

1 UNITED STATES DEPARTMENT OF AGRICULTURE

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6 EMERGENCY PUBLIC RULEMAKING HEARING

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DOCKET NUMBERS: AO-388-A17,

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AO-366-A46

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DA-05-06

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EMERGENCY PUBLIC RULEMAKING HEARING:

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The Hearing, taken in the above-styled matter at

21

the Kentucky Convention Center, 221 South Fourth

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Street, Louisville, Kentucky, on the 10th day of January,

23

2006, beginning at 8:32 a.m.

24

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## 1                   A P P E A R A N C E S

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3       FOR THE UNITED STATES DEPARTMENT OF

4       AGRICULTURE:

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1           A P P E A R A N C E S (CONT.)  
2  
3       FOR ARKANSAS DAIRY COOPERATIVE ASSN.; DAIRY  
4       FARMERS OF AMERICA, INC.; DAIRYMEN'S  
5       MARKETING COOPERATIVE, INC.; LONE STAR MILK  
6       PRODUCERS, INC.; and MARYLAND & VIRGINIA MILK  
7       PRODUCERS COOPERATIVE ASSN., INC.:  
8       MARVIN BESHORE, ESQUIRE  
9       LAW OFFICE OF MARVIN BESHORE  
10      130 State Street  
11      HARRISBURG, PENNSYLVANIA 17108  
12  
13      FOR DEAN FOODS COMPANY and DAIRY FRESH  
14      CORPORATION, A DIVISION OF NATIONAL DAIRY  
15      HOLDINGS:  
16      CHARLES M. ENGLISH, JR., ESQUIRE  
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1           A P P E A R A N C E S (CONT.)

2

3       FOR SELECT MILK PRODUCERS, INC. and

4       CONTINENTAL DAIRY PRODUCTS, INC.:

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10      FOR LAND O'LAKES DAIRY FOODS:

11      DENNIS J. SCHAD

12      LAND O'LAKES, INC.

13      405 Park Drive

14      CARLISLE, PENNSYLVANIA 17013

15

16      ALSO PRESENT:

17      JILL HOOVER

18      CLIFFORD CARMAN

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1 HEARING  
2 IN RE:  
3 UNITED STATES DEPARTMENT OF AGRICULTURE  
4 EMERGENCY PUBLIC RULEMAKING HEARING  
5 JANUARY 10, 2005

6 JUDGE DAVENPORT: This is a hearing  
7 on the proposed amendments and tentative  
8 marketing agreements and Orders. Docket numbers  
9 are AO-388-A17, AO-366-A46, and DA-05-06.

10 In the past, what I've done is I've asked for  
11 counsel to give me their appearances. However --  
12 which, I think probably what I'll do is -- in this  
13 case is, as you come to the microphone each time,  
14 identify yourself for the Hearing reporter so that  
15 the transcript reflects that.

16 At this time, I will call upon Mr. Stevens to  
17 enter his appearance, and also to give us an  
18 overview and to introduce the Department of  
19 Agriculture personnel.

20 MR. STEVENS: Your mic's not on.

21 JUDGE DAVENPORT: Okay. Is that  
22 better?

23 THE REPORTER: That's much better  
24 [laughs]. Thank you.

25 MR. STEVENS: I agree with everything he

1 said [laughs].

2 Good morning, your Honor. Good morning all.  
3 My name is Garrett B. Stevens; I'm with the Office  
4 of General Counsel, US Department of Agriculture,  
5 Washington, DC 20250.

6 I -- I've prepared some materials that we have,  
7 that we can go into in a minute. We can ask the  
8 witnesses if they may want to present exhibits for  
9 the record.

10 So I guess, unless there's something else your  
11 Honor wants to do, we'll go ahead and do that now.

12 JUDGE DAVENPORT: Mr. Stevens, you  
13 might introduce the Department of Agriculture  
14 personnel.

15 MR. STEVENS: I would be happy to do  
16 that, your Honor. And I'll -- I'll let them introduce  
17 themselves.

18 MR. TOSI: Good morning, your Honor.  
19 My name is Gino, G-i-n-o, last name, Tosi. T -- as  
20 in Tom -- o-s-i. I'm with Dairy Programs,  
21 Washington, DC.

22 MR. CHERRY: Good morning. My name is  
23 Richard Cherry, C-h-e-r-r-y. I'm with Dairy  
24 Programs, Washington, DC.

25 MS. HOOVER: Good morning. My name is

1 Jill Hoover, H-o-o-v-e-r. I'm with Dairy Programs  
2 in Washington, DC.

3 MR. CARMAN: Good morning. My name's  
4 Clifford, C-l-i-f-f-o-r-d, Carman, C-a-r-m-a-n. I'm  
5 with Dairy Programs in Alexandria, Virginia.

6 JUDGE DAVENPORT: Very well.

7 Mr. Stevens?

8 MR. STEVENS: Thank you, your Honor.

9 Your Honor, as a preliminary matter, we have  
10 given copies to the reporter and also to you, your  
11 Honor, and there are copies available on the table  
12 at the side of the room, I believe, of the -- of the  
13 documents that we would now ask be marked for  
14 identification and entered into the record.

15 JUDGE DAVENPORT: Very well.

16 MR. STEVENS: The first document is  
17 the -- is the Notice of Hearing, which appeared in  
18 the Federal Register, Volume 70, on Wednesday,  
19 December 28th, 2005, beginning at Page 76718, and  
20 continuing to Page 76724.

21 I ask that be marked, I believe, as Exhibit 1.

22 JUDGE DAVENPORT: So marked.

23 [WHEREUPON, document referred to is marked  
24 Exhibit 1 for identification.]

25 MR. STEVENS: I would ask that another

1 document, one-page document, entitled "USDA Sets  
2 Hearing on Proposed Amendments to Appalachian  
3 and Southeast Milk Orders," the press release  
4 noticing the -- of the notice of hearing, be marked  
5 as Exhibit 2.

6 JUDGE DAVENPORT: So marked, as well.  
7 [WHEREUPON, document referred to is marked  
8 Exhibit 2 for identification.]

9 MR. STEVENS: Your Honor, we have  
10 another document entitled "Certificate of Officials  
11 Notified," a one-page document, signed by the  
12 Hearing Clerk at the Department of Agriculture,  
13 who is nominated in that document the Docket  
14 Clerk. A one-page document in this proposed  
15 amendment hearing. And we'd like that marked for  
16 identification as Exhibit 3.

17 JUDGE DAVENPORT: So marked.  
18 [WHEREUPON, document referred to is marked  
19 Exhibit 3 for identification.]

20 MR. STEVENS: The next document is a  
21 document entitled "Determination re Mailing of  
22 Notice of Hearing" in this docket number that  
23 you've just mentioned. This -- this document is  
24 signed by the Market Administrator, Harold H.  
25 Friedly, Jr. of the Appalachian Marketing Area.



1 And we would like this marked for identification as  
2 Exhibit 4.

3 JUDGE DAVENPORT: So marked.  
4 [WHEREUPON, document referred to is marked  
5 Exhibit 4 for identification.]

6 MR. STEVENS: We would also like  
7 marked for identification a similar document  
8 entitled "Determination re Mailing of Notice of  
9 Hearing," signed by Sue L. Mosley, Market  
10 Administrator for Federal Order Number 6 Florida  
11 Marketing Area, and Federal Order Number 7,  
12 Southeast Marketing Area. We would like that  
13 marked for identification as Exhibit 5.

14 JUDGE DAVENPORT: Will be so marked.  
15 [WHEREUPON, document referred to is marked  
16 Exhibit 5 for identification.]

17 MR. STEVENS: These -- these are the --  
18 the -- the official documents from the Department  
19 noticing the hearing and giving notice to interested  
20 parties and a press release to the general public.  
21 We would ask that these be entered into  
22 evidence.

23 JUDGE DAVENPORT: Any objection from  
24 any of the personnel present?

25 They will be admitted into evidence as -- as

1 marked.

2 [WHEREUPON, Exhibit 1 through Exhibit 5 are  
3 admitted into evidence as marked.]

4 MR. STEVENS: Your Honor, next, we  
5 have three witnesses to introduce statistical  
6 material for the use of the parties at the hearing.  
7 We're prepared to do that at this time.

8 JUDGE DAVENPORT: Just -- before we  
9 start, there are probably a couple of  
10 announcements for the convenience of all parties  
11 concerned, and also the conduct of the hearing.

12 I would ask that you either turn your cell  
13 phones either off or on silent so that the other  
14 parties here are not disturbed by your -- your cell  
15 phone.

16 If anybody else is going to power up their  
17 notebooks, why don't we do that at this time so that  
18 we, maybe, are not quite as disrupted by that.

19 I will ask, if there are any people who have  
20 specific needs, to testify as to a particular time or  
21 if we have people who are in the dairy industry and  
22 have to get back to farms -- in other words, for  
23 your indulgence, if we take those people, in other  
24 words, when they are available. And we'll make  
25 every effort to make sure that everybody has a

1 chance to be heard as long as they wish to testify.

2 Mr. Stevens?

3 MR. STEVENS: Thank you, your Honor.

4 Let me call the first witness, Jason Nierman.

5 JUDGE DAVENPORT: Could you raise

6 your right hand.

7 JASON NIERMAN, after having been duly sworn, is

8 examined and testifies as follows:

9 JUDGE DAVENPORT: Please be seated.

10 And spell your full name for the Hearing

11 reporter.

12 THE WITNESS: My name is Jason, J-a-s-

13 o-n, Nierman, N-i-e-r-m-a-n.

14 EXAMINATION

15 BY MR. STEVENS:

16 Q. Good morning, Jason.

17 Could you -- you have given your name and

18 spelled it for the record. Could you tell us where

19 you work and -- and your business address, please.

20 A. I work for the Louisville Market

21 Administrator's Office. The address is 4511

22 Bardstown Road, Suite 103. And that's Louisville,

23 Kentucky 40218.

24 Q. Could you give us a -- a brief educational

25 background.

1 A. I have a bachelor's degree in animal  
2 science from Purdue Nur -- Purdue University; and  
3 a master's in agricultural economics from Purdue  
4 University.

5 Q. Could you describe for the record your  
6 duties at the Market Administrator's Office?

7 A. My job title is Agricultural Economist, and  
8 part of my duty is to -- duties is to prepare  
9 statistical information for the dairy industry.

10 Q. Among other duties of the --

11 A. Among -- yeah, among other duties.

12 Q. -- Market Administrator?

13 And you have participated in -- in Federal Milk  
14 Marketing Order Hearings previously to this time?

15 A. Correct.

16 Q. Well, now let me ask you: Have you  
17 prepared materials and brought them with you for  
18 use in the hearing today?

19 A. Yes.

20 Q. And you have given a copy of those to the  
21 administrative law judge, copies to the reporter,  
22 and there are copies on the side of the room  
23 available for the use of the parties of the hearing?

24 A. Correct.

25 Q. Now, do you have a copy of these

1 materials with you?

2 A. Yes.

3 MR. STEVENS: Let's start with the  
4 document marked -- entitled "Compilation of  
5 Statistical Material Federal Order Number 5  
6 Appalachian Marketing Area."

7 Your Honor, my set of this -- and I believe all  
8 the sets are similar. There -- there is a -- a cover  
9 sheet, a table of contents, and then two stapled  
10 copies of materials in a single unit.

11 BY MR. STEVENS:

12 Q. Is that correct?

13 A. Yes.

14 MR. STEVENS: And we're going to go  
15 through these and ask that they be marked, and  
16 then we will ask the witness to describe the  
17 material in them.

18 JUDGE DAVENPORT: The numbered  
19 pages go through 57?

20 MR. STEVENS: Well, that's the -- now,  
21 and that, I think we can do, just, as we go here.  
22 The -- I think a way to do this, of course, would be  
23 to give this a number. And then there are tables  
24 within it, which some of them are amenable to just  
25 giving it a number; and I think some of them will

1 have to have some -- then, sub-number, being a, b,  
2 c, d, something like that.

3 But let's go through them and -- and I guess  
4 we can. . . The -- the first one is -- is the  
5 compilation for -- for 2004. And it contains a cover  
6 sheet and a table of contents and then a -- a set of  
7 documents that has on the right-hand side, "Exhibit  
8 No." And it starts with Page 1, and it goes through  
9 Page 32.

10 BY MR. STEVENS:

11 Q. Is that right, Jason?

12 A. Correct.

13 MR. STEVENS: Okay. So my thought,  
14 and -- unless there is some other suggestions that  
15 your Honor would like to hear or would like to make  
16 your own decision on it, I guess we're at number --

17 JUDGE DAVENPORT: 6.

18 MR. STEVENS: -- 6. So this one could  
19 be marked Number 6, and has the pages that I've  
20 described

21 JUDGE DAVENPORT: Let's just mark it  
22 as --

23 MR. STEVENS: And that --

24 JUDGE DAVENPORT: -- collective Exhibit  
25 6, the cover sheet and the table of contents really

1 don't need further -- need to be further  
2 denominated. And each one of the exhibit pages  
3 do appear to have page numbers on them.

4 [WHEREUPON, document referred to is marked  
5 Exhibit 6 for identification.]

6 MR. STEVENS: Yeah. And there's some  
7 that aren't like that. That's why I differentiated,  
8 but -- and we'll get to those as we come to them.

9 And then, there is the second packet, which  
10 also has an "Exhibit No." on it, that is statistical  
11 material -- the same basic material as is in what we  
12 have marked as 6, which is for Order 5 for the year  
13 2005.

14 JUDGE DAVENPORT: Yes.

15 MR. STEVENS: Now, your Honor, we  
16 could mark this as 7, if -- if that's acceptable; and  
17 then mark the one-page thing as 8. And that's okay  
18 with me, certainly. If it's all right with you, we'll  
19 do it that way. Or, alternatively, we could make it  
20 6A, and that -- and make the other one 6B.

21 So that this is not a concern, how does it  
22 please the parties? Does it make any difference?

23 MR. BESHORE: They're -- they're  
24 numbered sequentially. I would -- if you could say  
25 the exhibit number.

1           MR. STEVENS: Okay. So you want -- so  
2 you want to --

3           JUDGE DAVENPORT: Let's consider it all  
4 Exhibit 6.

5           MR. STEVENS: I will defer to my learned  
6 counsel. Certainly, the -- the numbers continue --

7           JUDGE DAVENPORT: It's the --

8           MR. STEVENS: -- so I guess it will just a  
9 continuation of 6; and Page 57 will be the last  
10 page. All right.

11          So -- so the document has 57 pages, plus the  
12 title page and then the table of contents.

13          MR. BESHORE: Okay.

14          MR. STEVENS: Thank you. So, that's  
15 Number 6.

16 BY MR. STEVENS:

17          Q. Now, this material was prep -- prepared by  
18 you or pursuant to your supervision from records of  
19 the Department of Agriculture in the Market  
20 Administrator's Office?

21          A. Yes.

22          Q. It's not offered for or against any of the  
23 proposals, is it?

24          A. No.

25          Q. You -- you're not here testifying for or



1 against any of the proposals of the hearing?

2 A. No, I'm not.

3 Q. And it's -- it's prepared for the use of the  
4 parties in the hearing?

5 A. Yes.

6 MR. STEVENS: Your Honor, it has a table  
7 of contents. I don't want to -- I don't want to make  
8 this any longer than it's got to be, but I think it --  
9 it is helpful, sometimes, for the people that are  
10 here who have not seen these documents at this  
11 point, or -- for -- for Jason to go through it quickly,  
12 and just identify what is contained in the exhibit.  
13 I'm saying page-by-page, but -- but he -- he  
14 intends to go through it and just say basically  
15 what's in there and -- and what it represents.

16 BY MR. STEVENS:

17 Q. Could you do that for the record now?

18 A. Yes.

19 Q. Start with the -- with the first page of  
20 Exhibit 1 [sic] and just -- and just -- and go  
21 through the documents, sort of a brief description  
22 of what's contained in there.

23 A. This document is consistent with -- with  
24 what we print out on an annual basis for our annual  
25 statistics.

1 Page 1 is just the table of contents.

2 Page 2 is a map of the Federal Order 5 pool  
3 distributing plants as of December 2004.

4 Page -- Page 3, which is Table 1, will be the  
5 annual statistics, annual average prices and total  
6 producer milk as classified.

7 Page 4, Table 2, is the Advanced NASS Prices  
8 that are used in the announce -- in our announced  
9 price announcements.

10 Table --

11 Q. So, just to -- just -- just so the record  
12 reflects, reading your price there, you would be  
13 able to determine the -- at a -- at a two-week  
14 ending period of a date, the prices announced for  
15 these various products?

16 A. Those pro -- dairy-product prices would be  
17 used in Class I price formulas to compute Class I  
18 price.

19 Q. All right.

20 A. Table 3 is the average monthly NASS  
21 prices which are used in the Class III and Class IV  
22 price formulas.

23 Table 4 is the Uniform and Class prices of 3.5  
24 butterfat, the skim milk prices, and the butterfat  
25 prices.

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

3 Table 6 is receipts and utilization of other  
4 source milk, overage and opening inventories.

5 Table 7 is a classification of pool handlers  
6 total producer milk receipts.

7 Page 8 -- or Table 8 would be the  
8 classification of pool handlers total producer  
9 butterfat receipts.

10 Table 9 is the packaged disposition Class I  
11 utilization.

12 Table 10 is Class II utilization.

13 Table 11 is Class III utilization.

14 And then, Table 12 is Class IV utilization.

15 Q. And -- and I might say, all these, as you --  
16 as you go through these and -- and describe them  
17 for the record, some of them have footnotes; most  
18 of them have a source reference. All of those are -  
19 - are accurate and -- and -- and complete?

20 A. To the best of my knowledge, yes.

21 Q. All right. So, continue.

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

25 Table 14 is Class I packaged milk distributed

1 in mark -- in the marketing area by pool plants and  
2 nonpool plants.

3 Table 15 is the number of producers by state.

4 Table 16 is total pounds of producer milk by  
5 state that's pooled on Federal Order 5.

6 Table 17 is the state and county data for May  
7 2004. And that will go from Page 13 through Page  
8 19.

9 And from Page 20 through 26 is the state and  
10 county data for December of 2004.

11 Q. Now, let me -- let me interject here for a  
12 minute. When -- when -- in this -- in these tables,  
13 you see the word "restricted." What -- what does  
14 that mean?

15 A. Due to confidential concerns, the data,  
16 the producer milk data for that state cannot be  
17 provided.

18 Q. In other words, the --

19 A. There's less than three producers or  
20 possibly less than three handlers per state you.  
21 You would not release that state production.

22 Q. Thank you.

23 I interrupted. You were at -- you were at  
24 Table -- which table did you stop on?

25 A. I'm on Table 19.

1 Q. All right.

2 A. That's a list, by month, of handlers and  
3 plants subject to Federal Order 5 pooling  
4 provisions for 2004. And that would go through the  
5 end of that document, to Page 32.

6 Q. So, just let me -- let me make sure the  
7 record reflects that. That table, that -- it has  
8 various plants identified, location; and then it has  
9 a -- a grid that shows the months of the year  
10 represented by the first letter of the month. And  
11 then an "X." What does the "X" represent?

12 A. That was for, say, example on Page 27,  
13 for Broadacre Dairies, there is an "X" for every  
14 month.

15 Q. Right.

16 A. That was a pool distributing plant for all  
17 12 months of 2004.

18 Q. As opposed to Homestead Creamery,  
19 which was only one month, as I read the document?

20 A. Yes. Correct.

21 Q. Okay. And then, that would prove true for  
22 the -- for the document for the various handlers?

23 A. Yes.

24 Q. All right. Is that -- are you finished  
25 through Page 32?

1 A. Yes.

2 Q. Okay. Why don't you pick up with Page  
3 33, and describe those quickly for the record?

4 A. The second document would be --

5 Q. Well, let -- let me -- let me -- I'm sorry, I  
6 don't mean to interrupt you but let me -- let me just  
7 ask you: The material for 2005 is similar, and --  
8 and beyond that, identical, I guess, to the extent  
9 that you've made -- you may state for the record if  
10 it's not -- to the information submitted for -- for  
11 two -- the year 2004?

12 A. Yes. 2005 would contain the same tables  
13 as 2004, with the exceptions of Table 1; it says  
14 December 2005 data wasn't provid -- or wasn't  
15 available at the time this data was put together.  
16 There's no annual average statistics available.

17 And also, for Table 18, the state and county  
18 data for December 2005 was not available.

19 But other than that, the tables would be  
20 consistent with the -- the data that I just went  
21 through for 2004.

22 Q. And -- and -- is there something you want  
23 to share with the record about tables, I think, it  
24 was Tables 15 through 19 for the year 2004? Were  
25 those revised in any way from some previous

1 display of -- of that information?

2 And let me also say: You -- this is on the --  
3 this is typically on the Internet, is it not? You put  
4 this on the Internet for use of the parties during  
5 the year, as this information is compi -- compiled.

6 A. Correct.

7 Q. So --

8 A. Past copies would have probably been  
9 mailed to interested parties; and then, monthly, for  
10 2005, would be updated on our website.

11 Q. Okay. All right.

12 But -- but the numbers -- do I understand this  
13 correctly, that -- that numbers and information on  
14 the Tables 15 through 19, in -- in dealing with the  
15 year 2004, those have been revised from some  
16 previous publications of that material?

17 A. Yeah. Previous copies of 2004 and  
18 possibly 2005 that were on the Internet, the Tables  
19 15 through 18, where state production is listed,  
20 there -- there has been a revision in what states we  
21 have listed due to confidentiality concerns. We  
22 restricted some sta -- some states from listing and  
23 adding into the "other" category.

24 And I think those states are Illinois -- just a  
25 second. It would be Illinois, Missouri, West

1 Virginia and Wisconsin.

2 Q. All right. Now the -- the documents Page  
3 33 through Page 56 are similar to the ones for the  
4 previous year?

5 A. Correct.

6 Q. And your explanation of those would be  
7 the same, with any additions or corrections that  
8 you would want to make, to -- to what we  
9 represent -- what was represented for the year  
10 2004?

11 A. Yes.

12 MR. STEVENS: With that understanding,  
13 your Honor, I'm not going to have him go through  
14 all the tables, because they are -- they are  
15 basically the same. And if people have questions  
16 about this, certainly, you're -- you can ask him on  
17 cross examination.

18 BY MR. STEVENS:

19 Q. The -- the last -- Page 57, why don't you  
20 tell us what that is?

21 A. That is an example, which, for this, it's  
22 April of 2005, with a computation of the Federal  
23 Order 5 uniform prices.

24 Q. So for each class, the rep -- the -- and --  
25 and further delineated within the class, the



1 numbers that are represented on the table come  
2 from your official records, and are presented at the  
3 hearing for use of the parties, and are not for or  
4 against any proposal?

5 A. Yes.

6 Q. All right. That's -- now -- now having --  
7 having dealt with the material in Exhibit 6, let me --  
8 - let me -- let me just ask you one further question  
9 on 6. The last page, Page 57, that in -- is -- is an  
10 example of the computation of uniform pricing;  
11 right?

12 A. It's -- it is an actual month.

13 Q. And it is also --

14 A. But it's just for --

15 Q. And it is -- and it is also an actual month.  
16 It is an example of it, and it is an actual month.

17 A. Correct. Every month, we release a  
18 computation of uniform price with the -- it contains  
19 the same information. It would be different  
20 pounds, of course, and different prices. But the  
21 calculation and the computation of uniform price  
22 would be consistent.

23 Q. And this is the computation of the uniform  
24 prices for April of 2005 issued by your office?

25 A. Correct.

1 Q. All right. Let me ask you: Did you --  
2 you've brought other documents with you?

3 A. Yes.

4 Q. To the hearing?

5 You were asked by participants, interested  
6 parties, to prepare certain documents for the  
7 hearing; were you not?

8 A. Yes.

9 Q. And you've brought those with you today,  
10 and we've made copies available to the  
11 administrative law judge, to the reporter, and there  
12 are copies available at the side of the room for the  
13 use of the parties?

14 A. Yes.

15 Q. All right. Let me direct you to a document  
16 entitled "Compilation of Statistical Material  
17 Prepared at the Request of Dairy Farmers of  
18 America." Do you have that document?

19 A. Yes.

20 MR. STEVENS: There is a title page and  
21 there is a table of contents with 11 items issued.

22 Your Honor, we -- I just want to make sure we  
23 get them in the right order, so -- and -- and I  
24 apologize if some people may have them in a  
25 different order. But we're just trying to get them in

1 a -- in a certain order.

2 BY MR. STEVENS:

3 Q. And if this is not the correct order, you  
4 certainly can correct it, I mean, whatever the  
5 correct order is, can't you?

6 A. Yes.

7 Q. Do you want to start with that document?

8 A. That's fine.

9 Q. Okay. So --

10 JUDGE DAVENPORT: This will be marked  
11 as Exhibit 7?

12 MR. STEVENS: Right.

13 [WHEREUPON, document referred to is marked  
14 Exhibit 7 for identification.]

15 BY MR. STEVENS:

16 Q. Now, within that document, of course,  
17 there are -- there are following pages. And -- and  
18 the -- the following order; right? How many -- how  
19 many pages are in that document in total?

20 A. There's 15 total pages.

21 Q. Okay. And -- and some of it -- well, it's  
22 all pretty much in table form, with -- with titles at  
23 every -- of every table, of source documents,  
24 footnotes, and --and -- and the documents.

25 I just went -- would like you to go through

1 them, one by one, just name them for the record,  
2 and say what you want to say about them. But keep  
3 it brief, please, so we can move along here and get  
4 these documents over with. Could you do that,  
5 please?

6 A. Yes.

7 Q. All right.

8 A. Page 1 is the "Total Payments from  
9 Proposed Intra-market Transportation Credit Fund  
10 Based on Calculations Using Var -- Varying Mileage  
11 Rates" for April and October of 2005, which would  
12 be a proposal.

13 I believe, 2 is the Intra-market Transportation  
14 Credit. And those rates were requested by the  
15 proponent parties.

16 Page 2 is the "Estimated Total Pounds and  
17 Dollars from the Proposed Intra-market  
18 Transportation Credit Fund to Proponents of  
19 Proposal 2 and 3" for the --

20 Q. I'm sorry, did you leave out "Proposal 1"  
21 or -- or --

22 A. "Proposal 1, 2 and 3." Sorry.

23 Q. Okay. All right. Yeah.

24 A. It would be the for the same months and  
25 the same rates, so just what share of the total on

1 Page 1 would be paid to those parties.

2 Page 3 is the "Total Pounds of Milk Produced  
3 from Counties in the Appalachian and Southeast  
4 Marketing Areas and Pooled on Federal Order 5."  
5 It's also for the months of April and October of  
6 2005. And it's broken out from -- by proponent  
7 cooperatives, nonproponent cooperatives, and total  
8 milk pooled from nonmembers.

9 On Page 4 it lists some of the summary data.  
10 The title is "Summary Data from Analysis of the  
11 Proposed Intra-market Transportation Credit Fund."  
12 The first line average distance milk moved beyond  
13 nearest pool distributing plant of -- for those  
14 months, the simple and weighted average. The  
15 second set of data is the average zone adjustment  
16 between plants of the actual receipt and nearest  
17 pool distributing plants for -- on a simple and  
18 weighted average. The third line is the average  
19 Class I utilization for all pool distributing plants  
20 for both months.

21 The factors were used into calculating the  
22 numbers on Page 1 for the following tables.

23 Page 5 is the "Estimated Total Pounds and  
24 Dollars from Current Transportation Credit Fund  
25 Received by Proponents of Proposal 1, 2 and 3."

1 That's based that -- what they actually received in  
2 the first column, the total telephone conversation  
3 requested at 35 cents per hundredweight per mile  
4 is the actual credits and pounds, receiving credits  
5 for October and November 2005. And the four  
6 following tables comparing rates would be what  
7 they would receive if those rates were in place.

8 Page 6 is a listing of entities receiving Federal  
9 Order 5 Class Price Announcements. And those  
10 groupings were provided by the requesting party.

11 Page 7 through Page 8 is total milk pooled on  
12 Federal Order 5 by individual state. The reas --  
13 and on Page 8, the other category would contain  
14 could total milk from restricted states.

15 Page 9 contains "Producer Milk Produced in  
16 Counties Located in the Appalachian Marketing Are  
17 and Pooled on the Order by" individual "State."  
18 Effective November 1st, the Appalachian marketing  
19 area expanded with additional counties in Virginia,  
20 so to show that impact of those additional  
21 counties, the last two columns shows that -- the  
22 impact of the additional counties being added. And  
23 also, Georgia, the data from -- milk-production  
24 data from Georgia is restricted, so that was added  
25 into the state total of Tennessee.

1 Page 10 through 11 is the total milk pooled on  
2 Federal Order 5 that was delivered to a pool  
3 distributing plant in either Federal Order 5 or 7.

4 12 through 14 would be the "Daily Deliveries of  
5 Total Milk Pooled on Federal Order 5 That Was  
6 Delivered to a Pool Distributing Plant in Either  
7 Federal Order 5 or 7."

8 The footnote at the end at the Order, on one  
9 describes that we did not have the data, delivery  
10 data in electronic form for all handlers. So at the  
11 very bottom line, it shows a percent of total pool  
12 distributing plant deliveries. And that's the -- of  
13 what's in the table, the -- say, for example,  
14 January 2004, the sum of those daily deliveries  
15 represents 88.2 percent of the total deliveries to a  
16 pool distributing plant.

17 Page 15 is the "Estimated Uniform Price at the  
18 Location of the Plants Receiving 75 Percent of  
19 Total Diversions," and the cities are listed in  
20 alphabetical order. And this is regarding proposal  
21 5. We were asked to select the month with the  
22 lowest diverted volume in the last 12 months, and  
23 also the month with the highest diverted volume in  
24 the last 12 months.

25 So it might be easier to go through an

1 example.

2 Q. Please do.

3 A. For March 2005, Broken Arrow, Oklahoma,  
4 the first city listed, the current location adjustment  
5 is \$2.60 per hundredweight. Their uniform price at  
6 that location for March 2005 would be -- was 16.24.  
7 The actual Class III price was 14.08, and the  
8 actual Class IV price was 12.66. And those listings  
9 of cities represents 74.2 percent of the total, would  
10 be, out of area diversions for that month.

11 Proposal 5 proposes to change the price and  
12 the location adjustments of diversions out of the  
13 marketing area, based on the miles to the closest  
14 distributing plant.

15 So for Broken Arrow, the -- it is 104 miles from  
16 the closest pool distributing plant; and the  
17 differential of that pool distributing plant would be  
18 \$2.80. So in calculating the new location  
19 adjustments, you would take the -- as we  
20 understood, Proposal 5 was to take the location  
21 adjustment of the closest pool distributing plant,  
22 which in this case, \$2.80, and subtract out 104  
23 miles times the rate -- the per-mile-per-hundred-  
24 weight rate that's listed. In their proposal, it's 4  
25 cents, I believe. They asked us to do it at 3, 3 1/2



1 and 4 cent-per-hundred-weight.

2 So those last three columns are the estimated  
3 uniform price --

4 Q. And -- and the informa --

5 A. -- at those location adjustments with  
6 Proposal 5 in eff -- in effect.

7 Q. I didn't mean to interrupt you, there. If  
8 the reporter didn't get that, you need to. . .

9 MR. STEVENS: Do you need to have read  
10 back? Did you get what he said that was not. . .

11 THE REPORTER: He trailed off at the  
12 very end.

13 BY MR. STEVENS:

14 Q. This page, as all the pages are read as a  
15 numbered page, has footnotes. And -- and the  
16 information, obviously, is subject to the footnotes?

17 A. Correct.

18 Q. On this -- on this column that has the  
19 miles from the closest pool distributing plant, does  
20 that represent distributing plants -- does that  
21 represent the plants within Order 5, or does it  
22 represent also the plants outside of Order 5?

23 A. It represents both Order 5 and Order 7.

24 Q. You were also asked to prepare another  
25 compilation of -- of materials at the request of

1 Dean Foods, were you not?

2 A. Yes.

3 Q. Do you want to -- do you want to go  
4 through that one now? Do you have that in front of  
5 you?

6 A. Yes.

7 JUDGE DAVENPORT: That will be marked  
8 as Exhibit 8.

9 MR. STEVENS: Thank you, your Honor.

10 [WHEREUPON, document referred to is marked  
11 Exhibit 8 for identification.]

12 BY MR. STEVENS:

13 Q. Now, this just has a -- a cover page and a  
14 title -- a table of contents with four items listed, I  
15 believe. And then it has a number of pages, I  
16 believe starting at a Page 1 and going through to  
17 Page 11.

18 A. Correct.

19 Q. Okay. Could you quickly go through the  
20 document and described what's contained in it?

21 A. Page 1 is the "Estimated Federal Order 5  
22 Uniform Prices Regarding Proposal 5 at Different  
23 per-hundred-weight Mileage Rates." So that would  
24 be the impact of Proposal 5 on the uniform price at  
25 the rates requested by the party.

1 Page 2 through ni -- Page 9 is the loca -- the  
2 "Estimated Uniform Price Regarding Proposal 5 at  
3 the Location of the Top Ten Plants Receiving  
4 Diversions, Listed in Alphabetical Order." That's  
5 somewhat consistent with the prior table that I  
6 discussed with DFA, which would be Exhibit 7,  
7 Page 15. But it's listed for each month, that -- it's  
8 the top ten plants instead of the location of the  
9 plants receiving 75 percent. That's fairly  
10 consistent with that table.

11 Page 10 is the Month -- current  
12 "Transportation Credit Balancing Fund Assuming  
13 the Current 9 1/2 cents per-hundred-weight  
14 Assessment and Implementation of Proposal 4,"  
15 from January of 2004 through November 2005.

16 The first four columns shows [sic] the actual  
17 assessment through October of 2005 of 6 1/2 cents;  
18 and it increased to 9 1/2 cents in November 2005 --  
19 November 2005. The second column is the actual  
20 credits requested. And then, the third column is  
21 actual credits paid; with the pro rata percentage in  
22 the fourth column. The last five columns would be  
23 the impact of the 9 1/2 cent assessment in  
24 Proposal 4 on the beg -- I started with the  
25 beginning balance as it was -- actually was on

1 January 2004, and worked through the -- the  
2 balances using the assessments and the total  
3 credits paid under Proposal 4.

4 Q. So -- so just so -- let me understand this.  
5 The first four columns are actual assessments that  
6 were -- that occurred --

7 A. Yeah, that's the actual --

8 Q. -- that occurred?

9 A. That actually occurred, yes.

10 Q. Okay. And the -- and the -- and the rest  
11 of the document, the other five columns, are --

12 A. Yes.

13 Q. -- are a -- are exam -- are an example, are  
14 a -- are a --

15 A. Estimate. Yeah.

16 Q. "What if," an estimate?

17 A. Yes.

18 Q. All right.

19 A. Page 11 is the "Total Pounds Diverted and  
20 the Weighted Average Diversion Percentage For the  
21 Top Three Diverters Based on Diversion  
22 Percentage," for each month, January 2004,  
23 through November 2005.

24 Q. Did you have any further requests for  
25 information that you want to share with the hearing

1 at this point?

2 A. Yes. I have two further --

3 Q. All right.

4 A. -- two additional data requests.

5 Q. And --

6 A. One --

7 Q. Go ahead.

8 A. This one would be the request of both

9 Dairy Farmers of America and Dean Foods.

10 Q. Okay. And you -- you brought that with  
11 you today, and it has a title page and it -- and it  
12 has the -- a table of contents, and it has a one-  
13 page -- page.

14 A. Correct.

15 MR. STEVENS: Your Honor, I believe that  
16 is Number 9. We'll have that be marked as Number  
17 9.

18 JUDGE DAVENPORT: So marked.

19 [WHEREUPON, document referred to is marked  
20 Exhibit 9 for identification.]

21 BY MR. STEVENS:

22 Q. Could you describe that briefly, Jason?

23 A. That is the "Total Diversions to Plants  
24 Located Outside of the Southeast and Appalachian  
25 Marketing Area," which is part of Proposal 5 on

1 pricing diversions out of the marketing area,  
2 location -- changing the location adjustment.

3 Q. Okay. And that's data for January 2004  
4 through November 2005?

5 A. Correct.

6 Q. Anything else you'd like to say about that?

7 A. No, not at this time.

8 Q. All right. And you have -- you have one  
9 more document, I believe, that you -- you had  
10 received a request to prepare.

11 A. Yes.

12 Q. "Compilation of Statistical Material  
13 Prepared at the Request of Jeff Sims"?

14 A. Yes.

15 MR. STEVENS: Your Honor, I believe that  
16 is a --

17 JUDGE DAVENPORT: Exhibit 10.

18 MR. STEVENS: It -- yes. We would like  
19 that marked as 10.

20 [WHEREUPON, document referred to is marked  
21 Exhibit 10 for identification.]

22 BY MR. STEVENS:

23 Q. And that is -- that has a cover page, a  
24 table of contents, and three pages; is that right,  
25 Jeff -- is that right?

1 A. Yes.

2 Q. You're not Jeff. You're not Jeff.

3 A. Yeah, Jason.

4 Q. Jeff asked for it. But you prepared that at  
5 Jeff Sims' request.

6 A. Yes.

7 Q. Could you briefly describe that for the  
8 hearing?

9 A. Page 1 is the "Current Transportation  
10 Credit Fund Calculation Using Alternative Mileage  
11 Rates for 2004." The first two columns is the  
12 actual credits paid; and the sec -- and that is the  
13 first column. The second column is the total  
14 credits requested. And the next -- the next four  
15 columns would be the total credits that have been  
16 requested at alternate mileage rates.

17 Page 2 is the same information for the months  
18 of 2005, in which the transportation credit fund  
19 is -- is. . . It's -- we only pay transportation credit  
20 funds out through June -- July and December of  
21 each year. So that's why those are the only months  
22 shown.

23 And Page 3 is a map of the Appalachian  
24 Marketing Area Milkshed for October of two --  
25 2005. And each dot represents 1,000 pounds of

1 milk. To -- due to data restrictions, we could only  
2 show seventy --

3 JUDGE DAVENPORT: Excuse me. Did  
4 you say 1,000 or 10,000?

5 THE WITNESS: 100,000.

6 JUDGE DAVENPORT: 100,000. I'm sorry.

7 THE WITNESS: I'm sorry.

8 A. Due to confidentiality issues, we could  
9 only show 79.2 percent of the total milk pooled on  
10 Federal Order 5.

11 And each rec -- rectangle -- or triangle  
12 represents a manufacturing plant. And those  
13 plants were requested by Jeff Sims. And the star  
14 represents a Federal Order 5 pool distributing  
15 plant.

16 BY MR. STEVENS:

17 Q. So all of the information that you've --  
18 that you've just testified to was prepared by you or  
19 pursuant to your supervision or under supervision  
20 of the Market Administrator's Office?

21 A. Correct.

22 Q. Not prepared for or against any proposal?

23 A. No.

24 Q. I mean, prepared at the request of -- some  
25 of it request -- as we've described for the record,



1 some of it requested by the parties that are  
2 participating in the hearing?

3 A. Yes.

4 Q. For their use during the course of the  
5 hearing?

6 A. Yes.

7 Q. As they choose?

8 MR. STEVENS: Your Honor, we have  
9 another -- we have -- we've got two other witnesses  
10 and -- and a similar amount of material which we're  
11 going to present for -- for Order Number 7. We --  
12 we certainly can present the witness request now,  
13 at this point, on this material, or we certainly  
14 can -- and it may be appropriate to do that,  
15 because we will have two other witnesses putting  
16 statistical material on after this witness.

