UNITED STATES DEPARTMENT OF AGRICULTURE

PUBLIC HEARING ON PROPOSED	)	Docket No. A0-388-A22;
RULEMAKING	)	A0-356-A43;
TAMPA, FLORIDA	)	A0-366-A51
	)	[DA-07-03]
	)	
	)	
	)	

MORNING SESSION
BEFORE HONORABLE MARC R. HILLSON

DATE: May 23, 2007

TIME: 8 a.m. to 11:55 a.m.

PLACE: Sheraton Suites
4400 West Cypress Street
Pasco Room
Tampa, Florida

BEFORE: *Sandra M. Voorhees, RPR*
Notary Public, State of Florida

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ALSO PRESENT:
Jack Rower, USDA, marketing specialist
Jill Hoover, USDA, marketing specialist
Richard Cherry, USDA, marketing specialist
Barbara Tingle, USDA, marketing specialist

I N D E X

EXHIBITS MARKED FOR IDENTIFICATION

EXHIBITS RECEIVED INTO EVIDENCE

No.	Description	
36	Milk Marketing Composite	Page 560
37	Testimony of John Turcinov	Page 560
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P R O C E E D I N G S

THE COURT: Let's go on the record.

Good morning. It's May the 23rd, and this is the third day of our hearing in considering a number of proposed amendments on milk in the Appalachia, Florida and Southeast marketing areas.

Mr. English, call your next witness, please.

MR. ENGLISH: The witness' name is Evan Kinser.

Whereupon,

EVAN KINSER,

the witness herein, was first duly sworn, by the Court, to tell the truth, the whole truth, and nothing but the truth, so help you God.

THE COURT: Please state your full name and spell it for the record.

THE WITNESS: Evan Kinser. E-v-a-n, K-i-n-s-e-r.

THE COURT: Your witness.

DIRECT EXAMINATION

BY MR. ENGLISH:

Q Mr. Kinser, by whom are you employed?

A Dean Foods Company.

Q What is your title?

A Director of dairy policy and commodities.

Q And for how long have you held that title?

A A little over a year.
Q And before that, were you still at Dean Foods?
A Yes. Coming up on three years at Dean Foods.
Q What was your title at Dean Foods prior?
A Manager of dairy risk and commodities.
Q And prior to being employed by Dean Foods, by whom were you employed?
A Foremost Farms USA Cooperative.
Q For how long were you employed there?
A Seven years.
Q And what is your educational background post high school?
A I received a bachelor of science in animal science and agricultural economics from the University of Missouri, Columbia; a master's in business administration from University of Wisconsin, Madison.
Q And how many milk market orders have you testified at hearings; do you recall?
A At least four. This makes the fifth, at least.
MR. ENGLISH: I proffer the witness as an expert in the field for our purposes.
THE COURT: Any objection? You are so recognized.
BY MR. ENGLISH:
Q Mr. Kinser, you brought no written statement,

but you have a document -- a seven-page document that you brought with you?

A Yes.

MR. ENGLISH: Your Honor, could we have that marked?

THE COURT: I'll mark it as Exhibit 36.

(Exhibit 36 marked for identification.)

BY MR. ENGLISH:

Q And just for now, what is -- without going into a lot of detail, what is each document? Let's look at the first page; it's a map.

A The first page is a map produced by the Market Administrator's Office, Federal Order 30, as noted on it. They produce it twice a year and e-mail it out to interested parties and opt to use on their own distribution -- or publication, rather, where they provide the milk production at the county level, broken up into a few different areas, whereby the darker-colored counties are heavier milk-producing areas than the lighter-colored counties. And those counties with no color, either they have no record or there is milk production in those counties.

Q No milk production for federal or California purposes?

A That's correct.

Q What is the next -- what is Page 2? I'll use the number of these pages. Page 2 is another map?

A Correct. Page 2 is a map using mapping software to provide the same concepts, only looking at population; and again, whereby the darker-colored counties have higher populations, and the lighter-colored counties have less population. So you can see the table at the left, and this is using census data.

Q Available from the United States government?

A Yes.

Q Turning now to the first nonmap, Page 3, could you briefly describe what this is?

A Page 3 is a calculation that I prepared drawing out the Class I price change provided in Exhibit 21, Page B-1 and B-2. And it's just -- instead of column 1, column 2 is drawing the mileage rate for packaged milk off of Exhibit 21, Page H. And then the third column just divides the first by the second to represent, with the first line, a 10 cent per hundredweight increase in the Class I price would effectively reduce competition by 25 miles.

Q So if there were two plants, and you had miles A/B, and A being the plant A and B meaning plant B, and the two plants are located with a common customer 35 miles away, your conclusion is that the plant that has a 10 cent less will have a -- will gain a 25 cent advantage, basically, at that location?

A It means that if two plants are competing at whatever point that they're basically on par at, this will take the plant that experienced a 10 cent increase and basically move their line back 25 miles.

So if you drew a radius around plants and where they were competing and they were going out 125 miles, this would in effect cause that plant to retract 25 miles, if their competition did not experience that same increase.

Q Turning to Page 4, what is represented on Page 4?

A Page 4 is also a calculation that I prepared drawing on a lot of information. It's looking at -- let's look at the first table, if you will. Looks at multiple distributing plant locations regulated by Federal Order 7 using the blend improvements calculated by the market administrator for Federal Order 7 as provided in Exhibit -- Exhibit 18, the first page.

The second column would draw from Exhibit 21, D-1, to talk about the change in Atlanta. The next column, location change, is going to draw from Exhibit 21, D-1 and 2, represents the location change that's in the first column. The fourth column is just the difference between the two.

Q The second and third columns?

A Right.

And then the final column is the net back, what would be the change in value to dairy farmers shipping to that plant. So by example, a dairy farmer shipping to Baxley, Georgia, if all things equal, would gain from the changes proposed a $1.09 per hundredweight. The converse of that would be a Lafayette, Louisiana, a dairy farmer delivering to Lafayette, Louisiana, would gain 4 cents.

Q I'm sorry, you mean 14 cents for Lafayette?

A Thank you. Lafayette is 14 cents.

It's trying to represent the impact of changing the pricing surplus, not only at processor level but also at a dairy farmer level.

The second part of that is then doing the same calculations, only for Federal Order 7. The only change as far as sources would be in the first column, and it's going to come from Exhibit --

Q Exhibit 9.

A Exhibit 9, Page 13 of 13. And would work the same way.

Q That was actually Court Order 5?

A That's correct. The first one is 7; the second is 5. The label is correct.

Q And for instance, that would disclose that the dairy farmer shipping to either Mount Crawford in Virginia or Louisville, Kentucky, would experience a 4 cent increase?

A That is correct.

Q We'll spend a little more time later on 5, 6 and 7, but why don't you describe briefly what 5 is and how 6 and 7 are different from 5.

A All of them are set up the same way, just different comparisons in each state. The first is looking at a plant in Milwaukee, Wisconsin, regulated by Federal Order 30, selling to Miami, Florida, regulated by Federal Order 6. And the calculation is trying to look at calendar year 2006 and what value would have been available to a plant -- in this instance, again, Milwaukee, Wisconsin -- to package and produce milk to sell to the Miami, Florida, such that the plant would be fully regulated by Federal Order 6.

Then the second table is doing the same, only recognizing the proposal offered by DCMA and the gain a plant would get under this new proposal relative to today. So in this instance today, a plant located in Milwaukee, Wisconsin, could get regulated on Federal Order 6 and basically gain 16 cents for those sales, while under the changes proposed -- and I should point out I've also drawn data from the Market Administrator Office that the blend improvement comes from Exhibit 17. And again, all things static, the plant would jump to 33 cents weighted average return for that change.

As you move on to the next pages, the same calculation was done, just making some different changes. The next page is Indianapolis, regulated by Order 33, selling also to Miami, Florida. And again, today the plant would pick up 19 cents for getting fully regulated versus under the proposed changes. And again, the market administrator's evaluation of the impact looking back, that would jump to 35 cents.

The final page of the exhibit is the same, again, only now looking at a plant located in Olney, Illinois, regulated by Order 32, shipping to Bowling Green, Kentucky, competing with a plant regulated by Order 7. And selling such milk that they would be fully regulated by Order 7 today, that would gain the plant 38 cents under the new -- under the proposed rules, it would jump to 42 cents.

Q We'll come back to that in a while.

There's been a lot of testimony in this proceeding that there's a problem in the Southeast region. Does Dean Foods disagree that that's a problem?

A Dean Foods fully agrees with the various attempts that have been made prior to this hearing and in this hearing that there is a deficit milk situation in the Southeast. And we recognize that change is needed in decisive and different actions than the past, is what is needed.

Q So you're not talking about the fact that there is a problem in your testimony, correct?

A That's correct.

Q But in terms of the solution, does Dean Foods have a different position on what solution may be necessary?

A Yes. We appreciate that DCMA has offered a solution with many parts. We appreciate that the secretary has called a hearing to address the need for a change. We are concerned about the policy shift that is being offered as a fraction of the DCMA proposal and concerned about approaching that on an emergency status.

We also are disappointed that we didn't have a chance to offer proposals in time to have them noticed. So we, under practice, would opt to offer a modification to the proposals that have been presented.

Q And indeed, did Dean Foods submit proposed modifications for the hearing notice prior -- did you at least submit them prior to the hearing notice being officially issued?

A Yes. Our understanding is that was permitted after the hearing notice was signed but before it was publicly released.

Q And you made a number of proposals that thus were not officially noticed, correct?

A That's correct.

Q But did you nonetheless hear back from the department, any communication, that all but one of those proposals would be considered valid modifications of the hearing?

A Yes. We received a letter stating that it was the interpretation of the department that they were all within the scope, with the exception of one.

Q And just start at the one that wasn't. What was the one that was not within the scope of this hearing?

A The one that is outside of the scope was asking that if a change be made to the Class I price surplus that that change be handled separate from the market-wide pool and be a fluid price differential which would be returned to the milk that is shipped to the plant where that change is occurring.

Q And otherwise, let's talk briefly -- and we'll get to more detail in a little while -- about what your proposals were; that is to say, what was your different approach?

A Our different approach was we left the Class I price surplus alone, and we'll talk later about the reasons for complications of tweaking part of the surplus and not the full surplus. And recognized that Florida seems to work and that milk flows to Florida. The complaints about pool riding is much less, and that the secretary -- or excuse me, the market administrator currently has exercised her authority to change the diversion limits from what is codified; and our request was that the current regulations being exercised by the market administrator be codified for Florida and that same level of diversion limit be applied also to the Southeast Federal Order and the Appalachian Federal Order.

Q Why did you do that? Why was that your approach?

A The approach was if the Southeast is so deficit as -- again, I won't rehash the numbers that have been presented; the department is quite competent of looking through that and seeing the deficit. Even the proponents have a great argument of the deficit market.

But the milk that is in the market is what needs to be pooled, and the milk that is outside of the market is supplemental supplied and will be available to serve the market. And that that is needed should be pooled, and that is not -- would not be a part of the pool.

Q And is part of your consideration anything to do with how Florida is working or not working?

A And the success of Florida is the benchmark, and recognizing that more and more that the Appalachian Order and the Southeast Order look a lot like Florida relative to consumption and production.

Q And has anything at this proceeding with respect to Florida convinced you otherwise that Florida is working, not working?

A If anything, it's gotten stronger in that we are in Florida, and I have not noticed a Florida dairy farmer to testify that something is needing corrected.

Q So here we are in Florida, where Florida producers don't have to travel as far, and none of them has appeared, correct?

A Yes.

Q And yet dairy farmers with legitimate concerns from North Carolina and Virginia and Kentucky have traveled great distances to attend, correct?

A Yes.

Q Again yet, what would your Exhibit 36, Page 4, suggest will be the benefit for those dairy farmers who have traveled the greatest distance to come to these proceedings as opposed to those who haven't appeared at all?

A They will benefit the least. And, in fact, knowing that this is a status evaluation, it is quite possible that there will be no benefit accrued to them, because the evaluation of the market administrator did not assume that as blend prices changed that different milk could associate and try to pool on the Order such that the result may not be as presented.

Q And did you have other parts of your proposal, other than simply typing the diversion tables?

A We also asked for the touch base to not be as reduced as was asked for in the -- that portion of the proposal before us.

Q Did you have a slightly different version of touch-base reduction?

A It was a reduction. If I recall, it was two days.

Q Two days.

And finally, did you have any proposal with respect to transportation credits, Orders 5 and 7?

A We agreed with the proponents that January and February are months that probably need consideration, particularly recognizing the secretary's action that took effect in December to remove milk proceeding transportation credits from the calculation and diversion. We're supportive of that. And we could be supportive of more months, though we think that if you're going to expand it beyond that, that we would like to see the diversion limits that we're proposing today in effect and see how the market reacts to that before we would support a broader than -- than has been presented today.

Q Given the fact that the market administrator has discretion -- limited discretion, but otherwise the ability to alter diversion limits, do you have a view as to whether it is better to have what might be viewed by some as overly tight diversion limits versus overly used diversion limits as a starting point?

