BEFORE THE UNITED STATE DEPARTMENT

OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

IN RE:	)	7 CFR Parts 1005,
	)	1006, and 1007
Milk in the Appalachian,	)	
Southeast, and Florida	)	Docket No. 23-J-0019
Marketing Areas	)	
	)	AMS-DA-23-0003

RULEMAKING HEARING BEFORE
CHIEF PRESIDING ADMINISTRATIVE LAW JUDGE
CHANNING D. STROTHER, JUDGE

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Volume 5 of 6 Volumes

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**Reporter's Note: All names are spelled phonetically unless otherwise provided to the Reporter by the parties.

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(Whereupon, the following proceedings, Volume 5, were transcribed as follows and commenced at 9:00 a.m.)

* * * * * *

THE COURT: Good morning, Everyone, it's March 2nd, we're in Franklin, Tennessee, this is In re: Milk in the Appalachian, Florida and Southeast Areas, docket number 23-J-0019, in the Marriott -- Franklin Marriott, whatever the rest of the name is. Who wants to start? We had the issue, I understand it, of Mr. Herting's adoption of things that were in a prepared statement by Mr. Sims. Mr. Beshore.

MR. BESHORE: Thank you. Good morning, Your Honor. Subsequent to our colloquy at the end of the hearing yesterday, we prepared a document that I'd like to have marked as exhibit 83A, with Your Honor's approval, which is the testimony of Jeff Sims that was marked as exhibit 83, with portions excised or manually crossed out so that we would propose to have Mr. Herting testify to the portions of 83A, which are not crossed out, and I would be prepared to examine him in a voir dire manner preliminarily to document and establish his ability to testify firsthand to the materials in 83A, and also to establish some context of his, what was in his testimony versus what was originally in Mr. Sims.

THE COURT: Yes, that makes sense to me.

Before we get to that, may I ask, I don't know whether this is a question that goes to AMS or goes to the hearing reporter, I guess to you, Mr. Beshore, my, I think what I would recommend is that we don't withdraw the original exhibit 83 so that somebody down the line who may want to reconsider, perhaps at AMS's suggestion, introduction of this testimony will have the original exhibit, this is what I'm tentatively thinking anyway, but it certainly will not be admitted into evidence and I -- things that are, exhibits that are rejected would normally not appear on the website or in the record or would they? I mean, what do we do about this in general? I would think that if someone had an objection to the exhibit being rejected, in a brief they should have said oh, that shouldn't have been rejected," let's the appellate people upstream or downstream of me, whichever way you want to think about it, want to reconsider this, how would they have a way to look at what anyone's talking about?

MR. BESHORE: I have no objection to it and I think it would be fine to have original 83 be part of the record, although not accepted, it tantamount to an offer of proof, I guess, that in the rules that say if something's rejected, you can make an offer of proof. It can be there --

THE COURT: I don't think it is an offer of proof. Just to be clear, it's on the records, you're not presenting the entirety of the testimony as an offer of proof, if marked, you're satisfied with what's in it, right?

MR. BESHORE: I think the rules do say that rejected materials do follow, stay in there so the administrator can do something with them, but I'm not positive.

MR. HILL: That's a good question, I'm going to have to look into that myself, as you know, I'm going to object to the introduction of this evidence and at that time I will, you know, make an argument.

THE COURT: Okay, that doesn't answer my question.

MR. HILL: I'm aware of that.

THE COURT: All right. I mean, the record will certainly be clear. We're going, subject to further check, we're going to keep the original exhibit marked 83, which was the testimony of Jeffrey Sims in this matter, I'd like to have that available to those who review my work here, those who write the decision and those further up from that, but it is not -- it's not admitted into the record. It's not part of the formal record of this proceeding in that it is not evidence in this case, but I have not ruled. I'm not sure whether I should rule that it's rejected, but it's I guess that the offer is it withdrawn, but we do want the document to stay in the case, just not a part of the record, so far, unless someone decides somehow that it should be, which I doubt because Mr. Beshore has modified.

MR. HILL: Yes, I will say that, in other cases I've had, not rule-making hearings, when we've had documents that were identified and not part of the evidentiary record, they were not in the packet, so I would assume that those documents would not be on the website, but I will look into that further.

THE COURT: That's a question to whether this will be on the website. It won't be a part of the formal record, but it should somehow be available to those who look at the formal record. I'm being told that it can be marked as such, that's it not marked as the formal record and put on the website as such.

THE COURT: Identified, marked, but not received into evidence.

(Whereupon, Exhibit No. 83A was marked for evidence.)

THE COURT: Mr. Beshore, think you're up, do we need a witness?

MR. BESHORE: With that, I would call Mr. Herting back to the stand.

THE COURT: Mr. Herting, I'd remind that you you're still under oath. Your witness, Mr. Beshore.

MR. BESHORE: Okay, thank you.

REDIRECT EXAMINATION

BY MR. BESHORE:

Q. Mr. Herting, would you first explain a little bit how your testimony and Mr. Sims' were prepared and other witnesses' were prepared for this hearing and what role you had and Mr. Sims had and how they fit together?

A. Sure, certainly. As in the planning of who was going to talk to which parts of our proposals, it was decided I was going to focus on the allowance of the Georgia milk into the different areas, and then Jeff would be clean up and handle milk coming in from the West. Okay. So we kind of subdivided and he was going to handle that part and I would handle, you know, Georgia, but I could just as easily have handled talking about the milk coming from the West as I deal with that everyday.

Q. Okay. So, that's how that, the geographic testimony that's in exhibit 83A came to be part of Mr. Sims' testimony as opposed to yours?

A. Correct.

Q. Okay. Now were you involved last evening after the hearing when 83A was created by crossing out portions of 83 so that you could testify to --

A. I did that personally.

Q. You did that personally. Are you prepared now to read the portions of 83, read 83A, and does it represent information and testimony which you can attest to of your own personal knowledge here today?

A. Very much, yes, I'm prepared to and, yes, I can take it as being my own.

Q. Okay.

A. As this was my first hearing, you know, I don't know the guidelines of writing stuff up, if I had known better, I would have had Jeff write my testimony for me.

Q. Okay. Could you please proceed then with the testimony, your additional testimony that's now in 83A?

THE COURT: Well, I do think we do need to give AMS a chance to gone on the record with an objection. Also, I would ask the, you know, the original exhibit 83 was framed I think in terms of being on behalf of Lone Star, but Lone Star is a member of DCMA, is that right?

A. Yes.

THE COURT: It was the thought that that testimony was being submitted in support of DCMA.

A. In support of DCMA, for DCMA, yes.

THE COURT: Your testimony today, since you're not, Mr. Sims is I think an officer, secretary chief market analysis, now it says Officer of Lone Star Milk Products, Inc., but your testimony today is you're, not on behalf of Lone Star, but on behalf of DCMA, correct?

A. Correct.

THE COURT: Thank you. First, I guess I should say a little something; the rules basically provide that if -- I think the rules say, I should be reading from them rather than by memory, but if evidence is either rejected or accepted and someone has an objection to whatever took place there, they're to go on the record with an objection, and then they can argue later on to other folks, I'm not going to write this decision, the decision was wrong, of course I have not made a ruling yet, but I will, and so Mr. Hill is going to state his objection. The rules also provide that I should not entertain argument on this to go into the record, I'm not sure what that means, but I'm going to leave it up to Mr. Hill to say whatever he wants to say, and it is my intent to preserve AMS's arguments in full on this.

MR. HILL: And we thank you for that.

So, first I want to start off in that yesterday at the end of the hearing, Your Honor did point out the reasons for Mr. Sims not being able to come to this hearing due to an exposure to COVID, and from the perspective of AMS, of course we applaud that decision, it's a selfless decision, conscientious decision and our position to object to that is not meant as punishment in any way, so I wanted to get that out of the way first. And from my perspective, I have gone to several dairy hearings and I can say that AMS (unintelligible) obsessed even, in its pursuit to hear from industry member of all types. I've been at dairy hearings in which we were on the record at nine, ten o'clock at night because we were trying to get farmers to be heard. I've been at hearings in which dairy programs was up all night fulfilling dairy data requests, six weeks into a nine-week dairy hearing. So, I say all that to say that Dairy Programs is not a group which seeks to exclude industry from having their voices heard, but we are still constrained by the good book, and no, not that good book, but the good book of second CFR part 900. And so, I'm going to read again, as I spoke yesterday, off the record, 900.8(a) states in part, "that the hearing shall be held at the time and place fixed in the notice of hearing." I would say that that time is now and that place is here, 900.8(b)(1)

7CFR 900.8(b)(1) "requires that any interested person," make sure I say it correctly, "any interested person who desires to be heard, any person at any hearing under these rules shall perform proceeding to testify, state his name and address and occupation, 900.8(b)(3) states that, and I quote, "failure to appear, if any interested person fails to appear at the hearing, he shall be deemed to have waived the right to be heard in the proceedings." And finally, 900.8(d)(1)(i), "requires that," and I'll read it verbatim, "every witness shall, before proceeding to testify, be sworn or make affirmation, cross-examination shall be permitted to the extent required for a full and true disclosure of the facts." I do want to point out one other issue as an aside, for this hearing, to my knowledge, there were several other witnesses who wanted to testify in the way that Mr. Sims is now testifying through another witness, by handing over a document to be read on the record, those requests were denied, so.

THE COURT: Maybe, as, I hate to interrupt your argument, statement, your objection, but just to be clear, I perceive this not as any longer, I mean, testimony of Mr. Sims was identified as an exhibit, but was never discussed or offered into evidence, I perceive this now as being the mark-up version of that as being the testimony of Mr. Herting, no longer, and in a way never was, the testimony of Mr. Sims, as you say, he wasn't here. The rules do provide that witnesses are to appear in person or at least interested parties are. I understand you're being careful about that. I am -- as I said yesterday, there's a case, GH Dairy 71 agg decisions at 1, starting at 1, 2012 Judicial officer decision talks about, this basically says "milk hearings or rule-makings of this sort, the witness is to appear in person," as you say, "and be subject to cross-examination." And "in person" means in person. Even in 2012, we had telephones, I guess, so you have to be here. But -- and I don't -- if you've got a response to that, I want you to be able to make it, that's part of the reason why I'm raising this, but I see this now as Mr. Herting's testimony, if he brought this in in the morning, which I think we can waive the timing, and said "I want to present this as part of my testimony," then we would have let him, just like the federal registered notice of the hearing, provides, and probably in the rule someplace, so anyway, that is the way I see it. And he has provided in voir dire, he has provided that he has the expertise, the knowledge. He has also has stated that he had a hand in the preparation of the testimony, I guess since

Mr. Sims was, you know, really preparing it, Mr. Herting can't say it was prepared at Mr. Herting's direction, but like I said before, I don't hear in these cases, but other in agency litigation I've been involved in, the question is often to the expert witness with pre-filed testimony that you prepared, testimony prepared at your direction. So, anyway, you can continue, I just want to give you a chance to address that.

A. Sure.

THE COURT: This seems to me it's the testimony of Mr. Herting now and a basis has been laid. And my job here, as I said before, I think, that I'm supposed to exclude immaterial, irrelevant evidence, I think this is neither of those. I don't think it's unduly repetitious. I think what I've heard so far it's the type of evidence reasonable persons rely upon. Again, I applaud you going directly to regs and pointing exact text, but I think that's what I am supposed to exclude, and I would exclude testimony proffered on behalf of a person who's not here, but I don't see it as proffered on behalf of the person that's not here.

MR. HILL: So, to address -- oh, I'm sorry, did I cut you off?

THE COURT: No, go ahead.

MR. HILL: So to address that, while

normally would be right if someone came in and offered testimony, we would just allow it, assuming that was their testimony, that would be the assumption. Of course we know in this case from an exhibit that has been marked as 83, that it is in fact the testimony that was created by Jeffrey Sims, so to that extent, we know from the get-go that this is not something that Mr. Herting put together. Although he might be aware of some of these things, this was not something put together by Mr. Herting. So I will just say this, I'll keep this short, I'll keep this brief; these rules are here to help assure these formal rule-making hearings proceed smoothly and that the record is not awash with unverified and un-vetted testimony in which AMS cannot rely because it has not been, as the regulations say, it hasn't, cross-examination has not been done to the extent required for a full and true disclosure of the facts. And in this situation, because Mr. Sims is not here to actually talk about his own personal experiences, from his perspective, I don't think that that can happen, and instead, what's going to happen is, in future cases possibly, AMS is going to end up in a position where we have a lot of information on the record that they end up having to pour through that they cannot rely on to get to the portion that they can rely on that have been vetted properly. So opening up the hearing in this matter may signal others in the future that this is kind of a new day, a new dawn, a new frontier of how we can go about testifying, and that they will avail themselves in that manner of testimony. And this will ultimately, in our opinion, to a bit of chaos at hearings, because this hearing is a smaller hearing, there are not that many issues that we're discussing here, it's very limited in scope. It's -- we're in day three right now, we may be done today in day three, we may be done in day four, I've been in a lot longer hearings with Dairy and other hearings will be more contentious, more parties, people who don't get along as well as we do in this room right now, and in those situations we may find yourself in a chaotic situation and reaping the world with, not just from arguments at hearing, but as I said before, with AMS, at the end of the hearing pouring over voluminous documentation, voluminous documentation, trying to find the nuggets that they feel that they can rely upon, that's not just not in the best interest of AMS, but it's not in the best interest of the industry.

THE COURT: Thank you, Mr. Hill, Mr. Beshore.

MR. BESHORE: Just very briefly, I'd

like to state that, as Your Honor has stated, this is the testimony of Mr. Herting now. He's prepared to present it, be fully cross-examined with respect to his knowledge and the basis for that testimony just like any other witness in this hearing. And I will also say without, you know, speaking out at school or disclosing any state secrets that in these proceedings with pre-prepared statements, it's fair to say that every witness has not written and composed every sentence that they have testified to. And to the extent that there's a concern that Mr. Hill has expressed that the words in exhibit 83A were not composed by Mr. Herting, that's not anything that's necessarily new or different in these proceedings.

