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UNITED STATES DEPARTMENT OF AGRICULTURE

IN RE: FEDERAL MILK MARKETING ORDERS PUBLIC HEARING
NORTHEAST, ET AL., MILK MARKETING AREAS

Docket Nos. AO-14-A72, AO-388-A13, AO-356-A36,
AO-366-A42, AO-361-A37, AO-313-A46, AO-166-A70,
AO-368-A33, AO-231-A66, AO-271-A38, AO-380-A20,
DA-03-08

Hearing held on the 21st day of October 2003

at 8:52 a.m.

Alexandria, Virginia

TRANSCRIPT OF PROCEEDINGS

BEFORE: HONORABLE MARC R. HILLSON

APPEARANCES:

RANDAL STOKER, ESQUIRE
USDA Marketing Specialist

GARRETT B. STEVENS, ESQUIRE
United States Department of Agriculture

MARVIN BESHORE, ESQUIRE
130 State Street
Harrisburg, Pennsylvania
On Behalf of O-AT-KA Milk Products Cooperative, Inc.

ANTOINETTE CARTER, Marketing Specialist
United States Department of Agriculture

GINO TOSI, USDA, Agricultural Marketing Service

BERNADETTE JUAREZ
Office of General Counsel, USDA

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York Stenographic Services, Inc.

34 North George St., York, PA 17401 - (717) 854-0077

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P R O C E E D I N G S

October 21, 2003

ADMINISTRATIVE LAW JUDGE: Let us go on the record. Good morning, everybody. It is October 21, 2003. We are at the Holiday Inn in Old Town Alexandria, Virginia. And my name is Marc Hillson, H-i-l-l-s-o-n. I am the Administrative Law Judge in this proceeding, and this is a rulemaking hearing on -- what is it -- Federal Milk Order Public Hearing. And the Notice of Hearing -- well, let me say, the docket numbers are AO-14-A72 and DA-03-08, and the original Notice of Hearing was published September 8, 2003. And it is 68 Fed Reg -- Federal Register -- 52860 and an amended -- a correction was published on October 16 at 68 Federal Register 59554. Just a couple of preliminary things I want to discuss before we get rolling.

MR. STEVENS: May I ask, Your Honor? Can you all hear in the back? Can you hear okay? We are having a little trouble with the mike, but if you can't hear, we will speak louder for you. Is everything good back there?

ADMINISTRATIVE LAW JUDGE: People can always

1 hear me. And you can hear me. Right?

2 MR. STEVENS: Yeah. I just wanted to make
3 sure.

4 ADMINISTRATIVE LAW JUDGE: And there is plenty
5 of seats. This is the church -- this is the church
6 synagogue approach. There is plenty of seats if you all
7 want to move up. I will leave that up to you. The --
8 we have a Court Reporter here who is reporting -- who is
9 recording this proceeding. You can contact him if you
10 want to get the transcript directly from him to order it
11 from him. But is my understanding correct that the
12 transcripts are still posted on the internet and that
13 people can access the website and read the transcript
14 that way when it is available. Is that correct, Mr. --

15 MR. STEVENS: Yes, Your Honor.

16 ADMINISTRATIVE LAW JUDGE: Okay. And people
17 who will come up -- who have exhibits and then they have
18 four copies of the exhibits -- give one to me and drop
19 the rest off with the -- well, we will need at least two
20 for the Court Reporter and one over there. Is that way
21 you want to --

22 MR. STEVENS: I think the rules of practice
23 have an original and four copies.

1 ADMINISTRATIVE LAW JUDGE: Well, do --

2 MR. STEVENS: If you don't have those number
3 of copies, I am sure the hotel can provide copying
4 service for you or we will see that that is done. One
5 of my -- I am Garrett Stevens with the Department of
6 Agriculture's General Counsel's office and, of course, I
7 am Judge Hillson's assistant. That is to say to make
8 sure that the copies are made, that the copies are to
9 the Hearing Reporter, that before we leave here we have
10 copies of all the exhibits and everything that needs to
11 complete the record. So if you have problems with that,
12 see me or one of the marking specialists over here and
13 we will get that done for you. Thank you, Your Honor.

14 ADMINISTRATIVE LAW JUDGE: And I am going to
15 have -- the reporter is going to be the official marker
16 of the exhibits. So the copy -- the original copy, in
17 particular, as well, should be given to the reporter
18 and -- for marking. I just want to emphasize a couple
19 of things. This is a public hearing. It is open to
20 everyone. We will -- we -- I don't think we should have
21 any trouble accommodating anyone who wants to testify.
22 If anyone has other plans that require them to testify
23 earlier rather than later, at the first break, you can

1 let me know if you are on a tight schedule or whatever.
2 We can accommodate. Everyone has the right -- every
3 interested party also has the right to cross examine any
4 witness. And we will try to -- I am here to help that
5 go in an orderly fashion as well. I just want to
6 emphasize I don't participate in this Decision. I am
7 here to swear everyone in, swear in the witnesses, get
8 the exhibits admitted or rule on their admissibility, as
9 the case may be, to keep the testimony relevant, to rule
10 on objections, and to certify the record and to set a
11 briefing schedule at the conclusion of the hearing.
12 There will be a chance, also, that if people -- when
13 they see the transcript, there will be a chance to
14 submit proposed corrections to the transcript as well.
15 I want to also say that each time someone speaks here,
16 to ask -- particularly on cross examination, it is
17 important that you state your name, your business, what
18 your company is or your law firm -- you don't have to
19 say what law firm you are every time, but just to
20 basically identify who you are. I will figure out who
21 you are after a while, and I am sure the reporter will
22 too, but it will just be nice to remember to do that.
23 Otherwise, I will interrupt you and ask you who are

1 every time and you will find that extremely annoying. I
2 guess, at this time, I will -- I am going to -- it might
3 be a good time to go quickly around the room just to
4 have people identify themselves as -- in terms of their
5 participation here. Stand up, say who you are -- if you
6 are going to participate, if you are going to be asking
7 questions, you are here in a representative capacity, in
8 particular. Start off over here.

9 MR. STOKER: My name is Randal Stoker. I am
10 here with USDA, a marketing specialist.

11 COURT REPORTER: Spell your name for the
12 record.

13 MR. STOKER: R-a-n-d-a-l, S-t-o-k-e-r.

14 ADMINISTRATIVE LAW JUDGE: It might be easy,
15 by the way, folks, know that they are going to be asking
16 questions or cross examining, if they leave a copy of
17 their cards with the reporter. It will make life easy
18 in terms of getting your names spelled right. Okay.

19 MS. CARTER: My name is Antoinette Carter, and
20 that is A-n-t-o-i-n-e-t-t-e, last name, Carter,
21 C-a-r-t-e-r. I am a dairy products marketing specialist
22 with the United States Department of Agriculture,
23 Agricultural Marketing Service, Dairy Programs, Order

1 Formulation and Enforcement Branch.

2 MR. TOSI: I am Gino Tosi, Gino, G-i-n-o,
3 Tosi, T, as in Tom, o-s-i. I am with USDA Agricultural
4 Marketing Service, Dairy Programs, Order Formulation and
5 Enforcement Branch.

6 MR. STEVENS: I am Garrett B. Stevens, G-a-r-
7 r-e-t-t, initial "B," Stevens with a "V." I with the
8 Office of General Counsel, U.S. Department of
9 Agriculture, Washington, D.C., and you have my card so
10 you can be sure to spell that. Thank you.

11 MS. JUAREZ: My name is Bernadette Juarez,
12 B-e-r-n-a-d-e-t-t-e, last name is J-u-a-r-e-z. I am an
13 attorney with the Office of General Counsel for the
14 Department of Agriculture in Washington, D.C.

15 MR. BESHORE: Marvin Beshore, Attorney, 130
16 State Street, Harrisburg, Pennsylvania. I am here on
17 behalf of O-AT-KA Milk Products Cooperative, Inc. And I
18 am also entering an appearance on behalf of the
19 Association of Dairy Cooperatives in the northeast.

20 MR. ALEXANDER: My name is Craig Alexander.
21 That is C-r-a-i-g, Alexander, A-l-e-x-a-n-d-e-r. I am
22 with O-AT-KA Milk Products. That is O-AT-KA Milk
23 Products Co-op.

1 MR. GLOECKLE: I am Patrick Gloeckle. Last
2 name, G-l-o-e-c-k-l-e, here on behalf of Eagle Family
3 Foods.

4 MR. STEVENS: Excuse me?

5 MR. GLOECKLE: Here on behalf of Eagle Family
6 Foods.

7 MR. STEVENS: I am sorry. Thank you.

8 MR. DIEHL: My name is Peter Diehl. It is
9 D-i-e-h-l, and I am here on behalf of Diehl,
10 Incorporated.

11 ADMINISTRATIVE LAW JUDGE: Sir?

12 UNIDENTIFIED SPEAKER: I am not participating.

13 ADMINISTRATIVE LAW JUDGE: Okay. Then -- all
14 right. Anyone else on this side of the room? Okay.
15 Then I am -- ma'am, are you participating?

16 MS. LISELLA: I am Deborah Lisella,
17 D-e-b-o-r-a-h, last name, L-i-s-e-l-l-a. I am
18 representing Milnot Holding Corporation, which one of
19 the properties is the Milnot Company, which manufactures
20 sweetened and evaporated milk.

21 ADMINISTRATIVE LAW JUDGE: Okay. Okay.
22 Anyone else -- if you are a participant or be
23 participating, just say who you are.

1 MR. SCHAD: Dennis Schad, S-c-h-a-d. Land O'
2 Lakes, Incorporated.

3 ADMINISTRATIVE LAW JUDGE: No. No. Anyone
4 else in the back two rows in -- hearing nothing, I will
5 move on. Okay. Let us see, we have a number of
6 preliminary exhibits, I guess, that you want to --

7 MR. STEVENS: Yes, Your Honor.

8 ADMINISTRATIVE LAW JUDGE: -- describe what
9 they are and get them numbered officially and admitted.

10 MR. STEVENS: Garrett Stevens, with the Office
11 of General Counsel. Yes. We have some preliminary
12 documents, which are a list of notification documents.
13 I -- we have a witness, of course, John Rourke, who will
14 be -- we will be calling in a minute, and he will go
15 over these. But just for the parties and for Your
16 Honor, we could have these marked at this time if there
17 is no objection. They are available in the back of the
18 room. There are some copies, not a tremendous number of
19 copies, but there are copies in the back if you would
20 like to use them. The -- we have six in this set, a
21 list of notification documents. I will just pause a
22 minute while my esteemed colleague gets his copies. And
23 anyone else who would like to get a copy, please.

1 ADMINISTRATIVE LAW JUDGE: You can keep
2 talking about them. It is okay. They are pretty
3 preliminary anyway.

4 MR. STEVENS: Fine. Yeah. They are. They
5 are. And these guys are all -- the first one I would
6 like marked, Your Honor, is the Notice of Hearing for
7 Milk in the Northeast and other marketing areas, Docket
8 Number AO-14-A72, et al.

9 ADMINISTRATIVE LAW JUDGE: Okay. That will be
10 marked as Exhibit 1.

11 MR. STEVENS: And I won't read the rest of it.
12 That -- I would like that marked as Exhibit 1. The
13 second one is -- and second on our list, a correction to
14 the Notice of Hearing, with the same docket number. And
15 I have a copy to the reporter and I want to make sure
16 that these are marked, Your Honor, before the day --
17 before the hearing is finished. So I have done 1 and 2.
18 Number 3 is the Certification of Notice to the Governors
19 of the Notice of Hearing. Number 3 -- and number 4 is
20 the Certification of Notice to the Governors of the
21 correction to the Notice of Hearing. Because there was
22 a correction to the Notice of Hearing. So that -- so we
23 are here at number 4. Number 5 is the Market

1 Administrator's Certification of Notification to
2 Interested Parties of the Notice of Hearing. And number
3 6 is the Market Administrator's Certification of
4 Notification to Interested Parties of the Corrected
5 Notice of Hearing. I can explain these in more detail
6 at this point, which I will be happy to do. We can have
7 the witness, John Rourke, explain them in some detail
8 when he gets up there.

9 ADMINISTRATIVE LAW JUDGE: No. I note that
10 the rules basically say that before the taking of
11 testimony, these preliminary exhibits should be --

12 MR. STEVENS: Yeah.

13 ADMINISTRATIVE LAW JUDGE: -- should be made
14 part of the record. So --

15 MR. STEVENS: And that is what these are. And
16 I don't believe there is any objection from the group or
17 certainly --

18 ADMINISTRATIVE LAW JUDGE: Well, I will be
19 happy to ask. Does anyone have any problems with
20 admitting these first six documents into --

21 MR. STEVENS: Well, first I would like them
22 marked and which we will mark.

23 ADMINISTRATIVE LAW JUDGE: Okay. So --

1 MR. STEVENS: And then I -- and then --

2 ADMINISTRATIVE LAW JUDGE: -- I will ask the
3 reporter to mark Exhibits 1 through 6 --

4 MR. STEVENS: And --

5 ADMINISTRATIVE LAW JUDGE: -- and I will admit
6 them into evidence as Exhibits 1 through 6.

7 MR. STEVENS: All right. Thanks.

8 ADMINISTRATIVE LAW JUDGE: The seventh exhibit
9 you have, is that -- that will come in -- that will come
10 in through the witness.

