

CERTIFIED
TRANSCRIPT

NATIONAL FEDERAL MILK MARKETING ORDER
PRICING FORMULA HEARING

DOCKET NO.: 23-J-0067; AMS-DA-23-0031

Before the Honorable Channing D. Strother, Judge

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Carmel, Indiana

August 24, 2023

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Reported by:

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Certificate No. 11613

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(Please note: Appearances for all parties are subject to
change daily, and may not be reported or listed on
subsequent days' transcripts.)

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1 THURSDAY, AUGUST 24, 2023 - - MORNING SESSION

2 THE COURT: Let's come to order. This is the
3 second day of the hearing, August 24th. Dr. Vitaliano,
4 resume the stand. I'll remind you, sir, that you remain
5 under oath. And stretching my recall here, I'm going to
6 get this wrong eventually, but it -- were we doing
7 redirect, is that -- still cross. Okay. That's right.
8 We had two people here.

9 Who would like to go. Mr. English.

10 CROSS-EXAMINATION

11 BY MR. ENGLISH:

12 Q. Good morning, Dr. Vitaliano.

13 A. Good morning, Mr. English.

14 Q. My name is Chip English. I'm an attorney
15 representing the Milk Innovation Group. I think you were
16 here yesterday when I introduced the names of the ten
17 companies. But they operate and have activity in all
18 Federal Orders except for Florida. So they are -- they
19 may have non-Class I uses, but they have a lot of Class I
20 use, and therefore, they are obviously the people
21 purchasing milk from dairy farmers.

22 So I want to start discussing the issue of
23 consumers and fluid milk. And so I want to go back to the
24 end of, as I recall, Mr. Rosenbaum's cross-examination.

25 And I believe I heard you say, but please correct
26 me, I did try to write it down at the time, if protein
27 level goes up it has a higher value for fluid milk
28 consumers.



1 Do you remember saying that?

2 A. Yes, I believe so.

3 Q. Okay. Now, later, and I think it was Mr. Vetne,
4 you said you think like an economist, not a marketer,
5 correct?

6 A. I'm basically an economist, yes.

7 Q. And in fact, unlike, you know, my -- the members
8 of the Milk Innovation Group, have you ever worked for a
9 company that sold a gallon of milk to a consumer?

10 A. No, I have not.

11 Q. Okay. And does your economist lens then assume
12 that consumers are rational actors?

13 A. By and large, they are.

14 Q. So how would consumers know about the higher
15 protein level value of fluid milk?

16 A. One of the things that -- again, I'm not a food
17 scientist, but one of the things that I have been told is
18 that higher protein, higher solids milk gives a better
19 mouth feel to the product, and there are other things of
20 that sort.

21 I'll remind you of my testimony yesterday: I am
22 the lead-off witness for National Milk for this proposal,
23 and others subsequent to come. I will be followed by a
24 number of others who will address various versions of your
25 question, and they will be noting your questions, and they
26 will be responding to it.

27 Q. And I'm happy to notice them. They may find I
28 will ask them regardless.



1 But you yourself are the one on the stand right
2 now, and you are the chief economist for National Milk, so
3 I think -- you know, and you are the one who made the
4 statement, if the protein level goes up, it has a higher
5 value for fluids with consumers, and I want to test that
6 with you, because you are the one who made the statement.

7 How would consumers know about having other solids
8 in their milk as opposed to protein?

9 A. Well, I go back. If you look at the definition of
10 Class I milk over the years, it was based upon a minimum
11 content of nonfat solids. That changed some years ago
12 when lactose started being removed from fluid milk
13 products and was replaced, partly due to testimony by
14 National Milk Producers Federation, with a protein
15 standard.

16 So that in the definitions of a Class I fluid milk
17 product, there has always been a definition that basically
18 specified Class I products by proposing a minimum standard
19 for initially total nonfat solids, and then subsequently,
20 nonfat dairy solids, and then subsequently, protein.

21 So I'm assuming from that that USDA basically
22 considers fluid milk products to be defined by having
23 certain levels of nonfat solids and protein in them.

24 Q. But, of course, USDA is not the only one that gets
25 to say what fluid milk is, correct?

26 A. Can you repeat that question again?

27 Q. USDA is not the only one -- and that -- when USDA
28 has a definition, that's for pricing purposes, correct?



1 That has nothing to do with the definition of fluid milk
2 such as the Food and Drug Administration standard of
3 identity for milk, does it?

4 A. The fluid -- the FDA's definition of fluid milk
5 also includes a minimum nonfat solid standard. So I'm
6 assuming that basically the nonfat solids content of fluid
7 milk in various forms is considered to be definitive
8 for -- for -- for basically defining what a Class -- what
9 a fluid milk product is.

10 Q. So let me --

11 A. There must be a reason for all those standards.

12 Q. So let me go back to the question I actually
13 asked.

14 How would consumers know that milk has other
15 solids?

16 A. They would basically, as I said, that one of the
17 things that I have been told about, is that it improves
18 the taste. And consumers seem to be becoming more and
19 more concerned about the nutritional quality of the food
20 they consume. Basically every fluid milk product is
21 labeled with a -- basically a -- a -- what do you call it,
22 a compositional -- nutritional composition panel, and
23 those panels always include minimum protein levels.

24 I have been told that consumers check labels more
25 and more these days. They like clean labels, but they
26 like to see basically composition standards for product --
27 for components that they consider to be positive to
28 consume. And protein is one of them.



1 So I'm -- what you're -- what you seem to be
2 implying is that consumers are totally ignorant of what
3 they consume.

4 Q. I'm asking you your knowledge for the statement
5 that you made, if the protein level goes up, it has a
6 higher value for fluid milk consumers. And I'm also
7 asking, what -- how do they know and value other solids?
8 How do you know that as opposed to you have heard that, or
9 consumers are doing this?

10 A. Well, when I know something, I have not -- that
11 does not mean that I have experienced it empirically
12 personally myself, but I have learned it by consuming --
13 you know, reading it in media, talking to people who --
14 whose opinion I trust and know those sorts of things. And
15 I just -- that's why I made that statement. I'm not
16 saying that I have personally conducted a survey of
17 consumers and -- and asked them that question.

18 Q. Well, do you have a study that National Milk or
19 others have performed on that question?

20 A. I do not, that I can refer you to at the --

21 Q. Do you --

22 A. -- moment.

23 Q. -- have any research --

24 THE COURT: Sorry, Counsel, let the witness
25 finish.

26 BY MR. ENGLISH:

27 Q. Go ahead and finish, sir. Thank you.

28 A. I cannot cite a study at the moment.



1 Q. Can you cite any research?

2 A. Not in the sense that you are looking for. Again,
3 I go back to the statement I made that -- that the kind of
4 knowledge base that I acquire is from a number of
5 different sources that I trust and -- and basically temper
6 that with common sense.

7 And my sense is that -- that additional protein,
8 and nonfat solids in dairy products, including fluid --
9 particularly fluid milk products, has additional value to
10 consumers.

11 In the past, there have been -- a lot of dairy
12 products have been -- fluid milk products have been
13 marketed as such, as enhanced protein. My understanding
14 is that the products, the fluid milk products that are
15 experiencing growth at the moment, are products --
16 specialty products like Fairlife and others, that
17 specifically tout their increased protein content.

18 So from all of that, I am judging that, in
19 general, consumers would have a broad under- -- a broad
20 sense that higher protein is a good thing in -- in
21 products.

22 Q. So you --

23 A. Not every dairy product, necessarily, touts that
24 on the front of their -- front of their label, but that
25 that is generally considered to be a positive attribute of
26 a dairy -- of fluid milk product by consumers.

27 Q. So you brought up the subject of some products out
28 there, and I'll get back to Fairlife in a moment.



1 But during your 38 years with National Milk, have
2 you lived in the Washington DC area?

3 A. Yes, I have.

4 Q. You buy milk?

5 A. I -- I buy milk, and I consume a lot of milk.

6 Q. Okay. As do I, by the way.

7 One of the products -- or you said there were
8 products that people have marketed. Do you recall a
9 product that Safeway tried to sell in Washington DC that
10 was called 2/10?

11 A. I remember that product. Yes.

12 Q. That product isn't around anymore, is it?

13 A. No, it's not.

14 Q. Consumers didn't support it, did they?

15 A. They didn't support it because at that time, that
16 product was -- had additional -- additional solids in it
17 and was priced higher. Consumers do react to price.

18 What we are -- basically, if the Proposal 1 was
19 adopted, that would increase the prices of -- fluid milk
20 prices somewhat modestly, for all products. And so
21 consumers would basically -- any -- any product that
22 chose, particularly, with those higher standards in them,
23 my guess is you would start seeing a lot of promotion
24 of -- of the protein content and the nonfat solids content
25 of fluid milk products. And my guess is those products
26 would not disappear like 2/10 disappeared.

27 Again, 2/10 appeared in a -- in an environment
28 where it was a value-added product, that basically had --



1 I assume had higher price than others.

2 Now we're seeing a different environment where we
3 are seeing the products like Fairlife that are far more
4 expensive, are doing better than commodity fluid milk. So
5 there's something that's either changed out there or the
6 2/10 experience is not necessarily definitive of what
7 might occur in the current contemporary dairy market.

8 Q. I'll get back to Fairlife when I can.

9 But your comment is, well, look, we're going to
10 raise the price for everybody, and consumers are going to
11 get more.

12 What about those consumers who didn't want their
13 price to go up?

14 A. We have -- we will have an expert witness
15 testifying later on this same proposal, that is going to
16 testify about how sensitive consumption is to -- to --
17 consumption of fluid milk products is to prices. And
18 the -- you know, I think some of your own studies have
19 shown that -- have reconfirmed that dairy products,
20 particularly fluid milk, has traditionally been considered
21 very pricing elastic, and still apparently is.

22 Q. Well, not necessarily about the specialty
23 products, though, correct, sir? The ones you just
24 referred to like Fairlife? Doesn't that study show just
25 the opposite?

26 A. Well, all I know is that Fairlife and those kinds
27 of products are the ones that seem to be increasing their
28 consumption.



1 Q. But if they are the ones that are more price
2 elastic, raising the price isn't going to help on that one
3 thing that's growing, is it, sir?

4 A. Well, the question is, is -- is Fairlife basically
5 going to -- is the higher cost of the raw milk going to be
6 a significant portion of the price of that -- of that
7 product? Because my -- my understanding is that consumers
8 of that product are already willing to pay a significantly
9 higher price compared to the, you know, regular commodity
10 fluid milk.

11 Q. Now, I am trying to avoid talking about Fairlife
12 now.

13 But do you know anything about the expense of
14 producing that ultra-filtered product?

15 A. I'm assuming that the higher cost on the
16 supermarket shelf is related to higher cost of processing,
17 yes.

18 Q. All right. So let me go back to where I was. I
19 asked you about any study or research and -- and so now I
20 want to ask, you are the chief economist for National Milk
21 Producers. If such a study or research existed, you would
22 know it, wouldn't you?

23 A. Such a -- could you define the particular study
24 you are referring to again?

25 Q. I'm going back to the idea that protein goes up;
26 it has a higher value for fluid milk consumers.

27 A. I would probably be aware of a study of that sort,
28 yes.



1 Q. All right. You've also discussed with Mr.
2 Rosenbaum briefly --

3 THE COURT: I'm sorry, Counsel. You are changing
4 subjects. I just wanted to ask, is the record somewhere
5 going to tell us what the two products, Fairlife and
6 something -- I'm not sure if it's absolutely necessary.

7 MR. ENGLISH: Fairlife is spelled F-A-I-R-L-I-F-E.
8 As I described yesterday, they are one of the members of
9 the Milk Innovation Group. You will have testimony from
10 Fairlife at some point in this proceeding.

11 The Safeway product 2/10 meant 2% butterfat, 10%
12 protein.

13 Correct, sir?

14 THE WITNESS: That's my recollection, yes.

15 MR. ENGLISH: All right.

16 THE COURT: Thank you. I guess it would have been
17 covered by the record then. Sorry to interrupt.

18 MR. ENGLISH: No, no. Thank you very much, your
19 Honor, because --

20 THE WITNESS: Correction. That was that 10%
21 protein or 10% total solids?

22 MR. ENGLISH: Thank you very much. It is 10%
23 total solids. I appreciate that.

24 As long as we're talking about that, you said
25 earlier, I believe, that FDA was a protein standard, is in
26 fact an SNF standard, correct?

27 THE WITNESS: That is an SNF standard.

28 MR. ENGLISH: Okay. So we both saw the same



1 thing, right?

2 THE WITNESS: Yes.

3 MR. ENGLISH: Thank you.

4 All right. And, your Honor, thank you very much.

5 I knew what I was talking about with 2/10, and I think he
6 knew, but I appreciate your clarifying for the record.

7 THE COURT: Don't encourage me.

8 MR. ENGLISH: So, yes, it's a slight change of
9 subject, although we are still on the same issue, of
10 consumers.

11 BY MR. ENGLISH:

12 Q. So, you mentioned yesterday the issue that
13 California has different compositional standards, so I
14 want to talk about that just a little bit, because I don't
15 think the record is necessarily clear what that means.

16 So, first of all, for California whole milk, that
17 standard is not different from the federal standard.

18 A. Basically not, yeah.

19 Q. But as fat is removed, basically California in an
20 adjustment mechanism, for 2%, 1%, skim, requires more
21 solids nonfat in order to maintain at least a minimum
22 level of total solids, correct?

23 A. Yes. It's been a while since I've looked at those
24 standards on paper, but that's been -- that was my
25 impression when I -- when I've reviewed them.

26 Q. Thank you.

27 So -- so yesterday, I think it might have been
28 partially lack of clarity in the record, and maybe I



1 misheard. But the fact of the matter is the other 49
2 states do not have different standards from the FDA
3 standard identity, correct?

4 A. They have chosen not to adopt those standards.

5 Q. Well, and in fact, there's probably -- they
6 probably can't, can they?

7 A. I can't answer that question.

8 Q. Well, you -- you were at National Milk when the
9 1996 Farm Bill was passed, correct?

10 A. Yes.

11 Q. Okay. And part of that, of course, was we have
12 been talking about federal milk order reform, and that was
13 a product of the 1996 Farm Bill, correct?

14 A. That's correct.

15 Q. Was there not a provision in the 1996 Farm Bill
16 that expressly exempted California from the federal food
17 standards of identity?

18 A. I believe so, but I can't possibly confirm that.
19 I know there was legislation dealing with the California
20 system, and that was specifically on the regulation 102,
21 on the -- basically the higher make allowance in the
22 California product price formulas. I do -- yeah. But I
23 cannot -- I cannot positively affirm that there was that
24 provision that you referred to, but it does -- it sounds a
25 bit familiar to me, yes.

26 Q. So this, you know, United States code says what it
27 says. So, what -- absent that exemption and the
28 litigation that led to it brought by an out-of-state



1 processor, that's why the other 49 states don't have
2 different standards of identity, correct?

3 A. So you are -- you are saying that they are legally
4 prevented from doing so?

5 Q. Yes.

6 A. Yes. I don't know that but --

7 Q. Okay. So you would agree then that California is
8 an outlier. That is to say, you know, we've got 49 other
9 states. We have got California. Everybody else has the
10 federal standard of identity under FDA, correct?

11 A. Yes, the federal -- the FDA standards apply to all
12 the other states.

13 Q. So -- so under minimum regulated price theory for
14 USDA, should we not look at the FDA standard as applying
15 to everything other than California in order to think
16 about values of fluid milk?

17 A. Are you talking about a standard in the Federal
18 Order program?

19 Q. No, I'm -- I'm talking about the FDA standard of
20 identity, which we now agree is an SNF standard of 8.25%
21 for SNF, correct?

22 A. Correct.

23 Q. I really want to explore minimum price theory.
24 USDA is not attempting to set a market price, is
25 it?

26 A. In its pricing formulas USDA is attempting to set
27 a minimum price in order to operate the Federal Order
28 program, yes.



1 Q. By definition, a minimum price implies that the
2 market can operate above the minimum price, correct?

3 A. If it is a minimum price and not a maximum price,
4 then the market is always free to -- to exceed a minimum
5 price.

6 Q. And isn't it the case that if you operate as an
7 economist under minimum price theory, the greater risk
8 would be to set a minimum price that is above the market
9 price, correct?

10 A. If that minimum price is demonstrably above the
11 market price on a fairly regular basis, more than just
12 occasional, then that would be an issue.

13 The situation we're looking at here is, one, where
14 the minimum price has been allowed to fall progressively
15 further below, you know, where -- where we would think it
16 should be, based upon this particular issue at issue in
17 Proposal 1, the minimum skim milk -- Class III and
18 Class IV skim milk component composition standards. There
19 was a reason that USDA put those in originally in Federal
20 Order Reform, and it was designed clearly to reflect the
21 composition, maybe the minimum composition, of producer
22 skim milk.

23 Over the years, as I testified yesterday, the
24 minimum composition of producer skim milk has risen
25 progressively and now far exceeds.

26 So by that, by the terminology you are using, the
27 minimum price has become the -- what I would call the sub
28 minimum price, and we are seeking to re-establish it at a



1 minimum price level with respect to the particular issue
2 involved in Proposal 1.

3 Q. Sir, since 2000, have the sales of Class IV
4 products gone up?

5 A. Class IV products?

6 Q. Yes.

7 A. Generally, yes.

8 Q. Have the sales of Class III products gone up since
9 2000?

10 A. Yes, they have.

11 Q. Have the sales of Class II products gone up since
12 2000?

13 A. I'm not sure about that. Probably. I track
14 frozen products, which are a significant proportion of
15 Class II. They have been kind of stable to declining.

16 Q. So that's something --

17 A. Class II -- Class II, I'm not sure about.

18 Q. But -- but at least to your knowledge, of the
19 products you follow, Class II is stable to declining,
20 correct?

21 A. Somewhere around there, yes.

22 Q. And Class I has been going down, hasn't it?

23 A. That is correct.

24 Q. It goes down percentage terms of the total volume,
25 correct?

26 A. That's correct.

27 Q. And it is going down in absolute terms, correct?

28 A. Yes. In terms of a percentage of usage, basically



1 the market share of the milk produced in the United
2 States, a declining share of that milk has been going to
3 Class I.

4 Q. So because you brought it up, I'm going to jump to
5 a different place and come back.

6 Have you looked at the basis for USDA adopting
7 national yields for milk composition in Federal Order
8 form?

9 A. Have I looked at --

10 Q. Have you looked at that in your testimony?

11 A. The basis of that?

12 Q. Yes.

13 A. Yes. That was part -- looking at the decision
14 that implemented Federal Order Reform has been basically a
15 key foundation for all of the work we have been doing for
16 the last several years on Federal Order modernization.

17 Q. Do you recall, sir, a debate and discussion during
18 Federal Order Reform where you discussed informal
19 rulemaking, so we had a bit of a different proceeding than
20 this, correct?

21 A. Yes.

22 Q. Do you recall a debate and discussion about
23 whether or not for milk composition you should use
24 regional yields versus national yields?

25 A. I remember that generally. But -- but basically,
26 I looked at the final decision implementing Federal Order
27 Reform published in I believe it was April 1999, that I
28 assume is still the final decision on what would govern



1 all of the Federal Order Reform provisions, including the
2 current composition standard. So I have read that many
3 times. I have cited a key paragraph of that in my
4 testimony.

5 Q. Isn't it the case that USDA in the final decision
6 said, hey, there's parts of the proposed rule, the
7 recommended decision, that we're referring back to without
8 re quoting here? Do you recall that?

9 A. No, I don't.

10 Q. Okay. So regardless, Class III and Class IV
11 prices are set based upon these national composition
12 levels. But in the end, if you are a buyer of milk for
13 Class III, you pay on your actual components, correct?

14 A. Under component pricing.

15 Q. Under component pricing, correct?

16 A. That's correct.

17 Q. That's not true for Class I, is it? Class I is
18 paying on skim milk butterfat regardless if you're an MCP
19 order or a skim milk butterfat order?

20 A. That's correct.

21 Q. So --

22 A. And I state that as such in my testimony.

23 Q. Okay. So here I'm going to quote now from USDA in
24 Federal Order Reform: This pricing system eliminates the
25 need for regional yields based on regional differences in
26 milk composition.

27 Question 1: Do you agree, do you recognize from
28 that, that USDA said that there were regional differences



1 in milk composition?

2 A. I don't recall that, but there are indeed regional
3 differences in milk composition.

4 Q. And there still are today, correct?

5 A. Yes.

6 Q. Okay. The value of milk will be adjusted
7 automatically based on the level of components contained
8 in the milk in each order, even though the component
9 prices are the same nationally. This automatic adjustment
10 means that handlers will pay the same price per pound of
11 component but may have differing per hundredweight values
12 based on the milk component levels, creating equity in the
13 minimum cost of milk used for manufacturing purposes.

14 A. I don't recall that quote, but I assume it
15 referred to what handlers pay in the component pricing
16 orders.

17 Q. That statement does not apply to Class I milk,
18 does it?

19 A. The way you quoted it, I don't have -- I don't
20 have personal knowledge of that statement. But that --
21 the way you quoted it, it clearly applies to the
22 manufactured products.

23 Q. But regardless, for Class I milk in MCP orders or
24 skim milk butterfat orders, assuming I have quoted that
25 statement correctly, that one does not apply to Class I?

26 A. That is correct. Under Proposal 1, though, it
27 would still not apply to Class I, just because we are not
28 advocating the adoption of component pricing in any



1 orders. That is an issue that was specifically ruled to
2 be out of the scope of this hearing. And it's not a
3 position of National Milk and never has been. That is an
4 issue that needs to be decided order by order.

5 Q. But the problem is exacerbated by your provision
6 because you are going to increase that price. Correct?

7 A. Yes. There are a number of proposals that
8 National Milk is bringing to this hearing that would
9 increase the price of certain -- you know, the class --
10 class prices in the Federal Order formula, not
11 specifically to increase the prices but to -- as I
12 repeatedly stated in my testimony -- to bring the Federal
13 Order -- the critical Federal Order component prices,
14 formulas, into conformity with the current realities of
15 the structure of the U.S. dairy industry.

16 And over the years, the fixed coefficient nature
17 of most of the formula coefficients, coupled with the
18 evolution of the structure of the U.S. Dairy Industry,
19 changes in costs -- everything that I detailed
20 yesterday -- has caused the Federal Order component
21 pricing formulas to become increasingly misaligned with
22 the current realities. And their basic function was to
23 mirror as close as possible those realities so that price
24 discovery, through the end product prices back to raw
25 milk, could be made more efficient.

26 So the issue is, you're talking about nothing but
27 increasing prices.

28 Q. Well, you know, isn't it true that, you know, on



1 issue one and on issue four and on issue five, that is
2 exactly what National Milk is talking about doing with
3 respect to Class I and Class II, increasing prices?

4 A. In the short-term, it would have that effect.

5 But as I also took pains to point out in my
6 testimony, the overall effect on prices, you know, it's
7 still a relatively competitive market, is going to be
8 relatively small, because this is not -- this is not going
9 to have a -- and our -- and Scott Brown is going to
10 testify that this is not going to have a significant
11 increase in milk prices overall. In terms of individual
12 class prices, yes, there will be some difference.

13 Q. So let me unpack that.

14 A. But these are all cost-based increases.

15 Q. If -- in -- so that's another way of going back to
16 my question, that in the end the marketplace will set the
17 price, correct?

18 A. That is correct.

19 Q. So if that's going to be the testimony of
20 Dr. Brown, that it's going to be short-term increase but
21 ultimately not a significant increase, why are we doing
22 this?

23 A. The purpose of the Federal Order program is not to
24 necessarily support prices. We had a program called the
25 Dairy Price Support Program that had that intention.

26 The purpose of the Federal Order program, as I
27 understand it, is to assure that there is an adequate
28 supply of fluid -- of milk for fluid -- basically fluid



1 milk processing purposes, and to create orderly marketing
2 conditions in an industry that is very prone to disorderly
3 marketing conditions, totally apart from the question of
4 what the overall price of milk is as affected by the
5 system.

6 And again, I testified yesterday that the only way
7 that government intervention is capable of basically
8 altering prices is if it contains provisions that controls
9 the supply of the product, like milk, or any other
10 external thing that changes the cost of producing milk.
11 The Federal Order program does not really contain any
12 provisions that I'm aware of that fundamentally changes
13 the cost of producing milk at the farm.

14 Q. So, I'm still struggling here because I'm -- if,
15 as you say, at least as to Class II products you follow,
16 stable or falling, and Class I sales are just going down,
17 we quite clearly have an adequate supply of milk for fluid
18 use, right?

19 A. I cannot affirm that necessarily, because there
20 are parts of the country that are increasingly struggling.
21 That will be addressed by portions of our testimony on --
22 on a number of different -- of our -- some of our other
23 proposals.

24 Q. But this is the Federal Milk Marketing Order
25 system, and the statute is a national standard for
26 adequate supply, is it not?

27 A. Yes. But the statute implies that the system is
28 responsible for providing an adequate supply of milk in



1 all areas.

2 Q. Is that in the statute, in all areas?

3 A. That's the implication. It is a federal statute.

4 If the -- if the Federal Order program includes an area
5 that -- where the provisions are not providing for an
6 adequate supply of milk, then I would assume that that is
7 kind of the responsibility of the program.

8 Q. If you were to set a price sufficient to produce
9 all the milk the southeast needs, would you not just be
10 swimming in Class IV milk everywhere?

11 A. I don't know. I'd have to see an economic
12 analysis of that.

13 Q. All right.

14 A. But we're not -- we're not proposing to set a --
15 set a price level that would cause the nation to swim in
16 milk.

17 Q. But you are proposing to raise Class I prices
18 on -- which is the product that is constantly declining,
19 correct?

20 A. The effect of our package of proposals would be to
21 increase Class I prices in order to -- basically for the
22 purpose of more -- more fully aligning the dairy
23 product -- the Federal Order end product pricing formulas,
24 whose very purpose is to provide an efficient price
25 discovery mechanism, working through the end products back
26 to a value for raw milk.

27 Because the previous survey-based price discovery
28 processes, which were in many ways more efficient and more



1 direct, no longer were functional because the supply of
2 unregulated milk basically disappeared. So, the whole
3 purpose of our -- of our effort here has been to realign,
4 update, and modernize various aspects of those -- of the
5 end product pricing formulas to conform to the current
6 structure of the U.S. dairy industry.

7 Q. Sir, as an economist, if we wanted to modernize a
8 system where the fluid milk is the entity that -- or the
9 processors that basically are funding the system, if you
10 were going to modernize, why wouldn't we innovate in a way
11 to stop Class I sales from going down?

12 A. I'm assuming that the fluid milk processing
13 industry is doing everything it can to innovate in ways to
14 address that very problem.

15 But let me state a couple things.

16 My understanding of the purpose -- basic purpose
17 of the Federal Order program is to provide an adequate
18 supply of milk for fluid milk processing and to promote
19 orderly marketing. It is not an objective of the Federal
20 Order program, it is my understanding, to -- to address
21 the problem of declining consumption of any of the
22 products for which its prices provide a certain level of
23 regulation.

24 Q. Shouldn't USDA consider policy changes that it --
25 strike that.

26 At some level, shouldn't the Federal Order system
27 be concerned about whether we will have sufficient fluid
28 milk sales so that there will be a pool at all, say, in



1 the upper midwest?

2 A. I'm not sure I would say that it is the -- my
3 understanding is that the forces that are driving a
4 reduction in Class I consumption are fairly widespread,
5 and I'm not aware that the Federal Order program really is
6 designed to address that.

7 If that continues, yes, eventually it will make
8 the current Federal Orders as they are structured
9 unworkable, starting in the low utilization orders. That
10 is something that the industry is aware of and needs to
11 start addressing at some point.

12 Q. So, as you said yourself, you're confident the
13 Class I processors are seeking all the methods of
14 innovation they can, correct?

15 A. I would assume that they are very interested in
16 doing that. I work very closely with the dairy
17 management, the producer checkoff, and they are spending
18 lots and lots of resources on the fluid milk issue.

19 Q. And yet with all that innovation, with all those
20 resources, we still go down, correct?

21 A. Yeah. There are some problems that may not be
22 addressable, despite all of the resources and all of the
23 ingenuity brought to them.

24 Q. One thing we could try is having a price change
25 that would allow fluid milk to compete with bottled water
26 and so-called milk products that trade on our name; is
27 that correct?

28 A. Well, how low would that price have to be to make



1 that -- let's say we have an expert witness who will be
2 testifying in terms of how effective price changes are in
3 affecting consumption of fluid milk products. And the
4 evidence seems to be -- and this is you -- you express a
5 great interest in research studies. There have been an
6 immense amount of research studies looking at the question
7 of the sensitivity, technically known as elasticity, of
8 demand of fluid milk to changing prices. And the
9 overwhelming evidence is that it's -- that prices are not
10 a very effective way of -- of affecting consumption.

11 Q. Have any of those studies that you know of --
12 those studies that you know of all are doing dairy product
13 and dairy product comparisons, correct?

14 A. No, not -- some of them -- some of them can --
15 basically are looking at, you know, consumption of fluid
16 milk versus alternative beverages.

17 I would defer the question to our expert witness,
18 Harry Kaiser, who is going to testify on that very issue.

19 Q. All right. Is he going to testify during
20 components or later in the hearing?

21 A. I think he's testifying on another issue at this
22 point.

23 Q. Okay. Just wanted to -- thank you very much for
24 that.

25 All right. I want to go back to your comment
26 about disorderly marketing conditions.

27 So if our Federal Orders have been so prone to
28 disorderly marking conditions, then why is this the first



1 national price hearing we have had in over 15 years?

2 A. The first national pricing hearing?

3 Q. Yes. The last one was in 2007 for the 2008 make
4 allowance. That's --

5 A. Right.

6 Q. -- the last time, correct?

7 A. Yeah. Can you repeat your question again?

8 Q. If -- if we're so prone to disorderly marketing,
9 as you testified, then why did we wait 15 years to have a
10 hearing?

11 A. That's a good question. That is a -- that is a
12 question that I -- it is -- it is a result of many, many,
13 many, decisions, and it affects the issue of the make
14 allowance and many of the other issues we are looking at
15 here.

16 Again, I think I emphasized in my statement
17 that -- that the -- this growing misalignment between the
18 fixed nature of the product -- end product price formulas
19 and the dynamic changes in the dairy industry has gone on
20 way too long. I do not pretend to be able to answer why
21 that has occurred. But we are where we are here. It's
22 19 -- 2023. It is time to address them. If it has
23 been -- if that -- if this proceeding is coming late in
24 the game, so be it. But we are here to address these
25 problems --

26 Q. So --

27 A. -- rather than to go back and look at, you know,
28 what might have been.



1 Q. So in answer to my questions about adequate supply
2 of milk, you pointed to the deficit in the southeast. If
3 the southeast is so low on milk, isn't the answer regional
4 change?

5 A. Individual orders always have the opportunity to
6 petition the USDA for a hearing on individual issues, and
7 there recently was such a hearing in the southeast.

8 Q. And we're very careful not to talk about the
9 merits of that proceeding because that is a different
10 record. But I -- I agree, there's an open proceeding on
11 changes for orders 5, 6 and 7, correct?

12 A. Correct.

13 Q. Without going to the merits of that proceeding,
14 multiple component pricing was not proposed as part of
15 that proceeding, correct?

16 A. That's correct.

17 Q. Okay. I'm going back to the conversation about
18 consumers and the differences I think between products.

19 Through manufacturing processes for cheese, nonfat
20 dry milk, and butter, actual farm components are converted
21 into an equivalent yield of goods that those components
22 can make, correct?

23 A. Can you repeat that statement again, please?

24 Q. Okay. For cheese, nonfat dry milk, and butter,
25 the actual farm milk components are converted into an
26 equivalent yield of goods that those components can make,
27 correct?

28 A. That's correct. Yes.



1 Q. In other words, higher or lower components makes
2 more or less product, correct?

3 A. Makes more product and makes more value of those
4 higher components.

5 Q. But low SNF milk does not turn into low component
6 or substandard cheese, it just means it produces less
7 cheese, correct?

8 A. I have to defer that question to a cheese maker.
9 I think there's a -- there's a reason why cheese makers
10 fortify low -- low testing milk, so that it basically
11 provides for more efficient make process when they make
12 cheese. But I would defer that question. We have several
13 witnesses that are very familiar with cheese making. So,
14 they are the ones you should ask that.

15 Q. But if you have higher solids nonfat in fluid
16 milk, you don't get more milk in the bottle, do you?

17 A. Not in terms of just pure product yield. But that
18 does not necessarily mean you do not get higher value in
19 the end product.

20 Q. Okay. Well, part of that higher value in
21 Class III and IV may be that an entity might choose to
22 sell off their protein, correct?

23 A. Sell -- basically sell off their protein --

24 Q. Or buy, yes.

25 A. -- making it into products --

26 Q. Yes, yes.

27 (Court Reporter clarification.)

28 THE WITNESS: I assume so because, basically,



1 in -- analogous to dairy farmers, processors are very
2 effective and very efficient in making use of the raw milk
3 supply they get, and if they find that it serves their
4 advantage to -- to resell some of the components on the
5 open market as opposed to manufacturing them in their own
6 facility, they are free to do so. And I assume they do so
7 when it makes financial sense to them.

8 BY MR. ENGLISH:

9 Q. And going back to the previous answer, in fact, it
10 may very well be the case that cheese makers will fortify
11 their product. In order to fortify, they are buying
12 something from somebody, correct?

13 A. Yes.

14 Q. A fluid milk processor can't sell off protein, can
15 they?

16 A. Generally, no.

17 Q. Generally, no, or not at all?

18 A. Well, again, I'm not a fluid milk processor. I'm
19 not that familiar with that. But it is -- in terms -- in
20 terms of -- in terms of the raw milk they receive, they
21 would generally put whatever is -- whatever they use to
22 manufacture fluid milk products, they would retain all of
23 that protein, yes.

24 Q. Okay.

25 A. They do remove the butterfat, as you know.

26 Q. And that is because the FDA standard of identity
27 for milk provides for a minimum of 8.25 solids nonfat,
28 correct?



1 A. Uh-huh.

2 Q. That's a yes, not an uh-huh.

3 A. Yes.

4 Q. And it only permits adjustment to that milk by
5 removing butterfat, correct? That's the only adjustment
6 that FDA permits, correct?

7 A. That's correct.

8 MR. ENGLISH: Could we get the witness Exhibit 43,
9 please?

10 Your Honor, may I approach the witness?

11 THE COURT: You may, Counsel.

12 MR. ENGLISH: What I'm presenting the witness,
13 USDA has provided, courtesy -- actually more than one
14 copy -- of marked Exhibit 43.

15 THE COURT: That's fine.

16 MR. ENGLISH: This is the exhibit that was
17 produced at the request of National All-Jersey, which is
18 the protein test range by order 2022, which is the first
19 page, the other solids test range by order 2022, that's
20 page two, and then the nonfat solids test range by order
21 2022.

22 THE WITNESS: Yes.

23 BY MR. ENGLISH:

24 Q. Is that correct?

25 A. That is correct.

26 Q. You were here yesterday when USDA presented that
27 document?

28 A. Yes, I was, and I'm familiar with this document.



1 Q. Okay. So going back to my question about regional
2 yields, you know, there's a great variation here between
3 the vari- -- the variability -- the seasonal variability
4 very significantly among orders, correct?

5 A. On these graphs with those vertical axis ranges,
6 it appears that there is variation. Whether I -- I don't
7 have the context to say -- to label whether that's great,
8 but it is -- it exists.

9 Q. And then leaving aside the adjustments between
10 orders, in no order does it stay the same throughout the
11 year, does it?

12 A. No, it varies -- it clearly varies seasonally,
13 more so in some orders than others.

14 MR. ENGLISH: May I approach the witness to take
15 the exhibit back?

16 THE COURT: You may, Counsel.

17 BY MR. ENGLISH:

18 Q. So as we discussed a few minutes ago, high SNF
19 test milk does not turn into more fluid milk, correct?

20 A. Not quantitatively.

21 Q. Okay. But low SNF test milk would require that
22 you sell the low SNF milk as is, correct?

23 A. As long as it met the standard.

24 Q. Right. As an economist rather than someone
25 marketing milk, do you have any idea how a fluid milk
26 handler might be able to standardize their milk so they
27 could have higher protein unless it is the Fairlife
28 product?



1 A. In other words, can they legally fortify?

2 Q. Can they do so by standardizing -- given the fact
3 that all these milk comes in -- all these components at
4 different times of the year, how is a fluid milk handler
5 who wants to advertise their milk as higher protein going
6 to efficiently do that unless they carry on the cost of
7 the ultra-filtration process that Fairlife uses?

