UNITED STATES DEPARTMENT OF AGRICULTURE

EMERGENCY PUBLIC RULEMAKING HEARING

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EMERGENCY PUBLIC RULEMAKING HEARING:

The Hearing, taken in the above-styled matter at the Kentucky Convention Center, 221 South Fourth Street, Louisville, Kentucky, on the 12th day of January, 2006, beginning at 8:30 a.m.

A P P E A R A N C E S

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CLIFFORD CARMAN
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CONTINUED HEARING

IN RE:

UNITED STATES DEPARTMENT OF AGRICULTURE

EMERGENCY PUBLIC RULEMAKING HEARING

JANUARY 12, 2006

JUDGE DAVENPORT: We are back in session. Mr. Sims, you're still under oath.

MR. BESHORE: Okay. Thank you, your Honor.

JEFFREY SIMS, having been previously duly sworn, is examined and testifies as follows:

EXAMINATION

BY MR. BESHORE:

Q. Mr. Sims, I asked a few questions to Mr. DuPrey earlier in the hearing and asked him to perform some -- probably unfairly asked him to perform some calculations on the -- on the stand on the spot. What I'd like to ask you to do is to provide us with some precise numbers along the -- the lines that I was inquiring of Mr. DuPrey so that for the months of October 2005 and April 2005 where we have some very good data we can -- we can have a capsule snapshot of the supply/demand situation in the southeastern markets. So do you have Exhibits, what, 13C and 12 -- what page --

Page 2? Okay.

A. I do.

Q. Okay. And you know what I'm -- do you recall the examination of Mr. DuPrey?

A. I do.

Q. Okay. Can you take October first and start with the comparison of the Class I sales in the market with the in-area milk supply and go from there?

A. Yes. According to the statistics provided to this record by the market administrative -- and this particularly for the southeast Order Number 7 -- from Exhibit 13C, we see that the in-area -- the production pooled on Order 7 from producers located inside the marketing area for the month of October was approximately 274 million pounds, which relates to the total milk pooled on the order of approximately 572 to 573 million and relates to the Class I producer milk pooled on the order during that month of approximately 391 million. The conclusion drawn there certainly is that -- that a substantial amount of milk is pooled from outside the marketing area and that the milk produced within inside -- inside the marketing area is grossly insufficient to supply the Class I needs pooled on the market to the order of, again, 391 million pounds of Class I milk when there was only 274 million pounds produced inside the marketing area and pooled on the order.

In terms of the supply/demand relationship of those, if we look at the 391 million pounds of Class I producer milk pooled on the Order -- Order 7 in October, that represents in-pool distributing plants, I believe, from the -- also from that Exhibit -- let me find it -- I believe Exhibit 13A indicates that approximately 86 1/2 percent Class I was the market-wide average Class I used in pool-distributing plants.

So if we factor up the 391 million pounds of Class I producer milk by a factor divided by 0.865, that then gives us an approximation -- certainly a very near approximation of the total milk delivered or received by -- delivered to or received by pooled-distributing plants. So 391 million pounds divided by 0.87 is, I believe, approximately 449 million. I need a calculator. I've got one in my brief case. The -- if you factor up 300 -- roughly 391 million pounds of Class I milk by the percent of Class I utilization in pool-distributing plants, we can approximate the -- the amount of milk delivered to -- to pool-distributing plants. There certainly could be a little -- some Class I milk in the -- in the pool -- or in the producer milk, which was not received or processed by pooled-distributing plants. But I suspect it would be a relatively small portion. So we can rece -- we can calculate a proxy delivery amount to pooled-distributing plants in which case -- in this case it's roughly 450 million pounds received by or delivered to pool-distributing plants.

If we then use the reserve factor, which is at least intimated by Proposal 4, some 30 percent market reserve, we take the 452 million pounds of pool-distributing plant receipts times 1.3, that yields a necessary producer milk volume of approximately 587 million, 588 million pounds of producer milk necessary to carry a 30 percent reserve on simply pooled-distributing plant deliveries, which is an amount greater than the actual producer milk pooled on the order in that month, which was approximately 572, which suggest that in the month of October the amount of milk pooled over and above pooled-distributing plant receipts was less than the reserve which the proponents of Proposal 4 would suggest.

Q. Is -- is 30 percent reserve a figure that, aside from Proposal 4, is used from time to time in the industry?

A. I have heard it used in context before.

Q. Okay. Now, how does -- so in October, the data indicates the market is not overly loaded with excess reserve supplies?

A. That's what it would suggest.

Q. Okay. How about April '05?

A. It's following the -- the same process. We note -- I don't know coincidentally or not -- that the Class I milk in April -- the Class I producer milk in April 2005 in Federal Order 7 was virtually identical within just a few 100,000 pounds of the Class I milk in October. So, again, we can take the 391 million pounds -- and my recollection is that the Class I utilization of pooled-distributing plants was 87.7 percent that month -- excuse me -- which means we would have needed -- or that the proxy calculation of deliveries of -- to pool-distributing plants would have been approximately 445, 446 million pounds. Again, multiplying that by 1.3, we need a -- we have a need in the order, including reserve, of approximately 580 million pounds, which is less than the amount pooled.

However, if you'll note again back to Exhibit 13C, there was a substantial difference in the amount of milk produced within the marketing area in October and April, the seasonality of milk production, on the order of, again, 300 -- roughly 353 million pounds produced inside the marketing area and pooled on Order 7 in October -- excuse me -- in April and 274 million pounds in -- in October representing a swing of almost 29 percent between April and October which represents, in terms of the other supply, a sub -- accounts for a substantial portion of that difference over and above the reserve. Simply is -- we -- we were adequately supplied, including a reserve, in Order 7 in October, and producer seasonality accounted for a substantial portion, if not all, of the -- of the additional amount pooled in April.

Q. Very good. Was there enough milk in area even in April at the peak of the flush to supply the -- just the bare flat Class I needs?

A. No. The -- the amount of milk produced within the marketing area in April 2005 was approximately 353 million pounds versus 391 million pounds of Class I milk. So there was insufficient milk produced within the marketing area just even to cover Class I.

Q. Setting aside --

A. No -- no -- you know, no other use in distributing plants and no other reserve whatsoever.

Q. Okay. Now, there was some -- in your -- a couple of questions were addressed to you by Mr. Schad on cross examination in which there was some terminology used that I want to make sure is clearly defined in the record. You used the word "milk shed." What do you mean when you use that word?

A. When I use the term "milk shed," I -- I mean that to represent the geographic area which represent the supply area for a processing destination or set of processing destinations. Specifically the testimony -- or what I intended at that time was to represent those states which -- for which milk is drawn for -- for delivery to the southeast, Orders 5 and 7 particularly.

Q. So the milk shed for the Class I -- for Class I supplies for the southeast order is not coincident with the geographic confines of the order?

A. It's substantially larger.

Q. All right. And it extends to the regions depicted on various maps from which additional milk supplies are drawn to the southeast?

A. That is correct.

Q. Okay. You made the comment, if my notes are roughly correct, in response to Mr. Schad that the greater the distance of supply the greater the reserve needed. Do you recall that?

A. I do.

Q. Okay. Can you tell us what -- what -- what you meant by that?

A. Yes. As -- as the distance a supply is from its processing destination increases, the reserve requirement on that distant supply increases simply by sheer practicality. The longer milk moves, the more reserve you need in that area you're drawing from. It's a matter of practicality that you just -- if it's -- if milk is a thousand miles away, it takes at the very best 20 hours to move it to its location and with driver rest period et cetera, one load is leaving before the -- before the previous load is delivered. So you -- the further that supply is away, the more -- the greater the reserve requirement in terms of a relationship to the amount of milk moving. Consequently, that you have -- you see -- and the logical and logistical process -- the rational process of -- of delivering milk is to use the closest milk first and then use the furthest milk last. Therefore, you're going to see furthest milk from the processing centers delivered less because it's drawn on less. If you want to minimize miles, use the close milk first, the far milk last.

Q. Okay. And those supply and logistical dynamics would be represented, then, in some of the data which shows a lower than market percentage of deliveries for supplies from some out-of-area states?

A. The data do show that and it's a -- those data representing a rational allocation of supplies.

Q. By the way, did you note that the -- one of the exhibits that was presented yesterday, Supplemental Exhibit for Mr. DuPrey, I believe, which showed the average mile per -- average distance that supplemental was -- has been delivered in to -- in to the southeast from out of area -- on the inter-mark -- the present inter-market credits. Do you recall that exhibit?

A. Yes, I do.

Q. Okay. Did you happen to observe whether those distances have -- how they have increased or decreased in the recent period?

A. My reading of the exhibit shows a -- as to which we testified -- a general pattern of increasing miles up through 2004. However, the miles in 2005 show somewhat shorter distances meaning that milk moved -- closer milk moved in than -- than in a previous year. So --

Q. Even though the volumes in 2005 were up over 2004; right?

A. Yes. We were able to bring them from shorter distances.

Q. So you were doing a better job?

A. Well, I --

Q. Getting more milk --

A. The place -- the origin places were a little bit closer. How good the job is depends on the year and the month, but --

Q. Okay.

A. -- yes, generally they were a little shorter in 2005.

Q. Okay. Now, moving on to another area. The Exhibit 22 map of blue dots and red dots and yellow dots, yes, that's been discussed, you know, at some -- some length already in the hearing, do you recall Mr. English asking you a few questions about the Dean Foods plants, the one at Mount Crawford and the one in Louisville that were either blue or yellow?

A. I -- I do.

Q. And the implication was raised that, you know, a blue plant is going to, under Proposal 2, Proposal 1 as well, I guess, and the current system -- is going to be paying in -- it's going to be required to make payments in to the transportation credit balancing fund and inter-market fund or an intra-market fund; correct?

A. Yes.

Q. Okay. All plants would on an equal basis per hundred weight of Class I?

A. By order and equal basis, yes.

Q. By order. Okay. But the deliveries to the plants may not all be entitled to or may not, in some cases -- for instance the plant at Mount Crawford which has one of the DFA dairy farmers testified has an abundant supply locally, it's not going to have to draw milk there from distance sources; correct?

A. It may occasionally receive milk from distance sources if milk is dominoed out of that area. But most likely it -- it's -- the milk it receives from inside the marketing area may very well be closest to that plant and, therefore, would theoretically not receive a -- or not be eligible to receive an Intra-market Transportation Credit.

Q. Okay. Are there any red dots, to your knowledge -- well, assume with me that some of the numerous red dots on the map represent Dean Foods plants in the southeast. Is that a -- we can match them up with the handler list that the market administrator has provided. But that's a reasonable assumption; is it not?

A. I believe so.

Q. Okay. Now, those plants, then, would be on the opposite side of the pay in or draw out, you know, equation in the transportation credit balancing funds; would they not?

A. Yes. The implication of Exhibit 22 is that -- that plants -- particularly the plants shown in red must draw milk from -- from areas which are actually closer to some other plant and, thereby, would be generally eligible for the milk to receive an Intra-market Transportation Credit as proposed.

Q. Okay. And I don't mean to suggest that all the red plants are Dean's plants. There's certainly National Dairy Holdings plants and other single-operator plants involved in that?

A. I would think so, yes.

Q. Okay. The question has been -- a suggestion has been made by questioning from a number of persons and by testimony from some the witnesses in this hearing that the issues of getting milk to plants rather than being addressed with transportation credit funds in intra-market or inter-market in the manner of Proposals 1 and 2 and the current inter-market fund, rather than addressing the issues that way, they should be addressed -- the issues should be addressed with possible changes in location differentials. You're familiar with that testimony?

A. I -- yes, I heard that testimony.

Q. Did the proponents consider that approach to addressing these marketing disorder problems?

A. They did.

Q. And what was your conclusion?

A. The conclusion was that the issue of location adjustments in the southeast is -- is not a -- a single plant or maybe a couple of plant issues that could be fixed by simply tweaking the location adjustment at -- at a very small area.

Rather the issue was a market-wide issue where all plant location prices need to be reviewed. And then when you take that step, you realize that that brings into play areas outside the southeast where those plants border other plants or -- and other orders. So those issues -- the relationship of those plants' prices become an issue. Then you further extend that to the -- the area from which the southeast draws it supply. Well, perhaps half the United States, the source price of that milk becomes an issue for the southeast. And I would suspect the destination price becomes an issue for those suppliers. So what you have is a national issue with regard to Class I differentials and Class I location values. And it's not one that the southeast can solve on its own. It's not a -- not a targeted southeast only problem. This is an issue that needs to be addressed in a national context with national input and a national hearing.

Q. And since a national hearing would be required to potentially address that, you wanted to attempt to resolve this problem regionally and, therefore, have come forth with the suggestions and proposals -- Requests and Proposal 1, 2 and 3.?

A. Yes. The process we -- that was developed left the basic Class I differential structure in the southeast alone, provided what amounts to an overlaying process which -- which generates some new Class I money and generates a -- a -- a process for helping to move milk without the need for the completely revamping of the Class I differential structure with all the -- the -- the external issues that that creates.

Q. Okay. Now, at least one of the DFA dairy farmers was asked the question: If -- if these sales to -- some sales to some plants are so unprofitable, why do you make them? Why don't you just stop supplying those sales or stop supplying that plant and quit belly-aching and, you know, come and asking for changes in the regulations? And you may have been asked something along the same lines: Why are the -- why are the sales made? What's -- have you given some thought to that, Mr. Sims?

A. I have.

Q. And do you have -- do you have some -- some comments to make on it?

A. I do. There are, I believe, several rational and business rationale reasons why on any day or in any period a delivery might be made to a plant which is a high-cost place to -- to service. First off, deliveries to plants are a -- a long-term proposition. Sales to customers aren't a do-it-today, don't-do-it-tomorrow proposition. You really just, in practical terms, can't tell your customer that we would like to serve you when it's good for us, you're on your own when it's not. That kind of customer relationship doesn't work. They'll seek someone to serve it all the time.

Second, I would say that the issue of the delivery cost to a particular plant and the issue of pooling kind of run hand-in-hand that we -- the market-wide pool allows the inclusion of lower valued sales to be shared among all producers. Left alone, nobody wants to serve a -- or to deliver to a Class IV operation unless they can pool that -- that value with all the Class I. Consequently, the same is true of delivery of milk to Class I. When everyone shares in Class I, it's -- it's appropriate for everyone to share in the cost of delivery. It's an extension of the pooling concept. We have winners and losers, good plants, bad plants, and they're all served and they're all supplied.

Next, I would say that, you know, we could and the suppliers of milk can, at any one point in time, list -- you know, we -- we serve many plants with much milk; maybe 1,000 loads a week. And you can make a hierarchy of -- of the -- which -- which -- what's the most profitable plant to deliver to and what's the least profitable plant too and you can -- you can rate those one to 1,000. And but that list this week isn't going to be the same list next week. That hierarchy changes over time based on the relative supply and demand and you just -- you know, one -- one -- what's good one day is not necessarily good another.

Also, you have a number of dynamics which impact what's good and what's bad; the relative relationship of transport cost to differentials; the relative relationship of a local blend price to the distance blend price where supplement milk comes from. There are any number of factors that shift monthly which make one place harder or easier to deliver to. With extension, I guess we could say if you had that hierarchy of plants, which is, you know, here's a good one, here's a -- the next good one, the next best one, the next best one all the way down to the worst one --

Q. Or even delivers -- individual --

A. Deliveries. I guess we would ask the question: Who do [sic] we supposed to cut out? You know, how do you make the decision of which plants to tell we're not going to do that anymore? That's not a decision that is going to be easy to make and it's probably going to be very difficult to make. Lastly, I would point out that in any one day while a delivery to a -- to a place may seem like a -- a -- not a money maker today, it may be better than the next best alternative, that the -- the marginal cost or the marginal revenue generated by that sale is better than the net revenue of the next best place. So while though I don't like putting milk in here, it's better than the next place. So you continue to serve a place that's -- that -- or, you know, in short-term, you serve a place that you'd rather not simply because the next best place is even worse.

Q. Okay. Now, I think you made this point, but if I can just tie it -- tie it together perhaps. . .

MR. BESHORE: . . .and then I'll -- I'll be done, your Honor.

BY MR. BESHORE:

Q. You've indicated that the act originally authorized the pooling of classes of use. I mean, that's the basic concept of a market-wide pool --

A. Yes.

Q. -- Federal Order. And then in 1985, congress authorized additional provisions to be in the -- in Federal Orders which, in essences, authorized the pooling of transportation costs related to moving milk to locations for market-wide benefit, either to higher value uses or to lower value uses. You're aware of that?

A. I am.

Q. Okay. And is it your testimony, then, that these proposals for limited transportation credits -- inter-market, intra-market -- essentially are just an implementation of that congressional authorization to pool, on a limited basis, certain transportation costs?

A. They are exactly that and that's exactly the way they operate. They operate to offer -- incur funds and a mechanism to move milk for -- specifically with regard to both proposals Class I.

Q. And just as in -- you know, just in class pooling -- in basic pooling of class utilizations, if -- you know, if that Class IV sale is not going to be pooled, nobody's going to want to make it. And when you're looking at a variety of transportation costs that are unequally distributed across the market, that most expensive one, unless there's going to be some relief from the market at some point, you know, nobody's going to want to make it?

A. Agreed.

MR. BESHORE: Thank you.

JUDGE DAVENPORT: Questions?

MR. TOSI: Yeah, I do.

JUDGE DAVENPORT: Mr. Tosi.

EXAMINATION

BY MR. TOSI:

Q. Jeff, how much above or below the blend the price do your member organizations or producers receive generally?

A. I -- the -- the -- the price varies by location and the amount which a cooperative pays is their own business, it's not the business of the agency. So I simply cannot quote, for lack of information, the amount which dairy farmers receive.

Q. Well, you know -- okay. Finished?

A. Yes.

Q. Okay. If -- if -- if I -- I wouldn't ask you that if I didn't think the record needed that so that we can go home and make a decision. Okay?

A. I understand.

Q. Okay. But I've heard from some of your other people that are speaking on behalf of the same proposals that you're up here for saying that they're receiving something less. And I understand it all varies and all this, that and the other. I need to get something for the record that helps us with that.

A. I can, perhaps, provide maybe a month of some sort of comparison. The -- I think in November, which is the last pool we computed under Southern Marketing Agency, the comparable start-out price for produce -- for -- the start-out weighted average pool value -- I don't know if any producer gets this or not, obviously -- was, I believe $.60 less than the Order 5 and Order 7 price. But that is -- then there are volume and quality incentives which producers can receive over that. On average, that's probably last month in the order of 20-some-odd cents across the area. So at least at that spot, there may have been $.40 less than the order. But, theoretically, that is a -- is a -- at best -- the best I can give you. But at every individual point, that may not be true. The location adjustments out of that vary versus the order. So, as you heard, I think yesterday, some are very close, some may be a little bit different.

Q. When -- when you have to go outside the order to get your milk, who receives the money for that milk?

A. I beg your pardon?

Q. Who do you pay to get that milk?

A. Who do we pay to get that milk?

Q. Right. Just like when Dean comes out and buys milk from you, Dean is paying --

A. Oh, okay. The --

Q. You know, when -- when -- when SMA goes out --

A. The supplier of the supplemental milk would re -- you know, they're -- they're -- if you crystalize it into an extension of the -- what you just where the co-op is a supplier to Dean who is the customer, in this case if you'll follow that extension, the cooperative is the customer and the supplemental supplier is the -- or the deliverer of the supplemental milk or the purveyor of the supplemental milk is the supplier and the cooperative would pay that supplier. It's a -- it's a -- it's a -- it's a purchase of milk and -- and the cooperative then pays the supplier.

Q. And then when you bring that milk in and you receive a transportation credit, what happens to that transportation money? Who is receiving that money? Would it be SMA and its member organizations?

A. Generally, yes.

Q. Okay. And are they returning that money -- excuse me -- those funds to their members?

A. That -- the transportation credit -- any receipts of a transportation credit -- the receipts from the transportation balancing fund are a direct revenue source into the SMA pool and are distributed pro rata back to all the SMA members, which are the five-member co-ops. So it becomes a part of the -- of the general revenue stream to the -- to the agency. And then each member shares back pro rata.

Q. When -- when you're supplying plants at a loss -- I appreciated your redirect and comments to -- on redirect from Mr. Beshore and you expressed the need to keep -- to keep your customers.

A. Yes.

Q. That's a very important reason to you-all.

But if over the long-term you continue to lose money -- you can't do it at least at cost -- what rational basis is there to continue holding on to a customer when if you continue to operate in that way the customer's going to lose you as an entity that's going to be able to supply them with milk?

A. In the long run -- if you ever get to the long run in the milk business, I think the -- I tend to believe we never get to the long run in the milk business. In the long run, obviously, if the -- if the cost of supplying a particular place over the long run is -- it cannot be recovered, that place will -- that -- something will happen and either the supply will deny -- will decline to -- to -- to be delivered in there or the cost that will be applied to that place would be so high that other competition would take it over. At some point, there would be a tipping point at which time that position -- that location would no longer be served, either at the -- either because the plant can't get a supply or that the price the plant might have to pay would be so high that they say I can do that processing better or cheaper someplace else. That -- that would be the long run implication.

Q. Would that happen before or after you can't do it anymore -- the moving of the processing to some other place or competition coming in?

A. If you would repeat that question?

Q. Okay.

A. Perhaps I can offer maybe -- I think I understand.

Q. All right.

A. Maybe -- the history, at least in the southeast, has been that plants have tended to close; they have not been denied a supply. So the response has been on the processing side to -- to shut -- to consolidate operations. They -- they received a supply. And if -- if the -- if history indicates that the adjustment is on the processing side, it's not because they couldn't get a supply, it's because they made an election to move that processing or cease processing or something.

Q. Is that a unique thing just to the southeast?

A. I really can't testify as to what the history is anywhere else.

Q. You -- you -- in -- with regard to serving your customers, what role do full-supply contracts have in the southeast with your members? I mean, you -- you expressed the concern about competition coming in if you don't keep your customers and even if you're losing money. What role do full-supply contracts play in requiring you, under contract, to supply a plant with their full needs?

A. Number one, I -- full-supply contracts are not something that I deal with. I don't deal with the contractual relationship between the cooperatives and the customers. However, I am aware, at least marginally, that those -- to the extent that those exist, they are not forever. That -- you know, those -- they have a termination date; and at some point, when they're up for renewal, that any changes in the economics may very well be reflected in the new agreement.

Q. I'll ask the same question again, please.

A. Maybe I misunderstood your question. You asked what role they play. I be --

Q. I'm trying to find out --

A. Okay. Let's just say this: If a full-supply contract exist, tort law, I believe, would require the supplier to put it in there for the period of that contract. Am I right? I mean, I'm not an attorney. We've got plenty of them around here. But if someone is contractually bound to supply a plant for a period of time, I would think that they're going to do it.

Q. Well, let me tell you what I'm thinking a little bit. The record seems to establish that the southeast is chronically short of even producing enough milk to meet Class I needs.

A. Agreed.

Q. Okay. Eighty percent of the Class I use of milk here is controlled by your members -- member organizations, the proponents.

A. I don't know that it's 80 percent of the Class I. At least that -- we testified that -- market 80 percent of the milk. I don't know that it's 80 percent of the Class I.

Q. Okay. You got me on that one. How much is it then?

A. I do not know. I don't have that statistic.

Q. Do you think it's more than 50 percent?

A. I would believe it's more than 50 percent, yes.

Q. I mean, if you're controlling 80 percent of the milk and utilization is 60 percent, you know, can you spitball it here a little bit about how much of it you think that you are? It would seem to me that if you're the guy out there negotiating over order premiums and working with all these organizations that that would be part of the common knowledge of what you would know in terms of doing your job.

A. My response to that is that generally the utilization of milk of cooperatives is somewhat less than the -- the market average because of the balancing reserve that the cooperatives carry. The -- I think your -- your implication is that by supplying what appears to be a large majority of the supply, you -- we could exercise some ability to -- to -- to influence the price in some way. Is that the implication?

Q. No. I'm just trying to get some basic information, Jeff.

A. Okay.

Q. That -- that's all.

A. The -- I think the -- you know, the --

Q. And I'm not sure in your answers that I'm -- that what you're giving me is -- is clear-cut enough that I'm able to understand it. That's all.

A. I agree that it would be more than 50. I don't know that it would be more than 80. It would be -- if I -- to use your term -- spitball, it would probably be something 70 percent or better. It's between -- it certainly wouldn't be greater than 80.

So, perhaps, 70 percent. I -- I just don't --

Q. I noted, with interest, your comments on Class I price surface in general and the limitations of, perhaps, not being able to look at the southeast in isolation without considering the rest of the country on Class I price level issue. Are you of the opinion that having a nationally coordinated Class I price structure in the way that we have it now is superior or inferior to having location adjustments where pricing is -- for lack of a better way of saying it -- relative to each market?

A. I think the nationally coordinated series is -- is -- is superior to -- to a hodgepodge of location values based on order.

Q. Okay. Why -- why do you say that?

A. The -- the relative value of Class I, you know, extends to the -- to the -- the -- or the implication of the relative value of Class I extends to the footprint of each plant's sales area, which overlaps order areas and brings into play many plants, not just the ones inside any particular marketing area. So I think the -- and the -- the resulting need for a coordinated and reasonable surface is a national issue, not an order-specific one.

Q. And in that regard -- I appreciate your answer. In that regard, would you be of the opinion that Class I differential levels here in the southeast are -- are too low, that they are in need of adjustment upward, downward?

A. My opinion --

Q. Yes, sir.

A. And I will speak for my opinion only.

Q. All right.

A. -- is that they bear some -- they certainly could bear some increase.

Q. Does your organization have an opinion about -- your members, do they have an opinion about need there?

A. Officially, I believe not. But I doubt seriously any of them would say that they need to be lowered.

Q. Okay. All right. When you were commenting on the -- how much above or below the blend that you're able to return to your member organizations, the proponent -- what they're able to return back to their members, you estimated in one month that it would be about $.40 below the blend.

A. At -- at a -- at a single location -- other locations -- and, again, theoretically at that single location. Other locations with a relationship would be different.

Q. Okay. So there are other places where it could be less than $.40 and there are other places where it could be much greater than $.40?

A. I don't know that it would be much greater, but there could be some variation, yes.

Q. All right. Now, when we look at the proposals and to the extent that you're going to maintain that a inter-market transportation credit -- if we look at the southeast, for example, we go to $.20 and perhaps as much as $.15; that adds up to $.35. How are these proposals going to help solve the problem that the southeast currently experiences with regard to low-milk production that's local and bringing in sources of milk from long distances?

A. Are they or how are they? I missed the question.

Q. How are they?

A. How are they? Certainly shifting these costs on to the regulated Class I marketplace generates an assurance of funds to cover these costs which are now born outside the regulated marketplace. And to the extent that it's new money, it certainly helps our -- the -- it helps lower the -- the net cost of supplemental supplies and lower the net costs born by dairy farmers to supply milk produced within and delivered within the marketing areas.

Q. Well, will all producers share in this additional $.35?

A. Will all?

Q. All producers that are pooled on the market?

A. I would doubt it since it's -- since -- well, I can't say for sure, but it would be unlikely that everyone did. The current transportation credit system applies only on milk moved from outside the marketing area inside, and those funds flow to the organizations which move the milk which is not every dairy farmer. So it aids those -- but it does -- the implication and the application is that those funds to go to the -- to the organization providing the service. Likewise, the Intra-market Transportation Credit as proposed, if a dairy farmer delivers to their closest pool-distributing plant, that milk would not be -- would not receive an Intra-market Transportation Credit. So to the extent that there is milk, we do move milk to the closest place. And we try to do that as much as you can, if it works in the total system. So there would be some dairy farmers whose milk would not receive a credit. But every dairy farmer gains when the -- when the Class I milk is delivered and the Class I revenues are shared.

Q. That's all I've got, Jeff. Thanks for your patience with me.

A. Yes, sir.

JUDGE DAVENPORT: Other questions?

Very well, Mr. Sims.

MR. ENGLISH: Your Honor, Charles English for Dairy Fresh Corporation.

JUDGE DAVENPORT: Yes, sir.

MR. ENGLISH: John Enslen has a statement.

JUDGE DAVENPORT: Very well.

Mr. Enslen, if you would, raise your right hand.

JOHN E. ENSLEN, after being first duly sworn, is examined and testifies as follows:

JUDGE DAVENPORT: Please be seated. Tell us your name and, if you would, give us -- would you spell your name for the hearing reporter?

