MR. JENSEN: Thank you, Mr. Chairman, Commissioner Morgan, as well. I am grateful for the opportunity to be here before you today.

For the record, my name is Scott Jensen, and I work as an in-house counsel with Vissell USA. Vissell is a member of the American Chemistry Council, and I am pleased to be here as their representative today. Vissell is also a member of Consumers United for Rail Equity, and I am also pleased to tell you that CURE supports our comments made before the Board.

I will do my best to heed the Board's advice and briefly summarize my prefiled remarks. As you may or may not know, Vissell makes raw material plastic resin used by our customers to make household consumer goods, textiles, automobile parts, electronics equipment, and numerous other items. Vissell's products are manufactured around the country in Bayport, Texas; Lake Charles, Louisiana; Jackson, Tennessee, and Linden, New Jersey. From those facilities, we serve customers throughout the United States and North America.

ACC represents a $462 billion enterprise and a key element of the nation's economy. The business of chemistry is the second-largest rail customer industry. It generates 150 million tons of product which are moved by rail on an annual basis and also generates approximately $5 billion in annual rail freight revenue.

The chemical industry depends upon railroads for the safe and efficient delivery of its products. Importantly, 63 percent of ACC member rail-served facilities are monopolized by a single rail carrier. Those facilities pay, on average, 15 to 60 percent more than facilities served by competing rail carriers.

As for Vissell, well, we're the picture of rail dependence. Ninety-two percent of our ton miles are by rail. Our fleet of hopper cars has a replacement value in the neighborhood of $260 million, and, perhaps most importantly, our customers demand delivery by rail.

Recently, Vissell grappled with the notion of bringing a rate case to the Board. We were confronted with a dispute with an origin carrier, part of which involved a rate dispute, and that dispute deteriorated so badly that it actually interfered with our supply chain and our ability to serve our customers. The rate dispute portion of that larger dispute arose when a monopoly carrier demanded double-digit increases after the termination of connecting contracts.

Despite our desperate need for relief against such increases, we ultimately decided against bringing a rate case to the Board. Why? Simply put, in a highly competitive environment, companies like Vissell cannot afford even the slightest disruption to our supply chain, not even for a short period of time.
Such disruptions can cause damage to customer relationships and good will in an amount that cannot be quantified.

Vissell had no choice but to make quick decisions and try to preserve our position in a very highly competitive marketplace.

As an ACC representative today, I'm also informed that another ACC member company considered bringing such a case and also decided against it. So Vissell is not here today as the only company or the only ACC company to decide against a rate case.

Vissell and its fellow members of the ACC are here today to urge the Board to consider real world business environment as it undertakes changes to the small rate case proceedings. In a global marketplace, business moves at breakneck speed. In the current climate, companies like Vissell can neither endure nor afford lengthy and expensive proceedings with uncertain outcomes.

A rate case proceeding must be swift and a cost-effective process designed to

provide a level playing field and to be substantively fair.

Why am I here testifying today? I am here in particular because, as in-house counsel, I was responsible for interfacing with all aspects of the decision making process on the potential rate case proceeding. While I may not be an expert on all things transportation or the intricacies of existing small rate proceedings or even large rate proceedings, I was charged with the responsibility of consulting with those who are familiar with those intricacies, whether they be in-house experts or outside consultants.

I was also charged with consulting and updating our senior management on these decisions and the prospects of such a case. Let me say this. This senior management is rightfully concerned and very concerned about the business side and the operations consideration against the prospects of such a rate case.

Let me also emphasize that hard business decisions had to be made at the time we considered a rate case and played a large role in the decision making process, given the perception of the lack of an effective remedy elsewhere.

In conclusion, while we are hopeful for improvements to the rate case proceedings, any such changes would be but one piece of the larger picture. Unfortunately, more than streamlining small rate case proceedings is needed to restore the balance in the relationship between capture real customers and the monopoly real carriers. That balance, envisioned by the Staggers Act, is absent today.

I thank the Board for your time and attention and I'll be available for questions.

CHAIRMAN NOBER: Thank you very much.

Dr. Keith, I apologize for having you wait until last.

DR. KEITH: Not a problem. Chairman Nober and Commissioner Morgan, my name is Kendell Keith for the record. I am President of the National Grain and Feed Association. We appreciate the opportunity to address you this morning.

Our association has a thousand company members that handle and process over two-thirds of all U.S. grains and oil seeds. Rail is quite significant to our industry. About 40 percent of all commercial grain shipments move by rail.

