

USDA - FEDERAL MILK ORDER HEARING

Sheraton Hotel Station Square
300 West Station Square Drive
Pittsburgh, PA 15219

Thursday, June 23, 2005
8:00 a.m.

BEFORE: PETER M. DAVENPORT
U.S. ADMINISTRATIVE JUDGE

TRANSCRIPT OF PROCEEDINGS

VOLUME IV

Reported by:

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I N D E X

WITNESS: E. LINWOOD TIPTON

E X A M I N A T I O N: PAGE

CROSS BY MR. BESHORE	1092
CROSS BY MR. YALE	1098
CROSS BY MR. TOSI	1101
CROSS BY MS. CARTER	1110
CROSS BY MR. CRYAN	1119
CROSS BY MR. YONKERS	1130
CROSS BY MR. VETNE	1131
CROSS BY MR. OLSEN	1139

WITNESS: MARK ROBERTS

E X A M I N A T I O N: PAGE

DIRECT TESTIMONY	1141
CROSS BY MR. VETNE	1146
CROSS BY MR. BESHORE	1148
CROSS BY MR. TOSI	1154

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WITNESS: ELVIN HOLLON

E X A M I N A T I O N:

PAGE

REDIRECT TESTIMONY	1158, 1198
CROSS BY MR. VETNE	1174
CROSS BY MR. YALE	1185
CROSS BY MR. TOSI	1186
CROSS BY MR. SHAPIRO	1191

WITNESS: TODD WILSON

E X A M I N A T I O N:

PAGE

DIRECT TESTIMONY	1203
REDIRECT TESTIMONY	1258
CROSS BY MR. YALE	1211
CROSS BY MR. VETNE	1212

1

2

E X H I B I T S:MARKEDRECEIVED

3

4

EXHIBIT NOS. 1 - 33

1200

5

EXHIBIT NO. 33

1158

1200

6

EXHIBIT NO. 33(A)

1159

1200

7

EXHIBIT NO. 33(B)

1159

1200

8

EXHIBIT NO. 33(C)

1159

1200

9

EXHIBIT NO. 33(D)

1159

1200

10

EXHIBIT NO. 33(E)

1159

1200

11

EXHIBIT NO. 33(F)

1159

1200

12

EXHIBIT NO. 33(G)

1159

1200

13

EXHIBIT NO. 34

1200

1202, 1261

14

EXHIBIT NO. 35

1203

1261

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

JUDGE DAVENPORT: Welcome to day four of the public hearing. When we closed last night, we had taken the statement of Mr. Tipton which has been marked as Exhibit 32 and 32(a). Mr. Tipton was previously sworn. At this time, we'll entertain examination of Mr. Tipton. Is that an indication that there is no cross of Mr. Tipton? Mr. Beshore.

MR. BESHORE: Marvin Beshore for Dairy Farmers of America.

E. LINWOOD TIPTON

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

CROSS-EXAMINATION

BY MR. BESHORE:

Q. Good morning, Mr. Tipton.

A. Good morning.

Q. Let me ask you first about the statement, 32(a). Now, as I understand it from the statement, Lifeway sells over 80 percent of kefir in the United States?

A. Yes, sir.

1 E. Tipton - Cross by Mr. Beshore

2 Q. A pretty strong market position
3 there?

4 A. For a very small market, yes, sir.

5 Q. And the markets for culture
6 products, yogurts and kefir, kefir are growing
7 now at five percent per year, correct?

8 A. That's cultured products, the
9 market. Kefir is probably growing at a more
10 rapid rate than that.

11 Q. What's the growth rate for kefir?

12 A. I don't know exactly, but it's
13 approaching 10 percent.

14 Q. And kefir is presently a Class I
15 product?

16 A. That's correct. Excuse me. Kefir
17 by itself is Class I. There are mixtures of
18 fruits and juices, and those are less than six
19 and a half percent is clustered.

20 Q. And your request is to lower the
21 price of milk and kefir so that dairy farmers
22 can finance an even higher growth rate for
23 kefir and market share for Lifeway, I take it?

24 A. No, sir.

25 Q. Okay.

1 E. Tipton - Cross by Mr. Beshore

2 A. Our proposal is that kefir be
3 treated the same as yogurt. Yogurt is Class
4 II, and kefir is a competitive product with
5 yogurt, and its uses are virtually the same
6 pattern of consumption, and the proposal is
7 that they should be in the same class.

8 There are also a number of kefir
9 products which are in the smoothie category.
10 Instead of being called yogurt smoothies, they
11 are called kefir smoothies, and they compete
12 directly in the smoothie market with yogurts.

13 Q. Thus yogurt smoothies are Class I
14 and kefir is Class I, so you are on a
15 competitive par, correct?

16 A. I don't believe that most yogurt
17 smoothies are Class I.

18 Q. Now, with respect to some of your
19 comments in Exhibit 32, I'm always interested
20 when processors present themselves as the
21 champions of dairy farmers' income, and I take
22 it that because of your analysis of
23 elasticities and the price discrimination model
24 that you think a lot of products should be
25 reduced in classification in order to enhance

1 E. Tipton - Cross by Mr. Beshore

2 producer income, correct, reduced in price so
3 that farmers get more for it?

4 A. No, sir, that was not my testimony.
5 My testimony was that I presented those
6 elasticity numbers as an indication of the
7 changes that are occurring in the market with
8 respect to milk, and the suggestion that it may
9 not be working to dairy farmers' interest to
10 have these Class I prices in the products that
11 are in Class I, but my primary purpose for
12 going through that exercise was to demonstrate
13 that it certainly is not in the interest of the
14 industry, dairy farmers, processors or
15 consumers to attempt to classify a number of
16 these products which contain some limited
17 amounts of dairy products in Class I and
18 discourage the development of that market.

19 And using the indication of what's
20 happening in the fluid milk market and
21 extrapolating that to the beverage markets that
22 are not fluid milk but contain some dairy
23 ingredients in them, they should not be made up
24 in Class I.

25 Q. Okay. And was your testimony

1 E. Tipton - Cross by Mr. Beshore

2 prepared before the hearing this week?

3 A. Yes, sir.

4 Q. And were you targeting, if I can use
5 that word, many of those concerns relating to
6 Pepsico products and the like to proposals such
7 as proposal 1 which the DFA has abandoned?

8 A. Yes. They weren't necessarily to
9 proposal 1. I think that the major point of
10 that was that the companies that I am appearing
11 on behalf of want to maintain the six and a
12 half percent nonfat solid standard as it
13 currently exists in the orders. I offered a
14 couple of modifications to that, but basically
15 those were the proposal and are opposed to the
16 protein standard.

17 Q. What products of your companies
18 would the protein standard classify Class I
19 that the 6.5 nonfat solids would not?

20 A. I'm not sure of that. I did not
21 attempt to ascertain that.

22 Q. Do your --

23 A. But I would say in that regard that
24 a major part of their fear, and I think that a
25 major limitation on the protein standard is

1 E. Tipton - Cross by Mr. Beshore

2 that it attempts to limit the amount of protein
3 that can be contained in these products without
4 triggering the Class I classification, and
5 certainly the market for protein is an
6 attractive market, and they are very fearful
7 that by limiting that to a certain point that
8 they will just -- that it will force companies
9 who want to formulate these kind of products to
10 formulate them out of alternative ingredients,
11 particularly soy and other kinds of protein
12 ingredients so that they don't trigger that
13 level.

14 Q. Do the companies on this behalf you
15 are testifying today favor the continuation of
16 the federal milk order system?

17 A. It's not before this hearing. I
18 didn't ask that question, but I don't know what
19 their positions are in that regard.

20 MR. BESHORE: Thank you.

21 JUDGE DAVENPORT: Are other
22 examination? Mr. Yale.

23 MR. YALE: Benjamin F. Yale on
24 behalf of Select Milk Producers, Inc. and
25 Continental Dairy Products, Inc.

1 E. Tipton - Cross by Mr. Yale

2 -----

3 CROSS-EXAMINATION

4 BY MR. YALE:

5 Q. Good morning.

6 A. Good morning.

7 Q. The question I have is you testified
8 in your statement that kefir continues to have
9 a growth of about five percent. That's a
10 pretty healthy growth, is it not, for this type
11 of product?

12 A. It is, but I must emphasize that the
13 five percent growth of a unit of one is not a
14 very large magnitude, and this is a very, very
15 small market. So the percentages seem large,
16 but the actual physical growth of the market is
17 not abnormal at all.

18 Q. It would be a big fish in a small
19 pond or a small fish in a big pond?

20 A. Yes, sir.

21 Q. I guess my question is are they
22 paying Class I for kefir?

23 A. Yes, sir, except for the -- I think
24 they qualify for not paying Class I with
25 respect to the blends or the --

1 E. Tipton - Cross by Mr. Yale

2 Q. The kefir product itself is in the
3 dairy case, the one that's a Class I?

4 A. It is often not in the dairy case
5 but maybe in a refrigerated case but separated
6 from dairy and usually in a specialty product
7 area.

8 Q. What kind of container is it in?

9 A. It's normally marketed in a bottle.
10 There's no reason that it has to be that way.
11 The company that I'm representing has chosen
12 because of their equipment and their -- where
13 they want to place it to market it that way.

14 Q. But you have been paying -- within
15 the marketing of the federal order you have
16 been paying Class I?

17 A. Yes.

18 Q. And you have had the growth?

19 A. Yes.

20 Q. All right. So with -- let me go
21 back to the other statement. Kefir is a
22 specialty product. I mean, you say it's a
23 small thing, but it tends to be attractive to
24 certain ethnic groups like eastern Europe that
25 grew up with kefir as a food and within their

1 E. Tipton - Cross by Mr. Yale

2 own culture; isn't that correct?

3 A. It is a very specialty product.

4 There's no question about that. It is

5 identical in most of its properties to yogurt,

6 and that's the primary direct competitive

7 product. Now, whether kefir will be the yogurt

8 of the future, who knows. I don't know. But

9 they believe they are entitled to be classified

10 and priced as the order treats their most

11 direct competitor.

12 Q. My question comes back, isn't it

13 true that much of the sales of the kefir is

14 attractive at the ethnic groups, that this has

15 historically been one of their foods?

16 A. Yes, and within that group, the

17 competitive product is yogurt.

18 Q. But in spite of this disparity, you

19 have got a faster growth than yogurt even with

20 the higher prices?

21 A. Only by percentage. It's a small

22 market, and mathematically that's the result.

23 Q. Any research done to show how much

24 growth you would have had without that extra

25 cost?

1 E. Tipton - Cross by Mr. Tosi

2 A. No, sir.

3 MR. YALE: No other questions.

4 JUDGE DAVENPORT: Other
5 examination? Mr. Tosi.

6 -----

7 CROSS-EXAMINATION

8 BY MR. TOSI:

9 Q. Good morning, Mr. Tipton.

10 A. Good morning.

11 Q. I took it from your written
12 statement that you have no objection to how it
13 is that we -- how it would become the nonfat
14 milk solids ingredients that would be in the
15 product, a product that's a fluid form?

16 A. I'm sorry. I didn't get the first
17 part of what you said.

18 Q. I got it from your statement that
19 you are supporting the notion that any milk-
20 derived ingredient would be counted in
21 determining whether or not a product was at a
22 6.5 percent nonfat milk solids?

23 A. Yes, excluding whey.

24 Q. With the exception of whey, anything
25 else would be fair game, if you will?

1 E. Tipton - Cross by Mr. Tosi

2 A. Yes.

3 Q. For inclusion in that calculation?

4 A. Yes.

5 Q. Are you aware if whether or not the
6 Department now would consider, for example,
7 milk protein concentrate in the calculation of
8 a nonfat milk solid?

9 A. No, I -- no, I'm not. No.

10 Q. Okay. In differentiating something
11 between a fluid milk product and a food, how do
12 you make that distinction, in your own opinion?

13 A. Well, fluid milk has a -- most of
14 the fluid milks have standards of identity.
15 They are specific products. They are milk by
16 standards of identify. They by standard of
17 identity are authorized to add in certain
18 ingredients such as flavorings and sweeteners
19 and what have you. They are eligible to be
20 fortified with various components that are
21 approved under the standard. So there's a very
22 definitive statement as to what constitutes
23 milk and milk products.

24 Those products are generally
25 consumed as a beverage. They are certainly

1 E. Tipton - Cross by Mr. Tosi

2 purchased as a beverage, and beverage
3 consumption is as a beverage is, the primary
4 use of them. Once you get past that point of
5 that very defined group, it becomes more
6 difficult it seems for me to ascertain what is
7 a fluid milk product under your definitions,
8 and the general concept of it to be a beverage
9 is a pretty nebulous term, and we have heard
10 testimony at this hearing about the fact that
11 while they may be in drinkable form, they are
12 not a beverage in the sense of thirst-quenching
13 or in the sense of being consumed with a meal.

14 Frequently the products that are in
15 these categories are consumed as a snack as a
16 totally separate item, as a meal replacement.
17 They are not they are not consumed as
18 beverages. Beverages is a very nebulous term.
19 It gives the Department a great deal of
20 discretion. There's no question about that.
21 But it gives them an enormous amount of
22 regulatory responsibility, too.

23 Q. I'm a big fan of Starbuck's coffee.

24 A. Good.

25 Q. Would you consider this to be a food

1 E. Tipton - Cross by Mr. Tosi

2 or a beverage? I mean that I have coffee and,
3 let's say, it's half milk as well, a
4 cappuccino, for example.

5 A. Well, there's no question that it's
6 a beverage, but when you go to other kinds of
7 products like the frappuccino in a container,
8 the use pattern of that product is very seldom
9 as a beverage, per se. It's usually in the
10 form of a snack or not in conjunction with a
11 meal, et cetera.

12 So while you take coffee with same
13 similar ingredients -- not the same
14 ingredients, but similar ingredients, pursue it
15 in a different way, it's uses are an entirely
16 different situation.

17 Q. I also noted that in your testimony
18 that you quoted extensively from the 74
19 classification decision. Are your clients
20 aware of some of the changes that were made
21 during reform, specifically with respect to the
22 treatment of concentrated milk and ultra-
23 filtered milk?

24 A. I think so.

25 Q. With respect to ultra-filtered milk,

1 E. Tipton - Cross by Mr. Tosi
2 wouldn't, perhaps, one of your clients who are
3 buying ultra-filtered milk from the farm of the
4 need to bring that back to the full milk
5 equivalent?

6 A. Yes. I'm not sure when you say are
7 they -- I doubt if they are familiar with that
8 element. I wasn't quite sure what you were
9 talking about, but I just want to correct that.

10 Q. Well, the appropriateness, or if you
11 had an opinion on the appropriateness of doing
12 that?

13 A. Excuse me?

14 Q. On the appropriateness of bringing
15 ultra-filtered milk, concentrated milk back to
16 its full milk equivalent when a handler is
17 buying that --

18 A. Well, I believe you are talking that
19 ultra-filtered milk that has all of the same
20 constituents as are in milk. The filtration
21 processes remove only the water, and for that
22 to be milk, and it can be, you have to bring it
23 back to -- you have to add water to it, yes,
24 but if you -- there are other kinds of
25 ultra-filtered products in which some of the

1 E. Tipton - Cross by Mr. Tosi
2 nutrients are removed, and the product no
3 longer can be reconstituted and be milk by the
4 virtue of adding water to it.

5 Q. But to the extent that those
6 products are sold on the same channels as
7 marketed as milk and tend to be used in the
8 same way as milk, should we continue to
9 consider those products to be food milk
10 products?

11 A. Well --

12 Q. For federal order purposes?

13 A. Right. I wouldn't say they are all
14 necessarily used the same or intended to be
15 used the same or presented to the customer base
16 in the way that they are the same. They are
17 different products. They have different
18 nutrients. They have different components.

19 Q. If that's the case then, isn't there
20 a difference between whole milk and skim milk?

21 A. Yes, there is, and there's a
22 standard of identity that describes that.

23 Q. Are you thinking that it's important
24 for us to wait for FDA to come up with the
25 standard identity for us to define things while

1 E. Tipton - Cross by Mr. Tosi

2 in the meantime producers are producing milk,
3 and they are marketing their milk, handlers are
4 using it in the ways that they are, that
5 because of a lack of a standard of identity
6 that we cannot determine form of use?

7 A. No, I wouldn't be suggesting that.
8 However, it seems to me that the standard of
9 identity with respect to milk, the industry,
10 consumers, the federal government has decided
11 that these are products that ought to be
12 specifically defined. The parameters are
13 clearly set, and if the product is marketed,
14 this is the name of that product.

15 So that's home base for what you are
16 doing at the dairy innovation with respect to
17 milk quantity orders. When you start varying
18 from that, it's the area of -- that I think you
19 are getting into a lot of questions, and I
20 heard a lot of discussion at this hearing about
21 form and use.

22 Form and use, it seems to me, have
23 virtually no meaning without the context for
24 which you are talking about. Everything has
25 got a form, and most things have a use, and so

1 E. Tipton - Cross by Mr. Tosi

2 it has to be put into some kind of a context.
3 So the context to me, and I think that much of
4 this discussion has been on a very narrow
5 description of form and use, but the context in
6 which this must be looked at is what is the
7 purpose of this form and use classification,
8 and when it was initially put in, it was clear
9 that the fluid milks had a different kind of
10 price responsiveness from consumers and that
11 you could put a higher price on that portion of
12 the milk, and you would be able to generate
13 more revenue by doing so for dairy farmers,
14 that if they was all priced the same. So there
15 was a classification, higher price on this use
16 and a lower price on other uses.

17 That puts in context then the issue
18 of form and use, but the purpose was not just
19 form and use. The purpose was to generate
20 sufficient revenues to bring forth adequate
21 supplies of pure and wholesome milk. So that's
22 the context that it seems to me when we talk
23 about form and use, today even, that's the
24 context that it has to be in.

25 What is a revenue effect of -- to

1 E. Tipton - Cross by Mr. Tosi

2 dairy farmers, effect by meeting these
3 classifications, and that's the significant
4 part of what I think the Department had not
5 been looking at and has been looking especially
6 at the issue of use which causes it to trace a
7 lot of products that are not necessarily a
8 factor in terms of adding to revenue and, in
9 fact, may decrease the revenue to dairy
10 farmers. So that's the context, I think, that
11 form and use has to be viewed in.

12 Q. I understand that some of the
13 notions that you described there about
14 rationale from price discrimination amongst
15 various classes of use, but what about the
16 additional costs that it costs dairy farmers to
17 regularly supply the Class I market?

18 A. Well, it's pretty hard to know what
19 that added cost is. It's fairly minimal in the
20 sense that virtually all of the milk meets the
21 health standards and the sanitary standards and
22 is eligible for the fluid milk market. So if
23 you -- there's certainly no shortage of milk,
24 no potential shortage of milk for the beverage
25 market as compared to the other markets.

1 E. Tipton - Cross by Ms. Carter

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

3 We need one moment, please.

4 (Discussion held off the
5 record.)

6 MR. TOSI: Ms. Carter would
7 like to ask some questions.

8 JUDGE DAVENPORT: Ms. Carter.

9 MS. CARTER: Antoinette Carter
10 with USDA.

11 -----

12 CROSS-EXAMINATION

13 BY MS. CARTER:

14 Q. Good morning, Mr. Tipton.

15 A. Good morning.

16 Q. If I could just direct you to page 2
17 of your statement. The first full paragraph
18 after the second bullet, you list, I guess, the
19 number of categories that you suggest are
20 specific goals that USDA should have with
21 regards to, I guess, product classification.

22 What types of beverages fall into
23 these categories that are listed? It's the
24 first -- the second full statement of that
25 paragraph. For example, one of the categories

1 E. Tipton - Cross by Ms. Carter

2 listed is products that are positioned and
3 formulated to provide specific nutrients and
4 nutritional profiles meets specific groups of
5 consumers. What type of beverages are you
6 referencing there?

