

BEFORE THE SECRETARY OF AGRICULTURE

)	
Milk in the Upper)	Docket No. AO-361-A39;
Midwest Marketing)	DA-04-03
Area; Hearing on)	
Proposed Amendments)	HEARING TRANSCRIPT
to Tentative Marketing)	
Agreement and Order.)	Before Judge
)	Victor W. Palmer

DAY THREE OF THE FEDERAL ORDER 30 HEARING

The following is day three of the Federal Order 30 Hearing, taken before Kelly E. Hanna, Court Reporter, Notary Public, pursuant to Notice of Taking Hearing, at the Sofitel Hotel, 5601 West 78th Street, Bloomington, Minnesota, commencing at approximately 8:46 a.m., August 18th, 2004.

* * * * *

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20 Present for USDA, AMS Dairy Programs:

21 H. Paul Kyburz
22 Gino Tosi
Carol S. Warlick
23 Erin Feuillet
Henry Schaefer
24 Harold Ferguson
25

1 APPEARANCES:

2

Also Present:

3

Doug Peterson - Minnesota Farmers Union

4

Sue Beitlich - Wisconsin Farmers Union

Robert Carlson - North Dakota Farmers Union

5

Michael Brown - Northwest Dairy Association

Evan Kinser - Dean Foods

6

Paul Christ - Dean Foods

James D. Oberweis - Oberweis Dairy

7

Neil Gulden - Associated Milk Producers

Richard Lamers - Lamers Dairy

8

Ryan Miltner - Continental Dairy Products

Michael Reinke - Kraft Foods, Global Inc.

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5	NO. 33	568	573	573
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1 P R O C E E D I N G S

2 Whereupon, day three of the Federal Order 30
3 Hearing was commenced at 8:46 a.m. as follows:

4

5 JAMES OBERWEIS,

6 after having been first duly sworn by
7 the Court says under oath as follows:

8 ***

9

10 THE COURT: Mr. Oberweis handed me a
11 three-page exhibit, which I presume he's going to use
12 in his testimony. I'm going to mark that as Exhibit
13 30, so for those of you who have it, it's Exhibit 30,
14 and it's Mr. Oberweis' pages.

15 (Whereupon, Exhibit No. 30 was
16 marked for identification.)

17 THE COURT: Everybody see it and know
18 what it is? They seem to know it. All right, sir, if
19 you would give -- Mr. English, are you going to
20 question Mr. Oberweis?

21 MR. ENGLISH: No.

22 THE COURT: If you would state your
23 full name and identification, sir.

24 THE WITNESS: Sure. I'm Jim Oberweis.
25 I'm chairman of Oberweis Dairy in North Aurora,

1 Illinois. May I give a little of my background also,
2 and history?

3 THE COURT: Yes.

4 THE WITNESS: For those of you who
5 don't know me, I grew up in the dairy business, a
6 business started by my grandfather in 1927. I can
7 remember as a kid my father talking about the fact
8 there were 52 dairies in the Chicago and Chicago
9 suburban area in the 1950s, and by the 1970s, it was
10 down to, I don't remember the exact number, something
11 like eight or ten. Today there is only one left
12 headquartered in the entire Chicago area, and that's
13 us, and it's only because we're so small nobody wants
14 to buy us. I keep hoping to get bigger so that Dean
15 Foods will come around and say hi, but they haven't
16 been interested so far.

17 I had an older brother who went into
18 the dairy business, and my father advised me to look
19 elsewhere, because there was such excessive Government
20 interference in the business and resulted in very low
21 returns on capital, and that if I was smart, I would
22 look at some other industry, or some other business,
23 and I said, "You know what, I'm smart. I'm going to
24 look someplace else," and ended up in the financial
25 services business. I started one asset management

1 company, I started two stock brokerage firms, and I
2 started two mutual funds, One of which, by the way,
3 according to Wall Street Journal, was the number one
4 performing mutual fund in the country last year, up
5 108 percent.

6 About fifteen years ago, my older
7 brother had a stroke and wasn't able to continue in
8 the business. Rather than see my grandfather's legacy
9 lost forever, I ended up buying the company and trying
10 to figure out ways to grow the business. We have
11 taken a very different approach than most companies in
12 the business. We, believe it or not, actually still
13 do home delivery of milk in glass bottles, and we
14 charge about \$6 a gallon, by the way, for milk, which
15 is a little bit of a premium price to most of the
16 other products in the area.

17 Over the last twelve or fifteen years
18 since I've owned the business, we have grown the
19 business from about 50 employees when I bought it to
20 about 250 full-time employees today, and to about 750
21 part-time kids who work in our ice cream stores. We
22 have 32 ice cream dipping stores in Chicago, and the
23 St. Louis markets as well, and I'll let the panel
24 decide if we're a small business or not. We have, as
25 I said, about 250 full-time employees and about 750

1 kids that dip ice cream cones. I suspect, and we
2 certainly few ourselves as a small business, but I'm
3 not sure what your definition is of that.

4 Certainly what has happened recently
5 with the negative PPD has affected us, and let me add,
6 by the way, I do not consider myself an expert on
7 this. I'm someone who has a lot of capital invested
8 in this business. I'm certainly concerned about this
9 business, and I'm trying to figure out how to make the
10 business to continue to grow at as rapid a pace as we
11 possibly can.

12 When we face the negative PPD, our
13 company, by policy, has never paid the negative PPD in
14 the past to producers. We felt we had an agreement,
15 and the PPD is an adjustment to that, but with the, I
16 believe it was the April number that was the
17 4-something, unfortunately I was out of town, and Bob
18 Reno (phonetic) is our President and the guy running
19 the company on a day-to-day basis, made a decision
20 with an uproar from our producers -- and by the way,
21 we have approximately 40 family-owned farms that ship
22 milk exclusively to us -- created such an uproar that
23 he felt that he had to pay that PPD, and we did it
24 over a three-month period. That entirely wiped out
25 our profit for the month of May, and by the way, May

1 historically had been and was expected to be one of
2 the best months in company history, but because of the
3 PPD, it literally wiped out our entire month.

4 Then along came the May negative PPD,
5 which we did not pay, because of very substantial
6 payments into the pool. That created further uproar
7 among our shippers, and we ended up losing two of
8 them, one of them, Dennis, to Mid-West, and the other
9 I understand the milk ended up going to Dean Foods, so
10 our friends gained a couple of shippers, but it's
11 certainly something that has created uneasiness, it's
12 something that certainly, for us, feels like a very
13 serious situation, like an emergency, and certainly
14 something that we hope there will be a way to address
15 and deal with.

16 From our viewpoint, the Government
17 interference with the free market allocation of
18 capital resources is a very serious problem all across
19 the spectrum, and any ways that we can find to reduce
20 that interference and allow the free market to
21 allocate capital, to allocate resources the better.

22 And again, as I said, I don't consider
23 myself an expert, but it seems to me that Proposal 2,
24 which I heard a lot of testimony on yesterday, would
25 be a step in the right direction.

1 Proposal 3, that I understand you're
2 going to hear a lot more about today, would be a much
3 better step in the right direction to allow us to move
4 forward with less possibility of people coming in and
5 out of the pool.

6 And I have a little handout sheet that
7 will just take a minute to go through with you, and
8 this shows a lot about Oberweis Dairy, and it shows
9 the months January through July, and I'm just going to
10 --

11 THE COURT: It's Exhibit 30.

12 THE WITNESS: Exhibit 30, thank you.
13 I'm just going to direct your attention for those of
14 you who have it, to a few numbers. Not having my
15 glasses here, I hope I can read this, but I think the
16 key factors are the percentage of milk that is in
17 Class I in each of those months, which functions with
18 the total amount of milk that is pooled each month,
19 and if you look, let's say starting in January, the
20 pooled amount, I believe, is about 2 -- roughly 2.2
21 million pounds. Again, in February about 2 million
22 pounds, and then sudden in March it drops to about
23 600,000. In April, again, about 600,000, and in May
24 still about 600,000, and then in June suddenly it's
25 back up to 2.1 million, and in July 2.2 million.

1 Looking at that same information from a
2 slightly different standpoint, in January in Order 30,
3 according to our -- and these numbers were prepared
4 for me by our CFO, I believe they're accurate, and
5 there's probably someone in the room that can tell me
6 if they're not. I'm putting myself in Dennis's
7 position, I guess, by giving you these numbers. In
8 January, about 17 percent went into Class I, in
9 February 18 percent, in March, I believe that's 58
10 percent, in April 62 percent. May, what, is it, 53
11 percent, and then in June dropping back down to 15
12 percent, and in July 16 percent.

13 What is happening here, obviously, is
14 there are a group who are withdrawing from the pool
15 when it is to their economic advantage to withdraw
16 from the pool. We think this is clearly unfair to a
17 small company like ours, and clearly unfair to our
18 producers. We would like to see any progress made in
19 reducing the possibility of people, one selected
20 specific group of people, being able to move in and
21 out of the pool. Now, if you want to make it so
22 everybody can move in and out of the pool, that's
23 okay, let us just have a level, equal, fair playing
24 field. It seems to me like it's a real basic issue of
25 fairness to participants.

1 hundreds of millions?

2 A. Right.

3 Q. Because you missed three zeros,
4 basically?

5 A. You're correct. I stand corrected.
6 Thank you.

7 Q. And you mentioned that for May you
8 ended up -- your producers ended up basically with a
9 negative PPD effectively of \$150,000, was the impact
10 on them? I'm not sure that's on the sheet, but I
11 think you mentioned there was \$150,000 impact?

12 A. I don't remember the exact number.

13 Q. Whatever that number was for May, that
14 would be in addition to the \$94,885 that you had to
15 pay into the pool on the Class I milk?

16 A. That's correct, and you'll note that we
17 do, at the bottom of the sheet, show both the amount
18 that we had to pay into the pool, as well as our added
19 costs per hundredweight of those payments for each of
20 the months.

21 MR. ENGLISH: That's all I have. Thank
22 you. Thanks very much for appearing.

23 THE COURT: Incidentally, I'm going to
24 receive Exhibit 30, so that's in the record.

25 (Whereupon, Exhibit No. 30 was

1 received into evidence.)

2 THE COURT: Any other questions?

3 Mr. Vetne?

4 EXAMINATION

5 BY MR. VETNE:

6 Q. Mr. Oberweis, I'm John Vetne. I
7 represent Associated Milk Producers and other
8 cooperatives. Just a question on your management's
9 decision to pay the negative PPD while you were out of
10 town. Was there a belief that the announced negative
11 PPD represented a loss to dairy farmers?

12 A. Certainly some of the farmers that we
13 had initially took it that way, yes. It would appear
14 as a deduction from their check, is my understanding.
15 One apparently quit before they even knew that we were
16 considering making any adjustment.

17 Q. Is -- Was there an understanding, to
18 your knowledge, that the PPD would have been negative,
19 regardless of how much milk was pooled or depooled?

20 A. I heard the testimony yesterday in
21 which that was indicated. It was really the first
22 knowledge that I would have of that. Clearly,
23 however, the amount would have been dramatically less,
24 is my understanding from the testimony yesterday, and
25 we've had negative PPD's before, and nobody has quit

1 because they've been small numbers, but it was the
2 large number that really caused a lot of concern.

3 Q. Do you now have an understanding that a
4 negative PPD is a statistical number, a product of
5 arithmetic, rather than a cost or loss number?

6 A. Explain what you mean by that, please.

7 Q. Do you understand that the PPD is
8 simply the product of arithmetic of the blend price
9 minus Class III price?

10 A. Yes, I understand that, and we've tried
11 to communicate that to our producers as well as we
12 could, but sometimes they don't accept that.

13 Q. Your producers believe that it's a
14 deduction or a cost or a loss to them?

15 A. At times they seem to, yes.

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

18 THE COURT: Ms. Deskins?

19 EXAMINATION

20 BY MS. DESKINS:

21 Q. Sharlene Deskins, Office of the General
22 Counsel. Mr. Oberweis, on Exhibit 30 you have here
23 some things that say Class I, Class II, Class III, and
24 Class IV, and also Oberweis pool obligation?

25 A. Correct.

1 Q. Where do you get that information from?

2 A. Well, these sheets were provided to me
3 by our controller, Randy Anderson, and I'm not sure
4 which information you're asking me. I believe the
5 Class I, Class II, Class, III, and that information is
6 from the USDA sheets, and I have those with me that he
7 provided me also on a monthly basis. The pool
8 payments are the amounts that we actually paid.

9 Q. Okay. Now, those -- the information
10 you're holding up, that would have come from the Milk
11 Market Administrator's Office?

12 A. You probably know better than I do.
13 These sheets right here. I assume they come from the
14 Milk Market Administrator's --

15 Q. I'm pretty old, I can't read it from
16 here, but, like, the pool obligation would have been
17 calculated by the Milk Market Administrator's Office?

18 A. I don't know.

19 Q. Okay.

20 A. I assume so. These are the sheets I'm
21 talking about. The kind of blue form.

22 Q. Okay. I can't read them. The reason
23 I'm asking is because you said you oppose Proposal 7,
24 but it looks like the Market Administrator's Office is
25 doing a lot of work here?

1 A. We wish they would do none of that
2 work.

3 Q. But in the meantime, they are.
4 Certainly you understand the business burden of costs
5 when you have people doing these kinds of calculations
6 and determinations?

7 A. Yes, and I believe that we ought to
8 collectively work towards reducing their obligation to
9 perform that work.

10 Q. Okay, but in the meantime --

11 A. We think it is an anti-free market. We
12 think it hurts and upsets the system. We think it
13 makes it unattractive for the capital to come into
14 this industry, and we believe that it makes people
15 like -- other people like me who are full-time in the
16 business, think about how to get around the system as
17 opposed to thinking about ways to serve customers and
18 bring product -- and I just want to mention some words
19 that I heard yesterday sitting out there in the
20 audience, words like "diversions," "split plant,"
21 "paper pooling," and "touch base." These are words
22 that tell us we have noneconomic game playing going on
23 in our industry that hurts the industry, it hurts the
24 return on capital, it hurts participants, and it hurts
25 producers.

1 Q. In the meantime, these numbers that are
2 coming from the MA office, you do use, as you are in
3 here in Exhibit 30; correct?

4 A. Yes. We have to. We wish we didn't
5 have to, but we have to.

6 Q. Well, don't you think the MA should be
7 funded in order to do this function as long as the
8 regulations --

9 A. No, absolutely on the contrary. I
10 think the obligations that they have, the work that
11 they have should be reduced so that they don't need an
12 additional burden on the industry.

13 MS. DESKINS: I have no further
14 questions.

15 THE COURT: Any other questions?
16 Beshore?

17 EXAMINATION

18 BY MR. BESHORE:

19 Q. Mr. Oberweis, on Exhibit 30, the line
20 next to the bottom?

21 THE COURT: It may or may not be on.
22 It may be on. You might want to just check with your
23 fingers. Yeah, it's on.

24 BY MR. BESHORE:

25 Q. Okay. The line next to the bottom for

1 each month is labeled Oberweis Milk Purchases?

2 A. Correct. Number of pounds.

3 Q. Okay. Would I understand that to be
4 the total purchases from your 40 farm suppliers, dairy
5 farmer suppliers for the month?

6 A. That's what I understand it to be also.

7 Q. Okay, and if my quick mental arithmetic
8 is reasonable, they're delivering about 125,000 pounds
9 per producer, per month, perhaps, on the average?

10 A. If you divide that by 40, that would be
11 what the number is.

12 Q. To your knowledge, are any of those
13 producers, do they have gross annual sales to Oberweis
14 Dairy in excess of \$750,000?

15 A. I don't know for sure, but I believe
16 that none of them do. I believe our largest farm has
17 about 200 head.

18 MR. BESHORE: Okay. Thank you.

19 THE COURT: Other questions? There
20 doesn't appear to be any. Anything further you wish
21 to say, sir?

22 THE WITNESS: No. I think I said it
23 all. I hope I haven't been too nasty. I appreciate
24 the opportunity to be with you and to testify. Thank
25 you.

1 THE COURT: Thank you, sir. You're
2 excused, and we now have Mr. Tonak coming back.
3 You're still under oath.

4 Mr. Beshore, you may proceed.

5 (Whereupon, Mr. Tonak was
6 brought back to the stand.)

7 MR. BESHORE: Yes. Thank you, Your
8 Honor.

9 DIRECT-EXAMINATION

10 BY MR. BESHORE:

11 Q. Mr. Tonak, could you first turn to page
12 23 of your testimony, Exhibit 28.

13 A. Yes.

14 Q. Do you have that?

15 A. Yes.

16 Q. Okay. Now, the paragraph in the middle
17 of the page that begins "If 100 percent of the
18 eligible Class III milk had been pooled," are there
19 some errors in calculation embedded in that paragraph
20 that you would like to correct that Mr. Vetne brought
21 to your attention?

22 A. Yes, there are.

23 Q. Okay. Could you do that, please.

24 A. I'll do that by reading the entire
25 paragraph as it should have been. "If 100 percent of

1 the eligible Class III milk had pooled in July of 2003
2 through May 2004, the estimated PPD would have
3 averaged a negative 9.8 cents, while the actual PPD
4 averaged a negative 77.3 cents. If only 50 percent of
5 the eligible Class III milk had pooled, the average
6 PPD would have been a negative 20.2 cents for the
7 eleven months. Exhibit 9, Table 5D. If there had not
8 been any Idaho milk pooled and 100 percent of the
9 eligible Class III had pooled, the average PPD would
10 have been a positive 2.7 cents, and with 50 percent of
11 the eligible Class III pooled, the PPD would average a
12 negative .4 cents. Exhibit 9, Table 5E."

13 Q. Okay. That last number .4, .004, put a
14 dollar sign in front --

15 A. Dollar sign .004.

16 Q. Okay. Now, in Proposal 2, in the
17 language and the detail of Proposal 2, is there a
18 technical change in the proposal that you would like
19 to make?

20 A. Yes. In Section 1030.13, producer
21 milk, (f), there is a line in our proposal that should
22 read "Milk received at pool plants other than pool
23 distributing plants shall be classified pursuant to
24 Section 1000.44(a)(3)(v) and section 1000.44(b)."
25 we're deleting the "(3)(b)," since there is no (3)(b)

1 in the Order language.

2 Q. Okay. So, to be absolutely clear,
3 you're just deleting the parenthetical 3 and the
4 parenthetical small b after section 1000.44(b)?

5 A. That is correct.

6 Q. And with that correction, does the
7 language, to the best of your knowledge, does the
8 language carry out the intent of the proposal?

9 A. Yes, it does.

10 Q. Now, you were asked several questions
11 yesterday by Mr. Vetne, as I recall, about the CMPC
12 supply plant system, or about payment relationships
13 with the CMPC supply plant system, and I wonder if we
14 could just elaborate and explain a little bit for the
15 record what that system is and how it works and what
16 its function and role in the marketplace is.

17 A. I'd be glad to.

18 Q. Okay. Just start with, you know, it's
19 a supply plant system, but what's a supply plant, and
20 what's its function and its responsibilities in Order
21 30?

22 A. A supply plant in Order 30 is a
23 facility that allows milk to be accumulated and
24 shipped to the fluid market, and one of the
25 requirements, and, in fact, the major requirement of

1 that facility is that it ship 10 percent of its milk
2 receipts to fluid distributing or bottling plants.

3 Q. Are there any supply plants in Idaho,
4 by the way.

5 A. None that I'm aware of, no. Not in the
6 record.

7 Q. Okay.

8 A. The Order language for many years has
9 allowed supply plants located within the marketing
10 area to form systems to facilitate the economical
11 movement of milk to distributing plants, and that
12 system performs the same as an individual supply
13 plant, or in other words, it needs to move a minimum
14 of 10 percent of the system's milk to the fluid
15 distributing plants. The requirement, again, is that
16 all the supply plants in that system are within the
17 marketing area, and that it ship 10 percent to the
18 fluid distributing plants. These systems form to
19 begin operations August 1st.

20 As such, for the last, I believe three
21 years, the CMPC has facilitated the formation of a
22 supply plant system. The CMPC supply plant system
23 accounts for over 1 billion pounds of the milk pooled
24 on the market in normal months. It's composed of a
25 total of 48 plants. Of those 48 plants, 25 plants are

1 classified within the CMPC supply plant system as
2 committers. That is, they commit to ship a certain
3 amount of milk to the fluid market, if called upon.

4 There are also providers who have
5 established that they will ship over 10 percent of
6 their receipts to the fluid market, and, again, keep
7 in mind that the purpose of a supply plant system is
8 to facilitate the economical movement of milk to the
9 market.

10 Of these committers, which are, in
11 effect, manufacturing plants that are also supply
12 plants in most cases -- in most cases the supply
13 plants are manufacturing plants. They commit to
14 provide various levels of service. They commit to not
15 ship any milk, but be part of the system and have
16 somebody else ship for them. They may commit to ship
17 up to 5 percent of their milk, or they can commit to
18 ship up to 10 percent of their milk, as called upon.

19 If a plant would commit to ship none of
20 its milk, the CMPC system has a fee structure in place
21 that would, in effect, discourage any plant from
22 choosing this option. Net fee is 16 cents per
23 hundredweight. Consequently, there are no plants that
24 commit to ship zero within that system. In other
25 words, all plants have committed to ship some level of

1 milk.

2 Of the 25-plus committers, there are 6
3 that have committed to ship less than 10 percent and
4 pay a varying fee, based on the level they commit at.
5 The balance of the 25 plants have committed to ship up
6 to 10 percent, when called upon, during the fall and
7 heavy demand months during the winter, and they pay no
8 fee for being included in the supply plant, in that
9 CMPC supply plant system.

10 The entire purpose of the CMPC supply
11 plant system is to help facilitate the movement of
12 milk from the production areas to the fluid plants for
13 use in Class I.

14 The CMPC system in total ships about 23
15 percent of their milk to the fluid market on the low
16 end, and 28 percent-plus to the fluid market at the
17 upper end on a monthly basis.

18 Q. Now, you've indicated there are no
19 plants in the system supplying zero percent of their
20 volume; correct? Did I understand that correct?

21 A. That is correct.

22 Q. Okay. Let's talk a little bit about
23 how we got to this hearing, how your -- the group you
24 represent, as proponents, got to this hearing and why
25 you choose this particular forum and set of remedies

1 for the problems faced in the market, because there's
2 been suggestions that we should look at other forums
3 or other remedies to address these issues. When did
4 you start working on the problems of distant milk and
5 depooling in Order 30?

6 A. In October of 2003 there was a small
7 group of us that started discussing the growing
8 volumes of the distant milk and the negative PPD's
9 that we had experienced in July, August, and
10 September, trying to come to some common ground that
11 we could work from to move forward to correct what we
12 saw as developing problems in Order 30.

13 There was an exchange of discussions
14 that resulted in a meeting in December of the major
15 proponents of Proposal 2, and we had discussed a
16 number of issues that may or could be involved in
17 coming to a solution. Among the things we discussed
18 was the apparent problems created by this so-called
19 Class I and Class III price inversion, but at the time
20 we met, we had come through September, October, and
21 November, where the Class I price was actually higher
22 than the Class III price. We still had negative
23 PPD's, and we still had depooling. We were seeing
24 increases in this Idaho milk continue, and in looking
25 at the possibility of trying to do something about the

1 advanced Class I pricing, we determined that we would
2 not be able to implement anything in a one-Order
3 hearing. It would take a national hearing.

4 Number two, there's times that advanced
5 pricing works quite well, when prices are heading
6 down, when the Class III price is dropping, the
7 advanced pricing actually adds significant dollars to
8 producer checks.

9 Number three, it was not just simply a
10 matter of Class I and Class III price inversions. We
11 got into Class II and Class IV prices and
12 relationships between all classes, and as pointed out
13 in my testimony yesterday, part of that is driven by
14 the changes in the powder support price, which is way
15 pond the scope of any Federal Order hearing, as far as
16 we could determine.

17 We had looked at, is the depooling a
18 national problem, and there have been some areas with
19 some significant depooling last fall, and in reviewing
20 it, we've got Order 1 that has provisions to limit
21 depooling already in place. The differences in
22 utilization between Orders would indicate that the
23 amount of depooling and the impact of the price
24 relationship is very widely based on how much Class I,
25 II, III, and IV utilization is in each Order, and that

1 if you chose to address it on a national basis, you
2 would still have to design, in our opinion, provisions
3 to the distinct characteristics of each Order, so we
4 chose to go ahead requesting working to develop a
5 consensus position on a proposal where we could move
6 forward with requesting a hearing.

7 From that December meeting through into
8 January, we worked on various concepts of how we could
9 address the depooling and the distant milk as an Order
10 30 issue. We came to a number of possibilities of
11 addressing it. The Producers for Other Markets
12 Provision, as exists in Order 1, increasing the
13 shipping requirement, increasing the touch-base
14 requirement, eliminating split plants, and so on.

15 All of those went further than what we,
16 as a group, felt comfortable in going, and in some
17 cases involved dramatic changes in how individual
18 handlers would have to physically operate. We settled
19 on Proposal 2 in that January meeting as the best
20 approach for the majority of the participants in the
21 marketplace.

22 The one meeting in January included a
23 number of participants who were not proponents of
24 Proposal 2, but who have chosen to look at things in a
25 different matter, and in some cases actually submitted

1 another proposal at this hearing, that is being
2 considered at this hearing.

3 With that, we submitted our proposal,
4 and after submitting our proposal we gained the
5 support of two other cooperatives, Westby Cooperative
6 Creamery and Plainview Milk Products Cooperative, and
7 we've ended up here today.

8 Q. Now, at the time the proposal was
9 submitted, that was in February; correct?

10 A. That is correct.

11 Q. Okay. What portion of the market, what
12 volumes of milk and sales in the market did the
13 proponents represent?

14 A. As I recall, we had the calculations
15 from the -- we had the Market Administrator do some
16 calculations, and as a rule, those numbers were 43
17 percent of depooled milk and 59 percent of the milk
18 supplying the fluid market.

19 Q. And then that was set forth in your
20 letter of request?

21 A. That is correct.

22 Q. And the proposal represented the --
23 after the analysis and discussions and study that
24 you've reflected, that you've related, the proposal
25 represented the consensus of those marketers, that

1 this was the best forum and the best way to address at
2 this time the dual problems of distant pooling and
3 depooling in Order 30?

4 A. That is correct.

5 Q. Okay. Have you heard anything to date
6 in the hearing that makes you change your views on
7 that?

8 A. No, I have not. As a matter of fact,
9 if anything, what I've heard reinforces the view that
10 this is the best forum to address for Order 30.

11 MR. BESHORE: No further questions of
12 Mr. Tonak. I may redirect.

13 THE COURT: Any other questions?
14 Ms. Deskins?

15 CROSS-EXAMINATION

16 BY MS. DESKINS:

17 Q. Sharlene Deskins. I had a question for
18 you, it's about the numbers of 125 percent and 135
19 percent that are in the proposal, it might relate to
20 your testimony. You just said earlier that in
21 Proposal 2 it required handlers to make -- it would
22 require them to make dramatic changes in how they
23 operate?

24 A. That is correct.

25 Q. Okay. My question is, is that why the

1 number, the 125 percent and 135 percent were chosen?

2 A. That's some of it. What I think I said
3 in my testimony was that it would not make any change
4 in their physical operations and how they had to
5 receive milk at their plant, how they had to ship
6 milk, or any of these things that incur costs in the
7 handling of the milk. The process of depooling and
8 repooling the milk is basically some entries on
9 reports to the Market Administrator that you're
10 pooling some milk or you're not pooling some milk, so
11 it primarily involves changing some paper.

12 The 125 percent was chosen to
13 facilitate two things. Number one, if there were some
14 changes in a handler's operation, he added a number of
15 producers, had increased sales, needed more milk, he
16 could go out and procure that milk from producers of a
17 competing handler. There may be any number of things
18 that make some modifications to how a handler may
19 operate, and so the 125 percent, in reviewing the
20 numbers in Exhibit 9, I believe it was Table 11,
21 showed that the changes we proposed -- pardon me for a
22 minute.

23 THE COURT: Mr. Beshore, anybody at
24 your table, can you help him? What are you looking
25 for?

1 THE WITNESS: The yellow-covered table.

2 THE COURT: Oh, there you go.

3 Ms. Deskins has it.

4 THE WITNESS: Thank you. Pardon me, it
5 was in Table 10 in Exhibit 9. It shows the monthly
6 variation in milk production in Minnesota and
7 Wisconsin, and basically the 125 percent, except in
8 the month of March, is taking the higher range of
9 those numbers and adding 20 percent to it to
10 facilitate those changes of added volume in the market
11 that a particular handler is working with.

12 Additionally, since depooling is a
13 choice a handler makes, except for the Class I milk,
14 that they will either pool the milk or that they will
15 depool the milk, the 125 percent allows a handler to
16 depool a portion of his milk, and over a period of
17 months return that to the pool, and how he can do that
18 is shown in Table 6.

19 And what Table 6 basically shows is
20 that if a handler sat down and projected, or if there
21 was thought that there would be a few months of a
22 negative PPD, the first month he thought there would
23 be a negative PPD, he could actually depool 49 percent
24 of his milk, and then with 125 percent he could start
25 adding milk back to the pool. He'd have in that first

1 month 51 percent pooled, 49 percent depooled. In the
2 second month he'd have 36 percent depooled, 64 percent
3 back into the pool, and then applying the 125 percent
4 to the 64 percent he builds back to the third month,
5 80 percent of the milk in the pool, 20 percent
6 depooled, and in the fourth month he can be back at
7 the 100 percent, so it provides a mechanism for a
8 handler that wishes to depool a portion of his milk,
9 to add milk back into the pool, and so he's not able
10 to depool 100 percent of the milk as he does now, but
11 he can depool close to half of his milk, and over a
12 period of three months, add it all back into the pool.

13 And so those were the two reasons,
14 allowing for repooling of milk, and allowing for some
15 changed circumstances of an individual handler.

16 BY MS. DESKINS:

17 Q. So, and then just in terms of the other
18 numbers that had been chosen as you've just -- you
19 mention Table 7, as you just chose it and there would
20 be a different mechanism for it coming back into the
21 pool? I think Table 7 shows if you depool at 115
22 percent.

23 A. Okay. The mechanism under Table 7
24 would work the same as the mechanism under Table 6, if
25 we would have chosen 115 percent level. And we did

1 look at the 115 percent level, but when we looked at
2 the numbers in Table 10, there's some months there
3 where it's running 103 percent, 105 percent, and that
4 only gives a 10 percentage increase, and we -- while
5 some of us would have much preferred 115 percent,
6 perhaps, the general consensus was it was better to be
7 more lenient, allow for milk to repool quicker, give a
8 wider margin for changed operations of an individual
9 handler.

10 MS. DESKINS: Thank you. I don't have
11 any other questions.

12 THE COURT: Any other questions? Let's
13 hear from Mr. Lamers. Mr. Lamers?

14 CROSS-EXAMINATION

15 BY MR. LAMERS:

16 Q. Good morning, Mr. Tonak. I just want
17 to clarify a few things that was spoken to in your
18 statement. You spoke to the idea of increasing
19 service charges to fluid handlers in order to make up
20 the compensating difference necessary to compete with
21 the zero PPD's during negative PPD months, do I
22 understand that correctly? And then you also stated
23 that some fluid handlers were not able to recoup that
24 extra service charge. I suspect that service charge
25 was probably an additional service charge by CMPC or

1 something like that?

2 A. That is correct. That was an
3 additional service charge embedded into the overall
4 CMPC pricing, and there are individual handlers that,
5 because of the circumstances, were not able to recover
6 all or, perhaps, even part of their additional costs
7 in the negative PPD. I think Mr. Oberweis suggested
8 that they weren't able to adjust their prices to
9 overcome the impact of the negative PPD.

10 Q. Because of competition in the market?

11 A. Because of competition and price points
12 and so on.

13 Q. That is correct, and so if I'm given to
14 understand, then, essentially your proposal under
15 Proposal No. 2 still allows depooling?

16 A. Yes. It would allow a modest amount of
17 depooling.

18 Q. Right, so that basically then we do
19 have pricing -- producer pricing disparity between the
20 milk that is depooled versus milk that is pooled; am I
21 correct?

22 A. I think that would be a distinct
23 possibility. We're taking a modest step in that
24 direction, recognizing that there is a very diverse
25 marketplace here. It's not a heavy Class I

1 utilization market. There's a lot of other usages of
2 milk in manufactured products, and though some of our
3 group's participants would have liked to have gone
4 further, we came to a consensus of trying to alleviate
5 a problem without impacting any participant too
6 greatly.

7 Q. Then this also leads to the next
8 question. Of the milk used for most manufacturing
9 purposes, is that required to be Grade A milk, say
10 cheese, butter, pug?

11 A. I think that becomes a labeling issue.
12 I don't know of any -- there's no Federal Order
13 requirement that it be Grade A milk, but there is a
14 requirement that if Grade A milk is included in the
15 pool -- I mean, for that milk to be included in the
16 pool, it must be Grade A.

17 Q. And the reason for that being is that
18 it would be available to the fluid market; is that not
19 correct?

20 A. That is correct.

21 Q. And if the fluid market requires only a
22 20 percent reserve, how in heaven's name can a 400
23 percent reserve even hope to supply the fluid market?

24 A. Well, number one, I'm not sure what the
25 real reserve requirement of a fluid market is. There

1 may be a lot of debate if 20 percent is sufficient.
2 There is no debate that we're only using 20 percent of
3 the milk, or thereabouts, in Class I in this market,
4 and so the extra is an adequate -- in my opinion,
5 would be an adequate reserve, and this is part of the
6 reason that supply plants are only required to ship 10
7 percent of their milk, because of the low utilization
8 in the market.

9 If we were in a 90 percent utilization
10 market, the supply plants would need to ship a lot
11 more milk. We have provisions in place to direct the
12 supply plants to ship a lot more milk.

13 Q. I understand that. In your statement
14 also you address individual handler fees, and saying
15 that they have been eliminated, essentially, from
16 Federal Milk Marketing Orders because of the disparity
17 in pricing, and you gave one example. How is that any
18 different than depooling in the disparity in pricing?

19 A. I don't think it is.

20 Q. It's the same thing?

21 A. Same thing. When a Class III handler
22 depools, in effect, what he is doing is establishing
23 an individual handler pool.