A It seems to us that the best starting point, we need to start aggressive and allow the secretary -- excuse me, the market administrator the same discretion that they have to tighten, to use in reverse, and to loosen. So start -- as we're proposing. And if we are wrong, then we would agree to approach the market administrator and recognize adjustments need to be made and for him or her to exercise their authority and make that adjustment and loosen the pooling provision.

Q And what is their impact on transportation credits of tightening diversion limits? Or of changing the touch-base requirements?

A It's quite connected when you evaluate -- I thought Mr. Sims did a good job, although I'm not sure I agree with his conclusions. But when they talk about inefficient movement of milk as it relates to the current touch-base provision, to me that strikes of milk moving in the market that is not needed. And yet it's moving, so there must be some sort of economic incentive for that to move. So when you drop the touch-base requirement to clean up that efficiency, then it seems to me you're making it easier for milk to get associated with the market to ride the pool.

Q Turning back to your position on Class I and turning for a moment back to Page 3 of Exhibit 36. You've been here throughout the hearing, correct, Mr. Kinser?

A Correct.

Q So you've heard testimony of Mr. Hitchell and Mr. Courtay for some of your competitors' operating plants in the Southeast region, correct?

A Correct.

Q Using Page 3, Exhibit 36, for a moment, could you further describe what these impacts are as you looked at them for plants purely inside the market area and those relative to some plants close -- outside the market area?

A Exhibit 36, the third page again represents the impact of how a change is going to affect the interplay between how far a plant can service a customer, again just focusing on the differences. So some of the differences that are on this are only going to apply to plants out of the area.

For example the $1.70, $1.70 sent to any of the other plants regulated by these orders is not going to have that type of price spread. So you have two things changing: You have changes between plants located outside of these regulated areas, and you have changes between plants within the regulated area.

And candidly, all of this has sort of happened so fast, I have not had time to really go through and evaluate how Dean Foods' collection of plants fares relative to how one of our competitors' sets of plants would fare. And so when we approached this, we purely looked at it from a sort of world view of what's going on in the marketplace, not what is going on from a Dean Foods' perspective relative to one of our competitors. Just what's going on within the plant, sort of whitewashing the label on the plant to say it was or wasn't valid.

Q Is that by way of saying you were trying to look at what might be good policy as opposed to Dean policy?

A That's a fair statement, yes.

Q Turning now to Page 5. You also heard testimony -- I believe Mr. Hitchell for Kroger testified about how plants are regulated. Do you have any view -- without giving any direct data for a moment -- on whether or not there is an impact on plants outside of the marketing area for their choices as to whether they pool inside the market area -- pool plants in the Southeast region as opposed to where they're presently pooled?

A There are lock-out and lock-in provisions within each of the orders that affect how a plant qualifies to be a pool-distributing plant within an order. And as best I can tell, when I have walked through these, evaluated what a plant might look at, what it would take to be become a fully regulated plant on that order.

Q And did you thus run an analysis, on the short time frame that was available to you after receiving the testimony from the proponents on Monday, of how these various programs might work vis-a-vis pooling choices?

A On a very -- yes. I guess Page 5 is the first kind of very quick-and-dirty analysis of how a Federal Order 30 -- or how a plant located in Federal Order 30 might work to get regulated on Order 6. And in this instance, the choice made as far as optimization was to get greater than 25 percent of the route disposition on Order 6. And then the balance of their route disposition would then be spread out over other orders such that they didn't qualify on any other order as a fully regulated plant, and their regulation would default to 6.

Q And the miles delivery point here in this case, from Milwaukee to Miami, are 1,407, correct?

A Yes.

Q And given simple math, that is more than the 900 miles that USDA found in 1999 in a nonlinear -- let me backtrack.

You're not an expert on the Cornell model, correct?

A That's correct.

Q But you know, and you've looked at Federal Reform?

A Correct.

Q And as part of Federal Reform, USDA concluded that the cost of hauling raw milk was linear, but the cost of hauling packaged milk was nonlinear, correct?

A Correct.

Q And as part of that, USDA concluded that at 900 miles, the cost of moving packaged milk was less than the cost of moving raw milk, correct?

A Yes.

Q So, since the distance from Milwaukee to Miami is greater than 900 miles, the hauling rate you've actually used here as .00396 is not the 5 cents or the 4 and a half cents the coops say it costs to move packaged milk, correct? When you've done hauling rate analysis for this plant, you have not used 5 cents or 4 and a half cents?

A That's correct.

Q You've used a rate closer to 4 cents?

A That's correct.

Q And some of that is based on USDA's own conclusions that the movement of packaged milk is nonlinear and at 900 miles is less than raw milk, correct?

A Correct.

Q So, again, in the limited time you had to develop this model, you were just simply trying to find some numbers to compare?

A Correct.

Q All right. So let's just run through January 2006 for a moment as to how the calculations would work.

A The start is to look at the Federal Order 6 blends in January of 2006 as existed before any changes and to adjust that price to what that price would have returned back to a plant located in Milwaukee, Wisconsin. So that's the difference between the 1.75 plant location in Milwaukee and the $4 basing point in Order 6.

The next is then to look at what the Federal Order 30 blend would have provided to that plant, and Federal Order 30 as announced is $1.80. This is again located in $1.75, so you would back that off a nickel.

So when you compare the Order 6 adjusted blend in Milwaukee of 1446 to the Order 30 blend at Milwaukee of 1361, then the advantage of being on Order 6 is 85 cents.

The next is to use the hauling rate which we just discussed, which again comes from proponent's calculations as well of .00396 per mile, recognizing the 1,407 miles would cost $5.82 to move the milk. The location adjustment, and thinking about what the competitors are paying at $4.30, versus the plant at 1.75, would help offset $2.55 of that haul rate, such that the hauling loss at that point is $3.27.

The next is a couple of -- the next line is an assumption about the plant utilization. In reality, for the Florida order, that number could drop 50. And as you drop that number, it gets better.

Q Gets better in what way? More economic?
A It's more economic. It's more favorable to have the plant pooled on the other order. But I ran a plant at 85, which I believe is a reasonable representation of a fluid plant.
Q And your sales in Florida?
A Then the next is the sales in Florida. And again, in this instance, as I talked about earlier, 25 percent would get a plant qualified. And so if it was below 25 in other orders, the plant would flip and be a Federal Order 6 plant. So then, when you look at that percentage, when you take the 3.25 at 85 percent of that, and then 25 -- and I went ahead and put in a buffer, so it wasn't setting exactly at 25.
Q You can set exactly 25, but you'll miss the plant -- the plant might flip orders from month to month, and that would be difficult both for the market administrator and for the plant. So you put a buffer in it?
A Correct.
So when you take the $3.27 times .85 times .251, the net hauling loss is 70 cents. So when you net the 70 cents out of the advantage of being on Order 6, and 85 cents, then at that point the milk at the Milwaukee plant picks up 15 cents. And that same thing

was done January through December of 2006.

Then in the weighted -- and the next line below that is using the Florida Class I sales just to try and reflect that sales are not constant across the year, that there is a degree of seasonality. So you factor that in, and then the weighted result is 16 cents.

The next table starts off the same way, only again at this point, we're going to assume that the proposals were in place. And when you assume that, then the impact of the higher Class I differential is going to be part of the Florida calculation, which the market administrator provided. And again, I believe that's in Exhibit 17.

So I took the result of the market administrator's Exhibit 17 and 1.21 for the month of January, as far as the blend improvements for the proposals. Then I adjusted that now the Order 6 price would be announced at 5.40, as opposed to 4.30 -- excuse me, as opposed to 4.00, Milwaukee would remain unchanged at 1.75.

So you're now going to have an adjustment of 3.55 as opposed to the current 2 and a quarter. So the blend at Milwaukee, assuming this would have been in place, would have been 1427. The blend price at Milwaukee would be unchanged because there is no implications on that order. So the advantage is going to reduce by 66 cents again because the pricing point went up more than the blend increased.

Then again, go through the same calculations with the hauling rate, only now part of that has picked back up because the competitive location went up. And so the proposed location advantage changed from 2.55 to 4.25, recognizing the change of the Class I price at Miami, so now the net hauling cost is 1.57. Again, multiply that by 85 percent Class I equalization and by 25.1 route disposition, you're going to end up with a cost of 32 -- excuse me, a net cost of 34 cents.

So when you take the 34 cents out of the 60 cents -- excuse me, out of the 66 cent blend improvement, the result is 32 cents, compared to 15 cents, so picking up 17 cents a hundredweight for getting the plant regulated on Order 6. Again, weighted that out across the year, and it was 33 cents, so 33 cents gained relative to the current 16 cents.

Q And if someone wishes to criticize you for your hauling rate, notwithstanding the fact that USDA concluded that it did in 1999, the relative change would be the same. If you had a dollar or more -- $1.50 more hauling rating increase -- say make it 5 cents rather than this -- that relative change would still be the

same, correct? Because that is not going to change.
A I believe that is true, yes. It would be the same.
Q So you did that for each of the months of 2006 for a plant in Milwaukee selling in Miami, correct?
A Yes.
Q And you admit that's a rather extreme example?
A Yes.
Q Let's turn now to Page 6. How is Page 6 different from Page 5? I take it the analysis is the same type of analysis?
A Correct.
The change is that now the shipping plant has moved south, so he moved from Milwaukee to Indianapolis. So the order regulating the plant has changed from 30 to 33. The price point -- so that means now we're going to work off the 33 blend at Indianapolis, which happens to be the same blends as were announced.
Q The miles are still almost 1200, so the miles are still in excess of 900 miles?
A Correct.
Q So the Cornell/USDA analysis about nonlinear costs moving packaged products would apply again?
A Yes.
Q For purposes of calculating the hauling rate?

A Yes.

Q And so other -- if you -- you ran through the numbers that -- the numbers are what they are, but the bottom line is there is a weighted average gain for a plant in Indianapolis and Miami of 35 cents, using the same kind of discussion you had on Page 5, correct?

A Correct.

Q Is there anything else to discuss about Page 6 that is different from Page 5?

A No.

Q And again, if someone were to quibble with the hauling rate, would nonetheless -- would the relative difference stay the same?

A Yes.

Q Turning to Page 7.

A Page 7 makes two changes relative to the prior. Both the shipping location and the sales points have changed. Currently evaluating a plant located in Olney, Illinois, regulated by Federal Order 32, shipping to customers in Bowling Green, Kentucky, those sales would be considered part of Federal Order 7. This gets a little tricky as far as now you don't have a plant actually located, as best I can tell, in Bowling Green, so you have to figure out where the milk that you're competing with is at. I chose I thought to be the closest location, which is Murray, from a competitive standpoint, which may or may not be a fair street-level evaluation, but looking at closest competitive sources.

The big change here is clearly the miles have now dropped; you're not moving the milk very far, 186 miles in total. The other thing that's a significant change is you'll notice that the sales in Order 7 have changed from the prior. Now the thought is you're going to have 50 percent of your sales on Order 7, so there's 38.1 to reflect an assumption that there is 12 percent of this plant sales already in the order.

Q Where did you come up with that assumption?

A I picked the number noticing that that plant, as well as other plants, are continually showing sales into that marketing area. So it's clear that they can get sales there. Whether or not they have 12 percent there today is an assumption.

Q And you can change the percentage from 50 percent and the same relative weight would be given, correct?

A Correct.

Q And because the plants are already shipping there, even though this is less than 900 miles, the relative cost of moving more milk would be less and therefore nonlinear in your opinion?

A You're only going to have to look at the additional. So you're going to look at what's going to be a marginal analysis, not an overall cost of all the sales.

Q Since you're already moving milk there and also already have fixed costs for moving there, that marginal analysis suggests to you a lower hauling rate. So again, you've used the lower hauling rate on this page, but for a different reason?

A Correct.

Q And other than the fact that the conclusion here with those differences is a weighted average gain of 42 cents, is there anything different about the way 7 is calculated from 6 and 5?

A No.

Q So do you reach any conclusion about probable outcomes from this proceeding with respect to the pooling of plants from outside the area in this area?

A In a word, chaos. I think what's going to happen is a few things.

One, you're going to have plants located outside the area become regulated, and that will probably be at the expense of plants located in the area. And those dollars will get returned to dairy farmers located outside of the area.

The other thing is -- I didn't have enough time to do all this, but as you look at how the zones shift, I think what you'll see happen is these marginal plants aren't actually where you're trying to take the sales, that you would actually go one tier in, and so you would actually try and haul the milk farther. So, for example, I think if you're in Indianapolis trying to compete in Lexington -- or excuse me, trying to compete in Louisville, that that won't work very well. But if you go further east and go into Lexington because of how the zones are shifting, that the zones shift fast enough that you actually would want to skip over Louisville and haul the milk to Lexington to try to get regulated on the order.

And if not get regulated, at least take sales, because your price, excluding ordinary premiums -- which, again, I think are lower routes coming in -- just the regulated price provides the opportunity to do that.

Q So if the proposals are adopted and people in this room are expecting, you know, higher prices as per Page 4 of your exhibit, but the plants from outside end up being pooled and thus are able to revert back themselves, et cetera, what may very well happen?

A We could be right back where we are today within a year of when we make the changes, only just having a new level of complaint that the money is now in a different place but still in the pockets of the dairy farmers in the Southeast.

Q That is to say that the greatest beneficiaries that it proposes could very well be producers in Illinois, in Indiana, outside of the marketing areas?