7 A. I must be on the wrong page. I'm
8 sorry. I can't identify where you are --

9 Q. It's under the subheading, coping
10 with driving forces of change, and there are
11 two bullet points, two bullets.

12 A. Yes.

13 Q. The statement says -- in the
14 paragraph that begins with the phrase, USDA
15 should apply an acid test.

16 A. I have it identified now. Thank
17 you.

18 Q. Okay.

19 A. This was a general statement that it
20 seems to me that the whole policy that USDA
21 applies to the classification ought to be in
22 the context of expanding the market for dairy
23 ingredients and for milk and dairy products,
24 and I think it sometimes gets into a point of
25 protecting the milk market as opposed to

1 E. Tipton - Cross by Ms. Carter

2 expanding the market is the context in which
3 the decisions are made. So I was suggesting
4 that there's an acid test that ought to be
5 applied; is what you are doing, does it expand
6 the market or does it possibly contract the
7 market, and I was trying to identify what some
8 of the elements of consideration would be.

9 For example, it's clear and both
10 DMI, Dairy Marketing, Inc. and the milk
11 processor, more which you are very familiar
12 with, has spent a lot of time and energy trying
13 to find ways to expand the channels of
14 distribution for milk. It has been very
15 difficult to do. The success has been minimal
16 unfortunately and for lots of reasons.

17 So one of the things is when you
18 have products, however, that contain dairy
19 ingredients and that are growing, there is a
20 potential expansion of the market for milk and
21 dairy ingredients by encouraging the
22 development of that product that's going
23 through different channels of distribution than
24 is milk.

25 So when you talk about form and use

1 E. Tipton - Cross by Ms. Carter

2 and competitiveness, one of the elements, it
3 seems to me, is milk even in that kind of a
4 distribution system. It can't be competitive
5 if it's not significantly offered in that kind
6 of a distribution system.

7 So that's what I was trying to get
8 at here. I think that one of the areas of
9 enormous growth now are "nutritional products",
10 quote, unquote. "Nutritional products" are
11 coming in all kinds of forms and shapes and
12 colors and some of which contain milk and some
13 of which don't.

14 A lot of them contain whey, and we
15 had some discussion on whey yesterday, and it
16 seems to me that -- well, let's say proteins
17 are a driving force in most of those, and it
18 seems to me to try to move in the direction of
19 some of the proposals here, to put on the 2.25
20 percent protein limit below that, you're in
21 Class II, and above that, you are in II or III,
22 I guess, or whatever you are, and above that,
23 you are in Class I, and I looked -- I have in
24 the testimony I looked at what that 2.25 would
25 allow you to claim if you stayed below that,

1 E. Tipton - Cross by Ms. Carter

2 and it would be the maximum you could claim
3 under FDA rules would be a good source of
4 protein. If you went to the level that you
5 would have to in order to claim a high source
6 of protein, you would have to be Class I, and I
7 guess those are the kind of things that I think
8 ought to really be looked at seriously because
9 it will impede -- I think that one of the
10 witnesses yesterday talked about the fact that
11 once you put that level, people are going to
12 find alternate sources of other forms of
13 protein in order to not trigger that higher
14 level.

15 The regulations for high protein
16 don't say it has to be dairy protein. It's
17 just protein. So that would be to substitute
18 something else for what otherwise might have
19 been a dairy ingredient.

20 Q. I guess along those lines, in terms
21 of products that are currently excluded from
22 the fluid M product definition with regards to
23 meal replacements or formulas that are
24 considered meal replacement that are packaged
25 in hermetically-sealed containers, in your

1 E. Tipton - Cross by Ms. Carter

2 statement you reference proposal No. 3, and, in
3 fact, you support that proposal. That proposal
4 was modified here at the hearing in which they
5 supported meeting the current definition as it
6 is now.

7 What's your position with regards
8 to -- do you still support the modification
9 that was contained in proposal 3 or what is
10 your position?

11 A. We didn't endorse all of the
12 elements that were in proposal No. 3, and our
13 first priority is to maintain the meal
14 replacement category, because I think there are
15 an enormous number of products that would be --
16 the marketing would be severely damaged if that
17 were changed. So we totally endorse
18 maintaining that.

19 However, consistent with the
20 conversation we have been having, it seems to
21 me there are a lot of other products of special
22 uses that deserve some kind of attention and
23 possible exclusion, and among those are snacks.
24 You know, we heard a lot of discussion at this
25 hearing about the uses of various products in

1 E. Tipton - Cross by Ms. Carter

2 the snack category. We have been so focused on
3 meals, but by far, the majority -- I just want
4 to -- but a very large portion of the food
5 consumed in the United States is now consumed
6 in the form of snacks, and so it seems to me
7 that we need to refocus.

8 In fact, a number of the meal
9 replacement products have snack sizes and
10 components and markets because they frequently
11 promote the idea of consuming food more
12 frequently and in lesser quantities, and so
13 it's a part of their weight control, diet
14 control mechanism to encourage snacking.

15 So I guess we think that adding
16 snacks to the meal replacements would be an
17 appropriate move. I think that high protein
18 drinks is another category. They are different
19 than milk, and they appeal to a different
20 market. They are heavily into the sports area,
21 but they are also into just good nutrition.

22 So that was why we were suggesting
23 that there are some of these other categories
24 that have exactly the same reasons as meal
25 replacement, and the consideration ought to be

1 E. Tipton - Cross by Ms. Carter

2 given to exclusions for them as well.

3 Q. And one last question. On page 3 of
4 your testimony of your statement, you talk
5 about loss of revenue from lost sales resulting
6 from the higher Class I price of off-setting
7 the additional revenue generated from the
8 higher price. Could you explain that
9 statement, I guess, in the context that you are
10 stating it?

11 A. Can you help me out?

12 Q. Just to clarify what you --

13 A. I'm sorry. Could you help me
14 identify where on that page it is?

15 Q. Sure. It's subheading -- well, it's
16 under the paragraph heading, the reason for
17 price classification. It's the -- oh, it
18 starts out on -- well, the paragraph starts out
19 on page 2, at the very end of page 2 and ends
20 on page 3, top of page 3.

21 Could you explain that paragraph in
22 further detail? In your opinion, what's
23 contributing to the loss of revenue? I read
24 that, and I just didn't know where you were
25 going with that statement, what you meant.

1 E. Tipton - Cross by Ms. Carter

2 A. Well, a little later in the
3 testimony, I talk about some elasticity numbers
4 from recent studies, and there's been a
5 tendency to do composite analysis of
6 elasticity, and when people talk about
7 elasticity of fluid milk, they are normally
8 calculated over a long period of time, multiple
9 years, and all of the products are combined,
10 and the price movements become less in sync.

11 The new analysis of elasticities
12 which have measured shorter periods of time but
13 still four, five years, so a significant period
14 of time, and I measured them with respect to
15 different types of fluid milks, have found that
16 a number of those are, in fact, elastic. They
17 are not just less inelastic. They are, in
18 fact, elastic, and that would indicate that
19 when you change the price of those products,
20 that the change in revenue that's generated is
21 reduced greater than the increase in the sales.
22 So actually the revenues actually go down, and
23 when you look at these individual products,
24 there is a substantial question as to whether
25 or not putting them in Class I, in fact,

1 E. Tipton - Cross by Mr. Cryan
2 increases the producer revenues or decreases.

3 MS. CARTER: That's all I
4 have. Thank you.

5 JUDGE DAVENPORT: Dr. Cryan.

6 MR. CRYAN: My name is Roger
7 Cryan.

8 -----

9 CROSS-EXAMINATION

10 BY MR. CRYAN:

11 Q. Good morning.

12 A. Good morning.

13 JUDGE DAVENPORT: Mr. Cryan,
14 your microphone needs picked up just a little.

15 Q. With respect to the paragraph that
16 Ms. Carter was discussing on your acid test,
17 your acid test was whether the proposal or
18 suggestion increases the demand for the product
19 in question. Am I correct to understand that
20 according to that acid test, no product would
21 ever be moved into a higher price class; is
22 that correct?

23 A. No, it's not correct.

24 Q. How is it not? How can you move a
25 product into a higher price class and not have

1 E. Tipton - Cross by Mr. Cryan

2 some impact on the demand?

3 A. Well, I was making that statement in
4 the -- you are making a very technical
5 comparison. I was making that statement in the
6 context of what is the future of this product,
7 where is it placed in the market. As I was
8 saying earlier, it's not just the product.
9 It's the channel of distribution. It's the
10 placement of the product in the market. It's a
11 whole punch of things that come to bear as to
12 what is going to happen to this product on the
13 marketplace, and then the question is what is
14 the impact of the price change, the
15 differential on this product.

16 Q. So then your suggestion is in some
17 case bring the product in a higher price class
18 could increase the demand?

19 A. Well, I don't know. That's not my
20 point if that's what you are driving at.
21 That's not my point. The fact is that I'm not
22 saying that everything should be priced
23 according to the elasticity which is what you
24 are suggesting. I'm suggesting that's not the
25 only criteria. I think there are a number of

1 E. Tipton - Cross by Mr. Cryan

2 other elements, but I was trying to describe
3 generally the issue ought to be are you -- is
4 this a product that if given this treatment, it
5 is going to potentially increase the demand or
6 decrease it, and I don't think that the
7 elasticity measurement is the only
8 consideration in that decision.

9 Q. You discussed the cost associated
10 with Grade A production. I think you said
11 because practically all the milk in the U.S.
12 today is Grade A, that there's no substantial
13 cost associated with that; is that --

14 A. No, sir, I did not say that. I said
15 that there is no shortage of Grade A milk, and
16 it's hard to really ascertain the differential
17 cost because virtually all the milk meets the
18 Grade A requirements.

19 So a rationale that you have got to
20 have a Class I differential in order to
21 substantiate to sustain an adequate supply of
22 pure wholesome milk for the Grade A market, you
23 know, it could be a substantial change in the
24 production of Grade A milk, and there would
25 still be an ample supply of Grade A milk for

1 E. Tipton - Cross by Mr. Cryan

2 the market. This is not a very relevant
3 element anymore.

4 Q. Well, would the large share of U.S.
5 production that is Grade A suggest something
6 about the success as an incentive with the
7 Federal Order System, the opportunities in the
8 Federal Order System for pooling leading to the
9 farmers over the years to have made an
10 investment in Grade A milk production?

11 A. Well, the fact that dairy farmers
12 have access to the Grade A market through the
13 federal orders and through the pools, yes, it
14 makes a difference, but I believe that the
15 market has been a far bigger factor than has
16 the pooling mechanism in the market because
17 virtually everybody wants their product to meet
18 the standards that milk, the raw milk that they
19 are making their products from to meet the
20 standards that are set forth. So I think the
21 market itself has been a driving force on that.

22 Q. And the standards are required to
23 pool in the federal orders?

24 A. No. I'm talking about the standards
25 for production of milk on the farm, the health

1 E. Tipton - Cross by Mr. Cryan

2 and sanitation requirements on the farm and the
3 fact that processors want their milk to meet
4 those standards, and producers have converted
5 to do that, but that's true for products that
6 don't require a Grade A classification. There
7 are a whole bunch of products. I don't deny
8 that the pooling may have some impact on that,
9 but I think the market forces are far greater
10 than any of the pooling requirements or the
11 regulatory requirements in that regard.

12 Q. In your discussion of elasticities,
13 you did make a point of elasticities. You
14 indicated that the reports to congress -- with
15 respect to the report to congress on milk
16 demand issues has said that the own price
17 elasticity of demand for milk is around
18 negative .85, negative .098 in the last two
19 reports that have been put out?

20 A. Yes, sir.

21 Q. And then you discussed the
22 individual products and talk about the large
23 own priced demand elasticities for relatively
24 narrowly defined products like gallons of
25 flavored milk, half gallons of white milk and

1 E. Tipton - Cross by Mr. Cryan

2 half gallons of flavored milk. If the demand
3 elasticity for an aggregation of products, a
4 category of products is small but the price
5 elasticity of demand for the individual
6 products within the category are large, doesn't
7 that indicate that consumers are simply
8 responding to price by shifting within the
9 category?

10 A. No, not necessarily. In these
11 studies, they measure own price elasticities as
12 well as cross elasticities. The cross
13 elasticities would have an indication of the
14 shifting. The own price elasticities has an
15 indication of what happens to that product on
16 which the prices changed.

17 Q. Are those price elasticities and the
18 volumes associated with the study that would
19 allow a measurement of impact, are they
20 attached? Are you offering those?

21 A. I have not. I didn't put this in
22 the testimony, but they are in the reports that
23 -- or the speeches that I cited.

24 Q. Can you put in the volumes of milk
25 sold in order to calculate those overall --

1 E. Tipton - Cross by Mr. Cryan

2 A. No, the volumes are not in those
3 speeches, but the measurements that they ended
4 up with are.

5 Q. The cross price elasticities by
6 themselves?

7 A. Yes. The cross elasticities and the
8 only elasticities, and they did those with
9 respect to other soft drinks and other
10 competitive products as well.

11 Q. But I believe in order to calculate
12 the impact within the category, change of a
13 price from one price within the category, you
14 would need to have both the cross price
15 elasticities, the own price elasticities and
16 the bulk volumes of sales that are in the
17 study, in the calculation?

18 A. If you want to calculate the actual
19 magnitude of the volume, that would be true,
20 but I believe the elasticities give you a good
21 indication, that was my point, that there are
22 some of them that are very elastic, and that's
23 a concept that people generally --

24 Q. They're very elastic in isolation?

25 A. Excuse me?

1 E. Tipton - Cross by Mr. Cryan

2 Q. In isolation they are very elastic?

3 A. Individual products within the
4 category of fluid milk have very elastic
5 elasticities.

6 Q. Okay. On page 5, the middle of the
7 page, you say, one has to raise the question as
8 to whether continuing this system might be a
9 serious error in public policy. On the next
10 page, page 6 at the top, you say, there is
11 growing evidence that it may no longer be in
12 dairy farmers' best interest to have classified
13 milk pricing. Are you testifying in favor for
14 abandoning the Federal Order System?

15 A. No, sir. I said that the clients
16 that I represent have not taken a position on
17 that, or I at least am not aware if they have
18 taken a position on that. I offered, and I
19 repeat that I offered this data on the
20 elasticities to point out that there are some
21 serious things that are happening with respect
22 to the category of fluid milk and that we
23 believe it would be an error to try to extend
24 that category to all uses that are similar to
25 that for milk because it is working extremely

1 E. Tipton - Cross by Mr. Cryan

2 well with respect to milk. At least sales are
3 not improving. Sales are going down. The
4 market share is going down. Bottled water is
5 now greater than milk. Soft drinks are
6 increasing every year the share of market.
7 Juices are increasing share of market.

8 There's something in the real world
9 that says, hey, we ought to look at what
10 happening to this category of milk, and I think
11 this is one of the elements that ought to be
12 looked at.

13 Q. And the context for those remarks on
14 the specific issues is that you have some
15 questions to whether the system is working at
16 all?

17 A. The question is, you know, look at
18 the system. There is a question about whether
19 or not it's really enhancing reduce of revenue
20 which was its purpose, and don't attempt to
21 extend it to these other products that are on
22 the fringe and contain only a tiny bit or small
23 amounts of milk-derived ingredients. That's an
24 overreach, and you probably hurt the revenue
25 potential even more because you make it more

1 E. Tipton - Cross by Mr. Cryan

2 difficult for the components of milk and the
3 ingredients of milk to be used in these other
4 products.

5 Q. Is drinkable yogurt a beverage?

6 A. Excuse me?

7 Q. Is drinkable yogurt a beverage?

8 A. Well, beverage is a very nebulous
9 term. I have looked it up in several
10 dictionaries. They all kind of have the same
11 definition, but I don't know -- it is
12 drinkable. I think beverage goes more to
13 what's the purpose for which you drink it, and
14 it seems to me that the purpose for which
15 yogurt is consumed is quite different than the
16 purpose for which fluid milk is consume.

17 It's consumed in different times.
18 It's got different texture. We have had a lot
19 of testimony from the experts of the yogurt
20 companies in that regard, and I don't intend to
21 repeat that, but that's the context that I
22 think that's got to be looked at. You can't
23 say if that's a beverage that's got to be Class
24 I. It's a context of what is its real -- where
25 does a product fit in the market structure.

1 E. Tipton - Cross by Mr. Cryan

2 Q. So is that a yes or a no?

3 A. Beverage could be applied to a lot
4 of products. I don't know whether -- I don't
5 know what in your mind what a beverage means.
6 I don't know in my mind what it means. It's a
7 very nebulous term.

8 Q. And would the same answer apply to
9 kefir then, you don't know whether it's a
10 beverage?

11 A. Well, I know kefir is not used to
12 any great degree as milk is used. Whatever you
13 want to call it. Its usage pattern is entirely
14 different. It is not competitive with milk.
15 Its uses are not substitute for milk. It's a
16 whole different category.

17 Q. I'm sorry. I'm asking a relative
18 simple yes or no question.

19 JUDGE DAVENPORT: These
20 questions are not necessarily susceptible to
21 yes or no.

22 MR. CRYAN: Thank you very
23 much.

24 JUDGE DAVENPORT: Mr. Yonkers.

25 MR. YONKERS: Bob Yonkers,

1 E. Tipton - Cross by Mr. Yonkers

2 Y-O-N-K-E-R-S. I'm with the Milk Industry
3 Foundation.

4 - - - - -

5 CROSS-EXAMINATION

6 BY MR. YONKERS:

7 Q. I was very glad to hear that
8 Dr. Cryan thought that cross price elasticities
9 are relevant enough at this hearing to ask some
10 questions about them.

11 I would also like to point out that
12 he asked you a question about demand and your
13 use of the term. In economics we think of
14 demand as a series of prices and quantities
15 that consumers or any user, it could be any
16 intermediate step in the chain; is that
17 correct?

18 A. Yes.

19 Q. So usually we think of at higher
20 prices the quantity demand is lower. So if you
21 change the price, if you are talking about a
22 demand curve, as we normally call them, and you
23 move along that curve, you are changing the
24 quantity demand, but you are not changing the
25 demand for the product?

1 E. Tipton - Cross by Mr. Vetne

2 A. That's correct.

3 Q. I mean, the demand is calculated as
4 a function of a long list of independent
5 variables as we think in economics. So just
6 changing the price, you would be moving along
7 that curve that's changing the quantity demand,
8 and if you were to change demand, if you look
9 at the impact on demand, you can have a new use
10 for a dairy ingredient, and that would shift
11 the entire demand curve one way or the other;
12 is that correct?

13 A. That is correct.

14 MR. YONKERS: Thank you.

15 JUDGE DAVENPORT: Mr. Vetne.

16 MR. VETNE: John Vetne
17 representing HP Hood.

18 -----

19 CROSS-EXAMINATION

20 BY MR. VETNE:

21 Q. Mr. Tipton, let me see if I
22 understand correctly. In discussing
23 elasticities and demand for product, you
24 suggested that for classification purposes and
25 public policy, USDA ought to look at whether up

1 E. Tipton - Cross by Mr. Vetne

2 classification, therefore, increasing a price
3 reduces quantity of demand enough so that
4 deregulation, in effect, shoots itself in the
5 foot by reducing producer revenues?

6 A. Yes. I'm going to substitute some
7 other word for demand. Bob just gave me my
8 tutorial in economics and his terminology on
9 demand. His demand is correct. Yes. The
10 answer is it changes consumption. If it
11 changes consumption, it may well end up
12 reducing producer revenue, and that is
13 consideration that you make.

