

UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:)
)
) Docket Numbers
 NORTHEAST MILK MARKETING ORDER) AO-14-A70; AA-02-1
)

Virginia Room
 Embassy Suites Hotel
 1900 Diagonal Road
 Alexandria, Virginia

Friday,
 September 13, 2002

The above-entitled matter came on for
 hearing, pursuant to Adjournment, at 8:00 a.m.

BEFORE: HONORABLE DOROTHEA BAKER
 Administrative Law Judge

APPEARANCES:

On behalf of the Government:

GARRETT B. STEVENS, ESQ.
 Deputy Assistant General Counsel
 Marketing Division
 Office of the General Counsel
 U.S. Department of Agriculture
 Room 2343, South Building
 Washington, D.C. 20250

ERIN C. FEUILLET
 GINO TOSI
 Marketing Specialist
 Agricultural Marketing Service
 Dairy Programs
 U.S. Department of Agriculture
 Room 2977, South Building
 1400 Independence Avenue, SW
 Washington, D.C. 20250

APPEARANCES: (Continued)

On behalf of the Government:

JACK ROWER
Marketing Specialist
Agricultural Marketing Service
Dairy Programs
U.S. Department of Agriculture
Room 2965, South Building
Washington, D.C. 20250

BILL RICHMOND
Marketing Specialist
Agricultural Marketing Service
Dairy Programs
U.S. Department of Agriculture
Room 2963, South Building
Washington, D.C. 2090-5456

On behalf of the Respondents:

CHARLES M. ENGLISH, JR., ESQ.
Thelen, Reid and Priest, LLP
Suite 800
701 Pennsylvania Avenue, NW
Washington, D.C. 20004

STEVEN J. ROSENBAUM, ESQ.
Covington and Burling
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004-2401

MARVIN BESHORE, ESQ.
130 State Street
P.O. Box 946
Harrisburg, Pennsylvania 17108

JOHN VETNE, ESQ.
15 Powow Street
Amesbury, Massachusetts 01913

I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Robert Wellington	1073	1075 1081 1089	1089	1092
William Fitchett	1096	1107 1111	--	--
James Buelow	1120 1126	1129 1136	1152	1154
Warren Schanback	1157	1173	1191	1192 1201
Cyrus Cochran	1210	1216 1217	--	--
Erik Rasmussen	1220	1224	1226	--
David Arms	1235 1262	1271 1281 1293 1299	--	--
Edward Gallagher	1308 1329	--	--	--
Peter Fredericks	1335	1337 1338	--	--
Edward Gallagher (resumed)	prev.	1339	--	--
Dennis Schad	1347 1352	1354	--	--
Dennis Arms (resumed)	1341	1370 1373 1375	--	--

E X H I B I T S

<u>EXHIBIT NUMBER :</u>	<u>IDENTIFIED</u>	<u>IN EVIDENCE</u>
Exhibit Number 31	1095	1119
Exhibit Number 32	1095	1119
Exhibit Number 33	1157	1219
Exhibit Number 34	1229	1305
Exhibit Number 35	1229	1305
Exhibit Number 36	1229	1305
Exhibit Number 37	1229	1305
Exhibit Number 38	1308	1346
Exhibit Number 39	1336	1338
Exhibit Number 40	1347	1352
Exhibit Number 41	1366	1377

1 P R O C E E D I N G S

2 8:00 a.m.

3 JUDGE BAKER: Good morning.

4 The hearing will please come to order. This is
5 Day 4 of this hearing relating to the consideration of
6 proposals to make various changes to the Northeast
7 ~~Schedule~~ **Federal** Milk Marketing Order. It is a public
8 hearing, a rulemaking promulgation hearing, in which all
9 parties who have an interest are invited to testify and
10 indeed they can submit testimony upon any or all
11 proposals.

12 If there is anyone who would like to testify or
13 otherwise offer evidence, please let me know.

14 I think we were on Proposal 7 last evening, and
15 we've had some small testimony, some minimum testimony on
16 Proposal 1. During the first three days, there were 30
17 exhibits identified and/or admitted into evidence. We are
18 now ready to proceed.

19 I am going to note that this is Friday, the
20 13th. Very well.

21 Mr. Beshore, prior to beginning, Mr. English
22 wanted to make a comment.

23 MR. ENGLISH: Your Honor, before that happens,

1 I think there's some people who want to be heard on that
2 issue in terms of whether that can come up or whether they
3 should be able to do that. **Mr. θ** Vetne did not know that,
4 and before we, you know, return to that, perhaps that
5 should wait until the end. I think Mr. Vetne is going to
6 make that pitch.

7 **MR. VETNE BESHORE:** Well, we might be done
8 before he comes into the room.

9 **MR. ENGLISH:** He's not here, and it's not
10 limited. Nothing's been ~~added to~~ **that limited on** Proposal
11 7.

12 **MR. BESHORE:** Well, at least his direct
13 testimony was quite limited, and I think it's appropriate
14 to do that.

15 **MR. ENGLISH:** There were a couple things
16 yesterday.

17 **JUDGE BAKER:** Oh, you're keeping track, Mr.
18 English. You know more about the presentation than I do.
19 Mr. Vetne, we have waited for you.

20 Do you want to call your witness?

21 **MR. BESHORE:** Yes, I would. I'd like to recall
22 Bob Wellington.

23 **JUDGE BAKER:** Very well. Mr. Wellington, you
24 have previously been sworn in this proceeding.

1 Whereupon,

2

ROBERT WELLINGTON

3 having been previously duly sworn, was recalled as a
4 witness herein and was examined and testified further as
5 follows:

6

7

8

DIRECT EXAMINATION

9

BY MR. BESHORE:

10 Q Mr. Wellington, you've been sworn and
11 previously testified. Were you in the room when Dr.
12 Yonkers testified yesterday?

13 A No, I was not. I had to be over on the Hill.
14 I had a presentation before the House and the Senate
15 staffers. So, I could not be here, and ~~I've heard~~ **after**
16 **reading** his testimony, and I found there were some
17 mischaracterizations **from my testimony** from the last
18 hearing, and so ~~the day before the hearing,~~ **I pulled** my
19 testimony from the hearing record on that, I just wanted
20 to enter that in as to what the attention was focused on
21 at the last hearing.

22 Q Okay. By the last hearing, you're -- you mean
23 the references in Dr. Yonkers' testimony to the
24 proceedings in the Class 3 and 4 make allowance?

1 A Yes.

2 Q And that hearing took place in May 2000?

3 A Yes, correct.

4 Q In this very room, I believe.

5 A That is true, also.

6 Q Okay. Now, would you just proceed with your
7 comments in response to Dr. Yonkers' testimony?

8 A It's basically a repeat of what I said on the
9 hearing record at that point. It was on Pages 1486 and
10 1487 of that hearing record. I was commenting on the make
11 allowances, and I noted that for non-pasteurized **fat dry**
12 milk, using the same criteria as Dr. Ling, he came up with
13 a cost of 17.2 cents per pound, but the issue here is,
14 what I further stated, that non-fat dry milk, for non-fat
15 dry milk, clearly we could not go to a make allowance of
16 17.2 cents because our 17.2 cents of non-fat dry milk
17 relates to the fact that our plant is a balancer of milk
18 and is operating at much less capacity in the mid part of
19 the week most of the year, and during most of the week in
20 the Fall part of the year. That's why our costs are only
21 17 cents, because of those factors.

22 We think that the national milk proposal of 14
23 cents is near to where it probably should be. If we could
24 operate our plant around the clock basically throughout

1 the year, we think it could probably be at about that
2 level. The additional costs at some point, we're going to
3 have to ~~see~~ **seek** for the additional costs at some
4 point, we're going to have to ~~see the market taking a look~~
5 **at seek marketwide service payments for** that. That's not
6 a topic here at this particular hearing, and I don't
7 really want to discuss it, but that's why we think we
8 should -- that's where -- that's where we think we should
9 come from.

10 If you gave every powder manufacturer over 17
11 cents to make powder, everybody would want to make powder,
12 and we recognize that. So, we have to find a different
13 way to accommodate that for the marketplace. That's why I
14 do not agree to the point of 17 cents because I felt that
15 was not the right hearing to be doing that as this would
16 be and that's ~~why~~ **part of the reason one of the reasons**
17 we sought this particular hearing.

18 Q Okay. So, in that -- in that hearing, Agrimark
19 and ~~ABC&E~~ **ADCNE** did not attempt to advocate a make
20 allowance that also covered balancing costs in the
21 Northeast as you have read your testimony, correct?

22 A And particularly ~~Agmark~~ **Agrimark**. There was
23 some disagreement on some of the make allowances for Class
24 3 more than Class 4.

1 Q Okay. Thank you.

2 JUDGE BAKER: Are there any questions? Yes,
3 Mr. Rosenbaum?

4 CROSS EXAMINATION

5 BY MR. ROSENBAUM:

6 Q Mr. Wellington, I know that you are -- well, I
7 should ask you. Did you read the **tentative** final decision
8 when it came out?

9 A Yes.

10 Q Now, Dr. Yonkers quoted at great length from
11 that decision yesterday, and USDA's explicit conclusion
12 that the make allowance it was setting was high enough to
13 cover the costs incurred by the balancing plants. Do you
14 recall those statements?

15 A Yes, I do.

16 Q And it's absolutely true that anyone had the
17 opportunity, if they ~~still~~ **so** wished, to submit comments
18 with respect to anything and everything that USDA has
19 stated in that **tentative** final decision, correct?

20 A That's true, if we wanted to influence what
21 that decision would be. We felt that trying to influence
22 the make allowance to go from 14 cents to a higher amount
23 was not something that would be appropriate **to do that for**
24 **balancing.**

1 Q If you simply wanted to comment and state that
2 you disagreed with USDA's factual conclusion that the make
3 allowance ~~that~~ as it had been set was high enough to cover
4 all costs of the balancing plant, you had the opportunity
5 to make --

6 A I had the opportunity and in fact did that on
7 the witness stand. I didn't feel I also needed to do that
8 in brief because my goal here was not to say the
9 Department was wrong on their number.

10 Q USDA did not itself participate at the hearing,
11 but they are the ones who wrote the decision, based upon
12 what they believed the hearing established, correct?

13 A Correct.

14 Q And ~~ABC&E~~ **ADCNE** had the opportunity to file
15 comments stating that although they potentially,
16 conceivably, stated that **rather** although they ~~disagreed~~
17 with the make allowance, they thought the Department was
18 wrong in characterizing the make allowance as being large
19 enough to cover the cost of balancing. ~~ABC&E~~ **ADCNE** could
20 have said that, right?

21 A We could have, although like I said, we
22 normally put in comments if we disagree with the
23 conclusion of the Department, and if -- and -- and in that
24 instance, we did not disagree with the conclusions of what

1 they were trying to do.

2 Q Well, -- and -- and what you did tell the
3 Department is that it "should use all credible, reliable
4 information available to it", and you believe the
5 Department did so and commend the decision in that regard.
6 That's what ABC&E actually told the Department in the
7 comments it filed on February 9, 2001?

8 A And -- and in regard to the 14-cent make
9 allowance, we believe the Department did do that. Even
10 though we had a higher make allowance, we thought that
11 that -- if we were going to deal with the orderly
12 marketing issue, we had to come up with a make allowance
13 that we felt was a reasonable one for the whole country
14 because this was the entire Order, and we were -- it would
15 not be reasonable for me to be representing dairy farmers
16 to come up with a higher make allowance to represent our
17 balancing. We thought that needed to be directly handled
18 by -- by balancing issues, such as marketwide service
19 **guidance payments.**

20 Q Well, but the Department had also stated that
21 it was sure that it was covering the cost of balancing
22 because the ~~RDS~~ **RBCS** survey on which it was basing the
23 make allowance had itself been based upon the cost of
24 plants that were operating at less than 50 percent

1 capacity, correct?

2 A That's correct, and I can tell you that I
3 testified that I disagreed with that particular cost study
4 that was done. I don't think it was done with the same
5 intentions.

6 Q And -- and -- and the fact of the matter is,
7 sir, you testified already at this hearing that your
8 plants are operated at greater than 50 percent capacity on
9 an annual basis?

10 A Yes, they are.

11 Q And you've also testified at this hearing that
12 -- that USDA should not attempt to set marketwide service
13 payments to cover the balancing costs incurred by any
14 particular plant, right?

15 A I think it should be covering the plants
16 involved. I can tell you what our particular costs are
17 regarding that.

18 Q I believe you testified that the USDA should
19 rely upon Dr. Ling's study rather than attempting to limit
20 the cost of any individual **plant**.

21 A Yes, that is true.

22 Q Because any individual plant may be engaged in
23 all kinds of activities other than balancing, correct?

24 A That's true.

1 Q And you don't dispute the accuracy of USDA's
2 statement that the ~~RDCS~~ **RBCS** plants that are included in
3 the survey that led to the make allowance in fact did
4 operate at less than 50 percent capacity, do you?

5 A I don't -- that, I don't know. I can tell you
6 at the time, we were operating above 50 percent capacity.
7 We were actually operating at a higher capacity than we
8 were during 2001.

9 Q Well, I'm -- I'm trying to focus specifically
10 on the factual conclusions that USDA had reached based
11 upon the hearing record at the make allowance hearing
12 which was that in ~~other~~ **butter** powder plants that had the
13 ~~RTCS~~ **RBCS** survey which were the foundation of the make
14 allowance that was set were plants that operated at less
15 than 50 percent capacity on an annual basis? Would you
16 dispute that was true?

17 A That, I -- when I looked at that number, I had
18 a very difficult time believing that number, but I don't --
19 -- I can't dispute it from up here.

20 Q You don't dispute that USDA reached that
21 conclusion based upon the sworn testimony of Mr. Shad who
22 was the one who testified --

23 MR. BESHORE: Wait a minute. That is not an
24 accurate statement of either Mr. Shad's testimony or the

1 record. I mean, the evidence -- the percent utilization
2 numbers were out of the ~~RTCS~~ **RBCS** study which is not Mr.
3 Shad's study, and he had no knowledge of any utilizations
4 of any of the plants, other than perhaps as it relates to
5 that study. So, that is completely unfair to attribute
6 those factors in that study to Mr. Shad.

7 JUDGE BAKER: You could ask him whether or not
8 he disputed it.

9 MR. BESHORE: Well, the premise was misleading
10 and incorrect.

11 JUDGE BAKER: He could state if he disputed it,
12 Mr. Beshore.

13

14 BY MR. ROSENBAUM:

15 Q Let me simply ask you, Mr. Wellington. Do you
16 recall Mr. Shad taking the stand and testifying at these
17 hearings that the average plant utilization at the plants
18 that were included in the ~~RTCS~~ **RBCS** cost study operated at
19 an annual average utilization of 47.9 percent?

20 A No, I didn't record that. I didn't recall
21 that.

22 MR. ROSENBAUM: That's all I have.

23 JUDGE BAKER: Thank you, Mr. Rosenbaum.

24 Are there other questions for Mr. Wellington?

1 Yes, Mr. Tosi.

2 CROSS EXAMINATION

3 BY MR. TOSI:

4 Q Thank you for appearing again this morning,
5 Bob.

6 I'm confused now. Yesterday when -- when I was
7 asking you questions, you indicated to me yesterday, if my
8 memory serves me right, that you couldn't -- you did not
9 share what your real cost information was for balancing
10 and that you relied on the Ling study to tell you what it
11 is, and then once you got that, then you in turn agreed
12 with what he told you what it cost and you agreed with it.

13 A To isolate those costs of balancing, Gino. We
14 were talking at the other hearing what the costs were of
15 making powder, okay, and then the cost per pound to get a
16 make allowance. At this point, we were trying to isolate
17 because there are more cost factors involved. So, we were
18 trying to isolate those costs. If I were to
19 look at those same cost basis now, they would be slightly
20 higher. I don't have the numbers, but I know all the cost
21 factors have gone up and our pounds have gone down during
22 the 2001 comparison.

23 Q To the extent that you're saying that you know
24 what your costs are today, do you see that as being

1 something different -- with regard to your testimony
2 today, is it fair to characterize it this way, that you
3 know what your total costs are, but the costs that you're
4 attributing as a result of balancing Class 1 market is --
5 is -- is --

6 **A** ~~this~~ **This** would be a more difficult point to
7 isolate --

8 **Q** ~~to~~ **To** balance that total cost, how much of it
9 could be attributable to Class 1 was isolated **for you by**
10 **the Ling Study?**

11 **A** The total cost of the plants involved, yes.
12 The total cost -- the total cost. That's what we were
13 trying to isolate within the plant, what those costs were.
14 This issue right now that I was concerned about was the
15 fact that he did not say, gee whiz, we have this wonderful
16 make allowance and it covers our market, that I
17 specifically said that that was an issue that needed to be
18 directed -- that needed to be handled separately from the
19 make allowance issue because if you accommodate plants
20 that were operating at 50 percent capacity, then you could
21 make a lot of money at a 100 percent capacity and not want
22 to reduce money for the Class 1 market.

23 So, I mean, that's -- that's the issue, saying
24 that we needed to focus it on that. That was the point,

1 that we did not say everything was hunky dory on Class 4.
2 We needed our market service to look at that, and I said
3 that back at the hearing, too.

4 Q Okay. The cost things that you're talking
5 about today would be total costs?

6 A Making powder at our plant, correct.

7 Q Okay. That cost does not include then cost
8 that's attributable to balancing plants in the Class 1
9 market?

10 A It includes the cost of making powder at our
11 plants. We make powder at balancing plants in the Class 1
12 market and we incur that cost. There's a different issue
13 --

14 Q Okay. But it seems, at least the way I think I
15 understand right now, how perhaps you ~~relied~~ **can rely** on
16 one study as to say that -- and -- and the fundamental
17 basis of Proposal 7 seems to rest on the notion of some
18 measurement of unused plant capacity, trying to attach a
19 value to that and attribute that and characterize that as
20 a cost, and it would seem to me then that -- and the way
21 that the -- I think that you're interpreting this is
22 you're saying, well, that's -- that study then helped you
23 isolate the costs associated with balancing because it had
24 an impact on unused plant capacity.

1 A Yes, that's correct.

2 Q That ~~what~~ **this morning** you're telling me is
3 other cost is --

4 A I'm saying --

5 Q ~~are~~ **Are** you talking about the costs that are
6 unrecoverable because of unused plant capacity?

7 A I'm talking about that our costs tend to be
8 higher because of unused plant capacity. That's why we
9 have 17 cents, right? Okay. If we were operating near **or**
10 at full capacity, we believe those costs would be closer
11 to that 14-cent range. So, we have additional costs in
12 regard to that. That's one of the reasons we have
13 additional costs back when we testified at the ~~last~~ **Class**
14 **III** hearing, and if I were to go in and isolate, well,
15 which of those costs are associated with balancing, well,
16 the fact is that if we did have a higher capacity, my
17 costs would probably go down a penny a pound for every 10
18 percent. So, maybe that's 17. If I added 30 percent on
19 to our utilization last year which was 60, I added 10, I'd
20 get from 17 down to 14. I mean, I'm just saying that's --
21 that's the way we look at it on it. I can just tell you
22 what our costs were, okay, and I can tell you that we also
23 realized that when we tried to isolate the cost of
24 balancing our plant, there are a lot of other factors

1 involved. That's why we said that.

2 Q All right. Believe me, I -- I do grasp, you
3 know, the notion that when you're attributing your costs
4 to the product that you're making and how you assign that
5 over, the quantity of product, and end up with -- and
6 convert that, as I think you have, into so many cents per
7 pound, that you're saying that that's basically what it
8 costs and in effect it becomes your plant make allowance,
9 if you will, but we're still taking into account all of
10 the unused plant capacity, and if that's a total cost,
11 being able to isolate on just Class 1, that would seem to
12 be a number that would be something less than the total
13 that you're attributing to Class 1, and then in that
14 regard, you know, to the extent that one wants to
15 interpret what the Department says about **covering** the
16 total cost of balancing, I think it's difficult to
17 conclude that somehow the cost of balancing hasn't already
18 been covered.

19 A What we're saying on that, ~~you know~~ **Gino**, is
20 that we have additional costs involved, and when that
21 happens, just like it said in the Ling study, it brings up
22 your average cost, your average make allowance, okay, and
23 -- and for all your products.

24 That's a way of looking at the difference in

1 cost. You're saying, well, the 17 cents is what it costs
2 because it has everything in it, and it's really 16 cents
3 because you add -- because there are other factors in
4 regard to the Class 1 differential. What I'm saying is
5 this is the cost. This is saying what the cost is, okay,
6 and I can tell you that at least according to Ling's study
7 and the ones that we did, that if you lower the
8 differential, if you raise the utilization percentage,
9 then you can lower those per unit costs.

10 Okay. Now, if that question is saying, well,
11 gee, should it be -- it would be 16, 15, 14, yeah, all
12 those things would be impacted by that, which is saying
13 that we have additional costs involved and even at the
14 other hearing, we felt that you can't accommodate a market
15 that's doing balancing with a make allowance unless you're
16 going to encourage production of that product.

17 If that 50 percent number -- and I can't
18 dispute it from here, but I can just say that if that 50
19 percent number is correct, and we get another penny per
20 pound for every 10 percent utilization, and I'm making
21 money at 50 percent, I'm not but if I were, at a 100
22 percent, I'm making five cents more per pound, and I'm not
23 going to release that money for any milk, but I get
24 another 40-50 cents.

1 Q I can -- I appreciate your comments and your
2 statement that if the make allowance is too high, then you
3 put in effect the trim rate for causing that additional
4 production.

5 A And that's why we didn't say we need 17 cents.

6 Q But to the extent that -- that the Class 3 and
7 4 prices -- excuse me -- **Class IV** prices were based on
8 market prices and that the Class 4 prices is also designed
9 to be the market clearing price, would you say market
10 clearing depends on the market? Depends on the cost
11 involved in that particular market?

12 A That's why we're trying to go to a market
13 service payment on a market-by-market region, even in this
14 market, so we can make it -- so we can adjust it so it is
15 market-clearing because we have higher costs because of
16 balancing. That really is the intent of why we tried to
17 focus and separate the two issues out and that's what my
18 comment was, that we needed to separate the two issues
19 out.

20 Q Okay. By the way, with respect to your costs,
21 are you -- do you factor in the revenue side of --

22 A Not against cost. If you want to factor in the
23 revenue side, then you -- then you have profit or loss.

24 Q Okay. But when you decide to ship to the Class

1 1 market and you do so because there's a cost and there's
2 a revenue factor to it?

3 A We look at that, but we also, depending on the
4 time of the year, we also look at it to make sure we serve
5 that Class 1 market. So, that is a priority in our
6 organization.

7 Q Okay. Wouldn't the same be true of Class 4,
8 **there's a revenue side?**

9 A Sure. It's what you earn on selling Class 4
10 products.

11 Q Right.

12 A In response to that, particularly because I'm
13 not doing non-fat dry milk powder, I'm not going to be
14 able to get any kind of premium product. It's a very
15 straightforward commodity. It's sold basically at or
16 around the support price. So, it's not -- you may have
17 pay premiums on the milk, on all your milk, you're paying
18 some on your Class -- what's made as powder, and you're
19 not getting anything on that. CCC doesn't give you ~~the~~
20 ~~opportunity~~ **a premium**. So, I mean, there is -- there is
21 issues on that, but I wouldn't think it would be like
22 that, but it's -- it's not -- it's a much different
23 revenue stream.

24 MR. TOSI: I think that's all I have. Thanks,

1 Bob.

2 JUDGE BAKER: Do you have questions?

3 CROSS EXAMINATION

4 BY MR. ROSENBAUM:

5 Q Can you confirm for me, Mr. Wellington, that
6 participants in the ~~RTCS~~ **RBCS** survey, as it was used for
7 purposes of the make allowance, included both Land O'Lakes
8 and the Dairy Farmers of America?

9 A Land O'Lakes was in, and I believe Dairy
10 Farmers of America, yes. Yes.

11 MR. ROSENBAUM: That's all. Thank you.

12 JUDGE BAKER: Thank you.

13 Mr. Vetne?

14 REDIRECT EXAMINATION

15 BY MR. VETNE:

16 Q Bob, I'm a little bit confused now. Referring
17 to, I think it is, Exhibit 12, the Ling study in this
18 hearing as opposed to the survey in the other hearing, is
19 it your understanding that the intention that the
20 marketwide service payment be based on all unused plant
21 capacity as opposed to the unused capacity attributed to
22 Class 1?

23 A No. It's to Class 1. That's what the Ling
24 study looked at.

1 Q Okay. So, I mean, you were asked some
2 questions that seemed to assume that all unused plant
3 capacity was factored into the Ling costs.

4 A If I said that, that was not my intention.
5 ~~Those costs were just for Ling. We looked at just relating~~
6 **costs.**

7 Q Okay. So, then there is unused capacity in
8 manufacturing plants that is not attributable to Class 1?

9 A Absolutely. That's once again why we went to
10 the Ling study, to look at the isolate.

11 Q And you don't have to include that unused
12 capacity as part of your market service for your company?

13 A No, no.

14 Q And there are -- there are alternative ways of
15 balancing daily and seasonal fluctuations. Are -- are any
16 of those balancing alternatives available at -- at costs
17 comparable to -- to manufacturing non-fat dry milk and
18 butter?

19 A Not to our costs. That's why we use the plant.
20 They may be elsewhere in the market but not -- not -- not
21 available to us.

22 Q But you do use other means on occasion?

23 A Certainly.

24 Q And to the extent you use them, you don't

1 propose to recover the additional costs for that
2 alternative means of balancing?

3 A If those costs are beyond what the balancing
4 Class 1 is, yes.

5 Q That's not my question. My question is, would
6 your balancing Class 1 ~~use a~~ **using** means other than making
7 butter and powder? , ~~Do~~ **do** you want to recover the
8 additional costs for selected and different while you're
9 balancing?

10 A Yes. It's the cost of balancing, no matter how
11 you do it. We're looking at the efficient way for butter
12 and powder. ~~That's true.~~

13 Q **That's true.** So, -- so, when -- when you decide
14 to use cheese or -- or sell milk to Wisconsin, transport
15 milk to Wisconsin, you want to recover the additional
16 costs from marketwide service payments ~~to an~~ , **the** amount
17 in addition to manufacturing butter and powder locally?

18 A No, because our -- what we're looking at is our
19 costs involved. Those are a higher cost for us, and so we
20 didn't factor in those costs. We said what we view as the
21 most efficient, and so that's the level of cost that we
22 thought was appropriate. If we had to move that milk to
23 Wisconsin, it's a lot more costly for us than running it
24 into a butter ~~or~~ powder **plant**.

1 Q Okay. And so, and when you do that, would you
2 expect to get more in marketwide service payments then?

3 A No.

4 Q I see. Okay.

5 JUDGE BAKER: Thank you.

6 Are there any other questions for Mr.
7 Wellington? Mr. Beshore?

8 MR. BESHORE: Just real quick, Bob.

9 RE CROSS EXAMINATION

10 BY MR. BESHORE:

11 Q In -- in the three and four years when your
12 costs were over 17 cents, how much was it per pound?

13 A 17 cents a pound for powder.

14 Q The decision that the Secretary's ~~about to~~ **came**
15 **out with for the** make **allowance** is around 14 cents a pound
16 roughly, and, you know, you were satisfied with that
17 because the uniqueness of the Northeast Market, you
18 believe, was intended at that time to address the
19 additional costs in a marketwide service --

20 A That's what I said my testimony.

21 Q Which is why we're here.

22 A Yes.

23 Q Thank you.

24 JUDGE BAKER: Very well. Are there any other

1 questions?

2 (No response)

3 JUDGE BAKER: Let the record reflect that there
4 are none.

5 Thank you very much, Mr. Wellington.

6 (Whereupon, the witness was excused.)

7 MR. BESHORE: Thank you for accommodating Mr.
8 Wellington, Your Honor.

9 JUDGE BAKER: Indeed, you are welcome.

10 Now, is there anyone else who wishes to give
11 testimony with respect to Proposal 7?

12 (No response)

13 JUDGE BAKER: Let the record reflect that there
14 is no response, and we are now ready to move on.

15 The first several amendments were proposed by
16 New York State Dairy Foods, Inc. I understand from some
17 comments last night that certain witnesses will be giving
18 testimony on proposals out of order. That will be all
19 right, but can we call the witnesses now, please?

20 MR. ENGLISH: Your Honor, I think what we had
21 discussed was that maybe a couple of the people who are of
22 the non-consultant variety might testify about Proposals
23 1, 2, 3 and 4, and then, to the extent that the proposals
24 sort of ~~mutually~~ **inter** relate, we can go in a different

1 order as convenient for the parties, especially Mr. Vetne
2 and his clients, who have been very patient, but I would
3 call Mr. Fitchett at this time.

4 JUDGE BAKER: Very well. Did you say you've
5 been patient or Mr. Vetne?

6 MR. ENGLISH: I said Mr. Vetne has been
7 patient.

8 JUDGE BAKER: Oh, Mr. Vetne's been patient.
9 All right. Thank you.

10 MR. ENGLISH: I am just trying to move this
11 along.

12 JUDGE BAKER: Very well. Mr. English, try to
13 have the witness identify what proposal he is addressing.

14 MR. ENGLISH: He will.

15 (Pause)

16 MR. ENGLISH: Your Honor, in response to your
17 question, Mr. Fitchett will address both Proposal 1 and
18 Proposal 2.

19 JUDGE BAKER: Very well. Thank you.

20 MR. ENGLISH: Your Honor, I have handed a
21 statement which is a cover page plus four pages and ask
22 that be marked.

23 JUDGE BAKER: This will be so marked as Exhibit
24 31 for identification.

1 (The document referred to was
2 marked for identification as
3 Exhibit Number 31.)

4 MR. ENGLISH: And a one-page table and ask that
5 table be marked.

6 JUDGE BAKER: I don't have the one-page table,
7 do I?

8 MR. ENGLISH: Sorry, Your Honor.

9 JUDGE BAKER: Very well. Thank you.
10 That shall be marked as Exhibit 32 for
11 identification.

12 (The document referred to was
13 marked for identification as
14 Exhibit Number 32.)

15 MR. ENGLISH: Mr. Fitchett was previously sworn
16 and testified and actually already gave the first three
17 paragraphs of 30. So, when I ask him to start, he'll
18 actually start, you know, with the part that says Proposal
19 1.

20 JUDGE BAKER: Very well. Thank you.
21 Whereupon,

22 WILLIAM FITCHETT
23 having been previously duly sworn, was recalled as a
24 witness herein and was examined and testified further as

1 follows:

2

DIRECT EXAMINATION

3

BY MR. ENGLISH:

4

5

6

Q But, Mr. Fitchett, first, if I may have you explain what it is that is now Exhibit -- marked as Exhibit 31, your Table 1?

7

A 31 or 32?

8

Q I'm sorry? 32.

9

A This -- this table I put together based on changes that we are proposing in terms of reporting dates and therefore the following **pay date** changes that would accompany those changes in the reporting dates. The first column obviously are the months. The second column is the current date of the partial payment due date in the year 2002. The second column is the final pay date in the year 2002, and the third column represents the spread in terms of numbers of days between the partial pay date and the final pay date for the producers.

19

20

Q Go ahead. I was going to ask, what is the purpose of this table?

21

22

23

24

A The purpose of this table is to show what the spread of dates are between the partial and the final and to determine what the proposed change would affect the change in the pay dates between the partial and the final.

1 Q And the spread variance describes what?

2 A The spread variance on the far right column
3 describes the decrease in the number of days between the
4 partial payment and the final payment, based on our
5 proposal to change the partial pay date.

6 Q And ~~is it's~~ that variance that you're
7 describing in your testimony?

8 A That's correct.

9 Q Why don't you go ahead and give your testimony
10 that appears in Exhibit 31 but don't repeat the paragraphs
11 you gave yesterday?

12 A Marcus Dairy strongly supports the change
13 proposed to move the handler milk reporting date to the
14 Market Administrator from the 9th to the 10th of the
15 month. The extra day will help to get more accurate
16 information from the cooperative and to eliminate in our
17 need to estimate some of the numbers in order to file
18 reports on time.

19 Marcus has experienced several errors during
20 the inception of the new regulation. In fact, estimates
21 of values to send to the Market Administrator are often
22 used due to information -- due to late information from
23 the cooperative. One of these errors occurred in October
24 2000 and one was not caught until audited in June of 2002.

1 This \$25,000 overpayment to the pool has been acknowledged
2 but still not credited to our account.

3 Much of the milk that is supplied to the
4 cooperative to Marcus Dairy is co-mingled with Marcus
5 independent producer milk. Many of the complexities for
6 following this milk, along with the necessity of component
7 value pricing, which is new to Order 1 and Order 2, make
8 the reporting date requirement difficult to attain. The
9 extra day would be welcome relief.

10 Part 2. The proposal to move the reporting
11 date should be accompanied by the proposed change to move
12 the Market Administrator producer price differential
13 announcement date. There needs to be some flexibility for
14 the Market Administrator with this announcement date with
15 regards to weekends and holidays. The proposal by the New
16 York State Dairy Foods recognizes this need. It allows
17 the Market Administrator some flexibility with the
18 announcement date by suggested producer price
19 differentials announced on the 14th or the first day the
20 MA office is opened for business thereafter.

21 Part 3. The New York State Dairy Foods, Inc.,
22 proposal to move the dates described above also requires
23 similar movement to comply with the date of payment to the
24 producer settlement fund. ACH bank transfers many times

1 take a minimum of two days to complete, and the language
2 requiring payments be made not more than two days after
3 the producer price differential announcement is consistent
4 with current timing.

5 Part 4. Payments to producers and cooperative
6 associations need to follow the adjusted date of the
7 producer price differential announcement. New York State
8 Dairy Foods, Inc., proposal suggests the cooperative
9 payment continue to be the day after the PPD announcement.

10 Marcus Dairy has had many of their independent
11 producers complain about the length of time between the
12 partial payment and the final payment. Under former Order
13 1 Guidelines, partial payment was made on the fifth of the
14 following month for the first 15 days' production. Under
15 the former New York/New Jersey Order 2, the partial
16 payment was made on the 30th or the last day of the
17 current month for the first 15 days' production. The
18 ~~credit present~~ requirement for making the partial payment
19 on the 26th of the current month for the first 15 days'
20 production creates a longer time between payments with the
21 final payment as late as the 20th of the following month.
22 In fact, Marcus Dairy has been asked and has provided
23 additional payment advances 45 times over the past 20
24 months.

1 The proposal by the New York State Dairy Foods
2 is to change the partial payment requirement date to the
3 30th of the current month and to move the final payment
4 date to the day after payment from the producer settlement
5 fund which is the current regulation. This addresses the
6 issue of reducing the time between partial and final
7 payments. Table 1 compares those two payment methods.

8 That's the end of my statement on Proposal 1.

9 Q Would you like to give testimony on Proposal 2?

10 A I would. Proposal 2. The New York State Dairy
11 Foods, Inc., Proposal Number 2 is designed to assure an
12 adequate supply of milk for the Class 1 market. The new
13 ability of cooperatives to market independent milk and
14 other smaller cooperative milk supplies enables them to
15 show a much larger percentage sale to a Class 1 market.
16 The independent milk supply and many smaller cooperative
17 milk supplies have historically been associated with Class
18 1 fluid milk markets or pool distributing plants.

19 The request to increase the shipping
20 requirement from August to the November period by 5
21 percent would help to assure the supply to Class 1 when it
22 is most needed. Marcus Dairy in the Fall of 2000 had a
23 shortfall of milk that could not be covered by its normal
24 cooperative agreements. In order to supply our customers,

1 milk had to be procured through other means. The Market
2 Administrator did increase shipping requirements for the
3 following months to help correct this situation. This
4 demonstrates the need to maintain the right of the Market
5 Administrator to enact a "call" when conditions warrant.
6 The proposal to increase the shipping percentage will help
7 to alleviate the shortfall.

8 Q Mr. Fitchett, on the second page, there's
9 referenced something called ACH Bank Transfers. For the
10 clarity of this record, what does ACH Bank Transfers stand
11 for?

12 A I'm not sure I know what ACH is, but it's the
13 requirement from the Market Administrator as to the way
14 they want their payments. They're basically wire
15 payments.

16 Q So, it's your experience that -- that ~~the posts~~
17 **those** basically take two days to complete?

18 A That's correct. In most cases.

19 Q Now, with respect to the issue of -- of the
20 report on the 9th of the month, the problem, as I
21 understand it, is that you receive reports from people
22 from -- from the ~~end-users~~ **entities** from whom you receive
23 milk that you have to turn around and turn these reports
24 into the Market Administrator, correct?

1 A That's correct.

2 Q And many of those reports that you and -- let
3 me back up a moment. You are not only the vice president
4 and general manager of Marcus Dairy, you are also the
5 president of the New York State Dairy Foods, correct?

6 A That's correct.

7 Q And the association -- you're not just
8 testifying only on your own behalf, you're also testifying
9 on behalf of the association, is that correct?

10 A That's correct.

11 Q And so, you have talked to members of the
12 association and you yourself have experienced
13 circumstances in which the reports filed with you by other
14 handlers are not received in a timely basis allowing you
15 to file on a timely basis with the Market Administrator,
16 correct?

17 A That's exactly correct. In fact, the most
18 recent Monday, this past Monday, for filing requirements,
19 the latest -- the earliest we received reports from
20 outside was like 6:00 at night. We had already estimated
21 and filed the report with the Market Administrator. So,
22 we had estimated numbers as opposed to finalized numbers
23 in that report.

24 Q And -- and in your experience when you've filed

1 estimated numbers, have you had to correct those later?

2 A Very difficult to do after the fact. It
3 usually waits for an audit. In some cases, we are able to
4 correct the following month when we have compliance.

5 Q But for instance, you have one outstanding one
6 that leaves you as an overpayment of \$25,000?

7 A That's correct.

8 Q And you're a small business?

9 A That's correct.

10 Q And this is not really the exception, this has
11 sort of become -- the situation has sort of become the
12 norm with respect to the report?

13 A Unfortunately, since the change in the Federal
14 Order Reporting System, we have more times than not not
15 received the information on time, so that we could make
16 accurate reports or we've had to wait and delay. The fact
17 is, the Market Administrator has been very lenient in
18 terms of giving us extra time, if it was necessary, to
19 wait for those reports, but the fact is that it's
20 difficult and sometimes impossible to give them the
21 complete information on time because it comes from several
22 different sources. It comes from different cooperatives
23 and they have trouble probably getting some of their
24 information, but the fact is, it's always, always late in

1 the day on the final day that the report is due.

2 Q And this imposes additional costs on your
3 business as a small business, correct?

4 A Correct. We have to keep people there later at
5 night, even work on Saturdays, to try and get these
6 reports complete.

7 Q And without pointing fingers at any specific
8 entity, would it be fair to say that one or more of these
9 reports that you have spoken of for your own account are
10 from cooperatives who are in the room or have been in the
11 room during these proceedings, without naming specific
12 names?

13 A That's correct.

14 Q Now, I guess one question that arises is, you
15 move the date from the 9th to the 10th, and life being
16 what it is, suddenly if all reports show up late on the
17 10th, is that a realistic possibility?

18 A We would certainly hope not. The idea is so
19 that the reports get in -- as a matter of fact, it would
20 be a great idea if the reports could come in on the 9th
21 and we would have until the 10th to finalize our reports.

22 Q So, in other words, if -- if one of the
23 problems identified by anybody is that -- that the reports
24 conceivably will just move another day, one way for

1 dealing with that would be to require other handlers who
2 are handlers under the Order to make sure that they have
3 all of the reports in to the handlers who must file
4 reports with the Market Administrator on the previous day?

5 A I think that would solve the problem.

6 Q And -- and at that point then, I guess the
7 other question would be, you've said that -- that the
8 Market Administrator has by and large been somewhat
9 understanding and forgiving about the situation. You
10 would recommend at that point that -- that once the extra
11 day is in there, that -- that enforcement be more
12 rigorous?

13 A That would also be welcome. Not under the
14 current circumstances, no.

15 Q So, literally, the purpose of Proposal 1 is
16 -- is to recognize existing legitimate difficulties that
17 you face, especially as a small business, and address
18 those in a series of fashions that all cascade from this
19 one issue of the 9th?

20 A That's correct.

21 Q Now, the one other issue within that context is
22 that the Market Administrator also has some time deadline
23 that you're prepared to move, but as I understand it,
24 you're prepared to provide flexibility to the Market

1 Administrator? In other words, the Market Administrator
2 doesn't have to wait, if he so chooses, correct?

3 A That's correct. We wanted to give him the
4 opportunity, if he needed to move the date back a day
5 because of a holiday or because it was on a weekend, and
6 he did not have all of his information prepared, that he
7 could certainly do so.

8 Q And that is why dates after that all cascade
9 from the date that he actually issues the report as
10 opposed to having a fixed date so that if he chooses an
11 earlier date, that doesn't automatically give you extra
12 time to do things?

13 A That's correct. ~~He~~ We would still be bound by
14 paying the day after and so forth.

15 MR. ENGLISH: The witness is now ready for
16 cross examination.

17 JUDGE BAKER: Very well. Thank you.

18 Are there questions for Mr. Fitchett? Yes, Mr.
19 Beshore.

20 MR. BESHORE: Thank you.

21 CROSS EXAMINATION

22 BY MR. BESHORE:

23 Q Good morning, Mr. Fitchett.

24 A Good morning.

1 Q Mr. Fitchett, your counsel has used the word
2 "small business" a number of times with respect to your
3 operations, and, of course, dairy farmers are small
4 businesses, also.

5 Could you give us within a range of perhaps \$10
6 million the annual sales of your small business?

7 A We're approximately \$60 million.

8 Q Do you have any idea how that compares to the
9 annual revenue of the average dairy farmer in Order 1?

10 A I would say it's considerably more.

11 Q Now, one of the requests in Proposal 1, as I
12 understand it, is to delay the partial payment to dairy
13 farmers from the present requirement that it be on what,
14 ~~the 26th or 28th of the month?~~

15 A **The 26th or 28th of the month,** ~~The the~~ 26th, but
16 it depends on when the -- when the Saturday -- weekends
17 fall.

18 Q Okay. So, you want to postpone it from the
19 26th or 28th until the 30th?

20 A That's -- that is our proposal, yes.

21 Q And of course, that means a postponement in
22 cash flow to your -- to the dairy farmers in the market
23 whatever amount of days is involved in the delay of that
24 payment, correct?

1 A I would say it depends on how you look at it.
2 The fact is that we **pay buy** -- if we agree to move the
3 initial day by a day, that automatically will move the
4 final pay date, and so you're adjusting the length of time
5 between the partial and the final pay date, and the
6 problem that has arisen with us from our producers is that
7 there's too much time in between the partial and the final
8 pay date and that delay to them has created problems with
9 their cash flow, and again it goes back to where they were
10 prior to.

11 The fact of the matter is that we believe that
12 by moving both of these pay dates, we solve some of their
13 problem, and it actually reduces the amount of time
14 between the partial and final pay dates, so that they get
15 paid actually more frequently during the month.

16 Q Well, you don't -- are any of the dairy farmers
17 here that make that request that their payments be
18 delayed, payments be delayed to increase their cash
19 management abilities?