THE WITNESS: [reads] I am John E.

Enslen. That's E-n-s-l-e-n. I'm here on behalf of the 140 dairy farmers currently shipping their milk to Dairy Fresh Corporation facilities located in Alabama and Mississippi.

Dairy Fresh Corporation is a division of National Dairy Holdings, LP located at 3811 Turtle Creek Boulevard, Suite 1300, Dallas, Texas.

EXAMINATION

BY MR. ENGLISH:

Q. Sir, if you could stop just for one second.

A. Yes.

Q. I'm handing out your statement.

Could we have the statement marked?

JUDGE DAVENPORT: The statement has been marked. It is marked as Exhibit 36.

BY MR. ENGLISH:

Q. And I provided copies to the court reporter and to most of the parties.

And, Mr. Enslen, before you continue, I know a number of the people in the room know you. But, as we have with other witnesses, just talk a little bit about your background for a moment. For how many years have you been involved in the dairy industry?

A. I started in the dairy industry in 1973 with

Associated Milk Producers of -- out of Alabama.

Q. And for how long were you with that organization?

A. I was with Associated Milk nine years.

Q. And after that what did you do, I take it, in the dairy industry?

A. After that, Associated Milk Producers merged with Dairyman Incorporated. I spent two years or a little over two years with Dairyman Incorporated. Actually, I was here in Louisville for two years.

Q. And just for clarification, Dairyman Incorporated is not a constitute member of Dairy Farmers of America?

A. Correct.

Q. And so after the two years at Dairyman Incorporated, what did you do next?

A. I went to work with Dairy Fresh Corporation and working with them on the raw milk supply. And in 1988, I formed a consulting company and I've been working with Dairy Marketing, Incorporated, which is my consulting company, since that time.

Q. But in working with that dairy consulting company, you've continued working with Dairy

Fresh Corporation?

A. That is correct.

Q. And so you have something over 32 years of experience in raw milk procurement and issues in the southeast?

A. Yes.

Q. Okay. I apologize for the interruption --

A. No problem.

Q. -- but if you'll continue with your statement at this point.

A. [reads] The dairy farmers shipping to Dairy Fresh Corporation are located in Alabama, Florida, Louisiana, Mississippi and Tennessee. Their milk is delivered to the Dairy Fresh Corporation plants located in Cowarts, Alabama, Greensboro, Alabama, Hattiesburg, Mississippi and Prichard, Alabama. Except for the Greensboro facility, which manufacturers ice cream, these plants are traditionally Class I operations.

I am here -- I am appearing here today in Limited Opposition Proposal 2, which would establish a new Intra-market Transportation Credit fund in order to make up any -- Proposal 2 -- excuse me -- which would permit funds to be deducted from the producer's settlement fund in order to make up any shortfall in the handler funded portion of the fund. As already been stated by proponents and others, the southeast markets are deficit markets. Why should we recreate a situation that can reduce blend prices to dairy farmers in this region when local production is already inadequate?

Dairy farmers in this market need more not less money returned for their milk. And their experience has been that whatever changes are made in these hearings or from the Federal Order Reform, the end results has been lower Class I market utilization and lower blend prices relative to other dairy farmers. The largest southeast order merger didn't help. It appeared to have hurt. Transportation credits for supplemental milk haven't helped. They appear to have resulted in even lower Class I utilizations. Why should dairy farmers in this market pay for another idea resulting in ever lower blend prices?

We are not opposed to Proposals 1 or 3 or to the remainder of Proposal 2 and we are neutral on Proposals 4 and 5. And that is my presentation. Thank you.

Q. Sir, just to clarify because I think maybe some -- some words on the page didn't work out the way maybe you intended it. You're here only today in opposition to that portion of Proposal 2 that could result in funds coming out of producer settlement fund; correct?

A. That is correct.

MR. ENGLISH: The witness is available.

JUDGE DAVENPORT: Mr. Beshore?

MR. BESHORE: I have no questions.

JUDGE DAVENPORT: Mr. Tosi?

MR. TOSI: Yes.

EXAMINATION

BY MR. TOSI:

Q. Thank you for appearing today. I appreciate your participation.

Your statement says that transportation credits for supplement milk haven't helped and they have appeared to result in even lower Class I utilizations. Can you tell me why you think that is so? Can you expand on that?

A. Each time -- I'm going to kind of bring that again with merging of the orders. When you bring a larger order in, you attract more milk to the market, and milk that are classified in II, III and IV lower the utilization. Along with transportation credits, in my opinion, allows it to make it a little easier and more profitable to attach even more milk, not absorb it but it does have affect.

Q. You mean the additional milk that comes in for Class I that's from outside is able to piggyback the additional milk?

A. Yes.

Q. The milk that's --

A. The more money --

Q. -- for example, that's diverted but doesn't actually make it to the market?

A. That's correct.

Q. Okay. That's all I have, sir. Thank you very much.

JUDGE DAVENPORT: Mr. English?

MR. ENGLISH: I move admission of Exhibit 36.

JUDGE DAVENPORT: There appears to be no opposition, so Exhibit 36 is admitted into evidence at this time.

[WHEREUPON, document referred to is marked Exhibit 36 for identification.]

JUDGE DAVENPORT: Thank you, sir.

THE WITNESS: Thank you.

MR. ENGLISH: The next witness will be

Mr. Evan Kinser for Dean's Food Corporation. He has a statement and a short set of exhibits that we'll hand out.

JUDGE DAVENPORT: Mr. English, his statement will be marked as Exhibit 37 -- thank you -- and the exhibits will be 38.

Would you raise your right hand?

EVAN KINSER, after being first duly sworn, is examined and testifies as follows:

JUDGE DAVENPORT: Please be seated. Tell us your name and, if you would, spell your name for the hearing reporter.

MR. KINSER: Evan Kinser, E-v-a-n K-i-n-s-e-r.

EXAMINATION

BY MR. ENGLISH:

Q. Mr. Kinser, why don't you read the first short paragraph of your statement and we'll interrupt for some background.

A. [reads] Hello, my name is Evan Kinser; I'm employed by Dean Foods Company as a director of dairy policy and commodities. My business address is 2515 McKinney Avenue, Suite 1200, Dallas, Texas 75201.

Q. And could you briefly describe your posthigh-school education?

A. I have a Bachelor of Science in Animal Science and Ag-Economics from the University of Missouri, Masters in Business Administration Agribusiness from the University of Wisconsin Madison.

Q. And when did you first become involved in the dairy industry other than any dairy farm -- family dairy farm?

A. First experience would have been working with Foremost Farms starting in 1997.

Q. Now, before that, though, you -- you come from a family of dairy farmers?

A. That's correct. Grew up on a dairy farm.

Q. And what -- how long were you with Foremost?

A. I was with them six years.

Q. And what was your position in work that you did for Foremost?

A. The last was director of milk marketing.

Q. And by whom were you next employed?

A. Dean Foods.

Q. And when did you join Dean Foods?

A. In June of 2004.

Q. And since that time, has your title been director of dairy policy and commodities?

A. I began as a manager of commodity risk management and something else.

Q. And when did you become director of dairy policy and commodities?

A. In May of 2005.

Q. And since joining Dean Foods, have you had the lucky occasion to testify in any other Federal Order proceedings?

A. I have had such opportunity.

Q. Why don't you continue, then, with your statement?

A. [reads] Dean Foods owns and operates eight plants regulated by the Application Marketing Federal Order and ten plants regulated by the Southeast Marketing Federal Order. I'm appearing today to support and explain the philosophy of Dean Foods in arriving at Proposal Number 4 and Number 5. I will further explain our position on the remaining proposals.

Historical position: I would like to begin my testimony by reminding those considering the evidence presented at this hearing that Dean's position and testimony around this issue is consistent with the past perspective of Dean

Foods, its predecessors and representatives. The consistent message of transportation credit as been cautious support balanced by a concern that such credits could be abused resulting in undesired results whether anticipated or not. We continue to have concerns which has led to us propose and support Proposal Number 4 and Number 5. While our proposals and other proposals suggests that the idea of looking at the marketing areas of Federal Order Number 5 and Number 7 as a common area for procurement of supplemental supplies, we want to be clear that we -- we propose that only as a matter of convenience. We continue to hold strongly to the view that these orders need to remain as separate orders. While we know it is not part of this hearing notice, we continue to believe that these orders are too large and should be reduced in size rather than increased. This position is, again, consistent with our historical positions and testimony.

Definition of the problem -- large orders: The problem extends back to the 1980's. Illustrating it will require, hopefully, a quick and insightful history lesson. There are a lot of people in this room with first-hand experience of these events making them more equipped and experienced to offer the historical prospective, so I'd like to apologize in advance to them for the simplicity that I use to explain what took years and years to do.

One could look -- take it back to 1988 when Federal Order System had 41 Federal Orders. The beauty of the system back then is that the people -- excuse me -- the pools were small and the markets had large population basis relative to producer milk, had high utilizations to attract the supplemental milk needed to serve their marketplace. The inverse was also true. Those markets with significant supplies of milk and minimal population had much lower utilization and suppliers in those markets were always willing to look for the higher value.

Philosophically, nothing has changed, particularly as it relates to the propensity of pseudo handlers who do not operate a fluid plant yet have control of a milk supply and want to tap a Federal Order pool for additional revenue to pay their suppliers without serving the fluid market any more than is absolutely necessary. Federal Order Reform changed the size and scale of orders dramatically and eliminated the minus "X" cents per mile rule for diverted milk. More on this to follow. These changes created more opportunities for handlers to attach and divert now larger amounts of milk to few Federal Orders for the purpose of extracting dollars from the marketplace for minimal fluid service. Addressing this challenge should be the center of any change that results from this hearing.

Since the 1980's, the change in Federal Orders that are subject to this hearing has been a reduction from eleven orders to two. The old orders were, obviously, much smaller thus eliminating the ability of a handler to pool diversions on a particular order. For example, if a handler had sales in Louisville, Kentucky, there were only so many pounds of Class I milk available to the market that could be used for pooling diversions. The pooling of diversions and not serving the fluid market is where pseudo handlers capture the real value. Diverted milk typically doesn't travel to serve the market yet is available to draw the value from the market where it is pooled. So if there is a handler pooling of a group out-of-area-farms selling in to Louisville, the milk that stays at home gets the Louisville order price as opposed to the local order price. The pounds of milk that could be diverted were limited by the pounds of milk sold to fluid plants regulated by the Louisville order. If this pseudo handler wanted to pool more milk, it needed more sales and if those sales couldn't be gained in Louisville, the pseudo handler had to resort to another pooling location. To get the higher price at the next location, the milk had to be hauled further. This meant more miles had to be driven with a fully loaded milk truck making the return for such activity lower due to higher transportation cost, thus multiple small orders created a disincentive to have out-of-area milk diversions attached to an order because by the distance of the entry points from the farms shipping the milk. Today, this problem has been significantly changed. The entry points to a larger area and volume of sales has been made closer. To use the above example of a pseudo handler with out-of-area sales -- excuse me -- out-of-area farms, sales to Louisville would provide a gateway to ride on the entire Appalachian area allowing more pounds versus in the past this would have only been a part of the Louisville market.

Illustration of the problem -- large orders: I would like to offer a more concrete example to make the implication of order reform on creating easier entry points to pool riding equally clear to all. In order to keep this fairly simple, I'm going to make some assumptions. I'm going to focus on the Appalachian order and its predecessors, the Louisville, Lexington, Evansville, Easter Tennessee and Carolina. The purpose of this example is to focus on the implication of the entry point and not all the nuances of changes that were part of the reform.

Illustration assumptions: The current application -- excuse me -- the current Appalachian order regulation was the same for predecessors as far as shipping requirements. We're going to focus on the month of September. So diverted milk shall not exceed 25 percent. So a million pounds delivered would allow 1.33 million pounds to be pooled. Touch-base would require six-day touch-base, all consistent with the current regulation of the Appalachian order. Blend prices for predecessor orders were equal to each other and equal to the current order. And handler sales assumptions are as follows: The Louisville, Kentucky sales were 10 million pounds and that pooled milk on the Louisville Lexington order. Chattanooga sales, 10 million pounds that was pooled on the Eastern Tennessee order and Charleston, South Carolina sales, 10 million pounds pooled on the Carolina order. Handler had reasonably sufficient supplies of milk close to the above listed plants and the handler also had a large supply of milk in Jasper County, Indiana. Farms average 1.5 million pounds of monthly production in Jasper County. And the freight was $2.20 a loaded mile. Those are all of my assumptions.

Pre-reform pooling example: The Louisville sales, with the 10 million pounds of sales, 13.3 million pounds of milk could be pooled allowing 3.3 million pounds of diversions. So a decision could be made to pool two farms. Pooling those two farms would require six trips per farm, a total of 12 trips, 223 miles per load, so a trip would cost $490.60. So the total transportation to pool those two farms would be $5,887.20. The same logic applies in Chattanooga until you get down -- the only difference being the miles in Chattanooga and there the milage is 527 miles per load so the total transportation cost of pooling off the Chattanooga sales would have required transportation of $13,912.80. Charleston, again, follows the same with the only change being the miles. It's now 838 miles per load creating a total transportation cost of $22,123.20.

So Jasper County pre-reform results theoretical is that you would have six farms pooled meaning nine million pounds of milk. The remaining 7.2 million pounds would have stayed at home but have drawn off the blend price from the order. The cost of delivering the 1.8 million pounds would have been a total of $41,923.23. It is very unlikely that the pool draw would have been sufficient in Chattanooga and Charleston to justify paying the freight cost, so the likely outcome would have been only two farms pooled three million pounds of milk the remaining 2.4 staying at home to draw off the order and the cost of delivering the 600,000 pounds would have been $5,887.20.

Jumping ahead to the implications post-reform Louisville sales, there would be no change to pool. The 10 million pounds of Louisville sales would have, again, allowed 13 million pounds of milk to be pooled, 3.3 pounds could have been diverted back, two farms would have been pooled, six trips to Louisville required, same 223 miles, the same $490.60 per trip and the same total cost of $5,887.20. Chattanooga sales -- but the deliveries would have been to Louisville as far as touch-base. So instead of working with the freight from Jasper County to Chattanooga, the freight would have been from, again, Jasper County to Louisville so the cost would have worked out the same as the prior example. Charleston, the same situation. You would have delivered to Louisville, so the same transportation cost as Louisville.

So in the post-reform Jasper County, you could have pooled six farms, nine million pounds of milk, 7.2 million pounds diverted away, the cost of delivering the 1.8 million pounds would have been $17,661.60. If the pool draw prior to reform would have been sufficient in Louisville for milk to pool, then reform just allowed those same sales to Louisville to grow diversions. Now, with no new market service, an additional four farms have been added to the order and with it 4.8 million pounds of milk that did not serve the market. If somehow all the milk had made economic sense to pool earlier -- pre-reform -- it could now be pooled at a savings of $24,261.60.

Definition of the problem -- connected producer price surface: Another change that came with Federal Order reform that had a material effect on the economic value of pooling distant diversions was the relationship between the producer value of the distant and announced price -- excuse me -- distant milk and announced price. Prior to order reform, the value the milk at the diverted location was based on a formula that accounts for the miles and the defined point. The definition varied depending on the order at the time being examined and the plant to which the milk was diverted. This means that the further the milk was from the defined point, the less likely the milk attained enough economical value from being a pooled diversion to justify it being attached to the pool. This resulted in each plant having a different location adjustment depending on the order it was pooling milk on.

Federal Order Reform changed all of that. Under the current order provisions, a relationship between the producer value at the plant where it is diverted is the difference in the Class I differentials at the price announced county and the county where the diversion plant was located. The result is the location adjustment is the same for each plant regardless the order where it is pooled. This change significantly flattened the surface as it relates to milk being diverted to plants great distances from the market. Under reform, milage is not a consideration. The consideration is the spread in the Class I differentials. And as you move to the center part of the country and north, those zones become quite wide allowing many miles to be traveled with minimal or no change in the diversion price. This new flatter surface has made it more economically desirable to pool additional diversions than existed prior to reform. The combination of this and closer access points strengthen it also. With the current provisions, a handler would look at the saving -- excuse me -- the cost of moving milk to get it to touch-base which is partially offset by transportation credits. Any loss value for the use that wasn't available if the milk had stayed at home and the value for all pounds that stayed at home but received the higher order price. Any time this value is greater than te local order, handlers are more than eager to call up truckers and being transporting milk. Such games should not be encouraged and should force new thoughts to prevail and return a disconnected relationship between the Class I pricing surface and diverted milk value.

Illustration of the problem -- connected producer price surface: I would like to offer a more concrete example to make the implications of the reform on creating a flatter pricing surface for pool riding equally clear to all. In order to keep this fairly simply, I'm going to make some assumptions. I'm going to focus again on the Appalachian order and its predecessor orders, Louisville, Lexington, Evansville, Eastern Tennessee and Carolinas. The purpose of this example is to focus on the implication of the old pricing methodology for milk diversions versus current and not all the nuances that were part of reform.

Illustration assumptions: The blend prices for predecessor orders were equal to each other and equal to the current order. Diversions are going to a plant located in Portales, New Mexico. The assigning point assumption's that the Louisville Lexington order would be Madisonville, Kentucky at a milage of 1,095, Eastern Tennessee order, Chattanooga, Tennessee a milage of 1,187, Carolina's order, Ashville, North Carolina 1,350 miles. The diverted milk is discounted at 2.5 cents for each ten miles to the closest pooling distribute -- or excuse me -- that should just be 2.5 cents for each ten miles.

Pre-reform diverted milk example -- Louisville, Lexington, Evansville order -- diverted milk would be priced by discounting the blend based on a formula using 1,095 miles divided by ten multiplied by 2.5. This would have resulted in a price 2.74 -- excuse me -- $2.74 below the blend for milk diverted to Portales off the Louisville, Lexington, Evansville order. Eastern Tennessee order, diverted milk would be priced by discounting the blend based on the formula using 1,187 miles divided by ten multiplying by 2.5 cents. This would result in a price of $2.97 below the blend for milk diverted to Portales off the Eastern Tennessee order. Carolina's order: diverted milk will be priced by discounting the blend price on the formula using 1,350 divided by ten and multiplied by 2.5 cents. This would result in a price of $3.38 below the blend for milk diverted to Portales off the Carolina's order.

Post-reform diverted milk value example:

Diverted milk would be priced by discounting the blend based on the formula using the difference between the Class I differential for Roosevelt County, New Mexico to ten and Mecklenburg County, North Carolina 3.10. The would result in a price of $1 below the blend for milk diverted to Portales off the Appalachian order.

Just to review, the Louisville, Lexington, Evansville order resulted in a dis -- price discount of 2.74. The new flat price improved the price by $1.74 for all the milk that remained in Portales. While in Eastern Tennessee, the price would have been discounted $2.97; the new flat price system improved the price by $1.97. Finally, in the Carolinas, the discount was 3.38, an improvement of $2.38. When one considers the increased value for diversions under the scheme that was a result of Federal Order Reform combined with the freight savings for having a closer entry point, the fact that there is a problem with these orders should come as no surprise. It is with this very real problem that Dean Foods has proposed a solution to offer for the secretary's consideration.

Philosophy of Dean proposed solutions: Dean Foods continues to be concerned about the abuse and potential abuses of transportation credits, especially those that are used to attached milk produced outside the marketing area pooled with minimal deliveries. We are sympathetic to the ever increasing challenge of a shrinking milk supply within the marketing areas covered by these two orders and the cost associated with milk transportation. However, we cannot ignore the fact that milk many miles from this market place is being pooled on these orders when there is milk much closer. These distance divert -- distant diversions by handlers while well within the bounds of the regulation illustrate disorderly marketing and loopholes that are not consistent with the objectives of the federal milk marketing order core principles. Furthermore, such actions come at great cost to the local dairy farmers which cannot be tolerated any longer in such a fragile production environment. Milk, other than the necessary reserved, pooled but not serving the fluid market is abuse and must be curbed and unnecessarily reduces the price to local farmers. Is it because of these ongoing actions that Dean has proposed and fully supports Proposal Number 4 and Number 5 in order to prevent even greater harm by the adoption of Proposal 1 and 2. Proposals 4 and 5 are needed to curb the abuse and allow transportation credits to be used for what they were intended, to move milk that is needed to the marketplace.

Proposal Number 4: We support Proposal Number 4 as noticed with the noted changes and the changes are to clarify our position as we have considered the situation. And the changes -- jumping down Section 1005.82, Subparagraph D, Part 2, Paragraph V -- we're striking everything so that it would read "Divide 30 by the percent." So we have chosen to implement the suggested 30 that was part of our proposal. Jumping to Subsection 2, Paragraph V(2)(i) would be the same change, divide 30 by the percent striking all the balance in between. Section 1007.82d, Sub 2, Paragraph V, same change, divide 30 by the percent striking everything in between. Paragraph 3, Subparagraph V(ii), divide 30 by the percent striking everything else in between.

Explanation of Proposal 4: Proposal 4 differentiates the handler reimbursement rate based on the handler's service to the market. Current transportation credits are paid on eligible milk as long as transportation funds are available or credits are prorated for transportation funds -- or are prorated when transportation funds become limited. Presently, all handlers receive the same rate of reimbursement regardless of their level of service to the market or their level of pool riding, thus a handler shipping 100 percent of producer milk to a pool-distributing plant receives the reimbursement at the same rate as the handler shipping the absolute minimum.

In addition to the current calculation, Proposal 4 adds an additional two-part step which is designed to discourage pool riding and to take into consideration typical plant balancing. The first part of this additional step require -- considers the ratio of pounds of milk delivered to plants other than pool-distributing plants to the pounds of producer milk on the handler's report. The denominator is the total pounds of milk on the handler's report. The numerator is the pounds of milk the handler pooled that was not shipped to a Federal Order 5 or Federal Order 7 Pool Distributing Plant.

The second part addresses the fact that the pool-distributing plants need help balancing. Handlers serving these plants typically cannot ship the same amount of milk into these plants every day of the week. So not providing an appropriate diversion is to undermine the purpose of the Federal Order system. We suggest that there be an allowance for 30 percent diversion. This estimate considers that there is typically five strong production days at a distributing plant and seven days in a week. Five as a percent of seven is 71 percent; the inverse is 29 percent, which was rounded up to an even 30 percent.

Proposal 4 example, Co-op A: Co-op A assumption -- that their producer milk was 100 million pounds distributing plant deliveries were 55 million pounds resulting in diversions of 45 million pounds. The impact of Proposal 4 on Co-op A would be calculated as follows: Take the 45 million pounds of diversion pounds and divide by the 100 million pounds of producer milk, the resulting 45 percent would be divided into 30 percent in Proposal 4 resulting in 66.67 percent. When the market administrator establishes the amount of the transportation credit that would be payable to Co-op A, instead of 100 percent of the value, the heavy diversions would result in them receiving 66.67 percent of the payment. The savings would remain in the fund helping to either extend the fund or to allow for a higher proration to all eligible handlers.

Proposal 3 Example, Co-op B. B begins with the same 100 million pound assumption, 85 million pounds delivered to pool-distributing plants leaving 15 million pounds for diversion. The impact of Proposal 4 on Co-op B would be calculated as follows: Take the 15 million pounds of diversions and divide by the 100 million pounds of producer milk. The resulting 15 percent would be divided into 30 in Proposal 4 resulting in 200 percent. When the market administrator establishes the amount of transportation credit that would be payable to Co-op B, they would receive the full 100 percent of the value. The rule change does not allow for a handler to get more than they would be eligible for under the current regulation.

Proposal 5: We support Proposal 5 as noticed with the noted changes. The changes are to clarify our position as we have considered the situation and evidence presented at this hearing. Under Number 1, Section 1005.13(d), Subparagraph 6, my testimony the fourth line down begins under Section 1005.2 or 1007.2 shall be priced at -- I'm inserting the lower of A parentheses and then it would continue on as stated -- the location of the closest. Jumping down a couple lines in the original notice we're striking all the definition around our cents and we're choosing to use $.04 as noticed and continuing on until in front of the semicolon of what was noticed we're inserting comma or B parentheses, the location of the plant to which diverted. Subsection 2, Section 1007.13, Subparagraph D, Paragraph 6 has the same changes in my testimony. The fifth line down 1005.2 or 1007.2 shall be priced at -- we're adding into the language noticed in the hearing notice the lower of A parentheses continue on the location. And my testimony a couple lines down, we're striking from the original notice why. Continuing on, we're leaving the $.04 and striking the balance of our comment so that it -- proposing it would read, "calculated by multiplying $.04 per hundred weight. The balance of Proposal 5, we support as noticed.

Explanation for Proposal Number 5: As has been discussed, the connection of the Class I pricing surface and producer values has created a real opportunity for pool riding exacerbating the already problematic geographically large orders. Proposal 5 is aimed at disconnecting the producer values outside the order from the Class I pricing surface for diversion purposes only making it less desirable for out-of-area milk to ride on the pool. This is accomplished by modifying -- modifying the order language to utilize a formula in deriving the location adjustments for locations outside of the order in place of the current process which looks at the difference in the Class I differentials between the announced price and the pricing point.

Proposal 5 would price milk delivered to plants located outside the marketing area in a five-step process. Step 1: Determine the closest pool-distributing plant regulated by either Federal Milk Marketing Order Number 5 or Number 7. Step 2: Determine the distance in miles between the two using the shortest distance on hard-surface roads. Step 3: The resulting milage would be divided by ten. Step 4: That result would be multiplied by $.04. Step 5: This result would be subtracted from the price of the closest pool-distributing plant regulated by Federal Milk Marketing Order Number 5 or Number 7 to the price -- to price milk delivered to out-of-area plants. The values saved by lowering the price of out-of-area milk is retained in the pool to increase the blend price. The local producers will not have their price adjusted, so their milk price would increase in value. Producers actually delivering to pool-distributing plants would not realize -- that should be -- a change in value. It is difficult to say the exact effect of Proposal 5 because there is a degree of circular logic. First, milk will go off the pool because there's no economic value for being pooled on a distant order. Milk going off the pool will increase the blend price making it desirable for some milk to come back on. It will take some amount of time for the order to reach a new equilibrium, but the answer is the utilization should increase resulting in higher blend prices. The exact amount is a product of too many variables to say exactly today.

Simplistic example of Proposal Number 5: Proposal Number 5 example, Laurel, Maryland pooled Federal Milk Marketing Order Number 5, we have 21 known instances. Current location adjustment relative to Federal Milk Marketing Order Number 5 Announcement is a $.10 discount. The miles -- the closest pool-distributing plant is 152 and the current pool-distributing location adjustment on Order 5 is a $.30 discount. The current price at Laurel, Maryland would be the blend price in Mecklenburg County, North Carolina less $.10. If Proposal 5 were adopted, the price in Laurel, Maryland would be the blend price in Mecklenburg County less $.30, the location adjustment at the closest pool-distributing plant regulated by Federal Order 5 or 7 less $.61 which is 152 miles to the closest pool-distributing plant divided by ten multiplied by $.04. The resulting price at Laurel, Maryland would be a blend price at Mecklenburg County, North Carolina less $.91. Proposal 5 lowered the price in Laurel, Maryland by $.81 per hundred weight making it less desirable for milk to be pooled on Federal Milk Marketing Order Number 5 and then diverted back to a Laurel, Maryland plant. At some point, the milk would likely not pool on Federal Milk Marketing Order Number 5 but instead be pooled on the order it is located in, Federal Order 1. This would have the effect of lowering the manufactured pounds on Federal Milk Marketing Order Number 5, thereby increasing the Class I utilization and increasing the blend price.

Proposal Number 5 example: Keil, Wisconsin pooled on Federal Milk Marketing Order Number 5, 17 known instances. Current location adjustment relative to Federal Milk Marketing Order Number 5 announcement $1.35. The miles to the closest pool-distributing plant would be 458 and the location adjustment of that plant is a discount of $.90. The current price at Keil, Wisconsin would be the blend price of Mecklenburg County, North Carolina less $1.35. If Proposal Number 5 were adopted, the price in Keil, Wisconsin would be the blend price in Mecklenburg County, North Carolina less $.90. The location adjustment of the closest pool-distributing plant regulated by Federal Milk Marketing Order Number 5 or 7 less $1.83, which is a result of 485 miles to the closest pool-distributing plant divided by ten multiplied by four. The resulting price at Keil, Wisconsin would be the blend price in Mecklenburg County, North Carolina less $2.73. Proposal 5 lowered the price in Keil by $1.38 making it less desirable for milk to be pooled on Federal Milk Marketing Order Number 5 and then diverted back to a Kiel plant. At some point, the milk would likely not pool on Federal Milk Market Order Number 5 but instead be pooled on the order it's located in, Federal Milk Market Order Number

30. This would have the effect of lowering the manufactured pounds on Federal Milk Market Order Number 5 thereby increasing the Class I utilization and increasing the blend price.

