UNITED STATES DEPARTMENT OF AGRICULTURE

HEARING ON PROPOSED AMENDMENTS TO THE

APPALACHIAN, FLORIDA AND SOUTHEAST FEDERAL MILK ORDERS

Sheraton Suites

4400 Cypress Street

Tampa, Florida

taken on

May 21, 2007

before

Marc R. Hillson

Chief Administrative Law Judge

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(Time: 2:00 p.m.)

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Let's go on the record.

Good afternoon. Today is May 21st, 2007 and this is a hearing in a number of matters on milk in the Appalachian and Florida and southeast and northeast marketing areas. The Docket Numbers are AMS-DA-07-0559, AO-388-A22, AO-356-A43, A0-366-A51 and DA-07-03.

My name is Marc Hillson. I'm the administrative law judge presiding over this case -- of this hearing I should say. I'm here to sort of keep order and to get -- to swear the witnesses in and to get things done in an orderly fashion and to rule on any objections.

I'm not here to make a decision in this matter. That's up to other folks in the agency but not me.

This is a public hearing on the record. Basically, anyone who is interested can testify at this hearing. And likewise, anyone who's interested in asking questions at the hearing.

I'll keep reminding you a number of times over the course of the next few days that people who are on tight schedules, the producers who want to testify and get in and out need to let me know so that I can make sure to work them into that session's schedule.

Two little reminders. And one is that I'm sure everyone's cell phone is either on -- either off or on the -- some sort of a nonaudible -- some unaudible basis and there's other than one option.

And another thing, for the benefit of the reporter, anyone who's going to either be testifying or on a testimonial basis, if you'll give her a business card unless you don't care if your name is spelled right or your designation is wrong.

Whenever anyone talks or asks questions, please state your name or otherwise I'll be asking them, even though they've already given their name before, to give them again and the people that they are representing.

One other preliminary thing is I want just to go through here to see just to get an idea on how many people -- well, who is here and a representation of their capacity if they can stand up or sit in their seats. And I'll start with government counsel.

MR. STEVENS: Thank you, your Honor. My name is Garrett Stephens. I'm with the Office of General Counsel in the Marketing Division of the United States Department of Agriculture in Washington, D.C.

MR. ROWER: I'm Jack Rower, Marketing Specialist with A.M.S. Dairy Programs, the Order Formulation and Enforcement Branch.

MR. CHERRY: Richard Cherry, Marketing Specialist, the Order Formulation and Enforcement Branch in Washington, D.C.

MS. HOOVER: Jill Hoover, Marketing Specialist with Dairy Programs in Washington, D.C.

MS. TINGLE: Barbara Tingle, Dairy Programs, A.M.S., Washington, D.C.

CHIEF ADMINISTRATIVE LAW JUDGE: Do you want to go next?

MR. ENGLISH: My name is Charles English. I'm with the Law Firm of Thelan -- T-H-E-L-A-N -- in Washington, D.C. and I'm here on behalf of Dean Foods Company and National Dairy Holdings.

And just as to witnesses -- Is that what you're asking about as well or --

THE JUDGE: Sure.

MR. ENGLISH: Would expect to have two witnesses. One is Evan Kinser -- E-V-A-N K-I-N-S-E-R -- for Dean Foods Company, and one Rob Cottet -- C-O-T-T-E-T -- for National Dairy Holdings.

While they are not my clients, I also understand two other witnesses with similar positions would be appearing. One -- I believe it's John Hitchell -- H-I-T-C-H-E-L-L -- from Kroger will be here some time during this hearing.

And also, Mr. John Rutherford -- R-U-T-H-E-R-F-O-R-D -- will be here for the National Dairy Foods Association.

CHIEF ADMINISTRATIVE LAW JUDGE: Anyone else in a representational capacity other than that?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: No? Okay. Well, proceed, Mr. Beshore.

MR. BESHORE: Marvin Beshore -- B-E-S-H-O-R-E. I'm an attorney from Harrisburg, Pennsylvania representing Dairy Cooperative Marketing Association, Inc., a proponent of

Proposals 1, 2 and 3.

Our primary witness will be Mr. Sims, Jeff Sims, and perhaps one other witness on direct.

THE JUDGE: Thank you. Anyone else who's here in a representational capacity?

MS. SMITH: Hello. My name is Daniel Smith and I'm here representing the Kentucky Dairy Development Council, Georgia Milk Producers, North Carolina Dairy Producers and the Upper Southwest Producers -- which I didn't mention to you (speaking to court reporter).

With regard to witnesses, as of whom I know at this moment, Norman Jordan with the Southeast Dairy Task Force; Lee Lane, an DFA dairy producer from North Carolina; Billy Holiday, also an DFA producer from North Carolina.

Dr. Ben Shelton will be speaking on behalf of U.S. Milk Producers Association. Bill Newell, a Kentucky Dairy Producer speaking on behalf of DFA as well as the Kentucky Dairy Development Council -- actually, just the Kentucky Development Council.

And also, Will Crist -- C-R-I-S-T, also a Kentucky Dairy Producer speaking on behalf of DFA.

CHIEF ADMINISTRATIVE LAW JUDGE: Thank you. Is there anyone else here in a representational capacity?

MR. MILTNER: Thank you, Judge Hillson. Ryan Miltner -- M-I-L-T-N-E-R -- with the Yale Law Office -- Y-A-L-E -- on behalf of Select Milk Producers. We don't anticipate any witnesses at this point.

CHIEF ADMINISTRATIVE LAW JUDGE: Anyone in the back row here in a representational capacity?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. At this point, the government has a few exhibits that they're required to offer into evidence so I'll ask Mr. Stevens to identify these documents and I'll mark them and get them into evidence.

MR. STEVENS: Thank you, your Honor. The first one we'd like marked is -- and I guess we'll start with the press release announcing this hearing and it's a one-page document --

COURT REPORTER: Excuse me. These microphones aren't up very high, any of them. Is there any way that we can --

MR. STEVENS: Garrett Stevens, Office of

the General Counsel --

CHIEF ADMINISTRATIVE LAW JUDGE: Maybe you could --

COURT REPORTER: It's the microphones that are not up very -- I'm not hearing very well.

MR. STEVENS: I'll speak up.

COURT REPORTER: All of them seem to not be working or --

CHIEF ADMINISTRATIVE LAW JUDGE: You're not --

COURT REPORTER: Yeah. I'm not really hearing very well.

CHIEF ADMINISTRATIVE LAW JUDGE: There's a lot of background noise.

MR. STEVENS: Yeah.

COURT REPORTER: Is there any way that they can be turned up just a little bit?

CHIEF ADMINISTRATIVE LAW JUDGE: Maybe for this part if you'll stand up maybe she can have a chance to hear us.

MR. STEVENS: Yeah. Your Honor, Garrett Stevens with the Office of General Counsel, U.S. Department of Agriculture.

Your Honor, the first exhibit we'd like marked as Exhibit 1 is the press release that's a one-page document. It's on the U.S.D.A. web site USDA.gov or www.ams.USDA.gov. in the rule making part of that web site.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. I've marked that as Exhibit 1.

(Exhibit No. 1 was marked)

MR. STEVENS: All right. And the second one is the Notice of Hearing that was published in the Federal Register in Volume 72 starting at page 25986.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. And I'll mark that as Exhibit 2.

(Exhibit No. 2 was marked)

MR. STEVENS: And then, your Honor, that goes on to 26005, which has the proposals that we're going to hear at the hearing as Exhibit 2.

THE JUDGE: Okay. That's marked as two. What's Number 3?

MR. STEVENS: Okay. Number 3 is the Market Administrators of the -- of the two Marketing Orders here.

Sue Mosley was the one that May 9th, 2007 issued a Determination Re Mailing of the Notice of Hearing and it's mailed to interested parties and I'd like that marked as a one-page document.

I'd like that marked as Exhibit 3.

THE JUDGE: Okay. The Sue Mosley document is marked as Exhibit 3.

(Exhibit No. 3 was marked)

MR. STEVENS: And then there's a similar document signed by Harold Friedly, who's the Market Administrator for the Appalachian Order, Order Number 1005.

THE JUDGE: Okay. We're going to mark that as Exhibit Number 4.

(Exhibit No. 4 was marked)

MR. STEVENS: And then the last document is the hearing clerk issues a certificate of the officials notified that's indicated that -- that she, Joyce McPherson, the hearing clerk -- docket clerk has noticed the governors of Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia of the -- of the -- of the hearing notice and the docket numbers.

CHIEF ADMINISTRATIVE LAW JUDGE: I'll mark that Exhibit Number 5.

(Exhibit No. 5 was marked)

CHIEF ADMINISTRATIVE LAW JUDGE: And I will admit Exhibits 1 through 5 into evidence.

MR. STEVENS: Okay. So those are the -- those are the -- those are the beginning documents.

We have some testimony from witnesses, statistical testimony that they have prepared for the use of the parties at the hearing and also have prepared certain exhibits on the basis of requests that they have received from interested parties.

THE JUDGE: Okay. Thank you. At this time, are there any other preliminary matters or are you ready to call your first witnesses, Mr. Stevens?

MR. STEVENS: I am.

CHIEF ADMINISTRATIVE LAW JUDGE: You may proceed.

MR. STEVENS: And I might add that the exhibits that we're talking about here are in the back of the room. We have extra copies so if parties need them during the course of the hearing, they're certainly encouraged to use them.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. I would ask, though, that any witness give a copy of their statement to the reporter and a copy to me before they testify.

CHIEF ADMINISTRATIVE LAW JUDGE: Have a seat. Raise your right hand.

Do you solemnly swear that the testimony that you're about to give in this dispute hearing will be the truth and nothing but the truth so help you God?

MR. NIERMAN: I do.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Would you please state your name and spell it for the record?

MR. NIERMAN: It's Jason Nierman. N-I-E-R-M-A-N.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Your witness, Mr. Stevens.

DIRECT EXAMINATION OF JASON T. NIERMAN

BY MR. STEVENS:

Q. Okay. Jason, could you briefly describe for the record your educational background?

A. I have a bachelor's degree in science from Purdue University and I also have a masters in agricultural economics from Purdue University, also.

Q. And could you give us your employment background? You are an employee of the Administrator's Office in Louisville, Kentucky?

A. Yes. I worked five years in dairy programs in Washington, D.C. And for the last three and a half years I've worked in the Louisville Marketing Administrator's Office.

Q. And what do you do in the Marketing Administrator's Office?

A. My title is agricultural economics. We're economists. We do statistics. I work the pool and I do analyses when required.

Q. Have you testified at hearings before?

A. Yes.

Q. How many hearings?

A. This will be my third hearing.

Q. Now, prior to the hearing you prepared certain documents that you brought with you today?

A. That's correct.

Q. All right. And those are available for the parties to use and you've given copies to the reporter and the judge?

A. Yes.

MR. STEVENS: Your Honor, I'd like -- there's three -- there are three compilations here. There are multiple pages with maps and tables and such and I would like to mark those for identification. I think we're talking about --

MR. NIERMAN: Six.

MR. STEVENS: Six?

CHIEF ADMINISTRATIVE LAW JUDGE: Which one will be six?

MR. STEVENS: Exhibit 6. January through December of 2004.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay.

MR. STEVENS: It's a compilation of statistical materials.

CHIEF ADMINISTRATIVE LAW JUDGE: I will mark that Exhibit Number 6.

(Exhibit No. 6 was marked)

MR. STEVENS: Okay. And that describes the activities in the Appalachian and marketing areas.

Now, I'm going to have you go through these three exhibits. Your Honor, similar information is available and has been prepared for January through December of 2005, which I would like marked as Exhibit 7.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay.

(Exhibit No. 7 was marked)

MR. STEVENS: And then for the next ensuing year, January through December of 2006, which I would like marked as Exhibit 8.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. I have that.

(Exhibit No. 8 was marked)

CHIEF ADMINISTRATIVE LAW JUDGE: Just to reiterate, 2004 is Exhibit 6, 2005 is Exhibit 7 and 2006 is Exhibit 8?

MR. STEVENS: Yes.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay.

BY MR. STEVENS:

Q. Now, did you also prepare another document, which is entitled Compilation of Statistic -- Statistical Material for Federal Order Number 5, a 13-page document that has a table of contents and about 12 tables, more or less, and you prepared that for the hearing and brought that with you today?

A. Yes.

Q. Is that true?

A. I did.

MR. STEVENS: I'd like that marked as Exhibit 9.

CHIEF ADMINISTRATIVE LAW JUDGE: That's the one that's made at the request of --

MR. STEVENS: No. No. That was one that he prepared and then the next one is the Dairy market.

CHIEF ADMINISTRATIVE LAW JUDGE: All right. Well, I have one that says Dean Foods and one that says Dairy Cooperative Marketing.

MR. STEVENS: That's -- they're all --

CHIEF ADMINISTRATIVE LAW JUDGE: So the one that you just were talking about, the one that's --

MR. NIERMAN: That's Dairy Cooperative Marketing.

CHIEF ADMINISTRATIVE LAW JUDGE: And that's the one you wanted as Exhibit 9?

MR. STEVENS: Nine.

(Exhibit No. 9 was marked)

BY MR. STEVENS:

Q. Okay. And then you also were asked to prepare documents on behalf of Dean Foods?

A. That's correct.

MR. STEVENS: And that we'd like marked as Exhibit 10.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. That's been marked.

(Exhibit No. 10 was marked)

CHIEF ADMINISTRATIVE LAW JUDGE: That's one table?

MR. STEVENS: The one table. One table with a table of contents.

BY MR. STEVENS:

Q. All right. Now, as a preliminary matter, all these documents were prepared by you or pursuant to your supervision?

A. That's correct.

Q. And they come from official records from the Department of Agriculture?

A. That's correct.

Q. And they're not presented for or against any proposals?

A. No, they are not.

Q. They're here to be used for the parties during the course of the hearing for whatever purposes they choose to use them for?

A. Yes.

Q. Now, could you go through the -- briefly, could you go through the compilations and describe what material is contained therein and then go to the ones that you received requests for and describe briefly what those materials are?

A. Well, I'll start with 2004. The first page is a map of the Appalachian Marketing Area as of December of 2004 with the pool distributing plants noted on the map.

The next page would be Table 1 and it's the Annual Summary -- Annual Statistics for the year 2004, the average prices and pounds of producer milk for the year 2004 compared to 2003.

The next page would be -- contains Table 2. And Table 3, that's the NASS price -- prices that are used in the Federal Order of Price formulas.

CHIEF ADMINISTRATIVE LAW JUDGE: Would you -- for the benefit of the reporter, would you just spell NASS and --

MR. NIERMAN: It's National -- National Agricultural Statistic Service.

MR. STEVENS: N-A-S-S.

THE WITNESS: Table 4 is the Federal Order 5 minimum prices that are announced by the Department of Administrator Offices.

Table 5 is the classification of pool handlers total milk receipts.

Table 6 is the receipts and utilization of other source milk and overage and opening inventories for the year on a monthly basis.

Table 7 would be the classification of pool handlers total producer milk.

And Table 8 would be the corresponding total producer butterfat receipts for the year.

Table 9 is the Class I utilization by product. Table 2 is a Class II utilization.

THE JUDGE: You said Table 2 but you mean Table 10?

THE WITNESS: Table 10. Excuse me.

CHIEF ADMINISTRATIVE LAW JUDGE: All right.

MR. NIERMAN: Table 11 is Class III utilization. Table 12 is Class IV utilization.

BY MR. STEVENS:

Q. And just so the record reflects, these are -- you have monthly numbers and you had a total number and then you have an average --

A. Yes.

Q. -- in most cases?

A. Table 13 would be the monthly Class I products distributed in and out of the marketing area by Federal Order 5 pool plants.

Table 14 is Class I packaged milk distributed in marketing area by pool plants and nonpool plants.

Table 15 is the number of producers by state that were pooled on the Federal Order 5 by month for 2004.

Table 16 would be the corresponding total pounds of milk received by producers by state.

Table 17 is producer milk by state and county for May of 2004 and that is --

Q. Over a number of states?

A. It's, like, six pages. And Table 18 would be the producer of milk by state and county for December of 2004.

Q. Now, on some of these they're restricted. Maybe you can indicate for the record what that means, the word restricted?

A. The marketing administrator would restrict any data that would be comprised of three or less producers or handlers in any situation. In this case, it would be both. And if they have less than three producers in the county then that data would be restricted.

Q. In competitor terms?

A. Yes.

Q. Okay.

A. Table 19 is the list of all handlers and plants subject to Federal Order 5 regulation, including pool distributing plants and pool supply plants, cooperatives qualifying as pool handlers, other Order plants with in-area route disposition in Federal Order 5, producer handler, partially regulated plants and exempt and governmental agency plants.

Q. And then the schematic there next indicates the months they're regulated and the plant indicating the months?

A. That's correct.

Q. Now, you prepared similar information or -- and have described how it may or may not be similar for the ensuing two years?

A. It would be the same.

Q. Are they the same?

A. The same tables corresponding to the different years.

MR. STEVENS: So, in the interest of time, your Honor, we'd go over the second two -- this is the same information.

CHIEF ADMINISTRATIVE LAW JUDGE: Unless someone here really wants to hear it --

MR. STEVENS: No. Well, certainly the witness is subject to cross-examination. That's fine. Yeah. But we have a map and similar tables for the ensuing two years. Okay.

BY MR. STEVENS:

Q. Okay. And why don't you go into nine and ten then and describe them and what they contain in those exhibits?

A. Exhibit 9 was prepared at the request of Dairy Cooperative Marketing Agency, DCMA.

On page one and this is for on a monthly basis for 2004 to 2006, the total milk production from producers located inside the marketing area pooled on any order so it does include milk pooled under Federal Order 5 but also Federal Orders 1, 6, 7 and 33.

On page two is the daily deliveries of total milk pooled on Federal Order 5 that was delivered to a pool distributing plant either Federal Order 5 or 7.

And it's also -- on the left-hand side -- the side where the table will be the days of the month and the corresponding deliveries to pool plants on those days for January of 2004 to December of 2006 and that would go through page -- page five of the document.

And in this table we do not have all the data deliveries of the producers in the marketing area in electronic form so on the bottom of that table it shows the percent of the daily deliveries that are reflected in the table. So, it ranges from the mid '80s to the mid '90s depending on the month.

Page six is the transfer to actual transportation credit balancing fund history for the Order from January of 2004 through January of 2007. It shows the beginning balance of the fund, the assessments collected for the fund and the total credits, the value of the total credits paid, the ending balance and then the total pounds that claimed transportation credit and the Class -- the Class I pounds paid out and then prorated percentage to the right if there was not enough funds in the -- from the fund to pay out the requested credits. And that would go on to the next page to page seven.

Page eight is the total pounds for which transportation credit balancing fund was requested from 2000 through January of 2007.

On page nine, that's the weighted average distance milk moved for which a transportation credit balance -- balancing fund payment was requested and that also starts in 2000 through January of 2007.

Page ten is the estimated impact of the proposed Class I price adjustments on the uniform price. The first column is the actual announced uniform price out of Mecklenburg County, North Carolina. The second column is the announced uniform price with the proposed Class I price adjustments. The next column would be the change in that announced uniform price.

The fourth column is the additional revenue in the Federal Order 5 pool due to the proposed Class I price adjustments. The next column would be the weighted average change in uniform price at location, so that takes the -- all pool plant locations into account instead of the -- just at the announced location.

And the final column to the right is the weighted average change in Class I prices at location and it's on a monthly basis and the annual averages are on the bottom.

Page 11 is the transportation credit balancing fund payments using four different scenarios. The first column is the actual payout that was paid out by the Market Administrator from July of 2006 through January of 2007.

The second column effective December 1st there was an intra-rule that established -- established a variable mileage rate factor and that column is calculated -- recalculated and the payment using that factor.

The next column is the payout using the mileage rate factor and the proposed Class I price adjustments.

Q. This is fuel cost adjusted, right?

A. Yeah. It's a -- yeah. It's based on -- it varies on the --

Q. Diesel?

A. -- diesel fuel price. And then the final column is the payout with the mileage rate factor proposed Class I prices and paying on the full load, the entire load of milk moved.

And page 12 would be using that last column on page 11 as the payout for the transportation credit fund starting with a zero balance and using the assessment of 15 cents from January of 2006 through January of 2007 and showing how the payments on the transportation credit balance in the fund would have been estimated, the payout of what the fund would have looked like in 2006.

Page 13 is the estimated impact of the proposed diversion limits on the announced uniform price changing the diversion limits to 35 percent for March through June and December of each year. So, the first three columns is looking at the change in the uniform price just based on the diversion -- change in diversion -- diversion limits.

The fourth column is the -- taking both the proposed Class I price adjustments and the diversion limits into account and then the change in the uniform price. And then the final column is the B, the milk removed from the pool based on the change in diversion limits.

Q. Producer limits?

A. Yes.

Q. Okay. Now, why don't you go to Exhibit 10?

A. Exhibit 10 was prepared at the request of Dean

Foods. The table on page one would be -- was constructed just like the last table on page 13 but using the diversion limits of 15 percent for January, February and December, 20 percent for March through June and ten percent for July through November. And it's the same columns as I just explained in the previous table.

