BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

- - -

In the Matter of	:	Docket Nos.:
	:	AO-11-0333;
Milk in the Mideast	:	AMS-DA-11-0067;
Marketing Area	:	DA-11-04

- - -

HEARING ON PROPOSED AMENDMENTS

TO TENTATIVE MARKETING AGREEMENT AND ORDER

VOLUME II

October 5, 2011

9:05 a.m.

REPORTED BY:

Kristina L. Laker

Hearing on Proposed Amendments to Tentative Marketing Agreement and Order, before the United States Department of Agriculture, Agricultural Marketing Service, presided over by the Honorable Janice K. Bullard, Administrative Law Judge, at the Westin Cincinnati Hotel, 21 East Fifth Street, Cincinnati, Ohio, at 9:05 a.m., on Friday, October 5, 2011, before Kristina L. Laker, court reporter and notary public within and for the State of Ohio.

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THE JUDGE: Good morning. It's Wednesday, October 5, and we are continuing the hearing on the proposed change to Marketing Order 33. And the parties are present. Thank you for coming back.

And before going on the record today Mr. Wilson, counsel for Superior Dairy, informed me that he believes that the need to hold the hearing open tomorrow for the anticipated testimony from a producer has been eliminated. So we'll try to push through and have the hearing finished today.

I'm telling people that so that you can make or keep whatever travel arrangements you have, make arrangements with the hotel if you need to -- if you had extended your stay into Friday and now you can change that. That might be to everybody's advantage.

All right. And we will then continue with the presentation from Dairy Farmers of America and the other associated cooperatives who are represented by Mr. Beshore.

MR. BESHORE: May I call our next witness?

THE JUDGE: Please do.

MR. BESHORE: Mr. Carl Rasch.

THE JUDGE: Mr. Rasch, would you come up and have a seat here, please. Thank you.

(Witness sworn)

MR. BESHORE: Has the witness been sworn in?

THE JUDGE: Yes, he has. Your witness, Mr. Beshore. Oh, wait. Could we just state and spell your name for the record. I'm sorry.

THE WITNESS: Yes. My name is Carl Rasch. It's Carl with a "C." Last name, R-a-s-c-h.

CARL RASCH,

of lawful age, as having been duly sworn, as hereinafter certified, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BESHORE:

Q. Okay. And Mr. Rasch, have you prepared a statement which includes your employment information for presentation here today?

A. Yes, I have.

MR. BESHORE: Okay. And, your Honor, I would like Mr. Rasch's statement to be marked as an exhibit, if we could.

THE JUDGE: All right.

MR. BESHORE: It's four pages in total, a cover page and three pages of text. And that would be Exhibit No. --

THE JUDGE: I have 28.

MR. BESHORE: -- 28.

(Whereupon, Exhibit Number 28 was marked for identification.)

Q. Are you ready to proceed with your statement, Mr. Rasch?

A. Yes, I am.

Q. Go ahead.

A. I am Carl Rasch and I am here today to submit a statement on behalf of the Michigan Milk Producers Association hereafter referred to as MMPA. I am employed by MMPA as their Director of Bulk Milk Marketing. My business address is 41310 Bridge Street, Novi, Michigan.

THE JUDGE: Would you spell that, please.

THE WITNESS: Yes. Novi is N-o-v-i.
THE JUDGE: Thank you.
A. Although MMPA was not initially involved in discussions with USDA and development of the proposal being considered here today, we did petition USDA to be included as a proponent of Proposal No. 1. The hearing notice does list MMPA as a proponent and we are actively engaged in promoting adoption of Proposal 1, which would amend the definition of a pool distributing plant. It is MMPA's opinion that the definition as currently written and interpreted does not adequately reflect recent developments in dairy processing technology and dairy product distribution.
MMPA has always been an avid supporter of Federal Orders and the role they have played in creating an environment for orderly marketing. Regional Federal Orders were formulated based upon desires of the majority of milk producers in a geographic marketing area to have a program in place that provides them with an orderly means of determining the value of the milk that they have produced in the production of various products in today's modern dairy facilities and to establish a uniform minimum price for each of these various uses.

Federal Orders further advance the principle of orderly marketing by creating marketwide pooling of the aggregate value of marketing by individual producers and distribution of that value by way of a uniform minimum blend price for producers. Orderly conditions can only exist if there is a competitive balance among all players in regard to a uniform minimum price paid and a minimum uniform price received.

In my 33 years of experience in working for the dairy industry, I have learned that one of the most important aspects of any successful business relationship has been the issue of competitive equity amongst our dairy customer and producer members. The recent change in plant status for the Superior Dairy plant at Canton, Ohio, from fully regulated to partially regulated certainly raises questions about competitive equity amongst the processor population of the Mideast Order.

The magnitude of the inequity has been demonstrated by the economic analysis of the competitive advantage to be realized as presented earlier by Elvin Hollon. To have a processor as large as Superior Dairy operating in the midst of the

Mideast Order with such an advantage only because of a loophole in the current Order regulations is an invitation for disorder.

Obviously, there is economic benefit being realized by Superior Dairy as a result of the change in the Canton plant status from fully regulated to partially regulated. Why else would Superior Dairy acquire and reopen a plant previously closed by the two previous owners who found the plant to be inefficient by today's industry standards and economically nonviable.

Fulton County real estate records indicate that Farmers and Merchants State Bank awarded ownership of the facility to Superior Dairy as the result of a sealed bid auction conducted in January 2011. The plant is not capable of receiving conventional milk hauling equipment and is not equipped to wash them either. The processing capabilities of the plant are very limited.

Further evidence of Superior's efforts to avoid regulation is the uneconomic transfer of packaged product from their Canton plant to the Wauseon plant prior to distribution to the ultimate destination. Moving packaged products to a facility

200 miles to the northwest of Canton, Ohio, to ultimately distribute to the Northeast Federal Order market defies economic logic.

In our opinion, these non-economic activities are flagrant examples of a thinly disguised subterfuge by Superior Dairy to exploit a loophole in the Mideast Order language for its personal economic advantage. To allow a major processor to continue to operate with such an advantage just invites other imaginative processors to attempt to mimic Superior's activities and threatens the sustainability of the Order system. Because of the highly competitive nature of the fluid milk processing business it is imperative that this issue be addressed and that it be dealt with expeditiously.

As stated earlier, MMPA as an organization is a staunch supporter of Federal Milk Marketing Orders. At our most recent annual delegate meeting, policy was adapted -- it should say adopted -- that included a resolution endorsing Federal Orders and continuation of the program. The resolution acknowledged Federal Orders as a time tested method of regulating the industry for the benefit of our dairy farmer members and amending such regulations as market conditions change. The resolution concluded by stating that Federal Orders and the formal hearing process that we are participating in today have served the industry well.

Thank you for the opportunity to appear here today and provide our input on a matter that is very important to the membership of MMPA.

THE JUDGE: Okay. Thank you. Before we commence, Mr. Rasch, on Page 3, the first paragraph, the sixth line down starting, The magnitude of the inequity has been demonstrated by the economic analysis of the competitive -- although it says --

THE WITNESS: That should be -- yeah.

THE JUDGE: -- advance, it should be advantage?

THE WITNESS: It should be advantage. That's correct.

THE JUDGE: All right. And then also I think you changed it in your verbal testimony, but on Page 4, second paragraph, second sentence near the end, policy was adapted, and that should be adopted?

THE WITNESS: Correct.

THE JUDGE: All right. Thank you. In every other way is the written statement that you have submitted similar or equal to your verbal testimony?

THE WITNESS: It's identical, yes.

THE JUDGE: All right. Thank you very much.

MR. BESHORE: Thank you, your Honor. Just a few additional questions, Mr. Rasch.

BY MR. BESHORE:

Q. Did you provide Elvin Hollon with information with respect to the number of members at Michigan Milk -- MMPA and the Orders in which you market milk --

A. Yes.

Q. -- that he had --

A. I was the source of that data.

Q. And that was accurate information?

A. Yes, it is.

Q. Okay. Are you personally familiar in terms of having seen the Wauseon facility --

A. Yes.

Q. -- the Wauseon dairy plant?

A. I have not been in the plant, but I have

observed the plant over numerous years. We have a customer in the adjoining county that we service. And I have opportunity to go through Wauseon.
Q. Okay. What have you observed about that facility in terms of its ability to receive and store bulk milk?
A. It is a landlocked facility. The front of the building is on a main street of Wauseon. One side of the plant is -- has an alley. The backside of the plant also has a narrow alley. And then to the -- I believe the north side of the plant there's a parking lot that it shares with the adjacent Circle K convenience store.
So it is landlocked. It's a single-story building. No visible sign of raw milk storage from the exterior. There's nothing either vertical in the way of a milk silo or a bulkheaded horizontal tank into any of the walls. So any of the raw milk storage in that plant is contained inside the walls of that facility. My guess is that we have farms that have more raw milk storage on their premises than this plant contains.
Q. How familiar is it in 2011 -- how customary is it in 2011, if it is, for a commercial fluid milk

processing plant to be without outside silo milk storage?

A. I'm not aware of a commercial facility operating, at least in the area that MMPA services, that does not have raw milk storage.

Q. So you don't know of any other --

A. No, I'm not aware of any.

Q. -- any other fluid milk processing plants without outside --

A. Without exterior storage.

Q. You said, if I understood you correctly, that you didn't observe any -- you called it a bulkhead; what did you mean by that?

A. Oh, what you have is a horizontal tank that extends outside of the plant. The outlet valve which would allow you to -- well, the valve that would allow you to both pump into and out of that tank is enclosed in the interior of the plant. But the vessel that's holding the milk actually extends to the outside of the plant. That's what we call being bulkheaded into the wall -- into one of the exterior walls of the facility.

Q. And you didn't observe any such facility --

A. No, I did not.

Q. Okay. At the Wauseon plant?
A. That's correct.
MR. BESHORE: Okay. Your Honor, is Exhibit 6B available?
THE JUDGE: Exhibit 16?
MR. BESHORE: 6B.
THE JUDGE: Yes.
MR. BESHORE: For Mr. Rasch. Do you have a copy of it?
THE WITNESS: I don't have them labeled, but which exhibit is it?
MR. BESHORE: The exhibit that Mr. Carman put in that lists partially regulated distributing plants.
THE WITNESS: Yes, I have a copy of that.
BY MR. BESHORE:
Q. Okay. Could you go just to the back page which lists partially regulated distributing plants, 2011, the months of July and August.
A. All right.
Q. Do you have that?
A. Yes, I do.
Q. Okay. Now, there's one other plant besides

the Canton, Ohio, Superior Dairy plant -- one other partially regulated plant located within the Order 3 (sic) --
A. 33.
Q. -- geographic marketing area; is that correct?
A. You're referring to Order 33?
Q. Order 33, yes.
A. That's correct.
Q. And what plant is that?
A. C.F. Burger Creamery in Detroit, Michigan.
Q. Are you familiar with C.F. Burger Creamery in Detroit?
A. Yes, we are.
Q. And in what way; how are you familiar with them?
A. They are a customer of Michigan Milk Producers. We provide them with their raw milk supply.
Q. Okay. Can you tell us a bit about that plant's operations and why in some months, including July and August of 2011, but not all months that plant is a partially regulated distributing plant?
A. Yes. That facility has -- produces multiple

products. Without elaborating too much they have Class I and Class II utilization in that plant. That is seasonal.

And part of the requirement to be fully regulated is that you have to satisfy the minimum percentage of route distribution as a percent of your total receipts. And in Federal Order 33 I believe that requirement is 30 percent Class I utilization.

And because of their product mix and their customer base and the seasonality of some of the products that they're producing, they don't always meet the minimum requirement for route distribution. So that's how they shift from being fully regulated to partially regulated.

Q. So let me see if I understand your testimony. Would it be correct to say that the Burger Creamery is primarily a Class II plant?

A. The majority of their utilization is Class II, yes.

Q. And they also have as a secondary product category Class I products?

A. That's correct.

Q. In order to be categorized as a distributing plant -- a pool distributing plant in the Order, it's necessary for 30 percent of the production of the plant to be Class I products; is that your understanding?

A. That's correct.

Q. Okay. And some months their Class I drops below 30 percent and in those cases it becomes partially regulated?

A. Or their Class II utilization increases enough that they don't meet the 30 percent requirement, so -- as I said their business is driven by their customer base. And it is seasonal. And some of these things are beyond their control. They sell what they have -- they account for what they have and opportunities to sell as Class I milk. If they meet the 30 percent utilization requirement, they become fully regulated. If they don't meet that requirement, then they're partially regulated.

Q. Okay. Now, I note on Exhibit 6B, the last page, that they have -- it shows as having distribution in Order 30 as well as Order 33.

A. Okay.

Q. Can you tell us anything about how that distribution occurs, if you know?

A. They deal with a number of national dairy --

national food accounts that utilize shake mixes and single-service fluid milk packages. And they're going through distribution centers. And so to the extent they deliver the product to these distribution centers, then the finished product ends up where -- in the outlet centers. They're serviced from those centers.

Q. Okay. So Burger Creamery packages the products and delivers them to a customer's warehouse --

A. Yes.

Q. -- from -- and from that point the customer distributes to its stores wherever they may be?

A. That's correct.

Q. Now, would it -- in that type of situation, of course -- well, back up. The proposal in the hearing today, would it apply to Burger Creamery just as any other plant in the geography of Order 33?

A. It could.

Q. Okay. And let's just say hypothetically that -- or if in fact their customers change the distribution from the warehouses to an array of Orders outside of Order 33 -- let's say they had distribution down in Order 5, as well as Order 30, as well as Order

32, as well as Order 33, would it be possible that plant could be in the same situation as we've seen with the Canton Superior facility?

A. Sure. I mean, from the Detroit location you can go to -- in numerous directions. It's not that much further to Order 30 to 33. Order 32 geographic marketing area versus Federal Order 30. You know, you come south across the river here and you're in Federal Order 5. You go through -- across the Ambassador Bridge into Canada and over to Buffalo, you're into Federal Order 1.

Yeah, if they were to become more aggressive in pursuing national accounts, they could find themselves in the same situation that Superior Dairy is.

Q. And --

A. They could easily be distributing in at least five Orders.

Q. So one of the things that Proposal 1 would accomplish would be to prevent the possibility of plants such as Burger or other plants in the Order from lapsing because of that partially regulated --

A. That's correct. And that's our concern that if you got one entity doing it, how long is it going

to be before others attempt to do the same thing.
Q. Okay. Particularly when there's an economic advantage to the plant?
A. That's our point.
MR. BESHORE: Okay. Thank you. I have no further questions for Mr. Rasch. Thank you, Mr. Rasch.
THE JUDGE: Thank you. Mr. Wilson?
MR. WILSON: Can I beg 30 seconds of indulgence?
THE JUDGE: Yes. In the meantime I've got a question.

EXAMINATION

BY THE JUDGE:
Q. What is the square footage of the Wauseon plant, if you know?
A. I don't know. No, I wouldn't even guess what the square footage is.
Q. And have you ever been to Superior's Canton plant?
A. Uh-uh.
Q. So you wouldn't be able to compare the two?
A. No.
THE JUDGE: Okay.

CROSS-EXAMINATION

BY MR. WILSON:

Q. Good morning, Mr. Rasch.

A. Good morning.

Q. I'm James Wilson, the attorney for Superior Dairy. Why don't we start with the Burger topic since that was the last one we finished with. Is C.F. Burger fully supplied by MMPA?

A. Yes, they are.

Q. For their purchases do they pay class prices?

A. It depends on their status. If they're partially regulated, they pay the class prices. If they're fully regulated, then they pay for the producer components, the PPD, and then settle with the Federal Order equalization pool for the difference between the producer price and their classified use.

Q. Okay. Is that the equivalent to paying a premium, that last item you described?

A. No.

Q. Okay. Do they pay premiums also?

A. They pay for services.

Q. So would you consider --

A. They're paying --

Q. -- they're paying for services --
A. -- the minimum Order price.
Q. All right. Are you hesitant to describe that as a premium for some reason?
A. I don't think I have to.
Q. Okay. So I'm misusing the term in characterizing what you just said as a premium?
A. They pay more than the minimum Federal Order price.
Q. Okay.
A. They're paying for services.
Q. Does MMPA pool deliveries to Burger when they're partially regulated?
A. Yes, we do.
Q. There was some discussion toward the end of the 50 percent component with the proposal that's before the Secretary here. Has Burger in your knowledge ever come close to the 50 percent distribution that's referenced in Proposal 1?
A. In certain months, because they have a very seasonal product, they will be in excess of 40 percent. How close they are to 50, I don't know.
Q. Okay. Let's step away from the Burger topic. And I'm going to ask some more general

questions about MMPA's activities. How much milk does MMPA pool on an average monthly basis in Order 33?

A. My guess is about 300 million pounds.

Q. And can you give me your best estimate of what percentage of Class I milk on average would be in that -- in those components?

A. We service most all of the regulated distributing plants in the Michigan markets. I mean, I guess our percentage of utilization isn't much different than the Federal Order utilization.

Q. Okay. And what is that?

A. Roughly 40 percent.

Q. Okay. What processors does MMPA supply?

A. Country Fresh, which is a subsidiary of Dean Foods, Kroger, Bareman, Prairie Farms, C.F. Burger, Arps Dairy, Calder Dairy. I may be leaving somebody out.

Q. That's a fair representation --

A. That's the majority.

Q. -- of your customer base?

A. Yes.

Q. Okay. Have representatives of any of those companies -- I'm going to use the term generally -- complained to the MMPA about Superior Dairy's business

activities that's the subject of this regulation?
A. We have had communication with a few customers specifically about Superior. But more generally it's in our business relationship with these customers. They just tell us they are not opposed to paying a fair and equitable price, but they want us to be sure that it's the same for all of our customers.
Q. Okay. Is there any one or two particular producers who voiced that complaint to you or is this -- I mean --
A. Yeah, I have two particular customers that inquired what this hearing was about.
Q. Was that after the Notice of Hearing was already out?
A. That's right.
Q. I'm asking I guess more specifically about the period before the letter of MMPA, which I believe is dated July 20, joining in on the DFA proposal. Were you receiving -- and, again, I'm using the term generally -- complaints from your producers?
A. Not specifically about Superior Dairy.
Q. Okay. In your testimony today and in the letter you make a reference to how Superior Dairy's activity threatens the economic well-being of your

dairy producer members.
     A.   That's right.
     Q.   Help me understand specifically the harms that you see happening or potentially happening.
     A.   We see this as an opportunity for other Class I processors that are fully regulated to become partially regulated and not share the proceeds of those sales with the entire Federal Order pool and with all producers, even if they account for the minimum value for that milk. Those proceeds accrue to a limited number of producers as opposed to all of the producers that are entitled to share in the proceeds of the Class I market.
     Q.   Okay. So you're concerned about harm to producers?
     A.   I am here today both testifying on behalf of the concerns of our processor customer base.
     Q.   Okay.
     A.   But as well in our role of representing the interest of our dairy members.
     Q.   Well, how are the processors hurt by what's -- the partial regulation status of Superior Dairy?
     A.   It introduces a degree of uncertainty as to

what exactly their competition is paying. And that's one of the benefits of the Federal Order, having assurances that everyone is subjected to the same minimum pricing regulations.
Q. Does your organization from time to time depool milk?
A. We have depooled milk, yes.
Q. Why would you depool milk typically?
A. It would be sales to non-pool facilities. And it's our prerogative --
Q. Sure.
A. -- to either pool that milk or not pool that milk.
Q. Why would you do it, though, typically?
A. For balancing purposes.
Q. Does that activity have any effect on blend pricing?
A. It probably does.
Q. So you might say that in depooling milk you're availing yourself of an opportunity that also impacts pricing?
A. We are probably doing it because of the fact that the economics are there, the system allows it, and others are doing it.

Q. Absolutely. And can't Superior Dairy say the same thing with respect to its exploitation of the partial regulation status; it's there, other parties are doing it?
A. Pooling of Class I sales is not optional.
Q. On behalf of the MMPA it's your objective to protect and maximize business, presumably profits, for your constituent members, correct?
A. Our mission statement is to market the milk of our producers to the greatest advantage.
Q. Okay. So you surely don't fault Superior Dairy for wanting to also seek the greatest economic advantage the system permits, do you?
A. No, we don't.
Q. In the period after the partial regulation status was obtained by Superior Dairy, do you know if that reduced the blend price in the Mideast region, Order 33?
A. It probably didn't. But it had impacts on other Federal Orders. And as Elvin indicated earlier, we market milk in Federal Order 1. So to the extent it wasn't pooled, it probably reduced the blend price in Federal Order 1 which had an impact on us.
Q. And how so specifically?

A. A lower PPD.
Q. When were you last at the Wauseon plant?
A. Two weeks ago.
Q. Did you go in the plant?
A. No.
Q. Were you on the actual premises?
A. Yes.
Q. What was the purpose of you being there?
A. We have a customer in Defiance, Ohio. I was calling on them. And on the -- on my return trip, it's the next county over, I drove by to see what was going on at the Wauseon plant.
Q. All right. Did you observe any changes in the -- from your perspective?
A. Not from previous ownership, no.
Q. You didn't go in the plant, though?
A. No. As I said it was from the exterior.
Q. I understand. So if Superior has made changes in technology in the infrastructure, at least within the confines of the premises, you would have no idea?
A. No. I have no idea of what's going on inside the plant.
Q. Do you know if you or anyone on behalf of

MMPA has been in touch with any of the legislators of the U.S. Government in support of the proposal that you have advanced in this proceeding?

A. Well, obviously Senator Stabenow represents the State of Michigan.

Q. Have you contacted her office?

A. No. They contacted us asking what the matter was about and what our position was on it.

Q. Okay. And were you the person that interfaced with that office on behalf of the MMPA?

A. I was one, yes.

MR. WILSON: Okay. Can I have ten seconds, your Honor?

THE JUDGE: Yes.

MR. WILSON: Just one follow-up then on that topic.

BY MR. WILSON:

Q. Do you have any knowledge of whether Senator Stabenow or anyone in her office contacted USDA subsequent to their communications with you?