20 A They're not here. I think anybody that wants
21 their pay date delayed, they're going to get more in their
22 pay **month**. There's no question about that.

23 Q Okay. But, I mean, in effect, not in effect,
24 in actuality, Proposal 1 proposes to delay, move back,

1 both the partial payment date for dairy farmers each month
2 and the final payment date, correct?

3 A It does do that.

4 Q Okay. Now, when you're on the receiving side
5 of payments, is your business enhanced in its cash flow
6 when that people, you know, that owe you money for product
7 push it back for the time they pay you?

8 A No, but they want to go back to where the old
9 Order was and where this Order is, we'd suffer the same
10 problem on the other side.

11 Q Well, there have been changes in moving up the
12 dates of payment under -- under these Orders when they
13 were consolidated in Reform. I think we're all aware of
14 that.

15 A Correct.

16 Q Okay.

17 A The other thing we did look at, though, Mr.
18 Beshore, was, if we did not change the partial payment,
19 that's also in the table, if you don't change the partial
20 payment date, the proposed final payment date changes by
21 one day and this is done by one day only, you can see what
22 the spread in payment days are between the partial and the
23 final.

24 Q So, you'd -- the -- since the first payment's

1 been moved up, --

2 A No, this didn't move the first payment. It
3 ~~left~~ **kept** the first payment where it currently is.

4 Q Okay. But you're just saying since it was
5 moved up under the January 1, 2000, under the -- under
6 Order Reform, the -- there's a greater spread now between
7 the partial payment and the final payment than there was
8 under old Order 2 or old Order 1?

9 A Correct.

10 Q Okay. The audits -- audits and audit
11 adjustments relating to the reports of handlers to the
12 Market Administrator are a part of the business of -- of
13 the regulation, aren't they?

14 A Yes.

15 Q Okay. And the audit adjustments come some
16 months after the reports, and they're -- they're routine
17 and sometimes they're in the middle and sometimes they're
18 a little bigger and sometimes there are pluses and
19 sometimes there are minuses, is that fair?

20 A Fair.

21 Q Okay. And is there a dispute with the Market
22 Administrator with respect to the -- the account that
23 remains, you know, unsatisfied from May?

24 A No.

1 Q Thank you, Mr. Fitchett.

2 A You're welcome.

3 JUDGE BAKER: Are there other questions? Yes,
4 Mr. Vetne.

5 CROSS EXAMINATION

6 BY MR. VETNE:

7 Q Mr. Fitchett, I'm addressing your Proposal
8 Number 2. What is the significance to your proposal by
9 the factual observation in the second sentence, "The
10 ~~renewability of costs~~ **availability of co-ops** to market
11 independent milk and small cooperative milk enables us to
12 show a larger percentage of sales to the Class 1 market"?
13 How does that relate to the motivation behind your
14 proposal and the problem, if there is any, that you're
15 trying to fix?

16 A I think Mr. Arms is going to be more qualified
17 to speak to that than I am, but in general, and that's the
18 only way I can speak to it, in general, the ability for
19 them to pool 9-C independent milk with their own, most of
20 **it which** goes to the Class 1 market, and it certainly
21 gives them a higher percentage of their total sale to
22 Class 1 market and so the increase ~~to~~ **of** 5 percent in the
23 times of the year that we need it, we don't think it's an
24 undue burden on them, Number 1, and hopefully gives a

1 little more emphasis to putting milk in the Class 1 market
2 in Order 1 to help alleviate any shortfalls.

3 Q When you say "undue burden on them", the "them"
4 you're referring to is the cooperative associations --

5 ~~A Yes.~~

6 Q **A Yes** -- that pool 9-C milk?

7 Q Do you -- do you know why the fix for what you
8 identify as the 9-C problem is not to adjust the
9 qualification for 9-C milk?

10 A You're getting into technicalities now that I'm
11 not really qualified to speak to.

12 Q The answer is you don't know why you targeted
13 supply plants rather than 9-C as the solution to a 9-C
14 problem?

15 A No. I looked at it in general that we just
16 needed more milk available for the Class 1 market at that
17 time, especially in the year 2000, when we were almost
18 unable to supply our customers.

19 Q Prior to January of 2000, Marcus Dairy in
20 Connecticut was pooled under the New York/New Jersey
21 Marketing Order, correct?

22 A That's correct.

23 Q During the period prior to 2000, let's take
24 five years, did Marcus Dairy receive an adequate supply of

1 milk?

2 A Yes.

3 Q Did -- has there been a difference in your
4 ability to attract milk pre-Reform and post-Reform?

5 A During the year 2000 is the first time in my
6 recollection that we had difficulty attaining enough milk
7 supply during a couple of weeks to fulfill all of our
8 customer orders, and since then, milk supplies have
9 loosened up a little bit. We haven't had the same problem
10 in 2001, as for example, that we did in 2000, and so far
11 this year, we've not had that difficulty.

12 Q And you refer to normal -- normal cooperative
13 agreements. Marcus has independent producer supply and --
14 and cooperative milk supply, correct?

15 A Correct. And **an other** outside supply, too.

16 Q But you have a contractually-committed supply
17 from independent producers and cooperative associations?

18 A We have contractual agreements with a
19 cooperative association, yes.

20 Q And then, you have agreements with independent
21 producers? Whether they're in writing or not, you have a
22 contractual relationship with independent producers?

23 A Yes.

24 Q Was there anything different that you did in

1 the Fall of 2000 that caused you a shortfall?

2 A No, sir.

3 Q It was less production by your independent
4 producers and the cooperatives with which you had an
5 arrangement?

6 A No. I think that it was the fact that we
7 needed some additional milk supply above what was ordered
8 the prior week. We order milk on Thursday for the
9 following week, and if in fact there's a shortfall, the
10 normal routine is to call up as early as possible and
11 hopefully we can get the additional milk supply needed at
12 the end of the week and that had been going on for years,
13 and it was never an issue at all. We called, I think it
14 was, on the Friday afternoon we made the order and said
15 ~~you~~ **we** made a mistake, we need an extra couple tanks of
16 milk and the extra couple tanks of milk were unavailable.
17 So, it really made us scramble for the rest of that week
18 to continue to fulfill our customer orders.

19 Q And the call-in you're referring to is a call
20 to the cooperative association.

21 A ~~whom~~ **Whom** we have our agreement with?

22 A That's correct.

23 Q You'll call your independent producers and tell
24 them what you need for the week, is that correct?

1 A We take all the milk they can give us.

2 Q And in order to meet the shortfall that you had
3 in the Fall of 2000, did you supply that additional
4 requirement through calls to others or did your
5 cooperative association, the cooperative association
6 supplying you, make arrangements for that additional milk?

7 A No. We had to make the arrangements and made
8 calls to others.

9 Q And you -- you ~~pay~~ **paid** a bit of a premium for
10 that extra milk?

11 A Yes, sir.

12 Q More than the premium you would have paid a co-
13 op that ordinarily supplies you?

14 A Yes, but it wasn't a question of price at that
15 time. It was a question of getting the milk supply.

16 Q And you think that if -- if the standard -- if
17 ~~the~~ proposal **II** was adopted which increases shipping
18 requirements all the time by 5 percent, that you would
19 have an easier time getting milk?

20 A We think so.

21 Q You would have had an easier time because
22 instead of a seller's market, you would ~~have~~ essentially
23 ~~been in~~ **create** a buyer's market where there milk looking
24 for a pool home?

1 A I don't know the answer to that.

2 Q Okay. Do you know where that milk would come
3 from if there was an additional 5 percent shipping
4 requirement?

5 A I'm not sure.

6 Q If there is a 5 percent shipping requirement
7 and the ordinary circumstances apply that you've had for
8 five years before Federal Order Reform and most of the
9 time since and that milk were shipped to meet the
10 requirement, it would displace milk that's already being
11 received from Class 1, wouldn't it?

12 A I'm not sure I followed that, John.

13 Q If your plants and other plants are now being
14 supplied and -- and there is a requirement for more milk
15 to come in Class 1, and the Class 1 market is currently
16 being served, there would be no milk to move in to meet
17 the requirement forcing milk to move out to make room for
18 the milk that comes in, isn't that correct?

19 A That's correct.

20 Q Do you have any idea where the milk that comes
21 in would come from and where the milk that moves out would
22 go to?

23 A Not exactly, no.

24 Q Do you agree that the scenario that I've

1 painted would create a lot of transportation costs and
2 shelf life inefficiencies?

3 A I don't know where the milk would come from
4 exactly. It may or may not increase additional
5 transportation. I think it would depend on the source and
6 where the milk was going.

7 Q Do you have any idea of the location of plants
8 and milk supplies that may not now be shipping the extra 5
9 percent that would have to ship more if your Proposal 2 is
10 adopted?

11 A I do not.

12 Q If ~~field~~ **those** supplies are located distant
13 from distributing plant needs, do you offer a solution for
14 the higher hauling -- to recover the higher hauling costs
15 associated with such required shipments?

16 A I do not.

17 Q Would you agree that there would be higher
18 hauling costs that would be borne by somebody?

19 A If it's a distant trip, I certainly would
20 agree.

21 Q You've got no personal knowledge of any close
22 by -- any milk relatively close to existing distributing
23 plants that is not now shipping the proposed amount in
24 Proposal 2 that would have to ship more?

1 A I do not.

2 MR. VETNE: That's all. Thank you.

3 JUDGE BAKER: Thank you, Mr. Vetne.

4 Are there any other questions for Mr. Fitchett?

5 (No response)

6 JUDGE BAKER: There appear to be none. Thank
7 you very much.

8 THE WITNESS: Thank you.

9 (Whereupon, the witness was excused.)

10 MR. ENGLISH: The next witness also ~~out of~~
11 ~~order is~~ **having appeared before is** Mr. Buelow.

12 JUDGE BAKER: Mr. Buelow?

13 MR. ENGLISH: I'm sorry. Move the admission,
14 Your Honor, of Exhibits 31 and 32.

15 JUDGE BAKER: Are there any questions or
16 objections with respect to the introduction of evidence of
17 what has been marked for identification as Exhibits 31 and
18 32?

19 (No response)

20 JUDGE BAKER: Let the record reflect that there
21 is no response.

22 Exhibits 31 and 32 are hereby entered into
23 evidence.

24 (The documents referred to,

1 having been previously marked
2 for identification as
3 Exhibit Numbers 31 and 32,
4 were received in evidence.)

5 (Pause)

6 MR. ENGLISH: Your Honor, I'm not going to make
7 an exhibit of this. I won't have this marked.

8 Mr. Buelow has been previously sworn and
9 testified, so I ask that he give his statement. You asked
10 that it be identified for us, and it will be on Proposals
11 1, 2 and 3.

12 JUDGE BAKER: Thank you.

13 Whereupon,

14 JAMES BUELOW

15 having been previously duly sworn, was recalled as a
16 witness herein and was examined and testified further as
17 follows:

18 DIRECT TESTIMONY

19 THE WITNESS: Worcester Creameries Corporation
20 and Elmhurst Dairy, Elmside Farms, and Steuben Foods are
21 in favor of the changes proposed by New York State Dairy
22 Foods, Inc., in Proposal Number 1.

23 As I had stated earlier, I am responsible for
24 filing all of our company's Federal Order reports. When

1 Federal Order Reform happened in January 2000, many
2 changes went into effect with this new Order 1. Having to
3 compile not only butter fats but also proteins and other
4 solids information on each producer was certainly a large
5 change. Then having the receipts and utilization report
6 due a day earlier was also traumatic.

7 I can tell you that almost everyone thought
8 that in a few months, the wrinkles would be worked out and
9 everything would flow smoothly. Whereas it certainly is
10 much better today than it was in January of 2000, it still
11 is not working smoothly. I would like to share with you
12 exactly how it worked this month for us.

13 All offices were closed Monday, September 2nd.
14 This certainly hurt but final information usually isn't
15 compiled until the 2nd or 3rd, the reason being that we
16 have to wait until the information from the in-transit
17 loads are received. In our office, by the end of Friday,
18 the 6th, we had balanced. ~~Folks~~ **Quotes** agreed upon
19 shipping pounds with all but two of our suppliers.
20 However, we only had component information from our own
21 milk and one other very small cooperative. We were told
22 by the large cooperatives that we would not receive their
23 component information until Monday noon.

24 The reality was that we did not receive any

1 component information until 3 p.m. At 5:30, I was still
2 missing component information on over a million pounds of
3 milk. I then completed our reports with estimated
4 component pounds. I then discovered that one report that
5 our shrink on butter fat pounds was unrealistically low.
6 After reviewing that data, I filed the report at 11:30
7 p.m.

8 My point is receiving information from large
9 cooperatives this late leaves no time to review the report
10 to find possible errors. I finally received the last
11 information that was actually due, you know, by the 9th on
12 noon, the 10th. This month is not unlike most months.
13 Many months, I have filed reports that contain some
14 estimated information for the components. I am not truly
15 finding fault with anyone. This is just what happens most
16 months. No one in the industry has found a way to correct
17 the problem.

18 You might ask, how do the other Orders complete
19 this process even earlier than we do? The fact is that we
20 are the largest Order, the largest -- with the largest
21 amount of Class 1 milk. We have -- I ~~have heavy work~~
22 **having worked** in other Orders, ~~---It~~ appears to me that
23 milk in Order 1 moves to more locations each month than in
24 other Federal Orders.

1 For example, many **farmer farmers** in the Upper
2 Midwest have most of their milk go through one cheese
3 plant month after month after month. Here, a farmer may
4 deliver to several plants every month. This certainly
5 requires more accounting.

6 The producer differential must be announced by
7 the 13th of the month. This month, the date falls on
8 Friday. Payment to the producer settlement fund and
9 cooperatives are due on Monday, September 16th. For
10 handlers like us who package for other companies with
11 their own producer supply, this causes -- creates a new
12 challenge. Once we receive our detailed pool bill, we
13 must bill our customers for their respective portion.
14 Then we must collect from funds before the due date and
15 pay our bill to the producer settlement fund.

16 Some months like this one, with a weekend
17 falling during the time period, makes the process very
18 difficult to complete in the time frame required.
19 Payments to producers are due to the producers on Tuesday,
20 September 17th. This means the checks must be in their
21 hands, not mailed or en route. Producers checks must be
22 generated and physically delivered to the producer between
23 Friday, when the price was announced, and Tuesday, the
24 required payment date.

1 Moving the reporting date to the 9th -- from
2 the 9th to the 10th should allow cooperatives adequate
3 time to provide all component tests, eliminating the need
4 to estimate. In the event reporting dates are changed,
5 the Market Administrator's office will need an additional
6 day to complete the pooling process to establish the
7 price. This necessitates moving the producer payment
8 dates back. The producer payment dates are currently the
9 17th but this fluctuates when the 17th falls on a weekend
10 or holiday.

11 Worcester Creameries Corporation would like to
12 see the date for final payment become the 19th. We would
13 also like to see the date for the advanced payments move
14 from the 26th to the 30th of the month or the 28th or 29th
15 in the month of February.

16 Farmers have expressed concern about the
17 closeness of the final and advanced date and the length of
18 time between the advanced and the final date for their
19 ~~current~~ **timed** cash flow needs.

20 Proposal Number 2. Worcester Creameries and
21 its sister companies would like to support Proposal Number
22 2. We do believe milk pooled in Order 1 should have to
23 perform on the Order when milk is needed for Class 1. We
24 believe there is no need to have required shipments in the

1 months of January through July as Proposal Number 5
2 states.

3 We also feel that shipment -- shipping
4 requirements in the Fall months should be increased to the
5 stated levels. Milk available for Class 1 is always tight
6 in the Fall months. Asking suppliers to supply the
7 proposed 15 or 25 percent of the respective months of
8 their supply to Class 1 in the market that has a 40
9 percent Class 1 or more is reasonable and needed.

10 Worcester Creameries -- Proposal Number 3.
11 Excuse me. Worcester Creameries Corporation and its
12 sister companies do support Proposal Number 3. Requiring
13 producers to deliver two days of production to pool plants
14 in the months of August through December is needed.
15 Currently, producers are allowed to participate in the
16 pool and only make one delivery for ever and ever. This
17 encourages the ~~writing~~ **riding** of the pool. I have
18 personally received inquiries of suppliers outside the
19 Order wanting us to pool milk that physically would not
20 perform on the Order.

21 Regarding the proposed diversion limitations,
22 old Order 1 and 4 had these limitations for many years in
23 this market. The level with a high Class 1 market such as
24 this, we believe it is needed. **This would discourage the**

1 **practice of riding the pool.** I also believe it would make
2 milk more available to Class 1. By giving the Market
3 Administrator the authority to adjust the diversion
4 levels, I believe it would work very well for all parties
5 of this Order. For the year of 2000, milk supplies were
6 very tight in the Fall. The MA actually increased the
7 shipping requirements. These diversion limitations could
8 have helped, also.

9 When you are responsible for supplying milk to
10 three plants as I am and you have -- and you call the
11 major suppliers and they say there is no milk available at
12 any price, there's a problem. Therefore, we strongly urge
13 the adoption of this proposal. In years like this one,
14 when milk is more readily available, the MA would have the
15 authority to lower the diversion limitations.

16 Thank you for the opportunity to testify today.

17 JUDGE BAKER: Thank you, Mr. Buelow.

18 Mr. English, did you want to ask your witness
19 any further questions?

20 MR. ENGLISH: Yes, Your Honor, if I may.

21 JUDGE BAKER: Please proceed.

22 DIRECT EXAMINATION

23 BY MR. ENGLISH:

24 Q You referenced in your statement, for instance,

1 in September, by the end of **Friday the sixth** == after you
2 agreed on the pounds shipped but that you didn't have the
3 component information. Why is that **distinction** important
4 in Order 1 today?

5 A The process of preparing for the reports is the
6 supplier and -- and the handler usually share information
7 prior to the filing of the reports. The first information
8 that is shared is the pounds that are shipped, and once
9 those are agreed upon, then the supplier computes the
10 butter fat pounds and -- and then calls us and gives the
11 handler those pounds, and so it's important, Mr. English,
12 to have all that information prior to the filing of the
13 reports.

14 Q Is also part of the components the protein?

15 A Yes.

16 Q And if the protein is off, is that -- is that a
17 problem?

18 A Absolutely.

19 Q You've been, as you testified earlier, around
20 for a number of years and have some experience in this --
21 around the Federal Marketing Area.

22 A Thanks.

23 Q This hearing has been going too long.

24 What I mean to say is that you have been

1 participating as a -- as an active person, both on the
2 farmer side and now on the handler side, and in the
3 Northeast?

4 A Absolutely.

5 Q And you in particular observed changes that
6 have occurred prior to ~~that~~ **Federal** Order Reform and after
7 ~~that~~ **Federal** Order Reform, correct?

8 A Yes.

9 Q Now, prior to Federal Order Reform, you had
10 these three Orders that have been put together, but, of
11 course, these would belong to Orders 1 and the old Orders
12 1 and old Orders 2. The old Order 1 had a partial payment
13 date that was after the end of the month?

14 A Correct.

15 Q And that last one moved up significantly for --
16 for processors -- well, with respect to processors that
17 dealt with old Order 1, ~~theirs~~ **their movements were** moved
18 up literally nine or 10 days?

19 A That's correct.

20 Q And in your experience, what have the
21 cooperatives done for paying their small business farmers
22 with respect to those partial payments?

23 A My experience is that cooperatives vary their
24 payment dates in different areas, but to a large extent,

1 they have stayed with the old payment datesQ That
2 is to say, the fifth of the month if it's New England?

3 A If it's New England, the fifth and the 20th,
4 correct.

5 Q And -- and if it's in what was old Order 2,
6 would it then be like the end of the month?

7 A The -- a lot of the cooperatives that I know of
8 pay the advance from the 28th to the 30th and the final on
9 the 20th.

10 Q So, whatever the discussion is about the impact
11 on small businessmen, you know, the cooperatives have not
12 seen fit to make those changes for their members, correct?

13 A That is correct.

14 MR. ENGLISH: The witness is available for
15 cross examination.

16 JUDGE BAKER: Thank you.

17 Are there any questions for Mr. Buelow? Yes,
18 Mr. Beshore.

19 MR. BESHORE: Thank you.

20 CROSS EXAMINATION

21 BY MR. BESHORE:

22 Q Good morning, Jim.

23 A Good morning, Marvin.

24 Q I'm intrigued by the handler witnesses who are

1 -- seem to be tending -- speaking for the benefit of their
2 farmers' cash flow needs by requesting the right to pay
3 them later. Can you help me with that at all? You've
4 been -- you've been on the receiving side of that,
5 representing the farmers on the receiving side of that
6 cash flow.

7 Now, how is it going to help your suppliers',
8 independent farmers or anybody else, cash flow needs if
9 you pay them later?

10 A The only way I can answer that is what I said
11 is the truth. That's what producers have said to me.

12 Q They'd like the final check earlier. That's
13 what they've said, right?

14 A No. No, they really haven't, Marvin. They
15 like the old payment dates better than the new payment
16 dates, and one of the things they don't like about the new
17 payment dates, I might add, is -- is the variation in
18 dates, when it falls on weekends in that change. It's
19 very confusing. They'd like a consistent date.

20 Q The -- the Order does not prohibit handlers
21 from paying, closing -- closing up the time lag between
22 the partial and final by paying that final -- that final
23 payment earlier, does it?

24 A No, it does not. But it would be helpful for

1 someone to explain to me how we can do it under the
2 present system. There just isn't time to do that.

3 Q You can -- you're not waiting on any payment
4 from a pool or anything, and you're a Class 1 handler.
5 It's your money. It's in the bank. You can write the
6 checks.

7 A The way the system works, when the price is
8 announced and so forth, as I just testified, time-wise,
9 it's virtually impossible to make that process any quicker
10 than what we're doing now.

11 Q Let's talk about Proposal 2. Actually, ~~go to~~
12 **both** Proposal 2 and 3. You are -- you're encouraging
13 supporting proposals which increase certain requirements
14 related to deliveries to pool plants or deliveries from
15 supply plants to -- to pool distributing plants?

16 A Correct.

17 Q But you are supporting the retention of what is
18 probably the biggest pool-riding open loophole in the
19 whole system and that's the six-month/seven-month free
20 ride for supply plants where they have absolutely no
21 requirement at present to deliver any milk to any
22 distributing plant in the Order. Now, that's the way the
23 system's presently set up, right?

24 A That's correct.

1 Q Okay. So, you've got a supply plant, you know,
2 in Ohio or anywhere that sets itself up as a pool plant
3 during August through December, now they're in January
4 through July. As it's been stated in other hearings where
5 this provision was addressed, you could pool ~~in~~ **through**
6 that supply plant all the milk in the state of Wisconsin
7 under the Order during that period of time without any
8 obligations to supply it to the market, isn't that
9 correct?

10 A That's correct.

11 Q Okay. And you support the retention of that
12 provision? That's why you believe there is no need to
13 have required shipments in the months of January through
14 July in Proposal 5. That's your testimony. Proposal 5
15 would eliminate the free ride?

16 A I understand what Proposal 5 will do. I have
17 not seen -- whereas there has certainly been people
18 pooling milk outside the Order on the Order and during
19 that period, I have not -- maybe I can stand corrected,
20 but I have not seen larger volumes of milk pooled in that
21 period of time in relation to the Fall months when there
22 is performance requirements.

23 Q Well, whether there has been before or whether
24 there might be afterwards, if that provision's there,

1 you've had entreaties from folks outside the area that
2 want to attach their milk on to the pool, and if it's not
3 -- Proposal 5's not adopted and that's allowed, it would
4 be an open -- an open option, would it not?

5 A It could, yes.

6 Q And what's your -- what's your thought? I
7 mean, why should supply plants, wherever located, should
8 not have -- if you want to increase the demands upon them,
9 the minimum demands upon them ~~at all~~ **in the Fall**, why
10 should there not be minimum demands year-round? Class 1
11 demands year-round? Your plants need supplies year-round.
12 What's the justification for that?

13 A Again, as has been stated many years, I've been
14 around a long time, I've never -- never seen a problem in
15 supplying Class 1 plants from January through July.
16 There's no need to demand milk moved from further
17 distances to Class 1 plants during that period of time.

18 Q Now, the proposal, Proposal 3, **which would was**
19 ~~to~~ establish a touch-base provision. What's -- what's the
20 problem that needs to be addressed by requiring -- let me
21 start over.

22 There are substantial volumes of milk within
23 the Marketing Area that are regularly pooled by delivery
24 to non-pool plants. You agree with that?

1 A Correct.

2 Q Okay. And I think you testified yesterday
3 probably that you'd have some -- probably have some
4 business relations with some of those non-pool plants?

5 A Correct.

6 Q What is the -- what's the problem that requires
7 the imposition of monthly two-day deliveries to pool
8 plants by all producers?

9 A The problem, Marvin, is what's been stated many
10 times, is the shortness of the supply available to Class 1
11 plants in the Fall months, and I believe this is a way to
12 create more milk available during that period of time for
13 Class 1.

14 Q Well, touch -- the provision that you've
15 proposed doesn't require any deliveries to the
16 distributing plants, does it?

17 A It was proposed that they would just require
18 deliveries to pool plants.

19 Q Right.

20 A That's correct.

21 Q Now, you're supporting Proposal 3, which sets
22 diversion limits in the Orders of 60 percent and 75
23 percent. Do you have any -- do you have any idea why
24 those percentages are deemed to be appropriate?

1 A I don't think I can testify to that.

2 Q You would agree with me, would you not, that if
3 -- if the touch-base provisions require delivery of milk
4 to pool plants, that milk's not really needed at the pool
5 plant, it isn't then regularly utilized at the non-pool
6 plant, will continue to utilize the non-pool plant, you're
7 going to just encourage uneconomic deliveries for purposes
8 of meeting that touch-base provision that's not there now?

9 A It's not our intent to encourage uneconomic
10 deliveries and that's why we left -- we have a provision
11 in there where the Market Administrator can adjust those
12 in times that it's necessary.

13 Q Well, there's no -- there's no discretion given
14 with respect to the two-day touch-base, is there?

15 A No. It's on -- it's on the diversion
16 percentage limit.

17 I guess I might just add, Marvin, that I --
18 two-day touch-base period is just those Fall months. I
19 don't think it's unrealistic for -- as a performance
20 requirement for producers that pool under the Order.

21 Q The touch-base at the supply plant doesn't
22 really have anything to do with providing -- providing
23 milk to the Class 1 market?

24 A May or may not.

1 Q You made the comment with respect to your
2 proposal for the diversion -- in support of the proposal
3 for the diversion limits, that you believed it would make
4 more milk available for Class 1. It's on the third page.

5 A Correct.

6 Q The diversions are just from pool plants, not
7 distributing plants, right? So, it doesn't necessarily
8 tie that supply to -- to Class 1, does it?

9 A Not necessarily, but I -- I work at pool
10 plants, our pool distributing plants.

11 Q Is it that -- the Market Administrator's
12 exhibit on Page 63 shows that adoption of Proposal 3 would
13 have depool -- resulted in the depooling of volumes of
14 milk in almost every month of the year. Is that the
15 intention of the proposal?

16 A No, it's not.

17 Q Thank you, Jim.

18 JUDGE BAKER: Thank you.

19 CROSS EXAMINATION

20 BY MR. VETNE:

21 Q Mr. Buelow, good morning.

22 A Good morning.

23 Q Worcester Creameries Corporation in Jamaica,
24 New York, is a distributing plant, correct?

1 A Yes.

2 Q Does Worcester Creameries at that plant pool
3 any milk?

4 A Yes.

5 Q Does it have independent producer milk of its
6 own pooled at that plant?

7 A Technically, no. Milk is actually pooled at
8 the plant in Upstate New York. Our producers supply it.

9 Q And a plant -- what plant in Upstate New York
10 would that be?

11 A The Roxbury Plant.

12 Q Okay. And the Roxbury Plant is what kind of
13 plant?

14 A It's a pool distributing plant, also.

15 Q Okay. How much of the milk -- what percentage
16 of the milk at Worcester Creameries -- oh, is -- there is
17 a -- a distributing plant in Jamaica, New York, correct?

18 A Correct.

19 Q And is it true that a portion of that, **did** ==
20 milk coming into Worcester Creameries is tolled milk, milk
21 that is supplied, milk that's owned by others, pooled by
22 others, title to which is retained by others, and for
23 which Worcester receives a -- a -- a fee to convert raw
24 milk to some other product?

1 A It really isn't, John, Worcester Creameries.
2 That's Elmhurst Dairy in Jamaica, New York.

3 Q Hm-hmm.

4 A That's a sister company of ours, but that -- if
5 your question asked is serving Elmhurst Dairy, yes, that's
6 true.

7 Q And Worcester Creameries is not in Jamaica?

8 A Worcester Creameries is -- is a corporation
9 that purchases milk for all three of our plants, as I
10 justified the other day.

11 Q Oh, I see.

12 A And it is not a plant in itself.

13 Q Okay. So, -- okay. Elmhurst -- Elmhurst Dairy
14 in Jamaica, it tolls -- it provides tolling services?

15 A Yes.

16 Q And what portion of the milk received at
17 Elmhurst Dairy is tolled milk versus Elmhurst's own
18 products?

19 A That's proprietary information, John.

20 Q Okay. Would it be fair to say that a very
21 large proportion is tolled versus the amount of Elmhurst's
22 own produced milk supply?

23 A I don't know as I want to make the comparison,
24 but it is a large volume, yes.

1 Q Mountainside Farms doesn't appear on any
2 handler list, and I've been looking through. What is
3 Mountainside Farms?

4 A Mountainside Farms is a division actually of
5 Worcester Creameries Corporation, which is, Mountainside
6 Farms is the plant in Roxbury, New York, which is a
7 division of Worcester.

8 Q Mountainside is the plant?

9 A Mountainside is the plant. Worcester
10 Creameries is the producer supply.

11 Q The processor? Producer? What do you mean by
12 producer supplier?

13 A Worcester Creameries is the supplier, is the
14 purchasing arm of all three of these plants. However,
15 legally, the way it's constructed, Mountainside Farms is a
16 division of that company.

17 Q Who's the -- who's the reporting handler of
18 Roxbury milk?

19 A Worcester Creameries.

20 Q So, Worcester Creameries for regulatory
21 purposes is the plant operator?

22 A Yes.

23 Q And in real life, Mountainside Farms owns the
24 plant?

1 A Right.

2 Q Are you aware that there are -- in -- in the
3 Order 2, former Order 2 milkshed, New York/New Jersey
4 milkshed, primarily New York, New Jersey and Pennsylvania,
5 that there are a number of plants that were designated
6 pool plants prior to January of 2000 that are no longer
7 pool plants?

8 A Yes.

9 Q And those would include, for example, plants of
10 Kraft, Friendship Dairies, Hershey, among others?

11 A Yes.

12 Q So that, pre-Reform, when milk was received at
13 those plants, it was not considered diversion, it was
14 considered received at a pool plant?

15 A Correct.

16 Q And post-Reform, in order for those milk --
17 those plants to be supplied with milk, it has to be on the
18 diversion column of the handler report now?

19 A Correct.

20 Q And pre-Reform, when milk was received at those
21 plants, those receipts would come within the -- those
22 receipts would count as touch-base receipts; post-Reform,
23 milk ~~coming~~ **going** to those plants do not count as touch-
24 base receipts for individual producers?

1 A Correct.

2 Q You made reference to pre-existing diversion
3 limits. Would it -- would it not be the case that in
4 order to accommodate the milk that has historically been
5 pooled -- ~~has~~ **was** historically been pooled on Order 2,
6 under whatever diversion limits existed then, that the
7 diversion limits would have to be higher if -- the amount
8 of milk that would have to be diverted would have to be
9 higher if you take many of the largest manufacturing
10 plants and redesignate them as non-pool plants when they
11 used to be pool plants?

12 A If you'd like to testify on that, go ahead.

13 Q I'm asking you --

14 A I'm not sure, John.

15 Q You're not sure? Milk that used to go to a
16 manufacturing plant that was a pool plant, that was a pool
17 plant, --

18 A Correct.

19 Q -- did not have to be included as diverted
20 milk?

21 A That's correct.

22 Q And now it has to be included as diverted milk?

23 A Yes.

24 Q To accommodate that in the pool, the diversion

1 limits have to be higher?

2 A Yes.

3 Q Is part of the problem that you believe is
4 addressed by touch-base proposal milk located
5 substantially outside of the Northeast that doesn't come
6 into the Northeast?

7 A Would you repeat that again, John?

8 Q Is part of what -- what you perceive to be a
9 problem that needs to be addressed by a regulatory change
10 in the touch-base proposal, milk that is located outside
11 the --

12 A Yes.

13 Q -- Northeast --

14 A Yes.

15 Q -- that does not come into the Northeast?

16 A Yes.

17 Q And you hope that by increasing the touch-base,
18 more milk, wherever it's located, will at least physically
19 come into the Northeast?

20 A Yes. Let me just go a little further. The
21 answer is yes, if it's pooled on the Order.

22 Q And we agree that there are now fewer pool
23 plants at which milk may touch base?

24 A Yes.

1 Q Would your -- would that aspect of the problem
2 be served just as well if there were a touch-base
3 requirement that would count as touch base plants that
4 were formerly pool plants that are located in the
5 Northeast? In other words, two days delivery to a plant
6 located in the Northeast as opposed to a pool plant
7 located in the Northeast?

8 A I don't think I want to respond to that. I
9 -- I'd have to think that through.

10 Q All right. Has Elmhurst Dairy in Jamaica, New
11 York, contracted for independent producer milk supplies?

12 A Yes.

13 Q And has Elmhurst Dairy in Jamaica, New York,
14 contracted for supplemental cooperative milk supplies to
15 meet its bookings?

16 A Yes.

17 Q Excluding tolled milk?

18 A Yes.

19 Q And --

20 A Let me clarify that. It's not -- Elmhurst
21 Dairy, Inc., does not purchase any milk. It's always
22 purchased by Worcester Creameries Corporation, but it in
23 many cases is for the benefit of Elmhurst Dairy.

24 Q Worcester supplies the sister company?

1 A That's correct.

2 Q So, I mean, there's -- there's -- there's a
3 contractual relationship between Elmhurst and Worcester,
4 right?

5 A Correct.

6 Q Has Elmhurst Dairy for its own needs, excluding
7 tolled milk, received, ~~to did~~ Elmhurst Dairy for its own
8 ~~use received~~ **needs receive** an adequate supply of milk in
9 the years preceding Federal Order Reform?

10 A I guess personally, I can't -- I can't testify
11 to that. I only worked for Elmhurst six months before,
12 seven months before Federal Order Reform.

13 Q Okay. If there were a problem with adequate
14 supplies of milk at Elmhurst prior to Federal Order
15 Reform, would you not have become aware of the problem?

16 A Probably, yes.

17 Q Has there been any difficulty for Elmhurst
18 Dairy in Jamaica, New York, in receiving adequate supply
19 of milk since Federal Order Reform?

20 A Yes.

21 Q And could you describe when that problem
22 occurred?

23 A The most severe problem was in the Fall of
24 2000.

1 Q And during the whole Fall or portions of the
2 Fall?

3 A The earlier part of the Fall, before the call
4 was instituted. ~~It~~ ,it was a bigger problem. ~~after~~ **After**
5 the call was instituted. ~~It~~ ,it was ~~bigger~~ **better**. I
6 testified as to a lot of balancing and it's a daily
7 situation. The same thing is true when you look at it
8 from the perspective of the Class 1 handler. Many times,
9 my experience has been over the last two-three years, many
10 times you have to receive milk as a Class 1 handler on a
11 day that you really don't need it and find a way to roll
12 it until the day you do need it because it's not available
13 on the day you do need it.

14 Q Okay. When you're talking about the Fall 2000,
15 you said the early part of the Fall, is that September?

16 A September, yeah.

17 Q Okay. And during every day in September or is
18 it certain days?

19 A It wasn't every day, but it was certain days,
20 yes.

21 Q And that's because Elmhurst ~~or~~ **through**
22 Worcester did not have a commitment of adequate supplies
23 from independent producers and co-ops that regularly
24 served it?

1 A We were short of milk.

2 Q Do you know where the milk came from that
3 eventually served those needs?

4 A Yes.

5 Q Where?

6 A It came from -- from cooperatives.

7 Q I'm sorry. My question was, from what
8 location, not from whom. Do you know where it came from?
9 What -- what location it came from?

10 A A variety of locations. During that period of
11 time, we received milk from New York, Pennsylvania, from
12 outside the Marketing Area.

13 Q Do you know where in New York or where in
14 Pennsylvania?

15 A My memory is not that good. I couldn't give
16 you all the different locations.

17 Q All right. And -- and could you identify those
18 who did not ordinarily serve Elmhurst through Worcester
19 that met those needs for you?

20 A I'm sorry. Say that again, John.

21 Q Could you identify those entities who did not
22 ordinarily serve Elmhurst Dairy through Worcester that
23 served those needs for you?

24 A I'd rather not.

1 Q Could you state whether those entities or are
2 not members of ~~ABC&E~~ **ADCNE**?

3 A I think ~~they~~ all were, **but one** - -

4 Q Okay. Could you identify the amount of extra
5 premium that you had to pay for those products?

6 A I testified before that it was as much as three
7 times the normal current handling charges.

8 Q Okay. And what are the normal current handling
9 charges that are multiplied by three?

10 A That's proprietary information.

11 Q Okay. So, when you refer to normal handling
12 charges, you're referring to the handler charges paid by
13 Worcester/Elmhurst, etc. Then you did not mean to imply
14 normal in the market, correct?

15 A I don't understand what you're saying, John.

16 Q You used the term "normal current handling
17 charges".

18 A Correct.

19 Q Which you have declined to elaborate on as
20 proprietary. My question then is, when you say normal
21 handling charges, you're referring to handling charges
22 paid by the company that you work for rather than those
23 prevailing charges in the whole marketplace?

24 A I'm referring to the customary year-round

1 contract prices that the market is familiar with.

2 Q That Worcester pays?

3 A That Worcester pays, yes.

4 Q And you're not making a comment as to whether
5 those are normal or abnormal as respect to the market
6 average?

7 A No.

8 Q Okay. No, you are not making that comment?

9 A I'm not making that comment.

10 Q What you describe as a problem in parts of the
11 Fall of 2000, do you believe that increase in shipping
12 requirements will help alleviate that kind of situation?

13 A Yes.

14 Q Okay. By requiring some plants to ship an
15 additional 5 percent of milk?

16 A Yes.

17 Q Let's say that -- that the proposal had been in
18 effect, and in September 2000, as a result, you would have
19 received the additional milk. Your proposal would also
20 require that additional milk to come to your plants in
21 October and November of 2000.

22 A Correct.

23 Q Would that not displace milk when you didn't
24 need it?

1 A It could, yes.

2 Q It could. You didn't have any additional --

3 A I cannot say it will but it could.

4 Q Okay. I mean, you -- you -- you wouldn't have
5 any additional demands simply because there's additional
6 shipping requirement, would you?

7 A No.

8 Q Consumers aren't going to drink more because
9 there was a higher shipping requirement?

10 A No.

11 Q So, if you were already being served and there
12 is a higher shipping requirement and milk is coming in to
13 meet the shipping requirement rather than your need, it's
14 going to displace somebody's milk required to go some
15 place?

16 A **And A plant** obviously ~~it~~ handles what it
17 handles, John. The fact is that on certain days, even on
18 into October and November, there was days that we did not
19 receive the volumes we'd like. If you look at the whole
20 period of time, yes, and so I actually believed that doing
21 this would make a more orderly market for milk.

22 Q You had undertaken no examination of whether
23 increasing the shipping requirements would cause
24 displacement of more milk than it -- greater volume of

1 milk than would -- would serve additional needs?

2 A I have not examined that, no.

3 JUDGE BAKER: I realize there are additional
4 questions for Mr. Buelow, but the parties, by agreement,
5 it's two hours, so we're going to take our 15-minute
6 recess.

7 MR. VETNE: Thank you.

8 (Whereupon, a recess was taken.)

9 JUDGE BAKER: We are now back on the record
10 after our morning recess, and Mr. Vetne, you're
11 questioning Mr. Buelow.

12 BY MR. VETNE:

13 Q Mr. Buelow, Worcester and its sister companies,
14 are they the reporting handler on the cooperative milk
15 that they contracted for?

16 A Yes.

17 Q For Worcester's independent milk and the
18 cooperative milk that are included, that is included in
19 the handler report, what approximate average percentage is
20 Class 1?

21 A Between 85 and 90.

22 Q So, Worcester -- Worcester has its Class 1
23 needs completely supplied or almost completely supplied by
24 independent producers and co-ops under contract, correct?

1 A By independent producers and cooperatives,
2 correct. Yes.

3 Q Do you -- do you know -- well, strike that.
4 You do make reference to the Class 1 utilization of the
5 market as -- as a reference point for the reasonableness
6 of shipping requirements, --

7 A Correct.

8 Q -- correct? Now, a lot of the milk supplied to
9 the Class 1 market like yours is milk that is dedicated,
10 designed, committed, contracted and sought. It's in the
11 Class 1 market already, correct? Your supply is dedicated
12 to Worcester, and -- and for that
13 -- there's 85 percent Class 1 utilization.

14 Do you -- do you have any information on -- if
15 you take out that committed milk, the milk that Marcus
16 Dairy has committed, the milk of your dairy, the milk
17 that's already committed to the Class 1 market and serves
18 it and everything because it wants to, because it's close,
19 you take out that portion of the Class 1 milk, do you have
20 any information on the ratio of Class 1 to non-Class 1 for
21 the balance of the market's milk supply?

22 A No, I don't, John, and these type of questions
23 probably are better answered by our economist, David
24 **Enslar Arms.**

1 Q Okay. Would you agree with me that it's --
2 it's the ratio of -- of -- of non-committed Class 1 to
3 excess or surplus uses that should be looked at for
4 purposes of -- of supply rather than looking at what's
5 already there and already committed and it's going to go
6 there, wants to go there every day?

7 A Again, I would suggest you ask David ~~Ensler~~
8 **Arms** that question.

9 Q Would you agree with me then that if -- if a
10 performance requirement is structured so that it must
11 necessarily come in to a plant that hasn't committed Class
12 1 supply, it's going to displace milk that has to go
13 through on a truck some place else?

14 A I think I've already answered that question,
15 John.

16 Q And the answer before was yes?

17 A Yes.

18 Q Comparing old versus new, did Worcester
19 Creameries have an easier time or a harder time or did it
20 make no difference under the old system where the Market
21 Administrator had a meeting and called and wants to know
22 how the new shipping requirements are?

23 A I can't testify to firsthand knowledge of that
24 on the old Order. I wasn't ~~here~~ **at Worcester Creameries.**

1 Q Okay. With respect to your combined knowledge
2 at -- at Elmhurst/Worcester and the involvement you had in
3 the Northeast before, do you know whether milk came when
4 needed either easier or harder under the pre-existing
5 rules?

6 A I -- I can't say. I think to some degree,
7 you're comparing apples with oranges. It's different
8 rules. It's different times. It's different markets.
9 There's so many things that are different.

