

BEFORE THE SECRETARY OF AGRICULTURE

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Milk in the Upper)	Docket No. AO-361-A39;
Midwest Marketing)	DA-04-03
Area; Hearing on)	
Proposed Amendments)	HEARING TRANSCRIPT
to Tentative Marketing)	
Agreement and Order.)	Before Judge
)	Victor W. Palmer

DAY FOUR OF THE FEDERAL ORDER 30 HEARING

The following is day four of the Federal Order 30 Hearing, taken before Kelly E. Hanna, Court Reporter, Notary Public, pursuant to Notice of Taking Hearing, at the Sofitel Hotel, 5601 West 78th Street, Bloomington, Minnesota, commencing at approximately 9:08 a.m., August 19th, 2004.

* * * * *

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Present for USDA, AMS Dairy Programs:

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21

H. Paul Kyburz
Gino Tosi
Carol S. Warlick
Erin Feuillet
Henry Schaefer
Harold Ferguson

22

23

24

25

1 APPEARANCES:

2

Also Present:

3

Doug Peterson - Minnesota Farmers Union

4

Sue Beitlich - Wisconsin Farmers Union

Robert Carlson - North Dakota Farmers Union

5

Michael Brown - Northwest Dairy Association

Evan Kinser - Dean Foods

6

Paul Christ - Dean Foods

James D. Oberweis - Oberweis Dairy

7

Neil Gulden - Associated Milk Producers

Richard Lamers - Lamers Dairy

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Ryan Miltner - Continental Dairy Products

Michael Reinke - Kraft Foods, Global Inc.

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Whereupon, day four of the Federal Order 30
Hearing was commenced at 8:55 a.m. as follows:

THE COURT: All right, sir, if you
would come forward.

PAUL KYBURZ,
after having been first duly sworn by
the Court says under oath as follows:

THE COURT: We're on the record.
Mr. Kyburz has been called to the stand. He's been
sworn. He has a statement that we're going to mark as
Exhibit 39. And first of all, I think on behalf of
everybody, I'd like to thank Mr. Kyburz for the
hospitality and all the courtesies he's shown us here
since we've been at this site, so thank you for that,
Mr. Kyburz.

Would you state your name now and give
your statement.

THE WITNESS: My name is H. Paul
Kyburz, that's spelled, K-y-b-u-r-z.

THE COURT: And I apologize for

1 mispronouncing.

2 THE WITNESS: And I'm the Market
3 Administrator for the Upper Midwest Order, Federal
4 Order 30, and I do have a statement that I wish to
5 read.

6 THE COURT: Very well, sir. Go ahead.

7 THE WITNESS: My name is H. Paul
8 Kyburz. I'm the Market Administrator for the Upper
9 Midwest Order, Federal Milk Order No. 30. I have
10 worked for the Federal Milk Order Program for nearly
11 31 years, and have been Market Administrator for
12 nearly 11 years. I have been Market Administrator for
13 the current Upper Midwest Order, Federal Order No. 30,
14 since its formation on January 1st, 2000. I am here
15 today to testify in support of Proposal No. 7.

16 Proposal 7 would increase the maximum
17 administrative assessment rate for the Upper Midwest
18 Order, provided for in Section 1030.85 from 5 cents
19 per hundredweight to 8 cents per hundredweight.
20 Currently, the administrative assessment for all
21 Federal Milk Orders is provided for in 1000.85. The
22 administrative assessment language in Section 1030.85
23 simply points to 1000.85, which applies to all orders.
24 Proposal 7 would amend Section 1000 -- or 1030.85 to
25 provide for all of the administrative assessment

1 language pertinent to this Order, and discontinue the
2 reference to Section 1000.85. Under Proposal 7, the
3 administrative assessment would continue to apply to
4 the same milk as in the past.

5 It should be noted that if Proposal 7
6 were adopted, the 8 cent per hundredweight rate would
7 be the maximum rate allowable, not necessarily the
8 actual rate charged. The actual rate charged would
9 only be as high as needed, as determined by the Market
10 Administrator with approval by the Deputy
11 Administrator for Dairy Programs, Agricultural
12 Marketing Service, U.S. Department of Agriculture.

13 The increase in the maximum assessment
14 rate is necessary to ensure that the Market
15 Administrator has sufficient funds to carry out the
16 responsibilities for administration of the Order.
17 Administering Order functions including pooling,
18 auditing, providing market information and marketing
19 services requires staff and financial resources. The
20 expenses involved are often fixed or mandated expenses
21 beyond the short-term control of the Market
22 Administrator, such as office leases and employee
23 salaries and benefits. In addition, the Market
24 Administrator is required to maintain a specified
25 level of operating reserves. The level of the

1 required operating reserve is determined by a formula
2 set forth in regulation. The purpose of the reserve
3 funds is to cover the necessary costs of closing out
4 an Order, completing pools and audits, paying
5 severance pay to employees, terminating leases, etc,
6 in the event that the Order is terminated.

7 The Market Administrator is primarily
8 dependent on income from the administrative assessment
9 to fund the operations of the Order. This assessment
10 provided for in Section 1030.85 through reference to
11 1000.85 is collected each month on pooled producer
12 milk. The assessment is also collected on certain
13 other types of other source receipts assigned to Class
14 I and certain route disposition in the marketing area
15 by partially regulated distributing plants. The vast
16 majority of the administrative assessment income,
17 however, is from pooled producer milk.

18 In 2000, the first year of operation of
19 the Order, pooled producer milk averaged 1.95 billion
20 pounds per month. Monthly producer milk averaged
21 about 1.7 billion pounds in each of the years 2001 and
22 2002. During the first half of 2003, producer milk
23 averaged 1.9 billion pounds monthly. For the entire
24 42-month period of January 2000 through June 2003,
25 producer milk averaged about 1.8 billion pounds

1 monthly. At the 4 cent per hundredweight assessment
2 rate in effect throughout that period, these volumes
3 of producer milk generated sufficient revenue to fund
4 the Federal Order 30 operations and maintain the
5 mandated reserve funds.

6 In mid-2003, unusual price
7 relationships led to more dramatic depooling than had
8 been expected. During July through November 2003,
9 depooled milk totaled nearly 6.2 billion pounds. At
10 the assessment rate of 4 cents per hundredweight, the
11 depooling during these five months resulted in a loss
12 of nearly \$2.5 million in potential revenues that
13 would have been used to cover operational expenses and
14 build reserves. The loss of this income resulted in
15 the need to use the reserves to cover operational
16 expenses, thereby dropping our reserve level below the
17 mandated minimum. This situation made it necessary to
18 increase the administrative assessment rate from 4
19 cents to 5 cents per hundredweight, the maximum
20 allowed under the Order. The increased rate eased the
21 revenue situation, but could not make up for the loss
22 of producer milk from the market.

23 Heavy depooling occurred again during
24 March through May 2004, with nearly 4.7 billion pounds
25 of eligible milk held off the market during that

1 three-month period. Depooling was not a major factor
2 in June and July of 2004. However, significant
3 depooling could return in future months, depending on
4 price relationships. This situation of sharp
5 fluctuations in monthly producer milk, and the
6 difficulty in accurately predicting producer milk
7 volumes in the future, threatens the Market
8 Administrator's ability to carry out Order operations,
9 while at the same time maintaining legally mandated
10 operating reserves.

11 In effect, the Market Administrator
12 must be able to service a more than 2-billion pound
13 market when, in some months, the assessment is
14 collected on only 600 to 700 million pounds of milk.
15 As an example, producer milk in 2004 totaled 2.2
16 billion pounds in January and 1.9 billion pounds in
17 February. In March through May, however, pooled
18 producer milk dropped to 675 million, 608 million, and
19 663 million pounds, respectively. Producer milk
20 during March through May averaged less than a third of
21 the average for January and February. While the
22 Market Administrator's Office strives to control costs
23 and become more efficient in carrying out its work,
24 the efficiency gains can't compensate for revenue
25 derived from only a third or less of the market.

1 While we watch expenses and have reduced the size of
2 staff by more than 15 percent since January 2000, we
3 still need about \$740,000 in administrative assessment
4 income, per month, to cover basic operating expenses.
5 At a 5 cent per hundredweight assessment rate, this
6 equates to about 1.5 billion pounds of producer milk
7 needed to cover expenses.

8 An increase in the maximum assessment
9 rate to 8 cents per hundredweight would assist the
10 Market Administrator in administering Order functions
11 and maintaining required operating reserves in the
12 face of sharply fluctuating producer milk volumes.

13 Again, it should be emphasized that the
14 8 cent per hundredweight rate would be the maximum
15 rate allowable, not necessarily the rate charged. As
16 always, the actual rate charged would only be as high
17 as needed, as determined by the Market Administrator
18 with approval by the Deputy Administrator for Dairy
19 Programs, Agricultural Marketing Service, USDA.

20 It should also be noted that an
21 amendment to Section 1030.85 could necessitate a
22 conforming change by Dairy Programs to Section
23 1000.85, of the general provisions of Federal Orders
24 to delete references to part 1030.

25 This concludes by testimony.

1 THE COURT: Very well. Ms. Deskins?

2 DIRECT-EXAMINATION

3 BY MS. DESKINS:

4 Q. Mr. Kyburz, you also don't support
5 Proposal 8, which is regarding any conforming changes
6 that need to be made to the Orders?

7 A. Yes, I do.

8 MS. DESKINS: I have no further
9 questions.

10 THE WITNESS: Very well. Any
11 questions? Do you have questions, Mr. Christ? You
12 could use that whole hand mic, if you want. If they
13 just hand it over to you.

14 CROSS-EXAMINATION

15 BY MR. CHRIST:

16 Q. I'm Paul Christ representing Dean
17 Foods. Just a couple of technical questions. You
18 mentioned in your testimony that you cut your staff by
19 15 percent since Federal Order Reform. Can you recite
20 any other efforts you've made to increase the
21 efficiency of your office since that time?

22 A. We have made a number of efforts to
23 increase efficiency through better use of technology,
24 we have also taken a number of measures to reduce
25 cost, such as reducing travel of employees between our

1 offices, reducing travel to industry meetings and
2 conferences, we have negotiated some rent relief from
3 one of our landlords in one of our office spaces, and
4 have reduced staff size considerably, as I have
5 mentioned. We have also delayed a number of equipment
6 purchases.

7 Q. Okay, and one other question. In terms
8 of flexibility you have available in setting an
9 administrative rate. As I understand it, you can set
10 the rate for a particular month, up to the maximum
11 limit, and if you choose, you can also suspend the
12 administrative assessment?

13 A. That is correct.

14 Q. Okay. Is it possible that you could
15 charge a high administrative assessment during periods
16 when all the milk is pooled and then suspend it at
17 times when much of the milk is not pooled, is that a
18 possible scenario?

19 A. We do have authority with the approval
20 from the Deputy Administrator of Dairy Programs to
21 adjust the rate up or down, depending on market
22 situations.

23 Q. Okay, and you've made a practice in the
24 past of suspending the administrative assessment at
25 times when your reserve is adequate; is that correct?

1 A. That is correct.

2 Q. Could you give me an estimate of how
3 many months since Federal Order Reform you've actually
4 done that?

5 A. Since Federal Order Reform, we have not
6 waived the assessment. It was done a number of times
7 prior to Order reform.

8 MR. CHRIST: That's all I have. Thank
9 you very much.

10 THE COURT: Other questions? Yes,
11 Mr. Beshore.

12 CROSS-EXAMINATION

13 BY MR. BESHORE:

14 Q. Mr. Kyburz, would you have an estimate
15 for what the administrative rate would need to be in
16 Order 30 if the great majority of the distant milk,
17 which has been pooled in recent years, was no longer
18 pooled on the Order, but all of the traditional Order
19 30 milk, if I can put it that way, was pooled on a
20 regular basis and not depooled periodically?

21 A. I have not made that exact calculation.

22 Q. Do you have a -- can you give us an
23 estimate of approximately what volume of monthly
24 pooling would be reflected in that scenario?

25 A. I would go back to a point that I made

1 in my testimony that under our current expense
2 structure, we need about 1.5 billion pounds pooled on
3 a monthly basis to meet our operating needs.

4 Q. Okay. At what rate?

5 A. That would be at the current 5 cent
6 maximum.

7 Q. Okay. One other question, then. The
8 ability you have under the regulation to change the
9 rate, or waive it, as Mr. Christ had inquired with
10 you, what timing is involved in those actions? I
11 mean, how much -- if you're going to change a rate for
12 a given month, when do you have to make that decision
13 in order to effectuate it?

14 A. Any change in administrative assessment
15 rate is made as soon as we possibly can. In other
16 words, we give the industry as much notice as we
17 possibly can, and I guess one additional point that I
18 should make, in my testimony I referred to a minimum
19 level of reserves that the Market Administrator is
20 required to carry. There is also a maximum. In other
21 words, the regulation that we refer to defines by
22 formula a recommended level of reserves, and we cannot
23 be any less than 80 percent of that, but we also
24 cannot be more than 125 percent of that, so there is a
25 maximum that we can carry, and it's because of that

1 maximum that we have, in the past, had a number of
2 months when we have actually had to waive the
3 administrative assessment to stay under that maximum
4 amount.

5 Q. Going back to what I was trying to
6 learn, is there -- if hypothetically you were going to
7 adjust the rate based on, you know, anticipated
8 poolings in a given month, when would you need to make
9 that decision? In terms of how much administrative
10 delay, you know, what time is actually involved in
11 doing that?

12 A. We are always looking down the road and
13 trying to anticipate the situation, and as an example,
14 in 2003, when it became apparent to me that we needed
15 to increase the assessment rate, I made immediate
16 contact with the Deputy Administrator in Washington,
17 D.C. and was able to document the case of why I felt
18 it needed to be higher and get fairly quick approval,
19 and as soon as that approval was obtained, gave
20 notification to the industry of that increase from 4
21 to 5 cents.

22 Q. And was your notification to the
23 industry during the month it was applicable or before
24 the month it was applicable, or since the billing is
25 kind of in arrears for pooling?

1 A. It was before the pool process for the
2 month to which it applied, which last year was October
3 of 2003, so it was prior to our processing for the
4 October pool and the filing of October pool reports.

5 Q. And the processing of the October pool
6 would occur in the early weeks of November?

7 A. That's correct.

8 MR. BESHORE: Thank you.

9 THE COURT: Anything else? Yes,
10 Mr. Tosi.

11 CROSS-EXAMINATION

12 BY MR. TOSI:

13 Q. Morning, Paul. Thanks for appearing.

14 A. Morning.

15 Q. Are you familiar with any situations
16 where the authority for a higher assessment rate was
17 adopted, but the higher rate was not implemented?

18 A. Yes, I am. In the former Upper Midwest
19 Order, Federal Order 68, in 1990 there was an Order
20 amendment which increased the assessment rate from 3
21 to 5 cents, and that was prompted by market conditions
22 at that time that had resulted in substantial
23 quantities of milk moving off the market, mostly to
24 the former Chicago Regional Order at that time, and so
25 there was an amendment to increase that rate from 3 to

1 5 cents. A very short time after that, the situation
2 turned around and much of that milk came back, and so
3 it was not necessary to go above the 3 cent rate, even
4 though the authority was there. It was actually more
5 than eight years later, in December of 1998, that we
6 ever actually had to go above 3 cents, and that was
7 just to 3.5 cents. We never did need to go to the
8 full 5 cents.

9 MR. TOSI: Thank you. That's all I
10 have.

11 THE COURT: Yes, please.

12 CROSS-EXAMINATION

13 BY MS. YOVIEENE:

14 Q. Good morning, Mr. Kyburz.

15 A. Good morning.

16 Q. Does the Market Administrator's Office
17 audit nonpooled milk?

18 A. We audit pooled milk that goes to
19 nonpooled locations. We audit many nonpool plants
20 because there was producer milk received into those
21 locations, and we need to verify the utilization of
22 that milk.

23 Q. You mentioned that the fact that
24 there's approximately, you know, upwards of 1.9
25 billion pounds of milk that the Market Administrator's

1 Office has to be prepared to service?

2 A. Yes.

3 Q. But there are months during which
4 there's about 600 or 700 million of pounds of milk --

5 A. Yes, yes.

6 Q. -- that is on the pool, and that's the
7 milk that you're servicing. Who is paying for the
8 month -- who is paying your fees during those months,
9 just the 6 or 700 million pounds?

10 A. Yes.

11 Q. And the folks that depooled aren't
12 paying any fees?

13 A. The administrative assessment is not
14 applied to milk that is not pooled. It's only on
15 pooled producer milk.

16 MS. YOVIENE: Thank you.

17 THE COURT: Mr. Vetne.

18 CROSS-EXAMINATION

19 BY MR. VETNE:

20 Q. You referred to a, I think you used the
21 word regulation, which limits you as to a maximum
22 reserve, in addition to requiring a minimum reserve.
23 What is the source of that regulation?

24 A. That regulation is called the MA
25 Instruction 207. That's a regulation that all Market

1 Administrators abide by.

2 Q. It's a guideline issued by the Dairy
3 Programs branch, formally the Dairy Division?

4 A. That is correct.

5 Q. Has that regulation, that guideline
6 been in place in its current minimum and maximum form
7 for a number of years?

8 A. Yes, it has.

9 Q. And is that something that could be
10 changed without a rule-making process?

11 A. It is --

12 MS. DESKINS: Your Honor, I'm going to
13 object. That would call for the witness to make a
14 legal conclusion.

15 THE COURT: If you want to defer to
16 counsel on that, you may do so, Mr. Kyburz. He
17 deferred.

18 THE WITNESS: I deferred.

19 MR. VETNE: Denied.

20 BY MR. VETNE:

21 Q. Before making this proposal, let me ask
22 you, did you make any requests or explore the
23 possibility of having the Dairy Programs adjust the
24 guideline for the maximum amount you may keep in
25 reserve?

1 A. No, I did not.

2 Q. Okay. When there was a relatively
3 smaller amount of milk pooled, would it be correct to
4 say that the expenses of your office were covered by a
5 combination of current assessments and assessments
6 collected previously that had been paid by a large
7 group of pooled milk?

8 A. That is true. We used the assessments
9 coming in during those hauler months, we also withdrew
10 from our reserve funds to cover the remainder of the
11 operating expenses for those months.

12 Q. So some of your operating expenses came
13 from others than those who were pooled during the
14 short pooling months?

15 A. To the extent that we drew on the
16 reserves, that would be true, yes.

17 MR. VETNE: Okay. Thank you. That's
18 it.

19 THE COURT: Mr. Lamers, you have
20 questions?

21 CROSS-EXAMINATION

22 BY MR. LAMERS:

23 Q. Good morning, Mr. Kyburz.

24 A. Good morning, Dick.

25 Q. If I understand your proposal

1 correctly, you are asking for the 8 cent maximum?

2 A. That's correct.

3 Q. And in the event that the
4 Administration in their wisdom would say, for example,
5 adopt Proposal 3, which would greatly limit depooling,
6 you may not move off the 5 cent, where you presently
7 are, would that be correct?

8 A. I would never implement an assessment
9 that was higher than was absolutely needed.

10 Q. So basically this is simply an
11 insurance policy against market conditions that could
12 exist?

13 A. It would give the Market Administrator
14 some latitude in dealing with emergency situations in
15 the future, yes.

16 MR. LAMERS: Thank you, Paul.

17 THE COURT: Any other questions?

18 Mr. Beshore.

19 RE CROSS-EXAMINATION

20 BY MR. BESHORE:

21 Q. There's one other area that maybe you
22 covered, but I want to make sure we understand it.
23 When milk is depooled and then repooled, during the
24 period that it's depooled and not subject to the
25 producer assessment, do you necessarily, does your

1 office necessarily, nevertheless, have the obligation
2 and responsibility to keep track of that milk, in
3 essence?

4 A. We certainly have some involvement with
5 that milk in that it is still on payrolls that
6 handlers submit, and we do ask handlers to voluntarily
7 report those volumes of milk for statistical purposes.

8 Q. Well, you have to determine whether it
9 was properly depooled, I assume?

10 A. Yes.

11 Q. And when it becomes repooled, you have
12 to determine whether it's properly repooled as well?

13 A. Certainly.

14 Q. For instance, you have to -- your staff
15 has to determine whether the producers are obligated
16 to touch base or not again, or reassociate with the
17 market or not, and things of that nature; is that
18 correct?

19 A. Reassociation. Producer reassociation
20 is not required for simply depooling the milk.

21 Q. So long as the depooled milk has not
22 been associated elsewhere?

23 A. So long as the association has not been
24 broken by being pooled on another Order or degraded
25 for a full calendar month or things of those types.

1 Q. Okay, but that's something that you
2 have to ascertain?

3 A. Yes, certainly.

4 Q. So, and I gather you've indicated,
5 essentially your costs remain the same during the
6 months that it's depooled, as during the months when
7 it's pooled?

8 A. Essentially, that's true, yes.

9 THE COURT: Other questions? I do have
10 a question or two. While they're thinking of a
11 question, one came to my mind. I don't know if this
12 is helpful or not, but I gather some months you've
13 actually not collected the assessment because you
14 would have run over your reserve fund maximums, you
15 said that before, did you not?

16 THE WITNESS: In prior Orders, yes.

17 THE COURT: In prior Orders, not in
18 this Order, though?

19 THE WITNESS: That's correct.

20 THE COURT: Oh, okay, fine. We'll
21 leave it alone, then, it's not in this one. Do you
22 have another question?

23 MR. BESHORE: No.

24 THE COURT: Do you have one more
25 question here?

1 MS. YOVIENE: Uh-huh, there might be a
2 couple.

3 RECROSS-EXAMINATION

4 BY MR. YOVIENE:

5 Q. Mr. Kyburz, could you help clarify for
6 the record what would be the process for a producer
7 that wants to, for the first time, get pooled on Order
8 30?

9 A. They would need to have one delivery of
10 one full day's production into a pool plant during
11 that first month to gain association with the market.

12 Q. And in the next month, what would they
13 have to do?

14 A. As long as the association was not
15 broken, the association would remain in tact.

16 Q. And in the next twelve months later,
17 what would they have to do?

18 A. The answer would be the same. As long
19 as the association is not broken, it remains in tact.

20 Q. And twenty-four months later, what
21 would they have to do?

22 A. The answer would be the same.

23 Q. And when you say, they would have to
24 deliver just one day to a pool plant in month one --

25 A. Yes.

1 Q. -- that doesn't have to be a fluid milk
2 plant, that can be any pool plant?

3 A. That can be any pool plant, yes.

4 Q. And so where would their milk be going,
5 it could go to even a nonpool plant --

6 A. No.

7 Q. -- in month two?

8 A. Oh, yes, it could conceivably, yes.

9 Q. So a producer under existing regulation
10 can qualify to pool on Order 30 and only have to ship
11 one-day's milk supply in month one, and never ever
12 have to ship their milk to a pool plant again, and
13 they can stay in the pool?