THE COURT: No, I don't think that's quite the test -- I do -- are you finished?

MR. BESHORE: Yes.

THE COURT: I am going to allow the revised exhibit, it's 83A be identified after -- I don't think, I guess now we'll see how cross-examination goes perhaps (unintelligible) suggest that if there's issues with what this witness knows, whether this witness is knowledgeable about the testimony, whatever else, if there's not a basis for the testimony from this witness' pre-filed statement in this witness's testimony, then of course the challenge, challenge that, but I do think these are extraordinary circumstances, I agree with Mr. Hill that this should not be the dawning of a new age. The better procedure would be that folks -- well we did have extraordinary circumstance here, so I can't say that it wouldn't happen again, if say -- if a witness passed away, do not have to worry about bringing them in virtually or anything for that purpose, but the better process would be to work together to prepare testimony in advance and have it come in cleanly as the testimony of the witness that's going on the stand. And Mr. Beshore is right, we would not know really what went on behind that, but I do think the exposure to COVID is extraordinary circumstance and will allow this here. I would not expect to allow a flood of prepared testimony that's Federal Expressed in and another witness is asked to take over that testimony, I don't think that -- I understand the flood of testimony or not, but also it makes for discussions like this, which, in the best case scenario, say it's kind of a unique situation, I might spend it with time, but I think it will gump (sic) up the proceeding and thus will not be in the public interest. So, with that, I think we've met requirements of the rules for when there's an objection to certain evidence I guess being admitted. Like I say, I have admitted it, but I find it's proper material to be presented by this witness in his statement.

MR. BESHORE: May Mr. Herting proceed?

THE COURT: Yes.

A. My name is Mike Herting, M-I-K-E, H-E-R-T-I-N-G. My work address is 1405 North 98th Street, Kansas City, Kansas. And I'll be reading this testimony today as mine as I feel expert in the field and able to answer any questions that the evidence will bring.

"As has been adroitly demonstrated in DCMAs min proponent testimony, farm milk production inside the Order 7 marketing area is on a severe downward trend, a trend which is unlikely to substantively reverse any time soon. Class I milk pooled on Order 7 has likewise been declining, but at a slower pace than the in-area milk production decline.

"This condition has resulted in more and more milk being delivered to Order 7 distributing plants from outside the marketing area to supply the Class I needs of the Order 7 marketing area, each year the distance milk must move to supply the area increases as Order 7 becomes shorter and shorter in its relationship of supply to demand."

"Also as demonstrated in DCMA's primary

testimony, the cost of milk hauling has increased markedly over the last several years and most assuredly has increased in the decade and a half since the Order 5, 6 and 7 Class I differentials were last updated."

"A boots on the ground view of the supply of supplemental milk for the Order 7 area shows a preference for the geographic source of the supplemental milk supplies which varies based on the location of the plants the supplemental milk serves, as one would expect. Distances milk moves, and practical limits on those distances determine, for the most part, where supplemental milk moves from and moves to. Distributing plants in the north-central portion of the Order 7 marketing area, Nashville and Murfreesboro, Tennessee represent something of a pivot point for the preferred and most practical sources of supplemental supplies. The Nashville and Murfreesboro plants can effectively be supplied with supplemental milk from both the North and the West. Order 7 plants located in the Atlanta, Georgia area can generally best be served from the North, likely from milk produced within the Mid-east number 33, mid-east Order number 33, but milk can on occasion move to these plants from the central order number 32 area or from the Southwest Order area, number 126 area. More rarely, but not completely without precedent, these most northern and eastern Order 7 plants can receive milk produced within the Order one marketing area. Experience has taught us that there is something of a practical limit from moving milk from the West to plants East of a general North/South line, which follows the Alabama-Georgia state line, and extends northward from there. For plants West of Nashville and West of Georgia, by far, the most practical sources of supplemental supply would be from the Southwest Order or the Central Order area. This is not to say that milk never moves from the Southwest Order or Central Order areas to the Atlanta area or even to plants further East on the Order 5 marketing area, but the general preference is to supply these eastern plants from the north when the milk is available from there."

"Excepting the Nashville and Murfreesboro plants, the general preference to supply milk plants located west of the imaginary line we described would be from the west, more specifically the Texas panhandle portion of Order 126 or the southwest Kansas portion of Order 32. Also, when supplemental milk is needed, there is a general preference for the Texas milk to move into the plants located in the southwest corner of the Order 7 area, that is, the Louisiana and Mississippi plants, and a preference for the southwest Kansas milk to supply the supplemental needs of the plants in the northwest corner of Order 7, that is the Missouri, Arkansas and Memphis, Tennessee plants. "

"Currently there are 15 pool distributing plants regulated on the Southeast Order, 13 of which likely receive substantive quantities of supplemental milk. Of these 13 plants, 11 are located west of the imaginary separation line we described, and 2 of the 11 are the Nashville and Murfreesboro plants. The remaining nine plants, even though geographically closer to the western areas of reserve supply than the other Order 7 plants, the distances the supplemental milk moves to these plants is considerable. The distance from Hereford, Texas to Hammond, Louisiana is approximately 870 miles. And the distance from Cimarron, Kansas to Little Rock, Arkansas is approximately 615 miles. These represent two reasonable examples of the common lanes used for the delivery of supplemental milk to plants on the western side of Order 7."

"These large distances milk must move to meet the Order 7 handlers' need for supplemental milk to create a tremendous cost to the suppliers of the needed supplemental milk. At current diesel fuel cost, marketers must expect to pay a rate for hauling milk roughly 4.85 per loaded mile to $5.10 per loaded mile. From Hereford to Hammond lane, on a per hundredweight basis, the cost of hauling at the low end of the range at mileage rates stated is approximately $8.50, the difference in the Class I differential between Hereford and Dallas, Texas, which is Order 126 base pricing zone is $0.60, and the difference in the Order 7 and Order 126 base zone blend prices as announced at 3.5 percent butter fat content, averaged about $3.20 during 2022, exclusive of the additional loss incurred from buying milk on Orders 126 protein, butter fat and other solids prices, and selling the milk on Order 7 skim and butter fat prices. So, after considering the impact of the blend price gain moving from Order 126 to Order 7, and the location value impact, the blend price gain is about $3.08 per hundredweight. The nominal blend price gain covers about 45-percent of the cost of hauling, if we can obtain hauling at the most favorable rates available."

"Over the course of the currently defined eight-month Transportation Credit period, using the most recent period's mileage rate factor, the expected Order 7 Transportation Credit payment proration rates, and the now existing 85-mile adjustment, we would expect to recoup, on average, roughly a $1.38 per hundredweight from the transportation credit balancing fund for milk movements from the Texas panhandle to South Louisiana. All in, this leaves about $3.30 per hundredweight of the haul cost uncovered by blend price gains, considering only the 3.5 percent butter fat prices and the transportation credit balancing fund payments. The expected transportation credit balancing fund payments represent about 16-percent of the real cost of hauling, making up $3.30 of uncovered hauling cost is bad enough, but absent the transportation credit balancing fund payments, the picture is profoundly bleak. Even though seriously insufficient, the existence of transportation credit balancing funds payments carry one benefit that cannot be overlooked. As long as there's a Federal Order transportation credit balancing fund payment, we know we're going to collect it. Such payment reliability is not so sure when it comes to over-order charges. The gap between the cost of hauling and the potential gain in price from moving milk from the reserve supply areas that the demand areas must be paid by someone. Milk haulers can be a benevolent bunch, but they tend to balk at the idea of hauling milk across half a continent for no pay. The current Order 7 transportation credit provisions cover some of the loss, but in no manner do the Transportation Credits pay all of it. Any remaining costs of hauling must then be made up either from over-order prices charged to the receiving plants or the uncovered costs that must come out of the pockets of the dairy farmers who ship the supplemental milk. Unfortunately the over-order prices rarely -- are rarely sufficient to cover these large differences, and dairy farmers are left to pick up the tab on the remaining. The further the distance the milk must move, the more out of the bed the order blend price gains are in comparison to the real hauling cost. "

"When reserve milk suppliers are deciding whether to sell supplemental milk to plants in the southeastern U.S., the availability of Transportation Credits is a very important factor in that decision, and while currently we are out of touch with the reality of milk hauling costs and do not fill the gap between the cost of hauling and any blend price gains. They do offer some level of help in making the delivery of supplemental milk something of a more feasible proposition. Absent Federal Order transportation credit payments, there are two likely outcomes, one, the supplemental suppliers of milk would have to charge additional over-order prices in order to cover more of the real cost of hauling or supplemental suppliers would simply choose to keep their milk at home rather than incur a lost on shipping the milk to the southeast, neither of these outcomes is a good thing. Even if it could be obtained and history has shown it to be a formidable challenge, garnering additional service charges in excess of the order-regulated prices will not necessarily be born proportionately or equally by all handlers of Class I milk. The location of the respective receiving plants and the distance the milk is to a viable supplemental milk source, plants' relative access to local supplies and their net need for supplemental milk will drive how much additional cost each plant might bear. Differing sources of milk, differing distances the milk moves and the proportion of a plant's total milk supply represented by supplemental milk will create plant specific costs of milk, which likely would be very different plant to plant. Unequal costs of milk is a recognized source of market disorder."

"Alternatively, running the southeast short of milk is definitely an undesirable result and flies in the face of the basic purpose of Federal Orders. A perpetually milk-starved southeast will lead to inevitable loss to milk processing plants and will have the unhappy impact of increasing the distances milk must move within the southeast to supply whatever processing plants remain. Choking off the supply of supplemental to the southeast by removing or allowing the continued degradation of the effectiveness of the transportation credit program's financial incentives to move milk to the southeast will have a tangible impact on net returns to milk producers located within the southeast Order areas."

"An additional factor making the supply of milk challenging to the southeast is simply the loss of hauling capacity. Supply chain disruptions have made the replacement and upgrade of rolling stock difficult both for trucks and trailers. The loss of truck drivers to more 9:00 to 5:00 hauling routes and lanes is seriously crimping the supply of milk truck drivers, combined with U.S.'s general shortage of drivers, rules on allowable hours for trucks to run each day have stretched bulk milk hauling supply chain to the breaking point. None of these structural and regulatory changes impacting milk hauling are the Federal Orders' doing, and no one can expect the Orders to remedy them. However, the Order program must recognize that these very real logistical challenges exist, must recognize that the costs they create are equally real, and adapt the regulated pricing, cost recognition and partial cost reimbursement features of the Orders in this light."

"It may also inform the record of this hearing with a comment about the current state of supplemental milk agreements. Mr. Hollon's testimony mentioned that some seasonal supplemental milk agreements may include a non-receipt charge, whereby the buyer can decline some of the contracted quantities of milk and pay for what is colloquially known as a go-away fee. These go-away fees still exist in supplemental milk contracts, but the desire is that these provision be less frequently employed than in the past. In order to secure sufficient hauling capacity for long distance movements of milk, often today, the contracting party for the supplemental milk hauling must guarantee the hauler that a fixed number of loads per day will actually be hauled during the contract period, and guarantee features the specific originations and destination points for those supplemental milk loads. Logistically, it is difficult to adjust on a daily basis how many loads move when milk is moving very long distances. Haulers establish a truck and driver rotation over the milk movement period, and any substantive variation from that schedule results in missed or late loads. As an example, when milk must move 850 miles, that represents 13 to 15 hours of actual on-the-road time, and combined with the required driver rest breaks, refueling, stops, meal breaks, unloading time and the like, that means a two-day trip each way. So for a supplemental milk agreement of five loads of milk per day everyday, there are 10 loaded trucks per day headed towards the destination and 10 empty trucks per day headed back to the supplemental milk origin point to get another load. When accounting for the required driver rest days between driving assignments display five loads of milk per day requires at bear minimum of 20 trucks and likely at least 25 drivers. Even the smallest variation in the daily delivery schedule can disrupt logistics for several days."

"However, even though there is desire to make perhaps milk sale contracts call for shipments on equal number of loads per day, disruptions will invariably occur. A farm may have a production hiccup that causes the interrupted flow of milk or there are weather events that necessitates changes in hauling routes, a plant has a break down or there is a national holiday which slows plant receiving. These can be unforeseen issues, but nonetheless disruptive to the flow of milk. No matter how hard we try and how much we plan and how wonderful it is to see the same number of loads of milk leave for their destination everyday, there must be additional milk a available to serve as a buffer supplies, the reserve supplies for when these interruptions occur. This is even more true from milk produced within the southeast, since virtually the entire reserves for these supplies reside outside the marketing areas. The Orders diversion privilege is a necessary element in the obtaining a sufficient supply of milk so that the needed reserve supplies are available when called on."

"The federal Orders need Transportation Credits to facilitate the ready and orderly flow of supplemental milk into Orders 5 and Order 7 marketing area. The Secretary must update the Orders' current transportation credit provisions to better reflect the real cost of shipping distant milk into those marketing areas, and the Secretary must increase the transportation credit assessments to fund these needed higher transportation credit payments. Proposals 1 and 2 will be exactly that, and maintain the structured and overly regulated pricing of milk between competing handlers. Consumers of milk will benefit from the unimpeded and orderly flow of milk into the region and regulated processors of Class I milk will benefit from the continued surety of milk supply and orderly pricing of milk. Absent a properly functioning Federal Order transportation credit system, the supply of milk to the region is unquestionably threatened. The conditions we have described surpass emergency; the marketing areas are in a milk supply crisis. "

"As had been demonstrated for milk moving into the southeast from areas outside the marketing areas, likewise, the Class I differential structure is woefully inadequate to compensate dairy farmers from moving their milk within the Orders 5, 6 and 7 marketing areas. The Class I differential service within the three southeastern marketing areas has been updated once since Order Reform in the year 2000. While the rest of the country languishes under a differential price structure that is based on hauling costs a quarter of a century old. Even though slightly more recently updated, the differential surface in the southeast in no way represents the real cost moving milk within the marketing areas. DCMA's proposals 3, 4 and 5 address this urgent need and will provide needed financial incentives to move producer milk produced within the marketing areas or produced nearby to pool distributing plants in the three Orders. Just as the supply of supplemental milk from outside the marketing areas is threatened if additional regulated funds are not made available to encourage movements, dairy farmers inside the marketing area will cease to be willing to supply distant plants if there's financially return for that needed service, a service of market-wide benefit, fails to compensate them fairly. Thank you for the opportunity to testify today."