24 Q. And so, then, we are not treating
25 handlers, all handlers equally, are we?

1 A. Not under the current regulations.

2 Q. Very good. And would not an
3 alternative solution to address the unequal handling
4 or treatment of handlers be to say that if you're in
5 the pool, you're in the pool, if you're out, you're
6 out, and you don't come back in until August?

7 A. That would be one solution, and I think
8 that would be what we would now call the California
9 solution, and, in fact, our group talked about that as
10 a possible solution, but we weren't sure if we were
11 quite ready to prepare language to go that far,
12 because it would be a major, major change in how we've
13 traditionally approached pooling in the Upper Midwest
14 Order.

15 MR. LAMERS: I reluctantly will
16 re-describe what you've just said as being that you
17 are reluctant to make things fair and honest and
18 equitable versus inequitable. Thank you very much.

19 THE COURT: All right, Mr. Lamers.
20 Mr. Vetne?

21 CROSS-EXAMINATION

22 BY MR. VETNE:

23 Q. Dennis, at the beginning of your
24 testimony you indicated that there's been some change
25 in the makeup of the organizations that you represent,

1 some have been added, some have been taken away;
2 correct?

3 A. Yes.

4 Q. In your February 20th letter to USDA
5 requesting this hearing, you indicated that your
6 coalition represents about 43 percent of the milk
7 pooled and 59 percent of the milk delivered to Order
8 30 distributing plants. How have those numbers
9 changed with the additions and deletions to your
10 coalition?

11 A. I do not know. Those numbers were
12 provided at our request to the Market Administrator in
13 early February, and we've not made a subsequent
14 request. The request by Foremost that our testimony
15 not be given on their behalf is something that is
16 fairly recent, and they've -- when they told me that
17 they would prefer that we do not testify on their
18 behalf at this hearing, they also told me that they're
19 not opposing the changes, and so I'm not sure where
20 their position is at. I think it would be fair to say
21 it's gone from a position of strong support as a
22 proponent of Proposal 2 to a lesser supporting
23 position, or taking no position.

24 Q. Is it not true that if you take out the
25 Foremost milk and add in the new members of your

1 coalition, that the Foremost milk volume would exceed
2 the new members' volume?

3 A. I would think that would be a fair
4 statement, but I don't have any numbers to verify
5 that.

6 Q. All right. Do you have a copy of your
7 proposal in front of you, the one upon which you made
8 one correction?

9 A. Or the one I made two -- we've made two
10 corrections, actually, now, John.

11 Q. All right. Let me -- Maybe I missed
12 one. Maybe I'll hear another one. Look at your
13 proposal for Section 13(f)(3), that the Market
14 Administrator may waive 100 --

15 A. Okay.

16 Q. Subpart 1, "For a new handler on the
17 Order subject to the provisions of 1030.13(f)(3), what
18 is it that 13(f)(3), what's the function of that
19 reference in that clause? It is a reference to
20 itself.

21 A. Yes, and I think, you know, when you're
22 not a lawyer, you write these things, sometimes things
23 slip in. Right off, I think, you know, that is a
24 reference to the number one, to 1030.13(f) and further
25 subject to, I guess that the handler may waive the 125

1 or 135 percent. I think the thing we maybe need to do
2 is discuss the intent of some of these provisions and
3 not the exact verbiage that was used, and the intent
4 is clear, that if there's a completely new handler
5 available to serve the market or participate in the
6 market, that the Market Administrator may waive that
7 initial 125 percent -- or may waive that 125 percent
8 or 135 percent pooling limitation initially.

9 Q. Which would allow the handler to build
10 its milk supply?

11 A. Which would allow the handler -- a new
12 handler that had never been involved in the market or
13 pooled producers in the market to put together a milk
14 supply and become active in the market.

15 Q. It would not apply, as written, to a
16 new handler in the first month in any case, because
17 there is no prior month's reference report for the
18 handler to which any limitation can fall?

19 A. Well, that's why you have to waive the
20 limitation, because otherwise you would never have a
21 new handler come in the market, except in the month of
22 August, because the 125 percent or 135 percent of zero
23 is zero.

24 Q. It's always zero, okay. And August is
25 a free month for everybody?

1 A. That is correct.

2 MR. VETNE: Thank you.

3 THE COURT: Other questions? Any other
4 questions at all? Looking everywhere. Any other
5 questions at all? Going once, going twice. Thank you
6 very much, sir.

7 THE WITNESS: Thank you.

8 THE COURT: And who would we like to
9 call today? The gentleman here to your right,
10 Mr. English?

11 MR. ENGLISH: Mr. Evan Kinser for Dean
12 Foods, and I have a statement I would like to have
13 marked, Your Honor.

14 THE COURT: Yes. If you would raise
15 your right hand.

16 EVAN KINSER,
17 after having been first duly sworn by
18 the Court says under oath as follows:

19 ***

20
21 THE COURT: We'll mark the statement as
22 Exhibit -- I lost my numbers.

23 MR. ENGLISH: 31, Your Honor.

24 THE COURT: 31.

25 MR. ENGLISH: And there are two tables

1 on the back of his statement.

2 THE COURT: All right. They'll just be
3 included.

4 (Whereupon, Exhibit No. 31 was
5 marked for identification.)

6 DIRECT EXAMINATION

7 BY MR. ENGLISH:

8 Q. Mr. Kinser, would you state your full
9 name for the record.

10 A. Evan Kinser.

11 Q. And by whom are you employed?

12 A. Dean Foods.

13 Q. And for how long have you been employed
14 by Dean Foods?

15 A. Since June 1st.

16 Q. And before being employed by Dean Foods
17 -- let me back up. What's your position at Dean Foods
18 Company?

19 A. I'm the Manager of Dairy Risk
20 Management and Commodity Procurement.

21 Q. Before being employed by Dean Foods,
22 have you been involved in the dairy industry?

23 A. Yes. I spent six years with Foremost
24 Farms.

25 Q. And what was your position for Foremost

1 Farms?

2 A. Director of Fluid Milk Marketing.

3 Q. And prior to Foremost Farms, were you
4 employed by anybody in the dairy industry?

5 A. No.

6 Q. What's your educational background?

7 A. I have a Bachelor of Science in Animal
8 Science and Ag Economics from the University of
9 Missouri, MBA in Ag or Business from the University of
10 Wisconsin.

11 Q. Beyond your educational experience and
12 your experience working for Foremost and now Dean
13 Foods, do you have any personal experience involved in
14 the dairy industry?

15 A. I do. I grew up on a dairy farm in
16 southern Missouri, and continue to be involved with
17 the family operation.

18 Q. Do you have a statement today on behalf
19 of Dean Foods?

20 A. I do.

21 Q. Could you please give that statement.

22 A. Hello. My name is Evan Kinser. I am
23 employed by Dean Foods Company as the Manager of Dairy
24 Risk Management and Commodity Procurement. My
25 business address is 2515 McKinney Avenue, Suite 1200,

1 Dallas, Texas.

2 Dean Foods owns and operates
3 distributing plants regulated by the Federal Milk
4 Marketing Order No. 30, as well as other milk plants
5 located in the marketing area defined by Federal Milk
6 Marketing No. 30.

7 In spite of Mr. English's comments
8 about my testimony being, and I quote, A very, very
9 lengthy testimony, end quote, I hope that only one of
10 those "very's" should have been -- should have
11 sufficed. However, in his defense, I have shortened
12 -- excuse me. However, in his defense, it has been
13 shortened based on the evidence that has been
14 submitted. Many of the comments that was prepared to
15 make -- I was prepared to make are now redundant and
16 no longer necessary for forming a complete record.
17 Still, there are some points that either need
18 introduction or clarification. For that purpose, I am
19 appearing today to support and explain the philosophy
20 of Dean Foods in arriving at Proposal No. 3, No. 4,
21 No. 5, and No. 6. I will further explain our concerns
22 about Proposal No. 1 and 2.

23 Experts will support -- will supplement
24 my testimony with additional testimony. Mr. Paul
25 Christ will explain the mechanics of the proposals,

1 and Ms. Mary Ledman will cover the adverse economic
2 effects of depooling if the Order is allowed to remain
3 as it currently exists.

4 "The purpose of the Federal Order
5 System." Understanding the correct purpose of the
6 Federal Order system is key to this hearing being
7 successful. Distractions from the intent in the past
8 have led to tweaks or small patches when more concise
9 and meaningful action was needed. The focus always
10 needs to be on the original intent and what changes
11 should be made today to ensure the original intent is
12 carried out. Today, we can and should make different
13 actions than the past. This action must address a now
14 greater array of market conditions and resulting
15 opportunistic behaviors.

16 The Agricultural Marketing Act, the
17 AMAA, of 1937 provides for a system that would, quote,
18 insure a sufficient quantity of pure and wholesome
19 milk, end quote, which has routinely been construed to
20 mean packaged fluid milk only, through the ensuring
21 that, quote, for the payment to all producers and
22 associations of producers delivering milk to the same
23 handler of uniform prices for the milk delivered to
24 them, end quote, and, quote, for the payment of all
25 producers and associations of producers delivering

1 milk to handlers of uniform prices of all milk so
2 delivered, irrespective of the uses made of such milk
3 by the individual handler to whom it is delivered, end
4 quote. With this reminder of the regulation that is
5 to guide us, I would submit the intent is as follows:
6 The Federal Order system is to compensate dairy
7 producers serving, and standing ready to serve,
8 distributing plants in order to insure a sufficient
9 quantity of milk is available to produce packaged
10 milk. This should be accomplished with uniform
11 payments for milk, regardless of their milk's use and
12 equal prices charged to handlers using milk for the
13 same purpose.

14 "Upper Midwest Order Provisions." The
15 purpose of the Federal Order has been confused and
16 misapplied in developing regulation that governs the
17 Federal Orders. Some would lead the Secretary to
18 believe the Federal Order's purpose is to ensure that
19 all plants have a sufficient supply of milk. The AAMA
20 simply does not support this; it is clear the concern
21 of milk supply applies to distributing plants. The
22 track record and structure of this Order makes this
23 clear. There are many key sections from the Order
24 language to substantiate the only milk of concern to
25 the Order is distributing plants. In absence and by

1 extension, the milk supply of other plants is a
2 residual concern of the Order, only to the extent that
3 it is necessary to ensure that reserve producers,
4 those standing ready to serve the fluid market, have
5 outlets for their milk.

6 The first section highlighting the
7 importance of distributing plants' supply is Section
8 1030.7, Paragraph (g). This provision gives the
9 Marketing Administrator the authority to change
10 shipping percentages of pool plants to distributing
11 plants. There is no statement about the need in a
12 supply plant or a supply plant system. The purpose of
13 these plants being part of the Order is to meet the
14 needs of distributing plants. In the event current
15 requirements are ineffective, the Market Administrator
16 can make a change.

17 The next section highlighting the
18 importance of distributing plants' milk supply is
19 Section 1030.55, transportation credits and assembly
20 credits. This also illustrates that the purpose of
21 the Order is to ensure distributing plants have a
22 sufficient supply of milk. This particular section is
23 meant to provide economic incentive for handlers to
24 move milk to distributing plants. There is no
25 provision to ensure that all pool plants have an ample

1 supply of milk. The transportation credit is only
2 provided to pool supply plants for milk that ships to
3 pool distributing plants. The assembly credit is
4 given to any handler that delivers producer milk to a
5 pool distributing plants. Both provide handlers
6 economic incentives to give up milk by helping to
7 offset the cost of assembling and transporting milk
8 for shipments to distributing plants. No credit is
9 provided for a nonpool plant shipping to a pool supply
10 plant, and no credit is provided for a pool supply
11 plant shipping to a pool supply plant.

12 The dissection of Section 1030.7, the
13 definition of a pool plant, clearly illustrates that
14 only plants mandated to be regulated by the Order are
15 distributing plants. All other plants are allowed to
16 participate, based on defined service to a
17 distributing plant. Rather than spend the time to
18 explain each section -- excuse me, each subsection, I
19 would offer the following quick summery of Section
20 1030.7.

21 In Paragraph (a), the plant referenced
22 is distributing regulation as mandated, (b), the UHT
23 distributing regulation is mandated, Paragraph (c) is
24 a supply plant, regulation is voluntary, (e) deals
25 with a distributing system, it is voluntary to form

1 the system, mandatory regulation after it's formed,
2 (f), a supply system is voluntary, (g), the call
3 provision, voluntary, (h), plant exemption, special
4 circumstances depending on the plant, and, (i) is the
5 MA exemption, which is voluntary.

6 These sections of the Order language
7 clearly demonstrates the Order's main concern must be
8 with distributing plants' milk supply. However, the
9 Order also provides a pricing mechanism for all the
10 Order's milk. The pricing system is built around
11 pricing discrimination based on milk's use. This
12 serves as an attraction for milk to be in the pool.
13 One of the largest contributors to the pool is the
14 Class I price. This is clear from studying the
15 pricing formulas found in Section 1000.50 that price
16 -- excuse me, that Class I is structured to be the
17 highest price in the pool.

18 "Summery of Federal Order Logic." The
19 system is designed for classified pricing to maintain
20 certain relationships between the prices. It was
21 thought the supply plants and producers shipping to
22 them would want access to the dollars generated by the
23 distributing plants. Therefore, this system regulates
24 those plants, distributing plants, that are structured
25 to contribute to the pool and relies on an economic

1 incentive to drive regulation for the balance of the
2 supply plants. This is based on the assumption that
3 the revenues generated from the distributing plants
4 would always provide sufficient incentives to attract
5 a milk supply. In the absence of forced regulation,
6 the contributing plants would have left the Order,
7 rather than contribute. Without their contribution to
8 the pool, the incentive would be lost to draw other
9 milk. Having locked in the distributing plants to
10 regulation, it was thought would-be unregulated
11 handlers, supply plants, would voluntarily submit to
12 regulations for benefits.

13 "Change in Grade A Volume." One
14 possible cause for these glaring shortcomings could be
15 the result of not adjusting to change in the
16 underlying structure of the dairy industry. There are
17 significant changes that have occurred in the dairy
18 industry since the implementation of the AMAA in 1937.
19 I could spend hours discussing such changes as cow
20 genetics, production methods, cooling and processing
21 technology, transportation systems, etc. One dynamic
22 that seems to have been overlooked, which is the key
23 principle in the operation of the Federal Order, is
24 the issue of the availability of Grade A milk. The
25 industry has changed from a manufacturing grade to all

1 but exclusively Grade A milk production. The
2 regulations have not recognized that the incentives
3 needed to switch from manufacturing to Grade A are no
4 longer necessary.

5 I would like to submit some exhibits
6 into the record to illustrate this change, and at the
7 back are two exhibits. The first I will refer to as
8 H, the second I will refer to as I. Exhibit H
9 "Measures the Growth in Federal Milk Order Market,"
10 selected years 1947 to 2002, published in the "Upper
11 Midwest Dairy Market News," May of 2003. Exhibit I,
12 "Grade A Milk Production as a Percent of Total Milk
13 Production," published in the "Upper Midwest Dairy
14 News," May of 2003.

15 One could get the impression for how
16 the Orders currently behave that there continues to be
17 need for Grade A milk. In these exhibits -- excuse
18 me. If these exhibits were the only facts, likely the
19 reserve conclusion would be drawn; there is more than
20 an ample supply of milk available to the Grade A
21 market. There is an upward trend in the percent of
22 milk that is Grade A, nearing 100 percent, and a
23 declining percent of milk utilized in the Class I.

24 According to exhibit I, nationally only
25 2 percent of the milk produced was not Grade A. Of

1 the states in the same exhibit, the lowest percentage
2 is North Dakota with 70 percent Grade A. However,
3 when one considers the population of North Dakota and
4 the fact that it borders Minnesota, the sixth largest
5 milk producing state where all but 4 percent of the
6 milk is Grade A, there is little concern about North
7 Dakota having access to a sufficient supply of Grade A
8 milk.

9 Exhibit H shows the percentage of milk
10 utilized in Class I. Again, the concern of the Order
11 is to assure a milk supply to distributing plants,
12 which require Grade A. The percentage of milk
13 utilized in Class I has declined fairly steadily.
14 This exhibit only accounts for milk pooled within a
15 Federal Milk Order. It does not account for milk
16 outside the Federal Order pool, regardless of the
17 reason. There's no -- excuse me. There is a
18 declining percent of milk utilized in Class I. The
19 exception to this decline is in 1998 when there was a
20 financial incentive to depool. Again, Class I milk,
21 produced at a distributing plant, does not have the
22 choice about its participation in the pool; it must
23 participate in the pool by regulation. Other classes
24 of milk have the option of participating or not. For
25 part of 1998, there was not economic incentive to be

1 in the pool, in fact, there was economic incentive to
2 be out. Therefore, the producer pounds reported in
3 this exhibit, relative to the amount of milk required
4 by Class I, resulted in the year over year increased
5 percentage of milk pooled used in Class I. If this
6 same analysis were done comparing against total milk
7 production, it is unlikely the same increases would
8 have been seen.

9 "Inequity." The fact remains this
10 system requires proper economic incentive and proper
11 defined regulation. Missing these two key ingredients
12 allows handlers to associate with the Order and draw
13 money out of the Order, while not providing any
14 service to distributing plants. However, the problem
15 is not limited to these handlers merely being free
16 riders, drawing from the pool for no service, it
17 extends beyond that. When there are costs associated
18 by those servicing the markets, these costs are not
19 shared, instead they are left with the handler who
20 continued to do the right thing and serve the market.
21 When the free riders leave, the costs did not go away,
22 these costs are forced on a smaller pool of handlers.
23 More correctly they are forced on a smaller contingent
24 of dairy farmers. It is like going out with a group
25 of friends and sharing a great meal, eating as much as

1 you can, but when the server comes with the check, you
2 simply get up from the table and leave the bill to be
3 divided among those who didn't do the same.

4 "Among handlers." Current regulation
5 allows handlers who may or may not choose to be pooled
6 to enjoy the benefits of the pool, as long as they
7 meet the requirements of the Order for that month.
8 Furthermore, there is a cost to serve the market --
9 excuse me. Furthermore, when there is a cost to serve
10 the market, they're allowed to excuse themselves from
11 the table until the next meal is being served. The
12 idea of excusing themselves has been termed depooling.
13 A more technical definition of depooling would be when
14 the handler -- excuse me, when handlers do not report
15 milk that would normally pool on their pool report;
16 typically this is done for financial reasons.

17 The only milk that can depool is the
18 milk that is voluntarily pooled by pool supply plants
19 and 9(c) handlers, as opposed to the milk that is
20 mandatorily pooled by regulating distributing plants.
21 I discussed this earlier in my testimony when I
22 reviewed section 1030.7. The result of this structure
23 is that when there is no economic incentive, reward,
24 to stay pooled and no economic incentive -- excuse me,
25 economic disincentive, cost, for leaving the pool,

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

4 Nothing demonstrates this exact
5 situation any more clearly than recent history. A
6 quick glance look back, a little over a year, clearly
7 demonstrates that in today's marketplace this system
8 is broken. Undeniably, there is insufficient economic
9 incentive and poorly defined regulations resulting in
10 failure of the Order to achieve its intent.

11 Furthermore, it is producing a result that was
12 intended to prevent disorderly marketing. Ms. Ledman
13 will talk about this topic more extensively.

14 Who are the handlers that depooled
15 milk? Looking at the request for proposals noticed
16 for this hearing, specifically Proposal No. 2, you
17 will find a lengthy list of cooperatives who seem to
18 oppose depooling. Is this to say they do not depool,
19 I would think not. However, it would indicate that
20 they have more to gain by discontinuing depooling than
21 allowing the system to stay as it is. Admittedly,
22 there are some cooperatives who did not sign onto that
23 proposal, they likely opposed it, but what about
24 proprietary plants normally pooled on the Order? The
25 majority of the proprietary plants pooled on the Order

1 are Class III operations, and they likely depooled and
2 would like to continue to have that option. Which
3 operations return all the money to the producer?
4 Cooperatives do, either in the form of payment for
5 milk, earnings, or some combination. This being the
6 case, it would seem that the depooled proprietary
7 plants have little incentive to overpay for milk
8 relative to their pooled cooperative competition. If
9 this assumption is correct, they desire to return as
10 little as possible to dairy producers.

11 "Producer prices." Beyond the effects
12 of handlers' payment decisions, there are other
13 painful affects of depooling. Like my illustration of
14 leaving before the bill is covered at dinner, there
15 are costs currently not equitably shared among
16 producers. Let's focus again on the cooperatives that
17 are proponents of Proposal No. 2 noticed for this
18 hearing. The proponents are as follows: Cass-Clay
19 Creamery, Dairy Farmers of America, Foremost Farms
20 USA, Land O'Lakes, Mid-West Dairymen's Company,
21 Manitowoc Cooperative Milk Producers -- excuse me,
22 Milwaukee Cooperative Milk Producers, Manitowoc Milk
23 Producers Cooperative, Swiss Valley Farms, and
24 Woodstock Progressive Milk Producers. Each of them is
25 a dairy cooperative.

1 The only other proposal that would work
2 to accomplish anything similar would be the proposals
3 that Dean Foods has made. Why would these
4 cooperatives have cared any more than other
5 cooperatives? What about other proprietary plants?
6 Is there a reason for a select group to ask for a
7 change and others to accept the status quo? Yes, it
8 continues to be the same issue I've reiterated in this
9 testimony. Distributing plants are the only plants
10 that are forced into regulation under the Federal
11 Order, all other plants choose. To the degree you
12 service a distributing plant, by definition, lessens
13 your ability to depool. The inability to depool
14 lessens your competitiveness in the marketplace when
15 others can.

16 One might think that this statement
17 runs counter to my earlier argument that proprietary
18 plants represent the majority of the milk that
19 depools, and they would not pay any more than they
20 have to for milk. I stand by that statement. Suppose
21 they, being the proprietary plant, pay 5 cents per
22 hundredweight more for milk, which lowers their profit
23 margin. I will illustrate for those forced into the
24 pool paying the 5 cents additional per hundredweight
25 could be moving them to deeper negative margin. Let's

1 suppose there's a co-op shipping 25 percent of its
2 milk to a distributing plant, we'll call this Co-op A.
3 25 percent of Co-op A's milk supply must be pooled by
4 definition; there is no choice. The balance of milk
5 can be depooled.

6 Now, let's contrast that with Cheese
7 Factory C, a handler that is shipping the bear minimum
8 10 percent. That is enough milk that if they wanted
9 to fully pool, they could pool all their milk
10 receipts, but it does not force them into the pool --
11 it does not force them to pool any more than the 10
12 percent. Now, focussing on the worst-case scenario we
13 have, we will look at April 2004. Here Co-op A had to
14 pool 25 percent of their milk with the negative \$4.11
15 PPD. This means that Co-op A's blended PPD is a
16 negative dollar and 2.75 cents. Suppose Cheese
17 Factory C pooled 10 percent at the same PPD and has a
18 blended PPD of a negative 41.1 cents. The Class III
19 was announced at \$19.66 per hundredweight, with the
20 negative \$4.11 PPD would result in a blend of \$16.18.
21 If we assume the remaining milk of each went to cheese
22 production, each handler could easily pay the blend,
23 but they are not both able to pay the same price.
24 Co-op A would be able to pay \$18.6325, the \$19.66 plus
25 the dollar and 2.75 cents. Cheese Factory C would be

1 able to pay \$19.25, the \$19.66 plus 41 cents.

2 Let's say that Cheese Factory C wants
3 to be profit maximizing, yet competitive. They would
4 pay Co-op A's price, allowing them to make 61.75
5 cents. In reality, Cheese Factory C might see a
6 chance to expand their procurement, so they decide to
7 pay \$19.90. If Co-op A believes that Cheese Factory C
8 is going to overpay the blend and pay more than Co-op
9 A, Co-op A will have to lose to match Cheese Factory
10 C. If Co-op A guessed that they needed to pay 19 --
11 excuse me \$18.95 to be competitive, it would mean that
12 Co-op A paid 21.75 cents more than they had to pay.

13 In this example I make no provisions
14 for the operational efficiency or inefficiency of
15 Co-op A versus Co-op C, they are assumed to have the
16 same cost structure. This is merely an illustration
17 of how, based on different shipping percentages to a
18 distributing plant, affect a handler's able to pay for
19 milk.

20 "Hidden costs." A cost that often gets
21 overlooked to the marketplace, but not overlooked by
22 the Market Administrator, is the cost of operating the
23 Order. Proposal 7 is a request from the Market
24 Administrator to increase the maximum administrative
25 assessment rate for the Upper Midwest Order from 5

1 cents to 8 cents per hundredweight. This request is a
2 direct byproduct of the current system of allowing
3 milk to come and go from the Order. Mr. Kyburz must
4 be staffed to handle a pool in excess of 2 billion
5 pounds, however, in the past 18 months, 7 months he
6 has had to attempt to cover that overhead with the
7 income on only a fraction of the milk.

8 I will not take the time to illustrate
9 the detailed implications on Mr. Kyburz and his staff,
10 as I'm sure he will do so in direct testimony. Yet, I
11 feel it important to show that the Proposal No. 7 is a
12 direct cost on this lax system, and is forcing the
13 cost to be raised. To the degree the department fails
14 to recognize the flaw in the current system, which
15 allows for depooling and the increase in
16 administrative assessment, it is only a tax increase
17 on those who are already picking up the tab.

18 "Summery of Inequities." I hope that
19 it is clear at this point to the Secretary that there
20 are three fatal flaws in the system. First, it forces
21 regulation on distributing plants, but allows all
22 others voluntary participation. Secondly, these
23 plants choose to participate when they can siphon
24 funds out of the system for their betterment, but when
25 the reverse is true, they bail with no implications to

1 them. Third, the reality is there are implications
2 when milk leaves the pool, the costs that exist must
3 be borne by a smaller few. This creates a heavier
4 burden for those remaining in the pool, that is not
5 rewarded when the market improves, because the free
6 riders will return.

7 "Exposure to Order Failure Call
8 Provision." I would like to point beyond the economic
9 effects of the flawed system, such provisions proposed
10 -- excuse me. Such provisions position the Order to
11 completely fail its purpose. Earlier referenced
12 1030.7(g) for the purpose of illustrating that the
13 Federal Order was to ensure a supply to distributing
14 plants. This provision provides the Market
15 Administrator to increase or decrease for all or part
16 of the marketing areas, the shipping percentage to
17 encourage needed shipments or to prevent uneconomic
18 shipments to distributing plants. The current
19 provisions only require 10 percent of the pooled milk
20 to be shipped to distributing plants; no more than 90
21 percent can be diverted to a nonpool plant. With the
22 current provisions relying on economic incentive to
23 keep milk in the pool and available for such
24 provision, the change in shipping percentage would
25 need to be significant.

1 I will turn to July 2003 to illustrate
2 how significant. If we make the assumption that all
3 the distributing plants pooled in the Upper Midwest
4 Marketing Order were 100 percent Class I, that would
5 say that 53 -- excuse me, 50.3 percent of the milk was
6 diverted. If conditions had warranted for the Market
7 Administrator to adjust the shipping percentages, the
8 shipping percentages would have needed to be in excess
9 of 49.7 percent. To explain how I arrived at this
10 result, look at Exhibit 10, Table 2F. Notice that the
11 Class I percent was 49.7 percent. If more milk was
12 needed than the approximate 328 million pounds of milk
13 utilized in Class I, and there were only about 660
14 million pounds of milk in the pool, this from Exhibit
15 10, Table 2E, it would have required something greater
16 than 49.7 percent. The milk that is pooled is all the
17 Market Administrator can call on. So, to force milk
18 to move from Class II, III, or IV into Class I or
19 being faced -- excuse me, or face being depooled, the
20 shipping percentage would needed to have been higher
21 than 49.7 percent. However, if a call had been
22 issued, it is possible that some of the Class III milk
23 would not have met the requirement. This would have
24 been to the handler's betterment to be disqualified or
25 forced out of the pool. This would have forced the

1 requirement for even higher -- excuse me. This would
2 have forced the requirement even higher on Class II
3 and IV, since those handlers were the only ones who
4 would have wanted to be in the pool. By these
5 handlers wanting to be in the pool, they would have
6 liked -- they would likely do whatever is necessary to
7 remain pooled. The percentage would have only been
8 worsened if you assumed that there are no stand-alone
9 Class II facilities. Such a scenario would have
10 required the shipping percentage to be greater than
11 65.5, the sum of Class I and II percentage. The
12 reality of the marketplace needs was likely something
13 between 49.7 percent in the prior example and this
14 65.6 percent.

15 The response to this line of thinking
16 could be that milk would be readily available when
17 this happens and can be easily purchased, but actually
18 the opposite is the case, especially as it relates to
19 the most recent examples in the Upper Midwest. Cheese
20 plants are most interested in keeping all their milk
21 when the price is high, so they can make cheese and
22 not short any customers.

23 Now, put yourself in the place of a
24 Class III handler, back to Cheese Factory C. During
25 recent examples of the negative PPD's, Cheese Factory

1 C was looking at above, and in the case of 2004,
2 record high cheese prices. If Cheese Factory C wanted
3 to pool, they would have to give up at least 10
4 percent of what they wanted to pool, defined by
5 Section 1030.7, Paragraph (c). This would mean less
6 milk to the vat, they would be required -- excuse me,
7 they would receive the negative PPD on that milk, and
8 any milk they shipped in addition -- excuse me, and
9 any milk they pooled in addition to shipments.

10 I've already explained the implications
11 of that on their ability to pay for milk. Given that
12 information and my testimony about voluntary
13 participation, the alternative provided by the current
14 Order regulation to Cheese Factory C is to keep all
15 their milk, make cheese, and pool nothing. This would
16 be a win-win for Cheese Factory C. They are able to
17 make as much cheese as possible for customers; they
18 don't have the negative PPD. Thus, the Marketing
19 Administrator has no authority to call on Cheese
20 Factory C to ship additional milk if it is decided
21 that there are insufficient supplies available to
22 distributing plants. The handlers shipping milk to
23 the distributing plants will have a negative PPD, but
24 will have to compete with Cheese Factory C when they
25 go to pay for milk.

1 The point of this illustration is that
2 current provisions allow milk to leave the pool. This
3 renders the Order virtually useless to its purpose to
4 ensuring a milk supply to distributing plants. The
5 power of the Market Administrator to make milk
6 available to distributing plants is severely hampered.
7 To the degree these percentages would have increased
8 what milk remained in the pool could have opted to not
9 pool or depool, and those handlers would not have had
10 to respond to the increased shipping percentages.

11 "System Failure." Smooth function of
12 this system requires two keys. One, proper economic
13 incentive and, two, properly defined regulation. We
14 believe that both are missing within the current
15 regulation.

16 "Philosophy of Our Solutions."
17 Something must be done to change the Order to rectify
18 the shortcoming. We appreciate the Secretary's
19 recognition of this in requesting proposals and
20 subsequently having this hearing. We further
21 appreciate that the Secretary recognized four
22 proposals submitted by Dean Foods. Our proposals are
23 aimed at restoring the missing keys; one, proper
24 economic incentive and, two, properly defined
25 regulation.

1 To accomplish these two objectives,
2 there are several different approaches that could be
3 used. In the end, it is a matter of execution and
4 preference, as opposed to objective. Being candid,
5 Dean Foods has two objectives, and we aren't picky
6 about the execution, so long as the objectives are
7 achieved. I hope from this testimony that it will be
8 clear these objectives are consistent with the intent
9 of the Order and the current shortfalls we've
10 illustrated. First, there needs to be smaller Orders
11 and likely more of them. The objective of this Order
12 doesn't provide that every pound of milk -- excuse me.
13 The object of the Order doesn't provide that every
14 pound of milk have guaranteed access to the Order
15 draw, rather that distributing plants have sufficient
16 supplies of milk. Accordingly, this will help to
17 create economic incentive. Second, regulation
18 requiring that once milk attaches, the milk stays.
19 This regulation would create equity for all involved
20 in the Order.

21 Dean Foods understands and accepts that
22 the majority of the plants that we own and operate are
23 in the group of plants that are regulated by
24 requirement, as opposed to option/economic incentive
25 regulation. We further understand that it is believed

1 that the products that these plants produce are highly
2 perishable and face a less elastic demand curve.

3 These beliefs have led to the conclusion that those
4 products and others similar to them should be the
5 highest priced. Regardless of our belief and comfort
6 level with this, we're not going to express -- excuse
7 me, not going to protest or express opinions about
8 these conditions at this particular hearing.

9 However, we do have and would like to
10 express our concerns about how the dollars generated
11 by these circumstances are handled, what economic
12 incentives that are used to create, and most
13 importantly, how these dollars are uniformly
14 distributed to producers.

15 In an ideal world from Dean Foods'
16 perspective, the Federal Order would operate in such a
17 way to allow a distributing plant or a distributing
18 plant unit to have an individual handler pool. This
19 system would put the pressure on the distributing
20 plant to manage the pool in a way as to resolve the
21 purpose of the Federal Order. If this would be
22 allowed, it would force distributing plants to think
23 about how to ensure their futures supply of milk and
24 keep economic incentives in place that would insure
25 that when this is -- it is temporarily undesirable to

1 ship, as has been the case, the long run loss would
2 not -- the long run loss for not continuing to insure
3 a sufficient supply of milk would be too great to
4 forgo the long-term reward in order to gain short-term
5 pricing advantage.

6 I will introduce the proposals with
7 modifications. I will not comment on their mechanics
8 or function, Mr. Paul Christ will be providing this
9 information and detail in his testimony.

10 THE COURT: Could we take a little
11 break at this point? Some people might want to get a
12 drink of water and relax a little bit, so let's take a
13 break, and we'll be back in ten minutes.

14 (Recess taken from 10:21 to 10:44 a.m.)

15 THE COURT: All right. I think we can
16 commence. Yes, sir, you were up to Proposal No. 3.
17 We're back on the record.

18 THE WITNESS: "Proposal No. 3." In
19 proposal No. 3 we propose establishing a Dairy Farmer
20 for Other Markets Provision, much like the same titled
21 provision included in the Northeast Milk Marketing
22 Order, Section 1001.12, Paragraph (b), Subsection (5)
23 and (6). We would like to modify the language that
24 was submitted for the hearing and published in the
25 official notice to ensure that it reflects our intent,

1 and for this I will note what comments and changes
2 need to be made.