Proposal Number 5 example: Sulphur Springs, Texas pooled on Federal Milk Marketing Order Number 7, 40 known instances. The current location adjustment relative to Federal Milk Marketing Order Number 7 is a discount of $.10. The miles to the closest distributing plant is 126 and that plant's location adjustment is zero. The current price at Sulphur Springs, Texas would be the blend price in Fulton County, Georgia less $.10. If Federal -- excuse me -- Proposal Number 5 were adopted, the price in Sulphur Springs, Texas would be the blend price in Fulton County, Georgia less zero. The location adjustment of the closest pool-distributing plant regulated by Federal Order 5 or 7 less $.80, 126 miles to the closest pool-distributing plant divided by ten multiplied by four. The resulting price at Sulphur Springs, Texas would be the blend price in Fulton County, Georgia less $.80. Proposal 5 lowered the price in Sulphur Springs, Texas by $.70 making it less desirable for milk to be pooled on Federal Milk Marketing Order

Number 7 and then diverted back to a Sulphur Springs plant. At some point, the milk would likely not pool on Federal Milk Market Order Number 7 but instead be pooled on the order it's located in, Federal Order Number 126. This would have the effect of lowering the manufactured pounds on Federal Milk Marketing Order Number 7 thereby increasing the Class I utilization and increasing the blend price.

Proposal Number 5 example: Portales, New Mexico pooled on Federal Milk Market Order Number 7, 21 known instances. The current location adjustment relative to Number 7 is $1 off the announcement. The miles to the closest pool-distributing plant's 559 which has a location adjustment of minus $.30. Current price in Portales, New Mexico would be the blend price in Fulton County, Georgia less $1. If Proposal 5 were adopted, the price at Portales would be the blend price in Fulton County, Georgia less $.30. The location adjustment of the closest pool-distributing plant regulated by Federal Milk Marketing Order Number 7 or Number -- excuse me -- Number 5 or Number 7 less $2.24. That's the result of 559 miles to the closest pool-distributing plant divided by ten multiplied by $.04. The resulting price at Portales, New Mexico would be the blend price of Fulton County, Georgia less $3.14. Proposal 5 lowered the Portales, New Mex -- price in Portales, New Mexico by $2.14 a hundred weight making it less desirable for milk to be pooled on Federal Milk Market Order Number 7 and then diverted back to a Portales plant. At some point, milk would likely not be pooled on Federal Order Number 7 but instead pooled on the order it's located in, Federal Order 126. This would have the effect of lowering the manufactured pounds on Federal Order Number 7 thereby increasing Class I utilization and increasing the blend price.

Summary of the desired outcome of implementation in Number 4 and Number 5: This record is already overflowing with evidence that the milk supply located within the marketing area covered by these orders is shrinking. Our proposals work to accomplish the following: One, make existing dollars go further to handlers that are not trying to work the system. Two, increase revenues to local farmers. Three -- excuse me -- A, by decreasing the value of out-of-area milk for the direct benefit of local dairy farmers. B, decreasing the value of transportation credits to pool riders will increase the economic reward of activity thus lowering the pool riding, increasing market utilization, and increasing the blend price. Therefore, we urge the secretary to adopt Proposal Number 4 and Proposal Number 5 regardless of the position taken on any other proposals.

That concludes my prepared statement.

JUDGE DAVENPORT: Mr. English, it's ten after ten. Let's take a break at this time for 15 minutes.

MR. ENGLISH: That's what I was going to suggest.

JUDGE DAVENPORT: I'll allow you some additional time to go through the exhibits.

MR. ENGLISH: Thank you.

[WHEREUPON, a brief recess is taken.]

JUDGE DAVENPORT: We're back in session, Mr. English

MR. ENGLISH: Thank you, your Honor. I'll try to sequence this in -- in three ways. I'm going to start with some issues about Exhibit 37 and then go to Exhibit 38 and then I have some addition direct, your Honor.

EXAMINATION

BY MR. ENGLISH:

Q. First, Mr. Kinser, did you identify a typographical error on Page 12 of your testimony which -- which, actually, I believe you never read? You have read a statement but you short -- shortened it. Obviously, the exhibit will be the complete version. But for the purposes of the record, that which is Exhibit 37, is there a typographical error on Page 12 under 1007.82 in D25 and D37 that you'd like to correct?

A. Yes. The -- just confirming, I believe typographical error also exists -- I'm just confirming if it exist in the notice of hearing. But the intent on Page 12 -- this is in Section 1007.82 -- says "Plants qualified pursuant to Section" and my --

Q. You know what -- I'm sorry. Let's -- let's stop and discuss this. I think actually it's only in 2.5 or is it in 3.7 as well?

A. I believe it is only in 2.5.

Q. Okay.

A. And it is -- and it is also in the --

Q. Notice of hearing?

A. -- notice of hearing incorrectly. So I've -- I've correctly inputted what was in the notice of hearing, but there is an error now in both the notice of hearing and my statement in that the plant qualified pursuant to Section 1007 -- excuse me -- 1005.7 should be 1007.7. It should apply to the same --

Q. Well, it should be both; correct? It -- what's missing in 2.5 is what is presently in 3.7, that is you intended it to be included both --

A. That's --

Q. Both; correct?

A. -- correct. It should; that's correct. It's correctly stated but it should also include Section 1007.7 Subparagraph A and B.

Q. The intent of the proposal being that identical to the 1005.82 section that deliveries to either Order 5 or 7A and B plants will count for purposes of this calculation?

A. That is correct.

Q. Now going back to your example that starts on Page 4 and carries over to Page 6, do you have a clarification about that example?

A. Yes. And on Page 4 where I'm illustrating the implications of diverted milk not to exceed 25 percent based on testimony earlier by Mr. Nierman and how they would calculate this, one million pounds of delivered milk would allow a 1,250,000,000 pounds of milk to pool. So you'd have 250,000 pounds of diversions for every million pounds of milk pooled.

Q. And that would carry through the example -- while it changes the actual number, in your view, does it change the -- and it may change the magnitude of the issue. Does it change the result -- the ultimate result?

A. It does not. It would change the magnitude but not the ultimate result -- not the intent of the illustration.

Q. And then finally in the clarification mode, on Page 13 and carry over on Page 14, you have examples for co-ops with total producer milk, distributing plants deliveries, and diversions. Do you have a clarification as to that last line called diversions?

A. Correct. Diversions how I've used it is not consistent with the order language. Really, the line "diversions" in an example for Co-Op A and for Co-Op B should be deliveries other than to pool-distributing plants, which would be diversions and also deliveries to pool plants.

Q. Now, turning to Exhibit 38 for a moment, which is a three-page document, the first page labeled "Producer Milk Delivered to Federal Order 7 Pool Distributing Plants by Day, October '04 and October '05 Source Exhibit 13H," can you describe -- first of all, except to the extent that you've got data from the market administrator, who prepared this document?

A. I did.

Q. Entirely?

A. Yes.

Q. Can you describe, first, the first page of Proposed Exhibit 38?

A. The two boxes labeled "October '04 and October '05" are simply an extraction of data presented in Exhibit 13H listing day-by-day the receipts for the deliveries of milk to pooled-distributing plants for October 2004 and October 2005 respectively. And then underneath the boxes I have done -- prepared some calculation in each of them, the same type of calculation to look over the 31 days for the month of October and how many -- what day had the largest production and how many pounds that was.

Q. So, for instance, in the -- in the left-hand column for October '04, you took 31 days at the max -- you -- you actually calculated the daily max or you looked at it and came up with the daily max?

A. Correct. I -- I looked at the list and selected the largest daily delivery and then from that I figured out if that delivery had to be made every day of the month how many pounds of milk would have been required to deliver to distributing plants. And so at 31 days for October of 2004, 491,495,266 would have been required.

Q. And you did the same calculation for October '05?

A. That's correct.

Q. Okay. So going back to October '04, what is the next line of actual shipments?

A. The next line is actually the sum of the 31 days deliveries to pooled-distributing plants. So you result in 443,223,332 pounds actually delivered to pooled-distributing plants.

Q. And the same calculation for October '05?

A. That's correct.

Q. Now, the next line, would it be fair to say is the difference between the two?

A. That's correct. So, again, like the example that we last discussed in my testimony for Co-Op A, Co-Op B, that's really required pounds delivered to plants other than pooled-distributing plants.

Q. So the term "diversions" there is actually not technically correct, it's what you're using for this purpose but the pounds that would not be delivered to pooled-distributing plants?

A. That is correct.

Q. And what is the last line?

A. And then the last line is simply dividing the pounds delivered to not pooled-distributing plants into the maximum pounds required to get at the same percentage that would have been used in preparing exhibits in response to our request around Proposal Number 4.

Q. And for October '04, that was 9.82 percent and for October of '05 it's 12.71 percent?

A. That is correct.

Q. And that relates to what part of what proposal?

A. That relates to the 30 percent that we proposed in Proposal 4. So clearly illustrating that 30 percent in a month testified to by Mr. Sims as being a relatively tight month, there is more than ample room for diversions based on these two-months history.

Q. And there's been some discussion periodically through this hearing about the need for diversions in January through June; correct?

A. Yes.

Q. Is that discussion relevant to Proposal 4?

A. It is not relevant to Proposal 4. Proposal 4 is intended to apply against transportation credits which are only applied July through December.

Q. And, in fact, you're not saying that in any way a diversion of this type that exceeds 30 percent is improper; correct?

A. That's correct.

Q. It's only that it wouldn't receive the full level of transportation credit at that point?

A. That is correct.

Q. Let's turn to Page 2 of Exhibit 38, which is labeled "Seasonal Diversion Percentages." And could you describe what you did on this page?

A. This is the same concept only looking at it during the period that we just discussed, the period where transportation credits would be in effect and using the market administrator's statistical summaries. So Exhibit 6, Page 7 and 37, Exhibit 11, Page 4 and Exhibit 12, Page 2, I inputted the actual Class I product pounds that were a part of the marketplace then using 86 percent for the utilization of a distributing plant very similar to the numbers that were a part of an exhibit prepared and testified to by Mr. Sims by the marketing administrator's office to get at the pounds of milk that would have required to be delivered to a distributing plant each month and used the same concept under each period. So for Federal Order Number 5, July through December of 2004, the highest monthly delivery pounds would have been 4,703 -- excuse me --

Q. 473?

A. Yes, 473,328,249 pounds. And I did that same concept for Federal Order 5 2005 and then Federal Order 7 for 2004 and 2005.

Q. And what does that show?

A. It shows the highest amount of pounds that the marketplace would have demanded during the time period that's applicable to the transportation credit payment.

Q. And what do you conclude from that relative to what proposal?

A. Again, this would relate to the same concept of 30 percent in Proposal Number 4. And in looking at each of the results, it's clear that it's nowhere near -- basically, in 2005 -- in Federal Order Number 5, you're close to, at best, seven percent. Federal Order 7, at best, 11 percent, again, up against a 30 percent number which we're supporting for Federal Order 4. So lots of room -- those based on history.

Q. For Federal Order 5 and 7?

A. Federal Order 5 and Federal Order 7; correct.

Q. And if you were to change the Class I utilization of 86 percent, even though that's a percent that I think we heard just a few moments ago from Mr. Sims, if you change the Class I utilization, say, from 86 percent to 80 percent, what impact does that have on the columns?

A. It does not have any impact.

Q. And why is that?

A. Because you're going to change both the pounds at the max and the pounds at the min, it's going to move by the same change in the Class I utilization. So the effect, when you then calculate the percentage, will be unimpacted [sic]. You're going to change -- basically, you're going to change the denominator and numerator by the same amount.

Q. But, again, 86 percent appears to be --

A. Percentage change.

Q. The percent -- the percentages change but the differences do not; correct?

A. The pounds would change but the percentage would not.

Q. Okay. Nonetheless, 86 percent is a number you've heard throughout this hearing?

A. That's correct.

Q. The last page of Exhibit 38, which is the third page, could you describe what -- what you were trying to do with impact on transportation credits with implementation of Proposal 4?

A. Again, using data prepared by the market administrators in Exhibit 8, Page 10 for Federal Order 5 and Exhibit 15A for Federal Order 7, I inputted the current dollars requested for reimbursement off of their -- basically the existing program in the first column. In the second column, I inputted the effect of Proposal 4 being in place. And then the third column looks at the percent that would have reduced the transportation credit payment. Again, that's month by month for each order -- 2004 and 2005 for Federal Order 5 and

Federal Order 7.

Q. And you didn't have the data for December because the market administrator didn't have data for December; correct?

A. That is correct.

Q. And that's why in both December '05 for Order 5 and 7 you end up with a number sign DIV/0!, which is -- is merely a null value; correct?

A. That's correct. You're attempting to divide something by zero. It can't be done.

Q. Uh-huh. So that -- that could just be ignored for the purpose of this exhibit; correct?

A. That is correct.

Q. Now, what do you conclude from this page of Exhibit 38?

A. When you compare either of the prior two pages to this, it's clear that -- that some handlers that are getting transportation credits are significantly diverting more pounds than the order that implies needed to be diverted in that if you look, say, at October of 2004, the diversion percentage would calculate out to be just under ten and yet October of 2004 it was reduced by 18 percent. So almost two times the amount of diversions are happening as opposed to what would appear to really need to happen to balance Class I plants.

Q. A few additional questions, Mr. Kinser. What is Dean Foods' position on Proposal 1?

A. We are unsure of Proposal Number 1.

Q. But regardless of whether Proposal 1 is adopted, you would, nonetheless, be in favor of 4 and 5?

A. Absolutely. And if Proposal 1 would be adopted, definitely think that Proposal 4 and 5 need to be a part of that.

Q. What is the position of Dean Foods on Proposal 2?

A. Again, like Proposal 1, we're unsure. We're very concerned about potential abuses that could occur with that. And if Proposal 2 would be adopted, that Proposal 4 and 5 would need to be in effect and that Proposal 4 should also apply to Proposal 2.

Q. That is by way of saying that the hearing notice does not have that language in it for Proposal 2 but since Proposal 2 is brand new language you would propose to modify Proposal 2 with the identical language you have in Proposal 4; correct?

A. That is correct.
Q. And that is by way of saying that you don't think it would be fair that the intra-market credits be allowed to divert more than the supplement? You're not looking to create a new opportunity for people; correct?
A. That is correct.
Q. So that's just symmetry there?
A. That's correct. The same treatment of -- of milk moving from out of the area into the area be treated as milk moving in-area to in-area.
Q. In addition to -- to any issues you have in Proposal 2, do you think -- I'm sorry. Let me go to Proposal 3. What is your position of Proposal 3?
A. We support Proposal Number 3.
Q. Do you have any reservation as to the level of the -- of the amount paid?
A. Yes, we do believe that consistent with the secretary's findings in the past that a reduction should be made of the calculation of 95 percent consistent, again, with the implementation of -- as I understand it -- the original implementation of the transportation credits.
Q. And that, again, is done to -- to not encourage hauling and to encourage efficiencies?

A. That's correct. There's -- there's no need to encourage unnecessary movement of milk. And that would help force more economical movement with lower compensation.

Q. There were a series of questions from -- of Mr. Sims from Mr. Tosi and I wasn't quite sure it got to this point, so I'm going to ask you. If as a result of this hearing Proposal 1 is adopted and there are an increase in the transportation credits available for supplemental milk supplies, that will, of course, become a matter of public record; correct?

A. Yes.

Q. As an agriculture economist, do you have any opinion as to what would happen in the marketplace vis-a-vis sellers of milk to supply supplemental supplies regarding any increase in the transportation credit?

A. It would be my belief that they would feel some degree of entitlement to that change.

Q. At least a potion of it?

A. Yes.

Q. So that as an economist there is no assurance that the entire amount is going to flow to the benefit of dairy farmers in this market whether they are independent or cooperative members?

A. That's correct.

Q. Now, in your testimony on Page 30 -- Exhibit 37, for instance, on Page 6, you said another change that came with Federal Order Reform that had a material effect of the economic value of pooling distant diversions was the relationship between the producer value of the distant milk and the announced price. Do you remember that testimony?

A. Yes.

Q. And similarly you made a similar statement with respect to Federal Order Reform at another point. When you made those statements, were you looking at Pre-Federal Order Reform Orders 11 and 46?

A. That is correct.

Q. In fact, maybe we'll review a little history here beyond that. In 1990, there was a new order in the southeast -- new Federal Order. Do you know what that order was?

A. That was the Carolinas.

Q. And that was Order Number 5?

A. Five, yes.

Q. And at the adop -- at the time of the adoption of Order 5, do you now know that there were some provisions within Order 5 that were different from Orders 11 and 46?

A. That's correct.

Q. And what was the difference as to Order 5?

A. The difference, as I understand it, is that there was basically a different treatment of milk that flowed out of the Mid-Atlantic area into the Carolinas than milk that flowed from other directions. So, for example, milk from Laurel, Maryland into the Carolinas would have a -- would have been treated different as a diversion than milk diverted from Wisconsin.

Q. That is by way of saying that if milk was diverted back to a plant in Laurel or Carlisle that was regulated by Order 4 what treatment would it have under the then Order 5 Carolinas?

A. It would have been treated as if it were an in-area. So it would have had a -- similar to the today's flat pricing zone, it would not have had the zone-out.

Q. That's -- it didn't have zone-out. It used the plant location price identically as it uses it today?

A. That's correct.

Q. But that was limited to plants regulated under what was then Order 4?

A. That's my understanding.

Q. And it was limited to, at least in 1990, shipments into the Carolinas; correct?

A. Yes.

Q. And, obviously, that history needs to be considered by the secretary in making a decision regarding Proposal 5; correct?

A. Yes.

Q. You're not modifying your proposal today but you recognize that that was there; correct?

A. That's correct, that there was historical relationship between those two markets.

Q. Now, as you said yourself, though, diversions, say, up to Wisconsin were zoned out as to Order 5?

A. Yes.

Q. Similar to Order 11 and 46?

A. Yes.

Q. Now, a second change, as I've discussed some with Mr. Sims, was the merger and the establishment in 1995 of the southeast markets; correct?

A. Yes.

Q. And in addition to merging those orders, do you now know that there was a change of the zone-out regarding those orders when the present Order 7 -- well, minus some territory -- but what was then Order 7 was created?

A. Correct.

Q. And at that time, what had been zone-outs from the various orders went away and it was essentially a plant located in another Federal Order would have the same location value as its plant; correct?

A. That's correct.

Q. So when you talk about this history, it's a little bit pre-Federal Order reform and sort of stretches in a -- a sequence back to 1990 as to what was then Order 5 to 1995 as to what was then Order 7 and then in Federal Order reform at that point even 11 and 46 gave up their zone-out; correct?

A. Yes.

Q. And to the extent there was zone-out, it was based upon the then milage factors of 2 1/2 cents; correct?

A. Correct.

Q. Which reminds me of one other thing. If the secretary does adopt Proposal 3, which is the fuel cost adjustment, what is your position about what factors should be used as to Proposal 5?

A. If the secretary would adopt Proposal Number 3 as a reasonable adjustor for transportation credits, then the same factors should be used in implementation of Proposal Number 5.

Q. Adjusted for 95 percent?

A. Again, yes, using the same 95 percent adjustment.

MR. ENGLISH: I believe that concludes my direct examination and the witness is available for cross examination.

JUDGE DAVENPORT: Mr. Beshore?

MR. BESHORE: Thank you.

EXAMINATION

BY MR. BESHORE:

Q. Mr. Beshore. Good morning, Evan.

A. Good morning, Mr. Beshore.

Q. Let me -- let me start and see if I can understand Dean Foods' position on Proposals 1, 2 and 3. You support Proposal 3. Setting aside for a minute whether it's 95 percent or 100 percent, what -- what would the rate of reimbursement per mile -- what is the rate of reimbursement per mile that you are supporting be implemented in the order by virtue of your support for Proposal 3?

A. I don't think I understand.

Q. Well, I'm trying to understand what your support for Proposal 3 means. If Proposal 3 were adopted, as you view it, what -- how much would the rate of reimbursement increase? Would it -- just as proposed by -- by Mr. Sims? Would you -- you're adopting the same base period? You support the adoption of the same base period for the diesel fuel price?

A. We -- we agree with the concept of having an adjustor to recognize changes in fuel price over time and believe that when the secretary chooses the number that it should be conservative so as to not encourage uneconomic movement of milk.

Q. Well, but should he increase the rate presently to conform with the fact that diesel fuel costs a lot more now than it did when the current rate was adopted?

A. As it relates to Proposal Number 3, yes.

Q. Okay. Now, if the rate is increased presently but Proposal 1 is not adopted so that there's an increase in the rate of -- the maximum rate of assessment for the fund, you're going to have a situation where you're just going to be prorating -- I mean, you're not going to have gained anything; would you? Isn't that fair?

A. That is fair.

Q. Okay. So if you endorse the concept of Proposal 3, which would update the cost on the basis of fuel cost, even to maintain the status quo in terms of proportionate reimbursement, you've got to do something with Proposal 1?

A. That -- that is correct. That is why we have Proposal Number 4. And if the secretary does not see that Proposal Number 4 fits in this order, then we cannot support a change to Number 1 to increase the dollars available for more abuse of the system.

Q. Even though you're going to support increasing the rate?

A. We cannot support -- we cannot support a change that would encourage more abuse of the system. Proposal 4 has to be first. In support of Proposal 4 -- the secretary's support for Proposal 4, then we could support Proposal 1.

Q. Okay. And does the same thing apply to

Proposal 2?

A. Proposal 2 is, in our view, a bit more complex in that there's not a history to see exactly what movements would happen. It's a little akin to Proposal 5. If Proposal 5 is implemented, clearly some milk will likely make a decision not to associate with the order. If Proposal 2 is adopted, it's difficult to tell what type of movement could begin to happen given new economic incentives and disincentives.

Q. And --

A. And therefore, we --

Q. So you're not -- you're not sure whether you would support it or not until you see how it would work out? Is that what I understand?

A. To some degree, that's it. Please understand --

Q. How do we -- how do we solve that one?

A. Please understand that some of the testimony offered by Mr. Sims was different than the assumptions that we came to this hearing with on our belief for Proposal Number 2. And so having now got that information, we're still working through exactly what we feel. Definitely understand the -- the challenges of moving milk around, but we're very concerned about potential abuses. And if -- again, kind of like Proposal 1, if Proposal 4 is not adopted, we cannot support Proposal 2 under any conditions. We think Proposal 4 should be part first, then Proposal 1 and then possibly Proposal 2.

Q. Okay. Now, let's -- let's make sure we have Dean Foods' procurement position presently in context as we're discussing this. Is it fair to say that Dean Foods Company has made, some years ago, a corporate decision to essentially farm out, if you will, its -- the procurement of milk for its distributing plants?

A. It is -- it is fair to say that Dean Foods has made a decision in some areas to outsource aspects of procurement.

Q. Only aspects of procurement?

A. It is our belief that the producers that share -- that ship milk to Dean Foods, regardless of the umbrella that they would be perceived to be under, are Dean Foods shippers and that the service that are a part of managing that milk supply, pieces of it have been outsourced.

Q. Okay. Now, let's come at it another way. Are there any areas in this -- let's just talk about the southeast. In the southeast presently, does Dean Foods take on the responsibility for itself of procuring the total supply of milk it needs on a day-to-day basis for any of its distributing plants?

A. I believe the answer is no.

Q. Okay. So basically just to talk generally now, Dean has determined that it would rely upon the cooperatives to organize and procure the milk supply needed for its pooled-distributing plants -- the balance of the milk supply needed for its pooled-distributing plants which are not -- which is not provided by the producers supplying independently for -- to -- for Dean -- to Dean Foods for whom you've outsourced various other functions?

A. Are you asking are co-ops part of our procurement strategy and it relates to balancing our plants?

Q. No, not per -- that's not my precise question. Isn't it -- I just want to confirm what I think you answered previously, that Dean Foods, since it does not -- you said, no, it doesn't itself assemble all the milk it needs -- procure all the milk it needs for any of its plants, that it relies upon cooperatives to provide that function.

A. Cooperatives are a part of our milk supply strategy.

Q. Well, what's the other part?

A. We have direct milk purchases as well.

Q. Your own independent suppliers such as Mr. Roby?

A. That is correct.

Q. Okay. Now, you would agree, would you not, Mr. Kinser, since you were in this business before you were employed by -- by Dean -- you were on the cooperative side of the industry --

A. That is correct.

Q. -- that, you know, there are expenses incurred when cooperatives organize and assemble and deliver a supply of milk tailored to the needs of a distributing plant?

A. There are costs of milk procurement, yes.

Q. And when you go out of area -- when you have to go out of area for -- for milk supplies -- supplemental milk supplies, let's think about some of the costs that are involved. Of course, there are give-up costs involved in acquiring that milk supply from out of the area?

A. That -- that is sometime true.

Q. Okay. And there are, of course, the costs of transporting the milk from out of the area into the area?

A. That is true.

Q. And there are costs of -- how -- would having that out-of-area milk available when you want it, how do you -- that would factor into the equation; would it not? You've got to make -- make those arrangements in some way when you need it, I should say. Having the out-of-area milk available when you need it has got to be worked into the equation; fair enough?

A. That -- that seems reasonable.

Q. Okay. Sometimes that gets -- when you were -- when you were at Foremost, did you sell milk out of Order 30 to the southeast?

A. I'd rather not comment on my activities for another entity.

Q. Okay. Let's come at it generically. As a -- as an experienced professional in the dairy business -- well, let me go on to something else.

The -- you talked about the changes in pricing out-of-area milk which you are advocating under Proposal 5 and you talked about the Carolina order -- I think it's the Carolina orders -- in the '90s pre-reform when it had a pricing provision for milk originating in Order 4 for the Middle Atlantic area which you have likened to current out-of-area pricing provisions for Orders 5 and 7.

A. True.

Q. Okay. Do you -- are you aware of what the utilization on the Carolina order was during the time period when those pricing provisions were in effect -- out-of-area pricing provisions were in effect?

A. It's my understanding that the data is available, but I -- I want to think that it was in the mid to upper 70's.

Q. Are you sure it was that low?

A. It possibly could have been higher than that.

Q. Okay. What's a pseudo handler? By the way, is that defined in the Code of Federal Regulations anywhere?

A. Unfortunately, it's too late now to provide a proposal for definition of that to be included. Pseudo handler is a handler that's sort of acting as a handler but purely motive is about exploiting the value of the order for the benefit of producers that are not serving the market.

Q. Are there any pseudo handlers in Orders 5 and 7?

A. It would appear in looking at the data that we've seen here that, yes, there are pseudo handlers.

Q. And how do you -- how would you pick them out?

A. How would I pick them out?

Q. Yeah.

A. I think there are a few things. If you look at Exhibit 38, the third page where we're looking at the reduction in the Class I -- excuse me -- in the transportation credit, a handler or multiple handlers are diverting a significant more percent of their milk than is really required in the prior two pages' examples.

Q. Okay. So any handler with diversions of more than 30 percent, as you define them, is a pseudo handler; is that correct? I mean, that's -- that's how you lose credit -- lose funds under Proposal -- I'm sorry -- Proposal 4. Page 3 -- Page 3 of Exhibit 38 relating to Proposal 4, you're saying anybody whose milk would be -- I don't know. I lost you there somewhere. What -- what does the third page of Exhibit 4 -- Exhibit 48 tell us about who's a pseudo handler?

A. The third page of Exhibit 38 shows the reduction in the transportation credit with implementation of Proposal 4.
Q. Oh, so anyone who's pooling out-of-area milk is a pseudo handler?
A. If they are doing it with a great amount of diversions, then this reduction demonstrates the implications of diversions greater than 30 percent.
Q. Okay. So maybe my original question was correct. Anyone with diversions greater than 30 percent is a pseudo handler?
A. Seems fair.
Q. Every month of the year?
A. The 30 percent, as it applies in this instance, only applies to July through December, the time period that's been testified to as being the tighter or shorter time period for this market.
Q. Okay. But you want it to apply -- in your modi -- proposed modification to Proposal 2, I under -- does that apply in July through December?
A. You're correct that it would apply -- as my understanding of Proposal 2, it functions year round.
Q. And would your proposed modification of Proposal 2 with your Proposal 4 apply year round?

