes.
- 16 Q. From information from that source?
- 17 A. Yes.
- 18 Q. Okay. Whatever the source, it's public  
19 information that --
- 20 A. It's public information and we derived from  
21 that.
- 22 Q. And certainly MMPA has people here if that  
23 information is wrong they can speak to that?
- 24 A. Absolutely.
- 25 Q. Okay. So line 3, the DMS/DFA section?

- 1 A. That was derived by taking the total 9(c)  
2 minus the other three, which one was Market  
3 Administrator numbers, hard numbers from White  
4 Eagle and the public information from MMPA.
- 5 Q. It's what's left?
- 6 A. It's what's left.
- 7 Q. Okay. To the extent that independent  
8 producer milk is pooled by DMS in this market,  
9 it would show up in that line?
- 10 A. Correct.
- 11 Q. DMS --
- 12 A. So -- similar to or the same as independent  
13 milk pooled by White Eagle.
- 14 Q. Okay. If DMS pools, for example,  
15 Guggisberg's independent milk, then Guggisberg  
16 milk is part of that 700 pounds referred to in  
17 line 3?
- 18 A. Yes.
- 19 Q. White Eagle is a small business?
- 20 A. Correct.
- 21 Q. Guggisberg is a small business?
- 22 A. Correct.
- 23 Q. Superior Dairy?
- 24 A. I believe so, yes.
- 25 Q. United Dairy?

- 1 A. Yes.
- 2 Q. Dairy Support, Incorporated?
- 3 A. Yes.
- 4 Q. Brewster?
- 5 A. Yes.
- 6 Q. Erie Cooperative?
- 7 A. Yes.
- 8 Q. They're all small businesses?
- 9 A. As -- as Erie Cooperative is as a
- 10 cooperative would be.
- 11 Q. You don't have -- none of these entities
- 12 have staff economists on hand?
- 13 A. No.
- 14 Q. Okay. You don't have in-house people to do
- 15 what some of the larger corporations like DFA
- 16 have to prepare this information?
- 17 A. No.
- 18 Q. You were asked a series of questions
- 19 yesterday and you -- you refused to answer on
- 20 the basis of proprietary information.
- 21 A. Correct.
- 22 Q. I think one of those questions had to do
- 23 with the diversion percentage of White Eagle on
- 24 a monthly basis.
- 25 A. Yes.

1 Q. Do you remember that?

2 A. Yes.

3 Q. Are you willing to waive the proprietary  
4 objection you made and disclose the diversion  
5 percentage of White Eagle on a monthly basis?

6 A. Yes, I can do that. I thought I had  
7 answered that yesterday in a question. I don't  
8 remember what question it was. It was --  
9 between 50 and 60 percent was the diversion of  
10 White Eagle.

11 Q. Okay. There was also a question about  
12 asking you to disclose the percentage of  
13 independent producers pooled by White Eagle.

14 A. Yes.

15 Q. Are you willing to waive the privilege  
16 objection you made to that?

17 A. Yes.

18 Q. What is that?

19 A. It is roughly 20 percent.

20 Q. One of the questions that you asserted the  
21 proprietary privilege inquired about the number  
22 of Brewster's independent producers who were  
23 pooled through DFA/DMS.

24 A. Yes.

25 Q. Okay. How many is it?

1 A. The number of producers? That I am not  
2 sure. I couldn't tell you exact number of  
3 producers.

4 Q. But it's all of them, as far as you  
5 understand?

6 A. Yes.

7 Q. And that's -- that is based upon an  
8 agreement reached in Fairlawn, Ohio?

9 A. Yes.

10 Q. You were asked a number of questions about  
11 Attachment 2 to your statement. Do you recall  
12 that line of questions about Exhibit 2, the  
13 source of that information?

14 A. There was a lot of questions, yes.

15 Q. All right. You spent a lot of time on  
16 that.

17 A. Uh-huh.

18 Q. What was the source of the information in  
19 Exhibit 2, Attachment 2?

20 A. The source of the information was  
21 Dairyfoods.com.

22 Q. Okay. I think Mr. Beshore suggested that  
23 this was supposed to be a reproduction of the  
24 entire list. Did you represent that it was a  
25 reproduction of the entire list?

1 A. I do not recall saying that it was a  
2 reproduction of the entire list.

3 Q. Right. You pulled pertinent information  
4 for purposes of your report?

5 A. Pertinent information associated with the  
6 Mideast Order was pulled from there.

7 Q. Okay. And you've got a complete copy of  
8 the list?

9 A. Yes. (Indicating.)

10 Q. You're willing to have -- allow Mr. Beshore  
11 or Mr. English or anyone else look at it?

12 A. Sure.

13 JUDGE DAVENPORT: The question, as I  
14 recall, counsel, was, was it a cut-and-paste  
15 version of what was the website?

16 MR. TOM VETNE: Right. And, Your  
17 Honor, it wasn't ever intended to be a  
18 reproduction of the entire list, just the  
19 pertinent information.

20 JUDGE DAVENPORT: It was a little  
21 difficult getting that answer yesterday.

22 MR. TOM VETNE: And that's why I'm  
23 doing this line of questioning this morning.

24 BY MR. TOM VETNE:

25 Q. I think Mr. Beshore asked you yesterday if

1 you spoke for the independent members of White  
2 Eagle. Do you recall a question along those  
3 lines?

4 A. Vaguely.

5 Q. Okay. I think your -- what is -- does  
6 White Eagle pool for independent members?

7 A. White Eagle does have independent member  
8 milk -- or independent producer milk on their  
9 report similar to, say, the DMS report, yes.

10 Q. But these folks are not members of White  
11 Eagle?

12 A. No.

13 Q. You don't speak for them as if they're  
14 members of White Eagle?

15 A. The producers, no.

16 Q. You speak for them -- you're here giving  
17 your testimony on behalf of White Eagle  
18 Federation and its members?

19 A. Right.

20 Q. Not the independent producers?

21 A. I've not had any discussions with  
22 independent producers.

23 MR. TOM VETNE: I don't have  
24 anything else.

25 JUDGE DAVENPORT: Any cross?

1 Mr. Beshore?

2 RE CROSS-EXAMINATION

3 BY MR. BESHORE:

4 Q. Good morning, Mr. Leeman.

5 A. Good morning.

6 Q. Just first a question about this Attachment

7 2. My question's not only related to whether

8 Attachment 2 was complete with respect to the

9 website, but whether -- the content of

10 Attachment 2, whether some of it was on the

11 website at all.

12 Now, are you representing -- just stay with

13 me. Okay?

14 A. Okay.

15 Q. Whether the -- all the words and labels and

16 data on Attachment 2 is even on the website at

17 all.

18 Now, are you representing, testifying that

19 all of the words, labels, entries on Attachment

20 2 are on the web page?

21 A. No. It was taken apart and information

22 that we -- that was felt to be pertinent to this

23 hearing was put on there. It was -- it is not

24 the entire website.

25 Q. But isn't there information on Attachment

1 2, words, labels, headings that isn't even on  
2 the website at all that was put on here by  
3 somebody?

4 A. There may be.

5 Q. Okay. So it's a compilation of part of the  
6 website and additional verbiage added by  
7 someone?

8 A. That may be, yes.

9 Q. Now, you have just testified on redirect  
10 that the White Eagle independents were 20  
11 percent.

12 A. Correct.

13 Q. Twenty percent of what?

14 A. Twenty percent of the one hundred fifty  
15 million on the average that we showed on our  
16 report.

17 Q. Okay. So that's 30 million pounds?

18 A. Correct.

19 Q. Okay. How many producers does that  
20 represent?

21 A. I do not have a -- I couldn't tell you a  
22 producer number. I mean, a number of producers,  
23 I couldn't tell you that.

24 Q. Now, you've testified on redirect -- I  
25 assume that you took some time to prepare your

1 redirect examination since you were on direct  
2 yesterday and you know we're back here this  
3 morning, correct? You put some thought into it,  
4 put some preparation into it?

5 A. I put some thought into it, yes.

6 Q. Okay. Part of your redirect testimony is  
7 that a number of listed entities are small  
8 businesses. Do you recall that?

9 A. Yes.

10 Q. Now, among the small businesses that you  
11 are testifying on redirect you have included  
12 United Dairy?

13 A. To the best of my knowledge, I believe they  
14 are a small business.

15 Q. Under what definition of small business?

16 A. Under 500 employees.

17 Q. Okay. Now, what's your basis for that  
18 information?

19 A. My basis is -- actually comes off of my  
20 hunch in knowing -- knowing the business  
21 structure. I mean, having an idea of the  
22 business structure of United Dairy.

23 Q. Okay. United Dairy has a full service  
24 dairy plant in Martins Ferry, West Virginia,  
25 correct?

- 1 A. Correct. No, Martins Ferry, Ohio.
- 2 Q. Ohio. Excuse me, Martins Ferry, Ohio.
- 3 Okay. They just acquired a dairy within the
- 4 last year or so in Uniontown, Pennsylvania,
- 5 former Fykes Dairy, correct?
- 6 A. Correct.
- 7 Q. In addition, they have a third distributing
- 8 plant in the Commonwealth of Virginia, do they
- 9 not, or is it in West Virginia?
- 10 A. West -- Charleston?
- 11 Q. Charleston?
- 12 A. West Virginia.
- 13 Q. West Virginia.
- 14 A. Yes.
- 15 Q. Okay. Three distributing plants?
- 16 A. Yes.
- 17 Q. They have a sales force, correct?
- 18 A. I would assume so, yes.
- 19 Q. Production employees, correct?
- 20 A. Yes.
- 21 Q. Distribution employees?
- 22 A. Yes.
- 23 Q. Route distributors?
- 24 A. That would --
- 25 Q. Well, do you know?

1 A. By definition that would fall under  
2 distribution.

3 Q. Okay. And it's your testimony under oath  
4 here today that United Dairy with three  
5 distributing plants is a small business?

6 A. It -- if they are under 500 employees.

7 Q. Not "if they are." You're testifying that  
8 they are, Mr. Leeman.

9 A. I am saying that if they are under five,  
10 and that is my assessment of their business. I  
11 did not get that information directly from  
12 United Dairy.

13 Q. How did you come up with it?

14 A. It was my assessment of their business and  
15 my understanding of other businesses in typical  
16 amount of employees.

17 Q. How many employees did you figure they have  
18 to run the Charleston distributing plants and  
19 all its production functions and distribution  
20 functions?

21 A. I personally did not break it down by  
22 plant.

23 Q. Did you include Charleston at all?

24 A. Yes.

25 Q. How many did you figure for Fykes?

1 A. Actually Fykes I did not consider. You  
2 know, I did not consider Fykes at that point in  
3 time.

4 Q. Oh, you didn't count the one plant?

5 A. That one I -- it completely slipped my  
6 mind, that they had purchased that plant.

7 Q. Okay. Now, it's been brought to your  
8 attention. Are they still a small business?

9 A. That I don't know. Again, in the testimony  
10 prior to these questions I said that was an  
11 assumption based off of my independent feeling  
12 on it.

13 Q. Okay. Is that assumption -- is that the  
14 basis of all your testimony here --

15 A. No.

16 Q. -- Mr. Leeman? When you said Brewster  
17 Dairy's a small business, did you include  
18 Stockton -- the Stockton, former Kraft Cheese,  
19 plant?

20 A. Yes.

21 Q. As well as the Brewster operations in Ohio?

22 A. Yes.

23 Q. How did you determine that Superior Dairy's  
24 a small business?

25 A. That was based off of my feeling or

1 understanding of the plants.

2 Q. The same kind of assumptions that you made  
3 about United?

4 A. Yes.

5 MR. BESHORE: Thank you.

6 THE WITNESS: I believe there are  
7 people in this room that could testify to  
8 Superior Dairy if it is considered a small  
9 business or not, if my assumption is wrong.

10 JUDGE DAVENPORT: Other recross?

11 Very well. Mr. Leeman, you may step down.

12 Mr. English?

13 MR. ENGLISH: Thank you, Your  
14 Honor. Dean Foods has two witness. The first  
15 one would be Mr. Evan Kinser, and the second  
16 will be Mr. Paul Christ, and I'll just hand out  
17 everything at once and have it marked, and  
18 there's copies in the back.

19 JUDGE DAVENPORT: Raise your right  
20 hand.

21 (Thereupon, Mr. Kinser was sworn by  
22 Judge Davenport.)

23 JUDGE DAVENPORT: Please be seated.

24 (Thereupon, Exhibits 33 and 33-A of  
25 the Mideast Federal Milk Marketing

1                   Order hearing were marked for  
2                   purposes of identification.)

3                   JUDGE DAVENPORT: Mr. English, we  
4                   have marked Mr. Kinser's statement as Exhibit  
5                   33, and the exhibits to be referred to by  
6                   Mr. Kinser as 33-A.

7                   MR. ENGLISH:           Thank you very  
8                   much.

9   EVAN KINSER  
10                   of lawful age, a Witness herein, having been  
11                   first duly sworn, as hereinafter certified,  
12                   testified and said as follows:

13   DIRECT EXAMINATION

14                   BY MR. ENGLISH:

15                   Q. Mr. Kinser, before you give your statement,  
16                   let me ask a few questions about it and a couple  
17                   questions about the proposed Exhibits 33-A. Who  
18                   wrote Exhibit 33?

19                   A. I did.

20                   JUDGE DAVENPORT: They do have  
21                   Exhibits A through G. We'll call it Exhibits  
22                   33-A through G.

23                   MR. ENGLISH:           Fine, Your Honor.

24                   BY MR. ENGLISH:

25                   Q. And who prepared the exhibits, 33-A through

1 G, Mr. Kinser?

2 A. I did, understanding, though, that A  
3 through F is simply a printoff from the Order 1.

4 Q. To comply with -- you printed them off the  
5 website yourself, correct?

6 A. That is correct.

7 Q. Not someone else, correct?

8 A. That is correct.

9 Q. And so just to identify them, 33-A through  
10 33-F are what exactly?

11 A. They're the pool price announcements from  
12 the Northeast Order, Order 1, for February, A,  
13 March in B, April, C, May in D, June in E and  
14 July in F.

15 Q. And these documents are regularly prepared  
16 by the Milk Market Administrator for the  
17 Northeast Market?

18 A. That is correct.

19 Q. And relied upon by the industry?

20 A. That is correct.

21 Q. Now, turning to 33-G, which appears to be a  
22 summary sheet followed by four additional pages,  
23 could you describe what 33-G is?

24 A. 33-G, starting with page 2 through 4, is  
25 pulling the producer price differential, the

1 producer receipts and Class III utilization for  
2 the Northeast Order 1, the Upper Midwest Order  
3 30, Central 32 and Mideast 33, Pacific Northwest  
4 124 and Western, while it existed, 135 from the  
5 Federal Milk Order statistics for all Orders  
6 produced on the website of the Central Order.

7 Q. That is to say that the Central Order  
8 publishes all of that data?

9 A. That is correct.

10 Q. And the backup material for that is  
11 available for anyone to use if they want to  
12 check it here?

13 A. That is correct.

14 Q. And, in fact, this is material along with  
15 the backup material that you produced at the  
16 recent Central Order hearing in December of  
17 2004?

18 A. That is correct.

19 Q. Subject to the fact that you've now updated  
20 it?

21 A. I was just looking at what actually got  
22 copied and it appears that this is exactly what  
23 was at the Central Order that's been reproduced  
24 as opposed to the updated version, so it's  
25 exactly what was produced at the 32 hearing.

1 Q. And so that data is simply a reproduction  
2 in spreadsheet form so that you could then use  
3 it for the summary, correct?

4 A. That is correct.

5 Q. But otherwise it is -- who prepared 33,  
6 pages G-2 through 5?

7 A. I did.

8 Q. And what is 33 G-1?

9 A. 33 G-1 just pulled the summary information  
10 off of page 3 and off of page 5 into a simple  
11 one-page table rather than -- so it's really the  
12 summary and detail that would be in 2 through 5.

13 Q. So in addition to material that was pulled  
14 down, you did some calculations that appear on  
15 pages 3 and 5?

16 A. That is correct.

17 Q. Can you describe those calculations that  
18 you performed?

19 A. The bottom of page 3 and the bottom of page  
20 5 is a calculation. The first is month by month  
21 variance of the Class III utilization, and then  
22 the final line labeled as "all" is a variation  
23 of all the months available.

24 So in looking at the month by month, you're  
25 able to see representative time periods versus

1 all. They're not acknowledging a seasonality in  
2 the industry.

3 Q. And what were you attempting to show  
4 through this calculation?

5 A. The point of the calculation was to show  
6 that the variability in the Northeast Order is  
7 much less than that in the other Orders.

8 Q. The variability of what, sir?

9 A. The variability of the Class III  
10 utilization in the marketplace.

11 Q. And what do you think that shows?

12 A. I think that that demonstrates the  
13 effectiveness of the dairy farmer for other  
14 markets that exists in that Order that was also  
15 testified to by Mr. Gallagher.

16 Q. You mean the dairy farmer for other markets  
17 provisions?

18 A. That is correct, yes.

19 Q. At this time why don't you give your  
20 statement, which is Exhibit 33.

21 A. My name is Evan Kinser. I'm employed by  
22 Dean Foods Company as Manager of Dairy Risk  
23 Management and Commodity Procurement. My  
24 business address is 2515 McKinney Avenue, Suite  
25 1200, Dallas, Texas 75201. Dean Foods owns and

1 operates 12 distributing plants regulated by  
2 Mideast Marketing Federal Order.

3       Definition of the Problem. This is now the  
4 third time that I have sat in front of a very  
5 similar group of people to talk about the same  
6 problems. Continued discussion has yet to  
7 change the situation, so the discussion  
8 continues. There are two problems: one, the  
9 provisions of adequate incentives to attract an  
10 adequate and reliable supply of milk to the  
11 pool, and two, the provisions of adequate  
12 incentives to attract pooled milk to pool  
13 distributing plants. The current Order  
14 provisions fall short in solving either of these  
15 problems. The current provisions of the Mideast  
16 Order promote inequity among handlers and dairy  
17 farmers. These inequities arise from depooling  
18 and do not allow for equal treatment of all milk  
19 with respect to the distribution of the pool  
20 value. The ability to depool and repool at will  
21 amplifies the challenge of getting milk to the  
22 market.

23       Understanding the correct purpose of the  
24 Federal Order system is key to this hearing  
25 being successful. Distractions from the

1 intended in the past have led to tweaks or small  
2 patches, when more concise and meaningful action  
3 was needed. The focus always needed to be on  
4 the original intent, and what changes should be  
5 made today to ensure the original intent is  
6 carried out. Today, we can and should take  
7 different actions than in the past. This  
8 includes the Secretary continuing in the  
9 direction that was only started in the 2001  
10 hearing process. Today's actions must address a  
11 now greater array of market conditions and  
12 resulting opportunistic behaviors.

13       The Agricultural Marketing Act, the AMAA of  
14 1937, states as a declaration of policy the  
15 following, and I quote, "4, Through the exercise  
16 of the powers conferred upon the Secretary of  
17 Agriculture under this title, to establish and  
18 maintain such orderly marketing conditions for  
19 any agricultural commodity enumerated in Section  
20 8c(2) (which includes milk) of this title as  
21 will provide, in the interests of producers and  
22 consumers, an orderly flow of the supply thereof  
23 to market throughout its normal marketing  
24 seasons to avoid unreasonable fluctuations in  
25 supplies and prices," end quote.

1           The Federal Order system strives to provide  
2 a stable supply of milk routinely construed to  
3 mean for packaged fluid milk only, with minimal  
4 fluctuation recognizing that there are some  
5 unavoidable seasonalities. The current  
6 provisions are failing to accomplish the purpose  
7 of supply stability.

8           Mideast Order Provisions. The purpose of  
9 Federal Order has been confused and misapplied  
10 in developing regulations that govern the  
11 Federal Orders. Some would lead the Secretary  
12 to believe the Federal Order's purpose is to  
13 ensure all plants have a sufficient supply of  
14 milk. The AMAA and action by the Secretary  
15 simply does not support this; it is clear that  
16 the concern of an adequate and stable milk  
17 supply applies to distributing plants. The  
18 track record and structure of this Order makes  
19 this clear.

20           There are many key sections from the Order  
21 language to substantiate that the only milk  
22 supply of concern to the Order is that available  
23 to distributing plants. By absence and  
24 extension, the milk supply of other plants is a  
25 residual concern of the Order, and only to the

1 extent it is necessary to ensure that reserve  
2 producers, those standing ready to serve the  
3 fluid market, have outlets for their milk.

4 A dissection of Section 1033.7, the  
5 definition of a pool plant, clearly illustrates  
6 the only plants mandated to be regulated by the  
7 Order are distributing plants. All other plants  
8 are allowed to participate based on defined  
9 service to a distributing plant.

10 Specifically, the importance of  
11 distributing plants' milk supply is clearly  
12 illustrated in Section 1033.7(g). This  
13 provision gives the Market Administrator the  
14 authority to change shipping percentages of pool  
15 plants to distributing plants. There is no  
16 statement about the need for milk in  
17 manufacturing supply plants or a supply plant  
18 system. The purpose of these plants being part  
19 of the Order is to meet the needs of  
20 distributing plants. In the event current  
21 regulation -- excuse me. In the event current  
22 regulations are ineffective, the Market  
23 Administrator can make a change.

24 Section 1033.7 demonstrates the Order's  
25 main concern must be with distributing plants'

1 milk supply. However, the Order also provides a  
2 pricing mechanism for all the Order's milk. The  
3 pricing system is built around price  
4 discrimination based on milk's value -- excuse  
5 me, milk's use. This serves as an attraction  
6 for milk to be in the pool. The largest  
7 contributor to the pool is the Class I price.  
8 This is clear from studying the pricing formulas  
9 found in Section 1000.50 that Class I is  
10 structured to be the highest price in the pool.

11 Summary of Federal Order Logic. The system  
12 is designed for classified pricing while  
13 maintaining certain relationships between the  
14 prices. It was thought the manufacturing supply  
15 plants and producers shipping to them would want  
16 access to the dollars generated by the  
17 distributing plants. Therefore, this system  
18 regulates those plants, distributing plants,  
19 requiring them to contribute to the pool, and  
20 relies on economic incentives to drive  
21 regulation for the balance, supply plants.

22 This is based on the assertion that the  
23 revenues generated by distributing plants would  
24 always provide sufficient incentives to attract  
25 a milk supply to the pool. In the absence of

1 forced regulation, the contributing plants would  
2 have left the Order rather than contribute.  
3 Without their contribution to the pool, the  
4 incentive would be lost to draw other milk to  
5 the pool. Having locked in the contributing  
6 plants to regulation, it was thought would-be  
7 unregulated handlers, supply plants, would  
8 voluntarily submit to regulation in order to  
9 capture the benefits at the higher Class I  
10 price.

11 Inequity. The fact remains this system  
12 requires proper economic incentive and properly  
13 defined regulation. Missing these two key  
14 ingredients allows handlers to associate milk  
15 with the Order and draw money out of the Order,  
16 while not providing any meaningful service to  
17 distributing plants.

18 However, the problem is not limited to  
19 these handlers merely being free riders, drawing  
20 from the pool for no service. It extends beyond  
21 that, when there are costs incurred by those  
22 servicing the market. These costs are not  
23 shared. Instead, they are left with the  
24 handlers who have continued to do the right  
25 thing and serve the market. When the free

1 riders leave, the costs do not go away. These  
2 costs are forced upon a smaller pool of  
3 handlers.

4 More correctly said, they are at least in  
5 part forced upon a smaller contingent of dairy  
6 farmers. It's like going out with a group of  
7 friends and sharing a great meal, eating as much  
8 as you can and when the server comes with the  
9 check you simply get up from the table and leave  
10 the bill to be divided among those who didn't do  
11 the same.

12 Among Handlers. Current regulations allow  
13 handlers who may or may not choose to be pooled  
14 to enjoy the benefits of the pool, so long as  
15 they meet the requirements of the Order for that  
16 month. Furthermore, when there is a cost to  
17 serve the market, they are allowed to excuse  
18 themselves from the table until the next meal is  
19 being served.

20 This idea of excusing themselves has been  
21 termed depooling. A more technical definition  
22 of depooling was provided in prior testimony.  
23 The result of this structure is, when there is  
24 no economic incentive, or reward, to stay pooled  
25 and no economic disincentive, or cost, for

1 leaving the pool, this milk withdraws from the  
2 pool. Handlers operating nonpool Class III,  
3 hard cheese, operations are in prime position  
4 for exercising this option.

5       Nothing demonstrates this exact situation  
6 any more clearly than recent history. A quick  
7 glance back a little over a year clearly  
8 demonstrates that in today's marketplace the  
9 system is broken. Undeniably there is  
10 insufficient economic incentive and poorly  
11 defined regulation, resulting in failure of the  
12 Order to achieve its intent. Furthermore, it is  
13 producing disorderly marketing, a result it was  
14 intended to prevent.

15       There would not be a problem if all the  
16 handlers had equal access to the pool, equal  
17 access to depool and equal access to provide  
18 paper pooling. If such were the case, all  
19 handlers would be equally advantaged or  
20 disadvantaged relative to one another. However,  
21 this is not the case.

22       Some handlers, as discussed above, are  
23 unable to choose to be in or out of the pool.  
24 Some handlers have chosen to provide paper  
25 pooling options to others. The result of these

1 inequities creates price inequity. However, if  
2 perfect equity had existed, there would not be a  
3 need for the pool. With perfect equity for the  
4 handlers, all the handlers would have the same  
5 dollars available without regulation provided by  
6 the Federal Order.

7       Producer Prices. Like my illustration of  
8 leaving before the bill is covered at dinner,  
9 there are costs currently not equitably shared  
10 among producers. Let's look at an example of  
11 two different dairy cooperatives. We will  
12 compare two similar -- two similar cooperatives  
13 with only -- with the only exception being the  
14 percentage of their milk that they sell to a  
15 distributing plant.

16       Distributing plants are the only plants  
17 that are forced into regulation under the  
18 Federal Order. All other plants can choose to  
19 be pooled or not to be pooled. The degree you  
20 service a distributing plant, by definition,  
21 lessens your ability to depool milk. The  
22 ability to depool --

23 Q. "The inability to depool"?

24 A. That's correct. The inability to depool  
25 milk lessens your competitiveness in the

1 marketplace when others can. Let's suppose  
2 there's a cooperative shipping 50 percent of its  
3 milk to the distributing plant. We'll call this  
4 Co-op A. Fifty percent of Co-op A's milk supply  
5 must be pooled by definition; there is no  
6 choice. The balance of the milk can be  
7 depooled.

8 Now, let's contrast that with Co-op B,  
9 which is shipping 30 percent. That is enough  
10 milk so that if they wanted to be fully pooled  
11 they could pool all their milk receipts  
12 regardless of the month, but it does not force  
13 them to pool any more than 30 percent.

14 Now, focusing on the worst case scenario,  
15 we will look at April of 2004. Here, Co-op A  
16 had to pool 50 percent of their milk with a  
17 negative \$3.78 PPD. It's in Exhibit 6, Table 4.  
18 This means that Co-op A's blended PPD is a  
19 negative \$1.98. Suppose Co-op B pooled 30  
20 percent at the same PPD and had a blended PPD of  
21 a negative \$1.134. The Class III price was  
22 announced at \$19.66, with the negative \$3.78 PPD  
23 resulting in a blend of \$15.88.