8 A. I would assume that's -- that's a correct
9 statement.

10 Q. So how are they going to get more value from that
11 milk?

12 A. Let me answer your question the following way. It
13 is going to be a little -- take me a little time.

14 In the process that National Milk has gone
15 through, which I outlined yesterday, the intensive studies
16 necessary to modernize the Federal Order system, we had
17 the active participation over many, many meetings,
18 hundreds of meetings, of a lot of experts, worked for our
19 member cooperatives, very familiar with all of these
20 manufacturing processes.

21 And we shared -- in connection with that process,
22 some proprietary information was either shared or
23 summarized, and I was -- basically, as a result of that,
24 and maybe some subsequent witnesses will testify to this,
25 the majority -- currently the majority of the fluid milk
26 processing capacity in the United States is owned and
27 operated by dairy cooperatives, and it is furthermore
28 owned and operated by dairy cooperatives who are members



1 of the National Milk Producers Federation.

2 Those members who operate -- I was basically
3 assured -- opera- -- own and operate the majority of the
4 fluid milk processing capacity in the United States joined
5 the National Milk Board of Directors in unanimously
6 approving the package of recommendations that I outlined
7 yesterday in my testimony, including Proposal 1.

8 I interpret that vote to mean that the majority of
9 the fluid milk processing capacity in the United States
10 considers, approves of, and considers increasing the
11 component composition standards for skim milk, Class III
12 and Class IV skim milk, including, for Class I, is
13 something they support and considers to have value.

14 So how that works down at the individual consumer
15 level is -- is basically a -- a more complicated question.
16 It's going to be addressed by various experts that we have
17 testifying subsequently. But I'm looking at it in that
18 holistic sense that I just outlined.

19 Q. Well, thank you, sir. I really appreciate that
20 answer because it -- it confirms some things that we
21 thought. And it also raises a very important distinction.

22 Under the Agricultural Marketing Agreement Act,
23 cooperatives are entitled to reblend -- R-E-B-L-E-N-D --
24 the proceeds of milk to their dairy farmers, correct?

25 A. Correct.

26 Q. To the extent I do have a cooperative member of
27 MIG, but to the extent our clients are proprietary
28 operators, meaning entities that are not owned by



1 co-ops -- do you understand that phrase?

2 A. Yes.

3 Q. Okay. They do not have the right to reblend, do
4 they?

5 A. They do not.

6 Q. And so the assumption that co-ops who operate
7 fluid milk plants would be in favor of this does not mean
8 that in the end they can't just move the money from the
9 left pocket to the right pocket, does it?

10 A. No. But it does not assume that they will do
11 that. Again --

12 Q. But they have that right?

13 A. They have the right. And the statement I made
14 previously is simply a quantitative statement, that the
15 processing capacity -- the majority of the processing
16 capacity in the United States, fluid milk, has approved of
17 this particular provision. And I assume it doesn't mean
18 that they are looking at somehow moving the money around,
19 but that they basically think that this is a -- a
20 positive -- positive update to the -- this particular
21 provision in the Federal Order pricing system.

22 Q. So they already have a majority of the processing.
23 They can reblend; my clients can't reblend. A logical
24 consequence of that could be, we're going to be at 80%
25 ownership by cost of fluid processing?

26 A. I don't know. That's up to -- that's up to the
27 cooperatives to decide what's in their best interest.

28 Q. Should USDA consider that question in terms of



1 whether or not one segment of the industry is being
2 disadvantaged?

3 A. You would have to direct that question to USDA,
4 whether they would interpret that as part of the mandate
5 in operating the Federal Order program.

6 Q. I'm prepared to change subjects.

7 Yesterday, in answer to some questions, and I
8 believe it was Mr. Rosenbaum, you -- you talked about
9 disorderly marketing, and you used the phrase that, you
10 know, depooling makes producers unhappy.

11 Do you remember that?

12 A. Yes. And there will be subsequent tes- --
13 witnesses testifying to that extent.

14 Q. Yeah. I -- I understand.

15 Now, in your own testimony and the testimony of
16 others who support, you have referenced the fact that in
17 your view, that the failure to update these components,
18 has contributed to negative PPDs, correct?

19 A. Declining and increasingly negative PPDs, yes.

20 Q. And for the record, that is a producer price
21 differential, known in short as PPD.

22 All right. Isn't it true that negative PPDs also
23 make producers unhappy?

24 A. It tends -- yes, it tends to.

25 Q. So are negative PPDs, because it makes producers
26 unhappy, disorderly marketing?

27 A. It is an indicator of disorderly marketing because
28 it indicates that the distance between Class I and the



1 manufacturing classes has been shrinking. And, again, one
2 of the fundamental purposes of the Federal Order program
3 is to -- to regulate and ensure that Class I prices will
4 be -- will have sufficient differential above the
5 manufacturing products, because when they don't have that
6 differential, there basically is -- is little to no value
7 in federal milk order pools to share.

8 Q. Is that what USDA has said about negative PPDs?

9 A. I don't -- I don't -- USDA does not specifically
10 talk about PPDs. I know they report them. But in my
11 mind, PPDs are -- are basically an indicator of the
12 difference between Class I prices and the manufacturing
13 prices.

14 Q. Do you agree with the following statement, quote:
15 A negative PPD does not mean that there is less total
16 revenue available to producers?

17 A. Yes, I will agree that PPDs are misunderstood in
18 many cases by producers.

19 Q. Do you agree with the following statement: A
20 negative PPD does not mean that there is less total
21 revenue available to producers; it often means the
22 Class III component values are high relative to Class I
23 prices?

24 A. Yes, that is correct.

25 Q. Do you agree with the following statement:
26 Because component values are the biggest portion of a
27 producer's total revenue, high component prices, coupled
28 with negative PPDs, often result in higher overall revenue



1 to producers than when component prices are lower and PPDs
2 are largely positive?

3 A. I'd have to work out some quantitative examples,
4 but my general understanding of Federal Order pooling
5 would tend to agree with that statement.

6 Q. And would you agree that a negative PPD -- that
7 when you have negative PPDs, regulated FMMO prices should
8 not block market signals resulting from negative PPDs?

9 A. I'm not sure I fully understand that question.

10 Q. All right. Those following statements are from
11 USDA's final decision in Milk in California; Recommended
12 Decision and Opportunity to File Written Exceptions on
13 Proposal to Establish a Federal Milk Marketing Order found
14 at 82 Federal Register 10634. I can ask for official
15 notice now, but we're going to have a list at the end of
16 the proceeding.

17 So if negative PPDs cause depooling, what PPDs are
18 in USDA's view a sign the system is working? How then is
19 depooling disorderly marketing?

20 A. You keep dwelling on PPDs. As I explained, they
21 are basically an indicator of situations in which
22 depooling can occur. Depooling, for whatever reasons, and
23 it's clear why producer -- why -- why non-fluid processors
24 depool milk, choose to depool milk when it's in their
25 financial interests, if the regulations permit it.

26 But it appears to be the depooling of milk is an
27 indication of disorderly marketing, and it's certainly
28 disruptive to producers. And, again, we will have



1 testimony to that -- to that extent. To -- to that
2 effect.

3 Q. So, just to be clear, you say, I keep dwelling on
4 PPDs. But the testimony of National Milk is that the fact
5 that components are not being paid out on Class I is
6 contributing to PPDs.

7 So I'm not the one dwelling on it, you are, right?

8 A. We are -- you know, we -- our tes- -- my testimony
9 indicates that, yes, increasing the skim milk component
10 factors in Class III and IV would basically contribute to
11 higher PPDs.

12 Q. So USDA introduced an exhibit yesterday that
13 provided, starting in 2016, not only the total estimated
14 depooled milk, but the volume of depooled milk estimated
15 from 9(c) cooperatives.

16 Did you look at that table at all?

17 A. Not in detail, no.

18 Q. If I were to represent to you that between 2016 to
19 2022 the annual average of depooled milk by 9(c) handlers
20 was greater than 78% of the total depooled milk, would you
21 have any reason to disagree with me?

22 A. Not upfront, no.

23 Q. So are cooperatives causing disorderly marketing?

24 A. Cooperatives have -- cooperatives, just like any
25 other organization -- proprietary organizations, have the
26 right to depool milk when it is in their financial
27 interest. When it occurs, basically, the -- the revenue
28 will continue to accrue to their own individual members.



1 But it can cause -- yes, it can cause disorderly marketing
2 for those cooperatives and those non-cooperative companies
3 that are basically not able to depool.

4 Q. Wouldn't it be more reasonable to conclude that
5 depooling is a natural consequence of minimum pricing and
6 pooling and not by itself evidence of disorderly
7 marketing?

8 A. Can you repeat that question there, please.

9 Q. Would it not be more reasonable to conclude that
10 depooling is a natural consequence of minimum pricing and
11 pooling and not by itself evidence of disorderly
12 marketing?

13 A. It can be both. I would say it is a consequence
14 of those -- a natural consequence of those provisions.
15 But that does not mean it is not disorderly marketing.

16 Q. Let me turn to a couple of specific questions from
17 your testimony.

18 You discuss on page 8, Figure 1, and you're
19 comparing various consumer pricing indices.

20 So first, I believe you are saying that dairy
21 farmers are receiving 31% of the retail dollar, which is
22 higher than other food beverage products, correct?

23 A. It's higher than the -- well, it is relatively
24 high by the standards of -- of most food products, to my
25 understanding. It is not the highest, but it is fairly
26 significant. My guess is if you did that similar analysis
27 for a box of corn flakes, you would find the value of the
28 commodity corn to be much lower than 31%.



1 Q. I'm not sure I can resist. So corn flake sales
2 down, milk sales down. But anyway.

3 A. They appear to be related.

4 Q. So one issue as you look at that and recognizing
5 that dairy farmers are receiving 31% of the retail dollar,
6 isn't it the case that except in states that have their
7 own restrictions, that many retailers sell milk as loss
8 leaders.

9 A. Milk appears to be a popular loss leader product
10 because so many people buy it, and it draws -- there's a
11 reason why the dairy cases, I guess legendarily, often are
12 in the back of the store.

13 Q. Opposite side of the bread. I'm agreeing with
14 you, and I'm saying the opposite side of the bread. So
15 bread over there, milk over there.

16 A. Yeah. Like dairy farmers and dairy processors,
17 retail estab- -- food sales establishment operators are
18 very clever at doing their jobs.

19 Q. You repeatedly -- and I realize this covers not
20 just this issue, but other issues -- but you repeatedly
21 talk about the value of producer milk and the value to
22 processors needing to be reflected in the value of the
23 price.

24 Does any of that correspond to the market for
25 organic milk?

26 A. Well, my -- my understanding is the value of
27 organic milk in -- in the eyes of the consumers has to do
28 with the -- you know, basically the -- the process by



1 which it is produced, like all organic food products. And
2 I -- and consumers have their own perceptions of that
3 additional value and react accordingly.

4 Q. But isn't it true that organic milk is priced
5 using non-classified pricing that is higher than the
6 Federal Order minimums, correct?

7 A. Looking at the supermarket sales, yes, organic
8 milk seems to be priced -- priced higher.

9 Q. I'm not talking about the sales. I'm talking
10 about the dairy farmers. Don't the dairy farmers already
11 get the value of organic milk out of the marketplace
12 because they are getting a higher price in the Federal
13 Order and it's non-classified?

14 A. I have not seen producer pay stubs to that effect,
15 but I'm assuming that in order to induce dairy farmers to
16 bear the additional cost of producing organic milk, they
17 need to be paid a higher price.

18 Q. As the economist for National Milk Producers
19 Federation for 38 years, you don't know that that's the
20 case?

21 A. I have not done -- I have not done surveys of
22 producer -- producer pay prices, but I assume that that's
23 the case. I don't need to verify everything unless I'm
24 particularly using it in a -- you know, in an analysis.

25 Q. Well, assuming that is the case, if your proposals
26 are adopted, doesn't that just extract value from organic
27 milk into the conventional pool?

28 A. To the extent that organic milk participates in



1 the pools, there would -- there would be additional --
2 additional revenue paid into the pools from -- from
3 organic milk sales, as I understand the way the system
4 works for --

5 Q. Well, you said to the extent they participate in
6 the pools. It is not exactly as if organic fluid milk has
7 a choice, does it? It's going to participate in the
8 pools, right?

9 A. It does, yes.

10 Q. Back to the beginning of your testimony on page 2,
11 and this is more clarifying questions, because you and I
12 have some history here. I don't mean together
13 necessarily, but we have a lot of history here going back.

14 In page 2, second line of second paragraph, you
15 quote: Where we are in the Federal Order is a hybrid
16 product of Federal Order Reform rulemaking and
17 Congressional action.

18 Do you see that?

19 A. Yes.

20 Q. Okay. So Federal Order Reform itself was the
21 result of Congressional action, correct?

22 A. Federal Order Reform was mandated in the '96 Farm
23 Bill, yes.

24 Q. And USDA issued a proposed rule in 1998, correct?

25 A. Correct.

26 Q. And then they issued what their -- was their plan,
27 the final rule, in the late summer, early fall of 1999,
28 correct?



1 A. I don't remember the exact dates. But, yes.

2 Q. I -- I seem to recall a Congressional hearing
3 around the time of a hurricane, but anyway.

4 And the end product, though, was that Congress, as
5 you say, Congress, Congressional action, however you want
6 to phrase it, intervened and the final-final rule from
7 December of 1999 was a mandate by Congress as to the
8 Class I price surface, correct?

9 A. That's correct.

10 Q. USDA had in the proposed rule a preferred
11 different Option 1B, correct?

12 A. That's correct.

13 Q. And Option 1B would have set a dollar for base
14 class differential, correct?

15 A. I don't remember the exact number, but I recall
16 the Option 1B was structured so that on average,
17 throughout the country, the Class I differentials averaged
18 the same as under Option 1A.

19 Q. But nonetheless, they -- they started in a lower
20 base, if that's what Option 1B is in the record?

21 A. As I recall, the Option 1B, as it was developed by
22 the transportation model operated at that time by Cornell
23 University, produced a differential surface that was --
24 had a -- a lower slope, let's call it, geographically than
25 Option 1A, and a lower overall average, and that the
26 Option 1B price surface was adjusted upward to equal on
27 average over all the 3,000-plus counties that those
28 differentials applied, to which those differentials



1 applied, so that the two were the same in their average.
2 They differed primarily by the difference in slope.

3 I never understood why USDA produced two options.

4 Q. Nonetheless, they did, correct?

5 A. They did.

6 Q. And nonetheless, they had a preference, correct?

7 A. They had a preference in that they -- they chose
8 to produce Option 1 -- 1B in that recommended decision.

9 Q. All right. I'm really almost done.

10 And I -- I started at the end of Mr. Rosenbaum's
11 exam, and now I want to go back to the beginning. And I
12 just want to make sure I understand what your knowledge is
13 as opposed to the knowledge of a future witness.

14 And so I'm referring to the bottom of page 5 and
15 the top of page 6. The data to be used are USDA's average
16 component tests of producer milk in all Federal Orders
17 during calendar year 2022.

18 A. That's correct.

19 Q. As opposed to my having a conversation, likely
20 later today, with Mr. Covington, can you point to me where
21 that data comes from, where that answer comes from?

22 A. I computed this several times. I believe the most
23 recent one where I looked at it was -- was from -- from an
24 early responsive data request for -- originally from
25 National All-Jersey. It was the most complete data I saw
26 that included all the fat/skim order results, which are
27 not published on the USDA website.

28 I subsequently conferred with Mr. Covington who



1 was -- basically was tracking the latest data from USDA,
2 including on the exhibits yesterday, and reconfirmed those
3 numbers.

4 Q. Those numbers had a lot of footnotes to them,
5 didn't they?

6 A. I believe so. But we -- what we were looking to
7 do there was to establish an initial increase. We were
8 not wedded to those numbers, because if there's better
9 data became available, those numbers could easily be
10 adjusted.

11 The main -- main thing we were looking at was to
12 make the long overdue increase from the current much lower
13 standards to something that was approximating what the
14 current composition of milk was. Whether or not we would
15 fight over, you know, you know, a two-decimal-place
16 difference if new -- if new data became available, that
17 was not the -- that was not the particular issue.

18 The issue is to basically initially reset those
19 skim milk comp- -- component composition factors to
20 something that was close to the current composition of --
21 of producer skim milk and to provide a mechanism for
22 further adjustments based on data as computed by USDA.

23 You will note that we did not basically mandate
24 any particular level of increase. We did provide a
25 minimum so that, basically, what I would call nuisance
26 level increases, you know, would -- would not occur.
27 Because, as you know, our proposal was very respectful of
28 not disrupting risk management positions which have



1 subsequently become very important to the dairy industry,
2 whereas in the year 2000 they were probably less so.

3 Q. Well, so speaking of better data, you propose
4 using, you know, the national average as received in
5 all -- in orders, which would include in Class III and
6 Class IV, correct?

7 Your decision -- you are not distinguishing
8 between the milk actually received by Class I as opposed
9 to Class III and IV plants, correct?

10 A. Correct. It is basically the national average
11 test for -- for producer skim milk.

12 Q. Given -- given multiple component pricing, and
13 it's been around for a while now, as an economist, is it
14 not reasonable to conclude that rational actors, like
15 dairy farm cooperatives seeking to maximize the value of
16 producers' milk, would direct hire solids nonfat milk to
17 Class III and IV operations as opposed to Class I?

18 A. They could do that, yes.

19 Q. Shouldn't they be doing it, if they can?

20 A. If they can, and I presume -- and it was
21 economic -- in their economic interest to do so, they
22 would probably want to do so under the current -- current
23 provisions.

24 Q. And the current provisions, which you do not seek
25 to change, would continue to price Class I, whatever the
26 base component -- would continue to price Class I on skim
27 milk and butterfat, correct?

28 A. Say that again.



1 Q. In the MCP orders, where Class III and Class IV
2 achieve a higher price for the dairy farmer, if they do
3 higher protein or solids milk to the Class III/IV, you are
4 not seeking to change the Class I side from what it is
5 today based on your answer to the previous question?

6 A. Can you define what you mean by change the Class I
7 side?

8 Q. All right. In multiple pricing orders, let's say
9 a dairy farmer -- or a dairy farm cooperative has high
10 solids milk -- 50% of its milk is high solids and half of
11 its milk is lower solids. And it has two customers: One
12 customer is a Class III cheese operation, and the other is
13 Class I.

14 That rational cooperative is going to send that
15 high SNF milk to Class III, correct?

16 A. You would expect that to occur, yes.

17 Q. And send the lower SNF to the Class I, correct?
18 Yes?

19 A. Yes.

20 Q. Okay. And since you are not changing, not
21 proposing changing, and this hearing doesn't have open,
22 the fact that that exists, that it is to say MCP on
23 Class III/IV, skim milk butterfat on Class I, that
24 incentive won't change, correct?

25 A. That's under the current -- the current
26 arrangement.

27 Q. But that -- you are not proposing to change that
28 current arrangement, are you?



1 A. In terms of requiring fluid processors to pay in
2 on components on Class I, no, we're not -- we are
3 proposing a system in which Class I processors would pay
4 into the pools on the basis of increased skim milk
5 component composition factors, yes.

6 Q. So why should Class I handlers pay based upon
7 order value as opposed to what they are actually getting?

8 A. So what do you mean by what they are actually
9 getting?

10 Q. We just talked about rational actors in MCP orders
11 sending high SNF milk to Class III plants, correct?

12 A. They would have a tendency to send their higher
13 Class III -- their higher testing milk to Class III uses,
14 yes.

15 Q. And nothing in your proposal, if adopted, would
16 change that incentive, would it? To send it to Class III
17 as opposed to Class I, correct?

18 A. Yes. That would be correct.

19 Q. And so my question is, why then are you proposing
20 to use the national order average, which by definition the
21 incentive in MPC orders is to send it to cheese as opposed
22 to what Class I plants actually get just like Class III
23 and IV?

24 A. When you say what Class III -- Class I plants
25 actually get, you mean, the components that they get in
26 the milk?

27 Q. Yes.

28 A. Well, let me extend your question. What you are



1 suggesting is that maybe a better arrangement would be
2 setting the skim milk component standards at a lower level
3 for Class I versus Class III or Class IV. How would that
4 work as a system?

5 Right now, the Class -- Class I is established on
6 the basis of a mover that uses Class III and Class IV in
7 various combinations, previously the higher of, currently
8 the average of plus 74 cents. We are proposing obviously
9 the return to the higher of.

10 But still under either mover, basically, based on
11 Class III and Class IV prices that are computed by the
12 same formula under the current system. We are not
13 proposing to cre- -- we would not -- we considered but
14 decided not to propose the system whereby the Class III
15 and Class IV advanced pricing factor formulas would differ
16 in their component composition from those for the actual
17 Class III and Class IV. We have considered that to be
18 basically would -- would create, you know, disorderly
19 marketing on its own.

20 So we -- our proposal continues the system where
21 the Class III and Class IV formulas are the same, in terms
22 of their skim milk formulas, are the same, whether it's
23 the monthly class prices or the advanced skim milk pricing
24 factors. And that's very clear in the regulatory language
25 that I provided yesterday.

26 So we -- we specifically rejected the idea of
27 having a different set of -- of skim milk component
28 composition factors for Class I milk versus the



1 manufactured products.

2 Q. So in MCP orders, at least, where the incentive
3 will be to ship the higher solids nonfat to Class III and
4 IV operations, rather than a minimum pricing system that
5 recognizes that Class I isn't getting that value under
6 that incentive, you are just going to charge them more,
7 correct?

8 A. I do not agree with your premises that they do not
9 get higher value out of the -- out of the higher solids,
10 no.

11 Q. They are not getting all that value, are they, if
12 the incentive is to ship it to M- -- to cheese plants?

13 A. They are getting -- they are getting the value of
14 the higher solids milk that is in -- basically in the
15 pools.

16 Q. But they didn't get it themselves, did they?
17 Somebody else got it?

18 A. Well, when you say "it," what do you mean --

19 Q. I'm talking about --

20 A. -- because.

21 Q. -- the incentive in MCP orders to ship the higher
22 solids nonfat to a Class III or IV plant, and you agreed
23 that that's the case.

24 A. Well, let's say in a particular order that -- or
25 within a particular co-op, the lower testing milk,
26 currently, is higher than the lower testing milk that
27 would have been available to do, you know, that -- that
28 differential shipping that you described back in the year



1 2000.

2 So the value of the milk, even at the lower
3 testing milk, that is going to, presumably in your thought
4 experiment, Class I processors, is considerably --
5 probably considerably higher than the current skim milk
6 component composition factors that apply to all products.

7 Q. It may be somewhat higher, but if they are not
8 getting, because of the incentive, all of that value, you
9 have gone the full amount, correct?

10 A. That would -- that would be a consequence of
11 Proposal 1, yes.

12 Q. Thank you.

13 MR. ENGLISH: I have no further questions.

14 THE COURT: Thank you, Counsel. We have been
15 going for about an hour and a half. Do we need a break?

16 All right. Let's -- anything preliminary before
17 we take a ten-minute break?

18 Seeing nothing, let's come back at 20 of 10:00, at
19 9:40.

20 (Whereupon, a break was taken.)

21 THE COURT: Back on the record.

22 We have -- the witness has resumed the stand.

23 We have further cross-examination?

24 CROSS-EXAMINATION

25 BY MR. SMITH:

26 Q. Good morning, Dr. Vitaliano.

27 A. Good morning.

28 Q. I'm Dan Smith. I represent the Maine Dairy



1 Industry Association.

2 MDIA, just for context, represents all the farmers
3 in the state of Maine cooperative and independents.
4 Primarily serves to supply the two fluid milk plants in
5 Portland, and those two plants essentially provide the
6 fluid sales in Maine, but they also provide a not
7 unsubstantial portion of the fluid market in Boston. So
8 the primary concern of MDIA is the pay price.

9 If you refer back to yesterday, you testified --
10 you testified yesterday that the premiums in the
11 marketplace had -- had largely disappeared in recent
12 times.

13 Do you recall testifying to that effect?

14 A. That's my understanding, and that's been the
15 consistent report that I have gotten from our members who
16 are actually marketing milk.

17 Q. So -- and the net consequence of that is that the
18 Federal Order price becomes the pay price to the producer?

19 A. It is essentially becoming the pay price to
20 producers.

21 Q. As a result, the primary concern of MDIA farmers
22 is the pay price, and hence, in -- in this proceeding,
23 impact of the proposals on -- on the Federal Order price.

24 Does that track?

25 A. Yes.

26 Q. I'd like to also refer to your testimony yesterday
27 with Mr. Miltner, and, you know, greatly appreciated you
28 indicated that in addition to testifying to the specific



1 issue of this proposal, your testimony was also intended
2 to provide an overall summary and context for National
3 Milk's submission; is that correct?

4 A. That's correct.

5 Q. So in -- in that regard, I'd like to refer you to
6 page 5 of your testimony.

7 You summarized the functions of the Federal
8 Orders, the second being to promote orderly marketing, up
9 at the top.

10 A. Yes.

11 Q. So, can you just -- this morning you said --
12 testified that -- that in substance National Milk was
13 responding to the fact that we had -- and I don't mean to
14 characterize it, you can correct me -- that we had reached
15 a point of having a sub minimum price.

16 Can you just describe that again, what you meant
17 by that?

18 A. Again, the purpose of -- the purpose of the
19 current skim milk composition factors in Class III and
20 Class IV milk is to pro- -- is to basically specify the
21 average composition of producer skim milk in the country.
22 Those factors reflected roughly what the composition was
23 at the time of Federal Order Reform. They no longer do.
24 They are, basically, in that sense, for the -- for those
25 prices, you know, producers get paid based on those,
26 particularly in the fat/skim orders and for all Class I,
27 those are prices that are below the current value of the
28 components in the milk.



1 Again, the Federal Order component pricing
2 formulas establish a value for the individual components.
3 The skim milk composition factor establish standardized
4 levels of those components in producer skim milk, and the
5 current levels of those components who are valued by the
6 component pricing formulas are basically significant
7 under- -- significantly understated because the level of
8 components in current producer skim milk are significantly
9 higher than provided by the current component -- skim milk
10 component pricing factors.

11 To that extent, I would characterize those -- the
12 current skim milk component composition factors that
13 Proposal 1 addresses as substandard.

14 Q. So --

15 A. Sub minimum.

16 Q. -- your characterization then involved just
17 Proposal 1, or is it fair to broaden it out to that --
18 that given -- over time, that the lack of adjustment to
19 the other factors that make up the producer pricing, or is
20 that a --

21 A. The other factors that are subject of our other
22 proposals will have their own -- you know, there's a
23 common theme that the current factors are outdated. They
24 are outdated in different ways that will be addressed when
25 those proposals are addressed.

26 Q. Okay. Then I guess my question is a little bit
27 broader. Referring back to the issue of disorderly
28 marketing, I am interested in your assessment of the



1 relationship between the level of producer price with all
2 of the factors involved and disorderly marketing.

3 How does the level of price up and down affect
4 disorderly marketing in the system?

5 A. The level of -- are you talking about price
6 volatility?

7 Q. Increase and decrease, not so much the volatility
8 of the price, but I guess, cutting to it, if there's a
9 decrease in the price, as you've described with
10 Mr. English today, the relationship between the market
11 price and the minimum Federal Order price, there is a
12 balance to be struck there.

13 So at what point in relation to the market price
14 and the minimum price, as it has degraded over the years,
15 does that affect disorderly marketing?

16 A. Yeah, I'm not sure I can respond to the question
17 as you phrased it, because the -- the term disorderly
18 marketing that I have used in my testimony pertains
19 primarily to the decreasing distance between Class I
20 prices and the class prices for manufacturing products.
21 That -- that difference which is -- needs to be at a
22 certain minimum level to -- basically for the Federal
23 Order system to work, has been decreasing and increasing
24 the -- the incentives to depool milk which is what is
25 basically creating the disorderly marketing condition
26 in -- in the context of Proposal 1.

27 Q. Well, in -- in the context of Federal Order 1,
28 depooling's not so much an issue, correct?



1 A. Federal Order 1 is unique, almost, amongst orders
2 in that they have -- Federal Order 1 has a very effective
3 mechanism to discourage depooling. The other Federal
4 Orders do not have that. The Pacific Northwest order has
5 kind of a version of that. But Federal Order 1 is
6 relatively unique in that regard.

7 Q. But how about with regard to the disorderly
8 marketing of the supply of milk with reduction of producer
9 pricing and procedures going out of business, which in the
10 southeast, at least, is contributing to pressure on the
11 milk supply.

12 So in that sense, is there a direct correlation
13 between producer pricing and disorderly marketing?

14 A. Well, in terms of the southeast where they --
15 basically producers are not receiving the true component
16 value of any of their milk, you could argue then that the
17 Federal Order pricing formulas are contributing to
18 basically the significant pressure on the milk supply in
19 those areas and the producers are increasingly going out
20 of business in the area.

21 There are many reasons for that. But the -- the
22 adjustment in prices that we're proposing would -- would
23 have some marginally greater effect in the southeast, but
24 in those southeastern orders the amount of -- of
25 non-Class I milk is relatively small. So the impact of
26 increasing under Proposal 1 the skim milk composition
27 factors in Class I would have a much more significant
28 effect on the producer price down there, yes.



1 Q. But if you -- if you track from the experience in
2 the southeast to the northeast, one commonality is -- is
3 that in the northeast the distance that milk has to move
4 from the farms to the fluid milk plants has become
5 increased significantly; is that a fair statement?

6 A. Based upon our experience in this process I
7 described, the distance that milk travels from farms to
8 plants has been increasing pretty much nationwide.

9 Q. And is it reasonable to say that there can be
10 found a direct correlation between the price to producers
11 and that result with the loss of farms closer --
12 admittedly there's lots of other factors involved, but
13 isn't it fair to say that there is some correlation
14 between farm price and the exit of farms closer to the
15 plants?

16 A. I don't have specific knowledge of whether the
17 actual geographic location of plants -- of farms with
18 respect to plant location, whether that -- what -- what
19 effect that has on the exit of dairy farms. I'm not --
20 that is not a -- something that I'm that familiar with.

21 Q. Okay.

22 A. The actual location as opposed to the, you know,
23 financial implications for -- for viable farming
24 operations.

25 Q. Where I'm -- where I'm aimed, and maybe I'm not
26 going to get there on a straight line with you, it could
27 be -- but on page 7 of your testimony, at the top -- and
28 again, to your point that your discussion today and



1 yesterday is more summary in nature, you indicate that
2 Dr. Brown will be testifying with regard to the impact of
3 adopting National Milk's five proposals and, quote, his
4 analysis will show that these proposals will have a
5 modestly positive impact on the average price of milk
6 received by farmers, which will dissipate fairly rapidly.
7 The resulting average prices are expected to converge
8 within a few years to their baseline levels, i.e., levels
9 expected to prevail in the absence of any order changes.

10 So my -- my essential question to you, that
11 assumes that all five proposals are adopted; is that
12 correct?

13 A. That's correct.

14 Q. Your -- the petition includes basically summary
15 representations of the impact of each proposal on the
16 producer pay price?

17 A. I believe Dr. Brown will testify to that -- to
18 that extent.

19 Q. And is it fair to say that some of the proposals
20 will increase the producer price and some will decrease
21 the producer price?

22 A. Yes.

23 Q. So what -- what happens if some of the proposals
24 that have the effect of increasing producer prices are not
25 adopted to your summary statement on --

26 A. That will change that conclusion that I -- that I
27 stated Dr. Brown would testify to.

28 Q. Within that consequence --



1 A. Yes.

2 Q. -- of reducing --

3 A. All of my statements and all of Dr. Brown's
4 analysis in terms of the summary are in the assumption
5 that the entire package is National Milk's produce --
6 National Milk's proposals are adopted.

7 Q. And that -- that really leads to what is my, you
8 know, primary question for you in summary. Is it a
9 premise of -- of National Milk's submission that the
10 proposals need to be adopted as a package? You stated,
11 you know, in a number of places that they're presented as
12 an integrated comprehensive package.

13 But what happens on the backside? Is it National
14 Milk's proposal they all be adopted as a package or can
15 they be adopted piecemeal or should they -- I'm sorry to
16 repeat myself, your Honor, but all to be adopted
17 collectively or not at all or some can be adopted but not
18 others?

19 A. Our position is, obviously, that they all be
20 adopted together as a package, and our board of directors
21 voted to approve this package, my understanding, on the
22 assumption that there was an integrated package consisting
23 of proposals that would have some offsetting effects.

24 But the fundamental purpose of all of our
25 proposals is to update the current component end product
26 pricing formulas that are designed to basically mimic the
27 price discovery transmission process from end product
28 prices to producer prices to basically update those



1 technical mechanisms in the various formulas to more
2 closely resemble the current dairy industry structural
3 features.

4 Q. So, I'm trying to put one and one together.

5 If some of the proposals are not adopted, that
6 would have the consequence of reducing producer pricing.
7 Do you think that the result of that would be to
8 contribute to disorderly marketing?

9 A. Yes. It would depend on -- you know, there would
10 be various different mixes in which that could occur. But
11 my guess -- my -- I would -- I would agree with your
12 statement, yes.

13 Q. Thank you.

14 Okay. Just to switch in a couple quick questions.
15 Ms. Coale informed us yesterday that the economic analysis
16 is not going to be available until the end of the hearing,
17 if at all. And -- and the result of that is the
18 importance of the evidence submitted by each of the
19 proponents in terms of the impact of their proposals.

20 So is Dr. Brown -- will he be providing
21 evidentiary data in support of the summary statements in
22 the petition? Will it be laid out in more specific
23 detail?

24 A. I believe, you know, Dr. Brown -- I'm -- Dr. Brown
25 will testify to the impact of the package, and he will
26 address the specific components.

27 Q. With -- with supporting data?

28 A. Well, with -- with the data in his analysis, yes.



1 Q. Good. Okay.

2 And will he be providing an analysis of the impact
3 of the overall adoption of all five proposals --

4 A. Yes.

5 Q. -- so that we'll be able to assess the impact if
6 some or all of them are not --

7 A. That's my understanding, yes.

8 Q. Okay. Very good.

9 MR. SMITH: Thank you. That's what I have, your
10 Honor.

11 THE COURT: Thank you, Counsel.

12 Any further cross of this witness?

13 Yes.

14 MR. MILTNER: Ryan Miltner, counsel for Select
15 Milk Producers.

16 CROSS-EXAMINATION

17 BY MR. MILTNER:

18 Q. Dr. Vitaliano, I just have a couple of questions
19 to follow up on Mr. Smith.

20 National Milk's package of five proposals, there
21 are other proposals in the hearing, some of which are very
22 close to or address the same issues as National Milk,
23 correct?

24 A. That's correct.

25 Q. If, for instance, one -- let's say National
26 All-Jersey is proposal number two, if the department were
27 to want to adopt that proposal instead of number one, and
28 the rest of National Milk's, would National Milk support



1 that or is your position that it's all five of these or
2 none of them?

3 A. Under that hypothetical, National Milk would have
4 to examine the resulting package and decide whether it was
5 still good enough and whether they would support it. I
6 can't speak for our board of directors.

7 Q. Okay.

8 A. And I can't ultimately speak for how the dairy
9 farmers in each of the orders would react to something
10 different than our proposal, our package of proposals, in
11 a referendum on the orders.

12 But let's say we are -- we are proposing this
13 integrated package of recommendations. We have -- we feel
14 we have very strong support for each of them. Whether we
15 would say, you know, you change one decimal place in any
16 of our proposals we're -- you know, our support would
17 disappear, I can't speak to that either. What I'm saying
18 is that we are -- we are proposing -- we are supporting
19 our package of proposals. We feel they have been, you
20 know, very responsibly worked on and -- and can be -- can
21 be justified, and we're here to present that evidence.

22 Q. But for -- so, for instance, if -- if the Class I
23 price surface, which we're not talking about that proposal
24 right now, but if -- if that piece were not included,
25 National Milk would not support the other four components
26 being adopted?

27 A. I can't speak for National Milk under that
28 hypothetical.



1 Q. Okay.

2 MR. MILTNER: Thank you.

3 THE COURT: Any further cross?

4 I see Ms. Taylor is turning on her microphone
5 or --

6 MS. TAYLOR: Uh-oh. Good morning.

7 THE COURT: We do have AMS goes last, so I assume
8 that anyone else -- I'm not seeing anyone else wanting to
9 go, so it is your turn, AMS.

10 CROSS-EXAMINATION

11 BY MS. TAYLOR:

12 Q. Good morning. I just have a few questions. I
13 think most of our questions will probably be from
14 Mr. Covington later.

15 As we understand your proposal, you are not
16 proposing to increase the butterfat standard of 3.5%; is
17 that correct?

18 A. Well, the butterfat standard of 3.5% is -- my
19 understanding, is basically just a convenience for stating
20 class prices, you know -- you know, for producer milk.
21 It -- it never was intended to represent the actual
22 composition of milk. It was a convenience added that was
23 adopted many, many years ago. We're probably closer to 4%
24 now, but we're not advocating changing that because, you
25 know, we have, you know, decades and decades of data
26 stated at 3.5%. We're probably stuck with it now.