17 JUDGE DAVENPORT: Is there any  
18 preference by those in attendance here?

19 Mr. English?

20 MR. ENGLISH: Charles English for Dean  
21 Foods Company and Dairy Fresh Corporation, a  
22 division of National Dairy Holdings.

23 I would say let's go ahead and -- and ask the  
24 questions now. I think part of it is that there's so  
25 much material that some of us may forget the

1 questions and answers [phonetic], but that's his  
2 benefit.

3 But it may also be more con -- more  
4 organizationally efficient to go ahead and ask the  
5 questions now. And I think Mr. Beshore from Dairy  
6 Farms agrees.

7 MR. BESHORE: I agree [phonetic].

8 JUDGE DAVENPORT: Very well. Let's --  
9 let's open the floor to cross examination at this  
10 time.

11 MR. ENGLISH: I guess I'm standing up  
12 here, so. . .

13 JUDGE DAVENPORT: For the reporter's  
14 benefit, this is Charles "Chip" English.

15 MR. ENGLISH: Charles. . . Chip English,  
16 Charles English. For Dean Foods Company and a  
17 back portion of National Dairy Holdings that is --  
18 that the Dairy Fresh Corporation.

19 And we will have two witnesses.

20 First, let me thank you for a wealth of  
21 material, and -- and appreciate it very much. And I  
22 think everybody, by now, knows that when that  
23 "thank you" comes, it usually comes with a caveat,  
24 that I may have a few more requests, but we'll see  
25 as we go along. Perhaps not. But -- but thank you

1 for that.

2 And I also want to say something, that it was  
3 also very much appreciated today that your office  
4 had people at every single turn that one could  
5 make incorrectly, so we could get here, and that  
6 was very much appreciated, especially on a rainy  
7 day. So thank you very much.

8 EXAMINATION

9 BY MR. ENGLISH:

10 Q. I want to start by asking a few questions  
11 about how the Order works, and while there may be  
12 limitations on how you can interpret, or whether  
13 you can interpret some of the proposals, I want to  
14 ask at least how you did the data, relative to the  
15 proposals and relative to how the report is written  
16 [phonetic].

17 A. All right.

18 Q. And I'm going to venture, first, into an  
19 area that I confess has, at best, confused me and,  
20 at worse, did something worse -- a lot -- lot worse.  
21 And that is diversion limits, shipping percentages  
22 and -- and -- and the like. And you happen to be  
23 the first one up there, so I will talk about Order 5.

24 But as I -- I look at it, we've had a number of  
25 hearings involving some of the Orders in the

1 Midwest, and I think maybe the diversion limits  
2 work a little differently there.

3 But as I look at it, the diversion limits are  
4 found in the "Producer Milk" section, 1005.13. And  
5 that is in (d)(3) and (4), there are limits both on  
6 diversions that a cooperative association can do,  
7 and a handler, a noncooperative handler; correct?

8 A. Yes.

9 Q. Okay. And just for instance, the -- the  
10 diversion limitation by cooperative cannot exceed  
11 25 percent during the months of July through  
12 November, January and February, of the milk  
13 caused to be delivered to and physically received  
14 at pool plant during the months; correct?

15 A. Correct.

16 Q. So let me just run through an example. If  
17 a cooperative association caused to be delivered to  
18 a pool distributing plant -- there's only one pool  
19 distributing plant and one cooperative. So let me  
20 simplify it. And it caused to deliver one million  
21 pounds to the pool distributing plant, would I be  
22 correct that the amount it can divert, at 25 percent  
23 of a million, would be 250,000 pounds?

24 A. Correct.

25 Q. Okay. If one, in my confused thinking,

1 were thinking about diversion limits as the total  
2 amount of milk that a cooperative had -- that is to  
3 say, the cooperative delivered a million pounds,  
4 diverted the full 250,000 pounds; and so it had a-  
5 million-250, a diversion percentage could be  
6 calculated differently, which is the 250 is the  
7 numerator and the million-250 as the denominator,  
8 which would actually be a 20 percent diversion;  
9 correct?

10 A. Are we calculating diversion percentages  
11 for qualification is -- is the diversions divided by  
12 the deliveries to a pool distributing plant.

13 Q. Okay. And that's what we just did, the  
14 first example, which is --

15 A. Correct.

16 Q. -- the 250,000 divided by a million, would  
17 be 25 percent?

18 A. Correct.

19 Q. Okay. When you prepared the -- the data  
20 for Dairy Farmers of America, as to the calculation  
21 of the Intra-market transportation credits -- that is  
22 to say, Exhibit 7, Page 1. As -- as I read the  
23 hearing notice, I -- I read it one way, and I see  
24 today that there's maybe a proposal to modify the  
25 language.

1 As I read the hearing notice, the Intra-market  
2 credit would apply only to milk that moved from a  
3 farm in Order 7 to a plant in Order 5, or a farm in  
4 Order 5 to a plant in Order 7. Is that how you read  
5 the hearing notice?

6 A. No. We read it as any milk produced in --  
7 or, say, pooled -- for our Order, it would be any  
8 milk pooled on Federal Order 5 that originates in  
9 counties located in App -- the Appalachian  
10 Marketing Area or the Southeast Marketing Area.  
11 And that's how the data was prepared.

12 Q. That's the real question I'm getting at, is:  
13 The data was prepared based upon -- you know,  
14 whether my reading is correct, I think there is a  
15 proposed amendment that's out on the table which,  
16 to me, at least, makes sense. And apparently,  
17 that's how you read it initially, anyway, or at least  
18 how you were -- it was presented to you was  
19 intended to be?

20 A. Yes, that's how the data was prepared.

21 Q. So, for instance, on -- on Page 1, then,  
22 this calculation of what would have been paid to  
23 the proponents is for all farms located within the  
24 marking areas of 5 and 7?

25 A. Correct.

1 Q. Thank you.

2 A. That's pooled on Federal Order 5.

3 Q. Pooled on Order 5. Thank you.

4 And I -- of course, we had a hearing fairly  
5 recently regarding a merger -- proposed merger of  
6 5 and 7. And -- and the decision came out on that  
7 last year. There was some discussion in the record  
8 that, say, less than 5 percent of the producer milk  
9 that was in Order 5 was produced by farms in Order  
10 7; correct? It's whatever the percentage is in that  
11 record?

12 A. Yeah, whatever the percentage is.

13 Q. M-hm. Is it -- is it your recollection that  
14 it's around a low percentage from that market?

15 A. [no audible response]

16 Q. Less than 10 percent?

17 A. Yes, it's --

18 MR. STEVENS: Your Honor --

19 A. -- I would say it's less than 10 percent,  
20 but I can't say --

21 BY MR. ENGLISH:

22 Q. Okay.

23 A. -- for certain or exactly what it is, from  
24 recollection.

25 Q. In preparing Exhibit 8, Page 11. . .

1 I mean, I want to go back to my discussion  
2 about diversion percentages. When you prepared  
3 this chart, in the last column, "weighted average  
4 diversion percentage," you were calculating the  
5 same way we were discussing it, which is the  
6 percentage of milk diverted divided by the pounds  
7 actually delivered to distributing plants?

8 A. Correct. And to -- and also supply --  
9 supply plants, also.

10 Q. And similarly, when you calculated on  
11 Page 10 for Proposal 4 -- this -- this is the chart in  
12 which you show the actual credits requested, the  
13 actual credits paid, and then did a calculation at 9  
14 1/2 cents, and Proposal 4 total credits paid. Would  
15 I be correct that you used -- Dean Foods, in that  
16 proposal, suggested that it would be 30 percent  
17 with delimitation; correct?

18 A. Yes.

19 Q. Okay. And for this calculation, then, you  
20 used the same mechanism for calculating the  
21 percentage of diversions; correct?

22 A. No.

23 Q. No. Thank you.

24 What did you do?

25 A. Based on the Dean proposal as we



1 understood it, it took the total out-of-area or this --  
2 it would take total -- easy way to understand it is  
3 to take total producer milk, subtract out any  
4 deliveries to a pool distributing plant on Federal  
5 Order 5 or 7, and divide that by total producer  
6 milk, the -- each -- each individual handler. And  
7 that would be the new percentage.

8 You would take 0.3 divided by that percentage.  
9 So that would be a different calculation than we  
10 had discussed for Page 11.

11 Q. It's -- it's -- am I confused, thinking it's  
12 the other way of looking at diversions including all  
13 milk, first?

14 A. Yes.

15 Q. Okay.

16 A. Although you do also have the  
17 deliveries -- any deliveries to a pool supply plant --

18 Q. Are also --

19 A. -- technically aren't diversions in your  
20 percentage also.

21 Q. Correct.

22 A. Yes.

23 Q. But they wouldn't be diversions anyway.

24 Would they?

25 A. What was your question?

1 Q. Would -- would del -- would deliveries to a  
2 pool supply plant be diversions under the other  
3 mechanism for calculating diversions? They  
4 wouldn't be; right?

5 A. No, they would not be.

6 Q. Okay. So now let me review Page 10 with  
7 you for a moment and see if I can -- if I understand  
8 it. We're now, sort of, in the third full month of  
9 implementation of the change in the rate, correct,  
10 to the 9 1/2 cents from 6 1/2 cents; correct?

11 A. [no audible response]

12 Q. To Jan -- here in January, you are -- we  
13 are in the third month of a rate that's -- that's  
14 higher?

15 A. Correct.

16 Q. Did you collect, for November and  
17 December, the full 9 1/2 cents?

18 A. Correct.

19 Q. And you -- you're collecting in January the  
20 full 9 1/2 cents?

21 A. Yes.

22 Q. Okay. And do you anticipate -- I guess,  
23 right now, because you have to announce it on the  
24 fifth of the month. So, last week, did you  
25 announce, for February, collecting the 9 1/2 cents?

1       A.    We -- we announced that, on the advance  
2 price, the Class I price announcement on the -- on  
3 or before the 23rd, we would expect to have the  
4 assessment of 9 1/2 cents.

5       The provision of the Order allows the Market  
6 Administrator to reduce or waive the assessment  
7 if -- if there is enough money in the funds to cover  
8 the credits paid out in the prior period.  And  
9 once -- if that is met, then the Market  
10 Administrator could waive or reduce the  
11 assessment.

12      Q.    Would I be correct that there has not been  
13 such a conclusion reached yet, that, at this point,  
14 the Fund is sufficient to -- to waive or reduce?

15      A.    For the future?

16      Q.    Yes.

17      A.    That would be correct.

18      Q.    But nonetheless, for the purpose of  
19 calculating Page 10 and recognizing its example  
20 purposes only, you've done a look back for the  
21 purpose of this chart.  And showed what the  
22 asked -- requested and the actual credits paid  
23 were.

24      Were the actual credits paid for December  
25 2004 based upon 6 1/2 cents or 9 1/2 cents?

1 A. The actual would be based on 6 1/2 cents.

2 Q. Even though you were already collecting 9  
3 1/2 cents from the plants [phonetic]?

4 A. Are you talking about Dec -- December?

5 Q. December -- December of two -- I'm sorry,  
6 December of 2005. Or, you don't have to start with  
7 2005 yet.

8 A. No --

9 Q. What about November of 2005?

10 A. November of 2005, the actual assessments  
11 that are listed there are -- since you can see the  
12 increase from October 2005, that reflects the 9 1/2  
13 cents assessment.

14 Q. So for November at least, barring the fact  
15 that you wouldn't have a potential surplus for the  
16 prior month, as you see in a later column, you've --  
17 you can compare November 2005 at 340 -- 340,038  
18 versus, I guess, the assessment at 9 1/2 cents  
19 would have only been 337,795.27 for November?

20 A. [no audible response]

21 Q. Under the assumed change?

22 A. [no audible response]

23 Q. I'm wondering why the numbers are  
24 different. For November 2005, why the actual  
25 credits paid are more than what the assessment

1 would have been for that month.

2 It would have been --

3 A. We had a beginning -- we had a beginning  
4 balance --

5 Q. Okay.

6 A. -- that we. . .

7 Q. Going to the last set of columns, then,  
8 and the assessment at 9 1/2 cents and Proposal 4  
9 total credits paid, for 2004, it would appear that,  
10 unless somebody changed all their distributions,  
11 you would have actually had 4-million-1 in  
12 assessments and paid out 3-million-4 1/2 in  
13 credits; is that correct?

14 A. Yes.

15 Q. So the 9 1/2 cents for 2004, if Proposal 4  
16 had been in effect, and if 9 1/2 cents had been in  
17 effect, would actually have left you with a -- with a  
18 positive balance?

19 A. Correct.

20 Q. At the present time, if there isn't a  
21 positive balance for the Transportation Credit  
22 Balancing Fund, is there any mechanism to reduce  
23 the Producer Settlement Fund and pay of the  
24 monies out of the Producer Settlement Fund?

25 A. No.

1 Q. So, it's just straight up, what's in there is  
2 available and it's not there -- you don't dip into the  
3 fund and there's no mechanism for reducing the  
4 Producer Settlement Fund; correct?

5 A. Correct.

6 Q. And understanding for a moment that this  
7 is transportation credit balancing fund, and that  
8 there is also a proposal for a [sic] Intra-market  
9 fund?

10 A. Yes. There are two separate funds  
11 proposed.

12 Q. Have you today presented any data -- and  
13 I tried to follow along as quickly as I could; but I --  
14 I apologize. Have you presented any data as to  
15 whether, given the assessment rates and the  
16 existence of the Intra-market fund, there would  
17 have been any monies coming out of the producer  
18 settlement fund to compensate for that?

19 A. I haven't presented any data on that.

20 Q. Is it correct that, under the proposal --  
21 Proposals 1, 2 and 3, if the handler assessment is  
22 insufficient for the Intra-market credit fund, that  
23 the producer settlement fund could have to fund up  
24 to the same amount the handler is paid for a given  
25 month?

1       A.    Yes, the same dollar amount could be  
2 taken out of the producer settlement fund from  
3 what's been collected on assessment, is how I  
4 understood their proposal.

5       Q.    But the data -- at least, no one's asked  
6 you to present any data as to whether or not any  
7 such monies would have -- have been?

8       A.    Not specifically, no.

9       Q.    Now comparing for a moment, Exhibit 8,  
10 Page 10 to the Exhibit 10 requested -- the material  
11 requested by Mr. Sims, Page 1, this is the -- the  
12 chart that lists the total credits requested; but  
13 then, it also lists what those credits would have  
14 been. I guess, 1 -- Page 1 and Page 2, what they  
15 would have been had the rate been different than  
16 the present; correct? This is sort of the scenario  
17 of -- of 42 to 48 cents; correct?

18      A.    Correct.

19      Q.    How complicated would it be, and I'd  
20 really emphasize, I don't want to just create work  
21 here, to run Page 10 showing the Proposal 4 total  
22 credits paid versus the assessment, for those  
23 different rates, the 42, 44, 46 and 48?

24      A.    We could possibly do that.

25      Q.    Okay. If -- if you could do that, I would

1 appreciate it, for the same months, the end of '04  
2 and the end of '05, to show how those rates would  
3 work in the same mechanism.

4 MR. BESHORE: '04 and '05?

5 MR. ENGLISH: Yes. '05 is on 2 -- Page 2  
6 of -- of Exhibit 10. So, all I'm asking, Mr. Beshore,  
7 is, you know, we've got what it is at 9 1/2 cents,  
8 but then, of course, there's this other proposal so  
9 it seems to me it makes sense to see how they  
10 relate, they connect.

11 BY MR. ENGLISH:

12 Q. And at least, for now, finally, subject to  
13 talking to my client for a moment, I'd like to look at  
14 Exhibit 7, Page 15.

15 First a couple of general questions, that I'll  
16 have specific questions.

17 So this is the -- the requested page by Dairy  
18 Farmers of America running Proposal 5; correct?  
19 Page 15 of Exhibit 7?

20 A. Correct.

21 Q. And -- and as I understand it, the first  
22 heading for December 2004 is that that month was  
23 the month with the lowest total diverted volume for  
24 the last 12 months?

25 A. Correct.



1 Q. And then, this column, the fifth column  
2 over, "Percent of Total Out of Area Diversions,"  
3 would I be correct that that is as a numerator --  
4 why don't you tell me what it is, rather than my  
5 trying to [laughs] figure -- [laughter]?

6 A. It's the total out-of-area diversions at the  
7 top, the locations listed there in those ten plants.  
8 Their total volume of out-of-area diversions divided  
9 by the total market out-of-area diversions.

10 Q. Okay. So those ten locations?

11 A. Correct.

12 Q. All the diversions they had divided by the  
13 total of out-of-area diversions would be 75.9  
14 percent?

15 A. The total out-of-area diversions of those  
16 ten locations, yes.

17 Q. Now, under the heading for the month with  
18 the highest diverted volume, we have got, as I see  
19 it, two locations in Utah -- Layton, Utah and the  
20 Smithfield, Utah; correct?

21 A. Correct.

22 Q. -- that are in excess of 1,200 miles for  
23 diversions; correct?

24 A. What --

25 Q. And it's in excess of 1,200 miles from the

1 closest --

2 A. Closest --

3 Q. -- pool distributing plant?

4 A. That's correct.

5 Q. Would it be a fair assumption that the milk  
6 that is diverted to those plants is milk that is  
7 produced closest -- closer to those plants than to  
8 these markets?

9 A. I -- I can't answer that question.

10 Q. As a matter of economics, if the milk had  
11 been produced in Louisiana, the likelihood of it  
12 being diverted to Utah based upon the economic  
13 return, would be rather low; correct?

14 A. I can't answer that question.

15 Q. I have a specific question about Newport,  
16 Kentucky.

17 First, that is only modestly outside the  
18 marketing area; correct? I mean, that would be  
19 very close the marketing area, Newport, Kentucky?

20 A. Yes, it's 85 miles to the closest pool  
21 distributing plants.

22 Q. Okay. When I look at the last three  
23 columns, which are pricing it at 3 cents, 3 1/2  
24 cents, or 4 cents per mile, every other one, in my  
25 mind, logically, at least, went down from when you

1 increased the mileage rate from 3 cents to 3 1/2  
2 cents to 4 cents; correct? They. . .

3 A. Correct.

4 Q. Why did Newport, Kentucky go from 15.80  
5 for 3 cents down to 15.79 for 3 1/2 cents and up to  
6 15.80 for 4 cents?

7 A. [examines document] That may be an  
8 error.

9 Q. All right. Could you look into that?

10 A. Yeah.

11 Q. I just -- just want to have accuracy in the  
12 record; that's all. If you could just look into that  
13 for me.

14 A. All right.

15 Q. It may be a rounding issue; I don't know.  
16 Maybe they were all 15.80.

17 A. Yeah, more than likely, they should all  
18 be -- the 3 cents and the 4 cents is 15.80, then the  
19 3 1/2 cents should also be 15.80.

20 Q. I mean, I assume so. It's not the biggest  
21 issue in the world, but -- but if you -- if we could  
22 correct it for the record, I would appreciate it.

23 A. All right.

24 MR. ENGLISH: May we consult briefly?

25 [WHEREUPON, counsel confers inaudibly with

1 client.]

2 MR. ENGLISH: Thank you, sir. And I  
3 thank you both for what you've provided and in  
4 advance for what I have sent you off to [laughs] --

5 THE WITNESS: Okay.

6 MR. ENGLISH: -- to do for the rest of the  
7 week. I appreciate it.

8 JUDGE DAVENPORT: Ladies and  
9 gentlemen, it's about ten minutes 'til 10. Is this a  
10 good time to take a break?

11 What's your pleasure? 10 minutes?

12 MR. SPEAKER: 15.

13 JUDGE DAVENPORT: 15?

14 MR. SPEAKER: 15.

15 JUDGE DAVENPORT: 15. Very well.

16 Let's start at five after the hour.

17 [WHEREUPON, a brief recess is taken.]

18 JUDGE DAVENPORT: We're back in  
19 session.

20 Mr. Beshore?

21 MR. BESHORE: Thank you, your Honor.

22 I would like to enter my appearance: Marvin  
23 Beshore, B-e-s-h-o-r-e; attorney; Harrisburg,  
24 Pennsylvania. I'm here appearing on behalf of the  
25 five cooperative proponents of Proposals 1, 2 and

1 3.

2 And I have a few questions for Mr. Nierman.

3 But I would like -- first of all, I would like to  
4 also thank you for the -- for the work your office  
5 did at the request of the -- of the proponents,  
6 including the requests from DFA and from Mr. Sims.

7 EXAMINATION

8 BY MR. BESHORE:

9 Q. Let me first go to Exhibit 6, Page 57,  
10 which is the "Computation of Uniform Prices"  
11 calculation for Federal Order 5 for April 2005.

12 I'm interested in having you elaborate for the  
13 record the -- the effect of the location adjustments  
14 in the computation of uniform prices in Order 5.  
15 There are two lines on Exhibit 6, as I -- as I see,  
16 labeled location adjustments, with one with a  
17 negative and the other with a positive adjustment  
18 to uniform price calculation.

19 And the first -- the first one is in -- under  
20 Class I, in the third line of "total dollars" from the  
21 top, here, this "location adjustment" shows a  
22 negative \$1,150,000-plus. Can you tell us what --  
23 what that represents?

24 A. Producer milk is priced at the location of  
25 the plant that physically receives the milk. So in

1 this case, be analysis of the price at the location  
2 adjustment of 3.10 per hundredweight at  
3 Mecklenburg County, North Carolina, and adjusted  
4 back to the location, which, in this case, is  
5 negative.

6 So it means, on the weighted average, the milk  
7 was delivered to a different -- location adjustment  
8 less than 3.10. So if it is a Class I value, that's  
9 the Class I value at the location.

10 Q. So in terms of the bottom line, then, which  
11 is the -- the uniform price, the blend price for  
12 producer in the Order; correct? I mean, that's the  
13 ultimate bottom line.

14 A. Yes, the uniform price at the bottom is  
15 announced at the 3.10 location adjustments. So at  
16 the end, there's a line under total producer milk  
17 classified value, where you add, and there's five  
18 lines. The fourth line is location adjustments.

19 And that -- the math behind that is the  
20 provision of the order you add in, in both the total  
21 sum of the negative location adjustments, and  
22 subtract out the sum of any positive location  
23 adjustments; and that's done to get to the 3.10  
24 location adjustment that the announced price -- or  
25 the uniform price is announced at.

1 Q. Okay. So are there, in -- internal to the  
2 Class I location adjustment and to the location  
3 adjustment for producer milk that is the -- that you  
4 just described, which is the, what, \$2,373,000  
5 number?

6 A. Correct.

7 Q. Internal to each of those numbers, there's  
8 a plus and minus figure; is that correct?

9 A. That is possible, based on the location of  
10 the plant. M-hm.

11 Q. Okay. So if we talk about the Class I  
12 number -- or you have some plants in Order 5 that  
13 are plus-location-adjustment plants --

14 A. Correct.

15 Q. -- correct?

16 And other plants that are minus-location-  
17 adjustment plants?

18 A. Yes. From the 3.10 pricing zone, yes.

19 Q. Okay. And the -- the minus \$1,150,000 --  
20 -253.91 figure under Class I value indicates that  
21 the combination of those Class I pluses and Class I  
22 minuses is a negative \$1,150,000; is that correct?

23 A. Correct.

24 Q. Okay. And the effect of that as a negative  
25 number in the uniform price calculation is to

1 reduce the uniform price to producers by -- by  
2 some amount, since the minus in the -- of the total  
3 calculation?

4 A. Producer milk is priced at the location of  
5 the plant physically receiving the milk, and that's  
6 what the uniform price calculation is. When we,  
7 through the provision, we announce it at 3.10, and  
8 to get back to 3.10, we have to make adjustments  
9 for the location adjustment.

10 Q. Okay. But if that -- if that 1,150,000  
11 wasn't -- wasn't there as a minus to the Class I,  
12 the uniform price announced at 3.10 would be -- I  
13 haven't done the math, but a penny or two higher  
14 perhaps.

15 A. [no audible response]

16 Q. Just a matter of arithmetic.

17 A. Yeah, from my -- if it was, there was a -- a  
18 lower -- a negative number, yes, there would be  
19 more money in the classified value.

20 Q. Okay. Now let's look at the -- the add for  
21 location adjustments --

22 A. Yeah.

23 Q. -- of 2,373,091.96. That value, I think  
24 you indicated, represents a value for producer milk  
25 delivered to particular locations, not any



1 classification, but all classifications.

2 A. That would be all producer milk.

3 Q. Okay. And by adding that value, the  
4 uniform announced price, that 3.10 uniform price  
5 announced in the 3.10 zone, is some number of  
6 cents higher than it would otherwise be?

7 A. [no audible response]

8 Q. If you weren't adding 2,373,000 et cetera  
9 to the value of the -- of the pool, the uniform price  
10 would be reduced accordingly; correct? It's just  
11 arithmetic again.

12 A. Correct.

13 Q. Okay. Now the add-in of the 2,373,000,  
14 which results in increasing that uniform price,  
15 comes from adding the value of the negative  
16 location adjustments for producers who delivered  
17 milk to plants in lower than the 3.10 zone; correct?

18 A. Correct.

19 Q. So in essence, anytime producers -- for  
20 all milk delivered at plant points lower than the  
21 3.10 zone, the effect on the pool calculation is to  
22 add some value to the uniform price that's --  
23 announced in the 3.10 zone?

24 A. I don't know if I'm following that.

25 Q. Well, the -- the add-for-location

1 adjustments, I think we've established and you  
2 have testified, I don't want to put words in your  
3 mouth, but I think you testified that represents --  
4 that represents an addition of the minus location  
5 adjustments for producer milk deliveries?

6 A. That's correct.

7 Q. Now, internal to that 2,373,000 number,  
8 there might be some producer milk deliveries to  
9 positive-location adjustments -- adjustment plants?

10 A. That's possible, yes.

11 Q. Okay. Let's talk about how that works just  
12 a bit.

13 Do you have like -- let's assume there's a  
14 plant in the plus-20-cent zone in Order 5. I don't  
15 know if that's a real zone or not, but. . .

16 A. No, there isn't [phonetic].

17 Q. Okay. There isn't.

18 So if -- when producers deliver to a plus-20-  
19 cent zone, of course, their blend price on all milk  
20 is 20 cents over -- 20 cents greater than the -- the  
21 price quoted here at 3.10, or the zero zone;  
22 correct?

23 A. At 35, yes.

24 Q. At 35. Okay. Let's assume everything is  
25 at 35, to keep this as -- as simple as we can.

1 Okay.

2 So they get 20 cents more, and they get 20  
3 cents more regardless of whether their milk is  
4 classified Class I, Class II or Class III or Class IV;  
5 correct?

6 A. Then the uniform price would be 20 cents  
7 higher than what's announced.

8 Q. Okay. And by the classified value of milk  
9 delivered to that plus-20-cent zone is only 20 cents  
10 higher on the Class I --

11 A. Correct.

12 Q. -- zone; correct?

13 A. Correct.

14 Q. So the producers get paid 20 cents more  
15 than the base on all values, but the handler only  
16 contributes 20 cents more to Class I; correct?

17 A. I'd go back to my earlier statement that  
18 the Class I, the handler pays location adjustment  
19 on the Class I, the producer gets the uniform price  
20 plus 20 on all his producer milk delivered to that  
21 zone.

22 Q. So when that producer delivering to that  
23 plus-20-cent zone gets paid 20 cents more on this  
24 Class II or Class III or Class IV deliveries, that --  
25 that money comes, basically, just out of the pool;

1 correct?

2 A. Correct.

3 Q. By the same token, when the producer on  
4 the other end of the equation is delivering to a  
5 minus-20-cent zone, okay, he's -- his price is  
6 reduced on all -- on all his milk delivered to the  
7 minus-20-cent plan; correct? 20-cent-less-than-  
8 zero zone.

9 A. I don't know if I would say reduced. It's  
10 priced at the location, which is lower than the 3.10.

11 Q. Okay. And the -- the minus 20 cents on  
12 all volumes at that location, regardless of how  
13 they're classified, that's the value -- one of the  
14 values that you add back in to the uniform price in  
15 the \$2,373,000 figure on Page 57 of Exhibit 6?

16 A. Correct.

17 Q. Okay. Let -- let me go, then, to Page 28  
18 of Exhibit 6. This is the -- the handler list, or part  
19 of the handler list. And the same -- the same list  
20 is on Page 52 of Exhibit 6, handler list by month  
21 for 2004 and 2005. And I -- I want to look at the  
22 cooperatives qualifying as pool handlers, if we can.

23 All -- to be on this list, the -- for a cooperative  
24 qualifying as a pool handler, what -- what's  
25 required of the cooperative association?

1 A. Must -- a cooperative must deliver milk to  
2 a pool distributing plant or a pool supply plant.

3 Q. Okay. And one of the cooperatives which  
4 was a pool handler during all the months of 2004  
5 on Page 28, and all 11 months of information on  
6 Page 52, for 2005, was Dairylea Cooperative from  
7 Syracuse, New York; correct?

8 A. [examines document] Yes.

9 Q. All right. So that -- that would indicate  
10 that -- that Dairylea, as you know, delivered  
11 producer milk to -- to pool plants every month  
12 during these two years, or this 23-month period?

13 A. That would be correct.

14 Q. Could you turn to Page 15 of Exhibit 7?

15 A. [complies]

16 Q. When -- when this plant list -- and you --  
17 you may have clarified this with Mr. English, but I --  
18 -- just to be sure: To -- to develop these lists in  
19 response to the request from DFA, you -- you went  
20 to the -- the plants, however many plants you  
21 needed, to get to approximately 75 percent of -- of  
22 total diversions in the Order; is that correct?

23 A. The total out-of-area diversions; correct.

24 Q. Total out-of-area diversions. Okay.

25 And the plants that are just listed are in

1 alphabetical order, and not with respect to volumes  
2 or anything like that?

3 A. Correct.

4 Q. Now, in -- in all cases but one -- one or  
5 maybe two arithmetic [phonetic] issues that Mr.  
6 English brought up, in all of these other cases, the  
7 price that would be effective under Proposal 5 is  
8 reduced in every case except Broken Arrow,  
9 Oklahoma in March 2005, if my quick indication  
10 shows; is that -- is that your -- your observation?  
11 Proposal 5 would reduce the price in -- to all plants  
12 except that Broken Arrow of March 2005, when it  
13 seems to increase.

14 A. Also, the Winnsboro, Texas, the very last  
15 one in March 2005.

16 Q. Okay.

17 A. It increased by a penny.

18 Q. Under the --

19 A. Under the --

20 Q. -- three. . .

21 A. -- at the 3 cents. It stayed the same at 3  
22 1/2 and 4 cents.

23 Q. Okay. Now in order to divert milk -- by  
24 the way, those -- those locations are not the  
25 locations of producers; they're the locations of the

1 plant to which the producer milk was delivered;  
2 correct?

3 A. Yes.

4 Q. If your -- did your source of milk  
5 information show any producers located in Utah  
6 actually pooled on the Order? Do you recall?

7 A. There would be no producer milk from the  
8 State of Utah pooled on Federal Order 5 for any  
9 month if you'd look at the state production data.

10 Q. So therefore, any deliveries to Utah  
11 plants, which there were some, were from at least  
12 as far away as the borders on the state of -- there  
13 were -- they were from out of state, anyway, out of  
14 the state of Utah, there were diversions but there  
15 wasn't any producer milk there; correct?

16 A. That would be correct.

17 Q. Do you -- do you happen to -- to know,  
18 just from, you know, your knowledge, what the  
19 closest state of pooled milk was to the State of  
20 Utah under Order 5?

21 A. For that month, I do not know.

22 Q. Okay. Well, have you ever had any milk in  
23 Colorado pooled in Order 5, offhand?

24 A. I believe, if you look at the data for 2004  
25 and 2005, you would not see Colorado milk.

1 Q. So however milk got up to Utah, it went a  
2 long way from this -- from its home -- home of  
3 production; would you -- would you agree, and that  
4 necessarily follows from the fact that you -- it's  
5 producer milk and you don't have any producer milk  
6 in Utah or any states or -- immediately contiguous  
7 for Order 5?

8 A. That's relative. I don't know if I can --  
9 could answer that. There's no milk production in  
10 Utah on this date.

11 Q. Now, in order to be a diversion from Order  
12 5, the product -- producer had to qualify as a  
13 producer during that -- during that month by having  
14 their milk delivered to a -- to a pool plant the  
15 requisite number of days; correct?

16 A. Yes. The -- for July through December,  
17 the producer must deliver six days of production to  
18 a pool plant.

19 Q. Okay. And what are the diversion limits in  
20 -- in March?

21 A. In March, the diversion percent is 40  
22 percent.

23 Q. For the handler volume?

24 A. 40 percent of total milk delivered to a  
25 pool plant. [examines document] Of the individual



1 handler total.

2 Q. Of the individual handler total. Okay.

3 Now, would you turn to Page -- Page 10 of  
4 Exhibit 8?

5 A. [complies]

6 Q. Okay. The -- and this is -- this is for  
7 clarification. The rate that you utilized in  
8 determining the total credits which would have  
9 been paid under Proposals -- Proposal 4 with an  
10 assumed assessment of 0.095 -- and this is the  
11 third column from the -- from the right; okay?

12 A. Yes.

13 Q. The -- the rate of payment was the current  
14 rate of payment of 0.035 cents; correct?

15 A. Correct.

16 Q. All right. Can you walk through for me --  
17 and you may have done this with Mr. English, but  
18 I -- I'm not sure that I have captured it -- how you  
19 determined what volumes of milk would have  
20 qualified for a transportation credit, assuming  
21 Proposal 4 was adopted for this table?

22 A. The total amount of milk would not change  
23 what was requested or credited; it would be the  
24 same volume of milk on a per-pound basis -- on a  
25 pound basis receiving a credit.

1 Q. Okay. But some volumes would have  
2 received a lower credit rate; is that correct?

3 A. Correct.

4 Q. Okay. How did you determine which  
5 volumes would receive a lower credit rate?

6 A. [no audible response]

7 Q. In other words, how did you imply  
8 Proposal 4; can you detail that? Just walk through  
9 that for me.

10 A. Each individual that requests the  
11 transportation credit be applied, the Deans'  
12 percentages they outlined in their proposal, which  
13 would consider a diversion percent, and apply that  
14 to the 30 percent, that number is greater than 30  
15 percent for the individual handler, they -- that  
16 percentage would be multiplied by their requested  
17 credits, and they would receive a reduced rate on  
18 their transportation credits.

19 If that percentage is less than 30 percent,  
20 then they would receive 100 percent of their  
21 requested credits.

22 Q. Do you know how many diverting handlers  
23 reported in Order 5 during these months? How  
24 many handlers reper -- reported diverted milk.

25 A. No, I cannot.

1 Q. Do you know how many would have had  
2 their rate of credit reduced but application of  
3 Proposal 4?

4 A. No, I cannot.

5 Q. If you would turn to Page 11 of Exhibit 8.

6 A. [complies]

7 Q. How did you determine the -- first of all,  
8 "the Top Three Diverters Based on Diversion  
9 Percentage," I assume that means that somebody  
10 had -- if the diversion percentage is 40 percent,  
11 this would be the three -- the handlers whose  
12 diversion was as close to 40 as -- at or as close to  
13 40 as possible. That's how you determined the top  
14 three?

15 A. It would be the three -- three highest  
16 diverted percentages.

17 Q. Okay. It wasn't based on the volume  
18 diverted; it was based on their --

19 A. Based on their percentage --

20 Q. -- percentage.

21 A. -- of diversion.

22 Q. And the percentage diversion was based  
23 on the way the Order calculates diversion  
24 percentage; correct?

25 A. It's based on how the Market

1 Administrator determines qualifications at the time  
2 of the pool.

3 Q. Okay. And that's a different percentage  
4 calculation than the 30 percent in Proposal 4?

5 A. It is a different percentage -- or  
6 percentage calculation than the Dean Proposal 4.

7 Q. Okay. So the -- if we're trying to  
8 understand what volumes would be effected by  
9 Proposal 4, the volumes on -- on Page 11, I mean,  
10 you can't really apply those percentages to any  
11 Proposal 4 percentage; correct?

12 A. Correct.

13 Q. Now, one of the -- one of the tables, which  
14 I think was requested by DFA, Exhibit 8, Pages 2  
15 through -- 2 through 9, I have a que -- question or  
16 two about that -- that information.

17 Those are top ten -- the top ten plants by  
18 volume; is that correct?

19 A. That's the location of the top ten plants  
20 based on diversion volumes, receiving diversions.

21 Q. Are they just out-of-area plants?

22 A. I believe Dean's Proposal 5 refers to  
23 divers -- out-of-area diversions only.

24 Q. Okay.

25 A. So that -- this would represent just out-of-

1 area diversions.

2 Q. Now, there are some -- some plants that,  
3 just eyeballing it, and I didn't make a  
4 comprehensive chart, but for instance, the plant in  
5 Carlisle, Pennsylvania received diverted milk every  
6 month, I -- I think, in -- in both years here. Is  
7 that -- or nearly every month, not every month.  
8 Nearly every month both -- both years. Would that  
9 be your observation?

10 A. [examines document] Carlisle,  
11 Pennsylvania is listed in most months, yes.

12 Q. Okay. And -- and again, to be on -- for  
13 milk to be diverted, and therefore, the plant to  
14 show up here, it's got to qualify for pooling to  
15 begin with; correct?

16 A. The producer supplying delivery to those  
17 diverter plants would have to be qualified.

18 Q. Right. Thank you.

19 And -- so, I guess my question is: If -- if you  
20 have plants where producer milk is diverted to, you  
21 know, every month of the year virtually, or perhaps  
22 every month of the year, would tend to suggest that  
23 there's producer milk regularly supplying the Order  
24 and regularly diverted to those facilities, it's more  
25 or less a routine and regular part of the Order

1 supply.

2 A. The data shows what it shows.

3 MR. BESHORE: Thank you. That's all I  
4 have at this point, Mr. Nierman.

5 JUDGE DAVENPORT: Other cross  
6 examination?

7 MR. SCHAD: Good morning. My name is  
8 Dennis Schad, S-c-h-a-d. I work for Land O'Lakes.

9 EXAMINATION

10 BY MR. SCHAD:

11 Q. Morning, Jason.

12 A. Morning.

13 Just a couple questions. Real simple  
14 questions.

15 In November of 2005, there was a -- a change  
16 in Order 5 which increased the marketing area to  
17 additional counties within the state of Virginia; is  
18 that correct?

19 A. Correct.

20 Q. And there's a 7(d) processing plant in  
21 Strasburg, Virginia, an Order 5 reserve plant in  
22 Strasburg, Virginia; is that correct?

23 A. The plant in Strasburg, Virginia is a pool  
24 supply plant in Federal Order 5.

25 Q. Okay. Did the marketing area increase so

1 that that plant is now within the marketing area of  
2 Order 5?

3 A. I believe it is not within the marketing  
4 area.

5 Q. Okay. Just -- if milk goes to that Order 5  
6 plant and is pooled on another Federal Order, that  
7 would be a diversion -- would be your  
8 understanding it would be a diversion on that other  
9 Federal Order?

10 A. [no audible response]

11 Q. If Order 1 plant -- milk goes into that  
12 plant, then it would be a diversion on Order 1. If  
13 Order 7 mil went into that plant, it would be a  
14 diversion on that one?

15 A. Correct.

16 Q. Could I take you to Exhibit 7, Page 15.  
17 I'm just curious on your computations. For  
18 instance, if you'll look at Broken Arrow, Oklahoma  
19 in December of that month -- of 2004, you see that  
20 the difference between the -- the column two, 16.48  
21 of actual uniform, and the first column is -- is a  
22 decrease of 6 cents per hundredweight.