24 If we assume that the remaining milk of  
25 each went into cheese production, both co-ops

1 were able to overpay the blend, because neither  
2 had the negative PPD on all their milk. But  
3 they are not both able to pay the same price.  
4 Co-op A would be able to pay \$17.68, the \$19.66  
5 less their \$1.98 negative PPD; Co-op B would be  
6 able to pay \$18.826, again, the difference  
7 between \$19.66 and their \$1.134 negative PPD.

8         Let's say that Co-op B wants to be profit  
9 maximizing yet competitive. They would pay at  
10 Co-op A's price level allowing them to make  
11 \$1.146 per hundredweight in profit. In reality,  
12 Co-op B might see a chance to expand their  
13 procurement, so they decide to pay \$18. If  
14 Co-op A believes that Co-op B is going to  
15 overpay the blend and pay more than Co-op A,  
16 Co-op A will have to lose money to match Co-op  
17 B. If Co-op B guessed that they needed to pay  
18 \$17.95 to be competitive, it would mean that  
19 Co-op A paid \$0.27 more than their ability to  
20 pay.

21         In this example I make no provisions for  
22 the provisional efficiencies or inefficiencies  
23 of Co-op A versus Co-op B. They're assumed to  
24 have the same cost structure. This is merely an  
25 illustration of how different percentages to a

1 distributing plant affects a handler's ability  
2 to pay for milk.

3       Hidden Costs. A cost that often gets  
4 overlooked by the marketplace, but is not  
5 overlooked by the Market Administrator is the  
6 cost of operating the Order. In the current  
7 system, which allows for depooling, the  
8 administrative assessment is imposed only on  
9 those pooling. There is a tax on those who  
10 remain in the pool, even though everybody,  
11 including those who depooled, obtains the  
12 benefits of having announced minimum prices.

13       Summary of Inequities. I hope at this  
14 point it is clear to the Secretary that there  
15 are three fatal flaws in the system. First, it  
16 forces regulation on distributing plants, but  
17 allows all others voluntary participation.  
18 Secondly, these plants choose to participate  
19 when they can siphon funds out of the system for  
20 their betterment, but when the reverse is true,  
21 they bail with no cost to them.

22       And third, the reality is that when milk  
23 leaves the pool the costs of administration must  
24 be borne by a smaller few. This creates a  
25 heavier burden for those remaining in the pool

1 that is not rewarded when the market improvement  
2 proves, because the free riders will return. If  
3 all handlers had equal opportunity to do the  
4 above, there would be no inequity, but there  
5 would also be no need for the Order.

6 Philosophy of our Proposed Solutions.  
7 Something must be done to change the Order to  
8 rectify the shortcomings I've discussed above.  
9 We appreciate the Secretary's recognition of the  
10 need to change in requesting proposals and  
11 subsequently having this hearing. We appreciate  
12 the Secretary recognized two proposals submitted  
13 by Dean Foods. Our proposals are aimed at  
14 current pooling abuses.

15 The first most glaring and important  
16 pooling abuse is depooling. To the degree the  
17 Secretary does not solve this obvious error,  
18 action on any other proposal is hardly a  
19 band-aid to a gushing wound. Thus, I will  
20 introduce proposals with modifications. Our  
21 support for proposals can be divided into two  
22 categories.

23 Proposal Number 4. We support Proposal 4  
24 which would propose establishing a dairy farmer  
25 for other markets provision, much like the same

1 titled provision included in the Northeast Milk  
2 Marketing Order, Section 1001.12(b), paragraphs  
3 5 and 6. We would like to modify the language  
4 that was proposed by Ohio Dairy Producers and  
5 the Ohio Farmers Union for the hearing and  
6 published in the official hearing notice to  
7 ensure minimizing any loopholes.

8 Our proposal would read as follows --  
9 actually, I'll just note the changes rather than  
10 reading it. The change is that -- stated in my  
11 Exhibit 33.

12 Q. Yes, 33.

13 A. Thank you. The second line of paragraph 5,  
14 "cooperative association handler described in  
15 Section 1000.9, paragraph C," if the original  
16 stated "the," we're proposing striking the and  
17 replacing it with "any" pool plant. Continuing  
18 onto the next line, "operator or," the original  
19 language said "the," we're proposing striking  
20 "the" and replacing "any" cooperative  
21 association. Again, these changes are  
22 consistent with prior testimony at other similar  
23 hearings.

24 Effect of Northeast Order. Similar  
25 language exists in the Northeast Order. A major

1 difference is milk can get into the pool free in  
2 July. If milk leaves in the spring, it is out  
3 until July. This year, the provision played  
4 well into the hands of handlers in the  
5 Northeast. To illustrate this, I have included  
6 Exhibits 33-A through F. These are the pool  
7 price announcements for the Northeast Order for  
8 February through July. Notice the drop in Class  
9 III pounds of 223 million pounds from March into  
10 April. The PPD also went from \$1.07 to a  
11 negative \$2.38 at the same time. The pool lost  
12 another 37 million pounds of Class III milk in  
13 May, likely because of a negative PPD.

14       Then the provision worked. The milk could  
15 not repool in the Northeast Order in June. The  
16 overall system shortcoming was that the Mideast  
17 Milk Marketing Order does not contain the same  
18 or any similar language. Some savvy handlers  
19 moved milk to qualify for pooling on the Mideast  
20 Order for June. These handlers repooled their  
21 milk back on the Northeast Order in July as is  
22 allowed. Exhibit 33-A through F illustrates  
23 this point. Notice that from June to July the  
24 Class III pounds increased 176 million pounds,  
25 close to the level in March.

1           To illustrate this point I will turn to two  
2 exhibits; Exhibit 7, Table 1(a) and Exhibit 11,  
3 Table 24 C. Looking first at Table 1(a) in  
4 Exhibit 7, focusing specifically on New York and  
5 Vermont, Vermont is a stand out case showing in  
6 excess of 10 million pounds of producer milk  
7 pooled on the Order. This is the first time  
8 producer milk from Vermont has pooled on the  
9 Order. Then turning to New York, while it has  
10 been a consistent supply since creation of the  
11 Order, the pounds of producer milk pooled from  
12 New York, and, recognizing the footnote, New  
13 Jersey, is 54 percent higher than the highest  
14 prior month. Between the three states, there  
15 was an additional 64 million pounds pooled  
16 compared to the higher total prior.

17           Exhibit 11 prepared for Mr. Vetne helps  
18 provide a more detailed account of the  
19 situation. Table 24 C of Exhibit 11 indicates  
20 that there are 9 states with 1,044 producers  
21 pooled in the market in June of 2004 that were  
22 not pooled the prior two Decembers. Looking at  
23 milk that would normally be associated with the  
24 Northeast Order, not being pooled the prior two  
25 Decembers would provide 81 million pounds of

1 milk added to the pool from Vermont, New York  
2 and New Jersey.

3 It would seem almost obvious that this  
4 isn't milk that suddenly appeared. It was milk  
5 that was likely left homeless because of an  
6 earlier month's pooling decision. These  
7 exhibits help to illustrate how Northeast  
8 handlers took advantage of the pooling  
9 provisions of the Northeast Order in June.

10 MR. STEVENS: Mideast.

11 BY MR. ENGLISH:

12 Q. Mideast.

13 THE WITNESS: Thank you, Mideast.  
14 It's good to know people are listening. This  
15 clearly demonstrates a very similar proposal at  
16 work in the Northeast Order. The New York, New  
17 Jersey -- excuse me, the New York, Vermont and  
18 New Jersey milk could not pool in its home  
19 Order. Having lost its home, it needed another  
20 market and the next best option was the Mideast  
21 Order. Here we find what appears to be, in  
22 simple terms, an additional 80 plus million  
23 pounds of milk on the Mideast Order because it  
24 was unable to pool on the Northeast Order  
25 because of pooling decisions made in the prior

1 two months.

2           This milk is not milk that was forced  
3 out of a pool. It was milk that a handler took  
4 advantage of a depooling opportunity to save  
5 paying into the pool. However, the regulation  
6 in the Northeast Order did not provide any door  
7 to return to the pool, except to wait until  
8 July. Thus, the handlers began looking and  
9 found an open door in the Mideast Order. The  
10 handlers bellied up to the table for a quick  
11 meal before returning home in July for yet  
12 another feast. The implication was that they  
13 were shut out of the marketplace --

14           JUDGE DAVENPORT: No, "not shut out."

15           THE WITNESS:       Excuse me. They  
16 were not shut out of the marketplace. In other  
17 words, they were looking for another door  
18 because they had taken action that had  
19 implications they wanted a way around.

20           Think ahead for a moment and consider  
21 if a correction were implemented in all Orders.  
22 Milk would either stay pooled or shipped to a  
23 distributing plant to return to the pool. In  
24 practice, this cannot happen overnight. Such a  
25 change would require additional hearings. So if

1 this were to begin, which Order would be the  
2 right place to start? It would be the Order  
3 with the most generous pooling provisions, the  
4 Upper Midwest Order. A hearing has been held in  
5 that Order in which we asked for the same  
6 provision. We believe that it is the right  
7 Order or the Secretary to initiate a new policy  
8 and begin righting the existing wrongs.

9           Then the Central Order becomes the  
10 next vulnerable point, so we were at that  
11 hearing asking the Secretary to take immediate  
12 action to fix this glaring error in the Order.

13           Here we are today at the Mideast  
14 Order, the next most critical Order, and, again,  
15 we submit this similar language and urge the  
16 Secretary to quickly adopt Proposal 4. This  
17 would complete the core part of Federal Order  
18 system that desperately needs this language  
19 change.

20           Proposal Number 8. Again, I'll only  
21 note the changes from the language published in  
22 the Federal Register. In Exhibit 33, line 3 of  
23 paragraph 5, Section 1033.12 it's published to  
24 read "1000.9(c) if," and again "the," we're  
25 proposing striking that and replacing that with

1 "any pool plant operator or," the original  
2 language said, "the," we're proposing striking  
3 "the," replacing it with "any cooperative  
4 association."

5                   And moving to paragraph 6 --

6 BY MR. ENGLISH:

7 Q. Do you have a second line?

8 A. Yeah. In the second line striking -- the  
9 second line begins, "received at" strike "the,"  
10 "any pool plant operator or by," strike "the,"  
11 and replace "any cooperative association  
12 handler." That's all the changes in that  
13 section.

14                   Illustration of Dairy Farmer For Other  
15 Market Effectiveness. As pointed out earlier in  
16 my testimony, this type of provision exists in  
17 the Northeast Order. In fact, it is just like  
18 Proposal 8 with different months. Earlier I  
19 illustrated how the absence of this provision  
20 had a negative effect in the Mideast Order. I  
21 would like to contrast the pool consistency of  
22 the Northeast with the other markets with  
23 significant cheese manufacturing, i.e., the  
24 Upper Midwest, Central, Pacific Northwest and  
25 Western, when it existed, and Mideast. I

1 believe from this illustration it will be clear  
2 that the provision is effective and accomplishes  
3 the intent, pool stability.

4 In creating Exhibit 33-G, I summarized the  
5 Federal Order Statistical Overview, all Orders,  
6 January 2000 through current. Page 1 of Exhibit  
7 33-G is a summary of the following four pages.  
8 This exhibit illustrates the volatility of the  
9 Class III percentage of the Northwest, Upper  
10 Midwest, Central, Mideast and Pacific Northwest.

11 For example, examine August of 2003. Each  
12 market has a negative PPD at the base zone,  
13 meaning there would be a larger negative  
14 anyplace there is a negative location adjustment  
15 of the Order. Notice that in all Orders but the  
16 Northeast, the percent Class III utilization is  
17 noticeably less than what would be deemed,  
18 quote, normal, end quote.

19 If you only saw the Class III utilization  
20 for the Northeast Order in 2003, you would be  
21 hard pressed to pick which months handlers would  
22 have desired to depool, given the different  
23 rules.

24 To examine the situation on a more macro  
25 level, take a look at the first page of Exhibit

1 33-G. This just looks at the variance in Class  
2 III utilization by month and annually. Notice  
3 the variance on the Northeast Order is less than  
4 one-quarter percent. The variance for each of  
5 the other Orders is greater than 1 percent, with  
6 the Upper Midwest topping 5 percent. The  
7 Mideast Order is close to 1.4 percent.

8 And again, the exhibit that -- the numbers  
9 that I have are going to contrast, so I'm going  
10 to change them because when I prepared this I  
11 updated it, but clearly I made an error in  
12 copies and I don't have the updated numbers. So  
13 I'm going to tie my testimony back into the  
14 exhibit. So the Mideast is close to 1.3  
15 percent.

16 What is it that makes the Northeast unique?  
17 It is the dairy farmer for other markets  
18 provision. When this provision exists, handlers  
19 have to evaluate more than the current month's  
20 economic impact. This requirement causes them  
21 to behave differently than other handlers  
22 pooling milk on this Order, who only have to  
23 consider the immediate implications. They do  
24 not have to consider any possible future missed  
25 opportunities. Such consideration is currently

1 required by the Northeast Order's dairy farmer  
2 for other markets provision.

3       Dean Foods prefers Proposal Number 4 as  
4 presented to Proposal 8 because the  
5 ramifications are longer and more significant.  
6 As I illustrated earlier, the Northeast Order is  
7 not perfect. If it and the Mideast Order were  
8 worded like Proposal 4, the Mideast Order would  
9 not have been extremely effected this year.  
10 However, when you create a limitation on a  
11 handler to reenter due to voluntary depooling, a  
12 reentry point must be provided.

13       The Northeast Order allows that point to be  
14 July. Instead of a set month, both of these  
15 proposals allow handlers to serve the fluid  
16 market to return to the pool. This provides the  
17 handlers greater flexibility than in the  
18 Northeast Order, but also helps to reinforce the  
19 purpose of the Federal Order system. In  
20 Proposal 8, the standards are more lenient and  
21 they can return via the calendar, like the  
22 Northeast Order, but handlers still have the  
23 option of serving the market to return earlier.

24       We believe the summary of Federal Order  
25 Statistics Overview, all Orders. January 2000

1 through current in Exhibit 33-G 1 through 5  
2 clearly illustrates the effectiveness of the  
3 dairy farmers for other markets provision. Dean  
4 Foods urges the Secretary to adopt this  
5 provision, with the most effective version  
6 provided in Proposal Number 4.

7       However, if the Secretary feels the  
8 handlers still need a greater degree of latitude  
9 to play games in the marketplace, we feel the  
10 weaker standards offered in Proposal 8  
11 represents a significant improvement over the  
12 current standards and any other proposals  
13 offered at this hearing.

14       Proposal Number 3. Dean Foods supports the  
15 definition of temporary offered in Proposal  
16 Number 3 as a technical change that supports  
17 Proposals 4 and 8. We would like to modify  
18 Proposal 3 to read as follows. Amend Section  
19 10033.13 by revising (d), subparagraph (1) and  
20 we're proposing striking our proposal through  
21 (d)(3).

22 Q. And that's consistent with the idea that  
23 we're not supporting any change in the touch  
24 base requirements as stated by me at the  
25 beginning of this hearing, correct?

1 A. That is correct. So our only changes are  
2 to paragraph -- our testimony is only to  
3 paragraph 1, and we have a slight change to  
4 paragraph 1 from what was published in the  
5 Federal Register, and that occurs four lines up  
6 from the bottom, "flood," proposing inserting  
7 "or fire, which case the Market Administrator  
8 may determine the time of extension granted to  
9 the affected farm or farms," and the rest will  
10 remain. So actually I'm making a change from  
11 the printed exhibit, "effect" should be  
12 "affected."

13 JUDGE DAVENPORT: Also the word  
14 "granted" as opposed to "grated"?

15 THE WITNESS: Oh, thank you.  
16 Supporting this language is not meant to harm  
17 dairy farmers who have had a disaster occur.  
18 This is meant to close a loophole that might  
19 otherwise allow for depooling, while avoiding  
20 the ramifications intended in this and other  
21 proposals. It is focused to give the Market  
22 Administrator clear definition as well as  
23 latitude to intervene when there is good reason.

24 Alternative Depooling Solutions 5, 6  
25 and 7. Dean Foods supports the other parties,

1 Ohio Dairy Producers, Ohio Farmers Union, Dairy  
2 Farmers of America, Inc., Michigan Milk  
3 Producers Association, National Farmers  
4 Organization, Dairylea and Continental Dairy  
5 Products, Inc., who have offered alternative  
6 depooling solutions in Proposals 5, 6 and 7.  
7 Our preferred order of support of the depooling  
8 proposals -- excuse me, depooling solutions  
9 would be Proposal 4, as presented, 8 as  
10 presented, 7, 6 and 5. We have chosen this  
11 prioritization based on our estimation of the  
12 effectiveness of each proposal. Dean Foods is  
13 for the most part -- excuse me. Dean Foods is  
14 for the most effective remedy to depooling,  
15 which we believe is found in Proposal 4.

16 Non-Depooling Issues. Before turning  
17 to the remaining proposals, I want to make it  
18 clear that the most important action that can be  
19 taken by the Secretary at this hearing is  
20 implementing a solution for depooling. Any of  
21 the other proposals that Dean Foods or any other  
22 participant in this hearing could present pales  
23 in its importance for the health and viability  
24 of the Order system than to eliminating  
25 depooling from our Federal Order vocabulary.

1 With it clearly understood that depooling must  
2 be addressed by the Secretary, we offer our  
3 thoughts on the remaining proposals.

4           Pooling Abuses. We believe that  
5 there are many pooling abuses that allow  
6 significant amounts of milk to ride the pool and  
7 not serve the market. The exhibits prepared by  
8 the Market Administrator contain numerous  
9 illustrations. Clear examples can be found in  
10 looking at Exhibit 9. Here you can see the milk  
11 attached from four states providing minimal  
12 service to the marketplace.

13           Proposal 1. Dean Foods supports  
14 Proposal 1. This is a point of exposure and has  
15 been addressed in other Orders. Understanding  
16 the Secretary has implemented such a change in  
17 other Orders, Dean Foods supports the same  
18 change being in this Order, although we support  
19 the language adopted in Order 30, which is  
20 somewhat different than proposed here.

21           Proposal 2. Dean Foods supports any  
22 action that tightens the pooling provisions of  
23 the Order and lessens pooling abuse. This  
24 Order's current pooling provisions have been  
25 exploited. The minimal shipments of milk from

1 Iowa, Illinois, Minnesota and Wisconsin shown in  
2 Exhibit 9 make this clear. It is out of our  
3 concern for curbing this abuse that we support  
4 tightening the provisions at least as much as  
5 provided for in Proposal 2.

6 Ample evidence presented at this  
7 hearing provides strong support for the  
8 Secretary to take significant action to address  
9 the evils of depooling. Dairy farmers in their  
10 own words urged the Secretary to make changes  
11 quickly to help them survive. Dean Foods has  
12 offered proposals that have a track record of  
13 success as a solution for the problems in the  
14 Mideast Order. We urge the Secretary to use the  
15 provisions provided for in emergency proceedings  
16 to act expeditiously to implement change  
17 addressing depooling in this Order.

18 Having addressed depooling, the  
19 Secretary's further review of the record should  
20 recognize that paper pooling is an additional  
21 problem in this Order. As with depooling, dairy  
22 farmers urged action to be taken for the Order  
23 to cease providing their dollars to producers  
24 who are not serving their customers. Dean Foods  
25 supports these producers in urging the Secretary

1 to take immediate action implementing paper  
2 pooling solutions.

3 BY MR. ENGLISH:

4 Q. Does that conclude your prepared statement,  
5 Mr. Kinser?

6 A. Yes.

7 Q. You have not, in the prepared statement,  
8 taken a position on Proposal 9. Does Dean Foods  
9 presently have a position with respect to  
10 Proposal 9?

11 A. Dean Foods does not have a position  
12 currently on Proposal 9. Dean Foods supports  
13 the concept of transportation credits. It has  
14 two concerns; first of all, that there's a large  
15 percent of the market that is servicing the  
16 plants that would not be eligible for  
17 transportation credits under the proposal as  
18 presented, and that it starts only at 75 miles,  
19 but then tied to that Dean Foods is concerned  
20 that any transportation credits that would allow  
21 easier access for milk outside the Order to  
22 attach to the Order should not be assisted in  
23 the transportation credits.

24 So we support the concept. I think that  
25 all the milk that's serving should get it, but

1 it should not assist milk far from the market  
2 having it easier access to ride the pool.

3 Q. So restating that a little bit, it would  
4 defeat the purpose of having a hearing to  
5 prevent depooling and eliminate the pooling if  
6 you simultaneously provided in a brand new  
7 economic incentive that results in exactly that?

8 A. That is correct.

9 Q. You've heard testimony at this hearing, and  
10 even as we speak we know that the Market  
11 Administrator was running a February pool, but  
12 you've heard testimony that we are likely, at  
13 least in some zones of this market, to have  
14 negative PPDs and therefore at least some  
15 witnesses expect some depooling.

16 What effect, if any, does that testimony  
17 have on whether or not the Secretary should deal  
18 with this matter on an emergency basis?

19 A. That continues to urge the Secretary to  
20 exercise using the emergency proceedings.

21 Q. Did you bring Exhibit 11 up with you from  
22 the Market Administrator? It's the data in  
23 response to the request from Mr. Vetne.

24 A. Yes.

25 Q. Could you turn to page 2, which is the

1 Mideast Milk Order Pool Distributing Plants

2 Receipts By Size December 2004?

3 A. Yes.

4 Q. First, what is Dean Foods' position with  
5 respect to divulging information regarding its  
6 plants, its milk supplies and its volumes?

7 A. We consider that to be confidential  
8 information.

9 Q. Notwithstanding that, are you prepared to  
10 go the limited distance in disclosing for this  
11 record information you've disclosed that are 12  
12 plants owned by Dean Foods operating in this  
13 market, correct?

14 A. That is correct.

15 Q. In the Central Order, you were prepared and  
16 did disclose that you have -- for instance, none  
17 of the plants were 25 million pounds or more,  
18 correct?

19 A. Yes.

20 Q. For this Order, what are you prepared to  
21 say with respect to December 2004, page 2 data  
22 on Exhibit 11?

23 A. Prepared to share for the record that all  
24 12 plants of Dean Foods are in the top two  
25 categories and that they're fairly evenly

1 distributed.

2 MR. ENGLISH: One moment. I have  
3 no further questions. I move for admission of  
4 Exhibit 33, 33-A through G.

5 JUDGE DAVENPORT: Absence of  
6 objection, Exhibit 33 will be admitted.

7 MR. ENGLISH: And the witness is  
8 available for cross-examination.

9 JUDGE DAVENPORT: Cross-examination?  
10 Mr. Beshore?

11 MR. BESHORE: Thank you.

12 CROSS-EXAMINATION

13 BY MR. BESHORE:

14 Q. Good morning, Mr. Kinser.

15 A. Good morning, Mr. Beshore.

16 Q. Could you turn to page 7. Your testimony  
17 is Exhibit 33. I just want to inquire a little  
18 bit about the Co-op A, Co-op B example, which I  
19 think is -- is quite useful in describing some  
20 of the depooling ramifications.

21 If you assume with me for a moment that  
22 rather than having Co-op A and Co-op B, when you  
23 have could he Co-op A and Proprietary Handler B.

24 A. Okay.

25 Q. Okay. Let's look at how that works and

1 what happens there. When Proprietary Handler B  
2 depools, if it chooses to pay a competitive pay  
3 price, as you have suggested that Co-op B could,  
4 okay --

5 A. Yes.

6 Q. -- let's assume that it does that, then  
7 Proprietary Handler B has \$1.146 per  
8 hundredweight. Is that the right number? It  
9 has an amount over and above the competitive pay  
10 price that it -- in class value in its pocket,  
11 correct?

12 A. That would be correct.

13 Q. And since it's a proprietary handler and  
14 not a cooperative, producers in aggregate in the  
15 market have lost all claim to that value,  
16 correct?

17 A. That would be correct.

18 Q. It's a co-op, they've got a claim. Some  
19 producers have some claim to it through the  
20 cooperative, of course?

21 A. That's correct.

22 Q. But when it's proprietary depooling, and  
23 they pay a competitive price, the value's lost  
24 to producers in the pool forever?

25 A. Correct.

1 Q. Now, a couple of questions on the dairy  
2 farmers for other markets provisions. Is it the  
3 intent of any of these proposals relating to  
4 establishing a dairy farm for other markets  
5 provision -- what's your intent with respect to  
6 the inadvertent overdiversion of a producer or  
7 producers by a handler at any given time? I  
8 mean, you know that can happen --

9 A. (Witness nodding head up and down.)

10 Q. -- in the course of the dairy business?

11 A. Correct.

12 Q. Okay. Is that -- is that kind of  
13 depooling, you know, accidental depooling or  
14 inadvertent overdiversion, is that intended to  
15 be covered by the dairy farm for other market  
16 language?

17 A. Is your question is the accidental  
18 overdiversion forcing milk out of the pool?

19 Q. Right.

20 A. No.

21 Q. Okay.

22 A. No.

23 Q. So --

24 A. The intent is to discourage voluntary  
25 depooling.

1 Q. Okay. So you would support, I would --  
2 would you support language, and I don't have any  
3 specific language to propose, but language that  
4 the Secretary deemed appropriate if a dairy farm  
5 for other markets provision would be adopted,  
6 language that would allow the Market  
7 Administrator discretion to determine that there  
8 was an inadvertent depooling and it shouldn't  
9 be -- that producer should not be disqualified  
10 under these provisions?

11 A. That seems reasonable, and I would think  
12 something along the language that's in 6 -- I  
13 believe it's 6 and 7 that gives the Market  
14 Administrator the authority to look and see if  
15 they're attempting to -- the handler's  
16 attempting to get around the intent of the  
17 regulation, so similar language incorporated  
18 with this would seem fair.

19 Q. Okay. Now, one other question on dairy  
20 farmers for other markets language. You have  
21 page 9 and page 12 of your testimony, Exhibit  
22 33, you have changed the word "the" before "pool  
23 plant operator or cooperative association," and  
24 inserted the word "any." And in both cases --  
25 six times, I think if I'm counting right.

1 A. That is correct.

2 Q. And one of the -- the effect of that is to  
3 identify what -- is that -- if a producer is  
4 depooled, he can't get back on to the pool if he  
5 switches handlers, correct?

6 A. The real intent is if the handlers wouldn't  
7 start shuffling producers around on their report  
8 to be able to get them back into the pool.

9 Q. Okay. But let's look at it from the  
10 producer's side if we can. Producer -- an  
11 individual dairy farmer -- dairy farmers don't  
12 make the decision whether to be pooled or  
13 depooled?

14 A. That is correct.

15 Q. Fair enough. But this language, strictly  
16 speaking, applied would mean that, you know, a  
17 dairy farmer who left Proprietary Plant A to  
18 join Cooperative B and the Proprietary Plant  
19 depooled them in the last month he was required  
20 to ship milk to them, he could not be pooled by  
21 Co-op B, correct?