Q. Mr. Herting, just to be clear, the testimony that you have just given, you did not originally compose, correct?

A. Correct.

Q. But you are, have given it your -- it represents personal knowledge, expertise, experience you have in marketing milk in this region?

A. Very much so.

Q. And this region, entire region you've discussed here is within your area of everyday responsibility, correct?

A. It is.

Q. Okay. And you're prepared to answer any questions with respect to this testimony?

A. Yes, I am.

MR. BESHORE: Thank you. No further questions on direct, Your Honor.

THE COURT: AMS cross?

CROSS EXAMINATION

BY MS. TAYLOR:

Q. Good morning.

A. Good morning.

Q. I don't have too many questions since we answered a lot of them yesterday, but on page 3, going to into 4, you talked a lot about where supplemental milk comes from to supply certain plants in the Southeast and Appalachian Regions, and you discussed in general, the term you used, practical limits and the preferential supply stores, just want to ask to you elaborate on what those practical limits are?

A. How far the haulers can go and still be able to turn around and get back and get more loads that we're needing everyday. So, going beyond the two days out and two days back, creating a three-day trip going one way, then makes it six days, then puts a limit on now we need to try to find more trucks and more drivers to get the same milk into plants that are a little bit closer.

Q. So it's not just distance is what --

A. Well, the distance creates the practical limits on drivers and the number of trucks and trailers are available to get the volume of milk in, so there's many fewer loads that will go beyond those limits because we'll need the milk, you know, within a closer range.

Q. Towards the end of your testimony on page 10, and so I just wanted this clear for the record, the last sentence of the paragraph in the middle says "Even the smallest variation in the daily delivery schedule can disrupt logistics for several days," and who bears the cost of that disruption?

A. The dairy farmers.

Q. That's not recouped?

A. Correct.

Q. I don't think I asked this question of you yesterday, but since you're back with us this morning, I'll ask it, from the other side of the coin, and I understand all of the discussion that we've had about the cost of moving milk and who bears those costs, but from the consumer side of the perspective, which is part of the stool that we at AMS have to consider when we make these decisions or the Secretary considers, is it appropriate at this time given the decline in Class I sales as been put on the record here that we're raising essentially prices and they'll have to bear for fluid milk?

A. I think there's a fine line where we have to look at the needed revenue to the farms to keep them in business because the more of them that go out of business then raises the cost of bringing in more milk to replace those local farms going out of business. If we don't address that issue, it's going to raise the cost and then push away consumers as that cost increases without raising it to give more revenue to the farmers to aid.

MS. TAYLOR: Okay. Thank you. That's all I have.

THE COURT: Cross-examination from any other participant?

CROSS EXAMINATION

BY MR. TONAK:

Q. Dennis Tonak, Prairie Farms. On the bottom of page 6 of your testimony, you referenced a couple of numbers that I'd like to follow-up on, one of those being that you estimated that there be a $1.38 per hundredweight transportation credit in moving milk from the Northwest Texas, Texas panhandle area to Southern Louisiana, and I want to make sure those are the two points we're talking about?

A. Correct.

Q. Okay. And you also referenced the $3.30 left in uncovered costs, that's your estimate of the costs, the difference in the blend prices and that $1.38 transportation, correct?

A. Correct.

Q. Now in periods when transportation credit does not exist, would it be correct to add $3.30 and the $1.38?

A. Yes.

Q. Together and come up with a $4.68 cost?

A. And cover all the cost.

Q. To cover the full cost without Transportation Credits during the springtime, summertime, whenever Transportation Credits are not in place, to move milk from the Texas panhandle to Louisiana?

A. Correct.

Q. Okay. Then on page 4 of your testimony, you discuss that the Texas panhandle portion of order 126 is under general preference for Texas milk to move into the plants in the southwest corner of the Order 7 area. Is there milk closer to that southwest corner of the Order 7 area in Texas that could feasibly move to those southwest Order 7 plants?

A. There is, but I believe it's already calculated to Texas Class I deliveries and the Dallas marketplace, and then in some cases some of that may go down to Houston.

Q. So, in effect, to a certain extent, some of that milk is crossing each other with the Texas panhandle, moving through Texas in a southeasternly (sic) direction and the Central Texas, Eastern Texas moving back towards

Dallas or possibly down to the Houston markets, would that be correct?

A. That's correct.

Q. Okay.

MR. TONAK: Thank you.

THE COURT: Is there cross by any other participant? Seeing none, redirect Mr. Beshore?

REDIRECT EXAMINATION

BY MR. BESHORE:

Q. I just have two questions, Mr. Herting, on redirect. With respect to practical limits, Ms. Taylor asked you about that, to certain milk movements, are weight limits that vary from state to state a practical constraint on milk movements sometimes?

A. Can be.

Q. Can be? Yea. Now, talk about balancing the cost to consumers, the returns to the dairy farmers and minimum prices for milk, is it not the case that the least expensive, most cost-effective milk for consumers is local milk?

A. That's certainly correct.

Q. Okay. And that being the case, balancing cost to consumers, minimum prices cost to dairy farmers, wouldn't it make some sense to be favoring in some respects local milk with respect to incentives to produce and make available additional milk?

A. Yes, it does, and our proposals 3, 4 and 5 do exactly that.

Q. Okay. Because they're limited to essentially limited to in-area milk and providing --

A. Local supplies and the milk sheds.

Q. Additional compensation for that milk, which is ultimately the most cost-effective milk for consumers as well?

A. Correct.

MR. BESHORE: Thank you, that's all.

THE COURT: Okay, I think that completes this witness's testimony.

MR. BESHORE: I move for the admission of exhibit 83A and acceptance of course of the testimony that's been presented and Mr. Herting is (inaudible).

THE COURT: Of course reserve your objections, Mr. Hill?

MR. HILL: Yes, we continue our objection on the basis previously stated.

THE COURT: I think we can rely on what was previously said in the transcript. Good to be Judge because I get to refine what I say, but I had a couple of other thoughts, one, I do, 83A is identified as admitted into the record. This admission of course does not go to the weight of this evidence that later decision-makers will make a determination of that, I'm not expressing any opinion or I have no authority to make any determination in that regard.

I would also note that as, and I think I explained my rational for this previously, these are extraordinary circumstances, this is not opening a flood gate to switching around a whole bunch of witnesses at the last minute and having to go through the process here in deciding you know who is able to testify as to what, who prepared what, that doesn't seem disruptive to the proceedings, that's not public interest and not fair to the parties.

I do note that the solution provided in the rules, I will cite some rules now, 7CFR 900.8(d)(6) provides "for offers of proof or evidence excluded and the solution errs to proffer evidence in a succinct manner, and the Secretary determines that the Judge erred in excluding evidence and the error was substantial, the hearing shall be reopened to permit the taking of such evidence." There's been testimony in this case that an expedited decision is in the public interest. I think the delay, if I erred in excluding the evidence, which I still stand by my determination to let the evidence in, that would be hard to square with the public interest as well.

I also note that reference the GH Dairy case, a judicial officer decision at 71 agg decisions 1, makes an interesting determination, in that case, Judge Clifton had excluded a written statement by a witness who said could not travel because of a heart condition, his physician would not let him travel, and Judge, among other things, Judge Jensen, a fine judicial officer, Jensen determined that the issue of whether the Judge erred in excluding that testimony was mooted, because there was -- because the evidence proffer was not necessary to the decision. It's my role here, decision-makers down the line, my rulings have little precedential value because I've been thinking about it, I offered my -- I offered that thought, I'm not saying that should be determined, I of course do not know what the decision would be and I do not know -- I can't possibly know what all is in the record, but I wanted to make a note of that. So, with that, Mr. Herting, thank you, you're dismissed.

MR. BESHORE: That concludes DCMA's presentation. Our case is for proposals 1 through 5.

THE COURT: I don't actually have a witness list, even though I said I had one. Is AMS the keeper of the witness list?

MR. HILL: I believe Prairie Farms is going to be testifying next?

THE COURT: I will make a couple of notes. I understand there's a large gathering next door, if there's a problem with the noise, we'll have to deal with that when it comes to it, but I do think we should try to break a bit before noon to avoid the rush that potentially happens with 200-something people next door. Okay, with that, Prairie Farms is up.

PRAIRIE FARMS PROOF

THE COURT: I suppose, unless you want to take a morning break, I don't need one myself. There is no objection.

Whereupon,

DENNIS TONAK,

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

THE COURT: Mr. Tonak, I take it you do not have a representative like an attorney, you are in fact to conduct examination of yourself. So, with that.

MR. TONAK: "My name is Dennis, D-E-N-N-I-S, Tonak, T-O-N-A-K. I am the Senior Director of Federal Order Markets for Prairie Farms Dairy, Inc., 3744 Staunton Road, Edwardsville, IL, 62025, Prior to my employment with Prairie Farms, I was the CEO and General Manager of Mid-West Dairyman's Company, Rockford, Illinois. Previous employment experience includes various management and marketing positions with Southern Milk Sales, San Antonio, Texas, National Farmers Association, Ames, IA. I have a Bachelor of Science degree in Dairy Science from South Dakota State University, Brookings, South Dakota. I have appeared as a witness at various Federal Order hearings in the past."

"Prairie Farms Dairy, Inc., is a qualified Capper-Volstead cooperative. Prairie Farms dairy producer member-owners are located in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Ohio and Wisconsin. Most prairie farms dairy producer member-owners meet the definition of a small business. Prairie Farms pools the milk of our producer owners on Federal Orders 5, 7, 30, 32 and 33. Prairie Farms also markets the milk for a group of non-cooperative members (independence), in Texas. This includes making sure the milk is pooled and performing producer payroll. The independent milk is pooled on Federal Order 7, Federal Order 126. Prairie Farms also operates fluid plants, Class II plants and cheese plants throughout the Central

U.S. The plants operate as Prairie Farms Dairy, wholly owned subsidiaries Eastside Jersey Dairy and Ice Cream Specialities, and majority owned subsidiary Hiland Dairy. The Prairie Farms dairy producer member-owners, other cooperatives and independent suppliers supply the raw milk needs of these plants. There are nine Prairie Farms Dairy, Eastside Jersey Dairy and Hiland Dairy pool distributing plants regulated under Federal Orders 5 and 7."

"The southeastern United States milk supply has been decreasing for many years, while at the same time the population has been increasing. There has been an ongoing need to import milk from outside the area. Some of the earlier efforts provide for reliable supply of additional milk go back 50 years or more. These were primarily voluntary efforts among cooperatives, Transportation Credits institutionalized in 1996 helped to more uniformly share the cost of importing milk to southeast region. The short supply situation has continued to worsen and have moved from a short supply in the Fall and Winter only to a year-around short fall."

" Prairie Farms developed five principles to guide the development of the proposals submitted for this hearing. Credits for transportation and delivery to distributing plants should promote efficient milk movement. This will help save fuel, reduce costs, and benefit the environment.

Additional principle, producer milk delivering to distributing plants should receive compensation over and above that producer milk pooled on the order, but not delivering to distributing plants. Producer milk supplied to distributing plants, no matter if the milk originates in the marketing area or outside the marketing area, should receive fair and equitable treatment."

"Additional principle, Equitable treatment means the same regulation should apply to producers in the marketing area and outside the marketing area as long as the milk is delivering to distributing plants."

"Additional principle, assembly performance credits for producer milk delivered to pool distributing plants are a preferred approach for recognizing and rewarding the deliveries to pool distributing plants."

"These five principles are woven into the Prairie Farms' proposals. There is one other principle we also try to follow, K.I.S.S. (keep it simple.) Proposals with deep layers of complexity may improve the proposals and make them more effective for today. As the supply and demand situation changes, the complexity make the regulations less flexible and less able to adapt for the future. The existing transportation credit program highlights this lack of flexibility."

I do have a question, Your Honor, is this exhibit -- or is this testimony going to be marked as a exhibit?

THE COURT: I was going to say, I think now would be a good time maybe we can mark all the materials in your packet with the exhibit number, since we don't have a lawyer, AMS can backstop me here on next number, next number I have is 84.

MR. HILL: That is correct.

THE COURT: So I would mark, for identification, the testimony of Dennis Tonak, Prairie Farms Dairy, Inc., as to the Court proposes 6, 7, 8, 9 and 10 as exhibit 84. Maybe the easiest way is to list in the packet that Mr. Tonak distributed, top of page, says "Prairie Farms exhibits," I think we can -- I guess it'd be my suggestion to get each of those entries a separate exhibit number. Does that make sense to you, Mr. Tonak?

MR. TONAK: Yes, that would be what I

would expect.

THE COURT: Okay, so convenience of a hearing reporter, so 1997 per capita milk production 11 selected states would be 85. 2021 Per capita milk production, 11 selected states, exhibit 86. 87, is Federal Order 7 --

MR. HILL: Your Honor?

THE COURT: Yes?

MR. HILL: Could we slow down just a little bit for our court reporter?

MR. TONAK: I need to add that exhibit 86, 2021 per capita milk production, 11 selected states. In the packet delivered, in error, only had one table on it. There was a supplemental page that had two tables on it that was also passed out.

MR. HILL: Can we go off the record for a moment?

THE COURT: Yes, for this housekeeping matter, yes, let's go off the record.

(Whereupon, a housekeeping/organizational recess was observed.)

(Whereupon, Exhibits No. 84 through No. 87 were marked for evidence.)

THE COURT: Are you ready, Mr. Tonak?

MR. TONAK: Yes.