23 If you go to March of 2005, you'll see column  
24 two, 16.24, and you see an increase.

25 Just curious, how does that happen? What's in

1 the computation?

2 A. The last three columns has the impact of  
3 the uniform price, the full impact of the uniform  
4 price in Proposal 4 and Proposal 5.

5 So if you go to -- give me a second. All right.

6 On Exhibit 8, Page 1, there's an impact to the  
7 uniform price based on out-of-area diversions. So  
8 the impact -- the impact to the plant location also  
9 is -- the impact of the Proposal 5 is in place.

10 So I think if you hopefully -- if you look at  
11 those two months, there's maybe a larger positive  
12 impact to the plant price for March 2005 relative to  
13 December of 2004.

14 Q. I would -- I would just think that, if the  
15 uniform price in any month is "X," and it's going to  
16 be decreased by a function based on mileage, that  
17 there would be a linear.

18 A. The understanding of Dean Proposal 5 is  
19 that the uniform price will change based on the  
20 total calculation of out of area diversion so if you  
21 look at Exhibit 8, Page 1, there's a different impact  
22 each month, based on that proposal.

23 It's not a 4-cents increase every month. It's  
24 a varying impact each month based on the total  
25 number of div -- or, pounds of diversions and where



1 those diversions are located.

2 Q. Okay. So -- so Exhibit 8 has also taken  
3 into account the change in the -- in the uniform  
4 price that is distinct from the mileage of the -- to  
5 the plants?

6 A. It takes into account the net -- the total  
7 impact of the blend uniform price.

8 MR. SCHAD: Thank you.

9 JUDGE DAVENPORT: Mr. English?

10 MR. ENGLISH: Charles English again, for  
11 Dean Foods and Dairy Fresh Corporation, a division  
12 of National Dairy Holdings.

13 EXAMINATION

14 BY MR. ENGLISH:

15 Q. I have just one question, and it's in follow  
16 up to the questions of Mr. Beshore. Again, my  
17 favorite subject: Diversions.

18 If a cooperative or individual handler has a  
19 producer, say, in Kansas and ships six days of milk  
20 from that producer in Kansas into Utah [sic], but  
21 the other 24 or 25 days of the month, diverts that  
22 milk to Utah, the diversion limitation is for the  
23 coop or the handler in total, not just by individual  
24 producer; correct?

25 A. The diversion percentage is calculated on

1 an individual handler basis.

2 Q. But in other words, it is possible to  
3 have -- as long as there's enough milk actually  
4 being delivered by that handler to other producers,  
5 it is possible to have a producer, say, in Kansas or  
6 Oklahoma or New Mexico deliver six days to a  
7 distributing plant and divert all 24 other days, so  
8 long as the total volume of the handler meets the  
9 diversion limitation requirement; correct?

10 A. That's correct.

11 MR. ENGLISH: Thank you.

12 JUDGE DAVENPORT: Other examination  
13 of this witness?

14 Mr. Stevens?

15 MR. STEVENS: Your Honor, may I offer  
16 for admission Exhibits 6 through 10?

17 JUDGE DAVENPORT: Objection from  
18 anyone?

19 Exhibits 6 through 10 will be admitted into  
20 evidence at this time.

21 [WHEREUPON, Exhibit 6 through Exhibit 10 are  
22 admitted into evidence as marked.]

23 JUDGE DAVENPORT: Mr. Nierman, you  
24 may step down.

25 You want to call your next witness?

1           MR. STEVENS: Yes, your Honor. The  
2 next witness we would like to call is Steven  
3 DuPrey.

4           JUDGE DAVENPORT: You want to raise  
5 your right hand.

6 STEVEN DUPREY, after having been duly sworn, is  
7 examined and testifies as follows:

8           JUDGE DAVENPORT: Please be seated.

9           And if you would, spell your whole name for  
10 the hearing reporter.

11           THE WITNESS: Steven DuPrey, S-t-e-v-e-  
12 n, D-u-p-r-e-y.

13 EXAMINATION

14 BY MR. STEVENS:

15 Q. Good morning, Steven.

16 A. Good morning.

17 Q. Could you put in the record where you are  
18 employed, by whom you are employed, and the  
19 business address?

20 A. I am employed as an economist with the  
21 Market Administrator's Office in Atlanta, Geor --  
22 I'm sorry, in Lawrenceville, Georgia. The address  
23 is P.O. Box 491778, Lawrenceville, Georgia 30049.

24 Q. You're an employee in the Market  
25 Administrator's Office in -- in the Atlanta -- for

1 certain Marketing Orders?

2 A. Federal Orders Number 6 and Federal  
3 Orders Number 7.

4 Q. Could you briefly, for the record, state  
5 your educational background?

6 A. I have a bachelor's in economics and a  
7 master's in agricultural economics; both of which  
8 were obtained from Michigan State University.

9 Q. Go Spartans, huh?

10 A. Go Spartans [laughs].

11 Q. Could you describe briefly what your  
12 duties are in the Market Administrator's Office?

13 A. I'm responsible for comparing -- compiling  
14 statistical material, preparing publications for  
15 nonmembers; providing information requests. All  
16 sorts of stuff.

17 Q. All right. And how long have you worked  
18 in the Market Administrator's Office?

19 A. Since August of 2000.

20 Q. Have you testified in Federal Order  
21 Hearings before?

22 A. I have.

23 Q. Have you prepared and brought documents  
24 with you for the Hearing today?

25 A. Yes.

1           MR. STEVENS: Your Honor, we have a --  
2 a series of documents we want marked for  
3 identification; I'll --

4           JUDGE DAVENPORT: The first one will  
5 be marked as Exhibit 11.

6 [WHEREUPON, document referred to is marked  
7 Exhibit 11 for identification.]

8           MR. STEVENS: Okay. The -- the first  
9 document is the annual statistics for 2004. 11.  
10 Thank you, your Honor.

11          And I may also have you mark the 2005 annual  
12 statistics.

13          JUDGE DAVENPORT: That will be Exhibit  
14 12.

15          MR. STEVENS: Okay.  
16 [WHEREUPON, document referred to is marked  
17 Exhibit 12 for identification.]

18 BY MR. STEVENS:

19          Q. All right. As to the Exhibits marked 11  
20 and 12, you have made copies available to the  
21 administrative law judge, to the -- to the report --  
22 the Hearing reporter, and -- and also on the side of  
23 the room for the use of the parties?

24          A. I have.

25          Q. Did you hear Jason Nierman's testimony?

1 A. I did.

2 Q. All right. In -- in a similar way, you --  
3 you've -- you've presented -- you've prepared  
4 certain exhibits, and now I'm speaking about  
5 Exhibits 11 and 12, for the use of the parties in the  
6 hearing; right?

7 A. Correct. Well, it -- they were produced in  
8 the normal course of business and then provided  
9 here.

10 Q. Okay. So similarly to Jason's testimony, I  
11 mean, some of this is available on a website?

12 A. Correct.

13 Q. Some of it is mailed to the interested  
14 parties?

15 A. Correct.

16 Q. And this is the routine business of the  
17 Market Administrator, to make these statistics  
18 available on an annual basis and, I assume, on a --  
19 on a monthly basis?

20 A. Correct.

21 Q. All right. Let's start with Exhibit 11; and  
22 it is -- it is an exhibit that has a title page, a table  
23 of contents and [examines document] --

24 JUDGE DAVENPORT: 34 pages.

25 BY MR. STEVENS:

1 Q. -- and 34 pages.

2 JUDGE DAVENPORT: Correct.

3 MR. STEVENS: Thank you, your Honor.

4 BY MR. STEVENS:

5 Q. Could you briefly go through that and  
6 explain what's contained in -- in -- in the exhibit?

7 A. Certainly.

8 I guess, the first page is the -- is a map of the  
9 Southeast Marketing Area, showing pool  
10 distributing plant locations for pool distributing  
11 plants in 2004.

12 The second page is -- is several tables  
13 showing the receipts and classifications of  
14 producer milk and butterfat for the entire year of  
15 January through December.

16 Page 3 is "Receipts and Classifications of  
17 Other Source, Overages and Opening Inventories,"  
18 again, for all of 2004.

19 Page 4 is a "Classification of Total Receipts."

20 Page 5 is a "Total Class I Utilization by Pool  
21 Handlers."

22 Page 6 is route disposition information, broken  
23 out into three separate tables, route disposition  
24 "Inside the Marketing Area by Pool Plants"; route  
25 disposition "Outside the Marketing Area by Pool

1 Plants"; and --

2 Q. Total by what -- well, okay. I'm sorry; go  
3 ahead.

4 A. And "Total Route Disposition Inside and  
5 Outside the Marketing Area by Pool Plants."

6 The seventh page is -- is similar route  
7 disposition information, but it includes "Route  
8 Disposition Inside the Marketing Area by Nonpool  
9 Plants"; "Disposition Inside the Marketing Area by  
10 Pool Plants"; and "Total Disposition Inside the  
11 Marketing Area," which includes both nonpool and  
12 pool plants.

13 Page 8 is "Total Class II Utilization by Pool  
14 Handlers."

15 Page 9 is "Class III Utilization by Pool  
16 Handlers."

17 10 is "Class IV Utilization by Pool Handlers."

18 11 is -- are classified prices, are skim,  
19 butterfat, and uniform prices for each class. And  
20 in addition, the skim and butterfat uniform prices  
21 for all of 2004.

22 On Page 12 are "NASS Dairy Product Price  
23 Averages." These are the -- the base prices that  
24 go into product formulas to -- to create Class  
25 prices.



1 Page 13 through 19 is called "Producer Milk by  
2 County and State." It's -- some of these states are  
3 restricted and some of these counties are  
4 restricted. Our restrictions are less than three  
5 handlers or less than three producers, a state or  
6 county will be restricted.

7 Beginning on Page 20, is that same report,  
8 "Producer Milk by County and State" for December  
9 of 2004. And that goes through Page 25.

10 On Page 26 is a summary of our  
11 "Transportation Credit Balancing Fund" activity:  
12 the assessments; the pounds of milk that were  
13 claimed; the dollars associated with the milk that --  
14 claimed on the credit; the dollars paid; and the  
15 proration percentage.

16 Beginning on Page 27 lists our "Fluid Milk Pool  
17 Distributing Plants." Wherever you see an "X"  
18 means that plant was a pool plant for that month.

19 Q. And there are some explanatory -- there  
20 are some explanatory notes in there also, where  
21 there may not be "X"s in the -- the monthly boxes.

22 A. And that should be self-explanatory; but  
23 you are correct.

24 Beginning on Page 28, we have a similar table  
25 for pool supply plants. Again, if there's an "X,"

1 that -- that plant was a pool supply plant --  
2 qualified as a pool supply plant for that month.

3 Also, on Page 29, our cooperative  
4 associations, who were qualified for pooled milk.

5 On Page 30 begins our list of nonpool plants  
6 who had route disposition inside the marketing  
7 area. And they're listed by Federal Order Number,  
8 so those plants are regulated by another Federal  
9 Order who sold milk into our marketing area. And  
10 that continues until Page 33.

11 On 33, it begins a listing of our exempt  
12 distributing plants. These are plants that are not  
13 regulated, but did have sales.

14 On Page 34, it begins our listing of partially  
15 regulated distributing plants. And at the very  
16 bottom of Page 34, it lists our -- our producer-  
17 handler plants who had sales in our marketing  
18 area.

19 And that conclude Exhibit 11.

20 Q. All right. Now could you give your  
21 testimony explaining what's contained in Exhibit  
22 12?

23 A. This is --

24 Q. And -- and -- and, if you can, you know,  
25 make it brief and then relate it to what you

1 testified about Exhibit 11. It -- it does relate to  
2 2005, annual statistics data, similar to 2004 was  
3 Exhibit 11.

4 A. Correct. It contains the same information  
5 for January through November of 2005. And the --  
6 the main difference is, well, Exhibit 12 lacks the  
7 state and county report for December.

8 But other than that information, it is  
9 consistent with the formatting of Exhibit 11.

10 Q. So -- and the -- the information in these  
11 exhibits was prepared by you or pursuant to your  
12 supervision, under the ultimate supervision of your  
13 Market Administrator?

14 A. That's correct.

15 Q. From the official records of the  
16 Department of Agriculture to your Offices of the  
17 Federal Market Administrator's Office?

18 A. That's correct.

19 Q. And they're not presented for or against  
20 any proposal, are they?

21 A. They are not.

22 Q. Your -- your purpose here is to -- to  
23 present these for the use of the parties in the  
24 hearing?

25 A. Correct.

1 Q. Do you have anything else you would like  
2 to say about 11 or 12?

3 A. I do not.

4 MR. STEVENS: Thank you.

5 Your Honor. . .

6 BY MR. STEVENS:

7 Q. Well, let -- let me ask the witness: Do  
8 you -- you received requests as -- as the -- your  
9 colleague Jason received requests from interested  
10 parties to prepare documents for the hearing?

11 A. That's correct.

12 Q. And you've brought with you -- you've  
13 brought those with you today?

14 A. I have.

15 Q. Okay. And you've made copies available  
16 to the administrative law judge, to the court  
17 reporter; and they're available at the side of the  
18 room for the use of the parties?

19 A. That's correct.

20 Q. Now I'm going to go through this list,  
21 and -- and if I miss an entry, let me know; but I  
22 think we have them in the order that -- that we  
23 want them marked.

24 My first one, on my list, is "Exhibits Prepared  
25 by the Southeast Market Administrator at the

1 Request of Dairy Farmers of America and Southern  
2 Marketing Agency." Is that first on your list?

3 A. Correct.

4 JUDGE DAVENPORT: Will be marked as  
5 Exhibit 13.

6 MR. STEVENS: Thank you, your Honor.  
7 [WHEREUPON, document referred to is marked  
8 Exhibit 13 for identification.]

9 BY MR. STEVENS:

10 Q. Now this has a cover -- cover page, and it  
11 contains a certain number of pages.

12 Now, this -- this, your Honor, may be one that  
13 we want to use the "A, B, C, D" for the -- for the  
14 convenience of the parties, because it's not an  
15 exhibit that just goes from Page 1 to Page,  
16 whatever, 30 or whatever it has.

17 As -- as you can see when you look at the first  
18 page, "Page 1 of 1," so if you'll bear with me, the  
19 first -- the first page, could I ask that that be  
20 marked as -- as 13A or -- or A --

21 JUDGE DAVENPORT: Let's -- let's do it  
22 this way: The cover page will be 13-I; and the --  
23 the following page will be 13A, 1 of 1.

24 [WHEREUPON, cover page referred to is marked  
25 Exhibit 13-I and document referred to is marked

1 Exhibit 13A for identification.]

2 MR. STEVENS: All right. And then we  
3 have -- then we have the next page.

4 JUDGE DAVENPORT: 13B, 1 of 1.  
5 [WHEREUPON, document referred to is marked  
6 Exhibit 13B, for identification.]

7 JUDGE DAVENPORT: 13C, 1 of 1.  
8 [WHEREUPON, document referred to is marked  
9 Exhibit 13C for identification.]

10 JUDGE DAVENPORT: 13D, 1 of 1.  
11 [WHEREUPON, document referred to is marked  
12 Exhibit 13D for identification.]

13 JUDGE DAVENPORT: 13E, 1 of 1.  
14 [WHEREUPON, document referred to is marked  
15 Exhibit 13E for identification.]

16 JUDGE DAVENPORT: 13F, which has six  
17 pages.

18 MR. STEVENS: Thank you, your Honor.  
19 [WHEREUPON, document referred to is marked  
20 Exhibit 13F for identification.]

21 JUDGE DAVENPORT: 13G, 1 of 1.  
22 [WHEREUPON, document referred to is marked  
23 Exhibit 13G for identification.]

24 JUDGE DAVENPORT: 13H, which has 12  
25 pages.

1 No, excuse me, two pages.

2 MR. STEVENS: I'm sorry. 13 --

3 JUDGE DAVENPORT: I'm sorry.

4 MR. STEVENS: -- 13H, I think, is 1 of 2,  
5 yes, your Honor.

6 JUDGE DAVENPORT: 1 of 2. I'm sorry.

7 MR. STEVENS: Yes, your Honor.

8 JUDGE DAVENPORT: And 2 of 2.

9 [WHEREUPON, document referred to is marked  
10 Exhibit 13H for identification.]

11 JUDGE DAVENPORT: 13I, 2 of 2.

12 [WHEREUPON, document referred to is marked  
13 Exhibit 13I for identification.]

14 JUDGE DAVENPORT: 13J, 1 of 3 and 2 of  
15 3.

16 [WHEREUPON, document referred to is marked  
17 Exhibit 13J for identification.]

18 MR. STEVENS: Wait a minute. Let me --  
19 let me -- I don't -- I don't want to confuse it  
20 anymore, but I -- I guess at -- I'm back at the 13G  
21 for a minute. That's Page 1 of 1.

22 And then -- and then 13H was Page 1 of 2.

23 And again, I don't want to confuse it, but I  
24 would have that -- I mean, I would ask that that be  
25 13H for -- for Pages 1 of 2 of 13H, and then -- and

1 then -- and then start with 13I, Page 1 of 2, which  
2 is the document which is entitled "Federal Order 7  
3 Producer Milk States Partially In and Out of the  
4 Marketing Area- January '04 to October '05."

5 JUDGE DAVENPORT: Yes.

6 MR. STEVENS: Is that okay?

7 JUDGE DAVENPORT: That's what I'm  
8 trying to do.

9 MR. STEVENS: All right. Well, maybe  
10 I -- maybe I misheard, then. I'm sorry.

11 JUDGE DAVENPORT: I have 13J, 1 of 3,  
12 or 1 through 3.

13 13K is 1 of 1. Is that correct?

14 [WHEREUPON, document referred to is marked  
15 Exhibit 13K, for identification.]

16 JUDGE DAVENPORT: And 13L is 1 of 1.

17 [WHEREUPON, document referred to is marked  
18 Exhibit 13L for identification.]

19 JUDGE DAVENPORT: And the last  
20 Exhibit -- or last page I have is 13M.

21 [WHEREUPON, document referred to is marked  
22 Exhibit 13M for identification.]

23 JUDGE DAVENPORT: Subject to  
24 correction.

25 MR. STEVENS: Yeah, I -- I think we've



1 got it right. I -- I think I misplaced and had to  
2 correct it, and we got it straight.

3 But the -- the point is to make these so that  
4 you can refer to the pages; and then -- individual  
5 pages.

6 BY MR. STEVENS:

7 Q. Did you -- did you mark your exhibits as  
8 we went along there?

9 A. I did.

10 Q. Okay. Could you go through that briefly  
11 and explain what's contained in the -- in the  
12 Exhibit which has been marked 13A through M?

13 A. 13A contains two tables. This was  
14 regarding Proposal 2.

15 The first table is the "Proposed Intra-market  
16 Transportation Credits" on -- at various  
17 reimbursement rates, or "Various Mileage Rates"  
18 that the proponent requested, for April and October  
19 of 2005.

20 These would be the -- the eligible -- the  
21 dollars that could be potentially paid out, had this  
22 fund been in effect those two months at various  
23 mileage rates.

24 The second table are some summary measures  
25 that proponent requested. The -- the "Average

1 Extra Miles Transported," which is essentially, as  
2 it's footnoted, it's the distance from the county  
3 seat of the -- of production to the actual pool  
4 distributing plant, less the distance from the  
5 county seat of production to the nearest pool  
6 distributing plant of either Federal Order 5 or  
7 Federal Order 7.

8 The second column is that same calculation,  
9 but performed as a weighted average.

10 The third column is the "Average Zone  
11 Adjustments." It's the -- it's the -- whatever the  
12 zone was of the milk that received credit, those  
13 zones were all averaged together as a simple  
14 average.

15 The -- the following column is a weighted  
16 average of that same calculation there.

17 The last column is a "Weighted Average of  
18 Class I Utilization for the Pool Distributing Plants."  
19 And that's only the southeast pool distributing  
20 plants.

21 13B is the proponents' share of the proposed  
22 Intra-market transportation credit fund; that's  
23 Proposal 2. The proponent cooperatives being:  
24 Dairy Farmers of America; Arkansas Dairy  
25 Cooperative Association; Dairymen's Marketing

1 Cooperative, Inc.; Lone Star Milk Producers, Inc.;  
2 Maryland and -- and finally, Maryland and Virginia  
3 Milk Producers.

4 Q. Okay.

5 A. 13C is the proponents' "Share of Total  
6 Producer Milk Originating Inside the Marketing  
7 Area" of Federal Order 7.

8 13D is the "Federal Order 7 Transportation  
9 Credit Balancing Fund Under Proposals 1 and 3,"  
10 the combined effect of -- of those proposals. The  
11 first five columns are the actual audited values  
12 that occurred during 2005 through November. The  
13 next four columns are what the values would be  
14 under Proposal 1 and 3.

15 An explanatory note for -- I guess, it's the --  
16 it's the first column under "Values Under Proposals  
17 1 and 3," would be the -- the January through June  
18 assessment totals, that 4.3-million-dollar figure,  
19 that was obtained according to the proposal -- or  
20 the proposal language, looking at what the  
21 previous years' payouts were, and adjusting that by  
22 some anticipated increase in fuel -- diesel-fuel  
23 prices. And the Market Administrator, given that  
24 proposed language, would have capped  
25 assessments at that 4.3-million-dollar figure, and

1 cease collecting money beyond that.

2 The last four columns are -- is -- are the  
3 proponents' share of the transportation credit  
4 balancing fund under Proposals 1 and 3. And the  
5 proponents, again, are those listed -- that I listed  
6 previously.

7 13E lists those entities re -- requesting and  
8 receiving Federal Orders 6, which is Florida, and  
9 Federal Order 7, Southeast Marketing Area, those -  
10 - those price announcements. This was requested  
11 by DFA and these categories were -- were created  
12 by them.

13 13F is Federal Order 7 "Producer Milk by  
14 State - January '04 to October 2005." Some states  
15 are restricted. Again, I go back to my previous  
16 statement, restrictions are fewer than three  
17 handlers or fewer than three producers per state.  
18 It contains the total producer milk and that  
19 producer milk that was actually delivered to pool  
20 distributing plants. And it also provides the  
21 percent that was delivered.

22 On Page --

23 Q. Let me ask you about that for a minute. I  
24 direct you to Page 2 of 6.

25 A. I have a correction for Page 2 of 6.

1 Q. Okay. Could -- could you -- can you fill  
2 that in, at this -- at this point?

3 A. Yes.

4 Q. All right.

5 A. For the State of Arkansas, for -- its -- the  
6 year, year, month, month; 0405. The second line  
7 of data that's shown as blank. That number, under  
8 "Producer Milk Delivered to Pool Distributing  
9 Plants," is -- is a null value. That value should be  
10 22,418,987.

11 And the "Percent Delivered" should be 81  
12 percent.

13 Q. Okay. Why don't you go over that again to  
14 make sure everybody's with us on that.

15 A. Again, that number for Arkansas should be  
16 22,418,987; and that represents 81 percent of total  
17 producer milk.

18 In that same month, the restricted value that  
19 is currently listed, that 65 million, that number  
20 should be changed, or corresponding amount. That  
21 new number should be 43,320,548.

22 Q. Now, could you direct us to where that  
23 change is; what -- what Page?

24 A. It's at Page 2 of 6. It is -- again, for April  
25 of -- oh, I'm sorry. For May of 2004, "0405."

1 Q. All right. Oh --

2 A. And it's under "Restricted."

3 Q. -- okay. That's fine.

4 A. And once again --

5 Q. Now what -- what's the change again?

6 It's -- it's the one that says "Restricted." And  
7 what -- now what's the change?

8 A. The "Producer Milk Delivered to Pool  
9 Distributing Plants" currently says 65.7 million  
10 pounds.

11 Q. Right.

12 A. It should be changed to 43,320,548. And  
13 the corresponding percent should be 45 rather than  
14 68.

15 Q. Are you finished with 13F?

16 A. I am.

17 Q. Okay. Want to move on to 13G, then?

18 A. 13G is the total amount of Federal Order 7  
19 producer milk that was diverted outside of the  
20 marketing area, by month from January to  
21 October -- January '04 to October '05.

22 13H is a two-page exhibit. I have a change to  
23 be made on the second page. Inadvertently,  
24 January '04 through June '04, it should be listed as  
25 January of '05 through June '05.

1 Q. Okay. So each of those months?

2 A. Correct.

3 Q. Each of those months in the -- in the top  
4 set there, are not '04; they're '05?

5 A. Exactly.

6 Q. And -- and then. . .

7 A. This exhibit is producer milk that was  
8 actually physically delivered to pool distributing  
9 plants by day.

10 Q. Yeah. So the title changes, too, right?  
11 The title should be January '05, also?

12 A. No.

13 Q. Okay.

14 A. Page 1 of 13H --

15 Q. Oh. All right.

16 A. -- is all of 2004 information. And that is  
17 properly labeled.

18 Q. All right. All right.

19 A. The second page should all contain 2005  
20 data.

21 Q. Okay. We're done with H. I guess we'll  
22 move on to I; right?

23 A. 13I is producer milk that was produced  
24 inside the area and produced outside of the  
25 marketing area for three states. And those three

1 states are states that happened to be partially  
2 inside the boundaries of Federal Order 7 and  
3 partially outside of the boundaries.

4 It should be self-explanatory. One footnote is  
5 that two states are restricted, Georgia and Florida,  
6 because there are fewer than three handlers in  
7 those counties outside of Federal Order 7, so we  
8 could not show those.

9 Q. M-hm.

10 A. 13J lists -- at some point between January  
11 '04 and October '05, all of these cities listed  
12 received a diversion from Federal Order 7.

13 So to go through it: I'm listing the state and  
14 the city of diversion; the location adjustment of  
15 that city; the nearest pool distributing plant on  
16 Federal Order 5 or Federal Order 7 to that city; the  
17 pool plant city and state; then the distance  
18 associated with that city and that nearest pool  
19 plant; and the location adjustment of the pool  
20 plants.

21 So, 13K, the proponents requested what our  
22 transportation credit balancing fund payouts would  
23 have been had the reimbursement rate been forty --  
24 42 cents per mile, 44 cents per mile, 46 cents per  
25 mile, and 48 cents per mile, rather than the actual



1 35 cents per mile.

2 The first two columns are actual values that --  
3 that did occur. The remaining four are -- are  
4 assumed values based on the proponents request.

5 13L is a map that was requested by the  
6 proponents. It shows the amount of producer milk  
7 by location. Each dot on this map represents  
8 approximately one load of milk, 50,000 pounds.

9 It shows -- the squares are supply or  
10 manufacturing plants that were designated by the --  
11 by the request. And it also shows distributing  
12 plants of Orders 5 and 7.

13 The last page is a "Computation of Uniform  
14 Price" for April 2005.

15 Q. So this is an example and it also is an  
16 actual computation?

17 A. Correct.

18 Q. Okay. All right.

19 The next item I have that I would like marked  
20 as 14 is entitled "Exhibits Prepared by the  
21 Southeast Market Administrator at the Request of  
22 Dean Foods Company and Dairy Farmers of  
23 America." Is that next on your list?

24 A. That is correct.

25 MR. STEVENS: Your Honor, it has a title

1 page, and I just read the top of it; and it has some  
2 more information on there.

3 It is, again, a document that has exhibits  
4 within it, so I guess we could mark it 14.

5 [WHEREUPON, document referred to is marked  
6 Exhibit 14 for identification.]

7 MR. STEVENS: And then, you did a better  
8 job than I did with it on -- on 13, so 14, I -- I would  
9 like --

10 JUDGE DAVENPORT: The first one is --

11 MR. STEVENS: -- marked the same way.

12 JUDGE DAVENPORT: -- "Southeast Order  
13 Prices with Estimates-January '04 to October '05."  
14 That will be A. 1 of 1.

15 [WHEREUPON, document referred to is marked  
16 Exhibit 14A for identification.]

17 JUDGE DAVENPORT: 14B is the "Top Ten  
18 Southeast Order Diversion Plants with Estimated  
19 Uniform Prices-January '04 to October '05," and  
20 that's 14B. That Exhibit has eight pages.

21 [WHEREUPON, document referred to is marked  
22 Exhibit 14B for identification.]

23 JUDGE DAVENPORT: And that appears to  
24 be all of 14. Is that correct?

25 MR. STEVENS: Thank you, your Honor.

1 BY MR. STEVENS:

2 Q. All right, Steven. Could you -- could you  
3 go through what's contained in Exhibit 14, just for  
4 the record, please.

5 A. 14A is similar to what was prepared by the  
6 Appalachian Order. It shows, for January '04 to  
7 October '05, the actual Federal Order 7 uniform  
8 price; the actual Class III and Class IV prices; and  
9 estimated prices under Proposal Number 5, with --  
10 with various rates. Those rates are how you  
11 discount the location adjustment for the diversion  
12 points.

13 14B, again, similar to something that was  
14 prepared by the Appalachian Order. It shows the  
15 top ten diversion plants based on volume. They  
16 are listed in alphabetical order by month. It  
17 contains: the location of the diversion, the city,  
18 state and the differential; the nearest pool  
19 distributing plant of Federal Order 5 or Federal  
20 Order 7, and that's the plant, the city, the state,  
21 the differential and the miles between the diversion  
22 location and the pool plant; the percentage of  
23 diversions associated with the top ten plants for  
24 that given month, and that is a percentage of  
25 diversions outside of Federal Order 5 and Federal

1 Order 7.

2 Under the heading "Actual Prices," it contains:  
3 the uniform price in Atlanta; the Class III and  
4 Class IV prices; and the price for the diversion  
5 location with the -- with the -- with the current  
6 location adjustments.

7 The last four columns are the -- the estimated  
8 uniform price at that location based upon the rates  
9 specified, the -- the discount rates, if you will, of  
10 2, 3, 3 1/2, and 4 cents per mile. And those are  
11 incorporating a blend price effect, as well as the  
12 discount to that -- at that -- for that location.

13 And that should complete 14.

14 Q. Okay. And that -- you don't have anything  
15 to add to 14?

16 A. I do not. I do not.

17 MR. STEVENS: All right. The next one  
18 on my list, your Honor, I would like marked as 15,  
19 is a document entitled "Exhibits Prepared by the  
20 Southeast Market Administrator at the Request of  
21 Dean Foods Company, Part 1."

22 JUDGE DAVENPORT: Part 1 refers to an  
23 exhibit?

24 MR. STEVENS: Yes. And there is -- and  
25 there is a "Part 2," so we could give them separate

1 numbers or could give them -- but -- but, again,  
2 within -- within these, I think, there are -- correct,  
3 sort of, sub-exhibits. So I think we ought to give  
4 them each a number.

5 JUDGE DAVENPORT: Let's make it fairly  
6 simple, Mr. Stevens. IT appears there are three  
7 exhibits that all have only one page. They will be  
8 A through C.

9 [WHEREUPON, documents referred to are  
10 marked Exhibit 15, Exhibit 15A, Exhibit 15B and  
11 Exhibit 15C for identification.]

12 MR. STEVENS: All right. That's fine,  
13 your Honor. Thank you. And that's 15?

14 JUDGE DAVENPORT: Yes, sir.

15 MR. STEVENS: All right.

16 BY MR. STEVENS:

17 Q. Okay. Could you explain what's contained  
18 in Exhibit 15?

19 A. 15A shows, for 2004, and 2005 through  
20 November, what actually occurred in terms of  
21 transportation credit balancing fund activity. And  
22 also, under some scenarios that were requested by  
23 Dean Foods.

24 The first five columns are actually what had  
25 happened, "assessments," which is Class I pound

1 times the appropriate rate, which was 7 cents up  
2 until November, when the assessment increased to  
3 10 cents per hundredweight on Class I producer  
4 milk.

5 The "pounds claimed" are the pounds of milk  
6 that -- we received requests from handlers to  
7 receive a payment from the transportation credit  
8 balancing fund.

9 The "dollars claimed" are the dollars  
10 associated with those pounds.

11 The "dollars paid" column represents what was  
12 actually paid during that month.

13 And the "proration" is essentially the dollars  
14 paid divided by the dollars claimed.

15 Moving over to the "Estimated Values Under  
16 Proposal 4," they requested -- Dean Foods  
17 requested to incorporate the effects of a -- the 10-  
18 cent assessment, which is shown in the first  
19 column under "Estimated Values Under Proposal 4."

20 The next column is the "dollars claimed,"  
21 which incorporates the effect of Proposal 4 of  
22 reducing transportation credit balancing fund  
23 payments relative to their measure of diversions.

24 The "dollars paid" represents what was able to  
25 be paid from the fund.

1 And again, the "proration" associated with --  
2 with that in mind.

3 15B lists: the "Top 3 Diverting Handlers"  
4 based on the percentage of that handlers'  
5 diversion; the total amount of producer milk that  
6 was delivered to pool plants; and the total amount  
7 that was diverted for January of '04 through  
8 October of '05.

9 15C is the total amount of Federal Order 7  
10 producer milk that was diverted outside of the  
11 Federal Order 5 and Federal Order 7. This is a  
12 component, if you will, of -- of Proposal Number 5.  
13 And it's data from January '04 to October '05.

14 Q. All right. Now, we have another exhibit  
15 that you prepared at Dean Foods' request, the --  
16 of -- at the request of Dean Foods. And I'm  
17 referring to this as "Part 2."

18 MR. STEVENS: Are we going to mark this  
19 as 16? Can I have this as 16, or do you want. . .

20 JUDGE DAVENPORT: Let's -- let's mark  
21 this as 16. The first component has three parts;  
22 that will be 16A. The balance of the -- these  
23 exhibits are all maps which only have one page.  
24 So they will be marked B through E.  
25 [WHEREUPON, documents referred to are

1 marked Exhibit 16, Exhibit 16A, Exhibit 16B,  
2 Exhibit 16C, Exhibit 16D and Exhibit 16 E for  
3 identification.]

4 BY MR. STEVENS:

5 Q. All right. Steven, if you could, go through  
6 the material in -- in -- the Dean Foods request,  
7 Part 2; and -- and explain that for the record  
8 briefly, if you would.

9 A. 16A contains, for June '04, October '04,  
10 June '05, and October '05, the amount of producer  
11 milk of Federal Order 5 and Federal Order 7  
12 combined, that was pooled, by state. It also  
13 includes the amount that was delivered to Federal  
14 Order 5 or Federal Order 7 distributing plants. And  
15 there's a percentage associated with that for each  
16 state.

17 And also, the -- the last column, called "All  
18 States Monthly Percentage" is a summation of the  
19 total of producer milk and the total deliveries,  
20 those total deliveries divided by total producer milk  
21 of both Orders combined. And that's the  
22 percentage that was delivered to Federal Order 5  
23 or 7 distributing plants.

24 These four months were the months requested  
25 in another analysis, and we incorporated that



1 into -- into this exhibit for Dean Foods.

2 16B is a -- is a visual representation of a  
3 portion of 16A, so it's only -- it's the states  
4 represented in June of '04 that have more than  
5 three handlers for the combined Orders; and that --  
6 it shows the percentage that was delivered by  
7 county to pool distributing plants. Also shown are  
8 pool distributing plants. And -- and one thing to  
9 note is that 21 percent of producer milk of these  
10 Orders is not shown due to restrictions.

11 And 16C, D and E are -- are similar maps,  
12 constructed in the same way, containing the same  
13 infor -- the same information for different months.

14 Actually, the next exhibit actually is the raw  
15 data that goes into the maps, but we can -- we can  
16 discuss that after you give it a number, I suppose.

17 Q. Okay. So you -- you -- we'll go on to the  
18 next exhibit, there, which I guess we'd like marked  
19 as 17. And -- and this is a 38-page document.

20 A. Correct.

21 Q. Okay.

22 A. And -- and this is --

23 MR. STEVENS: I'd like -- I would like  
24 that marked as 17.

25 [WHEREUPON, document referred to is marked

1 Exhibit 17 for identification.]

2 BY MR. STEVENS:

3 Q. And could you please explain that for the  
4 record.

5 A. And this is the actual raw data that is  
6 displayed on the maps by county. It is combined  
7 producer milk of the two Orders, Appalachian and  
8 Southeast, from -- from -- by county, that was  
9 pooled; and then, that -- that which was delivered;  
10 and the percentage associated with that.

11 If a state was restricted or if a county was  
12 restricted, the last column will identify that fact.

13 MR. STEVENS: So, just to -- your Honor,  
14 I -- I see people going over to the table. But  
15 this -- this is an exhibit, I -- I think it's in your  
16 packet and I think it's in the reporter's packet, but  
17 some people may not have gotten it. I guess we're  
18 giving them the opportunity to go pick up copies of  
19 it.

20 A. This -- Exhibit 17 is the detail behind  
21 Exhibit 16A, for the record.

22 BY MR. STEVENS:

23 Q. So this -- the -- this Exhibit 17 is the  
24 detail behind --

25 A. Exhibit 16A.

1           MR. STEVENS:  And I -- I heard -- I just  
2 heard in the -- in the atmosphere that there may be  
3 not enough copies for everyone to have.  And if  
4 there are not enough copies, we will make  
5 additional copies and make them available.  And we  
6 apologize for that.

7           Does everyone have one that needs one?  And  
8 certainly, others can be made available.

9           Could we have just a minute, your Honor?

10          JUDGE DAVENPORT:  Certainly, you may.

11          MR. STEVENS:  Do you want to take a  
12 hand count of the people who need additional  
13 copies?

14 [WHEREUPON, an off-the-record discussion is  
15 held.]

16          MR. STEVENS:  All right.

17          JUDGE DAVENPORT:  I think we're ready  
18 for 18.

19          MR. STEVENS:  Okay.  All right.

20 BY MR. STEVENS:

21       Q.   Do you have another exhibit that you've  
22 prepared and brought with you today?

23       A.   The --

24       Q.   And is this the one entitled "Exhibits  
25 Prepared by Southeast Market Administrator at the

1 Request of Michael P. Sumners"?

2 A. Correct.

3 MR. STEVENS: Okay. Your Honor, could  
4 I have this marked as Exhibit 18?

5 JUDGE DAVENPORT: Yes, sir.

6 [WHEREUPON, document referred to is marked  
7 Exhibit 18 for identification.]

8 MR. STEVENS: It's -- it's a one-page --  
9 it's got a one-page cover page; and then it's got a  
10 series of exhibits within it, which your Honor so  
11 expertly numbered before. So, I -- I guess we're at  
12 18A for the first one; right?

13 JUDGE DAVENPORT: Right. 18B has  
14 three pages. 18C has three pages. And that  
15 appears to be the end of the exhibit.

16 MR. STEVENS: All right.

17 [WHEREUPON, documents referred to are  
18 marked Exhibit 18A, Exhibit 18B, and Exhibit  
19 18C for identification.]

20 BY MR. STEVENS:

21 Q. Steven, could you go through this exhibit  
22 and describe it briefly for the record.

23 A. It was requested that we provide the  
24 votes, by state. If a referendum were to be held  
25 during June of '05, the number of votes by state

1 are -- are shown.

2 A vote is different than a -- a producer. A  
3 vote is essentially an owner of a farm.

4 18B, I have a correction to make. The final  
5 column shown is stated as "Delivered to OF 5 or 7  
6 Distributing Plants." It needs to say "the Percent  
7 not Delivered to OF 5 or 7 Distributing Plants."

8 For June of '04, October '04, June '05, and  
9 October '05, I've prepared the amount of Federal  
10 Order 7 and Federal Order 5 producer milk that was  
11 pooled by state; the amount of milk that was  
12 actually delivered to a pool distributing plant from  
13 that state; the amount that was not delivered to a  
14 pool distributing plants on either Order from that  
15 state; and the percentage that -- that was not  
16 delivered from that state. And again, there are  
17 some restricted states.