Q. Okay. Do you have any other statistical material?

A. No. That's it.

Q. Let's just go over these couple points.

A. All right.

Q. Again, these were -- these were prepared by you and under your supervision?

A. Yes.

Q. And they're official records of the department?

A. Yes.

Q. It's not for or against any of the parties?

A. No.

Q. It's for use of the parties?

A. Yes.

MR. STEVENS: That's all I have on direct, your Honor. We'll submit this witness for cross-examination. We have other -- we have two other witnesses that --

CHIEF ADMINISTRATIVE LAW JUDGE: I'm

assuming you want these documents to be marked?

MR. STEVENS: I'd like them marked for identification and I would like them admitted either now or after cross-examination.

CHIEF ADMINISTRATIVE LAW JUDGE: All right. We'll have him cross-examined first if there are any questions.

Who wants to -- does anyone have questions of this witness?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: I see none and so at this point --

MR. BESHORE: I wasn't quick enough there, your Honor. I may have a couple questions.

CHIEF ADMINISTRATIVE LAW JUDGE: And once again, I just need to remind you that you need to say who you are each time just for the reporter.

MR. BESHORE: Marvin Beshore for DCMA.

CROSS-EXAMINATION OF JASON T. NIERMAN

BY MR. BESHORE:

Q. Now, Jason, can we look at Exhibit 9 towards the end of it first? On page 12 -- 12 of 13, Exhibit 9. The -- there are no -- there's no estimated payment reflected here in the months or is there of January and

February?

A. There are current provisions in the Order. There is no payment for January and -- or February. January could -- can be requested as a transportation credit month as it was in January of 2007, but it was not in January of 2006.

Q. Okay. So, if you go to -- in terms of January of 2007, you show on -- I guess, what -- page eight of Exhibit 9 in January of 2007 there were transportation credit payments paid?

A. Yes.

Q. How did that come about? Why is it not shown in the 2000 through 2006?

A. The handlers within -- that operated in the marketing area requested the transportation credit be extended to include January of 2007.

Q. And did that require a determination to be made by the Market Administrator?

A. Yes.

Q. And the Market Administrator made the determination that, what, the market needed the credits during that month, in essence?

A. There was an analysis performed that justified the request to include January of '07 as a transportation credit month.

Q. Okay. Now, if you go back to page 12 of 13 -- I think I misspoke perhaps. Probably.
That does show on the bottom line there January of 2007?
A. Yes.
Q. Okay. And it doesn't show anything for February, although that's a -- a month that is included in the proposals but not presently in the Order language?
A. (No verbal response)
Q. Is that your understanding?
A. Yes. We only performed analysis on months that actually the transportation credit provision actually occurred in. It's impossible to go back without the --
Q. You would have had to speculate as to possible volumes --
A. Yes.
Q. -- or mileages and other data for February?
A. That's correct.
Q. Okay. And so that when the table says it's prepared based on the variable mileage factor for in full load, it, in essence, includes calculations based on the proposals -- the DCMA proposal except for the -- including the month of February, which you had no way to estimate?
A. That's correct.
Q. Well, let me ask a question with respect to

Exhibit 10. The diversion limits that are stated in the title of the exhibit, where did you derive those diversion limits?

A. They were provided by Dean Foods.

Q. And so, you were just direct -- you basically just assumed that the limit would be 15 percent in January, February and December, 20 percent for March through June and 10 for July through November?

A. They -- they directed me to use those diversion limits in their analysis.

Q. Okay. Let me ask a question or two about Exhibit 6. And I'm assuming I understand your testimony to be that 6, 7 and 8 have the same tables and the same methodology for calculating them?

A. Yes. That's correct.

Q. Okay. Do any of these tables show the classification of receipts at the pool plants or are they -- I'm looking at a table here -- I guess Tables 5, 6, et cetera -- or are they on a handler basis?

A. They would be total handlers within the marketing area not specified just to pool plants.

Q. Table 6, which talks about receipts and utilization of other source milk, would those receipts necessarily have to be at the pool plants in order to get that table from --

A. I believe so.
Q. So, Table 6 wouldn't involve any diversions to nonpool plants?
A. Can you restate the question?
Q. Yeah. Diversions of milk to nonpool plants by pool handlers, they would not -- that type of milk movement would not show up in Table 6?
A. No, they would not.
Q. That's strictly receipts of other source milk at pool plants?
A. Yes.
Q. And the pool plants are plants identified in Table 19 of Exhibit 6?
A. Yes.
Q. And basically, you've got, what, pool distributing plants, which are -- well, the lion's share of plants and you've got two pool supply plants?
A. In 2004, yes.
Q. In 2004. Thank you.
(Time: 1:38 p.m.)
CHIEF ADMINISTRATIVE LAW JUDGE: Okay.
Mr. English?
CROSS-EXAMINATION OF JASON T. NIERMAN
BY MR. ENGLISH:
Q. Mr. Charles English for Dean Foods and National

Dairy Holdings.

Let me begin where Mr. Beshore left off referring to Tables 5 and 6.

Would the receipts and utilization of the other source milk in Table 6 be part of the volumes that reflect there be reflected as a part of the volumes that show up in Table 5?

A. Yes.

Q. So, just by example, for January of 2004 using Exhibit 6 of the 6 -- of the 6 -- 69,970,119 pounds that show up in the first line of Table 6 in the far right column, that would be part of the 639,197,790 that show up in Table 5 on the first row last to the right?

A. Yes.

Q. Is there within Table 6 -- and I apologize, I'm just looking at it -- for each month, and particularly just January of 2004, the total volume pooled as opposed to the volume received by pool handlers?

A. Table 7 would be the total producer milk pooled by the handlers on Federal Order 5. There should be the difference in Federal Order -- or Table 5 minus or Table -- the total of Table 6, I believe.

Q. Okay. And I apologize. And does milk diverted from pool handlers, is that reflected in the totals on Table 5?

A. Yes.
Q. So, in this case, milk receipts was not necessarily milk received at a pool distributing plant, it's milk pooled?
A. Yes.
Q. Is there anywhere in the data you've provided either in Exhibit 6 -- and I know seven and eight are identically put together -- or in Exhibit 9, the volumes of milk diverted as opposed to physically received at a pool plant?
A. No, there's not.
Q. Could we by the close of this hearing for each of the months in January of 2004 through the same date that you've given us here have the volumes of milk diverted outside the market to plants located outside the Orders represented by 5, 6 and 7?
A. I don't know if I could have the data to do -- I could do the total milk diverted but I don't know if I can -- I may be able to calculate total diversions to plants outside the marketing area.
Q. And I'm perfectly happy to have you work with, obviously, you know, Orders 6 and 7 and I'm going to ask the same questions. And then I just -- and obviously, I know that we need to deal with the confidentiality rules and all of that. But to the extent we could get the total

volume diverted to plants located outside of Orders 5, 6 and 7.

And then, if it is possible -- I realize I'm going a step further and I recognize that may be difficult -- but if it's possible, recognizing the confidentiality and how your data is put together -- to group it in some way geographically to plants located outside to the north and you come up with whatever division makes sense for confidentiality, assuming it can be done. If it can't be done, just come back and tell me it can't be done.

But my definition of north is going to be plants in West Virginia, outside the marketing area, Pennsylvania and northeast of that. So, Virginia, Maryland and any -- anyplace in New England and New York.

Plants to the northwest, which would be essentially Missouri, Indiana, Wisconsin and going in a line that direction -- and again, of course, you folks can define it -- and plants to the West, Texas and Oklahoma, using Oklahoma as sort of the line going west and that way, if that's possible.

A. Okay.

Q. To the extent in both Exhibit 9 and 10 that you made mathematical calculations regarding milk that would be pooled or milk that might no longer be pooled because it wouldn't meet diversion limitations, I assume that -- am I correct in my assumption that that is a static market?

You didn't make any assumptions of how people might have changed in the marketplace, you just took the numbers you had for those months and you compared them to what would be allowable?

A. Yes.

Q. In Exhibit 9 on page 11 of 13 you have the transportation credit balancing fund payments and you have a number of columns. The first column, as you've stated, is the actual payout and the second column is the payout but with a proposed variable mileage rate factor, correct?

A. Can you repeat that, please? Sorry.

Q. I'm just trying to -- looking at page 11 of 13 with your four columns -- and I've already asked about column three but let me make sure I understand what column two is.

If column one is the actual payout, column two is taking column one's actual payout and adjusting it for the variable monetary factor that's been proposed, correct?

A. That's correct.

Q. Now, column three is less than column two. And I assume that the basis point for column three is you start there with your calculations for column two and you make another adjustment?

A. That's correct.

Q. And that other adjustment is for the proposed Class I prices, correct?

A. That's correct.

Q. And since those proposed Class I prices, the service is higher and you use -- the actual class you use those prices as a subtraction factor in calculating transportation. Is that the reason why column three is less than column two?

A. Yes.

Q. Turning to page 13 of 13, for -- let's start with 2004. For every month for 2004 the actual announced uniform price and the second column, the uniform price with the current class of prices and the proposed diversion limits is precisely the same, --

A. Yes.

Q. -- correct?

A. Yes.

Q. And so, that means that the market that existed in 2004 did not divert milk greater than the existing rules?

A. For 2004, if you look to the right column, there's no producer milk -- producer milk -- producer milk removed due to the change in diversion limits. So, you would say that March through June and December of 2004 there were no handlers diverting more than 35 percent.

Q. Okay. And I got it but -- okay. Thirty-five percent is the proposed new limitation for those, correct?

A. Yes.

Q. And so, the marketplace for those months was not diverting as you just said more than 35 percent, correct?

A. There was -- there was no handlers --

Q. No handlers. I'm sorry.

A. -- diverting more than 35 percent.

Q. I guess no handlers diverting 35 percent in the market wouldn't be --

A. But that was calculated on --

Q. You answered -- you answered a better question than I asked, so ...

A. This is calculated on a handler basis, so ...

Q. Okay. But now, for 2005, there would have been producer milk removed that would no long be removed, correct?

A. Yes.

Q. As opposed to the question I asked earlier, which was diversions outside of the area, could we for Exhibit 9 and I guess also 10 for months in which you've now concluded the total producer milk removed would exceed those limits, could we just get the total volume of diverted milk so that one could calculate sort of the percentage of -- of these?

A. (No verbal response)

Q. In other words, I can compare if -- for the month of March of '05 you say that if these rules have been a factor, then 19,672,842 pounds in excess by handler -- by handlers that was in excess of the 35 percent limit, correct?

A. Correct.

Q. Could we just know for comparison purposes what the total volume for that month of diverted milk was, including milk diverted to plants inside the market area so it's not just outside but it's all -- it's all diversions?

A. I should be able to calculate that.

Q. Just give me one moment. That's all I have. Thank you very much. And if you would just let me know whether we're going to be able to get those other requirements.

A. All right.

CHIEF ADMINISTRATIVE LAW JUDGE: Does anyone else have cross questions?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Mr. Beshore, do you have any other questions?

RECROSS-EXAMINATION OF JASON T. NIERMAN

BY MR. BESHORE:

Q. Mr. Beshore again. For clarification and an elaboration, Jason, if you look at page 11 -- 13 of Exhibit 9, the payout with variables MRF that's column two that Mr. English was asking you about, that variable mileage rate factor is presently in the Order, correct?

A. That's correct.

Q. As of December 1, 2006 as you've indicated in footnote one?

A. Yes.

Q. Okay. Now, can you explain just a little bit what -- since it hasn't been elaborated on yet, it's going to be discussed at -- at some point in some length in the proposals what the variable mileage rate factor effective December 1, 2006 is and how that works?

A. Prior to December 1st, 2006 the mileage rate factor -- there was one but it was a fixed factor of .35 cents per hundredweight and that was involved in the transportation credit payment to determine the rate.

And then December 1st, the department issued a decision in which the variable factor was used and it adjusts on a monthly basis based on the price of diesel fuel.

Q. So, the rate per mile that is paid in transportation credits is now calculated each month --

A. That's correct.

Q. -- under the Order, correct? And the calculation is determined on the basis of the published diesel fuel costs as announced by the Energy Information Administration?

A. Yes, that's correct.

Q. Can you tell us what rate -- do you know what the rate was for December or January?

A. December of 2006 it was .438 cents and in January of 2007 it was .44 cents.

Q. And that number can go up or down with the change in -- that rate increases or decreases as diesel fuel prices change?

A. That's correct.

Q. Can you tell us what their calculated rates -- you've published that calculated -- that rate each month, do you not, as a matter of information to the Market -- the Market Administrator's Office publishes the rate each month?

A. Yes.

Q. Okay. Do you have and can you tell us what the rates have been after January up to the most recent announced rate?

A. February of 2007 was .438 cents, April of 2007 was

.442 cents, and May of 2007 was .449 cents. And I don't have -- the June was just announced on Friday and I don't have that number.

Q. Okay. Thank you.

CHIEF ADMINISTRATIVE LAW JUDGE: Any other cross-examination?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Mr. Stevens, do you have any redirect for this witness?

MR. STEVENS: No.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. And I assume there's no objections to Exhibits 6 through 10 being received into evidence?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: And you may step down.

PRESIDING OFFICER: Mr. Stevens, you may call your next witness.

MR. STEVENS: Steve Duprey.

(Time: 1:54 p.m.)

CHIEF ADMINISTRATIVE LAW JUDGE: Please raise your right hand. Do you solemnly swear that the testimony you're about to give in this hearing will be the truth and nothing but the truth so help you God?

MR. DUPREY: I do.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Can you please state and spell your name for the record?

MR. DUPREY: My name is Steven Duprey. S-T-E-V-E-N D-U-P-R-E-Y.

CHIEF ADMINISTRATIVE LAW JUDGE: You might want to bring the mic a little bit closer.

MR. DUPREY: (Witness complies)

CHIEF ADMINISTRATIVE LAW JUDGE: Okay, Mr. Stevens. It's your witnesses.

DIRECT EXAMINATION OF STEVEN DUPREY

BY MR. STEVENS:

Q. Could you describe for the record your educational background?

A. I have a master's and a bachelor's degree both in economics from the Michigan State University.

Q. And by whom are you employed?

A. The Market Administrator in Atlanta, Georgia.

Q. What are your duties in the Market Administrator's Office?

A. I'm employed as an agricultural economist and I've been in that position for -- since 2000.

Q. Seven years?

A. Seven years.
Q. And what are your duties?
A. Statistical reports, economic analysis, market -- writing the monthly market bulletins, special projects.
Q. Okay. And you've testified in market hearings before, Federal Market Order hearings?
A. Yes.
Q. How many?
A. This will be my fourth, I believe.
Q. Okay. And as in those hearings did you prepare material that you brought with you today to enter into evidence?
A. I did.
Q. And you've made it available in the back of the room for the use of the parties and submitted copies for identification to --
MR. STEVENS: Your Honor, do you have one?
CHIEF ADMINISTRATIVE LAW JUDGE: We have, I assume, a full set.
MR. STEVENS: They've been distributed. Okay.
BY MR. STEVENS:
Q. Now, you've prepared certain annual statistics; am I right?
A. Correct.

Q. For two Marketing Order hearings?
A. Correct.
Q. What Marketing Order areas are they?
A. Federal Order Number 6, which is the Florida marketing area, and Federal Order Number 7, which is the southeast marketing area.
Q. All right. And you prepared statistics for what years?
A. For 2004, 2005, 2006.
MR. STEVENS: Your Honor, I'd like to mark for identification the three exhibits which have green covers, the table of contents and 19 pages, the first one 19 and the second one 18, and a third one.
These are the marketing area and statistics for Federal Order Number 6 for the years 2004, 2005 and 2006.
CHIEF ADMINISTRATIVE LAW JUDGE: So I'll mark the 2004 Florida Marketing Area Statistics Exhibit Number 11.
(Exhibit No. 11 was marked)
CHIEF ADMINISTRATIVE LAW JUDGE: And I'll mark the 2005 Volume as Exhibit 12.
(Exhibit No. 12 was marked)
CHIEF ADMINISTRATIVE LAW JUDGE: And then,

the third green volume I have here as Florida I'll mark as Exhibited Number 13.

(Exhibit No. 13 was marked)

BY MR. STEVENS:

Q. And did you also prepare similar information for Federal Order Number 7 southeast marketing area?

A. Yes.

MR. STEVENS: The next three exhibits, your Honor -- I believe the first one is a buff colored table of contents and various statistical maps and statistical materials. The first one I think is 34 pages. The second one is 35 pages. The third one is 33 pages.

CHIEF ADMINISTRATIVE LAW JUDGE: I'll mark the 2004 volume for the Southeast Marketing area as Exhibit 14.

(Exhibit No. 14 was marked)

CHIEF ADMINISTRATIVE LAW JUDGE: I'll mark the 2005 one as Exhibit 15.

(Exhibit No. 15 was marked)

CHIEF ADMINISTRATIVE LAW JUDGE: And I'll mark the 2006 one as Exhibit 16.

(Exhibit No. 16 was marked)

BY MR. STEVENS:

Q. All right. And did you also prepare documents

setting forth the impacts of Proposal Number 3 that's noticed for hiring here?
A. I did.
MR. STEVENS: And, your Honor, I'd like that marked, I believe, as Exhibit 14 --
CHIEF ADMINISTRATIVE LAW JUDGE: Seventeen is the next number.
MR. STEVENS: Seventeen. Yes, sir.
CHIEF ADMINISTRATIVE LAW JUDGE: Which one of these two documents?
MR. STEVENS: It would be the one-page document. The one-page document. Impacts of Proposal Number 3; 2004 to 2006, Federal Order 6 - Florida Marketing Area.
CHIEF ADMINISTRATIVE LAW JUDGE: Okay. And I have that marked as Exhibit 17.
(Exhibit No. 17 was marked)
MR. STEVENS: And the next document I would like marked is a -- unfortunately, it doesn't have a number of pages but it is a document --
CHIEF ADMINISTRATIVE LAW JUDGE: The Dean Foods one or the proposed --
MR. STEVENS: It looks like a 15-page document. It is one that has the impacts of Proposal Number 2 --

CHIEF ADMINISTRATIVE LAW JUDGE: Okay.

MR. STEVENS: -- under Federal --

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. I'll mark that as Exhibit Number 18.

(Exhibit No. 18 was marked)

BY MR. STEVENS:

Q. Now, were you asked to prepare any documentation for this hearing by any private parties?

A. Yes.

Q. Okay. Did you bring that with you?

A. Yes. The final document would be the Dean Foods impact analysis.

Q. Okay.

MR. STEVENS: And how about I mark that one Exhibit Number 19? Okay.

(Exhibit No. 19 was marked)

CHIEF ADMINISTRATIVE LAW JUDGE: And that's 19?

MR. STEVENS: Nineteen was the last one that Dean Foods ...

CHIEF ADMINISTRATIVE LAW JUDGE: Thank you.

BY MR. STEVENS:

Q. Okay. And now, if you could, for the record briefly go through these documents and explain for the record what is contained therein. Let me ask you before you do that, were these prepared by you and pursuant to your supervision?

A. Yes.

Q. And they're official records from the Department of Agriculture?

A. Yes.

Q. Are they presented for or against any of the proposals presented here today?

A. No.

Q. They're here for the use of the parties for the purposes they deem necessary during the course of the hearing?

A. Yes.

Q. All right. Now, could you go through these -- the exhibits which have just been marked and briefly explain what's contained in each exhibit?

A. Yes. Exhibit 11 is an annual document that the Market Administrator is required to prepared in the normal course of duties. The first page is a table of contents, the second is a map --

Q. Let me ask you. Does this appear on a web site someplace, --

A. It does.

Q. -- this material?

A. Yes.

Q. Both these documents, the three Exhibits 11 through 13 and 14 through 17?

A. They're available -- available at www.fmm.Atlanta.com.

Q. Okay. Continue.

A. The first page is that map of the Florida marketing area with the locations of pool distributing plants. The second page are the receipts and classifications of producer milk and butterfat by month for Classes I, II, III and IV as well as the total proof of receipts.

Page three is the receipts and classifications of other source overages and opening inventories, again, for January through December of 2004.

On page four is the classification of total receipts by class along with the total receipts.

Page five is the total Class I utilization by pool handlers, which shows the total Class I Route 1 disposition, what was transferred or diverted to nonpool plants as well as ending inventory and Class I shrinkage.

Page six is the route disposition in the market by pool and nonpool plants along with a chart describing the -- the table -- the table shown.

The seventh page is the route disposition for -- well, it's the total route disposition for route inside the marketing area by pool plants. It also shows the disposition on routes outside of the marketing area by pool plants and then it sums those two numbers together to have the total disposition for pool plants.

Page eight contains information on the disposition on routes inside the marketing area by nonpool plants. And, once again, it shows the disposition of the routes inside the marketing area by pool plants and the final table at the bottom shows the total disposition inside the marketing area and that is by -- by month and by product as well.