THE COURT: We're marking exhibits for identification, I think I left off with 86, which is now, each of these exhibits that I'm going to talk about at this point in the hearing is a single sheet. 86 now is, has two tables on it. 87, Order 7 selected information; 88 Order 6, selected information; 89. Order 5, selected information; exhibit 90 is Order 7 daily Class I market utilization by month, 2020 to 2022. Exhibit 91, Order 7, daily Class I, market utilization comparison, selected months.

(Whereupon, Exhibits No. 86 through No. 91 were marked for evidence.)

THE COURT: Okay. I think the next one, exhibit 92, marked for identification, selected city to city, mileage and Class I differential. Exhibit 93 for identification, Order 7 transportation for transportation credit work sheet; exhibit 94, example milk movement to maximize Transportation Credits with current 1007.(c)(2)(i), milk from Illinois to, however you pronounce that, Mississippi.

"Exhibit 95, example of milk movement to maximize Transportation Credits with current 1007.82(c)(2)(i) milk from Texas to Lafayette, Louisiana." I also have a document entitled, stapled document with multiple pages called "Comments concerning the proposed distributing plant," I think we're going to mark those pages with exhibit numbers when we get to next witnesses.

(Whereupon, Exhibits No. 92 through No. 95 was marked for evidence.)

THE COURT: So, with that, you may continue with your prepared statement, if you're ready?

MR. TONAK: I'm ready for a few pages "The southeastern United States is short of milk every month of the year. The fluid needs of the region require imported milk from the areas of southeast year around."

"The available supply in the southeast region continues to shrink, especially when compared to the Region's population growth. Exhibit 85 shows the per capita milk production for 11 southeastern states Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia in 1997. Per capita milk production is method of easily understanding the population and milk production relationship. The 1997 per capita production of 206.2 pounds is slightly above the 201 pounds per capita fluid consumption for that year. Since that time, per capita production in the southeastern states has been shrinking faster than the per capita production.

"Exhibit 86 shows the 2021 population and milk production for the same 11 southeastern states. The population estimate is from economic research service report using U.S. Census Data updated on June 2nd, 2022. The milk production information is from the National Agricultural Statistic Service (NASS) February 2022 milk production released February 23, 2022."

"For the 11 southeastern states, the 2021 per capita milk production was 98.2 annually or 8.2 pounds per month. The United States 2021 annual per capita fluid milk consumption was a 134 pounds or 11.2 pounds. We can draw few conclusions from this information: One, the 11 southeastern states only produce 73.3-percent of their fluid milk needs. By necessity, the remaining 26.7-percent came from other states. This leaves no reserve supply variation in daily, weekly and monthly needs from the pool distributing plans. There is no milk available for Class II products or any other non-fluid products."

"Exhibit 86 also shows the removal of Virginia from the 11 states. Without Virginia, the per capita production of the remaining 10 states drops 90 pounds or 7.5 pounds per month. This leaves the 10 states producing only 67.2 percent of their remaining with the remaining 32.8 percent source from outlying areas."

"The origination location of the milk delivered to Eastside Jersey Dairy, Hammond, Louisiana for the five-day period from, May 2nd through 6th, 2022, and another five-day period from August 3rd to 7th, 2022, was established. For the May period, 60-percent of the milk came from the Eastern and Central Texas area and 40-percent of the milk came from Kansas, New Mexico and the Texas panhandle. The Order 7 marketing area did not supply any of the Hammond milk during the May 2nd through May 6th, 2022 period. For the October period, 45-percent of the milk came from the Eastern and Central Texas area, 39-percent came from Kansas, New Mexico n Texas panhandle, and 16-percent came from the Order 7 marketing area. It is understandable that the High Plains area provides milk to Hammond in October when milk is high demand. In May, milk would not move from the areas of East and Central Texas and Texas panhandle and incurred significant added mileage and hauling costs unless absolutely necessary -- unless absolutely needed to meet the milk supply demand for the region."

"March, April and May are no longer months of adequate supply. Exhibit 87 shows just how short region's milk supply actually is in March, April and May. There were 335,813,596 pounds of producer milk pooled on Order 7 in March of '22, according to the market administrator's Order 7 website. 296,832,200 pounds of producer milk delivered to pool plants. Exhibit 9, page 9, there were 141,328,307 pounds of milk pooled on Order 7 that originated in states or portions of states that were immediately adjacent to the market area. Removing these adjacent area pounds from the pool pounds would leave 194,485,280 pounds of pooled milk that's showed on the exhibit 87 in the third line from the bottom. The difference between the remaining 194,485,289 pounds of producer milk and the deliveries to pool plants of 296,832,200 pounds is a shortfall of 102,346,911 pounds. This shortfall is not unique to March. There was a shortfall in all three months of March, April, and May 2022. The same calculations, using the Class I market utilization, also resulted in a shortfall of producer pounds. In March, the Class I market utilization for Order 7 was 281,092,014 pounds, resulting in a shortfall when excluding the out-of-area milk from the designated areas. The adjacent area was 86,606,725 pounds, when compared with the pool producer milk of 194,485,289 pounds, again, after removing the adjacent area milk. These calculations done for April and May. And this exhibit 87 also shows a shortfall, the same methodology was used for Order 6, exhibit 88, and Order 5, exhibit 89. These exhibits dramatically show just how short the milk is in the Southeast U.S. is during the Spring. If a handler pulls too much of a producers milk on Order 5 or 7 during March, April and May, that handler is not able to claim Transportation Credits on that producers milk in the Fall, even though the market had a need for the milk in the Spring."

"Exhibit 90 is a table showing the Order 7 monthly Class I market utilization on a daily basis. Daily utilization is not equal among the months, although some months is both the spring and fall do not have the variability exhibits when comparing winter and summer months. The statistics are from the Market Administrator website in the Statistical Summary section. Exhibit 91, compares the daily average market utilization for April and September for 2020, 2021 and 2022, both April and September contain a holiday weekend, Easter and Labor Day, that could influence milk sales, especially sales of school milk. In 2020 and 2022, the daily average was higher in April by 50,274 pounds in 2020 and 137,732 pounds in '22, than it was in September, indicating that more milk was needed in Class I in April converting the pounds to tanker loads, there were about 82 more tankers needed in April to meet the

Class I needs than in September 2022. In 2021, the reverse was true. September 2021 was higher than April, 2021 by 26,069 pounds on a daily average."

"As an industry, we must take action to help ameliorate this drastic supply/demand in balance. There are choices among the proposals that this area that will provide the necessary distance.

(Whereupon, the Court Reporter asked Mr. Tonak to please speak up and into the microphone.)

MR. TONAK: "Proposals 9 and 10 would apply to Order 5 and 7 respectfully. The proposals, if adopted, would delete a portion of section 1005.82, payments from the transportation credit balancing fund and the corresponding portion of section 1007.82. Payments from the transportation credit balancing fund."

"This section from Order 5 is included here, I will highlight the section we want deleted."

"Section 1005.82, payment from the transportation credit balancing fund.

(c) Transportation credit shall apply to the following milk:

(1) bulk milk received at pool distributing plants from a plant regulated under another Federal Order, except Federal Order 107 (as stated); and

(2) bulk milk received directly from the farms of dairy

farmers at pool distributing plants," by then, the deletion starts, "subject to the following conditions: The dairy farmer was not a producer under this order for more than 45 days during the immediately preceding months of March through May for not more than 50-percent of the production of the dairy farmer during those three months, in aggregate, was received as producer milk under this order during those three months, and (iii) (as stated), The farm in which the milk was produced is not located within specified marketing area of the order in this part or the marketing area of Federal Order 7." (iii), The Market Administrator may increase or decrease the milk production standards specified in paragraph (c)(2)(i) of this section if the Market Administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the Market Administrator shall investigate the need for the revision either on the market administrator's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the Market Administrator shall issue a notice stating that the revision would be considered and inviting written data used in arguments. Any decision to revise the applicable percentage must be issued in writing at least one day before the effective date." So we're proposing deleting a significant portion of that section.

"I will specifically reference Order 7 in the following examples in exhibits, although the same principles apply to Order 5. The deletion of (c)(2)(i) will make the producer milk outside the marketing area that was pooled on Order 7 during the March through May period, and that is other wise ineligible for Transportation Credits for the appropriate subsequent period during the late summer and winter months. This proposal does not change any of the months that the Transportation Credits would be in effect or any of the other transportation credit provisions."

"Exhibit 92 shows the miles between selected cities in Illinois and Iowa and Kosciusko Mississippi. Kosciusko is the last Order 7 distributing plant in Mississippi, at least to my knowledge. The locations in Illinois and Iowa were selected because of milk production and relationship to distributing plant of other orders. Carlyle, Illinois is the county seat McClean County, IL. McClean County, IL, one of the largest milk producing counties in Illinois and relatively close to distributing plants in the St. Louis market that are regulated by Order 32. Bloomington, Illinois is the county seat of McClean County, Illinois. McClean County, though not a large milk-producing county, is home to a few producers who ship tanker load quantities of milk everyday. Dubuque, Iowa is the county seat of Dubuque County, Iowa. This area of Northeast Iowa and Southwest Wisconsin is an area of relatively concentrated milk production. Dubuque is home to an Order 32 pool distributing plant."

"Exhibit 92 also shows the miles between selected cities in Texas and Lafayette, Louisiana. Lafayette is the most southwest of any Order 7 distributing plant. It is one of the distributing plants closest to the Texas border. Texas, particularly East Texas has served as a reserve supply for Louisiana distributing plants for 50 years, give or take a few years. Sulphur Springs, Texas is the county seat of Hopkins County, Texas. At one time Hopkins County was largest milk producing county in Texas. Even though the milk supply in Hopkins County has dwindled since those days, it is still a reliable source of milk for the southeast. Stephenville, Texas is the county seat of Erath County, Texas. Erath County became the largest milk-producing county in Texas, as Hopkins County production moved lower. Dalhart, Texas is the county seat of Dallam County, Texas, the most northwestern county in Texas. Part of the Dalhart city limits are in Hartley County. Hartley County is now the largest milk-producing county in Texas. Ballinger, Texas is the county seat of Runnels County, Texas. Runnel County is a rural county with limited milk production, but it can originate at least an every other day load of milk. Milk produced in Runnels County is about 200 miles from any milk plant."

"Exhibit 93 is a worksheet from the Order 7 market administrator's website. To estimate the applicable transportation credit, the mileage and zone information from exhibit 92, the January 2023 Market Administrator announced fuel price in 48,500 pound load size was used."

"Exhibit 94 shows how handlers may change milk origination and delivery locations to minimize hauling in the spring and maximize Transportation Credits in the fall. In spring, the Carlyle, Illinois milk shed will supply milk needs at Kosciusko, Mississippi. The distance from Carlyle, Illinois to Kosciusko is 450 miles. Milk from the Bloomington area will deliver to O'Fallon. The total miles to deliver one load of milk to Kosciusko and one load to O'Fallon in this manner is 607 miles. In the fall, as illustrated, estimations change. Carlyle, Illinois goes to O'Fallon, a distance of 31 miles, and Bloomington, Illinois goes to Kosciusko, Mississippi, distance of 597 miles. The total miles now traveled are 628 miles, an increase of 21 miles over the spring total. The big difference is not in the increased miles, but in the transportation credit. If the Carlyle, Illinois milk could continue to deliver to Kosciusko in the fall and receive the transportation credit, now prevented by (c)(2)(i), the estimated transportation credit would be $290.03. Since the Carlyle milk will not receive Transportation Credits in the fall, the Bloomington milk will go to Kosciusko with estimated transportation credit of $563.76. Under this scenario, the miles traveled increased by 21 miles, but the transportation credit increased by $273.73. The $273.73 increased transportation credit divided by the 21, by the added 21 miles, yields an increment return of $13.03 on one-way mileage or $6.515 per round trip mile. Dubuque, Iowa and Carlyle, Illinois are the same type of comparison, total miles increase from 607 miles in the springtime of exhibit 94, 628 miles in the fall, a 21-mile increase. The transportation credit was $685.79 higher than it would be if (c)(2)(i) was not in place. This calculates to a $34.29 incremental returns on the one-way mileage for $17.145 per round trip mile."

"Exhibit 95 shows the same type of information for the Texas milk delivering to Lafayette, Louisiana."

"The type of milk movements illustrated in exhibits 94 and 95 are available to handlers in both Order 5 and Order 7 milk movement to maximize Transportation Credits are inefficient due to the increased miles traveled, though often profitable, and cost handlers money. The efficient outcome is to reduce miles wherever possible and still supply the needed milk to plants in the southeast. Fall Transportation Credits will efficiently supplement the cost of hauling in the fall when (c)(2)(i) is removed from the regulations."

"The deletion of section (c)(2)(ii) will allow producer milk located in the marketing area to be eligible for Transportation Credits using the same calculation mechanism producer milk from outside the marketing area. This should enhance the stair-stepping milk using both the in-area and out-of-area milk from North to South and West to East in the most efficient possible manner. The Transportation Credits are in place during the period when milk is in the shortest supply situation, and as result, milk will still need to travel long distances. "

"Transportation credits that are only

available on milk produced outside Order 5 and 7 marketing areas will not contribute to efficient in-area movement. Rather than continually redirect the in-area milk through stair-stepping to the needed areas, the in-area milk will move to the nearby local distributing plant. The out-of-area milk will need to move greater distances past the local milk supply to supply the needs of the distributing plants. There is no incentive to gradually stair-step to the in-area and out-of-area milk in the efficient combination since at this time the in-area milk does not receive transportation credits."

"Prairie Farms has Order 5 pool distributing plants in Holland, Indiana and Somerset, Kentucky. A group of producers is located south of Holland in the Evansville, Indiana area. There are approximately 48 miles from Evansville to Holland. Since this milk is in the Order 5 marketing area, it is ineligible to participate in transportation credits and delivers to Holland throughout the year. From Evansville to Somerset is a distance of 226 miles. From Bloomington to Holland is 235 miles, and from Bloomington to Somerset is 411 miles. If (c)(2)(ii) was removed from Order language, the Bloomington load could go to Holland and the Evansville milk could go to Somerset, combined mileage of 462 miles. By comparison, combined mileage of Evansville to Holland and Bloomington to Somerset is 459 miles. The transportation credit on the stair-step movement would be an estimated $200.20, again, with (c)(2)(ii) eliminated, compared to the current transportation credit, Bloomington, Illinois to Somerset, Kentucky, $288.67. There would be no mileage savings, but there would be a transportation credit savings of $88.47 for each load."