27 But that -- that is a nominal feature that only
28 enters this conversation in that technically it is my



1 understanding that the 3.5% nominal standard was
2 effectively used to set the current component composition
3 standards.

4 But we're not making a big deal of that. We're
5 saying in any case they are outdated and we are
6 recommending they be updated to something to basically --
7 you know, to current composition standards. That is the
8 entire purpose of Proposal 1.

9 Q. Okay. And then in your testimony, and I think
10 other -- you had other questions on this, you talk about
11 updating component levels for -- the component levels to
12 reflect all Federal Orders, but as you've discussed, there
13 are four Federal Orders for -- that you use fat/skim
14 pricing. And I know there are some estimated data that's
15 going to be put officially on the record by USDA in a
16 little bit, but those are estimated numbers.

17 And our question to you is, would you propose --
18 since you talk about using component levels in all orders,
19 are you proposing that USDA somehow would collect
20 component data in the fat/skim orders as well, that they
21 currently do not collect?

22 A. I would assume that if there is a standard, if,
23 you know, Proposal 1 is adopted as stated, using the
24 national average, in all orders, that the system would
25 basically provide for -- provide -- developing that data
26 for the fat/skim orders so that that could go into the
27 composition.

28 If there was a -- you know, a technical problem



1 with that because, you know, those orders would continue
2 not to pay in component pricing, as I pointed out in my
3 testimony, including the tests in those orders, which
4 represent maybe 10% of all the milk, if -- if there was an
5 issue that it would be very difficult to collect that
6 information, but nonetheless, USDA could feel that they
7 would get -- that using the component pricing order
8 issue -- data only would -- you know, would still give
9 basically a nationwide representation to the formulas.

10 We're not -- I would characterize that those --
11 those orders would, you know, have to be included to --
12 for us to support Proposal 1. That's kind of a technical
13 data issue. And we -- we thought it was important to
14 basically, if those orders would be affected by
15 Proposal 1, which it would be, that their data be included
16 in the -- in the -- in the analysis.

17 Q. Okay. So if I rephrase what I think I heard, was
18 you would -- you support that USDA would collect component
19 data in those four skim/fat orders that we do not
20 currently collect, and if there's some reason that we are
21 unable to collect that information, then you would be okay
22 just using the averages for the seven component orders
23 that we currently do collect?

24 A. Yes. I think I'm willing to commit National Milk
25 to that because it is -- it would not make a big
26 difference compared to the fundamental principle that we
27 need to update the component factors, significantly, from
28 where they currently are and to keep them updated in the



1 future.

2 The issue of whether the, you know, data could be
3 collected in those four orders or not is -- you know,
4 would have a relatively minimal effect on the -- on -- on
5 the system if every other provision of Proposal 1 was
6 adopted.

7 Q. Okay. Thank you.

8 The way you have the -- or National Milk has the
9 order language written is that the implementation would
10 happen in going forward basically February and March. If
11 there was a proposed increase, it reached the .07
12 threshold, that would be implemented in March.

13 I guess my question is why February, March? Why
14 not a calendar year basis?

15 A. That was basically, you know, looking through the
16 updating procedure that we proposed, we -- we would assume
17 that the -- shortly after the close of the calendar year,
18 the data for the recently closed calendar year would be
19 available, and that calculation of what the three years --
20 the -- the most recent three years, including the calendar
21 year just ended, would be able to be made and announced.

22 And so the -- the -- February, March, you know,
23 numbers in -- months in there, were based upon making the
24 calculation and announcing it as soon as possible, as soon
25 as the data would be available. Because my understanding
26 is USDA collects that data monthly, and so you would be
27 able early in the following calendar year to make that
28 calculation, announce the result, and with the 12-month



1 delay that we have recommended, we -- we would not need to
2 wait to -- in order to do it on a calendar year basis, you
3 would probably need to wait another ten months or so to be
4 able to then implement it.

5 Q. Okay. Two questions on that, then.

6 So the February/March announcement is tied to when
7 the data -- when USDA has the data available.

8 A. Yes.

9 Q. So if that was slightly different because of
10 actual -- when we get the data and we can announce that,
11 National Milk would be amenable to some possible slight
12 change to that announcement?

13 A. Yeah. Basically it was to make sure -- to make
14 the calculation and the announcement as soon as the data
15 would be available.

16 Q. Okay.

17 A. If the data were available two weeks later, so,
18 you know, that could be adjusted.

19 Q. Okay.

20 A. But it was basically to get the information out
21 quickly.

22 Q. And then the 12-month lag, is it safe to assume
23 that's related more to risk management and that's why
24 that's in there?

25 A. That is, yes.

26 Q. Okay. One last question.

27 In your testimony, you talked about how there
28 would be proposed changes both to 50 and the new section



1 1051, which you have in there. And then there's also talk
2 about how there would be changes to 1005.51, 1006.51, and
3 1007.51. But I don't see any reference to those changes
4 in your proposed language.

5 So could you explain what you mean there?

6 A. The proposed language only deals with Proposal 1.
7 Those statements -- those changes to the language in the
8 southeast -- the three southeastern fat/skim orders relate
9 to our Proposal -- Proposal 19 on the Class I differential
10 surface. And it's just a -- a convention. That will be
11 addressed at that time. And the language that we propose
12 for that -- for Proposal 19 will include the changes to
13 those provisions. It was basically just to simplify
14 the -- simplify the statement of the Class I differentials
15 in those three southeastern orders from that current --
16 the current sort of two-part statement, for which I assume
17 there's a reason, but I don't know that reason.

18 Q. Okay.

19 A. But those are -- you know, the members of our task
20 force that were familiar with that figure, that that was
21 something that could be done without doing injustice to
22 the reasons for why --

23 Q. But that was related to --

24 A. Yeah --

25 (Court Reporter clarification.)

26 BY MS. TAYLOR:

27 Q. I said, so that reference to in the Southeast
28 orders, Section 51, is really dealing with Proposal 19,



1 not a change that would go with Proposal 1, and I just
2 wanted to make sure --

3 A. That is correct.

4 Q. -- I was clear on that. Okay.

5 MS. TAYLOR: I think that's all we have. We'll
6 save the rest for the further witnesses for National Milk.
7 Thank you.

8 THE COURT: We have another cross-examination?

9 Okay. This is okay with you, AMS? We have
10 somebody interfering with you on -- yes, sir.

11 DR. BOZIC: Good morning, your Honor. Dr. Marin
12 Bozic, president of Bozic, LLC, here on behalf of Edge
13 Dairy Farmer Cooperative.

14 CROSS-EXAMINATION

15 BY DR. BOZIC:

16 Q. Peter, thank you for your testimony and your
17 diligent answers to this cross-examination. I want to
18 follow up to what Erin said about the -- asked about the
19 butterfat test, and you answering that it was merely a
20 matter of inconvenience.

21 We are just now completing the analysis that shows
22 that if butterfat test is increased that it will improve
23 hedge effectiveness --

24 (Court Reporter clarification.)

25 BY DR. BOZIC:

26 Q. We are just now completing analysis that shows
27 that if butterfat tests, standard butterfat test, is also
28 increased, that would increase the hedging effectiveness



1 when Class III futures are used for managing producer
2 gross pay pry risk.

3 So I wanted to ask you whether you see any
4 downside of increasing standard butterfat test. I
5 understand that it doesn't really matter. It doesn't
6 matter at all for pool accounting. But is there any
7 downside to increasing that?

8 A. What do you mean by increasing the butterfat test?

9 Q. So you used a certain procedure to increase the
10 protein test from 2-point -- from 3.1 to 3.36. If you
11 were to apply the same procedure to calculate the
12 butterfat test, instead of 3.5, let's say 4.02, or
13 whatever that may be, would there be any downside that you
14 are aware of?

15 A. Well, again, our Proposal 1 only relates to the
16 skim milk component composition factors. The butterfat
17 test comes into play in calculating the -- the skim milk
18 composition of a given test -- test -- skim test of -- of
19 producer milk when you translate that down to the somewhat
20 smaller value of producer skim milk.

21 So we are -- we are -- our proposal doesn't really
22 address the butterfat test. It is an -- it is important
23 that the current butterfat test be taken into account when
24 making that calculation. But we didn't -- I don't see
25 how, in a sense, our proposal relates to -- in any other
26 material way, to the butterfat tests.

27 Q. Understand. Because it's related -- it is focused
28 on skim milk price. But if AMS were to implement your



1 proposal in such way that they also increase or propose
2 increasing the standard butterfat test for the purpose of
3 effective risk management, would you -- would you -- could
4 you contemplate any unintended consequences or downside of
5 that?

6 A. Okay. You are talking about if they moved away
7 from the current 3.5% --

8 Q. Right.

9 A. -- that is -- that is material for hedging
10 purposes, because that's how the price -- because it is
11 the announced prices that the futures settle to.

12 I'm not a risk management expert. You can reserve
13 that question for our expert witnesses to follow that will
14 focus on risk management. But I assume that that would be
15 a disruptive -- that would involve a change in risk
16 management procedures.

17 Q. But other than risk management, are you aware of
18 any unintended or adverse consequences on any other aspect
19 of the industry, assuming that it is properly delayed
20 along with protein and other solids?

21 A. Well, again, I look at the current 3.5% butterfat
22 standard as just a -- a benchmark for reporting prices,
23 and that the key -- you know, the key factors are the skim
24 milk prices and the -- you know, and the butterfat
25 component prices.

26 If that standard were changed, as I alluded to,
27 decades worth of data that is standard -- that is stated
28 at the 3.5% butterfat, there would be a discontinuity in



1 the data series, but that would be probably a problem for
2 economists and other analysts.

3 Q. Right. But --

4 A. As opposed to something that would create
5 disorder -- you know, disruptive -- disruption in the
6 actual marketing of milk.

7 Q. Sure. So would it be fair to summarize your
8 statement as, you know, you cannot think of any concrete
9 example of real world disorderly marketing that would
10 ensue if butterfat test is increased?

11 A. Beyond, you know, risk management, considerations,
12 and --

13 Q. Right.

14 A. -- economic and policy analysis research --

15 Q. Sure.

16 A. -- reasons, no.

17 Q. Thank you very much.

18 Changing topics to delay --

19 THE COURT: Before you move on, can I just ask,
20 what is the butterfat test? Is that the same as a
21 butterfat standard, butterfat percentage? I've gotten a
22 little lost here.

23 THE WITNESS: Butterfat standard is probably a
24 more accurate term for that, because the butter -- the
25 term test implies actual composition determination through
26 laboratory procedures. This is the standard 3.5%
27 butterfat standard at which producer milk class prices are
28 announced.



1 DR. BOZIC: Forgive me, Judge, I don't have enough
2 grace here to speak eloquently in a proceeding like this,
3 but --

4 THE COURT: Believe me, I can't, so that's fine.
5 I think -- that makes sense to me. We're talking about
6 the percentage number that we --

7 THE WITNESS: His standard.

8 DR. BOZIC: We are talking about a standard, yes.

9 THE COURT: Very well. Thank you.

10 DR. BOZIC: Yeah.

11 BY DR. BOZIC:

12 Q. I wanted to change topic to delay. Your proposal
13 calls for a 12-month delay, in which the organization I
14 represent here today fully agrees that it is important for
15 risk management.

16 But just for the purpose of being on the record, I
17 was hoping that we could go into mechanics of how it
18 disrupts risk management. If you prefer that we defer
19 that to your expert witness, we can.

20 A. I would prefer that that be deferred to -- that
21 will be answered thoroughly by our expert witness.

22 Q. Okay. All right.

23 DR. BOZIC: No further questions, your Honor.

24 THE COURT: Okay. Thank you.

25 Any further examination -- examination in the
26 nature of cross before we get to redirect?

27 Seeing none, Ms. Hancock, you have the floor.

28 MS. HANCOCK: Thank you, your Honor.



REDIRECT EXAMINATION

1
2 BY MS. HANCOCK:

3 Q. Dr. Vitaliano, I'll start where we just left off.
4 You were asked about the butterfat standards.

5 Is that -- is the butterfat standard really just a
6 statistical comparison?

7 A. It's -- it's -- I wouldn't even call it
8 statistical. It is basically a data reporting convention.

9 Q. Okay. So something that you just use as a data
10 point?

11 A. Yeah. At the time that it was established, it was
12 represented approximately what the butterfat test was of
13 producer milk.

14 Q. Okay. And throughout your cross-examination
15 questions, you were taken down numerous trails to -- to
16 talk about different hypotheticals and consumer effects on
17 market.

18 I'm wondering if you could just take us back to
19 the high level of -- and give me a high level explanation
20 of what Proposal 1 is again?

21 A. Proposal 1 addresses one portion of the dairy
22 product pricing formulas that were adopted in Federal
23 Order Reform and are now and for the foreseeable future
24 the pricing formulas for the Federal Order program. Our
25 fundamental -- the reason we are here is because many
26 features of those product price formulas have become
27 outdated given the current realities in the U.S. dairy
28 industry.



1 For Proposal 1, the skim milk composition factors
2 that were -- that are -- were adopted in Federal Order
3 Reform and are currently still in place assume that there
4 is a certain composition and, therefore, value of the
5 components in producer skim milk in Class III and
6 Class IV. Those standards are currently -- seriously
7 understate the actual composition of producer skim milk
8 and, therefore, undervalue producer skim milk in Class III
9 and Class IV uses.

10 We are -- Proposal 1 simply proposes that those
11 factors be updated to reflect more closely the current
12 composition of producer skim milk and that they be --
13 that -- and that a mechanism be addressed -- be adopted
14 that will provide for them to be updated in the future
15 without going through a hearing, because as we will have
16 an expert witness testifying, the expectation is the skim
17 milk component composition of producer skim milk can be
18 expected to continue to increase even at the rates we have
19 seen that increase over -- in recent years.

20 Q. And did any of the hypotheticals or the examples
21 about the effects on other markets -- other classes of
22 products, Class I in particular, did that alter in any way
23 your belief that those numbers should be updated?

24 A. No.

25 Q. And we also heard some questions about, well, it's
26 been 15 years since anybody has requested to have this
27 looked at.

28 Does that in any way invalidate any of the reasons



1 that you have given today?

2 A. No. There -- I cannot speak to the reasons why
3 it's been 15 years since some of these provisions have
4 been raised.

5 Q. Does that in fact --

6 A. Basically, we are looking at where we are now and
7 going forward and not -- not -- not being concerned about
8 what happened in the past. But what's happened in the
9 past does not affect the fact that a serious updating of
10 many of these proposal -- of many of these factors needs
11 to be made, and that's why we're here.

12 Q. Okay. We also -- you received a line of questions
13 about PPDs and -- and the effect of Proposal 1 on PPDs.
14 Can you talk about what the totality of all of National
15 Milk's proposals effect will be on PPDs?

16 A. The totality of our proposals would be to reduce
17 the -- increase the PPDs on average and reduce the
18 instances of negative PPDs, and it would do so by simply
19 restoring an appropriate level of distance between Class I
20 prices and the manufacturing prices. Many of our
21 proposals would have that effect, and it would have that
22 effect in -- in total.

23 Q. And is that part of the reasons why you believe
24 that the entirety of the proposals should be adopted
25 together?

26 A. Making that change will promote orderly marketing
27 by -- by reducing the incentives for depooling and a -- if
28 you go back and look at the original decision in 1999 for



1 adopting Federal Order Reform, the Department of
2 Agriculture emphasized the importance of reducing the
3 instances of depooling of milk and clearly identified
4 depooling of milk as a disorderly marketing phenomenon.

5 Q. Okay.

6 A. So we are basically following the lead of what
7 USDA laid out in the Federal Order Reform initial decision
8 as what's -- what's important for creating and maintaining
9 orderly marketing.

10 Q. One of the other lines of questions you received
11 was suggesting that Federal Order pricing might be in some
12 way contributing to the cause of the declining Class I
13 markets.

14 Is that your experience?

15 A. We will have an expert witness testifying that
16 that is not really a significant cause, that there are
17 many other factors that are leading to the decline in
18 fluid milk consumption in the United States.

19 Q. And can you think of any examples of what those
20 might be?

21 A. Yes. I work fairly closely with the checkoff --
22 producer checkoff organization, and they are very -- they
23 spend a lot of resources looking at Class I consumption.

24 Probably -- I'm not an expert in this, but the --
25 the tremendous growth of alternative beverages to fluid
26 milk has led to increased competition, you know, far wider
27 consumer choice of beverages than was the case in the
28 past. The fact that consumers consume liquid beverages



1 increasingly away from the home, in their automobiles, and
2 their offices, and the like. And that milk is probably,
3 you know, maybe one of the lesser convenient beverages to
4 consume on the go, so to speak.

5 And one of the main drivers of the decline of
6 fluid milk, to my understanding, is the decline in, you
7 know, sit-down, home breakfast consumption, particularly
8 of -- of cereal, that there's a -- as Mr. English alluded
9 to, there is a correlation between the decline in cereal
10 consumption and the decline in fluid milk consumption.
11 And it is a fact that people are -- particularly children,
12 are eating breakfast less frequently, a sit-down meal at
13 home consuming cereal. And when cereal declines, fluid
14 milk is declining along with it.

15 So there -- again, we have to consult an expert on
16 what determines -- basically what the determinants of
17 fluid milk consumption are, but it is my understanding
18 that price is a relatively small part of that. And we'll
19 have an expert witness again testifying to that effect.

20 Q. And staying in that -- in that same line, there's
21 been some reports that some of these premium milk products
22 are selling at 150% of the fluid milk prices.

23 Have you seen those reports?

24 A. Yes. That's my understanding that -- I have
25 observed the price differences myself in the supermarkets.
26 It is my understanding that the highest price fluid milk
27 beverages are the ones that are experiencing growth at the
28 moment.



1 Q. Okay. Suggesting that it is not the Federal Order
2 pricing that's driving the decline in -- in Class I?

3 A. That would be my interpretation, yes.

4 Q. Okay.

5 MS. HANCOCK: That's all I have. Thank you,
6 Doctor. Appreciate your time.

7 THE COURT: Thank you, Counsel.

8 Anybody want to have a stab at testifying with
9 re-cross? I don't encourage it.

10 Okay. With that, I think -- I think we have the
11 one exhibit with this -- for this witness. So I move that
12 into -- and I guess in -- I'm sorry to interrupt your
13 conversation. You want to move your exhibit into
14 evidence?

15 MS. HANCOCK: Yes, your Honor. Thank you for the
16 reminder. I appreciate that.

17 THE COURT: Not at all.

18 MS. HANCOCK: Exhibit 62.

19 THE COURT: Yes.

20 Any objections?

21 Exhibit 62 as previously identified is entered
22 into the record.

23 (Thereafter, Exhibit Number 62 was received
24 into evidence.)

25 THE COURT: I think that's it. Thank you very
26 much, Dr. Vitaliano.

27 Okay. Who is next?

28 Are you going to bring up another AMS witness?



1 MS. McMURTRAY: Yes, your Honor. We're going to
2 call John Herbert as a witness right now.

3 THE COURT: Okay.

4 MS. McMURTRAY: And just a reminder before we get
5 started for -- for the -- oh, my gosh, the reporter, my
6 name is Michelle McMurtray.

7 THE COURT: Thank you, Counsel.

8 Please raise your right hand.

9 JOHN HERBERT,

10 being first duly sworn, was examined and
11 testified as follows:

12 THE COURT: Your witness, Counsel.

13 DIRECT EXAMINATION

14 BY MS. McMURTRAY:

15 Q. Good morning, Mr. Herbert. Can you please state
16 and spell your name for the record.

17 A. Yes, John Herbert, J-O-H-N, H-E-R-B-E-R-T.

18 Q. And what is your current position and title?

19 A. I am an Associate Market Administrator for the
20 Appalachian, Southeast, and Florida Marketing Areas.

21 Q. And in preparing for this hearing did you prepare
22 any documents?

23 A. Yes, I did.

24 Q. Do you have those documents with you today?

25 A. Yes.

26 Q. For documents that maybe you didn't prepare, were
27 those prepared under your supervision?

28 A. For the documents I did not prepare, they were



1 either prepared under my supervision or I was involved in
2 the preparation.

3 Q. And did you put these documents together of your
4 own accord, or were these documents the result of
5 requests?

6 A. They were the result of requests.

7 Q. And to be clear, do these documents reflect your
8 personal views?

9 A. They do not.

10 Q. And are you offering these documents in favor of
11 or against any of the proposals?

12 A. I am not.

13 Q. And do you intend that these documents be used by
14 all parties?

15 A. Yes.

16 THE COURT: I hate to bother with this, but can we
17 get -- I think we do need an address.

18 MS. McMURTRAY: Yes. Thank you.

19 THE COURT: I'm not sure why, but we're going to
20 follow the rules.

21 MS. McMURTRAY: And it can be your business
22 address.

23 THE WITNESS: The address of our office is 10301
24 Brookridge Village Boulevard, Louisville, Kentucky, 40291.

25 BY MS. McMURTRAY:

26 Q. Okay. So at this time I would like to mark the
27 chart titled Producer Milk and Components by Class and
28 Order as Exhibit 44.



1 (Thereafter, Exhibit Number 44 was marked for
2 identification.)

3 BY MS. McMURTRAY:

4 Q. Mr. Herbert, do you have this document?

5 A. I do.

6 Q. And can you please tell us what this document is?

7 A. Yes. This document represents Producer Milk and
8 Components By Class and Order for January of 2008 through
9 April of 2023. It is Table 1 on the hearing website.

10 Q. And I see that this document is rather lengthy and
11 that there are some footnotes that may help explain this
12 document. Can you go through those?

13 A. Yes, I can go ahead and read each footnote.

14 So footnote 1 states, "Skim milk pounds and
15 butterfat are reported data for all orders."

16 (Court Reporter clarification.)

17 THE WITNESS: I'll start all over on the
18 footnotes.

19 Footnote 1 states, "Skim milk pounds and butterfat
20 pounds are reported data for all orders. Nonfat solids
21 pounds by class are reported for multiple component
22 pricing orders."

23 Footnote 2, Class III and total other solids are
24 reported in MCP orders. To estimate the pounds of OS --
25 which is other solids -- in Classes I, II, and IV, the
26 non-Class III other solids pounds (total other solids
27 minus Class III other solids) were multiplied by the
28 percent of nonfat solids in each of the respective



1 classes. Example, Class I nonfat solids over Class I plus
2 Class II plus Class IV nonfat solids would give you
3 percent of nonfat solids in Class I as a percentage of I,
4 II, and IV.

5 Footnote 3, To estimate the pounds of protein in
6 Classes I, II, and IV, the non-Class III protein pounds
7 which is total protein minus Class III protein, were
8 multiplied by the percent of nonfat solids in each of the
9 respective classes. Example, Class I nonfat solids over
10 Class I plus Class II plus Class IV nonfat solids equals
11 nonfat solids in Class I.

12 Footnote 4, "For skim/fat orders, other solids
13 pounds for all classes were estimated by multiplying the
14 skim utilization percentage in each class by the estimated
15 total other solids pounds."

16 Footnote 5, "For skim/fat orders, protein pounds
17 for all classes are estimated by multiplying the skim
18 utilization percentage in each class by the estimated
19 total protein pounds."

20 Footnote 6, "For skim/fat orders, nonfat solids
21 pounds for all classes were estimated by adding the
22 estimated other solids in protein pounds."

23 Footnote 7, "The monthly market average protein
24 test, other solids tests, and somatic cell count of
25 producer milk pooled on Federal Orders 5, 6, and 7, were
26 estimated using producer weight and payroll data provided
27 by handlers to the Market Administrator. The component
28 data provided represents approximately 70% or more of the



1 total producer milk pooled on Federal Order 5 in a given
2 month, approximately 80% or more of the total producer
3 milk pooled on Federal Order 6 in a given month, and
4 approximately 70% or more of the total producer milk
5 pooled on Federal Order 7 in a given month."

6 Footnote 8, "The monthly average protein test and
7 other solids test of producer milk pooled on Federal
8 Order 131 were estimated using protein and other solids
9 tests for Federal Order 124. Total protein pounds were
10 estimated by multiplying the total producer milk pounds
11 on" -- "pooled on Federal Order 131 by the protein percent
12 in producer milk pooled on Federal Order 124. Total
13 solids pounds were estimated by multiplying the total
14 producer milk pounds pooled on Federal Order 131 by the
15 other solids percent in producer milk pooled on Federal
16 Order 124."

17 Finally footnote 9 indicates "values in italics
18 are estimated."

19 I do want to make two other comments about the
20 footnotes.

21 First, footnote 2, where it explains how the other
22 solids and protein are calculated for the component
23 orders, that is in general. Some orders actually do --
24 for some multiple component pricing orders, the
25 classification of components by class is actually at the
26 handler level, then each handler's classification is added
27 together to get the component levels by class. So you are
28 not going to multiply the percentages as indicated in that



1 footnote for all orders.

2 One additional comment with the page numbering in
3 the document. So the document goes pages 1 through 44,
4 and then skips to page 55. There are no missing pages.
5 It is just numbered incorrectly. So the pages after 55
6 back are actually the 45th page going -- and subsequent
7 pages are all numbered ten pages off.

8 MS. McMURTRAY: I appreciate that.

9 And so just to also clarify for the record and for
10 interested parties, that the footnotes contained in the
11 document that we have today that's marked as Exhibit 44,
12 those are different than the ones on the website, but we
13 will be updating this chart on the website.

14 I'll move next and I will mark the chart titled
15 Announced Class Prices and Prices Using NMPF's Proposed
16 Component Levels for January through December 2022 as
17 Exhibit 45.

18 (Thereafter, Exhibit Number 45 was marked for
19 identification.)

20 BY MS. McMURTRAY:

21 Q. Mr. Herbert, do you have that document in front of
22 you?

23 A. I do.

24 Q. And can you explain what this document is?

25 A. Yes. This document represents Announced Class
26 Prices and Prices Using National Milk Producers' Proposed
27 Component Levels for January through December 2022. This
28 represents -- this is represented by Table 6 on the



1 website.

2 Q. And can you just go through some of the data and
3 what this chart is showing us?

4 A. Yes. So I can go across the columns starting left
5 to right. Represents the class and order, which would be
6 the Federal Order. And then the first section represents
7 the prices under the current component levels in the price
8 formulas. So if you look at the first two footnotes, the
9 first footnote indicates that prices are in dollars per
10 hundredweight, and the second footnote indicates that the
11 component levels for protein is 3.1 pounds per
12 hundredweight of skim, nonfat solids is 9 pounds per
13 hundredweight of skim, and other solids is 5.9 pounds per
14 hundredweight of skim. Again, those are the current
15 component levels of skim milk reflected in the current
16 pricing formulas.

17 The second section labeled prices under proposed
18 levels reflect the class prices based on National Milk's
19 proposed component levels. Footnote 3 indicates that
20 those component levels for protein are 3.39 pounds per
21 hundredweight of skim; nonfat solids, 9.41 pounds per
22 hundredweight of skim; and other solids, 6.02 pounds per
23 hundredweight of skim.

24 The final section is labeled differences in prices
25 between current and proposed component levels, and it is
26 the difference between the -- it is the price under
27 proposed levels minus the prices under current levels.

28 Q. Thank you, Mr. Herbert.



1 So moving on to Exhibit -- what we have marked as
2 Exhibit 46, which I would also like to mark for
3 identification as Exhibit 46.

4 (Thereafter, Exhibit Number 46 was marked for
5 identification.)

6 BY MS. McMURTRAY:

7 Q. Can you explain -- can you just tell us what this
8 document is?

9 A. Yes. This exhibit is the PPD/Uniform Pricing
10 Reflecting National Milk's Proposed Class I Differentials
11 by Order for May 2022. Online is Tables 22 and 23. And
12 for this exhibit the first page represents May 2022, and
13 the second page is October 2022.

14 Q. And can you take us through what this chart is
15 showing us?

16 A. Yes. So, starting from left to right, the first
17 column is the Federal Order number. The next column is
18 the Class I producer milk pounds pooled on that order for
19 May 2022. Next column, total producer milk pounds, which
20 would be the producer milk pooled on that respective order
21 for May 2022. The next column to the right would be the
22 Class I utilization.

23 The next section of columns is the Class I
24 differential value. Actual represents the actual Class I
25 differential value, which would be at the current
26 differentials. The next column is the differential
27 value -- the Class I differential value using National
28 Milk's proposed differentials. And then the third column



1 under the Class I differential umbrella would be the
2 difference between actual and the proposed.

3 The next set of columns is labeled market average
4 Class I differential. The first column is the actual
5 market average Class I differential. The next column
6 would be the market average Class I differential under --
7 using the National Milk proposed differentials. And then
8 again the third column is the difference in those two.

9 The next set of columns represents the PPD or
10 uniform price at the announced zone.

11 I'll go ahead and read footnote 3. The -- it
12 indicates that an average PPD or uniform price -- which
13 the last row of these tables shows averages -- an average
14 PPD or uniform price cannot be calculated due to the
15 differences across skim-fat and multiple component pricing
16 orders. Difference reported in total/weighted average row
17 is the producer milk weighted average of the differences
18 across orders.

19 So back to the section PPD/uniform price at
20 announced zone. The first column actual represents the
21 actual PPD or uniform price announced for each order for
22 May 2022. The next column represents the PPD or uniform
23 price using the National Milk proposed differentials.
24 Then the third column is the difference.

25 Finally, to the far right, the heading is market
26 average PPD or uniform price at location. The first
27 column is, again, actual using current differentials. The
28 next column is the calculation using National Milk's



1 proposed differentials. And then, again, the third --
2 final column is the difference.

3 Q. Okay. And just to be clear, the chart on the next
4 page shows the same data, but just for October 2022, but
5 it is the same type of data?

6 A. That's correct.

7 Q. Okay. We will move on to what I would like marked
8 as Exhibit 47.

9 (Thereafter, Exhibit Number 47 was marked for
10 identification.)

11 BY MS. McMURTRAY:

12 Q. Mr. Herbert, do you have this document in front of
13 you?

14 A. I do.

15 Q. And can you tell us what this document is?

16 A. Yes. Exhibit 47 is Pooled Distributing -- Pool
17 Distributing and Supply Plants by Order, December 2000.
18 This is Chart 4 on the website.

19 And I will go ahead and mention that the next --
20 so Exhibits 47 through 52 are all going to be maps of pool
21 distributing plants and supply plants by order for
22 December of 2000, 2005, 2010, 2015, 2020, and 2022. And
23 those are Charts 4 through 9 on the website. And then at
24 the end of each of the maps there is a legend that
25 includes plant names, plant city, plant state, a FIPS
26 code, and Federal Order.

27 MS. McMURTRAY: At this time, we can go through
28 Exhibit 47 in a moment, but I would like to go ahead, as



1 Mr. Herbert indicated, and mark for identification as
2 Exhibit 48 the group of charts Titled Pool Distributing
3 and Supply Plants by Order for December 2005.

4 (Thereafter, Exhibit Number 48 was marked for
5 identification.)

6 MS. McMURTRAY: We would like to mark for
7 identification as Exhibit 49 Pool Distributing and Supply
8 Plants by Order for December 2010.

9 (Thereafter, Exhibit Number 49 was marked for
10 identification.)

11 MS. McMURTRAY: We would like to mark as
12 Exhibit 50 the Pool Distributing and Supply Plants by
13 Order for December 2015.

14 (Thereafter, Exhibit Number 50 was marked for
15 identification.)

16 MS. McMURTRAY: Marking for identification as
17 Exhibit 51 the Pool Distributing and Supply Plants by
18 Order for December 2020.

19 (Thereafter, Exhibit Number 51 was marked for
20 identification.)

21 MS. McMURTRAY: And the last one in this group, we
22 would like to mark for -- as Exhibit 52 the Pool
23 Distributing and Supply Plants by Order for December 2022.

24 (Thereafter, Exhibit Number 52 was marked for
25 identification.)

26 BY MS. McMURTRAY:

27 Q. Okay. Mr. Herbert, I'm going back to Exhibit 47.
28 I'd just like to take -- to have us go through this a



1 little bit and explain what it is.

2 So opening it to page 2, can you explain what this
3 map is showing?

4 A. Yes. This map represents pool distributing and
5 supply plant locations for the entire U.S. for
6 December 2000.

7 So the map -- each Federal Order is identified by
8 color which can be seen in the legend on the right. For
9 example, Federal Order 1 on the upper right-hand side is
10 shaded in green color as outlined with a green outline.
11 Each Federal Order is shaded and outlined with a different
12 color. The pinpoints on the map represent plant
13 locations, the pool distributing and pool supply plant
14 location.

15 I do want to make a note that the plant locations
16 are ba- -- throughout out those maps are based on the
17 plant state and county FIPS code where the plant is
18 located, so the pin locations are approximate. They don't
19 necessarily identify the exact address of the plant. They
20 are more, you know, based on the approximate location
21 based on the county.

22 Q. And just to be clear, there's a section on the
23 western side of the map that is not outlined or shaded.

24 Does that mean there is not a Federal Order in
25 that area?

26 A. That is correct.

27 Q. Okay.

28 A. At least let me clarify. So during December 2000,



1 that is -- that is correct.

2 Q. Okay.

3 A. And later maps will show the California is
4 highlighted, which there's a California order currently.

5 Q. Okay. Thank you.

6 Moving on to page 3, can you just take us through
7 this map?

8 A. Yes. So page 3 is for December 2000 Pool
9 Distributing and Supply Plants for Federal Order 1 and
10 Federal Order 33. Essentially, it is a zoomed-in version
11 of the previous page, so you -- you can see the Federal
12 Order 1 and Federal Order 33 marketing areas.

13 The Federal Order 1 is highlighted in green and
14 outlined in green, and the plant locations are identified
15 with a pin and a number. Those numbers correspond to the
16 legend in the back of the exhibit where you can find the
17 plant name and city, etcetera.

18 Federal Order 33 is the purple region. It is also
19 outlined by the purple lines. And for the plants, it is
20 the same information. Those pinpoints and numbers
21 represent plants, and the specifics on that plant as far
22 as the name, city, state, Federal Order, etcetera, can be
23 found in the legend at the back of the exhibit.

24 MS. TAYLOR: Mr. Herbert, I have a few additional
25 clarifying questions that we didn't discuss last night,
26 but I think it might be helpful for the record.

27 THE WITNESS: Okay.

28 MS. TAYLOR: On the first page -- and I want to



1 make this clear, since this is for, in Exhibit 47,
2 December 2000. This shows the current Federal Order
3 boundaries. It doesn't -- you talked about California.
4 But there was not -- was there also a Western order back
5 in December of 2000 that might not be reflected on here?

6 THE WITNESS: Yes, that is accurate. So there was
7 a Western order that I believe was terminated in 2004 that
8 is not reflected on this map.

9 Additionally, there were a couple other changes to
10 marketing areas. In 2005, the Appalachian Marketing Area
11 expanded to include additional Virginia counties. This
12 map reflects the current marketing area of Federal
13 Order 5.

14 Additionally, I believe it was in 2006, the
15 Arizona order -- or Clark County, Nevada, was removed from
16 the Arizona order, so this map represents the current
17 marketing area for the Arizona order also.

18 MS. TAYLOR: Thank you.

19 And one last thing. These locations of plants,
20 they don't necessarily reflect where that plant is
21 regulated, do they? They just are by physical location?

22 THE WITNESS: That is correct. The legend in the
23 back indicates which order they are regulated by.

24 MS. TAYLOR: That's it. Thank you. I'll turn it
25 back over.

26 BY MS. McMURTRAY:

27 Q. We can move on to page 4 of the same Exhibit 47.

28 Just once again, can you just describe this, what



1 this shows?

2 A. Yes. So page 4 represents pool distributing and
3 supply plants for Federal Orders 5, 6, and 7 for December
4 2000. Again, it is similar to page 2. It is just, you
5 know, zoomed in so that the plant locations and marketing
6 areas are easier to see.

7 The pink shaded area is the Appalachian Marketing
8 Area as outlined by the pink colored line. The Southeast,
9 or Federal Order 7, marketing area is shaded yellow and is
10 bordered by, I guess, a brown and yellow colored line.
11 And the Federal Order 6, or Florida Marketing Area, is
12 shaded blue as outlined by a blue line. And, again, the
13 plants are identified with pinpoints and numbers, which
14 can be found in the legend at the back of the exhibit.

15 Q. Okay. Just to make sure this is all on the
16 record, we'll move to page 5, and if you can just explain,
17 again, what this shows.

18 A. Yes. Page 5 represents pool distributing and
19 supply plants for Federal Order 30 for December 2000.
20 Again, it is -- essentially the second page of the exhibit
21 is zoomed in to make it easier to see the Federal Order 30
22 marketing area. The Order 30 marketing area is
23 highlighted in the tan color or shaded in the tan color,
24 and the outline, the brown there, outlines the marketing
25 area. And, again, the plants are identified on the map
26 with the pinpoint and number, which can be found in the
27 legend in the back of the exhibit.