As you know, NGFA actively works towards private solutions to differences between railroads and our ag. customers. Several years ago, NGFA and the rail industry agreed to a program of compulsory arbitration for certain rail shipper disputes. That arbitration system excludes those disputes involving rates.

The arbitration program addresses a myriad though of issues including loss and damage claims, demurrage and railroad practices. We think the arbitration system has proven to be extremely successful. Our members report that just having this compulsory arbitration system in place is useful because it lowers the bar for access to expedited and inexpensive dispute resolution.

One of the driving forces behind the success of rail arbitration is that all participants know that they are at risk if a formal arbitration case is pursued to completion. That encourages both parties to be reasonable and efforts to negotiate an agreeable settlement throughout the process prior to going to an arbitration committee.

That motivation is lacking in disagreement subject to Board jurisdiction regarding rate levels. Under present circumstances, the rail customer confronts a very daunting task to bring a rate case.

Although only about 30 percent of farm product shipments move at rates in excess of 180 percent of variable cost, grain companies in regions confronting the highest

revenue to variable cost ratios don't believe they have an effect rate remedy, especially in the wake of the McCarty Farms case.

We do actively support a financially healthy railroad system in this country and recognize that railroads cannot be all things to all people. However, we believe that Congress did intend for there to be practical limits on how much individual shippers should be expected to contribute to the market dominant carriers.

Ideally, remedies to achieve reasonable rates should be fair, reasonably acceptable and should discourage litigation, much like our arbitration system does.

First, just a few comments about why we think the rules for small rate cases have not been used. The STB rules contain a list of certain data which a complaining shipper should present to be eligible to pursue a case under the simplified procedures. But the statutory language and the Board's own rules appear to leave the railroad defendant free to argue that the test reviewing whether the stand alone cost approach is too costly given the value of the case requires a demonstration of the estimated results of a SAC case. Thus, the shipper seeking to use simplified approach may find themselves having to understand some form of cost for estimated preliminary SAC analysis in order to establish the patient should not be required to make a full blown presentation.

If a shipper establishes eligibility to use the simplified methodology, there are other uncertainties that they face on potential outcomes. The Board's benchmarks, the data sets to be used in small rate case determinations create some of these uncertainties.

Two of the benchmarks can be derived, as noted earlier, from public data. The third, revenue costs compares to, requires discovery.

The two benchmarks that are estimated from public data suggests that shippers wishing to use the simplified methodology could be confronting a rail rate that is substantially above 250 percent of variable cost.

Thus, the potential benefits of using the simplified methodology are considerably less than the stand alone cost approach. In addition, the fact of the Board's decision contains no indication of how the three benchmarks will be balanced to determine a maximum, reasonable rate adds to the uncertainty.

Let me touch on what we think might be some solutions or a ways to reduce barriers to resolution on rates. While NGFA members support the theory of differential price and we believe that there is something askew when adherence to a principle means that only a handful of railroad shippers throughout the U.S. really are practically able to obtain relief, the easiest correction that we see to make in the existing guidelines is with respect to the eligibility test.

Given that, the simplified procedures offer the likely prospect of recovering substantially less money. It would be illogical for a shipper that challenges a rate to not the stand alone cost methodology if that was a realistic option. Therefore, the Board should adopt a presumption in favor of a shipper's election to rely on the simplified methodology.

If the defendant railroad wishes to challenge the complainant's reliance on the simplified procedures, we suggest that the Board essentially shift the burden to the defendant railroad, approving the stand alone cost methodology would not be "too costly, given the value of the case."

If a railroad elects to make such a showing, then the shipper should be required to submit the basic data necessary for the carrier to complete its challenge, origin, destination, route, etcetera.

And the railroad should be required to establish the outcome of the SAC case and demonstrate that the benefits of the case exceed the cost of bringing it by a sufficient margin to convince the Board that a SAC presentation is not too costly, given the value of the case.

We sincerely believe that this approach will greatly simplify and streamline the eligibility phase of a small rate case complaint.

With respect to the three simplified benchmarks, we would urge the Board to solicit proposals under which the satisfaction and application of the benchmarks can be explained more fully. For example, one possibility would be for the Board's staff to assemble the inputs for a hypothetical simplified case and then to demonstrate how those inputs would be balanced as benchmarks.

The Board also should solicit comments on whether it may be possible to standardize certain elements of a basic rate complaint case and to make standardize information publicly available, at least for use in simplified cases.

Thank you very much. I look forward to the questions.