"It is not fair and equitable for out-0of-area milk to be eligible for Transportation Credits while in-area milk is not eligible. As the milk supply shrinks and the population increases in the southeast, it is more important than ever that all milk receives uniform application of Transportation Credit."

"The elimination of (c)(2)(i) and (c)(2)(ii) should incentivize the most efficient movement of producer milk to the distributing plants where needed. The (c)(2)(iii) section is then redundant and not needed when the (c)(2)(i) and (c)(2)(ii) are eliminated."

"Proposals 6, 7 and 8 would introduce Assembly Performance Credits in Orders 5, 6 and 7 respectively. Assembly Performance Credits would reimburse handlers for part of the cost for assembly, dispatch, delivery incurred on producer milk received at distributing plants regulated by the Order. As proposed there would be a $0.50 assessment on all Class I milk delivered to pool distributing plant. The $0.50 Assembly Performance Credit assessment can be adjusted by the Market Administrator without an Order Hearing. The funds are distributed on a pro rata basis to all producer milk delivered to those same distributing plants. The Assembly Performance Credit will operate on a year-around basis."

"As the number of producers and the milk volume produced in the southeastern United States has decreased, milk haulers have to travel more miles to pick up the milk. Additionally, the number of distributing plants in the region have also decreased. Not only does the hauler travel more miles picking up the milk at the farm, the hauler has to travel more miles to deliver the milk to the distributor. This leaves either the producer paying more for hauling and/or the hauler absorbing part of the increased cost and/or the handler absorbing part of the cost. The increased costs that the producer, hauler or handler are paying and absorbing are not necessarily uniform among all producers, handlers and haulers in the region. The Assembly Performance Credit would generate a credit that would partially cover these increasing costs in a uniform manner for all without regard for producer location, distributing plant utilization, distributing plant receiving the producer milk or handler or cooperative generating the milk deliveries. The APC is fair and equitable for both handlers and producers since a uniform assessment rate is applied for the Class I milk, and a uniform credit is received on the producer milk delivered to the distributing plants."

"The classified pricing in the Federal Order system mandates that all regulated plants in the same Class I differential zone pay the same Class I price. The plants would have same Class II, Class III Class IV prices also. However, the actual regulated cost paid by the individual regulated plants could very widely depending on the individual plants utilization milk in the various product classes. If the Assembly Performance Credit was applied to the Class I milk and then distributed on only the Class I milk, there would be much variability in the credit among the regulated plants. This is not the fair and equitable quote "outcome" demanded by Prairie Farms principles."

"The APC will help a handler partially recover the costs of assembling and delivering a load of milk to a pool plant. Costs of assembly include determining which producers are on a load, matching the hauler and the hauler's equipment with the load, et cetera. Prairie Farms case, producers have the same hauler and pay a hauling rate to a particular delivery destination. Prairie Farms pays the hauler additional amounts, if appropriate, if the load goes to alternative locations. Other cooperatives and companies may operate differently, but there are always some costs to oversee the efficient assembly of producer milk at the farm into movable loads."

"The dispatch of the milk is another cost area. The milk demands from the distributing plants and other plants in the region determine which loads should deliver to which plants in order to meet the plant's producer milk needs at the time required. This is further complicated since a plant's milk needs may vary widely day -- to-day and week-to-week. Many plants do not have enough silo storage capacity to take a uniform milk delivery every day of the week. Often the weekends are the days when plants have the least raw milk storage capacity, requiring extra milk deliveries in the middle of the week. There are times when an allocation process is performed since there simply is not enough milk available for all plants to receive the milk deliveries as they requested. This all becomes part of the dispatch cost. Delivery costs are the final piece to be partially born by the APC. Milk delivery costs for individual plants vary widely. Abundant local milk supplies delivered to a nearby plant provide that plant with lower delivery costs than a plant whose milk supplies come from a greater distance, the most efficient regional milk deliveries are likely to increase the delivery costs at some distributing plants and reduce the delivery costs at other distributing plants, with a net savings result. A uniform APC distribution will not fully recover all costs associated with assembling, dispatching and delivering milk to the distributing plants regulated by the Marketing Order. Since the APC distribution is uniform across all producer milk delivered to distributing plants, overall efficient milk movement results.

"The Assembly Performance Credit does not have a mileage-based component. Thus, there is no incentive to maximize mileage-based credits by moving milk among different milk supply locations and delivery locations. The incentive with the APC is to move milk efficiently, utilizing both the in-area and out-of-area milk."

"The language proposed for the Assembly Credits did not include possible changes required in other sections of Orders 5, 6 and 7, especially in 30 and 32."

"The combination of Assembly Performance Credits on a year-around basis and Transportation Credits on a seasonal basis applied to all in-area and out-of-area milk will promote the most efficient producer milk deliveries. This concludes my testimony."

THE COURT: Okay. What, are we moving to your comments concerning the proposed distributing plant delivery costs?

MR. TONAK: Those comments particularly relate to proposals 3, 4 and 5, and I would prefer to complete this testimony and questioning on this testimony before we proceed to that.

THE COURT: I understand. Any objection to that?

MR. HILL: No objection.

THE COURT: Mr. Beshore.

MR. BESHORE: I actually think it would be better to hear all of Mr. Tonak's testimony before going to cross. I mean, he's already commented about the distributing plant credits 3, 4 and 5 in part, and in his statement and this would just elaborate on it a bit and make it all one, that's just my thought.

THE COURT: I'm not sure. Mr. Tonak,

why do you prefer to take up this?

MR. TONAK: I think because they're two separate issues. Mr. Beshore said I commented to the producer delivery plant credit in my testimony, and I'm not aware that I directly testified to anything about the producer or the delivery -- distributing plant delivery credit, but, you know.

THE COURT: That's all right, so you have your hands full over there, Mr. Beshore, did you hear witnesses response to that? You indicated he addressed certain issues that are also addressed in the comments indicates that he did --

MR. BESHORE: I mean, he commented that uniform assembly credit was much, was preferable to mileage-based credits within the Order, which are the 3, 4 and 5, and so the argument was made that his assembly credits are superior to 3, 4 and 5 already, the comments further elaborate on there, so to me, it goes together, but I'm not going to, you know, if there's two to one --

THE COURT: We're -- fairly, I'm not going to, I doubt that I would restrict cross-examination, need to go back, witness seemed more comfortable going ahead and having cross on exhibits 84 through 96, actually I haven't marked 96, so let's see how it goes. If the witness' preference is to go with his testimony now, I don't want to restrict any of the cross-examination context that makes sense. I will say, I think I neglected to mark a sheet entitled "Prairie Farms exhibits," which is simply a list of the witnesses, exhibits 85 through 95, I'd like to mark that 96.

(Whereupon, Exhibit No. 96 was marked for evidence.)

THE COURT: Okay. So, let's go ahead with cross-examination of the witness's testimony, so far, AMS, you're up.

CROSS EXAMINATION

BY MS. TAYLOR:

Q. Good morning.

A. Good morning ing.

Q. Thanks for coming to testify today. I have some questions and then maybe I'll try to digest a little bit more over lunch as well. First off, how many member-owners does Prairie Farms have?

A. Our last count when I did the reports for January was 682.

Q. Thank you. In your testimony you talk about how the Transportation Credit program that's currently in place is inflexible, and I'm paraphrasing, to react to future changes, can you just elaborate a little bit more on why it's inflexible.

A. What I see as inflexible in it is that there is no good way of making changes to it outside of a Federal Order hearing such as this, and that goes to the proponent's proposals for 1 and 2. Now, the other part of it is the restrictions on out-of-area milk are not easily, in my view, overcome, though we have not gone to the Market Administrator about, and followed the procedures outlined in (c)(2)(iii).

Q. Okay. I'm going to have to look up that Order language.

A. That's the one that allows you to request, Market Administrator can review the limitations preventing milk pooled on the order in March, April, and May to receive Transportation Credits in the fall, and he has the ability on his own or after the request to make an adjustment in those limits.

Q. Okay. If I'm looking at the bottom of essentially page 2 of your statement, and this is just going to get a little technical, you reference numbers that are on your exhibits, in exhibit 85 and 86, but then you also reference, for example, in the third paragraph from the bottom, "201 pounds per capita fluid milk consumption for that year, year being 1997," I didn't see that number on your exhibit, so I'm just trying to find the source of that, perhaps it's in the record somewhere?

A. It is not in the exhibit. It is found in table labeled "Dairy Products Per Capita Consumption, United States, pounds per person." And it quotes that the source, USDA's economic research service calculations using data from USDA National Agg Statistical Service, USDA Farm Service Agency, USDA Farm Agg Service, USDA Agricultural Marketing Service, US Department of Commerce, Bureau of Consensus and the California Department of Food and Agriculture, last updated accept 30th of 2022. I do not have the online website address for this.

Q. From the looks of it, if I may interrupt, is that exhibit ten that you entered earlier into the record?

A. No.

Q. That's a different table?

A. That's a different table.

Q. Okay.

A. And both per capita include milk consumption been quoted in press and everything else.

Q. Okay.

A. Find the reference for the material.

Q. That's okay, I just like to have a record of where that number comes from, if it's government statistics, AMS can look that up later, I think you referenced the page, if that's okay with the Judge?

THE COURT: Yes, I mean, it's okay with me. If he's fine, come back and have further discussion on the record.

MS. TAYLOR: Okay.

Q. Then going on to the third page, again, I know this is technical, but I like to make sure the record is clear. Number one at the top, "and the 11 southeastern states only produced 73.3 percent of their fluid milk needs," again I didn't see that number on an exhibit.

A. That number was derived from exhibit 86.

Q. I see the numerator, I wasn't sure where the denominator would have come from.

A. I apparently overlooked putting that into the information, but the -- the specific number for 2021 is 134 pounds per capita, and again, that comes from that ERS dairy products per capita consumption data.

Q. Okay. Thank you. Later down on that same page, you talk about supplying your East Side Jersey Dairy plant in Hammond, Louisiana, and how, if I'm reading this correctly, in May, no milk, no in-area Order 7 milk supplied that plant?

A. That is correct.

Q. But in October, 16-percent of that milk came from Order 7 that supplied that plant?

A. That is correct.

Q. So, I'm not milk marketer, so I don't understand, maybe you can help me out, what happened, how come that milk -- let me rephrase. My layman's understanding would think that that Order 7 milk that went to that plant in the fall was more local, so that might be incorrect, my assumption would then be, why wouldn't I supply that plant in May as well and where would it have gone instead?

A. Well my layman's view matches yours. The specifics of the situation appear to be that one of the cooperatives supplying that plant has a hauler that delivers milk to that plant, and is back-hauling product from the general geographic area, back to the West -- back to the East, excuse me.

Q. So that brings me just to another operational question for Prairie Farms is, how much of your plant supplied is supplied by Prairie Farms members generally approximation, how much do you need to get elsewhere -

A. In total or Hammond?

Q. Yes.

A. In total?

Q. In total, the amount. I know this will be a rough estimate.

A. I would, without doing a little work, but if you include all of the plants, the East Side Jersey plants, the Prairie Farms plants and the Hiland Dairy plants, it's under half.

Q. Okay.

A. And some of those plant groups, we buy a significant portion from outside supplies.

Q. Later on in your statement you reviewed a lot of data in exhibit 94, which I'll study later, and basically showing how milk can be moved to maximize transportation credits, according to your statement, and then later, on the next page, should be the third page from the end, towards the top, you say "milk movement to maximize transportation credits are inefficient due to increased miles traveled though often profitable and cost handlers money." So I just need you to explain that a little bit more how on one hand it could be profitable but on the other hand it could cost money. And it might be because it's profitable for one party and not the other, but if you could elaborate on that?

A. In speaking of handlers, in that particular situation, it's more referencing the milk supply handler rather than distributing the plant handler. And so, on an incremental basis, those movements are very profitable. In some of those cases, when you look at 21 added miles and $34.29 cent incremental return for 20, for the added 21 miles, something like $685.79, but the reason it costs handlers, speaking of milk supply, handler's money, is because the Transportation Credit had not been sufficient, the Transportation Credit fund has not been sufficient to pay a hundred percent of the claims, so in an individual load basis, the incremental miles can be profitable, but an overall basis, everybody receives less than a hundred percent of their submitted claim.

Q. Okay. So get a little more money, but it still costs you in the end?

A. It still costs you.

Q. Okay. Okay. And later down in the paragraph, in the page, excuse me, that starts, the paragraph starts "Transportation Credits that are only available to milk produced outside of Federal Order 5 and 7 will not contribute to efficient in-area milk." And then you say later on, "The out-of-area milk will need to move greater distances past the local milk supply -- past the local milk to supply the needs for distributing plants," but I think, you say "it will need," but I think your whole statement is that's what's happening now, it's not something in the future, it's not --

A. It's what's happening now and will continue to happen. As an example, Sulphur Springs, Texas area milk, let's say goes to Hammond, Louisiana, that's some of the closest Texas supplemental milk to Hammond, and that happens in the Spring of the year. In the fall of year, that East Texas milk goes to Dallas and gets replaced with milk from West Texas, and the trucks almost, not quite, but almost meet each other coming from West Texas to Hammond or Lafayette, and with the milk going from East Texas to Dallas, that's the point I was trying to make.

Q. Okay. And later on that page, you talk about how milk from your producers in Evansville, Indiana is ineligible to get a Transportation Credit it's ineligible now is it true it'll be ineligible under the changes to the proposals 1 through 5?

A. With the changes in proposals 1 through 5, it would still be ineligible because it is milk within the marketing area of Order 5. So it would be eligible for distributing plant delivery credit. We would need to adjust that delivery location and probably leave it right there delivering to Holland, Indiana and bring the milk from Bloomington, Illinois to Somerset, Kentucky, and that milk then would receive a Transportation Credit and net dollars is going to be greater than if we could accomplish the stair-step movement.