28 Q. Thank you.



1 Moving on to page 6.

2 A. Page 6 represents pool distributing and supply
3 plants for Federal Order 32 for December 2000. Again, it
4 essentially is a zoomed-in version of page 2. The Federal
5 Order 32 marketing area is highlighted in the purple/pink
6 shaded area, and the marketing area as outlined by the
7 pink lines. And again, the plants are identified with the
8 pinpoint and number, and those plants -- the name and city
9 and state in regulating order can be found in the back of
10 the exhibit.

11 Q. Okay. Turn to page 7.

12 A. Page 7 represents the pool distributing and supply
13 plants for Federal Order 126 and 131 for December of 2000.
14 Similar to the other maps, it is basically a zoomed-in
15 version of the second page.

16 So the yellow-green color represents the Federal
17 Order 126 marketing area and is outlined by the yellow
18 border. The pink shade -- or I'm sorry, it's not really
19 pink. The -- to the left-hand side, the brownish shade is
20 the Federal Order 131 marketing area and is outlined by a
21 brown colored line. And, again, the plants are identified
22 with pinpoints and numbers which can be found in the back
23 of the exhibit.

24 Q. I think the last map on page 8.

25 A. So, page 8, the title says, Pool Distributing and
26 Supply Plants, Federal Order 51 and 124, December 2000.

27 As I mentioned previously, Federal Order 51 was
28 not a Federal Order marketing area in December 2000, so



1 that should just say Federal Order 124. The maps for 2020
2 and 2022 will actually include Federal Order 51 and 124 on
3 the same map.

4 But in this case the Federal Order 124 marketing
5 area is shaded in the purple color and outlined by the
6 purple outline. And, again, the plants are identified --
7 the plant locations are identified by the pinpoint and
8 number, and those numbers correspond to the table in the
9 back of the exhibit.

10 Q. And then on page 9, is this the table that you
11 have been referencing as we have gone through the maps?

12 A. Yes. Page 9 is the legend or table I was
13 referring to that includes the legend number, which is
14 what was identified on those maps, in addition to the
15 plant name, plant city, state, the FIPS, and the Federal
16 Order.

17 Q. Thank you.

18 MS. McMURTRAY: And I'll just note again for the
19 record that the exhibits that we have marked after this
20 one as 48, 49, 50, 51, and 52, reflect the same data, but
21 just in different years, so rather than have Mr. Herbert
22 go through them all.

23 So we will move on. I'd like to have marked for
24 Exhibit 43 -- 53. Sorry for that, 53.

25 (Thereafter, Exhibit Number 53 was marked for
26 identification.)

27 BY MS. McMURTRAY:

28 Q. Mr. Herbert, do you have this document in front of



1 you?

2 A. Yes.

3 Q. Can you tell us what this document is?

4 A. So Exhibit 53 corresponds to Chart 10 on the
5 website. It is Producer Milk by County for December 2000.
6 Similar to the other maps, Exhibits 53 through 58, which
7 correspond to Charts 10 through 14 online, are going to be
8 maps for December 2000, 2005, 2010, 2015, 2020, and 2022.

9 MS. McMURTRAY: And just to clarify for the
10 record. So very similar to the prior set of maps, so
11 Exhibit 54 would be Producer Milk by County for December
12 of 2005.

13 (Thereafter, Exhibit Number 54 was marked for
14 identification.)

15 MS. McMURTRAY: I'd like to mark for Exhibit 55
16 Producer Milk by County for December 2010.

17 (Thereafter, Exhibit Number 55 was marked for
18 identification.)

19 MS. McMURTRAY: I'd like to mark for Exhibit 56
20 Producer Milk by County for December 2015.

21 (Thereafter, Exhibit Number 56 was marked for
22 identification.)

23 MS. McMURTRAY: Marking for identification as
24 Exhibit 57, Producer Milk by County for December 2020.

25 (Thereafter, Exhibit Number 57 was marked for
26 identification.)

27 MS. McMURTRAY: And then our last one is --
28 marking for identification as Exhibit 58, Producer Milk by



1 County for December 2022.

2 (Thereafter, Exhibit Number 58 was marked for
3 identification.)

4 BY MS. McMURTRAY:

5 Q. Just a quick clarifying question, Mr. Herbert.
6 Would the orders -- would these reflect the current orders
7 that were in existence for each year that they show?

8 A. These maps, similar to the previous exhibits, the
9 marketing areas are going to reflect the current marketing
10 area, other than the Federal Order 51. So, for example,
11 as I stated, the additional counties that were added in
12 Virginia are reflected throughout these maps even though
13 those counties weren't actually added until 2005.

14 Q. Okay. Well, we will start with Exhibit 53.
15 Opening it to page 2, can you explain what we are looking
16 at?

17 A. Yes. So page 2 represents producer milk by county
18 for December 2000 for the Northeast Marketing Area, which
19 is Federal Order 1. The green line outlines the actual
20 Federal Order 1 marketing area. The light blue shaded
21 counties represent counties with milk production pooled on
22 Federal Order 1 in December of 2000 from within the
23 Federal Order marketing area. The darker blue shaded
24 counties represent counties with milk production pooled on
25 Federal Order 1 in December of 2000. Those counties are
26 located outside the marketing area.

27 I'll also note that the total pounds by state
28 listed in thousand pounds are identified on the right-hand



1 side of the page. And there is a -- there are restricted
2 states included in the other -- the other label at the
3 bottom of the total pounds by state. Those restricted
4 states include Delaware, Michigan, Minnesota, Nevada, New
5 Jersey, Utah, Rhode Island, Virginia, West Virginia, and
6 Wisconsin.

7 And one additional note on these maps. Each
8 Federal Milk Market Order may present data differently
9 while maintaining confidentiality, and so differences in
10 the maps reflect this as far as how the counties are
11 represented.

12 Q. And can you tell us why those states -- or what
13 does it mean for a state to be restricted?

14 A. If a state is restricted, it means that in that
15 particular state we cannot post the data because there are
16 fewer than three handlers with data. So in this case
17 there would be fewer than three handlers with milk pooled
18 on Federal Order 1 in December of 2000, so we cannot
19 publish that information for confidentiality concerns.

20 Q. Okay. We can move on to page 3.

21 Can you explain what we're looking at, at this
22 map?

23 A. So page 3 represents producer milk by county for
24 December 2000 for the Appalachian Marketing Area, Federal
25 Order 5. The Appalachian Marketing Area is outlined by
26 the red outline. The gray colored counties within the
27 marketing area represent counties in the marketing area
28 that have milk production pooled on Federal Order 5 in



1 December of 2000. The blue counties outside the marketing
2 area represent counties that have milk production pooled
3 on Federal Order 5 in December 2000 from outside the
4 marketing area.

5 Again, the exhibit lists total pound by state on
6 the right-hand side. The other line at the bottom of that
7 list represents restricted states, which in this case are
8 New Mexico and Oklahoma.

9 Q. And just to clarify, I apologize for not doing
10 this on the page, so -- on the prior page. But for
11 counties within the marketing area that are not shaded in
12 blue, does that mean that there was no milk in --

13 A. That's correct. That means -- it means there was
14 no milk pooled on that Federal Order.

15 Q. Okay. Moving to page 4, can you explain this one
16 for us?

17 A. Page 4 is producer milk by county for
18 December 2000 for the Florida Marketing Area, which is
19 Federal Order 6. The blue outline outlines the Federal
20 Order 6 marketing area. The light blue shaded counties
21 represent counties with producer milk pooled on Florida --
22 the Florida Marketing Area in December 2000 from within
23 the marketing area. The other blue shaded counties
24 represent counties with producer milk pooled on the
25 Federal Order 6 order in December 2000 from outside the
26 marketing area. And, again, the total pounds by state,
27 are listed on the right-hand side of the page.

28 Q. We can move on to page 5.



1 A. Page 5 represents producer milk by county for the
2 Southeast Marketing Area, Federal Order 7, for
3 December 2000. The brown outline outlines the Federal
4 Order 7 marketing area. The gray shaded counties inside
5 that outline represent the counties with producer milk
6 pooled on Federal Order 7 in December 2000 from within the
7 marketing area. And the blue shaded counties represent
8 counties with producer milk pooled on Federal Order 7 from
9 farms located outside of the marketing area.

10 Again, the total pounds by state are listed on the
11 right-hand side. And at the bottom of that list, other
12 represents restricted states, which in this case include
13 Illinois, Indiana, Maryland, Michigan, Minnesota, New
14 Mexico, Ohio, Pennsylvania, South Carolina, Virginia, and
15 Wisconsin.

16 Q. Moving on to page 6, can you explain this map?

17 A. Similarly, page 6 is producer milk by county for
18 December 2000 for the Upper Midwest Marketing Area,
19 Federal Order 30. The orange outline outlines the Federal
20 Order 30 marketing area. The gray shaded counties within
21 the outline represent counties with producer milk pooled
22 on Federal Order 30 marketing -- pooled on Federal
23 Order 30 for December 2000 from within the marketing area.
24 The blue shaded counties represent producer milk pooled on
25 Federal Order 30 in December 2000 from outside the
26 marketing area.

27 And, again, total pounds by state are listed on
28 the right-hand side.



1 In this case, there's a footnote 3, which
2 indicates that the pounds for Wisconsin also include
3 restricted pounds from Montana and -- or include
4 restricted pounds from Montana as well as Wisconsin
5 pounds.

6 Q. Okay. Moving on to page 7, can you explain this
7 map?

8 A. Page 7 represents producer milk by county for
9 December 2000 for the Central Marketing Area. The Central
10 Marketing Area's boundaries are highlighted by purple
11 outline. The gray shaded counties within that purple
12 outline represent counties with producer milk pooled on
13 Federal Order 32 in December 2000. The blue counties
14 outside that outline represent counties with producer milk
15 pooled on Federal Order 32 from outside of the marketing
16 area.

17 Total pounds by state are, again, identified on
18 the right-hand side of the page. The other line indicated
19 at the bottom of the page represents restricted states.
20 In this case the restricted states include Idaho, New
21 Mexico, Utah, and Wyoming.

22 Q. Moving on to page 8.

23 A. Page 8 is producer milk by county for
24 December 2000 for the Mideast Marketing Area, Federal
25 Order 33. The marketing area is outlined by the purple
26 outline on the map. The purple shaded counties represent
27 counties with producer milk pooled on 33 from counties
28 within the marketing area. The blue shaded counties



1 represent counties outside the marketing area that have
2 producer milk pooled on Federal Order 33 in December of
3 2000.

4 Again, the total pounds by state are identified on
5 the right-hand side of the page. The other line at the
6 bottom of that list represents restricted states. Those
7 states include Delaware, South Dakota, and Tennessee.

8 Q. Moving on to page 9, can you explain what we're
9 looking at here?

10 A. Yes. Page 9 represents producer milk by county
11 for December 2000 for the Pacific Northwest marketing
12 area, Federal Order 124. The purple outline indicates the
13 marketing area for Federal Order 124. The gray shaded
14 cells within that purple outline indicate counties in the
15 marketing area with producer milk pooled on Federal
16 Order 124 in December 2000. The blue counties outside of
17 that outline represent counties with producer milk pooled
18 on Federal Order 124 in December 2000 from outside the
19 marketing area. The total pounds by state are listed on
20 the left-hand side of the page.

21 Q. I know this is a bit tedious, but moving on to
22 page 10.

23 A. Page 10 represents producer milk by county,
24 December 2000, for the Southwest Marketing Area, Federal
25 Order 126. The green outline represents the Federal
26 Order 126 marketing area, and the blue shaded cells -- the
27 blue shaded counties represent the counties within the
28 marketing area with milk pooled on Federal Order 126 in



1 December 2000. The pounds by state are listed on the
2 left-hand side of the page. Again, "other" at the bottom
3 of that list represents restricted states, which include
4 Kansas and Oklahoma.

5 Q. And page 11?

6 A. Page 11 represents producer milk by county for
7 December 2000 for the Arizona Marketing Area, Federal
8 Order 131. The Arizona Marketing Area is outlined by the
9 black border. The light blue or gray shaded cells within
10 that border represent counties within the marketing area
11 that have producer milk pooled on Federal Order 131 in
12 December of 2000. The blue counties shaded outside the
13 marketing area represent counties without -- from outside
14 the marketing area that have producer milk pooled on
15 Federal Order 131 in December of 2000. Again, pounds by
16 state are indicated on the left-hand side of the page.

17 Q. Thank you.

18 And then just to, again, clarify for the record
19 that Exhibits 53 through 57 that are -- or through 58
20 marked for identification are -- show the same information
21 but for the specified year that's on the front of the
22 chart?

23 A. That's correct.

24 Q. And then I think Ms. Taylor as some more
25 questions.

26 MS. TAYLOR: Good morning. I just have one more
27 question and then a clarification for everybody.

28 Mr. Herbert, does USDA have one more exhibit to



1 put on at a later time?

2 THE WITNESS: Yes. USDA -- actually it is my
3 understanding USDA has a request for an estimated sales
4 report that we're planning on putting on. And I was not
5 here yesterday, but it is my understanding that there was
6 an additional request for information on salted and
7 unsalted butter that the USDA is also working on.

8 MS. TAYLOR: Thank you.

9 And for those in the room, and also watching via
10 webcast, the tables and charts that all of the USDA
11 witnesses have been referencing that are currently on the
12 website, those reflect our efforts to get data out as soon
13 as possible. And so what's on the charts might not be
14 exactly what's in the paper copies that we have here in
15 the room, particularly, we tried to include additional
16 footnotes to explain all the data.

17 It is our intention to upload the exhibits as
18 received officially here at the hearing with the correct
19 exhibit numbers, and they will be the correct versions.
20 And those should go up on the website relatively quickly
21 now that we have pretty much gotten all of our data
22 together and put it on the record.

23 But I just wanted to make that clear, if someone
24 has a paper copy and comparing it to what's online
25 currently, there might be, you know, some footnotes
26 missing, etcetera, but those will be changed shortly.

27 MS. HANCOCK: What exhibits did those apply to?

28 MS. TAYLOR: I couldn't tell you what exhibits.



1 Probably a number of them. Okay? But, you know, we
2 released some of these on the website maybe ten days, two
3 weeks ago, and have worked to make sure that, for what
4 goes in the record, that it's accurate, and also that the
5 footnotes provide some of the context that people need to
6 understand. So those additions were added.

7 THE COURT: Thank you, Ms. Taylor.

8 Is now a good time to take another morning break?
9 Okay. It's 11:17. Let's come back at 11:30. We'll try
10 to promptly start at 11:30. Off the record. Thank you.

11 (Whereupon, a break was taken.)

12 THE COURT: On the record. All right. We're
13 reconvening after the second morning break and continuing
14 with our -- with witness Herbert.

15 Have we completed direct?

16 MS. TAYLOR: Yes.

17 THE COURT: Okay. Who is up first for cross? I
18 notice Mr. English is standing.

19 Your witness, sir.

20 CROSS-EXAMINATION

21 BY MR. ENGLISH:

22 Q. Good morning.

23 A. Good morning.

24 Q. My name is Chip English. I'm an attorney for the
25 Milk Innovation Group.

26 First, I want to thank you for all the obvious
27 hard work. I think I may have missed that yesterday. I
28 should have said that yesterday for all of you.



1 I also want to thank you for the fact that there
2 are some clarifications here, the only caveat being that I
3 prepared the examination based upon the footnotes that I
4 had until this morning. And so I am going to have to
5 struggle to make sure I can renumber my questions based
6 upon the footnotes. So just bear with me a tiny bit on
7 that.

8 And this is basically Table 1 -- well, Exhibit 44,
9 which was Table 1, correct?

10 A. That's correct.

11 Q. Okay. So -- but, again, I do think the footnotes
12 help a lot. But let me start with a more mundane set of
13 questions.

14 So Exhibit 44, the first 44 pages, are all
15 basically the same information, which is the producer milk
16 and components, but only to a certain point. That is to
17 say, if you look back at the tables that were published,
18 and you took page 1 and page 55, they sort of go across,
19 correct?

20 A. That's correct.

21 Q. Okay. So one of the things in the footnotes is
22 the idea that italicized information is estimated,
23 correct?

24 A. Correct.

25 Q. I'm not saying that my eyes are worse than anybody
26 else's, but, you know, I just want to have the record
27 clear as to, you know, what columns are or are not
28 italicized.



1 So my understanding is that for MCP orders, so for
2 instance, page 1, the very first line, 2008 January
3 Northeast, every single number for an MPC order is an
4 actual number, that is to say none of them are italicized?

5 A. Correct.

6 Q. Okay. And that would be true for any other order
7 that's an MPC order, correct?

8 A. I believe the data represented on the first page,
9 which is skim pounds, butterfat pounds, and total pounds,
10 those numbers are actual numbers for both MCP and skim/fat
11 orders.

12 Q. Right. But -- well, I was going to get to skim --
13 but my point is, every number on MPC is an actual number?

14 A. On the first page, correct.

15 Q. Yes. So if I turn to the first Southeast page,
16 which is Appalachian, and it is page 6, as you were
17 starting to say with me there -- actually all of these are
18 also actual, or are any of these estimates?

19 A. Those are also actual.

20 Q. Okay. So basically the first 44 pages, all
21 numbers are actual?

22 A. Correct.

23 Q. Thank you.

24 So now turning to page 45, which is the first page
25 for an MPC order -- and, again, I'm looking at line -- the
26 very first line, 2008 January Northeast. And obviously
27 I'm not looking at the order number but -- so the column
28 Class I other solid pounds, that's an estimate, correct?



1 A. Correct.

2 Q. Class II other solid pounds is an estimate,
3 correct?

4 A. Correct.

5 Q. Class III other solid pounds is an estimate,
6 correct?

7 A. No.

8 Q. I'm sorry. See, that's why I need this.

9 Okay. So those are actual? Class III other solid
10 pounds are actual?

11 A. Correct.

12 Q. Class IV other solid pounds is italicized, so
13 that's an estimate, correct?

14 A. Correct.

15 Q. Total other solids pounds is actual, correct?

16 A. Correct.

17 Q. Class I protein pounds is estimated?

18 A. Correct.

19 Q. Class II protein pounds are estimated?

20 A. Correct.

21 Q. Class III protein pounds is actual?

22 A. Correct.

23 Q. Class IV protein pounds is estimated?

24 A. Correct.

25 Q. Total protein pounds is actual?

26 A. Correct.

27 Q. And, in fact, all the other numbers on that page
28 for the rest of the columns are actual, correct?



1 A. Correct.

2 Q. Thank you. Turning then to page 59, Appalachian,
3 which I believe is the first line item for skim milk
4 orders. So leaving aside the last column, somatic cell,
5 which I believe has not been discussed at this hearing,
6 somatic cell is an actual number, correct?

7 A. Although it is not italicized, that actually also
8 would be an estimate.

9 Q. Ah, okay. So all the numbers in the second set of
10 pages, this skim milk butterfat order, are estimated,
11 correct? Are there any actuals?

12 A. That's correct, they are all estimated.

13 Q. Thank you.

14 So I did have a series of questions of how the
15 estimates were done, but I think the footnotes may explain
16 it. But I also have a document which we uploaded
17 yesterday and labeled MIG Exhibit 2 that I would like to
18 hand out, have marked for identification.

19 (Thereafter, Exhibit Number 63 was marked
20 for identification.)

21 MR. ENGLISH: This was uploaded yesterday morning,
22 just like the objection.

23 THE COURT: Is 63 our next exhibit number?

24 Okay. Let's mark this one-page document labeled
25 in the top right-hand corner Exhibit MIG-2 as -- for
26 identification, we'll mark this Exhibit 63.

27 MR. ENGLISH: Your Honor, may I approach the
28 witness, just to give him a copy?



1 THE COURT: Of course, Counsel.

2 BY MR. ENGLISH:

3 Q. So I think we're almost completed handing it out,
4 so let me set the stage here.

5 This is a very hypothetical plant of 10 million
6 pounds. We used 10 million pounds because that showed up
7 elsewhere for things, so 10 million pounds. But being --
8 whether it is hypothetical or not, it represents, it is
9 intended to represent, what would be a real plant in an
10 MPC order. But all the numbers are hypothetical. In
11 fact, the fact that it is a 10% Class I plant is
12 hypothetical. But it's less relevant what the actual
13 numbers are than the questions I want to ask because they
14 go to the footnotes. I want to see if I have got the
15 footnotes correct now.

16 So do you understand that, what I have explained?

17 A. I believe so, yes.

18 Q. All right.

19 MS. McMURTRAY: We're going to object.

20 Mr. Herbert is here to testify to the facts in the
21 exhibits that he created, and this calls for speculation.
22 And we -- we're going to object.

23 MR. ENGLISH: Your Honor, it is not speculation.
24 I -- I want to ask him specific questions that go to the
25 footnotes as to which numbers are actual, which ones are
26 calculated, and which ones are estimated. And that goes
27 exactly to the footnotes. So it is not intended to be
28 testimony for or against anything. It is to clarify for



1 the record, because I happen to believe that -- I mean,
2 certainly the exhibit -- hey, listen, I figured it out,
3 but it took me quite a while to figure it out, and I have
4 been doing this for a while.

5 And I think the record should be clear about how
6 the -- if I'm wrong, if he disagrees with me, then he'll
7 disagree with me, and guess what, I'll have learned
8 something. But I am not putting this in -- that's a
9 hypothetical plant. These are not actual numbers. They
10 are not intended to represent actual numbers. They are
11 merely an effort on my part to understand the footnotes.

12 If you say no, then I'm going to be here a lot
13 longer going through those footnotes.

14 MS. McMURTRAY: We are okay with that, but we just
15 want to note for Mr. Herbert that if there is something
16 that he feels like he can't answer, to make sure that you
17 know that.

18 MR. ENGLISH: And if he can't answer, then we need
19 to know that, and we'll figure it out. But I'm thinking
20 it's not as hard as we're making it out to be because I
21 think -- I think the footnotes help.

22 THE COURT: No, I understand. Thank you. And I
23 think certainly we'll give Mr. English the opportunity to
24 build a foundation for the admission of that, and with
25 that clarification that I understand he's not --

26 MR. ENGLISH: I'm not going to ask this witness --

27 THE COURT: Yeah, he's not asking the witness to
28 vouch for this. This is a hypothetical. It is a way of



1 exploring --

2 MR. ENGLISH: Yeah.

3 THE COURT: -- the source which is reflected in
4 the footnotes of some of his exhibits for various numbers.
5 With that, I think we can continue. And it is marked for
6 identification. It is not admitted yet.

7 MR. ENGLISH: And I, frankly -- if I move it for
8 admission, it will be through the witness who prepared it
9 and not through this witness.

10 THE COURT: What?

11 MR. ENGLISH: I will -- I will -- if I move it for
12 admission at a later time --

13 THE COURT: Yes.

14 MR. ENGLISH: -- it will be through the person who
15 prepared it, rather than attempting to put this person on
16 the spot and validating anything. This is really an
17 effort as an illustration. And I think it's appropriate,
18 for the record, so we can understand the footnotes better.
19 And we all have the same foundation for how the footnotes
20 read.

21 THE COURT: Yeah. I like that. I'm not sure --
22 his clarifications might be admissible anyway. I want the
23 document to be available to the decision-maker so they
24 will know what this testimony means. We have had a lot of
25 caveats on this.

26 MR. ENGLISH: Let me say that the person who
27 prepared this --

28 THE COURT: Yes.



1 MR. ENGLISH: -- is going to be a witness probably
2 Monday or Tuesday of next week. So, you know --

3 THE COURT: Okay.

4 MR. ENGLISH: -- sort of like the USDA's exhibits
5 being admitted at the end, I mean, I -- I can tell you I
6 will move admission, and you can decide at that time
7 whether to admit or not. But I wasn't proposing to do it
8 now because it seems to me USDA may object because I'm
9 trying to do it through their witness. I'm not trying to
10 do that.

11 THE COURT: Okay. I just want to make sure --
12 well, we have got it for identification. It's in there --

13 MR. ENGLISH: Yeah.

14 THE COURT: -- at some point, and that is good,
15 all those caveats. Thank you.

16 BY MR. ENGLISH:

17 Q. So leaving aside the numbers and the fact that you
18 are not an MCP order, but, you know, let me talk about the
19 first part, which is receipts, which is, you know,
20 starting on line 3 through line 11.

21 And so I want to look at line 7C, which has
22 10 million pounds. That number would be reported to you
23 by a handler, correct?

24 A. Correct.

25 Q. Okay. Staying in the top section, line 6D,
26 producer milk butterfat, of the 3.9%, that would be
27 reported to you, correct?

28 A. Correct.



1 Q. Line 9D, protein, if you are an MPC order, 3.2%
2 would be reported, correct?

3 A. To clarify, since I'm not an MCP order, I'm not
4 positive if the pounds or the percentage is reported, but
5 one of the two would be reported in a component order,
6 yes.

7 Q. Okay. So would you have the same answer for
8 producer milk other solids because you are not an MPC
9 person?

10 A. Correct.

11 Q. But you believe one of them, the pounds or the
12 percentage would be --

13 A. Yes.

14 Q. And the same answer then for line 11, producer
15 milk nonfat solids, the 8.95%?

16 A. Correct.

17 Q. One would be reported?

18 A. That's correct.

19 Q. Okay. And the other would be calculated based on
20 Class III?

21 A. Essentially, yes.

22 Q. All right. Now, would I be correct then -- now
23 let's go to column E, percent skim. The line producer
24 milk -- the -- I'm sorry -- the butterfat would be
25 calculated at 0% because this is percent skim, correct?

26 I mean, now you are under the percent skim,
27 column E, so that means by definition the butterfat is
28 zero, but it might be 0.4, correct?



1 A. If you are looking at skim pounds only, then, yes,
2 the butterfat would be zero.

3 Q. Okay. Although actually it could be something --
4 it is almost impossible to skim it all out, right, so it
5 could be something like 0.04 or something?

6 A. That's speculating on what those numbers are.

7 Q. You don't know. Okay.

8 But by definition, since it is skim milk, now
9 column E is 100%, correct, because it's skim milk, so it's
10 got to be 100%?

11 A. I'm following that you are saying all the skim is
12 in the line 5.

13 Q. Yes.

14 A. So whatever is in column E, yes, I follow that.

15 Q. So, now, I realize you don't have an MPC order,
16 but if they have reported either the pounds or the
17 percentage in C or D for line 9, then line E -- I'm
18 sorry -- column E for line 9 is calculated. It's a
19 calculated number using that percentage and applying it to
20 skim milk, right?

21 A. Correct.

22 Q. And the same answer for producer milk, other
23 solids, it would be calculated using either percentage or
24 the number based upon now the percentage in skim, correct?

25 A. Correct.

26 Q. And for -- and then also line F, for E, would it
27 be the same answer for nonfat solids, correct?

28 A. Can you repeat that?



1 Q. So the producer milk nonfat solids, like the
2 protein and other solids, the 9.31% I'm showing in
3 column E, is simply using the calculation of 8.95% now in
4 skim, correct?

5 A. All -- yes, all three of those are correct.
6 Obviously, I have not verified the math on those.

7 Q. All right. Now, let's go to the second set, and I
8 realize -- so I don't know if we're going to have to have
9 an MPC person or not to figure this out.

10 Under utilization, what's reported is, you know,
11 1 million pounds. So this is a hypothetical 10%, Class I
12 plant, however unrealistic that is, which reported as
13 1 million pounds.

14 So that is an actual number, correct?

15 A. Correct.

16 Q. And then also the butterfat is reported at 2%,
17 correct? That's actually reported by them?

18 A. Correct.

19 Q. And so the skim in line 15D is merely subtracting
20 2 from 100 to get to 98?

21 A. Correct. I will clarify that the way you
22 are identifying the utilization report is a great
23 oversimplification of the pooling process for how the
24 utilization of skim/butterfat would be. But in general,
25 yes.

26 Q. Well, believe me, I wasn't trying to complicate
27 this more than I needed to.

28 Okay. Now, in -- so similarly, for Class II, the



1 total number of pounds would be reported, correct, which
2 is 25C?

3 A. Correct.

4 Q. And similarly, the fat used in Class II, which is
5 8% here, which is line 24D, would be reported, correct?

6 A. The fat pounds in 24C would be reported, correct.

7 Q. And then the line 33, Class III, which is
8 3 million pounds, 33C, that is also reported, correct?

9 A. Correct.

10 Q. And line 32D at 4%, the butterfat in the
11 Class III, would be reported, correct?

12 A. Either the percent or the pounds would be
13 reported, correct.

14 Q. Either the pounds or percent, okay. One or the
15 other, but it works to be the same ultimately, correct?

16 A. Correct.

17 Q. And then finally, for Class IV, 41C, the 4 million
18 pounds would be an actual number reported, correct?

19 A. Correct.

20 Q. And then either the pounds or the percentage in
21 40C or 40D would be reported, correct?

22 A. That's correct.

23 Q. Okay. Now, in skim milk orders, I realize it was
24 a footnote that says -- and I'll get back to that in a
25 second -- but that there's some data that you have
26 estimated from.

27 But you wouldn't be having the line for protein,
28 other solids, and nonfat solids, correct?



1 A. That's correct.

2 Q. Okay. Okay. I may stretch here, and then we'll
3 have to figure out what we're going to do.

4 Do you know in an MPC order whether, for instance,
5 the Class I protein for 19E is an estimate, going to the
6 footnotes?

7 A. According to the footnotes, yes, that is an
8 estimate.

9 Q. Thank you.

10 Similarly, Class I, other solids, line 20E, my
11 read of the footnote is that that is also an estimate,
12 correct?

13 A. Correct.

14 Q. Similarly, line 21, Class I, nonfat solids, 21E,
15 that is an estimate, correct?

16 A. The Class I nonfat solids would be a calculation
17 because you would have -- you have nonfat solids available
18 for Class II, III, and IV, and total nonfat solids, so you
19 can calculate Class I total nonfat solids.

20 Q. Okay. So -- so you would actually -- so that is
21 an actual calc- -- but it is a calculation, it is not a --
22 it is not a reported number, it is a calculation?

23 A. It is a calculated number.

24 Q. And how is it calculated again?

25 A. It would be the total other solids minus Class IV
26 other solids minus Class II other solids -- I'm sorry. It
27 would be total nonfat solids minus Class IV nonfat solids
28 minus Class II nonfat solids minus Class III nonfat



1 solids, the Class III nonfat solids being the sum of
2 protein and other solids.

3 Q. Would the nonfat solids line for Class III be an
4 estimate?

5 A. The nonfat solids for Class III would be a
6 calculation.

7 Q. Even in a Class I plant, it would be a
8 calculation?

9 A. In a component order, the nonfat solids in
10 Class III is a calculation.

11 Q. Would the protein, 27 -- so Class II, line 27E, is
12 that an estimate, that percentage?

13 A. Can you restate that?

14 Q. Class II protein percentage, line 27E, is that an
15 estimate?

16 A. Yes.

17 Q. Class II other solids, line 28E, is that an
18 estimate?

19 A. Yes.

20 Q. And then you are saying line 29, Class II, E,
21 that's actual?

22 A. That would be a calculation.

23 Q. A calculation, I'm sorry.

24 A. Yeah, for Class II that is an actual number based
25 on what's reported on the uniform price.

26 Q. And for Class III protein in this hypothetical
27 plant, line 35E, that's an estimate?

28 A. Class III protein in component orders is



1 identified on the uniform price, so that would not be an
2 estimate.

3 Q. But for an individual handler, it is still
4 reported as an actual?

5 A. Yes.

6 Q. Give me one second.

7 Thank you, sir.

8 So given the estimates that we have seen in the
9 columns, is it fair to say that USDA does not track the
10 actual utilization of components in a Class I plant?

11 A. That may be a question better suited for someone
12 in a skim -- or a component pricing order.

13 Q. Okay. So this is where I need to struggle with
14 the footnotes for a second.

15 So footnote 7, which refers to the estimates for
16 Orders 5, 6, and 7, and you have already read it into the
17 record, so I don't propose to make you do that again. But
18 to give us context, for the record, what is producer
19 weight and payroll data?

20 A. Producer weight is data submitted by handlers to
21 the Market Administrator which identifies, for example,
22 the pounds and components and milk deliveries pooled on
23 the respective Federal Order by month.

24 Q. And how was it that USDA was able to receive --
25 and I don't want confidential information, so if that's
26 what it goes to, you are going to tell me that's the
27 answer, and I'm done.

28 But how was it able to receive this information



1 that constitutes footnote 7?

2 A. So for the Federal Orders 5, 6, and 7, all
3 handlers pooled on the order submit their product pounds
4 and butterfat on a monthly basis. Some handlers also
5 submit their -- the components they use in the component
6 pricing orders. So that's, that information was used for
7 those estimates.

8 Q. And would that be reported for all their milk or
9 just the milk that came from the multiple pricing orders
10 for the producers?

11 A. In general, that would be reported on all their
12 milk for those estimates.

13 Q. So it's provided, but since it's not an MPC order,
14 is it collected for information only, that is to say you
15 don't audit it?

16 A. That's correct.

17 Q. Okay. The next footnote, footnote 8, refers to
18 the methodology that USDA used to estimate for the final
19 skim milk order, which is Order 131, correct?

20 A. Correct.

21 Q. And USDA chose to use Order 124, correct?

22 A. Correct.

23 Q. If you know, does the Pacific Northwest order have
24 the highest level of butterfat and the highest level of
25 protein in all the orders?

26 A. I do not know that.

27 Q. Do you know if there's a correlation between
28 butterfat and protein?



1 A. I do not know the answer to that off the top of my
2 head.

3 Q. So we have plenty of data in the record, and
4 people can calculate for themselves.

5 So assume with me for a moment that the Pacific
6 Northwest order does have the highest level of butterfat.
7 That would mean that any solids, whether or not they are
8 the same or whatever, any solids, would be found in less
9 skim milk, correct?

10 MR. HILL: Objection. He's asking for speculation
11 at this point. He should not be answering these
12 questions. He needs to put on his own witness in order to
13 answer these questions.

14 MR. ENGLISH: I don't think it's speculation.
15 It's a mathematical question. Just --

16 MR. HILL: Then you should find a witness to do
17 that on your own.

18 MR. ENGLISH: I am testing the estimate. There's
19 a -- there's a footnote here, footnote 8, and I'm testing
20 the question as to why it was done -- the comparison was
21 to Arizona, Pacific Northwest. If he doesn't want to
22 answer, okay, that's always the right of a witness. But I
23 do think I'm entitled to understand whether or not
24 footnote 8 -- you know, whether or not USDA's decision to
25 do it this way makes sense. I -- if you refuse, fine, but
26 I want to at least try to get at this. Footnote 8 has
27 made a statement of how estimate was made, and I would
28 like to explore that.



1 MR. HILL: We continue to object.

2 THE COURT: I'm not ruling on the objection quite
3 yet.

4 Do you have the question in mind?

5 MR. ENGLISH: My question was -- I mean, we went
6 through Table 2, and it in essence does this. If you have
7 high butterfat relative to 3.5, let's say you have 4.5%
8 butterfat versus 3.5, won't you necessarily have less skim
9 milk in hundred pounds of producer milk?

10 THE WITNESS: I would agree the higher the
11 butterfat, the less skim in a hundred pounds of milk.

12 THE COURT: Did you still have an objection to
13 that question? That's a tautology: If you have got more
14 than one, you got to have less of the other, right?

15 MR. HILL: I'll let him answer the question.

16 THE COURT: Okay.

17 MR. HILL: But we object to this line of
18 questioning, your Honor.

19 THE COURT: And tell me again why you are
20 objecting? Because it's be- -- it doesn't seem -- I mean,
21 given the footnotes, it doesn't seem beyond the scope of
22 this witness' testimony. If the cross-examiner is -- can
23 test whether it is beyond the knowledge of this witness or
24 the basis for the exhibit, I think, and the witness can
25 say if the witness doesn't know.

26 MS. TAYLOR: I just want to add, you know, John
27 was with the team that put this stuff together.

28 And for all of these orders, John, right -- I



1 mean, estimated numbers. You had to make some
2 assumptions, something to base the estimates on?

3 THE WITNESS: That's correct.

4 MS. TAYLOR: And for 131 -- or is that -- thank
5 you -- 131, those are the -- that's what you used to make
6 the estimate?

7 THE WITNESS: We chose that because there -- 131
8 is administered by the same Market Administrator as 124.

9 MS. TAYLOR: Right. So they sued 124 data to help
10 with the estimates on 131?

11 THE WITNESS: Correct.

12 THE COURT: Now I'm lost. Does that satisfy you
13 in any way, Mr. English?

14 MR. ENGLISH: Now, okay, look, I'm not trying to
15 be confrontational with USDA.

16 THE COURT: No, of course not.

17 MR. ENGLISH: If they would prefer not to go into
18 this, fine. I do think it is valid examination. But I'm
19 prepared to back off because I'm not trying to cause a
20 problem, but I do think it is fair to examine how a
21 footnote works and whether it makes sense. But if -- if
22 USDA is -- is so upset they want to object to it, even
23 though I think the objection is not well taken, I'm
24 prepared to back off and move on.

