

BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

- - -

In the Matter of : Docket Nos.:
 : AO-11-0333;
Milk in the Mideast : AMS-DA-11-0067;
Marketing Area : DA-11-04

- - -

HEARING ON PROPOSED AMENDMENTS
TO TENTATIVE MARKETING AGREEMENT AND ORDER

VOLUME I

October 4, 2011

8:05 a.m.

REPORTED BY:

Kristina L. Laker

1 Hearing on Proposed Amendments to Tentative
2 Marketing Agreement and Order, before the United States
3 Department of Agriculture, Agricultural Marketing
4 Service, presided over by the Honorable Janice K.
5 Bullard, Administrative Law Judge, at the Westin
6 Cincinnati Hotel, 21 East Fifth Street, Cincinnati, Ohio,
7 at 8:05 a.m., on Tuesday, October 4, 2011, before
8 Kristina L. Laker, court reporter and notary public
9 within and for the State of Ohio.

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1 APPEARANCES:

2 On behalf of the United States Department of
3 Agriculture:

4 HEATHER M. PICHELMAN, ESQ.
5 Office of the General Counsel, Marketing Division
6 1400 Independence Avenue, S.W.
7 Room 2325A South Building
8 Washington, D.C. 20250
9 202-720-4977
10 heather.pichelman@usda.gov

11 ERIN TAYLOR
12 WILLIAM RICHMOND
13 Marketing Specialists
14 Agricultural Marketing Service, Dairy Programs
15 1400 Independence Avenue, S.W.
16 Room 2961 South Building
17 Washington, D.C. 20250-0231
18 202-720-0758
19 erin.taylor@ams.usda.gov
20 william.richmond@usda.gov

21 On behalf of the Proponents:

22 MARVIN BESHORE, ESQ.
23 Attorney at Law
24 130 State Street
P.O. Box 946
Harrisburg, Pennsylvania 17108
717-236-0781
mbeshore@beshorelaw.com
Attorney for Dairy Farmers of America, Inc.,
Dairylea Cooperative, Inc., Erie Cooperative
Association, Foremost Farms USA Cooperative,
Inc., Michigan Milk Producers Association, Inc.,
NFO, Inc., Prairie Farms Dairy, Inc., and White
Eagle Cooperative Association

1 APPEARANCES (cont.):

2 On behalf of the Proponents (cont.):

3 BENJAMIN F. YALE, ESQ.
4 Yale Law Office, LPA
5 527 North Westminster Street
6 P.O. Box 100
7 Waynesfield, Ohio 45896-0100
8 419-568-6401
9 ben@yalelawoffice.com
10 Attorney for Continental Dairy Products, Inc.,
11 and Select Milk Producers, Inc.

8

9 On behalf of the Opponents:

10 JAMES D. WILSON, ESQ.
11 Cowden Humphrey
12 4600 Euclid Avenue, Suite 400
13 Cleveland, Ohio 44103-3748
14 216-241-2880
15 jwilson@cowdenlaw.com
16 Attorney for Superior Dairy, Inc.

14

15 JOHN VETNE, ESQ.
16 Consultant

16

17 Also present:

18 WENDY M. YOVIENE, ESQ.
19 Ober Kaler, P.C.
20 1401 H Street, N.W., Suite 500
21 Washington, D.C. 20005-3324
22 202-326-5027
23 wyoviene@ober.com
24 Attorney for Schneider's Dairy, Galliker Dairy
Company, Guers Dairy, Dean Foods

22

23

24

1 I N D E X

2 WITNESS:

3 CLIFFORD CARMAN

4 Page

5 By Ms. Pichelman: 30, 110, 300

6 By Mr. Wilson: 64, 106

7 By Mr. Beshore: 86, 333

8 By Mr. Yale: 103

9 By Judge Bullard: 111

10

11 ELVIN HOLLON:

12 By Mr. Beshore: 116, 285

13 By Mr. Wilson: 169

14 By Mr. Yale: 236

15 By Ms. Pichelman: 269

16 By Ms. Taylor: 271

17 By Mr. Richmond: 280, 313

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20 By Mr. Beshore: 315

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1 THE JUDGE: Thank you all for coming.
2 My name is Janice Bullard, J-a-n-i-c-e
3 B-u-l-l-a-r-d, and I'm the Administrative
4 Law Judge assigned to conduct this marketing
5 decision hearing. And this is Docket
6 No. AO-11-0333, AMS-DA-11-0067, and also
7 DA-11-04.

8 And we have convened today in response
9 to a Notice of Hearing issued by the United
10 States Department of Agriculture. And that
11 was pursuant to a proposal that was issued
12 -- well, requested by Continental Dairy
13 Products, Inc., Dairylea Cooperative, Inc.
14 -- that's D-a-i-r-y-l-e-a -- Dairy Farmers
15 of America, Inc., Erie Cooperative
16 Association, Foremost Farms --
17 F-o-r-e-m-o-s-t -- USA Cooperative, Inc.,
18 Michigan Milk Producers Association, Inc.,
19 NFO, Inc., Prairie Farms Dairy, Inc., and
20 White Eagle Cooperative Association.

21 At this time I'm going to ask the
22 parties to represent themselves by their
23 counsel. And just so we have an idea of how
24 the order of today's proceedings will go,

1 I'd like to first discuss some of the
2 prehearing motions that were filed by
3 parties and responses to the motions. And
4 it may be necessary to take some testimony
5 about at least one aspect of the motions.
6 And then we will hopefully hear testimony
7 about the underlying substantive issues.

8 All right. So first, let's ask for the
9 Dairy Farmers to please have their counsel
10 come up and enter an appearance, if you
11 will. And please state and spell your name
12 and give your business address, Mr. Beshore.

13 MR. BESHORE: Okay. Marvin Beshore,
14 B-e-s-h-o-r-e. My office is at 130 State
15 Street, Harrisburg, Pennsylvania. I'm here
16 representing Dairylea Cooperative, Inc.,
17 Dairy Farmers of America, Inc., Erie
18 Cooperative Association, Foremost Farms USA
19 Cooperative, Inc., Michigan Milk Producers
20 Association, NFO, Inc., Prairie Farms Dairy,
21 Inc., and White Eagle Cooperative
22 Association.

23 THE JUDGE: And your business address,
24 Mr. Beshore, just for the record.

1 MR. BESHORE: 130 State Street,
2 Harrisburg, Pennsylvania.

3 THE JUDGE: All right. Thank you very
4 much. And Superior Dairy has a
5 representative.

6 MR. BESHORE: There's another counsel.

7 THE JUDGE: Oh, I'm sorry. You have
8 another counsel?

9 MR. BESHORE: Yes.

10 THE JUDGE: Sure. But, Mr. Beshore,
11 will you be mostly conducting any
12 examination?

13 MR. YALE: We tend to tag team.

14 THE JUDGE: Take turns?

15 MR. YALE: Yes.

16 THE JUDGE: Tag team people, okay.
17 That's fine.

18 MR. YALE: And we sometimes have
19 different interests or explanations.

20 THE JUDGE: All right. Fine.

21 MR. YALE: My name is Benjamin F. Yale.
22 My business address is 527 North Westminster
23 Street in Waynesfield, Ohio 45896. And I am
24 here on behalf of Continental Dairy

1 Products, Inc.

2 THE JUDGE: Thank you.

3 THE COURT REPORTER: And just spell
4 your last name, please.

5 MR. YALE: Y-a-l-e.

6 THE COURT REPORTER: Thank you.

7 THE JUDGE: Thank you, Mr. Yale. I
8 didn't mean to exclude you.

9 MR. YALE: You probably would have had
10 a majority support.

11 THE JUDGE: Okay. Mr. Wilson?

12 MR. WILSON: Good morning, your Honor.
13 My name is James Wilson. I am here as
14 counsel for Superior Dairy, Inc., interested
15 party. I'm with the law firm of Cowden
16 Humphrey in Cleveland, Ohio, at 4600 Euclid
17 Avenue, Suite 400, Cleveland 44103.

18 THE JUDGE: Thank you. And Cowden for
19 the record is spelled C-o-w-d-e-n, correct?

20 MR. WILSON: That's correct, your
21 Honor.

22 THE JUDGE: Thank you. And don't go
23 too far, Mr. Wilson.

24 MR. WILSON: I won't.

1 THE JUDGE: And for the USDA, Office of
2 the General Counsel?

3 MS. PICHELMAN: Good morning. My name
4 is Heather Pichelman, P-i-c-h-e-l-m-a-n.
5 And I'm with USDA's Office of the General
6 Counsel in Washington, D.C.

7 THE JUDGE: Thank you very much. All
8 right.

9 MS. PICHELMAN: Your Honor, did you
10 want the appearances of the other people
11 here from USDA on record now or did you want
12 to wait?

13 THE JUDGE: Well, I think when they are
14 about to speak, I'd rather wait till then to
15 place their appearance on the record. I
16 wanted counsel to place their appearance
17 because I wanted to discuss some of the
18 prehearing motions that were filed.

19 And that's why I asked Mr. Wilson not
20 to go, because Mr. Wilson -- before the
21 hearing commenced I had talked to the
22 parties just about procedural aspects of the
23 motions. And I was informed by Mr. Wilson
24 that Superior Dairy had wished to file some

1 reply briefs to at least the Government's
2 response.

3 And I said at that time that I had been
4 made aware yesterday that someone had filed
5 another document. I have been put straight
6 by Mr. Beshore that it was Mr. Beshore
7 filing an opposition to the motion of
8 Superior Dairy, Inc., to disqualify USDA
9 Dairy Programs' personnel and participation
10 in the decision-making process.

11 So I just wanted to clarify that for
12 everyone. I haven't seen anything else
13 filed. If anybody filed anything else,
14 speak now, please.

15 Ms. Pichelman, you did not file
16 anything other than the two oppositions on
17 September 30, correct?

18 MS. PICHELMAN: That's correct, your
19 Honor.

20 THE JUDGE: All right. And Mr. Wilson,
21 you just have the two motions; is that
22 correct?

23 MR. WILSON: Yes, your Honor. There
24 are two motions that are pending. One is

1 the motion to disqualify AMS employees from
2 a certain level of participation in these
3 proceedings.

4 And I do have a -- I filed a brief in
5 support initially. The Government filed a
6 brief in opposition. And I don't recall off
7 the top of my head if other briefs were
8 filed by DFA.

9 We also have pending our motion that
10 pertains to disclosure essentially with
11 respect to ex parte communications. I'm
12 aware of the Government's brief.

13 If I may, I'm not sure if we received a
14 copy of Mr. Beshore's brief in opposition.

15 MR. BESHORE: We have not filed a
16 written brief with respect to the ex parte
17 motion. Our brief which was served on you
18 electronically on Friday was filed with
19 respect to the disqualification motion.

20 MR. WILSON: All right. So I believe
21 the briefing on the ex parte motion is our
22 brief, Ms. Pichelman's opposition, and then
23 our reply brief, which I'm going to present
24 to the Judge.

1 THE JUDGE: All right. Thank you. And
2 do you have copies for everyone?

3 MR. WILSON: I do.

4 THE JUDGE: Thank you.

5 MR. WILSON: Should your Honor
6 determine at some point in these proceedings
7 that there are questions with respect to
8 these motions or you do desire some colloquy
9 or oral argument, then we're prepared to
10 participate in that.

11 THE JUDGE: And I appreciate that. And
12 just so I'm absolutely clear, your reply
13 briefs were not filed with the Hearing Clerk
14 for the Office of Administration?

15 MR. WILSON: No, they haven't been. So
16 they're being presented through you.

17 THE JUDGE: All right.

18 MR. WILSON: I certainly can do that at
19 some point in the proceedings.

20 THE JUDGE: That's not necessary.

21 MR. WILSON: Thank you.

22 THE JUDGE: Because any exhibits that
23 are proffered today I'll be filing.

24 MR. WILSON: I have been routinely for

1 some time now e-mailing a number of --
2 Mr. Beshore, as well as a number of other
3 members of the -- what I'm learning is the
4 Milk Bar. I'm intending to do that from my
5 computer basically. In a few moments I will
6 e-mail the reply briefs that we just sent to
7 Mr. Beshore and to Mr. Yale and a number of
8 others as well.

9 THE JUDGE: That's fine. The one that
10 you handed to me will be the official one on
11 record.

12 MR. WILSON: Thank you, your Honor.

13 THE JUDGE: Thank you. And since
14 they're pleadings, I'm not going to give
15 them any exhibit number. They'll just be
16 filed as pleadings.

17 MR. WILSON: Very good.

18 THE JUDGE: And with respect to your
19 motions, Mr. Wilson, in reviewing them --
20 and I have to say that I did tell all the
21 parties that I feel -- considering that I
22 did not receive these until Friday, is when
23 I first saw the first motion, and late in
24 the day Friday evening I saw the second

1 motion, the Government's responses -- and
2 certainly did not have the opportunity to
3 give them a thorough study that they
4 deserve.

5 I did, however, read them and feel that
6 based upon the representations made that
7 matters are not necessarily those that need
8 to be ruled on today. I believe that the --
9 we can always enlarge or even "briefen" a
10 hearing and the testimony of the hearing.

11 We can take all the testimony. If
12 there is something that comes up that people
13 feel should not be given any weight, then
14 you can certainly feel free to argue that it
15 shouldn't be in the record. If something is
16 here that is not material to today's
17 substantive issues, same thing. It can
18 always be argued that it be excised from the
19 hearing transcript. But I feel it's more
20 important to get to the substantive issues.

21 I promised the parties that I will rule
22 obviously in a timely fashion on the two
23 motions. But there is one portion of one of
24 the motions, and I believe that it is -- of

1 course I made my little notes and -- it was
2 in a footnote, Mr. Wilson.

3 MR. WILSON: Do you know if it's in the
4 disqualifying motion or the ex parte?

5 THE JUDGE: I believe it's in the
6 disqualifying motion.

7 MR. WILSON: Okay.

8 THE JUDGE: Footnote 7.

9 MR. WILSON: I don't have that in front
10 of me.

11 THE JUDGE: No, I'm sorry. No, maybe
12 it's Page 7. So it must be -- no, I am
13 wrong. It is in the opposition for
14 disclosure, which makes sense.

15 MR. WILSON: Do you have a question for
16 me or for --

17 THE JUDGE: No, it's for you,
18 Mr. Wilson. Just so you know, your
19 footnote, Page 7, it's Footnote 9 --

20 MR. WILSON: All right.

21 THE JUDGE: -- in which you state that
22 the AMS solicitation of additional proposals
23 of July 15 triggered application of 7 CFR
24 Section 27(c), which requires that all

1 responsive submissions unless designated as
2 confidential by the submitting party be made
3 available for public inspection.

4 Notwithstanding this independent
5 requirement, a request by Superior Dairy on
6 September 9, 2011, for copies of documents
7 including those within the scope of Section
8 27(c) as of the date of this motion failed
9 to produce any responsive documents.

10 So I believe that the record will not
11 be complete unless we thoroughly discuss at
12 least that portion of the motion.

13 MR. WILSON: Right.

14 THE JUDGE: We have a similar approach
15 to sneak the important things in on
16 footnotes, apparently, Mr. Wilson.

17 MR. WILSON: It says -- in part for
18 rhetorical style, but to keep the
19 readability of the brief going and not go
20 into too many different directions, we have
21 been concerned for some time obviously with
22 garnering as much information as we can.

23 I don't want to get into argument on
24 merits of the case, but you'll find, your

1 Honor, that there will be much discussion
2 with respect to the impact and effect of the
3 proposed regulation. My client, it's no
4 secret obviously, believes that it's being
5 singled out as the sole beneficiary, if you
6 will, of these changes in a negative way.

7 And consequently we're very concerned
8 with all of the submissions that had been
9 received from all of the various other
10 interested parties, including DFA. There
11 has been some informal sharing of
12 information.

13 It took some time, but we eventually
14 did receive some of the correspondence that
15 we believe was submitted to the USDA from
16 the -- what I would call the Dean Foods
17 group, a number of different entities. We
18 had requested that and I have not received
19 that for some time. Eventually Counsel did
20 forward that to me, as well as another
21 correspondence from another party. I don't
22 recall the name off the top of my head.

23 We have submitted a document -- an
24 information data request, I guess, from the

1 USDA. We have a request -- a supplemental
2 request and a second supplemental request.
3 We did receive over the weekend -- I got my
4 e-mail Sunday night, so our friends at AMS
5 were -- have been working hard over the
6 weekend -- a response to this collective
7 group of requests.

8 Now, I don't know if that was all of
9 the documents and all of the information
10 that we requested. We were all under the
11 gun here to some degree, including your
12 Honor, with respect to a lot of paperwork
13 being -- and requests going back and forth.
14 But we did receive some information in
15 response to that.

16 We've also pursued a Freedom of
17 Information Act request. And I mean no
18 disrespect to the Public Information Officer
19 of the USDA, but it's been difficult. So if
20 the question is have we received everything
21 that we've been asking for, I don't know. I
22 suspect not. But we have received some
23 materials.

24 THE JUDGE: Well, I guess what I wanted

1 to let you know and give you the opportunity
2 to at least let the USDA know, have an
3 exchange of what you did receive -- but I
4 had asked Ms. Pichelman if she was able to
5 give us a witness who can speak to the
6 responsiveness of USDA and your specific
7 requests and whether or not there are some
8 exceptions or confidentiality within the
9 regulatory scheme that would prevent
10 disclosure.

11 So before we get into the substantive
12 matters I think we should go there. Are you
13 prepared at this point to question --

14 MR. WILSON: Well, I was anticipating
15 asking that of Mr. Carman or -- I'm not sure
16 what other governmental witnesses are going
17 to be presented. We would like to have some
18 information on the record with respect to
19 the extent to which our responses have been
20 honored.

21 We certainly expect that some of the
22 materials we've requested have not been
23 granted. That's the subject of the ex parte
24 motion obviously. We are very interested in

1 those communications and we're pushing for
2 them, for their disclosure. I assume those
3 have not been produced and that there may be
4 other materials that have not been produced.

5 So some exposition as to what has not
6 been produced in reply and some rationale
7 for that I think would be helpful to us and
8 to the record.

9 THE JUDGE: Okay. And rather than -- I
10 would prefer just because I'm such a linear
11 thinker myself that we approach this aspect
12 before we get into the substantive matters;
13 not to say you're precluded from asking any
14 other witness about what they may know or
15 may have produced in preparation for today's
16 hearing and whether you have been provided
17 that information, but to the extent that the
18 people who are involved specifically with
19 your requests and who are more familiar with
20 what was done in response to that, I think
21 we should have that person -- and
22 Ms. Pichelman is prepared to present
23 someone.

24 MR. WILSON: That's fine. Would you

1 anticipate in terms of me immediately
2 examining a person or giving Attorney
3 Pichelman an opportunity to do that in a
4 direct examination form before I go ahead?

5 THE JUDGE: No. I was going to ask
6 Ms. Pichelman to do some direct.

7 MR. WILSON: Thank you.

8 THE JUDGE: Before we go forward with
9 the testimony, is there any other
10 preliminary matter that we should be talking
11 about?

12 I know we will talk about exhibits.
13 But do you think it's more helpful to put
14 the exhibits in the record now,
15 Ms. Pichelman, before we do any testimony?

16 MS. PICHELMAN: We just have
17 preliminary ones, like the Notice of Hearing
18 and those things. Maybe we can just put
19 them in the record, kind of get past those,
20 and then, you know, if you would like to
21 then have Mr. Carman come up and speak about
22 the data requests, what we were able to
23 provide, and the things that we were not.

24 THE JUDGE: All right. That sounds

1 great. So why don't you give us a -- well,
2 do you have a list of those exhibits?

3 MS. PICHELMAN: We have the exhibits --
4 yes, your Honor, we have -- well, we have
5 the -- the actual exhibits, we'll pass them
6 around.

7 So the first one -- I'll explain what
8 these are. And I don't think anybody here
9 is going to have a big interest in them. If
10 you do, we'll get you one.

11 (Whereupon, Exhibit Number 1 was marked
12 for identification.)

13 MS. PICHELMAN: The first one marked as
14 Exhibit 1 is the Notice of Hearing that was
15 published in the Federal Register on
16 Thursday, September 8, 2011, entitled Milk
17 in the Mideast Marketing Area; Notice of
18 Hearing on Proposed Amendments to the
19 Tentative Marketing Agreement and Order.

20 THE JUDGE: And how would you like to
21 identify this exhibit, Government's Exhibit,
22 GX-1, EX-1?

23 MS. PICHELMAN: EX-1 is fine.

24 THE JUDGE: Thank you.

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

3 MS. PICHELMAN: The second one to be
4 marked EX-2 is a press release dated
5 September 8, 2011, The USDA Sets Hearing on
6 Proposed Amendments to the Mideast Milk
7 Order.

8 (Whereupon, Exhibit Number 3 was marked
9 for identification.)

10 MS. PICHELMAN: The third exhibit is
11 Certificate of Officials Notified dated
12 September 8, 2011. This is just showing
13 that the governors of the stated states were
14 essentially notified of this hearing in case
15 any interested parties would -- you know, to
16 let them know if they would like to attend
17 or participate in any way.

18 (Whereupon, Exhibit Number 4 was marked
19 for identification.)

20 MS. PICHELMAN: The fourth exhibit is
21 eight pages. And these are Determinations
22 regarding the Mailing of Notice of Hearing
23 pursuant to 7 CFR 900.4(b)(1)(ii).

24 It states that the Market

1 Administrators -- that basically they've
2 complied with allowing -- telling those that
3 may be interested in the different Milk
4 Marketing Areas about this hearing. So this
5 is just their certificate stating just that.

6 I'd ask that all four of these exhibits
7 be received into the record, please.

8 THE JUDGE: Mr. Wilson, any objection?

9 MR. WILSON: No, your Honor.

10 THE JUDGE: Mr. Yale, any objection?

11 MR. YALE: No objection, your Honor.

12 THE JUDGE: Mr. Beshore?

13 MR. BESHORE: No objection.

14 THE JUDGE: All right. We will admit
15 to the record the Government's Exhibits AMS
16 1 through AMS 4. Do you anticipate
17 admitting any other exhibits through the
18 testimony of any of your witnesses?

19 MS. PICHELMAN: The other exhibits we
20 would have would be regarding the data
21 requests.

22 THE JUDGE: Okay.

23 MS. PICHELMAN: But other than that,
24 you have the rest of the preliminary. But

1 then all the data requests after Mr. Carman
2 speaks on that, then we'll put those in the
3 record just to show exactly what was
4 requested of AMS.

5 THE JUDGE: All right. Thank you. Do
6 you, Mr. Beshore, want to submit any
7 exhibits at this time or do you want to
8 defer on that?

9 MR. BESHORE: I would like to defer
10 until our witnesses. But could I just make
11 a suggestion, sort of an administerial kind
12 of suggestion?

13 THE JUDGE: Sure.

14 MR. BESHORE: I would think it would be
15 useful and a custom at least in these
16 hearings as to number all the exhibits
17 sequentially 1 to whatever without
18 identifying the party with the exhibit
19 number or proponent.

20 THE JUDGE: All right.

21 MR. BESHORE: And I think that will be
22 helpful if we do it that way.

23 THE JUDGE: That's great.

24 MR. BESHORE: Thank you.

1 THE JUDGE: Thank you. Please feel
2 free to educate me. That's what I hope
3 lawyers will always do. Thank you for that.

4 All right. And Mr. Yale, did you have
5 any exhibits that you want to introduce at
6 this time?

7 MR. YALE: No, your Honor, not at this
8 time.

9 THE JUDGE: Thank you. And Mr. Wilson?

10 MR. WILSON: No, not at this time, your
11 Honor.

12 THE JUDGE: All right. Thank you. Are
13 you prepared to have Mr. Carman testify now?

14 MS. PICHELMAN: Yes.

15 THE JUDGE: Okay. Mr. Carman, would
16 you come up.

17 (Witness sworn.)

18 THE JUDGE: Would you please state and
19 spell your name for the record.

20 THE WITNESS: Clifford,
21 C-l-i-f-f-o-r-d, Carman, C-a-r-m-a-n.

22 THE JUDGE: And could you identify
23 where it is you're employed.

24 THE WITNESS: I'm employed as an

1 Assistant to the Deputy Administrator, Dairy
2 Programs, Agricultural Marketing Service,
3 U.S. Department of Agriculture in
4 Washington, D.C.

5 THE JUDGE: Thank you, Mr. Carman.
6 Your witness, Ms. Pichelman.

7 CLIFFORD CARMAN,
8 of lawful age, as having been duly sworn, as hereinafter
9 certified, was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MS. PICHELMAN:

12 Q. Good morning.

13 A. Good morning.

14 Q. How long have you been with USDA, Dairy
15 Programs?

16 A. Since January of 1994.

17 Q. And how long have you been with USDA?

18 A. I previously had worked for USDA from 1972
19 to '86.

20 Q. And Mr. Carman, are you here today in
21 support of or in opposition to the proposals that
22 we're hearing today?

23 A. I am not here in support of or opposition to
24 any of the proposals that we're going to hear today.

1 Q. Okay. Under 7 CFR 900.26, Requesting USDA
2 data for use at an amendatory hearing -- pointed that
3 request for preparation of USDA data to be used at a
4 Federal Milk Marketing Agreement or Order amendatory
5 proceeding must be received at least ten days before
6 the beginning of the hearing. This did not happen in
7 this case. But if an amendatory hearing is announced
8 less than ten days before the start of the hearing,
9 requests for data must be submitted within two days.

10 My understanding is that AMS did in fact
11 receive requests for data for this hearing?

12 A. Yes. We received a number of requests.

13 Q. Could you please walk us through the
14 requests and then what you were able to provide and
15 also an explanation if things were not available or
16 you could not provide -- a brief explanation of that,
17 too, please?

18 A. We received a request from Dairy Farmers of
19 America asking for a list of pool plants in Order 33,
20 as well as the partially regulated and other
21 classification type plants for Order 33. That's 1-A.

22 1-B was the request for all Orders of types
23 of distributing plants for each of the months of 2009
24 through 2011. For the Northeast Order, Order 1,

1 monthly data for 2010 and 2011 as regularly published
2 in their Bulletin on "Class I Route Sales in the
3 Northeast Marketing Area by Handlers Not Regulated
4 Under the Order" and "Changes in the List of Handlers
5 and Plants." Then a request for the monthly Order 33
6 Market Bulletin for the months of 2009, '10, and '11.

7 A request was received from -- on behalf of
8 Superior wanting to have a list of all the partially
9 regulated distributing plants and Federal Milk
10 Marketing Order Markets in which each of the plants
11 had sales.

12 For all partially regulated distributing
13 plants listed in response to No. 1, identify the
14 Section 76 options that were used to pool.

15 For all Orders, annual in-area route
16 disposition by handler type for 2000 through 2010.

17 For a selected set of Orders referred to as
18 the Eastern Markets, Orders 1, 5, 7, 33, 32, and 30 --
19 that would be the Northeast, the Appalachian, the
20 Southeast, the Mideast, the Central, and then the
21 Upper Midwest Orders -- the monthly volume of milk
22 distributed in-area by Section 76 partially regulated
23 handlers.

24 The same Eastern Markets and months in

1 No. 4 -- pardon me, I didn't identify the time period
2 for No. 4. It was monthly 2009 to date. And then
3 No. 5 for the same Eastern Market Orders identified in
4 No. 4, but only for 76(b), partially regulated plants,
5 the monthly aggregate volumes of milk received by
6 plants that would have been producer milk if the
7 plants were fully regulated.

8 THE JUDGE: Excuse me. Are you having
9 a problem?

10 THE COURT REPORTER: I'm sorry. I'm
11 getting distracted.

12 MR. WILSON: I'm sorry. We'll stop
13 talking.

14 THE JUDGE: All right. This young
15 woman is the most important person in the
16 room. Thank you.

17 A. No. 6, For Section 76(b) for partially
18 regulated plants located in the following states --
19 New England is not a state, but New York,
20 Pennsylvania, Ohio, Virginia, New Jersey, Maryland,
21 Delaware -- the same aggregate monthly volume
22 receipts, by supplier type, as requested in No. 5.

23 No. 7, For Section 76(b) receipts by
24 supplier type in No. 5, the average amount per

1 hundredweight by which the price paid for milk
2 exceeded the Federal Order plant value of milk
3 computed pursuant to 76(b)(1).

4 For receipts from cooperative associations
5 by 76(b) plants identified in No. 6 above, the monthly
6 volume of milk that was pooled in any Federal Order,
7 identifying the volume pooled in each Order.

8 Superior then submitted a supplemental
9 request asking for sources of milk by state of origin
10 for calendar year 2010 for all Federal Order Markets,
11 reported in a manner similar to the September 2006
12 publication.

13 No. 2, Sources of milk by state and county
14 of origin for May 2010 and May 2011, reported in a
15 similar manner to the February 2004 publication.

16 For each of the foregoing reports, please
17 include a separate column or columns containing
18 information for the following, in as much detail as
19 possible: Sources of milk for partially regulated
20 handlers, sources of milk for partially regulated
21 76(b) handlers; sources of milk for producer-handlers
22 and exempt plant handlers, and non-pool Grade A milk
23 production not accounted for under any of the
24 foregoing subcategories.

1 Second supplemental data request on behalf
2 of Superior. Producer milk by state and county of
3 origin for the Mideast Milk Marketing Order, the
4 Northeast Milk Marketing Order, the Appalachian Milk
5 Marketing Order, and the Southeast Milk Marketing
6 Order, for each months of January 2011 through August
7 2011.

8 For each county for which producer milk
9 under the Mideast Milk Marketing Order was produced,
10 and producer milk under one or more of the foregoing
11 markets -- Northeast, Appalachian, and Southeast --
12 was also produced, please state the volume of producer
13 milk from that county under each of the four Federal
14 Milk Marketing Orders, for each month of January 2011
15 through August 2011.

16 For each county identified in response to
17 the foregoing No. 2 paragraph, please state the
18 uniform price paid to producers in each county under
19 each of the Marketing Orders in which producer milk
20 from that county was pooled, for each month of
21 January 2011 through August 2011.

22 For each of the months of January 2010
23 through August 2011, state the uniform price, open
24 paren, statistical uniform price, closed paren, and

1 the PPD, where applicable, to producer milk delivered
2 to Canton, Ohio, under each of the following Marketing
3 Orders: Mideast, Northeast, Appalachian, and
4 Southeast.

5 No. 5, For the combined months of April 2010
6 through February 2011, for Superior Dairy, please
7 state the average total by which the statistical
8 uniform price and PPDs for the Mideast at Canton
9 location exceeded the statistical uniform prices and
10 PPDs under the Northeast Milk Order, and the aggregate
11 total difference in PPD payments for all producer milk
12 received by Superior Dairy and pooled under the
13 Northeast Market during that 11-month period.

14 No. 6, For each of the months of
15 January 2010 through August 2011, please state the
16 estimated volume of depooled milk under the Mideast
17 Order, i.e., milk that handlers elected not to pool
18 due to disadvantageous relationship between
19 intra-order class prices and the location adjusted
20 statistical uniform price.

21 No. 7, For each of the months identified
22 above, please provide the estimated impact on the
23 Mideast PPD for milk that was depooled.

24 No. 8, For the Mideast, Upper Midwest,

1 Northeast, Central, and Appalachian Federal Milk
2 Marketing Orders, monthly for January 2010 through
3 April 2011, please provide Class I route sales in each
4 marketing area by handlers not regulated under that
5 Order. Please note where data cannot be reported due
6 to confidentiality requirements.

7 No. 9, For the months of January 2010
8 through August 2011, please prepare a table showing
9 the total volume and individual market volume, and
10 class of utilization, of producer milk from any
11 Federal Marketing Order received at plants, pool and
12 non-pool, located in the following, Ohio,
13 Pennsylvania, and Maryland Class I pricing zones,
14 \$2,00, \$2.10, \$2.20, \$2.30, \$2.50, \$2.70, and \$2.80.

15 I believe that is all the data requests that
16 we have.

17 Q. Okay. Thank you. With that let's go back
18 to the first data request from DFA.

19 THE JUDGE: And before we proceed, I'm
20 going to have to ask you gentlemen to move
21 over here, because despite your promise not
22 to talk --

23 MR. WILSON: I know. It's difficult.

24 THE JUDGE: -- you can't refrain --

1 MR. WILSON: We'll move.

2 THE JUDGE: -- and maybe you can move
3 over somewhere away from the court reporter.
4 You might want to repeat your question.

5 MS. PICHELMAN: Absolutely.

6 BY MS. PICHELMAN:

7 Q. Let's return back to the DFA data request,
8 and I guess start with 1-A and what you were able to
9 provide.

10 A. 1-A, Order 33 and its predecessor Order 36
11 as typically published in December of each year is
12 provided.

13 MS. PICHELMAN: So exactly that. So
14 that would then be marked as Exhibit 4, I
15 believe.

16 THE JUDGE: 5.

17 MS. PICHELMAN: Excuse me, Exhibit 5.

18 THE JUDGE: Yes.

19 THE WITNESS: Excuse me, your Honor?

20 THE JUDGE: Yes.

21 THE WITNESS: This is where I need my
22 stack of exhibits.

23 THE JUDGE: Oh, all right.

24 MR. YALE: Your Honor, could we have

1 like a little bit of a break to get these
2 distributed so we all have them in front of
3 us?

4 THE JUDGE: Okay. Sure. Let's go off
5 the record. Five minutes.

6 (Off the record.)

7 THE JUDGE: Continuing with the direct
8 examination of Mr. Carman.

9 DIRECT EXAMINATION (cont.)

10 BY MS. PICHELMAN:

11 Q. Mr. Carman, I think we had started here back
12 with the DFA Data Request 1-A. And you had said that
13 -- in response to that, that you were able to provide
14 them that information?

15 A. Yes. I assume this is Exhibit 5?

16 THE JUDGE: Yes.

17 (Whereupon, Exhibit Number 5 was marked
18 for identification.)

19 A. Exhibit 5 is a series of December 19- --
20 from 1990 to December of 2010 a listing of the
21 distributing plants, the supply plants, the
22 cooperative associations for the predecessor Order
23 of -- Federal Order -- currently Federal Order 33.
24 That would then have been Eastern Ohio, Western

1 Pennsylvania, Federal Order 36.

2 Each of those years contain about -- it
3 takes about two sheets to do that history until we get
4 to December of 2000, which is when Federal Order
5 Reform took -- was in fact -- it actually started in
6 January of 2000. You will note, though, that for
7 December of 2000 that's not the case. It's November
8 of 2000.

9 If you read the footnote in there, it
10 delineates that there was a substantial depooling of
11 milk during that period. So supply plants were not
12 representative of the plants that would normally be on
13 the Order.

14 Q. And moving on, the second request, 1-B. You
15 were able to provide information requested on that?

16 A. Yes. And that's Exhibit --

17 Q. It would be Exhibit 6.

18 A. Exhibit 6.

19 Q. You're talking about the Federal Milk Order
20 Distributing Plant Information -- well, it starts with
21 that for 2009.

22 A. Right. It's a series of tables assembling
23 distributing plants by type. The first part of that
24 should be stapled together in the packet as Page --

1 consisting of a 15-page document, Page 1 through 15,
2 and it lists alphabetically the name of the pool
3 distributing plant, the city and state of its
4 location, the ZIP code and FIPS code, and the Class I
5 differential for that location. And then January
6 through December of '09.

7 And within each cell is a number -- for
8 example, No. 1 would indicate the plant was a pool
9 distributing plant on the Northeast Order, No. 1.
10 Likewise, if you went down, the next instance of a
11 different number is 124. So it would indicate that it
12 was a pool distributing plant on Order 124, the
13 Pacific Northwest.

14 The next set of tables is a listing of the
15 partially regulated distributing plants and the Order
16 that they reported to. It's an 11-page document. It
17 should also be stapled together in the packet. Again,
18 a similar operation of the listing of the name of the
19 plant, but in this case they've been sorted by the
20 Order number that they reported to. So all of the
21 partially regulated distributing plants in the
22 Northeast are grouped together, et cetera.

23 In the individual cells is a number or a
24 series of numbers which would indicate the Order where

1 the partially regulated distributing plant have route
2 sales.

3 Q. Okay. So then to their Request No. 2 you
4 were able to --

5 A. Now, wait a minute. I still have some more.

6 Q. Oh, I'm sorry.

7 A. There's a three-page document that lists the
8 producer-handlers and whether they're regulated. An
9 "X" indicates if they were regulated.

10 And then there is an exempt plant list,
11 which is an 11-page document. Again, an "X" indicates
12 that it was an exempt plant. Other indications are
13 footnoted as to -- a PDP was a pool -- in other words,
14 instead of being an exempt plant they would have been
15 a pool distributing plant for that month, et cetera.
16 The next document --

17 THE JUDGE: Okay. Can I just clarify.

18 So the four categories that you just
19 discussed, Mr. Carman, all comprise EX-6,
20 the sixth exhibit?

21 THE WITNESS: Yes.

22 THE JUDGE: All right. Thank you.

23 THE WITNESS: In response to DFA

24 Request 1-B. DFA Request No. 2 --

1 MR. YALE: Your Honor?

2 THE JUDGE: Yes.

3 MR. YALE: This is a suggestion, and
4 maybe I'm out of line here, but it appears
5 that we've got a wide variety of documents
6 that are a part of No. 6. He has grouped
7 them because that's the way he requested
8 them. But each of them really stand alone
9 kind of as independent ones.

10 And during the hearing if we reference
11 them, it might be a little easier if we had
12 each of those -- either a 6, 6A, or a whole
13 new number, only because we're going to say
14 Page 7 of 6 and there's going to be two or
15 three pages of 6.

16 THE JUDGE: All right.

17 MR. YALE: So it would be great if we
18 could identify --

19 MS. PICHELMAN: Maybe 6A through D?

20 THE JUDGE: I think that makes sense.

21 MS. PICHELMAN: Would that be
22 understandable?

23 MR. YALE: Yes. Thank you.

24 THE JUDGE: Thank you, Mr. Yale. So

1 for purposes of discussion, the first
2 identified group is the distributing pool
3 plants and that will be EX-6A.

4 The second was the partially regulated
5 distributing plant groups. That will be 6B.

6 Third is the producer-handler
7 regulatory status. That will be 6C.

8 And the fourth is the exempt plant
9 status. And that will be 6D.

10 (Whereupon, Exhibit Numbers 6A, 6B, 6C,
11 and 6D were marked for identification.)

12 THE JUDGE: Thank you for that
13 suggestion, Mr. Yale.

14 I believe Mr. Carman was going to
15 describe the next response to a request.

16 (Whereupon, Exhibit Number 7 was marked
17 for identification.)

18 A. The next response I believe will be
19 Exhibit 7. It's a two-page document stapled together.
20 And it was asking for monthly Class I route sales in
21 the Northeast Marketing Area by handlers not regulated
22 under the Order.