Q. Okay. You're proposing a $0.50 assessment for your assembly credits?

A. Yes.

Q. How did you determine that number?

A. I'll start by saying that our internal marketing cost information in Prairie Farms is not as robust as we would like it to be, and so we had to do some estimating of how cost are applied, but that is from our internal costing of milk being used to supply Order 5, Order 7 and order 32 distributing plants in Southern Illinois.

Q. And that's for your cost for your assembly dispatch delivery?

A. Yes, added costs.

Q. Okay. And if I'm understanding your proposal, the payout would be on all milk delivered to a pool distribution plant, it's not just Class I portion?

A. That is correct of all milk.

Q. So your Assembly Credit is for, Assembly Performance Credit Assembly dispatch and delivery, and at the same time you propose to amend, but keep some form of Transportation Credit wouldn't the delivery cost be considered part of what's already reimbursed through the Transportation Credit, is that getting double reimbursement on the same thing?

A. It could be in some cases. First off, there are three components, assembly, dispatch and delivery, and it's difficult to separate those components out entirely. Now I will compare, if there's a family with a few children and the children get a $10 a week allowance and one of the children goes to the father and said "There's something I want to buy, can I get my allowance, "and he's given $10, says "Thank you." Then he goes to his mother and says "There's something I'd like to buy, can I get my $10 allowance," and she gives it to him. He has $20 of a $10 allowance at that point, now that's double-dipping, no doubt --

Q. Sounds like my kids.

A. No doubt about it. The division between the -- or among the Assembly Credit and Transportation Credit isn't quite that clear, but we do understand that there may be a reason to look at modifications to eliminate any concerns.

Q. I think I only have one more technical, questions then I have more some bigger picture questions. So I'm going to talk about diversions, but try not to get everybody confused. So currently, if milk receives Transportation Credit, that milk is reduced from the handler's base from which they can defer it on, that's how system is set up?

A. That is correct.

Q. Okay. Under your proposal, essentially almost all milk under Assembly Credit proposal, and I understand your change is to the Transportation Credit proposal, pretty much all milk going to Class I plants would be able to get some form of Transportation Credit?

A. They would receive the Transportation Credit as such during the fall months, and Assembly Credit over the other months or the rest of the months. Now to the extent that there are diversions in the fall months when the Transportation Credit is in place, the Transportation Credits would be offset, just as they are now.

Q. So the handlers still have the choice, you can either get Transportation Credit on the milk or that can be part of your base from which to divert on?

A. That would be our view, yes.

Q. Okay. Great. Moving on to kind of some big picture things. There's been a lot of testimony about the costs incurred for supplying the southeast market and the impacts that that's had on various cooperative members and the co-op operations themselves, so regardless of what changes the Department might choose to put forth, can you speak to just the impact that these costs have had on your members and on you cooperative?

A. As a cooperative, we pay the Federal Order blend price, be it 5, 6 -- I mean, 5 or 7 or 32 or whatever, to our producers. What happens with these costs, and the costs not being recovered, is that it reduces the cooperative's earnings, and we're proud of the amount of dollars that we have paid back to our members in patronage over the years, not only to our individual dairy farmer producer farmers, but also to the cooperatives that supply our Prairie farmers plants, such as Dairy Farmers of America, Foremost Farms, Associated Milk Producers, and so on, so to the extent that we have unrecovered costs in supplying the milk to these various plants, it reduces the patronage paid to these various member producers and cooperatives, and reduces their areas, and so bottom line is, it hits them in the pocketbook.

Q. And have you experienced, as a cooperative, experience some of your farms, previous farms going out of business?

A. We've had a number of farms going out of business. I don't specifically remember the number we've lost in the last year, but we have sustained losses of membership.

Q. Can you talk a little bit about the Co-op's efforts to recoup some additional costs through the marketplace whether they've been successful or not?

A. It is very difficult to recover some of the costs through the marketplace. Now specifically the school milk, a number of our school milk contracts are based on Federal Order pricing. It's visible, no questions asked, USDA says this is what it is, and as that price changes, our price the schools and so on change accordingly. When you come to over-order pricing, there is that lack of visibility and clarity, not only schools, but some individual grocery store chains think that the over-order premiums are an attempt, for lack of a better word, to rob them. So, again, it's very difficult to, especially over the last few years, to increase premiums enough to recover the added cost.

Q. And on -- so, your supplemental milk that you need to bring in to fill your plant needs and customer needs, what happens if you aren't able to get that?

A. The plants end up a little short, and unfortunate because I'm not in the sales side of our plant business, so I don't receive the calls saying "Where is my milk?" I mean, you have upset customers to put it mildly.

Q. Would that impact your ability to keep accounts?

A. It depends on the alternatives they have of where to find an alternative source of product.

Q. So, under your proposal for the Transportation Credit changes, it would essentially allow more milk to receive Transportation Credit?

A. Yes.

Q. And the record I think is full of evidence that say, especially in Order 7, there's not enough money as it is to pay out Transportation Credits on the milk that claims them. So what's your opinion on the assessment level as it stands, would you support increasing that?

A. It would seem there's a need to increase the assessment level. If I had my druthers (sic), we'd go back to 1997 when there's adequate milk during the spring and summer months and Transportation Credit would only be used through the fall months, but that is not going to happen. And the supply situation in the southeastern states is only going to worsen, and I think we need to find solutions that will allow the most efficient movement of milk from out of the area into the marketing area to supply those needed supplies.

Q. So if increasing assessment was needed to accomplish that goal, you would be supportive?

A. I think we would support that.

THE COURT: Ms. Taylor, we talked about trying to find a break, is this a good stopping point?

MS. TAYLOR: Yea, I have a couple more

questions, but they can wait until afterwards.

THE COURT: Okay, well, I mean, let's reconvene at 1:15.

(Whereupon, a lunch recess was taken.)

THE COURT: Any preliminary business we need to take care of before we go back to witness Tonak? Hearing none, we continue the cross-examination by AMS, Ms. Taylor.

CONT'D CROSS EXAMINATION

BY MS. TAYLOR:

Q. Good afternoon again.

A. Good afternoon.

Q. I just have a couple questions left, let me, one of them we thought about at lunch, let me pull up what I wrote. You talked a lot in your exhibit about stair-stepping of milk.

A. Yes.

Q. And probably most of us in this room understand what that means, but to make the record clear, can you just explain what you mean by that?

A. It's a process by which you take the milk from the northern areas or the western areas and move it gradually to a nearby plant and then move that milk close to the nearby plant further to another plant, and you continue that process until the furthest milk in effect is stair-stepped through changing delivery locations to the plant that needs the milk.

Q. So if I looked at, say you drew that out on map, it would look like stair-steps basically?

A. Basically.

Q. Yes. Thank you. I only got a couple of remaining questions at the moment. Both your Prairie Farms' proposal and proposals by DCMA are being looked at as market-wide service needs, the authorization for that in the Act talks about allowing these payments to handlers for services of market-wide benefit. So when it comes to your Assembly Performance Credit, can you explain how those services of which that credit would be reimbursing for our services of market-wide benefit and at what point are those maybe just individual business decisions and not necessarily a market-wide benefit for everyone?

A. Well, our view is that from market-wide benefit perspective, it provides assistance in moving milk from where it originates to a destination, and in particular, in the southeastern area, if you look at the milk being closest to the distributing plant receiving the same benefit as milk that's further away, number one, it should increase the returns to that nearby producer and encourage them to stay in business or even to expand their business such that they would have more income. Secondly, the more distance milk, in all likelihood, would receive a benefit of the Class I price or the Federal Order uniform price at the zone of the producer location versus the zone of the delivery location. So, in effect, there's two market-wide benefits, one to the local producers to encourage them to increase milk production; and secondly, along with the potential differences in uniform price or Class I price, to encourage those producers to maintain milk production and move it to the plant where it is needed.

Q. And so just to close the loop on that, the ability for producers, local producers to stay in business and possibly grow, if they can, their milk production locally, is a service to the market?

A. Yes, because you don't have to bring in as much milk from outside.

Q. My last question is regards to the emergency request, the initial request to have this hearing through DCMA requested it to be considered on an emergency basis, does Prairie Farms have an opinion on that emergency request?

A. The -- we view the situation in the southeast to be an emergency in getting milk for the plants that need it for many of the reasons we've covered, the various testimony has covered. Now, of course it's more of emergency if USDA decides to adopt our proposals, and it adopt somebody else's, but.

Q. I appreciate your candor. Okay. So you think it would be appropriate, if market conditions are such that it is an emergency that the department move as expeditiously as possible?

A. Yes, I do.

MS. TAYLOR: That's all my questions for now. Thank you.

THE COURT: Cross examination by any other participant? I see none. I'm sorry, I see Mr. Beshore.

MR. TONAK: I didn't see him either, Your Honor.

CROSS EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Dennis?

A. Good afternoon.

Q. How long have you been the Senior Director of Federal Order Markets for Prairie Farms?

A. Since May of 2020.

Q. Were you with Mid-West prior to that?

A. Yes.

Q. How long were you with Mid-West?

A. Approximately 25 years.

Q. So, while you were at Mid-West, you didn't have any involvement with marketing itself, southeastern orders, correct?

A. That would be correct.

Q. Now, with the Prairie Farms you say 682 members, how many of those members are located in the southeastern marketing areas, Southeastern Order marketing areas 5, 6 or 7?

A. It's a relatively small number.

Q. Single digits?

A. I don't know the exact count, but it's a relatively small number.

Q. Well, single digits?

A. Well, it would be more than 9, you know, since single digits, but part of the thing is that we've got milk that is located in the Order 32 area that is closely associated with Orders 5 and 7, if I understand your question correctly?

Q. Well, my question was, how many farms are in the southeast market areas 5 or 7?

A. Right. And so those farms in Order 32 would be excluded from the answer.

Q. Right. Now let's talk about your plants in southeast, you have nine, nine plants, full distributing plants under Orders 5 and 7, according to your testimony, correct?

A. Yes.

Q. Okay. Can you -- can you tell us, name those nine plants?

A. There is a Prairie Farms plant that's in Somerset Kentucky, a Prairie Farms plant in Holland, Indiana; East Side Jersey Dairy Plant in Kosciusko, Mississippi, and in some of the reports, it's Prairie Farms plant, there is an East Side Jersey plant at Hammond, Louisiana. There are Hiland Dairy plants located at Memphis, Tennessee, Little Rock, Arkansas, Fort Smith, Arkansas, Fayetteville, Arkansas, and Springfield, Missouri.

Q. So, let's take East Side Jersey plants first, what portion of the supply at East Side Jersey plant in Mississippi is from Prairie Farms member farms?

A. It varies. It would be probably anywhere from 15 to 30-percent, depending on the day, the week, the month, so on.

Q. And how about the East Side Jersey plant in Hammond, Louisiana, what portion of that supply comes from Prairie Farms member farms?

A. I would estimate that that is over, no, let me back up, on East Side Jersey, Hammond?

Q. Yes.

A. None of the milk at that plant comes from Prairie Farms members. That milk is primarily supplied or at least the majority supplied by milk from the independent producers that we market and payroll in Texas.

Q. Now, going into the Hiland plants, Hiland in Little Rock, Arkansas, what portion of that supply comes from Prairie Farms member farms?

A. All of that supply comes from an outside cooperative that we have a supply arrangement with.

Q. Is that the co-owner of one of the minority owner of Hiland?

A. It is a minority owner of Hiland.

Q. So, there's no, no Prairie Farms deliveries, member farm deliveries to Little Rock?

A. I would not say no, there have perhaps been a relatively minor amount due to a special occasion, but during the normal course of business, there would not be any.

Q. Okay. How about the (phonetic) plant in Fayetteville, Arkansas?

A. Same as the Little Rock plant.

Q. How about Fort Smith, Arkansas?

A. Same as the Little Rock plant.

Q. And the Hiland plant in Memphis?

A. Prairie Farms supplies a portion of the milk into that plant. It currently is probably less than 10-percent.

Q. Finally, Hiland plant in Springfield?

A. Same as Little Rock plant.

Q. All non-Prairie Farms?

A. All non-Prairie Farms.

Q. And the plant in Somerset Kentucky, Prairie Farms plant in Somerset, Kentucky, what portion of that is from Prairie Farms member farms?

A. That varies, again, but it would be, on the high side, maybe 80-percent, maybe on the low side, 50-percent.

Q. Finally, Prairie Farms plant in Holland, Indiana, what portion of the supply there is from Prairie Farms member farms?

A. I'm going to estimate the same percentages I gave you for Somerset. I think I may have misspoken, Holland would be 50 to 80 percent, Somerset is slightly less than that.

Q. Okay. So, when, of the nine plants -- let's see, 1, 2, 3, 4, 5 had zero supply by my notes, make sure I'm correct, five have no supply from Prairie Farms member farms. One has less than 10-percent from Prairie Farms member farms; one has a max of 30-percent, 15 at

30-percent, and two have something less than 80-percent, 40 --

A. I would say that, you know, off the top, I don't have the exact numbers, but I'd say that's approximately correct.

Q. Okay. So that when you previously testified in response to questions from Ms. Taylor that something less than 50-percent of the Prairie Farms supply of milk to your southeast plants was from your own farms and that was well, well under 50-percent, in aggregate?

A. In aggregate, it's probably somewhat under 50-percent.

Q. Well way under 50-percent, isn't it, Dennis? Five of them have nothing, nothing for Prairie Farms, six has less than 10-percent, and seven is less than 30-percent?

A. Yes, it probably is.

Q. Okay. So, let's talk about your page 2, and I numbered the pages to 84, which I didn't see numbers on them anywhere, but I'm on the second page. Yes, I'm on the second page. In terms of the -- terms of your principles, the first one includes benefitting the environment, would you -- would you agree with me that supplying plants with local milk is the milk supply that provides the maximum benefit to the environment in terms of sustainability and carpet footprint and the like?