3 In amending 1030.12, producer, it says,
4 "If the pool plant," that should be "any" pool plant.
5 Continuing on, "operator or," it says, "the
6 cooperative association, "the" should be "any," and at
7 the end of that, "physically received otherwise as
8 producer milk at a pool," you need to insert the word
9 "distributing plant," "during the month."

10 A conforming change needs to be made by
11 the Secretary under Proposal 8 to clarify potential
12 implications created by Proposal No. 3. This change
13 would occur in Section 1030.13, Paragraph (d),
14 Subsection (1), which contains the following:

15 "If any dairy farmer loses producer
16 status under the Order in this part, except as a
17 result of a temporary loss of Grade A approval or as a
18 result of a handler of the dairy farmer's milk failing
19 to pool under any Order, the dairy farmer's milk shall
20 not be eligible for diversion unless at least one
21 day's," that should be "one day's production."

22 To make our proposal effective and
23 consistent, it should be changed to read as follows:

24 "If a dairy farmer loses producer
25 status under the Order as part in" -- excuse me, "in

1 this part, except as a result of a loss of Grade A
2 approval not to exceed 21 days in a calendar year, the
3 dairy farmer's milk shall not be eligible for
4 diversion unless at least," and that should be "one
5 day's production."

6 "Example from the Northeast." Similar
7 language exists in the Northeast Order. A major
8 difference is that milk can get into pools free in
9 July. If milk leaves in the spring, it is out until
10 July. This year, this provision played well into the
11 hands of several handlers in the Northeast. They left
12 the pool in April and May, because of the negative
13 PPD. Then the provision worked. They could not,
14 "repool," in the Northeast Order in June. The system
15 shortcoming was that the Northeast -- excuse me, the
16 Mideast Milk Marketing Order does not contain the same
17 or any similar language. Some savvy handlers moved
18 milk to qualify for pooling on the Mideast Order for
19 June. These handlers likely pooled their milk back on
20 the Northeast Order in July. These numbers are not
21 yet available.

22 To illustrate this point, I will turn
23 to Exhibit 13 submitted by Sharon Uther the Midwest --
24 excuse me, the Mideast Order. I would also like to
25 remind the Secretary of Ms. Uther's testimony with

1 regard to how one might interpret the numbers, more
2 importantly where this additional milk came from. It
3 would seem almost obvious that this isn't milk that
4 suddenly appeared. It is milk that has most likely --
5 excuse me. It is milk that was most likely left
6 homeless because of an earlier month's pooling
7 decision. Our requested Proposal 13, Pounds of
8 Producer Milk by State, February 2003 and 2004, and in
9 Exhibit 13, Pounds of Milk by State --

10 THE COURT: Let me interrupt you for a
11 moment. This Exhibit 13, it's not one of the Exhibit
12 13's we've received here, is it?

13 MR. ENGLISH: Yes, it is.

14 THE COURT: It is?

15 MR. ENGLISH: He's referring to Exhibit
16 13.

17 THE COURT: I'm sorry. Thank you. Go
18 ahead.

19 THE WITNESS: Exhibit 13, pounds of
20 milk by state, June of 2003 and 2004, to help
21 illustrate how Northeast handlers took advantage of
22 the pooling provisions of the Mideast Order in June.
23 I included February, because all milk would have
24 desired to have been in the pool that month. This
25 helps to single out other things that changed in the

1 Mideast Order from 2003 to 2004. I will not bore the
2 Secretary, nor the hearing attendees, with every line
3 of the two tables, instead I would like to focus the
4 attention on two states, New York and Vermont. Why
5 would milk in New York and Vermont pounds pooled --
6 Why would milk in New York and Vermont pounds pool on
7 the Mideast suddenly increase? The answer is the
8 product of this proposal at work in the Northeast
9 Order. It could not. Having lost its home, it needed
10 another market, and the best option was the Mideast.
11 Here we find what appears to be, in simple terms, an
12 additional 64 -- excuse me, 67.422 million pounds of
13 milk on the Mideast Order, because it was unable to
14 pool on the Northeast Order, because of the pooling
15 decisions made in the prior two months.

16 Think ahead for a moment and consider
17 if this were implemented in all the Orders. Milk
18 would either stay pooled or ship to a distributing
19 plant to return to the pool. Now, let's turn to the
20 practical, this can't happen over night. Such
21 implementation would require additional hearings, so
22 if this were to happen, which Order would be the right
23 place to start? The Order with the most generous
24 pooling provisions, the market of last resort, as was
25 said by one counselor, the dumping ground, or said

1 differently, the Upper Midwest Order. This is the
2 right Order for the Secretary to make the statement
3 and right -- and begin righting the wrongs.

4 "Proposal No. 4." Again, just noting
5 the changes.

6 "For the month," strike "December,"
7 replace that with "February." Same change as before,
8 "If the pool plant," that should be "any pool plant."
9 Continuing on, "operator or the," strike "the,"
10 replace with "any cooperative." Continuing down,
11 "proceeding months of July through," strike
12 "November," replace with "January." Continuing on,
13 "received otherwise as producer milk at a," insert
14 "distributing plant," "during the month."

15 Paragraph (6), "for any month July
16 through," strike "November," replace with "January."
17 Same changes as before, "if the," strike "the" and
18 replace with "any pool plant operator or," strike
19 "the" again, replace with "any cooperative
20 association," and again, "physically received
21 otherwise as producer milk at a pool," insert
22 "distributing plant."

23 Like in Proposal No. 3, we would look
24 for the same changes in Section 1030.13, Paragraph
25 (d), Subsection (1).

1 "Proposal No. 5." Amend Section 1013
2 -- excuse me, 1030.13 by adding Paragraph (f). In
3 Paragraph (f) we wish to strike "for July through
4 November," the Subsection 1000.44 (b), strike
5 Paragraph 3, Subsection (v), and in little (i) under
6 3, strike "subject to the provisions of Section
7 1030.13," I believe that's (f) in 3.

8 "Proposal No. 6." Amend Section
9 1030.13 by adding new paragraphs (d)(1) through (4),
10 and redesignating Paragraph (d)(4) as Paragraph
11 (d)(5), to read as follows:

12 "Except as a result of," delete
13 "temporary loss of Grade A approval," insert "to
14 exceed 21 days in a calendar year." No change in (2).
15 No change in (3), and then we are striking Subsection
16 (4).

17 We would like to couple this revised
18 Proposal 6 with an alternative to Proposal 1. Our
19 suggested amendment to Proposal 1 would read as
20 follow.

21 Subsection 1030.7. Producer milk.
22 Subsection (d) -- excuse me, Paragraph (d), Subsection
23 (2) would read: "The operator of a pool supply plant
24 may not include as qualifying shipments under this
25 paragraph, milk diverted directly from a producer's

1 farm pursuant to Section 1000.9(c) or Section
2 1030.13(c) to plants described in the paragraphs (a)
3 (b) and (e) of this section."

4 THE COURT: Do you want the words,
5 "pool supply plant" inserted? In the text I have it
6 just says, "The operator of a supply plant." Do you
7 want "the operator of a pool supply plant"? I heard
8 you say "pool" when you testified, but it's not in the
9 written format.

10 THE WITNESS: I will stick with what is
11 written, so it will just be supply plant.

12 THE COURT: Supply plant, okay. Go
13 ahead, sir, I'm sorry.

14 THE WITNESS: Thanks for that
15 clarification. These two together we would submit as
16 our revised Proposal 6.

17 "Proposal No. 1." Dean Foods on
18 principle must stand opposed to the limitations of
19 transportation credits. Accepting such is completely
20 counter to all the arguments that we have submitted to
21 the Secretary in this hearing. I would refer to
22 Exhibit 10, Table 9, that was received at this
23 hearing. This is the Market Administrator's response
24 to the following question: "Please provide the number
25 of pounds that received a transportation pool payment

1 that was hauled 400 miles or more miles since May of
2 2002." The answer as shown in Exhibit 10, Table 9,
3 "none." Proposal 1 and 2 attempt to prevent distant
4 milk from receiving incentives for attaching for
5 pooling purposes. The thought is correct, the
6 solution is wrong. In place of Proposal 1, the
7 Secretary should adopt Proposal No. 6.

8 Why should the distance from the market
9 make a difference? If the milk is needed, it should
10 be paid. The challenge is that there is too -- The
11 challenge is that there are so little costs because of
12 the loose pooling provisions, if milk could get
13 assistance with the transportation, it would connect.

14 The compensation for the milk should
15 not be limited by distance. Instead, the amount of
16 milk that can be pooled from serving a distributing
17 plant should be reduced. This change will limit milk
18 to serve the market to that which is needed to keep it
19 closer. There will not be the reward available for
20 milk moving long distances to move, unless it is
21 needed. We urge the Secretary to disregard this
22 request and implement Proposal No. 6 as it is
23 presented.

24 "Proposal No. 2." We oppose
25 transportation -- We oppose the transportation credit

1 that is consistent with Proposal No. 1 for the same
2 reasons we oppose Proposal No. 1. Like Proposal No.
3 1, we offer Proposal No. 6 as an alternative. Being
4 an equal opportunity opponent, we won't oppose purely
5 based on the proponents. The language that's similar
6 to Proposal -- excuse me. The language that is
7 similar to Proposal No. 5, we oppose. Much of our
8 opposition should be clear from our support of
9 Proposal No. 5.

10 There are a few areas we have serious
11 concern for this proposal. We feel that 125
12 percentage is too loose. Again, this will allow
13 guessing to be less of a factor. Handlers are allowed
14 a greater degree of slop for miscalculations for their
15 estimates. The provisions sets up allowing full
16 pooling in August. This is almost a
17 get-out-of-jail-free card for handlers. Why should
18 handlers be offered such forgiveness for taking
19 advantage of the system?

20 I hate to continue to say the same
21 thing in a different way, but the facts are what they
22 are. The pool should be about ongoing equity, not
23 about, in when it's good and leave when it costs. We
24 urge the Secretary to adopt Proposal No. -- We urge
25 the Secretary to adopt No. 5 over this proposal. If

1 the Secretary cannot see her way to do that, we would
2 urge that the variation be removed to a constant
3 percentage every month and possibly halfway between
4 125 and 115 as a compromise.

5 "Proposal No. 7." We have worked with
6 Mr. Kyburz and his staff a lot. We have leaned on
7 them for help and counsel, excluding counsel on issues
8 relating to this hearing since the announcement, of
9 course. Mr. Kyburz has a topnotch staff that is
10 extremely knowledgeable, helpful, and just great
11 people to work and deal with. Mr. Kyburz has clearly
12 demonstrated his ability to efficiently manage the
13 Order -- excuse me. Mr. Kyburz has clearly
14 demonstrated his ability to efficiently manage the
15 Order in very difficult circumstances that are beyond
16 his control. These difficult circumstances have
17 created the need for this hearing. These difficult
18 circumstances can be resolved by the Secretary. We
19 believe something needs to be done to help with this
20 difficult and historically unprecedented --- excuse
21 me, unpredictable problem. If the Secretary will
22 study closely the evidence of this hearing, it will be
23 clear that significant changes need to be made to
24 stabilize the Order.

25 We feel that we have offered proposals

1 that the Secretary should adopt to stabilize this
2 Order, relieving the Market Administrator this undue
3 stress. When this action is taken, I know from his
4 track record that Mr. Kyburz will be able to execute
5 those duties and manage a stable Order effectively as
6 he has done in the past.

7 If the Secretary needs to take action
8 specifically to the administrative assessment, we
9 would encourage language that would have the effect of
10 charging for milk not in the pool the prior month a
11 higher administrative assessment to recognize the
12 costs incurred to keep the Market Administrator's
13 Office ready for the increase in milk. It is likely
14 that tracking this every month is excessively
15 burdensome, in which case possibly a three-month
16 assessment for milk returning to the pool would cover
17 the lost revenue in most cases.

18 BY MR. ENGLISH:

19 Q. Does that conclude your statement?

20 A. It does.

21 Q. Do you have any comments --

22 THE COURT: Do you move for it's
23 receipt?

24 MR. ENGLISH: I move for the admission
25 of Exhibit 31.

1 THE COURT: It's received.

2 (Whereupon, Exhibit No. 31 was offered
3 and received into evidence.)

4 BY MR. ENGLISH:

5 Q. Do you have any comments on the
6 emergency nature of this proceeding?

7 A. I do not.

8 Q. A couple of times there may have been
9 some numbers in the statements that were different
10 from what you read. Let me go over a couple. On page
11 11 you said "class III price announced at 19.66 with a
12 negative PPD of \$4.11 would result in a blend of
13 \$16.18." Have you concluded that \$16.88 was a
14 mathematical error?

15 A. I would agree.

16 Q. And the right number, the difference
17 between \$19.66 and \$4.11 are \$15.55?

18 A. I would agree.

19 Q. On the next page, page 12, when you
20 were giving the example of Cheese Factory C and Co-op
21 A, if you said that Cheese Factory C may decide to pay
22 \$19.90, would you agree that what you meant to say was
23 the \$18.90 as listed in your statement?

24 A. Correct.

25 Q. And three lines down you said "If Co-op

1 A guessed that they needed to pay," if you said
2 \$18.95, you meant to say \$18.85?

3 A. That is correct.

4 Q. And on page 14, two lines from the
5 bottom, the first time the reference to 65.6 percent,
6 if you said 65.5 percent, you meant 65.6 percent?

7 A. That is correct.

8 Q. And I may have misheard, so I
9 apologize, but on page 21, when you were referencing
10 Proposal 5 and 1030.13, you're not actually striking
11 the reference to Section 1000.44(b), you're striking
12 the reference to the nonexistence Subparagraph (3) and
13 Subparagraph (5) as the whole?

14 A. That's is correct.

15 Q. Just 3 and 5?

16 A. Correct.

17 Q. The notice proposes to -- the various
18 sections, Proposals 1 and 2 and 6 open up 1030.13(d),
19 you've chosen to define the term temporary?

20 A. That is correct.

21 Q. And what is the purpose of that
22 definition?

23 A. The purpose of the definition is that
24 if -- it is my understanding that in some states a
25 producer could choose to give up their Grade A status,

1 which would make them degraded, and currently uses a
2 loose definition of temporary. This is to provide the
3 Market Administrator a clear definition of what
4 temporary is to mean, and define it in terms of 21
5 days in a calendar year -- excuse me, less than 21
6 days in a calendar year.

7 Q. Because if you don't do that, temporary
8 could mean 31 days in the month of July, 2003, even if
9 all these proposals are adopted, a producer could
10 claim they were temporarily degraded?

11 A. That is correct.

12 MR. ENGLISH: The witness is available
13 for questions if you have any.

14 THE WITNESS: Hearing done. We'll go
15 home.

16 THE COURT: Mr. Vetne?

17 MR. VETNE: I don't have any questions
18 at this time. However, I have an observation that the
19 changes made here to the proposal illustrate the
20 wisdom of exchanging testimony or at least giving
21 notices of changes to proposals prior to the hearing.
22 I would be surprised if all of these changes came
23 about over the course of the evening last night, so I
24 would like to either have some time to listen to other
25 examiners to absorb those changes and compare them to

1 what was noticed first.

2 THE COURT: All right. Go ahead, sir.
3 Is anybody else asking questions? I think what he's
4 asking is that, perhaps, if the witness steps down, he
5 would be brought back in about an hour or two. I
6 don't know if anybody else can ask their questions at
7 this point.

8 MR. VETNE: Well, yes, and I might
9 suggest that maybe the other affirmative witnesses
10 give their affirmative statements so that we have the
11 full context of his testimony with the details.

12 THE COURT: Do you have any problem
13 with this Mr. English? We'll let Mr. Kinser step down
14 and you will call your next witness?

15 MR. ENGLISH: I will comment that,
16 notwithstanding the Judge's attempts, we all sort of
17 commented on this on Friday that we were having
18 difficulty getting this done. You know, I apologize
19 if I was unable to exchange testimony. Some of these
20 changes actually were made over the evening,
21 Mr. Vetne. Moreover, because of other time
22 commitments, both because of filings with USDA on
23 Friday and on Monday of this week, and other
24 commitments that will take me away from this hearing
25 beginning at 4 p.m.

1 The one caveat is that I'm not prepared
2 to have this witness stay on the stand beyond 4 p.m.,
3 because I am the sponsoring attorney, and so I'm
4 willing to make some efforts to do this, but I'm
5 checking the four o'clock shuttle. Everybody, I
6 think, is a needed proponent in this proceeding, Your
7 Honor. Each participant knew that, and I cannot wait
8 beyond 4 p.m.

9 THE COURT: Well, let's do this, then.
10 Let's let the witness go off the stand now. Folks
11 will be looking at his testimony. We're going to take
12 a lunch break later, not now, but at one o'clock --
13 yeah, we'll put him back on the stand at one o'clock,
14 and that gives you some time --

15 MR. ENGLISH: I mean, and I may not
16 have a witness ready right now, you know.

17 THE COURT: Do we have a witness? I've
18 got somebody else who would like to testify. Should I
19 put him on?

20 MR. ENGLISH: Absolutely.

21 THE COURT: Okay, fine. Would you step
22 down, then, sir, and would Mr. Galloway, are you ready
23 to go on?

24 MR. GALLOWAY: sure.

25 THE COURT: Okay. Face me.

1 TIM GALLOWAY,
2 after having been first duly sworn by
3 the Court says under oath as follows:

4 ***

5
6 THE COURT: Take the stand.
7 Mr. Galloway, once you're seated at your place, would
8 you give your full name and identification, sir.

9 THE WITNESS: Tim Galloway. I'm CEO of
10 Galloway Company.

11 THE COURT: All right, sir, and do you
12 have a statement to give?

13 THE WITNESS: Yes, I do. I did submit
14 a comment when the original requests were out, and I
15 guess that that's part of the record. I just wanted
16 to elaborate a little bit.

17 Galloway Company is a third-generation
18 owned and operated dairy manufacturer providing
19 ingredients for further food processing. We are
20 actually Evan's example of the standalone Class II
21 operation, as all the products that we make in the
22 Federal Orders are classified in Class II. In
23 California we're III and IV, A, but that's another
24 matter.

25 We no longer buy milk directly from

1 producers as we did up until the mid-'90s, but we have
2 supply contracts from several cooperatives and
3 proprietaries.

4 Why are we interested in this hearing?
5 Our products are sold nationwide. Our competitors are
6 located in other Federal Orders that have different
7 provisions. To the extent that the Dean's proposal,
8 that this is really about Class I milk and providing
9 marketing incentives for milk from other classes to
10 flow to Class I, my testimony may be immaterial. But
11 to the extent that this is about equity with other
12 classifications between producers and between
13 handlers, there maybe some relevance.

14 I think it would be best to put my
15 testimony in the form of a parable. In order to get
16 downtown, we have to go right past my dairy plant from
17 my home, and I had my 10-year-old son and my
18 7-year-old daughter in the car with me. And we got to
19 the plant in probably April, and my son said, "Dad,
20 why are there that many trucks at the plant? They're
21 just many more than I've ever seen before," and I
22 said, "Well, son, that's because we're really busy
23 right now," and he said, "Oh, no, there are many more
24 trucks than that."

25 I said, "Well, the trucks over there,

1 they're the ones that are bringing in the milk from
2 the farms, the milk that we really want, the local
3 producers would want to support, that's the milk we
4 would really like to use in our operation." So I
5 said, "All those trucks are the milk that's coming
6 in."

7 My daughter said, "Well, what are those
8 other trucks other there?" I said, "Well, those are
9 the trucks that are taking that milk back out of here
10 and selling it to cheese plants for \$19.00 a
11 hundredweight or more, because they have customers who
12 can afford to pay that." "Oh. Well, what are those
13 trucks other there?" I said, "Well, those are the
14 trucks for the finished products that are going out
15 the door," and they said, "But where are you getting
16 your milk?" I said, "Well, those are the trucks over
17 here that are coming from California." My daughter
18 asked, "Well what do you call this," and I said, "It's
19 called orderly marketing."

20 It's a parable, but it is absolutely
21 true what happened to our business during the months
22 of March, April, and May of this year, and will
23 probably happen again in September. It is an
24 unfortunate fact that in order to keep our business
25 going, in order to compete with our competition in

1 other Federal Orders, that we cannot afford to pay the
2 huge negative PPD's that we had last spring, and,
3 therefore, we were fortunately able to work with our
4 good cooperatives and proprietaries to have most of
5 that milk come in and go right back out, or maybe not
6 even make our doorstep, and we were forced to bring
7 milk all the way across the country.

8 Now, we have an opportunity to do that.
9 The products that we make can be made out of fresh
10 fluid. We can make it out of evaporated milk in some
11 cases or condensed skim and cream, so we are different
12 than the Class I bottler.

13 The point of this is that the amount of
14 money that we lost and potentially lost with negative
15 PPD's is much greater than the amount of money that my
16 company has ever made on the pooling and depooling
17 game. And to the extent that we can have regulation
18 that tightens up the pooling and depooling, our
19 company would be in favor of that, and to the extent
20 that we can reduce the amount of long distance milk
21 that is pooled on our Order only to attract those
22 dollars, we would be in favor of regulation that would
23 tighten up those requirements.

24 I cannot tell you which of these
25 proposals is better. I think there are much better

1 minds in here that can do that, but I think those two
2 things need to be accomplished, and I thank you.

3 THE COURT: All right. Are there any
4 questions? Thank you very much, sir.

5 MR. ENGLISH: And your Honor, we do
6 have Mr. Paul Christ.

7 THE COURT: Mr. Christ?

8

9 PAUL CHRIST,
10 after having been first duly sworn by
11 the Court says under oath as follows:

12

13

14 DIRECT EXAMINATION

15 BY MR. ENGLISH:

16 Q. State your full name for the record,
17 please.

18 A. My name is Paul G. Christ.

19 Q. And --

20 A. That's spelled C-h-r-i-s-t.

21 Q. Why don't I have you read the first
22 paragraph of your statement, first.

23 A. Okay. My name is Paul G. Christ. I
24 reside at 245 Indian Trail South, Afton, Minnesota
25 55001. I have a long background in working with

1 Federal Milk Orders. From 1961 to early 1974, I
2 worked for the Dairy Division of the Agricultural
3 Marketing Service, which is now called Dairy Programs
4 of USDA, both in the Washington, D.C. office and in
5 Market Administrator's offices in the field. Between
6 1974 and 2000, I worked for Land O'Lakes, Incorporated
7 and was responsible for marketing Land O'Lakes member
8 milk under several Federal Milk Marketing Orders, and
9 when necessary, for proposing changes to those Orders.
10 Thus, I have experience both inside and outside the
11 government in the operation and effects of individual
12 Milk Orders and of the entire Federal Order system.

13 MR. ENGLISH: Your Honor, rather than
14 to vior dire and having had that read, I would ask
15 that Mr. Christ be recognized as an expert --

16 THE COURT: Has he been recognized in
17 any other hearings?

18 MR. ENGLISH: Yeah, for milk marketing
19 Order procedures.

20 THE COURT: Yes, he can be.

21 MR. ENGLISH: Thank you.

22 BY MR. ENGLISH:

23 Q. Now, before you give your testimony,
24 Mr. Christ, we should go through, there are going to
25 be, consistent with my statement a few moments ago,

1 changes that were made since you went home last night
2 and took proposed changes with you; correct?

3 A. Correct, and I will point them out. I
4 revised my testimony at 5 a.m., and then it has since
5 been revised again.

6 Q. Why don't you --

7 THE COURT: 5 a.m.?

8 THE WITNESS: I got up early this
9 morning, Your Honor.

10 THE COURT: Wow. You haven't gotten
11 too far from the farm, have you?

12 THE WITNESS: No.

13 MR. ENGLISH: Your Honor, can we have
14 this marked?

15 THE COURT: Yes. Exhibit 32.

16 (Whereupon, Exhibit No. 32 was
17 marked for identification.)

18 BY MR. ENGLISH:

19 Q. With the caveats that there will be
20 corrections that you will indicate as you go along,
21 could you give your statement, Exhibit 32.

22 A. Okay. My role here is to explain the
23 proposals that have been advanced by Dean Foods, and I
24 appear here as an advocate for Dean Foods Company in
25 support, primarily, of Proposal No. 3. I will attempt

1 to explain how Proposal No. 3 would work, and how it
2 would improve the supply of milk available for fluid
3 use, and the well-being of producers whose milk is
4 continuously pooled.

5 As was stated by Evan Kinser in his
6 testimony just before, Dean Foods Company is
7 interested in improving two aspects of the Upper
8 Midwest Order. The first is to increase the
9 availability of milk for Class I use, and the second
10 is to increase the flow of pool funds to those
11 producers who represent a reliable supply of milk for
12 fluid use.

13 Proposal No. 3 is designed to
14 accomplish those two goals.

15 First, I will attempt to explain how
16 Proposal No. 3 would work. It would add a new
17 Subparagraph (b)(5) to the producer definition,
18 Section 1030.12. Now, it's been read in by
19 Mr. Kinser. It also appears in the Notice of Hearing
20 with three minor modifications. In my statement, in
21 the second line of Subparagraph (5), the last word,
22 "the," is changed to any. In the third line the word,
23 "the" that proceeds "cooperative association" is
24 changed to "any," and the word "distributing" is
25 inserted in the last line between the word "pool" and

1 the word "plant."

2 Highlighting the word distributing
3 plant in the last sentence of the proposal represents
4 a modification as was presented by Mr. Kinser. Okay.
5 Now, I'm going to talk about the modified proposal.
6 The new --

7 THE COURT: Let me just make sure. In
8 32, I saw the changes that you mentioned in the text,
9 but up where it's the second, end of the second
10 paragraph, you need to change that in your text?

11 THE WITNESS: The second line of
12 Subparagraph (5).

13 THE COURT: Yeah. It says, "1000.9(c)
14 if the," and we should strike "the" and put in "any"?

15 THE WITNESS: Strike "the" and insert
16 "any," and you should make the same substitution in
17 the next line for the "the" that proceeds cooperative
18 association.

19 THE COURT: Oh, okay, I missed that
20 one. Good enough. Fine.

21 THE WITNESS: That should be "any."
22 Okay.

23 The new subparagraph would exclude from
24 the pool the milk of any dairy farmer whose milk was
25 not continuously pooled under one or another Federal

1 Milk Order during the last twelve months. The sole
2 exemption from this exclusion would be the case where
3 the dairy farmer temporarily lost Grade A status, and
4 whose production facility was reinstated as Grade A
5 within 21 days. That's not specified in the proposal,
6 but we do have it specified in other places in our
7 proposal. The idea that loss of Grade A status would
8 not be enough to require the re-qualification that the
9 proposal requires. The idea behind this exclusion is
10 to discourage milk that was depooled for economic
11 reasons from easily becoming repooled when it is
12 economically favorable to do so.

13 Dairy farmers for whom their milk is
14 pooled when benefits exists, and is not pooled when
15 costs exist, create a burden on producers whose milk
16 is continuously pooled. When the producer price
17 differential is positive, there is an incentive to
18 pool all milk used in Class III, and in some cases
19 Class IV. This has the effect of averaging down the
20 producer price differential, reducing returns to
21 continuously pooled producers. On the other hand,
22 when the producer price differential is negative,
23 there is an incentive to depool all milk used in Class
24 III, and in some Classes IV. This also has the effect
25 of averaging down the producer price differential,

1 resulting, again, in reduced returns to continuously
2 pooled producers. This means that the negative
3 differential is larger than it would otherwise have
4 been if there had not been depooling. Now, the real
5 losers in the process are producers whose milk is kept
6 in the pool and continues to be available to serve the
7 needs of the fluid market.

8 Under Proposal No. 3, milk that was
9 depooled within the last twelve months could, again,
10 become repooled, if the responsible handler
11 demonstrates that it is, in fact, available for fluid
12 use. This is accomplished by delivering ten days'
13 production from that dairy farmer's facility to a pool
14 distributing plant. This demonstration would insure
15 that pool participation would be open to any dairy
16 farmer for whom it is technically and economically
17 feasible to supply milk for fluid use. In effect, the
18 proposal would not prevent depooling. However, it
19 would make it more difficult to return such dairy
20 farmer's milk to the pool after it has once been
21 depooled.

22 This demonstration of competence to
23 supply milk for fluid use would continue for twelve
24 months before such formally depooled milk could be
25 pooled under the more flexible provisions of the Order

1 that apply to continuously pooled milk.

2 This proposed change would not be
3 economically burdensome if the milk were favorably
4 located relative to a distributing plant. However, it
5 would make it expensive for a distant or unfavorably
6 located dairy farmer to again become a producer and
7 participant in the pool. It would also insure the
8 milk for which it is not technically or economically
9 feasible to serve the fluid market, it would not be --
10 it would not be able to reenter the pool.

11 Dairy farmers whose milk is pooled
12 continuously under the Upper Midwest Federal Order
13 would not be affected by this proposal. These dairy
14 farmers shared both in the costs and benefits of pool
15 participation on a continuous basis.

16 Also, dairy farmers whose milk is
17 pooled continuously under any other Federal Milk
18 Marketing Orders during the preceding year would not
19 be affected by this proposal. They could enter the
20 Federal Order 30 pool under the same flexible
21 provisions as applied to Federal Order 30 producers
22 who are not depooled within the last year. In fact,
23 these other Order producers were continuous
24 participants in one or another Federal Order pool,
25 sharing both the costs and the benefits of such

1 participation on a continuous basis.

2 So, Proposal No. 3 would have three
3 desirable benefits:

4 Number one, some Class III milk would
5 stay in the pool when the producer price differential
6 was negative in order to avoid the extra cost of
7 returning to the pool. This would increase the
8 producer price differential, making it less negative
9 for all producers, especially those whose milk is
10 delivered to distributing plants.

11 Number two, some Class III milk that is
12 depooled would never return to the pool, because it is
13 no longer technically or economically feasible to do
14 so. This would have the effect of increasing the
15 producer price differential whenever it is positive.
16 Those producers whose milk is delivered to
17 distributing plants would benefit.

18 Number three, some Class III milk that
19 is depooled would return to the pool, but only through
20 regular, significant deliveries to distributing
21 plants. This would increase the supply of milk ready
22 and willing to serve the needs of the fluid markets.

23 For the above reasons, Dean Foods
24 Company urges the Secretary to adopt Proposal No. 3.

25 Now, I'll discuss Proposal No. 4. Dean

1 Foods Company also offers Proposal No. 4 for
2 consideration by the Secretary. It is offered as a
3 weaker, less desirable alternative to proposal 3, in
4 the event that proposal No. 3 is rejected. Proposal 4
5 is spelled out in my testimony, but there are a couple
6 of modifications.

7 The first is on line 3 of Subparagraph
8 (5), the word "the preceding pool plant operators"
9 should be changed to "any," that's in the third line,
10 and later in the third line, the word "the" that
11 precedes "cooperative association" should be changed
12 to "any." In addition, on the third to last line of
13 Subparagraph (5) the period is identified as July, I
14 think through November. We would change it to
15 November to January. That was spelled out in
16 Mr. Kinser's testimony, and also we would insert the
17 word "distributing" on the last line between the words
18 "pool" and "plant."

19 Similarly in Subparagraph (6) on the
20 first line the period of interest is not July through
21 November, it is now -- we would change that to July
22 through January, and on the third line the word "the"
23 that precedes "pool plant operator" would be changed
24 to "any," and later in that same line, the "the" that
25 precedes "cooperative association" is changed to

1 "any." The final change is in the last line of
2 paragraph (6), where the word distributing is inserted
3 between pool and plant. These are the same
4 modifications offered by Mr. Kinser.

5 Okay. We recommend modification of
6 Proposal No. 4 as I have just outlined. We're trying
7 to insure that deliveries for re-qualifying a dairy
8 farmer's milk for pooling would be accompanied only by
9 a demonstration that the milk is technically and
10 economically available to the fluid market. We want
11 the milk to be repooled to be delivered to a fluid
12 distributing plant.

13 The difference between Proposal No. 3
14 and Proposal No. 4 is that, in the event that a dairy
15 farmer's milk is depooled, the number of months for
16 which 10 days' milk production would have to be
17 delivered to a pool distributing plant would be fewer.

18 In the first case, under Subparagraph
19 (5), is the -- if the milk is depooled during the
20 period of February through June, only four months of
21 such deliveries would be required, compared to twelve
22 months under Proposal No. 3.

23 In the second case, also under
24 Subparagraph (5), if milk is depooled in any month of
25 July through January, then such deliveries would be

1 required in each month of February through June. Dean
2 Foods is more interested in discouraging depooling in
3 this short production season than during the rest of
4 the year.

5 In the third case, under Subparagraph
6 (6), if milk is depooled during the period of July
7 through January, only two months of such deliveries
8 would be required, compared to twelve months under
9 Proposal No. 3.

10 Proposal No. 4 would have the same
11 general effects and benefits as Proposal No. 3, except
12 that the benefits of depooling would be greater, and
13 the costs of repooling would be smaller. Thus, the
14 beneficial affects on continuously pooled producers
15 would be smaller, and there would be a less abundant
16 supply of milk available for fluid use.

17 Therefore, we again recommend the
18 adoption of Proposal No. 3, but if for whatever reason
19 the Secretary chooses not to adopt Proposal No. 3,
20 then we recommend the adoption of Proposal No. 4.

21 And now I'll talk about Proposal No. 5.
22 Proposal No. 5 is offered by Dean Foods Company as a
23 less desirable alternative to both Proposals No. 3 and
24 No. 4. It offers a different type of mechanism for
25 limiting the amount of depooled milk that can be

1 repooled in any given month. It is similar to
2 Proposal No. 2, but puts a tighter limit on how much
3 milk can be pooled from month to month under the
4 Order.

5 And Proposal No. 5 is spelled out in my
6 testimony, but, again, there are a couple of revisions
7 that were presented by Mr. Kinser. In the second line
8 of Subparagraph (f), the words for "July through
9 November" should be deleted, no monthly limitation.
10 Also, in the forth line from the bottom of
11 Subparagraph (f) where we make a reference to Section
12 1000.44(b), we should strike the Subparagraph (3)(v),
13 there's no need for that, because it just relates back
14 to the same subparagraph of 100.44(a).