23 The first page of that document is a
24 reproduction of Page 23 in one of the Bulletins for

1 the Northeast Marketing Order. And I didn't have -- I
2 don't remember what month it was published. The
3 second page of that document is a year-to-date similar
4 set of data, but the Orders that were broken out are
5 somewhat different than what's on the first page of
6 the document.

7 THE JUDGE: And who made this request?

8 THE WITNESS: This was DFA 2.

9 THE JUDGE: Thank you.

10 THE WITNESS: DFA No. 3 was monthly
11 Order 33 Market Bulletins for 2009, '10, and
12 '11. And that will be Exhibit 8.

13 Reproduction of all the monthly Bulletins
14 for those 30 -- approximately 30 months.

15 THE JUDGE: And could you just describe
16 who issued these Bulletins.

17 THE WITNESS: They are issued by the
18 Market Administrative Office in Cleveland
19 based on their in-house assembly of data and
20 in-house writers. It's supplied to
21 interested parties. All of the producers in
22 the Order also received a copy.

23 THE JUDGE: And since these are all
24 identified by the date that they're -- at

1 least the month that they're issued, we can
2 just call this whole packet EX-8?

3 THE WITNESS: Yes, ma'am, I think so.
4 (Whereupon, Exhibit Number 8 was marked
5 for identification.)

6 BY MS. PICHELMAN:

7 Q. And so that completes the DFA data request
8 then?

9 A. Yes.

10 Q. So then I guess let's turn to Superior
11 Dairy's request, the first request that they had
12 submitted.

13 A. Yeah. The first request of Item 1, given
14 the way that I supplied 1-B in the DFA request, I have
15 already fulfilled this. It's a listing of the
16 partially regulated distributing plants and the route
17 sales areas that each of those plants had.

18 So if they turn to what is now Exhibit 6B, I
19 believe it was -- yes, Exhibit 6B fills Superior's
20 No. 1 request.

21 Q. Okay. Then moving on to No. 2?

22 THE JUDGE: Excuse me. Do we want to
23 identify this as a separate exhibit,
24 Ms. Pichelman? Well, let me just clarify.

1 I'm sorry. I know this is probably your
2 cross-examination, Mr. Wilson. But I'm a
3 little confused.

4 MR. WILSON: It's all right. Your
5 assistance is greatly appreciated.

6 THE JUDGE: It helps to be ignorant, I
7 guess, and ask a lot of questions.

8 All right. Mr. Carman, so are you
9 saying that the --

10 THE WITNESS: This is --

11 THE JUDGE: -- six-page document that
12 you provided to Superior Dairy in response
13 to their first request is identical to the
14 document that comprises Exhibit 6C?

15 THE WITNESS: Exhibit 6B --

16 THE JUDGE: Oh, B. 6B.

17 THE WITNESS: -- is an 11-page
18 document, but they are one and the same as
19 Superior's -- in response to Superior's
20 No. 1.

21 THE JUDGE: Okay. So you didn't just
22 take 6B, duplicate it, and send it to
23 Superior?

24 THE WITNESS: No, I did not.

1 THE JUDGE: All right. So then that
2 answers my question. We will call this a
3 different exhibit then since it's not
4 identical. It will be EX-9.

5 MS. PICHELMAN: There's no exhibit -- I
6 think what Mr. Carman is saying is because
7 we've already provided 6B, that's the
8 information that Superior was requesting,
9 their first request of the first submission.
10 So there is no exhibit for that.

11 THE JUDGE: I see. You didn't keep a
12 copy of what you provided?

13 MR. WILSON: I think 6B is responsive
14 both to DFA and to Superior Dairy.

15 THE JUDGE: Okay.

16 MR. WILSON: And we have no problem
17 having a unitary exhibit.

18 THE JUDGE: All right. Thank you.

19 A. Superior No. 2 on the first request for --
20 they were asking for all partially regulated
21 distributing plants listed in response to No. 1,
22 Identify the Section 76 option under each -- under
23 which each accounts to the FMMO pools, 76(a), 76(b),
24 or 76(c). Please identify any month-to-month changes

1 in such identification.

2 That is proprietary information in how each
3 handler accounted for the pool. What I did, though,
4 in order to be partially responsive was I asked each
5 of the Market Administrative Offices to identify how
6 each of the handlers reported to their Order.

7 And I have counted, if you will, so -- I
8 have a one-page document that is responsive to
9 Superior No. 2 -- partially responsive. And it shows
10 the number of partially regulated distributing plants,
11 76(a), (b), or (c), and how many used each of those
12 pooling methods during that month.

13 So, for example, in 2009, January, it said
14 there were 16 partially regulated plants that used
15 76(a), there were 12 plants that used 76(b), and 10
16 plants that used 76(c). So there were 38 plants for
17 the month of January broken out in -- as indicated
18 above.

19 MR. WILSON: Has that document been
20 marked as an exhibit yet? I don't believe
21 so.

22 THE JUDGE: No, not yet. And that is a
23 six-page document?

24 MR. WILSON: No, it's one page.

1 THE WITNESS: It's a one-page document.

2 THE JUDGE: Just a one-page document.

3 MS. PICHELMAN: I think those two were
4 clipped. But Exhibit 9 should be one page.

5 THE JUDGE: Okay. So that's EX-9.

6 MR. WILSON: Exhibit 9?

7 MS. PICHELMAN: Yes, that's correct.

8 THE JUDGE: And that's entitled, The
9 Number of Partially Regulated Distributing
10 Plants, as Mr. Carman already noted.

11 (Whereupon, Exhibit Numbers 9 and 10
12 were marked for identification.)

13 A. Exhibit 10 is responsive to Superior's
14 No. 3, For all Orders, annual in-area route
15 disposition by handler type pool plants. I read that
16 to be other pool plants, that's plants regulated by
17 another Order, partially regulated plants, and other
18 plants which I have broken down into producer-handlers
19 and exempt plants.

20 So Exhibit 10, I believe, is a five-page
21 document with in-area route sales by handlers
22 regulated by that Order, in-area route sales by
23 handlers regulated by another Federal Order, partially
24 regulated route sales in the marketing area,

1 producer-handlers route sales in the marketing area,
2 and the exempt plant route sales in the marketing
3 area.

4 You will note there are footnotes. You need
5 to look at them carefully for one thing. We have some
6 reservations about -- there may be routes that are
7 outside of the defined marketing areas, so the sales
8 might be included when actually they weren't in the
9 marketing area. Very minor amounts, if it does occur.

10 Q. Moving on to Request No. 4?

11 A. No. 4 on Superior's request, For each of the
12 following Eastern Market Orders -- 1, 5, 7, 33, 32,
13 and 30 -- the monthly volume of milk distributed
14 in-area by Section 76 plants. That's proprietary
15 information and we were unable to supply anything.

16 For the same Eastern Markets, because I
17 couldn't do No. 4, I don't have anything for No. 5.

18 Likewise for No. 6, for Section 76(b)
19 plants, again, it relates back to proprietary
20 information. And I have no response to No. 6.

21 For No. 7, a similar response, I have no
22 available information.

23 And for No. 8, For receipts from cooperative
24 associations, again, proprietary information. And I

1 have no responsive information.

2 Q. Okay. Moving on to Superior Dairy's second
3 data request that I believe is dated August 10?

4 A. Sources of milk by state of origin for
5 calendar years for 2010 for all Federal Order Markets.
6 I have four documents that are each five pages in
7 length for the years 2007, 2008, 2009, and 2010. The
8 sources of milk by state of origin for all Federal
9 Orders.

10 I would note that this information was made
11 available midday yesterday for these four years. We
12 have been struggling to get some of the information
13 together. So this is in Washington at the MIB, Market
14 Information Branch.

15 Q. All right. You said there were four
16 separate documents in response, and we'll do 11A, B,
17 C, and D on this.

18 A. All right. 11A would be 2007. 11B, 2008.
19 11C, 2009. And 11D is 2010.

20 (Whereupon, Exhibit Numbers 11A, 11B,
21 11C, and 11D were marked for
22 identification.)

23 A. The second question in that first
24 supplemental by Superior, Sources of milk by state and

1 county of origin for May 2010 and May 2011. If you go
2 to the February 2004 publication, it's for all Federal
3 Orders. We don't have those. That data hasn't
4 cleared yet.

5 In fact 2004 is some data time period and
6 there hasn't been anything published by state and
7 county that is any more recent than that 2004
8 publication. I would note that some other documents
9 supplied later do cover sources -- state and county
10 milk for four of the Marketing Order Areas.

11 And for No. 3, because I didn't have any on
12 No. 2, I don't have that breakdown, can't supply it,
13 and that's not the way we keep the data in Washington
14 anyways. Don't have it.

15 Q. Okay. Then moving on to Superior Dairy's --
16 what's entitled the Second Supplemental Data Request,
17 essentially their third request for information. If
18 you could talk to us about what you have for that,
19 please?

20 A. The first response, Producer milk by state
21 and county of origin for the Mideast Milk Marketing
22 Order is Exhibit -- what's going to be Exhibit 12.

23 Q. We're on 12.

24 THE JUDGE: Yes.

1 (Whereupon, Exhibit Number 12 was
2 marked for identification.)

3 A. It's an extensive printing of state and
4 county data for the Mideast Order. For example, the
5 first page would show the State Code, 17, which is for
6 Illinois. The County Code, those would be FIPS codes,
7 if you will. The number of producers in that county
8 and the production pounds.

9 In the event that there are less than three
10 producers in any county, it's not listed and it's
11 summed and shown in what's called the Miscellaneous
12 category in this exhibit.

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

15 A. Exhibit 13, the Northeast Order, No. 1, is a
16 16-page document. And it shows state and county.
17 Again, the number of producers and the volume of milk
18 in that county. And, again, if there are less than
19 three, they are -- in this case they are included in
20 what's called the All Other for the state.

21 Exhibit 14 --

22 Q. I just wanted to clarify. Exhibit 13, is it
23 responsive to --

24 A. It's also responsive to Superior's No. 1 on

1 the second supplemental.

2 (Whereupon, Exhibit Number 14 was
3 marked for identification.)

4 Q. Exhibit 14 -- again, responsive to
5 Superior's No. 1 on the second supplemental request --
6 is for the Appalachian Order. In this case it's, I
7 believe, about 50-some pages in length. It runs by
8 month till January of 2000, and it takes approximately
9 six pages to cover. And then February takes six
10 pages, et cetera.

11 (Whereupon, Exhibit Number 15 was
12 marked for identification.)

13 Q. Exhibit 15 -- again, responsive to
14 Superior's No. 1 request on the second supplemental --
15 is a listing of public -- what's called public
16 producer milk by county and state. Again, an
17 indication if there's more than three producers, it
18 can be reported; if there's less than three, that's
19 included in what's called the Restricted category on
20 this set of documents. This is for the Southeast
21 Order, Federal Order No. 7.

22 Superior's No. 2 I do not have a response
23 for. It can be assembled from the prior four exhibits
24 by comparing the appropriate state and county and

1 coming up with, where available, the data for that
2 particular county and how much milk was on the various
3 Order pools. It takes a great deal of time.

4 And you will note that the data that I
5 supplied to you was obviously generated by different
6 data systems. Each one of them is in the Market
7 Administrative Office. And so doing a cross-border
8 comparison has not been done as requested.

9 (Whereupon, Exhibit Number 16 was
10 marked for identification.)

11 A. Exhibit 16 is a three-page document. As an
12 example I used the Northeast Order going by county --
13 by state and county. And you can look it up in
14 1000.52 what the differential is for the county. And
15 for the Northeast we know the base is in Boston. It
16 had a 3.25. And so if the differential is 3.15,
17 there's a minus 10 cent adjustment. So the announced
18 statistical uniform price at Boston minus 10 cents
19 will get you the announced statistical uniform price
20 for Hartford, Connecticut.

21 Q. So Exhibit 16 is responsive to their third
22 request, No. 3?

23 A. Yes.

24 Q. Moving on to No. 4, Request No. 4?

1 (Whereupon, Exhibit Number 17 was
2 marked for identification.)

3 A. Exhibit 17 is a one-page document. It
4 lists, For each of the months of January 2010 through
5 August 2011, state the uniform price and the PPD,
6 where applicable, for producer milk delivered to
7 Canton, Ohio, under each of the following milk
8 Marketing Orders: Mideast, Northeast, Appalachian,
9 and Southeast.

10 Exhibit 17, on the left-hand side there's a
11 series of four columns that all relate to the
12 Northeast. The price at Boston, the price at Canton
13 is compared -- is adjusted to Canton. So Boston is at
14 a 3.25 differential. Canton is at a 2.00
15 differential. So if you take 1.25 off the SUP,
16 statistical uniform price, in Boston, you get to the
17 price in Canton for January of 2010. It's a simple
18 calculation. Do the same thing for the PPD. The PPD
19 in Boston is 1.76, take 1.25 off of it, and you get to
20 51 cents in Canton, Ohio.

21 In order to stay on one page, the Southeast
22 Order and the Appalachian Order prices adjusted back
23 to Canton, Ohio. I purposely left off August 2011 for
24 the Southeast Order. It's minus 1.40. So whatever

1 the announced statistical -- pardon me, the blend
2 price for the Southeast Order was minus 1.40 issued to
3 Canton in general. There's a little -- in the fat and
4 skim Orders there's a slight difference, because
5 there's a uniform fat price and a uniform skim price.
6 It's close.

7 And then the Appalachian Order price,
8 similar adjustments. That doesn't seem logical to me.
9 I may have those two adjustments reserved. That table
10 is going to have to be corrected and resupplied.
11 That's definitely an error.

12 Superior No. 5 in the second supplemental,
13 For the combined months of April 2010 through February
14 2011 -- that would be the time period when the
15 Superior plant was pooled on a Northeast Order -- the
16 average total by which the statistical uniform price
17 and the PPD for the Mideast at the Canton location
18 exceeded the statistical uniform price and PPD under
19 the Northeast Milk Order, and the aggregate total
20 difference in PPD payments for all producer milk
21 received by Superior and pooled under the Northeast
22 Order.

23 The average total Mideast statistical
24 uniform price in Canton, Ohio, exceeded the Northeast

1 by about 13 cents. This is a stand-alone answer. I
2 don't have an exhibit for you. This is Superior's
3 proprietary information, so I am rounding.

4 And if you look at the differences in PPD,
5 Superior -- if the plant had been pooled on the
6 Mideast Order, everything else being equal, the PPD
7 would have been about \$500,000 higher than being --
8 rather than being pooled by the Northeast Order. That
9 is, producers would have been better off if the plant
10 had been pooled on the Mideast Order during that time
11 period.

12 Q. If you could move on to No. 6?

13 A. No. 6 is for the months of January 2010
14 through August 2011, please state the estimated volume
15 of depooled milk under the Mideast Order, milk that
16 handlers elected not to pool due to disadvantageous
17 relationship between intra-order class prices and the
18 location adjusted statistical uniform price.

19 It's a one-page document. And it shows the
20 estimated pounds of milk that are voluntarily not --
21 that was not pooled.

22 (Whereupon, Exhibit Number 18 was
23 marked for identification.)

24 Q. Okay. And that would be Exhibit 18. Your

1 Data Request No. 7?

2 A. For each of the months identified above,
3 please provide the estimated impact on the Mideast PPD
4 from milk that was depooled. That data is not
5 available. It would take a re-examination of each
6 handler's report and an estimate of how the milk would
7 or would not have been pooled. There would be
8 recalculation of the utilizations of the Order,
9 recalculations of the blend prices, and that is not
10 available.

11 (Whereupon, Exhibit Number 19 was
12 marked for identification.)

13 A. No. 8, Exhibit 19, for the Mideast, Upper
14 Midwest, Northeast, Central, Appalachian for
15 January 2010 through April 2011, please provide Class
16 I route sales in each marketing area by handlers not
17 regulated under that Order.

18 I only have it for the Northeast Marketing
19 Order as shown on Exhibit 19.

20 Q. And then Data Request No. 9?

21 A. Again, For the months of January 2010
22 through August 2011, please provide a table showing
23 the total volume and individual market volumes, and
24 class of utilization, of producer milk from any

1 Federal Order received at plants, pool and non-pool,
2 located in the following Ohio, Pennsylvania, Maryland
3 Class I pricing zones; 2.00, 2.10, 2.20, 2.30, 2.50,
4 2.70, and 2.80.

5 Exhibit 20 contains the information for the
6 Northeast Order only.

7 (Whereupon, Exhibit Number 20 was
8 marked for identification.)

9 Q. And that completes the data requests; is
10 that correct?

11 A. That completes what I have available. But I
12 obviously have to correct Exhibit 17 and resupply
13 that.

14 MS. PICHELMAN: Okay. Your Honor, we
15 ask that Exhibits 5 through 20 be received
16 into evidence.

17 THE JUDGE: Okay. Just may I ask, how
18 long do you think you need, Mr. Carman, to
19 do a revised version of Exhibit 17?

20 THE WITNESS: Less than an hour.

21 THE JUDGE: Okay. Thank you. All
22 right. Any objections to the admission into
23 the record of EX-5 through 20?

24 MR. YALE: No objection.

1 MR. WILSON: No objection.

2 MR. BESHORE: No objection.

3 THE JUDGE: All right. With that said
4 we will admit into the record EX-5 through
5 EX-20 with the proviso that EX-17 shall be
6 revised and redistributed and will be
7 replaced in the document package that has
8 been handed off to the court reporter.

9 And I'm going to at this juncture ask
10 the parties who are going to submit exhibits
11 to be sure after you make your submissions
12 to please mark that clearly by exhibit
13 number on the court reporter's two copies.
14 I'm trying to keep track. And if you need
15 to see what's what, you can certainly look
16 at my stack of exhibits as well. All right.
17 Thank you.

18 Okay. Mr. Wilson, do you have any
19 cross-examination?

20 MR. WILSON: Could you indulge me for
21 60 seconds?

22 THE JUDGE: Sure. Go off the record
23 for a minute.

24 (Off the record.)

1 BY MS. PICHELMAN:

2 Q. Mr. Carman, I just wanted to -- I know
3 Superior Dairy had discussed previously that they have
4 a Freedom of Information Act request, a FOIA.

5 And I just wanted to on the record state,
6 have you -- you've submitted one batch in response to
7 that?

8 A. I am aware that a FOIA was requested and
9 that documents were assembled and, when appropriate,
10 redacted. And my understanding is a set or a partial
11 response was made available sometime on Friday. Now,
12 I believe there's more documents yet to be supplied.

13 Q. Okay. So AMS is working on that and will be
14 supplying additional documents; that's your
15 understanding -- when possible?

16 A. Yes. And in fact I have to examine my
17 records and see if I have anything that's responsive
18 myself.

19 THE JUDGE: Just so the record is
20 clear, FOIA is an acronym for Freedom of
21 Information Act, and it's F-O-I-A.

22 MS. PICHELMAN: Thank you.

23 THE JUDGE: All right. Pass the
24 witness. Mr. Wilson?

1 MR. WILSON: Would you indulge me a
2 moment, your Honor?

3 THE JUDGE: Okay. We will go off the
4 record.

5 (Off the record.)

6 THE JUDGE: All right, Mr. Wilson.

7 MR. WILSON: James Wilson on behalf of
8 Superior Dairy. I'm likely to hop around a
9 bit here, so I beg the Judge's indulgence,
10 as well as the witness.

11 CROSS-EXAMINATION

12 BY MR. WILSON:

13 Q. For clarity on the record, it's my
14 understanding that the responses to the FOIA requests
15 were received at Superior Dairy on Monday, yesterday.
16 And on Friday -- you had stated Friday, which I
17 believe you believe to be correct, but I just want
18 to --

19 A. I believe it was sent on Friday, so...

20 Q. Okay. We received it on Monday. In fact I
21 picked it up on my way to Cincinnati. We've received
22 lots of documents here, lots of information obviously
23 which we're going to be digesting as quickly as
24 possible.

1 Mr. Carman, are you available for recall
2 later during this hearing in connection with any
3 questions that we might have that don't occur to me at
4 this moment?

5 A. Yes, I will be here for the duration of the
6 hearing. And obviously I will have to come back and
7 resubmit Exhibit 17.

8 MR. WILSON: Okay. Obviously I'll
9 reserve the opportunity to cross-examine him
10 on that and other things then.

11 Q. Would you turn to Exhibit 6B. This is a
12 document that's entitled Partially Regulated
13 Distributing Plant FMMO Markets Where Plant Had Sales.
14 And there's an Arabic numeral number one and a slash
15 and it says Plant Name. Do you see that, sir?

16 A. Yes, I have that exhibit in front of me.

17 Q. I note that there is beside the plant
18 Stremicks -- that's S-t-r-e-m-i-c-k-s -- Heritage
19 Foods, an Arabic numeral number two and a slash. What
20 does that two note?

21 A. It's an inadvertent copying of the name --
22 or the footnote to it. It has no relevance in this
23 use.

24 Q. Is the inadvertency the number two or is

1 there a footnote that was deleted from --

2 A. Number two was inadvertently included when
3 it should have been deleted.

4 Q. Okay. And is there a Footnote 1 on this
5 report?

6 A. Footnote 1 is at the top. It relates to
7 "Had Sales." Footnote 1 reads, Partially regulated
8 plants may have sales into areas not defined by
9 Federal Milk Marketing Orders. So a plant in
10 California -- for example, route sales in a number of
11 Federal Orders, but also route sales in California,
12 those route sales in California are not -- they're
13 covered by Footnote 1.

14 Q. Okay. What is meant on the last line of
15 this column, Select No. 5. Is that the name of a
16 plant?

17 A. Yes, that is the name of a plant.

18 Q. Okay. Would you turn to Exhibit 10. This
19 is entitled Annual Sales of Packaged Fluid Milk
20 Products in the Marketing Areas by Handlers Fully
21 Regulated by the Respective Order, 2000 to 2010. And
22 then there's a couple of footnotes.

23 A. Yes.

24 Q. Do you see that?

1 A. I have that before me.

2 Q. I believe in your testimony you indicated
3 that this report purports to show where sales are
4 being made into the marketing areas, correct?

5 A. This top exhibit is showing the pool plants
6 regulated by that Order and their route sales in that
7 marketing area.

8 Q. Okay. Do you have an equivalent report or
9 does the USDA maintain a report that shows sales from
10 the geographical origin of the plant of the handler?

11 A. No. The regulated handlers are competing
12 for where their route sales are. We don't keep the
13 data of -- that way.

14 Q. Do you keep it that way with respect to any
15 plant in the marketing system?

16 A. Again, we're looking to where they have
17 route sales.

18 Q. Right. That's traditionally the pertinent
19 factor with respect to this analysis, correct?

20 A. Correct.

21 Q. Okay. Have you been asked to do an analysis
22 based on the geographical location of the handler's
23 plant?

24 A. I'm not aware of that.

1 Q. Okay. Are you aware of any impact analysis
2 or equivalent that's been done based on, for example,
3 Superior Dairy's geographical plant location in
4 Canton, Ohio?

5 A. No, I'm not.

6 Q. Okay. You gave some narrative testimony,
7 and I'm going to ask you to repeat yourself to some
8 degree and help me understand the point. This
9 pertained to your testimony toward the end of
10 Ms. Pichelman's examination in connection with, I
11 believe, the September 22 information request that
12 Superior Dairy made shortly after you talked about the
13 13 cent answer.

14 A. Right.

15 Q. And you started to describe -- well, let me
16 put it this way. You mentioned the figure
17 approximately \$500,000 in some context. Could you
18 explain again -- and I beg the Judge's indulgence
19 here -- that answer. This was with respect to the
20 Mideast Order.

21 A. For 11 months during the period of 2010 and
22 2011, Superior's plant in Canton was regulated by the
23 Northeast Order based on where they had the
24 predominance of the route sales. Producers delivering

1 to the Canton plant -- independent producers would
2 have been pooled, would have participated in the
3 Northeast Order during that 11-month period.

4 Q. Right.

5 A. When you compare the PPD zone back to the
6 Canton plant for the Northeast Order compared to the
7 PPD for the Canton plant of the Mideast Order for the
8 same months, different pools, then the PPD times the
9 pool milk by the plant for those months would have
10 resulted in 500- -- approximately \$500,000 if the
11 plant had been pooled on a Mideast Order rather than a
12 Northeast Order. Everything else held constant. But
13 there's obviously -- that's not the case. When you do
14 shift, you make other things happen.

15 Q. So as most people in the room may have
16 figured out by now, I'm a stranger in a strange land
17 here. I'm going to ask you to help me understand the
18 point that's being made here.

19 Is the advantage -- is the statistic telling
20 us that Superior Dairy paid \$500,000 less because the
21 milk was sold into the Northeast area as opposed to
22 calculated in the Mideast?

23 A. The minimum payment to the producers was
24 \$500,000 less because it was pooled on a Northeast

1 Order.

2 Q. Okay.

3 A. How Superior elected to make those payments,
4 whether they made the producers whole, or -- I have no
5 knowledge.

6 Q. I see. So this is a -- in a sense what
7 they --

8 A. It's a minimum --

9 Q. -- it's just a comparison of the two Orders,
10 so to speak, for a certain period of time?

11 A. Yes.

12 Q. As a point of fact Superior may have paid
13 its producers different dollars during that period,
14 and that's not reflected in that exhibit, correct?

15 A. Correct.

16 Q. Okay. So as a matter of fact we don't know
17 that there was any actual savings, and I'm using the
18 term generally --

19 A. Or costs.

20 Q. -- or costs --

21 A. I got you.

22 Q. And this analysis presumably could be done
23 with respect to any PRDP that's selling milk and is
24 being analyzed with respect to an Order, because

1 there's always variation among the Orders with respect
2 to blend pricing and such, correct?

3 A. Correct.

4 Q. Okay.

5 A. The blend prices, statistical uniform price
6 is a function of how the milk was used on the Order
7 and the various prices at its location.

8 Q. Okay. I guess my question is, any time
9 there is an intra-order commercial activity of the
10 handler, you would be able to do an analysis of the
11 two Orders for the specific period to determine the
12 financial differential; that's what you've done here?

13 A. We could do it for an individual plant if
14 requested that, yes. But, again, it's proprietary
15 information. In this case Superior was asking for it.
16 And, again, we were careful to summarize the
17 information so not to disclose proprietary
18 information.

19 Q. Sure. You have produced in gross on some of
20 these reports information that I believe you're saying
21 if you broke it down by plant would be proprietary?

22 A. Correct. And/or by month. In some cases
23 I've just provided annual numbers when monthly numbers
24 were asked, because when you go to the individual

1 months...

2 Q. What is the standard that your office and
3 the USDA consults to determine what is or is not
4 proprietary?

5 A. Using a count of three; three producers in a
6 county, three handlers, three co-op buyers. And in
7 general that's -- we also sometimes look to whether
8 one of those individuals has substantial volume
9 vis-a-vis the other two and whether that would
10 disclose information.

11 Q. So you use a standard where if it -- what's
12 your standard if there are fewer than three?

13 A. It's not reportable.

14 Q. It's not reportable. If there are three or
15 more, it's reportable?

16 A. Generally, yes.

17 Q. Okay.

18 A. There are some exceptions to that.

19 Q. Would you be able to cite to a governmental
20 memorandum or something under the CFR, or what's the
21 origin of that -- those parameters, the three or more
22 rule, if you will?

23 A. Off the top of my head I do not know. But,
24 again, we are in charge of the proprietary information

1 and not releasing that. It is punishable by statute.

2 And I don't remember what...

3 Q. All right. I want to shift to a different
4 subject within the context of disclosures. And I
5 certainly appreciate on behalf of Superior Dairy all
6 the work that is being done here to collect this
7 information. We're obviously concerned about these
8 regulatory proposals. And I don't mean to diminish
9 through my questioning all the effort that's been put
10 into that.

11 We are and have been concerned with the
12 disclosure to us from the Government of communications
13 that have been received in connection with the DFA
14 proposal. You may be aware, for example, of our
15 pending motion for disclosure that pertains to ex
16 parte communications from other handlers and
17 interested parties.

18 I mentioned in the preliminary remarks with
19 Judge Bullard that we have received one or two copies
20 of correspondence that had been submitted to the USDA.
21 Charles English, who represents Dean Foods, not
22 initially, but at some point, provided us with copies
23 of correspondence that he had issued to the USDA.
24 Mr. Beshore had shared some materials with us as well.

1 But we have not received those sorts of
2 communications, even copies of the letters that we
3 received from Mr. English and Mr. Beshore, from the
4 Government in connection with our FOIA request or in
5 any other requests that were made.

6 Did you receive and consider those types of
7 requests and was some decision made with respect to
8 providing those to me?

9 MS. PICHELMAN: Your Honor, this
10 witness is just responding to the data
11 requests. I'm not sure how he can be
12 responsive. Mr. Carman is here just on the
13 data requests, and that's what he fulfilled
14 and was testifying on. I'm not sure how he
15 could be -- he's not here to respond to
16 that.

17 THE JUDGE: While I do agree that he
18 has not testified and that sounds -- the
19 question appears to be beyond the scope of
20 the direct examination, but I think
21 Mr. Wilson can at least try to lay a
22 foundation about whether or not Mr. Carman
23 was involved with any communications or any
24 requests for additional release of

1 communications, information, that sort of
2 thing.

3 Let's not confuse -- we have one person
4 asking questions. You'll have a minute,
5 Mr. Beshore, of course.

6 MR. BESHORE: In the nature of an
7 objection -- I mean, there's been a
8 representation made in question by
9 Mr. Wilson that communications on behalf of
10 the cooperative Proponents here, which I
11 might note is not DFA, it is eight
12 cooperatives --

13 THE JUDGE: Yes.

14 MR. BESHORE: -- nine cooperatives,
15 excuse me -- that the communications haven't
16 been provided in response to the Freedom of
17 Information Act request. And I'll just
18 note, I've been copied on these Freedom of
19 Information requests. All those
20 communications were there. I'm sure
21 Mr. Wilson has received the same thing.

22 I don't understand where we're going
23 with all that, because it's -- the premise
24 of the question is completely inaccurate.

1 THE JUDGE: Well, to me the question --
2 that little introduction to the question is
3 neither here nor there with respect to this
4 witness. So I agree with you there,
5 Mr. Beshore.

6 MR. WILSON: Well, Mr. Beshore maybe
7 has information that I don't have with
8 respect to what has and has not been
9 disclosed. I don't know -- and if
10 Mr. Carman is not the appropriate witness,
11 then --

12 THE JUDGE: Ask him.

13 MR. WILSON: -- I'll ask him, and then
14 I guess we'll wait for the appropriate
15 witness on those issues.

16 BY MR. WILSON:

17 Q. I believe -- and I don't want to step out of
18 the zone that you're giving me, your Honor -- did you
19 participate, Mr. Carman, in connection with receiving
20 and considering disclosure of those types of
21 communications?

22 A. I need to examine my records, but I don't
23 believe any of the requests were made directly to me.
24 They were made to my superior. If that superior

1 forwarded something to me and I responded, I may have
2 a responsive piece of information.

3 But I concentrated over the last couple of
4 weeks on assembling and supplying the data that we
5 could supply and that had been requested and set aside
6 the need to comply with the FOIA request.

7 Q. So you did participate in the -- at some
8 level in the response on the FOIA request?

9 A. No, I have not supplied anything to our --
10 to the individual that was assembling the response
11 from Dairy Programs. I have not fulfilled that
12 requirement yet.

13 Q. Who is that individual? I have been dealing
14 with a young woman, but I don't recall her name
15 offhand. She has a hyphenated name. Public
16 Information Officer.

17 A. She's the AMS Public Information Officer?

18 Q. Yes.

19 A. No, I don't know who that individual is.

20 Q. All right. So you expect that you will be
21 participating in connection with the FOIA request?

22 A. I will probably have some communications in
23 which I send information out to the Market
24 Administrators asking for information relative to the

1 data requests. To the extent that that's responsive,
2 yeah, I would have that kind of information.

3 Q. And just for my understanding, between my
4 esteemed counsel here, they made it clear that the
5 communications from various other interested parties
6 did not come through you. Do you have some sense of
7 which personnel within AMS would be involved in the
8 nature of those requests?

9 A. Well, within Dairy Programs, our Deputy
10 Administrator.

11 Q. Dana Coale?

12 A. Dana Coale. I'm assistant to Dana. The
13 Division Director for Order -- Order Enforcement --
14 Order Formulation and Enforcement, Will Francis.

15 Q. I was pleased to meet Mr. Francis this
16 morning. So you believe he might be more directly
17 responsive on that subject?

18 A. I'm quite sure that a lot of the documents
19 that were assembled and supplied on Friday that you
20 received on Monday were from Mr. Francis.

21 MR. WILSON: All right. Can I have 30
22 seconds to consult with my co-counsel?

23 THE JUDGE: Yes. But can you clarify
24 for me, we have, as I understand it, three

1 potential categories of requests. We have
2 the request for data that Mr. Carman has
3 explained and has produced a number of
4 exhibits to demonstrate the Department's
5 response to that?

6 MR. WILSON: Yes.

7 THE JUDGE: We have an outstanding FOIA
8 request from Superior Dairy?

9 MR. WILSON: Yes.

10 THE JUDGE: But then this request for
11 communications received by USDA from other
12 parties and the request to have those
13 communications shared, is that separate
14 from --

15 MR. WILSON: My recollection is that I
16 included that in my FOIA request.

17 THE JUDGE: That was in the FOIA
18 request. Okay.

19 MR. WILSON: And to Mr. Beshore's
20 point, he believes that all communications
21 have been included in the FOIA responses
22 received to date. He may be entirely
23 correct, but I don't have that confirmed
24 from Counsel.

1 And we have assumed that not to be the
2 case, because there's opposition to our
3 motion for the disclosure of ex parte
4 communications. And that would be a
5 frivolous exercise if there weren't
6 additional communications, I would think.

7 THE JUDGE: Okay. Just wanted to be
8 sure.

9 MS. PICHELMAN: I'm not quite sure if
10 we're kind of mixing things up a little bit.

11 MR. WILSON: Quite possibly.

12 MS. PICHELMAN: Okay. I'm not sure
13 where to go from here.

14 THE JUDGE: Well, I would just state on
15 the record, even though neither -- none of
16 the responses that I saw really mentioned
17 FOIA, but it was totally going to be
18 something I would write in my order ruling
19 on motion and the oppositions, that I have
20 absolutely no authority to tell the
21 Department to comply with the FOIA request
22 or to not comply with the FOIA request. And
23 I'm not the particular decider who makes the
24 determination whether something that is

1 withheld pursuant to one of the exemptions
2 to FOIA is properly withheld or improperly
3 withheld.

4 So it's fine if you want to talk about
5 the FOIA request. I just want to make it
6 clear that the Department was handling only
7 the two kinds of requests, something under
8 FOIA and something for the data request.

9 MR. WILSON: I believe that's correct.

10 THE JUDGE: I believe they've all been
11 wrapped up under FOIA now. But however they
12 were given, I just want to make it clear,
13 there's not some third category that fell
14 within this ex parte disclosure argument
15 that Superior is making.

16 MR. WILSON: Right. And Ms. Pichelman
17 can correct me, but my understanding is
18 there's a DFA request for a proposal -- I
19 don't know if it's DFA, et al. I don't want
20 to offend Mr. Beshore by misrepresenting
21 them.

22 THE JUDGE: Well, et al. minus one,
23 because Mr. Yale is representing --

24 MR. WILSON: All right. And then

1 there's the Superior Dairy requests which
2 were threefold on three various dates. And
3 then there's our FOIA requests.

4 THE JUDGE: Okay.

5 MR. WILSON: And that's that.

6 THE JUDGE: Right. As far as I'm
7 concerned, the only significance of there
8 being a FOIA request is that when I consider
9 the arguments of the parties, you know, as I
10 said, I was going to in gratis throw in
11 something about obviously a request under
12 FOIA is not something I have any authority
13 to make a ruling about.

14 MR. WILSON: That's understood. Very
15 good.

16 THE JUDGE: So that might let me off
17 the hook totally for that.

18 MR. WILSON: Can you indulge me 30
19 seconds, your Honor, before I reach the
20 podium?

21 THE JUDGE: I can do that. Yes. Thank
22 you. And then we'll have Mr. Beshore.

23 MR. WILSON: Just a few more questions,
24 your Honor.

1 THE JUDGE: All right.

2 BY MR. WILSON:

3 Q. Turning back to Exhibit 9.

4 A. I have Exhibit 9.

5 Q. Actually before I ask about that, just for
6 the clarity of the record and my ongoing education,
7 what does PPD mean; what is that the acronym for?

8 A. Producer Price Differential.

9 Q. Okay. And this is one I know the answer to,
10 but for the sake of the record, what is a PRDP?

11 A. Partially regulated distributing plant.

12 Q. Okay. Now, on Exhibit 9, I believe during
13 your direct examination you indicated that detail of
14 the components that's reflected in this report would
15 be considered proprietary?

16 A. Yes.

17 Q. And is that under the rule of three that you
18 essentially determined?

19 A. Each plant and how they pool is between the
20 plant and the Market Administrator that they're
21 reporting to.

22 Q. So that's a different analysis that was made
23 in terms of declaring that information proprietary,
24 not this -- if there's three plants in a --

1 A. Correct.

2 Q. Okay. And give me the rule of thumb on
3 that. You were just saying that it's between the
4 Market Administrator and the plant and it's nobody
5 else's business basically?

6 A. Correct.

7 Q. Okay. Would you turn to Exhibit 6B. And
8 then turn to Page 9 of 6B.

9 A. Exhibit 6B, Page --

10 Q. 6B and then to Page 9.

11 A. -- 9 at the bottom.

12 Q. All right. A couple questions. First,
13 about five down on the list of plants is PET Dairy,
14 Richmond. And there's a footnote there. Does that
15 footnote correspond to the same Footnote 1 below, or
16 is that an error?

17 A. That's an error.

18 Q. Okay. So there's no "1" there. And then
19 down at the bottom again you'll see the plant called
20 Select No. 5.

21 A. Correct.

22 Q. And there's a parenthetical after that that
23 reads Seven 76(b). What does that mean?

24 A. You got some proprietary information.

1 Q. Okay. Any particular reason that's on
2 there?

3 A. I believe when I copied it over from the
4 Order, I failed to strike out how they're pooled.

5 Q. Okay. 76(c) plants are State regulated,
6 correct?

7 A. They are in an area where there's marketwide
8 pooling.

9 Q. Okay. If they're in an area where there's
10 marketwide pooling and they're not Federally
11 regulated --

12 A. Yes.

13 Q. -- do I have that right? Now, for example,
14 California?

15 A. Yes.

16 Q. Okay. I believe some parts of New York as
17 well fall into that category, correct?

18 A. I'm not sure how we treat the Western New
19 York Order on that issue. It's not statewide. So I
20 doubt that we would have a 76(c) qualification.

21 Q. All right. So 76(c) qualifications are not
22 necessarily confidential and proprietary as far as
23 you're concerned?