11 MR. STEVENS: Now, the seventh exhibit will be
12 the statistical information of John P. Rourke --

13 ADMINISTRATIVE LAW JUDGE: Okay.

14 MR. STEVENS: -- which I will do at Your
15 Honor's convenience.

16 ADMINISTRATIVE LAW JUDGE: Okay.

17 MR. STEVENS: Next, if you would like --

18 ADMINISTRATIVE LAW JUDGE: Let -- well, just
19 give me a second.

20 MR. STEVENS: Sure.

21 ADMINISTRATIVE LAW JUDGE: I want the reporter
22 to get all these documents admitted -- marked and
23 admitted into evidence as Exhibits 1 through 6. And --

1 MR. STEVENS: May I approach?

2 ADMINISTRATIVE LAW JUDGE: My -- I propose
3 that will -- until -- that we hear the Government
4 witness first and then we will take a break and then I
5 can find out -- then we can discuss the sequencing and
6 the other witnesses who are going to testify today.
7 I -- my understanding is that normally -- there are
8 what, there were -- how many -- there were four
9 proposals. Is that right? Or is it five? I lost
10 track. There is four. I will -- we should -- that we
11 can just handle them in order unless there is a reason
12 not to. And I will leave -- we have -- this is not
13 going to be a super long hearing. So I assume we can be
14 pretty flexible here. So my plan is, is to let Mr.
15 Stevens call his statistical witness up on the stand and
16 finish his testimony and then we will take -- that is
17 when we will take our coffee break -- we will take our
18 morning break. And during that time, people can come
19 up -- can approach me here and we will just get a list
20 of witnesses in the order -- in the order for the rest
21 of the day and, with any luck, we will even finish
22 today. So, Mr. Stevens, do you want to call your first
23 witness?

1 [Direct Examination by Mr. Stevens]

2 ***

3 DIRECT EXAMINATION

4 BY MR. STEVENS:

5 Q. You are aware of those documents, are you
6 not, Mr. Rourke?

7 A. Yes. I am.

8 Q. And they were prepared by USDA, either
9 pursuant to your supervision or the market specialist's
10 supervision -- hearing division personnel prepared this
11 documents for the hearing.

12 A. That is correct.

13 Q. And they come from official records of
14 the Department of Agriculture.

15 A. Yes.

16 Q. And some from the MA's who sent them
17 in --

18 A. Yes.

19 Q. -- to be used at the hearing here today.

20 A. Correct.

21 Q. All right.

22 ***

23 MR. STEVENS: That will do it for that, Your

1 Honor.

2

3 BY MR. STEVENS:

4 Q. Now, your name again for the record is?

5 A. My name is John Rourke.

6 Q. Okay. Now, what is your occupation, Mr.

7 Rourke?

8 A. I am the Chief of the Market Information
9 Branch, Dairy Programs. I report to Marketing Service,
10 USDA.

11 Q. How long have you been in that position?

12 A. I have been in that position since May
13 1991.

14 Q. And what previous experience in dairy and
15 with the Government or otherwise do you have?

16 A. Well, I have started with the dairy
17 division in May 1970. I have been with the dairy --

18 Q. And what --

19 A. -- programs for 33 years.

20 Q. All right. And what is your training?
21 What is your -- what is your -- you have --

22 A. I have undergraduate degrees in economics
23 and did -- or postgraduate degree work in Ag economics

1 at Penn State University.

2 Q. As part of your duty -- what are your
3 duties at the Department? What type of duties do you do
4 for dairy programs?

5 A. The market information branch administers
6 two national information programs. One is the National
7 Dairy Market News Service and the other one is the
8 Federal Milk Ordering Statistics Program. And I have
9 responsibility for the operation of both of those
10 programs.

11 Q. Also known as FMOS.

12 A. Right.

13 Q. Is that the moniker?

14 A. Yes, sir.

15 Q. And as part of your duties, have you
16 testified in federal law hearings before?

17 A. Yes. I have. I have testified at
18 several hearings in the past.

19 Q. So in addition to your other duties, you
20 have appeared at federal law hearings before --

21 A. Yes.

22 Q. -- and testified.

23 A. Yes.

1 Q. And entered statistical information in
2 the -- in those hearings.

3 A. Correct.

4 Q. And what did -- did you prepare any
5 documents to bring with you today to the hearing?

6 A. Yes. I have prepared a several-page
7 document consisting of several tables of information.

8 ***

9 MR. STEVENS: Your Honor, I would like the
10 document that Mr. Rourke is referring to -- I guess for
11 ease of use, it has a cover page that starts,
12 "Statistical Information Provided by John P. Rourke."
13 And it is -- it has a cover page and it has six pages
14 attached to the cover page -- seven --

15 ADMINISTRATIVE LAW JUDGE: Okay. Do you want
16 that marked?

17 MR. STEVENS: Seven pages all together. I
18 would like that marked as Exhibit 7, if I could. We are
19 at Exhibit 7 --

20 ADMINISTRATIVE LAW JUDGE: Okay. Yes. That
21 is right.

22 MR. STEVENS: -- with the reporter?

23 ADMINISTRATIVE LAW JUDGE: Exhibit 7.

1 MR. STEVENS: Exhibit 7.

2 ADMINISTRATIVE LAW JUDGE: Okay. It is marked
3 as Exhibit 7. Go ahead.

4 ***

5 BY MR. STEVENS:

6 Q. Now, with respect to this document --
7 this document was prepared by you or prepared by
8 individuals in the Department from records -- from the
9 Market Administrator's offices and other --

10 A. Yes.

11 Q. -- and other sources.

12 A. Yes, sir. Other sources.

13 Q. Say, the FMOS, for example. Some of this
14 information comes from the Federal Market Order
15 Statistics. Does it not?

16 A. Some of it is -- some of it is published
17 by another Government agency.

18 Q. Okay. Now, was this information
19 generated by the Department or were -- did other parties
20 ask that this be prepared for the hearing?

21 A. This was prepared at the request of O-AT-
22 KA Milk Cooperative.

23 Q. Okay. Did you get any other requests

1 from any other parties to prepare documents for the
2 hearing?

3 A. No other requests were received.

4 Q. And pursuant to that request, you or with
5 the help of the Market Administrator, the Marketing
6 Specialists and other people in the Department of
7 Agriculture, created this exhibit, of which is marked
8 for identification as Exhibit 7.

9 A. Yes, sir.

10 Q. Now, could you go through the exhibit --
11 let us start with the cover page. There are two tables,
12 are there not, in the exhibit?

13 A. Yes. There are.

14 Q. And then there are one, two, three,
15 four -- four FMOS statistical tables. Are there not?

16 A. Correct.

17 Q. And they represent the years 2000 through
18 2003.

19 A. Correct.

20 Q. And I believe that we will go into this
21 in some -- in some detail later. These are -- it is the
22 same information for the four years basically explained
23 in a table. You can clarify this when you answer about

1 the specific tables.

2 A. Yes, sir.

3 Q. But that is generally true. Isn't it?

4 A. Correct.

5 Q. All right. Again, these were prepared
6 from official records of the Department.

7 A. That is correct.

8 Q. By your or pursuant to your supervision.

9 A. Yes, sir.

10 Q. And in conjunction with other people in
11 the Department of Agriculture. Did I hear an
12 affirmative?

13 A. Yes, sir.

14 Q. All right. Now, let -- having
15 established that, let us go through the tables -- and
16 let us go through the first two -- two tables and tell
17 us what is contained in the two tables, starting with
18 Table 1, the second page of the document marked for
19 identification as Exhibit 7.

20 A. Okay. I would start with a statement
21 about the function of Federal Milk Order Statistics. It
22 is the responsibility of the Market Information Branch
23 to assemble and publish information for all orders in

1 one place. It is the responsibility of the Market
2 Administrator to publish information for his or her
3 order. It is our responsibility to bring all that
4 information together in one place using market summary
5 reports filed by market administrators. We also develop
6 system-wide or market-wide statistics for all orders
7 combined. You have totals or averages. And we are also
8 the entity responsible for computing base prices used on
9 the Federal milk orders. Most of that would be
10 illustrated on the following tables. Table 1 shows
11 milk, skim milk, and cream used to produce the
12 evaporated and sweetened condensed milk in consumer-type
13 packages by handlers regulated under the Federal Milk
14 orders. All orders combined, annual totals, 2000
15 through 2002. A couple of items to mention about this
16 table -- in the reporting of this -- these products, we
17 do not have the reporting of these two products
18 separately. They are combined into one figure. I also
19 will address your attention to footnote 1, which reads,
20 includes producer milk and other source milk used to
21 produce these products in the regulated pool plants as
22 well as milk diverted or transferred to non-order plants
23 where these products are manufactured. In the year --

1 Q. Now -- let me interrupt you, if I may.
2 It is part -- I don't mean to interrupt you, but it does
3 have the source of the documents down there as footnote
4 2. Right?

5 A. Yes. The source is the United States
6 Department of Agriculture, Market Information Branch.

7 Q. Okay.

8 A. The -- for the year 2000, the volume,
9 which is shown in thousand pounds, is 2,248,675 pounds,
10 which would be equivalent to about 2.2 billion pounds.
11 Another point to make about these numbers is that these
12 numbers are not normally published and are statistics.
13 They are normally combined with other Class III products
14 and in any of the information that is released.

15 Q. So let me pause for a minute there.
16 That -- in other words, what you have just said is that
17 these are not -- if you looked up in the FMOS for the
18 year -- for these years that are noted in Table 1, you
19 wouldn't find these numbers written anywhere. They are
20 part of something else that is reported.

21 A. That is correct.

22 Q. Okay. Thank you. And Table 2.

23 A. Moving on to Table 2 --

1 Q. Please.

2 A. Table 2 is estimated total receipts of
3 producer milk, my handlers regulated under federal milk
4 orders, all orders combined, annual totals 2000 through
5 2002. Again, I would direct your attention to footnote
6 1, includes estimated figures for milk volumes that
7 while normally associated with federal milk orders, were
8 not pooled due to disadvantageous price relationships.
9 Again, the source is USDA Market Information Branch.
10 For the year 2000, the volume, again in thousand pounds,
11 120,552,222, which would be equivalent to 120.55 billion
12 pounds.

13 Q. Now, Mr. Rourke, this is total receipts
14 of milk as subject to the footnotes, of course.

15 A. Correct.

16 Q. And the other -- and just to
17 differentiate, Table 1 is milk, skim milk, and cream
18 used to produce these various products in consumer-type
19 packages.

20 A. Yes. It is.

21 Q. Right. So that is not the same
22 information on Table 1 and Table 2.

23 A. Correct. Table 1 includes other than

1 producer milk.

2 Q. All right. And how about the -- how
3 about the first FMOS statistical table for 2000? What
4 is that? The third -- well, actually the fourth page
5 counting the cover sheet.

6 A. Okay. Information shown for the year
7 2000 is the information of results from the use of the
8 product price formulas applicable for under the orders
9 for the applicable month.

10 Q. Subject to all the footnotes. Right?

11 A. Correct.

12 Q. And what has -- where noted on the table.

13 A. Correct.

14 Q. Take us through the table -- and it is
15 delineated Table 32 and then there is a footnote for
16 Table 31. This comes from the FMOS. It is a
17 reproduction of the table. Is it not?

18 A. Yes. It is.

19 Q. Okay. Take us through the -- you have
20 the columns on the top, the columns on the left-hand
21 side, and the various notations. Could you take us
22 through that and describe it?

23 A. Okay. Using January 2000 as an example,

1 the year and month is the month of the price. The
2 release date is the date on which the prices are
3 computed and issued. The Class II price is the 3.5
4 percent price for milk use in Class II products. It is
5 a dollars per hundredweight number. Class II butterfat
6 is the dollars per pound, which is the price per pound
7 for the minimum Class II price under the order. Class
8 III price is a milk price, 3.5 percent, shown in dollars
9 per hundredweight. Class III skim milk price is the
10 dollars per hundredweight price for Class III skim milk.
11 Class IV price is the dollars per hundredweight, 3.5
12 percent price. Class IV skim milk price is the dollars
13 per hundredweight price for Class IV milk -- skim milk.
14 The butterfat price is the -- basically has -- is made
15 up of -- has two purposes. It is the Class III
16 butterfat price and then it also is the price paid to
17 producers under component pricing orders per pound of
18 butterfat. Non-fat solids price is a component price
19 for -- on a dollars per pound basis for nonfat solids.
20 It is used in the computation of the Class IV skim milk
21 price. The protein price is the price per pound of
22 protein in dollars per pound, and it is used to compute
23 the Class III skim milk price, and it is also a

1 component price paid to producers. The other solids
2 price is a component price on the dollars per pound
3 basis, also used to compute the Class III skim milk
4 price, and it is also a component price paid to
5 producers. And the final figure is a somatic cell
6 adjustment rate, which is an adjustment to the producer
7 payment, based on the somatic cell count of the milk
8 that the producer delivers to the market.

9 Q. Now, going across the table for let us
10 say, January of 2000, the information is displayed under
11 those columns. Read it across. We understand -- I
12 think everyone understands the columns at the top. The
13 numbers across are numerical representations for each of
14 those categories. Right?

15 A. Correct.

16 Q. With the -- I guess with the exception of
17 the date, which is obvious there. I mean, the release
18 date is that date. And I assume those are all 2000.
19 Are they not -- with the month and the day.

20 A. Except for this --

21 Q. Right?

22 A. -- December is 2001.

23 Q. Okay. And which is noted there. Right?

1 Okay.

2 A. Correct.

3 Q. All right. I think I will leave that for
4 cross examination if people want to ask you about the
5 various kinds, which they probably will. And that is a
6 description of the table. Is it not?

7 A. Yes, sir.

8 Q. Okay. Now, let us go to 2001. It is the
9 same information and the difference is that it is for
10 2001.

11 A. That is correct.

12 Q. It is the same table, Table 32 -- it is
13 the title up at the top that refers to 2001.

14 A. Correct.

15 Q. And the description for the columns is
16 the same across the top.

17 A. Yes. It is.

18 Q. And the description for the months and
19 the pounds per hundredweight, dollars per pound -- I am
20 sorry -- dollars per hundredweight, dollars per pound,
21 dollars per hundredweight, dollars per pounds, dollars
22 per count for the somatic -- that is all the same.

23 A. Correct.

1 Q. And, in fact, it is the same for the next
2 two pages also. Isn't it -- with the exception that it
3 is for different years.