14 Q. That answer and that part of your
15 statement, however, is it not true that that
16 looks at an incomplete portion of the forest
17 because the forest also includes demand, not
18 just for the finished product, but a component
19 of demand for the ingredients that go into the
20 product, and those ingredients in turn affect
21 the Class III price if it's a whey derivative
22 or the Class IV price if it's some other dry
23 component, correct?

24 A. That's correct.

25 Q. And those things combine not just

1 E. Tipton - Cross by Mr. Vetne

2 demand for the beverage, drink, pourable or
3 suckable product, those things combined are
4 what influence producer prices?

5 A. Yes, sir, absolutely.

6 Q. Mr. Tosi asked you some questions on
7 deriving from the 1999 reform decision and
8 ultra-filtered milk. Did you understand his
9 questions to refer to the discussion on how raw
10 milk is priced from Farmgate to processor?

11 A. That's what I thought he was talking
12 about, yes.

13 Q. Okay. And you did not think that he
14 was talking about how you measure the 6.5
15 percent solids nonfat?

16 A. That's correct.

17 Q. With respect to the 6.5 percent
18 solids nonfat standard for whether a product is
19 a fluid milk product and, in turn, is a fluid
20 milk product that's classified, Mr. Tosi asked
21 you a question to the effect that you have no
22 objection to how we now count solids nonfat for
23 purposes of the 6.5 percent standard. Do you
24 recall that question?

25 A. My recollection of the question was

1 E. Tipton - Cross by Mr. Vetne

2 whether or not the milk-derived ingredients to
3 be counted included all milk-derived
4 ingredients, and I said, yes, other than whey.

5 Q. You have been involved in this
6 process of federal order regulation and
7 classification issues for a long time, correct?

8 A. Yes, sir.

9 Q. Were you involved at the time of the
10 1974 uniform classification hearing?

11 A. Yes, I was.

12 Q. And you are aware at that time the
13 Department adopted the 6.5 percent solids --
14 milk solids nonfat standard that is identical
15 to language on the current order?

16 A. Yes, sir.

17 Q. And you are aware that in the course
18 of adopting that standard in 1974, the
19 narrative discussion and the decision said that
20 USDA will not include sodium caseinate because
21 according to FDA, it's not a dairy product?

22 A. Yes.

23 Q. Did you have an understanding before
24 coming to this hearing that USDA was or was not
25 counting sodium caseinate, for example, as part

1 E. Tipton - Cross by Mr. Vetne
2 of the solids nonfat components of a product
3 for purposes of classification?

4 A. No, sir, I did not know.

5 Q. In Exhibit 30, page 4, you don't
6 have it, but you don't need it, but there is a
7 memorandum from dairy programs to all the
8 market administrators dated April 2, 2004
9 instructing that in determining the level of
10 solids nonfat for purposes of the 6.5 percent
11 standard, market administrators are to include
12 milk derivatives such as but not limiting to,
13 and I'm quoting, "dry milk protein concentrate,
14 MPC, liquid MPC, milk protein isolate, protein
15 serum, whey protein concentrate, lactose casein
16 and calcium caseinate".

17 Did you have an understanding before
18 coming to this hearing that as of April -- at
19 least as of April 2004, USDA had made some
20 change in the ingredients counted towards 6.5
21 percent sales?

22 A. No, I was not aware of that until
23 arriving here.

24 Q. If USDA is to significantly change
25 the way it interprets an existing rule, do you

1 E. Tipton - Cross by Mr. Vetne

2 believe that the industry deserves to be
3 informed of that so that it may respond in its
4 product formulations?

5 A. Yes, sir, without question.

6 Q. You have indicated opposition to
7 Proposal 7 which is a protein-based solids
8 standard for fluid milk products that excludes
9 whey. Are you aware as you sit here that what
10 is proposed in Proposal 7 is essentially what
11 USDA is now doing without benefit of an amended
12 rule?

13 A. Yes. I'm generally aware of that
14 the milk equivalent -- the calculation of the
15 nonfat solids by the milk equivalency. I
16 assume that's what you are talking about.

17 Q. No. I'm talking about using protein
18 as the basis of determining --

19 A. Oh. Yes, I am aware of that now.

20 Q. That's as a result of sitting at
21 this hearing?

22 A. Yes.

23 Q. And the materials you received in
24 the course of this hearing?

25 A. That's correct.

1 E. Tipton - Cross by Mr. Vetne

2 Q. You talked about the desirability of
3 not including, whether intentionally or
4 inadvertently, nutritional drinks in Class I,
5 correct?

6 A. Yes.

7 Q. That you believe that nutritional
8 drinks of whatever formula should all be in the
9 same classification?

10 A. Yes.

11 Q. Including nutritional drinks that
12 are offered as snacks?

13 A. Yes.

14 Q. A complete meal replacement, for
15 example, in an eight ounce package would be an
16 incomplete meal replacement in a four ounce
17 package and shouldn't make any difference of
18 what the package size is?

19 A. That's correct.

20 Q. And we have heard testimony that
21 protein-fortified drinks are apparently treated
22 by the Department now as meal replacements even
23 though they may not have all the vitamins added
24 to be the, whatever, one-quarter or one-third
25 reference for that. Did you hear that

1 E. Tipton - Cross by Mr. Vetne

2 testimony?

3 A. I don't recall that.

4 Q. Okay. Do you have an understanding
5 of how the Department now treats protein-
6 fortified supplements, protein-fortified
7 drinks?

8 A. I don't think I --

9 Q. You don't have an understanding?

10 A. I don't.

11 Q. And you had some discussion with
12 several examiners about Grade A milk.

13 A. Yes.

14 Q. And the volume of Grade A milk. Are
15 you aware that the quality standards for Grade
16 B milk have been changed over the years so that
17 they are very close now to Grade A?

18 A. Yes, sir.

19 Q. And are you aware that a number of
20 producers who market their milk as Grade B
21 actually produce milk that is of Grade A
22 quality, but they elect to be considered Grade
23 B producers?

24 A. I heard that and understand that to
25 be the case.

1 E. Tipton - Cross by Mr. Olsen

2 MR. VETNE: That's all I have.

3 Thank you.

4 JUDGE DAVENPORT: Is there
5 other examination of this witness? Mr. Olsen.

6 MR. OLSON: I'm Aaron Olsen,
7 O-L-S-E-N, for the National Yogurt Association.

8 -----

9 CROSS-EXAMINATION

10 BY MR. OLSEN:

11 Q. Good morning, Mr. Tipton.

12 A. Good morning.

13 Q. Do you believe that a product can be
14 a food even if it is drinkable?

15 A. Yes, sir.

16 Q. Do you believe that soup is
17 drinkable?

18 A. I do drink it, yes, sir.

19 Q. And is soup a food or a beverage?

20 A. I always think of it as a food.

21 Q. How about suppose you can't take
22 solid food, and you puree up a roast beef and
23 mashed potatoes and some vegetables into a form
24 that you consume. Would you consider that a
25 food or a beverage?

1 E. Tipton - Cross by Mr. Olsen

2 A. I'd consider it a food.

3 Q. Now, Yogurt can be made into a
4 drinkable form. Do you consider that to be a
5 food or a beverage?

6 A. Food.

7 Q. So just because something is
8 drinkable doesn't mean that it's a beverage?

9 A. Correct.

10 MR. OLSEN: Thank you.

11 JUDGE DAVENPORT: Other
12 examination of this witness? Well, let's take
13 a brief break at this time. Let's take five
14 minutes, and in the meantime, Mr. Roberts, if
15 you could, why don't you pass out copies of
16 your statement, if you have it and make it
17 available to the people.

18 (Short recess taken.)

19 JUDGE DAVENPORT: Let's
20 reconvene. Raise your right hand.

21

22

23

24

25

1 M. Roberts - Direct

2 MARK ROBERTS

3 a witness herein, having been first duly sworn,
4 was examined and testified as follows:

5 JUDGE DAVENPORT: Please state
6 your full name as you are seated.

7 MR. ROBERTS: My name is Mark
8 Roberts. I am product manager of technical
9 services and regulatory affairs for Hormel
10 Foods Corporation. In that capacity, I am
11 responsible for the regulatory compliance for
12 all of the product formulas of the parent
13 company, subsidiaries and joint ventures for
14 both import and export products.

15 I am also responsible for the
16 regulatory compliance of all the labels
17 associated with those formulas. I have to
18 admit that my expertise resides on the FSIS
19 regulatory side, having done regulatory affairs
20 for approximately 20 years for meat and poultry
21 products, not necessarily for milk-related
22 products.

23 I apologize for not having a
24 prepared statement of testimony for a handout,
25 but I have a change in wording from that which

1 M. Roberts - Direct

2 was originally published in the federal
3 registry, April 14, 2005, and so I prefer to
4 read that testimony into the record. I promise
5 it will be simple, straightforward and brief.

6 Hormel Foods Corporation is a
7 manufacturer of a wide variety of products for
8 both retail and other limited sectors of the
9 consumer market. Hormel Health Labs is a
10 wholly-owned subsidiary of Hormel Foods
11 Corporation involved in the business of
12 providing a variety of nutritious products
13 primarily for the health care industry.

14 Hormel Health Labs manufactures and
15 distributes hundreds of products that fall
16 under the general health care categories of
17 dysphasia, management, bowel management,
18 malnutrition, household products, diabetic
19 products and critical care products. A
20 relatively limited number of the products that
21 fall in these categories could be considered to
22 be fluid milk according to current regulations
23 and also classified as Class I.

24 It is the health care fluid milk
25 products Hormel Health Labs feels should be

1 M. Roberts - Direct

2 exempt from Class I regardless of milk solids
3 content. In that regard, Hormel Health Labs
4 proposes change to 7 CFR, Section 1000.15,
5 paragraph B(1) to read as follows: Paragraph
6 1, plain or sweetened evaporated milk/skim
7 milk, sweetened condensed milk/skim milk,
8 formulas, especially prepared for infant
9 feeding or dietary use meal replacement that
10 are packaged in hermetically-sealed containers,
11 nutrient enhanced fortified formulas,
12 especially prepared for the health care
13 industry, any product that contains by weight
14 less than 6.5 percent nonfat milk solids and
15 whey, and I believe that paragraph ends with
16 the word and.

17 Further, Hormel Health Labs also
18 proposes the corresponding wording change to 7
19 CFR, Section 1000.40, paragraph B(2)vi as
20 follows: Formulas, especially prepared for
21 infant feeding or dietary use meal replacement
22 that are packaged in hermetically-sealed
23 containers add nutrient enhanced fortified
24 formulas, especially prepared for the health
25 care industry.

1 M. Roberts - Direct

2 Hormel Health Labs understands the
3 intent of the milk order program to ensure that
4 producers appropriately share market returns
5 for high value fluid milk products. However,
6 Hormel Health Labs feels that fluid milk
7 products destined for the health care industry
8 would not be of high value since they have
9 limited distribution, are not sold in the
10 retail dairy case, and they do not compete
11 directly or substantially with fluid milk.
12 They should, therefore, be considered exempt
13 from Class I status.

14 Hormel Foods Corporation under the
15 name of Hormel Health Labs positions a number
16 of products that are designed to help counter
17 the effects of malnutrition in adults with a
18 variety of medical conditions. Such medical
19 conditions do not allow health care residents
20 to consume enough nutrients to maintain minimum
21 bodily needs. Very much like infants, such
22 adults have special requirements for
23 consumption of many foods in fluid form.
24 Nutrient enhanced fluid milk products help
25 these people to attain required nutrient

1 M. Roberts - Direct

2 levels, thereby counteracting or minimizing the
3 possibility of malnutrition and hopefully
4 improving the quality of their existence.

5 Products of this nature are not
6 marketed and are not labeled as dietary
7 supplements. They are considered by Hormel
8 Health Labs to be foods for special dietary
9 use. In view of the fact that such nutrient
10 enhanced fluid milk products are for the care
11 of residents in health care facilities and that
12 such residents typically have lower fixed or
13 even nonexistent incomes, these products should
14 remain affordable.

15 Beyond this, as I understand it, a
16 great many health care nursing home residents
17 are actually on state assistance. A situation
18 which increasingly drains state congress, and
19 this is something that will be of dramatic
20 concern in years to come as the baby boomer
21 generation reaches the geriatric age. They
22 should, therefore, not be subject to pricing
23 requirements of Class I category regardless of
24 milk solids content, and this concludes my
25 testimony.

1 M. Roberts - Cross by Mr. Vetne

2 JUDGE DAVENPORT: Examination
3 of this witness? Mr. Vetne.

4 - - - -

5 CROSS-EXAMINATION

6 BY MR. VETNE:

7 Q. Mr. Roberts, I'm John Vitne. I'm
8 counsel for Hood. Are you aware of whether any
9 of the products distributed by Hormel are
10 currently deemed by USDA being Class I?

11 A. They are deemed being in Class I
12 status.

13 Q. And none of these products that are
14 in Class I are available to consumers in
15 grocery or convenient stores?

16 A. None of them.

17 Q. Would it be sufficient for Hormel if
18 it simply were to exclude a product, no portion
19 of which was distributed to consumers in retail
20 establishments?

21 A. That would be convenient.

22 Q. Is the reason the products produced
23 by Hormel are -- some of them are in Class I is
24 because they are not considered meal
25 replacements and that some of the nutrients

1 M. Roberts - Cross by Mr. Vetne
2 that USDA requires meal replacement aren't
3 there?

4 A. In part they are not considered true
5 meal replacements. They are foods for special
6 dietary use that adjunct the dietary needs of
7 people with special medical needs, and the
8 regulations currently state that meal
9 replacements would have to be in hermetically-
10 sealed containers. These are not necessarily
11 hermetically-sealed containers.

12 Q. Is there any functional and
13 marketing difference, in your opinion, between
14 products that are identical in content and
15 differ only in whether they are hermetically-
16 sealed or not?

17 A. Would you restate that? I'm sorry.

18 Q. Are there any differences in the
19 marketing or functional use of products which
20 are identical in package content, but the only
21 difference is whether there is hermetically-
22 sealed packaging?

23 A. I don't believe so.

24 MR. VETNE: That's all I have.
25 Thank you.

1 M. Roberts - Cross by Mr. Beshore

2 JUDGE DAVENPORT: Other

3 examination? Mr. Beshore.

4 MR. BESHORE: Marvin Beshore

5 for Dairy Farmers of America.

6 -----

7 CROSS-EXAMINATION

8 BY MR. BESHORE:

9 Q. Good morning, Mr. Roberts.

10 A. Good morning.

11 Q. Taking off on that last question.

12 Isn't there a major difference in the shelf-

13 life of products that are packaged in

14 hermetically-sealed containers versus those

15 that are not?

16 A. That would be a functional

17 difference in the product, yes. Hermetically-

18 sealed products should be shelf-stable and

19 shall be remained at ambient temperatures for

20 extended periods of time.

21 Q. Does Hormel market some

22 hermetically-sealed products?

23 A. For the health care industry?

24 Q. Yes. Of the type we're talking

25 about here today.

1 M. Roberts - Cross by Mr. Beshore

2 A. Yes. I would -- it depends on the
3 true definition for hermetically-sealed
4 containers. If you are talking about a
5 container with a metal end double seamed to a
6 base that has been thermal stabilized through
7 retarding, we do not make those for the health
8 care industry.

9 Q. Now, can you tell us a little bit
10 more about the products, you know, at issue
11 here that are presently classified as Class I
12 that Hormel makes? What types of containers
13 are they in?

14 A. Some of them are in what you would
15 consider wax-lined gusseted cartons, a lot like
16 the old milk carton used to be, similar to that
17 in style. Other ones may be products that are
18 the subject of high temperature short time
19 processing, and they would be in tempered packs
20 or like the juice box-type containers.

21 Q. What are the shelf-life of those
22 products?

23 A. The products that are in the
24 gusseted cartons are typically distributed in
25 frozen form, and as long as they remain frozen,

1 M. Roberts - Cross by Mr. Beshore

2 I believe we have reasonable shelf-life. Once
3 they are thawed, it's just a few days.

4 Q. And how about the ones -- the other
5 type of packaging?

6 A. The other type of container, I would
7 say 12 months to 18 months. They are federal
8 stabilized commercially sterile.

9 Q. Do they require refrigeration?

10 A. No.

11 Q. What are the levels of dairy
12 ingredients in those products?

13 A. I don't have the product
14 formulations at hand, but many of them are a
15 great deal of milk. Probably as much as 80
16 percent or more.

17 Q. Do you know the protein levels, for
18 instance?

19 A. I have one sales brochure here for a
20 product known as Mighty Shakes, fortified
21 milkshake. A six fluid ounce serving provides
22 300 calories and nine grams of protein. A four
23 ounce serving provides 200 calories and six
24 grams of protein and so on. They have three
25 different levels.

1 M. Roberts - Cross by Mr. Beshore

2 Q. Is that all dairy protein?

3 A. I don't believe so. I think we have
4 additional proteins that add to this because
5 they have been nutritionally enhanced to
6 deliver more calories and more protein for
7 people who are at risk for malnutrition.

8 Q. Does your information show what the
9 constituents are by rank, what the ingredients
10 are by rank?

11 A. This information is just a sales
12 brochure.

13 Q. What population is that product
14 targeted to, what medical need or health need?

15 A. Primarily it is for those at risk
16 for malnutrition, this particular guide. They
17 can't consume other types of foods typically.

18 Q. Are your products -- what
19 distribution areas are your products made
20 available, national distribution?

21 A. I believe we have national
22 distribution for many of our products.

23 Q. You export them as well?

24 A. I know we have attempted to export
25 to Canada, but I don't believe we have

1 M. Roberts - Cross by Mr. Beshore
2 completed all the health Canada requirements
3 for those products yet.

4 Q. Are some of Hormel health care
5 products presently classified as Class II?

6 A. Not that I'm aware of. There could
7 be some. I don't know.

8 Q. So to the best of your knowledge,
9 all of them exceed the 6.5 percent nonfat milk
10 solids criteria present?

11 A. That's correct.

12 Q. And they are not in hermetically-
13 sealed containers?

14 A. Correct.

15 Q. What's the cost of the products -- I
16 mean, can you give us any idea what the price
17 category we're in?

18 JUDGE DAVENPORT: Mr. Beshore,
19 I'm getting an indication from the rear that
20 they are not hearing you.

21 Q. I asked what the price category for
22 the products was?

23 A. I can't give you a cost. I have to
24 apologize. I represent the meat and poultry
25 side of our business. Hormel Health Labs

1 M. Roberts - Cross by Mr. Beshore

2 people informed me during the week they could
3 not make it to this, and so I would represent
4 them. I will tell you this, that to change the
5 category for just one item, this Mighty Shakes,
6 would change the cost of the product to save in
7 excess of \$200,000 a year.

8 Q. For the company?

9 A. For -- it would just be the cost of
10 manufacturing of that product which would be
11 passed on to the health care industry.

12 Q. So, in essence, Hormel is asking
13 United States Dairy Farmers to contribute that
14 \$200,000 because the minimum price cost of the
15 milk ingredients would be lower, correct?

16 A. To be provided to recipients who
17 can't afford the higher price products.

18 Q. So let's assume they are Medicaid
19 recipients. Instead of taxpayers supporting
20 the cost, dairy farmers only should underwrite
21 the cost of that nutritional product, correct?

22 A. It would be -- in a sense that would
23 be correct, yes.

24 Q. Because Hormel intends just to pass
25 on this evidence?

1 M. Roberts - Cross by Mr. Tosi

2 A. To the health care industry.

3 MR. BESHORE: Thank you.

4 JUDGE DAVENPORT: Any other
5 examination? Mr. Tosi.

6 -----

7 CROSS-EXAMINATION

8 BY MR. TOSI:

9 Q. Good morning, Mr. Roberts. Thank
10 you for appearing. I'm glad you made it here.
11 I have a few questions. What would you
12 consider the elasticity for your health care --
13 the products that you manufacture that are
14 going in the health care industry? Would you
15 consider them to be very elastic, meaning that
16 almost regardless of what the price is, the
17 consumption will stay about the same?