10 Q Okay. So, choosing performance standards is a
11 matter of finding out which fruit you need to pick.

12 A Q Maybe apples are better than oranges? ?

13 Q Thank you.

14 JUDGE BAKER: Very well. Are there any other
15 questions for Mr. Buelow? Yes, Mr. English.

16 REDIRECT EXAMINATION

17 BY MR. ENGLISH:

18 Q Sir, Mr. Vetne asked you a question relating to
19 the difference that had happened in 2000 between September
20 and later months.

21 A Yes.

22 Q And in answering that question, was there a
23 part of the answer that you left out?

24 A Yes. The -- the -- in October, there was a

1 call. The call increased the shipping requirements which
2 would certainly make a difference in the supplies that
3 were available.

4 Q And Mr. Beshore referred you to Page 63 of
5 Exhibit 5 for volumes of milk that ~~were ordered~~, **in a**
6 **static world** in 2001 and 2002, that if Proposal 3 had been
7 adopted would not have been pooled. What is your **real**
8 **world** experience with such matters?

9 A There would have been -- in the real world,
10 people, when they know the rules, they -- they make
11 arrangements. They -- they find ways to deal with those
12 rules and so it's very, very hard to say that -- that this
13 would happen if -- if that was in place because people
14 would have done things differently.

15 Q And I think through a miscommunication or
16 whatever, some things ended up in the record that are
17 inaccurate. Mr. Beshore asked you about whether -- he
18 actually asked you to agree with him that the Market
19 Administrator does not have the authority under Proposal 3
20 to modify the touch-base requirements.

21 Having looked at the Hearing Notice during the
22 break, does that -- is that correct?

23 A No, it's not. Having looked at the Hearing
24 Notice, we are proposing that the Market Administrator

1 would have the authority to adjust both.

2 Q Both the delivery requirements and the
3 diversion percentages?

4 A Correct.

5 Q And this goes back to the series of questions
6 by Mr. Beshore about the so-called "~~market period~~" "**free**
7 **ride**" period. What about Proposals 2 and 3 in your
8 opinion may address the same philosophical issues raised
9 by Mr. Beshore?

10 A Proposals 2 and 3 would be increased shipping
11 requirements and touch base and -- and so forth in the
12 Fall months when the milk is needed. † I just simply
13 think that addresses the situation.

14 MR. ENGLISH: Thank you. I have no further
15 questions.

16 JUDGE BAKER: Thank you.

17 Are there other questions for Mr. Buelow? Mr.
18 Beshore?

19 MR. BESHORE: I hesitate ~~for the longest time~~
20 to prolong this.

21 RECROSS EXAMINATION

22 BY MR. BESHORE:

23 Q In Proposal 3, is it your intention in Part 6,
24 when you say that the delivery requirements and the

1 diversion percentages in Paragraphs D-3 and D-4 may be
2 increased or decreased to refer to the delivery
3 requirements?

4 A **MR. ENGLISH:** It's D-3.

5 Q **MR. BESHORE:** Well, that talks about diversion
6 percentages in Paragraph D-3.

7 A **MR. ENGLISH:** D-3 is physically equivalent to
8 two days' milk. It's the touch-base requirement.

9 Q **MR. BESHORE:** So, that's the language that you
10 intend to allow the Market Administrator what, to suspend
11 the touch-base?

12 A **MR. BEULOW:** Authority to adjust it.

13 Q Pardon?

14 A Authority to adjust it.

15 Q **A Would Whether** that increase or decrease it or -
16 - eliminate it for a period of time? ,

17 A ~~It~~ **it** would eliminate it for a period of time.

18 MR. BESHORE: Okay.

19 JUDGE BAKER: Very well. Thank you.

20 Are there any other questions for Mr. Buelow?

21 (No response)

22 JUDGE BAKER: There appear to be none. Thank
23 you very much, Mr. Buelow.

24 THE WITNESS: Thank you.

1 JUDGE BAKER: Thank you for appearing.

2 (Whereupon, the witness was excused.)

3 JUDGE BAKER: Mr. English, does that conclude
4 your presentation with respect to 1, 2 and 3?

5 MR. ENGLISH: No, Your Honor, but I know that
6 Mr. Vetne had wanted to -- to get some evidence in, and --
7 and the only other witnesses I have are Mr. Arms and Mr.
8 Conover, and they are flexible and can reschedule. I
9 would recommend that they -- I -- I've had seven out of
10 the last nine witnesses and, if nothing else, I need a
11 little time to finish preparing on that.

12 JUDGE BAKER: Very well. Mr. Vetne, what are
13 your presentations directed towards?

14 MR. VETNE: Your Honor, they are directed to
15 Friendship proposals 8, 9 and 10, Proposal 11 by
16 Friendship is withdrawn and it won't be addressed, and by
17 presenting testimony in support of Pooling Provisions 8, 9
18 and 10, implicitly, **if** not expressly, it addresses all
19 other pooling provisions which are inconsistent and
20 irrational.

21 MR. ENGLISH: I guess that means I'll object to
22 that characterization.

23 JUDGE BAKER: I will make a note here that even
24 though you have withdrawn 11, if there is anyone who

1 wishes to speak to 11, they may do so.

2 MR. ENGLISH VETNE: I have provided courtesy
3 copies during the break, so we don't have to spend time
4 distributing the testimony and provided the recorder with
5 four copies.

6 I'd like to ask that Mr. Schanback's statement
7 be marked so that we have a clear copy in the record.

8 JUDGE BAKER: Very well. It shall be marked as
9 Exhibit 33 for identification.

10 (The document referred to was
11 marked for identification as
12 Exhibit Number 33.)

13 Whereupon,

14 WARREN SCHANBACK

15 having been first duly sworn, was called as a witness
16 herein and was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. ENGLISH VETNE:

19 Q Before you start, Mr. Schanback, can you
20 describe briefly your -- your experience, hands-on and --
21 and background in the dairy industry?

22 A Certainly. I have a B.S. in Dairy Economics,
23 Agricultural Economics from Cornell University, and as
24 Friendship Dairy is a family-owned business, I have been

1 involved with the business since my teenage years. I have
2 done many things in the business, from loading trucks to
3 the position I hold now, which is vice president of both
4 plant distribution, milk procurement. My expertise in the
5 business is also in market order hearings.

6 Q And how many years have you been involved with
7 Friendship Dairy?

8 A About 25 years at this point.

9 MR. ENGLISH: Your Honor, I -- I offer Mr.
10 Schanback as an expert both in dairy economics and
11 marketing procurement of milk.

12 JUDGE BAKER: Are there any objections to Mr.
13 Schanback being regarded as an expert in dairy economics
14 and marketing procurement of milk?

15 (No response)

16 JUDGE BAKER: Let the record reflect that there
17 are none, and he is so regarded.

18 BY MR. ENGLISH:

19 Q Mr. Schanback, do you have a prepared
20 statement?

21 A Yes, I do.

22 Q Proceed, please.

23 A Okay. If I read too fast, please slow me down,
24 but I'll try to move this along as best as I possibly can.

1 Q In no way will I slow you down.

2 A Good day, ladies and gentlemen. My name is
3 Warren Schanback, and I am the Vice President of
4 Friendship Dairies, Incorporated, a family-owned and
5 operated business with one plant which is currently
6 regulated by the Northeast Order as a partially-regulated
7 distributing plant. Our company with fewer than 500
8 employees is a small business under the Regulatory
9 Flexibility Act. The dairy farm patrons that market their
10 milk to Friendship are also small business enterprises
11 under the Regulatory Flexibility Act.

12 For the 40 years or so of Market Order 2's
13 existence, we have been a fully-regulated pool plant.
14 After Reform, we were initially regulated as a pool supply
15 plant until a dramatically-revised set of economic factors
16 forced us to change our pool status to a partially-
17 regulated plant. Our dairy farm patrons no longer have
18 the opportunity ~~to enjoy~~ **they've enjoyed for** four decades,
19 to participate as pool producers through the Friendship
20 Dairy's plant.

21 Our plant is unique in that it manufactures
22 products that fall into every class in Federal Market
23 Order 1. The vast majority of milk received at our plant
24 in Friendship, New York, is used as Class 2 to manufacture

1 cottage cheese, sour cream and yogurt with much smaller
2 quantities going into products considered Class 3. We
3 also produce a significant amount of Class 1 cultured
4 buttermilk and non-fat dry milk to balance out our milk
5 supply.

6 We are also somewhat unique in that we purchase
7 approximately two-thirds of our plant's milk supply under
8 contract from about 125 independent dairy farmer patrons
9 who insist that we are the best outlet for their milk.
10 The remainder of the milk we use is purchased from dairy
11 cooperatives.

12 The following testimony is in support of our
13 Proposals 8, 9 and 10. Proposal 11 is withdrawn.
14 Proposal 8. When the Federal Orders were reformed in late
15 1999, much attention was given to the fluid differential
16 issue and just about every other issue seemed to take a
17 back seat. In the old Order 2, there were so many changes
18 being considered, that it was impossible to determine
19 their effect until they were adopted. Since we were a
20 pool plant from the Order's inception, we naively failed
21 to identify changes to the Order language that would
22 dramatically affect our status, such as the adoption of
23 new performance requirements in 1001.7(c) and the
24 extraordinary amount of additional milk represented by

1 those new requirements for our producers to be able to be
2 associated with the milk pool.

3 These new shipments were not due to any new
4 demand for fluid milk. For as many years as I can
5 remember, we had milk supply contracts with Class 1
6 handlers in anticipation of meeting the somewhat regular
7 late Summer call. We understood that in any moment, there
8 was the possibility that we would need to ship milk to
9 Class 1 operations which are now defined as distributing
10 plants, but it was a new concept to us that the Order
11 would have substantial minimum amount written into it.

12 We also failed to identify that severe burden
13 that the odd manner used to calculate this amount would
14 create for us because it dramatically increased the amount
15 of milk that would be required to establish our
16 performance. When we consulted with the Department, we
17 were informed that in the grand scheme of things,
18 including the uniform provisions across all Federal
19 Orders, our objections were immaterial. It was explained
20 that even though this facet of the performance provision
21 was new to the Northeast, it had pre-existed in at least
22 one other Federal Order and was therefore justified.

23 While we believed that our plant was different
24 from other manufacturing plants because of our location on

1 the western regions of the Order and the extra milk or the
2 extra value of our high Class 2 utilization provided to
3 the pool, we could not convince anyone in the Department
4 that this justified a grandfather exemption. We exhausted
5 every avenue to no avail.

6 The Order language states that "such shipments
7 must equal not less than 10 or 20, as the month may be,
8 percent of the total quantity of milk that is received at
9 the plant or diverted from pursuant to Section 1001.13
10 during the month" and that's my emphasis there. This was
11 a dramatic shift from the old pool unit concept, and since
12 the advent of Reform, not only do we need to qualify the
13 independent producer milk that we receive, we also have to
14 ship milk based upon the amount of 9-C milk that we are
15 receiving from cooperatives.

16 As applied, the current pooling rules require
17 redundant performance on cooperative supply of 9-C milk
18 and erect economic obstacles to manufacturing plants
19 receiving milk from independent producers from achieving
20 pool status. Because of the merged Order did not create
21 any new Class 1 demand by Northeast consumers, these
22 newly-required shipments merely displace the local milk
23 that had previously been supplied to distributing plants
24 and a new need to transport displaced milk to other plants

1 for disposition.

2 Sales trends are relatively constant and over
3 time, we have carefully cultivated a milk supply to match
4 our sales to our patrons and cooperative suppliers. While
5 we could have gone out and gotten a distributing plant
6 account, that still would have been a business decision
7 that we were in control of. What we were unprepared for
8 was such dramatically-changed Federal Order language that
9 created an artificial need to supply so much more milk
10 virtually overnight.

11 Fortunately for us, our cooperative suppliers
12 were there to help get through this crisis. For a
13 handling charge, they would provide as much milk as we
14 needed to replace the extra milk we had to ship, but there
15 was a catch. Every pound of milk we brought into our
16 plant to replace what we were required to ship increased
17 the amount of milk upon which we needed to calculate what
18 we were required to ship. In essence, the wording of
19 1001.7(c) had created a never-ending escalation for
20 pyramiding of shipments of displaced milk and replacement
21 milk.

22 The following calculations illustrate the
23 problem of 15 million pounds per month a supply plant
24 would encounter under Section 1001.7(c). The plant

1 receives 10 million pounds of milk per month from
2 independent patrons and five million pounds of milk from
3 cooperatives. Pre-Reform, a 20 percent call would have
4 been considered a worse case scenario. Post-Reform, it
5 has become normal for September through November.

6 What I go through here is pre-Reform 20 percent
7 call, you can see at the top, where the total milk supply
8 of this plant is 15 million pounds, the independent milk
9 supply which is 10 million pounds was what the 20 percent
10 call was based upon, therefore requiring two million
11 pounds of milk from this plant to be shipped for Class 1
12 use. Post-Reform, and I use Section 7(c), Number 2,
13 because it correlates most highly with the 20 percent
14 above, it shows the same plant, the 10 million pounds of
15 milk from independent milk supply, and a total milk supply
16 of 15 million pounds.

17 If you now take the 20 percent shipping
18 requirement, that would require that this plant supply
19 three million pounds not to improve Class 1 use but to a
20 distributing plant. If you would then, on the next page,
21 replace that additional one million pounds of milk, the
22 total milk supply now becomes 16 million pounds.
23 Calculating the 20 percent requirement on the 16 million
24 pounds now yields 3,200,000 pounds of milk that would need

1 to be shipped to a distributing plant, again not to Class
2 1 use but to the distributing plant. This process repeats
3 on and on until you eventually come up with a number which
4 is on Page 4, and I guess for purposes of expediency, I
5 won't go through each one of these calculations. It shows
6 that the final result is the requirement that this plant
7 ship 3,249,997 pounds of milk and even that is rounded
8 because this could go on forever. That 3,249,997 pounds
9 compared to the two million pounds is an increase of 162.5
10 percent of shipments to ~~qualified~~ **qualify** plant patrons
11 milk.

12 Even by the current definition of the so-called
13 "20 percent performance requirements" written into the
14 current 7(c)(2) has effectively created a 33 percent
15 shipping requirement, and this is if all things work
16 perfectly and receipts are exactly as you anticipated. In
17 fact, considering the consequences of missing the required
18 percentage by a few pounds, any reasonable handler would
19 add a few more percentage points to the minimum
20 requirement just to be safe.

21 Proposal 8 solves the problem by specifically
22 omitting 9-C milk from dairy farmers described in
23 1001.12(b) as has been done in other Federal Orders. It
24 does this while maintaining the reasonable performance

1 requirements because it bases the calculation on the
2 amount of milk produced by dairy farmers that is pooled
3 through association with the supply plant, whether or not
4 it was diverted from the plant.

5 Proposal 9. As I stated earlier in my direct
6 testimony, Friendship has many characteristics that are
7 unique. One is the ability to produce non-fat dry milk to
8 balance our milk supply as well as a portion of the milk
9 of our cooperative supply partners. Another is the
10 production and route disposition of a Class 1 product,
11 cultured buttermilk. Post-Reform, it was this product
12 that caused the plant to retain its designation as a
13 partially-regulated distributing plant.

14 Ironically, during the period of time when the
15 plant was considered a pool supply plant, the amount of
16 milk disposed of as route disposition and/or transferred
17 in the form of packaged fluid milk products to other
18 distributing plants was not able to be applied to the
19 Section 7(c) requirements for shipments made to a
20 distributing plant but was still considered as part of the
21 total quantity of milk that is received at the plant, the
22 exact same concession.

23 This is patently unfair and ~~during~~ **endures** the
24 history of the Market Order in recognizing that this

1 product satisfies an established Class 1 demand. Pre-
2 Reform, pool manufacturing plants met performance
3 requirements on the basis of Class 1 use or allocation of
4 milk and the volume of a Class 1 buttermilk was therefore
5 credited against the plant's call performance.

6 No testimony was received at the earlier
7 hearings supporting the change in this aspect of the
8 Order. Now, however, Friendship can qualify its plant
9 only by fulfilling someone else's need for Class 1 and
10 Class 2 milk without receiving any credit for its own
11 contribution to the Class 1 market before its contribution
12 of Class 1 prices to the marketwide revenue pool.

13 It is not our intention that conventional
14 distributing plants dedicated primarily to the production
15 and distribution of Class 1 products, which are not **now**
16 fully regulated under Order 1, should become inadvertently
17 regulated under Section 7(c) by virtue of our proposal.
18 It appears from the data assembled by the Market
19 Administrator that some of the partially-regulated
20 distributing plants of this kind, identified on Exhibit 5,
21 Pages 9 through 10 and 13 through 14 and 17 through 18,
22 also have distribution of Class 1 products sufficient to
23 meet the supply plant definition under a liberal reading
24 of Friendship's proposal.

1 It is our understanding that all plants
2 aggregated in the data on Exhibit 5, Page 61, are
3 conventional distributing plants; that is, plants with at
4 least 25 percent of milk receipts in the plant processed
5 and disposed of in the form of packaged fluid milk
6 products. These plants are not now fully regulated
7 because less than 25 percent of the total distribution is
8 in the Northeast Marketing Area.

9 What we had in mind when we wrote Proposal 9
10 was the conventional characteristics of a supply plant and
11 the distributing plant as described in the beginning of
12 USDA's Milk Marketing Order Statistics publication and in
13 a separate website document, entitled "Quantities and
14 Utilization of Regulation Milk". The description is as
15 follows: distributing plants are plants primarily engaged
16 in processing packaged fluid milk products and supply
17 plants are plants primarily engaged in producing
18 manufactured dairy products.

19 To exclude the possibility of the conventional
20 distributing plant becoming fully regulated through the
21 back door of Section 7(c) and to focus on the primary
22 function of supply plants in manufacturing dairy products,
23 we modify our proposal with the following clarification to
24 be added as a new section, Subsection 7(c)(6), as follows:

1 "6. Route distribution from the plant and transfers of
2 packaged fluid milk described in the foregoing Sections 1,
3 2 and 3 shall not count toward qualification as a supply
4 plant of any plant at which less than 50 percent of the
5 total quantity of milk physically received at the plant is
6 used to produce Class 2, Class 3 or Class 4 products."

7 With this clarification, eliminating the
8 possibility of dedicated distributing plants from becoming
9 pooled as supply plants, Friendship would be the only
10 supply plant with route disposition and transfers in the
11 form of packaged fluid milk at distributing plants in this
12 market.

13 Proposal 9 would restore the intent and
14 historical practice of the Order without detriment to the
15 pool but with substantial relief to Friendship, its dairy
16 farmer patrons and cooperative suppliers. It is
17 Friendship's intent that all of the supply plants route
18 disposition be applied to Section 7(c)(1), (2) and (3)
19 requirements whether or not the product was disposed of
20 within the Northeast Federal Milk Market Order, just as
21 the old call provision was interpreted to include all
22 Class 1 milk.

23 Proposal 10. As you can tell from my
24 testimony, I am not a big proponent of Reform or any other

1 artificially-created changes to the Federal Market Order.
2 This is because these changes occur overnight and are
3 extremely disruptive to the market until all of the
4 parties adjust.

5 One of the more onerous changes that was
6 incorporated into the Northeast Order was the setting of a
7 fixed amount of milk that must be shipped to distributing
8 plants in order for a supply plant to remain pooled. Pre-
9 Reform, temporary prices resulting from the shortage of
10 available milk to the Class 1 market was satisfied in
11 every instance through an established process known as the
12 "call". In fact, since every participant was aware that
13 the Market Administrator could require them to supply milk
14 for Class 1 use or face being depooled, there were many
15 instances where the official process of holding a meeting
16 to consider the appropriate level of shipments was not
17 even necessary to create enough supply to meet the demand.

18 Why then would this amount be set at 10 and 20
19 percent, and why would there be a need to ship milk al
20 year-round? There was and is no shortage of milk to meet
21 demand at distributing plants. There's no testimony heard
22 that would indicate this amount was necessary. The truth
23 is that these percentages were picked arbitrarily because
24 they were cardinal numbers, not because they were

1 systematically evaluated.

2 I understand that the Department identified the
3 possibility that distant plants not generally associated
4 with the Northeast Order could ride the pool. The reason
5 for creating a performance requirement was one method to
6 dissuade this activity. But why then would 5 and 10
7 percent not have been sufficient? This amount should have
8 been set at the minimum level that would have accomplished
9 the stated intent without causing any additional,
10 unnecessary and uneconomic movement of milk by supply
11 plants solely for the purpose of ensuring that dairy
12 farmers have access to the local market revenue pool.
13 After all, marketwide sharing of revenues among all
14 producers in the milkshed is the primary objective of the
15 Federal Milk Marketing Order Program. This objective is
16 defeated when the performance rules by design or in effect
17 result in (a) the exclusion of some producers from the
18 pool or (b) producers without access to a Class 1 outlet
19 having to buy market access from those who dominate the
20 market's Class 1 milk supply or (c) in shipments of
21 unneeded milk over long distances for the sole purpose of
22 performance, resulting in displacement of other milk
23 supplying Class 1 plants that must then be shipped for
24 manufacturing uses and additional transportation costs.

1 The reasoning in support of Proposals 3, 5 and
2 6, which we really haven't gotten into here yet but which
3 I understand that the way the proposals were submitted,
4 indicates that while 10 and 20 percent requirements may
5 not have been sufficient to create a disincentive to
6 distant pool plants, increasing this amount would not have
7 been more effective nor would decreasing it have been less
8 effective.

9 We believe that now is the appropriate time to
10 adjust these percentages to a more reasonable and less
11 market-distorting amount of 5 and 10 percent.
12 Furthermore, if any of the proposals of 3, 5 and 6 are
13 adopted, it is our testimony that the Department
14 absolutely must not pass up this opportunity to adjust the
15 percentages used in 1001.7(c) downward in an effort to
16 reduce the burden on plants that should be associated with
17 and create value for the pool, such as ours.

18 A simple analysis of the data provided by the
19 Market Administrator postulates that reducing these
20 percentages as we have proposed would have an
21 insignificant effect, especially if any of Proposals 3, 5
22 or 6 were adopted in one form or another. However, if
23 there is ever a need to increase the amounts to
24 accommodate a milk shortage, the Market Administrator

1 still retains the authority as granted in Section
2 1001.7(g) to consider and make such adjustments.

3 Thank you for the opportunity to address the
4 Department and all assembled here today.

5 Q Do you have any additional comments you wish to
6 make here this morning?

7 A Not at this time.

8 MR. ENGLISH: The witness is available.

9 JUDGE BAKER: Very well. Are there any
10 questions? Yes, Mr. Beshore.

11 CROSS EXAMINATION

12 BY MR. BESHORE:

13 Q Good morning, Warren.

14 A Good morning, Marvin.

15 Q Let me go to Proposal 10 first, if we can. One
16 of your comments -- actually, let me go to your -- one of
17 your comments towards the end of your statement intrigued
18 me, and I wonder if you can elaborate on it.

19 You indicate that you are opposing Proposals 3,
20 5 and 6 because they would place a burden on your plant,
21 such as yours, which create value for the pool.
22 Such as ours, which creates value for the pool. Towards
23 the bottom of Page 6, the next-to-last. Third-to-the-last
24 paragraph. Do you see that?

1 A Actually, I don't believe that I opposed in my
2 statement 3, 5 and 6.

3 Q Oh. Are you supporting?

4 A No. I -- I've made no judgment on 3, 5 and 6
5 at this point, but what I am saying is that if any of
6 those additional performance requirements are adopted,
7 that those performance requirements could take the place
8 of some of the shipping and -- shipping performance
9 requirements.

10 Q Okay. Well, the statement that I was really
11 intrigued about was that they -- that would burden the
12 plants that create value for the pool such as yours.
13 What's your Class 1 utilization?

14 A The Class 1 utilization? Well, that all
15 depends. Based upon the total plant receipts or our
16 independent patron receipts?

17 Q Based upon total plant receipts. In other
18 words, you look at your total, you know, your total
19 manufacturing operations, your total operations at your
20 plant in Friendship, what proportion of them are
21 production of Class 1 products?

22 A Combined Class 1 and Class 2 runs about 70
23 percent. However, strictly Class 1 is about 1.5 to 2
24 percent.

1 Q Okay. Now, in a 40 to 45 percent Class 1
2 market, in what sense does that utilization enhance value
3 to the pool?

4 A Well, I believe you're improperly
5 characterizing my statement to mean that I said that Class
6 -- my Class 1 adds substantially to the pool. However,
7 the combination of Class 1 and Class 2 use does add
8 substantially to the pool. As you know, there's a 70
9 percent premium or differential on Class 2 milk, and if
10 our plant wasn't there processing such significant amounts
11 of Class 2 milk into cottage cheese and sour cream and
12 yogurt, it's likely you'll go seven miles down the road
13 and it becomes Class 3 product at ~~a~~ **the Cuba** non-pool
14 plant.

15 Q So, are you saying that in order to pay your
16 independent producers, you blend price, producer price
17 differential as it's now described in the Order, that your
18 -- your plant utilization and plant accountability is
19 above that price?

20 A Yes, I think it most definitely is. I believe
21 from the rough calculations I made shortly before coming
22 down here, we actually have a net pool obligation and have
23 had the pool the last three months and then several other
24 months on beyond that, but we've actually had a net pool

1 obligation for a significant amount of time since Reform.

2 Q Why do you want to be part of the pool?

3 Since it costs you money every month, you have a net pool
4 obligation, you are better off being unpooled, wouldn't
5 you?

6 A In certain months, we would be better off being
7 non-pooled. It goes back and forth. Right now, we don't
8 really have a choice. Our milk is pooled, with a certain
9 portion of it going in Class 1 which is partially
10 regulated, so it must be pooled, and there are other
11 factors that also include reliability of supply that
12 factor into being associated with the pool.

13 Q Okay. I understand your 1 and 2 percent Class
14 1 has got to be partially regulated to the extent that
15 it's distributed in a federal milk order area, which I
16 gather it's not all distributed in Order 1, correct?

17 A That's correct.

18 Q What other Orders do you distribute it to?

19 A I believe we're down in the Southeast Orders.
20 That's all I can think of off the top of my head of any
21 significant quantities. We do ship some product down to,
22 I believe, the unregulated area in Western New York and
23 other areas, but it's mainly Atlanta, Southeast Florida
24 and those areas.

1 Q Okay. So, your milk is being pooled, I take
2 it, primarily to hedge the months when you will draw from
3 the pool on your -- be able to draw from the pool and pay
4 your producers the pool price when your utilization value
5 of Class 3, not Class 2, 1 percent Class 1 and the rest
6 Class 3 or 4, I guess, is to hedge so that during the
7 withdrawal out of the pool, when your utilization value is
8 less than ~~one class~~ **the blend price**?

9 A It works as a hedge, yes.

10 Q Okay. Now, your -- in order to, you know,
11 obtain that -- that hedge for your plant, you're proposing
12 in Proposal 10 that in a market where you have 40-45
13 percent Class 1, any supply plant operator should be able
14 to pool his milk with a minimum of 5 percent shipment to a
15 distributing plant, correct?

16 A Correct.

17 Q And for shipping 5 percent, you would be able
18 to draw from the pool enough money to pay your producers
19 the 40-45 percent blend price for the pool?

20 A So long as his plant or his milk supply
21 continues to act as a reserve for the market area, yes, I
22 believe that to be correct.

23 Q Well, the -- the -- we're talking about what --
24 what's requiring someone to be -- to qualify for that

1 blend price which is, you know, the milk in the pool,
2 correct, and you're saying it should be 5 percent?

3 A That's correct.

4 Q When you say so long as it acts as a reserve,
5 by that I take it, you just mean so long as it ships more
6 if it's ordered to ship more by the Market Administrator
7 with an increase in the percentages, a discretionary
8 increase, correct?

9 A That's one of the many, many aspects of
10 participating. Some of the other aspects are the fact
11 that they are there to balance, to take the milk when it's
12 not necessary for Class 1 use, and to dispose of it at
13 that time.

14 Q To take what -- what milk?

15 A Well, whatever milk is being received at that
16 plant that could be shipped, if necessary, to Class 1
17 distributing plants. The time that those distributing
18 plants do not need that milk, that plant is available to
19 process that milk and assist in the orderly marketing of
20 milk.

21 Q But prior to your -- your processing of
22 perishable -- primarily, it's 7 percent in the Class 1 are
23 perishable products, are they not?

24 A My products, yes. You -- you just asked me a

1 theoretical question about other plants.

2 Q Okay.

3 A I'm more concerned with myself.

4 Q Okay. That's what I thought I was asking
5 about. For you, under your proposals you support, for you
6 to obtain a pool plant and obtain blend price every month
7 by shipping 5 percent, the additional obligations that you
8 propose to add to the pool are to increase that percentage
9 if called upon by the Market Administrator, correct?

10 A Yes. That's been in place for in excess of 40
11 years, and we have agreed at previous hearings, previous
12 called hearings or meetings, that is a reasonable
13 expectation of supply plants.

14 Q Actually, for most of that time, it's been zero
15 requirement, right?

16 A That is correct.

17 Q You are proposing that under Proposal 10, that
18 there be a zero percent requirement in the months of
19 January through July. Is it January through July?

20 A No. Actually, I didn't address January through
21 July at all. I was just addressing the 10 and 20 percent
22 that was required to be shipped during the month of August
23 through December.

24 Q Okay. I misspoke. So, presently, there's a

1 zero requirement during January through July. Do you
2 support the retention of that zero requirement?

3 A Where do you see the Order says zero percent?
4 I -- I don't see that at all. I -- I see it as they say
5 that if you perform at the required levels from August, I
6 believe it's August, through December, --

7 Q Correct.

8 A -- that you then don't need to continue to
9 perform during the period of the year when there is excess
10 milk and that's as any reasonable person would arrange it,
11 that if you perform during the Fall when it's really
12 needed, you don't have to perform just for the sake of
13 performing during the rest of the year. However, if you
14 do not perform when it is critical to the Market Order,
15 then you would have to do something in addition to that or
16 instead of that and that is the 10 percent during January
17 through July 30th.

18 Q You understand that the market, during January
19 through July, continues to need approximately 40 percent
20 of its milk in the pool for Class 1 use, do you not?

21 A Sure. It just doesn't need it to be shipped
22 from supply plants. There are more economic sources for
23 that milk.

24 Q Such as removing it from the cooperative plants

1 and supplying it to the Class 1?

2 A Right. Marvin, that's one of thousands or
3 maybe probably one of 65 or 64 different options that can
4 happen.

5 Q Milk's got to -- the Class 1 milk, if we have
6 40 percent in the pool and the supply plants aren't
7 supplying any, and your obligation is to supply any, then
8 the rest of the market's got to supply more than ~~20~~ 40
9 percent, does it not, to get the same blend price that the
10 zero percent supply plants are getting, correct?

11 A Would you restate that?

12 Q If you've got a market that's got 40 percent
13 Class 1 utilization and the supply plants have a zero
14 percent obligation to deliver, in order to get to the
15 market average of 40 percent utilization, somebody, namely
16 the non-supply plant part of the market, is going to have
17 to be providing in excess of 40 percent to get the market
18 to 40 percent, correct?

19 A That's correct, but that amount can come from a
20 myriad of other sources. It's not -- it's not an absolute
21 that that needs to come from a cooperative butter powder
22 plant.

23 Q Okay.

24 A All right. It can come from many other supply

1 plants, maybe a supply plant in Minnesota that comes into
2 the Order in March, and they would provide some amount of
3 milk for distributing plants.

4 Q Do you think that's how the Secretary wanted to
5 refashion Order 1 here, have zero requirements for supply
6 plants during the January through July period, so that
7 milk can be imported from ~~those~~ **Minnesota**?

8 A No. If that were my suggestion, I would have
9 proposed it. I -- I haven't addressed the January through
10 July period at all in any of my proposals.

11 Q Are you -- do you oppose the portion of
12 Proposal 5 which would revise the requirements for pool
13 supply plants to require the 10 percent shipment for each
14 month January through July?

15 A I haven't analyzed it.

16 Q Okay. So, you have no position on that?

17 A That's correct.

18 Q Do you have a position with respect to the
19 portion of Proposal 5 which would eliminate the split
20 plant, so-called split plant provisions in Order 1?

21 A I haven't analyzed it. I have no position on
22 that.

23 Q Your plant's not a split plant, right?

24 A That's correct.

1 Q Now, let me just talk about Proposals 8 and 9 a
2 little bit. Let's talk about 9 first, I guess. It's your
3 -- it's your suggestion in Proposal 9 that your Class 1,
4 which is considered in the Southeast or outside the
5 Marketing Area, that they be considered part of your --
6 your performance for whatever requirements there are in --
7 for a supply plant, correct?

8 A Yes, just as now shipping to a distributing
9 plant, I don't believe that there's any limitation on
10 where the distributing plant is located, whether it's in
11 Order 1 or outside of the Order, so long as you're
12 shipping to a distributing plant that qualifies as a
13 supply plant in the current regulations.

14 Q But the distributing plants in the Order must
15 have 25 percent of them, I think that's the right
16 percentage, of their fluid milk products distributed in
17 the Northeast Marketing Area, correct?

18 A Yeah. I believe it's 25 percent of the total
19 receipts processed in the Class 1 and 25 percent of that
20 is route disposition in the market area.

21 Q Do -- do you buy any packaged product from
22 other -- other distributors and then, you know,
23 redistribute it from your plant?

24 A By packaged product, I'm going to interpret

1 you're --

2 Q Class 1.

3 A -- referring to Class 1.

4 Q Class 1.

5 A And the answer to that is no, we do not
6 purchase packaged fluid milk products and redistribute
7 them at this time.

8 Q As Proposal 9 is written, -- what's your
9 intention with respect to Proposal 9, if you did purchase
10 packaged Class 1 products and then would move them on from
11 your plant on routes? Would you propose that that's --
12 that those volumes be considered performance by your plant
13 under the Order?

14 A No.

15 Q Okay. So, you would only propose to consider
16 Class 1 products that you packaged at your plant?

17 A Correct.

18 Q Okay. Now, let's go to Proposal 8. Basically,
19 the bottom line of Proposal 8 is that you want to
20 reformulate the denominator of performance equations so
21 that you would qualify as a supply plant with less total
22 shipments to distributing plants than are required under
23 the present Order, **language** correct?

24 A Yes.

1 Q Given your present -- let's put it this way.
2 If -- what percentage -- if you're -- if Proposal 8 were
3 adopted, what percentage would the required shipments from
4 your plant be under Proposal 8, if you compared that to
5 the present denominator language in the Order? Do you
6 follow me on that?

7 A Yeah. I do.

8 Q Do you understand the question?

9 A Yeah. Actually, you know, if we can read
10 between the lines, the calculation beginning on Page 2
11 fairly represents the story.

12 Q Okay. So, you presently -- you'd have roughly
13 25 million total --

14 A No.

15 Q Total milk supply of 15 million --

16 A It's 15 million and that would reduce the
17 denominator, to move things along here, from 15 million to
18 10 million.

19 Q All right.

20 A Approximately.

21 Q Okay. So, the two million -- so that you could
22 then qualify the shipments of two million?

23 A That is correct. Continue to perform as we had
24 been required for many years or at least it was inferred

1 that we would perform for many years.

2 Q And that's what percentage of the 15 million?

3 A Pardon me? What --

4 Q Two million is what percentage of 15 million?

5 A Two million is what percentage of 15 million?

6 It's somewhere in the neighborhood of 7 or 8 percent,
7 isn't it? So, still a pretty significant amount. It's
8 nothing to be winked at.

9 Q Do you have the -- when you're looking at -- in
10 the circumstances of having a net pool obligation to the
11 Order, have you ever happened to depool your plant?

12 A Our plant is currently not a supply plant.

13 Q Do you intend to have the -- the prerogative to
14 depool your plant if it is a supply plant whenever you
15 have a net pool obligation to the **former order**?

16 A There -- and I forget as I'm sitting here, I
17 forget the section of the Order, but it's very specific as
18 to when you depool -- actually, it's not so much the plant
19 as it is the independent milk supply. When you depool the
20 plant and therefore the producers, you know, unless they
21 have some association with the cooperative or some other
22 handler, as to when those producers get back on, and I
23 think as a reasonable businessman, you would expect and we
24 do perform a calculation, a risk-benefit, as to if we were

1 to depool today to save money, what -- what would that
2 mean before we were able to get back on the pool, and it
3 would have to be a fairly convincing savings or cost
4 advantage to us to take that risk and depool now, not
5 knowing what was going to happen in the future months.

6 Q You're referring to the Dairy Farmer Program,
7 what's called the Dairy Farmer ~~Program, one of the~~ **for**
8 **other** markets provisions in the Order?

9 A Yes, and that actually was one of the -- one of
10 the issues identified that resulted in us making Proposal
11 11 and then withdrawing it.

12 Q Okay. Now, let's look at the combination of
13 Proposals 8 and 9. Proposal 8, I think, the denominator
14 reduces the present requirement from an effective 10
15 percent to an effective 7 or 8 percent, and Proposal 9
16 then reduces the percentage from 10 percent to 5 percent.
17 The two together would reduce the present performance
18 requirement from 10 percent to 3 or 4 percent comparing
19 apples to apples. Are you with me?

20 A Well, you lost me with the exact percentages,
21 but it would, for Friendship Dairies, reduce the
22 performance requirements so that we would have a realistic
23 chance of continuing to pool in Market Order 1 as an
24 independent operator. That's the full intent ~~of~~ **for** us

1 for 8, 9 and 10. We're not proposing this to help or to
2 hurt anybody else. This is strictly for Friendship
3 Dairies **concern**.

4 Q I understand. And to accommodate Friendship
5 Dairy, the effective performance requirements under the
6 Order which are presently 10 percent would be reduced by
7 changing the denominator in that equation, that ratio, in
8 Proposal 8 so that it went down to 7 or 8 percent, you
9 calculated, to two of the 15, 7 or 8 percent, correct?
10 And then if you reduce that to 5 percent **in nine**, it would
11 just then -- you'd only be required to have one million
12 deliveries and therefore it would be one of the 15,
13 correct?

14 A The amount of milk that Friendship would
15 deliver to distributing plants would not change. The
16 amount that we're currently delivering, the amount that we
17 would deliver on these proposals would not change.

18 Q Okay. You're currently a non-pool plant?

19 A That's correct.

20 Q So, you don't have to deliver anything?

21 A Our producers still have to perform in the
22 marketplace, and we are performing. Friendship Dairy's
23 plant is not performing that, but the producers are.

24 Q Okay. So, if nothing would change, why do ~~we~~

1 **you** need the proposals?

2 A Because right now, Friendship Dairies is not
3 operating the pool plant, and we're relying on our
4 cooperative supply partners to provide that service to us,
5 and they have been very cordial and have done that, and we
6 would still like the opportunity to once again pool our
7 plant as it was for the past 40 some odd years.

8 Q Was Friendship a -- the Market Administrator's
9 information in the proposal, Exhibit 5, Page 8, indicates
10 that Friendship was a pool supply plant during January
11 through September 2000, is that correct?

12 A Yeah. I'm not sure of the exact dates, but
13 that sounds correct.

14 Q Well, the first -- the first year **of reform** --
15 for the first seven months, you were grandfathered, so to
16 speak, under the old provisions and as somebody testified
17 earlier in the hearing, you were able to retain your **full**
18 **pool** status for January through July 2000 without any
19 shipments under the new regulations, correct?

20 A That's correct.

21 Q But you remained a pool plant during August and
22 September of 2000. Do you recall that?

23 A Yes, I do.

24 Q Okay. And -- and which I take it to mean that

1 you delivered the required 10 percent of your -- your
2 plant supply as -- as Friendship Dairy in order to qualify
3 in August of 2000, correct?

4 A Correct.

5 Q And in September of 2000, you also delivered
6 the 20 percent required as Friendship Dairy as an
7 independent supply plant to the pool in the Order,
8 correct?

9 A Correct.

10 Q Thank you, Warren.

11 MR. BESHORE: That's all I have.

12 JUDGE BAKER: Thank you, Mr. Beshore.

13 Yes, Mr. English?

14 THE WITNESS: Before Chuck gets started, can I
15 make one correction? I misspoke in answering some of your
16 questions or at least one of them. When I said that I --
17 my proposal did not address the January through July
18 shipping requirements, my proposal in fact did address
19 that by changing the required shipping amount from 10
20 percent to 5 percent. In other words, I'm correcting --
21 when I said it didn't affect that at all, it did. It
22 still kept that in as a requirement but lowered the amount
23 from 10 to 5 percent.

24 BY MR. BESHORE:

1 Q Unless you had been pooled in the prior August
2 to December and then it retains it at zero?

3 A That's correct.

4 MR. BESHORE: Okay.

5 REDIRECT EXAMINATION

6 BY MR. ENGLISH:

7 Q Mr. Schanback, are there times when a portion
8 or all of your independent supply is associated with the
9 cooperative and ends up being pooled on the Order as 9-C
10 milk?

11 A I believe so **Chip**, yes.

12 Q When that happens, does a portion or all of
13 that 9-C milk remain at your plant?

14 A I'm not sure. Is the 9-C milk that you're
15 referring to, is it the Friendship producer milk?

16 Q The Friendship producer independent supply
17 which, in answer to my previous question, you indicated
18 was associated with the cooperative at some point in time
19 is pooled as 9-C milk, is any portion of that 9-C milk
20 received at your plant?

21 A Yes. I -- I would have to, in response to your
22 prior question, say that the majority of it typically
23 remains at the Friendship facility. That's the Friendship
24 independent milk supply.

1 MR. ENGLISH: Thank you. No other questions.

2 JUDGE BAKER: Thank you.

3 Are there other questions for Mr. Schanback?

4 Yes, Mr. Tosi?

5 RECROSS EXAMINATION

6 BY MR. TOSI:

7 Q Mr. Schanback, I'm confused by your testimony
8 with -- for example, on Page 2 in the first full
9 paragraph, where you say that the "newly-required
10 shipments under the Order merely displaces local milk that
11 had previously been supplied to distributing plants."

12 I'm confused by what -- what milk is being
13 displaced and which is the milk that has been displaced in
14 whatever is being displaced?

15 A The situation that I was attempting to describe
16 was the fact that the changes to the Market Order did not
17 create any additional Class 1 demand by the consumer.
18 Therefore, the amount of milk that was required to be
19 shipped by supply plants to the distributing plants,
20 because that milk wasn't processed, packaged and then
21 dumped, if that milk that I ship was packaged and sold to
22 the consumers, that meant that some other amount of milk
23 that had been supplying those consumers the day before was
24 now having to find a home some place else, to be processed

1 by some other facility, pass within that facility into
2 other products in order to consume it.

3 Q All right. Under the old New York/New Jersey
4 Order, were you a temporary pool plant or a designated
5 pool plant?

6 A We were a designated pool plant.

7 Q And what ~~was~~ **were** the performance standards for
8 -- under the old Order for being designated a pool plant,
9 **monthly?**

10 A Monthly. I think if you're referring to the
11 mandatory shipping requirements, there weren't any written
12 into the Order, but there was a call provision that for
13 many years was a non-issue. There was no call. Pool
14 plants. What about processing the milk? Then there
15 became a time when it became quite regular, that every
16 Fall, there was a call hearing that we needed to perform.

17 Q And when there was a suggestion of a call, was
18 your dairy one of the dairies that voluntarily shipped
19 milk then?