Page nine is the total Class II utilization by pool handlers.

Page 10 is Class III utilization by pool handlers.

Page 11 shows the total Class IV utilization by pool handlers.

Page 12 is the announced Federal Order Class and Uniform Prices, so it's the skim and butterfat prices by class as well as the uniform price by month.

Page 13 is the National Agricultural Statistic Service product price averages that are used in the Federal Order pricing formulas.

Page 14 begins a listing of fluid milk distributing pool plants.

Page 15 is the cooperatives qualifying as pool handlers for Federal Order Number 6.

Page 17 lists nonpool plants who had route dispositions in the Florida marketing area. It is by Order and that's -- goes until page 18. And 18 also shows the exempt distributing plants who have route disposition. It shows partially regulated distributing plants.

And then, finally, on page 19 it shows producer handling plants who had route disposition. And that concludes Exhibit 11.

Q. Okay. And now, 12 and 13 are -- are similar information. And if they're dissimilar in any way, could you describe that for the record?

A. They should be exactly the same except for the 2005 and 2006.

Q. Yeah. And I note on the first one your table of contents ends on page 16 but you intend that to describe at least on my copy --

A. Yeah. The nonpool handler listing begins on page 16 and there are further delineations.

Q. So, in other words, it's described?

A. Yes.

Q. And let me ask you about 14, 15 and 16. Does this contain similar information and the statistical information for the Southeast Order that appears in 11 through 13?

A. It's exactly the same information. The only deviation is a report for the transportation credit balancing fund.

Q. Okay. So that's the difference between these two, in Order Number 7 you have the transportation balancing fund information?

A. We -- yes. Uh-huh.

Q. Where do you find that, pages 26 and --

A. It is page 26. Correct.

Q. Through the remainder -- well, page 26. Okay. And basically, that information is found on page 26.

A. And I think there might be one other difference and that would be listed in the producer milk and number of producers by state and county --

Q. Okay.

A. -- on page 13 of Exhibit 14.

Q. Okay.

A. And producer milk and number of producers by state and county for December of 2004, that begins on page 20.

Q. Okay. And so you've done that in 14, 15 and 16?

A. Correct.

Q. Okay. Is there anything else you'd like to say about the statistics?

A. No.

Q. Okay. Just let me -- let me make sure that the record reflects that these were prepared by you pursuant by you or pursuant to your supervision?

A. Correct.

Q. And they're official records of the department?

A. Correct.

Q. And they're not for the standing proposal?

A. They are not.

Q. They're for the use of the parties at the hearing?

A. They are.

MR. STEVENS: We ask that these be marked for identification as I believe they have been and that they be entered into evidence at this time during the course of examination.

CHIEF ADMINISTRATIVE LAW JUDGE: Do you have any follow-up questions on 17, 18 and 19?

MR. STEVENS: Thank you, your Honor, for reminding me.

BY MR. STEVENS:

Q. Would you like to briefly describe what's contained in Exhibits 17, 18 and 19 for the record?

A. Yeah. The same request that was made of Jason Nierman was made of me and I performed a similar analysis regarding the Florida Marketing Area. It shows by month from 2004 to 2006 the original blend price in Tampa, Florida and that would be the third column.

The fourth column would be the -- the new blend price at Tampa if Proposal Number 3 was implemented.

The fifth column is the impact of the proposed adjusted Class I price, so that's the difference between the previous two columns.

The next column is the weighted average blend price impact. And then the final column is the total amount of additional Class I revenues that would be generated by Proposal Number 3. The bottom shows the average annual totals.

Q. And you did something similar in 18 and 19?

A. The first --

Q. Let me ask you this. As far as 17 is concerned, this was Proposal Number 3 --

A. Correct.

Q. -- for the Federal Order Number 6. Who asked you to prepared this information?

A. The proponents, DCMA.

Q. Okay. And now, go on to 18. Who asked you to prepare that information?

A. Again, it was DCMA.

Q. And relating to Proposal Number 2 for Federal

Order 7?

A. Correct.

Q. Okay.

A. The first page of Exhibit 18 is identical to Exhibit 17 except it's just applied to the southeast marketing area and the prices are announced at the Atlanta base zone.

Q. Okay.

A. And the second page of the exhibit is a summary of transportation credit balancing fund activity if Proposal Number 2 was implemented and the footnote explains a little further.

This assumes an assessment rate on Class I producer milk of 30 cents per hundredweight, that payments are made on a full load basis and that the proposed Class I differentials are used as well as mileage rate factors that were implemented in the December -- recent December of 2006 decision, similar to the analysis performed by Mr. Nierman.

The third page shows from 2000 to 2006 what was actually requested in terms of the pounds requesting payment for the transportation credit balancing fund on the Southeast Order.

The fourth page shows the average distance traveled by milk requesting a credit from the transportation credit balancing fund by month from 2000 to 2006.

The fifth page is a table that shows from 2000 -- from January of 2004 to December of 2006 the producer milk pooled on Federal Order 7 by state. And some of this information is restricted because there were fewer than three handlers in that given state in that given month.

On the eleventh page we have a table showing the total Federal Order milk marketing farms located inside of Federal Order 7, so these are farms located within the southeast marketing area that had pooled milk on some Federal Order.

Footnote one says -- it includes the milk marketers on all Federal Orders but it excludes milk that was not pooled.

And then beginning on the twelfth page there's a table showing the daily deliveries to pool distributing plants on the Southeast Order and it's from January of 2004 to December of 2006 the total amount of milk delivered to pool plants -- pool distributing plants -- excuse me -- by day. And that should conclude ...

Q. Eighteen?

A. Eighteen.

Q. How about 19?

A. Nineteen was prepared at the request of Dean Foods. It shows the -- the original blend price in Atlanta and it shows the impact of the proposed diversion limits. I shouldn't -- it shouldn't say proposed diversion limits, it should say the diversion limits requested by Dean Foods and they are listed in the -- in the last column there.

They range 10 to -- 10 to 20 percent and it shows the impact of what those diversion limits would be on the blend price. The footnote shows the amount of milk that would have been removed on an annualized basis had those diversion limits been in effect for the southeast marketing area.

The second page of Exhibit 19 again shows transportation credit balancing fund activity; however, it's under a different set of scenarios requested by Dean Foods. This activity assumes and assessment rate of 20 cents per hundredweight on Class I producer milk, it assumes that the proposed Class I differentials are used and uses mileage rate factors for all the months.

It does not use a full load on that full load analysis for payout, it uses the lower of the plant or the market Class I utilization to determine the -- a portion of the payout.

The third page begins with a table, it's producer milk by state on Federal Order 7 and this is simply a table that has rearranged and ranked from highest to lowest the states that have the most milk pooled on the

Southeast Order very similar to the last few --

Q. What was the --

A. I'm sorry -- Exhibit 18 starting on page five. It's the exact same information just rearranged according to the food request. And so that should conclude Exhibit 19.

Q. Okay. So, the answer is do these exhibits, as far as being prepared by you pursuant to your supervision and its source and its purpose in this hearing would be the same?

A. Correct.

Q. Okay.

MR. STEVENS: We submit the witness.

CHIEF ADMINISTRATIVE LAW JUDGE: Does anyone have any questions of this witness?

CROSS-EXAMINATION OF STEVEN DUPREY

BY MR. BESHORE:

Q. Mr. Duprey, does -- I'm sorry. Marvin Beshore.

Does Order 7 have the same since December of '06 the same variable mileage rate factor application in its transportation credit programs as Mr. Nierman described in four and five?

A. Yes.

Q. Let me direct your attention if I could to Exhibit 18. It's an unnumbered page and towards the back, Total Federal Order Marketings of Farms located in Federal Order 7, the southeast marketing area. Do you have that?

A. Yes.

Q. Okay. Now, did -- when you prepared this was this -- does this represent marketing of all farms in the Federal Order 7 marketing area?

A. Yes.

Q. Irrespective of whether the milk was pooled in Order 7?

A. As the footnote shows it was milk that was marketed on all Federal Orders but not including milk that was not pooled.

Q. Okay. Would it be fair -- is this -- this is just grade A milk that's eligible for pooling as grade A milk?

A. Yes. It was -- it was actually pooled. Not eligible to be pooled, it was pooled.

Q. Okay. But when you say excluding milk not pooled, is there any substantial amount of milk not pooled as produced in these states?

A. On some instances there are price related reasons why milk doesn't get pooled but it's extremely rare in the southeast. It's -- it's -- it's extremely rare.

Q. Do you know, in addition to Order 7 what orders was milk delivered to or pooled on that was from within the

Order 7 marketing area?
A. Federal Order 5, Federal Order 6, Federal Order 126 and I believe Federal Order 32 as well.
Q. Okay. If all of the milk in the area was pooled on Order 7 -- let's just talk about January of 2006 -- do you have any idea whether it would have met the Class I needs of the marketplace?
A. (No verbal response)
Q. If you refer to page four of Exhibit 16 I think that might help. Page five.
A. No, it would not.
Q. Now, in a Federal Order pool even where you have full deliveries solely to distributing plants, Class I plants, is a hundred percent of that milk utilized that's classified as Class I at any time?
A. Generally, no.
Q. Why is that?
A. There are other uses of milk that milk products get classified as or used in that particular non-Class I product.
Q. Even at distributing plants?
A. Yes.
Q. So, even if all the milk in Order 7 marketing area were delivered to Order 7 distributing plants, we established it wouldn't have met all their needs for Class I

milk. It all wouldn't have been used for Class I in any event, would it?

A. No.

Q. Does the same thing -- the same dynamic basically apply in Order Number 6, that is, if you look at the milk produced in Florida, it doesn't meet the needs of the distributing plants in Florida generally?

A. At some points of the year, yes. At other points of the year, no.

Q. I don't have any other questions at the moment.

(Time: 2:23 p.m.)

CHIEF ADMINISTRATIVE LAW JUDGE: Any other questions? Go ahead, Mr. English.

CROSS-EXAMINATION OF STEVEN DUPREY

BY MR. ENGLISH:

Q. Charles English for Dean Foods Company and National Dairy Holdings.

If I could organize this by Order -- and if I get off track, I apologize -- let's first talk about Order 6.

Order 6 -- and I think producer milk -- as opposed to what is in the Code of Federal Regulations Diversion Limits that are adopted by the Order, has the Market Administrator for Order 6 adopted some different diversion limits pursuant to her discretion?

A. I don't believe so.
Q. When you prepared Exhibit 17 I assume that you prepared it given the diversion limits that are existing, correct?
A. (No verbal response)
Q. Because there's --
A. Correct.
Q. Because there's no proposal that you're aware of that would alter the diversion limits for Order 6, correct?
A. Correct.
Q. Turning to Exhibit 11 -- so we'll talk about Order 6 again -- I asked some questions. Were you in the room when I was speaking with Mr. Nierman?
A. I was, yes.
Q. And I was asking -- I asked a number of questions about diversions. Let me see how much we know about these Orders and I may make similar requests, if possible.
On page -- starting on page nine of Exhibit 11 -- I'm sorry. I apologize.
Starting on page five you have total Class I utilization by pool handlers and in the first section of that table you have transferred -- you have second column while transferred or diverted to nonpool plants for Class I, correct?
A. Correct.

Q. And you have similarly transferred or diverted to nonpool plants for Class II on page 9?
A. Correct.
Q. Class III on page 10?
A. Correct.
Q. And Class IV on page 11?
A. Correct.
Q. So, one could fairly easily calculate the total volume transferred or diverted in all classes by adding those four together, correct?
A. I think the -- the Class III includes and use to produce. But yes, generally. Generally --
Q. How difficult would it be at the end of this hearing to calculate just transferred total volumes of trans -- I'm sorry -- divertible for each month if you could provide the data?
A. I'd have to confer on that. I'm not sure if that information would even be releasable if it would be public information.
Q. I understand. Okay. And so, did you hear the number of questions that I asked Mr. Nierman about trying to calculate the data? And it obviously starts with a supposition of whether the total volume can be calculated.
And similarly, if the total volume can be calculated, can it, in the same fashion that I asked him, be

divided geographically? And I'm perfectly happy to have you work together and come to the same geographical lines, if it's doable, that mask confidential data. The last thing we're looking for is to divulge confidential data.

A. We can confer and find out whether or not that's doable.

Q. Now, turning to page nine for a moment, under total Class II utilization by pool handlers you have a column called nonfluid use to produce. For instance, January of 2004 8,074,863 pounds. Could you tell us what that means?

A. I'm not sure if that is milk powder that is used to make a Class II product. I think that might be what it is.

Q. But you're not certain?

A. I'm not certain.

Q. All right. Could you -- could you find out for us?

A. I could.

Q. All right. Are there -- turning now to Class III on page 10, are there any plants physically located in Florida that have Class III utilization other than inventory, I mean?

A. I do not know.

Q. Are there any plants in Florida -- turning to page

11 -- that have Class IV utilization that isn't any inventory or shrinkage or anything like that?

A. Again, I do not know.

Q. If you could find out when you're asking the other questions, I would appreciate it.

And as to the diversions, I'd ask the same question about -- if it's doable -- I assume it's more likely to be doable confidentiality-wise in total volume for Order 7 than Order 6 assuming it is the same kind of conference about how.

A. (No verbal response)

Q. And that's all the questions I have. Thank you.

CHIEF ADMINISTRATIVE LAW JUDGE: Does anyone else have any questions for Mr. Duprey?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: Does the government have any further questions?

MR. STEVENS: No.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. I'm going to -- are there any objections of the admission of Exhibit 11 through 19?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Exhibits 11 through 19 received into evidence. And Mr. Duprey, you may step down for now, but just like Mr. Nierman, I guess you may be testifying again later on at the hearing.

Okay. Can we do one more witness and then we can --

MR. STEVENS: We have one more witness.

CHIEF ADMINISTRATIVE LAW JUDGE: Before we take an afternoon break do you have -- you have one more witness, do you not, Mr. Stevens?

MR. STEVENS: We don't have any more witnesses for now.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. I misunderstood. Are you going to be calling the next witness, Mr. Beshore?

MR. BESHORE: Yes, Mr. Sims.

CHIEF ADMINISTRATIVE LAW JUDGE: And he's going to be on for a bit of time; is he not?

MR. BESHORE: Yes.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. All right. So why don't we take our afternoon break now and come back in about 15 minutes and then we'll go to about 5:30. Off the record.

(A break was taken from 2:31 p.m. to 2:52 p.m.)

CHIEF ADMINISTRATIVE LAW JUDGE: We're back on the record. Mr. Beshore, do you want to call your next witness?

MR. BESHORE: Yes. I'll call Jeffrey Sims.

CHIEF ADMINISTRATIVE LAW JUDGE: Do you solemnly swear that the testimony you will give in this hearing will be the truth and nothing but the truth so help you God?

MR. SIMS: I do.

CHIEF ADMINISTRATIVE LAW JUDGE: Please state and spell your name for the record.

MR. SIMS: Jeffrey Sims -- S-I-M-S.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Your witness, Mr. Beshore.

MR. BESHORE: Okay. Your Honor, we would like to request that Mr. Sims's statement, which is a 61-page document, be marked as proposed Exhibit 20.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. And I've so marked it.

(Exhibit No. 20 was marked)

MR. BESHORE: And the exhibits prepared in support of proposal Numbers 1, 2 and 3, which are -- it's one exhibit and the exhibits are identified by letter, you know, within the Exhibit as A through S. A through S. And I'd like to ask that the exhibit document be marked as proposed Exhibit Number 21.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. I so marked it.

(Exhibit No. 21 was marked)

MR. BESHORE: Okay. Thank you.

DIRECT EXAMINATION OF JEFFREY SIMS

BY MR. BESHORE:

Q. Okay. Now, before you proceed with your prepared statement, Mr. Sims, could you briefly describe for us your educational and professional background?

A. Yes. I have a bachelor's and master's degrees in agricultural economics from Auburn University. I have employment experience with the Market Administrator's Offices in Atlanta, Georgia as assist -- as an agricultural economist and assistant to the Market Administrator, and then Assistant Market Administrator in the Louisville Market Administrator Office.

And 11 years ago, I left the federal program and began working with Dairy Cooperative Marketing Association. I also work with, in other capacities, other marketing agencies in the southeast and southwest.

Q. What years were you in the Market Administrator's offices in Atlanta and Louisville?

A. In Atlanta, 1983 through 1991. And then in Louisville, 1991 through 1996.

Q. Okay. And briefly, what responsibilities did you have in your various positions within the -- those Market Administrator's Offices?

A. As an agricultural economist, my duties were similar to the -- described by Mr. Duprey and Mr. Nierman, data analysis, data recording, market analysis, market information.

As assistant to the Market Administrator, I had responsibilities in research, market information, producer relations. As Assistant Market Administrator in Louisville, I had responsibilities in all phases of federal administration.

Q. How many Federal Orders were involved that -- were you involved in the administration office of those offices?

A. Several. Their -- at one time, the Atlanta Market Administrator administrated as many as four when I was there. Also, for a brief time, the three Florida Orders that existed at that time and then four Orders in -- in Louisville.

Q. All right. And in your employment subsequent to service with the Market Administrator's Offices what orders have you been involved in marketing in your -- in your work?

A. Primarily, what now is the Appalachian Order, the

Southeast Order and the Florida Order with some understanding and recognition of issues in the Order 1 area, Order 33, Order 32 and Order 126.

Q. Have you testified previously in Federal Order hearings?

A. Yes.

Q. Both in your -- during your tenure with the Marketing Administrator's Office and in private industry?

A. Yes.

Q. Do you have any idea on how many occasions?

A. I don't think I could -- well, I could count that high but I -- several.

MR. BESHORE: I would offer Mr. Sims, your Honor, as an expert in agricultural economics and the Federal Market Order Administration for his testimony.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Any objections?

(No verbal responses)

CHIEF ADMINISTRATIVE LAW JUDGE: He's so recognized.

BY MR. BESHORE:

Q. Okay. Now, Mr. Sims, the document that's been marked as Exhibit 20, is that your prepared direct testimony?

A. It is.

Q. Okay. Would you proceed with it, please?

A. Yes. I am Jeffrey Sims. I am Assistant Secretary of Dairy Cooperative Marketing Association, Incorporated, hereafter referred to as DCMA, a marketing agency in common operating in the southeastern United States.

My business address is 13400 U.S. Highway 42, Suite 162, Prospect, Kentucky 40059.

I testify today on behalf of DCMA, whose nine Capper Volstead cooperative members are: Arkansas Dairy Cooperative Association, headquartered in Damascus, Arkansas; Cooperative Milk Producers Association, Incorporated, headquartered in Blackstone, Virginia; Dairy Farmers of America, Incorporated, headquartered in Kansas City, Missouri; Dairymen's Marketing Cooperative, Incorporated, headquartered in Mountain Grove, Missouri; Lone Star Milk Producers, Incorporated, headquartered in Windthorst, Texas; Maryland & Virginia Milk Producers Cooperative Association, Incorporated, headquartered in Reston, Virginia; Select Milk Producers, Incorporated, headquartered in Artesia, New Mexico; Southeast Milk, Incorporated, headquartered in Belleview, Florida and Zia Milk Producers, Incorporated, headquartered in Roswell, New Mexico.

Each of the members of DCMA marketed milk on one or more of the Appalachian, Florida and Southeast Federal Milk Marketing Orders during the year 2006.

Together, during December of 2006, DCMA member cooperatives marketed as member milk more than 69 percent of the producer milk pooled on the Appalachian Order, and when including milk marketed of other producers, more than 87 percent of the producer milk pooled on the Order.

For the Florida Order, during December of 2006, DCMA member cooperatives marketed as member milk more than 95 percent of the producer milk pooled on the Order, and when including milk marketed of other producers, more than 96 percent of the producer milk pooled on the Order.

For the Southeast Order, during the same month, DCMA member cooperatives marketed as member milk more than 69 percent of the producer milk pooled on the Order, and when milk -- and when milk marketed of other producers is included, more than 87 percent of the producer milk pooled on the Order.

DCMA is here today offering a comprehensive set of proposed amendments to the Appalachian, Florida and the Southeast Federal Milk Marketing Orders, listed as Proposals Numbers 1, 2 and 3 in the Notice of this hearing.

DCMA wishes to thank the Secretary for hearing these proposals on an expedited schedule and for considering emergency action and the omission of a recommended decision under the rules of practice and procedure.

DCMA *offers the following testimony in* support of Proposals Number 1, 2 and 3. For purposes of simplicity, I will refer to the three-Order area as the southeast region. I will attempt to be explicit if and when referring to the specific Order, individual, Southeast Order No. 1007.

Introduction

For at least the last quarter century, the southeastern United States has experienced declining milk production, and at the same time has seen substantial increases in population. These two factors have combined to create a milk deficit condition in the southeast unlike any other region of the United States.

Increases in Class I sales, brought on by increases in population, coupled with the decreases in milk production have left the southeast in the unenviable position of seeking milk supplies from further and further away.