22 A. That is true. This regulation would not  
23 allow that co-op to be pooled.

24 Q. I call it the scarlet letter provision.

25 A. Yes.

1 Q. It might not be completely fair to that  
2 producer. I mean, wouldn't it give any handler  
3 the ability if a producer had given an  
4 indication that they're going to switch  
5 affiliation, okay, in the period before they  
6 switch affiliation, while we're still obligated  
7 to supply that handler, the handler could depool  
8 them and they would be out for 3 months, 6  
9 months, 12 months whatever it is?

10 A. That is true. Again, the intent is not to  
11 brand the producer, but to keep handlers from  
12 shuffling producers back and forth across  
13 reports to circumvent the regulation.

14 Q. If we were to apply the Proposal 7 option  
15 to depooling, we wouldn't have to address that  
16 particular kind of dynamic at least?

17 A. That is correct.

18 MR. BESHORE: Thank you,  
19 Mr. Kinser.

20 JUDGE DAVENPORT: Mr. Vetne, with the  
21 expectation that you're going to be maybe just a  
22 little longer than what's gone on before, why  
23 don't we take a break at this time and let's be  
24 back at 10:00.

25 (Thereupon, a recess was taken.)

1 JUDGE DAVENPORT: We'll be back in  
2 session. Mr. Vetne.

3 MR. TOM VETNE: Thank you, Your  
4 Honor.

5 CROSS-EXAMINATION

6 BY MR. TOM VETNE:

7 Q. High, Mr. Kinser?

8 A. Good morning, Mr. Vetne.

9 Q. You've worked for Dean's since July of last  
10 year?

11 A. Since June of last year.

12 Q. June of last year. So, yes, at least since  
13 July of last year and even earlier?

14 A. Yes.

15 Q. Okay. And this is your third time  
16 testifying at one of these hearings on behalf of  
17 Dean?

18 A. That is correct.

19 Q. The issues tend to be the same?

20 A. That is correct.

21 Q. Okay. And the report that you've read into  
22 the -- your statement, rather, that you read  
23 into evidence today, is in large respect the  
24 same as the prepared statement you gave as a  
25 Dean witness in Minneapolis last year?

1 A. Similar.

2 Q. Okay. And it's very similar to the one you  
3 gave in Kansas City last December?

4 A. Yes.

5 Q. Okay. Like the statements you gave at  
6 those two hearings, the statement you gave today  
7 is a collaborative effort, isn't it?

8 A. Depending on your definition of  
9 collaborative.

10 Q. All right. Let's talk about that for a  
11 second. You had input from Dean employees?

12 A. Yes.

13 Q. Okay. Outside experts retained by Dean?

14 A. Yes.

15 Q. Mr. Christ?

16 A. Yes.

17 Q. Carl Conover?

18 A. Yes.

19 Q. Mr. English?

20 A. Yes.

21 Q. Others?

22 A. I think that would cover everyone.

23 Q. Okay. So the statement -- and the  
24 statement, while it was being written, was  
25 circulated amongst at least those people for

- 1 editing changes?
- 2 A. Yes.
- 3 Q. Corrections?
- 4 A. Yes.
- 5 Q. Additions?
- 6 A. Yes.
- 7 Q. Supporting facts?
- 8 A. I'm not sure I would go to support facts.
- 9 Maybe thoughts on how to develop argument.
- 10 Q. Okay. But it was circulated among a wider
- 11 group of people than yourself?
- 12 A. Yes.
- 13 Q. But nevertheless, the final product, the
- 14 statement that you gave here today, represents
- 15 Dean's corporate statement under oath?
- 16 A. That is correct.
- 17 Q. Do you have personal knowledge of Dean's
- 18 operation in the Mideast?
- 19 A. Depending on what detail.
- 20 Q. How about sales?
- 21 A. No.
- 22 Q. Milk supply sources and contracts?
- 23 A. Some knowledge.
- 24 Q. Okay. Distribution?
- 25 A. Minimal.

- 1 Q. Transactions between Dean plants?
- 2 A. Almost none.
- 3 Q. Transactions between Dean plants and plants  
4 of other companies?
- 5 A. None.
- 6 Q. Volume?
- 7 A. Some.
- 8 Q. What is the volume of milk receipts at the  
9 Dean plants in the Mideast?
- 10 A. I believe that to be confidential  
11 information.
- 12 Q. You're not going to answer that today?
- 13 A. That is correct.
- 14 Q. Okay. How about the aggregate?
- 15 A. The same.
- 16 Q. Not going to answer that one either?
- 17 A. Correct.
- 18 Q. Okay. What is the volume of Class I use at  
19 Dean plant in the Mideast?
- 20 A. I consider that also to be confidential  
21 information.
- 22 Q. You're not going to answer that today?
- 23 A. That is correct.
- 24 Q. How about the aggregate?
- 25 A. I consider that to be the confidential

1 information.

2 Q. And you're refusing to answer that today?

3 A. I'm claiming that it's confidential

4 information.

5 Q. Have you been here for the whole hearing?

6 A. Yes.

7 Q. This whole -- all week?

8 A. Yes.

9 Q. Was the information supplied yesterday and  
10 other days during the hearing by other witnesses  
11 as to who supplies Dean plants at various  
12 locations accurate, to the best of your  
13 knowledge?

14 A. I would believe correcting any statements  
15 made in the record regardless of Dean Foods  
16 would be divulging confidential information.

17 Q. You're not going to answer that one either?

18 A. Not to the degree that it would violate  
19 disclosure -- or would force us to disclose  
20 confidential information, no.

21 Q. Do you have Mr. Leeman's statement  
22 available to you up there? I've got an extra  
23 copy if you don't.

24 A. Do you happen to remember the number?

25 Q. Thirty.

1 A. I do not.

2 MR. TOM VETNE: May I approach,  
3 Your Honor?

4 JUDGE DAVENPORT: Certainly.

5 BY MR. TOM VETNE:

6 Q. I've got my copy here. Were you here when  
7 that statement was read into the record?

8 A. Yes.

9 Q. Would you mind looking at page 5, the last  
10 full paragraph?

11 A. Okay.

12 Q. Have you reviewed the paragraph?

13 A. I have.

14 Q. Okay. Do you dispute the facts asserted  
15 there about a Dean/DFA 20-year supply agreement  
16 with liquidated damages?

17 A. I assume that you're referring to the  
18 statements that are disclosed in the footnotes  
19 and -- of the annual report and our SEC filings.

20 Q. I don't believe they're in footnotes, but  
21 the information does come from your annual  
22 report 2003.

23 Do you -- do you dispute the facts asserted  
24 there in paragraph 5 of Mr. Leeman's statement?

25 A. I could not say that it is correct or

1 incorrect. I have acknowledged that they're  
2 notes about our milk supply agreement that are  
3 in public documents, and to the best of my  
4 knowledge those were prepared according to the  
5 regulation.

6 Q. Well, at the Minneapolis hearing and the  
7 Kansas City hearing, I think my father asked you  
8 some questions about the annual report in that  
9 agreement.

10 A. That is correct. My point of question with  
11 this is the 96 figure seems to be different, as  
12 I recall, from the interaction that I've had  
13 with your father.

14 Q. Do you want to take a look at the annual  
15 report?

16 A. I would be glad to do that.

17 Q. I think it's -- I'll give you again my copy  
18 here.

19 MR. ENGLISH: Hand it to counsel  
20 first.

21 JUDGE DAVENPORT: Do you want to mark  
22 that as an exhibit?

23 MR. TOM VETNE: Can we have that  
24 marked as an exhibit, Your Honor?

25 JUDGE DAVENPORT: Marked as Exhibit

1 34.

2 (Thereupon, Exhibit 34 of the Mideast  
3 Federal Milk Marketing Order hearing  
4 was marked for purposes of  
5 identification.)

6 JUDGE DAVENPORT: Please describe it  
7 for the record. It's the annual report?

8 MR. TOM VETNE: Right. Annual  
9 report for 2003 Dean Foods Company.

10 JUDGE DAVENPORT: Very well.

11 BY MR. TOM VETNE:

12 Q. Can you review the last paragraph there in  
13 brackets? I'm sorry, which page is that on? I  
14 should probably identify that for the record as  
15 well. The page you're reading or review now.

16 A. It would be on the fifth page.

17 Q. Okay. Is there --

18 A. There's no --

19 Q. No number on it? Okay. Page 5 of Exhibit  
20 34.

21 A. Yes.

22 Q. Okay. Now, in conjunction with Exhibit 30  
23 page 5, last paragraph, and Exhibit 34 that  
24 you're reviewing now, do you dispute the fact  
25 asserted in page 5 of Mr. Leeman's statement

1 that there is a Dean/DFA 20-year supply  
2 agreement that provides for liquidated damages?

3 MR. ENGLISH: Objection to the  
4 extent it calls for a legal conclusion as to  
5 what a liquidated damage is. This witness is  
6 not qualified to comment on that to the extent  
7 this witness doesn't have personal knowledge.

8 JUDGE DAVENPORT: To the extent he  
9 can answer --

10 MR. ENGLISH: He may answer. I'm  
11 not instructing him not to answer.

12 JUDGE DAVENPORT: -- his answer will  
13 not be deemed a legal conclusion.

14 THE WITNESS: I would agree that  
15 there is a statement to the amount of 96  
16 million, consistent with Mr. Leeman's statement.

17 BY MR. TOM VETNE:

18 Q. So Mr. Leeman has accurately stated that  
19 information in his statement?

20 MR. ENGLISH: Objection to the  
21 extent it calls for a legal conclusion.

22 JUDGE DAVENPORT: I think your  
23 question goes beyond this --

24 MR. TOM VETNE: Okay.

25 BY MR. TOM VETNE:

1 Q. Do you have a copy of the agreement that  
2 you're referring to in the annual report you're  
3 looking at now?

4 A. I do not.

5 Q. Have you ever reviewed the agreement?

6 A. No, I have not.

7 Q. Do you know what plants in the Mideast are  
8 subject to this agreement?

9 A. I do not.

10 Q. Do you know the contents of the supply  
11 agreement modifications for which Dean paid DFA  
12 28.5 million in the fourth quarter of 2003?

13 A. Only what has been disclosed in the SEC  
14 filings.

15 Q. Do you dispute the fact that payment was  
16 made at about the time Dean released its  
17 independent patrons to -- marketed through DMS?

18 A. Before my tenure with the company.

19 Q. Are you familiar with "Dairy Foods"  
20 magazine?

21 A. I am.

22 Q. Are you familiar with the Dairy 100 list  
23 that it published each summer?

24 A. I've seen it here as an exhibit.

25 Q. That list gives information on dairy

1 companies ranked by sale, among other things?

2 A. It appears to.

3 Q. Okay. Listing the milk plants that they  
4 operated during the prior year?

5 A. It appears to.

6 Q. Can you look at Attachment 2 to  
7 Mr. Leeman's statement?

8 A. (Witness complies with the request.)

9 Q. Have you seen that before?

10 A. I have not -- well, only in the --

11 Q. In connection --

12 A. -- proceedings of this hearing.

13 Q. In connection with his statement?

14 A. That is correct.

15 Q. Okay. Is it your understanding that that  
16 exhibit lists milk plants operated by certain  
17 dairy companies?

18 A. That has been the testimony of Mr. Leeman.

19 Q. Okay. And that the source of that  
20 information is the Dairy 100 list?

21 MR. ENGLISH: Objection. I  
22 believe that Mr. Beshore established that  
23 there -- some of this information comes from  
24 other sources and no one knows what it is, so I  
25 think that misstates the evidence.

1 BY MR. TOM VETNE:

2 Q. Look at page 1 of that exhibit, if you  
3 would.

4 JUDGE DAVENPORT: Mr. Vetne, why  
5 don't you clarify between those things that are  
6 added and those things which did, in fact,  
7 appear on the original document.

8 MR. TOM VETNE: Well, let me show  
9 you the original document. May I have this  
10 marked as Exhibit 35?

11 JUDGE DAVENPORT: It will be marked  
12 as Exhibit 35.

13 (Thereupon, Exhibit 35 of the Mideast  
14 Federal Milk Marketing Order hearing  
15 was marked for purposes of  
16 identification.)

17 MR. ENGLISH: Do you have copies  
18 for us?

19 MR. TOM VETNE: No.

20 BY MR. TOM VETNE:

21 Q. Let me show you Exhibit 35. Have you  
22 looked at that before?

23 A. I have not.

24 Q. Do you believe that the information  
25 contained there is correct in reporting that

1 Dean Foods operates a total of 105 plants in the  
2 US?

3 MR. ENGLISH: And I'm going to  
4 have to look at the document now since you don't  
5 have copies for us. You're going to ask him to  
6 read all 105?

7 MR. TOM VETNE: Nope. I'm going to  
8 get you to catch your flight.

9 MR. ENGLISH: Your Honor, I don't  
10 know how the witness can answer the question  
11 without reading all 105. I would comment for  
12 the record that the list, at least contains one  
13 that I pointed out yesterday, that is not, so,  
14 you know, we're going to be here all day.

15 There may be an easier way of asking  
16 the questions if he wants to know which  
17 plants -- what the 12 plants are in this Order,  
18 but if he's going to go through all 105 when I  
19 noted four errors yesterday, we're going to be  
20 here a long time.

21 MR. TOM VETNE: It's not my  
22 intention to go through all 105.

23 BY MR. TOM VETNE:

24 Q. Do you have any dispute -- or do you  
25 dispute the fact that Dean operated 105 plants

1 in the US in 2003?

2 A. I was not with the organization at that  
3 time and I don't know the plant count in 2003.

4 Q. Okay. We can agree that Tulsa, Oklahoma is  
5 not in Ohio or in the Mideast. Can we agree on  
6 that?

7 A. Yes.

8 Q. Okay. That's pretty obvious.

9 A. Yes.

10 Q. Do you see where it says in Attachment 2 --  
11 under Ohio on Attachment 2 to Mr. Leeman's  
12 statement that that's obviously an error?

13 A. Yes.

14 Q. Okay. But Dean did operate a plant in  
15 Tulsa in 2003?

16 A. I don't know that.

17 Q. All right. On -- also on Attachment 2, the  
18 first page, do you dispute that Upstate Farms  
19 operates a plant in Buffalo?

20 A. To which exhibit are you --

21 Q. I'm sorry. Page 3 of Exhibit 2 -- or  
22 Attachment 2, I should say.

23 A. I don't have any knowledge of Upstate's  
24 operations.

25 Q. Okay. Would you turn to the last page of

1 Attachment 2?

2 A. (Witness complies with the request.)

3 Q. It should be a printout of Mideast pool  
4 plants for May 2004 as published by the Market  
5 Administrator.

6 A. Yes.

7 Q. Do you contend, as Mr. English suggested in  
8 cross-examination yesterday of Mr. Leeman, that  
9 Upstate's Buffalo plant was mistakenly  
10 identified on the Market Administrator's list as  
11 a Mideast pool plant?

12 A. I don't know whether it was or not.

13 Q. On the first page of Attachment 2 --

14 A. Can we go back to the last question to make  
15 sure if I answered you correct? Were you asking  
16 me if I knew that the Market Administrator made  
17 a mistake?

18 Q. No. I'm asking you if you contend, as  
19 Mr. English suggested yesterday, that there was  
20 a mistake in this list by including the Upstate  
21 Buffalo plant?

22 MR. ENGLISH: And what are you  
23 looking at, sir?

24 MR. TOM VETNE: The last page of  
25 Attachment 2.

1 MR. STEVENS: This?

2 MR. TOM VETNE: Yes.

3 MR. STEVENS: Okay.

4 MR. ENGLISH: I'll fix it.

5 BY MR. TOM VETNE:

6 Q. Do you contend that in 2003 Dean Foods did  
7 not operate a plant in Detroit called Melody  
8 Farms?

9 A. It's my understanding that -- can you  
10 restate the question?

11 Q. Sure. Page 16 of Attachment 2 shows or  
12 purports to show a list of Dean Foods plants in  
13 Michigan.

14 Do you contend that in 2003 Dean Foods did  
15 not operate a plant in Detroit called Melody  
16 Farms?

17 A. I'm trying to be helpful here. I wasn't  
18 with the company at that point in time. It's my  
19 understanding, though, that that was operated in  
20 2003, but is not operated today.

21 Q. Okay. Do you contend that the inclusion --  
22 that its inclusion in Dean's 2003 plant  
23 operation was a mistake?

24 A. No.

25 Q. Do you know why the assertion was made by

1 Mr. English that it was a mistake?

2 MR. ENGLISH: I'll object to the  
3 characterization of the question. I believe I  
4 referred the witness to Exhibit 6, Table 2 which  
5 disclosed no such entity. I asked him to point  
6 that out. I made no assertion of whether it was  
7 or wasn't in 2003. In fact, there's no  
8 reference to 2003. It says 2004 as the data up  
9 here. Well, since this information doesn't come  
10 from it, sir, I mean, since you've recreated the  
11 whole document.

12 I object to the characterization of  
13 my question yesterday. If we have to go back  
14 and read the record, we will. The question I  
15 asked was, sir, when you look at the statement,  
16 how come it doesn't show up on Exhibit 6, page 2  
17 and the witness had no answer. That was my  
18 question.

19 MR. TOM VETNE: Nothing further.

20 JUDGE DAVENPORT: Very well. Other  
21 cross of this witness? Mr. Ricciardi?

22 MR. RICCIARDI: Al Ricciardi for  
23 Sarah Farms.

24 CROSS-EXAMINATION

25 BY MR. RICCIARDI:

1 Q. Good morning, Mr. Kinser.

2 A. Good morning, Mr. Ricciardi.

3 Q. As I understand it, Dean Foods operates 12  
4 distributing plants in Order 33, correct?

5 A. That is my testimony.

6 Q. And what's the source of your knowledge  
7 concerning the number of distributing plants?

8 A. Prior to this hearing I went to the Market  
9 Administrator's website and downloaded an  
10 exemplar to the document that Mr. Vetne and I  
11 were just discussing, and through what records I  
12 had I indicated the plants that I believed were  
13 owned and operated by Dean Foods and circulated  
14 that to be sure I was correct.

15 Q. Did you ever go to any internal document  
16 from Dean Foods to confirm that information?

17 A. Yes.

18 Q. And what did you look at?

19 A. The listing of plants.

20 Q. Did the listing of plants from Dean Foods  
21 list the volume of those plants?

22 A. It did not.

23 Q. Have you ever looked at information showing  
24 the volume of the distributing plants that Dean  
25 Foods operates in Order 33?

- 1 A. Yes.
- 2 Q. And when did you do that?
- 3 A. Prior to this hearing.
- 4 Q. Okay. So you have that information  
5 available from Dean Foods' documents?
- 6 A. I do not have it from Dean Foods'  
7 documents.
- 8 Q. You looked at the information and when you  
9 read it you got knowledge concerning the volume  
10 for each one of the plants, right?
- 11 A. Looked at what information?
- 12 Q. Information that you just told me about  
13 from Dean Foods' documents that would describe,  
14 one, the distributing plants and, two, the  
15 volume of each of those plant?
- 16 A. That is incorrect.
- 17 Q. You don't have that information?
- 18 A. I do have that information. I did not  
19 acquire that information from Dean Foods'  
20 documents.
- 21 Q. Where did you get it from?
- 22 A. The Market Administrator.
- 23 Q. Can you tell us for December of '04 the  
24 total volume in this Order from the Dean Foods  
25 distributing plants?

1                   MR. ENGLISH:        Asked and answered  
2 by Mr. Vetne.

3                   JUDGE DAVENPORT:  We are getting over  
4 into the same area.

5                   MR. RICCIARDI:     We are, Judge, but  
6 we didn't get an answer, so I'm asking for one.

7                   JUDGE DAVENPORT:  His answer, I  
8 expect, is going to be the same.

9                   MR. RICCIARDI:     It may, Judge, it  
10 may be different.

11                  MR. ENGLISH:        I'll let it go  
12 once, Your Honor, but I think at some point, you  
13 know, the hearing has to come to an end.

14                  THE WITNESS:        Would you please  
15 restate the question?

16                  MR. RICCIARDI:     Could you read it  
17 back for me, please?

18                                       (Thereupon, the Reporter read the  
19 record as requested.)

20                  THE WITNESS:        I believe that to  
21 be confidential information.

22 BY MR. RICCIARDI:

23 Q.    You know it, but you won't tell us, right?

24 A.    On the grounds that it's confidential  
25 information.  Other witnesses have sat up here

1 with knowledge and claimed confidential  
2 information as well.

3 Q. Dean Foods has proposals in this Order to  
4 change regulations, correct?

5 A. That is correct.

6 Q. And Dean Foods comes here requesting that  
7 the Secretary review that information to try to  
8 make decisions based upon a potential change in  
9 the regulations, right?

10 A. Can you restate that?

11 Q. Sure. I mean, Dean Foods is asking for  
12 changes in the regulations, right?

13 A. That is correct.

14 Q. And it's placed those issues before the  
15 Secretary?

16 A. That is correct.

17 Q. Who is the person who has the most  
18 knowledge at Dean's regarding information in  
19 Order 33 such as volumes of distributing plants?

20 A. Probably the Market Administrator would  
21 have full knowledge of that as well as the  
22 parties responsible for operating those plants.

23 Q. The Market Administrator doesn't work for  
24 Deans.

25 A. That is correct.

1 Q. Okay. So the question was the individual  
2 at Dean's who has the most knowledge regarding  
3 that.

4 MR. ENGLISH: I'm not sure that  
5 was the question.

6 MR. RICCIARDI: If it wasn't, I  
7 apologize. It is now.

8 THE WITNESS: So your question is  
9 who at Dean Foods --

10 BY MR. RICCIARDI:

11 Q. Yes.

12 A. I believe it would be a number of  
13 individuals who would have knowledge.

14 Q. The person with the most knowledge would  
15 be?

16 A. Probably the corporate controller of the  
17 dairy group.

18 Q. Okay. As I understand it, since I've  
19 listened to your testimony now for the third  
20 time going into these Orders, Dean Foods has a  
21 position that effectively we need to change each  
22 one of the Orders, otherwise we will have a --  
23 what I'll call the domino effect. That is, if  
24 you don't change the regulations in a particular  
25 Order, that the milk will go from one market to

1 the other, the one that doesn't -- has the least  
2 amount of regulation in terms of pooling and  
3 depooling, right?

4 A. That is true.

5 Q. So if that's true and all of the Orders  
6 were changed in the way that Dean Foods has  
7 proposed in the last three hearings, now the  
8 third, isn't it true that the milk would now go  
9 probably into Order 5, correct?

10 A. It could possibly.

11 Q. And has Dean Foods made any proposal to  
12 change the regulations in Order 5?

13 A. We have not.

14 Q. Does Dean Foods plan to do that?

15 A. Not currently. If you study the  
16 requirements of Order 5, the ability to attach  
17 milk quickly to that market is much less than in  
18 the prior Orders.

19 Q. I realize you've only worked with Dean  
20 since June you've said, but in looking at the  
21 Market Administrator information, are you aware  
22 that the number of distributing plants in this  
23 Order has declined since '89 from 87 to 42?

24 A. Is that in the exhibits that we've seen?

25 Q. I believe it is. But do you have any

1 knowledge of that?

2 A. No.

3 Q. Okay. With regard to the distributing

4 plants, you do know that Dean's owns and

5 operates 12 of those, correct?

6 A. Yes.

7 Q. Who makes the pooling decision as to

8 whether or not milk should be pooled or depooled

9 for Dean's in this market?

10 A. Our plants are all forced to pool. There's

11 no pooling/depooling decisions.

12 Q. Okay. With regard to the issue of

13 depooling itself, do you -- I think you've

14 defined it as an evil, as I recall, in the last

15 portion of your testimony?

16 A. That seems to be a fair characterization.

17 Q. Is it the depooling that's the evil?

18 A. I would say it's the inequity of all

19 parties to have equal opportunity to do such.

20 Q. Okay. So depooling itself is not a

21 problem. It's, from your position, inequitable

22 in some fashion, right?

23 A. In that not all parties have the same

24 opportunity.

25 Q. Okay. What parties don't have the

- 1 opportunity to depool?
- 2 A. Class I distributing plants.
- 3 Q. So it's Dean Foods that is complaining that
- 4 it doesn't have the opportunity to depool?
- 5 A. If you look at our request, we're actually
- 6 asking that everybody stop depooling and so
- 7 everybody has to play by the rules that are
- 8 currently forced upon us.
- 9 Q. Do you know whether or not DFA has depooled
- 10 milk in this market?
- 11 A. I thought, you've been here as much as I
- 12 have, that Mr. Gallagher in his testimony stated
- 13 that they had.
- 14 Q. Have you talked to them about stopping that
- 15 practice?
- 16 A. I have not.
- 17 Q. Has anyone at Dean Foods?
- 18 A. I would doubt it.
- 19 Q. Now, do you agree with Mr. Gallagher that
- 20 the one way of stopping this, and I think you
- 21 called it either an open wound or a gushing
- 22 wound or something like that, would be to change
- 23 the time for when milk prices are announced?
- 24 A. Can you clarify the question?
- 25 Q. Sure. Let me actually be more specific so

1 that we're talking about the same thing.

2 In his testimony at page 32 of the  
3 statement, Exhibit 14, Mr. Gallagher said, "The  
4 real solution to this problem is to change the  
5 manner in which Order prices are announced. We  
6 agree that if all Order prices were announced on  
7 the same day, there would almost never be a  
8 negative PPD and rarely any depooling."

9 My question is do you agree with that?

10 A. Which page?

11 Q. Page 32. I did read it, I think,  
12 accurately, but it's the middle paragraph on  
13 that page.

14 A. I believe that's a fair assessment.

15 Q. Okay. And if that's the real solution, is  
16 there a reason why Dean's hasn't proposed it?

17 A. Yes.

18 Q. And that is?

19 A. I believe that there are two problems. The  
20 first is the length at which it would take for  
21 the Secretary to hold a hearing and deal with  
22 that. I believe that would be a much longer  
23 hearing than has been occurring even given the  
24 length of this one. Secondly, is within the  
25 AMAA is directive that Class I milk buyers are

1 not disadvantaged. And I believe in aligning  
2 the prices that Class I milk could be  
3 disadvantaged in its ability to procure milk.

4 Q. Let's talk about a couple of things you  
5 just said. One of the reasons you said for not  
6 making this type of proposal advanced, at least  
7 talked about by Mr. Gallagher in his statement  
8 on page 32, is because, in effect, this would  
9 require a nationwide hearing, right?

10 A. That is a concern.

11 Q. Okay. Now, do you believe it's a  
12 nationwide problem?

13 A. No, we do not.

14 Q. Okay. You think it's a local problem?

15 A. That is correct.

16 Q. What Orders is it a problem in?

17 A. I believe the Orders that we've had  
18 hearings at and are consistent with my  
19 testimony.

20 Q. So is your testimony then that it's not a  
21 problem in Order 5 or 7, for example?

22 A. Not currently.

23 Q. Do you think it will be?

24 A. There's a chance.

25 Q. Well, if the domino theory is correct, then

1 it has to be, right?

2 A. Not necessarily.

3 Q. Okay. So you're telling me that if it is,  
4 in fact, contained in these three Orders that  
5 this problem or advantage that you're talking  
6 about will now leak over into other adjacent  
7 Orders?