A. Yes.

Q. Okay. So, let's go to the language on page 4, language 4, your changes to the Transportation Credit Balancing Fund, as you want to eliminate by the cross-outs the three subparts to two I, double I, triple I, so that there are no qualifications for receiving Transportation Credit Balancing Fund payments, other than delivery during the applicable months, correct?

A. That would be correct.

Q. Now, double -- triple I, and the language that you've crossed out here on triple I, as you referenced, I think, if I understood you correctly in response to Ms. Taylor, under the existing language, you had the opportunity to request the Market Administrator without a hearing to discretion to in essence accomplish what your proposal accomplishes, isn't that correct?

A. That is correct to in regards to I.

Q. Single I, subpart?

A. Single I, subpart, yes.

Q. But you did not make any such request, is that correct?

A. Not to this point.

Q. Okay. Is there any reason for that, if you can accomplish what one of your major objectives through, without a hearing, through the Market Administrator, wouldn't that be prudent option to take?

A. Well, as we've been reviewing options, we were looking at that, then the opportunity to present a proposal at this hearing came up and so we have not pursued it for the fall.

Q. Have you -- so your proposal with respect to credit, Transportation Credit Balancing Fund would expand the universe of eligible transactions that would receive payments from that fund, correct?

A. Yes.

Q. Are you making any proposal or supporting any proposal with respect to enhancing the funds available in the Transportation Credit Balancing Funds?

A. We would not object to the proposal put forward by proponents of 1 and 2.

Q. Well, are you supporting it or just not objecting?

A. Our Board has taken no position on 1 or 2, but they are not objecting to it.

Q. Okay. When you expand -- so, your expansion of the universe of payments here by eliminating single I and eliminating double I would mean that those payments would be payable both to all milk coming from outside the order and all milk inside the order in the applicable months, correct?

A. Yes.

Q. Have you done any analysis, asked the Market Administrator to make any calculations with respect to what that would mean in terms of proration of the payments available?

A. No.

Q. Do you have anything to offer for the hearing record in terms of what it would mean in terms of payments available proration?

A. No, I do not, but we feel that the proponents did a good job when it comes to the current transportation program, and there are a number of alternatives to our proposal or the proponents' proposals that need to be considered, but due to the number of combinations that it would be potentially available, we did not do an analysis.

Q. So on this hearing record, if the Department were to adopt your proposal, there'd be no way of knowing what financial impact it would have?

A. That would be correct. I would add that, if Prairie Farms was to make some of the movements suggested in exhibits 94 and 95, increasing the amount eligible for Transportation Credits, that there is no way of exactly predicting what the results of that would be either.

Q. So, are you saying that Prairie Farms has the ability to make -- to make deliveries that would qualify for Transportation Credits, but does not now make those deliveries?

A. We have not made those deliveries in the past.

Q. Okay.

A. But the benefits that could accrue to some of our producers, member-based, means that we have to strongly consider doing those things as much as we dislike doing it in the future.

Q. I want to talk about your proposed Assembly, Assembly Credit a bit. First of all, assembly of milk takes place at the farm level, would you agree with me on that?

A. Yes.

Q. Okay. And when we're looking at -- and basically that's the process of the truck stopping and pumping the milk in and out of the bulk tank, if it's a bulk tank load, farmer has a bulk tank or if it's a direct load farm, the milk being loaded into the -- into the tanker at the farm, that's the assembly process, correct?

A. Yes, it goes a little bit beyond that, as I testified to, because it's making sure the loads are matched with the buying milk and the individual produces farms, and with the hauler's equipment and so on, but basically that's correct.

Q. The hauler has a function of properly ascertaining volume of milk he's picking up and that it's identified with the farm and their permit and those things, getting the manifest filled out, that sort of thing, correct?

A. Yes.

Q. Okay. Now, once that milk's assembled on that truck, it can go anywhere, right?

A. It could go anywhere within the ability of the hauler and his drivers to make the delivery.

Q. Right. So, the function of assembling the milk is not directly linked to getting it to a distributing plant, pool supply plant, cheese plant, an ice cream plant or any other plant, wouldn't that be correct?

A. That could be correct, but without the assembly function and the miles involved in assembling that. Now, there is no milk to deliver to a pool distributing plant, a non-pool plant or any other plant.

Q. Okay. But to be eligible for market-wide service credits, under the Act, the function must be one that is necessarily a market-wide service, wouldn't you agree with that?

A. I think there can be a broadened definition of what components go into assembling and delivering a load of milk under the market-wide services.

Q. Okay. Now your Assembly Credit would be paid out to, on all milk delivered to the pool distributing plants, correct?

A. That is as it is currently written, yes.

Q. Okay. On a uniform basis?

A. On a uniform basis.

Q. So that the, the grit of receipts by producers in the milk shed would be the same grid as for all blend price payments under the order essentially?

A. Basically, yes.

Q. Okay. And isn't one of the dysfunctions in the southeast presently, in terms of supply and demand, that the supply and demand for milk in no way conform to the Class I differential grid in the region?

A. Yes, that is true, except that I would say that the, taking Class I function a little bit further, it is evolved into a uniform price, and that uniform price is actually what the producer sees and the uniform distribution of the Assembly Credit -- Assembly Performance Credit would also end up being part of a uniform distribution either to a handler or to a cooperative supplier and hopefully back to the individual producer.

Q. Right. But the uniform, the grid of uniform receipts would remain the same as it is now, it's not affected in any way because you're distributing your Assembly Credits on a uniform market-wide basis?

A. Yes.

Q. So, if you -- if I could call your attention to Mr. Herting's testimony yesterday, and my copy doesn't have a number marked on it, the last page, do you remember -- do you remember that exhibit that he presented, last page, which showed DFA Georgia milk production by county, all deliveries 2022?

A. No, I was not fortunate enough to receive a copy of that testimony, so I haven't seen it.

Q. 82, exhibit 82, last page. Let me give you mine, my copy.

A. Thank you.

Q. Exhibit 82, let me apologize for apparently not having enough copies available for you yesterday. Now, if you look at the last page we of exhibit 82, the red counties are the supply counties -- I mean, the blue counties are the supply counties. The red dots are the demand points, the plants to which milk from the supply counties were delivered in the southeast. Okay. Since you didn't get a chance to look at it yesterday, I want to give you the chance to figure it out.

A. Okay.

Q. Okay. Now, the movements of milk shown on exhibit 82, the last page, from the supply areas to the demand points are in every direction, north, south, east and west, correct?

A. Yes.

Q. And therefore they are in no way in conformity with the blend price grid in the Southeastern Orders, correct?

A. It would appear that they would not be.

Q. In fact, we've heard lots of testimony in this hearing, and you've been here for the entire hearing, correct?

A. Yes.

Q. Lots of testimony about how milk has to move from south to north, it loses location value, it has to move from, in flat areas, you know, west to east or east to west where there was no location value under the order. You've heard all that testimony, correct?

A. Yes.

Q. So, in the southeast, if we're trying to fashion some order provisions where we're generating some new revenue and trying to make it fit the market and address some of the market issues, spreading that revenue equally over the order as your proposed Assembly Credit does, would not address all these, the market conditions in the southeast reflected in exhibit 82, now isn't that fair?

A. That would be true. And I'm not sure the Orders are designed or intended to address all deliveries for all reasons, as part of my testimony indicated and I see a red dot there, Hammond, Indiana, this is for 2022, in the May time period, there was no milk delivered to Hammond, Indiana, but for whatever reasons that one of our cooperative suppliers chose, they delivered milk there in the October time period, and I assume that part of these deliveries are as a necessity to supply commitments made to various handlers and part of these deliveries are a factor of balancing the marketplace when milk was not needed further south.

Q. Well, I mean, this just reflects distributing plant demand points, so milk that's going to distributing plants is needed for distributing plants needs, correct, and that's not surplus milk?

A. No, I didn't say it was surplus milk. I'm saying it moved to somebody's distributing plant delivery points because it was not needed in the more traditional further south, higher uniform price plants.

Q. But it was needed in the plants --

A. But there was a need at some plants and the decision was made to use milk from Georgia rather than milk from someplace else.

Q. Okay. By the way, going back to the Transportation Credit, it's presently in the order and your proposals 1 and 2 of DCMA, and your proposal, do you agree with the DCMA proposals that the current reimbursement factors in the MRF and in the Transportation Credit system is way out of date in terms of the cost?

A. You're putting me in a difficult position because the Prairie Farms Board has taken no position. If I depart from being a Prairie Farm representative, I would be easier able to answer in the affirmative, even though that is not Prairie Farms' official position.

Q. Well, that's interesting because I'm not able to cross-examine the Prairie Farms Board, and I think you're saying that you've been sent by a mess -- you're a messenger sent by someone who's not here to be cross-examined to say what they want you to say?

A. No, I'm just saying the Prairie Farms Board did not take a position on proposals 1 and 2.

Q. And therefore--

A. They did not oppose it.

Q. But therefore you're not able to testify as to whether those costs are out-of-date?

A. Based on our internal knowledge, those costs do not accurately represent the cost that are in place today.

MR. BESHORE: Thank you. May I have just a minute, Your Honor?

THE COURT: You may.

MR. BESHORE: Confer with my client.

THE COURT: Let me ask a quick question I'm looking at the last page, exhibit 82, witness referenced a plant in Indiana, I don't see Indiana on my map, that's last page of exhibit 82, looking at same page.

MR. TONAK: No. I don't see Indiana on this.

THE COURT: Maybe I misheard it, nevermind.

MR. BESHORE: I think I have just one other question in follow-up to the Judge's question.

Q. You were talking about the plant in Hammond, Louisiana, correct?

A. Yes.

Q. And I think you referred to May of 2022, I mean, this is --

A. 2022.

Q. The exhibit.

A. October of 2022, the exhibit I understand is for all of 2022, I was just referencing those two time periods that were in my testimony where one of them no milk came to Hammond from any area of the southeast, and then the other October time period, there was. I am not disputing the delivery plant locations on the map in one way or just that that milk may have not have moved to Hammond, Louisiana out of Georgia on an ongoing basis.

Q. Okay. I just wanted to make clear that there was no misunderstanding about the time period covered by the exhibit, it's not just May, it covers the entire year of 2022. That's all the questions I have at this time. Thank you, Dennis.

THE COURT: Any cross-examination by any other participant? You're your own lawyer here, Mr. Tonak, is there anything you'd like to add to the record to further explain anything that came up on your cross-examination?

MR. TONAK: No, I will not add anything. I think the record is fairly complete and it's obvious there's a couple of differences of opinion of what the best way forward is.

THE COURT: I am not surprised. All right. Should we move on to the -- we could have these exhibits moved into the record now or we can just take everything up at once. Why don't we just take everything up at once? You have a set of one, two, three, four-page, including a cover sheet, entitled "Comments concerning the proposed distributing plant delivery credits, Dennis Tonak, from Prairie Farms." Is this part of the statement you wish to make the next --

MR. TONAK: Yes, and I would propose, if the Judge is agreeable, that the comment page be numbered 97, I think that's the next one in the series.

THE COURT: That's what I have.

(Whereupon, Exhibit No. 97 was marked for evidence.)

MR. TONAK: Then the three remaining pages numbered 98 and 99.

(Whereupon, Exhibits No. 98 and No. 99 were marked for evidence.)

THE COURT: Mr. Tonak, just a continuation of your testimony, you're still under oath, of course, I don't think you need to identify yourself or anything like that. If you had a lawyer here, you might ask whether there's anything you wish to add. As I understand exhibit 97 and the next exhibit is 98 through 100, pre-filed statement, we'll read that into the record, is there anything you'd like to add to that before you get started?

(Whereupon, Exhibit No. 100 was marked for evidence.)

MR. TONAK: I would just add that the comments, these comments are specifically concerning and related to proposals 3, 4 and 5?

THE COURT: Mr. Tonak, the witness is yourself.

MR. TONAK: "Comments concerning the proposed distributing plant delivery credits. As proposed, the distributing plant delivery credits alleviates a portion of the delivery cost when supplying in-area milk and milk from a privileged few out-of-area counties to pool distributing plants. The relief granted to the specified areas will be welcomed. Our particular concern is that not all out of area milk receives the same privilege as the milk from a few counties in Georgia, Virginia, and West Virginia. This treatment of these privileged counties is not fair and equitable, especially when considering the volume of milk necessary to meet the needs of the Order 5, 6, and 7 distributing plants as shown in exhibit 8, page 9, for Order 5, and page 10 for Order 6 and page 11 for Order 7."

The producer milk originating from states and parts of states that are adjacent to the marketing area and that delivered to pool distributing plants is shown in exhibit 9, page 1 for Order 5, page 3 for Order 6, and page 5 for Order 7. As an example, in Order 7 for March 2022, there were 3,823,107 pounds from Kentucky that was not part of the Order 7 marketing area. There was 58,432,326 pounds from Texas and 64,409,180 pounds from the restricted states. The sum of these pounds is 126,664,613 pounds. The sum is found in exhibit 100. Also incorporated into these exhibits 97, 98 -- excuse me, 98, 99, then under would be 97 is milk receipts at pool plants, and that comes from exhibit 9, page 7 for Order 5, page 8 for Order 6, and page 9 for Order 7. The last column in exhibit 100 is the percent of deliveries to pool plants that came from the defined areas adjacent to the Order 7 marketing area. There were 296,832,200 pounds received at Order 7 pool plants in March 2022. The outside milk from the specified areas accounted for 42.7 percent of the pool plant deliveries. Similar information is compiled for Order 5, exhibit 98; and Order 6, exhibit 99."

"If the proposed distributing plant delivery credits were expanded to include the additional areas listed on exhibits 98, 99 and 100, and also eliminate the possibility that milk receiving Distributing Plant Delivery Credits could also receive

Transportation Credits, the result would be a fair and equitable solution for all."