4 A. Yes.

5 Q. And the footnotes apply to each table as
6 they are noted and as they are known.

7 A. Yes.

8 Q. So you would read these tables the same
9 way -- each of the three that follow the first one --
10 you would read those the same way with the footnote, the
11 exceptions and qualifications -- they would all read the
12 same as the first one that you described.

13 A. Yes.

14 Q. And is there anything else that you would
15 like to add about the statistical information?

16 A. No. There is not.

17 Q. Now, let me ask you a couple other
18 questions. And these were prepared from departmental
19 records.

20 A. Yes. They were.

21 Q. And they were brought to the hearing
22 today. They are not presented for or against any
23 proposal that has been proposed to the Secretary. Are

1 ADMINISTRATIVE LAW JUDGE: I need -- even
2 though I know who you are, I still need you to identify
3 yourself.

4 MR. BESHORE: Oh. Marvin Beshore. Turning to
5 Table 1, am I correct that where milk is diverted or
6 transferred to non-order plants, which may produce more
7 than one product, the entire volume may show up in these
8 figures if the predominant product is canned milk,
9 evaporated milk or sweetened condensed milk in cans?

10 THE WITNESS: Not necessarily.

11 MR. BESHORE: Okay. We have observed that the
12 volumes reported here on Table 1 appear to be somewhat
13 greater than industry estimates of aggregate volumes.
14 Are there any things -- I know that 2000 -- and this was
15 a new data series with the new orders. Is that correct?

16 THE WITNESS: It was a new reporting
17 procedure.

18 MR. BESHORE: New reporting procedure. Okay.
19 Are there any elements to that -- to the reporting
20 procedure that might lead to some possible
21 overstatements in these figures?

22 THE WITNESS: The milk that is moved to the
23 non-order manufacturing plants is reported based on the

1 last audit or last visit by the auditors to those
2 plants. The -- since they are unregulated supply
3 plants, the auditor does not visit it on a monthly basis
4 and maybe a quarterly, semiannual or annual basis. The
5 information reported for that plant is based on what was
6 produced in that plant the last time the auditor was in
7 the plant. So it could be that after there was some
8 change in the -- for plants that have multiple use
9 products, there could have been a change in the actual
10 production of that plant. And so the information that
11 is reported is based on the last audit visit -- auditor
12 visit to the plant.

13 MR. BESHORE: And those -- if they are non-
14 order plants, their products are not routinely and
15 regularly audited in the way that full plants are, I
16 gather.

17 THE WITNESS: That is correct.

18 MR. BESHORE: Would you be -- would you be
19 aware that basically all production of evaporated and
20 sweetened condensed milk in the federal ordering system
21 is done at non-order plants? Does that sound right?

22 THE WITNESS: I do not -- not all of it is
23 produced in unregulated manufacturing plants, but the --

1 of that -- but the majority of it would be.

2 MR. BESHORE: Let me turn to your last
3 exhibit, the data -- the price data for the last table
4 in Exhibit 7 -- price data for 2003. Do you have
5 available the Class III and Class IV prices for
6 September?

7 THE WITNESS: Yes. I do.

8 MR. BESHORE: Okay. Could you just provide
9 those for the record so we can just entertain them on
10 the table?

11 ADMINISTRATIVE LAW JUDGE: If you have a
12 separate sheet of paper, we can just --

13 MR. BESHORE: Put them on a separate sheet of
14 paper. I --

15 ADMINISTRATIVE LAW JUDGE: have it -- have --
16 I mean, if you have something that is already printed
17 out, we can just have it exhibit -- as marked and as
18 admitted as Exhibit 7A rather than -- unless you want to
19 handle it and --

20 MR. BESHORE: It -- I was just asking for the
21 two numbers -- the Class III price and the Class IV
22 price.

23 ADMINISTRATIVE LAW JUDGE: Oh. Okay. Then --

1 MR. BESHORE: But if there is a separate
2 exhibit, I don't have any objection to that being
3 provided.

4 THE WITNESS: The same format as the last
5 page, it just has one additional month on it.

6 ADMINISTRATIVE LAW JUDGE: So you would have a
7 whole line across then?

8 THE WITNESS: Yes, sir.

9 ADMINISTRATIVE LAW JUDGE: And wouldn't it
10 just be easy just to have that as part of the record?

11 MR. STEVENS: Your Honor, that would be one
12 way. One -- another way would be for him to read across
13 the column into the record and supplement the record.
14 Whatever you would like him to do.

15 ADMINISTRATIVE LAW JUDGE: You could probably
16 do a little of each. You could read it in. But I would
17 say just -- if we have something on -- if we have -- it
18 is already there. It is already printed out. Why not
19 just put it in there?

20 MR. BESHORE: Right. Could -- I would ask
21 that that be marked as Exhibit 7A then?

22 ADMINISTRATIVE LAW JUDGE: Well, the reporter
23 doesn't have a copy of that. So we will have to --

1 MR. STEVENS: Yes. But we will -- we can --

2 ADMINISTRATIVE LAW JUDGE: We will do that --
3 we will do it during the break, but we will call it
4 Exhibit 7A. Okay?

5 MR. BESHORE: Okay. Yeah. Thank you.

6 MR. STEVENS: 7A for identification --

7 ADMINISTRATIVE LAW JUDGE: Yes. And I have a
8 feeling it will get admitted too.

9 MR. STEVENS: -- is the statistical material
10 for -- why don't you just say what it is?

11 ADMINISTRATIVE LAW JUDGE: It is just the
12 October -- it sounds to me like it is just the September
13 line for the 2003 table. Is that correct, Mr. Rourke?

14 THE WITNESS: Yes, sir.

15 MR. BESHORE: Could you just tell us what the
16 numbers are for the Class III price in September and the
17 Class IV price -- 3-5 price?

18 THE WITNESS: Class III price for September is
19 \$14.30. The Class IV price for September is \$10.05.

20 MR. BESHORE: Okay. So that is a difference
21 of \$4.25 if my quick arithmetic is right.

22 THE WITNESS: Yes. It would be.

23 MR. BESHORE: Okay. One other question, with

1 respect to the data on Table 1 -- that -- those pounds
2 are, as the table indicates, milk, skim milk, and cream.
3 And not -- they are not in a standardized milk fat test.
4 Correct? It is whatever it happened to be.

5 THE WITNESS: That is correct.

6 MR. BESHORE: Okay. I have no other
7 questions, Mr. Rourke.

8 ADMINISTRATIVE LAW JUDGE: Okay. Does anyone
9 else have any questions of Mr. Rourke? Mr. Stevens, did
10 you have anything else you wanted to ask Mr. Rourke?

11 MR. STEVENS: I have no other questions,
12 unless there is something else Mr. Rourke would like to
13 add at this point. Is there anything else you would
14 like to add at this point, Mr. Rourke?

15 THE WITNESS: No. There is not.

16 ADMINISTRATIVE LAW JUDGE: Okay. Then you can
17 step down, Mr. Rourke.

18 MR. STEVENS: Thank you, Your Honor.

19 ADMINISTRATIVE LAW JUDGE: And I will have
20 that marked -- no, I am going to admit it without
21 objection.

22 MR. STEVENS: I have no objection.

23 ADMINISTRATIVE LAW JUDGE: I presume this

1 Exhibit 7A, that one page with the extra line. Although
2 it is pretty early, I think that we should take a break
3 so that I can -- we can figure out what the course of
4 the rest of the day will be in terms of just get a
5 witness list and to -- so what I will do now -- it is
6 just before 9:30. I will call a 15-minute break and I
7 will ask those who are going to testify or who represent
8 those that are going to testify to come up here and let
9 us get a -- let us get a witness order so we can shoot
10 through the rest of the day.

11 ***

12 [OFF THE RECORD]

13 [ON THE RECORD]

14 ***

15 ADMINISTRATIVE LAW JUDGE: Let us go back on
16 the record. I have been informed that the -- that
17 Exhibit 7A -- that extra page -- there is copies in the
18 back of the room if anyone wants it. And I have also
19 talked with a few people during the break and I have a
20 witness -- a witness list. I am just going to read the
21 names. This is not -- this is flexible, but as of now,
22 we -- this is the order that we are going to call the
23 witnesses. If somebody has to catch a plane or

1 something and wants to switch their order, just let me
2 know. But I have Craig Alexander, Deborah Lisella,
3 Peter Gloeckle [sic - Patrick Gloeckle], Peter Diehl,
4 Dennis Schad, and David Arms. That is the list of
5 witnesses I have. Does that sound right to everybody?

6 MR. GLOECKLE: That is Patrick Gloeckle.

7 ADMINISTRATIVE LAW JUDGE: Well, I just took
8 the names I was given. Okay. It is Patrick Gloeckle to
9 be clear. I thought you -- I got -- I pronounced your
10 last name right --

11 MR. GLOECKLE: Yes. You did.

12 ADMINISTRATIVE LAW JUDGE: -- and this is what
13 I get for it. Okay. All right. So with that, I guess
14 we can call Mr. Alexander up to the stand.

15 MR. STEVENS: Are we back on the record, Your
16 Honor?

17 ADMINISTRATIVE LAW JUDGE: Yeah. Oh, yeah.
18 We have been back on the record for a couple of minutes.

19 MR. STEVENS: Thank you.

20 MR. BESHORE: Your Honor, if I might, before
21 Mr. Alexander testifies, we have a set of seven
22 exhibits, which I would like to mark, which he will
23 refer to in this testimony. And --

1 ADMINISTRATIVE LAW JUDGE: Okay. I will --
2 the first number will be Exhibit 8.

3 MR. BESHORE: Thank you. Yes. I have
4 distributed sets throughout most of the room. The
5 first --

6 ADMINISTRATIVE LAW JUDGE: Does the reporter
7 have a set?

8 MR. BESHORE: Yes. He does.

9 ADMINISTRATIVE LAW JUDGE: Okay.

10 MR. BESHORE: In fact, he has four sets.

11 ADMINISTRATIVE LAW JUDGE: Oh.

12 MR. BESHORE: The first one is a one-page
13 document, which I have asked to be marked as Exhibit 8
14 on the letterhead of the American Dairy Products
15 Institute titled, "Evaporated Milk Production." The
16 second exhibit, which I would ask to be marked as
17 Exhibit 9 is a three-page exhibit titled, "Department of
18 Food and Agriculture Milk Pooling Branch Classification
19 of Dairy Products in the State of California. Exhibit
20 10 is also a three-page table of Federal Order Class and
21 Class Prices from January 1998 through -- estimations
22 through December of 2004. Exhibit 11 is a one-page
23 graph entitled comparison of Federal Order and

1 California Prices. Exhibit 12 is a two-page document,
2 which is a USDA publication, Livestock, Dairy and
3 Poultry Outlook, dated September 23, 2003. Exhibit 13
4 is a one-page exhibit -- Chicago Mercantile Exchange
5 Milk Futures Prices -- Settlement Prices, 10/14/03. And
6 Exhibit 14 is a one-page document, handwritten title at
7 the top, Evap. Bid, showing evaporated milk bid awarded
8 by the Kansas City Commodity Office of USDA. The packet
9 of eight exhibits, which has been distributed, has an
10 additional exhibit, which is information that has
11 already been placed in the record by Mr. Rourke. So we
12 will not -- we are not going to mark that again.

13 MR. STEVENS: This last one?

14 MR. BESHORE: Right. The last one-page
15 document in the set that has been distributed.

16 ADMINISTRATIVE LAW JUDGE: Okay. Well,
17 Exhibits 8 through 14 have been marked as requested by
18 Mr. Beshore. Okay. And we are ready to swear in the
19 witness.

20 MR. BESHORE: Yes.

21 ADMINISTRATIVE LAW JUDGE: Okay. Please raise
22 your right hand.

23

1 CRAIG ALEXANDER,
2 having first been duly sworn, according to the law,
3 testified as follows:

4 ***

5 ADMINISTRATIVE LAW JUDGE: And please state
6 and spell your name.

7 THE WITNESS: Craig S. Alexander. That is
8 C-r-a-i-g, Alexander, A-l-e-x-a-n-d-e-r.

9 ***

10 [Direct Examination by Mr. Beshore]

11 ***

12 DIRECT EXAMINATION

13 BY MR. BESHORE:

14 Q. Mr. Alexander, do you have a prepared
15 statement which you have presented with respect to O-AT-
16 KA proposal one in this hearing?