18 18C shows the -- the amount of Federal Order  
19 7 transportation credits paid by state. It also  
20 shows the pounds associated with those payments.  
21 Many states were restricted due to the number of  
22 handlers.

23 And this is data for -- payoffs are from June --  
24 I'm sorry, July through December so that's the  
25 reason why it begins at July '04 and continues

1 through November of '05.

2 And that should conclude all of the exhibits  
3 that I have prepared.

4 Q. Now, as to the exhibits we've been talking  
5 about that -- that you've gotten requests from  
6 interested parties to prepare, those were prepared  
7 from -- from official records in your office?

8 A. Correct.

9 Q. By you or pursuant to your supervision  
10 under the direction of the Market Administrator?

11 A. Correct.

12 Q. They're not presented for or against any  
13 proposal, are they?

14 A. They are not.

15 Q. They're -- they're provided for the use of  
16 the parties as they choose to use them during the  
17 course of the hearing?

18 A. That's their intent.

19 Q. Do you have anything further you would  
20 like to add at this point?

21 A. I do not.

22 MR. STEVENS: Your Honor, I submit the  
23 witness.

24 JUDGE DAVENPORT: Very well.

25 Mr. Yale?

1 EXAMINATION

2 BY MR. YALE:

3 Q. Benjamin F. Yale, Yale Law Office,  
4 Waynesville, Ohio, on behalf of Continental Dairy  
5 Products, Inc. and Select Milk Producers, Inc.

6 Good morning.

7 A. Good morning, sir.

8 Q. I would like to turn to Exhibit -- oh, shoot.  
9 I think this is 16J.

10 MR. YALE: Is it 16, the one Dairy  
11 Farmers and Southern Marketing Agency? Is this  
12 it?

13 MR. SPEAKER: It's 13.

14 MR. YALE: Is that 13?

15 MR. SPEAKER: 13.

16 MR. YALE: 13. I wrote all the letters,  
17 but I didn't write the numbers on them.

18 BY MR. YALE:

19 Q. I would like to look at Exhibit J, subpart,  
20 Exhibit J, yeah. Which is the "Diversion City to  
21 Nearest Federal Order 5 or 7 Plant"; do you see  
22 that?

23 A. Yes, sir.

24 THE REPORTER: I'm sorry, sir. I need  
25 you to speak up.

1 MR. YALE: I'm sorry.

2 THE REPORTER: I'm sorry.

3 BY MR. YALE:

4 Q. The "Diversion City to the Nearest Federal  
5 Order 5 or 7 Pool Distributing Plant"; and I just  
6 have some questions in preparing this.

7 First of all, how did you derive the -- the  
8 miles?

9 A. We coordinated with the Appalachian  
10 Order to both use a statistic -- a mapping program  
11 called MapPoint.

12 Q. Okay.

13 A. It's a Microsoft product.

14 Q. And you used the actual addresses of  
15 those particular plants?

16 A. The exact state address of the plants and  
17 the city of diversion.

18 Q. Okay. Now, when a plant -- and under the  
19 Order, if there's a diversion, for example, to  
20 Tempe, Arizona, it -- you're not saying that it was  
21 diverted off of Hiland Dairy, that is just the closest  
22 plant; right?

23 A. Exactly.

24 Q. But for a -- for -- for there to be a  
25 diversion to Tempe, that producer milk had to have



1 been delivered some time to a pool plant in Order  
2 7; right?

3 A. Correct.

4 Q. And --

5 A. During the month, that's correct.

6 Q. And during that month.

7 And this is not saying that milk from Tempe  
8 went to Federal Order 7; right?

9 A. It is not.

10 Q. Now I would like, if you would, move to  
11 look to Exhibit 18.

12 A. [examines document]

13 Q. And Exhibit A, this just reflects the  
14 number of farms; it doesn't necessarily represent  
15 the block voting that's associated with that; right?

16 A. [no audible response]

17 Q. That -- that under the Order, the  
18 cooperatives did a block vote?

19 A. They can choose to block vote --

20 Q. They can choose numbers --

21 A. Correct.

22 Q. Right. Now under this "restricted states,"  
23 do any of the restricted states include any -- or, do  
24 any of those numbers under "restricted" include  
25 any producers located within the marketing area of

1 Federal Order 7?

2 A. Well, Florida could be.

3 Q. And that's what the dashes up there  
4 indicate, that they're all rolled into this. . .

5 A. Correct.

6 Q. Okay. Then looking at Exhibit B, are  
7 these -- when it says "Producer Milk," is this -- this  
8 is milk that qualified as -- or is producer milk  
9 produced in that state, but not delivered to a pool  
10 distributing plant in Order 7 or any pool  
11 distributing plant?

12 A. The first column is all producers milk --

13 Q. Okay.

14 A. -- in either Order.

15 The second column is what was physically  
16 delivered to a pool distributing plant to either  
17 Order.

18 Q. Okay.

19 A. The third is what was not delivered to pool  
20 distributing plants of either Order.

21 Q. Okay. And the diversion could have gone  
22 to any place other than a distributing plants in  
23 Order 7; right? It could have gone to another  
24 distributing plant in another Order or. . .

25 A. [examines document] Yes. I was checking

1 to see whether or not it was a -- a marketing-area  
2 issue.

3 It's deliveries to anything other than a  
4 distributing plant both on -- on Orders 5 and 7.

5 MR. YALE: That's all I have. Thank you,  
6 your Honor.

7 JUDGE DAVENPORT: Thank you, Mr.  
8 Yale.

9 Other cross? Mr. English?

10 Before Mr. English comes up, let me ask you  
11 again, if you would turn your cell phones off or turn  
12 them to silent or vibrate or some other mode. All  
13 right.

14 MR. ENGLISH: Thank you, your Honor.

15 EXAMINATION

16 BY MR. ENGLISH:

17 Q. Charles English again, for Dean Foods  
18 Company and Dairy Fresh Corporation, a division of  
19 National Dairy Holdings. I'm hoping I can shortcut  
20 this a little bit, Mr. DuPrey.

21 Mr. Stevens asked you point blank whether you  
22 were here for the examination of Mr. Nierbaum  
23 [sic], and you said you were; correct?

24 A. Mr. Nierman?

25 Q. Nierman. Yes, Nierman.

1 A. Yes.

2 Q. I'm sorry. And I also take it that, in  
3 compiling the data, in discussions you had, at least  
4 with Dean Foods, about how the procedure to put  
5 the data together, some of those discussions  
6 occurred jointly with a representative of Dean  
7 Foods and you and Mr. Nierman; correct?

8 A. Correct.

9 Q. And I asked a number of questions about  
10 how diversions worked under these Orders, and  
11 how you applied it to the proposals.

12 Would your answers be the same as the  
13 answers that Mr. Nierman gave me, as to how it  
14 works and how you prepared the data?

15 A. They would be substantially be the same,  
16 yes.

17 Q. Okay. Any material respectively different  
18 that you can recall?

19 A. No.

20 MR. ENGLISH: Thank you.

21 BY MR. ENGLISH:

22 Q. Let me turn back to what Mr. Yale looked  
23 at, which was the Exhibit 13J for a moment. And  
24 also looking at 13F just for the states that are  
25 included in the restricted data.

1       You said that -- for instance, for Tempe,  
2       Arizona, just because milk was diverted to Tempe,  
3       Arizona doesn't mean that milk was produced in  
4       Arizona; correct?

5       A.    Correct.

6       Q.    But nonetheless, it is correct that Arizona  
7       is among the states for which restricted data, at  
8       least for one or more months during this time,  
9       there was milk received from a farm in Arizona;  
10      correct?

11      A.    Correct.

12      Q.    Similarly, for one or more months for milk  
13      during this time period, there was milk received  
14      from California; correct?

15      A.    Correct.

16      Q.    And similarly, although we don't know that  
17      it's the same month and we don't know that the milk  
18      that was diverted was from California, there was  
19      milk diverted to Tulare, California?

20      A.    Correct.

21      Q.    Of -- a grand total of 1,580.97 miles from  
22      the nearest distributing plant; correct?

23      A.    Correct.

24      Q.    And as detailed in Exhibit 14, and I'm  
25      looking for now at -- at 14A. Had Proposal 5 been

1 in effect during the time shown, the impact for  
2 every month for the uniform price paid to dairy  
3 farmers in Order 7 would have been positive if you  
4 had Proposal 5 in effect; correct?

5 A. The -- the uniform price was higher under  
6 the proposal; correct. As announced in Atlanta.

7 Q. As announced in Atlanta.

8 A. Yes.

9 Q. And that's comparing apples to apples? I  
10 mean, obviously --

11 A. Exactly.

12 Q. -- the price announced in Shreveport  
13 would also be higher.

14 A. Correct.

15 Q. And I want to look for a moment and  
16 compare some statistics from Exhibit 11 and  
17 Exhibit 12 for a moment. I noted that on Exhibit  
18 11, Page 19, for May 2004, the restricted states  
19 total was 149 farms, with 78,472,087 pounds;  
20 correct?

21 A. [no response]

22 Q. Correct?

23 A. Correct.

24 MR. SPEAKER: Where was that?

25 MR. ENGLISH: It was Exhibit 11, Page

1 19, May 2004.

2 BY MR. ENGLISH:

3 Q. And if you keep that open for a second,  
4 sir, and compare it to Exhibit 12, Page 18, May  
5 2005, could you tell me what the restricted states  
6 total number of farms and total pounds is for May  
7 2005?

8 A. Number of farms, 228. The total pounds  
9 associated with those farms, 198,024,177.

10 Q. Which on the number of pounds is about  
11 an increase of about 2 1/2 times?

12 A. Roughly.

13 Q. As a percentage of the total milk on the  
14 pool, it's a far more significant percentage in May  
15 2005 than it was in May 2004?

16 A. It's more significant.

17 Q. Do you know what accounted for that  
18 additional producer milk being pooled on this Order  
19 in May 2005 as opposed to May 2004?

20 A. I do not.

21 Q. Do you know whether a significant  
22 percentage of the milk from the restricted states in  
23 May 2005 was actually delivered to plants in these  
24 Orders?

25 A. I do not.

1 Q. But some of the statistics you provided me  
2 show that; correct?

3 A. They -- they could.

4 MR. ENGLISH: Just one second.

5 [WHEREUPON, counsel confers inaudibly with  
6 client.]

7 MR. ENGLISH: I have no more questions  
8 at this time, and I thank the witness again for all of  
9 the hard work on the documentation he did.

10 JUDGE DAVENPORT: Very well.

11 Ladies and gentlemen, it's about -- almost the  
12 noon hour. And it sounds to me like the weather  
13 may be a little inconvenience [phonetic], so I would  
14 say -- I was going to suggest that maybe a little  
15 more time might be required to get to a place and  
16 get in and get out.

17 So, what is your pleasure? Think we can all  
18 get back by 1:30?

19 Very well. We will be in recess until 1:30.

20 THE REPORTER: All right.

21 [WHEREUPON, a lunch recess is taken.]

22 JUDGE DAVENPORT: Ladies and  
23 gentlemen, we have a producer that's driven  
24 something like five hours to get up here. And in  
25 view of the timing and the need for him to get back,



1 I would like your-all's indulgence, if we could go --  
2 just go ahead and take him now, at this time,  
3 before we resume the examination of our last  
4 witness.

5 So, if you would come forward.

6 Please raise your right hand.

7 JOHN NEAL SCARLETT, after having been duly  
8 sworn, is examined and testifies as follows:

9 JUDGE DAVENPORT: Please be seated.

10 If you would please, state your name and spell  
11 it for the hearing reporter.

12 MR. SCARLETT: I'm John Neal Scarlett,  
13 J-o-h-n N-e-a-l S-c-a-r-l-e-t-t; New Market,  
14 Tennessee.

15 I came here today to speak to the issue of the  
16 proposal. I'm an independent producer located --  
17 located in New Market, Tennessee. And I'm an  
18 independent producer for several reasons. One is  
19 I've chose my form -- to market my milk.

20 I pay for the transportation already, and I  
21 don't understand why that we need to create a new  
22 system when the mechanisms for doing what's  
23 asked in these proposals are already in place.

24 In any market in -- in things, there's -- there's  
25 only so much money. And any market, the

1 economics of that dictate what services are needed  
2 in that market.

3 And I don't feel like we need to create a whole  
4 new system of doing this when the mechanisms are  
5 already there, the coops are already in the  
6 business of providing milk to the plants, balancing  
7 and such. And for this, they're paid from -- a  
8 certain amount of fee for the plant -- from the  
9 plants. And I don't feel like that there's any need  
10 to involve the government in this, when all that's  
11 really needed is for them to go forth and say, "It  
12 costs more -- more for my services today than it  
13 did yesterday."

14 In creating this thing, we created -- there's a  
15 pot of money to be created here. And it will,  
16 without a doubt, change the way that milk is  
17 moved. It will decrease the efficiency, because  
18 it's a lot like LDP and the government payments on  
19 corn.

20 Now, if -- if soybeans are high, the market is  
21 telling me I ought to grow soybeans. And corn may  
22 be a little lower priced, because there's plenty of  
23 supply of corn. But in doing with the LDP payment,  
24 I'm calculating a false cash flow in there.

25 So I may end up growing corn, and there's less

1 soybeans; it doesn't respond to the market sales.  
2 There ends up being an oversupply of corn, and the  
3 false cash flow end up coming from a pool of  
4 money.

5 We happen to be located, where our farm is, is  
6 in Jefferson County, Tennessee. We're about 30  
7 miles outside of Knoxville. There is, in Knoxville,  
8 a very small pool plant that bottles milk. Also,  
9 down towards Chattanooga, there is another small  
10 pool plant that bottles milk.

11 Now, the way I read these proposals, it  
12 appears that, unless my milk goes to that small  
13 pool plant in Knoxville, my milk would be eligible  
14 for credits with the way the system has proposed.

15 That small pool plant in Knoxville is -- is a  
16 small plant. I -- I don't know exactly what they  
17 process, but two or three tanker loads a week.  
18 There's no way that there -- it can handle all that  
19 milk.

20 So this -- this creates a system where I am  
21 already paying a haul bill to carry my milk to North  
22 Carolina; it goes to Milkco at Asheville, North  
23 Carolina. And I'm already paying for that. I pay a  
24 company to market my milk.

25 When that comes back, that -- Milkco will be

1 able to apply for a credit on the milk that they're  
2 buying from me, without ever having to pay me any  
3 more for that money [sic]. It will be as the -- one  
4 boy down at the house calls some of those  
5 government payments, "It's manna money. It just  
6 falls in from Heaven."

7 But if there's no -- there's no set recourse that  
8 I can find in those proposals that allow that to  
9 come back to the producer. And I would like to  
10 think that the -- that one of the things that the Milk  
11 Market Administration with USDA takes into  
12 consideration is how this affects the producer, and  
13 ultimately, the producer price.

14 I think it -- it's -- in -- in looking at these  
15 proposals, there's also the side from the Intra-  
16 marketing thing that allows it to be collected from,  
17 basically, go into the producer blend price. And in  
18 doing that, not only will it be assessed from a  
19 plant, not only will that plant be able to get credit  
20 on -- or apply for that credit on my milk and never  
21 pay me, I'm going to lose out of my blend -- a like  
22 amount out of my blend price.

23 And I would be affected, through somebody  
24 else's management decision, at a -- at a coop or  
25 a -- somebody else that's marketing milk, their

1 management and their decision will be able to  
2 affect my blend price without me being a coop  
3 member. It will be an -- essentially, making me a  
4 back-door coop member with no representation  
5 whatsoever.

6 Like I say, the mechanics are already in place  
7 for this. As producers, we have consistently been  
8 told to get more efficient. The company that  
9 markets our milk, ten years ago had approximately  
10 300 producers. They've got something over 200  
11 now; I don't know exactly. But essentially, it will  
12 be basically like putting a tax on everybody else  
13 because those 80 to 100 producers chose to go out  
14 of business or had to go out of business because  
15 they couldn't compete in the market.

16 As I say, it -- it appears to be a way that my  
17 blend price will end up being affected by somebody  
18 else's management that I have no say-so in, and  
19 have no recourse on. I hope you-all will consider  
20 these proposals very carefully.

21 And like I say, I don't -- I do not understand  
22 why we're trying to reinvent the wheel, when the  
23 mechanism is already in place. In pure economics,  
24 that I had when I was down at UT, and I didn't do  
25 very well in it, but I -- I made it through. But the

1 old boy that was down there, Irvin Duvalle, he was  
2 from Berkeley, and he had been in-- he was -- had  
3 this -- he had been in the milk marketing and some  
4 other things.

5 But he said, in any given market, he said pure  
6 economics will dictate what services are needed.  
7 If the services are needed and the milk needs to  
8 move, it should be coming from the consumer and  
9 from the market rather than the producer paying for  
10 it. If it -- if they're not efficient enough to do it,  
11 or if they can't compete in the way they structure  
12 their selves to move the milk, then either the  
13 plants will say, "I don't need you. I'll do it  
14 myself," or, "You are worth 20 cents more or 15  
15 cents more." And then let the market work that  
16 out.

17 And I know that there's a lot of -- I'm -- I'm  
18 sure of the intent of some of this is, but the intent  
19 to allow my milk to be, after me paying a haul bill  
20 and sending it to North Carolina, to allow that to  
21 be credited to somebody for just moving it because  
22 I am closer to another plant, is a lot like: I serve  
23 on the school board back home, and they had us  
24 down at orientation in Nashville to learn to be a  
25 school-board member.

1       And they talked about writing policy; they  
2       talked about intent. And they had a long policy,  
3       down in Cumberland County, that they had wrote,  
4       on a dress code. And it was -- it had a lot of good  
5       things in it, but when you got down to it, if the kids  
6       came to school naked, they were complying with  
7       the dress code [laughter]. So I think we've got to  
8       be very careful about what actually is going to  
9       happen and what maybe the intent is.

10      Thank you.

11                 JUDGE DAVENPORT: Examination of this  
12      witness?

13      Mr. Tosi?

14      EXAMINATION

15      BY MR. TOSI:

16      Q. Thank you for appearing today, Mr.  
17      Scarlett. I appreciate -- we always appreciate  
18      when dairy farmers come to speak to things that  
19      really affect them.

20      You referred to you were of the opinion that  
21      there -- there's a mechanism already in place to  
22      deal with the issues that are part of this  
23      proceeding. Can -- would -- could you be a little  
24      more specific as to: What are the mechanisms that  
25      you're referring to?

1       A.   Well, the -- the company that markets my  
2 milk, there's -- there's two sides of them, and  
3 there's two sides of the coop and all.

4       One is, I pay the -- the outfit that markets my  
5 milk, I pay them a set fee for marketing my milk.  
6 Now, they're marketing milk to a plant over there,  
7 and they've entered into an agreement with that  
8 plant to provide milk.

9       They also provide a service to that plant, as  
10 does coops to all plants, I assume, that they will  
11 supply that plant, or they will balance their pool.  
12 And for that, they get X number of cents per  
13 hundred, and [sic] and above what I receive, from  
14 that plant. And they take a cut out of that; they're  
15 already being paid for the services of doing that.

16       Now, if they go -- if their services cost more or  
17 if they are worth more than what they were a year  
18 ago, the mechanism is that they're already being  
19 paid for a service, to transport milk, to balance the  
20 pools, because I don't receive exactly what that  
21 plant pays. That plant ends up paying more than  
22 what I receive. By law, I've got to have Federal  
23 Order minimum; that's all that I'm entitled to. Now,  
24 if there's an over-order premium or whatever  
25 excess there is, I can have part of that. But



1 there's a set -- there is another amount that ends  
2 up being back for services that that plant pays at.

3       Myself, as a producer, my need is for  
4 somebody to market my milk. That plant has a  
5 need for supply and balancing. And we're both  
6 paying what's between us, whoever it happens to  
7 be, the coop or the -- the broker or whoever it is,  
8 both of us are paying them for a service that they  
9 provide to us.

10       So all I'm saying is that the mechanism is  
11 there, without going through 16 pages of this,  
12 changing the language, changing the titles and all  
13 that, the mechanism is there for them to say, "My  
14 service costs more today than it did yesterday,"  
15 and the plant paid them for that service without  
16 creating a lot of bureaucracy, paper trail,  
17 administrative costs, and all of that.

18       Q. Let me see if I can recap. Let me make a  
19 statement, and you can tell me if you agree with it  
20 or not.

21       What you're referring to is a mechanism or,  
22 just, normal market forces of supply and demand  
23 and need and -- and all, ra --

24       A. Yes, sir. It --

25       Q. -- rather than saying that we ought to put

1 something extra into the Order to --

2 A. Yes, sir. It's --

3 Q. -- like what these proposals are asking to  
4 do.

5 A. Rather than go through all this thing with  
6 the proposal and all this long language, all we  
7 really need to do is -- is that, if the service -- if  
8 that plant needs the milk and needs the balance,  
9 they will pay for the service.

10 And if it's -- if the service is not efficient  
11 enough, or it's too high, the plant will choose to  
12 probably do it their selves. And either way, it  
13 doesn't -- it doesn't rewrite an Order; it doesn't  
14 change a lot of stuff. It let's the free market take  
15 care of that.

16 Q. Okay.

17 A. And that's where it ought to be.

18 Q. Okay. Thank you.

19 May I ask who markets your milk?

20 A. Piedmont Milk Sales in Blountville.

21 Q. Okay. And you -- you mentioned that --  
22 that they -- they may receive a -- a premium for  
23 delivering your milk to the plant in North Carolina?

24 A. I assume that, what services they do for  
25 the plant, comes and [sic] and above mine,

1 because I receive at -- at least Federal Order  
2 minimum. Now, we have had some over-order  
3 premiums in our checks.

4 Q. Okay.

5 A. And I have no idea what that might be that  
6 they receive, but it -- it stands to reason very well  
7 that, for -- nobody is going to do this stuff for free.  
8 They're not going to move the milk. And rather  
9 than that plant having to incur that aggravation  
10 themselves, if somebody can do it as cheap or  
11 cheaper, then I'm -- I assume, and to -- would  
12 think, by common logic, that they receive a --  
13 something from that plant for providing that  
14 services, or the plants pays them in one check and  
15 they disperse it out to 200-plus producers.

16 Q. All right.

17 A. So there has to be something there that --  
18 that they're getting money for doing that for;  
19 they're not doing it for free.

20 Q. Do you regularly receive a -- a premium  
21 that's above the Federal Order minimum blend  
22 price?

23 A. Yes, sir. We have regularly received a  
24 [sic] over-order price.

25 Q. It -- can you characterize it? Like, is it

1 generally 50 cents, a dollar more than blend?

2 A. I think it was running right at 70 cents  
3 last time.

4 MR. TOSI: Around 70 cents. Okay.

5 Well, thank you. I appreciate your patience.

6 And thank you again --

7 MR. SCARLETT: Thank you, sir.

8 MR. TOSI: -- for appearing.

9 JUDGE DAVENPORT: Anyone else?

10 Mr. Stevens?

11 EXAMINATION

12 BY MR. STEVENS:

13 Q. Mr. Scarlett, when the Department put out  
14 the Notice on this thing, they -- they defined "small  
15 business" from a dairy farmer's standpoints as  
16 somebody who has less than \$750,000 gross  
17 income per year.

18 Under -- under that definition, would you  
19 consider yourself a small business?

20 A. Yes, sir.

21 Q. And -- and would you like the secretary to  
22 take your dues in -- in that context, you know, as a  
23 small business, that -- that if you're talking to the  
24 secretary as a small businessman?

25 A. Yes, sir.

1 MR. STEVENS: Thank you.

2 JUDGE DAVENPORT: Anyone else?

3 Thank you, Mr. Scarlett. You may --

4 MR. SCARLETT: Thank you-all for  
5 allowing me to testify.

6 JUDGE DAVENPORT: -- step down.

7 Mr. DuPrey? Mr. DuPrey, even though lunch  
8 has passed, you are still under oath.

9 Mr. Beshore?

10 MR. BESHORE: Thank you.

11 EXAMINATION

12 BY MR. BESHORE:

13 Q. Marvin Beshore.

14 Mr. DuPrey, I'd like to first explore a little bit  
15 with some of the information you've provided for  
16 the record, the -- the supply and demand situation  
17 in -- in Federal Order 7.

18 Could you get out Exhibit 13?

19 A. I do.

20 Q. Okay. Would you go to Page 13C, or  
21 Exhibit 13C.

22 A. [complies]

23 Q. Okay. And I also need Exhibit 12, Page 2.  
24 I don't know if you have -- have -- have reference  
25 to both of them.

1 A. [complies]

2 Q. Okay. Do you have both of them?

3 A. I do.

4 Q. Now, let's talk about October 2005. On  
5 Exhibit 13C, do I understand correctly, that in  
6 October 2005, there was a total -- total production  
7 of dairy farmers, in the marketing area of Order 7,  
8 of 273,831,071 pounds; correct?

9 A. Correct.

10 Q. And that's all the production from all dairy  
11 farmers pooled on Order 7 in the marketing area; is  
12 that correct?

13 A. That's correct.

14 Q. Now, if you'll look at Page 2 of Exhibit 12,  
15 in the month of October of 2005, what is the  
16 volume of Class I product pounds, Class I only,  
17 product pounds for the -- for the Order?

18 A. For October, it was 390,959,356 product  
19 pounds.

20 Q. Okay. So if every pound of milk produced  
21 in the area by Order 7 pool producers was  
22 delivered and used for Class I, the pool would have  
23 been, what, 117 million pounds short, at least? Or  
24 approximately 117 pounds short?

25 A. Approximately.

1 Q. Okay. Now on Exhibit 13A, for the same  
2 month, you have a figure that shows the weighted  
3 average utilization of milk at pool distributing  
4 plants; is that correct?

5 A. Correct.

6 Q. Okay. And for October '5, that was what?

7 A. 86 1/2 percent.

8 Q. Okay. So, if we were just trying to  
9 determine the total amount of milk needed by those  
10 pool distributing plants in October, we have to take  
11 the Class I number of 390 million that you -- 391  
12 million, around, that you've provided, and increase  
13 it by the fact that only 86.5 percent -- that that  
14 Class I volume represented only 86.5 of the  
15 volumes processed at those distributing plants;  
16 correct?

17 A. Could you -- could you repeat that?

18 Q. Well. . . If --

19 A. I'm not sure what you are getting at.

20 Q. -- in order to -- in order to satisfy the  
21 needs of the distributing plants in Order 7 for milk,  
22 they required, in October of '5, volumes in excess  
23 of the Class I utilization, because that was only  
24 86.5 percent; correct?

25 A. I guess I'm not in a position to say why

1 they -- they had other than Class I utilization.

2 Q. Well, let's just say they used -- they used  
3 more than just the Class I volume?

4 A. That's correct.

5 Q. Okay. So if we're supplying their needs  
6 for usage, we need to supply more than the Class I;  
7 correct?

8 A. I -- I don't know. Who is "we"?

9 Q. Whoever is supplying it.

10 A. I don't know that. I don't know.

11 Q. Okay. They did supply them -- supply  
12 them more than the -- more than their Class I  
13 needs?

14 A. They did, yes.

15 Q. Okay. If -- to know what the total  
16 volumes, the approximate volumes used by those  
17 distributing plants could be calculated by taking  
18 the Class I product pounds and inflating it by the  
19 86.5 percent utilization -- weighted average utilization at  
20 distributing plants. You could approximate the --  
21 the pounds used; correct?

22 A. I would agree with that.

23 Q. Okay. Now -- and when you did that,  
24 instead of being 117 million short from in-area  
25 production, you would be another num -- another



1 mill -- millions of pounds -- some additional  
2 millions of pounds short for the plants' indicated  
3 needs?

4 A. I -- I believe it would be a larger amount,  
5 yes.

6 Q. Okay. And since that milk is not available  
7 in the area of Order 5 -- Order 7, and it's got to  
8 come from somewhere, it's got to come from  
9 outside the area?

10 A. That seems logical.

11 Q. Okay. And -- and it did come from outside  
12 the area in October of 2005, did it not?

13 A. Yeah. Milk did come from outside the  
14 area.

15 Q. By definition, if it didn't come from inside  
16 the area, it was from outside.

17 A. Correct.

18 Q. Okay. And the total -- total milk in the  
19 pool in October -- by -- by the way, if we  
20 additionally factor in the figure of 30 percent as an  
21 accepted reserve figure that's used, for instance,  
22 in Proposal 4, the total needs for the market would  
23 be -- and you could calculate it, would be an  
24 additional 30 percent above the needs at the  
25 plants? You --

1 A. Are you speaking about Class I?

2 Q. Yes. Needs -- well, needs for distributing  
3 plants. If you've got a reserve need for  
4 distributing plants of 30 percent, you could  
5 calculate what you need by taking the distributing-  
6 plant volume times 1.3?

7 A. You could do that.

8 Q. Okay. And that would be an additional  
9 volume over and above the amounts needed from  
10 outside the area in order to have a reserve, an  
11 operating reserve for -- for Class I?

12 A. I believe that would be correct.

13 Q. Okay. So in October of -- let -- let me  
14 just represent to you, I won't ask you to do the  
15 math, but let me just represent to you that the --  
16 take the 391-million Class I usage and increase by  
17 making that 86.5 percent of the receipts at  
18 distributing plants, and you get a number; and you  
19 increase that number by 30 percent for the  
20 operating reserve, assume with me that you would  
21 get a figure of about 584 million, total needs for  
22 the market; okay?

23 A. Okay.

24 Q. Assuming my arithmetic's decent, how  
25 many pounds were pooled in Order 7 in October of

1 2005? Your figure on Page 2 of, what, Exhibit 12.

2 A. The total producer milk in October was  
3 572,559,099 pounds of producer receipts.

4 Q. Okay. Now if you look at April, the April  
5 figures on these same exhibits, just briefly, the  
6 Class I usage in the pool in April was  
7 approximately -- was what, according to your  
8 exhibits?

9 A. 391,109,555 [sic] Class I pounds.

10 Q. About the same as October. Close; right?

11 A. Close. Yeah.

12 Q. But there was a -- a bit more production in  
13 the area in -- in April, with the seasonality of milk  
14 production; correct? As shown on Exhibit 13C.

15 A. Yeah, 13C does show that.

16 Q. Okay. So what was the in-area production  
17 in April, then?

18 A. Out of 235,715 --

19 Q. Was that --

20 A. I'm sorry, -725,243 pounds.

21 Q. Well, how about total in the area?

22 A. Oh, total? I'm sorry. 353,147,757  
23 pounds.

24 Q. Okay. And so, even in the spring, if you  
25 committed 100 percent of that in-area production at

1 the -- the peak of the flush, or close to the peak of  
2 the flush, we're short of the Class I needs of the --  
3 of the market; correct?

4 A. The in-area production is less than Class  
5 I producer milk receipts; correct.

6 Q. Okay. Let me ask you, then, to turn to  
7 Exhibit 13M, and I would like to -- I would like  
8 you to also have Exhibit 14A. Now Exhibit 13M is  
9 your -- a computation of uniform price for April of  
10 2005; correct?

11 A. Correct.

12 Q. And on Exhibit 14A, if I understand it  
13 correctly, what you did was recalculate the uniform  
14 price for a number of months beginning with April  
15 [sic] of 2004, assuming that Proposal 5 was part of  
16 the order regulations; correct?

17 A. Beginning with January '04.

18 Q. January '04. Yes.

19 A. Correct.

20 Q. Okay. Now, when you go the  
21 recalculation, assuming Order 5 was -- Proposal 5  
22 was -- was in place, can you tell us which lines --  
23 line items on the Uniform Price Calculation sheet  
24 were changed?

25 A. One number was changed.

1 Q. Okay. What number was -- is that?

2 A. The number associated with the location  
3 adjustments line. So that value for April 2005 was  
4 2,208,386.67. That --

5 Q. Okay.

6 A. -- value was changed under the proposal.

7 Q. So when you recalculated the uniform  
8 price, assuming Proposal 5 was in place, you  
9 changed just one number in the uniform price  
10 calculation, the location adjustment number;  
11 correct?

12 A. Correct.

13 Q. And did you increase or decrease that  
14 number?

15 A. I guess that number would have been  
16 decreased. That number would have been  
17 decreased.

18 Q. Are you certain about that?

19 A. I believe so. If you took -- because you're  
20 subtracting out a smaller number, you have more  
21 money in the -- the total skim milk and aggregate  
22 value.

23 Q. Is that a subtraction or an addition, the  
24 location adjustment number?

25 A. Oh, yeah, you are correct. That is an

1 addition.

2 Q. Okay.

3 A. So that number -- I -- I was mistaken.

4 That number would have increased.

5 Q. That number would have increased. Okay.

6 So for instance, if we look at April 2005, the  
7 line for April 2005 on Exhibit 14A, the first column  
8 of 14A, on the line for April 2005, shows the 15.85  
9 uniform price that you calculated, that you show  
10 also on Exhibit 13M; correct?

11 A. Correct.

12 Q. Now, when you get over, then, to the four  
13 hypothetical columns, "Estimates Under Dean  
14 Proposal 5," using a 2.0 transportation rate, the  
15 uniform price increases to 15.91; correct?

16 A. Correct.

17 Q. Okay. So the 2-million-208 would have --  
18 would need to be increased enough to get six more  
19 cents on the uniform price of the 691,727,960  
20 pounds in the pool for that month; correct?

21 A. That is correct.

22 Q. And if you go to. . .

23 Now, since that number is being increased and  
24 uniform price -- and that's the only number that's  
25 being changed in the uniform price calculation, and

1 you're showing uniform price increases, where is  
2 the money coming from to increase the uniform  
3 price?

4 A. You are reducing the payments to milk  
5 that was diverted outside of Federal Order 5 and  
6 Federal Order 7. Payments that would have been  
7 going to that milk are now being spread amongst  
8 producers inside the marketing areas.

9 Q. Okay. So the out-of-area milk -- some of  
10 the out-of-area milk that was in the pool -- that is  
11 in the pool, has had its price decreased. And the  
12 rest of the milk in the pool has had its price  
13 increased.

14 A. That is the reading of the proposal that --  
15 that I am looking at, right.

16 Q. Okay. The proposal generates no new --  
17 new money of that nature; correct?

18 A. [no audible response]

19 Q. As you in -- as you -- as you interpreted  
20 the 5, there's no new money created. You just take  
21 money from one group of producers or set of milk,  
22 lower that price, and add it to other producers and  
23 pounds of milk; correct?

24 A. That was the mechanics behind the -- the  
25 calculations.

1 Q. That's -- that's all that supporting  
2 mechanics.

3 And so, just following through there, in April  
4 2005, you know, we could -- we could do this  
5 arithmetic ourselves.

6 And if you're using a 4.0 transportation rate,  
7 you get that price -- uniform price from 15.85 to  
8 16.08, you've got a, what, 23-cent-per-hundred-  
9 weight increase on the 691-plus million pounds in  
10 the pool; correct?

11 A. That would be a -- that's the -- that's the  
12 price in Atlanta.

13 Q. Right, the announced -- which is the  
14 Fulton County, Georgia uniform price line on --

15 A. Yeah.

16 Q. -- Exhibit 13M.

17 A. Correct.

18 Q. Okay. So if we took 23 cents times  
19 691,727,960 pounds, we'd come up with a number  
20 that is the dollars net that are taken from the --  
21 that reduce the out-of-area price, and increase the  
22 rest of the pool. The math is --

23 A. I believe --

24 Q. -- dollar in/dollar out; correct?

25 A. I believe that math is correct, yes.



1 Q. Okay. Let me just ask a couple other  
2 clarifying questions on another table or two, if I  
3 could.

4 This Exhibit 15B, I think you made this clear,  
5 but the -- the title does not say anything about the  
6 locations of the diversions or how the diverting  
7 handlers were selected. Is that top three diverting  
8 handlers of milk wherever it's diverted?

9 A. Exactly. That's milk wherever it was  
10 diverted.

11 Q. It has nothing to do with in-area or out-of-  
12 area or. . .

13 A. It does not.

14 Q. And go to Exhibit 18. This is 18A.

15 No, I'm sorry, 18B, which is a three-page  
16 table. Just a couple of questions about this -- the  
17 two right-hand columns.

18 The column that says "Not Delivered to OF 5 or  
19 7 Distributing Plants," that column would include --  
20 and my question is: Would that column include  
21 deliveries to supply plants in Federal Order 5?

22 A. Yes.

23 Q. Or 7.

24 A. Yes.

25 Q. Okay. And if those supply plants had

1 deliveries to distributing plants, that would not be  
2 reflected in -- in these calculations on this exhibit?

3 A. Could you rephrase that?

4 Q. If the supply plants happen to have  
5 deliveries to distributing plants that month, so --

6 A. Transfers?

7 Q. Transfers. Yeah.

8 A. Okay.

9 Q. I'm sorry. Transfers.

10 -- those transactions are not reflected in the  
11 table; correct?

12 A. They -- they are not captured. This is the  
13 farm to destination --

14 Q. Okay. And --

15 A. -- transaction.

16 Q. Okay. And there are, what, three -- three  
17 supply plants regularly part of the Order 7 system  
18 or pool?

19 A. Well --

20 Q. Well, there -- you've got it in your -- with  
21 your tables of plants. Okay.

22 A. Yeah, 11 and 12.

23 Q. Now, the -- the final column -- and I think  
24 you've clarified this. But the title on each page of  
25 this table for that final column should -- should be

1 "Percentage Not Delivered to Federal Order 5 or 7  
2 Distributing Plants"; correct?

3 A. That's correct.

4 Q. The same on each -- on each page?

5 A. On all three; correct.

6 MR. BESHORE: Okay. That's all my -- all  
7 the questions I have at this time.

8 Thank you for all your work, Mr. DuPrey --

9 THE WITNESS: You're welcome.

10 MR. BESHORE: -- at our request and  
11 others'.

12 JUDGE DAVENPORT: Mr. Yale?

13 EXAMINATION

14 BY MR. YALE:

15 Q. Good afternoon. Ben Yale on behalf of  
16 Continental Dairy Products and Select Milk  
17 Producers.

18 I'm going to, kind of, follow up on some  
19 questions here that Mr. Beshore asked, dealing  
20 with the impact of these location adjustments and  
21 these proposals that, if you change the location  
22 adjustments, it doesn't really create any money it  
23 just changes how it moves, you know, in terms of  
24 the value that certain plants receive as opposed to  
25 others at that price; right?

1 A. [no audible response]

2 Q. Do you understand that line -- do you  
3 remember that line of questions?

4 A. I remember his line of questions.

5 Q. Okay. What you've done in this analysis  
6 in Exhibit 14 is kind of what we call a static  
7 analysis; right? You just took existing data,  
8 historic data, and applied new numbers to that to  
9 come up with new value; is that correct?

10 A. That's correct.

11 Q. All right. So that -- that's assuming that  
12 the people who delivered milk to, say, Tulare,  
13 California or Tempe, Arizona would continue to  
14 deliver milk to Tulare, California and Tempe,  
15 Arizona pools on Order 7 after either one of these  
16 proposals are done; is that correct?

17 A. That's correct.

18 Q. All right. So that, if, in fact, the rule  
19 changes their behavior, it -- it's conceivable, and  
20 economics would tell us, that they would seek a  
21 higher price than that price to move to another  
22 plant; and that, if they went to a plant with a  
23 higher differential, even under Proposal 5, that, in  
24 fact, they might actually add money to the pool in  
25 response to that regulation; right?

1 A. I didn't make any assumptions about  
2 anyone's behavior.

3 Q. I understand that. But -- but assuming  
4 that, in response, that they go to a plant with a  
5 higher value -- higher location differential, then it  
6 does, and it can, in fact, begin to create some  
7 additional value to the pool, can it not?