20 A Yes, and in fact, it -- it occurred even long
21 before there was a suggestion of a call. When -- when it
22 became apparent that this was the reality of the
23 marketplace, that we would need to supply milk every Fall
24 and that was a shift in paradigm from what had happened

1 before then, we as prudent businessmen arranged supply
2 contracts wherein we were supplying fluid ~~cars~~ **products** to
3 the Class 1 marketplace, and in fact, because of the
4 distant location of our plant and the type of producers
5 and the size of the producers, the location of the
6 producers, we determined that in order to do it
7 economically, there needed to be some manner in which we
8 provided added value to the Class 1 customer.

9 So, in fact, what we were doing was we were
10 supplying skim milk to Class 1 customers and that helped
11 us provide the extra value that would give us some
12 reasonable payback for our expenses.

13 Q Absent the call, a condition for being pooled
14 under the old New York/New Jersey, provided you were a
15 designated pool plant, it required no specific performance
16 requirements?

17 A Other than responding to a call if it were
18 necessary, but there was absolutely nothing written into
19 the Order that required mandatory shipments in any
20 particular month.

21 Q During those months in which there were no
22 calls and therefore no specific requirement for pooling,
23 did -- did you regularly ship to **any** Class 1 handlers?

24 A Yes. We had -- this was back in my early days

1 in milk supply and procurement, we began with a one-year
2 contract and we had a three-year contract and eventually a
3 five-year contract providing milk to Class 1 bottlers.

4 Q And has this been a month-in/month-out thing up
5 until Order Reform?

6 A No. This was an on-going process. This was
7 something that we had for close to 10 years on an on-going
8 basis, and it was steady throughout the year, and in
9 addition to that, we -- we worked with our customer to
10 tailor deliveries, to tailor quantities. There were times
11 when they would request additional milk. So, we would
12 provide it to them at the contract price. So, those are
13 an on-going business relationship that we had developed
14 outside of the requirements of the Market Order.

15 Q Okay. How should the Secretary reconcile ~~the~~
16 **having** testimony from the organization that represents
17 Class 1 handlers in the Northeast, specifically, for
18 example, the New York State Dairy Foods, ~~if we~~ **who** put on
19 witnesses that are saying that they would like to see the
20 performance standard increase while at the same time,
21 you're asking for a decrease? I would imagine and the
22 testimony suggested that the reason they're asking for an
23 increase is that they need more surety to be able to
24 attain an adequate supply of milk, and to the extent that

1 they're responding to customer demand that -- how would
2 you reconcile that with people that actually need the
3 milk, coming and testifying that actually need the milk
4 and then for somebody else to come and say we need to
5 lower it because Order Reform affects me in such a way
6 that I can't ~~--~~ **and pay** my producers ~~to the~~ blend all the
7 time?

8 A Well, you're asking me how I would reconcile
9 it, and what I would do is I would tell the people who
10 were represented by New York State Dairy Foods that they
11 need to wake up and realize that this has been going on
12 for as many years as the -- that people have been drinking
13 milk and that every Fall, you need more milk than you did
14 in the springtime, and as prudent businessmen, you need to
15 plan ahead and to anticipate the fact that you're going to
16 need that milk and arrange with a supplier of milk, be
17 that an independent or a cooperative, to supply that milk.
18 Basically get your head out of the Dark Ages.

19 Q All right. Why do you need to be pooled as a
20 condition of being able to pay your producers the blend
21 price?

22 A I actually don't need to be pooled to do that
23 on a temporary basis, but over a long term, I do need it
24 because there are times when the value of Class 2 products

1 is less relative to the value of all the other products
2 ~~that fall under the~~ , **the conglomerate** blend price, that
3 I'm not able to demand the price high enough from my
4 customers to return a reasonable price to my producers and
5 keep that business day in and day out. I could do it for
6 a short period of time. I could probably do it for
7 several years, but eventually that imbalance in the values
8 of the milk would cause me to cease operation, therefore
9 creating uncertainty in the marketplace and disorderly
10 marketing. Really, it would be just another plant in
11 Western New York that shuttered its doors, much like
12 Carnation or Charlapse or many of the other plants that
13 are coming off the Order now.

14 Q By long term, you mean a year?

15 A I -- I -- I would say that over time, the value
16 of the milk remains fairly constant, if you were to take
17 year snapshots. So, yes, I would -- I would say in a
18 year's time. Again, a lot depends upon the -- I would say
19 that the variation in the values of milk. It's not so
20 much that, you know, Class 2 is low or Class 2 is high,
21 but relative to what is it higher or lower.

22 Q Do you divert milk?

23 A No.

24 Q You may have answered this with Mr. Beshore,

1 but I'm not sure that I **completely** understood your answer.
2 If the Class 1 use in the Northeast is in the 40 percent
3 plus range, what's unreasonable about the existing
4 performance standards that are what they are,
5 significantly lower than 40 percent? One could look at
6 those numbers and perhaps conclude that it's kind of easy
7 to pool here or it's kind of easy to perform and therefore
8 have my milk be pooled here in the Northeast.

9 A Well, in comparison to the 40 percent, that
10 becomes more of a philosophical question as to where
11 should that 40 percent come from. Should it come from the
12 most economical source of the milk, which would be
13 relatively close to the plant where it's consumed, or
14 should it come from more distant plants? If I were going
15 to fashion a market order, it would be such that the
16 plants which are in a more economical location to supply
17 milk would be the first ones that were called upon to
18 supply the milk and then only in a decreasing amount as we
19 got further and further away would the more distant plants
20 be required to supply milk.

21 Q Okay. Have you ever asked the Market
22 Administrator -- excuse me. To the extent that the Order
23 currently provides authority to the Market Administrator
24 to adjust the performance standards for pooling, have you

1 asked or have you ever submitted a request to ask that to
2 be adjusted?

3 A Yes. On at least two occasions that I can
4 recall, we have made formal requests to reduce the
5 shipping requirements.

6 Q And I assume that it was turned down?

7 A It wasn't turned down out of hand. I think he
8 did a thorough investigation and it was his determination
9 that it was not appropriate at the time.

10 Q Okay. In that regard then, your request to
11 have it lowered was -- was --

12 A Eventually ~~approved~~ **denied**.

13 Q Okay. And to the extent that we're going to
14 have testimony -- that we have testimony so far that
15 suggests that the standard should be even higher and the
16 Market Administrator still has the authority to adjust
17 those, that in itself sort of suggests that maybe, you
18 know, the current numbers and the current standards still
19 were not adequately high enough.

20 A Well, that's one interpretation that's
21 suggested. I hold my interpretation to have greater value
22 and that is, is the Class 1 processors would love to have
23 100 percent participation. They would like it to be as
24 high as they can and use that stick to reduce the premiums

1 that they need to pay in order to acquire that milk.

2 Q If we adopted your proposal and lowered the
3 performance standard to -- to the numbers that you
4 indicated, and then Class 1 handlers came in and asked the
5 Market Administrator to adjust these numbers up
6 significantly, and to the extent that the Order serves as
7 the mechanism to make sure that the market's adequately
8 supplied with Class 1 milk, and the Market Administrator's
9 determination would be such that 5 percent, for example,
10 shipping requirement isn't enough, aren't you back to the
11 same situation that ~~we're~~ **you're** facing right now?

12 A Well, from everything I've seen, the Market
13 Administrator has done an outstanding job interpreting ~~as~~
14 **much the bits of** information ~~as that~~ he has. He has the
15 ability to reduce it. However, since this has become
16 institutionalized, the processors, Class 1 processors have
17 ~~become~~ **come**, for lack of a better description, they've
18 become lazy and have decided that they don't need to work
19 for that 10 percent. They don't need to return a price to
20 the marketplace to move that milk to Class 1, and they --
21 they are actually back in the same place.

22 If the Market Administrator did, I would think
23 that just as he has moved them up on a temporary basis,
24 under the current terms, he would move them up for a

1 temporary basis at a later point. So, lowering
2 -- lowering the basis ~~on~~ **from** which we begin would give
3 most of the participants time to adjust and they'd
4 probably ~~come~~ **be** back with the same thing, calling in
5 every Fall and saying we need more milk, institute the so-
6 called call, but it would now be on a lesser amount of
7 milk. and I think the producers, dairy farmers, in this
8 marketplace would benefit from that because they would be
9 getting more of the true value from Class 1 milk in the
10 Fall months.

11 MR. TOSI: That's all I have. Thank you very
12 much.

13 JUDGE BAKER: Thank you, Mr. Tosi.

14 Are there other questions for Mr. Schanback?
15 Yes, Mr. Vetne?

16 RE CROSS EXAMINATION

17 BY MR. VETNE:

18 Q You responded to a question from Marv Beshore
19 that pooling of your producers works as a hedge. I think
20 the question that generated that response was, isn't your
21 primary reason to be pooled that you will have a hedge.
22 Maybe I'm a little bit disconnected between the question
23 and the answer. So, I asked you about your reasons for --
24 for being pooled and some of these were addressed by Gino

1 Tosi and others.

2 Not being pooled, you sometimes have a milk use
3 of your producer milk that's greater than the blend in
4 your area and sometimes lower, correct?

5 A Correct.

6 Q Not being pooled then would provide to your
7 producers, the dairy farm patrons and cooperatives, for
8 that matter, greater price instability, less price
9 predictability, than to their neighbors who are able to
10 participate in the pool, correct?

11 A Correct.

12 Q And one of your objectives is to provide this
13 same price stability to your patrons as their neighbors
14 enjoy, correct?

15 A Correct. Stability is -- is essential.

16 Q And comparability between farms, that's also
17 important, isn't it?

18 A Yes. That's quite essential.

19 Q And yesterday or maybe it was prior -- is this
20 Tuesday? Well, there was testimony on the proposal which
21 referred to the excess milk and so forth, and the
22 observation was made that it would be disorderly to have
23 excess milk out there that doesn't have pooled access
24 because that would depress the blend price for all

1 producers.

2 With that referenced and I think you referenced
3 it, too, if you weren't able to provide a home for your --
4 for that milk, that milk would be competing for other pool
5 sources, wouldn't it?

6 A Yes, it would.

7 Q And that would have a depressing -- I think you
8 referred to cubic cheese as an example, that it would go
9 some place or try to find some place?

10 A Yes.

11 Q And -- and it would try to find some place that
12 is a pool outlet, correct?

13 A That's correct.

14 Q Because that's the competitive incentive for
15 dairy farmers?

16 A That is correct.

17 Q You said you have no incentive and then
18 corrected it, that you have no position on Proposal Number
19 5 to require shipments of 10 percent January -- yeah --
20 January through August, whatever it might be. You -- you
21 did have a position on what the shipment requirements
22 should be during those months, correct?

23 A Yes, I did.

24 Q And so, you didn't intend to imply that you are

1 indifferent to whether it should be 10 percent or not,
2 correct?

3 A That is correct. What I tried to explain
4 during that break between Marvin's and Chuck's
5 questioning, that I believe that the amount as written
6 into the Order, currently 10 percent should be reduced to
7 5 percent.

8 Q Which then you didn't have a current position
9 on, but you might brief, is whether there should be
10 elimination of the automatic qualification months?

11 A I -- I did not directly study that, but in the
12 statement, I believe I said that part of our objection is
13 the overnight changes that come about when the Market
14 Order is rewritten, and it's been what, 20-30 months at
15 this point. We've barely become adjusted to the post-
16 Reform, and here we are once again making additional
17 changes. I don't think that such drastic changes need to
18 be made. I think that for the most part, the Market Order
19 and the market economics are balancing the market
20 adequately. I don't think that there's any emergencies.
21 I don't think that there's any severe shortage of milk. I
22 don't think that anyone is suffering unnecessarily now
23 from something that happened overnight, and as I
24 understand it, you know, it doesn't really pertain to me

1 directly, but the changes or the Proponents' **for** Proposals
2 5 and 6 or 3, -- 2, 3, 4, 5 and 6, all of the pooling
3 provisions, are attempting to fix a problem of distant
4 plants, distant entities pooling on this Order and drawing
5 money that really belongs in the Northeast dairy farmers'
6 pocket to their pockets, and I think that there are many
7 more effective ways to solve that problem than to adjust
8 these performance requirements because performance
9 requirements involve everybody.

10 You can have a small group that is creating
11 this problem. It's far better to address that small group
12 head on than to make everybody suffer and then, in my
13 opinion, still not correcting the problem. You're just --
14 you're shading it a darker color, so that they have less
15 incentive, but you're doing that on the backs of all of
16 the other people who are performing a service and
17 performing as per the letter of the Market Order. You'd
18 be far better off doing something specific, and off the
19 top of my head, maybe if those distant plants are pooling
20 and the Secretary decides that that's inappropriate, that
21 there would be some other work around, perhaps a distance
22 differential, that the further you go and the fewer months
23 of the year that you supply this market, the more you have
24 to supply. There should be an overall target.

1 You're going to pool a 100 million pounds and
2 you gotta provide 20 million pounds in the Class 1 market,
3 and I'm just thinking of other solutions. I'm sure the
4 Department in its wisdom could solve that problem through
5 a better mechanism than what's being proposed by Acme and
6 New York State Dairy Producers.

7 Q One of the changes that came as a result of
8 Federal Order Reform was flat pricing and the milk that is
9 very distant from the market is no longer adjusted at the
10 producer's end of the transaction by its value relative to
11 the market that it's associated with?

12 A Yes. That was an ingenious solution.
13 Unfortunately, we're beginning to find out that there are
14 many other minor problems with that. I think the grand
15 scheme of things, it worked fairly well, but it
16 -- it's still suffering some abuses in certain instances.

17 Q Okay. But a result is that -- that producer
18 milk located distant to the market is -- is credited with
19 greater value than it actually has to the market?

20 A Yes.

21 Q And if the Secretary had the authority and the
22 willingness to adjust producer prices without Class 1
23 prices, that would be one way to address this -- the
24 outside milk problem, correct?

1 A Correct.

2 Q And it would address it without requiring
3 inside milk to ship all over the place in trucks and
4 displace milk at greater efficiency, correct?

5 A That's correct. I think one of the earlier
6 witnesses phrased it quite well when he said that as it's
7 proposed, it doesn't work. There are other solutions. I
8 just know that these aren't the best solutions, the ones
9 that are being proposed.

10 Q In the past when there was pre-Reform, the
11 observation was made and you agreed with it that for most
12 of the time, there was zero shipping requirements, --

13 A Correct.

14 Q -- correct? And I think the question was asked
15 as though that's a bad thing. But when there was no call
16 shipping requirements, it was because there was no need,
17 is that correct?

18 A That's correct.

19 Q And you shipped milk when it was needed, when
20 the Market Administrator held hearings in response to
21 complaints that there wasn't a need?

22 A That's correct.

23 Q I -- I'm thinking how sad it is that I'm saying
24 back in the good old days, the operators really understood

1 their business much better and planned ahead. Do you
2 believe that your producer in the market is served in any
3 way by making milk ship when it's not needed?

4 A No. It's actually a great disservice to the
5 dairy farmer because we in general, handlers in general,
6 are then incurring costs that actually are coming out of
7 somebody's pocket. The handling costs, the shipping
8 costs, that's all money that has to come from some place
9 and ultimately it either comes from the consumer in the
10 form of higher prices or from the producer in the form of
11 a lower price for his hard-earned produce.

12 Q You were asked by at least two or three people,
13 perhaps to wax philosophical, why have the shipping
14 requirements of 10 percent or 5 percent when the
15 marketwide Class 1 use is 40 percent. Let me ask you
16 about that. You heard -- did you hear the testimony of
17 Bill Fitchett and Jim Buelow who said a very high
18 percentage of -- of milk is dedicated to Class 1, --

19 A Yes.

20 Q -- correct? That's because they choose to have
21 a dedicated supply of milk to Class 1?

22 A Yes.

23 Q And that way, they have a small supply that
24 basically uses the balance?

1 A I would agree with that.

2 Q Okay. When there's an existing dedicated
3 supply to Class 1, usually by contract, it leaves a very
4 small part of the Class 1 market for the balance of the
5 milkshed to satisfy shipping requirements, correct?

6 A Yes, it does create a severe imbalance.

7 Q Okay. And it's really that portion that's not
8 already dedicated that is the portion in which to fit the
9 required shipments?

10 A That is correct.

11 Q And that small portion of Class 1 then has a
12 relationship to the reserve, the Class 3 and 4?

13 A Yes.

14 Q And we don't know precisely what that volume
15 is, but it's substantially different than ~~4~~ 40 to ~~6~~ 60,
16 correct?

17 A Absolutely.

18 MR. VETNE: That's all I have.

19 JUDGE BAKER: Thank you, Mr. Vetne.

20 Are there other questions for Mr. Schanback?

21 (No response)

22 JUDGE BAKER: Let the record reflect there are
23 none. Thank you very much.

24 THE WITNESS: Thank you.

1 (Whereupon, the witness was excused.)

2 JUDGE BAKER: Mr. Vetne, are there further
3 witnesses you wish to call?

4 MR. VETNE: Yes.

5 JUDGE BAKER: What proposal will this witness
6 testify about?

7 MR. VETNE: This is Cyrus Cochran. He's a
8 dairy farmer supplying milk to Friendship, and he's going
9 to address in general performance requirements as well as
10 marketwide service.

11 JUDGE BAKER: Very well. Thank you.

12 Whereupon,

13 CYRUS COCHRAN

14 having been first duly sworn, was called as a witness
15 herein and was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. VETNE:

18 Q Mr. Cochran, you've been sworn, and do you have
19 prepared statements?

20 A Yes, I do.

21 Q Okay. Do you want to make any preliminary
22 remarks concerning your background and experience in the
23 dairy industry?

24 A Just that I'm a dairy farmer. I farm in joint

1 venture with my father and currently two younger brothers.
2 We've got about a 107 cows.

3 JUDGE BAKER: Excuse me. If you could please
4 state your name for the court reporter? Thank you.

5

6 BY MR. VETNE:

7 Q State and spell your name for the record?

8 A Cyrus, C-Y-R-U-S, Cochran, C-O-C-H-R-A-N. And
9 do you want the address?

10 Q No.

11 A But at any rate, with no further ado, my name
12 is Cyrus Cochran. I'm a dairy producer from Westfield,
13 Pennsylvania. Our family ships milk to the Friendship
14 Dairy Plant at Friendship, New York. We are thankful to
15 have the opportunity to sell milk to one of the few
16 remaining independent handlers in the Northeast that
17 procures milk directly from dairy farmers.

18 Until 1998, for generations, my family has
19 marketed its milk to cooperatives. In fact, my
20 grandfather was one of the earliest members of the old
21 Maryland Cooperative Milk Producers, long since absorbed
22 into what is now DFA.

23 The nature of this hearing is a prime example
24 of one of the reasons my family became independent

1 producers. In this hearing process, I find it ironic to
2 see our major dairy cooperatives electing to work together
3 in an effort to financially frustrate independent
4 producers. These same cooperatives collectively control
5 market share not only in the Northeast but nationally as
6 well, yet nothing has been accomplished by the group to
7 significantly return a higher pay price to their members.
8 In spite of this reality, co-ops continue to devote their
9 efforts and energies to projects such as this, the
10 ultimate end being the elimination of alternative markets
11 for dairy farmers.

12 I am opposed to the so-called marketwide
13 service payments sought by the Proponent cooperatives.
14 Marketwide services have a long and ~~illustrious~~ **arsonous**
15 history in the Northeast. For decades, the old New
16 York/New Jersey and New England Market Orders featured
17 such payments to qualified cooperatives. I understand
18 that USDA in Washington, D.C., has opposed the concept of
19 marketwide services for decades, **dating back to the days**
20 **of Herb Forrest' leadership.** ~~Why in the entire~~ **Wisely at**
21 **the time of** Milk Order Reform ~~did~~ USDA ~~fail~~ **failed** to
22 include marketwide services in the merged Northeast Order?
23 .

24 Just as an infant cannot stay off its mother's

1 nipple for very long, we now find the Northeast Dairy co-
2 ops clamoring for Uncle Sam to restore these payments.
3 The ~~request for~~ **requested level of** six cents per
4 hundredweight on all member milk marketed by qualified
5 dairy cooperatives would in my estimate **pay drain** about
6 4.5 cents per hundredweight in the Northeast Milk Order
7 monthly producer revenue pool. That's about 4.5 cents per
8 hundredweight off the top of family's monthly milk revenue
9 and, quite frankly, we're running seriously into red ink
10 with current milk prices and don't have either the money
11 or the inclination to **further** subsidize the inefficiencies
12 of major Northeast dairy cooperatives from our money-
13 losing Northeast dairy farmers.

14 At current milk price levels, about \$6 a
15 hundredweight lower than last year for August-September
16 2002, I suspect virtually all the Northeast dairy farmers
17 are in the same red ink cash flow situation as our family
18 farm faces. In fact, recently in the Oneona Star, a New
19 York daily newspaper, the president of Dairy Lakes Co-op,
20 Clyde Rutherford, was quoted as saying ~~you can't find~~ **he**
21 **didn't think** a single Northeast dairy farmer making money
22 at current milk prices. In such a situation, why must the
23 co-ops try to drain the producer revenue pool, stealing
24 money from all dairy farmers instead of finding further

1 efficiencies in what promises to be a very tight Northeast
2 dairy market?

3 Rather than honoring the co-op request for
4 marketwide services, I urge USDA to investigate some of
5 these major cooperatives' failure to perform ~~on its honest~~
6 services. Example. In Pennsylvania, Crowley's Food
7 ~~shipped it over to~~ **shifted over to** independent producers
8 this past April 1 to have their milk hauled, tested,
9 inspected and paid for by Dairy Marketing Services, DMS, a
10 joint venture of Dairy Farmers of America and Dairy ~~Inc~~
11 **Lea** Co-op, Incorporated. I understand from talking with
12 Friendship and Crowley's of Pennsylvania that their milk
13 is tested twice a month for butterfat. However,
14 Pennsylvania state law requires that the milk fat be
15 tested four times per month.

16 Throughout the Northeast, grave questions are
17 arising about the accuracy of ~~the~~ DMS testing of milk for
18 gram cell count and butterfat content. It would be
19 against my self-interests to sanction payment of my scarce
20 milk income to underwrite such incompetence and potential
21 dishonesty. I'm afraid that the request for marketwide
22 services, if approved by USDA, would continue a mindset in
23 a statement made two decades ago by a Cornell University
24 dairy economist. That economist, well into a cocktail

1 party prior to the dairy dinner, stated that in the New
2 York Milk Order, the co-op tried to "pull the ~~screw~~
3 **screwing**" on them. I can think of no more appropriate
4 summary of the marketwide services proposal than pulling
5 the ~~screw~~ **screwing**.

6 Further, as proposed, marketwide services would
7 worsen the ~~transit~~ **tragic** involuntary extraction of value
8 from our family's struggling milk revenue. I already pay
9 the Northeast Market Administrator's office about five
10 cents per hundredweight for the MA's office to conduct
11 testing of my milk. I suggest that this cost figure is
12 high, that we are already paying five cents per
13 hundredweight to **the** MA for testing. Why should we get
14 docked another net 4.5 cents per hundredweight for the
15 cost of marketwide services? If approved, the cost to the
16 independent producer of combined MA testing and marketwide
17 services would be 9.5 cents per hundredweight.

18 The Cochran family has a problem when money is
19 involuntarily extracted from our monthly milk revenues.
20 My parents, John and ~~Betty~~ **Brenda** Cochran, are plaintiffs
21 in a legal action against USDA seeking to overturn the
22 mandatory 15 cents per hundredweight National Dairy
23 Promotion assessment on the grounds that the assessment
24 violates our free speech ~~sections~~ **protections** of the U.S.

1 Constitution.

2 Finally, I would like to also comment on the
3 proposal to mandate year-around Market Class 1 shipping
4 requirements in the Northeast Milk Order. I think this
5 proposal is wrong. It places further burden on Class 1
6 performance for milk plants that are located a long
7 distance from the Class 1 markets and processors. To
8 require year-around monthly Class 1 shipping requirements
9 would result in the uneconomical movement of producer
10 milk.

11 Further, given the fact that Dairy Farmers of
12 America controls so much access to Class 1 handlers in the
13 Northeast, I suggest that mandating monthly Class 1
14 shipping requirements would force both independent
15 producers and independent non-Class 1 handlers to further
16 kowtow to DFA. It is wrong to use the Federal Milk Orders
17 to boost the fortunes of cooperatives at the expense of
18 other more efficient parties in the industry.

19 In conclusion, I would restate, no marketwide
20 services and no expansion of Class 1 performance
21 requirements, and thank you very much for the time to
22 express that.

23 JUDGE BAKER: Very well. Are there any
24 questions for Mr. Cochran? Yes, Mr. English?

1 CROSS EXAMINATION

2 BY MR. ENGLISH:

3 Q Mr. Cochran, for your family farm operation,
4 you may not be aware that there's a provision within these
5 rules that defines a small business and for dairy farmer
6 purposes, that is the total income of ~~\$780,000~~ **\$750,000** or
7 less.

8 Would your business qualify as a small
9 business?

10 A Yes.

11 Q Yes?

12 A Yes, it would.

13 MR. ENGLISH: Thank you.

14 JUDGE BAKER: Are there other questions for Mr.
15 Cochran? Mr. Beshore?

16 CROSS EXAMINATION

17 BY MR. BESHORE:

18 Q Good morning, Cy.

19 A Hi, Marv.

20 Q Let's just talk about something that ~~we'll~~ we
21 **might be able to** agree on.

22 A We'll try.

23 Q You think the Secretary of Agriculture should
24 change these Market Order regulations to -- to push back,

1 to allow handlers to pay producers later or to pay now?

2 A I've been thinking about that. I think, first
3 off, strictly that as far as that date, no. But I think
4 the bigger problem with that is not so much the date we
5 receive the checks but particularly that advance check is
6 -- it seems like somehow it should be more indicative of
7 what the final check's going to be.

8 Q We tried that in a couple other hearings and
9 haven't gotten anywhere. So, we've kind of ~~thrown~~ **threw**
10 in the towel. But --

11 A That's a case, kind of my beef with the dairy
12 cooperatives, ~~that~~ **perhaps** they ~~would~~ **could** take the
13 incentive there and -- and the initiative and start
14 setting a higher -- paying a higher advance and for a
15 change having them set a market.

16 Q Are you aware that's -- that that is done, you
17 know, in some cases here in the Northeast? The rate of
18 the advance by the cooperatives ~~was~~ **is** higher than in the
19 mandate?

20 A In -- in some cases, it hasn't been higher.

21 Q In any event, as -- as a dairy farmer, as you
22 understand it, for every day you don't have that check,
23 partial or final, it's costing you money, right?

24 A Right.

1 MR. BESHORE: Okay. Thanks.

2 JUDGE BAKER: Are there other questions for Mr.
3 Cochran?

4 (No response)

5 JUDGE BAKER: Let the record reflect there are
6 none.

7 Thank you very much, Mr. Cochran.

8 (Whereupon, the witness was excused.)

9 JUDGE BAKER: You have not moved into evidence
10 what has been marked as Exhibit 33, Mr. English.

11 MR. ENGLISH: You're not the first one to
12 remind me of that.

13 JUDGE BAKER: All right.

14 MR. ENGLISH: Thank you. I -- I so move.

15 JUDGE BAKER: Are there any questions or
16 objections to Exhibit 33?

17 (No response)

18 JUDGE BAKER: Let the record reflect there are
19 none.

20 Exhibit 33 is admitted and moved into evidence.

21 (The document referred to,
22 having been previously marked
23 for identification as
24 Exhibit Number 33, was

1 received in evidence.)

2 MR. ENGLISH: Thank you.

3 JUDGE BAKER: You're welcome.

4 MR. ENGLISH: That's all I have, Your Honor.

5 JUDGE BAKER: You have no further witnesses?

6 MR. ENGLISH: No further witnesses.

7 JUDGE BAKER: Very well. We can now progress
8 to any other proposals.

9 Mr. Beshore?

10 MR. BESHORE: I think Mr. Rasmussen may have
11 some testimony.

12 JUDGE BAKER: So far, we have heard testimony
13 on Proposals 1, 2, 3, 8, 9, 10, and 11 has been withdrawn.

14 MR. BESHORE: I believe that there are -- Mr.
15 Arms is going to go twice, once on everything other than
16 Proposal 14, and then Proposal 14 which is separate, he
17 will go on that, and Mr. Conover has some testimony, and
18 I, in talking to Mr. Beshore, I believe he has two
19 witnesses, and I'm just thinking that **with** it being 10
20 after 12, it might make sense to take Mr. Rasmussen, if
21 he's ready. He has some proposals of his own, and I think
22 he's going to present some testimony, and I also made a
23 request for **some** information from him.

24 JUDGE BAKER: Very well.

1 Whereupon,

2 ERIK RASMUSSEN

3 having been first duly sworn, was called as a witness
4 herein and was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BESHORE:

7 Q Could you state your name and address for the
8 record, please?

9 A Yes. My name is Erik with a K Rasmussen,
10 R-A-S-M-U-S-S-E-N. I'm the Market Administrator of the
11 Northeast Marketing Order, USDA. The business address is
12 30 Winter Street, Boston, Massachusetts.

13 Q Could you describe briefly for the record what
14 your duties are as the Market Administrator?

15 A To administer the terms and provisions of the
16 Northeast Marketing Order.

17 Q And how long have you been in that position?

18 A Since January 1, 2000.

19 Q And can you briefly state for the record your
20 previous employment in the Market Administrator's offices
21 or in the dairy industry?

22 A Prior to that, I was the Market Administrator
23 of the New England Marketing Order which began in 1990.
24 Prior to that, I was Executive Director of the New York

1 State Legislative Commission on Dairy Industry
2 Development. Prior to that, I was Assistant Market
3 Administrator in the New York/New Jersey Marketing Order.
4 Prior to that, I was an economist for the New York/New
5 Jersey Market Administrator.

6 Q All right. Do you have some testimony
7 prepared, statements that you would like to give for the
8 record today?

9 A Yes.

10 Q Can you tell us what these statements relate
11 to; that is to say, what proposals you'd be making your
12 statements concerning?

13 A I have Proposal Number 4 and Proposal Number
14 12.

15 Q All right. Would you -- would you go ahead and
16 give your statement on those proposals, please?

17 A Yes. On Proposal Number 4 first, I have
18 proposed a change in Section 72 from no later than the
19 16th day of the month to a change of no later than the day
20 after the payment required in Section 71. The effect of
21 this, Section 71 is the payment into the Producer
22 Settlement Fund. Section 72 is the payment out of that
23 fund.

24 The issue arises and I'll refer to Exhibit 5,

1 Page 42 through 44, the payment dates under the Order,
2 referring specifically to the payment that's listed there,
3 P/S Fund, that's Producer Settlement Fund, and payment
4 from that fund. In the year 2000, which is Page 42 of
5 Exhibit 5, in the pool -- for the pool month March, June,
6 September and December, the payment into and out of the
7 fund ~~was~~ **were** on the same days. In the year 2001, for
8 March, June, August, and November, the payments into and
9 out of the fund were on the same days, and for the months
10 in 2002, May, August, which is occurring right now,
11 Monday, and November, will have to be made payments into
12 and out of the fund the same day.

13 The problem arises when there are checks for
14 late payments and there's inadequate funds to make the
15 payment in and out, clear funds, on the same day. The
16 Order provides that I can reduce the pro rata the payments
17 to handlers who can in turn reduce pro rata the payment to
18 dairy farmers. On one occasion, we ran into this
19 situation. I made the determination to go into the
20 assessment fund reserve, break the CDs and make the
21 payment, and it was not a problem that it was the handlers
22 that were losing, it was just where they couldn't find the
23 transfer. So, the effect of the proposal would be to
24 allow one extra day which would mean three or four times a

1 year, the dairy farmers would receive their money one day
2 later, but they would at least be assured of receiving the
3 full amount.

4 That's all I have on Proposal 4.

5 Q Okay. Why don't you give your statement on
6 Proposal Number 12, if you'd like?

7 A Proposal 12 is a continuation of a technical
8 correction. It is changing the words "pool plant
9 operator" in Section 73-B to "handler". The Department in
10 the Federal Register, Volume 65, Number 99, May 22nd,
11 2000, published a final rule correction for milk in New
12 England and other Orders, making it identical across the
13 Order system, the word "handler" in 73-A and 73-B. It was
14 a mixture of both across the Order system after Reform.
15 It was considered a technical correction.

16 This section continues with "pool plant
17 operator". The effect of changing it to "handler" would
18 be if a cooperative did not operate a pool plant but paid,
19 add "~~among non-~~ member farmers, they would have to provide
20 them the same information as ~~our non~~ member farmers are
21 required to receive from all other handlers who operate
22 pool plants."

23 I consider it an extension of that technical
24 correction. That concludes my testimony on 12.

1 JUDGE BAKER: Very well. Are there any --

2 MR. BESHORE: We offer this.

3 JUDGE BAKER: Are there any questions? Yes,
4 Mr. English?

5 CROSS EXAMINATION

6 BY MR. ENGLISH:

7 Q Mr. Rasmussen, thank you very much for that
8 testimony and the information. I think it's obvious
9 there's no uniform agreement.

10 There is one series of questions I would ask as
11 to information that you may have with respect to the
12 timing in which handler reports have actually been
13 received, and while you are not here to testify in favor
14 or against Proposal 1, nonetheless I'm going to ask if you
15 can answer some questions about the actual physical
16 receipt of handler reports by your office.

17 A Yes. With your request, I inquired since we
18 were doing the pool at this time and would have the
19 information. I have that information.

20 Q Can you provide information with respect to
21 reports received by the -- obviously it's not many, as I
22 understand it, but rather numbers of reports received
23 prior to the 9th, on the 9th, prior to 5:00, which I think
24 is close of business for your office, --

1 A Yes.

2 Q -- after 5:00 on the 9th, and reports received
3 on the 10th?

4 A Yes, I can. The total number of pool reports
5 for this month, that's the month of August, which was done
6 between the 9th and 12th of this week, there were 86 total
7 reports, 11 of them were received before the 9th, actually
8 on Friday, 61 were received on the 9th, 46 were before the
9 close of business, 15 after the close of business. There
10 were 14 received on the 10th. I hope that's right. I
11 **hope that adds up because I** can't read my own writing.

12 Q It adds up to 86 for me.

13 A Right.

14 MR. ENGLISH: Thank you. That's all I have,
15 and I appreciate your getting that for me.

16 JUDGE BAKER: Thank you.

17 Are there other questions?

18 (No response)

19 JUDGE BAKER: Let the record reflect -- oh,
20 yes? Do you have questions? Very well. Are there any
21 other questions? Yes, Mr. Beshore?

22 REDIRECT EXAMINATION

23 BY MR. BESHORE:

24 Q Just one question on Proposal 4. The -- is

1 there any other way that you can ~~see~~ **conceive of** as the
2 Market Administrator, besides pushing the day back one
3 time three or four times a year, to make sure that you got
4 the money for producers to be paid in full?

5 A There could be several ways. One would be to
6 increase the size of the Producer Settlement Fund Reserve
7 which is a nickel they have to pay back, pay another
8 nickel. It runs around 8 or 9 cents a hundredweight, but
9 that would essentially lower producer prices.

10 Q Okay.

11 A The other could be to require wires, wire
12 payments by a certain time during that day, but we've had
13 numerous occasions when the handler ~~says a~~ **sends the** wire
14 and the banking system loses it. Most of them have been
15 small and haven't affected it. One was a substantial
16 amount and it did. So I don't see any other way that
17 ~~wouldn't~~ **would** have -- that would do it, and this in fact
18 potentially would. If somebody did not pay even on the
19 16th, we would incur a late charge but that doesn't help
20 you.

21 Q Basically, the proposal is to the least onerous
22 thing you could come up with to keep the money flowing in
23 and out as fast as possible?

24 A It is the least onerous.

1 MR. BESHORE: Thank you.

2 JUDGE BAKER: Thank you.

3 Are there any other questions?

4 (No response)

5 JUDGE BAKER: Let the record reflect there are
6 none.

7 Thank you very much.

8 THE WITNESS: Thank you.

9 (Whereupon, the witness was excused.)

10 JUDGE BAKER: That brings us to the time for
11 our luncheon recess. So, we will take an hour for our
12 luncheon recess.

13 (Whereupon, at 12:25 p.m., the hearing was
14 recessed, to reconvene this same day, Friday, September
15 13th, at 1:25 p.m.)

16 A F T E R N O O N S E S S I O N

17 1:25 p.m.

18 MR. ENGLISH: Your Honor, I'm handing you four
19 documents.

20 JUDGE BAKER: All right. Mr. English has
21 called you, and you've been previously sworn.
22 Whereupon,

23 DAVID ARMS, SR.

24 having been previously duly sworn, was recalled as a

1 witness herein and was examined and testified further as
2 follows:

3 JUDGE BAKER: Yes. I think he's busy passing
4 things out. We are now in order after our luncheon
5 recess.

6 MR. ENGLISH: Your Honor, I've handed out to
7 the parties, the court reporter and yourself, four
8 statements by Mr. Arms, Number 1, 2, 3 and 4, and I'd ask
9 that they be given the next four consecutive numbers which
10 I believe --

11 JUDGE BAKER: Be 34, --

12 MR. ENGLISH: -- would be 34, 35, 36 and 37.

13 JUDGE BAKER: Correct. Very well.

14 MR. ENGLISH: In the order of 1, 2, 3 and 4.

15

16

17

(The documents referred to
were marked for identification
as Exhibit Numbers 34, 35, 36
and 37.)

18

19

20

21 JUDGE BAKER: Do you wish to proceed?

22

23

24

MR. ENGLISH: I would ask that Mr. Arms give
all four statements in seriatim and then be subject to
cross examination on all four --

1 JUDGE BAKER: Very well.

2 MR. ENGLISH: -- rather than bringing him up
3 several times.

4 JUDGE BAKER: Very well.

5 MR. ENGLISH: And I would ask that, as to 36,
6 Exhibit 36, in order to save time, 36 includes, in the
7 beginning, the language of the proposal in its entirety,
8 and the witness proposes to skip that, but we ask that it
9 be read into the record as if read.

10 JUDGE BAKER: Very well. Mr. Reporter, will
11 you make a note of that, please? Thank you.

12 ~~-----"Proposal Number 3. New York State Dairy
13 Foods, Inc., proposes to amend the producer milk
14 definition in Section 1001.13 by adding new Paragraphs
15 (d)(6) to read as follows:--~~

16 ~~-----Section 1001.13 Product Milk. (d)(3) The
17 equivalent of at least two day's milk production of a
18 dairy farmer is caused by the handler to be physically
19 received at a pool plant in each of the months of August
20 through December.~~

21 ~~----- (4) Of the total quantity of producer receipts
22 during the month, including diversions, the handler
23 diverts to non-pool plants not more than 60 percent of
24 such receipts in each of the months August through January~~

1 ~~and December and not more than 75 percent in each of the~~
2 ~~months January through July.~~

3 ~~————— (5) Any milk diverted in excess of the limits~~
4 ~~set forth in Paragraph (d)(4) of this section shall not be~~
5 ~~producer milk. The diverting handler shall designate the~~
6 ~~dairy farmer deliveries that shall not be producer milk.~~
7 ~~If the handler fails to designate the dairy farmer~~
8 ~~deliveries which are ineligible, producer milk status shall~~
9 ~~be forfeited with respect to all milk diverted to non-pool~~
10 ~~plants by such handler; and~~

11 ~~————— (6) The delivery requirements and the~~
12 ~~diversion percentages in Paragraphs (d)(3) and (d)(4) of~~
13 ~~this section may be increased or decreased by the Market~~
14 ~~Administrator if the Administrator finds that such~~
15 ~~revision is necessary to assure orderly marketing and~~
16 ~~efficient handling of milk in the Marketing Area. Before~~
17 ~~making such a finding, the Market Administrator shall~~
18 ~~investigate the need for the revision either on the Market~~
19 ~~Administrator's own initiative or at the request of~~
20 ~~interested persons if the request is made in writing at~~
21 ~~least 15 days prior to the month for which the requested~~
22 ~~revision is to be made effective. If the investigation~~
23 ~~shows that a revision might be appropriate, the Market~~
24 ~~Administrator shall issue a notice stating that the~~

1 ~~revision is being considered and inviting written data,~~
2 ~~views, and arguments. Any decision to revise an~~
3 ~~applicable percentage must be issued in writing at least~~
4 ~~one day before the effective date.~~

5 ~~————— Justification Proposal 3. This amendment is~~
6 ~~being proposed because we are finding the current Reform~~
7 ~~Order pooling provisions far too liberal. Since its~~
8 ~~inception in January 2000, the new provisions have~~
9 ~~resulted in abusive pool riding practices and the~~
10 ~~association of milk from distant sources not readily~~
11 ~~available to handlers to satisfy market fluid milk needs~~
12 ~~during the pool-qualifying months August through December.~~

13 ~~————— Because the Northeast Order has unlimited~~
14 ~~diversion rules and frequently enjoys a higher classified~~
15 ~~use value than certain other markets, some handlers have~~
16 ~~been able to draw the higher Northeast Order pool producer~~
17 ~~differential returns for their milk, without establishing~~
18 ~~a meaningful and continuing association with Order 1 pool~~
19 ~~plants. Under the new pooling standards, a handler can~~
20 ~~pool milk indefinitely in Order 1 simply on the basis of a~~
21 ~~single delivery to a pool plant. The handler then diverts~~
22 ~~unlimited quantities locally at a special net pricing~~
23 ~~advantage than is otherwise available on the milk. The~~
24 ~~end result is in an unwarranted transfer of Order 1 PPD~~

1 ~~funds because the diverting handler has no intention of~~
2 ~~becoming a regular source of reserve milk for the~~
3 ~~Northeast Order. Rather, the milk is moved to a pool~~
4 ~~plant in Order 1 only as necessary to qualify for the~~
5 ~~higher PPD payment. Under these circumstances, producers~~
6 ~~and handlers in Order 1 find themselves once again carrying~~
7 ~~some of the reserve associated with another market.~~
8 ~~————— We propose to restrict such abuse of the~~
9 ~~pooling privilege by requiring that at least two days'~~
10 ~~milk production from each dairy farmer in the pool must~~
11 ~~touch base at a pool plant in each of the pool-qualifying~~
12 ~~months rather than only once. Secondly, we propose to~~
13 ~~limit the diversions of pool milk to non-pool plants~~
14 ~~throughout the year to no more than 60 percent August~~
15 ~~through December and to no more than 75 percent in other~~
16 ~~months. We also propose in 1001.13(d)(5) standard~~
17 ~~depooling language found in other Orders for over-diverted~~
18 ~~milk along with provision in (d)(6) allowing the Market~~
19 ~~Administrator the means to adjust the diversion limits as~~
20 ~~orderly marketing conditions may require.~~
21 ~~————— Data on Page 87 of Exhibit Number 5 shows very~~
22 ~~clearly the dramatic extent of pool riding taking place in~~
23 ~~the Northeast in recent years under Order Reform. From~~
24 ~~the data, we note dramatic increase in producer milk~~

1 receipts from distant sources, especially in the flush
2 season, exceeding 100 million pounds from more than 800
3 producers in some months. The milk involved came from
4 such distant states as Idaho, Minnesota, Wisconsin,
5 Michigan, and Utah. None of this milk was needed to
6 balance fluid milk needs here. Much of it was diverted
7 elsewhere, rather than being physically received on a
8 regular basis at pool plants in the Northeast.

