

BEFORE THE SECRETARY OF
THE UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

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In the Matter of Proposed) Docket Number
Amendments to the Tentative) AO-166-A77;
Marketing Agreement and Order) DA-08-06

- - -

VOLUME II

- - -

PUBLIC HEARING BEFORE: Peter M. Davenport
U.S. Administrative Law Judge
U.S. Department of Agriculture

DATE: August 20, 2008
TIME: 9:00 a.m.
PLACE: Westin Cincinnati Hotel
21 East Fifth Street
Cincinnati, Ohio 45202

REPORTED BY: Renee Rogers, RPR
Notary Public, State of Ohio

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I N D E X

	Witness	Page
1		
2	Witness	Page
3	JOE CARSON	
4	Direct by Mr. Vetne	321
5	Cross by Mr. Beshore	335
6	Cross by Ms. Taylor	351
7	Redirect by Mr. Vetne	352
8	LYLE RUPRECHT	
9	Direct by Mr. Vetne	355
10	Cross by Ms. Beshore	365
11	Cross by Mr. Mr. Yale	376
12	Recross by Mr. Beshore	377
13	Recross by Mr. Stevens	379
14	JOHN HITCHELL	
15	Statement by John Hitchell	385
16	Cross by Mr. English	388
17	Cross by Mr. Beshore	392
18	Cross by Mr. Yale	395
19	Cross by Ms. Taylor	397
20	EVAN KINSER	
21	Direct by Mr. English	401
22		
23		
24		

E X H I B I T S

1		
2		Marked
3	Exhibit Number 16	321
4	Exhibit Number 17	398
5	Exhibit Number 18	399
6	Exhibit Number 19	400
7	Exhibit Number 20	400
8	Exhibit Number 21	400
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		

1 JUDGE DAVENPORT: This hearing is back
2 in session. Mr. Vetne?

3 MR. ENGLISH: While Mr. Vetne is
4 handing out things, I think I talked to all
5 the interested parties about this and also
6 spoke with Your Honor.

7 After we were recessed last evening and
8 after 7:30 in the evening I learned that
9 there is another witness who plans to
10 testify later today who arrived late last
11 night, and that is a witness for the Nestle
12 Corporation, Patty Stroup.

13 Because we were going over the witness
14 list, I thought it would be fair to
15 everybody to let them know there was another
16 witness.

17 JUDGE DAVENPORT: Mr. English, as usual
18 in these proceedings, sometimes things are
19 very fluid and --

20 MR. ENGLISH: Thank you.

21 JUDGE DAVENPORT: Raise your right
22 hand.

23 THE WITNESS: (Complies.)

24 JUDGE DAVENPORT: Do you swear or

1 affirm the testimony you are about to give
2 during this hearing shall be the truth, the
3 whole truth, and nothing but the truth, so
4 help you God?

5 THE WITNESS: I do.

6 JUDGE DAVENPORT: Please be seated.
7 Tell us your name and spell your name for
8 the hearing reporter.

9 THE WITNESS: Joe Carson, J-O-E,
10 C-A-R-S-O-N.

11 JUDGE DAVENPORT: Mr. Vetne?

12 JOE CARSON,
13 of lawful age, as having been duly sworn, was examined
14 and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. VETNE:

17 Q Mr. Carson, you have a written statement
18 you would like to read into the record, correct?

19 A Yes.

20 JUDGE DAVENPORT: This will be marked
21 as Exhibit 16.

22 MR. VETNE: Thank you very much, Your
23 Honor.

24 (Whereupon, Exhibit Number 16 was

1 marked for identification.)

2 Q Before you do that, can you tell the
3 record a little bit about your background?

4 A I am president and CEO of United Dairy.
5 We own and operate three plants, Martins Ferry, Ohio
6 and Uniontown Pennsylvania, and the plant in question
7 today, Charleston, West Virginia.

8 We're a family business. My father
9 bought in to the business in the fifties and sixties
10 and built the business, and I came in to the business
11 in 1989.

12 I've been president and CEO for the last
13 eight years. And my brother, sitting over there, runs
14 the procurement for the business, and I focus mainly
15 on sales and profits for the United Dairy company.

16 Q Mr. Carson, have you ever testified in a
17 Federal Milk Order hearing before?

18 A No. You know, we've never had the need
19 to basically, so.

20 Q Have you ever attended one?

21 A No. This is the first also.

22 Q Has United Dairy, other than you, ever
23 appeared to your knowledge at a Federal Milk Order
24 hearing?

1 A Not to my knowledge.

2 Q Okay. Proceed with your prepared
3 statement, please.

4 A I am Joe Carson, President of United
5 Dairy, Inc. United Dairy is a 50-year-old family
6 business, with headquarters in Martins Ferry, Ohio.

7 United Dairy operates fluid milk plants
8 in Martins Ferry, Ohio, in Uniontown, Pennsylvania,
9 and our smallest plant in Charleston, West Virginia.

10 Our milk supply comes from about 400
11 independent farmers located in Ohio, Pennsylvania,
12 Kentucky, and West Virginia.

13 A map of our procurement area for the
14 three plants is attached to my statement.

15 The Mideast Milk Marketing Agency,
16 MEMA, cooperatives have proposed Class I price
17 increases in the southern tier of the Mideast
18 Marketing Area.

19 United Dairy must oppose the specific
20 proposals of MEMA. We have found their pricing
21 methodology arbitrary and unfair.

22 The proposal, in particular, singles out
23 our smallest plant in West Virginia for the largest
24 proposed increase, 40 cents per hundredweight. That

1 plant is the only federal order pool distributing
2 plant in the state.

3 It serves many West Virginia schools and
4 communities in remote areas of the rural West Virginia
5 mountains. The plant also serves an endangered
6 species function, a place where independent producers
7 may have access to the Mideast market pool, and
8 thereby preserve their freedom of choice to remain
9 independent.

10 The proposals will place United Dairy's
11 Charleston plant at a unique and new competitive
12 disadvantage. Our primary large business competitors
13 are the Dean plants, supplied by MEMA or DFA, and
14 National Dairy Holdings plants, supplied and
15 part-owned by DFA.

16 A map showing these plants and ours is
17 attached. The individual plant that competes most
18 directly with United Dairy plant is Dean Foods'
19 Broughton Foods plant in Marietta, Ohio, just 85 miles
20 to the north of Charleston, West Virginia.

21 Currently, our Charleston, West
22 Virginia plant is located in the \$2.20 zone, and our
23 competitor in Marietta, Ohio, is located in a \$2.00
24 per hundredweight zone.

1 Under the proposal, the Marietta Dean
2 plant's Class I differential would increase by 15
3 cents to \$2.15 per hundredweight.

4 Our more remote competitors in
5 metropolitan Cincinnati, 195 miles to the west, would
6 see their price increase by 20 cents. Our price
7 differential in Charleston, which is now the same as
8 Cincinnati, would increase by 40 cents to \$2.60 per
9 hundredweight. Our plant would be the only plant in
10 this new, highest priced Mideast zone.

11 The MEMA cooperatives have repeatedly
12 claimed that the price increases are proposed
13 because of purported difficulties in attracting
14 adequate supplies of milk to the southern zone
15 plants.

16 How this can be so is difficult to
17 understand, since most of the plants, except ours,
18 are supplied by a single supply organization, MEMA,
19 which is free to shift its farm supplies between its
20 customers.

21 MEMA's proposal and supporting
22 testimony by DFA asserts that the greatest difficulty
23 in attracting adequate milk supplies is for
24 Charleston, West Virginia.

1 That is absolutely untrue. We have had
2 no difficulty procuring adequate supplies of milk at
3 current price relationships within the Mideast
4 market.

5 Our Order has always had enough
6 supplies to supply the plants within the order.
7 There are, in fact, producers who have expressed
8 their desire to sell milk to us whom we have had to
9 turn down.

10 A 40-cent hundredweight price increase
11 represents about three and a half cents per gallon.
12 In an industry where sales are won or lost for
13 differences of pennies or mils per unit, the new
14 competitive disadvantage proposed for United Dairy by
15 the MEMA cooperatives will almost certainly result in
16 loss of sales or loss of revenue, and may threaten
17 the continued viability of the Charleston plant as a
18 source of fresh milk for West Virginia consumers and
19 as a market for hundreds of north Appalachian
20 producers. This would not be good for producers who
21 rely on sales to the United Dairy plants.

22 In our opinion, no change is needed in
23 the zone at our Charleston, West Virginia plant.
24 However, if USDA determines that an increase is

1 needed, we should increase no more than the Dean
2 plant in Marietta, Ohio.

3 Q Mr. Carson, that concludes your prepared
4 statement?

5 A Yes.

6 Q Let me just ask you a couple of
7 questions. Has United Dairy, to your knowledge, while
8 you've been employed with United Dairy, always
9 purchased its milk supply primarily from independent
10 producers?

11 A We have -- at least in the last 25 years
12 we have always had a major independent base of milk.
13 We've dealt directly with the farmers.

14 That being said, we have purchased milk
15 from the co-op, first it was MMI, and then DFA. And
16 so we have always had a portion of our supply with the
17 co-op also, but a much smaller portion than our
18 independent supply.

19 Q And is the portion of the supply that
20 you purchased from the cooperatives, is that primarily
21 seasonal?

22 A It can be. We don't have any formal
23 contracts with them. At times we work out
24 arrangements to balance milk which reflects the

1 seasonality of it.

2 It just depends. You know, it depends
3 on many factors, on whether they want to sell us or,
4 you know, the pricing, things like that.

5 Q And on occasion do you sell bulk milk
6 from your supply to the cooperatives or customers of
7 the cooperatives?

8 A Not the cooperative milk, no.

9 Q No. Do you sell your independent
10 producer milk to other plants --

11 A Yeah.

12 Q -- to plants other than your own?

13 A Yes.

14 Q Do you -- the proposal by proponents
15 would raise your price by 40 cents and everybody else
16 by 15 or 20. Have you been sitting here the whole
17 hearing so far?

18 A For most of it yesterday.

19 Q Have you heard anything or do you have
20 any conclusion why it would be from testimony or other
21 information why --

22 A I actually -- I have no idea why, you
23 know, the Cincinnati region that we were always a part
24 of, you know, was proposed to go up 20 cents, and

1 Marietta, which is the Broughton Foods plant, which is
2 our main competitor, they were proposed to go up 15
3 cents.

4 And it just seems like we got singled
5 out down in West Virginia. We're only 85 miles south
6 of Marietta, and ours was -- our plant's proposal was
7 40 cents.

8 And my brother and I have been trying to
9 figure it out. We're not really sure why they, you
10 know, proposed for it to go up other than we're a
11 small -- we're actually a small customer of theirs,
12 and they have major obligations to the other plants in
13 the Southeast region, but that would be conjecture on
14 our part, so.

15 Q But you are aware, are you not, that
16 plants in the Cincinnati area are -- a significant
17 portion of those plants are supplied by one or more of
18 the MEMA cooperatives?

19 A Yes. If you look at the 11 plants in
20 question --

21 Q You're looking at the map, the second
22 map attached to your statement? What are you looking
23 at?

24 A I was looking -- I just had with me the

1 -- let's see. It was one of the attachments for the
2 Mideast marketing area supply region, the southern
3 region.

4 Q Oh, the 11 plants --

5 A Yeah.

6 Q -- that comprise --

7 A Yeah. The 11 plants in that area. I'm
8 not that familiar with the Indiana situation. But in
9 Ohio and Kentucky, I mean, we're basically the only
10 independent on here that -- independently owned or
11 that buy from independent farmers. And so it just
12 feels like we're sort of being singled out, I suppose.

13 Q So to the extent there are price
14 increases, the proposals treat your plant more
15 severely than it does the plants of customers of the
16 proponents?

17 A Yes; that's correct.

18 Q You identified the Dean Marietta plant
19 as your primary competitor?

20 A Yes.

21 Q In what buyer markets do you compete
22 with the Marietta plant?

23 A Dean Marietta has a long history of
24 competition with us. They sell milk directly in to

1 our markets through the supermarket outlets, and they
2 also have branch locations in Huntington, Charleston,
3 Beckley, the same areas that we have branch
4 locations. And they're just a major competitor.

5 And my issue is we would have to compete
6 with Dean -- like we can compete with them, but just
7 don't put our plant at a disadvantage.

8 As it is right now, we're in a 2.20 zone
9 and the Broughton Dean plant is at a \$2 zone, so we
10 already have a 20 cent higher cost to start with. So
11 we just don't want to see it broadened or expanded.

12 Q Do you compete with the Dean plant for
13 school bid sales?

14 A Yes. Schools, supermarkets,
15 institutions, pretty much any type of wholesale
16 customer.

17 Q By the way, when you purchase some milk
18 from the MEMA cooperatives, it's at a price that's
19 negotiated, correct?

20 A Yes.

21 Q And you end up paying the price they
22 want to get the milk?

23 A Yeah. I mean, it's negotiated.

24 Q If there were a better opportunity for

1 that milk, would you not expect as a matter of
2 business decision that they would sell it to a
3 different location at a higher revenue?

4 A Yes.

5 Q Is there anything unique about
6 distributing milk in West Virginia that makes it
7 difficult to processors that want to serve that
8 market?

9 A Well, it's somewhat rural. There's many
10 hills, so distribution costs are high. It's not very
11 populated, so you'll have a lot of small deliveries.
12 So that's probably why there's only one plant in West
13 Virginia, and that's ours.

14 Q The supply map that you provided is the
15 supply map for the three United Dairy plants, correct?

16 A Yes.

17 Q Would it be correct to say that
18 producers within that supply area may go to either
19 Charleston or Uniontown or Martins Ferry depending
20 upon where their need is on that particular day?

21 A Yes.

22 Q And from each of those plants you have
23 distribution in all directions, north, south, east and
24 west, correct?

1 A Yes.

2 Q Does the Charleston, West Virginia plant
3 serve a consumer market or a buyer market that is not
4 ordinarily served by the other two plants?

5 A Yes. We could not service Charleston --
6 if Charleston was not there, we would not be in those
7 markets.

8 Q So you would not be supplying West
9 Virginia --

10 A No.

11 Q -- mountains?

12 Okay. Do you have any other comments
13 that you would like to add before I turn you over to
14 Mr. Beshore? This is the trout part of the sandwich.

15 A I would just like to reiterate that we
16 don't currently have any problems getting supply to
17 the Charleston plant with our independent base.

18 You know, Charleston and most of West
19 Virginia has had a tough time economically. And as
20 most -- as anybody that has been paying any attention
21 in the processing world, last year was probably the
22 worst year in the history of the processors.

23 So the timeliness of this coming on
24 where potentially our cost could be raised in an

1 already difficult environment, you know, just makes it
2 -- just makes it tougher.

3 And we understand the need to look at
4 differentials. And we understand, you know, hauling
5 costs have gone up. But, you know, our first -- our
6 first choice would be that there be no change in the
7 differential, mainly because we're already 20 cents
8 higher than our main competitive -- our main
9 competitor.

10 But certainly if USDA chooses to make
11 some adjustments in the differentials, we would hope
12 that we would -- it would be proportional in
13 Charleston and not something like what's being
14 proposed. We just want it to be fair and equitable.
15 That's all we're asking.

16 MR. VETNE: Your Honor, I move the
17 admission of Exhibit 16.

18 JUDGE DAVENPORT: Very well. Exhibit
19 16 will be admitted at this time.

20 Cross-examination of this witness?
21 Mr. Beshore?

22 MR. BESHORE: Thank you, Your Honor.
23 Good morning, Mr. Carson.

24 THE WITNESS: Good morning.

1 CROSS-EXAMINATION

2 BY MR. BESHORE:

3 Q Let me first ask a question or two about
4 the United Dairy company. I do not note any
5 contention in your statement that United Dairy is a
6 small business as defined by the USDA in these
7 proceedings. Have you evaluated that?

8 A We're sort of right on the cusp. I
9 guess small business is defined by 500 or less
10 employees, and we're slightly over that.

11 Q So you have more than 500 employees?

12 A Correct.

13 Q Let's talk about the procurement side of
14 your business first. Does United contract with the
15 haulers that bring the independent dairy farmer milk
16 to your plants?

17 A We have arrangements with haulers, yes.

18 Q And you indicated that hauling costs
19 have gone up, as we all know?

20 A (Nods head.)

21 Q Can you tell us, do you know, what --
22 how much the expense of procuring milk from the dairy
23 farms in the procurement region of your plants has
24 increased over -- since, say, 1996 when the

1 differentials were established?

2 A I do not know that.

3 Q Can you give us any idea about that?

4 A I would guess it's up. It's higher.

5 Q Well, we've already established that.

6 A The one thing I would like to point out,
7 I don't directly do the procurement. So when I -- I
8 mean, my main concern is our viability of our overall
9 operation. So some of the specifics I may not know.
10 It doesn't mean I couldn't get you an answer at some
11 point.