17 A. Yes. I do.

18 Q. Okay. Would you proceed with that,
19 please?

20 A. My name is Craig S. Alexander. I am
21 testifying today on behalf of O-AT-KA Milk Products
22 Cooperative. I am currently the sales managers for
23 Ingredients and Food Service. O-AT-KA's business

1 address is Cedar and Ellicott Streets, Batavia, New
2 York, 14021. I have been employed at O-AT-KA since
3 November 2002. I grew up on an upstate New York dairy
4 farm. I received my bachelor's degree at SUNY Albany in
5 economics and political science. I received my master's
6 degree in agricultural economics at Cornell University.
7 After Cornell, I worked for Upstate Farms Cooperatives
8 as economist and as director of membership and field
9 services for seven years. I then worked for the Dairy
10 Institute of California as executive director. After
11 leaving that position in 1997, I returned to Cornell and
12 worked as extension specialist before joining O-AT-KA.
13 I have testified at numerous Western New York State
14 Order, Federal Order, and California State Order
15 hearings in my various capacities. O-AT-KA is owned by
16 the farmers belonging to Upstate Farms Cooperative,
17 Inc., Niagara Milk Cooperative, Inc., and Dairylea
18 Cooperative, Inc. Total membership of these
19 cooperatives is over 2,000 producers, located in several
20 northeastern states. O-AT-KA processed over 700 million
21 pounds of milk in 2002. O-AT-KA manufactures a full
22 line of canned evaporated milk products, butter, nonfat
23 dry milk, and a variety of long shelf life specialty

1 beverages. We estimate that we are the second largest
2 manufacturer of canned evaporated milk products behind
3 Nestle Foods Company. O-AT-KA's sales territory
4 includes distribution throughout the eastern U.S. and to
5 Puerto Rico, but with some sales as far as California.
6 O-AT-KA has asked for this hearing and is requesting
7 that USDA handle the decision-making process on an
8 expedited emergency basis. Every day that goes by with
9 the current misclassification of evaporated milk
10 products, is reducing our farmer owner's returns and
11 putting their investment at risk. We appreciate the
12 decision to call this hearing, but urgently request an
13 emergency decision for the reasons that we believe are
14 clear in this testimony. Exhibit 8 shows the estimated
15 production of canned evaporated milk products from a
16 survey by the American Dairy Products Association. As
17 the table shows, evaporated milk production has declined
18 almost every year and is down almost 40% since 1980. An
19 alternative source of data, NASS's Dairy Products Report
20 does not split evaporated milk by itself, and also we
21 have noticed that the annual report and monthly reported
22 numbers for 2002 are significantly different, and we
23 have asked NASS officials to review these data. The

1 largest manufacturer, Nestle, produces its product in
2 California from milk likely pooled on the California
3 State Order. Nestle closed its other evaporated milk
4 plant located in New York in the mid 1990s, with a
5 higher milk cost in New York likely being a contributing
6 factor. Other manufacturers besides O-AT-KA, include
7 Diehl, Inc., based in Ohio, and Milnot Holding
8 Corporation, located in Missouri. USDA has placed milk
9 used to produce evaporated milk products in the lowest
10 use classification for decades. In the uniform
11 classification decisions of 1974 that reviewed Class I,
12 II and III classification, USDA stated, "A Class II
13 classification should not apply to evaporated or
14 condensed milk or skim milk in consumer-type containers
15 as the cooperatives proposed. Such storable products
16 should remain in the lowest price class. A Class III
17 classification for producer milk in these products will
18 permit such uses to remain as a competitive outlet for
19 milk surplus to the needs of the Class I market. Such
20 products made from milk regulated under these orders
21 must compete over wide areas with the same products
22 processed from ungraded milk or milk that is often
23 priced at no more than the Minnesota-Wisconsin price.

1 Comparable pricing should prevail under these 32
2 orders." That is from March 5, 1974 Federal Register.
3 When national uniform classification was considered in
4 1993, and specifically Class II and Class III products
5 were reviewed, canned evaporated milk was again left
6 unchanged in its Class III designation. About that
7 time, USDA created a separate and narrow use
8 classification for nonfat dry milk only, known as Class
9 IIIa. Pricing of Class III for much of this time was
10 based on a competitive pay price survey known as the M-W
11 price series. In 1998 and 1999, when the Federal Order
12 reform process was taking place, evaporated milk, yet
13 again, was left unchanged in its historical
14 classification as a Class III milk product. However,
15 the lowest use valued manufacturing classes were more
16 definitively split between Class III and Class IV.
17 Class II became a cheese use class based on a cheese
18 yield and cheese pricing formula. Other products, such
19 as anhydrous milk fat, that are mostly butterfat, were
20 left unchanged in Class III as the USDA considered it
21 unnecessary to reclassify given the use of the same milk
22 fat price for Class III and Class IV. Reclassification
23 of milk used to produce canned evaporated milk to a more

1 appropriate Class IV classification was overlooked. It
2 is also important to understand the historical context
3 for the nation's leading evaporated milk manufacturer
4 that is located in and operating under the California
5 Marketing and Stabilization Plans. We can call it the
6 California State Order. Historically in California, the
7 lowest and residual classification of milk was Class IV
8 and since the early 1960s was based on butter and nonfat
9 dry milk pricing formulae. Until the late 1980s, this
10 classification contained not only butter and nonfat dry
11 milk, but also cheese and a number of other storable
12 products, including evaporated milk. When California
13 created a separate cheese use classification, known as
14 IVb, Class IVb, evaporated milk remained in the residual
15 classification that has become Class IVa. Therefore, it
16 continues to be based on butter and nonfat dry milk
17 pricing formulas. This table of California
18 Classification is listed as Exhibit 9. The fact that
19 the evaporated milk is currently misclassified in a
20 Class II cheese use class for pricing purposes, is
21 reason enough for reclassification. However, as we
22 predicted, the huge current price disparity caused by
23 the difference in the pricing basis between Federal

1 Order manufacturers and those not priced by a Federal
2 Order, is a compelling reason for emergency decision-
3 making. Regular evaporated milk products are made by
4 evaporation of water to result in a milk solids content
5 of a minimum of 6.5 percent butterfat and 23 percent
6 total solids with skim evaporated milk and filled
7 evaporated milk are other products in this category.
8 The content or yield of evaporated milk from raw milk is
9 driven by the nonfat solids content of the incoming milk
10 in a fashion similar to nonfat dry milk. As a rule of
11 thumb it takes about 38.87 pounds of milk to produce a
12 case of evaporated milk with 24 twelve ounce cans
13 weighing twenty pounds of product. However, the higher
14 the nonfat solids in the incoming milk, the less water
15 needs to be evaporated and the more cans of product that
16 can be produced from the raw milk. It is in no way
17 related to the protein-driven curd development so
18 critical to cheese production and, therefore, has little
19 relationship to the cheese yield-based Class III pricing
20 formula. We also face a milk component pricing problem
21 in that protein, as a percentage of total nonfat solids,
22 can vary between farms and regions. However, since the
23 yield of evaporated milk is tied to fat and total nonfat

1 solids and is not sold on the basis of protein content,
2 the current classification is a source of improper
3 pricing and possible raw product cost inequity. Further
4 problems are created by the fact that evaporated milk
5 selling prices, while effected by milk costs driven by
6 Class III formulas, are not tied directly to cheese
7 markets and the CME trading, as is much of the bulk
8 cheese that is sold. In no way does evaporated milk
9 substitute as a consumer use for cheese or vice versa,
10 cheese does not substitute for evaporated milk products.
11 Evaporated milk products can be and are produced from
12 reconstituted nonfat dry milk, they cannot be produced
13 from cheese. Evaporated milk is retorted in steel cans
14 such that it is sterile with an un-refrigerated shelf
15 life that can exceed 12 months. Shelf life of a year or
16 more with no need for refrigeration is a characteristic
17 that historically caused USDA to identify evaporated
18 milk in the lowest use class. Manufacturers have the
19 flexibility to produce and inventory products for use in
20 other time periods. Therefore, it made sense decades
21 ago when the USDA determined that evaporated milk should
22 be in the lowest use classification, and nothing has
23 changed in the meantime that would suggest putting

1 evaporated milk in other than the lowest classification.
2 However, there are now two manufacturing or storable
3 product classes, Class III and Class IV. Federal Order
4 reform in 2000 made it clearer than ever that Class III
5 pricing is tailored exclusively for cheese products.
6 The decision hinged Class III prices on the price of
7 cheese, make allowances for cheese, and yields for
8 cheese. Evaporated milk in no way competes with cheese
9 in product use. Because evaporated milk is similar to
10 powdered milk in that it has a long shelf life, it does
11 not need refrigeration and is based on nonfat solids
12 rather than protein, all characteristics more similar to
13 nonfat dry milk than to cheese, it is good policy that
14 evaporated milk be placed in the same class as powdered
15 milks. The properties of storability and nonfat solids-
16 based yields that evaporated milk shares in common with
17 powdered milk means that Class IV is now the appropriate
18 classification. The problems of misclassification make
19 it critical that evaporated milk be placed in the Class
20 IV category as soon as possible. Exhibits 10 and 11 are
21 from the published Federal Order and California State
22 Order data. This exhibit shows that for the month of
23 September, the price differences between California IVA

1 and the Federal Order Class III price are over \$4 per
2 hundredweight. On a finished product basis, this amounts
3 to about \$1.72 per case on a 24, 12 ounce basis. The
4 cost of milk has risen rapidly since this spring, as we
5 had predicted when we submitted our petition last
6 January. We have not been able to recover the full
7 extent of this regulated cost increase, especially when
8 the largest competitor, Nestle, is based in California
9 and has had no such increase in costs. Exhibit 11 also
10 shows that over time we have seen that both California
11 IVa and Federal Order Class III prices vary in
12 relationship to each other. There have been times when
13 Class III prices were lower and California IVa prices
14 higher. However, that was prior to the two support
15 price adjustments in 2001 and 2002 that reduced nonfat
16 dry milk prices by a combined 20 cents per pound. Given
17 the ongoing surplus amount of nonfat dry milk in the
18 market, this has dropped the Class IVa price and Federal
19 Order Class IV price by almost \$2 per hundredweight. We
20 believe putting the competitors on the same pricing
21 basis, fat and nonfat solids, will eliminate the
22 volatility of competitive conditions that has existed
23 for some time. It will also eliminate what we believe

1 to be a chronic condition of relatively higher raw
2 product costs if Federal Order evaporated milk
3 manufacturers remain on a Class III cheese formula
4 basis. The continuation of a significant spread in
5 Class -- in Federal Order Class III and California IVa
6 prices is seen in USDA's own Livestock, Dairy and
7 Poultry Outlook from September 2004 in Exhibit 12. USDA
8 expects the price difference to about 40 cents per
9 hundredweight for the year with Class III and Class IV
10 midpoints of the respective ranges to be \$10.65 and
11 \$10.25 per hundredweight. However, we believe this is
12 far too low as Class III futures in Exhibit 13 are
13 averaging \$11.87 per hundredweight for 2004 and,
14 therefore, will likely again show a large disparity with
15 California IVa prices. While futures prices are
16 expecting a fairly significant price drop in the next
17 few months, we do not know if and when this will really
18 happen. The misclassification of milk used to produce
19 evaporated milk and the current price disadvantage with
20 non-Federal Order milk sources has been borne by O-AT-KA
21 largely through reduction in margins and reduced returns
22 to producers owners as we have tried to maintain our
23 customer base in the face of a very competitive

1 marketplace with stagnant to declining overall sales.
2 O-AT-KA does not have a strong brand on which to rely,
3 instead the bulk of our sales are considered private
4 label and sold to others for resale in their labels.
5 Nestle, which does have a strong brand, Carnation, has
6 also entered the private label evaporated milk business
7 in recent years taking on several private label grocery
8 customers coast-to-coast. The private label business is
9 now even more price competitive and an additional
10 marketer with lower product costs over time will capture
11 more and more business. It will be impossible for us,
12 as a producer-owned co-op, to sustain production of
13 canned evaporated milk in the face of a prolonged and
14 significant raw product cost difference. Just one
15 example of the competitive environment we now face is
16 shown by the recent USDA canned evaporated milk bid.
17 Exhibit 14 shows the winning bidder for the period of
18 October through December 2003 was Nestle Food Company,
19 with a quantity of almost 6 million pounds of product.
20 Our bids averaged about 53 cents per pound for delivery
21 points around the country while Nestle averaged 42.5
22 cents per pound or about 20 percent less. In the
23 interest of the competitive bidding process, we think

1 USDA would want to allow for more than one company to be
2 submitting competitive bids by putting the potential
3 bidders on a more fair and equitable regulatory basis.
4 The continued misclassification of milk used to produce
5 evaporated milk could force plants out of production,
6 losing this market for the milk of Federal Order
7 producers and causing the milk to be turned into powder
8 that pays Class IV pricing. Given the overall declining
9 trend in evaporated milk sales over time, clearly this
10 is a product that cannot carry an additional burden of
11 class prices higher than Class IV. Even with a change
12 in classification that will correlate much better with
13 California prices, it should further be noted that
14 Federal Order Class IV prices will likely tend to be
15 higher than California IVa prices by ten to 15 cents per
16 hundredweight or about a 5-cent per case amount due to
17 formula differences. Lowering the classification of
18 canned evaporated milk and sweetened condensed products
19 from Class III to Class IV will not have a significant
20 impact on blend prices in the Federal Order system. We
21 originally estimated less than half a cent per
22 hundredweight by changing the classification of milk
23 used to produce evaporated milk products. The

1 information we received from USDA on milk used to
2 produce both evaporated and sweetened condensed milk in
3 Exhibit 7 looks perhaps to be double or more what we
4 would expect based on estimated finished product
5 production of these products. We would ask USDA to
6 review the milk used to produce data using canned milk
7 production as a check to verify the milk impacted by
8 this proposal and therefore the impact on the blend.
9 Even with what we believe is an inflated amount of 1.3
10 percent of federal order milk taking the data from
11 Exhibit 7, we estimate that the impact of reclassifying
12 from Class III to Class IV, with price spreads ranging
13 from 40 cents to as much as \$1.60, would -- could impact
14 the blend on a national average basis about half a cent
15 to just over two cents per hundredweight. Thus,
16 enabling Federal Order producers to continue to compete
17 for this evaporated milk market by reclassifying milk
18 used to produce evaporated milk to Class IV, would not
19 significantly reduce dairy farmer income, but would help
20 maintain an outlet for milk in canned milk products
21 under the federal order system. The impact would be
22 even less taking into consideration the milk might end
23 up in a Class IV use anyway. Clearly, canned evaporated

1 milk is misclassified and the competitive damage that is
2 being done can be minimized if USDA expedites its
3 decision through emergency decision-making. Also at
4 issue today is reclassification of sweetened condensed
5 milk in consumer-type packages. Evaporated milk and
6 sweetened condensed milk in consumer-type packages have
7 been linked in Federal Order regulation for decades. We
8 believe it makes sense to reclassify the milk in these
9 products, as well as evaporated milk, as they are many
10 times sold by the same marketers and sometimes produced
11 in the same plants. There are also similar issues with
12 non-Federal Order sources of the milk used to produce
13 these products coming from California and imported from
14 other countries. Other manufacturers of sweetened
15 condensed products in consumer-type packages will be
16 testifying on these issues. Thank you for the
17 opportunity to testify.