9 ——— Similarly, the data on Pages 2 and 3, Exhibit
10 5, showing the number of producers and daily average
11 output of producer milk originating from states outside
12 the Northeast, gives a clear picture of the seasonal
13 swings in these receipts, obviously pooled to the
14 disadvantage of northeastern producers.

15 ——— Adoption of our proposed amendments in Proposal
16 Number 3 would alleviate the pool riding problem by
17 placing reasonable seasonal limits on diversions of pool
18 producer milk to non-pool plants. Precedent for such
19 diversion limits had previously been established in the
20 Northeast in the former Orders prior to merger in 2000.
21 Our proposal is also similar to that recently made
22 effective in the Mideast Federal Order and is designed to
23 correct similar problems. Provision for more restrictive
24 diversion limits in the pool-qualifying months August

1 through December, 60 percent vs. 75 percent in other
2 months, better assures availability of fluid milk supplies
3 at pool distributing plants when needed. Diversions in
4 excess of 75 percent in the non-qualifying months should
5 bedepooled because it involves the pooling of excess
6 reserves at pool producers' expense. The 75 percent limit
7 allows enough flexibility to handlers to schedule
8 diversions of producer milk for manufacturing as may be
9 necessary without losing pool status.

10 ~~————— New York State Dairy Farmers, Inc., strongly~~
11 ~~urges the adoption of Proposal Number 3 to eliminate the~~
12 ~~clearcut abuse of the present pooling provisions in the~~
13 ~~Order.~~

14 ~~————— This concludes our statement on Proposal 3."~~

15 MR. ENGLISH: Mr. Arms has been previously
16 sworn, and I propose that he can now give his first
17 statement.

18 DIRECT TESTIMONY

19 THE WITNESS: Proposal Number 1. The four
20 amendments incorporated in Proposal Number 1 would
21 essentially restore the reporting and payment dates
22 previously specified in the former New York/New Jersey
23 Order. Proponent and supporting handlers, hereinafter
24 listed, consider these proposals necessary to correct

1 disorderly marketing conditions that have resulted from
2 the advanced reporting and payment dates promulgated under
3 the Reform Order made effective January 2000.

4 The first of the proposed 4(d) changes to the
5 Order involves the date for filing monthly reports with
6 the Market Administrator. As noticed for this hearing,
7 the specific amendment language is as follows, and if the
8 recorder could put that in, please.

9 "Each handler shall report monthly so that the
10 Market Administrator's office receives the report on or
11 before the 10th day after the end of the month in the
12 detail and on prescribed forms as follows."

13 Justification Re: Item 1. The due date for MA
14 reports, equalization payments, and payment for milk to
15 vendors under new Reform Order requirements have become
16 very difficult for Proponent buyer handlers to meet. The
17 advent of the Reform Order brought with it a departure
18 from farm-town-zone pricing, unique under the former New
19 York/New Jersey Order, as well as detailed reporting
20 requirements mandated for the switch from basic skim and
21 butterfat accounting to complete component accounting for
22 protein and other solids as well as for the butterfat in
23 the milk.

24 Adapting to the new reporting provisions, moved

1 ahead a day, from the 10th the 9th, of the following month
2 was difficult enough, without the added strain caused by
3 the fact the basic system was being radically changed from
4 farm to plant zone pricing, together with component milk
5 pricing and certain other Order changes, all at the same
6 time. As a result, MA reports suffered from inadequate
7 and inappropriate data collection which has not been
8 completely sorted out in audit even to this day.

9 The Reform Order failed to justify moving the
10 reporting date ahead to the 9th. Suppliers have
11 consistently experienced considerable difficulty
12 furnishing needed milk component data and billings to
13 buyer handlers in time for the latter to meet the new
14 reporting and payment deadlines. Often MA reports were
15 and still are filed containing erroneous or estimated data
16 simply because the reporting handler could not ascertain
17 the correct data in time. We know that this continuing
18 problem would be greatly alleviated if the reporting date
19 were to be moved back to the 10th, giving both suppliers
20 and buyers an additional day to complete their work.

21 It is our position that milk handlers should
22 not be penalized for failure to meet reporting deadlines
23 if they can't verify the data in the time allowed. Also,
24 the fact that Order Number 1 is the largest milk Order,

1 dealing with so many special marketing complexities, needs
2 to be given greater consideration in setting the mandated
3 reporting and payment dates. For example, some
4 Northeastern milk handlers process or account for more
5 milk than was received and processed in some milk Orders
6 in the U.S. prior to Order Reform. Furthermore, there is
7 extensive co-mingling of bulk milk on tankers traveling
8 over great distances, a condition extensively cultivated
9 among handlers in the former New York/New York Order, due
10 to the prior system of farm-point pricing and related need
11 to maximize hauling efficiencies from farm to plant.
12 Consequently, the fact that there is more co-mingling of
13 milk on the same tankers automatically entails more time
14 in verifying receipts from each source represented in the
15 co-mingled load, and because the Order Number 1 milkshed
16 is so large, milk hauling costs become very important to
17 both handlers and producers. Therefore, we think the
18 Order should encourage rather than discourage the least-
19 cost hauling solutions that have evolved over the years as
20 represented in existing co-mingled bulk routes. By
21 allowing the additional day in verifying respective
22 handler component volumes, the accuracy of MA reports will
23 be enhanced and audits made easier and less costly for all
24 concerned, including the Market Administrator.

1 All handlers, including cooperatives, should be
2 required to meet information report deadlines. We find
3 that inordinate rushing causes too many MA report
4 adjustments and tends to increase the administrative
5 workload for everyone involved.

6 2. The second change in reporting requirement
7 proposed by the New York State Dairy Foods Group involves
8 the date specified in the Order for the Market
9 Administrator to announce the producer price differential,
10 PPD, and the statistical uniform price each month.

11 Specifically, we propose the following changes,
12 and if the reporter would copy that.

13 "Section 1001.62 Announcement of Producer
14 Prices. In the introductory text, revise the reference to
15 the 13th day to 14th day and add new Paragraph (h) to
16 read: (h) If the 14th falls on a Saturday, Sunday, or
17 national holiday, the Market Administrator may have up to
18 two additional days to announce the producer price
19 differential and the statistical uniform price."

20 Justification Re: Item 2. Our proposed change
21 to the introductory text in Section 1001.62 simply gives
22 the Market Administrator up to the 14th of the month to
23 announce the final producer pay price, as was provided
24 previously in the former New York/New Jersey Order. This

1 suggested amendment is consistent with our proposed one-
2 day extension for submission of handler MA reports.
3 Furthermore, it would allow the MA additional time, if
4 needed, up to two additional days, if the stated official
5 deadline of the 14th of the following month falls on a
6 weekend or a national holiday.

7 This proposal is consistent with our first date
8 change ~~proposed~~ **proposal** discussed above to restore the
9 mandated MA report deadline to the 10th rather than the
10 9th. It also would give the MA more latitude in
11 establishing monthly uniform price announcement dates
12 should the official deadline otherwise fall on a weekend
13 or a national holiday. This latter provision would extend
14 to the MA sufficient time to make the necessary price
15 computations without undue pressure brought about by
16 weekend or holiday circumstances.

17 Although this proposal could give the MA up to
18 two additional days for making the price computations, it
19 does not require the additional time be used if the MA
20 finds it possible and advisable to announce the producer
21 pay prices earlier. In fact, the MA might still announce
22 the final PPD on the 13th or earlier, if feasible to do
23 so. The MA would have such flexibility under our proposal
24 because the language currently refers to "on or before"

1 the final date and we do not propose removing this text
2 relative to proposed new date of the 14th. However, we do
3 recognize that the day-later handler report deadline that
4 we are proposing would also be expected to require similar
5 additional day for the MA staff to complete their work as
6 well.

7 With respect to proposed new Paragraph (h) in
8 Section 1001.62, we are suggesting this amendment only
9 because the current provision does not appear to give the
10 MA flexibility in announcing the official producer pay
11 price, if the stated report date of the 14th, currently
12 the 13th, happens to fall on a weekend or a national
13 holiday.

14 Under current conditions, the MA staff must
15 work overtime or on the weekend in order to get the
16 necessary work done and the producer pay price announced
17 on time, if the announcement date provided in the Order
18 happens to fall on the weekend or national holiday. We
19 know that on several occasions, the MA has announced the
20 producer pay price on the 12th of the month under
21 difficult time constraints. We believe the MA should not
22 have to meet an unreasonable report deadline and therefore
23 should be extended the same courtesy as is now provided
24 handlers in making payments pursuant to Section .90. This

1 provision states, "If a date required for a payment
2 contained in the Federal Milk Order falls on a Saturday,
3 Sunday, or a national holiday, such payment will be due on
4 the next day that the Market Administrator's office is
5 open for public business." Our proposal would give the MA
6 the flexibility to adjust the producer price announcement
7 date up to two additional days, if necessary, under such
8 circumstances. We stress, however, that there is no
9 requirement under our proposal that the MA use the extra
10 time afforded.

11 3. The third proposed date change involves the
12 required date of settlement by handlers with the Market
13 Administrator for payment to the Producer Settlement Fund.
14 The proposal, as written in the hearing notice, is as
15 follows, and I'd ask the clerk to type that.

16 JUDGE BAKER: Very well. Mr. Reporter, will
17 you make a note in that regard?

18 "Section 1001.71 Payments to the Producer
19 Settlement Fund. Each handler shall make payment to the
20 Producer Settlement Fund in a manner that provides receipt
21 of the funds by the Market Administrator no later than two
22 days after the announcement of the producer price
23 differential and the statistical uniform price pursuant to
24 Section 1001.62, except as provided for in Section

1 1000.90. Payment shall be the amount, if any, by which
2 the amount specified in Paragraph (a) of this section
3 exceeds the amount specified in Paragraph (b) of this
4 section."

5 THE WITNESS: Justification RE: Item 3. This
6 proposal is intended primarily as a conforming change made
7 necessary by the one-day proposed extension in the date
8 for filing MA reports and the computation of the producer
9 price differential, PPD, and the statistical uniform
10 price. It would make the handler payment deadline fit
11 better with the date the uniform price is announced.

12 Currently, the Reform Order specifies that
13 handler payments to the Producer Settlement Fund be made
14 no later than the 15th after the end of the month, unless
15 modified pursuant to Section .90, which provides
16 additional time if the 15th falls on a weekend or national
17 holiday. In the latter circumstance, the payment to the
18 Producer Security Fund can be delayed to the next business
19 day.

20 Since the current Order also specifies the 13th
21 as deadline for computing the producer price differential,
22 a two-day interval from the 15th, we have similarly
23 proposed a conforming two-day interval from the date that
24 the PPD would be announced under our proposal. We also

1 propose to maintain the existing special exemption
2 pursuant to Section .00, allowing additional time if the
3 PPD is announced on a weekend or a national holiday.

4 Proponents consider the current handler payment
5 requirement to the Producer Security Fund, deadline of the
6 15th, difficult to comply with given the current deadline
7 mandated for computing the PPD and uniform price. Rather
8 than proposing new handler payment deadline date extended
9 by one day, which would be the 16th, we have instead
10 simply proposed the new deadline be no later than two days
11 following date of the PPD price announcement. The change
12 would better suit capital flow from handlers to the
13 Producer Settlement Fund from month to month, knowing the
14 interval in business days from the time the PPD is
15 announced to payment to the Producer Settlement Fund would
16 always be no more than two business days. Our proposal
17 gives handlers a consistent time frame in which to execute
18 the capital transfers involved. It also enables improved
19 concurrent billings for milk transfers or diversions
20 because a more consistent time interval is provided in
21 which to ascertain what the MA assignment to classes was
22 on such transfers at pool time.

23 4. The fourth and final date change set forth
24 in Proposal Number 1 of the hearing notice would amend the

1 payment dates the producers in Subparagraphs (a)(1) and
2 (a)(2) of Section .73. The proposal was as follows, and
3 again if that could be inserted.

4 JUDGE BAKER: Very well. Mr. Reporter, would
5 you please add that to the record?

6 "Section 1001.73 Payments to Producers and
7 Cooperative Associations.

8 Introductory text unchanged. (a) Preliminary
9 text in (a) unchanged.

10 (1) Partial payment. For each producer who
11 has not discontinued shipments as of the 23rd day of the
12 month, payment shall be made so that it is received by the
13 producer on or before the 30th day of the month, except as
14 provided in Section 1000.90, for milk received during the
15 first 15 days of the month at not less than the lowest
16 announced class price for the preceding month, less proper
17 deductions authorized in writing by the producer.

18 (2) Final payment. For milk received during
19 the month, payment shall be made so it is received by each
20 producer no later than the day after the required day of
21 payment by the Market Administrator the following month,
22 pursuant to Section 1001.72, in an amount computed as
23 follows: (subsequent text unchanged.)

24 THE WITNESS: Justification RE: Item 4. The

1 primary purpose of this proposal is to make date of final
2 payment to producers conform with the changes previously
3 proposed in the payment dates for computing the uniform
4 price and in settlement dates to and from the Producer
5 Settlement Fund account. We are, therefore, at this point
6 in our statement addressing the need to amend Section
7 .73(a) to best accommodate our prior date change amendment
8 proposals.

9 We feel it important at this time to also call
10 attention to the fact that we did not propose any change
11 in the requirement for day-earlier payments to
12 cooperatives as currently set forth in Section .73(b).
13 Our proposal would continue to relate the date for final
14 payment to the day after payments are made by the Market
15 Administrator from the Producer Settlement Fund.
16 Therefore, under our proposal, dates of final payment
17 could move a day or two later only if the date of payment
18 from the Producer Settlement Fund were extended the same
19 number of days. This sequence in the relationship of date
20 of final payment to date of payment from the Producer
21 Settlement Fund should be continued.

22 Upon careful reflection on the issues involved
23 with the several date changes proposed, we find it is
24 necessary to move the date of partial or advance payments

1 as well. Otherwise, the number of days between dates of
2 partial and final payments will narrow still more. We
3 find that during 2001, the current spread in days between
4 final payment date for milk received the prior month and
5 the date of advance payment, partial payment for milk
6 received in the current month averaged only nine days,
7 with the variation from six to 12 days. The six-day
8 spread was in February and the 12-day spread occurred in
9 May. That spread in days would be reduced possibly two to
10 four days pursuant to our proposed date change extensions.
11 Consequently, we have proposed in Paragraph (a)(1) that
12 the date of partial payment be moved to the 30th of the
13 month instead of the 26th as now provided.

14 For the convenience of interested parties, we
15 have attached Table 1 -- excuse me.

16 Can you help me, ~~Chuck~~ **Chip**?

17 MR. ENGLISH: It's Exhibit 26.

18 THE WITNESS: Okay. Table 1, Exhibit 26, --

19 JUDGE BAKER: Mr. English, are you saying that
20 Table 1 on Exhibit 26 is the ~~one you're making your~~
21 ~~recommendation on~~ **matter to which you're making reference?**

22 MR. ENGLISH: Yes, **Exhibit 26 was admitted**
23 **yesterday and became table 1, and we discussed it at that**
24 **time.**

1 JUDGE BAKER: Very well. Thank you.

2 THE WITNESS: Table 1 shows the year 2002 dates
3 of partial payment -- partial advance and final milk
4 payments to cooperatives, together with the dates of
5 payment into and out of the Producer Settlement Fund
6 account. From the data, we find that a much longer spread
7 in days currently exists between dates of advance and
8 final payments for milk received the same month. In 2002,
9 that spread will average 22 days by year-end, as ~~show~~
10 **shown** in the table.

11 Making advance payments on or before the 30th
12 of the month would conform more closely with the dates
13 previously set in the respective Orders prior to merger
14 and, more importantly, would create better spacing between
15 required pay dates, more to the liking of many independent
16 producers as well as handlers, and while the date of
17 advance payment was moved ahead under Order Reform, it is
18 important to note that some cooperatives have not changed
19 member pay dates in like manner. Other handler witnesses
20 will testify at this hearing regarding the difficulties
21 they have experienced under the current partial payment
22 provisions contained in Subparagraph (a)(1).

23 We also call attention to the fact that while
24 we propose the 30th as the new deadline for the making of

1 partial payments, actual advance pay dates may differ as
2 the proposed Order language still refers to on or before
3 the 30th of the month.

4 There is another NYSDFI proposed date change
5 not included under Proposal number 1 by the USDA. Rather,
6 it was joined with others, ADCNE ~~and the~~ cooperatives and
7 the Market Administrator, in Proposal 4, which would amend
8 Section .72 regarding dates of payment from the Producer
9 Settlement Fund by the Market Administrator. Accordingly,
10 we will address this issue in separate testimony on the
11 merits of Proposal 4.

12 Finally, we call special attention to a
13 marketing problem experienced by certain NYSDFI membership
14 which would be alleviated considerably were the amended
15 payment dates incorporated in Proposal Number 1 adopted by
16 the Secretary. The problem relates to tolled bulk milk
17 purchased by licensed milk distributors for processing and
18 packaging into Class 1 product at pool distributing
19 plants. New cooperative 9-C provisions in Order 1 require
20 that the tolled milk be purchased at the PPD and component
21 prices rather than at straight Class 1 skim and butterfat
22 prices, as before. Consequently, an adjustment is
23 required each month for the MA credit issued to the
24 processing handler on the 9-C receipts together with a

1 charge for the MA assessment fee on the tolled milk.

2 The processor must then prepare billing to the
3 distributor at the difference between Class 1 cost of the
4 skim and butterfat and the 9-C credit from the Market
5 Administrator, plus the MA fee involved. To do so
6 requires detailed component values as well as the final
7 PPD price. The billing involved is made subsequent to the
8 PPD price announcement and ~~issue~~ **issuance** by the MA of the
9 handler's pool obligation, which is needed to make the
10 billing for the 9-C adjustment involved. This requires
11 some additional time after the MA announces the uniform
12 price. Adoption of Proposal Number 1 by the Secretary
13 will help ~~proponent~~ **component** handlers who experience this
14 special problem.

15 This concludes our statement on Proposal Number
16 1, except for direct supporting testimony which I think
17 has been presented already here.

18 JUDGE BAKER: Very well. Thank you very much.

19 May the witness be examined now with respect to
20 Proposal 1?

21 MR. ENGLISH: Well, Your Honor, I would think
22 it would be more efficient if he would move on and let him
23 read Proposals 2, 3 and 4 and just be cross examined in
24 total. I just think it's more efficient. It's up to you,

1 but it strikes me as -- as being more efficient.

2 JUDGE BAKER: Well, I don't know whether it'd
3 be more efficient or not. Some people may forget their
4 questions. All right. We will move on to Proposal Number
5 2.

6 THE WITNESS: Proposal Number 2. We propose
7 two amendments to the pool plant definition in Section .7.
8 These are as follows.

9 Your Honor, I don't know if everyone in the
10 room has this statement.

11 MR. ENGLISH: Yes, everybody has it.

12 JUDGE BAKER: Yes.

13 MR. ENGLISH: All of your statements have been
14 passed out.

15 THE WITNESS: Okay.

16 MR. ENGLISH: All four exhibits.

17 THE WITNESS: Then I'd ask the reporter to type
18 in the proposal.

19 JUDGE BAKER: Very well. Mr. Reporter, if yo
20 will type that in, please. Thank you.

21 "Section 1001.7 Pool Plant.

22 1. Amend Section 1001.7C(1) and (2) to increase
23 the applicable shipping percentages by 5 percent over the
24 entire qualifying period August through December each

1 year. The revised rate in Subparagraph (1) for August and
2 December would be 15 percent and the performance standard
3 contained in Subparagraph (2) for each of the months
4 September through November would be 25 percent of
5 receipts.

6 2. Remove Paragraph (h)() which authorizes
7 split plants, pool and non-pool segments, in the same
8 plant facility."

9 THE WITNESS: Justification. Since the
10 inception of the Reform Order, a major milk drain has been
11 taking place in the Northeast in the Fall months, making
12 it increasingly difficult for fluid milk handlers to
13 procure enough milk to satisfy demand. This drain occurs
14 largely because spot milk is moved from the Northeast to
15 other areas by transfer, diversion or shift of producers
16 at seasonally high prices, without having to maintain
17 appropriate association with the Northeast Order for
18 pooling purposes.

19 While milk has not been as tight this year
20 compared with 2000 and 2001, we think the situation will
21 change markedly during September through November 2002
22 and, I would add, during 2003. We also are aware that
23 some of the extra milk in the market this Spring and early
24 Summer stems from earlier switching or dumping milk back

1 into the Northeast from Southeastern Order areas where it
2 had been used as reserve milk.

3 Therefore, Proponents think long-term action is
4 needed to alleviate the milk shortages regularly occurring
5 in the Fall for Order 1 fluid milk handlers as well as
6 corrective measures to lessen the extent to which Federal
7 Order 1 carries the reserve milk for other market areas.
8 We think this can best be accomplished by raising the pool
9 performance standards in the Fall when the milk is needed
10 most. An increase in the shipping standards is made
11 necessary because we find that an increasingly greater
12 share of the milk in the Northeast is being leveraged via
13 revised cooperative 9-C provisions to favor the needs of
14 some handlers over others, creating inequities and
15 disorderly marketing in the process. Our proposed 5
16 percent increase in the shipping requirement under
17 Proposal Number 2 will do much to correct the Fall milk
18 shortage problem provided other safeguards, such as an
19 effective call provision, is also maintained in the Order.

20 While we recognize the common desire among
21 handlers to market their milk to best advantage, we also
22 consider it the prime responsibility of Order provisions
23 to assure that an adequate supply remains to fulfill the
24 Class 1 needs of Marketing Area consumers. It is

1 appropriate, therefore, for the Order to allow the
2 complete withdrawal of producer milk during July through
3 November each year, followed by a repooling of the same
4 milk in Order 1 in the flush production season. This
5 unduly burdens both handlers and producers who then wind
6 up having to carry the surplus reserves otherwise
7 associated with another market.

8 The proposed 5 percent increase in
9 qualification requirement during August through December
10 is modest and not without precedent. The resulting
11 shipping standards are similar to those previously in
12 effect in the former New England and Middle Atlantic
13 Orders prior to the merger in 2000, and they match those
14 established August through November 2000 and 2001 under
15 the call orders promulgated by the Market Administrator.

16 To fully appreciate the current pool
17 qualification issues in the Northeast, one must understand
18 the significant structural changes that have been taken
19 place in the market since adoption of the Reform Order.
20 Perhaps the most important change affecting pool
21 qualification is the new cooperative 9-C provisions
22 adopted under Reform. Another involves the loose pooling
23 requirements, particularly with respect to allowable
24 diversions and the degree to which producer milk must

1 touch base with pool plants in the primary market.

2 The new 9-C provision, Section 1001.9,
3 Paragraph C, has placed the larger Northeast cooperatives
4 in a strong position to direct a larger share of milk,
5 market milk to best advantage wherever it may be most
6 needed. The issues are, to which markets, and for whom,
7 and for how much?

8 Prior to Order Reform, the New England Order
9 had a similar 9(d) cooperative pooling provision but it
10 was restricted to members only. This difference is
11 important because the current 9-C standards permit other
12 cooperatives, normally smaller, and independent producers
13 to join the 9-C unit of a larger cooperative willing to
14 take the responsibility to pool the milk and direct its
15 markets. Subsequent merger activity among milk dealers
16 coinciding with other changes in corporate market
17 structure within the region has resulted in the shifting
18 of large blocks of independent producers primarily
19 associated with pool distributing plants into these larger
20 co-op 9-C units. This gave the cooperative 9-C units
21 involved a leading edge **± in** pool qualification ability
22 due to the high degree of shipments to Class 1 pool
23 distributing plants made possible by the added
24 independents. The 9-C cooperative pooling advantage for

1 some has reached the point that an increase of 10 to 15
2 percent in shipping requirement should not pose a
3 qualifying problem for the parties. That is, unless they
4 misuse it to pool too much manufacturing milk or sell too
5 much milk to other markets, most notably to the Southeast.

6 This 9-C unit pooling advantage is now being
7 used extensively to leverage the inclusion of other
8 independent producers and smaller cooperatives associated
9 primarily with manufacturing operations into their
10 expanded 9-C unit for the privilege of guaranteed pooling
11 at a service fee. The degree to which the cooperative
12 decides to take on the pooling responsibility for
13 additional manufacturing milk directly affects their
14 ability to respond to our proposed higher shipping
15 standards. And what has happened as a result of extending
16 the pooling guarantee? The answer is fewer and fewer
17 sources of reserve milk supply for fluid milk handlers and
18 that is our main concern for the future.

19 According to the Handler Location Index
20 released by the Market Administrator in April 2001, only
21 nine of the 150 Northeastern plants listed as partially or
22 fully regulated or exempt under Order Number 1, were
23 classified as pool supply, PS, plants. Prior to Order
24 Reform, there used to be more. Of the nine pool supply

1 plants remaining, only three are proprietary, Fleur-de-
2 Lait in New Holland, Pennsylvania, Queensboro Farms in
3 Canastota, and Emkay Trading in Arcade, New York. The
4 rest are cooperatively owned. While one might suggest the
5 reduction in number of pool supply plants was simply the
6 result of plant closings, such conclusion does not hold
7 up. Why? Because several of the former reserve pool
8 supply plants simply converted to non-pool status. And
9 the change in status was made easier with "guaranteed
10 pooling" and unlimited diversion privileges under Order
11 Reform.

12 The extent to which cooperative 9-C milk has
13 been gaining market share is clearly demonstrated in Table
14 2.

15 MR. ENGLISH: Exhibit 26.

16 THE WITNESS: Thank you. Table 2 of Exhibit
17 26.

18 This table gives a breakdown of total market
19 milk produced by cooperatives and independent producers.
20 It also shows the market share represented in the expanded
21 9-C units. From the data in Table 2, we find that average
22 milk production covered in 9-C units is now greater than
23 total co-op milk receipts by more than 100 million pounds
24 a month. We also call attention to the fact that 9-C milk

1 now represents more than 80 percent of all milk produced
2 for the Northeast Order. Consequently, it is imperative
3 that all cooperatives understand that the market tools
4 provided them under current 9-C provisions carries with it
5 awesome responsibility to see to it that consumer fluid
6 milk needs in Order 1 are given top priority at all times.

7 The second amendment to the pool plant
8 definition proposed by our group, officially noticed in
9 Proposal Number 2, called for the removal of Paragraph
10 (h(7)) set forth in Section .7 of the Order. We note, too,
11 that identical amendment is proposed by the Association of
12 Dairy Cooperatives in the Northeast.

13 The provision is designed to enable special
14 split-plant status, both pool and non-pool within the same
15 facility, is proposed to be removed.

16 Justification. The new Reform Order has been
17 too liberal in its pooling standards. Since its inception
18 in January 2000, the Reform provisions have encouraged
19 abusive pool riding practices. This provision is one of
20 them. It no longer serves the purpose for which it was
21 originally intended and could be used to the detriment of
22 orderly marketing procedure.

23 Original purpose of the split-plant designation
24 was to set aside a portion of receiving facilities as

1 "non-pool" to receive and handle Grade B milk, separate
2 from Grade A milk received at the "pool" section of the
3 handler's facility. We understand the provision is not
4 normally approved by the Market Administrator except for
5 this purpose. For example, we understand it might be used
6 to separate non-pool Grade B Amish-produced milk from
7 other Grade A milk in the plant.

8 The problem with it, however, is that, once
9 approved, it provides a means whereby the handler may
10 establish a pooling pattern very detrimental to the public
11 interest and orderly marketing. The underlying problem is
12 that this provision may be used to ride the pool,
13 especially if the Order enables unrestricted diversions,
14 as the Northeast Order presently does. Milk from distant
15 split-plants can be readily pooled and qualified under
16 Order 1 with minimal shipments during the qualifying
17 period. After ~~full~~ **pool** qualification is achieved, the
18 handler may then add substantially to receipts at the
19 pooled portion of the plant beginning January 1 and
20 continuing through July 31 while at the same time
21 continuously diverting milk to non-pool plants. Most
22 importantly, it could provide the means to draw the higher
23 producer price differential from the Order 1 pool without
24 ever making a meaningful contribution to the market.

1 Since it is our understanding the provision is
2 not currently being used by handlers located within the
3 Order 1 Marketing Area, we concur with the ADCNE
4 cooperatives that it be removed from the Northeast Order
5 as soon as it is ~~practicable~~ **practicle** to do so.

6 ~~This concludes our~~ **MR. ENGLISH:** Could you
7 continue with your statement on Proposal Number 3, which
8 is exhibit 36? We've already asked the court reporter to
9 enter in the first part which is the language of the
10 proposal.

11 **"Proposal Number 3. New York State Dairy**
12 **Foods, Inc., proposes to amend the producer milk**
13 **definition in Section 1001.13 by adding new Paragraphs**
14 **(d)(6) to read as follows:**

15 Section 1001.13 Product Milk. (d)(3) The
16 equivalent of at least two day's milk production of a
17 dairy farmer is caused by the handler to be physically
18 received at a pool plant in each of the months of August
19 through December.

20 (4) Of the total quantity of producer receipts
21 during the month, including diversions, the handler
22 diverts to non-pool plants not more than 60 percent of
23 such receipts in each of the months August through January
24 and December and not more than 75 percent in each of the

1 months January through July.

2 (5) Any milk diverted in excess of the limits
3 set forth in Paragraph (d)(4) of this section shall not be
4 producer milk. The diverting handler shall designate the
5 dairy farmer deliveries that shall not be producer milk.
6 If the handler fails to designate the dairy farmer
7 deliveries which are ineligible, producer milk status
8 shall be forfeited with respect to all milk diverted to
9 non-pool plants by such handler; and

10 (6) The delivery requirements and the
11 diversion percentages in Paragraphs (d)(3) and (d)(4) of
12 this section may be increased or decreased by the Market
13 Administrator if the Administrator finds that such
14 revision is necessary to assure orderly marketing and
15 efficient handling of milk in the Marketing Area. Before
16 making such a finding, the Market Administrator shall
17 investigate the need for the revision either on the Market
18 Administrator's own initiative or at the request of
19 interested persons if the request is made in writing at
20 least 15 days prior to the month for which the requested
21 revision is to be made effective. If the investigation
22 shows that a revision might be appropriate, the Market
23 Administrator shall issue a notice stating that the
24 revision is being considered and inviting written data,

1 views, and arguments. Any decision to revise an
2 applicable percentage must be issued in writing at least
3 one day before the effective date.

4 Justification Proposal 3. This amendment is
5 being proposed because we are finding the current Reform
6 Order pooling provisions far too liberal. Since its
7 inception in January 2000, the new provisions have
8 resulted in abusive pool riding practices and the
9 association of milk from distant sources not readily
10 available to handlers to satisfy market fluid milk needs
11 during the pool-qualifying months August through December.

12 Because the Northeast Order has unlimited
13 diversion rules and frequently enjoys a higher classified
14 use value than certain other markets, some handlers have
15 been able to draw the higher Northeast Order pool producer
16 differential returns for their milk, without establishing
17 a meaningful and continuing association with Order 1 pool
18 plants. Under the new pooling standards, a handler can
19 pool milk indefinitely in Order 1 simply on the basis of a
20 single delivery to a pool plant. The handler then diverts
21 unlimited quantities locally at a special net pricing
22 advantage than is otherwise available on the milk. The
23 end result is in an unwarranted transfer of Order 1 PPD
24 funds because the diverting handler has no intention of

1 becoming a regular source of reserve milk for the
2 Northeast Order. Rather, the milk is moved to a pool
3 plant in Order 1 only as necessary to qualify for the
4 higher PPD payment. Under these circumstances, producers
5 and handlers in Order 1 find themselves once again
6 carrying some of the reserve associated with another
7 market.

8 We propose to restrict such abuse of the
9 pooling privilege by requiring that at least two days'
10 milk production from each dairy farmer in the pool must
11 touch base at a pool plant in each of the pool-qualifying
12 months rather than only once. Secondly, we propose to
13 limit the diversions of pool milk to non-pool plants
14 throughout the year to no more than 60 percent August
15 through December and to no more than 75 percent in other
16 months. We also propose in 1001.13(d)(5) standard
17 depooling language found in other Orders for over-diverted
18 milk along with provision in (d)(6) allowing the Market
19 Administrator the means to adjust the diversion limits as
20 orderly marketing conditions may require.

21 Data on Page 87 of Exhibit Number 5 shows very
22 clearly the dramatic extent of pool riding taking place in
23 the Northeast in recent years under Order Reform. From
24 the data, we note dramatic increase in producer milk

1 receipts from distant sources, especially in the flush
2 season, exceeding 100 million pounds from more than 800
3 producers in some months. The milk involved came from
4 such distant states as Idaho, Minnesota, Wisconsin,
5 Michigan, and Utah. None of this milk was needed to
6 balance fluid milk needs here. Much of it was diverted
7 elsewhere, rather than being physically received on a
8 regular basis at pool plants in the Northeast.

9 Similarly, the data on Pages 2 and 3, Exhibit
10 5, showing the number of producers and daily average
11 output of producer milk originating from states outside
12 the Northeast, gives a clear picture of the seasonal
13 swings in these receipts, obviously pooled to the
14 disadvantage of northeastern producers.

15 Adoption of our proposed amendments in Proposal
16 Number 3 would alleviate the pool riding problem by
17 placing reasonable seasonal limits on diversions of pool
18 producer milk to non-pool plants. Precedent for such
19 diversion limits had previously been established in the
20 Northeast in the former Orders prior to merger in 2000.
21 Our proposal is also similar to that recently made
22 effective in the Mideast Federal Order and is designed to
23 correct similar problems. Provision for more restrictive
24 diversion limits in the pool-qualifying months August

1 through December, 60 percent vs. 75 percent in other
2 months, better assures availability of fluid milk supplies
3 at pool distributing plants when needed. Diversions in
4 excess of 75 percent in the non-qualifying months should
5 be depooled because it involves the pooling of excess
6 reserves at pool producers' expense. The 75 percent limit
7 allows enough flexibility to handlers to schedule
8 diversions of producer milk for manufacturing as may be
9 necessary without losing pool status.

10 New York State Dairy Farmers, Inc., strongly
11 urges the adoption of Proposal Number 3 to eliminate the
12 clearcut abuse of the present pooling provisions in the
13 Order.

14 This concludes our statement on Proposal 3."

15 MR. ENGLISH: And finally, Exhibit 37, your
16 one-page statement on Proposal Number 4.

17 THE WITNESS: All right. I do want to make the
18 observation at this point that I may want -- I will want
19 to come back to Proposal 3 with regard to a suggestion
20 modification of our position.

21 MR. ENGLISH: We will do that.

22 THE WITNESS: Proposal Number 4. This proposal
23 had previously been included among the group of date
24 changes contained in Proposal Number 1 but later separated

1 by the Department to be included jointly ~~in jointly~~ with
2 the ADCNE cooperatives and the Market Administrator as
3 Proposal Number 4.

4 The date change amendment in Proposal 4 in
5 Section .72 would require that the Market Administrator
6 make payment to handlers from the Producer Settlement Fund
7 each month no later than the day after handler payments to
8 the Producer Settlement Fund are received. Current
9 provision in Section .72 requires such payment from the
10 Producer Security -- Settlement Fund be made no later than
11 the 16th day after the end of each month, unless such date
12 fell on the weekend or national holiday, in which case
13 payment is made no later than the next business day,
14 pursuant to Section .90. This exception in Section .90
15 would apply under Proposal 4 as well.

16 The jointly-sponsored amendment is needed
17 because problems have ~~risen~~ **arisen** for the Market
18 Administrator since Order Reform in clearing funds in
19 those months when payment to the Producer Settlement Fund,
20 pursuant to Section .71, and payment from the Producer
21 Settlement Fund under Section .72 happen to fall on the
22 same day. At least one day is needed between the
23 respective payment dates to assure sufficient funds are
24 available for payments to handlers pursuant to Section

1 .72.

2 In 2002, same-day Producer Settlement Fund
3 payment dates arise three times, May, August, and
4 November. This is shown in ~~or~~ **our** Table 1, Exhibit 26.

5 The proposed amendment fits other date-change
6 proposals advanced by NYSDFI at this hearing and conforms
7 with sound business practices. We urge its adoption.

8 JUDGE BAKER: Now may the witness be
9 questioned, Mr. English?

10 MR. ENGLISH: I have a couple ~~thing~~ **things**,
11 Your Honor.

12

13

14 DIRECT EXAMINATION

15 BY MR. ENGLISH:

16 Q With reference to Proposal -- sorry -- Exhibit
17 24 yesterday that was entered in the record, Mr. Arms, I
18 believe that it was just provided to you a moment ago.
19 After reviewing Exhibit 24 and the tables that appear in
20 Exhibit 24 that was not read into the record but is part
21 of the exhibit, do you have a correction for the record?

22 A Yes, I do.

23 Q And what is that correction?

24 A The correction is the listing of New York State

1 Dairy Foods Inc. members, Byrne Dairies, Syracuse, New
2 York, should be shifted from that list to the one below
3 it, which is Other Northeast Dairy Processing Companies in
4 Favor of these Proposals. Their membership status changed
5 ~~to put~~ ,**but** their position in favor of this proposal **is**
6 **unchanged.**

7 Q Now, a moment ago, you mentioned that there was
8 a modification to the position. Let me ask you first.
9 You've sat here throughout the hearing, correct?

10 A Yes, I have.

11 Q And you've heard both the examination of the
12 witnesses by Mr. Beshore and you have considered the
13 question of the so-called free ride ~~credit~~ **period**,
14 correct?

15 A Yes, sir.

16 Q And have you reached a conclusion about what
17 the -- what the issue really is there in terms of New York
18 State Dairy ~~Farmers~~ **Foods** Association?

19 A Yes, sir.

20 Q And -- and what is that?

21 A The ADCNE Proposal 5, I believe it is, --

22 Q Yes.

23 A -- requiring a 10 percent shipping standard in
24 the flush months from the get-go had considerable merit,

1 but in our view, in our perspective, only with respect to
2 application to sources beyond the Northeast Order area.

3 Q The plants?

4 A Distant sources.

5 Q The plants?

6 A Yeah. The plants in the distant states that
7 are currently or have been -- strike the word "currently",
8 that did ride the pool.

9 Q That did until August 1st when they, according
10 to the testimony of their own witness, went off on August
11 1st, correct?

12 A Right.

13 Q And so, the position or modification you're
14 suggesting to Proposal 5, which is not your proposal but
15 since others have been asked about it and you may well be
16 asked about it, the modification is that to the extent a
17 10 percent shipping requirement is applied to supply
18 plants, that it be applied to supply plants located
19 outside the Marketing Area, **for January through July,**
20 correct?

21 A Yes. The reason we do not support it for
22 handlers within the Northeast area is really a quite
23 simple one and that is, especially March, April, May,
24 June, the milk is not needed, and we fail to see **any the**

1 economic sense of forcing our pool supplies that are
2 located within the Northeast area, forcing them to make
3 shipments to the primary market only to make -- only
4 having to make arrangements to back haul the milk back.

5 ~~Your Honor~~, I know this has been done in the
6 past, and so we feel it needs to be -- it needs not to be
7 applied to such sources within the ~~market~~ **Northeast**.

8 MR. VETNE: Your Honor, ~~I cannot accept that~~
9 **John Vetne** on behalf of Friendship.

10 JUDGE BAKER: Mr. English, are you through?

11 MR. VETNE: No, I have an objection.

12 MR. ENGLISH: Just one second. Why don't we go
13 off the record one second?

14 (Discussion off the record.)

15 MR. ENGLISH: Before Mr. Vetne makes his
16 objection.

17 ~~BY MR. BESHORE:~~

18 Q Mr. Arms, we -- we -- you discussed this with
19 the members. Were you thinking about the Marketing Area
20 as being sort of the Marketing Area covered by the states
21 in which the Marketing Area encompasses? In other words,
22 were you including all of New York or just the part of New
23 York that's the Marketing Area?

24 A No. I -- I don't believe my testimony referred

1 to Marketing Area. I think it referred to Northeastern
2 states.

3 Q So, -- so, in other words, to the extent that -
4 - that by way of example, Friendship is located one county
5 outside the Marketing Area, you did not intend by way of
6 this modification to extend that to that; you mean the
7 Northeastern states?

8 A ~~You~~ **We** do not see the necessity to have forced
9 shipment from Friendship or any other pool handler in that
10 --

11 Q In ~~which pool handlers lie~~ **January through**
12 **July?**

13 A Yes, in those months.

14 Q All right. So, with that clarification --

15 A It's an uneconomic shipment.

16 MR. ENGLISH: that clarification, Mr. Vetne may
17 still rise, but maybe that will alter it a little bit.

18 MR. VETNE: Your Honor, I **did** have two
19 objections, one of which is specifically related to
20 Friendship and that has been resolved, and I thank you,
21 Dave, for that clarification.

22 But I -- I -- I -- I have to rise, also, to
23 -- to voice an objection that this new proposal raises a
24 question of differential burdens and standards for milk

1 supplies inside and outside of the Marketing Area which
2 were not included in the hearing notice and concerning
3 which we spent some time in Federal District Court in
4 Milwaukee addressing for the milk for the Mideast Market
5 where it was also not in the hearing notice.

6 JUDGE BAKER: What were the results, Mr. Vetne?

7 MR. VETNE: Pardon?

8 JUDGE BAKER: What were the results?

9 MR. VETNE: The result wasn't and an appeal is
10 pending, Your Honor. But in that -- in that case, and in
11 the Mideast, as -- as it happened, there are folks who did
12 not come to Ohio to appear because there was nothing in
13 the notice, and so when it came up in the hearing, it
14 slipped by because people weren't there. I wasn't there
15 in particular because I had been informed that -- that
16 things were negotiated and there was going to be no
17 adverse impact, and it's hard for people who are not there
18 to voice an objection when it comes up.

19 So, I've been asked to monitor that for
20 purposes of this hearing and to give notice of -- of
21 objection because it created differential standards for
22 which the parties, not just in the Midwest but parties
23 elsewhere, had no notice. So, that's -- that's the extent
24 of my objection, not on behalf of Friendship in this case

1 but because I ~~didn't~~ **do** represent the parties elsewhere
2 who -- who did not come and are concerned about this kind
3 of thing philosophically and legally, and on the grounds
4 that it was not noticed, I would object to this
5 modification for differential burdens inside and outside.
6 That's all.

7 JUDGE BAKER: Very well. Thank you, Mr. Vetne.
8 Thank you for your erudite recitation.

9 MR. ENGLISH: Your Honor?

10 JUDGE BAKER: Yes, Mr. English?

11 MR. ENGLISH: In no fewer than four proposals
12 is Paragraph (c)(1) which has been proposed to be amended
13 by a number of parties open for consideration, and indeed
14 one of the proposals is Proposal Number 5, that in each of
15 the months of January through August and December, such
16 shipments must ~~be for~~ **equal** not less than 10 percent of
17 the total quantity of milk that's received at the plant.