18 A. I would guess that would be the
19 case. I'm not as familiar with the health care
20 industry as I could be, but I don't believe
21 that our sales would necessarily increase as a
22 result of this change. I believe that we're
23 being purchased at a rate that can be consumed
24 by the people with medical difficulties.

25 Q. Okay. To the extent that -- let's

1 M. Roberts - Cross by Mr. Tosi

2 just use a nursing home as an example. To the
3 extent that nursing homes also provide for
4 their residents fluid milk, regular milk as we
5 know it, to the extent that's Class I, and we
6 are asking that your product to be Class II,
7 what rationale would there be to the extent
8 that we're talking about people that need extra
9 care and may have other dietary and health
10 issues that benefit from, for example, they
11 can't eat a solid diet, they are on a liquid
12 diet, and that liquid diet may include your
13 product, the products that you make and, for
14 example, with regular fluid milk we have one
15 that we price as Class I, and others you are
16 asking would price at Class II, how other than
17 the emotional component that's in there, how
18 would we rationalize that, why we should make
19 that distinction?

20 A. My familiarity with nursing care has
21 increased dramatically in the last six months
22 because I have put both my parents into that
23 situation. So observing from that standpoint,
24 Class I fluid milk is distributed within
25 nursing care facilities at feeding time

1 M. Roberts - Cross by Mr. Tosi

2 circumstances. You see that at nearly every
3 table. Our product is not necessarily
4 distributed for those people at feeding time.
5 It is more likely to be contained on a med pass
6 cart that is going through the nursing care
7 portion of the facility.

8 My mother is in nursing care. My
9 dad is in assisted living. He doesn't see that
10 kind of product. That's not on his table for
11 feeding. It doesn't come to his room, but my
12 mother would have it come to her room on a med
13 pass cart. So there is a distinction as to how
14 it's distributed within the nursing facility.

15 Q. I'm with you on that because I also
16 care for an aunt of mine that's also in a
17 nursing home. And one of the reasons that I
18 asked was I have noticed things go both ways --

19 A. Uh-huh.

20 Q. -- at feeding time. Milk is always
21 served, and there are some that even at feeding
22 time will also have, for lack of a better way
23 of describing, part of their meal is products
24 that are similar to the products that you are
25 making, and in that regard, I understand what

1 M. Roberts - Cross by Mr. Tosi
2 you are getting at. But with respect to
3 differentiating why they should be priced
4 differently when I understand what you are
5 talking about there out of a consumer level,
6 but the primary thing here is that with respect
7 to what that transaction price needs to be
8 between dairy farmers and that first person
9 that's buying milk from them?

10 A. I guess I don't know enough about
11 the pricing structure to comment on that except
12 for the fact that these products are typically
13 only distributed in the nursing care side. The
14 nursing care side of a facility has specific
15 costs for packages or for programs compared to
16 assisted living. It's considerably more
17 expensive to be in nursing care, and something
18 like this kind of a product contributes to that
19 additional cost, and to me, like I say, a large
20 number of residents in health care facilities
21 are on assistance, state assistance. Certainly
22 it's just one small portion of what their total
23 costs are, but I think any difference can help.

24 MR. TOSI: Thank you. That's
25 all I have. I appreciate your patience.

1 E. Hollon - Redirect

2 JUDGE DAVENPORT: Other
3 examination of this witness? Well, thank you,
4 Mr. Roberts for your testimony here today. You
5 may step down.

6 Mr. Beshore, is Mr. Hollon ready to
7 take the stand?

8 MR. BESHORE: Yes, he is.

9 JUDGE DAVENPORT: The
10 supplemental statement has been marked as
11 Exhibit 33.

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

14 JUDGE DAVENPORT: Mr. Hollon,
15 you were previously sworn. Let's just make you
16 still under oath.

17 MR. HOLLON: Yes, sir.

18 JUDGE DAVENPORT: Please be
19 seated.

20 ELVIN HOLLON
21 a witness herein, having been first duly sworn,
22 was examined and testified as follows:

23 REDIRECT EXAMINATION

24 BY MR. BESHORE:

25 MR. BESHORE: In addition to

1 E. Hollon - Redirect

2 Mr. Hollon's statement which has been marked
3 as --

4 JUDGE DAVENPORT: Exhibit 33.

5 MR. BESHORE: -- Exhibit 33,
6 we have seven additional --

7 JUDGE DAVENPORT: Attachments.

8 MR. BESHORE: -- attachments.

9 JUDGE DAVENPORT: We'll mark
10 those as A through the appropriate letter.

11 (Exhibit Nos. 33(a) through
12 33(g) were marked for identification.)

13 BY MR. BESHORE:

14 Q. And before you read your
15 supplemental statement, Mr. Hollon, let's go
16 through the attachments and identify them, if
17 you would, please.

18 JUDGE DAVENPORT: Mr. Beshore,
19 I don't believe I have the attachments.

20 A. Due to the lateness of the evening,
21 there are not a tremendous number of the
22 attachments. Each of them represent an
23 Internet site. They are all printed in their
24 entirety. The site is listed in the testimony,
25 and it is attempted to be written on each of

E. Hollon - Redirect

the copies.

The first one is titled -- I numbered them instead of lettering them, but No. 1 or A would be titled, Whey Products Definition, Composition and Functions. It's a publication of the U.S. Dairy Export Council. This is as it printed off the site. It's a reference manual. It's a multi-page. This is pages 28 through 40, and if you were to click on the link as written, it would take you to this document. It's a general description of whey processing and products and specifications about whey products.

The second listing is a publication with dairy proteins on the title. It was prepared by the Wisconsin Center for Dairy Research and the Wisconsin Milk Marketing Board. Pages 1 through 14. It is, again, a general listing of whey, it's processing, what type of products are produced from the stream and some specification data in it.

The third listing which would be Exhibit C in this stream is a listing from the US Dairy Export Council. It's entitled, Whey

1 E. Hollon - Redirect

2 Products, Milk, Minerals and Dairy Calcium, New
3 Findings Benefits Application. It's a document
4 of eight pages. It lists some specific
5 technical specs about whey. This is intended
6 as are the first three to be a technical
7 support or a sales brochure-type support.

8 The fourth listing which would be D
9 is published by the Wisconsin Center For Dairy
10 Research and is composed of two pages. It's
11 titled Quick Guide to Choosing the Best Type of
12 Whey. It lists several different whey products
13 and then begins to characterize them as they
14 benefit in use in various food uses from bakery
15 products, breads, beverages, cheese,
16 confectionary items, dry mixes, salad
17 dressings, a wide number of products with which
18 you might choose whey and which particular whey
19 product you would use.

20 The fifth item or item E is entitled
21 Whey Protein. It comes from a source
22 wheyprotein.com, everything you need to know
23 about whey protein. It is four pages. This is
24 section 9 of this particular document, and it
25 lists under the individual proteins within the

1 E. Hollon - Redirect

2 whey protein complex. In specific page 3 lists
3 a product -- or I'm sorry -- a protein,
4 glycomacropeptide.

5 Item 6 which would be F in the
6 stream is a publication out of the Journal of
7 Dairy Science. It's a technical publication.
8 I'm going to reference it only for the purpose
9 of indicating that there are specific tests
10 that can identify the glycomacropeptide.

11 And finally, the seventh one is G.
12 It's off of the Web Site DoItWithDairy.com
13 which is a DMI publication, and it has several
14 composition statistics for types of whey.

15 Each of these links are in the
16 testimony. They would be in the record. They
17 are not excerpted. I'm not editing them in any
18 way. They are produced in their entirety, and
19 from each of them, I would point to a
20 particular conclusion that distinguishes
21 between certain types of whey, that's their
22 intended use.

23 Q. Now, with that identification of
24 exhibits, could you proceed with your
25 supplemental statement which has been marked as

1 E. Hollon - Redirect

2 Exhibit 33.

3 A. Additional comments concerning the
4 use of whey. I presented a supplemental
5 statement for Dairy Farmers of America, Inc.
6 Our proposal requires using all milk proteins
7 in the determination of the 2.25 protein
8 standard. However, for pricing purposes, whey
9 and whey products, which are the by-products of
10 cheese-making are not priced.

11 JUDGE DAVENPORT: Mr. Hollon,
12 I understand we have a statement. It makes it
13 easier for the hearing reporter if can you slow
14 your delivery.

15 THE WITNESS: Yes, sir.

16 A. Given the possibility, which has
17 been raised at this hearing that whey proteins
18 derived from processes other than
19 cheese-making, which would be priced, could be
20 used as protein in fluid milk products. It is
21 important to know and to be able to demonstrate
22 that the whey proteins from various sources are
23 distinguishable.

24 The following U.S. Dairy Export
25 Council publication, Whey Products Definition,

1 E. Hollon - Redirect

2 Composition and Functions, is a general summary
3 of the whey manufacturing process and contains
4 a product description and composition guide.
5 This site is [http://www.usdec.org/files/pdfs/](http://www.usdec.org/files/pdfs/us08d_04.pdf)
6 [us08d_04.pdf](http://www.usdec.org/files/pdfs/us08d_04.pdf).

7 Whey proteins resulting from cheese-
8 making and casein manufacturing have several
9 different characteristics that make them
10 distinguishable from one another. The whey
11 from cheese-making is commonly known as sweet
12 whey, while the whey from casein manufacture is
13 termed acid whey. DFA makes and markets both
14 products. The source for the terms sweet whey
15 and acid whey, the publication site is [http://](http://144.92.196.21/pdf/resources/whey/dairyproteins.pdf)
16 [144.92.196.21/pdf/resources/whey/dairyproteins.](http://144.92.196.21/pdf/resources/whey/dairyproteins.pdf)
17 [pdf](http://144.92.196.21/pdf/resources/whey/dairyproteins.pdf).

18 Q. Could you just indicate is that
19 Exhibit 33(b)?

20 A. Yes.

21 Q. And the prior Internet address which
22 for the U.S. Dec publication was the
23 publication you have previously identified as
24 Exhibit 33(a); is that correct?

25 A. Correct.

1 E. Hollon - Redirect

2 Q. Okay. As you continue through, just
3 link the exhibit to the address for additional
4 clarity of the record.

5 JUDGE DAVENPORT: Unless
6 there's an objection from the audience, I don't
7 know that he needs to read the site itself, but
8 merely reference it to his statement.

9 A. Those different characteristics
10 include: A difference in pH - acid whey has a
11 more acidic pH measure while sweet whey is
12 lower in pH. However, the manufacturer can
13 offset this factor after the whey is
14 manufactured. So this difference is not a
15 certain identifier.

16 2, a difference in the calcium
17 content - according to the U.S. Dec Publication
18 whey products, milk, minerals and dairy
19 calcium, sweet whey has a calcium content of
20 700 to 800 milligrams per 100 grams while acid
21 whey has 2,000 milligrams per 100 grams. This
22 would be Exhibit C.

23 3, a difference in ash content -
24 according to the DMI publication, Do It With
25 Dairy, sweet whey has an 8.4 percent ash

1 E. Hollon - Redirect

2 composition, while acid whey is 10.8 percent.

3 This would be sourced in Exhibit G.

4 4, the flavor and functionality
5 profile of sweet whey is superior. A Wisconsin
6 center for dairy research publication, Quick
7 Guide to Choose the Best Type of Whey, lists 60
8 function and flavor product application
9 characteristics for which sweet whey has 21
10 desirable attributes and acid whey, 7. This
11 would be attachment D.

12 5, a difference in titratable
13 acidity - however, the manufacturer can offset
14 this factor after the whey is manufactured so
15 this difference is not an identifier.

16 6, the protein glycomacropeptide,
17 valued for medicinal benefits is found only in
18 sweet whey. This would be noted in Exhibit E.
19 The journal of Dairy Science, Volume 87:1 --

20 Q. Excuse me. That's actually F, isn't
21 it?

22 A. You are correct, that's F. No. No.
23 I'm sorry. The journal article, yes. The
24 journal article is F.

25 No. 6, the protein glycomacropeptide

1 E. Hollon - Redirect

2 valued for medicinal benefits is found only in
3 sweet whey, and that is in reference 5 which is
4 E. The Journal of Dairy Science, Volume 87:174
5 through 177 describes three laboratory methods
6 to recover this protein from or determine if it
7 is present in whey protein isolates, and that
8 would be reference -- or that would be
9 attachment F.

10 These various characteristics make
11 it possible to distinguish between the whey
12 produced from cheese-making, yielding sweet
13 whey, and acid whey which is produced from
14 casein or cottage cheese manufacture. The whey
15 component of MPC, milk protein concentrate, is
16 more akin to the sweet whey than to the acid
17 whey. While it is technically feasible to
18 produce whey from milk protein concentrate,
19 there is no domestic producer of whey from MPC
20 of which we are aware, nor is there an
21 international supplier. Our investigation into
22 this possibility indicates that this process
23 would be expensive, and the product produced
24 would not be competitive with sweet whey
25 produced from cheese-making.

1 E. Hollon - Redirect

2 If any question arises with respect
3 to whether the whey protein in a fluid milk
4 product should be priced, it is the handler's
5 responsibility to provide any and all proof
6 satisfactory to the market administrator of the
7 source of whey protein the handler has utilized
8 in the fluid milk products.

9 Additional comments concerning
10 discretion afforded the secretary in product
11 classification.

12 After additional consideration, we
13 would offer this modification to our proposal
14 to provide the secretary some discretion and
15 latitude in classification of future products
16 that are a result of new technological
17 advances. Our criteria for offering this
18 modification is:

19 There will be new products and
20 advances that challenge the classification
21 provisions.

22 There should be some mechanism to
23 deal with new products that provides some
24 relief to the maker, the industry and the
25 secretary.

1 E. Hollon - Redirect

2 There should be some parameters
3 around the discretionary authority so that it
4 is reviewed in a prompt hearing to consider the
5 need for amending the Order language.

6 Our language to accomplish this is
7 as follows: We would add in paragraph C which
8 would read, products of new technology. The
9 classification of any product which meets the
10 criteria of paragraph A of this section, and
11 which is produced through the use of milk
12 processing or packaging technology not
13 commercially utilized, and I'm going to insert
14 the words here, and the United States, at the
15 time of promulgation of this regulation shall
16 be determined by the deputy administrator,
17 Dairy Programs, AMS by applying the purposes
18 and intentions of paragraphs A and B.

19 This determination shall be
20 effective until a permanent classification of
21 the product is established after a hearing
22 pursuant to the Act is held to consider
23 amendments to this subpart. Such hearing shall
24 be held no later than one year after the
25 interim determination of the deputy

1 E. Hollon - Redirect

2 administrator is made.

3 I have two additional comments that
4 are not a part of my statement that I would
5 like to make. Yesterday there was some line of
6 questioning about would or could this proposal
7 make U.S. produced whey be more competitive for
8 a marketed product, and at least one or two
9 witnesses said that while they thought it would
10 be the case, they weren't necessarily sure they
11 would include that in their marketing programs.
12 I think we would include that in our marketing
13 programs to promote to beverage makers that use
14 of a domestically-produced -- or not
15 domestically-produced, but a sweet whey would
16 be a product that could be used in making
17 beverages and would have some price advantages
18 to some of the other milk proteins.

19 And lastly, there was some line of
20 questioning back and forth about the price
21 impact at the consumer level, and while none --
22 that question was offered, no one offered any
23 particular data, and while I do not have the
24 exact data, I don't have access to anyone
25 else's product formulations, and the specific

1 E. Hollon - Redirect

2 product formulations that we make are
3 confidential in the same manner offered by some
4 of the other witnesses. I would offer a
5 comparison that should be a reasonable proxy,
6 and I'm going to read through the math, and the
7 logic is to take the difference in Class I skim
8 versus Class II skim, add a differential and
9 simply divide down to a package level, and
10 while I realize, again, that's not an exact
11 formulation measure, it should be a reasonable
12 proxy of when the consumer reaches for a carton
13 of product X, what kind of price difference
14 would there be if the dairy ingredients there
15 were priced as Class I instead of Class II.

16 For 2003 and 2004 the Class I mover,
17 the skim price of the Class I mover averaged
18 \$8.0087. One of yesterday's witnesses
19 mentioned a particular product that they sell
20 in an 11-ounce container. They noted for the
21 record that they produce product in Michigan,
22 and Michigan has a \$2.00 differential. So I've
23 added \$2.00 to my \$8.0087.

24 For 2002 and 2003 the Class II price
25 was \$6.8125 per 100 weight. The difference in

1 E. Hollon - Redirect

2 those two would be \$3.1962 per 100 weight.
3 That would be for 100 pounds. So one pound
4 would be .0320. So if I had a carton, a
5 consumer item that weighed a pound and it was
6 100 percent dairy ingredients, then the
7 difference between Class I and Class II would
8 be 3.2 cents. If I had an 11-ounce carton
9 which was the size mentioned yesterday in this
10 particular product, then 11-sixteenths of 3.2
11 cents would be 2.2 cents, and if I had an
12 eight-ounce container, that difference would be
13 8-sixteenths or half. So it would be 1.6
14 cents, and that would assume that there was no
15 vegetable, no puree, no stabilizer, no
16 emulsifier, nothing in the container other than
17 dairy, a dairy ingredient.

18 I would say that it would be a
19 stretch to say that a consumer would reach into
20 the dairy case or into any case, and in terms
21 of picking which product they were going to
22 consume, that a difference of 1.6 cents would
23 cause their hand to go this way or to the right
24 instead of to the left to pick a product.

25 That concludes my additional

1 E. Hollon - Redirect

2 statement.

3 Q. Just for clarification with respect
4 to the language modification or proposal that
5 you have made, that would be added to the
6 definition of fluid milk product, correct?

7 A. That would be correct. I would note
8 that this modification is offered by DFA.

9 Q. One final question. The possibility
10 that adoption of Proposal 7 would lead to new
11 paperwork for some handlers or the processors
12 out there has been raised, and, in fact, the
13 paperwork itself might be enough to scare off
14 some use of dairy ingredients. You have
15 indicated DFA would be a seller -- is a seller
16 of ingredients.

17 If you were selling to someone who
18 was not -- to a possible purchaser who was not
19 presently regulated in any way by the Federal
20 Order System, would your sales force offer them
21 technical assistance in that respect?

22 A. We would certainly be willing to
23 help explain to them what requirements they
24 need, get them in touch with the various
25 people, explain to them how easy it is to

1 E. Hollon - Cross by Mr. Vetne
2 comply, get them in touch with the appropriate
3 personnel to help them in whatever way they
4 needed to be able to comply.

5 Q. In your view and experience with
6 those requirements, would it be unduly
7 burdensome?

8 A. It would not be unduly burdensome in
9 our experience.

10 MR. BESHORE: Thank you.

11 JUDGE DAVENPORT: Let's defer
12 examination until after the break. Let's take
13 a 15 minute break at this time and come back at
14 10:15.

15 (Short recess taken.)

16 JUDGE DAVENPORT: Let's come
17 back to order, if we can. Mr. Vetne, you wish
18 to exercise some examination of Mr. Hollon.

19 MR. VETNE: John Vetne for HP
20 Hood.

21 -----

22 CROSS-EXAMINATION

23 BY MR. VETNE:

24 Q. Mr. Hollon, the attachments or
25 accompaniments to your supplemental statement,

1 E. Hollon - Cross by Mr. Vetne

2 Exhibit 33 describe a number of products and a
3 number of uses for whey. Is it your intention
4 that these be illustrative rather than
5 exhaustive?