18 Q. Mr. Alexander, could you refer to Exhibit
19 8 --

20 A. Yes.

21 Q. -- for a moment, please? Now, can you
22 tell us just briefly how this information is derived by
23 the American Dairy Products Institute?

1 A. Annually, ADPI sends out a survey to the
2 participating evaporated milk manufacturers.

3 Q. And they report their volumes and
4 production to --

5 A. That is correct.

6 Q. -- ADPI and then it reports the
7 aggregate.

8 A. Right.

9 Q. Okay. Are all of the manufacturer's of
10 the evaporated milk in the United States members of ADPI
11 to your knowledge?

12 A. To my knowledge.

13 Q. So in your estimation, this ADPI
14 information is a good measure of national production of
15 evaporated milk.

16 A. Yes.

17 Q. Can you explain to us how you could
18 convert the data on Exhibit 8 to volumes of raw milk?

19 A. Well, we can simply -- and typically the
20 industry talks about 24 canned cases, not 48 canned
21 cases used here. But the conversion is similar. The
22 finished product for the cases reported here in this
23 table are for the larger cans -- or for the larger case

1 sizes and would represent 40 pounds of finished product.
2 And it would typically be half that for the 24 canned
3 cases. So it would be 20 pounds. For the more typical
4 24-case -- 24 canned cases, we use 38.87 pounds of milk
5 equivalent to product a case of the 24 12-ounce cans.
6 So that is our -- that is our conversion factor to get
7 back to a milk equivalent -- 38.87.

8 Q. So for simplicity, if we use 40 pounds,
9 as opposed to 38.87, 40 pounds per of raw milk to make a
10 24-canned case. Is that correct?

11 A. Right.

12 Q. Okay.

13 A. It is basically double.

14 Q. Okay. So --

15 A. I mean, it is about double.

16 Q. Okay. So for these 48-canned cases,
17 which are reported on Exhibit 8, it is roughly 80 pounds
18 of raw milk --

19 A. That is correct.

20 Q. -- per case.

21 A. That is correct.

22 Q. Okay. So -- but -- and that would mean
23 that the total raw milk going into production of

1 evaporated milk would be -- say, in 2002, would be
2 approximately what volume?

3 A. Roughly 750 million pounds of milk.

4 Q. 750 million pounds nationwide --

5 A. Nationwide.

6 Q. -- including production in California.

7 A. Correct.

8 Q. And the producer in California, Nestle,
9 is the single largest evaporated milk producer in the
10 United States.

11 A. That is right.

12 Q. Now, at O-AT-KA -- you have indicated
13 O-AT-KA produces products other than evaporated milk.
14 Is evaporated milk its single largest product line?

15 A. Probably -- in terms of the amount of
16 milk going in, probably nonfat dry milk would be. But
17 canned evap would be a close second.

18 Q. If your production or your sales of
19 canned evaporated milk go down at O-AT-KA, does the milk
20 then go into nonfat dry milk?

21 A. Yes. It does.

22 Q. Now, if -- just looking at -- focusing on
23 and limiting your focus to the Federal Order system, and

1 ignoring California for a moment, is -- what is the
2 right classification for evaporated milk?

3 A. There is no question in our minds that
4 evaporated milk is a cheese. So we believe that is just
5 makes sense to put it in a solids-based classification.
6 And we believe Class IV makes sense.

7 Q. So with the present Federal Order system
8 of end-product pricing, product-priced formulas for the
9 manufactured milk classes, Class IV is the appropriate
10 classification for evaporated milk.

11 A. That is correct.

12 Q. And in your opinion, would the same thing
13 apply to sweetened condensed milk?

14 A. Yes.

15 Q. And that would be the case regardless of
16 whether there was the problem that is out there in the
17 real world, in terms of competition with California.

18 A. That is correct.

19 ***

20 MR. BESHORE: I have no other questions for
21 Mr. Alexander.

22 ADMINISTRATIVE LAW JUDGE: What about these
23 exhibits that we have marked?

1 MR. BESHORE: I would like to move the
2 admission of Exhibits 8 through 14.

3 ADMINISTRATIVE LAW JUDGE: Any objection?
4 Exhibits 8 through 14 are admitted into evidence. Does
5 anyone else have any questions of Mr. Alexander? I
6 guess you can step down -- oop -- go ahead. I am sorry.
7 Go ahead.

8 MS. CARTER: I am Antoinette Carter with USDA.
9 Mr. Alexander, if I can just direct your attention to
10 Exhibit 8 again.

11 ADMINISTRATIVE LAW JUDGE: You may have to
12 speak up a little bit so the folks in the back --

13 MS. CARTER: Oh.

14 ADMINISTRATIVE LAW JUDGE: -- can hear you.

15 MS. CARTER: Can hear me -- can you hear me?
16 You indicated that these figures are derived from
17 manufacturers that are members of ADPI.

18 THE WITNESS: Correct.

19 MS. CARTER: Is that correct?

20 THE WITNESS: The American Dairy Products
21 Institute.

22 MS. CARTER: And this is done as a survey.
23 And do the members report this information voluntarily?

1 THE WITNESS: Yes.

2 MS. CARTER: So it may not include all of the
3 members. These members may not reflect all of the
4 members, if it is a voluntary -- could or could not.

5 THE WITNESS: It is possible.

6 MS. CARTER: It is possible. Additionally,
7 this -- these figures show that there is a constant or
8 steady decline in the amount of evaporated milk and
9 related products being produced. What is your
10 observation as to contributing factors for the decline?

11 THE WITNESS: I think it is the canned
12 evaporated milk is very mature and that over time it
13 has, you know, been used very much in the household, you
14 know, for cooking. And over time we have seen less at-
15 home cooking being done and more food service and out-
16 of-home meals. And so it is kind of product of modern
17 lifestyle.

18 MS. CARTER: Okay. Let us see -- on page 1 of
19 your statement, and you have also, in cross examination,
20 stated that O-AT-KA does, indeed, manufacture other
21 products besides evaporated and milk. Are these all
22 that are listed -- the products -- are they all classes?
23 Do they vary from Class I's or Class IV or --

1 THE WITNESS: We have no Class I products, but
2 we do have some Class II.

3 MS. CARTER: Okay.

4 THE WITNESS: And obviously with evap, the
5 Class III, and then we have Class IV. So we have II,
6 III, and IV products being produced in our plant.

7 MS. CARTER: Okay. On the source of supply
8 for O-AT-KA, is that all your member producers, or is it
9 producers that are not -- nonmembers of O-AT-KA?

10 THE WITNESS: It is virtually 100 percent
11 member --

12 MS. CARTER: Uh-huh.

13 THE WITNESS: -- from member sources.

14 MS. CARTER: Okay. Let us see -- thank you.

15 THE WITNESS: Okay.

16 ADMINISTRATIVE LAW JUDGE: Mr. Stevens.

17 MR. STEVENS: Your Honor, Garrett Stevens.

18 Mr. Alexander, you -- I believe in your testimony you
19 referred to a request for emergency treatment --

20 THE WITNESS: Yes.

21 MR. STEVENS: -- of this matter.

22 THE WITNESS: Right. Could you expand on that
23 a little bit in terms of why you think an emergency

1 exists that needs to be addressed and how you would like
2 the Secretary to address that emergency?

3 THE WITNESS: Well, for the competitive
4 reasons that we talked about that, you know, currently
5 the major marketer canned evaporated milk in our
6 marketplace is -- has a substantially lower raw product
7 cost, therefore, we found it difficult to recover the
8 dramatically increased cost that we faced. So I -- as a
9 competitive factor, we found it difficult to recover in
10 our pricing that increase in costs and it makes some
11 sense, given that our major competitor doesn't have
12 those increased costs. So we are -- because of the very
13 stagnant nature of the market, we can't afford to give
14 up customers. So we have had to be price-competitive to
15 maintain that customer base, yet -- so we have basically
16 taken the increase in reduced margins. And that
17 directly goes back to the producers. They receive the
18 returns from the sale of their milk and finished
19 product. So it is basically an issue that we feel that
20 if the secretary could come to a decision and possibly,
21 on an emergency basis, make that decision and implement
22 it, it would help us greatly. We also think that going
23 forward -- you know, although it has just been a

1 relatively few months now that we have had such high
2 prices, we think that going forward, while there might
3 be a narrowing of the price difference -- we think that
4 there still will be a substantial price difference and
5 that any relief that we could get as soon as possible
6 would be appreciated. The means by which that would
7 happen, frankly, I know that there is -- they can put
8 out a -- forego the recommended decision and go right to
9 the final decision and implement it quicker. They can
10 have a reduced briefing schedule. So there is ways to
11 implement it faster. And I know that in some cases in
12 the past, USDA has used those mechanisms to implement
13 decisions quicker.

14 MR. STEVENS: Okay. Is there anything you
15 would like the record to reflect concerning the small
16 business aspects of this matter? Are there any small
17 business aspects that the Department should take into
18 account in considering this rule change?

19 THE WITNESS: Well, I think, based on the fact
20 that O-AT-KA employs about 300 people in our plant. We
21 are a single plant. We are, I guess, considered a small
22 business and, therefore, have limited resources. That,
23 coupled with the fact that our returns go back to our

1 farmer owners, also makes us a little different from,
2 you know, the multinational corporation that is the
3 leader in the marketplace right now. So we feel that
4 that is an important consideration for USDA to take into
5 account.

6 MR. STEVENS: Do you consider your farmers
7 small business operators?

8 THE WITNESS: Absolutely. Yes.

9 MR. STEVENS: That is all I have, Your Honor.

10 ADMINISTRATIVE LAW JUDGE: Any further
11 questions? And you may step down. Thank you very much.
12 And according to my list here, Ms. Lisella is the next
13 to testify. Please raise your right hand.

14 ***

15 DEBORAH LISELLA,
16 having first been duly sworn, according to the law,
17 testified as follows:

18 ***

19 ADMINISTRATIVE LAW JUDGE: Okay. And can you
20 please state and then spell your name for the record?

21 THE WITNESS: Deborah A. Lisella,
22 D-e-b-o-r-a-h, L-i-s-e-l-l-a.

23 ***

1 [Direct Examination by Administrative Law Judge]

2 ***

3 ADMINISTRATIVE LAW JUDGE: And are you just --
4 are you going to read a statement? Is that --

5 THE WITNESS: Okay.

6 ADMINISTRATIVE LAW JUDGE: Proceed.

7 THE WITNESS: My name is Deborah Lisella. I
8 represent Milnot Holding Corporation. I am the vice
9 president of operations. On behalf of Milnot, a small
10 business employing 422 people, we would request
11 emergency disposition to classify evaporated and
12 sweetened condensed milk in consumer-type packages as
13 Class IV products. Milnot produces evaporated and
14 sweetened condensed milk in consumer-type packages,
15 utilizing approximately 200 million pounds of raw milk
16 annually in this production. Regular evaporated milk
17 products remove water from raw milk, resulting in milk
18 solids content of a minimum of six-and-a-half percent
19 butterfat and 23 percent total solids, cited in 21 CFR
20 131.130. Similarly, sweetened condensed milk products
21 are made by blending condensed milk and sugar, resulting
22 in a product containing milk solids in a minimum of
23 eight percent butterfat and 28 percent total solids, as

1 cited in 21 CFR 131.122. The contents of evaporated and
2 sweetened condensed milks are driven by the nonfat
3 solids content of the incoming milk, similar to nonfat
4 dry milk. The higher the nonfat solids of the incoming
5 water, the less water needs to be removed and the more
6 canned products result from the raw milk. Production of
7 these milk items is not related to the protein-driven
8 curd development critical to the production of cheese,
9 and has little relationship to the cheese yield-based
10 Class III pricing formula. In the uniform
11 classification decisions of 1974, which reviewed Class
12 I, II, and III classifications, the USDA stated, "A
13 Class II classification should not apply to evaporated
14 or condensed milk or skim milk in consumer-type
15 containers as the cooperatives proposed. Such storable
16 products should remain in the lowest price class. A
17 Class III classification for milk in these products will
18 permit such uses to remain as a competitive outlet for
19 milk surplus to the needs of the Class I market. Such
20 products made from milk regulated under these orders
21 must compete over wide areas with the same products
22 processed from ungraded milk or milk that is often
23 priced at no more than the Minnesota-Wisconsin price.

1 Comparable pricing should prevail under these 32
2 orders." That is 49 Federal Register at 8491 to 8492,
3 published in 1974. During the 1998-'99 reforms, when
4 manufacturing classes were more definitively split
5 between Class III and Class IV, evaporated and sweetened
6 condensed milks were overlooked and remained with a
7 Class III designation, instead of moving to the more
8 appropriate Class IV designation. Evaporated and
9 sweetened condensed milks are packaged in shelf staple
10 packages, whereby shelf life of a year or more can be
11 realized without refrigeration. Because of this shelf
12 life and characteristics based on nonfat solids rather
13 than protein, evaporated and sweetened condensed milks
14 should be in the lowest classification of storable
15 manufactured products, similar to powdered milk. Milnot
16 respectively requests that 7 CFR Section 1000.40 removes
17 paragraphs C-13, re-designate the paragraph D-12, as
18 paragraph D-13 and add new paragraph D-12 to read as
19 follows: Evaporated or sweetened condensed milk in a
20 consumer-type package and. Given the August 2003
21 differential of \$3.85 per hundredweight up charge, a
22 Federal Order Class III versus California Class IVa milk
23 and the September 2003 differential of \$4.42, we

1 respectfully request emergency disposition from this
2 hearing as the pricing differential places our
3 organization at an unfair competitive disadvantage to
4 manufacturers utilizing the California Class IVa milk in
5 the manufacture of their products. The most recent
6 evidence of this disparity, being the award of 100
7 percent of October through December 2003 USDA bid
8 evaporated milk to Nestle Food Company, who utilizes
9 California Class IVa milk in the manufacture of their
10 evaporated milk. The current 40-plus percent milk price
11 advantage has created a significant advantage to
12 manufacturers using this California milk. Thank you for
13 your expedited attention in this matter.