A. Yes.

Q. Okay. So is it, then, your testimony that any -- any handler with more than 30 percent diversion any month of the year in these orders is a -- in essence, a pseudo handler whose credits should be reduced?

A. We've heard testimony by Mr. Sims that this market is deficit for its Class I needs. So in-area production does not appear to ever have a need to be used at other than distributing plants.

Q. But your -- how does your modification to Proposal 4 work? Is that only to -- is the denominator -- well, let's see. I guess is the numerator only diversions of in-area milk?

A. No, it recognizes diversions of in-area as well as out-of-area. So no -- someone who handles more milk located in the area than out of the area is not mistreated and vise versa; they have equal treatment.

Q. So Proposal 4, as attached on to Proposal 2, would say that a handler -- if there's a handler who has in-area milk moving long distances otherwise entitled to the credit but the handler also has supplement milk distant from the market, the use of which in the spring months of the year, is --

results in diversions greater than 30 percent, because of that he wouldn't get credits otherwise applicable to long distance movements within the order?

A. I believe I agree with what you just stated. Let me see if I understand what you just said. You said that if you had an in-area handler shipping all their milk to distributing plants but carrying enough out-of-area milk on their pool report that it made their pool report something greater than 30 percent diverted that their in-area transportation credits would be reduced?

Q. Correct.

A. Then, yes, I agree.

Q. Even if that out-of-area milk -- well, okay. If -- if there's out-of -- if there's milk needed in the fall for -- what -- what's your philosophy here at Deans? If milk's needed in fall to supply the Class I needs of the market from out-of-area, since you've got, what, a 20 percent plus swing in in-area production fall to spring, you're not going to need that out-of-area milk -- all of it -- the same volumes in the spring; correct?

A. That seems to be a fair representation.

Q. Okay. But you don't want that milk, then,

to be pooled in the spring; is that it?
A. Mr. Pittman testified yesterday as far as their handling of milk that they're able to procure milk for balancing and that that milk is not pooled on their marketplace. It appears to work.
Q. And that's what -- that's really your objective for Orders 5 and 7 is to have milk come in only when needed and not be pooled on the days it's not needed and the seasonal supplies not be pooled?
A. We recognize the need for supplemental reserve supply for this marketplace but believe that the current regulations are allowing for that supplemental supply to be greater than is demanded and it is being abused.
Q. Well, did you hear Mr. Sims' testimony this morning that the lower percentages rationally are going to be delivered from the most distant -- the most distant supplies of milk are going to have a lower deliver percentage at any given time than closer suppliers?
A. Yes, I head that testimony.
Q. Okay. And that's a logical and reasonable and economically efficient way to supply the market; is it not?

A. That is correct.

Q. And that could result in situations where if a handler happened to be the supplemental handler with a distant milk supply that his diversions would be more than 30 percent, especially in the spring of the year; correct? Nothing -- nothing wrong with it but it would happen?

A. It could happen, yes.

Q. Under a perfectly rational economic supply situation?

A. There are multiple ways to build a perfectly rational supply system. And within the dairy industry, we play by the rules that are given us. And we believe the rules are broken.

Q. The examples that you provided relating to the definition of the -- definition of the problem, let me see if I can understand how this -- how this works or how you suggest it works. Currently your examples using the -- using Louisville as a, what, a gateway?

A. Yes.

Q. When -- if all milk is qualified at Louisville in your examples, the post-reform pooling example, all milk's qualified at Louisville

and that's how you -- that's how you reduce the transportation costs basically; right?
A. That is correct.
Q. Okay. What -- where do you account for the displacement of the Louisville local milk in that equation?
A. Well, this comes to the -- there's multiple things that could have happened with that. It's possible that --
Q. First of all, you didn't account for it in your calculations; right?
A. There -- there is an acknowledgment that there's a cost associated with that milk.
Q. Okay. But when you bring milk in from outside to service Louisville, you are displacing the local Louisville milk that otherwise would have serviced that plant?
A. Not necessarily.
Q. Well, how not? You going to pump it in and pump it back out and take it somewhere?
A. We've just been discussing about the deficit nature of this market and the need for supplemental supplies. It could have came in as supplemental balancing.
Q. So you say -- you're saying it's needed in

Louisville? These were all needed supplies in Louisville?
A. That's correct.
Q. So in the pre-reform example, then, where did the needed milk for Louisville come from, you haven't accounted for there then? Or didn't you need it pre-reform and now you do? In other words, I think the equa -- one -- at least one thing is missing. And then react to this: At least one thing is missing in the whole equation here and that is the fact that if these are just qualifying sales, sales that are made for the purpose of pooling milk, which is the premise of your hypothetical, as I understand it, you haven't accounted for the cost displacing the local milk.
A. That is true.
Q. If they are, on the other hand, demand-deliveries because they're needed in the market and in the post-reform they're needed at Louisville, you haven't accounted for the needs at Chattanooga and Charleston.
A. That is true.
Q. Okay.
A. But in the same sense, the effect carries through as far as the -- the dilution effect of not

hauling it as far.

Q. Well, if milk is only needed at Louisville and its closer to the reserve supplies, I think we could all agree that transportation costs is going to be less.

A. True.

Q. Okay. Now, on -- with respect to Proposal 5, your -- just talking about mechanics of this. Your only -- it only relates to the pricing of diverted milk; right?

A. That is true. Delivered milk to pooled-distributing plants would be unaffected.

Q. And delivery of milk -- out-of-area milk from plants would not be -- or -- right -- from plants would not be -- or to plants -- to pooled plants would not be -- would not be effective; correct?

A. That is true.

Q. Okay. So you could put up a pooled-supply plant at a distant point under Proposal 5 and the price of that pooled-supply plant would be the same price as any other pooled plant under the present order and you could bring milk in and keep it home as long as it goes through the pooled-supply plant and pricing wouldn't change; isn't that correct?

A. I believe that would be possible. It's not a desired outcome. So if -- if, in fact, there's not sufficient requirements for an out-of-area pool-supply plant to set up like that, then the secretary should possibly consider a change to the pool-supply plant definition for out-of-area to prevent such a scenario from developing.

Q. Now, in your hypotheticals with respect to the operation of Proposal 5 -- and treating these out-of-area non-deliveries as diversions now, which is how you treated them in the hypothetical -- take the Kiel, Wisconsin example. That's the first one, I guess.

A. Maryland's the first one.

Q. Actually, Laurel's the first one.

A. Or Laruel, yeah.

Q. Well, let's -- let's talk about Kiel because Laurel might have a special -- a special circumstance. Keil, that's a -- that's a non-pool plant; correct?

A. I would believe -- I just am working off the data provided by the market administrator's office, and I assumed that they're non-pool plants.

Q. Okay. So the cost -- when you -- when you decrease the -- the applicable price on these diversions, your intent is that the milk will not be pooled on Order 5 and 7; correct?

A. Intent is to make it less economically desirable for milk distant to the market not delivering to the market to be lowered.

Q. Well, if you look at Kiel, I mean, is there any -- you've got some knowledge of the relative -- relative prices here. I mean, there would be no reason whatsoever to pool that milk if it had a minus $1.35 off Order 5; would there?

A. I -- I would -- I would doubt it would make economic sense.

Q. Okay. So the marketer is going to have -- is going to want to pool it back in Order 30? It's not going to work to pool it in Order 5; correct?

A. It would be unlikely that the diverted pounds would be pooled on Order 5.

Q. Okay. So -- and when you -- when you require that -- when you make -- make that the economic outcome, you're -- in addition to imposing a zone-out price, you're imposing the requirement on that marketing handler to take that milk back to an Order 30 pool plant to reassociate with that market; aren't [sic] you not?

A. Keeping in mind that Order 30 has split plant provisions, that may not require any different action other than simply receiving it into a different silo.
Q. Okay. Or it may or it may not depending on what the handler's got available, I suppose.
A. The handler would have the full regulations at their disposal which include a split plant provision.
Q. Well, how about in Sulphur Springs, Texas, you got split plants down there?
A. I am less familiar with that marketplace.
Q. How about Portales, New Mexico, are there split plants out there?
A. Same as would apply to Sulphur Springs.
Q. So the answer is you don't know?
A. That's correct.
Q. Okay. Assuming there aren't -- there aren't split plants, you're going to require additional -- there's going to be a cost to this if the milk is not economically pooled on 5 and 7. There's going to be an additional cost imposed on this supplemental milk of reassociating with its -- with its home order by delivery to a pool plant; wouldn't you agree?

A. Yes.
Q. Is that a desired result of Proposal 5 or byproduct of Proposal 5?
A. I'd probably list that in the unintended result category.
Q. It's not a very -- not a very desirable result; is it?
A. I would agree with that.
Q. Okay. Let me talk about the 95 percent factor on Proposal 3 just a little bit. Let's explore how this record might be a little different than the record in '97 when that was -- when that was put in place. First of all, for the price, when we put a fuel adjustor in place, the -- the rate of reimbursement on transportation is going to automatically go up and down with the -- with the fuel market?
A. True.
Q. Okay. And that wasn't a possibility in the '97 hearing when the secretary was adopting a fixed rate of reimbursement until further hearings?
A. True.
Q. Now, in this record, we're also working with base costs of operating equipment which are at least two years old as Mr. Sims testified. Do

you agree with that?

A. Yes.

Q. And, you know, wouldn't you agree that cost of insurance and equipment and labor for the operation of milk-hauling trucks has increased since 2003?

A. Seems reasonable.

Q. Okay. So we've got a build in -- what's the annual rate of increase, I mean conservatively, three percent, four percent on all those costs?

A. I wouldn't know with that detail.

Q. Well, you're an economist. I mean --

A. I don't follow every part of the committee, though.

Q. Well, isn't the, you know --

A. As the general inflation, three percent seems reasonable.

Q. Okay. So if -- just -- just assuming the cost of hauling milk -- you know, the -- the cost unrelated to fuel have -- have moved with the general rate of inflation -- three percent or so a year -- the five percent's already built in; isn't it?

A. We still have concerns that the closer you get, that if there's not a degree of protection, it just expands the potential for abuse.

Q. But the degree of protection you would want is an additional five percent discount off cost figures that are already at least six percent or more behind the current general rates of inflation; correct?

A. Mr. Beshore, I find it quite interesting that your proponents are going to be the beneficiaries of this. My organization is going to experience the increased cost of this. And we are here supporting it with protections and you're challenging me on five percent when I'm supporting your position.

Q. You're challenging us on five percent; right?

A. Fair. But, again, I am willing to support a position that's going to increase my cost as an organization and I am challenging that be hedged at a five percent reduction.

Q. We appreciate your support in all -- in all respects.

Just one final question or perhaps a followup, if I might, for now, Mr. Kinser. Do you -- are you aware in being in the operation of Dean's distributing plants how far in advance time-wise they place their orders of milk for delivery to the plants?

A. Not at a level that's probably fair for me to represent to this record.
Q. Well, if you look at -- your plants would have fluctuations in daily needs that -- that may be something like the market average perhaps shown on the first page of Exhibit 38?
A. That seems reasonable.
Q. Okay. Are they firmed up as much as a week in advance, do you know?
A. It would be my belief that we'd place orders a week in advance.
Q. Do you know whether those orders ever -- ever change during that time period?
A. I would believe that they do change.
Q. Okay. And you rely on your suppliers to absorb those -- those changes and get -- get you the milk that you need when you need it?
A. I would agree, yes.
MR. BESHORE: That's all I have for now. Thank you.
JUDGE DAVENPORT: Mr. Schad?
EXAMINATION
BY MR. SCHAD:
Q. Good morning, Evan.
A. Good morning, Mr. Schad.

Q. Dennis Schad, Land O'Lakes. Let me see, the -- I expect the only things I'll be referring to are Exhibit 7 and the wording of the proposals. So if you'll -- if we have that.

A. When you say "wording of the proposal," you're talking as in my 37 or in the official notice of hearing?

Q. In your proposal --

A. Okay.

Q. -- however that is. I guess starting with Proposal 4, just a question on Dean's motivation. Why did Dean submit Proposal 4?

A. As I attempted to illustrate in the beginning of my testimony, Dean Foods has a rich history in its predecessor organizations and representation that transportation credits can be abused and we believe as we watched them be implemented over time they have been abused. And Proposal 4 is aimed at trying to keep those abuses in check.

Q. Simply put, is your motivation toward the producers that you -- that you -- who are independent producers who are yours who -- to whom you pay, are -- is the motivation towards the cost of the transportation credit as a Class I handler would pay? Is it -- is it producer-driven or is it your cost driven?

A. I guess we have a degree of concern about the milk supply in the southeast, so we are continually being conscious of the implications on dairy producer revenues and it's our understanding that making any change to Proposal 4 is probably unlikely to affect our assessment as far as our actual cost of milk. But as it -- if it would, it would only be the effect that it has, in fact, proved out that somebody is abusing the system.

Q. Okay. So the answer -- your answer would be it is mainly driven from a producer standpoint?

A. Yes.

Q. Producer plant standpoint. Question: In Federal Orders 1, 33, 30 and 126, does Dean Foods also have plants?

A. Yes.

Q. Does Dean Foods also have an independent supply within those orders?

A. You said 1, 33 and 126?

Q. And also 30.

A. And also 30?

Q. Yes.

A. I think more of those than not but I could not tell you for sure that we have independent supplies in all of the orders that you listed.

Q. Okay. Let's go to Proposal 4 and the language in Proposal 4. First off let's --

A. Maybe for clarity purposes, can we work from Page 10 of my testimony.

Q. Okay. And I'll -- I'll work from -- I'll mainly work from the Federal Order 5 provisions and we both assume that they're -- they're equal also in the Federal 7 provisions. Okay. Let's start with D2. What milk does D2 refer to?

A. Do you mean where does it lie within --

Q. No. What milk.

A. It applies to milk that is eligible for transportation credits. Is that --

Q. Any particular -- I'll start off with a -- if you go to -- if you had the order in front of you, you could go to D2. And at the beginning of D2 it refers you back to C1 which is defined, "If transportation credits shall apply to the follow milk, Section 1, bulk received from a plant regulated under another Federal Order." So your D2 is specific to plant-to-plant transfers.

A. That's correct.

Q. The relationship in order to qualify for full

transportation credits for plant-to-plant transfers, would you describe that relationship for a handler?
A. I don't have your code up here with me.
Q. It's -- go to your proposal.
A. Okay.
Q. Is it true that it is deliveries to Order 5 and Order 7 -- 7A and 7B plants?
A. Yes.
Q. What -- what deliveries of that plant -- what's the numerator and the denominator of that relationship? That's -- that's the question that I'm asking.
A. Is your question what's the numerator and what's the denominator in the calculation of the 30 --
Q. Of the 30 --
A. Do they go into the 30 percent?
Q. Relative to -- to Section -- to your first --
A. Okay.
Q. -- D2.
A. The -- I think I stated that. I'm just trying to find it in my testimony just to make sure. Well, you're going to take the pounds of producer milk delivered to plants, other than plants qualifying as A and B under Section 7 of Federal Order 5 and

Federal 7, and divide that by the total pounds of milk on the producer on -- the total pounds of producer milk on the handler's report.

Q. Okay. Let's -- let's explore that relationship in reference to D2. If that -- is there -- is there an assumption that that plant is owned by a handler on Federal Order -- again, we're assuming this is all Federal Order 5. It's a plant-to-plant transfer for Federal Order 5 -- an other order plant sending milk into Federal Order 5 classified as Class I. So is your assumption that the owner of the plant is also a handler on Order 5? Where would you go for that relationship? Would the --

A. You're going to look, though, at the -- as I understand it, you're going to look, though, only at the pounds of producer milk that that handler has on Order 5.

Q. So the assumption is the owner -- is it owner or operator or is it -- or do you -- do you have a distinction -- sometimes the order -- the order makes a distinction between the owner and operator. Do you have a -- does your proposal have a distinction?

A. It does not have a distinction.

Q. Okay. So the owner or operator, their -- you would go to their Order 5 handler plant to determine whether a plant-to-plant transfer was -- could get all of the transportation credits?
A. Maybe I'm confu -- I would -- unless I'm missing where you're at, I think there would only be one report that you'd be looking at to make that determination.
Q. I'm confused also. What -- what would that report be?
A. Their pool report that they're filing to pool the milk. They're going to have --
Q. Would that -- again, is it the assumption that the owner of the plant has a 9 -- a 9C -- 9C producer milk? I mean, otherwise, you know, if there is a -- if there was a Dean plant in Philadelphia, Pennsylvania that wants to send milk to another Dean's plant, do you go to the Dean's handler report for Barber to see whether that -- that transfer qualifies?
A. So you're saying if Philadelphia shipped to --
Q. Shipped milk to --
A. Barber?
Q. No. I'm sorry. I switched Order 5 and

Order 7.

A. Okay.

Q. And I apologize for that. So assuming that Dean's has -- well, okay. Now let's switch over to 7. Let's say that a Dean's plant in Philadelphia, Pennsylvania wants to send milk in bulk to a plant within Order 7 and wants to get -- get the transportation credits for that under the section of the order that gives transportation credits for -- for Class I transfers, would you expect the secretary to go to the Dean's handler report for Order 7 to see dispositions of producer milk to determine whether to pay for transportation credits?

A. I'm trying to follow the example. You mean that the delivery to 7 would link the Philadelphia plant into part of the report of the plant that received the milk?

Q. Again, I'm -- maybe I'm -- I am -- I am -- I am giving a hypothetical where a plant owned by Dean's --

A. Okay.

Q. -- wants to ship milk from that plant to a -- another Dean's plant that is pooled under Order 7.

A. Okay.

Q. That -- okay. It also wants to collect transportation credits for -- which are applicable through the order for a transfer from a -- from an other order plant which is the Order 1 plant in Philadelphia to this plant in Order 7. I'm asking where should the market administrator go for -- for the relationship for your proposal to see whether they meet your -- the diversion requirements?

A. Okay. I think -- if I understand the question right in context of Proposal 4 -- that the market administrator would look at the -- well, now it's not as clear.

JUDGE DAVENPORT: If you can, answer the question. If you cannot answer the question, let's move on Mr. Schad.

A. I'm going to make a try. If the plant that shipped it in then didn't qualify as a plant on the order so they did have their own report to file on that order, then you would work off the plant that is within the order. So the Order 7 plant report would be the calculation that you would use to make the determination.

BY MR. SCHAD:

Q. So -- so in this case, the Order 7 pool plant, you would look at the producer milk associated to that order -- the Dean's plant report for that receiving plant and look at the producer deliveries?

A. That is -- as best I can understand your example and understanding -- my understanding of the order language, that is what the market administrator would need to do , yes.

Q. Okay. Let's say the -- let's go now to a plant that is also a pool -- also a pool plant on Order 1 to make it easy. It is not 7A plant, it is a 7B, C or D plant.

A. Okay.

Q. So --

A. How about throw B out as well.

Q. Let's throw B out.

A. Okay.

Q. C or D supply plant --

A. Okay.

Q. -- pooled on Federal Order 1. So you -- the -- the question would be -- let's -- let's make it easy. Let's make it a Carlisle plant that is owned by Land O'Lakes. Where would -- where would the secretary go to find out whether a -- and going back to Order 5 --

A. The -- the -- you're saying that Carlisle would be a pool-supply plant pooled on Federal Order Number 1?

Q. Correct.

A. Transferring to a 5 or a 7?

Q. Correct.

A. Then I believe you would look at the report of the 5 and the 7 for making the determination.

Q. The plant?

A. The plant in 5 or the plant in 7's pool report to which the milk was --

Q. Okay. So it would have nothing to do with -- with the possible 9C report of Land O'Lakes on Federal Order 5?

A. In the case where you're acting as a handler on the order, though, you're going to have to take --

Q. I'm sorry. Start from the beginning. I'm very sorry, sir.

A. I think it --

JUDGE DAVENPORT: Let's rephrase the question.

BY MR. SCHAD:

Q. I think the question was that we're looking at a transfer from a supply plant pool on Federal Order 1 into Federal Order 5. And it is a transfer under the order -- the Class -- the Class I allocated back to the Order 1 plant is based on the lesser of plant or -- or -- or market-wide Class I utilization. And that my question is that that -- that -- that transfer -- the supply plant wishes to get transportation credits for that movement. The language of your proposal would tell me to go to the producers -- the relationship of producers into 7A and B locations of two Federal Orders 5 and 7. I'm asking where would I find that relationship?

A. Okay. And now you've added in as I was trying to answer that then a 9C report is going to be filed in relation to that.

Q. In relation --

A. Versus in the first example there was no 9C report; that was an option.

Q. Okay.

A. Correct?

Q. No. No, that -- I would expect that Dean -- if Dean has producers on the Federal Order 7 that it would have -- it puts in a report which -- which defines producer deliveries.

A. Correct. But that's -- but Dean would not have access to the 9C section of the report.

Q. No.

A. Okay. So in the first instance, no 9C was available. Now in the second instance, 9C is available.

Q. The assumption -- yeah, okay. The handler who operates the plant has a 9C report.

A. Then I believe you'd have to use the -- that handler's report that's being attached to Order 5 or Order 7 and, actually, the combination thereof.

Q. Okay. So there's -- there's the relationship between the owner/operator of plant and their 9C report?

A. Yes.

Q. Okay. How about if that owner/operator of that plant has no pool on the order but does not submit a 9C report, their -- their milk is pooled on someone else's 9C report or someone -- or -- or another Class I --

JUDGE DAVENPORT: Let's ask one question at a time.

MR. ENGLISH: One question at a time, Mr. Schad.

BY MR. SCHAD:

Q. Okay. Again, the question is let's say that that handler that owns and operates that plant does not submit a 9C report yet has milk pooled on the order?

A. That some -- that -- that someone else has written their milk onto their report?

Q. Yes.

A. Then the milk to which the report has been written on would be from which the calculation is made from.

Q. Okay. So it would be riding on that -- on that other handler -- that 9C handler, it would be incumbent on him -- on his -- in his producer receipts?

A. In the case of a 9C; correct.

Q. And the next case, if that owner/operator of the plant that's included on a report of a -- of a -- of a pool plant, not a cooperative, a --

A. Then you would use the calculation of that pool report for that plant.

Q. i think this would probably be the last level of complexity here. How about if the owner/operator of that plant is a joint venture between two co-ops that may or may not submit a joint report but let's assume to hit every level that they -- they submit separate reports, where would you go then?

A. I'm inclined to think at that level you would have to look at each of the reports independently and that they would stand on their own for the calculation of their individual rate of compensation for transportation credits.

Q. It gets rather complicated; doesn't it?

A. I would agree.

Q. Thank you. Let's -- let's, again, go back to the language of your proposal. And as I understand it, in your relationship -- your Z relationship, you're looking at. Again, let's start with Federal Order 5 to make it clear. Your relationship is you would - in a denominator you would have the total pooled pounds on Federal Order 5 and as a numerator you would have deliveries to 7A and B plants in Federal Order 5 as well as 7A and B plants in Federal Order 7; is that correct?

A. No. It would be -- you -- you would -- the denominator would move to the top and then you would subtract out deliveries that were a part of the denominator that were delivered to 5A, B, 7A, B plants and the remaining would be the numerator.

Q. Okay. We're saying the same things. I'm

saying it from different sides of the mirror.
A. Okay.
Q. But I believe we are saying the same thing.
Okay. From a Federal Order 5 perspective, deliveries to an Order 7A or B plant, how does Federal Order 5 treat those deliveries?
A. Federal Order 5 would treat deliveries to Federal Order 7 as -- it would get the classification that it got out of the plant. Most likely in order for it to remain on 5, it would have been requested as other than Class I.
Q. Okay. So under -- under the Federal Order definition of the word "diversion," it would be a diversion?
A. That is correct.
Q. Okay. Would Federal Order 5 -- milk delivered to a Federal Order 7A or B plant, would they -- would that milk be eligible for transportation credits under Federal Order 5?
A. I do not believe so. I believe that if milk is pooled on 5 but diverted to a Federal Order 7 that it is not eligible for a transportation credit on either order under the current language.
Q. I think both of us would agree to both of

those things about being the diversion not eligible for transportation credits. I would -- I would then ask your rationale in your relationship of including diverted milk that has no relationship to the transportation credit in your relationship for -- for our Percentage C.

A. It is -- the more I pondered it, it is unlikely that milk is going to be -- in the example we were just going through that milk is going to be pooled on one of the orders and diverted to the other order for purposes of pooling. But to the degree that happens, we don't understand that that -- we do not believe that that action by the handler should lessen their receipt of transportation credits because they still served the market.

Q. Did they serve the Federal Order 5 market?

A. Not directly.

Q. Okay. I didn't get the memo that said that the orders merged. Did I -- did I miss it?

A. That is kind of my point around that is that, you know, we don't believe that these orders need to merge and we actually believe they should be broken up. But we also recognize that there's a limited supply of milk and that at times strange things have to happen. We do not want a handler penalized for one of those strange instances where it crossed a line.

Q. Let's move away from the language of Proposal 4 for a little while. I'm going to your testimony Pages 4 and 5 when you talk about the -- comparing the pre-reform pooling examples against post-reform pooling examples. And I think you have two issues there. If I could characterize it, one would be the consolidation of the orders and the other is the zone-out provision that -- that was dropped.

A. Those are the two issues that I illustrated in my testimony, yes.

Q. Right. Are you aware that order consolidation was a function of the -- of a legislative mandate?

A. Yes.

Q. Okay. Your -- your -- did you have the opportunity to read the final rule for order -- for a Federal Order reform?

A. I've read sections of it, not in its entirety.

Q. And I don't have it with me here but I would -- would you agree with me that the secretary gave reasons for combining certain Federal Orders? And I'm -- go ahead.

A. There was, within the decision as I recall, some explanation of the secretary for grouping certain Federal Orders together.

Q. Among --

A. But also understanding to your point earlier that the secretary didn't have discretion to choose how many orders to form, it was dictated in the legislation as I understand -- the range.

Q. You're correct. And I believe the record would show that the secretary did not use as many as he could have.

A. And it's also my understanding the secretary did not consolidate it to the full degree that he could have.

Q. Agreed. Okay. Among the reasons the secretary gave looking at the plants and Class I overlap, he talked -- he talked about things like milk supply and the overlap between Federal Orders.

JUDGE DAVENPORT: Mr. Schad, I understand that you're going to testify later. If you wish to include those in your remarks, I'd be happy to listen. But, in other words, if you're going to ask a question, let's ask the question.

BY MR. SCHAD:

Q. And would you agree that he -- he gave reasons for consolidating the orders and they were -- they were rational reasons?

JUDGE DAVENPORT: Those are asked and answered previously.

MR. SCHAD: Thank you.

BY MR. SCHAD:

Q. Okay. Let's talk about Proposal 5 for a little while. Again, let's go to the language. The question that I asked before and I asked your opinion -- I asked someone from the market administrator -- okay -- start -- let's go backwards a second.

For Proposal 5 -- okay -- for purp -- and I'm reading -- for purposes of making payments of producer milk and non-pooled milk except milk diverted plant inside the marketing area, you would -- you would -- basically that provision would say that milk diverted inside the marketing area should be priced on the Class I surface; correct?

A. Yes. Yes.

Q. Okay. And there is another provision that then says that plants outside of the marketing area would be -- would be priced based on the closest plant. And I believe if you -- I think your language now says that shall be priced at the lower of, A, the location of the closest pool-distributing plant in the marketing area less an adjustment, dah, dah, dah. But to just to start with that -- that phrase, having nothing but your proposal to prepare for this at the very beginning, I understood that when you spoke of "the marketing area" you were -- you were speaking of Order 5 if we were talking about the Order 5 provision and Order 7 if it was the Order 7 provision. So I -- I prepared based on the idea that a plant could have two different -- depending on -- two different locations depending on the marketing area you chose. Do you believe that your language is sufficient that what I read into it would not be what the secretary will ultimately use or interpret?

A. Well, to the degree you were confused and let's make the record clear, our intent was that the -- there would not be a different location if it went to 5 or if it went to 7 but that the calculation would be to the nearest pool-distributing plant that's within either 5 or 7 combined and that would apply to both so that there would only be one calculation necessary for each plant located outside of the marketing area.