6 A. Yes.

7 Q. There are other uses, special
8 formulations that are specific to a particular
9 manufacturer and/or user?

10 A. The purpose for including these into
11 this statement was there were questions on
12 Monday about how could you tell this protein
13 from that protein. So the purpose was to look
14 through what was available and point out that
15 there ways to tell, that there could be tests
16 that would show differences between protein
17 sources.

18 So anyone who uses, you know, a milk
19 protein and claims a pricing exemption for whey
20 would be on the honor system, but every so
21 often it's good to check the honor system.

22 Q. As used in Proposal No. 7, whey, as
23 I now understand it, is not just whey but means
24 sweet whey?

25 A. Whey from the product of cheese -

1 E. Hollon - Cross by Mr. Vetne

2 making which is termed in the literature as
3 sweet whey.

4 Q. But it would exclude the product of
5 cottage cheese-making?

6 A. Yes, sir.

7 Q. Which produces acid whey?

8 A. Yes, sir.

9 Q. And are you aware that there are
10 some Class III cheese varieties, hundreds of
11 which are described in the publication called
12 Cheese Varieties and Description, there are
13 some Class III specialty cheese varieties that
14 result in acid whey from the cheese production
15 rather than sweet whey?

16 A. That's correct.

17 Q. Whatever by-product is produced,
18 that acid whey would not be eligible for
19 exemption under your proposal?

20 A. Yes.

21 Q. If a food beverage manufacturer
22 finds a use for what we have talked about, and
23 we have talked about as acid whey, from protein
24 derived from acid whey, whether it's from a
25 Class III cheese use or Class II cheese use or

1 E. Hollon - Cross by Mr. Vetne

2 Class IV casein use originally, first of all,
3 the protein has already been priced if it comes
4 from the Federal Order source?

5 A. Correct.

6 Q. Some method must be employed under
7 your proposal to convert that protein to a
8 solids nonfat equivalent or skim milk
9 equivalent, correct?

10 A. Correct.

11 Q. And with respect to that whey
12 protein, acid whey protein source, describe the
13 process, and not necessarily the numbers, the
14 process you believe USDA should employ for the
15 upcharge on that nonfat solid --

16 A. I don't have one to offer at this
17 time. We would have to deal with that on
18 break.

19 Q. The modification that you offer on
20 the last page of your supplemental testimony,
21 when you refer to new milk processing or
22 packaging technology, do you intend to include
23 in that term not only processing and packaging
24 technology by makers of consumer products, but
25 also, processing and packaging technology by

1 E. Hollon - Cross by Mr. Vetne

2 makers of milk-derived ingredients?

3 A. You have to give me some more
4 examples. I have not necessarily considered
5 that.

6 Q. Let's say somebody buys a fraction
7 of a protein or finds some new combination of
8 milk-derived ingredients that currently does
9 not exist, but that, as we have heard, in 2010
10 will not meet our assumptions in 2005 the same
11 way our 1999 reform assumptions -- reform
12 reality did not meet the assumptions from 1974.
13 My question has to do with the ingredients
14 going into the manufacturer, and the question
15 is, does new milk processing packaging
16 technology apply to both the ingredients side
17 as well as the consumer product side?

18 A. Yes, it would.

19 Q. And what you are proposing by this
20 new language -- are you aware that the FDA as
21 well as its California equivalent have a
22 procedure for temporary standards of identity
23 for new milk products?

24 A. I am not aware of it, but I would be
25 surprised if there is one.

1 E. Hollon - Cross by Mr. Vetne

2 Q. Well, for purposes of Federal Order
3 Standards, this proposal serves as essentially
4 that kind of function, a temporary standard
5 until one that can be made more permanent?

6 A. Yes.

7 Q. I haven't had a chance, of course,
8 to study the attachments that you provided, but
9 you represent that there are laboratory methods
10 to distinguish sweet whey protein from acid
11 whey protein?

12 A. Yes.

13 Q. And without reading them, can you
14 tell me if those attachments also provide
15 equally clear distinction between either form
16 of whey protein and undifferentiated milk
17 protein?

18 A. I'm not sure I know what
19 undifferentiated milk protein is.

20 Q. Milk protein that comes -- the kind
21 of milk protein that you find in milk protein
22 concentrate for which the serum proteins and
23 casein proteins have not been segregated.

24 A. No, I cannot tell you if they
25 provide a differentiation between the two. The

1 E. Hollon - Cross by Mr. Vetne

2 journal article itself talks about testing for
3 the GMP, glycomacropeptide, which was present
4 in the sweet whey but not present in acid whey.

5 Q. The methods that are used or
6 described in these articles to distinguish and
7 the equipment that was used by those testers
8 described in the article, are those methods and
9 is that equipment, to your knowledge, generally
10 available to any use by dairy manufacturers and
11 milk processors?

12 A. The testing procedures described in
13 the article, familiar with them, but they are
14 available. One of the articles mentioned a
15 commercial laboratory that does do them, and
16 our own whey salespeople has me that we have
17 run those types of tests. It's not something
18 as normal as a butter fat test or a protein
19 test that you might do on an incoming month
20 supply, and it's not something that's cheap or
21 inexpensive. The cost of the test has some
22 value.

23 Q. What about time?

24 A. Actually I do not know about time.
25 I didn't inquire about that. However, the

1 E. Hollon - Cross by Mr. Vetne

2 thought process here is not every instance
3 would the test be run. Just like today, not --
4 and an audit doesn't look at every single
5 transaction, unless there's some thought that
6 there's reason to. So the fact that there is a
7 distinguishable test and it can be done is what
8 I was attempt to demonstrate.

9 Q. On page 3 you refer to the hand with
10 responsibility as it always is to provide
11 records to the market administrator, in this
12 case, the source of whey proteins that the
13 handlers utilized?

14 A. Right.

15 Q. It's true, is it not, that if a
16 handler buys an ingredient of mixed proteins
17 from an ingredient manufacturer that you won't
18 determine simply by identifying the supplier
19 what the whey proteins are?

20 A. That burden of proof goes with the
21 reported requirement. So if there's a desire
22 to get an ingredient, use it in a beverage
23 formulation, it would be exempt from Class I,
24 or it's going to have to go all the way down
25 the chain. We have many customers that have

1 E. Hollon - Cross by Mr. Vetne

2 very strict requirements on what they wish to
3 purchase and many specifications around it. So
4 as a seller, we have to meet those
5 requirements.

6 Q. And is it not true that the
7 manufacturers of food mixes that include milk
8 proteins in turn get their subcomponents of the
9 mix from other manufacturers?

10 A. Yes.

11 Q. And that can go several links down
12 the chain?

13 A. It can certainly be a multiple chain
14 or maybe one chain, and, again, we, the
15 supplier, are involved in those chain links and
16 have demands that we meet in order to make a
17 sale. So I would not view that as an
18 impossible standard to have to meet.

19 Q. But the proof satisfactory that you
20 are referring to would require the ultimate
21 maker of a consumer product to follow that
22 chain through all of the component suppliers of
23 the ingredient back to the one that received
24 the milk from a cow than segregated away from
25 other proteins?

1 E. Hollon - Cross by Mr. Vetne

2 A. It would have to be a determination
3 that the product met the spec and standard and
4 periodically the ability to test that to make
5 sure it happened.

6 Q. Do you believe that a handler who
7 has undergone that process should be able to
8 rely on whey protein versus other milk protein
9 or other dairy protein contents in their
10 ingredients as provided by the manufacturers
11 and ingredient specifications in the
12 classification of a product as opposed to the
13 handler having an additional responsibility of
14 testing and confirming that mix of composition
15 of a proteins?

16 A. Much of the answer to that question
17 is going to be embodied in the relationship of
18 the supplier and the buy/sell arrangement. We
19 have, for example, buyers who want to make sure
20 that some product that they buy from us doesn't
21 have a gluten product in it because someone
22 down the chain has a need for a gluten-free
23 product. So part of the specs is you will
24 provide A, B, C, D, and it's up to you to
25 provide it.

1 E. Hollon - Cross by Mr. Vetne

2 So if there's a default somewhere,
3 there's a penalty that comes back to the
4 supplier, not the person in the middle. So if
5 a handler can demonstrate they have those types
6 of agreements and somehow the fault is not
7 theirs, I would think it reasonable that a
8 burden would be -- they might still have to
9 provide whatever penalties are required to the
10 pool, but they should be able to turn around
11 the other way and say, supplier, you didn't
12 provide me what we agreed to, I have some
13 penalty that you need to pay.

14 Q. So it's the intention of your
15 proposal that if the protein composition in the
16 finished product is met but it is met through
17 inadvertence rather than intent, that the
18 handler ought nevertheless be assessed an
19 upcharge by Class I classification?

20 A. Yes.

21 MR. VETNE: All right. Thank
22 you.

23 JUDGE DAVENPORT: Other
24 examination? Mr. Yale.

25 MR. YALE: Real quick just to

1 E. Hollon - Cross by Mr. Yale

2 kind of follow up on some other things. Ben F.
3 Yale for Select Producers, Inc. and Continental
4 Dairy Products.

5 -----

6 CROSS-EXAMINATION

7 BY MR. YALE:

8 Q. Have you given an indication whether
9 there's any other cooperatives that support the
10 testimony of the National Milk and the DFA in
11 this hearing?

12 A. I have been. I have been receiving
13 some communication from Select Milk Producers
14 and Continental Farms, Inc. that they would
15 also support the proposals by National Milk and
16 DFA.

17 MR. YALE: And for that, let
18 the record reflect that that proposal is
19 withdrawn. Thank you.

20 JUDGE DAVENPORT: Other
21 examination? Mr. Tosi.

22 MR. TOSI: I'm Gino Tosi with
23 Dairy Programs in Washington, D.C.
24
25

1 E. Hollon - Cross by Mr. Tosi

2 -----

3 CROSS-EXAMINATION

4 BY MR. TOSI:

5 Q. Elvin, I wanted to ask questions of
6 you on the new modification that you are making
7 here to allow the Department to have some
8 flexibility in making determinations on whether
9 or not something is a fluid milk product.

10 As I read the proposal, I take away
11 from it that there would be an interim
12 classification of any new product and that, in
13 essence, any new product would require a
14 hearing before we make a final classification?

15 A. It would not be any new product, and
16 the secretary is going to have some discretion
17 in saying how it falls. So just because I walk
18 in the door and say, I have got a product with
19 these ingredients and my new ingredient that's
20 new technology is I just scrambled the name of
21 the old ingredient and called it new, there's
22 going to have to be some judgment that's there,
23 but if that new ingredient is a result of some
24 technology that was unforeseen, today or
25 whenever these rules become final, then the

1 E. Hollon - Cross by Mr. Tosi

2 secretary is going to have some discretion
3 rather than being caught in limbo, and the
4 secretary would say, using, you know, the
5 criteria set out in section A and B, I'm going
6 to consider this product to be in Class I, II,
7 III or IV, and obviously, if everybody agrees,
8 there would be no dispute and no need to do
9 anything. If there was some dispute and some
10 disagreement and the secretary felt like he or
11 she needed to enforce the new classification,
12 then they could do so with the interim
13 possibility and then have a hearing to say
14 there's a new technology, it was an unforeseen,
15 we're going to call this product Class I, we
16 are opened to proposal from the industry about
17 what to do.

18 Q. But the order language doesn't say
19 to the extent that the person or the product
20 being classified in the Department agreed, then
21 we don't need to have a hearing. It doesn't
22 say that. It just says a new product, the
23 determination shall be effective until a
24 permanent classification of the product is
25 established after a hearing pursuant to the

1 E. Hollon - Cross by Mr. Tosi

2 act, and it continues on that we have to hold a
3 hearing within one year after an interim
4 determination is made.

5 A. We'll take that question into
6 consideration when we're reading it.

7 Q. Are you aware that on our product
8 classification list that we treat products that
9 have been -- that we have to classify as a
10 confidential matter between the department and
11 the company making the product?

12 A. You mean if DFA comes into the local
13 market with products, and they say, explain to
14 us what classification is?

15 Q. No. I'm talking about current
16 products.

17 A. Elaborate a little bit.

18 Q. We maintain a product classification
19 list that describes the product, its
20 composition, who makes it. Are you aware that
21 that list to be kept confidential?

22 A. Yes.

23 Q. And to the extent that people here
24 that have come to the hearing will not reveal
25 confidential information, what purpose would a

1 E. Hollon - Cross by Mr. Tosi

2 hearing serve to have someone come and say,
3 well, anything that we're going to ask of that
4 is confidential?

5 A. The product itself by brand name and
6 description would probably not be the necessary
7 focus, but whatever the distinguishing
8 characteristic that the maker seemed to think
9 deserves a different classification would be.

10 Q. Are you aware that they are able to
11 come back in the Department and do that now?

12 A. Yes. But there seems to be a desire
13 to have some degree of flexibility in the fluid
14 milk product standard that says this was our
15 attempt to try to provide some -- that would
16 meet the test, and the secretary can find
17 amendment C, you know, not included in the
18 language.

19 MR. TOSI: Thank you. I
20 appreciate it.

21 JUDGE DAVENPORT: Mr. Hollon,
22 it's unusual for me to have to ask a question.
23 But what level of a hearing are you talking
24 about? Are you talking about an internal
25 hearing at the Department or are you talking

1 E. Hollon - Cross by Mr. Tosi
2 about a hearing before an administrative law
3 judge?

4 THE WITNESS: A hearing before
5 an administrative law judge.

6 JUDGE DAVENPORT: And
7 typically you realize those hearings are open
8 to the public?

9 THE WITNESS: Again, it would
10 be if DFA wouldn't want to bring -- with the
11 understanding of the confidentiality, wouldn't
12 bring product X and say this is it, but in
13 attempt to convince the Department that somehow
14 product X meets a new classification, there
15 would have to be some reasons why, and so those
16 reasons would somehow be incorporated into the
17 order provisions.

18 JUDGE DAVENPORT: Other
19 agencies, of course, do have provisions for
20 dealing with privileged information and trade
21 secret information. Our current rules of
22 practice don't have very much in there. So in
23 other words, that is probably something that
24 you may wish to at least envision in your
25 proposal.

1 E. Hollon - Cross by Mr. Shapiro

2 THE WITNESS: Okay.

3 JUDGE DAVENPORT: Is there
4 other examination of Mr. Hollon? Yes, sir.
5 Please identify yourself and spell your last
6 name for the reporter.

7 MR. SHAPIRO: Jeff Shapiro,
8 S-H-A-P-I-R-O. General Mills.

9 -----

10 CROSS-EXAMINATION

11 BY MR. SHAPIRO:

12 A. Good morning.

13 Q. I wondered, if I could, to talk a
14 little bit about whey. Currently is it your
15 understanding that whey is not included in the
16 calculation to determine product
17 classification?

18 A. I've not read all the memos attached
19 to Mr. Vetne's brief, but I think that at times
20 it has been and hasn't been. At the beginning
21 of the standard, it was -- whey was considered
22 a beverage drinkable, and there's been some
23 confusion. That's been the purpose of the
24 hearing is to try to make it clear. I can't
25 tell you all the particulars of the current

1 E. Hollon - Cross by Mr. Shapiro
2 classification.

3 Q. If a product right now has below six
4 and a half percent milk solids nonfat, under
5 the proposal that you support, let's say that
6 would roughly convert to, let's say, two
7 percent protein, you would agree that that
8 product then under the proposal you support
9 would remain in Class II?

10 A. If all of the proteins from the
11 dairy source were two percent as you described
12 it, yes, that product would remain in Class II
13 or a new product created would be Class II.

14 Q. Now, under current classifications,
15 it's my understanding that whey is not
16 included.

17 A. Okay.

18 Q. But under the proposal you support,
19 let's say of that product that it has below two
20 percent protein, I'm going to add in the whey
21 for either functionality purposes or protein
22 purposes, and let's say we add in enough to get
23 the total protein content of that product, now
24 up to two and half percent protein. That
25 product would then move from Class II to Class

1 E. Hollon - Cross by Mr. Shapiro

2 I under the proposal you support; is that
3 correct?

4 A. Yes, it would.

5 Q. Have you run an assessment of all
6 the products of the marketplace today and the
7 amount of whey that they might use?

8 A. I have no idea.

9 Q. So it's definitely possible that
10 there might be several wheys that move from one
11 class to another under the proposal you
12 support?

13 A. It's entirely possible.

14 Q. I wanted to move a little bit to the
15 discussion that you had on pricing, if we
16 could.

17 A. Okay.

18 Q. First just to clarify for the
19 record, could you reiterate the source of your
20 data for the alleged impact on price?

21 A. The Class I Mover is published every
22 month by the market administrators. It's the
23 first hearing I have ever been to where not a
24 listed price was put in, and that's because it
25 wasn't part of the classification hearing, but

1 E. Hollon - Cross by Mr. Shapiro

2 every month the Class I prices of skim and fat
3 are published, and every month the Class II
4 price skim and fat are published and every
5 Federal Order source, if you go down to some of
6 your product accounting guys at General Mills,
7 I'm sure they have those documents.

8 Q. I'm sure they do. I'm glad I don't
9 have to see them all the time. You reference
10 -- on product specifically you used the data
11 from one particular MA; is that correct?

12 A. Yesterday I think one of your three
13 witnesses mentioned that you have a plant in
14 Michigan. So I used \$2.00 for the differential
15 added on top of the Class I group because
16 that's the base differential for 33.

17 Q. And you use that in your discussion
18 with respect to Nouriche today?

19 A. Yes.

20 Q. I would just like to clarify for the
21 record that we do not manufacture Nouriche in
22 Michigan. I want to walk you through a
23 hypothetical. If we say that you, let's
24 pretend, purchased 500 million pounds of milk
25 every year. Now, under the math, as I

1 E. Hollon - Cross by Mr. Shapiro

2 understand it, if I have this right, that you
3 presented, you would be paying roughly one and
4 a half million dollars more every year for that
5 milk to be Class I than to be class 2; is that
6 correct?

7 A. Yes, that would be correct.

8 Q. Does DFA not believe that one and a
9 half million dollars would have a significant
10 impact on its manufacturing practices and
11 operations?

12 A. I have no comment one way or the
13 other other than to say that thus far, all of
14 the reasons for why this proposal would be bad
15 is that when the consumer reaches their hand in
16 the dairy case, somehow their behavior is going
17 to be changed by a price difference of one and
18 a half cents.

19 There's been no evidence at all --
20 evidence is the wrong word, but no claims at
21 all about, you know, where, in your case, the
22 1.5 million does it show up on General Mills'
23 book and on Dairy Farmers' books. I don't
24 think anybody has said that it's beneficial --
25 more beneficial one way or another.

1 E. Hollon - Cross by Mr. Shapiro

2 Q. I didn't want to suggest that that
3 was the amount of milk that we necessarily
4 presented.

5 A. No. I understand. That was as a
6 hypothetical.

7 Q. But you would agree that one and a
8 half million dollars could have a significant
9 impact on, perhaps, a manufacturer's decisions
10 with respect to their operations in general?

11 A. It may, indeed, but, again, I would
12 say that no one mentioned that until now, and
13 every witness who has said this is a bad thing
14 to do has said that when consumers reach for
15 that product, that a difference in price is
16 going to make a difference to whether they buy.

17 Q. That's assuming that the impact on
18 price to the manufacturer would have still
19 allowed that product to get to the shelf in the
20 first place, correct?

21 A. Yes, that's true.

22 Q. Finally, with respect to the
23 discussion on technology. We're a company that
24 is constantly innovating. It would be your
25 suggestion under your proposal that every time

1 E. Hollon - Cross by Mr. Shapiro

2 a new manufacturing innovation basically hits
3 the marketplace, that an eventuality of that
4 would be a hearing similar to this?