A Yes, absolutely.

Q And there has been a fair amount of discussion in this proceeding about diversion limits, and the proponents have concluded that even though Florida can make it work, they can't live with the diversion limits similar to or exactly like Florida.

Was there any data that you saw in this proceeding that suggested otherwise?

A I think there is a few things. One is that the assumption seems to be in the proponents' underlying analysis that any milk associated with the market should be pooled in the market, and I'm not sure that that assumption is a fair evaluation. I don't think that that's how it works in Florida. I think that milk that can effectively serve the market will not be continually pooled. And also in looking at their exhibit --

Q Exhibit 21?

A Yes.

Q Pages N -- do you want to look at Page N-1?

A Yeah. N-1 all the way through the last page of O-13.

Q What line are you looking at on those?

A Yeah, the very bottom, the reserve supply. So in January, this would say the reserve is a percent of receipts, basically at 22 percent.

Q Which was the highest for the time period?

A Let me flip to the back. Yes.

Q N-13?

A Yeah. If you look at N-13, actually, January 2004 is the highest of the whole three-year period, at basically 22 percent. And it gets as low as -- I guess it appears in October of 2006 of 6.8, so 7 percent.

Q Now, the cooperatives, of course, would point out that independent milk would be delivered day in and day out, and they're the ones that have to divert the milk.

Do you have a response to that given these percentages?

A There appears to be room for some diversions relative to what we were asking for.

Q And based upon the problems you see with the Class I, versus the opportunities of diversions, do you see an opportunity for dairy farmers in the Southeast region from this hearing, vis-a-vis diversion and Class I?

A Can you restate that?

Q Looking at the exhibits, in particular market administrator's review of your request, is there a financial opportunity for dairy farmers if diversion limits are further lowered?

A Yes.

In looking at the exhibit prepared for the proponent -- so I'm going to focus on Order 5 first. Exhibit 9, Page 9 -- excuse me, Exhibit 9, Page 13 of 13, comparing that to Exhibit 10, Page 1 of 1. The fifth column of Exhibit 9, Page 13 of 13, shows the results of all the proposals combined for Federal Order 5. Exhibit 10, if you look to the third column, shows the results that would be -- of the request that we are making of the market administrator at this hearing.

And you'll notice that the results are the same, only in our proposal you don't have the shifting of the Class I price around and changing the relationship between the in-area plants with each other as well as in-area plants to out-of-area plants.

If you move -- I say they're the same; they're not the same every year. Some years, the proponents' results more net to the pool; some years, this proposal would net more for the pool. When you look at them combined, the result would basically be the same.

The difference is, then, the next level, that these funds would be spread evenly over the area, so those dairy farmers on the fringe would be picking these numbers as well as those deep in the core, versus now there is a different allocation of the money to dairy farmers in one location versus dairy farmers in another.

When you look at Federal Order 7, and that is provided to us in Exhibit 18 and 19, basically see the same results. The impact is the next-to-the-last column labeled "Weighted Average Blend Price Impact." When you look at the annual total there, as far as the impact, and again compare that to Exhibit 19, the middle column, basically have the same results again each year.

The result is not exactly the same; but again, you get the money in the pockets of the dairy farmers. It's more evenly spread over the marketing area, and you don't have the disruption in the Class I, again between plants within and plants out of -- and also does not provide opportunity for plants to flip over and become regulated -- or with less than the likelihood of that.

Q Do you have any other comments on diversions?

A No.

Q The proponents' analysis relied on a number of proposed reserve supply areas and then pricing out to Miami, correct? Is that your understanding of what they did?

A It's my understanding that they assessed different reserve supplies to Miami, and the lowest one they chose and backed everything off of that point.

Q At least to the east, mostly. Obviously, they adjusted some in the west, Louisiana to the west and some of that. But the primary justification -- not making this smoothly, but the primary justification was not Miami and then back, correct?

A That's correct.

Q And they used Worcester as their reserve supply; is that correct?

A Yes.

Q Looking at Exhibit 36, Page 1, let's start visually for a moment. Does Ohio strike you as a reserve supply area -- or northeastern Ohio, as a reserve supply area as compared to other parts of the country?

A No.

Q When you overlay that with Page 2, which is the population in Ohio, and especially the population right in northeast Ohio, does the population demands for milk in that area suggest that Worcester is a reserve supply area?

A No.

Q And you're not the only person who thinks that, are you?

A I'm not.

Q Are you aware, as a representative of Dean Foods, of a proceeding in the fall of 2006 in the Commonwealth of Pennsylvania with respect to whether or not the over order premium for Pennsylvania should be expanded to cover additional milk? Are you aware of that proceeding?

A I am.

Q In that proceeding did cooperatives, some of whom are members of DCMA, propose that the over order premium in Pennsylvania be applied to additional supplies of milk?

A Yes.

Q And did the opponents have as one of their reasons to oppose this that if the over order premium was applied to additional milk in Pennsylvania that Pennsylvania plants would either buy additional Ohio milk or would face milk from Ohio competition, plants, to come into Pennsylvania?

A That's correct.

Q And what was the response to that on rebuttal by Dairy Farmers of America, a member of DCMA, that milk could come from Ohio and go to Pennsylvania?

MR. BESHORE: Let me object to that question before there is a response, Your Honor. He is asking for the rebuttal testimony of one of the cooperatives here in a state proceeding relating to the scope of a state regulatory program. Absolutely irrelevant.

MR. ENGLISH: Your Honor, it's a clear party admission. DCMA represents these entities. And what is relevant is the statement made by a representative of Dairy Farmers of America was there was no milk available in eastern Ohio to move into Pennsylvania. And they have testified that it is a reserve supply area.

THE COURT: I'm going to allow him to answer. You can take care of it on cross-examination and ask the question.

MR. ENGLISH: And it is sworn testimony.

THE COURT: There is a pending question for you.

THE WITNESS: Yes.

BY MR. ENGLISH:

Q Was there testimony from Dairy Farmers of America about the availability of milk from eastern Ohio for Pennsylvania?

A Yes.

Q And have you procured a true and correct copy of a portion of that testimony? In a limited time you couldn't get all the testimony, but this is the relevant portion?

A Yes.

Q I would like to have this marked?

THE COURT: I'll mark this as Exhibit 37.

(Exhibit 37 marked for identification.)

BY MR. ENGLISH:

Q Now, the witness was a Mr. John Turcinov of DFA?

A Yes.

Q And Mr. Beshore was the sponsoring attorney?

A Yes.

Q So the answer to this question, which unfortunately just started on the top of the page, and I don't have the question with me, begins here, and there's a question on 209. There was an analysis done by Mr. Turcinov of plant capacity and supply in the region -- the Mideast region?

A Correct.

Q And this was an exhibit to that testimony, and this is the exhibit referenced. If I hand -- I'm going to hand you the documents.

THE COURT: Do you want this marked as well?

MR. ENGLISH: Yes.

THE COURT: I'll mark this map as Exhibit 38.

(Exhibit 38 marked for identification.)

BY MR. ENGLISH:

Q And --

MR. BESHORE: Assuming 38 is going to be offered for the record, I'm wondering if Mr. Turcinov, who created it, is going to be called to explain it. Because it's -- certainly requires some elaboration if it has any probative value.

THE COURT: I'm guessing he is not going to be called. I am guessing that AMS perhaps would exhibit it if it has merit, but we haven't identified it at this point.

BY MR. ENGLISH:

Q You understand that coop -- there's a label in the upper right-hand corner called "Coop 7," and that is the exhibit number that was given to it at -- in Pennsylvania, correct?

A Correct.

Q And you understand that to be the document that Mr. Turcinov is referring to on Page 208 and on Page 209 with the statement that is 37?

A Yes.

Q And it has colors, which appear to be rather -- obviously, there's a red color, correct?
A Correct.
Q And there is blue and there is green, correct?
A Right.
Q Now, I have one more document. And this document you got off of the Internet this morning?
A Yes.
Q And the source is the Ohio Department of Transportation?
A Yes.
Q It's a county-level map of Ohio, correct?
A Correct.
For the record, the URL for its location -- its source is at the bottom left.
THE COURT: I assume you wanted this marked?
MR. ENGLISH: Yes. Could I have this marked as well?
THE COURT: I'll mark this as Exhibit 39. I think he said the map.
(Exhibit 39 marked for identification.)
BY MR. ENGLISH:
Q First, on its face, without explanation, there is a label called "Total number equals milk supply." Bottom number -- top number equals milk supply; bottom

number equals plant capacity.

THE COURT: We're back on 38 now?

MR. ENGLISH: Yes, we're back on Exhibit 38.

BY MR. ENGLISH:

Q If you add the milk supply provided by Dairy Farmers of America from 2005 for Ohio and compare it to the plant capacity in Ohio, what do you conclude?

A It appears that the plant capacity is roughly 20-some percent greater than the milk supply.

Q Of Ohio?

A Of Ohio.

Q In total?

A Correct. That's adding the 214 and the 118 -- excuse me, 181 -- compared to the milk supply compared to the 161 and 320 of plant capacity.

Q And in your experience in the dairy industry, is a state where the milk supply is 20 percent less than the plant capacity an area of reserved supply?

A No.

Q Now, there is red and there is blue. Ohio seems to be a little of half of each, correct?

A Correct.

Q Looking at Exhibit 39, and identifying Wayne County in the upper tier, northeast part of the state, two counties south of Cuyahoga and west -- three counties west of the boarder with Pennsylvania, and comparing it to Exhibit 38, have you concluded whether Wayne County is located in the red part of the map provided by Dairy Farmers of America or the blue part of the map?

A My conclusion is that it isn't a red.

Q So now, relating to the testimony of Mr. Turcinov of DFA, when Mr. Turcinov was asked the question: "Given the red areas in western Pennsylvania and eastern Ohio, is there a lot of surplus milk available in those areas to -- talking about eastern Ohio -- to move east into Pennsylvania?"

And the answer is "No."

Based upon that question and answer provided by Dairy Farmers of America in November of 2006, what is your conclusion about Wayne County serving as a reserve supply for Florida?

A It's an inadequate reserve. It would not work.

MR. ENGLISH: I have no further questions of this witness.

THE COURT: Are you going to proffer any exhibits?

MR. ENGLISH: I'm sorry. Yes, I proffer 36 through 39.

THE COURT: Okay.

MR. BESHORE: We object to 37 and 38.

MR. ENGLISH: But they are admissions of a party in this proceeding. They are sworn -- 37 is sworn testimony. It's the examination by Mr. Beshore himself, and it's a document that was referenced in there.

THE COURT: This is a rule-making hearing, and it's not an adversarial proceeding, technically. I'm going to assume that the AMS could give it the value that they want to on it, but -- so I'm going to allow the evidence into -- receive into evidence Exhibits 36 through 39.

(Exhibits 36 - 39 received into evidence.)

Are you done with this witness, Mr. English?

MR. ENGLISH: This witness is done.

THE COURT: Who wants to go first?

MR. SMITH: Your Honor, I recognize people would like to get home, but we've just received a tremendous amount of information in oral form. I'm wondering if we might take a 10-minute break so I can consult with my client about how we wish to proceed with cross-examination?

THE COURT: Why don't we just take the full 15 minutes and come back at 10 minutes of the hour.

Before we go off the record, I want to make sure: Are there any other witnesses? Are there any producers or anyone else that you wanted to testify today?

Let's go ahead and go off the record.

(Recess.)

THE COURT: Let's go back on the record.

During the break I find out that we are going to have one more producer witness after we're done with the current witness, Mr. Kinser. And also, Mr. English approached me and said that Mr. Beshore and he both want to get two more documents marked, right?

Mr. English: Right. Yes, Your Honor. Yes, Your Honor.

While we were off the record, Mr. Beshore approached me about -- I had referenced two letters to Mr. Kinser, a letter from Dean Foods to -- the department had a letter in response from the department regarding this proceeding. And while we do not have copies at the moment, Mr. Beshore has asked if we, Dean Foods, have a copy -- and we do have one copy -- if we would put it in the record, and we're certainly willing to do so.

The first document is a four-page letter dated May 1st, on Dean Foods stationery, addressed to Dana Coale, deputy administrator of dairy programs, re-proposals for potential public hearing regarding order regulations for the Southeast, and contains eight numbered proposals and a paragraph which is in reference to a ninth proposal. And it's signed by Evan Kinser.

THE COURT: We'll mark that as Exhibit 40.

(Exhibit 40 marked for identification.)

Mr. English: Then there's a letter of response from the department. I believe it's dated May 16th, 2007. The date is a stamp and it doesn't come through all the way. But it cannot be the 16th because it was received on the 15th by Mr. Kinser. I'm not sure of the exact date of the letter. It's addressed to Mr. Kinser, explaining that the first eight numbered proposals can be offered as modifications, but that the ninth proposal is not an acceptable modification. And that's signed by David Jamison, acting head, administrative dairy programs.

THE COURT: I'll mark that as Exhibit 41, and I'll receive both Exhibits 40 and 41 into evidence.

(Exhibits 40 and 41 received into evidence.)

Should I give back it to you, Mr. English, once you get copies made? Or how are we going to do that?

MR. ENGLISH: I don't have anybody here with me at the moment who can get those made while we're here. If you do so, I will figure that out.