12 Q Well, I thought --

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

14 Q On the distribution side do you have any
15 more knowledge of those costs, any more, you know,
16 firsthand knowledge, immediate knowledge of how much
17 those costs have -- the cost of moving packaged milk
18 product have increased, say, over the last ten years
19 or so?

20 A Well, I know they're up and, as I said
21 -- I mean, they're up versus 1996, they're up versus
22 2004, so. I don't -- I don't have a specific number.

23 Q You heard Mr. Hollon's testimony and saw
24 his testimony about diesel fuel cost increases and the

1 Cornell data on what it costs to move packaged milk,
2 et cetera.

3 You know, from your experience and your
4 perspective, are those rates and that information
5 reasonably -- does it reasonably accord with your
6 experience?

7 A I think when -- some of what he quoted
8 with the loaded miles and then the fuel add-on, that
9 part I wouldn't have a problem with.

10 The only problem I have is when he got
11 to a certain point in his study or in that Cornell
12 study -- and without getting too technical, because I
13 didn't study it that greatly, but it seemed like he
14 had to back in or smooth or whatever you call it, and
15 he did that in the Cincinnati region and he did it in
16 the northern part of the Southern tier and just forgot
17 to smooth our part out basically.

18 Q So if I understand --

19 A Because everybody had these higher
20 hauling and higher costs associated with it. All the
21 plants had it. None of the supply plants have moved.
22 They're all the same locations. So everybody's had
23 the higher cost.

24 And when he went to implement it, he

1 did, and he smoothed it out to all the customers he
2 had to smooth it out to, or for whatever reason, and
3 he just didn't for us.

4 Q Okay. So your issue is not with the
5 data, but how it's applied?

6 A Yeah. But, I mean, I'm not a technical
7 analyst. So, I mean, I couldn't -- there's no
8 question costs are up.

9 Q Okay.

10 A And we're not even disagreeing with the,
11 you know, USDA looking at this. I mean, I know it was
12 prompted by the co-op, but I'm just saying we don't
13 even disagree that, you know, differentials should
14 have been looked at.

15 It's just you can't take our plant and
16 sort of isolate it. Milk flows freely. We're located
17 right off the interstate. It could get there in an
18 hour from Marietta, or a little over an hour.

19 You just can't isolate our situation.
20 So we're just asking to be treated fairly and on an
21 even playing field.

22 Q You said the Broughton Foods plant at
23 Marietta is 85 miles north of your plant in
24 Charleston?

1 A Yes.

2 Q How far north of Marietta is your plant
3 at Martins Ferry?

4 A Probably not too different from that.

5 Q 85 miles north of?

6 A Yeah. I mean, it's almost right in
7 between.

8 Q Now, you understand that the proposal
9 here, the cost at your plant at Martins Ferry would
10 not change?

11 A Yes.

12 Q And the same for the plant in Uniontown?

13 A Yes. But the Uniontown plant has the
14 highest differential in the whole order. It's at
15 2.30.

16 Q Right. And it would remain there.

17 A Right now there currently is no
18 differential between Martins Ferry and Marietta.
19 They're both at \$2, and they're 85 miles south. We're
20 at 2.20 now, so we're already higher than the Marietta
21 plant.

22 Q Right.

23 A For whatever reason, even though, you
24 know, you think as you go south or -- you know, the

1 Marietta plant is at the same radius as Martins
2 Ferry.

3 So if it went up whatever they decide --
4 I think the proposal is 2.15, that would actually be
5 appropriate, given the distance between that and
6 Martins Ferry.

7 Q With respect to the map that shows where
8 your farms are located, I want to understand if I
9 heard your testimony correctly. If you look at the
10 most northern region, procurement area, which I
11 believe to be Crawford County, Pennsylvania, the
12 county just south of Erie, Pennsylvania. Do you see
13 that?

14 A Okay.

15 Q Okay. Now, are you testifying that you
16 would move milk from Crawford County, Pennsylvania to
17 Charleston, West Virginia, farm milk?

18 A No. No.

19 Q Okay. But I think your literal answer
20 to Mr. Vetne was that on any day you could move milk
21 from any location between the procurement area to any
22 of your plants. And that's --

23 A That's not -- yeah. That was --

24 Q So can you give us an idea of where the

1 procurement area for the Charleston plant is?

2 A I would guess probably -- I mean, I
3 could get more specific. I could ask my brother.
4 But, I mean, I would guess it's mainly the Ohio, the
5 Ohio region, what's closer there. I mean, and West
6 Virginia. You know, you can see right above north of
7 the United -- the Charleston facility.

8 Q There are like two or three counties in
9 West Virginia there that have some --

10 A Yes.

11 Q -- farms?

12 A Yes.

13 Q As I understand it, your milk supply
14 primarily is from your independent dairy farms, but
15 historically when you -- and currently when you need
16 supplemental milk supplies you have purchased them
17 from the cooperatives?

18 A Yeah. We've had at times rocky, but
19 we've always had a relationship with the co-op, first
20 MMI and then DFA. And at times we'll work out an
21 arrangement, not formal contracts, but we'll work out
22 arrangements. We'll buy some more if it fits both our
23 needs. So we don't -- I'm trying not to say we have
24 this major antagonistic relationship, because we

1 don't.

2 Q I'm trying to --

3 A I mean, we really don't.

4 Q I understand that.

5 A And we do business together. But
6 there's nobody here that could blame me for sitting
7 here when your plant is put at risk, because 40 cents
8 in the marketplace, 40 cents a hundredweight
9 translated per gallon is a major, major increase.

10 Q Do you have -- let's go to the -- one
11 final question on that. I mean, it's fair that over
12 the years the cooperatives have served as the
13 balancing function for your plant when you needed
14 extra supplies, and the relationship has been one that
15 both sides have worked with over the years?

16 A That's been part of how we've done
17 business. It's not been the only reason we've done
18 it, but that's been part of it.

19 Q Now, let's -- let me go to the sales
20 side of your business. I don't see a -- the map --
21 you don't have a sales distribution map here. Could
22 you tell us --

23 A I probably should have.

24 Q Can you tell us a little bit about sales

1 from the Charleston plant, a little bit more about the
2 geography of the sales from the Charleston plant?

3 And I've noted that it appears from
4 time to time, perhaps regularly, it's a partially
5 regulated plant under Order 5, I think?

6 A I'm not aware of that, but I don't think
7 so.

8 Q Where are the outerliers of sales from
9 your plants?

10 A Basically if you look right there,
11 Kanawha County, United Dairy, Inc., you can go in any
12 direction until you get up to the northern panhandle,
13 West Virginia, in which case that would be the Martins
14 Ferry facility services that northern stretch.

15 We have a branch in Beckley, West
16 Virginia, we have a branch in Paintsville, Kentucky,
17 which is directly in that Pike County in the eastern
18 part of Kentucky. We have a branch in Portsmouth,
19 Ohio which is the Southern tip of Ohio.

20 And we do some business in Virginia.
21 And that's partially how we do some business with the
22 co-op is, you know, Virginia-based milk.

23 And we've been to North Carolina a
24 little bit, but we pulled out of -- we had a major

1 branch in North Carolina and no longer have one
2 anymore.

3 So that's pretty much it. Basically a
4 hundred miles, you know, around that facility and then
5 a little bit in to Virginia.

6 Q The plant in -- when you say -- you have
7 a distribution facility in Kentucky, did you say?

8 A Yes. A small one.

9 Q Okay. That's in Pike County?

10 A Yes. In Paintsville. Paintsville is
11 the town.

12 JUDGE DAVENPORT: Would you agree that
13 it's really Johnson County?

14 THE WITNESS: Is it Johnson County?
15 Okay. I don't get down there enough,
16 obviously. All my Kentucky questions I'm
17 going to defer to --

18 MR. BESHORE: We will also.

19 Q The distribution area in Kentucky, who
20 are your competitors over there for distribution over
21 there?

22 A I suppose it would be the Southern Bell,
23 sold by Prairie Farms, the Flavorich plant. Dean, you
24 know, comes down a little bit from Marietta through a

1 distributor that's located in the same town. It's a
2 major distributor, B&B Distributing.

3 And then, you know, Dean Louisville
4 doesn't get down there that much, but a little bit on
5 some outskirts.

6 Q Are you familiar with the -- the
7 Flavorich plant, is that London, Kentucky?

8 A Yes.

9 Q Are you familiar with the price
10 applicable to that plant, Federal Order minimum
11 pricing?

12 A No. But I think it's higher. Didn't it
13 just get adjusted?

14 Q Okay. Well, on page 48 of Exhibit 15,
15 it's indicated to be a current differential of \$2.90,
16 okay?

17 A (Nods head.)

18 Q So you're in a pretty good competitive
19 position with your pricing of 2.20 to compete with the
20 plants over in Kentucky that have a --

21 A Well, first of all, any competition
22 would be minimal. We have a small facility. We don't
23 do a lot of business there. And we -- we actually
24 have on the -- from the farm standpoint we have very

1 little back and forth for farms in that Appalachian
2 order.

3 I mean, the Kentucky side of things is
4 just a very minimal thing for us. When I mean
5 minimal, it's not even ten percent of our Charleston
6 business.

7 Q Does the Martins Ferry plant also
8 distribute in Kentucky?

9 A No.

10 Q Now, what plants compete with you for
11 distribution in West Virginia besides the Broughton
12 plant that you've mentioned?

13 A Well, it's mainly that Superior Dairy
14 out of Canton, Ohio that has some distributors down
15 there.

16 Q How far is Canton from Charleston?

17 A I'm not sure exactly. Probably maybe
18 180 miles, I would guess, somewhere in that
19 neighborhood.

20 I mean, really -- really it's mainly the
21 Marietta facility, honestly. I mean, that's the main
22 competitor. You might have some programs through
23 warehouses and things like that of warehouse trucks
24 and stuff like that that you have to compete with, but

1 as far as direct competition for DSD, you know,
2 wholesale business, it's mainly the Dean facility in
3 Marietta.

4 Q Do plants in -- any plants to the east
5 and south come in to West Virginia for sales?

6 A Well, the only plant east would be like
7 the Winchester plant. They don't compete with us on a
8 direct basis.

9 Q That's the Hood plant?

10 A No. It's Not hood. It's the Kroger.

11 JUDGE DAVENPORT: West?

12 A Oh, west of that. I'm sorry. That is
13 west. You said east or west. I guess I --

14 Q Right.

15 A That was west. They don't compete for
16 any business. They just service their own stores.

17 Q The Kroger plant in Winchester?

18 A The Kroger plant. If you go directly
19 east, that would be Virginia. They -- there are no
20 more plants in southwest Virginia. There used to be
21 -- the Valley Rich plant would come up into West
22 Virginia quite a bit, but they no longer are there.
23 And if you head up north they don't come in to really
24 West Virginia.

1 Like Shenandoah, Dean Shenandoah plant
2 really doesn't -- I mean, they might come into West
3 Virginia on the east -- northeast part, but we don't
4 go there so we don't really compete.

5 Q You don't go there out of Charleston,
6 right? I assume you wouldn't.

7 A No. But we don't really go -- we might
8 service a couple stops over there from Martins Ferry
9 or Uniontown, but we don't have a big part of the
10 business over that way. Very small.

11 Q How -- in terms of size, are your three
12 plants roughly the same size?

13 A No. Charleston does the smallest amount
14 of volume and they've had the toughest time. I
15 mentioned some of the things, where they're located,
16 sort of the -- not a big population, not a lot of
17 growth, you know, the economic situation.

18 And, you know, our business mainly
19 serves -- we have independent farmers, we're an
20 independent dairy, and we have independent grocers
21 that we sell to.

22 And as everybody probably knows, there's
23 -- you know, Wal-Mart's continue to get built. We do
24 not have the Wal-Mart private label contract, so

1 consequently our volumes in all three facilities have,
2 you know, eroded through the years as more and more
3 independent grocers come under fire and close. But
4 that's perhaps another story or another hearing.

5 Q You called independent farmers an
6 endangered species, or you used that terminology. Do
7 you know how many independent farms there are in Order
8 33?

9 A No, I don't.

10 Q So you don't know how many other plants
11 purchase milk from independent farms?

12 A Well, I know it's less than what it used
13 to be.

14 Q Or less plants than there used to be?

15 A Yeah. Less plants. But also, you know,
16 different arrangements now. You know, when Dean Foods
17 and DFA, you know, made arrangements to be the full
18 supply, that had a major effect on our market. And of
19 course the DFA-owned plants have arrangements with
20 DFA.

21 So, you know, you can't predict the
22 future, but I do know that we provide good outlets to
23 people -- to farmers that want to remain independent.
24 That's the only point I was trying to make.

1 Q Do the farmers pay the full -- do your
2 farmers pay the full haul -- the full cost of the haul
3 to the plant, haul of the -- the full expense of
4 transporting milk from the farm to your plants?

5 A I don't -- I'm not sure on that.

6 Q You may provide some support for that?

7 A If you want -- I mean, my brother might
8 be able to answer things on the hauling or something
9 like that. I can get that for you if you want.

10 Q Do you pay --

11 A Probably -- it would probably depend. I
12 mean, I would guess due to distance and different
13 arrangements with different haulers, different
14 farmers, it probably is not a set thing, to answer
15 your question specifically.

16 Would the farmer pay all the hauling? I
17 would say no, because it would be different.

18 MR. BESHORE: Thank you. That's all I
19 have. Thank you, Mr. Carson.

20 THE WITNESS: Thanks.

21 JUDGE DAVENPORT: Mr. Yale?

22 MR. YALE: (Shakes head.)

23 JUDGE DAVENPORT: Ms. Taylor?

24 MS. TAYLOR: Good morning, Mr. Carson.

1 THE WITNESS: Good morning.

2 MS. TAYLOR: Thank you for appearing
3 here today.

4 CROSS-EXAMINATION

5 BY MS. TAYLOR:

6 Q Can you give us an estimate of how --
7 percentagewise how much co-op milk you purchase?

8 A Right now it's probably around ten
9 percent for all three facilities.

10 Q How about for your Charleston plant,
11 just an average?

12 A It would be probably between ten, 15 --
13 probably less than ten.

14 Q Do you pay premiums for the purchase of
15 co-op milk over other premiums?

16 A Oh, yeah.

17 Q I think that you touched on your supply
18 for the plant in Charleston.

19 Do you happen to know an average haul
20 for the independent supply that comes into your
21 Charleston plant, an average distance maybe?

22 A No. But I could get it if you need it.

23 Q No. I was just wondering if you knew.

24 My last question, do you know the average size of your

1 independent producers? Are they basically small
2 farmers, a hundred cows or less, 200 cows?

3 A I don't know the average, but we do have
4 some bigger farms. I would say it would -- we've
5 probably had 50 to 75.

6 And we also have -- especially up in the
7 Ohio region, you know, there are some big farms. We
8 have some big arrangements with some bigger farms.

9 MS. TAYLOR: That's it. Thank you very
10 much.

11 JUDGE DAVENPORT: Mr. Vetne, redirect?

12 MR. VETNE: Just a couple of
13 questions.

14 REDIRECT EXAMINATION

15 BY MR. VETNE:

16 Q Concerning competition on packaged fluid
17 milk sales within Virginia, you answered some
18 questions about where that comes from.

19 Are you familiar with a distributor
20 called Potomac Farms?

21 A Yeah. They're out of Maryland, though.

22 Q They're out of Maryland?

23 A Yes.

24 Q Are you aware that the Potomac Farms

1 plant in Maryland competes towards the west into West
2 Virginia?

3 A Yeah. Yeah.

4 Q And they compete with you?

5 A Yeah. They compete mainly with our
6 northern facility, with Charleston a little bit.

7 Q Do you know whether the Potomac Farms
8 plant is regulated?

9 A I believe they are nonregulated.

10 Q You made some mention of a Wal-Mart,
11 and you indicated that you did not sell milk to
12 Wal-Mart.

13 A No. Private label.

14 Q You do not sell private label milk to
15 Wal-Mart?

16 A Yes.

17 Q Would it be correct to say that the
18 contract for private label milk to Wal-Mart would be
19 the largest single account available within the state
20 of West Virginia?

21 A Yes.

22 Q And that account at West Virginia is
23 served by whom?

24 A Dean Foods Marietta.

1 MR. VETNE: Thank you.

2 JUDGE DAVENPORT: Other questions of
3 Mr. Carson?

4 Very well. Thank you, sir. You may
5 step down.

6 THE WITNESS: Thank you.

7 JUDGE DAVENPORT: Raise your right
8 hand.

9 THE WITNESS: (Complies.)

10 JUDGE DAVENPORT: Do you swear or
11 affirm the testimony you're about to give
12 during this hearing shall be the truth, the
13 whole truth, and nothing but the truth, so
14 help you God?

15 THE WITNESS: Yes.

16 JUDGE DAVENPORT: Please be seated.
17 Tell us your name, and if you would, spell
18 it for the hearing reporter.

19 THE WITNESS: My name is Lyle
20 Ruprecht. My first name is L-Y-L-E, last
21 name is R-U-P-R-E-C-H-T.

22 LYLE RUPRECHT,
23 of lawful age, as having been duly sworn, was examined
24 and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. VETNE:

3 Q Mr. Ruprecht, where do you live?

4 A I live -- my address is Butler County --
5 Butler, Ohio. I actually live in Knox County, Ohio.
6 It's in the northeast region of Ohio, north central,
7 bordering on Northeast.