15 Okay. In addition, under, I don't know
16 what we call it after subparagraphs, but it's number
17 (3) under Subparagraph (f), small (i), we would delete
18 the language following the phrase "for a new handler
19 on the Order." That means we would delete the words
20 "subject to the provisions of Section 1030.13(f)(3),"
21 okay, and I think that's all the modifications.

22 THE COURT: Which words would you
23 delete?

24 THE WITNESS: Okay. The words
25 following the phrase under (f)(3)(i), "for a new

1 handler on the Order."

2 THE COURT: You keep that?

3 THE WITNESS: Keep that, and delete the
4 words "subject to the provisions of section
5 1030.13(f)(3)," I think it is.

6 THE COURT: Okay, yeah.

7 THE WITNESS: Okay. The mechanism for
8 discouraging the depooling of milk under Proposal No.
9 5 is to restrict the amount of additional milk that
10 can be pooled, and strike the words "during the July
11 through November," by the handler from one month to
12 the next. That means that the volume of milk that is
13 continuously pooled under Federal Order 30 or any
14 other Federal Order can be pooled without hindrance or
15 restrictions. However, milk that has been depooled
16 under this Order or any other order can only be
17 gradually repooled during the short season -- during
18 any season. This means that most of the milk for
19 which the cost of pooling is avoided during periods of
20 negative producer price differentials cannot
21 immediately enjoy the benefits of pooling when the
22 producer price differential is positive.

23 This reduces the benefits of depooling
24 and increases the costs of repooling, and delete the
25 words in my written statement, "during the short

1 season, July through November." The effect is a
2 modest discouragement of depooling.

3 If depooling is discouraged to any
4 degree, producers whose milk stays in the pool will
5 enjoy a higher or less negative producer price
6 differential during the months when it is negative.

7 However, Proposal No. 5 provides for
8 instant repooling of any milk that is delivered
9 directly to a pool distributing plant. This has a
10 desirable affect of increasing the supply of milk that
11 is readily available to the fluid market, following a
12 period of depooling, strike the next sentence.

13 Proposal No. 5 increases the cost of
14 depooling with a greater percentage of a handler's
15 milk that is depooled. The following table 1
16 illustrates the time it takes to repool all the milk
17 of a handler if he depools between 10 and 90 percent
18 of the milk under his control. Now, I have to extend
19 the table to accommodate the modifications that we
20 made in the proposal over night.

21 In the first column under 10 percent
22 for month zero, it needs to be extended out to 17
23 months, and I can read the numbers that will follow
24 each numbered month. For month six, it would be 23.1,
25 instead of 100. For month seven it would be 26 .6.

1 For month eight it would be 30.6. For month nine it
2 would be 35.2. For month ten it would be 40.4. For
3 month eleven it would be 46.5. For month twelve it
4 would be 53.5. For month thirteen it would be 61.5.
5 For month fourteen it would be 70.7. For month
6 fifteen it would be 81.3. For month sixteen it would
7 be 93.5, and for month seventeen it would be 100
8 percent.

9 Similarly, in the column under 20
10 percent for the zero month, I would modify the numbers
11 starting with month six. For month six the number
12 would be 46.2 percent, instead of 100, month seven
13 would be 53.1, month eight would be 61.1, month nine
14 would be 70.3, month ten would be 80.9, month eleven
15 would be 93.0, and month twelve, it would be 100
16 percent reflecting that all of the milk would be
17 repooled by that time.

18 Under the column for 30 percent in
19 month zero, I would modify the number for month six,
20 it would be 69.3, instead of 100, month seven would be
21 79.7, month eight would be 91.7, and month nine would
22 be 100.

23 And finally under the column
24 representing 40 percent of the milk pooled in month
25 zero, I would start modifying numbers again at month

1 six. It would be 92.6 percent, instead of 100, and
2 then in month seven it would be 100 percent.

3 The point of Table 1 is that the
4 greater the proportion of milk that is depooled, the
5 longer the time needed to re-qualify the depooled
6 milk. This is a desirable feature of Proposal No. 5.
7 Those handlers and producers who gain the greatest
8 benefit from depooling, by depooling a greater
9 percentage of the milk, also incur the greatest loss
10 of benefit from attempting to regain pool status. It
11 will take a much longer time before they're able to
12 capture a bigger share of the positive producer price
13 differentials.

14 I will offer some -- a little confusion
15 about Proposal No. 6, which I will talk about next.

16 Proposal No. 6 is offered by Dean Foods
17 to supplement Proposal No. 3. I want to back up just
18 a bit. Again, Proposal No. 5 is offered as in the
19 order of priority in third position behind Proposals
20 No. 3, No. 4 and No. 5. We prefer Proposal No. 3, and
21 if that fails, Proposal No. 4, and if that fails,
22 maybe Proposal No. 5.

23 Okay. Proposal 6 is offered by Dean
24 Foods to supplement Proposal No. 3. This one should
25 be adopted with Proposal No. 3. It is intended to

1 insure that a greater amount of producer milk is more
2 readily available for transfer to a pool distributing
3 plant for fluid use, and it was read with
4 modifications by Evan Kinser. I'll just mention the
5 modification.

6 Under Subparagraph (d) on the second
7 page here, I think it's on the seventh line after the
8 words "Grade A approval," we would insert "not to
9 exceed 21 days in a calendar year." Now, it makes it
10 more consistent with other parts of the proposals.
11 Also in (D)(2), the word "four" should revert back to
12 "two," which was the original language in the
13 proposal, and in (D)(3), the first line, the word
14 "four" should revert back to "two," the same as it was
15 in the original proposal. Strike the paragraph
16 following the recitation of the proposal.

17 We are abandoning changes to
18 Subparagraph 1030.13(d)(4). This would have required
19 tighter limits on diversions. We believe that if
20 there is a tighter requirement for producer milk to be
21 received in a pool plant, there is less need to
22 restrict the amount of milk that can be diverted.

23 Proposal No. 6 does nothing more than
24 insure that more producer milk is activity engaged in
25 the process of serving the fluid market. This process

1 starts with the production of Grade A milk, and then
2 continues the next step of being received in a Grade A
3 pool plant facility. If producers' milk is diverted
4 to a nonpool plant, then it is out of the Grade A
5 marketing stream and is no longer available to the
6 fluid market. Increasing this touch-base requirement
7 insures that more milk stays in the Grade A marketing
8 stream one more step than otherwise would be the case.
9 The effect is to make more milk physically available
10 to the fluid market. If it's not in a Grade A tank or
11 Grade A facility, it's not available to the fluid
12 market. This proposal would require a modest increase
13 in the amount of milk that remained in the Grade A
14 marketing stream.

15 Proposal No. 6 would also insure that
16 pool plant operators keep their Grade A facilities
17 operating at a higher level of output than would be
18 the case if more milk were diverted. In effect, more
19 Grade A milk would be available for fluid use at all
20 times, and pool plant operators would routinely engage
21 in Grade A operations, thereby maintaining greater
22 standby capacity and competence for supplying the
23 fluid market.

24 Proposal No. 7. Proposal No. 7 is
25 offered by the Market Administrator to insure that he

1 can collect adequate funds through the administrative
2 assessment to operate his office and effectively
3 enforce the order. He does, indeed, need to do this.
4 However, a large part of the funding problem arises
5 from massive depooling of milk. When milk is depooled
6 because of a negative producer price differential, no
7 administrative assessment is paid on that milk, and
8 the Market Administrator may find himself short of
9 funds. In the event --- In that event, he seeks to
10 increase the administrative assessment on the
11 disadvantaged milk that remains in the pool. This
12 increases the financial burden on continuously pooled
13 milk.

14 A better solution to the problem is to
15 discourage or eliminate the practice of depooling. We
16 believe that Proposal No. 3, in particular, would
17 accomplish that objective, and should be adopted.
18 Therefore, we recommend that Proposal No. 3 be
19 adopted, and the increase in the amount -- so that the
20 increase -- that will increase the amount and
21 predictably of administrative revenues for the
22 enforcement of the order by the Market administrator.

23 We nonetheless sympathize with the
24 Market Administrator, who is unable anticipate the
25 financial risks of his operations, when some of those

1 who receive the services and benefits he provides do
2 not pay for them. For example, calculations by the
3 Market Administrator provide the foundation for the
4 decision to depool milk, and depooled milk does not
5 pay any administrative assessment. This is a bizarre
6 state of affairs. In addition, he continues to audit
7 these plants and these handlers and, again, they're
8 not paying administrative assessments.

9 If an increase in administrative
10 assessment is to be considered, the Market
11 Administrator should insure that such an increase in
12 funds -- increase falls on nearly all market
13 participants. This can be done by suspending or
14 revising downward the assessment rate during months
15 when milk is depooled. It can then be increased when
16 the depooled milk returns to the pool.

17 Of course, if Proposal No. 3 is
18 adopted, this risk should be reduced substantially,
19 and maybe eliminated.

20 Now, Mr. Kinser talked about a further
21 elaboration of Proposal No. 6, I put it under Proposal
22 No. 8, and we offer the following proposal as a
23 conforming change to reinforce Proposal No. 6, and
24 that is the operator -- that would add a section that
25 says, "the operator of a supply plant may not include

1 as qualified shipments under this paragraph, milk
2 diverted directly from producers' farms pursuant to
3 Section 100.9(c) to plants described in paragraphs
4 (a), (b), and (e) of this section."

5 This proposed change would have two
6 desirable effects. The first would be to discourage
7 the practice of diverting nearby milk to distributing
8 plants in order to qualify distant milk for pooling,
9 which is never delivered to the distributing plant.
10 The distant milk may not be practically available for
11 fluid use, but nevertheless gets pooled because the
12 nearby deliveries -- of the nearby milk being
13 delivered to a distributing plant. We prefer to
14 insure that all milk in the pool participate to some
15 -- and to a greater degree in the Grade A marketing
16 system. By prohibiting the use of diversions to make
17 qualified shipments, some of the milk that otherwise
18 would be qualified for pooling with virtually no
19 performance, will now have to be qualified by physical
20 shipments from a pool supply plant.

21 This improvement would also insure that
22 more activity will take place in the Grade A
23 facilities of pool supply plants, thereby increasing
24 the competence of operators of such plants to serve
25 the fluid market. This concludes my testimony.

1 BY MR. ENGLISH:

2 Q. Mr. Christ, on page two of your
3 testimony, I may have misheard, but I don't think I
4 did, in the middle paragraph for dairy farms for whom
5 this milk is pooled, in the middle if you referenced
6 Class II, rather than Class III, you meant to say
7 Class III?

8 A. I meant to say Class IV, if I said
9 Class II. Class III and Class IV are typically the
10 problems for depooling.

11 Q. But if you said Class II and Class IV,
12 you meant to say Class III and Class IV?

13 A. Class III and Class IV, that is
14 correct.

15 MR. ENGLISH: Your Honor, I move
16 admission of Exhibit 32 as revised by the witness.

17 THE COURT: All right, and it's
18 received.

19 (Whereupon, Exhibit No. 32 was
20 offered and received into evidence.)

21 THE COURT: Again, I'm going to look to
22 Mr. Vetne a little bit for some advise. Do you want
23 do cross now, or would you like him -- I wonder if we
24 should bring he, Mr. Christ and Mr. Kinser back as
25 kind of a panel.

1 MR. ENGLISH: I was going to discuss
2 that with my colleagues over lunch. We do have
3 another witness, although I think her testimony goes
4 strictly to the problem and not to the proposed
5 solution, and it may make more sense, especially
6 because of my circumstances, if we could get these two
7 done and then Ms. Ledman could come on separately.
8 Ms. Ledman's testimony is strictly testimony of why
9 depooling is wrong.

10 THE COURT: Do you have anybody else
11 who would testify now?

12 MR. ENGLISH: No, I have no -- those
13 are my three witnesses, so I have these two available
14 for cross-examination. I can take a brief conference
15 to see if we can put them both on at the same time. I
16 don't know if people are ready or not.

17 THE COURT: Well, why don't you discuss
18 it with counsel here in the room, and why don't we
19 break for lunch, and be back at one o'clock, and then
20 we'll see what happens, okay.

21 (Lunch taken from 11:45 a.m. to 1:13 p.m.)

22 MR. ENGLISH: Your Honor, Charles
23 English. Over lunch we have decided to accept the
24 idea of both Mr. Kinser and Mr. Christ being on the
25 stand, basically simultaneously for cross-examination.

1 This actually happened once before, although not with
2 parties in Order 30, and I've learned a couple of
3 things from that. First, for the witnesses, it's very
4 important that you speak into the microphone and
5 identify yourselves, so that the record will identify
6 which of the two persons is answering, and then
7 obviously if an examiner addresses a question to both,
8 they will pick who answers. It may very well be the
9 questioner addresses a question to someone and the
10 other person chooses to answer. I think that what
11 would have happened had Mr. Kinser been on the stand
12 and referred questions to Mr. Christ, and if Mr.
13 Christ had been on the stand and afterwards would have
14 said, well, that's already been answered by
15 Mr. Kinser, so with that, we will see how this goes,
16 and I hope it will work. Thank you.

17 (Whereupon, Evan Kinser and Paul Christ
18 Were brought back to the stand.)

19 THE COURT: Very well. Both the
20 witnesses are sworn and they're both on the stand
21 together, and do we have anyone prepared to start
22 questioning them? Ms. Deskins, did you have some
23 questions you wanted to ask of them?

24 MS. DESKINS: I'll start, Your Honor.

25 THE COURT: Yes.

1 CROSS-EXAMINATION

2 BY MS. DESKINS:

3 Q. This is for either one of you. I just
4 wanted to know, you use the term continuously pooled,
5 and I wonder if you could explain to us what that
6 means for the record.

7 A. (By Mr. Christ) This is Paul Christ.
8 Continuously pooled means that producer's milk was
9 included in a handlers report to the Market
10 Administrator each month as being milk available to be
11 pooled.

12 Q. And just so I make sure it's clear on
13 the record, if someone only, if they only shipped milk
14 -- they only reported shipping milk for one week out
15 of the month, but the reports are done on a monthly
16 basis; right?

17 A. (By Mr. Christ) The reports are done on
18 a monthly basis, and the Market Administrator also
19 gets producer payroll reports, so it would be fairly
20 easy to determine whether a producer was pooled -- all
21 of his milk was pooled or only a portion of the milk
22 was pooled, because he would get the information from
23 the handler as to how much was paid on what volume of
24 milk for that producer, so it could be possible that
25 some of the milk would have been pooled for an

1 individual producer and some of the milk would not
2 have been pooled, but under our Proposal No. 3, some
3 of that -- he would not be a producer for some of that
4 milk, and then he would have to meet the performance
5 requirements to become repooled.

6 Q. Okay. Okay, so whatever portion is
7 pooled, that's what you consider continuously pooled?

8 A. (By Mr. Christ) I'm going to argue that
9 once the reporting of his milk for pooling, a
10 producer's milk for pooling was discontinued part of
11 the month or a whole month, that that would make him
12 -- some of his milk would be delivered to a plant as
13 other than producer milk, and, therefore, the
14 performance requirements that become reassociated with
15 the pool would kick in, so even though a portion of
16 the milk during the month, only a portion was
17 depooled, those performance standards would kick in.

18 Q. Okay. This is for you, Mr. Christ. On
19 page 3 of your testimony you put, "However, it would
20 make it expensive for a distant or unfavorably located
21 dairy farmer to again become a producer and
22 participate in the pool." I was wondering if you
23 could just explain why that is.

24 A. (By Mr. Christ) Well, for example, you
25 might have a very small producer, and that's the only

1 producer whose milk would have to go through a
2 bottling plant in order to become qualified in an
3 area, and it would be uneconomic to run a separate
4 truck to pick up that small producer and deliver the
5 milk into the bottling plant, and even if it was a
6 larger producer and a larger volume of milk and was
7 more distance, the cost of transporting that milk to a
8 bottling plant might be greater than benefits of
9 repooling his milk.

10 Q. This is for both of you, it relates to
11 Proposal No. 7. In looking at this, both of you have
12 proposed that when people depool and then want to
13 reassociate with the pool, that the cost of that
14 should be borne by those who want to reassociate
15 themselves again, and I was just wondering, how would
16 you see that working? That they should have a higher
17 assessment than other people or should it be on the
18 portion of their milk, that they're reassociation
19 there should be a higher assessment?

20 A. (By Mr. Christ) This is Paul Christ. I
21 have some ideas, but I don't know if you want to
22 respond, Evan.

23 A. (By Mr. Kinser) This is Evan. I think
24 there are multiple ways that it could be structured,
25 it's a matter of what is reasonable as far as the

1 burden that's going to be put on the Market
2 Administrator's Office, and if milk is coming back
3 into the pool, do they have records to accurately
4 assess that milk for the market assessment that was
5 not paid while it was out of the depool or should
6 there just be a flat rate, so when they increase or
7 come back into the pool, that they know the first
8 month in that they're going to be paying whatever it's
9 set at to get back into the pool. So you could -- I
10 would propose that it could be structured a few
11 different ways, it's a matter of could the Market
12 Administrator have access to records to document the
13 pounds that were not pooled if you applied it just to
14 those exact pounds that were left out of the market.

15 A. (By Mr. Christ.) This is Paul Christ,
16 and just another alternative way to deal with that
17 would be if a lot of milk leaves the pool, the milk
18 that is depooled pays no administrative assessment.
19 During a period like that, it may be possible to
20 reduce the administrative assessment on the milk that
21 remains in the pool, and then when the milk that was
22 depooled becomes reassociated in the market, with the
23 market, then you could have a higher rate of
24 assessment on both the continuously pooled and on the
25 newly pooled milk and generate more money. Now,

1 that's outside of the tradition of how administrative
2 assessments are collected, but it would, I think, more
3 fairly shift the burden to everybody that benefits
4 from the market.

5 Q. Okay. And you understand the way the
6 proposal is set up now, the Market Administrator can
7 raise it if the expenses require it, but if he
8 doesn't, he would just keep it the same rate for
9 everybody?

10 A. (By Mr. Christ) This is Paul Christ
11 again, and that's the way it's been done historically
12 that he adjusts when he needs more money or less
13 money. I've experienced a number of months where
14 there was zero administrative assessment in this
15 market, but that doesn't address the question of some
16 paying more over time than others, and it would be
17 wise to find a mechanism for causing that to be evened
18 out more.

19 MS. DESKINS: That's all the questions
20 I have for now. Thank you.

21 THE COURT: Yes, Ms. Warlick.

22 CROSS-EXAMINATION

23 BY MS. WARLICK:

24 Q. Hello. Carol Warlick from Dairy
25 Programs. I have two questions from Paul Christ's

1 exhibit. I've numbered the pages, so the first
2 question I had was on Page 8. At the top of the page
3 when you talk in Section (D)(1), this is Proposal No.
4 6, Section 1030.13.

5 A. (By Mr. Christ.) Yes.

6 Q. You talk about "Milk of a dairy farmer
7 shall not be eligible for diversion until milk of such
8 dairy farmer has been physically received," is this,
9 again, referring to the two-day touch-base?

10 A. (By Mr. Christ) This is Paul Christ.
11 The answer is, no. This is the -- okay, I think this
12 is the present language of the Order, I'm not positive
13 of that, but in order to bring a producer whose not
14 been on the pool back, he may need to become
15 reassociated by delivery to a pool plant. I could
16 check that by reading the language in the Order, but
17 that's the intent. Even though it's not -- it may not
18 be the language of the present Order, that would be
19 the intent that he has to show some evidence that he's
20 now part of the marketing Order and otherwise it would
21 just be a matter of paperwork, not of physical
22 performance.

23 Q. Okay. Thank you. Mr. Christ, on the
24 follow page where you discussed Proposal No. 8, for
25 number (2) you say, "The operator of a supply plant

1 may not include as qualifying shipments," is it your
2 intent to also exclude as qualifying shipments the
3 1030.13(c) milk? The milk diverted from a pool plant
4 to another pool plant?

5 A. (By Mr. Christ) This is Paul Christ
6 speaking. The answer is, no. This would be
7 diversions from a pool supply plant to a pool
8 distributing plant is what we're trying to reflect
9 here, and the reason for that is the potential of
10 abuse of the flexibility of having a few producers
11 near a metropolitan area, who used to qualify many
12 producers who were not practically available to the
13 fluid market.

14 Q. Okay, so you wanted it -- it was just
15 supposed to be for the (9)(c) to plants, not from
16 supply plants also?

17 A. (By Mr. Christ) No. This would be
18 diversions -- my intent was that diversions by a
19 supply plant who has producer milk under his control
20 to a distributing plant, without milk having first
21 been received at the supply plant. Evan, do you want
22 to elaborate on that?

23 MR. CHRIST: Your Honor, I think maybe
24 we should address this question on brief more
25 completely, but, because we have a little bit of

1 confusion between us.

2 THE COURT: Mr. English, do you want to
3 straighten out the confusion, or do you want to do it
4 on brief?

5 MR. ENGLISH: Well, Mr. Christ -- maybe
6 if we do the rest of the cross-examination and then we
7 can talk briefly --

8 THE COURT: And then come back to it.

9 MR. ENGLISH: -- and then resolve that
10 one issue without reopening it --

11 THE COURT: Ms. Warlick, they're not
12 ready to answer it now.

13 MS. WARLICK: Okay. Well, I'll wait.
14 Thank you.

15 THE COURT: Other questions? Anybody
16 else at the Government table? I'm giving Mr. Vetne a
17 little time. I know he needs a little time to get his
18 notes together. Anyone else over there? Mr. Vetne,
19 it looks like it's up to you.

20 CROSS-EXAMINATION

21 BY MR. VETNE:

22 Q. I can at least start. John Vetne
23 representing Associated Milk Producers Cooperatives
24 for my appearance --

25 THE COURT: I think one of the

1 problems, John, is I think that's a microphone that
2 has a battery in it, rather than a wire. Maybe that's
3 a new one. The one yesterday just had a battery. You
4 did swap with the other one? You've got the wire,
5 okay.

6 BY MR. VETNE:

7 Q. I'll start with questions prompted by
8 Evan Kinser's testimony, but I invite and encourage
9 both of you to respond.

10 Mr. Kinser, there are a number of
11 statements that you make, and I'll refer to them,
12 although I'm sure I won't include all. On page 3 you
13 have some language in quotes, which I assume is quoted
14 from the Act, the Agricultural Marketing Agreement
15 Act. Referring to what you call "a system to ensure a
16 sufficient quantity of pure and wholesome milk." At
17 the bottom of the page you say "The Federal Order
18 system is to compensate producers serving, or standing
19 ready to serve, plants in order to have a sufficient
20 supply of packaged fluid milk." On page 16 and
21 throughout, you iterate the same thought, "The
22 objective of the Order is that distributing plants
23 have sufficient supplies of milk."

24 Now, maybe I'll address this to
25 Mr. Christ, first. Isn't it true, Mr. Christ, that if

1 there were not a Federal Order system, distributing
2 plants would have sufficient supplies of milk, because
3 that would be the market to which all producers would
4 like to sell their milk?

5 A. (By Mr. Christ) This is Paul Christ.
6 I think I would agree to that, that if our assumptions
7 about the inelastic demand for fluid milk products are
8 correct, that would give the fluid processors an
9 incentive to pay more than would be willingly paid by
10 milk manufacturers. Now, that's a general statement,
11 but as we've seen with volatile markets, you still can
12 have price distortions, but in the absence of
13 regulations, I would expect that fluid processors
14 would make arrangements with suppliers so that they
15 have an adequate supply of milk, but with Federal
16 Orders they have more objectives than just that with
17 the reference to achieving comparative prices for
18 producers, there's also an objective of increasing the
19 returns to producers, so the classification --
20 classified pricing and the pooling mechanism is a way
21 to try to do both, but our argument is, it's the
22 effectiveness of getting milk delivered to fluid
23 plants is reduced with the present relatively loose
24 pooling provisions and relatively loose shipping
25 requirements.

1 Q. In a purely competitive -- to follow up
2 on that, in a purely competitive market, without
3 Government price fixing, would not fluid milk handlers
4 compete daily on the current value of milk, just like
5 cheese plants do?

6 A. (By Mr. Christ) This is Paul Christ
7 again. Do you mean on a buying side or the selling
8 side?

9 Q. Buying raw producer milk.

10 A. (By Mr. Christ) They would seek to pay
11 enough milk to get an adequate supply, but not to
12 overpay for that.

13 Q. And they would do it on using the same
14 current economic data that their manufacturing
15 procurement competitors use?

16 A. (By Mr. Christ) Yes, this is Paul
17 Christ again. In a competitive market they would all
18 have access to the same market information, but maybe
19 less than they have now, because the Federal Milk
20 Order generates data that we wouldn't otherwise have.

21 Q. Well, let's look at now. There are a
22 lot of non-Federal Order data that are available to
23 everybody now that weren't available thirty years ago,
24 including, for example, CME trading prices.

25 A. (By Mr. Christ) This is Paul Christ

1 again, and, yes, that's correct. We do have more
2 pricing institutions and more data than we had thirty
3 years ago.

4 Q. And, in fact, much of what USDA reports
5 derives directly or indirectly from those unregulated
6 trading sources?

7 A. (By Mr. Christ) That's correct.

8 Q. Now, to follow up on the various
9 sections on the, what Mr. Kinser termed the primary
10 objective or the objective of the statute, and I'll
11 provide this for both of you. In the statute there's
12 a section dealing with milk Orders and provisions
13 contained in milk Orders in Section 8(c)(5), and the
14 statute introduces in the case of milk, "Orders shall
15 have one or more of the following terms and conditions
16 and no others." Now, I'm going to provide this to you
17 and maybe you can do it quickly or not, but I'm going
18 to invite you, challenge you, to find one provision in
19 there that expressly says the purpose of the Order is
20 to provide an adequate supply of milk for fluid use.

21 MR. ENGLISH: May I see what you're
22 showing?

23 MR. VETNE: It's the statute.

24 MR. ENGLISH: You can show it to me
25 first.

1 MR. CHRIST: Your Honor, can we have
2 just a minute to do this?

3 THE COURT: Sure. Let's go off the
4 record.

5 MR. VETNE: Or we could simply
6 stipulate, counsel, that there's nothing in there that
7 says that.

8 MR. ENGLISH: We've got a stipulation
9 of counsel with long standing interpretation of USDA
10 in the Courts is for that, and I would accept the
11 first stipulation.

12 MR. VETNE: No.

13 MR. ENGLISH: Then I won't stipulate to
14 it.

15 THE COURT: It doesn't appear we have a
16 stipulation. I'll tell you what, though, I suspect we
17 can brief. Why don't we just say that --

18 MR. ENGLISH: It does seem like he is
19 arguing, Your Honor.

20 THE COURT: Yeah, it's sort of
21 argumentative, but if they want to find it and later
22 on come up and say, well, we found it, fine, but for
23 the time being, I don't think we should take up more
24 time looking for it. Go on to something else.

25 MR. VETNE: All right. I'll make a

1 representation to counsel that there is nothing in the
2 section that deals with provisions of milk Orders that
3 characterizes the purpose, or even provides the
4 authority to provide provisions for the purpose or for
5 the primary purpose of supplying fluid milk plants.
6 However, there is a provision in Section 18,
7 (8)(c)(18) to which you might turn that deals with the
8 prices fixed for Federal Milk Order purposes and the
9 relationship of resulting regulated prices to adequate
10 milk supply.

11 BY MR. VETNE:

12 Q. Mr. Kinser, is that where you believe
13 you got, or somebody got for you, the language that
14 you quote on Page 2, (8)(c)(18).

15 A. (By Mr. Kinser) I have in front of me
16 the document that I got it from, and I must admit that
17 the setup of what you've laid in front of me and the
18 setup of the quote that I have is different in
19 affirming that the exactly -- it does not look to be
20 exactly the same.

21 THE COURT: Well, again, I guess we can
22 discuss it -- you could do that on brief.

23 Mr. English, I'm sure, will --

24 THE WITNESS: (By Mr. Kinser) I will
25 agree that what you've laid in front of me, the words

1 there match the words that are in my testimony.

2 BY MR. VETNE:

3 Q. The words in Section (8)(c)(18),
4 concerning adequate supply of milk?

5 A. (By Mr. Christ) Yes.

6 A. (By Mr. Kinser) Yes.

7 Q. Concerning the Secretary's authority to
8 fix prices?

9 A. (By Mr. Kinser) This is Evan again,
10 and, yes.

11 Q. And you would agree with me that your
12 proposals do not make any effort to change the pricing
13 formula as authorized by Section (8)(c)(18), to get an
14 adequate supply of milk if you're not getting one now?

15 A. (By Mr. Kinser) That is correct.

16 Q. And if you'll also turn back to page 7
17 of the document that I gave you, there's a Subsection
18 called (8)(c)(5)(j), which I'm sure Mr. Christ is a
19 bit more -- with which Mr. Christ is a bit more
20 familiar authorizing various market wide service
21 payments, and there are provisions there authorizing
22 handlers from gross pooled revenues to be rewarded for
23 supplying the fluid market when needed or disposing of
24 surplus milk when needed; is that correct, Mr. Christ?

25 A. (By Mr. Christ) This is Paul Christ.

1 There are a number of conditions under which market
2 wide service payments are authorized. "For services
3 of market wide benefit," okay, "Providing facilities,
4 handling those specific days the quantity of milk not
5 needed by handlers, transporting milk," I think that's
6 probably the list, but the idea of market wide
7 services is those behind the language in the law, and
8 remember when these were adopted, was that the cost of
9 servicing the fluid processor, the fluid market is
10 often higher than keeping milk at home for
11 manufacturing, and these were designed to try to
12 provide increased incentives to serve the fluid
13 market.

14 Q. Okay, and would you also agree with me
15 that your provisions do not draw on the authority of
16 Section 608 (C)(5)(j), the market wide service
17 authority?

18 A. (By Mr. Christ) This is Paul Christ
19 again. That's correct, and as a result of that, no
20 one made that proposal, so it is outside the scope of
21 the hearing.

22 Q. I'm just trying to find the extent to
23 which your proposals are within the scope of the
24 statute. You haven't drawn as authority on either of
25 the two provisions in the statute that deal with

1 encouraging or suppling milk to fluid plants, and yet
2 your proposals, every one of them, are justified by
3 attractions of milk to fluid plants or getting their
4 pesky manufacturing milk off the pool; is that
5 correct?

6 A. (By Mr. Christ) Well, I would like you
7 to repeat the question, because it includes a
8 conclusion or assertion in there I'm not sure I agree
9 with, but try it again.

10 Q. Your proposals have two objectives, to
11 get milk to fluid plants and for which you do not draw
12 on the two sections of the statute that authorize
13 provisions to do that, and the other objective is to
14 get manufacturing milk of -- to shrink the size of the
15 pool?

16 A. (By Mr. Christ) Evan may want to
17 elaborate on this, this is Paul Christ again, but the
18 two objectives of the proposal is, one is to increase
19 the incentives to provide milk to the fluid
20 processors, and number two, to increase the share of
21 the revenue that flows to the people who actually
22 supply the fluid market, and the pooling and depooling
23 suggestions that we have would be to either require
24 people who depool to provide service to the fluid
25 market, or, you know, discourage them from being on

1 the pool when it's favorable and not being on the pool
2 when it's unfavorable, and that, too, would provide
3 more money to those who stay on the pool and are
4 willing to serve the fluid market.

5 Q. Mr. Christ, in going through your
6 testimony with respect to the Order language and the
7 changes there too, let me look for illustration on the
8 fourth page of your testimony in which you refer to
9 changes, modifications made to proposals to amend
10 1030.12. In your testimony you directed us to put
11 some penciled in inserts or changes, such as "any"
12 instead of "the," and there were other changes to the
13 public proposal that are in bold?

14 A. (By Mr. Christ) uh-huh.

15 Q. The fourth page, top of the page.

16 A. (By Mr. Christ) Okay. I found it.

17 Q. Would it be correct to say that Dean
18 Foods' intention to make the changes that appear in
19 bold were made in advance of this hearing?

20 A. (By Mr. Christ) This is Paul Christ.
21 I have rewritten this testimony several times. The
22 change of the months being made in bold were made this
23 morning, and that was based on advice I got from my
24 principle yesterday evening before I left.

25 Q. All right. What about the addition of

1 the word "distributing" at the bottom of that section,
2 between the words "pool" and "plant," when was that
3 change made within your group?

4 A. (By Mr. Christ) This is Paul Christ.
5 It was made early. Maybe, Evan, you know of just
6 when. It would have been last week.

7 A. (By Mr. Kinser) This is Evan. I don't
8 know, John, exactly when, but it was probably --

9 A. (By Mr. Christ) -- last week, probably.

10 Q. Okay. Mr. Christ, would you agree with
11 me that the insertion of the word "distributing"
12 sharply reduces the pooling options to any producer or
13 organization affected by, compared to the notice
14 proposal, affected by the notice proposal?

15 A. (By Mr. Christ) This is Paul Christ.
16 I'm going to argue that, yes, it makes it more
17 restrictive, but it also fulfills the intent, the
18 original intent, and this change was made as a result
19 of a conference call we had, and I remember expressing
20 to you that this would have little impact and would
21 not achieve what they intended to achieve, so we
22 concluded that, yes, we should have had that in the
23 original proposal, and that's what we wanted to
24 achieve, and so we inserted it as a modification.

25 Q. By this would not achieve what we

1 intended to achieve, are you referring to the fact
2 that the word "distributing" was not in the published
3 proposal?

4 A. (By Mr. Christ) This is Paul Christ. I
5 would argue that the absence of the word
6 "distributing" was just an inadvertent oversight on
7 the part of us as proposers, and in discussing the
8 affects of the proposal, it became clear, it was not
9 achieving our first objective to improve the
10 availability of milk for fluid distributors.

11 Q. You've previously served as an expert
12 witness and as a management employee for Land O'Lakes;
13 correct?

14 A. (By Mr. Christ) Yes. This is Paul
15 Christ. Yes, that's correct.

16 Q. And put yourself mentally in the shoes
17 or under the hat that you wore at that time. If you
18 were reviewing a proposal that called for certain
19 changes in deliveries to pool plants, you would take a
20 look at your milk supply and the location of the pool
21 supply and distributing plant and assess a change or
22 cost or benefit to your organization as a result of
23 that proposal; correct?

