

the Western order, adding that perhaps the standard should be raised.

A proposal, published in the hearing notice as Proposal 7, seeking to establish a "netting" provision for diverted milk from a pool distributing plant by the amount of any transfers out of that plant, should be adopted immediately. This proposal was offered by DFA. The Western order does not currently contain this provision as a feature of how the order defines producer milk.

The DFA witness testified that by adopting a "netting" provision, a distributing plant's ability to divert milk would be based on the actual amount of milk retained by the distributing plant. According to the witness, this feature would deter a plant from physically receiving milk into the facility only to have milk reloaded and moved to another plant for uses other than Class I. The witness added that the provision would ensure that milk being pooled was demonstrating a service in meeting the Class I needs of the market.

Many witnesses testified in opposition to Proposal 7. A witness representing NDA was of the opinion that if adopted, the provision would reduce the ability to pool milk by limiting the ability of a plant to maximize the use of its pooling base. Witnesses representing Davisco, Glanbia, Gossner and Magic Valley all concurred that adoption of DFA's proposal would have a dramatic negative impact on their ability to pool the milk of their producers. The witnesses were all of the opinion that Proposal 7's only real purpose was to prevent many Idaho producers from having their milk pooled on the Western order.

d. Proprietary Bulk Tank Handler Provision

A proposal, published in the hearing notice as Proposal 5, seeking to eliminate the *Proprietary bulk tank handler* (PBTH) provision of the Western order, should be adopted immediately. The proposal was offered by DFA. The PBTH provision is a pooling provision and feature of only the Western order. It provides for a person who operates a plant that produces Class II, III, and IV milk products, and who operates a truck that picks up the milk of a producer, to be a regulated handler of the order.

According to the DFA witness, PBTH's are able to pool large volumes of milk that do not actually service the Class I market. The witness testified that PBTH milk is received into a plant to qualify it for pooling and is subsequently pumped back out of the plant to be delivered to a manufacturing

plant. The witness emphasized that milk pooled through a PBTH in this manner never services the Class I market.

The DFA witness testified, however, that their major concern with the PBTH provision was that some entities are purchasing milk below the order's minimum prices from PBTH's. The witness asserted that this results in inequity among handlers in the minimum prices they pay for milk and undermines the key pricing principle of the Federal milk order system of uniform prices to handlers. The witness testified that in removing the PBTH provision handlers currently using the provision could be able to pool their milk by utilizing other provisions that are contained in the order.

In brief, DFA asserted that the record evidence clearly demonstrated that large volumes of milk are pooled on the order through the PBTH provision, but demonstrates only minimal service to the Class I market. DFA noted that under the current diversion limit standard, a PBTH can pool 20 loads of milk for every one load used in actual Class I production. More importantly, DFA stressed that this one load of milk is sold at less than minimum class prices.

The DFA brief maintained that pooling milk is not an entitlement. Instead, milk must demonstrate actual performance to the Class I market. DFA concluded that because the order contains other provisions that are more performance based through which a PBTH could qualify for pooling, the PBTH provision should be removed.

A witness representing River Valley testified in support of eliminating the PBTH provision. The witness viewed the provision as a loophole in the Western order's pooling provisions that allows manufacturing plants to qualify milk for pooling on the order that does not demonstrate any reasonable service in supplying the Class I needs of the market. The witness asserted that PBTH's have used financial incentives to solicit producers located near distributing plants to become patrons and then use those nearby producers to qualify all the milk of a PBTH. Because the producers were already delivering milk to the distributing plant, the witness emphasized, no actual new milk is being made available to service fluid demand, but the amount of milk that can be pooled is significantly increased. The witness noted that this milk is being used in Class II, III, and IV uses. The witness characterized pooling milk in this way as fostering disorderly marketing conditions which justifies

removing the PBTH provision from the Western order.

A witness representing NDA testified in opposition to Proposal 5. The NDA witness said that the PBTH provision is provided as a more efficient way for some handlers to operate their plants. The witness is of the opinion that the goal of Proposal 5 is to make it more difficult for some producers to be pooled. According to the witness, accomplishing this end should not be a reason for its removal from the order. If there are problems with the PBTH provision it should be modified, not eliminated, the witness stressed.

A brief filed by NDA also expressed opposition to removing the PBTH provision. NDA agreed that all pool plants should be accountable to the pool at minimum class prices and that different wholesale prices for milk between handlers can create disorderly marketing conditions. Nevertheless, NDA also held there would be no guarantee that uniformity of pricing between handlers would actually be achieved by eliminating the provision. NDA stressed that it is a handler's need to pool milk that is the catalyst for selling milk below class prices.

Eliminating the PBTH provision would, maintained NDA, agitate the problem and cause handlers to seek other ways to pool milk. Rather than its elimination, the NDA witness advocated modification of the provision to address its shortcomings.

Two witnesses representing Glanbia and Davisco also testified in opposition to Proposal 5. These witnesses stated that if adopted, the proposal would create market disorder and discontent for some Idaho producers who would no longer be able to pool their milk on the Western order. The Davisco witness asserted that Federal order reform adopted performance standards that could not accommodate pooling the milk supply of the consolidated Western order, even though this milk supply stood willing and available to serve the Class I needs of the market. Under the current standards, Davisco is able to pool less than half of the producers they did prior to milk order reform, the witness said. The Davisco witness estimated that if the PBTH provision is removed, they would be able to pool less than 5 percent of their milk supply.

The Davisco witness emphasized that their milk stands ready to supply the Class I market, but is has never been needed for the fluid market. In this regard, the witness was of the opinion that producers should not be penalized by not having the ability to pool their milk simply because it is not needed for Class I use.