8 A. I think the leakage will be minimal.

9 Q. And the reason for that?

10 A. Is the amount of manufacturing capacity  
11 that exists within 5 and 7 and has historically  
12 attached to 5 and 7 is much less than this Order  
13 and the prior two that we've had hearings at.

14 Q. Can you tell me any specific examples of  
15 when milk was not available to supply the Class  
16 I needs in Federal Order 33 in the last 12  
17 months?

18 A. I cannot.

19 Q. Because there aren't any?

20 A. There are none that I have knowledge of.

21 Q. So there have been -- there's an adequate  
22 milk supply in this Order and there has been  
23 over the last 12 months, correct?

24 A. Maybe adequate, but it's not necessarily  
25 reliable.

1 Q. Is -- can you point out to me then --  
2 you've quoted the AMAA on page 2 of your  
3 statement, Exhibit 33. Is there anything in the  
4 AMAA that talks about reliability as opposed to  
5 adequacy?  
6 A. It talks about quarterly which relates to  
7 reliability.  
8 Q. When you say "reliability," are you talking  
9 about the milk not being of good quality?  
10 A. I'm talking about it not being a consistent  
11 part of the pool.  
12 Q. Okay. So it's consistency of availability.  
13 Is that what your concern is?  
14 A. That's in the direction.  
15 Q. Okay. And can you tell me then  
16 specifically why it is, if there was an adequate  
17 milk supply in the last 12 months, that you  
18 contend that there wasn't a reliable supply?  
19 A. If you look at the numerous reports, and I  
20 guess I refer most directly to -- well, I don't  
21 seem to have the exhibit with me, but the  
22 exhibit that immediately comes to mind is the  
23 exhibit prepared by Market Administrator  
24 Compilation of Statistics for the Order showing  
25 the size of the pool and how much it varies.

1 Q. Okay. Can you tell me for the 12 plants  
2 that Dean's operates whether there was any  
3 occasion at all from information that either you  
4 have or you've been able to review from Dean  
5 Foods that any of those 12 plants did not have  
6 an adequate supply of milk, and let's say in the  
7 last 24 months?

8 A. I would say in studying the exhibits of  
9 this material there are documents, particularly  
10 the one I just referenced, that demonstrate that  
11 the pool of milk available to serve this market  
12 is not adequate and reliable.

13 Q. Tell me specifically in the last 24 months  
14 any instance that you can describe specifically  
15 where the 12 -- any of the 12 Dean's plants did  
16 not have an adequate supply of milk?

17 A. I'm not aware of any specific instance.

18 Q. Okay. Now, let me ask you a question. I  
19 looked through the exhibits that you proposed --  
20 that you prepared and I looked through your  
21 statement.

22 As I understand it, you have concluded that  
23 the model for this particular Order should be  
24 Order Number 1, and the reason that you are  
25 talking about this Order following what's going

1 on in Order Number 1 is because of some  
2 particular provisions that Order 1 has; is that  
3 right?

4 A. That is true.

5 Q. And that provision would be what?

6 A. The dairy farmer for other markets  
7 provision. In my testimony I cite that that's  
8 found in Section -- Section 1001.12, subsection  
9 (b), subparagraphs (5) and (6).

10 Q. And you say on page 13 of your testimony  
11 that that particular provision makes the  
12 Northeast unique, right?

13 A. Yes.

14 Q. And when we do sort of a scientific theory,  
15 we have to take a look at all of the factors to  
16 be able to compare two things together. You're  
17 comparing, for example, this Order and Order  
18 Number 1, to decide whether or not that's the  
19 thing that makes it unique, this particular  
20 provision, you have to take a look at all of the  
21 facts in Order 1 and all of the facts in Order  
22 33, right?

23 A. Sure.

24 Q. Okay. Now, one of the facts in Order 1  
25 that makes it unique is the dominance of Dean

1 Foods in that particular Order, right?

2 A. That might be a factor of uniqueness.

3 Q. Would you agree that Dean Foods would  
4 control 70 to 80 percent of the milk that's  
5 supplied in Order Number 1?

6 A. I don't have any knowledge of that.

7 Q. Do you disagree with that?

8 A. I don't have knowledge to affirm or deny  
9 that statement.

10 Q. Would you agree that Dean Foods controls  
11 over 50 percent of the milk in that particular  
12 Order?

13 A. I don't have knowledge.

14 Q. When you looked at Order Number 1 to  
15 determine whether it was unique or not, did you  
16 look at that information?

17 A. I did not.

18 Q. Do you have any information whatsoever  
19 regarding the amount of control that Dean's  
20 exerts in Order Number 1?

21 A. I do not.

22 Q. Is that information available to you?

23 A. It could be available to me. I've never  
24 asked.

25 Q. If you wanted to look for it, it would be

1 there?

2 A. I could probably acquire it.

3 Q. But that's not information that's important  
4 enough for you to bring before the Department in  
5 this particular proceeding?

6 A. It's of the same degree of confidentiality  
7 as the milk volumes that are on this Order.

8 Q. Would you agree or disagree with Professor  
9 Cotterill's statements in Exhibit 3, including  
10 the attachments, regarding the dominance of Dean  
11 Foods in the Northeast?

12 A. I am really unfamiliar with the Northeast  
13 Market and cannot either support or deny his  
14 claim.

15 Q. Okay.

16 MR. RICCIARDI: Thank you, sir.

17 JUDGE DAVENPORT: Other cross?

18 CROSS-EXAMINATION

19 BY MR. MILTNER:

20 Q. Hello, Evan.

21 A. Good morning, Mr. Miltner.

22 Q. I have just a couple of questions for you  
23 on Proposals 4 and 5. I'm going to try to  
24 characterize some of your testimony and if I'm  
25 wrong, let me know. Okay?

1 A. Sure.

2 Q. If you see that there's a problem with the  
3 dairy farmer for other markets provision in  
4 Order 1, it's that it has a free month to allow  
5 reentry into the pool, would that be accurate?

6 A. That's a piece of it, that there's a free  
7 month. But the second piece is that that is the  
8 only way, as I understand that provision, to be  
9 able to get back in.

10 Q. Okay. And in your statement you talk  
11 about -- I want to make sure I use the right  
12 language, the same language you used here. It's  
13 on page 14.

14 You say, "if the Secretary feels handlers  
15 still need a greater degree of latitude to play  
16 games in the marketplace, we feel the weaker  
17 standards offered in Proposal Number 8 should be  
18 adopted over Proposal Number 4."

19 A. (Witness nodding head up and down.)

20 Q. It's nice to have a little bit of levity in  
21 some of these statements?

22 A. I try. It's a long statement. It needs a  
23 little humor.

24 Q. Proposal 4 and Proposal 5 both suggest  
25 basically a one-year exclusion from the pool for

1 those individuals that choose to depool, those  
2 handlers that choose to depool, right?

3 A. The difference between Proposal 4 and  
4 Proposal 5, as I understand it, is that Proposal  
5 4 would require a handler to deliver at least 10  
6 days' of milk production from a dairy farm to a  
7 distributing plant for 12 months to return to  
8 the same pooling status as they're treated with  
9 today, versus Proposal 5 would just eliminate  
10 the producer from the pool for a full 12 months.

11 And if I can clarify that a little further,  
12 that even the first month that the producer has  
13 delivered at least 10 days, the producer would  
14 be back, part of the pool, but only because of  
15 their demonstration of service to the market.

16 Q. Right. So if -- under Proposal 4, I think  
17 as both you and I interpret it, if a handler --  
18 or if a farmer is just depooled and they deliver  
19 ten days to a distributing plant, the following  
20 month they're back in?

21 A. As I understand, for the following month  
22 they would still be obligated to the 10 days.  
23 They would have to do that for 12 consecutive  
24 months and then they would be at the status that  
25 they were prior to this kicking in and there

1 would not be any deliveries required.

2       So, for example, if I would depool a  
3 producer this month, in March, in order for the  
4 producer to have the same pooling status that  
5 the producer would have had available by not  
6 depooling this month, for the following 12  
7 months, 10 days of that producer's milk would  
8 have to be delivered to a pool distributing  
9 plant --

10 Q.   Okay.

11 A.   -- each of those months. And in the  
12 absence of any month they would have to start  
13 the count again.

14 Q.   Okay. Would you agree that even if it's a  
15 requirement that they deliver ten days'  
16 production for an entire year for a -- for an  
17 organization that has a large percentage of  
18 Class I deliveries, probably more than a third  
19 of their milk, it does allow them some  
20 flexibility to, as you say, play games with the  
21 Order?

22 A.   That is a possibility.

23 Q.   That they would -- if there were, for  
24 instance, 40 percent Class I milk deliveries,  
25 they would be able to, perhaps, depool and then

1 over the next 12 months have those farmers  
2 re-pooled back?

3 A. I think you may have some challenges in --  
4 on that scale because you're -- all the farms  
5 are going to have to have 10 days of milk  
6 production get to a distributing plant. So you  
7 only have a 30-, 31-day window, and in February  
8 then you have a 28-day window, so I think  
9 there's going to be some challenges. It's not a  
10 wide open door, but I would agree it is also not  
11 perfect.

12 Q. It wouldn't be easy and it wouldn't work  
13 for everybody, but with a handler with access to  
14 Class I plants, a large amount of access to  
15 Class I plants, there is some room for games for  
16 shift to be had under Proposal 4?

17 A. Yeah. They shuffle the trucks, that could  
18 be done.

19 MR. MILTNER: I think that's all  
20 I have. Thank you.

21 JUDGE DAVENPORT: Other cross?

22 FURTHER CROSS-EXAMINATION

23 BY MR. BESHORE:

24 Q. One question I neglected the first time,  
25 Evan, with respect to your concerns which you

1 stated in answer to questions from Mr. English  
2 and in your written statement about Proposal 9,  
3 that you don't want to have transportation  
4 credits that would enable distant milk to pool  
5 more easily on the Order. Okay? You remember  
6 that --

7 A. Yes.

8 Q. -- comment?

9 A. Yes.

10 Q. Okay. Now, wouldn't it be correct that if  
11 you -- if transportation credit applied to all  
12 milk going to Class I plants, including all milk  
13 within 75 miles of the plant, which I think the  
14 Market Administrator's exhibit shows is roughly  
15 50 percent, I'm not being precise, but roughly  
16 50 percent of the milk to distributing plants in  
17 the Order, if you included a transportation  
18 credit for all of that additional volume, the  
19 incentive would be just that much more to be  
20 able to bring in distant milk?

21 A. It would. The counter to that, I think, is  
22 that in the absence of that, the sort of  
23 economic heart of displacing local milk to allow  
24 more distant milk to move is -- it's not as  
25 effective. So if I have milk that's within 75

1 miles that's not getting any transportation  
2 credit, I'm indifferent moving it to a  
3 distributing plant versus moving it somewhere  
4 else so long as the haul is the same.

5       So if I'm trying to move milk in from  
6 outside the market and just move the milk to a  
7 non-distributing plant and I let the external  
8 milk take that slot and -- but if I'm going to  
9 have to give somebody transportation credit on  
10 that milk to displace it out of distributing  
11 plant, I'm going to have to look at it a little  
12 differently.

13       So I agree that on the surface it's going  
14 to provide more money for the distant milk, but  
15 on the other hand, it's going to provide a  
16 counter to shuffling local milk out.

17 Q. Well, it limits -- the 75 mile exemption  
18 limits the amount of transportation credit that  
19 is available to any milk under the proposal,  
20 correct?

21 A. That is correct.

22 Q. And on the other end, the 350-mile cap,  
23 which is less than the published hearing  
24 proposal, but the 350 cap that Mr. Gallagher  
25 articulated also limits the amount of

1 economic -- of credit available to milk from  
2 extended distances?

3 A. It does. Just, you know, when you begin to  
4 look at distributing plants and draw a 350-mile  
5 circle around it, it can capsule a large  
6 supply of milk that's beyond the borders of the  
7 Order.

8 Q. Okay.

9 MR. BESHORE: Thank you.

10 JUDGE DAVENPORT: Mr. Tosi?

11 CROSS-EXAMINATION

12 BY MR. TOSI:

13 Q. Good morning. I would like to ask a couple  
14 of questions.

15 A. Good morning.

16 Q. You made a statement, and I believe it was  
17 in regards to one of the questions when you were  
18 being crossed, about you were of the opinion  
19 that -- at least with respect to Dean's position  
20 in Order 33, in the Mideast Order, that you were  
21 of the opinion that there was an adequate milk  
22 supply for serving distributing plants, but you  
23 were concerned about the reliability of supply.

24 A. That's correct.

25 Q. Would you please go into a little more

1 detail on what it is about the Mideast Market  
2 that raises concerns with respect to the  
3 reliability of supply?

4 A. Okay. Probably the best example of that  
5 that comes to mind is in Exhibit 9, interesting  
6 enough, the data prepared at our request by the  
7 Market Administrator. If you look towards the  
8 bottom of that, you will find totals, one being  
9 total producer milk receipts, and the second  
10 from the bottom, the percent of total producer  
11 receipts at distributing plants.

12 When you look at the pounds of milk that is  
13 represented in these four states that is a part  
14 of the pool as far as has access to the dollars  
15 that are here, and so we think that that should  
16 be a part of the market that could be relied on.  
17 And as you follow that across, you'll notice  
18 that it is not consistent in the pounds, and  
19 then also it's not consistent in supply to  
20 distributing plants. And actually the time when  
21 it steps up to supply it's August, September,  
22 October, November.

23 Now, admittedly that is the time when the  
24 marketplace is shorter, but that degree of  
25 service seems to be an awful slim degree of

1 service and only -- all but disappear. And the  
2 only reason in April or May the percent is  
3 higher, if you look at April at 4.7 and May at  
4 3.6, it's because the denominator is dropped.  
5 There's 302 in April and then 303 million pounds  
6 of milk that's not a part of the pool.

7       So I believe that that table and those few  
8 lines of that table help illustrate that it --  
9 there's adequate milk because it's not moving,  
10 but it's not reliable.

11 Q. I accept your interpretation. I would like  
12 to ask a question if you might -- if I propose  
13 an interpretation to you and ask if you would  
14 agree or disagree with it.

15 A. Sure.

16 Q. If the Secretary would use the information  
17 that you just talked about here in Exhibit 9  
18 together with other information to conclude that  
19 it -- perhaps it's not so much the issue of  
20 reliability of supply, but rather equity amongst  
21 producers who share in the appropriate sharing  
22 of revenue from all classes of milk amongst all  
23 producers, would your organization be supportive  
24 of a conclusion like that if the data supported  
25 that sort of conclusion?

1 A. I'm not sure, Mr. Tosi, I'm following  
2 the --

3 Q. Well, I guess when I look at this if --  
4 let's go to September 2004, for example.

5 A. Okay.

6 Q. We have a pretty significant spike, in  
7 fact, it's the month in which we had the largest  
8 amount of producer receipts to distributing  
9 plants, and yet in that month we had a lot of  
10 milk that was depooled.

11 A. Yes.

12 Q. Okay. It would suggest to me that -- it  
13 may suggest that plants were not only adequately  
14 supplied, but to the extent that this was a  
15 month in which there was depooling and we don't  
16 know what milk's going to be depooled until the  
17 month is over --

18 A. That's correct.

19 Q. -- that with respect to reliability of  
20 supply, it would be kind of hard to conclude  
21 that from just looking at this?

22 A. In that the -- you don't know what milk's  
23 not going to be a part of Order until after --

24 Q. We all know that milk going to the  
25 distributing plant, the distributing plant

1 cannot escape regulation. Do you agree with  
2 that?

3 A. That's true. I agree.

4 Q. And all milk that the Class I plants need  
5 is procured during the month at a known price?

6 A. That's true.

7 Q. However, decisions on whether or not to  
8 pool or depool milk used in other uses really  
9 isn't made until the month closes, until we know  
10 what the other class prices are; is that  
11 correct?

12 A. That is true.

13 Q. So to me that would suggest more an issue  
14 of equity versus reliability of supply, equity  
15 amongst producers.

16 A. That's true. I would agree with that.

17 Q. Okay. Have you, or to your knowledge, has  
18 Dean's ever asked, since Order Reform, for the  
19 Market Administrator to increase any of the  
20 Orders' pooling standards? For example, to  
21 increase the performance requirement that co-ops  
22 or supply plants would have to supply to  
23 distributing plants to meet your needs?

24 A. I don't have knowledge of that in this  
25 Order. I know we have in others -- or in

1 another Order.

2 Q. Would you be of the opinion that to the  
3 extent the Market Administrator has the ability  
4 to respond to requests from organizations such  
5 as yours to -- if there's a question about  
6 reliability to increase those standards to make  
7 sure that the distributing plants are adequately  
8 supplied with milk?

9 A. I would agree they would. In some of my  
10 prior testimony that I cut out of this  
11 particular testimony I've talked extensively  
12 about the level at which the Market  
13 Administrator would need to increase that  
14 standard to have been effective in the time of  
15 depoolment.

16 And actually I updated the standards before  
17 I cut it out, and if I recall the standards for  
18 this Order would have needed to have been near  
19 63 percent shipping requirements in order to  
20 begin to force milk to be moved.

21 Q. Okay. Could you describe in general for  
22 this Order what percent of the milk that you  
23 procure is co-op verses independent milk supply?

24 A. I don't know.

25 Q. To the extent that you buy milk from

1 co-ops, do you pay over order premiums?

2 A. I believe we do.

3 Q. Within that over order premium structure or  
4 whatever arrangement that you have for those  
5 times when you need supplemental milk supplies,  
6 do you pay -- or do you charge the cost in any  
7 amount for hauling or transportation?

8 A. It is my understanding that the over order  
9 premium has all of that --

10 Q. Factored into it?

11 A. -- factored into it. Admittedly, they're  
12 doing that before the costs are incurred because  
13 they're setting an over order premium similar to  
14 the type the class prices are announced. And  
15 then they start servicing the plants later and,  
16 you know, conditions in the marketplace may  
17 cause them to pay more give up charges or less  
18 than what they thought.

19 MR. TOSI: That's all I have.

20 Thank you, Mr. Kinser. I appreciate your  
21 patience with me. Thank you.

22 THE WITNESS: You're welcome.

23 JUDGE DAVENPORT: Redirect,  
24 Mr. English?

25 REDIRECT EXAMINATION

1 BY MR. ENGLISH:

2 Q. First let me ask the witness. You  
3 referenced a document that you had pulled down  
4 off the internet from the Market Administrator  
5 with reference to the questions from  
6 Mr. Ricciardi as to which plants were Dean Foods  
7 plants.

8 A. Yes.

9 Q. May I look at that document for one second?

10 A. Yes.

11 MR. ENGLISH: May I approach?

12 BY MR. ENGLISH:

13 Q. That document you downloaded yourself,  
14 correct?

15 A. That is correct.

16 Q. No one else downloaded it for you?

17 A. No.

18 Q. And what is that document entitled?

19 A. Mideast Milk Marketing -- excuse me,  
20 Mideast Marketing Area Plants for May of 2004.

21 Q. Now, turning for a moment to Exhibit 30,  
22 the statement of Jeff Leeman and what is, I  
23 guess, Attachment 3 -- it's the last page of  
24 what is purported to be Attachment 2 which now  
25 seems to be downloaded from multiple sources,

1 it's the last page of Attachment 2, do you see  
2 that?

3 A. Yes.

4 Q. That is a list of something that is  
5 purported there, do you see it?

6 A. Yes.

7 Q. What is the heading on that document?

8 A. This document says "USDA Dairy Programs  
9 Mideast Market Administrator Pool Plants May of  
10 '04."

11 Q. And then it has a column -- it has  
12 something for state, plant, city, all sort of  
13 scrunched together, right?

14 A. Yes.

15 Q. Does that look a little bit like your  
16 document except that they've sort of taken the  
17 three headings, state, plant and city, and  
18 scrunched them together?

19 A. Yes.

20 Q. And except for the fact that the heading is  
21 entirely different? Look at your heading that  
22 you pulled down yourself as opposed to the  
23 document that is the last page of Attachment 2  
24 pulled down by some unknown person, could you  
25 compare the two headings for me?

- 1 A. Mine is, as you said, state, plant, city  
2 only spaced out.
- 3 Q. The heading, the overall caption.
- 4 A. And then it contains county and  
5 differential.
- 6 Q. I'm sorry, Mr. Kinser. The caption. The  
7 title of the document.
- 8 A. Oh, mine says -- at the top, "Mideast  
9 Marketing Area Plants for May of 2004."
- 10 Q. And theirs says "Pool Plants for May '04"?
- 11 A. Yes.
- 12 Q. Is there a difference between plants and  
13 pool plants?
- 14 A. Yes.
- 15 Q. Do you have Exhibit 7 with you, the data  
16 requested from Dairy Farmers of America?
- 17 A. Yes.
- 18 Q. Can you turn to Request Number 9(a) which  
19 is a map of the Mideast Marketing Area?
- 20 A. Yes.
- 21 Q. And on that map, are there plants listed  
22 under the second heading for the legend called  
23 "Partially Regulated Plants"?
- 24 A. Yes.
- 25 Q. Do you see, for instance, a green triangle

1 for a partially regulated plant, the only one  
2 located in New York, the only plant of any kind  
3 located in New York?

4 A. Yes.

5 Q. I know -- I was not sure how well you know  
6 New York geography, but do you know whether that  
7 would be around Buffalo?

8 A. I'm just showing my ignorance of New York  
9 geography, so, no.

10 Q. Okay. You don't know. But regardless, it  
11 is the only plant listed on Request Number 9(a),  
12 a map for the identical month May 2004, in New  
13 York, correct?

14 A. Yes.

15 Q. Okay. Looking at your document that you  
16 pulled down --

17 MR. ENGLISH: -- which, Your  
18 Honor, I would like to have marked at this time.

19 JUDGE DAVENPORT: Very well. It will  
20 be marked as Exhibit --

21 MR. ENGLISH: And I'll get  
22 additional copies.

23 JUDGE DAVENPORT: It will be marked  
24 as Exhibit 37. The reason I've marked it as 37,  
25 I've already marked Mr. Christ's statement as

1 Exhibit 36.

2 MR. ENGLISH: Sorry to get ahead  
3 of this.

4 (Thereupon, Exhibits 36 and 37 of the  
5 Mideast Federal Milk Marketing Order  
6 hearing were marked for purposes of  
7 identification.)

8 BY MR. ENGLISH:

9 Q. What has now been marked as Exhibit 37, do  
10 you see a plant listed under New York?

11 A. Yes.

12 Q. And what is the name of the plant listed  
13 under New York?

14 A. Upstate Farms.

15 Q. Looking at Request Number 9(a), which has  
16 only one plant listed as a partially regulated  
17 plant, what do you conclude about Upstate Farms  
18 as to its pool status?

19 A. They appear to be a partially regulated  
20 plant.

21 Q. Which is not the same thing as a pool  
22 plant?

23 A. That's correct.

24 Q. So the questions yesterday that I asked  
25 were correct, that it is not a pool plant,

1 correct?

2 A. I would say, yes.

3 Q. Looking for a moment in Pennsylvania now,  
4 outside the marketing area -- I'm sorry, let's  
5 skip that. Let's look at Maryland because  
6 there's only one plant in Maryland. Do you see  
7 one plant in Maryland?

8 A. Yes.

9 Q. Is that plant a partially regulated plant?

10 A. Yes.

11 Q. Looking at both the last page of Attachment  
12 2, which purports to be pool plants, and what is  
13 now marked as Exhibit 36, do you see one plant  
14 listed under Maryland?

15 A. Yes.

16 Q. And that is Potomac Farms Dairy,  
17 Cumberland?

18 A. Yes.

19 Q. And that's a partially regulated plant,  
20 correct?

21 A. It would appear.

22 Q. That's the only plant listed on a map,  
23 which by the way, I suspect was probably, if you  
24 go to the internet, attached to this very  
25 document that we now attached as Exhibit 37,

1 right? I mean, the two are related?

2 A. Yes.

3 Q. And, in fact, Exhibit 37 and Attachment 2,  
4 also have supply plants listed, correct?

5 A. Yes.

6 MR. ENGLISH: Your Honor, I renew  
7 my objection to strike Attachment 2. This is  
8 precisely why we ought not to have documents  
9 just admitted into evidence that purport to be  
10 from somewhere that an inaccurate. The heading  
11 on this document has plainly been altered by  
12 someone.

13 Exhibit 37 is direct from the Market  
14 Administrator's document. It matches up with  
15 9(a) which was put into evidence by the Market  
16 Administrator for May 2004. A partially  
17 regulated plant is not the same thing as a pool  
18 plant. There were questions asked in an attempt  
19 to rehabilitate Attachment 2, for that matter,  
20 it even called into question my questions about  
21 Attachment 2, which now actually shows that  
22 Attachment 2 was even worse than we thought it  
23 was.

24 It has a label which is inaccurate,  
25 and to permit an inaccurate document, that is

1 how things get into court at some point. We  
2 have an inaccurate document, we don't know who  
3 prepared it, we don't know who pulled it off the  
4 internet, and I've -- these are only the errors  
5 I've been able to identify so far. The entire  
6 attachment has been called into question  
7 repeatedly and ought to be stricken and I renew  
8 my motion to strike Attachment 2.

9 MR. BESHORE: I join the motion  
10 and add Attachment 3 to it, as I initially  
11 objected to that website compendium, alleged  
12 printout.

13 MR. ENGLISH: And it seems to be  
14 the same problem -- we just don't know because  
15 we don't know the accuracy because we don't know  
16 the source. It's not subject to  
17 cross-examination. The cross-examination of  
18 Attachment 2 and now the attempt to rehabilitate  
19 Attachment 2 only identifies and highlights the  
20 problems with that document.

21 JUDGE DAVENPORT: Mr. English, I  
22 think you've adequately pointed out the  
23 deficiencies of the exhibit and the exhibit, of  
24 course, has been previously admitted. And we've  
25 had significant testimony concerning the exhibit

1 and I'm confident the Administrator can sort it  
2 all out.

3 MR. ENGLISH: I understand, Your  
4 Honor. My only point remains that these are the  
5 only inaccuracies I've been able to find so far,  
6 and I won't have an opportunity, once the record  
7 is closed, to be able to point out more  
8 inaccuracies such as I find, but I understand.  
9 I have noted my exception. I have no further  
10 redirect of this witness.

11 MR. BESHORE: I do want to make  
12 the same comment with respect to Attachment 3  
13 and with respect to the record being closed, et  
14 cetera, that I join Mr. English's comments.

15 JUDGE DAVENPORT: Your exceptions are  
16 noted. Is there any further examination of this  
17 witness? Very well.

18 THE WITNESS: Before stepping  
19 down, I need to make a correction.

20 MR. ENGLISH: I apologize, Your  
21 Honor. This is a correction that he noted to  
22 me, not the other way around.

23 BY MR. ENGLISH:

24 Q. Correct, Mr. Kinser?

25 A. That is correct. The correction --

1 Q. Why don't you identify the page?

2 A. The error is on page 12 of my statement.

3 And if you recall at that point I paused

4 significantly trying to contemplate that

5 something didn't look right. I figured out what

6 it is.

7 On page 12 under Proposal 8, Section 6 of

8 the proposed language, I noted a change in the

9 first -- second line of paragraph 6 "received at

10 any pool plant." The original language there

11 said, "received at a pool plant." That should

12 have stayed.