14 ADMINISTRATIVE LAW JUDGE: Anything you want
15 to add?

16 THE WITNESS: No.

17 ADMINISTRATIVE LAW JUDGE: Okay. Does that --
18 Mr. Beshore.

19 MR. BESHORE: Just a couple questions. Ms.
20 Lisella, where is Milnot's plant located?

21 THE WITNESS: Our plant is located on the
22 border of Oklahoma and Missouri, with the primary
23 portion of that plant being in Missouri.

1 MR. BESHORE: And does it serve as a -- you
2 are not a regulated Federal Order plant. Correct?

3 THE WITNESS: No. We are not.

4 MR. BESHORE: Okay. But you are -- the source
5 of supply for your plant is milk which is pooled and
6 regulated under one or more Federal Milk Orders.
7 Correct?

8 THE WITNESS: Yes.

9 MR. BESHORE: And the market of this milk --
10 of that milk to your plant insists that you pay the --
11 at least the Federal Order minimum prices.

12 THE WITNESS: Oh, yes, they do.

13 MR. BESHORE: Okay. Does your plant take
14 significant amounts of non-Class I or surplus milk from
15 the Texas and Oklahoma area?

16 THE WITNESS: Currently, with our contract and
17 agreement with our co-op, we are not at liberty to do
18 that. So basically we are locked in with our contracts,
19 take 100 percent of our milk from our co-op suppliers.

20 MR. BESHORE: Okay. But that milk comes from
21 the Texas and the Oklahoma --

22 THE WITNESS: Texas-Oklahoma area.

23 MR. BESHORE: -- area.

1 THE WITNESS: Yes.

2 MR. BESHORE: Okay. And so your testimony is
3 in support of both proposal two, which relates to
4 sweetened condensed milk, as well as proposal one,
5 relating to evaporated milk.

6 THE WITNESS: Yes.

7 MR. BESHORE: Okay. Thank you.

8 ADMINISTRATIVE LAW JUDGE: Does anyone else
9 have any questions of the witness? Thank you very much.
10 You may step down.

11 MR. STEVENS: Oh. I have one or two --

12 ADMINISTRATIVE LAW JUDGE: Oh. Why do you
13 keep doing that?

14 MR. STEVENS: -- questions, not to burden the
15 record, Your Honor. But you also have asked for
16 emergency treatment --

17 THE WITNESS: Yes.

18 MR. STEVENS: -- of this. And I guess you
19 would agree with Mr. Alexander's representations about
20 the need for -- it may be more particularized or a
21 little different with your company, but it is similar.

22 THE WITNESS: It is similar. Yes.

23 MR. STEVENS: Similar situation. Do you have

1 anything you would like to add to the record in terms of
2 small business -- in terms --

3 THE WITNESS: Well --

4 MR. STEVENS: Whether Milnot -- or I am not
5 sure -- but is there something that you would like to
6 add? If there is nothing --

7 THE WITNESS: As the total number of employees
8 of 422 people compared to again --

9 MR. STEVENS: Right.

10 THE WITNESS: -- a multinational company --

11 MR. STEVENS: Right.

12 THE WITNESS: -- to give you some numbers --

13 MR. STEVENS: Right.

14 THE WITNESS: If I look at the price
15 differential of milk in August, essentially our
16 competitors producing in California had a \$1.55 --

17 MR. STEVENS: Yes.

18 THE WITNESS: -- per case on a --

19 MR. STEVENS: Uh-huh.

20 THE WITNESS: -- 24 12-ounce evaporated milk
21 case cost to go out and market their goods. In
22 September, that grew to \$1.79. If you look at a small
23 business, the overhead we have to endure and other

1 considerations, it is very difficult to try to find that
2 \$1.79 from other sources --

3 MR. STEVENS: Sure.

4 THE WITNESS: -- other than the ingredient
5 costs.

6 MR. STEVENS: Right. And that -- and the
7 farmers supplying milk to your company -- they are small
8 businesses. Aren't they?

9 THE WITNESS: They are small businesses also.
10 And if they don't sell milk, they are trying to find
11 other outlets for that milk.

12 MR. STEVENS: Thank you very much.

13 THE WITNESS: Thank you.

14 ADMINISTRATIVE LAW JUDGE: You may step down.

15 THE WITNESS: Thank you.

16 ADMINISTRATIVE LAW JUDGE: Yes, Mr. -- wait a
17 second.

18 MR. TOSI: Just -- I am sorry.

19 THE WITNESS: No. That is okay.

20 MR. TOSI: Excuse me. Yes. I am Gino Tosi
21 with USDA. For your milk supply that you are buying
22 from cooperatives, do you pay premiums above Federal
23 Order minimums?

1 THE WITNESS: Yes. We do.

2 MR. TOSI: Are you at liberty to say how much
3 more than the Federal Order minimum that you are paying?

4 THE WITNESS: No. I am not.

5 MR. TOSI: That is all.

6 MR. STOKER: I had one too. And I probably
7 should have --

8 ADMINISTRATIVE LAW JUDGE: You need to
9 identify yourself.

10 MR. STOKER: Randal Stoker, USDA. I probably
11 should have asked this to Craig earlier. A couple of
12 references have been made to the classification
13 statement from 1974 --

14 THE WITNESS: Uh-huh.

15 MR. STOKER: -- and reform took place in
16 January of 2000. In your opinion, why did it take a
17 three-year period before a proposal was made to
18 reclassify evaporated milk?

19 THE WITNESS: Well, if I look back through my
20 notes and the numbers that exhibited, there was some
21 disparity in 2000. Generally speaking, if you look at
22 the history, there has not been that disparity between
23 Class III and Class IV, such as we are seeing the last

1 few months. And I think with the timing of the reform,
2 I don't believe it was anticipated that that should come
3 under consideration at that time.

4 MR. STOKER: Thank you.

5 ADMINISTRATIVE LAW JUDGE: Mr. Beshore.

6 MR. BESHORE: Yeah. Just to follow up on that
7 question -- did the -- as Mr. Alexander referred to,
8 that the two so-called tilts that USDA did in the
9 support price program, reducing the price of nonfat dry
10 milk within the last 12 months or so -- did that, in
11 your opinion, have a significant effect on the potential
12 -- on the spread between Class III and Class IV that we
13 are seeing now and the potential that it will continue?

14 THE WITNESS: Yes.

15 MR. BESHORE: Okay. So that is also one of
16 the factors.

17 THE WITNESS: That is also one of the factors
18 that has occurred since the year 2000.

19 MR. BESHORE: Okay. And in terms of the
20 current -- one figure in your testimony -- you said the
21 current 40-percent plus milk price difference -- that is
22 based on, what, \$4 that is the present spread between
23 Class III and Class IV prices?

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ADMINISTRATIVE LAW JUDGE: Thank you. And if
would state and then spell your name for the record,
please?

THE WITNESS: Sure. Patrick J. Gloeckle,
G-l-o-e-c-k-l-e.

ADMINISTRATIVE LAW JUDGE: And are you going
to be reading a statement or just testifying?

THE WITNESS: Testifying.

[Direct Examination by Administrative Law Judge]

ADMINISTRATIVE LAW JUDGE: Then go right
ahead.

THE WITNESS: Okay. I am here on behalf of
Eagle Family Foods. I am vice president of procurement
and alliances at this time. Eagle Family Foods is one
of the oldest and hopefully very well-known manufacturer
of sweetened condensed milk and related products in the
United States. Sweetened condensed milk is our primary
business and we have plants -- producing plants in
Pennsylvania and Mississippi where we process sweetened
condensed milk for national distribution. We employ

1 just under 300 people. Eagle Family Foods fully
2 supports the proposal on behalf of O-AT-KA Milk Products
3 to reclassify evaporated milk, as well as sweetened
4 condensed milk in consumer-type packages as a Class IV
5 product. It is our position that these disparities that
6 exist under the current regulations do not yield a level
7 playing field for all producers. The resulting
8 inequities in the cost of milk make it more difficult to
9 compete and can drastically affect the viability of our
10 business. Evap and sweetened condensed milk have been
11 linked in the past. We feel strongly that sweetened
12 condensed milk is not a cheese-type product and that it
13 is more solids-based than protein-based. We feel that
14 is where it belongs. And the quicker any action can be
15 taken on this matter, the better. So we also support
16 the emergency treatment and will be very desirous to
17 that outcome. That is essentially all I have.

18 ADMINISTRATIVE LAW JUDGE: Mr. Beshore.

19 MR. BESHORE: Mr. Gloeckle, where exactly are
20 your plants located -- the two Eagle plants?

21 THE WITNESS: We have a plant in Wellsboro,
22 Pennsylvania and a plant is Starkville, Mississippi.

23 MR. BESHORE: Do both of those plants purchase

1 milk -- well, is either of those plants a regulated
2 Federal Order plant?

3 ***

4 [Tape 2, Side 1]

5 ***

6 THE WITNESS: No.

7 MR. BESHORE: Okay. Do both of them,
8 nevertheless, purchase milk that is pooled under Federal
9 Milk Orders.

10 THE WITNESS: That is correct. No.

11 MR. BESHORE: What -- it is sweetened
12 condensed milk has a -- as a processed product in -- is
13 it produced the same way that Mr. Alexander described,
14 that is retorted in steel cans, et cetera?

15 THE WITNESS: Yeah. Basically, we would echo
16 the same thing that this is a solid-based --

17 MR. BESHORE: Right. And it is product that
18 has an extended shelf life.

19 THE WITNESS: Yes. It does.

20 MR. BESHORE: Thank you.

21 ADMINISTRATIVE LAW JUDGE: Go ahead, Mr.
22 Stevens.

23 MR. STEVENS: Mr. -- what is your last name?

1 I am sorry. I missed it. I know I spelled it. And I
2 think I kept up with the spelling. How do you pronounce
3 it, sir?

4 THE WITNESS: Gloeckle.

5 MR. STEVENS: Gloeckle?

6 THE WITNESS: Yes.

7 MR. STEVENS: Okay. Mr. Gloeckle. Would --
8 your company is a small business. Would you say?

9 THE WITNESS: Yes.

10 MR. STEVENS: Oh. And because of the number
11 of employees in the plants and where they are located
12 and how they operate.

13 THE WITNESS: Right.

14 MR. STEVENS: Your supply of milk comes from
15 small businesses from farmers.

16 THE WITNESS: That is correct.

17 MR. STEVENS: What would you like the record
18 to reflect with respect to the small business aspect of
19 this?

20 THE WITNESS: I would like to reflect that
21 Eagle Family Foods considers itself a small business.

22 MR. STEVENS: Okay. And people have expressed
23 concerns about the effects of larger companies versus

1 smaller companies. You -- I am assuming you would
2 subscribe to those same points that were made by the
3 previous two witnesses.

4 THE WITNESS: Yes, sir.

5 MR. STEVENS: And you also, I guess, would
6 agree that an emergency situation exists and relief
7 needs to come sooner rather than later.

8 THE WITNESS: Absolutely.

9 MR. STEVENS: That is all I have. Thank you.

10 ADMINISTRATIVE LAW JUDGE: Any further
11 questions of Mr. Gloeckle? You may step down, sir.

12 THE WITNESS: Thank you.

13 ADMINISTRATIVE LAW JUDGE: What, did you have
14 something, Ms. Carter?

15 MS. CARTER: Well, I did. I am sorry.

16 ADMINISTRATIVE LAW JUDGE: Were you waiting
17 until I said you can step down now?

18 MS. CARTER: No. Sorry about that.

19 THE WITNESS: That is okay. Sure.

20 MS. CARTER: Just a couple of questions.

21 THE WITNESS: Sure.

22 MS. CARTER: I apologize. The first of which
23 -- does Eagle produce any other products besides -- or

1 manufacture any other products besides sweetened
2 condensed --

3 THE WITNESS: Yes.

4 MS. CARTER: What are those products?

5 THE WITNESS: We produce a -- we have a very
6 small portion. We have an eggnog business. We have
7 done that one. We produce nondairy creamer. And that
8 is also a very small business -- part of what we do.
9 And we produce a coffee product -- Kava Coffee.

10 MS. CARTER: So is it your testimony that the
11 proposal, if adopted, to reclassify sweetened condensed
12 milk in consumer-type packages from Class III to Class
13 IV, would improve your competitive standing in the
14 industry?

15 THE WITNESS: Yes. We see as a small business
16 it is increasingly difficult to sometimes compete --

17 MS. CARTER: Okay.

18 THE WITNESS: -- against some of the larger
19 ones.

20 MS. CARTER: Okay. Thank you.

21 THE WITNESS: You are welcome.

22 ADMINISTRATIVE LAW JUDGE: I guess you can go.
23 Okay. The next witness I have on my list is Mr. Diehl.

1 Okay. Please raise your right hand, Mr. Diehl.

2 ***

3 PETER DIEHL,

4 having first been duly sworn, according to the law,
5 testified as follows:

6 ***

7 [Direct Examination by Administrative Law Judge]

8 ***

9 ADMINISTRATIVE LAW JUDGE: Okay. And if you
10 could state your name and then spell it for the record?

11 THE WITNESS: My name is Peter Diehl, that is,
12 D-i-e-h-l.

13 ADMINISTRATIVE LAW JUDGE: And you may give
14 your testimony.

15 THE WITNESS: Thank you. I am Peter Diehl. I
16 am president/chairman/CEO of Diehl, Incorporated, which
17 is a family-owned and operated small business, which
18 manufactures canned dairy products, including evaporated
19 and condensed milk. We have three plants currently.
20 One is in Ohio, one in Michigan, and one in Idaho. We
21 are in full support of the proposal by O-AT-KA to change
22 evaporated and condensed milk in consumer-sized packages
23 from Class III to Class IV on an emergency basis. We

1 feel very strongly that these are solid-based products
2 and not protein based products. And that is our major
3 contention for the change.