Q. Okay. So that -- that's clear that was your intent?

A. That was the intent.

Q. And that was the way the market administrator interpreted it as well in the reports that they give us.

I have a question. If a plant qualifies as an Order 5 or 7 plant outside of the marketing area -- let's say that a plant in Ohio becomes a pool plant on Order 5, would you -- would you move -- would the calculations then change?

A. We gave that some degree of consideration. We would not be opposed if the secretary would believe that such language should be used. Plant regulated as opposed to located, though, you know, the intent of this is to do with firming up the price to producers located in and serving the southeast. So unless there would be a significant shift, I wouldn't see plants outside the area becoming regulated. That could distort it significantly.

Q. So your answer is that you would be open to an interpretation so that if a plant outside of the market area gets pooled then it -- all the mileages should change based on that relationship?

A. If such a situation would develop that there would be need for Federal Order 5 or Federal Order 7 to regulate a pool-distributing plant -- fully regulate -- and that plant would be outside a Federal Order, we would -- we would -- we'd leave that at the secretary's discretion to decide whether it should be regulated by or located within, but based on the current location and regulation located within works.

Q. Just -- just I would -- I would hope that you would make it clear and brief one way or the other so that the language is written such that this doesn't happen and we end up with lawyers getting billable hours out of it.

A. Fair enough.

Q. Okay. Given that -- given that -- and I appreciate your, again, parking back to the producer side of things and -- and -- as your rationale and your motivation. So I would -- I would ask you why should the price of an in-area 7 producer be influenced by the distance between a diversion and the closest Order 5 plant?

A. Because the in-area producer, by evidence within this record, is regularly supplying Class I needs of this market which is creating the value for other producers to be a part of this market and we do not believe that the attachment of distant milk should lessen the return to that producer.

Q. Well, again, that's not -- not the question I asked. The question I asked is: If -- if, indeed, a -- a plant of diversion is -- where Order 7 milk is going to is closest to an Order 5 pool plant than a corresponding Order 7 plant, I'm asking what the rationale for that in-area producer -- why -- why -- why should he be satisfied that diversion is based on the closest of an Order 5 plant which may be in -- and it is -- in the middle of Virginia relative to his Order 7 -- his Order 7 marketing area?

A. That's a fair question. The produce -- I guess we looked at it from an idea of simplicity. And the complexity that you've described for the help of producers, I'll give that some consideration and we may take a different position, then, on brief. But for the purposes of simplicity so as to not have, say, a plant in Carlisle, Pennsylvania having two different rates, we chose to choose the closest plant.

Q. And I would -- I would also agree with simplicity and I think that -- I won't say that. Thank you.

What -- what, in effect, you're proposing is basically two pricing structures outside of the marketing area. One at a -- or -- or maybe I'm not -- would there be any change to the Class I pricing of -- of plants outside of the marketing area vis-a-vis Order 5 and 7?

A. I can't come up with a clear example that such --

Q. Again, let's go back to the 7-- 7C or D plant within Federal Order 1 which is sending milk to Federal Order 5. There -- that plant is responsible to Federal Order 1 at a -- at a price at -- at plant and I would assume there's another relationship. Are -- are you going -- because you're going to change the price of diversion at that plant in Federal Order 1, are you going to also change the Class I pricing structure?

A. Only to the point that you'd divert enough milk that it would have to start getting --

Q. No, I'm -- I'm sorry to interrupt you.

JUDGE DAVENPORT: Let him finish his answer please.

A. I think only to the degree that you would divert enough milk that it couldn't qualify as other than Class I. You'd use up all the non-Class I at that plant but then at which point I think you'd run the risk that the producer milk would then become producer milk at that plant and pooled on that report. I'm inclined to think no, but that is --

Q. I'm sorry. You -- you weren't asking [sic] the question, again the relationship if you've got a 7 -- 7D plant in Federal Order 1. Okay. That plant is shipping milk into Federal Order 5. Okay? It is a bulk transfer. My -- we -- we -- your proposal would speak to the fact that diversions to that 7D plant outside of the marketing area would -- would be zoned out. There's also times when that 7D plant sends milk into the marketing area. My question is: Would your proposal do anything about the -- the pricing of that Class I milk when it -- when it comes inside?

A. So to make sure I'm understanding, the -- the milk is pooled on 1 and being diverted in?

Q. Well, it's a plant-to-plant transfer.

A. Okay. You mean it is transferred --

Q. It is Order 1 -- it is milk that the supply plant is pooled on Federal Order 1 for what -- under whatever Federal Order 1 regulations are applicable to that.

A. Okay.

Q. Milk is being put on a transport truck, bulk transfer is made such that that -- that load of milk goes to an Order 5 pooled-distributing plant.

A. Okay.

Q. Okay. Currently, the Class I value of that plant in relation to the receiving plant -- the shipping and receiving plant are -- are defined through the Class I pricing service?

A. Yes.

Q. Okay. Now you're proposing to change that plant vis-a-vis its diversion to Order 5?

A. But it -- I think --

Q. You're -- you're -- you're trying -- you're proposing to change the diversion. You're zoning out to that Order -- Order 1 plant. My question is: Does your proposal speak to the Order 1 value -- the Class I value at that Order 1 plant? Are you trying to zone-out the Class I value as well?

A. No.

Q. Okay. And that's clear in your proposal?

A. If I understand your question, you're talking about one milk being diverted in. And our proposal speaks to Order 5 milk being diverted out.

Q. Okay. The only question I would have is this: I wouldn't call it a diversion, I would call it a bulk transfer. It is not -- I'm talking about diversion. Diversion, for me, speaks to producer milk. We're talking about --

MR. ENGLISH: If he wants to testify about what he thinks diversion means, I think the appropriate way is for him to testify. We have testified diversion means something different. And I think we've now confused the record for the last 15 or 20 minutes unnecessarily. I would recommend that he testify to that.

MR. SCHAD: Okay. Thanks.

I'll take a break.

JUDGE DAVENPORT: It's at the lunch hour. There are fewer folks here, so maybe the crowd might not be quite so large. Let's see if we can get back at 1:15.

[WHEREUPON, a brief recess is taken.]

JUDGE DAVENPORT: We're back on the record.

MR. BESHORE: Thank you. Marvin Beshore.

FURTHER EXAMINATION

BY MR. BESHORE:

Q. Evan, a couple other questions with respect to Proposals 4 and 5. In the fraction in Proposal 4, the 30 percent fraction, deliveries to pool supply plants do not qualify -- or they would -- they're considered diversions; correct?
A. Under the definition of Proposal 4, yes.
Q. Okay. Even if the pool-supply plant has shipments to distributing plants?
A. I believe the shipments to pool-supply plants from the supply plant would help to lessen the numerator of that fraction.
Q. Is that in the language of your proposal somewhere?
A. It -- I believe it is in that the language talks about the deliveries to other than pooled-distributing plants.
Q. But where does it say that the numerator is reduced by any shipments from a supply plant to a pooled-distributing plant?
A. Well, the numerator is producer milk delivered to other than and then it quotes the sections but, in effect, pooled-distributing plants.
Q. Okay. But my -- I'm asking you about a situation. Let's take a hypothetical situation but we've got actual facilities and entities in the

record. Arkansas Dairy Cooperative Association operates a supply plant that shows up on the -- on the -- on the plant list here.

A. Correct.

Q. Okay. And it's a small organization. And let's assume that they assemble much of their milk supply at that supply plant and then transship it to distributing plants and other customers, perhaps. Okay. Where in -- as I read Proposal 4, it says that those deliveries to supply plants are in the -- in the numerator of the -- of the equation. And it appears to me they would -- in that hypothetical scenario would be well over the -- likely well over -- assume more than 30 percent of their milk's assembled at that supply plant -- that they would be over the 30 percent and not eligible for either inter-order or intra-order transportation credits.

A. And so your question is?

Q. Isn't that the way your proposal would work?

A. I guess it would depend on exactly how the handler -- and to use your example -- Arkansas Dairy Cooperative is pooling the milk. If there -- as I understand it, I guess, the intent of the proposal would be that their deliveries -- actual shipments to pool-distributing plants would come out of the numerator -- out of the total pounds of milk that they had on their report.

Q. The transshipments from the supply plant -- the transfers from the supply plant --

A. Yes.

Q. -- to the pool-distributing plant would not be included in the numerator?

A. Yes.

Q. Okay. What if the supply plant assembled the milk of two cooperatives, how would you determine to which cooperative any transfers were going to be credited?

A. It would be according to the pool report of the handler requesting the credit.

Q. Well, either -- say they're 50/50 -- either cooperative requests the credit. Is the numerator -- and there are transfers out of that supply plant -- how do you know which numerator of which cooperative is reduced by those transfers?

A. But each cooperative would be filing its own --

Q. Yes.

A. -- pool report --

Q. Yes.

A. -- and would making its own request for a transportation credit?

Q. Yes.

A. Then it would be against demerits of its pool report against its transportation credit request.

Q. And if one cooperative supplied -- had all its deliveries just to that supply plant and the supply plant wasn't on its pool report, it would have 100 percent in the numerator and no eligibility for any credits; correct?

A. That's my -- if I'm correctly understanding your example, yes.

Q. Okay. Now, let's look at it from the other end. If you have a -- a distributing plant -- I'll try to keep the math real simple here -- that has requirements for seven million pounds of milk per month -- let's make it ten -- 10 million pounds of milk per month --

A. Okay.

Q. Okay. The supplier or suppliers to that plant -- well, if it was a single supplier, the supplier could -- the plant would have with it rights to divert 30 million pounds -- three million, I'm sorry -- three million pounds and be able to claim

full value of transportation credits; correct?
A. Yes.
Q. Now, what if the supply of that five million pounds is half of the distributing plant's independent supply and the other half a cooperative supplier and the distributing plant's independent supply has no diversion because it's received every day of the month so that all the balancing diversions for that plant are on the cooperative's supply of five million, I take it that under Proposal 4 would that cooperative be able to claim full transportation credits assuming that was the total of the cooperative's operations?
A. If that was the total of their operations, I do not believe that they'd qualify for full transportation credit.
Q. In fact, the way the proposal would work, they'd only get probably 50 percent of transportation credits?
A. They have -- what's on their -- they have 10 million pounds on their report?
Q. Five million.
A. Five million pounds on their report?
Q. Three million in diversions because they -- they have all the diversions for that plant's

supply.

A. So they'd have three-fifths?

Q. Three-fifths. They'd get 60 perc -- 60 percent transportation credits?

A. Correct.

Q. But if that plant handler wanted to go out and get a supplemental load from out of the area for its plant, it would get 100 percent credit because it -- it doesn't have any diversions; correct?

A. Assuming there's nothing else going on in their pool report other than just what we've talked about, yes.

Q. Okay. So all credits are not created equal under Proposal 4?

A. Just the same as all pool reports are not created equal.

Q. And, in fact, the distributing plant's got a lot of control over who can -- who's entitled to the diversions that go with its plants for purposes of transportation credit; isn't that what -- the way it works -- would work?

A. I don't know that it's any different than a handler has control over today on what their diversions are.

Q. Okay. With respect to Proposal 5, let's assume we have a price and we have a reserve supply of milk for Order 7 that's in Texas and the closest plant is the Shreveport plant.
A. Okay.
Q. Okay. So that would be the plant off of which the price for the Texas milk is established; correct?
A. Yes.
Q. Now, what happens if the Shreveport -- the owner of Shreveport closes the plant and consolidates its operations in other locations, what's the price of the reserve milk for Order 7 in Texas?
A. The market administrator would have to look at the closest distributing plant at that time to the supply.
Q. Okay. So -- and if that wasn't the same distance as the Shreveport plant, the price of that reserve supply milk would change --
A. Yes.
Q. -- by virtue of the closure of the distributing plant?
A. Correct.
Q. And if a new plant was constructed

somewhere, the price could -- the price of any milk would -- all milk to which it was the closest plant would change?

A. Yes.

Q. Are you aware of any other provisions in Federal Order regulations which make the price of milk at any location subject to plant operators building or closing or opening plants?

A. No, because, you know, given that case, if -- it would be useful to the secretary to lock the order at the location of pool-distributing plants today and define all the cities as basing points rather than the closest pool-distributing plant. That's a reasonable position that we'd support the secretary choosing.

Q. Is that a modification to Proposal 4 or 5, I guess?

A. We'd consider it. I don't know that right now thinking quickly on the stand in response to your question I'm ready to say that I think that is as good a language as what we've written. But, again, to make it clear on the record, if the secretary would choose that, we'd not be in opposition to that choice.

MR. BESHORE: Thank you. Nothing

further.

JUDGE DAVENPORT: Mr. Schad?

EXAMINATION

BY MR. SCHAD:

Q. I guess first I'd like to explore with you something you said in direct in response to your attorney's questions about the relationship between the former Order 5 and milk in the former Federal Order 4 as to diversions. Could you expand on your comments?

A. The question, as I recall it, was to acknowledge that if you follow back in time that there was, in fact, a period of time when there was a predecessor order to Order 5 called the Carolinas which also bore the number of 5 and that while that order did have a zone-out provision as has been discussed in my testimony similar to Proposal 5 it offered a different pricing mechanism for what was then Federal Order 4 -- excuse me -- for pool plants located within Federal Order 4.

Q. And is it anything more than the acknowledgment of the fact that there was such a provision?

A. That is really all it is, that the secretary may need to consider that that was the case and that to the degree that the secretary needs to take it any further that we would urge the secretary to only consider those exact regions and not to expand it to what exist today as those, if you will, current existing Federal Order. So, for example, the Carolina then would be used in its definition at play that point in history as opposed to the existing Carolina order today which is the full Appalachian Federal Order and that Order 4 would be defined in that area that was a part of then Order 4 not its existing Federal Order 1.

Q. So you would -- you would suggest that the secretary would write an order which delineates counties where there would be a pricing surface based on something applicable to the old Order 5 but then zone-out beyond there; is that -- is that what you're saying?

A. To the degree the secretary believes to be consistent with history and needs of the marketplace, we could support that. We are not ready to amend our proposal to draft such language, just more to acknowledge for this record and the secretary and staff as they consider it that we recognize that was a case in the situation and should the secretary feel such would need to be in play and implementing a zoning today we would understand that.

Q. Would we then -- if the secretary took into consideration that which you're speaking of, would we then have a plant in the former Order 4 that could have a diversion applicable -- a diversion price applicable to Order 7 and a different one applicable to Order 5?

A. If it went to the select area, it could actually have a different diversion. If it was pooled on Order 5 -- you're going to get into a degree of complexity here to address this. But you -- you, theoretically, could end up with different prices even for milk pooled within Order 5 because the fact that 5 in the period of time that I'm talking about and 5 today is not the same geographical area.

Q. Okay. So it wouldn't even -- you're right, that would add a large level of complexity and I will leave it at that. The second question is a question I brought up with the market administrative's office relative to the 7 -- the Order 5, 7D plant in Strasburg, Virginia. It was established that Strasburg is outside of the marketing area for Order 5. So if we walk you through the scenario if milk was -- if Order 5 milk goes into Strasburg, Virginia, then it is Pooled Order 5 and it's not a diversion so the point -- the point is moot relative to your Proposal 5. But if Order 7 milk goes into that plant, it would then become a diversion on Order 7, so would you -- would you -- would you treat pool milk on one of your joined Federal Orders differently than if it's diverted at the same plant?

MR. ENGLISH: Object to the characterization of joint Federal Orders. We specifically said that we are not merging and we oppose merger and we're only defending transportation credits. So I'll object to that characterization.

MR. SCHAD: Please strike the word "joint."

A. So then is your question -- to make sure I understand clearly -- would there be a different price --

BY MR. SCHAD:

Q. Would you -- would you apply the -- would you apply -- if I can restate my question. Would you -- would you apply the Proposal 5 relative to Order 7 at -- at this plant in Strasburg while Order

5 milk would be deliveries to plant which are pooled on Order 5 would be a pooled-plant delivery?

A. I don't think there's a differentiation in the language between pool plants and non-pool plants. Correction, there is. So yes.

Q. So you would -- you would -- you would -- you would zone it out for Order 7 although in Order 5 it would be a pool-plant delivery?

A. That is correct.

Q. Okay. Next set of questions. I'm sure you're aware Order 5 and Order 7 have provisions in Section 13 which limit diversions by handlers cooperative or non-member?

A. Yes.

Q. Okay. You're also aware that this Section 13 in both orders speak about touch-base and the number of days that each order requires in the physical touch-base?

A. Yes.

Q. And you -- I would -- would you agree with me that these provisions are put into the order in order to regulate the appropriateness of milk that's pooled on the order?

A. That is -- that is their intent.

Q. Okay. Are you also cognizant of the fact under Section 7 of both orders there's a provision that allows the market administrator to increase shipping percentages for supply plants both cooperatively owned and outside of the --

A. It's my understanding that the market administrator has discretion on that, both directions.

Q. And he could respond to requests from interested parties to increase the percentages of supply plants?

A. My understanding, the interpret to that -- the interpretation of that provision would give the market administrator the discretion to assess the market and to determine whether or not the diversion percentages should be changed in meeting the needs of the market at that point in time.

Q. Okay. Thank you for that answer.

I guess in your proposals for this -- in your response to invitation for addition proposals, has Dean Foods put any proposals in that would tighten the diversion limitations under Provision 13?

A. Not that I'm aware of.

Q. And did they -- did -- were there any proposals advanced by Dean Foods that would speak to the touch-base?

A. Not in this particular hearing. It was our understanding in the request for proposals that they were to be focused around transportation credits. And we kept our scope within that scope.

Q. Thank you very much

JUDGE DAVENPORT: Other questions, Mr. Tosi?

MR. TOSI: Can you hear me?

THE WITNESS: Yes.

BY MR. TOSI:

Q. Okay. Thanks for appearing today.

A. You're welcome.

Q. I have a few questions. The intent of Proposals 4 and 5 as I understand them is that as a condition for receiving some sort of transportation credit, whether it be an inter-market or an intra-market, as a condition for receipt of those credits that there would be a separate limitation on diversions that are separate and apart from the diversion limit standards that are currently part of the producer milk definition of Orders 5 and 7; is that correct?

A. That's correct as it relates to Proposal 4.

Q. Okay. All right.

A. Yes, I'd agree with that.

Q. Okay. And to the extent that you have the opinion that it's the -- the orders carrying an excess quantity of milk that's not in Class I and that there's too much of that milk which ends up bringing down the blend price of the order, why not -- would you be supportive of a change in the orders diversion limit standard? For example, to the extent that 30 percent is something lower than what diversion limit standards currently are, would you be supportive of a decision that went in that direction?

A. That would be helpful to move that direction. I guess a concern could be that it's possible, given the magnitude that this is happening, that the real volume of exploitation -- the reports that are actually doing that have room for such a change before they're sort of penalized. So you may penalize some parties but could be that those parties are the outlying ten percent of the problem. But we would not -- we would not oppose and we would support that type of decision from the secretary but still support Proposal 5 as being effective in accomplishing the same -- the same type.

Q. But you see no conflict between a diversion limit standard for the orders as they currently exist for producer milk and conditioning something separately as a condition for the receipt of a transportation credit?

A. I see them as compliments because as you change the diversion percentages you could have need to do more milk shuffling which could increase the transportation credit requests.

Q. Okay. Are you of the opinion -- ask it maybe a little bit differently. Are you of the opinion that the current performance standards -- the pooling standards of the order are adequate for Order 5 and 7?

A. It would depend on ones definition of "adequate." But our -- our inclination is that there's more milk that's able to be pooled on this order than is really necessary. So we would tend to characterize the pooling limits as loose.

Q. Okay. If -- if your proposals were -- if you would assume for a moment that we would adopt all of the proponents' proposals for increasing the inter-market transportation credit rate along with establishing an Intra-market Transportation Credit as modified in your Proposals 4 and 5, how much of a -- how much of an increase in the blend do you think producers in Orders 4 and 5 would benefit -- excuse me -- 5 and 7? I apologize. Have you done any estimate?

A. Not exactly. You can look at some of the exhibits that were prepared by both offices as it relates to the implementation of particularly Proposal 5. But when they made their estimates, as I understand it, it was -- and as I think Mr. Yale examined them on -- it was a static model so it did not acknowledge that Proposal 5 left unchanged could be an uneconomically desirable outcome for some milk.

So, for example, if there's milk in -- I'll just pick, say, Portales -- it's possible that the implementation of Proposal 5 that the handler could have received more money making a different pooling decision. But in the exhibits prepared at this hearing, to the best my knowledge, that was not taken into account. So to really get at a number, you have to make a decision about what milk would make a different pooling choice than was made.

And also as I attempted to say in my

testimony, you're going to have some milk that will leave; and as that milk leaves, the blend will go up. And as the blend goes up, there will be some milk that will then see economic value and come back. And so you'll see an oscillating effect as the market rebalances because not everyone will have full knowledge to what anyone else is doing on their pool report and so there will be a degree of guessing what type of value is there. And until everyone gets comfortable with what other party's guesses are, it will move around. I have no hesitation in saying it will be an improvement over the existing level. But to say that I think it's "X" cents would be purely speculation.

MR. TOSI: That's all I have for you. Thank you very much. Oh, excuse me. I apologize. One more technical questions.

BY MR. TOSI:

Q. Regarding Proposal 4 in Part D2 of Proposal 4 in the proposed order language where we speak to 7A or 7B plants, would you consider plants that are pooled under unit pooling provisions, would they be excluded or included in the other-than shipments?

A. Thinking through this, 7D would be a unit pool, so you'd have a situation where a Class II plant had attached to a Class I plant. From a -- I -- to me, it's -- to allow that is inconsistent with the principle that we've testified in support of this. So I would think you'd exclude that -- the 7D plant. It would -- you -- it would be as is. You would not -- I would -- I would not incorporate that additional plant as an exclusion.

Q. Okay. If -- if -- if those unit things were 7D plants, that's really what we're referring to unit pool?

A. 7 -- 7D is not the --

Q. I think its 7E, but I might be mistaken. But whatever -- whatever that provision is --

A. Yeah, if it's -- if you're asking about the unit provision, I would agree with my answer. If I misinterpreted the paragraph you're going to, I may want to offer a different answer.

Q. Okay. All right. But, I mean, we're talking about unit -- units --

A. If your question is about unit pool regardless of paragraph specification, I stand by my answer.

MR. TOSI: Okay. Thank you.

I appreciate it. That's all I have for you.

Thank you.

A. You're welcome.

JUDGE DAVENPORT: Other questions?

EXAMINATION

BY MR. ENGLISH:

Q. Just a few questions, Mr. Kinser. You were asked several questions by Mr. Beshore about the applicability of Proposal 4 now to Proposal 2, in particular as to months January through June. Having considered the issue over lunch, do you have anything to add at this point regarding that issue?

A. In taking a closer look at the shipping of the spring period, it appears to be less as kind of alluded to in some of Mr. Beshore's questioning. So we would be open to considering a different percentage for the period of January through June and maybe going as high as that using instead of 30 percent that that would be 45 percent for January through June for the intra-market for what is listed in this notice of hearing as Proposal Number 2.

Q. And is that based on the idea that having used the 30 percent that that's -- that's 50 percent higher? And if you use -- look at the changes in the percentages in the two orders, they appear to go up about 50 percent?

A. That's correct, to reflect the increases as part of the records submitted by the market administrators.

Q. So the intent -- the intent is to recognize the need in the spring to have a higher diversion?

A. That's correct.

Q. Some questions from Mr. Schad suggested some potential lack of clarity in the amendments to Section 13 and the two Orders 5-13 and 7-13 with respect to how you priced a plant could it have, for Order 5, one value and Order 7 a different value. And you answered the question you intended it to be. Is there a word change that you would make within those provisions that would clarify that in the line that says, "Shall be priced at the location of the closest pooled-distributing plant located in the marketing area less an adjustment"?

A. I believe you would want to strike "the" and it would just be "marketing area."

Q. Or either marketing area?

A. Or either; I mean, that would work as well. Implement the word "either" in place --

Q. So for clarity, "Shall be priced at the location of the closest pooled-distributing plant located in either marketing area"?

A. Yes.

Q. And -- well, we haven't had an opportunity to talk about it at all -- the issue of the plant in Strasburg came up. Are you aware how close that plant is to the marketing area?

A. I am not.

Q. Okay. If it's approximately 25 miles from the marketing area and within the State of Virginia, would there be flexibility in Dean's view for dealing with pool plants that are so close to the marketing area?

A. That seems like a reasonable consideration.

MR. ENGLISH: That's all the questions I have, your Honor. I do have some requests for official notice. But I'm finished with the witness if that didn't raise any new questions. I would offer Exhibits 37 and 38.

JUDGE DAVENPORT: 37 and 38 are admitted.

[WHEREUPON, documents referred to are marked Exhibit 37 and Exhibit 38 for identification.]

MR. ENGLISH: And then if the witness is excused, I have some official notice requests.

JUDGE DAVENPORT: You may step down.

MR. ENGLISH: During the hearing, your Honor, and during this testimony we referred to a number of proceedings before the secretary. Beginning sort of in an order of importance to this proceeding, there was a proceeding involving transportation credits that resulted in a partial, tentative, final decision. On July 18th, 1996 -- published in the Federal Register of July 18th, 1996 at 61 Federal Register 37628 there was reference by Mr. Sims --

JUDGE DAVENPORT: Last -- last four again?

MR. ENGLISH: Sorry?

JUDGE DAVENPORT: The last four again?

MR. ENGLISH: 37628 -- so 61 Federal Register 37628 July 18th, 1996. Mr. Sims and others made reference to the -- what became the partial final decision of that proceeding at 62 Federal Register 27525 on May 20th, 1997. I made reference to some prior proceedings involving Class I location adjustments. I have some of those cites. There was a proceeding involving the merger of a couple of West Texas orders and New Mexico. The result of that hearing, a final decision was published at 56 Federal Register 42240 on August 14th, 1991. I also made reference to what Mr. Stevens and I remember back in 1985 was a court case involving a number of players in Texas to a Texas decision. The citation for that is 50 Federal Register 9661 published on April 1st, 1985.

JUDGE DAVENPORT: The date again, I'm sorry.

MR. ENGLISH: April 1, 1985. All of those are decisions, not the rules. The next one I'm going to cite, I don't have the decision; I will get it and send it to the players. I have the rule published that established the Carolinas Order, Order 5 that has been discussed today. And the rule cite ought to give one -- once one goes to that federal register, one may -- ought to be able to go back and find the final decision. But, nonetheless, the rule cite is 55 Federal Register 31352 published on August 2nd, 1990. That was the establishment of the Order 5 that has been referenced in this proceeding. The original publication -- promulgation hearing, yes. I know, because someone in this room was principally involved in it, that there was a proceeding involving Indiana. I confess, notwithstanding all the books I have, I'm unable to find that proceeding today. But some of the books led me astray last night. So I do not have at the moment the proceeding that I referenced from Indiana. I would ask official notice of each of those proceedings -- the decisions of those proceedings for this --

JUDGE DAVENPORT: So ordered.

MR. ENGLISH: And that concludes our testimony. I do believe there's a dairy farmer here.

JUDGE DAVENPORT: Mr. Sumners has been anxiously waiting, so. . .

Mr. Sumners, why don't you come on up.

Mr. Sumners' statement is going to be marked as Exhibit 39.

[WHEREUPON, document referred to is marked Exhibit 39 for identification.]

JUDGE DAVENPORT: Raise your right hand.

MICHAEL SUMNERS, after being first duly sworn, is examined and testifies as follows:

JUDGE DAVENPORT: Please be seated. Tell us your name and spell your name for the hearing reporter.

THE WITNESS: Mike Sumners or Michael Sumners, M-i-c-h-a-e-l S-u-m-n-e-r-s.

JUDGE DAVENPORT: Mr. Sumners, we have marked your statement as Exhibit 39. Are you prepared to read it into the record at this time?

THE WITNESS: Yes.

JUDGE DAVENPORT: Please do so.

THE WITNESS: [reads] My name is Mike Sumners; I'm a dairy producer from Paris, Tennessee and sell the milk production of my dairy operation to Dean Foods, Incorporated.

JUDGE DAVENPORT: You want to pull the mike just a little closer to your mouth? There you go.

THE WITNESS: Is that better?

JUDGE DAVENPORT: That's good.

THE WITNESS: [reads] After evaluating Proposal Number 1, it seems that this is an attempt to extract more money out of the marketplace for milk going to Class I uses but for the money to move out of local area to the detriment of dairy producers located in the Appalachian and the southeast marketing area. A more useful use of the money collected from the marketplace under this program would be for it to go to the local dairy producers to maintain a local supply of milk. Based on information provided by the southeast market administrator's office during October 2005, the potential impact of the pool from transportation credits could have been $.11 per hundred weight increase. While the additional income amounts to only 0.6 percent of the total milk price, it could be as much as ten percent or more of the dairy producers' profit.