14 A. That is correct, as long as the
15 association is not broken.

16 MS. YOVIENE: Okay. Thank you.

17 THE COURT: Mr. Lamers?

18 RE-EXAMINATION

19 BY MR. LAMERS:

20 Q. I have a follow-up question to that,
21 Paul, if you don't mind. Do you ever really have any
22 producers as such that ask to qualify for pooling, or
23 is it not the handler that will qualify the producer?

24 A. Generally, it's the handlers that would
25 qualify the producers, yes.

1 Q. Yes, and so that basically being as how
2 it is the pool funds that go to the handler directly,
3 who controls whether or not that milk is pooled or not
4 pooled, and if their producer is pooled or not pooled,
5 the handler controls that situation, does he not?

6 A. That's generally true, yes.

7 Q. So producers, per se, really don't have
8 anything to say, and all the producer really cares
9 about is that he's being paid a competitive price by
10 the handler, because he really has no knowledge of
11 whether he's pooled or whether he's not pooled?

12 A. I can't speak for producers.

13 MR. LAMERS: Okay. Thank you, Paul.

14 THE COURT: Anything else? Thank you
15 very much, Mr. Kyburz.

16 THE WITNESS: Thank you.

17 THE COURT: Mr. Vetne, I think we can
18 get started with you, but keep in mind that around ten
19 o'clock we have the fire drill coming.

20

21 NEIL GULDEN,

22 after having been first duly sworn by

23 the Court says under oath as follows:

24

25

1 THE COURT: Oh, incidentally for the
2 record, we'll receive the statement of Mr. Kyburz.

3 MS. DESKINS: If people want it as an
4 exhibit. I wasn't going to put it in, but.

5 THE COURT: We'll put it in as an
6 exhibit. I marked it as Exhibit 39.

7 (Whereupon, Exhibit No. 39 was
8 marked for identification.)

9 MS. DESKINS: Okay. I will move for
10 its admission, then.

11 (Whereupon, Exhibit No. 39 was offered
12 and received into evidence.)

13 THE COURT: All right. Mr. Vetne, I
14 think we're ready to go. I've marked his statement as
15 Exhibit 40.

16 (Whereupon, Exhibit No. 40 was
17 marked for identification.)

18 MR. VETNE: That would be good, and
19 then there are some exhibits that begin with cover
20 pages entitled "Federal Milk Order Market Statistics,
21 1989 Annual Summery," which has other -- it's simply
22 an assembly of documents which are marked A, B through
23 H.

24 THE COURT: Do you want to mark that
25 41?

1 MR. VETNE: 41, please, yes.

2 (Whereupon, Exhibit No. 41 was
3 marked for identification.)

4 THE COURT: You may proceed.

5 DIRECT-EXAMINATION

6 BY MR. VETNE:

7 Q. Mr. Gulden, before you start reading
8 your statement, give us a brief synopsis of your
9 experience in the industry and in marketing milk and
10 Federal Milk Order involvement.

11 A. I've worked for Associated Milk
12 Producers since 1970, and approximately 1976 I started
13 working with the Federal Order Milk Marketing side,
14 shortly after as Director of Fluid Marketing, since
15 that time, and I have had extensive testimony at other
16 hearings, and throughout that period.

17 Q. Okay. Since 1976, you have
18 periodically testified at Federal Order hearings as an
19 expert for AMPI?

20 A. Yes.

21 Q. Would you proceed to read your
22 statement, please.

23 A. I'm Neil Gulden, Director of Fluid
24 Marketing for Associated Milk Producer, Inc., AMPI.
25 My office address is 315 North Broadway, New Ulm,

1 Minnesota 56073.

2 My testimony is in opposition to
3 Proposal 2, (part 1), and 3, 4 and 5. I am joined in
4 that opposition by Alto Dairy Cooperative, Bongards'
5 Creameries, Ellsworth Cooperative Creamery, Family
6 Dairies USA, First District Association, Davisco
7 Foods, Valley Queen Cheese Company, and Wisconsin
8 Cheesemakers Association.

9 This coalition, including 30 members of
10 WCMA, which is Wisconsin Cheesemakers Association,
11 represents 11,250, or 71.3 percent of the producers on
12 the Order, and 1.34 billion pounds or 62.9 percent of
13 the producer milk on the Upper Midwest Order based on
14 December 2003 pool information supplied by the Market
15 Administrator.

16 The option of pooling or not pooling
17 milk delivered to a nonpool plant has been a mainstay
18 of the Federal Order system and it should remain so.
19 Class I prices have, for decades, been based on the
20 value of milk used in manufactured products, plus a
21 differential. At the insistence of fluid market
22 processors, regulated Class I prices are calculated
23 and announced by USDA in advance, before the beginning
24 of the month, based on previous manufacturing milk
25 values. Regulated milk prices for manufactured

1 product uses, however, are based on current values and
2 announced retroactively, after the marketing month has
3 passed. This also has been true for decades. Under
4 pricing formulas employed for decades, there is always
5 a lag between changes in the value of milk, and
6 changes in the advanced Class I price. As a result, a
7 sharp increase in the current value of milk for
8 manufactured products will periodically produce a
9 Class III or Class IV price that exceeds the
10 statistical uniform or blend price, and on occasion
11 will exceed the Class I price. This has also been
12 true for decades.

13 Exhibit 41A, Federal Order Milk Market
14 Statistics for 1989, Table 12, for example, shows that
15 considerable milk was voluntarily depooled in nine
16 Federal Order Markets during the latter part of 1989
17 because the blend price was at or below the Class I
18 price. During the first half of 2004, similarly, milk
19 in 10 of 11 Federal Milk Markets was depooled, because
20 the blend price was below Class III price.

21 Q. Mr. Gulden, if I may interpret, you
22 stated in your testimony, your oral testimony, that in
23 1989 the blend price was at or below the Class I
24 price, did you mean to say, as written in your
25 testimony, at or below the Class III price?

1 A. Yes. I'm sorry.

2 Q. Okay, proceed. Thank you.

3 A. After that last sentence, that would
4 refer to Exhibit 41B.

5 The occasional inversion of the
6 relationship between Class I or blend prices, and
7 Class III or IV values, is caused by advanced pricing
8 for milk used in Class I and II products, at the
9 request of fluid milk processors. As a result,
10 regulated producer prices do not reflect the current
11 value of milk in these products. There's good reason
12 to reconsider whether advance pricing for Class I and
13 II products continues to be good policy from a
14 regulatory standpoint. Rather than look to remedy the
15 cause of price inversion, advance Class I pricing, or
16 take an additional step towards letting the
17 marketplace govern, proponents of repool limitations
18 prefer to treat the result of price inversions,
19 depooling. Proponent's approach further insulates the
20 Federal Milk Order system from marketplace realities.

21 The fact that the Federal Order pricing
22 system periodically results in Class I prices so low
23 that blended Federal Order returns are lower than
24 class II, III or IV prices does not make a case for
25 punishing milk not pooled by limiting repooling. The

1 proposals limiting repooling are a bad idea for Order
2 30 or on any milk marketing Order. It is a
3 particularly bad idea to consider placing
4 depool/repool limitations in Order 30 when the problem
5 of price inversion and voluntary depooling is national
6 in scope. A proposal addressing the same issue is
7 pending for Order 32, which would be Exhibit 41C, and
8 Order 33 interests that have also advocated a similar
9 amendment, Exhibit 41D and E. Members of our
10 coalition, and others, have responded to USDA's
11 invitation for proposals in Order 32 with a request,
12 equally applicable here, that these issues should only
13 be heard in a national hearing, Exhibit 41F.

14 The Federal Order formula for Class III
15 milk simply establishes a value for cheese milk based
16 on commodity price. The Class III price, Class IV if
17 it is higher, has a differential value added to it to
18 determine the Class I price. The differential value,
19 the \$1.80 in Order 1030, is legally set, artificially
20 high, subsidized price for milk used in Class I.
21 Cheese milk gets no such subsidy from the Federal
22 Order, because its prices are obtained entirely from
23 the marketplace. Cheese milk receives no, and I would
24 insert, monthly monetary benefit from the Federal
25 Order unless the money created by the differential

1 value results in a blended value that is higher than a
2 Class III price.

3 The Class I price is determined
4 approximately two weeks prior to the month for which
5 it is applicable, using the formula described above
6 and the commodity prices at that time. At the end of
7 the applicable month, the final Class III price is set
8 using the same formula. This results in about a
9 six-week lag between the Class I and Class III prices
10 in which the market value can rise or fall, depending
11 on market conditions. For April 2004, the market
12 value of Class III, during this six-weeks period, rose
13 \$6.02 per hundredweight, completely eclipsing the
14 \$1.80 differential value. This caused the estimated
15 value of the blended Federal Order return to be
16 substantially less than the estimated Class III price,
17 resulting in most Class III milk being depooled. In
18 effect, the Federal Order created no benefit to the
19 cheese maker, because the market value of cheese was
20 higher than the subsidized Class I and resulting
21 Federal Order blend value.

22 Proponents of Proposals 2 and 5 contend
23 that this Class III milk should be penalized by
24 limiting the amount that can be pooled on the
25 following month if market conditions warrant. We

1 disagree strongly with this radical change in
2 historical Federal Order pooling philosophy.

3 Limiting repooling of milk forces a
4 cheese plant to decide whether it is more cost
5 effective to depool, to remain pooled in order to
6 avoid limitations, or to do a combination of both. In
7 either case, estimating Federal Order blended values
8 or producer price differentials is not an exact
9 science. Undoubtedly, some milk would end up pooling
10 -- or depooled, I should say, when it should have been
11 pooled and vice versa, causing losses in revenue.
12 Cheese plants should be free to make business
13 decisions without future months being affected by
14 limiting repooling of milk on the Federal Order.

15 Any forced pooling of cheese milk when
16 Class III prices are higher than the blended Federal
17 Order return is simply a transfer of money from
18 market-driven cheese plant returns to other Order
19 participants whose business leans more toward shipping
20 a higher percentage of their milk to the Class I
21 market. The Federal Order should be sharing money
22 derived from Class I handlers, not taking money from
23 one group of producers, cheese milk, and using it to
24 offset a low Class I price created by the orders' own
25 pricing system.

1 Exhibit 41G shows an example of what
2 happens when the cheese values, Class III price,
3 increase dramatically and actually overtakes the Class
4 I price during the six-week period from when the Class
5 I price is set and the final Class III is set.

6 In January '04 a positive PPD was
7 available for all producers because the Class I mover
8 changed very little between 12/19/03, when the advance
9 Class I price was announced, and 01/03/04, when the
10 Class III price was announced. This created an
11 effective differential between Class I and Class III
12 of \$2.04. This resulted in a return of 37 cents,
13 which was the PPD, from Class I revenues, which should
14 be shared with all milk pooled.

15 In April '04, the effective Class I
16 differential was negative 4 -- the effective of Class
17 I differential was negative \$4.22, because of the
18 rapidly increasing cheese market between 03/19/04 and
19 04/30/04. That resulted in a negative PPD of \$4.11
20 and caused most of the Class III milk to be depooled.
21 That doesn't mean that -- That doesn't mean Class III
22 did anything wrong or took any money that they weren't
23 supposed to from the pool. In fact, they took nothing
24 from the pool. It simply means that Class I values
25 were too low relative to Class III and the return from

1 milk going to Class I, fluid use, was not very
2 competitive with milk used to manufacture cheese. The
3 point is that cheese milk should not be forced to pool
4 or be threatened with limits on what they can pool the
5 following months, just because the order pricing
6 system isn't creating enough Class I money to produce
7 a positive PPD.

8 Arguments that depooled milk is not
9 serving the fluid market or is not available to the
10 fluid market just don't hold water. First, in order
11 to pool milk in any month, a block of milk must be
12 shipping the Federal Orders' required 10 percent to
13 the distributing plant or be a part of a unit of
14 supply plants that is doing so. If milk is depooled,
15 there's no reduction in distributing plant sales
16 because contract commitments to fluid market plants
17 assure a continuous supply of milk to meet their
18 needs. Even depooled milk serves the market. The
19 milk is available for Class I use during the month in
20 which it is marketed. It is only depooled after the
21 end of the month, and depooled milk is just as
22 valuable to the market as any other milk, in terms of
23 additional seasonal sales and balancing functions.

24 Depooling and negative PPD's, which
25 prior to 1996 would have been the equivalent of the

1 Federal Order blend price, minus the Class III price,
2 are not new revelations. Class III prices have been
3 higher than the Federal Order blended price many times
4 as cheese values rose faster than Class I prices.
5 Exhibit 41H shows the months -- it should be H, not
6 G -- shows the months from 1990 through 1999 when this
7 occurred in old Federal Order 1068.

8 Since I started working with Federal
9 Orders in the early-1970s, this negative PPD effect
10 has occasionally occurred, and depooling was often the
11 result, if you estimated that the Class III price was
12 going to be higher than the blend price. When there
13 was Class I revenue to share, all the milk pooled
14 received its share. Plants added this revenue to
15 their market returns, be it cheese or fluid, and paid
16 producers as best they could. Over this time period
17 there have been times when cheese was a better return
18 and times when selling to the fluid customer was much
19 better than cheese. However, we don't or can't change
20 our business plans for short-term advantages and risk
21 losing our customer base. We all compete for
22 producers based on how we have structured our
23 representative businesses.

24 We fully recognize the competitive
25 problems caused by the Federal Order Class I pricing

1 structure. However, forcing cheese plants to
2 subsidize the other milk in the other Federal Order
3 pool is the wrong way to solve this problem. The
4 solution, if one is needed, is to price all milk on
5 the basis of the current value of milk.

6 If depooling is as big a problem as
7 proponents say, then the timing of the Class I price
8 might be a better place to find the solution. This
9 would get the money out of the marketplace, instead of
10 taking it from one farmer and giving it to another.

11 In fact, the large negative PPD's in
12 April and May '04 for Order 30 will have been
13 recovered through the cooperation of several common
14 marketing agencies who set over-order premiums charged
15 to distributing plants by the end of September 2004.
16 This is the one way to get money out of the
17 marketplace, but it does cause competitive problems if
18 not adopted in surrounding Federal Order areas.

19 Proposals 3 and 4 state that if a
20 producer loses association with the Order during
21 certain months, they will not be permitted to be a
22 producer in that month or future months, depending on
23 which months they lost association, including
24 depooling, unless the producer ships at least ten
25 days' milk production to a distributing plant during

1 those months.

2 Because these proposals affect the
3 ability to depool milk, we oppose them based on my
4 testimony regarding Proposals 2, part 1, and 5. In
5 addition, Proposals 3 and 4 make no provision for
6 repooling, as soon as possible, milk that loses Grade
7 A status -- just a second, please -- by loses Grade A
8 status, I meant degraded -- milk converting from B to
9 A or milk missed because of human error. As published
10 and modified, the proposal is not a repooling
11 standard. There is no practical means of compliance
12 with Dean's preferred Proposal 3, as modified, option.
13 Dean would punish individual producers for pooling
14 choices made by their handlers, without regard to the
15 reasons for which a producer's milk may have been
16 depooled. A rule that operates as an effective
17 barrier to pool participation for a producer, as this
18 one -- as does this one, is simply a disguised means
19 of erecting an absolute barrier. Proposals 4 and 5,
20 as modified, also create effective barriers, but in
21 different ways.

22 Creating Federal Order rules that force
23 handlers to make decisions on pooling or depooling,
24 where it's only a matter of degree which one causes
25 more economic harm, will make Federal Orders less and

1 less appealing to more and more dairy farmers. I
2 wouldn't want to see more Federal Orders jeopardized
3 because of issues that have nothing to do with sharing
4 Class I money, as intended. This would be a
5 tremendous setback to dairy farmer income.

6 Proponents have asked the Secretary to
7 consider and decide the proposals limiting repooling
8 on an emergency basis. This would be entirely
9 irrational. Price inversions and depooling have been
10 with us for decades. It has been a factor in
11 marketing decisions, business develop decisions, and
12 regulatory decisions for the course of those same
13 decades. A change in regulatory policy departing as
14 far from past agency practice as the one proposed, to
15 treat the consequences of price volatility and Class I
16 pricing lag that have long been a feature of the
17 system, requires the benefit of a recommended
18 decision, with opportunity for industry briefing and
19 exceptions, before a change is made. That concludes
20 my statement.

21 MR. VETNE: Your Honor, I ask receipt
22 of Exhibits 40 and 41?

23 THE COURT: All right. They're
24 received.

25

1 (Whereupon Exhibit Nos. 40 and 41 were
2 offered and received into evidence.)

3 BY MR. VETNE:

4 Q. Mr. Gulden, if you would turn, please,
5 to Exhibit 41G, Class I and blend prices for January
6 '04 and April 04. Do you have any comment on how that
7 would have change and how that would have affected
8 your producers and other members of the coalition if a
9 portion of the milk had been required to be pooled?

10 MR. BESHORE: Which exhibit?

11 MR. VETNE: 41G, the second to the last
12 page.

13 THE WITNESS: Looking at the month of
14 April '04 when there was a negative \$4.11 PPD, for
15 example purposes, if we had pooled 75 percent of our
16 Class III milk -- or if the Order had pooled 75
17 percent of the Class III milk, Exhibit 9, Table 5D
18 shows that the PPD would have been a negative \$1.14,
19 and that the 75 percent pooling of Class III would
20 have then given you a statistical blend price of
21 \$18.52, which is plus \$2.97 from the actual. If you
22 take the 75 percent of the Class III that would have
23 been pooled, times the negative \$1.14, you get 86
24 cents. Now, this is 86 cents more off the bottom line
25 of cheese plants than what they would have had had

1 they been able to depool all their milk and went into
2 the Federal Order -- it increased the Federal Order
3 pool to subsidize the inverted pricing problem, and
4 that was at the expense of Class III dairy farmers.
5 It would have been at the expense of Class III dairy
6 farmers.

7 Q. Okay. At the end of your statement you
8 make some comments concerning standards for emergency
9 action or lack of emergency action on this particular
10 proposal. Would it be correct to say that because
11 depooling has been a factor in marketing milk and in
12 business decisions for decades, that depooling since
13 the Federal Order Reform and depooling in the future
14 is not something that's been unforeseen or
15 unforeseeable?

16 A. That would be correct.

17 Q. Okay, and the practice of depooling is
18 clearly not recent; correct?

19 A. That's correct.

20 Q. And in that respect and those respects,
21 among others, the circumstances, applying emergency or
22 non-emergency standards are very different from those
23 that you believe apply to the distant milk proposals?

24 A. That is correct.

25 Q. That's not something that's been a

1 factor for decades or a factor in business decisions
2 for decades?

3 A. That's right.

4 MR. VETNE: I may have some additional
5 redirect later, but we'll see what the cross brings
6 out.

7 THE COURT: Who's going to start -- or
8 let's see, are we getting near ten? We've got a
9 minute or two. Does anybody want to start or proceed,
10 you could ask a few questions. Mr. Beshore, are you
11 saying you might be able to start?

12 MR. BESHORE: I wasn't, but I will.

13 CROSS-EXAMINATION

14 BY MR. BESHORE:

15 Q. Morning, Neil.

16 A. Morning.

17 Q. Let me begin by inquiring a bit with
18 respect to the producers on whose behalf you indicate
19 you are speaking. Are you claiming to speak for all
20 the producers who are suppliers to the 30 members of
21 Wisconsin Cheesemakers Association?

22 A. I'm speaking for their directive from
23 their Board of Directors.

24 Q. I understand that you're speaking for
25 the cheese makers --

1 A. Right.

2 Q. -- but are you speaking for -- but you
3 quote, and you cite in the bottom of page 1 of your
4 statement that your coalition represents 11,250
5 producers, 71.3 percent of the producers on the pool,
6 62.9 percent of the producer milk. Now, that was --
7 those figures were derived, I assume, by aggregating
8 all the milk processed by the, or handled by the
9 Wisconsin Cheesemakers Association?

10 A. Not all of it. The Cheesemakers' CEO,
11 who is here today, you can ask him some more about
12 that, Marvin, but we -- he contacted all the cheese
13 plants that were in favor of this proposal, and we
14 calculated which producers those were, separate from
15 other members of Wisconsin Cheesemakers that might be
16 opposed to this.

17 Q. Okay. So you don't represent all of
18 the Wisconsin Cheesemakers Association, just those
19 that are in support of your position?

20 A. That is correct. As far as the
21 producers are concerned. Wisconsin Cheesemakers has a
22 position, as an entity being in favor of this.

23 Q. Okay. Now, the producers who are
24 supplying the members of the Wisconsin Cheesemakers
25 Association who are supporting your position, are you

1 purporting to speak for them?

2 A. Through their CEO, yes. The ones that
3 we have contacted who are in favor of this position,
4 yes.

5 Q. I don't mean, are you speaking for a
6 plant, I mean, do you claim to be speaking for the
7 producers, the dairy farmers, that supply those
8 plants?

9 A. Well, I would say, yes, Marvin, because
10 those are the plants that pay the producers who would
11 be affected by this proposal.

12 Q. Well, you understand, do you not, let's
13 take Woodstock Progressive, one of the members of the
14 coalition that I'm representing. They have producers
15 that supply some of these cheese plants. They're
16 members of Woodstock Cooperative. You understand that
17 the cooperative is authorized to represent those
18 producers under the Federal Orders; correct?

19 A. Yes, and they would not be included in
20 these numbers.

21 Q. Well, how did you exclude them? What
22 if the plant they're supplying is part of the 30, is
23 one of the 30 that you've included?

24 A. It isn't.

25 Q. It's not? Okay. Let's talk about

1 Manitowoc, did you include any plants to whom members
2 of Manitowoc Milk Producers Association supply?

3 A. We included the plants, but to the best
4 of our ability, we excluded any members.

5 Q. Of Manitowoc?

6 A. Any -- no, no. We did include all of
7 those, you're right.

8 Q. Okay.

9 A. That's correct.

10 Q. Okay. Now, who speaks for those
11 producers in Federal Order proceedings, their
12 cooperative, Manitowoc, or their cheese, the owner of
13 the Cheese Plants Trade Association?

14 A. No, I'd say the people who speak for
15 those cooperatives are the ones who pay them, and they
16 have given their CEO the right to support this
17 proposal.

18 Q. So, and it's your testimony and your
19 representation in this hearing that the cheese plant
20 that's buying the milk speaks for the producers in
21 precedence to their cooperative?