8 A. [no audible response]

9 Q. If they --

10 A. I'm not sure what you're speaking about.  
11 I'm sorry.

12 Q. Well, any of the mil -- any of the diverted  
13 milk.

14 A. If the diverted milk goes to a higher  
15 price --

16 Q. Higher price --

17 A. -- location.

18 Q. -- or a lower pri -- and -- a different  
19 location, it could -- depending on the location, it  
20 could impact the actual dollars that are in the pool,  
21 one way or the other?

22 A. One way or the other, if milk moves  
23 through a different location, it's going to -- it will  
24 have an impact on the pool.

25 Q. Okay. We'll leave it to the participants of

1 this Order to determine how they'll use those rules  
2 to play that game. But it just -- it -- that is a  
3 static plan and not a dynamic.

4 I want to, if you would, turn to page -- or  
5 Exhibit 16. And there was just a clarification on  
6 these maps, and the like; and also with 17.

7 As I understand it, this is -- this -- these  
8 coun -- counties that are --

9 MR. SPEAKER: Which of these?

10 MR. YALE: I'm -- I'm looking at Exhibit B.

11 MR. SPEAKER: Okay.

12 BY MR. YALE:

13 Q. Because I think B through E are about the  
14 same?

15 A. Yes.

16 Q. All right. What this is reflecting -- this  
17 isn't the percentage of milk produced in that  
18 county; it's the percentage of milk produced in that  
19 county that was pooled on Order 7 that was  
20 delivered to the pool plant; right?

21 A. It was the percentage of producer milk  
22 that was -- of producers -- of producer milk on  
23 Federal Order 5 and Federal Order 7 --

24 Q. Right.

25 A. -- shipped.

1 Q. So, it might represent 2 percent of the  
2 milk in that county, total production, with the rest  
3 of the money going to another order; right?

4 A. I suppose that's possible, yes.

5 MR. YALE: Yeah. Okay.

6 Very good. I have no other questions.

7 JUDGE DAVENPORT: Mr. Schad?

8 EXAMINATION

9 BY MR. SCHAD:

10 Q. Hello, Steven.

11 A. Hello, sir.

12 Q. My name is Dennis Schad. I -- I work for  
13 Land O'Lakes. S-c-h-a-d. Couple, just, clarifying  
14 questions.

15 On Exhibit 12, on Page 22, you probably don't  
16 even have to turn to it, there is a listing of four  
17 supply 7(c) and 7(d) plants.

18 A. Supply plants are -- okay. Yes, there are.

19 Q. Okay. Just a question in there: Are all  
20 four of those plants located within the marketing  
21 area of Order 7?

22 A. Yes, they are.

23 Q. Okay. Let's go to Exhibits 13J.

24 A. [complies]

25 Q. First off, as I read this, where -- there --

1 in column 2, there's a -- a geographic location. I  
2 assume there was a -- a plant in that town that milk  
3 was diverted from Order 7 to; is that correct?

4 A. That's correct. That's the location of -- of  
5 a plant that received diverted milk.

6 Q. Okay. And in column 4, would you tell me  
7 what -- what the -- what's represented in column 4?

8 A. Column's entitled "Nearest Pool Plants."  
9 Those are the pool distributing plants of Federal  
10 Order 5 or 7 that are nearest to the city associated  
11 on that corresponding line.

12 Q. Okay. Are all of those plants located  
13 within the Order 5 or Order 7 marketing area?

14 A. They are.

15 Q. And under your understanding of Proposal  
16 5, is it a requirement to be in that column for a --  
17 any -- any plant that's qualified to be a 7(a)(b) --  
18 5(a)(b) plant, that they -- that they be within the  
19 marketing area?

20 A. I don't think that it specifies that it has to  
21 be inside the marketing area.

22 Q. Okay. And we'll. . . It says what it says.

23 A. Proposal 5 -- they -- I mean, it says what  
24 it says. But I'm -- they just so happen to all be in  
25 the marketing area.



1 Q. Okay.

2 A. (a) and (b).

3 Q. Okay. I didn't -- I noticed there are no  
4 plants in the state of Virginia, that were -- milk  
5 was -- Order 7 milk was diverted to. Are there no  
6 plants that milk was diver -- Order 7 milk was  
7 diverted to --

8 A. Are you referring --

9 Q. -- in the state of Virginia?

10 A. Are you -- are -- which exhibit are you  
11 referring to?

12 Q. I'm on -- still on J. 13J.

13 A. And the question was, "There was no milk  
14 diverted into Virginia?"

15 Q. I noticed that there are no plants.

16 A. That's -- that's what the exhibit shows.

17 Q. All right. If there was a -- if there was a  
18 7(d) Order 5 -- if there was an Order 5 7(d) plant,  
19 in which Order 7 -- Order 7 milk was delivered to --  
20 well, let me say that again and make sure I got it  
21 right.

22 If there was an Order 5 7(d) plant in which  
23 there was Order 7 milk diverted to, should that  
24 plant be listed in here?

25 A. I -- I don't think it should be. I don't

1 believe it should be listed in here.

2 Q. And why not?

3 A. [no audible response]

4 Q. It has --

5 A. Could be their only --

6 Q. Well, let's --

7 A. -- pool distributing plants.

8 Q. Let's strike -- strike the question, please.

9 If milk is delivered to an Order 5 7(d) plant, if

10 Order 7 milk poolers ordered that milk [phonetic],

11 is that a diversion under Order 7?

12 A. Say it one more time.

13 Q. If Order 7 milk is delivered to an Order 5

14 7(d) plant, is that a diversion under Order 7?

15 A. I'm not exactly sure.

16 Q. If milk is delivered to an Order 1 7(d)

17 plant, is that a div -- diversion under Order 7?

18 A. I believe milk delivered to another Order

19 7(d) plant would be pooled on that Order, not on --

20 it would be producer milk on that Order --

21 Q. Right. And --

22 A. -- that it was received.

23 Q. Okay. If Order 7 milk was delivered to

24 that Order 5 plant, would it be a diversion under

25 your Order, or would it be a pool -- a pool-plant

1 delivery to that Order 5 plant?

2 A. I believe it would become producer milk  
3 on Order 5. But I could -- I could be wrong.

4 Q. Okay. Now, if -- okay.

5 If there was a 7 -- if there is a 7(d) plant  
6 within the state of Virginia that is outside the  
7 marketing area for Order 5 and 7, and Order 7 -- I  
8 mean Order 5 milk delivered to that plant is a  
9 diversion, then should it be included as -- as -- in  
10 the zoning-out Proposal of Order 5?

11 A. [no audible response]

12 Q. I'm sorry; in the zone-out Proposal --  
13 zone-out Proposal 5.

14 MR. STEVENS: Your Honor? I'm -- I'm  
15 going to object, I guess, because that's a question  
16 that should be addressed to the proponents, not to  
17 this witness. Should they be?

18 JUDGE DAVENPORT: Well, let -- let him  
19 answer if he --

20 MR. STEVENS: -- the point of --

21 JUDGE DAVENPORT: -- if he can.

22 However --

23 MR. STEVENS: If it -- if --

24 JUDGE DAVENPORT: -- it appears that  
25 he's having a little difficulty with the questions.

1 MR. SCHAD: I -- and I'll --

2 MR. STEVENS: And that's -- and that's  
3 why I'm objecting.

4 MR. SCHAD: And I'll just stop there.

5 BY MR. SCHAD:

6 Q. I'll just stop there. If you -- if you don't  
7 know, you don't know.

8 A. I don't know.

9 MR. SCHAD: Thank you.

10 JUDGE DAVENPORT: Mr. English?

11 MR. ENGLISH: Thank you. Charles  
12 English again, for Dean Foods and Dairy Fresh  
13 Corporation.

14 EXAMINATION

15 BY MR. ENGLISH:

16 Q. I want to discuss with you Mr. DuPrey,  
17 just a few things discussed with you by Mr.  
18 Beshore.

19 And, first I want to go to this suggestion -- and  
20 I don't want to be about any negative connotations  
21 that may have been implied, but the suggestion  
22 that money was being reduced to out-of-area  
23 producers and handed over, or whatever, to in-area  
24 producers. And I want to, at least, have the record  
25 be clear as to what half of that discussion was.

1       When, on Exhibit 13M, the location adjusted  
2 numbers you discussed, would go up, correct, from  
3 2,208,366.67? In order to get to, say, 16.81 which  
4 is 6 cents -- sorry, 16 -- 15.90 for '04/'05, from  
5 Exhibit 14A, in order to account for that 6 cents,  
6 you would have -- you would multiply that 6 cents  
7 by the number of pounds, and just do the math with  
8 me, or I'll do the math for you, and suggesting it's  
9 around \$400,000.

10       A.    Okay.

11       Q.    So if it's around \$400,000, then the 2-  
12 million-208 would have been 2-million-6; correct?

13       A.    Okay.

14       Q.    Is that true? Is it \$400,000?

15       A.    Under your assumptions, yes.

16       Q.    And -- and then, the line for total skim  
17 milk and aggregate value would have also gone up  
18 by the same amount; whatever the number is, that  
19 line would go up by that same number; correct?

20       A.    Correct.

21       Q.    And that number does -- thus translates  
22 into a higher uniform price, which is the 15.91;  
23 correct?

24       A.    Correct.

25       Q.    So all producers, not just in-area

1 producers, all producers benefit from that 6-cent  
2 increase; correct?

3 A. Correct.

4 Q. Now I realize that, according to your own  
5 testimony, you started at the MA's Office in 2000,  
6 which was after Federal Order reform; correct?

7 A. Correct.

8 Q. Did you, you know, happen, in your  
9 studies of Ag economics, and I can't imagine why  
10 you would or why you wouldn't -- in yours master's  
11 degree, follow the format of -- of Federal Order  
12 reform?

13 A. Ironically enough, I did not.

14 Q. Ironically or luckily? [laughter].

15 Since you've come to the MA's Office, have  
16 you -- have you had occasion to look back to see  
17 how the various Federal Orders, in particular,  
18 Southeast Order, worked prior to Federal Order  
19 reform?

20 A. I probably couldn't testify with any great  
21 degree of accuracy on that.

22 Q. So you don't know whether this zone-out  
23 concept, which would effectively share more of the  
24 dollar with all producers, existed prior to Federal  
25 Order reform, or something like it?

1 A. I couldn't testify.

2 Q. Similarly, you had a discussion with Mr.  
3 Beshore about this market structure, and his  
4 concept that there would need to be, you know, a  
5 30 percent reserve. Are you aware of Federal  
6 Order statistics prior to Federal Order reform about  
7 the Class I utilization in these markets?

8 A. Prior to reform?

9 Q. Yes.

10 A. Vaguely, yes.

11 Q. For instance, would -- would you know  
12 that -- that the percentage for, say, October of  
13 1996 was 86.8 percent of Class I; that's all market.

14 A. I'll take your word for it.

15 Q. Assuming that is the case, and that, by  
16 the way, comes from table 18 of the Annual Federal  
17 Market Order Statistics that are published, if -- if  
18 the total Class -- the total market for all regulating  
19 entities for Order 7 was 86.8 percent in October of  
20 1996, and the market was able to take care of any  
21 reserves at a much lower level than 30 percent,  
22 wasn't it?

23 A. I'll take your word for it.

24 Q. What -- what changed from 1996 to the  
25 present? We had Federal Order reform; correct?

1 A. Correct.

2 Q. Do you know when transportation credits  
3 first came in?

4 A. It was sometime around -- sometime prior  
5 to Federal Order reform, I believe.

6 Q. Sometime around August of 1996, maybe?

7 A. That could be correct.

8 Q. Do you know what accounts for the drop in  
9 Class I utilization in these markets from  
10 substantially above 80 percent to something closer  
11 to 50 or 60 percent for April of this year?

12 A. I don't -- I don't believe I can testify to  
13 that.

14 Q. If -- if prices are held equal, a drop in the  
15 Class I utilization and an increase in lower you  
16 could go -- lower utilizations would mean a lower  
17 price aid to farmers; correct?

18 A. All -- all things equal; correct.

19 MR. ENGLISH: Thank you.

20 JUDGE DAVENPORT: Other examination  
21 of this witness?

22 Mr. Beshore?

23 EXAMINATION

24 BY MR. BESHORE:

25 Q. Marvin Beshore. Just one followup on --



1 on pool -- pool mathematics. And I'm on Exhibit  
2 13M of -- Exhibit 13M.

3 Mr. English inquired, would -- if \$400,000 was  
4 added to the location adjustments, bringing the  
5 announced blend price up 6 cents, wouldn't that go  
6 to all producers in the Order, I think, or something  
7 to that effect.

8 And you -- you've indicated in the affirmative,  
9 that it would; correct?

10 A. Correct.

11 Q. However, the \$400,000 came from  
12 somewhere; and it came from the producers who  
13 delivered to plants -- delivered diverted milk to  
14 plants outside of the marketing area under  
15 Proposal 5; correct?

16 A. As milk diverted outside of the two  
17 marketing areas.

18 Q. Outside of the two marketing areas? Yes.

19 A. Correct.

20 Q. Thank you. Okay.

21 So, if there was a reduction in prices to those  
22 dairy farmers, of that \$400,000, that was your  
23 assumption in calc -- making these hypothetical  
24 calculations under Proposal 5; correct?

25 A. Yes, but a portion of their amount that

1 went to these out-of-area -- out-of-the-combined-  
2 area locations, that's correct.

3 Q. All right. And to the extent that those  
4 reductions, which -- the amounts of the -- of the  
5 reductions at those various delivery points are in  
6 other exhibits; and I won't bother to go to them.  
7 But to the extent that those deductions -- those  
8 reductions in price under Proposal 5, are greater  
9 than 6 cents per hundredweight, you know, there's  
10 a net loss to the -- on that milk for the producers  
11 delivering to those points; correct?

12 A. If those location adjustments per the  
13 proposal would result in an -- a decrease of greater  
14 than 6 cents, then yes, you're correct.

15 Q. And that's the only -- the only -- that's the  
16 source of the -- of the nominal 6-cent increase in  
17 the announced uniform price; correct?

18 A. I believe that's correct.

19 Q. Okay. And reducing the price at the -- on  
20 the diverted milk, and therefore increasing the  
21 price of the rest of the pool in a zero-sum  
22 scenario; correct?

23 A. I believe that's correct.

24 MR. BESHORE: Okay.

25 JUDGE DAVENPORT: Mr. Schad?

1 EXAMINATION

2 BY MR. SCHAD:

3 Q. Just one question, Steven, and I apologize  
4 for not asking it before. And if you can -- can or  
5 can't answer it.

6 During the period -- okay. I'm back on Exhibit  
7 13J. And for the period of time that you took in  
8 listing all of the plants that Order 7 milk was  
9 diverted to, was -- was milk diverted to Valley Milk  
10 in Strasburg, Virginia? I mean, was milk -- was  
11 Order 7 milk delivered to Valley Milk in Strasburg  
12 in that. . . And if you can't answer the question,  
13 don't.

14 A. It's not listed on this exhibit, so I can  
15 only assume that it was not.

16 MR. SCHAD: Thank you.

17 JUDGE DAVENPORT: Other questions?

18 Very well. Mr. DuPrey, it looks like you may  
19 step down.

20 Mr. Stevens?

21 MR. STEVENS: Yeah. If I haven't at this  
22 point, which I don't believe I have, I would like to  
23 move admission into evidence of Exhibits 11  
24 through 18.

25 JUDGE DAVENPORT: Any objection?

1 Very well. They will be submitted.

2 [WHEREUPON, Exhibit 11 through Exhibit 18 are  
3 admitted into evidence as marked.]

4 MR. STEVENS: Okay. Your Honor, I  
5 would like to call to the stand Bob Vander Linden.

6 JUDGE DAVENPORT: Raise your right  
7 hand.

8 BOB VANDER LINDEN, after having been duly  
9 sworn, is examined and testifies as follows:

10 JUDGE DAVENPORT: Please be seated.  
11 Could you tell us your name, and if you would,  
12 spell it for the hearing reporter, please.

13 THE WITNESS: My name is Bob Vander  
14 Linden, V-a-n-d-e-r capital-L-i-n-d-e-n.

15 EXAMINATION

16 BY MR. STEVENS:

17 Q. Good afternoon, Bob.

18 A. Afternoon.

19 Q. Could you tell us for the record by whom  
20 you're employed and your business address,  
21 please?

22 A. Yes. I am employed by the Market  
23 Administrator's Office. Address is 10801 Renner,  
24 that's spelled R-e-n-n-e-r, Boulevard, Lenexa,  
25 Kansas 66219.

1 Q. And what's your position in -- in that  
2 office?

3 A. I'm the Market Administrator of that  
4 office.

5 Q. And how long have you been in that  
6 position?

7 A. Less than a year.

8 Q. And did you work for the Market  
9 Administrator before that?

10 A. Yes.

11 Q. How many years?

12 A. 37 years in total.

13 Q. And have -- I guess you've had a lot of  
14 duties over there?

15 A. Yes.

16 Q. One of your duties is you -- you have  
17 appeared in Milk Marketing Hearings before?

18 A. Yes, I have.

19 Q. Testified?

20 A. Yes, I have.

21 Q. Submitted evidence?

22 A. Yes, I have.

23 Q. Were you asked by interested parties to  
24 prepare some documents to bring to the hearing  
25 today?

1 A. Yes.

2 Q. And did you bring them with you?

3 A. Yes.

4 Q. Do you have them with you?

5 A. Yes.

6 Q. You've provided copies for the  
7 administrative law judge, and for the reporter, and  
8 some at the side of the room for the use of the  
9 parties?

10 A. Yes, I have.

11 MR. STEVENS: Your Honor, I would like  
12 to mark for identification a -- a -- these --

13 JUDGE DAVENPORT: Two-page exhibit.

14 MR. STEVENS: I believe it's two pages;  
15 and I think we're at 19?

16 JUDGE DAVENPORT: Correct.

17 MR. STEVENS: I would like to have  
18 marked for identification a two-page document  
19 entitled "Compilation of Statistical Material  
20 Prepared at the Request of Dairy Farmers of  
21 America."

22 [WHEREUPON, document referred to is marked  
23 Exhibit 19 for identification.]

24 BY MR. STEVENS:

25 Q. And this -- this information comes from

1 Federal Marketing Order Number 32, the Central  
2 Marketing Area?

3 A. That is correct.

4 Q. Prepared by you, or pursuant to your  
5 supervision?

6 A. Yes.

7 Q. It's not presented here in favor or against  
8 any proposal, is it --

9 A. No.

10 Q. -- by you, certainly?

11 A. No.

12 Q. And it's here for the -- it's here as  
13 requested by interested parties for their use during  
14 this hearing.

15 A. That is correct.

16 Q. Now, could you briefly describe for the  
17 record what's contained in the -- in this  
18 compilation that's been marked for identification as  
19 Exhibit 19?

20 A. This is a -- the Central Order is a  
21 component pricing Order, as compared to the  
22 Orders 5 and 7, which is the skim-fat pricing-type  
23 Order.

24 So this is an actual calculation of the Central  
25 Order pool for November of 2005. And it's, briefly,

1 laid out the same as any other Order. The Class I  
2 portion is based upon skim-fat pricing, the Class  
3 II, III and IV of the handlers' utilization is actually  
4 based upon component pricing. That's the total  
5 utilization for plants represented and pooled in the  
6 Central Order.

7 And then, the lower half is actually giving  
8 credit for components paid to producers so that,  
9 when -- when we announce a net price, if you will,  
10 it's a producer price differential, which is a lot less  
11 than a statistical uniform price.

12 And in order to be comparable, you have to  
13 add the Class III price to the producer price  
14 differential, and that will equate to a statistical  
15 uniform price that may be compared to skim fat  
16 Orders.

17 Q. Okay. And this is an actual document  
18 issued by your office for November of 2005?

19 A. That is correct.

20 MR. STEVENS: Okay. I don't have  
21 anything further, your Honor, and I submit the  
22 witness.

23 JUDGE DAVENPORT: Mr. Beshore?

24 EXAMINATION

25 BY MR. BESHORE:



1 Q. Marvin Beshore.

2 Mr. Vander Linden, thank you very much for  
3 providing this information at the request of Dairy  
4 Farmers of America, and for coming here.

5 I guess, are you a new category here, an out-  
6 of-area Market Administrator? [laughter].

7 A. I am an out-of-area Market Administrator;  
8 that is correct. [laughter].

9 Q. Okay. Looking at Exhibit 19 for a minute  
10 or two, I want to draw your attention to two lines  
11 on the "Producer Price Differential" calculation for  
12 November of 2005 for Federal Order 32. Two lines  
13 which have figures representing somatic cell  
14 adjustments and the somatic cell values.

15 First one says "somatic cell adjustment on  
16 Classes II, III, and IV," and the amount indicated  
17 is \$554,771.85.

18 A. Correct.

19 Q. Okay. And then there's a -- further down  
20 the -- the calculation flowchart, there's a figure  
21 that says "Adjustment for a reported somatic cell  
22 value," \$759,432.04. I want to -- I want to learn  
23 about the origin of those and -- and how they're --  
24 how they're reconciled.

25 The -- the -- the first number, is that a value

1 paid by handlers on those somatic cell -- for  
2 somatic cell adjustments in Classes II, III and IV  
3 milk?

4 A. It -- it's a -- it's a prorated number. The  
5 handler acts -- actually reports the total number;  
6 and then, the percentage of producer milk that's in  
7 Class II and III -- II, III and IV, as compared to the  
8 total producer milk, then that percentage is applied  
9 to that total number reported.

10 Q. Okay. And this is a positive number.  
11 Does that -- is that generated off of a base value  
12 in some way?

13 A. It's generated by the organizations that  
14 are reporting producer milk, and each producer is  
15 being tested for somatic cells, and this will be an  
16 adjustment to -- plus or minus from 350, the base.

17 Q. Okay. So when -- when the value here is  
18 reported at \$554,000 as a -- as a positive value,  
19 does that indicate that the, what, average milk in  
20 the pool was above the \$350,000 base in a positive  
21 adjustment zone?

22 A. It was below. If it's --

23 Q. It was below -- I'm sorry. It's below.

24 A. That's correct.

25 Q. Okay. And when producers with -- or

1 handlers with II, III and IV utilization acquire milk  
2 under the Order that is below the 350, they are  
3 required to pay into the pool and -- or account for  
4 the indicated value of -- of that milk?

5 A. Correct.

6 Q. All right. So the aggregate that handlers  
7 then accounted for was the \$554,771.85 value in  
8 November?

9 A. [no audible response]

10 Q. Aggregate positive. . .

11 A. For II, III and IV.

12 Q. For -- for those Classes?

13 A. That's correct.

14 Q. Okay. And what about Class I?

15 A. It does not apply to Class I.

16 Q. So if Class I processor -- well, you've got,  
17 what, how many -- what, 373 million pounds of  
18 Class I usage in the pool --

19 A. Yes.

20 Q. -- this month?

21 A. Yes.

22 Q. Okay. For those pounds, if there's  
23 positive -- if the somatic cell count is less than  
24 350,000, what's the obligation of the handler?

25 A. [no audible response]

1 Q. Is there any obligation of -- of the handler  
2 for the Class I pounds?

3 A. On somatic cell?

4 Q. On somatic cell.

5 A. No.

6 Q. Okay. Now, going down to the  
7 "adjustment for reported somatic cell value" line,  
8 the 759,000: What -- what is that line?

9 A. That is the total somatic cell on all  
10 producer milk pooled anywhere. And -- if you look,  
11 well, a little bit to the left of that number, you will  
12 see that the average for the market was 262.

13 Q. Is that 262,000?

14 A. That's correct.

15 Q. Okay. So the weighted average of milk  
16 was that somatic cell test?

17 A. That is correct.

18 Q. And producers, are they -- they're paid for  
19 that higher quality milk, lower somatic cell, under  
20 the Order? There's a minimum value required  
21 under the Order to be counted, to be paid to the  
22 producer for that milk?

23 A. There's a --

24 Q. On the basis of the somatic cell value.

25 A. There's a -- a minimum requirement for

1 nonmembers. For cooperatives, they can pay on  
2 their own plant.

3 Q. Okay. And for nonmembers, there's a  
4 minimum required --

5 A. That is correct.

6 Q. -- amount?

7 And for handlers paying to a cooperative, they  
8 have to account at the same minimum value that --  
9 to the cooperative as a whole, as if it was a  
10 nonmember?

11 A. That is correct.

12 Q. Okay. Now -- so producers as a whole  
13 were paid \$759,432.04 for the positive somatic cell  
14 values. But handlers only contributed  
15 \$554,771.85; is that a fair characterization of  
16 those two lines?

17 A. It is.

18 Q. Okay. Where did the other \$205,000-odd  
19 come from?

20 A. It washes through the producer price  
21 differential.

22 Q. Is that another way of saying it just comes  
23 out of the pool, or out of the kitty?

24 A. Yes.

25 Q. Okay. So everybody in the pool, their

1 uni -- their producer price differential was reduced  
2 by the 205,000 that was paid to producers for their  
3 better somatic cell value, in essence?

4 A. Correct.

5 Q. Let's talk about protein just a little bit.  
6 On the -- on the value lines, building up to the  
7 value of the pool, I think there's only one line  
8 showing a value based on protein pounds, and  
9 that's under Class III; is that correct?

10 A. That is correct.

11 Q. And that value is \$44,284,578.93?

12 A. That is correct.

13 Q. Now the protein -- there's another protein  
14 line, then, in the -- in the bottom part, "less value  
15 of protein in producer milk," \$88,220,142.21. Is  
16 that what producers were paid for the protein in  
17 their milk?

18 A. That is correct.

19 Q. Okay. How is -- the 44 million that was  
20 paid in for protein, what's the -- with 88 million  
21 paid out, where does the other 44 million come  
22 from?

23 A. The Class I skim price is derived by the  
24 price -- the advanced pricing factors, and it is  
25 used, the higher of the Class III or Class IV. So if

1 Class III happened to be the highest price in  
2 advanced pricing factors, the Class III skim is  
3 made up of protein and other solids. That's how  
4 the Class III skim is derived.

5 So even though it's not broken out as such,  
6 the Class I skim, in most cases, represents a pretty  
7 high portion of protein value.

8 Q. So roughly, what, 38 million here, Class I  
9 skim pounds, are -- or 38 million, 390,637.02 on  
10 this?

11 A. Correct.

12 Q. So, you're saying that that frequently  
13 comes -- makes up a substantial portion of the 44-  
14 million-dollar difference between protein value  
15 paid in and that taken out by --

16 A. That is -- that is correct.

17 Q. Okay. Where would the other 6 million  
18 come from?

19 A. Again, the Class III price is made up, as  
20 we pay producers, is made up of protein and other  
21 solids. The other solids price is based upon  
22 weight.

23 However, the Class II and Class IV is based on  
24 nonfat solids. That value is derived from the  
25 nonfat dry-milk price. So, entwined in the

1 utilization of I, II and IV is a makeup of -- well, I  
2 won't -- a majority of that protein.

3 Q. And any --

4 A. Obviously, nonfat solids is protein and  
5 other solids added together.

6 Q. Right. So there's -- if I can just, maybe,  
7 summarize roughly in concept here: In -- in the --  
8 in Multiple Component Pricing Orders, handlers pay  
9 in on certain values of Class I. II, III and IV pay  
10 in on different formulas of valuation. Producers  
11 are -- are paid on a different set of values. And  
12 they're not necessarily identical?

13 A. The prices that are used to the Class III  
14 for protein and other solids is the same price that  
15 is paid to producers for protein and other solids.

16 MR. BESHORE: Okay. Thank you very  
17 much, Mr. Vander Linden.

18 THE WITNESS: You're welcome.

19 JUDGE DAVENPORT: Mr. Yale?

20 Mr. Stevens?

21 EXAMINATION

22 BY MR. STEVENS:

23 Q. Bob, I'm sorry. I -- I -- I neglected to ask  
24 you: I know you -- I guess, working for over 30 in  
25 the Market Administrator's Office, you got an



1 education; right?

2 A. Somewhat. [laughter].

3 Q. You had some other education, didn't you?

4 A. Yes. I --

5 Q. Why don't you tell us about that.

6 A. I have a -- an accounting gree -- degree  
7 from Iowa. And I worked -- basically, my  
8 experience has gone through the -- the auditing  
9 process. I worked nine years as auditor here in  
10 our organization. And then held different  
11 responsibilities throughout the 30 years of my  
12 career.

13 Q. A lot of on-the-job training?

14 A. That's correct.

15 MR. STEVENS: I don't have anything  
16 further.

17 JUDGE DAVENPORT: Other examination  
18 of this witness?

19 Very well. Mr. Vander Linden, you may sit  
20 down.

21 It's about quarter of 3.

22 MR. STEVENS: Your Honor, just, could  
23 I -- could ask that Exhibit --

24 JUDGE DAVENPORT: 19 be admitted into  
25 evidence?

1 MR. STEVENS: -- 19 be -- yes.

2 JUDGE DAVENPORT: You so may.

3 [WHEREUPON, Exhibit 19 is admitted into  
4 evidence as marked.]

5 JUDGE DAVENPORT: Being as we're  
6 going to start taking witnesses other than the  
7 government witnesses at this point, this would be a  
8 good time for a break.

9 Well, let's say 5 minutes after the hour.

10 [WHEREUPON, a brief recess is taken.]

11 JUDGE DAVENPORT: It's my  
12 understanding that there are a couple of producers  
13 that would like to get on today. And with everyone  
14 else's indulgence, I'll let them come forward at this  
15 time.

16 If you would, would you raise your right hand,  
17 please.

18 ROBERT KLINGENFUS, after having been duly  
19 sworn, is examined and testifies as follows:

20 JUDGE DAVENPORT: Please be seated.

21 Tell us your name; and then, if you would,  
22 spell it for the hearing reporter.

23 MR. KLINGENFUS: My name is Robert  
24 Klingenfus; R-o-b-e-r-t K-l-i-n-g-e-n-f-u-s.

25 JUDGE DAVENPORT: Very well.

1 Mr. Klingenfus, you have a statement which  
2 you have given to the hearing reporter, to me, and  
3 to certain members. There are a few other copies  
4 of your statement, but not enough to go around.

5 Are you prepared to read your statement at  
6 this time?

7 MR. KLINGENFUS: Yes.

8 [WHEREUPON, document referred to is marked  
9 Exhibit 20 for identification.]

10 JUDGE DAVENPORT: Please start.

11 MR. KLINGENFUS: "Producers in Federal  
12 Milk Order 5 & 7 are unable to supply all of the  
13 total milk needs of our market. The cost of  
14 transporting in the additional milk needed to fully  
15 supply the market must be paid by someone. These  
16 transportation costs can be paid by consumers, the  
17 outside suppliers of the milk, lower processor  
18 margins [or] (profit), tighter margins for marketers  
19 or lower prices to producers. The fact that  
20 producers, cow numbers, and pounds of milk  
21 produced in the Southeast is rapidly declining,  
22 suggests that order 5 & 7 producers cannot  
23 continue to bear these transportation cost [sic]. It  
24 is apparent that the present supply program is  
25 failing by asking producers in a deficit market to

1 pay the cost of transporting milk from a surplus  
2 markets. The proposal to increase the  
3 Transportation Credits and establish a new  
4 Transportation Credit Fund will surely accelerate  
5 the process of pressuring our fellow Southeast  
6 producers out of business."

7 "At issue are three separate proposals."

8 "Proposal 1 if approved would increase  
9 payments to processors to the -- to the  
10 Transportation Credit Balancing Fund from \$0.095  
11 to \$.20 on Class I producer milk. Producers  
12 outside our -- our market have been able to send or  
13 pool only five days of production into our market,  
14 in order to qualify all of their monthly production at  
15 our order price. The proposal -- the proposal  
16 increase -- proposed increase in the transportation  
17 assessment encourages an excess of milk to be  
18 qualified in our order which further erodes our  
19 class I market and uniform blend price. The  
20 qualifying of outside milk at times has become so  
21 rampant [that] many producers question if we have  
22 the plant capacity to process all milk that is being  
23 pooled in our order. If we don't have the plant  
24 capacity to process all the milk that comes into our  
25 Order [sic] what is going on? Are we really

1 servicing our market by lowering producer prices  
2 with milk we can't even process? Is someone  
3 abus -- abusing the intent of our federal order  
4 system, or is management in supplying the market  
5 a problem? Whatever the situation, the Southeast  
6 producers should not have to share the cost of  
7 transporting in our competitors' milk."

8 "Proposal 2 seeks to establish a  
9 Transportation Credit Balancing Fund on intra-  
10 market movements of milk within the Appalachian  
11 and Southeast marketing areas. This proposal if  
12 approved would add an additional \$0.10 per  
13 hundredweight on producer Class I milk over and  
14 above the \$0.20 transportation assessment in  
15 Proposal 1. The proposal further states: "If an  
16 insufficient balance exists to pay all of the credits  
17 computed pursuant to this section, the market  
18 administrator shall first reduce the producer-  
19 settlement fund by the lesser of the number of  
20 dollars necessary to pay the credits. . ." This  
21 proposal will have a direct negative impact on the  
22 Federal Orders' 5 a& 7 uniform blend prices. We  
23 are adamantly opposed to this proposal."

24 "Also of concern is the effect the Intra-market  
25 assessment may have on any new fluid processor or

1 marketing agency. Under this proposal it appears  
2 a potential new processor or marketing agency will  
3 be assessed the additional hundredweight  
4 transportation assessments even if they have 100%  
5 of their milk supply secured with local producers.  
6 In the [sic] event the added assessments could  
7 possibly be used to. . . In this event, the added  
8 assessment could possibly be used to deter  
9 competition from other processors or marketing  
10 agencies seeking to enter our market. At the same  
11 time it does [sic] allow a new processor --  
12 processor to -- or marketing agency without a local  
13 supply access to the tran -- to the transportation  
14 credits to subsidize transporting milk they can  
15 locate anywhere in the order. Could the intra  
16 market assessment cop -- possibly be used to  
17 exploit intra market location differentials? None of  
18 these sit -- situations seems to make the market  
19 more efficient for producers or consumers. . ."

20 "Proposal 3 seeks to calculate the mileage  
21 rate factor using a fuel cost adjustor based on the  
22 price per gallon as reported by the ener -- energy  
23 Information Administration of the U.S. Dept. of  
24 Energy. This will be based on the Lower Gulf  
25 Cost -- Coast Districts combined. Although we

1 would -- we would support the utilization of an  
2 outside entry [sic] to set diesel fuel prices to  
3 minim -- minimize manipulation, we firmly oppose  
4 the implementation of proposal 1 and 2."

5 "We believe processors are currently paying in  
6 the neighborhood of \$1.80 [a hundred] in over  
7 order premiums for our class I milk. Such high  
8 over order premiums seem to suggest some  
9 adjustment needs to be made in the method of  
10 calculating the bend -- blend price. Many  
11 producers want an accounting of how the \$1.80  
12 over-order premiums is being distributed. Most  
13 of us assume, this is returned as quality  
14 premiums. . .volume premiums [and] with the  
15 remainder used to transport milk in to balance [our]  
16 milk supplies. While we may not be entitled to all  
17 this information, I believe we are entitled to learn  
18 the true cost of transporting all this milk if we are  
19 expected to share in the transportation costs. In  
20 the event this amendment -- amendment --  
21 amendments are approved a detailed accounting of  
22 any and all milk movements and its associated cost  
23 [sic] should be available to the market  
24 administrator and others."

25 "None of these proposals will bring more

1 money into the market. . .for producers, handlers  
2 or processors. The attempt appears to be to shift  
3 the burden of transportation cost. The logic of  
4 possibly reducing the blend price in an already  
5 deficit market escapes me. I believe a better  
6 approach would be to determine the true cost of  
7 transporting milk into and within our market, and  
8 then investigate the merits of adjusting the  
9 location differentials accordingly. This could allow  
10 the increased blend price to cover the cost of  
11 transporting milk into our order instead of using  
12 transportation credits. Intra order producers would  
13 have an incentive to expand production with a  
14 higher blend price guarantee. At the same time  
15 standards for quali -- qualifying milk would likely  
16 need to be reviewed for this to work. I do not  
17 understand the full ramifications of changing  
18 location differentials but it should be investigated  
19 as an option to the above proposals."

20 I would like -- this -- this is a presentation of  
21 myself as a producer and two other producers.

22 JUDGE DAVENPORT: Very well.

23 Are there questions of this witness?

24 Mr. Beshore?

25 EXAMINATION



1 BY MR. BESHORE:

2 Q. Marvin Beshore.

3 Mr. Klingenfus, where are you located; where  
4 do you live?

5 A. I -- I farm through about 30 miles east of  
6 here. I milk 130 cows; sell my milk to Deans  
7 through DMS.

8 Q. Okay. You have made the statement, in  
9 the last paragraph of your statement, that "None of  
10 these proposals will bring more money into the  
11 market place for producers, handlers or  
12 processors."

13 Now, I think you -- you stated correctly in your  
14 proposal that Proposals 1 and 2 would establish  
15 new assessments on handlers --

16 A. M-hm.

17 Q. -- on Class I.

18 That is, there would be new money required to  
19 be paid to fund those payments. Wouldn't that be  
20 new money being brought into the marketplace?

21 A. Not, that's assessment on the handlers, I  
22 would believe.

23 Q. But the -- the --

24 A. I --

25 Q. -- money is being brought -- brought into

1 the marketplace for producers to get the -- get the  
2 milk delivered, to provide transportation to get the  
3 milk deli -- delivered. Is it not? Isn't that your  
4 understanding?

5 A. It would be -- it would have to be some  
6 milk brought from outside our Order. Would that --  
7 is that what you're saying?

8 Q. Well, outside or -- or inside, depending on  
9 which proposal you're talking about.

10 A. I -- the money would have to -- to make  
11 our market better, the money would have to come  
12 from outside our Order, I would think. The only  
13 way I could see you could do that is to get  
14 somebody that -- that's milk's being -- somebody  
15 outside our Order is paying this assessment fee to  
16 have their own milk hauled in. The -- when we do  
17 that, that's all -- bringing that excess milk in is  
18 also going to lower blend price, and we're going to  
19 pay again.

20 Q. Well, if you assume with me that the -- the  
21 assessments would be on -- would be new payments  
22 required to be made by handlers in this Order,  
23 wouldn't that be raising new money?

24 A. I don't see it.

25 MR. BESHORE: Okay. Fine. Thank you.

1 JUDGE DAVENPORT: Other questions?

2 Mr. Stevens?

3 EXAMINATION

4 BY MR. STEVENS:

5 Q. So you testified you're a dairy farmer?

6 A. Pardon me?

7 Q. You're a dairy farmer yourself?

8 A. Yes, sir.

9 Q. 130 cows, did you say?

10 A. Yes.

11 Q. Now, the -- the -- the Department, when it  
12 does these hearings, it talks about dairy farmers  
13 who are small businesses and -- and they -- they're  
14 defined as a -- as a business that has less than  
15 \$750,000 a year gross income. Would you consider  
16 yourself a small business under that definition?

17 A. Yes. My cows don't give that much milk  
18 [laughs].

19 Q. Would that they -- would that they --

20 A. Wish they did. [laughter]

21 Q. You wish they did.

22 And so you would like -- I -- I'm assuming, and  
23 tell me if -- if I'm assuming wrong, that you would  
24 like the secretary to consider your testimony in the  
25 context of your being a small business in your own

1 view?