13 So it should have read, "received at a pool

14 plant or by a cooperative association handler."

15 And then the change that I intended to make is

16 in the next line described in Section 1000.9

17 subsection (c), and the original proposal said

18 "the," it should have been struck and had "any

19 pool plant operator or," the original proposal

20 said "the" and should have been struck and had

21 "any cooperative association."

22 So in preparing this -- I still am

23 consistent that I was changing "the" from "any,"

24 I just inserted it in the wrong spot in the

25 language.

1 Q. The bottom line is you're not making any  
2 change in line 2 of subparagraph 6 as it appears  
3 in the notice, but you are making a change, you  
4 identified, in 3 to "any" that appears as "the"  
5 in the notes?

6 A. That is correct.

7 MR. ENGLISH: Thank you. No  
8 further questions.

9 JUDGE DAVENPORT: Mr. English, we do  
10 have Mr. Bear that would like to be heard.  
11 We'll take him at this time.

12 MR. ENGLISH: I would certainly  
13 defer to Your Honor as always.

14 (Thereupon, a discussion was held off  
15 the record.)

16 JUDGE DAVENPORT: We are back on the  
17 record.

18 MR. ENGLISH: The document I  
19 identified as Mideast Marketing Area Plants for  
20 May 2004 I think we've identified as Exhibit 37,  
21 Your Honor?

22 JUDGE DAVENPORT: Exhibits 37, 33 and  
23 33-A through G are all admitted into evidence at  
24 this time, as is Exhibit 34, which we need some  
25 additional copies of which was the annual

1 report.

2 MR. ENGLISH: Okay. Somebody  
3 else can provide those. I'm providing the court  
4 reporter with copies of Exhibit 37, and also the  
5 Government.

6 JUDGE DAVENPORT: Mr. Baer's  
7 statement will be marked as Exhibit 38 for  
8 identification at this time.

9 (Thereupon, Exhibit 38 of the Mideast  
10 Federal Milk Marketing Order hearing  
11 was marked for purposes of  
12 identification.)

13 JUDGE DAVENPORT: Would you raise  
14 your right hand?

15 (Thereupon, Mr. Baer was sworn by  
16 Judge Davenport.)

17 JUDGE DAVENPORT: Please be seated.

18 MR. BAER: I have a bad cold,  
19 so bear with me.

20 JUDGE DAVENPORT: Please identify  
21 yourself. Your statement does that, but if you  
22 would, spell your name for the hearing reporter.

23 MR. BAER: My name is Larry  
24 Baer, B-a-e-r, Larry as it sounds. My farm is  
25 located at Marshallville, Ohio. 12599 Bolton

1 Road, Marshallville 44645. My family owns L & R  
2 Dairy Farm, which stands for Larry and Roberta,  
3 and now stands for Robyn, my daughter, in  
4 Marshallville, Ohio, Wayne County. Our dairy  
5 farm has been in the family for 75 years; it's  
6 the third generation. My daughter Robyn joining  
7 my wife Roberta and I operating this 300-cow  
8 dairy. We ship our milk as independent  
9 producers to Smith Dairy in Orrville, Ohio, a  
10 good independent market.

11 I testified in the Order 33 hearing  
12 in Wadsworth, Ohio a couple of years ago or  
13 whenever, in hopes that we had solved pooling  
14 problems, but apparently not. I strongly urge  
15 the USDA to acknowledge that a milk market  
16 emergency exists in Federal Order 33 and needs  
17 to take prompt, emergency action to proposals at  
18 this hearing.

19 I strongly oppose one proposal being  
20 discussed today, transportation credits. As I  
21 can best figure out, this proposal seeks  
22 transportation credits for milk hauled more than  
23 75 miles and up to 400 miles from farm to plant.  
24 I think this proposal is unacceptable. If  
25 approved, it would become one more hose to

1 siphon money out of our monthly producer revenue  
2 pool in Order 33 before our statistical uniform  
3 price are calculated.

4           Let's review recent history in  
5 Federal Order 33. Many recent events, just like  
6 the proposed transportation credit, have drained  
7 funds from revenue pools reducing farmers' milk  
8 prices. I offer this history to remind USDA  
9 about the dangers of proposed transportation  
10 credits, which I fear would become another giant  
11 sucking sound taking money away from our milk  
12 income.

13           Wisconsin Milk Pooled on Order 33.  
14 Millions of pounds of milk from Wisconsin are  
15 pooled on Order 33 each month. Over extended  
16 periods of time, milk from Wisconsin has reduced  
17 our milk prices by as much as \$0.60 to \$0.80 per  
18 hundredweight in Order 33. Only a small amount  
19 of this milk actually is delivered to Order 33  
20 plants, only enough to qualify larger volumes  
21 each month. I find it ironic that proposal for  
22 transportation credits extends up to 400 miles.  
23 Why, that's just about the distance from milk  
24 rich northeastern Wisconsin to fluid milk plants  
25 in southeastern Michigan or south central

1 Indiana.

2           Proposing that Order 33 producers  
3 subsidize through a transportation credit the  
4 distance from these faraway Wisconsin farms  
5 pooled on Order 33 to plants in western Michigan  
6 or Indiana is, in my opinion, ridiculous.

7           Order 33 producers are already abused  
8 by long distance pooling of milk, one of the  
9 issues being discussed here. It is wrong to  
10 expect that we subsidize the transportation of  
11 Wisconsin milk that drains our milk checks each  
12 month.

13           Depooling. Three times during 2004,  
14 Order 33 producers suffered depooling. That's  
15 when the Class III cheese milk price rises above  
16 the Class I fluid milk prices for a particular  
17 month. Those months, major marketers depool the  
18 cheese milk removing millions of dollars from  
19 the Federal Order revenue pump -- pool. Excuse  
20 me.

21           The Order 33 Market Administrator  
22 estimates that for the worst month, April 2004,  
23 all producers lost around \$1.60 or more because  
24 of the depooling. Our farm alone lost \$9,000 in  
25 April 2004 due to depooling. And following

1 almost two years of low milk prices prior to  
2 that, we surely needed that income which  
3 depooling stole.

4 Certain market organizations derive  
5 large amounts of revenue from depooling. Isn't  
6 that money stolen by depooling enough subsidy  
7 for certain marketers' inefficiencies?

8 I never cease to be amazed at all the  
9 ways money can disappear from the Order 33 pool  
10 and my milk check. In June of 2004, certain  
11 marketing organizations pooled tens of millions  
12 of pounds of milk from farms usually associated  
13 with the Northeast Federal Milk Order, Order 1,  
14 on Federal Order 33.

15 Why? Because these same marketers  
16 depooled that same Class III milk from the  
17 Northeast Milk Order, Order 1, in April and May  
18 of 2004. Under the rules of Order 1, that milk  
19 volume could not be pooled on Order 1 until July  
20 2004. So rather than lose money by being unable  
21 to pool so many millions of pounds of milk in  
22 Order 1 for June 2004, certain marketing  
23 organizations trucked enough of that milk west  
24 to Order 33 plants to qualify it here. In June  
25 2004, the addition of Order 1 milk plus the

1 repooling of normal Class III milk surplus in  
2 Order 33 caused a 10 times increase in cheese  
3 milk in this Order, compared to May 2004 Class  
4 III totals. That's disorderly marketing.

5           The Market Administrator estimates  
6 that all Order 33 producers lost about \$0.06 per  
7 hundred -- about \$0.06 per hundredweight because  
8 of that Northeast milk pooled on Order 33 in  
9 June 2004.

10           Virtually all that Northeast milk  
11 traveled more than 75 miles to get to Order 33  
12 plants in June 2004. I estimate that if such  
13 transportation credits were in place in June  
14 2004, that certain marketing organizations would  
15 want to charge M-E to subsidize this inefficient  
16 movement of milk, that already had lowered my  
17 monthly milk price by importing millions of  
18 pounds of milk from states as far away as  
19 Vermont and New Jersey. Give me a break.

20           In conclusion, I completely oppose  
21 any scheme, such as transportation credits, to  
22 further extend the powers of raw milk marketers,  
23 co-ops or private handlers to take any more  
24 money out of the Order 33 producer revenue pool.  
25 Enough is enough.

1                   I support Proposal 4 and 5 or 6 which  
2   calls for firms to be allowed to pool only 115  
3   percent more milk than pooled during the  
4   previous month. That proposal would help stop  
5   depooling maybe.

6                   I further urge that USDA recognize  
7   disorderly marketing conditions in Order 33 and  
8   review the hearing record and proposals on an  
9   emergency basis. We need these market  
10  inequities addressed promptly, and not wait two  
11  or three years for a solution.

12                  Transportation credits would, in my  
13  opinion, encourage more marketing  
14  inefficiencies. In an efficient dairy market  
15  place, certain marketing organizations would  
16  recover additional transportation costs from raw  
17  milk buyers. Failure to make raw milk buyers  
18  pay the true costs of delivering the produce to  
19  their plant door merely subsidizes processors'  
20  profits.

21                  The Baer family does not wish to  
22  further encourage these same parasites siphoning  
23  more of our milk income by creating  
24  transportation credits in Order 33.

25                  This summarizes my thing, but I would

1 like to speak from my heart a little bit, if I  
2 so may. I've been at this hearing since it  
3 started. And to some extent I'm amazed at  
4 what's taken place. I think that we have a  
5 monopoly in our Order, and I feel that DFA, and  
6 I don't want to be nasty, but you guys had every  
7 chance to pay the farmer when you depooled on  
8 over order premium. You siphoned that money  
9 out, and you had testimony at this hearing that  
10 nobody seems to know where that money went. The  
11 directors testified, two of them, and neither  
12 one of them got the money from the depooling.

13           Now, when I was at that Order hearing  
14 in Wadsworth some years back, that issue was on  
15 the line and you would not address it. But I  
16 talked to your man afterwards, just like  
17 Mr. Gallagher, that's your marketing man, and I  
18 said, "I do not have a problem if you depool if  
19 the farmers get that money."

20           Now, this thing -- for two years we  
21 brought very low milk prices, extremely low milk  
22 prices. And when it came around that the price  
23 rose, you guys took the money and run. Now you  
24 want to create a tax for us to subsidize the  
25 haulers out of everybody's milk check. And I

1 went out and talked to several of your  
2 individual producers and none of them know about  
3 it, not one.

4 Now, do you represent the farmers or  
5 do you not? I think it's very important that we  
6 have recognition in this meeting. And I hope  
7 the Market -- well, USDA has some support in on  
8 it, I surely do. Thank you.

9 JUDGE DAVENPORT: Cross?  
10 Mr. Beshore?

11 LARRY BAER  
12 of lawful age, a Witness herein, having been  
13 first duly sworn, as hereinafter certified,  
14 testified and said as follows:

15 CROSS-EXAMINATION

16 BY MR. BESHORE:

17 Q. Morning, Mr. Baer. You're in support, I  
18 gather, of the proposals and DFA's advance to  
19 tighten the pooling provisions of the Order, to  
20 make it more difficult for distant and un -- and  
21 excess supplies of reserve to be on the Order?

22 A. I didn't quite follow your question.

23 Q. The proposals -- you've been here most of  
24 the hearing. You heard Mr. Gallagher's  
25 testimony?

1 A. Yes, I did.

2 Q. Did you hear him talk about Proposal 2,  
3 which would tighten the performance provisions  
4 of the Order, increase the requirements to  
5 supply milk in distributing plants that you want  
6 to be pooled? Do you remember that?

7 A. Yes, I do.

8 Q. Okay. And I would assume, and you tell me  
9 if I'm wrong, that you would support that?

10 A. Yes.

11 Q. You think it's a good idea?

12 A. I feel that you're putting the cheese  
13 plants that was proposed earlier at a  
14 disadvantage because they're going to have to  
15 buy more milk and you're going to charge them  
16 money for -- to pool.

17 Q. So you oppose --

18 A. Yes, I do.

19 Q. You oppose tightening up the pool -- do you  
20 understand that those regulations are what  
21 enable a couple hundred milk -- pounds of milk  
22 per month from Wisconsin or Iowa to be pooled on  
23 the Order?

24 A. Well, I understand that, but I think that  
25 one of the -- the issues that I addressed that

1 that they have to touch base ten times per  
2 month.

3 Q. You think they do?

4 A. Well, if I understand it. Now, I'm no  
5 market expert. Trust me.

6 Q. Okay.

7 A. I'm just a farmer. I would sooner be home  
8 milking cows than being here, trust me.

9 Q. I trust you about that.

10 A. But I feel that I don't want to put a  
11 cheese plant at a disadvantage of having to pay  
12 your organization or some organization to pool  
13 up milk if they do need it. And we do know that  
14 Federal Order 33 brings in milk because they do  
15 not have enough milk for Class III.

16 Q. For Class III?

17 A. Yes. Or Class I, whichever. Somebody's  
18 going to get shorted.

19 Q. Okay. And you heard Mr. Gallagher testify,  
20 and I think we're close to the same page here,  
21 that depooling should be restricted?

22 A. Absolutely.

23 Q. Okay. Now, the subject on which we differ  
24 is transportation credits, I take it, from your  
25 testimony, correct?

- 1 A. Pardon?
- 2 Q. You don't agree with DFA's position or the  
3 position of Michigan Milk Producers Association,  
4 National Farmers Organization and Dairylea  
5 Cooperative on transportation credits, right?
- 6 A. That's right.
- 7 Q. How far is your -- by the way, have you  
8 ever been a member of a milk marketing  
9 cooperative?
- 10 A. Yes, I have.
- 11 Q. Your family has. What cooperative was  
12 that?
- 13 A. I was with MMI, and then when they merged I  
14 was a member for a very short time.
- 15 Q. Okay. And you elected to go independent?
- 16 A. Yes, I did.
- 17 Q. Okay. And it's -- has it been a good  
18 financial option for you?
- 19 A. Yes, it has. Very much so.
- 20 Q. You get paid more than your cooperative  
21 neighbors for their milk?
- 22 A. Yes.
- 23 Q. How much more?
- 24 A. Well, I don't know what they get all the  
25 time, but I do get more.

- 1 Q. When you do know -- when you do know, how  
2 much more do you get?
- 3 A. Probably \$0.25, \$0.30. It depends on the  
4 quality.
- 5 Q. Now, at Smith Dairy, what's your -- what's  
6 your average over order premium year-round?
- 7 A. Well, I'm not sure I'm prepared to give  
8 that statement to you. It's probably \$0.45,  
9 \$0.50.
- 10 Q. And how about quality premiums, what do  
11 they run?
- 12 A. Well, I'm at the top of the quality.
- 13 Q. Okay. And what's the amount of premium  
14 that Smith offers for top quality?
- 15 A. \$0.95.
- 16 Q. On all your milk?
- 17 A. Yes.
- 18 Q. And that's in addition to the basic over  
19 order premium?
- 20 A. That's correct.
- 21 Q. Are there any other incentive programs that  
22 Smith has?
- 23 A. Yes, they do.
- 24 Q. And what are they?
- 25 A. Volumes. I'm not sure on them figures.

1 Q. Okay. Is your 300-cow dairy entitled to  
2 volume premiums?

3 A. Pardon?

4 Q. Your 300-cow dairy, are you entitled to  
5 volume premiums?

6 A. Yes, I am.

7 Q. What are the volume premiums? What do they  
8 range from?

9 A. You know, I'm not sure.

10 Q. But whatever it is, it would be in addition  
11 to the quality premium and the basic premium?

12 A. That's correct.

13 Q. Are there any other premiums that Smith  
14 has?

15 A. Well, no. Well, yes, they do. They have a  
16 yearly premium. If you stay with them and if  
17 you get the quality premium, you get an  
18 additional amount.

19 Q. Okay. A longevity type of premium?

20 A. That's correct.

21 Q. Okay. How much is that?

22 A. Oh, I would have to go home and figure  
23 that. I wasn't prepared for that.

24 Q. Okay. \$0.05 on all your milk, \$0.15 cents,  
25 something in that order?

- 1 A. Yeah. That's probably right.
- 2 Q. Okay. Now, Smith Dairy, which has some  
3 very attractive programs for pay, as you've  
4 described, is nevertheless not able to acquire  
5 all its milk or chooses not to acquire all its  
6 milk from independent dairy farmers?
- 7 A. Yes.
- 8 Q. You heard Mr. Steiner's testimony, correct?  
9 And the supplier that balances Smith Dairy are  
10 the cooperatives in the Order, correct?
- 11 A. That's right.
- 12 Q. Okay. And when they bring that milk into  
13 Smith Dairy, you heard the testimony, he's paid  
14 the delivered price; is that correct?
- 15 A. That's right. That's what he said.
- 16 Q. The same price regardless of what distance  
17 that milk has to come from, correct?
- 18 A. That's right.
- 19 Q. By the way, how far is your farm from Smith  
20 Dairy?
- 21 A. Three miles.
- 22 Q. Okay. What's your hauling charge to get  
23 it?
- 24 A. I can't even tell you that.
- 25 Q. You don't know?

- 1 A. No.
- 2 Q. Do you know if it's less than \$0.50 a  
3 hundredweight?
- 4 A. It probably is.
- 5 Q. Less than \$0.40?
- 6 A. I would have to go home and figure it.
- 7 Q. Okay. Does Smith have any hauling subsidy  
8 incentive programs?
- 9 A. No.
- 10 Q. Okay. Now, you would agree with me, of  
11 course, that if a dairy farmer was 150 miles  
12 from the plant and chose to supply Smith, it  
13 would be responsible for having its milk  
14 delivered to Smith's plant, incur the hauling  
15 cost?
- 16 A. Probably.
- 17 Q. And it would cost more than you because  
18 you're three miles from the plant?
- 19 A. Right.
- 20 Q. But Smith would pay the same price for it,  
21 correct?
- 22 A. I would imagine.
- 23 Q. To the best of your knowledge, he offers  
24 the same premium prices and programs to all  
25 producers regardless of where they're located,

1 correct?

2 A. (Witness nodding head up and down.)

3 Q. Is that a "yes"?

4 A. Yes.

5 Q. Okay.

6 MR. BESHORE: Can I have a  
7 second? I don't have any other questions.

8 Thank you, Mr. Baer.

9 THE WITNESS: You're welcome.

10 JUDGE DAVENPORT: Other cross? Very  
11 well. Mr. Baer, thank you for your testimony  
12 here today and being with us this week.

13 THE WITNESS: Thank you.

14 JUDGE DAVENPORT: At this time I  
15 would propose that we take our lunch recess and  
16 let's be back at 12:30, let's say.

17 MR. ENGLISH: That's fine with  
18 me, Your Honor.

19 MR. BESHORE: I'm sorry. I  
20 didn't -- could we make it 1:00?

21 JUDGE DAVENPORT: We can make it  
22 1:00.

23 MR. GALLAGHER: Let's make it noon.  
24 We'll be back. Come on.

25 MR. BESHORE: We're going to have

1 lunch.

2 MR. ENGLISH: Whatever you want,

3 Marv.

4 MR. BESHORE: I would like 1:00.

5 JUDGE DAVENPORT: Very well. We'll  
6 make it 1:00.

7 (Thereupon, a luncheon recess was  
8 taken at 11:30 a.m., with the  
9 proceedings to be continued at 1:00  
10 p.m.)

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1                                   AFTERNOON SESSION

2   1:02 p.m.

3                           (Thereupon, Mr. Christ was sworn by  
4                           Judge Davenport.)

5                           JUDGE DAVENPORT: Very well.

6                           Mr. English?

7   MR. ENGLISH:           Thank you, Your  
8                           Honor. Dean Foods calls Mr. Paul Christ.

9   PAUL G. CHRIST

10                           of lawful age, a Witness herein, having been  
11                           first duly sworn, as hereinafter certified,  
12                           testified and said as follows:

13   DIRECT EXAMINATION

14                           BY MR. ENGLISH:

15                           Q. Mr. Christ, could you read the first  
16                           paragraph of your statement, and then I'm going  
17                           to ask you a few follow-up questions.

18                           A. My name is Paul G. Christ, spelled  
19                           C-h-r-i-s-t. I reside at 245 Indian Trail,  
20                           South Afton, Minnesota 55001. I have a long  
21                           background in working with Federal Milk Orders.  
22                           From 1961 to early 1974 I worked for the Dairy  
23                           Division of the Agricultural Marketing Service  
24                           of USDA, both in the Washington office and in  
25                           the Market Administrator's offices in the field.

1 Between 1974 and 2000 I worked for Land O'Lakes,  
2 Incorporated and was responsible for marketing  
3 Land O'Lakes member milk under several Federal  
4 Milk Orders, and when necessary, for proposing  
5 changes to those orders. Thus, I have  
6 experience both inside and outside the  
7 government in the operation and effects of  
8 individual milk orders and of the entire Federal  
9 Milk Order system.

10 Q. Thank you. May I interrupt you for a  
11 couple minutes? What is your educational  
12 background?

13 A. I have a bachelor's and master's degree  
14 from Southern Illinois University. The  
15 Bachelor's Degree was in vocational agriculture  
16 which was -- I was trained to be a teacher of  
17 agriculture. A Master's in agricultural  
18 economics. I went to graduate school at Kansas  
19 State University working on a Ph.D. I didn't  
20 finish the paper.

21 Q. Nonetheless, you have an educational  
22 background in ag economics?

23 A. Yes. That's the strongest part of it.

24 Q. And so there will not be any implications  
25 here, you left full-time employ with Land

1 O'Lakes in 2000, but you have not departed the  
2 dairy industry entirely, have you?

3 A. No, I have not. I've done some consulting  
4 for several clients, primarily Dean Foods in the  
5 last couple years, on an intermittent basis.

6 Q. And you've appeared at a number of hearings  
7 since 2000?

8 A. Yes, I have.

9 Q. Continue with your statement, sir.

10 A. I appear here as an advocate for Dean Foods  
11 Company in support of Proposal Numbers 2, 3, 4,  
12 6, 7 and 8. I will attempt to explain how each  
13 proposal would work, and how it would improve  
14 the supply of milk available for fluid use and  
15 the well-being of producers whose milk is  
16 continuously pooled.

17 As was stated by Evan Kinser in his earlier  
18 testimony, Dean Foods Company is interested in  
19 improving two aspects of the Mideast Milk Order.  
20 The first is to improve the ability of the Order  
21 to attract an adequate and reliable supply of  
22 milk to the Federal Order 33 pool, and the  
23 second is to improve the availability of milk  
24 for Class I use. I will address each proposal  
25 in its order of priority for Dean Foods Company.

1 I'll start with Proposal Number 4.

2 Proposal Number 4 is the most important of  
3 all the proposals offered at this hearing. It  
4 would establish a dairy farmer for other markets  
5 provision that would require a greater  
6 commitment by handlers to either pool or not to  
7 pool milk on the Order. I will attempt to  
8 explain how Proposal Number 4 would work. It  
9 would add a new subparagraph (b)(5) to the  
10 producer definition, Section 1033.12.

11 Dean Foods recommends one change in the  
12 language offered in the hearing notice by Ohio  
13 Dairy Producers and the Ohio Farmers Union. We  
14 would change the words "the pool plant operator  
15 or the cooperative association" in the first  
16 sentence of the proposed Subparagraph  
17 1033.23(b)(5) to read "any pool plant operator  
18 or any cooperative association." This is the  
19 same change that was present by Mr. Kinser  
20 earlier. This change would make the depooling  
21 of any dairy farmer's milk by any handler in any  
22 Federal Milk -- Federal Order Market subject to  
23 the repooling terms of the rest of the  
24 subparagraph.

25 The new subparagraph would exclude from the

1 pool the milk of any dairy farmer whose milk was  
2 not continuously pooled under one or another  
3 Federal Milk Order during the last 12 months.  
4 The sole exception from this exclusion would be  
5 the case where the dairy farmer temporarily lost  
6 Grade A status and whose production facility was  
7 reinstated as Grade A within 21 days. This  
8 exception can be achieved by adopting a  
9 conforming change under Proposal Number 3  
10 offered by Dean Foods Company to the producer  
11 milk definition.

12       The idea behind requiring ten days'  
13 delivery of milk to a distributing plant is to  
14 provide a benefit to the pool while discouraging  
15 milk that was depooled for economic reasons from  
16 easily becoming repooled when it is economically  
17 favorable to do so. The benefit to the pool  
18 would be more milk being made readily available  
19 to the Class I market.

20       Dairy farmers for whom their milk is pooled  
21 when benefits exist and is not pooled when costs  
22 exist create a burden on producers whose milk is  
23 continuously pooled. When the blend price is  
24 higher than a particular class price, there is  
25 an incentive to pool all milk used in that

1 class. This has the effect of averaging down  
2 the producer price differential and the blend  
3 price, reducing returns to continuously pooled  
4 producers. On the other hand, when the blend  
5 price is lower than a particular class price,  
6 there is an incentive to depool all milk used in  
7 that class. This also has the effect of  
8 averaging down the producer price differential  
9 and the blend price resulting, again, in reduced  
10 returns to continuously pooled producers. The  
11 losers in this process are the producers whose  
12 milk is kept in the pool and continues to be  
13 available to serve the needs of the fluid  
14 market.

15 Under Proposal Number 4, milk that was  
16 depooled within the last 12 months could again  
17 become repooled if the responsible handler  
18 demonstrates that it is, in fact, available for  
19 fluid use. This is accomplished by delivering  
20 ten days' production from that dairy farmer's  
21 facility to a pool distributing plant. This  
22 demonstration would ensure that pool  
23 participation would be open to any dairy farmer  
24 for whom it is technically and economically  
25 feasible to supply milk for fluid use. In

1 effect, the proposal would not prevent  
2 depooling. However, it would make it more  
3 difficult to return such a dairy farmer's milk  
4 to the pool after it once depooled.

5 This demonstration of competence to supply  
6 milk for fluid use would continue for 12 months  
7 before such formerly depooled milk could be  
8 pooled under the more flexible provisions of the  
9 Order that apply to continuously pooled milk.

10 This proposed change would not be  
11 economically burdensome if the milk were  
12 favorably located relative to a distributing  
13 plant. However, it would make it expensive for  
14 a distance -- a distant or unfavorably located  
15 farmer to again become a producer and  
16 participant in the pool. It would also ensure  
17 the milk for which it is not technically or  
18 economically feasible to serve the fluid market  
19 would not reenter the pool.

20 Dairy farmers whose milk is pooled  
21 continuously under the Mideast Milk Order would  
22 not be affected by this proposal. These dairy  
23 farmers shared in both the costs and the  
24 benefits of pool participation on a continuous  
25 basis. Also, dairy farmers whose milk is pooled

1 continuously under any other Federal Milk Orders  
2 during the preceding year would not be affected  
3 by this proposal. They could enter the Federal  
4 Order 33 pool under the same flexible provisions  
5 as apply to Federal Order 33 producers who were  
6 not depooled within the last year. In effect,  
7 these other Order producers were continuous  
8 participants in one or another Federal Order,  
9 pool sharing both the costs and the benefits of  
10 such participation on a continuous basis.