22 A. They do.

23 Q. Okay. Is that the way it works with
24 AMPI?

25 A. No, absolutely not.

1 Q. Okay. When you sell milk to a cheese
2 plant, you still speak for the producers, do you not?

3 A. Well, they're AMPI -- We are the ones
4 paying the producers. We are the ones who write the
5 payroll check for them.

6 Q. That's your test, who writes the check?

7 A. Yes.

8 Q. Okay.

9 A. Who's speaking for the producers is who
10 is at risk of losing income because of the proposals
11 at that hearing.

12 Q. Well, I take it that you have then
13 included, if there are members of Milwaukee Milk
14 Producers who supply proprietary cheese plants that
15 are members of the Wisconsin Cheesemakers Association,
16 in your view you're speaking for those producers
17 through their cheese plant today?

18 A. Yes.

19 Q. Have you talked to Mr. Berg about that?

20 A. Occasionally.

21 Q. Did you ask him when you came up here
22 if you had the -- did you tell him that you were going
23 to come up here and speak for his members?

24 A. It's in my testimony.

25 Q. Did you speak with Mr. Donahue about

1 speaking for his members?

2 A. No. They don't write the milk check.

3 Q. They don't count?

4 A. I didn't say that. That's your
5 viewpoint.

6 Q. Let me -- Let's talk about depooling
7 pre-1990 --

8 THE COURT: Well, why don't we take a
9 break now. It's almost ten o'clock, if you're going
10 to a new subject, and we'll let you proceed when we
11 come back, and so I don't know for how long. When the
12 bell goes off, we'll come back.

13 MR. BESHORE: Since we're going to have
14 a break here, I wonder if Mr. Vetne has his other
15 witness's statement and might be able to make it
16 available.

17 THE COURT: If he can do so, I'm sure
18 he will.

19 (Recess taken from 10 to 10:18 a.m.)

20 THE COURT: I just had a request.
21 Mr. Lamers would like to ask a couple questions at
22 this point, and so Mr. Lamers, would you come forward,
23 and we'll go back on the record.

24 CROSS-EXAMINATION

25 BY MR. LAMERS:

1 Q. Morning, Neil.

2 A. Morning.

3 Q. You made several statements here, Neil,
4 that I would like to get clarification from you. You
5 had stated that the Class III cheese market producers
6 are supposed to share the Class I moneys as intended
7 by the act, but the Class III producers are not
8 supposed to share any moneys through the pool to Class
9 I producers. Can you show me the act where and
10 specifically Section (5)(b)(2), where market wide
11 pooling is provided, where that's spelled out, or my
12 interpretation of that is that all farmers share
13 equally in the market, regardless of what the prices
14 are; isn't that true?

15 A. No. The Order was intended to share
16 enhanced Class I and II revenues, and that's what
17 creates your blend value or PPD value.

18 Q. Where is that stated?

19 A. I don't know where it's stated --

20 MR. VETNE: Your Honor, this is another
21 one of those legal things that we discussed yesterday,
22 and if we can, we'll brief that section.

23 THE COURT: Yeah, since you brought it
24 up, he's going to. He'll answer that on brief.

25 MR. BESHORE: Well, if I might, on

1 behalf of questions of that nature, when a witness
2 takes the liberty of making assertions about what the
3 statute says, and it's intended to do, etc, I think
4 it's not impertinent to ask him what the basis for it
5 --

6 THE COURT: Well, he was asked and he's
7 answered. He said he didn't have that data at his
8 fingertips, but counsel said he address it on brief.

9 BY MR. LAMERS:

10 Q. Then one other thing. You mentioned
11 that the differential value of \$1.80 in order 30 is
12 legally set artificially high, subsidized price for
13 milk used in Class I. Where does the subsidization
14 come from?

15 A. Well, you're subsidizing producers
16 because the differential is legally required by that,
17 and the bottlers pay that differential value.

18 Q. They pay, so basically it's not a
19 subsidization, it's simply a level of pay, is that not
20 correct?

21 A. It's a subsidy to producers, because it
22 is money that bottlers have to pay, and that's what's
23 basically shared in the pool for producers.

24 Q. Oh, basically what you're saying here,
25 then, is that the Class I market subsidizes the cheese

1 manufacturers so they can pay that money to their
2 producers?

3 A. If that cheese milk is pooled, yes,
4 that would be the case.

5 MR. LAMERS: Okay. Thank you very
6 much. That's all I have.

7 THE COURT: Fine. Mr. Beshore?

8 RE-CROSS-EXAMINATION

9 BY MR. BESHORE:

10 Q. Neil, how many of the 30 members of the
11 Wisconsin Cheesemakers Association that you're
12 representing receive ballots from the Market
13 Administrator in the Federal Order Referendum to vote
14 on behalf of the producers who supply them?

15 A. How many of the companies, is that what
16 you're saying?

17 Q. Yes.

18 A. Probably none.

19 Q. Now, let's talk about depooling
20 pre-1990 a little bit, Exhibit 41A, you've testified
21 that depooling is a decade's old practice tried and
22 true for Federal Orders, is that your testimony?

23 A. Well, that sure has been the case, yes,
24 and it's been part of the Federal Order for as long as
25 I can remember.

1 Q. The dynamics are quite different today
2 than they were in the time period reflected in Exhibit
3 41A; isn't that correct, Neil?

4 A. Recently, that would be the case
5 Marvin, but I don't think the issue is any different.
6 It's just a matter of degree.

7 Q. Well, it's a matter of great degree, is
8 it not, multiples of magnitude, wouldn't you agree?

9 A. It has been for -- well, if you look at
10 the Exhibit 41H, you can see that at times it would
11 approach \$3 negative, in '99, August, so.

12 Q. Okay, I'm talking about -- I wanted to
13 talk about pre-'90?

14 A. Oh.

15 Q. Which is the 1989 summery in 41A here
16 for a minute. One of the things, one of the dynamics
17 about depooling pre-Federal Order Reform was that it
18 was location sensitive in a way that it's not today,
19 wouldn't you agree?

20 A. It was more location sensitive than it
21 is now, yes, after Federal Order Reform.

22 Q. So the footnote on the second -- on the
23 third page of Exhibit 41A, the asterisk footnote says,
24 "Because the blend price adjusted for location was at
25 or below the Class III price in certain zones of these

1 markets in these months, handlers elected not to pool
2 milk that normally would have been pooled under these
3 orders." That's what happened back in that period of
4 time; correct?

5 A. Well, their location undoubtedly
6 affected their decision to pool or not to pool and it
7 had more of an affect at that time than it does now.

8 Q. But typically, you know, in the Upper
9 Midwest, in the outer zones where milk was priced on
10 location values, it was lower than at the inner zones.
11 It may have been depooled while cheese plants on inner
12 zones continued to pool same months; right?

13 A. That's a possibility. I don't know
14 which months that would have occurred, but.

15 Q. But you were in the industry, you know
16 that that's the way it occurred back then?

17 A. Well, I know that has happened, but I
18 don't know that -- you know, I couldn't tell you right
19 now that any particular month you might have had all
20 of it depooled. It depends on the severity, you know,
21 as you say, the level of negative PPD or the level of
22 the blend price at that time.

23 Q. Were there any months, to your
24 knowledge, pre -- well, let's just say in the 1989
25 period reflected in Exhibit 41A, when you had 3 or \$4

1 spreads in the Class I -- or in the blend of Class III
2 spread?

3 A. I don't have that with me, Marvin, so I
4 don't know the exact spreads that you're asking for.

5 Q. Okay. Exhibit H, 41, Exhibit H, you
6 have identified some months between 1990 and 1999 on
7 old Order 68 when there were negative relationships
8 between the blend in Class III or negative PPD's.
9 What zone did you compare those prices at?

10 A. Those were the base zone.

11 Q. So, when the base zone --

12 A. Can I --

13 Q. When the base zone difference is a
14 penny or two, does anybody depool milk?

15 A. It depends on how good an estimator you
16 are.

17 Q. Okay. Now, you have challenged or you
18 have characterized the Class I price as a subsidized
19 price, and I gather it's -- by the way, you don't mean
20 Government fund subsidized, do you?

21 A. No, no. I mean --

22 Q. Why do you call it subsidized? Who's
23 subsidized -- I mean, what's subsidized about it?

24 A. Well, what I'm referring to is that
25 it's a price, a legally set price by statute that

1 bottlers have to pay. They have no choice, and so to
2 that extent, I don't believe they would be paying it
3 without a Federal Order, and to that extent, it adds
4 money to the pool, and it's indirect subsidy to dairy
5 farmers.

6 Q. Well, in fact, in the Upper Midwest, in
7 all your markets, they're paying, those bottlers are
8 paying substantially more than that minimum price all
9 the time for that Class I milk, are they not?

10 A. Oh, sure with over-order premiums, sure
11 they are.

12 Q. Now, so the Class I pool value, which
13 you want to be able to share in when its to your
14 advantage -- by the way, that is your position, you
15 want to be able to share in the Class I price when it
16 means something to you; right?

17 A. I would hope so.

18 Q. And you are -- but you don't want to be
19 part of the same process if it means that you have to
20 equalize with the pool; right?

21 A. That would be correct.

22 Q. And you want them to share with you,
23 but you don't want to share with them; right?

24 A. Share what with them?

25 Q. Well, what do you want to share from

1 the Class I suppliers?

2 A. I want to share the enhanced value,
3 basically, of the differential value on Class I and
4 any differential value of Class II, and if that
5 creates some revenue above the Class III value, I want
6 to share in that.

7 Q. Now, you actually want to share more
8 than the differential value, isn't that the case,
9 Neil?

10 A. Well, there can be more than the
11 differential value if you're effective differential is
12 more than \$1.80.

13 Q. And if the effective differential is
14 more than \$1.80, you want to share that; right?

15 A. Yes.

16 Q. In fact, some months the effective
17 differential may be more than \$2, more than \$3; isn't
18 that correct?

19 A. Or a \$1 or 50 cents, yes. It can go
20 either way.

21 Q. Okay, but it can go quite higher than
22 \$1.80, can it not?

23 A. It can. It can. It just depends on
24 the time frame when, in the current Order, when the
25 mover is set, and what commodity markets are doing at

1 that time.

2 Q. Did you pool your milk -- report your
3 milk as pooled in Order 68 or your Class III milk for
4 July?

5 A. Of this year?

6 Q. Of this year.

7 A. Yes.

8 Q. Okay. Do you know what the Class III
9 price was for July?

10 A. \$14.85, is that correct?

11 Q. Yes. Right on the button. Do you know
12 what the Class I price was for July?

13 A. No, but if you have it, I will believe
14 you.

15 Q. I believe that Exhibit 5, Market
16 Administrator's exhibit, Table 4, if you have that.
17 Can you tell us what the Class I price for July 2004
18 was?

19 A. It looks like \$19.75.

20 Q. Okay. Class III \$14.85, Class I
21 \$19.75. what's the effective differential for that
22 month on Order 68?

23 A. You're going to make me do this?

24 Q. Yeah.

25 A. Okay. \$4.90.

1 Q. I meant to say Order 30, sorry. \$4.90?

2 A. \$4.90, yes.

3 Q. Okay, and you reported all your milk to
4 be pooled that month, I assume?

5 A. You bet.

6 Q. And you want the right to do that?

7 A. Oh, yes.

8 Q. That differential was created by the
9 advanced pricing dysfunction that you've cited in your
10 testimony; correct?

11 A. That is correct.

12 Q. And you want the right to take
13 advantage of that dysfunction when it works to your
14 advantage; right?

15 A. Well, I want the -- when there's a
16 positive, when I estimate that there's a positive
17 affect on the PPD, current language, I think it's a
18 right of every dairy farmer to share in that positive
19 return, yes.

20 Q. And that system that generates that
21 \$4.90 differential for your dairy farmers occasionally
22 creates a situation where it tilts the other way?

23 A. That's correct.

24 Q. And you want to opt out at that time
25 and let the other producers in the market supplying

1 the Class I, that don't have the chance to opt out,
2 holding the bag; correct?

3 A. Well, that is, in fact, what happened,
4 of course. Whether they're holding the bag or not,
5 that's a matter of them having to -- being -- either
6 choosing to stay in the Order or to be a higher
7 shipper, a higher Class I shipper, or if you're a
8 distributing plant, you have no choice as stated in
9 the Order, but that doesn't mean that I agree with you
10 that I'm opting out of anything. I'm just not
11 pooling, because there isn't any incentive for me to
12 pool. It would cost my dairy farmers money out of my
13 cheese returns for me to pool that Class III milk, and
14 I don't think I should -- I don't think the Order
15 should require me to do that.

16 Q. Well, why should the producers who are
17 supplying Class I be required to share it with your
18 producers at any time, then?

19 A. That's the structure of the Order,
20 Mr. Beshore. That Class I milk --

21 Q. Until it's changed.

22 A. I think that would take a -- to change
23 that, it would take a major change, of course. You
24 might want to do that on a national basis.

25 Q. By the way, in terms of whether

1 depooling is a national issue or not, you're aware
2 that in Orders such as Order 1 your cheese competitors
3 essentially have to keep their milk pooled?

4 A. Yes, I'm aware of that.

5 Q. And by the same -- and any other
6 manufacturing use competitors in Order 1 have to keep
7 their milk pooled all the time, essentially?

8 A. Yes, I'm not totally familiar with
9 Order 1, but I'm aware of what you're saying.

10 Q. Okay. So there's not any particular
11 problem with depooling in that Order, which is the
12 largest Order in the system?

13 A. I don't know. I haven't talked to any
14 of the cheese manufacturers in that part of the
15 country. I assume if they could depool, they sure
16 would.

17 Q. And the same thing could be said for
18 the Orders in the southeast where there are not large
19 volumes of depooling in Florida and the Appalachians
20 and southeast, no particular problems there, are
21 there?

22 A. Well, I don't know if there's any
23 problems there, Marvin, because it's, what is it, a 95
24 percent Class I utilization in Florida.

25 Q. The Florida Order?

1 A. Yeah, something like that.

2 Q. There probably wouldn't be much of a
3 need for a hearing on depooling?

4 A. Probably not. Especially since they
5 have voted on that -- within that Order.

6 Q. Now, Mr. Gulden, Neil, you've indicated
7 that you think the depooling negative PPD's is a
8 function of the price timing under the price
9 announcement, price timing under the Orders, and if
10 anything should be fixed, that should be fixed;
11 correct?

12 A. That's my testimony, yes.

13 Q. Okay. Would you -- Do you have an
14 opinion that all prices -- to fix that, all prices
15 should be announced, all class prices should be
16 announced in advance of the month?

17 A. No, I haven't made any -- I haven't
18 proposed anything, Marvin, or -- and I don't have an
19 opinion on whether it should be before the month or
20 after. I guess that would be for somebody else to
21 propose. That's not my proposal.

22 Q. Okay. Would you support having your
23 Class III price announced in advance of the month?

24 A. I would have to think about it. I
25 haven't done any analysis on it.

1 Q. Would you support it, support Class I
2 prices being announced after the month is over, by the
3 5th of the next month as class III and IV prices are
4 now?

5 A. I could support that easier than before
6 the month.

7 Q. It's a little closer to where you are
8 right now?

9 A. Uh-huh. Yes.

10 MR. BESHORE: I don't have any further
11 questions at the moment, Your Honor. Thanks, Neil.

12 THE COURT: Other questions?
13 Ms. Deskins?

14 CROSS-EXAMINATION

15 BY MS. DESKINS:

16 Q. Good morning.

17 A. Good morning.

18 Q. I just wanted to clarify some things in
19 your statement. On your first page you list two
20 organizations, First District Association and DAVISCO
21 Foods?

22 A. Yes.

23 Q. Are those -- What types of
24 organizations are those?

25 A. First District Association is a

1 qualified cooperative from Litchfield, Minnesota, and
2 Davisco Foods owns and operates cheese facilities and
3 has producer members in Le Sueur, Minnesota, and North
4 and South Dakota and this area.

5 Q. For First District Association, do you
6 know approximately how many members they would have?

7 A. I don't, and I'm not sure that they
8 would want me to give out their numbers.

9 Q. What about for Davisco Foods, do you
10 know how many dairy producer members or dairy handler
11 members they have?

12 A. No, we approach this on a consolidated
13 basis, ma'am, which is reflected in the numbers right
14 below that for all these entities.

15 Q. So for each of these entities, you
16 couldn't give us a breakdown of how many members they
17 had and how many would be dairy producers or handlers?

18 A. I couldn't do that without their
19 permission.

20 Q. The next question I had was a couple
21 times in your testimony, I'm trying to find an example
22 of it, you refer to that the proposals were forced, it
23 was on Page 5, you say "Any forced pooling of cheese
24 when Class III prices are higher," there's a couple
25 other times, like the bottom of page 6 you become

1 forced to pool, and I was just wondering if you could
2 explain to us how any of the proposals would force you
3 to do that, or what you mean by the term forced?

4 A. Well, it's probably a poor choice of
5 words, but what I meant by that is that in these
6 pooling and repooling provisions, there's a multitude
7 of decisions you have to make on whether you're going
8 to pool or not pool, and in some of these proposals
9 that have been talked about here at this hearing, they
10 would affect you eleven months, all the way out to
11 seventeen months ahead, and you'd have to be deciding
12 in month one how much milk you can depool and what
13 affect that's going to have on you in those future
14 months, so and there's no way you can do that.

15 There's no way you know what kind of an
16 affect that's going to have on you six months down the
17 road, sometimes even two months down the road, and so
18 you may have to pool your milk, you may not want to in
19 the current month, but you may have to, just to, so
20 call, protect yourself in the out months where you
21 couldn't get back on the pool. If you depooled too
22 much, you couldn't get back on by some of the
23 proposals, and so your decisions would have to be
24 based on your best guess, your best estimate of what
25 you think is going to happen out five, six, seven,

1 eight months down the road, and you would have to make
2 that decision now in the month whether you're going to
3 -- how much you're going to depool, how much you're
4 going to pool, and so, in effect, it makes you do
5 things that you wouldn't normally do, and it would
6 possibly make you pool milk, force you -- not force
7 you, I shouldn't use that -- it would make you make a
8 decision that would be bad for your dairy farmers,
9 could be bad for your dairy farmers, based on what's
10 going to happen out in the out months. Does that
11 answer your question?

12 Q. It does. And my next question for you
13 is, I think you kind of said it when you were
14 testifying, do any of these proposals impact you more
15 or less than the other ones?

16 A. Oh, depending on which month you're
17 referring to, because, you know, of course, there's
18 months when there isn't any depooling, and there is no
19 affect, and so I would say on average, the distant
20 pooling would affect, in my mind would affect us more,
21 but on certain months if we couldn't repool or if our
22 decision said we were going to depool a certain amount
23 of milk, that could have a large affect, depending on
24 the severity of the moneys that we would have to share
25 with the pool if we decided to pool the milk.

1 MS. DESKINS: I don't have any other
2 questions. Thank you.

3 THE COURT: Very well. Ms. Warlick?

4 CROSS-EXAMINATION

5 BY MS. WARLICK:

6 Q. Good morning, Mr. Gulden. Carol
7 Warlick with Dairy Programs.

8 A. Good morning.

9 Q. I think you're familiar with the
10 definition we have for small businesses. For a dairy
11 farm it's a small business if it has an annual gross
12 revenue of less than \$750,000, and a dairy products
13 manufacturer is a small business if it has fewer than
14 500 employees, so I'm curious about the dairy products
15 manufacturers for AMPI and then the other companies
16 that are part of your consolidated group and also the
17 dairy farmers that make up these consolidated groups.

18 MR. VETNE: It might help at least in
19 part for that question to know that Mr. Umhoefer is
20 going to testify as CEO of the Wisconsin Cheesemakers
21 Association, and he will address the small business
22 factors for the member companies of Wisconsin
23 Cheesemakers.

24 THE WITNESS: The question on AMPI, no,
25 absolutely AMPI is not a small business.

1 MS. WARLICK: No further questions.

2 THE COURT: All right. Fine.

3 Mr. Vetne?

4 MR. VETNE: I think there was left
5 standing the one part of the question what about the
6 members --

7 THE WITNESS: The members, okay. The
8 AMPI, as a cooperative, is not a small business. Our
9 members -- we certainly have members that would fall
10 under your small business definition, yes.

11 MS. WARLICK: The dairy farmers?

12 THE WITNESS: The dairy farmers, yes.

13 THE COURT: Other questions? Does the
14 record reflect how you pay producers -- well, of
15 course you're a co-op so, I don't know if that would
16 be fair, but in terms of Cheesemakers of such, when
17 they make an arrangement with a supplier to a producer
18 co-op, independent farmers, whatever, do their
19 contracts for milk set a fixed price in advance, or
20 does it allude to the Market Order and then you have
21 add-ons or subtractions, how does that work? Can you
22 give us an idea?

23 THE WITNESS: For a proprietor plant,
24 you mean?

25 THE COURT: Yeah, I guess. I guess I

1 may have opened up a door that's a little unclear. It
2 may vary from place to place.

3 THE WITNESS: Well, it certainly does.
4 It certainly does. As far as the Federal Order is
5 concerned, when they're pooling their milk, these
6 producers have to be paid the minimum Federal Order
7 price.

8 THE COURT: Right, I knew you paid the
9 minimum Federal Order price, but with premiums and the
10 rest of it, is the practice to make a contract with
11 the supplier sometime in advance of the time that you
12 actually received the milk, first of all?

13 THE WITNESS: That's not the normal
14 course of business, but that is happening to a lesser
15 degree.

16 THE COURT: What's the normal course of
17 business?

18 THE WITNESS: The normal course of
19 business is to, if you're pooling your milk, you take
20 your revenue from the Federal Order pool and you use
21 that to enhance your returns from whatever type of
22 product, cheese plant, for instance, your returns from
23 your cheese operations, and naturally, everyone's
24 different, not everybody makes the same kind of
25 cheese, not everybody is cushioned, then, for next

1 time --

2 THE COURT: Well, that's how the plant
3 operators gets its money, but in terms of his supply
4 contracts does, he have some mention in those
5 contracts about the Order price and pluses or minuses,
6 or is it just a flat price, or?

7 THE WITNESS: I imagine that there are
8 all of those out there, but I don't have specific
9 information as to how many.

10 THE COURT: Good enough. We'll leave
11 it there. Mr. Vetne?

12 REDIRECT EXAMINATION

13 BY MR. VETNE:

14 Q. There's no further cross, I think.
15 Same three questions. Mr. Gulden, yesterday, and I
16 think you were here, Mary Ledman referred to a lag in
17 addition to the six-week lag that you referred to in
18 your testimony. That is the lag between the market
19 response as reflected in the CME trading, and the NASS
20 reported price or the NASS survey price of two or
21 three more weeks. To that extent, the economic lag
22 between the Class I price and the market price for
23 Class III is even a bit more extreme than you have
24 referred to in your testimony?