2 A. Yes, sir.

3 MR. STEVENS: Thank you.

4 JUDGE DAVENPORT: Mr. Tosi?

5 EXAMINATION

6 BY MR. TOSI:

7 Q. Good afternoon, Mr. Klingenfus. I  
8 appreciate you coming and taking the time to  
9 participate in this hearing.

10 I wanted to ask you a couple of questions  
11 about your written statement. Specifically, if we  
12 could refer to the last paragraph of your written  
13 statement, where you were talking about you feel  
14 that it's better to determine what the true cost of  
15 transporting milk is in -- into -- into the market and  
16 within the market; and then investigate the merits  
17 of adjusting the location differentials accordingly.

18 With respect to adjusting the location  
19 differentials, are you referring to increasing the  
20 level of the Class I differential?

21 A. Like I said at the very last sentence, I  
22 don't understand all the ramifications, but it -- it  
23 appears to me, if all we're talking about is  
24 transportation, location differential is price  
25 differential because of transportation. And that

1 looks like what we should be looking at. I don't  
2 know how it will affect me, for sure.

3 Q. Okay. And then, the other part of what  
4 you say in that statement, you're saying that, "At  
5 the same time, the standards for qualifying milk" --  
6 and I assume you're meaning for pooling?

7 A. M-hm.

8 Q. Okay. For being pooled on the Order.

9 -- "would likely to be -- would like need to be  
10 reviewed."

11 Are you advocating increasing the -- the  
12 standards under which milk is eligible to be  
13 pooled? For example, like increasing the number  
14 of days that your production has to touch base at a  
15 pool distributing plant, or increasing how much  
16 milk has got to be delivered to distributing plants?

17 A. It -- it would seem logical, if I wanted to  
18 protect an increase in the location differential, I  
19 would want to make the qualifying standards  
20 harder.

21 Q. Okay. Okay.

22 And, to make sure that I understand what  
23 you're saying is, is that: You don't think that the  
24 proper avenue for dealing with the situation here in  
25 the Southeast and -- and in the Appalachian Order,

1 the proper way to be dealing with these issues are  
2 not with transportation credits but with, perhaps,  
3 level of Class I differential and the standards  
4 under which milk can be pooled?

5 A. Yes. I -- I see as some of the concern is  
6 the difference -- I get paid 10 cents over the blend  
7 price. The over-order premiums -- or for -- for  
8 Class I are around \$1.80. That's an awful lot of  
9 money to pay -- play with in there.

10 And not -- you -- I got -- I don't have the  
11 figures; I have no idea what it costs for quality  
12 premiums, volume premiums; but I wouldn't think  
13 they'd be that terribly high, so there's a lot of  
14 money to play with in there.

15 Q. M-hm.

16 A. If we raised the blend price, that would  
17 reduce -- because if it -- without the processors, I  
18 mean, they're going to be unwilling to pay more  
19 money. It would just reduce the amount of money  
20 that's left, is money that the -- that the marketer is  
21 able to use for -- to subsidize other transportation  
22 and make nego -- negotiate deals.

23 I -- I -- I would like to see the playing field a  
24 little more even, because there's some individuals  
25 that receive an -- an awfully large volume premium,

1 and I suspect there is some arrangements made on  
2 transportation in addition to that. So I would like  
3 that to come out a little bit more, too.

4 Q. M-hm. You -- you mention that -- you're  
5 saying that, in your market right now, it's your  
6 understanding that the over-order premium is about  
7 \$1.80 a hundred?

8 A. I -- I don't have access to the information.  
9 I'm -- that's as to being hearsay from me.

10 Q. Okay. And -- and -- but you are receiving  
11 10 cents?

12 A. That, I can say.

13 Q. But you -- you're still left with the feeling  
14 that you -- what your share of that over-order  
15 premium is, it -- it's just a -- a really small fraction  
16 of what you believe the over-order premium to be?

17 A. What I -- the 10 cents is a small fraction.  
18 I'm -- I -- a lot of that -- a good portion of that  
19 over-order premium needs to go back to pay the  
20 volume and the quality premiums.

21 Quality premiums could be 25 cents a piece;  
22 and the potential for a volume premium would be  
23 another 50 cents. So that took -- that would eat a  
24 dollar of it up.

25 Q. Okay.

1       A.    And -- and then -- and the 1.80 is on  
2   Class I, and you wouldn't get that on all your  
3   milk --  
4       Q.    M-hm.  
5       A.    -- so you would have to reduce that some.  
6   I -- I --  
7       Q.    Well, do you --  
8       A.    I think that needs to be looked at, what is  
9   going on there.  
10      Q.    All right. Do you -- do you ever ask your  
11   handler what happens to the money?  
12      A.    I don't get a reply.  
13      Q.    But -- but -- you do ask --  
14      A.    I --  
15      Q.    -- but you don't get an answer --  
16      A.    I have --  
17      Q.    -- at all, or is it you don't get an answer  
18   that you understand or. . .  
19      A.    Are they obligated to tell me what over-  
20   order premiums are paid?  
21      Q.    Well, I -- you know, I -- I don't make a  
22   judgment on them; I'm just trying to find out --  
23      A.    No, I have not asked him.  
24      Q.    -- what they tell you; that's all.  
25      A.    No. If they are obligated, I will ask him



1 [laughs]. Well. . .

2 Q. Okay.

3 A. I'm --

4 MR. TOSI: That's all I have, sir.

5 MR. KLINGENFUS: Oh, okay.

6 MR. TOSI: Thank you very much.

7 JUDGE DAVENPORT: Okay. Other

8 questions of this witness?

9 Thank you very much, Mr. Klingenfus for  
10 coming with us today and for giving your testimony.  
11 And you may be excused.

12 MR. KLINGENFUS: Thank you.

13 JUDGE DAVENPORT: Is there any other  
14 producer that wants to come forward at this time?

15 MR. SPEAKER: How you doing?

16 MR. SIDEBOTTOM: Okay.

17 JUDGE DAVENPORT: Very well. Would  
18 you raise your right hand.

19 JIM SIDEBOTTOM, after having been duly sworn, is  
20 examined and testifies as follows:

21 JUDGE DAVENPORT: Please be seated.

22 Tell us your name; and then if you would, spell  
23 it for the hearing reporter.

24 MR. SIDEBOTTOM: My name is Jim  
25 Sidebottom, J-i-m S-i-d-e-b-o-t-t-o-m.

1 I'm here representing the Kentucky Dairy  
2 Development Council, and I'm president of that  
3 organization. And I have a statement that the  
4 organization has made. I will read that.

5 [WHEREUPON, document referred to is marked  
6 Exhibit 21 for identification.]

7 MR. SIDEBOTTOM: "Farm milk prices in  
8 Kentucky and the Southeastern United States --  
9 States have eroded over the past several years,  
10 especially when compared to other geographical  
11 areas of the U.S. Kentucky Dairy Development  
12 Council, which represents all dairy farmers in  
13 Kentucky and many Allied Industry members, is  
14 opposed to any Federal Order change which further  
15 erodes farm price[s] or weakens the position of  
16 Kentucky dairy farmers in comparison to other  
17 states and regions of the U.S.

18 "We encourage Federal Order considerations,  
19 which would strengthen the position of Kentucky  
20 and Southeastern U.S. dairy farmers in the market  
21 place. The Southeastern U.S. is a growing market  
22 for milk and dairy products; however,  
23 noncompetitive pricing is discouraging milk  
24 production in this region.

25 "Further, we propose that any and all Federal

1 Order proposals in the future contain, or be  
2 accompanied by, a statement of fiscal impact on  
3 dairy farmers. This should be written in language  
4 which can be understood by all.

5 "Submitted by Kentucky Dairy Development  
6 Council, Jim Sidebottom, President; Roger Thomas,  
7 Executive Director."

8 JUDGE DAVENPORT: Very well.

9 Questions of this witness?

10 Mr. Tosi?

11 EXAMINATION

12 BY MR. TOSI:

13 Q. Thanks for appearing today, Mr.  
14 Sidebottom.

15 A. Okay.

16 Q. I will ask you a few questions.

17 With respect to your opposition to any Federal  
18 Order changes which would erode the farm price for  
19 milk to Kentucky dairy farmers, what's your  
20 position about the -- these proposals that are  
21 under consideration; would they -- would they help  
22 or would they hurt Kentucky dairy farmers?

23 A. Well, our position is that, if additional  
24 monies are taken from producers, for whatever  
25 causes, transportation or whatever, we're paying

1 for transportation from our farms, and then also  
2 9 1/2 cents already to be shipped milk to -- to  
3 supply the deficit in this state, then any -- any  
4 further monies taken from there would erode  
5 producers' profits.

6 Q. Okay. Okay.

7 When you say "take money away from  
8 producers," are -- are you -- are you referring to,  
9 what, the -- the Federal Order coming up with a  
10 minimum price --

11 A. Yes.

12 Q. -- or a blend price that -- that's -- that  
13 would be lower than it might otherwise be as it  
14 currently is?

15 A. That's correct.

16 Q. Okay. And when you talk about  
17 "noncompetitive pricing discouraging milk  
18 production in the region," could you give me a few  
19 examples of what you mean by noncompetitive  
20 pricing?

21 A. Well, of course, by being a deficit state --  
22 and I'm speaking for other people here, and I don't  
23 want to get it mixed up with my personal feelings,  
24 but I think what we're referring to is -- is particular  
25 money -- milk that's coming from the Northern

1 states, which are probably receiving more monies.

2 I think it's 60 to 90 cents that we're not paid,  
3 because of a deficit for shipping of milk into this --  
4 the state, that -- that -- that may be over Federal  
5 Orders that other farmers north of here are  
6 receiving. But we can't encourage other farmers to  
7 come into Kentucky when we're getting paid less  
8 money than what they are.

9 Q. Okay. Could you tell me a little bit more  
10 about the Kentucky Dairy Development Council, like  
11 the nature of your membership, how many members  
12 you might have, and how many of them are dairy  
13 farmers and. . .

14 A. Well, we have approximately 1,360 dairy  
15 farmers in the state of Kentucky; and all of them  
16 are considered members.

17 Q. Okay.

18 A. We have Allied Industry, which also makes  
19 up this group of -- of people. There's -- there's  
20 ten -- or 12 dairy farmers on this Board, and eight  
21 Allied Industry members, that make it up.

22 Q. M-hm. And I would like to ask it again,  
23 just to make sure that I'm -- I'm understanding you.  
24 Is -- is it the opinion of your organization here that  
25 you're speaking on behalf of -- that -- that they are

1 of the opinion that transportation credits, and  
2 increasing them from their current levels, is a -- is  
3 a good thing for dairy-farmer interest here in the  
4 Appalachian and the Southeast?

5 A. Well, any additional money that's taken in  
6 transportation credits that would be taken from us  
7 would be a disadvantage to us.

8 Q. Okay. What -- what -- what do you see as  
9 taking transportation credits away from you?

10 A. Well, if we're assessed an additional 10,  
11 20, 30 cents for paying for milk being hauled into  
12 us here, that producers are paying in order to get  
13 here, well, then, that's definitely taking money  
14 from us producers.

15 MR. TOSI: Okay. I -- okay. I think I  
16 understand you.

17 MR. SIDEBOTTOM: Okay.

18 MR. TOSI: Thank you very much. I  
19 appreciate it.

20 MR. SIDEBOTTOM: Okay.

21 JUDGE DAVENPORT: Mr. Beshore?

22 EXAMINATION

23 BY MR. BESHORE:

24 Q. Marvin Beshore; just a question or two,  
25 Mr. Sidebottom.

1 Did I understand your last comment there to  
2 indicate that you understand the proposals to be  
3 assessments on dairy farmers for transportation  
4 costs?

5 A. Well, if it's -- if Federal Order -- if that  
6 changes the Federal Order pri -- blend price, it  
7 comes to us. Yes, it would.

8 Q. Okay. But when you talked about 10 cents  
9 or 20 cents, did you understand those amounts in  
10 the proposals to be assessments against the dairy  
11 farmers' price?

12 A. Yes.

13 Q. Okay. Now let me just ask you a quick  
14 question or two about the Kentucky Dairy  
15 Development Council.

16 You said that you consider 1,360 dairy farmers  
17 members?

18 A. Yes.

19 Q. What do you mean by that? I mean,  
20 have -- have people -- how does someone become a  
21 member of your group?

22 A. There is no charge for someone belonging  
23 to the Kentucky Dairy Development Council. So  
24 any permit holder is considered or is a member of  
25 our organization.

1 Q. Okay. So you put them on your  
2 membership rolls if they've got a permit to market  
3 milk in Kentucky, whether or not they are aware of  
4 the organization?

5 A. That -- that is correct, and --

6 Q. Okay.

7 A. -- they're -- we -- we ask them to support  
8 us.

9 Q. Okay.

10 A. And that's -- that's where it comes from  
11 there.

12 Q. Okay. And there -- there are no dues?  
13 How is your --

14 A. No, sir. No.

15 Q. -- organization funded? Okay.

16 How is your organization funded?

17 A. Right now, Allied Industry is funding.

18 There is support coming from Allied Industry.

19 There is a charge for Allied Industry members, and  
20 it -- and that's where we. . .

21 And we have received a grant, and it also  
22 helping us with that.

23 Q. A -- a governmental grant of some nature?

24 A. It is the -- what's called -- I don't know  
25 whether you're familiar with it, Phase One



1 Tobacco --

2 Q. Okay.

3 A. -- Funds.

4 Q. I was wondering about that.

5 A. Yeah.

6 MR. BESHORE: Okay. Thank you.

7 JUDGE DAVENPORT: Other questions?

8 Very well. Mr. Sidebottom, you may be -- you  
9 may step down. Thank you for coming.

10 Any other producers?

11 Mr. Beshore?

12 MR. BESHORE: Proponents of Proposals  
13 1, 2 and 3 call David Darr as our first witness.

14 JUDGE DAVENPORT: Mr. Darr, you want  
15 to raise your right hand?

16 DAVID DARR, after having been duly sworn, is  
17 examined and testifies as follows:

18 JUDGE DAVENPORT: Please be seated.

19 Tell us your name and spell your name for the  
20 reporter.

21 THE WITNESS: My name is David, D-a-v-  
22 i-d, Darr, D-a-r-r.

23 MR. BESHORE: Your Honor, before Mr.  
24 Darr proceeds, he has -- we have made available, I  
25 think there may still be copies available, to anyone

1 here, and I -- hopefully, your Honor has one and  
2 the reporter, a --

3 JUDGE DAVENPORT: We have been  
4 distributed that. Would you like it marked as two  
5 separate exhibits, or would you like it all marked  
6 as Exhibit 22?

7 MR. BESHORE: I'd like it marked as two  
8 separate exhibits; the testimony as one exhibit and  
9 the -- one-page document, front and back, exhibit  
10 as a second consecutive number.

11 JUDGE DAVENPORT: Well, I had marked  
12 the -- the front-and-back document as Exhibit 22,  
13 and his narrative as 23, if that's all right.

14 MR. BESHORE: That's fine.

15 JUDGE DAVENPORT: Very well.

16 MR. BESHORE: Thank you.

17 [WHEREUPON, documents referred to are  
18 marked Exhibit 22 and Exhibit 23 for  
19 identification.]

20 EXAMINATION

21 BY MR. BESHORE:

22 Q. Okay. Now, before you begin with your --  
23 your narrative statement, Mr. Darr, would you  
24 briefly relate, state for the record, your  
25 educational and professional background.

1       A.    I have a bachelor's degree in agricultural  
2    economics from the Ohio State University.  I also  
3    have a master's degree in agricultural economics  
4    from the Ohio State University, as well as a  
5    master's in business administrative from Rockhurst  
6    University in Kansas City, Missouri.

7       I have been employed with Dairy Farmers of  
8    America since September 2001.

9       Q.    Okay.  And in what capacities have you  
10   been employed with -- with DFA and what  
11   responsibilities have you had?

12      A.    With DFA, I've worked in our -- our  
13   marketing department with our headquarters in  
14   Kansas City.  I conduct and oversee marketing  
15   studies for our regional offices throughout the  
16   country, primarily in relation to milk transportation  
17   and pricing.

18      Q.    Okay.  With that background, would you  
19   proceed with -- with your testimony, please.

20      A.    Yes.

21      "I am David Darr; I serve as a Marketing  
22   Analyst for Dairy Farmers of America, Incorporated  
23   (DFA), a Capper-Volstead cooperative.  In that  
24   capacity, I study the movement of milk within  
25   various regions of DFA.  My business address is

1 10220 N. Ambassador Drive, Kansas City, Missouri,  
2 64153. I testify today as a proponent of Proposals  
3 1, 2 and 3.

4 "I am here today to present results of a  
5 marketing study that I have undertaken for the  
6 Southern Marketing Agency (SMA), a Capper-  
7 Volstead marketing agency in common operating in  
8 the Southeast United States. In my study, I looked  
9 at the relationship between milk supplies and  
10 demands in the Southeastern United States, and  
11 will present testimony summarizing my findings.

12 "The marketing study done for SMA has  
13 utilized a linear programming model to estimate  
14 costs (specifically freight) involved with various  
15 milk demand situations in the Southeast. The  
16 model that has been developed allows us to input  
17 data on milk production and sales, and then  
18 allocate milk to the ideal plant subject to  
19 constraints that were put on the model. A linear  
20 programming tool called "What's Best," an Excel  
21 Microsoft -- a Microsoft Excel add-in developed by  
22 a company named LINDO was used to compute the  
23 model. LINDO has developed linear programming  
24 software since 1979. More information about the  
25 software can be found at [www.lindo.com](http://www.lindo.com). The

1 mathematical process of linear programming is a  
2 widely accepted method of optimizing models with  
3 many variables and constraints. It was a technique  
4 used by Cornell in the development of our current  
5 Class I differential floor. Using the purchased  
6 software, I developed the model that was used to  
7 produce the data I will review in a few minutes.  
8 While the model has not been officially peer  
9 reviewed, it has gone through several -- several  
10 iterations, and has undergone theoretical and  
11 practical revisions with the help of members of  
12 SMA. Similar models have been used in other  
13 regions of DFA, and the logic of the model has  
14 passed many tests.

15 "Through SMA, I was presented with  
16 consolidated milk production information by county  
17 for June 2005. Milk production modeled represents  
18 in excess of 80 percent of the total milk produced  
19 in the two Federal Order marketing areas. Also  
20 through SMA, I was presented with demand sale  
21 information for Federal Order 5 & 7 pool  
22 distributing plants that SMA serves. Given this  
23 data, a model was created that moved milk from  
24 each county to the plant that is closest to that  
25 county. In some areas with multiple plants,

1 demand sales information was consolidated to  
2 represent a metropolitan area demand, instead of a  
3 plant-specific demand. Exhibit [22] is a graphical  
4 representation of the distribution of milk that  
5 resulted from running the [sic] model. The model  
6 was set so that there were no constraints placed on  
7 plant capacity -- each plant could receive an  
8 infinite amount of milk. The goal was to allocate  
9 milk from each county to the closest possible pool  
10 distributing plant.

11 "A mileage matrix similar to that found in an  
12 atlas drives the model. Distances for each  
13 combination of points were calculated using the  
14 center point of each county, and the center point of  
15 each zip [sic] code where each plant is located.  
16 Software by the name of PC Miler was used to  
17 calculate the distance between each combination of  
18 points. PC Miler is a product available from ALK  
19 Technologies, and according to their website, it is  
20 used by over 20,000 logistics companies around  
21 the world. More information on PC Miler is  
22 available from [www.alk.com](http://www.alk.com).

23 ["The model was set to move all milk  
24 production to the closest plant, at the minimum  
25 cost. Visually, you can see how the model worked

1 on Page 1 of Exhibit [22]. Each of the lines on the  
2 map represents milk moving from a county, to a  
3 plant. Because there were no constraints placed  
4 on demand, all of the milk from each county goes  
5 to a single point. Also, each line on the map  
6 should be the shortest possible length from a  
7 county to a point, to represent the distance  
8 minimization function of the model. On average,  
9 farm milk traveled 51 miles from the center point of  
10 each county to the nearest point. Milk from some  
11 counties traveled over 100 miles to find the  
12 nearest point, while other counties traveled less  
13 than 5 miles. This analysis works towards  
14 identifying the closest viable market for producers  
15 located in each county of the Southeast.

16 "Next, I wanted to see how much of each  
17 area's demand would be filled if all milk moved to  
18 the closest viable market. This is presented in  
19 Page 1 of Exhibit [22] by the color-coded circles on  
20 the map. Plant demand was taken from SMA sales  
21 information for 2005. For each area, the highest  
22 monthly demand sales volume from January 2005  
23 through October 2005 was used in the model. In  
24 areas with multiple plants in a close proximity,  
25 multiple plants were grouped together to form an

1 area. In total, there were 42 possible delivery  
2 points in the model. I took the amount of milk  
3 placed into each area by the model, and divided  
4 that number by the maximum SMA monthly demand.  
5 This computation is referred to as the "share of  
6 demand received" by each area. I have color-  
7 coded the share of demand received into four  
8 categories. Circles on the maps that are red  
9 represent areas that received less than 50% of the  
10 milk that they actually demanded. These are areas  
11 in the most deficit parts of the Southeast, and  
12 represent 1/2 of the delivery locations in the  
13 model. One area in Louisiana received no milk  
14 from the model. There were no counties for which  
15 it was the closest location. Areas shaded yellow  
16 received more than 50% of their demand, but less  
17 than 100% of what they wanted. 7 of the 42  
18 delivery points' shipments fell within this category.  
19 When I add the number of red points to the number  
20 of yellow points, it tells me that 66% of the  
21 delivery points in the model received less milk than  
22 what they demanded. The other 33% of the  
23 delivery points in the model received more milk  
24 than what they demanded. I have broken them  
25 down into two categories. Points that are light



1 blue in color (8 points) represent areas that  
2 received between 100% of their demand and 200%  
3 of . . .demand. Beyond that, there were 6 points  
4 (colored dark blue) that received more than twice  
5 the milk that they demanded. At the high end of  
6 the scale, one point received 6 times the milk that  
7 was demanded. It is apparent that while most of  
8 the delivery points that were allocated more milk  
9 than what they demanded are located along the  
10 outside border of the Southeast, there are  
11 occasions where locations in the heart of the  
12 Southeast have a local milk supply that exceeds  
13 plant demand.

14 "I wanted to present this same data in one  
15 additional way before we move on to additional  
16 testimony. Page 2 of the exhibit takes the same  
17 milk production and area demand information  
18 contained on page 1, but summarizes at the state  
19 level. The map looks at each state's milk  
20 production contained in the model, and divides that  
21 production by the pool distributing plant demand in  
22 that state. The result is a ratio that measures the  
23 pounds of production in each state in relation to  
24 the pounds of pool distributing plant demand sales.  
25 From the data in the model, only 5 states in the

1 region had more milk production than demand from  
2 pool distributing plants. All of the states with an  
3 excess supply (except Mississippi) are located  
4 along the fringe of the Southeast. As we move  
5 deeper into the Southeast, the deficits tend to  
6 grow. For example, in Tennessee, for every 10  
7 pounds of demand, there was 5.2 pounds of  
8 production. Additional supply would have to come  
9 from somewhere else. In South Carolina, for every  
10 10 pounds of demand, there was less than 2.5  
11 pounds of production. Alabama had the lowest  
12 ratio. In Alabama, for every 10 pounds of demand,  
13 there were less than 2 pounds of production. Put  
14 another way, in Alabama, over 80% of pool  
15 distributing plant demand would have to come from  
16 somewhere other than Alabama.

17 "This completes my description of the model  
18 that has been developed to further describe the  
19 milk supply/demand relationship in the Southeast.  
20 In upcoming testimony, Mr. Jeff Sims will use the  
21 model that I have described as justification for  
22 Proposals 1, 2 and 3."

23 MR. BESHORE: Your Honor, we would --

24 JUDGE DAVENPORT: Mr. Beshore, in  
25 view of the fact that Mr. Sims is going to testify

1 about this data, would it be better to go ahead and  
2 put Mr. Sims on at this time?

3 MR. BESHORE: I think it would be better  
4 to go ahead and see if there are any questions for  
5 Mr. Darr.

6 JUDGE DAVENPORT: Very well.

7 MR. BESHORE: Mr. Sims' testimony is  
8 very, very lengthy.

9 JUDGE DAVENPORT: Very well.

10 MR. BESHORE: And, you know, if -- if  
11 there are additional questions for Mr. Darr later  
12 that -- he will be available.

13 But I would propose to offer to Exhibits 22 and  
14 23 for the record and make Mr. Darr available for  
15 examination.

16 JUDGE DAVENPORT: Very well.

17 While we're doing that, I'll also admit the  
18 statements of Doc -- of Mr. Klingenfus and Mr.  
19 Sidebottom. And so we have 20 through 23  
20 admitted into evidence at this time.  
21 [WHEREUPON, Exhibit 20 through Exhibit 23 are  
22 admitted into evidence as marked.]

23 JUDGE DAVENPORT: Questions of Mr.  
24 Darr?

25 Mr. English?

1 EXAMINATION

2 BY MR. ENGLISH:

3 Q. Charles English for Dean Foods and Dairy  
4 Fresh Corporation.

5 Thank you, Mr. Darr, for -- for appearing. And  
6 I have mostly questions about what you have and  
7 what you could have done or -- and things like that.  
8 And -- and we'll go as far as we can.

9 First, you point out on Page 2 of the statement  
10 that is Exhibit 23, that the milk-production model  
11 represents in excess of 80 percent of the total milk  
12 produced in the two Federal Order marketing areas.

13 I assume that that means, and please correct  
14 me if I'm wrong, but I -- I assume that means that  
15 Southern -- SMA was able to make available to you,  
16 because they represent, one way or the other,  
17 marketing 80 percent or a little more than 80  
18 percent of -- of the milk; correct?

19 A. Correct.

20 Q. And that, to the extent that they don't  
21 market on behalf of various entities' milk, you don't  
22 have that information, or weren't -- you weren't  
23 provided that information so you were unable to  
24 model it?

25 A. Correct.

1 Q. When you say in excess of 80 percent, you  
2 know, "in excess of 80 percent" could be 85; it  
3 could be 90; it could be 95; it could be 80.5. Do  
4 you know. . .

5 A. 80 to 85 percent.

6 Q. Okay. Was the 15 to 20 percent that you  
7 couldn't model, was any particular portion of --  
8 larger portion of it in one regional area or another?

9 A. There were selected pods of milk that we  
10 weren't able to include in the model throughout the  
11 Southeast. I am -- off the top of my head, I don't  
12 know if there's one area that's weighted  
13 significantly heavier than any others.

14 Q. Let's me see if I can get it from a  
15 different angle. Would I be right that -- that -- and  
16 I -- and I maybe able to narrow the universe down,  
17 but this 15 to 20 percent would be what we  
18 generally call independent milk supplies?

19 A. Correct.

20 Q. But would the 15 to 20 percent -- would  
21 independent milk supplies be further limited by if  
22 the independent milk is marketed by an entity that  
23 is part of SMA?

24 A. That would have been included in this  
25 model.

1 Q. So, for instance, if DMS markets the milk  
2 of some independent farmers, that would be  
3 included in the model?

4 A. Correct.

5 Q. Would milk from Piedmont Milk Sales --

6 A. No.

7 Q. -- be in the model? No.

8 That would be -- that would be an element that  
9 is not?

10 A. It is not.

11 Q. Okay. And Piedmont Milk Sales generally  
12 markets the milk of producers in Southwestern  
13 Virginia and Northeastern Tennessee?

14 A. I'll take your word for it.

15 Q. You indicated that, in this linear model, it  
16 was not demand constrained. Could it have been  
17 demand constrained?

18 A. Yes. We could have placed caps on how  
19 much milk each plant would take. The result would  
20 be that then milk would be dominated to the next  
21 plants that has excess capacity.

22 Visually, that would be represented in, say,  
23 Virginia, where you have blue circles -- dark blue  
24 circles that represent plants that receive more than  
25 200 percent of their demand -- this is on Page 1 of

1 Exhibit 22.

2 If those plants were capped at their demand  
3 volume that we had in the model, after they  
4 received 100 percent of their demand, that Virginia  
5 milk would have to flow south or east or west to  
6 find the next-best home for that milk.

7 Q. So, for instance -- and I was going to use  
8 that example -- we see, for one of the two blue  
9 circles in Virginia, the one that is farther south,  
10 that in its non-demand-capped form, it receives, as  
11 an ideal movement, milk from a county in North  
12 Carolina, sort of, Eastern North Carolina. Do you  
13 see that?

14 A. Correct. Yes.

15 Q. And if it had been capped, it would at  
16 least appear to me visually that -- that the most --  
17 well, the next logical movement for that milk would  
18 have been to the red circle in North Carolina that's  
19 close to the coast.

20 A. Yes.

21 Q. Is there a particular reason why you did  
22 not run the model with demand capped at 100  
23 percent?

24 A. We wanted to provide some level of  
25 confidentiality on -- on specific proprietary plant

1 demand. If you would like to, you know. . .

2 Q. I -- I asked if there was a reason; you  
3 provided the reason [laughs].

4 A. There -- there was a reason [laughs].

5 Q. I don't believe I can speak for all those  
6 facilities, so I don't believe I could -- even if I  
7 were given permission, I don't believe that I could  
8 waive it for all of them, so. . .

9 But one could visually take some of this  
10 information and --

11 A. Yes, and -- and --

12 Q. -- draw some sort of. . .

13 A. -- that -- that tells me for that county that  
14 you're referencing in North Carolina, in the -- the  
15 Eastern half of the state that is moving up to  
16 Virginia, that although the -- the plant in Virginia  
17 that it is currently going to is full, that would still  
18 be its closest pool distributing plant that it would  
19 get to.

20 And that, since that one is full, it would have  
21 to find a -- a more-distant home for the milk.

22 Q. Right. And -- and again, that would  
23 appear to be true because the other-plant  
24 alternative, if you constrained at 100 percent, is  
25 one in central North Carolina that is a light-blue



1 circle, which is between 100 and two -- 200  
2 percent; correct?

3 A. That is also correct.

4 Q. And similarly, down in Louisiana, the  
5 Florida parishes have a blue circle located right in  
6 them, but if you constrain that at 200 percent,  
7 conceivably, some of that milk would then move  
8 south from the Florida parishes to the red circle,  
9 which I presume is New Orleans.

10 A. Yes.

11 MR. ENGLISH: Okay. Thank you.

12 I think that's all the questions I have at this  
13 time.

14 JUDGE DAVENPORT: Other questions?

15 Mr. Yale?

16 EXAMINATION

17 BY MR. YALE:

18 Q. Good afternoon.

19 A. Good afternoon.

20 Q. Ben Yale for Select Milk Producers and  
21 Continental Dairy Products, Inc.

22 Can you identify any other sources -- or, not  
23 sources. Yes, sources or supplies of milk that you  
24 did not include in the -- in this model, other than  
25 you said Piedmont? Is, like, Southeastern Graded

1 a -- is -- was that included in, or. . .

2 A. They would not have been included in this  
3 model.

4 Q. Okay. Any others?

5 A. I believe Jeff will identify members of  
6 SMA later in his testimony, and it would include  
7 those parties.

8 Q. That are included?

9 A. Yes.

10 Q. Okay. Do you have knowledge of your own  
11 of what the other sources of milk are in the  
12 Southeast? In addition, what --

13 A. Out -- outside of the model?

14 Q. Outside of the -- yes.

15 A. I don't believe I know all of them.

16 Q. Okay. And, again, we're dealing only with  
17 milk that is located within the marketing area; is  
18 that correct?

19 A. Correct. This is for geographies that are  
20 located within the Federal Orders, for the purpose  
21 of this hearing, 5 and 7.

22 Q. All right. So looking here on the Eastern  
23 side of -- or the Western side of the map, the  
24 one -- the -- the one with the dots; I'm not sure  
25 which. . .

1 A. Page 1.

2 Q. That's --

3 JUDGE DAVENPORT: That's Page 1.

4 BY MR. ENGLISH:

5 Q. Okay. I guess there is a 1 and a 2 on  
6 there; very good. I was trying to find some way to  
7 describe that; I was missing the obvious. That's  
8 why I'm a lawyer [laughs].

9 A. [laughs]

10 Q. Yeah. If you look on the Western side of  
11 Page 1, there in Arkansas, you've got a plant  
12 located right along the border. Is it fair to say  
13 whether we've got Oklahoma there to the east -- or  
14 west of that?

15 A. Yes, directly --

16 Q. Okay.

17 A. -- actually, the circle overlaps the state  
18 line between Arkansas and Oklahoma.

19 Q. All right. So we -- we might presume that  
20 there's a milk supply in Oklahoma that's supplying  
21 that plant.

22 A. Yes.

23 Q. All right. And that -- that that might turn  
24 that red dot to a yellow, aqua, or blue dot; right?

25 A. I don't have the volume of milk supplies in

1 those counties in here. I can say that counties in  
2 the Southeast and Appalachian Federal Orders  
3 moving to their closest home only fills half the  
4 demand of that plant.

5 Q. And we might have the same situation with  
6 the one there in Northeastern Louisiana -- or  
7 Northwestern Louisiana; right?

8 A. Possibly.

9 Q. And what about, as we look up into the  
10 northern part of this map, milk from southern  
11 Indiana going into the plant there in, looks like  
12 here in Louisville, if I can figure this out correctly.  
13 Again, you don't know anything about the milk  
14 supply nearby?

15 A. No.

16 Q. All right. But there might be milk closer  
17 to these plants outside of the marketing area, some  
18 of these fringe ones, than -- than is the -- than the  
19 milk that's within the marketing area; is that right?

20 A. Yes.

21 MR. ENGLISH: Okay. That will be an  
22 admission against interest. It -- it is a nice job;  
23 that's one of the better things I've seen over the  
24 years submitted in Federal Order Hearings, so. . .

25 I have no other questions. Thank you.

1 JUDGE DAVENPORT: Other questions?

2 Very well. Mr. Darr, you may step down.

3 MR. BESHORE: At this time, proponents  
4 call Jeffrey Sims.

5 DAVID DARR, after having been duly sworn, is  
6 examined and testifies as follows:

7 JUDGE DAVENPORT: Please be seated.

8 Do we have Mr. Sims' statement, Mr. Beshore?

9 MR. BESHORE: We do have his statement  
10 and a set of exhibits which are available. And we  
11 need to -- you don't have one?

12 May I have a moment?

13 JUDGE DAVENPORT: Nor does the  
14 hearing reporter.

15 While they're getting for exhibits, Mr. Sims,  
16 would you tell us your name and then spell your  
17 name for the hearing reporter.

18 THE WITNESS: Jeffrey Sims, S-i-m-s.

19 JUDGE DAVENPORT: Mr. Beshore, you  
20 want the statement first and then the exhibits?

21 MR. BESHORE: Statement first, please.

22 JUDGE DAVENPORT: We'll mark the  
23 exhibits -- or the statement Exhibit 24; and the  
24 exhibits 25, then. Is that agreeable?  
25 [WHEREUPON, documents referred to are

1 marked Exhibit 24, Exhibit 25, Exhibit 25A,  
2 Exhibit 25B, Exhibit 25C, Exhibit 25D, Exhibit  
3 25E, Exhibit 25F, Exhibit 25G, Exhibit 25H,  
4 Exhibit 25I, Exhibit 25J, Exhibit 25K, Exhibit  
5 25L, Exhibit 25M, Exhibit 25N, Exhibit 25O,  
6 Exhibit 25P, Exhibit 25Q, Exhibit 25R, Exhibit  
7 25S, Exhibit 25T, Exhibit 25U and Exhibit 25V  
8 for identification.]

9 [WHEREUPON, off-the-record remarks are  
10 made.]

11 MR. BESHORE: Thank you. We have one  
12 other one-page exhibit, your Honor, which I would  
13 like to --

14 JUDGE DAVENPORT: Very well. That  
15 will be marked 26.

16 MR. BESHORE: -- also have -- have  
17 marked now.

18 [WHEREUPON, document referred to is marked  
19 Exhibit 26 for identification.]

20 EXAMINATION

21 BY MR. BESHORE:

22 Q. Okay. Now, Mr. Sims, before you proceed  
23 with your statement, would you relate for us and --  
24 and the record your professional, educational  
25 background and -- and employment experience?

1       A.    Yes.  I have bachelor's and master's  
2 degrees in agricultural economics from Auburn  
3 University.

4       I was employed for some number of years in  
5 the Federal Milk Market Administrator's Offices,  
6 beginning in Atlanta, Georgia as agricultural  
7 economist; culminating in 1996 -- or 1991 with a  
8 transfer to Louisville, Kentucky as Assistant  
9 Market Administrator.

10       In 1996, I began -- I left the Market  
11 Administrator's Office and began working with  
12 Dairy Cooperative Marketing Association, which is  
13 a marketing agency-in-common operating in the  
14 Southeast.

15       And in 2002, I took on the additional  
16 responsibility of serving with Southern Marketing  
17 Agency, also a marketing agency-in-common  
18 operating in the Southeast.

19       Q.    What was your initial year of employment  
20 with the Market Administrator's Office in Atlanta?

21       A.    1983.

22       Q.    Okay.  And you were employed, then, by  
23 the Market Administrators in Atlanta or in  
24 Louisville for 13 years or so?

25       A.    Roughly.

1 Q. Okay. And your final position was as  
2 Assistant Administrator in Louisville?

3 A. Correct.

4 Q. Okay. What range of responsibilities and  
5 involvement with Federal Order operations did you  
6 have in that 13-year period?

7 A. During that 13-year, I -- year period, I  
8 was involved in all phases of Federal Order ad --  
9 administration.

10 Q. Okay. And subsequent to your Federal  
11 Order employment, now, and your employment  
12 with -- with DCMA and -- and SMA, can you  
13 describe your responsibilities and -- and duties in  
14 your current occupational role?

15 A. Yes. I prov -- I serve as assistant  
16 secretary and administrator of Southern Marketing  
17 Agency, administering the Southern Marketing  
18 Agency revenue and cost pool. I take care of  
19 corporate administration, market analysis,  
20 economic analysis, statistics, general record  
21 keeping, audit, and pooling.

22 Q. Okay. And is -- are those capacities  
23 similar with DCMA?

24 A. That's correct, except DCMA currently  
25 does not operate an over-order pool.



1 Q. Okay. And do you have additional  
2 responsibilities with marketing agencies-in-common  
3 in contiguous geographic areas?

4 A. Yes. Our -- my company does provide  
5 audit services to the Greater Southwest Agency.

6 MR. BESHORE: Okay. Now, I would offer  
7 Mr. Sims, your Honor, as -- as an expert in  
8 agricultural economics and in Federal Milk  
9 Marketing Orders, for purposes of his testimony in  
10 this hearing.

11 JUDGE DAVENPORT: Any objection?

12 Proceed.

13 MR. BESHORE: Okay.

14 BY MR. BESHORE:

15 Q. Now, Mr. Sims, have you prepared a -- a  
16 statement, and -- which has been marked as Exhibit  
17 24, and a set of exhibits marked as 25 and 26 for  
18 the hearing?

19 A. I have.

20 Q. And are you prepared to proceed with your  
21 statement?

22 A. Yes, I am.

23 Q. Do so, please.

24 A. [reads] I am Jeffrey Sims. I serve as  
25 Assistant Secretary of Dairy Cooperative Marketing

1 Association, Incorporated and Southern Marketing  
2 Agency, Incorporated, two marketing agencies-in-  
3 common operating in the southeast United States.  
4 My mis -- business address is 13400 US Highway  
5 42, Suite 162, Prospect, Kentucky 40059. I testi --  
6 testify today on behalf of Arkansas Dairy  
7 Cooperative Association; Dairy Farmers of  
8 America, Incorporated; Dairymen's Marketing  
9 Cooperative, Incorporated; Lone Star Milk  
10 Producers, Incorporated; and Maryland & Virginia  
11 Milk Producers Cooperative Association,  
12 Incorporated. Together these cooperatives will  
13 hereafter be collectively referred to as the  
14 proponents.