MR. BESHORE: May I? I'd like to object. The content of any congressional communications one way or the other is completely irrelevant to this hearing. And

I object to any further, you know, inquiry into that. It's not probative for the Secretary in this hearing matter.

THE JUDGE: Do you care to address that, Mr. Wilson?

MR. WILSON: I don't believe that we're bound by the same strict relevancy standards as in a court of law as I've been informed in several cases. He's already testified that there's been communication with Senator Stabenow's office. And it's a simple follow-up as to whether or not he knows if they've been in touch with the office -- or the USDA.

THE WITNESS: Yeah. Our members are --

THE JUDGE: Wait a second. I have to rule on the objection. I'm going to overrule the objection. I don't see any -- even if it's irrelevant and not probative, it certainly doesn't have any kind of bias in the question or the answer.

MR. WILSON: Thank you, your Honor. Go ahead, sir.

THE WITNESS: As I started to say, the

dairy farmers that are members of MMPA are constituents of Senator Stabenow.

MR. WILSON: Yes.

THE WITNESS: And a legislative aide was simply inquiring what the proceeding was about and what MMPA's position was relative to it.

MR. WILSON: I see.

THE WITNESS: It was strictly a phone call asking for information.

MR. WILSON: Thank you.

BY MR. WILSON:

Q. My question was, if you know, if Senator Stabenow or anyone in her office then followed up and contacted the USDA?

A. No, I don't.

Q. You don't know?

A. I have no idea.

MR. WILSON: Thank you. I have no further questions.

THE JUDGE: All right. Thank you. Mr. Yale?

MR. YALE: I have no questions.

THE JUDGE: Anything from the

Government, Ms. Taylor?

EXAMINATION

BY MS. TAYLOR:

Q. Good morning, Mr. Rasch.

A. Good morning.

Q. Thank you for being here today. I think this got summarized pretty well during your cross-examination, but I want to make sure the record is clear, that the reason you're testifying here on behalf of your members, you're concerned with some disorderly marketing conditions that you feel is a result of Superior's action.

Can you just for the record clarify specifically what those disorders are?

A. I think my last comment about the fact that it raises serious questions about the competitive relationship between the rest of the regulated processors and this market, vis-a-vis, you know, their competition with Superior Dairy, puts the status of Federal Orders in jeopardy.

You know, we're starting down a slippery slope. If it's okay for Superior Dairy, how long is it going to be before somebody else tries to duplicate the same thing. You know, we're left with, you know, the Class I processors being able to isolate the Class I sales for the benefit of just themselves and a handful of producers as opposed to approximately 3,000 dairy farmers today in the Mideast Order that share in the benefits of the added value from those sales.

Q. Thank you. And one follow-up to the conversation you had about C.F. Burger Creamery.

A. Yes.

Q. You mentioned that the plant has some seasonal patterns that lead to it being a fully regulated pool distributing plant?

A. Yes.

Q. Does Burger manufacture eggnog to your knowledge?

A. Yes.

Q. And is that a Class I product?

A. Yes, it is.

Q. And could that be why they sometimes become fully regulated?

A. There's not much of a market for eggnog other than around the holidays.

MS. TAYLOR: Thank you.

THE JUDGE: All right. Any follow-up, Mr. Beshore? Come on up.

MR. BESHORE: Just one follow-up question to a question from Mr. Wilson.

REDIRECT EXAMINATION

BY MR. BESHORE:

Q. He asked you what the volume of milk MMPA pools each month. You said around 300 million pounds.

A. I think he asked in regards to Order 33.

Q. Pooled on Order 33.

A. That was my understanding.

Q. Okay. That was your answer?

A. Yes.

Q. Okay. My question is, of that roughly 300 million pounds monthly assembled pooled on Order 33, what portion of it, if any, is assembled in small trucks, non-semi-trailers -- but small trucks, the type of which could be -- would be required for delivery to the Wauseon plant?

A. Hardly any. I don't know. We operate a couple of processing plants, one at Ovid, Michigan, and one in Constantine, Michigan. There's probably a few small trucks that shuttle back and forth from those two plants to farms in the immediate vicinity of that. But from a commercial standpoint that's not the way milk is assembled these days. Most of the milk hauled in Michigan is in 10,000 to 12,000 gallon configurations, not 3,000 gallons.

Q. 3,000 gallons, about the size of a small --

A. Small single axle truck, yes.

MR. BESHORE: Okay. Thank you.

THE JUDGE: Mr. Wilson?

MR. WILSON: I have nothing further, your Honor.

THE JUDGE: Does anyone else have questions?

(No response.)

THE JUDGE: I have a question, Mr. Rasch.

REEXAMINATION

BY THE JUDGE:

Q. As I understand your testimony, you're saying that even if someone -- an entity like Superior paid more than the minimum price, only those producers to whom that payment was made would benefit as opposed to all the producers if they were fully regulated and there was pooling involved?

A. We'd have an issue with that.

Q. Okay.

A. We don't think that's equitable.

Q. All right. But that's my understanding of your concern, what I just said?

A. Yes.

Q. Okay. Great. And pooling of Class I milk is not optional, I believe you said?

A. That's correct.

Q. But only for fully regulated producers or for everybody?

A. I would say it's for fully regulated producers -- or fully regulated handlers.

Q. Handlers, I'm sorry. Handlers.

A. Yes.

THE JUDGE: Thank you. Okay. Any follow-up to my questions, Mr. Beshore?

MR. BESHORE: No.

THE JUDGE: Mr. Wilson?

MR. WILSON: No, your Honor.

THE JUDGE: Okay. Government?

MS. PICHELMAN: No.

THE JUDGE: Mr. Yale?

MR. YALE: No.

THE JUDGE: No one else?

(No response.)

THE JUDGE: All right. You may step

down.

THE WITNESS: Thank you.

THE JUDGE: Thank you for your testimony. All right. Mr. Beshore, do we have a motion to admit EX-28?

MR. BESHORE: Yes, there is.

THE JUDGE: Okay. Any objection?

MR. WILSON: No objection.

THE JUDGE: Thank you. We will admit into the record EX-28.

MR. BESHORE: Okay. Our next witness is Joe Weis.

THE JUDGE: Good morning.

THE WITNESS: Good morning.

(Witness sworn)

THE JUDGE: Please state and spell your name and give us your business address.

THE WITNESS: My name is Joseph W. Weis, W-e-i-s. And my business address is E10889 Penny Lane, Baraboo, B-a-r-a-b-o-o, Wisconsin 53913.

THE JUDGE: All right. Thank you. Mr. Beshore?

JOE WEIS,

of lawful age, as having been duly sworn, as hereinafter certified, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BESHORE:

Q. Have you prepared, Mr. Weis, a five-page statement for your primary testimony here today?

A. Yes, I have.

MR. BESHORE: Okay. I'd like that to be marked, your Honor, as Exhibit 29.

THE JUDGE: Yes.

(Whereupon, Exhibit Number 29 was marked for identification.)

Q. And Mr. Weis, I'd like you to read the first page of Exhibit 29 and then stop at that point. And I have some additional questions. And then we'll go from there.

A. My name is Joseph W. Weis. I am employed by Foremost Farms USA Cooperative, Foremost, as Vice President of Member Services and Milk Marketing. My business address is E10889 Penny Lane, Baraboo Wisconsin 53913. I have been employed by Foremost for 22 years. I have worked in the dairy industry for 38 years. My educational background is Bachelor of Science, Food Science and Industries, University of

Minnesota, 1973.

My duties at Foremost over the years have included plant management of cheddar cheese and fluid milk packaging plants, CEO of Foremost predecessor cooperative Golden Guernsey Dairy Cooperative of Milwaukee, Wisconsin, and Vice President of Consumer Products Division at Foremost prior to the sale of our fluid milk plants in 2009.

I have served as the president of Central Milk Producers Cooperative, CMPC, since 2005. I have been co-chair of the marketing committee of the Mideast Milk Marketing Agency, MEMA, since 2007 and chairman of the administrative committee of the Regional Milk Marketing Agency since 2004.

THE JUDGE: Okay. Just a couple of administrative matters. Foremost is spelled F-o-r-e-m-o-s-t. Guernsey, G-u-e-r-n-s-e-y.

And Mr. Weis, you stated in the first sentence -- I'm sorry, first line, second sentence, you testified I am employed. The writing says I employed. You want to amend --

THE WITNESS: Yes, I do.

THE JUDGE: -- that writing to include

I am? All right. Thank you. I just want to make sure.

BY MR. BESHORE:

Q. Mr. Weis, can you just describe a little bit further your responsibilities in plant management of cheese and fluid milk packaging plants during your employment history here; what years were covered, how many plants?

A. Well, most significantly from 1979 to '81 I was the plant manager at Wisconsin Dairies Co-op, which is a predecessor cooperative of Foremost Farms at Richland Center, Wisconsin; at that time manufacturing 1.8 million pounds of milk a day into cheddar cheese.

My most significant in the fluid milk plant management responsibility was at Golden Guernsey Dairy in Waukesha -- that's W-a-u-k-e-s-h-a -- Wisconsin, where we packaged 800,000 to a million pounds of milk a day into Class I and Class II products.

Q. And as the CEO of Golden Guernsey over -- for what years were you in that capacity?

A. I was CEO of Golden Guernsey from January 1 of 1990 to January 1 of 1995, at which time Golden Guernsey Dairy Cooperative and Wisconsin Dairies Co-op

consolidated to form Foremost Farms USA.
Q. As CEO of Golden Guernsey, how many plants did you -- were you responsible for overseeing the operations of?
A. Five plants.
Q. Okay. How many fluid milk plants?
A. We had two packaged fluid milk plants. We had one juice packaging plant. And we had a butter/powder plant and we had a cheese plant -- an Italian cheese plant.
Q. Okay. And then after the formation of Foremost Farms you became the Vice President of Consumer Products Division at Foremost; is that correct?
A. That's correct.
Q. Okay. And for how many years were you in that position?
A. I was Vice President of Consumer Products from -- there was some title changes, but the responsibilities remained the same from 1995 until April of 2009.
Q. And in those years did you have responsibility over the operations of processing plants?

A. Yes. Plants doing business as Golden Guernsey Dairy in Milwaukee. Morning Glory Dairy in DePere, Wisconsin. And for a time up until 1999 we had a bottling plant, Golden Guernsey Dairy, in Wausau, Wisconsin. W-a-u-s-a-u. And DePere is D-e-P-e-r-e. And the juice plant in Madison until its sale in 2007.

Q. So the plants in -- the Golden Guernsey plant in Waukesha, the Golden Guernsey plant in Wausau until -- while it was in operation --

A. Correct.

Q. -- and the Morning Glory plant in DePere, those are all fluid milk processing plants?

A. Correct.

Q. Class I plants. And were they pool distributing plants under the Federal Order?

A. Yes, they were.

MR. BESHORE: I would offer at this time Mr. Weis as an expert witness in milk marketing and dairy plant operations.

THE JUDGE: Mr. Wilson?

MR. WILSON: I'll interpose the same objection that I did yesterday with these characterizations of expertise. I won't repeat all the narratives in the record.

THE JUDGE: All right. I believe that to be consistent I will overrule the objection. I did not find any grounds to sustain an objection on the grounds that someone is employed by the industry in which they maintain to be an expert, nor do I find it's significant that they be paid for their opinion; that is not the chief hallmark of being an expert witness.

I also find that the Federal Rules that describe what it takes to be qualified as an expert do not apply in this regulatory rulemaking proceeding.

MR. BESHORE: Thank you, your Honor.

BY MR. BESHORE:

Q. With that now, Mr. Weis, would you proceed with the balance of your prepared testimony before I have a few additional questions for you.

A. Foremost Farms USA is a dairy farmer-owned Capper-Volstead cooperative of 1,918 farms which are located in seven states. In 2010, Foremost's member-owners marketed 5.6 billion pounds of milk through their cooperative.

Foremost owns and operates 11 manufacturing plants in Wisconsin and one in Minnesota, and also supplies Grade A raw milk to distributing plants located in Federal Orders 5, 30, 32, and 33.

Foremost Farms markets and pools milk for its member-owners in Order 33. Foremost was a requester of this hearing and supports the proposed amendments to Order 33. I would strike the "s" on Orders. I offer this testimony in supplement to the testimony which Elvin Hollon has presented. I want to address in particular the comments to the disorderly impact which a partially regulated plant may have where it procures raw milk and distributes fluid milk products.

Unless someone can convince me otherwise, I believe Elvin Hollon's explanation of the logistical and accounting mechanisms used by Superior Dairy to maneuver Order 1 sales of milk packaged at their Canton plant through their Wauseon facility in order to avoid regulation of their Canton plant on Order 1 to be correct.

Based upon descriptions I have heard regarding the Wauseon site and facilities, and my experience in managing packaged fluid milk businesses, it is highly unlikely that the Wauseon facility could be upgraded into an economically viable, state-of-the-art plant, given its limited space and high cost of capital equipment required to compete in today's marketplace. However, it seems to be a successful investment in its current role.

Competition in Federal Order markets for sales of fluid milk products is premised upon the fact that all competitors have a minimum base price for their raw milk which has been set by the Federal Milk Market Administrator. In addition, the marketwide pool assures that all competing processors have the same minimum cost for raw milk when they go to the country to acquire producer milk supplies for their plants.

If only some of the plants involved are participants in the marketwide pool, while others are operating on an individual handler pool basis, the fundamental baseline for orderly marketing is lost. That is what happens if it is possible for a major processor to compete for producer milk supplies and for major sales accounts in a Marketing Order without being part of the marketwide pool. If allowed to go on over a period of time this creates an inherently unstable competitive situation for all of the pool handlers in the marketplace.

When I look at the estimates which Elvin Hollon has provided with his testimony which involve the difference between the individual plant blend value and the marketwide pool blend value, it is apparent that a partially regulated plant will have a competitive advantage versus pool handlers.

The disorderliness which a major plant operating on an individual handler pool basis can bring to what is otherwise a marketwide pool in terms of the sale of packaged fluid milk products is in addition to the impact which such a plant can have on producer milk procurement. The packaged fluid milk business is highly competitive, to the point where tenths of a cent differences in price per gallon can cause business to change hands.

A partially regulated plant in Ohio which procures milk in Ohio will have impacts in the Order 33 market. However, when the plant has sales not only in its home Order but in adjacent Orders and it is not subject to marketwide pooling, the impacts which it has can lead to disorderly conditions in other Orders as well.

The USDA has quite properly acted to correct regulatory terms in Milk Orders which have led or can lead to fully regulated plants becoming partially regulated. In Order 30 we have had experience with a bottler obtaining partially regulated status by associating diverted milk volumes with their distributing plant. The extent of these associations on paper brought the percentage of Class I utilization at the distributing plant below the minimum level established in the plant definitions.

This was an unintended result of regulatory accounting which was corrected by language in the Federal Order Reform Decision which removes diverted milk volumes from the calculation in the determination of whether a plant's utilization will make it a regulated distributing plant.

We have experienced how language was existed prior to the Federal Order Reform in 2000 for the manner in which bulk transfers to other distributing plants were treated was used to control in which Order a distributing plant was pooled, even though the majority of its route distribution was in an adjacent Order.

We see these as examples of situations where the Secretary has consistently found that plants located in Federal Order Marketing Areas that have marketwide milk procurement and distribution should be pooled on a marketwide basis and there should not be regulatory and accounting loopholes which allow these plants to manipulate where they are regulated or as a means to achieve partially regulated status and thereby operate as individual handler pools.

THE JUDGE: And just for purposes for a consistent record, Mr. Weis, on Page 4, second paragraph, second sentence, your verbal testimony was Orders which have led or can lead to fully regulated plants.

You did not mean to not say pool, correct; you did not mean to omit pool from your --

THE WITNESS: I did not.

THE JUDGE: -- verbal testimony? All right. So the record is reflected to assure that the verbal testimony is consistent with the written testimony. Thank you.

All right. Mr. Beshore?

BY MR. BESHORE:

Q. Mr. Weis, were you present in the hearing

room here for the testimony yesterday?
A. Yes, I was.
Q. Okay. And you heard Mr. Carman's testimony with respect to his calculation of the estimated difference in PPD draw for the Canton plant for the 11 months when it was pooled in Order 1 versus Order 33; do you recall that?
A. Yes. I believe he referenced 13 cents per hundredweight was the average difference in PPD, if I understood his explanation, which translated into $500,000 approximately.
Q. Okay. Now, I want you to just talk about a formula without the result of a formula. With the information that he presented or testimony, could you determine approximately how many pounds of milk were pooled during that 11-month period by the Superior plant?
A. Yes.
Q. Okay. And how would you make that calculation?
A. Divide the $500,000 by 13 cents per hundredweight to determine the hundredweights that were pooled.
Q. Okay. And so that would give you the --

A. That's the aggregate volume for the period.
Q. Okay.
A. And as he said it was an approximation.
Q. And if you wanted to break that -- to estimate that on a monthly basis, you'd just divide that number by 11?
A. Yes.
Q. Okay. If you made that calculation, would it be -- would the plant's monthly volume be within the ranges that were on Mr. Hollon's spreadsheet, do you think?
A. Yes, they would.
Q. Okay. So you tested that, without giving an exact number, and it's within those ranges?
A. Yes.
Q. Okay. I think this is clear from your testimony, but I don't want there to be any question about it. In your opinion, Mr. Weis, as a knowledgeable milk marketer and a plant operator, is the Wauseon facility in the configuration of the facilities with the characteristics that have been described -- is that a viable economic fluid milk processing plant in today's marketplace?
A. Given the space constraints and with my

knowledge of what kind of investment it would take, I'm very skeptical.

Q. But as you've observed it's profitable in terms of -- apparently profitable in terms of the regulatory advantages that it provides presently?

A. Yes.

Q. Okay. One other area of questioning. If you could have Exhibit 6B, which is the list of partially regulated distributing plants. And just to look at it on the most current basis, go to the last page of 6B, which shows the listings for July and August of 2011.

A. Yes.

Q. Okay. And I want to talk just about Order 30, which is one of the primary areas of your -- of Foremost's location and market. Now, Superior Dairy, of course, Canton is indicated as having distribution in Order 30 during July and August of 2011, correct?

A. Yes.

Q. And you've testified to some of the concerns with respect to that. My question is, there are a number of other plants, perhaps three or four here, that show distribution within Order 30. And I'm wondering if you could just provide us with some analysis of why those plants do not pose, if they don't in your judgment, the same type of concerns that Superior Dairy poses. And I'll just start from the top.

The Dean Foods North Central, LLC, in Bismarck, North Dakota, shows a partially regulated distributing plant with distribution in Order 30. Does that pose the same kinds of concerns that are posed by the Superior, Canton plant, and if not, why not?

A. That plant in Bismarck is located in an unregulated area. I believe there's a State Milk Pricing Commission in North Dakota. But it is located in an area where there's very limited milk supply. So its ability to have a significant impact on the Order 30 market is very limited by the availability of raw materials.

Q. And is its regulatory status limited in terms of the portion of its distribution -- it can be distributed in Order 30 and stay partially regulated?

A. Correct.

Q. Okay. Now, the next -- going down the column -- and I'm in August, the next Order 30 plant I see is Darigold plant in Boise, Idaho. And you heard

Mr. Hollon provide some information about what he knows about that facility. Do you know anything about the operations of Darigold in Boise, Idaho?
     A.   Nothing in addition to what Mr. Hollon has offered in his testimony.
     Q.   Which indicated that it produces extended shelf life products, I believe, and primarily perhaps organic milk products?
     A.   Correct.
     Q.   Now, does that pose -- distributions from Boise, Darigold as a partially regulated distributing plant, does that pose the same concerns in Order 30 that Superior, Canton poses in your view?
     A.   No, it does not.
     Q.   Okay. Why not?
     A.   Because it is a -- I would guess that the primary products that are being distributed into the Order 30 marketplace are contract packaged, organic milk products, which are separate and apart -- different market than the conventional white fluid milk products that we're discussing here.
     Q.   As well as being in the extended shelf life category?
     A.   Correct.

Q. Gossner Foods -- the next one I see, Gossner Foods in Logan, Utah, also shows as having some distribution in Order 30 as well as probably every other Order in the system.

Do distributions from the Gossner's Foods plant in Logan, Utah, present the same concerns as you had with distributions from Superior, Canton?

A. No, they do not. It's a separate class of products from the Federal Order regulation standpoint, but I believe them to be aseptic milk products.

Q. Okay. So --

A. Sterile products.

Q. Okay. In the commercial marketplace that's a separate category of products compared to what you call fluid white milk products?

A. Yes.

Q. So you're really not competing in the same marketplace with the --

A. Correct.

Q. Okay. I think there's one more, if I'm looking at it right, Stremicks Heritage Foods, Riverside, California, also has some distribution in Order 30. And my same question, does that distribution by a partially regulated distributing plant raise the same concerns in Order 30 as the distributions from the Superior plant in Canton, Ohio?

A. No, I believe that's an extended shelf life product as well.

Q. Different products, different competitive issues?

A. Yes.

Q. Okay. Now, what you're saying -- if we talked about Order 32 -- you're familiar, of course, with Order 32 as well as Order 30 generally?

A. Yes.

Q. And would the same -- would you give the same answers with respect to plants that have distribution in Order 32 as well as Order 30 in terms of how they compare with the Canton concern?

A. Yes, I would.

Q. Okay. There's one plant on there that is an Order 32 that's been, I believe, the subject of some questions perhaps from Mr. Wilson. The Central Dairy plant in Jefferson City, Missouri, are you familiar with that plant?

A. I'm not familiar with that plant.

Q. Okay. Are you familiar with whether or not it's in Federal Order 32, the geographic marketing

area for Order 32?
A. No, I am not.
Q. Have you ever noticed what's referred to as a donut hole in Order 32 on the maps --
A. Yes.
Q. -- on the Federal Order maps?
A. Yes.
Q. Okay. There's actually a circle of unregulated area in the middle of Missouri; you're aware of that?
A. Yes, I am.
Q. Okay. So it's possible Central Dairy in Jefferson City might be in the donut hole?
A. It's possible.
MR. BESHORE: Okay. I have no other questions for Mr. Weis.
THE JUDGE: Thank you.
MR. BESHORE: Thank you, sir.
THE JUDGE: All right. Mr. Wilson?
MR. WILSON: Thank you, your Honor.
CROSS-EXAMINATION
BY MR. WILSON:
Q. Good morning, Mr. Weis.
A. Good morning.