5 A. No, that would not be the case.
6 Only if there became a desire to change the
7 classification through something that's not
8 already embodied in the rules. If the current
9 rules will allow product to be classified, then
10 we would see no reason to change the process
11 now, but there appears to be a concern exactly
12 as you have noted that what do we do with
13 something new. So our only goal was to attempt
14 to provide some language that might help to
15 deal with that.

16 MR. SHAPIRO: I appreciate the
17 clarification. J.

18 JUDGE DAVENPORT: Other
19 examination? Thank you, Mr. Hollon. Excuse
20 me. Mr. Beshore.

21 MR. BESHORE: Thank you, Your
22 Honor. Just a question or two on redirect,
23 Elvin.

24

25

1 E. Hollon - Redirect

2 - - - - -

3 REDIRECT EXAMINATION

4 BY MR. BESHORE:

5 Q. The examples of possible tests for
6 differentiating among whey proteins that are
7 provided, is there any contention that those
8 are the only tests or the --

9 A. No.

10 Q. -- that those are exhaustive of the
11 technology available?

12 A. It was only meant to provide the
13 knowledge that there was a way to do it.

14 Q. Now, with respect to the questions
15 from Mr. Shapiro of General Mills, in your
16 price impact calculations, you used the
17 differential for Michigan, but you could -- if
18 you used another differential, you could go
19 through the same math that you described in
20 your testimony and come up with a different
21 price impact, correct?

22 A. There are more differentials than
23 \$2.00. So obviously if you have a lower
24 differential, you have a lower impact and a
25 higher differential, a higher impact. I simply

1 E. Hollon - Redirect

2 picked that location because somebody testified
3 they had a manufacturing plant there and it was
4 for example?

5 Q. In any event, it's going to be
6 pennies regardless of where it's produced?

7 A. That would be true.

8 Q. By the way, with respect to the
9 proposed language C, the trigger on that is
10 twofold, that it must be a product of
11 technology that's not presently commercially
12 utilized, correct?

13 A. Correct.

14 Q. And secondly, it's got to be a
15 beverage product?

16 A. Yes, that would be true.

17 Q. Meeting the form and use test?

18 A. Yes.

19 MR. BESHORE: Thanks.

20 JUDGE DAVENPORT: Other
21 examination? Very well. Mr. Hollon, you may
22 step down.

23 MR. BESHORE: Has his exhibit
24 been accepted and its attachments? Has it been
25 accepted? If not, I would move them.

1 E. Hollon - Redirect

2 JUDGE DAVENPORT: At this time
3 to the extent that I have not previously
4 admitted in the Exhibits 1 through 33 with all
5 attachments, it would be admitted into the
6 record at this time.

7 MR. BESHORE: Thank you.

8 (Exhibit Nos. 1 through 33
9 were admitted into the record.)

10 JUDGE DAVENPORT: Dr. Cryan, I
11 understand you have an additional exhibit.

12 MR. CRYAN: Yes, sir. Thank
13 you. My name is Roger Cryan, C-R-Y-A-N.

14 JUDGE DAVENPORT: Give your
15 exhibit to me and to the hearing reporter as
16 well as to the government representatives.
17 This will be marked for identification as
18 Exhibit 34.

19 (Exhibit No. 34 was marked for
20 identification.)

21 MR. CRYAN: I presented some
22 information, Exhibit 14(c) when I gave my
23 testimony which offered the data from a market
24 research study commissioned by DMI,
25 commissioned IRI Market Research to do a study

1
2 on the carb countdown. Hood's subsequent
3 presentation of another version of that may be
4 recognized that there was some confusion about
5 which elements of the presentation were from
6 that third party market research firm and which
7 were not.

8 So I obtained this presentation,
9 power point presentation. This was the
10 presentation that was directly presented by the
11 market research firm to DMI, and I offer this
12 as an exhibit in order to clarify which parts
13 of the material are directly from the market
14 research firm and which parts may or may not
15 have been added by DMI.

16 JUDGE DAVENPORT: Mr. Vetne.

17 MR. VETNE: John Vetne for
18 Hood. Your Honor, I would simply refer back to
19 my prior objections for all of this survey data
20 in all forms. However, I do not object to the
21 receipt of this third version as a
22 clarification of what was presented to the DFA
23 people in January of 2005.

24 MR. CRYAN: Thank you.

25 JUDGE DAVENPORT: With that

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being the case, Exhibit 34 will be admitted
into the record.

(Exhibit No. 34 was admitted
into the record.)

MR. CRYAN: Thank you.

JUDGE DAVENPORT: Is there
anyone else that is wishing to offer their
testimony before we go to Mr. Wilson? Well,
Mr. Wilson, it looks like you are up. Raise
your right hand.

TODD WILSON

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

JUDGE DAVENPORT: Most of the
people in the audience have already heard you,
but would you, please, tell us again your full
name.

THE WITNESS: Todd Wilson.

JUDGE DAVENPORT: And that's
T-O-D-D, W-I-L-S-O-N?

THE WITNESS: That's correct.

JUDGE DAVENPORT: Very well.
Mr. Stevens has also provided me with an
exhibit which, I gather, that you are going to

1 T. Wilson - Direct

2 use during your testimony. It has been marked
3 as Exhibit 35 for identification.

4 (Exhibit No. 35 was marked for
5 identification.)

6 MR. STEVENS: Thank you, Your
7 Honor. My name is Garrett Stevens. I'm
8 general counsel for the U.S. Department of
9 Agriculture.

10 -----

11 DIRECT EXAMINATION

12 BY MR. STEVENS:

13 Q. Todd, during the course of the
14 hearing, you were asked to provide certain
15 information relative to some calculations that
16 might be done under your marketing order; is
17 that correct?

18 A. That's correct.

19 Q. And have you made an attempt to do
20 an example of those calculations?

21 A. Yes, I have.

22 Q. Have you brought that with you
23 today?

24 A. Yes, I have.

25 MR. STEVENS: Your Honor,

1 T. Wilson - Direct

2 thank you for marketing the Exhibit No. 35.

3 Q. I'm now referring to that, Todd.
4 This is a three page document, am I correct?

5 A. Yes, it is.

6 Q. And this seeks to provide for the
7 record information that has been requested of
8 you during the course of the hearing?

9 A. Yes, it is.

10 Q. Could you now go through the exhibit
11 page by page and please describe for the record
12 what is contained therein.

13 A. The first page as identified is an
14 example of reconstitution of nonfat dry milk
15 with water. When nonfat dry milk is added with
16 water, there's some inherent factors that we
17 apply. As nonfat dry milk -- kind of just go
18 through the columns in the row, if you will.
19 Nonfat dry milk is included in a product by its
20 pounds. It also has a weight factor. In this
21 particular case, it's the pounds per gallon
22 column, 13.24. If you divide the pounds of
23 9.33, you get .7 gallons.

24 The same could be applied with
25 water, except usually water is used in forms of

1 T. Wilson - Direct

2 gallons. So applying the weight factor from
3 gallons to pounds, you end up with the amount
4 of pounds. Also, nonfat, I have in here pounds
5 of butter fat, percent protein, pounds of
6 protein, percent SNF and SNF pounds.

7 The next column is a column I
8 have entitled with volume factor. Volume
9 factor is simply the weight of an unmodified
10 milk product weight of 8.62 divided by the
11 pounds per gallon of that individual
12 ingredient. In the case of nonfat dry milk,
13 it's 13.24. In this example, it gives us a
14 .651 volume factor. This volume factor can be
15 applied to the pounds of the product to yield
16 that ingredients Class I displacement pounds.
17 In this example, it's 6.07.

18 When nonfat is added to water to
19 reconstitute back to the level of protein and
20 solids that was in its original form, in this
21 example, it was 90.67 pounds of water. It's
22 weight though as reflected by this, its
23 unmodified milk equivalent or milk equivalent
24 volume would be a 1.034 weight volume factor.
25 This is simply, again, the 8.62 divided by

1 T. Wilson - Direct

2 8.33. So its Class I displacement weight for
3 the water is 93.73. Those two numbers combined
4 give us the total volume of the reconstituted
5 product weight of 99.8 pounds. If you divide
6 the 99.8 back by its total gallons of 11.58, it
7 give us an 8.62 weight per gallon.

8 The fluid equivalent factor, the
9 next column over, is a factor that is computed
10 by taking the percent SNF, 96.2 and dividing by
11 the percent SNF and the skim milk portion of
12 original milk of 9, adding to that the level of
13 fat in the product, in this example it's
14 10.697.

15 This factor applied to the pounds of
16 9.33 also gives us a pounds volume, fluid
17 equivalent pounds of 99.8. In this example,
18 this product, this nonfat dry milk has been
19 fully reconstituted back to its fluid form with
20 the water. So there's no fortification under
21 the Federal Order.

22 The next page, again, this is an
23 example using nonfat dry milk, but in this
24 case, I'm showing the example of fortification
25 and what the effect of putting nonfat dry milk

1 T. Wilson - Direct

2 into milk has. In this particular case, we
3 have 98 pounds of milk, two pounds of nonfat
4 dry milk. Again, we have got a volume factor
5 for milk as 1 volume. The volume factor for
6 nonfat dry milk is 13.24. I'm sorry. The
7 volume factor is .651. Doing the math the same
8 way as the other previous example gives us a
9 Class I displace pounds of 99.3. This, again,
10 is the weight of the modified complete product.

11 In this example though, we have a
12 significant amount of increased protein and
13 increased solids. In a product we apply our
14 fluid equivalent factors to the nonfat dry
15 milk. We actually end up with 20 pounds more
16 of equivalent weight of the product. This
17 equivalent weight is not priced at Class I.
18 Rather, it's priced at Class IV. This is what
19 we sometimes use in our market as termination
20 -- or the term fortification.

21 The next example, again, this is a
22 reconstitution example and fortification
23 example. We're reconstituting water -- or
24 we're using water to reconstitute a
25 concentrated product that I have labeled UF

1 T. Wilson - Direct

2 concentrate. I have taken this example of the
3 50/50 ratio, 50 pounds of UF concentrate, 50
4 pounds of water. In this example, protein
5 percent of the UF is 9.9, solid nonfat is
6 16.71, equivalent solids nonfat is 28.74. The
7 volume factor in this example is the 8.62 that
8 I referenced in the previous examples divided
9 by the 8.886 in UF concentrate to be a .973.

10 It's Class I displaced pounds is
11 48.65. Added to the water displaced pounds is
12 51.7 and would yield 100.35. Divide this back,
13 it, again, yields a 8.62, the weight for the
14 modified product. However, there is increased
15 protein and increased solids in the product
16 because of the fluid equivalent factor. Again,
17 this factor is referenced in the next to the
18 last column as 3.197. In this example, it's
19 the 9.9 percent protein divided by the protein
20 test of skim milk of 3.1 that is used in the
21 Federal Order. This will yield 3.194. Adding
22 the fat from that product of .003 percent, we
23 yield 3.197. Applying that to the 50 pounds in
24 the product will then yield a fluid equivalent
25 pounds of 159 pounds and 86. So in this

1 T. Wilson - Direct

2 example, the equivalent pounds 159.86
3 subtracted from 100.35 pounds of Class I, we
4 yield fortification pounds of 59.51.

5 Q. Todd, these are illustrated
6 examples, I mean, they are hypothetical
7 examples, and they don't reflect any real
8 calculations that you have done under your
9 order with respect to any particular products?

10 A. That is correct.

11 Q. And they are done in accordance with
12 the application of the order revisions in the
13 same way that you would do it for any products
14 that you were evaluating under the Federal
15 Order?

16 A. That is correct.

17 Q. Let me just make sure the record
18 reflects, Todd, you are employed by the market
19 administrators office?

20 A. Yes, I am.

21 Q. And you've worked in that capacity
22 for how many years?

23 A. 17.

24 Q. 17 years. And during the course of
25 the 17 years in the market administrators

1 T. Wilson - Direct

2 office, briefly for the record could you tell
3 us what your duties have been?

4 A. I have been involved in the pooling
5 process for 15 years. I have been involved in
6 the auditing process for 17 years, dealing with
7 the code of regulations and different things
8 for that entire time.

9 Q. So during the course of your employ
10 with the market industry, you have had
11 occasions to apply your provisions of the
12 marketing order to various products, reports
13 and the products that they represent that have
14 come into your office?

15 A. Yes, I have.

16 Q. And these examples are offered by
17 you for the use of the parties here at the
18 hearing?

19 A. Yes, they are.

20 Q. They are not offered for or against
21 any proposal, are they?

22 A. No, they are not. You are correct.

23 MR. STEVENS: That's what we
24 have on direct, Your Honor. We offer the
25 witness for cross-examination.

1 T. Wilson - Cross by Mr. Yale

2 JUDGE DAVENPORT: Very well.

3 Cross-examination? Mr. Yale.

4 MR. YALE: Benjamin F. Yale on
5 behalf of Select Milk Producers, Inc. and
6 Continental Dairy Products, Inc.

7 - - - - -

8 CROSS-EXAMINATION

9 BY MR. YALE:

10 Q. Good morning, Todd.

11 A. Good morning.

12 Q. And on behalf of my clients, I want
13 to thank you for making this available for the
14 record. Using these formulas, one can take any
15 of the products in which protein or solids
16 nonfat are present, plug them into the
17 appropriate thing and do the same math and
18 arrive at a number that the market
19 administrator would find for pricing purposes;
20 is that correct?

21 A. In our market, in the area, yes.

22 Q. Yes. This is a Class I product.
23 The fortification volume would be priced at
24 Class IV, and the rest would be priced at Class
25 I; is that correct?

1 T. Wilson - Cross by Mr. Vetne

2 A. That's correct. The third example?

3 Q. Right, the third example.

4 A. Yes.

5 MR. YALE: I have no other
6 questions.

7 JUDGE DAVENPORT: Thank you,
8 sir. Other questions? Mr. Vetne.

9 MR. VETNE: John Vetne for HP
10 Hood.

11 -----

12 CROSS-EXAMINATION

13 BY MR. VETNE:

14 Q. Thank you for preparing these
15 examples, Mr. Wilson. In response to the last
16 question from Ben Yale and looking at Exhibit
17 35, he asked you, I think, if you could apply a
18 similar approach to any protein, milk protein
19 and come up with a fluid milk equivalent. Do
20 you recall that question and answer?

21 A. Yes.

22 Q. And your response was in our market
23 in the area, yes. Now, I note that on the top
24 of this exhibit the words Southwest Milk
25 Marketing Order No. 1126 is indicated. Does

1 T. Wilson - Cross by Mr. Vetne
2 your testimony illustrate how reconstituted
3 products from milk sources are converted to an
4 SNF equivalent and a skim milk equivalent only
5 in the southwest marketing order, or is your
6 testimony that this is the way it's done in the
7 Federal Milk Marketing Order system?

8 A. My testimony is specific to the
9 Southwest Milk Marketing Order as indicated in
10 the exhibits.

11 Q. Can there be variability between
12 market administrator offices, on their approach
13 to this kind of thing?

14 A. I'm here just to explain the
15 procedures used in our ordinary marketing area.

16 Q. That wasn't my question. My
17 question is can there be variability from
18 market to market where -- one of the markets at
19 issue in the hearing is the Southwest, but all
20 of the others are also in the notice. I
21 expressed an interest in finding out how it's
22 being done now for the record, and if it's
23 being done not the same in other marketing
24 orders, we won't get that from you. So my
25 question --

1 T. Wilson - Cross by Mr. Vetne

2 A. That's correct.

3 Q. That's correct. And do you know
4 whether there may be variability?

5 A. I do not know.

6 Q. Now, Exhibit 34 -- 35. I'm sorry.
7 Page 3, example of reconstitution of UF with
8 water. Let me see if I understand. The UF
9 concentrate that we're dealing with here, this
10 is an illustrative product made up of simply
11 two components, UF concentrate and water, and
12 the finished product is a combination of those
13 two; is that correct?

14 A. That is correct.

15 Q. And the UF concentrate ingredient
16 used in that product started out with 50 pounds
17 of UF concentrate of which 4.95 pounds of
18 protein were protein? Am I reading this
19 correctly?

20 A. That's correct.

21 Q. All right. And then of the UF
22 concentrate, 8.38 pounds of the 50 pounds were
23 solids nonfat pounds?

24 A. Correct.

25 Q. And that would be the protein as

1 T. Wilson - Cross by Mr. Vetne

2 well as some lactose as well as trace minerals
3 in the 50 pounds of UF concentrate; am I
4 correct.

5 A. Yes.

6 Q. And then we move over two more
7 columns. Well, we move over one more column.
8 There's a term, percent SNF equivalent. Now,
9 that's a term that's not in the Federal Orders
10 currently; am I correct?

11 MR. STEVENS: Your Honor, I
12 think the question was it's not in the Federal
13 Orders currently. He's testifying about the
14 Southwest Order.

15 Q. It's not in the general provisions
16 of the Federal Orders as applied in the
17 Southwest Order?

18 A. There are a lot of terms on this
19 form that's not in the Federal Order.

20 Q. I'm just asking about this
21 particular term, SNF equivalent.

22 A. Okay.

23 Q. It's not in the order that you
24 administer?

25 A. That is correct.

1 T. Wilson - Cross by Mr. Vetne

2 Q. Okay. And the order that you
3 administer for purposes of fluid milk product
4 definition uses exactly the same general
5 provisions that are used in all Federal Market
6 Orders, correct?

7 A. That's correct.

8 Q. There's nothing unique to the
9 Southwest here?

10 MR. STEVENS: Your Honor,
11 every order -- this is Garrett Stevens from the
12 general counsel office. Every order stands on
13 its own record. Every provision, every order
14 stands on the record made for that provision.
15 So I'm instructing the witness to answer the
16 question in that context.

17 Q. My question was simply whether
18 there's anything in the fluid milk product
19 definition applied in the Southwest Order
20 that's different from all the other Federal
21 Orders?

22 A. Again, I stated I'm here to testify
23 on the Southwest Order, examples that's
24 explained in this exhibit.

25 Q. The exhibit illustrates the approach

1 T. Wilson - Cross by Mr. Vetne
2 that the Southwest market administrator took in
3 classifying carb countdown, correct?

4 MR. STEVENS: Your Honor, I
5 object to the question. It assumes something
6 that's not in evidence certainly in this
7 hearing, some computation that may have been
8 made by a market administrator. If he wants to
9 ask him a question about how the provisions are
10 applied in the order as to specific products, I
11 think that's okay, but, you know, let's put a
12 foundation in there and let's ask the question.

13 JUDGE DAVENPORT: Do you want
14 to restate your question, Counsel.

15 Q. The hypothetical illustration in
16 Exhibit 35, page 3 illustrates the approach
17 taken by the Southwest Milk Marketing Order
18 Administration in classifying carb countdown
19 and other low carb milk beverages; is that
20 correct?

21 A. The classification of products is a
22 confidential matter between the handler and --

23 Q. For purposes of carb countdown
24 there's already data in the record, there's
25 already testimony that it contains UF milk, and

1 T. Wilson - Cross by Mr. Vetne
2 for purposes of this answer, I represent Hood.
3 Now, can you answer the question?

4 A. I'm not sure that what's in the
5 record indicates where carb countdown is
6 manufactured.

7 MR. STEVENS: John, I think we
8 can short-step this. If you'll stipulate, I
9 guess, and we can agree that carb countdown has
10 been evaluated by the market administrators in
11 the Southwest Order and that he has applied the
12 marketing order provisions of the Southwest
13 Order to carb countdown. I think we'll
14 stipulate to that.