8 It's just outside of -- Wayne County was
9 identified yesterday as one of the potential surplus
10 areas to draw milk from. We're just southwest of
11 Wayne County. It takes me about 20 minutes to be in
12 Wayne County.

13 Q Can you tell us a little bit about what
14 you do and your education getting what you do.

15 A Okay. What I am -- I guess I have -- I
16 serve two masters. I have basically two jobs. My
17 full-time job I'm a nutritionist for a place called
18 Gerber Feed Service. It's an independently owned feed
19 mill in Wayne County, Ohio. Basically that's my
20 full-time job. I put in about 45 hours a week there.

21 Q By nutritionist, you mean -- you don't
22 mean a nutritionist for moms and babies, you mean a
23 nutritionist for dairy --

24 A Right.

1 Q -- livestock; is that correct?

2 A Right. I work with dairy farms. That's
3 what I do. I work with dairy farmers. I drive around
4 all day, talk to farmers, and advise them on how to
5 feed their cows best to get the most production, keep
6 the cows healthy, and do it the cheapest way
7 possible.

8 But in my travels I talk to a lot of
9 farmers. And actually over the last year I've talked
10 to a lot of farmers about milk marketing, not
11 necessarily because of, you know, trucking issues, but
12 more because the BST issue.

13 But in the last year I've actually
14 talked to a lot of guys about, you know, how they
15 market their milk. And I spent a lot of time talking
16 about milk marketing last year.

17 Actually, last night I went -- to give
18 you a scope, I went through my cell phone last night
19 and just counted up of the dairy farmers I have cell
20 phone numbers for, how many cows they represent, and
21 it was between 18 and 19,000 cows.

22 And just about all those within the last
23 year I talked to, and they're basically all greater
24 Wayne County producers. You know, I've talked to

1 these guys on how they market their milk.

2 So I guess I have a pretty good thumb on
3 -- I walk around all day in rubber boots up to my
4 knees, and I talk to dairy farmers. That's what I
5 know. You know, as far as some of the logistics of
6 what DFA is looking at, what independent -- you know,
7 the plants are looking at, I don't know that.

8 I guess I have more of a truck
9 driver/farmer mentality on what I see occurring in the
10 marketplace.

11 To finish my statement on what I do, I
12 guess I said 45 hours a week I work for Gerbers as a
13 nutritionist. The other 15 hours a week I'm involved
14 in my parents' operation. I live right across the
15 road from them.

16 They've been farming for 30 some years
17 -- dairy farming for 30 some years, and I've been
18 spending more and more time there. I spend about 15
19 hours a week there right now. My responsibilities
20 include herd health, getting breeding done, financial
21 record keeping.

22 My parents are near retirement age.
23 We're I guess undergoing a gradual expansion so when
24 they retire hopefully it's a profitable enough

1 business to support a younger generation, I guess.
2 That's my background.

3 Q So you have -- you share an interest
4 with your parents in a dairy farm and you're a
5 professional dairy nutritionist?

6 A Right.

7 Q And the dairy farm that you help your
8 parents operate, it supplies milk to United Dairy?

9 A Yes, it does.

10 Q And did you become aware of these
11 proposals and this hearing and showed up from
12 Northwest Ohio to share some thoughts?

13 A Yeah.

14 Q You want to just proceed with that?

15 A Sure. Sure. As I said, I talked to a
16 lot of guys in our area over the last year on the milk
17 marketing. Our area is the traditional largest dairy
18 population area in Ohio. There's definitely growth in
19 the western part of the state, but the greater Wayne
20 County area I'd say within, you know, less than 75
21 miles of Wooster, Ohio there's probably a hundred
22 thousand cows. You know, there's a lot of cows. It's
23 been very steady with that population for a long
24 time.

1 Being a traditional dairy area there's
2 also a lot of competition in that area. A lot of
3 plants have been there for a long time.

4 There's -- you know, as far as fluid
5 plants, you know, DFA talked about the fluid plants in
6 the whole Mideast Federal Order 33 region yesterday.

7 There's two of them in that area.
8 There's Smiths in Orville and Superior in Canton, but
9 beyond that -- and they both maintain customers,
10 independent customers. There's also a lot of cheese
11 plants that have independent customers. There's a
12 Brewster Cheese, Middlefield Cheese, I have customers
13 going to Minerva Cheese. I'm missing some. But
14 there's a whole -- Guggisberg maintains an independent
15 customer base. United comes in that area and procures
16 milk.

17 And actually as of earlier this year
18 Maryland Virginia Milk Producers co-op has now come up
19 into this area and procured some milk, and it sounds
20 like they're going to procure more as time goes on.

21 So there's a lot of competition for milk
22 in this area. And a lot of it is really to local
23 plants, which is from my standpoint outstanding,
24 because competition creates higher prices and more

1 premiums.

2 I have a buddy from -- he lives in the
3 southwestern part of the state. And as we have seen
4 in, you know, all the plants in the southwestern -- or
5 southern region of Federal Order 33, you know, there's
6 a lot of them around Cincinnati and Springfield, you
7 know, a lot of them are essentially DFA-controlled
8 plants. He doesn't have much of an option. He only
9 milks about 150 cows. My premiums are way above his.
10 You know, it's the same Federal Order. Competition is
11 good for me, and I guess that's my viewpoint.

12 You know, these proposed -- these
13 proposed Class I differential increases really put the
14 Charleston plant at a disadvantage. I mean, it's
15 pretty obvious to me.

16 You know, I'm not going to argue -- you
17 know, after -- I was actually at a meeting in January
18 where some guys from Maryland Virginia Milk Producers
19 co-op came up to the area to Wayne County, Ohio,
20 Lonestar had a presence there also, and it was really
21 interesting.

22 You know, I don't -- as I said, I don't
23 get a lot in to the milk procurement and how the
24 system works, but it was really educational to me. I

1 mean, it's pretty obvious that the southeastern US has
2 less and less farms, there's more and more people.
3 It's becoming more and more of a deficit area. And
4 it's pretty obvious that transportation costs have
5 come up, thus there's a problem.

6 You know, as you look at this Exhibit 15
7 yesterday, page 40, you know, what's a -- they're
8 using Wayne County, Ohio to figure out the Class I
9 differential in Miami. I mean, it's -- it's a
10 pertinent question.

11 So I'm not saying that there -- there's
12 a problem and it's just going to keep growing. And I
13 guess my problem is not with, you know, a solution to
14 come up -- that there's -- it's obvious to me that a
15 solution needs to be found for this increased
16 transportation problem.

17 I guess my problem is it needs to be
18 equitable. Because the plants that are out there, I
19 want them to stay in business so I have options and
20 competition for my milk, because the less competition
21 there is -- you know, our feed mill supply is hog
22 farmers and chicken farmers also.

23 Let me tell you, there's a lot of
24 consolidation in that industry that just scares the

1 dickens out of the dairy industry. And the producers
2 that I work with do not want to see that happen.

3 As I said, I'm not in this industry all
4 the time, but just as I -- I got here about 2:00
5 yesterday. And as I sat and listened to this
6 presentation, in -- you know, Mr. Hollon said there's
7 an art to, you know, how they came up with these Class
8 I differentials.

9 You know, as I look -- if you look at
10 the Southern region, the Federal Order 33, which is
11 the region in question, this subregion, essentially
12 most of the plants are I guess west of Columbus.

13 There's three plants east of Columbus.
14 Those are the ones that are more pertinent to my area,
15 so I'm going to talk about what I know, which is those
16 three plants. Tamarack plant in Newark, the Broughton
17 plant in Marietta, and the United Plant in Charleston.

18 Tamarack and Broughton are both in a
19 2.15 zone. United is in a 2.60 zone. These are the
20 proposed zones.

21 But, you know, the two -- if you look at
22 page 48 of DFA's Exhibit 15, you know, you look at the
23 MEMA matrix and the Southeastern model matrix, both of
24 those basically use the closest surplus milk to

1 determine, you know, their prices.

2 So, you know, it's not an exact
3 science, but if you look at those, Charleston,
4 Marietta, Newark all use Wayne County as their closest
5 surplus milk. So basically all those matrixes are
6 showing is how close they are to Wayne County.

7 Well, that's not much of an art form. I
8 mean, in reality I can tell you there isn't a whole
9 lot of milk from Wayne County going to Newark. You
10 know, the milk that goes from there, from a truck
11 driver mentality, it's coming from west, it's coming
12 from north, it's coming from Michigan, from Northwest
13 Ohio.

14 You know, as far as the Marietta plant,
15 I talked to a hauler a couple days ago. He hauls
16 about four loads of milk a day from greater Wayne
17 County. Three of those loads of milk are going to
18 Marietta. You know, that is Wayne County milk going
19 there. Charleston, right now I don't know of a single
20 load of milk from Wayne County going to Charleston.

21 You know, I don't know everything, but
22 in reality, you know, these matrices are showing how
23 close those three plants are to Wayne County.

24 And if that's what you're going to use

1 to come up with your art form -- I mean, this isn't
2 realism or impressionism. I mean, this is surrealism.
3 I mean, as an art form, I mean, Salvador Dali would be
4 proud.

5 You know, if you start looking at -- if
6 you look at the proposed distance, if you look at
7 Newark to Marietta to Charleston, they're all about 90
8 miles apart. Newark and Marietta are both in a 2.15
9 zone and Charleston's in a 2.60 zone.

10 I mean, is halfway between those two,
11 if Marietta -- if it's halfway between those two,
12 shouldn't they be halfway between differential-wise?
13 I mean, it seems to me like the proposal should be
14 there in the 2.40 zone.

15 My point is this: It needs to be
16 equitable. I want competition. I want United and I
17 want -- and really not just United. I'm not rooting
18 for them, I'm rooting for other independent businesses
19 to stay in business because I want the competition.
20 And as it stands now, this proposal is not equitable.
21 That is my point.

22 MR. VETNE: Thank you, Mr. Ruprecht.

23 The witness is available.

24 JUDGE DAVENPORT: Very well.

1 Mr. Beshore?

2 MR. BESHORE: Good morning,
3 Mr. Ruprecht. We've not met, but I'm Marvin
4 Beshore, representing the cooperatives which
5 are requesting the proposals here, and that
6 includes the organizations Michigan Milk
7 Producers, National Farmers Association,
8 Foremost Farms --

9 THE WITNESS: Nice to meet you.

10 MR. BESHORE: -- as well as DFA. I've
11 missed one or two probably.

12 CROSS-EXAMINATION

13 BY MR. BESHORE:

14 Q Your family's farm in -- it's not in
15 Wayne County, but near -- southwest of Wayne County, I
16 guess? --

17 A Right.

18 Q -- is a United supplier. Which United
19 plant does the milk go to?

20 A Martins Ferry. Well, in general it goes
21 to Martins Ferry.

22 Q How far is the Martins Ferry plant from
23 the farm?

24 A From my experience of driving there,

1 it's probably -- it's a strong two hours. I'm going
2 to say it's probably about 120 miles.

3 Q Do you know what the charge for hauling
4 the milk, what your family's farm pays to have milk
5 hauled from the farm to Martins Ferry?

6 A Today, or next week?

7 Q Both.

8 A It's going to change.

9 Q Tell us what it is today and what the
10 change will be.

11 A Well, I guess the way we negotiated it
12 was basically the hauler came up with a price on how
13 much it would cost to get our milk to Martins Ferry,
14 and basically we had to negotiate who pays for what.

15 Right now it's 92 cents. We pay 82
16 cents, United is paying ten cents. Of that total 92,
17 it's going to be raised ten cents.

18 I missed a phone call yesterday from a
19 milk hauler, and I know what it's about. I know he
20 wants to raise it ten cents and I know we're going to
21 pay for it. So it's \$1.02 total cost.

22 And when our milk goes there, it's two
23 farms on the truckload so it's -- you know, the
24 assembly charge would be small.

1 Q Is there an additional assembly charge
2 on top of that?

3 A No. There's no assembly charge. I'm
4 just saying it's an efficient load.

5 Q So some of the other loads from the area
6 may be higher if they're not as efficient? Is that
7 your point in terms of efficient assembly? It may be
8 a higher cost?

9 A I'm saying \$1.02 is the best rate we
10 could find, and it worked. And I think it's probably
11 a very competitive rate from our location to Martins
12 Ferry. So I'm saying it's a good rate, I think
13 because we have a good hauler and also because it's
14 efficient for the hauler.

15 Q Is there any milk from that area going
16 to the United plant in Charleston?

17 A From this area?

18 Q From your farm, your local area.

19 A At the present time I know south of us
20 about 40 miles there's a large farm that I know, you
21 know, they used to like hauling to Charleston, but
22 they don't -- I guess they don't think the hauling is
23 -- the hauling became an issue and they're not going
24 to Charleston right now. You know, I don't know where

1 Charleston gets its milk largely.

2 Q How far is it from your farm in -- did
3 you say it was Knox County? --

4 A It's Knox County, yeah.

5 Q -- to Charleston?

6 A Probably about 200 miles.

7 Q Now, the farm 40 miles to the south, a
8 large farm, is that a United independent farm?

9 A Yes.

10 Q And it was going to Charleston but is no
11 longer?

12 A That's the last I heard. Once again,
13 I'm a fly on the wall. You know, I don't know where
14 they're going this week, but last I heard United was
15 selling it back to DFA because they didn't need -- you
16 know, they were going to Charleston but they got milk
17 from somewhere else.

18 Q Okay. The farms -- the milk in the
19 Wayne County procurement area, you mentioned a number
20 of plants, and I think you said they had independent
21 customers.

22 I take it you mean they're independent
23 dairy farmers. The plants are purchasing milk
24 directly from the farms and not from the

1 cooperatives. And the plants you named were Smith
2 Dairy in Orville, was it?

3 A Um-hmm.

4 Q Superior in Canton, correct?

5 A Um-hmm.

6 Q And Guggisberg Cheese?

7 A Um-hmm.

8 Q Middlefield Cheese?

9 A Um-hmm.

10 Q Brewster Cheese?

11 A Brewster and Minerva.

12 Q Minerva Cheese separate?

13 A Yeah. Those -- all of those have some
14 -- well, most of them have -- they all have an
15 independent farmer base just like United would.

16 Q As well as United?

17 A Right. And I guess the other players in
18 the market are definitely DFA, DMS, and I know one
19 White Eagle co-op member in that area too.

20 Q The Newark plant is what direction from
21 the Wayne County area?

22 A Southwest.

23 Q And how far did you say it was?

24 A Oh, if you call Wooster the epicenter of

1 that Wayne County milkshed, it would take you maybe an
2 hour and 15 minutes southwest to get to Newark. It's
3 probably 60 plus -- I would guess 65 miles if I had to
4 guess.

5 Q How far is Marietta from the Wooster
6 area?

7 A About two hours, so about 120 miles
8 probably.

9 Q And Charleston, then, is approximately
10 how far from Wooster?

11 A I read -- oh, from Wooster? I said 85
12 miles from Marietta, so 205.

13 Q So 120 plus an additional 85?

14 A Yep.

15 Q And is it your testimony that price
16 should be the same to haul milk that 200 miles down to
17 Charleston as it is to get it the 120 to Marietta?

18 A No. No. My testimony would be that it
19 needs to be a fair and equitable differential. In
20 having Broughton Marietta in the same category as
21 Newark at that 2.15 zone, and having Charleston at
22 2.60, it's pretty obvious that Broughton is about
23 halfway between those two, you know, why are they in
24 the same zone?

1 Q Well, it's 85 miles further to the south
2 to Charleston, correct?

3 A Right. Not all the -- if you want to --
4 you know, actually, the exhibit that I thought was a
5 more accurate representation, you know, if you're
6 trying to make the point that it's not halfway or that
7 Charleston is further, I think the more accurate
8 exhibit -- because Wayne County can't be the milkshed
9 for the entire Southern region. Apparently it's been
10 identified as the cheapest in Miami.

11 Maryland Virginia Milk Producers co-op
12 has identified that it is the cheapest next milk to
13 get to supply, they said four plants, I know two are
14 around Winston Salem, North Carolina, one is in
15 Asheville, North Carolina, I forget where the other
16 one is, but it's basically going right past
17 Charleston.

18 They've identify this greater Wayne
19 County milk as a milkshed. Well, if milk from Wayne
20 County is going there, and milk from these other
21 regions, especially the northwest region of Federal
22 Order 33 has to supply it.

23 So actually, you know, if you start
24 looking at the average -- if you look at page 39 of

1 this Exhibit 15, you start looking at either the
2 average or the median on page 39, the hauling costs
3 minus location adjustment, if you start looking at the
4 average and the median cost, you know, above what the
5 current differentials are -- you know, as I look
6 through these plants, I mean, they're generally in the
7 buck 50, buck 60, buck 70 range until you get to
8 Broughtons and United. You know, they're 2.12 for the
9 average and median on Broughton, and 2.27 to 2.33 for
10 United.