24 A. (By Mr. Christ) This is Paul Christ.
25 Yeah, Mr. Vetne, I would be interested in enhancing

1 the wellbeing of the members or of the stockholders of
2 the organization that I work for, that would be my
3 responsibility. If I was a Government employee, my
4 objective would be to improve the performance of the
5 system, because that's that --- they're the stewards
6 of the public interest. At this point, I'm a steward
7 of the interest of my client.

8 Q. Nevertheless, I would like an answer to
9 my question. In your capacity now or in the past,
10 advising anybody in response to a proposal, if you
11 analyzed the proposal published, you would have made a
12 radically different assessment than analyzing the
13 proposal as now amended by the addition of the word
14 distributed?

15 A. (By Mr. Christ) I would have made --
16 This is Paul Christ. I would have made a different
17 assessment, because the proposal, as modified, is more
18 limiting on the pooling side, but more rewarding on
19 the assurance of an adequate supply of fluid milk,
20 and, yes, it was different.

21 Q. Substantially different in, for
22 example, anyone who would have wanted to access
23 transportation costs to them to comply with this
24 provision, if adopted?

25 A. (By Mr. Christ) This is Paul Christ.

1 Transportation costs would be one of the
2 considerations that would be made in deciding how this
3 proposal would affect it.

4 Q. And the resulting analysis would be
5 different if the transportation costs, when examined
6 in coming to this hearing, involved supply plants and
7 the transportation costs now at issue with
8 distributing plants?

9 A. (By Mr. Christ) This is Paul Christ
10 again. The factors that needed to be considered would
11 be the same, and transportation would be one of those.
12 The amount of weight that would be given to each of
13 those factors might differ as a result of this
14 modification.

15 Q. Right, because you'd be looking at a
16 sharply limited member of plants that could receive,
17 and a sharply different relationship between milk
18 supplies or farm location and the potential receiving
19 plant?

20 A. (By Mr. Christ) This is Paul Christ.
21 Yes, that's correct, and the intent is for people to
22 consider those factors before they choose to depool.

23 Q. Now, your revised proposal suggests
24 reassociation with the pool through a distributing
25 plant. You represent an organize that owns

1 distributing plants in this market and others?

2 A. (By Mr. Christ) This is Paul Christ.
3 That's correct.

4 Q. Dean Foods contracts in advance with
5 milk supply organizations for an adequate supply of
6 milk; correct?

7 A. (By Mr. Christ) This is Paul Christ. I
8 have no direct knowledge since my retirement from Land
9 O'Lakes in 2000 about the supply arrangements that
10 Dean Foods has with its suppliers, and I believe the
11 relationship between Land O'Lakes and Dean Foods was
12 not executed, physically executed until I retired, and
13 I can't speak about what I knew before I left Land
14 O'Lakes. That's confidential information.

15 Q. Mr. Kinser, you're working for Dean
16 now. Do you know the answer? Do you have supply
17 arrangements, supply agreements with supply
18 organizations to provide an adequate supply of milk?

19 A. (By Mr. Kinser) This is Evan Kinser.
20 We do have supply agreements.

21 Q. And those agreements are not on a spot
22 basis, but they're for a length of time in the future;
23 correct?

24 A. (By Mr. Kinser) I would believe that is
25 correct.

1 Q. And when they have to be renewed,
2 they're not renewed the day before they would end,
3 they're renewed months or it might be years before
4 they end?

5 A. Again, I have not seen the supply
6 agreements, and I could not say definitely. It seems
7 logical.

8 Q. And you rely on those that supply you
9 to honor their commitment and provide an adequate
10 supply of milk?

11 A. (By Mr. Kinser) That is correct.

12 Q. Dean is no longer in the milk
13 procurement business; correct?

14 (By Mr. Kinser) That is not correct.

15 Q. I'm sorry. Does Dean continue to pool
16 producers in its reports?

17 A. (By Mr. Kinser) I don't know.

18 Q. I guess milk procurement was a little
19 bit too vague, because obviously you're procuring milk
20 even from your contract suppliers. Does Dean operate
21 a unit, a distributing plant unit in this market?

22 A. (By Mr. Kinser) At times.

23 Q. At times? And when that occurs, what
24 plants are unitized?

25 A. (By Mr. Kinser) This is Evan Kinser.

1 There are Class -- well, I termed or referred to
2 earlier as standalone Class II plants that are part of
3 a distributing plant unit.

4 Q. What plants are we referring to?

5 A. (By Mr. Kinser) I believe the plants
6 would be the Rockford plant, the Belvidere plant,
7 Huntley and Saunemin.

8 Q. They're primarily Class II plants?

9 A. (By Mr. Kinser) Belvidere and Rockford
10 are Class II.

11 Q. And at times you unitize them and at
12 times you don't?

13 A. (By Mr. Kinser) That is correct.

14 Q. Okay, and but it's a decision you can
15 make on a month to month basis?

16 A. (By Mr. Kinser) That is correct.

17 Q. And there's no requirement that milk
18 going into those plants be pooled when it's
19 disadvantageous for reasons of price to do so, to
20 standalone Class II plants?

21 A. (By Mr. Kinser) Can you repeat that?

22 Q. There is no requirement that milk going
23 into the standalone Class II plants be pooled when its
24 because of reasons of price, that it's disadvantageous
25 to pool that milk? Well, let me say it differently.

1 You can decide on a month to month basis whether those
2 unitized standalone Class II plants are pooled or not
3 pooled?

4 A. Same as a Class III handler or a Class
5 IV handler.

6 Q. So on page 5 of your testimony, under
7 Paragraph (e) distributing plant systems, where you
8 have voluntary/mandatory, and you're referring to
9 unitized standalone Class II plants. Mandatory means
10 that you elected during that month to keep the plant
11 pooled with the rest of the systems?

12 A. (By MR. Kinser) Yes. That is the
13 reason for the voluntary and mandatory forming of the
14 unit. It's voluntary, once the unit is formed, all
15 pooling mandatory.

16 Q. Wouldn't the same be true for supply
17 plants, most of the same way, if milk comes into the
18 supply plant, it's pooled, it doesn't, it's not?

19 A. (By Mr. Kinser) In order to qualify, a
20 supply plant would have to meet the minimum shipment
21 requirements.

22 Q. Yes, but as far as being pooled, and
23 maybe both of you could answer this, if milk is
24 delivered to the supply plant or the silo that's
25 designated as the supply plant, it's pooled, that's

1 mandatory?

2 A. (By Mr. Christ) This is Paul Christ.
3 If there's a -- If a handler report filed with the
4 Market Administrator for that plant and that milk,
5 it's pooled, but a Grade A facility can receive milk
6 and simply not file a report. I believe that's
7 correct.

8 Q. All right. We can find out.
9 Mr. Kinser, I'll ask you first. In your testimony you
10 talk about your opinion of the perceived benefits of
11 milk repooling only at distributing plants. Now, in
12 the Upper Midwest, as in other places, Dean Foods has
13 a supply contract that serves Dean Foods plants, you
14 said that; correct?

15 A. (By Mr. Kinser) This is Evan. Supply
16 contracts plural?

17 Q. Supply contract or contracts. Let me
18 ask you, are there plural agreements?

19 A. (By Mr. Kinser) Plural.

20 Q. And to your knowledge, other
21 distributing plants have similar contracts, maybe not
22 of the same duration or the terms, but have contracts
23 to supply an adequate supply of fluid milk in future
24 months?

25 A. (By Mr. Kinser) What was the last part

1 of your question?

2 Q. Other distributing plant operates
3 similarly have supply contracts?

4 A. (By Mr. Kinser) Yes.

5 Q. To supply milk, and not a spot basis,
6 but they operate in the future?

7 A. (By Mr. Kinser) Yes, I would agree.

8 Q. And some distributing plants, probably
9 a few, but some distributing plants have their own
10 producer milk supply and supply their fluid needs that
11 way and frequently pool additional milk that they
12 don't need, would you agree with that?

13 A. (By Mr. Kinser) I would agree, that is
14 correct.

15 Q. Okay. Are you aware of any supply
16 plant that does not meet one of those categories,
17 either they have a supplied by, committed supplied by
18 agreement, or they have a producer milk supply that
19 they rely on?

20 A. (By Mr. Kinser) Can you rephrase the
21 question?

22 Q. Did I miss any kind of arrangement
23 here? Are there any distributing plants that have
24 other arrangements that you're aware of, other than
25 you contract with somebody else, or a committed supply

1 to make sure you have it in the future, or you develop
2 your own producer milk supply to make sure that you
3 have enough milk? Are there any other kind of
4 arrangements with anybody that you can think of? The
5 only thing I can think of is somebody who supplies
6 milk on a spot daily basis.

7 A. (By Mr. Christ) This is Paul Christ.
8 Let me try to answer that, and I think I can speak
9 about one of the Land O'Lakes' facilities, that we
10 receive milk, Land O'Lakes fluid facilities, we did
11 receive milk from a variety of suppliers, other than
12 our own sources, and as I recall, there were no
13 contracts, that it was based on long-term working
14 relationships, but they were flexible, and the amount
15 that came from this one or that one did change from
16 month to month, so there at least is one example in
17 this market that at least prior to December of 2000
18 that was the case.

19 Q. Okay, and your working relationship
20 understanding was that milk would be supplied when you
21 needed it?

22 A. (By Mr. Christ) This is Paul Christ
23 again. As I was intimately involved in supplying that
24 plant, it was not an assured supply. That the
25 negotiations had to be done frequently and to make --

1 and to try to balance the needs of the plant with the
2 interest of the suppliers, and some would prefer to
3 reduce how much milk they put in, and then we would
4 try to persuade others to put more milk in, but it was
5 an ongoing activity of trying to persuade suppliers to
6 put enough milk in to meet the needs of the plant.

7 Q. Who owns that plant now?

8 A. (By Mr. Christ) That's one of the
9 plants that's in the Dean Foods system, and I have no
10 idea whether that arrangement has been changed or not.

11 Q. Okay. Are you aware of any
12 distributing plant that operates on that day by day
13 system anymore?

14 A. (By Mr. Christ) Well, I used that one
15 as an example, because that's one I was familiar with.
16 I don't have intimate knowledge of any fluid
17 processing plants outside of Land O'Lakes in
18 historical plants.

19 Q. I'll start with Mr. Kinser on this one.
20 Mr. Kinser, if delivered to a distributing plant is
21 the only way with which a producer may gain or regain
22 access to the pool, what do you either propose or what
23 do you believe to be the means by which a producer
24 seeking pool access will gain access to a distributing
25 plant sale? This is in context of we've talked about

1 these plants already being supplied by contracts. How
2 does a producer who wants access to the pool or to the
3 market come in there, essentially to displace
4 committed supplies or producer milk supplies that are
5 going daily.

6 A. (By Mr. Kinser) The only time that
7 issue would come into play is in the evidence that the
8 producer stops serving the market.

9 Q. And that's -- that issue comes into
10 play because of your proposal. Let's assume the
11 producer stops serving the market for whatever reason.
12 Whether the producer depools or it sells it milk to
13 Canada, the producer can't come back in, and would you
14 also suggest that, perhaps, distributing plants who
15 bemoan the inadequacy of the supply or bemoan the milk
16 that's not going into distributing plants be required
17 to open their doors to producers when they seek the
18 market?

19 A. (By Mr. Kinser) What is your question?

20 Q. My question is, in order to provide
21 distributing plant access, would you have the
22 objection to a complimentary regulatory requirement
23 requiring distributing plants to open their doors at
24 the prevailing price to anybody seeking access to the
25 fluid market, thereby displacing your regular

1 suppliers?

2 Mr. Christ, If you want to answer that
3 question, rather than write the answer for Mr. Kinser,
4 that's fine.

5 A. (By Mr. Christ) This is Paul Christ,
6 and my answer is, that's not our proposal.

7 Q. All right. Would you agree,
8 Mr. Christ, since you answered that, that there would
9 be a problem in producers finding access to a
10 distributing plant under your proposal, if they left
11 the pool?

12 A. (By Mr. Christ) This is Paul Christ,
13 and I would submit that that's one of the things that
14 a handler who wanted to depool milk would have to
15 think about, that if it is difficult to get back on
16 the fluid market, then he would be wise to think at
17 length about whether it's wise to depool, and the two
18 go hand in hand.

19 Q. So if I might paraphrase, your answer
20 is, yes, it would be difficult, because access is
21 limited, and, yes, that is your intent?

22 A. (By Mr. Christ) This is Paul Christ,
23 again. I didn't answer that it would be difficult. I
24 answered, I believe that it could be difficult, and
25 that evaluation would have to be made by the party who

1 was considering depooling, and I can't evaluate in any
2 hypothetical situation, but the party considering such
3 action could evaluate that.

4 Q. Uh-huh. Would you agree that it would,
5 in fact, be difficult to find access, for example, to
6 the Dean plant, since they have committed suppliers by
7 contract?

8 A. (By Mr. Christ) This is Paul Christ
9 again. I'm not qualified to answer that, because I
10 really don't know the details of the supply
11 arrangements with their suppliers, and so I don't know
12 how much flexibility is available to accept milk from
13 new sources.

14 Q. Mr. Kinser, do you have flexibility to
15 back off your committed supply and take milk from
16 somebody else?

17 A. (By Mr. Kinser) This is Evan Kinser. I
18 don't know.

19 Q. Isn't it the case that for a
20 substantial portion of the Dean supply, you must buy
21 milk either from DFA or from an organization in which
22 DFA participates or with DFA's consent?

23 A. (By Mr. Kinser) I do know that we buy
24 milk from multiple parties in this marketplace,
25 beyond the parties that you've mentioned.

1 Q. That wasn't quite my question. Isn't
2 it true that you have a contract with DFA, Dean
3 corporate-wide, to rely on DFA for milk supply, or to
4 buy milk from organizations in which DFA participates,
5 or if you go outside that, to do so only with DFA
6 consent, otherwise there is a substantial financial
7 penalty?

8 A. (By Mr. Kinser) I do not know that.

9 THE COURT: I'm going to mark this as
10 Exhibit 33, the document that you've just handed me,
11 Mr. Vetne.

12 (Whereupon, Exhibit No. 33 was
13 marked for identification.)

14 BY MR. VETNE:

15 Q. And the document that I've handed you
16 is a copy of excerpts from the 2003 Dean Foods Annual
17 Report, and it's clear that it's excerpts, because
18 it's a copy of the cover page and then the next page
19 is page 43, but I direct your attention to the middle
20 of page 43 where it says that in 2001, that Dean Foods
21 "Issued a contingent, subordinated promissory note to
22 Dairy Farmers of America, in the original principal
23 amount of \$40 million. DFA is our primary supplier of
24 raw milk, and the promissory note is designed to
25 ensure that DFA has the opportunity to the continue to

1 supply raw milk to certain of our plants until the
2 year 2021, or be paid for the loss of that business.
3 The promissory note has a 20-year term and bears
4 interest," etc, etc, "but interest will not be paid in
5 cash, but will be added to the principal amount of the
6 note annually, up to a maximum principal amount of \$96
7 million. We may prepay the note at any time, without
8 penalty. The note will only become payable if we ever
9 materially breach or terminate one of our milk supply
10 agreements with DFA without renewal or replacement,"
11 and my question related to that, and as well as to the
12 last page of the excerpts from the Dean report, on
13 page 86, at the bottom, which refers to "An expense
14 item of \$28.5 million resulting from a payment to DFA
15 as consideration for certain modifications to our
16 existing milk supply arrangements."

17 A. (By Mr. Kinser) Can you clarify where
18 you read the second one?

19 Q. The second one was at the very last
20 page of the exhibit, Exhibit No. --

21 MR. VETNE: What was it, Your Honor?

22 THE COURT: 33.

23 BY MR. VETNE:

24 Q. 33. Right at the bottom, the next to
25 the last bullet, at the bottom of the page.

1 THE COURT: Page 86 of the --

2 BY MR. VETNE:

3 Q. Yes. Page 86 of the annual report.
4 Did you look at that, both of those items now?

5 A. (By Mr. Kinser) I see it. Thank you.

6 Q. Now, do you recognize the Dean Foods
7 Annual Report?

8 A. (By Mr. Kinser) This is Evan Kinser,
9 yes.

10 Q. And what I've provided you is not a
11 complete copy, but it's an accurate copy of the
12 excerpts provided?

13 A. (By Mr. Kinser) I believe it to be.
14 I've never read what you put in front of me.

15 Q. Okay, and it's accessible on the Dean
16 Foods site, through a link to the SCC; correct?

17 A. (By Mr. Kinser) It could be.

18 Q. You've never done that?

19 A. (By Mr. Kinser) I've never done that.

20 Q. And my question again, and perhaps this
21 might help you answer, was in view of contract
22 arrangements with DFA and associates, that you be
23 penalized if you didn't buy milk from DFA, what
24 opportunity is there for access to the Dean Foods
25 plant?

1 MR. ENGLISH: Don't answer that
2 question yet. I object to the characterization. His
3 own words are opportunity to continue to supply raw
4 milk from certain plants. There's a reference to
5 amendments. There's no foundation for the idea this
6 witness knows what those agreements are, and for the
7 record, the statements of how the agreements work by
8 Mr. Vetne are inaccurate.

9 THE COURT: Well, how do you proceed?
10 Are you instructing the witness not to answer?

11 MR. ENGLISH: I'm not instructing him
12 not to answer, although I don't think there's a
13 foundation laid for his knowledge, and I think the
14 characterizations of linking it back to a previous
15 question, which was inaccurate, doesn't work.

16 THE COURT: But I don't know what I
17 have before me. Do I have an objection? Do I have an
18 instruction to the witness or other --

19 MR. ENGLISH: I'm objecting to the
20 mischaracterization from earlier, and making the
21 statement that somehow this annual report corroborates
22 what Mr. Vetne just said, when it doesn't say the
23 exact words he used, which were, in essence, that you
24 have to buy the milk unless you get consent --

25 THE COURT: I'm going to overrule the

1 objection and let the witness answer.

2 MR. VETNE: And actually before the
3 witness answers, I'm going to express graduate to
4 Mr. English for suggesting that the step-by-step
5 approach might be better.

6 MR. ENGLISH: Does the witness -- and
7 before you do a step-by-step approach, why don't you
8 find out if the witness can answer the question.

9 BY MR. VETNE:

10 Q. Mr. Kinser, your responsibilities for
11 Dean are national?

12 A. (By Mr. Kinser) That is correct.

13 Q. That is correct, and do your
14 responsibilities include participating in milk supply
15 agreements?

16 A. (By Mr. Kinser) They will when I get up
17 to speed on them.

18 Q. And in the course of -- and you've only
19 been there for, what, six weeks at this point?

20 A. (By Mr. Kinser) Slightly over. June
21 1st.

22 Q. And during that time, during that six
23 weeks, have you become generally familiar with the
24 terms of milk supply agreements between Dean Foods and
25 cooperatives that supply Dean?

1 A. (By Mr. Kinser) I have not.

2 Q. Is that why you're here to testify,
3 rather than somebody that does have knowledge?

4 MR. ENGLISH: I object to that.

5 THE COURT: I'll sustain the objection.
6 I think you've made the point, Mr. Vetne, by bringing
7 in this document that they have an existing contract
8 with Dairy Farmers of America, that there's a note
9 outstanding, which to me looks like some sort of
10 aversion of liquidated damages clause, reduced to a
11 note form, so that they can execute it right away, and
12 I think that's now in the record, as soon as we
13 receive this exhibit.

14 MR. VETNE: Yes. I'll move it's
15 receipt.

16 THE COURT: I'll receive it.

17 (Whereupon, Exhibit No. 33 was offered
18 and received into evidence.)

19 BY MR. VETNE:

20 Q. Mr. Kinser is there anyone who is
21 testifying on behalf of the Dean proposals in this
22 room that does have knowledge of the terms of
23 agreements either in the Upper Midwest or any place
24 else?

25 A. (By Mr. Kinser) Not that I'm aware of.

1 Q. Do you have a copy of any of the
2 exhibits in front of you that you could look at
3 Exhibit 12. Do you have Exhibit 12 in front of you?

4 A. (By Mr. Kinser) This is Evan, yes.

5 Q. For the first page, would Dean Foods in
6 the Upper Midwest be one of the five distributing
7 plants or distributing plant units that receive more
8 than 25 million pounds of milk?

9 A. (By Mr. Kinser) This is Evan. I do not
10 know.

11 Q. Do you not know anything about the
12 specific operations of the distributing plants in the
13 Upper Midwest?

14 A. (By Mr. Kinser) The distributing plants
15 of Dean Foods, that would be a correct statement.

16 Q. Okay. Mr. Christ, would you know
17 whether Dean Foods would be among one of the five
18 plants that receive 25 million pounds of milk?

19 A. (By Mr. Christ) This is Paul Christ. I
20 would have to rely on my information, which is more
21 than four years old, when I worked for Land O'Lakes
22 and several of these plants were owned by Land
23 O'Lakes. I have no way to know that the volumes are
24 anymore similar to what they were then, so I really
25 don't have any objective information.

1 Q. Yeah, that was my question.

2 MR. ENGLISH: I'll help you out. We'll
3 stipulate that the answer is yes.

4 MR. VETNE: Thank you.

5 BY MR. CHRIST:

6 Q. Mr. Christ, if you look at this
7 exhibit, roughly 70 percent of the Class I route
8 disposition comes from the five plants or units that
9 have --

10 A. (By Mr. Christ) This is Paul Christ.
11 It looks like it's about right.

12 Q. Would you agree with me that having
13 five buyers represent 70 percent of the market to
14 which you would have to perform, provides additional
15 limitations of access by producers seeking to pool or
16 repool, and that's -- it's a two part question -- and
17 that's a good thing in your view?

18 A. (By Mr. Christ) Let me respond to what
19 I understood your question to be. This is Paul
20 Christ. Five is a smaller number than six, and six is
21 a smaller number than seven, but the total number of
22 producer -- or distributing plants is 23, so there's
23 more than just numbers involved in whether there's a
24 meaningful access to a distributing plant, that might
25 mean, one would be location, another might be of

1 supply arrangements that you talked about earlier, I
2 guess those would be major factors.

3 Q. All right. Mr. Kinser, the middle of
4 page 10 of your testimony, and I'm referring to the
5 last two sentences ending the paragraph that ends in
6 the middle. From what you know of the Upper Midwest,
7 would it not be accurate to say that the market is
8 extraordinarily competitive for milk supplies between
9 manufacturing plants?

10 A. (By Mr. Kinser) I would agree with
11 that, this is Evan Kinser, I would agree with that
12 statement.

13 Q. And Mr. Christ, do you also?

14 A. (By Mr. Christ) This is Paul Christ. I
15 agree as well, but my experience, which is getting
16 pretty rusty, is that, yes, it's very competitive.

17 Q. And that a principal motivating factor
18 of milk procurers is to attract and retain as much
19 milk as possible for their capacity to their plants?

20 A. (By Mr. Christ) This is Paul Christ
21 again, and one of my crusades while I was in this
22 business was to try to balance the cost of filling the
23 plant, versus the benefits of filling the plants, and
24 we had quite a bit of disagreement about that, but
25 there is a cost at which it does not pay to add

1 another producer.

2 Q. Uh-huh, and then there are those that
3 disagree with that, too, as you say?

4 A. (By Mr. Christ) Just subjectively I
5 would say that the plant operators like to run the
6 plant full, because that minimizes their total average
7 costs.

8 Q. So the incentive, if you were to weigh
9 incentives, Mr. Christ, between two incentives, one is
10 to retain as much milk as possible, and one is to pay
11 as little as possible. Which would weigh out higher
12 based on your experience of other's behavior in the
13 market?

14 A. (By Mr. Christ) My observation over
15 time is that people will pay a price that will not
16 cover all costs in order to keep the plant full, and
17 will actually incur some -- they'll cover their
18 variable costs, and they may not cover all of their
19 fixed costs, in order to keep a full supply of milk,
20 but it's still from an economic standpoint, it's a
21 rational thing to do, because you lose less than if
22 you no longer operate the plant.

23 Q. Mr. Kinser, looking at the bottom of
24 page 14 on your statement, the sentence that beginning
25 at the bottom, you make a point about milk being

1 readily available or an ease with which milk might be
2 purchased. Would it be correct to say that you make
3 this statement in the abstract, and do not make it in
4 reference to any specific experience by Dean Foods?

5 A. (By Mr. Kinser) It is correct that it
6 is made -- it is not made with respect to Dean Foods.

7 Q. You're not aware of any incident or
8 experience of Dean Foods anecdotally or otherwise that
9 would objectively prove the hypothetical that you
10 posit?

11 A. (By Mr. Kinser) Can you rephrase the
12 question?

13 Q. I'm not sure that I can. You are not
14 aware of any, partly because you haven't been there
15 long enough, but you're not aware of any specific
16 example in Dean Foods' operations which proves this
17 point?

18 A. (By Mr. Kinser) That is correct.

19 Q. This one I can address to either one of
20 you, so take turns or take your pick. The changes in
21 the various provisions from "the" cooperative to "any"
22 cooperative, and -- well, I'm looking at page 18,
23 Mr. Kinser, of your testimony, which is revised
24 proposed amendment to Section 12 (b)(5). Is it
25 correct to say that if a handler receiving milk of a

1 dairy farmer has depooled that dairy farm, and the
2 farmer changes his market to another customer, that
3 that farmer may not be pooled by the succeeding
4 customer?

5 A. (By Mr. Christ) This is Paul Christ.
6 I'll try to answer that. That's a correct
7 interpretation if you accept our substitution of "any"
8 for "the," and it was ambiguous -- it would be
9 ambiguous if you -- if the "the" remained in there.

10 Q. And that's what you intended for --

11 A. (By Mr. Christ) To make it clear, no
12 matter who depooled the milk, another handler would
13 not be able to repool it unless they met the
14 performance standards.

15 Q. Now, ordinarily a dairy farmer does not
16 make the decision or have any part of a decision
17 whether his or her milk is depooled; correct?

18 A. (By Mr. Christ) This is Paul Christ.
19 That's correct. Those decisions are made by the
20 handler who makes reports to the Market Administrator,
21 and anyone who's interested in maintaining a supply of
22 milk will try to provide a market. I'm including
23 pooling and depool and re-qualification, and
24 everything else, that is superior to the market
25 offered by his competitors, so the handler would have

1 to take all those things into consideration when he
2 chooses to depool some of the milk.

3 Q. So if the producer left and found a new
4 market, that producer might find out for the first
5 time when his new buyer tries to pool the milk that
6 he's ineligible?

7 A. (By Mr. Christ) This is Paul Christ.
8 That's correct. The producer may or may not be
9 advised whether his milk was in or out of the pool.

10 Q. Would this also apply to producers,
11 there are some, who have been Grade B and want to
12 convert to Grade A?

13 A. (By Mr. Christ) This is Paul Christ.
14 The proposal says that -- okay. "It says if a pool
15 handler or operator of a pool plant or a cooperative
16 association caused the milk of a dairy farmer to be
17 received as other than producer milk," the language of
18 the proposal would say that if the producer was not a
19 Grade A producer in the past, in order to get back on
20 the market, he would have to go through the
21 performance standards, because his milk would have
22 been cause to be delivered as other than producer
23 milk. Another variation of that is, what about the
24 new producer? A new producer could come directly in,
25 because his milk would not have been caused to be

1 delivered as other than producer milk.

2 Q. Because he wouldn't have any milk?

3 A. (By Mr. Christ) He didn't have any
4 milk, right.

5 Q. So that might be a solution to your
6 proposal, is to, for example, incorporate, make a
7 different entity to come back on?

8 A. (By Mr. Christ) This is Paul Christ.
9 Okay, I didn't anticipate all of the ways to beat the
10 rules, but clearly there is some opportunity. We hope
11 to limit those opportunities.

12 Q. I'm not sure I understood, I think it
13 was Paul Christ talked about Proposal 6 being
14 supplementary to Proposal 3. I didn't know whether to
15 infer from that that it's equally supplementary to --
16 in descending preference to Proposals 4 and 5.

17 A. (By Mr. Kinser) This is Evan Kinser.
18 The answer to your question is, yes.

19 Q. Yes, it's supplementary to either one
20 or all?

21 A. (By Mr. Kinser) It's supplementary to
22 all and in descending Order from 3 to 4 to 5.

23 Q. This is a question to both of you, and
24 this is by reference to your philosophy, which in
25 asking this question I do not adopt, but if the

1 objective is to pool milk whose producer -- for a
2 producer who's willing, ready, and able to supply the
3 fluid milk market, would it not be fair and rational,
4 once those criteria; ready, willing, and able, are
5 established, if the producer cannot find access to a
6 fluid milk plant?

7 A. (By Mr. Christ) This is Paul Christ.
8 We struggled, probably for 60 years in the program, to
9 decide who is and who is not ready, willing, and able
10 to supply the fluid market. The first criteria, of
11 course, is you've got to be Grade A. You're not going
12 to supply the fluid market unless you're Grade A, and
13 beyond that we can argue that, well, you can
14 demonstrate that by delivering your milk to a bottling
15 plant. As more Grade A became more abundant, we say,
16 if you can demonstrate that by delivering to a
17 bottling plant or a pool supply plant, and then as
18 milk became more abundant, we found even -- we created
19 even looser and looser linkages between the actual
20 performance of delivering to a fluid plant, and what
21 we consider ready, willing, and able, and I think
22 we've gone beyond reason, because clearly the milk
23 that is routinely depooled, when a producer price
24 differential is negative, it is not ready, willing,
25 and able in the specific months when it's depooled to

1 service the fluid market.

2 So I think it takes more than that. It
3 takes some demonstrated competence, and in our view,
4 if you choose to depool milk, then you have to exhibit
5 that demonstrative competence to actually serve the
6 fluid market.

7 Q. Milk is depooled after the fact, after
8 the month is over; correct?

9 A. (By Mr. Christ) This is Paul Christ.
10 The answer is, yes, the handler reports are filed the
11 following month.

12 Q. And you can't conclude from the
13 activity on a report of a month that's over that milk
14 in the middle of that month that went -- on the 15th,
15 that went to a cheese plant was not available if asked
16 for by a distributing plant on that day?

17 A. (By Mr. Christ) This is Paul Christ.
18 That's entirely possible. The Federal Milk Order does
19 not make it mandatory that plants or producers who
20 want to remain in the pool do more than the minimum
21 performance standards, and by depooling the milk, the
22 handler who did the depooling is making an
23 over-jester, I would say, that the milk, in fact, was
24 not available, and so our proposal would require a
25 similar over-jester to demonstrate that the milk is

1 available before it comes back in.

2 Q. There is milk, Mr. Christ, that goes
3 from farms to supply plants or diverted to cheese
4 plants day in and day out, week after week, month
5 after month, year after year; correct?

6 A. (By Mr. Christ) This is Paul Christ.
7 That's correct, especially in the market that carries
8 much of the national reserve, like this one, there's
9 milk that never reaches the fluid plant.

10 Q. In terms of practical availability,
11 that milk is no less available and no more available
12 in the month that it's pooled then when it's not
13 pooled; isn't that correct?

14 A. (By Mr. Christ) That's correct. The
15 milk is not delivered to a fluid processing plant, but
16 it is technically available if it is in the pool.
17 It's not mandatory that they go to a bottling plant.

18 Q. You've been here for the duration of
19 the hearing?

20 A. (By Mr. Christ) This is Paul Christ.
21 I missed a few hours, a couple hours yesterday, but
22 I've been here for most of it.

23 Q. And you're aware that in months when
24 there was substantial depooling, many of the
25 cooperatives or other handlers that depooled milk also

1 continued to make milk available to the market,
2 because of supply companies?

3 A. (By Mr. Christ) This is Paul Christ,
4 and I agree that is very likely, because most milk
5 suppliers want to maintain a continuing relationship
6 with a fluid customer.

7 Q. There was earlier testimony by a small
8 processor of Chicago that a number of years ago there
9 were, what, 1,500 distributing plants in Chicago and
10 now there's one left?

11 A. (By Mr. Christ) This is Paul Christ.
12 I'm not that old, actually.

13 Q. How about you Evan?

14 A. (By Mr. Kinser) This is Evan Kinser.
15 I'm not that older either.

16 Q. You would agree that there has been a
17 huge attrition in the number of distributing plants
18 that receive milk?

19 A. (By Mr. Christ) This is Paul Christ.
20 That's correct. This is a phenomenon that goes across
21 the dairy industry.

22 Q. And combined with that attrition in the
23 number of plants, there's an even greater attrition in
24 the number of handlers operating those plants because
25 they've come under consolidated ownership?

1 A. (By Mr. Christ) This is Paul Christ.

2 I would accept that, although I don't have the
3 statistical evidence, but that's my impression.

4 Q. Well, Dean Foods is one example of
5 that; correct?

6 A. (By Mr. Christ) Yes.

7 Q. And there has also been a consolidation
8 on the supply side of those supplying the remaining
9 distributing plants?

10 A. (By Mr. Christ) This is Paul Christ.
11 Yes, in terms of supply organizations and in terms of
12 dairy farmers themselves.

13 Q. And both of those things create
14 substantially different marketing conditions than
15 existed in the 1950s, '60s and '70s?

16 A. (By Mr. Christ) This is Paul Christ.
17 That's correct. The market has changed dramatically.

18 Q. And one way it changed dramatically,
19 perhaps as dramatically as anything else, is that the
20 opportunity of a producer to have access to a
21 distributing plant is reduced?

22 A. (By Mr. Christ) This is Paul Christ. I
23 I'm not sure of that. I've seen statistics that I
24 can't recite the source, that the rate of attrition
25 among fluid processors, among supply organizations,

1 among dairy farmers is similar. We've got maybe 10
2 percent of what we had 30 or 40 or 50 years ago, so I
3 really don't know the relative numbers.

4 Q. I'm not sure I understand your answer.

5 A. (By Mr. Christ) Well, maybe at one time
6 in the past there were a thousand dairy farmers for
7 every dairy plant, and now you could argue that
8 there's probably a thousand dairy farmers for every
9 dairy plant. The ratio would be similar.

10 MR. VETNE: Okay. I might have more in
11 the future, but I think I have a good start here.
12 Thank you.

13 THE COURT: Very good. Do you have
14 some questions you would like to make for the
15 witnesses? Mr. Beshore does now.