25 A. I know we talked about that, John, but

1 I'd have to think about that, because it lags on both
2 ends. You see, it lags on the advance price and it
3 also lags when Class III price is announced.

4 Q. The Class I lags two or three more
5 weeks in reference to the market value of cheese and
6 the milk going into cheese. Let's take it out of the
7 Class III price for a second.

8 A. Yes.

9 Q. Okay, and I think you testified and
10 heard testimony that part of the response of the
11 pooled market during periods of depooling was to
12 increase premiums charged to buyers and premiums paid
13 to producers to meet the competition with depooled
14 milk?

15 A. Yes.

16 Q. Okay. Would you agree with me that
17 that would have the affect of -- have a positive
18 affect on the mailbox price surveys as reported by the
19 USDA?

20 A. Oh, yes, it would.

21 Q. And would you also agree with me that
22 if proposals were adopted, the mailbox price would
23 probably be reported at a lower rate -- at a lower
24 level than would be if proposals are not adopted?

25 A. Yes.

1 MR. VETNE: Okay. That's all.

2 THE COURT: Questions? Yes,

3 Mr. Beshore.

4 RE CROSS-EXAMINATION

5 BY MR. BESHORE:

6 Q. Just a couple other questions, Neil.
7 The organizations to whom you're -- on whose behalf
8 you're speaking, are they all supporting the part, I
9 guess what you've identified as Part 2 of Proposal 2?
10 I mean, you talked about Proposal 2, Part 1. You're
11 supporting or not in opposition of Proposal 2, Part 2,
12 I take it?

13 A. That's correct.

14 Q. And is that uniformly the position of
15 the organizations for whom you're speaking?

16 A. No, it is not.

17 Q. It is not?

18 A. It is not.

19 Q. Are some of them opposing Part 2 of
20 Proposal 2, do you know?

21 A. I don't know of any of them that are
22 opposing it at this point, Marvin.

23 Q. All right. They're just not taking a
24 position?

25 A. Yes, that's correct.

1 Q. And by Part 2 of Proposal 2, we're
2 talking about the so-called distant milk?

3 A. Yes.

4 Q. Now, when -- I just want to inquire a
5 little bit about your position on depooling with
6 respect to -- and the impact on administration of the
7 Order. You heard Mr. Kyburz's testimony this morning?

8 A. Yes, I did.

9 Q. You understand that his -- when you
10 depool and others, and those for whom you are speaking
11 depool a billion pounds of milk, plus, from Order 30,
12 you don't pay any administrative fees on that depooled
13 milk; correct?

14 A. I understand that.

15 Q. And that affects the ability to
16 maintain that Order administration which allows you to
17 participate in the \$4.90 effective differential in
18 July when you repool the milk, you understand that?

19 A. I understand that's the way it works,
20 yes.

21 Q. Would you think it might be appropriate
22 that when milk repools, it ought to pick up the, you
23 know, nickel a hundredweight for every month that it
24 was off the pool when it comes back on, since
25 administration goes on as he indicated, would that be

1 fair and appropriate?

2 A. I don't think that would be appropriate
3 at all.

4 Q. Okay. You think you ought to get the
5 benefit without paying the dues?

6 A. No. I think that when I come back on
7 the pool, and I have something to -- I have some money
8 that was generated by the Class I and II differentials
9 as a positive PPD, and I'm participating in that, I
10 will pay my portion of the MA fees at that point, and
11 I have no problem with Mr. Kyburz's proposals.

12 Q. But you understand that the system must
13 go on when you're not paying on that depooled milk, it
14 must be maintained; correct?

15 A. Yes.

16 Q. And that the people who remain pooled
17 are the ones who are footing that bill; correct?

18 A. Well, they're footing the bill, yes, in
19 months where you have depooling, they are obviously
20 paying their MA fees for the pool.

21 Q. And it's only because they're paying
22 their MA fees, and the MA can keep his operation going
23 that you're, then, able to come in in July and pool
24 that milk and get your pro rata share of \$4.90
25 effective Class I differential, isn't that the case?

1 A. No, I don't think so. I think there's
2 other months where if Mr. Kyburz is short on his needs
3 for administering the Order, that he raised the MA
4 fees to make up past shortfalls, and I've been as much
5 a part of that as anybody in paying those fees, in
6 months that we are pooling our milk.

7 Q. But you don't make up for the cost of
8 administering when you're not in the pool; isn't that
9 right?

10 A. Well, it depends on what he raises his
11 MA fee, and how much his ability is to raise his MA
12 fee in other months.

13 MR. BESHORE: Thank you.

14 THE WITNESS: Yes.

15 THE COURT: Yes, Ms. Yoviene.

16 CROSS-EXAMINATION

17 BY MS. YOVIENE:

18 Q. Morning, Mr. Gulden.

19 A. Good morning.

20 Q. Wendy Yoviene for Dean Foods. In order
21 to understand if I have more questions for you, I was
22 hoping you could explain to me what you meant by sham
23 pooling when you testified on Monday about the sham
24 pooling that was happening from Idaho and other
25 states?

1 A. Back to Proposal 1?

2 Q. Yes.

3 A. Well, by sham pooling, I, again, my
4 terminology might not be the best, but it's the same
5 as paper pooling, and you've heard that term, where
6 milk is pooled by one delivery to the market and then
7 stays at the diversion point the rest of the time as
8 in the case of Idaho, so they only have -- and there
9 is no intent, never has been any intent to ship milk
10 to the Order.

11 Q. Are there any other problems with that
12 kind of pooling that you were seeing when you called
13 it sham pooling? What are the evils of it that you
14 seem to have a problem with?

15 A. The evils of it?

16 Q. Yeah.

17 A. Well, in terms of my dairy farmers, the
18 evils are that over the last twelve months it's cost
19 them roughly an average of 35 cents a hundredweight
20 per month to have Idaho milk pooled on this Order and
21 with no apparent fee for the milk.

22 Q. Okay.

23 A. From that distance, and there's other
24 factors that have cause, and as I stated in my
25 testimony, there's other factors that have caused

1 Idaho to seek out another market.

2 Q. I'm sorry, I didn't hear you.

3 A. There's other factors that have caused
4 the Idaho milk to seek out a market.

5 Q. Okay. Now, in your cross-examination
6 you said that, you know, it's part of your business
7 that you have to make decisions that could be bad for
8 your dairy farmers over time; is that correct?

9 A. Well, hopefully not bad all the time,
10 but.

11 Q. And you have to consider that?

12 A. Yes.

13 Q. And in your operations you have to make
14 decisions about what you're going to do with your
15 plants, whether you're going to invest in your plants,
16 and you have to look at that over the long run, you
17 have to take a long look at those kinds of business
18 decisions?

19 A. On a plant basis, yes.

20 Q. And when you make those decisions, are
21 you taking into consideration how that impacts your
22 dairy farmers?

23 A. Definitely.

24 Q. Yesterday Mary Ledman testified that
25 there are other reasons why the producer price

1 differential can be negative, do you remember that
2 testimony?

3 A. Yes, I do.

4 Q. Do you have any reason to disagree with
5 that testimony?

6 A. No, no, no reason.

7 MS. YOVIENE: Thank you.

8 THE COURT: Other questions? Anything
9 further, Mr. Vetne?

10 MR. VETNE: Mr. Gulden does have an
11 additional statement, but before that, in order to
12 combine like testimony on a like issue, I would like
13 to call Mr. Umhoefer.

14 THE COURT: All right fine. If you
15 will step down, Mr. Gulden.

16 MS. WARLICK: One more question.

17 THE COURT: You have one more? Stay
18 put, Mr. Gulden.

19 RE-CROSS-EXAMINATION

20 BY MS. WARLICK:

21 Q. Just one more question, Mr. Gulden.
22 Carol Warlick with Dairy Programs. I was just
23 wondering if you could clarify your position in
24 regards to both Proposals No. 6 and Proposals No. 7.

25 THE COURT: Are you ready to talk about

1 6 and 7?

2 THE WITNESS: I have a statement on
3 Proposal 6. On proposal 7, and that would be the
4 Market Administrator's, I have no comment on that, and
5 I'm not opposed to it, to his proposal.

6 MS. WARLICK: Okay. Thank you.

7 THE COURT: Fine, if you want to step
8 down, sir. Yes, Mr. Vetne.

9

10 JOHN UMHOEFER,
11 after having been first duly sworn by
12 the Court, says under oath as follows:

13 ***

14

15 DIRECT EXAMINATION

16 BY MR. VETNE:

17 Q. Mr. Umhoefer, you've been sworn and you
18 identify yourself in your written statement and your
19 affiliation?

20 A. Yes.

21 Q. Would you proceed, please.

22 THE COURT: And I'm marking that
23 statement as Exhibit 42.

24 (Whereupon, Exhibit No. 42 was
25 marked for identification.)

1 MR. VETNE: Oh, yes. Thanks.

2 THE WITNESS: Hello. My name is John
3 Umhoefer, and I'm executive director, not CEO, of
4 Wisconsin Cheesemakers Association, a nonprofit trade
5 association based at 8030 Excelsior Drive in Madison,
6 Wisconsin, and that is at 53717.

7 Wisconsin Cheesemakers Association, as
8 part of a coalition identified by Mr. Gulden, wishes
9 to offer testimony in opposition to Proposals 2, 3, 4,
10 5, and 6.

11 Wisconsin Cheesemakers Association, or
12 WCMA, represents dairy manufacturers and marketers.
13 Our membership includes 62 dairy manufacturing
14 companies operating 82 cheese and butter-making
15 facilities. In addition, WCMA has 25 members that
16 further process dairy products into pasteurized
17 process products, cut cheese for retail or food
18 service sale, or market dairy products. Another 270
19 member companies supplying goods or services to the
20 industry and are affiliated members of the Wisconsin
21 Cheesemakers Association.

22 A significant portion of our members
23 will be affected by proposals offered at this hearing.
24 Specifically, 32 WCMA members operating 42 dairy
25 facilities are pooled on Federal Milk Marketing Order

1 30.

2 Three WCMA member companies that supply
3 milk to Order 30 employ more than 500 people at a
4 total of seven facilities. Thus, 29 WCMA member dairy
5 processors that pool milk on Federal Order 30 are
6 small businesses for the purposes of economic analysis
7 under the Regulatory Flexibility Act. These 29 small
8 businesses operate 35 facilities making cheese and
9 butter.

10 Wisconsin Cheesemakers Association is
11 concerned that these 35 small business facilities
12 pooled on Order 30, and, indeed, all WCMA members
13 pooled on Order 30, will face significant new costs
14 due to requirements proposed in Proposals 2, 3, 4, 5,
15 and 6. These include costs to ship milk greater
16 distances, only to satisfy the proposed new
17 requirements, costs to add new milk silos, only to
18 satisfy proposed new requirements, costs to add
19 employee positions, only to satisfy proposed new
20 requirements, and costs to upgrade software, only to
21 satisfy proposed new requirements.

22 These costs are not offset by any new
23 benefit to the dairy producers shipping milk to our
24 member dairy facilities. In fact, many of these
25 proposals will severely discourage depooling and open

1 up these dairy producers to new milk check deductions
2 to offset new costs. Some of these proposals add both
3 needless costs for our members' dairy facilities and
4 reduce the ability to depool, a double negative for
5 these Upper Midwest dairy producers.

6 "Proposal 2." Proposal 2 described in
7 the June 23rd Federal Register limits the amount of
8 milk a handler may report to 125 percent of the
9 previous month, with exceptions for March and August.
10 A cheese making facility that pools, for example, 10
11 percent of its milk in September, could report 12.5
12 percent of its milk in October. This plant could not
13 pool all receipts until the following July, ten months
14 after depooling 90 percent of its supply.

15 Members of our trade association are
16 concerned that Proposal 2 focuses on depooling, while
17 ignoring Federal Milk pricing provisions that lead to
18 negative producer price differentials, or negative
19 PPD's. The Federal Order system fails to set prices
20 for all milk classes in sync with each other.
21 Depooling is an economic response to out-of-sync milk
22 prices and the subsequent negative PPD's.

23 Proposal 2 requires a new
24 administrative task of designating which producers are
25 to be removed from the pool each month. Among the 29

1 WCMA member companies which qualify as small
2 businesses, I would like to point out that 16 of those
3 29 have less than 50 employees. Each of these
4 companies surveyed by WCMA employs one staff position
5 or less than one staff position to perform the
6 administrative paperwork associated with pooling on
7 Order 30. Each added administrative task will require
8 additional work and potentially additional staff to
9 complete these requirements.

10 This proposal also builds in an
11 inequitable concept that allows handlers to ship milk
12 to pool distributing plants and pool that additional
13 milk above and beyond the 125 percent limitation.
14 Since both the access to distributing plants is
15 limited, and the milk needs of distributing plants are
16 finite, this proposal is inherently unfair. Some
17 producers will gain quick access to the Order 30 pool
18 after depooling and some will not.

19 "Proposals 3 and 4." These proposals
20 are particularly costly to WCMA member facilities due
21 to added shipping costs, added administrative costs,
22 and the potential need for added silo capacity at
23 dairy facilities to handle this volume of milk
24 expected to move through pool plants.

25 This testimony will address versions of

1 these proposals found in the June 23rd Federal
2 Register, and the changes presented this week, as USDA
3 may select either as a viable version.

4 WCMA members pooling milk on Order 30
5 designate a portion of their silo capacity to
6 accepting milk for pooling. This Grade A silo, or
7 pool silo, is designated annually. A number of WCMA
8 members surveyed for this testimony have inadequate
9 pool silo capacity to qualify their producers for the
10 equivalent of ten day's milk production each month as
11 required in Proposal 3 and 4 in the June 23rd Federal
12 Register. Silo capacity has been built to accommodate
13 current order requirements, which call for one-time
14 touch base for producers that remain associated with
15 the Order. Most WCMA members surveyed designate one
16 silo as a Grade A silo and remaining silos as nonpool
17 silos.

18 Some members surveyed noted that an
19 existing, appropriately sized silo might be designated
20 as a pool silo, or could be designated, but others
21 noted that in order to adequately pool the volume of
22 milk proposed in Proposals 3 and 4, and in Order to
23 keep an adequate volume of silo capacity for nonpooled
24 milk, new silo capacity would be required.

25 Conservative cost estimates from

1 members for a concrete pad, stainless steel silo and
2 piping ranged from \$50,000 to \$100,000 or greater.
3 This cost to these small businesses would be incurred
4 directly due to requirements found in Proposals 3 and
5 4. Some members surveyed by WCMA expressed concern
6 that their current locations for milk silos could not
7 accommodate the addition of another pad and silo.
8 These members face the added costs of preparing new
9 ground to support the weight of trucks and silos.

10 In the end, this new silo capacity adds
11 costs and inefficiency in milk storage. Existing
12 Federal Order systems and industry supply contracts
13 provide ample milk for the Class I market. Additional
14 pool silos are not necessary at supply plants to
15 assure an adequate supply of Grade A milk for the
16 bottle.

17 Two WCMA members with multiple
18 facilities report having one pool silo serving all
19 their plant locations. Shipping ten day's milk from
20 each farm to a single pool silo serving several plants
21 would require increased milk hauling to and from that
22 single pool silo, the wasteful practice of loading and
23 unloading milk solely to meet a new requirement for
24 the Order.

25 An attached table on Page 6 provides

1 this hearing with costs of shipping a given load of
2 volume of milk a given distance. This chart uses a
3 conservative freight cost per loaded mile of \$2.20.
4 All additional milk shipping reduces the quality and
5 the safety of Order 30 milk supply, and adds costs
6 that reduce the ability of these small businesses to
7 provide milk price premiums to dairy producers.

8 The changes to Proposals 3 and 4
9 unveiled this week require the equivalent of ten day's
10 milk to be received at a pool distributing plant to
11 reassociate a producer with the Order. This change
12 results in multiple concerns. First, it is highly
13 unlikely that cheese factories will be able to find a
14 home for this level of milk, for multiple producers,
15 at pool distributing plants in Order 30. Second, new
16 shipping arrangements, including new routes, new
17 haulers, may be required to ship member milk directly
18 to a bottling plant. Third, new costs to cover this
19 inefficient movement of milk would be borne by the
20 cheese factory and producer patrons.

21 Proposals 3 and 4 are also onerous for
22 the added administrative burden to small businesses.
23 New staff time and new software capacity -- capability
24 would be required to track daily milk shipments from
25 producers with the intent of assuring that ten day's

1 equivalent milk was shipped from each member farm.
2 Milk receipts from each farm, with milk pick-up
3 ranging from every other day to three times daily
4 would have to tracked -- or must be tracked against
5 ten day's equivalence. Any changes in milk shipment
6 must be carefully tracked due to milk haulers
7 adjusting routes or skipping or altering milk pick-ups
8 for any reason.

9 Members expressed concern with how and
10 when Order 30 would audit and verify the accuracy of
11 the ten day's equivalence. Members expressed concern
12 that the daily changes in milk supply from a given
13 farm within a month could not guarantee that accepting
14 milk into a distributing plant for ten days would be
15 the same as the equivalent of ten day's milk
16 production. Members have experienced producers
17 involuntary depooled by a Market Administrator after
18 delivery of milk for the requisite number of days
19 where the day's pickup volume was below daily average
20 production for the producer. More likely, therefore,
21 a plant would need to assure that 11 or 12 days' milk
22 shipments are made to be certain that the equivalent
23 of 10 days' milk production has reached the bottling
24 plant. Members estimated the administrative costs of
25 meeting the requirements in Proposal 3 and 4 at

1 one-third to one-half person additional staff time.
2 One member, small business estimated this cost at
3 \$20,000 in additional staff time and software
4 upgrades.

5 "Proposal 5." Proposal 5 is similar in
6 structure to Proposal 2 with a more restrictive
7 limitation on repooling milk.

8 This proposal establishes a similar
9 administrative requirement as Proposal 2 and a similar
10 inequitable concept of allowing some producers with
11 access to pool distributing plants to pool milk
12 outside of the limitation proposed for other producers
13 -- or all producers.

14 Changes to Proposal 5 made this week
15 further restrict repooling and adds to the
16 administrative workload of selecting which producers
17 cannot pool each month.

18 "Proposal 6." Proposal 6 requires
19 plants to re-qualify producers by shipping two day's
20 milk to a pool plant in each of the months of July
21 through November.

22 This requirement serves no discernable
23 purpose towards the goal of orderly marketing in
24 Federal Order 30. The current practice of qualifying
25 producers for Order 30 through a one-time shipment of

1 milk to a pool plant works effectively and efficiently
2 under the Order. The proposed requirement adds
3 unnecessary administrative costs and the potential for
4 added milk shipment for no purpose that benefits the
5 Order.

6 The increase in the amount of milk
7 delivered to a pool supply plant will require
8 additional Grade A or pool silo capacity at several
9 WCMA member small businesses now pooling milk on Order
10 30. The need to match pool silo capacity to this
11 pooled milk, and the need to maintain adequate
12 capacity in non-pool silos will force some of the
13 small businesses surveyed to construct additional silo
14 capacity. As noted earlier in this testimony,
15 conservative cost estimates for a concrete pad,
16 stainless steel silo, and piping ranges from \$50,000
17 to \$100,00 or greater.

18 The conforming change to Proposal 6,
19 noted as Proposal 8 in the testimony of Paul Christ,
20 creates the inefficient scenario of qualifying
21 producer milk by shipping milk to a pool supply plant,
22 rather than directly diverting the milk, before
23 shipping milk to the pool distributing plant. The
24 shipment of this milk to the pool supply plant,
25 followed by pumping the milk into and out of a pool

1 silo, and reloading the milk for a shipment to the
2 pool distributing plant adds needless cost and reduces
3 the quality of the milk for the consumer.

4 Shipment of producer milk through a
5 pool supply plant will undoubtedly require additional
6 Grade A silo capacity at Wisconsin cheese factories.
7 Again, this cost would be incurred to fulfill
8 inefficient regulation that results in lower milk
9 quality.

10 "Proposal 7." Proposal 7 raises the
11 ceiling for a maximum administrative assessment rate
12 for the Upper Midwest order from 5 cents to 8 cents
13 per hundredweight.

14 Wisconsin Cheesemakers Association
15 would like to offer an independent opinion in
16 opposition to this proposal for an increased spending
17 cap. While WCMA recognizes the quality of work
18 performed by the Federal Order staff, this proposal
19 offers no offsetting requirement for the Federal Order
20 to review or limit its fixed costs as milk volume
21 changes. If rates are always adjusted upward in the
22 face of reduced milk hundredweight, then presumedly an
23 order area with a diminishing milk supply would
24 implement a higher and higher assessment.

25 The Federal Order, like a small

1 business, should be required to live within its means.
2 Short-term declines in assessment income should be
3 addressed through reserve supplies of funds or lines
4 of credit. Long-term declines should trigger a review
5 of cost savings. That concludes my testimony.

6 BY MR. VETNE:

7 Q. Mr. Umhoefer, the copies of Exhibit 42
8 that I received and past around didn't have a Page 6,
9 either it got swallowed in the copy room -- do you
10 have an extra copy of Page 6 that I can make copies?

11 A. I ran out of money for the copier.
12 That's just a joke, sir.

13 Q. It's okay, you've got to save it to
14 repool.

15 MR. VETNE: And, Your Honor, I will get
16 copies of this and propose to mark it for convenience
17 as the next consecutive exhibit, rather than
18 reattaching to everybody's distributed copies.

19 THE COURT: All right. Fine. So we'll
20 make that Exhibit 43 when we have it.

21 (Whereupon, Exhibit No. 43 was
22 marked for identification.)

23 BY MR. VETNE:

24 Q. And your last thoughts there on
25 Proposal 7, when you say you want to offer an

1 independent opinion, you mean independent of any other
2 member of the coalition that has addressed the other
3 proposals?

4 A. Yes, that's correct.

5 MR. VETNE: I'm going to make some
6 copies of this.

7 THE COURT: Do you have somebody to go
8 out and do that while you're still working?

9 MR. VETNE: If anybody wants -- I may
10 have some redirect later, but I need to hear the cross
11 first.

12 THE COURT: Cross, anybody?
13 Mr. Beshore?

14 CROSS-EXAMINATION

15 BY MR. BESHORE:

16 Q. Good morning, Mr. Umhoefer.

17 A. Morning.

18 Q. In your statement you say you are -- in
19 testimony in opposition to proposals 2, 3, 4, 5, and
20 6, and I want to just ask questions, basically, with
21 respect to Proposal 2.