24 A. Not all -- looking back at my remembering

1 how some of those -- not all those plants always use
2 the 76(c). They are generally using 76(c) in every
3 month.

4 MR. WILSON: Thank you, Mr. Carman.

5 THE JUDGE: Mr. Beshore, did you have
6 anything you wanted to ask?

7 MR. BESHORE: I do have a few
8 questions. Thank you, your Honor. Marvin
9 Beshore representing the cooperative
10 Proponents -- eight of the nine cooperative
11 Proponents. Mr. Yale represents
12 Continental.

13 CROSS-EXAMINATION

14 BY MR. BESHORE:

15 Q. And just for clarification when on that
16 point, Exhibit 5, it has a cover page Dairy Farmers of
17 America, et al., Hearing Request 1-A. So that this
18 record is clear, and there's been to date the usage of
19 the -- started by I guess Superior, which for rather
20 transparent reasons wishes to label everything as just
21 DFA.

22 Is it not correct, Mr. Carman, that a
23 request for this hearing and every communication that
24 I've made with respect to data requests has been made

1 on behalf of a number of different cooperatives,
2 including Foremost Farms, National Farmers
3 Organization and others, as well as Dairy Farmers of
4 America?

5 A. That's correct.

6 Q. And that the information that you've
7 provided have been in response to the requests of all
8 of those entities and not just Dairy Farmers of
9 America?

10 A. Correct.

11 Q. Okay. Of course the hearing notice
12 indicates that the proposal is on behalf of nine
13 cooperatives, I think -- eight or nine?

14 A. To be truthful I didn't look at the hearing
15 notice.

16 Q. Okay. Well, it's in the record. Thank you.
17 Okay. Let's talk about Section 76 just a little bit,
18 if you don't mind. On Exhibit 9 you were asked by,
19 you know, Superior Dairy to categorize partially
20 regulated distributing plants under Section 76(a),
21 (b), or (c).

22 Can you describe for the record now what
23 those options, those different provisions of Section
24 76 are, how they operate -- first of all, does Section

1 76 -- does it generally state the -- define the
2 obligations of a partially regulated distributing
3 plant to account to a Federal Order in marketwide
4 pools?

5 A. Yes. For their route sales in the marketing
6 area.

7 Q. Okay. And so what are the (a), (b), and (c)
8 options there?

9 A. They refer to subparagraphs within that
10 section of the Order.

11 Q. Which is 7 CFR Part 1000.76?

12 A. .76.

13 Q. Thank you.

14 A. 76(a) currently as it exists is a result of
15 a Supreme Court decision, Lehigh Valley, which was --
16 the plants in that case indicated that they were
17 paying excessive amounts. They were paying the
18 difference between Class I and Class III. What we
19 have now is the difference between Class I and blend.

20 That accounting or that assignment is netted
21 out for packaged or bulk milk that is pooled and paid
22 to that Federal Order or any other Federal Order. So
23 it's an accounting to attempt to bring equal costs for
24 the raw milk going to the packaged milk for their

1 route sales in the marketing area.

2 Q. Could I just interrupt you at that point.
3 When you say it's -- that there's an accounting entry
4 made with respect to bulk or packaged milk that the
5 plant had acquired which was subject to regulation,
6 did I understand you right?

7 A. Correct.

8 Q. So that if there's a plant in Virginia which
9 has acquired bulk milk from a regulated source --
10 Federally regulated source, and it packages milk at
11 its plant, distributes a quantity of milk into a
12 Federally regulated area -- say the plant is otherwise
13 unregulated, but it distributes a quantity into a
14 regulated area that for purposes of this question is
15 equal in volume to the amount of the bulk regulated
16 milk that it purchased, would it have any obligation
17 to the marketwide pool?

18 A. Only for the administrative costs for the
19 route sales in the area.

20 Q. Okay.

21 A. But they wouldn't have to settle with the
22 pool.

23 Q. Okay. And that's by operation of these
24 regulations, they would automatically be considered to

1 have -- since they bought regulated milk to have paid
2 a regulated price?

3 A. Yes.

4 Q. Would a plant in that transaction category
5 show up here as (a), (b), or (c) --

6 A. 76(a).

7 Q. -- on Exhibit 9? So on Exhibit 9 they would
8 have been -- if there was a plant in that category, it
9 would show up under the (a) category?

10 A. They could have under 76(c) also -- it could
11 -- yes.

12 Q. Okay. One or the other?

13 A. Yes.

14 Q. Okay. So I interrupted your description of
15 (a).

16 A. I was basically complete with (a).

17 Q. Okay.

18 A. 76(b) is a provision that allows the plant
19 to go through a set of calculations -- or the Market
20 Administrator on behalf of the plant as if the plant
21 was fully regulated and account to the pool if there
22 are regulations. In doing that the Market
23 Administrator looks to the gross payments that they've
24 made to their producers and compares that to their

1 obligation in effect as an individual handler pool and
2 fully regulated.

3 Q. And what happens when that calculation is
4 made -- first of all, does that reflect -- was that
5 calculation done on the basis of the plant's entire
6 producer -- entire universe of acquired milk, the
7 purchased milk, bulk milk?

8 A. Yes. Receipts and utilization of the
9 individual plant.

10 Q. Okay. From all sources and regardless of
11 the quantity it has in the area -- quantity of route
12 sales in the area of a particular Order?

13 A. Yes. The plant is treated as if it was
14 qualified as a pool plant when in fact it's not even
15 qualified.

16 Q. Okay. And what happens then when the Market
17 Administrator examines the payroll and makes that
18 comparison; what would it indicate?

19 A. If there's an obligation to the pool, it
20 goes to the producer-settlement fund. But generally
21 that's not the case. The plant has through various
22 premiums or whatever met its minimum requirements.

23 Q. Okay. So generally under Section (b) those
24 plants are required to make no payments into the

1 Federal marketwide pool?

2 A. Generally.

3 Q. Okay.

4 A. If the plant is -- that calculation is done
5 a couple weeks or so after the pool is done and at
6 that point if -- at pool time they could have made an
7 estimate of whether or not they thought they were
8 going to have an obligation and might issue a third
9 check to the producers and -- in an estimation of what
10 they thought their obligation was so that their gross
11 payment producers would cover all of their obligation.
12 And it's a function of how good their estimates are.

13 Q. If a plant elects to -- tells the Market
14 Administrator I want to use Option (b), and when the
15 Market Administrator examines their payroll and
16 determines they have not -- their payroll has not met
17 the full value required as if the plant was fully
18 regulated, what happens?

19 A. I don't know how each of the Market
20 Administrators administer that. I believe some of
21 them do not allow. If your producer payroll does not
22 show that you met your obligations, then you have an
23 obligation to the pool.

24 Q. Is there another possibility there

1 administratively?

2 A. Administratively, the Market Administrator
3 might allow them to make an additional payment. But I
4 don't know. I haven't asked the Market Administrators
5 individually how they're treating that. I suspect
6 that -- the payroll is the payroll. These are the
7 obligations you made to the producers. And if you
8 don't meet the minimum, then you owe the rest of the
9 money to the pool.

10 Q. If there was a bill owed, would it be
11 calculated on the basis of the compensatory payment
12 under Section (a), that amount, or the net difference
13 in total obligation to all producers under (b)?

14 A. I believe it's the net difference.

15 Q. Under (b)?

16 A. Under (b).

17 Q. On all their milk?

18 A. Yes.

19 Q. So they've got a pretty good incentive to
20 make sure that producer payroll figured on an
21 individual annual basis is as equal to the marketwide
22 pool value -- or full classified value?

23 A. Yes.

24 THE JUDGE: Could I just interject

1 here, Mr. Beshore?

2 MR. BESHORE: Yes.

3 THE JUDGE: I don't mean to cut you off
4 generally, but I was trying to confine this
5 portion of the discussion from Mr. Carman to
6 the exchange of what he did, why he
7 exchanged it.

8 And I think your questions are now
9 going into what the Milk Marketing Orders
10 seem to accomplish that maybe go more to the
11 substantive issues of this hearing, am I
12 right?

13 MR. BESHORE: Well, I just thought we'd
14 explain what the data under Exhibit 9, for
15 instance, represents.

16 THE JUDGE: Okay. I think we're going
17 to have more testimony from Department
18 witnesses that discuss the actual
19 substantive issues.

20 MS. PICHELMAN: No, your Honor.

21 MR. BESHORE: I see a negative
22 headshake.

23 THE JUDGE: Okay.

24 THE WITNESS: My understanding is I'm

1 the only Government witness.

2 THE JUDGE: Okay. Well, then...

3 THE WITNESS: We may have some other
4 experts that actually do the pool in the
5 room.

6 THE JUDGE: Right.

7 MR. BESHORE: Your Honor, I'm done with
8 that question.

9 THE JUDGE: Okay. Thank you. I guess
10 I'm fearful that we will be expanding this
11 particular discussion way beyond where we
12 even have -- you have the opportunity to
13 present your witnesses to discuss your
14 proposal.

15 MR. BESHORE: Yeah, I don't want to
16 expand any more than we need to.

17 THE JUDGE: Okay.

18 BY MR. BESHORE:

19 Q. Let me ask you a question or two in
20 follow-up to your testimony that's not in any exhibit,
21 but Mr. Wilson also asked you about it, and that's the
22 calculation done at Superior's request for the
23 11-month period in which Superior Dairy in Canton was
24 pooled on Order 1 versus Order -- when it was pooled

1 on Order 1, was that sort of the subject matter of
2 that request, to make some financial calculations with
3 respect to the 11-month period when Superior was an
4 Order 1 plant rather than an Order 33 plant, Superior,
5 Canton?

6 A. Hang on a second. It was in the second
7 supplemental request.

8 Q. Which I -- yeah, I don't -- I don't have.
9 And Mr. Wilson probably e-mailed it to me, but I don't
10 have it in front of me here.

11 A. The request --

12 THE JUDGE: Wait. Could I just
13 interject. I don't think that was admitted
14 into the record, the actual request, was it?

15 THE WITNESS: But I read it --

16 THE JUDGE: Wait a second.

17 THE WITNESS: -- earlier, your Honor.

18 THE JUDGE: Yes. I was going to say, I
19 heard it read into the record. But I don't
20 think anyone has the actual document in
21 front of us, just to make it clear.

22 MR. BESHORE: Yeah, I heard that also,
23 but I didn't get it down verbatim and I
24 don't have it in front of me, so...

1 THE JUDGE: Nor did I.

2 MR. BESHORE: Okay.

3 THE WITNESS: Do you want me to read it
4 again?

5 MR. BESHORE: Well, at least answer --
6 tell me if I've got the starting point
7 correct.

8 BY MR. BESHORE:

9 Q. You were talking about an analysis of 11
10 months when the Superior, Canton plant was pooled in
11 Order 1?

12 A. Correct.

13 Q. Okay. And you then compared the value --
14 the minimum producer value on Order 1 versus Order 33
15 for that 11-month period of time?

16 A. At the Canton location.

17 Q. At the Canton location. And on the basis of
18 just the statistical uniform values in the Orders?

19 A. And the producer price differential, the
20 PPD.

21 Q. Okay.

22 A. Again, at Canton. And did a simple average
23 of those 11 months of the reported PPD. It comes out
24 to whatever it comes out. It's around 12 or 13 cents.

1 I think it rounds to 13. And then the Market
2 Administrator for the Northeast Order had the pool
3 milk that was reported to them.

4 And so it was a simple calculation of the
5 simple average of the PPD times the pool milk
6 aggregated over that 11-month period and compared
7 between the two Orders. And so when you go through
8 that, it's about \$500,000 difference.

9 Q. Okay. So the simple average around 13
10 cents, the volume of pool milk at Canton for 11
11 months, the product of that multiplication is
12 approximately \$500,000?

13 A. Approximately, yes.

14 Q. Okay. And Superior authorized you to --
15 asked you to make that calculation and to present it
16 here, correct?

17 A. Yes.

18 Q. Okay. Now, can you tell us the volumes that
19 were represented in that calculation for Superior's
20 Canton plant; is that all milk supplied to that plant
21 that was pooled on Order 1?

22 A. I don't believe so.

23 Q. Okay. What is the volume then -- I mean,
24 how -- was it just their independent producer milk

1 that was pooled in Order 1 that was the volume you
2 used there?

3 A. Yes.

4 Q. Okay. So if they were supplied by
5 cooperatives with milk during that period of time,
6 it's not included in that calculation?

7 A. The cooperative would have pooled that milk.

8 Q. Okay. So this is just milk that was pooled
9 by the Canton plant on its report?

10 A. Yes.

11 Q. Okay. Could you turn to Exhibit 19. Just
12 for clarification, and you may have enumerated this in
13 your -- itemized this in your answer.

14 A. Okay. I have Exhibit 19 in front of me.

15 Q. Okay. These route sales by handlers not
16 regulated under Order 1 includes, for instance,
17 handlers regulated under other Federal Orders such as
18 Order 33?

19 A. Yes.

20 Q. Okay. As well as partially regulated
21 handlers?

22 A. Producer handlers, exempt plants.

23 Q. Okay. Now, I'd like to turn to Exhibit 20,
24 the next one.

1 A. Excuse me, 20?

2 Q. 20. And perhaps because I don't have the
3 request in front of me, I really got lost in
4 understanding -- or trying to understand what is
5 presented on Exhibit 20.

6 Can you just go like across the -- you know,
7 the first line for me; Pool Period 1001, is that,
8 what, January 2010?

9 A. Yes.

10 Q. And, of course, State of Maryland. Location
11 adjustment. You're using, what, Baltimore there or is
12 that all locations in the State of Maryland or --

13 A. All the locations where the differential was
14 2.8.

15 Q. All locations where it is 2.8. Okay. And
16 then the product pounds; what does that represent?

17 A. The producer milk, I believe.

18 Q. At farms located in Maryland?

19 A. At the plant.

20 Q. At plants. Producer milk that was pooled at
21 plants physically located in Maryland; is that
22 correct?

23 A. Yes.

24 Q. Okay. So in Maryland -- so here's my

1 puzzlement then. There's at least one pool
2 distributing plant in Order 1 located in Baltimore.
3 It's on some of the exhibits here.

4 A. There's at least one.

5 Q. There's more than one, I guess, in Maryland.
6 But that --

7 A. There's more than one.

8 Q. -- one comes to mind. Okay. So is that --
9 there's no Class I pounds shown on here. So I would
10 gather this doesn't reflect any milk pooled at Green
11 Spring Dairy, correct?

12 A. Right. I don't know what Green Spring's
13 Class I differential is.

14 Q. Okay. But I guess it's something other than
15 2.80?

16 A. Yeah.

17 Q. Okay. So why does this only show Maryland,
18 2.80?

19 A. That's what they asked for.

20 Q. Okay.

21 A. For the months of January 2010 through
22 August 2011, prepare a table showing the total volume
23 and individual market volume, and class of
24 utilization, of producer milk from any Federal

1 Marketing Order received at plants, pool and non-pool,
2 located in the following Ohio, Pennsylvania, and
3 Maryland Class I pricing zones; 2.00, 2.10, 2.20,
4 2.30, 2.50, 2.70, and 2.80.

5 Q. Okay. Regardless of the Order on which the
6 milk is pooled; is that correct -- I mean, this could
7 include milk pooled on multiple Orders?

8 A. No. This is done by the Northeast Order, so
9 there was no correspondence across.

10 Q. Order 1 only?

11 A. Yes.

12 MR. BESHORE: Okay. Thank you. May I
13 have a minute?

14 THE JUDGE: Let's go off the record.

15 (Off the record.)

16 MR. BESHORE: I have no further
17 questions at this time. Thank you,
18 Mr. Carman. Thank you, your Honor.

19 THE JUDGE: Mr. Yale?

20 MR. YALE: I want to enter an
21 appearance for another company. The name of
22 the company that I represent is Select Milk
23 Producers, Inc.

24 CROSS-EXAMINATION

1 BY MR. YALE:

2 Q. And I want to -- if you would, Mr. Carman,
3 look at Exhibit 6B.

4 THE JUDGE: And just to make it clear,
5 this is Benjamin Yale.

6 MR. YALE: I'm sorry.

7 THE JUDGE: Representing?

8 MR. YALE: Select Milk Producers, Inc.

9 THE JUDGE: In addition to Continental.

10 THE WITNESS: I'm looking for 6B?

11 MR. YALE: B.

12 THE WITNESS: All right. I have
13 Exhibit 6B.

14 BY MR. YALE:

15 Q. Okay. If you would look at Page 8 of that
16 exhibit.

17 A. Page 8.

18 Q. And at the bottom it has a plant named
19 Select No. 5.

20 A. Yes, Select No. 5.

21 Q. And then if you look at Page 9, do you have
22 Select No. 5, Section 76(b)?

23 A. Yes.

24 Q. And that's not the name of that plant, is

1 it?

2 A. No.

3 Q. And you've been requested to distribute a
4 tremendous amount of information to this hearing,
5 right?

6 A. Yes.

7 Q. And sometimes things can slip through,
8 right -- I mean, you know -- and then this was not
9 intended to be part of this exhibit; is that right?

10 A. That's correct.

11 Q. And ordinarily you would have considered
12 that confidential information?

13 A. Yes.

14 MR. YALE: All right. Your Honor,
15 based on that, we move to strike those --
16 that phrase out of that exhibit and ask for
17 purposes of the record that Exhibit 6B be
18 corrected to not -- or be redacted to not
19 include that Section 76(b) on Pages 9, 10,
20 and 11, and that further instruction, nobody
21 be able to ask questions directly to that
22 particular fact. We're kind of calling back
23 some confidential information that's been
24 disclosed.

1 THE JUDGE: Yes, I have no problem.

2 THE WITNESS: You're not going to sue
3 me, are you?

4 MR. YALE: Oh, no, Cliff. You guys
5 have worked hard. And I, you know, thought
6 that it's a situation we just don't want it
7 to get posted on the Internet and be part of
8 the public record. And, again, I appreciate
9 everything you did.

10 THE WITNESS: I apologize.

11 MR. YALE: Oh, I understand. A lot of
12 work done. Thank you.

13 THE JUDGE: All right. Thank you,
14 Mr. Yale. So pursuant to Counsel's motion
15 we will have the original copies that have
16 been submitted of Exhibit 6B, Pages 9, 10,
17 and 11 corrected to excise the information
18 that is in parentheses following Select
19 No. 5, which is the last entity identified
20 in the list of entities on those three
21 pages.

22 All right. You can put the genie back
23 in the bottle sometimes.

24 MR. YALE: No, we're fine.

1 THE JUDGE: All right. Any redirect?

2 MR. BESHORE: No.

3 THE JUDGE: Ms. Pichelman, anything
4 further from Mr. Carman?

5 MS. PICHELMAN: No. Thank you.

6 THE JUDGE: All right. You may step
7 down.

8 MR. WILSON: Your Honor, may I ask a
9 few follow-up questions based on some of the
10 testimony that was solicited after I sat
11 down?

12 THE JUDGE: Very briefly.

13 MR. WILSON: Okay.

14 THE JUDGE: I mean, again --

15 MR. WILSON: Four questions, tops.

16 FURTHER CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q. Okay. Mr. Carman, when Superior Dairy in
19 Canton became a PRDP, do you know if there was a
20 lowering of the Order 33 market blend price?

21 A. I did not examine that. I do not know.

22 Q. Okay. Would you please turn back then --
23 this is in follow-up to Mr. Beshore's questioning --
24 Exhibit 20.

1 A. I have Exhibit 20.

2 Q. Now, I don't think I misheard you, but if I
3 did, correct me. You indicated that this shows
4 analysis of sales pertinent to Order 1?

5 A. It's producer pounds and then the
6 utilization only for the Northeast Order.

7 Q. Why did you confine it only to the Northeast
8 Order?

9 A. That's all the data that was made available.

10 Q. That's all that was made available. But you
11 will agree that our Request No. 9 in my correspondence
12 of September 22 asked for any of the Marketing Orders,
13 correct? If it's convenient, I can read you my
14 paragraph I have on the computer here.

15 A. My interpretation of -- is for those states
16 and those price zones to provide the data. That is
17 the data that I was able to acquire. I did not get it
18 from the other Orders that may or may not have milk
19 pooled.

20 Q. Did you request it from the other Order
21 areas?

22 A. Your supplemental request was supplied to
23 all eight Market Administrative Offices.

24 Q. Okay. And you only received it from Order

1 1?

2 A. Yes.

3 Q. Did you get some indication -- and I know I
4 said it'd be four questions, I guess four distinct
5 areas, your Honor -- did you get indications from the
6 other Order areas that the Administrative Offices said
7 it's on its way?

8 A. There were indications of proprietary
9 information.

10 Q. I don't understand. Are you expecting no
11 additional information from them?

12 A. I am not expecting any additional
13 information.

14 Q. All right. Now I am confused. Why would it
15 be proprietary for every Order except Northeast?

16 A. Northeast has multiple cooperatives and
17 multiple handlers. So they're on the three or more
18 issue compared to an individual cooperative or an
19 individual handler on another Order.

20 Q. Okay. So it's fair for me to conclude that
21 the reason I don't have the reports here from the
22 other areas isn't because they didn't have sales into
23 Ohio and Pennsylvania and Maryland as requested, it's
24 just that those Market Administrators have declined to

1 produce that information?

2 A. That's a fair assumption.

3 Q. And then the final topic, you referred --
4 under Mr. Beshore's examination you were describing
5 76(a), (b), and (c) options under 1000.76. Does a
6 plant to your knowledge defined in 76(c) have the
7 option to choose otherwise to be 76(a) or (b)?

8 A. They're supposed to be a 76(c) is my
9 understanding.

10 Q. They don't have a choice, correct?

11 A. If the minimum obligation under another
12 option is there, the Market Administrator may elect --
13 may, I -- but my -- I would have to go back and look
14 at the records. But I thought there were a couple
15 times when a plant was a, quote, (c), but was an (a)
16 or a (b) on another category.

17 Q. Okay.

18 A. Or another month.

19 Q. And -- I'm getting toward the end, your
20 Honor -- we earlier -- I mentioned California as a
21 State regulated area and I thought part of New York as
22 well. In fact doesn't Western New York have its own
23 State Order that pertains -- in lieu of the Federal
24 Order?

1 A. Yes. But the Western New York Order does
2 not cover all of the State of New York, so I don't --

3 Q. Fair enough. With respect to that portion
4 of Western New York that is not under the Federal
5 Order System, do you know if 76(c) applies to those
6 plants?

7 A. I don't think so.

8 Q. Do you understand why that's the case with
9 respect to that area?

10 A. Because it's not a statewide pool.

11 MR. WILSON: Thank you, your Honor.

12 Thank you, Mr. Carman.

13 MS. PICHELMAN: Your Honor, just very
14 quickly.

15 FURTHER REDIRECT EXAMINATION

16 BY MS. PICHELMAN:

17 Q. Mr. Carman, I just wanted to clarify a
18 little bit. When you were discussing the No. 9
19 request for information and that you did reach out to
20 all Market Administrators to -- you know, and say if
21 you had any information to provide me, obviously you
22 need to do that now, there's a data request, do you
23 believe that they read the request and in fact would
24 have provided you information if they thought that

1 they had a need to provide based on the request or if
2 they could without divulging any confidential
3 information -- you believe they looked at it, analyzed
4 it, and determined that they -- based on the question
5 of their understanding that they had nothing to
6 provide?

7 A. Correct. They seemed to respond very
8 quickly to me.

9 MS. PICHELMAN: Thank you.

10 THE JUDGE: Any follow-up to
11 Ms. Pichelman's question?

12 (No response.)

13 THE JUDGE: No? Mr. Yale?

14 MR. YALE: I request a break.

15 THE JUDGE: Yes, we can definitely have
16 a break. We're overdue on a break. I just
17 have one question before we do that.

18 EXAMINATION

19 BY THE JUDGE:

20 Q. Mr. Carman, you described and I think
21 someone had classified it as a rule of three, but
22 pretty much you said if there were three producers or
23 less, then you would consider it proprietary?

24 A. If there was less than three.

1 Q. Less than three. Okay. And is that because
2 it would be easy to identify who those people were?

3 A. No. It relates to if I know mine and the
4 numbers being reported when there's only two, I know
5 the other guy's.

6 Q. Okay. And that is the rationale for using
7 that as the baseline for what the Department considers
8 proprietary or not?

9 A. Yeah.

10 Q. A baseline?

11 A. Rule of three.

12 THE JUDGE: Right. All right. Thank
13 you very much. Okay. Let's go off the
14 record.

15 (A brief recess was taken.)

16 THE JUDGE: We will proceed with
17 presentation from Mr. Beshore.

18 MR. BESHORE: Yes.

19 THE JUDGE: Mr. Beshore?

20 MR. BESHORE: The Proponents call Elvin
21 Hollon as their first witness.

22 THE JUDGE: Before we do that, we
23 talked about exhibits. Do you care to
24 introduce them through Mr. Hollon's

1 testimony?

2 MR. BESHORE: They will be introduced
3 through Mr. Hollon. But I would like to
4 have marked and identified for the record
5 five exhibits.

6 THE JUDGE: Okay.

7 MR. BESHORE: The first of which -- and
8 there should be copies available for
9 everyone. Hopefully we made -- we attempted
10 to make sufficient copies. And they're at a
11 table in the back of the room.

12 The first, which I'm going to ask to be
13 marked as Exhibit 21 for identification, is
14 a statement regarding Proposal 1 which
15 consists of a cover page and 16 pages of
16 text, 17 pages in total. It's possible that
17 some of the copies don't have page numbers
18 on them. But that's the total number of
19 pages in Exhibit 21, Statement of Elvin
20 Hollon.

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

23 MR. BESHORE: Exhibit 22 is a one-page
24 document which is a printout of a Superior

1 Dairy Internet -- the web page information
2 sheet, Exhibit 22.

3 (Whereupon, Exhibit Number 22 was
4 marked for identification.)

5 MR. BESHORE: Exhibit 23 is a
6 multi-page document with a cover page,
7 Selected Fulton County, Ohio, Public Land
8 Records from the County Auditor's website
9 relating to the Wauseon properties owned by
10 Superior Dairy.

11 The interior pages are marked as
12 indicated on the cover page and they total
13 cover plus ten, I believe. And that's
14 Exhibit 23.

15 (Whereupon, Exhibit Number 23 was
16 marked for identification.)

17 MR. BESHORE: Exhibit 24 is a two-page
18 document which is an excerpt from the 2009,
19 2010 Mideast Market Administrator's Annual
20 Statistical Report, Pages 26 and 27 of that
21 publication. That's Exhibit 24.

22 (Whereupon, Exhibit Number 24 was
23 marked for identification.)

24 MR. BESHORE: And Exhibit 25 is a

1 three-page legal size spreadsheet, a
2 document titled, Calculation of Estimated
3 Federal Order 33 Ohio Milkshed at Test
4 Minimum Price, January 2010 through July
5 2011. And that is Exhibit 25.

6 (Whereupon, Exhibit Number 25 was
7 marked for identification.)

8 THE JUDGE: All right. Thank you. Are
9 there any objections to the exhibits
10 proffered by Mr. Beshore? Anything from --

11 MR. BESHORE: I propose to offer them
12 when he's given testimony about them, if
13 that's acceptable.

14 THE JUDGE: Okay.

15 MR. WILSON: And I don't anticipate any
16 necessarily, but I'd like to reserve the
17 opportunity after I see them applied.

18 THE JUDGE: Okay. Thank you. All
19 right.

20 (witness sworn.)

21 THE JUDGE: Your witness.

22 MR. BESHORE: Thank you, your Honor.

23 ELVIN HOLLON,

24 of lawful age, as having been duly sworn, as hereinafter

1 certified, was examined and testified as follows:

2 DIRECT EXAMINATION

3 BY MR. BESHORE:

4 Q. Now, Mr. Hollon, before we proceed to have
5 you describe the exhibits and give your statement, I'd
6 like you to just briefly provide us with your name,
7 address, current professional position, and your
8 educational and employment background.

9 THE JUDGE: And may I interject. Will
10 you spell your name, please.

11 A. My name is Elvin Hollon. It's E-l-v-i-n
12 H-o-l-l-o-n. And I've been employed by Dairy Farmers
13 of America for 32 years, Dairy Farmers of America or
14 its predecessor. I have a Bachelor's degree in Dairy
15 Science Manufacturing and a Master's degree in
16 Agricultural Economics from Louisiana State
17 University.

18 My job duties over the course of my career
19 have dealt with statistical analysis and data
20 collection, procuring milk, selling milk, dealing with
21 customers, dealing with Federal Milk Marketing Orders,
22 and various buy-sell arrangements that DFA may make
23 with its customers over that time frame.

24 I'm currently employed in our corporate

1 marketing team in Kansas City, where I've been in that
2 position since 1998.

3 THE JUDGE: DFA stands for?

4 THE WITNESS: Dairy Farmers of America.

5 THE JUDGE: All right. Thank you. I'm
6 sorry.

7 Q. And you've been in your present job position
8 since what date?

9 A. 1979.

10 Q. No, your current job position.

11 A. 1998.

12 Q. Since 1998 what are your day-to-day duties
13 and responsibilities?

14 A. Again, I deal with prices. I deal with USDA
15 information. I generally function as a liaison and an
16 in-house consultant for our various operational areas
17 with Federal Order activities.

18 So I testify at hearings. I provide data
19 analysis. I work with our sales guys. And I work
20 with the various milk marketing agencies around the
21 country that DFA is a member of.

22 Q. Have you testified previously as an expert
23 witness in Federal Milk Order proceedings?

24 A. I've testified at many Federal Milk Order

1 proceedings.

2 MR. BESHORE: And I would offer
3 Mr. Hollon as an expert witness for this
4 hearing in his --

5 MR. WILSON: Objection.

6 MR. BESHORE: -- fields of agricultural
7 economics, dairy economics, and milk
8 marketing.

9 MR. WILSON: And I object.

10 THE JUDGE: Grounds?

11 MR. WILSON: If I may. An expert
12 witness is somebody who is provided in
13 judicial proceedings as somebody who has
14 evaluated evidence and is giving an opinion
15 that is deserving of an elevated state of
16 consideration because of his expertise. The
17 expertise in milk marketing areas, I
18 understand, is largely a province of the
19 Secretary of Agriculture.

20 Now, I certainly expect to have no
21 objection to Mr. Hollon exposing facts and
22 describing evidence and providing that to
23 the record; however, to have him
24 preliminarily characterized as an expert

1 witness is affording to him a
2 characterization which I believe would be
3 inappropriate.

4 It may be noted in his own report,
5 through testimony -- he acknowledges that he
6 is a payroll employee of the Dairy Farmers
7 of America. I understand expert witnesses
8 are compensated for their time. They're not
9 typically employees of the actual party
10 whether it's a lawsuit or in this case the
11 Proponents.

12 So we are concerned that at the outset
13 he's being characterized that way. I expect
14 he's going to continue to testify and that
15 there's sometimes the fine line between fact
16 and opinion. And I'm not going to stand up
17 every time I think that fine line is being
18 approached. However, I do believe it's
19 important to interpose this objection at
20 this time.

21 THE JUDGE: Do you care to respond,
22 Mr. Beshore?

23 MR. BESHORE: Yes. And I understand
24 that this is the first Milk Order hearing

1 that your Honor has presided over. But I
2 would state and note that Mr. Hollon has
3 been offered and received as an expert
4 witness in these areas at many, many federal
5 or local Order hearings over the years, and
6 generally, maybe completely, without
7 objection.

8 I think it's perfectly appropriate to
9 note at the beginning that his testimony --
10 by the way, there's nothing in the doctrine
11 of expert testimony anywhere that limits
12 that to persons who are in an independent
13 contractual as opposed to employment
14 relationship with any party. Just note
15 that. And that objection I think is
16 completely immaterial in any tribunal.

17 But I think it's perfectly appropriate
18 that Mr. Hollon be recognized as an expert
19 in his field so that his statements carry
20 that -- you know, that necessary weight in
21 these proceedings. And it's the practice of
22 these proceedings it has been done.

23 THE JUDGE: Well, let me just ask you,
24 Mr. Beshore. Are you familiar whether or

1 not in considering the testimony of the
2 record -- whether or not the Secretary of
3 the Department of Agriculture has to assign
4 elevated weight as someone would in a court
5 of law?

6 We're not in a court of law. We're not
7 even in an administrative hearing where I
8 would write a decision on the substantive
9 facts. So does it matter to any degree
10 whether Mr. Hollon is characterized as an
11 expert witness?

12 MR. BESHORE: Well, I think it matters
13 for the record, which the Secretary must
14 evaluate all of the testimony on the basis
15 of its source and its -- you know, its full
16 weight, including the expertise and
17 background and stature and position of the
18 witness.

19 And that's how it's been presented
20 previously. And whether the Secretary is
21 compelled -- the Secretary is not compelled
22 to take anybody's testimony, you know, for
23 any weight.

24 THE JUDGE: Right.

1 MR. BESHORE: But I believe that it's
2 appropriate that the witness's position and
3 stature be recognized for the fullness of
4 the record for the Secretary's
5 consideration.

6 THE JUDGE: I see Mr. Yale has his hand
7 up.

8 MR. YALE: Ben Yale on behalf of
9 Continental. Obviously we agree with this,
10 the request to be an expert. And let me
11 just add this. I've seen the testimony.
12 And you can read it, anybody can. It's
13 replete with more than just factual
14 comments, there's analysis that's done.

15 It's taking a myriad of facts from
16 different Federal Orders and different
17 knowledges and putting them together in a
18 way that -- you know, in a much more
19 simplified thing. And that is evidence of
20 somebody who has an expertise of what's
21 being done rather than just the reflection
22 of facts. I mean, there's a thought process
23 there.

24 Obviously the Secretary can weigh any

1 evidence any way the Secretary wants to
2 weigh it. We can call them experts or
3 non-experts or good or bad or stupid or
4 smart. That's the Secretary's decision and
5 his own wisdom. But I think that it is
6 reflective of the type of testimony that's
7 about to be given.

8 THE JUDGE: All right. As I see it I
9 will certainly overrule the objection to
10 Mr. Hollon being called an expert, because I
11 hear -- and you actually have admitted,
12 Mr. Wilson, that Mr. Hollon's testimony will
13 be a mix of fact and opinion.

14 If you are challenging his experience
15 and his expertise and his ability to reach
16 an opinion, that's another thing. I mean,
17 we can do a little voir dire on that.

18 But I do not understand this proceeding
19 to have the same characterization of
20 witnesses as it would in a court of law
21 where the Federal Rules of Civil Procedure
22 or Criminal Procedure actually define what
23 constitutes an expert.

24 And I think I can take official notice

1 that you do not have to be a paid third
2 party of any of the party components to be
3 characterized as an expert. If you had to
4 be a third party, we would never have anyone
5 testify in a criminal proceeding for the
6 United States. For instance, an FBI lab
7 official or the FBI agent or individuals
8 similarly situated who worked for the
9 Government. They don't get anything extra
10 either.

11 So I find that your objection has no
12 grounds on those two issues. But if you are
13 concerned about Mr. Hollon's background and
14 wish to conduct some voir dire, I'll allow
15 you a little latitude there.

16 MR. WILSON: I don't doubt that he has
17 a very impressive curriculum vitae. And I
18 don't want to belabor the record with that.
19 I would only comment that I would surmise
20 that everybody here could be an expert.
21 Mr. Carman probably is an expert in his
22 particular field of governmental
23 regulations.

24 So if the standards are loose and

1 that's the case, then obviously I thank the
2 Judge for allowing me to interpose my
3 objection on the record. Thank you.

4 THE JUDGE: There's nothing that makes
5 us adhere to the Civil Rules of Procedure,
6 so therefore I believe for our purposes
7 Mr. Hollon can be an expert.

8 MR. BESHORE: Just a brief comment on
9 that. He's solely -- he's not been offered
10 as an expert in, you know, annuities. He's
11 been offered as an expert in dairy economics
12 and milk marketing.

13 And I don't think the standards -- or
14 the bar is low at all with respect to his
15 expertise. And I don't think people can
16 come up here and give opinions about
17 anything they want to in this hearing. So I
18 take exception to Mr. Wilson's
19 characterization.

20 THE JUDGE: We've already --

21 MR. WILSON: My objection has been --

22 THE JUDGE: -- addressed it, so --

23 MR. WILSON: -- overruled, so --

24 MR. BESHORE: Thank you.

1 BY MR. BESHORE:

2 Q. Okay. Mr. Hollon, before you go into your
3 statement of principle, let's just identify the
4 exhibits or note a little bit about the exhibits that
5 are referenced in your testimony.

6 Exhibit 22 is a one-page exhibit. Just
7 identify what that is.

8 A. It's a print-off of a Facebook page about
9 Superior Dairy. It would be available to anybody who
10 would go out to the site and call it up and print it
11 off. It describes facts about the dairy, a
12 family-owned business, operated since 1922, a list of
13 examples of their customers, their business address,
14 phone number, a history, a product mix from their
15 business operation. And it's a current live document.

16 Q. Okay. Exhibit 23?

17 A. Exhibit 23 is a recap of land records pulled
18 out of the legal system. It is multiple pages. It
19 describes land records of the Wauseon, Ohio, plant.
20 It gives addresses, parcel sizes, square foot, acreage
21 by several different parcels. It talks about purchase
22 values, some brief descriptions of -- and what those
23 are, and it also has some pictures to it.

24 Q. And the website from which it was obtained

1 is -- shows both on the cover page and on the margins
2 of the printed pages or at least several of them?

3 A. It does.

4 Q. Okay. Exhibit 24?

5 A. Exhibit 24 are two pages taken out of the
6 Federal Order 33 in 2009, 2010 Market Administrator's
7 Statistical Report. It's a publicly available
8 document. Pages 26 and 27. And it describes route
9 sales within the Mideast Order. 2009 data, 2010 data.
10 It describes sales by various categories of plants,
11 various -- into and out of various Orders. It
12 describes in-area sales, sales into other Federal
13 Orders. And, again, available from the Federal Order
14 33 Market Administrator's database.

15 Q. Okay. And in fact some of that information
16 perhaps is already embedded in some of Mr. Carman's
17 exhibits perhaps?

18 A. It may well be.

19 Q. Okay. Exhibit 25 is a three-page document.
20 Can you describe that for us?

21 A. Exhibit 25 is an Excel spreadsheet that I
22 prepared. It's a three-page document. The columns in
23 yellow represent columns where data might be entered.
24 Columns in orange would be where calculations might be

1 made. The time period is January 2010 through July of
2 2011. And there are various references that I'll make
3 in my testimony.

4 As a general characterization Columns A
5 through F are data taken from the Federal Order 33
6 Market Administrator Statistics that are pounds in the
7 subset of the Order identified by the Marketing
8 Administrator as Ohio. There are component tests.
9 There are -- in those component tests are -- in
10 Columns B, C, D, E, and Column F is a somatic cell
11 count record.