According to Market Administrator statistics introduced at this hearing, during 2006, producer milk was delivered to Order 5, 6 and 7 pool plants from not less than 27 states. Just as the milkshed for the region has expanded and milk movement distances have increased for milk moved from outside the marketing area, the distance milk moves within the marketing areas has likewise increased.

Exacerbating the enormity of the distances milk must move to supply the Class I demand in the southeast is a national environment of high fuel costs.

The DCMA proposal offered here today is an integrated one in that all of the elements are linked as a singe package. DCMA believes the varied needs and interests of the marketers of milk, the produce -- the producers, the numerous producer organizations, the processors of milk, and the southeast region's consumers can best be addressed by considering these proposed amendments together.

Substantial modification or elimination of any element of the plan will reduce the plan's effectiveness and will render the plan with insufficient support to allow DCMA to continue to pursue the plan.

DCMA -- DCMA believes that the comprehensive approach provides benefits for all the region's dairy stakeholders.

DCMA proposes a comprehensive three-pronged package of amendments aimed at increasing the capability for the southeast region's Federal Milk Marketing Orders to attract a sufficient quantity of milk for the region.

The three basic elements of the proposal are: (1) Increase minimum Order Class I prices in all three of the Appalachian, Florida and Southeast Federal Milk Marketing Orders; (2) Tighten diversion provision -- tighten percentage diversion limits in the Appalachian and Southeast Orders while making the producer marketing area association provisions more efficient; and (3) Improve the Transportation Credit Balancing Fund provisions in the Appalachian and Southeast Orders.

I will address the three prongs of the proposal in the order just listed.

Prong One: Minimum Order Class I Prices

The history of minimum Order Class I prices over the last 25 years in the southeast region can be reported in a very brief summary. As a result of the 1985 Farm Bill, Class I differentials in much of the Federal Order program were increased.

In the southeast, the Class I differential in the benchmark city of Atlanta increased from $2.30 per hundredweight to $3.08 per hundredweight. The $3.08 Class I differential in Atlanta -- Atlanta remained unchanged until the Order Reform process in the year 2000 when it was raised to $3.10 per hundredweight, an increase of $0.02 per hundredweight. Atlanta's Class I differential remains $3.10

per hundredweight today.

Meanwhile, under Order Reform, the Class I differentials in the reserve supply areas outside the southeast increased at amounts sometimes greater than the Class I differential increases within the southeast regions' Orders.

For example, the Class I differential in Marathon County, Wisconsin, a historically heavy milk production and reserve supply area, increased from $1.04 per hundredweight to $1.70 per hundredweight.

While the Order Reform adjustments to Class I differentials in the areas outside of the southeast were warranted, the net effect was that the spread in Class I differentials between the historic reserve supply areas and the southeast narrowed, lessening economic incentives to move milk into the region.

In other words, the Class I differential surface in some cases was flattened under Order Reform versus the surface that existed prior to Reform. Likewise, changes in Order marketing areas and pooling provisions flattened producer blend price relationships with somewhat lowered Class I utilizations in the southeast.

Combined, the flatter Class I price surface and flatter blend price surfaces have reduced economic incentives to move milk into the southeast from the reserve supply areas.

Over the 1986 to 2007 period, diesel fuel prices and milk hauling costs in general have increased considerably more rapidly than have Class I differentials in the southeast.

According to the U.S. Department of Energy, Energy Information Administration, hereafter referred to as the EIA, the U.S. average diesel price was $0.94 per gallon in 1986, and averaged $2.70 per gallon in 2006, an increase of 187 percent.

Other costs of hauling such as equipment, wages, and insurance have all risen along with fuel. As we stated, for the benchmark city of Atlanta, since 1986, the Class I differential has gone up $0.02 per hundredweight, an increase of 0.65 percent.

Over this same time period, milk production within the southeast has continued its seemingly relentless decline necessitating increased needs for importation of milk supplies from the reserve regions into the southeast.

Greater needs for milk to move, with lessened regulated price differences upon which to move the milk has left the southeast in dire straights in obtaining needed milk supplies.

The southeast is a region which has experienced sizeable population growth over the last few years. Exhibit 21, page A, provides in table form the U.S. Census Bureau population estimates for the years 2006 -- excuse me -- 2000 to 2006 for the southeastern states wholly within Orders 5, 6 and 7 of Alabama, Arkansas, Florida, Georgia, Mississippi, Louisiana, North Carolina, South Carolina, and Tennessee.

The nine-state region has seen an increase of 8 -- seen an 8.4 percent growth in population in just six years compared to 6.2 percent growth for the U.S. as a whole.

The southeast's population growth rate over the last six years was 135 percent of the U.S. growth rate with no likelihood of the southeast slowing down in the near future. With more people comes more demand for milk and dairy products and the southeast already does not have enough milk.

The population growth in the nine-state southeast region from 2000 to 2006 totaled more than 4.7 million people. Exhibit 21, pages B1 through B4 provide a snapshot of the supply-demand condition present in the Order 5, 6 and 7 areas.

Pages B1 through B3 compares the producer milk produced within the Appalachian and Southeast marketing areas to the Class I milk pooled on the two Orders.

Page B4 compares the milk produced within the state of Florida as reported by NASS -- N-A-S-S -- to the Class I milk pooled on the Florida Order.

Data on milk production within the Order 5 and 7 marketing areas is taken from Market Administrator Exhibit 9, page 1 and Exhibit 18, page 11.

In each case, an additional calculation is made showing the supply-demand relationship with modest presumed rates of necessary reserves and Class II use.

Whether just comparing the available milk production in the area to the area's Class I use or the area's Class I, Class II and a -- and a reserve, the supply-demand picture is gruesome.

In Order -- in the Order 5 and 7 area, local in-area milk production in 2006 was only able to supply the milk used in Class I in four months of the year, while in Florida, in-state milk production was insufficient to supply the Class I needs every month of 2006.

When the milk -- when the milk -- when the use of milk in Class II and a modest reserve is added to the Class I use, the deficit condition in the Orders 5 and 7 areas becomes year around and the Florida deficit worsens.

Based on this analysis, the Order 5 and 7 areas can supply only about 76 percent of the milk necessary to meet Class I, Class II and reserve demands, and in the Florida area, in-state producers supply only about 66 percent of the milk necessary to meet Class I and reserve demands on an annual basis.

Annual comparisons presume milk produced in the spring would be available to meet the greater demands in the short season, which, of course, is not the case.

In the worst month of 2006, August, the Order 5 and 7 areas supplied less than 64 percent of the milk necessary to meet Class I, Class II and reserve -- and reserve demands.

In Florida, during -- during its worst month of 2006, October, in-state producers provided less than 61 -- 61 percent of the necessary supplies. It is then not a joke when the marketers of milk state that at least one out of every three loads of milk delivered to plants in the southeast is supplemental milk.

Clearly, no other region of the country has a milk supply and demand situation which even approaches the critical milk-deficit condition existing in the southeast.

The current Class I differential structure in the southeast provides insufficient Class I price differences to move milk within the region as well as inadequate price incentives to attract supplemental milk from outside the region.

Exhibit 21, pages C1 through C4, graphically represents the per hundredweight per ten mile relationship of Class I prices as they -- as they exist in the southeast today. As can be -- as can be seen from the Exhibit map diagrams, the relationship of Class I prices in the southeast is, at least using Louisville, Kentucky and Springfield, Missouri as basing points, about $1.8 cents to $1.9 per hundredweight per ten miles while the true cost of hauling milk -- bulk milk is more than $4.8 cents per hundredweight per ten miles.

Since installed in the Appalachian and Southeast Orders in December 2006, the Market Administrator mileage rate factor for use in the Transportation Credit -- Credit provisions, a mileage rate which was set intentionally low has averaged about 4.4 cents per hundredweight per mile per -- per .0044 per hundredweight per mile, which is 4.4 cents per hundredweight for ten miles.

When using Mount Crawford, Virginia as a basing point -- as the basing point, the Class I price relationships become even grimmer. In the case of Mount Crawford, the price surface reflects a relationship of barely more than one-tenth cent per hundredweight per mile, well less than the -- than one-fourth the cost of moving milk.

Using Atlanta as a basing point for the Florida area, the price surface reflects a relationship of about 1.9 cents to .02 cents per hundredweight per ten miles, slightly higher than the two Orders to the north, but still seriously inadequate to move the milk.

The long-stated purpose for the Class I price structure, which generally provides increasing Class I prices moving toward milk-deficit regions and away from reserve supply regions is well established.

The Secretary has repeatedly affirmed, and the majority of the industry concurs on the need for a structured class -- structured price surface, which provides orderly incentives to move milk from the reserve -- from reserve supply areas to where the milk is needed to supply fluid milk product demand.

The Class I price surface, coupled with a traditional blend price surface, creates economic incentives for milk to be attracted out of manufacturing uses in the reserve supply areas into use in fluid milk products in the milk-deficit regions.

The system functions as designed unless the price differences between the reserve areas and the deficit areas are insufficient to encourage the milk to move. Such has become the case with regard to the southeast's relationship in price, both within the region, and in terms of the southeast's price relationship versus the reserve milk supply areas.

The issue faced by the southeast is that Class I price differences coupled with Class I utilization differences in the southeast versus the more well supplied regions of the U.S. are simply not enough to shake milk away from manufacturing uses in the reserve supply areas without substantial priming of the money pump with over order values.

While the southeast has not gone short of milk for any extended periods of time, at least it has not yet, the orderly marketing of milk and economically justified movements of milk will be enhanced when the regulated values of milk are more reflective of the real costs of moving milk from reserve supply areas to the milk-deficit southeast.

Left at their current levels, the Class I prices in the southeast will fall further and further away from the values necessary to move the milk, eroding and threatening orderly marketing, and jeopardizing the supply of milk to the region.

The Secretary should act now to return the Class I price surface in the region to a level which is more reflective of the true location values of milk, thereby sending the economic signals necessary to bring forth a sufficient quantity of milk.

In order to partially address the issue of insufficient price incentives required to move milk to the southeast, DCMA proposes increasing minimum Order Class I prices in the Appalachian, Florida and Southeast Order marketing areas.

The proposed changes to the Class I prices for plant locations in the Appalachian Order Marketing Area range from an increase of .10 cents per hundredweight to an increase in $1.00 per hundredweight.

Proposed changes to the Class I prices for plant locations in the Florida Order Marketing Area range from an increase from $1.30 per hundredweight to an increase of $1.70 per hundredweight and the proposed changes to the Class I prices for plant locations in the Southeast Order marketing area range from an increase of .10 cents per hundredweight to an increase of $1.15 per hundredweight.

Just as would be expected in a conventional Class I price surface, the greater increases in proposed Class I prices occurred at plant locations most distant from the reserve milk supply areas.

DCMA recognizes that a national review of the Class I pricing structure under Federal Orders may be undertaken in the not too distant future. To that end, DCMA considers these proposals to be possibly temporary in nature pending any changes to the broader Class I price system which may come about from that review.

To effectuate the proposed changes in minimum Order Class I prices in the three subject marketing areas, DCMA proposes modifying section 100x.51 of each of the three southeastern region Orders by including a new provision, a "Class I price adjustment", which will be added to the Class I price "mover", and to the section 1000.52 Class I differential to obtain the monthly minimum Order Class I price.

Exhibit 21, pages D1 and D2, is a summary table of proposed Class I price adjustments and the current Class I differential by Federal Order distributing plant location within the Orders 5, 6 and 7, which added together thus provides the effective proposed Federal Order Class I price surface.

Included in the Notice of Hearing are the proposed complete sections 1005.51(b), 1006.51(b), and 1007.51(b), detailing the full list of proposed adjustments for all counties and parishes within the Order 5, 6 and 7 marketing areas.

Exhibit 21, page E, provides a color map of the proposed effective Class I price surface for the

Appalachian, Florida and Southeast marketing areas.

In determining the proposed Class I prices, DCMA used combined multiple methodologies in the price surface development process with Class I prices being built recognizing that minimum Order Class I prices must remain aligned with neighboring marketing areas which are not at this time being proposed to be amended.

Given the -- given the neighboring Order Class I price alignment constraint, an acquisition cost model for procuring and moving bulk milk into the southeast from multiple potential supplemental sources outside the southeast was analyzed and the minimum cost used to establish the proposed Class I price in the most distant point in the southeast from those supplemental supplies, that point being south Florida.

After establishing a Class I price for south Florida, then plant location points successively nearer the supplemental sources were analyzed, establishing prices progressively lower and lower as plant locations were nearer and nearer to the supplemental source -- source locations.

As a check method to the bulk milk acquisition cost model and process, a second model was developed which sought minimized acquisition costs of moving packaged fluid milk products between other-order distributing plants located in Federal Order marketing areas contiguous to the southeastern Orders and plants within the southeastern Orders with success -- with further successive cost minimizations for plant to plant packaged fluid milk product movements within the southeast.

Finally, the relative Class I price data supplied by the two acquisition cost models were smoothed using industry knowledge and best professional judgment to develop the traditional Class I price surface as is proposed.

We applied industry knowledge and best professional judgment and concluded which plants had sufficiently common local area producer milk procurement, sufficiently common areas of supplemental milk procurement, and were located within near enough proximity to be in potential competition for Class I sales. And these plants were grouped to the extent possible in common pricing zones.

Exhibit 21, page F, provides the initial bulk milk movement and procurement calculation for the south -- for south Florida using the five possible alternative supplemental supply locations of Wayne County, Ohio; Jasper County, Indiana; Hopkins County, Texas; Lancaster County, Pennsylvania; and Franklin County, Pennsylvania.

In the exhibit example, the mileage from each of the possible supplemental sources was computed to Miami using a mileage rate of 0.00352 dollars per hundredweight per mile, which represents 80 percent of 0.0044 per mile, 0.0044 dollars per mile being the rough average of recent Market Administrator mileage rates used in the Transportation Credit provisions of Orders 5 and 7.

The calculated cost of hauling to Miami was then added to the existing Class I differential in each of the potential supplemental supply locations to get an acquisition cost for Miami using each of the alternate supply locales.

In the Exhibit example, Wayne County, Ohio was the least cost supplier under the calculated bulk milk acquisition cost model and the resulting possible Class I differential in Miami would be $6.14 per hundredweight.

After calculating the minimum cost of supplying Miami under this scenario, Class I prices at successively closer points to the reserve supply areas were calculated to develop the initial possible Class I price framework.

Exhibit 21, pages G1 and G2, provides further examples of the bulk movement model-predicted prices at various plant locations in Orders 5 and 7 using Miami as the base point.

As discussed, the second model applied cost minimizing calculations based on packaged fluid milk movements starting with plant locations contiguous to, but outside the Order 5 and 7 marketing areas.

Exhibit 21, page H, provides the example model calculation for packaged -- packaged fluid milk delivery to Lafayette, Louisiana and Shreveport, Louisiana.

Again, successive movements of packaged fluid milk movements plant to plant from the outer edge of the Order 5 and 7 marketing areas were then analyzed, moving toward Florida, and at each plant location the minimum acquisition cost determined.

The mileage rate used in the packaged milk movement model was 0.00396 per mile, approximately 80 percent of the market administrator per mile rate of 0.0044 dollars per mile on a -- based on a 40 -- which is based on a 48,000 pound bulk milk load factored back to a 42,000 pound packaged milk load.

The packaged milk hauling cost per mile of 0.00396 is approximately 71 to 72 percent of the real cost of hauling packaged milk. The bulk delivery models and packaged milk movement models provided strikingly similar overall results.

The models generate -- did generate some differences at a few plant points, but these were easily explained and reconciled.

Using the bulk milk movement generated price surface and the packaged fluid milk movement generated price surface as guides, a smoothed Class I price surface was developed using industry knowledge and best professional judgment to group plants into pricing zones, thus providing a traditional Class I price surface.

The resulting Class I price surface is the price system proposed by DCMA today. Both the bulk milk movement and packaged milk movement models used hauling costs, which are notably less than the real cost of hauling. This allowed flexibility in defining which plants were placed into which final price zones, since the initial prices generated by the two models allowed for variations.

As will be seen in later data, differences between plant prices in the final Class I price surface did not exceed the real cost of hauling.

In developing the Class I price surface, all plant locations within Orders 5, 6 and 7 received some Class I price increase, with the smallest changes occurring in northern Virginia, north-central Kentucky, southern Indiana, Arkansas, southwest Tennessee, and northwest Louisiana.

These plant locations all have proposed Class I price adjustments in the new sections 1005.51(b) and

1007.51(b) of .10 cents per hundredweight.

Successive tiers of plants within the marketing areas, that is, successively further away -- further from the "outside" edge of the marketing areas see progressively increasing Class I price adjustments.

According to Market Administrator analyses previous -- previously introduced -- introduced as Exhibit 9, page 10 and Exhibit 17, page 1, and Exhibit 18, page 1, the expected annual increase in Class I revenue in the Order 5 pool for 2004 through 2006 resulting from the Class I prices as proposed would have been $19.3 million, $18.6 million and $18.3 million, respectively, for each year.

For the Order 6 pool the additional Class I values would have been $36.4 million, $38.3 million and $39.2 million, respectively, for each year. And for the Order 7 pool, the additional Class I values would have been $16.8 million, $17.1 million and $17.7 million, respectively, for each year.

The Market Administrators introduced Exhibits -- Exhibit 9, page 10, Exhibit 17, page 1, and Exhibit 18, page 1, projecting that Order base zone minimum uniform prices would increase approximately .25 to .26 cents per hundredweight, $1.19 to $1.22 per hundredweight, and .64 cents per hundredweight per year in Orders 5, 6 and 7, respectively, under the DCMA proposal.

Increasing the minimum Order Class I prices under the three southeastern Orders and the resulting uniform price increases will provide dual benefits as intended in the establishment of a Class I price surface.

First, the increased uniform prices resulting from increased Class I revenues will send economic signals to producers currently supplying the three Orders, hopefully encouraging additional milk production to supply the marketing areas.

Second, uniform price increases in the three Orders will offer additional economic incentives for moving supplemental milk into the Orders if sufficient milk is not available within or nearby the Order's marketing areas. This is exactly the intent of the regulated Class I price surface.

The primary use of milk in the southeast is in fluid milk products. Some soft and hard dairy product manufacturing remains, but the number of plants located in the three marketing areas which produce these manufactured products has declined over the years as milk production has declined.

Some of the manufacturing plants which remain serve predominantly as balancing facilities converting seasonal or weekend reserve milk supplies into storable products.

The costs of servicing Class I plants exceeds the costs of serving plants which manufacture hard products. The daily, weekly, monthly and annual fluctuations in Class I demand back up quickly onto the marketers of bulk milk to the Class I plants.

Hard product manufacturing plants are not as immediately impacted by changes in the demand for their products resulting like -- from events like school calendars, grocery store sales promotions, holidays and even predicted snowy days.

Further, as Federal Order provisions and Order regulated prices suggest, hard product manufacturing plants can make their products and can store those products for much later sale.

Class I plants do not have the luxury of building inventory in times of surplus and waiting for an opportune time to sell their product. Likewise -- likewise, Class I plants cannot hold substantial inventories while schools are on breaks or even until milk sales pick up -- pick back up after the summer. They cannot build large inventories in anticipation even if they know a grocery store chain is going to run a sales promotion on milk.

Whether stored as bulk milk in a plant silo or in jugs in refrigerated coolers, fluid milk products have a short and finite life expectancy. Class I plants vary their receipts of bulk milk with the near-term and immediate-term needs for that milk in fluid milk products.

Variation in daily receiving becomes greater and balancing requirements on their bulk milk suppliers increases much more so than for deliveries to hard product manufacturing facilities.

This variation in processing makes supplying of bulk milk for fluid use costly. As the proportion of use in fluid milk products in a marketing area increases as a portion of its total raw milk supply, these supply and balancing costs increase proportionally.

These higher costs of supplying Class I plants are reflected in the Class I differential and the predominantly Class I Order marketing areas therefore are expected to have Class I prices reflective of these high supply and balancing costs.

The Secretary's September 1, 2006 Tentative Partial Decision on Transportation Credits in the Appalachian and Southeast Orders is replete with data and analyses regarding milk hauling costs and the impact of diesel fuel prices on those costs.

We will not over-burden this record with a rehashing of those data and analyses of the impact of diesel fuel costs on milk hauling costs other than to provide for this record a history and update with regard to fuel costs and the changes in costs which have occurred since the 1985 Farm Bill, Order Reform, and since the Order 5 and 7 Transportation Credit hearing was held in early 2006.

Exhibit 21, pages I1 through I3 provides national average diesel fuel prices annually for 1986 to 2006, and monthly for January of 2000 to present for the southeast.

The 1986 to 2006 annual data may be found at the web site cited in the testimony quoted from the U.S. Department of Energy.

Monthly data for January 2000 to present can be found at the web site cited.

As used by the Market Administrators in the calculation of the mileage rate for transportation credits, the later -- the later data are for the Lower Atlantic -- the Lower Atlantic and Gulf Coast regions as reported by the EIA.

As previously discussed, the Class I price surface as proposed resulted from running two milk supply models modified by industry experience and best professional judgment to arrive at the Class I price surface.