THE COURT: I'll give them to the USDA.

MR. ENGLISH: If USDA could do that, that would be better.

And so again, the witness may begin cross-examination.

THE COURT: Who wants to go first? Go ahead, Mr. Beshore.

EXAMINATION

BY MR. BESHORE:

Q Good morning, Evan.

A Good morning, Mark.

Q Let's talk about Ohio first. In the corporate view and position of Dean Foods, is Ohio a surplus or a deficit area?

A They're surplus milk in Ohio.

Q Just not in the Southeast?

A I do not believe that it's a sufficient surplus, but it should be considered as a reserve supply from the Southeast.

Q Okay. Let's look at Exhibit 21. This is a page out of the chart in which Wayne County, Ohio, is boxed, correct?

A Correct.

Q Okay. Now, you see that the heading above the five possible places there, five locations, potential supply areas?

A Yes.

Q Now, your testimony is that Wayne County, Ohio, should not be used as a potential supplier of the Southeast; is that correct?

A Yes.

Q Would you prefer Jasper County, Indiana?

A I'm not sure that it works either.

Q What do you mean by that?

A I'm not sure that you got -- I think you improve the local supply and demand positions, but I don't know whether it serves as a sufficient reserve supply.

Q Okay. What is your definition of a "sufficient reserve supply"?

A That's -- when I look at the map on surplus, I think about --

Q Which map?

A Great question. First page of Exhibit 36.

I guess my glance at that Jasper County, Indiana, doesn't sort of jump off the page at me.

Q Isn't that the darkest-red county in northwestern Indiana?

A It is.
Q By the way, Wayne County is the darkest red county in northeastern or east-central Ohio, correct?
A Correct.
Q As far as you're concerned, neither of those locations are sufficient amounts of reserve to serve as base points for the Southeast?
A Yes.
Q Do you know if your plants in the Southeast ever get supplemental supplies from Jasper County, Indiana, for instance?
A I believe there is some milk that are received in our plants.
Q That being the case, why wouldn't that be a reasonable basing point to use?
A I don't think that's the only milk that comes into our plants.
Q How about Franklin County, Pennsylvania? Is that a reasonable potential supplier that you use for a base point -- basing prices off of in the Southeast? Do you know where that is, by the way?
A I was going to say -- I'm going to have to be candid and say I don't know which county Franklin County, Pennsylvania, is.
Q How about Lancaster County, Pennsylvania?

A I recognize Lancaster.
Q And you know where that is?
A Yes.
Q Is that a reasonable potential supplier area for -- as a base point for prices for the Southeast?
A I think that is.
Q Now, if you use Lancaster County, Pennsylvania, as a base point for prices in the Southeast, they only would be higher than has been proposed by DCMA; isn't that correct?
A That would happen as well as the analysis that I did for out-of-area plants hauling to Miami would just pick up that much more for that type of move.
Q We'll talk about those analyses in a minute, but I just want to focus on the fact that you don't find Wayne County, Page F of Exhibit 21, appropriate; but you would find Lancaster County appropriate?
A Yes.
Q Therefore, you would find the prices that would result from using Lancaster County to be appropriate?
A I would say that that would be a point from which you could do the calculation. I don't think you can pick a solo-reserve supply, pick a point, and back away from that as a way of making a change.
Q Would Hopkins County, Texas, be an alternate

point that you might use?

A Yes.

Q And is that a potential supply area for the Southeast -- reserve-supply area for the Southeast?

A Yes.

Q Now, if you use those two basic points as alternate supply points for the Southeast, your prices would be significantly higher at most, if not all, points than using Wayne County, Ohio, isn't that correct?

A Can you restate the question?

Q I think you were suggesting -- I'm just trying to respond to your suggestion that you ought to use multiple basing points to generate a price surplus.

A Correct.

Q And what I'm asking is, if you used Lancaster County, Pennsylvania, which you've now acknowledged is a potential reserve area, and Hopkins County, Texas, another potential reserve area, the mileage's for both of which are shown on Page F of Exhibit 21, if you use those as multiple points, the price grid that you would generate for the Southeast would be significantly higher than that presented in the DCMA proposal, isn't that fair?

A It's probably true. I would say that you're still also leaving another reserve supply out, in that

Wisconsin is not in the calculations.

Q Have you made any of those calculations?

A I have not. I have presented really as much calculations as we've had time to provide.

Q But we don't have to make the calculations to intuitively -- I mean, you know, you have national responsibility. You've got plants in the Southeast, you know. And you know what the map is. I mean, without being rocket scientists here trying to be overly precise, if you added, you know, Marathon County, Wisconsin, okay, as on the table on Page F, and generated prices to Miami and other points in the Southeast, we know that those prices are going to be even higher than the ones shown on here, would they not?

A I would agree they would be. I would agree that you can create sharper dislocations than exist in the proposals for Florida.

Q So by choosing Wayne County, Ohio, from the potential supply areas identified on Page F, the DCMA proposal basically adopted a minimalist approach to raising prices. Now, isn't that just fair, since it wasn't the lowest price generated at Miami?

A If you focus only on the Miami analysis, yes.

Q Okay. Let's turn to Page 5, 6, and 7 of Exhibit 36.

Okay. Now, can you summarize for me and sum up, perhaps in a sentence -- maybe it takes two -- the point of these charts -- your point in presenting these data sets?

A My point is to illustrate that it is possible to see out-of-area finance associate, and it is possible to see milk move further distances to serve markets as a result. And the combination of those two would suggest to me inefficiencies.

Q Okay. Now, does the possibility -- is the possibility shown by the fact that your weighted-average gain numbers on -- the far bottom number on the right of Exhibit 5, and the number in the middle, that they're positive?

A Yes.

Q If they're negative, that's not possible, right?

A If it's --

Q It's not economically possible?

A If it's negative, then the economic drive to do it would not be there.

Q Okay. Now, let's just look at some of the -- some of the composition of your hypotheticals here. First of all, I'm on Page 5.

The Milwaukee plant, you posted only 25.1

percent sales in Florida. If that's an Order 30 plant, and the rest of its sales are an Order 30, it's not going to be pooled in Florida, correct?

A I would not believe that it could keep the balance of its sales in Order 30.

Q In order to be pooled in Florida, which is what you need for the proposed competitive situation scenario, right?

A Correct.

Q In order to be pooled in Florida, if you've got 25.1 percent of the sales in Florida, where are the other 60 -- 74.9 percent?

A I would believe that they could be distributed. As you think about Wisconsin -- or Milwaukee, Wisconsin, that you could easily have sales in Order 30, 32, 5 and 7. As you basically move the milk down, you would have sort of a Christmas tree of distribution in order to spread them out.

Q Okay. Let's be direct and clear here. If you're going to be pooling in Florida with 25.1 percent, you're located in Milwaukee, you can't have any more than 25.0 percent in Order 30, correct?

A That is correct.

Q And so -- and you need two other orders, at least, in which you have no more than 25.0 percent -- or

24.9, if that's all you've got left, correct?
A Correct. And this proposal provides added incentives for those sales to grow in 5 and 7. So there is two orders to put 24 percent in each of those; that is 48 percent. So you're left -- you have a balance back in Wisconsin.
Q Where does the cost of acquiring those sales show up on this exhibit? That is, sales in Orders 32, 5, 7, wherever they might need to be?
A They're not accounted for in this.
Q If they weren't -- are they going to be automatically profitable transactions?
A Not necessarily.
Q And, in fact, if you think of -- in order --
A I feel in the dark.
Q See if we can throw some light on it.
Okay. They're not going to be automatically profitable transactions. And of course if they were sufficiently unprofitable, you might not have a positive here on your bottom line, correct?
A It's possible.
Q Now, let's look at another component of this table, and that's the hauling rate. You used the .396 hauling rate. Why?
A I was trying to do a fair comparison relative

to the examples offered by Mr. Sims, and so I used the same factor that he offered in his analysis.

Q But you understand that he testified that that is not a full cost of hauling, correct? Packaged milk.

A It's possible.

Q Is it possible?

A That is his testimony.

Q But, let's be candid, Mr. Kinser. You know, as a hauler of packaged milk, as Dean Foods corporate, that that is not the full cost of hauling packaged milk, correct?

A The hauling cost is going to depend on exactly the point of origination and the point of destinations and whether or not you're going to have -- I'm not sure that it's quite that straightforward, but I would agree that there are a range of hauling costs that could be considered.

Q What is Dean Foods' average hauling cost for packaged milk per mile?

A I don't know.

Q Did you investigate that before making any of these data sets?

A We have a hundred and some-odd plants and no, I did not have time to survey the plants to get --

Q Did you survey any of them?

A No.

Q Do you have knowledge from prior surveys of the average cost of hauling packaged milk?

We're getting more light on it.

A It's getting brighter.

No.

Q Okay. Now, the cooperative side of the industry doesn't -- the milk suppliers don't haul packaged milk, so we come to these hearings, put in a lot of invoices about what it costs -- not this hearing but prior hearings, about what it costs to haul supplemental bulk milk into the record so that the secretary can have as accurate as possible information about that. You've seen that data, correct?

A I have seen the data.

Q Okay. Now, when we are then talking about the cost of hauling packaged milk, since we don't do it, we've got to work off of hypotheticals or data. But the handlers have that information, and I don't see it here in the records so that we can use accurate information. Can you help us at all with that?

A Two thoughts that come to mind. One is just the sort of time frame of which needing to respond to this, and also just thinking about -- appears as though you can -- well, I'm using this as sort of -- there could be potential unintended consequences. I'm not using this as a justification of what the price surplus should be. When you start arguing the price surplus, that that is not a factor, it seems as though -- you go that right route as a policy shift from the department's historical practice.

Q So the department should take into account the cost of moving packaged milk when it considers Mr. Hitchell's concerns about competition, your concerns about competition, Mr. Courtay's concerns about competition, other analysts' concerns about competition, but should not take it into consideration when Mr. Sims presents a smooth surface for increasing the Class I differentials. Is that your position?

A Let me clarify that. If it is going to be the department's practice to do that, that seems to be a policy shift, and it's doing such on an emergency proceeding, it does not sound like a good solution.

Q Okay. Let's go back and look at the hauling rate factors on that Page 5 of Exhibit 36 again.

If -- if you assume the best information in the record here is Mr. Sims' testimony that -- on the cost of hauling packaged milk, because no other information has been presented. And if you assume that if you plugged in here the full cost of hauling packaged milk at roughly --

let's just use 5 cents instead of -- or 5 instead of. 39, okay; .05 instead of .0039. Just hypothetically, if you used that, isn't it correct that the bottom line on this analysis would show a negative?

A It's possible, because you're going to increase the hauling cost; you're going to leave the location adjustments the same. So it's possible as you increase that, that that could happen.

I guess the flip side is that you -- I made an assumption about the plant, and the plant could dilute itself back out, and then they would have less Class I disposition to move. So there is other ways that you could deal with some of that inflated cost to help mitigate it.

Q You mean by pooling Class II milk up -- or Class III or IV?

A Absolutely. Which exactly defeats the purpose.

Q In any event, if -- and we can all do the arithmetic on the brief, if by substituting a more realistic hauling rate than the .00396 in these equations in these tables, these Page 5, 6 and 7 on Exhibit 36, if you get -- if it generates all minus figures, your testimony would withstand that those aren't really logical hypotheticals, correct?

A If you could justify the 5 cents as being accurate.

Q Well, how about at 4 and a half?

A Again, you could do it. You assume that people won't -- that all your assumptions here would have to hold intact as they are presented, which I -- candidly, I really think that if I were running the plant in Milwaukee, I wouldn't run it at 85 percent.

Q Okay. If you were running a fluid milk plant in Milwaukee, you wouldn't be gunning for sales in Miami either, would you?

A Probably not. But I could.

Q By the way, when you're figuring the mileage from -- the mileage from -- the cost of supplying that Miami market out of Milwaukee, were you figuring mileage from Milwaukee to Miami, or just from somewhere in the Order 30 base-point milkshed?

A That's a great question, but the source of all the mileage provided here, unless I've mistyped something, would be using Mapquest, and it was from the city to the city. So when I provided, in this instance, Milwaukee, it's 1500 miles from Milwaukee to Miami.

So the further assumption here is that all the sales are in Miami, that theoretically the sales could start as soon as you cross into the Federal Order 6 marketing area to accomplish it, though the map would be slightly different because of the comparison and location adjustments. But that competitive set versus Miami.

And the same would apply all the way through. So the second -- the following page, when I did Indianapolis to Miami. That's again miles from Indianapolis to Miami. Same thing would apply to getting sales in the Florida order. And then Olney, Illinois, to Bowling Green, truly is miles from Olney to Bowling Green.

Q If you look at the Olney to Bowling Green, Page 7 of Exhibit 36, just for a minute, why did you pick Bowling Green when there is no plant there?

A I was trying to find a population center. I used Page 2 -- if you look at Page 2, Exhibit 36, and the population, when you look just across the Illinois border into Order 7, the counties, at least as I see them, appear to be white, which means you have less than 25,000 people in those counties.

So I was trying to find a place where you had people, and so the biggest sort of reasonable distance there in eastern Kentucky that I saw was Bowling Green, which is blue, which puts you at least at 100,000 to 200,000 people. So if you're going to have sales, you've got to have sales where there are people at. And Bowling Green was a population center available.