12 Columns G, H, I, and J are then computations
13 of total pounds times test to get the pounds of
14 product. Columns K, L, and M are the producer -- the
15 component prices; again, taken from the Market
16 Administrator records. Column N is an extension of
17 price times pounds to come up with a component blend
18 price total dollar value.

19 Column O, Order 33 is a multiple component
20 market, so their producers would get paid for a
21 various somatic cell count test. So there's the --
22 Column O is the rate. Column P is the dollars
23 attributed to that rate. Column Q is a location
24 value. Canton is in the base zone, so it doesn't have

1 a plus or minus location value off the base.

2 Column R would be total dollars divided by

3 total pounds or a Component Order Minimum Price.

4 Column S is the PPD value, which is a per

5 hundredweight volume. And Column T then is an At Test

6 Order Minimum price, computed all with the data that's

7 on this page.

8 Q. Those columns are on the first page of

9 Exhibit 25, correct?

10 A. Yes. That would be Columns labeled A

11 through T.

12 Q. Okay.

13 A. The second page contains Columns U through

14 QQ. In general this page calculates what I'll refer

15 to as an in-plant blend price. It takes published

16 Federal Order prices for Class I in Columns U and V,

17 computes the price -- a class price under the Federal

18 Order price formula.

19 As I'll explain in my testimony, we assign

20 plants in Order 33 a typical plant having an

21 86 percent Class I use value. So Column Y is the

22 Class I contribution from that -- those prices and the

23 86 percent utilization value. Columns Z and AA

24 compute Class II prices. It computes a Class II

1 price. A typical use value of 9 percent. Column DD
2 then would be a Class II contribution to the in-plant
3 use value.

4 Columns EE through GG are Class III prices.
5 Column HH computes a Class III price using those
6 prices and the price formulas. Column II, the
7 three percent, is the use of that value of a typical
8 distributing plant. Column JJ, the Class III
9 contribution to an in-plant blend price. Columns KK
10 and LL, I do the same type of computation for Class IV
11 prices. Column MM, a Class IV price, a two percent
12 use value. Column OO, contribution of Class IV.

13 Now, Column PP then would add together the
14 values in Y, DD, JJ, and OO. So for the month of
15 January 2010 those sum up to \$17.29. Column QQ nets
16 the producer Order tested minimum, that's in Column T,
17 of 16.32 against the in-plant blend of 17.29, and
18 notes that the in-plant blend price was 97 cents
19 higher than the Order at test minimum. And that
20 computation is then repeated all the way down the page
21 ranging in values from 97 cents in January of 2010, 98
22 cents in July of 2011. And in one or two months that
23 value is negative.

24 The third page, columns range from PP out to

1 EEE. And the first set of calculations, the in-plant
2 blend -- the difference between the in-plant blend and
3 the Order minimum, the Federal Order publishes a
4 mailbox milk price. That's a normal statistical
5 publication of each Order. It attempts to represent
6 the dollars in a producer's hand at their mailbox.
7 And the order varies.

8 There are prices for geographic divisions
9 smaller than an Order. This is an Ohio milkshed
10 mailbox price. To that mailbox price we have added a
11 haul rate for Ohio taken from Order 33 statistical
12 studies. That number is -- I can do it from memory --
13 about 43 cents, 7 cents Market Administrator fee for
14 non-member milk, and the mandatory 15 cents promotion
15 assessment totals 75 cents for a monthly total
16 milkshed price of \$17.67. In my testimony I'll make
17 some statements comparing Columns DD to TT.

18 The columns on this page that are in green,
19 just make a note of the fact that Column PP is greater
20 than Column TT. And I'll make some comments about
21 that in my testimony.

22 Columns WW through XX mimic the
23 contributions -- or the calculation that would be made
24 under the (a) provision that Mr. Carman outlined in

1 his statement.

2 Q. Section 76(a)?

3 A. Section 76(a), that's correct. And I'll
4 make some comments about that in my statement. And in
5 Columns ZZ through EEE, I'll take the comparison in
6 Column QQ, which is the in-plant blend versus the
7 component blend, and for plants of a various size
8 would indicate a potential dollar difference between a
9 plant that was partially regulated and a fully
10 regulated plant. And I'll make some comments about
11 those numbers in my statement.

12 Q. Okay. With that introduction to your
13 exhibits, would you proceed with your statement,
14 Mr. Hollon?

15 A. Testimony on behalf of Continental Dairy
16 Products, Inc., Dairy Farmers of America, Inc.,
17 Dairylea Cooperative, Inc., Erie Cooperative
18 Association, Foremost Farms USA Cooperative, Inc.,
19 Michigan Milk Producers Association, Inc., NFO, Inc.,
20 Prairie Farms Dairy, Inc. -- one extra Inc. -- and
21 White Eagle Cooperative Association.

22 Statement of Proponents. I am Elvin Hollon.
23 I am employed by Dairy Farmers of America as the
24 Director of Fluid Marketing and Economic Analysis. My

1 office is located at 10220 Ambassador Drive, Kansas
2 City, Missouri 64153. I am testifying today on behalf
3 of Continental Dairy Products, Inc., Dairy Farmers of
4 America, Inc., Dairylea Cooperative, Inc., Erie
5 Cooperative Association, Foremost Farms USA
6 Cooperative, Inc., Michigan Milk Producers
7 Association, Inc., NFO, Inc., Prairie Farms Dairy,
8 Inc., and White Eagle Cooperative Association. And in
9 my statement I refer to this group as the
10 Cooperatives.

11 Order hearing proceedings always walk a fine
12 line between building a credible hearing record and
13 respecting the boundaries of a confidential business
14 relationship. Superior Dairy is a customer of Dairy
15 Farmers of America, Inc., and we value our
16 relationship.

17 At times in the marketplace suppliers and
18 buyers have differing views of the terms of trade.
19 This hearing represents one such situation. We fully
20 intend to present our case as best we can and maintain
21 the boundaries of confidentiality. We expect other
22 participants to respect that effort.

23 The Proponents are supporters of the Federal
24 Milk Marketing Orders. We believe Federal Orders are

1 economically proven marketing tools beneficial to
2 dairy farmers. The Cooperatives collectively market
3 the majority of the milk and service the majority of
4 the Class I sales in the Order.

5 We requested this hearing to consider
6 changes in the Order 33 regulations dealing with the
7 requirements for pool distributing plant. Using pool
8 statistics published in the Mideast Milk Marketing
9 Area 2009-2010 Statistical Report for the Order-wide
10 mailbox milk price and milk production by farm size,
11 we estimate that more than 85 percent of the nearly
12 6,974 producers pooled on Order 33 are small
13 businesses.

14 The disorderly marketing conditions
15 supporting this hearing request are harmful to these
16 small businesses on whose behalf this request is made.
17 Failure to address these issues will be detrimental to
18 all the members of our cooperatives both in their
19 day-to-day dairy farm enterprises and the milk
20 processing investments which they have made.

21 The Cooperatives. Continental Dairy
22 Products, Inc., is a member-owned Capper-Volstead
23 cooperative of 29 farms that produce milk in three
24 states. During the course of a year Continental will

1 pool milk on Federal Milk Marketing Orders 5, 6, 7,
2 30, 32, and 33.

3 Dairy Farmers of America is a member-owned
4 Capper-Volstead cooperative of 9,200 farms that
5 produce milk in 49 states. They pool milk on 10 of
6 the 11 Federal Milk Marketing Orders including the
7 Mideast Order.

8 Dairylea Cooperative, Inc., is a
9 member-owned Capper-Volstead cooperative of 2,000
10 farms that produce milk in nine states. They pool
11 milk on three of the ten Federal Milk Marketing Orders
12 including the Mideast Federal Order.

13 Erie Cooperative Association is a
14 member-owned Capper-Volstead cooperative of 22 farms
15 that produce milk in two states. They pool milk on
16 two of the ten Federal Milk Marketing Orders including
17 the Mideast Federal Order.

18 Foremost Farms USA Cooperative, Inc., is a
19 member-owned Capper-Volstead cooperative of 1,918
20 farms that produce milk in seven states. Foremost
21 Farms USA pools milk on four of the ten Federal Milk
22 Marketing Orders including the Mideast Federal Order.

23 NFO, Inc., (NFO) is a member-owned
24 Capper-Volstead cooperative of 1,500 farms that

1 produce milk in 18 states. NFO pools milk on six of
2 the ten Federal Milk Marketing Orders including the
3 Mideast Federal Order.

4 Michigan Milk Producers Association (MMPA)
5 is a member-owned Capper-Volstead cooperative of 1,380
6 farms that produce milk in four states. MMPA pools
7 milk on five of the ten Federal Milk Marketing Orders
8 including the Mideast Federal Order.

9 Prairie Farms Dairy, Inc., is a member-owned
10 Capper-Volstead cooperative of 805 farms that produce
11 milk in seven states. They pool milk on five of the
12 ten Federal Milk Marketing Orders including the
13 Mideast Federal Order.

14 White Eagle Cooperative Association is a
15 member-owned Capper-Volstead cooperative of 12 farms
16 that produce milk in three states. They pool milk on
17 four of the ten Federal Milk Marketing Orders
18 including the Mideast Federal Order.

19 Producer and Handler Minimum Price
20 Uniformity: the Federal Order Marketwide Pool System.
21 To establish and preserve orderly marketing conditions
22 the Orders establish marketwide pools in which all
23 handlers have uniform minimum class prices for all
24 milk; and all producers have a minimum uniform blend

1 price or PPD distribution on their milk production.

2 Producers are either in or out on the basis
3 of performance. Handlers are in or out on the basis
4 of criteria which reflect the handler's relationship
5 to the market and milkshed, with the intent to have
6 competitive handler uniformity. These handler
7 criteria have always recognized limited exceptions,
8 since the pools are not nationwide and all-inclusive.

9 Since the inception of Federal Order Reform
10 the rule has always reflected the desire for full
11 marketwide pooling. Any exceptions are limited. The
12 Reform Decision noted explicitly that marketwide
13 pooling was the preferable and fair pooling option and
14 adopted it for all Orders.

15 "Marketwide sharing of the classified use
16 value of milk among all producers in a market is one
17 of the most important features of a Federal Milk
18 Marketing Order. It ensures that all producers
19 supplying handlers in a marketing area receive the
20 same uniform price for their milk, regardless of how
21 their milk is used. This method of pooling is widely
22 supported by the dairy industry and has been
23 universally adopted for the 11 consolidated Orders."
24 Citation 64, Federal Register at 16130, April 2, 1999.

1 The Reform Decision stressed the importance
2 of pooling all significant competitors and also
3 updating for changes in marketing patterns and
4 technology. This was recently applied in the changes
5 to the producer-handler definitions system-wide.

6 Distributing Plant Pooling Principles in the
7 Federal Order System. Several statements in the 1999
8 Final Decision for Federal Order Reform summarize the
9 Order system's views and philosophy regarding pool
10 distributing plants. The overriding theme is that
11 similarly situated plants processing fluid milk
12 products and selling in competition with each other
13 should be subject to the same Order Regulations.

14 Quote, Pool Plant. The pool plant
15 definition of each Order describes those plants which
16 receive milk that shares in the marketwide pool. It
17 provides standards to identify those plants engaged in
18 serving the fluid needs of the marketing area. Pool
19 plants serve the fluid market to a degree that
20 warrants their producers sharing in the added value
21 that derives from the classified pricing of milk.

22 While the pool plant definition in every
23 consolidated Order provides for a set of common
24 principles, the standards applicable to pool plants

1 differ among the consolidated Orders, reflecting the
2 fact that marketing conditions vary across the
3 country. The goal in drafting pooling standards is to
4 ensure both an adequate supply of milk for fluid use
5 and orderly marketing by allowing all milk in a
6 marketing area the opportunity to serve the fluid
7 market and thereby share in the pool.

8 There are two performance standards
9 applicable to pool distributing plants in the
10 consolidated Orders. The first standard, which varies
11 among Orders, requires a distributing plant to have a
12 minimum Class I utilization. Since route disposition
13 includes only Class I milk, the specific standard is a
14 measure of a distributing plant's route disposition as
15 a percent of its total receipts of fluid milk
16 products. This standard is generally directly related
17 to the market's Class I utilization.

18 Once it is determined that a distributing
19 plant is sufficiently associated with the fluid market
20 to share in the pool, a second standard determines if
21 the plant is sufficiently associated with a particular
22 market to share in the pool applicable to that market.
23 The in-area standard adopted for the consolidated
24 Orders requires that a distributing plant have 25

1 percent of its route disposition within a marketing
2 area before it can be fully regulated by the Order
3 covering that marketing area.

4 The 15 percent in-area standard in the
5 proposed rule has been changed to 25 percent for all
6 Orders to reflect the larger, merged marketing areas
7 that are adopted. This change should not affect the
8 regulatory status of any current distributing plant.
9 Citation 64 Federal Register at 16132, April 2, 1999.

10 The language in the Federal Order Reform
11 Decisions which created a uniform pool distributing
12 plant definition and the 25 percent in-area standard
13 clearly intended to keep all plants regulated and not
14 to deregulate existing pool plants. The Reform
15 Decisions, by pointing out that the pre-reform
16 qualifying percentage was generally no more than 15
17 percent, establish the historical finding of USDA that
18 an association at that level with a pool necessitated
19 full pooling and full regulation.

20 At the time and based on market conditions
21 in the Orders, the Reform Decision concluded that
22 establishing the 25 percent in-area route distribution
23 standard would not create any problems because the
24 Orders were bigger and would regulate all existing

1 handlers in the same manner as they had been
2 regulated. Now, some 12 years later, there is a need
3 to modify that standard for Order 33.

4 The Reform Decision provided further
5 guidance noting the importance of handler competition
6 and milk procurement in the establishment of Order
7 boundaries and the resulting Order Regulation.

8 Comments on Consolidation Criteria. Most of
9 the comments relative to Order consolidation criteria
10 were submitted prior to publication of the proposed
11 rule. It was the overall opinion of the commenters
12 that overlapping route disposition and milk
13 procurement are the most important criteria to
14 consider in the consolidation process.

15 Regulation of processors on the basis of
16 their location rather than their sales areas has
17 largely been incorporated in the consolidated Orders
18 by a provision that would pool a handler under the
19 Order for the area in which the handler is located
20 unless more than 50 percent of the handler's Class I
21 route dispositions are distributed in another Order
22 area.

23 This provision should help assure that the
24 Order under which a distributing plant is pooled will

1 not change from month to month, and that a plant
2 operator is subject to the same provisions, such as
3 producer pay prices, as are its primary competitors.
4 Cite 64 Federal Register at 16045, April 2, 1999.

5 The Federal Order System has reacted
6 consistently over the years by updating regulations
7 for distributing plants where new sales patterns or
8 practices lead to circumstances where competing plants
9 are not similarly regulated. For instance, a 1998
10 (sic) decision, Milk in the Ohio Valley, and
11 Louisville-Lexington-Evansville Marketing Area --
12 [Docket Nos. AO-165-A57 and AO-123-A58] -- support the
13 historical precedent in the Orders for similarly
14 situated plants to have a common regulatory rules
15 base.

16 THE JUDGE: Excuse me. May I interject
17 here, Mr. Hollon. I heard you say a 1998
18 decision. I might have heard that wrong.
19 But it says 1988. So I want the record to
20 reflect which is correct.

21 THE WITNESS: 1988 is correct.

22 THE JUDGE: Oh, thank you. I might
23 have misheard, but --

24 MR. WILSON: No, you heard it

1 correctly.

2 THE JUDGE: Okay. Thank you.

3 A. This Decision changes the current regulatory
4 status of a pool distributing plant that is located in
5 the Louisville-Lexington-Evansville marketing area but
6 is regulated by the Ohio Valley Order because a
7 greater portion of its fluid milk products
8 distribution is in the latter Order's marketing area.
9 It would regulate such plant under the
10 Louisville-Lexington-Evansville Order. Proposed Rule,
11 signed January 7, 1988.

12 This Decision altered the pool distributing
13 plant standards for a single plant emphasizing the
14 desire of orderliness and thus correcting a disorderly
15 marketing condition which caused similarly situated
16 plants within the same competitive area to have
17 different costs of raw milk.

18 This proceeding noted that provisions
19 regulating processing plants serving retail stores
20 over a wide geographic area may need to be altered in
21 order to assure that all handlers competing for milk
22 procurement and sales in an Order are subject to the
23 same price as their competition.

24 While historically the issues concerning the

1 right tests for partial regulation versus full
2 regulation of distributing plants dealt with plants
3 outside the marketing area with limited in-area sales,
4 it is very instructive for this hearing that in the
5 Federal Order Reform Decision, at least two changes in
6 the distributing plant language were implemented
7 uniformly across the system in order to maintain a
8 regulated status for all similarly situated
9 distributing plants and prevent the disorder of such
10 fully regulated plants becoming partially regulated.

11 In one case, the language establishing the
12 denominator for the minimum Class I percentage at a
13 pool distributing plant was clarified to use only
14 volumes physically received at the plant. This
15 eliminated the possibility for a plant to avoid pool
16 plant status by associating volumes of diverted
17 non-Class I milk with the plant, thereby becoming
18 partially regulated.

19 In another case, the treatment of packaged
20 transfers was changed to prevent plants from becoming
21 partially regulated via certain plant-to-plant
22 transfer transactions. The final decision stated:

23 "However, for the single purpose of
24 qualifying a plant as a pool distributing plant, the

1 pool distributing plant definition has been modified
2 to treat transfers of packaged fluid milk products to
3 other plants as if they were route disposition of the
4 transferring plant for the purpose of identifying the
5 plant's association with the fluid market. This is
6 necessary to preclude a plant from becoming partially
7 regulated if the plant shipped significant quantities
8 of packaged fluid milk products to another
9 distributing plant." Cite 64 Federal Register at
10 16132, April 2, 1999.

11 In both these instances, the Department
12 acted to close loopholes in language which allowed
13 plants which were intended to be fully regulated to
14 become partially regulated, a disorderly marketing
15 condition.

16 The Decision further emphasized just how
17 important maintaining consistent and constant pooling
18 standards within an Order marketing area by providing
19 special regulations for the unique set of plants that
20 distribute ultra-pasteurized or aseptically-processed
21 fluid milk products.

22 "A special pool distributing plant
23 provision, that is Section 7(b) of the consolidated
24 Orders, has been adopted for distributing plants that

1 distribute ultra-pasteurized or aseptically-processed
2 fluid milk products. Such plants must be located in
3 the marketing area and must process a certain
4 percentage of their milk receipts into
5 ultra-pasteurized or aseptically-processed fluid milk
6 products during the month.

7 Plants specializing in ultra-pasteurized or
8 aseptically-processed fluid milk products tend to have
9 erratic processing and distribution patterns
10 reflecting the long-life nature of the product they
11 process. In some months, they may process fluid milk
12 products but have little or no route disposition
13 because the products are stored in inventory.

14 In addition, these plants often have much
15 wider distribution patterns than do other distributing
16 plants and, under current orders, frequently shift
17 regulation from one order to another. This shifting
18 regulation is disruptive to the producers and/or
19 cooperatives supplying these plants and is an
20 additional regulatory burden to the plant operator..."

21 Cite 64 Federal Register at 16132, April 2, 1999.

22 Order Regulation history is replete with
23 changes designed to preserve the competitive balance
24 afforded handlers and producers by the assurance of

1 common minimum prices. This hearing request continues
2 that process.

3 Recent Changes in Market Conditions. Public
4 data and historical records indicate Superior Dairy of
5 Canton, Ohio, is a mainline dairy processor producing
6 a standard line of dairy products. As noted on its
7 Facebook page, it manufactures a variety of dairy
8 products, including milk, half and half, cottage
9 cheese, sour cream, chip dip, bulk ice cream, ice
10 cream cakes, and distributes them to grocery stores
11 and other businesses such as Fishers Foods, Costco,
12 Baskin Robbins, BJ's, and Walmart. That cite is
13 [http://www.facebook.com/pages/superior-dairy/151379038](http://www.facebook.com/pages/superior-dairy/151379038252331#!/pages/superior-dairy/151379038252331?sk=info)
14 [252331#!/pages/superior-dairy/151379038252331?sk=info](http://www.facebook.com/pages/superior-dairy/151379038252331?sk=info).
15 And this would be Exhibit No. 22.

16 Joe Soehrlen, of Superior Dairy, testified
17 in the March 2005 Federal Order hearing dealing with
18 performance standards and depooling issues, that
19 Superior Dairy is a family-owned company with 235 to
20 255 employees, started by his grandfather in 1922. In
21 2005 they had 180 independent producers representing
22 75 percent of their volume, indicating a monthly
23 volume at that time in excess of 30 million pounds,
24 assuming average size producers.

1 Our understanding is that since at least
2 1990, and from Federal Register information as far
3 back as 1952, Superior Dairy has been an Order 33 --
4 and before that, the predecessor, Order 36 -- pool
5 distributing plant. 17 Federal Register 9922-9923,
6 November 4, 1952.

7 Exhibit 5, which refers to the next
8 sentence, in recent years, Order 33 annual statistical
9 summaries show it as a pool distributing plant for
10 every month in 2008, 2009, and up to March of 2010.

11 Exhibit 8, the Federal Order Reform Final
12 Decision published in March 1999 lists a table of
13 plants and their regulatory status, listing Superior
14 Dairy as both an Order 36 pool distributing plant in
15 October 1997 and a plant expected to maintain pool
16 distributing plant status after the Reform Decision
17 was implemented in 2000.

18 At the time of the March 2005 Federal Order
19 hearing dealing with performance standards and
20 depooling issues, and according to 2004 data included
21 in that hearing record, Superior Dairy did not have
22 any sales in either the adjoining Order 1 or Order 5
23 marketing areas.

24 In April 2010, however, Superior became an

1 Order 1 pool distributing plant. And over the
2 following months Superior has expanded its business
3 footprint with sales now reported into seven different
4 Orders. That would be Exhibit 6A.

5 Recently, as evidenced by data published by
6 the Order 1 Market Administrator, Superior Dairy,
7 Canton, Ohio, has become a partially regulated pool
8 distributing plant effective with March 2011
9 deliveries, effectively depooling the Canton plant and
10 milk supply. This change in status is a cause of
11 disorderly marketing conditions.

12 In 2011, Superior Dairy acquired a
13 previously closed, small processing property at
14 Wauseon, Ohio, Exhibit 23. This plant, Superior
15 Dairy, Wauseon, Ohio, appeared for the first time on
16 the March 2011 list of pool distributing plants as
17 published by Federal Order 1.

18 In the same month, the Superior Dairy,
19 Canton, Ohio, plant disappeared from any Market
20 Administrator listing of pool distributing plants but
21 appeared in some Market Administrator reports as a
22 partially regulated distributing plant. It appears
23 that these events are part of an artifice designed to
24 allow Superior Dairy, Canton, to avoid full regulation

1 by falling below the 25 route disposition requirement
2 in any marketing area.

3 The following description is, we believe,
4 the explanation of how Superior Dairy's Canton plant
5 has evaded full regulation. The recently purchased
6 Wauseon, Ohio, plant is very small with a small
7 refrigerated storage area and limited milk receiving
8 facilities. The plant's receiving facilities are too
9 small and access is too difficult to receive an
10 over-the-road tanker of raw milk.

11 Consequently, for Order Regulation purposes,
12 any milk sales of substantial volume associated with
13 the Wauseon, Ohio, plant can only come from the
14 physical movement of packaged product, transferred
15 into and then out of the Wauseon plant. This product
16 movement allows the product's ultimate distribution to
17 be reported on the Wauseon handler report.

18 We believe that Superior Dairy, Canton, is
19 maneuvering enough Order 1 sales through the Wauseon
20 plant and onto the Wauseon handler report to qualify
21 Wauseon as an Order 1 pool distributing plant. These
22 transshipments remove these Order 1 sales from the
23 Canton plant, thereby disqualifying it from full
24 regulation in Order 1 -- or any other Order -- by

1 making sure no individual Federal Order Marketing Area
2 receives 25 percent of the Superior, Canton, route
3 disposition.

4 Establishing and maintaining the current
5 status of these plants would appear to be a
6 challenging task requiring sales in multiple Orders
7 and an adroit management of the milk orders of one's
8 customers. However, we know that in recent months
9 Superior Dairy, Canton, has had sales in Orders 1, 5,
10 6, 7, 30, 32, and 33. This is from Exhibit 6B.

11 Additionally, because of geographic
12 proximity to non-Federally regulated areas in central
13 Pennsylvania and western New York, we expect the plant
14 may also have sales in those unregulated areas.
15 Consequently, by virtue of its broad geographic
16 distribution, Superior has quite a few marketing area
17 locations to work with in its effort to avoid pool
18 plant status.

19 A rough picture of Superior's distribution
20 in various Orders can be gleaned from Order 33
21 published information which shows the change in route
22 distribution by Order 33 plants, and in Order 33 by
23 Order 1 plants, between March and April 2010, when
24 Superior switched from being pooled in Order 33 to

1 Order 1.

2 Exhibit 24, Page 26, notes that sales by
3 pool plants decreased by approximately 30 million
4 pounds. A review of the pool distributing plant list
5 shows the only changes between the two months was the
6 addition of Toft Dairy, from partially regulated
7 status to pool distributing plant and Superior Dairy
8 being dropped from the list.

9 Additionally data shown in the pie chart on
10 Page 26 notes that sales by partially regulated plants
11 in Order 33 amounted to 0.79 percent, an extremely
12 small volume and reflective of the Order preference
13 for full regulatory status. Also note from the table
14 on Page 27 that sales by Order 33 handlers into
15 unregulated areas is remarkably similar both month to
16 month and year to year in spite of the change in
17 status of Superior Dairy, which would indicate that
18 while they may have some sales into unregulated areas,
19 the volume is small and hardly a competitive factor.
20 It appears that the competition for sales into
21 unregulated areas must come from fully regulated
22 plants and the change in status by Superior to
23 partially regulated did not result in significantly
24 more sales into unregulated areas.

1 Issues in the Mideast Order. Superior
2 Dairy's shift to becoming a partially regulated plant
3 causes disorderly marketing conditions to occur in the
4 Mideast Federal Milk Marketing Order. Producer price
5 relationships based on Order minimum values are now in
6 question and handler competitive equity has been
7 jeopardized. Producer and handler pricing equity are
8 impacted by the Order's payment terms for partially
9 regulated distributing plants.

10 It has been our general experience that
11 while Part 1000.76(a), (b), (c), and (d) define the
12 payment obligations for a partially regulated handler,
13 handlers most often opt for Section (b). That option,
14 in general, states that if a plant can demonstrate to
15 the Market Administrator that it has paid producers in
16 aggregate the minimum order Class use values, it will
17 not have any pool obligation.

18 The test takes into account all payments
19 made to the producer including any premiums paid. The
20 plant is thus able to operate as if in an individual
21 handler pool, avoiding payments to the marketwide
22 pool. This can amount to a substantial value. The
23 dollars otherwise payable to the pool can be used in a
24 competitive fashion to procure a milk supply in

1 competition with pool handlers.

2 Furthermore, the provision (b) test outlined
3 above does not require that all producers supplying
4 milk to the partially regulated handler be paid
5 uniformly, so adjoining producers delivering milk to
6 similarly situated plants, or in this case the same
7 plant, may receive widely different prices.

8 Furthermore, the plant may choose between
9 Sections (a) and (b) each month depending on the
10 payment calculation. Ironically, in the 2004 hearing
11 referenced earlier, Superior Dairy was supporting
12 changes in Order 33 regulation that would eliminate or
13 greatly restrict the practice of depooling.

14 A key reason why Superior opposed this
15 practice was the resulting differences in producer pay
16 prices which some handlers were able to take advantage
17 of depooling and others could not. In this case,
18 Order 33 provisions were changed to more fairly
19 distribute returns.

20 Clearly this is a very similar situation and
21 warrants a change in Order Regulations to eliminate
22 this practice. Competitive equity among pool
23 distributing plants is also jeopardized by this
24 situation. Unless changed, current provisions will

1 afford similarly situated handlers widely differing
2 minimum prices. This violates the basic regulatory
3 premise of uniform minimum prices.

4 To estimate the potential magnitude of this
5 problem, we have calculated the potential differences
6 which could accrue to Superior Dairy in its capacity
7 as a partially regulated distributing plant. The
8 Cooperatives supply more than 20 fluid use processing
9 plants within the Order 33 competitive area. Based on
10 recent billings, these fluid use plants had a
11 utilization mix of 86 percent Class I, nine percent
12 Class II, three percent Class III, and two percent
13 Class IV.

14 Published Order 33 statistics indicate that
15 when Superior became pooled on Order 1 in April of
16 2010, the volume of distribution into Order 1 by Order
17 33 plants was reduced by approximately 13 million
18 pounds per month. Attributing the bulk of this volume
19 to Superior, and expecting that it would represent
20 more than 25 percent of the plant's total route
21 disposition implies plant volumes in the 30 to 50
22 million pound range. Exhibit 25.

23 Using these volumes, the average
24 distributing plant estimated class utilizations,

1 actual class prices, actual market test data for Ohio,
2 and statistical uniform blend price data, we
3 conservatively estimate the potential advantage that
4 could have arisen from Superior being partially
5 regulated for the 19 months ending in July 2011 to
6 average 93 cents per hundredweight. The range high to
7 low of the difference is a negative position of 13
8 cents per hundredweight to a high of \$1.89 per
9 hundredweight.

10 The total dollar impact of this advantage
11 for a plant processing 30 million pounds of milk per
12 month is estimated to be as much as \$567,806 per
13 month; and it averages just under \$289,000 per month.
14 Greater volumes would result in greater advantages.

15 Since in this example these funds are not
16 paid to the marketwide pool, they would reduce every
17 pool producer's PPD. And while they must be paid
18 directly to the plant's milk suppliers, this
19 constitutes an advantage to the partially regulated
20 plant providing it with funds to pay for milk supplies
21 that other competitors do not have. Or said another
22 way, a competitor would have paid this value into the
23 marketwide pool and not have the funds available to
24 pay producers for milk.

1 In 8 of the 19 months in our calculation,
2 the in-plant blend, based on minimum prices and the
3 utilizations as explained above, was equal to or more
4 than enough to fully fund the Ohio milkshed's adjusted
5 mailbox price. In the remaining 11 months all
6 handlers in our typical example would have to come up
7 with more dollars from sales margins to pay for milk
8 supplies, but the partially regulated plant would not
9 have to come up with as much.

10 These advantage funds may then be used by
11 the partially regulated plant to gain market share for
12 packaged fluid milk products or to procure milk
13 supplies with a competitive advantage or simply to
14 enhance the plant's bottom line in a manner not
15 available to competitors, hardly meeting the fairness
16 test of marketwide pooling.

17 Request. The Order 33 regulations need to
18 be amended to correct the situation where a
19 traditional distributing plant facility, located in
20 the heart of a Federal Milk Order marketing area, and
21 which has been pooled continuously for many years, has
22 been able to escape full regulation because of a
23 loophole in the definition of pool plant which enables
24 it to split route distribution among various Federal

1 Orders so that it is not pooled on any Order.

2 This is a disorderly market condition
3 threatening uniformity of treatment among both pool
4 producers and regulated handlers and it should be
5 corrected with appropriate amendment to the pool plant
6 language. As a result of our proposal, Superior Dairy
7 would be in the same position with respect to milk
8 cost and competitive equity with other similarly
9 situated pool distributing plants and in the same
10 fully Federally regulated position that it was prior
11 to March 2011.

12 The Cooperatives understand that under this
13 proposal a plant located inside the Order 33 marketing
14 area, which has more than 25 percent of its sales in
15 another Order area, and more of its sales in that
16 Order than in Order 33, will be pooled in the Order
17 with greatest sales. While this is not necessarily
18 ideal, it is acceptable. The proposal assures that
19 the plant will be pooled somewhere.

20 Proposed Order Language. The Cooperatives
21 offer the following Order language, amending the pool
22 plant definition of Order 33, underlined wording
23 represents language different from current language.

24 1033.7 Pool Plant. Pool plant means a

1 plant, unit of plants, or a system of plants defined
2 in Paragraphs (a) through (f) of this section, but
3 excluding the plant specified in Paragraph (h) of this
4 section. The pooling standards described in
5 Paragraphs (c) through (f) of this section are subject
6 to modification pursuant to Paragraph (g) of this
7 section:

8 (a) A distributing plant, other than a plant
9 qualified as a pool plant pursuant to Paragraph (b) of
10 this section or Section 1000.7(b) of any other Federal
11 Milk Order, from which during the month 30 percent or
12 more of the total quantity of fluid milk products
13 physically received at the plant, excluding
14 concentrated milk received from another plant by
15 agreement for other than Class I use, are disposed of
16 as route disposition or are transferred in the form of
17 packaged fluid milk products to other distributing
18 plants. At least 25 percent of such route disposition
19 and transfers must be to outlets in the marketing
20 area.

21 The next sentence represents our proposed
22 change and is underlined in our language. Plants
23 located within the marketing area with combined route
24 disposition and transfers of at least 50 percent into

1 Federal Order Marketing Areas but without 25 percent
2 of route disposition and transfers into any one
3 Federal Order will be regulated as a distributing
4 plant in this Order.

5 The Cooperatives' proposal establishes an
6 alternative test for pool distributing plant status,
7 which is: If a plant located in the Order 33
8 Marketing Area has at least half of its total route
9 disposition in Federal Order Marketing Areas but its
10 sales patterns are such that no one Order has more
11 than 25 percent of its sales volumes, then it would be
12 regulated in Order 33, the Order where it is
13 physically located.

14 Request for Emergency Consideration.
15 Because of the competitive issue which Superior
16 presents in Order 33 and in the other Federal Orders
17 in which it operates and the substantial dollar impact
18 we find in the marketplace resulting from the change
19 in regulation from pool distributing plant to
20 partially regulated plant, we ask that the Secretary
21 process this request under expedited hearing
22 procedures and consider implementation without a
23 recommended decision.

24 The Cooperatives' producer-members are

1 intermingled with producers supplying Superior Dairy
2 on a regular basis, and may receive different minimum
3 blend prices as a result of this situation.
4 Furthermore, the Cooperatives supply milk to both
5 Superior Dairy and its competitors and the differences
6 in regulatory status cause disorderly market
7 conditions which are exacerbated each day that the
8 status remains unchanged.

9 THE JUDGE: Would you please spell for
10 the record Wauseon.

11 THE WITNESS: W-a-u-s-e-o-n.

12 THE JUDGE: Thank you. And,
13 Mr. Hollon, to the degree that your spoken
14 testimony varies from the written text found
15 in Exhibit 21, is it your intention that the
16 text represents the accurate evidence?

17 THE WITNESS: Yes.

18 THE JUDGE: Thank you. All right. Any
19 questions?

20 MR. BESHORE: Just a few perhaps
21 clarifying questions on direct -- or
22 supplemental questions on direct,
23 Mr. Hollon.

24 BY MR. BESHORE:

1 Q. On Page 10 of Exhibit 21, the bottom
2 paragraph, there are references made there to the
3 Federal Register in November 4, 1952, and to Exhibit 5
4 on the third line of the bottom --

5 A. Page 9?

6 Q. Yeah.

7 A. Okay.

8 Q. I numbered them sequentially including the
9 cover.

10 A. Okay.

11 Q. I'm sorry.

12 A. Yes.

13 Q. Page 9, yes. The sentence speaks of your
14 understanding since 1990 and perhaps as far back as
15 1952. Does Exhibit 5 cover the 1990 period of time --
16 does the Federal Register exhibit go back to 1952; is
17 that what's intended there?

18 A. No, Exhibit 5 doesn't go back to 1952. It
19 goes back to 1990. That was Mr. Carman's exhibit.

20 Q. Exhibit 5 covers the 1990 to date period,
21 correct?

22 A. Correct.

23 Q. Okay. And the Federal Register then
24 indicates that Superior Dairy was a pool plant back in

1 1952?

2 A. Yes.

3 Q. Okay. And you believe that the regulated
4 status continued in the interim between '52 and 1990?

5 A. Yes.

6 Q. Okay. Now, on the next page of Exhibit 21,
7 the first full paragraph towards the top, in
8 April 2010, you referenced Exhibit 6A there; is that
9 correct?

10 A. Yes.

11 Q. And does 6A -- what portion of that
12 statement is covered under 6A?

13 A. I think that was Mr. Carman's exhibit that
14 broke out pool distributing plants by month and the
15 Order they were regulated under.

16 Q. Okay. So that shows the change in
17 April 2010 from Order 33 to Order 1; is that correct?

18 A. Yes.

19 Q. And the last part of that sentence which
20 talks about the footprint now being reported into
21 seven different Orders, that doesn't show up on 6A,
22 right?

23 A. I am not certain. It shows up on 6B.

24 Q. Okay. So it shows up on 6B for sure?

1 A. Yes.

2 Q. Okay. Going back to what would be Page 13
3 of the text of Exhibit 21, Published Order 33
4 statistics, that paragraph.

5 A. Okay.

6 Q. Again, your exhibit reference to the second
7 sentence is Exhibit 25?

8 A. Should be 24.

9 Q. Okay. I think you testified it was 25. You
10 meant 24?

11 A. That's correct.

12 Q. Okay. Let's look at Exhibit 24 then just a
13 moment, if we could. In referencing Exhibit 24 just
14 previously there, you -- and in your testimony it's
15 offered to call attention to the changes from March to
16 April in 2010; is that correct?

17 A. Correct.

18 Q. And just looking at the first page of
19 Exhibit 24, which is Page 26 of the Market
20 Administrator's publication, that represents data with
21 respect to route sales in Order 33 from whatever
22 source, correct?

23 A. Correct.

24 Q. Okay. And you noted first for the pool

1 plants -- I think you noted in your testimony, for
2 pool plants there was a reduction from that month --
3 whether it's noted in your testimony or not, there was
4 a reduction from 481 million to 450 million from pool
5 plants, correct?

6 A. Yes.

7 Q. And certainly some substantial portion of
8 that was the change in regulations to Superior Dairy
9 in that month?

10 A. That would be correct.

11 Q. Okay. Now, just going across those columns
12 then, there's no particular -- well, there's some
13 change in the volume of partially regulated plants and
14 producer-handler and exempt plants. But when you go
15 to distribution for Order 1 handlers into Order 33,
16 there's a substantial change.

17 And is it your testimony that certainly
18 Superior Dairy would be reflected in that change?

19 A. Yes.

20 Q. Okay. And then you make -- okay. Going
21 over to the second page then of Exhibit 24, the same
22 lines. First of all, the second page is a different
23 subset of data than the first page of 24. This is
24 route sales by all -- or just by Order 33 pool

1 distributing plants, correct?

2 A. Correct.

3 Q. Now, the second column, Sales into Order 1,
4 shows a decline from March, 23,704,000 pounds to
5 April, 10,583,000 pounds, correct?