Q. You're employed by Foremost, correct?
A. Yes, I am.
Q. With respect to Foremost do you know how much milk is pooled by Foremost in Order 33 in a typical month?
A. Approximately 200 million pounds.
Q. Okay. And this is the same question I asked the prior witness. Of that in a typical month what percentage would you characterize as Class I?
A. I would estimate that we're probably a little higher than market average, maybe 50 percent.
Q. MEMA, that stands for what?
A. Mideast Milk Marketing Agency.
Q. And who were the members of that organization?
A. National Farmers Organization, Dairy Farmers of America, Foremost Farms USA, and Prairie Farms Dairy.
Q. Okay. So the other Proponents in this case are members of that organization?
A. Yes.
Q. Okay. What's the function and purpose of MEMA?
A. To coordinate the supply -- the assembly and

the delivery of the supply of our collective cooperatives to the marketplace and to balance the needs of the marketplace.

Q. So you're involved in product pricing, transactional decisions, and analysis as part of your role?

A. For raw milk, yes.

Q. Okay. Are you engaged in negotiation of premiums that are paid from time to time?

A. That is one of my functions, yes.

Q. Okay. You mentioned in your written statement something called the Regional Milk Marketing Agency. What is that?

A. That is an agency that has representatives from the Central Milk Producers Cooperative Agency, the Upper Midwest Milk Marketing Agency, and the Iowa Milk Marketing Agency that meets on a monthly basis and makes recommendations with regard to estimated Class I skim milk and butterfat prices that can be used at respective agencies in formulating price announcements and also recommends over-order premium levels. The ultimate responsibility and the authority rests in the hands of the individual agencies.

Q. Okay. My next question concerns minimum class pricing. How does Superior's partially regulated status affect minimum class price competition among plants?

A. When Superior Dairy is able to include -- because their plant blend is higher than the marketwide blend, the Order blend, and when they are able to include those monies in accounting for meeting the minimum price requirement and payment to their producers, that creates additional funds which can either be used to gear additional producer milk supplies, solicit additional business, or fall to the bottom line.

Q. But if I understand your testimony, it doesn't affect the minimum class price, it just provides additional funds that they may have available to pay producers?

A. Correct.

Q. Okay. So the minimum stays the same?

A. The minimum is established and published by the Market Administrator.

Q. Well, if a partially regulated plant, like pool plants, pays minimum class prices, how can there even be that tenth of a cent advantage that you described on Page 4 of your statement?

A. Because the difference between the plant blend and the marketwide blend, those dollars are contributed to the marketwide pool to be shared by all producers in the Order. Those additional funds are available to create that opportunity, that competitive advantage that appears in the marketplace.

Q. That doesn't harm the producers necessarily, but you would argue it gives Superior an advantage to other handlers?

A. Correct.

Q. Okay. You described in your non-statement examination with Mr. Beshore concerns about Order 30, I believe; is that Minnesota and in that area?

A. It's the former Chicago Regional Order and Upper Midwest Order. So from Chicago.

Q. Do you know if Superior procures milk from that Order?

A. I don't believe it does, no.

Q. Okay. So how is Order 30 impacted by the scenario that's under challenge by this proposal?

A. It can be impacted in the way we just discussed in terms of the change in handler equity and the competitiveness that results from their ability to operate as a partially regulated plant and use those additional dollars that are not contributed to the marketwide pool in their ability to price the product.

Q. With respect to the Wauseon plant -- have you ever been there?

A. No, I have not.

Q. Okay. So anything and everything you know about its physical characteristics, I'm presuming, is by and large based on the exhibit and the testimony of the two prior witnesses yesterday and today, correct?

A. That's correct.

Q. And would you agree with me that they both acknowledged that they hadn't been inside the plant since Superior acquired that plant?

A. Correct.

MR. WILSON: Okay. Thank you. I have no further questions.

THE JUDGE: All right. Thank you. Mr. Yale?

MR. YALE: I have no questions, your Honor.

THE JUDGE: Anything from the Government?

MS. PICHELMAN: No.

THE JUDGE: Before you go --

Mr. Beshore, anything else?

MR. BESHORE: Just one quick follow-up question.

REDIRECT EXAMINATION

BY MR. BESHORE:

Q. The agencies that Mr. Wilson asked you about, the Mideast Milk Marketing Agency, the Regional Milk Marketing Agency, you mentioned CMPC and two other members of the Regional Milk Marketing Agency -- are the members of those agencies all Capper-Volstead dairy cooperatives?

A. Yes, that's required by law.

Q. Okay. And they're the only persons involved, they're the only entities involved in the operations of those agencies?

A. Yes.

MR. BESHORE: Thank you. No further questions.

THE JUDGE: Okay. Any follow-up?

MR. WILSON: No.

THE JUDGE: Anyone else have questions for Mr. Weis?

(No response)

THE JUDGE: All right. You may step

down. Thank you very much for your testimony. And just for the record, Capper-Volstead, C-a-p-p-e-r-dash-V-o-l-s-t-e-a-d.

Are you ready for your next witness or do you want to take a brief morning break?

MR. BESHORE: I would like Mr. Hollon to come back for his one exhibit. That's my only other -- or supplemental exhibit. That's my only other witness at this time.

THE JUDGE: Okay.

MR. BESHORE: There is, you know, at least one other witness here to testify in support of the proposals that's not our witness per se.

THE JUDGE: Okay.

MR. BESHORE: But this would be a great time for a robust morning break if we're going to make other logistical arrangements concerning our getaways.

THE JUDGE: Yes. In addition, Mr. Wilson had stated that there was the potential of reaching some stipulations.

Okay. Well, by a robust morning break,

I guess you mean a long one?
MR. BESHORE: Correct.
THE JUDGE: Thank you.
MR. BESHORE: Yes.
THE JUDGE: See, it pays to go to law school. You learn all different words.
So let's say we will come back on the record in 20 minutes or so at around 10:45. Thank you very much.
(A brief recess was taken.)
THE JUDGE: Today is Wednesday the 5th of October. And as I understand it the parties have entered into some stipulations. And maybe we'll wait until after the testimony of Mr. Hollon to present the stipulations. What's your pleasure?
MR. BESHORE: Actually our --
THE JUDGE: Mr. Wilson will present this?
MR. BESHORE: We're going to present this through the witness in the afternoon.
THE JUDGE: All right. Thank you.
MS. PICHELMAN: Your Honor, really quickly. Did we receive Exhibit 29 into

evidence?
THE JUDGE: We did not. Thank you. And I was going to ask --
MR. BESHORE: I would like to move Exhibit 29.
THE JUDGE: Thank you. Any objections to Exhibit 29?
MR. WILSON: None.
THE JUDGE: I'll refresh your recollection. That is the statement of Mr. Weis. None?
MR. WILSON: None.
THE JUDGE: Thank you. We will receive into the record Exhibit 29. Thank you for that, Ms. Pichelman. I appreciate it.
All right. We had wanted to recall Mr. Hollon; is that correct -- at this time?
MR. BESHORE: Yes. I'd like to recall Mr. Hollon for the limited purpose of providing an exhibit which was referenced earlier relating to the formulas in his spreadsheet.
THE JUDGE: All right. Thank you.
All right. Mr. Hollon, you took an

oath. You remain under that oath. And unless anything has changed with your address or anything --

THE WITNESS: No, ma'am.

THE JUDGE: All right. Mr. Beshore?

MR. BESHORE: Okay. I'd like to mark a six-page legal size document as an additional exhibit, which has pretyped on it Exhibit 25 Formulas.

ELVIN HOLLON

FURTHER REDIRECT EXAMINATION

BY MR. BESHORE:

Q. So the original spreadsheet was Exhibit 25; is that correct?

A. Yes.

MR. BESHORE: Okay. So this -- I don't know if that's sufficient identification for it or how your Honor would like to --

THE JUDGE: Well, let's call it 25A.

MR. BESHORE: 25A.

(Whereupon, Exhibit Number 25A was marked for identification.)

Q. And with that identification, Mr. Hollon, could you explain to us what Exhibit 25A is, please?

A. Exhibit 25A is a repeat of Exhibit 25 with a different formatting style. And in this format it took two pages to equal -- to get one page printed because of the width of the spreadsheet. And so the columns -- I've also inserted an explanatory row called Column Value. And that is simply the column assigned to that -- the value assigned to that column by Excel.

So the column that I would have discussed as A, Ohio Milk Pounds, for purposes inside the spreadsheet is Column C. And so if a formula were used, that 334,100, the formula would reference Column C, add, subtract, multiply, or divide it.

So otherwise the rows are the same, the labels are the same. And for example purposes where -- to answer the question asked of me yesterday about formulations, easy enough to go to Column G in terms of Column Value or Column E in terms of my label, Ohio Nonfat Solids Percent. The value is 8.81.

Q. That's the value on the spreadsheet that's Exhibit 25?

A. Yes.

Q. Okay. 8.81. So you've got two lines on the spreadsheet, one is the line that's on the prior

exhibit --
A. Yes.
Q. -- for January 2010, that's the first line, and then the line below it is the same information, except where there are calculations you show the formula?
A. Correct.
Q. Okay. So continue with your description there of Column E, Ohio Nonfat Solids Percent.
A. So the value 8.81 was derived by adding F13 and E13. E13 would be 3.14. And F13 would be 5.67. If you add those two numbers together, you get 8.81.
Q. Okay. And just to be clear, this Exhibit 25A has a row across the top of the spreadsheet called Column Value which is identified -- letters -- consists of letters, correct?
A. Correct.
Q. And that's not on Exhibit 25?
A. Correct.
Q. Okay. But those Column Value letters are the letters that are -- that indicate what cell is used in the formulas?
A. Correct.
Q. Are the formulas otherwise basically

self-explanatory, that is, just arithmetic
calculations?
A. Correct. They're all add, subtract,
multiply, divide; typical spreadsheet functions.
There's no statistical functions. There's no
financial functions. There's no higher math functions
involved.
Q. Okay. And the entirety of the formula is
printed on -- in the appropriate cell in Exhibit 25A?
A. Correct.
MR. BESHORE: Okay. I have no further
questions. Mr. Hollon is available for --
MR. WILSON: I have no
cross-examination.
THE JUDGE: Mr. Yale?
MR. YALE: I have nothing.
THE JUDGE: Anything from the
Government?
MS. PICHELMAN: No.
THE JUDGE: All right. Motion?
MR. BESHORE: I move for the receipt of
Exhibit 25A.
MR. WILSON: No objection.
THE JUDGE: Any objections?

(No response.)

THE JUDGE: All right. We will receive into the record Exhibit 25A. Thank you, Mr. Hollon.

MR. BESHORE: We have no further witnesses from the Proponent group. There is another witness present of which we're aware that would like to testify at this time relating to the proposals. And I'll let him identify himself.

(Witness sworn.)

THE JUDGE: Please state and spell your name for the record.

THE WITNESS: My name is Jeffrey Sims. J-e-f-f-r-e-y S-i-m-s. And I am Assistant Secretary of Southern Marketing Agency. My business address is 13011 West Highway 42, Suite 206, Prospect -- that's P-r-o-s-p-e-c-t -- Kentucky 40059.

THE JUDGE: All right. Thank you. Mr. Sims, you have a statement you wish to present?

THE WITNESS: I do.

THE JUDGE: Okay. Go ahead.

THE WITNESS: Could we preliminarily mark this; is it 30?

THE JUDGE: It would be Exhibit 30.

(Whereupon, Exhibit Number 30 was marked for identification.)

JEFFREY SIMS,

of lawful age, as having been duly sworn, as hereinafter certified, was examined and testified as follows:

THE WITNESS: My statement is, I am Jeffrey Sims. I am the Assistant Secretary of Southern Marketing Agency, hereafter referred to as SMA, a Capper-Volstead marketing agency in common operating in the southern United States. My business address is 13011 West Highway 42, Suite 206, Prospect, Kentucky 40059.

I testify today on behalf of SMA, whose seven Capper-Volstead cooperative members are: Arkansas Dairy Cooperative Association, headquartered in Damascus, Arkansas; Dairy Farmers of America, Inc., Southeast Council, headquarted in Knoxville, Tennessee; Dairymen's Marketing Cooperative, Inc., headquartered in Mountain Grove, Missouri; LANCO-Pennland Quality Milk Producers, Inc., headquartered in Hagerstown, Maryland; Lone Star Milk Producers, Inc., headquartered in Windthorst, Texas; Maryland & Virginia Milk Producers Cooperative Association, Inc., headquartered in Reston, Virginia; and Premier Milk, Inc., headquartered in Ocala, Florida. SMA is a qualified cooperative federation under each of the Appalachian, Florida, and Southeast Federal Milk Marketing Orders.

Each of the seven cooperative members of SMA marketed milk on one or more of the Appalachian, Florida, and Southeast Federal Milk Marketing Orders during the years 2010 and 2011. In addition, two of these members, Dairy Farmers of America, Inc., and Maryland & Virginia Milk Producers Cooperative Association, Inc., have marketed milk on the Mideast Order. These two members had milk pooled on Order 33 as recently as August 2011.

The seven cooperative members of SMA

are here today to testify in support of Proposal 1, as included in the Notice of Hearing. Proposal 1 would regulate on the Mideast Order a distributing plant located inside the Mideast Order Marketing Area which distributes more than 50 percent of its route distribution in Federal Order Marketing Areas but, however, does not have sufficient route disposition in any one Federal Order Marketing Area to qualify as a pool distributing plant.

Inasmuch as there is a distributing plant located inside the Mideast Marketing Area which currently does not meet the in-area route disposition criteria of any Federal Order, and is partially regulated on multiple Orders by virtue of its wide geographic distribution of packaged fluid milk products, the issue is timely for resolution.

According to Market Administrator statistics, the plant in question, Superior Dairy, Canton, Ohio, is a partially regulated plant on the Northeast, Appalachian, Florida, Southeast, Central, and Mideast Orders, thus exhibiting a considerable geographic footprint to its Class I route distribution. Few bottling plants distributing traditional shelf-life products would have a larger geographic area of packaged fluid milk distribution than does Superior Dairy.

As a partially regulated plant on the above listed six Orders, Superior Dairy is in direct competition for Class I sales with handlers fully regulated by those listed Orders, and would be in direct competition with at least some of those regulated handlers for farm milk to supply their plants.

Superior Dairy's route disposition in the Appalachian, Florida, and Southeast Orders, and thus its Class I sales competition with plants regulated under those Orders gives rise to SMA's interest and participation in this hearing.

Based on the following factors and principles, SMA supports Proposal 1.

No. 1, The irregular switching of a distributing plant between full regulation and partial regulation can be a source of marketing disorder. The uncertainty of the regulatory status of a plant can wreak havoc on the marketing plans of producers and cooperative associations.

Planning and executing the procurement of and pooling of the necessary reserve supplies for the Class I sales of a plant prone to willy-nilly regulatory changes can be very challenging.

No. 2, The irregular switching of a distributing plant between regulation on multiple Orders can be a source of marketing disorder. The same challenges would exist in carrying and properly pooling reserve supplies for plants that switch between Orders as exists for plants switching between full and partial regulation.

Additionally with regard to plants switching into and out of Order pools, as described in Items 1 and 2 above, Order provisions which consider historical pooling relationships or historical pooled volumes in determining what milk constitutes the allowable, that is pool-able, reserves which may be associated with an Order's Class I needs can make difficult the equitable assignment of those reserves to the Order producer pool which benefits from the plant's Class I revenues.

These problems of the proper pooling of reserve supplies, in the case of a plant switching regulation, are exacerbated by the fact that oftentimes the plant's regulatory status is not known until after the month is over.

Another source of disorder can be the regulation of a distributing plant in an Order distant from the plant's location, such that its raw milk procurement area does not necessarily fit well with the predominance of its Class I sales.

In recognition of this issue and the problems it can create, the Secretary has used the distributing plant lock-in provisions to great success in the

Appalachian and Southeast Orders, as well as a number of their various predecessor Orders.

The recognition that the location of a plant can be a more important determinant of what Order the plant should be regulated in than the plurality of the plant's Class I route disposition would eliminate exactly the kind of marketing disorder which evidently exists today in the Order 33 and neighboring marketing areas.

It now appears that plants can distribute traditional shelf-life packaged fluid milk products over wide areas, as wide or almost as wide as the distribution of long shelf-life products.

In light of this new distribution distance reality, and I would note that it is approximately 840 miles from Canton, Ohio, to Jacksonville, Florida, it is very logical and appropriate for the Mideast Order to extend the distributing plant location lock-in provisions to include non-exempt distributing plants which do not meet the full regulation Class I distribution percentage requirement in any Order, just as the current Order 33 locks in plants which distribute aseptically processed fluid milk products.

No. 3, It is our observation that partially regulated distributing plants, once they become partially regulated, seem to seek to remain partially regulated. This is evidence of a real or a perceived competitive advantage gained through the partially regulated plant status.

No. 4, Evidence has been presented in this hearing that suggests that the subject partially regulated plant may be transferring packaged fluid milk products to a fully regulated plant, and the motivation for this activity is to allow the partially regulated plant to maintain its in-area route disposition percentages at levels which are less than required for full regulation on any Order in which the plant has Class I packaged fluid milk product sales.

If the current Order provisions are allowing a distributing plant to avoid full regulation by virtue of the transfer of packaged fluid milk products to a pool plant, purely for the purpose of limiting the partially regulated plant's calculated in-area route disposition percentages, then the Order provisions are encouraging the uneconomic movement of milk.

For the above reasons, Southern Marketing Agency, Inc., supports Proposal 1 as a sound and practical method for correcting the disorderly marketing conditions which are occurring in the Mideast and neighboring marketing areas, resulting from the current partially regulated status, and perhaps the transitory Order to Order fully regulated status, of a distributing plant located inside the Mideast Order Marketing Area.

THE JUDGE: Thank you, Mr. Sims. To the extent that your verbal testimony varies in any way from your written statement, is it your intention that the written statement

represents your official comments?
THE WITNESS: It is.
THE JUDGE: All right. Thank you very much. Is there anyone who would care to question Mr. Sims? Mr. Wilson?

EXAMINATION

BY MR. WILSON:
Q. Good morning, Mr. Sims.
A. Good morning.
Q. On the first page of your written statement you make two references to Dairy Farmers of America, Inc. In the first paragraph you refer to, I believe, as Dairy Farmers of America, Inc., Southeast Council and then down below you refer to Dairy Farmers of America, Inc.
A. Yes.
Q. Are these the same entities?
A. They are.
Q. Okay. What does the Southeast Council mean?
A. That's just their regional designation for the southeast area group.
Q. One company?
A. It is one company. It's a -- I guess you could call it a division.

Q. With respect to the Appalachian, Florida, and Southeast Order territories, Superior Dairy sends milk in those areas, correct?

A. That's my understanding, yes.

Q. Okay. Do you know whether or not Superior sold milk prior to its becoming a partially regulated plant?

A. My recollection is it did, yes.

Q. Okay. Since the point at which Superior Dairy became partially regulated, do you know if the volume of the orders to these regions changed because of that status?

A. I do not, no.

Q. The last question essentially, you mentioned -- in fact you use the term lock-in in your testimony. What do you understand that to mean?

A. The Orders, particularly in the Southeast and elsewhere, have a history of defining the regulatory status of a pool distributing plant based on the marketing area where the plant physically sits. In years past typically the predominance or plurality of Class I route disposition was used as the determinant for which Order a plant would be regulated in. But the Secretary has over time recognized that there are conditions where the physical location of the plant is more important than the predominance of its Class I sales.

The Appalachian Order, the Southeast Order both recognize a plant located inside the marketing area without regard to how much of its sales are outside as long as it meets the 25 percent in-area requirement. Those plants are pooled, regulated in the Order where it physically sits inside the marketing area without regard to the plurality that's Class I route disposition.

Q. Do you believe then that if there was a lock-in of Superior Dairy to Order 33, that that would effectively resolve the problems that are contemplated here?

A. Locking that plant or any other plant in Order 33 meaning those...

Q. I'm just asking about Superior Dairy right now.

A. In that case, yes, I would agree that it would absolve those disorderly marketing conditions. I think it bears pointing out that disorderly marketing conditions do not occur in a vacuum. They spread. It's the CDC's worst virus nightmare. They go everywhere. And so we have to remember that a disorderly marketing condition in one place can quickly become a disorderly marketing condition in another.

The worst kind of disorderly marketing condition is a condition where the industry loses confidence in the Order's uniform price provisions. And that's kind of where we are today.

MR. WILSON: Thank you, Mr. Sims. I have no further questions.

THE JUDGE: All right. Thank you. Any questions from the Government?

MS. PICHELMAN: No.

THE JUDGE: Oh, Mr. Beshore?

MR. BESHORE: Thank you, your Honor. I have just a couple of questions for Mr. Sims.

EXAMINATION

BY MR. BESHORE:

Q. Mr. Sims, in response to a question from Mr. Wilson you referenced I think the CDC?

A. Yeah, I'm sorry.

Q. Can you tell us what -- what's the CDC and how does it fit into that --

A. Perhaps --
Q. -- thought process?
A. -- a bad analogy. Centers for Disease Control had a virus running wild. I'm sorry.
Q. CDC's worst nightmare, is that what you said?
A. Yes. Perhaps I could have worded it better.
Q. Okay. Your final comment in response to Mr. Wilson referenced the system's loss of confidence, I think, or regulated party's loss of confidence.
Is it your thought that that's -- that that leads to disorder or can be a disorderly condition, or could you just elaborate on that?
A. My position is that is the ultimate disorder.
Q. Why the ultimate disorder?
A. The basic -- today's Order operations are uniform pricing to producers and to handlers. And the partially regulated plant provisions, while they ostensively provide a system for equating the classified use value of a plant versus what its classified use value would be as a fully regulated plant, nonetheless do have a bit of a hole. And it's a small hole, but a hole nonetheless.