15 Exhibit 25, Pages A1 through A5 are letters  
16 from each of the proponent cooperatives  
17 authorizing me to speak on their behalf in this  
18 matter. In addition, Dairylea Cooperative,  
19 Incorporated of Syracuse, New York has asked us  
20 to testify on their behalf in support of Proposals  
21 Numbers 1, 2, and 3 as included in the Notice of  
22 Hearing.

23 All of the proponents market member milk on  
24 either one or both of the Appalachian or the  
25 Southeast Federal Milk Marketing Orders.

1 Together the cooperatives market in excess of 80  
2 percent of the producer milk pooled on the  
3 Appalachian and Southeast Orders.

4 The proponents of these emergency  
5 amendments wish to thank the Secretary for  
6 hearing these proposals on an expedited schedule,  
7 and for considering emergency action and the  
8 omission of a recommended decision under the  
9 rules of practice and procedure.

10 The proposals [sic] offer the following  
11 testipor -- testimony in support of Proposals  
12 Number 1, 2 and 3 as listed in the Notice of  
13 Hearing.

14 Introduction.

15 For at least the last 25 years, the  
16 southeastern United States has experienced  
17 declining milk production, and at the same time,  
18 has seen substantial increases in population.  
19 These two factors have combined to create a milk  
20 deficit condition in the Southeast unlike any other  
21 region of the United States.

22 Increases in Class I sales, brought on by  
23 increases in population, coupled with decreases in  
24 milk production have left the Southeast in the  
25 unenviable position of seeking milk supplies from

1 further and further away. According to Market  
2 Administrator statistics introduced at this hearing,  
3 during 2004, producer milk was delivered to Order  
4 5 and 7 pool plants from not less than 28 states.

5 Just as the milkshed for the region has  
6 expanded and milk-movement distances have  
7 increased for milk moved from outside the  
8 marketing area, the distance milk moves within the  
9 marketing areas has likewise increased.

10 Consolidation of milk processing into fewer and  
11 larger plants, and the loss of dairy farm numbers  
12 has caused what little milk remains in the region to  
13 be poorly situated with regard to Class I demand.  
14 Class I fluid-milk processing plants are typically  
15 located near population centers, which  
16 unfortunately puts them distant from milk  
17 production centers.

18 Exacerbating the enormous -- enormity of the  
19 distances milk must move to supply Class I demand  
20 in the Southeast is a national environment of high  
21 fuel costs.

22 Transportation Credit Balancing Funds are  
23 currently included in the Appalachian and  
24 Southeast Orders in section 0.80, 0.81 and 0.82,  
25 and these provisions address a portion of the costs

1 of bringing in supplemental milk to the Southeast.

2 Proposal Number 1 seeks to increase the  
3 Transportation Credit Balancing Fund assessment  
4 rate in each of the two Orders. Proponents have  
5 proposed increasing the maximum Transportation  
6 Credit Balancing Fund assessment by 5 1/2 cents  
7 per hundredweight of Class I milk in the  
8 Appalachian Order, such that the maximum rate of  
9 assessment pursuant to section 1005.81 would be  
10 15 cents per hundredweight; and proponents have  
11 proposed increasing the maximum Transportation  
12 Credit Balancing Fund assessment by 10 cents per  
13 hundredweight of Class I milk in the Southeast  
14 Order, such that the maximum rate of assessment  
15 pursuant to section 1007.81 would be 20 cents per  
16 hundredweight.

17 In Proposal Number 3, proponents seek to  
18 amend the mileage reimbursement factor utilized in  
19 the Transportation Credit payment provisions of the  
20 Orders -- of both Orders by updating the mileage  
21 rate, and inclusion of a diesel-fuel cost adjuster.  
22 Proposal Number 2 seeks to add new provisions to  
23 the Orders providing for an Intra-market  
24 Transportation Credit which will offset a portion of  
25 the transport cost of supplying milk produced

1 within the two marketing areas to pool distributing  
2 plants. The Intra-marketing -- market  
3 Transportation Credit would at least -- would be at  
4 least partially funded by adding a new provision to  
5 the Orders, an Intra-market Transportation Credit  
6 Fund, which would be funded by an Intra-market  
7 Transportation Credit Assessment, which is  
8 requested to be a maximum of ten cents per  
9 hundredweight of Class I milk in the Appalachian  
10 Order, and is requested to be a maximum of 15  
11 cents per hundredweight of Class I milk in the  
12 Southeast Order.

13       Proposals Number 1, 2 and 3 will be dealt with  
14 separately for purses -- purposes of this testimony,  
15 but proponents consider the -- the partial  
16 reimbursement for costs of supplying milk for Class  
17 I use to the Southeast, whether that milk is  
18 produced inside or outside the marketing areas, to  
19 be inextricably linked, in that both provisions seek  
20 to assign a portion of the costs of supplying milk  
21 for Class I onto the Class I purchaser.

22       For reasons of expediency, for purposes of  
23 this testimony, the term Southeast or Southeast  
24 region shall refer to the Appalachian and Southeast  
25 Marketing Areas, or their predecessor Orders. We

1 will attempt to be specific when refer -- when  
2 referring to the two Orders as opposed to  
3 references to the region.

4 Testimony in Support Of Proposals Number 1  
5 and 3.

6 The current system of Transportation Credits  
7 as provided in sections 0.80, 0.81 and 0.82 of the  
8 two Orders was installed in the Southeastern  
9 Orders in 1996, with a substantial amendment to  
10 the provisions in 1997. With the exception of  
11 conforming changes to the Order language  
12 resulting from Order consolidation, and the  
13 deletion of an unused scale-ticket provision, the  
14 Transportation Credit provisions have remained  
15 basically unchanged since 1997. References in  
16 this testimony to the initial provisions of the  
17 Transportation Credits will refer mostly to the 1997  
18 language and promulgation.

19 Exhibit 25, Page B, is a tabular comparison of  
20 the portion of the actual cost of hauling Class I  
21 milk which was funded by Transportation Credits in  
22 1997 versus the portion of the actual cost which  
23 Transportation Credits funded in 2003, 2004, and  
24 2005.

25 When the current system of Transportation

1 Credits was installed in the Southeastern Orders in  
2 1997, approximately 94 to 95 percent of the cost of  
3 transport on supplemental Class I milk was covered  
4 by Transportation Credit Balancing Fund payments.  
5 In 1997, the prevailing quoted cost of over-the-  
6 road milk transport was in the range of \$1.75 to  
7 \$1.80 per loaded mile, which computes to a -- per-  
8 hundredweight-per-mile factors of \$0.00365 to  
9 \$0.00375, using a 48,000 pound load of milk. The  
10 mileage rate included in the 1996 Transportation  
11 Credit promulgation and decision was 0.37 cents  
12 per hundredweight per mile. The method for  
13 conversing -- conversion of hauling rates per  
14 loaded mile to rates per hundredweight per mile is  
15 demonstrated in Exhibit 25, Page C.

16 In 1997, the Secretary installed a rate per  
17 hundredweight per mile in the Orders which was  
18 slightly less than the actual transport cost,  
19 deciding 0.35 cents per hundredweight per mile  
20 was a reasonable rate per hundredweight per mile,  
21 lowering the mileage rate from the 0.37 cents per  
22 hundredweight per mile included in the 1996  
23 Transportation Credit provisions. There was little  
24 testimony in the 1997 proceeding regarding hauling  
25 rates, but industry memory is that haul rates were



1 approximately \$1.80 per loaded mile in 1997.

2 Since 1997, haul -- fuel costs and other cos --  
3 factors impacting the cost of hauling have  
4 increased substantially, and there has been no  
5 adjustment in the Orders' per-hundredweight-per-  
6 mile reimbursement rate since 1997.

7 Exhibit 25, Pages D1 through D3 shows the  
8 monthly cost of diesel fuel for the United States  
9 and nine U.S. sub-regions, as reported by the  
10 Energy Information Administration of the United  
11 States Department of Energy on their website at  
12 <http://tonto.eia.doe.gov/oog/info/wohdp/diesel.asp>.

13 From the exhibit we can see that the national  
14 average diesel-fuel price in mid-1997 was reported  
15 to be approximately \$1.15 to \$1.17 per gallon,  
16 while the national average diesel-fuel price in mid-  
17 2005 was reported to be approximately \$2.20 to  
18 \$2.50 per gallon, roughly double the 1997 cost.  
19 Costs in the autumn months of 2005 increased even  
20 further following hurricane Katrina. While diesel  
21 prices have moderated somewhat from the highs  
22 registered in the fall of 2005, diesel-fuel prices  
23 still substantially exceed the prices which existed  
24 when the Transportation Credit provisions were  
25 installed in 1997.

1 Another factor has also come into play which  
2 has reduced the effective rate of reimbursement of  
3 the cost of moving Class I supplemental milk from  
4 the Transportation Credit Balancing Funds. This  
5 factor --

6 Oh, sorry.

7 This factor is the necessary proration of  
8 payments by the Market Administrators from the  
9 Transportation Credit Balancing Funds due to ins --  
10 insufficient Fund balances in the latter months of  
11 the payment period.

12 MR. ENGLISH: I'm sorry; this -- this is  
13 Charles English. I admit, I talk very fast. And I  
14 try to listen very fast, but I think both the court  
15 reporter and -- and -- and others are having a little  
16 trouble. I think we have lots of time, believe it or  
17 not [laughs]. So maybe, Mr. Sims, if you could  
18 slow down just a little bit.

19 THE WITNESS: Very well.

20 MR. ENGLISH: Thank you.

21 THE WITNESS: I'm sorry.

22 MR. ENGLISH: That -- no, that's okay.  
23 I -- but I'm having trouble keeping up, so. . .

24 THE WITNESS: You're kidding [laughs].

25 MR. ENGLISH: I am; gotcha [laughter].

1           MR. SPEAKER: We're willing to let you  
2 be behind [laughter].

3           THE WITNESS: How slow would you like  
4 me to go?

5       A. [reads] As stated previously, milk moves  
6 greater --

7           JUDGE DAVENPORT: We unders -- we  
8 understand you did go to Auburn [laughter].

9           THE WITNESS: But I have a son at UK,  
10 let the record reflect.

11       A. [reads] As stated previously, milk moves  
12 greater and greater distances each year, in greater  
13 and greater volumes each year, to serve the Class  
14 I needs of the Southeast. These greater distances,  
15 coupled with greater volumes of supplemental milk,  
16 have left the Transportation Credit Balancing  
17 Funds insufficient to cover all the claimed  
18 Transportation Credits.

19       Recent history shows that as currently funded,  
20 the Transportation Credit Balancing Fund is  
21 sufficient to cover 100 percent of claimed  
22 Transportation Credits in the Appalachian and  
23 Southeast Orders typically only during the first  
24 couple of months of the Transportation Credit  
25 payment period.

1       Order provisions require the Market  
2 Administrators to prorate available Fund dollars to  
3 claimed credits if the Fund is insufficient in a  
4 month. Looking again at Exhibit 25, Page B, we  
5 see that the effective rate of payout of claimed  
6 credits in the Southeast Order after adjusting for  
7 this proration was a little more than 39 percent in  
8 2004, and was slightly more than 54 percent in the  
9 Appalachian Order in that year. These effective  
10 rates of payment after proration have been only  
11 slightly better in 2005, owing to the increased  
12 assessment rates applicable since November 2005.  
13 Both the Appalachian and Southeast Market  
14 Administrators began prorating Transportation  
15 Credits in September 2005.

16       Referring again to Exhibit 25, Page B, the  
17 factors described above, higher rates per mile for  
18 hauling and the proration of available  
19 Transportation Credits Funds, are combined into  
20 one comparison. The combined effect of these  
21 changes has left the real portion of transportation  
22 cost on Class I supplemental milk paid via the  
23 Transportation Credits radically lower in 2004 and  
24 2005 than in 1997.

25       In 1997, approximately 94 to 95 percent of the

1 actual cost of hauling Class I supplemental milk  
2 was paid through the Transportation Credit  
3 provisions, while only approximately 46 percent  
4 was paid in 2004; 46 percent being the approximate  
5 simple average of 54.6 percent in the Appalachian  
6 Order and 39 percent in the Southeast Order.  
7 Proponents have estimated the assessment  
8 amounts and claimed credits for December 2005;  
9 and based on those estimates, project that the  
10 final percentage of hauling costs on Class I milk  
11 which would be reimbursed from the Transportation  
12 Credit Balancing Funds in 2005 to be about 48  
13 percent in the two Orders combined.

14 As stated previously, 2005 has been in  
15 practical terms very little better than 2004. In  
16 round numbers, the portion of hauling costs on  
17 Class I supplemental milk which is paid through the  
18 Transportation Credit Balancing Funds has been  
19 cut by more than half in 2004 and 2005, versus the  
20 levels paid in 1997. We have every reason to  
21 believe that this trend of increasing transport costs  
22 and decreasing effective Transportation Credit  
23 Balancing Fund payments will continue unless  
24 amendments to the Transportation Credit Balancing  
25 Fund provisions are installed.

1       Returning the effective rate of Transportation  
2       Credit payments to the levels originally foreseen  
3       and installed by the Secretary will require  
4       attacking both of the identified causal factors. We  
5       will now provide evidence and testimony in support  
6       of amending the per-hundredweight-per-mile rate  
7       included in the Orders, and testimony in support of  
8       increasing the maximum rate of assessment on  
9       Class I producer milk.

10       Testimony regarding per hundredweight  
11       mileage rate, which is Proposal Number 3.

12       As demonstrated in Exhibit 25, Pages D1  
13       through D3, the cost of fuel has escalated rapidly  
14       in recent years. This should certainly be no  
15       surprise to anyone owning an automobile. The  
16       impact on the cost of milk hauling has  
17       corresponded to the cost of fuel as one would  
18       expect. Previous testimony has put the cost-per-  
19       loaded-mile for over-the-road hauling at \$1.75 to  
20       \$1.80 per loaded mile in 1997. That rate is more  
21       like \$2.35 today -- per mile today.

22       Exhibit 25, Page E, is a compilation of actual  
23       hauler bills to cooperative associations for the  
24       month of October 2005. Hauler bills were  
25       randomly selected from cooperative records,

1 summarized and compiled into the exhibit. The  
2 range in costs per mile from the Exhibit invoices is  
3 \$1.89 to \$2.70, with an average of \$2.48 per  
4 loaded mile. We full bel -- fully believe that the  
5 ranges in costs per mile for hauling computed from  
6 this sample of hauling bills is highly indicative of  
7 the universe of hauling costs being charged in the  
8 marketplace.

9 Diesel-fuel costs are not the only reason  
10 transport costs have increased. General cost  
11 increases in equipment, insurance, labor and new  
12 government regulations regarding driver rest  
13 periods and on-the-road time have all worked to  
14 increase per-mile transport costs. Diesel-fuel cost  
15 merely represents the most visible transport cost  
16 factor.

17 Proponents believe that setting the Federal  
18 Order rate of reimbursement for hauling cost at  
19 some rate less than the actual hauling cost  
20 continues to be a reasonable approach for the  
21 Transportation Credit Balancing Fund provisions.  
22 Full reimbursement of the cost per mile of moving  
23 Class I could lead to complacency in seeking  
24 hauling efficiencies, or worse yet, could encourage  
25 uneconomic movements of milk.

1       The 1997 Transportation Credit Balancing  
2 Fund provisions set the rate per hundredweight per  
3 mile at point -- at 0.350 cents, and the rate has not  
4 been updated since then. Costs of hauling have  
5 increased substantially since 1997, to such a level  
6 that the 0.35 cents per hundredweight per mile  
7 would be insufficient if fuel were free.

8       Exhibit 25, Page F, shows the mileage rate  
9 which would have been in effect in late 2004, the  
10 period of time of the Hurricane Emergency Hearing  
11 in the Southeast Orders, if fuel had no cost. In the  
12 Secretary's decision on the Hurricane Emergency,  
13 it was decided that hauling costs on extraordinary  
14 movements of milk resulting from the 2004  
15 hurricanes would receive reimbursement using a  
16 maximum rate per loaded mile of \$2.25.

17       According to fuel data already introduced, the  
18 cost of diesel in the Southeast in September 2004  
19 was about \$1.87 per gallon. Using 5 1/2 miles per  
20 gallon fuel use by a tractor-trailer and removing  
21 the fuel cost from the total rate per loaded mile  
22 results in a mileage rate during late 2004 of almost  
23 0.40 cents per hundredweight per mile, which is  
24 greater than the Order rate, and this is if fuel were  
25 free. Clearly, the mileage rate under the Orders is



1 in need of updating.

2 Rather than proposing the continuation of a  
3 fixed rate per hundredweight per mile for payments  
4 from the Transportation Credit Balancing Fund,  
5 proponents offer the following system for the  
6 computation of a variable or moving per-  
7 hundredweight-per-mile rate. The use of a -- use  
8 of fixed rate suffers from lack of responsiveness to  
9 changes in hauling costs, as we have demonstrated  
10 above.

11 However, if mileage rates were fixed in the  
12 Orders based on the current hauling costs, and if  
13 hauling costs were to decline from their current  
14 rates in the future due to decreases in fuel cost,  
15 the Order provisions would be left with a per-mile  
16 rate which could be too generous -- could be too  
17 generous, and therefore might encourage  
18 inefficiencies in hauling or uneconomic movements  
19 of milk.

20 None of the proponents offer themselves as  
21 experts in the field of predicting fuel-cost changes,  
22 which are the primary mover of hauling costs in the  
23 short run. As a result, proponents have no  
24 certainty as to the direction fuel costs will move in  
25 the future. The uncertainty of future fuel-cost

1 changes makes setting the Order rate for hauling in  
2 the Transportation Credit Balancing Fund  
3 provisions based on the current rate of hauling,  
4 with no provision for making future adjustments  
5 outside the formal rulemaking process, fraught with  
6 danger.

7 Adjustable rates for hauling costs based on  
8 fuel changes are common in industry, and even the  
9 U.S. government has updated the allowable mileage  
10 rate for business use of automobiles over time.

11 Exhibit 25, Pages G1 through G5, provides  
12 summaries of computations of hauling rates for the  
13 period of October and November 2003. During this  
14 period, diesel-fuel costs were relatively stable,  
15 ranging from \$1.48125 to \$1.48225 per gallon  
16 nationally, and \$1.4210 to \$1.4308 in the Lower  
17 Atlantic and Gulf Coast EIA regions. This is the  
18 only period in recent history that fuel costs have  
19 varied less than one cent per gallon over a two-  
20 month period.

21 Exhibit 25, Page G5, shows an average hauling  
22 rate being charged in the Southeast during October  
23 and November 2003 of approximately \$1.91 per  
24 loaded mile. Since the diesel prices were not  
25 rapidly fluctuating during this period, proponents

1 believe this to be a fair time frame upon to which  
2 ba -- ba -- upon which to base diesel adjustments  
3 to haul rates, and to use as a base-period, if you  
4 will. Proponents offer \$1.91 per loaded mile as the  
5 base rate for determining the mileage rate under  
6 the two Orders.

7 In determining hauling rates, industry utilizes  
8 an average -- or, uses a range of 5.0 to 6.0 miles  
9 per gallon fuel use for transporting milk, with use  
10 of 5.5 mils -- miles per gallon often cited as a fair  
11 average.

12 Statistics on combination fuel econom --  
13 combination Truck fuel economy from the United  
14 States Department of Transportation, included as  
15 Exhibit 25, Page H, shows that the average miles  
16 traveled per gallon of fuel for a combination truck  
17 was 5.2 miles per gallon in nin -- in 2002. The  
18 United States Department of Transportation defines  
19 a "combination truck" as what would norma -- what  
20 would commonly be called a tractor and trailer.

21 Combination truck fuel economy from the US  
22 DOT statistics show little change in average fuel  
23 economy per mile since 1998. The United States  
24 Department of Transportation fuel-use data are  
25 copied from the US DOT website, and the table is

1 sourced at --

2 JUDGE DAVENPORT: Mr. Sims, if we  
3 might just say "at the source that's listed in the  
4 written statement."

5 A. [reads] -- at the source as listed in the  
6 written statement.

7 Proponents offer 5.5 miles per gallon as the  
8 fuel consumption rate to be used in computing  
9 Federal Order Mileage Rates.

10 Load sizes used for industry mileage  
11 calculations range from 44,000 to 48,000 pounds  
12 per load, with 46,500 pounds being an often-used  
13 load volume for route pick up. Tankers can  
14 typically hold the full 48,000 pounds, but due to  
15 normal daily variation in farm production, 46,500 is  
16 often used to represent the average load side --  
17 size over the year in tankers completing farm  
18 pickup. A 5,600 gallon tanker can hold, at its  
19 fullest, 48,160 pounds of milk. Proponents seek to  
20 encourage the efficient use of hauling equipment,  
21 and offer 48,000 pounds as the load size for use in  
22 the Order provisions.

23 Proponents propose the use of the Lower  
24 Atlantic and Gulf Coast EIA regions in the  
25 computation of mileage rates under the

1 Appalachian and Southeast Orders. As reported by  
2 the Energy Information Administration, the Lower  
3 Atlantic region is comprised of the states of  
4 Virginia, West Virginia, North Carolina, South  
5 Carolina, Georgia, and Florida. The Gulf Coast  
6 region is comprised of the states of Alabama,  
7 Mississippi, Arkansas, Louisiana, Texas and New  
8 Mexico. The area covered by these two EIA  
9 regions fairly well mirrors the Appalachian and  
10 Southeast marketing areas, and would include the  
11 important reserve supply areas in the southwest.

12 As for states in the two Mar -- Order Marketing  
13 Areas, only Kentucky, Tennessee and Missouri  
14 would not be reflected in the Atlantic and Gulf  
15 Coast regions' EIA fuel data. Expansion of the  
16 number of EIA regions beyond the Lower Atlantic  
17 and Gulf Coast regions for use in the mileage-rate  
18 computation would include much more territory, and  
19 would likely not appreciably impact the computed  
20 fuel costs. In fact, over time, the Lower Atlantic  
21 and Gulf Coast EIE -- EIA regions have shown  
22 diesel-fuel costs among the lowest reported.

23 Important in the proposals is that the monthly  
24 change in the fuel cost be recognized. Use of a  
25 consistent base period, tied to consistent reporting

1 regions, will accomplish this. Industry in the  
2 Southeast uses the Lower Atlantic and Gulf Coast  
3 regions in computing hauling cost fuel adjustments,  
4 and has seen no issues arise from their use versus  
5 use of some larger geographic fuel cost statistic.

6 Exhibit 25, Page I, shows an example  
7 computation of the proposed Mileage Rate for the  
8 month of December 2005 using the mathematical  
9 information and data set forth here. Using diesel-  
10 fuel cost for the Lower Atlantic and Gulf Coast EIA  
11 regions for the four weeks ended December 23,  
12 2005, the simple-average diesel-fuel cost for the  
13 Southeast was approximately \$2.41 per gallon.

14 Using the start-out rate per loaded mile in  
15 effect when diesel was approximately \$1.42, the  
16 October and November 2003 period previously  
17 discussed, we see that diesel fuel now exceeds the  
18 base period price by \$0.99 per gallon. We next  
19 divide the change in fuel cost by the proposed  
20 average fuel use of a milk truck, that is, 5.5 miles  
21 per gallon. The resulting figure represents the  
22 change in the cost of hauling milk one mile, for the  
23 given change in diesel-fuel cost over or under  
24 \$1.52 per gallon. In this case 99 cents divided by  
25 5.5 equals 18 cents per-loaded-mile cost increase

1 due to fuel. Next, the change per mile in hauling  
2 costs resulted from -- resulting from fuel-price  
3 changes is added to the reference rate of hauling  
4 costs per loaded mile, which as discussed is  
5 proposed to be \$1.91 per loaded mile.

6 The resulting value is the fuel-adjusted cost  
7 per loaded mile. Again, in this case, 18 cents plus  
8 \$1.91 equals \$2.09. Next, divide the adjusted rate  
9 per loaded mile by the number of hundredweights  
10 on a typical load, which is 480, to get the mileage  
11 rate in dollars per hundredweight per mile, and  
12 multiply by 100 to get the mileage rate in cents per  
13 hundredweight per mile, again mathematically,  
14 \$2.09 divided by 480 equals \$0.004355, and  
15 \$0.004355 times 100 equals 0.436 cents per  
16 hundredweight per mile. This rate per mile  
17 represents the fuel-adjusted cost of hauling milk.  
18 Proponents have called this new process the  
19 Mileage Rate, and have proposed a new section,  
20 1005.84 and 1007.84, in the two Orders.

21 The mileage rate as proposed will be less than  
22 the actual cost of hauling, and does not need  
23 further reduction. As described above, the mileage  
24 rate resulting from the computation as proposed  
25 yields a rate per hundredweight per mile which is

1 less than is actually being paid in the marketplace.  
2 The mileage rate as proposed to be computed is  
3 based on 2003 costs of hauling and only reflects  
4 changes in the costs of fuel since that time. Other  
5 costs, as previously discussed, have increased the  
6 actual cost of hauling since then.

7 Also, no further adjustment in the mileage rate  
8 is necessary because the pounds reimbursed on  
9 are -- on a class -- on a load are Class I only.  
10 Depending on whether the mileage rate is used in  
11 the current Transportation Credit provisions or the  
12 proposed Intra-market Transportation Credits, and  
13 whether it is Order 5 or Order 7, the Class I use on  
14 the load will be between approximately 65 percent  
15 and 90 percent.

16 The use of a fuel adjuster itself reduces the  
17 need to further downwardly adjust the mileage rate.  
18 As shown in Exhibit 25, Pages J1 and J2, the  
19 mileage rate will move up and down with the cost of  
20 fuel. No longer is there any need to safeguard the  
21 mileage rate from lower fuel costs by setting the  
22 rate at less than the computed cost, because the  
23 mileage rate will be self-correcting. As seen in  
24 Exhibit 25, Pages J1 and J2, the mileage rate as  
25 proposed would have ranged between 0.417 cents



1 per hundredweight per mile and 0.461 cents per  
2 hundredweight per mile, with a simple average of  
3 0.433 cents per hundredweight per mile during  
4 2005.

5 The computation of Transportation Credits and  
6 the proposed Intra-market Transportation Credits  
7 provide mileage safeguards which reduce the  
8 actual rate of reimbursement below the actual cost  
9 of hauling. Current Transportation Credit  
10 provisions reduce the mileage on farm direct milk  
11 by 85 miles, and the proposed Intra-market  
12 Transportation provisions reduce the mileage by  
13 the distance a producer is from his or her nearest  
14 pool distributing plant. For all of the above  
15 reasons, proponents see no practical reason to  
16 further adjust the Mileage Rate by any factor after  
17 conversion to a per-hundredweight-per-mile rate  
18 established on the 2003 cost of hauling and fuel  
19 costs.

20 Common practice in the industry is to compute  
21 the diesel fuel adjuster on the last Monday of the  
22 current month, using the most recent four weeks'  
23 diesel prices as reported by EIA. Proposal Number  
24 3, as included in the Notice of Hearing, provides  
25 Order language which mirrors industry practice in

1 setting haul rates, with a slight modification to fit  
2 Market Administrator price announcement  
3 schedules already in place.

4 We propose that the mileage factor to be used  
5 for the Transportation Credit Balancing Fund  
6 provisions and the Intra-market Transportation  
7 Credit provisions be computed and announced  
8 along with the advanced Class I price such that the  
9 mileage rate as announced for the current month --  
10 is announced for the current month on the Friday  
11 that falls on or before the 23rd of the month.

12 The time frame used would be the most-recent  
13 four weeks available prior to the announcement of  
14 the advanced Class I price. For example, the two  
15 thou -- the December 2005 mileage rate would have  
16 been announced on December 23rd, 2005 and would  
17 have used the energy information administration  
18 diesel prices for the Lower Atlantic and Gulf Coast  
19 regions announced by EA -- EIA on November 28,  
20 December 5, December 12 and December 19. In  
21 practical terms, the mileage rate announced under  
22 the Orders would be announced a week or two  
23 earlier than currently computed by industry.  
24 Industry may or may not adopt this change in  
25 timing of their actual fuel adjustment changes to

1 haulers, but whether or not industry makes this  
2 change in computing monthly haul rates is not  
3 material to the administration of the Order. The  
4 important aspect here is that the Orders need a  
5 formalized process for keeping haul costs  
6 reasonably current and adjusted for relative  
7 changes in diesel fuel costs, whether fuel costs  
8 rise or fall, and the system proposes utilizing well-  
9 understood industry practice and independently  
10 announced, reliable fuel-cost data.

11 Adjustment of reimbursement for mileage costs  
12 from changes in die -- in fuel costs is appropriate.  
13 Industry uses fuel adjustments to pay for hauling  
14 on an ongoing basis, and even the Federal  
15 government uses mileage rates for reimbursement  
16 of personal vehicles used based on changes in  
17 vehicle operation costs.

18 JUDGE DAVENPORT: Let's stop at that  
19 point, and just ask the audience as a whole what  
20 your pleasure is with respect to pushing on. In  
21 other words, this statement, of course, is 56  
22 pages.

23 It's now after 4:30. We did start at 8:30 this  
24 morning. This does appear to be a breaking point,  
25 if need be; or we can push on, as -- whatever your

1 preference is.

2 MR. STEVENS: I'll defer to the court  
3 reporter and the government, your Honor. I'm --  
4 I'm here regardless.

5 MR. SPEAKER: We're here.  
6 [WHEREUPON, off-the-record remarks are  
7 made.]

8 JUDGE DAVENPORT: Mr. Beshore?

9 MR. BESHORE: If -- if it's not a hardship  
10 on the court reporter and the other participants, we  
11 would like to -- maybe we need a -- you know, a  
12 short break; but we'd like to attempt to get Mr.  
13 Sims' direct testimony in this even -- today.

14 JUDGE DAVENPORT: Well, I have -- I  
15 have no objection to doing that. But let's make  
16 sure that our court reporter is comfortable; and if  
17 she'd like to have a break, as long as she wants,  
18 well, then, we'll --

19 MR. BESHORE: We certainly concur with  
20 that.

21 JUDGE DAVENPORT: -- resume after  
22 that.

23 Okay. How long do you need? 10 minutes,  
24 15? Okay.

25 We'll be in recess at this time, until quarter

1 of.

2 [WHEREUPON, a brief recess is taken.]

3 JUDGE DAVENPORT: Very well. Mr.  
4 Sims, it looks like you may proceed.

5 A. [reads] Transportation Credit Assessment  
6 Rate.

7 The assessments for the Transportation Credit  
8 Balancing Funds have been insufficient to fund all  
9 claims made on the tran -- funds in the last few  
10 years. Both the Appalachian and Southeast Order  
11 Market Administrators have collected the mas --  
12 maximum transportation credit balancing fund  
13 assessment in 2004 and 2005, pursuant to section  
14 10xx.81 of the Orders; yet both Orders had  
15 insufficient funds to pay all claimed Credits.

16 Even with the addition to the assessment rates  
17 of three cents per hundredweight of Class I milk,  
18 which went into effect in the Orders in November  
19 2005, proponents anticipate both the Order 5 and  
20 Order 7 Transportation Credit Balancing Funds to  
21 be insufficient for calendar year 2006. Proponents  
22 appreciate and thank the Secretary for acting to  
23 partially relieve the insufficiencies of the two  
24 Transportation Credit Balancing Funds in the  
25 recent Order proceeding, but note that the three-

1 cents-per-hundredweight increases in the  
2 Transportation Credit Balancing Fund assessments  
3 are still not enough, given the changes in fuel  
4 costs, supplemental milk volumes, and distances  
5 supplemental milk moves, as previously described.  
6 Exhibit 25, Page K, shows the amount per  
7 hundredweight of Class I Transportation Credit  
8 Balancing Fund assessment which would have been  
9 necessary to fund all claims for credits in 2004,  
10 and estimates of the amounts necessary for 2005.  
11 These credits are computed at the rate per  
12 hundredweight per mile as currently included in the  
13 Orders, that is 0.35 cents per hundredweight per  
14 mile, and do not take into account additional funds  
15 which would be necessary if the mileage rates are  
16 amended as proposed above.

17 For the year 2004, the Transportation Credit  
18 Balancing Fund assessment of 0.065 cents per  
19 hundredweight of Class I milk, the maximum  
20 allowed under the Appalachian Order, would have  
21 had to have been increased to \$0.0889 per  
22 hundredweight to pay all claimed Credits. For that  
23 year in the Southeast Order, the seven cents per  
24 hundredweight maximum assessment would have  
25 had to have been increased to 13.18 cents per

1 hundredweight to pay all claimed Credits.

2 Clearly, the three-cents-per-hundredweight  
3 recent increase would have been barely sufficient  
4 to allow the payment for all -- of all claims in  
5 Order 5 in 2004; and is projected to be insufficient  
6 to fund all Transportation Credit -- Credit claims in  
7 Order 7.

8 Claimed Transportation Credits from the  
9 Appalachian Order Transportation Credit Balancing  
10 Funds in July, September, and October 2005  
11 exceeded the credits claimed from the Order in the  
12 same months of 2004. Claimed Credit --  
13 Transportation Credits from the Appalachian Order  
14 Transportation Credit Balancing Funds in August  
15 and November 2005 were somewhat less than  
16 claimed in the same month during 2004.

17 In the Southeast Order, claimed credits were  
18 down slightly in July, August, September and  
19 November of 2005, versus the same month in 2005,  
20 while --

21 Two thous -- that should be "2004."

22 -- versus the same month in 2004, while  
23 October 2005 claims exceeded October 2004.  
24 Marketers of milk may have shifted some supplies  
25 of supplemental milk onto Order 5 and away from

1 Order 7 since the recent history of net payments  
2 after proration on Order 5 have exceeded Order 7.  
3 The Market Administrators for the two Orders have  
4 supplied these data in Exhibits 10, Pages 1 and 2,  
5 and 13K. The general trend has been for claimed  
6 Transportation Credits to increase over time.  
7 Obviously, if this trend continues in 2006, the  
8 Transportation Credits Funds will be even more  
9 deficit in available funds than was true in 2004 and  
10 in 2005.

11 The critical milk supply condition of the  
12 Southeast requires -- requires that effective action  
13 be taken to more fully fund the Transportation  
14 Credit Balancing Funds and bring equity and order  
15 to the reimbursement of costs of transportation --  
16 of transporting supplemental milk for the  
17 Southeast.

18 Proposal Number 3 provides an increase in the  
19 per-hundredweight-per-mile reimbursement rate;  
20 and this raise will increase the payout from the  
21 Transportation Credit Balancing Funds. Exhibit 25,  
22 Page L, demonstrates, based on calculations by the  
23 Market Administrators already intro -- introduced at  
24 this hearing, the projected increase in cost which  
25 occurs from increasing the per-hundredweight-per-



1 mile reimbursement rate for each of the two  
2 Orders.

3       Based on actual 2004 and 2005 milk  
4 movements and origin points, the Transportation  
5 Credit Balancing Fund assessment rate would need  
6 to be increased by 4.62 cents per hundredweight of  
7 Class I milk in Order 5, and by 6.23 cents per  
8 hundredweight in Order 7, if the per-mile  
9 reimbursement rate were 0.46 cents per  
10 hundredweight per mile.

11       Based on the proposed system for computing  
12 Mileage Rates described above, the per-mile  
13 reimbursement rate based on \$2.40 diesel price per  
14 gallon, which is the approximate average current  
15 price per gallon, would be approximately 0.44 --  
16 0 -- 0.44 cents per hundredweight per mile.

17       There is a cumulative effect to the changes in  
18 the Mileage Rate as proposed and the  
19 insufficiencies of the current Transportation Credit  
20 Balancing Fund assessment rate needed, which will  
21 be summarized at this time. This calculation and  
22 summary can be found in Exhibit 25, Page M.

23       For the Appalachian Order, increasing the per-  
24 hundredweight-per-mile reimbursement rate from  
25 0.35 cents to 0.46 cents requires an increase in

1 the assessment of 4.41 cents per hundredweight,  
2 and the Fund was 2.39 cents per hundredweight  
3 insufficient based on the 2004 assessment rate of  
4 6.5 cents per hundredweight, yielding a needed  
5 assessment rate of 13.3 cents per hundredweight  
6 of Class I milk for 2004. Proponents estimate that  
7 for 2005, the required assessment would have had  
8 to have -- would have had to be 14.15 cents per  
9 hundredweight of Class I milk.

10 For the Southeast Order, increasing the per-  
11 hundredweight-per-mile reimbursement rate from  
12 0.35 cents to 0.46 cents requires an increase in  
13 the assessment of point -- of 6.09 cents per  
14 hundredweight, and the Fund was 6.18 cents per  
15 hundredweight insufficient based on the 2004  
16 assessment rate of seven cents per hundredweight,  
17 yielded a -- yielding a needed assessment rate of  
18 19.27 cents per hundredweight of Class I milk in  
19 2004. Proponents estimate that for 2005, the  
20 required assessment would have had to have been  
21 18.69 cents per hundredweight of Class I milk.

22 If diesel-fuel costs were to return to the highs  
23 experienced in 2005, the per-hundredweight-per-  
24 mile rates under the Orders would exceed 0.46  
25 cents, and thus, the amounts paid for

1 Transportation Credits would exceed the estimates  
2 stated here.

3 Proponents recommend setting the maximum  
4 rate of Transportation Credit Balancing Fund  
5 assessment, which is stated in section 10xx.81 of  
6 the Orders, at 15 cents per hundredweight of Class  
7 I milk in the Appalachian Order and 20 cents per  
8 hundredweight of Class I milk in the Southeast  
9 Order. These maximum rates represent an increase  
10 of 5 1/2 cents per hundredweight of Class I milk in  
11 Order 5, and 10 cents per hundredweight in Order  
12 7, above the rates which were put into effect in  
13 November 2005.

14 Changing the relative maximum rate of  
15 assessment for the Transportation Credit Balancing  
16 Funds in the two Orders could alter the relative  
17 total Class I cost to handlers under the Orders.  
18 Currently, the differences in maximum assessment  
19 rate is one-half cent per hundredweight. This  
20 proposed newest -- the proposed new maximum  
21 rates would differ by five cents per hundredweight.

22 While the proposed difference in maximum rate  
23 of Transportation Credit Balancing Fund  
24 Assessment between the two Orders may seem like  
25 a divergence from the Orders' pricing practice of

1 having both Orders with basically the same Class I  
2 price, this ostensible sameness of Class I value is  
3 not always -- has not always been as it appears.

4 In 2002 and 2003, the Market Administrator for  
5 the Appalachian Order waived the assessment for  
6 the Transportation Credit Balancing Fund for two  
7 months each year. In the ten mon -- in the other  
8 ten months, the rate assessed was the Order 5  
9 maximum rate of 6 1/2 cents per hundredweight.  
10 During those years, the Market Administrator for  
11 the Southeast Order did not waive the assessment  
12 in any month.

13 In simple terms, the annual average  
14 assessment for the Appalachian Order was 5.4  
15 cents per hundredweight, which is 6 1/2 cents per  
16 hundredweight times ten months, divided by twelve  
17 months. The annual average rate of assessment in  
18 the Southeast order was seven cents per  
19 hundredweight, leaving an actual diff -- difference  
20 in the effective rates of assessment of 1.6 cents  
21 per hundredweight.

22 In addition, Order 7 handlers importing milk  
23 from outside the Southeastern Orders would have  
24 experienced higher net costs of supplemental-milk  
25 hauling in those earlier years due to the proration

1 of Transportation Credit Balancing Fund payments  
2 in Order 7 during that period. Handlers in Order 7  
3 thus would have their -- had their net  
4 reimbursement of hauling costs reduced versus  
5 Order 5 importing handlers.