6 A. An increase -- oh, into Order 1. Yeah,
7 decline. Okay.

8 Q. Decline. Okay. Now, you referenced Order 1
9 statistics in your testimony that showed a decline in
10 sales from Order 33 plants, right?

11 A. Yes.

12 Q. Of the same magnitude as is reflected here
13 on the other side of the coin, correct?

14 A. Correct.

15 Q. Then going across the column there are
16 decreases in sales from Order 33 to other Orders with
17 Superior's change in regulation, correct?

18 A. Correct.

19 Q. Such as sales in Order 5 went from
20 12 million plus down to 7 million plus, correct?

21 A. Correct.

22 Q. And sales into Order 30 went from 23 million
23 plus down to 16 million plus?

24 A. Yes.

1 Q. And sales into all other Federal Orders
2 aggregated went from 26 million plus down to
3 15 million plus, correct?

4 A. Yes.

5 Q. But you noted that there was not substantial
6 change on the sales into unregulated areas from 23 to
7 22, a little less than a million change, correct?

8 A. Correct.

9 Q. Okay. And you made some comments on that --

10 A. Yes.

11 Q. -- in your testimony? Okay. If there is
12 any difference in the proposed language in the hearing
13 notice and the language as -- of your proposal and the
14 language as stated -- as presented in Exhibit 21, is
15 it your intention to support the precise language in
16 the hearing notice as opposed to any fine differences,
17 if there are any, between the language in Exhibit 21;
18 you're not proposing to modify the proposal as before
19 the hearing notice, correct?

20 A. No.

21 MR. BESHORE: With those questions I
22 have nothing further for Mr. Hollon on
23 direct. We'll offer the exhibits before
24 he's done and offer him for

1 cross-examination.

2 THE JUDGE: All right. Thank you.

3 MR. BESHORE: Perhaps after lunch.

4 THE JUDGE: It is 12:30. I have a
5 motion to adjourn now for lunch. Anybody
6 want to second?

7 MR. WILSON: No objection.

8 THE JUDGE: Show of hands? Okay. I'm
9 hoping an hour will be sufficient for lunch.
10 So we will resume at about 1:30.

11 (A lunch recess was taken.)

12 THE JUDGE: And before we continue with
13 the examination of Mr. Hollon, I had said
14 this morning if there is anyone from the
15 producer community who has a time
16 constraint, maybe we should hear your
17 testimony now. If there is, I'm happy to
18 entertain it; if not -- all right. If this
19 was an auction house, I would be hitting the
20 plate right now.

21 All right. Well, with that said then
22 we will continue the testimony of Mr. Hollon
23 with I guess would be his cross-examination
24 by Mr. Wilson.

1 MR. WILSON: Thank you, your Honor.

2 CROSS-EXAMINATION

3 BY MR. WILSON:

4 Q. Good afternoon, Mr. Hollon.

5 A. Good afternoon, Mr. Wilson.

6 Q. As I did with Mr. Carman, I'm going to warn
7 you, I'm going to hop around a bit. I'm bound to talk
8 on something and then go back to it. At some point I
9 think we're going to pick up your written testimony
10 and sort of leaf through it page by page where I may
11 have specific questions about your comments. So at
12 some point that will be the method. But for now I'm
13 going to start more generally and we'll see how it
14 goes.

15 As I understand it, the overall -- or one of
16 the overall marching themes of the Federal Milk Market
17 Regulation System is to maintain orderly marketing
18 conditions, fair statement?

19 A. Fair.

20 Q. Okay. And one of the objectives is to have
21 a uniformed system of classified pricing throughout
22 the farm milk markets, correct?

23 A. Correct.

24 Q. How many different Marketing Administrator

1 areas are there, Federal?

2 A. Either nine or ten. I lose track of the
3 final count.

4 Q. Okay. And they're known by their Order
5 number?

6 A. Correct.

7 Q. I thought there was 11; does that sound
8 right?

9 A. 11 was the start. And I think one was
10 eliminated. And I think there's remaining 10.

11 Q. Okay.

12 A. I think that's right.

13 Q. In your written remarks that you read into
14 the record you obviously make periodic references
15 specifically to Superior Dairy, correct?

16 A. Yes.

17 Q. So it's fair to presume that the primary
18 rationale as you understand it for the proposal of DFA
19 and the other cooperatives is to modify the manner in
20 which Superior Dairy is doing business, correct?

21 A. We seek to modify the partially regulated
22 language.

23 Q. And specifically only the Superior Dairy,
24 however; is that not correct?

1 A. In the Federal Order 33.

2 Q. Okay. Well, for the record, as you
3 understand it as the expert in this area, Superior
4 Dairy is operating currently in an authorized capacity
5 within the regulations in the manner that they're
6 written, correct?

7 A. Correct.

8 Q. Okay. Well, other than Superior Dairy what
9 other handler plants are situated geographically
10 within Order 33?

11 A. What are the other Order 33 pool
12 distributing plants?

13 Q. Yes.

14 A. Canton is off the top of my head. But we
15 can pull Mr. Carman's exhibit and read through them.

16 Q. Do you recall which exhibit that was?

17 A. I think it was 6A.

18 Q. Why don't you do that so that I could at
19 least get a sense. Do you have 6A in front of you,
20 sir?

21 A. 6A for 2011.

22 Q. Yes. Well, I have 2009 on my 6A.

23 A. Okay. Well, if you go to the back, it will
24 be 2011.

1 Q. Right.

2 A. Would it be easy enough to say that it is
3 any dairy with Order 33 in the January through August
4 row?

5 Q. There are entities on this exhibit, for
6 example, Creamland Dairies, which is located in
7 Albuquerque, New Mexico. Is that Rule 33 Federally
8 marketed -- Federally regulated handler?

9 A. No. That is Order 126.

10 Q. My question is, who are other than Superior
11 Dairy the Federally regulated pooling plants in the
12 Order 33 so I can get some sense of who else might be
13 impacted directly by the proposed regulation should
14 the USDA adopt it?

15 A. Agropur in Grand Rapids is an Order 33 pool
16 distributing plant.

17 Q. All right. And, you know, as you name each
18 one, I have one follow-up question. Do you know if
19 that company is supplied by Dairy Farmers of America
20 in 2011?

21 A. I'm not certain.

22 Q. Okay.

23 A. Arps Dairy.

24 Q. What was that?

1 A. A-r-p-s.

2 Q. Where is that located?

3 A. Defiance, Ohio.

4 Q. Okay. Do you know if that dairy is supplied
5 by DFA?

6 A. I'm not certain. Baremans Dairy.

7 Q. And why don't you spell that for the record.

8 A. B-a-r-e-m-a-n-s. They're in Holland,
9 Michigan.

10 Q. And do you know if they're supplied by DFA?

11 A. We do supply milk to Baremans Dairy.

12 Q. Okay. And are they Federally regulated?

13 A. Yes.

14 Q. And currently they're not partially
15 regulated, correct?

16 A. Correct.

17 Q. Okay.

18 A. This is a list of distributing pool plants,
19 so they would all be fully regulated plants.

20 Q. Very good. Bear with my relative ignorance
21 on some of these points.

22 A. Broughton Foods, Marietta, Ohio.

23 Q. And is that handler supplied by DFA?

24 A. I'm not certain.

1 Q. Okay. So as to the ones that you're not
2 certain, they might be, you just don't know as you sit
3 here today?

4 A. That's correct.

5 Q. Okay. How would you find that out?

6 A. I may go back to our local area to ask them.

7 Q. Okay. When you say our area, do you mean
8 DFA, your employer, correct?

9 A. If the question is does DFA supply them,
10 yes.

11 Q. Okay.

12 A. C.F. Burger, Detroit, Michigan.

13 Q. Are they supplied by DFA?

14 A. I do not know. Calder Brothers Dairy in
15 Lincoln Park, Michigan. Carl Colteryahn Dairy in
16 Pittsburgh. Country Fresh, Grand Rapids. Country
17 Fresh, Livonia. Country Fresh, Marquette. Those are
18 all the ones I see on that page.

19 Q. And are all of those entities that you've
20 mentioned so far -- are they plants physically located
21 within the boundaries of Order 33?

22 A. Yes.

23 Q. Now, is it not --

24 A. To my knowledge, yes.

1 Q. Okay. Everything is obviously to your
2 knowledge. Somebody may be subject to Order 33 under
3 the current regulations, however, and not be
4 geographically located within the limits of the
5 territory, correct?

6 A. That could happen because of some of the
7 provisions in Order 33.

8 Q. Right. In fact that's -- with respect to
9 Order 1, that's what's happening currently by way of
10 Superior Dairy, correct?

11 A. Correct.

12 Q. Their plants are in Wauseon, Ohio, and in
13 Canton, Ohio, both geographically located within the
14 limits of Order 33, but they've been able to avail
15 themselves of Order 1 classification, correct?

16 A. Yes.

17 Q. Do you know of any regulated handlers that
18 are not geographically situated within the boundaries
19 of Order 33 who are nevertheless considered Order 33
20 plants?

21 A. I've not looked to see if any of the plants,
22 for example, are there by provision of lock-in. Order
23 33 does have those rules. There may be a plant that
24 may fit that definition, and I just don't know.

1 Q. Do you consider the geographical location of
2 the plant to be a particularly pertinent
3 consideration?

4 A. Yes.

5 Q. Okay. But you didn't -- but you haven't
6 been asked, I guess, by your employer to look into
7 other plants throughout the United States that aren't
8 being classified in areas that are outside of their
9 geographical location?

10 A. Not at this time.

11 Q. Okay. Is it fair to say that the
12 geographical location of Superior Dairy's plants is a
13 factor in the proposed changes that DFA and company
14 have put before the USDA?

15 A. Yes.

16 Q. Okay. Do you know if DFA is a supplier of
17 milk products to Superior Dairy?

18 A. Yes.

19 Q. Do you know if there's a supply agreement
20 between Superior Dairy and DFA in connection with
21 those purchases?

22 A. That falls in the confidentiality between
23 supplier and buyer.

24 Q. Okay. So there may or may not be, you're

1 not going to say; is that fair?

2 A. That's fair.

3 Q. Okay. Have you read any agreement between
4 Superior Dairy and Dairy Farmers of America?

5 A. I have not.

6 Q. Okay. Wouldn't that agreement be pertinent
7 to your analysis here to see what's actually happening
8 on the ground in terms of dairy purchases and sales?

9 A. Again, the tenets of that document are
10 confidential between Superior and DFA. And our
11 proposal here deals with Federal Order minimum
12 values --

13 Q. I understand.

14 A. -- oh --

15 Q. Well, let me ask it another way --

16 THE JUDGE: Excuse me.

17 Q. -- that's not --

18 THE JUDGE: Would you let him answer
19 the question.

20 MR. WILSON: I'm sorry, your Honor. I
21 get excited.

22 THE JUDGE: He's not finished.

23 MR. WILSON: Are you finished?

24 A. Our proposal here deals with Federal Order

1 minimum values and concerns not only with this
2 situation but potentially other situations, so...

3 Q. All right. I'd like to get an understanding
4 of what you do think is relevant and what you think is
5 not relevant since you're giving such an expert
6 opinion here. And let's put aside Superior Dairy and
7 DFA since you're maintaining that that's proprietary
8 information.

9 Should it be relevant for you to consider
10 the hypothetical agreement between a supplier and a
11 handler in determining what's actually happening on
12 the ground?

13 A. Again, our concerns are with Federal Order
14 minimum, you know, values and Federal Order
15 Regulations. So we're looking at that as our, you
16 know, overriding principle.

17 Q. So if there hypothetically were an agreement
18 between somebody like Superior Dairy and somebody like
19 DFA and that provided terms that were in excess of
20 Federal -- current fully regulated standards, it
21 doesn't matter to you for the purpose of your
22 promotion of this proposal?

23 A. No, that wouldn't be true.

24 Q. Okay. How am I mistaken there?

1 A. Again, we're concerned about Federal Order
2 minimum values and the potential for those to change.
3 And so we want to ensure that the regulations provide
4 for that continuity, if there is an agreement or if
5 there's not an agreement.

6 Q. Are you testifying in general that you have
7 seen actual evidence of the economic harm here, or are
8 you essentially saying that as you analyze the
9 scenario it looks like there's a possibility of this
10 disruption in the market?

11 A. Our concern has much to do -- I would say
12 all to do with potential.

13 Q. Potential?

14 A. Correct.

15 Q. So you haven't done any actual analysis of
16 actual sales, purchases, payment prices, things of
17 that nature in order to formulate your opinions as
18 reflected in your testimony; is that fair?

19 A. If I did or I didn't, that would again fall
20 into the area of confidentiality. So I'm not going to
21 reply to that comment.

22 Q. Just so I understand here, you -- when it
23 comes to your hypothetical analysis, that's fair game
24 for questioning; if you actually formed your opinion

1 based on looking at actual data, I can't ask you about
2 that -- that's your position?

3 A. Again, our concern is Federal Order minimum
4 values and those regulations.

5 Q. Who is "our"? I'm asking you --

6 A. The cooperatives.

7 Q. -- in the formation of your testimony and
8 your report what you considered. It sounds to me like
9 you considered some actual data, but I'm not sure.
10 And if you did consider actual data, you're telling me
11 you're not going to share that with us here, correct?

12 A. Well, if you want to question me about the
13 data that I considered, you can take a look at it as
14 it's been laid out and talk about it.

15 Q. All right. You're an economist by trade,
16 correct?

17 A. Yes.

18 Q. When you use the term such as similarly
19 situated, what are the factors that go into your use
20 of that phrase?

21 A. The same geographic location. It would
22 have -- in this particular case -- Federal Order, you
23 know, activity. Similar product mixes. In general
24 similar competitive nature. They're never going to be

1 identical, a similar competitive nature. So they look
2 like the majority of the customers in the marketplace
3 or the majority of processors in the marketplace
4 procured from the same general areas.

5 Q. Common procurement area?

6 A. Common procurement areas.

7 Q. Now, is the common procurement area
8 necessarily situated within the geographical
9 boundaries of a Federal Marketing Order?

10 A. They're not always identical.

11 Q. In fact it's fairly common that procurement
12 goes over the boundary lines, is it not?

13 A. I would say that it happens. But the
14 overwhelming preponder- -- the overwhelming majority
15 of the procurement activity is within the boundaries
16 of -- but, again, it's not going to be absolute.

17 Q. Isn't it the primary concern under the
18 current system that it's where sales are made as
19 opposed to procurement --

20 A. Yes.

21 Q. -- to determine -- so is common sales area
22 also a factor in determining similarly situated?

23 A. Yes.

24 Q. And is it not a fact that this geographical

1 factor that you listed first here is a relatively new
2 concept to the Federal Milk Regulations analysis?

3 A. The list that I gave you didn't have any
4 priority, one, two, three, four, five.

5 Q. All right.

6 A. But if you went back to the Federal Order
7 Reform Decision, for example, they listed I think six
8 or seven criteria or this similarly situated with
9 common boundaries. And I think I've outlined at least
10 four of them, I think. Another one was common
11 balancing area and common supplemental supply sources.

12 Q. Okay. But if you regulate Order 33 here
13 with the proposal that you're endorsing and you're
14 supporting, that only affects -- that only by and
15 large impacts the geographical situation of the
16 plants; it doesn't, for example, address in any way
17 common procurement or common sales area where those go
18 over the geographical order of Order 33, correct?

19 A. No, I would say that was incorrect. You
20 know, the procurement areas in that case probably
21 wouldn't change if they would have remained the same.

22 Q. Okay.

23 A. The language does provide for measures of
24 sales area as a part of the language change.

1 Q. There was a large stack of documents -- I
2 don't remember what it was marked -- in the exhibits
3 from Mr. Carman and the USDA that included reports,
4 Marketing Administrator Bulletins. Are you familiar
5 with those?

6 A. Yes.

7 Q. And your specialization is in the dairy
8 industry, correct?

9 A. Yes.

10 Q. So it's fair to say that you read the Market
11 Administrator Bulletins fairly regularly?

12 A. Yes, I do.

13 MR. WILSON: Okay. I'm going to -- I
14 only have a handful of exhibits. So I'll
15 mark them I guess the next number, whatever
16 the number we're up to. I don't know what
17 that is.

18 MS. PICHELMAN: 26.

19 THE WITNESS: Can I give the Judge her
20 exhibit back now?

21 MR. WILSON: That's fine. I do have
22 some questions from that Bulletin. But I'm
23 going to go to those in a few minutes.

24 We're up to No. 26, you determined?

1 THE JUDGE: Yes.

2 MR. WILSON: All right. I'm going to
3 mark an Exhibit 26. And I'll present a copy
4 to the Judge. And I'll present one to the
5 witness, of course, or unless you want the
6 witness to see your copy. I will give one
7 to the -- I have a copy for the Government
8 and for Mr. Beshore. And then I have only a
9 small handful. But we can obviously make
10 more copies for anybody else.

11 THE JUDGE: Two for the record.

12 MR. WILSON: Two for the record. I
13 have ten total.

14 (Whereupon, Exhibit Number 26 was
15 marked for identification.)

16 BY MR. WILSON:

17 Q. Okay. Are you familiar, sir, with a handler
18 by the name of Schneider's?

19 A. I'm familiar with the plant, yes. Not
20 intimately familiar with their business. But I'm
21 familiar with the name.

22 Q. Do you know where they have plants?

23 A. No. Not until you handed me this map. Is
24 this the Marketing Administrator Bulletin you were

1 referring to?

2 Q. No. I was going in a different line of
3 questioning with that.

4 A. Okay.

5 Q. This is just materials that we got on the
6 Internet about Schneider's.

7 A. Okay.

8 Q. And it shows various bits of information on
9 here. Largely focused in Pennsylvania; do you see
10 that?

11 A. Yes.

12 MS. YOVIENE: Objection. My name is
13 Wendy Yoviene.

14 THE JUDGE: Okay. I'm sorry. You'll
15 have to come up and speak a little louder.

16 MS. YOVIENE: My name is Wendy Yoviene.

17 THE JUDGE: And could you spell your
18 name.

19 MS. YOVIENE: Y-o-v-i-e-n-e.

20 THE JUDGE: And your affiliation?

21 MS. YOVIENE: I'm representing
22 Schneider's Dairy, Galliker Dairy, Guers
23 Dairy, Dean Foods for the limited purpose --
24 these entities are not proponents or

1 opponents. It's only a limited appearance
2 about process to ensure that the scope of
3 the hearing meets with the Court order last
4 week, among other things.

5 THE JUDGE: Okay.

6 MS. YOVIENE: And the objection is
7 simply foundation. One is unable to know
8 the source of this, whether it's hearsay.
9 You know, what -- foundation.

10 THE JUDGE: Okay.

11 MS. YOVIENE: Is it cut and paste, you
12 know.

13 THE JUDGE: And the only way to really
14 lay a foundation is through the witness.
15 And I'm not going to have Mr. Wilson testify
16 about this. So I think maybe we'll defer
17 ruling on your motion -- on your objection
18 until you can or cannot establish through
19 this witness whether there's a sufficient
20 foundation.

21 MS. YOVIENE: I'm just asking for a
22 foundation before he --

23 THE JUDGE: Okay. And then if it can
24 be cured through another witness, then we'll

1 hit that head-on if it's okay. Now, before
2 you go away, and I know it breaks the flow,
3 but could you spell your clients' names just
4 for the record. Schneider's is
5 S-c-h-n-e-i-d-e-r. And you said Dean Foods?

6 MS. YOVIENE: Apostrophe "s."

7 THE JUDGE: Apostrophe "s." Thank you.
8 It's Schneider's Dairy?

9 MS. YOVIENE: Yes. Guers.

10 THE JUDGE: Spell that for us.

11 MS. YOVIENE: G-u-e-r-s Dairy.

12 THE JUDGE: You said Deans Foods?

13 MS. YOVIENE: Galliker Dairy Company.
14 G-a-l-l-i-k-e-r. And Dean Foods, D-e-a-n
15 F-o-o-d-s.

16 THE JUDGE: Thank you, Ms. Yoviene.

17 MS. YOVIENE: And, again, they're
18 neither proponents or opponents. This is
19 just purely in the limited capacity as if --
20 to protect the process.

21 THE JUDGE: All right. Thank you.

22 We'll return to your objection. I promise
23 not to forget. Thank you.

24 BY MR. WILSON:

1 Q. Do you know if Schneider's is an Order 33
2 handler?

3 A. Not off the top of my head.

4 Q. How would you go to find that out?

5 A. Get the Judge's list again and...

6 Q. Why don't you do that. Just keep it over
7 there from now on.

8 A. Schneider's Dairy shows in 2011 that they
9 were a fully regulated pool distributing plant for all
10 months.

11 Q. Now, they have two plants in Pennsylvania,
12 don't they?

13 A. This listing is for Pittsburgh.

14 Q. If you look at that little cartoon map on
15 the exhibit, they have two plants in Pennsylvania, do
16 they not?

17 THE JUDGE: Excuse me. But we have an
18 objection outstanding. And you might want
19 to try to lay a foundation with this
20 witness. I don't know how well that's going
21 to go.

22 MR. WILSON: Let me ask this then.
23 Maybe he knows this without having the map
24 in front of him.

1 BY MR. WILSON:

2 Q. They also operate a partially regulated
3 plant, do they not? You might look at Exhibit 6B,
4 Page 10.

5 A. Looking at the partially regulated plant
6 list in 2010 I do not find a Schneider's Dairy. I'm
7 looking at the 2011 and I don't find a Schneider's
8 Dairy.

9 MR. WILSON: They're not alphabetical.
10 May I approach the witness, your Honor?

11 THE JUDGE: For what purpose?

12 MR. WILSON: To show him where it says
13 Schneider's. Do you see right there?

14 THE WITNESS: Yes, I see it.

15 Q. Okay. Is Schneider's Dairy in your
16 estimation as the economic expert in the dairy
17 marketing system similarly situated to Superior Dairy?

18 MS. YOVIENE: Objection. Lacks
19 foundation.

20 THE JUDGE: That's sustained. You
21 might ask him a few more questions.

22 MR. WILSON: I don't really understand
23 the nature of the objection. I'm trying to
24 find out how this witness uses the term

1 similarly situated.

2 Q. Now, we have testimony, do we not, that one
3 of the factors that supports your clients and others'
4 proposal here is plant-to-plant transactions Superior
5 Dairy is doing, correct?

6 A. Correct.

7 Q. Canton and Wauseon?

8 A. Correct.

9 Q. Is it relevant to you if a company like
10 Schneider's is also doing plant-to-plant transactions
11 between Pittsburgh and central Pennsylvania?

12 MS. YOVIENE: Objection. Facts not in
13 evidence.

14 THE JUDGE: That is sustained. I'm
15 sorry, Mr. Wilson. When you ask Mr. Hollon
16 questions about your marked Exhibit 26, he
17 right off the bat said this was the first he
18 knew about how many -- based upon this.

19 MR. WILSON: Right.

20 THE JUDGE: We have an objection about
21 this. This is not evidence. This is a
22 picture --

23 MR. WILSON: I understand.

24 THE JUDGE: -- from the Internet.

1 MR. WILSON: Let's disregard the
2 picture from the Internet. He obviously was
3 able to discern from Exhibit 6 that
4 Schneider's is partially regulated and
5 Federally regulated at the same time.

6 BY MR. WILSON:

7 Q. And they have two plants, correct?

8 THE JUDGE: But I think going back to
9 something else you said about the similarly
10 situated, I heard the witness say that there
11 were -- he named at least five and he
12 thought there may be as many as seven
13 circumstances that are laid out in a
14 previous Federal Register, I believe it was,
15 that states what characterizes similarly
16 situated.

17 So the only thing he's looking at now
18 is one thing of the five. So I think before
19 you can ask him a wrap-up question, you
20 should ask him if he knows about any of the
21 other things that would bring him to making
22 an opinion about similarly situated.

23 BY MR. WILSON:

24 Q. If you were to consider a company like

1 Schneider's that has a Federally regulated plant and a
2 partially regulated plant, how would you go about
3 trying to discern if they are similarly situated to
4 Superior Dairy?

5 A. I would look at Order Regulation. I would
6 look at location. I would look at product mix. I
7 would look at who and where they procure milk from.
8 Look at the sales territory.

9 Q. Common sales area?

10 A. Look at common sales area. I would look at
11 supply source, supplemental milk supplies and sources.
12 There would be a whole raft of factors.

13 Q. All right. You don't know as you sit here
14 today whether or not in fact Schneider's and Superior
15 Dairy have a common sales area, correct?

16 A. Correct.

17 Q. But if they did, that would be a factor you
18 would deem pertinent in your consideration of
19 similarly situated, correct?

20 A. It would be a factor I would deem pertinent
21 if they were similarly situated. I know that they're
22 in different Federal Orders.

23 Q. But they're also located essentially within
24 a few hundred miles of each other in Ohio and in

1 Pennsylvania, correct?

2 A. I don't know.

3 Q. You don't know what states they're in?

4 A. Yes, I know what states they're in.

5 Q. All right.

6 A. But I don't know the distance that they're
7 apart. And I don't know the sales mix that they both
8 have, if they both compete for the same geographic
9 customer or even the same type of customer within
10 geography. One plant may have large box stores as a
11 customer and another plant may have IGA grocery stores
12 as a customer.

13 Q. All right. In the process leading up to
14 today when you wrote your testimony, did you do that
15 kind of analysis outside of the geographical location
16 of Order 33?

17 A. In a limited sense, yes. We did look at
18 areas where we may have customers who inquire about
19 competitive factors relative to Superior Dairy.

20 Q. Did you do a common sales area analysis?

21 A. If that meets that definition, yes, we
22 looked at other geographies outside of Order 33 where
23 we have customers who made comments to us about
24 competitive factors with Superior Dairy.

1 Q. And you're not going to tell me who those
2 customers are, are you?

3 A. No. But I can -- I will tell you the
4 geographies. They're Federal Orders 5, 6, 7 --

5 Q. Well, I'll get what I can. Go ahead.

6 A. 5, 6, 7, 32, 1.

7 Q. And these are handlers that have complained
8 about competitive disadvantage to Superior Dairy?

9 A. They have inquired about competitive
10 situations.

11 Q. You don't just take their word for it,
12 though; you actually then collect hard data and do an
13 analysis?

14 A. We do not just take their word for it. We
15 do go and investigate and see if we think that there's
16 an issue and if we need to make a response.

17 Q. Did you participate in that investigation?

18 A. In a limited sense, yes, I did.

19 Q. Because you say "we" a lot. Who did the
20 investigation?

21 A. You mean who personally did the
22 investigation?

23 Q. Yeah. Who are you talking about here?

24 A. Well, first of all, pieces of our customer

1 mix. In our marketing group we have several other
2 economists who began to talk to our people, if you
3 will, on the ground. So somebody in Order 6 who said
4 Customer X, you know, is having a problem and this
5 product is distributed to Store Y, so we would have
6 gone to Store Y and looked.

7 We looked at distribution cost. We looked
8 at where that supplier may or may not have gotten its
9 milk supply from. So we would investigate quite a few
10 parameters. And we would do that in all of those
11 cases.

12 Q. And when you say we, again you mean other
13 DFA employees?

14 A. Yes, but not just DFA employees. We may
15 have -- we have relationships in common marketing
16 agencies where there's expertise there. We also may
17 have other cooperatives to which we jointly market
18 milk together. So there may be an area where they
19 have more local expertise than we do.

20 Q. Okay. And, again, not stepping on
21 proprietary information, I conclude that somewhere
22 within the DFA offices is all this collected data --
23 actual data and reports from all of these sources; is
24 that what you're saying -- or would you say that's

1 true?

2 A. Yes, I would say that's true.

3 Q. Okay. But none of that is for the record,
4 because it's all proprietary, correct?

5 A. The intimate details of that, yes, are
6 confidential.

7 Q. Okay. So you've studied them, you've made
8 an opinion, but except for DFA and the other
9 cooperatives or the other participants in this nobody
10 else is to see that data?

11 A. Correct. That data.

12 Q. And your opinion is formulated in part on
13 that data?

14 A. Yes, that would be part of the information
15 that we used.

16 Q. Okay. Are you familiar with a handler named
17 Prairie Farms?

18 A. Yes.

19 Q. In fact they're a co-proponent of the
20 regulation that's under consideration, are they not?

21 A. Correct.

22 Q. Do you know where their plants are
23 geographically situated?

24 A. Some.

1 Q. Can you tell me what you know?

2 A. They have plants in Missouri. They have
3 plants in Oklahoma. They have plants in Arkansas,
4 Tennessee, Illinois, Indiana. I think that's all.

5 Q. Do they sell solely within a sales marketing
6 area?

7 A. No.

8 Q. So they're similar to Superior Dairy in that
9 regard, are they not?

10 A. That they sell in multiple market areas?

11 Q. Yes.

12 A. They have multiple plants in multiple market
13 areas that sell in multiple market areas.

14 Q. Right. I only bring that up because -- and
15 we'll get this specifically in your testimony, you
16 make a point at some point toward the end that
17 Superior Dairy sells in multiple marketing areas. And
18 I guess you consider that pertinent to your support of
19 the proposal?

20 A. Yes.

21 Q. But you agree that plants that are not
22 geographically situated in Order 33 do the same?

23 A. Yes.

24 Q. This proposal was only to change the way

1 business is done in the Order 33, correct?

2 A. It would affect plants who are located in
3 the marketing area of Order 33.

4 Q. What marketing area covers Missouri?

5 A. Order 32 and Order 7.

6 Q. Are you concerned with disruption to the
7 market in Order 32 and Order 7 because a plant such as
8 Prairie Farms sells outside of those Orders?

9 A. First of all, we would always be concerned
10 about disruption in a marketing area.

11 Q. Okay.

12 A. And we would investigate situations where we
13 felt like that was at risk. In this case for this
14 reason and with regard to the partially regulated
15 standard we don't have a concern at this point.

16 Q. And in fact Prairie Farms also operates
17 fully regulated and partially regulated plants, do
18 they not?

19 A. They do.

20 Q. Okay. So like Schneider's and like Prairie
21 Farms, Superior Dairy operates fully regulated and
22 partially regulated plants?

23 A. When you say like, if you mean in the same
24 manner.

1 Q. They have that in common?

2 A. Yes, they have that in common. I can't say
3 that they're operated the same or take liberty with
4 the provisions in the same way. But they both have
5 fully regulated and partially regulated plants.

6 Q. So the taking liberty, that's of concern to
7 you, not necessarily the fact that a single handler
8 company is partially regulated and fully regulated at
9 the same time; that in and of itself is not creating
10 disorderly marketing, correct?

11 A. I would agree.

12 Q. And selling in multiple Marketing Order
13 Areas also in and of itself does not create disorderly
14 marketing concerns?

15 A. I would agree.

16 Q. Okay. And would you also agree that it's
17 not solely the fact that there are two plants
18 operating -- I believe you refer to it as
19 plant-to-plant transactions -- that in and of itself
20 does not create disorderly marketing conditions, does
21 it?

22 A. That in and of itself?

23 Q. Yes.

24 A. No.

1 Q. Okay. So we have three factors that do
2 occur. And those factors are all pertinent to
3 companies other than Superior Dairy, correct?

4 A. Yes.

5 Q. Okay. We had a few examples here?

6 A. Correct.

7 Q. But it's the manner in which Superior Dairy
8 is doing it that somehow causes their activity to
9 create disorder in the market?

10 A. Correct.

11 Q. Is it the extent to which they're selling
12 milk -- I mean, how do I -- help me understand what
13 you mean when you talk about the way in which Superior
14 Dairy is doing these things that causes them to be so
15 objectionable?

16 A. Well, I can't outline the detail in all the
17 examples that you've mentioned, because I'm not
18 familiar with each of them intimately.

19 Q. All right.

20 A. However, where there's a situation we have
21 now that's a partially regulated plant, that gives us
22 concern about how producers are paid, it gives us a
23 concern about how supply arrangements are made, it
24 gives us concerns about competitiveness downstream in

1 the marketplace, it gives our customers concerns about
2 those. And so all of those are funneled back to the
3 change in regulation that we're seeking to change.
4 And so that would be our focal point.

5 Q. Well, here's the thing that I don't quite
6 get, and you can help me. We have a few examples of
7 companies other than Superior Dairy that are engaged
8 in plant-to-plant transactions, are fully regulated
9 and partially regulated --

10 MS. YOVIENE: Objection. He said a few
11 examples. I don't know where in the record
12 there's an example of Schneider's Dairy
13 doing plant-to-plant transfers.

14 THE JUDGE: That's sustained. I
15 haven't heard that.

16 MR. WILSON: That's fine.

17 Q. They have the potential if they have more
18 than one plant, do they not -- a company that has more
19 than one plant could do plant-to-plant transactions?

20 A. Yes.

21 Q. And you're concerned about the potential
22 behavior here as much as you are actual transactional
23 behavior, correct?

24 A. Yes.

1 Q. So if a company like Schneider's with two
2 plants were doing plant-to-plant transactions, were
3 partially regulated and fully regulated, and were
4 making sales theoretically outside of Order 33 at
5 least as far as the Pittsburgh plant is concerned,
6 those would be the same kind of circumstances that
7 would at least give an economist like you some concern
8 that we better look and see what's happening here,
9 right?

10 A. If those things were in place in the
11 marketplace and we had those concerns, we would
12 investigate or take a look.

13 Q. Okay. But your regulation here by your own
14 report is really focused on Superior Dairy, correct?

15 A. Focused on Order 33.

16 Q. So there must be something beyond these
17 analyticals that are causing you and the Proponents
18 you're serving here to target Superior Dairy. Is that
19 the secret information that is not on the record that
20 you've collected that causes you to say Superior Dairy
21 requires these regulations but not, for example,
22 Schneider's or Prairie Farms?

23 A. Our current concern is with Order 33. And
24 so -- and currently our concern is not in other

1 geographies.

2 Q. I understand that. That's from the record.
3 My question is why --

4 A. That's my answer to your question, our
5 concern is with Order 33.

6 Q. Except that generally you're concerned with
7 these circumstances wherever they occur, correct?

8 A. Generally, yes.

9 Q. All right. Why have you chosen just Order
10 33 then?

11 A. Because we have an example of an
12 exploitation in the regulations we feel that needs to
13 be corrected.

14 Q. A potential exploitation or an actual
15 factual-based exploitation that you've seen evidence
16 of?

17 A. The exploitation is for real. It's
18 happening, so...

19 Q. You've actually seen evidence of it?

20 A. I think Exhibit 6B says Superior Dairy is a
21 partially regulated plant. That would be evidence
22 that it's happening.

23 Q. How many partially regulated plants are
24 there in the United States?

1 A. On that list maybe 20, 25.

2 Q. All right. Again, it must be my ignorance
3 here. I thought that you said a few minutes ago that
4 being partially regulated in and of itself does not
5 constitute an indication of disorderly marketing?

6 A. I told you that we have concerns about how
7 producers are paid, how competitive factors exist in
8 the marketplace, that we received concerns from
9 customers in the marketplace, and that we looked into
10 them.

11 Q. Right. I'm simply trying to discern the
12 difference. Your proposal is against my client. It's
13 not going to impact as directly by any means all of
14 the other plants in the United States. In fact it's
15 so clear that you name Superior Dairy by name on
16 almost every page of your report.

17 So I want to understand for the record that
18 it's not just general theoretical concerns, that you
19 actually are relying upon actual economic data of
20 actual commercial activity here that has caused you to
21 be a proponent of this proposal.

22 A. I have no other answer to give you. You've
23 asked me like five times.

24 Q. And I'm searching for an answer.

1 A. And you got the best one I have.

2 Q. Okay. You decline to answer that question,
3 is that what you're saying?

4 A. I've answered it five times now the same way
5 each time. So that's my answer.

6 Q. Okay. I can't get up there and force you.

7 A. Nor I, you.

8 Q. What's a blend price?

9 A. A blend price is a term used in the industry
10 to represent the payment out of the Federally
11 regulated pool each month of -- the average of all the
12 utilizations times all the pounds divided by the total
13 pounds of the pool.

14 Q. Are you familiar with the concept of market
15 blend price?

16 A. Yes.

17 Q. Is that what you just defined?

18 A. Yes.

19 Q. Okay. What is a plant blend price then?

20 A. That would be a term in the industry that
21 talks about doing that same math but just inside the
22 boundaries of an individual plant.

23 Q. Okay. And those pricings then can be
24 different, correct?

1 A. Yes.

2 Q. Okay. And when we're speaking about Order
3 33, have you done an analysis of the impact on the
4 actual market blend price in that Order since Superior
5 Dairy became partially regulated?

6 A. Are you talking about Exhibit 25?

7 Q. I'm not talking about any exhibits. I'm
8 just asking, have you done an analysis of the impact
9 on the market blend price from the point forward by
10 which Superior Dairy became partially regulated?

11 A. No.

12 Q. Why not?

13 A. Our example here again deals with the
14 regulation to change the potential to things that
15 we're concerned about. And so that's the analysis
16 that we've done and presented for the record.

17 Q. You could do that analysis, couldn't you,
18 that I'm talking about, looking at the actual impact
19 on the market blend price in Order 33, if you wanted
20 to, right?

21 A. I don't know that I necessarily have all of
22 the individual data to be able to do that.

23 Q. What kind of data would you need?

24 A. I may need proprietary data from plants to

1 know what their situations are.

2 Q. Sure. You get that all the time, don't you?

3 A. No.

4 Q. You've received a ton of it in this case,
5 haven't you, that's not part of the record; all these
6 people that complained about Superior Dairy, they give
7 you proprietary information?

8 A. They do. But they don't necessarily tell me
9 what their pounds of Class I, II, III, IV sales are.
10 And I don't necessarily have the ability to audit
11 those to see if they're right.

12 Q. Sure. You don't have subpoena power. But
13 if you asked for it, you'd probably get it, wouldn't
14 you?

15 A. No.

16 Q. Do you think it's relevant to determine what
17 the market blend price is since Superior Dairy became
18 partially regulated since you're so concerned about
19 how they're creating disorder in the market?

20 A. I don't think it's particularly relevant to
21 have an actual example. The Secretary is not required
22 to know an exact circumstance before he can take
23 action.

24 Q. I understand that. But you've selected

1 Order 33. You haven't selected Order 1 or 7 or 32.
2 You've selected Order 33 as the target of the proposal
3 that you are supporting here today. And you're saying
4 that actual on-the-ground pricing differential
5 information doesn't matter to you?

6 A. I told you in an answer to an earlier
7 question that we have investigated claims from some of
8 our customers, and we found those to have merit. And
9 so we have looked into that information. We have
10 calculated what we think potential impacts could be
11 should situations change.

12 Q. Right.

13 A. And I provided that for the record.

14 Q. I know you've done that.

15 A. Okay.

16 Q. I'm talking to you as a lawyer who knows a
17 little bit about this area and an economist who is an
18 expert. I want to understand your methodology. Are
19 you saying -- again, I know you've got stuff that I'm
20 never going to see from people that are complaining.