Another negative to Proposal Number 1 is it lacks safeguards on the amount a of milk that can be attached to the market -- marketing areas due to higher transportation credits. Based on information provided by the southeast marketing administrator's office, the average per hundred weight payment was $1.08 per hundred weight during October 2005. With the potential near doubling of the transportation credit balancing fund assessment, there could be a near doubling increase in transportation credits paid on the same volume of milk that qualified for the credit in October 2005 or more likely there will be a near doubling of the milk that is brought into the market area just to qualify for transportation credit. While the additional milk pooled would unnecessarily lower the price for producers in the marketing area, initially the transportation credit makes the out-of-area milk cheaper than the in-area milk. The lower price, which will force some producers out of business, which will increase the need for additional milk supplies from outside the marketing area.

Proposal Number 1 should be rejected and the subject of covering milk needs of the Appalachian southeast marketing area should be dealt with in a hearing on Class I differentials, diversions and touch-base provisions that would benefit all producers serving the market area, not just a few. By including all costs of all producers serving the marketing areas in a hearing in Class I differentials, diversions and touch-base provisions, it would provide opportunity for accountability to the market and return integrity to the Federal Order system in the eyes of local producers.

Proposal Number 2 is similar to Number 1 in the fact that apparently the differentials are not adequate to generate the cost of providing milk to plants within the marketing areas. Proposal Number 2 should be rejected and dealt with by holding a hearing on the appropriate differential levels in the marketing areas. Another large problem with Proposal Number 2 is that it is -- that if an inefficient balance exist to pay all of the credits, then the producers' settlement fund will be raided to cover the difference. This is the same funding mechanism that was attempted when transportation credits were first discussed in 1996. That funding mechanism was rejected then and it should be rejected now.

Both proposals really should and could be handled by more effective negotiation by those supplying the market. A much more efficient and effective way of doing business than having the agricultural marketing service of the United States Department of Agriculture dictate the compensation of supplies of certain marketing areas.

Proposal Number 3 has some merit. If you are going to use the AMS to dictate compensation of serving the marketing areas, ability to change the milage rate factor in the face of volatile energy markets is much more superior than having a statistic factor that might be too low sometimes and too high other times. As with the first two proposals, this is a function best left to the open market and should not be a function of the market administrator. Given the fact that transportation credits will probably continue to be part of the Appalachian and southeast marketing areas, some adjustment factors should be included in the order language. The amount should be determined by transportation specialists, either government or private, and not those in the dairy industry that have a vested interest in the mileage rate factor.

Proposal Number 4 and 5 both have merit in the fact that they try to put safeguards in place to protect the dairy producers in the marketing areas in question by limiting the amount of money that leaves the marketing areas and should be implemented in some fashion. For local dairy producers in the market areas, the movement of revenue out of the marketing area cuts in to profitability. This leads to the reduction in supplies and dairy producers exiting the business which in turn requires more milk from out-of-area and the need for more money to leave the area. Any attempt to limit the needless pooling of milk on the marketing areas as Proposal 4 tries, due to an incentive created by the transportation credits, needs to be implemented. Proposal Number 5 attempts to keep local milk from moving out of area to make room for out-of-area milk that is only brought to the market area due to the incentive provided by the transportation credits should also be implemented.

And then I'd be happy to answer any questions.

JUDGE DAVENPORT: Mr. English?

EXAMINATION

BY MR. ENGLISH:

Q. Sir, Charles English for Dean Foods.

What prompted you to come to this hearing?

A. My interest in the dairy industry in the southeast continuing.

Q. Did anybody at Dean Foods ask you to attend this hearing?

A. No.

Q. Who wrote your statement that you just gave?

A. I did.

Q. And would it be fair to say you don't agree entirely with Dean Foods' position that you heard a few minutes ago?

A. Yes.

MR. ENGLISH: I have no further questions.

JUDGE DAVENPORT: Mr. Beshore?

EXAMINATION

BY MR. BESHORE:

Q. Good afternoon, Mr. Sumners.

A. Good afternoon.

Q. Thanks for the advanced copy of your statement yesterday. I appreciate that. We appreciate your support on Proposal 3, too -- also.

I have some questions on your views on the other proposals. First of all, with -- tell us a little bit more about your -- your operation in Paris, Tennessee. How -- how many cows are you milking there?

A. A little over 500.

Q. And are you delivering milk daily to -- does Dean purchase your milk on a daily basis?

A. Most of it's milk on a daily basis.

Q. Okay. Is it -- is it delivered every day? It's not every other day?

A. It's delivered -- as far as I know, my milk is being delivered to a distributing plant probably the past 15, 20 years. I don't -- I don't know of any time that -- it may have gone to a -- been diverted to another plant; but if it did, I can't recall a time in many, many years.

Q. Okay. Have you been milking cows there for 15 to 20 years?

A. I grew up on a dairy farm and out of college since '81.

Q. Okay. And if I understand your testimony correctly now, the milk from that farm has been purchased by Dean and taken to its distributing plant in Nashville, Tennessee, is that where it goes?

A. It hadn't been -- it hadn't been purchased by Dean that whole time.

Q. Okay.

A. The past -- starting in June of 2001.

Q. Dean or its -- or the predecessor owners of the Nashville plant; is that fair? I'm not trying to trick you here.

A. Well, I've shipped milk to Kroger; I've shipped milk to Barber in those years -- different plants. Basically, as the co-op comes in, I find a different market.

Q. Okay. And the market that you have found and that you have today is a market -- well, the markets you've always found for the last 15 years, if I understand your testimony correctly, are markets where the distributing plant buys your milk every day of the year and takes it in to their distributing plant?

A. That's correct.

Q. Okay. Now, do you provide the sole supply to those distributing plants?

A. No.

Q. Okay. And do you have a written contract with this -- with your -- with Dean to take all your milk?

A. I have an agreement -- made agreement in 2004 for Dean to take my milk.

Q. And Dean's obligated to take 100 percent of your milk?

A. No. I guess if they call me up and said I don't want your milk anymore, that could very well happen.

Q. Okay. So the contract doesn't have any period of time on it that it last -- it's good until a certain time?

A. The way I looked at it, Dean Foods is my customer. If they called me up and told me they didn't want my milk anymore for any reason, I

would accept that and go further.
Q. Okay. Now, you're not the only supplier to Dean's plant. Let's just assume for purposes of example and simplicity here that Dean has ten farms of the same size that it needs to buy milk from. Okay, you're one of them; there are nine other farmers same size as you that provide the supply to that Dean plant. Okay?
A. Okay.
Q. Now, you understand from the testimony 'cause you've been here this whole hearing, right --
A. Correct.
Q. -- that the Dean distributing plant is not going to use the same amount of milk every day; correct?
A. Correct.
Q. Okay. And it's not going to use the same amount of milk in every month of the year; correct?
A. Correct.
Q. It's not going to use the same amount on weekends as it does on weeks -- during the weeks -- the high days; correct?
A. Correct.
Q. Okay. But now your -- your milk -- you're Number 1 out of the ten. Your milk is in there

every day of the year because they need some milk at least every day of the year and you're Number 1 on their list. Let's assume that. Okay? That's the way it's worked with you.

A. Right.

Q. Okay. Now, let's assume -- not assume, but we know that the producers are numbered one through ten and that's the order in which Dean calls for their milk in terms of its needs. Okay? Let's assume that Number 10 is last and they only need his milk half the days out of the year. Okay?

A. Okay.

Q. Now, if you're Number 10, what are you going to do with your milk the other half of the time? You're not Number 1 now, you're Number 10. Somebody's Number 10; right?

A. Right.

Q. Okay. Now, what's he going to do with his milk for the time -- half the time Dean doesn't need it?

A. Well, what are my choices? You -- you -- are there other things --

Q. You tell me.

A. -- in this scenario?

Q. Well, no, wait. You said in your testimony that --

A. I guess I could build a bottling plant and bottle it myself.

Q. Okay. That's one option. Then Dean would have to pick somebody --

A. I would sell the milk.

Q. Pardon?

A. I would sell the milk.

Q. And you would bargain -- you would, I guess, engage in more effective negotiation than those currently supplying the market according to your testimony here on Page 3; right?

A. That's correct.

Q. Okay. Where -- where do you think you'd sell it half the time? Remember, you only have it half the time.

A. If I couldn't sell it, I wouldn't produce it.

Q. Okay. How would you produce milk only half the days of the year? Remember, Dean only needs it half the time.

A. If you -- if you want to do that, you would freshen your cows, you'd milk them six months and you would turn them dry.

Q. Okay. Let's assume that those -- the half the year doesn't include -- let's say it's -- it's -- it includes the last half of August, September, October, November but only the first half of December, not the second half of December and then the first half of -- and then the month of January. How would you work that?

A. Well, what part of this scenario are we including now?

Q. The whole year.

A. The whole year?

Q. Right. But they don't need any -- they don't need any milk the last two weeks in December or the first six months of the year.

A. And I'm selling the milk?

Q. You're producing the milk and selling it.

A. If they only want it for a short period of time, I guess they would pay what we call a give-up charge.

Q. You'd negotiate that with them?

A. I would attempt to do that, yes.

Q. Okay. Okay. And when you didn't -- and you'd dry your -- you'd freshen your cows in the summer and dry them off for the six months you didn't need them; is that what you said?

A. I -- you could do that. That's not what necessarily I -- I'm not -- what's your point?

Q. My point is you're Number 1 in the market -- in this market. Here's my point: In this market --
A. That would be DFA, right, Number 1 in the market?
Q. No. No. No, it's not. In this market you're in this situation of Producer Number 1 because your milk, as you've testified, goes to that distributing plant or whichever one you're supplying every day of the week, every month of the year for the last 15 years. You're in line, Number 1. But there are other producers in this market who are in, you know, Number 8 or 9 or 10 in line. That's -- now, you understand where I'm going? They've got a little different situation than you do; don't they?
A. Yes. But I wouldn't look at the world that way.
Q. Well, if you were in that position, how would you look at it?
A. Well, if I -- if I was -- in the dairy business, first thing I did when I went in the dairy business, I'd go to somebody and see if I've got sales first.
Q. Okay.

A. And then once I get the sales, then I'll supply those sales.
Q. Okay.
A. And then if I couldn't make money at doing that, I would quit.
Q. But Dean's got the sales. Somebody's got to supply them. You understand that?
A. No, I don't.
Q. You don't understand that?
A. Just because somebody has a want doesn't necessarily mean it gets filled.
Q. Well, don't you want the supermarkets in this marketing area filled with fresh milk when the consumers want it?
A. If that's what the consumer is willing to pay for, I'm sure they'll have it.
Q. Okay. And they want it --
A. But I don't think -- I don't think that's a right as a consumer in they expect me to provide that right. No, I don't believe that.
Q. You think the consumers ought to conform their buying habits to the production levels of the milk --
A. No.
Q. -- that the cows --

A. That's not what I said.
Q. -- the cows on your farm?
A. That's not what I said.
Q. Okay. You're saying the plants ought to just put the -- make the milk available to the consumer when they have it, not when it's demanded?
A. I did not say that either.
Q. Okay. What did you say?
A. I said if the consumers are willing to pay for whatever services that they desire. But it's not my responsibility at my loss to give them what they desire.
Q. Okay. What if you were -- let's make it a little easier. Let's say you were Producer Number 7. And in that case Dean needs you five days out of 7 year round. Okay. They need your milk Monday, Tuesday, Wednesday, Thursday, Friday. Remember Mr. Kinser just testified about how it's typical pattern for distributing plants -- you heard his testimony -- to take in milk Monday, Tuesday, Wednesday, Thursday and Friday but not Saturday and Sunday. Do you recall that?
A. I -- I don't have a problem with classified pricing. And I understand why it's needed. Okay?

Q. Okay. Why is it needed? Why is it needed?

A. Because production and demand are not in balance, so you need this pool of milk and it shares in supplying the market.

Q. Okay.

A. And we have diversions and touch-base to try and make all that equitable. But at some point you can not support a supply of milk that's not come to that plant. That can be different in different parts of the country. You can have where you only have one day touch-base in some parts of the country and everybody share a little bit and the processor gets the milk to bottle. But then in a deficit area, how are you going to make it work if you can't even sustain the deficit area? It's not like the milk in the deficit area cost more. It's actually the cheapest milk you have. But you want to keep making it cheaper and the milk that move long distances more, you know, that's where the money goes.

Q. What makes you think that the milk in the marketing area is the cheapest milk?

A. Because that's what the dairy farmers are receiving. And the farmer that's coming from New

Mexico or a far-off place, he's receive the monies that got his milk here plus what he's getting paid for his milk.

Q. Did you ever look at those mailbox prices that the market administrator puts in their information they sent out to you?

A. I've a list back on the table.

Q. Why don't you compare -- have you compared yours to the guy down in New Mexico -- your mailbox price to the guy in New Mexico that's the supplemental supplier in this market?

A. I can -- I can do that. But that's not what --

Q. Have you done it was my question. Have you done it?

A. Yes.

Q. Okay. Well, if you did it, you would see something a little different than what you're saying here, I think, and that is that you're saying that milk is more -- that farmer is getting more for the milk than -- than you are as a local dairy farmer. It doesn't show up in the mailbox prices.

A. No, it doesn't.

Q. Okay.

A. So -- so -- so we're doing all this and we're not supplying the market and we're just creating a cost that gets greater and greater as we go along 'cause the milk that -- what we're paying -- the plants are paying is getting higher and higher. We've got over order charges that's higher than it's ever been. And if you look at co-op members' checks, there can be as much as a dollar below Federal Order minimum. And we know that the co-op has got to pay Federal Order minimum. We know they got transportation credits. You announced over order premiums and your members are paid a dollar under minimum. There's dollars per hundred weight that are charged and collected but we don't know where that shows up; that's not public information.

Q. Well, the co-op has some cost of operating; don't you think?

A. A lot of cost evidentially.

Q. Of bringing the milk in?

A. And -- and -- and who's benefitting from that -- bringing milk in?

Q. Let me --

A. Is it the local producer or is it the producer outside the area?

Q. How about the consumers in the area, the

plants in the area, they're benefitting; aren't they?
A. Temporarily.
Q. Okay.
A. What's going to be paying later?
Q. How far are you from Nashville? How far is your plant -- your farm, I'm sorry?
A. From Paris?
Q. Yeah, Paris to Nashville to the plant you're delivering to.
A. About 120 miles.
Q. Okay. What do you pay for hauling?
A. My milk doesn't go to Nashville --
Q. I'm sorry.
A. -- most of the time.
Q. Where does it go?
A. Most the time it goes to Murray, Kentucky.
Q. To Murray. Okay. And how far is Murray from Paris?
A. Thirty-five miles.
Q. Okay. And is that a -- what's in Murray, Dean Foods' distributing plant?
A. Morningstar plant.
Q. Morningstar plant. Okay. How much do you pay in hauling to get the milk to Murray?
A. A negotiated price between me and a

private individual.

Q. And what is that amount?

A. It's adequate, but that's sort of proprietary.

JUDGE DAVENPORT: Sounds like he's invoking a confidential -- confidentiality, Mr. Beshore.

A. He might -- he might not want me saying what he's -- what that is. I -- from my side I could say, but he might not want other people to know.

BY MR. BESHORE:

Q. Okay. Does he have a fuel adjuster on that charge?

A. No.

Q. Has it gone up with the fuel price?

A. No.

Q. Really? Is he available for long hauls from, you know, Portales, New Mexico to Nashville?

A. He's very accommodating, so he might be.

MR. BESHORE: Okay. Thank you.

I don't have any other questions.

JUDGE DAVENPORT: Counsel?

MR. STEVENS: Thank you, your Honor.

EXAMINATION

BY MR. STEVENS:

Q. Good afternoon, sir.
A. Good afternoon.
Q. I appreciate you coming here. You've been here the whole time and you've been participating, I'm sure, talking to people and learned a little bit more. You seem to know a whole lot already.
A. Well, I've been around.
Q. When you started out in the dairy business, what year was that?
A. When I got out of college, I started working for somebody in Franklin, Tennessee in 1981.
Q. So you learned the business there? You worked for another dairyman?
A. I grew up in a family operation that was sold in '78 and that's while I was in college. I finished college and went to work for a dairyman. My father and two brothers still farm today. They're not in the dairy business but other farming activity. I worked for somebody for three years and became a partner. And in 2001, I generated enough equity that I bought a farm, bought my partner out and put the two herds together and four and a half years later I'm still here.

Q. Still selling milk?
A. Pardon?
Q. Still selling milk?
A. Yes.
Q. Still dairying and still selling milk. Now, so you -- you said you have 500 -- you milk 500 cows now?
A. Yes. Actually, there's a total of 450 cows. You don't milk all the cows; some of them are dry.
Q. Okay.
A. Right now it's around 540 cows.
Q. Okay. And when -- when the secretary puts out the notice of this hearing, he defines a small business as a business with less than $750,000 gross income of a year -- yearly income. Under that definition, would you consider yourself a small business?
A. Strict -- no.
Q. Were you a small business once?
A. Yes, when I was milking 80 cows.
Q. When you were milking 80 cows, you weren't making that much money?
A. Correct.
Q. And apparently now you are?

A. Well, I -- I've had to make money in the dairy business because that's all I've ever done. And my -- my net worth is more now than what it used to be.

Q. And I guess you're testifying here today -- I think it would be fair to say that you want that kind of dairying to continue -- the kind that you do -- that your colleagues that are in the same position as you do?

A. I would like the opportunity to be in the southeast to be in the dairy business just as it is in New Mexico or anywhere else. And I think that economics should dictate that not somebody writing rules and regulations on where they're going to move the money.

Q. I hear that. What -- what you've testified to is you like the -- you like the free market. You like the parties to negotiate these prices and work it out that way?

A. Yes. It can be cruel at times, but it can be very rewarding at others. And I think that's -- that's fair to do it that way. But I'm not opposed to no regulations. What I would like to do is the Federal Orders to give us integrity, accountability. And those that are dedicated, they -- they should be rewarded in the monies that are regulated. And then there ought to be monies above that. If you -- if you regulate the true value, you actually do the opposite of what you're trying to do because then the -- everybody has access to that money. And -- and -- and trying to move milk to a deficit area is going to take less and your milk just keeps moving further away. It's just an endless cycle.

Q. And -- and I guess I get from your testimony that you would like the handlers in these two orders to be concentrating on -- on buying local milk and using that milk to do their business -- to process milk and sell it in the marketplace as opposed to drawing in milk from -- from further and further distances into the -- these two marketing areas?

A. Right. A good dairyman in the southeast can produce milk at a much cheaper price than what a dairyman in New Mexico can produce it. They may produce it cheaper there but by the time they haul it here I'll take half the haul bill and build a mansion. But that milk is the most expensive milk that comes into this market. And those people don't get a big price because then out there they take the money and they dribble it around too. So there's -- no one's ever benefitting from all this other than maybe the transportation --

Q. How about the haulers, yeah, they might -- they might benefit, right --

A. Right.

Q. -- for hauling the milk?

A. But those people in New Mexico, that's a fairly new area. They moved there for -- for the cost of producing milk and they should be obligated to get their milk to the market just as I'm obligated to get it to the market.

Q. So you're -- you're -- and I hear from you that you're basically -- I mean, to you -- and -- and I know you're not speaking for anybody but yourself. But -- and there are others out there like you certainly. But you just want -- you see an unfairness and you would like this to be operated, in your opinion, in a fairer way than it seems to be going here for the last few years?

A. Well, I've been to several of these hearings. And my opinion is everybody is trying to get their fair advantage. And I think -- and, of course, there's no consumers here being represented. But the secretary has to step back with no bias and create opportunity for everybody.

There's a dairy farm -- you know, we've got dairy farms that may be fifth generation dairy farms that want to hang on another ten years. And they want the system so they can hang on another ten years. It may be better that they move somewhere else or stop dairying. I mean, that's just the force of economics. But there needs to be an unbiased decision about a lot of these things.

Q. And -- and you -- to be fair, you can appreciate that -- that -- I mean, you have your opinions and there are other dairy farmers and they may have a different opinion. They may be members of co-ops, they may be independent producers also. And you may or may not agree on some of these issues.

A. That's -- that's correct.

Q. And you can see there's a difference of opinion here; right?

A. If they want transportation credits and they've been doing transportation credits within their organization for years, they can continue to do that. I just don't want to see them put it in the Federal Order --

Q. Okay.

A. -- where I have to live with their ideas.

Q. And I hear you saying to me and I -- and I've -- you would like the secretary to look at the record of this thing and make a fair decision?

A. Correct.

MR. ?: I thank you very much for your testimony, sir.

A. Thank you.

JUDGE DAVENPORT: Mr. Tosi?

BY MR. TOSI:

Q. Good afternoon, Mr. Sumners. Thanks for participating in this proceeding.

A couple questions. In your written statement you characterize Proposal 1 as benefitting a select few. How does Proposal 1 benefit only a select few and who would they be in your opinion?

A. Well, presumably it would be the ones that were getting their -- their transportation subsidized in effect by a higher Class I differentials than everybody else. But, of course, that -- most of that money goes within the co-op and then that co-op can spread that money out however they want to. So I don't know if it's a select few or it's pennies for many. It's probably more or less pennies for a lot of people than -- but that would be speculation on my part. But that -- the amount of milk that --

the people that are bringing that amount of milk in that's getting the credits are the one benefitting. The guy delivering the milk every day is not necessarily benefitting.

Q. Okay. To pick up a little bit on the line of questioning that Mr. Beshore was pursuing with you, if for some reason tomorrow you got letter from Dean that says they only want half your milk now and your milk had to go a much further distance, would you be of the opinion that you would be able, then, to take advantage of a transportation credit to have your milk moved further?

A. Me personally?

Q. On an Intra-market Transportation Credit thing here.

A. For me personally where I'm located in the order, it would probably benefit me.

Q. Okay.

A. But if I was on the other side, you know, of the plant, it wouldn't benefit me. Say if they took my milk to Birmingham, I'd get Birmingham price, Federal Order minimum, first plant received, and I'd have help hauling my milk there. They guy 50 miles north, he'd have to pay his full cost. Of course, I'm sitting over there where there's a lot of corn, cotton seed and -- and my feed cost may be $20 a ton cheaper than his. But I don't share that with him. Why should he share the cost of moving milk with me?

Q. So in your view then, trans -- the cost of transporting your milk to market then is part of your cost of production?

A. Yes. To me, the difference between what the milk plant pays for milk and what they pay me, all that is a cost of my production because that's -- you've got a value of milk, the government takes part of that value and redistributes that money among other producers for me to enjoy taking my milk to that plant every day. So that's also a cost of production.

MR. TOSI: All right. Thank you. Appreciate your patience with us. And, again, we appreciate your participation. Thank you.

A. All right. Thank you.

JUDGE DAVENPORT: Any other questions?

Thank you, Mr. Sumners.

It's about 2:30. My list says that Mr. Schad is next but let's -- let's take our break at this time

and let's be back at quarter of three.
[WHEREUPON, a brief recess is taken.]
JUDGE DAVENPORT: Want to raise your right hand, please.
DENNIS SCHAD, after being first duly sworn, is examined and testifies as follows:
JUDGE DAVENPORT: Please be seated. Tell us your name and spell you name for the hearing reporter.
MR. SCHAD: Hello. My name is Dennis Schad, S-c-h-a-d, and my business address is 405 Park Drive, Carlisle, Pennsylvania 17103.
JUDGE DAVENPORT: Very well, Mr. Schad. You have two statements. One is regarding Proposals 1 through 4; that has been marked as Exhibit 40. The other one is regarding Proposal 5 and that has been marked as 41.
MR. SCHAD: That's correct, sir.
[WHEREUPON, documents referred to are marked Exhibit 40 and Exhibit 41 for identification.]
JUDGE DAVENPORT: Are you prepared to read your statement into the record at this time?
MR. SCHAD: I am.
JUDGE DAVENPORT: Please proceed.

MR. SCHAD: Starting with Exhibit 40: "My name Dennis Schad and I'm here to testify on behalf of Land O'Lakes, Incorporated. I hold a Bachelors Degree in History from the College of William and Mary and a Masters in Business Administration from Virginia Tech. I have worked for Land O'Lakes and its predecessor cooperative for 25 years and my current title is Director of Regulatory Affairs. Prior to this assignment, I have held positions in the cooperatives marketing and transportation departments. I have testified at numerous federal and state milk marketing order hearings and before the agriculture committees of several state legislatures.

Land O'Lakes is a dairy cooperative with over 4,000 dairy farmer member-owners. The cooperative has a national membership base whose members are pooled on six different Federal Orders. For over ten years, Land O'Lakes and its -- that should say predecessor cooperatives have -- has provided a supplemental supply of milk to the southeast. From that time, Land O'Lakes' members have been continuously pooled on the southeast orders. Just as a point of clarification, when I speak of the southeast, I'll be speaking of both orders together. And if I'm -- if I'm -- if I'm speaking about one distinctively, I'll make that distinction.

I testify today in support of Proposals 1 and 3, in opposition to Proposals 4 and 5, and with no position on Proposal 2.

Land O'Lakes supports Proposal 1. Land O'Lakes is a supplemental supplier to the southeast orders. In this role, the cooperative supplies seasonally needed milk from its northeast and mid-west milk sheds. Testimony has already been given by the proposal's proponents that show that claims against a transportation credit fund exceed the fund's resources. When claims exceed the fund's resources, payments to handlers who provide the supplemental deliveries are prorated. Proponents point out that only 39 percent of the claims were paid in Order 7 during 2004 while 54 percent of the claims were reimbursed in the Appalachian order.

Land O'Lakes appreciates the change in southeast orders in November 2005 that increased Class I assessment in the two orders by $.03 per hundred weight. We also agree with the proponents' analysis which states that the

November increase is insufficient to fully reimburse future claims against the fund.

Land O'Lakes agrees with the analysis provided by proponents and supports Proposal 1 which will increase the Class I transportation fund assessment by $.05 in Order 5 and $.10 in Order 7.

Land O'Lakes has no position on Proposal 2. Having no members residing in the marketing areas of the two Federal Orders, Land O'Lakes takes no position on Proposal 2.

Land O'Lakes supports Proposal 3. Land O'Lakes is a supplemental supplier of milk to the southeast from its milk sheds in the northeast and the mid-west. We have read the testimony of the proponents and agree with their evidence and analysis. In transporting milk to the southeast markets for over ten years, Land O'Lakes has seen its cost increase. We have experienced increase -- increases in all court -- strike that. We have experienced increases in all cost categories including but not limited to labor, insurance, fuel and truck costs.

Land O'Lakes supports the variable cost per mile transportation credit reimbursement rate as presented by the proponents. Basing the reimbursement rate on diesel fuel cost will be responsive to the cost actually experienced by the handlers who move milk into the deficit markets.

Land O'Lakes opposes Proposal 4. Previous testimony has stated the obvious. The ongoing trend in the southeast has been a decline in milk production and an increase in population in the region. These supply and demand conditions have resulted in the need to source supplemental milk further from the marketing area. The transportation credit provisions of Orders 5 and 7 are designed to provide credits to handlers who support -- I'm sorry. Strike that and I'll start from the sentence again. The transportation credit provisions of Orders 5 and 7 are designed to provide credits to handlers who import supplemental milk in to the Appalachian and southeast orders during the short production months of July through December.

In order to qualify for transportation credits, certain requirements must be met. Payments are limited to producers that reside outside of the order's marketing area and such producers are required to be off market for at least two months of the preceding February through May period.

Payments are made only on Class I movements and no transportation payments are made to producers for the first 85 miles of travel. Additionally, transportation payments are decreased by the positive difference between the farm and the receiving plants Class I zone.

This program reimburses handlers for some of the cost of importing supplemental milk on a transactional basis. Milk is moved to the deficit market and partial payments are made -- are made based on a set of stringent contingencies. The intent of Proposal 4 is to add another set of requirements to order transportation credit provisions for making needed July through December shipments of Class I milk to the southeast. These new requirements would do nothing to encourage the needed imports into the southeast during the short production months, July through December.

Proposal 4 would require a comparison between Z percent -- 30 -- and a percentage of milk delivered to plants other than Order 5, 7A and B and Order 7A and B -- I'm sorry -- Order 7 -- 0.7A and B plants. If the proponent-defined delivery relationship as greater than Z percent, then the transportation credit payments to the importing handler will be so prorated.