4 ADMINISTRATIVE LAW JUDGE: That is it? Okay.
5 Go ahead, Mr. --

6 MR. STEVENS: A broken record, Your Honor.
7 The same -- I would ask you similar questions to the
8 other witnesses. You are a small business.

9 THE WITNESS: Yes. We are.

10 MR. STEVENS: You have the same concerns that
11 were expressed by the other witnesses about the effect
12 of larger businesses versus smaller businesses in this
13 market.

14 THE WITNESS: Yes.

15 MR. STEVENS: You also would subscribe to the
16 request that this be handled on an emergency basis.

17 THE WITNESS: Yes. I do.

18 MR. STEVENS: Thank you. That is all I have,
19 Your Honor.

20 ADMINISTRATIVE LAW JUDGE: Mr. Beshore?

21 MR. BESHORE: Just similar questions also.
22 Your plants are not regulated plants under the Federal
23 Orders. Correct?

1 THE WITNESS: Correct.

2 MR. BESHORE: Okay. But they do purchase milk
3 that is regulated under Federal Orders.

4 THE WITNESS: Yes. We do.

5 MR. BESHORE: Okay. At all locations, I
6 assume.

7 THE WITNESS: Yes.

8 MR. BESHORE: In -- is it your -- I asked this
9 question of Mr. Alexander also. Setting aside the, you
10 know, very difficult competitive situation with the
11 dominant player in California, is it your view that
12 sweetened condensed and evaporated are properly Class IV
13 and not Class III products in the Federal Order system?

14 THE WITNESS: Yes. It is.

15 MR. BESHORE: Because it is more solids-based
16 and not cheeses.

17 THE WITNESS: That is right.

18 MR. BESHORE: Thank you.

19 ADMINISTRATIVE LAW JUDGE: Anyone else have
20 any questions? Ms. Carter, any questions?

21 MS. CARTER: No, thank you.

22 ADMINISTRATIVE LAW JUDGE: Okay. Thanks very
23 much, sir. You may step down. Mr. Schad? You can sit

1 down. But can you raise your right hand?

2 ***

3 DENNIS SCHAD,

4 having first been duly sworn, according to the law,
5 testified as follows:

6 ***

7 [Direct Examination by Mr. Beshore]

8 ***

9 ADMINISTRATIVE LAW JUDGE: Okay. And if you
10 would state your name and then spell it, please?

11 THE WITNESS: Dennis, D-e-n-n-i-s, Schad,
12 S-c-h-a-d.

13 MR. BESHORE: One question. Do you have a
14 brief statement in relation to proposals one and two on
15 behalf of ADCNE, the Association of Cooperatives in the
16 Northeast?

17 THE WITNESS: I do.

18 MR. BESHORE: Proceed.

19 THE WITNESS: My name is Dennis Schad, and I
20 am employed by Land O' Lakes, Incorporated. My title is
21 economist and director of middle Atlantic marketing. I
22 have worked at Land O' Lakes and its predecessor
23 cooperatives for 21 years. During my tenure, I have

1 worked in the field with membership, managed
2 transportation, marketed milk and finished dairy
3 product, and have regulatory responsibility for the
4 northeast. I have a bachelor's degree in history from
5 the College of William and Mary, and a master's degree
6 in Business Administration from Virginia Tech. Land O'
7 Lakes is of Allstate Cooperative with a national
8 membership base. In the northeast, Land O' Lakes has
9 over 2,200 members who are pooled on Federal Order one.
10 The cooperative owns and operates and Order one pooled
11 butter powder plant located in Carlisle, Pennsylvania.
12 I appear here today on behalf of the Association of
13 Dairy Cooperatives of the Northeast, known as ADCNE.
14 Our members are Agri-Mark, Incorporated, Land O' Lakes,
15 Incorporated, Maryland and Virginia Milk Producers
16 Association, Incorporated, St. Alban's Cooperative
17 Creamery, Incorporated, Upstate Farms Cooperative,
18 Incorporated, Dairy Farmers of America, Incorporated, O-
19 AT-KA Cooperative, Incorporated, Dairylea Cooperative,
20 Incorporated. Collectively, ADCNE members represent
21 more than 65 percent of the producers pooled under the
22 northeast order. ADCNE supports proposals one and two,
23 which would change the classification of milk used to

1 produce evaporated and sweetened condensed milk in
2 consumer-type packages from Class III to Class IV. It
3 is important for the functioning of the Federal Order
4 system that products be appropriately classified. These
5 products are long shelf-life products which fit best in
6 the Class IV in the current system of product
7 classification and the end-product price formulas.
8 Furthermore, when there are large differences between
9 Federal Order Class III and IV prices, as in the present
10 time, manufacturers of federal other-sourced milk for
11 production of evaporated and sweetened condensed
12 products are -- which are distributed in a national
13 marketplace, can be at a substantial competitive
14 disparity with non-Federal Order manufacturers of these
15 products. ADCNE urges the Department to adopt proposals
16 one and two on an emergency basis.

17 ADMINISTRATIVE LAW JUDGE: Are there any
18 questions of Mr. Schad?

19 THE WITNESS: Thank you very much.

20 ADMINISTRATIVE LAW JUDGE: Thank you very
21 much. I only have one more witness on my list. Do you
22 know of any other people that we know who are coming in
23 -- might have been coming in later on in today or coming

1 in the afternoon or -- because it looks like this is
2 going to end a little bit shorter -- earlier than we had
3 planned. I don't want to -- yet, but I don't want to
4 shut anyone out who might have been coming in later on.
5 Seeing nothing but heads shaking, I will ask Mr. Arms to
6 come on up here.

7 UNIDENTIFIED SPEAKER: This is moving a lot
8 faster than I had anticipated.

9 ADMINISTRATIVE LAW JUDGE: You are not
10 complaining about that, I don't think. Are you?

11 UNIDENTIFIED SPEAKER: No. I am -- no
12 complaints.

13 ADMINISTRATIVE LAW JUDGE: Take your time.
14 Did you have any exhibits you were going to be
15 introducing or are you just going to read a statement?

16 MR. ARMS: I have a statement -- a detailed
17 statement on proposal number three.

18 ADMINISTRATIVE LAW JUDGE: Right.

19 MR. ARMS: And I would like to offer that
20 entire statement if that --

21 ADMINISTRATIVE LAW JUDGE: If you are going to
22 read it, then it is in the record anyway and I mean --

23 MR. ARMS: All right.

1 ADMINISTRATIVE LAW JUDGE: So I mean --

2 MR. ARMS: But other than that, no.

3 ADMINISTRATIVE LAW JUDGE: Okay. If -- are
4 you ready to be sworn in, Mr. Arms?

5 MR. ARMS: Yes.

6 ADMINISTRATIVE LAW JUDGE: Please raise your
7 right hand.

8 ***

9 DAVID C. ARMS,

10 having first been duly sworn, according to the law,
11 testified as follows:

12 ***

13 [Direct Examination by Administrative Law Judge]

14 ***

15 ADMINISTRATIVE LAW JUDGE: Okay. If you would
16 state your name and then spell it for the record,
17 please, and then you can read your statements.

18 THE WITNESS: My name is David C. Arms. That
19 is A-r-m-s. I am appearing here at this hearing on
20 behalf of New York State Dairy Foods, Incorporated. My
21 office is located at 145 Pinehaven Shore Road, Suite
22 2092, Shelburne, Vermont, 05482. And I am appearing
23 here as an economic consultant for New York State Dairy

1 Foods. I am employed also by Berkshire Dairy and Food
2 Products, Inc., a brokerage and services firm, located
3 in Wyomissing, Pennsylvania, and also with Nationally
4 Better Dairy and Food Products, Inc., a family-owned
5 brokerage business with office at the same Shelburne,
6 Vermont location. My career spans more than 40 years,
7 and I have testified at numerous milk hearings in New
8 England, New York, and the middle-Atlantic areas.
9 Currently, I am privileged to serve several milk
10 handlers operating in the northeast Order marketing
11 area. I have a dairy farm background, and after serving
12 in the U.S. Army, attended and graduated from the
13 University of Vermont with a degree in agricultural
14 economics in 1959, followed by graduate work at Penn
15 State University, leading to a master's degree in the
16 same field in 1961. Following graduation from Penn
17 State, I accepted a position with USDA, first, as a
18 trainee in the St. Louis Market Administrator's office
19 and then later as a junior marketing specialist in the
20 dairy division of USDA in Washington, D.C. Other
21 employment background includes positions as economist
22 with United Farmers of New England, Cambridge,
23 Massachusetts; executive director of Cooperative Dairy

1 Economic Service, a federation of operating cooperatives
2 in New England; manager of the Richmond Cooperative
3 Association in Richmond, Vermont; economist with
4 Northeast Dairy Cooperative Federation, NDCO, Syracuse,
5 New York; and economist with Dietrich's Milk Products,
6 Reading, Pennsylvania. I had planned, Your Honor, to
7 give a statement first on proposal number three,
8 however, I do have a statement also with respect to
9 proposal one and two.

10 ADMINISTRATIVE LAW JUDGE: I will leave it up
11 to you.

12 THE WITNESS: So in order to follow sequence
13 on the proposal, I will switch gears here and talk about
14 proposals one and two. New York State Dairy Foods,
15 Incorporated supports the adoption of proposal number
16 one, as set forth in the Notice of Hearing. This
17 proposed amendment, submitted by O-AT-KA, would
18 reclassify evaporated milk from Class III to Class IV,
19 normally the lowest valued class. Niagara Milk
20 Cooperative, Niagara Falls, New York, is one of the
21 proponents and a member of New York State Dairy Foods,
22 Incorporated. The directors support proponent request
23 on the basis that O-AT-KA can no longer effectively

1 compete in evaporated milk markets without incurring
2 very large losses. This occurs because of the existing
3 price disparity for milk used to make evaporated
4 consumer product from federally regulated milk versus
5 that made from non-Federally regulated milk. This price
6 disparity is particularly apparent in California, which
7 enjoys an especially large comparative price advantage
8 relative to proponents'. In addition, Class IV
9 classification is appropriate from the standpoint that
10 evaporated milk, like dried milk powders, is a product
11 end use involving extensive special processing and the
12 removal of the water component in milk. The product,
13 like nonfat milk powder and butter, enjoys a relatively
14 long storage capability compared with other milk
15 beverages. A Class IV designation for evaporated milk,
16 therefore, is similarly warranted. It is important, in
17 our view, that O-AT-KA and others similarly situated,
18 obtain the needed price relief sought under proposal
19 number one. The O-AT-KA operation performs a valuable
20 market balancing service. The evaporated milk
21 utilization, as part of this balancing function, should
22 not be forced to close due to severe member losses
23 caused by milk pricing system not effectuating the

1 purposes of the Agricultural Marketing Agreement Act.
2 Proposal number two would reclassify sweetened condensed
3 milk in consumer-type packages from Class III to Class
4 IV, as well as evaporated milk. In the event the
5 Secretary decides an imperative that these two products
6 be similarly classified, New York State Dairy Foods,
7 Incorporated would support the change because both are
8 under similar comparative price disadvantage. I would
9 like to add further that we would support emergency
10 action in this matter. That concludes the testimony on
11 proposals --

12 ADMINISTRATIVE LAW JUDGE: On one and two.
13 But do you want to go -- why don't you do all your
14 testimony and then we will open up the questions after
15 you finish? Do you want to talk about three now, as
16 I --

17 THE WITNESS: Well, I don't know if there is
18 cross examination on one and two. You might --

19 ADMINISTRATIVE LAW JUDGE: I would rather just
20 do it all at once.

21 THE WITNESS: You would -- okay. I will
22 respect that, sir.

23 ADMINISTRATIVE LAW JUDGE: Appreciate it. I

1 was just glancing through this and since you have tables
2 attached -- at least one set of tables attached to this,
3 we will make -- I guess it would make more sense to mark
4 it as an exhibit. You are not going to actually read
5 the entire table, I would presume. I would hope.

6 THE WITNESS: No. I am not. And that is
7 why --

8 ADMINISTRATIVE LAW JUDGE: Okay. That is
9 fine.

10 THE WITNESS: -- I indicated it would be good
11 as an exhibit.

12 ADMINISTRATIVE LAW JUDGE: Let us see, I lost
13 track -- are we -- is the next number Exhibit 15? Does
14 that sound right? The last one was 14.

15 MR. STEVENS: Your Honor, what number -- is
16 this --

17 ADMINISTRATIVE LAW JUDGE: We are still -- I
18 was waiting for the reporter. I was double-checking
19 with the reporter. But I am going to mark this as an
20 exhibit because I noticed this statement right here
21 proposal number three has a table attached to it, which
22 is not -- obviously, he is not going to read the table.

23 MR. STEVENS: 15? Is it 15?

1 ADMINISTRATIVE LAW JUDGE: That is what we are
2 checking on over here.

3 MR. STEVENS: All right. I think it is 15.

4 ADMINISTRATIVE LAW JUDGE: I think it is 15.
5 The last one I have here is 14. So I am going to
6 presume it is 15. I am going to mark it as Exhibit 15.
7 And I will ask the reporter to mark his copy as Exhibit
8 15.

9 MR. STEVENS: Yeah. None of the statements
10 have been marked as exhibits.

11 ADMINISTRATIVE LAW JUDGE: I am only marking
12 this one because there is a table attached. The
13 statements are --

14 MR. STEVENS: It is --

15 ADMINISTRATIVE LAW JUDGE: -- already in the
16 record -- read into the record --

17 MR. STEVENS: Exactly.

18 ADMINISTRATIVE LAW JUDGE: -- so I am not --

19 MR. STEVENS: No. I just wanted to make sure
20 that we --

21 ADMINISTRATIVE LAW JUDGE: That is correct.

22 MR. STEVENS: Because that would affect the
23 numbers, but okay.

1 ADMINISTRATIVE LAW JUDGE: It would.

2 MR. STEVENS: 15 is the statement and a table.

3 ADMINISTRATIVE LAW JUDGE: It is a -- I am
4 marking this one because he has a table attached to it,
5 which is more than -- so it is just easy to put -- I
6 could just mark the table, but -- anyway. Okay. You
7 can proceed with your statement.