11 I mean, those two are a different bird.
12 They're a different animal than all the rest of
13 these. The fact that you're treating Broughtons like
14 -- you know, those two need to be treated similarly.

15 And, you know, that's what you have on
16 page 39, but these matrixes that you use on page 48,
17 like I said before, all they really are doing are
18 showing the closest -- how close they are to Wayne
19 County.

20 And I'm saying you can't get all the
21 surplus milk from Wayne County. You're going to have
22 -- you know, Clinton County, Huron County, all these
23 counties in Michigan, there's counties in northwest
24 Indiana. You know, they're a huge growing supply of

1 milk, too.

2 Not all -- I guess my point is Broughton
3 and United need to be a lot closer together and it
4 needs to be equitable. It needs to be fair. Right
5 now, the way it stands, I don't think the proposed
6 differentials are fair.

7 Q But the additional 85 miles from
8 Broughton down to Charleston, don't you think farmers
9 ought to have something for that additional haul?

10 A I'm not saying Charleston and Marietta
11 need to be the same. I'm saying it needs to be fair.
12 And I'm saying, you know, it has been 20 cents
13 difference between those before. 20 cents now sounds
14 fair to me.

15 Like I said, I'm not the expert. I'm
16 not the one making the rules. But I can tell you,
17 compared to what the rest of the proposed Southern
18 region is getting, you know, a jump from -- the
19 difference between those now is 20 cents, and it's
20 going to be 45. That's a big change. And what I'm
21 saying is those two are the same animal and they
22 needed to be treated similarly.

23 Q So 45 is too much in your view, but it
24 costs -- what? -- 80 cents to a buck to get the milk

1 that 85 miles? That's your home farm's experience?

2 A No. No. No. Don't look at farmer's
3 cost compared to hauling cost. I mean, DFA's own
4 formula recognizes the first 36 miles as a different
5 cost because -- because --

6 Q No. My question was, doesn't it cost in
7 hauling, by your own experience, a dollar
8 hundredweight or so to move that milk 80 to a hundred
9 miles, move milk from your farm 80 to a hundred miles?

10 A No. You can't look at it that way.

11 Q But isn't that the cost? That's just my
12 question. That's what it cost, right?

13 A You have to look at it broken down --
14 just how the DFA looks at it.

15 Q No. I'm asking you, isn't that the
16 cost?

17 MR. YALE: Objection, Your Honor. He's
18 trying to answer the question and
19 Mr. Beshore is not allowing him to answer
20 the question.

21 JUDGE DAVENPORT: Well, he does need to
22 answer Mr. Beshore's question, then he can
23 explain. The question was is that your
24 cost.

1 A My cost to get to Martins Ferry is
2 \$1.02.

3 Q Okay. That's all -- that was my
4 question.

5 JUDGE DAVENPORT: If you want to expand
6 upon that, you may.

7 A But my cost to get to Holmes Cheese,
8 which is 20 miles from my house, would be 60, 70 cents
9 because --

10 Q That's what Holmes charges their --

11 A No. No. When I said assembly charge,
12 there's a certain cost just to come pick up the milk.
13 If you figure out mileage cost per hundredweight, it
14 doesn't cost a dollar a hundredweight to truck milk a
15 hundred miles.

16 I mean, that's exactly why DFA has their
17 trucking set up so that the farmer pays the first 36
18 miles and the incremental is paid by whatever means,
19 you know, DFA can get it from the plant, is because
20 that first 36 miles they have deemed to be a lot more
21 expensive because you've got to stop at the farm,
22 you've got to pick it up. So that first 36 miles is a
23 lot more expensive than the additional.

24 So if you're talking about additional

1 mileage from Marietta to Charleston, that's a
2 different animal. So if you're comparing that to our
3 rate to Martins Ferry, it's not a fair comparison.

4 MR. BESHORE: Thank you.

5 JUDGE DAVENPORT: Mr. Yale?

6 MR. YALE: I'm Ben Yale, on behalf of
7 Continental Dairy Products and Select Milk.
8 Good morning.

9 THE WITNESS: Good morning.

10 CROSS-EXAMINATION

11 BY MR. YALE:

12 Q As I listened throughout the entirety of
13 your testimony, which is refreshing to see a farmer do
14 the analysis and come up with some understanding that
15 sometimes we don't have after looking at this stuff
16 for years, but the question I really wanted -- to kind
17 of maybe summarize your testimony, your concern about
18 the demand for fairness for United, you're not here
19 arguing that they not pay more, pay less, or anything
20 like that, you want a fair map of pricing for all the
21 plants in that region; is that correct?

22 A Yes.

23 Q And the reason for that is that by
24 maintaining that fairness, you maintain competition in

1 that milkshed so that the producers are able to obtain
2 a higher price?

3 A You're an excellent listener. That's
4 exactly what I was trying to project.

5 MR. YALE: I don't have any other
6 questions.

7 JUDGE DAVENPORT: Other questions of
8 this witness?

9 MS. TAYLOR: I just want to thank you
10 for coming and testifying this morning.
11 Thank you, Mr. Ruprecht.

12 THE WITNESS: Pleased to be here.

13 JUDGE DAVENPORT: Mr. Beshore?

14 MR. BESHORE: I'm sorry. One little
15 detailed question.

16 RE-CROSS-EXAMINATION

17 BY MR. BESHORE:

18 Q How large is the truck that picks up
19 your family farm and the other farm? Is it a 48,000
20 pound, or larger or smaller?

21 A The two -- our milk is shipped every
22 other day. It's roughly around 15,000, and the other
23 farm has been shipping 34, 35,000. So it's roughly a
24 50,000 pound load. So very close to the 48.

1 Q Thank you.

2 A And just -- just this isn't even
3 addressing you. I just sort of found it comical. As
4 I said, I deal with farmers and truckers.

5 And I can't remember your name, the
6 lawyer from Dean that --

7 MR. ENGLISH: English.

8 A English. Mr. English. I thought it was
9 comical yesterday you asked Mr. Hollon, you know, are
10 you paying these truckers too much, or something to
11 that effect, or is DFA paying their truckers too much
12 to haul the milk.

13 After talking to a lot of haulers, I can
14 give a very definite no. So be reassured that the
15 haulers do not think they're being paid too much for
16 hauling milk.

17 I -- neither here nor there, but I just
18 thought it was comical that you brought that up
19 yesterday, so. Well, thank you for having me.

20 JUDGE DAVENPORT: Excuse me.

21 THE WITNESS: Oh.

22 JUDGE DAVENPORT: Mr. Stevens?

23 MR. STEVENS: Good morning.

24 THE WITNESS: Good morning.

1 RE CROSS-EXAMINATION

2 BY MR. STEVENS:

3 Q Your testimony made me curious, I guess,
4 in the sense that -- did you say how large your family
5 farm was, how many cattle you --

6 A No, I didn't.

7 Q What is the size of your farm?

8 A I guess we're really -- like I said, I'm
9 trying to take more and more of an interest in the
10 farm, and part of that it needs to get bigger to be
11 competitive. Last year at this time we were about 70
12 cows. Right now we're about 110. A year from now I
13 hope to be about 140, 150 cows.

14 Q It's located in Wayne County?

15 A No. It's in Knox County, which is
16 northwest catty-corner to Wayne County.

17 Q Okay. Close?

18 A Yeah.

19 Q Is it the next county to it?

20 A It's --

21 Q Contiguous?

22 A Diagonal. Our corner just basically
23 about touches their corner.

24 Q And the farm, the family farm, what's

1 the size of the farm in terms of the acreage?

2 A Let's see. I own about 40 acres and my
3 parents own 280. So it's about a total of about 320
4 and about 300 tillable.

5 Q You plan to expand the acreage also, or
6 just the dairy operation?

7 A In time both. You know, in the near
8 future we need to have more cows per acre, so at first
9 it's going to be cows.

10 Q Okay. Now, and how many -- so on the
11 farm how many employees are there? I mean, there's
12 your parents, right? Who else works on the farm? You
13 and your parents?

14 A No. It would be essentially my dad is
15 full time, my mom and I would be part time. We have a
16 full-time employee -- one full-time employee, one
17 part-time lady that helps milk, and three part-time
18 high school kids.

19 Q Okay. So you're a small business?

20 A Yeah.

21 Q As a farm business you're small in the
22 sense you don't have a lot of employees, but you have
23 a certain size and you plan to grow over the years and
24 that's what you're looking for?

1 A Yes.

2 Q And your testimony, I guess, is to
3 inform the secretary about those situations that are
4 unique to your operation as a small business, and then
5 with a broader view toward what all this means in
6 terms of what the relative Class I differential should
7 be in Order 33?

8 A Yes.

9 Q And I heard from your testimony -- I'm
10 wondering what -- can you offer up for the record
11 something that would be a more appropriate location
12 differential at Charleston than --

13 A At Charleston?

14 Q Yeah. Than that is proposed by the
15 proponents?

16 A Like I said, it's a little bit beyond
17 me, because I don't know what's to the south, other
18 than I know that Federal Order 5 and 7 have gone up.

19 You know, it does sound like it needs to
20 be higher. You know, I'd say if you want to keep
21 Newark at 15 and Charleston at 2.60, Broughtons needs
22 to be 2.40.

23 You know, if you want to keep Broughtons
24 in Marietta at 2.15, you know, Charleston needs to be

1 20 cents higher than that. I -- you know, that 20
2 cents differential between Broughtons and Marietta --
3 or between Marietta and Charleston, you know, that
4 sounds fair.

5 How you skin it exactly, I can't tell
6 you, but I would say that 20 cent differential --
7 because those two plants are the same animal. They're
8 pulling from the same milkshed. I would say a 20 cent
9 differential is fair.

10 Q That's what I meant. What you just said
11 now, that's your rationale for having some sort of
12 number that is different than what was proposed in the
13 notice of hearing?

14 Am I understanding you? You want to add
15 something else to what you've already said about why
16 that number should be different than what it is?

17 A Not really.

18 MR. STEVENS: Thank you very much.

19 MR. VETNE: I just wanted -- I don't
20 think he testified that it should be
21 different than it is.

22 MR. STEVENS: Well, what it is, of
23 course, what it is now and what it is
24 proposed to be under the hearing that we're

1 here at.

2 MR. VETNE: I think his testimony was
3 whatever it is, it should be the same
4 relationship with Marietta.

5 THE WITNESS: That's the more important
6 thing, is the differential between the two.

7 MR. VETNE: Thank you.

8 MR. STEVENS: Just to follow that up
9 with one question.

10 Q What you're talking about is fair and
11 equitable between the plants located in contiguous
12 area, close to each other, same sales areas or
13 milksheds, these are the factors that the secretary
14 should look in to to determine what the appropriate
15 location differential should be?

16 A Yeah. It -- and in this case if you're
17 looking at that whole Southern region, I don't know
18 where Smiths Dairy in Indiana gets their milk exactly,
19 but of the other eight plants, you know, they are all
20 essentially supplied by the same entities, you know,
21 the ones that make up MEMA, you know, DFA, MMPA.

22 So I guess I'm -- I guess I'm especially
23 trying to say, hey, make sure you take care of those
24 guys, because those are the guys that are going to

1 keep competition in the marketplace. But, I mean,
2 overall it needs to be fair to everybody.

3 Q And, of course, that's the purpose of
4 this hearing is for people like you and certainly the
5 proponents and everyone to come in here and educate
6 the secretary as to what the facts are, what the
7 situation is, and make recommendations about what
8 changes should be made, right?

9 A Yeah.

10 Q That's what it's for?

11 A Yeah.

12 Q And I would certainly say thank you for
13 coming and adding your voice to that record. Thank
14 you.

15 A Well, thank you for listening.

16 JUDGE DAVENPORT: Let's take a
17 ten-minute break at this time.

18 (A brief recess was taken.)

19 JUDGE DAVENPORT: Raise your right
20 hand.

21 THE WITNESS: (Complies.)

22 JUDGE DAVENPORT: Do you swear or
23 affirm the testimony you are about to give
24 shall be the truth, the whole truth, and

1 nothing but the truth, so help you God?

2 THE WITNESS: I do.

3 JUDGE DAVENPORT: Please be seated.

4 Tell us your name, and if you would, spell
5 it for the hearing reporter.

6 THE WITNESS: My name is John
7 Hitchell. First name is spelled J-O-H -- I
8 mean J-O-H-N, last name is spelled
9 H-I-T-C-H-E-L-L.

10 JOHN HITCHELL,
11 of lawful age, as having been duly sworn, was examined
12 and testified as follows:

13 STATEMENT BY JOHN HITCHELL:

14 I am employed by The Kroger Company
15 Manufacturing Group as the general manager of raw milk
16 procurement. I am appearing today in opposition to
17 the requested modification in Class I differentials in
18 Proposal Number One.

19 The Kroger Company operates two fluid
20 distributing plants that are regulated under Federal
21 Milk Order 33. Crossroad Farms Dairy, located in
22 Indianapolis, Indiana, and Tamarack Farms Dairy
23 located in Newark, Ohio.

24 The Kroger Company believes that the

1 implementation of the proposed Class I differentials
2 will disrupt traditional pricing relationships which
3 date back to the Class I differentials mandated in the
4 1985 Farm Bill, and reestablished during Federal Order
5 reform in 1999 between fluid handlers located within
6 Order 33, and will place our dairy plants in an
7 unacceptable competitive situation.

8 Under the current pricing structure, the
9 Class I differential at Crossroads and Tamarack is the
10 same as their processing competitors that are located
11 in the northeast -- northeast of these facilities in
12 northeastern Ohio at a 20 cent a hundredweight
13 difference in facilities located in northern Indiana
14 in Federal Order 33.

15 The proposal, if adopted, would increase
16 the Class I differentials 15 cents a hundredweight at
17 Crossroad Farms and Tamarack Farms, while leaving the
18 competitors' Class I differential unchanged.

19 This would erode the competitive balance
20 between Crossroads and Tamarack and their competitors
21 located in the northern area of Order 33, which will
22 not experience an increase in their Class I
23 differentials.

24 Milk supplies in Federal Order 33 are

1 committed to be used in the deficit markets in the
2 Southeast each year. If milk supplies are inadequate
3 to meet demand, then how can milk produced within this
4 order be committed to deficit markets?

5 Currently, milk supplies are adequate to
6 meet the needs of the market, and there is no
7 justification to disrupt the competitive balance
8 between handlers by increasing Class I differentials.

9 If in the future supplying milk to
10 handlers located within the area of the proposed
11 increase in Class I differentials becomes an issue,
12 then The Kroger Company would suggest that a hearing
13 be convened to promulgate a new Federal Milk Marketing
14 Order.

15 The area of the proposed Class I
16 differential increase suggested at this hearing would
17 be counties contained within a new order.

18 If a problem would occur in supplying
19 milk to the plants within this area, it would make
20 economic sense to have the monies generated by the
21 milk utilization of these facilities used to their
22 fullest extent to aid in procuring a milk supply.

23 Today the dollars generated by these
24 plants are blended throughout all of the dairy farmers

1 in Order 33, the vast majority of who will never
2 supply milk to these facilities.

3 An order which contains the plants
4 affected by this proposal I believe would generate
5 sufficient income to help ease any supply concerns
6 that may occur in the future and would not require an
7 increase in Class I differentials.

8 Needless to say, based on my testimony,
9 The Kroger Company believes that no emergency
10 marketing conditions exist, and therefore this hearing
11 should follow traditional hearing procedures.

12 Thank you. And I will be happy to
13 answer any questions.

14 JUDGE DAVENPORT: Mr. English?

15 MR. ENGLISH: Good morning,
16 Mr. Hitchell. Charles --

17 THE WITNESS: Good morning,
18 Mr. English. How are you today?

19 MR. ENGLISH: -- English. I represent
20 Dean Foods, Prairie Farms, and National
21 Dairy Holdings.

22 CROSS-EXAMINATION

23 BY MR. ENGLISH:

24 Q There may be some testimony that is

1 similar to yours later today, so I want to just make
2 the record clear.

3 When is the first time that I or anybody
4 present ever saw your testimony?

5 A Yesterday.

6 Q And at that time had you independently
7 concluded that the correct decision -- well, not from
8 this hearing, because there's no notice for that, but
9 a better approach for dealing with any perceived
10 problem with the Southern region would be a separate
11 order?

12 A I did.

13 Q And that was independent with any
14 discussion you had ever had with Dean Foods?

15 A I had not discussed that with anyone,
16 except one of my suppliers.

17 Q You've got two plants that would be
18 adversely affected by the proposal in consideration
19 today?

20 A That is correct.

21 Q Do you have any information regarding
22 supplies of those plants that would suggest those
23 markets were a little different than what the
24 proponents suggested?

1 A Both of those facilities have been
2 supplied by either MEMA, in the case of Crossroads, or
3 DFA or MMI in the case of Tamarack, predating my time
4 in this job, which is now over 20 years. And in no
5 time has anyone ever come to us and said there is a
6 significant problem supplying these plants with milk.
7 So I see no -- I see no problems with supplying those
8 facilities.