A partially regulated plant only pays the Federal Order administrative assessment on its Class I route disposition. So that the 14 some odd percent that Mr. Hollon used of other uses in the plant, there's no administrative assessment that that plant has to pay and if that plant distributes Class I milk outside any Federal Milk Order, that milk carries no administrative assessment.

And if you take a plant with 86 percent Class I and maybe 90 percent of its milk is distributed in a Federal Order area and a four-and-a-half cent administrative assessment, which is, I think, current in Order 1, pretty soon you get -- start counting that out and that's a tenth of a cent a gallon, which Mr. Weis has described as the level of competition. So you have a -- not a hypothetical, but a true advantage with regard to a partially regulated plant.

Q. And going back to your reference to a virus and spreading -- I mean, how is it that you would be concerned about, you know, a situation that is disorderly, that has been developed in terms of its mechanisms in the hearing process spreading?

A. We've been taught something here over the last few days about how to structure plant-to-plant movements of milk to remove a plant from full regulation. And this is a repeatable process. You can -- in theory you can -- anyone can convert a warehouse -- a traditional refrigerated dairy warehouse, bottle one gallon of milk, turn it into a plant, and utilize this provision.

That's the virus I'm worried about, that this is a repeatable -- could become a systemic problem in the Order system where anybody can do this and then define that I'm going to have a fully regulated plant, which is really nothing more than a glorified distribution center, and a partially regulated plant which supplies that glorified distribution center.

Q. Okay. And the amount of capital to convert that hypothetical warehouse, that everyday warehouse into a plant eligible for pool plant regulation is quite modest?

A. It could -- it could be modest, yes.

Q. Just one final question. Do you have any thoughts, Mr. Sims, on the -- you know, the relative urgency of this type of issue in Federal Orders insofar as the Secretary should take that into account in considering how to handle the hearing procedurally with respect to whether there's a recommended decision or not?

A. I do. I would -- so the marketing agency would support emergency action based on my -- our belief that, again, undermined confidence in a Federal Order's pricing is the most emergent kind of disorderly marketing condition.

MR. BESHORE: Thank you. No other questions.

THE JUDGE: All right. Thank you.

Mr. Yale?

MR. YALE: I don't have anything.

THE JUDGE: Ms. Taylor?

EXAMINATION

BY MS. TAYLOR:

Q. Good morning, Mr. Sims.

A. Good morning.

Q. Thank you for being here today. I want to turn to Page 3 in your testimony.

A. Yes.

Q. Both in Points 1 and 2 you talk about the difficulties in carrying and properly pooling reserve supplies due to a plant switching between partially and fully regulated or between regulation on different Orders. I believe you're probably the first witness to mention it or at least couch it in those terms.

So can you explain a little bit for the record what you mean --

A. Yes.

Q. -- about those difficulties?

A. Absolutely. Class I plants obviously don't take the same amount of milk every day. There is a weekly, within the month, within the year variation in how they receive their milk and distribute their product. And there's necessary reserves, additional supplies associated with those Class I sales, which are associated with the Order pool.

And if you have a situation where a plant -- after the end of the month you find out, whoops, it's no longer an Order 33 plant, it's now an Order 1 plant or now it's an Order -- no longer an Order 5 plant, it's an Order 1 plant and all of a sudden you have changed regulations -- each of these Orders have different criteria for how much milk is of the allowable reserve, all of a sudden you find yourself -- particularly when plants move on to Orders with tighter reserve requirements, you can have milk which is not pooled because now it doesn't qualify because it was more than the allowable reserve on the new Order.

Unfortunately all those things often don't become known until after the month is over. It's the 8th, 9th, 10th of the month and it's an uh-oh, guess what happened. And so it's not as easy as just changing numbers on a piece of paper. Milk actually really moved on real trucks and might very well not be able to be associated with the Order where the Class I sales end up. So one Order is carrying the reserve for another Order, and that is not right.

Q. And those difficulties then lie with the cooperatives who are supplying that milk who then pool -- plan on pooling that milk?

A. It certainly falls on the cooperatives. But a plant that has a proprietary or its own supply could be subject to the same problem. If they're carrying their own reserve, they would have the similar problem if they switched regulation and how much of their reserve and where it's pooled.

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

THE JUDGE: All right. Any follow-up?

MR. YALE: Yes.
THE JUDGE: Mr. Wilson?
MR. WILSON: I have no follow-up.
THE JUDGE: All right. Thank you.
MR. YALE: Benjamin F. Yale on behalf of Continental Dairy Products.

EXAMINATION

BY MR. YALE:
Q. Mr. Sims, I want to follow up with that discussion you just had with Ms. Taylor. When it comes to this idea of qualification and when we're talking about reserve supplies, oftentimes we're talking about supply plants or other plants in the milkshed that supply those markets, right?
A. Well, it could -- generally when I think of that, I think of the delivery to a -- probably a manufacturing facility held in reserve for the Class I sales.
Q. That's right. But part of that system that makes that work for that reserve supply is keeping those plants -- whether they're a manufacturing facility or a supply plant, you know, a power plant, or something like that -- qualified -- or part of that system is making sure that that plant itself is

qualified to allow for the efficient movement of the unneeded milk during that period of time; is that correct?

A. I would agree with that, yes.

Q. All right. And that in order to maintain the qualification of those plants, the cooperatives that are managing that are routinely trying to schedule loads of milk into pool distributing plants to ensure that the minimum shipments are met to qualify those plants, right?

A. Yes, that's correct.

Q. And if you find out after the fact that you're two loads short because the plant you delivered it to wasn't a pool distributing plant in that Order could have significant impacts on the balancing and the cost and the efficiencies of that reserve supply?

A. To paraphrase, there could be domino effects, where the change in regulation of one plant could affect the milk which is qualified at another plant or the qualification of a supply plant -- yes, those -- all those things follow.

And when it comes to qualification, a miss is as good as a mile. If you're two loads short, you're done. There's no going back and unringing the bell.

MR. YALE: I have no other questions.

THE JUDGE: All right. Thank you.

Mr. Beshore?

MR. BESHORE: Just one follow-up with respect to the questions on pooling reserve supplies and how changes in plant regulation can lead to situations with particular Order provisions.

REEXAMINATION

BY MR. BESHORE:

Q. Are you familiar with the "dairy farmer for other markets" provision in Order 1?

A. I am.

Q. And is that an example for provision where if a plant changes from Order 1 to another Order or from another Order to Order 1, you could have difficulties in figuring out how to pool the milk?

A. Absolutely. That one would present particular challenges.

MR. BESHORE: Okay. Thank you.

THE JUDGE: Okay. Mr. Wilson?

MR. WILSON: No, I have nothing further.

THE JUDGE: Anything further from the Government?
MS. TAYLOR: No.
THE JUDGE: All right. And I just have a question, Mr. Sims.

EXAMINATION

BY THE JUDGE:
Q. The concern basically is that the participants in the pool and the circumstances where you have people who are not qualified anymore to contribute to the pool, those people will fall short of the expectation of the price?
A. I think I misunderstood your question.
Q. Well, it's because I'm a total layman in this. Okay. The participants in the pool, do you expect that the producers who have sold the milk to these handlers -- they expect that they will participate in a certain distribution of the amount that goes into the pool?
A. Oh, okay. Let me see if I can answer your question.
Q. Sure.
A. When you plan the marketing of your milk and the assignment of the reserve supplies for that, there

is a certain expectation that that plant is going to be regulated at a certain place. And the pool-able reserves meet -- are determined based on a certain set of criteria. And those are defined in the Order.

Once that plant -- if that plant changes regulation, it very often can change, it falls under a different set of criteria. And the producers as you would say associated with the pool or previously associated with the pool can be left out, because they don't meet the criteria for pooling on the other Order. The plant may switch, but some of the producer or reserve supplies may not be able to go with it.

Q. And that inequity -- you see that as an inequity?

A. I do.

Q. And that cannot be in any way fixed by paying more than the minimum price up-front?

A. Generally that's -- those pooling questions are not ameliorated by over-order values.

THE JUDGE: All right. Thank you. Any follow-up on my questions, Mr. Wilson?

MR. WILSON: None, your Honor.

THE JUDGE: Mr. Beshore?

MR. BESHORE: No.

THE JUDGE: Mr. Yale?

MR. YALE: No.

THE JUDGE: Anything from the Government?

MS. TAYLOR: No.

THE JUDGE: All right. Anyone from the audience; any questions for Mr. Sims?

(No response.)

THE JUDGE: Well, I thank you for your testimony. You may step down.

THE WITNESS: And you received --

THE JUDGE: And we received -- yes. Thank you. Exhibit 30. Any objections to 30?

(No response.)

THE JUDGE: We will admit 30 into the record. Okay. So it is 11:30. Where do we stand at this point, Mr. Beshore?

MR. BESHORE: I'm not aware of any other witnesses, with the exception of Mr. Wilson's witness. I would suggest or propose that we recess at this time to reconvene at 1:00.

THE JUDGE: All right. I'll just throw

it out there, is there anyone in the general audience that cares to give a statement at this time? Not to say you're precluded at a later time, it's just that this would be a good time to do it.

(No response.)

THE JUDGE: All right. With that said then I will certainly thank you for your recommendation and take you up on it, Mr. Beshore.

We will close the hearing for now. And we will reconvene at 1:00. Thank you very much.

(A lunch recess was taken.)

THE JUDGE: It's Wednesday afternoon, October 5. And have we heard from your e-mail?

MR. WILSON: Yes, we're all set to go.

THE JUDGE: Okay. Great. All right. We're going to resume the hearing in the Marketing Order 33 Proposal.

Mr. Wilson, if you want to step forward. I understand you have some representations to make?

MR. WILSON: Well, I don't know about representations. We're going to call a witness.

THE JUDGE: Okay.

MR. WILSON: And after he takes the stand, then I'll review the exhibit numbers that will be presented.

THE JUDGE: Okay.

MR. WILSON: And we'll make sure we do all that housekeeping. This is Emil Soehnlen.

(Witness sworn.)

THE JUDGE: Please state and spell your name for the record.

THE WITNESS: My name is Emil Soehnlen. It's spelled E-m-i-l S-o-e-h-n-l-e-n.

THE JUDGE: Thank you very much. Mr. Wilson, your witness.

MR. WILSON: Thank you, your Honor. We are going to have five documentary exhibits here. Two have been marked already. And I'll do a recap and then identify the other three.

I do have -- one of the exhibits is the

written statement that Mr. Soehnlen is going to read into the record. I have some extra copies for some of the people in the room. I don't know that I have enough for everybody. But I'll put them at the end of the table, and if anybody wants to come up and grab them until they're gone, feel free.

I think most of the key personnel in the front of the room have been provided with a copy.

THE JUDGE: All right.

MR. WILSON: The exhibit marked 26 is generally known as the one that I've referred to as the Internet web page from the Schneider's Dairy website.

MS. YOVIENE: I object to that.

THE JUDGE: Yes. Well, the objection is on the record. The objection as I understood was to the authenticity.

MS. YOVIENE: And now I have an objection to it that is different than authenticity.

THE JUDGE: All right. Step forward then.

MS. YOVIENE: Wendy Yoviene representing Guers Dairy, Schneider's Dairy, Galliker's Dairy, and Dean Foods.

I have a separate objection in addition to yesterday's objection to Exhibit 26. It is an out-of-court statement offered for the truth of the matter. It's referenced in the testimony. And I also propose to move to strike the testimony in various different ways. Schneider's Dairy is not a party, so there's no hearsay exception that would apply here.

THE JUDGE: All right. I haven't heard any real testimony about this. Is this --

MS. YOVIENE: It's in the --

THE JUDGE: -- future testimony? And I don't have a copy of Mr. Soehnlen's exhibits or anything else to look at.

MS. YOVIENE: If I may, I'll read to your Honor the testimony.

THE JUDGE: Well, I feel out of context. It's not real helpful to me. And we'll have to -- I really believe that at the point in time when it comes up during the testimony, that might be the best time to bring it to my attention. Because then the proponent of the evidence can make an offer of whether or not it's intended to be the truth of the matter. Okay?

MS. YOVIENE: Okay. My point was we know what the testimony is now because they've handed it out. And the genie is out of the bottle after they've read it.

THE JUDGE: Well, not really, because it's an administrative hearing. I'm not going to strike things. There's no jury.

MS. YOVIENE: Okay.

THE JUDGE: And I'm not the decision maker.

MS. YOVIENE: Yeah.

THE JUDGE: So --

MS. YOVIENE: That's fine.

THE JUDGE: -- if it is something that is not admissible -- I mean, I will say under our rules of evidence, I haven't seen much about the hearsay rules. If you're objecting that -- I mean, I'd like to see some authenticity.

If this is something that Schneider's actually put together themselves, then it's an admission. And even if you're not a party, it's Schneider's own evidence.

I don't know what relevance it has to the hearing. I don't know what probity it has to the hearing. But that doesn't mean it's not admissible. For the sake of an administrative hearing it's the weight that any party wants to put on it.

So why don't we just wait and see the context that it's going to be talked about.

MS. YOVIENE: Okay. So any objections I have to the testimony in terms of scope, just wait until it's about to come up?

THE JUDGE: Yes. I believe it -- if I hear this out of context, I don't know if it's for the truth of the matter or if it's just something about Schneider's.

MS. YOVIENE: Is there a chance that I should highlight the issues for you and you read it ahead of time for efficiency?

THE JUDGE: No.

MS. YOVIENE: Okay.

THE JUDGE: No.
MS. YOVIENE: Okay.
THE JUDGE: I think it's better to just pretend we're in a regular court of law and when somebody testifies, that's when you would jump up.
MS. YOVIENE: And so I will.
THE JUDGE: And raise your objection.
MS. YOVIENE: And so I will.
THE JUDGE: Okay.
MS. YOVIENE: Thank you.
MR. WILSON: Your Honor, I have a set of documents for you.
THE JUDGE: Okay. Thank you.
MR. WILSON: I don't remember if I was -- I think the objection was while I was in mid sentence, but I'm not sure.
So just to recap again, Exhibit 26 is the Schneider's website page. Exhibit 27 is the document that has the No. Public Record 1937. It's the law firm letter to the Secretary.
THE JUDGE: Yes. But I might say that I've admitted that over -- I mean, just for

limited purposes.

MR. WILSON: I'm just trying to help the room remember where we are, but I won't do that.

THE JUDGE: Okay.

MR. WILSON: Two new exhibits.

THE JUDGE: Okay. Three.

MR. WILSON: Three. 31 is the testimony we're about to hear from Mr. Soehnlen.

THE JUDGE: All right.

MR. WILSON: That was 31, I think?

THE JUDGE: Yes.

(Whereupon, Exhibit Number 31 was marked for identification.)

MR. WILSON: 32 and 33 are Market Administrator Bulletins, one of the Northeast Marketing Area dated July 2011, and then the other one, which is not going to be referenced in his written statement but I'll introduce it and make -- explain it and lay a foundation for it at the end -- is the Mideast Market Administrator's Bulletins for August 2009, August 2010, and

August 2011.

THE JUDGE: All right.

(Whereupon, Exhibit Number 32 was marked for identification.)

EMIL SOEHNLEN,

of lawful age, as having been duly sworn, as hereinafter certified, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q. Mr. Soehnlen, would you state your name.

A. My name is Emil Soehnlen.

MR. WILSON: You need to speak closer to the microphone or pull it closer to you.

Q. You have some prepared remarks that you'd like to deliver in these proceedings; is that correct?

A. That is correct.

Q. Then I'll sit down and allow you to do so. Have you been sworn in?

THE JUDGE: Yes.

MR. WILSON: Okay.

THE JUDGE: Could you speak one more time?

THE WITNESS: Yes.

THE JUDGE: All right. Can people hear

him in the back?

AUDIENCE MEMBER: Yes.

THE JUDGE: All right. Thank you.

THE WITNESS: If I need reminded, please -- to speak into the microphone.

THE JUDGE: Okay.

A. My name is Emil Soehnlen. I am Vice President and In-House Counsel for Superior Dairy, Incorporated. Previously, I worked in various departments throughout Superior's organization since 1998, including Vice President of Operations and Chief Financial Officer.

In 1993, I received a Bachelor's degree in Accounting from the University of Notre Dame. And in 1996, I received two degrees from the University of Akron, a Juris Doctor, and a Master's in Taxation. Later that year, I became a licensed attorney within the State of Ohio as well as a Certified Public Accountant.

I am testifying today on behalf of Superior Dairy and against the proposed amendment to Milk Marketing Order 33. Superior represents 100 percent of the handlers that would be negatively affected by Federal Order 33 rule changes proposed by DFA, et al.

The producers supplying Superior Dairy represent 100 percent of the producers who would have to give up part of their regulated milk revenue under the proposal.

Superior receives about 40 million pounds of producer milk each month, of which about 82 percent is used to produce Class I fluid milk products. A significant majority of such producer milk is supplied by DFA. In a letter to Superior Dairy from DFA dated May 13, 2011, DFA explained that it is industry practice, and DFA practice, for cooperatives that supply partially regulated distributing plants to charge class prices plus a premium based on plant utilization. Superior Dairy buys milk from DFA consistent with this practice.

I am appearing today to explain why the regulatory remedy proposed by DFA, et al., in response to so-called marketing disorder by partially regulated handler's use of Part 1000.76(b) in Order 33, should not be adopted. In addition, DFA and other cooperative proponents have ignored or misstated material facts in order to exaggerate the claimed competitive or regulatory impact of Superior Dairy's partially regulated status.

At the beginning of my career at Superior Dairy in 1998, the industry was in a state of fluctuation as consolidation at all phases of the industry were occurring. These include processors, retailers, and raw milk suppliers. In addition, the industry was being modified by the Federal Order Reform.

As many of Superior's regional competitors began to exit the industry by selling their ownership interests to the large corporations like Dean and Suiza, Superior made a major investment in its newly patented filling and packaging technologies. These new found technologies would give Superior an edge in competition with significantly larger competitors.

Setbacks continued to slow the rollout of the new technologies. Such setbacks included two major customer bankruptcies and a large plant fire which destroyed most of the newly engineered technologies. In 2006, Superior again was able to utilize its new technology which quickly caught on with certain customers such as Costco and Sam's Club.

The new technologies expanded Superior's distribution capabilities into many new Federal Orders. As our sales growth occurred in Order 1, and other business was lost in Order 33, Superior was regulated out of Order 33 and into Order 1 in April of 2010. Superior's Order 33 distribution dropped to approximately 20 percent of its sales, while its Order 1 distribution was about 28 percent of its sales.

This was bad for Superior and bad for Superior's independent and cooperative producer suppliers. Superior's class price obligations remained the same, of course. Those obligations are accounted for in two payments: One directly to dairy farmers, and another payment to the producer-settlement fund of an Order.

When it became regulated in Order 1, Superior paid more into the Order 1 producer-settlement fund, and the blend price payable to producers, parentheses, at the Canton location, closed parentheses, was lower by about 13 cents per hundredweight over a period of 11 months than it would have been had Superior continued to be regulated in Order 33.

Superior had to increase the over-order premiums paid to its producers to keep them competitive since there were many other handlers buying milk produced in eastern Ohio that could offer the Order 33 blend price, or even higher blend prices under Order 5. In essence, Superior had to pay more into the settlement fund and more to its independent and cooperative suppliers causing Superior to bear a substantial economic penalty for being regulated into Order 1.

Superior was unable to take on additional caseless volume to help regulate them back into Order 33 as the capacity of the caseless line was too constrained. Superior Dairy looked for other options to restore the competitive playing field and keep our producers competitively compensated.

In early 2011, Superior did buy an older facility in Wauseon, Ohio. Superior is very interested in this facility for several reasons.

1. It provided Superior a means in which to drop its Order 1 and Order 33 distribution percentages below 25 percent and get Superior to qualify for PRDP, partially regulated distributing plant, treatment under 1000.76. As described before, Superior was already close to the 25 percent threshold in the markets where it had its greatest sales.

2. The opportunity to procure raw milk in

this area made the location even more attractive due to the amount of milk located in western Ohio and southern Michigan. Wauseon is slated to serve as a redundant operation to, quote, back up, closed quote, Superior's operation as well as provide increased manufacturing capabilities for new business.

3. It is close enough in proximity to not have separate administrative functions.

4. Serve as a prototype facility for the caseless milk operation.

By March 2011, the Wauseon plant was running, and Superior distributed enough of its Northeast sales through Wauseon to avoid regulation of the Canton plant in Order 1. Superior did not, at that time, have 25 percent of its total sales in Order 33, so its Canton plant became partially regulated.

As a result of Canton's shifting from full regulation in Order 1 to partial regulation, it should be emphasized that the Order 33 blend price was not affected at all. Only the Order 1 blend price was affected. The arguments of DFA, et al., hereafter referred to as the Proponents, that the Order 33 producers have suffered or will suffer any reduction in blend prices due to Superior's partial regulation are simply, flatly, and unequivocally false. But it is understandable that Order 33 cooperatives would try to gain a blend price windfall, by the DFA, et al., proposal, to gain for Order 33 what was lost to Order 1.

Since becoming partially regulated, Superior Dairy has not changed its procurement pricing nor gained new customers by offering lower prices. Assertions to the contrary by the Proponents, in requests leading to this hearing, and in testimony by Mr. Hollon in this hearing, are also simply false.

Superior has had sales into markets at some distance from Canton for several years. This was the result of innovative technology, not any regulatory advantage. Such sales at a distance appear to be the only concrete expression of concern or complaint to DFA by its other customers, as explained in testimony by Mr. Hollon. These DFA customers, competitors of Superior Dairy, are understandably resistant to marketing innovations of a competitor. DFA apparently hopes to use these complaints as pretext for changes in Order 33 rules so they will be endorsed by its many other customers by targeting Superior Dairy in a unique way.