16 CROSS-EXAMINATION

17 BY MR. BESHORE:

18 Q. I do have a few questions. Good
19 afternoon Evan and Paul. I want to first address the
20 proposed change in language of Section 1030.12(b)(5),
21 which is on Page 4 of Paul's statement, and I think
22 Evan addressed it also on Page 18. The change, the
23 deletion of the word there, "the" and changing it to
24 "any." As I understand it, this would have the affect
25 of placing the onus for being depooled upon the

1 producer, rather than having it attached to the
2 handler or the cooperative which did pool it?

3 A. (By Mr. Christ) This is Paul Christ. I
4 believe it places the onus on whichever handler is
5 marketing the producer's milk. The handler who's
6 marketing the producer's milk today may be different
7 than the handler who depooled the milk in the past.

8 Q. Well, doesn't it place with the
9 producer -- doesn't it give the producer a, you know,
10 a D on his forehead, I guess, for depool that he's got
11 to carry with him from handler to handler if he moves
12 from one to the other?

13 A. (By Mr. Christ) This is Paul Christ.
14 That's correct. If his milk was depooled, then
15 whichever handler is reporting to the Market
16 Administrator for his milk has the responsibility to
17 meet those performance requirements.

18 Q. Okay, and you propose to do that even
19 though it's not the producer's choice or within his
20 control whether it's depooled or not?

21 A. (By Mr. Christ) This is Paul Christ.
22 That's correct, but this kind of thing happens often.
23 For example, a producer may have had an antibiotic
24 experience within the last year. When a producer
25 shifts his business from one handler to another,

1 usually the second handler will ask for a report from
2 the first handler, and this information is exchanged,
3 and I would guess that the same sort of exchange would
4 take place with this kind of a situation.

5 Q. Well, let's think about how that might
6 work. If the depooling decision is not made by the
7 handler, now, I'm not talking about depooling because
8 of antibiotics in the milk in Grade A loss or
9 something like that, I'm talking about voluntary
10 depooling, you know, that you're addressing with your
11 proposals and we're addressing with our proposals
12 here. Voluntary depooling, that choice is made by the
13 handler, and it's not made until sometime after the
14 month; correct?

15 A. (By Mr. Christ) This is Paul Christ.
16 That's correct.

17 Q. And when do those reports go in, the
18 6th, the 8th? Or actually the producer reports, or
19 the payroll reports that would show depooling, or
20 whatever, when would they go in?

21 A. (By Mr. Christ) This is Paul Christ.
22 That's a matter of record in the Order itself, and
23 that's one of the things that, I guess, I've learned
24 to forget, because there was always a tight business
25 to try to get it in on time.

1 Q. It's probably around the 8th?

2 A. (By Mr. Christ) Yeah.

3 Q. Now, if a producer changes, you know,
4 his market, let's assume it's at the end of a month,
5 from one handler to another, and the handler that he's
6 leaving has not yet filed his pool report, he would
7 have the option of reporting, assuming the producer
8 was -- let's assume it was a producer that his milk
9 was delivered to a cheese plant in Order 30, which is
10 a fairly modest assumption when you've got 80 percent
11 of the milk being manufactured by cheese, I guess,
12 that handler that is losing that producer now has the
13 option of reporting him as depooled for the prior
14 month; correct?

15 A. (By Mr. Christ) This is Paul Christ.
16 Yes, unless his milk -- yeah, I think he has the
17 option of depooling.

18 Q. And then when the change has already
19 been made, the new handler, the cooperative, and the
20 producer, who had no control over it, accepts the
21 burden of -- under the way the proposal is proposed to
22 be revised -- has got the burden of coming back onto
23 the pool?

24 A. (By Mr. Christ) That's correct, and I
25 think what you're implicating here is that the handler

1 who's losing the producer may sabotage the handler who
2 gets the producer by depooling the milk.

3 Q. Well, I wonder if you don't give them
4 those tools, by putting, you know, the onus on the
5 producer, rather than on the handler, as your proposal
6 was originally written, and that as some of the other
7 proposals have been written?

8 A. (By Mr. Christ) This is Paul Christ
9 again. Let me respond that normally when a producer
10 transfers markets, it's known well in advance and Evan
11 can tell you about the length of contracts with
12 Foremost Farms, but it's done well in advance, and if
13 -- I don't know if the handler can keep something like
14 this secret, but that would become -- it would be
15 considered abusive by the producers affected and also
16 by their neighbors, so I think there would be some
17 discipline on that.

18 Q. Well, whether he's pooled or not the
19 last month doesn't happen until after he's gone;
20 right?

21 A. (By Mr. Christ) I guess that's
22 correct. I was trying to point out that handlers have
23 a lot of lead time. I think with Land O'Lakes the
24 contracts were 30 days, yeah, they were 30 days notice
25 or 60 days notice, depending on the length of the

1 contract.

2 Q. But the lead time doesn't have any
3 affect on the reporting of the milk after the change
4 takes place?

5 A. (By Mr. Christ) That's correct, and
6 what you're implying, I think, is possible.

7 Q. Okay. Let me ask about the proposed
8 language regarding the 21-day limitation on temporary
9 depooling or non-Grade A status. I'm not sure where
10 that comes up, precisely on which page --

11 A. (By Mr. Christ) That's an exemption
12 from these performance requirements.

13 Q. Okay. Can you see any possible
14 complications where there are natural disasters on the
15 farms, fires or storm damage or conditions of that
16 sort where they might be off the market for a longer
17 period of time?

18 A. (By Mr. Christ) This is Paul Christ.
19 That's correct, but if he's off the market, that
20 creates no disability here, no problem. It's only if
21 his milk is delivered to a plant other than producer
22 milk, that's when the disability arises, and he has to
23 meet new performance standards.

24 Q. Okay. What about the circumstance --
25 I'm wondering, how was the 21 days arriving at? I

1 don't know if either of you can explain that or not.

2 A. (By Mr. Christ) This is Paul Christ. I
3 don't know the answer. I will let Evan try it, but I
4 know the practice of the Market Administrator is
5 saying, if I'm degraded this month, I have until the
6 end of the next month to get back on Grade A, and I
7 stay in the pool, and the 21 days is a shorter period
8 of time than that, and I don't know if you discussed
9 why 21 days?

10 A. (By Mr. Kinser) This is Evan Kinser.
11 The purpose of 21 days had to do with keeping enough
12 of the milk in the pool in the month and also applying
13 it to the calendar year so that they couldn't continue
14 to go, you know, if you allowed a period of time, they
15 couldn't continue to do it multiple months, and this
16 would also allow if something happened and the
17 producer was legitimately degraded there would be,
18 say, three one-week windows for them to return to the
19 market if they were degraded three times over the
20 course of the year. It seemed reasonable.

21 Q. So is it your thought that the current
22 interpretation of the Market Administrator, which Paul
23 has related, which I understand to be the current
24 interpretation, that that's too generous a period of
25 time to allow regrading?

1 A. (By Mr. Kinser) If I understood what
2 Paul said, Paul said the current interpretation is
3 that so long as they return by the end of the month,
4 so if I'm degraded on the first day of the month and I
5 am back by the very last day of the month --

6 A. (By Paul Christ) No, the following
7 month.

8 Q. The following month.

9 A. (By Evan Kinser) -- it's an even more
10 generous situation, you've got, you know, let's say
11 you have two, 31-day months back do back. You've got
12 61 days to be off the market and one day back on.

13 Q. But that's the current interpretation
14 of the limits of a temporary loss of Grade A status,
15 to allow for continual -- to be within the concept of
16 continuous association, and is it your position that's
17 overly generous and needs to be tightened up by
18 producer milk language here?

19 A. (By Mr. Kinser) This is Evan Kinser. I
20 did not know that to be the current interpretation.
21 The concern that we had is that it puts undue pressure
22 on the Market Administrator to make value judgements
23 on what the definition and the language of temporary
24 is, and this provides a hard and fast definition.

25 Q. Would you agree that there could be

1 situations with respect to degrade and regrades where
2 the regulatory bureaucratic paperwork and personnel
3 may not be able to accommodate a producer getting back
4 on the market within the 21 days? I mean, sometimes
5 you just need the inspectors to have the paperwork
6 signed in time. It could a problem?

7 A. (By Mr. Kinser) That is a possibility.

8 Q. The requirement in several of the
9 proposals, that for 10-days delivery to pool
10 distributing plants per month, isn't it the case that
11 in the Federal Order system currently, the only Orders
12 that have delivery requirements of that Order are the
13 very high utilization Orders such as Order 7?

14 A. (By Mr. Christ) This is Paul Christ,
15 and that is correct, but we would not apply the ten
16 days uniformly across the market. That is only --
17 that only comes into play if the decision to depool
18 has been made. The intent is to discourage depooling,
19 and what we've done is increased the difficulty of
20 returning to the market after depooling, so it only
21 applies to those producers who have been depooled. It
22 does not apply to continuing producers under this
23 market, or continuing producers under any other
24 Federal Milk Market Order.

25 Q. But you do agree that the only other --

1 the only place where they've got that delivery
2 requirement is in a very high utilization Order, for
3 any purpose?

4 A. (By Mr. Christ) This is Paul Christ,
5 and that's right, and the reason, as I understand it,
6 that they have such high delivery requirements is that
7 they need to demonstrate regularly for all the
8 producers that that milk is available for fluid use,
9 and our proposal would say that we need to demonstrate
10 for the producers who would depool, that the milk is
11 available for fluid before they get back into the
12 pool.

13 Q. Okay. The 115 percent requirement in
14 the repooling limit, in one of the proposals, which
15 number is that, I forgot?

16 A. (By Mr. Christ) Proposal 5.

17 Q. I know you've both been here and heard
18 Dennis Tonak's testimony with respect to the 125
19 percent similar provision in Proposal 2 and how that
20 was derived, including the fact that the ratio of days
21 in the months of February and March, for instance, is
22 111 percent right there, wouldn't -- don't you find
23 115 to be, perhaps, a strained percentage in that
24 context, or how would you accommodate it, justify it
25 in that context?

1 A. (By Mr. Kinser) In Mr. Tonak's
2 testimony, he referred repeatedly to Exhibit 9, which
3 was the Mid-West Group's request to the Market
4 Administrator, Table 9 and Table 10.

5 Q. Yes.

6 A. (By Mr. Kinser) I would use the same
7 justification that Mr. Tonak used, and if you look
8 down through the months, there are no scenarios in
9 Table 9, with the exception of coming out of depooling
10 in which the percentages exceed 115 percent.

11 Q. Well, it's pretty tight, is it not,
12 when you're going from February to March, when the
13 number of days already puts you at 111, and in
14 addition, you've probably got some increase in pounds
15 of milk per cow per day?

16 A. (By Mr. Kinser) History shows that
17 without depooling, it would not have limited anyone's
18 access.

19 Q. In other words, you could have pooled
20 the same amount the next month, you just couldn't have
21 repooled, basically?

22 A. (By Mr. Christ) This is Paul Christ. I
23 believe that it wouldn't create any great difficulty
24 with the proposal. This was calculated on a daily
25 average basis, that the actual percentage is affected

1 by the number of days of the month. We, I think,
2 could accept something that allowed a smooth
3 transitional at the same relative rate.

4 Q. Now Proposal 8, which is outlined on
5 page 9 of your testimony, Paul, and addressed in
6 Evan's testimony as well, can you tell us what your
7 intention is with respect to how that would operate
8 for supply plant units in Order 30?

9 A. (By Mr. Christ) I will try that. This
10 is Paul Christ. This would not allow diversions to be
11 used to qualify a supply plant, or a 9(c) plant, and
12 the idea is to prevent the use of nearby milk to pool
13 milk at a plant that is really not reasonably located
14 relative to the fluid market, because that milk is not
15 technically or economically available to the market,
16 so it's -- we would like to discourage that, because
17 we would like all milk associated with the pool to
18 have demonstrated competence to serve the fluid
19 market.

20 Q. And I take it, then, that that would
21 mean that with supply plant units, I take it you do
22 intend that to apply to supply plant units?

23 A. (By Mr. Christ) This is Paul Christ.
24 Yes, we would prefer not to qualify any plant with
25 diversions, whether it's inside the unit or outside

1 the unit.

2 Q. You heard Dennis Tonak testify that one
3 of the objectives of the group on his behalf he was
4 testifying, in evaluating all the different options
5 for addressing distant milk pooling and depooling,
6 that they attempted to come up with some proposals,
7 some suggestions that would address those problems
8 without requiring massive, if any, changes in the
9 physical organization of the -- or of the operations
10 of the handlers and suppliers in the market, do you
11 remember that testimony?

12 A. (By Mr. Christ) This is Paul Christ. I
13 remember the general discussion, yes.

14 Q. Okay. Now, would it not be the case
15 that the Dean Foods proposals, as opposed to the
16 Mid-West Dairymen's, et al. group of proposals are
17 intended to and would require changes in the
18 day-to-day operations of marketers in Order 30?

19 A. (By Mr. Christ) This is Paul Christ.
20 Yes, that's the case. It would require more activity
21 in the Grade A tank at a pool supply plant. There
22 would be more milk received, and as a result more milk
23 variable for shipment to fluid plants.

24 Q. Okay. One final question. Paul, when
25 you were involved with Land O'Lakes pre-retirement and

1 pre-Reform in 2000, pre-2000, when there were negative
2 PPD's in Order 30 and you were purchasing milk on, as
3 you've described it, on a noncommitted basis, did the
4 negative PPD's affect the availability of milk to your
5 plants?

6 A. (By Mr. Christ) This is Paul Christ.
7 The answer is yes. That there were many times where
8 there was a struggle to get enough milk in our fluid
9 operations, and there was always the opportunity to
10 increase the percentage of Land O'Lakes milk that went
11 into fluid, but that was an expensive and a
12 proposition that would damage our competitiveness, so
13 we tried our best to get others to ship at levels less
14 than ours, but still, more than what they had been
15 doing. Very difficult sometimes.

16 Q. And particularly when you had these
17 negative PPD's?

18 A. (By Mr. Christ) That's correct, and we
19 even had internal disputes about how to use the milk.

20 Q. Just one final question. In terms of
21 -- In this market, in Order 30, there are producer
22 marketing arrangements, agreements with organizations
23 that are known as bargaining co-ops or that type of
24 organization?

25 A. (By Mr. Christ) Common marketing

1 agency.

2 Q. No. I mean bargaining organizations or
3 testing cooperatives. Okay, they are producer
4 contracts, but they're not the sort that you referred
5 to when you talked about there being windows of time
6 to change, advanced notice, a limited time to change
7 and terminate those contracts and move from one market
8 to another, I mean, they worked differently, did they
9 not?

10 A. (By Mr. Christ) This is Paul Christ.
11 That's correct. The bargaining organizations have a
12 different relationship with the producers, they do not
13 take title to the milk.

14 Q. And those producers in this order are
15 able and they do, from time to time, change from one
16 handler to another on a very short notice, perhaps,
17 and without hitting a 30-day window ever, you know,
18 every year or something like that; correct?

19 A. (By Mr. Christ) This is Paul Christ
20 again. Yes, that would be my understanding.

21 Q. And so the dynamics with respect to
22 those particular producers, the dynamics from one
23 handler to another, in terms of their status as a
24 depooled producer, would be even more fragile than for
25 the producer who's got to give a couple months advance

1 notice and there's maybe more opportunity for
2 communication between handlers?

3 A. (By Mr. Christ) This is Paul Christ
4 again. I think that's correct. I don't know what
5 find of contractual relationships exist between
6 producers and, say, a proprietary plant, even though
7 they're represented by a bargaining co-op, but if they
8 do not have the same sorts of contracts, yes, there
9 would be more opportunity for a handler not to be well
10 informed.

11 MR. BESHORE: Thank you.

12 THE COURT: Any questions? Yes, sir.
13 Please state your name for the record.

14 Mr. GULDEN: Neil Gulden with
15 Associated Milk Producers.

16 CROSS-EXAMINATION

17 BY MR. GULDEN:

18 Q. Just a clarification, Paul, on your
19 Proposal No. 8, and excuse me if this was covered
20 already, but did you clarify, are you referring to
21 section 1037(d) or should that be (c)? (d), in the
22 Order there is reserved, and I'm wondering what you
23 might be reserving that for?

24 A. (By Mr. Christ) This is Paul Christ.
25 We have checked both versions of our testimony, and I

1 agree that (d) is not appropriate, because (d) is
2 reserved. If we're relating to a supply plant, those
3 are covered by (c), and supply plant units are covered
4 by (f).

5 Q. Okay, so it should state Section
6 1037(c)(2), is what you're referring to?

7 A. (By Mr. Christ) That's correct.

8 Q. Okay. Thank you. Now, with your
9 language, then, in that -- in your proposal, is there
10 any significance to the word diverted in your second
11 line where it says "Under this paragraph note
12 diverted," relative to the Order language where it
13 says "delivered"?

14 A. (By Mr. Christ) Excuse me. This is
15 Paul Christ. Neil, where is the word delivered that
16 you want me to look at?

17 Q. It's in the section in the Order,
18 current Order language on 7(c)(2), and it would be the
19 third line in 7(c)(2).

20 A. (By Mr. Christ) There is no --
21 MR. ENGLISH: We're going to clarify
22 this section.

23 BY MR. GULDEN:

24 Q. Question, then, so what your proposal
25 says is that -- now, wouldn't the result of your

1 proposal be that Section 9(c) milk, could that not
2 result in milk being shipped further away from a
3 supply plant -- or from a distributing plant, excuse
4 me, to a supply plant and be reshipped, then, back to
5 a distributing plant to accomplish the same thing?

6 A. (By Mr. Christ) This is Paul Christ.
7 That's correct, and you're implying that there could
8 be transportation inefficiencies with that --

9 Q. I'm not implying, there is.

10 A. (By Mr. Christ) There can be, and we're
11 trying to cure a separate evil, and the separate evil
12 is that nearby direct shipped milk, diverted milk is
13 used to qualify milk that is not economically or
14 technically available to the fluid market, and so it's
15 a tradeoff of the lesser of two evils, and I would
16 argue that our proposal is the lesser of two evils.

17 Q. So the fact being that most milk is
18 delivered on a FOB delivered basis, this would cost
19 suppliers significant extra freight to freight this
20 milk back to a distributing plant and then transfer it
21 out of there -- or to a supply plant, and then
22 transfer it out of that supply plant back to the
23 distributing plant?

24 A. (By Mr. Christ) This is Paul Christ
25 again. That's correct if that milk is being used to

1 qualify a supply plant. For example, (9)(c) co-ops
2 can deliver milk direct from farms to a plant, to
3 qualify milk that is not associated with the supply
4 plant, but will be delivered to other medical plants,
5 so it's possible to continue to use it by (9)(c)
6 co-ops, but if you use it to qualify a plant as a
7 supply plant or a co-op plant, this proposal would not
8 permit that.

9 Q. Okay. Then, would your proposal -- so
10 your proposal, then, would not include 1030.13(c),
11 which is in the current language, if you wanted to
12 refer to the current language of 7(c)(2). My question
13 is, would that not allow, if you're not including
14 1030.13(c) in your proposal, would that not allow a
15 proprietary supply plant operator the ability to use
16 direct ship to qualify their supply plant, and at the
17 -- and be just directly opposite of what a cooperative
18 could do?

19 A. (By Mr. Christ) This is Paul Christ.
20 Would you repeat the question again? I think I have
21 the gist of it, but I'm not positive.

22 Q. If you're not including 1030.13(c),
23 would that not allow a proprietary plant the ability
24 to use direct ship to qualify their supply plants?

25 A. (By Mr. Christ) This is Paul Christ.

1 The answer is, no. This particular paragraph, it
2 says, "diverted by a pool plant operator to another
3 pool plant," that's producer milk, but it's not a
4 qualifying shipment unless it's diverted to a pool
5 distributing plant.

6 Now, the (c) does not refer to a
7 qualifying shipment, and our proposal would not allow
8 a diversion to a pool distributing plant to be a
9 qualified shipment. The handler could still make
10 diversions to a pool distributing plant, but that
11 delivery could not be used to qualify a plant.

12 MR. GULDEN: Okay. That's the
13 clarification I needed. Thank you.

14 THE COURT: Very well. I'm getting
15 ready for a break, I think.

16 MR. ENGLISH: Short?

17 THE COURT: Yeah, a very short break,
18 but, yeah, I don't want you to miss -- let's just see.
19 We still have questions?

20 MR. ENGLISH: I do.

21 THE COURT: Let's continue for a
22 moment, and let's see what happens. Any more
23 questions? Are these witnesses excused?

24 MR. ENGLISH: I said I have redirect,
25 but I was waiting to make sure no one else had

1 questions.

2 THE COURT: Do you want to do
3 re-direct?

4 MR. ENGLISH: Well, I don't want to
5 question until I fully try to clarify that issue.

6 THE COURT: Well, how do you want to
7 clarify? Do you want to go off the record?

8 MR. ENGLISH: We could either go off
9 the record, or we could take, like, a very short
10 break, a very short break.

11 THE COURT: Let's take a short
12 five-minute recess.

13 (Recess taken from 3:05 to 3:15 p.m.)

14 THE COURT: Go ahead.

15 REDIRECT EXAMINATION

16 BY MR. ENGLISH:

17 Q. Charles English for Dean Foods. Let's
18 start with the clarification. The easiest way to get
19 at this, Mr. Kinser, if you look at the present
20 language of (c)(2), can you insert one word in
21 language (c)(2) and end up with what you're trying to
22 get at in what is Proposal 8 in Mr. Christ's testimony
23 and Proposal 6 in yours?

24 A. (By Mr. Kinser) This is Evan Kinser,
25 yes. It would be to insert the word "not" after

1 supply plant. "May," insert not, "include."

2 Q. And that was the intent of what you
3 were trying to do when we were drafting that and
4 making a few to many changes in the middle of the
5 night; right?

6 A. (By Mr. Kinser) That is correct.

7 Q. Now, there was a fair amount of
8 discussion with Mr. Beshore about the 10 percent
9 delivery requirement being -- for repooling after milk
10 has been depooled, as somehow being as stringent as
11 high utilization market. 10, sorry, a 10 day
12 requirement. How does it compare to Order 1's
13 existing Producer for Other Markets Provision?

14 A. (By Mr. Christ) This is Paul Christ.
15 I'll try that. I don't have the same knowledge of
16 Order 1 language as, say, Order 30, but my
17 understanding is when a person, a dairy farmer is
18 identified as a dairy farmer for other markets, he
19 cannot get on the pool under any conditions until a
20 certain time, that this seems to be more liberal than
21 that.

22 Q. So there's a savings clause, in
23 essence?

24 A. (By Mr. Christ) This is Paul Christ.
25 This proposal allows a producer to be back on the

1 market and in the pool the first month he chooses --
2 or his handler chooses to return it, and that may not
3 be so in Order No. 1.

4 Q. And this debate about the word "any"
5 and "the" in the Proposals 3 and 4, what is the
6 purpose of that change? What are you trying to get
7 at?

8 A. (By Mr. Kinser) This is Evan Kinser.
9 The concern was that between handlers there could be
10 creative report filing that would allow for producers
11 to be on one handler's report one month, disappear
12 from any report for a while, and then be on another
13 handler report, and the claim could be made that I am
14 not the, as it says, pool plant operate or the
15 cooperative association that did not associate this
16 milk as producer milk.

17 Q. So while you have proposed one solution
18 to that problem, which is to use the word "any" rather
19 than "the"; correct?

20 A. (By Mr. Kinser) That is correct.

21 Q. If the Secretary, in her wisdom,
22 decided to apply some discussion to the Market
23 Administrator to make that evaluation, your main
24 concern is not necessarily one dairy farmer who has
25 not pooled and switches handlers so much as a block of

1 dairy farmers, a block of them; correct?

2 A. (By Mr. Kinser) That is correct.

3 Q. One other question. There was some
4 questions by Mr. Vetne about the ability of Class II
5 plants that are part of units to not be in the pool
6 and somehow comparing that to supply plants. Is there
7 a difference in the mechanism in which they can choose
8 to pool and not pool?

9 A. (By Mr. Kinser) In order to form a
10 distributing plant unit, the notice has to be filed
11 with the Market Administrator's Office in advance, so
12 once that is filed, then all that milk received within
13 that, and it would have to be pooled, Class III
14 handlers can -- are filing their reports after the
15 month and make a decision whether or not to file them
16 at pool.

17 Q. So, for instance, a Class II operation
18 that wishes to be in a unit or not in a unit would,
19 for the month of April, this year when we had
20 depooling, have to make that decision in March,
21 whereas a Class III operation would have the full
22 opportunity of knowing what happened and choose to do
23 it in May?

24 A. (By Mr. Kinser) That is correct.

25 MR. ENGLISH: That's all the questions

1 I have.

2 THE COURT: Fine. Other questions?

3 Thank you both very much.

4 MR. ENGLISH: I thank everybody.

5 THE COURT: And we have another
6 witness.

7 MARY LEDMAN,
8 after having been first duly sworn by
9 the Court says under oath as follows:

10 ***

11

12 MS. YOVIENE: Your Honor, my name is
13 Wendy Yoviene. I would like to enter my appearance
14 for Dean Foods.

15 THE COURT: Very well.

16 MS. YOVIENE: Has the witness been
17 sworn?

18 THE COURT: Yes, she has, and we're
19 marking her statement as Exhibit 34.

20 (Whereupon, Exhibit No. 34 was
21 marked for identification.)

22 DIRECT-EXAMINATION

23 BY MS. YOVIENE:

24 Q. Ms. Ledman, if you would please read
25 the first paragraph of your statement through the

1 bullet points and then stop there for a moment.

2 A. My name is Mary Keough Ledman. I
3 reside at 1642 Old Barn Circle Libertyville, Illinois
4 60048. I am an agricultural economist that provides
5 consultation to the dairy industry. My previous
6 public service includes employment with the USDA's
7 Federal Order 30, Glen Ellyn, Illinois, and the
8 Foreign Agricultural Service and the National
9 Agricultural Statistic Service in Washington, D.C. My
10 private sector experience includes: Manager of Dairy
11 Economics for Kraft Foods and Director of Materials
12 Planning for Stella Foods. For the past ten years I
13 have been employed by Keough Ledman Associates, Inc.,
14 a dairy economic consulting firm that provides:
15 Monthly dairy product and milk price forecasting;
16 economic, financial, and policy analysis; dairy
17 product and milk sourcing strategies; domestic and
18 international market information; and expert witness
19 testimony.

20 Q. Now, would you please briefly describe
21 your educational background.

22 A. Yes. I grew up on a 160 acre, 50 cow
23 dairy farm in Southern Wisconsin. I attended the
24 University of Wisconsin, Platteville, for a year before
25 transferring to Texas A&M. I have an Under-grad in

1 Agricultural Journalism and a Master's in Agricultural
2 Economics from Texas A&M. My master's thesis was on
3 Alternatives to the old Minnesota/Wisconsin Milk Price
4 Dairy, and later I calculated the Minnesota/Wisconsin
5 Milk Price Dairy for the U.S. Department of
6 Agriculture.

7 Q. And have you testified before in a
8 Federal Milk Order hearing as an expert witness?

9 A. Yes, I have.

10 Q. How many times, approximately?

11 A. More than five and less than ten, I
12 would say.

13 Q. And is your educational background and
14 this work experience contained in your curriculum
15 vitae?

16 A. Yes, it is.

17 Q. And is your curriculum vitae attached
18 to your testimony?

19 A. Yes, it is. It is attached as Appendix
20 A.

21 MS. YOVIENE: At this time, Your Honor,
22 I would like to move the admission of Mary Ledman as
23 an expert in dairy economics and marketing.

24 THE COURT: I presume there's no
25 objections. You're so considered and will be treated.

1 THE WITNESS: Thank you.

2 MS. YOVIENE: Your Honor, before Ms.
3 Ledman starts further testimony, I'd like to premark
4 two additional exhibits. At the back of her testimony
5 you'll see a cover page, it says, "Exhibit Blank,
6 which I presume it could be premarked as an Exhibit
7 35?

8 THE COURT: Would you like that 35?
9 Okay.

10 MS. YOVIENE: And that is a Hoard's
11 Dairyman article, and I'd like to ask Ms. Ledman to
12 authenticate it right now, because she will be
13 referencing it in her testimony, and then the next
14 exhibit is a compilation of USDA data that I would
15 like to have premarked as Exhibit 36?

16 THE COURT: Fine.

17 (Whereupon, Exhibit Nos. 35 and
18 36 were marked for
19 identification.)

20 BY MS. YOVIENE:

21 Q. Ms. Ledman, can you just describe
22 what's been premarked as Exhibit 35, what the document
23 is.

24 A. Yes, it is. This is a Hoard's Dairyman
25 article that I submitted to Hoards in September of

1 2002 that showed up in their Milk Check Outlook column
2 in which I was describing the unpredictability of
3 PPD's and how that occurs.

4 Q. Do you still stand by the views that
5 are articulated in this document?

6 A. I do.

7 Q. And let's turn to what has been marked
8 as Exhibit 36. Would you please describe what these
9 documents are.

10 A. These documents are USDA documents that
11 I've used in the course of my work. The retail prices
12 for whole milk and 2 percent milk as collected by AMS,
13 the announced cooperative Class I prices in selected
14 cities, January through June of this year. That's
15 published in Dairy Market News about mid-month, and
16 the mailbox prices, also as published in Dairy Market
17 News.

18 Q. Just for the record, it looks like you
19 also have the announced cooperative Class I prices for
20 July of 2004?

21 A. Okay. Correct. July and August.

22 Q. Okay. Thank you. Now, Ms. Ledman, if
23 you would please proceed with reading your testimony.

24 A. Thank you. I appear here today on
25 behalf of Dean Foods in support of Proposal No. 3 and

1 closing the depooling loopholes in the Federal Orders.

2 My interest in the economic impacts of
3 liberal pool regulations is not new. In September of
4 2002, Hoard's Dairyman, Exhibit 35, an article was
5 published that I wrote that outlined how liberal
6 depooling contributed to the unpredictability of the
7 producer price differential. Prior to 2002, the more
8 egregious depooling was done by the end users of Class
9 II and Class IV milk. The concerns of liberal
10 depooling regulations became more in vogue in 2003 and
11 2004 when Class III end users, and by far the largest
12 volume of milk associated with the pool, jumped ship.
13 It is my opinion that liberal pooling, regardless of
14 class, undermines orderly marketing and the ability of
15 all producers to share equally in the pool revenue.
16 These are two of the early premises of the Federal
17 Milk Marketing Orders.

18 When asked to describe disorderly
19 marketing, many joke, "I can't describe it, but I'll
20 know it when I see it." Well, folks, I think that
21 we've all seen disorderly marketing of different
22 magnitudes since the implementation of the Federal
23 Order Reform in 2000. That is not to say that these
24 situations did not occur prior to 2000. However,
25 several factors included in Federal Order Reform have

1 led to increased disorderly marketing. Those factors
2 include:

3 The higher of setting the Class I
4 mover; the use of NASS, National Agricultural
5 Statistical Service, dairy product prices in tandem
6 with advanced pricing; and the easy entry and exit to
7 Federal Order pools, i.e., liberal pooling
8 regulations.

9 Since we are only skinning one of those
10 cats today, I'll stick to the liberal pooling
11 regulations.

12 Historically, the concept of pooling
13 within the Federal Order was designed for all
14 producers to share equally in the pool while the
15 system of classified pricing ensured that all Grade A
16 milk was utilized in the highest valued class.
17 Unfortunately, neither are true today.

18 The system worked well when there was
19 just two or even three classes of milk and when Class
20 I utilization dominated the markets. However,
21 increased U.S. milk production in tandem with lower
22 per capita milk consumption has resulted in greater
23 manufacturing utilization and has increased the
24 incentive for manufacturers to jump in and out of the
25 pool. Furthermore, the ability to depool milk

1 provides a disincentive to move milk to its highest
2 valued use. An excellent example of this occurred in
3 November of 2000.

4 In November 2000, the Federal Order
5 announced Class III and IV milk prices were \$8.57 and
6 \$13 per hundredweight respectively. The blend price
7 for Federal Order 30 was \$10. If the classified
8 system truly moved milk to its highest value use,
9 Class III manufacturers would sell their milk to
10 butter-powder plants. Even if the Class III
11 manufacturer received the blend price of \$10 for its
12 milk, it would seem that the plant would be receiving
13 \$1.43 per hundredweight more for the milk, rather than
14 putting it into cheese production.

15 In the real world, the cheese
16 manufacturer is indifferent to selling its milk to the
17 butter-power plant, because it will draw the
18 difference between the blend price and the Class III
19 price to pay its producers. On the other hand,
20 selling the milk to the Class IV manufacturer that
21 depools the milk will place the cheese manufacturer at
22 a competitive disadvantage in the country procuring
23 milk from dairy producers. Since the Class IV
24 manufacturer depools its milk, it could pay its
25 patrons \$12 bucks -- \$12 per hundredweight. The

1 patrons would be better off by \$12 per hundredweight
2 versus the blend price, and the manufacturer could
3 pocket the remaining \$1 per hundredweight for other
4 uses.

5 Q. Mary, let me stop you right there.
6 Okay. In this last sentence, you just said, the
7 patrons would be better off by \$12 a hundredweight,
8 did you mean \$2 a hundredweight?

9 A. I'm sorry, the patrons would be better
10 off by \$2 a hundredweight versus the blend price.
11 That would be a \$12 producer payment -- or milk check
12 of \$12 compared to a \$10 blend price, sorry. Thank
13 you.

14 Q. Please continue.

15 A. Still, the other producers and
16 manufacturers in the marketing area lose as do
17 consumers. Producers receive a lower blend price due
18 to the depooling of the higher class prices of milk.
19 Cheese manufacturers within the marketing area face
20 greater competition procuring milk, and have no
21 incentive to sell milk to the Class IV manufacturer
22 that does not pool the milk. The disincentive to sell
23 milk to the Class IV manufacturers result in less
24 butter production, more volatile butter prices, and
25 higher butterfat costs to consumers. The Chicago

1 Mercantile Exchange, CME, Grade Double A butter price
2 averaged \$1.15 per pound in October of 2000, followed
3 by a \$1.65 per pound in November and \$1.37 per pound
4 in December, according to USDA's Dairy Market News
5 Monthly Products Price Summary 2000.