To the extent possible, the existing Class I price relationship of nearby plants was preserved as current. Plants located within the same or very closely located metropolitan areas, if the Class I prices are currently the same, received the same Class I price in the proposal.

Cities or groups of cities where plants had their common Class I price preserved include Little Rock and Ft. Smith, Arkansas; Atlanta, Dacuia, and Braselton, Georgia; Baxley and Savannah, Georgia; Louisville, Kentucky and Holland, Indiana; Fulton and Murray, Kentucky; London and Somerset, Kentucky; Nashville and Murfreesboro, Tennessee; Memphis and Covington, Tennessee; Winston Salem and High Point, North Carolina; New Orleans, Baker, Baton Rouge, Hammond, and Lafayette, Louisiana; Kingsport and Powell, Tennessee and Lynchburg and Wirtz, Virginia; Orlando, Orange City, Tampa, Plant City, Lakeland, and Winter Haven, Florida; and Clewiston, Deerfield Beach, and Miami, Florida.

Since the underlying transportation costs, which -- which created the proposed Class I price surface have changed substantially from those which generated the current Class I price surface, there are some notable changes in plant to plant Class I price relationships.

In the eastern and southeastern portions of the Appalachian Order marketing area, Spartanburg, South

Carolina is proposed to be in a .20 cent per hundredweight higher Class I price zone than Winston Salem and High Point where those cities now have the same Class I price.

Mount Crawford, Virginia is proposed to have a .30 cent per hundredweight lower Class I price than Lynchburg and Wirtz, Virginia where those cities now have the same Class I price.

Asheville, North Carolina is proposed to have the same Class I price as Winston Salem and High Point, where Asheville now has a Class I price .15 cents lower than Winston Salem and High Point.

The difference in Class I prices between Asheville, North Carolina and Spartanburg, South Carolina is proposed to be increased from .15 cents to .20 cents per hundredweight.

Charleston, South Carolina is proposed to be in a .30 cent higher Class I price zone than Florence, South Carolina where those cities currently have the same Class I price.

In the northern portion of the Order 5 marketing area, Winchester, Kentucky and Madisonville, Kentucky are proposed to have the same Class I price, while currently Madisonville is priced .20 cents higher than Winchester.

Also, it is proposed that Winchester,

Kentucky no longer have the same Class I price as Louisville, Kentucky and Holland, Indiana, but rather, would have a Class I price .30 cents per hire -- per hundredweight higher than Louisville and Holland.

In the central portion of the Appalachian Order marketing area, Athens, Tennessee is proposed to no longer have the same Class I price as Kingsport and Powell, Tennessee and Lynchburg, Wirtz, and Mount Crawford, Virginia. Rather, it is proposed that Athens have a Class I price .20 cents per hundredweight higher than the first four of these -- of those locations and .50 cents higher than Mount Crawford.

In the southern portion of the Southeast Order marketing area, Hattiesburg is proposed to have the same Class I price as the New Orleans-Baton Rouge area, while Hattiesburg -- Hattiesburg currently has a Class I price .20 cents per hundredweight less than New Orleans-Baton Rouge.

The west to east increase in Class I differentials as proposed, which represents the increasing costs of hauling milk from the reserve supply areas in the southwest resulted in differing proposed Class I prices across the midsection of the Order -- of the Order 7 marketing area.

Currently, Shreveport, Louisiana; Kosciusko, Mississippi; Birmingham, Alabama, and the Atlanta, Georgia metroplex all are in the Order's $3.10 per hundredweight base zone.

As proposed here, there will be an increasing Class I price adjustment moving west to east of .10 cents per hundredweight at Shreveport, .20 cents per hundredweight at Kosciusko, .30 cents per hundredweight at Birmingham, and .70 cents per hundredweight at Atlanta.

Across the Order 5 and 7 marketing areas other relationships between plant locations have changed under the Class I price proposal representative of the increased costs of hauling between points.

In the Florida Order marketing area, all plants fall into one of three current Class I pricing zones. The DCMA proposal provides for four pricing zones in the peninsular portion of the Order 6 marketing area, although all plants will actually remain in one of three effective Class I price zones.

All plants which currently have the same Class I price will likewise continue to have the same Class I price under the proposal.

Currently, there is a .30 cent per hundredweight Class I price difference between north Florida and central Florida, and likewise, there is a .30 cent per hundredweight Class I price difference between central

Florida and south Florida.

Due to the -- due to the increased cost of hauling costs reflected in the proposal, there would be a .40 cent per hundredweight Class I price difference between north Florida and central Florida and a .60 cent per hundredweight Class I price difference between central Florida and south Florida.

DCMA proposes that the base reporting zones for Class I prices and uniform prices be unchanged.

For Order 5, prices would continue to be announced applicable for Mecklenburg County, North Carolina. For Order 6, prices would continue to be announced applicable for Hillsborough County, Florida. And for Order 7, prices would continue to be announced applicable for Fulton County, Georgia.

Location adjustments for plant locations outside the base pricing zones would be based on the various plant location's Class I differential, plus the new Class I price adjustment compared to the Class I price differential plus Class I price adjustment applicable in the three Order base zones.

Exhibit 21, page J, provides three examples of calculations of location adjustments under the DCMA proposal.

The first example is the calculation of the location adjustment applicable for Nashville, Tennessee on the Southeast Order, a location within the Order 7 marketing area.

The second example calculation is the location adjustment applicable for a load diverted and pooled on Order 7, delivered to a St. Louis, Missouri plant, which is outside the Southeast Order marketing area.

The third example calculation is the location adjustment applicable for a load diverted and pooled on Order 32 delivered to an Atlanta, Georgia, plant.

The second and third examples show the compatibility of the DCMA proposed Order 5, 6 and 7 language with the -- with existing Orders not a part of this proceeding.

While the effective difference in Class I prices between plants in many instances has changed under the DCMA proposal, the number of effective price zones actually has not.

Exhibit 21, page K, provides a listing of the Class I differential zones in the current Orders, as well as the effective Class I prices as proposed. As can be seen, there are currently 13 effective Class I price zones in Orders 5 and 7 and three effective price zones in Order 6.

At current, Class I differentials range from

$2.20 in Orders 5 and 7 to $3.60 with a simple average difference from one price zone to the next of .12 cents per hundredweight.

Under the DCMA proposal, the number of effective price zones would still be 13 with a simple average difference from one zone -- price zone to the next of .19 cents per hundredweight.

The changes in average price zone differences are supported by the increased hauling costs used to build the Class I price surface. In Orders 5 & 7, the total range in current differentials from lowest to highest is $1.40 per hundredweight predicated on an imputed hauling rate per ten miles of approximately 1.9 cents.

As proposed, the total range in Class I prices from lowest to highest is $2.30 per hundredweight predicated on an imputed hauling rate per ten miles of approximately 3.5 cents.

The imputed hauling costs increased approximately 84 percent and the range in Class I prices increased about 64 percent in Orders 5 and 7.

In the Florida Order area, the current range in differentials from lowest to highest is .60 cents per hundredweight spread equally across three effective zones.

While the proposed number of pricing zones under Order 6 is four under the DCMA proposal, the true effective number of price zones remains three in that one proposed zone currently contains no plants.

In Order 6, the current imputed hauling rate per ten miles is approximately .02 cents. As proposed, the total range in Class I prices from lowest to highest is $1.00 per hundredweight, predicated on an imputed hauling rate of approximately 3.5 cents.

The imputed hauling costs increased approximately 75 percent and the range in Class I prices increased about 67 percent.

For Orders 5, 6 and 7, the Class I price zone system as proposed by DCMA is indicative and reflective of the imputed cost of hauling, as should be the case.

As a final check process to the smoothed Class I price surface, the data in Exhibit 21, pages L1 through L8 was developed. These data provide an analysis of the current Class I price applicable at plant locations within the Order 5, 6 and 7 marketing areas and the current per ten mile relationship of those locations to plant locations within the three-Order marketing areas with lower regulated Class I prices, which are within 200 miles of the subject plant location.

Likewise, the same analysis is provided showing the per ten mile difference using the Class I price differences as proposed by DCMA. As can be seen, there are the inevitable changes in Class I price relationships between plant locations resulting from the new proposed Class I price surface.

However, as can be seen from the last column on the right, the differences between plant locations under the DCMA proposal do not exceed the cost of moving Class I fluid milk products between those locales, thus offering no incentive for uneconomic movements of milk.

Hauling costs have increased since the current Class I price surface was established. This fact is indisputable and is true for movements of packaged fluid milk products as well as for bulk milk. In developing the Class I price structure, which would help attract a sufficient quantity of milk for the marketing areas as proposed, DCMA had two fairly clear choices.

First, retain all the plant to plant Class I price relationships between plants in Orders 5, 6 and 7 as they -- the same as they are now, meaning that to increase regulated Class I revenues all Order 5, 6 and 7 plants would experience the same Class I price increase, or second, change the slope of the Class I price surface within the Order 5, 6 and 7 marketing areas moving west to east and north to south and change some plant to plant Class I price relationships which have existed for at least the last seven years.

In either case, plant to plant price relationships would change.

In the first option, in order to appreciably increase regulated Class I values, the plants on the western and northern outer rim of Orders 5 and 7 would see very large increases in their Order Class I prices, significantly changing those plants' price relationship with plants -- plants regulated by contiguous Orders not a part of this proceeding.

In the second option, the slope of Class I prices could be changed adding an economically justified amount to the Class I prices at the Order 5 and 7 rim plants, then with progressively increasing Class I values as we moved east and south within Orders 5, 6 and 7.

Either way, somewhere plant to plant Class I price relationships would be changed. The decision DCMA made was to elect the second option making regulated Class I price changes -- changes at all plants within Orders 5, 6 and 7, recognizing that some existing Class I price relationships would be disturbed rather than create massive Class I price changes on the outer border of Orders 5 and 7.

DCMA believes that this process provided -- provides the more orderly process -- process for transitioning Class I values in the Order 5, 6 and 7 pools to the higher values needed to attract a sufficient quantity of milk for the three marketing areas.

Further, changing the slope of Class I -- of the Class I price surface inside Orders 5, 6 and 7 will encourage milk to move within the Order areas, where raising Class I prices uniformly throughout the three order marketing areas would not.

To repeat the main thrust of DCMA's Class I price proposal, the increased Class I prices provided in the proposal will enhance revenues in the monthly Federal Order pools. Based on analyses provided or completed by the Market Administrators for the three Orders and previously described in Exhibit 9, page 10, Exhibit 17, page 1, and Exhibit 18, page 1, DCMA expects annual pooled Class I revenues in the Order 5, 6 and 7 pools to increase $18.3 million, $39.2 million, and $17.7 million, respectively.

These increases in Class I prices would have the anticipated -- would have been anticipated to increase base zone uniform prices in 2006 by .26 cents, $1.20 and .64 cents per hundredweight, respectively, for the three Orders.

Increasing the minimum Order Class I prices under the three southeastern Orders will provide dual benefits as intended in the establishment of a Class I price surface.

First, the increased uniform prices resulting from enhanced pool revenues -- enhanced pooled Class I revenues will send economic signals to producers currently supplying -- to producers currently supplying the three Orders, hopefully encouraging additional milk production to supply the areas.

Second, uniform price increases in the three Orders will offer additional economic incentives for moving supplemental milk into the Orders if sufficient milk is not available within or nearby the Order's marketing areas.

Redefining and changing the slope of the Class I price relationships within the southeast Orders will likewise -- likewise send signals to producers to direct supplies to the most milk-deficit portions of the regions.

Prong Two: Diversion Limits In Orders 5 and 7

As part of the package of proposals, DCMA proposes lowering the codified diversion limit percentages provided in Sections 1005.13 and 1007.13 of the Appalachian and Southeast Orders.

Currently, percentage limits on diversions to nonpool plants in Order 5 are 25 percent of deliveries to pool plants during the months of January, February, July, August, September, October and November, and 40 percent of deliveries to pool plants during the months of March, April, May, June and December, an annual simple average of 31.25 percent.

The current percentage limits on diversions to nonpool plants in Order 7 are 50 percent of deliveries to pool plants during the months of January, February, March, April, May, and June, and 33 percent of deliveries to pool plants during the months of July, August, September, October, November, and December, an annual simple average of 41.5 percent.

There is an effective limit of zero diversions to nonpool plants on milk delivered to pool distributing plants in each of the two Orders and for which a transportation credit is requested.

Under the Orders, diversions to nonpool plants allow for the associating of reserve supplies with an Order's marketwide pool without the uneconomic movement of milk to pool plants and then ensuing transfers of surplus milk supplies from pool plants back out to nonpool plants.

Appropriate diversion limits for a Federal Order marketing area must take into account the need for reserve supplies for servicing the Class I needs of the marketing area, the need for balancing supplies weekly, monthly, seasonally, and annually, and producer seasonality of production.

In general, historically, the more deficit a marketing area is in terms of milk supplies compared to Class I demand the lower the allowable diversions to nonpool plants compared to deliveries to pool plants.

Diversion limits in Orders 5 and 7 reflect this general relationship with diversion limits which are tighter than Orders to the north and to the west and looser than the Florida Order.

However, the diversion limits in Orders 5 and 7 are in need of improvement.

DCMA proposed making -- proposes making the diversion limit percentages stated in the Appalachian and Southeast Orders identical. The proposal calls for diversions to nonpool plants being limited to 25 percent of deliveries to pool plants during the months -- during the months of January, February, July, August, September, October and November, and 35 percent of deliveries to pool plants during the months of March, April, May, June and December.

This change lowers the stated diversion limit percentages in the Appalachian Order by five percentage points in each of the months of March, April, May, June and December resulting in a reduction in the simple average annual diversion limits in Order 5 of 2.08 -- and that's two point zero eight percentage points.

The proposal would decrease the stated diversion limit percentages in the Southeast Order by 25 percentage points in each of the months of January and February, by 15 percentage points in each of the months of March, April, May and June, by eight percentage points in each of the months of July, August, September, October and November, and an increase of two percentage points in December resulting in a reduction in the simple average annual diversion limits in Order 7 of 12.33 percentage points.

Making the codified diversion limit percentages in Orders 5 and 7 the same may tend to more closely align the monthly blend prices generated by the two Orders. While not a particular focus of this proceeding, this possible improved blend price alignment between the Appalachian and Southeast -- Southeast Orders could provide an ancillary benefit to the marketers of milk in the two marketing areas.

It should be noted that the changes in codified percentage diversion limits as proposed do not fully capture the real volume of milk which may be removed from the two pools as a result of the proposed changes.

If the volume of producer milk delivered to pool plants were the same each month, then the volume of milk which would no longer be eligible for diversion would be 6.67 percent and 29.72 percent in the Order 5 and Order 7 pools, respectively, a substantially greater reduction than it appears when comparing the codified monthly diversion limits changes.

This calculation is provided in Exhibit 21, page M.

The proposed reductions in allowable diversions in the Appalachian and Southeast Orders would be on top of the reduction in allowable diversions to nonpool plants which came about as a result of the Secretary's 2006 Order 5 and 7 Transportation Credit Decision.

The proposed diversion -- the proposed diversion percentages will reduce the volume of milk which may be pooled by diversion to nonpool plants on both the Appalachian and Southeast Orders, a change which should further increase producer uniform blend prices in the two Orders over and above the increases in producer uniform prices resulting from the proposed increased pooled Class I values.

The benefits of the resulting increased uniform prices will complement and enhance those benefits which will accrue from increased uniform prices resulting from increased Class I prices, namely encouraging milk production from currently -- from current producers and enhanced economic incentives for movement of supplemental milk supplies into the region.

According to the -- to Market Administrator analyses, previously described in Exhibit 9, page 13, and Exhibit 18, page 1, the estimated impact on minimum Order uniform prices from decreasing percentage diversion limits in Orders 5 and 7 to the levels as proposed would be average annual increases in uniform prices of .02 cents and .07 cents per hundredweight, respectively.

How much uniform blend price increase any particular producer may experience as a result of the proposed changes in Class I prices under the Orders will vary based on how much the Class I price is increased at the producer's plant of delivery.

Producers delivering to plants which receive greater increases in Class I prices will experience greater increases in blend prices than a producer delivering to a plant which receives a lesser Class I price increase.

However, any increases in uniform blend prices to producers which result from reduced pooled diversions to nonpool plants will be uniformly experienced across all producers in the pool.

DCMA believes the diversion limit percentages as proposed properly reflect the nature of balancing the necessary reserve supplies for the two marketing areas, daily, monthly and seasonally, and will allow the appropriate volumes of milk moved to nonpool plants to be pooled on the Orders.

Exhibit 21, pages N1 through N13 and O1 through O13, provides an analysis of the receipts of milk daily by pool distributing plants regulated by -- by Orders 5 and 7 for the period of January of 2004 through December of 2006.

Pages N1 through N13 are data for Order 5 and pages O1 through O13 are data for Order 7. The data on daily receipts by pool distributing plants is taken from Market Administrator Exhibit 9, pages 2 through 5, and Exhibit 18, pages 12 through 15.

In this analysis, each day's producer milk receipts by pool distributing plants on the Order were compared to the highest day of receipts by pool distributing plants for that month. The difference between the highest day of receipts and each day's actual receipts for the month were then summed.

This resulting total, representing the total volume of milk which was not received each day of the month versus the highest receiving day, was then divided by the month's total actual receipts by pool distributing plants. The resulting value represents in percentage terms the necessary reserve required each month over that month's receipts to have enough milk available to cover plant's day of greatest need.

Also provided is the same calculation for each Order on an annual basis.

The daily receipt data for Order 5 did not include the totality of receipts at pool distributing plants, but rather, the data represent approximately 85 to 90 percent of the daily data.

The pounds reported by the Order 5 Market Administrator were grossed up by the monthly reporting percentage to give a better picture of the daily volumes marketers dealt with in the marketing area. While this gross-up process presumes that the remaining unreported daily receipts data would be identical in variation to the reported portion of the receipts, we do not believe that this presumption impacts the nature and results of the analysis in any significant way.

If anything, DCMA believes this gross-up calculation in the Appalachian Order analysis would tend to reduce the analyzed variation in pool distributing plant receipts versus the real variation.

As would be expected, the calculated reserve factor varies month to month and year to year based -- depending on the actual receipts at plants and how high the highest day of receipts actually was, and for that matter, how low the lowest days of receipts were.

Over the 36-month period represented in the analysis, we can see that on average about 12 to 13 percent of monthly pool distributing plant receipts is the bare minimum reserve necessary to cover daily fluctuations in pool distributing plant receipts.

On an annual basis, the reserve requirement as calculated is about 22 percent at a minimum. The analysis as shown does not presume any necessary reserve to cover daily, monthly and seasonal variations in the producer supply, nor does it account for any general reserve requirement over and above the plant's needs on the month's highest days.

It would be serendipitous indeed if the day of highest milk needs by plants coincided with the day of highest production in the month and every day's production followed the variation in daily need. Such is never the case.

Since the average reserve requirement as computed in the analysis for Order 5 versus Order 7 does not differ greatly over the 36-month period, DCMA feels having the same diversion limits in Orders 5 and 7 is a justifiable, workable and desirable procedure.

Based on the analysis described above and allowing for a reasonable additional reserve in the tightest supply months of 10 to 12 percent above the bare minimum daily reserve requirement depicted above, DCMA proposes a limit on diversions to nonpool plants during the months of January, February, July, August, September, October and November of 25 percent of pool plant deliveries for both Order 5 and Order 7.

The additional reserve proposed over the calculated bare minimum reserve detailed in the Exhibit will allow for unforeseen changes in the supply demand relationship, daily variations in producer supplies, weather occurrences, and the general need for reserves to cover the marketing area's needs.

It should be noted that the days of greatest need and days of least need are not fore-known. And if anyone even tried to predict them, one would only be able to predict them with poor accuracy.

In order to accommodate seasonal fluctuations in dairy farmer supply and by seasonal fluctuations, we mean the spring flush, DCMA proposes a limit on diversions to nonpool plants during the months of March, April, May, and June of 35 percent of pool plant deliveries for both Orders 5 and 7.

The 10 percentage points higher level of allowable diversions will permit additional volumes of diversions to nonpool plants in the spring and early summer months above the diversion allowance in the tighter supply months, thus allowing regular producers who supply the Class I needs of the marketing areas in the tight supply months to pool all of their additional production in the flush months as well as accommodation of the regular decline in Class I sales which occurs every summer when schools are out of session.

Federal Order provisions generally recognize the need for additional diversions to nonpool plants to handle increases in producer supplies and reductions in Class I demand during the spring and early summer months.

Then we come to December, which includes the one day each year when the level of plant -- a pool plant -- that should read when the level of pool distributing plant receipts can somewhat be predicted.

December, normally considered a month of celebrations, is simply no party for marketers of milk. Around the middle of the month, schools close for the two -- two-week traditional break. Class I plants shut down or severely limit their receiving operations over the holiday period and bulk milk marketers are left with substantial surplus milk volumes and often limited places to put it.