18 So, plants located outside are on notice that
19 as a result of this hearing, they could be subjected to a
20 rule of 10 percent shipments, ~~that then~~ as a reasonable
21 modification of ~~our that~~ proposal, it is perfectly
22 rationale to say, to have an exception for that, and the
23 exception allows the rules to apply to everybody, but the
24 proposal is open, and the Court in Milwaukee specifically

1 found that once a Notice of Hearing is out there, the
2 parties participate or don't participate at their own
3 risk, especially when you're looking at (c)(1) being open
4 in this hearing, and -- and the fact of the matter is,
5 this is far more direct and -- and nonetheless the Court
6 in Milwaukee found without any difficulty that the issue
7 there with respect to a plant treatment, qualification for
8 a plant and how to qualify milk, was open for
9 consideration. That's what this hearing is all about, and
10 there's been a lot of discussion about this in supplies,
11 and frankly, (c)(1) plainly indicates that the question of
12 whether or not you're inside or outside, the question of
13 what you're going to have to ship is an issue, and the
14 fact that we have said as an appropriate modification, we
15 don't want plants inside to be subjected to that, such as
16 Friendship, doesn't change the fact that we are allowed to
17 testify that the proposal would be appropriate if applied
18 outside.

19 MR. VETNE: I need to add just one thing and
20 concede that in some very modest respect, ~~Chuck~~ **Chip**
21 English is correct, and that is, that the issue that arose
22 in the Mideast involved an unnoticed new regulatory burden
23 and the -- the question here involves the mitigation or
24 alleviation of a burden that was noticed. So, to that

1 extent, the issues are different, and, you know, for that
2 purpose, there may be a different analysis by the
3 Department.

4 Thank you.

5 JUDGE BAKER: Very well. Thank you.

6 THE WITNESS: Your Honor?

7 JUDGE BAKER: Yes?

8 THE WITNESS: There's another basis for the
9 modification, which I'd like to get into the record.

10 JUDGE BAKER: Very well. We'll do that later.
11 What is involved here, I think Mr. English and Mr. Vetne
12 are both aware ~~of the~~ **there is a** legal question, and
13 ultimately, it will be decided. Most of these hearing
14 notices do provide for appropriate modifications of the
15 matters noticed for hearing. Of course, it goes to the
16 question of what a reasonable person would consider within
17 the ambit of an appropriate modification.

18 With respect to seeking an appropriate
19 modification here, I will let it in. If the Department in
20 its wisdom decides later on that it is inappropriate or if
21 the Court rules that -- the Appeals Court rules in the
22 meanwhile, then there will be a guidance for the
23 Department to proceed from.

24 But thank you all for -- for keeping all our

1 legal principles at the forefront.

2 THE WITNESS: Your Honor, may I consult with
3 legal counsel for a moment?

4 JUDGE BAKER: Which one?

5 THE WITNESS: Mr. English.

6 (Laughter)

7 (Discussion off the record.)

8 BY MR. ENGLISH:

9 Q And just to be clear, Mr. Arms, this is -- this
10 is a portion of Proposal 5 you can agree we can modify,
11 but you don't necessarily agree with all of the content of
12 Proposal 5, correct?

13 A Correct.

14 Q And -- and that is, that you discussed at some
15 length the issue on 9-C milk, and to the extent that's in
16 here, your testimony on 9-C milk, Proposal 5, you're not
17 saying adopt Proposal 5 with this one modification, you --
18 your whole testimony has to be considered with respect to
19 Proposal 5, correct?

20 A Yes, sir.

21 JUDGE BAKER: Very well.

22 MR. ENGLISH: The witness is available for
23 cross examination.

24 JUDGE BAKER: Are there questions, Mr. Vetne?

1 MR. VETNE: Probably.

2 CROSS EXAMINATION

3 BY MR. VETNE:

4 Q You offered that a modification to Proposal 5,
5 which addresses supply plant shipping requirements. Did
6 you intentionally omit reference to your own Proposal 2 in
7 that regard for a similar modification?

8 MR. ENGLISH: I think, for the record, what we
9 ~~need~~ **mean** to say is that considering Proposal 5,
10 recognizing there's a lot in the proposal that opens
11 (c)(1) or the whole area of (c) up for consideration, that
12 with respect to the one issue of the January through July
13 period, that is being addressed by this modification but
14 it does not change the testimony he gave in the earlier
15 statement.

16 MR. VETNE: Okay.

17 THE WITNESS: That is correct.

18

19 BY MR. VETNE:

20 Q I'm going to ask you **Dave,**== you can go with me
21 to Page 4 of your testimony on Proposal 2, Page 3, leading
22 into Page 4. Your testimony there generally expresses
23 some concern about pooling changes, correct?

24 A Yes.

1 Q Okay. You -- you intended it to encompass the
2 universe in -- in that discussion of concern about pooling
3 changes, structural changes for pooling in the Northeast?

4 A We think it has direct bearing on the current
5 supply situation.

6 Q Okay. And then, you prioritize your concerns,
7 as I understand it. The most troubling concern, as I
8 understand your testimony, is that there's now new
9 authority for 9-C milk in -- in New York that didn't exist
10 before. That's Number 1, correct?

11 A That's correct.

12 Q And Number 2 is that with respect to that 9-C
13 milk, diversions are unlimited. That's the second ~~basis~~
14 **biggest of** concern, correct?

15 A I wouldn't necessarily put it in that order. I
16 think I also expressed in the testimony, the statement,
17 that we're very concerned about the guaranteed pooling
18 status to some other cooperatives that are extended by the
19 new 9-C provisions which result in the milk not being
20 readily available.

21 Q And so, would it be correct to say then that
22 you'd combine the 9-C opportunity with unlimited
23 diversions?

24 A Yes, sir.

1 Q And -- and that combination is your greatest
2 concern?

3 A Yes.

4 Q Okay. And the third concern would be the touch
5 base with pool plant requirement?

6 A Well, yes.

7 Q And you -- you said that, correctly, that --
8 that there are fewer pool plants in the market, we've been
9 over that a little bit, and that that hasn't happened
10 because they closed. Your testimony on Page 5 concerning
11 Exhibit 2 says several former pool supply plants simply
12 converted to non-pool status, and that the 9-C pooling
13 opportunity for co-ops made that ~~an issue~~ **easier**, correct?

14 A Correct.

15 Q Is it your belief that the plants that formerly
16 had pool status really didn't want to have pool status and
17 they embrace this opportunity?

18 A Certainly each business entity is going to
19 appraise their situation, and in the case of the handler
20 with very high Class 2 use ~~need to -- well, being, it~~
21 **could very well be** that they might decide to go non-pool
22 in order to pay into the Federal Order.

23 Q You heard the testimony of Warren Schanback,
24 didn't you?

1 A Yes.

2 Q Okay. And Mr. Schanback indicated that the
3 producers supplying that plant are now pooled through the
4 cooperation of a cooperative. That's the 9-C kind of
5 transaction that you were referring to, correct?

6 A Yes.

7 Q Okay. And you also heard Mr. Friendship say
8 that he really didn't want to be non-pooled and he made
9 all kinds of efforts to try to remain in the pool? You
10 heard him say that?

11 A I did.

12 Q Okay.

13 A That doesn't pertain or isn't completely
14 relevant of what -- to my statement.

15 Q Well, the impression I got from your statement
16 was that -- that the pool plants that continued in
17 existence, pool supply plants that continued in existence
18 of which as pool plants you ~~said~~ bemoaned, ~~that they did~~
19 ~~not achieve~~ **achieved their non-** pool status because that's
20 what they really wanted?

21 A The bottom -- may I be clear?

22 Q Please.

23 A The bottom line is that the 9-C provision is
24 being used to leverage a high Class 1 volume on one side

1 in order to guarantee pooling on another side to another
2 group, and as a result, the milk to which the guaranteed
3 pooling has been provided is no longer **really** available to
4 the market because they do not have to ship it. They're
5 automatically qualified by the larger 9-C unit.

6 Q You're aware that Friendship served as a source
7 of -- as a pool supply plant served as a source of
8 supplemental milk pre-Reform when there was a call or
9 threat of a call, correct?

10 A Correct. This statement, incidentally, is not
11 directed at Friendship per se. It's directed at a
12 situation at a number of places.

13 Q A number of places in relation to the ability
14 of those places to have milk pooled through cooperative 9-
15 C transactions?

16 A And to not make them available to fluid
17 handlers.

18 Q Is there any situation that you have in mind
19 when you say, made your last statement, that does not
20 involve a 9-C handler?

21 A Can you repeat the question?

22 Q Your statement, if I can paraphrase it,
23 concerned that manufacturers could pool, can pool and do
24 pool through 9-C unit and not make their milk available.

1 My question then was, are you aware or have a concern of
2 any particular situation in which 9-C is not part of the
3 equation producing the problem?

4 A Yes, there are other problems more pronounced
5 in 2000 and 2001, mainly a rather very large shift of milk
6 to the Southeast.

7 Q Okay.

8 A And that milk was not readily available.

9 Q Okay. And was that shipped by entities other
10 than 9-C handlers?

11 A I'm aware of some, yes.

12 Q You -- you ~~belong~~ **bemoan** -- at the top of Page
13 5, ~~if you have two or~~ **the fact fewer and** fewer sources of
14 reserve supply milk are available for the fluid handlers,
15 one of those pre-Reform sources was Friendship in order to
16 retain its status as a designated pool supply plant. That
17 is one of the sources that is no longer available post-
18 Reform, correct?

19 A I'm not so sure it's not available. It could
20 possibly be made available by Friendship if they choose to
21 do so or -- or it could be made available by the 9-C
22 cooperative involved. They -- they may call for it.

23 Q Yes, but Friendship no longer has a
24 responsibility as they did before to make a supply

1 available in response to a call?

2 A I assumed that, but I do not know it for a
3 fact. I cannot ~~answer for~~ **manage** the Friendship
4 operations.

5 Q Friendship has described its milk as being
6 pooled by somebody else. Part of the problem that you see
7 is that the fact that that milk is now no longer pooled
8 and marketed in Friendship's control leaves you with one
9 fewer ~~sources~~ **source** of reserve supply milk?

10 A I'm an economist, and I know the handlers
11 respond to economic facts of life. It is a fact that, I
12 believe public knowledge, that Friendship has been able to
13 leave the pool at times ~~and come on to the pool~~, becoming
14 nonpool when it was to their advantage when the Class 2
15 price was such that it was favorable relative to the blend
16 and vice versa. There are a lot of different -- that's
17 the rule. To me, at the same time, I work for another
18 client, the H.P. ~~Wood~~ **Hood** Company, which makes this same
19 product at Vernon, and that plant has been fully pooled
20 the whole time and paid into the Producer Settlement Fund
21 when the Class 2 price was high.

22 I -- I see that it causes -- definitely causes
23 some inequities among handlers, and I think this is
24 contrary to the purposes of the Act.

1 Q So, it would be a good idea then to have
2 Friendship pool continuously?

3 A No. I -- please don't put words in my mouth.
4 I think that it becomes a decision, an economic decision,
5 depending upon what the rules are, and so I have no
6 comment to make on that.

7 Q Oh, no comment. Okay. Do you know how the
8 Dairy Farmer ~~Market~~ **for Other Markets** provisions work in
9 Order 1?

10 A I'm familiar with them. In fact, I'm familiar
11 with its origin.

12 Q Isn't it true that it is extraordinarily
13 difficult and there are huge disincentives to take milk
14 off the pool to take advantage of a price ~~diversion~~
15 **inversion**?

16 A And rightfully so, in our opinion.

17 Q So, your answer is yes?

18 A Yes.

19 Q Have you -- you refer on Page 3 in the first
20 full paragraph to a "prime responsibility, the prime
21 responsibility of the Order provision is to ensure an
22 adequate supply of Class 1 milk." I'm aware that the
23 pricing provision of the statute in Section 608(c)(18)
24 addresses adequate supply of milk.

1 Are you aware of any other provision of the Act
2 that would correspond with your assertion of the purpose?

3 A I'm an economist and not an attorney.

4 Q Okay.

5 A But I would add that I do believe the
6 cooperatives recognize that the Class 1 price carries with
7 it a differential that then accrues to the benefit of all
8 producers in the market a very significant magnitude such
9 that they certainly should give priority to the fluid
10 needs of the market.

11 Q As an economist, you agree that milk ought not
12 flow to a bottling plant when it's not needed?

13 A I believe that was the basis of our
14 modification suggestion to Proposal 5 because we are in
15 agreement essentially that it doesn't make economic sense
16 to force milk down through the market if it's -- in those
17 months when there is a large surplus and it only makes
18 matters worse.

19 Q Milk can move to a market when not needed, even
20 outside of the scope of your modification?

21 A I think one needs to take into account in the
22 Northeast Order, as Mr. Gallagher has pointed out, ~~ake a~~
23 **the mega** - market, that milk has to move considerable
24 distance and it just doesn't make sense to have so much

1 freight charged and, incidentally, under the new Order,
2 it's charged to the producer because ~~his~~ **its price priced**
3 ~~is~~ at the plant ~~that~~ **of** first ~~receives it~~ **receipt**. So, I
4 think it's uneconomic.

5 Q You also make a reference to -- on Page --
6 bottom of Page 4 to "the specter of somebody pooling too
7 much manufacturing milk". Is it your testimony that
8 there's some manufacturing milk in the milkshed that maybe
9 shouldn't be pool eligible or have pool access? By
10 manufacturing milk, I mean Grade A milk eligible for the
11 fluid use, that is needed for fluid use, that some of that
12 should just be included out of the pool.

13 A My statement referred to contractual
14 obligations that might be made by cooperatives with
15 manufacturers for pool supply contracts without waiver in
16 such contracts to cause -- to enable the cooperative to
17 draw a -- a supply from it to meet a critical need for
18 fluid milk **in the city**. That's primarily what I said.

19 Q Okay. You -- you did not intend then to suggest
20 that there should be a limit to the amount of the excess
21 reserve that is pool eligible or has pool access?

22 A I did not intend to limit the scope of the
23 number of plants or anything like that in the Northeast,
24 manufacturing plants.

1 MR. VETNE: I think that's all I have for now.
2 Thank you.

3 JUDGE BAKER: Thank you, Mr. Vetne.
4 Are there other questions? Mr. Beshore?

5 CROSS EXAMINATION

6 BY MR. BESHORE:

7 Q Mr. Arms, I want to -- I want to get your
8 statement on Proposal 1 first. Have you -- have you
9 calculated how much Proposal 1 would -- would cost dairy
10 farmers?

11 A I have not. However, I've given it some
12 thought, and knowing the argument might be that producers
13 lose a certain amount of money for each day that the
14 payment date is extended, there are offsetting monies that
15 are coming to ~~pool~~ **the** producers and cooperatives that
16 have -- that have not been taken into account.

17 Q You're adding that under Proposal 1?

18 A What I want to say is that under the Reform
19 Order and the current 9-C provisions, we have added, as my
20 data have shown, very substantially to the total 9-C
21 volume, and that milk, whether it's independent or small
22 co-op, to the extent it's added into the 9-C unit, enjoys
23 all the rights and privileges extended to 9-C milk, and so
24 therefore, you have a large volume of milk, fully

1 independent milk, that's now being paid for as cooperative
2 milk at the earlier date. So, that tends to offset.

3 Q That's -- the provision you're referring to is
4 in the Order since Order Reform?

5 A We're trying to point out that under Order
6 Reform, the advanced date of payment moved way up from
7 where it was, and --

8 Q You --

9 A -- in addition, -- no. Only to the extent as
10 **proposed** in the proposal, but I'm trying to also point out
11 that there's a lot more milk that's being paid for early
12 because of the revised 9-C.

13 Q The reason I asked that question was because
14 some of the same handlers that you're testifying for here,
15 when producers requested a modification of the rate of
16 advanced payment with a possible first year stamp and some
17 of the same parties were very interested in having a CPA
18 calculate very carefully what that change, that 5 percent
19 change in the rate of payment on the partial would
20 supposedly cost those handlers, **the time rate of money.**

21 Now, here, you've pushed it the other way, and
22 I wondered if you had made the same calculation.

23 A No, I have not.

24 Q Okay. You've asserted on Page 3 of your

1 testimony in support of Proposal 1 that handlers should
2 not be penalized for failing to meet reporting deadlines.
3 You're not -- you're not ~~penalizing them~~ **penalized** in any
4 way by the Order if you get your report in a day late, are
5 you? I mean, are you?

6 A I have not.

7 Q Based on --

8 A I believe a handler has to get his report in on
9 time and is subject to penalty. That's -- certainly that
10 is true with regard to payment.

11 Q Oh.

12 A ~~But not to~~ **To** the Producer Settlement Fund.

13 Q Okay. So, whatever penalties are in the Order
14 for filing a day late, that's what you're referring to on
15 Page 3?

16 A Yes, and one thing leads to another and it
17 could wind up there, but there's another concern. We have
18 asked for another day here to restore the 10th which we
19 had before as the reporting date. We are concerned that
20 the additional time will be taken up and now we're
21 beginning -- we may be getting reports late on the 10th.
22 So, we didn't propose the change, but in retrospect, it
23 probably would have been advisable to keep the 9th as the
24 date for vendors to verify their data with the handlers so

1 that the handlers can get their reports done on time.

2 Q Now, is it your position that the industry can
3 never meet the reporting dates in the current Order?

4 A We propose ~~that they~~ **the date** change that and
5 assume the cooperatives will ~~need~~ **meet** it.

6 Q But is it --

7 A ~~It's better~~ **Better**.

8 Q Is that because you think that it's impossible,
9 physically, clerically, administratively impossible, for
10 the industry to meet the dates in the current Order?

11 A It seems with the expansion that has taken
12 place and all the structural changes that I have mentioned
13 in my statement, that it is getting increasingly
14 difficult.

15 Q Are people learning how to do it? Isn't that
16 what's going on?

17 A It's not a question of learning. It's a
18 question of just being overwhelmed.

19 Q So, you're saying it's physically impossible?

20 A It's not physically impossible, but it's made
21 it a lot more difficult.

22 Q It would make your life easier if it was
23 postponed, correct?

24 A It would delay ~~it to~~ **,if** the date we had before

1 it was restored.

2 Q And with respect to -- with respect to Proposal
3 2, your -- you -- you talk about milk going south to
4 Southeastern Orders. If milk from Pennsylvania or
5 Maryland or New York, wherever it might be, has a better
6 return because it's in the South and therefore is shipped
7 down there and isn't even on this Order, how are increased
8 shipping requirements in Order 1 going to address that
9 issue at all?

10 A Cooperative 9-C units will need to respond to
11 those standards, and while they send milk -- a lot of milk
12 to the South, that milk is available for them to ship back
13 necessarily and they likely will.

14 Q Actually, if milk goes south out of the 9-C
15 unit, that reduces the total volume in that -- assume 9-C,
16 that reduces -- and it's pooled on Southern Order, that
17 reduces the total volume in that 9-C unit and makes it
18 easier to meet whatever standards there are with the same
19 amount of 7-A shipments, doesn't it?

20 A It's still 9-C milk which can be transferred.

21 Q If it's pooled in the other Order, --

22 A No, I didn't say that it was pooled on the
23 other Order.

24 Q Oh, so, you're concerned with milk that's

1 transferred only?

2 A Yes, and that's in large volume. No, I didn't
3 say all milk. We're aware of that.

4 Q Now, the 9-C problem that you've talked about,
5 if you look at the -- if you look at the 9-C handler list
6 on Exhibit 5, can you tell us which 9-C units are causing
7 a problem on Page 18? **Agrimark?**

8 A I think my statement speaks for itself. I am
9 not going to go through this list. I can cite perhaps one
10 or two examples, but I'm not going to go through this
11 list. It's not necessary. The principle is that there is
12 guaranteed pooling extended to some smaller co-ops which
13 may make the milk available or may not because they have
14 guaranteed pooling for which they are paying the larger
15 co-op for that service.

16 Q Okay. If the largest 9-C unit in the Order has
17 shipments to distributing plants in aggregate considerably
18 above any performance standard in your proposals, is that
19 going to have any impact on them?

20 A You have put your finger right on the problem
21 because what has changed is that if the requirement is set
22 at 45 percent, some of the 9-C units are already over
23 that. It doesn't bother them a bit. They don't have to
24 ship any milk to them. That's the problem.

1 Q But that bothers you?

2 A It bothers our **group**, -- I'm speaking for fluid
3 milk handlers, and it takes from, it reduces the number of
4 sources competing, that may compete to ship their milk to
5 fluid milk handlers.

6 Q So, you're bothered by the fact that the
7 largest, you know, 9-C handler in the Order has over --
8 well over any minimum shipping requirements you propose,
9 and your -- but you can't reach within that unit the
10 sources of milk that you would like to on an individual
11 instead of aggregate basis?

12 A I -- I think my statement is clear, that the
13 milk may be available but under -- certainly under
14 different terms.

15 Q Price?

16 A Price and/or ~~milk~~ **amount**.

17 ~~Q Now,~~

18 A The point is they don't have to ship any more.

19 Q And -- and -- and imposing a 25 percent
20 shipping requirement on somebody who's already shipping
21 40-45 isn't going to do any good, is it?

22 A In this market, Marvin, the Class 1 level is
23 high enough so that in August through December, there
24 should be no problem in meeting standards we used to have

1 throughout most of this Northeast Order.

2 Q Okay.

3 A It was never a problem in the Middle Atlantic
4 Markets. The shipping percentage was higher in New
5 England.

6 Q And it was lower in Order 2?

7 A But now, with the change in the structure
8 that's taken place, it's -- it's become tighter.

9 Q Okay. The provisions of Order 2 always allowed
10 9-C handlers to combine cooperatives or non-members of
11 their -- on their -- in their units, isn't that correct,
12 Mr. Arms?

13 A No, it is not correct, because they didn't have
14 9-C units.

15 Q The bulk tank units?

16 A That's different. That's a different animal.

17 Q They could combine non-members and cooperatives
18 on that unit, could they not?

19 A That's your statement. That isn't relevant to
20 what I'm saying now with the Reform Order.

21 Q And you're not aware that in the prior Order 1,
22 cooperatives regularly pooled non-member milk on their 9-B
23 D units?

24 A It was my understanding that 9-B D units were

1 limited to members. Perhaps somewhere along the line,
2 that got amended, but if so, it's not to my knowledge. If
3 that is true, I stand corrected.

4 Q The -- the proposed diversion requirements
5 would apply year-round, correct? Your proposed diversion
6 requirements?

7 A Yes.

8 Q And so, even in the -- even in the Spring
9 months, handlers of -- would be limited, 9-C or otherwise,
10 would be limited in their ability to divert producer milk
11 to non-pool plants to 75 percent of the milk, correct?

12 A Yes, and that isn't very much different than
13 the levels you -- your ~~pool~~ **group** has proposed.

14 Q Well, our -- our level's 90 percent, I think,
15 is it not?

16 A I'm not seeing a huge difference.

17 Q Okay. Well, is there --

18 A But our position is it should be tighter, not
19 looser, because if -- if milk is diverted to those kind of
20 levels, then it really isn't needed in the pool.

21 Q Is there milk capacity at -- at pool plants to
22 pool all the milk that would need to be delivered to those
23 plants under your proposal?

24 A My experience has been that it is not a major

1 problem and I'll tell you why. What handlers do is they
2 schedule milk into their plants from certain producers to
3 serve certain routes and they may keep one route going for
4 the first 10 days, switch to another route another 10 days
5 or whatever, as necessary, to make sure they're not over-
6 diverted.

7 Q ~~Because there are~~ **Are those** good economic ways
8 to organize the milk -- milk supply in the milkshed?

9 A In our view, if there -- if the milk is being
10 associated with this market -- if milk is being associated
11 from ~~prior~~ -- from as far away as the Midwest, --

12 Q I'm listening.

13 A **If Milk** ~~has been~~ **is being** pooled in this Order
14 by single shipment and then diverted very extensively at
15 the non-pool plant out there, that's an example of milk
16 that's not really needed here. Why should pool producers
17 **have bear** the burden of carrying the reserve of that other
18 market? That's our position.

19 Q That's your justification for a 75 percent
20 diversion limitation?

21 A We feel it's a reasonable limit.

22 Q And in the Fall, --

23 A We don't feel there should be unlimited
24 diversion and the 90 percent that you propose comes close

1 to it. Ours is tighter. All of our provisions here are
2 tighter but still reasonable in our opinion.

3 Q Now, under 75 percent diversion, in the Spring,
4 that would apply in May, right?

5 A The higher diversion limits are in those months
6 that are flush, yes.

7 Q Now, if, as Exhibit 5 shows on Page 74, in May
8 of 2001, almost 800 million pounds of milk in the Order
9 was diverted to non-pool plants, meaning, you know, that's
10 where it was eventually received and processed, that
11 diversion limitation is not going to -- that's more than
12 25 percent of the milk in the pool, is it not?

13 Considerably more, 800 million pounds.

14 A Unfortunately, we're dealing with a period when
15 there was quite a bit of this outside milk. There was a
16 lot of diversions, and quite frankly, we would expect that
17 our proposal, which I believe is the table in there, that
18 our proposal would result in depooling as it existed, that
19 handlers will revise their practices, and we submit that
20 that level of depooling would not occur.

21 Q Well, you -- you've heard Mr. Schad's testimony
22 that the plants in Minnesota and Wisconsin are not
23 presently pooled under the Order?

24 A Yes, I did.

1 Q Okay.

2 A That's a good step in the right direction.

3 Q Well, even if you took a -- say you took a 100
4 million pounds out of that 800 million that went to non-
5 pool plants in May 2001, just to take the highest number
6 out that was from those Upper Midwest poolings, you're
7 still -- you still have considerably more than 25 percent
8 of the pool going to non-pool plants, don't you?

9 A Marvin, I think handlers will adjust their
10 procedures on how they divert milk and that at 75 percent,
11 that is an ample diversion limit with which all handlers
12 should ~~be~~ **meet**. That's our testimony. To the extent you
13 feel differently, then your group ~~is~~ **put** in the higher
14 **range rate**. We think it's too loose.

15 Q And as you've testified, you support a zero
16 percent shipping requirement for -- for pool supply plants
17 in the Northeastern states during January through July?

18 A Not really. ~~Would~~ **When** you ask that question
19 **and you** leave out that the plant has -- in order to enjoy
20 that, they must meet the performance standards the prior -
21 - in the prior months, August through December, and that's
22 a very important criterion, and if they do not, then they
23 must ship 10 -- in order to stay in the pool in each of
24 the months that you mentioned, they would have to ship the

1 10 percent that you're proposing in each and every month.

2 Q By the way, the 9 -- under your -- under your
3 Proposal 2, what would **if** the plants not pooled during the
4 Fall, what would it be required to ship during the January
5 through July period?

6 A ~~To the~~ **A** pool supply plant?

7 Q Yes.

8 A To remain pooled, it would have to meet the 10
9 percent shipping requirement in each and every one of
10 those months, if it didn't qualify in the preceding
11 period. It has to earn its way is what I'm saying.

12 Q Thank you, Dave.

13 JUDGE BAKER: Very well. Are there any more
14 questions? Mr. Tosi?

15 CROSS EXAMINATION

16 BY MR. TOSI:

17 Q Mr. Arms, what -- what -- is it your position
18 that we -- the **Northeast** Order has no diversion limits at
19 this time for pool supply plants?

20 A The diversion limits, I'm thinking, applies
21 mostly to producer milk.

22 Q Diversions, right? How about this producer
23 milk that's pooled by supply plants?

24 A I believe the qualifying rules there apply to

1 the percentage of receipts at the supply plant which must
2 be shipped, and if they in turn -- if your question is, do
3 they -- if they ~~in turn~~ **earn or** qualify during the August
4 through December, then they -- yes, they do have and have
5 earned the right to qualifying in the other months.
6 That's my understanding.

7 Q With respect to a limit on diversions, --

8 A Oh.

9 Q -- part of your testimony is in part that it's
10 -- the pooling standards are a little too loose for the
11 Northeast and some of it seemed to be --

12 A The testimony was really directed towards
13 diversion of producer milk.

14 Q That's what I'm asking about. I know that
15 right now, -- let me -- let me ask it this way. Wouldn't
16 the diversion limits for a supply plant under the
17 Northeast Order now be 100 percent minus the applicable
18 shipping requirement of the Order?

19 A Yeah. It'd have to meet the shipping
20 requirement, yes.

21 Q So that, since we're saying you have to ship,
22 for example, 25 percent of receipts **in then** the diversion
23 limit for that supply plant, then it's --

24 A It's inverse to the qualification **in of** the

1 requirement is what you're saying.

2 Q Right.

3 A I believe it is for the supply plants.

4 Q Okay. Also, to the extent that the Order
5 currently provides the Market Administrator the authority
6 to adjust shipping standards and diversion limits at least
7 for -- and by extension diversion limits for supply
8 plants, have -- have you or the people that you're here to
9 represent ever requested the MA to adjust the shipping
10 standard up or down?

11 A For pool supply plants?

12 Q Yes, sir.

13 A I'm not aware of any.

14 Q To -- to the extent that the Secretary's
15 already granted authority to the Market Administrator to
16 adjust such standards, why are we again asking the
17 Secretary to adjust something that authority's been given
18 to someone to consider and adjust?

19 A We propose to keep that authority for the
20 Administrator to --

21 Q Well, I understand that.

22 A -- adjust --

23 Q That part, I understand. But --

24 A Yeah. In the long-term, we feel that what

1 transpired in 2000 and 2001 is going to be more of the
2 long-term norm, especially with the changes taking place
3 in the market.

4 Q Okay.

5 A So, we feel that that 5 percent standard,
6 additional standard that was put in via call before should
7 still pertain. Now, for example, this year, it -- we have
8 had a significant change. Had those provisions been in,
9 it might have warranted a call to reduce the percentage.
10 However, as we look down the road, with the current pay
11 prices to farmers being where they are at \$12+, these low
12 prices, high feed costs, etc., we may find ourselves in
13 2003 with just exactly the opposite situation, a shortage,
14 a shortage of milk. So, what we're proposing is longer
15 term.

16 Q Long-term or short-term, and I cannot remember
17 in which -- under which proposal you indicated something
18 **about** a situation that you're expecting to happen
19 beginning now. I'm sorry. I'm trying to find it. I had
20 marked it. I'm not quick enough here.

21 A It happens to us all the time with our senior
22 moments.

23 Q Page 2. Sorry. Page 2 of Proposal 2 of your
24 written statement. The situation -- beginning with the

1 paragraph, "While milk has not been as tight this year
2 compared with 2000 and 2001, we think the situation will
3 changed markedly during September through November".

4 As a practical matter, this hearing could not
5 correct that fast enough because --

6 A All I'm saying -- I realize that. All I'm
7 saying is that there will be cycles up and down.

8 Q Okay.

9 A Now, what we are proposing ~~is what~~ to establish
10 we think is appropriate for the long-term.

11 Q Okay. And to the extent that we set a new
12 number or whether we retain the current number by asking
13 the Market Administrator to have you submit information to
14 the Market Administrator with the justification why you
15 think the number needs to go up or down, why are we asking
16 the Secretary to do that now?

17 The Secretary's already given authority to the
18 Market Administrator to take care of something as a matter
19 of normal duties and as a matter of course to be
20 responsive to the industry, and it -- it -- it might seem
21 to the Secretary that this is redundant.

22 A We don't see it quite that way, and the Market
23 Administrator calls are to ~~just~~ **adjust** up or down for a
24 current situation, emergency-type situation, as opposed to

1 longer-range planning by handlers as to what their
2 requirements are, and we feel this is more important. The
3 one's **with for** the short-range and the other's longer
4 range.

5 Q Be it long or short, the Market Administrator,
6 by the submission of adequate information and
7 justification, can change those numbers to whatever it
8 takes to maintain orderly marketing?

9 A Yes, he can.

10 Q So, why do we need to publish a new -- go
11 through the effort here of coming up with a new set of
12 numbers that only in turn would be changed either in the
13 short run or the long run by the Market Administrator
14 based on current marketing conditions?

15 A I think our statement is saying that we think
16 is needed because of the structural changes taking place
17 in the market, and another consideration is at this
18 hearing, you have proposals, a whole range, one which
19 hardly changes the standards, another that increases the
20 standards under our proposal, and a third which decreases
21 it, and so the same arguments could be used, the same
22 questions could be asked.

23 Q Yes, and I did ask that of --

24 A Okay. And the same questions can be raised

1 with them, and I would say we are concerned. We certainly
2 don't want to go backwards and reduce the standards, and
3 for the same reasons, we think that the standards we are
4 proposing are appropriate.

5 Q You're not opposed to the Market Administrator
6 continuing with the authority to adjust the standards that
7 have been established under the Order for pooling?

8 A We not only are not opposed, we support it. We
9 definitely want the call provisions to be there, to the
10 extent they need it.

11 MR. TOSI: Okay. Thank you very much.

12 THE WITNESS: You're welcome.

13 JUDGE BAKER: That brings us to the time for
14 our afternoon recess.

15 (Whereupon, a recess was taken.)

16 JUDGE BAKER: Hearing will now resume after our
17 recess.

18 Prior to the recess, Mr. Arms was being
19 examined by Mr. Tosi. Are there any other questions? Do
20 you have any more questions? Mr. Vetne?

21 CROSS EXAMINATION

22 BY MR. VETNE:

23 Q Mr. Arms, were you present earlier in the
24 hearing for Bill Fitchett's testimony and Mr. Buelow's

1 testimony which discussed some difficulty in the Fall of
2 2001?

3 A Yes, I was.

4 Q And you heard their descriptions of their milk
5 supply arrangements with independent producers and
6 contracts with cooperatives?

7 A Yes.

8 Q Is that fairly typical of the members of the
9 New York State Dairy Foods, their description of their
10 supplies as well as their difficulty?

11 A I can't characterize that. I'm familiar with
12 some but not all.

13 Q Okay. The ones that you're familiar with, was
14 their description fairly typical?

15 A Perhaps.

16 Q In what way was it atypical?

17 A Well, you know, they have some large handlers
18 involved in the membership and they have some smaller
19 ones, and I believe that in the case of Bill Fitchett, he
20 characterized his business as being of the smaller size
21 whereas the Elmhurst operations is considered a major one.

22 Q With the exception of some quantitative
23 differences, were their experiences typical of the
24 handlers that you're familiar with?

1 A I'm sorry. I didn't get the question.

2 Q Okay. The question is, with respect -- with --
3 with the exception of perhaps some quantitative
4 differences, were their descriptions typical of the
5 handlers, other handlers that you're familiar with?

6 A Yes.

7 Q Were -- did you help place some milk to meet
8 the temporary needs in the Fall of 2001?

9 A Yes.

10 Q With respect to the handlers that were so
11 supplied, what percentage of their monthly needs were met
12 by supplemental shipments from non-contracted sources?

13 A I can't answer that, as I -- I do not know. I
14 do not have full knowledge of their placement.

15 Q Do you have enough knowledge to be able to
16 comment on whether it was a substantial portion of their
17 monthly needs or tiny portion?

18 A You're limiting your question to those two
19 participants?

20 Q No. To any -- any -- any -- any handler or
21 distributor that you're familiar with that had trouble in
22 the Fall of 2001 obtaining milk between his regular supply
23 of **committed** independent or cooperative milk, the portion
24 that they required for supplemental milk in relation to

1 their ordinary monthly supply.

2 A I don't know to what extent that was in terms
3 of the percentage because I'm not privy to all of their
4 information.

5 Q Okay.

6 A I don't do their market reports or whatever. I
7 don't know that.

8 Q You indicated that you helped to place some
9 milk during that period. To whom did you place milk?

10 A Proprietary information.

11 Q The identity of the handler to whom that --
12 that you helped supply milk is proprietary?

13 A I believe it is, yes.

14 Q Is the handler that you helped obtain milk
15 during that period a member of New York State Dairy Foods
16 or one of the non-members of the reporting participants?

17 A Both.

18 Q At the current time, I think you identified a
19 principal problem, that there are no diversion limits
20 either in the Fall or in the Spring, and you propose
21 diversion limits as do some others, and you propose the
22 ability of the Market Administrator to adjust diversion
23 limits.

24 With respect to supplying milk to alleviate

1 temporary shortages, would you expect that if there are
2 limits in diversion, that -- that adjustment of those
3 limits would be an important source of supplemental milk
4 during times of supply crisis?

5 A The main function of the diversion limit, as I
6 understand the word, is that you limit the total
7 association with the market to pool milk and over. If
8 it's diverted extensively beyond limits, it's going to be
9 depooled.

10 Q I understand. At the current time, the Market
11 Administrator only has authority to adjust supply plant
12 shipments, correct, and supply plant shipments --

13 A Yes.

14 Q -- **And supply plant shipments** represent a
15 relatively small portion of the total milk pooled?

16 A As I testified, it's down to three plants.

17 Q Right.

18 A Relatively small plants.

19 Q So, the -- the establishment of a diversion
20 percentage, whatever it might be, and the ability to
21 adjust that percentage would be expected to be a major
22 source of supplemental milk, would it not?

23 A It could be, yes.

24 Q It could be? What -- what --

1 A That's the reason we're proposing it.

2 Q Well, you're being equivocal. Why would you be
3 equivocal? You said could be. Wouldn't you expect that
4 since the majority of milk is milk to which no diversion
5 limit applies, wouldn't that be a principal source of
6 supplemental milk?

7 A Well, there can be a concern that you could
8 have distant milk continue to be associated with this
9 market, and if the diversion limits are too high, then
10 they can jockey those diversion -- their diversions around
11 so that they can still keep ~~them~~ **it** outside of the market.

12 Q I see. With respect to the milk supply within
13 the market, the majority of which is milk that is not
14 subject to any limits applied to supply plants?

15 A I would agree with that.

16 Q When -- you would agree with that, and if
17 diversion limits are reduced, so that more milk has to be
18 shipped to pool plants, that would be an important source
19 of additional milk, a tool for additional milk for the
20 ~~market~~ **Market Administrator**?

21 A Yes, it would be more milk associated with the
22 pool, one way or another.

23 Q Well, diversion limits associated with the
24 pool?

1 A If it's shipped within the diversion limits, it
2 doesn't necessarily mean it's going to be diverted to ~~the~~
3 **a pool distributing plants plant.**

4 Q No. I understand that. In fact, it won't be.
5 By definition, diversion --

6 A ~~The~~ **I mean the** additional milk available.

7 ~~MR. VETNE~~ **JUDGE BAKER:** Are there any other
8 questions for Mr. Arms?

9 (No response)

10 JUDGE BAKER: Let the record reflect that there
11 are none.

12 Thank you very much.

13 (Whereupon, the witness was excused.)

14 MR. ENGLISH: Your Honor, I move admission of
15 Exhibits 34, 35, 36, and 37.

16 JUDGE BAKER: Very well. Are there any
17 questions or objections?

18 (No response)

19 JUDGE BAKER: Hearing none, the documents
20 marked as Exhibits 34 through 37 are hereby admitted and
21 received into evidence.

22 (The documents referred to,
23 having been previously marked
24 for identification as

1 Exhibit Numbers 34, 35, 36,
2 and 37, were received in
3 evidence.)

4 MR. ENGLISH: Your Honor, I have no further
5 witnesses.

6 JUDGE BAKER: Very well. Are there --

7 MR. ENGLISH: Well, on Proposals 1 through 4.
8 Mr. Arms will appear later on Proposal 14.

9 JUDGE BAKER: Very well. Does anyone else have
10 any witnesses? Yes, Mr. Beshore?

11 MR. BESHORE: Your Honor, we have two -- two
12 further witnesses, Mr. Gallagher to be recalled and Mr.
13 Schad to be recalled. Mr. Gallagher has a nine-page
14 statement which I have available, and I'd like to ~~now mark~~
15 **have marked** as the next proposed Exhibit 38.

16 JUDGE BAKER: 38.

17 MR. BESHORE: I believe.

18 MR. BESHORE: I would like to suggest and
19 propose that rather than have Mr. Gallagher read the
20 exhibit, the testimony and the exhibit into the record,
21 that we distribute it and take a few minutes and allow --
22 allow everyone to have the opportunity to read it, and
23 that I request that it be admitted into the record as if
24 read, as if he had read and given the testimony, and that

1 we then -- I'll have a couple of additional questions for
2 him on direct examination and then he may be made
3 available for cross examination on the full statement as
4 if presented, plus his supplemental questions.

5 JUDGE BAKER: Are there any objections to that
6 procedure?

7 (No response)

8 JUDGE BAKER: Let the record reflect that there
9 are none.

10 MR. ENGLISH: Your Honor, I don't have an
11 objection. I'd just note that Mr. Arms is literally
12 upstairs working further on Proposal 14, and this might
13 ~~perhaps be~~ **press** the time or point where there's an
14 interesting point there, but why don't we move forward
15 because I'm sure we have plenty to do?

16 JUDGE BAKER: Very well. You mean Mr. Arms
17 isn't here?

18 MR. ENGLISH: Mr. Arms has gone upstairs to his
19 room to work.

20 JUDGE BAKER: All right. Thank you.
21 Are in agreement?

22 ~~MR. ENGLISH~~ MR. BESHORE: Yes, there are no
23 objections.

24 Should we take a brief recess?

1 JUDGE BAKER: Yes, we can take a brief recess.

2 MR. VETNE: Your Honor, may I say one thing?

3 JUDGE BAKER: Yes.

4 MR. VETNE: A similar request was made at
5 another hearing, and it turned out the exhibit was not
6 incorporated in the record as if read. So, I want to make
7 sure that that -- that that actually gets done because
8 sometimes we do word searches of the transcript looking
9 for things, and so it really needs to get into the record,
10 not just accompany the record as an exhibit.

11 JUDGE BAKER: Very well. Thank you.

12 Mr. Court Reporter, will you take it upon
13 yourself as a personal responsibility to see that all
14 that's been marked as Exhibit 38 is copied in its entirety
15 in the record?

16 Mr. Vetne, the court reporter has indicated
17 he will do that.

18 (The document referred to was
19 marked for identification as
20 Exhibit Number 38.)

21 Whereupon,

22 EDWARD GALLAGHER

23 having been first duly sworn, was called as a witness
24 herein and was examined and testified as follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

DIRECT TESTIMONY

"Proposal 4. Payments from the Producer Settlement Fund are presently required to be disbursed by the 16th of the month. Proposal 4 from the Hearing Notice seeks to change the "16th" to "the day after the due date required for payment" to the Producer Settlement Fund. The intent of this proposal is to provide a more orderly disbursement of funds. Under current provisions, the 16th of the month sometimes is the same day that payments into the Producer Settlement Fund are made. Identification of the "16th of the month" was a Federal Order Reform aspect that slipped by our collective purview of the proposed changes. If recognition of this aspect had occurred during the Federal Order Reform review process, the ADCNE cooperatives would have asked for the change which we are seeking at this hearing.

Proposal 5. ADCNE's request changes to Section 1001.7 to limit the ability of vast quantities of milk not produced near the Northeast and not in any meaningful amount delivered to distributing plants pooled under the Northeast Order from being pooled under the Northeast Order. Known as "opportunistic pooling", the liberalness of Section 1001.7 and its resulting impact on blend prices under the Northeast Order is an unintended consequence of

1 Federal Order Reform. ADCNE's requested changes will
2 limit the potentially abusive pool riding that could occur
3 on the Northeast Order. This abusive pool riding could
4 lead to vastly lower blend prices, reduced milk production
5 within the Northeast, and a longer-term inability for
6 Class 1 distributing plants from being adequately
7 supplied.