Q Okay.

A I mean, you can run thousands of these. You can look at every iteration of every plant outside and inside. And again, I think when you do that, you're going to find some really interesting things; that you're going to have some milk move longer distances, to be more competitive, than shorter distances.

Q Because under the DCMA proposal, because the gradient of the location prices has increased in steepness?

A Correct. And that's taking into account Page 3 that the more that gradient increases, is the more miles that a plant either loses to its competitor or a competitor gains against it, depending on which point you want to do the reference.

Q Now, looking at -- by the way, looking at table -- Page 3, Exhibit 36. Again, if you used a closer to actual packaged-milk mileage rate on this table, your mileages in the reduced competition miles will decrease, correct?

A As you modify the mileage rate, it will definitely affect the outcome of the concentric circles. There is no way to drive it to zero unless you've assumed that --

Q Well, if there's no changes in price, that's

the only way to drive it to zero?
A Correct.
Q Because your zero is the base-price relationship?
A Correct.
Q But if instead of .00396 you use .0005, then just by the first line, quick math, your reduced competition miles is going down to 20?
A Correct.
Q And they would all be reduced accordingly as you get down the table?
A If you assume 5 cents and that would be how you do the math, then the results would change.
Q Okay. Let's talk about pooling and diversion a little bit.
How many plants does Dean Foods have in Orders 5 and 7?
A That's my biggest fear, that somebody would ask that question. Would you like me to attempt to count them?
Q Come close, if you can.
A About 20.
Q How many of those plants have Class II production at them? Have Class II production?
A I would believe that probably all of them are

going to show some disposition to Class II.

Q By making fluid cream products and cottage cheese and products of that nature?

A They're all going to have some cream sales. A lot of our cream is moving to either our own or other Class II facilities, so they'll have the disposition of cream getting classified as Class II.

Q You're -- so in the Southeast, you would have plants that -- fluid milk plants, distributing plants that move cream to your own nonpool Class II facilities?

A Yes.

Q Nevertheless, those -- so the demand for -- what products do those nonpool Class II facilities make? What Class II products?

A Ice cream, predominantly, but not exclusively.

Q Do they receive fluid milk directly -- farm milk directly as well?

A I think it depends on the plant. I know we have some that don't, and it's possible that we have some that do.

Q Okay. Are all of -- how many non-ice cream plants do you have in the Southeast? Or nonpool Class II plants?

A I'm going to suggest for the record it's three.

Q Okay. Is most of the demand for fresh dairy ingredients for those plants reflected in the receipts at the pool-distributing plants?

A The question is, are they receiving their milk via a pool-distributing plant as opposed to having receipts on their own?

Q Well, the majority of their milk from the pool-distributing plants rather than directly.

A The two that I have the better knowledge of, I would say that is absolutely true. The third, I really don't know how that plant sources. I believe -- two are that way, and I believe that there's three. It's hard for me to think. It's also knowing the one I don't know as much about would work differently, it surprises me. So I wouldn't say for sure, but I believe that your assumption and statement is correct.

Q Okay. So that being the case, the orders for milk -- the demand for milk at the distributing plants is an aggregate of the needs -- your company's needs for milk for its Class I and for its Class II uses?

A Not exactly. If you're connecting that to the prior question and drawing the conclusion that if ice cream demand goes up and the ice cream plant needs more fresh milk product and then we're going to order the milk into the distributing plan for reasons to then skim it and move the cream over, no.

The bottling plants are the demand plants, and the Class II stand-alones are the balancing facilities of that. So if there is insufficient demand in a bottling plant to create enough cream to run an ice cream plant, we're going to find another plant to be a cream supplier or find cream on the open market to manage that.

Q Okay. The demand at the distributing plants, is there any plant that demands the same volume of milk seven days a week, 365 days a year?

A Not that I'm aware of.

Q And you've seen the exhibits presented by the market administrators and by Mr. Sims which show daily receipts at pool distributing plants in Orders 5 and 7?

A Correct.

Q Are those receipts are generally reflective of the patterns of receipts in your -- in Dean's 20 plants in the region?

A I have no reason to think that they're not representative.

Q Now, if you just take Page N-1 of Exhibit 21, if you have it.

A Okay.

Q Again, just using January 2004 for simplicity, it's the first month?

A Can we use February?

Q Sure.

A Thank you.

Q That's fine.

The -- what is your position with respect to whether -- well, the high point is Wednesday the 4th in February, 2004, correct?

A Yes.

Q Okay. Now -- and the low point looks to me like Sunday the 22nd.

A I think that's correct.

Q Okay. And there's about 20 percent less milk required on Sunday the 22nd than on Wednesday the 4th, correct?

A That's fair.

Q Now, what is your view with respect to whether the 20 percent of the milk that is required on Wednesday that is not required on Sunday should be pooled?

A Well, I don't think that that's a fair comparison because --

Q Why not?

A When you are pooling and diverting milk, you're pooling and diverting monthly. Now, I'll agree that you've got to balance day to day, but at the end of the month, when you file the pool report, it's the results of the month's activities.

Q You're getting darker.

A Keep up with me, Mark. Keep up with me.

I'm seeing fine now.

Yeah, you can make points from highs to lows, but the reality is when you file a pool report -- because the pool report is where the diversions come into play. If you don't have a pool report, you've got nothing to divert. So you're going to look at the results of the month's activities, which is going to include, absolutely, the 20-percent reduction on Sunday the 22nd. But it's also going to include your highest delivery day, of the 4th of February.

I guess I'd take that further to say that I have no reason to believe that if the request had been made -- and I really wish that we had done it, that if you bring Federal Order 6 that you will see the same thing. You'll see variations from day to day. You'll see high days and low days, and you'll see some percent of the reserve supply, and that market is functioning.

Q We'll talk about that in a minute. I just want to know in principle -- I take it your answer is yes, that the milk that is needed on Wednesday that's not needed on Sunday should nevertheless be pooled?

A Milk making delivery to the market should always be pooled. The milk that is on stand-by reserve and not always coming to the market, that's where we've got to look at whether that milk needs to continually be a part of the pool, or if it's only a part of the pool when it's served.

Q Okay. So if the dairy farmer -- and I know you're from a dairy farm.

A That's correct.

Q And you've worked for a coop for a while.

A That's correct.

Q If the dairy farmers' milk -- your view on pooling here in the Southeast is that for the farmer whose milk is needed some days but not all days, their milk should be pooled when it's needed --

Now it's getting light again.

The milk should be pooled when it's needed, but not necessarily pooled when the distributing plant doesn't order it?

A I think when you follow that logic, you're making an assumption that somehow the distributing plant might just not order milk. And we've had equal testimony to not only the challenges on the supply side in the Southeast, but the same type of testimony to the growing population. And to think that somehow distributing plants aren't going to continue to order milk to serve customers is illogical.

Q You read something into the question that is not there at all. I'm not saying that distributing plants don't order milk. I'm saying they order it when they needed it, as the data on N-1 and OO and various exhibits in this hearing so show. As the data show, the distributing plants order it when they need it. I'm not saying they're not going to order it, but they don't need as much every day.

And the question is, when milk is not needed, should that dairy farmer's milk -- but it's needed some days but not all days. We're only talking about monthly, now, or weekly variations when it's needed. Some days and all days, should it be pooled? And what I heard you say was, not always.

A Yes.

Q And that's your position, correct?

A Yes.

Q Now, if it's not pooled in these orders, is it going to be pooled anywhere in the Federal Order System, or just have a depooled manufacturing price?

A In our earlier discussion when we talked about reserve supply, at least two of the areas that we picked as reserve supply are federal areas, so there's pooling available in those, and they have less stringent pooling requirements than is being put -- than exist or proposed in this proceeding. The one outlier to that of our three earlier would be the Pennsylvania situation because of the fact that part of that area is unregulated. But I would suggest that the majority of that milk finds a pool.

Q Just so we're absolutely clear, your position is that milk should be pooled on another Federal Order which has more liberal pooling provisions and not pooled in the Southeast?

A I'm not sure I would agree with that to its logical conclusion.

Q Where do you stop?

A I think that is the debate that is before us today, is what is a reserve supply? Because if a reserve supply is that all milk has a home, then you've got to continue to shuffle the orders around such that all the milk can find its way onto a Federal Order.

And if the definition of a reserve supply has to do with the demands of a Class I facility, then you could have situations where some milk was not part of the Federal Order, such as exists today in Idaho, by the dairy farmers' own choosing.

Q And is that -- that's what you're advocating for the Southeastern United States today?

A I'm in agreement with the problem that the

Southeast dairy situation is such that demand is growing and supply is diminishing and that a solution to that is to increase the funds -- the payments to dairy farmers. And the proposal that I support is to do that by way of tightening the diversion such that the dollars paid of the plants' processing the milk in the order and serving the customers located here goes to the dairy farmers that are continually serving the market.

Q With respect to the volumes of their milk that are delivered to distributing plants only?

A If we focus on the Southeast, I don't understand how, even with provisions tighter than we have suggested, that milk located here doesn't pool. It's the fringe milk that we're in debate about, whether it's reserve supply or not. It's the milk in Hopkins County, Texas; it's the milk in Wisconsin; it's the milk in Pennsylvania.

Q And the issue with that milk is not whether it's needed in the Southeast, because we know it's needed some days of the week -- at least some days of the week, at least some months of the year, correct?

A Correct.

Q And the issue is whether it is pooled on the Southeast, whether or when it's not needed in the Southeast, it's pooled by the Southeast?

A That is the question.

Q Now, is it your view -- can you turn to Exhibit B-1 through B-4 of 21? Pages B-1 through 4, Exhibit 21. I just want to talk about seasonal variations in supply and demand a little bit.

Of course, you're very familiar with the counterrelationship of seasonal demand for Class I needs and seasonal supply of farm milk.

A Correct.

Q Is it Dean Foods' position in this hearing that a farm, wherever located, whose milk is needed, fully needed by the Southeast in the short season, should not be fully pooled in the spring on the Southeast orders?

A Yes.

Q Only so much of the milk should be pooled as would fit within the what, 10 percent diversion that you propose?

A I don't think that is true. Because we had -- we have had to -- and continue to support the idea of recognizing seasonality and that there is a different diversion in the spring than there is in the fall, because there is a definite seasonality. And to take a flatline approach and disregard, that is to not acknowledge the conditions of the market that are, as you say, they're cyclical and unfortunately, countercyclical.

Q You advocate what, 15 percent in the spring?
A 20 percent.
Q For what months?
A March through June, which is 100 percent increase of the July through November period.
Q What is your view of the equity for farmers in orders outside the Southeast who must absorb on their pool all of the nonClass I marketings of these, quote, fringe, close quote, suppliers to the Southeast and not experience the benefit of the Class I sales of those quote, fringe, Southeast suppliers?
A Let's reopen 33. Let's talk about tightening it up. And you and I will have the same conversation about the Mideast marketing area. Let's go to 32, and you and I will have the same exchange.
Q So the answer is Idaho?
A Say that again?
Q Your answer is Idaho; that is, the milk should not be pooled?
A That is that at some point it needs to be evaluated if all the milk has to have a home on every order.
MR. BESHORE: May I have just one minute?
THE COURT: Sure.
BY MR. BESHORE:

Q With respect to Class I prices, do you have a Class I price proposal for the Southeast in this area?

A No. We oppose the proposal to adjust the Class I price surplus. We believe that we -- and have demonstrated that our proposal would put equal dollars in the pockets of dairy farmers and not disrupt the Class I price surplus.

Q So your proposal is the status quo?

A As far as the Class I price surplus, our proposal is far from status quo as it results to the pay to dairy farmers.

Q I'm talking about Class I prices, not your Class I price proposal is the status quo?

A Yes.

Q Now, does Dean Foods -- is it Dean Foods' position that the Class I price surplus legislated by Congress in 2000 should remain in place in perpetuity?

A No.

Q Okay. Do you have any expectation of when you might think it would be appropriate to adjust it?

A I believe we -- there has been suggestions for an evaluation, and maybe that is needed.

It has to be looked at, though, from an overall perspective. I think trying to piecemeal something together would not work.

Q And you consider the entire Southeast to be a piecemeal situation?

A Yes. Because you change -- you've made two major changes -- not that changes is bad, but that the change of out-of-area relative to in-area and then changes with the in-area. It seems that if you're going to talk about the Class I price surplus that you've got a national surplus and that not just -- it changes as it relates to matters beyond just the scope of this area.

Q Your out-of-area/in area concerns are reflected by 5, 6 and 7; that analysis and the, quote, chaos that it represents, correct?

A Well, that's a piece of it. I think you also have to take in -- and you're referring to Exhibit 36?

Q 36, pages, 5, 6, and 7, yes.

A I think you also have to include Page 3 in that, because all of the out-of-area Class I differential is going to be unchanged, the in-area is going to be increased on differing gradients. Again, not all those points are going to be applicable.

The other thing that is -- that's not included in this -- the proponents support raising the transportation assessment 10 cents for Order 7. So if you want to compete with Order 7, and your competitor had a 10 cent increase -- that is really a net of 20 -- you could go take some sales, keep your plant off the Order, and you've got 20 cents to work with instead of 10.