11 So Proposal Number 4 would have three  
12 desirable effects. Number one, some milk in  
13 Class II, III or IV would stay in the pool when  
14 the blend price was lower than the class price,  
15 in order to avoid the extra cost of returning to  
16 the pool. This would increase the producer  
17 price differential making it less negative and  
18 the blend price for all producers, especially  
19 those whose milk is delivered to distributing  
20 plants; two, some Class III milk that is  
21 depooled would never return to the pool because  
22 it is no longer technically or economically  
23 feasible to do so. This would have the effect  
24 of increasing the producer price differential  
25 whenever it is positive. These producers whose

1 milk is delivered to distributing plants would  
2 benefit; three, some Class II, III or IV milk  
3 that is depooled would return to the pool, but  
4 only through regular, significant deliveries to  
5 distributing plants. This would demonstrate  
6 that for the milk being repooled it is  
7 technically and economically feasible to serve  
8 the fluid market. It would also increase the  
9 supply of milk ready and willing to serve the  
10 needs of the fluid market.

11 For the above reasons, Dean Foods Company  
12 suggests -- urges the Secretary it adopt  
13 Proposal Number 4.

14 Now I'll discuss Proposal Number 8. Dean  
15 Foods Company offers Proposal Number 8 for  
16 consideration by the Secretary. It is offered  
17 as a weaker, less desirable alternative to  
18 Proposal Number 4, in the event that Proposal  
19 Number 4 is rejected. Proposal Number 8 reads  
20 as follows. I don't have to reread it, because  
21 it would read exactly as presented by Mr. Kinser  
22 this morning.

23 The difference between Proposal Number 4  
24 and Proposal Number 8 is that in the event that  
25 a dairy farmer's milk is depooled, the number of

1 months for which 10 days' milk production would  
2 have to be delivered to a pool distributing  
3 plant would be fewer.

4 In the first case, under subparagraph (5),  
5 if milk is depooled during the period of  
6 February through June, only four months of such  
7 deliveries would be required, compared to 12  
8 months under Proposal Number 4.

9 In the second case, also under subparagraph  
10 (5), if milk is depooled in any month of July  
11 through January, then such deliveries would be  
12 required in each month of February through June.  
13 Dean Foods is more interested in discouraging  
14 depooling in the short season than it is during  
15 the rest of the year.

16 In the third case, under subparagraph (6),  
17 if milk is depooled during the period of July  
18 through January, only 2 months of such  
19 deliveries would be required, compared to 12  
20 months under Proposal Number 4.

21 The same conforming change to the producer  
22 milk definition, which is Section 1033.13(d)(1),  
23 needs to be made for this proposal as was  
24 offered for Proposal Number 4. That change is  
25 offered by Dean Foods Company as Proposal Number

1 3. I think I discuss that at the end of the  
2 statement.

3 Proposal Number 8 would have the same  
4 general effects and benefits as Proposal Number  
5 4, except that the costs of repooling would be  
6 smaller. Thus, the beneficial effects on  
7 continuously pooled producers would be smaller,  
8 and there would be a less abundant and reliable  
9 supply available for fluid use. Therefore, we  
10 would again recommend the adoption of Proposal  
11 Number 4. But, if for whatever reason the  
12 Secretary chooses not to adopt Proposal Number  
13 4, then we recommend the adoption of Proposal  
14 Number 8.

15 Now I'll discuss Proposal Number 7.  
16 Proposal Number 7 is supported by Dean Foods  
17 Company as a less desirable alternative to both  
18 Proposal Numbers 4 and 8. It offers a different  
19 type of mechanism for limiting the amount of  
20 depooled milk that can be repooled in any  
21 month -- any given month.

22 We recommend that Proposal Number 7 be  
23 modified by deleting the words "and allocated to  
24 Class I use in excess of the prior month's  
25 volume allocated to Class I use," from proposal

1 subparagraph 1033.13(3)(1).

2       Now, I'll mention that there was a colloquy  
3 yesterday over the meaning of these words, and  
4 our interest is to ensure that any milk to  
5 distributing plants would be considered exempt  
6 from the 115 percent limitation. If it is  
7 somehow restricted by Class I use, that would  
8 make it more difficult to re-qualify the milk  
9 through deliveries to distributing plants.

10       So here's the rationale for the change, but  
11 we need to consider the discussion of the  
12 language before we come to a final conclusion on  
13 whether and how we want the language changed.  
14 This -- as I read it, this proposed subparagraph  
15 would not allow the repooling of milk delivered  
16 to a pool distributing plant unless there was  
17 growth in the Class I use at the receiving  
18 plant. We believe this places too great a  
19 burden on a handler seeking to repool formerly  
20 depooled milk by servicing the Class I market.  
21 The supplying handler has no control over the  
22 Class I sales by the receiving plant, but is  
23 nevertheless willing and able to supply the  
24 needs of that plant. Such willingness and  
25 ability is the heart of an effectively

1 functioning Federal Milk Order. It should not  
2 be discouraged in any way.

3       The mechanism for discouraging the  
4 depooling of milk under Proposal Number 7 is to  
5 restrict the amount of additional milk that can  
6 be pooled by a handler from one month to the  
7 next. That means that the volume of milk that  
8 is continuously pooled under Federal Order 33,  
9 or any other Federal Order, can be pooled  
10 without hindrance or restriction. However, milk  
11 that has been depooled under this or any other  
12 Order can only be gradually repooled. This  
13 means that most of the milk for which the cost  
14 of depooling is avoided during months of  
15 negative -- the cost of pooling is avoided  
16 during the periods of negative producer price  
17 differentials cannot immediately enjoy the  
18 benefits of pooling when the producer price  
19 differential is positive. This increases the  
20 costs of repooling. The effect is a modest  
21 discouragement of depooling.

22       If depooling is discouraged to any degree,  
23 producers whose milk stays in the pool will  
24 enjoy a higher or less negative producer price  
25 differential during months when it is negative.

1 However, Proposal Number 7 provides for instant  
2 repooling of any milk that is delivered directly  
3 to a pool distributing plant. This has the  
4 desirable effect of increasing the supply of  
5 milk that is readily available to the fluid  
6 market following a period of depooling.

7 Proposal Number 7 increases the costs of  
8 depooling with the greater percentage of a  
9 handler's milk that is depooled. The following  
10 Table 1 illustrates the time it takes to repool  
11 all of the milk of a handler if he depools  
12 between 10 percent and 90 percent of the milk  
13 under his control.

14 And Table Number 1 is headed "Effect of the  
15 percentage of milk depooled on the time it takes  
16 to repool all of the milk of a handler at a rate  
17 of 115 percent per month under Proposal Number  
18 7." This table has ten columns and the first  
19 column is the month. It ranges from zero to 17.  
20 And the other nine columns are under the heading  
21 of "Percentage of milk pooled."

22 So, for example, column number 2 has 10,  
23 which means 10 percent of the milk is pooled, 90  
24 percent is depooled. The third column is headed  
25 by 20, which means 20 percent of the milk is

1 pooled, 80 percent is depooled.

2       Now, I will read the numbers in the second  
3 to the tenth column to demonstrate how long it  
4 takes to repool all the milk based on the amount  
5 of milk that has been depooled. For example, in  
6 column number 2, if 10 percent of the milk is  
7 pooled and 90 percent is depooled, in the first  
8 month 11.5 percent of the milk can be pooled; in  
9 the second month, 13.2; in the third month,  
10 15.2; fourth month, 17.5; fifth month 20.1; the  
11 sixth month 23.1; the seventh month, 26.6; the  
12 eighth month 30.6; the ninth month, 35.2; the  
13 tenth month, 40.5; the eleventh month, 46.5; the  
14 twelfth month, 53.5; the thirteenth month, 61.5,  
15 the fourteenth month, 70.8; the fifteenth month,  
16 81.4 percent; the sixteenth month, 93.6 percent,  
17 and by the seventeenth month, 100 percent of the  
18 milk will be pooled. And this demonstrates it  
19 will take 17 months to repool all the milk if 90  
20 percent were depooled.

21       The third column headed by 20 percent means  
22 20 percent of the milk is pooled, 80 percent is  
23 depooled. In the first month, 23 percent of the  
24 milk -- total milk could be pooled; second  
25 month, 26.4; third month, 30.4; fourth month,

1 35; fifth month, 40.2 percent, sixth month,  
2 46.2; seventh month, 53.2; eighth month, 61.2;  
3 ninth month, 70.4; tenth month, 80.9; eleventh  
4 month, 93 and by the twelfth month, 100 percent  
5 of the milk will be repooled.

6       And in the case where 30 percent of the  
7 milk is pooled and 70 percent is depooled, in  
8 the first month, 34.5 percent of the total milk  
9 would be pooled; the second month, 39.7 percent;  
10 third month, 45.6 percent; fourth month, 52.5  
11 percent; fifth month, 60.3 percent; sixth month,  
12 69.4 percent; seventh month, 79.8 percent;  
13 eighth, 91.8 percent and by the ninth month, 100  
14 percent of the milk would be pooled.

15       In the fifth column headed by 40, that  
16 means 40 percent of the milk is pooled, 60  
17 percent is depooled, in the first month, 46  
18 percent of the total milk would be pooled;  
19 second month, 52.9; third month, 60.8 percent;  
20 fourth month, 70 percent; fifth month, 80.5  
21 percent; the sixth month, 92.5 percent and again  
22 in the seventh month, 100 percent of the milk  
23 would be in the pool.

24       The sixth column where 50 percent of the  
25 milk is pooled and depooled in a particular

1 month, the first column, 57.5 percent of the  
2 milk can be pooled; second month, 66.1; third  
3 month, 76.0; fourth month, 87.5 and by the fifth  
4 month, all the milk would be repooled.

5           And in the case -- in the seventh column  
6 where 60 percent of the milk is pooled and only  
7 40 percent is depooled, in the first month, 69  
8 percent of the total milk would be pooled; in  
9 the second month, 79.4; third month, 91.3  
10 percent and in the fourth month all of the milk  
11 would be in the pool.

12           The fourth column where 70 percent of the  
13 milk is pooled and 30 percent is depooled, in  
14 the first month, 80.5 percent would be in the  
15 pool.

16                   JUDGE DAVENPORT: 80.5?

17                   THE WITNESS: 80.5. Thank you.

18 The second month, 92.6 percent, and by the third  
19 month, 100 percent of the milk would be back in  
20 the pool. When only 20 percent is depooled  
21 under the ninth column and 80 percent remains in  
22 the pool, the first month, 92 percent would  
23 be -- of the total milk would be in the pool and  
24 the second month all of it. And finally, where  
25 90 percent of the milk remains in the pool and

1 only 10 percent is depooled, it would take one  
2 month and all the milk would be back in the  
3 pool.

4           What this demonstrates is the more  
5 extreme the rate of depooling, the longer it  
6 would take a handler to recover the situation  
7 where all of the milk was back in the pool, with  
8 the exception that the -- if he delivers the  
9 milk to a pool distributing plant he can speed  
10 that up.

11           So the point of Table 1 is that the  
12 greater the proportion of milk depooled, the  
13 longer the time needed to re-qualify the  
14 depooled milk. This is a desirable feature of  
15 Proposal Number 7. Those handlers and producers  
16 who capture the greatest benefit from depooling,  
17 also incur the greatest loss of benefit from  
18 attempting to regain pool status.

19           Now I'll discuss Proposal Number 6.  
20 Proposal Number 6 is very similar to Proposal  
21 Number 7. It attempts to achieve the same  
22 limited repooling of formerly depooled milk. We  
23 just prefer the language of Proposal Number 7.

24           Proposal Number 2. Proposal Number 2  
25 is supported by Dean Foods as a supplement to

1 the other proposals that we support. It would  
2 increase the shipping percentage for supply  
3 plants and cooperative association plants and  
4 would reduce the amount of milk that can be  
5 diverted.

6 By increasing the shipping percentage  
7 for supply plants and cooperative association  
8 plants, Proposal Number 2 promotes a more  
9 effective mechanism for assuring that an  
10 adequate and reliable supply of milk is  
11 available to distributing plants under the  
12 Mideast Order. Higher shipping requirements  
13 will make it more difficult to pool as much milk  
14 on the Order as in the past, but they will make  
15 a greater share of pooled milk available to the  
16 fluid market. One effect would be to increase  
17 the blend price to all producers on the market.

18 The second part of Proposal Number 2,  
19 which reduces the amount of milk that can be  
20 diverted by a plant operator, does nothing more  
21 than assure that more producer milk is actively  
22 engaged in the process of serving the fluid  
23 market. This process starts with the production  
24 of Grade A milk, and then continues the next  
25 step of being received in a Grade A pool plant

1 facility. If producer milk is diverted to a  
2 nonpool plant, then it is out of the Grade A  
3 marketing stream and is no longer available to  
4 the fluid market. The effect of this proposal  
5 is to make more milk physically available to the  
6 fluid market.

7 Proposal Number 2 would also ensure  
8 that pool plant operators keep their Grade A  
9 facilities operating at a higher level of output  
10 than would be the case if more milk were  
11 diverted. In effect, more Grade A milk would be  
12 available for fluid use at all times.

13 Finally, the conforming change in  
14 Proposal Number 3 -- milk Proposal Number 3.  
15 Proposal Number 3 is offered by Dean Foods  
16 Company as a clarification and a limitation on  
17 how long a dairy farmer's milk can be degraded  
18 without losing pool status. It reads as  
19 follows, and it reads the same as was presented  
20 by Mr. Kinser earlier.

21 Proposal Number 3 would prevent the  
22 use of phony degrading of producer milk to  
23 achieve depooling without incurring the proposed  
24 complications of repooling that milk. It closes  
25 one loophole to the effective application of

1 Proposal Numbers 4, 8 and 7.

2           Dean Foods Company is no longer  
3 offering the second part of Proposal Number 3  
4 dealing with touch base requirements. We do not  
5 intend to argue its merits neither here nor in  
6 the brief. This completes my testimony.

7 BY MR. ENGLISH:

8 Q. Thank you, Mr. Christ. There was some  
9 discussion, a fair amount of it early on amongst  
10 us for Dean Foods off the record, but also some  
11 discussion on the record in questions and  
12 colloquies with respect to Proposal Number 2(d)  
13 and how it reads.

14           Do you recollect some of that discussion  
15 without getting into what it was for a moment?

16 A. Yes, I do recollect.

17 Q. And having considered it during this  
18 hearing, have we, from our point of view,  
19 discovered something of some concern?

20 A. Yes. I believe the intent of paragraph (d)  
21 in Section 1033.7 is to require 30 percent  
22 delivery requirement for all the milk under the  
23 control of the cooperative that wants to pool  
24 the plant. That's not clearly explicit in the  
25 way the paragraph reads right now. It says, "A

1 plant operated by a cooperative association if  
2 during the month 30 percent or more of the  
3 producer milk of the members of the association  
4 is delivered to distributing pool plants or to a  
5 nonpool plant," but it doesn't explicitly  
6 include any other milk that may be under the  
7 control of the cooperative. There may be some  
8 non-member milk that belongs to another  
9 cooperative or other independent producers that  
10 may be under the control of the cooperative and  
11 nevertheless associated with the cooperative  
12 plant.

13         And we would urge that language be adopted  
14 that includes both member milk and non-member  
15 milk associated with that plant designation.  
16 And we would suggest something like that the --  
17 it should be 30 percent or more of producer milk  
18 and -- producer milk of members of the  
19 association and reported as received at the  
20 plant from producers not members of the  
21 association.

22         And we would hope that would include any  
23 milk of non-members under the control of the  
24 cooperative that was either received at the  
25 plant or diverted from the plant and the 30

1 percent requirement would apply to all that  
2 milk.

3 Q. And to be clear, we don't know of anybody,  
4 to our knowledge, who's doing this presently,  
5 correct?

6 A. No.

7 Q. But do --

8 A. I think -- my experience with Federal  
9 Orders is that this would be the intent, that  
10 all of the milk be qualified in the same fashion  
11 and just not explicitly included in the  
12 language.

13 Q. Your other experience with Federal Orders,  
14 now that we've pointed this out on the record,  
15 it might very well be the case that people might  
16 go off and do it?

17 A. Well, they might try to find a way to use  
18 this as a loophole.

19 Q. And if the intent and purpose is to  
20 continue to assure adequate supplies of milk for  
21 fluid use and to avoid the ability of any -- any  
22 entity, this is directed at everybody, right?

23 A. This would be directed at everybody, yes.

24 Q. That by closing that loophole before it's  
25 used, we might actually eventually prevent

1 ourselves from coming back to another hearing in  
2 beautiful Ohio in two or three years from now?

3 A. Yes. That is correct. And it would also  
4 result in efficient administration of the  
5 Orders.

6 MR. ENGLISH: I have no further  
7 questions at this time. While on direct we  
8 haven't addressed Proposal Number 9, it may very  
9 well be that one or more persons have questions  
10 and we will not object to that.

11 We're not putting that in direct, but  
12 we're prepared to have Mr. Christ also address  
13 Proposal Number 9, if necessary.

14 JUDGE DAVENPORT: Cross of this  
15 witness? Mr. Beshore?

16 CROSS-EXAMINATION

17 BY MR. BESHORE:

18 Q. Good afternoon, Paul.

19 A. Good afternoon, Mr. Beshore.

20 Q. A couple of questions on language from your  
21 proposals that -- and I also asked Evan Kinser  
22 about these.

23 If you go to page 2 at the top, you've, you  
24 know, testified, as Evan did, you're  
25 recommending a change in language to Proposal 4

1 and it might apply to one or more of the others  
2 from the pool plant or the cooperative to any  
3 pool plant or any cooperative?

4 A. That's correct.

5 Q. Okay. Now, wouldn't -- what's your comment  
6 on the concern that I tried to bring to the  
7 attention of the hearing when I asked Evan  
8 doesn't this place producers, individual  
9 producers who don't have any control over how  
10 their milk is pooled, potentially at a  
11 disadvantageous position if they choose to  
12 change marketing affiliation?

13 A. Yes. This is outside the control of the  
14 producer. Even today they don't have any  
15 control over whether the milk is pooled or  
16 depooled. And we have the situation, as  
17 mentioned by some of the producers, when the  
18 milk is not depooled, they suffer. So this is  
19 not an unusual case.

20 It will affect the attractiveness of a  
21 producer. If he has not been pooled for some  
22 reason in the past, it will be more difficult  
23 for a new market to generate the same kind of  
24 revenues on this milk as they do on their fully  
25 pooled producers, so there could be a bit of a

1 problem there.

2 Q. Okay. And isn't it generally the case that  
3 producers are obligated by marketing agreement,  
4 membership agreement in cooperative associations  
5 or, you know, in a number of cases in state law,  
6 obligated to provide at least 30 days or maybe  
7 60 days or even more notice to their marketing  
8 organization before they can terminate that  
9 relationship?

10 A. That's correct. Typically, especially in  
11 cooperatives, farm have a contract that they  
12 have to give advanced notice.

13 Q. Now, Proposal Number 7, go to page 5 of  
14 your testimony. You have suggested that certain  
15 proposed language in Proposal Number 7 should  
16 be -- should be eliminated if it is adopted;  
17 that language being "and allocated to Class I  
18 use in excess of the prior month's volume  
19 allocated to Class I use."

20 Without a limitation of that nature on  
21 repooling, does it not allow the depooling  
22 handler who has Class I sales to depool a  
23 portion of his milk and the next month -- a  
24 handler who has both Class I sales and Class III  
25 sales, he depooled Class III sales and the next

1 month just swapped the producers who are  
2 supplying a Class III plant, first doesn't the  
3 supplying Class I plant end up with the same  
4 volume, repool them all because they've  
5 delivered to distributing plants and not suffer  
6 any consequences?

7 A. I think that's possible, but in the case  
8 where the producers were displaced, clearly  
9 their milk was available to the fluid market.  
10 And the producers who did the replacing, the  
11 milk producers, their milk clearly is available  
12 to the fluid market. They both demonstrated  
13 their competence to supply the market.

14 Q. Well, is competence really the issue?

15 A. Competence is the issue when you consider  
16 milk from long distances, or milk that may be  
17 delivered to a cheese plant ordinarily and it  
18 may have become lax in quality, for example.  
19 There are some disciplines associated with  
20 effectively supplying the fluid market.

21 And another aspect of that is the location  
22 of the producer. If the producer is in a  
23 favorable location relative to the bottling  
24 plant, that increases his competence to ship to  
25 the bottling plant.

1 Q. Okay. So there might be some incidental  
2 costs involved in re-shuffling producers that  
3 way?

4 A. Oh, yes.

5 Q. But nevertheless, it would, in effect,  
6 defeat the intent of requiring, you know, some  
7 period of time before you can bring all your  
8 milk back on, because if you had equal amounts  
9 of milk, you could bring it all -- or enough  
10 Class I volume to cover the volume depooled, you  
11 could bring it all back on without any  
12 penalties, so to speak?

13 A. A handler who controlled class -- who had  
14 Class I sales would have that opportunity. But  
15 again, it has to be both technically and  
16 economically feasible for the milk to go to a  
17 distributing plant in order for it to be  
18 repooled and avoid these penalties.

19 Q. But if you keep the existing language in  
20 Proposal 7, it would be -- I mean, this is a  
21 case where Dean wants to loosen the proposal  
22 rather than keep it stricter, doesn't it?

23 A. We want milk delivered to distributing  
24 plants. The Class I sales will be there. And  
25 if the ability to repool is based on the growth

1 of Class I use at a particular facility or even  
2 in the market as a whole, that -- Class I use is  
3 not likely to grow by 15 percent a year, or it's  
4 not likely to grow by 1 or 2 percent a year. So  
5 I think that that creates almost an absolute  
6 barrier to -- for pooling milk through this  
7 performance criteria.

8 Q. Well, it just -- in fact, doesn't that  
9 language just mean that the 15 percent repooling  
10 limitation is a hard 15 percent which cannot be  
11 avoided by shifting milk in and out of the  
12 distributing plants, existing sales in and out?

13 A. Okay. I would argue that Dean Foods has  
14 proposed the same sort of thing both in the  
15 Upper Midwest and the Central. In that case, we  
16 wanted to offer two mechanisms for returning to  
17 the pool; one was a 15 percent rate, and the  
18 second would be to go ahead and deliver your  
19 milk to a distributing plant.

20 Q. Okay. You have not offered any comments on  
21 Proposal 9, but I would like to ask you a couple  
22 of questions about it.

23 A. Okay. Now, the policy of Dean Foods was  
24 expressed by Evan Kinser. To the degree I  
25 discussed Proposal Number 9, I'll be speaking on

1 my own behalf and not as a representative of  
2 Dean Foods. It's just based on my experience  
3 and the opinions that I've developed over the  
4 years.

5 Q. Okay. And I understand that.

6 A. Uh-huh.

7 Q. You're familiar with the transportation  
8 credits in the Upper Midwest Order?

9 A. Yes, I am.

10 Q. Okay? And can you -- your experience and  
11 your expertise and in your -- your judgment,  
12 have they been a helpful tool in that market in  
13 moving milk for Class I purposes?

14 A. In my opinion, yes, they've been helpful.  
15 Before we had Federal Reform, the price surface  
16 was very flat in the Upper Midwest and there was  
17 almost nothing available from the Order to  
18 encourage the movement of milk from supply areas  
19 into metropolitan areas where the distributing  
20 plants were located.

21 Transportation credit helped, in my view,  
22 though, they were not adequate to make it  
23 attractive to ship the fluid, but it was a  
24 better situation than existed before.

25 Q. Okay. So they -- wait. When you said

1 "they were not adequate to make it attractive to  
2 ship the fluid," what do you mean?

3 A. Well, in most heavy production areas,  
4 including in Order 33, many producers have the  
5 option of either selling to a manufacturing  
6 facility or a fluid facility. And given the  
7 fact that the fluid facility is usually located  
8 at a greater distance than the manufacturing  
9 facility, the shipping to the fluid plant would  
10 incur higher transportation costs. Okay? So a  
11 producer, if he does choose to ship to a fluid  
12 processing plant, he ends up worse off than his  
13 neighbor who ships to a manufacturing facility.

14 Now, I think this is a major flaw in  
15 Federal Milk Orders in that the focus of the  
16 Order is to get an adequate supply of milk to  
17 the fluid market. And if people who serve the  
18 fluid market end up worse off than people who  
19 ship to a manufacturing facility, the Federal  
20 Order fails. Okay?

21 Transportation costs will help offset some  
22 of that difference. And I would hope it would  
23 offset all of it because if we want producers to  
24 be willing and maybe eager to supply the fluid  
25 market, they have to be at least as well off and

1 maybe a little better off than a neighboring  
2 producer who ships to the manufacturing market.

3 Q. Okay. So transportation credits, being as  
4 they are a form of regulation and government  
5 intervention, if you will, if they just cover a  
6 portion of that deficit, if you will, for the  
7 Class I producers, that's a way of limiting the  
8 intervention in an incremental manner to see if  
9 it consists marketing conditions. Would you  
10 agree?

11 A. I would agree. Incrementally it's an  
12 improvement, but it does not resolve the problem  
13 until the producer associated with the fluid  
14 plant is at least as well off as his neighbor  
15 who's associated with the manufacturing plant.

16 Q. Okay. Is it your observation, in view of  
17 the evidence that's been presented while you  
18 were here this week and information from the  
19 Market Administrator, that the conditions you've  
20 just described exist in Order 33?

21 A. Yes. I believe that those conditions  
22 exist. That the average distance that milk has  
23 to move to get to a fluid distributing plant is  
24 greater than the average distance that milk has  
25 to move to get to a manufacturing plant.

1 Q. Okay. And therefore, on average, the fluid  
2 suppliers are disadvantaged and -- are  
3 disadvantaged?

4 A. Yes. And I view that as the failure of the  
5 Federal Order regulation.

6 Q. For which transportation credits are one  
7 means of redressing in part?

8 A. Yes. This is not the total answer, but  
9 this is a useful part of the package.

10 MR. BESHORE: May I? Thank you.

11 No other questions for Mr. Christ.

12 JUDGE DAVENPORT: Very well.

13 Mr. Vetne?

14 MR. TOM VETNE: I don't have  
15 anything, Your Honor.

16 JUDGE DAVENPORT: Mr. Tosi?

17 MR. TOSI: I have none.

18 JUDGE DAVENPORT: Very well.

19 Mr. Christ, you may step down.

20 THE WITNESS: That was easy.

21 Thank you.

22 JUDGE DAVENPORT: Mr. English, we do  
23 have one gentleman who wanted to clarify  
24 Superior Dairy's status.

25 MR. ENGLISH: That's fine, Your

1 Honor. And I have no more witnesses.

2 JUDGE DAVENPORT: You want to come up  
3 front at this time, sir? Raise your right hand.

4 (Thereupon, Mr. Soehnlén was sworn by  
5 Judge Davenport.)

6 JUDGE DAVENPORT: Please be seated.  
7 Tell us your name, and as you give us your name  
8 would you spell it for the court reporter?

9 MR. SOEHNLEN: My name is Joseph  
10 A. Soehnlén, S-o-e-h-n-l-e-n. That's pronounced  
11 "S-o-n-l-e-n."

12 MR. TOSI: We couldn't hear  
13 you, sir.

14 MR. SOEHNLEN: Okay. Basically  
15 I'm employed by Superior Dairy and Superior  
16 Dairy is a family owned company. It was started  
17 by my grandfather in 1922.