25 THE COURT: Well, I'm not reading USDA as upset in
26 any way --

27 MR. ENGLISH: They certainly don't want this
28 question answered, but that's fine.



1 THE COURT: Well, I don't know. There's a lot of
2 reasons to make objections.

3 All right. It doesn't sound like I need to rule
4 on --

5 MR. ENGLISH: No --

6 THE COURT: -- the objection, but I do think it is
7 fair to explore the basis for this. And I mean, it is a
8 general statement, and I'm not sure what to do with it,
9 but we -- I don't think anything -- the witness has
10 prepared everything --

11 MR. ENGLISH: The answer to the first --

12 THE COURT: One at a time, please.

13 MR. ENGLISH: Yeah, he answered the first half of
14 the question. There was a second half to the question
15 that I think is just as simple and just as obvious. But
16 if USDA persists in the objection, I -- I am not here to
17 start a fight over that issue.

18 THE COURT: Well, I don't want to leave a hole in
19 the record. Now I'm intrigued.

20 MR. ENGLISH: See, I --

21 THE COURT: Just as simple?

22 MR. ENGLISH: I think there is a hole in the
23 record, so that's fine.

24 THE COURT: Let's try -- I mean, bear with me.
25 Let's try it that way. Let's just -- because I think the
26 first one is just -- you know, speaks for itself
27 basically, which is fine to ask it and get an answer to
28 it.



1 BY MR. ENGLISH:

2 Q. So --

3 THE COURT: Let's give it a try.

4 BY MR. ENGLISH:

5 Q. -- we have just established under my hypothetical
6 of 4.5% butterfat that there's less skim, correct?

7 A. Less than 3.5% butterfat, yes.

8 Q. Yes.

9 And let's assume for one second that the solids in
10 the 3.5 and the 4.5, that is to say a total of, say, 9%
11 solids, the fact that there is less skim mean that the
12 percentage of nonfat solids in the skim, just like we saw
13 in Table 2, will be higher in the milk that has 4.5%
14 butterfat, correct?

15 A. I'm not sure I'm comfortable answering that
16 question without discounting -- doing the calculation.

17 Q. Okay.

18 MR. ENGLISH: I will move on, your Honor.

19 THE COURT: Very good.

20 BY MR. ENGLISH:

21 Q. I am then done with Exhibit 44.

22 So then I would like to move to Exhibit 45, which
23 I believe was Table 6. And, again, I want to thank you
24 because I think -- I think the heading has changed from
25 the table because the table might not have called it
26 Announced Class Prices. And so it now says Announced
27 Class Prices at the very top, which means, having talked
28 about this earlier with Dr. Vitaliano, that it is 96 -- it



1 is announced at 96.5 and 3.5, correct?

2 A. Yes, 96.5% skim and 3.5% butterfat.

3 Q. Did the request ask for the calculation to be done
4 at announced class prices?

5 A. Can you restate that question?

6 Q. Okay. Would you agree that if analysis was done
7 at actual test, that the numbers would change?

8 A. At actual test, the numbers would be different.

9 Q. And so my question is, then, did the requester ask
10 for the information to be at announced class prices?

11 A. I do not know the answer to that, and I don't have
12 the request in front of me.

13 Q. Okay. Could we request that this table be run at
14 actual test?

15 MS. TAYLOR: You can request, and we will look
16 into it.

17 MR. ENGLISH: Thank you.

18 BY MR. ENGLISH:

19 Q. And turning to Exhibit 46 --

20 THE COURT: We'll count this on-the-record
21 discussion as the request, right? You don't have to --

22 MR. ENGLISH: Yes, I'm making -- okay. I'm
23 officially making a request, and I heard that will be
24 taken under advisement, and we'll hear back.

25 MS. TAYLOR: And just to be clear, just to be
26 clear for the record, in Exhibit.

27 14 that USDA put on, in that exhibit, for each --
28 in that exhibit that lists all of our exhibits, there is a



1 column labeled request, and that is exactly what was
2 requested and we were responding to. So just so everyone
3 is clear about that.

4 MR. ENGLISH: Okay. Thank you. I appreciate that
5 very much. I thought that was the case, but again, I was
6 running around looking at stuff, so -- but that's a very
7 nice clarification. Thank you.

8 Nonetheless, I now make the request, that I
9 understand to be under advisement, that Exhibit 45
10 information be provided at actual test.

11 THE COURT: So noted.

12 MR. ENGLISH: Thank you.

13 BY MR. ENGLISH:

14 Q. Turning to Exhibit 46. And I really have just one
15 question. This data is basically a calculation for May of
16 2022, of October '22, everything else being held the same,
17 the only thing is if NMPF's proposed Class I differentials
18 were in that market; is that correct?

19 A. It is a -- that is correct, this is a static
20 comparison holding everything else the same, just changing
21 the differentials.

22 Q. Thank you. That -- I should have used the word
23 static. Thank you very much.

24 MR. ENGLISH: I appreciate the witness' time. I
25 do recall that yesterday I had questions about some other
26 tables that were sort of pending because we weren't sure
27 if the witness could answer. I'm not sure if we're ready
28 to talk about that now or if you want to do it after lunch



1 or how you want to do it. That's Tables 2 and 3. There
2 were some open questions, and you said that you thought it
3 would be better if both witnesses could be on the stand at
4 the same time.

5 THE COURT: Okay. So it is relevant to this
6 witness then, because otherwise we could not break up
7 cross, but if it is pertinent to this witness'
8 testimony --

9 MS. TAYLOR: Yes.

10 MR. ENGLISH: Well, I mean, I don't know if USDA,
11 whether they want to finish this witness on these tables
12 and then we can do something different. I'll leave that
13 to USDA how they want to handle it.

14 MS. TAYLOR: Yeah, if we could finish with just
15 cross for Mr. Herbert, and then we can definitely put
16 Ms. Cashman up to talk about --

17 MR. ENGLISH: I'm fine, perfectly content with
18 that.

19 MS. TAYLOR: -- those other questions.

20 MR. ENGLISH: I'm fine with that.

21 Thank you, sir. I'll see you again.

22 THE COURT: Okay. Next up for cross?

23 Yes, sir. Your witness.

24 MR. ROSENBAUM: Steven Rosenbaum for the
25 International Dairy Foods Association.

26 CROSS-EXAMINATION

27 BY MR. ROSENBAUM:

28 Q. I do want to follow up on a footnote question for



1 Exhibit 44 to make sure I understood correctly what you
2 said.

3 Just to orient ourselves, where 131 is the Arizona
4 order, correct?

5 A. Correct.

6 Q. It is a fat/skim order, correct?

7 A. Correct.

8 Q. Okay. Meaning that there is no reported
9 information as to protein levels, correct?

10 A. That information is not a part of the pooling
11 process, the pooling calculations.

12 Q. Okay. All right. And that the footnote indicates
13 that to estimate component levels in the Arizona order,
14 Order 131, that USDA relied upon component levels as
15 reported in an MCP order, which is Order 124, Pacific
16 Northwest order, correct?

17 A. Correct.

18 Q. And did I understand you to say that the reason
19 that Order 124 was selected for comparison purposes was
20 because the same individual administers both the Arizona
21 order and the Pacific Northwest order?

22 A. Yes, the same Market Administrator oversees the
23 Arizona and Pacific Northwest orders.

24 Q. And is it implicit in that answer that there was
25 no analysis as to, for example, whether the weather
26 conditions in the Pacific Northeast (sic) and the weather
27 conditions in Arizona are sufficiently different that one
28 would expect differences in the milk produced one place or



1 the other?

2 A. I did not personally do any type of analysis like
3 that.

4 Q. Okay. And you're not aware of that having been
5 done by anyone else?

6 A. Can you repeat the question originally?

7 Q. Yeah, you -- you didn't do it. And my follow-up
8 question is, and I take it you are not aware that anyone
9 else did it either?

10 A. Correct.

11 MR. ROSENBAUM: That's all I have.

12 THE COURT: Any other cross-examiners?

13 Yes, sir.

14 MR. VETNE: John Vetne, consultant to National
15 All-Jersey.

16 CROSS-EXAMINATION

17 BY MR. VETNE:

18 Q. I want to start with the series of exhibits
19 identifying pool distributing and supply plants, which
20 would be Tables 4 through 6, starting with Exhibit 47.
21 I'm just hoping to get a better understanding, and
22 hopefully the record will have a better understanding of
23 what information is included and not included here.

24 So the -- the -- Exhibit 47, page 2, the dots
25 represent both pool distributing and pool supply plants,
26 correct?

27 A. Correct.

28 Q. Okay. And the pool distributing plants have a



1 common feature: They receive milk, put it in a bottle,
2 sell it to customers, and at a certain percentage, within
3 the marketing area, they are fully regulated. Is that
4 correct?

5 A. In general, yes.

6 Q. Okay. Although it could be that a dot located in
7 one marketing area identifies a plant that's regulated
8 some place else because the plurality or majority is
9 marketed elsewhere.

10 A. That could be.

11 Q. Okay. The pool supply plants are so designated by
12 virtue of a function those plants provide in supplying or
13 having milk supply available to distributing plants; is
14 that correct?

15 A. In certain cases, yes.

16 Q. Pardon?

17 A. Not in all cases, but generally, yes.

18 Q. In what case might they not have milk supply
19 available to distributing plants?

20 A. There are provisions in some orders for
21 cooperative-owned supply plants, that their qualification
22 provisions are not based on shipping percentage to
23 distributing plants, for example.

24 Q. So supply plants, unlike distributing plants,
25 could have a lot of functions. In this list, the supply
26 plant could be a cooperative plant, who -- which is so
27 designated by the cooperative as a pool supply plant,
28 correct?



1 A. Could be, yes.

2 Q. Okay. And another type of supply plant is a bulk
3 tanking unit that receives and assembles milk and sends it
4 to a contributing plant customer; is that correct?

5 A. That is a description of the supply plant.

6 Q. Okay. And there are supply plants --

7 MR. HILL: I'm going to object -- object, your
8 Honor. I mean, the request was for a pool plant, not for
9 each FMMO for year end 2000, 2005, 2010, 2015, 2020, and
10 2022. I think these relevant questions are not relevant
11 questions for this witness. He provided the data that he
12 provided, not to be asked about where pool supply plants
13 are after that and the like after that. I think he
14 provided what he provided. I think we're getting far
15 afield of what he was asked in this data request.

16 MR. VETNE: May I respond?

17 THE COURT: Yeah. Go ahead.

18 MR. VETNE: So USDA was asked a question to put
19 dots identifying certain plants. They're involved in
20 regulating the milk industry. The plants receive milk.
21 I'm trying to identify what these dots represent. I'm not
22 going to go beyond to what individual plants do. I want
23 to find out what this list represents. If --

24 THE COURT: Well, that seems fair to the extent
25 the witness knows. I think Mr. Hill is saying maybe it
26 wasn't necessary that the witness know all that in order
27 to construct this map.

28 MS. TAYLOR: Your Honor, may I interject a little



1 bit to help clear the record up?

2 THE COURT: Yes, you may, Ms. Taylor. Thank you.
3 As always.

4 MS. TAYLOR: Yes. Well, I don't know about that,
5 but -- to Mr. Hill's point and to -- to -- for Mr. -- to
6 clarify for Mr. Vetne and the record, supply plants are
7 defined in each order separately. Mr. Herbert only works
8 for Orders 5, 6, and 7, so he can't speak to the
9 definitions that are in the other remaining eight orders.

10 But they are in section -- and I'm looking it
11 up -- 1007.7 -- well, in each order, it's in .7. And so
12 they are all differently defined based on the marketing
13 conditions in those orders, so anybody can look up the
14 regulations. For example, on bulk tank units, that does
15 not exist in every order, so that's not something that's
16 applicable across the country in all 11 orders.

17 Now, I just want to be clear. He's here to speak
18 to the map, to Mr. Hill's point, and the regulations in
19 each order he can't speak to.

20 THE COURT: So that's the source of the --
21 BY MR. VETNE:

22 Q. The source -- the source of what's identified as
23 supply plants in this map, is if they meet the definition
24 in each market.

25 A. Correct.

26 Q. Okay. And -- and to the information that you
27 assembled, you relied, in large part, on what you received
28 from other Market Administrators?



1 A. That's correct.

2 Q. Okay. And in some cases, the supply plant dots
3 represent plants that manufacture products, and other
4 occasions they may represent plants that do not
5 manufacture products.

6 A. I don't know the details of each supply plant, but
7 that could be the case.

8 Q. You are not personally aware of any, for example,
9 cooperative-designated plant that does not manufacture
10 products?

11 You are equivocating. Is it true that you do not
12 know that a -- that any cooperative-designated
13 manufacturing plant does not manufacture products?

14 A. Can you rephrase that question, please?

15 Q. Okay. You indicated that a plant can be
16 designated as a supply plant by a cooperative.

17 A. Correct.

18 Q. Okay. And is it not true that those plants
19 usually manufacture products?

20 A. Again, I can't speak to what the provisions say in
21 each order for what supply plants regulations are.

22 Q. How about the orders that you are familiar with?
23 Are there designated cooperative supply plants?

24 A. There is order language to allow cooperative
25 supply plants, yes.

26 Q. In the order?

27 A. In the -- in the orders that I work in, yes.

28 Q. Okay. And you're familiar with what happens in



1 those plants?

2 MR. HILL: Again, I'm going to object. He's here
3 just to -- just for the location of these plants, not to
4 what each plant does or what --

5 MR. VETNE: I'm not talking about each plant. I'm
6 just talking about what's in general in this.

7 BY MR. VETNE:

8 Q. So in the orders --

9 THE COURT: Yeah, I'm -- I'm having trouble --
10 Counsel. I'm having trouble figuring out whether that
11 question is relevant to his -- pertinent to his testimony.
12 Did he have to know that in order to construct these
13 exhibits; is that what you are --

14 MR. HILL: That is my objection. He does not.

15 THE COURT: Yeah, that he did not -- he did not
16 have to know that, he did not utilize that information.
17 Whether it's -- whether it's within his -- you know, his
18 expertise otherwise, I don't know that that's pertinent to
19 his testimony.

20 MR. HILL: It's not within the scope of the data
21 request.

22 MR. VETNE: Are we here to assemble a regulated
23 price structure for milk that is used in Class II, III,
24 and IV? And are not supply plants that do manufacturing,
25 plants that receive milk, they use Class II, III and IV?
26 And are not proponents, including cooperatives, that own
27 supply plants that use Class II, III, and IV? And this
28 record, even if the witness knows, is not going to reveal



1 information that at least some of the plants on this map
2 are plants that would be affected by and receive milk in
3 Class II, III, and IV?

4 I don't understand the objection in context of
5 this hearing.

6 THE COURT: Well, I guess, you know -- allow me.
7 I think part of Mr. Hill's objection is that if you wanted
8 that information in, to present your own testimony. It's
9 not -- it's not --

10 MR. HILL: That is correct. That is correct, your
11 Honor.

12 THE COURT: It's not appropriate to try to bring
13 that in through cross-examination. It's not a challenge
14 of this witness' testimony.

15 Is that -- is that information not otherwise in
16 this record?

17 MS. TAYLOR: I think our objection -- and this
18 isn't just for this current discussion -- is that USDA
19 witnesses are here to put on data as requested. And it is
20 important in this proceeding and every proceeding, that we
21 maintain our impartiality as to what gets put on the
22 record, other than -- it's up to the proponents to ensure
23 they put on their information. USDA here is only here to
24 put on data and speak to that. And any other questions --
25 our witnesses are not put up for that purpose.

26 THE COURT: What do you say to that, Counsel?

27 MR. VETNE: I do not understand how my question
28 can be perceived to support or oppose an individual



1 proposal, as was the nature of the objection. I don't get
2 it. Maybe somebody can explain it to me.

3 THE COURT: Well, Ms. Taylor, I mean, it does seem
4 like objective data. But I do understand -- and, you
5 know, my experience with these milk hearings is limited,
6 but from what I hear you saying is that you respond to
7 data requests, you put up that data, and then the witness
8 is to testify to that. They are not here to testify as to
9 the market generally. They are not taking a position.
10 That -- I mean, that goes to that.

11 You know, the idea is that this data is important
12 to some aspect of the case, but this witness isn't here
13 for that. You are not taking a position on that. You are
14 not -- you haven't prepared this witness for that.

15 MR. HILL: That is correct. There are certain
16 data requests made. The USDA makes the decision on which
17 data requests to fulfill. And this was one of those that
18 was fulfilled. And questioning beyond the scope of that
19 data request, we think, is improper.

20 THE COURT: All right. I'm going to sustain the
21 objection. And my rationale is that the USDA witnesses
22 here are fulfilling a limited role of responding to data
23 requests and presenting that data. If the questions go to
24 something that's pertinent as to whether that data is
25 properly presented or how the spreadsheets were
26 conducted -- how they were put together, I mean, that
27 seems relevant.

28 But otherwise, I think the ground rules, as I



1 understand them -- I mean, if some other party wants to
2 speak to this -- I'm making a general ruling here, so if
3 some other party wants to speak to this. But as I
4 understand the ground rules as explained by AMS, which
5 makes sense to me, is that the role of their witnesses is
6 limited here. And the witnesses can know a lot about a
7 lot of different things, but they are not being put on the
8 stand to explore everything they know about the milk
9 industry.

10 BY MR. VETNE:

11 Q. Mr. Herbert, the dots on the map, starting with
12 Exhibit 47, represent plants -- plant locations,
13 approximate locations by county, of plants that are
14 reported and published by each Market Administrator in
15 their list of regulated plants that comes out monthly, or
16 at least annually, correct?

17 A. Correct.

18 Q. And those plants and plant locations are also
19 identified, if you are familiar, in the Interstate Milk
20 Shippers list published by the Food and Drug
21 Administration, correct?

22 A. I am familiar with the list, but not familiar
23 enough to testify about the list.

24 Q. Pardon?

25 A. I am familiar with that list, but I am not
26 familiar enough to testify to anything on that list.

27 MR. VETNE: Okay. Okay. I'll come back for
28 official notice, but just to alert folks, the Interstate



1 Milk Shippers list identifies plants and products made by
2 plants in every state in the country. The Market
3 Administrator's list identifies plants and plant
4 locations, some of which are included in the published
5 handler lists and in the dots in the -- in the map. And I
6 will be asking for official notice so you can correlate
7 the regulated pool supply plants with those that
8 manufacture products.

9 So, with that suggestion --

10 THE COURT: You are going to take that up later?

11 MR. VETNE: Well, I will bring up -- yeah, there
12 will be official notice later.

13 THE COURT: Is that something -- can I get a read
14 from AMS and anyone else, whether they think that's
15 appropriate?

16 MR. HILL: Okay. Yeah.

17 THE COURT: Okay.

18 MR. VETNE: Just FYI.

19 BY MR. VETNE:

20 Q. Let's go to -- let's go to --

21 THE COURT: Thank you, Counsel.

22 BY MR. VETNE:

23 Q. -- Table -- Table 1, Exhibit 44, and the rather
24 lengthy exhibit, as you explained to Mr. English, includes
25 reported data, calculated data, and estimated data,
26 correct?

27 A. Correct.

28 Q. Let's quickly touch base with the information for



1 Arizona derived from Order 124.

2 Arizona data is not available because of
3 confidentiality, correct?

4 A. It is a combination of confidentiality and because
5 it is skim/fat order.

6 Q. Okay. Did you, in preparing this exhibit for the
7 Arizona information, do anything to compare the Pacific
8 Northwest data that was used with actual data available in
9 Arizona?

10 A. I did not.

11 Q. Did you ask the Pacific Northwest Market
12 Administrator, Arizona Market Administrator, to do any
13 comparison for checks and balance to see is this rational
14 or not rational?

15 A. I did not ask any question like that of the Market
16 Administrator, no.

17 Q. So you don't know what the Market Administrator
18 that supplied this information did to help this record
19 decide whether the information is somewhat accurate, real
20 accurate, or who knows what?

21 MR. HILL: Can you repeat the question, please?

22 BY MR. VETNE:

23 Q. The question was --

24 THE COURT: Can you read the question back, or is
25 that too hard?

26 (Thereafter, the requested testimony
27 was read by the court reporter.)

28 MS. McMURTRAY: It is my understanding that we



1 have a witness that can come back on that can answer this
2 question, that it's Ms. Cashman who can provide some
3 clarity on this.

4 THE COURT: Okay.

5 MR. VETNE: Wonderful.

6 THE COURT: Are you objecting to this witness
7 answering whether or not he knows whether it is accurate,
8 kind of accurate, or who --

9 MS. McMURTRAY: I think our position is that we
10 would prefer if Mr. Herbert does not know, that
11 Ms. Cashman can provide this information, is -- is a more
12 appropriate witness to provide this information.

13 THE COURT: Is that satisfactory, Counsel?

14 MR. VETNE: Okay. That's fine.

15 BY MR. VETNE:

16 Q. Generally with respect to the data in Exhibit 44,
17 you indicated you relied on reports received from Market
18 Administrators, including your own markets, correct?

19 A. Correct.

20 Q. Okay. Can you tell us whether that -- let me go
21 back. The information to the Market Administrator is
22 supplied by handlers. They fill in a form of receipts,
23 utilization, in some cases protein pounds and solids
24 nonfat pounds, and send it to the Market Administrator,
25 correct?

26 A. That's correct.

27 Q. Okay. And then the Market Administrator receives
28 that, assembles it, sometimes audits it, and in this case,



1 forwarded it to you to assemble this exhibit, correct?

2 A. In general, yes.

3 Q. Okay. Do you know if the Market Administrators,
4 including your own office, that assembled this information
5 collect the information from handlers using the same
6 reporting procedure?

7 A. Can you rephrase that question?

8 Q. Do all handlers report in the same manner: Here's
9 how much milk I received, here's how much I used in
10 Class I, Class II, here's how many protein pounds I had
11 from an MPC order, skim pounds? Is it the same form and
12 the same process in each Market Administrator's office?

13 A. It would not be the same process for each order.

14 Q. Okay. Would it be the same information received
15 in each order?

16 A. Not in all cases due to some orders pricing on
17 skim and fat, other orders pricing on component pricing.

18 Q. Okay. But in some -- different information is
19 reported, I understand that. But the process of providing
20 the information, does that vary?

21 A. That process is -- would be similar.

22 Q. Okay. For a Class I handler, for example,
23 hypothetically identified in Exhibit 3 of Mr. English's,
24 would that come in one report to the Market Administrator
25 from the handler?

26 A. I'm not sure I'm the appropriate witness to answer
27 that, not being in a component pricing order.

28 Q. Okay. In your market would the information



1 submitted to the market you work in and -- markets, and
2 are familiar with, would that come from the handler in one
3 report?

4 A. In the case of the exhibit Mr. English provided,
5 the protein, other solids, nonfat solids, etcetera, would
6 not be on a report the way you are describing it.

7 Q. Would not be included, but the fat and the skim
8 would come from the handler in one report?

9 A. Correct.

10 Q. And utilization would come in that same report?

11 A. Correct.

12 Q. And if the handler diverted milk, would it be in
13 that one report?

14 A. That's correct.

15 Q. Okay. And do you know whether the one-report
16 process is used by other Market Administrators' orders?

17 A. I'm not sure I understand the question when you
18 say a "one-report process."

19 Q. Okay. A handler such as that described in
20 Exhibit 53, do you know whether markets that receive that
21 information receive it from the handler in one report,
22 here's all my receipts, here's all my utilization?

23 MS. McMURTRAY: Your Honor, I'm sorry, we're going
24 to make an objection to relevance. I don't think this has
25 any relevance to what Mr. Herbert's testimony has been or
26 to what --

27 THE COURT: Or what?

28 MS. McMURTRAY: Sorry. To what Mr. Herbert has



1 testified to, it doesn't have any relevance.

2 THE COURT: Counsel?

3 MR. VETNE: Source of the information for
4 Exhibit 44.

5 THE COURT: Well, but why is that? Well, we can
6 ask.

7 Did you take any of that information into account
8 in preparing Exhibit 44, Mr. Herbert?

9 THE WITNESS: Did I take any of what information?

10 THE COURT: I guess --

11 MR. VETNE: From other Market Administrator's
12 office to assemble Exhibit 44.

13 THE WITNESS: The other Market Administrator's
14 office provided data for assembly of Exhibit 44.

15 MR. VETNE: Okay.

16 THE COURT: And I guess the question is, I mean,
17 you didn't ask whether it comes in in one report or
18 whether it is similar or -- if I'm getting the gist of
19 this --

20 THE WITNESS: That's correct.

21 THE COURT: -- line of questioning.

22 THE WITNESS: I did not ask each Market
23 Administrator office who made the report, where they got
24 the information from.

25 THE COURT: I'm sorry to interrupt. We -- I did
26 promise lunch to the hearing reporter around 12:30. We're
27 a little past, but I don't know how much more you have to
28 go, and I -- I don't want to interrupt your cross



1 unnecessarily.

2 MR. VETNE: That's fine. Probably 20, 30 minutes,
3 it could be. Depending on --

4 THE COURT: Okay. Then we'll come back to you
5 after --

6 MR. VETNE: Depending upon interruptions.

7 THE COURT: That's the nature of the business.

8 All right. It is 12:40. We decided we need an
9 hour. Let's come back at 1:40.

10 (Whereupon, a luncheon break was taken.)

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1 THURSDAY, AUGUST 24, 2023 - - AFTERNOON SESSION

2 THE COURT: Okay. On the record.

3 Are you ready, Counsel?

4 MR. VETNE: I am.

5 THE COURT: Mr. Herbert has resumed the stand.

6 You are still under oath, of course.

7 Your witness.

8 MR. VETNE: John Vetne for NAJ. We had an hour
9 lunch. I got to plan, perhaps shorten what I was going to
10 do, and what I'm going to do is to thank you and to thank
11 USDA for all the work that went into the exhibits, and
12 tell you that I'm done. Thank you.

13 THE COURT: Thank you, Counsel.

14 In that case, we'll immediately go on another
15 lunch break for the benefit of the record.

16 Okay. Who is next? Any further cross of Witness
17 Herbert?

18 MR. SMITH: Good afternoon. Dan Smith for --
19 whoa, that's better -- MDIA.

20 CROSS-EXAMINATION

21 BY MR. SMITH:

22 Q. Just a quick question about calculations in
23 Exhibit 46.

24 Just using Federal Order 1 as an example, to
25 calculate the actual Class I value, I multiplied the
26 Class I pounds against the announced Class I price, and
27 instead of 19 and change -- 19,1, come out 19,4 and
28 change.



1 But on -- for October, the difference was quite
2 more substantial, between 19 -- the reported number of 19
3 and my calculation, Class I price came out of the
4 statistical handbook for Federal Order 1 for that month.
5 So I gather it's -- it's not using the statistical Class I
6 price, it's a different calculation?

7 A. The -- under the Class I differential value
8 column, or the section, is that the section you are
9 referring to?

10 Q. Yeah.

11 A. Yeah. So the actual represents the -- just the
12 actual value of the Class I differentials, not the total
13 value of the Class I -- not the total Class I value for
14 that order.

15 Q. I'm sorry. I don't understand that distinction.
16 That's what I'm getting at.

17 A. Right. Yeah, so that -- so essentially that just
18 represents the -- so -- the location value for each plant.

19 Q. That's what I thought. Okay.

20 A. So that's -- it represents the location value but
21 for all Class I deliveries.

22 Q. So the -- it is the computed value of the -- of
23 the Class I, and I assume that's the same for the -- for
24 the PPD, the same -- it would be the computed value for
25 the whole pool, right?

26 A. I'm not sure I understand that question. I'm
27 sorry.

28 Q. Just, you -- you -- when you ran these, you just



1 ran the pool calculation using the new National Milk
2 proposed Class I price instead of the existing Class I
3 price?

4 A. We essentially -- I mean, we essentially just
5 re- -- readded the uniform price of the PPD announcement
6 changing the Class I differentials, which are in the top
7 of the price, under classified value, then the total
8 location differentials are toward the bottom of the page.

9 Q. Yeah. Okay. And so along that line, what -- how
10 do you calculate in the average Class I differential that
11 the 282 as -- does that also take into account all the
12 location adjustments in its --

13 A. Yes, that is the -- I mean, this is the market
14 average Class I differential. To get the 282, you would
15 take the actual Class I differential value of the
16 19,103,413, divided by the Class I pounds for Federal 1,
17 which is the 678,025,669. That is per hundredweight.

18 Q. Okay.

19 MR. SMITH: Thank you. That's all I have. Thank
20 you, your Honor.

21 THE COURT: Thank you, Counsel.

22 Any other cross-examination?

23 Ms. Hancock rises.

24 MS. HANCOCK: Thank you.

25 CROSS-EXAMINATION

26 BY MS. HANCOCK:

27 Q. Good afternoon. Just a couple of questions.

28 Under Federal Orders, milk is priced where the



1 milk is delivered; is that right?

2 A. That is correct.

3 Q. Okay. And then in Exhibit 44, I think you spent
4 some time talking about the different columns that were
5 either estimated, calculated, or actual numbers.

6 Do you recall that?

7 A. Yes.

8 Q. Is it correct that handlers provide a report
9 reporting their Class I sales in multiple component areas
10 and that that would include protein calculations as well?

11 A. I'm sorry. I'm not sure I understand that
12 question.

13 Q. Well, for the area -- for Class I reports, do the
14 Class I reports that you get from handlers also include
15 the protein calculations?

16 A. I'm not really understanding what you mean by
17 "Class I report."

18 Q. Well, when the handlers provide a report of their
19 pool, their pool report?

20 A. Yeah, their pool report.

21 Q. It will include the protein calculations as well?

22 A. It would include the protein in their producer
23 milk receipts.

24 Q. And will that -- so does that mean that in
25 Exhibit 44, that that is a calculated amount, not an
26 estimated amount?

27 A. On which column?

28 MS. HANCOCK: I guess you answered the question we



1 needed. Thank you.

2 THE WITNESS: All right. Thank you.

3 THE COURT: Anyone else?

4 AMS redirect?

5 MR. WILSON: Your Honor, Todd Wilson, USDA.

6 REDIRECT EXAMINATION

7 BY MR. WILSON:

8 Q. A few items have been described as actual versus
9 reported.

10 Could you clarify what you mean by those two
11 terms?

12 A. Yes. So when I was saying actual earlier, I was
13 talking about what we actually see on the pool report. It
14 would be more accurate to describe these terms as either
15 reported or calculated or estimated.

16 Q. So to follow up on that, what would you describe
17 as calculated?

18 A. Calculated, for example, would be nonfat solids or
19 the component levels in each class as far as utilization,
20 or skim pounds would be calc- -- all those would be
21 calculated.

22 Q. Thank you.

23 To follow up with Exhibit 63, could you go through
24 that again to describe for a skim and fat order which
25 items would be reported on a market report from a handler?

26 A. Yes. So on a market report from a handler, under
27 the receipt section at the top, the total producer milk
28 pounds and butterfat pounds would be reported. Under the



1 utilization, the total pounds and butterfat pounds for
2 Class I, II, III, and IV will be reported on a skim/fat
3 order.

4 Q. And for a multiple component order, are there
5 additional information provided?

6 A. Yes. On a multiple component order, the protein
7 pounds in producer milk, other solids pounds in producer
8 milk receipts, and nonfat -- or I'm sorry -- the protein
9 pounds, the other solid pounds in producer milk
10 receipts --

11 (Court Reporter clarification.)

12 THE WITNESS: Yes. Sorry about that.

13 So on a component order, the protein pounds in
14 producer milk receipts and other solids pounds in producer
15 milk receipts are also reported.

16 BY MR. WILSON:

17 Q. And the other components listed throughout
18 utilization of protein, other solids, and nonfat solids?

19 A. Those would all be calculated.

20 Q. Thank you.

21 MR. WILSON: Nothing further.

22 THE COURT: Re-cross? If someone can justify it.

23 Okay. So I think now is an appropriate time to
24 offer this witness's exhibits into record?

25 MS. McMURTRAY: Yes, your Honor. We would --

26 THE COURT: I'm sorry?

27 MS. McMURTRAY: Yes. And we would need to make
28 sure that 14 through 58, those would be the ones that



1 would be admitted at this time.

2 THE COURT: Okay.

3 Any objections?

4 MR. ENGLISH: I would object. I thought we were
5 waiting until we were done, and I thought we were going to
6 put two witnesses on the stand to talk about Tables 2 and
7 3. Remember, we did not finish 2 and 3 yesterday.

8 MS. McMURTRAY: That's fine.

9 MR. ENGLISH: Yeah.

10 THE COURT: Okay. Tables 2 and 3 are which
11 exhibits?

12 MS. McMURTRAY: 17 and 18.

13 MR. ENGLISH: Exhibits 17 and 18. Those are the
14 ones that I still had questions about yesterday, and that
15 was apparently better to have both witnesses on the stand
16 at the same time rather than my try to do things piecemeal
17 was my understanding.

18 MS. McMURTRAY: And so Ms. Cashman is ready, I
19 think, to go up with Mr. Herbert, and then we can admit
20 those after additional questions for them.

21 THE COURT: Okay. Do you want to wait on all of
22 them or reserve on 17 and 18?

23 MS. McMURTRAY: We'll just wait on all of them.

24 THE COURT: Okay.

25 You are dismissed, Mr. Herbert. Thank you.

26 THE WITNESS: I believe --

27 THE COURT: Oh, I'm sorry, we're going to do a
28 dual. I'm so easily confused. Two for one, excellent.



1 Welcome back, Ms. Cashman. I guess out of an
2 excess of caution, I'll swear you in again. Please raise
3 your right hand.

4 LORIE CASHMAN,

5 Being first duly sworn, was examined and
6 testified as follows:

7 THE COURT: You may take a seat.

8 The witnesses are ready.

9 Mr. English?

10 MR. ENGLISH: Thank you. Chip English for the
11 Milk Innovation Group.

12 CROSS-EXAMINATION

13 BY MR. ENGLISH:

14 Q. So we now have Exhibit 44, which was Table 1,
15 Exhibit 17, which was Table 2, and Exhibit 18, which is
16 Table 3.

17 So my first question is, how does Exhibit 17
18 compare to Exhibit 44?

19 A. Okay. So I wrote down table numbers but --

20 Q. Okay. If you want to do -- so how does Table 2
21 compare to Table 1?

22 A. Right. So Table 2 matches for butterfat in all
23 orders, and protein butterfat, other solids, and nonfat
24 solids test in producer milk for the multiple component
25 orders.

26 Q. And so, otherwise, other than those categories of
27 data that are in Table 1, Table 2 does not take other data
28 from Table 1 other than that; is that correct?



1 A. So I mean this is semantics, I guess. But the
2 data that is in Table 44 that we're saying is reported --
3 or are we saying -- no, all this data is reported. Yeah.
4 So all of the data that's on, say, page 1 of 44, that's
5 all reported data. And that data is used to calculate the
6 tests that are reported in Table 2.

7 Q. Okay. So another way of putting it is estimated
8 data is not included in Table 2; is that correct?

9 A. That's correct.

10 Q. Thank you.

11 So Table 3, otherwise known as Exhibit 18, how
12 does the information in this table relate -- I'll break up
13 the question -- to the information in Table 1, Exhibit 44?

14 A. So the data in 18 are yearly averages of the data
15 that are in Exhibit 17.

16 Q. That therefore answers my question.

17 A. Yes.

18 Q. Thank you.

19 Are they weighted averages or simple averages, for
20 Table 3, Exhibit 18?

21 A. Well, the all markets combined is a weighted
22 average by producer pounds. The -- let me double-check
23 this footnote here.

24 These tests are reported. They are weighted by
25 producer pounds as well. So the yearly average is
26 weighted by producer pounds, as well as the all-average
27 total -- or all markets combined.

28 Q. Okay. So just to be clear, you -- it is not



1 simply you take the 12 months of 2000 for Order 1, add
2 them up, and divide by 12, it is a weighted average?

3 A. Correct.

4 Q. Okay.

5 MR. ENGLISH: That's all I have. Thank you. I
6 appreciate it.

7 THE COURT: Thank you, Counsel.

8 Anyone else?

9 I mean, I know we called Ms. Cashman for Mr.
10 English's purposes. Any redirect?

11 MS. McMURTRAY: Thank you.

12 REDIRECT EXAMINATION

13 BY MS. McMURTRAY:

14 Q. Ms. Cashman, you had -- well, Mr. Herbert had a
15 lot of questions this morning on the -- Exhibit 44 when it
16 came to estimated numbers for Arizona in particular.

17 Do you want to speak to that?

18 A. Yes. We did use 124's test to estimate, as
19 they're administered by the same Market Administrator.
20 However, we cannot speak to any comparisons because it
21 would reveal confidential information.