So I think you've got a lot of moving parts that we really haven't had time to look at and think about. I mean, candidly, I was working on this last night, just exhausted, thinking, what if something is wrong here. But yet we're making policy decisions on this that impact plants, the value of plants, and dairy farmers' income. And I'm really not sure that we've given proper due diligence.

Q Okay. In any event, if these -- 5, 6 and 7 of Exhibit 36, if they're negative by comparison with appropriate -- appropriate mileage -- appropriate packaged-milk costs factored in, they're not going to represent realistic options, correct? That's your testimony?

A I believe that to be -- I'm just trying to think through my mind what are the values of diversions, because I didn't acknowledge the value of diversion, getting access to divert more milk and changing all of that. So again, in 6 the diversions are pretty tight. There is not going to be a lot of room there.

Q There is not going to be room to divert it?

A There will be less room to divert. There will be less game-playing options.

Q Okay. Thank you.

THE COURT: Mr. Smith, any questions?

CROSS-EXAMINATION

BY MR. SMITH:

Q Dan Smith. Good morning, Evan.

A Good morning, Dan.

Q I would like to follow up, to begin with on the -- where you ended up with your testimony on Class I.

Do I understand your position is not so much that some adjustment needs to be made, but the particular adjustment that has been proposed is not the -- is not the proposal that you can support?

A Yes.

Q With regard to the adjustment that needs to be made, in the beginning of your statement, do I understand that it's the position of Dean Foods that at some level, producer income needs to be enhanced to ensure the supply in the Southeast?

A Yes.

Q Do you have some suggestion in terms of how Class I -- the Class I surplus can be adjusted as an alternative to what has been proposed?

A Not to present and not in the top of my mind.

Analyzing the Class I surplus is, I believe, a very complicated process that one does not do in short order. As I don't think -- I don't in any way suggest that I don't think DCMA has not spent time to bring what they brought.

I think that the emergency action that the secretary needs to take to improve farm income for Southeast dairy farmers today, and immediately, is to tighten diversion limits. After we've done that, let's watch what happens, and let's look at what we do next.

Q Following that line for the moment, DCMA's proposal, with the limits that is -- are in their proposal, would yield 2 cents and 11 cents on the blend. How far -- do you have an assessment of what your -- you do? What impact on the blend price for your proposals do you follow?

A The results -- I believe, when you say the DCMA proposal would have a 2 and a 10 cents, that you are drawing from Exhibit 9, Page 13 of 13, and Exhibit 18, Page 1.

And in my direct, I was trying to compare it to -- if you move on across and you take into account not only the diversions offered by DCMA but also their Class I changes, that you get results, looking at Exhibit 18 for Order 7, of 26, 26 and 24 for the years 2004, 2005 and 2006.

We ask the market administrator to evaluate diversion limits alone, and the result is 23 cents, 27 cents, 29 cents/2004, 2005, 2006. So as you can see, the result every year is not the same of their package against our alternative, but very similar in results.

The difference is that the distribution of the dollars is quite different. Again, looking at Exhibit 36, Page 3 -- pardon me, Page 4, and just picking on December, their allocation of the December improvement is $1.09 at Baxley, a dairy farmer delivering to Baxley, Georgia. And it's only 4 cents to a dairy farmer delivering to Shreveport, Louisiana. It's only 4 cents to a dairy farmer delivering to Mount Crawford. Strike that.

Then to move on to Order 5, which their results are on Exhibit 9, Page 13 of 13 --

Q If I might, Evan. The question I was trying to tease out is if you removed Class I, an adjustment to the Class I from the package and only make the diversion adjustments that you've suggested, what kind of increase to the farmers' blend price might you see from only an adjustment to the diversion limits?

A Is your question, if the secretary would adopt just the diversion limits being offered by Dean Foods as opposed to the package being offered by DCMA?

Q Correct.

A That is the question I'm trying to answer. I'm trying to explain that if you look at the dollars that we are offering -- same dollar returns back to dairy farmers that the DCMA package offers -- the distribution of the dollars looks different under our proposal than under the DCMA proposal.

Q Okay. I interrupted you.

A I was just going to walk through the same exact statements. Just looking at Order 5, and you will find the same -- that under the DCMA proposals, as analyzed by the market administrator, you get 24, 27 and 27 cents improvement for 2005 -- 2004, 2005, 2006.

Turning to Exhibit 10, looking at just the Dean Foods diversion proposal, you get an improvement of 21, 31 and 24; roughly the same numbers as far as dollars back to the dairy farmers. But when you look at where the dollars are distributed, under the DCMA proposal for dairy farmers delivering to Order 5 distributing plants, a dairy farmer in Charleston, South Carolina, picks up 94 cents, while a dairy farmer to, say, Louisville, Kentucky, picks up 4 cents.

Q Okay.

A So I would say that the proposals on their face return the same improvement of dollars in producer paychecks.

Q I don't follow that last conclusion.

A That if you take the dollars that -- dairy farmer paychecks, if you just look at gross-up, dairy farmers --

Q Gross-up?

A Total gross-up.

Q The distribution is different, but the total gross-up?

A Correct.

Q Can you provide the basis for the percentages? I don't understand in your testimony, to date that you've explained the basis for the percentages that you are proposing as compared to what DCMA has proposed, and why you asked the department to run the calculations on those numbers.

A It is my understanding, unless I've misinterpreted it, that the proposals that we have -- and that would be January, February, December -- would be at 20 percent diversion limits. March through June would be 10 percent. And July -- I'm sorry, I did not say that -- let me try this again.

You have 15 percent diversion limits for December, January, February. You have 20 percent diversion limits for March through June, and you would have 10 percent for July through November.

And it's our understanding that those are the limits that are in place by action of the market administrator for Federal Order 6.

Q So your -- the basis for the equation is to just to pattern the Florida market?

A As it is being administered today, yes.

Q Was there any attempt to account for the obvious differences between the configurations of the markets in that calculation?

A I tried to run some rough production per capita of Federal Order 5, Federal Order 7 against Federal Order 6. And at least the results that I have suggested to me is that production per capita, the pounds of milk produced by dairy farmers in the marketing area relative to the consumption in the marketing area of each of those areas were roughly the same. So from that, the thought was also that Florida is working so well, to follow that.

Q Correct me if I'm wrong. I understood in your earlier testimony today -- when you referred to Page N-13 of Exhibit 21, did you seem to think at that point that there was more room, given the totals totaling out that is presented on that page in terms of the balancing equation in the market?

A I think there is. I think if you look -- there are a few months that's in the tighter period where it's going to be -- the diversions are going to be less than is existing in the marketplace today; but then there are a few months where there is more -- more diversions than the marketplace is calling for. So again, some of the discussion that I had with Mr. Beshore that it's acknowledging that there's seasonality and that the market should respect that, as well as the policy on how we address it.

Q Which leads to the ultimate question that you and Mr. Beshore reached, which is the diversion limits attempting to address the milk that's being pooled in terms of volume and time when it's not needed in the market. Is that correct?

A That is the question that's unresolved.

Q Do you have an assessment from your analysis of the market as well as the testimony that's been presented as to what that volume looks like against the Class I pool needs of the combined two orders?

A Well, I'm going to draw from Exhibit 21, B-1 and 2. As I understand it on B-1, it's the Class I milk for 5 and 7, and then combined. So just trying to talk at a really high level, in the lower right-hand corner, you have 26-billion pounds of milk Class I demanded in the marketplace. Flip the page over --

Q That's over a three-year period?

A Yes.

Flip the page over on B-2, you have the production over the same period, same three-year period, of area 5 and area 7, and you end up with 26.3.

So just on its face, summing those two together, I believe that the Southeast marketing area production was insufficient for the Class I demands. And as has been discussed already, Class I plants are never going to be 100 percent Class I. But if you just look at distributing plants to meet packaged-milk processing, the area is deficit. So all of the milk produced here should be pooled, and the milk that is in debate is that milk which is not located in the marketing area.

Q If you continue on to Page B-3, Mr. Sims has plugged in, in the fourth column, the additional 25 percent in terms of making the ultimate calculation of the deficit situation in the market.

A I guess I prefer to maybe back up one column and just look at column three before we make assumptions about that, and it points out you're 400-million pounds short in the market. I'm suggesting to move away from four, because you're having to make some assumptions about what type of disposition is in a plant, and really what maybe should be in a plant.

Q So you draw from Page B-2 that the market's in deficit. But in terms of the volume or percentage that the market is in deficit, where would your analysis carry forward from that to get to the question of how much milk is extra to the pool that is currently being diverted?

A Can you restate the question?

Q I'll start with my -- you make the original calculation off of Page 2 that the market is in deficit in terms of its ability to provide the supply. But in terms of quantifying the actual number of that deficit, not just in terms of the local supply, but the supply for the market, that volume of milk that is extraneous to the pool, how can you get to that next step without making assumptions -- some assumptions?

A To address the milk that is a part of the pool but not being used in the marketplace, I believe that Exhibit 32 offered by the Market Administrator's Office for Federal Order applies, and Exhibit 33 offered by the Market Administrator's Office for Federal Order 7 gets at that, in that it's the diversion. So it's the delivery that is not into the pool plants in the Order -- let's be clear that they did different things, and so the two numbers are not exactly the same.

But if your question has to do: How do we quantify the milk that is participating in the pool but not being utilized in the pool plants, I would suggest that one could rely on Exhibit 32 and 33 to get that.

Q Can you take that pool volume, or do you need to make some accounting for Mr. Beshore's questions to you in the end of your testimony with regard to its balance and function, that some of that milk is being relied upon for a balancing function?

A I guess it is the belief and testimony of Dean Foods that there is balancing, but the current provisions -- current diversions are in excess of the balancing needs.

Q So that the amount is ultimately an elusive number?

A Yes.

Q The percentage of that.

I'd like to turn to the Class I discussion of your Exhibit 36, I believe, and your three sheets relating to potential changes in pool qualification by your Milwaukee plant and the Indianapolis plant and the Olney plant.

With regard to the Milwaukee plant, as I understand it, 25 percent -- 25-plus-change percent of that plant's sales would have to move south to Miami to be pooled on the Federal Order.

A No.

Q Can you go back through the -- the provision by

-- the procedure by which the plant would be pooled again, changed from Order 30 to Order 6, in terms of a percentage. If I've misstated it --

A The way we understand the regulations is that you're going to have to have 25 percent of your disposition of Class I products in the marketing area of Federal Order 6. And you would have to have the balance of that disposition divided out across the balance of the Order such that it was not greater than 25 percent in any of the other orders.

Q That was the thrust of my question. I left out that the order -- you were dispersing the remainder less than?

A Just to make sure that the record is clear, the marketing area of Order 6 is greater than Miami.

Q Sure.

A And so this assumes that all of that 25 percent of 85 is sold in Miami, when in reality there are closer points with which to start with disposition.

Q Dispositions in Route 6 greater than 25 percent, and no route dispositions greater than 25 percent in the another order?

A Yes.

Q The 25 percent change, what would that look like, that current 25-percent volume of your hypothetical plant in Milwaukee, you could just give a short explanation of where that milk is currently sold that might be available to the plant to be upped and lifted and trucked down to Florida?

A So the plant could discontinue, and would need to actually discontinue, some sales that are in the Federal 30 marketing area.

Q And those sales would be by way of to schools, to supermarkets?

A Any route disposition of Class I product located in Federal Order 30, or a plant would have to grow capacity, grow production such that it could accomplish 25 percent of its sales in Federal Order 6 and shifting such that the Federal Order 30 sales were less than 25 percent of Class I.

Q Isn't it correct that the patterns of sales between a processing plant and their customers are well established and depend on relatively long -- for the dairy industry anyway, relatively long-term relationships between supplier and customer?

A I think it depends on how you look at a customer.

Q Well, in the Milwaukee area, the customers -- would it be correct that the base customer -- the customer base for your plant would be a supermarket-supplied contract and school contracts, other institutions?

A Maybe let me be clear for the record: Dean Foods does not have a plant in Milwaukee.

Q We understood that. We're talking public policy.

A Okay. So there are a lot of things -- a lot of sales points for plants that include those that you stated.

Q Wouldn't 25 percent of the plant's volume be embedded in terms of its sales over relatively long-term contracts?

A I'm not sure that I believe that to be true. Maybe I could --

Q It would be your testimony that a plant would have 25 percent of its supply available to essentially pick up and move to Florida over a relatively short-term basis?

A I believe it could be done.

Q Mr. Beshore asked you whether the cost of those new sales is reflected in your -- in your analysis. And you have hauling in column one of those three sheets. In the middle there, you've identified where the costs are. My understanding was that you had not reflected the cost of selling that milk in the Florida market as opposed to

the Milwaukee market? Marketing cost --
A That's not what I understood the question from Mr. Beshore to be.
Q Well, what did you understand his question to be?
A I understood him to be asking if I had looked at the cost of serving customers not located in Federal Order 6.
Q So you're serving the customers in Federal Order -- I'm sorry, say that again.
A My understanding of the question from Mr. Beshore: Had I evaluated the cost and reflected the cost of serving customers not located in Federal Order 6?
Q So from the 75 percent volume, that would be dispersed across the market?
A Yes.
Q And the answer is that that's not reflected in this equation?
A That's correct.
Q And is the cost of moving that milk, finding a new home for that 25 percent of milk, the cost of those sales, other than hauling costs, is that reflected in the calculations?
A Can you restate that?
Q You're taking 25 percent of the volume of the

plant's production, picking it up, trucking it down to Florida, and you have to market that milk and find a new customer for it. Is the cost of that -- those -- that sales cost reflected in this analysis?