15 MR. VETNE: If that's the
16 case.

17 MR. STEVENS: Fine. Then you
18 don't need to ask him the question.

19 MR. VETNE: Yes, I do. I need
20 to ask him -- we're here find out -- to amend
21 the orders. Part of that process is to find
22 out how they are not being applied. Now, I'm
23 asking how they were being applied for very
24 specific purpose to a product.

25 MR. STEVENS: Your Honor, I

1 T. Wilson - Cross by Mr. Vetne
2 would object because it's a matter of record.
3 Anyone can go to the hearing clerks office of
4 the United States Department of Agriculture and
5 determine in a proceeding filed by Mr. Vetne's
6 client how that determination was made. We
7 don't need to repeat all that in this record.

8 MR. VETNE: On the contrary,
9 the secretary cannot go to the 15A record and
10 make a decision here that is record-based as a
11 part of my statute.

12 MR. STEVENS: And what is
13 relevant of that, Your Honor?

14 JUDGE DAVENPORT: I'll allow
15 you to ask him if the same type of computation
16 was made with respect to the classification of
17 your product and whether that is illustrative
18 of the same type of procedure that was done
19 with respect to your client's product.

20 BY MR. VETNE:

21 Q. Did you hear the judge's restatement
22 of my question?

23 A. Yes, I did.

24 Q. Can you answer it that way, please?

25 A. I can answer it to the extent that

1 T. Wilson - Cross by Mr. Vetne
2 carb countdown is not manufactured in the
3 Southwest Marketing Order and that
4 classification determinations are made through
5 those marketing orders where a product is
6 manufactured.

7 Q. Nevertheless, the market
8 administrators office for the Southwest did
9 some tests on carb countdown as well as other
10 carbohydrate-reduced milk beverages, correct?

11 A. That is correct.

12 Q. And nevertheless, you as well as
13 Mr. Flemming from the Southwest market
14 administrators office testified in support of
15 the manner in which USDA classified carb
16 countdown at the 58 percent?

17 MR. STEVENS: We will
18 stipulate to that, Your Honor.

19 Q. And it was the basis and analysis
20 and application of what USDA believes to be the
21 current rules by your office that provided the
22 foundation for a Class I classification of carb
23 countdown as well as low carb as indicated in
24 that 15A record, correct?

25 MR. STEVENS: Your Honor, the

1 T. Wilson - Cross by Mr. Vetne
2 department would stipulate that as represented
3 in the record, the 15A proceeding that we are
4 referring to, that information is available and
5 is out there in the public record.

6 MR. VETNE: Again, Your Honor,
7 that's not the point. I do not understand the
8 government's desire to exclude from this public
9 record --

10 JUDGE DAVENPORT: Let's take a
11 recess at this time. Let's let you and
12 Mr. Stevens confer, and let's see if you can
13 come to a stipulation, and we'll be in recess
14 for at least five minutes. Let me know whether
15 you need more time.

16 (Short recess taken.)

17 JUDGE DAVENPORT: Let's come
18 back into session, if we could. Mr. Vetne,
19 have you and Mr. Stevens been able to reach any
20 common ground at all?

21 MR. VETNE: Your Honor, very
22 little, but I would like Mr. Stevens to correct
23 me if I state this wrong.

24 JUDGE DAVENPORT: Very well.

25 MR. VETNE: My objective as I

1 T. Wilson - Cross by Mr. Vetne

2 indicated a couple days ago is to have somebody
3 from USDA with reference to the general
4 provisions, Section 1000.15, explain how it
5 works, how USDA is currently applying that
6 section and the 6.5 percent solids nonmilk fat
7 standard in particular in the administration of
8 the orders so that we might know for this
9 hearing what we are changing, how the proposals
10 would affect that and what would be different
11 and to provide a reference point for that
12 change.

13 Mr. Stevens has indicated to me that
14 section -- the general provision Section
15 1000.15, with respect to that, this witness
16 cannot testify as to how the Department and all
17 of its market administrators office administers
18 it, but he can testify as to how it's applied
19 by the Southwestern market administrators
20 office, and I guess the rest of us may infer
21 from that that it would be applied similarly,
22 but we have no assurance that it is.

23 So my intention is, because I don't
24 want repeated objections to interrupt my
25 examination, to try to focus my question on how

1 T. Wilson - Cross by Mr. Vetne
2 the Southwest Milk Market Administrators Order
3 would apply to section 1000.15 to the
4 determination of what is and is not a fluid
5 milk product.

6 JUDGE DAVENPORT: Very well.

7 MR. STEVENS: I don't have any
8 problem with what he stated so far.

9 JUDGE DAVENPORT: Very well.
10 Let's proceed.

11 BY MR. VETNE:

12 Q. Mr. Wilson, in your Southwest Milk
13 Market Order, you have evaluated whether
14 certain milk-based beverages which include an
15 ultra-filtered ingredient are or are not Class
16 I, correct?

17 A. Correct.

18 Q. This would include products which
19 are marketed or offered in the market as
20 carbohydrate-reduced beverages, correct?

21 A. Correct.

22 Q. And with respect to such products
23 made from ultra-filtered milk, Exhibit 35, page
24 3 shows us how your office arrives at a solids
25 nonfat percentage to apply the 6.5 percent

1 T. Wilson - Cross by Mr. Vetne

2 standard in the general provision 1000.15,
3 correct?

4 A. Correct.

5 Q. Section 1000.15 with reference to
6 the 6.5 percent solids nonfat refers to solids
7 nonfat contained in the product, correct?

8 A. Will you repeat the question,
9 please?

10 Q. The general provision Section
11 1000.15, in context of the 6.5 percent milk
12 solids nonfat standard refers to such solids
13 nonfat as contained in the product or
14 equivalent words; is that correct?

15 A. That is correct.

16 Q. In the general provision concerning
17 Class I and Section 40, first in Class I, has
18 products disposed in the form of fluid milk
19 products, correct?

20 A. Correct.

21 Q. So milk that's in Class I is
22 products that are disposed of in the form of
23 products, the content of which is 6.5 percent
24 solids nonfat or more unless otherwise
25 specifically accepted? Did I combine those two

1 T. Wilson - Cross by Mr. Vetne

2 sections accurately?

3 A. I think you rephrased it.

4 Q. Yes, I did. Do you have any problem
5 with the way I phrased it, the content of
6 which?

7 A. Yes.

8 Q. And what is your problem with my
9 rephrasing, that contain is not the same in
10 your mind as --

11 A. Containing?

12 Q. Containing is not the sometime as
13 content of which?

14 A. I don't believe so.

15 Q. You don't believe so. Okay. And
16 you, in fact, looked beyond the content of the
17 product for solids nonfat for purposes of
18 administering general provision 1000.15 in your
19 marketing order?

20 MR. STEVENS: Your Honor, I
21 would instruct the witness to answer the
22 question that implies the order provisions that
23 apply. That's my instruction to the witness.

24 A. As the order provisions apply, that
25 is how we --

1 T. Wilson - Cross by Mr. Vetne

2 Q. Okay. And the two columns in
3 Exhibit 35 that are headed percent solids
4 nonfat equivalent and equivalent solids nonfat
5 pounds, is that the bottom line of how you
6 apply this 6.5 percent standard in the
7 Southwest Market Marketing Order?

8 MR. STEVENS: I direct the
9 witness to answer the question as the order
10 provisions apply.

11 A. As the order provisions apply.

12 Q. He didn't tell you to use those
13 words. He told you to explain to me how they
14 apply.

15 MR. STEVENS: No, I didn't.
16 This witness is an employee of the Department
17 of Agriculture, and he works in the market
18 administrators office. He applies the
19 provisions to the marketing order to any
20 products, reports the come in his office.
21 There is obviously a dispute between
22 Mr. Vetne's client and the Department about how
23 certain calculations were made.

24 As I said, those are a matter of
25 public record. He is instructed as any

1 T. Wilson - Cross by Mr. Vetne
2 employee is to apply the market order
3 provisions.

4 Q. Mr. Wilson, I understand based on
5 counsel's objections that I may not have an
6 answer to that question, but let me ask you
7 this. To use Mr. Stevens' words, marketing
8 order provisions that apply, can you please
9 point me to a marketing order provision that
10 you rely on in reference in any matter to the
11 percent solids nonfat equivalent columns in
12 Exhibit 35, page 3?

13 MR. STEVENS: Your Honor, can
14 I have the question repeated for the record?

15 (Question read back.)

16 MR. STEVENS: Can we have a
17 minute, Your Honor?

18 (Discussion held off the
19 record.)

20 MR. STEVENS: Your Honor, in
21 order to shorten this, and I'll offer this as a
22 stipulation, the Department uses the order
23 provisions, that is market administrator use
24 the various order provisions to classify milk
25 products that come in. Not only do they use

1 T. Wilson - Cross by Mr. Vetne

2 the marketing orders and their provisions in
3 the general provisions, but they also base
4 their interpretations upon decisions that the
5 Department has made that have been referenced
6 to in this hearing, certainly, concerning
7 issues such as form and use, considering other
8 issues as to how these individual provisions
9 are interpreted.

10 So when the question is asked of a
11 witness, show me the order provision, well,
12 it's the order provision -- it's specific order
13 provisions of the Texas Order, Southwest Order.
14 It is combination of that with the application
15 of the general provisions, and it's a
16 combination of the all the rule-makings that
17 have gone into the formulation of those
18 regulations.

19 MR. VETNE: Mr. Stevens, can
20 we, perhaps, add to that, that combination, the
21 manner in which USDA on a case-by-case basis
22 has classified individual products so as to be
23 consistent with one product to another?

24 MR. STEVENS: I don't know
25 that I'm willing to stipulate to that. That

1 T. Wilson - Cross by Mr. Vetne
2 goes beyond what I'm willing to stipulate to.

3 MR. VETNE: My question was
4 whether you would be willing to include it, and
5 apparently you are not?

6 MR. STEVENS: No.

7 MR. VETNE: So we have a
8 representation of counsel that, perhaps, we
9 won't find those words solid that's nonfat
10 equivalent.

11 BY MR. VETNE:

12 Q. But nevertheless, Mr. Wilson, in
13 deciding in the Southwest Order what is a Class
14 I product or fluid milk product, you ascertain
15 a solids nonfat equivalent from the product
16 made with UF milk?

17 A. That is correct.

18 Q. And that attributes for purposes of
19 the 6.5 percent standard in your order to the
20 product -- or to that standard the lactose that
21 had been removed?

22 A. That is correct.

23 Q. You periodically receive guidelines
24 and memoranda, instructions at your office from
25 Dairy Programs, formerly the Dairy Division

1 T. Wilson - Cross by Mr. Vetne
2 concerning interpretation of the order,
3 correct?

4 A. Correct.

5 Q. And one of those guidelines was
6 issued in 2004 concerning particularly the 6.5
7 percent standard and how to arrive at 6.5
8 percent ingredients which was included in
9 Exhibit 30(c). Are you familiar with that?

10 A. I believe so.

11 MR. STEVENS: Your Honor, the
12 Department could stipulate to that, that such a
13 thing was issued on the date as given by
14 Mr. Vetne, but the document speaks for itself
15 and any interpretation that he would put on it
16 is his interpretation.

17 MR. VETNE: We're trying to
18 find out what the Southwest Order does, Your
19 Honor, as indicated.

20 MR. STEVENS: That's fine.

21 Q. Prior to April of 2004, you have
22 been there long enough, there was a memorandum
23 addressed to the same subject but specifically
24 included -- excluded rather -- things such as
25 milk protein concentrate, whey protein

1 T. Wilson - Cross by Mr. Vetne

2 concentrate from the tally of things to add up
3 to the 6.5 percent. Are you familiar with
4 that?

5 A. That one?

6 Q. Yes.

7 MR. STEVENS: I'm sorry, Your
8 Honor. I'm having a little trouble. What
9 specific document are you referring to now,
10 John?

11 MR. VETNE: I'm not referring
12 to an exhibit. I'm asking referring to -- I'm
13 asking if he's familiar with a November 22,
14 1995 memorandum which addressed the same 6.5
15 percent standard, but it instructed market
16 administrators not to include milk derivatives
17 such as casein, sodium caseinate, lactose, whey
18 solids, whey protein concentrate or milk
19 protein concentrate in the tally of things to
20 add up if you look for 6.5 percent solids
21 nonfat. Are you familiar with that 1995 memo?

22 A. I'm aware of that, yes.

23 MR. STEVENS: Your Honor, if
24 he has a document that he's referring to, first
25 of all, I would like to see it, and if it's a

1 T. Wilson - Cross by Mr. Vetne

2 document issued by the Department that we can
3 stipulate to, we would be happy to stipulate to
4 it, but any interpretation that he puts on it
5 is Mr. Vetne.

6 Q. Now, currently at least as of April
7 2004, the Southwest office of the market
8 administrator follows the directive of Dairy
9 Programs and looks to all of these ingredients
10 including but not limited to milk protein
11 concentrate, milk protein isolate, whey protein
12 concentrate, protein serum, et cetera, for
13 purposes of determining whether a milk beverage
14 has 6.5 percent solids nonfat?

15 A. We follow the direction of the
16 deputy administrator.

17 Q. Okay. Now, with respect to that
18 type of product, do you in administration of
19 your order apply a similar approach to that
20 described in Exhibit 35, page 3 to come back
21 from protein to a percent solids nonfat
22 equivalent?

23 A. On what product?

24 Q. On the products that are the subject
25 of the April 2, 2004 memorandum.

1 T. Wilson - Cross by Mr. Vetne

2 A. Those products are not -- those
3 products included milk products?

4 Q. No. These are ingredients. I
5 handed the witness a copy of Exhibit 30, table
6 C, a memorandum of April 2004. At the bottom
7 of that memorandum in my yellow highlight are
8 certain ingredients which your office among
9 others were instructed to be included in the
10 tally of 6.5 percent solids nonfat.

11 MR. STEVENS: Your Honor, the
12 Department will stipulate that this memo was
13 sent to the field offices, and we will
14 represent that this employee of the market
15 administrator follows the directives of the
16 dairy division as each market administrators
17 office does.

18 Q. My question, Mr. Wilson, goes to the
19 next step. With respect to those milk-derived
20 ingredients, which, if any or all or not does
21 your office -- with respect to which, if any or
22 all or not, does your office apply an approach
23 that's similar to Exhibit 35, page 3 to
24 determine a solids nonfat equivalent from a
25 milk protein ingredient?

1 T. Wilson - Cross by Mr. Vetne

2 A. Yes.

3 Q. You do to all of them?

4 A. I didn't say that.

5 Q. Okay. Can you identify though which
6 of those products that go into determining 6.5
7 percent solids nonfat to which you in turn
8 determine skim milk equivalent or solids nonfat
9 equivalent?

10 MR. STEVENS: I instruct the
11 witness to answer the question in application
12 of the present order provisions of the
13 Southwest Order.

14 A. In application of the provisions of
15 the Southwest Order, we follow the directives
16 of the deputy administrator.

17 Q. Thank you. Turn the paper around if
18 you face it away from you. And look at those
19 dairy-derived ingredients to which you apply an
20 approach similar to Exhibit 35, page 3 to
21 calculate in turn a solids nonfat equivalent.

22 A. It appears that these are -- as
23 indicated in the letter, they each have a level
24 of protein in them. The same approach can be
25 used in determining a solids nonfat equivalent

1 T. Wilson - Cross by Mr. Vetne
2 as you stipulate.

3 Q. Okay. And, in fact, does your
4 office or would your office, if provided with
5 the product that contained any one of those as
6 the only milk ingredient, would your office
7 make an approach that is similar in order to
8 arrive at a percent solids nonfat equivalent?

9 A. As I have said before, we follow the
10 directives of the deputy administrator.

11 Q. Well, my client and every interested
12 party would like to know if there's a directive
13 that's in addition to that with respect to what
14 milk ingredients enjoy a solids nonfat
15 equivalent calculation and which might add to
16 the total solids in the product but do not have
17 a milk equivalent calculation? That's the
18 thrust of my question.

19 For example, whey protein isolates,
20 if that were the only product, the only
21 ingredient in a beverage and its composition
22 were 6.5 percent or more, would your office
23 under the current fluid milk product definition
24 and Southwest rules apply a skim or SNF
25 equivalent approach?

1 T. Wilson - Cross by Mr. Vetne

2 A. I don't know how to answer this any
3 better than I have already answered it. The
4 deputy administrator directs us from time to
5 time, as you've stipulated, the ways that the
6 programs would have to be done. When that is
7 done, our market administrator applies those
8 directives, and I follow his direction.

9 Q. What directives does your office
10 operate under with respect to which milk-
11 derived ingredients to apply the solids nonfat
12 equivalent procedure?

13 A. The directives are from the deputy
14 administrator.

15 Q. With respect to each of those milk-
16 derived ingredients, what are the directives as
17 you understand them?

18 JUDGE DAVENPORT: Counsel,
19 Mr. Stevens went through a discussion of that
20 with you, and there was offered a statement as
21 to what directives are used. At this time what
22 I'm going to do is I'm going to declare a
23 recess of 20 minutes. I would remind the
24 people in the audience that check-out time for
25 the hotel is 12:00. If any of you want to

1 T. Wilson - Cross by Mr. Vetne
2 check out during this period of time, you would
3 be able to do so, and let's be back at 10
4 minutes after 12:00.

5 (Short recess taken.)

6 JUDGE DAVENPORT: We are back
7 in session. Mr. Wilson, you are still under
8 oath.

9 THE WITNESS: Yes, sir.

10 JUDGE DAVENPORT: Mr. Vetne.

11 BY MR. VETNE:

12 Q. Mr. Wilson, with respect to the
13 dairy-derived ingredient, calcium caseinate, a
14 beverage containing that ingredient as offered
15 on the market, is it the practice of the
16 Southwest market administrators office,
17 directives from market administrator and/or
18 Dairy Programs to employ an approach similar to
19 the example on Exhibit 35, page 3 to derive
20 from protein in calcium caseinate a solids
21 nonfat equivalent?

22 JUDGE DAVENPORT: Mr. Vetne,
23 your voice is sort of tapering off.

24 Q. Did you hear my question?

25 A. Not toward the end.

1 T. Wilson - Cross by Mr. Vetne

2 Q. Is it your practice with respect to
3 calcium caseinate to employ an approach to
4 determine a solids nonfat equivalent for that
5 dairy ingredient?

6 A. If marketed on the Southwest Order.

7 Q. Of course.

8 A. If a product was introduced that
9 used calcium caseinate and was put into a
10 container, we would use a similar approach.

11 Q. Okay. That was my question. Thank
12 you. So if a product contains roughly three
13 percent protein exclusively from calcium
14 caseinate, would you agree with me that it
15 would end up -- excluding other exceptions, a
16 beverage containing three percent protein
17 exclusively from calcium caseinate, that that
18 would produce a solids nonfat equivalent in
19 excess of 6.5 percent?

20 A. I would stipulate to that yes.

21 Q. Now, we have covered calcium
22 caseinate. Would you take a similar approach
23 to casein?

24 A. Are we going through the list?

25 Q. Yes, we are.

1 T. Wilson - Cross by Mr. Vetne

2 A. What was the product?

3 JUDGE DAVENPORT: Mr. Wilson,
4 if you wish, you could indicate that all the
5 items on the list would be similar to read.

6 A. I would so stipulate.

7 Q. All right.

8 JUDGE DAVENPORT: Not
9 stipulate, but testify.

10 Q. Let me go through the list again.
11 With respect to each of these items, milk
12 protein concentrate, liquid milk protein
13 concentrate, milk protein isolate, protein
14 serum, whey protein concentrate, and I stop
15 there, in all of those -- the other one is not
16 a protein product, but with respect to all of
17 those ingredients, you would seek to arrive at
18 a solids nonfat equivalent for purposes of
19 assessing solids nonfat under the 6.5 percent
20 standard in Section 1000.15?