21 But you don't believe that it matters -- I
22 don't care about the Secretary -- you in giving your
23 opinion don't think it matters what the actual price
24 impact on the ground is in order to make this

1 proposal?

2 A. Certainly the actual price on the ground
3 matters, because we've looked into that. But to make
4 the proposal we don't have to -- we don't feel like we
5 have to present the actual price on the ground to have
6 a hearing to ask the Secretary to consider changes in
7 the regulation.

8 Q. Okay. Tell me how I don't know you've
9 looked at -- you did look at it?

10 A. Well, you asked me earlier had we talked
11 with our customers in other areas and other
12 geographies, have we investigated their claims, and I
13 told you yes.

14 Q. I understand. Did you specifically look at
15 the impact of the blend price in Order 33 since
16 Superior Dairy became partially regulated?

17 MR. BESHORE: May I, your Honor?

18 THE JUDGE: Yes, Mr. Beshore.

19 MR. BESHORE: I want to object to some
20 of the repetition in the questioning and
21 note that there's an exhibit in the record
22 that's got three pages of spreadsheet
23 calculations that covers some of the period
24 of time among others that Counsel is

1 inquiring about.

2 MR. WILSON: DFA --

3 THE JUDGE: Excuse me. There's an
4 objection and I'd like to rule on it. And
5 it is sustained. Could we move along. I've
6 heard the same answers. I've heard them --

7 MR. WILSON: I'm trying to get actual
8 answers, your Honor.

9 THE COURT REPORTER: Let her speak.

10 THE JUDGE: I've heard them
11 consistently, Mr. Wilson. It seems to me
12 that there were some customer raised
13 concerns --

14 MR. WILSON: Right.

15 THE JUDGE: -- that Dairy Farmers of
16 America investigated, put together whatever
17 information they felt they had to put -- but
18 I also heard Mr. Hollon testify that he
19 doesn't have all of the information that
20 would allow him to do a blend price analysis
21 to determine whether or not the change in
22 the status of Superior Dairy's would be such
23 that it merited the change that they're
24 asking for.

1 He's saying he heard some complaints,
2 he looked at them, and found some
3 justification. In other words, to use a
4 lawyer leeway, he found probable cause,
5 prima facie evidence, but he doesn't prove
6 it beyond a reasonable doubt.

7 MR. WILSON: I'm not asking for
8 reasonable doubt, your Honor.

9 THE JUDGE: You don't even have to have
10 substantial for this circumstance.

11 MR. WILSON: Right. If I may, this
12 gentleman was represented as an expert. I'm
13 just trying to figure out why he's an
14 expert. And he uses -- it was his term,
15 your Honor, similarly situated or market
16 disruption. These terms -- I'm trying to
17 understand what he considers relevant and
18 what he doesn't.

19 And I understand repetition. And I
20 think, and to my defense, part of that's the
21 answers that I'm getting are non-answers,
22 but that's up to another person to decide.
23 Superior Dairy has been targeted, your
24 Honor, in --

1 THE JUDGE: No arguments. I'm not here
2 to hear argument.

3 MR. WILSON: All right.

4 THE JUDGE: This is an objection. I'm
5 sustaining it.

6 MR. WILSON: Thank you.

7 THE JUDGE: Ask another question.

8 BY MR. WILSON:

9 Q. This is a different question, even though
10 it's on the same topic. The blend price actually did
11 go down -- or did not actually go down in Order 33
12 since Superior became partially regulated; is that not
13 correct?

14 A. I don't know.

15 Q. Okay. And you also don't know if the
16 market -- if the plant blend price at Superior Dairy
17 is higher than the market blend price in Order 33, do
18 you?

19 A. I would say that answer also falls within
20 the confidentiality between Superior and DFA.

21 Q. Okay. Did you ask for this information from
22 Superior Dairy?

23 A. No.

24 Q. Why not?

1 A. I'm guessing one reason, I wasn't sure that
2 they would give it to me.

3 Q. Well, you could have asked, though, right?

4 A. Yes, I could have.

5 Q. But that's not relevant to you, is it?

6 A. That's not true.

7 Q. Okay. Do you maintain that all of
8 Pennsylvania should be subject to the same proposed
9 regulatory changes that you're urging for Order 33?

10 A. That's not our proposal.

11 Q. Okay. DFA has in the past publicly stated
12 that position, though, have they not?

13 A. I'm not certain.

14 (Whereupon, Exhibit Number 27 was
15 marked for identification.)

16 MR. WILSON: May I introduce -- or mark
17 for identification, your Honor, Exhibit 27?

18 MR. BESHORE: May I?

19 THE JUDGE: Yes.

20 MR. BESHORE: I'd like to interpose an
21 objection to this line of questioning.

22 THE JUDGE: Okay.

23 MR. BESHORE: The extension of the
24 marketing area is a proposal that Superior

1 had asked the Secretary to hear. It is not
2 in the hearing notice. That was the subject
3 also in their pending Federal Court action.
4 In fact it's not in the hearing notice.

5 The marketing area issue is not before
6 the hearing and it's irrelevant.

7 THE JUDGE: All right. Thank you.

8 MR. WILSON: Was that an objection or a
9 comment?

10 MR. BESHORE: That was an objection to
11 the line of questioning.

12 THE JUDGE: That was an objection.
13 It's beyond the scope of the hearing.

14 MS. YOVIENE: I second the objection.

15 MR. WILSON: May I respond?

16 THE JUDGE: You may respond.

17 MR. WILSON: Okay. I'm trying to use
18 the terms that the witness has offered and
19 put in writing here, such as similarly
20 situated. And this line of questioning is
21 drawn from his own language, his own
22 testimony, his own argument. So I don't
23 believe his objection is on point.

24 THE JUDGE: I hear what Mr. Beshore is

1 saying, that you're asking a question about
2 what Dairy Farmers of America's position is
3 regarding an area that's outside of the
4 Marketing Order 33 and whether or not that
5 area should be or should not be similarly
6 brought under some other marketing area.

7 That's not what we're here to discuss,
8 whether you believe that to be true or not.
9 I mean, that's an argument that you can
10 raise at the end of the day with the
11 Secretary. And you have -- there are
12 avenues where you can challenge whatever the
13 Secretary might come up with after this.

14 But I prefer to keep us on track,
15 discussing 33, discussing what the Secretary
16 has agreed to discuss.

17 MR. WILSON: Right. Your Honor, I
18 am -- and it is obviously clear that
19 Superior Dairy is an opponent to the
20 proposed regulation. We are trying our best
21 through cross-examination to elicit
22 information from this expert witness as to
23 factors that may in fact support our
24 position, which I believe I have a right to

1 do that.

2 They may not like the questions. But
3 we have -- I'm begging your Honor for some
4 latitude here to develop some points, so
5 that when the Secretary receives the record,
6 he sees this gentleman being challenged.
7 And that's what I'm endeavoring to do here.

8 Every question I've asked has been
9 drawn from his language and from his
10 analysis. I haven't always gotten answers,
11 but...

12 THE JUDGE: I would say that the last
13 question you had asked, Mr. Wilson, was
14 talking about -- you raised Pennsylvania,
15 you raised whether or not the Dairy Farmers
16 of America had a position about whether
17 Pennsylvania came within a Marketing Order.

18 MR. WILSON: Right.

19 THE JUDGE: That's beyond the scope of
20 direct. That's beyond the scope of the
21 Notice of Hearing. That's beyond the scope.
22 Now, it's not to say you're not interested
23 in that answer and not to say that it might
24 not be helpful to your position, but it's

1 beyond the scope of today's proceedings.

2 And I think that I must sustain that
3 objection and ask you to confine your
4 questions to Order 33.

5 MR. WILSON: Okay. May Mr. Vetne be
6 heard on this particular point, your Honor?

7 THE JUDGE: To me, he can, yes. But he
8 won't be questioning --

9 MR. BESHORE: Is Mr. Vetne counsel --
10 entering an appearance as counsel for
11 Superior?

12 THE JUDGE: He's going to have to at
13 this point.

14 MR. VETNE: I'm a consultant to
15 Superior.

16 THE JUDGE: Oh, well, then you can
17 testify.

18 MR. VETNE: The rules of practice
19 permit any person, not just lawyers, to take
20 any part in this proceeding.

21 THE JUDGE: Sure.

22 MR. VETNE: And I'll enter an
23 appearance as counsel if that's what it
24 takes.

1 THE JUDGE: No, no, no. I like to have
2 an orderly presentation of the evidence.
3 You can certainly be called to rebut
4 whatever it is we do with Mr. Hollon.

5 But to interrupt the testimony of
6 Mr. Hollon by you introducing your own
7 testimony or asking questions or making
8 argument to me even with the wide open way
9 that a Marketing Order hearing is conducted
10 is I don't think an orderly way.

11 So why don't we just finish up with
12 Mr. Hollon. And then you can be put on the
13 stand or you can make your statement,
14 however you want it to be made. But I ruled
15 on this. I've ruled.

16 So if you want to present some other
17 argument about it, ask me to readdress my
18 ruling, that's fine. But I don't want to do
19 it while we have a witness just sitting
20 here. Let's continue with this testimony.

21 MR. VETNE: I have simply a statutory
22 reference that relates to the objection and
23 the ruling that your Honor just made which I
24 think is dispositive.

1 THE JUDGE: You can certainly hand that
2 to Counsel.

3 MR. BESHORE: I ask that Mr. Vetne
4 speak as counsel or as a witness, I suppose.

5 THE JUDGE: I hear you.

6 MR. BESHORE: If he's going to be a
7 witness, it's from the stand.

8 THE JUDGE: One way or the other
9 Mr. Vetne will have his chance to say
10 whatever it is he wants to say. But it's
11 not helpful to me to have someone interject
12 in the middle of an examination.

13 MR. WILSON: Can I beg the Court's
14 indulgence for 30 seconds?

15 THE JUDGE: Yes, you may. In the
16 meantime while you discuss, do I see -- we
17 had another objection. Is there something
18 that you wanted to say?

19 MS. YOVIENE: (Moving head left to
20 right.)

21 THE JUDGE: No. Okay. And the reason
22 I'm saying that is because I think
23 Ms. Yoviene had raised an objection, I
24 sustained that objection, she joined in with

1 Mr. Beshore's objection, but I saw her
2 looking like she wanted to say something.
3 She has declined. Are we ready to proceed?

4 MR. WILSON: Yes. One last sentence on
5 this subject and then I swear to God I'll
6 move on. We maintain that under 7 USC
7 608c(9) the Secretary must determine that
8 the proposal under consideration is the only
9 practical alternative and items that are
10 outside of the specific scope may and should
11 be considered.

12 So I would just enter that comment into
13 the record. And then I'll move on with
14 questions.

15 THE JUDGE: That's fine. You know, and
16 I am obviously, Mr. Wilson, not totally
17 versed in everything that's been going on in
18 this case. But I know that just from
19 reading the pleadings and the District Court
20 proceeding, I'm aware that you had already
21 brought that question before the Secretary.

22 MR. WILSON: We have. And the District
23 Court basically -- here's the Catch 22, your
24 Honor. The District Court says go to the

1 administrative hearing and shoot your shot
2 there. And now we're trying to do that and
3 the argument is potentially, well, you can't
4 do it here either. So it's a little bit of
5 a challenge, but we'll try to navigate.

6 THE JUDGE: I don't think this is the
7 witness to do it with, that's for sure.

8 MR. WILSON: Well, we'll present our
9 own witness as well. I don't even know if
10 there's going to be any other witnesses for
11 DFA, et al., and if there are, then
12 obviously I'll pursue that as best I can.
13 But I don't control that.

14 THE JUDGE: Okay.

15 BY MR. WILSON:

16 Q. I would like to have most of the rest of the
17 testimony be a leaf-through of your statements. If
18 you could put that in front of you, Mr. Hollon.

19 A. Yes, sir.

20 Q. Turn to page -- in my numbering I start
21 No. 1 on the first page of text, not on the title
22 page, okay?

23 A. Same with me.

24 Q. Would you turn to Page 2. You have a

1 sentence there. I'm going to read the sentence into
2 the record and then ask you a question about it. It's
3 at the very top. It says, quote, The disorderly
4 marketing conditions supporting this hearing request
5 are harmful to these small businesses on whose behalf
6 this request is made, end of quote. Did I read that
7 correctly?

8 A. You did.

9 Q. Now you used the verb "are" there as opposed
10 to "may be." So are you testifying that you have seen
11 facts that actually indicate the harm?

12 A. Yes, we have customers who have raised
13 concerns.

14 Q. Right.

15 A. And we have producers who have raised
16 concerns about the potential changes that might result
17 in this.

18 Q. Okay. And the concerns themselves are not
19 in and of themselves the evidence of the harm. You
20 then go beyond that and you look for actual economic
21 data in support of that conclusion, correct?

22 A. Would you rephrase that, please?

23 Q. Well, let me ask it a different way. It's
24 not enough simply for some competitor of Superior

1 Dairy to say, foul, we think they're disorderly and
2 then you're going to say it's harmful; you need to go
3 beyond that, correct?

4 A. We have looked into their claims, as I said
5 earlier, and determined that we think there is a
6 reason to pursue the path we're on.

7 Q. Right. And that it's harmful what Superior
8 Dairy is doing, not theoretically harmful?

9 A. Yes.

10 Q. But the evidence of the actual economic harm
11 is proprietary, right?

12 A. The details of such are.

13 Q. Okay. When Superior Dairy buys milk, is it
14 not already paying class prices?

15 A. Yes.

16 Q. If it didn't, it'd be in violation of the
17 Federal Regulations, would it not?

18 A. Yes.

19 Q. Okay. So it's not the price that Superior
20 Dairy is paying that is causing disorderly marketing
21 conditions, correct?

22 A. I would say it has more to do with the
23 manner in which those prices are paid.

24 Q. What do you mean by manner? You said that

1 before. I don't know what you mean. What do you
2 mean?

3 A. Well, in the example in my spreadsheet, you
4 know, I pointed out a calculation. And at the end of
5 that calculation I pointed out that other competitors
6 have to pay a certain amount of those funds into the
7 marketwide pool as Superior Dairy does not.

8 Q. That's a hypothetical calculation, correct?

9 A. If we were asking about the entirety of the
10 amount, then you could say, yes, there's \$20 here,
11 there's \$20 here. But the difference is the \$20 here
12 is the end gain and the other competitors have \$20
13 plus some additional amount in order to procure their
14 milk supplies.

15 Q. And that's purely a hypothetical analysis,
16 correct?

17 A. No, it's not.

18 Q. But you don't know what Superior Dairy is
19 paying for milk because you haven't looked at it, have
20 you?

21 A. The minimum values I would know.

22 Q. But you don't know what the actual payments
23 are, correct?

24 A. That would be true.

1 Q. Okay. They may be in excess of -- well in
2 excess of the Federal minimum standards, correct?

3 A. Even if they are in excess, there is still a
4 portion that a regulated handler pays into the
5 marketwide pool that Superior Dairy wouldn't. So that
6 would represent an advantage due to the partially
7 regulated standard.

8 Q. Page 4 of your report, please.

9 A. Yes.

10 Q. I'm going to read the sentence and then ask
11 you some questions. This is right in the middle.
12 Quote, The overriding theme is that similarly situated
13 plants processing fluid milk products and selling in
14 competition with each other should be subject to the
15 same Order Regulations, correct?

16 A. Correct.

17 Q. But your proposal for all intents and
18 purposes only pertains to similarly situated plants
19 in -- geographically situated within Order 3 (sic),
20 correct?

21 A. Incorrect.

22 Q. Or 33, I mean.

23 A. Similarly situated plants, yes, inside Order
24 33.

1 Q. Okay. So you would argue that similarly
2 situated plants outside of Order 33 also is pertinent
3 to your analysis, but for whatever reason you're all
4 targeting 33, correct?

5 A. Our proposal only affects Order 33.

6 Q. Turn to Page 5, please.

7 A. Yes, sir.

8 Q. You're discussing and you have in italics
9 the words route disposition, correct?

10 A. Yes.

11 Q. That phrase pertains to sales of milk,
12 correct?

13 A. Yes.

14 Q. All right. Your proposal by and large does
15 not utilize sales disposition as the primary defining
16 scope of the proposed regulation, you're relying upon
17 the geography of the plant, correct?

18 A. Our proposal adds geography in a case where
19 route disposition -- the route disposition calculation
20 would suggest it would be pertinent.

21 Q. Where else in the United States has
22 geography been added as the pertinent factor?

23 A. In situations where there are lock-ins.

24 Q. Like where?

1 A. One that quickly comes to mind would be the
2 Kroger plant in Winchester, Kentucky. It's locked in.

3 Q. Okay. What Order is that under?

4 A. Order 5.

5 Q. And were the regulations there revised akin
6 to which you're proposing here for Order 33?

7 A. Yes. And in fact I think one of our cites
8 refers to the hearing where that was done.

9 Q. And that was only done for -- as to Kroger
10 or for all the plants within Order 5?

11 A. The lock-in applies to any plant that meets
12 the provisions.

13 Q. Okay. And, again, this is still new to me
14 as I've said now ad nauseam. If your proposal was
15 adopted by the USDA, then is it fair to say that Order
16 5 and Order 33 will be both subject to the
17 geographical factor?

18 A. I'm sorry. I'm not following your question.
19 Are you referring --

20 Q. I may not have asked it well.

21 A. -- to the lock-in provision or are you
22 referring to --

23 Q. I don't know what the lock-in provision is.
24 Why don't you tell me that?

1 A. A lock-in provision in that particular
2 example suggests that a plant that has their sales in
3 one place with its procurement in another may be --
4 there may be reason to lock it into the location where
5 its geography is, even though the sales may be in
6 another place. And the language is pretty common. In
7 fact it may be in every Federal Order.

8 Q. All right. Well, then why do you need to
9 revise Order 33 if the language is already there?

10 A. They don't work the same way.

11 Q. What do you mean they don't work -- what's
12 the antecedent to --

13 A. The lock-in provision would not accomplish
14 what our language change does here. So the
15 circumstances are different.

16 Q. Where else other than the lock-in provision
17 in Order 5 is the geography a factor to your
18 knowledge?

19 A. I think there's a plant in Savannah,
20 Georgia, that is a UHT plant that prevails itself --
21 the plant is no longer in existence. It did have that
22 case. Off the top of my head I'm not familiar, but
23 the language is predominant in the Orders.

24 Q. When Mr. Carman testified earlier -- I'm

1 going to try to carefully paraphrase his response -- I
2 asked him if USDA had reporting on sales and activity
3 based on geography of a plant. And I believe he
4 indicated that they did not.

5 Would that kind of reporting be necessary
6 after your proposal is adopted, should it be adopted
7 by the USDA?

8 A. I'm not following your question. I'm sorry.

9 Q. All right. I'll ask it a better way, I
10 hope.

11 A. I'm patient.

12 Q. Let me put it this way. When I was becoming
13 a temporary member of the Milk Bar, it was explained
14 to me that route disposition was the predominant
15 factor in determining what Order one should be
16 regulated under.

17 And then it was further explained to me, and
18 I take it at face value, that that's being changed
19 here, at least with respect to Order 33, and that
20 route disposition is not the predominant factor, but
21 geographical location of the plant is. Is that a fair
22 conclusion by me?

23 A. I would start off with your first assertion
24 that primarily route disposition is the factor in

1 Federal Orders.

2 Q. Okay. So far so good.

3 A. So far so good. And our proposal here
4 doesn't change the base route disposition qualifier,
5 if you will. But it adds some language in a situation
6 where a plant has more than 50 percent of their sales
7 in a Federal Order territory, but not so much to have
8 20 percent -- 25 percent in one individual Order.
9 Then another qualifier would come -- and in the case
10 of our language and in this proposal -- lock that
11 plant into -- or regulate that plant in Order 33.

12 Q. Only as to Order 33, though?

13 A. A plant located within the marketing areas,
14 so this is only Order 33.

15 Q. Okay.

16 A. Did that cover your answer with regard to
17 this proposal and lock-in provision?

18 Q. I don't know. They're my questions, your
19 answers, and I'll leave it at that.

20 A. All right.

21 Q. Turn to the very bottom of Page 8 -- or, no,
22 I'm sorry, the top of Page 9.

23 A. Yes, sir.

24 Q. I'm going to read a sentence and then ask

1 you a question or two about it. Quote, Order
2 Regulation history is replete with changes designed to
3 preserve the competitive balance afforded handlers and
4 producer by the assurance of common minimum prices,
5 closed quote.

6 How are handlers beset by varying minimum
7 prices -- don't they all have to pay at least the same
8 minimum class price?

9 A. Yes, they all have the same common minimum
10 price. That is what this sentence is designed to say,
11 is that they have the common minimum price and there
12 have been times when there have been factors that
13 affected that common minimum price that the Order --
14 there were hearings to change the regulation to
15 continue that assurance.

16 And we touched on -- in our line of
17 questioning you've asked me about our proposal today.
18 You've asked about the lock-in provision. Those would
19 be examples. There were other examples in our
20 testimony where Order provisions were changed because
21 of someone taking advantage of the way a rule was
22 written to get back to the principle of common minimum
23 price.

24 MR. WILSON: Can I indulge the Court

1 for 30 seconds?

2 THE JUDGE: Sure.

3 BY MR. WILSON:

4 Q. Stepping away from the testimony just for a
5 second, the written testimony, I don't want to cause
6 you to give me any proprietary information. I don't
7 think you will anyway. You've made frequent reference
8 by now to customer complaints or customer reports, I
9 guess, that caused this DFA investigation that you've
10 been involved in.

11 Without telling me who these complaining
12 parties are, can you give me a sense of -- a
13 garden-variety of complaints so I have a sense of what
14 kind of complaints you're getting that caused this
15 investigation?

16 A. That's a fair question.

17 Q. Thank you. I'm bound to have one.

18 A. As I answered earlier and gave you some
19 indication of geography that it was Orders 5, 6, 7,
20 32, 1. And the type of common concern is there's
21 product in Store X. And I can go in and read the code
22 and see what plant it came from. And I know what my
23 price is. And I don't see how it could be priced
24 accordingly. So that's a pretty common variety of

1 comparison.

2 So then is something with the raw milk price
3 out of line somewhere, is that something that you can
4 say -- DFA has said something or any of the other
5 suppliers -- we're not the only one who function this
6 way -- is that something that you could investigate
7 and tell me.

8 Q. Okay. And you did investigate?

9 A. Yes.

10 Q. And you came to agree with the complaining
11 parties?

12 A. Yes.

13 Q. Okay. By the way, were there any complaints
14 that were made that you investigated that you didn't
15 adopt or accept?

16 A. From time to time that happens where we'll
17 get a --

18 Q. No. I mean here, in this case.

19 A. I can't tell you. I don't know.

20 Q. Okay. In some cases -- this is a general
21 question -- you use conditional verbs in your report
22 like may result, can result. In other portions of the
23 report -- and I can come up with 30 examples -- you
24 say -- you declare that there is harm.

1 I'm trying to understand if your conclusion
2 ultimately is speculative or based on evidence. And I
3 know we don't have the evidence here. Is it your
4 testimony that you've taken what you've seen and then
5 extrapolated various possible results?

6 A. We've done both.

7 Q. On Page 13 toward the bottom there's a
8 sentence that reads, quote, Since in this example,
9 these funds are not paid to the marketwide pool, they
10 would reduce every pool producer's PPD, closed quote.
11 Do you see that sentence?

12 A. You read it correctly.

13 Q. Thank you. Now, is this an example where
14 you've actually looked and seen if the producer's PPD
15 has been reduced or you're concluding that that could
16 be a cause and effect?

17 A. That could be a cause and effect. This
18 relates back up to the paragraph before, to estimate
19 the potential magnitude of the problem.

20 Q. And, for example -- well, I guess the entire
21 balance of that paragraph then, though, is a potential
22 analysis, not a fact-based investigation, correct?

23 A. I don't think I would choose -- make those
24 choice of words. But there's potential impact. And

1 the data and analysis is -- those are factual reported
2 data.

3 Q. Do handlers sometimes pay premiums to
4 suppliers?

5 A. In this provision -- in this proceeding
6 we're concerned about Order minimum prices. So that's
7 where my testimony is going to focus.

8 Q. I understand. And I'm not asking you to
9 refocus. I'm asking if sometimes handlers pay
10 premiums to suppliers.

11 A. And, again, I'm going to stay where I am.

12 Q. You won't answer that?

13 A. I don't think I want to get into that
14 discussion.

15 MR. WILSON: I'm just about done, your
16 Honor. I'd just like another 60 seconds to
17 consult with my consultant.

18 THE JUDGE: Okay.

19 MR. WILSON: And then I'll probably
20 relinquish the floor.

21 THE JUDGE: All right. Let's go off
22 the record for a minute.

23 (Off the record.)

24 MR. WILSON: That's all that I have at

1 this time, your Honor.

2 THE JUDGE: Don't leave yet. I have to
3 ask other parties if they have any
4 questions.

5 Do you, Mr. Beshore, have any
6 follow-up?

7 MR. YALE: Well --

8 THE JUDGE: I know, Mr. Yale. Can I
9 have your answer, Mr. Beshore?

10 MR. BESHORE: Well, I will have some
11 redirect. I would like to reserve it until
12 all other parties have questioned
13 Mr. Hollon, if I could.

14 THE JUDGE: Absolutely.

15 MR. BESHORE: All right. Thank you.

16 THE JUDGE: Mr. Yale, would you like to
17 come up, so that we can be sure to hear you.

18 MR. YALE: Benjamin F. Yale on behalf
19 of Continental.

20 CROSS-EXAMINATION

21 BY MR. YALE:

22 Q. Good afternoon, Elvin. How are you?

23 A. Good afternoon, Ben. I'm just fine.

24 Q. I want to -- if you would, would you look at

1 your Exhibit 25. I'm just trying to understand this a
2 little bit better. And if you don't mind, I think I'm
3 just going to kind of go through and -- you've
4 somewhat explained it in your testimony. But I think
5 it's such an important exhibit and I want to make sure
6 the record is clear.

7 First of all, the yellow information -- you
8 told me this is information that you were provided or
9 was given; this is not something you computed, right?

10 A. Correct.

11 Q. All right. Now, I notice that you've got
12 Federal Order 33 and Ohio. Why are you making the
13 choice -- why do you have Ohio in some areas and Order
14 33 in the others?

15 A. Where there is data that's specific to Ohio
16 and the procurement area for producers. We tried to
17 be as narrow as we could to paint the most accurate
18 picture that we could. That wasn't -- I think every
19 place where there is an Ohio we had Ohio information.
20 The remainder was -- for example, the butterfat price
21 is the same everywhere.

22 Q. Right.

23 A. The butterfat percentage, though, would vary
24 geographically across the Orders. So we try to get as

1 direct a comparison as possible.

2 Q. And Order 33 has territory in more than one
3 state, right?

4 A. It does.

5 Q. All right. And in Ohio -- or let's go back
6 there. We talked -- there's some question about
7 common procurement for Canton, Ohio. What would you
8 define as the most likely common procurement area for
9 Stark County or Canton, Ohio?

10 A. It would be the most producers closest to
11 the marketing area and those within the state. It's
12 not going to be absolute. It's not -- you know, the
13 procurement areas to some extent are going to depend
14 on, you know, the day of the week when milk is needed,
15 you know, or it's needed somewhere else. But the most
16 common area is going to be closest to the plant in
17 Ohio.

18 Q. Okay. So we come across -- and you've taken
19 this information -- the producer butterfat prices,
20 these are things that are announced by the Market
21 Administrator, right?

22 A. Columns K, L, and M, correct.

23 Q. Right. And we would find that information
24 in some of the other documents that were supplied by

1 Mr. Carman earlier today, right?

2 A. Correct. Most likely in the Market
3 Bulletins.

4 Q. Right. And then the component blend price,
5 how did you come up with that component blend price?

6 A. For example, Column B, butterfat percent
7 times Column A would give me butterfat pounds in
8 Column G.

9 Q. Okay.

10 A. C times A would give me Column H and work my
11 way across. So once I had the pounds of those
12 products, then I multiply each of those pounds times
13 their appropriate price. So G times K plus H times L
14 plus I times N would give me -- and then add those
15 products together would give me the 51,549 for -- or
16 51 million for January.

17 Q. Okay. And then the somatic cell count,
18 what's the role of that in this pricing?

19 A. Some of the Federal Orders provide an
20 additional payment to producers, either a premium or a
21 deduction for somatic cell count. That's generally an
22 indicator of milk quality. So the goal is to have an
23 incentive to produce milk quality -- or improve milk
24 quality. And there's an equation that defines how

1 much that premium is.

2 So the rate in Column O was applied against
3 the equation. I think it is 350,000 minus, in this
4 case, 234,000, Column F, times 0.00077. And that
5 equation is done every month. And that would have
6 resulted in the dollars in Column P times the pounds.

7 Q. Okay. And I notice there's nothing in there
8 for location value for Canton?

9 A. That's correct. Because it is in the base
10 zone, so there would be no pluses or minuses to add to
11 the price there.

12 Q. And then the component order minimum price,
13 what does that represent?

14 A. That's the combination of N plus P divided
15 by pounds.

16 Q. Okay.

17 A. So you've taken all of the dollar values and
18 you add them together on the component -- on a cell
19 count basis and come up with the component minimum
20 price. Into that we added the producer price
21 differential in Column S. 15.52 plus 0.80 would be
22 16.32 in January 2010.

23 Q. Okay. So this is what -- based on minimum
24 Federal Order prices on an average producer in Ohio --

1 A. Correct.

2 Q. -- delivering to Canton --

3 A. Correct.

4 Q. -- would have received for their price,
5 right?

6 A. Correct.

7 Q. And this is before any discounts or any
8 other adjustments?

9 A. This is only minimum Order values.

10 Q. All right. So then we move over to the
11 second page. And, again, I guess the yellow means you
12 picked this information up. And by the same Federal
13 Order 33 you received this from the Market
14 Administrator as part of the public announcements,
15 right?

16 A. From the Market Administrator, except for
17 Columns X, CC, II, and NN, and those were drawn from
18 the Cooperatives' collective experience at billing
19 more than 20 fluid milk customers in the area. We
20 needed a proxy for a plant utilization.

21 Q. Okay.

22 A. So it doesn't represent any one individual
23 plant, but it's the cross of more than 20 plants.

24 Q. Okay. So we have over here Class I price at

1 test. What's the test; is that the average?

2 A. If we go back to the average butterfat test
3 on the prior page.

4 Q. Okay.

5 A. So you would take Columns U and V and
6 multiply them times the appropriate skim pounds and
7 butterfat pounds calculation to get that average
8 17.5669.

9 Q. Okay. And then you have this Class I
10 contribution?

11 A. Correct. That's the typical plant. And our
12 universe was 87 percent Class I. So 17.57 roughly
13 times 86 percent would be 15.11.

14 Q. And then you carried that forward for Class
15 II, the same kind of computations; is that true?

16 A. That's correct.

17 Q. All right. And the prices you used for the
18 butterfat protein and other solids for these
19 computations for Class III are the same ones that
20 showed up for computing the component prices for the
21 producers, right?

22 A. That would be correct.

23 Q. Okay. And as a result of that then we come
24 all the way over here to PP and you have blend at

1 test -- in-plant blend at test?

2 A. Correct. So that would be the value that
3 the -- of the milk inside the plant at those
4 utilization factors that would be availed into the
5 plant. So it would have so much, you know, Class I
6 values, so much with II, so much with III, so much for
7 IV.

8 Q. Now comes this QQ. What does that mean?

9 A. So QQ is PP -- Column PP, that value, minus
10 Column T. And that would represent a value that the
11 fully pooled plant would have paid into the pool.

12 Q. Okay.

13 A. And that would have gone to fund PPD values
14 and other monthly -- along with other monthly
15 calculations to pay producers. And this is designed
16 to show that if we were to take a plant that did not
17 share that with the pool, would they have more money
18 in their hand or less money in their hand.

19 Q. Okay. So it's a discussion of like an
20 individual handler pool -- what's an individual
21 handler pool?

22 A. An individual handler pool would be no
23 plant -- or the plant does not participate in a
24 marketwide pool. And that plant would have the

1 entirety of Column PP to pay its producers in some
2 way, shape, or form. There would be no sharing in
3 utilizations. And in the testimony and then the
4 examples that we cited, individual handler pools are
5 not the favored view of the Secretary. And they no
6 longer exist in Orders.

7 Q. Okay. And that's kind of the same as an
8 in-plant blend, right?

9 A. Yes.

10 Q. Okay. Now, we have over here -- I guess you
11 repeat PP and QQ over on the last page?

12 A. Yes.

13 Q. And we now come over here to these things,
14 milkshed and mailbox price. What is this talking
15 about?

16 A. The Federal Order System on a monthly basis
17 goes back and under a prescribed formula tries to get
18 a proxy for what producers receive at their mailbox.
19 And so every Marketing Order does either some for the
20 entirety of their Order and some break down their
21 Order by different geographies and requests from
22 producers or from members of Congress to outline what
23 a dairy farmer is actually getting paid.

24 And it's a collection of all of those

1 values, its at test. And Columns RR, SS, and TT were
2 designed to try to get a further comparison of what
3 the in-plant blend price might be to the actual
4 mailbox price. So it would be a proxy for what it
5 might take to procure those.

6 Q. Like in this first one here, the 16.92 is
7 basically what the producer has to spend?

8 A. That's correct.

9 Q. Okay. But the producer -- although the
10 plant may pay a particular price, the producer also
11 has other costs to get it to the market, right?

12 A. That is correct. And I was going to say
13 Column RR should be yellow, not orange.

14 Q. Okay.

15 A. So there are other costs. And those costs
16 vary widely. So we're not able to get our arms around
17 every individual one. But the Market Administrator's
18 Office in Order 33 does on an annual basis conduct a
19 transportation study. And they determine what
20 producers pay for milk hauling and provide a large
21 realm of data statistics around that. And for the
22 Ohio market they did a study and determined the
23 number.

24 Q. Okay. And that's where you came up with the

1 75 cents?

2 A. That hauling number, plus the non-member fee
3 of 7 cents, plus the promotion assessment. All
4 producers who were not members of a cooperative or who
5 were non-members would pay the non-member fee, someone
6 would pay that. And the promotion assessment, all
7 producers would paid that.

8 Q. So let me kind of phrase it and tell me
9 whether you agree or not. TT is -- this is what the
10 average plant located within the Canton, Ohio, zone
11 would be paying the average Ohio producer who received
12 this mailbox price of 16.92, that they'd have to pay
13 17.67 to get to that mailbox price, right?

14 A. Yes.

15 Q. So the 17.67, not the 16.92, would be what a
16 plant would have to pay the producers?

17 A. That amount of revenue would have to show up
18 somewhere to procure the milk, get it hauled, and pay
19 those two assessments.

20 Q. Okay. So now let's go over to UU through
21 XX. What's going on here?

22 A. UU through XX follows the language in
23 Section 76(a). And should a plant opt to settle up
24 with the Market Administrator for being a partially

1 regulated plant under those provisions, that's the way
2 the calculation would work. And it is a Class I price
3 less the Class III price less the PPD, which gets you
4 to the Class I minus blend, and those were adjusted
5 for location.

6 So if a plant were to choose the Section (a)
7 option in that month, they would have had to pay 15.30
8 on their Class I route sales.

9 Q. Say that -- they would have to pay 15.30?

10 A. They would have to pay the pool 15.30 on
11 their Class I route sales into the market to meet the
12 Section (a) obligation.

13 Q. Okay.

14 A. To meet the Section (b) obligation they
15 would have to go back to Column PP and pay 17.29.

16 Q. Okay.

17 A. So I wanted to see what the comparison of
18 the (a) and the (b) option would be for a typical
19 plant at the minimum values.

20 Q. So XX, the Market Administrator when they go
21 to enforce the payments, an individual -- or a
22 partially regulated handler who avails itself under
23 76(a) for this particular month, that's what they
24 would have to pay their producer on average, 15.30?

1 A. No. They would have to account to the pool.

2 Q. Account to the pool --

3 A. Yes.

4 Q. -- at 15.30?

5 A. Correct.

6 Q. But if they were doing the (b) where they're
7 paying the individual producers, it would be --

8 A. 17.29. But their prices are times different
9 pounds. So 17.29 is on all milk and the 15.30 is on
10 the route sales.

11 Q. And then as we go into -- let's go back. To
12 get to that number, really the UU is what they would
13 have to account to, right, and you'd add XX plus YY to
14 get to UU, right?

15 A. Yes.

16 Q. So we corrected that statement, right?

17 A. Yes, that's correct.

18 Q. All right. It's not 15.30 --

19 A. I went the wrong direction.

20 Q. Right. Okay. So now we've computed these.
21 You have these estimated plant volumes. And explain
22 what you're saying here.

23 A. I wanted to give some hypothetical or some
24 potential result from a plant that was 30 million

1 pounds a month being completely partially regulated.
2 And so I took the variance differences of Column PP
3 and multiplied them out against the 30 million pounds
4 to see what that might be, a 40 million pound level,
5 what that might be, and a 50 million pound level, what
6 that difference might be.

7 Q. And what is this comparing; you're comparing
8 PP to what?

9 A. We're taking -- PP is the in-plant blend
10 minus the component value. So actually QQ would be
11 the difference of 97 cents.

12 Q. Okay.

13 A. And then at a 30 million pound plant that
14 would be 291,000 that -- in that particular month
15 under the actual prices and the tests, that a
16 partially regulated plant would have an advantage over
17 a fully regulated plant.

18 And I also wanted to know how that might
19 vary over time. So I did it for an extended period.
20 And there were at least two months where that
21 particular payment method would not have resulted in
22 satisfying the requirement. So the partially
23 regulated handler would have to come up with some
24 additional monies in September of 2010 and some

1 additional monies in February of 2011 unless they were
2 really good estimators and maybe they might have opted
3 for the (a) provision.

4 Q. But they had to -- or opt out of that prior
5 to making the payment?

6 A. It's my understanding that the Market
7 Administrators will not allow a post-pool choice.

8 Q. Now, there was some discussions about this
9 issue of whether we pick on one plant or not. And I
10 want to -- you've been involved in how many years in
11 Federal Orders?

12 A. Approximately 30.

13 Q. Okay. And practically all the Orders that
14 existed in the Federal Order System today; is that
15 right?

16 A. Yes, that would be true.

17 Q. Okay. Now, you mentioned that you had some
18 questions from buyers and you did the interviews and
19 investigations to see if there was a problem, came to
20 believe there was a problem, which led us to here.

21 In your experience in all those Orders do
22 you need to have a multitude of people that are taking
23 advantage of the situation or -- how many do you need?

24 A. The Order history shows, for example, one.

1 In many cases the extended shelf life plants --
2 there's only one plant in that particular Order that
3 had that problem. And so there was a hearing and made
4 that change.

5 The lock-in provision that Mr. Wilson and I,
6 you know, discussed at that point in time only applied
7 to a single plant. It was not uncommon before Federal
8 Order Reform that not every Order had a lock-in
9 provision.