22 MS. McMURTRAY: That's it. Thank you.

23 THE COURT: Okay. That is sort of new
24 information.

25 Any cross on that?

26 Seeing none -- oh, okay.

27 MR. ROSENBAUM: Steven Rosenbaum for the
28 International Dairy Foods Association.



1 CROSS-EXAMINATION

2 BY MR. ROSENBAUM:

3 Q. I mean, the fat levels in the Pacific Northwest
4 versus Arizona, that's not -- not confidential, right,
5 average fat levels?

6 A. That's correct.

7 Q. And was any effort made to determine whether there
8 is a correlation between fat levels and protein levels
9 generally in milk?

10 A. There was not.

11 MR. ROSENBAUM: Thank you.

12 THE COURT: I'm sorry, there was not an effort to
13 determine or there was not a correlation?14 THE WITNESS: There was not an effort to
15 determine.

16 THE COURT: Thank you.

17 Well, that was new, too. Any re-redirect?

18 MS. McMURTRAY: No.

19 THE COURT: No more questions for these two
20 witnesses, then.21 Okay. Is now the time to put in the exhibits?
22 Let's try it again.23 MS. McMURTRAY: Yes. So at this time we would
24 move for Exhibits 14 through 58 to be admitted into
25 evidence.

26 THE COURT: Any objections?

27 Exhibits 14 through 58 are admitted into the
28 record.

1 (Thereafter, Exhibit Numbers 14 through 58
2 were received into evidence.)

3 THE COURT: Witnesses Herbert and Cashman, thank
4 you. You may step down from the stand.

5 Okay. Who is our next witness?

6 MS. HANCOCK: Calvin Covington, your Honor.

7 THE COURT: I'll swear you in. Raise your right
8 hand please.

9 CALVIN COVINGTON,

10 Being first duly sworn, was examined and
11 testified as follows:

12 THE COURT: You may take the stand.

13 DIRECT EXAMINATION

14 BY MS. HANCOCK:

15 Q. Mr. Covington, would you mind stating and spelling
16 your name for the court reporter?

17 A. Yes, ma'am. My name is Calvin Covington,
18 C-A-L-V-I-N, C-O-V-I-N-G-T-O-N.

19 Q. Mr. Covington, what is your mailing address?

20 A. Mailing address for Southeast Milk, who I am
21 representing, is P.O. Box 3790, Belleview,
22 B-E-L-L-E-V-I-E-W, Florida, zip code 34421.

23 Q. Thank you.

24 And are you here to testify on behalf of National
25 Milk today?

26 A. I'm here to testify on behalf of Southeast Milk,
27 Incorporated, supporting the National Milk Producers
28 Federation Proposal No. 1.



1 Q. Okay. And where are you -- or are you currently
2 employed?

3 A. I'm self-employed.

4 Q. Okay. And -- and what is your role in working on
5 behalf of Southeast Milk? Is that as a consultant?

6 A. Yes. I have been a consultant for Southeast Milk
7 since I retired as their CEO several years ago.

8 Q. And did you prepare a written statement for your
9 testimony today?

10 A. Yes, ma'am, I did.

11 MS. HANCOCK: Your Honor, at this point I would
12 like to mark what's been previously identified as Exhibit
13 National Milk Producers Federation Exhibit 2. If we could
14 have -- I think it is 64.

15 THE COURT: I think we're up to 64. Okay.
16 Exhibit NMPF-2 in the upper right-hand corner will be
17 marked Exhibit 64.

18 (Thereafter, Exhibit Number 64 was marked
19 for identification.)

20 BY MS. HANCOCK:

21 Q. Mr. Covington, before you read your testimony, I'm
22 wondering if you could give us a little bit of background
23 starting with your education.

24 A. Okay. I'll just start with my college education.
25 I graduated with a Bachelor of Science degree in animal
26 science from North Carolina State University. After that,
27 I received a certificate in business from the University
28 of North Carolina. And then a few years later, I received



1 a Master of Science degree from Ohio State University,
2 from the Department of Agriculture Economics and Rural
3 Sociology.

4 Q. What year did you receive your Master's of Science
5 degree?

6 A. 19- -- boy, I'm trying to think now. I think it
7 was '89, 1989.

8 Q. Can you give us an overview of what you did in
9 your professional career after you graduated in 1989
10 through today?

11 A. Well, I actually graduated a lot -- a year -- you
12 are going to make me younger than what I am. I actually
13 graduated many years earlier with my Bachelor's degree.
14 It was later after I started working I got my Master's
15 degree.

16 Q. Okay. Take me through your professional career.

17 A. Okay. Basically I worked for three different
18 employers before I retired from full-time work.

19 The first employer I had was the local and then
20 the state Dairy Herd Improvement Association, more
21 commonly known as DHIA, where I -- I served as a -- in
22 those days we called it a milk tester.

23 Then, after that, after I graduated from college,
24 I went to work for then the American Jersey Cattle Club,
25 National All-Jersey, Incorporated. I started as an area
26 representative for them, working in the Southeast, and my
27 major responsibility was providing service to five fluid
28 milk plants in the Southeast that marketed -- bottled and



1 marketed All-Jersey milk. I was the liaison between the
2 plants and the producers.

3 After doing that for a couple years I moved to the
4 national headquarters. Basically all my time there was
5 spent with National All-Jersey, Incorporated, the milk
6 marketing arm, then the American Jersey Cattle Club. And
7 basically, what my work there involved was the promotion
8 of multiple component pricing.

9 And we did that in about three different ways:
10 Number one, I worked with individual manufacturing plants
11 to encourage them, work with them, to get them to
12 implement voluntary multiple component pricing plans; then
13 in some cases we formed cooperatives or we expanded the
14 base of current cooperatives that would market milk to
15 manufacturing plants on a multiple component basis; and
16 then the third row is we started building our case to
17 implement multiple component pricing in the Federal Milk
18 Marketing Order system. Back when we first started doing
19 that, we did it order by order, so I was involved -- I've
20 been -- I was involved in every order and order hearing
21 that was held on multiple component pricing. Then it
22 ended up, then, with multiple component pricing as a part
23 of Federal Order Reform that went in in 2000. So that
24 that's what I have been doing, when I was working
25 full-time.

26 Since retiring from Southeast Milk, I have
27 probably spent 50 to two-thirds of my time doing
28 consulting work, not only for Southeast Milk but for other



1 cooperatives, for fluid milk plants, retail grocers,
2 investment companies interested in investing in dairy,
3 doing a fair amount of speaking at various events on milk
4 marketing.

5 Also, I've conducted for several people milk
6 pricing workshops, getting -- update them on how the
7 Federal Order system works, and also, putting out a
8 monthly newsletter for the Southeast with blend price
9 forecasts and so forth. So that's what I have been
10 doing -- probably since I retired full-time, and I have
11 actually gone back twice now for Southeast Milk and served
12 as their interim CEO.

13 Q. Okay. You served in the role as CEO for Southeast
14 Milk on two separate occasions?

15 A. Well, one full time, then went back to on an
16 interim basis.

17 Q. Okay. Three times then, total?

18 A. Yes, ma'am.

19 Q. Okay.

20 MS. HANCOCK: Your Honor, I would offer
21 Mr. Covington as an expert witness on raw milk marketing,
22 specializing in milk pricing and in particular on multiple
23 component order pricing.

24 THE COURT: Any objections?

25 Yeah, I skimmed over the testimony. I find that
26 this witness on voir dire is qualified as an expert to
27 testimony on those topics.

28 MS. HANCOCK: Thank you, your Honor.



1 BY MS. HANCOCK:

2 Q. Mr. Covington, would you mind reading your
3 statement which has been identified as Exhibit 64 into the
4 record, please.

5 A. Yes, ma'am, be glad to.

6 My name is Calvin Covington. This testimony is
7 presented in support of National Milk Producers Federation
8 Proposal 1: Update the milk component factors in the skim
9 milk price formulas. This testimony is presented on
10 behalf of Southeast Milk, Incorporated, a longtime member
11 of NMPF.

12 My off-farm career in the dairy industry covers
13 50 years working with dairy farmers and their
14 organizations. This work includes preparing proposals for
15 and presenting testimony at many Federal Milk Marketing
16 Order hearings over the past five decades. I retired from
17 SMI as their CEO in 2010, but remain involved in the dairy
18 industry, particularly in the area of milk pricing and
19 Federal Order regulations.

20 Since leaving full-time employment with SMI, my
21 association with the cooperative continues, including
22 serving as their interim CEO most recently in 2022 and
23 representing the cooperative on Federal Order and dairy
24 policy issues. This includes serving as a member of the
25 NMPF Federal Order task force which developed this and the
26 other proposals presented at this hearing.

27 SMI is a Capper-Volstead cooperative and a pool
28 handler in the Florida and Southeast Federal Milk



1 Marketing Orders. SMI is responsible for supplying all
2 the raw milk needs for pool dist- -- for four pool
3 distributing plants located in the Florida Federal Milk
4 Marketing Order and one pool distributing plant in the
5 Southeast Federal Milk Market Order.

6 As of June 30th, 2023, SMI's membership consists
7 of 114 dairy farmer members who own and operate 119
8 Grade A dairy farms.

9 SMI extends its appreciation to the Secretary of
10 Agriculture and the Dairy Division staff for holding this
11 hearing.

12 My testimony in support of updating the milk
13 component factors in the skim milk price formulas is
14 organized into the following areas:

15 One, the current skim milk price formulas and
16 producer milk components; two, challenges created by the
17 current skim price formulas; three, proposal to meet these
18 challenges; and four, comments on alternative proposal.

19 The current skim milk price formulas and producer
20 milk components. The skim milk price formulas used today
21 in the 11 Federal Milk Marketing Orders were implemented
22 as a part of Federal Order Reform in 2000. The skim milk
23 component factors implemented then and still in use today
24 are 3.1 protein, 5.9 other solids, 9.0 nonfat solids,
25 which is the protein plus other solids.

26 Keeping with the tradition of publishing milk
27 prices on a hundredweight basis at 3.5% butterfat, the
28 above skim milk components convert to 2.99 pounds of



1 protein, 5.69 pounds of other solids, and 8.68 pounds of
2 nonfat solids, and 100 pounds of milk contained in
3 3.5 pounds of butterfat and 96.5 pounds of skim milk.

4 Federal Order Reform implemented multiple
5 component pricing in seven of the 11 Federal Milk
6 Marketing Orders. (Note: The Western order, one of the
7 original seven multiple component pricing orders, was
8 terminated in 2004. California became a Federal Milk
9 Marketing Order in 2018, bringing the total of multiple
10 component pricing orders back to seven.) These seven
11 Federal Milk Marketing Orders accounted for 89% of all
12 Federal Milk Marketing Order producer milk in 2022. The
13 majority of milk production in these seven orders is
14 utilized in Class II, III, and IV, the manufacturing milk
15 classes.

16 In the seven multiple component pricing Federal
17 Milk Marketing Orders, producers are paid for their skim
18 milk production based on protein and other solids milk
19 components. Handlers pay for Class III skim milk on the
20 protein and other solids contained in the skim milk, and
21 Class II and IV skim milk is priced based on its nonfat
22 solids content.

23 The other four Federal Milk Marketing Orders use
24 skim/butterfat pricing. Handlers pay for skim milk in all
25 four classes on hundredweight basis regardless of the
26 components contained in the skim milk. Producers are paid
27 the same way for their skim milk production on a
28 hundredweight basis regardless of the components contained



1 in the skim milk.

2 Dairy farmers have responded and continue to
3 respond positively to economic signals to increase skim
4 milk component levels. Continuous improvements in
5 genetics, nutrition, and dairy farm management have and
6 continue to enable dairy farmers to increase milk
7 component levels.

8 Table 1, which uses data taken from the
9 USDA-AMS-Dairy Program Table 3, shows annual producer milk
10 component percentages from 2000 to 2022. During this time
11 period, dairy farmers increased the protein percentage in
12 their milk production from 3.02% to 3.25%. Nonfat solids
13 percentage increased from 8.71% to 9.03%. Table 1 also
14 shows after declining from 2000 to 2010, the butterfat
15 percentage increased from 3.7% in 2011 to 4.06% in 2022.

16 Again, I have Table 1 there titled Annual
17 Butterfat, Protein, Other Solids, and Nonfat Solids
18 percentages in Producer Milk Using Data Provided by
19 USDA-AMS-Dairy Program (Table 3) (2000 to 2022).

20 The adoption of genomics in dairy cattle selection
21 is increasing the speed of genetic progress, including
22 higher milk component levels. Many widely used artificial
23 insemination sires have positive genetic transmitting
24 ability for milk components. Dairy farmers keep improving
25 dairy cattle nutrition, cow comfort, and dairy farm
26 management, all of which increase milk components. The
27 research and tools available to assist dairy farmers in
28 improving milk component levels continues to expand. All



1 signs point to future increases in milk component levels.

2 Ken Nobis, a Michigan dairy farmer, will provide
3 testimony regarding practices on his farm which have and
4 continue to improve milk component levels.

5 Mike Van Amburgh, Professor of Animal Science at
6 Cornell University, will testify on milk component levels
7 in farm milk and how and why they are projected to
8 continue to increase.

9 The challenges. In multiple component pricing
10 Federal Milk Marketing Orders, the relative value of
11 Class II, III, and IV skim milk has increased as
12 components increased. However, the value of Class I skim
13 milk in all Federal Milk Marketing Orders and the value of
14 Class II, III and IV in the four non-multiple component
15 pricing Federal Milk Marketing Orders has not benefited
16 from the increase in skim milk components.

17 Failing to adjust the skim milk component factors
18 used to calculate the Class I skim milk value in all
19 Federal Milk Marketing Orders, and the Class II, III, and
20 IV skim milk values in the four non-multiple component
21 pricing Federal Milk Marketing Orders, has, is, and will
22 continue, to create marketing challenges unless skim milk
23 component factors are updated regularly to correspond with
24 actual milk component levels in skim milk.

25 An essential element of modernizing the Federal
26 Milk Marketing Order system involves updating the protein
27 and other solids content found in the producer milk supply
28 in 2000, to the actual protein and other solids content in



1 today's producer milk supply.

2 The out-of-date skim milk component factors mean
3 today's Federal Milk Marketing Order class prices fail to
4 reflect the true value of skim milk, misalign the
5 relationship between the values of fluid milk relative to
6 manufactured milk, thereby creating disorderly marketing
7 conditions, and makes it more difficult to ensure
8 consumers have an adequate supply of milk for fluid uses.

9 The skim milk component factors implemented under
10 Federal Milk Marketing Order Reform approximated the
11 average pounds of protein, other solids, and nonfat solids
12 contained in 100 pounds of producer skim milk at the time.
13 With so many changes in Federal Milk Marketing Orders
14 occurring simultaneously, this was a practical approach.
15 It also helped to maintain an alignment between the
16 Class I skim milk value and the skim milk values of the
17 three manufacturing milk classes.

18 However, as skim milk components increase, a
19 misalignment in pricing occurs if adjustments are not
20 made. Higher skim milk component levels increase the
21 relevant value of Class II, III, and IV skim milk prices
22 in Federal Milk Marketing Orders with multiple component
23 pricing versus the Class I skim milk value in all Federal
24 Milk Marketing Orders.

25 In 2000, the protein factor was established at
26 3.1, other solids factor at 5.9, and nonfat solids factor
27 at 9.0. Again, these factors approximated the average
28 pounds of protein, other solids, and nonfat solids



1 contained in 100 pounds of producer skim milk at the time.

2 In 2022, using data compiled from Market
3 Administrator reports, the average pounds of skim milk
4 components contained in 100 pounds of producer skim milk
5 was 3.39 protein, 6.02 other solids, and 9.41 nonfat
6 solids in Table 2.

7 Table 2 is the table that I prepared titled
8 Average Pounds of Protein, Other Solids, and Nonfat Solids
9 Contained in 100 Pounds of Producer Skim Milk in Federal
10 Milk Marketing Orders With Protein and Other Solids
11 Component Tests, (2000 to 2022).

12 This is data that I have been keeping for a number
13 of years and, also, each month, where I go to each Market
14 Administrator's data, pull off the data they report for --
15 on pounds of producer milk and the pounds of components,
16 and then I calculate a weighted average each year from all
17 the orders with that data available.

18 And so you can see on 2022, again, that's where
19 the 3.39 protein in skim milk, 6.02 in other solids, and
20 9.41 in nonfat solids was the average.

21 After this table and testimony was prepared, I had
22 access to the data put out by USDA that's been entered in
23 as exhibits, especially Table No. 1. And I took the
24 Table 1 data, which had component information for the four
25 Federal Milk Marketing Orders using skim/butterfat
26 pricing. I took that data of components, added to my
27 data, and taking it to two decimal places did not change
28 my results for 2022 based on my data from -- from the



1 seven orders for Federal Milk Marketing Orders. Again,
2 that's 3.39 protein, 6.02 other solids, 9.41 nonfat
3 solids.

4 Tables 3 and 4 show, numerically, the misalignment
5 in milk prices caused by the increase in skim milk
6 components.

7 Using average 2022 Federal Milk Marketing Order
8 prices and 2022 average protein and other solids levels
9 stated above, the 2022 average Class III skim milk price,
10 at test, in Federal Milk Marketing Orders for multiple
11 component pricing was 11.75 per hundredweight. That is
12 shown in Table 3.

13 If 2022 skim milk components were the same as skim
14 milk component factors established in 2000, the Class III
15 skim milk price would have been \$0.83 per hundredweight
16 lower or 10.92 per hundredweight. Again, this is shown in
17 Table 3. Again, 10.92, as you would expect, is the
18 average 2022 Class III skim milk price per hundredweight
19 published by USDA-AMS-Dairy Program.

20 Simply put, higher milk component levels in skim
21 milk increased the average actual Class III skim milk
22 price per hundredweight in Federal Milk Marketing Orders
23 with multiple component pricing by \$0.83 per hundredweight
24 compared to the current skim milk component factors.

25 Because the Class I mover skim milk price is still
26 calculated based on skim milk component levels implemented
27 in 2000, the Class I mover skim milk price does not
28 increase when skim milk components increase. Again, this



1 is shown in Table 3. This results in a narrowing of the
2 difference between the Class I and the Class III price,
3 presenting more opportunities for price inversions.

4 Again, Table 3 titled Misalignment in Skim Milk
5 Prices, Class III Versus the Class I Mover Skim.

6 Again, there in the second column for 2000 skim
7 milk components, the factors we have now, 3.1 and 5.9.
8 Using 2022, average Class III skim milk prices gives a
9 value of 10.92 per hundredweight.

10 Again, going to 2022, using the average actual
11 skim milk components, still using the 2022 average
12 component pricing, that gives us 11.75, where the higher
13 components have increased the Class III skim by \$0.83 a
14 hundredweight.

15 Coming down below there, the Class I mover today
16 is still based upon those factors determined back in 2000.
17 So the Class I mover skim, using 2022 prices, remain --
18 remains the same on both -- both years because the skim
19 milk component factors remain steady. Again, there's no
20 change in the Class I skim value there.

21 Table 4 shows similar calculations using the
22 Class IV skim milk price. In 2022, the average actual
23 Class IV skim milk price per hundredweight in Federal Milk
24 Marketing Orders with multiple component pricing orders is
25 \$0.61 higher due to the increase in nonfat solids level.

26 Again, there's no change in the Class I mover skim
27 value due to using the nonfat solids factor established in
28 2000.



1 Again, I have Table 4 there, the Misalignment in
2 Skim Milk Prices, Class IV Skim Versus Class I Mover Skim.
3 Again, you see the 13.52 based on the 9.0 skim milk
4 component. We go to averages in 2022, that's 14.13,
5 increase of \$0.61. Again, no change in the Class I mover
6 skim milk price.

7 Failure to adjust the skim milk component factors
8 creates the following challenges:

9 One, a longtime practice in the Federal Milk
10 Marketing Order system is the establishment of the Class I
11 milk price based on the value of milk used for
12 manufacturing, plus a specified Class I differential. In
13 2000, the actual Class III and Class IV skim milk values
14 approximated the announced Federal Milk Marketing Order
15 Class III and Class IV skim milk values. This was because
16 the Federal Milk Marketing Order skim milk factors closely
17 aligned with the actual skim milk component levels at that
18 time.

19 Today, this is no longer true. The actual value
20 of Class III and Class IV skim milk values in multiple
21 component pricing markets is higher than the announced
22 order Class III and Class IV skim milk prices. This is
23 because the actual skim milk component levels are higher
24 than the current skim milk component factors. Milk used
25 for manufacturing derives its value from the components in
26 the milk. The higher level components in hundredweight of
27 milk, the greater the milk's value. The Class I price is
28 no longer being based on the actual value of milk used for



1 manufacturing but a lower value.

2 Two, in Federal Milk Marketing Orders with
3 multiple component pricing, a producer's prorated share of
4 the Class I price is provided through the producer price
5 differential. Higher component levels increase skim milk
6 prices in Classes II, III, and IV. Due to the outdated
7 and fixed skim milk component factors, the Class I skim
8 milk price does not increase as dairy farmers increase
9 skim milk component levels. This allows skim milk prices
10 for Classes II, III, and IV to increase relative to
11 Class I.

12 As producer component levels increase, but without
13 additional revenue from Class I skim (to increase the
14 producer price differential), the difference between
15 prices for Classes II, III, and IV milk versus respective
16 Federal Milk Marketing Order's blend price narrows. This
17 results in increased milk price inversions which leads to
18 depooling, resulting in disorderly marketing.

19 Three, three Federal Milk Marketing Orders,
20 Appalachian, Florida, and Southeast, which use
21 skim/butterfat milk pricing, are deficit in milk
22 production. These Federal Milk Marketing Orders do not
23 have an adequate supply of raw milk within their respected
24 geographies to meet fluid milk demand throughout the year.
25 Supplemental milk is purchased and transported into these
26 three Federal Milk Marketing Orders from other regions to
27 meet demand.

28 Particularly, supplemental milk in the Appalachian



1 and Southeast Federal Milk Marketing Orders is procured
2 from marketing areas with multiple component pricing. The
3 higher relative value of skim milk in these Federal Milk
4 Marketing Orders, due to increased milk component levels,
5 increases the cost of this additional supplemental milk.
6 Due to no corresponding adjustment in skim milk prices in
7 Federal Milk Marketing Orders with skim/butterfat pricing,
8 this increases the cost of procuring supplemental milk.
9 Most supplemental milk is procured by dairy cooperatives.
10 Dairy farmers pay the increased expense which lowers their
11 mailbox milk price.

12 Proposal. To correct the challenges caused by the
13 current skim milk factors and to help better meet the
14 primary objectives of Federal Milk Marketing Orders, the
15 following is proposed:

16 One, update the current milk component factors
17 used in the skim milk price formula, which applies to all
18 Federal Milk Marketing Orders. The proposed skim milk
19 component factors equal the weighted average pounds of
20 protein, other solids, and nonfat solids in 100 pounds of
21 Federal Milk Marketing Order producer skim milk for the
22 calendar year 2022 and rounded to the nearest hundredth of
23 a pound.

24 The proposed updated skim milk factors are:
25 Protein, from 3.1 to 3.39 per 100 pounds of Class III skim
26 milk; other solids, from 5.9 to 6.02 per 100 pounds of
27 Class III skim milk; nonfat solids, from 9.0 to 9.41 per
28 100 pounds of Class IV skim milk.



1 Two, the above updated skim milk factors would not
2 be implemented until the first day of the 12th month after
3 adoption of this proposal. The current skim milk
4 component factors would remain in place until then. Both
5 dairy farmers and handlers use risk management programs,
6 and this delay will allow most transactions placed prior
7 to updating the skim milk component factors be completed.

8 Ed Gallagher, a risk management specialist, will
9 provide testimony regarding the importance of delaying the
10 implementation of proposed skim milk component factors
11 until the 12th month after implementation.

12 Three, to prevent future misalignments in the skim
13 milk component factors and to avoid returning to an
14 administrative hearing, an updating procedure is proposed.
15 By February 28th of the third year and beginning one year
16 after the announcement of a change of skim milk factors,
17 AMS shall calculate the weighted average of component
18 pounds (protein, other solids, nonfat solids) in
19 100 pounds of Federal Milk Marketing Order producer skim
20 milk for the three previous calendar years.

21 If the calculated nonfat solids calculation
22 differs by the nonfat solids factor in effect by
23 0.07 percentage points or more, then update the factors
24 for protein, other solids, and nonfat solids to the
25 corresponding calculated values. The updated factors
26 would be announced no later than five days after the
27 calculation. Implementation of the updated factors would
28 be effective the first day of March of the following year.



1 If the calculation does not exceed the
2 0.07 percentage point threshold, repeat this procedure in
3 the following year using the weighted average for the
4 three preceding calendar years. Continue this procedure
5 in subsequent years until the 0.07 threshold is exceeded
6 and the skim milk component factors are updated
7 accordingly. If the factors are updated, repeat this
8 procedure three years thereafter.

9 Table 5 is provided to help better understand the
10 future adjustment procedure. Table 5, Example Adjustment
11 Procedure.

12 Assume if this proposal was implemented in
13 January 1, 2025, updated skim milk factors would be
14 implemented January 1, 2026. Then by February 28th, 2028,
15 calculated weight -- calculate weighted average of
16 component pounds (protein, other solids, nonfat solids) in
17 producer skim milk for the calendar years 2025, 2026, and
18 2027. If the calculated nonfat solids factor differs by
19 0.07 percentage points or more, then announce updated skim
20 milk factors by March 5th and then implemented a year
21 later then in March 2029.

22 If factors are updated, the above procedure is
23 repeated in three years by using calendar years 2028,
24 2029, and 2030.

25 If the skim milk component factors are not
26 updated, the procedure is repeated in one year using
27 calendar years 2026, 2027, 2028, and so on until there's
28 an update.



1 Skim milk factors need to be updated if components
2 change. However, it is important to promote orderly
3 market and to make changes no more frequently than
4 necessary.

5 Updating every three years and using a three-year
6 average smooths out unexpected ups or downs in component
7 averages. With today's rapid advancements in genomics,
8 biotechnology, and nutrition, along with the potential of
9 weather events that could impact the next year's feed
10 supply, it is possible to have unexpectedly large
11 differences in milk components from one year to the next,
12 plus the three-year average allows dairy farmers and
13 handlers using risk management tools to better anticipate
14 potential future changes.

15 The 0.07 factor was determined by looking at the
16 historical change in nonfat solids levels and keeping in
17 mind the need to promote orderly marketing. If this
18 proposal had been implemented as a part of Federal Order
19 Reform, three updates would have occurred over the past
20 ten years. The 0.07 threshold is reasonable and helps
21 maintain orderly marketing.

22 A change in the nonfat solids level is solely used
23 to indicate if an update is warranted versus using each
24 component separately. Nonfat solids are simply the sum of
25 protein and other solids. Thus, a change in the level of
26 nonfat solids is a result of a change in protein, other
27 solids, or both.

28 Alternative proposal. SMI appreciates National



1 All-Jersey, Incorporated, also proposing an update of the
2 skim milk component factors in its Proposal No. 2. Even
3 though the NAJ proposal is almost identical to the NMPF
4 proposal, there are two parts of the NAJ proposal we
5 disagree with. They are, one, updating the skim milk
6 component factors annually, and two, annual change in
7 either protein or other solids, regardless of magnitude,
8 results in a change in the skim milk component factors.

9 A purpose of Federal Milk Marketing Orders is
10 promotion of orderly marketing of milk. This is the
11 reason the NMPF proposal calls for only changing skim milk
12 factors every three years and only if the three-year
13 average nonfat solids level exceeds the current nonfat
14 solids by 0.07 percentage points or more. As stated
15 above, skim milk factors need to be updated if components
16 change; however, it's important to promote orderly
17 marketing and make changes no more frequently than
18 necessary.

19 Under the NAJ proposal, an annual change in the
20 other solids level from just 6.02 to 6.03, and no change
21 in protein level, would result in change for the following
22 year. It is difficult to see how such a small change is
23 worth the effort. As testified to earlier, it is possible
24 unexpected ups and downs in annual milk component levels
25 could occur. Again, the reason for only changing every
26 three years.

27 Again, we appreciate and thank NAJ for supporting
28 an update in the skim milk component factors. However,



1 SMI encourages the Secretary of Agriculture not to accept
2 the portions of the NAJ proposal which includes updating
3 annually and based on a change in either protein or other
4 solids regardless of the magnitude of the change. The
5 update process proposed by NMPF is a more orderly process.

6 In summary, the milk component factors currently
7 used in the skim milk price formulas need updating. Dairy
8 farmers have increased and continue to increase the level
9 of milk components in their milk production. This
10 increase causes a price misalignment between the Class I
11 skim milk value in all Federal Milk Marketing Orders
12 versus Class II, III, and IV skim milk values in multiple
13 component pricing orders.

14 The component factors need updating to assist
15 Federal Milk Marketing Orders in meeting their two primary
16 purposes as specified in the Agricultural Marketing
17 Agreement Act of 1937: Maintain orderly marketing
18 conditions, and protect the interest of the consumer by
19 ensuring an adequate supply of fluid milk for consumption.

20 Southeast Milk, Incorporated, expresses its
21 appreciation to the Secretary of Agriculture and the Dairy
22 Division for holding this hearing to consider these
23 important proposals. We encourage the Secretary to
24 recommend the adoption of Proposal 1, update the milk
25 component factors in the skim milk price formulas.
26 Respectfully submitted.

27 I have attached to it Appendix 1. I will not read
28 that. That's been put in the record earlier by the



1 testimony of Peter Vitaliano. But, again, it's just the
2 proposed language to update the factors as proposed by
3 National Milk in Proposal No. 1.

4 Q. We get to start the clock over, it turns out.

5 A. Excuse me?

6 Q. I'm just teasing.

7 A. Oh.

8 Q. Okay. Thank you for that, Mr. Covington.

9 I just have a couple more follow-up questions to
10 kind of flesh out some of the information that you have
11 and know.

12 I'm wondering if we could just start, if you could
13 give us, given all of the touch points that you have had
14 from Order Reform and multiple component prices even being
15 introduced into the Federal Order system all the way
16 through today, if you can just give us a little bit of the
17 historical perspective about that.

18 A. The first -- the first regulated milk pricing plan
19 to implement multiple component pricing was the State of
20 California state order, and that took place back in 1962.
21 That -- that was the first one.

22 After that, from 1962 up until the first hearing
23 was held in 1985, there were several individual
24 proprietary plants, several individual cooperatives who
25 implemented their own voluntary multiple component pricing
26 plans throughout a big area of the United States.

27 In 1985, in Salt Lake City, the first -- well, let
28 me back up. Actually the first Federal Milk Marketing



1 Order hearing held on multiple component pricing was back
2 in the early '60s, believe it or not, in Tallahassee,
3 Florida, back when Florida had five Federal Milk Marketing
4 Orders.

5 But then the next one wasn't held until Salt Lake
6 City in 1985 in what was then the Great Basin Federal Milk
7 Marketing Order. Again, that program was implemented --
8 wasn't implemented until 1988. So that was the first
9 Federal Milk Marketing Order to have multiple component
10 pricing.

11 After 1988, before Federal Order Reform, there was
12 a series of hearings held for individual orders and groups
13 of orders supporting multiple component pricing. They
14 included hearing the Mid Atlantic order, the old Ohio
15 Valley order, and it had a couple other orders around it.
16 Michigan, Southern Michigan, I think it had two orders up
17 there. Pacific Northwest -- I call it Pacific Northwest.
18 It was actually I think -- I can't remember the name of
19 the order back then. There was two orders before Federal
20 Order Reform. They put in multiple component pricing.
21 And then in the mid '90s, five Upper Midwest Federal Milk
22 Marketing Orders came together and put in multiple
23 component pricing.

24 And then as a part of Federal Order Reform, as I
25 mentioned in my testimony, multiple component pricing in
26 Federal Milk Marketing Orders then was extended to other
27 orders. And then when California came in the Federal
28 Order system in 2018, it -- its -- its multiple component



1 pricing it had in the state order was changed or modified
2 to the one used by Federal Milk Marketing Orders.

3 Q. And throughout that time what -- what did you
4 observe was happening when -- as multiple component
5 pricing was implemented in those respective orders?

6 A. Well, once -- once it started and people saw the
7 value of it and what it did, then it -- it grew. I mean,
8 it was hard to get the first one. I mean, it took a long
9 time to get the first one. But once you get something in
10 place and people see it works, then it grows.

11 Q. And eventually it evolved to where we have it
12 today with all the four orders?

13 A. That is correct. Yes.

14 Q. Okay. And -- and of the four orders that
15 currently are not multiple component pricing, what is your
16 understanding about whether that -- those markets are at
17 all affected by multiple component pricing?

18 A. Well, of the four orders -- I'll just give you a
19 little bit more history -- three of those orders, the
20 Appalachian, the Southeast, and the Florida order, are
21 high Class I utilizations. The other order without
22 multiple component pricing is the Arizona order. It has a
23 much lower Class I utilization. It would be below 50%
24 Class I utilization.

25 And going back to my involvement on Federal Order
26 Reform, when we were trying to get multiple component
27 pricing into the -- all Federal Milk Marketing Orders,
28 the -- there's one predominant cooperative in that Federal



1 Milk Marketing Order, and they had in place their own
2 voluntary multiple component pricing plan. It is still in
3 place today. And so they requested that -- they wanted to
4 keep their own plan -- so they requested not to be a part
5 of multiple component pricing and continue with
6 skim/butterfat pricing.

7 On the three orders with high Class I utilization,
8 there was discussion efforts to also extend multiple
9 component pricing to those three orders, but what we were
10 told then, when I -- I was involved in it prior to Federal
11 Order Reform -- by people at the Dairy Division at that
12 time, since those three orders had over the majority of
13 their milk in Class I, if a multiple component pricing
14 plan would not be in accordance with the Agriculture
15 Marketing Agreement Act in 1937, to put multiple component
16 pricing in the order of that high Class I utilization.

17 Q. And so, at least, I think, as I understood your
18 testimony, at least with respect to Arizona, you are aware
19 that there is voluntary multiple component pricing that
20 does occur even though it's not in that order?

21 A. Yes. In fact, you have -- you have had in the
22 past, and you still have today in the three -- in the
23 Appalachian order -- excuse me -- yeah, in the -- in the
24 Southeast Federal Milk Marketing Order you still have
25 voluntary multiple component pricing plans, not as many
26 today as there have been in the past, but there are --
27 there are -- there are some.

28 And then, when I was full-time at Southeast Milk,



1 we had a balancing plant that was an ultra-filtration
2 plant. And all that product was sold on multiple
3 component pricing. We sold that milk on protein and other
4 solids.

5 Q. And based on your experience in working with these
6 multiple component orders, do you -- what do you expect
7 will be the result of -- of the implementation of National
8 Milk's proposal?

9 A. Well, it just -- like I -- I testified, if --
10 since we haven't updated the skim milk component factors,
11 we have got a misalignment between the Class I skim milk
12 value in all orders and the -- and the -- in all orders,
13 versus the Class II, III, and IV skim milk values in
14 multiple component pricing orders. We got out of whack.
15 And so the whole thing of this proposal is just to update
16 those factors to get them more back in -- in line, to be
17 more in accordance with what the purposes of Federal Milk
18 Marketing Orders are.

19 Q. And for those Class I markets, do you believe that
20 there is going to be an effect for them as well?

21 A. Yeah. Well, if the proposal -- National Milk's
22 proposal increases skim milk component levels, it will
23 increase the price of -- it will increase the Class I skim
24 mover, which increases the Class I price in Federal Milk
25 Marketing Orders. And so if we add more dollars to the
26 Federal Order pools by increasing the skim -- the Class I
27 skim milk value and orders in the -- in the skim/butterfat
28 market orders, if we add more skim dollars there, it will



1 increase the uniform blend price. And then in orders for
2 multiple component pricing, it will increase the producer
3 price differential.

4 Q. Okay. So even for the dairy farmers, they -- you
5 believe that they would benefit even for their Class I
6 sales?

7 A. Well, I'm going to say it is more than believe.
8 If you add revenue to the Federal Order pool, you are
9 going to increase returns to dairy farmers.

10 Q. And we have heard a line of questioning yesterday,
11 today -- I'm not sure where my days are now -- but about
12 whether there is actually a value to having component
13 prices in Class I milk.

14 Do you believe that skim milk solids have a value
15 in Class I?

16 A. Yes. Yeah. Skim milk solids have a value in
17 Class I or fluid milk.

18 Q. And how does that work?

19 A. Well, people don't buy milk just for colored
20 water. You know, it's the solids in milk that give its
21 nutritional value. That's the reason people -- people
22 buy -- buy milk. That's the reason why FDA, in some
23 individual states, set minimum solids nonfat standards
24 for -- for milk. It gives it value. I mean, why would
25 you drink milk if it didn't have nutritional value?

26 Q. And --

27 A. Oh, and one more thing. Again, the federal
28 government recognizes that because we are required to put



1 nutritional labeling showing the amount of fat and protein
2 per serving on the side of milk jugs or milk cartons.