22 A. Uh-huh.

23 Q. Are you opposing all of Proposal 2, or
24 do you have a position with respect to the distant
25 milk?

1 A. If I can parse that, and I don't know
2 if I can, it's one proposal.

3 Q. Yes.

4 A. Now, if I can parse it, then I would
5 oppose the portion that dealt with depool, and be
6 neutral on the portion that deals with distant milk.

7 Q. Okay. Is that -- Distant pooling, most
8 people in Wisconsin aren't neutral on that, are they?

9 A. Well, I have a lot of members that
10 instructed me to be neutral, so that's a lot of
11 people.

12 Q. Okay. You have some members who have
13 already participated in this hearing, have you not --
14 do you not?

15 A. I have members that have participated
16 in this hearing?

17 Q. Yes. As members of other groups or
18 organizations or on their own behalf?

19 A. I'm not sure that I have, sir.

20 Q. Okay. Is Land O'Lakes a member of
21 Wisconsin --

22 A. No, sir.

23 Q. It's not. Is Westby Cooperative
24 Creamery a member --

25 A. No, sir.

1 Q. Galloway?

2 A. No, sir.

3 Q. So you -- Are any of -- Do you have
4 some cooperative members of Wisconsin Cheesemakers
5 Associations, members who are cooperatives?

6 A. Yes.

7 Q. Are any of those cooperative handlers
8 on Order 30, to your knowledge?

9 A. Oh, yes.

10 Q. Did you provide the information --
11 provide Mr. Gulden some information with respect to
12 numbers of dairy farmers that were part of the groups
13 he was speaking on behalf of?

14 A. We asked the Order to do that. The
15 Order would not let me see even my own members'
16 producer numbers.

17 Q. Well, who were the producers that were
18 supplying your members that were included in those
19 numbers? I mean, are they members of cooperatives?

20 A. If you are shipping to a proprietary
21 plant, yes, you are also a member of a tested co-op.

22 Q. Okay, so you were including in the
23 numbers -- well, what exactly did you ask the Market
24 Administrator to provide in the way of numbers in milk
25 volumes there?

1 A. As far as our members, it would be
2 members that were -- excuse me. Dairy producers
3 shipping to members, less any that were shipping -- or
4 that were also members of Family Dairies, because we
5 didn't want to double count, me counting the Family
6 Dairies people and the Family Dairies counting the
7 Family Dairies people.

8 Q. Okay, so you asked the Market
9 Administrator to provide to you, provide to
10 Mr. Gulden, the numbers of all dairy farmers, other
11 than members of Family Dairy supplying your member
12 plants?

13 A. Yes.

14 Q. So that included DFA members supplying
15 those member plants?

16 A. No, because I didn't include plants
17 that aren't pooled on the Order on their own. I'll
18 give you an example. I have several members that DFA
19 provides the milk for and pools the milk for. I did
20 not include those plants in any of my totals, only
21 plants that directly pool on the Order, pool their
22 producers on the Order were included in any of these
23 totals. I have several members that I wish I could
24 have added to our list, but we did not.

25 Q. Well, who did you include on the list?

1 A. People that, as I stated, that have
2 producers that ship to the Order, that they pool on
3 the Order, that they fill out the pool -- the monthly
4 information for it to the Order.

5 Q. Does that mean that they operate a
6 supply plant?

7 A. Yes, sometimes a satellite.

8 Q. Well, are they all handlers that
9 appeared on the handler list? Would they all -- they
10 all have to be handlers under the Federal Order 30?

11 A. Yes, I used the very Order documents,
12 not the one you're holding, one similar to make my
13 determination.

14 Q. Okay, and, for instance, Grandy Milk at
15 Darlington, is that included?

16 A. See here you get into an area that I
17 don't believe I'm obliged to list my members for you.

18 Q. Well, did you in -- for Manitowoc Milk
19 Producer Dairy Farms included in your claimed milk
20 representation volumes?

21 A. I believe producers that were -- that
22 used Manitowoc milk as a testing co-op were included
23 in this.

24 Q. Well, you're saying that you used
25 Manitowoc as a testing co-op, you understand that

1 Manitowoc is a qualified cooperative association in
2 the Order 30?

3 A. I believe you're correct.

4 Q. And you understand that in order to be
5 that, they must have a membership and marketing
6 agreement with those dairy farmers?

7 A. I'll accept that.

8 Q. And they have the right to vote for
9 those dairy farmers in any Federal Order Referenda?

10 A. I'll accept that.

11 Q. Okay, and they have a right to
12 represent those dairy farmers in Federal Order
13 matters?

14 A. The word represent, that word may
15 appear in some legal documents.

16 Q. Well, let me ask you. Is it your
17 testimony that you, that your plant, through you
18 and/or Mr. Gulden have more right to speak for those
19 Manitowoc members than the President of Manitowoc who
20 testified at this hearing?

21 A. My members feel that the dairy
22 producers that ship to their cheese plants would be
23 greatly impacted by some of the proposals and/or all
24 of them to some degree, and that's very important to
25 them. They're very concerned about their producers,

1 and they wish to speak on their behalf where the milk
2 check is involved, yes.

3 Q. Well, why can't they just speak for
4 their own proprietary interests as a business person
5 and a plant operator, as opposed to purporting to
6 speak for the dairy farmers who have elected
7 cooperative representatives to come here and speak for
8 them?

9 A. Did you say purporting to do that?

10 Q. Yeah, why --

11 A. We would like to actually do that. We
12 would like to speak on their behalf.

13 Q. Okay. In spite of the fact that
14 they've elected other persons to come here and speak
15 for them?

16 A. It could be a case where there are two
17 different groups of people that would like to speak on
18 behalf of these dairy farmers.

19 Q. And your basis for having -- for
20 wanting to speak on their behalf is that, what, you
21 buy milk from them?

22 A. Well, we're concerned that their milk
23 prices, their milk checks will be impacted by the
24 outcome of this hearing.

25 Q. Aren't you concerned that your costs of

1 doing business would be impacted even more?

2 A. I'm not sure. It depends on how prices
3 would be passed through.

4 Q. Did -- Do you assert the same right to
5 speak for members of Milwaukee Milk Producers
6 Cooperative?

7 A. Yes, I believe we do.

8 Q. Should the Secretary take your
9 testimony on behalf of those members or the testimony
10 of the elected director of Milwaukee Milk Producers or
11 President that was here testifying earlier?

12 A. That's a good question. I think the
13 secretary should waive my responses to your earlier
14 questions in his decision to who should speak for
15 these people. I believe that we do have a strong need
16 to speak on behalf of patrons who I've often shipped
17 to a proprietary plant.

18 Q. You understand that the statute directs
19 the Secretary to recognize cooperative marketing
20 associations as the representative of their dairy
21 farmer members under Federal Milk Order proceedings?

22 A. I'm not aware of that, but I will not
23 challenge that.

24 Q. Okay. Is it -- What do you mean when
25 you say there are 35 small business facilities pooled

1 on Order 30?

2 A. I don't know if you're parsing jargon,
3 I have 35 plants that have producers that pool milk on
4 Order 30.

5 Q. So you're not suggesting that your
6 members have 35 pool plants under the Order?

7 A. I think I am suggesting that, that are
8 small businesses.

9 Q. You are suggesting that?

10 A. Pool supply plants, yes.

11 Q. Would you look at the list of pool
12 supply plants on Table 2 of Exhibit 5. Do you have
13 that available? Page 14 and 15 of Exhibit 5.

14 A. Which page, sir?

15 Q. Page 14 and 15, Table 2.

16 A. Okay.

17 Q. Do you see in the center two columns
18 there's a list of December 2003 pool supply plants?

19 A. Yes, sir.

20 Q. Okay. Now, can you identify the 35
21 Wisconsin Cheesemakers Association pool supply plants
22 in December 2003?

23 A. I could, but I won't.

24 Q. Okay. Are the NFO plants Wisconsin
25 Cheesemakers plants?

1 A. NFO is not a member of Wisconsin
2 Cheesemakers plants.

3 Q. Okay, so those plants wouldn't be
4 included in your list of 35?

5 A. Only plants that are members, sir.

6 Q. Well, you won't tell me who the members
7 are, maybe we can get some of them by identification
8 of who's not a member here.

9 A. Oh, I think that would be --

10 Q. Land O'Lakes, you said was not a
11 member?

12 A. I believe you're getting in an area
13 where the Federal Order puts a big R on things, when
14 you start to determine things by defect of
15 elimination.

16 Q. I'm only asking who are the 35 plants
17 that you've identified in your small business
18 facilities pooled on Order 30, and you've identified
19 in your testimony here, I want to --

20 A. Yeah, as a trade association, I'm
21 simply not obliged to -- it's not Government data,
22 it's not public data who my members are.

23 Q. Is Swiss Valley Farms a member of
24 Wisconsin Cheesemakers Association?

25 A. How many times would you like me to say

1 I can't answer that for you, sir?

2 Q. Well, you did answer it for some, and I
3 just -- you've answered that Land O'Lakes is not and
4 NFO is not, is Swiss Valley Farms a member?

5 A. I guess I've decided we've come to a
6 point where you're starting to eliminate things to the
7 point where I can't tell, when you'll reach the point
8 when you'll have only my members left.

9 Q. What is proprietary about the
10 membership list of Wisconsin Cheesemakers Association?

11 A. What is proprietary about it?

12 Q. Do the members not wish to be
13 affiliated and known as -- under your banner?

14 A. They wish to be affiliated, yes.

15 Q. But not identified?

16 A. They wish for me to speak on their
17 behalf.

18 Q. Without their identity being known to
19 the Secretary?

20 A. Sure.

21 Q. Okay. Now, let's go to Proposal 2.
22 Mr. Tonak, you heard his testimony, you've been here?

23 A. Yes.

24 Q. Okay. Do you recall that he described
25 in some -- with some specificity or thought that

1 Proposal 2 was crafted by the proponents in order to
2 address the issues of distant milk and depooling
3 without requiring physical rearrangements in the
4 operations of marketers in the Order, do you recall
5 that?

6 A. Yeah, I believe I do, yes.

7 Q. And if, in fact, Mr. Tonak and all
8 those for whom he speaks, the members of the
9 coalition, they market the milk, if they're correct
10 that the issues could be addressed this way without
11 requiring changes in physical operations, your members
12 wouldn't have to build any new facilities or make any
13 of these other investments that you're concerned about
14 if Proposal 2 is adopted, wouldn't you have to agree
15 with that?

16 A. I definitely did parse my testimony by
17 proposal, and Proposal 2 focused on the administrative
18 tasks and some of the inequities in reaching a
19 distributing plant.

20 Q. Okay, so you understand Proposal 2
21 doesn't require -- is not intended to require new
22 capital investments and things of that nature?

23 A. Well, I can't say what my members will
24 do in the future, but I didn't testify to that effect,
25 that's correct, sir.

1 Q. So your concern, then, in opposing
2 Proposal 2, your concern is that, although you would
3 not be required to make new investments or handle milk
4 differently, you would be somewhat -- your members
5 would be somewhat constrained if, in fact, they are
6 pooling milk, filing pool reports? They would be
7 somewhat constrained once a month in terms of which
8 volumes they list on the pool sheet and which ones
9 they list on the depool sheet?

10 A. That's true. They would also be
11 constrained to gain pool proceeds. Now, they can
12 repool 100 percent a month after depooling. Under
13 this they can repool only a lower percentage.

14 Q. Assuming that they depooled?

15 A. Yes, sir.

16 Q. Now, without going into the dollar
17 specifics, let me -- Do you have a due structure in
18 your association?

19 A. We have a due structure in our
20 association.

21 Q. Your members have, what, monthly dues
22 that they are obligated for the support of the
23 association?

24 A. You know, as confidential as our
25 membership list is, our due structure is ever more so.

1 Q. I assume there are periodic
2 requirements that members provide some funds for your
3 coffers?

4 A. My members pay dues, yes.

5 Q. Can they elect to depool from the dues
6 fund and remain members of the association?

7 A. They -- It is a voluntary membership
8 organization, yes. They may come and go as they see
9 fit.

10 Q. So if they want the benefits of your
11 sources and the association's services, they're going
12 to have to pay dues, I gather?

13 A. It sounds like an analogy. Obviously,
14 yes.

15 Q. As far as to carry the analogy through,
16 then, they would wish, with respect to the Federal
17 Order, to be able to have the advantage of a \$4.90
18 effective differential in July of 2004, without having
19 paid dues in April, May, and June; correct?

20 A. To carry the analogy through is, they
21 would wish to be able to repool at 100 percent in my
22 organization, rather than have to spend several months
23 slowly paying upwards.

24 MR. BESHORE: Thank you.

25 THE COURT: Anything further,

1 Mr. Beshore?

2 MR. BESHORE: No, not at this time.

3 THE COURT: Yes, Ms. Yoviene.

4 CROSS-EXAMINATION

5 BY MS. YOVIENE:

6 Q. Good morning, Mr. Umhoefer, I'm Wendy
7 Yoviene for Dean foods.

8 A. Hello.

9 Q. Is there anything in Proposal 3 that
10 would force a plant operator to depool milk after it's
11 adopted?

12 A. Could you repeat that, you're speaking
13 a little quietly.

14 Q. Is there anything in Proposal 3 that
15 would force a plant operator to depool milk after it
16 was adopted?

17 A. I don't believe that you'd be forced to
18 depool unless Proposal 6 were adopted and you couldn't
19 get your producer on the market the first day of the
20 month, and then he's effectively depooled, and then
21 you have to spend twelve months shipping ten day's
22 milk to a pool distributing plant to become repooled.

23 Q. Actually, I think we have a
24 misunderstanding. Isn't it true that under Proposal
25 3, there's nothing in it that says you have to make a

1 choice not to pool milk, it says, rather, if you want
2 to depool, then you have a standard shipping
3 requirement to meet; is that true? Is that your
4 understanding?

5 A. Are you saying my answer was incorrect?

6 Q. Yeah, I'm trying to clarify and make
7 sure we're all on the same page here as you understand
8 the proposal.

9 A. I don't believe any of the proposals
10 demand depooling.

11 Q. Correct, and I agree with you. I just
12 want to make that clear for the record and make sure
13 that you understood that. So, then, do you agree if
14 milk is not depooled and a plant operator chooses not
15 to depool -- and it's a choice, we all agree with that
16 -- the costs that you talked about, the personnel
17 costs associated with repooling would not be incurred?
18 If you don't depool, you don't have to repool?

19 A. Well, I'd like to look at the proposal
20 again. I'm not sure the proposal only addresses
21 depooling. Isn't it if a producer wishes to
22 reassociate with the market for any reason, not just
23 depooling? For example, if they're degraded and
24 failed to get regraded in the time period you
25 specified --

1 Q. Right, but the personnel costs do --

2 A. I believe it would be failure to
3 reassociate.

4 Q. The personnel costs that you were
5 talking about, as I understand them in your testimony,
6 was that you're going to have to figure how to repool
7 after you've made a choice to depool --

8 A. Any outcome of your proposals need to
9 be considered, not simply one of the few.

10 Q. Right, but I'm addressing the costs
11 that you were talking about specifically, where you --
12 here, I'll cite it to your testimony. Just, let's
13 understand this. You say on page 2 of your testimony,
14 "A number of WCMA members surveyed for this testimony
15 have inadequate pool silos capacity to qualify their
16 producers for the equivalent of ten day's milk
17 production."

18 A. Right.

19 Q. "So silo capacity would have to be
20 built." That is only going to happen after a plant
21 operator chooses to depool; correct? That cost, if
22 they want to -- if they chose to depool, and then they
23 chose to repool, then they would have that cost?

24 A. That's true in that case.

25 Q. Okay.

1 A. I'm worrying that there are other cases
2 where we may have to reassociate a producer with the
3 pool and build new silos.

4 Q. Okay. I just wanted to understand
5 that. Okay. Would you have any objection to Proposal
6 8 if it applied only to plants located outside of the
7 states where the Federal Order 30 is located?

8 A. I don't have an opinion on that.

9 Q. You don't have an opinion, or you're
10 neutral on that based on membership?

11 A. Did you ask me for an opinion? I don't
12 have an opinion.

13 MS. YOVIENE: Okay. Okay. Thank you.

14 THE COURT: More questions.

15 Ms. Deskins?

16 CROSS-EXAMINATION

17 BY MS. DESKINS:

18 Q. Sharlene Deskins, Office of the General
19 Counsel, USDA. Mr. Umhoefer, in light of the fact
20 that you can't identify who the members are of the
21 Wisconsin Cheesemakers Association, how do you -- how
22 can the Secretary, then, evaluate what impact, if any,
23 these proposals will have on members who haven't been
24 identified?

25 A. Ma'am, I did make those members

1 available in a request for confidentiality to Order
2 30.

3 Q. I'm sorry, I don't understand that
4 answer.

5 A. I did tell Order 30 with a request that
6 they maintain confidentiality, I did tell them my
7 members, so they know, and I imagine that they could
8 let you know.

9 Q. Well, you understand this is a public
10 hearing. I mean, the reason the Secretary is taking
11 testimony here is so it can be evaluated, not just by
12 the Government, but the people that are present, if
13 the information is confidential and can't be revealed,
14 how can the Secretary evaluate it?

15 A. I'd be happy to share that information
16 with the Secretary.

17 Q. Well --

18 A. On a confidential basis.

19 Q. But the point is this is a public
20 hearing.

21 A. Yes, it is.

22 Q. And I'm asking you, how can the
23 Secretary evaluate what impact these proposals will
24 have when the membership of your organization is
25 confidential?

1 A. I believe I'm the first person that's
2 been asked all week to list the members of their
3 association. If we're going to do that, I suggest we
4 list the members of every association that's been
5 here.

6 Q. Well, I think my question was, how can
7 the Secretary evaluate the impact that these proposals
8 will have on your membership if the membership is
9 confidential?

10 A. And I answered that I would be happy to
11 share that list with the Secretary on a confidential
12 basis.

13 Q. Well, as you understand, this is a
14 public hearing, the testimony is not only for the
15 Government, but also if people here have questions,
16 that's the purpose of the hearing to gather
17 information?

18 A. Yes.

19 THE COURT: Maybe Mr. Vetne can help us
20 with that. Can you help at all, Mr. Vetne? You
21 understand the point, if he's keeping all the
22 membership confidential, although he has advised the
23 Order 30 Market Administrator, but it's not a matter
24 of this record as such.

25 MR. VETNE: It's not a matter of this

1 record, as the witness said, as are the individual --
2 it's not of record, the individual members all that
3 spoke in favor of the many proposals that represent
4 cooperative members, individual farmers are not
5 represented, the witness is under oath, and let me ask
6 a question. Mr. Umhoefer, do you have direction from
7 the Board or those you represent to maintain the
8 confidentiality of the member list at this hearing?

9 THE WITNESS: Yes, sir.

10 MR. VETNE: Okay. We can't go any
11 further than that, Your Honor.

12 THE COURT: All right. Well, we'll
13 just have to look at the record and see if it
14 satisfies or not when the Final Decision has been
15 made.

16 BY MS. DESKINS:

17 Q. Also, Mr. Umhoefer, on Proposal 7, you
18 put down that the Federal Order should operate like a
19 small business, in your testimony --

20 A. Did I say the Order 30 --

21 Q. You said, "The Federal Order, like a
22 small business, should be required to live within its
23 means."

24 A. Yes, I did.

25 Q. Do you understand that the Federal

1 Order is a Governmental entity which can't always
2 control what costs it has, unlike a small business?

3 A. Can a small business always control its
4 costs?

5 Q. Well, a small business would have
6 options that a Government entity doesn't have, such as
7 closing down for a month; correct?

8 A. That's an option?

9 Q. Well, for some small businesses it is.
10 They could close down during the summer, they can
11 close down during winter, they could close down during
12 the school breaks.

13 A. The question? I'm sorry.

14 Q. My question is, you have here that a
15 Federal Order should operate like a small business.
16 You would agree that --

17 A. It should strive to meet the
18 principles, may I say that.

19 Q. And you also understand that the
20 Federal Order doesn't regulate how much milk is pooled
21 per month, that's depending on factors that it doesn't
22 control?

23 A. That's true.

24 Q. So its costs is something it can't
25 necessarily control?

1 A. You mean its income?

2 Q. Yes, its income.

3 A. That true.

4 MS. DESKINS: I have no further
5 questions.

6 THE COURT: Very well. Other
7 questions? Any other questions? Mr. Beshore?

8 CROSS-EXAMINATION

9 BY MR. BESHORE:

10 Q. Mr. Umhoefer, the exhibit that's
11 attached, which I think is 43.

12 A. I think I surrendered mine. Did you
13 give it back? Thank you, sir.

14 MR. BESHORE: Was is 43, Your Honor?

15 THE COURT: 43.

16 BY MR. BESHORE:

17 Q. I have one question on Exhibit 43,
18 Mr. Umhoefer. Could you tell us, if you look at the
19 first number in the upper left, \$611, the rate per
20 hundredweight that is, you know, indicated by that
21 expense to -- by that expense?

22 A. You're wishing me to -- okay. Any of
23 the figures, including that one, sir, is figured by
24 dividing the pounds across the top by the 45,000,
25 multiplied by 2.20, multiplied by the miles. I

1 intended it to be clear, and I apologize if it isn't.

2 Q. But I wonder if you could just -- if
3 you know, or if you could calculate for the record
4 what that rate per hundredweight would be, because I
5 think, you know, it's useful in expressing the
6 information.

7 A. I would defer anyone with a calculator
8 to do that, and I would accept their answer.

9 Q. So you didn't figure in per
10 hundredweight --

11 A. No, sir.

12 Q. -- the cost?

13 A. I think the only variable in this
14 equation is 2.20 per loaded mile, freight cost per
15 loaded mile.

16 Q. Okay. If I told you that our
17 calculator comes up with a cost of \$24.44 per
18 hundredweight, does that sound about right for that 50
19 mile --

20 A. I never did that math, so I will defer.

21 Q. Now, let me go back to, then, if I
22 might, to whom you're speaking for. When you asked
23 the Market Administrator, let's see if we can get the
24 info here, you asked the Market Administrator to
25 provide to you or Mr. Vetne or Mr. Gulden certain

1 information, who was it provided to?

2 A. The Federal Order was asked by me to
3 provide -- I asked for the Order to give me the
4 producers shipping to each of my members, and the
5 Order said, no. Then I asked the Order to provide me
6 an aggregate of all the producers shipping to all of
7 my members that are pooled on Order 30, these 32
8 companies, and they said, yes, and that data went to,
9 I believe, Mr. Vetne.