As advanced by DFA in their request for hearing, DFA suggests that Order minimum values and handler competitive equity are now at issue because partially regulated handlers, specifically under Section 1000.76(b), can act as an individual handler pool, avoiding payments to the marketwide pool. DFA contends these inequities arise because the dollars otherwise payable to the pool can then be used in a competitive fashion in procuring milk supply in competition with pool handlers.

A reminder of the core purpose of, quote, orderly marketing conditions, closed quote, in the Federal Order System is key to resolution of issues in this hearing. The Agriculture Marketing Agreement Act of 1937 states as declaration of policy:

"Through the exercise of the powers conferred upon the Secretary of the Agriculture under this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in Section 8c(2) of this title as will provide, in the interest of producers and consumers, an orderly flow of supply thereof to market throughout its normal marketing seasons to avoid unreasonable fluctuations in supplies and prices."

The Proponents have repeated the conclusion of disorderly marketing conditions throughout its testimony, but have not explained what this means nor how it relates to any threat, real or hypothetical, to the adequate supply of milk, orderly flow of milk, or reasonable prices for milk, which were of concern to Congress in 1937.

The current proposal of the Proponents to regulate Superior Dairy was advanced by the notion that a distributing plant regulated at the time of the Federal Order Reform should not be allowed to break away from full regulation. Mr. Hollon argues on Page 5 of his testimony that: "The language in the Federal Order Reform Decisions which created a uniform pool distributing plant definition and the 25 percent level clearly, italics, intended to keep all plants regulated and not to deregulate existing pool plants, closed quote.

This argument makes reference to Section 64 Federal Regulation (sic) 16312, April 2, 1999, which states that:

"The 15 percent in-area standard in the proposed rule has been changed to 25 percent for all Orders to reflect the larger, merged marketing areas that are adopted. This change should not affect the regulatory status of any current distributing plant."

However, when reviewing the Federal Register, it appears that the Secretary was primarily concerned with avoiding regulation of plants not previously regulated. Three plants were noted as changing regulatory status from fully regulated to partially regulated as a result of Federal Order Reform, at Pages 16082 through 86 of the Final Decision. Thus, the intent of the language quoted by Mr. Hollon can be seen more to prevent the regulation of handlers which were not subject to full regulation rather than keeping all plants fully regulated as the Proponents try to imply.

The focus of argument by the Proponents, and the source of the problem they identify, is the Wichita Plan Option for partially regulated plants in Part 1000.76(b), and use of that option by Superior Dairy in particular. As described by the Proponents in Mr. Hollon's testimony at Page 12:

That option, in general, states that if a plant can demonstrate to the Market Administrator that it has paid producers in aggregate the minimum class values, it will not have any pool obligation. The test takes into account all payments to the producer including any premiums paid. The plant is thus able to operate as if in an individual handler pool, avoiding payments to the marketwide pool. This can amount to a substantial value. These dollars otherwise payable to the pool can be used in a competitive fashion to procure a milk supply in competition with pool handlers.

At Page 13, Mr. Hollon estimates that the sums otherwise payable to the pool provides an, quote, advantage, end quote, to the partially regulated distributing plant estimated about $289,000 per month, but admits that this money must be paid to the plant's milk suppliers. This is because a Section 76(b) handler, or an individual handler pool plant, must always pay at least minimum class price for all milk received, just like pool plants in a marketwide pool.

On Page 14, however, Mr. Hollon takes the argument a step further and asserts that the advantage, quote, funds can also be used by the plant to gain market share for packaged fluid milk products. This conclusion is plain wrong if we are dealing with regulated minimum prices. And Mr. Hollon repeatedly said that he was talking about regulated minimum prices and regulatory advantages. Mr. Hollon, in fact, declined on cross-examination to discuss over-order premiums paid for raw milk, except to acknowledge that payment of premiums could occur.

The Wichita option, in fact, provides no competitive sales advantage, italics, for partially regulated handlers at minimum regulated prices, as explained in numerous USDA decisions.

The Wichita option was originally adopted for the Wichita Milk Order in 1951, at the request of a cooperative with a plant near Wichita that primarily sold milk to other markets. The Secretary agreed with the option proposed, and rejected a proposed compensatory payment equal to the difference between the Class III price and the fluid use prices, explaining:

The partially regulated handler through choice or because of competitive conditions may pay farmers more than the Class III price for such milk, and as a result have a higher cost than the class prices on the milk so disposed of in the marketing area.

If through choice or competitive conditions these payments are equal to the amount that the Order now provides at class prices on his entire utilization, the requirement of additional payments is not necessary to provide uniformity of costs to handlers and protection to regular producers.

The Wichita Plan will ensure uniformity of costs of milk among handlers, and will recognize the payments that non-pool handlers choose to make to approved dairy farmers.

16 Federal Register 1242, 1243, from February 9, 1951, Recommended Decision, and 16 Federal Register 2519 from March 17, 1951, Final Decision. A half-century later, the Secretary came to the same conclusion in the course of Federal Milk Order Reform. He concluded that the Wichita option for partially regulated plants would, quote, equalize the competitive positions of both fully regulated plants and those plants not regulated under an Order, closed quote. 64 Federal Register 16026, 16163, April 2, 1999.

For producers, however, we agree with the Proponents, that use of the Wichita option may produce non-uniform farm milk prices because the option allows the partially regulated plant to operate, quote, as if in an individual handler pool, closed quote. These same observations, and the same criticisms, were made in the Nourse Report in 1962.

Compensatory payments or some equivalent device are especially needed with respect to milk that moves from a market with individual handler pooling to a Federal Order Market with marketwide pooling, to protect the integrity of the pool.

In the case of milk sold on routes within the marketing area by an unregulated handler, many of the Orders provide that the compensatory payment may be calculated by handler option as follows:

The difference between the total amount paid by the unregulated handler to his producers and the amount he would have been required to pay for his milk if fully regulated by the Order.

This latter method of computation, commonly known as the Wichita Plan, is objectionable because in effect it sets up an individual handler pool for the unregulated handler, while the fully regulated handlers with whom he is competing are required to equalize. If the unregulated handler has a higher Class I utilization than the average for the market, his producers will fail to bear a proper share of the burden of maintaining the reserve supply.

Report to the Secretary of Agriculture by the Federal Milk Order Study Committee, April 1962, Pages Roman numeral two, dash, four, dash, 26 to 27. There was apparently a regulatory policy in place at the time of the Nourse Report limiting or prohibiting use of the Wichita option where the procurement area of a partially regulated and fully regulated handlers overlapped.

Quote, the Committee is informed that the Wichita Plan is not authorized in situations where the unregulated handlers are found to be buying milk in competition with the handlers fully regulated by the Order, closed quote.

Nourse Report, Page 11 (sic), dash, four, dash 27, Footnote 7. This policy is no longer in place, and its absence is the source of potential farm milk price disparity described by the Proponents.

But even though a partially regulated distributing plant or individual handler pools may produce a higher blend price, it cannot be said that marketing disorder necessarily results. It is the consequence of blend price differences, not their mere existence, that demonstrate disorder, if any. That is true in this case.

The partially regulated distributing plant blend price received by Superior's producers is admittedly higher than Order 33 blend prices. But Superior's plant is operating close to its processing capacities, with limited ability to increase its milk supply. Order 33 and its pool plants will continue to receive an adequate supply of milk under prices that have prevailed in Order 33 for more than 18 months without Superior as a pool plant.

Additionally, the availability of the Wichita option provides no competitive advantage in procurement or sales, and no lost blend price opportunity for pool producers, whenever a partially regulated handler buys milk from a cooperative association at class prices plus premiums.

It is the cooperative's option, when this takes place, to pool the milk on its handler report. If a cooperative elects not to pool, it receives the kind of benefit Mr. Hollon has calculated hypothetically in Exhibit 25, but the hypothetical advantage is retained by the co-op rather than the plant.

An additional wrinkle in the competitive and regulatory analysis is the ability of some handlers to coordinate distribution from two or more company plants in order to maximize Wichita option pricing opportunities for one or more plants that remain unregulated. The Proponents identified the two plants operated by Superior Dairy in Ohio, one regulated in the Northeast, and the other partially regulated, at which such opportunities apply. The economic reality apparently relied upon by Mr. Hollon is that where incentive and opportunity exist to improve the company's bottom line, a rational decision is to take advantage of that opportunity.

There are several other handlers operating multiple plants that have similar incentive and opportunities.

MS. YOVIENE: Objection.

THE JUDGE: We're not there yet.

A. Several of these --

MS. YOVIENE: I --

THE JUDGE: We're not there yet.

MS. YOVIENE: I think --

THE JUDGE: We can strike it from the record.

MS. YOVIENE: Oh, you want to finish?

THE JUDGE: Yes. I want to hear what

you're objecting to.

MS. YOVIENE: I apologize.

THE JUDGE: That's okay.

A. Several of these compete for raw milk and/or fluid milk sales with Order 33 handlers, and are therefore similarly situated to Superior Dairy by competitive factors. These include: (1) The Tuscan-Lehigh, Dean Foods, plants in Lansdale, Pennsylvania, fully regulated Order 1, and then Schuylkill Haven, Pennsylvania, which is partially regulated; (2) Schneider's Dairy plants in Pittsburgh, Pennsylvania, fully regulated Order 33, and Williamsport, Pennsylvania, partially regulated in most months; (3) Marva Maid plants in Landover, Maryland, fully regulated Order 1, and Newport News, Virginia, partially regulated.

THE JUDGE: And now you may --

MS. YOVIENE: Objection.

THE JUDGE: -- interpose your objection. As I understand --

MS. YOVIENE: May I approach?

THE JUDGE: Yes.

MS. YOVIENE: Okay. This is a different one than the one I raised earlier actually.

THE JUDGE: Okay.

MS. YOVIENE: I was just speaking to Exhibit 26 earlier. I apologize.

THE JUDGE: All right.

MS. YOVIENE: So I'll state my objection if it pleases the Court.

THE JUDGE: Yes.

MS. YOVIENE: Okay. This paragraph is objectionable because it's outside the scope of this hearing. We had a hard-fought battle last week in court.

Some of the entities that are listed in this paragraph are entities that did not come to this hearing because of a court order that said that the hearing would be limited in scope to a proposal that focused on plants located in Order 33. For that reason I would move to strike.

But in addition, this testimony lacks any foundation, specifically the testimony that these plants have similar incentives and opportunities. As you read the full paragraph, as you just did, there's no explanation of the similarities other than two factors; no discussion of the fact that the cooperative proponents put into evidence, which was these entities, are within State regulated territories. Nothing has been addressed by them in terms of foundation.

THE JUDGE: Okay. Do you care to address that, Mr. Wilson?

MR. WILSON: Thank you, your Honor. I would urge that the objection be overruled. I believe the two grounds were cited here. One is that we somehow are trying in a backdoor way to get our proposals into these proceedings. We are not doing that. In fact if one goes further in the paragraph, Mr. Soehnlen is going to explain that that's not our intention here.

By now it seems apparent that similarly situated plants is a major consideration of the proposed rulemaking. And in part this information is being used in connection with the argument. We don't necessarily agree with the definitions or the applications that have been used. And it's clear also that we're opposed to the proposed rulemaking.

With respect to representations that are being made, we don't believe they're an accurate -- the location of plants and their status is a public -- publicly understood information. We've had a number of witnesses look at -- I think it's Exhibit 26 that has the list of all the plants that says if they're regulated or partially regulated. So I don't know that there's any real concern about misrepresentations made.

And I would say thirdly if -- in terms of relevancy, probity, or argument, the objecting counsel will have an opportunity, I presume, to cross-examine the witness and test the statements that are being made. And I certainly would think that would be more appropriate than excluding the testimony. So I would urge an overruling of the objection.

THE JUDGE: I believe it would be appropriate at this time to defer ruling until Counsel has the opportunity to address these issues. I'm leaning towards admitting this evidence, because it -- some of it is verifiable within the documents that have already been admitted in the record.

Other statements would have maybe little probative value, maybe little relevance, but that's for the Secretary to determine, not me. I would err on the side of the inclusion the same way that I allowed Exhibit 27, which I believe, Mr. Wilson, is your -- well, is your attempt to have the Secretary address the expansion of this proposal into other areas, and we discussed that.

MR. WILSON: Right. No. Our concern is that there's -- one of the standards that the Secretary has to consider -- there are two things actually, any other practical alternatives, which is a general standard that's published in the regulations, but also beyond that -- it just escaped my brain here.

THE JUDGE: That's fine. I've already

told Ms. Yoviene that I'm leaning towards admitting this. I will make a better ruling after the opportunity to cross-examine.

I will note that my impression of Mr. Rasch's testimony this morning was that he did discuss other potential effects in other areas other than 33. And he was testifying on behalf of some of the cooperatives that are involved in Order 33.

So why don't we just defer on -- I wanted to understand what your motion was. As far as 26 goes, we're not there. But if I hear that this was pulled from some generally published Internet site, unless you're going to produce some evidence that Schneider's didn't post it and that it's some kind of Internet gremlin that wants to put itself out there as Schneider's and publish false information to the public, I'm inclined to let it in.

But yesterday I did not feel comfortable. I didn't know where it came from. I don't know who pulled it. I don't know who looked at it. And I thought we should have at least some authentication. But as far as its hearsay value, I'm -- so we do have authentication, just so you know, I think it will come in.

I don't know what probative value this has to the Secretary's decision-making process. But to the extent that it shows that Schneider's has by its publication more than one facility -- it may or may not have significance, I don't know.

MS. YOVIENE: Would you like me to answer you now or wait?

THE JUDGE: No. We'll wait.

MS. YOVIENE: Okay.

THE JUDGE: Okay. Mr. Soehnlen, you were in the middle of the paragraph after citing the names of those entities with "I understand." You may proceed.

THE WITNESS: I understand that the agenda and proposals at this hearing are limited, and do not mention these plants to propose another option beyond the scope of that limitation. However, the Secretary at the end of the day must make a determination that the regulatory remedy selected, if a decision is made to amend the Order, is, quote, the only practical alternative available, closed quote, to benefit producers. Section 7 USC 608c(9).

Thus, if the Secretary becomes aware of practical alternatives that lie beyond the limited scope of a hearing agenda, the final decision should be to deny the unduly-limited proposal. That should be the Secretary's decision in this case, regardless of whether the limitations in remedies available by the hearing notice were self-imposed or inadvertent.

It does not appear that shift in plant status from full regulation to partial regulation, and everything that follows such a shift as described by Mr. Hollon, is disruptive or disorderly enough by itself to merit Federal Milk Marketing Order amendment.

The Northeast Market Administrator's Bulletin for July 2011, at Page 2, observed that changes in the plant regulation changed the volume of milk in Class I under that Order: Quote, For example, a large distributing plant regulated under the Order in 2006 became partially regulated for 2010 and part of 2011, closed quote. And that's Exhibit 32.

This, as I understand it, was a plant that had sister plants through which sales could be coordinated to help the plant flip into or out of partial regulation. No hue and cry, or call for Federal Milk Marketing Order amendment, followed these events.

DFA also contends that similarly situated plants in the same competitive marketing area having differing costs of raw milk is a disorderly marketing condition.

Superior offers a simple, rational response to this assertion. Partially regulated distributing plants have been operating in this area and against similarly situated pool plants for a long time; however, these activities were not categorized as disorderly until now, and now only for one partially regulated distributing plant.

Schneider Dairy, with a fully regulated Order 33 plant and a partially regulated distributing plant in Pennsylvania, has a milk procurement area as well as sales territory that overlap with Order 33 and Order 1 handlers, as disclosed in the Schneider's website that I downloaded and printed. This is Exhibit, I believe, 26.

MR. WILSON: Yes.

THE JUDGE: Yes.

MS. YOVIENE: Objection.

THE JUDGE: We know.

THE WITNESS: These plants, on procurement and distribution factors, are similarly situated to Order 33 and Order 1 plants. The 1998 letter DFA offered to Secretary Glickman in which DFA contended that partially regulated distributing plants in the unregulated Pennsylvania markets are similarly situated to Order 33 and Order 1 handlers because, A, they compete in the same market and for the same supply as other regulated plants and, B, they benefit from the Federal Milk Marketing Order system without having to burden in the costs, makes the same point.

Proponents argue that justification for their proposal is found in lock-in provisions for ESL and UHT milk plants. The Federal Order lock-in provisions for extended shelf life milk was created, as I understand it, because these plants had the ability to establish route dispositions in varying markets, and could easily shift regulation from one market to another.

Thus, blend prices to producers could vary to the detriment of the handler and the producers, particularly if the plant became pooled on a distant market where blend prices were lower than the market in which the plant procured its milk supplies.

DFA fails to mention the other defining characteristics that make ESL milk distribution potentially disorderly, which include erratic processing because of the ability to build inventory, which prevents smooth supplies of milk.

Having said that, the difficulties experienced by ESL plants and their producers when faced with shifts in regulation from one market to another, and the burden of being pooled on a market with a blend price lower than the market in which the plant is located, rings a familiar bell when we look at what happened to Superior Dairy in April of 2010. It shifted from regulation under Order 33 to Order 1, and its producers received lower regulated blend prices as a result.

Superior had hoped to avoid this result by purchase and operation of the Wauseon plant at substantial cost. Now, the economic viability of the Wauseon plant is brought into question by the Proponents' proposal. Superior would be burdened with a substantial cost that may not outweigh the disbenefit of returning to regulation in Order 1, which would unavoidably happen if the Wauseon plant were to close.

While we feel that no amendment should

be recommended by the Secretary as a result of this hearing, if the Secretary should nevertheless feel compelled to do something, that something should be to lock Superior Dairy into Order 33 the same way that ESL plants are locked into the Order in which they are located. Superior should not again be subject to flipping into and out of Order 1 simply because its sales into Order 1 are above the 25 percent of total route disposition.

The DFA, et al., proposal does not, for unexplained reasons, deal with this problem. But Proponents' testimony quite adequately demonstrates that such shifts are harmful to plants and the producers that supply them.

For this reason, we suggest, for illustration, the following alternative modifications of Proposal No. 1, consistent with limitations in the Notice of Hearing, should any amendment be recommended by the Secretary and submitted to producers for their approval:

Plants located within the marketing

area with combined route disposition and transfers of at least 50 percent into Federal Order Marketing Areas will be regulated as a distributing plant in this Order.

Or plants located within the marketing area with combined route dispositions and transfers of at least 50 percent into Federal Order Marketing Areas and such distribution is into four or more marketing areas, will be regulated as a distributing plant in this Order.

An amendment of this type would lock-in Superior Dairy to Order 33, benefit pool producers in the common milkshed, avoid losses of Superior Dairy's contribution to the pool if its distribution to other markets goes up and down, generally avoid the kind of difficulty experienced by Superior Dairy and its suppliers from April 2010 through February 2011, and affect no other plant in the market, to our knowledge.

That concludes my testimony.

THE JUDGE: All right. Thank you.

MR. WILSON: I just have one follow-up with respect to Exhibit 32.

THE JUDGE: Oh, can I interrupt you?

MR. WILSON: Yes.

THE JUDGE: I'm sorry.

MR. WILSON: By all means.

THE JUDGE: Just to do some administrative cleanup. Suiza is spelled, S-u-i-z-a. Tuscan, dash, Lehigh, L-e-h-i-g-h. And Schuylkill, S-c-h-u-y-l-k-i-l-l Haven, Pennsylvania.

And Page 4 the witness said 64 Federal Regulation 16312. I believe he meant Federal Register on 16312. Page 7, there seems to be an inconsistency between the citation for the Nourse Report. And Nourse is spelled, N-o-u-r-s-e.

At one point the document identifies the citation as Roman numeral 2, dash, 4, Pages 26 to 27. At another time in the following paragraph and the witness also testified the varying ways, the document and the witness said Nourse Report Page 11.

MR. WILSON: No, it should be -- it's

really Roman numeral two in both places.

THE JUDGE: Okay. I just want to make sure we have a clean record.

MS. PICHELMAN: And, your Honor, I think we still need to mark the two exhibits.

THE JUDGE: Okay. And this has been marked as Exhibit 31. The other exhibit that we referred to is the Schneider's -- this was produced yesterday, Exhibit 26. It has a picture of --

MR. WILSON: That's the website.

THE JUDGE: -- Pennsylvania and New Jersey. And that was mentioned in the witness's testimony.

And can I ask you, Mr. Soehnlen, is your testimony -- your verbal testimony to the extent that it varies from the written testimony, is it your intention -- what is your intention, that your verbal testimony outweigh the written or that the written outweigh the verbal?

THE WITNESS: I would like the written to outweigh the verbal.

THE JUDGE: All right.
MR. WILSON: And the only exception to that is that in the written testimony there's a few blanks for the exhibit numbers that he read in, so --
THE JUDGE: Yes. Okay. Thank you.
MR. WILSON: Shall I proceed?
THE JUDGE: All right. Thank you for your indulgence, Mr. Wilson.
MR. WILSON: This will take 30 seconds, I hope. I've put in front of the witness Exhibit 33, which is entitled Mideast Market Administrator's Bulletin Supplement. And these are three different supplements. The first one is August 2009, the next one is August 2010, and the third one is August 2011.
THE JUDGE: Can we then -- since they are three different things, can we identify the August 2010 as 33A and the August 2011 as 33B?
MR. WILSON: Yes, your Honor.
THE JUDGE: Thank you.
MR. WILSON: And then the August --

well, August 2009 would be -- oh, you want 33, 33A, and 33B?

THE JUDGE: Well, we can do A, B, and C.

MR. WILSON: A, B, and C probably is -- that's what we've been doing in other exhibits.

THE JUDGE: All right. That's fine.

(Whereupon, Exhibit Numbers 33A, 33B, and 33C were marked for identification.)

BY MR. WILSON:

Q. What are these documents -- I mean, what is the Market Administrator's Bulletin?

A. It's a publication by the Federal Milk Marketing Order 33.

THE JUDGE: I'm sorry. Could you keep your voice up.

MR. WILSON: Yeah, get closer to the mic there.

THE JUDGE: You can bring the mic to you.

THE WITNESS: I'm trying. I'm sorry.

A. It's the Mideast Market Administrator's

Bulletin. And it makes announcements with regard to the different milk and production activities in the market.