For the most part, cows, as agnostics, do not celebrate the various December holidays and insist on continuing to give milk every day right through the month of

December. The last half of December in every way represents as surplus a condition as the worst days in the middle of the spring flush.

Looking back at Exhibit 21, pages N1 through O13, we note that without fail, December 25 each year is the day of lowest pool distributing plant producer receipts. For these reasons, December is proposed to have a limit on diversions to nonpool plants during the month of -- during the month of 35 percent of pool plant deliveries for both Orders 5 and 7.

Nearby and adjacent Orders to the Appalachian and Southeast Orders recognize this fact and contain diversion provisions allowing greater diversions to nonpool plants in December than in the immediately preceding tight supply months.

The second part of the diversion provision prong of DCMA's three-prong proposal deals with the requisite number of days a producer must be received at a pool plant during the month in order for that producer's milk to be eligible for diversion to a nonpool plant.

Currently, in the Appalachian Order, a producer must be delivered -- delivered to a pool plant for not less than two days during the months of January through June and for not less than six days during the months of July through December for the dairy farmer's milk to be eligible to be pooled by diversion.

In the -- in the Southeast Order, a producer must currently be delivered to a pool plant for not less than four days during the months of January through June, and for not less than ten days during the months of July through December for the dairy farmer's milk to be eligible to be pooled by diversion.

The producer Marketing Order Association requirement, commonly referred to as the "touch base" days, defines the minimum number of days each month that a dairy farmer must supply the Class I needs of the marketing area in order to be considered sufficiently associated with the Class I marketplace, and thus, his or her milk eligible for pooling by diversion to a nonpool plant.

As milk production within the Appalachian and Southeast Orders marketing areas has declined and Class I demand grown, the milkshed for two Orders has grown geographically. The obvious -- the obvious result of this growth in the geographic milkshed footprint is that more producers located more distant from the marketing areas must fill the unmet Class I needs of the marketing areas.

These distant producers may very well serve the Class I needs of the marketing areas almost every month of the year, are ready to serve the marketing areas at any time as needed, yet, during short periods of time, particularly during the spring flush or on weekends, their milk may be needed sparingly. These most distant farms represent the seasonal reserve and weekly reserve needed for the Orders.

In order to facilitate the efficient pooling of these reserve supplies, DCMA proposes reducing the touch base days in both Orders 5 and 7 to one day each month. A producer would then be eligible for diversion to a nonpool plant in any month during which the dairy farmer's milk was delivered at least one day to a pool plant.

The farm would continue to be required to perform at least at that minimum level each and every month to be eligible for pooling the deliveries of that farm to nonpool plants demonstrating that the farm's milk is indeed able to serve the Class I needs of the marketing area at any time when called upon for greater volumes.

Reducing the number of touch base days for pooling a producer will lessen the need to deliver milk of producers to pool plants when lesser volumes of milk from those producers is truly needed thereby discouraging uneconomic movements of milk. Efficient -- efficiency in delivering milk to the current marketing areas requires that the most distant producers are the last producers called upon to serve the needs of the marketing area, and conversely, the most logical first producers to leave at home on days when the marketing areas are sufficiently supplied with nearer milk.

To require distant producers to deliver more days to pool plants when the milk is not truly needed requires the substitution of the more distant producers for delivery into pool plants, displacing nearer producers already serving those plants. This only adds trucking miles and marketing costs and does not increase the supply of milk available for the marketing area.

In fact, the displacing of nearer-by milk and the requisite delivery of milk from more distant producers is a zero sum game. The more-local producer is moved out and the distant producer is moved in with no net gain or loss of pooled milk. Only the truckers gain.

It is important to note that the real effective limit on diversions to nonpool plants in a Federal Order is the Order's diversion limit percentages. Regardless of the number of producers who deliver milk during the month to pool plants on the Order, the volume of milk those producers market in a month and where those producers' milk is delivered, the effective maximum diverted volume is the percentage limit in effect in the Order. DCMA has proposed reducing the diversion limit percentages as described above.

The proposal that farms be required to touch base at Order 5 and Order 7 pool plants one day per month for both Orders along with the diversion limit percentages proposed above would completely harmonize the diversion provisions in the Appalachian and Southeast Orders and provide diversion provision alignment with nearby -- with other nearby and adjacent Orders.

Exhibit 21, page P, provides a comparison of touch-base requirements and diversion limits percentages by month for the Northeast, Mideast, Central, Southwest, and Florida Orders as current and for the Appalachian and Southeast Orders as proposed.

The current provisions in Orders 5, 6 and 7 allow the Market Administrator discretion in setting the effective diversion percentages and touch base days at rates and requirements different from the codified provisions if marketing area supply and demand conditions warrant.

DCMA supports the continuation of the provisions allowing Market Administrator discretion in changing diversion limits and touch base days. This is an important provision allowing for timely modification to the diversion limits and touch base days if conditions in the marketing area change.

CHIEF ADMINISTRATIVE LAW JUDGE: If I could stop you there, why don't we take a break?

(A break was taken from
4:01 p.m. to 4:11 p.m.)

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. We're back on the record. Mr. Sims, you can continue.

MR. SIMS: Thank you, your Honor.

Prong Three: Transportation Credits in Orders 5 & 7

On September 1, 2006 the Secretary issued a Tentative Partial Decision which restructured the Transportation Credit Balancing Fund provisions in the Appalachian and Southeast Orders.

The Tentative Partial Decision updated the hauling cost factor used in computing transportation credits and installed a new fuel adjuster which helps keep the transportation credit mileage rate more current with changes in fuel costs.

At that time, the maximum assessments on Class I handlers used to furnish the Transportation Credit Balancing Funds were increased from .095 cents per hundredweight to .15 cents per hundredweight in the Appalachian Order and from .10 cents per hundredweight to .20 cents per hundredweight in the Southeast Order.

These were needed and appropriate amendments to the transportation credit provisions and DCMA appreciates the Secretary's actions in this area.

The record of the 2006 Transportation Credit Proceeding and the Tentative Partial Decision are replete with analyses regarding costs of hauling and the impact of fuel costs on hauling, and there is no need to re-hash those data here.

Rather, DCMA proposes new and additional changes to the Transportation Credit Balancing Fund provisions to make the provisions more relevant to the current state of milk marketing in the two Orders.

DCMA proposes four enhancements to the Transportation Credit provisions. First, we propose extending the months during which Transportation Credits are paid to the months of January and February, in addition to the months of July through December as current.

DCMA proposes retaining June as an optional Transportation Credit payment month based on industry request and Market Administrator discretion.

Second, DCMA proposes the payment of Transportation Credits on full loads of milk rather than just the calculated Class I portion as current.

Third, the DCMA proposal simplifies the process for determining which producers are supplemental, and therefore, their milk eligible for transportation credits.

Lastly, DCMA proposes raising the maximum

Class I assessment for transportation credits from .20 cents per hundredweight to .30 cents per hundredweight in the Southeast Order.

The data on daily receipts by pool distributing plants previously described in Exhibit 21, pages N1 through N13 and O1 through O13 are also instructive regarding the months of greatest need for milk in the Appalachian and Southeast marketing areas.

Likewise, a review of data in Market Administrator Exhibits 6, 7, 8, 11, 12, 13, 14, 15 and 16is useful in evaluating the volume of milk needed for Class I in the Orders. The need for supplemental milk in the -- in the Order 5 and Order 7 marketing areas has become acute in the months of January and February.

When transportation credits were first installed in the Orders in the middle 1990's, the available milk supplies within and nearby the marketing areas were sufficient to provide a sufficient quantity of milk for fluid use in the seasonally long months in the first half of the year. Only during the months of seasonally low production did the marketing areas require supplemental milk from more distant sources to supply the various Orders' Class I needs. Such is no longer true.

And now, the seasonal increase in production from producers associated with the Orders year-round is not sufficient to supply the Class I milk needed within the marketing areas in January and February. January and February are -- regularly are months of high daily average Class I use in both the Appalachian and Southeast Orders. See Exhibit 21, page B1.

And January and February are months which precede the come-on of the seasonal flush in the southeast. As a result of these factors, January and February now are months which require substantial supplement -- supplemental supplies to meet the fluid milk needs of the two marketing areas.

The DCMA proposal would offer marketers of milk an opportunity to recoup through the transportation credit system a portion of the hauling costs incurred on the substantial volume of milk imported into the two marketing areas from supplemental producers during the months of January and February.

Exhibit 21, pages B1 through B3, provides additional data regarding the supply-demand relationship in Orders 5 and 7. Page B1 shows the Class I producer milk monthly for Orders 5 and 7 and for the two Orders combined and compares the daily average Class I use each month for 2004 through 2006 to that year's annual average daily Class I use.

Each month's daily average use of Class I milk is then expressed as a percentage of the annual daily average use. Months with percentages greater than 100 percent had higher daily average Class I use than the annual daily average.

Months with percentages less than 100 percent had lower daily average Class I use than the annual daily average. Exhibit 21, Page B2 shows the monthly volume of milk produced within the Appalachian and Southeast marketing areas that was pooled on some Federal Milk Order for the 2004 to 2006 period.

Exhibit 21, Page B3, then compares the total monthly Class I producer milk in Orders 5 and 7 to the Federal Order pooled milk produced within the two marketing areas for the three-year period.

The data from Exhibit 21, page B3, show that on an annual basis and in many months of the -- and in many months of the year, there are not sufficient quantities of milk produced in the Appalachian and Southeast marketing areas to meet the needs for Class I, much less any needed reserve or any use in pool distributing plants in Class II products.

When weekends and other daily and weekend balancing need -- needs are added, the deficit condition becomes even bleaker. We can see from the data that the problem is worsening.

The data on Federal Order producer milk marketings in Exhibit 21, page B2, do show some irregular -- irregularities which may skew the values slightly. April of 2004 is of particular note. There may have been some milk production in the region that month which was not pooled on any Order due to price inversions.

In addition, a change in the Appalachian Order marketing area in November of 2005 further skews the in-area milk production statistic.

Further complicating any analysis of the Class I use in the Appalachian and Southeast Orders is the change in pool distributing plants which has occurred over the 2004 to 2006 period.

In the Appalachian Order, six pool distributing plants closed during the three-year period. One plant became regulated as a result of the Order 5 marketing area expansion and one plant reopened under different ownership after having been closed for about a year.

In the Southeast Order, two pool distributing plants closed between January of 2006 -- excuse me -- between January of 2004 and December of 2006 and one newly constructed plant opened. One plant moved back and forth from regulated -- from fully regulated and partially regulated status.

These changes in pool distributing plants can impact the Class I milk pooled on the Order. At any rate, over the three-year period, the data are clear that January and February are months of higher than average Class I use and the months -- and are months which precede the spring flush.

The combination of Class I need and available producer supplies now show January and February as months when the supply-demand relationship is more like the existing transportation credit payment months in the last half of the year than the flush months of March, April, May -- and -- March, April and May, and thus, January and February should be added to the months when Transportation Credit payments are made -- when Transportation Credit payments are made.

Seasonal increases in supplies in the spring flush months of March, April and May support the position that transportation credits should not be paid in those months, at least not for now. These data also -- also support these three months as the months when there is less need for supplemental supplies of milk in the two marketing areas. This issue will be explored in greater detail later.

For the full history of transportation credits in the southeastern Orders, transportation credits have been paid on the calculated Class I portion of the supplemental -- on the supplemental load of milk.

Current transportation credit provisions provide that the calculation of the Class I portion of the load, whether that load is a producer milk load or an other-order plant transferred load, is the calculation used in determining the classification on an other-order plant transferred load not agreed for Class II, III or IV use pursuant to Section 1000.44.

The result is that the Class I portion of a supplemental milk load requested to receive a transportation credit is typically the Market Administrator's monthly percentage estimate of Order-average Class I use. For Order 5, this may range from 65 to 75 percent Class I and for Order 7 this may range from 60 to 70 percent Class I.

The payment of transportation credits on the calculated Class I pounds only combined with a mileage rate for transportation credits, which is by design less than the full cost of hauling, has left marketers receiving through the transportation credit system a very low percentage of the real cost of hauling.

Transportation credits, as required in Sections 1005.82 and 1007.82 are paid on deliveries of supplemental milk to pool distributing plants. The average use of Class I milk in pool distributing plants typically is in the upper 80 percent range, and often higher, all the while transportation credits remain paid at substantially lower Class I percentage rates.

It should be noted that even plants which are considered "all Class I" do not have all their milk classified as Class I. The extra butterfat which comes into plants from producers over and above the average use of butterfat in Class I fluid milk products gets disposed of by the plant in the form of surplus cream, which generally would be moved to a plant processing Class II or Class IV products.

The maximum Class I use in a typical "all Class I plant" then is limited to about 95 percent Class I. The result is that even in a pool distributing plant which produces only packaged fluid milk products the assessment on Class I milk for transportation credits does not cover all the milk received by the plant.

In Order 5 and Order 7, pool distributing plants whose actual dairy product production is less than virtually all Class I, the predominant second use is in Class II products. Suppliers of milk to these plants deliver the entirety of milk needed by the plant without regard to the Class uses made of the milk by the plant.

Haulers of milk charge the same rate per mile for milk delivered to a plant that produces Class I products, Class II products, or whatever. It really doesn't matter what the plant -- what a plant produces, the cost of moving milk to that plant is the same.

So, the cost of delivering a supplemental milk load is not conditioned on the Class I utilization of a plant, and thus, the amount of transportation credit on that load should not be influenced by the particular use of milk in the plant or by the Class I use of milk in the Order as a whole.

Transportation credits are paid on supplemental milk deliveries to pool distributing plants only, not to pool supply plants. DCMA supports continuation of this process in the payment of transportation credits. Limiting the payment of transportation credits to pool distributing plants will ensure that the cost recovery system provided by the payment of transportation credits will not apply to the delivery of milk to hard product manufacturing plants.

Repeatedly, the Secretary has determined that delivery of supplemental milk into the Appalachian and Southeast Orders is an activity of market-wide benefit and that the reimbursement of a portion of the costs of hauling on supplemental milk is an action which promotes the equitable assignment of the costs of hauling this supplemental milk.

Further, the Secretary has continued to find that the equitable distribution of supplemental milk hauling costs enhances orderly marketing in the two marketing areas. Expanding the payment of transportation credits to full loads of milk will further enhance orderly marketing and will help ensure sufficient supplemental milk is available for use by pool distributing plants.

In order to ensure that the transportation credit provisions do not encourage uneconomic movements of milk, as previously mentioned, the mileage rate established under the transportation credit provisions has been purposefully -- purposely set at less than the full cost of hauling in its own right.

In addition, the Transportation Credit provisions provide that on a farm-direct supplemental milk load, 85 miles is deducted from the true origin to destination mileage before calculating the Transportation Credit payment. In effect, no transportation credit is allowed on the first 85 miles of a supplemental milk -- supplemental producer milk Transportation Credit load.

At the current approximate mileage rate, this represents an automatic difference of about .37 cents per hundredweight between the Transportation Credit paid and the calculated hauling cost, again, which is purposely set at less than the real cost of hauling.

These protections supplant any possibility that paying for transportation credits on full loads of milk will encourage uneconomic movements of milk.

The proposal that transportation credits be paid during the months of January and February requires that the system for determining which producers are supplemental and thus their milk eligible for transportation credit payments must be amended.

DCMA proposes that the process for determining whether a producer's milk is eligible to receive a transportation credit in the Appalachian and Southeast Orders be simplified.

Currently, for a dairy farmer's milk to be eligible to receive a transportation credit, the dairy farm must be located outside the Order 5 and Order 7 marketing areas and the dairy farmer may not be a "producer" under the Order during more than two months -- two of the months of January through May and not -- and no more than 50 percent of the --

MR. SIMS: Excuse me?

MR. BESHORE: Is it January through May I heard you read or February through May?

MR. SIMS: It is February through May. I misspoke. February through May is correct.

And no more than 50 percent of the production of the dairy farmer during those two months, in aggregate, can be received as producer milk under the Order during those two months.

DCMA proposes that the requirement that the dairy farmer must be outside the Order 5 and 7 marketing areas be retained, but proposes a more simple process for determining the limits to producer association which further define which producers are "supplemental".

Since February is currently a month included in the months which a producer may be out of the pool for determining if the producer is supplemental, and February is proposed as a month for payment of transportation credits, it is necessary to modify the months and provisions for determining which producers are supplemental.

For determining which producers qualify as supplemental suppliers to the Appalachian and Southeast Order marketing areas, DCMA proposes that a dairy farmer may not be a producer on the Order of more than 45 of the 92 days in the March through May period or must have had pooled less than 50 percent of the producer's Grade A milk on the Order during those three months combined.

It is important to note that the proposal is an "either/or" process. If the producer is off the pool more than half the days or is off the pool with more than half of his or her milk during March through July, then the producer is considered to be supplemental, and therefore, his or her --

MR. BESHORE: Excuse me.

MR. SIMS: I stumbled again.

MR. BESHORE: The prior sentence or that same sentence, the months are March through May rather than March through July. Is that correct.

MR. SIMS: March through May is correct.

Then the producer is considered to be supplemental, and therefore, his or her milk eligible -- is eligible to receive a transportation credit in the immediately following transportation credit payment period of July through February, and June, if applicable.

Data -- data analyzed above support March, April and May as the appropriate months to require producers to be out of the Appalachian and Southeast Order pools in judging their status as supplemental producers.

The proposed system for determining if a producer qualifies as "supplemental" is substantially simpler than the current system, yet retains the basic elements which define a producer as supplemental. Retained would be the requirements that a supplemental producer cannot be located within either the Appalachian or Southeast Order marketing areas and cannot be a regular producer supplying the marketing areas year-round.

Limiting the producer to association with the Order pool to no more than half the time or no more than half their milk is sufficient disassociation to render the producer not a regular supplier of milk to the Order.

DCMA proposes to increase the maximum transportation credit assessment allowable under the Southeast Order to .30 cents per hundredweight of Class I milk, an increase of 10 cents per hundredweight from the current maximum.

Three factors included in this proposal will impact the payments from the Transportation Credit Balancing Funds. The proposed increases in Class I prices in Orders 5 and 7 will lessen payments from the month -- from the fund since the differences in origin point Class I prices and delivery point Class I prices will increase.

Since all delivery points in Orders 5 and 7 under the Class I price proposal detailed above will see an increase in their Class I price, all calculations of differences between Order and -- origin and destination, Class I prices will increase.

Proposals Number 1 and 2 contain a conforming change -- conforming changes to the Order 5 and 7 language pertaining to the payment of transportation credits so that the Class I price at the origin and destination points is compared rather than comparison of origin and destination Class I differentials as is currently specified in the Orders.

The addition of the months of January and February as proposed for payments of transportation credits will tend to increase transportation credit payouts, as will the payment of transportation credits on entire loads of milk.

Based on analyses by the Market Administrators of the two Orders introduced at this hearing in Exhibit 9, page 11 and Exhibit 18, page 2, DCMA anticipates that the transportation credit assessment rate will be sufficient in Order 5 at the current .15 cents per hundredweight of Class I milk, but the transportation credit assessment rate will be insufficient for Order 7 at the current .20 cents per hundredweight of Class I milk and should be raised to .30 cents per hundredweight to cover anticipated shortfalls in the transportation credit fund resulting from the proposed amendments.

According to Exhibit 9, page 11, the Market Administrator for Order 5 estimates that as a result of the DCMA proposal, during the July of 2006 through January of 2007 period, Transportation Credit payments would have totaled $4,073,312.

DCMA estimates that there would be a payment of $313,000 for the month of February, thus bringing the total estimated Transportation Credit Balancing Fund expenditure to $4,383,312.

This amount divided by the Order 5 Class I producer milk from 2006 of 4,136,735,262 pounds suggests that, for now, the .15 cent assessment on Class I producer milk for the Transportation Credit Balancing Fund will be sufficient.

According to Exhibit 18, page 2, the Market Administrator for Order 7 estimates that as a result of the DCMA proposal, during the July through December of 2006 period, Transportation Credit payments would have totaled $15,704,872.

DCMA estimates that there would be total payments of $2,900,000 for the months of January and February, thus bringing the total estimated Transportation Credit Balancing Fund expenditure in Order 7 to $18,604,872.

This amount divided by the Order 7 Class I producer milk from 2006 of 4,774,045,357 pounds suggests that for 2006 the .30 cent assessment proposed on Class I in Order 7 would have not have provided sufficient funds to pay all claimed Transportation Credits.

It is estimated, however, that the .30 cent per hundredweight Class I assessment would have been sufficient using the DCMA proposal in 2004 and in 2005.

DCMA proposes that the maximum Transportation Credits assessment would be set at .30 cents per hundredweight in Order 7 and at such time it is -- as it is determined that this rate is truly insufficient, DCMA may propose its revision through another hearing proceeding.

Recent increases in the cost of fuel have -- could have a substantial impact on the magnitude of funds paid from the Transportation Credit Balancing Funds making the need for sufficient assessments especially relevant.