18 JUDGE DAVENPORT: Speak up just a  
19 little more.

20 MR. SOEHNLEN: Do you want me to  
21 repeat that?

22 MR. STEVENS: Your Honor -- could  
23 we get your name again? Because you were  
24 talking to the reporter, which is fine, but --

25 MR. SOEHNLEN: My name is Joe

1 Soehnlén, S-o-e-h-n-l-e-n.

2 MR. STEVENS: First name Joe, you  
3 say?

4 MR. SOEHNLEN: Joseph. I have one  
5 point that I wanted to clarify, and that is  
6 Superior Dairy is family owned company started  
7 by my grandfather in 1922. It employs between  
8 235 and 255 employees and on that basis is my  
9 belief it qualifies as a small business.

10 The other issue that I wanted to  
11 cover was that -- the major issue that has  
12 caused producers shipping to our company to call  
13 in and talk things -- talk the pricing over with  
14 me is the issue of depooling and its effects on  
15 their milk check.

16 I have discussed this issue with many  
17 of our producers who are shipping to us and I  
18 believe that the view that I'm presenting fairly  
19 represents their interests and their wishes. So  
20 it is with this in mind that I strongly support  
21 Proposal Number 4. And I certainly would  
22 include the changes presented by Mr. Christ.

23 I would also like to see changes  
24 similar or equivalent applied to the surrounding  
25 Orders. It is my experience that when you

1 change one Order and leave pooling opportunities  
2 open in other Orders, it's very, very difficult  
3 to regulate human ingenuity. It just about  
4 doesn't happen. That's the extent of my --

5 JUDGE DAVENPORT: Very well. Any  
6 examination of this witness? Mr. Beshore?

7 JOSEPH SOEHNLEN  
8 of lawful age, a Witness herein, having been  
9 first duly sworn, as hereinafter certified,  
10 testified and said as follows:

11 CROSS-EXAMINATION

12 BY MR. BESHORE:

13 Q. Good afternoon, Mr. -- is it "Soehnlén"?

14 A. "Soehnlén."

15 Q. "Soehnlén." Does Superior Dairy -- is it  
16 supplied by independent dairy farms?

17 A. Some, but we have -- about 75 percent of  
18 our supply is independent producers.

19 Q. Okay.

20 A. We get some supplemental milk from White  
21 Eagle. We get some supplemental milk from some  
22 of the cheese plants in our area and we do get  
23 some supplemental milk from Guggisberg despite  
24 the fact that they said we were not users and  
25 patrons of theirs.

1 Q. We will make sure that's corrected. We  
2 didn't mean to overlook you, sir, Mr. Soehnlén,  
3 or Superior. How many dairy farmers --  
4 independent dairy farmers make up that 75  
5 percent of your supply?

6 A. About 180.

7 Q. Can you tell us what payment programs you  
8 have for your independent farmers?

9 A. I'll be glad to share with you in general,  
10 but I don't like to get too specific. We  
11 basically pay Federal Order plus we've developed  
12 over the years a quality premium program. We  
13 used to have a quality milk over order premium  
14 and a quality premium, but the last five years  
15 we've really focused on extending the shelf life  
16 of your products and so we've put all of our  
17 emphasis on quality premiums.

18 Q. Okay. And there are tiers or levels in  
19 that quality premium?

20 A. There are levels, uh-huh.

21 Q. Do you pay any volume premiums?

22 A. No, we don't.

23 Q. Any longevity premiums, or things of that  
24 sort?

25 A. No. And I don't encourage contracts

1 because if they don't want to ship with me, I  
2 don't want them there because they have to be  
3 there.

4 Q. What's the -- what are the ranges, if you  
5 care to provide it, of the over order quality  
6 premiums that you pay?

7 A. Ranges from \$1.05 to \$1.60.

8 Q. For the lower the range at \$1.05, what's  
9 the requirement in terms of level of quality?

10 A. Well, I should know that, but I don't.

11 Q. Okay. The -- do you pool any milk on  
12 your -- for Superior Dairy in addition to that  
13 milk supplied by your independent farms?

14 A. I get some White -- I get some milk through  
15 White Eagle and I use some of your own pooling  
16 privileges, yes.

17 Q. White Eagle uses some of your pooling  
18 privileges, is that it?

19 A. Yes, that's correct.

20 Q. Okay. Do you pool any other -- like the  
21 cheese plants that you get supplemental --

22 A. Yes, we do.

23 Q. -- you pool them?

24 A. Yes.

25 Q. How many cheese plants do you pool through

1 Superior?

2 A. Three.

3 Q. Okay. Do they --

4 A. I don't pool all of their milk, but I pool  
5 some of their milk.

6 Q. Some of their milk. Do they compensate you  
7 as is the custom in the marketplace for that  
8 privilege?

9 A. I don't believe they do, but I -- the  
10 arrangement we have worked out is when I need  
11 some milk, I kind of strong-arm and get a little  
12 bit.

13 Q. Okay. And the rest of the time you report  
14 their producer milk on your pool report so that  
15 it's pooled?

16 A. (Witness nodding head up and down.)

17 Q. That's correct?

18 A. That's correct.

19 Q. Okay. Were those arrangements --

20 A. Wait. You know what, I'm not sure if it's  
21 still in existence or not. At one time we did  
22 charge one cheese plant pooling privileges. I  
23 don't know if that's still in existence or not.

24 Q. Okay. Were any of those pooling  
25 arrangements brokered by a third party?

1 A. No. Only White Eagle.

2 Q. Okay. What has it brokered?

3 A. Well, they basically handle -- they supply  
4 us supplemental milk and that's -- maybe I'm not  
5 understanding the term "brokerage"; I don't  
6 know.

7 Q. Okay. With respect to your supplemental  
8 supplies from White Eagle and from Dairy Farmers  
9 of America -- let's just talk about DFA. What's  
10 your arrangement with DFA in terms of -- do you  
11 buy from them every month of the year?

12 A. I think so, but it's strictly on a spot  
13 basis.

14 Q. Okay. Do the supplies that you acquire  
15 from them tend to be greater in the fall of the  
16 year than in the spring of the year?

17 A. I cannot answer that.

18 MR. BESHORE: Thank you,  
19 Mr. Soehnlén.

20 JUDGE DAVENPORT: Very well. Other  
21 cross? Mr. Tosi?

22 MR. TOSI: Yes, sir.

23 CROSS-EXAMINATION

24 BY MR. TOSI:

25 Q. Thank you for appearing. When you have to

1 buy supplemental milk supplies, for example,  
2 from a cooperative, are you charged an over  
3 order premium?

4 A. Yes.

5 Q. And in that do you also pay a  
6 transportation charge for having that milk  
7 delivered to your plant?

8 A. Yes.

9 Q. Okay.

10 A. I have to clarify that. That depends where  
11 it comes from. If the supplemental milk comes  
12 from a cheese plant located in our area and our  
13 milk is farm direct shipped, then I don't pay  
14 any extra hauling. And I usually don't pay any  
15 extra premium for that. I usually just trade  
16 loads.

17 Q. Okay. So what you're saying, I think, is  
18 when you need supplemental milk supplies, most  
19 of it is available to you locally?

20 A. No, most of it isn't available to me  
21 locally. I have to bring milk in from out of  
22 the area.

23 Q. Okay.

24 A. We have several large customers and when  
25 they run a special promotion, milk would be very

1 difficult to find locally.

2 Q. But you do pay for delivery?

3 A. Yes, I do.

4 MR. TOSI: Thank you very  
5 much. That's all I have.

6 JUDGE DAVENPORT: Yes, sir.

7 FURTHER CROSS-EXAMINATION

8 BY MR. BESHORE:

9 Q. I just want to make sure things are clear  
10 here on the charges. If you buy supplemental  
11 milk through a DFA or -- basically does that  
12 come through MEMMA? Is that your understanding?

13 A. (Witness nodding head up and down.)

14 Q. "Yes"?

15 A. Yes, it does.

16 Q. Or under the MEMMA pricing program?

17 A. (Witness nodding head up and down.)

18 Q. You need to say "yes" --

19 A. Yes.

20 Q. -- so that we can have it show on the  
21 record. Thank you. You're charged a price for  
22 that milk, correct?

23 A. Correct.

24 Q. And that price might be premium of an over  
25 order premium of \$1.50, \$1.75, you know, \$2,

1 whatever it might be at the time, correct?

2 A. That's correct.

3 Q. Okay. There's no additional charge for  
4 transportation?

5 A. Not through DFA, no. That's correct.

6 Q. Okay. You have a delivery charge, the  
7 volume's delivered to your plant at that amount,  
8 you're billed at the volume for that amount and  
9 that's how it was purchased and delivered,  
10 correct?

11 A. That's correct.

12 Q. Regardless of where it has to come from as  
13 far as DFA's concerned?

14 A. That's correct.

15 Q. Okay.

16 MR. BESHORE: Thank you.

17 JUDGE DAVENPORT: Other questions?

18 Thank you, Mr. Soehnlén. You may step down.

19 MR. SOEHNLEN: Thank you.

20 JUDGE DAVENPORT: You want just a  
21 second before you put on your rebuttal witness?

22 MR. BESHORE: I think we're  
23 ready. Mr. Rasch is the first witness.

24 JUDGE DAVENPORT: Mr. Rasch, you were  
25 previously sworn. You're still under oath.

1           (Thereupon, Exhibit 39 of the Mideast  
2           Federal Milk Marketing Order hearing  
3           was marked for purposes of  
4           identification.)

5           MR. RASCH:           All right. I have  
6           an additional statement I would like to present  
7           at this time as it relates to transportation  
8           credits and the statements on behalf of the  
9           Michigan Milk Producers Association whom I'm  
10          representing. In previous testimony that's  
11          taken place here, we have indicated that we  
12          support the transportation proposal as  
13          modified -- Proposal Number 9 as modified by the  
14          DFA witness and as I myself testified to in  
15          regards to the Michigan modifier; however, we  
16          are not in support of the proposal that was  
17          presented by Mr. Weis on behalf of Foremost and  
18          Alto that relates to application of a  
19          transportation credit to milk movement from  
20          supply plants to pool distributing plants.

21                   And that's the purpose of this  
22          statement and I will skip past the first  
23          paragraph and read my -- start with the second  
24          paragraph of the statement. The Judge needs a  
25          copy.

1                   MR. BESHORE:       Excuse me.

2                   MR. RASCH:           We are opposed to  
3 the payment of transportation credits for plant  
4 transfers for the following reasons. First,  
5 pool proceeds should be used to assist in the  
6 movement of milk for the marketplace by the most  
7 efficient means possible. The most efficient  
8 method is direct delivery from the farm to the  
9 plant that ultimately distributes the finished  
10 product. Introduction of an intermediate  
11 delivery point, such as a supply plant, adds  
12 additional expenses related to testing, pumping  
13 and storage of the raw milk. Movement of milk  
14 via plant transfers also requires additional  
15 transportation equipment and drivers, which add  
16 expense to the delivery process.

17                   Information contained in the Market  
18 Administrator's Exhibit Number 7, DFA Requests  
19 8(a) through 8(e) demonstrates that there are  
20 adequate reserve supplies contained within the  
21 market area, specifically central Michigan and  
22 northern Ohio which are located within  
23 reasonable direct ship distances of Class I  
24 deficit regions of the market area. Based on  
25 the aforementioned information, we believe that

1 USDA will conclude that pool proceeds should not  
2 be used to subsidize a less efficient method of  
3 milk delivery that is not necessary.

4           Secondly, and probably most important  
5 to us, allowing plant transfers to qualify for  
6 transportation credits will only encourage pool  
7 riding -- will only do more to encourage pool  
8 riding by distant pool supplies. Because of  
9 differences in rules for pooling milk that  
10 pertain to supply plants, an incentive exists to  
11 establish supply plants outside the marketing  
12 area solely to facilitate compliance with the  
13 touch base performance requirements for  
14 individual producers.

15           Market Administrator Exhibit Number  
16 7, DFA Request Number 3 demonstrates that small  
17 volumes of milk delivered to pool distributing  
18 plants can be leveraged into the ability to pool  
19 huge quantities of distant milk supplies.  
20 Except for September 2004 when milk was  
21 voluntarily depooled, only 7 percent of the  
22 distant pool -- distant milk pooled was actually  
23 moved to a distributing plant. Supply plant  
24 transfers represented only one-third of these  
25 deliveries to distributing plants.

1           The compensation associated with  
2 being eligible for a pool draw on such a large  
3 volume of milk would appear to be more than  
4 adequate compensation for any transportation  
5 cost incurred. Additional payment from the pool  
6 in the form of a transportation credit is not  
7 warranted.

8           Finally, if a legitimate need for an  
9 assembly point exists in order to accommodate  
10 shipment of distant milk to deficit Class I  
11 markets, other options are available. Reload  
12 points can be used to assemble milk which,  
13 because of either time or distance constraints,  
14 is not capable of supplying pool distributing  
15 plants on farm direct basis. Because reload  
16 points don't qualify as a plant, transportation  
17 credits would apply to shipment of milk from  
18 them to distributing plants for which Class I  
19 utilization is assigned.

20           For all of these reasons, MMPA  
21 opposes adoption of any proposal that would  
22 provide for payment of transportation cost  
23 incurred by -- in transferring milk from plant  
24 to plant.

25



1 7(d) plant, require that it be located within  
2 the marketing area. I think that would be  
3 sufficient to curb any potential abuses.

4 Q. To your knowledge, are you aware that that  
5 is typically the language in most Federal Orders  
6 for cooperative association plants which have  
7 pooling status by virtue of that affiliation?

8 A. I believe that to be the case, yes.

9 Q. Okay. And you suggest it might be  
10 appropriate for Order 33 as well?

11 A. I certainly would agree with that.

12 Q. Okay. Do you have anything else you want  
13 to add at this point?

14 A. Nope. That's it.

15 MR. BESHORE: The witness is  
16 available, Your Honor.

17 JUDGE DAVENPORT: Mr. Vetne?

18 MR. TOM VETNE: Very quickly.

19 CROSS-EXAMINATION

20 BY MR. TOM VETNE:

21 Q. Mr. Rasch, in your second paragraph, the  
22 last two sentences, you referred to some  
23 additional expenses there.

24 Is it a true statement that the costs that  
25 you're referring to there were borne by the

1 operator of the supply plant?

2 A. They may be. Depends on -- depends on your  
3 supply agreement. I know in your case if we  
4 have used supply plants to provide spot milk,  
5 typically the price for transfer milk is more  
6 expensive than direct ship milk irrespective of  
7 the hauling costs.

8 Q. And those additional expenses would not be  
9 recovered by the transportation proposal that  
10 Foremost has put forth?

11 A. No.

12 MR. TOM VETNE: Thank you.

13 JUDGE DAVENPORT: Very well. Other  
14 examination? Mr. Beshore, to the extent you  
15 haven't requested it, the exhibit will be  
16 admitted into evidence and Mr. English's Exhibit  
17 36 will be admitted into evidence at this time.

18 MR. TOSI: The number of this  
19 exhibit?

20 JUDGE DAVENPORT: This is 39. You  
21 may step down.

22 MR. BESHORE: I recall  
23 Mr. Gallagher.

24 JUDGE DAVENPORT: Mr. Gallagher?  
25 Mr. Gallagher, you're still under oath.

1                                   EDWARD W. GALLAGHER  
2   of lawful age, a Witness herein, having been  
3   previously duly sworn, as hereinafter certified,  
4   further testified and said as follows:

5                                   FURTHER REDIRECT EXAMINATION  
6   BY MR. BESHORE:

7   Q.   First of all, Mr. Gallagher.  There have  
8   been a couple of issues raised about the  
9   language in proposed -- it in Proposal 7.  In  
10   particular, the language that says "any other  
11   Order," that describes milk having been pooled  
12   on "any other Order."

13            You're aware of the discussion I'm  
14   referencing?

15   A.   Yes, I am.

16   Q.   Okay.  What are your thoughts or comments  
17   on -- you know, on that issue?

18   A.   The purpose of Proposal 7 is to put  
19   restrictions on milk that is depooled from being  
20   repoled to create some type of economic  
21   consequences for that behavior.  It is not the  
22   intent of this proposal that if -- and let me  
23   use an example.

24            If a hypothetical handler has 10 farms and  
25   then those 10 farms have been continuously

1 pooled on the Order month in and month out, but  
2 in Month A it happens that two of those farms  
3 double their herd size and all of a sudden  
4 there's a 30 percent increase in the amount of  
5 milk pooled by that handler for one month to the  
6 next, this provision is in no way intended to  
7 force some of that milk off the pool.

8 That milk in that example should all be  
9 pooled continuously in the following month,  
10 unless there was some milk from that handler  
11 that was depooled in the prior month.

12 Q. From that producer?

13 A. From that producer or from that handler.

14 Q. And do you think the language needs to  
15 be -- or should be adjusted in any way to  
16 address that?

17 A. We -- we are -- we are hesitant to shoot  
18 from the hip today and suggest a possible change  
19 to this since the chief architect isn't with us  
20 and we're not able to have constant contact with  
21 that individual.

22 We are going to review this and if we  
23 believe that there is a need for a change that  
24 we will acknowledge that in brief. And we also  
25 recognize that if USDA, in their wisdom, sees

1 fits to adopt this, as we wish they would, this  
2 proposal, and they feel that there needs to be a  
3 modification just to be sure that such an  
4 example as I just gave does not occur, we would  
5 recommend they have the ability to do that.

6 Q. Okay. And in any event, the intent you've  
7 made as clear as you've possibly can?

8 A. I've tried to, yes.

9 Q. Okay. Did the same comments apply to  
10 the -- the question was raised earlier on, I  
11 think, about changes in production between a  
12 month -- month of February, 28 days and March  
13 with 31 days --

14 A. Right.

15 Q. -- with increasing per day production?

16 A. Right. You go from a 28 -- February is 28  
17 days and March is 31, and the flush hits just  
18 right and you have more than a 15 percent  
19 increase in your production over February and  
20 you hadn't depooled any milk, then the intent is  
21 not to prevent milk from being pooled.

22 Q. Okay. Now, Mr. Gallagher, do you have  
23 any -- do you know the average size of DFA  
24 producers and Dairylea producers and affiliated  
25 organization producers in Order 33?

1 A. Yeah. Yeah. They're probably about  
2 110,000 pounds of milk produced per month.

3 Q. Now, is that within the definition of small  
4 business for dairy farmers?

5 A. Yes, it is. In fact, for -- for the  
6 Dairylea and DFA farms -- and I can't speak for  
7 any of the Proponents of our proposal. The  
8 Dairylea and DFA farms which, at least on the  
9 DFA side, is 2,600 members in the Mideast Area  
10 Council, 95 percent of those farms would fall  
11 under the definition of a small business.

12 Q. Now, previously when you testified you  
13 provided information, a list of the  
14 organizations whose milk was pooled through --  
15 or suppliers through DMA, I guess. Do you  
16 recall that?

17 A. Yes.

18 Q. Did -- was that a list of all entities  
19 whose milk was pooled through DMS?

20 A. No. That was a list of entities who helped  
21 supply their contractual obligation, their Class  
22 I obligation.

23 Q. Through DMS --

24 A. Through DMS/DFA.

25 Q. -- or DFA?

1 A. Their MEMMA requirements. But there's a  
2 different list of organizations, I'm saying.  
3 There's a different list of the organizations,  
4 who they pooled.

5 Q. Okay. Could you provide us with that list  
6 or at least --

7 A. Of the names?

8 Q. -- the additional members -- the additional  
9 entities?

10 A. Let me just go through the list that I  
11 have.

12 Q. Okay.

13 A. I'll read them off now. Obviously it's  
14 DFA, Dairylea, the 1,373 DMS independents,  
15 Grande Cheese, Family Dairies, the Brewster  
16 Cheese plant in Stockton and Brewster Cheese  
17 plant in Brewster, Land O'Lakes, Holmes Cheese,  
18 Guggisberg Cheese, Minerva Cheese, Pearl Valley  
19 Cheese, Bear Lake Cooperative and Farmers Union.

20 Q. Farmers -- now, what Farmers Union  
21 organization is that?

22 A. Farmers Union Milk Cooperative.

23 Q. From what geographic area? Is that the  
24 Pennsylvania Farm --

25 A. That's the Pennsylvania -- Ohio. I believe

1 the Pennsylvania -- the farmer that testified  
2 earlier in the proceeding was a Farmers Union  
3 member. We pooled his milk.

4 Q. Okay.

5 A. DFA does. DFA/DMS.

6 Q. Did you mention Family Dairies?

7 A. Yes, I did.

8 Q. Okay. When milk is pooled from out of the  
9 area through an in-area agency, is there  
10 sometimes a -- you know, a revenue arrangement  
11 on that milk?

12 A. Yes, there is sometimes.

13 Q. And you're aware that those kinds of  
14 arrangements were testified to at length in some  
15 earlier proceedings on Order 30, for instance?

16 A. Yeah. I'm aware that those types of  
17 arrangements have come up in testimony in prior  
18 hearings and similar subjects.

19 Q. Okay. And you were here when DFA's request  
20 with respect to terms with respect to those  
21 kinds of arrangements was referred to and then  
22 unreferred to as extortion?

23 A. I did hear that.

24 Q. Are there sometimes split elements to those  
25 arrangements?

1 A. Yes, there are sometimes.

2 Q. Okay. If something's talked about as a  
3 split, that is not the split of the pool draw,  
4 or is it?

5 A. No, it's not.

6 Q. Okay.

7 A. Let me explain what I believe what it is.

8 Q. Okay.

9 A. In general, again, this stuff has been  
10 testified to at the other hearings, although I  
11 haven't been there and I'm pretty sure it's the  
12 same as what I'm about to talk about.

13 Generally what happens is an entity who has  
14 producers outside the marketing area in an area  
15 where the pay price is a different Order's pay  
16 price will make an arrangement to get their  
17 producers pooled on the Mideast Order because  
18 the Mideast Order typically would have a higher  
19 PPD than the area where the producers reside.

20 And by getting the producers qualified,  
21 then those producers then are eligible to  
22 receive the Order 33 PPD which is higher than  
23 the PPD paid in the market where the producers  
24 reside. However, what producers tend to get  
25 paid in the -- in the -- outside the market area

1 is the going rate for that area, which is the  
2 PPD of the Order that they weren't pooled in,  
3 which is lower and then the handler then --  
4 there's a difference between the PPD for Order  
5 33 and the PPD where the producers reside, and  
6 it's not uncommon for the handler who has the  
7 producers in the outside area to come to an  
8 accommodation with a handler who's allowing them  
9 to get pooled in the area to somehow share, in  
10 some manner, the difference in the PPD between  
11 the two Orders, thereby meaning that the handler  
12 who has producers on the outside area gets some  
13 income.

14 Generally if it's a cooperative, that  
15 income will somehow trickle back to producers.  
16 If it's not a cooperative, I don't know what  
17 happens with the money, but it could very well  
18 be pocketed by that handler.

19 Q. So if the PPD difference happens to be  
20 \$0.30, there might be a \$0.15 -- \$0.15 sharing  
21 of the difference possibly?

22 A. Possibly. Possibly it could happen.

23 Q. And if it was a \$15 -- like, Order 30, we  
24 already talked about, you know, a percentage of  
25 Class III or something, if it's a \$15 Class III

1 price and somebody is charging 1 percent that  
2 would be \$0.15 right?

3 A. As -- sure. If something like that was  
4 going on, sure.

5 Q. Okay. Now, let's talk about transportation  
6 credits a little bit. When Mr. Kinser testified  
7 just earlier today and described what he  
8 considered a potential abuse situation if  
9 Proposal 9 was adopted, do you recall that?

10 A. I do recall.

11 Q. And he talked about an in-area  
12 manufacturing plant and an in-area distributing  
13 plant and the possibility of transportation  
14 credits somehow encouraging, you know,  
15 disorderly and inefficient movement of milk  
16 between those facilities or between that, do you  
17 recall that?

18 A. I do recall that.

19 Q. Do you have any thoughts, comments on the  
20 possibility that Proposal 9 would foster any  
21 such abuses?

22 A. Yeah. I respect -- excuse me, respectfully  
23 disagree with my good friend Mr. Kinser. First  
24 of all, the -- there's a mileage exclusion that  
25 the first 75 miles are ineligible for

1 transportation credit, so any close-in milk  
2 between a Class I plant and a manufacturing  
3 plant, if it gets moved around between one or  
4 the other, it doesn't matter, it's not going to  
5 qualify for a transportation credit.

6       Secondly, if milk is coming in from a  
7 greater distance, we're only getting -- we're  
8 only asking for 65 percent of the actual cost  
9 after you deduct the cost for the first 75  
10 miles. You're excluding the first 75 miles and  
11 then you're only getting 65 percent of what's  
12 left.

13       And it just makes no rational sense to me  
14 whatsoever that somebody's going to pool milk in  
15 from greater than 75 miles and move milk around  
16 to try and get a credit when they're not going  
17 to get full compensation for those costs, and so  
18 they're going to be moving milk around just to  
19 create a larger loss for themselves. And it  
20 just doesn't make any sense to me that that will  
21 happen.

22       I believe that the only time that these  
23 credits will be available is when milk is really  
24 needed and milk is really going to the Class I  
25 market.

1 Q. And, in fact, that's --

2 A. And that's how --

3 Q. -- how it has been intended and designed?

4 A. -- they were intended and designed and how  
5 they work not only here, but in the Southeast  
6 Order for their type of transportation credit  
7 and the Upper Midwest Order for their type of  
8 transportation credit.

9 Q. Now, we've heard just today from a dairy  
10 farmer who supplies distributing plants in Ohio  
11 to which DFA and through MEMMA is a supplemental  
12 supplier. You heard that testimony of Mr. Baer?

13 A. Yes, I did.

14 Q. Okay. And we just heard the testimony from  
15 Mr. Soehnlén of Superior Dairy who also has  
16 independent producers and supplemental supplies  
17 as needed from DFA. You remember this  
18 testimony, also?

19 A. DFA supplies spot -- spot loads of milk to  
20 them. That's right.

21 Q. In both cases, the testimony was that  
22 producers -- the independent producers supplying  
23 those Class I plants day in and day out are paid  
24 premiums which begin, you know, somewhere near a  
25 dollar and go well in excess of a dollar; is

1 that correct?

2 A. That's -- that is correct.

3 Q. And do you know that to be, in fact, the  
4 case in the marketplace?

5 A. From my discussions with the people that I  
6 work with at DFA in the Fairlawn office, that is  
7 typical for the premiums paid by Class I plants  
8 to their independent supplies for this market.

9 Q. Okay. Now, you're the supplemental  
10 supplier. When they don't have enough from  
11 those -- from their regular handle -- regular  
12 deliverers, the regular suppliers, they don't  
13 have enough milk they turn to you, correct?

14 A. That's correct.

15 Q. And you have to get that milk, as  
16 Mr. Soehnlén said, from longer distances,  
17 wherever it's needed, wherever you can make it  
18 available; is that correct?

19 A. That is correct.

20 Q. Okay. Now, with those supplemental milk  
21 supplies, are you able to return to your dairy  
22 farmer members prices that are -- do these  
23 supplemental sales yield back to you funds  
24 sufficient to pay prices at the level they're  
25 paying their regular suppliers?