10 So there were situations where there were
11 hearings that went to a problem -- or went to a
12 solution for a single individual plant. So it's not
13 uncommon for that to happen.

14 Q. The language tends to be general so that it
15 will catch anybody else that tries the same thing, but
16 it may only have the effect of one, right?

17 A. That's correct.

18 Q. But that's because it only takes one to
19 cause disorderly marketing conditions, right?

20 A. That is correct.

21 Q. So if the Department had to wait until two
22 or three or four or five were involved, it might be
23 too late; is that correct?

24 A. That's -- there could be dissatisfaction

1 with the system as a whole. There could be economic
2 disadvantage to individual producers or processors.
3 So it behooves the Secretary to review the situation
4 and act.

5 Q. There was questions about similarly situated
6 partially regulated handlers throughout the country.

7 A. Yes.

8 Q. Are you aware of any other partially
9 regulated handler that is set up under the particular
10 ruling that Superior is today?

11 A. I've looked through Mr. Carman's list. And
12 while I can't say I'm aware of every single one, if I
13 look through his list, the ones that I have --

14 Q. That's 6A?

15 A. That is 6B.

16 Q. 6B.

17 A. And if I go to the last page, that would be
18 July, August. And on that list I count 37 plants. Of
19 those I think 20 of them are either a factor -- a
20 predominant factor in their scenario is either they're
21 in a State Order and unregulated territory or an
22 extended shelf life plant. I can't speak to every
23 single Order of the 37.

24 Q. But of the 20 you identified those?

1 MR. WILSON: I'm going to object.

2 THE JUDGE: Grounds?

3 MR. WILSON: When I asked him to
4 identify them, I was met with objections
5 from some counsel that they weren't allowed
6 to talk about these plants and he said he
7 didn't know. Now he's engaged in colloquy
8 where all of a sudden he knows and he's
9 describing the scenario that Mr. Yale has
10 put forward.

11 So I object to the objection being
12 sustained when I asked the question and now
13 we'll interpose her objection and ask that
14 the witness not discuss these other plants
15 on the basis of the proprietary information
16 objection.

17 THE JUDGE: Well, I don't think that
18 that was the objection that I sustained,
19 Mr. Wilson. The objection that I sustained
20 was that there was no foundation laid about
21 whether or not Schneider's was within a
22 certain Marketing Order or whether -- how
23 many plants they had, and how they
24 distributed their product, whether it was

1 plant-to-plant, whether it was within
2 various Marketing -- I think it was
3 generally to the foundational evidence to
4 discuss Schneider's. That's the objection I
5 sustained.

6 The questions I'm hearing now go to
7 evidence that's in record. I'm not hearing,
8 unless I'm missing something, any answer of
9 proprietary information.

10 MR. WILSON: Thank you. I'll withdraw
11 the objection and then just engage in a
12 little bit of recross based on this line of
13 questioning, if the Court allows it.

14 THE JUDGE: Yeah, that's fine. Sure.

15 BY MR. YALE:

16 Q. You mentioned three things here, the plants
17 are located in another state, ESL -- I mean in a State
18 Order, ESL are located predominantly -- or partly
19 predominantly in unregulated areas. Let's start with
20 ESL.

21 A. Okay.

22 Q. What is ESL?

23 A. It stands for extended shelf life. And it's
24 a general reference to packaged milk products that

1 have a different heat treatment. And so they're able
2 to -- sometimes they don't have to be refrigerated.
3 Or if they do have to be refrigerated, they have a
4 much longer distribution life.

5 And so the distribution network is more
6 extensive. They can travel greater geographies. And
7 it can also be stored in the warehouse for longer
8 periods of time. Generally the plants that produce
9 them don't have quite the same production pattern.
10 And they don't have a consistent sales and
11 distribution pattern to a plant that does not produce
12 extended shelf life products.

13 Q. And to your knowledge is Superior involved
14 in any ESL?

15 A. Not to my knowledge.

16 Q. Then you talk about regulated in a State
17 Order. What's the significance there?

18 A. Of the Section 76 provisions, there is
19 Section (c) that provides for specific regulations for
20 plants who are regulated in the State Order and with a
21 marketwide pool.

22 Q. So, for example, a plant located in
23 California that has distribution into the marketing
24 area would be subject to 76(c)?

1 A. Correct.

2 Q. And we've already discussed that Superior is
3 located in Order 33. Ohio does not have a State
4 Order, right?

5 A. That's correct.

6 Q. All right. And then the other one is that
7 it's located in markets predominantly in an
8 unregulated area. And what's the significance there?

9 A. That's a general rule. Plants predominant
10 -- any plant's predominant competition is closest to
11 home. Their sales patterns are closest to home. So
12 if you're located in an unregulated area, the
13 predominance of your sales patterns would be
14 unregulated. And that's likely to not be regulated
15 fully on a Federal Order.

16 Q. Unless your sales reached a certain level
17 within that marketing area --

18 A. Correct.

19 Q. -- right? Regardless of where you were
20 located?

21 A. Correct.

22 Q. And, again, that's not the case here, to
23 your knowledge, with Superior?

24 A. No.

1 Q. Okay. Now, you talk about the situation
2 with the plant in Wauseon and milk moving back and
3 forth. In all of your years of observing milk
4 movement of raw milk and product and the like, is this
5 a pattern that you have seen before?

6 A. There have been situations where, you know,
7 plants have transferred packaged goods on their market
8 reports for various reasons. So the entirety of that
9 occurrence is not -- this isn't the very first time
10 that it's ever happened. But it is generally designed
11 to try to slip through some scenario or regulation.
12 Perhaps the plant made a mistake and didn't want to
13 lose its pool status, so it might move packaged goods
14 around from time to time.

15 And there's times Federal Order Reform made
16 some changes in the calculation for a pool
17 distributing plant that was designed to short circuit
18 scenarios such like this where a plant was looking for
19 a loophole.

20 Q. In your opinion does this look like an
21 operation designed to find a loophole in the Orders?

22 A. Yes.

23 Q. All right. Now, you mentioned that, you
24 know, it takes one plant to do that, to have an impact

1 on the rest of it. First of all, does that have an
2 impact within the procurement area of milk?

3 A. Yes.

4 Q. And how does it have an impact on the
5 procurement area?

6 A. Well, in the example that, you know, I put
7 together, it showed that there were funds available to
8 the partially regulated plant that might not be
9 available to the fully regulated plant.

10 Q. To pay the producers?

11 A. To -- well, that could be one thing they
12 could do with those funds, pay producers.

13 Q. Or keep it?

14 A. Or add to the bottom line. Or seek
15 additional sales, to expand marketing area and share.
16 And, you know, the -- any plant would be -- would have
17 the right to do those things, just as long as they
18 start -- well, if they start with the same regulatory
19 basis, they have no complaint.

20 Q. But by having them with -- coming from the
21 same procurement area, but competing in the same
22 general marketing area but with different rules, it
23 has the potential of creating -- just add to the fact
24 might create winners and losers; is that right?

1 A. That would be correct.

2 Q. And that's a sign of disorderly marketing
3 conditions?

4 A. Yes.

5 MR. YALE: Pardon me, your Honor. I'm
6 just going through my notes here making sure
7 I've covered everything I wanted to.

8 Q. Now, you represent -- in your testimony you
9 talked about nine cooperatives that represents a
10 significant portion of the Milk Order 33; is that
11 right?

12 A. Correct.

13 Q. All right. And what role do these
14 cooperatives provide beyond supplying of milk -- any
15 of the producers; do they have any other role in the
16 marketplace?

17 A. All of those cooperatives, for example, have
18 quality incentive programs that are designed to incent
19 producers to produce better quality milk as demanded
20 by the marketplace. Milk is perishable. The demand
21 is not constant day by day. Production is pretty
22 constant. So there's a balancing function that has a
23 day-by-day activity and then a week-by-week activity,
24 a seasonal activity.

1 Milk production is seasonal. And so there's
2 times when there's a lot more than the market demands.
3 And there's times when there's not as much. So as a
4 general rule cooperatives work together to balance the
5 market at the least cost, which in general makes dairy
6 farmers -- more money for dairy farmers and reduces
7 the overall supply chain of cost.

8 Q. And also ensures the plants have a supply of
9 milk when you need it?

10 A. Ensures to the best of their ability to have
11 a supply when they need it.

12 Q. And part of the pricing and the pooling and
13 blending provisions of the Federal Order, would you
14 agree that those are designed in part to pay back to
15 the cooperatives part of that cost or that balancing?

16 A. Yes.

17 Q. All right. So that if a plant is an
18 individual handler plant -- or partially regulated
19 plant within a marketing area, do they contribute to
20 that balance of cost?

21 A. Certainly they would depending on -- of
22 course, how they procure their milk supply or if they
23 were an individual handler under the scenario with a
24 large group of independent producers, likely their

1 curve might look different than the market's curve.
2 And then it puts more balancing costs back to the
3 whole market.

4 The scenario of minimizing the cost of the
5 entire supply chain of the market is generally the
6 most efficient when all the market works together to
7 do that. It's the least amount of balancing resources
8 that are needed, the least amount of transportation
9 that's needed. That's the most efficient method.

10 Q. So by having someone who is not fully
11 participating in the blend and the Federal pricing
12 within that procurement area in a common -- in
13 somewhat common marketing area, that they're shifting
14 those costs to other participants?

15 A. Well, that could be one of the effects,
16 certainly.

17 Q. Now, we've talked about partially regulated
18 handlers and some lock-in provisions and some other
19 things. But over the years, the USDA has been faced
20 with other situations in which it appears that based
21 on the rules as it stands somebody ended up having an
22 advantage over their competitors, other than just
23 partially regulated handlers and the like; is that
24 right?

1 A. Yes.

2 Q. All right. Are you familiar -- this is
3 taking us back a few years, but the late '80s, early
4 '90s there was a plant in Clovis, New Mexico?

5 A. Yes, there was.

6 Q. Do you remember that plant, Gold Star; does
7 that ring a bell?

8 A. I think it was a boxed milk plant.

9 Q. Right.

10 A. In Clovis, New Mexico.

11 Q. And they were able to take advantage -- by
12 shipping milk into Texas were able to take advantage
13 of a pricing scheme in Texas that had never considered
14 the idea of a plant located in Clovis, New Mexico,
15 right?

16 A. That's correct.

17 Q. And it gave them an advantage?

18 A. At the time.

19 Q. And they were the only plant basically that
20 were taking advantage of that?

21 A. Yes.

22 Q. And was there a hearing held on that?

23 A. There was.

24 Q. And was there a corrective action to the

1 Orders to take care of that?

2 A. I don't remember the specifics, but I think
3 the answer to that is yes. And I don't think the
4 plant remained around too much longer after the
5 loophole was closed.

6 Q. Do you know of any other examples such as
7 that?

8 A. I'm familiar with situations where, for
9 example, people have -- have located processing
10 facilities, you know, or reload facilities to take
11 advantage of a location or a change. And then there
12 have been -- on the flip side there's times when
13 location adjustments have changed, pricing -- or
14 pricing services have changed in the Order, and people
15 have been upset about them. So it's not uncommon to
16 see changes in the status quo in Order Regulation.

17 Q. One final question. I want to know whether
18 you've heard -- there was a litigation that went on
19 leading up, you know, prior to this hearing, right;
20 you're aware of that?

21 A. I'm aware. I'm not familiar with all of the
22 documents.

23 Q. You've read some of the documents?

24 A. I've read a few of the documents. I haven't

1 read them all.

2 Q. All right. I want to read a paragraph and
3 see if you had read this one or not. It's one of the
4 pleadings. On September 14, 2011, AMS --

5 MR. WILSON: Hold on. May your Honor
6 ask him to identify what pleading he's
7 looking for so we can read along?

8 MR. YALE: Sure. That would be fine.
9 It is the affidavit of Dana Coale. And it
10 is from Paragraph 6. And it was attached to
11 the memorandum in opposition to the motion
12 for a preliminary injunction filed by the
13 USDA.

14 MR. BESHORE: Filed by Superior.

15 MR. YALE: No. I mean in opposition.
16 This is the affidavit that was filed in
17 opposition.

18 Q. Okay. AMS is not aware of any other
19 similarly situated partially regulated handler located
20 in another marketing area. Further, since a decision
21 has not been issued on whether or not a partially
22 regulated plant located within a marketing area
23 creates disorderly marketing conditions, it would be
24 premature for USDA to consider the issue on a national

1 basis. Do you recall seeing that?

2 A. I've not seen Dana's affidavit.

3 MR. YALE: All right. Very good. I
4 don't have any other questions, your Honor.

5 THE JUDGE: Okay. Thank you.

6 MR. WILSON: Your Honor, I don't know
7 if there's any more questions for the
8 witness. I do have one administrative
9 matter pertinent to this portion of the
10 case. But I don't want to step on -- if
11 anybody wants to ask questions.

12 THE JUDGE: Well, yes, because I think
13 we would have redirect before we --

14 MR. WILSON: Yeah. I'm just bringing
15 to your attention that I want to raise an
16 administrative matter before we close out
17 this portion of the proceedings. It
18 pertains to evidence with this witness.

19 THE JUDGE: Okay. Well, I was going to
20 address your 26; is that what you want to
21 do?

22 MR. WILSON: What I want to do is have
23 the Exhibit 36 -- what I was attempting to
24 mark as Exhibit 27 the Court declined to

1 permit me to use the exhibit and to inquire
2 from it. That's not the issue here. I
3 would pursuant to Rule 900.8(d)(6) of the
4 Rules of Practice simply ask that the
5 exhibit be marked and accompany the record.

6 THE JUDGE: Okay. That's fine.

7 MR. YALE: That's Exhibit 26 or 27?

8 THE JUDGE: 27.

9 MR. WILSON: 27 is what I wrote on
10 here.

11 MS. YOVIENE: What's it entitled?

12 MR. WILSON: It was going to be
13 pertinent to the questions that I was going
14 to ask about Pennsylvania, and the Court
15 declared that I ought not to do that. So
16 that's what that pertains to. You objected,
17 remember?

18 MS. YOVIENE: Oh, so -- it was marked
19 as 26, as I recall.

20 THE JUDGE: No. 26 was the map.

21 MR. WILSON: I'm not going to try to
22 get that in. That was just to help the
23 witness try to remember where the two plants
24 were located.

1 THE JUDGE: So just for the sake of
2 keeping a clean record, do you withdraw 26?

3 MR. WILSON: Well, I'll mark it and
4 allow it to accompany the record, but I
5 won't move for its admittance, if that's the
6 proper terminology, at this time.

7 THE JUDGE: No, it's either in the
8 record or it's not.

9 MR. WILSON: Well, I'm asking for that
10 document the same treatment I'm asking with
11 respect to Exhibit 27 then, that it be
12 marked and accompany the record. And there
13 was an objection stated as to it, I believe.

14 THE JUDGE: Well, there was an
15 objection to 26.

16 MS. YOVIENE: I don't even know what 27
17 is.

18 THE JUDGE: I think 27 was never shown
19 to anyone. Questions were asked. And there
20 were objections. The objections were
21 sustained. But we never revisited 27.

22 But I would like to really revisit
23 these documents at the end of Mr. Hollon's
24 testimony so we don't have them standing

1 there. And you're out of line to be asking
2 him questions at this point because we can
3 do redirect.

4 MR. WILSON: Your Honor, I approached
5 the podium because I thought you invited me
6 to do so.

7 THE JUDGE: Well, I did. But you said
8 it was an administrative thing.

9 MR. WILSON: Right. Evidentiary.

10 THE JUDGE: And before you advanced I
11 said --

12 MR. WILSON: All right. Thank you.
13 I'll sit down.

14 THE JUDGE: Let's get to the other
15 parties and we'll get back to you in turn.

16 MR. WILSON: I apologize. I misread
17 your directive.

18 THE JUDGE: You don't have to
19 apologize. We can keep it -- I'm just
20 trying to keep things clean.

21 Okay. Do you have any questions,
22 Ms. Pichelman?

23 MS. PICHELMAN: Yes, your Honor. The
24 Government has a couple questions. I'm

1 going to start with --

2 THE JUDGE: I would like to just before
3 we go there -- Mr. Hollon has been here for
4 two hours and so has everybody else.

5 Do people need a quick biological
6 break? Let's go off the record for ten
7 minutes.

8 (Off the record.)

9 THE JUDGE: All right. We are back on
10 the record after a brief recess this
11 afternoon. And we will commence with the
12 examination of Mr. Hollon by Ms. Pichelman.
13 Your witness.

14 EXAMINATION

15 BY MS. PICHELMAN:

16 Q. Mr. Hollon, I think Mr. Beshore kind of went
17 through this with you, but I just want to make sure
18 the record is clarified. Looking at your testimony on
19 Page 15, just for the record, there was some language
20 that was added and also omitted in the beginning of
21 the pool plant definition that I believe was not
22 intended to be a proposal of DFA, but I just was going
23 to walk through it just for the record.

24 A. Okay. Yes, ma'am.

1 Q. In the beginning it says, Pool plant means a
2 plant, unit of plants, or a system of plants. The
3 word "a" is actually then added by you. You did not
4 intend to --

5 A. No, I did not.

6 Q. Okay. Secondly, if you continue with that
7 sentence, system of plants as specified in paragraphs
8 (a) through (f) of this section. What has been
9 omitted and now your testimony is for a plant
10 specified in paragraph (g) of this section. That's
11 currently in the regulations. And your proposal is
12 not to omit that from --

13 A. It was not my intent.

14 Q. Okay.

15 A. My cut and paste isn't working too good.

16 Q. And then finally in (a) it states, A
17 distributing plant, other than a plant qualified as a
18 pool plant pursuant to paragraph (b) of this section
19 or -- you have section or 1000.7(b) of any other
20 Federal Milk Order. And the current regulations just
21 have 1000 and then it's blank 0.7(b).

22 You also did not propose to add -- to put
23 1000 there instead of a blank?

24 A. I did not.

1 MS. PICHELMAN: Okay. Thank you.

2 That's all of my questions.

3 THE JUDGE: Thank you.

4 MS. PICHELMAN: Your Honor, now AMS has
5 a few questions.

6 THE JUDGE: All right. Please state
7 and spell your name for the record and
8 identify your affiliation.

9 MS. TAYLOR: My name is Erin Taylor,
10 E-r-i-n T-a-y-l-o-r. I'm with USDA, AMS,
11 Dairy Programs.

12 EXAMINATION

13 BY MS. TAYLOR:

14 Q. Good afternoon, Mr. Hollon.

15 A. Good afternoon, Ms. Taylor.

16 Q. Thank you for testifying today. I'm going
17 to start with Exhibit 25, your spreadsheet, some
18 clarification questions so that when we get back to
19 D.C., everyone knows what's on the spreadsheet and
20 there's no questions that we can't get answered later.

21 We're going to start with the first page,
22 Column A, Ohio Milk Pounds. That is in thousands of
23 pounds?

24 A. Yes.

1 Q. Okay. And then when we move on to G through
2 J, that's just in pounds; that's not in any
3 abbreviated form?

4 A. Correct.

5 Q. Okay. On the last page of that exhibit,
6 start with Column RR, Federal Order 33, Ohio Milkshed
7 Mailbox Price. You said this came from Order 3 (sic)
8 data, I believe?

9 A. Order 33 data.

10 Q. Yes. Excuse me. Order 33 data. Is that
11 Ohio Milkshed -- is that defined in the specific data
12 set from them or is that a defined term that you used?

13 A. It's published in Dairy Market News, which
14 when you get down to the footnotes, it says that the
15 data is supplied by each individual Market
16 Administrator.

17 Q. And in column TT, you stated that the green
18 cells shows where the value in Column PP is greater
19 than the value in Column TT?

20 A. Yes.

21 Q. And if you look down to March 2011, I
22 believe that cell is marked green, but that -- perhaps
23 it should be marked orange; that the value in that
24 cell is actually greater than the value of PP? 21.72

1 is what's in TT and the value in PP is 20.82.

2 A. Did I state them backwards? The goal here
3 -- or the analysis is that PP is greater than TT.

4 Q. That is --

5 A. You're right. You're correct.

6 Q. Okay. So that one box --

7 A. That should be orange.

8 Q. Should be orange. And now that I'm looking
9 at it, in November of 2010 those two values are equal?

10 A. Correct.

11 Q. So --

12 A. The testimony said equal or greater than.

13 Q. Equal or greater than. Okay. So then when
14 we go back to your testimony, and I'll get to that
15 page, where you state there's eight examples, it
16 should then be seven?

17 A. Correct. It should be seven.

18 Q. Okay. And then the calculation you made in
19 Column AAA, which is the Estimated Total Dollar Gain
20 or Loss?

21 A. Yes.

22 Q. And that should be the value in Column ZZ
23 times the value in Column QQ, divided by 100?

24 A. Yes.

1 Q. I get a slightly different number when I do
2 that calculation, and perhaps there's a rounding
3 somewhere that it's not showing. When I use my
4 calculator to do that, I get the number just 291,000.
5 I don't get an extra 442 pounds (sic).

6 A. Dollars.

7 Q. Excuse me, dollars.

8 A. It could well have been picking up a
9 fraction from back at -- I didn't -- you know, showed
10 everything in two decimal places on the page.

11 Q. Okay. So this 97 cents could be a few more
12 decimals?

13 A. Yes.

14 Q. Okay. I think that's it for that exhibit.
15 I want to move on to your testimony in Exhibit 21,
16 Page 1. At the bottom you discuss your estimate on
17 the number of small businesses by farms within the
18 marketing area?

19 A. Yes.

20 Q. And you say you estimate that more than
21 85 percent of the producers are small businesses.
22 Where did you get that 85 percent figure?

23 A. I started out with the \$750,000 definition
24 of small business and used a 16.43 Ohio mailbox price

1 for calendar year 2010. Did the math on that. And it
2 gave me 45,648.2 hundredweights, 12 months. Divide
3 those two. I got 380,402 pounds per month.

4 I went back and looked through the brackets
5 of production by farm size. And the two largest
6 brackets accommodated the majority of that milk and
7 made an assumption of half of the next bracket to get
8 to that farm size. Because the brackets were not
9 subdivided enough for me to get an exact farm count.

10 Q. Okay.

11 A. And when I did the calculation the way I
12 just described it, all of the 227 plus all of the
13 238 -- the largest bracket was 227, the next bracket
14 was 238, the next bracket was 288. I got 753 farms
15 and that amounted to 89 percent of the total -- or
16 that was the big farms -- bigger than a small
17 business. So the remainder -- and I rounded that.

18 MS. PICHELMAN: Real quickly, is your
19 microphone on right now; can you hear him in
20 the back?

21 MR. BESHORE: No, we can't.

22 MS. PICHELMAN: Okay. I don't think
23 your microphone is on. I want to make sure
24 everybody can hear you.

1 THE WITNESS: I had nothing to do with
2 it going on or off.

3 MS. PICHELMAN: There's no on/off
4 switch?

5 THE WITNESS: Is that better? Is that
6 better?

7 BY MS. TAYLOR:

8 Q. I want to move on to Page 14 of your written
9 statement. I want to discuss the first two full
10 paragraphs you have there. So first where it says, In
11 8 of the 19 months, it should be 7?

12 A. Correct.

13 Q. And then in the second sentence, In the
14 remaining 11, it should be 12?

15 A. Correct.

16 Q. Okay. We'll start there. This paragraph
17 looks back at Exhibit 25, Page 3, the green box; is
18 that what you discussed?

19 A. Correct.

20 Q. Okay. Can you kind of just go over again
21 what these green boxes mean in relation to this
22 paragraph? Because I think this is kind of trying to
23 summarize some of your argument, and I'm not sure it's
24 clear for the record what exactly that means.

1 A. Column PP is a comparison of the component
2 minimum price at test and the in-plant blend price.
3 And the handler in this, you know, example would be
4 obligated to pay his producers at least the in-plant
5 blend price.

6 For a fully regulated handler they would
7 only have the value equal to the component price. The
8 remaining classified value would go into the pool.
9 And they would not have that in their funds to meet
10 their payroll. And so that's the source of Column QQ
11 is the difference between those two.

12 I wanted to see how that in-plant blend
13 price might compare with the actual mailbox price. So
14 we took the published mailbox price, added the hauling
15 promotion and MA fees as numbers to represent a
16 typical farm, that every farm would be obligated to
17 pay that in this milkshed, from some revenue source,
18 and that's the summation, for example, in June that
19 arrives at \$17.52.

20 So in that particular month the in-plant
21 blend price of 17.11 both met the obligation and was
22 actually greater than what had to be paid. So my
23 assumption from that is that there's some additional
24 dollars that are available to the partially regulated

1 plant. And I saw that in June, in July -- it was
2 equal in November and December -- April of 2011, May
3 of 2011, and June of 2011. So that's what that
4 calculation is designed to show.

5 Q. Okay. So in the remaining 12 months, when
6 you say all handlers in your example, do you mean all
7 fully regulated handlers?

8 A. Yes.

9 Q. So that says that then in order to compete
10 with a partially regulated handler, they have to pay
11 in excess of the minimum price?

12 A. The minimum component blend price falls far,
13 far short of the mailbox price of Column TT.

14 Q. Okay.

15 A. And that's what the stats say an average
16 producer would get. So you would assume that would be
17 at a minimum, the competitive value. So to get from
18 the component price minimum to the mailbox price, some
19 more money has to come from somewhere. The fully
20 regulated handler puts a portion of his into the pool,
21 so he doesn't have that to pay.

22 Q. Okay. So then that brings us down to that
23 following paragraph where you're trying to give an
24 example of a disorder that -- the partially regulated

1 plant -- the fully regulated plant has to come up with
2 more money from somewhere else besides what they --
3 the minimum price that they have to pay because of the
4 advantage that you say a partially regulated handler
5 has and that they have some extra money to procure
6 milk supplies?

7 A. Yes. The fully regulated handler has taken
8 the classified value and shared it with the marketwide
9 pool. So it's not available at their discretion to
10 pay the milk supply. A partially regulated handler
11 doesn't share that classified value with the pool.
12 And so they meet the -- if they meet the minimum
13 in-plant blend price, they pay their use value, they
14 don't have to come up with any more money.

15 Q. Okay. I have an additional question back
16 to -- well, in the same part of Exhibit 25 I meant to
17 ask before. You talked about in Column SS -- you're
18 including the hauling cost, promotion fee, and a
19 non-member service fee?

20 A. Yes.

21 Q. You had said that the non-member fee was --
22 you thought was 7 cents?

23 A. Yes.

24 Q. Just to clarify for the record that if --

1 would you agree that if we went back to Section --
2 that 1000.76(a) allows for no more than 7 cents as a
3 deduction from marketing services, but in Order 33
4 that actual deduction currently is 5 cents?

5 A. Okay. So it's been moved -- it's not
6 reached the full maximum yet or it's been reduced
7 perhaps periodically. So whatever the stated amount
8 is currently, that's what it should be in that
9 equation.

10 MS. TAYLOR: Okay. That's all I have
11 for the moment. My colleague has some
12 questions.

13 MR. RICHMOND: Bill Richmond,
14 R-i-c-h-m-o-n-d. USDA.

15 EXAMINATION

16 BY MR. RICHMOND:

17 Q. Good afternoon, Mr. Hollon.

18 A. Good afternoon.

19 Q. I just wanted to briefly touch on the actual
20 Order language. Your proposal would add a sentence to
21 1033.7(a) that reads, Plants located within the
22 marketing area with combined route disposition and
23 transfers of at least 50 percent into all Federal
24 Order Marketing Areas but without 25 percent of route

1 disposition and transfers into any one Federal Order
2 will be regulated as a distributing plant in this
3 Order.

4 Can you expand for us a little bit the
5 reasoning behind the 50 percent and also the
6 25 percent?

7 A. Well, the 25 percent is the current
8 standard. And so that would be -- the reason for
9 that, we didn't hit 25 percent in any one Order. And
10 as we discussed in our group, we knew we needed to
11 come up with a number and -- whether it was going to
12 be 26 or 99.

13 And so as we discussed what would be a
14 reasonable number that would not be too low and would
15 not be too high, we agreed amongst ourselves that
16 50 percent was the number that we would pick and that
17 it should be a reasonable test of over -- if half of
18 your receipts are in Federal Order territory, we would
19 think, well, that seems to be a reasonable indicator
20 that you should be regulated in the system.

21 Q. Okay.

22 A. So we picked that as a reasonable test
23 number.

24 Q. Okay. Thank you. Let's look now at Page

1 16, your paragraph under the Request for Emergency
2 Consideration. Your testimony has revolved around a
3 lot of the potential advantages that can be gained
4 from falling under partial regulations.

5 If you could, for the record, just clarify
6 for us what is the fundamental disorder that's
7 occurring or stands to occur and why should this be
8 considered as an emergency?

9 A. There would be a handful -- you know, first
10 of all, the handler competition issue is alive and
11 real. And so we do have customers in Order 33 and in
12 other Orders who have asked competitive questions.
13 And, you know, that's a day-to-day, you know, fact in
14 our business.

15 So we have handlers in other Orders as I
16 outlined to Mr. Wilson who have said, gee, I look at
17 my competitive area in Atlanta and I see where I've
18 got product that looks a whole lot like this product,
19 and its, you know, price is something that I don't
20 understand how it works; now, how can it be that
21 inexpensive and in addition to that it was packaged a
22 lot of miles away from my plant. So we get those kind
23 of questions. So -- those are day-to-day,
24 week-to-week, month-to-month questions. And those are

1 the most pressing and the most active.

2 And our concern on the producer side is
3 that -- in months where the funds are available, there
4 may begin to be a procurement difference with plants
5 in the same geographic territory, procuring in the
6 same -- if the procurement is in the same geographic
7 territory, producers are side by side. And that's not
8 quite as quick to occur.

9 But it nonetheless -- and it has both the
10 potential and can occur where a producer will come and
11 say, well, you know, a partially regulated plant or
12 this plant has offered me this, you know, so maybe we
13 can't compete with that because we don't have the
14 funds, so -- there's other cooperative members
15 procuring.

16 And so those would be the two areas where we
17 see the most amount of problem. To some extent if
18 plants flip back and forth between Orders, and while
19 that hasn't been the case here yet, that sometimes is
20 a problem. Because maybe you sell somebody based on
21 expectations of returns and volumes -- returns, dollar
22 amounts, and then -- or blend price, and that becomes
23 a problem to the seller. And then if somebody can
24 pick their regulation, that seems inherently unfair

1 that I can look and say, well, I can be an (a) plant
2 or a (b) plant. And as we saw from Mr. Carman's
3 exhibit those numbers weren't consistent across the
4 row from time to time.

5 So all of those are issues that -- you know,
6 we have concerns about. Some are more active than
7 others at the moment. But we have them now and we
8 think they warrant emergency conditions because
9 they're ongoing. They happened yesterday. They
10 happened today. They'll happen until the situation is
11 resolved.

12 MR. RICHMOND: Okay. That's all I
13 have. We appreciate it.

14 THE WITNESS: You're welcome.

15 THE JUDGE: All right. Is there anyone
16 else who has questions they would like to
17 put forward to Mr. Hollon?

18 (No response.)

19 THE JUDGE: Can everybody hear me?
20 Okay. All right. Any redirect from
21 Mr. Beshore?

22 MR. BESHORE: Yes. Is there recross
23 from Mr. Wilson?

24 THE JUDGE: Well, you haven't done your

1 redirect yet, so...

2 MR. BESHORE: I thought he was going to
3 cross on the other --

4 THE JUDGE: I'd rather put it all
5 together.

6 MR. BESHORE: Okay.

7 REDIRECT EXAMINATION

8 BY MR. BESHORE:

9 Q. Mr. Hollon, let's look at Exhibit 6B,
10 please, if you would. And let's go to -- just take
11 the last page, which is the most current two months of
12 information relating to this part of 6B. Do you have
13 that?

14 A. I do.

15 Q. Okay. Now, I just want to inquire about the
16 similarities and differences here in terms of some of
17 the plants. I'd like you to focus -- just look at the
18 column under July and August which show for the given
19 plant on the line how many different Orders they're
20 distributing milk in.

21 Okay. That's what -- under July on each
22 line it shows how many Orders the given plant has
23 distribution in; is that your understanding of the
24 exhibit?

1 A. Yes.

2 Q. Okay. And for Superior Dairy in Canton,
3 Ohio, as your testimony stated there is distribution
4 in seven Federal Order areas, correct?

5 A. Correct.

6 Q. Okay. Now, I want to compare that to the
7 other plants here which show distribution in more than
8 two Federal Order areas starting from the top. And
9 I'm going to ask you for each one, if you know
10 anything about what type of products that particular
11 plant may distribute.

12 The first one -- and I'm in July coming down
13 from the top -- that has distribution in more than two
14 Orders is Kohler Mix Specialties of Minnesota, LLC,
15 White Bear Lake, Minnesota. Are you familiar with
16 that plant?

17 A. No, I'm not.

18 Q. Do you know -- okay. So you don't know
19 anything about their product mix?

20 A. Other than their name, which indicates to me
21 it probably makes ice cream mix -- but I'm not
22 familiar with this plant.

23 Q. Okay. Let's go down -- Superior is the next
24 one -- to the next plant that has distribution in more

1 than two Orders, Darigold, Inc., Boise, Idaho. Are
2 you familiar with that plant?

3 A. I am.

4 Q. Do you know anything about its product mix?

5 A. They have an extensive organic milk
6 distribution system. And it's done through an ESL
7 packaging network. So they have distribution all over
8 the country. And if my memory serves me correct, they
9 do some private label for one of the larger organic
10 milk lines, either Horizon or Aurora.

11 Q. Okay. So's that extended shelf life
12 product -- organic extended shelf life product to your
13 knowledge?

14 A. And also Boise, Idaho, is located in an
15 unregulated geography. It's not a part of any
16 marketing area.

17 Q. Okay. Let's move down then to the next
18 plant, which I believe is Gossner Foods, Logan, Utah.
19 What do you know about the Gossner plant?

20 A. It's located in an unregulated marketing
21 area. And they do have an extended shelf life product
22 that is distributed widely both in the U.S. and
23 internationally.

24 Q. Now, extended shelf life, the pool plant

1 definitions in Order 33, and they're all Federal
2 Orders, have a separate category for plants producing
3 extended shelf life product, correct?

4 A. Yes.

5 Q. Okay. So they're pooled or not pooled under
6 rules that apply strictly to extended shelf life
7 products, right --

8 A. Correct.

9 Q. -- processing plants?

10 A. I've already had this discussion with
11 Mr. Wilson and Mr. Yale.

12 Q. Okay. So in terms of your testimony with
13 respect to Superior and your customers, those plants
14 aren't similarly situated to Superior?

15 A. Not in terms of being in an unregulated
16 territory, nor to my knowledge with an extended shelf
17 life product.

18 Q. Okay. Let's go then to the next plant
19 that's more than two Orders, HP Hood, LLC, Sacramento,
20 California. Do you know anything about their product
21 mix?

22 A. They have extended shelf life products. And
23 they are in a State regulated market, the California
24 Order. And I suppose you could say they're in an

1 unregulated territory with regard to Federal Orders.

2 Q. So not only do they have a different type of
3 product than Superior Dairy, but they're also under
4 Category 76(c) in a State Order marketwide pool in
5 California?

6 A. Yes.

7 Q. Okay. Let's look then at Meadow Gold
8 Dairies, Inc., Salt Lake City, Utah. Do you know
9 anything about that plant and its product mix?

10 A. To my knowledge it is not an extended shelf
11 life product plant, but it is in an unregulated
12 marketing area.

13 Q. Okay. Morningstar Foods in Gustine,
14 California, shows a distribution in four Federal
15 Orders. What do you know about that?

16 A. It's in a State Milk Marketing Order. So it
17 would be a 76(c) plant.

18 Q. Do you know anything about its product?

19 A. I do not.

20 Q. How about Straus Family Creamery in
21 Marshall, California, three Orders?

22 A. Only that it's in a State Order.

23 Q. Stremicks Heritage Foods, Riverside,
24 California?

1 A. Both of the Stremicks plants in Riverside,
2 California, are partially owned by DFA. They are in a
3 State Marketing Order. And they have extended shelf
4 life products.

5 Q. That's at Riverside in Santa Ana,
6 California?

7 A. Yes.

8 Q. So finally on this list, again, the last
9 plant listed with distribution in more than two
10 Federal Order areas is WhiteWave Foods, City of
11 Industry, California. What do you know about the
12 product mix or operations at that plant?

13 A. Only that it's in a State regulated
14 geography -- State regulated Order.

15 Q. Okay. And is it your testimony that plants
16 in a non-Federally regulated area -- State Order or
17 just non-Federally regulated area are different than
18 Superior, Canton, which is in the middle of Order 33?

19 A. That's correct. They're not in Order -- the
20 middle of Order 33 is not in a State regulated area,
21 nor is it in an unregulated market territory.

22 Q. And in plants that have extended shelf life
23 products, it's a different competitive arena than the
24 standard fresh distributing milk products?

1 A. Yes. Again, in some conversation with
2 Mr. Wilson and Mr. Yale we discussed that.

3 Q. Okay. All of the other plants that are
4 partially regulated plants on this list appear to only
5 distribute in one or -- in a couple cases two -- two
6 Orders, correct?

7 A. Judging from the -- yes, from the detail
8 provided in the exhibit.

9 Q. At least in July and August of --

10 A. Yes.

11 Q. -- 2011? And that is a type of distribution
12 pattern that's not the same as Superior, Canton; would
13 you agree?

14 A. I would agree. I'm not familiar with every
15 single -- of the remaining plants. The ones we've
16 gone over I told you what I knew about them. But I
17 don't know information about every one of the 37 on
18 the list.

19 Q. Okay. Now, you are aware, are you not, that
20 in -- that a number of the states in the Northeast and
21 the East have State Regulations, State minimum milk
22 price regulations?

23 A. There are State milk price regulations in
24 New York and Virginia. And in both of those states

1 some of the geography is in the Federal Order and some
2 of it is in a Federal Order -- or in a State Order and
3 some is in a Federal Order.

4 Q. Is it your --

5 A. Oh, and Pennsylvania.

6 Q. -- best of your knowledge that the State
7 Regulations apply at least in the non-Federally
8 regulated portions of those states?

9 A. Yes.

10 Q. And how about Pennsylvania?

11 A. Same. Pennsylvania has some of its
12 geography in the Federal Order and some in the State
13 Order. And the State Order Regulations apply in
14 non-Federally regulated areas.

15 Q. Okay. With respect to the operation of --
16 by the way, do you -- Mr. Yale read to you the
17 affidavit of Dana Coale, the Deputy Administrator of
18 AMS, indicating that she was not aware of similarly
19 situated partially regulated distributing plants in
20 Federal Order Marketing Areas. Do you agree with that
21 statement?