6 As illustrated by the above example,
7 the ability to depool does not promote orderly
8 marketing or equitable sharing of pool revenue among
9 dairy producers, two of the early goals of the Federal
10 Orders. How much money is left on the table due to
11 depooling? In November 2000, it is estimated that the
12 uniform blend price and in the PPD in the Upper
13 Midwest Order would have been a dime higher if all the
14 Class II and IV milk would have been pooled. That
15 would have added an additional \$2.3 million to
16 producers in that marketing area.

17 The November 2000 example could be
18 considered by some a minor irritant compared to the
19 virtual all-out evacuation of Class III milk from the
20 pool during 2004. The variation in the volume of
21 Class II and IV milk pooled on the Order swings by
22 millions of pounds, not billions of pounds. According
23 to Table 2E, producer milk by class, January 2000 to
24 June of 2004, as prepared by the Market
25 Administrator's Office, the volume of Class III milk

1 on the pool varied from 1.5 billion pounds and
2 accounting for 68.9 percent of the pool in January of
3 2004 to just 11 million pounds and 1.8 percent of the
4 pool in April of 2004. It is estimated that the
5 uniform blend price and the PPD in the Upper Midwest
6 Order would have been \$2.97 per hundredweight higher,
7 albeit still negative at \$1.12 per hundredweight, if
8 all the Class III milk had been pooled in April 2004.

9 It's my opinion that the large shifts
10 in the monthly volume of milk pooled on the Federal
11 Orders results in disorderly marketing and prevents
12 dairy producers from sharing equally in the value of
13 classified pricing. Using data from 2E, Producer Milk
14 by Class, January 2000 to June 2004, as prepared by
15 the Market Administrator's Office, I analyzed the
16 monthly variation in pooled milk by class. Table 1.
17 Since Class I milk is the only class of milk that must
18 be pooled, it comes as no surprise that the least
19 amount of variation in the volume of milk occurs in
20 Class I.

21 You'll note that the annual average,
22 and this is, for example, in 2000, 15 percent, that's
23 the difference in the monthly Class I milk pooled in
24 the highest month versus the lowest month, adjusted
25 for 30 day calendar months, days, so we don't have to

1 worry about a 28 to a 31 day comparison here. This is
2 all months adjusted to a 30-day calendar basis, so
3 you've got 15 to, say, 19 percent difference in the
4 volume of the highest month to the lowest month in
5 these four years, really not a large difference. The
6 more dramatic swings can be seen in Class II and Class
7 IV and then most recently here with Class III.

8 When asked to describe pooling, I
9 compare it to a poker game. First, if you are
10 representing a Class II, III, or IV manufacturer, you
11 analyze your cards, in this case the classified
12 prices, and estimate a blend price. If it appears
13 that your company has more to win than lose, you ante
14 up and join the pool and share in the revenue pot. If
15 it appears that your company has more to lose than
16 win, that is, it will pay more into the pool than it
17 draws out, the company just folds and waits for the
18 next hand. The only exception is for the Class I
19 handler, it has to ante up for every month, good or
20 bad, and the Federal Order system deals a new hand
21 each and every month to play.

22 Consumer voices are often silent in
23 these proceedings. As a consumer who buys between
24 five and six gallons of milk a week, I notice milk
25 prices. It's also been my experience this past summer

1 that many of my neighbors, who are aware of my
2 occupation, have asked me, "When are milk prices
3 coming down," or "Why are our milk prices higher than
4 Michigan or even Florida?"

5 I recently reviewed USDA retail price
6 data as collected by AMS to provide comments on a
7 retail milk pricing story. It was then that I
8 discovered that the retail milk prices for whole milk
9 and 2 percent in both the Milwaukee and Chicago
10 markets increased more than the farm levels increased.
11 That is, the Class I mover price increase from April
12 through May 2004 adjusted for milk composition, and
13 what I mean by that is I take that class I mover,
14 which is announced with a per hundredweight skim value
15 and per pound butterfat and put them together for a
16 whole milk at 3.25 percent butterfat and skim value
17 and what was the other one here, 2 percent butterfat
18 and 98 percent skim. When you do that, when you
19 adjust for the 2 percent milk composition, the farm
20 level increase was 71 cents per gallon while the whole
21 milk price increased almost 78 cents per gallon. The
22 average 2 percent retail milk price in the Milwaukee
23 market increased 97 cents per gallon while the Chicago
24 price increase was 80 cents per gallon. The retail
25 whole milk prices also posted similar gains.

1 Before jumping to the conclusion that
2 some company was enhancing retail milk prices, I
3 reviewed the announced cooperative Class I prices in
4 selected cities as published in Dairy Market News.
5 These data illustrate that the co-op over-order
6 premium in the Chicago and Milwaukee markets increased
7 from \$1.80 per hundredweight in March to \$2.25 in
8 April, to \$3.72 in May. That equates to a 16.5 cent
9 per gallon increase in the raw material costs due to
10 the higher over-order premium from March to May.

11 In fact, the three major cities within
12 the Order 30 posted the highest cooperative over-order
13 premiums, averaging more than \$3 a hundredweight from
14 April through August of 2003. The next highest
15 cooperative over-order premium was for Miami at \$2.10
16 per hundredweight.

17 As a result of the highest over-order
18 premiums, the retail of 2 percent milk prices in
19 Milwaukee and Chicago increased 36 percent and 23
20 percent more than the average retail milk price
21 increase of 62 cents per gallon from April through May
22 of 2004. Figures 1 and 2 illustrate the dramatic
23 increase in retail milk prices from January through
24 June of 2004.

25 What caused the cooperative over-order

1 premium to rise to the highest level in the Upper
2 Midwest during the second quarter of 2004? The simple
3 answer is competition for milk. Record high Chicago
4 Mercantile Exchange cheese prices, an extremely
5 favorable milk price to cheese price relationship, and
6 the ability to depool kept all the milk in the cheese
7 vats, particularly in April.

8 The cheese to milk price relationship,
9 sometimes referred to as the spread or margin, is the
10 difference in the Class III milk price compared to the
11 average CME block cheese price times ten, assuming a
12 10 pound yield of cheese from 100 pounds of milk. A
13 typical spread is near 8 cents per pound. Table 2
14 illustrates that the spread was exceptional in April,
15 but was actually negative in May. According to USDA,
16 the mailbox milk price for May in Wisconsin was \$20.39
17 per hundredweight, within 3 cents of the theoretical
18 value of milk used to manufacture cheese, but 22 cents
19 less than the announced Class III milk price.

20 The Class III milk price sets the
21 competitive stage in Order 30. In April 2004, when
22 the Class III milk price exceeded the blend by \$4.11
23 per hundredweight, class I users anted up \$2.25 more
24 for milk followed by a bump to \$3.72 per hundredweight
25 the next month. Despite the positive 30 cent per

1 hundredweight draw from the June pool, and a \$3.45
2 higher Class I mover versus the Class III price, the
3 cooperative over-order premium really hasn't budged
4 and neither have my retail milk prices.

5 "More negative PPD's to come." As part
6 of my consulting business, I forecast the Class I, II,
7 III, and IV prices for the next twelve months. It is
8 my opinion that Order 30 is likely to face another
9 negative PPD situation in September of 2004. The key
10 driver of this situation is the rising CME cheese
11 prices. The advanced Class I milk price announced
12 this Friday, August 21st, is likely to be \$13.99 per
13 hundredweight. Assuming the block cheese price is
14 \$1.60 for the remainder of August and September, and
15 today the block cheese price increased to \$1.61,
16 barrel price \$1.58, and I believe the butter price
17 actually fell 7 cents to about \$1.53. In any case, I
18 have estimated that the Class III price for September
19 will be \$14.89. Further, the Class II and IV prices
20 are forecast at \$13.01 and \$12.35. They could be a
21 little high now, given the decrease in the butter
22 price. Table 4 illustrates that based upon my
23 estimates, that the estimated blend price, including
24 Class III milk, would be near \$14.85.

25 Given that the Class III price is

1 estimated at \$14.89, plus the additional Market
2 Administrator's fee of a nickel, it is very likely
3 that Class III milk will be depooled from the market.

4 Table 5 illustrates that if the Class
5 III milk is depooled in September 2004, the estimated
6 blend price falls by 40 cents per hundredweight to
7 \$14.45. The revenue to dairy producers serving the
8 market is lower. However, the competitive landscape
9 in the Upper Midwest will likely force Class I, II,
10 and IV handles to cough up an additional 40 cents a
11 hundredweight to match milk prices set my cheese
12 manufacturers that have jumped the pool.

13 In conclusion, it is my opinion that
14 the Federal Order pricing and pooling practices failed
15 to ensure that milk flows to the highest value use.
16 The liberal pooling regulations promote disorderly
17 marketing and provide free-riders the opportunity to
18 play the system. Meanwhile, consumers of fluid milk,
19 who live in what is referred to as a surplus milk
20 area, pay some of the highest retail prices for milk
21 in the United States.

22 BY MS. YOVIENE:

23 Q. Thank you, Ms. Ledman. Just a couple
24 of follow-up questions on your testimony. During your
25 testimony you were talking about the swings in volume

1 of classes of milk on the pool. If you could
2 briefly -- you did it very generally and you were
3 referring to Table 1 when you spoke about Class I
4 varying from 15 to 19 percent with an average of 12
5 percent. If you could just summarize briefly the
6 swings in the Class III volumes.

7 A. Okay. Just a correction there. The 12
8 percent is the volume year to date, 2004, it's not an
9 average. What that shows here, in particular in 2003
10 and 2004 that virtually there were months where you
11 had almost all of the Class III milk depooled, and
12 from 1.5 billion pounds being pooled, then followed, I
13 believe in April with just 11 million pounds. That's
14 what the 98 percent would be referring to.

15 Earlier in 2000 -- In the early years
16 2000 and 2001, we saw more depooling, perhaps, on the
17 Class II and Class IV, driven in part by a higher
18 support price for nonfat at that time. Nevertheless,
19 they are also in and out of the pool, with volumes
20 easily three times that of the fluid market.

21 Q. And then when you were talking about
22 over-order prices, you referenced retail prices, and I
23 just want to clear it for the record, the retail
24 prices that you were using, you derived from Exhibit
25 36; is that correct?

1 A. That is correct.

2 Q. And the cooperative over-order premiums
3 you derived from Exhibit 36 as well?

4 A. Yes.

5 Q. Okay. One more question. Do you have
6 an opinion whether USDA should treat this problem that
7 you've just been describing as an emergency?

8 A. Yes, I do. Clearly this is disruptive.
9 Clearly the volatility in dairy product prices that
10 are used to set the milk prices is not going to go
11 away. You know, we just had the negative PPD's here
12 in April, May, and already in September, they're going
13 to be back on our doorstep, so, yes, I don't think
14 this is something that should take a year or two years
15 to solve.

16 MS. YOVIENE: Ms. Ledman, is now
17 available for cross-examination.

18 THE COURT: Very well. Questions? Mr.
19 Vetne?

20 MS. YOVIENE: May I move the admission
21 of exhibits?

22 THE COURT: Yes, 34, 35, and 36 are
23 received.

24 (Whereupon Exhibit Nos. 34, 35, and 36 were
25 offered and received into evidence.)

1 MS. YOVIENE: Thank you.

2 CROSS-EXAMINATION

3 BY MR. VETNE:

4 Q. Good afternoon, Ms. Ledman.

5 A. Good afternoon, Mr. Vetne.

6 Q. I don't think we've ever said that to
7 each other before.

8 A. I don't think so either.

9 Q. The projections that you make for some
10 modest inversion of prices for September, is that any
11 different in degree from price inversions that the
12 industry has periodically experienced over the last 20
13 years?

14 A. The price inversions that the industry
15 experienced in May were the highest ever.

16 Q. That wasn't my question. I'm talking
17 about the projections.

18 A. The projections?

19 Q. For September.

20 A. It would be higher than average when
21 you consider that on average there isn't a price
22 inversion.

23 Q. Okay. Let me go back a little further.
24 Are you aware that there have been price inversions in
25 depooling for 20 years, perhaps more, in this market?

1 A. Yes, but that doesn't make it right.

2 Q. Okay, and during the course of that 20
3 years, there have been inversions as great or greater
4 than what you projected for September?

5 A. Correct.

6 Q. When you say that you think this is an
7 emergency, do you think -- it be correct to say that
8 you think the department ought to act quickly?

9 A. Correct.

10 Q. Okay. Are you aware that in the
11 process that the department uses, emergency doesn't
12 necessarily mean quickly, but it means that -- what it
13 means mostly is that market participants are denied
14 the opportunity to comment and provide feedback on a
15 proposed rule before that rule becomes effective?

16 MS. YOVIENE: Objection. Ms. Ledman --
17 he's mischaracterized, making a characterization that
18 Ms. Ledman doesn't know the rules of the proceedings,
19 and she DOESN'T know that parties can be able to file
20 post-hearing briefs, so she really can't comment on
21 that with more information, and she's not a lawyer.

22 THE COURT: All right, I'll accept that
23 objection. Sustained.

24 MR. VETNE: My question, and I think
25 I'll repeat it, because I don't think the objection is

1 responsible.

2 BY MR. VETNE:

3 Q. My question is, are you aware that the
4 process of emergency for the department means that a
5 rule becomes final before you have the opportunity to
6 comment on the proposed rule to file exceptions to a
7 recommended decision, are you aware of it?

8 A. I am not an expert on the technical
9 differences between an emergency as you've described.
10 I believe the department should -- I believe the
11 department should act on an expedited manner, in an
12 expedited manner on this situation.

13 Q. So if the department could
14 expeditiously provide a recommended decision and allow
15 feedback, that would satisfy that objective?

16 A. Without being too surly, I'm not sure
17 of everything that happened in the past.

18 Q. Okay. Well, I'll represent to you that
19 there was a decision published within 30 days of the
20 hearing back in the 1980s, I haven't seen that much
21 since.

22 A. And I entered in 1989.

23 Q. I infer, and tell me if I'm correct,
24 that you do not specifically advocate any particular
25 proposal?

1 A. Quite honestly, none of them here today
2 are as strict as I would like to see them, so being
3 that the Proposal No. 3 is the one that I'm supporting
4 because that is the strictest one. In my opinion the
5 industry would be better served if they -- everyone
6 announced in December whether or not they were going
7 to be in the pool for the next year. It would help
8 Mr. Kyburz in his budget for the next year. He would
9 know exactly how much milk to be expected in the pool,
10 and it would be transparently obvious to all
11 participants on how to calculate a PPD and estimate it
12 versus a Class III price, if they're trying to do
13 forward contracting, I think it would be a lot of
14 benefit for them.

15 Q. You're talking about the California
16 solution?

17 A. The California solution is a little bit
18 different, because all handlers are in the pool there.
19 It's actually the producers that opt in or out, not a
20 manufacturer, but similar from the standpoint that you
21 make a commitment in December for the next year.

22 Q. If any of the pooled, repool limiting
23 proposals had been in place last spring, would you
24 expect to see that -- would you expect that the
25 reported mailbox price would have been lower than

1 reported in the attachments or the exhibits
2 accompanying your statement?

3 A. I've not done any analysis to be able
4 to comment on that.

5 Q. Do you not believe that some of the
6 overload premiums charged for Class I and II milk were
7 responsive to competitive conditions of some depooled
8 milk?

9 A. Yes.

10 Q. And is it not reasonable to conclude
11 that if all milk had pooled that there wouldn't have
12 been over -- that degree of additional over-order
13 premiums?

14 A. That is quite possible.

15 Q. And that if there weren't that degree
16 of over-order premiums, then the average price to
17 farmers as reflected in the mailbox price reported
18 would be lower?

19 A. That's where we may have a disconnect,
20 because the mailbox price, for me in particular,
21 wasn't even as high as the Class III price, and
22 usually you see that mailbox price in excess of the
23 Class III price, so I'm not sure I would go quite to
24 that level of the analysis.

25 Q. Let's come back one step. At least

1 there would have been, if the repool limiting
2 proposals had been in place, there would have been
3 some money that was generated in premiums that would
4 not otherwise have been generated?

5 A. Correct.

6 Q. So you're just not sure whether that
7 money would have gone to producers, is that where we
8 disconnect?

9 A. I think it would depend on the month,
10 John.

11 Q. Would you agree that the proposals of
12 limiting depooling, I think as characterized in the
13 earlier exhibit by Dr. Jesse, treat a symptom of an
14 underlining problem within the Orders?

15 A. I stated early on in my testimony that
16 I think that there is several contributing factors,
17 the higher of Class I, the NASS dairy product prices,
18 using those in the formula versus the CME has caused a
19 lag in prices and a greater disconnect, but I think
20 there's one difference, and also going to four class
21 systems, is that that spread between III and IV can be
22 very disruptive as well, so while there are several
23 causes or contributors to this depooling situation,
24 yes.

25 Q. Before there was -- there were two

1 classes, and, in fact, before III was subdivided into
2 III and IV, milk for competitive reasons would tend to
3 go to the highest value class; is that correct?

4 A. Correct.

5 Q. And to marketplace sponsors, milk would
6 tend to seek out between two products in the same
7 class, the highest return?

8 A. Yes.

9 Q. And the Order no longer -- well, the
10 order now makes manufacturers indifferent to those
11 differences?

12 A. As long as the milk is pooled, the
13 order --

14 Q. Within the pool, the normal
15 circumstance is it makes handlers indifferent?

16 A. Correct.

17 Q. And that indifference has exacerbated
18 the spread between those two product prices?

19 A. Correct.

20 Q. You were talking earlier in your
21 testimony concerning some milk that moved from the
22 Northeast to the Mideast when it couldn't have a pool
23 home because of pool restrictions?

24 A. Correct, yes.

25 Q. Would you expect that if there is a

1 problem in -- you say there's a problem, I'll accept
2 that for this purpose. If there's a solution to this
3 problem that's limited to the Upper Midwest, that
4 handlers, particularly those that have cross-market
5 operations, will respond similarly as we've already
6 observed between Order 33 and Order 1?

7 A. I'm not sure if I'm going to answer
8 your question the way that you posed it, but I believe
9 that depooling is a problem across all Federal Orders
10 to some degree or another, and that it should be
11 addressed as a multi-Order or a national issue rather
12 than piecemeal.

13 Q. Would you agree that it would create
14 disorder to do it on a local basis, and if -- yeah,
15 let me just stop there -- creates disorder in adjacent
16 markets?

17 A. You know, I think it's just a step in
18 the right direction, and somebody's got to take that
19 step, and once that step occurs here, it will, barring
20 that we don't have a national hearing, yes, there will
21 some pain, and I'm sure there will be some disorderly
22 marketing and chaos, but somebody has to take the
23 leadership in this industry and make the right step,
24 and I think the others will follow.

25 Q. Are you aware that the Secretary has

1 the authority to take -- to initiate proposals and to
2 call a national hearing?

3 A. Not specifically, but it doesn't
4 surprise me either.

5 Q. By taking the first step, are you
6 assuming that other steps will inevitably follow so
7 that the whole nation is uniform in its ability to
8 restrict depooling and repooling?

9 A. I think so.

10 Q. In your opinion, would that be the best
11 result?

12 A. That's an open question.

13 Q. Well, it is, and I guess let me for a
14 best result, let's make a comparison. Either if it's
15 only done in some, let's say if you take states that
16 have 11 or maybe 10 steps left, and you only take 5,
17 that would leave some severe problems, wouldn't it?

18 A. You can make a case that in Orders with
19 very high Class I utilization, the southeast, Florida,
20 that maybe there's not the pressing need there, but
21 definitely in Orders that have a higher manufacturing
22 use, and in a Class, you know, III, IV type of spread,
23 disparity within those regions, there's a greater need
24 for it.

25 Q. And if it is not done in all of those?

1 A. It would make my job easier if it was
2 applied equally across all Orders, because part of my
3 job is, what I call teaching adult education in the
4 dairy industry, how milk is priced, Dairy 101, and I
5 have a high level of frustration when I'm teaching
6 this and I show how a blend price is put together, and
7 then the slide goes, but oops, not everybody has to
8 play by this rule, and so, and this is an industry
9 where our pricing is complicated, there are Wall
10 Street Journals articles stating how complicated this
11 is, and it really doesn't need to be as complicated as
12 we're making, so, you know, the simple answer is
13 uniform provisions on all Orders such as my
14 suggestion, you decide on December 1st whether you're
15 in or out. It's pretty clear-cut, pretty simple.

16 Q. The other two factors, the higher of
17 factor and NASS product prices -- actuality, the
18 second bullet line on page 2, is really two points,
19 isn't it. The use of NASS is one point and advanced
20 prices for Class I is also another point?

21 A. Correct.

22 Q. Addressing those could also remove all
23 economic incentive to depool, couldn't it?

24 A. I still think you're going to have a
25 Class III forge, but it would be a step in the right

1 direction.

2 Q. And that would occur, perhaps, mostly
3 in a market like the Pacific Northwest where there's a
4 lot of Class IV?

5 A. Correct.

6 MR. VETNE: Thank you.

7 THE COURT: In as much as you teach
8 Dairy 101 for people that don't understand Milk
9 Orders, I'd like a course right now on a couple of
10 things. I have problems understanding how the Class
11 III or IV price can be higher than the blend price.
12 Would you explain that just a little bit, how it's --
13 how you set the Class IV and III prices and the blend
14 price.

15 THE WITNESS: Okay.

16 THE COURT: So that there could be a
17 variation. I go back to Minnesota/Wisconsin price
18 series, and I didn't follow through on the changes
19 that have been made.

20 THE WITNESS: If you would turn to page
21 7 of my testimony, I have a Table 4, the blend price
22 is the weighted average --

23 THE COURT: Page 7?

24 THE WITNESS: Yes.

25 THE COURT: I'm not just doing this for

1 myself. I want to make the record clear, because it's
2 puzzling, I think. Go ahead.

3 THE WITNESS: The blend price is
4 weighted average of the value of the milk that's in
5 the pool.

6 THE COURT: Right.

7 THE WITNESS: Okay. So Table 4
8 illustrates that if the September Class I price is
9 \$15.79, and 20 percent of the milk in the pool is at
10 Class I, then the Class I contributes \$3.16 to the
11 blend price. Likewise, if the Class II price was
12 \$13.01, and 5 percent of milk in the pool was used as
13 Class II, its contribution is 65 cents. The Class III
14 price is estimated at \$14.89 cents, and if all of that
15 is pooled, that accounts for, then, 70 percent of the
16 milk in the pool, and a blend contribution of \$10.42.
17 the estimate for the Class IV milk price is \$12.35
18 and, 5 percent of milk in the pool is estimated to be
19 used in Class IV. You add up all those numbers and
20 you get a market wide average price of \$14.85. In
21 this case the Class III price is 4 cents higher, and
22 so, and in addition it costs about 5 cents for the
23 Market Administrator's fee, so if I'm going to be a
24 part of the pool, it would actually cost me money in a
25 Class III -- assuming that I have a cheese plant --

1 THE COURT: How is a Class III price
2 higher than a Class IV price?

3 THE WITNESS: Okay. The Class III
4 price is the cheese milk price, and it is derived from
5 the National Agricultural Statistical Survey of 40
6 pound block in 500 pound barrel price, multiplied by a
7 yield factor, subtracting a manufacturing cost, so
8 it's the value of milk that's used in cheese.
9 Meanwhile, the value of milk that's used in Class IV
10 is for butter-powder, and so in this case the
11 butter-powder value is less because the value of
12 butter and nonfat dry milk, you take the NASS prices
13 for butter and nonfat dry milk minus the manufacturing
14 cost, multiplied by a yield factor, their value only
15 adds up to \$12.35. Now, there have been times, like
16 in November of 2000, where the butter-powder value,
17 because the butter market went up to \$1.80 and the
18 nonfat dry milk price was a \$1 a pound, that we ended
19 up with a Class IV price of \$4.13.

20 THE COURT: Why is the Class -- do you
21 know -- well, I probably shouldn't ask you this, but
22 apparently the Class II price, then, is derived by
23 adding something onto Class IV, which means that it's
24 not necessarily higher than Class III, as one would
25 suspect.

1 THE WITNESS: Exactly. The class II is
2 driven off of really the 70 cent premium off the Class
3 IV price, and there's a little nuance there, but
4 that's good enough for Government work.

5 THE COURT: All right, so does it make
6 sense to have a Class II price that's lower than a
7 Class III price?

8 THE WITNESS: In my opinion, the system
9 would -- it would be easier if it was -- prior to
10 2000, everything was driven off the Class III price,
11 okay, and Class II was a 30 cent premium above Class
12 III, but Class IV is butter and power, Class II
13 products you spoon, like yogurt and ice cream, and so
14 theoretically, you can use the ingredients that go
15 into making butter and power to make any Class II
16 items, okay, you can't take cheese and make ice cream
17 out of it, so there is a logical rationale, but I'd be
18 remiss to say that probably the biggest rationale is
19 that 21 percent of the nation's milk supply is
20 produced in California. They have a four class
21 pricing system, and much of what we adopted after 2000
22 was to be -- looks a little bit more like California,
23 than what we were before 2000, but it is a challenge
24 to the system.

25 THE COURT: I think that's it. Thank

1 you so much. Any more questions?

2 THE WITNESS: If -- But where you
3 really see the problem is when you have Class -- in
4 table 5 -- when you have Class III milk, then, not
5 pooled, then you've got, you know, 50 percent of your
6 milk is Class I, and now Class I is the major
7 component in that blend price. Whereas, I estimate
8 that only about 10 percent of that Class III milk is
9 going to be pooled.

10 THE COURT: You wouldn't want to have
11 some provision that made Class I milk necessarily
12 higher than Class III, which is the way it used to be?

13 THE WITNESS: Well, even under -- prior
14 to 2000, we did have times when the Class III was
15 still higher than the class I.

16 THE COURT: I heard some testimony here
17 earlier about there being a difference in the date
18 that certain prices are announced. I gather that --
19 can you explain that? What the difference is in
20 announcing --

21 THE WITNESS: The Class I milk price,
22 and the advanced Class II skim price is announced by
23 the 23rd of the month, and it's the Friday before the
24 23rd, if the 23rd is a Friday, it's on the 23rd, but I
25 believe Friday's the 21st this month, and so that will

1 be the Class I price for September, but a cheese
2 manufacturer will not know their milk price for
3 September until approximately October 5th.

4 THE COURT: Prices for milk may have
5 risen between September and October?

6 THE WITNESS: And they will, given the
7 strengthening in the cheese market.

8 THE COURT: Okay. Thank you. Yes,
9 sir. Do you want to come forward, you've got to use
10 the microphone and give your name.

11 THE WITNESS: My name is Michael Brown
12 with Northwest Dairy Association.

13 CROSS-EXAMINATION

14 BY MR. BROWN:

15 Q. And Mary, I want to thank you as usual
16 for tying real market consequences to what happens
17 with regulations. I've known Mary for many years, and
18 she's always been helpful in that way, and I just have
19 actually a couple of clarifications and a couple of
20 extensions of things that you've either written or
21 that you've commented on, and one of those is some
22 challenges with NASS, and I want to talk specifically
23 a little bit -- ask you how you think that may relate
24 to depooling, and it also may relate to premium issues
25 --

1 MS. YOVIENE: I'm going to say, she
2 actually said she wasn't going to be addressing that
3 in her testimony today, that she's not prepared for
4 it.

5 MR. BROWN: She mentions it in her
6 testimony.

7 MS. YOVIENE: She mentions it, but she
8 says she's not going to address it.

9 THE COURT: Well, let's hear his
10 question, and if it's something she can answer without
11 going off the reservation, we'll let --

12 MR. BROWN: It relates to why it
13 affects how premiums are paid in the market for now.

14 THE COURT: Well, let's HEAR it, and
15 we'll see. Let's hear the question, and we'll see.

16 BY MR. BROWN:

17 Q. My question simply is this, Mary. And,
18 again, would you agree that the NASS price for cheese
19 lags behind the CME price for cheese?

20 A. Yes, I would.

21 Q. Okay. As a result of that, would it be
22 your observation from your experience that the NASS
23 price for Class III milk, as a result, can lag what
24 would be the CME value of cheese for any given month?

25 A. Yes, and I illustrate that in Table 2.

1 Q. Yes, and, again, a good document here,
2 which, frankly, Mary, I will take home and use, so as
3 a result of that, when the market is rising for
4 cheese, if any market is rising for cheese, is it
5 possible, then, for cheese plants -- first of all, do
6 cheese plants generally tend to price their cheese on
7 CME?

8 A. Yes, they do.

9 Q. Okay, so if the CME market is rising
10 during a given month, the cheese market is rising, is
11 their margin likely also to rise if they're buying
12 milk based on Class III prices because of that lag?

13 A. Yes.

14 Q. Would it also, then, also be true when
15 the cheese market is declining that their margins
16 could get tightened or even go negative, depending on
17 the severity of the decline?

18 A. Yes, and, again, I show that in Table
19 2.

20 Q. Okay, so looking at that, would it be
21 your observation that a cheese plant would be more
22 likely to be able to pay a short-term or incentive, or
23 a higher spot price for milk based on Class III when
24 the marketing is rising, than when the market is even
25 flat?

1 A. That's true, but even taking that a
2 step further, they can only -- they can't afford to do
3 that every month.

4 Q. Yes, that's a good observation. I
5 would agree. Would you also agree that when the CME
6 is declining and NASS, again, is behind, the cheese
7 plants are to (a), will have less cash flow to pay for
8 milk, and (b), may be less apt to pay premiums in a
9 market?

10 A. Correct.

11 Q. Given that, would it be an additional
12 incentive to depool if the numbers line up for a plant
13 because of that NASS decline and because of a forced
14 poor margin in times when CME is declining to even
15 have another incentive to depool?

16 A. I would have to look at what the Class
17 III price would be relative to the blend price to make
18 that decision.

19 Q. Okay. Very good. Just one more
20 question, and do you -- I guess a couple, but again,
21 it just relates -- they relate. The first one is,
22 have you had much opportunity to be familiar with how
23 California prices milk? Just the basics of how it
24 operates?

25 A. Yes.

1 Q. And what cheese price do they use to
2 price their milk?

3 A. The CME 40 pound block price or,
4 actually, and if the 40 pound block price goes below
5 the support price for 40 pound blocks, they will
6 implement or use the support price for 40 pound blocks
7 as a pricing factor in the 4(b) calculation.

8 Q. Because of that, can there be
9 discrepancies for either one of those, between just
10 the relative values over time between CME and
11 California prices, because of the use of NASS versus
12 CME -- I mean, Federal Order California prices?

13 A. Federal Order uses 500 pound blocks,
14 plus 3 cents added to the block -- or excuse me.
15 Federal Order uses a 40 pound block price and a 500
16 pound barrel price, with 3 cents added to the barrel
17 price, and the breakdown is approximately 55 percent
18 barrel cheese and 45 percent block cheese.

19 Q. Last question, finally, and, again,
20 Mary, I really thank you, you've helped clarify some
21 things. From your observation, not even necessarily
22 completely related to this hearing, but from your
23 observation, are there probably other issues on III
24 and IV that need to be considered, whether
25 independently or along the depooling issues?

1 MS. YOVIENE: Objection. It's outside
2 the scope of her testimony.

3 THE COURT: I'll allow that objection.

4 MR. BROWN: Okay, very good. That's
5 all I have. Thank you, Mary. Oh, excuse me, Ms.
6 Ledman.

7 THE COURT: Other questions? Mr. Tosi?

8 CROSS-EXAMINATION

9 BY MR. TOSI:

10 Q. Mary, thank you for appearing today. I
11 appreciate it very much. I just wanted to ask, just
12 with respect to the pricing volatility as being a
13 contributing factor to depooling. In your
14 professional capacity, and in the work that you were
15 doing leading up to the large amount of depooling
16 that's taken place here in 2004, were you able in any
17 way to foresee the rapid run-up, for example, in the
18 cheese price and the magnitude that it is, and then,
19 say, maybe, for example, the relationship between the
20 Class III and Class IV price?

21 A. The short answer is, yes. For example,
22 I put together a monthly forecast by the 10th Of the
23 month, and today I looked at the forecast that I put
24 together for May 8th -- or excuse me, March 8th, and
25 so on March 8TH, I already had for April, an inversion

1 between Class III and Class I, and I think most people
2 in the industry would have had it as well. You have
3 to keep in mind that that Class I price for April was
4 announced by March 17th, and really the data that went
5 into that price was from the last week of February and
6 the first week of March. By mid-March we were at a
7 \$1.80 on cheese, headed to 2 bucks, so we had a great
8 amount of certainty in March that the Class III price
9 for April was going to be higher than the Class I. I
10 did not have it to the magnitude that it was. I think
11 it was, you know, \$1.50, 2 bucks difference, but not
12 --

13 Q. But you had the direction --

14 A. The direction, you know, and that's a
15 good thing to get right in this industry.

16 Q. Okay, and I also appreciate that you
17 limited your testimony to deal with the issues that
18 the industry is facing with respect to the pooling
19 standards of the Order, pooling/depooling, joining the
20 pool back, and this may be a chicken and egg sort of
21 question, but to the extent that there are a lot of
22 things that are interrelated here, for the three
23 things that you mentioned of what you see as being one
24 of the faults of Federal Order Reform and not having a
25 regulatory system that's able to provide for orderly

1 marketing in the way that you think that it should, if
2 you were to rate which problem you think is the most
3 severe or to the extent that the Secretary decides the
4 priority in which to consider some of these other
5 issues, how would you give a priority to addressing
6 the problems? What advice would you give her?

7 A. Well, we're already addressing
8 depooling, okay. I'd like to see all prices announced
9 on the same day.

10 Q. And in that regard, you wouldn't care
11 if it were all retrospective pricing, like we have
12 with II, III or IV, or you would like to see, for
13 example, all prices announced in advance, like we
14 currently do in Class I?