8 THE WITNESS: Proposal number three simply
9 provides that ending bulk inventory of fluid milk and
10 cream be classified in the lowest valued class, normally
11 the lower of Class III or Class IV prices applicable for
12 the month, rather than always to Class IV. It was
13 originally one of several proposals submitted by New
14 York State Dairy Foods designed to shore up the
15 classification and assignment provisions made effective
16 under the reform order rules pertaining to receipts of
17 other sourced milk in the northeast order. This
18 proposal was not included by USDA among the proposed
19 amendments considered at the northeast order hearing
20 held September 10, 2002, because the Secretary
21 considered this proposal would best be taken up at
22 future hearing involving any amendments to Section 40,
23 pertaining to all milk orders. There does not appear to

1 be a compelling need to restrict the classification of
2 ending bulk inventory of milk and cream to Class IV. By
3 doing so, it tends to increase the volume of other
4 source milk assigned to a higher valued class use at
5 transferee plants than is accorded producer milk
6 whenever Class IV prices are higher than another than
7 another class price. The reason this happens is that
8 the reform order assignment rules, under Section
9 44(a)(3), require that certain other source milk
10 receipts, including dairy farmer for other market milk,
11 be assigned "in series beginning with Class IV." Ending
12 bulk inventory of fluid milk product, like allowable
13 shrinkage, dumpage, and involuntary product loss, should
14 be classified in the lowest valued class use. Since
15 either Class IV or Class III may not always be the
16 lowest valued class, provisions should be made to assure
17 classification to the lowest valued class to enable a
18 more equitable sharing of pool proceeds between producer
19 and other source milk receipts. While the Department
20 may have believed Class IV would be the lowest class use
21 value under order reform, actual experience, from
22 January 2000 to April 2003, date of recent amendment to
23 manufacturing milk price formulas, has been that Class

1 IV milk prices average significantly higher than Class
2 III milk prices. In fact, over the past two years,
3 2001, 2002, Class IV prices averaged 66 cents and 40
4 cents per hundredweight higher respectively than Class
5 III milk prices. The monthly price difference ranged
6 from \$2.36 per hundredweight above Class III in April of
7 2001, to \$1.83 under in October 2001. See attached
8 statistical price data offered as Exhibit #15. Your
9 Honor, I will address the table at the end of my
10 statement.

11 ADMINISTRATIVE LAW JUDGE: That is fine.

12 THE WITNESS: At first glance, one might think
13 our proposal to classify ending bulk inventories at the
14 lowest class value is intended to reduce milk costs for
15 fluid milk dealers. This simply is not the case. The
16 reason is that the orders presently reclassified
17 beginning bulk inventories to the higher Class I use the
18 following month. So the lower previous classification
19 is compensated for at the Class I price applicable when
20 the milk is actually processed. It is true that the
21 amendment to the manufacturing milk price formulas,
22 effective in April 2003, greatly improved the
23 classification and assignment inequities New York State

1 Dairy Foods, Incorporated Group initially proposed to
2 correct. From our recent 2003 price data, the spread
3 between Class III and Class IV milk prices has reversed.
4 Increased make allowances in the Class IV formula are
5 largely responsible for reversing the previous trend.
6 However, the amendments don't guarantee that Class IV
7 prices will always be the lowest of the class prices. A
8 combination of increased milk powder and butter prices,
9 relative to market cheese prices, could conceivably make
10 Class IV values higher than Class III in any given
11 period. Also, we recently experienced sharp divergence
12 between advanced Class I price movers and the final
13 Class III price, \$7.07 versus \$13.80 in August of 2003.
14 This unusually large run up in final August Class III
15 price, relative to the advanced August Class I mover,
16 actually resulted in Class I and Class II milk values,
17 in some areas, that were lower than final Class III
18 component milk values in the same month, which produced
19 negative PPD, or producer price differentials, in final
20 statistical uniform price calculations. Our proposal
21 would automatically correct classification of ending
22 bulk inventories for these unusual changes in monthly
23 formula milk values by classifying it according to

1 lowest class use value for the month. We, therefore,
2 respectfully urge its adoption. I would like to make
3 some comments on the table attached. I regularly do
4 milk price estimates for my client milk dealers on a
5 monthly basis and these are -- reflect my calculations
6 for the years 2001, 2002 of the manufacturing prices
7 under Federal Order one for Classes II, III, and IV.
8 With respect to 2003 prices, they are actual prices down
9 through September, but estimated at -- for October,
10 November, and December of this year. I would hasten to
11 point out the large reversal that has taken place this
12 year with July -- with the Class IV price swinging down
13 \$1.83 less than the Class III. And, as you can see from
14 my projections, that we are likely to experience price -
15 - the price spread exceeding \$4 a hundredweight, with
16 the exception of December, for the balance of this year.
17 And I might add that my initial projections of price
18 estimates for 2004 indicate that this -- a sharp spread
19 difference between Classes III and IV will continue, at
20 least for the first six months of 2004. I have here a
21 directory of membership in the New York State Dairy
22 Group which I can make available for the record. But I
23 would point out that the membership comprises major milk

1 -- fluid milk dealers and some manufacturing handlers in
2 the State of New York -- that do business in the State
3 of New York. Mr. Bruce Krupky [ph], the executive
4 director, has given me a paragraph here that gives some
5 information on our membership. New York State Dairy
6 Foods, Inc., is a full-service trade association
7 representing 111 businesses and companies primarily in
8 the dairy processing, manufacturing, and distribution
9 industry. The trade association is headquartered at 201
10 South Main Street, Suite 302, North Syracuse, New York,
11 13212, and has been in operation since 1928. The New
12 York State Dairy Foods, Inc., Board of Directors has
13 authorized me, being David Arms, to represent the
14 association in presenting testimony on their behalf at
15 this hearing today. The testimony presented expresses
16 the general interest and official positions of the
17 association. The association appreciates the
18 opportunity to come before this hearing today and thank
19 USDA and the Northeast Milk Marketing Order
20 Administration for initiating the -- this hearing. And
21 that concludes my testimony.

22 ADMINISTRATIVE LAW JUDGE: Okay. And you want
23 -- I presume you want me to -- you want to move the

1 admission of Exhibit 15 into evidence. Would that be a
2 fair statement?

3 THE WITNESS: Yes. Would you please, sir?

4 ADMINISTRATIVE LAW JUDGE: Any objection to
5 Exhibit 15 being admitted into evidence? It is
6 admitted. Okay. Let me open the -- open it up to cross
7 examination. Who wants to go first? Mr. Beshore.

8 MR. BESHORE: First, Dave, I want to thank you
9 for your support of proposals one and two.

10 THE WITNESS: Thank you.

11 MR. BESHORE: Question with respect to how
12 this classification works and what impacts it has. You
13 say that most of the classification of ending
14 inventories of Class IV tends to increase the volume of
15 other source milk assigned to a higher value class use
16 at transferee plants than is accorded producer of milk.
17 This is on the third full paragraph of your statement.
18 Could you -- can you explain that a little bit more and
19 indicate what impact does that classification of other
20 source milk at higher values have on the value of the
21 pool?

22 THE WITNESS: The difficulty that we
23 experienced was particularly, I think, in the year 2001.

1 There were substantial movements, intermarket movement,
2 of milk to the south. And, at the same time, there was
3 substantial intermarket movement of milk between orders
4 to the west, like Order 33, into the northeast market.
5 And so a substantial quantity. Furthermore, as was
6 evidenced at the mid-east hearing, involving problems of
7 the sourced milk imports, it was made clear that there
8 is -- because of the rather liberal diversion
9 provisions, provided under the reform order, that
10 handlers could associate milk with the northeast order
11 and then divert it rather liberally in their own local
12 area, so there was a lot of pool riding. To the extent
13 the milk was received at order one pool plant, the order
14 required first that inventory be in Class IV, and it
15 required this other source milk to be assigned to Class
16 IV first. So contrary to what the normal intentions are
17 of the order, it enabled the other sourced milk to get a
18 higher use classification value by being assigned to
19 Class IV first. To the extent any receiving handler had
20 a very large inventory, I can just reveal this on a
21 direct basis on a personal basis, actually, because, for
22 example, the corporation that we operate, Naturally
23 Better Dairy and Food Products, because some milk that

1 we purchased to come from a cooperative that is fully
2 regulated under Order 33 -- that milk is received at the
3 pool plant operated by MK Trading in Arcade, New York.
4 And that plant tends to have large ending inventories.
5 So invariably, the other source, Order 33 milk, gets
6 assigned to Class IV. Irrespective of the milk values
7 and throughout a lot of this period, the Class IV price
8 was substantially higher. And -- but frankly, we don't
9 see that it should enable the Order 33 producers to
10 garner a larger share of the pool proceeds in the
11 northeast order simply because the way ending inventory
12 is assigned.

13 MR. BESHORE: So if proposal three was
14 adopted, it is your view that more of the local order
15 milk would be assigned to higher valued classifications.

16 THE WITNESS: Yes.

17 MR. BESHORE: Thank you.

18 ADMINISTRATIVE LAW JUDGE: Further questions?
19 Mr. Stevens, Ms. Carter, no questions? Mr. Tosi, no
20 questions? Okay. Then I guess you may step down.
21 Thank you for your testimony.

22 THE WITNESS: Thank you, sir. Well, according
23 to my list, there are no more witnesses. So I am just

1 going to call again to make sure. Is there anyone else
2 who wants to testify? Maybe we ought to go have a
3 discussion -- let us go off the record for a few -- oh,
4 go ahead.

5 MR. BESHORE: Just one thing. I would like to
6 ask that official notice be taken of the 1974 decision
7 on classification, which has been referenced by several
8 of the witnesses. There are actually a couple of
9 decisions that are, I think, published sequentially in
10 the Federal Register -- March 5, 1974. But I would
11 request the one -- that 39 Federal Register, which
12 includes pages 8491 and 92 -- that is not the start page
13 of the Decision and that is the Decision -- or that
14 includes -- that is -- those are pages within the
15 Decision.

16 ADMINISTRATIVE LAW JUDGE: Is there any
17 objection to that? I will take -- we will take official
18 notice of that in that case. Let us go off the record
19 for a few minutes and just have a little give and take,
20 discuss what we want to do on post-hearing procedures.
21 So off the record.

22 ***

23 [OFF THE RECORD]

1 [ON THE RECORD]

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ADMINISTRATIVE LAW JUDGE: We have had a discussion with the people in the room about a briefing schedule and a transcript review schedule. And the consensus seems to be that because the issues in this case are -- Mr. Stevens -- turn it down. Mr. Stevens --

MR. STEVENS: I am sorry. I was --

ADMINISTRATIVE LAW JUDGE: Thank you. Yes.

MR. STEVENS: I am sorry.

ADMINISTRATIVE LAW JUDGE: The briefs -- all parties' briefs are going to be due on the 29th of October. That is one week and one day from now. And that is because the issues are pretty succinct. There has been a request for emergency relief and everyone agrees that an expedited schedule would be appropriate. The other thing is that the -- any corrections to the transcript must be submitted within one week of the transcript's posting on the internet. We anticipate that -- the posting date will probably be in a week or so. And so that people will have a week or so after that to submit any requests for correction. Mr. Stevens.

York Stenographic Services, Inc.

34 North George St., York, PA 17401 - (717) 854-0077

1 MR. STEVENS: Your Honor, I have one question,
2 I guess, for the group. What -- it -- does this make
3 any provision for the people who are not at the hearing
4 today who might want to file a brief? That is the
5 question. In other words --

6 ADMINISTRATIVE LAW JUDGE: Well --

7 MR. STEVENS: -- if the transcript may be due
8 -- may be available after the briefs are due, then if
9 someone who happens not to be here, for at least one
10 reason being that the hearing might be ending earlier
11 than they anticipated or not, what provision can we make
12 for people who are not here to file briefs --

13 ADMINISTRATIVE LAW JUDGE: I suppose if
14 somebody is not here, request an extension and it is a
15 brief one and they give me a good reason, I mean, then I
16 will --

17 MR. STEVENS: All right.

18 ADMINISTRATIVE LAW JUDGE: -- take a look at
19 it. I mean --

20 MR. STEVENS: That sounds fair.

21 ADMINISTRATIVE LAW JUDGE: You know, the
22 hearing was --

23 MR. STEVENS: Noticed.

1 ADMINISTRATIVE LAW JUDGE: -- adequately
2 noticed and if someone doesn't show up, it is hard to
3 say that they should complain that they didn't -- they
4 could have participated in this discussion and they
5 didn't. So --

6 MR. STEVENS: Exactly.

7 ADMINISTRATIVE LAW JUDGE: With that, I will
8 call the hearing closed. Thank you very much.

9 MR. STEVENS: Thank you, Your Honor.

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IN RE: FEDERAL MILK MARKETING ORDERS PUBLIC HEARING
NORTHEAST, ET AL., MILK MARKETING AREAS

HELD AT: ALEXANDRIA, VIRGINIA

DATE: OCTOBER 21, 2003

We, the undersigned, do hereby certify that the foregoing pages, numbered 1 through 103, inclusive, are the true, accurate and complete transcript prepared from the reporting by the reporter in attendance at the above identified hearing, in accordance with applicable provisions of the current USDA contract, and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the hearings, and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the hearing.

Date:

Barbara A. Wilson, Transcriber
York Stenographic Services, Inc.

Date:

Sarah Mowrer, Proofreader
York Stenographic Services, Inc.

Date:

Brad Weirich, Reporter
York Stenographic Services, Inc.