10 Q. So you provided Mr. Kyburz's office
11 with a list of 32 members or plants or what?

12 A. I believe I used their form and
13 indicated on their forms who my members are.

14 Q. And then your request was -- so it
15 wasn't a list of plants?

16 A. It was their list, their blue sheet,
17 and I don't know the title of that, it comes out each
18 month and lists the plants -- I believe it was in
19 Exhibit 5 -- that are included each month, and I
20 indicated who my members were among those.

21 Q. Okay, so you took a handler list, I
22 gather?

23 A. Yes, sir.

24 Q. And annotated it with your, identified
25 your members on that list?

1 A. Yes, sir.

2 Q. And then asked Mr. Kyburz's office to
3 provide you with what information?

4 A. The producers shipping to those plants.

5 Q. The number of producers shipping to
6 those plants?

7 A. Yes.

8 Q. And who did you tell them to exclude?

9 A. I don't believe we asked them to
10 exclude anyone.

11 Q. Okay, so, if there were DFA members
12 shipping for those plants, they were included, because
13 you did not tell them to exclude DFA members; correct?

14 A. I may not be correct about that sir,
15 and I have the list. I wonder if I could peek at it.

16 Q. Well, do you have your instruction to
17 Mr. Kyburz?

18 A. No, sir. As I stated earlier, these
19 are plants that are shipping, that are listing
20 producers each month and pooling those producers on
21 the Order. If DFA is doing that, I did not include
22 it.

23 Q. Well, you didn't include DFA as a
24 member, but when you asked the Market Administrator to
25 report to you the number of producers delivering to a

1 given plant without exclusion, that may well include
2 DFA members, would it not?

3 A. I did not include plants that have
4 supply arrangements with DFA.

5 Q. How did you determine that?

6 A. Because I asked them.

7 Q. Asked who?

8 A. The plants.

9 Q. What if a plant has a part, you know,
10 buys some milk from DFA producers and some milk from
11 other folks, how did you handle that plant?

12 A. This is for producers shipping to
13 plants, not for spot milk.

14 Q. Aren't you aware that there are DFA
15 producers, for instance, who ship milk directly to
16 proprietary cheese plants?

17 A. Absolutely, and I did not include
18 those.

19 Q. How did you exclude them?

20 A. I crossed them off the list.

21 Q. Crossed who off the list?

22 A. The companies that have DFA milk coming
23 into their company.

24 Q. Any amount of DFA milk coming into
25 their plant?

1 A. I'm not aware of plants that have
2 partial arrangements with DFA.

3 Q. Oh, you're not. Okay. Now, what did
4 you do -- I take it that plants that have Milwaukee
5 Milk Producers, you included them on your list?

6 A. Yes.

7 Q. And plants that were supplied by
8 members of Woodstock Progressive Cooperative, you
9 included them on your list?

10 A. As I said before, yes.

11 Q. Okay, and if there were any plants
12 supplied by members of Land O'Lakes, did you include
13 them on your list?

14 A. I included on my list companies that
15 have producer patrons and list those producer patrons
16 each month on their pool reports.

17 Q. Do you have access to those pool
18 reports?

19 A. I asked my members for that
20 information. I did not ask them for the pool reports.

21 Q. What information did you ask your
22 members for?

23 A. Do you have producer patrons that you
24 pool each month under Federal Order.

25 Q. You didn't ask them who they were

1 members of, though, who their patrons were members of?

2 A. I asked them if they had producer
3 patrons that they pooled each month on the Federal
4 Order.

5 Q. Irrespective of whether the patrons
6 were members of cooperative associations?

7 A. What we were trying to gather was how
8 many of my members had pooled on the Order, how many
9 milk producers shipped milk to cheese plants that are
10 members of my association.

11 Q. Now, did you instruct the Market
12 Administrator to eliminate members of Family Dairies?

13 A. No. That was done by Family Dairies.

14 Q. How did Family Dairies do that? Did
15 you provide them with the information you got from the
16 Market Administrator?

17 A. I'm concerned about speaking on their
18 behalf, but they know where their members ship milk,
19 and they used that knowledge to that effect.

20 Q. But you just got one number, one
21 aggregate number of producers, and was it producers
22 and milk volumes?

23 A. And they have an aggregate number of
24 their producers branded, so we subtract those two
25 aggregates.

1 Q. Now, Family Dairies is the same type
2 of, what you refer to as a, testing organization, that
3 other cooperatives in Wisconsin are; correct?

4 A. I believe so, yes.

5 Q. Are the members of the Wisconsin
6 Cheesemakers Association listed on your website,
7 Mr. Umhoefer?

8 A. No.

9 Q. By the way, on your web page, you do
10 list the officers and directors of the association, do
11 you not?

12 A. Yes.

13 Q. And the companies with whom --

14 A. I'm not sure that's up to date. You
15 could tell me.

16 Q. I can't tell you.

17 A. Does it say a year?

18 Q. I don't know, but I'm trying to get
19 some addition -- see if there's additional information
20 that might be made available for the record --

21 A. I'm concerned that information might be
22 dated.

23 Q. Well, I'm concerned with whether you're
24 going to provide what's on a public website for this
25 public record or not, okay, and your public website

1 lists officers and directors of the company with whom
2 they are affiliated, you would agree with that,
3 whether it's current or not, you would agree with
4 that; correct?

5 A. There is a web page to that affect,
6 yes.

7 Q. Which your organization sponsors and
8 maintains; correct?

9 A. Yes, but it's not up to date in my -- I
10 believe, because we haven't updated our website in
11 quite some time.

12 Q. Would -- Well, is the identity of the
13 officers and directors of your association a
14 confidential matter that you wish not to provide for
15 the Secretary?

16 A. That's a good question. What I would
17 like to do is get the permission of each of my members
18 to relinquish that information.

19 Q. And provide it for this record? Can
20 you do that before the day's over?

21 A. I doubt it.

22 MR. BESHORE: Thank you.

23 THE COURT: Let's break for lunch. Is
24 he completed? Do you want to complete, Mr. Vetne,
25 this witness, or you have some more questions, don't

1 you?

2 MR. VETNE: I'm not sure. Are there
3 any other questions?

4 MS. YOVIENE: He's not being excused,
5 is he?

6 THE COURT: Well, he's not until we
7 complete all the questions. Mr. Vetne has some
8 questions to add.

9 MR. VETNE: I have no more at this
10 time.

11 THE COURT: Then he would be excused,
12 unless there's additional questions.

13 MS. YOVIENE: Okay. We need a minute.

14 THE WITNESS: Can I ask my lawyer a
15 question?

16 MR. VETNE: Of course, he can.

17 THE COURT: Try to stay away from the
18 microphone.

19 MR. BESHORE: If Mr. Umhoefer's
20 testimony is concluded, I would like to make a brief
21 motion.

22 THE COURT: Well, there's some more
23 questions coming.

24 MS. YOVIENE: No, I'm joining his
25 motion.

1 THE COURT: Oh, you have a motion?
2 First of all, let me receive Exhibits 42 and 43, is
3 that part of the motion, though?

4 MS. YOVIENE: Yes, it's part of the
5 motion.

6 THE COURT: Okay, fine. Let's hear the
7 motion first.

8 MR. BESHORE: Your Honor, I would like
9 to move to strike Mr. Umhoefer's testimony, and I'll
10 object to the receipt of the exhibits on the grounds
11 that he will not disclose for whom he is speaking, and
12 we cannot, therefore -- the Secretary cannot probe the
13 weight of the testimony, and it should not be part of
14 this record.

15 MS. YOVIENE: I join that motion.
16 We're unable to cross-examine him about the various
17 representations that are made, so I join that motion.

18 THE COURT: All right. Mr. Vetne, do
19 you want to respond?

20 MR. VETNE: Yeah, sure. I am unable to
21 discern any practical difference in Mr. Umhoefer's
22 testimony in a representative capacity on behalf of
23 members who have an interest in this proceeding from
24 the representative testimony of cooperative officials
25 on behalf of unnamed producers. Mr. Umhoefer, in

1 fact, as far as ability to cross-examine, he has shown
2 ability to describe the practices and operations of
3 his company, for example, in greater detail than some
4 witnesses for handlers who have appeared here, and
5 certainly in a manner that is pointedly responsive to
6 these proposals and the impact of these proposals on
7 the type of handler that he represents for his
8 association, so, I mean, the Secretary may waive
9 something, but, you know, this industry is not always
10 a kind one as Judge Learned Hand (phonetic) said in a
11 Decision in, I think it was in the 1930s or '40's,
12 that "To the city dweller of poets, milk provides
13 visions of echoic serenity, but indeed milk has caused
14 more strife than alcoholic beverage."

15 MS. YOVIENE: I think that's a
16 paraphrase.

17 MR. VETNE: That's a paraphrase, but
18 it's pretty close, you know, and there are, among
19 other things, real concerns about the -- sometimes
20 about the real consequence of media, you know, what is
21 DFA going to put out in its producers letters, what is
22 Pete Harden going to write in his missile. There are
23 some issues that need to be addressed that should not
24 be throttled -- the view should not be throttled by
25 representing everybody that holds that view, and

1 that's one reason why we have representative capacity
2 witnesses, that's one reason why trade associations
3 testify, and as far as our legislative hearings, just
4 like they testify before legislature, and don't always
5 provide every member on their list. Thank you.

6 THE COURT: Ms. Deskins, you wish to
7 make a statement?

8 MS. DESKINS: Actually, Judge, the 900
9 rules do require if someone is testifying in a
10 representative capacity, they're supposed to state
11 what their authority is to act. Perhaps if the
12 witness did that, that would provide the information
13 necessary.

14 THE COURT: I guess she's asking if
15 there was a vote taken, something to that sorts.

16 MR. VETNE: I think he said that, and
17 this will be redundant, but --

18 THE COURT: I don't remember.

19 MR. VETNE: -- Mr. Umhoefer, if you
20 didn't say it, would you state for the record the
21 direction that you have from your Board.

22 THE WITNESS: My testimony is given at
23 the direction of my Board of Directors.

24 MS. DESKINS: And who's on the board?

25 THE COURT: Not their names, but what

1 kind of folk?

2 THE WITNESS: I listed in great detail,
3 dairy manufacturing companies, 62 dairy manufacturing
4 companies operating 82 cheese and butter-making
5 facilities, 25 members that further processes dairy
6 products into pasteurized process products, cut cheese
7 for retail and food service sales or other market
8 dairy products, and another 270 companies supplying
9 goods and services to the industry.

10 THE COURT: Well, they're not all in
11 the Board?

12 THE WITNESS: No, sir, but they're a
13 subset on that.

14 THE COURT: How large is the Board?

15 THE WITNESS: The Board is 19 persons.

16 THE COURT: 19 persons, and are they
17 all dairy manufacturing companies?

18 THE WITNESS: They are a subset of this
19 list. They are a combination of dairy manufacturing
20 companies, some affiliated members, and some market
21 members.

22 THE COURT: All right. Fine. Well,
23 I'm going to deny the motion. Whatever weight shall
24 be given to his testimony will be given, and I do
25 think that he does indicate that he certainly

1 represents cheese manufacturers, and I think that's
2 their position, and as I recall the Learned Hand
3 quote, it also said something about what chickens
4 could not do the lactic tide is swept away, that is my
5 recollection. Very well. All right. Is there other
6 questions for the witness, then? Very well, sir.
7 We're going to adjourn for lunch, and we'll be back at
8 1:15.

9 (Lunch Recess taken from 12:13 to 1:22 p.m.)

10 THE COURT: Back on the record.

11 Mr. Vetne, you're introducing and offering Exhibit 42
12 and 43?

13 MR. VETNE: Yes.

14 THE COURT: We're receiving both of
15 them.

16 (Whereupon, Exhibit Nos. 42 and 43 were
17 offered and received into evidence.)

18 THE COURT: Do you have anything
19 further?

20 MR. VETNE: Yes, a relatively short
21 statement by Mr. Gulden on Proposal 6.

22 (Whereupon, Neil Gulden was
23 brought back to the stand.)

24 THE COURT: And we'll mark his
25 statement as 44.

1 (Whereupon, Exhibit No. 44 was
2 marked for identification.)

3 THE COURT: Go ahead. Thank you for
4 remembering that. You may proceed. Mr. Gulden is
5 still under oath from earlier, and as I've said, we've
6 marked his statement as Exhibit 44.

7 DIRECT EXAMINATION

8 BY MR. VETNE:

9 Q. Mr. Gulden, do you have some additional
10 comments on the proposals, including additional
11 proposals by Dean Foods?

12 A. Yes.

13 Q. Would you proceed with that.

14 A. Again, I am Neil Gulden, Director of
15 Fluid Marketing for Associated Milk Producers, Inc.,
16 AMPI. My office address is 315 North Broadway, New
17 Ulm, Minnesota 56073.

18 My testimony is in opposition to
19 Proposal No. 6. I am joined in that opposition by
20 Alto Dairy Cooperative, Bongards' Creameries,
21 Ellsworth Cooperative Creamery, Family Dairies USA,
22 First District Association, Daviso Foods, Valley Queen
23 Cheese Company, and Wisconsin Cheesemakers
24 Association.

25 Milk should be allowed to associate

1 with the Order and become eligible for diversion if,
2 as currently the case, one day's production is
3 received at a pool plant during the first month the
4 dairy farmer is a producer. If a producer's milk
5 can't be diverted until after one day's production is
6 received at a pool plant, several days of pooled milk
7 value could be lost due to weather problems, truck
8 breakdowns, or scheduling conflicts. The intent is
9 obviously to pool the milk, but getting it to a pool
10 plant the first day eligible isn't always possible or
11 practical. Reassociation also should not change if a
12 producer loses producer status as a result of the
13 handler of the dairy farmer's milk failing to pool the
14 milk under any order, most likely milk depooled
15 because of inverted pricing causing a minus PPD.
16 Depooling was discussed in earlier testimony, and we
17 believe individual dairy farmer's milk should not be
18 forced to reassociate after depooling due to inverted
19 pricing in the order. Touch base in this circumstance
20 serves no useful purpose and causes undue expense
21 because of extra hauling required to get the milk into
22 the pool plant. Section 1030.13(d)(1) of the order
23 should not be changed.

24 A two days' milk, or more, production
25 touch base provision is unreasonable and uneconomical,

1 especially in lower utilization Orders like Order
2 1030, which averages 10 to 16 Class I when all milk is
3 pooled, forcing more milk into pool plants, which for
4 the most part would be supply plants, would add
5 substantial freight costs, and in some cases the
6 additional expense of more storage tanks, which would
7 all be passed on to dairy farmers and serve no
8 practical or useful purpose.

9 In the Upper Midwest there is still
10 enough B milk scattered throughout the milk routes to
11 make picking it up separately very expensive.
12 Proposals 3, 4, and 6, as published, would require
13 touch base every month in varying degrees. We feel
14 this would virtually require us to uncommingle all of
15 our milk. Doing so would cost an average of \$2.50 per
16 hundredweight additional hauling cost. Approximately
17 70 percent of AMPI's Grade A milk in the Upper Midwest
18 is commingled with Grade B milk on farm pickup routes.
19 Other members of our coalition regularly commingle
20 half of their Grade A milk supply with some B milk,
21 Grade B milk. On AMPI's B milk volume alone, this
22 would add another \$300,000 a month, \$3.6 million
23 annually, to our hauling expense. A combination of A
24 and B milk producers would have to foot this cost.
25 Some B 's would convert to Grade A, but many would

1 just simply be forced out of business.

2 Whether or not a producer touches base
3 once to associate with the Order or every day of the
4 month, they are still inspected by the states to
5 receive a Grade A permit, still inspected by FDA
6 through the Interstate Milk Shippers Program and are
7 under no less scrutiny by their milk buyer. This milk
8 is no less available or of no less quality just
9 because it doesn't touch base with the pool plant
10 during the month. For these reasons, plus the fact
11 that there is B milk that should be economically
12 commingled with Grade A, and the fact that 70 to 80
13 percent of the Grade A milk isn't regularly shipped
14 for Class I uses, we believe the current Order 30
15 provisions of establishing association with the order
16 by delivering one day's production to a pool plant is
17 entirely appropriate.

18 Order 30 requires shipments to
19 distributing plants to be a minimum of 10 percent
20 Grade A milk received from the dairy farmers. The
21 reciprocal or 90 percent of that milk may be diverted
22 to nonpool plants. This is a very reasonable approach
23 in any Federal Order and particularly Order 30 with
24 its high percentage of milk used in manufactured
25 products. The 10 percent may be efficiently shipped

1 directly from farms to the fluid milk plant. This not
2 only saves transportation and handling costs, it
3 preserves the highest milk quality. Efficiency, cost
4 savings, quality, and related public interest
5 considerations have been the basis for direct ship
6 performance rules in the Federal Order system for
7 several decades. Some examples of these decisions are
8 listed in Exhibit --

9 MR. VETNE: -- 44.

10 THE WITNESS: --44A. We are, frankly,
11 surprised that Dean Foods' modified Proposal No. 6
12 advocates a pooling requirement known to compromise
13 fluid milk quality.

14 If the idea here is to somehow make
15 more milk available to the fluid market, the Order
16 already has a provision to accomplish that. Section
17 1030(g) gives the Market Administrator the ability to
18 increase or decrease shipping percentages for all or
19 part of the marketing area. This literally provides
20 the flexibility needed to address any shortage of milk
21 for Class I needs. There is no shortage of milk for
22 Class I needs, but there is an increasing shortage of
23 fluid milk handlers in the Federal Order system
24 through which producers may gain pool access.
25 Consolidation of fluid milk handlers over the past

1 decade has resulted in fewer and fewer outlets through
2 which producers may have pool access by sales to the
3 Class I market. Market access for producers has been
4 further limited by consolidation of milk suppliers and
5 exclusive supply agreements between the largest buyers
6 and the largest sellers.

7 Although this problem is not yet as
8 acute in the Upper Midwest as in markets to our south
9 and east, over 70 percent of the market's Class I
10 route disposition is in the hands of only 5 of 23
11 distributing plant handlers. Table 1, Exhibit 12
12 attached as -- what is that number?

13 MR. VETNE: 44.

14 THE WITNESS: 44, again. Attached as
15 44B. The department should be very cautious in
16 adopting rules that will limit producers' access or
17 create new costs for access to the market pool.

18 Section 1030.13(d)(2), (d)(3), and
19 (d)(4) are effectively serving the market in the most
20 efficient and economical manner and should not be
21 changed or amended.

22 We must also oppose Dean's proposal to
23 limit the ability of a degraded producer from
24 reentering the pool. There are reasons why a producer
25 might be degraded, and many solutions to the degrading

1 that may take over 21 days during the course of a year
2 to fix. The current system works. We are not aware
3 of any problem with it, and it does not need to be
4 fixed. That concludes my statement, Your Honor.

5 BY MR. VETNE:

6 Q. Mr. Gulden, you give this statement, as
7 well as your prior statement on behalf of a number of
8 cooperative associations, as well as the Cheese Trade
9 Association, the same people, the same organizations
10 support your testimony in both?

11 A. Yes, they do.

12 Q. Have you had the opportunity since you
13 last testified to calculate the portion of the milk to
14 which you referred in your prior statement, the
15 portion of milk represented by the cooperative
16 association members of this coalition in relation to
17 the total pooled milk supply for the month of December
18 '03?

19 A. Yes, I have.

20 Q. Would you provide that data for
21 percentage of pounds and producers?

22 A. Yes. The cooperative pounds listed in
23 my previous testimony would represent 33.3 percent of
24 the Order pounds for December of 2003.

25 Q. And in terms of number of producers?

1 A. And producer numbers would represent 37
2 percent of the producers for that same month.

3 Q. You speak in your testimony a bit about
4 access and large processing organizations, large
5 supply organizations, and contracts between them. Are
6 there organizations in this market of which you're
7 aware of that pool substantial quantities of milk in
8 adjoining markets?

9 A. Yes.

10 Q. And in further -- in markets further
11 away also that are not adjoined?

12 A. That's true.

13 Q. Okay. Do these organizations have an
14 opportunity, if milk is depooled or ineligible for
15 pooling to shift milk and, therefore, milk burdens to
16 other markets?

17 A. It would have that opportunity. They
18 would have the opportunity to -- that others wouldn't
19 have, to depool, take the milk to another market and
20 bring it back the following month without any penalty
21 involved.

22 Q. And that is your opinion that that
23 would create an inequity that does not now exist?

24 A. Yes, it would.

25 Q. If you accept the proponent's

1 description of the current problem as inequitable, it
2 would, in effect, trade one inequity for another?

3 A. Yes, it would.

4 MR. VETNE: I have no further questions
5 now. I might later.

6 THE WITNESS: John?

7 MR. VETNE: Yes, you have something
8 else you want to say, Neil?

9 THE WITNESS: No.

10 THE COURT: He wants to talk with you
11 for a second. We'll take a little recess for you to
12 talk.

13 (A discussion was held off the record.)

14 THE COURT: Questions? Mr. Beshore, do
15 you want to go first? Who wants to go first?

16 CROSS-EXAMINATION

17 BY MR. BESHORE:

18 Q. Neil, on the last point about the
19 ability of any organizations pooling milk in Order 30
20 to depool from Order 30 and repool in another Order
21 and come back to Order 30 or vice versa, were you
22 directing those comments towards Proposal 2?

23 A. It was a general depooling comment,
24 Marvin.

25 Q. Well, did you -- are you familiar with

1 the language in Proposal 2 which specifically limits
2 the ability to bring milk back onto Order 30 if it's
3 off Order 30?

4 A. You mean if it's pooled on another
5 Federal Order?

6 Q. Right.

7 A. I don't specifically remember that,
8 Marvin, but I'll take your word for it.

9 Q. Okay. In any event, if there's
10 language in there that was addressed to pooling abuse
11 back and forth among Orders, potential abuses, you
12 haven't really analyzed that fully?

13 A. To that extent I was referring to other
14 proposals that would not -- or that would let a
15 handler take his milk and depool it one month, pool it
16 on another Order, and come back the following month
17 without any penalty.

18 Q. Okay, and those -- the proposals that
19 would provide -- that would allow that were which
20 ones?

21 A. 3 and 4.

22 Q. Okay. Now, with respect to the
23 percentage of the Order 30 which the cooperative milk
24 that you represent is -- do you have any idea what
25 your percentage would be in a month like May?

1 A. I don't, but it would certainly be
2 less, because of the milk that wasn't pooled.

3 Q. Considerably less, okay, and might it
4 be less than 10 percent, perhaps?

5 A. I don't have that number, Marvin, I
6 just know it would be less.

7 Q. Are you -- What's your thought, Neil,
8 on whether Proposal 6 would have any affect on the
9 pooling of distant milk?