8 These proposed changes are not meant to
9 prohibit milk produced in distant production regions from
10 being pooled under the Northeast Order. Instead, the
11 changes are meant to limit such pooling to that which has
12 a regular association with distributing plants pooled
13 under the Northeast Order. Under the Order's current
14 provisions, a manufacturing plant in a distant area could
15 become a pool plant under the Northeast Order in the Fall
16 months by delivering a small portion of its plant receipts
17 to an Order 1 distributing plant. It then could remain a
18 pool plant during the subsequent months of January through
19 July without shipping any milk to a pool distributing
20 plant. As a pool plant with no pooling requirements, it
21 could ultimately pool the entire milk production of the
22 state in which it is located.

23 These are two aspects of Section 1001.7 that
24 need to be dealt with in order to prevent what has become

1 known as opportunistic pooling and thereby reinforce the
2 integrity of the Northeast Federal Order. Both aspects
3 are mutually inclusive and need to be dealt with swiftly
4 and simultaneously.

5 The first aspect is the elimination of
6 Subsection 7 of Section 1001.7. The Order language in
7 Subsection 7 is more popularly known as the "split-plant"
8 provision. This provision allows a pool plant to
9 designate a portion of its plant as a non-pool plant. The
10 use of the split-plant provision creates two "paper
11 accounting" plants out of one physical plant location and
12 it serves to facilitate opportunistic pooling on the
13 Northeast Order.

14 The second aspect relates to the Northeast
15 Order's supply plant shipping provisions. Presently, to
16 qualify as a pool plant under Section 1001.7(c), a
17 manufacturing plant is required to transfer or divert at
18 least 10 percent of its plant receipts to a pool
19 distributing plant during the months of August and
20 December and transfer or divert at least 20 percent to a
21 pool distributing plant during the Fall months of
22 September, October and November. If a manufacturing plant
23 meets these requirements in each of the months of August
24 through December, the present Order language allows such a

1 plant to automatically be a pool plant during the
2 subsequent January through July, including the entire
3 flush period. Meeting the August through December pool
4 plant requirements allows a manufacturing plant to pool
5 unlimited amounts of milk on the Order Number 1 pool
6 without having to ship a single load of milk to a pool
7 distributing plant.

8 Manufacturing plants that have set up their
9 operations to take in both Grade A and Grade B milk can
10 best take advantage of the split-plant pooling provision
11 that ADCNE is attempting to change. Such plants can
12 utilize this provision to "skinny" down the Grade A plant
13 receipts to make it easier for them to become a pool plant
14 under a high Class 1 utilization and ultimately high
15 producer price differential Order. Here's how.

16 Take, for example, a cheese plant located
17 outside of the Northeast that takes in 62 million pounds
18 of milk in a month that can be treated as two plants, a
19 Grade A plant and a Grade B plant. For every one load of
20 milk transferred from the Grade A plant to a pool
21 distributing plant under the Northeast Order, the
22 manufacturing plant can take delivery at the Grade A plant
23 and pool on the Northeast Order an additional nine loads
24 during August and December. By doing this, the Grade A

1 plant meets the requirements of a pool plant for those
2 months. The remaining milk purchases, amounting to 1,230
3 loads of milk, are delivered to the same physical facility
4 but to the cheese plant's Grade B plant side. These
5 loads, plus the nine loads on the Grade A side that aren't
6 shipped to a pool distributing plant, are used to
7 manufacture cheese. Since the milk at the Grade B side of
8 the plant is Grade A and can be pooled under Federal
9 Orders, the cooperative operating the plan can use
10 provisions in the "local" Federal Order to get the milk
11 pooled on that "local" order.

12 During the Fall months of September, October
13 and November, two of the 10 loads delivered to the Grade A
14 side would be delivered to a pool distributing plant in
15 the Northeast Order to qualify the Grade A side of the
16 plant as a Northeast Order pool supply plant.

17 Once accomplished, each month during August
18 through December, the Grade A side of the plant
19 automatically becomes a Northeast Order pool supply plant
20 for the subsequent months of January through July.
21 However, there is no requirement to ship any milk to a
22 Northeast Order distributing plant again until August.
23 Instead, all the milk delivered to the Grade a side can be
24 utilized in the production of cheese, diverted to the

1 Grade B side or diverted to another cheese plant nearby.

2 The Northeast Order has an appropriately
3 liberal one-day touch-base provision. After the
4 equivalent of one-day's milk production of a farmer is
5 delivered to a Northeast Order pool plant, that farmer can
6 become a Northeast Order producer. The farmer maintains
7 Northeast Order producer status as long as his/her milk is
8 associated, i.e., pooled, with the Northeast Order pool
9 each subsequent month and the producer's milk is not
10 delivered to a non-pool Class 1 plant on any day.

11 Back to our example, the Northeast Order touch-
12 base provision means that any producer whose milk is on a
13 load that is delivered to the Grade A side of the plant
14 meets the qualifications to have his/her milk pooled under
15 the Northeast Order. During the August to December
16 qualifying period, the supply plant shipping provisions
17 limit the amount of milk that can be pooled and limits the
18 amount of milk that would be delivered to the Grade A
19 side. However, during the free pooling period of January
20 through July, any farmer delivering just one day to the
21 Grade A side becomes eligible for Northeast Order pool
22 producer status.

23 It is here during this period where the real
24 threat of pool-riding abuse can occur. Now, a single

1 plant has the theoretical ability to pool 100 percent of
2 its state's milk production on the Northeast Order pool.
3 Here is why.

4 In my example of a split-plant purchasing 62
5 million pounds of milk per month, this equates to two
6 million pounds of milk receipts per day. Although not
7 strictly the case, let's assume that the two million
8 pounds per day represents two-days' milk production on
9 about 300 farms. By juggling routes, it is theoretically
10 possible to qualify 9,300 producers,
11 ~~300 farms times 31 days,~~ **(9,300 farms X 3,333 pounds per**
12 **farm per day X 31 days) for the pool. This would then**
13 **allow, via diversions, a split manufacturing pool plant to**
14 **pool 961 million pounds of milk on the Northeast order in**
15 **January.** During February, the same rotation procedure
16 could be used to pool qualify another 8,400 farms and an
17 additional 784 million pounds of milk. Since 961 million
18 pounds could have been qualified in January, a total of
19 1.7 billion pounds of milk could be pooled o the Northeast
20 Order during February. As you can see, it doesn't take
21 too many months before a state as large as California
22 could have 100 percent of its monthly milk production
23 pooled on the Northeast Order.

24 Recapping this example, the Northeast Order

1 provisions present the opportunity for a manufacturing
2 plant of any intake capacity, from two loads per month to
3 150,000,000+ pounds of milk per month in the heart of a
4 distant marketing order's milkshed, to deliver a total of
5 eight loads of milk, about 400,000 pounds of milk, during
6 August through December and qualify as a pool plant during
7 the subsequent January through July. Upon achieving this,
8 the particular plant not only can pool 100 percent of the
9 milk it uses for manufacturing at the plant, but all the
10 milk produced in the state in which it is located during
11 the subsequent January through July.

12 For manufacturing plants located in states
13 outside of the Northeast Order that purchase milk in the
14 milkshed of a marketing order with a producer price
15 differential or blend price that is lower than the
16 Northeast's, the potential economic harm to the Order
17 Number 1 pool can be significant and place at risk its
18 producer price differential level, the economic, financial
19 and psychological impact on the Order 1 pool producers in
20 the Northeastern states, and the ability of cooperatives
21 and handlers to maintain a competitively-priced milk
22 supply that meets the needs of the Class 1 handlers and
23 dealers.

24 Although not currently to this extreme, the

1 potential ability for this to occur should be corrected.
2 Ultimately, taken to an extreme, the ability for
3 Northeastern Class 1 and manufacturing plants to compete
4 in regional and national markets could be harmed.

5 Continuation of these provisions, as is, is
6 unnecessary to the fulfillment of the purpose of the
7 Northeast Order. At present, the provisions discussed
8 serve to create the potential disorderly marketing
9 conditions that could undermine the strong and vibrant
10 dairy industry in the Northeast.

11 ADCNE strongly recommends the following changes
12 to reduce potentially harmful effects of opportunistic
13 pool riding.

14 Eliminate Section 1001.7(c)(3) which allows for
15 manufacturing plants to obtain "free-ride" pooling during
16 January through July if, during each of the prior months
17 of August through December, the plant met the pool plant
18 provisions.

19 Amend the provisions of Section 1001.7(c)(1) to
20 create year-round supply plant pool requirements.
21 Currently, there are year-round requirements that are
22 imposed on manufacturing plants that do not meet the
23 August through December qualification requirements.

24 These requirements are that during the months

1 of January through August and December, a minimum of 10
2 percent, and during September through November, a minimum
3 of 20 percent of plant receipts are received or diverted
4 to Northeast Order pool distributing plants.

5 ADCNE requests that 1001.7(c)(1) be amended to
6 incorporate the 10 percent shipping requirements of
7 January through August and December and the 20 percent
8 shipping requirements of September through November as the
9 regular monthly, year-round, shipping requirements for
10 pool supply plants.

11 Eliminate Section 1001.7(h)(7) which allows for
12 split plants.

13 Make the requested adjustments in 1001.7(g)
14 that correspond to our marketwide services proposal.

15 Redesignate Paragraphs 1001.7(c)(4) and (c)(5)
16 as Paragraphs (c)(3) and (c)(4).

17 Exhibit * 38, Table 1, estimates the impact to
18 the producer price differential as a result of milk being
19 pooled in the manner described above. The pounds
20 highlighted under the heading "opportunistically pooled"
21 are estimated from a table in Exhibit 5 presented by Peter
22 Fredericks of the Northeast Order Market Administrator's
23 office. To get the opportunistically-pooled pounds, I
24 took Peter's monthly numbers and subtracted three million

1 pounds. This subtraction was made based on my estimates
2 of the milk associated with the Northeast Order pool due
3 to the Order 1 pool distributing plant located in Utah.

4 The analysis I went through shows that for the
5 18-month period from January 2001 through July 2002, the
6 Northeast Order producer price differential was reduced by
7 an estimated 16 cents per hundredweight. This varied from
8 a high of 51 cent reduction to an increase of about 1 cent
9 on a monthly basis.

10 The changes ADCNE is recommending will likely
11 restore most of this value to the producer price
12 differential and improve prices to all Northeast Order
13 producers. Although the amount of the reduction on the
14 Northeast Order producer price differential is not as
15 great as occurred in other Orders due to pool-riding
16 activities, it nonetheless is an unnecessary cost to the
17 pool. More importantly, the potential extent of the harm
18 to the pool could so severely lower the Northeast's
19 producer price differential that these changes must be
20 made on an expedited basis and be implemented prior to
21 January 1, 2003.

22 During the Federal Order Reform process, ADCNE
23 was a proponent of the "free-ride" provisions for the
24 subsequent January through July but did not request the

1 split-pool plant provision. During the Federal Order
2 Reform comment period, ADCNE did not recognize the
3 significance of the split-plant provisions in combination
4 with the free-ride provisions could have on the Northeast
5 Order producer price differential. This hearing is the
6 first opportunity we have had to correct this unintended
7 consequence of Federal Order Reform. Due to the need to
8 correct this issue prior to the beginning of the next
9 free-ride period that begins in January, ADCNE requests an
10 emergency and expedited implementation of this proposal by
11 January 1, 2003.

12 During the ADCNE deliberations of the formation
13 of the Northeast Order, Dairylea and DFA had been
14 proponents for allowing the free-ride provision. It was
15 our goal to create a set of Federal Order provisions that
16 were fair to all handlers previously pooled under the
17 former Orders that were to make up the Northeast Order.
18 Dairylea and DFA recognized that it would be important to
19 have the free-ride provisions so that Friendship Dairies,
20 Pollio, Kraft, Chateaugay Cooperative and Dietrichs Milk
21 Products would all be able to maintain their direct
22 producer shippers and to pool milk during the early
23 implementation of the new Order.

24 Since implementation of Federal Order Reform,

1 one of these businesses chose to make their producers non-
2 pool. Presently, all of the direct shippers to each of
3 these businesses are pooled by Dairy Marketing Services.
4 Due to the changing business relationships in the
5 Northeast Order and the continuation of provisions that
6 allow proprietary plants to pool their independent
7 shippers if they so choose, the Northeast Order's "free-
8 ride" provisions serve no useful purpose and should be
9 eliminated. Also note, any handler currently meeting the
10 20 percent shipping requirements in September through
11 November would not be disadvantaged by the imposition of
12 year-round shipping requirements since the January through
13 July percentages would be lower than those they would be
14 meeting in the Fall.

15 My ADCNE colleagues and I have reviewed New
16 York State Dairy Food's Proposal Number 2. ADCNE supports
17 the parts of this proposal to the extent that it is
18 similar to ours regarding split plants and shipping
19 provisions. However, their proposed increase in the
20 August through December shipping provisions is unwarranted
21 and could lead to disorderly marketing conditions in that
22 some handlers currently pooling milk on the Northeast
23 Order could be forced to depool producers.

24 Additionally, the NYS Dairy Foods proposal has

1 not closed the loophole in the Order regarding the free-
2 ride shipping provisions during January through July.
3 Their proposed changes do not present the appropriate
4 safeguards to the integrity of the Order. Although a
5 portion of their Proposal Number 3 would require 25
6 percent of receipts to be shipped to pool plants during
7 January through July, this does not ensure that Class 1
8 distributors receive milk, nor does it limit the potential
9 pool-riding ability for a distant region's manufacturing
10 plant. These things being the case, Proposal 2 should be
11 rejected.

12 Friendship Dairies Proposal Number 10 has also
13 been reviewed by ADCNE. Again, ADCNE supports it in that
14 it maintains shipping provisions during August through
15 December. However, it does not address the free-ride
16 months of January through July and its reduction in the
17 level of the shipping provisions would not be an
18 improvement to the Northeast Order. As a point of note,
19 we believe the reference to the Paragraph (f) in the
20 1001.7(c)(3) is incorrect. We believe the correct
21 reference should be Paragraph (g), not Paragraph (f).

22 Proposal 6. The changes to 1001.13(d)(1) were
23 requested so that the Order language is clearer relative
24 to the interpretation of this provision. Presently, the

1 touch base for a producer is one day. Once a producer's
2 milk is delivered to a pool plant during the month, at any
3 time during the month, the producer's milk is eligible to
4 be pooled for the entire month and any subsequent month,
5 provided the producer remains a pool producer under the
6 Northeast Order. If such producer does not have any of
7 his/her milk pooled under the Northeast Order in a
8 subsequent month, such farm must re-establish itself with
9 the Northeast Order by having his or her milk delivered to
10 a pool plant some time during a month.

11 The Northeast Order does not have any year-
12 round diversion limitations for pool distributing plants.
13 Although there aren't specific diversion limitations for
14 pool supply plants, the monthly shipping requirements, if
15 any, have been de facto diversion limitations. That is,
16 if a plant or 9-C cooperative has to divert 10 percent of
17 its receipts to a pool distributing plant, it then becomes
18 limited to diverting no more than 90 percent of its
19 receipts to a non-pool plant. We believe these also apply
20 to pool distributing plants.

21 The lack of specific diversion limitations on a
22 year-round basis under the producer milk provisions needs
23 to be corrected. The lack of diversion limitations on
24 distributing plants means they can divert significant

1 amounts of milk off their plant during January through
2 July, limited only by economics and the amount of milk
3 that can be delivered to their plant. Ultimately, this
4 could mean that one pool distributing plant could pool an
5 entire region's milk production. Here's an example of how
6 it could happen.

7 Suppose a pool distributing plant needs 37
8 million pounds of milk. It receives this milk from 200
9 farms that produce 3,000 pounds every day. Since there
10 are no de facto diversion limitations at pool distributing
11 plans during January through July, each day, 200 different
12 farms could supply milk to the plant. Since one day's
13 farm production was received at the pool plant, the
14 producer is qualified for the Order Number 1 pool until
15 such farm's milk is no longer reported as October Number 1
16 pool milk. So, in January, this plant could qualify 577
17 million pounds of milk. In February, the distributing
18 plant could qualify an additional 521 million pounds for
19 the Order Number 1 pool and allow that plant to pool 1.1
20 billion pounds. In a few months, the plant could
21 theoretically pool all the milk in the Northeast on Order
22 Number 1.

23 Although I don't illustrate them here, there is
24 a potential pool-riding opportunity for milk produced

1 outside of the region and taking advantage of the lack of
2 diversion limitations at pool distributing plants. ADCNE
3 requests swift and immediate resolution to this issue by
4 implementing our proposal on an emergency and expedited
5 basis.

6 During the Federal Order Reform process, myself
7 and other members of ADCNE failed to recognize this
8 loophole in the Northeast Order. If we had, we would have
9 pointed this out to Dairy Division and requested the
10 diversion limitations that we requesting at this hearing.

11 The application of our request is fairly
12 straightforward. ADCNE requests year-round monthly
13 diversion limitations that would be one minus that month's
14 shipping provision. This then would be diversion
15 limitations of 90 percent during December through August
16 and 80 percent for September through November. Additional
17 language is suggested that milk that is over-diverted
18 shall not be producer milk and that the Market
19 Administrator shall depool all non-pool plant deliveries
20 if the over-diverting handler doesn't cooperate with the
21 Market Administrator by designating producers whose milk
22 will be depooled.

23 ADCNE requests that any milk depooled due to
24 over-diversion is not treated under the dairy farmer for

1 other market provisions and is allowed to be pooled again
2 the following month and will not carry the dairy farmer
3 for other market penalties.

4 Also, ADCNE is requesting that the Market
5 Administrator be given the same authority he presently has
6 with supply plant shipping provisions and that other
7 Market Administrators have in their Orders with diversion
8 limitations percentages; namely, to be able to
9 administratively adjust the percentages as market
10 conditions warrant. Truly, this is an amendment that is
11 more procedural than strategic. It is the intent of ADCNE
12 to maintain the diversion percentages at one minus the
13 shipping provision percentages. If the shipping
14 percentages are adjusted administratively, then the
15 diversion percentages also need to be so adjusted.

16 ADCNE also recognizes the unfairness of
17 allowing the same milk to be pooled on a state order,
18 utilizing minimum pricing and marketwide pooling of the
19 Class 1 price proceeds, and a Federal Order. To my
20 knowledge, such double dip pooling is not now occurring on
21 the Northeast Order. However, due to the presence of the
22 Western New York State Milk Marketing Order within the
23 milkshed of the Northeast Order and the knowledge of
24 double dip pooling of California milk elsewhere, the

1 Northeast Order should be amended to prevent this from
2 occurring.

3 The addition of Paragraph 1001.13(e) was
4 specifically worded to make the double dipping prohibition
5 effective on state order milk that utilizes minimum class
6 pricing and marketwide pooling of the class price
7 proceeds. This would certainly entail milk pooled under
8 the Western New York State Order and California's state
9 order. However, it would have no impact on milk priced
10 under state pricing programs such as those operated by the
11 Pennsylvania Milk Marketing Board, the Maine Milk
12 Commission, the former Northeast Dairy Compact or the
13 Virginia Milk Commission. Under these state pricing
14 programs, state-mandated Class 1 premiums are paid to
15 producers delivering milk to Class 1 plants under their
16 regulation. In the case of Virginia Milk Commission,
17 Maine, the Dairy Compact and possibly under the PMMB,
18 these Class 1 premiums are pooled and paid to a wider
19 group of farms than those actually delivering to the Class
20 1 plants. Allowing milk that is priced under state milk
21 pricing regulations like those mentioned would maintain
22 orderly marketing conditions within the Northeast Order.
23 Using this proposed amendment to depool milk priced under
24 the four Northeastern state programs would cause serious

1 disorderly marketing conditions as it would impinge on the
2 ability for Northeast Order pool distributing plants from
3 maintaining an adequate supply of milk for their needs.

4 Additionally, ADCNE requests that the present
5 1001.13(d)(2) be redesignated as 1001.13(d)(3).

6 My ADCNE colleagues and I have reviewed New
7 York State Dairy Foods Proposal Number 3. To the extent
8 that it is similar to our Proposal Number 6, in that it
9 maintains a touch-base provision, would implement
10 diversion limitations and give the Market Administrator
11 discretionary authority to adjust the diversion limits,
12 ADCNE supports it. However, ADCNE does not support their
13 two-day touch-base provision, request to have milk touch
14 base in August through December, and restrictive levels of
15 their diversion limitations.

16 Implementation of Proposal 3 could cause
17 disorderly markets as it would significantly raise the
18 cost of producers maintaining their pool eligibility. It
19 could prevent some producers located in the Northeastern
20 states and who have been regularly pooled on the
21 Northeastern Order or its predecessor Orders from
22 retaining pool producer status. If milk was forced from
23 the pool, it could undermine premium markets and blend
24 prices throughout the Northeast."

1 (Whereupon, a recess was taken.)

2 JUDGE BAKER: Back on the record.

3 MR. ENGLISH: Mr. Beshore may have some
4 questions first, I think.

5 MR. BESHORE: Yes, I do have just a few
6 questions on direct.

7

8

9

DIRECT EXAMINATION

10 BY MR. BESHORE:

11 Q Mr. Gallagher, first, on Page 4 of your
12 testimony, which is Exhibit 38, at the bottom, there's a
13 reference to Exhibit X, Table 1. Should that be Exhibit
14 38, Table 1?

15 A Yes, it should be.

16 Q That's the table attached to your testimony
17 which is in Exhibit 38?

18 A Yeah. The last page of the testimony.

19 Q Now, your testimony in Exhibit 38 does not
20 address Proposal 1. Does ADCNE have a position with
21 respect to Proposal 1?

22 A Yes, it does.

23 Q Okay. Would you indicate that position and
24 explain it, please?

1 A Yeah. ADCNE opposes Proposal 1. Dairy farming
2 is an industry that's 24/7. Those that provide services
3 to dairy farmers unfortunately sometimes have to work some
4 pretty odd and pretty hard hours and sometimes that means
5 working late to get the required things done so that dairy
6 farmers can get paid.

7 We are all challenged in our businesses to be
8 able to meet deadlines. There is no single business in
9 this room that isn't challenged in that manner, and
10 regarding the -- the reporting issues, certainly any --
11 any handler in this room that has to rely on data coming
12 in from another business entity is -- is challenged on
13 getting the information in time so that they can file the
14 reports timely, and certainly anybody that relies on
15 information from another business does not necessarily
16 have any ability to force another business to report to
17 them earlier. So, we are all challenged with that.

18 That said, I do not believe -- ADCNE does not
19 believe that the current filing date is unreasonable, and
20 we all, I think, as an industry need to work harder
21 together to find ways for the industry to come together to
22 resolve this problem as opposed to making a regulatory
23 change that in the end will result in delay of payment to
24 those who we serve and that is dairy farmers.

1 This is the, as I had testified earlier, the
2 largest Federal Milk Marketing Order in the United States,
3 largest number of producers, largest number of non-member
4 producers, and -- not the largest number of producers but
5 certainly the largest -- one of the largest number of
6 producers and the largest number of non-member producers,
7 and we do not want to see payments to dairy farmers
8 delayed any further than they already are, and I think as
9 an industry, we can come together to resolve these issues
10 ourselves.

11 I would also like to point out that the
12 Northeast Order is already the latest reporting date
13 order. There's a couple of others whose reports of
14 utilization are also due by the 9th, but none as late as
15 the 10th. I also don't believe that by adjusting the date
16 it would speed up the process. I just think everything
17 would happen one day later.

18 So, in summary, in excuse of the administrative
19 difficulty, I believe it will cause huge financial -- huge
20 financial costs to dairy farmers pooled under this Order,
21 and I believe that **during** Federal Order Reform, when the
22 Secretary judged that there would be some challenges
23 because of the make-up of our Order, he did in fact set a
24 date for the Northeast Order that was the latest of any of

1 the other Orders or -- or as late as any other Order.

2 So, I believe during the Federal Order Reform
3 process, the unique characteristics of the Northeast Order
4 were considered when the Secretary set the current
5 reporting date.

6 Q One of the changes that would be made in
7 Proposal 1 does not relate to reporting challenges, it's
8 strictly the request to defer the partial payment now due
9 on the 26th of the month till the 30th of the month.

10 Is your opposition to Proposal 1, does it
11 include opposition to deferring the partial pay date?

12 A Yes, it is. Dairy farmers should be paid as
13 timely as possible. The money we're talking about is
14 dairy farmer money, and it should be paid to them as
15 quickly as possible. I recall Mr. Fitchett's testimony of
16 yesterday indicating that the number of advances he has to
17 make because of the closeness of the two payment dates and
18 with 45, I can tell you two businesses that I work with,
19 that's a pretty small number, and advances to dairy
20 farmers are a normal course of business in our industry as
21 well ~~as our~~ **are** pool adjustments that we referred to.
22 That's the normal course of the business, that all of us
23 operate under.

24 Q Now, Mr. Gallagher, you've addressed both in

1 your comments in Exhibit 38 and previously some comments
2 with respect to whether you believe the issues in this
3 hearing should be addressed by the Secretary on an
4 emergency or an expedited basis.

5 Can you just summarize ADCNE's position with
6 respect to whether conditions exist in Order 1 which merit
7 consideration of proposals on an expedited basis?

8 A Yes, I can. Thank you.

9 The ADCNE proposals here at this hearing, I
10 believe, all warrant to be considered on an emergency and
11 expedited basis. In Exhibit 38, we talk about some
12 solutions to what we call "pool-riding" issues, both due
13 to split-plant provisions in this Order that I feel are no
14 longer necessary, that the group feels are no longer
15 necessary, as well as having the -- the zero percentage
16 shipping percentage during January through July as well as
17 not having diversion limits on pool distributing plants.

18 They all create a loophole in the Order that
19 can be taken advantage of and that will lower blend prices
20 to producers in this area. I believe that needs to be
21 dealt with on an emergency basis to close up those
22 loopholes as well because if -- if new information comes
23 along that we may see this in the August pool or anything
24 like that that may change our minds on this, we'd reply in

1 brief, if there was a change to our position on -- on the
2 emergency conditions that exist that I've talked about or
3 that we've written about in Exhibit 38.

4 As well as for marketwide services, our
5 marketwide services proposal, the ADCNE cooperatives and
6 owners that meet the balancing provisions, the marketwide
7 service provisions, have experienced significant balancing
8 costs that are becoming burdensome to their members in
9 that they have to finance that entire electricity --
10 excuse me -- milk balancing ~~curve~~ **period**. We -- we cannot
11 go through another flush period without some assistance
12 and some mitigation from those costs.

13 So, we're asking that our Proposal 7 be dealt
14 with on an emergency and expedited basis. We believe that
15 Congress stated that these types of provisions are very
16 important and should be timely acted on, and we will talk
17 in our brief on how we believe that should be applied.

18 Q Thank you, Mr. Gallagher.

19 MR. BESHORE: That concludes my direct
20 examination and Mr. Gallagher's direct testimony at this
21 time.

22 JUDGE BAKER: Are there any questions for Mr.
23 Gallagher? Mr. Vetne?

24 MR. VETNE: Your Honor, I have a request to

1 briefly interrupt Mr. Gallagher's cross examination with
2 just a tad additional information by Mr. Fredericks that I
3 requested that are relevant to several of the pooling
4 proposals. It's a one-page exhibit.

5 JUDGE BAKER: Well, he's being very gentlemanly
6 and graciously stepping down.

7 MR. BESHORE: We have no objection to Mr.
8 Fredericks being called for this -- for this purpose at
9 this time.

10 JUDGE BAKER: Very well.

11 (Whereupon, the witness was excused.)

12 Whereupon,

13 PETER FREDERICKS

14 having been previously duly sworn, was recalled as a
15 witness herein and was examined and testified further as
16 follows:

17 DIRECT EXAMINATION

18 BY MR. VETNE:

19 Q Mr. Fredericks, I asked you this morning, and
20 I'm extraordinarily grateful that you're here this
21 afternoon, if you could assemble some information showing
22 the pounds of milk received at manufacturing plants that
23 are now non-pool plants that were formerly pool plants
24 under Order 2, is that correct?

1 A That is correct.

2 Q Okay. And you've assembled in a one-page --

3 MR. VETNE: Your Honor, could I have this
4 marked as the next consecutive exhibit?

5 JUDGE BAKER: It would be Exhibit 39.

6

7 (The document referred to was
8 marked for identification as
9 Exhibit Number 39.)

10 JUDGE BAKER: Is that 1997 or 1999?

11 THE WITNESS: 1999, December 1999.

12 JUDGE BAKER: Thank you.

13 It's marked as 39, Mr. Vetne.

14 MR. VETNE: Okay. And there's been a
15 **handwritten** correction on the -- on the year.

16 BY MR. VETNE:

17 Q Could you just explain what's in here?

18 A This list is pool plants that were classified
19 as manufacturing plants under the ~~Formal~~ **former** Order,
20 Federal Order Number 2, in the month of December 1999. A
21 list of those plants is -- is given ~~in there~~ **on the left**.
22 These plants now are non-pool manufacturing plants under
23 the new Northeast Combined Order, and there's two
24 representative months, July of 2002 and December of 2001,

1 **in and** pounds of milk ~~received~~ **receipts** at those plants
2 under the -- under those current months in the Northeast
3 Order.

4 Q And that's Order 1 of pool milk receipts?

5 A Order 1 pool milk receipts, correct.

6 Q Thank you very much.

7 MR. VETNE: That's all I have.

8 JUDGE BAKER: Very well.

9 MR. VETNE: I move Exhibit 39 into evidence.

10 JUDGE BAKER: Very well. Mr. English?

11 MR. ENGLISH: May I ask a few questions?

12 JUDGE BAKER: Yes.

13 CROSS EXAMINATION

14 BY MR. ENGLISH:

15 Q Mr. Fredericks, would it be correct to say that
16 the number listed here for pounds of milk received, do you
17 know whether that is pool milk or non-pool milk?

18 A It is pool milk.

19 Q So, even though the plants may not be pool
20 plants, this milk is pool milk, correct?

21 A That is correct.

22 Q Could there be other pounds of milk received at
23 these plants that are non-pool milk since they're non-pool
24 plants?

1 A There could be.

2 Q And you don't have that information because if
3 it's non-pool milk, it's not reported to you?

4 A That is right. It would not be represented in
5 these numbers as well.

6 MR. ENGLISH: With those caveats, Your Honor, I
7 **don't** have an objection to its admission.

8 JUDGE BAKER: Very well. Are there any other
9 questions or objections? Mr. Stevens?

10 MR. STEVENS: Yeah.

11 CROSS EXAMINATION

12 BY MR. STEVENS:

13 Q This is not presented for or against any
14 proposal, is it?

15 A No, it is not.

16 Q For the use of the parties in the hearing?

17 A That's correct.

18 MR. STEVENS: That's all I have.

19 JUDGE BAKER: Are there any other questions or
20 objections?

21 (No response)

22 JUDGE BAKER: Hearing none, Exhibit 39 is
23 admitted and received into evidence.

24 (The document referred to,

1 having been previously marked
2 for identification as
3 Exhibit Number 39, was
4 received in evidence.)

5 JUDGE BAKER: Thank you, Mr. Fredericks.
6 (Whereupon, the witness was excused.)

7 JUDGE BAKER: Thank you, Mr. Gallagher.

8 Whereupon,

9 EDWARD GALLAGHER

10 having been previously duly sworn, was recalled as a
11 witness herein and was examined and testified further as
12 follows:

13 MR. VETNE: Thank you, everybody.

14 JUDGE BAKER: Mr. English?

15 CROSS EXAMINATION

16 BY MR. ENGLISH:

17 Q Mr. Gallagher, as to Proposal Number 1, I'm
18 grateful that you think people should, you know, work
19 overtime and everything. Would you confirm for me that
20 your organization was one of the organizations that
21 produced one or more handlers that represent the New York
22 State Dairy Foods Association that you were unable to get
23 the reports to them by Tuesday, the 10th of this month?

24 A We weren't this month. We may have been the

1 other months. I don't believe we were this month.

2 Q So, if I have a witness here who gets on the
3 stand later and says that, yes, that's when he got his
4 report, it was Tuesday, the 10th, you would be
5 contradicting him?

6 A Oh, the individual handler or the Market
7 Administrator?

8 Q No, no. The individual handler.

9 A Oh, I -- I don't know.

10 Q And so, you don't know when the handler gets
11 the reports that they're supposed to work overtime and
12 somehow get them in on time, even though you get to them
13 late?

14 A I don't.

15 Q Okay. Turn to Table 1 of Exhibit 38. We spent
16 a little time looking at it, and I thought I just helped,
17 at least for myself, explain where it came from.

18 A Do you want me to explain how I calculated it?

19 Q Well, let me ask some specific questions, and
20 then if I haven't covered everything, you can --

21 A Okay.

22 Q -- explain further. The -- the column that is
23 labeled "Paper Pool Pounds", --

24 A Yes.

1 Q -- I looked at Exhibit 5 and while the number
2 is similar, it is different by about three million pounds
3 for the page on which the Market Administrator's ~~quoted~~
4 **disclosed** the pounds that were coming from states outside
5 the Marketing Order.

6 A Yep. How I calculated that column?

7 Q Well, first, let me just see if I can -- first,
8 I'd like to confirm that -- that -- that the real genesis
9 of that column is milk from outside the Northeastern
10 states, correct?

11 A Correct.

12 Q So, your definition of paper pool pounds does
13 not include pounds of milk produced in the Northeast,
14 correct?

15 A Correct.

16 Q Okay.

17 A Let me back up. There's probably some Rhode
18 Island milk in there maybe.

19 Q **A** For whatever milk has to be masked because of
20 ~~that milk,~~ **not enough** producers or ~~whoever~~ **whatever** it is,
21 they have to mask ~~it to~~ **if for, to few of** handlers,
22 whatever it is, may have gotten thrown into that column.
23 So, there may be a little bit, **but** --

24 A Nothing significant.

1 Q But you didn't necessarily mean to include that
2 because for your term "paper pool pounds", you mean milk
3 produced outside the Northeast as your testimony
4 indicates?

5 A Correct.

6 Q Okay. Now, --

7 A And outside of West Virginia.

8 Q And outside of West Virginia. Now, I **did do**
9 notice that the sort of general difference of three
10 million pounds, and I guess -- let me see if I understand
11 and you tell me if I'm wrong. Would that be pounds
12 associated with the fully-regulated plant in Utah that is
13 the Dannon Yogurt facility?

14 A Again, it was a -- when that plant initially
15 came on, it looked like there was about three million
16 pounds showing up in that column in the Market
17 Administrator statistics. So, I sort of went three
18 million pounds. I don't know if that's the correct number
19 or not, and it probably isn't, and so what I'm calling
20 paper pool pounds is probably -- can be seen as I'm saying
21 probably not the correct number of pounds. It's probably
22 too many. So, whatever I calculate here for the net
23 pooling ~~pack~~ **impact** is the worse case scenario. It
24 probably in reality wasn't as negative as what I was

1 showing.

2 Q Okay. Not unlike other proceedings, you were
3 trying to show an estimate -- you were really trying to
4 show an illustrative impact as opposed to an exact impact?

5 A Correct. I have no idea what the --

6 Q Fine.

7 A I don't have the information to calculate the
8 exact number.

9 Q I don't think any of us have, and I appreciate
10 what you ~~intended~~ **attempted** to do.

11 So, by way of example, since the milk in
12 January of 2001 far exceeded the number of pounds of milk
13 that were pooled for each of the months preceding August
14 to December, you assumed then that in order to be pooled,
15 that milk would have to have 10 percent deliveries on the
16 market to meet the requirements for milk that had not met
17 the requirements for the previous five months, correct?

18 A Correct.

19 Q And so, that's where again trying to create a
20 conceptual impact, you came up with deliveries in -- in
21 the third column?

22 A Yes.

23 Q Then you -- the fourth column would be the
24 difference between the -- the first column and the third

1 column. I guess you subtract the third column from the
2 first column?

3 A The additional deliveries?

4 Q Yes.

5 A Yes.

6 Q How did you calculate the Class 3 and Class 4
7 pounds?

8 A Okay. What -- what -- the assumption I made
9 was any milk that would have been driven in here on the
10 truck from an outside area landed in a Class 1 plant, and
11 milk that normally would have gone to that Class 1 plant
12 that particular month actually ~~had to be brought~~ **got**
13 **diverted** to a manufacturing plant. I made the assumption
14 that it got diverted to a Class 4 plant, and I will say
15 that I do know that some milk came in in that manner
16 during this time period that went to Class 1 plants and
17 did not displace other milk because the milk was needed at
18 the Class 1 plants, and I do not know if, you know, in
19 that rotation, whether there's actually milk displaced at
20 Class 1 ~~prices or plants~~ **if it** went to Class 4. That was
21 the assumption I made. It could have gone to a Class 3.
22 This is a real ball park estimate.

23 Q Right. But for the most part, for most of
24 these months, I mean, it's all -- I haven't checked yet,

1 but for the most part, the -- if it went to Class 4, it
2 had a lesser impact on the pool than if it went to Class 3
3 because Class 4 was higher than Class 3 for most of these
4 months?

5 A It might have. Yeah.

6 Q And then, the -- that **meant the** column for
7 Class 3 is the difference, I take it, between additional
8 deliveries and that amount that you assume went to Class
9 4?

10 A Yep. Wait, wait. The -- the Class 3 column in
11 **that every** case was the additional deliveries.

12 Q I'm sorry.

13 A And the distributing plant delivery then
14 transferred over to **the** Class 4 **column**.

15 Q Okay. I see. And you made the assumption that
16 -- that the additional deliveries went into Class 3 on --
17 on the grounds that it --

18 A It stayed -- it stayed home and went into a
19 local manufacturing plant, and then again, I don't know if
20 it was a Class 3 plant. I am making that assumption.

21 Q But that was -- you made that assumption based
22 upon the number of hearings on this, and the assumption is
23 that would be the great economic benefit to the **MP entity**
24 that would have been doing this, correct?

1 A I don't know that. That was the assumption I
2 made, and it wasn't just one entity **doing it**.

3 Q Well, if it was just one entity, you wouldn't
4 have had the information. So.

5 Thank you, sir.

6 JUDGE BAKER: Are there other questions for Mr.
7 Gallagher?

8 (No response)

9 JUDGE BAKER: Let the record reflect there are
10 none.

11 Thank you, Mr. Gallagher.

12 THE WITNESS: You're very welcome. Thank you.

13 (Whereupon, the witness was excused.)

14 JUDGE BAKER: Do you wish to admit Exhibit 38
15 into evidence?

16 MR. BESHORE: Yes, I'd move the admission of
17 Exhibit 38.

18 JUDGE BAKER: Are there any questions or
19 objections to Exhibit 38?

20 (No response)

21 JUDGE BAKER: Hearing none, Exhibit 38 is
22 admitted and received into evidence.

23 (The document referred to,
24 having been previously marked

1 for identification as
2 Exhibit Number 38, was
3 received in evidence.)

4 MR. BESHORE: At this time, I'd like to recall
5 Dennis Schad.

6 JUDGE BAKER: Very well. Mr. Schad?
7 Whereupon,

8 DENNIS SCHAD
9 having been first duly sworn, was called as a witness
10 herein and was examined and testified as follows:

11 MR. BESHORE: Your Honor, I'd like to ask that
12 Mr. Schad's testimony be marked as Exhibit 40.

13 JUDGE BAKER: It shall be so marked.

14 MR. BESHORE: It's testimony with respect to
15 Proposals 8, 9 and 11, and it's not a long statement, and
16 I would like to ask Mr. Schad to read it now, please.

17 JUDGE BAKER: Very well.

18 (The document referred to was
19 marked for identification as
20 Exhibit Number 40.)

21 DIRECT TESTIMONY

22 THE WITNESS: ADCNE opposes Proposal Number 8.
23 Proposal Number 8, submitted ~~b~~ **by** Friendship Dairies,
24 would liberalize the pool supply plant qualification

1 procedures. Currently, a pool supply plant must transfer
2 or deliver directly (divert) to 7-A or 7-B plants
3 sufficient volumes of milk to qualify. Qualification is
4 determined by a relationship where distributing plant
5 deliveries (numerator) are compared to total deliveries to
6 the supply plant, plus the diversions of the handler
7 operating the supply plant (denominator). Proposal Number
8 8 would limit the deliveries in the denominator to only
9 pooled Order 1 milk controlled by the operator and
10 included on his handler report. The proposal would
11 specifically exclude from the denominator milk from the
12 producer handlers, milk pooled on another Federal Order,
13 non-pool milk and milk received at the supply plant as
14 Order 1 co-op diverted milk, 9-C.

15 The intent of the supply plant qualification
16 procedure is to qualify both the plant and the handler
17 operator of the plant. It is meaningless to qualify a
18 supply plant in which the operator does not control the
19 milk of a group of dairy farmers. A cheese plant operator
20 would never incur the costs to ship milk from the plant to
21 a distributing plant unless the plant **is** intended to pool
22 a group of dairy farmers and draw from the Federal Order
23 pool.

24 Thus, it is appropriate for the operator of the

1 plant who also controls the milk of a group of dairy
2 farmers to qualify both the plant and the supply of the
3 milk he controls.

4 Proposal 8 would effectively reduce the supply
5 plant qualification standards from their existing modest
6 levels in this 45 percent Class 1 utilization market.
7 ADCNE does not believe that reduction in the performance
8 requirements in Order 1 are appropriate.

9 ADCNE opposes Proposal Number 9. Proposal
10 Number 9, submitted by Friendship Dairies, would
11 liberalize the pool supply plant qualifications.
12 Currently, a pool supply plant must transfer or deliver
13 directly (divert) to 7-A or 7-B plants sufficient volumes
14 of milk to qualify. Qualification is determined by a
15 relationship where the distributing plant deliveries
16 (numerator) are compared to total deliveries to the supply
17 plant, plus the diversions of the handler operating the
18 supply plant (denominator). Proposal Number 9 would add
19 to the numerator route distribution and packaged fluid
20 milk transfers from the supply plant.

21 Order 1 has a provision to qualify a
22 distributing plant, the 7-A provision. That provision
23 qualifies a distributing plant based on a Class 1
24 percentage of 25 percent and in-area route distribution of

1 the Class 1 of 25 percent. The proposal would cause
2 unnecessary confusion to handlers by merging the
3 characteristics of the 7-A and 7-C provisions together.

4 Additionally, the proposal would have the
5 possible unintended consequence of pooling on the Order
6 partially regulated distributing plants with route
7 distribution, 1001.3, greater than the 7-C plant-shipping
8 requirement of 10 or 20 percent. Moreover, while the 7-A
9 definition only includes in-area route distribution, the
10 proposal does not specify that the route distribution be
11 within the Marketing Area.

12 ADCNE opposes Proposal Number 9 which combines
13 the characteristics of two different order provisions for
14 the benefit of the few supply plants that may have Class 1
15 sales. The proposal confuses the provisions, such that a
16 distributing plant could qualify as a supply plant.
17 During the Reform process, ADCNE advocated the expansion
18 of federal regulation into the unregulated portions of the
19 Northeast and **also advocated** a lower in-area route
20 disposition standard for 7-A plants. The Final Rule
21 included neither. If the proposal's intention is to
22 accomplish the goal of extending regulation, ADCNE rejects
23 the method and opposes Proposal Number 9.