21 A. Not knowing exactly what that
22 complete list of products, actually their
23 makeup or their -- what they are, yes, the
24 similar approach can be made to compute a
25 solids nonfat equivalent.

1 T. Wilson - Cross by Mr. Vetne

2 Q. That wasn't quite my question. My
3 question was under current rules as applied by
4 your office on directives from the market
5 administrator of Dairy Programs, if presented
6 with a beverage which contains any one of
7 those, the protein content, per se, three
8 percent, exclusively from that, would you make
9 a similar calculation to determine solids
10 nonfat equivalent?

11 A. Yes.

12 Q. Okay. In what way, if any, is the
13 approach to the 6.5 percent standard in the
14 fluid milk product definition currently
15 pursuant by a directive and interpretation from
16 Dairy Programs, in what way is that different
17 from proposal No. 7?

18 MR. STEVENS: Your Honor, if
19 he knows. If you know.

20 A. Yeah. I don't know. I'm not
21 prepared to answer that.

22 Q. As in proposal No. 7, you do look at
23 milk-derived ingredients including those in the
24 April 2, 2004 memo, correct?

25 A. I believe that's in the record as

1 T. Wilson - Cross by Mr. Vetne
2 proposal 7. I don't have proposal 7 in front
3 of me.

4 Q. Proposal 7 is the MMPA proposal.

5 A. I understand.

6 Q. You currently look at ingredients,
7 milk-derived ingredients containing milk
8 proteins, correct, for purposes of the
9 standard?

10 MR. STEVENS: Your Honor,
11 asked and answered. I think he already
12 testified that he interprets the provisions of
13 the Dairy Program directives in implementing
14 the order and applying the order, the Southwest
15 order as all the market administrators do.

16 MR. VETNE: My objective, Your
17 Honor, as you know is to try to find out how
18 that --

19 JUDGE DAVENPORT: It's kind of
20 hard to tell which questions have been asked
21 and which questions haven't been asked,
22 Mr. Vetne. We seem to be going back over the
23 same area in different words, but certainly in
24 the same particular area. Can you focus us
25 more sharply and then move on.

1 T. Wilson - Cross by Mr. Vetne

2 MR. VETNE: My objective here,
3 Your Honor, we have gone through the general
4 approach and not getting a general answer to
5 find out how the current application differs
6 from that proposal, and I don't have a general
7 answer, but maybe I can do it with specific
8 answers.

9 JUDGE DAVENPORT: As long as
10 we don't go through an exhaustive encyclopedia
11 of each and every ingredient.

12 MR. STEVENS: Your Honor, I
13 think that the record has to clearly reflect
14 that this is an employee of the market
15 administrators office. He acts pursuant to the
16 direction of the market administrator who acts
17 in conjunction with the director of the Dairy
18 Programs branch in Washington, D.C.

19 For Mr. Vetne to ask this witness
20 how he would interpret it, the only proper
21 answer he could give is subject to the
22 direction of my supervisors and how the various
23 directives apply. We know what the latest
24 directive is from the Dairy Program. We know
25 that he interprets --

1 T. Wilson - Cross by Mr. Vetne

2 JUDGE DAVENPORT: It appears
3 the answer goes beyond that. He has also
4 testified that if faced with particular
5 components that he would employ calculations
6 similar to that contained on Exhibit 35, page
7 3.

8 MR. STEVENS: Subject to
9 limitations that I just outlined, Your Honor,
10 with all due respect.

11 JUDGE DAVENPORT: Such other
12 limitations as, in other words, might be
13 directed by his supervisor. I don't know,
14 Mr. Vetne, that we can go beyond that. If you
15 wish, I will allow you to submit questions
16 which, in other words, we will allow to be
17 forwarded to the director of this program, and,
18 in other words, if they -- they can respond to
19 those questions. In other words, I will allow
20 you to tend to those questions more
21 specifically.

22 MR. VETNE: Let's see if I can
23 finish and do this question through this
24 witness.

25 BY MR. VETNE:

1 T. Wilson - Cross by Mr. Vetne

2 Q. Without specific reference to
3 proposal 7, is the application of a milk order
4 definition by your office currently one that
5 takes proteins in milk-derived ingredients and
6 converts them to a solids nonfat equivalent to
7 assess whether or not the product meets the 6.5
8 percent standard?

9 A. We look at the level protein, and we
10 do compute an equivalent as I have demonstrated
11 in these exhibits, and these exhibits explain
12 how these concentrated-type products have an
13 SNF equivalent.

14 Q. Okay. So it's not these exhibits?
15 We're only talking about page 3 of Exhibit 35,
16 right? That's the one that explains that?

17 A. It's part of the entire exhibit.

18 Q. That's the one page of the exhibit
19 that explains how you come to an SNF
20 equivalent. You don't use the word SNF
21 equivalent in any of the other two pages?

22 A. No. Correct.

23 Q. So page 3 of Exhibit 35 generally
24 explains what you do, what your office does
25 under the current provisions by direction of

1 T. Wilson - Cross by Mr. Vetne

2 your superiors when faced with a beverage that
3 contains a milk protein in some concentrated
4 form?

5 A. Yes.

6 Q. And in making that solids nonfat
7 equivalent, you have some reference to the
8 protein content of the ingredient, correct?
9 For example, casein, calcium caseinate contains
10 about 91 percent protein, correct?

11 A. I think it's been testified that
12 it's close to the 90 percent. So 91 is pretty
13 close to 90, I believe, yes.

14 Q. You know that for a fact as you
15 testified to that effect previously at another
16 hearing? You are not guessing now? You have
17 done this before?

18 A. I have looked at a lot of different
19 products, and calcium caseinate, I believe, is
20 in that range of 90, 91 percent.

21 Q. And there are various products,
22 dairy-derived products containing protein of
23 whey protein concentrate of various protein
24 concentrations 40, 60, 90 -- maybe not 90 --
25 milk protein concentrate, whey protein isolate,

1 T. Wilson - Cross by Mr. Vetne
2 milk protein isolate. They all have various
3 either off-the-shelf protein concentrations
4 which are targeted or buyer-specific protein
5 concentrations, and that's the protein
6 concentration you use to come back to a solids
7 nonfat equivalent; is that correct?

8 A. Typically the protein concentration
9 as exhibited by those ingredients as was
10 testified earlier is a total nitrogen protein.
11 The protein that is in this example of UF
12 concentrate isn't a true protein measurement.

13 Q. So say we have whey protein
14 concentrate at 40 percent protein. That's what
15 you refer to as gross protein or total protein?

16 A. Whatever you want to call it.

17 Q. Are we talking about the same thing?
18 Something other than true protein?

19 A. If you want to call it gross
20 protein, that's fine.

21 Q. All right. Whatever term we're
22 using, gross protein or total protein, we're
23 talking about some of which the difference
24 between that and true protein and some of which
25 as measured by most testing equipment is

1 T. Wilson - Cross by Mr. Vetne

2 actually a measure of nonprotein nitrogen,
3 correct?

4 A. Yes.

5 Q. And the relationship between true
6 protein and nonprotein nitrogen in milk varies
7 from producer to producer, cow to cow, region
8 to region, although maybe not very much, but
9 there is variation, correct?

10 A. Yes.

11 Q. And there's variation between
12 nonprotein nitrogen and true protein, between
13 these various product types as well as within
14 batches of products, correct?

15 A. I would presume so.

16 Q. And when products are offered, say,
17 off the shelf whey protein concentrate at 40
18 percent, there's also variation in
19 manufacturing some allowance, plus or minus,
20 correct?

21 A. That's my understanding.

22 Q. Okay. Do you apply those allowances
23 and variations both in manufacturing as well as
24 between nonprotein nitrogen and nitrogen to
25 account for those variances when you calculate

1 T. Wilson - Cross by Mr. Vetne

2 back to solids nonfat equivalent?

3 A. Probably not because typically
4 whenever we look at the ingredients, we're
5 looking at formulations, batch records, and
6 typically we'll test the actual ingredient and
7 use that as a basis and try to come back and
8 see if that -- if the test that we got on that
9 result matched up with what the supplier of the
10 ingredient says that it's supposed to be. So
11 there's variations as you pointed out.

12 Q. And if it was a close case on the
13 6.5 percent solids nonfat equivalent
14 calculation and a test you did from one batch,
15 from one sample of the ingredient from the
16 ingredient manufacturer would bring that above
17 6.5 percent because of the manufacturing
18 variation, how would you apply that result to
19 your classification determination?

20 A. Well, I'll certainly check with my
21 supervisors and market administrators and
22 ultimately go on to deputy administrator, but
23 as I look at the language, it's a pretty hard
24 number, but I would certainly check with --

25 Q. It's a hard number, meaning it's 6.5

1 T. Wilson - Cross by Mr. Vetne

2 percent contained in or product-containing, and
3 there's no room for discretion with respect to
4 that 6.5 percent?

5 A. Well, I don't know if I want to go
6 to that extent, but I would -- ultimately if
7 I'm looking at a product, I'm not the one
8 making the determination. I refer that up to
9 market administrator who then refers it up to
10 the deputy administrator, and we have then
11 direction from Washington to the final
12 determination of that product.

13 Q. Do you currently test and
14 distinguish between whey-derived proteins and
15 casein proteins?

16 A. Could you repeat?

17 Q. Do you currently test milk products
18 to distinguish between whey-derived proteins
19 and casein proteins?

20 A. Not that I'm aware of, but I'm not a
21 chemist. I don't know.

22 Q. Okay. Do the tests that you
23 currently perform on your equipment distinguish
24 between milk-derived proteins and nonmilk-
25 derived proteins?

1 T. Wilson - Cross by Mr. Vetne

2 A. Nonmilk-derived?

3 Q. Nonmilk proteins.

4 A. As in?

5 Q. As in soy protein isolate.

6 A. I don't think the methods that we
7 employ currently offer any distinction similar
8 to butter fat.

9 Q. Do you know whether food components
10 other than proteins give off nitrogen?

11 A. I have heard a lot of things give
12 off nitrogen.

13 Q. Does your testing equipment, if this
14 happens, distinguish between nitrogen from a
15 nonprotein source and nitrogen from a protein
16 source?

17 A. I don't know.

18 Q. And in your office in making
19 classification determinations, it was alluded
20 to by statement of your counsel, do you also
21 look at other things that have been described
22 characteristically in decisions such as the
23 form of the package, placement of the package,
24 the significance of competition, whether there
25 is product substitution, in your opinion, or

1 T. Wilson - Cross by Mr. Vetne

2 not? What role do those things play in
3 determinations of classification in your
4 office?

5 A. Well, as we have said before,
6 there's -- in the code of regulations, there is
7 descriptions. There are guidance that leads us
8 to form a -- to offer a -- I would characterize
9 it as an opinion at the point of market
10 administrator, at my level anyway. For
11 instance, if we had a product that has
12 something in it and we think, you know, we need
13 to be doing some testing on it, if it's -- I
14 heard one testimony talking about soup. If it
15 looks like a soup, we have in regulations that
16 that is not a fluid milk product effectively
17 classified as Class II. So there's many things
18 we look at as you pointed out.

19 Q. Product characteristics or market
20 characteristics, if I might phrase it this way,
21 that might not be stated with pinpoint
22 precision in the regulations but which apply
23 some intuition?

24 A. Intuition?

25 Q. Intuition or conclusion.

1 T. Wilson - Cross by Mr. Vetne

2 A. Could you -- I'm sorry. I got lost.

3 Q. For example, let's say -- let's just
4 say that a --

5 JUDGE DAVENPORT: Give him an
6 example like similarly to a soup. Would that
7 be an intuitive conclusion?

8 Q. Yes. Similar to a soup would be an
9 intuitive conclusion, correct?

10 A. Okay.

11 Q. And an intuitive conclusion of the
12 same kind contributing to a classification
13 determined might be a low carb dairy beverage
14 were sold in gabled containers or jugs and
15 placed in the dairy case some place close to
16 milk?

17 A. And it was called soup?

18 Q. No. It's called a dairy beverage,
19 it can't be called milk, but it's there. Would
20 that factor have some role, -- does not that
21 factor have some role?

22 A. Certainly.

23 Q. Yes. And does not your office also
24 make some conclusions as part of that process
25 on product substitution by consumers, whether

1 T. Wilson - Cross by Mr. Vetne

2 it's intuitive or measured?

3 A. I don't know if it would make any
4 conclusions by substitutions, except from our
5 own personal standpoint of us maybe
6 substituting our own preferences.

7 Q. You don't recall that Mr. Flemming
8 at one point said that one of the factors
9 entered into for his judgment of classification
10 was that was consumer substitution?

11 A. I don't recall that.

12 Q. Between a low carb product and milk?

13 MR. STEVENS: Your Honor,
14 Garrett Stevens, U.S. Department of
15 Agriculture.

16 MR. VETNE: He doesn't recall.

17 MR. STEVENS: If we're going
18 to go into what records was -- now he's
19 referring to the market administrator,
20 Mr. Flemming and what he testified to in a 15A
21 proceeding.

22 MR. VETNE: I didn't say that.

23 MR. STEVENS: That's what you
24 just said. You said, didn't Mr. Flemming
25 testify such and such, and we can read it back

1 T. Wilson - Cross by Mr. Vetne
2 if we would like to hear it, but that's what I
3 heard, and if we're going to redo that, in
4 other words, put that record on there, why
5 don't you take official notice, and we'll have
6 all of it in, and we won't have to go through
7 all of these questions.

8 MR. VETNE: The witness said
9 he doesn't remember.

10 BY MR. VETNE:

11 A. I don't recall Mr. Flemming being at
12 this hearing and testifying.

13 Q. Okay. No, I wasn't -- I was, in
14 fact, referring to the 15A hearing at which you
15 were present when Mr. Flemming talked about his
16 classification determination. And my question
17 to you was whether you recall him saying that?

18 JUDGE DAVENPORT: Asked and
19 answered. Let's move on.

20 MR. VETNE: I'm going to sit
21 down for a minute so that I can consult with my
22 client.

23 JUDGE DAVENPORT: Very well.
24 Other examination? Mr. Stevens.

25 MR. STEVENS: Your Honor, I

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have a few redirect, if I could.

JUDGE DAVENPORT: You may want to defer that until we decide whether or not there's going to be additional cross.

MR. STEVENS: I'll be happy to do that.

JUDGE DAVENPORT: Is there anyone else that is going to exercise cross of this witness? I take that as no. While they are conferring, this might be a good time -- it's my understanding that the transcript will be coming in fairly short order. What is your pleasure with respect to the period of time for corrections to the transcript, Mr. Tosi.

MR. TOSI: Yes. Your Honor, we're expecting that we would have the transcript up on the Internet on or about July the 11th and then allowing for the usual two week time period for folks to offer corrections.

JUDGE DAVENPORT: Rather than targeting July 11, in other words, let's put it on as to the date it actually is posted on the Web Site.

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MR. TOSI: Yes, Your Honor.

JUDGE DAVENPORT: And allowing two weeks after that date for corrections to the transcripts.

MR. TOSI: And then for every day that we may go beyond July 11, all other dates would be adjusted accordingly.

JUDGE DAVENPORT: Would be adjusted accordingly. How long for initial briefs, Mr. Stevens?

MR. STEVENS: I have no number, Your Honor. I leave it to the parties, but certainly the sooner the briefs are in, the sooner the process moves along.

JUDGE DAVENPORT: Very well.
Mr. Yale.

MR. YALE: Two weeks.

JUDGE DAVENPORT: Mr. Beshore.

MR. BESHORE: Two weeks after the corrections.

JUDGE DAVENPORT: Two weeks after the corrections?

MR. BESHORE: Yes.

JUDGE DAVENPORT: Mr. Vetne.

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MR. VETNE: Four weeks. I got
the biggest --

JUDGE DAVENPORT: Very well.
Mr. Tipton.

MR. TIPTON: I suggest at
least five to six weeks. This is the summer
holidays. There is no --

JUDGE DAVENPORT: I'm a little
reluctant to go beyond the four weeks,
Mr. Tipton.

MR. TIPTON: At least the four
weeks then.

JUDGE DAVENPORT: Four weeks.
How does that sound? And then reply briefs 14
days after that.

MR. STEVENS: Your Honor, I
don't believe anybody has requested reply
briefs, and I know that in many of the previous
hearings I have been in, it only has been one
brief, and in looking at this record, I don't
know that we need reply briefs.

JUDGE DAVENPORT: Very well.
No reply briefs then. That alleviates that
problem. Mr. Vetne, is there additional cross

1 T. Wilson - Redirect

2 of this witness?

3 MR. VETNE: I'm through, Your
4 Honor. Thank you very much.

5 JUDGE DAVENPORT: Mr. Stevens,
6 redirect.

7 -----

8 REDIRECT EXAMINATION

9 BY MR. STEVENS:

10 Q. Just to clarify, Mr. Wilson, you are
11 an employee of the market administrators office
12 of the Southwest Order?

13 A. That's correct.

14 Q. You work pursuant to the supervision
15 of your department administrator?

16 A. Yes.

17 Q. Who is that illustrious individual?

18 A. Richard Flemming.

19 Q. And he works and you work in
20 conjunction with the Dairy Programs branch for
21 the Agriculture Marketing Service at the U.S.
22 Department of Agriculture in Washington, D.C.?

23 A. Correct.

24 Q. From time to time you receive
25 directives from the officials in Washington

1 T. Wilson - Redirect

2 about interpretations of the various order
3 provisions, and some of those have been alluded
4 to in your direct testimony -- I'm sorry -- in
5 your cross-examination just past?

6 A. That is correct.

7 Q. And you are aware of the latest one,
8 right, that has been described for the record?

9 A. Correct.

10 Q. And is it your testimony that you in
11 your office through the direction of your
12 supervisors apply that directive in operating
13 the Southwest Marketing Order?

14 A. Yes.

15 Q. And any testimony that you may have
16 given today which might be considered
17 inconsistent with that would not be correct,
18 would it?

19 A. Correct.

20 MR. STEVENS: That's all I
21 have.

22 JUDGE DAVENPORT: Very well.
23 Any recross? We have talked about the posting
24 of the transcript on the Web Site. I'm sure
25 that most people, at least most of the

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attorneys certainly know where that Web Site is, but Mr. Tosi, for the benefit of anyone else and for the purpose of its inclusion in the transcript, would you give me the --

MR. TOSI: It's www.USDA.GOV/DAIRY. If you go there, it brings you to a menu, and it's pretty obvious to click on things that have to do with rule-makings and things, what this proceeding is, and it will be located there.

JUDGE DAVENPORT: Mr. Stevens.

MR. STEVENS: Your Honor, I just note for the record that the last proposal as is traditional in these hearings is a proposal by the Dairy Programs Agricultural Marketing Service for the Federal Marketing Orders to make such changes as necessary to make the entire agreements and orders conform with any amendments that may result in a hearing.

As I say, this is posed at virtually every hearing that I have been to, and I just want to note for the record that the Dairy Programs proposes that, and we'll implement

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that unless there are comments from the participants in the hearing today.

JUDGE DAVENPORT: Very well. I had previously announced that the exhibits through 33 were admitted into evidence. At this time Exhibit 34 and 35 are admitted to the record as part of this transcript.

(Exhibit Nos. 34 and 35 were admitted into the record.)

JUDGE DAVENPORT: Are there any other administrative matters that need to be touched upon before we recess? That being the case, I declare the hearing closed, and I look forward to reading the briefs.

(At this juncture, the hearing was concluded at 12:45 p.m.)

C E R T I F I C A T E

I hereby certify that the
proceedings and evidence are contained
fully and accurately in the
stenographic notes taken by me on the
hearing of the within cause and that
this is a correct transcript of the
same .