10 A. I have to get that in front of me,
11 Marvin.

12 Q. Two-day touch base proposal.

13 A. Okay, the touch base. I think the
14 touch base wouldn't have -- it would have some affect,
15 but with the spreads between Class III and IV that
16 have been in the Order recently or within the last
17 twelve months, you could easily touch base twice and
18 still come out very well on doing that.

19 Q. So as far as distant milk pooling is
20 concerned, we need Proposals 1 and that part of 2, in
21 your view?

22 A. Yes.

23 Q. Okay.

24 THE COURT: Are you completed,
25 Mr. Beshore?

1 MR. BESHORE: Yes.

2 THE COURT: Very well.

3 CROSS-EXAMINATION

4 BY MS. YOVIERNE:

5 Q. Good afternoon, Mr. Gulden.

6 A. Hi.

7 Q. Wendy Yovierne representing Dean Foods.

8 Just to clear things up, isn't it true that a producer
9 who's pooled on Order 30 today can continue to be
10 pooled on Order 30 indefinitely, without delivering to
11 a fluid milk plant once they've pooled?

12 A. Yes, once they're pooled, that's
13 correct.

14 Q. I wanted to ask you about Page 2, the
15 second full paragraph of your testimony you say,
16 "Proposals 3 and 4 and 6 as published would require
17 touch base every month in varying degrees." With
18 respect to Proposals 3 and 4, isn't it the case that
19 there's no touch base required if there's no depooling
20 and then repooling?

21 A. That would be right in that proposal,
22 yes.

23 Q. Okay. I just wanted to clear that up
24 and make sure we understood your testimony. Thank
25 you.

1 THE COURT: Other questions?

2 Ms. Deskins?

3 CROSS-EXAMINATION

4 BY MS. DESKINS:

5 Q. Mr. Gulden, I just want you to, maybe
6 if you could clarify something on the first page,
7 where you write "Reassociation also should not
8 change," do you see that?

9 A. Yes.

10 Q. Okay. Could you explain how that could
11 happen where it looks like a producer could lose
12 status because of the actions of a handler?

13 A. Well, if the depooling provisions were
14 implemented, Proposal -- I forget which proposal
15 number -- one of the proposals would make the producer
16 touch base after being depooled.

17 Q. And depooled by whom, the handler?

18 A. By the handler, yes, and so what I'm
19 saying is that in the current Order a producer is not
20 required to reassociate with the market after they've
21 lost association by depooling for inverted pricing
22 reasons, and I would propose to continue that
23 practice.

24 Q. Okay. I just wanted you to explain
25 that, thank you.

1 THE COURT: On Page 2 of your
2 testimony, I heard something and read something else.
3 The very second paragraph, it's written "Which
4 averages 15 to 20 percent Class I when all milk is
5 pooled."

6 THE WITNESS: Yes.

7 THE COURT: But I heard you say 10
8 percent to 15 percent pooled, which would it be?

9 THE WITNESS: Well, I've got 15 to 20.

10 THE COURT: You've got 15 to 20, then I
11 heard wrong. Good enough. Other questions? Yes,
12 Ms. Warlick.

13 CROSS-EXAMINATION

14 BY MS. WARLICK:

15 Q. Hi, Mr. Gulden. Carol Warlick with
16 Dairy Programs. This is a clarification. You said
17 that for co-op pounds, when you talked about 33.3
18 percent of Order pounds, December 2003, and then you
19 said 37 percent of Order producers in December 2003,
20 was that just AMPI, or was that your whole group?

21 A. No. That's all the cooperatives in our
22 group.

23 MS. WARLICK: Okay. Thank you.

24 THE COURT: Other questions? Yes,
25 please.

1 requirement, that's a better option?

2 A. If I got stuck with it, I would have no
3 choice if I got stuck with it.

4 Q. Well, of the two provisions, which
5 is -- that seems to answer your concern?

6 A. My preferred choice is to do it just
7 like we're doing it right now.

8 Q. I understand that, but I'm asking you,
9 if you had to chose between a touch-base provision
10 that said you have to touch base on the first day of
11 the month, if you want all of your milk pooled, versus
12 if you touch base on the tenth day for that month, you
13 can still get your milk pooled, would you choose
14 option one or option two? You'd rather have the whole
15 month pooled; right?

16 A. That's sort of the gun or the knife
17 theory, you know.

18 Q. That's true, but you'd rather have your
19 whole month pooled?

20 A. Well, if that's my only choices.

21 Q. That's your only choice in this
22 question.

23 A. Okay. Then I would pool the whole
24 month, yes.

25 MS. YOVIENE: Thank you.

1 THE COURT: Anything else? I think the
2 witness is excused. Thank you, sir.

3 THE WITNESS: Judge?

4 THE COURT: Yes.

5 THE WITNESS: I had one statement on
6 Proposal 1, yet.

7 THE COURT: Oh, yes, oh, and also,
8 let's receive your Exhibit 44. It's received.

9 (Whereupon, Exhibit No. 44 was
10 received into evidence.)

11 THE COURT: Go ahead, sir, Proposal 1.

12 THE WITNESS: Yes, just a quick, I had
13 a language change on Proposal No. 1. In the hearing
14 announcement under Proposal 1, under 1030.7(c)(2), the
15 last sentence in that language on 7(c)(2) should read
16 like this: "Handlers may not use shipments pursuant
17 to Section 1000.9(c) or Section 1030.13(c) to qualify
18 plants outside the area described above," and that's
19 the change. You strike the words "marketing area" and
20 insert "area described above."

21 THE COURT: Very well.

22 THE WITNESS: And the other comment I
23 had, Your Honor, is just the emergency conditions.
24 I'd read this into the record. Proponents of Proposal
25 1 believe that emergency conditions exist to warrant

1 the omission of a recommended decision on the issue of
2 distant pooling. Large volumes of distant milk have
3 consistently pooled on the Upper Midwest Order,
4 reducing returns for Midwest dairy farmers. We urge
5 the Secretary to act quickly on our proposal. That's
6 all I had, sir.

7 THE COURT: Very well. Any questions
8 as to those two topics that he just testified on.
9 Anybody want to question him at all on that?
10 Ms. Deskins?

11 RECROSS-EXAMINATION

12 BY MS. DESKINS:

13 Q. Mr. Gulden, the change that you've made
14 to 1030.7(C)(2), you want it to cover the entire
15 states that are listed above?

16 A. Yes, for the states that were listed
17 above.

18 Q. Okay, not just limited to the marketing
19 area?

20 A. Right.

21 MS. DESKINS: Okay.

22 THE COURT: Other questions?

23 MS. YOVIENE: I might.

24 THE COURT: Yes, we'll wait.

25 RECROSS-EXAMINATION

1 BY MS. YOVIENE:

2 Q. Wendy Yoviene for Dean Foods again.
3 Mr. Gulden, just to follow up on your last statement
4 that you read, I just want to understand, you just --
5 you're saying that you think it's an emergency to --
6 that the department needs to address the problem of
7 the reduction -- the negative adverse impacts on your
8 pool price, you think that there's emergency there
9 because there's a problem with your pool price being
10 reduced by milk that's riding the pool?

11 A. On distant pooling, yes, on just that
12 issue.

13 THE COURT: Anything else? I think
14 not. Anybody else? Are you done? I understood we
15 have some rebuttal witnesses, Mr. Beshore does and
16 Dean Foods does?

17 MS. YOVIENE: Dean Foods does.

18 THE COURT: Dean Foods does with
19 Mr. Christ, and you're sworn, Mr. Christ.

20 Whereupon, Paul Christ was
21 brought back to the stand.)

22 DIRECT EXAMINATION

23 BY MS. YOVIENE:

24 Q. Mr. Christ, you had some comments that
25 you wanted to add in response to some of the testimony

1 that you've heard over the past couple of days?

2 A. Yes.

3 THE COURT: Give your full name again.

4 THE WITNESS: My name is Paul G.

5 Christ, an advocate for Dean Foods at this hearing.

6 We've heard a good deal of opposition testimony to the
7 proposals advanced by Dean Foods, and we've also had
8 several conversations off the record, and we believe
9 by making some minor modifications and our position as
10 stated in my earlier testimony, that we can reduce the
11 differences of opinion and maybe limit some of the
12 conflict between the interested parties here. So I
13 would like to address several of those modifications
14 that we would be willing to accept.

15 None to Proposal No. 3. I will, in my
16 comments related to Proposal No. 3, we talked about
17 how long a degraded producer would have until they
18 have to get back on. We're reconsidering that because
19 the Market Administrator has an active practice of
20 limiting how long the producer can be off the market,
21 or none Grade A before he can return without
22 reestablishing his pool status, and we may accept
23 that, but we will address that on the brief.

24 Nothing on Proposal No. 4. Nothing on
25 Proposal No. 5, but let's see. Proposal No. 6, we --

1 the way the proposal read in my original testimony was
2 "Milk of the dairy farmer shall not be eligible for
3 diversion unless -- until rather -- until such milk of
4 such dairy farmer's been physically received." We
5 would change the word "until" to "unless," and the
6 practical affect of that would be to make it possible
7 for that producer's milk to be received any time
8 during the month, and his milk would be eligible for
9 pooling during the entire month. Now, I'll just read
10 that first sentence fully in what I think would be
11 adequate: "Milk of a dairy farmer shall not be
12 eligible for diversion unless milk of such dairy
13 farmer has been physically received as producer milk
14 at a pool plant during the month." That should be
15 adequate, and then the next sentence would be, "if a
16 dairy farmer," so and so.

17 Similarly, I guess in the second
18 sentence, I'll read that as well. "If a dairy farmer
19 loses producer status under the Order in this part,
20 except as a rule of temporary lose of Grade A
21 approval," and the rest of that is under
22 reconsideration, "The dairy farmer's milk should not
23 be eligible for diversion, unless milk of the dairy
24 farmer has been physically received as producer milk
25 at a pool plant during the month," so I think that

1 would eliminate this problem of getting each
2 individual producer in the Grade A tank the first of
3 month, it could happen any time during the month, and
4 the producer, then, would be pooled for the entire
5 month.

6 On proposal No. 6, in the original
7 testimony would have prohibited any milk shipped
8 directly from a farm to a distributing plant from
9 qualifying the plant or a supply plant operator or a
10 cooperative, we would modify that to bring into
11 agreement with both Proposals No. 1 and 2. We would
12 use the same geographic territory as defined in
13 Proposals No. 1 under 1030.7(c)(2), or plants within
14 the states of Illinois, Iowa, Minnesota, North Dakota,
15 South Dakota, and Wisconsin, and the Upper Peninsula
16 of Michigan would be able to use direct shipments from
17 farms to distributing plants to qualify the plants
18 within that territory, but, and then we would use
19 similar language to what's in Proposal 1 and Proposal
20 2 to prohibit use of that device to qualify plants
21 outside of this defined Midwest territory, Now, I'll
22 just read the language in Proposal No. 2 and add a
23 couple of words. "The operator of a supply plant
24 located outside the area described above cannot
25 include such shipments as qualifying shipments,

1 cooperative associations may not use shipments
2 pursuant to Section 1000.9(c) to qualify plants
3 located outside the area described above." I
4 scratched "marketing" and added the words, "described
5 above," so we could live with that language on using
6 milk shipped direct from a farm to a distributing
7 plant for the purpose of qualifying other plants.
8 That ends my clarifications.

9 THE COURT: Questions?

10 BY MS. YOVINE:

11 Q. I just want to clarify, Mr. Christ,
12 that we're not changing Proposal 6 completely. This
13 is just an adjustment to the supply plant?

14 A. In effect, what our modification
15 proposal 6 does is it partitions Proposal 6, whereas,
16 it would have applied to all plants in the original
17 proposal, now it will just apply to plants that are
18 outside of this defined Midwest area, where all are
19 part of where the Federal Order 30 is located.

20 Q. You said the word "it" as a pronoun.
21 What are you referring to when you say "it"?

22 A. The proposal.

23 Q. Okay.

24 A. That's neuter.

25 THE COURT: Any other questions? How

1 about over at this table? No?

2 MS. YOVIENE: I think I still have a
3 question.

4 THE COURT: You have got another
5 question?

6 MS. YOVIENE: I think I do.

7 BY MS. YOVIENE:

8 Q. I'm just not sure the record is yet
9 clear, so I want to make sure. If you read Proposal
10 No. 6, there are proposed revisions to Section
11 1030.13, producer milk, and then there are
12 provisions --

13 A. Oh, I'm sorry, I was addressing
14 Proposal 8 when you mentioned Proposal 6 before, so
15 therefore, Proposal 6 deals with the touch-base
16 provision.

17 Q. Okay, so you're not amending proposal 6
18 at all?

19 A. No, I'm changing the word "until" to
20 "unless".

21 Q. Right, but I mean on the issue --

22 A. Of using shipments from farms to
23 distributing plants, no, that's Proposal 8. I'm sorry
24 I created that confusion.

25 Q. I've got to grab another piece of

1 paper.

2 A. Okay.

3 MS. YOVIENE: Okay. I have no further
4 questions.

5 THE WITNESS: Okay.

6 THE COURT: Thank you, sir. Anybody
7 else? Are we calling another witness? Mr. Beshore?

8 MR. BESHORE: Yep. Mr. Tonak has some
9 additional testimony. However, we probably need about
10 five minutes to figure out, it was addressed to
11 changes -- some of it was addressed to changes to
12 Dean's proposals, which have now been readjusted.

13 THE COURT: Changed again. Well, why
14 don't we take a five-minute break, or do you want a
15 little more?

16 MR. BESHORE: That would be helpful.

17 THE COURT: Do you want a ten-minute
18 recess? It's now five of two. Let's come back here
19 at five after two.

20 MR. BESHORE: That would be good.
21 Thank you.

22 THE COURT: Okay. We'll recess, then.

23 (Recess taken from 1:59 to 1:13 p.m.)

24 (Whereupon, Paul Christ was
25 brought back to the stand.)

1 THE COURT: Folks. Let's go.

2 Mr. Christ is being brought back. Ms. Back on the
3 record. Mr. Christ, you're back in the stand.

4 MS. YOVIENE: Thank you, Your Honor.

5 BY MS. YOVIENE:

6 Q. Mr. Christ, I fear from talking with
7 people on break that we didn't make the record very
8 clear with what modifications Dean Foods is prepared
9 to make to their proposals in response to some of the
10 testimony they've heard since we've testified. If you
11 could briefly just confirm for me, is it the case that
12 the only change you are proposing to Proposal 6 that
13 is in your testimony, your written testimony, is
14 changing the "until" to "unless."

15 A. That's one of them, and then at the end
16 of that same sentence, I would add "during the month"
17 for milk being delivered or received in a pool plant
18 during the month, and that is put in two places.

19 Q. And then in paragraph -- I mean in
20 Proposal 8 from your written testimony yesterday,
21 could you confirm for me that your discussion just a
22 few minutes ago regarding the adoption of language
23 from Proposal 2, applied solely to Proposal 8?

24 A. That is correct.

25 MS. YOVIENE: Okay. Thank you.

1 THE COURT: Very well. Mr. Beshore?

2 MR. BESHORE: Mr. Tonak had to step
3 outside the room for a moment, and he will be
4 momentarily returning.

5 THE COURT: I understand he's here,
6 though. Sir, you're still under oath.

7 (Whereupon, Dennis Tonak was
8 brought back to the stand.)

9 THE COURT: You've handed me a
10 document, which I'm marking Exhibit 45. It's one
11 page. It says. "Summery of Federal Order May 2004" at
12 the top. This apparently was mailed to you by the
13 Marketing Administrator.

14 THE WITNESS: That would be correct.

15 THE COURT: Let's make sure everybody
16 has copies. Did the court reporter get a copy? All
17 right. Let's mark it Exhibit 45.

18 (Whereupon, Exhibit No. 45 was
19 marked for identification.)

20 THE COURT: It looks like everybody has
21 a copy now, Mr. Beshore.

22 THE WITNESS: I would like to clarify
23 or possibly further muddy the waters concerning the
24 Wisconsin Cheesemakers Association testimony I heard
25 earlier. There are three qualified cooperatives who

1 represent, but do not payroll producers, which support
2 Proposal 2 -- who support Proposal 2. They are
3 Woodstock Progressive, Milwaukee Cooperative, and
4 Manitowoc Milk. Together, these cooperatives
5 represent over 4,000 producers shipping to Wisconsin
6 plants who may be members of Wisconsin Cheesemakers
7 Association. I should also add that these
8 cooperatives represent producers who supply Class I
9 plants.

10 The Wisconsin Cheesemakers Association
11 website lists Doug, D-o-u-g, Simon, S-i-m-o-n, of
12 Trega, T-r-e-g-a, Foods as President of Wisconsin
13 Cheesemakers Association for the 2003-2004 year. We
14 do not know if Trega is one of the 32 plants
15 Mr. Umhoefer referenced as opposing Proposal 2 in his
16 testimony. We do know that there are over 400
17 producers that are member of Manitowoc who ship to and
18 are payrolled by Trega. Tayt, T-a-y-t, Wuethrich,
19 W-u-e-t-h-r-i-c-h, of Grassland Dairy Products is
20 listed as a director. We do not know if Grassland is
21 one of Mr. Umhoefer's 32 plants. We know that the
22 producers who are payrolled by Grassland are entirely
23 within the membership of the three bargaining
24 cooperatives supporting Proposal 2.

25 At this time, I would like to add a

1 clarification on Proposal 2. Mr. Vetne asked the
2 question concerning provision 1030.13(f)(3)(i), and in
3 that question he noted that that provision referenced
4 back 1013(f)(3). In checking our work papers on the
5 proposal, that should have been a reference to
6 1030.13(f)(4), where a block of milk may be considered
7 ineligible for pooling. The determination is to be
8 made by the Market Administrator when he believes a
9 handler is trying to evade the purpose of the
10 provisions. It is our intention that this section,
11 (f)(4), should cover more than just reporting. We're
12 also including changes in methods of operations such
13 as sham transactions and milk swaps that serve no
14 legitimate purpose. Since Mr. Christ's
15 clarification -- I need to -- one of our concerns with
16 the Dean's proposals addresses a change in
17 1030.13(d)(1), which would define a temporary loss of
18 Grade A approval not to exceed 21 days in a calendar
19 year. We believe that Dean's intent is to enforce
20 performance requirements in order -- enforce more
21 stringent performance requirements if the loss of
22 Grade A approval exceeded 21 days in a calendar year.

23 Our interpretation of the change is
24 that if during a calendar year, a producer loses Grade
25 A status for more than 21 days, all he need do is a

1 one-day touch base to associate with the pool and,
2 again, gain diversion privileges. If the loss of
3 Grade A approval is less than 21 days, there's no
4 touch base required for pool and diverted milk.

5 I hope I've not mischaracterized Dean's
6 intent, and if I have, I apologize. If not, it would
7 be difficult for us to approve the change. There are
8 many occurrences beyond the producer's direct control
9 which would prevent him from regaining Grade A status
10 in less than 21 days. Among these occurrences are
11 facility damage due to fire, wind, roof collapse
12 because of snow load, farm quarantine, any number of
13 things.

14 The Order allows for a waiver of
15 performance for plants due to so-called acts of God.
16 Such a waiver would be appropriate for the producer in
17 this case as well, and we feel it's adequately
18 provided in the current language.

19 In their Proposal 3, the change from
20 language reading "10 days' delivery to a pool plant,"
21 to a "10 days' delivery to a pool distributing plant"
22 is a big change. It is relatively easy to accommodate
23 a delivery to a pool plant, though it is costly and
24 inconvenient. It is much more difficult and costly in
25 most cases to make the 10 days' delivery to a pool

1 distributing plant. Some producers may be located
2 close to supply plants, but distant from distributing
3 plants.

4 The Order transportation credit only
5 helps offset the delivery costs from supply plants to
6 distributing plants. It does not apply to farm direct
7 deliveries.

8 Statements have been made that
9 depooling is not the real problem. That it is just a
10 symptom of a deeper problem, and in a manner, I agree.
11 The deeper problem is a market performance and
12 association problem. A problem with who should share
13 in the market wide pool. The problem is not Class I
14 Class III inversions, though it may play a role.
15 There were negative PPD's in July, August, September,
16 October, November 2003 and April and May 2004. In
17 four of those seven months, the Class I was higher
18 than the Class III. Exhibit 34, Table 4 predicts a
19 negative PPD in September 2004 with Class I price
20 higher than the Class III. Table 5 shows a predicted
21 impact when the Class III depools. The deeper problem
22 is not class price inversions, but who should share in
23 the benefits of the market wide pool, not just on an
24 occasional basis, but month after month on a
25 continuing basis.

1 There are four factors that include the
2 PPD and the related statistical uniform price. One,
3 advanced Class I pricing. Because of the nature of
4 Class I pricing, there are months where the Class I
5 price is close to or can even fall below the Class III
6 price. These are generally times of rising
7 manufactured product prices. There are also times
8 when the Class I price is significantly higher than
9 the Class III price. A recent example is June 2004.
10 The Class I price was \$22.93, and the Class III price
11 was \$17.68 cents, over a \$5 spread. These are
12 generally times of falling manufactured product
13 prices. We submit that advance Class I pricing does
14 not create the whole problem.

15 Number 2, Class II and IV prices
16 relative to Class III prices. When Class II and IV
17 prices are significantly lower than Class III prices,
18 there is a negative effect on PPD's, and by extension
19 the statistical uniform price. When Class II and/or
20 IV prices are higher, there is a positive affect.

21 Three, market utilization of milk. As
22 a market utilization of Class I, II, III, and IV
23 change the impact of the various price relationships
24 -- let me try that again. As the market utilization
25 of Class I, II, III, and IV changes, the impact of the

1 various price relationships on the PPD changes. One
2 way of illustration is to review Exhibit -- 45?

3 THE COURT: The last one? Yes.

4 THE WITNESS: Is to review Exhibit 45.
5 This is from the June 2004 Upper Midwest Dairy News,
6 Page 8. The information presented is for May 2004.
7 The second column from the right shows the uniform
8 price for all Orders adjusted to the Cook County,
9 Illinois, location. This accounts for -- this
10 adjustment accounts for differences in Class I prices
11 among the Orders. The Class II, III, and IV prices
12 are the same across the Orders. The differences
13 reflected in the FOB Cook County prices are a result
14 of differences in utilization of milk due to market
15 pooling standards, market need for Class I milk, and
16 available manufactured outlets. The price range of
17 \$2.73 would indicate that one national hearing on
18 depooling would need to be broken into Order by Order
19 subsets as we are doing here to adequately address the
20 depooling issue.