1 A. No, they do not.

2 Q. Can you -- do you have information to  
3 provide which provides some detail with respect  
4 to the conclusion -- comment you just made?

5 A. Yes, I do.

6 Q. Do you have annual information for 2004 and  
7 information for the month of October 2004?

8 A. Yes, I do.

9 Q. Okay. Now, the top line for these  
10 calculations is the over order Class I premium  
11 that is charged by MEMMA to all of its  
12 customers, correct?

13 A. That's correct.

14 Q. And those are -- that premium is delivered  
15 into their plants, correct?

16 A. That's correct.

17 Q. Whether they're regular customers day in  
18 and day out, or committed supply -- partial  
19 supply customers, whatever, you've got to  
20 deliver them all milk at a price?

21 A. That's correct.

22 Q. Can you vary those prices according to  
23 where you have to go to get the milk?

24 A. No, we cannot. It's -- we're getting milk  
25 from maybe hundreds of different locations, if

1 you think about it, thousands of different  
2 farms, and then beyond that when we have to  
3 purchase supplemental milk, 10, 20 50 different  
4 prices and you can't charge -- there's not a  
5 process that's available to charge a different  
6 price for every load. It's -- the price is  
7 struck before the month even starts and it's  
8 quoted by MEMMA before the month even starts and  
9 that's the price for the month.

10 Q. Okay. Now, let's take the month of -- you  
11 want to do annual figures first or the month of  
12 October?

13 A. Let's do annual.

14 Q. Okay. For the year 2004, what was -- and  
15 we're talking about Class I sales now. What was  
16 the average, you know, gross premium, over order  
17 premium received by MEMMA?

18 A. \$1.72 per hundredweight.

19 Q. Okay. Now, there's previously been  
20 testimony, and Dr. Cotterill, for instance, was  
21 asked about it, there are some credits available  
22 to customers who provide even purchases on a  
23 day-of-the-week basis, correct?

24 A. That's correct.

25 Q. And there are also some credits available

1 to customers and upcharges made upon them if  
2 they sell milk out of the MEMMA area into other  
3 areas, correct?

4 A. Correct.

5 Q. Okay. Now, what are the nets -- and I  
6 think there's been testimony that the uniform  
7 seven-day-a-week credit ran around \$0.30?

8 A. Correct.

9 Q. \$0.30, \$0.35 perhaps?

10 A. Correct.

11 Q. What's the net credit on an annual basis  
12 against the \$1.71?

13 A. The average on Class I sales was \$0.34 per  
14 hundredweight for 2004.

15 Q. So 1.71 gross --

16 A. \$1.72.

17 Q. I'm sorry. \$1.72 gross credits of \$0.34.

18 Now, is MEMMA responsible for hauling the milk  
19 into that customer from whatever location?

20 A. Yes. If it's milk directly from farms,  
21 there's a farmer obligation to pay for a portion  
22 of it, but whatever the farmer doesn't pay for  
23 the cooperatives have to pick up that cost.

24 Q. And that has to come out of the money you  
25 charge for the milk?

1 A. It comes out of the handling charge we get  
2 from our customers.

3 Q. Okay. Now, setting aside what the farmer  
4 pays, because that's an in and out, how much per  
5 hundredweight on average did MEMMA incur for  
6 hauling in-area milk supplies in 19 -- 2004?  
7 I'm sorry.

8 A. This is just from the producers.

9 Q. Yes.

10 A. \$0.37 cents a hundredweight. Just on the  
11 Class I.

12 Q. Okay. Now, there's also been testimony  
13 that MEMMA is to meet -- the members of MEMMA,  
14 DFA, NFO, Foremost --

15 A. Yes.

16 Q. -- Land O'Lakes, whoever they may be --

17 A. Yes.

18 Q. -- the members of MEMMA have to go out of  
19 the area or go to supplies wherever they may be  
20 out of the area and get supplemental supplies,  
21 particularly in the fall of the year, to meet  
22 the Class I requirements of the market and are  
23 charged the costs involved with those supplies?

24 A. Yes, there are.

25 Q. Okay. Now, those supplies are going into

1 those plants at the same premium delivered in  
2 prices as any other supplies, correct?

3 A. That's correct.

4 Q. And that delivered in price is the most you  
5 can get out of the marketplace, correct?

6 A. That's correct.

7 Q. Okay. What are the charges that MEMMA  
8 incurs for the supplemental -- supplemental  
9 milk? And this is averaged out over a year.

10 A. Okay. They have premium/give up charges  
11 that they have to pay to whom they purchase the  
12 milk that average \$0.26 cents per hundredweight.  
13 And they have freight to get the milk into the  
14 plant that they're supplying to that average  
15 \$0.08 per hundredweight.

16 Q. Okay. \$0.26 average year-round, average on  
17 all Class I year-round, give up charge or  
18 premium on supplemental milk at \$0.08 additional  
19 hauling?

20 A. That's correct.

21 Q. Okay. Are there any other direct costs of  
22 that Class I supply?

23 A. There's a cost/adjustment. Obviously if  
24 you're bringing some milk in from a lower zone  
25 to a higher zone and sometimes you pick up some

1 zone even though the zone is very flat and  
2 that's part of the challenge of which in part we  
3 need to have transportation credits because the  
4 zones are so flat in the Mideast area.

5 Q. Okay. How much do you gain?

6 A. We gain about \$0.04 per hundredweight on  
7 all the Class I sales.

8 Q. Okay. So you get back the \$0.04. What's  
9 the net you then have on these Class I sales --  
10 all Class I sales year-round to be able to pay  
11 out to your producers?

12 A. \$0.71 cents per hundredweight.

13 Q. Now -- but is there anything -- are there  
14 any costs in there for operating the  
15 cooperative?

16 A. Not -- not in what we've netted out to  
17 date, no.

18 Q. Okay. So you've got \$0.71 from the  
19 marketplace, premium net of direct costs of  
20 landing the milk at those plants?

21 A. Correct.

22 Q. Okay. And now, have you --

23 A. We've got \$0.71 left to pay producers and  
24 to pay the costs of running the organization.

25 Q. Okay. Field men, payroll --

1 A. Absolutely.

2 Q. -- everything else?

3 A. Everything as naturally happens when you're  
4 a milk seller.

5 Q. Okay. That's annual. How about a month  
6 like October when the record shows the costs of  
7 supplemental supplying the market are at their  
8 peak?

9 A. Okay. For October 2004 -- do you want me  
10 to just run down --

11 Q. Just run down through the categories in the  
12 same manner.

13 A. Okay? The gross Class I price -- this is  
14 for October 2004. The same information for the  
15 same group of handlers. Gross Class I price  
16 per -- gross Class I premium of \$1.81 per  
17 hundredweight; credits, \$0.35 per hundredweight;  
18 the additional haul of the producers \$0.38 per  
19 hundredweight. The supplements -- this is for  
20 the month of October. Supplemental milk give up  
21 charges and premiums \$0.44 per hundredweight.  
22 Supplemental freight, \$0.23 per hundredweight;  
23 and zone recovery, it's plus \$0.04 per  
24 hundredweight. So that nets to a net left to  
25 pay costs of operation and to pay producers of

1 \$0.45 cents per hundredweight.

2 Q. Okay. Now, the Proposal 9 would generate  
3 roughly what amount per hundredweight on Class I  
4 in the market?

5 A. Well, I -- let me back into it. It's --  
6 you know, it was somewhere roughly from two and  
7 a half to \$0.03 per hundredweight for pool in  
8 October, which would be the month when you would  
9 have probably the most significant adjustment to  
10 the pool price. And let's just call it \$0.03.  
11 And that would probably -- you know, it's \$0.03  
12 on a pool and it's about 35 percent Class I, so  
13 you convert that back to something on Class I  
14 only, it's probably around \$0.08 per  
15 hundredweight just on Class I.

16 Q. Okay. Why can't you -- you're asking --  
17 you're asking for limited government  
18 intervention in Proposal 9 to get a couple cents  
19 of transportation out of the pool.

20 Why -- why do you need government  
21 intervention in that limited way that you're  
22 requesting?

23 A. Okay. First of all, the zones in the  
24 Mideast Order are flat and wide. Milk regularly  
25 travels greater than 75 miles to get to Class I.

1 The zones and grades, the price grades do not  
2 cover the costs of moving the milk, Class I, as  
3 it moves across these zones from these long  
4 distances.

5 Producers pay the cost of hauling for  
6 relative -- basically probably not quite the  
7 first 75 miles, but 75 miles or less and that  
8 extra hauling cost, the remainder of it, is paid  
9 by the supplier of the milk to the Class I  
10 plant.

11 The market structure in this area does not  
12 allow the suppliers to get that extra cost back  
13 from their customers. And currently then,  
14 whoever is supplying the milk has to eat these  
15 costs and their milk returns are reduced as a  
16 result. They're -- what they end up having left  
17 to pay their farmers is reduced because of this.

18 At the same time, then this puts deliveries  
19 to manufacturing plants at a better economic  
20 position than deliveries to Class I because they  
21 don't have these extra hauling costs to eat  
22 because most of that hauling is coming from  
23 within 75 miles, most if not all is coming  
24 within 75 miles.

25 This is a disorderly marketing condition

1 that needs to be corrected. Mr. Christ  
2 testified to the same. Class I pricing and  
3 pooling mechanisms should result in Class I  
4 suppliers getting a portion of their  
5 over-the-road transportation costs recovered by  
6 the Order. It's not happening right now. The  
7 increasing zone is not enough to cover this  
8 extra cost and there's no other mechanism in the  
9 Order to help get some of those costs back. And  
10 so this, too, then creates a disorderly  
11 marketing condition.

12 All producers share equally in the proceeds  
13 of deliveries to the Class I market, but not all  
14 have sharing in those costs. And, again, that  
15 is a disorderly marketing condition. So the  
16 market needs government intervention to correct  
17 for these disorderly marketing conditions that I  
18 mentioned.

19 And I believe -- we believe -- the  
20 Proponents of Proposal 9 strongly believe that  
21 Proposal 9 is the solution that will give the  
22 suppliers partial -- and it's far from a hundred  
23 percent, it's very partial reimbursement for  
24 these costs. And we've made it partial in part  
25 to assure that there aren't the ability for

1 somebody to play games by moving milk around and  
2 gaming the system and unjustly taking money out  
3 of the pool that really shouldn't be pooled,  
4 getting just -- we all get a credit here or  
5 there.

6 We specifically put safeguards into this  
7 proposal, and we've recognized that by doing  
8 that we are limiting ourselves to getting less  
9 than 100 percent of the cost recovery, but  
10 nonetheless this is a step in the right  
11 direction of having something that takes some of  
12 the -- some revenue out of the pool, very small  
13 amount of revenue out of the pool, pay it to the  
14 suppliers of Class I milk to make them get a  
15 little bit closer back to even than they  
16 currently are in the operations that they have  
17 to assure that the Order works and that Class I  
18 gets the milk whenever they need it.

19 MR. BESHORE: Thank you. Nothing  
20 further.

21 JUDGE DAVENPORT: Cross or recross?  
22 Mr. Tosi?

23 MR. TOSI: One moment, Your  
24 Honor. Do you have a question?

25 MR. STEINER: May I ask a

1 question?

2 JUDGE DAVENPORT: Very well.

3 Mr. Steiner, why don't you come up at this time.

4 CROSS-EXAMINATION

5 BY MR. STEINER:

6 Q. Good afternoon, Mr. Gallagher.

7 A. Good afternoon, Mr. Steiner.

8 Q. I just want to make sure I understood a  
9 couple of the statements.

10 A. Sure.

11 Q. Was it your statement at one point that  
12 when additional milk is half -- is brought into  
13 this area from out of the area by the MEMMA  
14 group to supply needed Class I demand, perhaps  
15 in October, the fall of the year, that in no  
16 case are customers of MEMMA charged additional  
17 amounts related to the cost of transporting that  
18 into the market?

19 A. In absolutely no case?

20 Q. Well, my understanding was that you  
21 answered a question, and -- "Are those customers  
22 charged any more than at any other time," and I  
23 understood your answer to be "No."

24 A. Oh, do premiums go up in October higher  
25 than maybe they are in -- I'm just using an

1 example because I'm not familiar enough with the  
2 market. Yeah, the premiums are not necessarily  
3 the same month in and month out.

4 Q. Actually I'm thinking of could some of the  
5 handlers who purchase milk from MEMMA have an  
6 agreement whereby they're charged a certain  
7 amount for a certain amount of milk that they  
8 buy, but if they require additional amounts and  
9 MEMMA needs to go outside the area and incur  
10 give up fees, transportation costs, whatever,  
11 that then is subject to being charged back to  
12 those handlers?

13 A. There -- there could be contracts that  
14 exist that there's a -- a range where if you  
15 order plus or minus your normal orders there's  
16 no adjustment, if you order plus or minus beyond  
17 that, there's some adjustment. That gets more  
18 back into some of the credits that I was talking  
19 about.

20 I'm not aware of anything that happens on  
21 any type of a regular basis. And, again, I'm  
22 not MEMMA. I'm not representing MEMMA. I'm not  
23 aware of anything that happens on a regular  
24 basis with all their customers that results in  
25 them passing along their supplemental milk

1 purchases when they go outside the area to  
2 purchase a load of milk.

3 Q. Okay. And I understand that you're not  
4 MEMMA. Would you answer the same way for DFA or  
5 Dairylea?

6 A. I would answer the same way, yes.

7 Q. Okay. Thank you. And the other question I  
8 had was I understood toward the end that you  
9 commented that the amount that the  
10 transportation credit projected by your  
11 calculations to generate is a very small amount  
12 on a monthly basis as far as revenue out of the  
13 pool?

14 A. On a relative basis. Now, certainly to a  
15 dairy farmer, \$0.01 per hundredweight -- I don't  
16 mean to belittle that \$0.01 per hundredweight is  
17 not important to a dairy farmer, but in the grand  
18 scheme of things relative to the larger cost,  
19 the suppliers of the supplemental milk are  
20 incurring and that their members are paying for,  
21 I believe that \$0.03 or -- \$0.02 to \$0.03,  
22 whatever it is out of the pool, is an  
23 appropriate amount for use of the pool to  
24 compensate the suppliers in Class I.

25 Q. I believe that one of the exhibits you

1 showed projected somewhere between \$300,000 and  
2 the \$500,000 per month could be a total amount  
3 of transportation credit that could be generated  
4 in total.

5 A. There were a number of different -- the  
6 exhibit that we -- there's an exhibit -- the  
7 only reason I'm balking, I apologize, there was  
8 an exhibit, I believe that Dean Foods put on. Or  
9 there might have been an exhibit that Mr. Rasch  
10 put on, there was an exhibit that we put on.  
11 And the exhibit that I ended up referring to in  
12 my testimony was Mr. Rasch's because in his  
13 table I had run it after we had finalized what  
14 we were going to testify here to the Order that  
15 had \$0.031 cents and had the 75-mile exclusion  
16 and there were ranges, though, on that. There  
17 was a range if the credit was \$0.031 and then  
18 there were a couple of other ranges. For  
19 October 2004, the Market Administrator ran the  
20 numbers of the \$0.031 and they came out with  
21 that first column, which I can quote the number  
22 if you give me a second.

23 Q. Please.

24 A. Okay. Thank you. Yeah, I do. It's  
25 Exhibit 8, Request -- Table 1. There's a range

1 across the top that's 3 -- \$.003 and \$.0035 and  
2 \$.004 dollars. The \$.003 is \$413,698 that would  
3 be subtracted from the pool. It goes up on  
4 \$.004 and is \$577,969 that will be subtracted  
5 from the pool. The -- our request is for the  
6 \$.003 -- actually \$.0031, so it will be a little  
7 bit larger than that. So it's going to be  
8 roughly \$420-ish-thousand in October. And I got  
9 to believe that, you know, September, October,  
10 November is going to be the months where you're  
11 probably going to get the largest calculation  
12 there per month --

13 Q. Okay.

14 A. -- just because you've got -- you're  
15 bringing in more supplemental milk at that time  
16 than you normally would.

17 Q. One final question. Do you believe that  
18 \$420,000 is a small amount of money to come out  
19 of the pool?

20 A. Again, relative to the grand -- the bigger  
21 picture, relative to the cost incurred by the  
22 suppliers Class I milk, this is \$420,000 of  
23 compensation which -- I don't have my calculator  
24 here, but the actual cost is probably -- I mean,  
25 we -- that \$0.031 -- \$.003, in this case, the

1 actual is \$.0031, has been reduced by 35 percent  
2 of what the actual cost is. And there are 75  
3 miles that were excluded. You add all of this  
4 up, you're probably only going to get \$0.20 on  
5 the dollar in cost recovery.

6 So truthfully, I think it's pretty small  
7 when you're figuring that the costs may be more  
8 like a couple million dollars.

9 MR. STEINER: Thank you. No  
10 further questions.

11 THE WITNESS: You're welcome.

12 JUDGE DAVENPORT: Let's take just  
13 five minutes at this time and come right back.

14 (Thereupon, a recess was taken.)

15 JUDGE DAVENPORT: Let's get back into  
16 session, if we could. Mr. Tosi?

17 RE-CROSS-EXAMINATION

18 BY MR. TOSI:

19 Q. Ed, thanks for coming back to the stand.

20 A. You're welcome.

21 Q. I'm not sure who previously offered this as  
22 a suggestion; it may have been Mr. Rasch.

23 Would you and your organization -- did you  
24 support the notion that 7(d) plants should be  
25 restricted, those plants that are located within

1 the marketing area?

2 A. For the purpose of a transportation credit?

3 Is that --

4 Q. I don't remember it being restricted in

5 that way, but --

6 A. Could you state your question again,

7 please?

8 Q. For 7(d) plants, that it would be

9 restricted to co-ops operating plants that are

10 within the marketing area?

11 A. We would support that.

12 Q. Okay. I know that we have several

13 competing proposals here with respect to what to

14 do about when milk's depooled at the rate at

15 which differing entities of have offered

16 different proposals, but conceptually they're

17 all sort of similar.

18 Does your organization have a rank order?

19 If you want to take a minute --

20 A. Nope, I got it.

21 Q. Oh, wonderful.

22 A. We rank Proposal Number 7 first. None of

23 the others meet the grade. I would like to

24 comment on one thing, if you don't mind, that

25 maybe will be helpful. I'm more familiar with

1 the provisions of Order 1. That's where I've  
2 spent my career.

3 On their dairy farmer for further markets  
4 provision, they don't have the scarlet letter  
5 provision that Marvin Beshore referred to, that  
6 if for whatever reason somebody becomes a dairy  
7 farmer for other markets, if that producer  
8 decides then to leave that handler and go to  
9 another handler on its own volition, that  
10 producer can get repooled. So it's not a mark  
11 on the producer, it's a mark on the handler.

12 Q. And based on your experience in that Order,  
13 is there any abuse --

14 A. No.

15 Q. -- taking place by producers to go to  
16 another handler if a handler is dissatisfied  
17 with the producer because of whatever?

18 A. None that I'm aware of. It's -- none that  
19 I'm aware of.

20 Q. And then one last thing about  
21 transportation credits --

22 MR. TOSI: I have no further  
23 questions. Thank you.

24 JUDGE DAVENPORT: Yes, sir?

25 MR. ENGLISH: Charles English for

1 Dean Foods.

2 RE CROSS-EXAMINATION

3 BY MR. ENGLISH:

4 Q. Could Proposal 8 and/or Proposal 4 pull  
5 itself up from the failing grade if it adopted  
6 the language in Order 1 that doesn't have the  
7 scarlet letter?

8 A. I offered that as a courtesy based on my  
9 knowledge of the dairy farmer for other markets  
10 provision, but we've reviewed those proposals,  
11 and even with that adjustment we feel the best  
12 fit for this market to create the depooling  
13 issue that exists in this market is Proposal  
14 Number 7.

15 Q. Notwithstanding the fact that you've agreed  
16 that that language works in Order 1?

17 A. That's correct.

18 MR. ENGLISH: Thank you.

19 JUDGE DAVENPORT: Other questions of  
20 Mr. Gallagher? Mr. Beshore?

21 FURTHER REDIRECT EXAMINATION (Continued)

22 BY MR. BESHORE:

23 Q. Just one clarification to make sure I  
24 didn't misstate something. The numbers that you  
25 presented in your testimony earlier here this

1 afternoon with respect to premium -- premiums  
2 received -- Class I premiums received, hauling  
3 costs, et cetera, those were DFA numbers and not  
4 MEMMA numbers, correct?

5 A. Those are DFA numbers, not MEMMA numbers,  
6 but likely they're similar to the other numbers.

7 Q. But we're not here --

8 A. I can't testify -- I'm not here testifying  
9 on behalf of MEMMA.

10 Q. Or any of the other individual members of  
11 MEMMA?

12 A. Well --

13 Q. Well, DFA.

14 A. DFA/NFO.

15 Q. Okay. And some of those costs are -- some  
16 of the hauling delivery costs, for instance, are  
17 co-op specific and not established by the  
18 marketing agency in common?

19 A. Correct.

20 Q. Okay.

21 MR. BESHORE: Thank you.

22 JUDGE DAVENPORT: Any other  
23 examination of this witness? Very well,  
24 Mr. Gallagher, you may step down.

25 THE WITNESS: Thank you.

1                   JUDGE DAVENPORT: Are there any other  
2 individuals present who wish to present or give  
3 us any testimony or statements or additional  
4 exhibits at this time? Mr. Stevens?

5                   MR. STEVENS:           Yes, Your Honor.  
6 The Proposal Number 11 is the proposal proposed  
7 by Dairy Division Dairy Programs Agricultural  
8 Marketing Service. That proposal provides that  
9 they would make such changes as may be necessary  
10 to make the entire marketing agreement and the  
11 Order conform to any amendments thereto that may  
12 result from this hearing.

13                   This is a proposal that is added at  
14 all Market Order hearings to give to the  
15 Secretary obviously to put people on notice to  
16 this possibility and to give people the chance  
17 to comment or say anything they would care to  
18 about that, so I just make that statement for  
19 the record. Thank you.

20                   JUDGE DAVENPORT: Statements from  
21 anyone else at this time? Very well. In this  
22 particular case copies of the transcript are not  
23 available from the hearing clerk's office.  
24 Anyone who wishes may order a copy from the  
25 hearing reporter; however, it will be posted on

1 the website and I guess with that regard once  
2 it's posted on the website, I guess I need some  
3 sort of agreement as to how long you all need  
4 for corrections and then also for briefs and/or  
5 statements supplemental to this proceeding,  
6 bearing in mind that you guys are going to ask  
7 for an expedited decision in this matter.

8 MR. ENGLISH: Your Honor, it is  
9 always useful to recognize that things could be  
10 delayed; although once we've gone, thank  
11 goodness, on the record I'll say this, to have a  
12 professional court reporter, we have all done  
13 better, I think. And we thank the court  
14 reporter for her wonderful attention at this  
15 hearing.

16 Normally we look at something like a  
17 fixed day when we expect that the transcript to  
18 be ready and then two weeks thereafter, and if  
19 the transcript isn't on by a certain day, the  
20 schedule slides sort of automatically rather  
21 than having to come bother you about adjusting  
22 the schedule and then similarly the briefs are  
23 also due in that.

24 One thing I think it's necessary to  
25 point out, because I've had some discussions

1 with John Vetne before he left, that he would  
2 like at least the briefs due on or before the  
3 11th, I think of May, because he's going to be  
4 out of the country for several weeks thereafter.  
5 So I do want to at least get that out there.

6 I'm not sure how that works for the  
7 schedule, Mr. Beshore, but -- so normally it's  
8 been something like two weeks after when we  
9 expect the transcript to be ready for  
10 corrections. And then three weeks for -- three  
11 or four weeks for brief.

12 JUDGE DAVENPORT: When is the  
13 transcript expected?

14 (Thereupon, a discussion was held off  
15 the record.)

16 JUDGE DAVENPORT: Is 14 days after  
17 it's posted enough time for corrections?

18 MR. BESHORE: That is enough time  
19 for corrections.

20 JUDGE DAVENPORT: And is three weeks  
21 or four weeks preferable to all briefs?

22 MR. BESHORE: I would like to  
23 propose four weeks after for briefs. And I  
24 would like to request that in this proceeding a  
25 ten-day period after that for reply briefs. We

1 don't usually have reply briefs, however, with  
2 the way the briefing process in these hearings  
3 has been recently, I think it demonstrates that  
4 an opportunity -- short window of opportunity  
5 for reply to matters that could not have been  
6 anticipated that come up in briefings would be  
7 important and is important in my -- in my view  
8 and I would request it.

9 JUDGE DAVENPORT: Comments,  
10 Mr. Stevens?

11 MR. STEVENS: I think that -- I  
12 think --

13 JUDGE DAVENPORT: That's appropriate?

14 MR. STEVENS: -- the 23rd is a  
15 doable day. And then I don't -- I personally do  
16 not see the need for reply briefs, but I  
17 understand that counsel may. But, again, it's  
18 up to Your Honor. We don't usually have them.

19 JUDGE DAVENPORT: Typically we don't.  
20 In other words, I anticipate that we may have  
21 some unexpected things that may arise in the  
22 briefs.

23 MR. TOM VETNE: The only problem  
24 is, Your Honor, that my father's leaving for  
25 Norway on May 14 and I expect him to be gone two

1 or three weeks, so the brief schedule that  
2 Mr. Beshore is proposing for reply briefs will  
3 be due, I'm sure, sometime while he's gone.

4 MR. BESHORE: I'm not trying to  
5 interpose something that's a problem for John,  
6 but --

7 JUDGE DAVENPORT: My solution would  
8 be just to preclude reply briefs.

9 MR. BESHORE: Well, I feel the  
10 need to have reply briefs and I think Tom has  
11 substituted well and he could handle the reply  
12 briefing and responsibility.

13 MR. TOM VETNE: You did get that  
14 down?

15 JUDGE DAVENPORT: Very well. Let's  
16 leave it at that. In other words, 14 days after  
17 the posting on the website for the corrections;  
18 three weeks beyond the posting for the -- excuse  
19 me, four weeks after that for the brief, and  
20 then ten days thereafter for reply briefs.

21 MR. BESHORE: Thank you.

22 MR. ENGLISH: Thank you, Your  
23 Honor.

24 JUDGE DAVENPORT: That appears to  
25 conclude our hearing at this time. Thank you

1 for your participation and I'll declare the  
2 hearing closed at this time.

3 MR. ENGLISH: Thank you, Your  
4 Honor.

5 (Thereupon, the proceedings were  
6 concluded at 2:53 o'clock p.m.)

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C E R T I F I C A T E

STATE OF OHIO, )  
) SS:  
SUMMIT COUNTY, )

I, Christina A. Arbogast, a Registered Professional Reporter and Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that these proceedings were taken by me and reduced to Stenotypy, afterwards prepared and produced by means of Computer-Aided Transcription and that the foregoing is a true and correct transcription of the proceedings so taken as aforesaid.

I do further certify that these proceedings were taken at the time and place in the foregoing caption specified.

I do further certify that I am not a relative, employee of or attorney for any party or counsel, or otherwise financially interested in this action.

I do further certify that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Akron, Ohio on this 21st day of March, 2005.

\_\_\_\_\_  
Christina A. Arbogast, RPR

My commission expires December 7, 2005.

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