3 Q. So a consumer going to purchase milk, they would
4 have that information available to them in order to make
5 that educated choice?

6 A. That -- that information is there, yes.

7 Q. Okay. And in your experience, who is it that is
8 producing most of the Class I milk?

9 A. Well, you know, dairy farmers are producing the
10 milk, but today the majority of -- of fluid milk
11 processing plants are owned by cooperatives.

12 Q. And do you have an understanding about whether
13 those cooperatives are supportive of National Milk's
14 proposal?

15 A. To the best of my knowledge, cooperatives who own
16 fluid milk processing plants are members of National Milk
17 Producers Federation, and they voted in support of this
18 proposal. And then following me, there will be a
19 representative of the second largest fluid milk processor
20 in this country, testifying in support of this proposal.

21 Q. And given all of your breadth of experience in the
22 Southeast, are you at all concerned about the increase --
23 or about the impact of increasing skim milk solids factors
24 on handlers in Appalachian and Southeast orders and
25 Florida orders?

26 A. No, I'm not.

27 Q. And why not?

28 A. Yes, it will -- it will increase the price. But,



1 again, in those three particular orders, we're deficit
2 milk production. So by increasing the skim milk revenue,
3 that would provide additional money that can be paid to
4 dairy farmers to try to encourage milk production, local
5 milk production, and likewise, it will make it a little
6 more easier as far as procuring supplemental milk, as I
7 explained in my testimony, to bring the milk into those
8 areas, especially in the Appalachian and Southeast orders,
9 where they get a fair amount of their supplemental milk
10 from Federal Milk Marketing Orders using multiple
11 component pricing.

12 Q. And in Florida, for example, do you know how much
13 of their milk is Class III and Class IV for skim?

14 A. In -- in Florida, it is very, very little. And,
15 again, I'm going to round it off here. Last year in
16 Florida, the Class III and Class IV skim milk was only
17 about 2 and three-quarters percent of total producer milk
18 in that order. And then if you want to break it down even
19 further, most of that is going to be classified as -- as
20 inventory or shrink.

21 Q. And are you concerned about skim milk solids
22 levels falling below the national average?

23 A. It's been that way since Federal Order Reform in
24 several areas of the country. Again, I put in my
25 testimony the factors that -- that we are under now that
26 were put in in January of 2000 as part of Federal Order
27 Reform used to calculate the Class I mover skim. And,
28 again, in the Florida order, in the Appalachian order, and



1 in the Southeast order, as based upon my personal
2 knowledge, their skim component levels were below that
3 number back when it was put in in 2000.

4 Q. And we heard a line of questioning earlier that
5 asked about high solids being routed to Class III plants
6 or to cooperatives.

7 Do you believe that that's going to be the natural
8 consequence of National Milk's proposal?

9 A. That has occurred in -- in the past many years
10 ago, and I'll have to admit, I was a part of -- part of
11 some of that.

12 But today, marketing conditions have changed a
13 lot, and there is very, very little of that done today,
14 very, very little. And the reason why, we have got less
15 fluid milk plants in areas where there's a lot of
16 manufactured milk, so there's less opportunities to do
17 that. All right? And you have got -- you know, again,
18 you have higher component levels up there, and there's not
19 as much variation as it was at one time among farm milk to
20 do that. And in the Southeast, if we wanted to do that,
21 there is just no manufacturing plants left to do it.

22 So I have knowledge of some of it being done, but
23 today it's very minimal.

24 Q. And customers can request it if they want it?

25 A. When I was full-time in Southeast Milk, we had a
26 customer to request it. I said, yeah, we'll do it, but
27 it's going to cost you because we're going to have to move
28 that milk some distance, and that was the end of it.



1 Q. Okay.

2 MS. HANCOCK: Thank you for your time. Appreciate
3 it.

4 THE WITNESS: Yes, ma'am.

5 MS. HANCOCK: Your Honor, I turn the witness, and
6 then we'll make the admission of the exhibit at the end.

7 THE COURT: Yes. It's nearly 3 o'clock. I think
8 we should take an afternoon break. It's 2:55. Let's come
9 back at 3:05, I guess. See everybody then for cross of
10 this witness.

11 (Whereupon, a break was taken.)

12 THE COURT: Back on the record at 3:07 p.m. Okay.

13 MR. ROSENBAUM: Steven Rosenbaum for the
14 International Dairy Foods Association.

15 CROSS-EXAMINATION

16 BY MR. ROSENBAUM:

17 Q. Good afternoon, Mr. Covington.

18 A. Good afternoon, sir.

19 Q. Now, it is the case that 90% of the milk pooled in
20 the Federal Order system today is pooled in --

21 (Court Reporter clarification.)

22 THE COURT: Off the record.

23 (Technical issue.)

24 THE COURT: Back on the record.

25 BY MR. ROSENBAUM:

26 Q. Okay. Start the question again.

27 90% of milk pooled in the Federal Order system
28 today is pooled on multiple component pricing orders; is



1 that correct?

2 A. No, sir.

3 Q. It's not true?

4 A. The number I have is 89%.

5 Q. I appreciate the correction.

6 89% of the milk pooled on the Federal Order system
7 today is pooled in multiple component --

8 A. Of producer milk.

9 Q. Yeah, you just have to let me finish the question
10 so the reporter --

11 THE COURT: One at a time.

12 BY MR. ROSENBAUM:

13 Q. -- can -- can get it down. So try one more time.

14 89% of the milk pooled on the Federal Order system
15 today is pooled in multiple component price orders,
16 correct?

17 A. 89% of the producer milk --

18 Q. Okay.

19 A. -- of all producer milk in Federal Milk Marketing
20 Orders, is pooled or associated with Federal Orders who
21 have multiple component pricing.

22 Q. Okay. And Proposal 1, which is your proposal,
23 National Milk's proposal, would have no impact on the
24 price paid to farmers with respect to milk used to make
25 Class II, III, or IV products in those MCP orders; is that
26 correct?

27 A. In the multiple component pricing orders, the
28 National Milk Producer proposal would not impact the price



1 of Class II, III, or IV milk in the orders of multiple
2 component pricing.

3 Q. And -- and that's because they are being priced --
4 strike that.

5 That's because the milk that they are providing is
6 being paid for based upon component levels, by definition,
7 if they are an MCP order, correct?

8 A. Yes, sir. And in multiple component pricing
9 orders, the Class II milk or Class II skim accounted to
10 the order based upon the nonfat solids content, Class IV
11 nonfat solids content, and Class III on the protein and
12 other solids.

13 Q. Okay. And so what they are being paid is based
14 upon the actual component levels as you have just
15 described in their milk, correct?

16 A. Producers and -- who -- who are regulated under
17 Federal Milk Marketing Orders and milk component pricing
18 orders, they are paying for their milk based upon the
19 volume -- the pounds of protein, other solids on the skim
20 portion, again, and the -- and the butterfat, plus
21 producer price differential, plus in some orders they have
22 somatic cell count adjustment for that.

23 Q. Okay. And Proposal 1 doesn't do anything with
24 respect to the price being paid for the fat content in any
25 class, correct?

26 A. The Proposal 1 only addresses the components in
27 the skim.

28 Q. All right. And the reason why under multiple



1 component pricing orders the price of the milk goes up in
2 Class III based upon protein and other solids is what?
3 What's the theoretical basis for that?

4 A. If I understood you correctly, why the price of
5 Class III milk goes up?

6 Q. Yes.

7 A. Okay. The Class III price is determined based
8 upon the price of cheese, the price of dry whey, and the
9 price of other solids. Again, it uses the end product
10 pricing formula, converts those over to the yield factors
11 and so forth. So as the price of cheese, both block and
12 barrel, the price of dry whey, the price of other solids,
13 as those prices go up, then the Class III price is going
14 to increase as well.

15 Q. In terms of the payment made to farmers in a
16 multiple component pricing order, why does it make sense
17 to pay them more based upon the particular component
18 levels if their milk is being used for Class III products?

19 A. Because if the component levels go up in
20 manufacturing products, you have a greater yield per given
21 amount of milk.

22 Q. You're paying more -- so from a handler's
23 perspective, you are paying more for the milk, but you can
24 make more cheese out of it?

25 A. If it's -- if it's -- if that milk is used for
26 cheese, yes. The more components in milk, on average,
27 on -- generally speaking, the higher yield that you will
28 get.



1 Q. Okay. And -- and when it comes to Class IV
2 products, what's the reason why it makes sense to pay more
3 for milk being used to make Class IV products if the
4 component levels -- specific component levels are higher?

5 A. Well, I'm going to pick one Class IV product,
6 nonfat dry milk powder. If you have more nonfat solids in
7 a given amount of milk, you will get a greater yield of
8 nonfat dry milk powder out of a given volume of milk.

9 Q. Okay.

10 MR. ROSENBAUM: So I would like to have a document
11 marked as whatever the next exhibit number is.

12 THE COURT: 65 is what I have.

13 MR. ROSENBAUM: Exhibit 65.

14 (Thereafter, Exhibit Number 65 was marked
15 for identification.)

16 MR. ROSENBAUM: I'm sorry. Do I give one copy to
17 the reporter and one copy to yourself and one copy for the
18 witness?

19 THE COURT: Yes, that would be sufficient. Yes.

20 BY MR. ROSENBAUM:

21 Q. The -- before I ask you a question about
22 Exhibit 65, you have described -- well, before I get to
23 Exhibit 65.

24 Proposal 1 would increase the price for milk being
25 used to make Class II, III, and IV products in the four
26 fat/skim orders, correct?

27 A. That is correct. This proposal would increase the
28 skim milk values in the skim/butterfat orders for



1 Class II, III, and IV skim.

2 Q. Okay. And your proposal would increase the
3 Class I price in all orders, correct?

4 A. It'd increase the Class I skim price in all
5 orders, yes.

6 Q. Okay. So I have shown you a -- I have had --
7 strike that.

8 I have provided you a copy of Exhibit 65, which is
9 an article that appears you authored back in 2015.

10 Do you remember this article?

11 A. Well, it's got my picture on it, so that's a
12 pretty good sign. If -- if you would help me -- I'm
13 trying to look where this was printed at.

14 Q. It is at the very last page at the bottom, I
15 copied the website which it came from. It is from Ag
16 Proud.

17 Does this help orient where this comes from?

18 A. No, sir. Now, I'm sure I wrote this article, but
19 I'd have to go back and search my records to tell you
20 actually who I wrote it for.

21 Q. Okay.

22 A. I just can't remember, because I'm going to be
23 perfectly honest with you -- okay, go back -- go back --
24 look up there on the last page. You see where it ends
25 "PD"? On the last paragraph --

26 Q. Yes.

27 A. -- in bold?

28 I'm assuming this was written for Progressive



1 Dairymen.

2 Q. Okay.

3 A. That's their initials. And sometimes what
4 happens, other people will pick them up or they might --
5 Progressive Dairymen might allow them to do it.

6 Q. Okay.

7 A. So I'm going to make the assumption that PD, that
8 was done at Progressive Dairymen.

9 Q. Okay. So let me -- since you are on page 5, let
10 me call your attention, and I'm just going to read it into
11 the record, a couple paragraphs. This is an article from
12 2015, just to be clear, so the numbers are not likely to
13 be exactly the same today.

14 But I'll quote: "The economic impact of higher
15 component levels."

16 Do you see that, sir?

17 A. Yes, sir, I do.

18 Q. Okay. "The economic impact of higher component
19 levels, both at the farm and the plant, is significant.
20 Using 2014 component prices, the 2014 Class III price
21 (average components) is \$0.63 per hundredweight higher
22 compared to using 2000 average milk component levels. A
23 50,000-pound tanker of milk when manufactured into cheddar
24 cheese yields 144 more pounds of cheese at 2014 milk
25 component levels compared to 2000."

26 Next paragraph. "A cheese plant desiring to
27 manufacture 20 million pounds of cheese per month can
28 receive 111 fewer tankers of milk, at 2014 milk component



1 levels compared to 2000, and still produce 20 million
2 pounds of cheese. This is a saving in money, more
3 efficient, and improves sustainability," end quote.

4 Did I read that correctly?

5 A. Yes, sir.

6 Q. Okay. And so is it fair to say that in the first
7 paragraph, you are describing that higher component
8 levels, given component pricing, has increased the amount
9 that farmers receive for Class going -- for milk going to
10 Class III compared to what it would have been 14 years
11 earlier?

12 A. Based on those component levels. They have
13 higher -- higher component levels in 2014 compared to
14 2000. And, again, in that one you read there, I was using
15 a cheese plant as an example.

16 Q. Yes. And -- and you actually calculate the result
17 is you could make 144 more pounds of cheese?

18 A. That's correct.

19 Q. Okay. And -- and then in the next paragraph you
20 say that as a result of that, if a plant were producing --
21 or producing 20 million pounds of cheese a month, they
22 could do so with 111 fewer tankers of milk, correct?

23 A. That's what I wrote there, yes, sir.

24 Q. Okay. So now I want to switch to Class I --

25 A. Uh-huh.

26 Q. -- and ask am I correct that the higher component
27 levels in milk would not reduce at all the number of
28 tankers of milk that you needed to make fluid milk?



1 A. That -- that is correct.

2 Q. Okay.

3 A. Can I -- I need to clarify that though. That is
4 correct unless that plant happened to be fortifying or
5 something to that fluid milk, it would have an impact.
6 But if it was not fortifying, yes, you are correct, you
7 don't get any more gallons of milk out of -- used for
8 fluid regardless of those component levels.

9 Q. And -- and so at least when you are looking at how
10 much product you can produce, the increase in component
11 levels has been of observable value to Class III and
12 Class IV handlers, but not to Class I handlers; isn't that
13 true?

14 A. Yeah. And that's the reason why under Federal
15 Milk Marketing Orders, Class I milk is still -- still
16 priced, the skim portion is still priced on per
17 hundredweight basis, not on components.

18 Q. Well, but the whole impetus of your Proposal 1 is
19 that there's been an increase in solids levels, isn't it?

20 A. Not -- not -- not correctly.

21 What our proposal is -- if we go back to Federal
22 Order Reform, Federal Order Reform, we have -- Federal
23 Order Reform uses end product pricing, and if the Class I
24 price is based at that time on the higher of Class III or
25 IV, you got to start somewhere to get that Class III or IV
26 price. Class III or IV skim price.

27 So Federal Order Reform, the average components
28 used at that time was what I had in my testimony. They



1 were approximate. You can go back and look at -- you had
2 components were published with the old Minnesota/Wisconsin
3 price at that time and what was a part of Federal Order
4 Reform. So you had to start somewhere.

5 And so those component levels were used to convert
6 that price over to Advanced Class III and IV skims in
7 order to calculate the Class I skim milk value.

8 Q. Is --

9 A. What our proposal -- I'd like to finish if I
10 could, please.

11 Q. I thought you were done. Please do.

12 A. No, I'm not finished yet.

13 Q. Go ahead, please.

14 A. What our proposal does is just update these
15 factors. When they were established in 2000, they were
16 established to have relationship between them and what the
17 Class III and IV values were.

18 As my testimony shows, where Class III and IV has
19 gone up, as you very well explained there through your
20 questions, their values have gone up, so that difference
21 between Class I and III and IV is narrower compared to
22 what it was in 2000.

23 All our proposal does is update 'em to what they
24 are currently and maintain that same alignment.

25 Q. But isn't it a fact that that narrowing has
26 occurred because solid levels that are of value to
27 Class III and IV and II have increased, and therefore, the
28 price paid, at least in the multiple component pricing



1 orders, has gone up, but those solids are not of value in
2 Class I; and so, yes, there's been narrowing, that's --
3 that reflects the value of -- the relative value of the
4 milk. Isn't that the case?

5 A. I -- my testimony -- you -- you're supporting my
6 testimony where you say I'm --

7 Q. I think --

8 A. -- narrowing it. And what we -- what our proposal
9 does, is to update it and get back where it was to have a
10 proper alignment so we can encourage milk to go to
11 Class I.

12 Q. Well, speaking in terms of milk going to Class I,
13 Class I utilization has plummeted in this country over the
14 last 30 years, hasn't it?

15 A. Yeah, Class I utilization has gone down.

16 Q. Class I utilization nationwide is -- in the
17 Federal Order system is 27%, correct?

18 A. I'd have to go back. You're -- I'm not -- I
19 thought it was somewhere about 28 and a half, but I need
20 to go back. I'm going from memory.

21 Q. In that range, in any event, correct?

22 A. Class I utilization is low, yes.

23 Q. It is the lowest ever, isn't it?

24 A. The lowest since we have been keeping statistics.

25 Q. How long have we been keeping statistics?

26 A. You can go back and you can go to USDA database,
27 and you will find -- the oldest thing I have got is a 1932
28 yearbook of agriculture, and there are statistics in that.



1 And I think that was about the first good set of
2 statistics we had.

3 Q. And since 1932 has -- strike that.

4 Is the current Class I utilization the lowest it's
5 been since 1932?

6 A. The -- yes, sir, it is -- it is the lowest based
7 upon the data we got, yes.

8 Q. Now, USDA yesterday put in an Exhibit 39, which
9 said that -- let me -- and let me just -- I don't want to
10 paraphrase here. I'll read the footnote -- the note.

11 Quote: "No order received any call for or had any
12 issuance of milk to be shipped to Class I plants in their
13 order." And this is a document that covers the period, I
14 believe, from 2010 to the present.

15 Is that -- do you have any information
16 inconsistent with that statement?

17 A. I -- I -- I don't know what you are referring to.
18 In -- when I was running Southeast Milk, it was -- we
19 didn't -- if we needed milk, we didn't call the Federal
20 Milk Market Administrator, it was our responsibility to do
21 that.

22 Q. I mean, the Federal Order administrator does have
23 the power to order manufacturing plants to give up milk if
24 that's necessary to meet Class I needs, correct? Is that
25 your understanding?

26 A. Yeah. And it probably -- I think it varies some
27 from order to order. I'm looking at this sheet right here
28 that you have given me here, and it shows the shipping



1 standards. And, again, I don't see it identified with any
2 particular order, but it looks like since shipping
3 standards are different from order to order, this only
4 deals with one Federal Milk Marketing Order.

5 THE COURT: Do we have an identification? You
6 handed the witness a previous exhibit.

7 MR. ROSENBAUM: I'm sorry --

8 THE COURT: I'm not sure. You may have. Which
9 exhibit is that?

10 MR. ROSENBAUM: If I failed to, that was my
11 oversight.

12 THE COURT: That may have been mine.

13 MR. ROSENBAUM: It's Exhibit 39, your Honor.

14 THE COURT: Yes. Okay. The witness was looking
15 at Exhibit 39 on the last testimony.

16 MR. ROSENBAUM: We'll rely upon USDA's testimony
17 about what that note means.

18 BY MR. ROSENBAUM:

19 Q. But let me just ask it this way. You don't -- you
20 are not aware of any calls that USDA -- that USDA has
21 point out or any Market Administrator has put out
22 requiring a manufacturer to give up milk so that Class I
23 needs could be met?

24 A. Again, I'm not aware of it. And, again, when I
25 was managing Southeast Milk full-time, we were -- we
26 weren't expected to call the Market Administrator when we
27 needed milk, we just had to go out and look for it.

28 Q. Okay. So without the intervention of the federal



1 government, milk was made available to meet all Class I
2 needs; is that a fair statement?

3 A. Not all the time.

4 Q. I mean, isn't the -- okay. Isn't the country as a
5 whole awash in milk? From a fluid needs perspective?

6 A. No, sir. No, sir, I wouldn't -- I would not agree
7 with that statement because you have got areas, especially
8 the area that I -- I have worked -- worked in here in the
9 past years. We had to continually go further and further
10 out to get milk to serve the fluid milk markets.

11 Q. And aren't there pending proposals to address that
12 through transportation credits of some kind?

13 A. There -- there was a hearing held back in
14 February, yes, to look at that.

15 Q. And you were awaiting the decision, correct?

16 A. The recommended decision has -- has come out
17 and -- but there still has not been a final decision or
18 referendum.

19 Q. All right. Now, when the MCP orders -- and I
20 appreciate the history you gave. When the MCP orders
21 went -- that went into effect in the 1990s, and then they
22 were expanded in 2000 -- you know the timeframe I'm
23 discussing?

24 Let me rephrase that. You testified that there a
25 few select orders that actually had MCP provisions, even
26 before the 1990s, but I think you testified that several
27 of them, maybe you said five of them, adopted them in the
28 mid 1990s, and then that was expanded in 2000 as part of



1 order reform. Is that right?

2 A. No, sir.

3 Q. That's not right?

4 A. That's not what I testified to.

5 Q. Okay. Let me -- let me just ask it a little
6 differently then.

7 Several orders adopted multiple component pricing
8 in the mid 1990s; is that right?

9 A. Yes.

10 Q. Okay. And then in 2000, there was order
11 consolidation, correct?

12 A. Yes.

13 Q. And at that point most of the orders adopted
14 multiple component pricing, but not all?

15 A. Seven of them out of the 11 did.

16 Q. Okay. That's fine. That's what I was getting at.

17 Now -- and when -- when -- when that was done, the
18 system was one in which the price paid by a handler for
19 Class II, III, or IV milk in those seven orders would go
20 up automatically as the -- as the component levels went
21 up, correct?

22 A. No, sir.

23 Q. Well, I mean, let me -- let me be a little bit
24 more specific. Perhaps that would help.

25 With respect to those seven orders and with
26 respect to the specific components identified in the
27 orders, if those component levels in producer milk went
28 up, that producer would get paid more for their milk,



1 correct?

2 A. Not necessarily.

3 Q. What's -- what's wrong with that statement?

4 A. You just mentioned component levels. It also
5 depends upon the price of protein and other solids. The
6 component levels could go up, but if the price of protein
7 and other solids went down, the total payment to that
8 producer could be less if his components went up. So you
9 got to have the -- what the price does as well.

10 Q. Okay. So -- and the price, in this context, is
11 based upon the price of the finished product, be it cheese
12 or nonfat dry milk or whatever -- whatever particular
13 product is at issue, correct?

14 A. For -- for Class III, it's determined by the price
15 of cheddar cheese and barrel cheese and dry whey and
16 butter, and then for Class IV, it is butter and nonfat dry
17 milk powder.

18 Q. Okay. So assuming the price stayed the same, the
19 amount paid stayed the same -- strike that. Start that
20 again.

21 Assuming the price stayed the same, the amount
22 paid to the farmer went up if that farmer's component
23 levels went up?

24 A. If the component prices remain the same, that is
25 correct.

26 Q. Okay. But that -- Class I was not tied to that,
27 correct? The Class I price -- I price was simply not tied
28 to that?



1 A. The Class I milk price in all Federal Milk
2 Marketing Orders, the skim is paid on a per hundredweight
3 basis, and the fat is paid -- butterfat's paid on a per
4 pound basis.

5 Q. Okay. And -- and as a result, there was no effort
6 to put in place a mechanism by which Class I prices would
7 automatically go up if milk component levels went up,
8 correct?

9 A. The -- the Class I price in Federal Milk Marketing
10 Orders today is -- is an average of the Class III and IV.
11 If the Class III and IV prices go up, which is
12 determined -- Class III and IV price is determined by the
13 various dairy products that I just mentioned, then the
14 Class I price is going to increase.

15 Q. Yes. But the Class III and IV prices in terms of
16 the pricing, they are not affected by changes in component
17 levels, correct, in the formula?

18 A. In -- in the -- in the Federal Milk Marketing
19 Orders, and this is what this whole proposal is about,
20 those skim component standards remain the same to
21 calculate the Class III and IV price -- skim prices that
22 are used to calculate the Class I price.

23 Q. So -- so it is fair to say that as of 2000, a
24 mechanism was put in place by which, at least for the 90%
25 of the milk in the MCP orders, as components increased,
26 the -- that would be reflected in the payment obligations
27 with respect to Class II, III, and IV, but not with
28 Class I; is that fair?



1 A. Yeah. Class I in all -- Class I skim portion of
2 all Federal Milk Marketing Order is paid for on a per
3 hundredweight basis, but the butterfat is paid for on a
4 component basis.

5 Q. Right. But we're not -- nobody's at this hearing,
6 I believe, talking about changing the butterfat component
7 price, correct?

8 A. No, sir. I'm just trying to answer the question
9 to the best of my ability.

10 Q. So correcting for the -- for the butterfat part of
11 it, which I appreciate, where everybody pays more if the
12 level goes up, Class II, III, and IV, at least with
13 respect to MCP orders, is set up so that if the component
14 levels go up, the amount owed goes up, but that's just not
15 how Class I is priced?

16 A. No, sir. Class I in Federal Milk Marketing
17 Orders, the skim portion is paid on a per hundredweight
18 basis and, again, the butterfat is on a per pound
19 butterfat basis, right.

20 Q. But the skim milk price component, on Class I
21 there are two pieces of the payment calculation, right?
22 One is for the fat level and one is for skim milk,
23 correct?

24 A. No, sir.

25 Q. What is it then?

26 A. There's three parts to it. You have the skim per
27 hundredweight, the butterfat per pound, and the Class I
28 differential.



1 Q. You are -- you are --

2 A. Excuse me. And there are also four parts. Your
3 assessments, if you are in some orders, for example, the
4 transportation credits, you have to pay assessment on
5 that.

6 Q. Okay. So leaving aside the Class I differentials
7 for a moment -- and of course, you are quite right, that's
8 part of the system -- but in terms of changes in component
9 levels, the system is set up, at least as far as the MCP
10 orders are concerned, that increases in component levels
11 will result in an increase in payment obligations for
12 Class II, III, and IV, but not Class I?

13 A. Yes, sir.

14 Q. Okay. And I think we have already established
15 that one obvious reason that makes sense is because,
16 increased component levels allow you to produce more
17 Class II, III, and IV products, but do not allow you to
18 produce more Class I product. Isn't that a fair way to
19 characterize the system?

20 A. When it comes to Class II, III, and IV, your
21 manufactured products, as the component levels increase,
22 you will get more pounds of product per given unit. On
23 Class I milk, on the Class I skim portion, if you have
24 more pounds of Class I or Class I skim, you don't get any
25 more gallons of milk to sell under the -- under the
26 conventional system.

27 Q. Okay. Now -- okay. Did USDA say something in
28 writing that MCP was inappropriate for the three orders in



1 the Southeast part of the United States?

2 A. I was told it verbally.

3 Q. How long ago was that?

4 A. 19- -- well, I -- I'd have to go back. I -- it
5 was going to be before 2000. So somewhere between -- I
6 can't remember -- you can look back and see when the -- I
7 call it recommended decision, when the first information
8 was put out about the orders, somewhere during that period
9 of time.

10 Q. Okay. The -- it's been a while. But don't the --
11 I mean, wasn't it suggested in a recommended decision that
12 farmers had to be given the option of whether to go to MCP
13 or not, and certain orders have just resisted that?

14 A. Again, as I -- I said earlier, you had one order
15 where the cooperative -- the dairy farmers cooperative did
16 not -- didn't -- just asked not to have it. And so far,
17 again, in the Appalachian, Florida, and Southeast Federal
18 Milk Marketing Orders, again, producers have not asked
19 for -- for a hearing. And that's -- that's -- that's
20 the -- that's up to them.

21 Q. Well, okay. But your -- what your proposal does
22 with respect to the price for milk going into Class II,
23 III, and IV in the four fat/skim orders, is effectively to
24 pay them as if their milk component levels are as high as
25 the milk component levels in the MCP orders; isn't that
26 right?

27 A. No, sir.

28 Q. Well, aren't you proposing to change the Class III



1 and IV price so that they will reflect an assumption that
2 protein levels are at 3.39, other solids are at 6.02, such
3 that combined, solids nonfat are at 9.41?

4 A. That's what our proposal does. But, again, it is
5 nothing different than what was done in Federal Order
6 Reform in 2000. All we're doing is updating.

7 In Federal Order 2000, if you looked at component
8 levels in producer skim milk in -- in Florida,
9 Appalachian, the Southeast orders, again, there's not
10 Federal Order data back then, but I'm very familiar with
11 what component levels were down there. You can look at
12 DHI records and so forth to give you an idea. And it's
13 just common knowledge that those component levels in 2000
14 were lower than the standards put in in 2000.

15 So using what you are saying there, they were
16 paying above average back in Federal Order -- back in
17 Federal Order Reform. All we're doing -- and they have
18 increased component levels down there. So all we're doing
19 is updating what was already in place.

20 Q. But -- but the way you are updating -- let me take
21 it from this perspective. If you are a dairy farmer in a
22 multiple component pricing order, your ability to be paid
23 based upon a protein level of 3.39 is dependent upon your
24 milk actually having 3.39 protein in the milk, correct?

25 A. In multiple component pricing orders, under the
26 order, if you are regulated under the order, producers are
27 paid based upon their pounds of protein and other solids
28 in butterfat.



1 Q. And that will continue if Proposal 1 is accepted,
2 correct?

3 A. Yeah. Proposal 1 has nothing to do with that.

4 Q. Right. Okay. So -- and if you are a farmer in an
5 MCP order and your protein is actually 3.2%, you will be
6 paid less money than if it were 3.39%, correct?

7 A. Assuming the prices are equal.

8 Q. But if Proposal 1 goes into effect and you are a
9 farmer in any of the four fat/skim orders, you will be
10 paid for your milk under the assumption that your milk has
11 3.39% protein regardless of what level it actually has; is
12 that correct?

13 A. No, sir. In the skim/butterfat orders, producers
14 are paid a blend price, price per pound of butterfat and
15 the skim milk. It takes all classes blended together, and
16 the producers are paid on a per hundredweight basis.

17 Now, yes, our proposal would increase the Class I,
18 II, III, and IV skim milk values in those orders. So it
19 would add more skim dollars to the pool, which would
20 bring -- bring the total uniform blend price higher.

21 Q. So with respect to milk going to Class III use in
22 any of those four orders, farmers will be paid under a
23 formula that assumes the protein level is 3.39 regardless
24 of what the actual protein level is; is that correct?

25 A. And, again -- yes, it assumes that, and that's no
26 different than what was done back in 2000. It assumed
27 that the factors were -- the current factors we have now,
28 even though their actual milk was below. So we're not



1 changing any of the methodology. We're just updating what
2 the numbers are to try to make it more accurate.

3 Q. Wasn't USDA in 2000 openly trying to come up with
4 formulas that reflected essentially the same prices that
5 existed under the system they were replacing?

6 A. I'd have to go back and read the decision again to
7 give you an -- an answer on that. I -- I have got a
8 copy -- I've still got copies of it. I need to go back
9 and read it.

10 Q. What is DHI?

11 A. Dairy Herd Improvement Association.

12 Q. Okay. And what is it -- what do they do?

13 A. Dairy Herd Improvement Association is one of the
14 oldest dairy farmer organizations in the country. They
15 provide dairy records services to dairy farmers.

16 What it involves -- again, it's changed over
17 time -- but it involves them going out, when I was
18 involved in it, once a month for two milkings. You record
19 each animal's production. You pull a milk sample, test it
20 for butterfat. We did a little bit on somatic cell count.
21 Get the information on when the calves were born and when
22 the cows was bred and so forth.

23 Pull all that data together, provide management
24 information for the dairy farmers. It's very critical.
25 About 50% of the dairy farmers in this country are
26 enrolled in it. Plus, more importantly, it was the basis
27 that -- that we used to measure genetic transmitting
28 ability of sires, one reason we made so much genetic



1 progress. You have got to know what the cow performance
2 at that time in order to predict the future. Now,
3 genomics is changing that.

4 Q. And is part of the performance that was -- that's
5 measured by DHI or DHIA, the component levels in the milk
6 produced by the cows?

7 A. Yes. Again, there are several different type --
8 DHIA -- and it's been years since I -- I was -- you know,
9 I worked with them. I'm still trying to stay up with it.
10 You got different programs. But, yeah, it pulls a milk
11 sample, and you can measure it for -- measure it for
12 butterfat, measure it for protein. They do some other
13 tests now to measure the available -- the -- what they
14 call mons in there to help on fitting programs and so
15 forth, and somatic cell count.

16 Q. Okay.

17 MR. ROSENBAUM: That's all I have.

18 THE COURT: All right. Mr. English, your witness.

19 MR. ENGLISH: Thank you, your Honor.

20 CROSS-EXAMINATION

21 BY MR. ENGLISH:

22 Q. Mr. Covington, my name is Chip English. I'm an
23 attorney for the Milk Innovation Group.

24 Good afternoon, sir?

25 A. Good afternoon, sir.

26 Q. So I believe in response to questions from
27 National Milk's attorney Ms. Hancock, you said consumers
28 buy fluid milk for its nutritional value.



1 Do I have that statement correct?

2 A. Yes, sir.

3 Q. Okay. And yet, fluid milk consumption has been
4 constantly decreasing when components in nutritional value
5 has been increasing, correct?

6 A. Fluid milk consumption continues to go down, yes,
7 sir.

8 Q. Okay. So by that metric, as an economist, you
9 might conclude that the components and nutritional value
10 haven't been helping, correct?

11 A. No, sir, I would not agree with that statement.

12 Q. Do you have any study to share with this record
13 that consumers buy fluid milk for its nutritional value?

14 A. No, sir, I have no -- no testimony in regards to
15 that to put into the record.

16 Q. So if I asked about research, you'd have the same
17 answer?

18 A. I'm sorry?

19 Q. If I asked the same question about any research as
20 opposed to a study, you would answer the same thing, that
21 you don't have the information on that.

22 A. I -- I don't have any -- any with me here for this
23 hearing.

24 Q. So you testified that during Federal Order Reform,
25 USDA orally told you that Federal Orders with high Class I
26 utilization, like the three in the Southeast, should not
27 go to multiple component pricing. Doesn't that imply that
28 the real value for multiple component prices is in



1 Class II, III, and IV?

2 A. Yes, sir.

3 Q. If Class I fluid milk gets value for protein,
4 other solids, and solids nonfat, why price Class I milk on
5 skim and butterfat?

6 A. The reason we price Class I on skim and
7 butterfat -- again, you can separate out the butterfat,
8 any extra butterfat and sell that, but on skim, we can't
9 do anything with skim except go up, increase the level
10 with skim. And, again, skim milk without going up, you
11 don't get any more -- you don't have any more volume to
12 sell.

13 Q. Thank you, sir. I agree.

14 So I would like you to turn for a moment to
15 pages 6 and 7 of your testimony where you do an analysis
16 in Tables 3 and 4. And I -- in both of them -- let me
17 just start with Table 3 -- you do an analysis comparing to
18 the 2022 average Class I mover skim milk price in all
19 orders.

20 Can you tell me what fluid milk processor pays for
21 Class I milk at the Class I mover skim milk price?

22 A. Well, the processor is going to pay for Class I
23 milk at the Class I mover skim value, the Class I
24 butterfat, plus Class I differential, plus any Federal
25 Order assessments that might take place.

26 Q. So -- but Federal Order assessments don't go to
27 dairy farmers, right? They go to USDA, correct?

28 A. No.



1 Q. Well, what kind of assessments do you mean then,
2 are you talking about?

3 A. There are transportation credits.

4 Q. All right. I'm sorry. I have not been to the
5 Southeast recently. So -- okay.

6 So with that -- by assessments, you didn't mean
7 assessments, handler assessments, you are referring to
8 transportation credits and things like that in the
9 Southeast?

10 A. Yes, sir. It's a part of the Federal Order
11 minimum price.

12 Q. Okay. So -- but nonetheless, you have done this
13 comparison to a price that no one actually pays, correct?

14 A. And, again -- yes, sir, because we're only dealing
15 with skim milk here. I could have added the total thing
16 on there, and we're still going to be similar -- the same
17 difference.

18 Q. Well, but it would be a huge gap between Class III
19 and the final Class I price with all those assessments in
20 the Southeast, correct?

21 A. I hope it is.

22 Q. And it's already a large gap, isn't it?

23 A. Yeah.

24 Q. But you didn't show that gap, did you?

25 A. No, sir, I did not show that gap because that's
26 not a part of this proposal.

27 Q. You don't want to talk about the whole price the
28 Class I handler wants to -- has to pay -- not wants to, I



1 guarantee it -- has to pay. You did this comparison, and
2 I think somebody looking at this would say, oh, look, look
3 how close that Class I mover price is to the average
4 skim -- Class III skim price.

5 And the answer, of course, is that's not the price
6 anybody pays, is it?

7 A. And given my testimony, I did not say that's the
8 price that's paid.

9 Q. So you didn't mean to imply that -- I mean, you
10 didn't mean to show, for instance, on Table 4, that the
11 Class IV skim milk price would be 14.13 and the price that
12 handlers actually had to pay is 13.03, or a dollar-ten
13 less, right? You didn't mean to show it that way, did
14 you?

15 A. I prepared this table, and I'll stand behind this
16 table because I wanted to show the differences as to what
17 happened between the Class I skim values and the Class III
18 and IV skim values over a period of time because
19 components have changed.