Q. To your knowledge this is a generally published document, correct?

A. Correct.

Q. Okay. And there seems to be a map of states ranging from Wisconsin to New York on the front there. And it has little squares blocked in. What do you understand that map to be representing?

A. I believe this represents the Order 33 milkshed.

MR. WILSON: Okay. Your Honor, I have no questions on this exhibit. But I want to have it introduced as a foundation so that it becomes part of the record for the Secretary.

THE JUDGE: Okay.

MR. WILSON: I have nothing further.

THE JUDGE: All right. Are you going to talk about Exhibit 32?

MR. WILSON: Do you want me to -- we did. It was in his testimony, I believe. 32. He referenced the Northeast plant.

There's a paragraph in there that talks about a plant in the Northeast that became partially regulated. And I believe the phrase that Mr. Soehnlen used, there was no hue and cry then. That's where he referenced that particular exhibit.

THE JUDGE: Yes. That's on Page 9.

MR. WILSON: Okay. So I believe all of the exhibits have been introduced and discussed in some way. At the appropriate time I'll move for their admittance into the record.

THE JUDGE: Thank you. Do I hear any objection to Exhibit 31, which is the witness's written testimony, Exhibit 32, which is a Market Administrator's Bulletin of July 2011, and Exhibit 33, the three parts which represent three separate Mideast Market Administrator's Bulletin?

(No response.)

THE JUDGE: I'm hearing no objections. I admit 31, 32, and 33A, B, and C into the record.

Although I would normally ask you,

Mr. Beshore, to come up and give your questions, since we have these outstanding objections to the 26 and some of the evidence contained in 31, I'd like Ms. Yoviene to come up so that we can fully discuss them and be done with that.

All right. Thank you.

MS. YOVIENE: With respect to Exhibit 26 --

THE JUDGE: Well, we've heard some discussion. And I feel at this point it might be good to ask some questions of the witness so that we can figure out exactly to what degree things constitute hearsay and to what degree the witness can authenticate at least Exhibit 26.

Go ahead.

MS. YOVIENE: Okay.

EXAMINATION

BY MS. YOVIENE:

Q. What is the source of Exhibit 26?

A. The source of Exhibit 26 was the Schneider's Dairy website. And I can quote the URL, if you would like, all the http, slash, slash, if necessary.

Q. With respect to the second page --
A. Yes.
Q. -- what is your understanding of what that represents?
A. My understanding of what this represents is enclosed in the caption. The Schneider's family of dairies network of processing and distribution facilities allows us to offer a wide variety of products delivered fresh every time. And this outlines their marketing or their distribution area.
Q. The second page?
THE JUDGE: I'm sorry.
Q. I'll ask a more specific question --
THE JUDGE: Sure.
Q. -- so you don't have to be general. I'm looking at the second page, which is a map that has a milk bottle on it.
A. Oh, I'm sorry. This?
Q. Yes.
A. That was the first page on mine, so...
Q. I'll ask you a specific question. You cite it in your testimony. Is your purpose in citing it to say that this represents the procurement area -- the gray section represents the procurement -- the raw

milk procurement area for Schneider's Dairy, Pittsburgh and Schneider-Valley Farms?

A. My purpose in the testimony is to represent that Schneider on its website published this information as this is their procurement area.

MS. YOVIENE: Okay. My objection is that a portion of this page from the website was excluded from the exhibit. If you read it in context, you can see that this is a representation clearly about Schneider's Dairy, Pittsburgh. It does not represent the procurement area for Schneider-Valley Farms. And that's the problem with bringing in witnesses --

MR. WILSON: Objection.

MS. YOVIENE: -- that can't -- that aren't here to testify. There's no foundation. It is hearsay.

THE JUDGE: Okay.

MS. YOVIENE: And it's about a nonparty.

THE JUDGE: All right. As far as I'm concerned, it has -- whatever value anybody wants to place on this they can or cannot.

I don't see where it has any probative value. I don't see that it really falls within the hearsay exception because your client put it up on their website. They adopted it as -- for whatever else it means.

If someone wants to interpret information as being one thing, they can do that. But they do that at their own peril. So I don't believe that this represents anything more than what Schneider says on their website.

I don't think that it explains fully the company's business structure or the various entities that they deal with or who they are dealing with outside of the shadowed area that is represented on the map.

And I agree with you, it looks as though just from my official -- unofficial notice of how websites are usually structured, and they usually do have their scroll at the top that allows you to click on to the various sites within the site. So it does look like the last page of Exhibit

26 would really be the first thing that comes up on their website.

So I'm going to overrule your objection. I let it in for the limited purposes of it being pages from a website that Schneider's Dairy posted itself. I do not believe it has much relevance or probity in the Secretary's findings.

MS. YOVIENE: Thank you for your Honor's time.

THE JUDGE: So it comes in much the same as Exhibit 27. With respect to -- you had some concerns about the testimony itself, and specifically about Mr. Soehnlen's testimony on Page 8 that talked about similarly situated to Superior Dairy.

Again, I believe that in considering whether or not -- what weight to place on this testimony, the Secretary is going to look at all of the factors that makes an entity similarly situated to another. And from the testimony I've heard in the past day and a half, those similarly situated factors are more than whether an entity is fully regulated.

So I don't believe that this standing alone and by itself is going to carry any weight with the Secretary without the additional consideration of what similarly situated means. And we've heard lots of people talk about similarly situated.

And I don't -- I think that's a term of art that will be given whatever probative value the Secretary looks at to decide whether it meets all the factors that makes something similarly situated.

So to that extent I'm overruling your objection. It comes in -- whatever weight it gets, I can't imagine -- for purposes of the discussion of Order 33.

MS. YOVIENE: Thank you, your Honor. And I would just be remiss if I didn't also state the same objection with respect to Page 9 where -- Exhibit 26, the text is actually referencing 26, that it's lack of foundation, and I did believe it's objectionable for the reasons that Exhibit

26 was. And I accept your rulings.

THE JUDGE: Okay. That's fine.

MS. YOVIENE: Thank you. You don't have to waste the time.

THE JUDGE: You're representing your client. That's not a waste of time. If in fact you were to take issue with my ruling, we'd have to have it in the record so somebody could look at it. So regardless it comes in.

MS. YOVIENE: Okay.

THE JUDGE: Thank you very much.

All right. Mr. Beshore?

MR. BESHORE: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Soehnlen.

A. Good afternoon.

Q. Let's get one small, little project out of the way. First off, last evening before we adjourned there was some colloquy concerning volumes of milk, you know, received from processing at Wauseon.

A. Okay.

Q. Are you prepared to provide that

information, just monthly -- state the volumes for the record?

A. I am prepared. It is back where I was sitting at the table, though.

MR. WILSON: May the witness get his notes?

THE JUDGE: Oh, of course. Shall we go off the record for a minute or two?

MR. WILSON: We can do that.

(Off the record.)

THE JUDGE: Why don't we ask the question again.

BY MR. BESHORE:

Q. Okay. Mr. Soehnlen, are you able to provide for the record the volumes of farm milk received and processed at the Wauseon facility monthly since it started in March 2011?

A. Yes, I am.

Q. Okay. Could you just read those, month and volume, please?

A. In March we processed 142,373 pounds of milk. In April, 255,964 pounds of milk. In May, 156,672 pounds of milk. In June we processed 139,073. July, 162,050 pounds. August, 151,079 pounds. And

September, 151,981 pounds.
Q. Okay. Thank you very much. Thank you for cooperating to provide that information for this hearing record.
The Superior, Canton facility has had three regulatory statuses in recent years as discussed in your testimony. It was fully regulated for many, many years under Order 33, correct -- a pool distributing plant?
A. Correct.
Q. Then in April 2010 it shifted to being fully regulated under Federal Order 1, correct?
A. That's correct.
Q. And then in March 2011 it became partially regulated and that situation -- and that status has continued to date, correct?
A. That is correct.
Q. All right. Now, of those three -- let me see if I understand your testimony correctly. Of those three statuses, if you were ranking them as Superior -- and I think your testimony does this, the most preferred is the status quo of partially regulated?
A. That is correct.

Q. The second best is being fully regulated under Order 33?
A. That's correct.
Q. And of those three the least desired by Superior is being fully regulated under Order 1?
A. I would agree with that, yes.
Q. Okay. And from Superior's point of view you would rank those regulatory statuses according to how they work out financially, dollars and cents, for Superior Dairy, correct?
A. That would be one factor, yes.
Q. Okay. Well, isn't that the dominant controlling factor?
A. Well, it does assist our independent producer supply.
THE JUDGE: I'm sorry. Could you keep your voice up.
MR. VETNE: Bring your mic to you rather than leaning over.
Q. Could you --
A. I'm sorry. It does benefit our independent producer supply.
Q. Okay.
A. Independent farmers who ship milk to

Superior.
Q. Okay. By virtue of the way those regulations work, it's easier financially for Superior to pay more to its producers according to the rank of those regulatory options, correct?
A. According to the rank of the regulatory options a partially regulated distributing status is a more preferred status.
Q. And it enables you to more easily pay more to your suppliers?
A. Correct.
Q. Okay. Do I understand correctly from your testimony that as a partially regulated distributing plant Superior has reported and accounted to the Federal Orders through the 76(b) option?
A. That is correct.
Q. Okay. What percentage -- and let me just say, if I ask you any questions that go into proprietary information that you choose not to disclose for this record, I fully understand that and just so state it and we'll move on to something else. So with that preface --
A. I understand.
Q. Okay. Can you tell us what percentage of

sales of Superior Dairy are into Federal Order areas in the aggregate?
     A.   In the aggregate, I do not have that information off the top of my head. I could estimate approximately about 90 percent or so of our sales -- our route dispositions go into Federally regulated territories.
     Q.   Okay. Let me just go to a couple of questions about the Wauseon facility. There's been testimony by other witnesses about the physical characteristics of that facility. When you purchased it, did it have a washer?
     A.   No.
     Q.   Okay. Does it have a washer now?
     A.   Yes.
     Q.   Okay. So when did you put truck washing equipment into that facility?
     A.   In February of 2011.
     Q.   Is it correct that there's no outside exterior storage facilities, silos at that site for storing milk?
     A.   There is raw milk storage capabilities there.
     Q.   Inside the plant?

A. It's just a horizontal silo, if you will.
Q. Undercover?
A. Yes.
Q. Inside the walls of the plant?
A. Uh-huh.
THE JUDGE: I'm sorry. Is that a yes?
THE WITNESS: That's a yes. I'm sorry.
THE JUDGE: Thank you.
Q. What products are you producing there?
A. We are making five gallon dispensers.
Q. Okay. Is that the only product line that you're making there?
A. As of now, yes.
Q. As of now. Okay. The public records from Wauseon County that we placed into the record indicated a purchase price -- the pricing of the plant of $352,000. Is that an accurate purchase price of the facility?
A. That is actually inaccurate.
Q. That's inaccurate. Can you tell us what you paid for it?
A. I would prefer not to tell what we paid for the facility.
Q. You've indicated that you've made

substantial investments in your testimony here and substantial investments which would be placed at risk by -- I'm paraphrasing, I can't find the exact point in your statement that you stated this -- but something to the effect that you've made substantial investments there that would be placed at risk if there was a change in the regulations.

A. That is correct.

Q. Okay. What in fact -- besides the purchase price and I guess putting a washer in there, are there other substantial investments you've made in that facility?

A. We have begun to upgrade all the processing equipment inside the facility.

Q. And do you intend to put a -- I take it that since the facility you've indicated may serve as a protocol facility for the caseless milk operation, do you intend to put in some caseless packaging equipment?

A. That is -- yes, that is the intent, is to transfer one of our caseless packaging fillers up to the Wauseon facility.

Q. And what is it about -- if the Wauseon facility is presently regulated under Order 1. You

want to keep the status quo. If it's regulated under Order 1, what is it about the change in regulation that would place your investment in that facility in jeopardy?
I think on Page 10 of your testimony -- the economic viability of the Wauseon plant is brought into question by the Proponents' proposal. What would keep it from being a protocol caseless facility under -- if you're regulated under Order 33 or Order 1 or wherever you distribute milk from?
A. As being a partially regulated distributing plant we have received some opportunities in which we were able to, you know, procure milk and do some things differently. And we've been able to channel that into the facilities at Wauseon at a cost. There's an expense to operate the facility. And there's an expense to be regulated in Order 1. And there has to be a balancing of those expenses.
Q. Okay.
A. And if regulation into a different Order happens, we might have to shut the facility down.
Q. So let me see if I can translate that statement or restate it perhaps. The financial benefits that you've obtained from becoming partially

regulated have been channeled into the investments at the Wauseon facility and into operating it, and if you no longer have the financial benefits from being partially regulated, it may -- the facility may no longer be economically viable; is that correct?
A. I would say that is a fair representation, yes.
Q. Among the costs -- you mentioned the cost of the Wauseon facility, operating it as you do at the present time. Among those costs are the costs of moving packaged milk product from Canton to Wauseon, offloading it and then reloading it onto distribution trucks, and taking it to its ultimate destination; would you agree with that?
A. That is a cost, yes.
Q. And those are costs that you're incurring at the present operation of the Wauseon facility?
A. That's one of the costs, yes.
Q. One of the costs. Okay. So basically in Mr. Hollon's testimony he described what he thought to be or understood to be the way the Canton and Wauseon are operating now for regulatory purposes, and that was correct the way he described it?
A. I would say that was accurate. And I think

my testimony reflected a very similar statement.
Q. I just wanted to confirm that and make sure. However, you have otherwise accused Mr. Hollon of making false statements in this hearing, correct?
A. I would probably characterize them more as possibly misleading.
Q. Okay. Well, on Page 3 of your testimony -- and maybe you want to change this and I want to give you that opportunity -- you say in the bottom paragraph in the second full sentence, Assertions to the contrary by the Proponents, in requests leading to this hearing, and in testimony by Mr. Hollon in this hearing, are also simply false.
Now, do you want to withdraw that statement, that testimony of this hearing is simply false -- what Mr. Hollon has given is simply false, Mr. Soehnlen?
A. With respect to Superior Dairy changing our pricing regulation -- or, I'm sorry, our pricing practices for using the partially regulated status to go out and lower or procure milk sales is -- I would say is false, and I would not want to change my testimony.
Q. Well, Mr. Hollon didn't say that you were doing that, did he?

A. The way I understood it, he had complaints, he investigated those complaints, and by his investigation led him to believe that this practice was happening, which is why they promulgated an amendment to the Federal Milk Marketing Order.

Q. Didn't Mr. Hollon's testimony specifically say that the money obtained by the regulatory advantage, which you confirmed there's a financial benefit there, could be used to lower product prices, it could be used to increase producer prices, or it could be used to benefit Superior's bottom line, but he made no assertions about how it was in fact being used; now, isn't that a fair statement of his testimony, because he had no way of knowing?

A. I distinctly remember in his testimony him saying that they had other people in the market, other suppliers or other members in the market, customers which were complaining that we had an advantage.

Q. You do. You've confirmed that. You do have an advantage, right?

A. Well, they were claiming that we were using this advantage to lower milk prices at the retail level.

Q. You think he testified that they were

complaining that you lowered retail prices?
A. To gain market share, correct. Yes, I believe that's what his testimony was leading.
Q. If he did not so testify, would you withdraw your charge here that he gave false testimony?
A. I believe he was making a strong representation that that was what's happening, that he investigated those claims, and that that is why he promulgated a Federal Milk Marketing Order change.
Q. And you're holding to --
A. I believe that was --
Q. -- your contention?
A. -- I believe that was one of the factors he strongly was leading to. If I'm wrong, I would probably -- yeah, I would like to correct the record and say that I'm wrong. But I believe that was -- that was a factor he was trying to solicit or he was -- alluded to in his testimony.
Q. Other than that assertion, and of course the record will speak for itself --
MR. WILSON: I'll make an objection so that I can speak.
MR. BESHORE: There's not a question pending, but certainly I would yield to

Mr. Wilson.

THE JUDGE: Okay.

MR. WILSON: Thank you. I'd just like to request that the witness be -- have an opportunity to reread the paragraph on Page 3 that these questions are directed to.

The proposition was that he accused Mr. Hollon of making a false statement, and then the subject matter that was addressed by Counsel was different than what's in that paragraph.

So I'm only going to ask -- make a request that Mr. Soehnlen be able to reread the paragraph in the middle of Page 3 that is substantively pertinent to the accusation of inaccuracy.

THE JUDGE: I'm kind of -- you lost me, Mr. Wilson. I heard -- well, I'm really kind of lost --

MR. WILSON: The paragraph that begins with, As a result --

THE JUDGE: -- I thought Mr. --

MR. WILSON: -- is the one that he then describes as false. And the subject matter that Counsel here is addressing is different. We're talking apples and oranges.

MR. BESHORE: Well, I asked him what he was alleging to be false. There's an allegation that testimony by Mr. Hollon in this hearing is false.

MR. WILSON: There's not an objection, your Honor. I only had to say objection because Counsel kept talking and I was hoping to get the floor.

I'm only asking as a point of privilege that I believe this witness is entitled to that he can reread the paragraphs to himself that he's being subject to examination of.

THE JUDGE: Nobody has stopped him from doing that. I feel Mr. Soehnlen has held his own. He's answered the questions.

MR. WILSON: I'm merely asking that he be provided the opportunity; is that permissible?

THE JUDGE: Of course.

MR. WILSON: Thank you.

THE JUDGE: He's had all the time in

the world to read this.

MR. WILSON: Okay.

THE JUDGE: He wrote it, I assume.

MR. WILSON: Go ahead.

THE WITNESS: Well, again, my question is -- or I believe what my counsel is trying to say is I'm being questioned about Mr. Hollon's testimony, and I would like to reread that testimony that's in the record.

THE JUDGE: Well, I don't hear that question. The question that I heard, Mr. Soehnlen, is you made an assertion that you recollected testimony that Mr. Hollon made and requests leading to the hearing -- requests to the Proponents apparently leading to the hearing that was maybe confirmed by Mr. Hollon or false, that those things that you believe Mr. Hollon based his assertions on are false.

Now, I don't see why you have to reread Mr. Hollon's testimony, if that is what --

MR. WILSON: That's not what I was requesting he do.

THE JUDGE: Yeah, I didn't think so.

MR. WILSON: I was merely requesting that Mr. Soehnlen have an opportunity to peruse Page 3.

THE JUDGE: And he can certainly do that.

MR. WILSON: Thank you.

THE JUDGE: But, as I said, I think he's held his own. I understand. And I don't know if anybody else will, but -- I'm the most ignorant person in this room about this matter and I understand that what Mr. Soehnlen is saying is that he believed that Mr. Hollon testified, and I recollect similar testimony, that complaints were made by customers about how they were being adversely effected by the Superior change in how it did business.

And the complaints that Mr. Soehnlen believes were alluded to were that Superior was lowering its prices to gain a competitive advantage or Superior was paying people more than they should have been paying. And Mr. Soehnlen wants to make it clear that if that is what Mr. Hollon said, that is not true. I think that's where we are.

MR. WILSON: Thank you.

BY MR. BESHORE:

Q. Is there anything else that Mr. Hollon testified to that you believe was false?

A. I believe there was some misleading testimony by Mr. Hollon.

Q. Okay.

A. I don't want to say that it's false, but I believe it's misleading.

Q. So there's nothing else that you would say is false other than what you believe to be the assertion about Superior's product prices to customers?

A. To my recollection, yes.

Q. Okay. You've made a point on Page 5 in your testimony in Exhibit 31, in dissecting the Final Decision -- the Secretary of Agriculture's Final Decision in Federal Order Reform in 1999 that three plants -- there's a reference there to three plants changing regulatory status from fully to partially regulated.

What three plants are referred to there; do

you know?
A. If you give me one second, I do have them marked. The first plant that I noticed was Friendship Dairies in Friendship, New York. The second dairy that I noted was Queensboro Farm Products, Inc., in Canastota, New York. And the third one I noticed was Turner Holdings, LLC, and that was in Covington, Tennessee.
Q. Okay. Now, what is it -- what are you -- when you say you noticed, in looking at what, a plant list that was part of the Federal Register publication in April of 1999?
A. That is correct.
Q. Okay. And the change was from, what, the Recommended Decision to the Final Decision with respect to those plants?
A. I believe what the Federal Register shows is the current status and its expected status under the proposed regulation.
Q. Okay. So the current status listed there is, what? Just take Friendship Dairies.
A. The current status is fully regulated.
Q. Okay. And the prospective status is partially regulated; is that what you're --

A. Correct.
Q. Okay. And Queensboro, the same thing?
A. Same thing.
Q. Okay. So when your testimony says three plants were noted as changing regulatory status, you noted those plants as changing regulatory status as opposed to the Secretary; is that -- do I have it right?
A. I assume the Secretary reads the Register. I don't know. I noticed them.
Q. Okay. But there was no text --
A. No text.
Q. -- there was no text in the Decision which said, you know, these --
A. Actually there was text through the body of the Register that noted those particular instances -- or certain instances. So there was text in the -- there was text that described the change in plant status. So I do not have every -- I do not have those with me. But there was text located in the body of the Register that noted plants coming in, out, and status changes.
Q. Do you know anything about the Friendship plant, for instance?

A. I have very limited knowledge of the Friendship plant.
Q. Do you know that it's not a typical --
A. I believe it's --
Q. -- regular --
A. -- I believe it's --
Q. Let me ask the question first. Okay. Let me ask the question. Are you aware that it's a plant that primarily overwhelmingly makes Class II products, not Class I products?
A. I do believe you are correct, that it is a strong Class II plant.
Q. Okay. Queensboro, do you know anything about that plant?
A. I do not have any recollection of that plant.
Q. And Turner -- where was the Turner plant located?
A. Tennessee.
Q. Okay. Are you aware that that plant also is a Class II plant primarily?
A. I believe -- it was my understanding that they did -- all the plants did Class I, but I'm not -- I'm not as experienced as some of the other counsel is

here.

Q. Okay. That's fine. Thank you. In your discussion of the Nourse Report in your statement, Page 7, for instance, I guess, but no particular place -- it's correct, is it not, that the Nourse Report viewed the situation where one plant has an individual handler pool status essentially and all the other plants around it have -- are part of the marketwide pool, but the Nourse Report did not approve of that situation but viewed it as a disorderly situation?