The Secretary's recent Decision on Transportation Credits in Orders 5 and 7 reiterated the need to keep the Transportation Credit Balancing Funds fully funded.

As a protection to the Class I handlers funding Transportation Credits, the Order provisions direct the Market Administrator to establish Transportation Credit assessment rates that ensure that handlers of Class I milk will not be charged more than what is reasonably -- that should be "than" -- charged more than what is reasonably expected to be paid out in Transportation Credits.

The Transportation Credit Balancing Funds provisions afford the Market Administrator discretion in setting the assessment rates at or less than the maximum allowed by the Orders based on projected Fund needs.

Proponents continue to support this process and the Market Administrator's discretion in setting the Transportation Credit Balancing Fund assessment rates in the two Orders ensures that if payments from the fund are less than anticipated assessments can be lowered by the Market Administrator accordingly.

An important nuance to the Transportation Credit Balancing Fund provisions is that if the Transportation Credit Balancing Fund is insufficient in a month to pay all claimed transportation credits, then the Market Administrator prorates available credits to the claimed credits expending all the available funds that month.

There is no process for recouping in the future these unpaid transportation credits if the Fund -- if funds -- if the Fund's payments are prorated, meaning that the marketers of milk who are responsible for payment of the hauling costs on supplemental milk are left holding the bag on the unpaid portion of the Transportation Credit.

On the other hand, Class I handlers are protected by the Order provisions if the Transportation Credit Balancing Funds become over-funded through the Market Administrator's requirement to suspend Transportation Credit Balancing Fund assessments or to lower assessment rates.

In simple terms, this is a one-sided risk proposition. Class I handlers are insured or assured that their assessments over time will be in line with the needs for funding the Transportation Credit Balancing Funds, but the raw milk marketers are not assured of getting their hauling costs on supplemental milk covered if the Funds are less than fully furnished.

For this reason, it is important that the Secretary set maximum transportation credit assessment rates and the Market Administrator set actual rates of assessment high enough to ensure sufficient funds are available to cover the claimed credits.

In summary, the Appalachian and Southeast Orders, and their predecessor Orders, have had Transportation Credit Balancing Fund provisions for many years and the Transportation Credit provisions have functioned as intended by increasing the regulated cost of Class I milk so that supplemental milk could be procured from outside the marketing areas.

The Transportation Credit Balancing Fund system should be -- should continue to be a part of the Appalachian and Southeast Orders and needs to be improved and updated as proposed.

Integrated System Approach

As stated, the DCMA proposal is designed as an integrated and coordinated system of provision changes designed to meet the needs of the many differing interests in the marketing areas.

Just as producers must judge an Order in its entirety when deciding whether or not to approve an Order as amended, the DCMA proposal is part of the entire Order provision package and stands together as a package of provisions.

The proposed changes to the Class I pricing and diversion limit provisions work together to send the economic signals necessary to ensure that a sufficient quantity of milk is available to meet the fluid milk needs of the three marketing areas.

The transportation credit provision changes and the diversion limit changes work together to encourage the importation of supplemental milk when needed and to allow certain milk which is now part of the pooled reserve to become supplemental to the marketing areas and not pooled year-round.

The transportation credit provisions work together with the Class I pricing changes to form two fronts for ensuring an adequate supply to the marketing areas.

In addition to the obvious relationships of the various prongs of the proposal as described throughout this testimony, there are more subtle linkages as well.

The Class I price surface as proposed is based largely on a price gradient of 80 percent of $0.0044 per hundredweight per mile. This rate is seemingly less than is paid under the transportation credit provisions where the $0.0044 per hundredweight per mile rate comes from.

However, when after deducting the required 85 miles from the actual mileage before transportation credits are calculated, the actual per mile rate on Transportation Credits and the proposed Class I price surface begin to line up quite nicely.

In Order 5, according to Market Administrator Exhibit 9, page 9, the average distance Transportation Credit eligible supplemental milk moved during 2006 was 442 miles.

In Order 5, the 85 mile Transportation Credit deduction represents a reduction in the effective hauling reimbursement of approximately 19 percent.

In Order 7, according to Market Administrator Exhibit 18, page 4, the average distance Transportation Credit eligible supplemental milk moved during 2006 was 707 miles.

In Order 7, the 85 mile Transportation Credit deduction represents a reduction in the effective hauling reimbursement of approximately 12 percent.

Further still, the linkage of the correction of the diversion limit percentages in the Appalachian and Southeast Orders coupled with the correction of the Class I price surface will create a blend price gradient more in line with the cost of moving milk and more likely to bring forth a sufficient supply of milk for the region.

DCMA has endeavored to provide a system of Order provision changes which, functioning together, improve the ability in the southeast Order -- southeastern region Orders to secure a sufficient quantity of milk for the three marketing areas. This we believe we have done.

Over Order Prices

Over order prices do exist in the southeast and are reflective of the significant -- significant costs associated with service of predominantly fluid milk marketing areas.

At present, these substantial costs incurred in supplying milk for the southeast are largely borne outside Order-regulated values. The proponents seek changes to the regulated levels of prices and to the regulated cost recovery mechanisms to give assurance that the necessary revenues will be there to help cover costs of supplying milk for the southeast, to offer assurances to the marketplace and the costs for which reimbursement is sought are indisputable, to recognize the limits in over order pricing to address these issues and to ensure uniform application of the revenues and uniform sharing of the costs.

According to data included in "Dairy Market News", Volume 73, Report 02 and Volume 74, Report 02, Class I Over Order Prices did increase in many cities during 2006 versus 2005. The simple average over -- Class I Over Order Price for all reported cities increased .25 cents per hundredweight from 2005 to 2006.

In the south -- in the southeast, for the benchmark cities of Atlanta and Miami, the simple average Class I Over Order Prices increased .79 cents per hundredweight and .67 cents per hundredweight, respectively, from 2006 to -- from 2005 to 2006 -- from 2005 to 2006, far exceeding the national average increase.

Such substantial increases in Over Order prices in the southeast in the coming year are highly unlikely leaving the almost-certain additional increases in supply costs for moving milk into the southeast likely to go uncompensated.

Federal Order regulated prices are, by definition, minimum prices. The proposals made by DCMA continue this practice of setting regulated values and cost reimbursement systems at less than full costs. Hauling costs used in the development of the Class I prices and payment of Transportation Credits are less than the actual current cost.

Over Order prices serve an important function in the price discovery process in that they can react quicker to changes in location values of milk than can the regulated values.

Over Order prices also compensate marketers of milk for the costs which, by definition, are underrepresented in the Order regulated values.

Given that the DCMA proposal retains the minimalist approach in its allocation of cost values it is reasonable to expect Over Order prices to continue to exist in the southeast even if this DCMA Federal Order proposal is adopted.

Disorderly Conditions Without Amendment

As previously discussed, the Class I price surface under Federal Milk Marketing Orders must be reflective of the relative values of milk across marketing areas and those relative values must reasonably reflect the real costs of moving milk.

Serious deterioration in the effectiveness of the Class I price surface in the southeastern Orders has resulted from a failure of the Class I price surface to keep pace with changes in the cost of milk hauling.

The southeast continues to see declines in milk production within the region necessitating increasing volumes to be imported into the region from supplemental and distant regular sources.

The costs of procuring sufficient quantity of milk for the southeast increases as local production decreases. In fact, the supplemental milk costs seem to accelerate faster and faster all the time.

Exhibit 21, pages Q1 and Q2, demonstrate the losses which are incurred at current minimum Order Class I price differences, hauling rates and values for deliveries of milk to pool distributing plant locations within the southeast from six potential supplemental supply locales.

The hauling cost factor used is the April 2007 Market Administrator mileage rate for use in the Transportation Credit computations. Three of the supplemental supply origin points are the same as was used in the bulk milk movement and procurement analysis above; three others are different potential supply locales.

In each example case, there is a loss on moving milk from the reserve supply areas to the southeast. As the cost of hauling increases, and it no doubt will, the losses incurred will increase, too.

Exhibit 21, pages Q3 and Q4, repeats the demonstration of transactional losses as just described above, but uses the losses which are incurred at current minimum Order uniform prices using the average uniform price at location, adjusted from the 2006 average as published in

"Dairy Market News", Volume 74, Report 05, January 29 through February 2, 2007.

When using blend price differences between the reserve production areas and plant locations in the southeast the losses are only slightly less grim than when using the Class I price differences.

The southeast imports more than one third of its supply in the most deficit months of the year to cover the fluid milk needs of the three marketing areas.

In round numbers, this represents more than 300,000,000 pounds of milk moved into the region monthly. If the average supplemental milk hauling and procurement transaction creates a loss of $1.50 per hundredweight at Order values, even after the collection of Transportation Credits, the total loss to the southeast would be more than $4,000,000 per month.

An average Order minimum price loss of $1.50 on supplemental milk is highly conservative. Unfortunately, these costs are not evenly distributed over all producers supplying the marketing areas.

In the Transportation Credit Tentative Decision on the southeastern Orders in 1996, Docket Number AO-388-A9, et al., the Secretary states in the Conclusion section of the Decision that, quote, "Testimony and exhibits introduced at this hearing indicate that the Southeastern

United States has a chronic shortage of milk ...", close quote, and further states that, quote, "The burden of filling the void between the supply of and demand for fluid milk has fallen disproportionately on cooperative associations serving these markets", close quote.

In the Transportation Credit Final Decision on the southeastern Orders in 1997, reopened from above Docket Number AO-388-A9, et al., the Secretary states in the Conclusion section of the Decision that, quote, "The record indicates that disorderly marketing conditions existed because of the significantly different costs that were incurred by handlers who provide the additional service versus those who do not", close quote.

The continued burdening of certain segments of the producer population with these costs of supplying milk to the southeastern Orders' handlers will exacerbate unequal returns for producers' milk replicating the disorderly marketing conditions which existed when Transportation Credits were first installed in the southeastern Orders.

Just as the costs of procuring supplemental supplies does not fall proportionately on all producers, handlers, too, can see differing costs of supplemental milk. The orderly assessment of costs on Class I milk thorough the regulated Class I price and Transportation Credit structure will alleviate the disorderly marketing which comes from handlers similarly situated not paying the same cost for milk.

The elements of disorderly marketing that are currently present in the southeast, inequitable returns to producers, unequal costs to handlers, and insufficient economic incentives for the procurement of sufficient quantities of milk will be ameliorated by the DCMA package of proposals.

Over Order prices can be, at any point in time, very temporary. Many non-economic pressures can impact the level of, and even the very existence of, Over Order prices in a region or marketing area.

Reliance on Over Order prices to reimburse marketers of milk for such a major portion of the substantial costs of procuring and maintaining a sufficient quantity of milk for the southeast as is currently the case leaves something to be desired.

Further, establishment of a representative regulated price surface offers handlers assurance that the portion of their cost of milk regulated by the -- represented by the regulated milk values is equitably and universally applied.

Order Language

Included in Proposals number 1, 2 and 3 in the Notice of Hearing is Order language designed to effectuate the proposed amendments to the -- to the three Orders. Scattered throughout this testimony are mentions of the proposed revised Order language in reference to the particular points of the package of proposals.

For clarity, we will now summarize all of the proposed changes in Order language by pertinent section.

In Sections 1005.13(d)(1) and (d)(2) and 1005.13(d)(2) -- did say 1005.13(d)(1) and 1007.13(d)(1) and (d)(2) --

MR. BESHORE: That's not correct.

MR. SIMS: The provisions are amended to require a producer to deliver one day's production each month to a pool plant for that producer's milk to be eligible for pooling by diversion to a nonpool plant.

In Sections 1005.13(d)(3) and (d)(4) and 1007.13(d)(3) and (d)(4) the monthly diversion limit percentages are set at 25 percent of pool plant producer milk deliveries in January, February, July, August, September, October and November, and 35 percent of pool plant producer milk deliveries in the remaining months.

In Sections 1005.50(b), 1006.50(b), and 1007.50(b), the calculation of the Class I skim milk price is specified to be the sum of the monthly Class I skim milk "mover" from Section 1000.50(q)(1) or (q)(2), plus the Class I differential from section 1000.52, plus the Class I price adjustment from Section 1005.51(b), 1006.51(b), or 10051(b), as the case may be. I stumbled again.

MR. BESHORE: The last Order reference 1007 --

MR. SIMS: 10 -- 1005.51(b), 1006.(b) and 1007.(b), as the case may be.

In Sections 1005.50(c), 1006.50(c), and 1007.50(c), the calculation of the Class I butterfat price is specified to be the sum of the monthly Class I butterfat "mover" from section 1000.50(q)(3), plus the Class I differential from Section 1000.52 divided by 100, plus the Class I price adjustment divided by 100 from Section 1005.51(b), 1006.51(b), or 1007.51(b), as the case may be.

In Sections 1005.51, 1006.51, and 1007.51, the current language in each Order is renumbered and a subparagraph a is renumbered as subparagraph a and a conforming change is made to recognize the new language in Sections

1005.50, 1006.50 and 1007.50.

A new Subsection 1005.51(b), 1006.51(b), and 1007.51(b) is added to each Order specifying the newly created "Class I price adjustment" for each county or parish located within the three marketing areas.

In Sections 1005.81 and 1007.81, conforming changes are made to require the Market Administrator to consider the historical and expected payouts from the Transportation Credit Balancing Funds in the months of July through February when setting the Transportation Credit Balancing Fund's effective assessment rate.

In Sections 1005.82(a)(1) and 1007.82(a)(1), the months during which Transportation Credit Balancing Fund payments are to be made is specified as July through February, and June if requested.

In Sections 1005.81(c) -- or -- excuse me -- 1005.82(c)(1) and 1007.82(c)(1), language is deleted so as to provide that Transportation Credit Balancing Fund payments will be made on full loads of milk rather than just the calculated Class I portion.

In Sections 1005.82(c)(2) and

1007.82(c)(2), language is provided to revise the definition of which producers are supplemental, and therefore, their milk eligible for Transportation Credit Balancing Fund payments.

In Sections 1005.82(d)(2)(iii) and 1007.82(d)(2)(iii), as well as sections 1005.82(d)(3)(v) and 1007.82(3)(d)(v), conforming changes are made such that -- let me re-read those.

In Sections 1005.82(d)(2)(iii) and 1007 -- 1007.82(d)(2)(iii), as well as Sections 1005.82(d)(3)(v) and 1007.82(d)(3)(v), conforming changes are made such that the origin point Class I price and the destination point Class I price are compared when computing the Transportation Credit Balancing Fund payments.

Certain changes in the Section 1005.82 and 1007.82 language requiring -- required renumbering various subsections.

Need For Emergency Action

The notice of hearing in this proceeding invited comments on emergency conditions present in the marketing areas and seeks comments on considering emergency action and the omission of a recommended decision under the rules of practice and procedure.

The costs of hauling supplemental milk into the southeast region are real, are substantial, and are increasing, as has been fully demonstrated. Milk production is declining and population is increasing in the region. The sufficient quantity of milk for the southeast region is threatened by regulated price incentives which are insufficient to encourage milk to move into the area.

Slowing growth rates in milk production nationally may make additional -- obtaining necessary additional supplies to meet the fluid milk product demand in the southeast especially difficult -- may make obtaining necessary supplies to meet the fluid milk product demand in the southeast especially difficult during the fall of 2007.

Proponents have demonstrated the insufficiency -- the insufficiency of current regulated price levels to send the economic signals necessary to attract a sufficient quantity of milk to the marketing areas. Substantial losses will be incurred in supplying milk to the region if the regulated prices are not adjusted to offer assurances that costs of supplying the marketing areas are covered, or worse, the region may go short of milk if marketers have no way of recovering the supply costs.

As has been stated in previous decisions and reaffirmed by the Secretary, the costs defined in these proposals are currently not borne equitably by all producers, exacerbating the problem. Delay in implementing these amendments only worsens the inequities present. Since these costs fall disproportionately on one segment of the producer population, the cost per hundredweight borne by those producers exceeds the cost per hundredweight for the Orders as a whole. Quick correction of this situation will preserve the orderly marketing of milk in the region by safeguarding the regulated cost recovery by those marketing -- marketers of milk actually incurring the costs of maintaining the sufficient quantity of milk for the region.

The costs associated with -- the costs associated with delivering milk in and to the Appalachian, Florida and Southeast marketing areas are considerable and are ongoing. Failure -- failure to address these issues through the Federal Order program puts in jeopardy the sufficient quantity of milk for the southeast. Delay will not lessen the costs, will not see a reversal in cost trends, nor see an equitable reapportioning of the costs onto all parties in the marketing areas.

The current process for payment of the costs of milk delivery in the Appalachian, Florida and Southeastern Orders, as has been demonstrated, does not offer marketers of milk sufficient reassurance that a sufficient portion -- significant -- that a significant portion of the costs of supplying milk will be covered.

If the provisions of the Orders are left unchanged, the economics in the delivery of milk will likely, sooner than later, make such deliveries unworkable and the supply -- the supply of milk in the marketing areas will be threatened. Only quick action on the part of the Secretary will forestall such a lamentable occurrence.

The milk marketing dynamics in the southeast continue to worsen in regards to available supplies to meet the needs of the marketing areas. Exhibit 21, page R provides the 1980 to 2006 annual milk production history for the 12 southeastern states.

Milk production has been dropping on average about two percent per year in the southeast, but decreased 3.84 percent from 2005 to 2006. Exhibit 21, page S provides southeastern state milk production for the first quarter of 2007 versus the first quarter of 2006 and milk production in the 12 southeastern states declined a frightening 4.18 percent.

Clearly, the problem of supplying milk to the southeast is worsening, and worsening at an increasing rate. Exhibit 9, page 8, and Exhibit 18, page 3, introduced by the Market Administrators for the Appalachian and

Southeast Orders show the volume of milk for which a Transportation Credit was claimed in each year of 2000 to 2006.

In Order 5, Transportation Credits were requested on 489.1 million pounds of milk in 2006 versus 305.9 million pounds in 2000, an increase of 60 percent.

In Order 7, Transportation Credits were requested on 819.5 million pounds of milk in 2006 versus 373.6 million pounds in 2000, an increase of 119 percent.

As we sit here today, USDA statistics show national milk production growth is also slowing, potentially leaving less -- even less milk in reserve supply areas available for the southeast.

The existence of Emergency conditions is beyond argument. Some of the provisions as proposed to be amended here are pursuant to the marketwide service payment provisions of the Agricultural Marketing Agreement Act, and therefore, deserve quick action.

As previously mentioned, DCMA recognizes that a national review of the Class I pricing structure under Federal Orders may be undertaken in the not too distant future. The question may be asked as to why DCMA has made this proposal now versus waiting and participating in the national review of Class I prices at a later date.

There are several reasons for proceeding with this request now instead of waiting. First, a national review of Class I pricing may or may not yield changes in Orders 5, 6 and 7 other than what is proposed by DCMA today.

Second, the milk supply and demand condition for the southeast is at a critical juncture and must be addressed without delay.

Third, proceeding with the package of proposals described here today certainly does not preclude DCMA from participating in the national review of Class I prices at such time as that review is undertaken.

And fourth, the cost of moving milk into the southeast is increasing almost daily and the price incentives and cost reimbursement -- cost reimbursement processes proposed by DCMA cannot wait on, nor rely on, the possibility of future changes from a national Class I surface -- Class I price surface review.

For the above reasons, the Secretary should omit the issuance of a Recommended Decision and follow the practice used in several other recent proceedings and issue a Tentative Final Decision with an Interim Order and allowing the opportunity for comments before a Final Decision and Order are issued.

Testimony Regarding Proposals 4,5, 6 and 7

The Notice of Hearing included three

proposals made by the Market Administrators for the Appalachian, Southeast and Florida Orders listed as Proposals 4, 5 and 6, respectively. These proposals would raise the maximum assessment for Order administration under each of the three Orders to eight cents per hundredweight of producer milk, certain receipts of other source milk, and certain Class I dispositions in the marketing area by partially regulated distributing plants.

DCMA is not opposed to these proposals. DCMA understands that there may be conforming changes to the Orders as required by any amendments adopted as a result of this Proceeding, and therefore, is not opposed to Proposal Number 7.

Summary

The proponents again wish to thank the Secretary for the opportunity to propose these emergency amendments to the Appalachian, Florida and Southeast Federal Milk Marketing Orders and look forward to a quick decision installing the needed changes to the Orders. This concludes my prepared statement.

(Time: 5:03 p.m.)

BY MR. BESHORE:

Q. Mr. Sims, in reading Exhibit 20, did you have any substantial changes in the language as -- as in the prepared exhibit other than any you may have specifically noted?

A. Well, my intention was to read it as printed.

Q. Let's look at Exhibit 21, that which is the compilation of exhibits prepared in support of Proposals 1, 2 and 3 by DCMA and I want to -- I want to go through these exhibits and allow you to elaborate on them, if appropriate, and make sure they -- that the record is clear with respect to what the exhibits represent and how they were prepared.

So, starting alphabetically, page A of Exhibit 21 is census data. Do you have anything to add to that?