15 A. I think we'll get more political
16 support if they're all done advanced, and as some wise
17 person in the dairy industry said, and it has to be
18 when the markets are calm. I would also like to get
19 rid of the higher of for Class of milk, Class I and
20 all others, and there's a great amount of debate in
21 this industry whether Class I handlers should have the
22 ability to forward contract, should Class III handlers
23 have the ability to forward contract. The USDA
24 effectively takes themselves out of the equation of
25 that political quagmire by setting everything off

1 Class III, and let it be their decision whether or not
2 to forward contract or use the future's market, and I
3 think it offers a much more transparent market
4 solution to some of the political debates that we get
5 into as to who should have the ability to forward
6 contract versus who shouldn't --

7 MS. YOVIENE: I have to object at this
8 point.

9 THE WITNESS: I'm sorry.

10 MS. YOVIENE: Ms. Ledman, it's not
11 within the scope of your testimony.

12 THE WITNESS: No, it's not. I'm sorry.

13 MS. YOVIENE: I suspected, Ms. Ledman.

14 THE COURT: Well, you may object, but I
15 think when the Government Marketing Specialist asked
16 his question, and the witness responded, I'm going to
17 overrule the objection. Go ahead.

18 BY MR. TOSI:

19 Q. And with respect to counsel and all and
20 to the witness, there are a lot of interrelated things
21 here, and part of the debate here that I'm picking up
22 from the various proposals and competing interest here
23 is there are some that are defining this as a pooling
24 issue, there are some that are saying, well, you know,
25 you're making pooling decisions on the basis of price,

1 and it's how we're setting prices that affects pooling
2 issues, and we kind of have this chicken and egg
3 thing, which came first, and they're sort of related,
4 and it was just -- it would be nice to hear from an
5 expert witness to give advise on a sense of priority,
6 you know, as we go about to try to keep Orders in a
7 condition that it could meet its mission.

8 THE COURT: Well, as I say, I overruled
9 the objection. You had that question, and she has
10 answers to give, I'm going to allow it, so go ahead.
11 But I don't think you finished your answer.

12 THE WITNESS: Oh, I think I have.

13 MR. TOSI: Anyway, I thank you. I
14 appreciate your opinions very much. Thank you.

15 THE COURT: Other questions? Yes,
16 Mr. Beshore?

17 CROSS-EXAMINATION

18 BY MR. BESHORE:

19 Q. Hi, Mary. Do you have any projections
20 for negative PPD's beyond September in your
21 twelve-month outlook?

22 A. Not at the moment, but as you know, the
23 market conditions -- it really depends. Marketing
24 conditions are ever changing, and as this market -- it
25 just depends how high it goes up. We could have

1 another situation in October, but at this point I
2 don't have it in there.

3 Q. How about out beyond that?

4 A. No, not that I know of. I haven't
5 looked at them that closely.

6 Q. Okay. Now, I wonder if the -- I guess
7 I don't quite follow one of your comments here about
8 higher of contributing to the negative PPD's.

9 A. Ah.

10 Q. Isn't it the case that the higher of,
11 by extending the difference between Class III and IV
12 prices and the Class I price, by basing it off the
13 higher of, creates a situation where you've got less
14 opportunities for price inversions than you would if
15 you were using the lower of of just 1?

16 A. I think I said that the higher of
17 setting the Class I mover has contributed to
18 disorderly marketing. If I've stated it in the
19 testimony or written it, could you point it out to me,
20 please.

21 Q. Page 2, and yeah, the prior sentence
22 says that, but I thought it was linked to depooling
23 and negative PPD's as well, and maybe I misread it.

24 A. My favorite example of that really goes
25 back to 2000-2001, where we had the Class IV setting

1 the higher of, and then that prompted a lot of Class
2 II and Class IV to be depooled, and that type of
3 disorderly marketing, but it did not -- the higher of
4 there did not contribute to the negative PPD.

5 THE COURT: Just a moment. Off the
6 record.

7 (A discussion was held off the record.)

8 THE COURT: Back on the record.

9 BY MR. BESHORE:

10 Q. Okay, so you think the higher of
11 creates situations to depooling, but not necessarily
12 negative PPD's?

13 A. Yes.

14 Q. Now --

15 A. The negative PPD is because of the
16 relationship between the Class III price and the blend
17 price.

18 Q. So as long as Class -- when you're
19 basing it off of -- in the higher of system the class
20 price, if it's based off of Class IV, you're never
21 going to have negative PPD, because Class III is the
22 lowest, and you'll always have a positive PPD?

23 A. Exactly.

24 Q. Okay. With respect to the dynamics of
25 depooling and how it plays into the CME -- or how CME

1 and NASS prices play into that, Mike Brown had asked
2 you a few questions, and I think you said that there
3 are times when the difference between CME and NASS,
4 when the prices were moving down -- moving up, it
5 leads to incentives to depool or adds to incentives to
6 depool, is that it?

7 A. Let's just say that the disconnect
8 between the current cheese market being today's
9 Chicago Mercantile Exchange price is what a cheese
10 manufacturer -- determines what a cheese manufacturer
11 can pay for his milk today, and the NASS price, the
12 Class III price is always going to be representing a
13 cheese market two to three weeks behind that.

14 Q. Okay. So when prices are moving in one
15 direction, there's an incentive to depool, correct,
16 that adds to the incentive of depooling and
17 possibilities of depooling, is that your testimony?

18 A. Right.

19 Q. So wouldn't it also be the case when
20 they're moving in the other direction, the incentive
21 to pool -- there would more incentive to pool and
22 obtain a draw from the pool, isn't it kind of a wash
23 up and down?

24 A. If all the milk stayed in the pool the
25 whole time, it would be a wash, but because we don't

1 have 1.5 billion pounds of Class 3 in the pool all the
2 time, it's not a wash, and then there's a little
3 disconnect with your Class III, IV relationship in
4 there as well, but if you had all the milk required to
5 be pooled, or at least not being able to jump out,
6 there would -- it would be more of a wash. It would
7 not be exact, but it would be more.

8 Q. But in terms of the incentive to
9 somebody when they're -- under the present system of
10 being able to come in or out whenever you wanted to,
11 isn't the incentive a wash? I mean, when it's going
12 up, it's one way, and when prices are going down, it's
13 the other way?

14 A. The incentive is really just tied to
15 the Class III price versus the blend price, so it's
16 not just, what are the CME prices doing, but what's
17 that doing relative to the announced Class I price and
18 II and IV in that whole blend calculation.

19 Q. Okay, and I guess one of the factors --
20 to extent it's tied to the whole blend calculation,
21 one of the factors is how much Class IV you've got in
22 the pool?

23 A. Correct.

24 Q. And by the way, traditionally in Order
25 30, there's not been very much Class IV at all, has

1 there?

2 A. No, there hasn't.

3 Q. But there's been a whole lot of it
4 lately, hasn't there?

5 A. It's amazing how that happens.

6 Q. Where did it all come from?

7 A. I heard out west.

8 Q. But you know, don't you? Don't you
9 know?

10 A. Sure.

11 Q. Where did it come from?

12 A. I think Idaho. I shouldn't say that
13 all, I think we do have some Class IV representatives
14 in Minnesota and a few in Wisconsin as well.

15 Q. Your choice with respect to a solution
16 for depooling would be that, you know, something like
17 the California option, I think you've indicated?

18 MS. YOVIENE: Objection. I think he
19 mischaracterized her testimony.

20 THE COURT: Well, I'm not so sure if he
21 has. I've read the paper that was attached, and it
22 said something like that, so I'll overrule the
23 objection. Go ahead.

24 BY MR. BESHORE:

25 Q. But you're supporting Proposal 3,

1 because it's the toughest one here, would you support
2 any proposals like Proposal 2 that make a good dent in
3 the present system as well?

4 A. There are a lot of good milk
5 procurement people sitting out here, and quite
6 honestly, there are ways to circumvent the system, and
7 Proposal 2 just does not go far enough. My dilemma
8 right now is, is just doing something in Order 3, but
9 half-cocked is that worst than not doing anything. I
10 truly believe that you have to go with something as
11 stringent as Proposal No. 3, and it's my own fault
12 that I didn't put a proposal into USDA for something
13 stricter.

14 Q. Okay.

15 A. I just believe that -- I believe that
16 the people sitting out in this audience -- and you
17 even heard it with the cross, "well, if you did this,
18 sir, if you did that, would that get around provision,
19 you know, 1(b)(c)(2)(3)(a)," and these are great
20 people out here, and I just don't -- I believe that
21 for this system to operate properly, we have to go as
22 strict as possible.

23 MR. BESHORE: Okay. Thank you.

24 THE COURT: Any more questions? Sir?

25 MR. BROWN: I have one more.

1 THE COURT: Stay with it.

2 MR. BROWN: It was based on what she
3 said.

4 RECROSS-EXAMINATION

5 BY MR. BROWN:

6 Q. Okay. Mary, Ms. Ledman, again, Mike
7 Brown with Northwest Dairy Associations. Mary, you
8 said you really like the way California has handled
9 depooling, and certainly, what was your observation of
10 their support or that among their industry players
11 when they had that hearing?

12 A. I was not at the hearing, so I don't
13 know.

14 Q. My observation was that it was very,
15 very high, and it was very strong support, and but
16 beyond that, my other question is are California's
17 regulated prices for cheese and butter-powder milk
18 higher or lower than Federal Order prices?

19 A. They tend to be lower.

20 MR. BROWN: Thank you.

21 THE COURT: Fine. Any other questions?
22 I thought you might have some.

23 REDIRECT EXAMINATION

24 BY MS. YOVIERNE:

25 Q. Mary, is it the case that California

1 has a different pooling -- approach to pooling than
2 what you were thinking about when you said you -- when
3 you seemed to have talked about the California pooling
4 program, in that their handlers are -- well, what are
5 the differences between the California pooling system
6 and the pooling system -- the regulations that you're
7 advocating here in terms of making stronger pooling
8 regulations to prevent depooling?

9 A. The California system is really a
10 producer system, not a handler system. The handlers
11 or the manufacturers are all in the pool, and it's
12 actually the dairy farmer who decides whether or not
13 they're going to be in the pool.

14 Q. And you're not supporting that?

15 A. No. The only -- I am supporting
16 Proposal No. 3, but if I had my way --

17 Q. Thank you, Mary. Mr. Vetne asked you
18 how September's projected PPD compares with PPD's
19 historically over the past 20 years, and you gave him
20 an answer, and my question to you is, how will the
21 effect of September's negative -- projected negative
22 PPD, differ from years past, given the state of
23 pooling regulations today in the Upper Midwest? Will
24 it be more or less egregious in terms of depooling?

25 A. I think it will be equally egregious as

1 past depooling. I mean, it's really quite a simple
2 calculation, you know, you look at what you think the
3 blend price is going to be compared to the Class III
4 price, and you make that decision whether to pool or
5 depool.

6 Q. So you feel it's a significant problem?

7 A. Yes. I believe that depooling is a
8 significant problem with Federal Orders.

9 Q. Now, you looked at -- in Table 1 of
10 your testimony, you looked at the volume swings, the
11 variations in volumes for the Upper Midwest. Did you
12 also look at the volume swings in other Orders?

13 A. No, I did not.

14 Q. Did you compare -- in your testimony
15 you looked at the over-order premiums in the Upper
16 Midwest, did you also look in other orders what the
17 over-order premiums were doing over the last couple of
18 months?

19 A. Yes.

20 Q. Okay, and did you conclude that
21 over-order premiums were significantly higher in the
22 Upper Midwest?

23 A. Yes.

24 Q. And what did that lead you to conclude
25 about the problems -- the depooling problems in the

1 Upper Midwest versus the depooling problems elsewhere,
2 were they more or less egregious?

3 A. Well, there's more Class III milk in
4 the Upper Midwest, so the depooling is more egregious
5 where you have the higher volume of manufacturing
6 milk.

7 Q. Thank you. Now, in response to a
8 question from Mr. Beshore, I think -- help me remember
9 this -- but I think he was asking you if advanced
10 pricing was the only reason that negative producer
11 price differential occurred, and I thought I heard you
12 say, yes. Is that your testimony, or are there other
13 reasons?

14 A. It's a contributing factor. It's not
15 the only reason.

16 Q. Okay. What is another reason?

17 A. Depooling.

18 Q. And is there a third reason? Like,
19 what is the impact of price spreads between Class III
20 and IV?

21 A. The Class III and IV invert spread
22 difference.

23 Q. And it makes a difference --

24 A. The Class II, III, and IV price
25 relations contribute to negative PPD's as well.

1 Q. I think that in your discussions on
2 cross-examination there was some discussion that Class
3 III values out in the marketplace were able to give
4 Class III processors the ability to pay the
5 significantly higher Class III prices that were
6 existing in the market. Do you remember having a
7 discussion about that, or would you agree with that?

8 A. My recollection of the discussion is
9 that Class III manufacturers could pay more than the
10 Class III price when the same market was going up,
11 because the Class II price, for example, was
12 determined from the NASS prices that were two to three
13 weeks old.

14 Q. And did Class I processors have that
15 same value increase in their end products?

16 A. No.

17 Q. To allow them to increase their
18 over-order premiums like they were forced to do?

19 A. No.

20 Q. Now, you were asked a lot of questions
21 about the causes of depooling. Is it your position,
22 do you stand by your testimony earlier today that the
23 department should, on an emergency basis, not
24 withstanding all the other causes, even the ones that
25 you mentioned in the front end of your testimony,

1 address depooling right away and enforce stricter
2 regulations to prevent depooling in the Upper Midwest?

3 A. Yes, I do.

4 MS. YOVIENE: Thank you. I'm not sure
5 I'm finished. Mr. Kinser is going to ask Ms. Ledman a
6 question, if it's okay with you, Judge.

7 THE COURT: Very well.

8 EXAMINATION

9 BY MR. KINSER:

10 Q. Evan Kinser, Dean Foods. Ms. Ledman,
11 you were talking earlier about predicting September's
12 PPD, is it easier to predict September's PPD now on
13 August 18th or, say, the first week of October?

14 A. The first week of October.

15 MR. KINSER: Okay. Thank you.

16 THE COURT: All right. Any more
17 questions? Yes, Mr. Beshore.

18 RECROSS-EXAMINATION

19 BY MR. BESHORE:

20 Q. One other question, Mary. You've
21 stated in response to Mr. Tosi's question, your
22 preference for all prices being announced at the same
23 -- on the same day --

24 MS. YOVIENE: I again object to this
25 line of questioning as outside of the scope of her

1 testimony.

2 THE COURT: Objection noted. Go ahead,
3 sir.

4 BY MR. BESHORE:

5 Q. And you endorsed the option of all
6 prices in advance. The same degree of coordination
7 would be achieved by all prices being announced as
8 they are, all classes being announced as they are
9 presently for Class III and Class IV, wouldn't you
10 agree?

11 A. Are you saying that if all prices were
12 announced by the 5th of, like, of October for
13 September?

14 Q. Correct. At the same time for all
15 classes.

16 A. You would have a similar level of
17 coordination, yes.

18 Q. Okay, and the objectives of having them
19 coordinated would be the same thing achieved that way,
20 and the same as if they were in advance?

21 A. Yes.

22 MR. BESHORE: Okay. Thank you.

23 THE COURT: Any further questions?

24 There doesn't appear to be any. Thank you very much.

25 Off the record for a moment.

1 (A discussion was held off the record.)

2

3 MICHAEL BROWN,

4 after having been first duly sworn by

5 the Court, says under oath as follows:

6 THE COURT: All right, fine. Mr. Brown
7 has been sworn and is our next witness. You've given
8 me two documents, one is your statement, which we will
9 mark as Exhibit 37, and then you have a letter, we'll
10 mark that as 38.

11 (Whereupon, Exhibit Nos. 37 and
12 38 were marked for
13 identification.)

14 THE COURT: All right sir, if you could
15 give your full name and identification.

16 (Whereupon, Exhibit Nos. 37 and
17 38 was marked for
18 identification.)

19 THE WITNESS: My name is Michael L.
20 Brown. I'm employed with Northwest Dairy Association,
21 635 Elliot Avenue, Seattle, Washington 98119.

22 THE COURT: All right, sir, go ahead.

23 THE WITNESS: Okay, again, thank you
24 for the chance to testify today. Again, my name is
25 Michael Brown. I'm director of industry relations

1 with Northwest Dairy Association.

2 NDA is a dairy cooperative with
3 approximately 680 members in Washington, Oregon,
4 Idaho, and Northern California. NDA markets or
5 processes about 7 billion pounds of milk annually to
6 other processes or through NDA's marketing subsidiary,
7 WestFarm Food. We manufacture products included in
8 all four product classes, as defined by the Federal
9 Milk Marketing Order Program.

10 I am here solely to testify regarding
11 the depooling provisions contained within Proposal No.
12 2. Although depooling is a general issue, it's an
13 interest of ours. The national implications of this
14 require us to put these comments into the hearing
15 record, so we can separately propose what we feel will
16 be a better approach to dealing with the issue into
17 the future. Specifically:

18 NDA urges USDA to reject consideration
19 of any regulation of depooling in the Upper Midwest
20 and other Federal Order Markets on a market-by-market
21 basis, but instead should do so as part of a national
22 hearing which puts the issue in proper context with
23 other issues related to Class III and IV price
24 formulas.

25 NDA's concerns over addressing

1 depooling on an Order by Order basis, and without
2 consideration of the other Class III and IV issues,
3 are outlined in NDA's letter to USDA regarding their
4 July 12th, 2004, invitation to submit proposals for a
5 public hearing to amend the pooling provisions of the
6 Central Milk Marketing Order, that is the other
7 exhibit. In that letter, NDA urges USDA not to
8 consider separate regulation of depooling in the
9 Central Order and outlines many reasons why depooling
10 is best addressed nationally, along with other
11 manufacturing milk issues. We ask that that letter be
12 marked as an exhibit, and we thank you for doing so.

13 I also ask that the reasoning set forth
14 in this exhibit be considered as my testimony here
15 today.

16 We believe that taking a broader,
17 system-wide approach to the depooling issue will
18 provide consistent depooling rules across orders, but
19 also allow the industry to simultaneously address
20 other pricing issues that can also encourage
21 depooling.

22 At the same time, we do also recognize
23 that there would be no harm to our cooperative if the
24 Secretary were to proceed to consider how best to
25 address depooling here in the Order 30 market. We

1 recognize that this initial Order 30 proceeding may
2 help both the industry and the department develop a
3 better understanding of how best to deal with the
4 issue.

5 That said, I can also testify, based on
6 my understanding of the operations in the Northwest,
7 and my generally understanding of economics of plant
8 operations around the country, that if I were
9 operating a manufacturing plant here in the Order 30
10 area, I would be very concerned about the future
11 financial viability of my operation, if I lost the
12 ability to depool, unless and until the Class III and
13 IV formulas are modified to reflect today's operating
14 costs, especially energy and labor. Both energy and
15 labor costs have risen significantly since the 1998-99
16 period, went the evidence was prepared upon which
17 today's Class III and IV formulas are based. And
18 together, these two factors represent roughly half of
19 the cost of operating a manufacturing plant.

20 Like it or not, depooling is a part of
21 the financial picture of plant operations, and those
22 operations are being squeezed with each upset in the
23 international energy market, be it from Iraq, Russia,
24 or Venezuela. Regardless of the plant's direct energy
25 source, their energy costs, over time, relate directly

1 or indirectly to the price of oil, which is now at
2 record levels.

3 The recent run-up in oil prices will
4 continue to negatively impact dairy manufacturers,
5 until the Class III and IV formulas are adjusted to
6 reflect those cost increases. Yet, we all know that
7 the last hearing on that subject took three years to
8 conclude. Closing down depooling before that problem
9 is fixed could jeopardize plants, by locking them into
10 unprofitable economic posture.

11 Many producers without such plant
12 investments may consider my testimony and respond that
13 depooling is not fair and should be fixed immediately.
14 I urge them to recognize that if rising energy and
15 labor costs are not reflected in the pool calculation,
16 then the plant operators are bearing costs that, under
17 the system of end product pricing which we have had
18 now for over four years, are supposed to be shared in
19 the pool. Put another way, failure to address the
20 energy and labor issues in the manner intended by the
21 USDA brings a windfall subsidy to producers, without
22 plant investments, through the Federal Order blend
23 price, at the same time that depooling takes money
24 away from them.

25 Depooling may not be fair, but neither

1 is a system that overcharges for Class III and IV
2 milk. The thrust of my testimony is that the two
3 issues are related, and both must be considered
4 together so that producers will have profitable plants
5 to ship to.

6 Thank you very much for considering my
7 views. I would be very happy to answer any questions
8 about this testimony.

9 THE COURT: All right, fine. We've
10 marked your statement as Exhibit 37, and we've marked
11 that letter that you referred to as Exhibit 38, and
12 we'll received both of them --

13 MS. DESKINS: Your Honor, I do have an
14 objection to Exhibit 38, and I think it's beyond the
15 scope of the notice. The Secretary has already
16 determined that this hearing should be held, and this
17 is an objection to having a hearing.

18 THE WITNESS: May I clarify?

19 MS. YOVIENE: I second that objection,
20 Your Honor.

21 THE WITNESS: May I clarify?

22 THE COURT: Yes.

23 THE WITNESS: The letter is submitted,
24 not because it objects to including the hearing,
25 because it further explains our concerns over

1 depooling in general. If, Your Honor, would so like,
2 I will reassemble another letter explaining those --
3 or document explaining those issues and resubmit it
4 tomorrow if the so desired.

5 THE COURT: No. That's not the
6 problem. She's saying that the letter goes beyond the
7 proposals that are before us, but on the other hand,
8 you made a proposal, this was his letter making a
9 proposal, and he's objected, so without going into
10 whether or not what he says, you've stated or --

11 MS. DESKINS: He didn't make a
12 proposal. This was an objection to having any
13 hearings and now he wants it in the record.

14 THE COURT: I mean, okay, so he made an
15 objection to holding the hearing. The objection was
16 overruled, but he just wants the record to reflect
17 that he made an objection. I don't have any problem.
18 I'll receive it.

19 MR. VETNE: I would like to say also,
20 because we have thought about how this is going to be
21 used. Whatever the hearing, whatever the evidence is
22 in this hearing, one of the rational and
23 notice-related conclusions of the Secretary might be,
24 on the basis of this record, that what is proposed
25 here should not be done locally, but should be done

1 nationally, and that is the thrust of the letter
2 submitted in response to the Order 32 proposal notice
3 invitation for hearing --

4 THE COURT: What I'm doing, his
5 testimony is his testimony. He's made his statement,
6 that's the main thing. He refers to the fact that he
7 sent a letter to the Secretary objecting to the
8 proceeding, and that's what we have. We have a letter
9 showing that, and we'll receive it in that manner.

10 (Whereupon, Exhibit Nos. 37 and 38
11 were received into evidence.)

12 THE COURT: All right. Questions?
13 Yes, Mr. Beshore.

14 EXAMINATION

15 BY MR. BESHORE:

16 Q. Mike, you're opposed to changing
17 depooling in Order 30, because it affects -- its going
18 to affect adversely the operating statements of your
19 manufacturing plants in Idaho; correct?

20 A. No. It's not correct. If you look at
21 my statement, and I apologize, because I know I'm a
22 fast reader, I read too fast, and people can't always
23 understand me. We actually -- We actually have no
24 problem with depooling being considered in this Order
25 for two reasons; (a), it doesn't affect us directly,

1 and second of all, because we need to start setting
2 some precedence on the issue, so I need to clarify
3 that we certainly aren't here to say that the issue
4 shouldn't be considered. We are saying we feel it's a
5 national issue, and as we move ahead, we need to think
6 about it that way, so, Marvin, I don't want you to
7 think that we, by this statement, think that there is
8 a problem to proceed consideration of the decision.
9 We do think it's a national issue.

10 THE COURT: Well, I tell you, you know,
11 have me confused too.

12 THE WITNESS: Okay. I apologize.

13 THE COURT: You want it to be
14 considered, but you don't want the Secretary to grant
15 the proposals, is that what you're saying? You just
16 want them to consider it, say we considered it, and
17 we're not granting it, now we'll think about it some
18 more, is that what you're saying?

19 THE WITNESS: No, our point is that --
20 yeah, that does sound bad. It does. We don't support
21 it. We recognize it's part of the proposal, and will
22 be considered, so, Marvin, I guess you're right, no we
23 don't support it being done Order by Order, even
24 though it doesn't directly affect us. We also
25 recognize that because of that, the weight of our

1 opinion probably is a lot lighter than it would be
2 otherwise within an Order hearing.

3 BY MR. BESHORE:

4 Q. Okay, well, if it doesn't affect you
5 directly, why would you oppose it, the situation being
6 fixed for the 15,000 producers in Order 30?

7 A. Because our concern is that we're going
8 to fix it Order by Order by Order, which I -- we
9 believe is a slower fashion, will result in
10 inconsistent results, and won't address what we view,
11 and I think most of you know, our concerns over
12 manufacturing margins that we deal with in III and IV,
13 and if we are forced to pool milk, we are, in effect,
14 in some periods forced to give ourselves negative
15 margins.

16 Q. Well, let me just explore that a little
17 bit. When you're forced to -- you're never forced to
18 pool?

19 A. No, I shouldn't say that --

20 Q. You want to be able to pool when you
21 can draw money out, but not if you would have to
22 equalize it?

23 A. We want our manufacturing plants to be
24 profitable --

25 Q. Right, we all do.

1 A. -- and the sad irony is, is that they
2 aren't, and I'll go on public record saying that. We
3 face large transportation costs, transportation costs
4 disadvantages being in the Pacific Northwest, we face
5 lower competitive prices, being on the west coast with
6 other Marketing State Orders. As a result of that,
7 depooling for us is some ways to keep our cash flow
8 balanced. Again, I would be glad to discuss it
9 further.

10 To my limited knowledge, I'm new at
11 NDA, but we are not a particularly profitable co-op as
12 far as our manufacturing plants are concerned, and our
13 concern is that our chance to make ourselves whole, if
14 we don't address the margin issues, it goes away, if
15 we regulate depooling and do not address some of our
16 cost challenges, which haven't been looked at since
17 2000.

18 Q. Well, now, I understand NDA's position
19 with respect to manufacturing and allowances and the
20 regional issue, Northwest, I understand that
21 completely. I don't understand why it leads you to
22 come here and interpose an objection to the producers
23 in Order 30 fixing some of the problems here?

24 A. Our concern is that we could have, of
25 course, theoretically ten hearings on this issue.

1 Northeast already has some kind of a depooling reg,
2 but we could have ten hearings on this, our concern is
3 it would be better served to have one or two broader
4 hearings, looking at all Class III and IV issues. I
5 think we recognize that this hearing is being, from my
6 view, a very strong record, certainly being submitted.
7 We haven't heard the other side yet, but I guess we
8 feel it's important that we take a opportunity to
9 bring to the record that we feel this is a national
10 issue, and that we feel that it is best addressed that
11 way, recognizing that there's a hearing hear, and it's
12 going to be addressed in some fashion or another.

13 Q. Well, has someone indicated to you that
14 if -- the USDA, that if they have Order hearings on
15 pooling issue, they won't consider national hearings
16 on class price issues?

17 A. No, but, again, to some extent it gets
18 into -- it comes to -- it gets to an issue with
19 timing. Are we -- one of the things that we do hear
20 from the USDA is that resources are very limited.
21 There's a lack of -- there's trouble with judges,
22 there's trouble finding staff in order to hold a
23 hearings, as Your Honor knows, and one of our concerns
24 is that if there -- and there seems to be, frankly,
25 within the industry pretty good agreement that pooling

1 needs to be addressed, whether you're for it or
2 against it, everybody recognizes that the issue is
3 going to be on the table one way or another. Does it
4 make efficiency sense even, to hold a group of
5 hearings, rather than one or two larger ones?

6 I would agree with you in this Order,
7 there's a lot of milk and a lot of producers, but they
8 still take, you know, the Order process takes a lot of
9 time, whether it's an emergency hearing or not, it's a
10 long process and it ties up resources.

11 One of our concerns is because we have
12 been told before that that's a good issue, or yeah,
13 we're interested, but, you know, we've got eight
14 things in front of our plate, and if there's a more
15 efficient way to do this faster than other issues,
16 maybe that's a better way to do it.

17 Q. By the way, when you link depooling as
18 Doug Marshall's letter does, I think, I read it quite
19 quickly, I think your testimony does too, when you
20 link depooling with plant profitability, basically
21 what you're saying is there are times when, you know,
22 pooling helps the bottom line, and you want to be able
23 to retain that and be free not to retain it when it
24 doesn't help the plant bottom line?

25 A. Pooling helps our producer bottom line,

1 because we pay Federal Order blend, so when we pool --
2 when we depool, it helps the plant bottom line.
3 Sometimes that money stays in, a lot of times that
4 money goes out to pay other producers. For example,
5 we're now an unregulated market in Idaho, and to be
6 competitive in a cheese market, depooled dollars is
7 sometimes needed to help pay those producers.

8 Q. When the manufacturing price is above?

9 A. When cheese is above, because, as most
10 of you know, we're predominately a butter-powder and
11 not milk, so in that case, that's one of the ways that
12 we keep ourselves competitive in those markets, but
13 again, if you look at our bottom line overall, you
14 won't find us particularly profitable, but even beyond
15 that, Marvin, these are really fair questions. Even
16 beyond that, our concern is that regulations in Class
17 III and IV, and inability to adapt those, keep them up
18 to date, those price formulas -- or particularly
19 manufacturing costs up to date, forces us into a
20 system where we're not competitive, competing with
21 other plants in our region who have a price advantage,
22 that makes it very tough to compete, because we deal
23 with the same transportation differential, same kind
24 of costs, and so our view is, is that if you addressed
25 it all at once, we can resolve a lot of the issues on

1 the formula side or on the manufacturing margin side
2 that make us, frankly, unprofitable, a great period of
3 the time.

4 Q. Let me make sure. By addressing it all
5 at once, you're talking about a national hearing which
6 addresses both issues of making allowances in Class
7 III and IV and the right pooling regulations in each
8 Order in the system, all in one hearing?

9 A. Yes.

10 MR. BESHORE: Okay.

11 THE COURT: Other questions? Yes.

12 EXAMINATION

13 BY MS. YOVIEENE:

14 Q. Good afternoon, Mr. Brown.

15 A. Good afternoon.

16 Q. It's the case that Northwest Dairy
17 presently pools milk in Order 30; is it not?

18 A. That is true.

19 Q. And who pools your milk for you?

20 A. We have confidential agreements on
21 that, although if you check the record, I believe some
22 of them have already acknowledged that they do, but we
23 actually signed agreement where we're not supposed to
24 say, so I feel I cannot, but check the record. We
25 were already outed so, it's no secret, and I guess,

1 can I comment further? Distant pooling has been a
2 common practice, if you notice, we're not hear
3 testifying against distant pooling. We recognize, we
4 tightened it up in the Northwest order, we recognize
5 other orders are doing the same.

6 Q. Now, you mentioned in your testimony on
7 cross-examination, I believe it was, that you weren't
8 opposed to the Department considering this issue of
9 depooling, because it needed -- there needed to be a
10 precedence; is that correct?

11 A. We recognize --

12 Q. Is that correct?

13 A. Yeah. We recognize the Department --

14 Q. I'm just asking you a yes or no
15 question, sir.

16 A. Okay, well, repeat it, then, please.

17 Q. You mentioned in your testimony that
18 Northwest Dairies was not opposed to the Department
19 considering depooling --

20 A. That is true.

21 Q. -- because there needed to be
22 precedence --

23 A. That is true.

24 Q. -- for dealing with the problem of
25 depooling?

1 A. This is true.

2 Q. Okay. Thank you, sir. How much does
3 it cost to transport your milk from wherever you
4 transport it from into Order 30?

5 A. I honestly don't know.

6 Q. Do you transport your milk into Order
7 30?

8 A. When we initially associated with the
9 pool, yes.

10 Q. Just one time?

11 A. Yes.

12 Q. One time only?

13 A. That's correct.

14 Q. None of your milk regularly comes to
15 Order 30?

16 A. That is correct.

17 MS. YOVIENE: Thank you.

18 THE COURT: Any other questions?

19 Doesn't appear to be any. Thank you, sir.

20 THE WITNESS: Thank you.

21 THE COURT: And as I say, I would just
22 like to get all the loose ends done before we hear
23 from Mr. Vetne's witnesses tomorrow. Is there anybody
24 else? Do you have somebody from the Market
25 Administrator's Office that's going to come up?

1 MS. DESKINS: Well, we have our own
2 proposal.

3 THE COURT: And you have your own
4 proposal. Do you want to do that now? Are you ready
5 to or not? It won't take much time tomorrow, but if
6 you have it now --

7 MS. DESKINS: I think it would take up
8 maybe 20 minutes tomorrow.

9 MS. YOVIENE: We're ready to end this
10 proceeding.

11 THE COURT: Well, either way. No, no,
12 I'm not going to -- we don't want you to push it.

13 MR. VETNE: If I have to vote here, I
14 vote for this tomorrow. It's 5:30 already. My
15 evening is going to be really full.

16 THE COURT: Okay. All right. Let's
17 adjourn to nine o'clock tomorrow? We could make it
18 8:30, but you guys want a little time to work. We'll
19 make it nine a.m. Let's make it 8:45.

20 (Whereupon, the Federal Order 30
21 hearing was adjourned at 5:08
22 p.m.)

23 ***

24

25

1 STATE OF MINNESOTA :

:

CERTIFICATE

2 COUNTY OF HENNEPIN :

3 BE IT KNOWN, that I, Kelly E. Hanna, Court
4 Reporter, took the foregoing Federal Order 30 Hearing;

5 That the witnesses, before testifying, were by
6 the Court first duly sworn to testify the whole truth
7 and nothing but the truth relative to said cause;

8 That the testimony of said witnesses were
9 recorded in shorthand by me and were reduced to
10 typewriting under my direction;

11 That the foregoing Federal Order 30 Hearing is a
12 true record of the testimony given by said witnesses;

13 That I am not related to any of the parties
14 hereto, nor an employee of them, nor interested in the
15 outcome of the action;

16 That the cost of the original has been charged to
17 the party who noticed the Federal Order 30 Hearing,
18 and that all parties who ordered copies have been
19 charged at the same rate for such copies;

20 WITNESS MY HAND AND SEAL this 2nd day of
21 September, 2004.

22

23 _____
Kelly E. Hanna, Court Reporter,
Notary Public

24

25