20 Q. Thank you, sir.

21 On page 4 of your testimony, among other reasons,
22 you say that the components are misaligned. You actually
23 say, "It makes it more difficult to ensure consumers have
24 an adequate supply of milk for fluid use."

25 Whether it's 27 or 28.5%, Class I utilization in
26 this country, can you seriously say that it is difficult
27 to ensure consumers have an adequate supply of milk for
28 fluid uses?



1 A. It is becoming more difficult, yes, sir.

2 Q. You mean, you are talking about your pocket of the
3 country, correct?

4 A. I don't consider where I live a little pocket.

5 Q. Okay. A large pocket of the country.

6 A. It is a pretty sizeable geographical area.

7 Q. Okay. But in terms of the Federal Order, it's --
8 okay. Let's be very careful, because I think there's a
9 little misnomer here.

10 You testified that 89% of the producer milk is in
11 MCP orders, correct?

12 A. That's correct, yes, sir.

13 Q. Now, let's be careful. When you use that
14 definition with producer milk, if there's a producer
15 located in Ohio but whose milk is shipped to an Order 5
16 plant, is that part of the 11% or part of the 89% of
17 producer milk?

18 A. The producer -- where he is regulated at -- so I
19 just went through each Federal Order. They publish the
20 volume of producer milk. Again, it doesn't -- you know,
21 you got a summary there where it shows where it comes
22 from, but I just used the producer milk in each particular
23 order.

24 Q. Okay. So -- so a producer, as you said -- well,
25 the producers are not actually regulated, but where their
26 milk is pooled I think is what you meant to say.

27 If a producer is located in -- physically in the
28 Order 33 marketing area, in Ohio, but his milk is



1 routinely received and he is pooled on Order 7, that is
2 producer milk on Order 7, correct?

3 A. That is correct.

4 Q. Okay. So if we think about the amount of milk
5 that's actually produced in your large pocket of the
6 country, it's much less than that 11%, isn't it, of
7 producer milk? There's a significant portion of that
8 producer milk pooled on Orders 5, 6, and 7 that is
9 physically produced in MCP orders, correct?

10 A. No, sir.

11 Q. No? If a producer -- how about my example of an
12 Ohio producer who routinely ships to Order 5.

13 A. Yeah. In that -- that example of Ohio producer,
14 the order he's geographically located in, but if he ships
15 to a plant in the Appalachian order, yes, he's going to be
16 considered a producer in the Appalachian order.

17 Q. And so my comment is, your statement that 11% of
18 the producer milk is associated with your large pocket,
19 does not reflect where the milk is actually produced,
20 correct?

21 A. It does not reflect where those dairy farmers are
22 located at. There's data out there. If we wanted to dig
23 into it, we could give you a specific answer to that
24 question.

25 Q. So USDA introduced a number of exhibits today, and
26 if you need me to show them to you, I will, but I'm just
27 going to make a few comments and representations. But if
28 you -- your lawyer wants you to see them, that's fine.



1 I'm looking at Exhibits 53 and 58.

2 (Court Reporter clarification.)

3 MS. HANCOCK: I think if you are going to ask
4 about an exhibit, you should have a copy in front of the
5 witness.

6 MR. ENGLISH: That is -- that is absolutely right.
7 We'll get them from USDA.

8 Your Honor, may I approach the witness?

9 THE COURT: Yes, you may approach the witness.

10 BY MR. ENGLISH:

11 Q. So Exhibit 53 is Producer Milk by County, December
12 2000, and Exhibit 58 is Producer Milk by County,
13 December 2022. And I'd like you to start, just because it
14 will be easier if we go 5, 6, 7, and we're going to look
15 at Order 5.

16 So the total producer -- the total pounds by state
17 of producer milk for Order 5 in December of 2000 was
18 558,221,939, correct?

19 A. Whatever that number is there, yes, sir.

20 THE COURT: Is that page 3 of --

21 MR. ENGLISH: Yes, sir. That's page 3 of 11.

22 THE COURT: Of Exhibit 53.

23 BY MR. ENGLISH:

24 Q. And if you turn to 2022, the total -- so this is
25 now page 3 of 12 -- is 469,251,782, correct?

26 A. Yes, sir.

27 Q. That is about a 16% drop of producer milk?

28 A. Again, I -- it'll take me a minute here to do that



1 mathematics in my head. But it is a -- the drop there
2 between 558 million down to 469 million, whatever that
3 difference is divided, whatever percent -- it is what it
4 is.

5 Q. Yeah. And without belaboring the point, if we --
6 if we looked at Order 6 and Order 7 you would -- you would
7 see some fairly significant drops there as well, correct?

8 A. I'm just going to look here.

9 Q. You have an absolute right to do so.

10 A. And -- I'm looking at Order 6 here. You have a
11 drop from 253 million down to 217 million. You had --
12 Order 7, as I would expect, is the largest drop from
13 619 million down to 319 million.

14 Q. And that -- a lot of that producer milk -- well,
15 okay. Maybe let me not specify "a lot." But there is a
16 quantity of that producer milk that is coming in each of
17 those orders from outside the individual order, correct?

18 A. Espec- -- mainly -- especially in Federal
19 Orders -- the Appalachian order and the Southeast order,
20 they have a -- again, we could go through and do the
21 calculations based upon the exhibits you gave me and do --
22 come up with what that number is.

23 Q. To the extent that that milk is coming from an MCP
24 order, part of your testimony is that you have to compete
25 with the MPC orders to get that milk, correct?

26 A. Cooperatives, especially in those two orders,
27 bringing in supplemental milk from orders for multiple
28 component pricing do have to compete. Again, they have



1 to, you know, be competitive or pay to move that milk down
2 there, yes.

3 Q. And so wouldn't it make sense -- you know,
4 whatever you were told before Federal Order Reform, if
5 Class I has value, and if you are needing to bring milk in
6 from outside orders, and some of that milk is having to
7 compete with MCP orders, wouldn't it make sense to have
8 those orders adopt multiple component pricing?

9 A. That would be up to the dairy farmers in those
10 orders if they want to request that.

11 Q. Hold that thought for a second.

12 But to the extent they haven't, why then should
13 they get the benefit of the components on Class I value?

14 A. Again, this whole proposal, Proposal 1, we're just
15 updating what was already put in place in Federal Order
16 Reform to try to keep the same price alignment as I had in
17 my testimony.

18 Q. I will stipulate that that is what you have said
19 repeatedly, thank you.

20 Now, my question is, why haven't the farmers gone
21 to MCP if it has value for Class I?

22 A. The dairy farmers in those orders have not
23 requested it. And I can give you more answer to that if
24 you will let me finish.

25 Q. You can finish. I will never cut you off.

26 A. I appreciate that.

27 Q. If I do, it's a mistake.

28 A. Okay. In those orders, you have a very high



1 Class I utilization. All right? Class I utilization is
2 much higher in the Florida order -- and I'll just use the
3 Florida order as an example. The Class II, III, and IV in
4 the Florida Federal Milk Marketing Orders, there is very
5 little. There is very little used to produce. As I
6 mentioned earlier in III and IV, most of that is shrink of
7 inventory, so the inventory gets classified back into
8 Class I. The Class II in the Florida Federal Milk
9 Marketing Order, most of Class II is the cream that's been
10 separated, has been sent out.

11 The -- and, again, you could go back and look for
12 the data that's been requested. A few years back the
13 Market Administrators did some analysis of the impact of
14 multiple component pricing on the three Southeast orders.

15 And particularly in Florida, since you have very,
16 very little II, III, and IV, as you very well stated in
17 your questions, you have to increase component values to
18 get more money in, II, III, and IV. Since there is very
19 little II, III, and IV there, you are not going to be able
20 to increase the price any. So multiple component prices,
21 for example, in the Florida order is mainly just a
22 redistribution of the dollars. You're not generating any
23 new dollars. And it has some of that same effect in the
24 Appalachian and the Southeast, not -- not -- but not quite
25 to that extent.

26 And so that is the main reason why dairy
27 farmers -- the majority of dairy farmers or a number of
28 dairy farmers have not requested that in those three



1 orders.

2 Q. I think there's two pieces to that for a second.

3 If -- if there isn't sufficient II, III, and IV --
4 well, strike that for a second.

5 Part of your testimony, at least as to the MCP
6 orders, is that this compression that you talk about when
7 you look at only the mover and not the actual price the
8 Class I handlers have to pay is causing negative PPDs, and
9 then that causes depooling, correct?

10 A. No, sir.

11 Q. That's not your testimony?

12 A. No, sir.

13 Q. All right. I'm prepared to move on, in which case
14 I think I want to get the exhibits back for USDA, and I'm
15 going to ask for Exhibit 52.

16 THE COURT: Yes, you may approach, of course.
17 Off the record briefly.

18 (Off-the-record.)

19 THE COURT: Back on the record.

20 We'll take a ten-minute break. Let's come back at
21 4:15 p.m.

22 (Whereupon, a break was taken.)

23 THE COURT: Back on the record.

24 Your witness, Mr. English.

25 MR. ENGLISH: Thank you, your Honor.

26 During the break I asked for USDA to provide me
27 with copies of Exhibits 47 and 52 to hand to the witness,
28 and I have also notified Ms. Hancock.



1 Exhibit 42 is Pool Distributing and Supply Plants
2 by Order, December 2000, and Exhibit 52 is Pool
3 Distributing and Supply Plants by Order, December 2022.

4 May I approach, your Honor?

5 THE COURT: Yes.

6 BY MR. ENGLISH:

7 Q. So, of course, Mr. Covington, you are welcome to
8 peruse the entire document. I will focus in these two
9 documents on the list of plants in Orders 5, 6, and 7.
10 And I can tell you that for Exhibit 47, that's on pages 10
11 and 11, and on Exhibit 52, it is just page 10.

12 When you are ready, let me know. I just want to
13 make sure you had a chance to look at it.

14 A. Okay. You said page 10 --

15 Q. For Exhibit 47 --

16 A. For 47, I got page 10 in front of me.

17 Q. Yeah, but it is also page 11. But the point is, I
18 want to talk about the list of plants on Exhibit 47 and
19 Exhibit 52, for three Orders 5, 6, and 7. Okay?

20 A. So I have got page 10 and 11 here. And then on
21 Exhibit 52, I have page 10 here.

22 Q. Okay. And just, you know, stating I think the
23 obvious that you know, but, you know, between 2000 and
24 2022, there are a significant fewer plants in the
25 Southeast in 2022 than in 2020, correct?

26 A. The number of plants has declined. Excuse me, the
27 number of pool distributing plants has --

28 Q. Pool distributing plants has declined?



1 A. Yes.

2 Q. Okay. And that would then connect up to the
3 exhibits we were just showing and talking about with
4 producer milk, because with fewer plants, you would need
5 less producer milk, correct? At least the number of
6 plants that have declined.

7 A. Not necessarily. And the reason I say that,
8 because some of the plants have consolidated, and some of
9 the plants that -- on your 2022 list, would be taking in
10 more milk than some on your 2000 list.

11 Q. And I get that. But even so, given the number --
12 given the loss -- the number of plants that have departed,
13 which it looks like over 30, at some point you have to
14 think that there's less volume being produced in the
15 Southeast, correct?

16 A. Yes, that's correct.

17 Q. Yes. Okay. So now turning and focusing on
18 Exhibit 52, and going to your testimony during direct
19 about cooperative-owned plants, and obviously to the
20 extent you know, but -- but you're -- you have been active
21 in the Southeast for a long time, I'd like to go down the
22 list on Exhibit 52 and have you identify which plants are
23 owned by cooperatives. Can you do that?

24 A. Yes, sir.

25 Q. Thank you. So I'm going to start, I think the
26 very first one under Order 5 is Prairie -- number 63,
27 Prairie Farms in Holland, Indiana. Would you agree that's
28 the very first one?



1 A. Yes, sir.

2 Q. Okay. And unlike some plants we'll see, we know
3 who owns that, correct? Prairie Farms owns that, correct?

4 A. Yes, sir.

5 Q. They are a co-op.

6 Okay. The next plant, plant 64, New Dairy
7 Kentucky, LLC, in London, Kentucky, that is not a
8 cooperative plant, correct?

9 A. Yes, sir. I -- I feel pretty certain -- I'm going
10 to have to think -- because they have changed names a lot
11 through all the bankruptcies and so forth and the change
12 in ownerships. That is one of the Borden group plants.

13 Q. And that's my view as well. Thank you, sir.

14 So plant 65, Prairie Farms in Somerset, Kentucky,
15 again, that's owned by Prairie Farms, correct?

16 A. That's what it said, yes, sir.

17 Q. Okay.

18 A. I -- yeah, I'm going to make the assumption if it
19 says Prairie Farms, it is owned by Prairie Farms.

20 Q. Okay. So we'll go through this pretty quickly.

21 So 66, Winchester in Winchester, Kentucky, whose
22 plant is that? Or is it a co- -- this is a co-op plant.
23 I mean --

24 A. No, I'm -- in Winchester, that's the -- and I
25 could miss a couple -- that's a Kroger plant.

26 Q. All right. Plant 67, Milkco, is that a co-op
27 plant?

28 A. No.



1 Q. Okay. Plant 68, Dairy Fresh in High Point, North
2 Carolina, is that a co-op plant?

3 A. That is, yes.

4 Q. Plant 69, Maola, in High Point, that's a co-op
5 plant?

6 A. Yes.

7 Q. I confess, I don't know 70, Homeland Creamery. Do
8 you know whether that's a co-op?

9 A. It's -- it's a farmer -- direct farmer-owned
10 plant.

11 Q. Okay. That's what I have not heard of it. Thank
12 you.

13 So maybe we can cut to the chase a little bit.
14 71, Dairy Fresh in Winston-Salem. If it is Dairy Fresh,
15 is that also a co-op?

16 A. Yes. And in years past, Dairy Fresh has been a
17 common name, but I think all the Dairy Freshes now are
18 cooperative-owned. I can't think of any Dairy Fresh
19 plants -- I cannot think of any Dairy Fresh plants that
20 are not cooperative-owned that carry the name Dairy Fresh.
21 In the past, there were some.

22 Q. Okay. As I look down the list, there may not be
23 another one.

24 72, Pet Dairy in Spartanburg, South Carolina, is
25 that a co-op plant?

26 A. Yes, it is.

27 Q. 73, Mayfield Dairy Farms in Athens, Tennessee, is
28 that a co-op plant?



1 A. Yes, sir.

2 Q. 74, Broadacre Dairies in Powell, Tennessee, I
3 don't know that plant.

4 A. That's a grocer-owned plant.

5 Q. Okay. 75, Westover in Lynchburg, Virginia, I
6 don't recognize that.

7 A. That's a Kroger plant.

8 Q. 76, Marva Maid Dairy in Newport News, Virginia,
9 that's -- that's a co-op plant, isn't it?

10 A. That is correct.

11 Q. 77, Valley Milk in Strasburg, Virginia, is that a
12 co-op plant?

13 A. That -- that is a supply plant --

14 Q. Okay.

15 A. -- by a cooperative.

16 Q. Okay. Supply by cooperative. Thank you.

17 A. No, it is a supply plant.

18 Q. Oh.

19 A. But it is owned by a cooperative.

20 Q. Okay.

21 A. Because your list says pool distributing and
22 supply plants.

23 Q. Yeah. Thank you, sir.

24 78, Shamrock is a member of MIG, so it is -- in
25 this case, not a co-op, correct?

26 A. Best of my knowledge, it is not a cooperative.

27 Q. 79, Homestead Creamery in Wirtz, Virginia, I don't
28 recognize that one. Is that a producer?



1 A. That's -- that's a very -- very small plant in --
2 I think -- it's couple of -- I think it is a farmer and a
3 university professor owns it.

4 Q. Great investment.

5 Number 80 and 81, Publix Supermarkets, those are
6 not co-op plants, correct?

7 A. They are not cooperative plants.

8 Q. McArthur Next?

9 A. That's privately owned.

10 Q. 83, Dakin Dairy in Florida?

11 A. That's a farmer-owned.

12 Q. And 84, 85, T.G. Lee Foods, those are co-op-owned?

13 A. They are, yes.

14 Q. 86, M&B of Tampa?

15 A. Again, that's a farmer slash/plant operator.

16 Q. 87, New Dairy. If -- if that's the same New
17 Dairy, that's the Borden operation, correct?

18 A. That is correct.

19 Q. What you and I would call a Borden operation.
20 88, Venture Milk in Alabama?

21 A. That is just a small specialty plant. I don't
22 know if it's one individual, who owns it, or if it's
23 several.

24 Q. So then we have three in a row, Hiland Dairy,
25 those are Prairie Farms-owned, right? Or are they joint
26 venture with Prairie Farms and DFA?

27 A. I think it is joint venture, but I don't know for
28 sure.



1 Q. Regardless, they are co-op, correct?

2 A. That is correct.

3 Q. 92 Centennial Farms in Atlanta, Georgia?

4 A. That's Kroger.

5 Q. We have already discussed Publix, which is 93,
6 which is not a co-op, correct?

7 A. It is not a cooperative.

8 Q. 94, SMI Ultra Filtration Plant, I don't recognize
9 that.

10 A. That is Southeast Milk, Incorporated, a dairy
11 cooperative. It's an ultra-filtration plant. It was a
12 supply plant in December of that year.

13 Q. You know what, you know what got me, was the fact
14 that it was capital S, lowercase m-i. If I had read it as
15 S-M-I, I would have gotten it, sir. So that's a co-op
16 plant, but it is specialty.

17 95, Kleinpeter Farms Dairy in Baton Rouge,
18 Louisiana?

19 A. That's Kleinpeter family.

20 Q. Yeah. Eastside Jersey Dairy in Hammond,
21 Louisiana?

22 A. That's a cooperative.

23 Q. 97 is New Dairy, which, again, I think we have
24 agreed is Borden and not a cooperative, correct?

25 A. The best of my knowledge, yes, that's Borden.

26 Q. Okay. 98, Dairy Farmers of America, Inc., is that
27 a supply plant?

28 A. That is a supply plant.



1 Q. And obviously co-op-owned, correct?

2 A. Yes.

3 Q. Memory Lane Dairy. I don't recognize that.

4 A. That is a farmer-owned.

5 Q. We have already discussed Hiland, number 100,
6 which is the joint venture, correct?

7 And Prairie Farms, we have got 102 Hiland again.
8 Heritage Farms Dairy, 103?

9 A. That's Kroger.

10 Q. And 104, Purity Dairies, is that a co-op-owned
11 plant?

12 A. That's cooperative.

13 Q. Thank you.

14 So I'm going to try very hard not to repeat all
15 the earlier examination of the earlier witness. I will
16 really try to shorten it. But one of the conversations I
17 had with Dr. Vitaliano was cooperatives have the right to
18 reblend their proceeds and pay their dairy farmers under
19 the Federal Order blend, correct?

20 A. That is correct.

21 Q. And proprietary operators do not have that
22 opportunity, do they?

23 A. If they are regulated by Federal Order, they
24 don't.

25 Q. Okay. And so if the Class I price goes up, that
26 benefit of reblending the cooperatives have for owned
27 Class I plants will increase their advantage over
28 proprietary Class I plants, correct?



1 A. I -- I got to think about that just a little bit.
2 That's a complicated question. And I'm going to repeat
3 back and make sure I'm understanding your question, if
4 that's okay.

5 Q. Of course it is.

6 A. Okay. So what you are asking, if Proposal 1 --
7 Proposal 1 increases the Class I skim value. If I
8 understand your question, you are saying if Proposal 1
9 increases the Class I skim value, that means that the
10 cooperatives can reblend more? Is that your question?

11 Q. They can use their opportunity to reblend that the
12 proprieties don't have, yes.

13 A. I have a -- again, I want to -- I'm going to think
14 about it here just a little bit more as I'm trying to
15 answer. I don't see how -- and I'm going to put -- I'm
16 putting myself as a -- when I was a cooperative manager,
17 that we had fluid milk plants. All right?

18 I don't see how increasing the Class I price
19 through this proposal, there's other ways also to increase
20 the Class I price, how it made it any easier for our
21 cooperative, Southeast Milk, to reblend. We had to pay a
22 competitive price. We had to answer to our dairy farmer
23 members every month and show them the dollars that came in
24 and what dollars we had to pay. We just couldn't pick a
25 number and say, hey, we want to keep this. We had a lot
26 of checks and balances in place.

27 So my answer to your question, based upon my
28 experience, running a cooperative with fluid milk plants,



1 increasing the Class I price did not make it any easier or
2 give us any more incentive to reblend.

3 Q. But it gives you the right to.

4 A. Yeah. And our proposal has nothing to do with
5 that. The Agricultural Marketing Agreement Act of 1937
6 provides cooperatives, which the Act looks it's dairy
7 farmers, to be able to not require to pay the minimum
8 uniform blend price to its members.

9 Q. Let me just briefly touch on something we have
10 talked about a little bit. And that is, the requests are
11 not to USDA to have multiple component pricing in the
12 three Southeast -- I'm sorry -- in orders -- in some of
13 the Southeast orders.

14 Isn't it true that in 2018 there was a submission
15 made on behalf of multiple cooperatives, but on the
16 letterhead of National All-Jersey, requesting a hearing to
17 go to multiple component pricing in Orders 5 and 7?

18 A. A request was made. I'd have to look back for the
19 exact year that it was made.

20 Q. And then it was -- ultimately it was withdrawn,
21 correct?

22 A. A hearing was not held on it.

23 Q. Okay. And there was a hearing in February or
24 March -- I'm not sure, I wasn't there -- but it was late
25 February, early March of this year, on transportation
26 credits, you know, getting -- moving -- you know, the
27 issue of transportation credits, I want to stay away here
28 from substance -- but no one asked for a multiple



1 component pricing for that, correct?

2 A. I -- I never saw any petition submitted asking for
3 it.

4 Q. Do you agree that federal -- I'm sorry, let me --
5 strike that.

6 Do you agree that FMMOs are designed to establish
7 minimum pricing?

8 A. That is one of the provisions of Federal Milk
9 Marketing Orders, to establish minimal prices that
10 regulated handlers must pay for milk.

11 Q. So to the extent Dr. Vitaliano testified that
12 over-order premiums are disappearing or have disappeared,
13 is that not an indication that the minimum price is at or
14 above the market price?

15 A. No, sir.

16 Q. How much of the milk that is sold in the Southeast
17 is cooperative milk, percentage-wise?

18 A. Well, I'm going to have to go order -- order by
19 order. And I -- if I had my data -- data, I could give
20 you the exact number. So I'm going to go order by order,
21 because I don't want to provide -- I'm under oath, so I
22 want to provide correct information.

23 In the Florida order -- boy, the Florida order,
24 roughly, has approximately 200, 225 million pounds of
25 producer milk a month.

26 Mr. English, I cannot give you a good answer to
27 that because, the reason why, I know ones that are
28 cooperative, but I also know that are some cooperatives



1 marketing nonmember milk. And technically, I don't know
2 how that's classified as nonmember or cooperative.

3 To get a real good answer on that, the Market
4 Administrator -- again, I don't know if that information
5 is confidential -- could give you -- give us those
6 numbers.

7 Q. Okay. And if it is confidential, we're not going
8 there. So I'm going to move on.

9 In response to a number of questions, you're
10 clearly aware the Class I fluid milk sales are declining?

11 A. Yes, sir.

12 Q. Significantly, correct?

13 A. You need to define significantly. Last year on a
14 percent basis I know about how much it declined, but it is
15 probably in the eye of the beholder whether that number is
16 significant or not.

17 Q. So what was that percentage for last year?

18 A. Last year it was a little less than 2% from what
19 it was the previous year.

20 Q. If it declined 2% a year over 20 years, that would
21 be 20%, correct?

22 A. No, sir. If you go back and do the math, it would
23 be a little different than that.

24 Q. All right. Okay. 2% compounded, if it was 2%
25 compounded, it would be 20%, correct? I understand your
26 point. It would be 18% if it was 2% a year, but
27 nonetheless -- okay, the numbers will be what they are.

28 But -- and you agree with me that if Proposals 1



1 and 2 are adopted -- strike just say Proposal 1 because
2 that's your proposal -- Class I prices are going to go up,
3 correct?

4 A. Yes, sir.

5 Q. Given that your testimony is on behalf of National
6 Milk and not just the Southeast, do you have any idea of
7 Class I -- if Class I plants actually get the order
8 average or the national average of components, either one?

9 A. It depends -- you say plants --

10 Q. Class I -- Class I plants.

11 A. -- what plants -- what plants are you talking
12 about?

13 Q. I'm talking about Class I plants.

14 A. Class I plants in all Federal Milk Marketing
15 Orders?

16 Q. Yes.

17 A. Just giving a simple average and doing simple
18 math, if you have an average on milk volume, it's going to
19 be half would be above and half is going to be below.

20 Q. Do you have any information as to whether Class I
21 plants are getting the order average?

22 A. We could go back in the -- one of the exhibits
23 that was presented, I could -- by the -- by the Dairy
24 Division, and I can't remember which one it is, you can
25 help me on what number this is, and where it showed by
26 order, by month, where it broke down the Class I, the
27 skim, and Class I protein, so forth, in all orders. We
28 could go back in there and do that calculation of what the



1 protein level is in each of those classes, in each of
2 those orders, and give you an exact answer to that
3 question.

4 Q. Now, of course we had a long conversation about
5 that document and estimates. That is how the milk is
6 received.

7 Do you have any information based upon that, that
8 the milk is utilized as assumed in the estimates, where
9 the percentages are done pursuant to the Exhibit 63?

10 A. I have confidence in the data that comes out of
11 the Dairy Division and their numbers, because they are
12 audited numbers. And so, again, just like I said -- said
13 before, I would take that exhibit and do those
14 calculations, and I -- I would have confidence in that.

15 Q. You have -- you and the prior witness have
16 repeatedly talked about just updating the value of the
17 components.

18 Isn't it really the case that the issue is not if
19 there is value in the components, but if there is
20 additional value in those component for the increase
21 proposed?

22 A. Okay. I only got -- I didn't get the first part
23 of that question.

24 Q. Okay.

25 A. Could you -- could you just say it just a little
26 slower? I want to make sure I get it right.

27 Q. Okay. Absolutely.

28 The testimony has been, as I understood it, that



1 there is value to Class I processors in the components.

2 I'm asking, is there additional value in that
3 delta increase proposed for Class I?

4 A. My testimony stated that the solids in milk
5 provide nutritional value to Class -- to fluid milk, milk
6 used in Class I, and I'll stand by that.

7 Our proposal updates the milk components from what
8 they were in 2000 to 2022. Yes, that increases the skim
9 milk value, so the Class I price will go up. And I am
10 comfortable, as a marketer of milk, of charging an extra
11 place to Class I processors.

12 Q. So talking about nutritional value. Aren't there
13 a -- rather, there are consumers, who, when they think
14 about nutritional value of milk, they don't want lactose,
15 do they?

16 A. I don't agree with that statement.

17 Q. Do you know if there is a product out on the
18 market called Lactaid that is --

19 A. There is lactose-free milk out there.

20 Q. Okay.

21 A. But that doesn't mean that all -- just because
22 there is a product out there does not mean that all
23 consumers don't want lactose.

24 Q. I didn't say all. I just said --

25 A. That's what I understood you said.

26 Q. Okay. I apologize. I didn't -- I don't think I
27 said that, but I --

28 A. We could go back to the court reporter, I guess,



1 if you need to.

2 Q. I'm willing to concede you may have heard that,
3 but I don't believe I said that. I said there are --
4 maybe you heard "are" as "all" -- there are --

5 A. I heard -- well, remember, you and I speak a
6 little different dialects a little bit, so --

7 Q. I -- I was not born in the large packet of your
8 country.

9 A. I appreciate you giving us the -- that adjective
10 to describe it.

11 Q. There are -- rather than all -- there are
12 consumers who buy lactose-free products, correct?

13 A. Yes, sir, because it's on -- on the shelf. And if
14 it wasn't on the shelf -- they wouldn't have it on the
15 shelf unless people bought it.

16 Q. And lactose represents 4.9% of the solids nonfat
17 that we're talking about, correct?

18 A. No, sir.

19 Q. It does not represent 4.9% of the --

20 A. You said solids nonfat. If you -- if we look at
21 the other solids in milk, which is about -- again, if we
22 want to use our averages there in skim, about 6.01, the
23 lactose -- if we do -- do testing and so forth, the
24 lactose is probably going to be about 5%.

25 Q. Okay. I'm sorry. I said 4.9, you said 5. That's
26 a bigger number. Thank you. I'll take 5.

27 So that's more than half of the 9.41, and we're in
28 a minimum pricing system, and there's consumers out there



1 who, yeah, they have a nutrition value, they don't want
2 the lactose, correct?

3 A. There -- there are some consumers who buy
4 lactose-free milk because they are lactose intolerant.

5 Q. Or they believe they are, I'll leave that for a
6 different day.

7 But those consumers who don't want that solid are
8 going to get charged more for their milk under your
9 proposal, correct?

10 A. We -- we don't know that for sure. Our proposal
11 raises the Class I skim price. And, again, based upon
12 2022, just a rough calculation, it's about \$0.047 per
13 gallon. We don't know how much any of that, or all of it,
14 whatever, might be reflected back in the retail consumer
15 price.

16 Q. But whether it makes it to the retail price, the
17 handlers who buy milk, and then, either by adding a
18 neutralizing agent or by using a process that removes the
19 lactose, regardless when it gets to retail, they are going
20 to pay more for their milk when they found a market for a
21 product that actually subtracts the thing that you says
22 has nutritional value, correct?

23 A. Yeah, the Class I price will go up.

24 Q. So -- so let's talk about how someone might be
25 able to make money off that volume value -- and this is
26 now different from my conversation about Safeway's 2/10
27 product.

28 Okay. You mentioned nutrition label. Do you have



1 any research or study that says that consumers actually
2 look at nutrition labels closely enough to make a decision
3 on their milk as being 8% or 9%?

4 A. I have none with me.

5 Q. Does that mean you don't know of any or you just
6 don't have it with you?

7 A. I have a number of studies back in my files that I
8 have kept over the years related to fluid milk and about
9 anything dairy. I would have to go back there and look
10 and see if there was -- if I have it back in my
11 collection.

12 Q. Now, leaving aside, you know -- well, even
13 nutrition labels, if they -- in order to go to a higher
14 percentage, in order to label the milk as a high protein,
15 they would have to make sure they actually have that
16 protein, correct? To be truthful, right?

17 A. If you want to have a truthful label, it needs to
18 say what's in the milk.

19 Q. And yet we have seen from the exhibits that the
20 components vary from time of year. So how are Class I
21 processors going to monetize in a label risk environment?

22 A. Well, you start talking about nutritional labels,
23 and that's getting beyond my expertise and beyond what
24 this proposal is.

25 Q. Well, except you have talked about value for
26 Class I. What evidence do you have that there is value
27 for Class I in these components?

28 A. Well, even though Class I sales are down, we're



1 still selling about 45 billion pounds of packaged fluid
2 milk in this country, and consumers won't buy that
3 45 billion pounds of milk unless they had some value to
4 them.

5 Q. Known to them as butterfat and skim, correct?

6 A. Yeah, butterfat -- what was before butterfat and
7 skim? I lost that part.

8 Q. I said known to them as butterfat and skim?

9 A. I -- I guess I lost you there. Known to them,
10 butterfat --

11 Q. Consumers. Consumers. Known to consumers.

12 A. Known to consumers butterfat and skim, I'm sorry,
13 I'm just not catching --

14 Q. Well, milk is sold as whole milk. Milk is sold as
15 2% milk. Milk is sold as 1% milk.

16 A. Yes, sir, that's correct.

17 Q. Thank you.

18 Isn't it true that fluid milk sales are by FDA and
19 by consumers so highly already defined and regulated in
20 ways that alternative beverages are not, that any system
21 increase in costs will actually continue to hinder sales
22 of fluid milk?

23 A. Yes, fluid milk is regulated. We -- and that's
24 one of the reasons we're having this hearing, because it's
25 regulated. But I'm not convinced that this proposal,
26 which does increase the Class I skim milk price, will
27 hinder fluid milk sales.

28 Q. Is it your position that low or negative PPDs are



1 an indicator of disorderly marketing?

2 A. Did you say lower or negative?

3 Q. I asked that low or negative.

4 A. Not necessarily.

5 Q. Okay. Not necessarily. Thank you.

6 Under what circumstances are they actual
7 disorderly?

8 A. Well, we need to go back to what causes negative
9 producer price differentials. All right? Because there's
10 different things that cause them. When prices -- dairy
11 product prices, especially the cheese, butter, nonfat dry
12 milk powder, if they are increasing -- increasing very
13 rapidly, especially in a lower Class I utilization market,
14 yes, you are going to have a negative producer price
15 differential.

16 In my conversations with dairy farmers, and I have
17 done a lot of information with dairy farmers, we gettin' a
18 number of them realizing that, hey, in those type of
19 markets, if we got a negative PPD, our total value of what
20 we get for our milk is going to go up. They understand
21 that. And if it gets real, real high like we have had
22 recently, it is going to reverse, our price is going down.
23 And more and more dairy farmers are getting educated and
24 understand that.

25 Where they have an issue with negative or low
26 producer price differentials, is where, in some Federal
27 Milk Marketing Orders where it's so easy to not pool milk,
28 manufacturing milk is not required to participate in a



1 Federal Milk Marketing Order, it's only voluntary. Only
2 voluntary. And the pooling requirements in some orders
3 allows that milk to be taken off or put back on.

4 And some -- many dairy farmers who are selling
5 maybe to a fluid milk plant or the cooperative has a
6 mixture of products, when they start seeing that milk can
7 go on and off the pool, that when their Class III price
8 might be higher than the blend of whatever they don't have
9 to pay in, that -- that creates some -- creates some
10 challenges and some disorder among those producers
11 allowing that milk to go on and off that creates the
12 higher negative producer price differentials.

13 Q. So we heard today that one solution for that is
14 Order 1, correct? Order 1 has its own performance
15 standards that make it difficult to easily disassociate
16 and reassociate with the pool, correct?

17 A. It -- orders have different performance standards.

18 Q. So one way to deal with depooling would be, as we
19 did in the post Federal Order Reform, two separate rounds
20 of hearings to address performance standards because of
21 depooling, correct?

22 A. Each order could have a hearing, could be a filed
23 a petition to discuss that, yes.

24 Q. And you could do that without raising Class I
25 prices, correct?

26 A. That's a separate issue, the pooling requirements
27 from the prices.

28 MR. ENGLISH: I have no further questions of this



1 witness.

2 THE COURT: Okay. Any cross by anyone else for
3 this witness?

4 Going once, going twice.

5 Redirect? Ms. Hancock?

6 MS. TAYLOR: Your Honor?

7 THE COURT: Yes.

8 MS. TAYLOR: We were just waiting for the end. I
9 think USDA has some questions --

10 THE COURT: I'm sorry. I meant -- yeah.

11 MS. TAYLOR: But in the essence of time, I don't
12 think we'll finish in eight minutes if we're going to try
13 to respect our 5:00 p.m. time, and we'd be happy just to
14 start in the morning.

15 THE COURT: Is that okay with everyone else?

16 Seeing no objections, very well.

17 Any housekeeping we need to do before we are done
18 for the day?

19 Yes, Mr. Rosenbaum.

20 MR. ROSENBAUM: Steve Rosenbaum. During my
21 cross-examination I gave the witness Exhibit 65. I'd like
22 to move that into evidence at this point, if that makes
23 sense, or I can do it at the conclusion of his testimony.

24 THE COURT: Do we have any objection?

25 MS. HANCOCK: Your Honor, if we could -- just
26 allow us the evening to do a little homework and then the
27 witness can verify where it came from. So if we don't
28 have an objection, we could maybe move in the morning to



1 do that since he'll stay on the stand.

2 THE COURT: Works for me, if it does for you, too.
3 It apparently does.

4 MR. ROSENBAUM: That's fine.

5 THE COURT: I'm seeing assent. I'm seeing nods of
6 heads.

7 Okay. Anything else?

8 All right. We'll adjourn until 8:00 a.m.
9 tomorrow.

10 (Whereupon, the proceeding concluded.)

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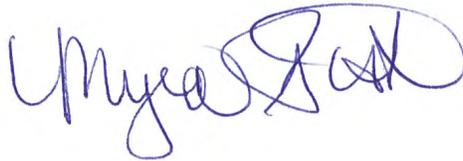
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1 STATE OF CALIFORNIA)
2 COUNTY OF FRESNO) ss.
3

4 I, MYRA A. PISH, Certified Shorthand Reporter, do
5 hereby certify that the foregoing pages comprise a full,
6 true and correct transcript of my shorthand notes, and a
7 full, true and correct statement of the proceedings held
8 at the time and place heretofore stated.

9
10 DATED: September 4, 2023
11 FRESNO, CALIFORNIA

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17 MYRA A. PISH, RPR CSR
18 Certificate No. 11613



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