21 Four, depooled milk. Milk currently
22 depools in Order 30 whenever there is financial gain.
23 This depooled milk would be reflected in monthly
24 changes in market utilization. Among the Order, the
25 amount of depooling may be limited by Order pooling

1 provisions such as the Order 1, Producers for Other
2 Markets language. There is testimony in the record
3 that manufacturing, i.e., nonpool plant handlers, must
4 be allowed to depool and repool as they desire, since
5 they have experienced increased operating costs,
6 especially for energy and labor, and are squeezed by
7 the time lag between the NASS prices and CME prices.
8 The NASS prices on which the Federal Order values are
9 based lags the CME. This is well documented. These
10 rationale for depooling are red herrings. There is a
11 lag in the NASS price, both in up markets and down
12 markets. The class III and IV price formulas are
13 consistent from month to month. We expect that the
14 labor and energy costs for manufacturing plants are
15 dramatically -- are not dramatically increased during
16 the months of depooling and reduced during months of
17 repooling. I know these costs do not change
18 dramatically on a month to month basis in our
19 jointly-owned plant.

20 The cooperatives who developed Proposal
21 2 did so in an attempt to modestly change an
22 inequitable sharing of the market wide pool in Order
23 30. The proponents also took care to craft Proposal 2
24 so normal, physical operations of plants would not be
25 impacted, or at the least minimally impacted. That

1 concludes my comments.

2 THE COURT: Are there questions? You
3 talked about the advance pricing in Class I as
4 compared -- what do you call the one for Class III?
5 That's not advance pricing, what's that?

6 THE WITNESS: I think most people refer
7 to it as current pricing. Some people refer to it as
8 after-the-fact pricing.

9 THE COURT: If they were both the same,
10 Class I and Class III/Class IV were both the same,
11 either both advanced pricing or they were both current
12 or after-the-fact pricing, would that end price
13 inversion between them?

14 THE WITNESS: I think there is a
15 possibility, a strong possibility, perhaps, that if
16 the Class I and the Class III price were announced at
17 the same time, using the same formula, using the same
18 set of statistics, that it would end the price
19 inversion between Class I and Class III. That does
20 not mean there would not be inversions with other
21 classes. The problem, as I see it, is that the fluid
22 handlers have found over the years that the advanced
23 Class I pricing mechanism works well for them to get a
24 price for a very perishable product set prior to
25 delivering that product to the grocery store and

1 before it goes to the consumers.

2 If we applied advanced Class III
3 pricing for cheese plants, I suspect that they would
4 be very happy when the market prices for cheese were
5 going up and they would scream very loudly about the
6 cost to their pocketbook when a price, as an example,
7 was set six weeks before the month ended and the
8 market price had been dropped.

9 THE COURT: All right, so you would
10 think that advance pricing for Class III would raise
11 problems --

12 THE WITNESS: No, I --

13 THE COURT: -- for the cheese makers.

14 THE WITNESS: It's going to be a wash,
15 because there's going to be times with advance
16 pricing, the cheese market will be moving up and the
17 Class III price will have been set, and the Class III
18 price will, at a low level will enhance the cheese
19 plant's returns for sale of cheese made at a later
20 time into an up market. At the same time, when the
21 reverse happens and the Class III price is set in
22 advance on a high cheese price, with a high Class III
23 price, and the cheese prices start to fall, and the
24 cheese plant is paying significantly more money for
25 the milk than what they feel they can generate out of

1 the cheese market, they're going to be put in a
2 difficult position. I would use the words "scream
3 bloody murder," but that may not be appropriate.

4 THE COURT: How is that different than
5 what happens to the Class I people with advanced
6 pricing?

7 THE WITNESS: Well, the Class I people
8 have the price set out ahead. They can set their
9 price for product out onto the marketplace, and it
10 gives them a relatively stable environment to work in
11 on a month to month basis.

12 THE COURT: But their price -- the
13 current price won't exceed the advance price for Class
14 I?

15 THE WITNESS: The current Class III
16 price?

17 THE COURT: No, if you compared the
18 advance pricing for Class I, say going back to current
19 pricing for Class I, does advance pricing -- it will
20 sometimes be a situation where you said Class III
21 people could be in where you've got an advanced price,
22 whatever it is, but then a current price set later is
23 a little higher?

24 THE WITNESS: The Class I people may
25 have some of the same problems that the cheese people

1 do, and the fact that if you set the Class I price at
2 the end of the month, they sold 30 days of milk,
3 delivered it to the grocery store. The milk came into
4 their plant on the first of the month. They product
5 packaged it, put it out in the grocery store on the
6 2nd of the month. The grocery store sold it on the
7 3rd of the month, and the class didn't know what their
8 cost of milk was until the end of the month. No, they
9 could be in a difficult situation.

10 THE COURT: So would you feel that even
11 if there were such a thing as a symmetry between Class
12 I pricing and the Class III/Class IV pricing, both
13 being advanced, both being current, there would still
14 be a need for depooling regulations?

15 THE WITNESS: If both prices were set
16 at the same time, using the same formula, the
17 depooling could occur at times when there's wide
18 spreads between the prices in the other classes. You
19 could set Class I, II, III, and IV milk prices at the
20 same time, the Class I price being \$1.80 at Chicago,
21 higher than the Class III price, and the Class II
22 price and the Class IV price could be significantly
23 lower than the Class III price.

24 That's pretty much what happened in
25 some of the months of September, October, November,

1 and I believe -- of 2003 and May of 2004. The Class I
2 price was higher than the Class III price, but there
3 was still a negative PPD.

4 THE COURT: So if you were to -- if the
5 Secretary were to set regulations on pooling and later
6 on there was also some effort to establish a symmetry
7 between Class I pricing on one hand and Class
8 III/Class IV on the other, in terms of them both being
9 advance pricing, both being current or whatever, the
10 depooling regulations would not be a wasted exercise?

11 THE WITNESS: That would be my opinion.

12 THE COURT: Okay. Who has questions?

13 BY MS. YOVIENE:

14 Q. Wendy Yoviene for Dean Foods.

15 Mr. Tonak, would you agree that Proposal 3, without
16 the modifications that Dean Foods presented yesterday,
17 adding the word "distributing" in front of "pool
18 plants" would open a loophole and make depooling
19 easier for some handlers?

20 A. I want to make sure I understand your
21 question, and if it -- is the question, if a handler
22 depooled under the requirements of Proposal III, would
23 it be easier to reestablish association with the pool
24 through ten days' delivery to a pool plant, would that
25 be easier than ten days' delivery to a pool

1 distributing plant?

2 Q. That's my question.

3 A. And the answer to that would be yes.

4 Q. Now, you mentioned that DFA, in
5 Proposal 2 and the other proponents of Proposal 2,
6 have proposed a modest change. Are you suggesting
7 that the problem of depooling in the Upper Midwest and
8 the problems with the producer price differential are
9 modest?

10 A. Not at all. They're very big problems.
11 The reason our group ended up developing --

12 Q. Thank you, Mr. Tonak.

13 A. -- what we considered to be modest
14 changes, was to try to get industry buying and not
15 significantly affect the operations of any of the
16 participants in the Upper Midwest Order 30 pool.

17 Q. So you proposed a modest change to a
18 significant problem?

19 A. Yes, we did.

20 MS. YOVINE: Thank you, Mr. Tonak.

21 THE COURT: All right. Other
22 questions? Mr. Beshore, do you have some questions?

23 MR. BESHORE: Nothing further.

24 THE COURT: Vetne?

25 MR. VETNE: No more questions.

1 THE COURT: Okay. At this table? Not
2 at this table. It seems like you're finished, then.
3 Anything else? Yes, Mr. Vetne.

4 MR. VETNE: Your Honor, I have a
5 request for official notices of some things that I
6 think would help the briefing here. Once I have it
7 here. The first is of a one-page release from the
8 Federal Milk Market Administrator for the Northeast
9 Market, from Boston, announcing the Northeast uniform
10 price for April 2004, and I have copies for
11 information distribution, and I don't have copies of
12 any of the rest. That was a one-page, that one was
13 easy.

14 THE COURT: It's the Market
15 Administrator, the Northeast Marketing Orders released
16 of April 2004 pertaining to uniform prices.

17 MR. VETNE: It's the Uniform Price
18 Announcement in which in that announcement, the Market
19 Administrator discusses Order 1 depooling and it's
20 affect on the producer price.

21 THE COURT: I see. All right. We'll
22 take office notice of it.

23 MR. VETNE: Second, we refer to table
24 12, I believe, of the Federal Milk Order Statistics
25 Annual Summery. It was an exhibit in our testimony

1 from 1989, and then we had one table from 2004. I
2 would like to ask official notice of the Federal Milk
3 Order Market Statistics. The format has changed a
4 little bit after 2000, January 2000, but they're all
5 available on the web, and with 2004, in fact, the
6 annual data is updated continuously.

7 THE COURT: You're asking that official
8 notice be taken of a series of documents starting with
9 --

10 MR. VETNE: Federal Milk Order
11 Marketing Statistics.

12 THE COURT: For what year?

13 MR. VETNE: For 2000 through to date.

14 THE COURT: 2000 through 2004.

15 MR. VETNE: To the date of briefing,
16 actually.

17 THE COURT: Date of briefing.

18 MR. VETNE: All of these are requests
19 through the date of briefing.

20 THE COURT: That's granted as well.

21 MR. VETNE: The third is the reports of
22 trading on the Chicago Mercantile Exchange as reported
23 in the Daily Dairy Report that Mary Ledman helped
24 prepare, which is also available on the web at
25 dailydairyreport.com, that reflects the reporting of

1 stock prices.

2 THE COURT: Do we have a comment from
3 Mr. Beshore?

4 MR. BESHORE: Yes. The Daily Dairy
5 Report is a publication of the, actually of Ms. Ledman
6 and another -- and a coauthor. It's a newsletter,
7 which happens to be published on the web, and I don't
8 think that's appropriate for official notice. It's a
9 private newsletter publication, is what it is. The
10 facts of trades on the CME is something different than
11 is published in the Dairy Market News and elsewhere, I
12 don't have any problem with that, but the newsletter,
13 I don't know, but that's not an appropriate -- a
14 private newsletter is not something that's appropriate
15 for official notice.

16 THE COURT: Well, you would take
17 official notice of the prices from the Chicago
18 Mercantile Exchange, and if he's looking them up in
19 her letter, it just says, "This is Chicago market
20 factor --

21 MR. BESHORE: If we're taking notice of
22 the notice of the pricing on the exchange, they should
23 be taken directly from the source or from Dairy Market
24 News, not from a private newsletter.

25 MR. VETNE: Your Honor, the rules for

1 official notice in the proceeding and judicial notice
2 in any court proceeding do not depend on this
3 Government source, it depends upon the general
4 reliability of the information, and the
5 trustworthiness of the information. That is why
6 courts as frequently as I illustrated, take judicial
7 notice of stock prices as published in, like, the Wall
8 Street Journals, so private, but it is also
9 unassailable, and actually the purpose for which I
10 requested official notice was the trading reports in
11 this document, and as Mr. Beshore noted, it is
12 available in the weekly publication by USDA, the
13 Market News, but it's a weekly paper, and they trade
14 daily, and from the last weekly report to the date our
15 brief is due, there may be something that we need to
16 reference. I'm suggesting we take official notice of
17 the CME trading prices. It is difficult for somebody
18 to go to the CME and assemble them themselves, they
19 are assembled here.

20 THE COURT: What we'll do, we'll take
21 official notice of it, but if you find that he's
22 taking notice of something that's an area -- you have
23 a right to say that's wrong. Do you follow me?

24 MR. BESHORE: Well, no, I'm not sure.

25 THE COURT: If he files -- In his

1 brief, he's quoting, citing certain prices, and you're
2 looking at another -- the Department's notes, you
3 would just say he's wrong, here it is.

4 MR. BESHORE: But there's no
5 opportunity for reply for this, I mean, we have just
6 one set of briefs.

7 THE COURT: If there's an error like
8 that, I would let you put it in the file. Of course,
9 I probably won't be in control then, but I will
10 certify the record.

11 MR. BESHORE: The other thing is, as
12 far as the Daily Futures Trading records, I mean, if
13 that's what it's for, I'd really question the
14 pertinence of that.

15 THE COURT: Why we need such current
16 information?

17 MR. BESHORE: Well, at any period of
18 time. Daily changes in futures prices, at least be
19 told on this record.

20 THE COURT: I have got a feeling that
21 Mr. Vetne is connected on his computer to these
22 things, it's just an easy way for him to get
23 materials. I'm going to let him do it. We'll use
24 those figures, but if there's a problem with it, you
25 certainly are free to file a motion and say that this

1 is wrong, etc, etc, and then whoever is writing the
2 Decision at the time will have to look at it.

3 MR. VETNE: Thank you, Your Honor. And
4 just so everybody understands, I make reference to the
5 Daily Dairy Report, because it's a convenient
6 compilation of all that trading activity, and I'm
7 referring to what's in the box of that Daily Dairy
8 Report, not necessarily to the narrative, which is
9 sometimes an opinion about that.

10 THE COURT: All right.

11 MR. VETNE: Thirdly --

12 THE COURT: You were up to forth.

13 MR. VETNE: Well, fourthly, then.

14 MS. YOVIENE: May I interpret?

15 THE COURT: Sure.

16 MS. YOVIENE: Your Honor, I have no
17 objection to Mr. Vetne asking for official notice of
18 these documents, as subjective evidence Mr. Beshore is
19 concerned about in the Daily Dairy report. However, I
20 would like a ruling from this, Your Honor, that
21 official noticed documents aren't going to be
22 precluded by the fact, reliance on official data isn't
23 going to be precluded by the fact that Mr. Vetne is
24 asking for official notice ahead of time. I mean,
25 things are going to change, prices are going to

1 happen, and these are, on the average, as Mr. Vetne
2 said, unassailable to business from the Department of
3 Agriculture, from a Governmental agency.

4 THE COURT: Well, he's getting the
5 material in now. I presume that if you're ready to
6 brief and something comes up and you want official
7 notice taken of it, you would sort of footnote your
8 briefs and say "We ask that official notice be taken."
9 Everybody, then, can object to it. It will be up to
10 the decider to decide whether or not to take official
11 notice. Yes, that's the way it would be.

12 MS. YOVIENE: Okay. Thank you.

13 MR. VETNE: And I would concur in that
14 strongly. I'm not intending by inclusion to exclude
15 other things that may be officially noticeable, but I
16 just want to put some things on record here.

17 THE COURT: Well, I think it's helpful.
18 You're giving everybody a source of materials you're
19 going to be looking to.

20 MR. VETNE: Thirdly, from 2000 to the
21 date the brief was filed, the bulletin of the Market
22 Administrator for Order 30, 32, and 33 --

23 THE COURT: Why 32 and 33?

24 MR. VETNE: Order 32 and 33 both show
25 milk ebb and flow, actually, of milk from Minnesota,

1 Wisconsin, Iowa, and the same general procurement
2 area.

3 THE COURT: Show milk that's going off
4 the Order, is that your --

5 MR. VETNE: Switching between Orders.
6 They all rely on an overlapping production area.

7 THE COURT: We'll take official notice.

8 MR. VETNE: Next, the 2002 Agriculture
9 Census State Data. I think it's in Table 51, but I'm
10 operating from memory, for the states, I don't know if
11 I got them all, Minnesota, Wisconsin, Illinois, Iowa,
12 North Dakota, South Dakota --

13 THE COURT: -- Wisconsin.

14 MR. VETNE: -- Wisconsin, for the
15 specific states identified in some of the proposals
16 where they identify states beyond the marketing area.

17 THE COURT: Well, actually, the states
18 you gave were all within Order 30.

19 MR. VETNE: All have some or part of
20 the -- yeah, for the states, the entire states for
21 which any part of Order 30 is located. That would
22 take care of it.

23 MS. YOVIENE: Not of a limiting factor,
24 but just for our record, you were referring to the
25 Order 32 and 33 statistics, what time frame were you

1 referring to?

2 MR. VETNE: 2000. January 2000 to the
3 date the brief was due.

4 THE COURT: And that's for all of the
5 documents you had?

6 MR. VETNE: Except for the Articles of
7 Census. The Census data, by the way, this was still
8 trickling out, but it was released starting in the
9 spring of this year, and from the National
10 Agricultural Statistics Service, a document called
11 "Milk Production" and a sister document called, "Milk
12 Document Disposition and Income," again 2000 to date.

13 THE COURT: We'll do that one too.

14 MR. VETNE: All right, and finally, the
15 Dairy Market News, for which Mr. Beshore and I have
16 referred. This one -- it's also available on the web,
17 and I think it's available from 2000 to date, so I'll
18 ask for that to the date of briefing in addition.

19 THE COURT: All right. Fine. That's
20 also officially noticed.

21 MR. VETNE: All right, and I want to
22 request one more thing, or just request a consensus.
23 On occasions requests are made for official notice or
24 judicial notice of prior decisions of the Secretary.
25 It's my belief that prior decisions of the Secretary,

1 when those Decisions express as such, policy or apply
2 policy in particular, are as readily referenced and
3 making reference in the same way as precedent in a
4 prior court decision. I don't think we need to take
5 official notice of the history of decisions from the
6 Upper Midwest in Order 30 leading to this. In fact,
7 all decisions, including the one proceeding this,
8 incorporate by reference prior findings all the way
9 back to day one, but if there is not consensus about
10 that, then I would request official notice of Order 68
11 from the day it was created, decisions of the
12 Secretary, and Order 30 from its creation.

13 MR. Beshore: From its creation?

14 THE COURT: You've risen to your feet.

15 MR. VETNE: Well, Order 30 -- Well,
16 there was a time when Order 30 ceased to exist for
17 awhile, and then -- '67, and then emerged, but they're
18 both -- one is from the '60s and one is from the '70s.

19 MS. YOVIENE: Just to be clear, Mr.
20 Vetne, are you talking about referencing Federal
21 Registered Decisions by the Department?

22 MR. VETNE: Final Decisions of the
23 Secretary and Federal Decisions, yes.

24 MS. YOVIENE: I cannot conceive that
25 there are precedent setting without context, but I do

1 agree that you can cite to them as official notice
2 documents.

3 THE COURT: Mr. Beshore, what do you
4 think about this?

5 MR. BESHORE: Well, no, I think they
6 can be cited without being noticed or anything like
7 that. The only caveat that I would want to note is
8 that their cite is for the acts taken as opposed to
9 facts found.

10 THE COURT: Yeah, of course, but
11 actually the policies change, so there are a lot of
12 changes, but it's sometimes a bit of language in one
13 of those that sounds apt to today's situations and
14 like, etc.

15 MR. VETNE: Those are cited both by all
16 of us in briefs with the courts and in other venues
17 for the actions taken and the reasons given for those
18 actions, and the reasons given for those actions, as
19 Mr. Beshore noted, sometimes relate to facts that are
20 different than facts here. It's if we no longer have,
21 you know, only a billion pounds, we have 2 billion
22 pounds that we're dealing with, so we can't argue that
23 a fact found in the past, that there's a billion
24 pounds of milk is true today, but we can look to what
25 the Secretary did and what he explained in those

1 decisions without taking judicial or official notice
2 of the whole series of Decisions.

3 THE COURT: I would think that's a
4 better way to do it than taking official notice. Any
5 problem with that?

6 MS. DESKINS: Judge Palmer, I did have
7 one question. Is there anyone here from the Wisconsin
8 Farm Bureau Federation? Okay.

9 MS. YOVIENE: Wendy Yoviene for Dean
10 Foods. We may have one or two more questions for Paul
11 Christ in response to some things the FDA testified to
12 just a moment ago. Could we take a five-minute break
13 to discuss that?

14 THE COURT: Take a five-minute break.
15 (A discussion was held off the record.)

16 THE COURT: Back on the record.
17 Mr. Beshore, you want me to receive, I believe,
18 Exhibit 45?

19 MR. BESHORE: Yes, we would request
20 that.

21 THE COURT: It's received.

22 MR. BESHORE: Thank you.

23 (Whereupon, Exhibit No. 45 was offered
24 and received into the evidence.)

25 THE COURT: Any other witnesses as to

1 anything at all? What about the Government's, what
2 about modifications? I think I did hear Mr. -- the
3 Market Administrator, I think he did address that when
4 he testified, but I don't know. Do we need to say
5 anything about that?

6 MS. DESKINS: Modifications to Proposal
7 7?

8 THE COURT: No, modifications, the
9 general ones --

10 MS. DESKINS: Actually the Market
11 Administrator did address that when he testified.

12 THE COURT: He did address it, so we've
13 covered everything, then, and now we're to the point
14 where we decide upon when we should file, whatever
15 we're going to file, proposed corrections to the
16 transcript and briefs, so one more time off the
17 record.

18 (A discussion was held off the record.)

19 THE COURT: Back on the record. We had
20 an off-the-record discussion of filing corrections,
21 proposed corrections to the transcript and filing
22 briefs, and it's been decided that two weeks after the
23 transcript is posted on the website, that any proposed
24 corrections will be filed by the parties hereto, and
25 then three weeks after that date that comes for files,

1 the corrections -- three weeks after that they will
2 file their briefs, and they'll exchange their briefs
3 directly by, what, FedEx?

4 MR. VETNE: We commonly exchange by
5 e-mail.

6 THE COURT: E-mail, FedEx, however you
7 wish to do it, but you'll exchange briefs directly.

8 MR. VETNE: And corrections.

9 THE COURT: Off the record again for a
10 second.

11 (A discussion was held off the record.)

12 THE COURT: Back on the record. I
13 would thank you all. I think that concludes the oral
14 portion of this proceeding, and I thank you once
15 again.

16 (Whereupon, the Federal Order 30
17 Hearing was concluded at 3:09
18 p.m.)

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1 STATE OF MINNESOTA :

:

CERTIFICATE

2 COUNTY OF HENNEPIN :

3 BE IT KNOWN, that I, Kelly E. Hanna, Court
4 Reporter, took the foregoing Federal Order 30 Hearing;

5 That the witnesses, before testifying, were by
6 the Court first duly sworn to testify the whole truth
7 and nothing but the truth relative to said cause;

8 That the testimony of said witnesses were
9 recorded in shorthand by me and were reduced to
10 typewriting under my direction;

11 That the foregoing Federal Order 30 Hearing is a
12 true record of the testimony given by said witnesses;

13 That I am not related to any of the parties
14 hereto, nor an employee of them, nor interested in the
15 outcome of the action;

16 That the cost of the original has been charged to
17 the party who noticed the Federal Order 30 Hearing,
18 and that all parties who ordered copies have been
19 charged at the same rate for such copies;

20 WITNESS MY HAND AND SEAL this 3rd day of
21 September, 2004.

22

23 _____
Kelly E. Hanna, Court Reporter,
Notary Public

24

25