Section 1005.13 and 1007.13 already define the necessary shipments required for pooled producer status at a handler and an individual producer level. Diversions by cooperative associations and operators of pool plants may not exceed 25 percent between July -- July and November and 40 percent between -- during December. Those are the transportation credit months and those are the provisions for Order 5. Additionally, both orders require that all pooled producers touch-base at a pool plant during each month. In order to facilitate movements during the short months which coincide with the months in which handlers may draw transportation funds, touch-base requirements are increased.

Under the order's definition, a diversion is a delivery to a non-pool plant. Deliveries to other order Section 0.100 blank 0.7A plants are down classified and counted as diversions. Proponents offer a new diversion definition in order to qualify for full payment of transportation credit where a diversion is a delivery to a plant other than 1005.7A and B or 1007.7A or B plant. While pooled

Order 5 milk is ineligible to collect transportation credits at an Order 7 distributing plant, proponents would include such deliveries in the numerator of their transportation credit relationship. Likewise, the order would include delivers to 7C and 7D supply plants and deliveries to 7E, Class I, Class II system of plants in the numerator of the diversion relationship while proponents would exclude these deliveries from their calculation for full transportation credit reimbursement.

It is actually unclear what milk would be included in the denominator of the proponents' relationship.

I'd like to strike that -- that paragraph. I think that it is clear now from the testimony of that, so please strike the last sentence and I won't read on from there.

Section 1005.82D, Section 2 sets the requirements for distribution of transportation credits between other order plant -- strike that and start from the beginning.

Section 1005.82D(2) sets the requirements for a distribution of transportation credits between an other order plant shipping -- an other order shipping plant and an Order 5 distributing plant. It is completely unclear what milk is to be included in the proponent's relationship for this provision of their proposal. On the basis of an undefined relationship, proponents recommend limiting the payment of Class I transfers from other order pool plants.

Proposal 5 is vague and defective. However, the secretary should not reject this proposal for these reasons. He should reject these changes to the transportation credit provisions because these proposals do nothing to better effectuate the movement of milk into the deficit market. The current provisions define a transactional relationship. Supplemental Class I milk is needed in these markets during specific period and the transportation credit provides monies to partially effectuate that movement. The current order producer qualification and transportation credit criteria provide adequate safeguards to this program and no more are required. Land O'Lakes request that the secretary reject Proposal 4.

I'll now read Exhibit 41. The first two paragraphs are redundant to Exhibit 40, so I won't read those.

Starting off, Land O'Lakes opposes Proposal

5. Prior to Federal Order Reform, many orders had provisions that zoned out diversions. Typically, an order would price milk at the order's pricing point and then would price diversions as a mileage function away from that point. Sometime the provision carried a stipulation that the price of the plant of diversion could be no lower than the Class III price.

Integral to order reform was the development of a national pricing surface which provided the relative price differences between geographic locations from milk and its components. In relative rather than absolute terms, the order reform model provided an integrated national map which defined the location value of Class I milk in the United States.

While never specifically addressed in the final decision, the secretary chose to change the individual order zone-out pricing provisions to a system which priced diverted milk in a standard fashion for all orders based on the Class I pricing surface. Nonetheless, the secretary addressed a similar issue in a proposal for Order 1 in the Federal Order Reform process. A producer group pooling milk in the northeast order proposed that a producer pricing surface be overlaid in the Class I pricing surface. That Order 1 propose would have provided a different uniform price to a producer delivering to a distributing plant in the same Class I pricing zone compared to a producer delivering to a manufacturing plant in that same zone. The secretary denied this Order 1 proposal stating, "A producer pricing differential structure that differs from the Class I differential is denied." Parenthetically, this issue is discussed in the final decision of Federal Order Reform in Part 6A, which is the northeast region in the section entitled "The Need for a Producer Pricing Mechanism."

Admittedly, the issues which prompted the Order 1 proposal are different from the one in front of us today. However, the essence of Proposal 5 is to provide a producer uniform price for diverted milk that is different from the Class I pricing surface. To that point, the issue is raised in the Federal Order Reform Order 1 proposal and Proposal 5 are the same.

Since the reform process, the appropriateness of pooling milk distant from an order's marketing area and that milk's participation in the Class I market have been addressed through the producer qualification sections of the Federal Orders, not the pricing sections.

Generally speaking, radiating from the southeastern region of the country, Class I milk prices decrease. The Class I pricing surface is lower in Indiana and Wisconsin than it is in Tennessee and North Carolina. Likewise, the Class I value is lower in Texas and New Mexico than it is in Mississippi or Georgia. These relative differences in Class I values are also applicable to the blend price differences between milk delivered to plants in the in-area and out-of-area examples. Proponents of Proposal 5 would argue that the relative differences of the Class I pricing surface are inadequate to determine the value of diverted milk. They propose that the value of diverted milk should be updated to current transportation cost and be zoned out of a rate of $.04 per ten miles. Others may contend that the pricing at the out-of-market plants are correct, but the Class I differentials in the southern orders should increase by $.04 per ten miles from the order's reserved plants.

The value of diverted milk at a plant could change based on the change in the pool status of "closest pool-distributing plant." Proposal 5, as written, could bestow an economic value to maintaining the pool status of a distributing plant solely for the value of diversion. For instance, based on Proposal 5, the value of milk -- the val -- the value of diverted milk at Carlisle, Pennsylvania would have increased by $.52 per hundred weight on November 1st, 2005 when Order 5 expanded its marketing area into Virginia which resulted in the Morningstar plant at Mount Crawford becoming the pool on Federal Order 5. Now Carlisle is 115 miles closer to the closest -- I'm sorry. Strike that again from the sentence. Now Carlisle is 115 miles nearer to the "closest pool-distributing plant." Moreover, the regulatory-driven economic benefit from Proposal 5 could provide incentives for building balancing plants in the Order 5 and Order 7 marketing area rather than in the milk shed of surplus milk production.

Prior to order reform and its resulting Class I pricing surface, distributing plants shifted sales in order to qualify as a pool plant in the order with the lowest Class I price. Ignoring market economics, route distribution was shifted between distributing plants to gain regulatory advantage.

Adoption of Proposal 5 could provide similar diseconomic incentives for maintaining a distributing plant or choosing the site for a balancing plant.

In the early 1990's when then Atlantic Dairy Cooperative first sold milk to the then Carolina/Virginia Cooperative, the sale was transactional. The milk was loaded out of Carlisle, an Order 4 pool plant, based on availability and price. As the relationship matured, the importing cooperative offered to facilitate the pooling of Middle Atlantic milk on Order 5 year round. For Carolina/Virginia, this new transaction guaranteed a first option volume of milk at a known price for its Class I needs. From the larger market prospective, this change resulted in having all of the Order 5 producers sharing the cost of maintaining the supplemental supply of milk and having Order 5 rather than Order 5 receiving the benefit of the Class I sales.

This transaction was further facilitated by provisions in Pre-reform Order 5, Sections 1005.75A and 1005.53A, Subsection 6 which priced diversions to a plant located -- I would like to back up and say which priced diversions to a pool plant located in the marketing area of former Order 4 based on the Class I value at the plant of receiving.

Adopting a zone-out provision in Orders 5 and 7 would change the economics of providing supplemental milk to the southeast. For instance, the value of milk diverted to Carlisle would decrease by $.61 per hundred weight from its current value reflecting 168 miles between Carlisle and Mount Crawford, Virginia. Adoption of Proposal 5 would decrease the location value of diversions of milk to the Land O'Lakes cheese plant in Kiel by an estimated $1.38 per hundred weight as a function of the 457 miles between Hoosier Dairy and Holland, Indiana and Kiel, Wisconsin. As a consequence, there would be little economic incentive to maintain an on-call supply of Order 5 or Order 7 milk in the northeast or upper Midwest.

In my opinion, the adoption of Proposal 5 would result in the return to supplying the deficit southeast markets through transactional relationships. Milk to the southeast would be sold out of plants on an as-available basis and at prevailing give-up charges. If disorderly marketing conditions resulted in the change from the zone-out diversion prices after Federal Order reform, they have been addressed through the pooling -- I'd like to read that prior sentence again. If disorderly marketing conditions resulted in the change from the zone-out diversion pricing after Federal Order reform, they have been addressed through the pooling qualification hearings in Orders 1, 30, 32 and 33 during the last five years. During that period, Orders 5 and 7 have not requested a hearing to tighten their pooling qualifications. Land O'Lakes believes the adoption of Proposal 5 would be disruptive to the acquisition of supplemental supplies of milk to the southeast orders and recommends that the proposal not be adopted.

I'm available for questioning.

JUDGE DAVENPORT: Cross examination?

Mr. Sumners?

EXAMINATION

BY MR. SUMNERS:

Q. Do you-all have full-service contracts?

A. I'm sorry?

Q. Does LOL have full-service contracts?

A. We have full-service contracts, not in the southeast orders. We have full-service contracts in other places.

Q. Did they always work well?

A. They -- they have been --

Q. Did they always -- excuse me.

A. They have been continued over time, so the assumption is they work well for both parties. They have provisions in them normally which allow both sides to change on an annual basis. We have long-term contracts with some -- some buyers. We provided all of their milk, all of their balancing.

Q. Does -- do sometimes you make these agreements and lose money?

A. Sometimes we make -- sometimes the conditions change and at the moment we can lose money. As I said, some portions of them are open negotiation. Sometimes, you know, if you look at one, the contract may -- may include more than one plant where you -- you may lose money on one transaction and make it in another.

Q. But sometimes they do lose money?

A. Sometimes -- sometimes an individual transaction may lose money, yes.

Q. And do you consider that because you're making these decisions and losing money it would also be the responsibility of, say, Foremost or some other cooperative or independent producer that they should share in the cost in these contracts that you agree upon and don't work out?

A. Again, we're talking about -- we're talking about the contracts that are not in the two orders that were addressed here. And normally they are no provisions -- Federal Order provisions that would facilitate sharing of a loss on a transaction. However, sometimes through over order mar -- over order pooling marketing agencies -- marketing agency in common, there could be a possibility that -- that -- that losses could be shared between two cooperatives given the fact that circumstances have changed. But I can't think of any instances.

Q. But you don't do it through the Federal Order system?

A. In those -- in those other -- no.

MR. SUMNERS: Thank you.

JUDGE DAVENPORT: Mr. English?

MR. ENGLISH: I have no further questions.

JUDGE DAVENPORT: Mr. Tosi?

EXAMINATION

BY MR. TOSI:

Q. Good afternoon, Dennis. Thanks for -- for coming and participating.

With respect to the different diversion limit standard, if you will, between what the Orders 5 and 7 currently provide and the 30 percent standard that -- that's being proposed by Dean Foods with respect that being a condition for receipt of a credit, do you see them as one in the same thing and not as separate provisions?

A. I guess I see the inconsistencies between the two. They -- while there -- that they're being called the same word -- diversion -- the relationship is different. So does that answer your question? I'm struck by their inconsistencies and they measure two different things but, however, they have the same word that describes it.

Q. Okay. If the proposal had been to lower the diversion limit standards as they currently exist in Orders 5 and 7 to some lower number or -- that would have -- that --

A. Instead of 25 percent, you could only have 20 or 15 percent diversions?

Q. Yeah. If that approach had been taken, your opinion would be different?

A. No, sir, I would be opposed to that provision also.

Q. Well, I understand that you might be opposed to that. But with respect to the consistency, you see them as being --

A. If you're -- if you're -- if you're asking me whether -- whether their -- their -- if they proposed -- if their relationship for Z percentage was the same relationship as the Federal Order where you're taking deliveries to 7A, B, C, D and E plants and of both Federal Orders, presumably I -- I guess you would -- you would do it across both of them, I would be -- I would be opposed to that as well. I think that the point in my testimony is that the -- the transportation credit provisions facilitate the movement needed milk on a per load basis based -- based on that -- that milk being delivered for Class I inside the marketing area. Looking at -- I think anything outside of that transaction is incidental.

Q. Just a hypothetical here. What if the diversion limit standards were -- in Dean's modification were 60 percent instead of what they're proposing at 30, would you be supportive of that?

A. No, because we're opposed to limiting that transaction. It's all about bringing that load of milk that is needed by the Class I market. And that's the only thing that's paid. None of the milk that stays home and is diverted or is diverted inside of the marketing area or goes to any other thing than Class I is paid. We're struck by the fact that the transportation credits address only -- only movements of needed Class I milk. Any -- any limits to the payment of that we're opposed to.

Q. So let me see if I'm understanding you correctly. So if the secretary decides that transportation credits will only apply to -- excuse me -- that -- with the milk that comes into the market and receives the inter-market transportation credit, okay, that no diversions will be allowed to attach itself to that volume of milk that's coming in for additional Class I use?

A. No.

Q. Excuse me. For Class I use.

A. No. I'm saying that the -- that the order already has diversion limitations in Section 13; that they define whether that load of milk coming in is actually pooled Order 5 milk if it's going to an Order 5 pool plant.

Q. And that there should be no difference then between the diversion limit standards as specified in the diversion -- the producer milk standards of each order, that should -- there should be no other differentiation made -- excuse me. I'm formulating that question poorly. Give me a moment.

A. Okay.

Q. Is it that you don't see a need to limit the amount of additional milk that attaches itself to pooling eligibility in Orders 5 and 7 other than what the current order's diversion limit standards currently provide?

A. If -- if there was -- if there -- if that was the problem, it should be addressed through Section 13, not Section 82. We would be -- we would participate in a hearing that would address Section 13 and the touch-base requirements and the diversion requirements. Our position is that the transportation Section 82 already -- to be qualified -- the first qualification in order to get the payment is that you've got to meet those Section 13 requirements. We believe that there -- other than that which is already in 82, which we recognize as safeguards for abuse, there should be no other.

MR. TOSI: Okay. Thank you.

I understand you perfectly now. Thank you.

MR. SCHAD: Okay.

JUDGE DAVENPORT: Mr. English?

EXAMINATION

BY MR. ENGLISH:

Q. Charles English for Dean Foods.

I realize that perhaps in exhibits and in some testimony there's been imprecision. But the word "diversion" does not appear in Proposal 4; does it?

A. The word "diversion" do not --

Q. Yeah. Why don't you look for a moment since you've used it and said that that would --

A. I need a copy in front of me.

Q. You're certainly welcome to use my copy.

A. Rather than reading the entire -- the entire part word for word, I will -- if you characterize to me that the word does not appear there, I will -- I will say that I agree that it says what it says.

MR. ENGLISH: Thank you.

JUDGE DAVENPORT: Other questions of Mr. Schad?

Very well.

Thank you, Mr. Schad.

Mr. Beshore, are you going to call -- recall Mr.

Sims?

MR. BESHORE: Yes.

JUDGE DAVENPORT: Mr. Sims, you are still under oath.

EXAMINATION

BY MR. BESHORE:

Q. Mr. Sims, before we get to your testimony with respect to Proposals 4 and 5, you were asked earlier a question by Mr. Tosi to which you did not have the information to answer relating to the proponent cooperative's share of Class I sales in Orders 5 and 7. Do you recall that?

A. I do.

Q. Okay. Now, have you obtained some information responsive to that -- to the question from Mr. Tosi that you'd like to present for the record?

A. Yes, I have.

Q. Could you provide that, please?

A. Yes. And per -- and perhaps some explanatory description would be helpful also.

Q. Yes.

A. Mr. Tosi asked me about an issue of, I guess what we might call, market share of the Class I in Orders 5 and 7 which is not a statistic I calculate regularly. We do understand the Class I utilization of the agency which is influenced by the Class I utilization in Orders 5 and Order 7 but it also is -- we -- the agency has sales -- southern marketing agency is to whom I'm speaking. That agency has sales in Orders 126, in Orders 32, 33, Order 1 and Order 6. So the Class I utilization of the agency is a number I regularly keep but the market share of Orders 5 and 7 is a little bit down the line. I was able to calculate it, though, and provide an apples-to-apples calculation with regard to the statement in the -- in the proponent -- the main proponent testimony.

I believe that statement said that those proponents represent our market in excess of 80 percent of the milk in the two marking areas -- or in the two orders. And that is true; that number is -- for a recent month was approximately 84 percent. And by my calculation, trying to do apples to apples, the Class I utilization or the amount of -- excuse me -- the Class I market share of those that would be applicable to those -- that 84 percent would be about 80 to 81 percent. So somewhat slightly less than the -- than the share of producer milk but -- but not -- as I indicated, a little less but not seriously different.

Q. Okay. So because the agency -- that is southern marketing agency's operations for which you are the assistant secretary and the supervisor in essence, because they're broader than just Orders 5 and 7, you don't routinely calculate or have the specific numbers that you were asked for but you've now provided that?

A. That's -- that's correct. The -- the data were available; I just didn't have them on the tip of my tongue. And the question Mr. Tosi asked me is not one that I normally calculate on a regular basis. I -- there are other Class I statistics which we do, but that was not what was asked.

MR. BESHORE: Okay. Now, we have prepared and made available, your Honor, to all participants a document -- a nine-page document entitled "Testimony in Opposition to Proposal Number 4 (Dean Foods)," which I would ask be marked with the next exhibit number.

JUDGE DAVENPORT: That will be Exhibit 42, Mr. Beshore.

[WHEREUPON, document referred to is marked Exhibit 42 for identification.]

MR. BESHORE: Okay. And then

accompanying that exhibit we have a three-page document with some tables and data sets which the title of which on the first page is "Ratio of Highest Delivery Day to Lowest Delivery Day by Month, Federal Order Pool Distributing Plants." I would ask that that three-page document be marked as Exhibit 43.

JUDGE DAVENPORT: So marked.

[WHEREUPON, document referred to is marked Exhibit 43 for identification.]

MR. BESHORE: And we also have a document prepared and made available to everyone -- a six-page document entitled "Testimony in Opposition to Proposal Number 5 (Dean Foods)." And I'd ask that that be marked Exhibit 44.

JUDGE DAVENPORT: So marked.

[WHEREUPON, document referred to is marked Exhibit 44 for identification.]

MR. BESHORE: Accompanying that statement of testimony we have a two-page exhibit set that I would ask be marked as Exhibit 45. The title on the first page, "Milk is not needed at pool-distributing plants in Oder 1005 -- Choice Divert to Goshen, Indiana or Divert to Leitchfield, Kentucky, Load of milk produced in Rensselaer, Indiana."

JUDGE DAVENPORT: So marked.

[WHEREUPON, document referred to is marked Exhibit 45 for identification.]

MR. BESHORE: Thank you. Now, with -- with your Honor's consent and that of the other participants and the government, we would propose that Exhibit 42 be made a part of the record and be incorporated in the record as if read and presented verbatim by Mr. Sims under oath without him taking the time to read that at this point.

JUDGE DAVENPORT: Same thing with 44?

MR. BESHORE: And the same thing with 44, yes.

JUDGE DAVENPORT: Is there opposition from any party here?

Very well. Your motion will be granted.

MR. BESHORE: Thank you. Now, I would like to ask Mr. Sims a few questions with respect to Exhibits 43 and 45 in the way of further direct testimony on -- on these --

JUDGE DAVENPORT: If you would, at your convenience, would you also provide the court reporter and myself with a copy of those four exhibits?

MR. BESHORE: Yes, we will.

JUDGE DAVENPORT: But you may proceed.

BY MR. BESHORE:

Q. Okay. Mr. Sims, turning to Exhibit 43, then, could you explain the first page of Exhibit 43? First of all, was that prepared by you or under your direct supervision?

A. It was.

Q. Okay. What do you -- what do you have in the first page of Exhibit 43?

A. These data are taken directly from exhibits previously introduced at this hearing by the market administrator or witnesses basically providing the -- by month, the delivery data regarding daily deliveries at pool-distributing plants from January 2004 through October 2005 for each of the Appalachian and southeast orders. This tabulation selects data that exhibit and simply compares on a ratio basis the highest day of delivery during a calendar month to the lowest delivery day at pool-distributing plants during that calendar month and then provides a simple average of the high days and low days and a ratio for the --

for the 22-month period for each -- for each order noting particularly that the ratio of the highest day of delivery to the lowest day of delivery was 135 percent or 1.35 ratio in the Appalachian order over the 22-month time frame and 1.38 high day to low day in the southeast order.

Q. Okay. Page 2 and 3 of Exhibit 43 appear to be similar data sets on a calendar basis. Can you -- day of the week basis. Can you -- did you prepare those?

A. I did.

Q. Okay. Can you explain them, please?

A. Yes. Page 2 is, again, the -- that same data, I believe, for -- taken from the market administrator data previously introduced and just lays out in calendar format for the month of February 2005 the -- the deliveries to pooled-distributing plants as indicated in the market administrator exhibits. This exhibit was designed to -- to show the -- the pattern weekly of deliveries and the variation of days delivery particularly through the week, that Sunday deliveries and -- Saturday and Sunday deliveries are substantially less than deliveries on Mondays, Tuesdays, Wednesdays and Thursdays with a -- kind of a -- I guess a gable roof, if I may draw a mental picture, look to the relationship that the Saturdays and Sundays on either end of the week are very low and then the Wednesday representing the peak day of deliveries and then somewhat sliding almost curve like between the ends of the week of particular note.

Also, there is a -- this describes not only average deliveries by calendar day for the month of February -- and February was selected because it has 28 days; that means it has one of each day of the week. It makes the calculation more realistic and simple. There also shows a pattern within the month in Order 5 which is -- which is a fairly recognizable pattern in distributing plant deliveries where deliveries in the first portion of the month are heaviest and then decline throughout the month.

This one's a little bit odd just a little bit in that -- and it's true also in the -- in the succeeding -- well, the -- only in Order 5 -- the Page 2 that there was a little higher delivery in the fourth week of the month but that typically is a -- deliveries are higher in the first portion of the month and ease off as you go through the month.

Then in the bottom right corner, some selected ratios again of deliveries comparing the average Wednesday, which is the average high day, to the average Sunday. There's almost 19 percent difference between the average Wednesday and the average Sunday. And when you compare the high day, again, to the low day, 33 percent more deliveries on the highest day of deliveries in this month, which happened to be a Friday, to -- to the lowest Sunday -- 100 -- again, 33 percent swing in deliveries.

Q. Okay. And the third page of Exhibit 43 then is the same set of information related for February 2005 with respect to the Federal Order 7 information; is that correct?

A. That is correct.

Q. Are they -- are the two orders similar in their patterns?

A. The patterns show very similar shape and data. There is some differences in this -- this -- the exhibit for Order 7. The decline from the first week to the second week to the third week to the fourth week is -- is -- is a little more evident. The fourth week is lower than the third week, which is lower than the second, which is lower than the first. The ratio of the high day to the low day very similar. In the previous Order 30 -- the Order 5 exhibit, I believe it was 33 percent and this one is 32 percent of the relationship of the average Wednesday but roughly 21 percent more than the average Sunday. And then the within week pattern, similar with the peak on Wednesday. However, in this case, we had a -- kind of an unusual circumstance where Monday and Thursdays were -- were fairly high also. A little -- a little less peaked at Wednesday but it did peak at Wednesday.

Q. Are the high day and the low day shaded on each calendar?

A. They are for emphasis.

Q. Okay. Now, just one -- one little thing I noticed here in the box in the bottom right of Pages 2 and 3, which is a comparison of the high day to the low day --

A. Yes.

Q. -- okay -- the dates for the high day and the low day for the Order 5 data, would they be the shaded days of February 4 and 20 as opposed to indicated days of February 11?

A. They are. That is a correction we need to make to that -- to that exhibit. That bottom right corner should read February 4 to February 20.

Q. Okay. And the import that -- the relevance of this data is set forth in your testimony which has been received in Exhibit 42?

A. It is.

Q. Okay. Let's turn then to Exhibit 45, a two-page exhibit which goes with the testimony relating to your position in opposition of Proposal 5. Did you prepare this exhibit?

A. I did.

Q. What's the date on the first page -- or information on the first page of Exhibit 45?

A. This hypothetical milk movement demonstrates that the decision-making, which would occur in -- with location adjustments as -- on diverted milk or milk diverted outside the marketing area, which would occur currently, the decision of a load of milk originating in Rensselaer, Indiana, which is a town very, very close to an important supply -- reserve supply center for the southeast and how the decision makers on where to route that milk, the kind of decision-making they follow or would follow with -- under the current location adjustment structure and then the location adjustment structure as provided or as proposed in

Proposal Number 5.

Of particular note that the -- the -- what is demonstrated here is that if you lower the location adjustment at Goshen, Indiana, which is a reserve processing plant in that state, if you lower -- and which is outside the Order 5 marketing area. If that location adjustment is reduced sufficiently at that plant and the location adjustments are not, of course, changed inside the marketing area, you could encourage a surplus load or a reserve load that otherwise would go to Goshen to move into the Order 5 marketing area to a -- to a processing plant at -- manufacturing plant at Leitchfield, Kentucky, move more miles to -- so -- because the economic incentive has been so reduced to leave it at Goshen that now you encourage milk to move into the marketing area for Class III processing rather than minimizing the miles and leaving it outside.

Q. Would you describe that as a regulation which generates an uneconomic -- or the incentive for an uneconomic movement of milk?

A. That would be the -- that would be my implication, yes.

Q. Okay. Let's look at the second page,

then, of Exhibit 45. Did you prepare that?

A. I did.

Q. What does it show?

A. This, again, is a hypothetical situation which shows another consequence which could occur or an incentive which may arise from the Proposal Number 5 location adjustment structure. We -- basically a hypothetical supply plant located in Portales, New Mexico which would receive 20 million pounds of milk half of which would be shipped to the southeast or -- and half retained by the plant.

The first half of the -- the upper section -- the section above the stars, if you will, basically shows the value of that milk. If half of it were shipped to a plant in the southeast or in Order 7 -- the pool-distributing plant -- and then the other half were diverted to that at Portales based on the order -- excuse me -- the Proposal 5 location adjustment at Portales, the milk would be at blend values worth about $3,044,000. However, if you established a pool-supply plant in Portales, received the same 20 million pounds of milk into that plant then transshipped 10 million pounds to the southeast, all the milk -- since that pool -- that plant now is subject to the Class I price surface location adjustment process, the milk becomes worth substantially more. That you would have an incentive to establish a pool supply plant in a reserve supply area, receive the milk and then transship the order requisite amount to -- to qualify the plant as a pool-supply plant.

Q. Is establishment of a pool supply plant in Portales, New Mexico a logical economic activity?

A. I'm not going to say it's illogical, but the -- the history of assembling milk and delivering to market has been that farm-direct delivery is -- is the preferred process. Moving that milk through a supply plant adds cost and it is not the preferred process.

Q. Okay. Is it necessary to have a supply plant out there in New Mexico in order to make those reserve supplies available for the market?

A. It is not.

Q. Could you put one up if you needed to to circumvent the effect of these zone-outs? Could you put one up and run it and -- for $154,000 a month?

A. Well, the -- the -- I would think so. The $154,000 is what would be available on --

theoretically on the transship portion versus the previous -- I'm not an expert in the operation of receiving and transshipping milk, but I would think at $1.54 on that volume there would be certainly an incentive to consider it.

Q. Okay. Now, do you have anything further that you would like to add at this point with respect to proponent's positions on 4 and 5?

A. Not that I can think of now.

MR. BESHORE: Okay. Thank you.

Mr. Sims will be available for other questions

JUDGE DAVENPORT: Mr. English?

EXAMINATION

BY MR. ENGLISH:

Q. So let me start where you ended. Charles English for Dean Foods.

What you're saying is we need to modify our language so that milk transferred to a non-pool plant outside the order would get the same price as if it's diverted?

A. Would you repeat that question?

Q. What you're saying is that in order to accomplish the complete fix, now that you've identified the loophole in the things intended to close a loophole in Exhibit 45, is that not only should milk diverted to Portales that otherwise would be pooled on this market be priced at less -- down 2.45 but also transferred milk should be treated the same?

A. I don't think that's the implication. The purpose of the exhibit is not to say that that was what we need to do; it's that rather your proposal -- the proposal for Number 5 would create an encouragement to do something that otherwise would not happen.

Q. And that encouragement could be taken away by the secretary as a result of this record concluding that both diverted milk and transferred milk under these circumstances could be priced identically; that is to say down 2.54?

A. I suspect there might be other unintended consequences. For example, you would be reducing the Class I price applicable at that receiving station by a substantial amount versus what it would carry.