9 Q Do you, in fact, receive at times milk
10 that would otherwise be supplemental to this market or
11 other markets?

12 A There are times the milk may be coming
13 in from those plants is supplemental, but if it is,
14 it's because milk has been moved elsewhere.

15 And I don't know today what would you
16 call supplemental? I mean, the milk that would
17 generally come to those plants would possibly be
18 Michigan milk, and that's part of the order. I'm not
19 sure I would call that supplemental milk today.

20 Q But your conclusion is that none of your
21 suppliers have ever come to you and said, look, we're
22 having trouble supplying those plants with milk?

23 A No. Not on an ongoing -- I mean, there
24 may be a seasonal condition, certain times of the year

1 when it's very, very hot, very, very humid when the
2 entire milk marketing structure was under pressure,
3 not just our plants, but all plants throughout the
4 country, or certainly throughout the eastern United
5 States.

6 But for an ongoing position saying
7 there was a necessity that those plants could no
8 longer be supplied, no.

9 Q Now, you were here earlier today for the
10 testimony provided by both Joe Carson for United and
11 the dairy farmer from Wayne County?

12 A Yes, I was.

13 Q And one of the issues -- one of the
14 principal issues addressed there was that their plant
15 was being raised more than Broughton foods location,
16 correct?

17 A That is correct.

18 Q Is that any different from Tamarack,
19 Crossroad being raised 15 cents and plants to the
20 north not being raised at all?

21 A It sounds like their situation is
22 somewhat different based on the severity of the
23 amount, but the situation is basically the same.

24 We are talking an increase, if this

1 proposal is adopted, of well over a penny a gallon.
2 And as was stated by one of my processing peers
3 earlier today, business is lost in this industry for a
4 penny or less.

5 MR. ENGLISH: Thank you. No further
6 questions.

7 JUDGE DAVENPORT: Mr. Beshore?

8 MR. BESHORE: Good morning, John.

9 THE WITNESS: Good morning, Marvin.
10 How are you today?

11 MR. BESHORE: Good. How are you?

12 THE WITNESS: Just fine.

13 MR. BESHORE: I just have one or two
14 questions.

15 CROSS-EXAMINATION

16 BY MR. BESHORE:

17 Q Do I understand your position that you
18 feel the relationship of Class I differentials between
19 your plants in Ohio and plants in the north should
20 remain the same as it was established in 1985?

21 A Correct. Or as -- well, remain the same
22 as they are today. And there may have been -- I did
23 not go all the way back to '85 to determines if there
24 had been slight adjustments from '85 to '99 to now,

1 but the way they are today, yes.

2 Q Okay. Well, you referenced the '85 Farm
3 Bill --

4 A Well, again, that --

5 Q There was testimony about that -- you
6 brought some testimony about that at the southeast
7 hearing --

8 A I did.

9 Q -- as well?

10 A I did.

11 Q That's the benchmark that is your point
12 of reference?

13 A Right.

14 Q And just one other question. With
15 respect to the possible new order of the Southern
16 region, your concern is, if I understand it, is that
17 the Class I proceeds from the plants in the Southern
18 region should be blended with fewer -- with a lesser
19 volume of non-Class I milk?

20 A Well, our concern is that there's a need
21 for milk supply to be here -- one of the things we all
22 in this industry ought to give some pause to is are
23 there other things we can do besides raising Class I
24 price and the cost to consumers.

1 I mean, milk sales this year in the
2 first quarter are down two percent. They're down now
3 somewhat less than that, but certainly around one
4 percent year to date.

5 Our concern is, is there something else
6 we could do to better utilize the monies that are
7 generated to the system and help the dairy farmers to
8 get a better return to supply these plants.

9 We believe it should be looked at. We
10 think this is a greater situation -- I mean, this
11 would be an excellent situation to do that.

12 We were concerned in 1999 about the
13 moving of -- about the consolidation of these orders,
14 in putting a fairly low Class I utilization market
15 which we do business with Michigan combined with what
16 was in Order 33 and Order 32.

17 It's taken nine years for the problem to
18 surface but if you folks are correct, the problem has
19 surfaced. At this point there is a significant amount
20 of Class I utilization, based on at least what I know
21 of our plants, and I am assuming that most of the
22 folks, you know, these plants that are in this
23 proposal are our processing competitors, hence their
24 utilization is greater than the market.

1 Would we not be better off for the dairy
2 farmers who supply this market, and would we not be
3 better off for the consumers who we supply by seeing
4 if we could combine those dollars and better utilize
5 and pay the dairy farmers who supply that market than
6 to have those dollars blended out to dairy farmers
7 that will never supply that market, and keep from
8 increasing Class I costs to consumers.

9 Q I think the answer to my question was
10 yes --

11 A Yes.

12 Q -- to have --

13 A But I'm taking --

14 Q -- current Class I dollars distributed
15 among fewer dairy farmers?

16 A But I'm taking license.

17 MR. BESHORE: Thank you, John.

18 JUDGE DAVENPORT: Mr. Yale?

19 MR. YALE: Ben Yale, Select Milk and
20 Continental Dairy Products. Good morning,
21 John.

22 THE WITNESS: Good morning, Ben.

23 CROSS-EXAMINATION

24 BY MR. YALE:

1 Q I think you've heard the concept that
2 blend that moves milk is not the differentials?

3 A I have.

4 Q Isn't that really what you're saying, if
5 you need to move the milk, then you need to change the
6 blend?

7 A That is correct.

8 Q And the blend is -- within the Order is
9 not -- you can't really fragment it throughout the
10 order, it has to be within a particular order?

11 A That is correct. I believe that -- we
12 are not proposing that the blend be changed within the
13 order.

14 We are proposing that there be a new
15 order in order to have a higher blend for the dairy
16 farmers who supply those plants.

17 Q That thought isn't just in the southern
18 part of the Mideast Order, it's a consideration the
19 department needs to give throughout the Federal Order
20 system?

21 A I'm certain that there are other areas
22 that should be looked at. We do not have any at this
23 point in time to discuss, but I'm sure there are.

24 MS. TAYLOR: Good morning,

1 Mr. Hitchell.

2 THE WITNESS: Good morning.

3 CROSS-EXAMINATION

4 BY MS. TAYLOR:

5 Q Have you found -- were you here
6 yesterday for Mr. Hollon's testimony?

7 A Part of it. I may have stepped out for
8 part of his testimony, which I'm sorry I missed.

9 Q He talked in detail about the cost to
10 transport, for their cooperatives to supply plants,
11 the cost of diesel going up, et cetera.

12 Have you found that your procurement
13 costs for milk have gone up similarly?

14 A Certainly we pay a fuel surcharge which
15 has continually gone up. We also pay over order
16 premiums.

17 Because of the -- I will say in the last
18 year, because of the extraordinarily record high cost
19 to move that, that the over order premiums have not
20 increased, but the fuel surcharge premiums have
21 increased dramatically in all markets, which we
22 understand.

23 But I think -- another thing, I'm not
24 sure if it was discussed, but, in fact, we are helping

1 to offset the cost of increased transportation by
2 significant increased cost in fuel surcharges that we
3 are paying, and understand it needs to be paid. We're
4 not arguing about that.

5 MS. TAYLOR: That's it. Thank you for
6 testifying.

7 THE WITNESS: Thank you.

8 JUDGE DAVENPORT: Other questions?

9 Thank you, Mr. Hitchell. You may step
10 down.

11 Mr. English?

12 MR. ENGLISH: Thank you, Your Honor.
13 Mr. Kinser will be --

14 MR. STEVENS: Your Honor, just to
15 clarify for a second. We marked that, his
16 testimony?

17 JUDGE DAVENPORT: Excuse me. That was
18 marked as Exhibit 17 and it will be admitted
19 in to evidence at this time.

20 MR. STEVENS: Thank you.

21 (Whereupon, Exhibit Number 17 was
22 marked for identification.)

23 MR. ENGLISH: Mr. Kinser will be the
24 next witness. And we have predivided up

1 sort of the documents and the exhibits on
2 single-sided paper for the court reporter,
3 Your Honor, USDA, and the attorneys, and
4 then we have got for public, outside of that
5 group, double-sided paper trying to be a
6 little green here.

7 So I'm going to hand out now -- there's
8 going to be testimony -- we tried to put it
9 together as one exhibit book, but Kinko's
10 didn't quite cooperate with us, so we have
11 four separate documents, testimony, and then
12 three exhibits.

13 JUDGE DAVENPORT: Very well. Let's
14 mark the statement as Exhibit 18.

15 (Whereupon, Exhibit Number 18 was
16 marked for identification.)

17 MR. ENGLISH: We have another 30 copies
18 that are being handed out to the public. We
19 made 45 copies total, 15 single-sided and 30
20 double-sided.

21 JUDGE DAVENPORT: Mr. English, I've
22 marked them in the order which you've given
23 me is the testimony itself as being Exhibit
24 20, the proposal one alternative, which is

1 separately stapled, as Exhibit 21, the maps
2 as Exhibit --

3 MR. STEVENS: Your Honor --

4 MR. ENGLISH: What's labeled as
5 proposal --

6 JUDGE DAVENPORT: Excuse me. 18 should
7 be -- 18 was the statement, 19 was the
8 Proposal One, 20 was the maps, and 21 were
9 the tables.

10 (Whereupon, Exhibit Numbers 19, 20, and
11 21 were marked for identification.)

12 JUDGE DAVENPORT: Thank you,
13 Mr. Stevens.

14 Would you raise your right hand.

15 THE WITNESS: (Complies.)

16 JUDGE DAVENPORT: Do you swear or
17 affirm the testimony you're about to give
18 during this hearing shall be the truth, the
19 whole truth, and nothing but the truth, so
20 help you God?

21 THE WITNESS: I do.

22 JUDGE DAVENPORT: Please be seated.
23 Tell us your name and spell your name for
24 the court reporter.

1 THE WITNESS: Evan Kinser, E-V-A-N,
2 K-I-N-S-E-R.

3 EVAN KINSER,
4 of lawful age, as having been duly sworn, was examined
5 and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. ENGLISH:

8 Q Mr. Kinser, I know Exhibit 18 has some
9 information regarding by whom you're employed, but
10 let's go ahead and discuss a few things first.

11 This is not your first time appearing at
12 a Federal Order hearing, is it?

13 A No.

14 Q Have you kept count, or lost count yet
15 of how many times you've appeared at these hearings?

16 A I have managed to lose count.

17 Q More than half a dozen?

18 A It's close to a half a dozen.

19 Q And did you grow up in a family with a
20 dairy farm?

21 A Yes. I grew up in southwest Missouri on
22 a farm that involved dairy that's still operated today
23 by my parents and my brother.

24 Q And that gave you some direct experience

1 with dairy farm operations?

2 A Absolutely.

3 Q You stayed close to that?

4 A I continue to be in touch with my family
5 and what's going on at the farm.

6 Q And other than your direct experience on
7 the farm, what is your educational experience,
8 beginning with college?

9 A I attended the University of Missouri
10 Columbia and obtained degrees in animal science and
11 agricultural economics, from there went on to the
12 University of Wisconsin in Madison and earned an MBA
13 in agri business.

14 Q Following your educational experience or
15 while your educational experience was being obtained,
16 did you become employed at any time in the dairy
17 industry other than on the farm?

18 A Yes. In college, both undergrad and
19 then working on my master's, I had opportunity to work
20 with a couple brokerage firms at different times, and
21 then as I was finishing my master's began to work for
22 Foremost Farms U.S.A. in Baraboo, Wisconsin, and
23 completing my master's, joined them full time and
24 spent a total of six years with Foremost.

1 Q Following Foremost?

2 A Following Foremost I joined Dean Foods,
3 which was approximately four years ago, in a manager
4 role, and now I'm director of dairy policy and
5 commodities.

6 Q And, in fact, shortly after you joined
7 Dean Foods you had the privilege of appearing at your
8 first one of these in I think Order 32?

9 A I believe I started in Order 30 with
10 just a few month's experience.

11 Q And you have qualified in the past as an
12 expert in agriculture economics, especially as it
13 applies to marketing orders?

14 A That's correct.

15 MR. ENGLISH: I move that Mr. Kinser be
16 recognized as an expert in agricultural
17 economics, especially as it relates to
18 Federal Milk Marketing Orders.

19 MR. BESHORE: No objection.

20 JUDGE DAVENPORT: It will be so noted.

21 Q Now, Mr. Kinser, at the beginning of the
22 proceeding I entered an appearance for Dean Foods, and
23 you're appearing for National Dairy Holdings, and they
24 have a witness appearing, and for Prairie Farms, but

1 Prairie Farms does not have a witness, correct?

2 A That is correct.

3 Q Are you authorized by Prairie farms to
4 oppose Proposal One?

5 A I am.

6 Q With the limited time finalizing your
7 testimony as late as this morning, have you had an
8 opportunity to actually run your testimony by Prairie
9 Farms?

10 A No. They have not had a chance to see
11 the final version.

12 Q So even though they are opposing
13 Proposal One and you're authorized to speak for them
14 on that behalf, whatever other positions they may take
15 with your testimony, we can address on brief?

16 A Correct.

17 Q In addition to Michael Meyer appearing
18 on behalf of National Dairy Holdings and you appearing
19 for Dean Foods, Mr. Conover, who is known to a number
20 here, and we'll address his own curriculum vitae
21 later, will be appearing as a policy expert, correct?

22 A That is correct.

23 Q But Mr. Conover has not made a study of
24 Dean Foods operations --

1 A That is correct.

2 Q -- recently?

3 A That is correct.

4 Q And so any questions regarding Dean
5 Foods should be directed to you?

6 A Yes.

7 Q When you first learned that there might
8 be a hearing convened, the one here today and
9 yesterday for Order 33, did you take any action with
10 respect to contacting directly or indirectly USDA
11 regarding the question of alternative proposals?

12 A I did. And learned that there was not
13 an option to submit an alternative proposal.

14 Q Except to the extent that you could make
15 alternatives based upon the hearing notice?

16 A That's correct.

17 Q But alternatives that were outside the
18 scope of a yet-to-be-noticed hearing were not -- you
19 weren't encouraged to make those?

20 A I did not have the option to submit a
21 proposal to be included in the notice.

22 Q And turning from the issue of
23 alternative proposals, have you, as I think we've
24 seen, made a request for data from a number of Market

1 Administrator's Offices?

2 A Yes.

3 Q And you've gotten a lot of responses for
4 which you appreciate those responses, correct?

5 A Correct. The market administrators have
6 been extremely cooperative. Given the timing of how
7 this fell and when our requests were in, we were
8 crowding them against their resources to run pool to
9 get scheduled price announcements out. So we greatly
10 appreciate them allocating resources and getting
11 responses available to us.

12 We did inquire of another possible work
13 to be done that the responses would probably take a
14 week to do, so we did not go ahead and formally
15 request that because it would be too late for this
16 record.

17 Q That was a request that you made
18 yesterday -- or just informally off the record
19 discussed yesterday?

20 A It was a discussion that occurred
21 yesterday.

22 Q Leaving aside the efforts that the
23 market administrators were able to make, and
24 recognizing that it's outside what they were able to

1 do, is there some frustration that you've had with the
2 data issue?

3 A It's been challenging to sort of think
4 through the different things that need to be looked
5 at, and more specifically to be able to obtain two
6 things: One, detailed data.

7 Clearly market administrators have to
8 abide by the confidentiality standards, and we
9 acknowledge that and appreciate that, and to be able
10 to work around those -- and by work around I mean ask
11 questions in a way such that they can provide
12 responses that are not confidential, take more time.
13 So the pressure of this time has limited our ability
14 to do that.

15 Q With respect to data that's actually
16 available in mid-August of 2008, have you had any
17 particular frustration?

18 A Knowing that a chief complaint is that
19 this is impacted by the changes in the southeast, that
20 there have been very limited data available to see any
21 of the marketing activities that have occurred in the
22 southeast to be entered in to this record.

23 Q Before you read your testimony that is
24 Exhibit 18, why don't we spend a few minutes

1 discussing the exhibits that have been marked as
2 Exhibit 19, 20, and 21.

3 And I don't propose that you read
4 Exhibit 19 in to the record, so why don't you describe
5 what Exhibit 19 is that's labeled Proposal One
6 alternative.

7 A Understanding from past practices that
8 it is within the option of folks -- of the interested
9 parties to offer alternatives to the notice of
10 hearing, Exhibit 19 is Dean Foods' alternative to
11 Proposal One.

12 Basically it's structured the same as
13 Proposal One. The difference is in Proposal One there
14 are adjustments to each of the counties, and what we
15 have done is in place of the proposal we have offered
16 alternative adjustments to the existing differentials.

17 Q And sort of summarizing, the
18 differentials that are plus differentials in the
19 Southern region in Proposal One have been zeroed out?