A. My understanding from the Nourse Report was that it felt that this -- that there was an opportunity for disorder to happen in that situation.

Q. Okay. In offering Exhibit 32 and commenting on it, you seem to be suggesting that whatever is referred to on Page 2 of Exhibit 32 in terms of a plant changing regulatory status, that that is similar to Superior Dairy's situation; is that the point of Exhibit 32 and your comments about it?

A. First, could I take a look at Exhibit 32?

Q. Absolutely. I just assumed you had it there. I'm sorry.

A. The purpose of Exhibit 32 was to show that a plant which was regulated inside of Order -- or in Federal Order 1, which became partially regulated, it was a significant -- it was a relatively large plant that had multiple plants to work with -- became partially regulated, and there was no attempt to change any marketing orders to re-regulate that plant.

Q. Okay. Now, do you know what plant you're -- what plant that is?

A. My understanding is that was a PET plant.

Q. Do you know where the PET plant is located, if it was a PET plant?

A. I believe it was located in Virginia in an unregulated zone.

Q. Okay. So you believe that a PET plant in nonregulated areas of Virginia located there changed regulation under Order 1 over a period of months from one status to another status; is that your testimony?

A. That is my -- that is my testimony, yes.

Q. Okay. And are you asserting that -- that change in regulation of a plant in an unregulated area between Order 1 and Order 5 physically, correct -- Virginia would be geographically sort of between Order 1 and Order 5, correct?

A. Correct.

Q. Okay. But that change in regulation is comparable to the changes in the Canton -- Superior Dairy, Canton plant regulation?

A. My assertion is that a plant becoming -- a plant which was fully regulated under a Marketing Order that became partially regulated under that Marketing Order is a similar comparison to the Superior Dairy, Canton, Ohio, facility.

Q. Okay. Are you aware of the status of the PET, Richmond plant at the present time?

A. I believe it is regulated again.

Q. Fully regulated under Order 1?

A. I do not know for sure it's under 1. I do believe it is fully regulated. It might have been in Order 5, but I'm not sure.

Q. Okay. Do you have Exhibit 6B?

A. No, I do not.

MR. BESHORE: Could he have Exhibit 6B, your Honor?

THE JUDGE: 6B?

MR. BESHORE: Yes.

THE JUDGE: Again?

MR. BESHORE: Yes, again.

Q. Okay. If you look at the last page of 6B, which shows the status of these plants in the most current months, July and August of 2011. Did you see the line for PET Dairy, Richmond?

A. Yes, I see it.

Q. Okay. Is that the plant that you were talking about and you believe is referenced in Exhibit 32 --

A. I believe --

THE JUDGE: Wait a minute. Finish your sentence, please.

Q. Is the PET Dairy, Richmond plant the plant that you've been talking about and you believe was referenced in Exhibit 32?

A. I believe that is the plant, yes.

Q. Okay. And what status does it -- on Exhibit 6B what status has it had in August of 2011, PDP 1? You'll see on the footnote what that means.

A. It's a pool distributing plant. I believe that reference is Order 1.

Q. Okay. In July, the same thing?

A. Correct.

Q. Okay. And if you go back to June -- to the prior page, in May and June it was -- of 2011 it was also a pool distributing plant, correct?

A. That is correct.
Q. So apparently there's -- whatever was going on, the PET plant has resolved itself into full regulation status at the present time?
A. I can't comment on what was going on at the PET plant, so...
Q. Well, I can't either. I don't know what was going on. My question was, apparently whatever was going on it has resolved itself such that the PET plant is presently fully regulated?
A. It appears that is the case.
Q. Okay. Just a final question or two, Mr. Soehnlen. I want to just go to your alternative proposals noted on Page 10 of your testimony, Exhibit 31. Your first alternative -- let's assume that Superior Dairy continued to operate just as it is today at Canton and at Wauseon for purposes of discussion. Under your Proposal 1 would both of those facilities be pooled in Order 33?
A. Under Proposal 1, I know the Canton facility would be pooled in 33. I would have to think about the -- I believe the Wauseon facility would still be pooled in Order 1.
Q. Is that your intention or would you -- is

your intention to have them both pooled in Order 33 since that's a preferable option to Order 1 from your perspective?

A. I would say my preference would be they both be in 33.

Q. Okay. Now, the second option, your second alternative, can you talk about that a little bit? I'm not sure -- why is that a -- why do you have to -- I mean, if "1" accomplishes what you want, what's the purpose of Alternative 2?

A. The purpose of Alternative 2 would get -- again, this language should look familiar. It's very similar to the treatment that is afforded in extended shelf life plants, where facilities have the capability to serve more than one marketing area and to prevent the disorder from going in between the different marketing areas. Again, that jumping around between one Order to the next has been shown to be disorder. This would help, you know, lock us into current Federal Order.

Q. Okay. I really just wondered what was your thought process in concluding the language "and such distribution is into four or more marketing areas"?

A. The language with four or more marketing areas is to help, I believe, limit it to plants that service -- there's very few plants that service more than four marketing areas when looking through the status of the different plants in Order 33.

So this one would affect Superior Dairy and Superior Dairy only and not change the other -- the status of -- the regulation status of the other facilities.

Q. Okay. And in that case your view is that it might be -- alternatively at least and you're proposing something that would affect Superior and Superior only, and that's a good idea here as an alternative?

A. Well, as an alternative -- they wouldn't listen to my first alternative, so -- I mean, I've got to fall back on some different alternatives, I guess.

THE JUDGE: I'm having a real hard time hearing you, so I imagine the people in the back are too.

THE WITNESS: I said we're not allowed to have any hearings on my first proposal, so I had to go back to fallback proposals.

THE JUDGE: Okay.

MR. BESHORE: I have no further questions for Mr. Soehnlen at this time.

THE JUDGE: All right. Thank you. I would have called on Mr. Yale, but he stepped out of the room.

So Ms. Pichelman, do you and the Government have questions?

Please state your name.

MR. RICHMOND: Bill Richmond, USDA.

EXAMINATION

BY MR. RICHMOND:

Q. Thank you for testifying today. We really appreciate it. We just had a couple of questions for you. Let's start on Page 1 of the exhibit. The second paragraph, the last sentence says that the producers supplying Superior Dairy represent 100 percent of producers who would have to give up part of their regulated milk revenue under the proposal.

What is your understanding of regulated milk revenue?

A. My understanding of regulated milk revenue is that Superior Dairy is obligated to pay classified prices to its -- excuse me, under Section 1000.76(b) Superior is obligated to pay its -- to pay the minimum classified value to its producers.

Now, again, our plant blend is typically higher than the market blend. So under that regulation I would have to pay these producers who supply us a higher -- the higher of the plant blend. So they're going to be negatively impacted if they do not have -- if they're not regulated under Section 1000.76(b).

Q. Okay. Thank you. In Pages 6 and 7 you go into discussion of the Nourse Report. And, again, I just wanted to see if you would like the opportunity to clarify.

That paragraph on Page 7 there, the third one that starts with, This latter method of computation. The last line there says, will fail to bear a proper share of the burden of maintaining the reserve supply. What is your understanding of maintaining a reserve supply?

A. My understanding of maintaining a reserve supply is the balancing that takes place throughout the market in which that fully regulated producers absorb the cost of -- throughout the course of a year. So, again, this is -- maintaining that reserve supply is the balancing that takes place.

MR. RICHMOND: Okay. I think I'm okay.
MS. TAYLOR: Good afternoon. This is Erin Taylor with USDA.

EXAMINATION

BY MS. TAYLOR:
Q. On Page 9 of your statement, the top paragraph, you quote from the Market Administrator's Bulletin, that's Exhibit No. 32, about a large distributing plant regulated in the Order in 2006, it became partially regulated in 2010, and then you went on to say, This, as I understand it, was a plant that had sister plants through which sales could be coordinated to help the plant flip into or out of partial regulation.
What's your basis for that statement?
A. The basis for that statement is -- this was a Dean Foods plant. It had multiple locations. And it had the opportunity to transfer product throughout -- through their different manufacturing plants. My basis is they had an opportunity to shift sales patterns so that they could be -- take advantage of the rules and be partially regulated.
Q. Okay. But the name of the large distributing plant being a Dean Foods plant, you

didn't grasp that part from Exhibit 32?
A. I grasped that through the public reports and -- that shows which plants become regulated and partially regulated.
Q. Okay. I want to talk about your modification, primarily the first one. I guess first you had said before in cross by Mr. Beshore that 90 percent of Superior's route disposition goes into Federal Marketing Orders. Is that for the two plants combined or for this Canton plant or the Wauseon plant?
A. That would be for both plants combined.
Q. Okay. So under your modification you had stated that Canton would then become locked into Order No. 33. It would become a fully regulated plant because it would have at least 50 percent of its route disposition and transfers into Federal Marketing Orders?
A. That's correct.
Q. But you're unsure whether that would lock-in your Wauseon plant?
A. I'd have to read the full section quoted above that. I don't have that available and I don't know off the top of my head. Because the

preponderance of the sales in Wauseon would still go into Order 1, so I'd have to read the full text of this passage.

Q. Okay. But when you take out the 25 percent of route disposition, your modification would say if any plants located in the marketing area and has route disposition in any Federal Order, it doesn't matter where it is or what percentage it is, it would then become locked into Order 33?

A. Again, I believe the text above still has provisions which would prevent plants from being totally locked in.

Q. I'm guessing what I'm trying to get at is, above -- in the first part above on Page 10 you talk about if the Cooperatives' Proposal 1 was adopted, the economic viability of the Wauseon plant is brought into question. I'm trying to find out then how is that different than if your modified Proposal 1 was adopted?

A. It would still be brought into question. I still would have to -- we'd still have to evaluate the economic feasibility of operating the plant in Wauseon. Again, we still have some strategic value for the plant. So there's economic considerations

that we're forced to live under.
And, again, if I -- my first -- and I think I stated that with Mr. Beshore, my first preference would be to remain a partially regulated distributing plant. There was a lot of -- we had a lot of issues when we were physically located and received a preponderance of our milk from Order 33 and we were regulated into Order 1. It was economically very difficult for us. So if we had to choose a second alternative, it would be to be in Order 33.
Q. Okay. A few follow-up questions also. What percentage of your supply or how many independent producers do you have, approximately?
A. Approximately 120 independent producers.
Q. And would you consider most of them small businesses?
A. Yes, I would.
Q. And is Superior itself a small business?
A. Yes, it is.
Q. And can you comment on the request for emergency consideration as brought by the Proponents for this proposal?
A. Yes, I can comment on that. I think we've demonstrated that we do not have the financial

advantage through the prices that we're paying for a large amount of our milk supply, and that the benefits were somewhat exaggerated to prompt members into action and to necessitate -- you know, the larger dollar amount necessitated more emergency.

I don't believe -- I believe it's significantly less than what the Proponents have suggested. I know it's significantly less than what the Proponents have suggested.

Q. Okay. So you would ask that the Secretary not consider this an emergency and go through the normal rulemaking process as we move forth?

A. That is correct.

MS. TAYLOR: Okay. That's it. Thank you for testifying today.

THE WITNESS: Thank you.

THE JUDGE: Anything else from the Government?

MS. PICHELMAN: No.

THE JUDGE: All right. One second, please. I'd like to --

MR. YALE: I have nothing, your Honor.

THE JUDGE: You have nothing. All right. Thank you, Mr. Yale.

Okay. Ms. Yoviene?
MS. YOVIENE: I have some questions.
THE JUDGE: Sure.
REEXAMINATION
BY MS. YOVIENE:
Q. Good afternoon, Mr. Soehnlen.
A. Good afternoon again.
Q. Isn't it true that the Pennsylvania Milk Marketing Board has the regulatory authority to establish minimum prices above Federal minimum prices?
A. I believe that is the case, yes.
Q. And you would agree that those regulated prices are well above -- $2.00 above Federal minimum prices currently?
A. I do not have that information.
Q. Okay. If they were well above -- $2.00 above Federal minimum prices, that would be significantly above your mandated regulated price, correct?
A. If they were $2.00 above Federal minimum -- again, I'm not exactly sure on the workings of that -- of the Pennsylvania Milk Marketing Board as far as how it determines payments to the Board and how the payments get distributed. So I have a -- you're more

sophisticated on that than I am, so...
Q. Well, thank you.
A. If the question is, is $2.00 more than the Federal minimum, I would consider that -- that on its face I would say, yeah, that seems significant.
Q. Okay. Let's see. And you're aware, aren't you, that Virginia has its own minimum pricing program that resulted in regulated prices above Federal minimum prices, are you not?
A. I'm aware there's a Virginia milk program out there. I'm aware there's a Virginia regulatory agency for milk, yes. I can't confirm everything about the Federal -- I don't study enough to know the Federal implications of it.
Q. Okay. Thank you. With respect to your Exhibit 32, you don't have any firsthand knowledge that transfers were the reason there was a change in regulatory status of the processor referred to in your exhibit, do you?
A. I do not have firsthand knowledge, no.
Q. Thank you. Do you know where the -- let's see -- this Schuylkill Haven plant in Pennsylvania is; do you know where that is, how many miles that is away from the Ohio border?

A. I'm sorry, the...
Q. This Schuylkill Haven, Pennsylvania, plant.
THE JUDGE: Could you spell that for us, please?
THE WITNESS: Oh, boy.
MR. WILSON: S-c-h-u-y-l-k-i-l-l, I believe.
MS. YOVIENE: Schuylkill, S-c-h-u-y-l-k-i-l-l.
MR. WILSON: Schuylkill.
MS. YOVIENE: And then H-a-v-e-n is the second part of that name.
A. I do not have that information with me. I might have it back in my notes, because I believe I looked it up one time.
Q. You don't have any firsthand knowledge, do you, that Schuylkill Haven acquires raw milk from western Pennsylvania, Ohio, or Order 33?
A. Schuylkill Haven, I do -- I'm not -- I am not familiar with where their procurement practices are.
THE JUDGE: They're on the Schuylkill River. It's nowhere near Ohio.
MS. YOVIENE: Thank you, your Honor.

THE JUDGE: I can take official notice having grown up in Philadelphia and the Schuylkill River runs through it.

MS. YOVIENE: For the record, they're near Philadelphia.

THE JUDGE: Yes. Thanks.

BY MS. YOVIENE:

Q. And you've referenced the marketing plant in Virginia. Do you know how far away that is from Ohio?

A. I do not have it on me, no.

Q. And you do not have firsthand knowledge, do you, of where they procure their raw milk from?

A. I do not have firsthand knowledge.

Q. Okay. And with respect to Schneider-Valley Farms you do not have firsthand knowledge of where they procure their raw milk from, do you?

A. I have a website which they purport where they claim they have -- where they procure their milk supply.

Q. So is your answer no to the question of whether you have firsthand knowledge of where they procure their milk from?

A. If their website is accurate, I would say I have -- I would have knowledge of it. Maybe it's not firsthand, but I would have knowledge.

MS. YOVIENE: I'll leave that one. Okay. And that's all. Thank you. Thank you, Mr. Soehnlen.

THE WITNESS: Thank you.

THE JUDGE: All right. Mr. Wilson?

MR. WILSON: I have no redirect.

THE JUDGE: Oh, wait a second. Well, first of all, Mr. Wilson gets to redirect. And then we'll go around again.

MR. WILSON: That's fine. I have no redirect for this witness.

THE JUDGE: All right. Thank you. Now Mr. Beshore.

MR. BESHORE: Thank you. Just one follow-up question.

RECROSS-EXAMINATION

BY MR. BESHORE:

Q. You responded to someone that you felt that the economic impact of partially regulatory status of Superior Dairy had been exaggerated; did I hear you correctly?

A. Yes.

Q. Now --

MR. WILSON: Only one question.
MR. BESHORE: One line. I'll take --
MR. WILSON: Take liberty --
MR. BESHORE: -- the same liberty --
MR. WILSON: I know.
MR. BESHORE: -- that you did.
Q. Now, did you see -- you've seen and you've been here through the hearing -- you've seen Mr. Hollon's spreadsheet, Exhibit 25?
A. Yes.
Q. Okay. Have you looked at those calculations; have you studied those calculations?
A. I've studied -- I've -- I haven't -- I haven't explicitly studied every calculation, but I've reviewed the spreadsheet.
Q. Okay. Are you asserting that anything in that -- in those calculations is inaccurate?
A. I believe it's misleading.
Q. Okay. I asked you a different question. Are you asserting that any of those calculations are inaccurate?
A. I believe the calculation is accurate. The way it was portrayed I believe was misleading.
Q. Okay. So you believe that the numbers are

correct, they're accurate?
A. I believe if you take into consideration over-order premiums, these numbers would be accurate.
Q. Well, now, wait a minute. I'm not sure -- the exhibit is strictly calculating Order values, correct?
A. That's not my understanding, no. If the spreadsheet strictly calculated classified values, there would be no advantage for Superior Dairy with respect to the ability to proffer from more sales.
Q. Okay. Let me see if I understand you. The spreadsheet you've said is accurate as far as you know in terms of the arithmetic and the calculations; however, you don't think that what one would conclude -- that what Mr. Hollon concluded from the data is properly concluded, you would make other inferences from the same data?
A. The data here does not reflect strictly classified values of milk, which I believe was being offered that this is what it did.
Q. And you're saying that doesn't --
A. His calculation --
Q. -- relate to --
THE COURT REPORTER: Wait.

Q. Let me ask the question.
THE JUDGE: One person at a time, please.
MR. WILSON: Can the witness finish his answer, your Honor?
THE JUDGE: Excuse me?
MR. BESHORE: Well --
MR. WILSON: Can the witness finish his answer?
MR. BESHORE: He finished on this.
MR. WILSON: I don't think he did.
THE JUDGE: Let's not get into a fight about that.
All right. Ask your question, Mr. Beshore.
BY MR. BESHORE:
Q. Are you stating that the exhibit does not reflect minimum classified values?
A. I'm stating that if the spreadsheet was solely reflective of minimum classified values, Superior Dairy -- or this advantage that he calculated would not exist.
MR. BESHORE: Okay. I'll leave it right there. Thank you.

THE JUDGE: Mr. Wilson?

MR. WILSON: Yes. I have no redirect based on that.

THE JUDGE: Mr. Richmond or Ms. Taylor?

MS. TAYLOR: We couldn't let you off that quickly.

THE WITNESS: I knew that wasn't going to be the case.

REEXAMINATION

BY MS. TAYLOR:

Q. I want to return to the Order language. I want to make sure that the record is clear on what the intent of your modification is. So if I could ask the Judge to give you Exhibit 21 to look at. It's probably the easiest and the biggest font for you to read, along with your exhibit, Page No. 10.

THE JUDGE: Would it be helpful to -- I'm sorry, Ms. Taylor. Would it be helpful to also look at Exhibit 1, which actually has the --

MS. TAYLOR: I'm actually going to have him turn to Page 15.

THE JUDGE: Okay.

MS. TAYLOR: It's a little bigger font.

THE WITNESS: Okay. So I'm looking at Exhibit 21?

MS. TAYLOR: Yes.

THE WITNESS: Exhibit 21, Page what?

MS. TAYLOR: Exhibit 21, Page 15.

THE WITNESS: Okay.

MS. TAYLOR: It's just the Proposed Order Language by the Proponents. And specifically Paragraph A that is identical to what is proposed in the hearing notice. So we'll work from there.

THE WITNESS: Okay. And you want me to turn to my testimony?

MS. TAYLOR: Yes. Your Page 10.

BY MS. TAYLOR:

Q. Okay. So what you're doing is striking the 25 percent route disposition and transfers into any Federal Order barring that as part of the Proponents' proposal towards the end. And when I had asked you before what would the impact be on your plant in Wauseon, you weren't quite sure because you had to read the above text.

So I guess I'm trying to get at the intent of your proposal. Because as we read your proposal it would create a conflict with other Order's regulations, in that you're still leaving -- other Orders still have the 25 percent route disposition and transfers in their marketing area would -- a plant pooled in that area.

So, for example, your Wauseon plant, if it had 30 percent route disposition in Order 1 right now, it would be regulated in Order 1. Under this modification under Order 1's regulations it should be regulated in Order 1, but under this modified proposal it would be regulated in Order 33.

So then where are we trying to regulate that specific plant, I guess is the question?

A. That's a good -- I would have to sit down and review that a little bit more here.

Q. Okay. And I understand that.

A. I didn't take into consideration when I drafted this.

Q. Okay. I don't expect you to have to figure that out right now. But that's a conflict that we need to get cleared.

A. I did give an alternative proposal also, so...

Q. Right. Which also strikes the 25 percent route dispositions. So as we read it, it would still create the same problem, that you're modifying Order 33's regulations, but yet if a plant located in Order 33 had a route disposition in another Order of 40 percent, and that Order said if you had route disposition in a marketing area of 25 percent, well, that other Order would say you should be regulated here.

A. Okay. It -- I'm not going to dispute that what you're saying is incorrect. I thought we were trying to tie it to some sort of geographic, inside the area. And I'm sure there's some language -- or some modifications in the proposal which would imply something similar. But I think you understand the intent of the proposals.

Q. The intent of the proposal for Order 33 is that any plant located in Order 33 with route disposition of 50 percent in any marketing area in the aggregate would be regulated under Order 33?

A. That is correct.

MS. TAYLOR: Okay.

THE JUDGE: Mr. Soehnlen, do you think you need time to look at the entirety of the proposal and your counterproposal and come back and talk about it a little more?

MR. WILSON: Can I address that, your Honor?

THE JUDGE: Sure.

MR. WILSON: Our intention -- Mr. Soehnlen is my client -- is to present another way of thinking about this. Certain issues have been raised. We ultimately defer upon the Secretary and the ample staff here to craft legislative language. It's obviously not what we do.

So our intention is to state a concept, you know, the locked-in concept, taking in geographical factors as something that they can consider as part of their deliberations.

And I don't know that we want to write the legislation per se and we hope that the expression would be understood and that the USDA itself, if they were to embrace that concept, would tighten it up, make it consistent, et cetera.