A The cost of serving a customer in Miami, Florida?

Q Correct.

A Yes.

Q Where is that cost reflected?

A Well, maybe it's not directly reflected. It's assumed that a -- serving a customer would be the same as it is in -- that service cost of the customer would be the same; the difference is the haul price. And so the hauling is what's demonstrated. The assumption is the balance of service.

Q I'm from the North. Milwaukee is way north; Florida is way south. Isn't it correct that we're two very, very different markets? To come down here and sell milk in Florida after your historic time having served in the Milwaukee market is going to require some additional costs, and costs in addition to your existing cost pattern back home? You're breaking into a whole new market.

A You're breaking into a whole new market. You are probably bringing in cost savings to your customer.

And our experience is that money moves milk. Money moves customers.

Q This amount of money, you think, will move milk 2,000 miles?

A Yes.

Q There's a fair amount of volatility in the net gain -- not a fair amount, a tremendous amount month to month to the plant, running from 84 cents in the March side to a loss for the month of September. Volatility is obviously a concern for manufacturing interest. Is that volatility similarly reflected for the sales in the Milwaukee plant month to month?

A I'm not sure I understand the question.

Q The month-to-month net gain for pooling the milk in Florida between Order 30 and Order 6 reflects substantial monthly volatility. I'm just wondering if that's common to the two markets or specific to this particular movement of the milk?

A I would say that's a product of the example.

Q In the sense that --

A In the sense that the relationship between the plant cost and the blend in Order 30 is going to function differently than the plant cost and the blend in Order 6.

Q So the plant manager, whoever is going to make this decision in the Milwaukee plant, would not have to confront that volatility if he keeps -- or she keeps the milk at home as opposed to moves it to Florida?

A I believe that to be true.

Q Thank you.

THE COURT: Mr. Rower, you have some questions.

EXAMINATION.

BY MR. ROWER:

Q Good morning, Evan.

A Good morning.

Q Jack Rower.

Evan, much of your testimony is focused on diversion limits here this morning. Do you have any opinion on the proposed touch base changes and provisions in the orders?

A If the secretary is going to adopt the diversion limits offered by the proponents, we would oppose the touch-base requirements being lowered to one day a month.

There is a very definite interplay, and I think that this was touched on some in the testimony about the inefficient movement of milk for touch base. And I think that that's driving at milk moving to market that is not needed; it's moving in order to get qualified to touch base. And so if you don't tighten diversion limits more significantly and you lower the touch base, you widen the gate for milk to get in.

Now, I will agree that diversion limits how much can get here, but touch base also makes it worth to qualify. So if -- if our diversion limits would be adopted, we would support the idea of dropping the touch base to two days a month. If the proponents of 1, 2 and 3 touch diversions are adopted, we'd prefer no change to the touch-base requirements.

Q You used the term "widening the gate." Would you explain what that means just so that we clearly understand what you -- what you're referring to?

A Sure.

If I'm -- let's be clear that the touch base is more critical to milk moving greater distances. Because if you're local milk, then if -- you need to somehow shuffle things around. A 200-mile shuffle of milk to touch base is not as costly as a 500-mile shuffle to touch base. So touch base has different implications on in-area producers as opposed to out-of-area producers.

So it's our belief from, again, this idea that touch base is creating an efficiency, but the inefficiency that's resulting is that milk needs to travel a great distance in order to meet its touch-base requirement. And in doing that, you're going to have to shift some local milk possibly to make room for that.

And that -- that that is the gamesmanship of the system. If you would lower it so that that milk only now needs to travel one day a month so that once it's done -- it's done its one-day touch base -- it can remain out there and then the claim is made, well, it's available because it's touched. But if it's not moving more than that once, it's not serving the market. And that -- our concern is that the diversions offered that such could occur more often than is good for the market.

Q Okay. Thank you. I have another question. I have to read my handwriting.

Evan -- and it's been repeated here several times this morning -- I just want to make sure that we understand. Would it be too simplistic to summarize Dean Foods' position on Proposals 1, 2 and 3 as follows: The existing Class I prices should not be changed; but for Orders 5, 6 and 7, the tightening of diversion limits would provide a more appropriate set of tools to repress marketing conditions in the Orders 5, 6 and 7?

A Yes.

Q Okay. No more expansion in that, and that would be a reasonable summarization?

A I guess on the one remaining, we would support the idea that if -- if the diversion tightening occurs, that we would support the expansion of transportation credits to include, as offered by DCMA, January, February, as months where they could be paid out; but on only the Class I portion, and not the expansion; the four loads as asked for.

MR. ROWER: Thank you very much.

THE COURT: Any other questions from the AMS table? Any more cross-examination?

EXAMINATION

BY MR. BESHORE:

Q Evan, on that --

THE COURT: That's Mr. Beshore again.

BY MR. BESHORE:

Q The last point, you're opposed to the transportation credits on a full load of milk?

A Yes.

Q Even though there is no way the suppliers can know whether that is going to be used for Class I or Class II in your plant?

A Maybe the other plants are different, but we tend to not have huge fluctuations from month to month, because I understand their operations from what is utilized in the plant. So when suppliers are serving our plants, while they don't know the exact -- I will agree we don't know the exact -- probably not a huge surprise to them.

Q Let me put the question another way. I didn't put it in a good way. Yeah, we may know that we're only going to get 80 percent Class I on deliveries to your plants, correct? That's what you're saying?

A Correct.

Q But that Class II, the 20 percent that is Class II, you know, we all know that's going to return 2, 3, 4, $5,000 less to the pool than the Class I, correct?

I mean, whatever the numbers show, and the Market Administrator's data, that's correct, right?

A It returns something different than Class I.

Q Well, much less, right? Let's not mince words here.

A Let's be clear. It depends on what is going on in the marketplace; that the time period that we're entering into now is going to be very different than some time periods that we've been through.

Q At worst -- I mean, the relationship at best, I should say -- between Class II and Class I, if Class IV is the mover, okay, then the Class II price is just going to be 70 cents over Class IV; which means that if you've got a $3.50 differential, it's going to be $2.80 less than Class I, correct?

A Yes.

Q That's the best-case scenario from the pool's point view?

A Correct.

Q And the worst-case scenario is what we've had for basically the last two, three, four years or whatever when Class III is the driver, correct?

A Yes.

Q And Class IV is below Class III substantially in many cases, and that means that Class II is below Class III substantially in many cases, correct?

A Yes.

Q Now, in those cases, you're going to order milk into those distributing plants, and you only want transportation credits to be paid on Class I, even though it costs the same amount to get that 20 percent, or whatever it is, on Class II there, correct?

A Yes.

Q And you want the suppliers to eat that loss, correct?

A No.

Q You want to pay for it?

A I'm saying that the Federal Order is designed to charge a minimum price; we want the dollars that we pay to go back to the dairy farmers that serve our market. And I think that what you are proposing is going to suggest that we lessen Class II production in the

Southeast. And if that's what the marketplace mandates, then we'll evaluate that. But to suggest that our Class I sales should fund the competitor's opportunity to bring Class II milk into the marketplace, I can't support that.

And I know I support that at my own expense. In fact, as we've talked about earlier, there is Class II disposition in our plants.

Q Back to the original point: You expect your suppliers to eat that cost, correct?

A I understand that we are charged -- as has been talked about -- order premiums, and that currently we are charged less than Class I for Class II supplies.

Q Will you accept and endorse an over-order charge that evens out the returns on that Class II and Class I, your distributing plants, including that transportation cost that you don't want to reimburse out of the credits of the pool?

MR. ENGLISH: This is Charles English for Dean Foods. Given the public nature of this proceeding and the antitrust issues, I don't think that is a question that can be appropriately answered.

THE COURT: Are you claiming proprietary information?

MR. ENGLISH: I'm suggesting that the answer to that question is not appropriate.

THE COURT: Are you directing your client not to answer?

MR. ENGLISH: I'm not directing him not to answer; I'm giving him my opinion.

THE COURT: The question is before you.

THE WITNESS: Our evaluation of that, I don't believe, is any different than the cooperative's evaluation of lowering the over-order premium for an increase in Class I price.

BY MR. BESHORE:

Q As Mr. Sims testified, that doesn't occur in the Southeast anywhere, correct?

A I wasn't talking about whether or not the directional change -- just if the price goes up 10 cents because of the result of this hearing, it's not been suggested to me the overall premium is going down 10 cents.

Q And that's your response to whether you're willing to make your suppliers whole on their Class II price losses?

A I'm suggesting that it's similar logic.

Q So your answer is yes. That's your response: To make your suppliers whole in the Class II price switches?

A No. I'm suggesting that that's as much as I'm saying about the topic.

Q Let's move on, then.

With respect to Exhibit 36, your 5, 6 and 7 calculations here, hypotheticals, I've just got a couple other questions that came up perhaps with Mr. Smith's questions, or which I just neglected to get to the first time.

First of all, on Page 7, the scenario for a -- presently, an Order 32 plant switching to an Order 7, okay? Didn't you leave out of the comparison numbers here, the transportation credit charge in Order 7?

A I don't think so. And correct me if I'm wrong here, but I believe that because I'm comparing against a plant in the area that the competition is going to face the same -- already be in that situation, so you're already going to have that interplay.

Q Well, it's going -- somewhere in here you've taken into account the difference in Class I price, have you not?

A Only -- only at the differential level, not -- it would be true if I was going to try and move Order 32 into Order 7 and not move the plant that -- that there's a larger gap than I've represented. But I'm flipping the plant all the way over such that it's going to be as equally accountable on the transportation assessment. So they're going to have the same -- that's going to impact both of them equally and wash out, so the only difference is the location adjustment.

Q Well, there's a 20 cent transportation credit surcharge in Order 7, presently, year end, correct?

A Yes.

Q And there's not in Order 32, correct?

A Correct.

Q So don't you need to reflect that in the difference in cost -- or in profit or gain in this potential transaction? Doesn't it have to be in there somewhere, Evan?

A I don't think so, because I'm comparing against the competitive situation, where the competitor would be in the same -- I think I can put it in. I think it would just wash right back out.

Q Well, you're going to have to put it in -- you have to put it in both places, wouldn't you?

Well, how about this? In the proposed competitive situation, under the DCMA proposal, it's going to get to 30 cents. Don't you have to show that somehow?

A It's my understanding that if I'm competing against a plant fully regulated by 7 that there's is also at 30 cents.

Q Yes.

A So if I'm paying 30 cents more and my competition is paying 30 cents more, we both lose up, and so our relationship between each other is unchanged.

Q But how do you factor in the fact that if your pool is in Order 7 and you've got all of these sales back into Order 32, you're not going to give them all out. You are now under Order 7, and your cost is going to go up 20 cents to 30 cents.

A That is true. For the balance of the sales, back into the home area, there will now be an assessment that -- yes.

Q That you didn't have before on -- in this case, since you're hypothesizing 38 percent in Order 7, you're going to have 61.9 percent in other orders.

A No. No. The 38.1 represents an increase. Because this -- we already have sales. The assumption is that there's 12 percent sales. So this is just a marginal analysis. You'd still just have 50 percent sales back out. So you'd have to take that, whatever it is, 20 percent or under the proposed 30, and divide it by two. So you have 10 or 15 cents back out of area.

Q Okay. Well, if you -- 10 or 15 cents is going to make this a -- you only gain 4 cents to begin with; you take 10 or 15 cents off, it's not a very good deal, is it?

A Well, I think you bring up a point. Then I think you've got to go back to the first and look at -- you could be extracting more out of the marketplace now because there's 20 cents unaccounted for in this. You could raise your price 10 cents and still have an advantage. So there could be some profit, but I haven't recognized that existing in the first. So --

Q Well, why would that be a plus in the first?

A Because you could be selling at a higher price than is reflected there.

Q But this isn't intended to reflect profitability. You just went through that with Mr. Smith. It doesn't reflect profitability or cost and sales in any way, shape or form. Right?

A Sure.

Q In any event, the transportation credit is not showing up in that -- on Page 7 there?

A That's true.

Q Okay. Now let's just look at 5 and 6 for one other question.

Is it your testimony that on Page 5 that a 17 cent gain -- weighted-average gain for that Milwaukee plant pooling in Federal Order 6, 17 cent gain is enough to make -- to change behavior in the marketplace over that distance and trigger the chaos -- that's your word, trigger the chaos that you foresee if the proposal is adopted. 17 cents will do that, right?

A I'm suggesting that it could and that we have not looked at all the points. If this exists and then it's a possibility, what else could exist?

Q Okay. Let's look to Page 6 now of your Exhibit 36. The top half, the current competitive situation -- and this is an Order 33 plant, correct?

A Yeah.

Q Presently, under your analysis, has a 19 cent incentive to pool on Florida order, correct?

A Yes.

Q How many Order 33 area plants are pooled on the Florida order?

A There is zero.