Q. Not if it's transferred for this order purpose only.

A. It would -- since the transferred milk would be allocated Class I, the 10 million pounds that would move would be Class I and the Class I price applicable at the Portales plant would be substantially less than it would be at -- otherwise.

Q. But when you say it's transferred to Portales, New Mexico non-pool plant and -- and 1649, what'S it going to be processed as?

A. It really doesn't matter --

Q. The blend price?

A. -- because it would receive a blend price.

Q. Okay.

A. The classification of the amount retained at the Portales plant is immaterial. The net effect on the producer side would be that the producers would draw the blend.

Q. But the point is that -- that at Portales -- and let's be honest, there's no Class I operation at Portales; right?

A. Not that I'm aware of. But what -- the -- the milk -- the half that would move to the southeast would be Class I by the allocation and transfer provisions under the order.

Q. Absolutely, just as it is under the top half of the example on the top page with Proposal 5, correct, it's the same?

A. The --

Q. That part's the same. I'm talking about the bottom half -- the 10 million pounds that in the two examples ends up in the same place but according to your example gets priced differently; correct?

A. I think I misunder -- did not follow you.

Q. Okay. You've got two examp -- you're comparing two examples and you're saying there's a benefit in the second example to setting up a supply plant and having a location adjustment; correct?

A. And having a location adjustment which is higher than would be applicable --

Q. Because it's been transferred rather than diverted; correct?

A. Yes.

Q. Okay. Do you agree that in your example there is no change to the treatment of the milk whether it was shipped directly or whether it was transferred on the top half of the line for the milk that actually ended up in Federal Order 7? That milk ends up being value --

A. Oh, I disagree completely. The milk that -- I'm sorry. The milk which in the upper half is shipped as producer milk from Portales to a distributing plant in Order 7, that's producer milk and subject to the allocation and the blend price process. But the lower half, that -- that transferred amount would be Class I by the section whatever transfer classification. What is that?

Q. Okay. So it would -- it -- but, nonetheless, it's -- it's Class I and then you're saying the transfer milk because it's also pooled it's going to draw the blend price, correct, less the dollar of the location?

A. That's correct.

Q. And all I'm saying is if you adjusted that location -- if the secretary said we think Proposal 5 is right, notwithstanding all of the comments on that side of the room, one way of curing that potential situation, which by the way doesn't exist today, would be to also price transferred milk the same way you price diverted milk and then you'd close that loophole?

A. I agree that that would theoretically close the loophole.

Q. Thank you.

Now, prior to Federal Order Reform, when -- and even prior to the merge of the southeast markets, when you had zone-out provisions, you had the opportunity for supply plants outside those marketing areas but you didn't have them; did you? At large distances -- more than 100 miles outside the marketing areas -- you did not have pool-supply plants outside the southeast marketing area?

A. I seem to recall one at some time, but it may have been a -- it may have been a short-lived occurrence.

Q. Or maybe it just didn't work out and wasn't worth the cost and it wasn't worth having to shift 50 percent of the milk all the time; correct?

A. I don't know the decision-making which may have left it short-lived. But it didn't last very long.

Q. I'm going to come back to the first page of page -- of Exhibit 45, but let me go to Exhibit 43 first. As I breezed -- and I emphasize "breezed" -- through your testimony, as I understand the implications of Exhibit 43, you're saying, for instance, for October 2005, it would be impossible in your view to met the 30 percent guideline that we propose limiting transportation credits because the highest day, the lowest day is really 1.306; is that correct?

A. In Order 5?

Q. In Order 5.

A. The implication of the -- of the -- of the exhibit is that 30 percent is a -- could be a high standard to meet based on that kind of relationship between relative days. It would also be important to note that the suppliers of milk don't know when the high day is coming; they have no advanced notice. They -- the orders typically are put in the week ahead, so they've got to not only be prepared theoretically for the high day any time, they also need a reasonable reserve over and above that high day. So --

Q. And -- and accounting for that reasonable reserve is what Dean Foods proposed to do by looking at -- as a monthly basis. Do you agree that -- that if you look at October for Order 5, if the lowest day was 10,223,081 and the highest day is 13,346,838 and you end up with a ratio high to low of 1.306 you're going to have a lot of days between the 10 million and the 13 million that raise that -- that lower that down, which is exactly the calculation Mr. Kinser did; correct?

A. I don't know if the calculation is completely analogous. I would agree that all the other days are in between. The -- also, there is an implication certainly that you need a reserve over and above the high day too.

Q. I guess nobody questioned the calculations Mr. Kinser -- on -- on the first page of 38. But what -- that was done for the month of October and it was done for Federal Order 7. And it showed that taking into account the high day -- and -- and we're acknowledging that there's a need for reserve -- that the diversion that was necessary on a monthly basis -- because it's a monthly issue; isn't it not? Don't you get the monthly -- the 30 percent on a monthly basis, it's not a daily basis?

A. That's true but the -- on a -- on a within-month basis, milk produced on a Monday isn't very much good to you on a Friday.

Q. I understand. But, nonetheless, if the ratio to the high and the low as adjusted by Mr. Kinser on the first page of 38 means that not accounting for the extra reserve that you're talking about, all you would need is 12.71 percent. Thirty percent, when you look at your number, is actually a fairly significant percentage.

A. I beg your pardon?

Q. The 30 percent limit that is provided is more than twice what the highest done on a max basis multiplied by 31 is versus actual shipments.

A. I believe Mr. Kinser's calculation used the -- what, in effect, was the maximum receipt compared to, in essence, the average of all months receipts because he compared every month the actual deliveries in a month. So you're comparing the maximum day to the average day, which is a substantially different statistic than the average day -- than the high day to the low day. And milk on the first day of the month isn't very much use to you on the 15th or much past the third day. You just can't roll it forever. It's -- and, again, there has to be some sort of a reserve over and above the high day. It would be helpful if we knew when the high day was coming. So on the first day of the month you have to be prepared for the very highest day you think it possibly could be plus a reserve over that.

Q. Sort of like I've got to plan for my billable hours tomorrow, right, sort of high day and low day?

A. Beg your pardon?

Q. I'm just saying in a marketplace people have to plan for that all the time; don't they?

A. Agreed. The -- also, it would be -- the receiving at a plant is, of course, a plant decision.

And the kind of the weekly relationship of how much they receive on each day is their decision. And so that -- it kind of backs up onto the supplies.

Q. But you have an over-order premium program which includes a seven-day receiving credit which you yourself agreed with me -- was it only yesterday -- has not provided a sufficient economic incentive to convince people to go to a more even receipt. Aren't there market opportunities out there in order to achieve the same result?

A. There could be.

Q. And you do agree that notwithstanding this discussion about daily and high and low and average that the diversion limitations that the marketing administrator has are done on a monthly basis?

A. I would agree with that, yes.

Q. Turning to Exhibit 45 -- and I guess turnabout being fair play -- you've referenced the opportunity for selling to a plant -- a non-pool plant in Leitchfield, Kentucky.

A. Yes, sir.

Q. Is that a large plant?

A. By what definition?

Q. Well, by the definition of Goshen, for instance.
A. It is not, I believe, as large as Goshen.
Q. So on a daily basis, just as the question was asked of Mr. Kinser about what happens to the milk in Louisville, just because the milk is available, the plant in Leitchfield may not be able to take it; correct?
A. That's a possibility.
Q. Whereas the plant in Goshen is large enough and generally does take what comes to it; correct?
A. I don't think Goshen always takes everything it can -- that --
Q. But a whole lot more -- I'm sorry. Finish.
A. The implication -- I would agree that the capacity at Goshen exceeds the capacity at Leitchfield. The -- the importance of this exhibit is that there is a -- if -- if this exist -- you asked me a question earlier about my -- our proposals and whether there were any possibilities of uneconomic movements of milk. The Proposal 5 does at least have one.
Q. And -- and the reason it has one is that we have left the price surface inside the marketing

area identical; correct?
A. That would be correct.
Q. So if the milk approached Leitchfield but you suddenly had one of those phone calls from one of those people who hasn't planned very well and needs more milk, it would be a whole lot easier to ship it down to the marketplace now than if you had been shipping up to Goshen; wouldn't it?
A. If it's closer to Louisville already, it's easier to deliver it to Louisville than if it's further away.
Q. But isn't the point of this that if we allowed diversions in the area to have a higher value that milk may be more available when we actually need it?
A. I -- if you would repeat that? I don't know that I follow you.
Q. Well, let me ask it a slightly different way. We obviously were trying to keep the diversion limits, you know, within the marketing area, we were trying to keep the pricing, you know, the same. One way of solving this would be to say, no, if you divert the milk there's a different price regardless. You certainly wouldn't be in favor of that; would you?

A. I would not.

MR. ENGLISH: Thank you.

JUDGE DAVENPORT: Mr. Tosi?

MR. TOSI: I had my time [phonetic].

JUDGE DAVENPORT: Excuse me. Mr. Stevens?

EXAMINATION

BY MR. STEVENS:

Q. On Exhibit 45, I -- I preface this by saying I'm a lawyer. I don't understand the milk business as well as you do and you know that. But -- but my question is how is this an uneconomic movement of milk, this -- this -- this instance that you're describing in Exhibit 45?

A. Okay. Fair -- fair question.

You have a load of milk in a -- Rensselaer, Indiana is in kind of the northwestern side of the state -- north of Indianapolis. If you draw a line between Indianapolis and Chicago, it's -- it's in -- on that line there someplace. Goshen, Indiana is on, I believe, the central eastern -- the northeastern portion of Indiana. Rensselaer, which is, again, a town really close to a very large important production locale for the southeast. Rensselaer is 104 miles from Goshen.

The uneconomic movement of milk which we describe here is those -- that load is surplus; it needs to move to manufacturing. And the kind of location adjustment structure proposed in Proposal Number 5, because of the pricing difference between what would be received out of the pool or the pool draw, if you will, for a diversion to Goshen would actually encourage that milk to move 200 -- instead of 104 miles to Goshen, it would actually encourage it to move 291 miles all the way to Leitchfield, Kentucky. And the uneconomic portion -- the -- the -- our aspect or our definition for this purpose of the uneconomic movement of milk is that's a -- that is a reserve or a surplus load. There's no reason to encourage that milk to move an extra 190-some-odd miles or nearly 190 miles for processing. It should go as short a distance as possible.

Q. Okay. And it's moved that way to get a better price?

A. That's correct. Because Proposal 5 lowers the net price it would receive at Goshen but it doesn't change the price it would receive at -- in Kentucky. So -- and it changes those relationships so substantially that now you would haul milk further to get a higher price rather than leaving it where -- at a closer plant. And we shouldn't encourage milk to move further than it has to.

Q. And -- and the reason you say that is because you're talking about surplus milk as opposed to Class I milk that you're talking about in your proposals?

A. Agreed. Our proposals address Class I which is a needed movement. The best thing to do is minimize -- it's always best to minimize miles no matter what. That's where the real cost is in moving milk. It's -- that's -- it's miles. So every proposal should -- or, you know, we always ought to measure our efficiency in -- in -- or one of the measure's of efficiency -- a main measure of efficiency is miles. We shouldn't encourage milk to move further.

Q. So sometimes when you move --

A. For manufacturing; excuse me.

Q. Go ahead, I'm sorry. Correct.

So sometimes when you move Class I milk, it might be an uneconomic movement of milk but it benefits the order because the Class milk -- the Class I milk should move that way?

A. That is one of the essences of the

proposal, that sometimes you make a movement that is costly and may, in fact, cost more to move it than -- than -- than the net return versus the source cost but the order needs the milk. The purpose of the -- of the order is to attract that Class I milk and that's exactly what we're aiming at.

Q. And in that last instance the transportation credits aren't going to cover the whole cost of moving that milk but they're going to give you some recovery of that cost?

A. They certainly help.

Q. And that's different from this how?

A. That's different from this because the purpose is to attract the Class I. Our desire is to odd -- is to -- well, I guess the -- you could say that the issue is entirely opposite. On reserve loads or surplus loads, you're desire is to leave those -- is to minimize the miles, don't -- why -- you know, there's no reason to move them any further than you have to. In a market that needs Class I, the purpose of the transportation credits is to provide that -- that humph which allows you to move it -- that extra money which helps you move it from a source location to a destination.

Q. And that's a benefit to the market?
A. Absolutely.
MR. STEVENS: That's all I have, your Honor. Thank you.
JUDGE DAVENPORT: Mr. Tosi?
BY MR. TOSI:
Q. A couple questions, Jeff. What your Exhibit 43 is trying to show is that perhaps the 30 percent number that Dean Foods is proposing as being representative of -- you referred to it as a reserve factor.
A. Yes.
Q. Okay. What I take away from Exhibit 43 is that your reserve factor is -- the need for it actually needs to be higher. What you're showing is that that -- that that 30 percent number by Dean is not adequate.
A. If you agree -- I guess I will couch it this way.
Q. Okay.
A. If you agree that there should be some limit on -- or some limit placed on transportation credits as a result of Proposal 4 -- a statement I'm not ready to make -- that agreement I'm not ready to make -- but to that end, I would agree with your

statement that this exhibit shows that based on the high day of delivery and the low day of delivery a 30 percent reserve requirement which is, I guess, kind of presumed in the -- in the Dean Proposal 4 is insufficient in many months. In fact, even in an average circumstance.

Q.   Okay. And then in your written statement there where you go on to talk about how perhaps that's unfair because there were all these differences at the plant level with respect to types of customers and you've got, like, four lines there of what makes it all so different. But yet at the same time we -- we do have a one-size-fits-all on diversions.

A.   Agreed.

Q.   So why are you making this point different --

A.   I think the --

Q.   -- with respect to transportation credits?

A.   Okay. I understand. And the difference is that it's applied to a different level or order application. They're saying that when -- you know, at the time of the year when we need to move milk that -- let's -- you know, we need to limit that if -- if reserve requirements -- you know, at certain reserve requirements. I tend to believe that the orders diversions limits as provided are the right protection. They do offer the appropriate method for ensuring that too much milk is not attached to the order. I prefer that those -- that that be the vehicle that the amount of milk pooled on the order is -- is -- is -- is measured against, that diversion privilege and the diversion limits. I don't -- I rambled a bit. Did I answer your question?

Q. Well, yes, you did.

A. Okay.

Q. I'm just -- with that being your answer, I -- I just am struck by the need for trying to do something about two marketing areas that have declining milk production and that are increasingly becoming reliant on external supplies of milk, meaning external to the marketing area and the need for supplemental milk supplies --

A. Yes.

Q. -- and to the extent that a higher blend price helps do that --

A. Okay.

Q. -- that trying to do something about the additional milk that does attach itself to the order -- to the orders and does tend to run down the blend price why you would be opposed to a proposal or that you couldn't offer a modification to a proposal that seeks to do that.

A. I don't -- I -- maybe I'm misunderstanding. I -- I -- the data presented for Exhibit 43 were developed regarding Proposal 4 which limits transportation credits which does exactly the opposite of the kind of thing I think you're aimed at.

Q. Uh-huh.

A. So maybe I'm misunderstanding the question. The -- the need -- you know, as the -- you know, my -- my feeling and the -- and I think it's born out from the -- from the data is that the further the milk gets away, the -- you know, you -- you -- it's going to be diverted more. And the bigger the milk shed, it's -- that -- those diversion rights are necessary to allow -- to offer an encouragement for the milk to move. That kind of seems like a -- like an irony.

But the -- you know, the sad part is you have to let the milk stay home a little bit in order to allow -- to encourage it to move. If that -- if that's not a -- you know, the distance milk, it has to -- has to be a part of the order and then not move, not incur transportation cost in order to economically advantage it enough to encourage it to move.

Q. You said earlier in your testimony, as I recall -- and correct me if I'm wrong -- that the further you have to reach for your supplemental supplies of milk the greater your reserve requirement needs to be.

A. Yes.

Q. To the extent that that's true and you keep -- the further and further that you have to reach for your supply of milk and the more now milk attach -- more surplus milk that attaches itself to Orders 5 and 7 as a result of that --

A. I would -- I would use the word "reserve" -- but, yeah, go ahead -- instead of surplus.

Q. Reserve. Thank you. I'll go along with that. You're going to continually run down the blend price such that you're never going to have a situation where local supplies -- you're continuing to exacerbate the situation that you're continuing to rely on supplemental supplies where the order's doing nothing to help local milk production.

A. That is a -- seems like a cruel irony.

Q. And to the extent that there are proposals here that are -- that would try to do something about that, don't you think that the secretary should seriously consider that as a -- as a way to, perhaps, assure the southeastern markets here a local supply of milk together with bringing in the additional supplemental supplies with transportation credits?

A. We certainly have no -- no qualms with raising the price in some method inside the marketing area. There is certainly no -- no problem with that as a concept. However, since the cost of obtaining the supplies from outside is not born by everybody, we just need to make sure that our solution doesn't make that cost imbalance and that in equity worse such that the cure is worse than the -- you know, the -- than the disease.

Q. Okay. And to the extent that you're talking about -- you're talking about the 20 percent of the milk supply that you don't control?

A. I'm talking -- that since -- since the -- well, remember that that 80 percent includes the milk marketed from outside. So that 80 -- you know, you may have 50 percent of the milk, you know, which is carrying the major portion of the reserve supply the next 30 percent to make the 80 so that what you're -- as long as we don't spread -- we don't increase the cost of the 30 percent of reserve, which is outside, which those marketers are -- are bringing in. And then that cost filters on to only half the milk and then whatever cost you have increase doubles on them because they're only half the supply.

MR. TOSI: All right. That's all I have. Thanks.

JUDGE DAVENPORT: Other questions?

Mr. English?

MR. ENGLISH: I've actually referenced this data before, so I'd like to take official notice and then ask one or two questions. And that is --

And you're certainly welcome, Mr. Beshore, to add any years that you want to add.

But for many years there are federal market orders statistics on an annual basis that are published. And while the table may have changed after Federal Order Reform, for the seven or eight years I'm looking at here it's Table 18. But it's always been called the same thing, "Class I Utilization of Handlers Regulated Under Federal Orders by Marketing Area." And what I have is

1990 to 1996. I would propose to take official notice back to 1985 and then up to the present -- to the present of that table, whether it's Table 18 or if the table changed. But I think it's always been called Table 18. I'd like to ask official notice of that -- of that table.

JUDGE DAVENPORT: So noted.

EXAMINATION

BY MR. ENGLISH:

Q. I've been sitting here for three days, Mr. Sims, hearing about the need for a 30 percent reserve or whatever reserve that you think you need. And -- and I'm wondering since you were in the marketing administrator offices in this area how is it that these markets managed to have, for instance, the southeast market on average in 1996 an 80.7 percent Class I utilization? It clearly didn't have a 30 percent reserve; did it?

A. That would be true at that time, yes.

MR. ENGLISH: Thank you.

JUDGE DAVENPORT: Other questions.

Thank you, Mr. Sims. It looks like you may step down.

MR. ENGLISH: Have Exhibits 42 through 45 been received, your Honor?

JUDGE DAVENPORT: Yes, they have.

I have all exhibits, if not specifically noted. In other words, 1 through 45 are now in the record.

MR. ENGLISH: I have one more witness to call -- a short witness -- and that's Mr. Hollon and he has stepped out of the room.

JUDGE DAVENPORT: Actually, Mr. Hollon is a relatively tall witness.

MR. ENGLISH: Point well taken.

Mr. Stevens, I'll yield to you.

MR. STEVENS: Your Honor, just -- we can do this now since we have a little time. The Proposal 6 is the proposal by a dairy program agriculture marketing service. This is a proposal that is submitted in all hearings and it's a proposal that sets forth the basis upon which the secretary -- and I'll just read the paragraph -- "For all federal milk marketing orders make such changes as may be necessary to make the entire marketing agreements and the orders conform with any amendments thereto that may result from this hearing." It's something we put in the record each time notice to everyone here and the people that will read this transcript when it gets on the Internet and it's available that this is what the secretary proposes to do with the hearing record here and throughout the course of this proceeding.

JUDGE DAVENPORT: Very well.

MR. STEVENS: Thank you, your Honor.

JUDGE DAVENPORT: Is Mr. Hollon ready?

MR. HOLLON: You want to cross examine me? You want a piece of me [laughs].

MR. ENGLISH: Yes. We call Elvin Hollon.

JUDGE DAVENPORT: Very well.

Mr. Hollon, would you raise your right hand.

ELVIN HOLLON, after being first duly sworn, is examined and testifies as follows:

JUDGE DAVENPORT: Please be seated. Give us your name and then spell your name for the hearing reporter.

MR. HOLLON: My name is Elvin Hollon, H-o-l-l-o-n.

JUDGE DAVENPORT: Hold that mike towards you just a bit.

MR. HOLLON: Elvin Hollon, H-o-l-l-o-n.

EXAMINATION

BY MR. ENGLISH:

Q. Okay. Mr. Hollon, could you state -- you haven't testified previously in this proceeding. Could you give us your business address, please?

A. 10220 Kansas -- or Ambassador Drive, Kansas City, Missouri.

Q. And by whom are you employed at that location and in what capacity?

A. I'm employed by Dairy Farmers of America and I'm the director for fluid marketing and economic analysis for DFA.

Q. Okay. Now, earlier today in -- questions were presented to Mr. Sims, one question in particular by Mr. Tosi, which indicated that, you know, the secretary needed or desired information for this record concerning the pay prices for cooperative producers in the southeast. Do you recall that?

A. Yes, I heard that question.

Q. Okay. And have you, in light of that expressed interest, obtained some information to place in the record with respect to that?

A. I have. I went and looked at some statistics that we keep as a matter of normal business. And our own internal week-to-week -- or month-to-month type analysis compared the Federal Order milk price at various locations throughout the southeast and then added to that incentives which would be -- I think Mr. Roby yesterday referred to some of them as volume or quality or protein incentives. Plus, in DFA's case, there are some additional funds that we pay as a result of some of our investments that are regularly paid to producers. I did comparisons -- or I looked at comparisons for Tennessee, Louisiana, Missouri, Virginia, North Carolina, South Carolina and Alabama.

Q. Are those pay regions within DFA?

A. Those would be states. And within in those states there would be, you know, two to three different pay regions in some of them.

Q. And what information do you have for that geographic area?

A. In those areas for the period January through June of 2005, our -- our prices at that comparison would have been ranging from $.25 below the blend price to $.30 above the blend price with the majority being at about $.20 above the blend price.

Q. Now, you've heard -- we've had the testimony in this hearing of producers such as Mr. Roby who are not members of a cooperative association and whose milk is delivered seven days a week, 365 days a year to distributing plants in the order. And he indicated that he was paid $.70 -- a $.70 per hundred weight premium, or thereabouts, over the Federal Order. Is that representative of the prices paid to producers similarly situated to Mr. Roby throughout the southeast area?

A. Yes, that would be correct. I looked in each of these areas where we had competitors in that area who were not SMA members and their prices range from $.10 above to $.90 above. And it would be a comparison of what would be the Federal Order price at location. For example, if we have producers in the Florida parishes of Louisiana, we might use the Federal Order price at Hammond for the base of that comparison. So we'd be comparing, perhaps, a producer who ships to Dairy Fresh, one of the ones Mr. Ensley [sic] --

Q. Enslen.

A. -- represented. Enslen. And so -- and the majority of those ranges might be $.50.

Q. Over the order?

A. Over the blend.

Q. Okay. Thank you.

Do you have anything further on that?

A. I have nothing further on that.

MR. ENGLISH: Thank you.

JUDGE DAVENPORT: Cross of this witness?

Mr. English?

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

JUDGE DAVENPORT: Very well.

Mr. Hollon, thank you.

MR. HOLLON: You're welcome.

JUDGE DAVENPORT: Are there any other witnesses at this time?

If there are no witnesses at this time, of course, the transcript of these proceedings will be posted on the web page.

Mr. Tosi, what is your suggestion as to how long they need for corrections?

MR. TOSI: Yes, sir, your Honor. What we have been doing and it's been working very well, we're supposed to have our transcript within -- within seven days after the close of this proceeding. Shall we stay on the record?

JUDGE DAVENPORT: I think so.

MR. TOSI: Okay. We -- the service that

we're -- that we're paying for is to have the record within seven days. We're hoping that within ten days from today that once we receive the transcript from the court reporter that we would have it within a day or two posted on the Internet. We've been using the date that we have the transcript posted on the Internet as the date that triggers the submission of corrections and the submission of briefs.

JUDGE DAVENPORT: That's my recollection and that seems to work very well.

MR. TOSI: It seems to work really well. And that for every day that -- for every day that we're late in doing that for whatever dates that we set here now, all other dates would adjust --

JUDGE DAVENPORT: Accordingly.

MR. TOSI: -- automatically and accordingly.

JUDGE DAVENPORT: How long do you think that is appropriate for corrections?

MR. TOSI: I'll let the other parties speak to that issue.

MALE SPEAKER: Can we actually go off the record? I mean, I just wonder -- I mean, if you want us to stay on, we can stay on. But some of this --

JUDGE DAVENPORT: The only reason for that is at some times there have been some complaints about what was said and what we actually --

MALE SPEAKER: Then we'll stay on.

JUDGE DAVENPORT: Although, you know, we can -- we can shut the record off at this point.

MALE SPEAKER: Well, no, no. That's fine, your Honor. I'm fine with that. I would point out that, you know, assuming we're talking about ten days which would put us on a Sunday, so one or two days would put you right on the 24th.

JUDGE DAVENPORT: We're also -- and many of you will be involved in another hearing.

MALE SPEAKER: I was about to point out that whether the people here -- other people in the room -- or other people, there's going to be another hearing starting on the 24th.

JUDGE DAVENPORT: As a matter of fact, I will be.

MALE SPEAKER: I confess that I might not be. But then if I'm not, Ms. Yovine [phonetic] will be. But having said that, people in this room will be involved -- certainly people who have testified.

JUDGE DAVENPORT: To cut to chase, though, is 30 days unreasonable?

MALE SPEAKER: I would like 30 days for this transcript, yeah, for the corrections if that's okay with you Mr. --

JUDGE DAVENPORT: Mr. Tosi?

MR. TOSI: Your Honor, this hearing was asked to be conducted on an emergency basis. In that regard, we gave a lot less notice than -- we try to give at least 30 days.

JUDGE DAVENPORT: I understand.

MR. TOSI: I think in this case we -- we -- it was about nine days, I think, which is very, very unusual. And -- and in -- in past emergency hearings, we do have precedent where corrections to the record, along with briefs -- the submission of briefs could happen simultaneously. Perhaps just throwing out for the parties participating here if there would be any objection to submission of corrections and briefs at the same time, that way it won't interfere with their participation in another upcoming emergency hearing the week of the 23rd of January.

MALE SPEAKER: I don't -- I don't object to that approach. I just -- I'm concerned about things that are going on in this industry whether it's this hearing or other things that -- that are setting up for -- for what I think might be an unreasonable date. But I wasn't the proponent so I'm going to let the proponents propose a date and then we'll try to talk about it.

MR. TOSI: That procedure's perfectly acceptable --

JUDGE DAVENPORT: Very well. We'll --

MR. TOSI: -- to have the corrections and the -- and the --

JUDGE DAVENPORT: Corrections and initial brief within 30 days then from date of posting on the website?

MALE SPEAKER: We would -- we would request 45 days for corrections and briefs.

MALE SPEAKER: No objections, your Honor.

JUDGE DAVENPORT: Forty-five days then.

MALE SPEAKER: It would be 45 days after the transcript is posted on the Internet. And on our website we will indicate what that date is.

JUDGE DAVENPORT: Very well.

MALE SPEAKER: Thank you.

MALE SPEAKER: Thank you. I appreciate that.

JUDGE DAVENPORT: Are you allowing reply briefs at this time?

MALE SPEAKER: It didn't particularly work the one time we tried it.

JUDGE DAVENPORT: Very well. There will be no reply briefs, then.

Is there anything further we can transact today?

Gentlemen, we'll close the hearing and the matter will be under submission.

MALE SPEAKER: Thank you, your Honor.

MALE SPEAKER: Thank you, your Honor.

MALE SPEAKER: Thank you.

MALE SPEAKER: And we thank the court reporter.

[WHEREUPON, the Continued United States Department of Agriculture Rulemaking Hearing is recessed at 4:30 p.m.]

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C A P T I O N

The Hearing in the matter, on the date, and at the time and place set out on the title page hereof.

It was requested that the Hearing be taken by the reporter and that same be reduced to typewritten form.

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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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