A. No. It's basically self-explanatory.

Q. And the source from the United States Census Bureau, the information is as indicated?

A. Correct.

Q. Okay. Now, Exhibit -- or pages B1 through B4, did you prepare those -- prepare that exhibit?

A. I did.

Q. And it's discussed in more than one place or it's referenced in more than one place in Exhibit 20. First of all, was it prepared initially for Market Administrator data?

A. The basic underlying data is, not the Administrator data. The -- the data on Class I producer milk comes straight from the Market Administrator's annual statistics. The data on -- both for Orders 5 and 7, and for Order 6 as it pertains to page B4.

The data on in-area production for farms located inside the marketing areas, which comes in on page B2, that's data taken right out of the Market Administrator exhibits prepared for this hearing. And then the -- the basic comparison for Orders 5 and 7 of production to Class I and a reasonable reserve is page B3. That is my analyses.

And then for page B4, the monthly production -- well, this is for B4. It pertains to the Order 6 marketing area. The Class I producer milk comes straight from the Order -- from the Order 6 Market Administrator's statistics. The monthly production, however, comes from the -- the NASS milk production -- monthly milk production data reported for Florida for the state of Florida. And then those comparisons again are mine.

Q. Okay. Now, let's look at B3 and B4 specifically. Could you go from left to right and cross those columns and make sure and explain the arithmetic or the calculations?

A. Yes. It probably would make sense to go back to B1 and work our way forward.

Q. Okay.

A. B1 simply is a -- a compilation of the Class I producer milk pool on Orders 5 and 7. If you're going left to right, the first column is the Order 5 Class I producer milk as reported on the Market Administrator's data by month. But, of course, the number of days, the daily average Class I use in the Order, and then just simply compares each month to the total annual and shows again for plants for months which are more than a hundred percent their higher than average daily use in Class I, months with less than 90, a hundred percent are less than the average.

The same is repeated for the fourth, fifth, sixth and seventh -- fifth, sixth, seventh and eighth columns -- excuse me. The same data for Order 7, again, taken straight from the Market Administrator's data as they release monthly. And then the last four columns are simply the sum of the data for Orders 5 and 7.

And then if you'll go to page B2, again, these data are taken straight from the -- the data prepared for this hearing by the Market Administrators based on in-area production pool on some Order, then Order 5, Order 7 and the sum of the two.

Then, if you go to page B3, the following -- if you will flip back to B2, you'll note eight -- roughly 805,000,000 pounds of milk produced in Orders 5 and 7 that carries right on to page B3, the top of the first column.

If you go to the previous page B1 805,480,000 pounds of Class I, that comes right over to B3. And then per production inside the market area as compared to Class I producer milk and it shows in the third column in-area surplus or deficit for the Orders 5 and 7 areas combined that -- for example, for the year 2006, the milk produced inside those two marketing areas pooled on some Order only provided enough milk to cover the Class I need in four of the 12 months.

And if you gross up the Class I need by a factor of 125 percent to recognize some necessary reserve and the Class II -- use of Class II, then the -- the area of production was grossly insufficient to supply the needs of the marketing area and that is what is reflected in the fifth column.

Q. The fifth column is Class I use times 125 percent?

A. The fourth column is Class I use times 125 percent and then the fifth column would be the fourth column compared with the monthly production.

Q. And at the bottom of -- at the bottom of each of those pages then you have, what, three aggregate totals --

A. Correct.

Q. -- on a monthly and an annual basis?

A. That's correct.

Q. The number to the far right at the bottom of page

B3 --

A. Yes.

Q. -- is negative seven billion --

A. Yes.

Q. -- and some additional pounds. What does that represent?

A. That represents a -- at a reserve in Class II use of 125 percent of Class I use that in the last three years in the Order 5 and 7 area just to -- to supplement the -- the supplemental milk produced inside the marketing area would have to be imported from --

(Reporter's audio tape shut off)

MR. SIMS: Your tape recorder shut off.

COURT REPORTER: Thank you. I'll need to get another tape.

MR. SIMS: -- that recommends that in order to supply the necessary milk to supply Class I, Class II and some modest, modest reserve in the last three years milk produced outside the Order 5 and 7 marketing area of approximately 7.1 billion pounds would have had to have been brought into those marketing areas to supply that need over that three year total.

BY MR. BESHORE:

Q. Okay. And page B4 then represents the same analysis for the Florida Order; is that correct?

A. That is correct. The -- the monthly production is -- rather than taken from Market Administrator's statistics, uses the NASS monthly report for the Florida -- state of Florida. But the Class I producer milk is straight off the Federal Order reports and then the comparisons to the right are analogous to B3.

Q. Now, B4 uses a Class IV of 115 percent --

A. Yes.

Q. -- rather than 125 percent. Why is that?

A. Basically, a reflection of the lower Class II use in the Florida area versus the four and five and seven areas.

Q. And the bottom line, if you will, to the far right for Florida is for the three years is what amount?

A. 2.85 billion pounds short of -- to meet Class I plus a modest reserve for the three year total.

Q. Okay. Let's go then to the C1 to C4 maps. Did you prepare these?

A. I did.

Q. And you describe the -- what they represented in -- in your -- in your testimony, they represent, what, essentially mileages and price gradients under the status quo?

A. Correct.

Q. Let's move to D1 and -- D1 and D2. Did you prepare that Table?

A. I did.

Q. And it indicates the current differentials at distributing plants and it's sorted alphabetically by state; is that correct?

A. Yeah. By state and city, correct.

Q. Currently that's in the proposal --

A. The proposed price adjustment pursuant to the new Section 1000.51(b).

Q. As set forth in the notice of hearing?

A. Yes. That actually probably should read 10054.41(b), 10064.51(b) and 1007.51(b) rather than the 100.51(b) as I had listed it. That is not technically correct. It should be 105, 106 and 107.

Q. And that's because you propose that changes in Class I price are a -- are to be embodied in a new section -- a new part 51(b) under each Order rather than --

A. That's correct. And that same correction needs to be made on D(2) -- the heading on D(2).

Q. Page E is the color map, correct?

A. It is.

Q. And did you prepare that?

A. I did.

Q. And that represents the geographic areas of the proposed new differentials?

A. The current differential plus the Class I price adjustment as proposed.

Q. Page F of Exhibit 21, did you prepare that calculation?

A. I did.

Q. And why is Wayne County, Ohio circled -- not circled but --

A. Boxed.

Q. Boxed, yeah.

A. The -- this represents the initial calculation of the -- of potential supply areas and the -- and the acquisition costs for Miami and then the -- which one of the five of these five potential supply areas represents the low cost potential supplier of bulk milk to Miami. Wayne County, Ohio, based on its current differential plus mileage, generates the low -- the least cost supply point for Miami.

Q. By the way, are those actual realistic supplemental supply areas of the market?

A. They do represent pockets of supply that are -- might be available in the southeast. Yes, sir.

Q. Turn to G1 and G2 then. Did you calculate this table?

A. I did.

Q. And what does it represent there?

A. As is detailed in the testimony, after establishing the -- the initial possible price at -- at Miami successively northward plant locations were -- were compared to that -- that Miami price. Based on distances back from Miami, this represents what those particular prices could have been under the unsmoothed bulk movement model.

And then with the -- by calculating the initial price versus Miami and then subsequent iterations after that and then simply compared it to the final price as proposed in the DCMA Proposals 1, 2 and 3.

Q. Okay. So, the final price column or the price that would be applicable under the notation under the notice of hearing proposals?

A. Correct.

Q. Page H is a one page example of the -- what, the bulk --

A. Package.

Q. -- package. Packaged milk movements. And you prepared that?

A. I did.

Q. Do you have anything to add beyond the explanation in your statement?

A. The -- this is, you know, the -- just an example of how the packaged milk movement acquisition cost model worked for Lafayette. We compared five plant locations outside of the Order 7 area which might provide a source of packaged milk for Lafayette, used the current differential plus the cost of hauling packaged milk to provide the least cost potential supplier of packaged milk to Lafayette.

In the case of Lafayette, Tyler, Texas is currently $3.00 plus a $1.18 haul rate or haul cost provides the low cost supplier of packaged milk to Lafayette at $4.18.

Q. Low cost. Low cost from points outside the Order?

A. In this case, yes. Successively further inside, as we described in the testimony, points moving on inside then became inside the inside but the first iteration was outside the inside.

Q. Okay. And the next exhibit pages in Exhibit 21 are pages I1 through I3 and the source of that data are the footnoted Department of Energy web -- web site pages, I take it?

A. That's correct.

Q. And then this simply shows the diesel fuel prices from those web sites that have been used so either that historically existed or which reflect the data series that are used in the current transportation credit rate calculation?

A. Correct.

Q. So, go to page J of Exhibit 21. Did you prepare this calculation?

A. I did.

Q. And briefly, what is it and what does it depict?

A. This just simply provides by way of example the calculation of location adjustments as required under certain Order provisions under three different milk movements and how the -- the location adjustment would be calculated both inside marketing areas for milk movements to plants outside of marketing areas and for milk pooled on other areas moved into these areas and how the -- the various provisions of all the Orders within would be -- would work together and to provide a location -- a proper location adjustment structure.

Q. Okay. Page K, did you prepare that?

A. I did.

Q. And what was the source of the data?

A. The source of the data would be the Orders regulating the -- the part 1,000 which provides the current Class I differentials at plant locations across the southeast as they -- as they exist today and then the -- which is the first column. And then the first 13 of those numerals there in the upper half represent those, if you will, price zones or differential zones which exist currently in Orders 5 and 7.

And then the bottom three represent the three price zones in Order 6. And then the column to the right simply takes each zone and subtracts the -- the -- in the first column and subtracts the number immediately above it to kind of give -- you know, going from a 220 to a 240 is .20 cents and a 240 to 260 is .20 cents and then averages those for Order 5 and 7 and provides them a step-wise zone to zone or the average change is .12 cents.

In the Order 5 and Order 7 area, step-wise the Order change from one zone to the price zone in the Order 6 is .30 cents. And then uses the same methodology based on the -- the DCMA proposal and provides a step-wise calculation of the average change zone to zone and it goes up from .12 cents currently to .19 cents in Orders 5 and 7 and from .30 to .50 cents in Order 6.

Q. Okay. Pages L1 through L8 of Exhibit 21 is entitled DCMA Proposal Comparison of Class I Price Adjustment and Differences Per Ten Miles, plants located within 200 miles of the proposed lower or same Class I prices. And maybe you can just take the top -- take Birmingham, Alabama first, --

A. Yes.

Q. -- which is the first plant location analyzed in pages L1 through L8 in Exhibit 21 going from left to right, if you would, and just explain the analysis.

A. Certainly. The first column states the location within Orders 5, 6 or 7, the city that has a -- currently a pool distributing plant in it.

The second column is the Class I differential applicable at that city. In this case, Birmingham has a $3.10 Class I differential. The proposed Class I price under the DCMA proposal is the current differential at Birmingham of $3.10, plus a Class I price adjustment of .30 cents for a total of $3.40.

Then the next column says how many -- you know, where are other plants within 200 miles of Birmingham that have a lower Class I price either now or under the proposal and it starts -- and it makes some comparisons.

In this case, the current differential and the next plant next north of Birmingham happens to be Decatur, Alabama with a current differential of $2.90.

If you skip over then three more columns to current price difference, the difference between $3.10 and $2.90 gives you the .20 cents there in the -- one, two, three, four -- the eighth column.

The .20 cents is divided by 78 miles and converted to a rate per ten miles to give roughly 2.5 to 2.6 per ten miles is the current difference between those plants.

Then we calculate for Decatur the proposed price compared to the proposed price at Birmingham. In this case, Decatur would be at $3.20, a total of $2.90 plus a .20 -- a .30 cent adjustment, compares that to the $3.40 cents at Birmingham, which is proposed, so then it's the same 20 as -- .20 cents does not change in this case, .20 cents, and then compares that .20 cents to the -- again, the .78 cents and calculates a difference per ten miles.

And that occurs at every plant location throughout the southeast and all plants with a lower price or same price within 200 miles.

But the -- I guess the most important column here is the last one to the right, which then basically shows that based on all the proposed prices throughout the southeast that the difference between those prices -- a difference between prices and those plants within 200 miles, there's no plant that those differences exceed the cost of moving milk between those locations.

Q. So this is an attempt to analyze the change, if any, in the competitive relationship among these plants?

A. A potential competitive relationship.

Q. Potential competitive relationship. Could you turn to page M?

A. Yes.

Q. And it's a one pager. Did you prepare that?
A. I did.
Q. Okay. And what does it depict?
A. It simply reports the -- the DCMA proposal for percentage diversion limits by month for the Appalachian Order and the Southeast Order in two comparisons.

First, the upper half of the page is simply their percentage points change month-to-month. For example, in the Appalachian Order, the current diversion limit in March is 40 percent and DCMA proposes 35 percent, so that is a reduction in five percentage points.

For the first -- for the Southeast Order, the current diversion limit in Order 7 in January is 50 percent. DCMA proposes 25 percent for a percentage points change of 25.

The bottom half of this, however, takes the next step and then shows what that would mean in terms of potential pounds pooled, meaning that, you know, just because in Order 7 -- for example, the best one to look at perhaps is the Southeast Order, the bottom right section of columns. The current limit is 50 percent and the proposed limit is 25.

But in terms of the pounds that that represents, that is a reduction of half, that the pounds which can be diverted goes down by half when the percentage points change is 25 going from 50 to 24 -- 25 percent, there is a relative reduction of half.

Q. And the bottom right number then for the Southeast Order, Order 7, shows a simple average change in volume eligible for diversion of almost 30 percent?

A. Correct.

Q. Okay. Moving on then to Exhibit N1 -- page N1 through N13 --

CHIEF ADMINISTRATIVE LAW JUDGE: Mr. Beshore, we're going to break or do you want to -- it's 5:30, which is what we were talking about stopping at today?

MR. BESHORE: I'd just a-soon plow to the end of --

THE WITNESS: It won't take that much longer.

MR. BESHORE: -- the end of this exhibit, --

MR. SIMS: Your Honor --

MR. BESHORE: -- if we can. I think that will be best because then I'm done with -- we're done with direct testimony.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. Go forward.

BY MR. BESHORE:

Q. N1 through N13, --

A. Yes.

Q. -- tell us about that.

A. By month using the market -- the data released by the Market Administrator in the case of Order 5 it is grossed up by the -- the percentage reporting as we described in the testimony.

But for each month, it takes the daily deliveries to pool distributing plants in that month and compares the actual deliveries each day to the highest day during that month.

If you look to page N1 for January of 2004, the single highest day of deliveries to pool distributing plants would have been Friday, January the 19 with roughly 17.6 million pounds of deliveries. Obviously, that's the high days. There is no difference. You know, that represents zero. There's no difference in the high day.

Each number then of the actual deliveries is compared to, in this case, 17,585,000.

For the first day of January of 2004, which was a Thursday, there was about 13.4 million pounds actually received by pool distributing plants, meaning versus the high day there was about 4.2 million pounds that had to be disposed of. We simply then sum those -- those values for the -- in the case of January, for 31 days. So there was

96.7 million pounds that had to be disposed of versus the high day of deliveries that month.

Q. And let's make clear what you mean by disposed of. If the -- let's take Sunday the 25th of January. If you have 6,220,766 pounds of milk that are less than was needed on the highest day of the month or the 9th, by disposed of, you've got to -- the pool distributing plants don't want it so you -- what can you do as a marketer?

A. You -- it would probably go to a nonpool plant.

Q. That's called a diversion, right?

A. I think that's -- yes. That's exactly what they call it.

Q. Okay. And so, it's got to be diverted and the bottom -- just sticking with January of 2004, which is every month that's calculated the same way throughout here whether it's Order 5 or Order -- for Order 5, correct?

A. Correct.

Q. The reserve as percentage of receipts, 21.56 percent, what's that?

A. That is the division of 96.7 million, which is the total amount which -- of milk which had to be disposed of versus the high day divided by the sum of actual receipts, the 448. roughly five million pounds, 96.7 million pounds divided by 40 -- 448.5 million pounds represents that 21.56 percent had to be disposed of in that -- in that month.

Q. And that just assumes -- that's -- 21 percent, that's just averaged out over the month?

A. Sure.

Q. It doesn't take into account the daily fluctuations between the 9th of the month and the 25th, correct?

A. It does sum all those differences. Yes.

Q. Okay. And you provided -- you used the Market Administrator's data and then made those calculations for each month of January of 2004 through December of 2006 on pages N1 through N12, --

A. Yes.

Q. -- correct?

A. Yes.

Q. And then N13 is, what, a summation of N1 through N12?

A. Correct.

Q. Okay. And O1 through -- page 01 through page O13 of Exhibit 21, what is that data?

A. The analogous data for -- for Order 7 -- oh. N1 through N13 are data for Order 5. O1 through O13 are the analogous data as released by the Market Administrator for Order 7.

Q. Okay. Let's turn then to page P of Exhibit 21.

Did you prepare it?
A. I did.
Q. And it compares Federal Order provisions in these Orders and in adjoining Orders in terms of touch base and diversion limits. Is that correct?
A. Yes.
Q. Do you have anything to add to what you've -- what you had in your direct statement?
A. No.
Q. Let's look then at Q -- page Q1 through Q4 of Exhibit 21. Did you prepare this data set?
A. I did.
Q. And can you briefly perhaps take one of the transactions --
A. Yes.
Q. -- and break it down, please?
A. Q1 -- pages Q1 and Q2 compare the transactional losses on the procurement of -- of milk from an area outside the southeast to plant locations inside the southeast based on differences in the Class I prices or the Class I differentials applicable at those spots.
The top of Q1, this is a milk movement from Lancaster, Pennsylvania to Mount Crawford, Virginia; Lancaster, Pennsylvania being a supplemental supply location and Mount Crawford being the northern most plant in

Order 5 -- the nearest, actually, Lancaster.

It's 213 miles from Lancaster to Mount Crawford using the Market Administrator's mileage rate for transportation credits applicable for July -- excuse me -- for April of 2007 of 0.00442 dollars, the haul cost is .94 cents, roughly.

Actually, when you move from -- Lancaster has a differential of $2.90 per hundredweight. Mount Crawford currently is $2.80, so you actually lose -- lose money going -- on differentials going from Lancaster to -- to Mount Crawford. So, if you pay .94 cents to haul it, you lose a dime on that transaction from the difference in Class I prices, you lose $1.04.

And then that same calculation for Lancaster is repeated for Winston-Salem, Spartanburg, Atlanta and Miami and those are based on the Class I differential differences.

The pages Q3 and Q4 are identical calculations except rather than using Class I differentials, they use the average 2006 blend prices -- producer uniform blend prices applicable at those supply locations and the delivery locations.

Q. So, Q1 and Q2 are Class I price -- it's an analysis of whether the current Class I prices will economically move the milk?

A. The Q1 and Q2 would be analysis of -- they -- they all are losers so they -- but yes, the loss which is incurred based on the differences in Class I prices.

Q. And three and four are based on differences in blend prices?

A. Yeah. And they're all losers, too.

Q. Okay. Let's look then at page R in Exhibit 21. Is that a simple compilation from NASS -- U.S.D.A. NASS data of milk production from the 1980's to 2006 for the southeastern United States?

A. It is.

Q. Okay. And the calculations in the far -- the two right-hand columns are just percentage changes which you did just arith -- arithmetic calculations based on the NASS numbers?

A. Correct.

Q. And the same thing at the bottom two lines of data on the exhibit are, again, just analyses based on the NASS numbers?

A. Correct.

Q. Okay. And finally, page S of Exhibit 21. What's that data?

A. That's the --

Q. Well, what's the source, first of all? It's not sourced on the exhibit itself.

A. That's -- yes. That is inadvertently left off. These are NASS data for the first quarter of milk production of 2006 and 2007 for the same states, which are shown on page R, just simply shows that the percentage change in milk production in the southeast in the first quarter of 2006 versus the first quarter of 2007 down 4.18 percent.

Q. Okay. Thank you, Mr. Sims.

MR. BESHORE: I have no further questions at this time, your Honor.

CHIEF ADMINISTRATIVE LAW JUDGE: Okay. It's about 5:45. Let's adjourn until 8:30 tomorrow morning. We'll start with cross-examination of Mr. Sims.

Although, as I've said before, any producers that want to get in and out tomorrow, just let me know before we start and we'll try to put them in.

MR. SIMS: Your Honor, the additional copies of Exhibits 20 and 21 are available on the table now.

CHIEF ADMINISTRATIVE LAW JUDGE: All right. We're adjourned for the day. We're off the record.

(Hearing was concluded at 5:45 p.m.)

REPORTER'S CERTIFICATE

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, MONICA HASBROOK, CSR, certify that I was authorized to and did stenographically report this hearing on May 21, 2007 and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the foregoing action.

Dated this 25th day of May, 2007, IN THE CITY OF TAMPA, COUNTY OF HILLSBOROUGH, STATE OF FLORIDA.

Monica Hasbrook

Monica Hasbrook, CSR
Texas CSR No. 2760

MONICA HASBROOK
Florida Notary Assn., Inc