24 I don't believe -- since Number 11 has been

1 withdrawn, I think probably in the interest of time, it
2 can just be read into -- put in the record as if read.

3 JUDGE BAKER: Very well.

4 "ADCNE Opposes Proposal Number 11. Proposal
5 Number 11, submitted by Friendship Dairy, would change the
6 "producer for other markets" provisions of the Producer
7 section. Currently, a dairy farmer who is caused to be
8 reported as non-pool by his handler is excluded from the
9 pool for a specified period. Proposal Number 11 would
10 change the effective dates of (b)(5) from December to June
11 to January through July and in (b)(6) from July to
12 November to August through December. On that portion of
13 the proposal, ADCNE sees no compelling reason to change
14 the dates but is open to other reasoning.

15 Our opposition to Proposal Number 11 comes from
16 its abandonment of the provision in (b)(5) where a dairy
17 farmer is excluded for the month he is depooled and for
18 the two succeeding months. Proposal Number 11 would take
19 away any penalty for depooling a producer during the
20 current December through June period.

21 ADCNE proposed the "dairy farmer for other
22 markets" provisions during the Order Reform process.
23 Order 1 is surrounded by large areas of geography that is
24 not regulated by any Federal Order. This federally-

1 unregulated Marketing Area has allowed distributing plants
2 in New York, Pennsylvania, Maryland, and Virginia to be
3 partially regulated by the Federal Orders. The "dairy
4 farmer for other markets" provision was advocated to
5 provide a disincentive to handlers to use Order 1 to
6 balance these partially-regulated plants.

7 ADCNE opposes the portion in the proposal that
8 eliminates the two-month penalty for depooling milk during
9 the first half of the year."

10 MR. BESHORE: With that, I'd like to move the -
11 - the admission of Exhibit 40, including the third page
12 which addresses Proposal 11, which is published in here.

13 JUDGE BAKER: Very well. Are there any
14 questions or objections?

15 (No response)

16 JUDGE BAKER: Hearing none, Exhibit 40 is
17 admitted and received into evidence.

18 (The document referred to,
19 having been previously marked
20 for identification as
21 Exhibit Number 40, was
22 received in evidence.)

23 DIRECT EXAMINATION

24 BY MR. BESHORE:

1 Q Mr. Schad, Exhibit 40 includes a fourth page
2 which is a table.

3 A Yes.

4 Q Could you describe the information on that --
5 on that Table A, what it represents, please?

6 A That table -- I'm sorry. That table was
7 distributed by the Market Administrator's office around
8 January 2000 when the new Federal Order was implemented,
9 and it allowed people to understand the dairy farmer for
10 other markets provision.

11 What it very -- if you read it, you see the
12 July, August, September, October, November months, and
13 it's going from left to right, that would show you that if
14 a -- a handler caused a dairy farmer to be non-pool during
15 the month of July, that dairy farmer would be depooled
16 during that month, the green, and the succeeding December,
17 January, February, March, April, May, June as well.

18 Q When you say "depooled", you mean not eligible
19 to be pooled on Order 1?

20 A Withdrawn from the handler reports, so that it
21 is not -- not reported as pool milk on this Order or any
22 other Orders, and so you see the June, July, August,
23 September, October, November have that provision. I think
24 that's the (b)(~~e~~) provision.

1 There's also a provision that during the months
2 of December, January, and February, March, April, May,
3 June, that there is, in addition to depooling the producer
4 for one month, the penalty extends for the next two
5 months. So, if -- if a handler causes a producer to be
6 non-pooled during December, that producer is obviously
7 non-pooled December and also ineligible to be pooled on
8 the market the subsequent January and February. Again, it
9 works down till it gets to a point, as you see, if a
10 producer is depooled in May, he is -- the current
11 regulations would have that -- that pool -- that producer
12 ineligible to return until July and if the producer is
13 depooled in June, he is eligible to return in July.
14 That's the current Dairy Farmer ~~Market~~ **for Other Markets**
15 provision.

16 Q Thank you.

17 MR. BESHORE: Mr. Schad is available for cross
18 examination.

19 JUDGE BAKER: Very well. Are there any
20 questions for Mr. Schad? Mr. Vetne?

21 CROSS EXAMINATION

22 BY MR. VETNE:

23 Q Mr. Schad, the term "other markets" as used in
24 this -- this exhibit does not include other federal

1 markets. Producers are free to come and go from federal
2 markets, correct?

3 A We're referring to the chart?

4 Q Yes.

5 A Yes.

6 Q Yes. Yes, they are?

7 A Yes, they are. They are, as I said.

8 Q This -- this would only apply then to -- to a
9 handler who might consider the benefits or disbenefits of
10 taking some milk off the pool to take advantage of the
11 price inversion?

12 A Well, --

13 Q It would apply in that case?

14 A It would, and as my testimony says that I did
15 read, it was specifically put into the Order by ADCNE to -
16 - to the extent that ADCNE could put it -- could put
17 anything in the Order, due to the unregulated Class 1
18 plants in in Maine, New York, Pennsylvania, Maryland and
19 Virginia. So, there are -- there are two reasons for it.

20 Q Okay. Do you know whether this was applied to
21 the Class 1 plant in Portland, Maine, **Oakhurst Dairy**, when
22 it came into the market and had previously ~~processed~~
23 **caused** milk to be non-pooled?

24 A No, sir, I do not.

1 Q Going to your comments on Proposal 8, you would
2 agree, would you not, that any 9-C milk, any milk that's
3 diverted or delivered under 9-C, to a pool supply plant
4 has been pool-qualified by the cooperative, so causing the
5 milk to be delivered?

6 A Yes.

7 Q Okay. And you would agree that by -- by
8 shipping on that milk, it would effectively be required to
9 be double qualified?

10 A I -- it probably would be the definition of
11 double qualified, but I would expect the one that you
12 would give, I would answer affirmatively.

13 Q And -- and the more -- the more cooperative 9-C
14 milk that a supply plant receives or is willing to
15 accommodate, the greater the shipping burden on the supply
16 plant, correct?

17 A I'm not sure what the supply plant buys. If
18 you put that stipulation on it, I would agree to your
19 question.

20 Q The plants listed on Exhibit 39, which was
21 recently marked, Crowley, Eagle, Friendship, Kraft, Pollio
22 and ~~Chateaugay~~ **Leprino**, --

23 A If they're -- if there's a line of questioning
24 that comes from that, I don't have it in front of me, but

1 --

2 Q Are you familiar with those, some of those
3 plants?

4 A If we take -- start from ~~Chateaugay~~ **Leprino**,
5 start from there, yeah.

6 Q Okay. I mean, those plants are -- are -- are
7 an important outlet of the market's reserve to allow
8 producers to be pooled, correct?

9 A I'm not sure to allow producers to be pooled,
10 but I would say that there -- you know, we've talked a lot
11 about different kinds of reserves around here, and I would
12 think that they're definitely an important part of -- of
13 what Mr. Ling, Dr. Ling would call excess reserves.

14 Q Yes. And you would also agree that if milk
15 -- well, the ADCNE co-ops supply a lot of milk to these
16 plants, correct? You have the exhibit now in front of
17 you.

18 A Again, remember that ADCNE is not a marketing
19 ~~agent~~ **agency**. I can't -- I can't answer that question,
20 but I would say that you're probably correct.

21 Q All right. The comments that you made on
22 Proposal 9, let's go to those for a second.

23 A Yes, sir.

24 Q When a supply plant ships milk to a

1 distributing plant, that distributing plant -- that
2 shipment is qualified even though the shipping plant has
3 10 percent Class 2 use or 50 percent Class 2 use, correct?

4 A The supply plant ships to a distributing plant?

5 Q Right. The shipment qualifies whether the
6 receiving distributing plant has 10 percent -- sorry -- 10
7 percent Class 2 or 50 percent Class 2?

8 A Sure. The distributing plant has ~~to be~~ **to meet**
9 25 -- 25.

10 Q And the distributing plant can have up to --
11 theoretically up to 75 percent Class 2?

12 A Yes, sir.

13 Q And that's of milk physically received, and it
14 doesn't count to your diversion?

15 A Yes, the definition is milk physically received
16 at the plant.

17 Q And of that 25 percent of receipts, it can be
18 pooled with as little as 25 percent of that 25 percent
19 which is 6.25 percent distribution in the Marketing Area?

20 A That would be correct.

21 Q And the distributing plant receiving such milk
22 that qualifies as a supply plant, with respect to 75
23 percent of the route distribution can be anywhere outside
24 from, you know, from Central Pennsylvania to Florida and

1 Texas, on 75 percent of its distribution and still remain
2 pooled?

3 A Yes. Probably with the assumption that it is
4 physically located in the Marketing Area.

5 Q Why?

6 A Because I believe ~~it's just an oversight~~
7 there's another set of, ~~:- This if it~~ is physically located
8 outside the marketing area. You could get into a
9 plurality issue rather than --

10 Q There's a qualification in Section 7 as to its
11 locations, 7-A.

12 A That's probably in all the Orders. The
13 question of -- of being qualified in two different Federal
14 Orders at the same time.

15 Q Oh, yeah. That's why we have a plant out in
16 Utah that's qualified here because it has distribution
17 throughout the country, but a plurality is marketed in the
18 Northeast.

19 A I would ~~==I would say~~ **assume through** that
20 regulation, **that's the way it's pooled.**

21 Q And that plurality represents at least 25
22 percent of its total distribution?

23 A I'll take your word for it. I have -- I have
24 not had the need to read that provision in a long time.

1 Q Okay. Just so I understand here, what -- a
2 shipment of milk from a supply plant that goes to a
3 distributing plant, it may be used for Class 2 and may be
4 used for Class 1 and it's distributed outside of -- of the
5 marketing area is a good thing and should be encouraged,
6 correct?

7 A Except that probably if it's shipment from a
8 supply plant to a distributing plant, it probably gets all
9 Class 1 utilization because you'd want to do that so that
10 you have the price. From that -- you know, except for
11 that technical proviso, I would agree to you that there is
12 basically an allocation.

13 Q And it's shipped directly from the farm as a
14 diversion, so it gets the allocation?

15 A Yes.

16 Q But it's -- it's -- can you explain why it's
17 not a good thing, why a supply plant supplying a
18 competitor with Class 1 and Class 2 should get credit for
19 supplying the competitor but not get credit for its own
20 similar Class 1 and Class 2 distributed within the
21 Marketing Area and outside? Why -- why is that a good
22 thing?

23 A I guess my testimony is such that your proposal
24 confuses the 7-A and 7-C **plant**.

1 Q How?

2 A It's for the benefit of very few -- very few
3 people.

4 Q ~~There have been some individual problems~~
5 **There's a problem** since Reform, that you -- did you write
6 this before Friendship modified and -- and clarified this
7 proposal?

8 A Yes, sir.

9 Q Okay. And many of your concerns that you
10 address here have -- have been addressed now in
11 Friendship's modification which is designed to not
12 inadvertently regulate plants that are currently partially
13 regulated?

14 A To the extent that -- that your modification
15 does that portion, I agree with you.

16 Q Okay.

17 A I think ADCNE has a philosophical problem with
18 the definition when you have two different definitions of
19 both 7-A and 7-C, especially after the testimony of your
20 Proponent member. We're talking about 1 or 2 percent of -
21 - of it. That is the Class 1 utilization at that point.

22 Q Class 1 utilization is 1 or 2 percent, correct,
23 and yet the receiving plant may have up to 75 percent of
24 Class 2 and it still gets credit for that and Friendship

1 hasn't asked for -- well, it asked for it, but it wasn't
2 granted in the proposal for any Class 2, correct?

3 A No, they did not.

4 Q Yeah. That's unfortunate. But -- and finally,
5 at the end, you -- you indicate opposition to regulating
6 distributing plants that are not now regulated. Why? Why
7 is that? Why would you not want to enhance the Class 1
8 use of the market?

9 A We rejected ~~that~~ **nothing**.

10 Q Oh. If -- if -- if --

11 A We spoke to the issue -- ADCNE spoke to the
12 issue in Order Reform. I don't -- I don't know if the
13 position of the cooperatives has changed, but I ~~did~~
14 ~~testify~~ **can just say** during Order Reform, we had a group
15 that took that position, and I did not have the luxury of
16 hearing your testimony. Some maybe would have said this
17 is the same as Order Reform, why do -- why don't you want
18 that -- that in, when making clear it was denied.

19 Q Okay. So, you don't have a philosophical
20 objection to adding Class 1 milk to the market?

21 A No. I -- I don't contest that.

22 Q Okay.

23 MR. VETNE: Thank you. That's all I have.

24 JUDGE BAKER: Are there any other questions?

1 Yes, Mr. English?

2 CROSS EXAMINATION

3 BY MR. ENGLISH:

4 Q But now, since the -- what I thought were clear
5 waters have been muddied perhaps a little bit. You've
6 done the modification that you oppose Proposal 9 in its
7 entirety, and one of those reasons is because they would
8 cause disregulation of those plants, correct?

9 A Correct.

10 MR. ENGLISH: Thank you.

11 JUDGE BAKER: Thank you.

12 CROSS EXAMINATION

13 BY MR. VETNE:

14 Q As it was written prior to modification, prior
15 to Reform?

16 A We -- we -- we were opposed to -- to Proposal 9
17 even before and after the modification.

18 Q You do not believe that, as assumed in Mr.
19 English's question, that it would cause deregulation of
20 currently-price-deregulated plants?

21 A I believe your modification would -- would make
22 that -- that point clear. However, that does not change
23 our position on that, no.

24 Q I understand. But you were answering a

1 compound question with a single answer, and I wanted to
2 clarify that.

3 Thank you.

4 A Thank you.

5 JUDGE BAKER: Mr. Tosi has a question.

6 CROSS EXAMINATION

7 BY MR. TOSI:

8 Q Thanks for coming back, Dennis.

9 I felt the need to ask this because you're also
10 employed at Land O'Lakes. The proposal to not include as
11 producer milk milk that's already pooled under a state
12 program that has marketwide pooling, --

13 A Yes.

14 Q -- in your written testimony there, you
15 specifically cite California. Is it Land O'Lakes position
16 that California indeed has no marketwide pooling?

17 A I'm not sure. I can -- I won't speak to that
18 issue here. I'm here as a representative of ADCNE.

19 Q Okay. I'm not trying to do anything here, but
20 there have been other Land O'Lakes representatives ~~here~~
21 **that thought otherwise**, and I wanted to make sure that --

22 A I am not going to answer.

23 Q Okay.

24 JUDGE BAKER: Are there any other questions for

1 Mr. Schad?

2 (No response)

3 JUDGE BAKER: Let the record reflect that there
4 are none.

5 ~~(Chorus of ayes)~~

6 JUDGE BAKER: Are there any other witnesses?

7 MR. ENGLISH: To my knowledge, there's one more
8 witness, Mr. ~~Barnes~~ **Arms** on Proposal 14.

9 JUDGE BAKER: Very well.

10 MR. ENGLISH: Could we take -- it turns out it
11 is being printed as we speak. Do we want to take a short
12 recess?

13 JUDGE BAKER: How much?

14 MR. ENGLISH: Well, I don't know. We're hoping
15 -- five minutes?

16 JUDGE BAKER: Very well. Five minutes.

17 (Whereupon, a recess was taken.)

18 JUDGE BAKER: On the record.

19 MR. ENGLISH: Your Honor, the statement on
20 Proposal Number 14 by Mr. Arms, who has been previously
21 sworn.

22 JUDGE BAKER: Very well.

23 Whereupon,

24 DAVID ARMS, SR.

1 having been previously duly sworn, was recalled as a
2 witness herein and was examined and testified further as
3 follows:

4 MR. ENGLISH: And I thank everyone for their
5 indulgence.

6 Your Honor, for the record, Proposal 14 is the
7 proposal that was included in the Supplemental Hearing
8 Notice and was submitted on behalf of H.P. Hood Company.
9 It has since also been adopted by the New York State Dairy
10 Foods Association Group.

11 JUDGE BAKER: Very well.

12 MR. ENGLISH: So, the testimony by Mr. Arms
13 will be in behalf of that group.

14 JUDGE BAKER: Very well. Thank you.

15 DIRECT TESTIMONY

16 THE WITNESS: Supplemental Hearing Notice
17 Proposal Number 14. NYSDFI Proposal 14 would amend the
18 unit pooling provision in Section 1001.7(e) as follows.
19 Section 1001.7 Pool Plant (introductory text unchanged),
20 (e) (text unchanged), and then type the rest into the
21 record.

22 JUDGE BAKER: Mr. Reporter, this should be
23 typed into the record. Thank you.

24 (The document referred to was

1 marked for identification as
2 Exhibit Number 41.)

3 "~~1.~~ **Section 1001.7(e)(1)** At least one of the
4 plants in the unit qualifies as a pool distributing plant
5 pursuant to Paragraph (a) of this section.

6 2. Other plants in the unit must process at
7 least 60 percent of monthly receipts of producer milk,
8 including cooperative 9-C milk, only as Class 1 and Class
9 2 products and must be located in the Northeast Marketing
10 Area, as defined in Section 1001.2, in a pricing zone
11 providing the same or a lower Class 1 price than the price
12 applicable at the distributing plant(s) ~~located~~ **included**
13 in the unit, and (3) (text unchanged.)

14 This proposal was originally submitted on
15 behalf of the H.P. Hood Company, Chelsea, Massachusetts.
16 It has since been made one of the several proposals
17 advanced by the NYSDFI handler group. It would allow H.P.
18 Hood and similarly-situated unit-pool handlers who operate
19 two or more plants, at least one of which is a pool
20 distributing plant defined in Section 1001.7(a), greater
21 flexibility in their operations. It would enable
22 Proponent handler to help the cooperatives and others by
23 allowing some Class 3 and Class 4 balancing operations at
24 the secondary plant in the unit.

1 Present unit pooling standards under Paragraph
2 (c) unduly restricts utilization of receipts at the
3 secondary plant exclusively to Class 1 or Class 2 product
4 use. This requirement is too ~~restrict~~ **restrictive**. It
5 doesn't allow the secondary unit-pooled plant any
6 flexibility in Class 3/Class 4 use similar to that
7 afforded other handlers who have some Class 3 or Class 4
8 processing integrated with their Class 1 and Class 2
9 operations at a single pool distributing plant located in
10 the metropolitan area. We see no reason why the combined
11 unit-pooled operation should be so competitively
12 restricted in operational flexibility.

13 As a practical matter, it is important to
14 recognize that some transfers from a unit-pooled plant may
15 be assigned Class 3 or Class 4, even though the transfer
16 may have been intended for Class 2 assignment at the
17 receiving plant. Also, the current limitations fail to
18 take into account necessary plant shrinkage and ending
19 bulk inventory assigned to Class 3 and Class 4,
20 respectively.

21 The H.P. Hood plant at Vernon, New York, is
22 presently linked with the Hood Agawam, MA, pool
23 distributing plant in a single unit-pooled entity pursuant
24 to 1001.7(e). Agawam is a Class 1 pool distributing plant

1 while the Vernon plant is primarily engaged in processing
2 Class 2 products, such as cottage cheese and cream.

3 Over the past year, August 2001 through July
4 2002, the classified use of receipts at the Vernon plant
5 has been as follows: Combined Class 1 and Class 2 **for use**
6 **of the Skim at the plant** -84 percent, for Butterfat-90
7 percent, for Total Pounds-84.2 percent; Classes 3 and 4
8 ~~for Skim utilization amounted to~~ -16 percent **on the skim**,
9 for Butterfat-10 percent, and for Total Pounds-15.8
10 percent.

11 The above use of milk received at Vernon over
12 the past year has not changed significantly since the
13 beginning of the Reform Order. The data shows that Hood
14 has kept within the rules set under Section 1001.7(e).
15 Milk assigned Class 3 and Class 4 has been largely
16 restricted to shrinkage and assignment to bulk milk in
17 ending inventories.

18 This year, Hood was requested by a cooperative
19 to condense excess reserve milk at Vernon on a tolling
20 basis. It was accomplished but requested Class 2
21 assignment at the transfer plant could not always be
22 achieved.

23 Our Proposal 14 ~~would~~ **would** provide the
24 necessary regulatory tools for Hood to assist the

1 cooperative in handling extra milk at least some of the
2 time during critical plant capacity limitations faced by
3 the cooperative. The proposed limitation of no more than
4 ~~60~~ 50 percent Class 3 and Class 4 use at the unit-pooled
5 plant provides the means to help balance the market
6 without burdening the market pool. If the proposed
7 amendment is adopted, the company might consider plant and
8 equipment changes there to enhance plant efficiency. The
9 decision to make the changes, however, are not likely
10 unless the unit-pooling provision is amended to permit a
11 modest amount of Class 3 use there. We urge Proposal 14
12 be adopted in the interests of orderly marketing. We
13 believe the amendment is also in the public interest as
14 well."

15 JUDGE BAKER: Thank you, Mr. Arms.

16 Are there any questions for Mr. Arms? Yes,
17 Mr. Beshore?

18 CROSS EXAMINATION

19 BY MR. BESHORE:

20 Q Mr. Arms, why -- ~~let's put the~~ Hood could put -
21 - the equipment that belongs in the plant and operated
22 apart from the distributing plant unit it now has, is now
23 in, correct?

24 A It could, but it -- it would then have to

1 change how it makes its pool status, and there are a lot
2 of complications to that.

3 Q What are the complications?

4 A An example. I believe it was January and
5 February, **shown in exhibit 5**, the company did elect not to
6 withhold status for the Vernon plant, and the difficulty
7 that arose is that as soon as **nonpool** plant status was
8 requested, the ~~plant's normal~~ **Class I** skim shipment that
9 they had from that plant to a pool distributing plant in
10 metropolitan New York was assigned because it was coming
11 from a long-~~way~~ **away** plant, it was assigned to the ending
12 inventory at the receiving plant, and so, therefore, its
13 own transportation credit was removed and that is
14 inefficient. So, here again, it makes it difficult to
15 maintain a Class 1 segment of their business which they
16 really wish to expand. That's one problem.

17 Q Okay. So, once of the things the plant does
18 besides processing Class 2 products is operate as a supply
19 plant to provide skim to other Class 1 operators?

20 A Presently on a very limited basis, but it is
21 something that they might want to expand.

22 Q Okay. Besides that ~~as a~~ problem, are there
23 other problems that keep you from just delinking the
24 plants and make it whatever you want?

1 A That has been suggested and possibly could be
2 pursued further. However, as a matter of policy, the
3 company feels they should have the same flexibility as
4 they -- as another handler in the city who is presently
5 making its own Class 3 and 4 product ~~in~~ **through** their
6 plant. So, really the combined unit ~~in~~ **Agawan and** Vernon
7 should be considered as one and should be on the same
8 competitive basis as others in the city who do both.

9 Q And the competitive market that -- the
10 competitive product that you would be doing there would be
11 what, condensed milk?

12 A The company ~~only~~ **presently** has a ~~condensed~~
13 **condenser at the** plant and that can be used and was used
14 this year for that, for condensing for the co-op as the
15 ~~amount of member milk was sold off~~ **moved on.**

16 Q So, condensed, when it's sold off, is
17 classified in the use of ~~a~~ **the** plant to which you sell it
18 or how is condensed classified?

19 A I believe it's classified according to the
20 assignment at the transfer plant.

21 Q **Transfer, you mean the - -**

22 A **Transferee Plant**

23 Q Okay. So, if you sell condensed to a cheese
24 plant, it's got to be Class 3?

1 A Correct.

2 Q But if you sell condensed to an ice cream
3 plant, it's going to be Class 2?

4 A Correct.

5 Q So, your present concern is that when you're
6 condensing and selling the condensed to a cheese plant,
7 you might ~~take~~ **kick** above the Class 3 limitation in the
8 present pooling regs?

9 A Yeah. The present ~~pool~~ **rules** requires Class 1
10 and 2 use **exclusively**. ~~There's no model~~ **Doesn't allow** for
11 any Class 3.

12 Q Well, there's always some -- some lower class
13 use in the ~~new~~ **unit** right?

14 A Correct. And that is what I have shown in the
15 statement. There is some of unavoidable Class 3 and 4 use
16 ~~in~~ each and every one. I did not show the actual pounds
17 ~~from the pool provisions~~ **for reasons** of proprietary
18 information. However, I did use some percentages which
19 clearly show that the company has tried to keep within the
20 limits set by the Order.

21 Q Okay. Now, what -- your -- your proposed
22 amendment would establish an operating limit of what?

23 A It would permit, to permit the company to have
24 some Class 3 use there, actually from the condenser

1 operation. Milk would be condensed there and moved to
2 other locations.

3 Q So, you're proposing that Vernon **facility** would
4 be able to process up to 40 percent of its receipts as
5 Class 1? Am I reading it right?

6 A Yes, you are. That's correct. We deliberately
7 chose a high percentage to keep this -- the spirit of the
8 proposal, the present proposal.

9 Q You ~~have would included~~ **include now in there**
10 any 9-C milk that you've purchased at Vernon, correct?

11 A We would include all receipts.

12 Q All receipts?

13 A Yes.

14 MR. BESHORE: Thank you, Mr. Arms.

15 THE WITNESS: Thank you.

16 JUDGE BAKER: Are there any further questions?

17 CROSS EXAMINATION

18 BY MR. VETNE:

19 Q Mr. Arms, when -- when Vernon is operating as a
20 pool plant, it sells condensed to someone else's
21 distributing plant, ~~and it has~~ **because they have** some
22 Class 2 use in which they can condense, can part of the
23 Class 1 allocation come back to Vernon?

24 A Yes, it could. But I do -- I want to ~~include~~

1 **in make clear for** the record that the company has not been
2 running their condenser this whole time, except for
3 opening **milk it up** for the cooperatives.

4 Q Okay. But the plant has on occasion separated
5 milk and -- and sold skim --

6 A Yes.

7 Q -- to a plant?

8 A Correct.

9 Q And that is something that is not feasible if
10 the plant is a non-pool plant?

11 A Correct. Because if it isn't assigned the
12 Class 1, then the transportation allowance available **in**
13 **the zones** is lost. You see, the Vernon plant is in the
14 250 zone, and New York City area is in the \$3.15 zone.
15 So, the loss is the difference between \$2.50 and \$3.15.

16 Q So, you could do it, but there's a practical
17 economic barrier?

18 A Correct.

19 Q Thank you.

20 JUDGE BAKER: Are there any other questions?

21 MR. BESHORE: Just one.

22 JUDGE BAKER: Mr. Beshore?

23 CROSS EXAMINATION

24 BY MR. BESHORE:

1 Q Mr. Arms, in your -- in your statement where it
2 says, "This year, Hood was requested to condense excess
3 reserve milk at Vernon on a tolling basis. It was
4 accomplished but requested Class 2 assignment at the
5 ~~transfer transferor~~ plant could not always be achieved."
6 Do you mean transferee?

7 A Correct. Same mistake as I made earlier.

8 Q Okay. So, you could not --

9 A That should be changed.

10 Q You couldn't always get the Class 2 --

11 A Well, --

12 Q -- assigned --

13 A -- this is to my knowledge. Now, when the
14 issue came up and they asked my input, I suggested to them
15 that they request Class 2 utilization in the spirit of
16 ~~efficiency~~ **the provision** of the Order. However, I'm not
17 really certain how it was assigned. I was advised it may
18 not be that -- come out that way.

19 Q Well, --

20 A But if we -- if we requested it, the
21 Administrator would recognize that we had tried to do
22 that.

23 Q If it's going to cheese plants, it's **got tough**
24 to get **requested** Class 2, your condensed? It's probably

1 not going to be Class # 2.

2 A That's the problem. I think the cooperative
3 was also trying to assist in moving it in the right
4 direction.

5 MR. BESHORE: That's it.

6 JUDGE BAKER: Are there any other questions for
7 Mr. Arms?

8 (No response)

9 JUDGE BAKER: Let the record reflect that there
10 are none.

11 Thank you very much.

12 THE WITNESS: Thank you.

13 (Whereupon, the witness was excused.)

14 JUDGE BAKER: Are there any other witnesses to
15 be presented?

16 (No response)

17 JUDGE BAKER: Let the record reflect that there
18 is no response.

19 Mr. English?

20 MR. ENGLISH: Your Honor, I would move the
21 admission of Exhibit 41.

22 JUDGE BAKER: Are there any questions or
23 objections?

24 (No response)

1 JUDGE BAKER: Hearing none, Exhibit 41 is
2 admitted and received into evidence.

3 (The document referred to,
4 having been previously marked
5 for identification as
6 Exhibit Number 41, was
7 received in evidence.)

8 JUDGE BAKER: Anyone who wishes to testify with
9 respect to any or all of the proposals, ~~you~~ **he** may testify
10 for or against or otherwise. Is there anyone in the room
11 who wishes to give testimony or other evidence with
12 respect to the matters before this hearing? Mr. Vetne?

13 MR. VETNE: Your Honor, **in the other evidence**
14 **category** I have a couple requests for official notice, and
15 the material I request is officially published in the USDA
16 statistical material, and I believe all of it, certainly
17 most of it, is available on the website. There has been a
18 lot of reference here to changes since Federal Order
19 Reform and comparisons before and after.

20 The Northeast ~~Mark~~ **Market** Administrator on his
21 website has statistical data, plants lists, and other
22 regulatory information, historical information, for the
23 three Northeast Orders from 1998-1999. I would like that
24 historical data officially noticed for the Northeast.

1 Should I do all of these at once or --

2 JUDGE BAKER: Well, no. Are there any
3 questions with respect to that request? Mr. Beshore?

4 MR. BESHORE: Just with respect to exactly what
5 it is, all historical information in 1998 and 1999 on the
6 website?

7 MR. VETNE: Just for the Northeast. It's milk
8 information, utilization, receipts, plant lists, price
9 information for the Northeast and that's for the three
10 ~~present~~ **predecessor** Orders, the Middle Atlantic, New
11 York/New Jersey, and New England.

12 MR. BESHORE: I don't have any objection to
13 taking notice of those publications. It's a bit **vague or**
14 unclear as to what we're actually getting.

15 JUDGE BAKER: Mr. Vetne, what do you intend to
16 do with this information?

17 MR. VETNE: Well, there are -- there are plants
18 identified there. There have been plants identified here.
19 There's a discussion of plants that were pooled that are
20 no longer pooled, plants that were not pooled that are now
21 pooled. There are volumes. You know, there's reference
22 there to class use, demand. Everything that's involved in
23 this hearing is -- is -- is -- is addressed there.
24 Everything that's in Exhibit 5. For example, **OK let's**

1 **limit it to this**, the kinds of data that's in Exhibit 5
2 for the historical period is -- is -- is what I think is --
3 - it is relevant.

4 JUDGE BAKER: Very well. Then it's all
5 available on the website?

6 MR. VETNE: All available on the website.

7 JUDGE BAKER: All right. Thank you. Your
8 request is so granted.

9 MR. VETNE: Okay. There's a publication by
10 NASS called "Milk Production, Disposition and Income",
11 which shows on a broader scale without pool reference
12 dairy farms and their production by state, again for the
13 years 1998 to date.

14 JUDGE BAKER: Where is that available, Mr.
15 Vetne?

16 MR. VETNE: That's on the website, on the
17 National Agricultural Statistics Service site of the USDA
18 website, and there's a link to that in the Dairy Programs
19 website and the Dairy Program website is
20 www.ams.usda.gov/dairy.

21 JUDGE BAKER: Very well. So granted.

22 MR. VETNE: And finally, also available on the
23 website is one publication, perhaps two, on producer milk
24 by state and county of origin, that is, milk pooled in --

1 in various Federal Markets, and it shows by state where
2 that milk is pooled.

3 JUDGE BAKER: That's on the website?

4 MR. VETNE: That's also on the website.

5 MR. ENGLISH: For all Orders?

6 MR. VETNE: Yes.

7 MR. ENGLISH: Do you mean to include in the
8 record the publications for all Orders?

9 MR. VETNE: I mean to include that entire
10 publication because we've also been discussing at this
11 hearing milk located in and pooled here, milk from -- from
12 other places, milk located here and pooled elsewhere. For
13 example, shipping down to the Southeast. Those kinds of
14 movements have been identified throughout this hearing.

15 MR. ~~ENGLISH~~ BESHORE: ~~Are you going to We~~
16 **already** put the evidence in on this?

17 MR. VETNE: I don't think so.

18 JUDGE BAKER: Very well. Are there any
19 objections?

20 (No response)

21 JUDGE BAKER: Hearing none, then official
22 notice will be granted.

23 Mr. Vetne, anything further?

24 MR. VETNE: That's it. Thank you.

1 JUDGE BAKER: Mr. English?

2 MR. ENGLISH: I also have some official notice
3 material.

4 JUDGE BAKER: Very well.

5 MR. ENGLISH: There's been reference to the
6 Southeast Order **decision** ~~that was issued~~ terminating the
7 Marketwide Service Proposal Hearing that was held in 1986.
8 That can be found at 52 Fed. Reg. for Federal Register,
9 beginning at Page 15951, etc., for **May 1**, 1987.

10 JUDGE BAKER: Very well.

11 MR. VETNE: Your Honor?

12 MR. ENGLISH: Also, --

13 MR. VETNE: Excuse me.

14 JUDGE BAKER: Yes, Mr. Vetne?

15 MR. VETNE: I'm not going to object to that,
16 but I -- I don't want by inference or interpretation to
17 suggest that because we've identified these prior
18 decisions for official notice, that reference cannot be
19 made to prior decisions, as a matter of fact, ~~if the~~ **each**
20 decision incorporates prior decisions and the findings
21 therein, so we have a continuum and we can refer to the
22 prior decisions, sort of like we refer to legal decisions
23 by courts, it's -- it's part of the precedent that governs
24 our -- our comments here. That's all I want to say.

1 MR. ENGLISH: I don't disagree. I usually do
2 this, though, Mr. Vetne, and I end up leaving one out, but
3 part of this is to provide the courtesy to everyone that
4 these are things that will probably ~~come~~ **show up in on**
5 ~~the~~ brief and therefore I ~~feel you're entitled to give~~
6 somewhat **of** advanced notice.

7 MR. VETNE: I agree. That's a good idea.

8 MR. ENGLISH VETNE: **Just so we we** don't infer
9 that there's an exclusion **of others**.

10 JUDGE BAKER: Very well.

11 MR. BESHORE: Well, I just want to reiterate
12 Mr. Vetne's comments, so we aren't -- that we agree and
13 there's an understanding that noticing any of these
14 decisions doesn't exclude the use of references to
15 decisions of the Secretary published in the Federal
16 Register that might not be noticed.

17 MR. ENGLISH: Mr. Beshore, I ~~understand that~~
18 **absolutely agree with you**. I don't have a problem with
19 him. I want to do this as a courtesy to the parties. I
20 know it happens sometimes that, you know, Mr. Vetne might
21 have the cite that I don't have or you might have a cite
22 that I don't have or vice versa, and this speeds the
23 process for all of us.

24 There's also been reference in this Order to

1 the proceeding that lasted a bit longer than three days
2 with respect to cooperative service payments. I think
3 that one lasted four months. There are two separate
4 decisions. The first decision at 32 Fed. Reg. 6401,
5 published on April 20th, 1967. In that decision, it was
6 decided that yes, cooperative service payments would --
7 would be permitted in this Order, and then the second
8 supplemental hearing was ~~to establish the rules~~
9 **established** provisions for ~~the Order~~ **how they would work,**
10 33 Fed. Reg. ~~109~~ **10978**, published July 29th, 1968.

11 Also, I -- I do not have the exact cite, I know
12 it's available on the website, but there's been reference
13 here to the Pennsylvania **Milk** Marketing Order and the
14 premiums issued thereunder, and so I -- it's a state
15 agency. It's not a government entity, and I intend to ask
16 for at the time of brief official notice of various
17 documents from that state agency with respect to Orders
18 issued thereunder and/or **over-order** premiums that are
19 issued and enforced in that jurisdiction.

20 JUDGE BAKER: Are they on the website?

21 MR. ENGLISH: I'm sorry?

22 JUDGE BAKER: Are they on the website?

23 MR. ENGLISH: They are not on the AMS website
24 because they are not United States Department of

1 Agriculture documents. I do believe they are available on
2 the Pennsylvania **Milk** Marketing Board website, but I don't
3 know for certain, and if they are not, I will certainly
4 provide in the record ways that they can be found. Mr.
5 Beshore, for instance, certainly knows where they can be
6 found. He appears often in those proceedings as I do.

7 JUDGE BAKER: Very well. As you know, official
8 notice ~~is granted~~ **basically is limited** to sources which
9 are available to everyone.

10 MR. ENGLISH: I do. These are public agencies
11 and they are available to everyone.

12 JUDGE BAKER: Very well. Thank you.

13 Does that conclude your --

14 MR. ENGLISH: Yes.

15 JUDGE BAKER: Very well. Does anyone else have
16 anything to say, testimony to give, or evidence that they
17 wish to present?

18 (No response)

19 JUDGE BAKER: Let the record reflect that there
20 is no response.

21 That brings us to the time to consider the
22 matter of the **submission of** proposed corrections to the
23 transcripts and the time for setting the briefings which
24 will occur hereafter. I am open to suggestions with

1 respect thereto.

2 MR. ENGLISH: Your Honor, I believe the first
3 question is, when will the transcripts be ready? Once we
4 cross that bridge.

5 COURT REPORTER: It's supposed to be a five-day
6 delivery.

7 MR. ENGLISH: Supposed to be five-day delivery.

8 MR. TOSI: Your Honor, ~~my~~ **our** experience with
9 these hearings around the country on different Marketing
10 Orders, that we've asked for five-day turn-around, but in
11 every -- in every case, they've always come in much later
12 than five days later. If -- if I could propose two weeks
13 from today, the Department would have it available on our
14 Dairy Programs website, and two weeks from today would be
15 September 27th, at the earliest.

16 JUDGE BAKER: In other words, you all will have
17 the transcripts available on September 27th?

18 MR. TOSI: At the earliest, Your Honor.

19 JUDGE BAKER: Let's assume that that occurs,
20 how much time do you suggest for the **submission of**
21 proposed corrections to the transcript? Remember we've
22 got four full days of hearing.

23 MR. ENGLISH: Two weeks, Your Honor? Which
24 would be October 11th, I believe.

1 JUDGE BAKER: Very well. October 11th.

2 MR. ENGLISH: That's a Friday. Monday's a
3 holiday.

4 JUDGE BAKER: Very well. Then October 11th is
5 the date indicated for the submission of proposed
6 corrections to the transcripts.

7 Thereafter, what are the suggestions for
8 submitting briefs?

9 MR. ENGLISH: 30 days thereafter, Your Honor?

10 JUDGE BAKER: November 11th? That's a holiday.

11 MR. ENGLISH: So, November 12th?

12 JUDGE BAKER: November 12th.

13 MR. TOSI: Your Honor, may I also recommend,
14 what we've been doing in the past proceedings is that for
15 every day that the Department is late -- for every day
16 past the 27th that the Department is late in having ~~them~~
17 **that** available on our website, the transcripts on our
18 website, all other -- that the date for the submission of
19 corrections and the date for briefs would -- would be
20 extended the same number of days?

21 MR. BESHORE: That procedure has been -- has
22 worked very well, and I agree wholeheartedly with Mr.
23 Tosi's suggestion, Your Honor.

24 JUDGE BAKER: I'm not familiar with ~~that~~ **such**

1 **proceeding.** Usually I desire certainty with respect to
2 the carrying out of obligations, but I'm willing to go
3 along with that and ~~you may have~~ **we will make this** a
4 marvel of achievement.

5 MR. ENGLISH: Well, again, Your Honor, it
6 really has worked, and frankly, I think it provides for
7 more certainty for us, but I can understand that it hasn't
8 been something that you've done before. Literally, I
9 think almost all of us in the room have done this, and we
10 would appreciate it if we could do it that way.

11 JUDGE BAKER: If you wish to do it that way,
12 the record will so reflect, and we'll look forward to
13 having a happy ending to this.

14 Are there any other matters to come before the
15 hearing? Yes, Mr. Vetne?

16 MR. VETNE: Yes. ~~I don't have a problem with~~
17 **On the matter of filing** the briefs. We've also sort of
18 changed that a little bit in the past year or two. Mail
19 is still being screened and it will take some time to get
20 that through and sometimes it doesn't get through. So,
21 our practice has been to provide an e-mail or fax. Most
22 of us use e-mail-attached copy to the Dairy Division and
23 the Dairy Division then will make a copy and take it down
24 and get it stamped in with the hearing clerk. That way,

1 they have their brief expeditiously and can start working
2 on it and -- and we also send courtesy copies to each
3 other. It's not required by the rules, but it's a good
4 thing to do.

5 Thank you.

6 JUDGE BAKER: Mr. Tosi?

7 MR. TOSI: Yes, Your Honor. I have no
8 objection to that, but I would ask that if the parties are
9 asking me to submit a copy on their behalf to the hearing
10 clerk, which I'm happy to do, that they specify that.
11 Sometimes I'm not sure if they're just sending a copy to
12 me as a courtesy or -- or if they're also asking me to --
13 to deliver it to the hearing clerk's office as well. Just
14 please specify and we'll take care of it.

15 JUDGE BAKER: This is what I'm wondering. What
16 if the time becomes important? Whether a brief is timely
17 filed or not, it's received in your office, but it isn't
18 filed until ~~later~~ **the next day or after the weekend on.**

19 MR. TOSI: Yes, Your Honor. When someone sends
20 an e-mail to us, included on that e-mail is the date and
21 time which that document was sent to us.

22 JUDGE BAKER: Yes, that presumes an e-mail.

23 MR. TOSI: Yes.

24 JUDGE BAKER: Ordinary mail. Would you send

1 ordinary mail ~~through~~ **Mr. Tosi**?

2 MR. VETNE: Ordinary mail is the date of
3 postmark, not the date of receipt, and an e-mail receipt
4 and postmark or postmark equivalent are the same day.

5 JUDGE BAKER: All right.

6 MR. TOSI: Your Honor, just as an interesting
7 tidbit, at our last hearing, I got some things in the mail
8 where I could not determine what the post date was because
9 the post office has ~~been~~ **not been clearly** stamping the
10 envelopes that the documents arrive in, and in fact, with
11 the e-mail, it's sort of foolproof in the sense that it's
12 very accurate with respect to giving not only the date but
13 the exact time the sender actually hit the send button.

14 JUDGE BAKER: Very well.

15 MR. TOSI: That has not been a burden at all
16 for us.

17 JUDGE BAKER: Very well. Are there any other
18 matters to come before the hearing?

19 (No response)

20 JUDGE BAKER: Let the record reflect that there
21 are none.

22 MR. TOSI: I'd just like to thank everybody for
23 a good hearing.

24 MR. ENGLISH: Thank you.

1 MR. ~~FOST~~ **ENGLISH**: And, Your Honor, thank you.

2 JUDGE BAKER: Well, I thank you all.

3 Everything was well prepared and very efficient.

4 Thank you all, and the hearing is adjourned.

5 (Whereupon, at 5:45 p.m., the hearing was
6 concluded.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1
2
3
4
5
6
7
8
9
10
11
12