22 A. I would certainly not dispute Ms. Coale.

23 Q. Okay. Is that also your knowledge, that
24 you're not aware of any partially regulated

1 distributing plants located in Federal Marketing Order
2 Areas that are similar to the Canton, Ohio, Superior
3 Dairy facility?

4 A. I'm not aware of any. Again, with regard to
5 this exhibit I don't know everything about all of the
6 plants that are there. But I would also lean heavily
7 on Ms. Coale's assertion.

8 Q. Now, the assertion has been made by Superior
9 in various communications, pleadings, et cetera, that
10 there's something nefarious and unique about geography
11 as a criteria for -- as one of the criteria for the
12 regulation of a distributing plant; you're aware of
13 that?

14 A. Yes.

15 Q. Okay. And do you agree with that?

16 A. It's not nefarious and it's not unique and
17 it can be used as a regulation. Again, I discussed it
18 with Mr. Wilson. We talked about, for example, the
19 lock-in provisions, that geography is a real key
20 factor in effecting -- you know, is there something
21 about the geography that makes it difficult for a
22 plant to be regulated or not regulated. And so that
23 factored into the decision of a change in regulation.

24 Q. And, for instance, the Winchester, Kentucky,

1 plant which presumably is reasonably not far from
2 Superior, and they have some interactions
3 conceivably -- is locked into a different Federal
4 Order than Order 33 by its geography, correct -- it's
5 locked into Order 5?

6 A. Yes.

7 Q. Because the Secretary found that for orderly
8 marketing it was necessary to lock in any plant in
9 that part of Kentucky into Order 5?

10 A. So the milk supply -- that it could procure
11 a milk supply in the general vicinity of its plant,
12 even though in that particular case it had sales -- a
13 large amount of sales in another Federal Order.

14 Q. Okay. And presently every Federal Order
15 locks ESL plants, UHT plants into the geography where
16 they're located, correct?

17 A. To my knowledge, yes.

18 Q. If they're in a marketing area?

19 A. To my knowledge, yes.

20 Q. And prior to that there were -- are you
21 familiar with the fact that there were Order hearings
22 which specifically addressed individual plants and
23 where they -- individual UHT or ESL plants and where
24 they should be regulated?

1 A. Yes.

2 Q. For instance, the Savannah, Georgia, plant
3 was regulated under a given Order by virtue of the
4 hearing just like this one?

5 A. Yes, that would be correct. That's the one
6 that comes to mind.

7 Q. Okay. Same thing true for a plant in
8 Michigan; do you recall that -- the White Light --

9 A. White Knight Packaging, yes.

10 Q. White Knight, not White Light. White
11 Knight. Okay.

12 A. Yes.

13 Q. And the KanPak, Kansas Pak --

14 MR. WILSON: Your Honor --

15 Q. -- plant in --

16 MR. WILSON: -- objection.

17 THE JUDGE: Grounds, please?

18 MR. WILSON: I endeavored to ask about
19 one state, Pennsylvania, and I was
20 instructed not to do so. And everybody else
21 is asking about every state -- Georgia,
22 Kansas -- and I don't quite understand the
23 difference and how that's relevant to what
24 I've been told is consideration of Order 33

1 and Order 33 alone. So that's the nature of
2 my objection.

3 THE JUDGE: Okay. I would just like
4 the record to reflect that the questions you
5 asked were not the same general questions,
6 are you aware. You put a piece of paper in
7 front of a witness and started asking
8 specific questions about the piece of paper
9 before establishing whether the witness knew
10 anything about it or not.

11 So I do think that they're different
12 questions. As to the relevance of this,
13 I'll ask you, Mr. Beshore, to explain how
14 your line of questioning is relevant to the
15 validity of changing the Marketing Order in
16 33.

17 MR. BESHORE: Well, it's just eliciting
18 some examples for the record of other
19 hearings that addressed one plant and its
20 regulation, and that geography is a
21 consideration also. And it's regulation of
22 the -- you know, as I say, the challenge has
23 been made that those characteristics of this
24 hearing should lead to its rejection --

1 proposal's rejection.

2 THE JUDGE: Okay.

3 MR. BESHORE: Just one other question
4 on that.

5 BY MR. BESHORE:

6 Q. The KanPak plant in Kansas, do you recall
7 that was subject to a hearing to lock it into --

8 A. I don't recall that.

9 Q. Okay. Let me ask another -- about another
10 aspect of the Superior circumstances and the hearing
11 today and whether you've seen that in any other --
12 whether that existed in any other situations.

13 Are you and -- now, Superior, as a direct
14 reflection of your testimony, has two plants, one in
15 Canton and one in Wauseon, correct?

16 A. Correct.

17 Q. Both in the marketing area of Order 33,
18 correct?

19 A. Correct.

20 Q. Okay. Now, the transactions that are
21 underlying involve Canton delivering -- the Canton
22 plant processing product, delivering it to Wauseon
23 where it's unloaded and then reloaded, and then taking
24 it back past Canton into the Order 1 area, correct?

1 A. That's our hypothesis. I don't have direct
2 knowledge of what they do on a day-to-day basis. But
3 that makes logical sense to me that that's what's
4 happening.

5 Q. Okay. Well, let's assume that's correct.
6 Are you aware of any other circumstances where
7 plants -- two plants owned by the same company move
8 packaged milk from one plant west and then back again
9 over the same geography in order to get to the final
10 destination?

11 A. No, I'm not.

12 Q. As far as your knowledge is concerned that's
13 unique to Superior Dairy and its two plant operations?

14 A. I can only say based on, you know, my
15 knowledge of dealing with other customers that I don't
16 see that happening, unless there's an occasional plant
17 breakdown, unless there's some kind of catastrophe.
18 But in the scenario to do it on a several or
19 multi-month basis, I'm not familiar with it happening
20 anywhere.

21 Q. Okay. Are those types of milk movements --
22 as an economist and a milk marketing expert would you
23 consider them uneconomic milk movements?

24 A. On their face you would have to consider it

1 uneconomic. I can't see the entirety of the equation
2 that Superior is evaluating in this case. But on the
3 surface that seems like an awfully inefficient way to
4 deliver packaged milk products.

5 Q. Set aside whether there's any gain or loss
6 under the regulatory program, is it -- as an
7 economist, is it a -- would you have any -- do you
8 believe it to be an economic transaction to move milk
9 roughly 190 miles west -- milk products, then back the
10 same 190 miles east, and then further east to their
11 ultimate destination?

12 A. No, that does not seem to be an economic
13 process.

14 Q. Is it not the case that the Secretary in
15 Federal Milk Order proceedings has regularly when
16 evidence has been shown of uneconomic milk movements
17 done solely for pooling purposes or regulatory
18 purposes made changes to those regulations to
19 eliminate the incentive or the possibility of yielding
20 financial returns from uneconomic milk movements?

21 A. Yes. And I think in the recent -- for
22 example, the transportation hearing in the Southeast,
23 the Secretary made a determination that a plant could
24 not claim transportation credit into grocery credit in

1 the same load of milk, so to prevent someone from
2 making an uneconomic movement to take advantage of the
3 transportation pool.

4 In one of the depooling hearings there was a
5 finding that a supply plant outside the boundaries of
6 a marketing area could not be used to qualify milk in
7 that area. So it had to show a true economic
8 performance standard in order to gain advantage of the
9 marketwide pool.

10 In the Order 33 depooling hearing there was
11 also, I think -- my memory says there was language
12 instituted to tighten up the performance standards in
13 order to demonstrate true economic performance and
14 share in the marketwide pool. So those would be three
15 examples that come to mind when the Secretary has made
16 that determination and ruled that the regulation
17 should be modified.

18 Q. Okay. So there wasn't any incentive for
19 those uneconomic transactions?

20 A. Yes.

21 Q. Okay. Now, Exhibit 25, your spreadsheet, I
22 want to talk about that, just a question or two.
23 First of all, you did not use any proprietary
24 information related to Superior Dairy's utilization

1 percentages for -- or volumes in this exhibit; is that
2 correct?

3 A. That's correct.

4 Q. However, you -- because DFA supplied
5 Superior Dairy -- you know, you could have -- if you
6 wanted to violate that proprietary information
7 relationship, you could have obtained that kind of
8 information and used it, but you have intentionally
9 not done that, correct?

10 A. The only thing that I would have known would
11 have been delivery volumes. I wouldn't necessarily
12 have known every facet of their sales patterns or
13 anything else. But, you know, obviously we sell their
14 milk. So we know how much we sell them. They buy
15 milk from us. They know how much, you know, that
16 transaction is.

17 But we did not use those. We used
18 information as outlined in the testimony that came
19 from published documents to make assumptions about
20 volumes.

21 Q. Is it possible that sales would have been on
22 the basis of utilization --

23 A. It's possible.

24 Q. -- classified --

1 A. Yes.

2 Q. -- without utilizations so that rather than
3 using, you know, a blended utilization from 20 other
4 plants, you could have used Canton's actual numbers
5 from --

6 A. Based on our sales.

7 Q. -- your sales records, but you did not,
8 correct?

9 A. No, did not.

10 Q. Okay.

11 A. As I testified we used a typical blend of
12 more than 20 plants in the competitive area.

13 Q. Okay. And if Superior thought that that was
14 overstating an advantage because of their
15 utilizations, they could correct it if they chose to?

16 A. They can, yes.

17 Q. All right. But you're not going to do it,
18 you're going to keep that proprietary?

19 A. Yes.

20 Q. Now, when Canton -- during the months when
21 it has been partially regulated, is it not correct,
22 that either Order 1 or Order 33 has actually suffered
23 a diminution of funds in the pool because Canton has
24 not been a fully regulated distributing plant?

1 A. I'll have to give that some more
2 consideration. Off the top of my head I'm not sure.

3 Q. Did you show in your Exhibit 25, for
4 instance -- and you testified that when they're
5 partially regulated, they don't have to pay?

6 A. Well, that would be true. Yes, that would
7 be a fact.

8 Q. And therefore since they have not paid into
9 the pool --

10 A. Yes.

11 Q. -- there are less funds in the pool than
12 there would be otherwise?

13 A. Correct.

14 Q. Okay. So when you said you don't know if
15 the PPD has been lowered or not, was that on the basis
16 of what; since there are less funds in one of those
17 pools, wouldn't arithmetically the PPD be reduced?

18 A. Yes, that would be true.

19 Q. Unless, I guess -- so long as Superior's
20 utilization was higher than the marketwide average --
21 Class I utilization?

22 A. Yes.

23 Q. Okay. So as a distributing plant you can
24 assume, you would expect that its utilization would be

1 higher than the marketwide average in Order 33?

2 A. Yes, you would expect that higher than the
3 marketwide average in Order 33.

4 Q. Because the marketwide average is, what,
5 40 percent roughly?

6 A. Yes.

7 Q. Or 35, 40 percent, or somewhere in there?

8 A. Yes.

9 Q. Same thing for Order 1, 40 percent or a
10 little bit better?

11 A. A little bit better.

12 Q. Okay.

13 A. I would say, you know, when asked that
14 question before, I still would not know is it 15 cents
15 worse off, is it 15 cents better off, is it a dollar
16 worse. But certainly the fact that those funds
17 weren't paid into the pool, that would be some monies
18 that would be available.

19 Again, they have to pay their in-plant blend
20 value to someone, but not in terms of going into the
21 pool. So all producers would not have shared in that
22 marketwide value.

23 Q. Okay. With respect to your spreadsheet,
24 Exhibit 25, does your spreadsheet program have a

1 function on it where you can show the formulas in the
2 cells?

3 A. Yes.

4 Q. Okay. And can you print that out?

5 A. Quite likely. And if I can't figure it out,
6 I'm sure there's somebody in the room who could --

7 Q. Would you be willing to do that --

8 A. Sure.

9 Q. -- supplement the exhibit --

10 A. Yes.

11 Q. -- for the record so that there's no
12 question -- or so there's more information with
13 respect to the calculations that were made in the
14 cells that have calculations?

15 A. Yes.

16 MR. BESHORE: Thank you. We'd like the
17 opportunity -- we will endeavor to do that
18 as soon as it's feasible, your Honor, and
19 make that an additional page to Exhibit 25.
20 And when that's done, if there's questions
21 about it, Mr. Hollon would certainly be
22 available.

23 But with that and with the movement --
24 moving Exhibits 21 through 25, I have no

1 further redirect.

2 THE JUDGE: Okay. Before we turn to
3 recross, is there any objection to the
4 admission of 21 through 25? I'm not sure if
5 I asked before.

6 MR. WILSON: I have no objection.

7 MS. PICHELMAN: No.

8 THE JUDGE: All right. With the
9 proviso that 25 will now be revised to
10 reflect -- I guess, just on the face of the
11 spreadsheet we will see the manner in which
12 the calculations were reached, and hopefully
13 they will be consistent with Mr. Hollon's
14 testimony. We can hope.

15 All right. So we will move into the
16 record Exhibits 21 through 25. All right.
17 And I'll turn now to see if you have any
18 recross at this time.

19 MR. WILSON: I have no recross, only
20 the evidentiary issue we abbreviated --

21 THE JUDGE: Okay.

22 MR. WILSON: -- and discussion on.

23 MS. PICHELMAN: Your Honor, I think
24 that the Government has one, very quickly.

1 THE JUDGE: Well, I was going to go in
2 order. Does Mr. Yale have --

3 MS. PICHELMAN: Oh, I'm sorry.

4 THE JUDGE: -- any questions?

5 MR. YALE: I have nothing further, your
6 Honor.

7 THE JUDGE: Okay. And because I was --
8 I'd like to get this issue out of the way
9 since I had said that I would address it in
10 turn. We had the proffer of Mr. Wilson's
11 26.

12 MR. WILSON: With respect to 26, your
13 Honor, my witness I presume tomorrow will be
14 able to lay a foundation with respect to it.
15 If you recall, that's an Internet page very
16 similar to the Facebook page that was
17 presented earlier. We can produce the same
18 sort of testimony to establish how it was
19 reproduced from the computer.

20 THE JUDGE: Okay. As far as the
21 authenticity, that --

22 MR. WILSON: Right. So I would ask
23 that it remain marked, but that no further
24 discussion be made with respect to Exhibit

1 26.

2 THE JUDGE: Okay. We will proffer it
3 for admission at this point.

4 MR. WILSON: And then the other exhibit
5 that I purported to use was Exhibit 27. I'm
6 not asking to revisit the nature of your
7 objection, your Honor -- or your sustaining
8 of the objection; merely to ask that it be
9 marked and accompany the record pursuant to
10 900.8(d)(6) of the Rules of Practice.

11 THE JUDGE: Okay. Could you explain to
12 us what Exhibit 27 is?

13 MR. WILSON: Yeah, I'll describe it
14 without commenting on it. It's a letter
15 written on law firm letterhead of McLeod,
16 Watkinson & Miller. It's dated April 28,
17 1998.

18 It's addressed to the Secretary of
19 Agriculture, Dan Glickman. And it is signed
20 by an attorney named Richard Rossier,
21 R-o-s-s-i-e-r, who identifies himself as one
22 of the attorneys for DFA, Dairy Farmers of
23 America, Inc.

24 THE JUDGE: Okay.

1 MR. WILSON: Does your Honor have a
2 copy of this exhibit? I don't recall.

3 THE JUDGE: No, I do not. And I don't
4 know who else may not.

5 MR. WILSON: Well, I think I gave it to
6 Mr. Beshore.

7 MS. YOVIENE: I have a copy if anybody
8 needs it.

9 MR. WILSON: I have two copies for the
10 court reporter.

11 THE JUDGE: Okay.

12 MS. YOVIENE: Your Honor, may I
13 approach?

14 THE JUDGE: Yes.

15 MS. YOVIENE: With respect to the offer
16 of proof, I'm just confirming that -- let's
17 see. If the Secretary decides that the
18 Judge erred in excluding the evidence, and
19 that such error was substantial, the hearing
20 shall be reopened to permit the taking of
21 such evidence. I'm quoting from 7 CFR
22 900.86.

23 I just wanted to, for the record, state
24 that my clients are relying on that

1 provision, because if this were to be
2 brought into the record by the Secretary's
3 decision, we do have, you know, information
4 for cross-examination purposes including
5 things like Pennsylvania Regulation has
6 changed over the last few years.

7 And the issues that they seem to be
8 wanting this letter to go in for would be
9 affected by that to the extent that the
10 over-order premium in Pennsylvania has
11 gotten a lot more significant by over 1.50,
12 and that would affect handler equity issues
13 and so forth.

14 THE JUDGE: I believe that I've already
15 ruled that this is not a relevant document.

16 MS. YOVIENE: Yes. I'm not questioning
17 that, your Honor. I'm just saying if the
18 Secretary takes that offer of proof and
19 decides they want to utilize it as part of
20 the record, we would have something to say
21 and we would want the hearing to potentially
22 be reopened -- or the opportunity to reopen.

23 THE JUDGE: Okay. I think your
24 position is stated on the record for future

1 consideration.

2 MS. YOVIENE: Thank you.

3 THE JUDGE: But I do believe that under
4 the regulations as they exist, I would not
5 exclude it from being admitted to the
6 record, but in my opinion it has very little
7 relevant or probative value to the limited
8 issue that the Secretary scheduled this
9 hearing to consider.

10 So if the Secretary wants to consider
11 it, then your position is on the record.
12 And the citation -- you talked about me
13 excluding things, not including things. So
14 I'd rather err on completion, have it there.

15 But as I said, my feeling is that the
16 issues that this Exhibit 27 addresses are
17 not really relevant or probative. So I do
18 not feel that it has any merit with respect
19 to the issues today.

20 MS. YOVIENE: And I agree on behalf of
21 my clients.

22 THE JUDGE: Right. On the other hand
23 to exclude something that someone has
24 proffered gives automatic right for

1 complaint from the proffering party.

2 MS. YOVIENE: And I don't mean to
3 suggest exclusion of the offer of proof. I
4 just wanted to note my position for the
5 record.

6 THE JUDGE: I appreciate that.

7 MS. YOVIENE: Thank you.

8 THE JUDGE: And that's what you're here
9 for. And we may as well have a complete
10 record.

11 All right. So for the limited purposes
12 of having Exhibit 27 available and over the
13 objection of several parties and in
14 consideration of my ruling on the probity
15 and relevance of the underlying evidence
16 that 27 reflects, we admit it into the
17 record.

18 All right. And that's all that you
19 wanted to address, Mr. Wilson?

20 MR. WILSON: Yes, your Honor.

21 THE JUDGE: All right. Thank you. And
22 Ms. Pichelman, you had something -- not you?

23 MS. PICHELMAN: AMS had just one
24 follow-up question.

1 THE JUDGE: All right.

2 MR. RICHMOND: Very quickly.

3 REEXAMINATION

4 BY MR. RICHMOND:

5 Q. Mr. Hollon, in your last line of questioning
6 you referenced ESL plant system, extended shelf life
7 plants?

8 A. Yes.

9 Q. Are you referencing plants that are
10 regulated under the pool plant definition, for our
11 case, 1033.7(b), the Order regulates ultra-pasteurized
12 or aseptically-processed fluid milk products?

13 A. Can I see your CFR?

14 Q. Yes. So would it be fair to characterize
15 your reference to ESL's meaning, ultra-pasteurized or
16 aseptically-pasteurized fluid milk products?

17 A. Yes.

18 Q. Okay.

19 A. And repeat the section again?

20 Q. 1033.7(b).

21 A. Yes.

22 MR. RICHMOND: Okay. I appreciate it.

23 That's all. Thank you.

24 THE JUDGE: Back to you, Mr. Beshore.

1 Anything on the questions from AMS?

2 MR. BESHORE: No, nothing further.

3 THE JUDGE: All right. Anything from
4 the audience with respect to this witness's
5 testimony?

6 (No response.)

7 THE JUDGE: All right. You may step
8 down. Thank you. Mr. Beshore, you informed
9 us that -- he has a witness who was only
10 available today.

11 MR. BESHORE: Yes.

12 THE JUDGE: And do you want to call
13 that witness?

14 MR. BESHORE: Yes. Mr. Courtade.

15 (Witness sworn in.)

16 THE JUDGE: Please state and spell your
17 name for the record.

18 THE WITNESS: My name is Charles
19 Courtade. It's spelled C-o-u-r-t-a-d-e.

20 THE JUDGE: All right.

21 THE WITNESS: And I'm with Dairy
22 Farmers of America, regional manager for
23 Michigan, northern Indiana, northwest Ohio.

24 THE JUDGE: All right. Thank you.

1 Your witness, Mr. Beshore.

2 MR. BESHORE: Yes.

3 CHARLES COURTADE,
4 of lawful age, as having been duly sworn, as hereinafter
5 certified, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. BESHORE:

8 Q. Mr. Courtade, what's your business address?

9 A. 7799 Division Avenue North. And that's
10 Comstock, C-o-m-s-t-o-c-k, Park, Michigan.

11 Q. And how long have you been employed by Dairy
12 Farmers of America?

13 A. Well, a predecessor co-op that merged into
14 DFA -- but 36 years.

15 Q. Okay. So you've been in the milk business
16 36 years?

17 A. Yes.

18 Q. As a gainful employee --

19 A. Yes.

20 Q. -- occupationally? With respect to -- okay.
21 So you're a regional manager for DFA. What geographic
22 area do your duties include?

23 A. The lower peninsula of Michigan. Northern
24 Indiana, which would be from about Fort Wayne, north.

1 And then northwest Ohio. So pretty much Sandusky,
2 west and then south to Finley.

3 Q. Okay.

4 A. General area.

5 Q. Is Fulton County, Ohio, in that geographic
6 area?

7 A. Yes.

8 Q. Okay. And is Wauseon, Ohio, in that
9 geographic area?

10 A. Yes, it is.

11 Q. Okay. Are you familiar with the dairy plant
12 at Wauseon, Ohio, presently which has been
13 discussed -- by the way, you've been in the hearing
14 today --

15 A. Yes.

16 Q. -- in the hearing room today?

17 A. Yes.

18 Q. Are you familiar with the facility at
19 Wauseon, Ohio, which is presently listed under the
20 Federal Regulations -- Federal Order System since
21 March of this year as a pool distributing plant in the
22 Order 1?

23 A. Yes. That was my customer from
24 approximately 2003 right through the time it closed

1 the second time in 2010.

2 Q. Okay. Now, when you say that plant was your
3 customer --

4 A. Yes. I'm the one that called on the plant
5 anyway.

6 Q. Okay. Just so we're clear, starting in 2003
7 you had job responsibility for servicing that plant?

8 A. Yes.

9 Q. And who was it operated by at that time?

10 A. It was Sterling Milk Company. Then they
11 sold out in approximately 2005, 2006 to a company out
12 of Wisconsin, QuikTrip, that also operated convenient
13 stores as Sterling did, along with the dairy. And
14 then starting in 2008 a group of local investors
15 bought the plant that had been sitting vacant for
16 several months and reopened it.

17 Q. Okay. And once they reopened it what
18 happened to it?

19 A. The last time?

20 Q. The last time, the local investors.

21 A. It never really took off. Most months they
22 took between 200,000 and 300,000 pounds a month, which
23 is very small. They took on a distributor that they
24 thought was going to be their savior, but it never

1 grew like they thought it was going to. So they ended
2 up closing it down early 2010.

3 Q. Okay. So the most recent owner prior to
4 Superior went out of business; is that correct?

5 A. Yes.

6 Q. Okay. And the prior owner, Sterling -- what
7 is it, Sterling Dairy?

8 A. It was called Sterlena Pride at the end
9 there, the last couple of years.

10 Q. Okay. Prior to Sterlena Pride it was just,
11 what, Sterling Dairy --

12 A. Sterling Dairy Company.

13 Q. And that company went out of business also?

14 A. Yes, in 2007.

15 Q. Okay. During the time that you were
16 responsible for supplying those now defunct,
17 nonexistent businesses, you know, how much milk was
18 this plant able to take on basically in that period of
19 time?

20 A. Going back to the records, the biggest month
21 they ever had was 1.9 million, and that was in 2003.

22 Q. Okay. Their average volumes were what?

23 A. Between a million and a million and a half.

24 It kind of went by time periods, because the original

1 owners at one time -- and I don't know what the
2 reasoning was for this was -- besides their own
3 convenience stores, they also sold to outside
4 customers. And at one point they made the decision
5 not to sell to outside customers anymore, just go to
6 the stores.

7 So prior to that decision they were probably
8 million and a half a month. And then once they
9 distributed it to the stores, it was about 800,000 to
10 a 1,000,000 a month once they changed their philosophy
11 there.

12 Q. How does that size plant compare to fluid
13 milk plants in the marketplace today?

14 A. Quite small. One of the smallest around,
15 that I deal with anyway.

16 MR. BESHORE: Okay. Your Honor,
17 Exhibit 23, could the witness have that
18 exhibit?

19 THE JUDGE: Okay.

20 Q. Do you have Exhibit 23?

21 A. Yes.

22 Q. Okay. And if you page through that exhibit,
23 you'll see some pictures and information sheets
24 relating to the -- from the Public Land Records in

1 Fulton County relating to the Wauseon plant. Do you
2 see that?

3 A. Yes.

4 Q. Okay. Now, you're familiar with this plant
5 itself; you've been there on site physically, correct?

6 A. Correct. Yes.

7 Q. You've been in the plant --

8 A. Uh-huh.

9 Q. -- and in the offices?

10 A. Uh-huh.

11 Q. Okay. Is this record -- do the pictures --
12 I mean, do they accurately -- do they show the
13 facility that you're familiar with?

14 A. Yes.

15 Q. Okay. And the depictions of the structures
16 and their sizes that are on, for instance, Exhibit 3A
17 of the exhibit, the one that says 3A on the bottom,
18 does that information appear to you to represent the
19 plant you're familiar with?

20 A. Yes, it does.

21 Q. Now, if you look at the bottom middle of
22 3A -- Exhibit 3A -- Page 3A of Exhibit 23, there's a
23 set of information there relating to sales of the
24 plant. Do you see that?

1 A. Yes.

2 Q. Relating to this real estate?

3 A. Yes.

4 Q. And it shows Superior Dairy, Inc., acquired
5 it February 1, 2011, correct?

6 A. Yes.

7 Q. The seller being Farmers & -- someone. Do
8 you know who they acquired it from?

9 A. I believe that would be the local investors
10 that were running it up until the time it closed.

11 Q. Or their bank perhaps?

12 A. Could be.

13 Q. Okay. And, of course, the prior transaction
14 there on 7/28/2010 shows that the seller was Sterlena
15 Pride Dairy and the buyer was this Farmers & entity.
16 Do you see that?

17 A. Yes.

18 Q. Okay. As you testified around 2007 Sterlena
19 Pride had acquired the plant, correct?

20 A. Yes.

21 Q. Okay. Now, was it easy to supply milk to
22 this facility?

23 A. No, it was very difficult.

24 Q. Why?

1 A. The receiving area was in the back of the
2 building. And it was a landlocked plant with a street
3 -- well, I think there was a building between the
4 plant and the street to the south. I can't remember
5 exactly there. But the street ran across the front of
6 the whole plant. And then there's an alleyway down
7 the back right against the plant almost.

8 So a truck going in there, we were very
9 limited. We had to put a single -- a double axle
10 street truck in there, which there are very few of
11 those. Almost every hauler now runs semi-trucks. And
12 so it would be very difficult to get a semi in there.
13 So we had to use smaller trucks. There was one in the
14 area, but it was a very small load. In the end
15 probably 25,000 pounds every other day is all -- and
16 normal loads are 50,000 or more.

17 The other small truck in the area really was
18 towards the Cleveland area. Normally he would pick up
19 going west to east. And he would end up headed
20 towards Cleveland because that's where he went most of
21 the times. So he had to turn around and bring it back
22 on the days they needed additional milk.

23 They did not have a wash system, which
24 almost every plant -- I think every plant I deal with

1 has automated wash. So the employee at the plant had
2 to get in to wash the truck.

3 Q. What do you mean get in and wash the truck?

4 A. Get in the tanker itself.

5 Q. In the milk tank?

6 A. Yes. Yes.

7 Q. No other plants that you service have
8 that --

9 A. No.

10 Q. -- require that type of service?

11 A. No. No.

12 Q. Okay.

13 A. A semi -- we did have to send a semi in, and
14 from what I heard it blocked the alleyway because
15 there was no room behind the building. So that would
16 be difficult. I was never there to actually witness
17 that, but I could imagine. But that -- earlier on
18 when I first took on the account, when they took
19 higher volumes, we were having occasion to put bigger
20 trucks in. But towards the end there we just used the
21 smaller trucks.

22 Q. Do you have any other plants that are that
23 difficult to service, any other commercial plants
24 operating in your area today that are that difficult?

1 A. No. Everybody takes at least a full load of
2 milk.

3 Q. Full load being a semi?

4 A. Yeah, being 50,000. That's typical on a
5 transport truck to haul about 50,000 pounds.

6 Q. And everybody else has washing facilities as
7 well?

8 A. Yes.

9 Q. Okay. Do you know whether there is the
10 ability to -- is there much storage capacity in the
11 way of cooler capacity at this facility to your
12 knowledge?

13 A. For a finished product or...

14 Q. Yes, finished product.

15 A. I never saw the cooler, but I don't think
16 so. I'd have to look. It's a small plant. And I
17 didn't see the processing area and -- nor where the
18 truck backed in. And the restaurant took a pretty
19 good chunk of the building, too, so...

20 Q. There wasn't much left for --

21 A. I can't imagine there was much left for a
22 cooler. But I never did see it.

23 MR. BESHORE: Okay. That's all the
24 questions I have for Mr. Courtade. Thank

1 you very much. And he's available for other
2 questions.

3 THE JUDGE: Mr. Wilson?

4 CROSS-EXAMINATION

5 BY MR. WILSON:

6 Q. Good afternoon, Mr. Courtade.

7 A. Good afternoon.

8 Q. You're still employed by Dairy Farmers of
9 America, correct?

10 A. Yes, I am.

11 Q. And when Sterling owned the Wauseon plant,
12 you called on them, correct?

13 A. Yes.

14 Q. Do you call on Superior Dairy at Wauseon?

15 A. No, I do not. Our company deals with the
16 Canton -- folks at Canton. So I haven't been involved
17 with that at all.

18 Q. When was the last time you were at the
19 Wauseon plant?

20 A. Sterlena closed in about March of 2010. And
21 it was probably about a month or two before that.

22 Q. Okay. So you haven't been at the plant
23 since Superior Dairy took it over, correct?

24 A. No, I haven't.

1 Q. Okay. Have you had conversations with
2 Superior Dairy with respect to how it tries to make
3 milk plants efficient?

4 A. I never talked to anybody at Superior Dairy.

5 Q. So since you've never talked to anyone at
6 Superior, it's fair to say that you haven't
7 participated or learned of their strategic planning
8 and operational goals, things of that nature?

9 A. No.

10 Q. Are you aware that Superior Dairy, for
11 example, has installed a wash facility at Wauseon?

12 A. No, I wasn't.

13 Q. Okay. Whether they did or not, you just
14 don't know?

15 A. No, I don't know.

16 Q. All you know is that Sterling didn't have
17 that facility?

18 A. Right.

19 Q. Okay. If a wash facility has been
20 installed, then that component as a factor of
21 efficiency would have been eliminated, correct?

22 A. Uh-huh.

23 THE JUDGE: I'm sorry. Is that a yes
24 or a no?

1 A. Yes. Sorry.

2 Q. And are you familiar with Superior Dairy's
3 filling and packaging technology?

4 A. I've heard about it. I've never seen it.

5 Q. Okay. It's not necessarily the same
6 packaging and filling technology that Sterling was
7 using, correct?

8 A. Correct.

9 Q. And it may have different efficiencies,
10 correct?

11 A. Correct.

12 Q. And how would you describe the raw milk
13 supply in northwest Ohio; it's pretty ample, is it
14 not?

15 A. There's a lot less farms. There are a few
16 large farms in the area. But it's not a real big
17 production area as compared to some other areas that I
18 work with.

19 Q. All right. It's better than some, not as
20 good as others perhaps. Do you know if Sterling
21 served customers such as Costco, Walmart, BJ's, those
22 kind of customers?

23 A. I'm sure they did not.

24 Q. Okay. So they wouldn't have had a need

1 necessarily to meet the milk demands of customers that
2 are that large, correct?

3 A. Right.

4 Q. Are you aware that those are customers of
5 Superior Dairy?

6 A. Yes.

7 Q. Okay. And I believe you testified that
8 Sterling's biggest month was probably in the vicinity
9 of 1.9 million pounds?

10 A. Yes. Correct.

11 Q. What do you understand to -- do you have any
12 understanding of Superior's pound performance on a
13 monthly basis at Wauseon?

14 MR. BESHORE: May I just interpose this
15 comment. That question coming from Superior
16 waives any objection to the proprietary
17 nature of the information of Superior's
18 volume.

19 Their attorney has asked a witness what
20 is Superior's volume of that plant, if you
21 know. That issue has now been waived.

22 THE JUDGE: Would you like to address
23 that?

24 MR. WILSON: We don't care.

1 THE JUDGE: All right.

2 MR. WILSON: Let it all out. I wish
3 all this proprietary information were
4 available. It really puts us in a box. So
5 have at it, Mr. Beshore, and you, and you.

6 BY MR. WILSON:

7 Q. Do you have any understanding to Superior
8 Dairy's volume on a monthly basis at Wauseon?

9 A. No, I do not.

10 MR. WILSON: Okay. Thank you.

11 THE JUDGE: All right. Any questions,
12 Mr. Yale?

13 MR. YALE: I don't have any questions.

14 THE JUDGE: Any questions from the
15 Government?

16 MS. PICHELMAN: No.

17 THE JUDGE: All right. Any redirect?

18 MR. BESHORE: No.

19 THE JUDGE: All right. Well, thank
20 you, Mr. Courtade. You are excused.

21 Do we have another witness that we
22 could hear that would be somewhat brief?
23 It's already 5:00.

24 MR. BESHORE: I would suggest this

1 Q. Mr. Carman, you wanted to return to Exhibit
2 17 and actually replace the exhibit that's currently
3 in the record; is that correct?

4 A. If that's acceptable to the record. Exhibit
5 17 had two title errors. The 17 that I had before
6 listed the Southeast Order first and then Appalachian.
7 Those two titles, those columns were reversed. The
8 numbers in the columns were correct, but the titles
9 were wrong. The 17 exhibit that I am reintroducing --
10 or replacing has August been added to both columns
11 rather than the indications I had before, minus 1.40,
12 minus 1.80.

13 Q. Okay. So the two changes, you switched the
14 headings to put them in the appropriate spot and you
15 also added August to those two at the very end --

16 A. Correct.

17 Q. -- which were not there before?

18 A. Correct.

19 THE JUDGE: All right. Anything
20 further?

21 MS. PICHELMAN: Not on this exhibit.
22 Are there any questions before we move on?

23 MR. BESHORE: Not on this exhibit.

24 MS. PICHELMAN: Just on this exhibit.

1 MR. WILSON: No.

2 MR. BESHORE: No questions on this
3 exhibit.

4 BY MS. PICHELMAN:

5 Q. Okay. Mr. Carman, you also want to make a
6 clarification about something you had testified
7 previously about Exhibit -- oh, I'm sorry, a data
8 request from Superior Dairy.

9 A. Superior Dairy made a data request, I
10 believe it was No. 5 on the second supplemental. It
11 talked about the aggregate difference in the PPD and
12 the dollar values. I represented that I thought that
13 that was only the independent milk with Superior.

14 On additional talking -- or discussions with
15 other individuals in the room, it was pointed out that
16 Superior was pooling all of the producer milk that was
17 delivered to the plant when it was regulated by the
18 Northeast Order. So the \$500,000 number is across a
19 much larger volume of milk than what I had originally
20 represented.

21 MS. PICHELMAN: Okay. Thank you.

22 THE JUDGE: All right. Mr. Wilson,
23 any --

24 MR. WILSON: I have no

1 cross-examination for Mr. Carman.

2 THE JUDGE: Mr. Beshore?

3 MR. BESHORE: Just a question on that
4 with respect to the \$500,000 calculation.

5 FURTHER RECROSS-EXAMINATION

6 BY MR. BESHORE:

7 Q. I think you said that that represents all of
8 the producer milk at the plant?

9 A. Yes.

10 Q. Okay. Do you know if there is non-producer
11 milk that transfers or, you know, what --

12 A. No.

13 Q. -- other than producer milk?

14 A. I did not inquire as to what other milk may
15 have been in the plant.

16 Q. When you say all producer milk, would that
17 include so-called 9(c) milk?

18 A. Yes.

19 MR. BESHORE: Okay. Thank you.

20 THE JUDGE: Any questions, Mr. Yale?

21 MR. YALE: I have no questions. Thank
22 you.

23 THE JUDGE: Okay. Any follow-up to the
24 questions from Mr. Beshore?

1 MR. WILSON: No.

2 THE JUDGE: Okay. All right. Thank
3 you. You may step down. I assume that if
4 the audience had questions, they would have
5 piped up by now.

6 (No response.)

7 THE JUDGE: Thank you. All right. I
8 have been put forth with a modest proposal
9 that we start tomorrow morning a little bit
10 later than today. A lot of information has
11 exchanged hands and the parties might want
12 to look it over. And it's been a long day.

13 Unless anyone heartily objects, I
14 propose that we start tomorrow morning at
15 9:00. If there is someone here who cannot
16 stay and must leave early in the day and
17 that would impose a hardship, I would
18 appreciate hearing it now. Going once,
19 going twice -- all right.

20 We will convene tomorrow at 9:00. And
21 thank you all for your participation and for
22 your consideration and for being quiet and
23 attentive, and that's not always easy to do.

24 Thank you. And we will now go off the

1 record.

2 (Hearing concluded for the day at 5:07
3 p.m.; to be reconvened at 9:00 a.m.)

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1 C E R T I F I C A T E

2 STATE OF OHIO :
3 : SS
4 COUNTY OF HAMILTON :

5 I, Kristina L. Laker, the undersigned, a duly
6 qualified and commissioned notary public within and
7 for the State of Ohio, do hereby certify that the
8 foregoing is a Hearing on Proposed Amendments to
9 Tentative Marketing Agreement and Order held at said
10 time and place; that said Hearing on Proposed Amendments
11 to Tentative Marketing Agreement and Order was taken in
12 all respects pursuant to notice and agreement of the
13 parties as to the time and place; that said Hearing on
14 Proposed Amendments to Tentative Marketing Agreement and
15 Order was taken by me in stenotypy and transcribed by
16 computer-aided transcription under my supervision.

17 I further certify that I am neither a relative
18 of nor attorney for any of the parties to this
19 cause, nor relative of nor employee of any of their
20 counsel, and have no interest whatsoever in the
21 result of the action.

22
23
24

1 In witness whereof, I hereunto set my hand and
2 official seal of office at Cincinnati, Ohio, this
3 _____ day of _____, 2011.

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My commission expires:
September 8, 2013

Kristina L. Laker (Pedersen)
Notary Public