Q Now, wouldn't that suggest that if there is 19 cents to do this under present, and there aren't any doing it, that maybe 17 is not going to change anybody's behavior in Milwaukee?

A I'm not sure that looking -- because really you're talking about that there is 33 cents. So you raise the bar up, and so you're talking about more opportunity than exists today. So --

Q By a difference of 17 cents -- 16.33. Marginal gain of 17 cents?

A Right. But they're not doing it today, so they're going from a zero gain to a 33-cent gain.

Q Sixteen is not enough to make anybody in Milwaukee do it today, right?

A True.

Q And 19 is not enough to make anybody do it today in Indianapolis, right?

A Correct.

Q Just a couple other questions. You've stated and -- or asserted that your proposal for diversion limitations in Orders 5 and 7 is the present Florida model, correct?

A As administered, not as codified.

Q But isn't it true that since December 6th that if you took those percentages as presently administered in Florida and just imposed them on 5 and 7 presently, you would actually have tighter diversion requirements than you have in Florida because of the provision in Orders 5 and 7 since December 1 that you can't qualify diversion volumes on transportation credits on milk?

A And Florida doesn't have a transportation credit fund.

Q I understand. But you're not changing apples to apple or oranges to oranges here. If you had those percentages in this order, in 5 and 7, but you're not able to divert off of all of your pool milk, you actually have tighter percentages than exist in Florida, isn't that true?

A Yes.

Q One final question. You have asserted, if I understood you, in response to Mr. Smith, that dairy farmers in Southeast can essentially get as much additional money under your proposals as under the DCMA's proposals, correct?

A The dairy farmers that are part of the market would receive as much under our proposal as under DCMA's proposal.

Q And your proposals have absolutely no new dollars for dairy farmers in the aggregate, correct?

A That is correct.

Q So the only way any producers are going to get more under your proposal is if it's taken from other dairy farmers presently in those markets, correct?

A It seems as though the dairy farmers that I've heard testify are concerned that their money is elsewhere.

Q Isn't it correct that since you're not providing any new funds to the market -- to these markets in the Southeast that the only way any farmers are going to get any more money is to have it taken from other dairy farmers?

A Yes.

I guess a clarification of that, to think about what is going on today, the money is there today. And it's just being distributed in a different way, and we would like it to be distributed to the dairy farmers that are part of the Southeast marketing area.

Q And not to farmers outside the area who are supplying Class I milk to your plants, correct?

A Not to dairy farmers outside that are not serving milk to our plants.

Q Well, how are you going to get any additional funds, under your proposals, okay, in the Florida market, where you're not increasing Class I prices. You're not changing the diversion requirements. How are those blend prices going to be any different under your proposals than they are today?

A They will not be.

Q So there is no new money from anybody's pockets for the dairy farmers in Florida, correct?

A That's correct.

Q Thank you.

THE COURT: Do you have redirect, Mr. English?

MR. ENGLISH: Yes.

REDIRECT EXAMINATION

BY MR. ENGLISH:

Q Charles English for Dean Foods and National Dairy Holdings.

Mr. Kinser, perhaps in my rush this morning I omitted the purpose of Pages 6 -- 5, 6 and 7 of Exhibit 36. And I think you sort of got it out in some of your answers to Mr. Beshore. But given the fact that USDA said that it is necessary to do sort of spatial pricing and also look at the movement of packaged milk and that packaged-milk prices, unlike raw milk, are nonlinear. Was the purpose of Pages 5, 6, and 7 merely an example of the kind of shadow-pricing analysis not done and not provided in this record?

A Yes, it's an example of that.

Q And that is what USDA said needed to be done to establish a Class I price surplus during Federal Order Reform, correct?

A Yes.

Q And there were -- stay with me, some of the details; this is an example only; but a number of questions addressed the cost of servicing a new market or the cost of moving milk from one plant to another when you never serviced a market.

If you are a company operating many multiple fluid milk plants, and you already have customers in Florida, and you have a label, like TG Lee that fortunately is in this room today, is there anything that says that you can't use that label "TG Lee" in a plant in Wisconsin and move that milk down to Florida in that very same label?

A No.

Q And other than the plant code, the customer wouldn't know; and therefore, the marketing cost could virtually be zero for a plant -- or operating multiple plants, correct?

A That's correct.

Q And furthermore, if you have multiple plants, it is possible to start moving volume around between plants in order to engage in this practice, correct?

A Correct.

Q So that's the point of the Cornell model shadow pricing, is to look at those kinds of deals, correct?

A Yes.

Q And again, we don't have that in this record, do we?

A No.

MR. ENGLISH: I'm not being facetious here. Just in case someday somebody is reading this record who wasn't in this room or we forget. There was a lot of references to light and darkness during the discussion between Mr. Beshore and Mr. Kinser. For the record, that was because a light over Mr. Kinser's head was going on and off.

THE WITNESS: Literally.

MR. ENGLISH: Literally going on and off. There wasn't any discussion between Mr. Beshore and Mr. Kinser.

BY MR. ENGLISH:

Q With respect to the issues raised by Mr. Beshore on whether it would be preferable to use a basing point that happens to have a result that is higher from Miami isn't the real point. Again, none of that analysis has been done as to what those impacts would be, even as to Miami?

A That's correct. It's missing.

Q And isn't the reason why you ended up looking at Worcester and understanding what the problems were that we heard a lot of testimony from Mr. Hitchell, we heard from Mr. Courtay about plant alignment issues and if those plant alignment issues that literally result from a straight line analysis of Worcester to Miami?

A Yes.

Q And the whole point of a multispatial Cornell model looking at the pricing is to try to minimize those kinds of dislocations that occur?

A Yes.

Q And again, that analysis has not been done?

A Correct.

Q And finally, is that lack of analysis -- which is John Peachey's comment with respect to emergencies -- with respect to that kind of analysis that's lacking and the kinds of issues that we've addressed today with respect to the emergency?

A As it relates to Class I price surplus, Dean Foods does not believe that it's an emergency situation. We would believe that the diversion situation is an emergency; we'd like that expedited. The Class I is not an emergency. It appears, at least by both statements of counsel for USDA as well as counsel for DCMA, that it is a policy shift, that that seems to be not in line with an emergency decision, and that we should not proceed down the emergency track for the Class I price surplus.

And adding to that, knowing that there is an open hearing record for the Class I price, which changes all of these relationships, that this proceeding as it relates to Class I should be suspended until there is a decision or at least proposed decision on that decision and then reopened this hearing an evaluate where we go from there. But not proceed on the emergency for Class

I.

Q Just to be clear. Maybe counsel for DCMA was acknowledging it was a change in policy. You just said if it was a change in policy, it could be made. I believe that's what Mr. Beshore --

A Sorry, if I mischaracterized the statement. And I may have done the same for office of general counsel. So if it is a policy, which it appears as though --

Q You agree it is -- it's a policy change?

A Yes.

MR. ENGLISH: I have no further questions of this witness.

THE COURT: You have any questions? Just keep within the scope.

MR. BESHORE: Just one. I will keep within the scope.

Let the record reflect that when I referred to light and darkness, it related to the contents of the testimony, as opposed to the --

MR. ENGLISH: I object.

THE COURT: You may step down, Mr. Kinser. Thank you for testifying.

I've already admitted Exhibits 36 through 41 into evidence.

Let me ask you, Mr. Beshore, just in terms of the timing. I can do this either way. Do you want -- is the next witness a short witness, or do you want to break for lunch and then come back and finish up? I have no preference.

But the hotel has a 12 o'clock check-out time, so -- and it's 11:45.

MR. BESHORE: I need to do something about that.

But this is a short witness.

THE COURT: Okay. Then I say let's just continue.

Whereupon,

JOHN PEACHY,

the witness herein, was first duly sworn, by the Court, to tell the truth, the whole truth, and nothing but the truth, so help you God.

THE COURT: Can you please state your name and then spell it for the record?

THE WITNESS: John Peachey, P-e-a-c-h-e-y.

THE COURT: Your witness, Mr. Beshore.

DIRECT EXAMINATION

BY MR. BESHORE:

Q Where do you live, Mr. Peachey?

A Live near Sarasota, Florida, in Sarasota

County, approximately 60 miles south of here.

Q What do you do for a living?

A I'm a dairy farmer.

Q Have you been at the hearing this week?

A Yes, I have.

Q For the entire proceedings? Or how much time?

A Yes, sir.

Q And you've listened to the testimony?

A Yes, I did.

Q And you have some appreciation for the topics that are being discussed?

A Yes, sir.

Q Did you hear Mr. Kinser's testimony this morning with respect to the lack of participation from the witness stand from Florida dairy farmers in this area?

A Yes, sir, I did.

Q Do you have any comments on that?

A Yes, I have a comment.

We, in Florida in Order 6, live in a realistic world, not in a world that is fairy tale. Order 6 has a lot of problems. I ship into Miami. Give you a little illustration on what's happening in Florida.

In 1998 there were 135 dairy farms in Tampa -- independent dairy farms which would encompass the

Hillsborough County, where the meeting is, today. And there were about 76 Florida dairy farmers which would have been in the South Florida group. Today there are 140 dairies in Florida. There -- in my county, I'm the only dairy.

In Manatee County, which would be the neighboring county, there are approximately three. In Hillsborough County, where the meeting is being held, there are approximately four. So in this area, we have lost approximately 100 dairies since 1998.

In the next couple of years, because of environmental problems, we estimate 25 percent of our dairies will go out of business. The new rules on environmental issues that will from 200- to 700-cow dairies, most of those costs are estimated costs between a million and a million and a half on each dairy. And most dairies will not be able to absorb those type of costs.

The average dairy in Florida right now is approximately 700 cows, approximately, on a loaded day. In 1996 we had one 3200-cow dairy go out. We had a couple that would have been in the 700-cow range. If it continues there will be very little milk production in Florida, partly because of environmental costs, partly because of the returns to the dairy farmer is not enough to stay in business.

We import a lot of our milk in September, August, October, November. In 19 -- I mean in 2004, when we had the hurricane, we had a lot of milk on the road, coming to Florida. We had a number of the major plants that closed down. That milk was either dumped or some of it was kept in some areas; some of it went to surplus. Approximately five days later, we had plants demanding milk. We had -- the order was 150 percent of what the original had been, and we brought milk as far as from California, at $32 a hundred, and we could not find milk.

The argument whether it's surplus milk or whether it's not surplus doesn't really hold any water, because when a plant asks you to bring in milk, you don't have a week. Usually, it's within a day they want that milk. If they don't want the milk, they may order -- and we only have nine plants, and some of the plants are taking 45 loads a day. We try to get an order usually on Thursday the week before. They order the milk, and it may be two days later they may say they don't need ten loads of that milk. So then you have to find a home for that milk. Then a couple days later, because their sales are up, they want extra milk. So then you have to bring that milk -- either you hope you have a local supply, or you bring it from some other place.

One of the problems with Wisconsin and the Midwest as a reserve area, when milk is short, most of those reserve areas want you to give up -- the give-up charge is anywheres where from three and a half to six dollars a hundred. You have freight on top of that, which is usually six to seven dollars. And we just can't afford to bring in that milk into Florida.

One of the things that is different in Florida than in many areas is the Florida dairy farmer pays for bringing that milk in. And it may come in at $26 a hundred. He sold to the plant at $18 a hundred for Class I, and then whatever percentage of Class II would be paid at that price. Plants may vary from anywheres 90 percent Class I down to about 75.

Q Now, how do you market your milk? Through a cooperative?

A I belong to Southeast Milk, Incorporated.

Q When you said "we have only nine plants," did you mean --

A Florida has only nine plants, major plants. We have a couple minor plants; but major plants would be nine.

Q That's nine fluid milk plants -- distributing plants?

A Correct.

Q Does the Florida Order need the changes that are proposed in Florida -- do dairy farmers need the changes that are proposed by DCMA?

A Yes, they do, and I support it very strongly.

Q Do you have any other comments that you would like to make at this point?

A No, I believe that is all for right now.

Q Thank you.

THE COURT: Any one have any questions of Mr. Peachey?

A Thank you for testifying, sir. You may step down.

I understand now that there is no more witnesses. The only thing we need to talk about is the briefing schedule, right?

MR. ENGLISH: We have Proposal 7 which is something that is proposed in every -- actually --

THE COURT: You don't have any witnesses?

MR. BESHORE: We have no witness; we just wanted to note for the record that it's there. And the department will endeavor to make conforming changes as necessary based on the record.

Thank you, Your Honor.

THE COURT: My understanding is that the transcript of this proceeding is going to be posted on a five-day turnaround, so presumably that will be the end of -- by the start of next week.

Grab my calendar here and talk about dates for the briefs. Can I assume that June 1st would be a day -- that's next Friday. Do you think the transcript will be posted by next Friday?

MR. CHERRY: We expect so. We hope so.

THE COURT: Why don't we go off the record for this.

(Proceedings concluded at 11:55 a.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, SANDY M. VOORHEES, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record of the testimony and proceedings.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated: 05/30/2007.

Sandra M. Voorhees

SANDRA M. VOORHEES
Notary Public - State of Florida
My Commission Expires Aug 18, 2007
Commission # DD221692
Bonded By National Notary Assn.

SANDY M. VOORHEES, RPR