20 A Correct.

21 Q And additional counties within the
22 marketing area that are in Proposal One listed as zero
23 remain as zero?

24 A Yes.

1 Q And then there are counties that are now
2 listed as minus five cents?

3 A Yes.

4 Q Some counties labeled as minus ten
5 cents?

6 A Yes.

7 Q And some counties that are minus 15
8 cents?

9 A That is correct.

10 Q And you'll be discussing that in your
11 testimony?

12 A Correct.

13 Q What is Exhibit 20?

14 A Exhibit 20 is three maps of the states
15 where in Proposal One alternative, which is Exhibit
16 19, we're trying to graphically illustrate -- the key
17 is on the first page, so the pink basically represents
18 a minus five, the yellow represents a minus ten, and
19 the green represents a minus 15.

20 So you can see basically in Michigan
21 what the adjustments are and that all counties have an
22 adjustment that are in to the main part of Michigan,
23 not the upper peninsula.

24 Then the next is Ohio. The adjustments

1 are made to the Northwest area of Ohio. And then
2 Indiana, and the adjustments in Indiana are the
3 northeastern quadrant of Indiana.

4 Q So this is a graphical or geographical
5 illustration of Exhibit 19?

6 A Correct.

7 Q And, again, the key may not have come
8 out as well on the copies. I think the pink is a
9 little more obvious than the yellow, but they're
10 designed to be the pink is minus five, yellow minus
11 ten, and green is obviously minus 15?

12 A Yes.

13 Q And, again, that will be discussed in
14 your testimony?

15 A Yes.

16 Q And finally, Exhibit 21, which is five
17 pages of charts, January '07, January '08, April '07,
18 April '08, May '07, May '08, June '07, June '08, and
19 August and November '07, are each of those months
20 essentially the same kind of calculations, so if we go
21 over one calculation people should understand what
22 they are?

23 A Correct. The layout is exactly the
24 same, the formulas are the same. The difference is

1 the month level detail that is plugged in to drive the
2 formulas.

3 Q So let's just for convenience purposes
4 look at the first page of Exhibit 21, and for
5 convenience discuss January of '07. Why don't you
6 first tell us what it is you were attempting to derive
7 here.

8 A The basic attempt is to look at what
9 blend prices would look like if the Order were divided
10 in to three subregions and have those operate as
11 independent orders, sort of following the logic of the
12 cooperatives. Basically the assumption of the
13 cooperatives and the statement of the cooperatives if
14 they are three distinct areas.

15 So following that layout -- there was
16 no attempt made to come up with a different structure,
17 but to then process the data that's provided and model
18 what we thought the three regional blends would look
19 like.

20 Q Before I got to the calculations, let me
21 just ask you a question. The first is -- let's back
22 up. The first is, did you hear testimony from
23 Mr. Hollon yesterday?

24 A Yes.

1 Q Did you hear him describe these as three
2 reasonably different milksheds?

3 A I did.

4 Q And that is part of the genesis of this
5 effort?

6 A That's correct.

7 Q Also, you were here earlier today when
8 Mr. Hitchell testified, correct?

9 A Yes.

10 Q Had you come up with this concept of
11 looking at this in this respect, not having run the
12 numbers themselves, but this concept before yesterday?

13 A Yes.

14 Q Had you discussed that at all with
15 Mr. Hitchell before yesterday?

16 A No.

17 Q So you and he came up with this concept
18 independent of each other?

19 A Correct.

20 Q All right. So first describe what's
21 actually shown, then let's talk about the underlying
22 assumptions and what you did for January '07 to derive
23 this document.

24 A Let me first say that this is not the

1 most polished document I've ever created. It's more
2 in working form than published form, but again, that's
3 the function of the rush.

4 So it's put together to illustrate,
5 though not in a pretty form, the differences in the
6 three regions if they were processed as independent
7 orders.

8 So the way it kind of logically flows is
9 it starts out with the actual data that was published
10 by the market administrators when they announced the
11 PPD price for Order 33.

12 From there, it's adjusted knowing that
13 in Exhibit 7 Dean Foods supplemental request, data was
14 provided about the pool receipts of the distributing
15 plants in each of the regions.

16 Then there's some amount of milk that's
17 not accounted for in distributing plants. The
18 assumption is made that that milk is predominantly
19 nine C milk, so that it could not be associated with
20 any individual plant, but more with a cooperative
21 which is much less geographically constrained.

22 So then there's a process where using
23 the receipts at pool plants and the milk available,
24 again, following the logic that was set up by the

1 cooperatives or the proponents in their request to
2 then allocate the balance of that milk in to the
3 different regions, and from that apply back the
4 individual utilization at the distributing plant level
5 and come up with basically what the composition of
6 three different orders would look like, and push that
7 through a classified pricing system.

8 And the Class I differential used for
9 each of the regions is basically the simple average of
10 the plants that were divided into the region.

11 And so the resulting blend would not
12 track well with the announcement of the EMA in that I
13 did not allocate fat between Classes I, II, or III, I
14 did it III, IV all the way through, but I treated each
15 of the regions the same. So the comparison between
16 the regions should fall out rather uniformly, though
17 again not perfectly.

18 And actually it was this data that was
19 the informal request where the response was it would
20 probably take something like a week, because it was
21 not as simple as sort of redirecting a file. At least
22 that was what I understand the response to be.

23 Q All right. So from a big picture level
24 I think that helps explain. Let's try to drill down

1 for a moment.

2 A Okay.

3 Q To the right of January '07, sort of the
4 first line in any of these has three columns, and then
5 it's labeled milk available. It's also the -- you
6 have the South, Northwest, and Northeast?

7 A Correct.

8 Q Does this derive from the exhibits
9 introduced yesterday from the market administrator
10 from the request from the cooperatives based upon
11 their definition of these categories?

12 A Yes. Working with those top three
13 lines, milk available comes from DFA 3-B in Exhibit 5,
14 and then it is supplemented because at Deans Foods
15 request for additional months in Exhibit 7, Dean Foods
16 supplemental number two.

17 And what it is, it's the -- again, it's
18 just following the request of the cooperatives for
19 milk available, then broken out by the regions.

20 The next line underneath that --
21 actually, I would like to skip down to the bottom
22 line, the distributing plant receipts. It comes off
23 the exact same tables, just using a different column
24 on the same table. So again that's DFA 3-B,

1 supplemented by Dean Foods supplemental request number
2 two.

3 The middle row labeled distributing
4 plant pool receipts comes from Exhibit 7, Dean Foods
5 supplemental request three. There's two pages to that
6 request in Exhibit 7. So I'm using the regional
7 breakout of the distributing plants reports to input
8 that number into the formula.

9 The next kind of logical place to step
10 would then be to go to the next rows which are broke
11 out in to Class I, II, III, and IV and work from left
12 to right.

13 The most left number comes again from
14 the MA's announcement of the PPD where they provide
15 the pounds of producer milk in each class.

16 The column to the right of that labeled
17 exhibit comes from DF -- excuse me -- Exhibit 7, Dean
18 Foods supplemental request number three, pages one and
19 two, pulling off the total Class I pounds in the
20 market area two, three and four that's on the
21 distributing plant reports.

22 The next column is just a mathematical
23 difference between the market and the exhibit,
24 basically showing that I know if I just used the pool

1 plant reports clearly not all -- excuse me -- the
2 distributing plant reports, not all the milk is
3 accounted for into the pool, so then an allocation has
4 to be made of the balance.

5 The way I chose to do this was Class I.
6 I allocated according to distributing plant pool
7 receipts, their portion of the receipts that they had
8 of the overall distributing plant receipts by region.

9 The II, III, and IV, I allocated
10 according to milk available. So it's basically the
11 same ratio that milk is available in the marketplace.

12 When you pull that back through, it
13 doesn't turn out to perfectly account for everything,
14 but when you think about in this instance a market
15 that's about 1.4 billion, in general, my error was
16 less than a truckload.

17 So it basically accounted for all the
18 milk, because there was some degree of rounding
19 error. And some of it I can see, and you can see here
20 in January, if you look at the Northwest you see that
21 it adds up to something greater than a hundred percent
22 between the areas.

23 And this is just a function that if you
24 would add up the numbers on mine or the numbers

1 provided by the market administrator, there's some
2 rounding error, and I'm sure that that probably
3 accounts for most of my error to not tie back
4 perfectly.

5 So then once I had the pounds of milk by
6 class, by region, I could then multiply that through.
7 And, again, I stated earlier, the Class I differential
8 that I used was the simple average of the data
9 provided in Exhibit 5, DFA request 1-A. So from that
10 I just calculated out very simplistically blend
11 prices.

12 So in this instance you can see the
13 south in January of 2007 under the simplistic model
14 would have had a blend price of 19.52, the Northwest
15 18.95, and the Northeast 19.28.

16 And then the line below that just
17 compares that region back to the south. So the
18 Northwest was 57 cents below the south, and the
19 Northeast was 24 cents below the south.

20 You drop down to the last set of lines,
21 that's the utilization by class within each of the
22 areas. So a few things kind of fall out to me that
23 kind of tie logically is that the highest price occurs
24 in the South. It says the proponents say and that's a

1 deficit market, you should expect it would have a
2 higher price. And then the lowest price is in the
3 Northwest, which proponents suggest is the most
4 surplus market.

5 And when you look at the utilization,
6 it falls out very similarly. You see the highest
7 Class I utilization occurring in the South, the next
8 highest in the Northeast, and finally the lowest
9 occurring in the Northwest.

10 Q And the same analysis, then, was done
11 for each of the other months?

12 A That is correct. So the only thing that
13 changed as I went from January of '07 to January of
14 '08 was then to just look at the applicable month to
15 draw the data off of the tables and to plug it in.
16 The formulas were not adjusted in the process.

17 Q And just with any other analysis that
18 may be done to look at how blend price might be
19 affected, such as, for instance, that was done in the
20 Southeast, this is a static analysis based upon how
21 the market existed at the date of the month, correct?

22 A That's correct. There's no assumptions
23 of something changing from what's established here
24 that would cause things to happen.

1 And to the degree errors exist as far as
2 the calculation, it's applied evenly across the
3 regions. And I guess by errors I'm just thinking that
4 it's an extremely simplified calculation of the pool,
5 nothing that even closely resembles the detailed
6 process that the market administrators go through
7 looking at each handlers individual report and rolling
8 it up into a single pool.

9 Q Finally, before you read Exhibit 18, you
10 were here earlier today for the testimony of both
11 United and the dairy farmer who was supporting their
12 position, correct?

13 A Yes.

14 Q And, in essence, a significant element
15 of their discussion focused on the relationship
16 between their operation in Charleston and Dean Foods'
17 operation in Broughton, correct?

18 A Correct.

19 Q Do you have any comment with respect to
20 that analysis as it applies to the north of Broughton?

21 A To the degree the logic is the
22 relationship should be maintained, then we would
23 follow that that logic could continue to apply as you
24 look to the north.

1 We have competition to the north and to
2 the east that's not at consideration for an increase.
3 So the alignment will be changed should Proposal One
4 be adopted as submitted.

5 Q Why don't you proceed, then, with
6 reading Exhibit 18.

7 A Hello. My name is Evan Kinser. I am
8 employed by Dean Foods Company as Director of Dairy
9 Policy and Commodities.

10 Dean Foods owns and operates 11
11 distributing plants regulated by the Mideast Milk
12 Marketing Federal Order. Three of these
13 distributing plants stand to be directly and
14 adversely affected by Proposal One.

15 I am appearing today to oppose the
16 Proposal being considered at this hearing and to
17 oppose the issuance of an emergency decision.

18 Let me begin by saying I was wrong. I
19 thought it would take at least a year before this
20 hearing was convened as a direct consequence of the
21 Southeast hearing and the decision there to depart
22 from a national price surface, even temporarily.

23 The Federal Orders impose regulatory
24 authority over the marketing of milk. They are not,

1 in today's marketplace, the market.

2 Thus, when the Secretary takes action
3 exercising his regulatory authority, it changes the
4 marketplace, but it does not set the market.

5 For example, when the Upper Midwest and
6 Central Orders' regulations were changed to prevent
7 milk from being simultaneously pooled on both a state
8 marketwide pool and a Federal Order, mainly to
9 address California-produced milk that was not
10 delivered to a federal order plant, it did not
11 eliminate California dairy farmers from producing
12 milk. It changed how those responsible for California
13 milk transacted the marketing of milk.

14 The same is true when the Upper Midwest
15 changed pooling provisions, which significantly
16 reduced the economic incentive to pool milk from
17 Idaho on the Order but diverted to Idaho.

18 This did not eliminate the Idaho dairy
19 farmers from producing milk or prohibit them from
20 pooling their milk where economically feasible. It
21 just changed how those marketing Idaho milk did their
22 business.

23 The most extreme example of the impact
24 on markets as opposed to being the market is the

1 Western Order. In this example dairy farmers opted
2 to oppose the final rule and the Order was
3 eliminated. There continues to be a healthy dairy
4 industry and the consumers continue to have products.

5 This being the case, because markets
6 are complicated things, they are influenced by many
7 forces. While the secretary, through Federal
8 Orders, attempts to manage those forces, he
9 certainly does not control them.

10 Thus, when considering changes to the
11 regulations, it is complicated to think through
12 every potential outcome that might occur.
13 Oftentimes things happen beyond industry's,
14 including the secretary's, expectations.

15 These things have been referred to as
16 unintended consequences. Unintended consequences
17 are, however, also sometimes predictable, and this
18 hearing was both predictable and predicted.

19 When the secretary raised the Class I
20 differentials in the Southeast effective May 1, 2008,
21 the market in the Southeast was not magically cured.
22 Those who handle milk and marketing milk under those
23 Federal orders are adjusting their businesses to play
24 by the new rules.

1 Those regulatory changes did not set
2 the market. However, they did impact milk values.
3 It is my opinion that this proceeding is a direct
4 product of the secretary's action in response to the
5 proponent's success in the Southeast, if not by
6 virtue of economics, then by the belief they found a
7 sympathetic ear in the secretary.

8 The secretary has the responsibility to
9 guard over the industry and enact decisions which
10 fulfill the intentions of the Act, including setting
11 minimum prices that are high enough to bring forth an
12 adequate supply of milk, and to protect the interests
13 of consumers.

14 The secretary's responsibility is not
15 an easy one. When contemplating a decision, there is
16 a mountain of information. This information is in
17 the form of fact, arguments, and opinions.

18 The secretary must focus on the facts
19 to guide his judgment, all the while being bombarded
20 with the biases as to the handling of the facts.

21 This proceeding will be no different.
22 However a witness's track record should be weighed
23 when contemplating how the secretary treats their
24 opinion of the market's reaction to new rules.

1 Bad policy. From where I sit it appears
2 the secretary has begun to walk down a road toward a
3 bad end. I see no reason to abandon the past practice
4 of the secretary, namely the logic behind the
5 nationally coordinated Class I price surface the
6 secretary proposed for Federal Order reform.

7 Furthermore, like the Southeast, a
8 decision to change minimum prices in this proceeding
9 will not occur in a vacuum.

10 National price surface. In reading the
11 secretary's decision regarding the Class I
12 differentials in the Final Rule published in the
13 Federal Register on April 2, 1999, it seems clear to
14 me the secretary was concerned about the local,
15 regional, and national implications of the Class I
16 price surface.

17 The secretary went so far, when
18 commenting about industry's comments, to state, and I
19 quote, these comments provided valuable information
20 about particular markets, but generally did not
21 consider the feasibility or impact of a local or
22 regional issue on a national basis.

23 While remaining mindful of local and
24 regional concerns, USDA has also evaluated alternative

1 Class I pricing structures from a national
2 perspective, as should be expected, given the national
3 concerns expressed about milk pricing, close quote.

4 In the discussion about the process, the
5 secretary provided nine key criteria used to guide the
6 decisions.

7 One: Ensure an adequate supply of milk
8 for fluid use. As long as the Mideast Order is going
9 to be configured as it is today, I do not see any
10 evidence in this record to suggest there is anything
11 but an ample supply of milk.

12 Two: Recognize quality, Grade A, value
13 of milk. Again, with the record of Grade A milk
14 supply growth in the Mideast, it seems obvious that
15 quality is being addressed.

16 Three: Provide appropriate market
17 signals. This is where the proposal before us today
18 begins to break down.

19 While I know the proponents argue the
20 southern portion of the marketing area may not have a
21 correct market signal, their focus of raising minimum
22 prices in that area may provide other inappropriate
23 market signals.

24 It would suggest that -- excuse me. I

1 would suggest that will happen -- what will happen as
2 it seems at least part of the justification for this
3 hearing is a reaction to the secretary's adjustment in
4 the Southeast price signals.

5 Four: Recognize value of milk at
6 location. This has to be very closely linked with the
7 prior point. Milk definitely has value at a location,
8 but that value is a function of its alternative value
9 at another location.

10 In the Southeast hearing, a lot of time
11 was spent trying to illustrate the implications of
12 what was referred to in the Federal Order reform as
13 shadow pricing. Thus, changing a local value has more
14 than a local effect. It has the potential to impact
15 the value at another location. This is why nationally
16 coordinated pricing is so important.