Now we much prefer the Assembly Credit and the Transportation Credits allowing, especially out-of-area milk, to receive full Transportation Credits in the fall even though that milk delivered to pool distributing plants during the March, April and May period. Our second choice then, if that would not happen, would be to expand the distributing plant delivery credit area and make sure we restrict Transportation Credits so that producer milk receiving delivery plant -- distributing plant delivery credits could not also receive Transportation Credits. We would also think that the diversion limitations for in-area milk should be the same as the diversion limitations in the Transportation Credit program. That concludes my statement.

THE COURT: Any cross by AMS?

RECROSS EXAMINATION

BY MS. TAYLOR:

Q. Good afternoon. That's a lot for me to process in like two minutes, Dennis. So, hold on --

A. Would it be helpful if I walk through one of the line items on exhibit 100?

Q. Yes. Let's start with the -- that's a good idea because if I, just to be clear, exhibit 98 and 99 were prepared by the Market Administrator 5, 6 and 7, so those and they look similar to what our copies of what was entered into the record previously by John Herbert?

A. Yes. Now, the base portion, and I can identify the columns that was prepared by the Market Administrator, the year, month, and this is specifically referencing exhibit 100, the year, month, the Kentucky, the Texas and the restricted states volume were all prepared by the Market Administrator and included in the exhibit 9 package.

Q. Uh-huh (affirmative).

A. The total was a sum of the preceding three columns, which was basically a spreadsheet edition. The Federal Order 7 Producer Milk concedes that pool plants came from the exhibit 9 prepared by the Market Administrator. And then the percentage is another math calculation. So, in fact, if we go to March, which was used in the testimony shows $3,823,107 Kentucky area outside of --

Q. Sorry, what line are you on?

A. It'd be the March.

Q. Of what year?

A. 2022. And there's were the Kentucky pounds of $3,823,107 pounds. The next column, and that's now outside the Order 7 area in Kentucky, that was delivered to Order 7 pool distributing plants. The next column is Texas milk delivered to Order 7 pool distributing plants $58,432,326 pounds. The next column is the milk from the restricted states, which would be milk from Illinois, Kansas, North Carolina, outside the Order 7 area, the pool Order 7, Oklahoma, South Carolina, outside the Order 7 area, pooled on Order 7, and Florida. Georgia milk from outside the Order 7 area, pooled on Order 7. Milk from Missouri outside of the Order 7 area and pooled on Order 7. Excuse me, I've been saying pooled, it's actually delivered to Order 7, pooled to distributing plants. And Tennessee counties not in the Federal Order 7 marketing area. And so the sum of those three columns is the 126,664,613 delivered to pool distributing plants. The total receipts, producer receipts at Federal Order 7 producer or at Federal Order 7 pool plants was 296,832 pounds by divided that number by $126,664,613, we arrive at 32.7 percent calculation. Meaning that, in these defined areas on this exhibit, supplied 42.7 percent of the Order 7 pool plant needs.

Q. Okay. So at the bottom of your statement on exhibit 97 talk about those "delivery credits were expanded to include the additional areas listed in exhibit 98, 99 and 100," and go on about something else, "it would be a fair and equitable solution, so I take that to mean that you want to include all of the states, you're expanding that to include all of the states in that footnote that you just read, as well as Kentucky and Indiana and those places, counties outside of the marketing area?

A. Yes, it would include milk from those areas that are outside of the marketing area.

Q. But in your view, regular suppliers of the market?

A. But regular suppliers to the pool plants.

Q. Okay.

A. Or the distributing plants actually. And again, that is our second choice. Our first choice is still the Assembly Credit and building it to expand Transportation Credits to at least eliminate the (c)(2)(i) provision.

Q. Okay. And your second choice is to expand the delivery credits as proposed by DCMA, plus these additional areas that we just discussed, as well as restrict the credit so that the same milk can't get two credits basically?

A. Yes.

Q. You get delivery credit, you can't get

Transportation Credit?

A. That is correct.

Q. And at that point your second choice is not to also include the Assembly Credit?

A. Our second choice would not include the Assembly Credit. I mean the Assembly Credit is our preferred first choice.

Q. Okay.

A. But we're -- but we're proposing this as a second option for the Department to consider.

MS. TAYLOR: Okay, I think for the moment that's all my questions.

THE COURT: Any other cross of this witness, Mr. Beshore?

RECROSS EXAMINATION

BY MR. BESHORE:

Q. Dennis, I want to make sure I understand your first and second choices, configurations of those options. So, on your first choice, you would change the Transportation Credit Balancing Fund so that it had no limitations as to location of producers or other time of year or marketing by the other, yea, no limitations on location of the producers or their ability to qualify for the credit?

A. There would be no limitation on the producer's ability to qualify for the Transportation Credit. The Transportation Credit would exist only in the months of July through now February or January of the proposal to make February an option.

Q. So it's still say in the, it would only be in the generally shorter months?

A. Yes.

Q. But it would apply to both out-of-area and the in-area producers.

A. Yes. And to try to put a fine point on it, there are producers, let's say in Texas, there's Southern Illinois that regularly supply Order 7 distributing plants, and under our proposal, the fact that they supplied to distributing plants in March, April and May would not disqualify them from receiving Transportation Credits in the fall and winter months.

Q. Right. I understand that. But now I'd interested in how that, on your preferred system, how that payment program for the Transportation Credit Balancing Fund interacts with your Assembly Credits. The Assembly Credits are year-around to all producers supplying milk to distributing plants, correct?

A. Yes.

Q. So that during the payout months of Transportation Credit Balancing Fund, producers would get both credits?

A. Yes, because we see the credit, those credits as two different items. We would expect that the Transportation Credit would be limited, not limited, but prorated and the application of the prorated Transportation Credit and the Assembly Credit would more nearly cover the costs during those fall months.

Q. Okay. So during the 7 or 8 months, they get both credits, the other months they only get Assembly Credits. Producer supply distributing plants get both credits during the 7 or 8 months, but only the Assembly Credits during the spring months basically?

A. During the months that the Transportation Credit is not in place.

Q. Okay. And your second alternative then is, second choice is to expand the distributing plant delivery credits proposed by DCMA to any producer supplying the market?

A. That'd be fine. The way we're viewing it is the defined areas in the exhibit, in Order 5, as an example, I believe there's milk from Maryland, Pennsylvania possibly Ohio that delivered to the Order 5 area in the spring months or year-around and those areas are not immediately adjacent to the marketing area.

Q. But on 97 you say "proposed distributing plant delivery credits were expanded to include the additional areas listed in the exhibits 98 to 100, which if I understood it correctly includes all sources?

A. No, there's --

Q. Kentucky, Texas most restricted states on 100.

A. Kentucky, Texas and the restricted states, those are all areas that are immediately adjacent to the, in the case of exhibit 100, the Order 7 marketing area. That is an example, Kansas, Texas, Oklahoma are all immediately adjacent bordering on the Order 7 marketing area. Missouri borders on the Order 7 marketing area. Illinois borders on the Order 7 marketing area.

Q. So you would exclude, exclude Pennsylvania?

A. Pennsylvania is excluded and for Order 7 purposes --

Q. Michigan gets excluded?

A. Michigan is excluded. Indiana is excluded/-D.

Q. For Order 7?

A. For Order 7.

Q. But not Order 5?

A. For Order 5, Indiana. Illinois would be included. Missouri is not included. The rest of Kentucky would be included, that is not in the Order 5 area, but there is a break from, in the Order 5 area, between some counties in Kentucky that are not in the

Order 5 area, and Ohio, so Ohio would not be included. The intent here is to make sure or try to make sure that those areas immediately adjacent to the marketing area and the areas that are likely and have exhibited a finite to the marketing area in supplying pool distributing plants are included, but those areas that occasionally deliver to pool distributing plants, let's say Michigan or Ohio under Order 5, are not included.

Q. Each if they delivered year-around?

A. Even if they deliver year-around, the way that this is presented. Now it's fine with us to include the other areas. It's just as we were looking at the numbers, and as we were requesting information from the marketing administrator, this is the manner in which we requested it, and I don't have any knowledge of how much, as an example, Ohio or Michigan milk consistently delivers to Order 5 or --

Q. Okay. So the limiting principle for your alternative is whatever happened to be included or not to be included on this?

A. On this list, because it's adjacent, it's areas adjacent to the marketing area.

Q. Okay. Now, you go on to say that anyone that "eliminated the possibility of milk receiving distributing plant delivery credits could also receive

Transportation Credits." So would there still be a Transportation Credit Balancing Fund under your alternative 2?

A. Well, there could be because let's say milk out of Michigan.

Q. So the fund would only, so there'd probably be no prorations that'd support a hundred percent of the cost of bringing milk out from Michigan or Pennsylvania, New York, Wisconsin or whatever, under that alternative?

A. The other part of it is theoretically a handler could say "I don't want to participate in the distributing plant delivery credit."

Q. Handler choice?

A. Handler choice, during these fall months because in my estimates and estimation, I'm better off with the --

Q. Transportation?

A. Transportation.

Q. Non-prorated Transportation Credit fund?

A. Yes.

Q. At the higher reimbursement rates that have been proposed?

A. Yea. And you know all of this tends to fly a little bit against one of our principles of keep it simple and all of that, but we're trying to present some alternatives to USDA that may be better than any of the individual proposals themselves.

Q. Now, you also talked about diversions, if I understood you correctly if in-area milk were to be eligible for delivery credits and/or Transportation Credit Balancing Fund payments that you would not be able to divert milk or you'd have to divert volumes, against your delivered volumes, is that correct?

A. Yes. We see the -- we see the diversion limitations in the Transportation Credit program as it currently exists as a preferred option. And if the distributing plant delivery credits, when we look at them, we feel it would be appropriate to remove those diversion limits from that program or conversely allow diversions on both programs. We just think that the way diversions are treated should be similar between both programs.

Q. Okay. Well I know you're not marketing much around in the area, but you've heard testimony from the marketers in the area that the only time milk is diverted in the area is when there's absolutely a shutdown at a plant or, you know, one of these extraordinary holiday weekends and such, you've heard that testimony, right?

A. Yes.

Q. Why would you penalize those transactions?

A. The easiest answer to that is our Southern Illinois milk delivers to Kosciusko, both Kosciusko and Memphis. Recently Kosciusko had to back off some milk because of weekend constraints and too much milk coming in from some of our other suppliers, and we put that milk that normally delivers into Kosciusko into our Carbondale non-pool plant, that milk was not pooled, so therefore it did not affect our ability to fill out Transportation Credits, and that was a choice we made to maximize our Transportation Credits. We have milk in Southeast Missouri that would qualify for the distributing plant delivery credits. Now, if that milk goes through the same situation as our milk in Southern Illinois, they're allowed to gain diversions if your distribute plants plant credits are in place with no penalty, but we just don't think that's fair, we think it should be the same on both sides.

Q. You just basically draw the line at adjacent states rather than in-area in the marketing area? Adjacent, beyond adjacent states, they're going to have the same rules as the, I mean, states beyond the adjacent states under your program would have the rules that apply to everybody now, you just want to move the line out a little bit?

A. Well, if USDA saw fit to include those states in the program, we would not object, as I said. The adjacent states has a method because of our data request from the Market Administrator to obtain numbers that we could work with and view, and if we would have (unintelligible) different states, obviously we would have implemented those states.

Q. One final question, Dennis, would you agree with me that with new money being proposed to be raised in these Southeastern Orders under Prairie Farms program or DCMA program, either way, there's new money in effect being raised from charges of Class I handlers. DCMA proposals would focus and place more of that new money to the in-area producers than the Prairie Farms proposals which would place more of that new money to the out-of-area producers? I mean that's the way it would. Work?

A. Beyond the delivery credit program, I'm more uniform distribution of the new money to all of those who are supplying the distributing plants of the order.

Q. More of the new money would go outside the market area under the Prairie Farms proposal than under the DCMA proposal, correct? It's arithmetic, Dennis.

A. I'm never good at arithmetic. I will take your statement at face value.

Q. Okay. Thank you.

THE COURT: Any additional cross statements?

MS. TAYLOR: I just have one question. I wan to make sure the record is clear, there's a lot of back and forth on the additional areas.

FURTHER RECROSS EXAMINATION

BY MS. TAYLOR:

Q. Prairie Farm is requesting, your second choice would be to expand the delivery credits to the adjacent state areas, because in your view, am I summarizing this correct, because in your view, those are regular suppliers of the Southeastern Federal Orders?

A. Yes.

MS. TAYLOR: Thank you.

THE COURT: Anyone else have an examination for this witness? Do you have anything else you'd like to say? If you had a lawyer, you might have some questions on direct, do you have anything you'd like to say?

MR. TONAK: I do not have anything additional I wish to say.

THE COURT: I assume that you'd like to move into evidence?

MR. TONAK: Yes, I'd like to move these

exhibits through 100 and starting with what was it 84, I believe, that's what I had.

MR. TONAK: Into evidence.

THE COURT: Any objections?

MR. HILL: No objection.

(Whereupon, Exhibits No. 84 through No. 100 were entered into evidence.)

THE COURT: Exhibit 84 through 100 marked for identification and entered into the record. Mr. Tonak, thank you, you may step down. We have another witness, I was given a piece of paper, testimony of Sally Keefe, is that our next witness?

MS. TAYLOR: Your Honor, we have one more proposal to go over and it is proposed by a dairy farmer who's been here with us this whole time. I'm wondering if Ms. Keefe would defer and let him present?

MS. KEEFE: I'm happy to have Mr. Sumners go, either way.

MS. TAYLOR: He's been waiting very patiently, if we could let him go first, if he would like.

THE COURT: It is 3:30, maybe we could take a break or we could press on. Do we have, looks like this hearing is going to wrap soon, do we have proposed dates for transcript corrections, objections thereto, briefing dates?

MS. TAYLOR: Don't think we have yet, maybe we can take a quick afternoon break and that can be discussed, then brought on the record when we get back.

THE COURT: Want to try to take a break now or do you want to postpone the break? Hope that we get through these witnesses.

MS. TAYLOR: I think Mr. Sumners wants a quick break, maybe 10 minutes?

THE COURT: Sure. Come back at 2:45.

(Whereupon, a recess was observed.)