6 These costs of transport certainly exist, and  
7 have been -- and have been paid, just they have  
8 been paid for outside the Transportation Credit  
9 Balancing Fund assessment system. So while on  
10 the surface the Transportation Credit Balancing  
11 Fund assessments have appeared to be roughly  
12 equal in the two Orders, because the maximum  
13 rates of assessment defined in the two Orders have  
14 been roughly equal, differences in the true  
15 effective rate of assessment have existed, as well  
16 as differences in handler costs of supplemental  
17 supplies due to differences in Transportation  
18 Credit Balancing Fund payment prorations.

19 The differing rates of maximum Transportation  
20 Credit Balancing Fund Assessments have --  
21 between Orders 5 and 7 reflect the somewhat  
22 differing costs of supplying supplemental milk to  
23 the two Order areas. While both Order areas draw  
24 milk from the same supplemental sources in the  
25 Indiana, Ohio, and Michigan area, additional

1 supplemental milk supplies for the Order 7 area  
2 originate in the south -- Southwestern United  
3 States, while additional supplemental milk supplies  
4 for the Order 5 area originate in the Middle-  
5 Atlantic states.

6 The additional distance milk moves from the  
7 Southwest region to the Order 7 area versus milk  
8 movements to the Order 5 area for milk originating  
9 in the Middle-Atlantic states, represents the  
10 principal difference in supp -- supplemental milk  
11 hauling costs, and thus the relative differences in  
12 Transportation Credit Balancing Fund payments. It  
13 should be noted that some milk does move from the  
14 Southwest region into Order 5 as supplemental milk  
15 and the miles this milk travels is often greater than  
16 if the mile -- if the milk were delivered into Order 7  
17 plants.

18 There could be concern that the differences  
19 which exist in differences [sic] supplemental milk  
20 must move to supply the two Orders, coupled with  
21 differences in supplemental milk volumes received  
22 in the two Orders could lead to substantially  
23 different Transportation Credit Balancing Fund  
24 Assessment rates applicable in the Orders. If this  
25 becomes problematical, the Secretary could remedy

1 the situation by consolidating the two Orders.

2 The costs of supplying supplemental milk to  
3 the Southeastern Orders are real, and are ongoing.

4 In the recent past, the assessment for the  
5 Transportation Credit Balancing Funds has been  
6 seriously insufficient to cover even a half of the  
7 transportation costs, and thus those costs have  
8 been borne outside the regulated marketplace.

9 Proponents seek to -- to return order and equity to  
10 the reimbursement of these costs by having the  
11 Orders assess handlers for these costs, and  
12 standardize the reimbursement for these costs to  
13 those handlers who are incurring them.

14 The Transportation Credit Balancing Funds'  
15 provisions afford the Market Administrator  
16 discretion in setting the assessment rates at less -  
17 - at or less than the maximum allowed by the  
18 Orders, based on projected Fund needs.

19 Proponents continue to support this process, and  
20 the Market Administrators' discretion in -- in  
21 setting the Transportation Credit Balancing Fund  
22 assessment rates in the two Orders insures that if  
23 payments from the fund are less than anticipated,  
24 assessments can be lowered by the Market  
25 Administrator accordingly.

1       As previously discussed, the Market  
2 Administrator discretion in setting assessment  
3 rates has resulted in dissimilar assessment rates  
4 between the two Orders in the past, and that may  
5 be true in the future. Conversely, changes in the  
6 sources of supplemental supplies, or the volumes  
7 of the supplemental supplies may lead to actual  
8 assessment rates being closer in the two Orders  
9 than the differences in the maximum stated rates of  
10 assessment would suggest.

11       Proponents have proposed a minor  
12 modification to the Market Administrator discretion  
13 process in -- in setting the Transportation Credit  
14 Balancing Fund assessment. Given that the  
15 Mileage Rate, as proposed to be adopted, will be a  
16 moving rate, the new mileage -- the new language  
17 in sections 1005.81 and 1007.81 requires the  
18 Market Administrators to take into account any  
19 changes in the effective Mileage Rate between the  
20 current year and the previous year in determining  
21 the level at which to set the rate of the  
22 Transportation Credit Balancing Fund assessment.

23       In summary, the Appalachian and Southeast  
24 Orders, and their predecessor Orders, have had  
25 Transportation Credit Balancing Fund provisions



1 for many years, and the Credit provisions have  
2 functioned as intended by increasing the regulated  
3 cost of Class I milk so that milk for Class I use  
4 could be procured from outside the marketing  
5 areas. The Transportation Credit Balancing Fund  
6 system should continue to be a part of the  
7 Appalachian and Southeast Orders, and needs to  
8 be improved and updated as proposed.

9 Testimony in Support Of Proposal Number Two.

10 Proponents seek to amend the Appalachian  
11 and Southeast Orders by adding new provisions  
12 which would help move milk for Class I use within  
13 and between the two marketing areas. It is  
14 envisioned that the structure of these provisions  
15 would be analogous to the current Transportation  
16 Credit Balancing Fund system, only limited to milk  
17 movements to pool distributing plants within the  
18 two marketing areas, and applicable only to  
19 distances represented by movements to pool  
20 distributing plants beyond a producer's nearest  
21 pool distributing plant, with such credits to be  
22 known as Intra-market Transportation Credits.  
23 Proponents propose adding a new section to each  
24 Order, sections 1005.83 and 1007.83, to  
25 accomplish these new provisions.

1 Proponents seek additional new provisions to  
2 at least partially fund the Intra-market  
3 Transportation Credits by adding a new sub-section  
4 to each Order, sections 1005.81(d) and 1007.81(d).  
5 Proposals -- proponents seek a maximum rate of 10  
6 cents per hundredweight of Class I milk in the  
7 Appalachian Order, and a maximum rate of 15 cents  
8 per hundredweight of Class I milk in the Southeast  
9 Order to at least partially pay for the Intra -- Intra-  
10 market Transportation Credits.

11 The funds generated from the Intra-market  
12 Transportation Credit assessments would be  
13 deposited into a new fund, named the Intra-market  
14 Transportation Credit Fund, and if the balance in  
15 the Intra-market Transportation Credit Fund was  
16 insufficient to pay all computed Intra-market  
17 Transportation Credits for the month, the  
18 difference would be allocated from the producer  
19 revenue pool. Conforming language in sections  
20 1005.61 and 1007.61 is proposed to effectuate this  
21 process.

22 At this time proponents wish to offer two  
23 correcting and amplifying modifications to the  
24 Federal Order language as published in the Notice  
25 of Hearing. The first pertains to section 1005.83

1 and 1007.83, Payments from the Intra-market  
2 Transportation credit fund. In section  
3 1005.83(b)(2), after the words "within the  
4 marketing area" insert the phrase "or located  
5 within the marketing area," so that the entire  
6 subparagraph now reads: "(2) Determine the total  
7 pounds of producer milk physically received from  
8 farms of producers located in the marketing area or  
9 within the marketing area of Order 1007 , paren, 7  
10 CFR Part 1007, paren, at each pool distributing  
11 plant. . ."

12 Likewise, In section 1007.83(b)(2), after the  
13 words "within the marketing area" insert the phrase  
14 "or located within the marketing area," so that the  
15 entire subparagraph now reads: "(2) Determine the  
16 total pounds of producer milk physically received  
17 from farms of producers located in the marketing  
18 area or within the marketing area of Order 1005,  
19 paren, 7 CFR Part 1005, paren, at each pool  
20 distributing plant. . ."

21 These minor correcting modifications conform  
22 the language to the intent of the provisions such  
23 that producers located within either Order 1005 or  
24 1007 would be eligible for their milk to receive an  
25 Intra-market Transportation Credit for delivery to a

1 pool distributing plant regulated on either Order  
2 1005 or 1007. Language suggesting that  
3 producers located in either marketing area would  
4 be eligible for their milk to receive an Intra-market  
5 Transportation Credit is correctly included in the  
6 Notice of Hearing in sections 1005.83(b)(1) and  
7 10017 -- 1007.83(b)(1). The modified proposed  
8 language is provided in Exhibit 26.

9 BY MR. BESHORE:

10 Q. Now, if I could interrupt you at that point,  
11 Mr. Sims, do you have proposed Exhibit 26 in front  
12 of you?

13 A. I do.

14 Q. I wonder if there may be a typographical  
15 error on proposed Exhibit 26, in referencing the  
16 section of each Order which the modified language  
17 would apply to.

18 The -- your testimony as read said, "section  
19 1005.83(b)(2) and 1007.83(b)(2)."

20 And proposed Exhibit 26 appears to refer to  
21 point-82(b)(2).

22 A. Which -- which -- which one's correct? Is  
23 it --

24 Q. 83.

25 A. Is it 83 or 82?

1 Q. 83.

2 A. Yes, then -- then Exhibit 26 should read  
3 section 1005.83 in both places where it appears.

4 Q. And 1007.83?

5 A. Correct.

6 Q. Okay.

7 A. [reads] The second modification of the  
8 Order language from that included in the Notice of  
9 Hearing regards Market Administrator  
10 determination of the location of producers for det -  
11 - for determining the Intra-market Transportation  
12 Credit. As described previously, the Market  
13 Administrator estimates of the Intra-market  
14 Transportation Credit values used the county seat  
15 of counties within the marketing areas as a proxy  
16 starting point versus locating each producer's farm  
17 more specifically.

18 Proponents support revised Order language for  
19 the computation of the Intra-market Transportation  
20 Credit which could -- would continue the use of a  
21 county seat within the marketing area as the  
22 starting point for computing mileages until such  
23 time as all producers' farms could be located at a  
24 sufficient level of specificity to satisfy the Market  
25 Administrator that the computation of distances

1 from farm to plant are accurate and proper.

2 The Intra-market Transportation Credit  
3 provisions as proposed include two potential  
4 sources of income to fund the proposed credits.  
5 Obviously the best scenario for dairy farmers is to  
6 have the new assessment for the Intra-market  
7 Transportation Credits pay for the entirety of the  
8 expected Credits, such that the Class I  
9 marketplace is paying all of the cost of extra  
10 mileages for delivery of Class I -- of milk for Class  
11 I use.

12 To that end, proponents have proposed  
13 maximum rates of assessment in the Appalachian  
14 Order and Southeast Order which should cover the  
15 estimated cost of Intra-market Transportation  
16 Credits. Proponents believe that the cost of  
17 moving milk for Class I use should be borne by the  
18 Class I marketplace. However, if the Secretary  
19 elects to install assessments at less than the full  
20 amount necessary to pay for the new Intra-market  
21 Transportation Credits, provisions are proposed  
22 which would allow claimed Intra-market  
23 Transportation Credits which exceed the amount of  
24 assessment to be paid from the producer revenue  
25 pool.

1       In order to have equity in the cost of  
2       delivering milk for Class I use between producers,  
3       proponents offer the process for adjusting to  
4       pool -- for the -- for adjustment to pool revenues to  
5       cover shortfalls in assessments as a fail-safe  
6       system. By providing this alternate source of  
7       funds, the Intra-market Transportation Credits can  
8       be paid even if Intra-market Transportation Credit  
9       assessments are insufficient. If assessments are  
10      not sufficient to pay all Intra-market  
11      Transportation Credits and no other source of  
12      funds is available to cover these costs, the  
13      shortage in Intra-market Transportation Credits  
14      creates inequities between those producers whose  
15      milk is traveling further than their closest pool  
16      distributing plant and those producers whose milk  
17      is able to be delivered to their nearest plant.

18      An installation -- the installation of in -- of an  
19      Intra-market Transportation Credit system as  
20      proposed would complete the cycle of regulated  
21      cost reimbursement for Class I milk deliveries by  
22      setting up a system of cost recovery on intra-Order  
23      milk movements complementary to inter-Order milk  
24      movements provided by the current Transportation  
25      Credit Balancing Fund system. In this way, the

1 regulated cost of Class I milk would reflect  
2 reimbursement of extraordinary costs of supplying  
3 milk for Class I use to the Southeast region no  
4 matter where the milk was produced.

5 Exhibits 10, Page 3, and 13B contain maps  
6 which show graphically the location of milk  
7 supplies and pool distributing plants in the  
8 Appalachian and Southeast Order Marketing Areas,  
9 as well as the location of pool and nonpool  
10 manufacturing facilities. These maps were  
11 prepared by the Market Administrators at our  
12 request. Of particular note is the concentration of  
13 milk production in the Northernmost and  
14 Northwestern-most areas, with pockets of milk  
15 production in southern Missouri [sic] and eastern  
16 Louisiana -- excuse me southern Mississippi and  
17 eastern Louisiana, central Tennessee and lesser  
18 pockets of milk scattered throughout the marketing  
19 areas. Also of note is the location of pool  
20 distributing plants which are typically positioned  
21 near population centers, often in the interior of the  
22 marketing areas, distance from the -- distant from  
23 the more concentrated milk production areas.

24 Inherently difficult in the marketing of milk in  
25 the Southeast is the distance mis -- milk must



1 move within the marketing areas to supply Class I  
2 needs. While producer location adjustments do  
3 provide some incentive to pull milk generally north  
4 to south, the location-adjustment effect is typically  
5 insufficient to reimburse the true cost of milk  
6 movements to supply Class I.

7 Moving and providing class -- milk for Class I  
8 use, while influenced by a number of institutional  
9 factors, remains an activity governed by the  
10 immutable laws of economics. The decision on  
11 whether or not to undertake a business activity  
12 rests on the opportunity for that particular  
13 business activity to cover the variable costs of  
14 taking on the activity. For example, a farmer will  
15 only harvest a drought-impacted field of corn if the  
16 sales value of the that -- of the harvested grain  
17 will exceed the cost of harvesting and delivery to  
18 the customer.

19 Such is true of the delivery of milk for Class I  
20 use. Since producers pay the cost of delivering  
21 their milk to the processing plant, they will, in the  
22 interest of reducing their costs in marketing their  
23 product, seek to deliver milk to the plant nearest  
24 them. A producer should only agree to deliver  
25 milk to a more-distant plant if the return on the

1 milk to deliver to that more-distant plant is greater  
2 than or equal to the increased cost incurred in  
3 moving milk beyond the nearest plant. Alternately,  
4 the producer should agree to make the more-  
5 distant delivery if a process in -- is in place which  
6 equalizes the cost of hauling realized by the  
7 producer in making the distant delivery with the  
8 cost of the most-near delivery.

9 Plants and producers, for any number of  
10 institutional and practical reasons, are not -- are  
11 often not closely located. Production agriculture,  
12 and animal agriculture in particular, is being  
13 forced further and further away from population  
14 centers, while Class I processors have tended to  
15 locate their facilities near urban or developed  
16 areas. This push of milk production away from  
17 population centers has left the producer in the  
18 unenviable position of having to send milk further  
19 and further to supply Class I cust -- processors.

20 The Class I price surface under Federal Orders  
21 has not kept pace with this dynamic, and  
22 producers are footing the bill for ever-increasing  
23 costs of delivery of milk for Class I use. It is  
24 important that the regulated marketplace  
25 recognizes this dynamic and brings order and

1 equity to the allocation of these costs of supplying  
2 milk for Class I use.

3 Proponents offer here a compromise solution  
4 to the sharing of these Class I supply costs which  
5 places bearing of the costs both on producers and  
6 on Class I, if the Secretary elects to establish  
7 Intra-market Transportation Credits assessments at  
8 an amount which is less than the amount of the  
9 Credits themselves. Since these costs are of great  
10 consequence, fairness requires that they be  
11 equally [sic] distributed, or the supply of milk for  
12 Class I use will be threatened in the Order -- Order  
13 5 and Order 7 marketing areas.

14 What? Equit -- equi -- "that they be equitably  
15 distributed. . ."

16 In support of their proposal, proponents offer  
17 substantial evidence that there are significant  
18 costs incurred by marketers of milk in the delivery  
19 of Class I milk use -- of milk for Class I use beyond  
20 a producer's nearest pool distributing plant.

21 Proponents have already testified regarding  
22 Exhibit 22, which provides the result of a computer  
23 model analyzing milk delivery patterns for a  
24 significant portion of the milk supply for the  
25 Southeast.

1       The problems faced by real-life marketers of  
2 milk is that milk can't always stop at the closest  
3 plant. Using the Exhibit 22 map as an example,  
4 milk moves from blue to yellow to red circles.

5               JUDGE DAVENPORT: Just as a point of  
6 clarification --

7               THE WITNESS: Yes, sir.

8               JUDGE DAVENPORT: -- the prior  
9 paragraph, the testimony itself, is 22 and the map  
10 is 23.

11       Excuse me. The -- it -- the testimony was 23  
12 and the map is 22.

13               THE WITNESS: Thank you, your Honor.

14       A. [reads] The proponents have already  
15 testified regarding Exhibit 23. . .

16       Yes, the testimony is 23, the map is 22.

17       -- using the Exhibit 22 map as an example,  
18 milk moves from blue to yellow to red circles.  
19 These costs of getting milk to where it has to go  
20 for Class I use are unfortunately not borne evenly.

21       As described in Exhibit 22, previously  
22 described by Mr. Darr, is the relative milk  
23 production and processing by state for the  
24 southeast. As can be seen from the exhibit, milk is  
25 not proportionately located with regard to Class I

1 demand. Even within the Southeast, which is milk  
2 deficit as a whole, there are states and sub-  
3 regions that have more milk than there is Class I  
4 processing demand. The movement of the milk  
5 from the areas of relative abundance, if that can  
6 be said of the Southeast at all, to the areas of  
7 greater deficit is the relief asked for under  
8 Proposal Number 2.

9 At the request of the Proponents, and already  
10 introduced at this hearing, the Market  
11 Administrators for the Appalachian and Southeast  
12 Orders computed hypothetical --

13 That should be "Intra."

14 JUDGE DAVENPORT: Intra.

15 A. [reads] -- Intra-market Transportation  
16 Credits for the months of April and October 2005,  
17 using the provisions as proposed by the  
18 proponents. These data were presented in Exhibits  
19 7, Page 1, and Exhibit 13B.

20 As described by the Market Administrator  
21 witnesses, using the monthly mileage cost  
22 computation process described earlier, Mileage  
23 Rates for the Intra-market movements of 0.42  
24 cents, 0.44 cents, 0.46 cents and 0.48 cents were  
25 applied to the additional miles milk moved beyond

1 each producers' closest plant, and adjusting for  
2 revenues generated from milk moving to higher-  
3 priced zones, yields Intra-market Transportation  
4 Credits costs in the average month of between  
5 \$725,000 and \$850,000, for Orders 5 and 7  
6 combined, depending on the cost of fuel, with a  
7 range of calculated Intra-market transportation  
8 credits of \$650,000 to \$940,000 depending on the  
9 season and the cost of fuel. Costs of this  
10 magnitude are hardly inconsequential.

11 Relating the general economic theory of  
12 whether or not to take on a business activity to  
13 these milk movements and their enormous cost  
14 leaves one to wonder why any dairy farmer would  
15 undertake delivery to a plant beyond their nearest  
16 plant, and we concede this would be a very good  
17 question. Federal Order Class I differentials do  
18 offer some economic incentive for moving milk  
19 generally north to south, but zone differences are  
20 typically insufficient at current haul costs to  
21 compensate producers for taking on this activity.

22 If these substantial costs are ignored in the  
23 regulated milk marketing system, then producers  
24 will question why they should pay for making sure  
25 milk is supplied to Class I, and will ultimately

1 decide that they are not going to do it any more.  
2 The supply of milk for Class I in the southeast will  
3 be threatened, and the need for any regulated  
4 process of pricing Class I milk will be negated.

5 Exhibit 25, Pages N1 and N2, shows the loss  
6 incurred by marketers of milk in four more-or-less  
7 typical milk movements within the marketing areas,  
8 and the loss incurred when milk must move against  
9 the price grain. We will not for -- for this purpose  
10 attempt to quantify any impact of blend price  
11 differences between Orders 5 & 7, although the  
12 examples do include a movement from the Order 5  
13 marketing area to the Order 7 marketing area.

14 The four example movements represent  
15 somewhat representative Intra-market milk  
16 deliveries. In each of the examples, the cost of  
17 moving milk from a milk production center to a  
18 Class I processing center exceeds the amount  
19 received from location adjustment differences plus  
20 the local producer-paid hauling, even for those  
21 movements which go with the price grain. As  
22 demonstrated in the exhibit, it is typical in the  
23 Southeast for producers to have a deduction for  
24 local hauling in the form of a route assembly  
25 charge plus mileage to the producer's nearest

1 plant, without regard to the plant at which the  
2 producer's milk is actually delivered.

3 JUDGE DAVENPORT: Excuse me. Was  
4 that price gain as opposed to price grain?

5 THE WITNESS: Where -- what did I say?

6 MR. STEVENS: I think you said "grain."

7 MR. TOSI: You said "grain."

8 THE WITNESS: It's price -- with -- which  
9 would -- "which go with the price grain."

10 JUDGE DAVENPORT: Grain.

11 THE WITNESS: That is the. . .

12 MR. SPEAKER: All right.

13 A. [reads] A problem of milk marketing in the  
14 Southeast, which is likely not very much a problem  
15 in other parts of the country, is pointed out by  
16 Page N2 of Exhibit 25. There is a milk production  
17 center located north of Lake Pontchartrain in  
18 Louisiana and Mississippi, and this area has the  
19 highest Class I differentials in the Southeast  
20 Order. This milk has no opportunity to move to  
21 higher-priced zones, and the milk is sometimes  
22 needed outside the eastern Louisiana milk-  
23 processing centers. When this milk moves out of  
24 its "home area," it incurs both hauling costs and  
25 location-adjustment losses.



1       As distance was -- distances between  
2       milksheds and processing centers have grown, the  
3       producer-location-adjustment structure has become  
4       less relevant in the moving of milk. In earlier  
5       times, when producers may have been located more  
6       closely to cities and hauling costs were less, the  
7       Order producer-location adjustments provided a  
8       greater portion of the hauling cost reimbursement  
9       than is currently the case.

10       Exhibit 25, Pages 01 and 02, show how, as  
11       milk must move further within the Order areas, the  
12       producer location adjustment fades in relevance to  
13       the cost of hauling. In the Exhibit example, milk is  
14       moved from Asheville, North Carolina to  
15       Spartanburg, South Carolina and also to  
16       Charleston, South Carolina. The Class I  
17       differentials in Asheville, Spartanburg and  
18       Charleston are \$2.95, \$3.10 and \$3.30,  
19       respectively.

20       The location adjustment difference between  
21       Asheville and Spartanburg pays just less than half  
22       of the cost of hauling. However, when the  
23       movement is stretched to Asheville to Charleston,  
24       the location adjustment difference pays only  
25       slightly more than one-fourth of the cost of

1 hauling.

2 The same situation is experienced in Order 7,  
3 as can be seen from Page 02 of Exhibit 25. In this  
4 example, milk is moved from Springfield, Missouri  
5 to Little Rock, Arkansas; to Kosciusko, Miss --  
6 Mississippi; and to Cowarts, Alabama. The Class I  
7 differentials in Springfield, Little Rock, Kosciusko  
8 and Cowarts are \$2.20, \$2.80, \$3.10 and \$3.45,  
9 respectively. The location adjustment difference  
10 between Springfield and Little Rock pays slightly  
11 more than half of the cost of hauling; however, as  
12 the milk moves farther, the percentage of haul cost  
13 which the location adjustment pays diminishes to  
14 slightly less than 88 -- excuse me, 38 percent for  
15 the movement to Kosciusko, and to only slightly  
16 more than 35 percent for the movement to Cowarts.

17 As we can readily see, the Class I and  
18 producer location adjustment surface is insufficient  
19 to cover a reasonable portion of the cost of moving  
20 milk within the marketing areas. The proponents'  
21 proposal for Intra-market Transportation Credits in  
22 the Appalachian and Southeast Orders supplement  
23 the current insufficient incentives to move milk  
24 present in the existing location adjustment  
25 process, without the need to tackle the national

1 issue of Class I prices, differentials, and location  
2 adjustment structure.

3 The proposals described here fit the need -- fit  
4 the need as suggested by the general economic  
5 theory previously discussed. In this case, the  
6 additional business activity is the delivery of milk  
7 for Class I use beyond a producer's most desirable --  
8 desirable plant, which is presumed to be his or her  
9 nearest plant. The parties taking on these  
10 additional costs, that is, the variable costs of  
11 supplying milk for Class I use, and taking on the  
12 additional business activity need to be reasonably  
13 assured that they will be reimbursed for the  
14 additional costs at a level which will continue to  
15 allow them to undertake this extra business  
16 activity.

17 The marketers of milk will not be guaranteed  
18 that their additional costs will be completely  
19 covered, since hauling costs are reimbursed at less  
20 than full cost and costs of transport will apply only  
21 to the Class I portion of the load. The application  
22 of traditional economic theory to the additional  
23 business analysis, while not quite perfect in its  
24 application, will aid in moving milk represented in  
25 the additional business activity, and bring order

1 and equity to the allocation of these costs.

2 The question may be raised, does this new  
3 process of cost allocation through the Federal  
4 Order pooling mechanism reduce economic  
5 incentives for production of milk and processing of  
6 milk to relocate as near to each other as practical?  
7 The answer is "no," the incentive for producers to  
8 locate close to plants, and vice versa, will still  
9 exist. First, producers will have their -- will  
10 continue to have their milk mail -- their milk  
11 mailbox price reduced by the value of hauling to  
12 their nearest plant.

13 The provisions are -- as proposed presume the  
14 continuation of this system by reimbursement of  
15 costs only on milk which moves beyond the  
16 distance to the producer's nearest pool distributing  
17 plant. Further, if a producer is determined to be  
18 the same distance from two plants, as the  
19 producer's nearest plant, the plant to be used as  
20 the producer's nearest plant is the plant -- is to be  
21 the plant with the highest Class I price. This  
22 process mirrors the economic decision-making of a  
23 producer in that, if a producer is indifferent as to  
24 the plant to which he or she desires to deliver their  
25 milk because the distances to the plants are the

1 same, then the producer will seek to deliver milk to  
2 the higher priced plant.

3 Under the proposed provisions, plants will  
4 continue to seek nearby supplies, even when  
5 offered an Intra-market Transportation Credit,  
6 since the full cost of acquisition of the milk is less  
7 than fully covered for the distance -- distant  
8 producers.

9 [reads] Producers -- producers should not be  
10 rewarded for being relatively distant from their  
11 nearest pool distributing plant, and the use of the  
12 distance to their nearest pool distributing plant  
13 recognizes that. However, a producer, as an  
14 individual entity, should not be disadvantaged  
15 versus other producers on the Order, because that  
16 producer's milk must move to a more distant plant  
17 to a supply the Order's Class I needs.

18 Proponents have no interest in seeing a  
19 regulatory system devised and implemented that  
20 will encourage milk to move in uneconomic ways.  
21 To that end, proponents have built certain  
22 safeguards into the pos -- proposed Order language  
23 to forestall such a possibility. These are:

24 One: Only mileages for actual milk movements  
25 to pool distributing plants beyond the distance to

1 the producer's nearest pool distributing plant will  
2 be eligible for an Intra-market Transportation  
3 Credit.

4 Two: Movements of milk to pool supply plants  
5 and to nonpool plants, regardless of use  
6 classification at the receiving plant, will not be  
7 eligible for an Intra-market Transportation Credit.

8 Three: Reimbursement is for Class I milk  
9 movements only, using the monthly average Class I  
10 utilization percentage of all pool distributing plants  
11 to compute the presumed volume of Class I milk  
12 delivered by each producer to pool distributing  
13 plants.

14 Four: The calculation of the Intra-market  
15 Transportation Credit takes into account any  
16 revenue generated from moving milk to a pool  
17 distributing plant located in a higher-priced zone  
18 than the zone price applicable to the producer's  
19 nearest pool distributing plant. If the amount of  
20 revenue generated by movement to a higher-priced  
21 zone exceeds the additional hauling cost, no Intra-  
22 market Transportation Credit is available.

23 And five: The use of a monthly Mileage Rate  
24 which is based on current fuel costs will prevent  
25 any over-reimbursement of costs if fuel prices

1 decline.

2       These extra costs of moving milk produced  
3 within the marketing areas to pool distributing  
4 plants exist now, but currently these costs are  
5 disproportionately borne by cooperative members --  
6 marketers of milk and their cooperative member  
7 producers. All producers in the Order benefit from  
8 the activity of supplying milk to -- for Class I use  
9 through an enhanced blend price, but all  
10 producers do not share equitably in the costs of  
11 supplying the milk to Class I.

12       One of the purchases -- purposes of  
13 marketwide pooling in a Federal Order marketing  
14 area is to make producers indifferent as to the use  
15 classification at the plant to which their milk is  
16 delivered. This indifference can only continue if a  
17 producer's net revenue in supplying milk to a plant  
18 is likewise not dependent on the use of milk at a  
19 plant, or when delivery to a distant plant results in  
20 the same net revenue to the producer as a nearby  
21 plant.

22       In the Southeast, as in many Federal Order  
23 marketing areas, pool and nonpool manufacturing  
24 plants exist nearby the larger pockets of milk  
25 production. This can see -- be seen graphically in

1 the milk density and plant location maps prepared  
2 by the Market Administrators and previously  
3 received Exhibits 10, Page 3, and 13B.

4 If a producer is no longer indifferent as to the  
5 delivery point of his or her milk because revenue  
6 losses of supplying milk to Class I plants exceeds  
7 the reimbursed value to the producer through pool-  
8 location adjustments, then the producer will seek  
9 to have their milk delivered to the nearest plant,  
10 which may be a manufacturing facility. Competition  
11 to -- between producers to supply closest plants  
12 will likely ensue, creating pressure on over-order  
13 prices.

14 Unfortunately, as described above, milk  
15 prod -- production locales, and Class I processing  
16 locales do not often coincide geographically.  
17 Further, plant processing volumes do not  
18 necessarily match available local supplies. More  
19 simply put, there are some producers whose milk  
20 must move to a Class I plant which is not their  
21 closest plant due to imperfections in the location  
22 of milk supply versus Class I processing.

23 These imperfections create costs in moving  
24 milk. When these extra costs of supp -- when  
25 these extra costs of supplying milk for Class I use



1 are borne disproportionately by some producers,  
2 the value of marketwide pooling is diminished and  
3 disorderly marketing results. A hallmark of  
4 producer -- of the -- a hallmark of the Federal Milk  
5 Marketing Order program is equitable returns for  
6 producers with regard -- without regard to the use  
7 classification of milk they deliver, and when that  
8 equity is threatened, marketing becomes  
9 disorderly, since returns to producers will vary  
10 based on the producer locale and the cost of  
11 supplying milk for Class I use.

12 Proposal Number 2 provides that producer milk  
13 produced within either the Appalachian or  
14 Southeast marketing areas and delivered to a pool  
15 distributing plant on either Order which moves a  
16 distance greater than the distance of the producer  
17 to the producer's nearest pool distributing plant  
18 will be eligible to receive an Intra-market  
19 Transportation Credit.

20 The Credit is available to any handler, both  
21 cooperative and pool-distributing-plant handlers  
22 alike. Since there is value received from the Order  
23 provisions in moving milk from a lower-priced zone  
24 to a higher-priced zone, these zone differences, if  
25 any, reduce the amount of the Intra-market

1     Transportation Credit.

2         The process for computation of the Intra-  
3     market Transportation Credit is exemplified in Exhibit  
4     25, Page B -- excuse me, Page P. In the example  
5     described in the exhibit, a producer is located  
6     within the marketing area of Order 5 or Order 7,  
7     and that producer's nearest pool distributing plant  
8     is 25 miles away, and that nearest pool distributing  
9     plant is located in the \$2.80 differential zone of  
10    the Order.

11         During the month, the producer's milk is -- was  
12    actually delivered to pool -- to two pool  
13    distributing plants, one in the \$3.10 differential  
14    zone of the Order and the -- and the producer is  
15    located 125 miles from this plant, and the other  
16    plant is in the \$2.60 differential zone of the Order,  
17    and the producer is located 75 miles from this  
18    plant. The producer delivered 100,000 pounds to  
19    the two pool distributing plants, split equally  
20    between the two plants. The average Class I use  
21    at all pool distributing plants on the Order during  
22    the month was 90 percent, thus 45,000 pounds of  
23    the -- of the milk delivered by the producer to each  
24    pool distributing plant is computed to be Class I.  
25    In the example, neither plant had shipments out of

1 the plant which would have offset any of the  
2 receipts from the producer.

3 To compute the Intra-market Transportation  
4 Credit for the delivery to the plant in the \$3.10  
5 differential zone the Market Administrator would do  
6 the following:

7 One: Determine the extra milk -- the extra  
8 miles the milk moves beyond the producer's  
9 nearest pool distributing plant. In this case, the  
10 extra miles would be 100 miles, that is 125 miles  
11 moved to the plant of actual receipt, less the 25  
12 miles the producer is from his or her nearest pool  
13 distributing plant.

14 Number 2: Multiply the extra mileage -- extra  
15 miles by the mileage rate applicable for the month,  
16 to get the gross mileage rate per hundredweight.  
17 In this example, 100 miles times four -- 0.44 cents  
18 per hundredweight per mile equals 44 cents per  
19 hundredweight.

20 Determine -- Number 3: Determine the -- if the  
21 movement netted any increase in location  
22 adjustment. In the example, the producer's nearest  
23 pool distributing plant is in the \$2.80 differential  
24 zone and the delivery was to the \$3.10 delivery  
25 [sic] zone, so that in this case there is an increase

1 in zone value of 30 cents per hundredweight from  
2 the movement of the milk.

3 Number 4: If the movement of milk resulted in  
4 an increase in zone value, net the zone increase  
5 value against the gross credit per hundredweight.  
6 In this case the gross credit of 44 cents per  
7 hundredweight is reduced by the zone increase  
8 value of 30 cents per hundredweight, leaving a net  
9 credit of 14 cents per hundredweight.

10 Number five: The net credit per hundredweight  
11 is multiplied by the number of hundredweights of  
12 Class I milk to determine the Intra-market  
13 Transportation Credit. In the Exhibit example, 14  
14 cents per hundredweight is multiplied by 450  
15 hundredweights of Class I milk to generate an  
16 Intra-market Transportation Credit of \$63.00.

17 To compute the Intra-market Transportation  
18 Credit for the delivery to the plant in the \$2.60  
19 differential zone the Market Administrator would do  
20 the following:

21 One: Determine the extra miles the milk  
22 moved beyond the producer's nearest pool  
23 distributing plant. In this case, the extra miles  
24 would be 50 miles, that is 75 miles moved to the  
25 plant of actual receipt, less the 25 miles the

1 producer is from his or her nearest pool  
2 distributing plant.

3 Number two: Multiply the extra miles by the  
4 mileage rate applicable for the month, to get the  
5 gross mileage rate per hundredweight. In this  
6 example, 50 miles times 0.44 cents per  
7 hundredweight per mile equals 22 cents per  
8 hundredweight.

9 Number three: Determine if the movement  
10 netted any increase in location adjustment. In the  
11 example, the producer's nearest pool distributing  
12 plant is in the \$2.80 differential zone and the  
13 delivery was to the \$2.60 differential zone, so that  
14 in this case, there is no increase in zone value as  
15 a result of the movement.

16 Number four: If the movement of milk resulted  
17 in an increase in zone value, net the zone val --  
18 the zone increase value against the gross credit  
19 per hundredweight. In this case, the gross credit  
20 of 22 cents per hundredweight is not reduced.

21 The net credit per hundredweight is  
22 multiplied -- Number 5: The net credit per  
23 hundredweight is multiplied by the number of  
24 hundredweights of Class I milk to -- to determine  
25 the Intra-market Transportation Credit. In the

1 Exhibit example, 22 cents per hundredweight is  
2 multiplied by 450 hundredweights of Class I milk to  
3 generate an Intra-market Transportation Credit of  
4 \$99.00.

5 MR. BESHORE: Your Honor, I would like  
6 to interrupt Mr. Sims at that point. This would be a  
7 good breaking point in his statement. And  
8 everyone is bored with this; we're -- we've gotten  
9 through a good hour [phonetic].

10 I propose that we break and adjourn at this  
11 time.

12 JUDGE DAVENPORT: If I might ask those  
13 who are present here what we might expect  
14 tomorrow and what your pleasure is with respect to  
15 starting time.

16 MR. BESHORE: If I might, we have Mr.  
17 Sims. The proponents have six dairy farmers  
18 who -- dairy farmers who will have testimony  
19 tomorrow, but not very lengthy, but they each  
20 have -- have statements.

21 MR. ENGLISH: Your Honor, I would  
22 propose starting at 9 a.m. probably be glad of the  
23 extra half hour to -- there's a lot to digest, and we  
24 have some other testimony put together.

25 I've done a quick survey; if I'm wrong, people

1 are welcome to jump in. But in addition to Mr.  
2 Sims finishing up here and the six dairy farmers --  
3 and I'll get back to Mr. Sims in a moment -- but,  
4 Mr. Kinser from -- testifying for Dean Foods, Mr.  
5 Enslin intends to testify for Dairy Fresh.

6 There are two dairy farmers here who ship to  
7 Dean Foods who want to testify tomorrow. Then, I  
8 understand, that there is a Mr. Pittman who might  
9 be here for SMI. Mr. Schad will testify at some  
10 point, in favor some things and maybe in opposition  
11 to some things.

12 And then coming back to Mr. Sims, I would  
13 expect that he might show a rebuttal on 4 and 5.

14 JUDGE DAVENPORT: We also have --  
15 let's see, in -- in addition to that --

16 MR. ENGLISH: And then, the market  
17 distributors.

18 JUDGE DAVENPORT: The market  
19 distributor. Mr. Nierman --

20 MR. ENGLISH: Right.

21 JUDGE DAVENPORT: -- who is coming  
22 back with those additional exhibits.

23 MR. ENGLISH: Right. That should be  
24 relatively short, but still. . . And, of course, I had  
25 anticipated that the four of us would at least -- so I

1 would expect to get done tomorrow anyway.

2 Certainly the dairy farmers are going to get done,  
3 if at all possible.

4 But Mr. Kinser and Mr. Innesland, I think, are  
5 flexible; and I hope Mr. Pittman and Mr. Schad are.

6 MR. SCHAD: Yeah.

7 MR. ENGLISH: That's what I understand  
8 to be the witnesses.

9 JUDGE DAVENPORT: Very well. Let's --

10 MR. ENGLISH: And I would ask that we  
11 start at 9 a.m.

12 JUDGE DAVENPORT: Is there any strong  
13 opposition to deferring until 9:00 tomorrow?

14 Mr. Tosi?

15 MR. TOSI: Just -- just as a concern, your  
16 Honor, we -- can we go off the record?

17 JUDGE DAVENPORT: Sure. We're off  
18 the record.

19 THE REPORTER: Okay.

20 [WHEREUPON, the United States Department of  
21 Agriculture Rulemaking Hearing is recessed at  
22 5:37 p.m., pursuant to reconvene at 9:00 a.m.  
23 on January 1, 2006.] ]

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CERTIFICATE OF REPORTER

STATE OF KENTUCKY AT LARGE:

I, DANYIEL CARPENTER, Notary Public for the State of Kentucky at Large, do hereby certify that the foregoing was reported by stenographic and mechanical means, which matter was held on the date, and at the time and place set out in the caption hereof, and that the foregoing constitutes a true and accurate transcript of same.

I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

GIVEN under my hand and Notarial seal this

day of

2006.

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My Commission Expires: Notary Public

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JANUARY 10, 2008

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