THE JUDGE: All right.

MR. WILSON: So I don't know that we really want to offer too much more in terms of the legislative guidance.

THE JUDGE: I wasn't asking that.

MR. WILSON: Okay.

THE JUDGE: I was just merely referring to Mr. Soehnlen's representation that he hadn't had a chance to look at --

MR. WILSON: Right. And I believe that's what the AMS attorney was -- not attorney, an AMS representative was attempting to do here to her credit. I'm just suggesting that -- we'll do whatever the Bench requests, but I don't know that we have that much more to say on this subject.

THE JUDGE: I'm not requesting anything. It was Mr. Soehnlen who said that he didn't read it.

MR. WILSON: Okay. I'm trying to say that we're not interested in doing that. That's all.

THE JUDGE: Okay.

MR. WILSON: On behalf of my client.

THE JUDGE: So you're not allowing your client to answer the question. Okay. That's fine.

MR. WILSON: Emil, do you want to do what the Judge is asking?

THE JUDGE: I'm not asking him anything. I just want to know if he wants the time to look at that before he gives an answer. That's all.

THE WITNESS: I believe the AMS has sufficient knowledge of our intent, that they can craft legislation if they feel appropriate.

THE JUDGE: All right. So you feel comfortable that Ms. Taylor's summary is what your intention was --

THE WITNESS: Correct.

THE JUDGE: -- and what you hope to achieve? Okay. Notwithstanding your earlier comment that, gee, I haven't looked at it?

THE WITNESS: I'm not as fast -- a speed reader like everybody else.

THE JUDGE: That's okay. You're a CPA. I understand. You have to think things through. And that's a good thing.

All right. Any other questions from

the Government?
MS. TAYLOR: No.
THE JUDGE: Anything from Ms. Yoviene at this point?
MS. YOVIENE: No, your Honor.
THE JUDGE: No. All right.

EXAMINATION

BY THE JUDGE:
Q. I just have a question about the spreadsheets that you were discussing, Mr. Soehnlen. And you specifically talked about the advantages. Could you just -- for purposes of my understanding, what column are we talking about that reflects the purported advantage?
A. The purported advantage, that's shown in Columns AAA, CCCC, and EEE.
Q. Okay. And what is it -- is there something that you believe is not reflected on the spreadsheets that would have changed that number?
A. I believe when looking at Section 1000.76(b), if we look specifically at minimum classified pricing, these values that are purported here would not exist, because they would have to be any -- again, I tried to explain it earlier -- that

would have to be paid to the producers.

So the advantage that I would have is I would have a lot of producers that would want to sell me milk. There would be no fund for me to take advantage of because I would have to pay that to the producers.

Q. All right. So this is starting with the base price and not including anything else that you might pay directly to the producer; is that --

A. This is starting with the minimum classified price.

Q. And it does not entertain any amounts that you may pay in addition --

A. In addition to that minimum classified price.

Q. All right.

A. This spreadsheet takes that -- additional payments into consideration.

THE JUDGE: Okay. Thank you very much.

Any follow-up to my questions?

MR. WILSON: No further redirect.

THE JUDGE: Anything from anyone else; any questions for Mr. Soehnlen?

(No response.)

THE JUDGE: No. All right. Thank you for your testimony. You may step down.

THE WITNESS: Thank you.

MR. WILSON: I believe I have no other witnesses. And I believe my exhibits were admitted. So I don't believe there's any other business.

THE JUDGE: All right. Thank you, Mr. Wilson. Is there any other presentation that anyone would care to make at this time?

(No response.)

THE JUDGE: Okay. Mr. Wilson, I believe you had some kind of procedural motion?

MR. WILSON: I don't think so. I think --

THE JUDGE: Oral argument?

MR. WILSON: Well, if there's any interest in the Bench in having oral argument on the briefs, we'll -- the two motions, we'll provide that. But if there's no interest in that, we'll -- I'll sit down.

THE JUDGE: Okay. I would just like to state on the record my reasons for not entertaining oral argument on motions. If I were to do that, then I would be forced to wait until the transcript is issued and certified before I can give a decision on what I believe to be well argued and addressed motions.

The delay I believe might somehow affect the parties. I don't know how. I don't know if interlocutory appeal is ever entertained in this sort of matter by anybody. But I feel that it's best for the parties particularly considering the nature of the motions that I rule on those without the 60 day or so interim that I believe it might take for the transcript to be compiled, distributed, reviewed by the parties, and then certified by me.

MR. WILSON: Thank you, your Honor.

THE JUDGE: All right. Thank you.

MS. PICHELMAN: Your Honor, I actually had one more thing I wanted to bring up.

THE JUDGE: Oh, sure.

MS. PICHELMAN: There actually is a second proposal that's in the Notice of

Hearing. It's really just more of an administrative proposal. But it's by Dairy Programs, AMS, proposal to make such changes as may be necessary to make the entire Marketing Agreement and the Order conform with any amendments thereto that may result from this hearing.

So this is just a conforming changes proposal that if the proposed amendment were modified -- the modifications -- there are just changes that you need to make throughout the Order just to make sure that happens. We have no witnesses. It's pretty straightforward.

THE JUDGE: And does anyone want to --

MR. WILSON: We have no comment on behalf of Superior Dairy.

THE JUDGE: All right. Nothing from Superior Dairy.

Yes, Mr. Beshore?

MR. BESHORE: One final request, if this is the appropriate time. I want to request that official notice be taken of two documents that Mr. Hollon referenced in his testimony.

THE JUDGE: All right.

MR. BESHORE: Okay. And those are the --

THE JUDGE: Let me get his testimony.

MR. BESHORE: -- Final Decision on Federal Order Reform, which was published April 2, 1999, at 64 Federal Register 16130. That's one of the pages of that publication. I don't have the starting page. What I intend to request, the notice, is the entirety of that Decision. And multiple witnesses have brought that up.

THE JUDGE: And this is just for purposes of clarity. This is referenced at Exhibit 21, Page 4?

MR. BESHORE: Correct. Mr. Vetne informs me that the starting page is 16026 in the Federal Register for that Final Decision.

The other item for which I would like to make a point -- and Mr. Hollon referenced in Pages 6 to 7 in his statement, Exhibit 21, that I would like referenced is the

Louisville-Lexington-Evansville proposed rule signed January 7, 1998, which I do not have the Federal Register cite at the moment, but I will assure everyone that I will provide that promptly to your Honor -- or to everyone. I think we've got enough information to take notice of that action and the publication -- I mean, the publication information will be supplied.

THE JUDGE: Mr. Vetne, can you pull that citation out of your pocket?

MR. WILSON: We have no objection to that request.

MR. VETNE: I would like to address official notice of other documents.

THE JUDGE: All right. Well, first, can we talk about a time frame. When will you be able to supplement the record with that citation, Mr. Beshore?

MR. BESHORE: By the end of the week.

THE JUDGE: All right. Is that acceptable; does anyone have an objection to that?

MR. WILSON: No objection.

MR. BESHORE: I'll e-mail that to everybody.

THE JUDGE: All right.

MR. BESHORE: I'll file it with the Hearing Clerk.

THE JUDGE: Would you, please. I was going to say, will you just file a supplement to Exhibit 21.

MR. BESHORE: Yes.

THE JUDGE: And we will say that Exhibit 21, Page 4, has been corrected by Mr. Vetne's kind additions and that 21, Pages 6 to 7, shall be supplemented by Exhibit 21A, filed with the Hearing Clerk, distributed to the parties. Thank you.

All right. Mr. Vetne, please place your appearance on the record and spell your name.

MR. VETNE: John Vetne, V-e-t-n-e. I'm an attorney and consultant to Superior Dairy. I live in the boondocks of northern Maine at 311 George Cole Road, New Portland, Maine.

THE JUDGE: Thank you, Mr. Vetne.

MR. VETNE: Your Honor, I will be doing major rowing on the briefing of this.

THE JUDGE: All right.

MR. VETNE: Official notice of decisions is perfectly fine. The Rules of Practice address official notice of facts which are not in genuine dispute from official sources and then provides an opportunity to disprove those facts, if you would object. And the reason one would refer to official notice of USDA decisions is so that one can refer to facts contained in those decisions.

THE JUDGE: All right.

MR. VETNE: There's another reason why one might refer to USDA decisions, and that is to refer to statements of policy and practice. And that is more like referring to a prior court decision as precedent.

And I do not want it to be inferred that by not -- you know, that those are the only two cases -- only two decisions that might be referenced for purposes of policy and we're limited to those two.

As is typical for these briefs, I and other parties will probably refer to a number of historical decisions for the purpose of tracing the policy development of the Department with respect to lock-in, partially regulated plants, and so forth.

So I just want to make sure that I am not -- we are not by agreeing to official notice of those two cases in any way limited to referencing other decisions. That's all.

THE JUDGE: Oh, I don't see why it would.

MR. VETNE: I don't either. But, you know, who knows.

THE JUDGE: That's true. Caution is never misspent when it comes to the law. Thank you.

Ms. Yoviene, do you care to be heard?

MS. YOVIENE: Of the utmost caution for briefing purposes I'd like to request official notice. I have citations for two of them -- I'll be happy to supplement the record -- of the State milk pricing laws for Pennsylvania and the pricing announcements.

And for that I have a citation for the pricing announcements of www.mmb.state.pa.us. And then if one selects Pricing, they will find the producer pricing announcements.

THE JUDGE: All right. Thank you. I think for the sake of a complete and clear record, if you could supplement the record by filing that information with the Hearing Clerk, that would be Exhibit 34, I would appreciate that. Anyone who wants to look it up you have it on record. If you have an objection, you can raise that and I'll address that.

MS. YOVIENE: Okay. So to complete my request with the filing clerk?

THE JUDGE: Yes.

MS. YOVIENE: Okay.

THE JUDGE: Or Hearing Clerk.

MS. YOVIENE: Okay.

THE JUDGE: Mr. Vetne?

MR. VETNE: Point of clarification, your Honor, I hope you're only asking Ms. Yoviene to file with the Hearing Clerk the URL for the sites, rather than the documents that are contained --

THE JUDGE: Oh, yes. No, absolutely. Just a copy of the URL. So if there's any misstatement on the record, we have it in writing.

MS. YOVIENE: Or the citation if for some reason --

THE JUDGE: Or the citation.

MS. YOVIENE: Yes.

THE JUDGE: Yes. That's right. No, it should be a one-page document. No, I do not expect -- thank you for that -- to download the entire website.

MS. YOVIENE: Yes, thank you for that. And just to be clear, it would be more than Pennsylvania. It would be Pennsylvania, Virginia, Montana -- the states that do have over-order or minimum pricing regulation.

THE JUDGE: Okay.

MR. BESHORE: For clarification, will the request state what particular time period and particular documents are being referenced? I mean, there's a, you know,

literal mountain of data for -- you know --
THE JUDGE: I hear you, Mr. Beshore.
MR. BESHORE: -- extended periods of time.
THE JUDGE: But I think this has such limited application to what we're here about. And I think what Ms. Yoviene wants to do is make sure that anyone who wants to take umbrage with the discussions about Schneider Dairies and any similarity that it may or may not have with Superior Dairies, we'll have some frame of reference to look through to see pricing. That's all.
I don't know that dates -- I mean, what's your concern, Mr. Beshore? I guess I'm not understanding your concern.
MR. BESHORE: My concern is just that the -- you know, the scope of the data that is being noticed for the record be defined.
THE JUDGE: Okay.
MR. BESHORE: That's specifically my concern.
THE JUDGE: All right. I thought I heard the scope when Ms. Yoviene came up and

said she just wanted this website to show a written -- she wanted official notice to be taken of those states that had pricing that was over or under the Federal minimum. That's what I believe; am I wrong about that?

MS. YOVIENE: Yes. And the price announcements to show the difference between the Federal minimum price and the State minimum price.

THE JUDGE: Okay.

MS. YOVIENE: And I'm happy to scope it by time, by date.

THE JUDGE: Okay.

MS. YOVIENE: And then we don't have to worry about it.

THE JUDGE: All right. Thank you. If you could do that. So I do feel we have a defined limitation of what we're looking for on that website.

You're still not satisfied, Mr. Beshore?

MR. BESHORE: I'm not -- I don't want to beat a dead horse here, but there's literally, you know, all kinds of information on those websites that are published pursuant to those statutes and regulations that, you know, define what goes on in those regulations.

THE JUDGE: Right.

MR. BESHORE: Prices -- various levels of prices and types of prices. I'm only looking for a little bit of specificity and definition in terms of what's being brought into the record.

THE JUDGE: Okay.

MR. BESHORE: And I don't want to make any further deal out of it. I don't think we've had a whole lot of specificity here. But if your Honor is satisfied and everybody else is satisfied, I'll leave it at that.

THE JUDGE: What more specificity do you want?

MR. BESHORE: Time periods. And price announcements are one thing. Does that mean no regulations, no price orders? There's all sorts --

THE JUDGE: Do you want to address

this, Ms. Yoviene, because it seems like you've raised a terrific bag of worms here.

MS. YOVIENE: And I apologize.

THE JUDGE: That's okay.

MS. YOVIENE: It's been my mantra apparently. The intention is to cite to the -- whatever the authorizing law is that provides the state with the authority to do state level minimum or over-order pricing to cite to the law -- which we could do anyway, but specifically to cite to price announcements. Price announcements that are related to the time frame that we've been talking about, which is, you know, the last -- you know, since March. I can scope it to around a year.

And then I would think that it would be price announcements perhaps related to decision making about partially regulated facilities in the past by USDA.

THE JUDGE: All right. Is this really necessary for purposes of the Department's analysis and decision making? I mean, I don't even know what you're protecting your client from. I guess I'm very -- what's the purpose of this?

MS. YOVIENE: Our clients are not here to say that they're not similar to Superior Dairy.

THE JUDGE: I understand. Okay. All right.

MS. YOVIENE: And there are official notice ways to do it.

THE JUDGE: Okay. And as I said, Mr. Beshore, if you don't like whatever is filed, you can file an objection and we can address that, okay?

MR. BESHORE: Okay.

THE JUDGE: But I think I heard specific parameters of time and specific information. And if you need me to issue an order that says that this filing is limited to the information contained with respect to the pricing, I will do that.

MR. BESHORE: I'm fine.

THE JUDGE: Okay. If you want, I'll do that. But if there is a problem, you know where to find me and the Hearing Clerk.

Okay. All right. So any other matters from anyone else at this point?

(No response.)

THE JUDGE: No. All right.

MR. WILSON: Is the Court going to address the briefing schedule?

MS. TAYLOR: And transcript.

MR. WILSON: And transcript?

THE JUDGE: Well, I do not have the -- I was not involved in the contracting of the court reporter, so I do not know the terms of the agreement between AMS and Ms. Laker's Cin-Tel Corporation.

THE COURT REPORTER: Do you want to go off the record and we can discuss that?

THE JUDGE: Pardon me?

THE COURT REPORTER: Do you want to go off the record and we can discuss the dates?

THE JUDGE: Yes, let's go off the record. Thank you.

(Off the record.)

THE JUDGE: After discussion back and forth with the parties and confirmation that the transcript should be received within five business days of today, notwithstanding the Federal holiday on Monday, we'll have the parties proposed corrections to the transcript filed not later than 15 days after the transcript is posted on AMS.

Briefs shall be due not later than Wednesday, November 30. Reply briefs shall not be entertained, I don't think. I'm pretty sure that's the way it goes. Take your best shot.

And in the interim if there are any issues that arise over the supplemental filings that I anticipate to occur before too long, hopefully by the end of this week, the parties are free to raise that in a motion to me.

MS. YOVIENE: Your Honor, if there's room in the 60 days, why wouldn't reply briefs be possible for December 2?

THE JUDGE: I don't think they're anticipated by the regulation.

MS. YOVIENE: Okay.

MS. PICHELMAN: Yeah, I mean, I guess it doesn't talk about a per se reply brief.

But I guess you can file what you wish to have the Secretary consider.

THE JUDGE: Sure.

MS. PICHELMAN: I guess if it's -- I'm not sure it's really -- it's not really contemplated.

THE JUDGE: I was just looking at that being such a close -- the 30th being so close in time to the 60 days that I would not want to impose on parties the obligation to see a reply brief and then have to respond to a reply brief in two days.

MS. PICHELMAN: Right. That's not really contemplated in this process to have such a back and forth like that.

THE JUDGE: That's what I thought.

MR. BESHORE: It's usual. It's been done infrequently.

THE JUDGE: Right.

MS. PICHELMAN: Yeah, everything has been done.

THE JUDGE: I think it's better to just say no, if you can. Are you okay with that?

MS. PICHELMAN: Right. I mean, I don't

want to restrict people from filing what they want to. It's not a restriction. I guess it's just not really set up for a back and forth, I guess, between interested parties.

THE JUDGE: Oh, no. I mean, sure, within that deadline you can file what you want. I just don't want to impose on the parties the obligation --

MS. PICHELMAN: Absolutely.

THE JUDGE: -- to file a reply brief, particularly when you're only two days out from the 60-day deadline. That would be imposing a lot more all-nighters, so -- on people. I don't want to do that.

But, again, I do appreciate Ms. Pichelman's caution that people can file whatever they like within that deadline.

MS. PICHELMAN: I just wanted to remind those interested parties who are going to be filing, that you need to file briefs with the Hearing Clerk's office. And then there's -- we request a courtesy copy go to AMS. But that is not filing. When you give it to AMS, that is not officially filing. You have to file it with the Hearing Clerk's office. So that's just kind of a reminder.

MR. BESHORE: And they are not able to accommodate electronic filing yet, correct?

MS. PICHELMAN: You'll have to take that one to the Hearing Clerk. I don't believe you can do an electronic filing.

MR. YALE: Don't wait till the last minute.

THE JUDGE: We haven't implemented that. So I would not stake my claim on that. The Hearing Clerk's office is 12th and Independence, Southwest, South Building, Room 1031, Washington D.C. 20050.

I see Mr. Yale's hand in the air.

MR. YALE: Yes. Out of experience, can we -- can it be stated that in the event that an electronic copy has been served upon the Department personnel responsible for this and an effort is made to deliver to the Hearing Clerk --

THE JUDGE: I don't like that.

MR. YALE: Well, we had a situation

where the Hearing Clerk only had one person -- they were busy, they did not answer the phones, security would not allow our runner to deliver the documents one afternoon.

THE JUDGE: Yeah, they have to be there by 4:30.

MR. YALE: Well, we were there by 2:00.

THE JUDGE: Okay.

MR. YALE: And back again at 4:00 and back again at 5:00. And we were not allowed in.

THE JUDGE: I have no problem with people sending it to me. I do not want to burden AMS with having to deal with the parties' filings. I just feel that that would not be fair.

MS. PICHELMAN: Your Honor, will the Hearing Clerk accept faxed-in briefs as well?

THE JUDGE: The Hearing Clerk does accept fax. But I know from experience that the Hearing Clerk's fax machine is a dinosaur.

But anyone who wants to with an abundance of caution send it to me -- I just feel better being the conduit. I don't want to put any other party in the position of filing anything.

Will that resolve your issue, Mr. Yale, e-mail it to me?

MR. YALE: We'll just send it a week earlier so that somebody will be there during that week.

THE JUDGE: Well, if you send it to me --

MR. YALE: Yeah, I'll do that.

THE JUDGE: -- it will be -- I will forward it to everybody.

MR. YALE: All right. I appreciate it.

THE JUDGE: Okay?

MR. YALE: All right. Thank you.

THE JUDGE: I just wish there were -- you know, Mr. Yale, I just work there.

MR. YALE: Oh, I know that. It was just very frustrating.

THE JUDGE: I'm sure that it -- and you should just work there.

Okay. My e-mail is -- and please don't use this to gloat about the Phillies losing, if they should lose -- is Bullard -- no, it's not actually. Sorry. That's my old e-mail.

It's janice.bullard@dm.usda.gov.

So if all the parties want to -- feel comfortable about having it somewhere and have someone to blame it on receiving it or not, I volunteer.

MR. BESHORE: Thank you.

MR. YALE: We appreciate that.

MS. TAYLOR: We still appreciate your courtesy copies to AMS.

THE JUDGE: And as I say if -- I do believe I have in all the pleadings from the parties some which way their e-mail addresses and I will forward it to them.

Ms. Yoviene, if I don't have yours, when you make your filing, be sure to add it there so I can forward that.

Yes?

MR. VETNE: For what it's worth, it's been customary in the Dairy Bar to have each other's e-mail addresses to distribute among ourselves anything we file.

THE JUDGE: Okay.

MR. VETNE: So I don't want -- you shouldn't take the extra burden. I think our professional courtesy to each other will be the same for this as in the past. We'll get it from each other.

THE JUDGE: Okay. Well, thank you very much.

Is there any other outstanding housekeeping matter, procedural matter, if there's a substantive matter?

(No response.)

THE JUDGE: And with that said I think we can comfortably close today's hearing. Thank you all for your attentiveness and participation and courtesy. I appreciate it.

(Hearing concluded at 3:55 p.m.)

C E R T I F I C A T E

STATE OF OHIO :
: SS
COUNTY OF HAMILTON :

I, Kristina L. Laker, the undersigned, a duly qualified and commissioned notary public within and for the State of Ohio, do hereby certify that the foregoing is a Hearing on Proposed Amendments to Tentative Marketing Agreement and Order held at said time and place; that said Hearing on Proposed Amendments to Tentative Marketing Agreement and Order was taken in all respects pursuant to notice and agreement of the parties as to the time and place; that said Hearing on Proposed Amendments to Tentative Marketing Agreement and Order was taken by me in stenotypy and transcribed by computer-aided transcription under my supervision.

I further certify that I am neither a relative of nor attorney for any of the parties to this cause, nor relative of nor employee of any of their counsel, and have no interest whatsoever in the result of the action.

In witness whereof, I hereunto set my hand and official seal of office at Cincinnati, Ohio, this _________ day of ______________________________, 2011.

____

My commission expires: September 8, 2013

Kristina L. Laker (Pedersen)
Notary Public