17 Five: Facilitate orderly marketing with
18 coordinated system of prices. This is definitely a
19 part of any Federal Order decision.

20 One must acknowledge the intent of the
21 act to facilitate orderly marketing. Anything else
22 will lead to chaos, such as multiple emergency
23 hearings.

24 However, going back to the Southeast

1 proceeding, changing values begins to have secondary
2 impacts. It seems to be the secretary's approach will
3 gradually create a situation where the foundation for
4 the first decision is changed because raising prices
5 outside that region will alter economic decisions for
6 supplying that market.

7 At that time the circle will be
8 complete and the industry will be caught in a
9 continuous loop which feeds on itself.

10 The line will quickly blur between the
11 beginning of the loop and the end of the loop. The
12 only clear outcome will be ever increasing prices for
13 plants and consumers.

14 While the proponent witness
15 acknowledged this being problematic, it doesn't mean
16 that attempts wouldn't be made to correct the
17 misalignment with yet other tweaks to Order
18 provisions.

19 We urgently need a return to nationally
20 coordinated pricing without further disruption of
21 individual markets.

22 The most recent changes to the
23 transportation credit funds administered in Federal
24 Order 5 and 7 affect how producers qualify.

1 Clearly from Exhibit 9 milk is moving
2 from the impacted area into Order 5. It is more
3 difficult to tell, given the restricted response
4 provided in Exhibit 7 about --

5 Q Exhibit 10.

6 A Excuse me. That was Exhibit 10 -- about
7 milk moving from the impacted area into Federal Order
8 7.

9 The existence of the Federal Order 5 and
10 7 transportation credit funds is an important
11 consideration for the secretary for two reasons.

12 First, the proposed increase to this
13 market will assist milk in getting milk disassociated
14 from Federal Order 5 or 7 to continue to qualify for
15 future transportation credits on Federal Order 5 or 7.

16 The second concern is the impact this
17 will have on transportation credit payments. I am not
18 sure the proponents proposal is clear on the subject.

19 It appears to me this will change the
20 zones used in calculating the transportation credit in
21 the Federal Order 5 and 7 in such a way as to increase
22 the payout for the same haul. This is likely to
23 decrease the fund faster.

24 To the degree the secretary believes the

1 proposal is unclear, Dean Foods would advocate that
2 this temporary change have no additional adverse
3 effect on Federal Order 5 and 7 transportation credit
4 calculations.

5 Regardless, these two points illustrates
6 how adoption of this proposal exposes the Southeast to
7 yet another future hearing.

8 Six: Recognize handler equity with
9 regard to raw product costs. I believe this is an
10 area that was highlighted in the Southeast hearing.

11 The concerns raised were not given any
12 weight in the secretary's findings. In fact, it
13 appears to us that the concerns were dismissed as
14 being speculative.

15 Well, our speculation was accurate as
16 shown by the call of this hearing. Since the
17 implementation of the Southeast prices has only been
18 in place going on its fourth month, and at best two
19 months of incomplete data has been made available to
20 this record, it is too early to tell if the decisions
21 provided handler equity.

22 On the surface it appears there is
23 exposure, but I will concede given the quickness of
24 this hearing I have no additional data with which to

1 argue my point. Of course, proponents don't have
2 additional data to prove their case either. This
3 hearing was called too early.

4 Seven: Minimize regulatory burden.
5 This seems to be a mute point in this proceeding,
6 other than there is a cost to change and cost to
7 plants are inconsistent, increased minimum prices.

8 Eight: Minimize impact on small
9 businesses. Again, there is cost to change. I have
10 not seen any information applying the impact of this
11 change on small verses large businesses.

12 I have also seen no analysis to address
13 the impact on consumers, namely the WIC and school
14 lunch programs.

15 Nine: Provide long-term viability.
16 This depends on ones perspective of what needs to be
17 viable. If it is dairy farmers, clearly a revenue
18 increase can't be a bad thing. At least it seems as
19 such on the surface, but let us be clear. The
20 proposal has no impact at best on milk prices when
21 considering the market-wide pool.

22 Admittedly, some dairy farmers will
23 benefit more than the negative impact to the
24 market-wide pool. However, there will be a negative

1 impact on 11 plants. These plants will have higher
2 costs. The competitive structure will change in the
3 region. There is downside exposure in that some
4 plants will not survive.

5 B. Unseen unintended consequences. The
6 changes in Federal Order rules impact milk values in
7 such a way to either motivate milk to move in certain
8 directions or to discourage such movements. Again,
9 the Federal Orders are not the market, just an
10 influence on the market.

11 Thus, my testimony in the Southeast and
12 my comments today of only being surprised about the
13 timing is not that I'm psychic. Knowing that money
14 moves milk, it wasn't a stretch to see the new money
15 of the Southeast Class I differentials affecting milk
16 movement beyond the Southeast.

17 I am not yet convinced that the
18 proponents were not already aware that this problem
19 would arise as they were testifying at the southeast
20 hearing.

21 Yesterday's discovery suggests all the
22 more the cooperatives expected this impact. Again,
23 following yesterday it seems they were pretty quick to
24 be working with the department before the rule had

1 even been published.

2 While it is possible they overlooked
3 this possible consequence, I have more respect for
4 them than to believe they were slow in knowing.
5 Rather, I think they went to a soft spot looking for a
6 win. Now having got one, they are looking to leverage
7 it for more.

8 I strongly believe that action on
9 increase differentials in response to proponents will
10 have impacts beyond the area of change.

11 If the proponents proposal is adopted,
12 the increased price could be more than is intended --
13 excuse me -- more than is needed to provide economic
14 incentive to cause milk moved from the north to stop
15 and stay in the southern area of the Mideast Order.

16 This would then bring about the circular
17 logic I mentioned above, because southeast minimum
18 prices may need to rise to dislodge that milk from
19 this region.

20 I am not convinced that will be the
21 proponents next step. Rather, I have my eye on the
22 Federal Orders 1, 32, and 126. I think their
23 Southeast changes could lead them to make a case that
24 holding milk in the Southeastern edge of Federal Order

1 1 has been compromised by the change in the Southeast.
2 I think St. Louis, Missouri was also affected all the
3 more by the change in the Southeast.

4 While this isn't a new thing, it could
5 be a tipping point that forces cooperatives in that
6 market to request relief.

7 Finally, I think eastern Texas has to be
8 on their radar. If milk in northern Mideast is
9 jumping the southern region to enter the southeast, it
10 hardly -- it seems hardly a stretch to think of the
11 milk situation in western Texas jumping the Dallas
12 market to be in the southeast.

13 Thus, increased Class I differentials
14 are likely going to need to be proposed -- I'll try
15 this again. Thus, increased Class I differentials are
16 likely going to be proposed as needed.

17 What might make the Texas suggestion an
18 error is the low differential values of milk in west
19 Texas might be low enough to provide incentive for
20 ample surplus to move east. Therefore, all the milk
21 would want to be in the Southeast. It is content to
22 move to Dallas rather than staying in west Texas.

23 Marketing conditions are different. The
24 proponents have changed the rationale for why the Class

1 I price needs increased in this proceeding from the
2 rational that was used to support the Southeast
3 Proposal. This was wise, as the marketing conditions
4 are different in the Mideast.

5 In the Southeast temporary Class I
6 proceedings, Dean Foods acknowledged the exhibits that
7 demonstrated deficit milk supplies in those markets
8 overall. Here, no such market data has been provided
9 to the record.

10 The only argument for a deficit that
11 exists in this record is data involving subjective
12 regions defined by the proponents further complicated
13 by their definition of milk supply.

14 Dividing the market order in to regions
15 for analysis is a very different case than looking at
16 a full market order as was done in the Southeast.

17 I will admit that Dean Foods has not
18 helped this record, because in our attempt to simplify
19 an already crunched data request schedule, I blindly
20 followed the data request structure of the proponents.

21 I want to make clear that as it relates
22 to the deficit in the south region of the Mideast
23 Order, I do not subscribe to their lines.

24 I believe there is insufficient data to

1 critically evaluate the different possible ways lines
2 could have been drawn. However, I will concede they
3 have intended, if not helped, to draw a structure of
4 three different subregions in the existing Federal
5 Order.

6 While this point was ignored by the
7 secretary in scheduling a hearing on Proposal One
8 only, I challenge him to consider the idea again to
9 see if there are enough different things -- excuse me
10 -- enough things different about this market to take a
11 different action to a very similar request to
12 disregard historic policy.

13 Action to considered. It is clear from
14 the Proponents testimony that the marketing conditions
15 in the Southeast, where a similar request was granted,
16 and the Mideast are different.

17 Knowing different marketing conditions
18 exist, the secretary must consider the possibility of
19 a different solution.

20 From my vantage point the secretary has
21 several paths which must be considered before offering
22 a decision. Otherwise, it is a bit like noticing your
23 hair is getting long after having trimmed your
24 fingernails, and deciding that fingernail clippers are

1 handy and using them to cut hair. While it can be
2 done, it has implications that are undesirable and
3 unsightly.

4 Reverse the decision of the Southeast.
5 I would like to take advantage of this opportunity to
6 remind the secretary that the action in the Southeast
7 could still be reversed, especially since it is
8 temporary.

9 This proceeding is evidence that the
10 secretary's action in the Southeast had consequences
11 that reached beyond the area where the price was
12 changed.

13 Furthermore, in this proceeding is a
14 result --

15 Q If this proceeding.

16 A Thank you. Furthermore, if this
17 proceeding is a result of the Southeast as predicted,
18 how many more requests will come, or are even in the
19 works, should the secretary adopt this proposal?

20 Where has the nationally coordinated
21 Class I price surface gone? These impacts become like
22 the ripples in a pond after a rock has been tossed in.
23 They just keep spreading and spreading.

24 Soon, we will have completed the circle

1 and we'll be back in the Southeast looking for more
2 relief, but not coordinated price levels.

3 The secretary should return to a
4 national view of the Class I price surface and abandon
5 the Southeast alignment in temporary Class I
6 differentials in his decision.

7 Q You mean adjustment, rather than
8 alignment?

9 A Southeast adjustment in the temporary
10 Class I differentials in his decision.

11 Deny the proponents request. In looking
12 over the data, I think it would be reasonable for the
13 secretary to conclude there is insufficient evidence
14 at this time to take action on the proponents proposal
15 and should reject their proposal.

16 Yesterday the proponents reminded
17 the secretary of the decision regarding the
18 Mideast transportation credits.

19 I amplify their reminder to
20 highlight the secretary's conclusion that the
21 secretary -- excuse me. I amplify their reminder
22 to highlight the secretary's conclusion that the
23 cooperatives are able to get increased costs out
24 of the marketplace.

1 It seems they have simply changed
2 the numbers and are here hat in hand asking for
3 transportation relief again.

4 Their own testimony admitted they
5 have a fuel adjustor that is a part of the over
6 order premium calculation.

7 Rejecting this proposal would clearly
8 be the correct outcome if the secretary would abandon
9 the Southeast adjustment in temporary Class I
10 differentials.

11 It is still the correct decision to
12 make in light of their chief complaint is a function
13 of the Southeast change. Moreover, we have only
14 limited data of the marketplace under the new rules
15 because little is available to this record.

16 If we learned anything from Federal
17 Order reform, surely the industry learned that it
18 takes more than a couple months for handlers to get
19 used to the new rules before they begin changing
20 their marketing strategies.

21 Suspend the hearing until data is
22 available to understand the real implications of the
23 Southeast. If flat out rejecting the proposal does
24 not set well with the secretary, it could be that the

1 evidence of this hearing has at least piqued a
2 curiosity in the mind of the secretary that something
3 needs to be done.

4 If this is the case, we would ask the
5 secretary to first consider suspending the hearing
6 without closing it today to allow for more data to be
7 gathered and alternative proposals to be proposed and
8 considered.

9 This hearing was asked for on an
10 expedited basis by the cooperatives. Again, the data
11 is limited, especially relating to the impact of the
12 Southeast Class I differential change. Thus, it
13 would be wise of the secretary to suspend this
14 hearing for one year, or at least until one year of
15 data is available, to allow for more data to see
16 exactly what the market looks like and how, or indeed
17 whether, milk is actually moving.

18 I am sure the Proponents are going to
19 say, quote, the proposed change is temporary, close
20 quote. Yes, I would agree that word is used, but
21 they have provided no time line with which to change
22 it, or any other mechanism other than through
23 proceedings such as this.

24 The use of temporary and the request

1 for expedited action by the Proponents does not in
2 any way lessen the burden on the secretary to make a
3 fact-based decision.

4 Rushed judgments on the part of the
5 secretary could lead to more proceedings and other
6 administrative efforts that could be avoided through
7 the exercise of a bit of patience and administrative
8 restraint.

9 At a minimum, the lack of data
10 presently available regarding surrounding markets
11 impacts prevents any emergency decision.

12 How can the secretary make the right
13 decision when a primary reason for this hearing has
14 no data backing it up? We urgently deny -- we urge
15 denying emergency consideration of this matter.

16 If the request is not denied outright,
17 it should at least be suspended until sufficient data
18 can be provided to document the impact the Southeast
19 Change has had on milk movements in the Mideast.

20 Divide the Mideast Order in to three
21 smaller orders. In the process of considering any
22 proposal, the secretary has an obligation to look for
23 an appropriate outcome that satisfies all his
24 obligations under the AMAA, even if such an outcome is

1 not within the scope of the hearing.

2 Admittedly, the secretary could not
3 adopt the outcome without an expansion of the scope of
4 the hearing. This need for expansion of the notice --
5 excuse me. This need for expansion of the hearing
6 notice to reach a legal outcome should not prevent the
7 secretary from considering real and justifiable
8 possibilities that arise during the course of the
9 hearing.

10 If the secretary sees as clearly as I do
11 the data presented by the proponents, I believe a
12 natural consideration would be to examine the
13 implications if the Mideast Order were divided in to
14 three orders as the proponents have divided the
15 subregions.

16 I am not offering this as an alternative
17 proposal, as I know that such a proposal is beyond the
18 scope of this hearing. However, it is well within the
19 intent of the proponents request for the hearing.

20 It has merit to address the issues they
21 have made in presenting their case with much less
22 impact on consumers. It could have a positive impact
23 on dairy farmers, particularly in the southern region
24 of the Mideast Order that is purportedly deficit.

1 While this is not a proposal for this
2 record, I wish to provide the secretary with some
3 insight on what such a decision could look like and
4 how it addresses the concerns of the proponents, and
5 does so without having negative consequences on
6 consumers or unintended consequences to all industry
7 participants because the nationally coordinated price
8 surface has been abandoned. Basically, it only
9 changes how the dollars are distributed among the
10 dairy farmers.

11 And exhibit 21 is meant to sort of
12 supplement this to illustrate the implications of
13 blend prices for three different Orders.

14 Lower class differentials in the milk
15 surplus areas. Should the secretary conclude he only
16 wants to consider action with the Class I
17 differentials and not explore the possibility of
18 alternative proposals, I would offer an alterative to
19 the proponents proposal that is within the scope of
20 this hearing.

21 The Proponents have discussed the
22 merit of increasing the Class I differentials to
23 help enhance the attractiveness to delivery to the
24 Southern regions plants.

1 Their examples rely heavily on the
2 price spreads between the reserve supply areas and
3 the southern region. They conclude that the action
4 to be taken is to increase the Class I differentials
5 in the south.

6 A very similar outcome could be
7 achieved by reducing the differentials in the north.
8 With more freedom of consideration, I might have
9 offered a more creative proposal.

10 However, we were not given an
11 opportunity to submit an alternative proposal, so my
12 proposal must be made within the scope of the
13 hearing record.

14 Thus, I would propose the lowering of
15 the northern Class I differentials to increase the
16 price spread from north to south to help attract the
17 milk to the south.

18 This is a logical action as the price
19 spread is important and helps to move milk, and such
20 action will widen the spread.

21 Option 1-A -- excuse me. Next is a
22 quote from the reform decision. Option 1-A
23 establishes a 1.60 per hundredweight fixed
24 differential for surplus --

1 Q Three.

2 A Excuse me. -- for three surplus zones,
3 upper, midwest, west, and southwest, within a
4 nine-zone national price surface, and for the other
5 six zones, an added component that reflects regional
6 differences in the value of fluid and manufacturing
7 milk. This option emphasized current supply and
8 demand conditions with the USDSS model output.

9 Q And you cited 64 Fed Reg. 16110, the
10 page number in the Federal Order reform?

11 A That is correct.

12 The dairy industry has changed since
13 Federal Order reform. This change includes the
14 shifting of milk supply and continued shift in
15 population.

16 Considering that 1.60 was applied to,
17 quote, surplus zones, at the time of reform, it seems
18 the secretary needs to consider the definition of
19 surplus and the price level of the Northwestern
20 portion of the Mideast Order.

21 Q This is what Exhibits 19 and 20
22 illustrate, correct?

23 A That is correct.

24 Conclusion. The decision before the

1 secretary is a complicated one. The clearest action
2 would be to reverse the action in the Southeast and to
3 deny this request.

4 Should the secretary conclude the
5 Mideast requires action, I would reiterate that there
6 is risk for unintended consequences for the same
7 variety that provoked this hearing.

8 Thus, the secretary should consider all
9 the possibilities, including exercising patience and
10 exploring alternative proposals.

11 The first alternative proposal that
12 should be considered is dividing the Mideast Order in
13 to three -- excuse me -- in to smaller orders
14 something akin to the proponents data request.

15 However, if the secretary concludes some
16 action needs taken immediately, I would advocate the
17 secretary complement the decision in the Southeast by
18 lowering the differentials in the milk surplus area of
19 this reserve supply order.

20 Q Mr. Kinser, earlier today for a few
21 minutes did you look at some of the documents and
22 exhibits that were submitted in a prior proceeding in
23 Order 33 held in Wooster I think in 2005?

24 A Yes.

1 Q And were there for those -- for that
2 proceeding, were there five zones that are different
3 from three zones proponents used today, to your
4 knowledge?

5 A I'm not sure about the five, but I know
6 that the zones were definitely different, and there
7 were more than three.

8 Q For instance, Indiana was broken off
9 north to south, from what is today broken off, so it
10 was the northern part of Indiana with northern Ohio
11 and a southern part of Indiana with the southern part
12 of Ohio?

13 A That's correct.

14 Q And that breakdown was proposed by some
15 of the same proponents who are proponents today?

16 A Correct.

17 Q Turning for a moment to page five of
18 your testimony and your discussion about
19 transportation credits, and partly because I needed to
20 understand for myself earlier today, the second reason
21 why you said that there's a concern about the credit
22 payments is that depending on how these changes are
23 applied in this Order, that could have an impact on
24 how fast the fund is drawn down in Orders 5 and 7,

1 correct?

2 A Correct.

3 Q Could you give just an illustration of
4 that to explain what you mean by that?

5 A The way the transportation credit works
6 is there is a mileage factor rate that is announced
7 monthly that is a function of the diesel price.

8 That is then multiplied by the
9 difference between the miles from the last pickup to
10 the plant of delivery less 85 miles.

11 From that, we then subtract the
12 difference between the zone differential of the farmer
13 and the zone differential of the plant.

14 So if you have a farm and you want --
15 and say \$2 going to 2.20, you would subtract 20 cents
16 out of that. So if this proposal would raise the \$2
17 to 2.20, the same calculation would be made, but now
18 instead of subtracting 20 cents off you could subtract
19 zero off, and those higher dollars would have to come
20 out of the fund.

21 Q So, in essence if the temporary
22 increases were somehow segregated from the real price,
23 then the difference the transportation fund credit
24 purposes would be a greater subtraction?

1 A Correct.

2 Q But if you include it and literally add
3 it on as I think the proponents have suggested might
4 actually be done, you're actually going to increase
5 the transportation credit that could be paid out on an
6 identical movement of milk, and that change will occur
7 in another Order --

8 A Correct.

9 Q -- as a result of this hearing?

10 A Correct.

11 MR. ENGLISH: Your Honor, as I turn the
12 witness over for cross-examination, I have
13 two motions: One, move the admission of
14 Exhibits 18 through 21; and two -- and maybe
15 we can take this up later in the day, but to
16 make the motion formally that was made in
17 the testimony of Mr. Kinser, that while we
18 pursue the testimony today, no reason not to
19 pursue the testimony today, that at the end
20 of the day today rather than closing the
21 hearing, we suspend the hearing until a
22 future date when we can have real data about
23 what's happened in the southeast and the
24 Appalachian.

1 JUDGE DAVENPORT: We'll take your
2 second motion up after the lunch break.

3 MR. ENGLISH: Thank you.

4 JUDGE DAVENPORT: It appears that it's
5 just slightly after 12:00. Let's be back at
6 1:00.

7 MR. VETNE. Your Honor, might I take up
8 a matter before we break, a request for
9 official notice, because I may not be back
10 after the break?

11 JUDGE DAVENPORT: Very well.

12 MR. VETNE: We talked early in the
13 evening about data that was prepared by the
14 market administrator and data that was not
15 but is available on the website.

16 I would like to request official notice
17 through the briefing deadline for the -- on
18 the market administrator's sites for Orders
19 33, 7, 5 and 1, the annual statistics
20 publication on those websites and monthly
21 updates.

22 And also of the market administrators
23 -- I think the central market administrator
24 indicated that they were going to renew

1 shortly an annual publication in their
2 market service bulletin about where milk is
3 produced and supply relative to demand for
4 milk. So the market service bulletins or
5 market administrator reports also through
6 the briefing date.

7 That is the first category request for
8 official notice from the market
9 administrator website data.

10 JUDGE DAVENPORT: Any objection,
11 Mr. Stevens?

12 MR. STEVENS: None.

13 JUDGE DAVENPORT: Very well. So
14 ordered.

15 MR. VETNE: Okay. The second request
16 is an online publication called federal milk
17 order market statistics. It's an annual
18 publication. It used to be on paper, it
19 might still be. Who knows.

20 And that is also updated online, but
21 I'd like to request official notice of the
22 FMMOS data for 2000 to date through the day
23 of briefing.

24 That would also permit us to make

1 reference to that to observe and argue
2 changes that appear in producer milk
3 supplies, production prices, and whatnot.
4 So FMMOS, federal milk marketing order
5 statistics 2000 to date.

6 JUDGE DAVENPORT: That is available
7 online?

8 MR. VETNE: Yes, it is.

9 JUDGE DAVENPORT: Very well.

10 MR. STEVENS: No objection.

11 MR. VETNE: Okay. Third, there is a
12 publication that used to be annual or
13 close. It hasn't been annual since.

14 But it's a publication that identifies
15 sources of milk by state and county or
16 marketing areas. I think it's been done
17 probably twice since Federal Order reform.

18 Whatever publication has that
19 information that is online on the Dairy
20 Programs website since Federal Order reform,
21 whether it's one, two, or three, by the time
22 of briefing I would like official notice of
23 that.

24 JUDGE DAVENPORT: Very well.

1 MR. VETNE: Third, we talked about
2 fuel. I would like to ask official notice
3 through the date of publication for bureau
4 of labor statistics producer price index
5 prices for fuel, including diesel fuel
6 through the date of briefing.

7 That index will show changes from
8 various past periods, a zero point indexing
9 period, and have historical information, and
10 it will have information until approximately
11 both -- the current information in August
12 comes from June. June is the most recent.
13 So it's two month's lag.

14 So the PPI data on the bureau of labor
15 statistics for fuel, including diesel fuel.

16 MR. BESHORE: Question.

17 MR. VETNE: Yes, sir.

18 MR. BESHORE: Is that the Energy
19 Information Agency?

20 MR. VETNE: No. That's next.

21 MR. BESHORE: So that's a different
22 data set?

23 MR. VETNE: It's a different data set.

24 MR. YALE: This is only through the

1 date of the briefing?

2 MR. VETNE: Through the date of the
3 briefing.

4 MR. BESHORE: Is that just an index
5 set? The BLS statistics are just indexes,
6 not prices?

7 MR. VETNE: The BLS producer price
8 index is an index comparing today's price
9 versus some prior price. It doesn't report
10 the absolute price.

11 MR. BESHORE: It only reports a
12 relationship, just an index?

13 MR. VETNE: That's right.

14 JUDGE DAVENPORT: Very well.

15 MR. VETNE: And the third is the
16 Department of Energy, Energy Information
17 Administration publication that is online.
18 I think it's monthly, approximately the 12th
19 of each month, and it's called the
20 short-term energy Outlook.

21 That publication has actually fuel
22 prices, including diesel fuel, for about two
23 years prior to its publication and then has
24 projections by the agency on prices for

1 approximately two years in the future.

2 Again, that is published and updated
3 every month during about mid-month. It's
4 called a short-term energy outlook, STEO,
5 and it's on the Energy Information Agency
6 part of DOE, Department of Energy website.
7 Official notice of that document through
8 public -- through briefing.

9 JUDGE DAVENPORT: Very well.

10 MR. VETNE: And there's a couple of
11 documents that Mr. Kinser made reference to,
12 and that is also available online from a
13 prior hearing.

14 That's the Wooster, Ohio, 2005 hearing
15 for the Mideast, Exhibit 7, Exhibit 15, and
16 Exhibit 11 all have information on milk
17 supplies, where the milk is produced, where
18 it's going, by I think five different zones
19 designated by proponents at that time, as
20 well as information on fuel costs and
21 transportation costs relevant to the
22 transportation credit proposal that has been
23 discussed. Those are in those three
24 exhibits.

1 JUDGE DAVENPORT: Mr. Beshore?

2 MR. BESHORE: I have no objection to
3 official notice of all the government
4 publications.

5 I do object to attempting to take
6 official notice of the prior testimony or
7 exhibits. I just -- you know, they're not
8 government publications.

9 In essence it's offering by official
10 notice testimony from a prior hearing, and I
11 don't think that's appropriate.

12 MR. VETNE: I could clarify it. The
13 exhibits referenced as Exhibit 7 and Exhibit
14 11 were prepared by the market
15 administrators. They're not regular
16 publications, but they were published by the
17 market administrator.

18 Exhibit 15, from that exhibit was
19 tables prepared by Dairy Farmers of America,
20 by MEMA, the proponents.

21 It's the kind of thing that if we were
22 in a court of law it would be received as an
23 admission and they could explain it and
24 differentiate it. It would come in because

1 it's a statement made by a party.

2 Nevertheless, the data is, I think,
3 reasonable data. Nobody objected. They
4 have the information available, too. It's
5 online.

6 If there's some particular problem with
7 it, all the rules and the statute allows is
8 an opportunity for them to show that the
9 data is not good. And they will have that
10 opportunity, I believe.

11 JUDGE DAVENPORT: Mr. English?

12 MR. ENGLISH: I would join Mr. Vetne.
13 Prior testimony or exhibits from the same
14 party in a similar proceeding in
15 administrative proceedings routinely could
16 become exhibits. They're available on the
17 website. They should be part of this
18 record.

19 JUDGE DAVENPORT: Mr. Yale?

20 MR. YALE: I join Mr. Beshore and
21 strenuously object to this process. They've
22 still got a half a day.

23 If they think their exhibit is worth
24 it, then bring them in, put a witness on the

1 stand, and we can question the relevance to
2 the current hearing.

3 You know, this -- bringing in
4 piecemeal, they were submitted in the midst
5 of the context to support particular
6 proposals --

7 JUDGE DAVENPORT: Excuse me. All I
8 think he's asking for is we take notice of
9 it.

10 MR. YALE: But I think taking notice of
11 it means it's in the record, and then
12 therefore it has to be commented on.

13 The secretary has just recently taken
14 official notice -- we think incorrectly --
15 after the hearing was closed of documents,
16 and it ended up being the numbers they
17 used. And it's depriving the whole process
18 of a formal rulemaking by allowing it.

19 It's very simple. They aren't denied
20 bringing them into the record and they
21 haven't. I mean, they have that opportunity
22 and they could do so. So that's -- that
23 would be my objection. If they want it as
24 an exhibit, bring it.

1 JUDGE DAVENPORT: Mr. Beshore?

2 MR. BESHORE: One comment. With
3 respect to offering prior statements or
4 prior testimony as admissions and suggesting
5 that we can put factual information in the
6 briefs to rebut it -- I mean, Mr. Hollon's
7 off the stand. If there was something they
8 wanted to present him with in terms of prior
9 testimony, it should have been done and it
10 wasn't done.

11 Prior testimony, there's no basis for
12 bringing that in to the record by, you know,
13 bootstrapping some attempt at an official
14 notice. It's not an official notice
15 document.

16 JUDGE DAVENPORT: Mr. Stevens?

17 MR. STEVENS: Well, I have to agree
18 that bringing in exhibits from prior
19 hearings opens that door through expanding
20 the record that is certainly not subject to
21 cross-examination, to the riggers of the
22 validity of that information to the current
23 situation.

24 JUDGE DAVENPORT: To the extent that it

1 is available generally and on the website,
2 is it not able to be referenced in any
3 brief?

4 MR. STEVENS: I have to agree that it's
5 in the public domain and everyone is aware
6 of it.

7 JUDGE DAVENPORT: Very well. My ruling
8 would be, then, that we simply make
9 reference to it.

10 MR. STEVENS: Let me just make the
11 point that it being official notice does not
12 necessarily make it a probative document
13 that the secretary can look at as to, for
14 example, the truth or the falsity of what's
15 in those papers because, again, it isn't
16 subject to current cross-examination or
17 flushing out, which the parties have the
18 opportunity to do in this hearing if that's
19 what they choose to do.

20 Because it puts the secretary in the
21 position or someone challenging the action
22 potentially of saying, look, it's in the
23 record there because it was officially noted
24 and it must be accepted as truth.

1 Just by the fact of official notice of
2 these documents from prior hearings doesn't
3 establish the probative value of them. So I
4 just -- I want to make that point because I
5 think that's an important point for everyone
6 here to know.

7 With all due respect to Mr. Vetne, he
8 has the opportunity, if he wants to bring
9 that material in, to present it, have it be
10 subject to cross-examination, have it be
11 subject to the riggers of formal
12 rulemaking. That's the fair way to do it.

13 To do it by saying I want official
14 notice, and then later in the brief argue it
15 and expect the other parties to argue it as
16 to the truth or falsity of the information
17 is not the appropriate way to go, John.

18 MR. VETNE: I can respond to that
19 actually, okay? I mean, I -- you know what
20 I'm talking about. I have the documents
21 here.

22 As I said, two of the documents were
23 prepared by the Mideast market
24 administrator. He's here. I don't think

1 anybody is suggesting that information he
2 prepared in 2005 is erroneous.

3 I do agree with Mr. Stevens that merely
4 agreeing that the facts are there and that
5 those facts are true is not the same thing
6 as a determination that they are material
7 facts or relevant facts. And that can be
8 argued. That is always an argument.

9 And almost never is anything omitted
10 from these hearings. Based on that
11 suggestion it's always left to the
12 secretary.

13 The other document, the one that --
14 it's exhibits, not testimony, data exhibits
15 offered by DFA. Again, I have it here.

16 If there's some error in that data,
17 Mr. Hollon -- and I'll explain it. If there
18 is a relevance argument with respect to that
19 data, we can all argue it in a brief.

20 But I think the data is good. The data
21 relates to exactly the same things that were
22 here. Mr. Hollon himself has used numbers
23 from 2003 to make extrapolation to 2008.

24 That's what this would permit us to do with

1 more recent data. Thank you.

2 MR. STEVENS: The only comment I would
3 have on that, John, is that he has accepted
4 -- I guess he has given official notice of
5 it. There have been objections. The record
6 is clear on that.

7 As with any -- as with any material
8 presented at this hearing, the secretary
9 will give it due consideration.

10 MR. VETNE: Your Honor, maybe the best
11 thing to do is if anybody wants to examine
12 this, I will leave a copy of -- my copy of
13 these things so anybody can examine it here
14 on the front table. Thank you.

15 JUDGE DAVENPORT: Mr. Beshore?

16 MR. BESHORE: I don't want to belabor
17 this, but the problem I have with taking --
18 with observing and providing explicit
19 opportunity to utilize in briefing for
20 factual information data which are not
21 government publications, I mean, official
22 notice is taken of government publications
23 according to the rules of practice and
24 general rules of evidence because they are

1 indisputable factual pieces. Other
2 information should be the subject of
3 testimony.

4 We're specifically prohibited by the
5 rules from bringing additional information
6 in to the record on briefs, factual
7 information. It's expressly prohibited.

8 Mr. Vetne wants to bring factual
9 information by dumping a document from a
10 prior record in here that's not a government
11 publication, and it's not appropriate.

12 MR. ENGLISH: Charles English. I don't
13 want to belabor the point, but the fact of
14 the matter is that a prior statement of a
15 party is always admissible as long as it is
16 subject to authenticity.

17 And here it is. It's a document that's
18 in another record subject to
19 cross-examination. Frankly, it doesn't
20 matter whether it's subject to
21 cross-examination. It is a factual
22 statement made by a witness and we can use
23 it for that purpose.

24 JUDGE DAVENPORT: I have already ruled

1 that it may be referenced. I will not take
2 official notice of it. All right.

3 MR. VETNE: Thank you.

4 JUDGE DAVENPORT: Is there anything
5 further we can take up before the lunch
6 break? And now it's almost 20 after, so
7 let's be back at 20 after 1:00.

8 (A lunch recess was taken.)
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C E R T I F I C A T E

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2
3 I, Renee Rogers, a notary public within and
4 for the State of Ohio, do hereby certify that the
5 within 150 pages were taken by me in stenotypy and
6 transcribed by computer-aided transcription, and that
7 this is a true, accurate, and complete transcription
8 of the same.
9

10
11 My commission expires:
12 April 13, 2011

Renee Rogers
Notary Public-State of Ohio