CHAIRMAN NOBER: Thank you very much and thank you all for your testimony. I want to commend you all on making concrete substantive suggestions which I know I have several questions about.

First, Commissioner Morgan?

COMMISSIONER MORGAN: Thank you. Let me start with you, Mr. Moreno, and I can kind of put both of your parties together as I ask a couple of the questions.

Let's talk first about the eligibility issue. You've suggested that we determine that based on tonnage.

MR. MORENO: Yes.

COMMISSIONER MORGAN: Do you have any specific ranges that you would like us to look at in that regard?

MR. MORENO: The League did suggest, make a tonnage suggestion in the original guidelines of around 500,000 tons per year and I think we would stand by that recommendation at this point.

COMMISSIONER MORGAN: With respect to arbitration, I mentioned in my opening statement that the Board had compiled a record for use in Congress as it related to legislation directing mandatory arbitration and you all participated in that as did many other parties.

That is a pretty full record of options that could be pursued and it didn't really -- it wasn't pursued. I mean it was sent up to Congress and that's the last, at least I heard about it. So if that's of interest to organizations out there, I would just again repeat what I said at the beginning which is that there is a record compiled there. It certainly doesn't show consensus, but certainly it shows a full panoply of options that could be pursued. But I think the Board did raise that issue and did try to pursue it.

MR. MORENO: I agree. I think what the League would like to see the Board do is take more of a position on favoring arbitration and advocating for the necessary statutory changes.

COMMISSIONER MORGAN: And what I think i would suggest is that if there's consensus out there at least among certain groups that would be a help in that process.

With respect to mediation, the AAR has proposed mediation as an option and I understand from reading their comments that they have provided their suggestion to the NITL for their review.

Has the NITL come to any agreement on mediation as an option here?

MR. MORENO: The League has not developed its position yet. The AAR proposal has been submitted to the League's rail transportation committee for review.

I would say that mediation, the effectiveness of mediation is limited, if there isn't a backstop, so to speak, of an effective small case rate process, if the mediation should fail. And therefore, we don't think mediation in and of itself is the answer.

COMMISSIONER MORGAN: Is it an answer? Is it one option?

MR. MORENO: We have concerns that mediation, nonbinding mediation simply throws another hurdle in the process and extends the amount of time which, as far as the League is concerned, time is probably the biggest enemy in these small rate cases. So we would be concerned about that and that's one of the things we're considering as we evaluate the AAR's proposal, but we haven't taken an official position on it yet.

COMMISSIONER MORGAN: You talked about what I guess I would term simplified SAC as another approach to handling these cases, and of course, we had that

conversation originally in the record that resulted in the guidelines that we have today.

My only concern with that would be that that would start a whole new process again. In other words, we have these three guidelines in place. There's discussion of how to make that work better. If we were to pursue some new option, simplified SAC, for example, obviously there's more meat that has to be put on those bones and that's going to require some time.

So at what point do we get this process in some form to where people can start to use it? That's more of a comment than a question, but given that I think everyone is concerned with getting this ball rolling, I would be concerned that we don't really know what that would look like.

MR. MORENO: We share that concern and we raise it as a concept that ought to be explored, but not necessarily taking a position on it at this time.

COMMISSIONER MORGAN: And then you also suggest some sort of rate comparison as a possible way to go.

How does that square in your view with the statutory requirements? Obviously, we've got some case law from the past that suggests that that sort of focus is not in full sync with the statute?

MR. MORENO: Just as there's arbitration, there are some solutions here that may require some statutory changes and if they do, then we would like to see the Board get out in front and advocate the necessary changes.

COMMISSIONER MORGAN: Mr. Jensen, if I might turn to you. I get a sense from your testimony that you feel that the current process needs to be refined, but really you're more focused on other changes that you feel are more appropriate in a broader sense.

MR. JENSEN: I wouldn't say more focused, but I would say equally as focused. AS I said, we view this as one piece of a larger puzzle. There are important changes that could be made here, and in fact, need to be made. But there are also important changes that need to be made whether inside this arena or outside this arena.

COMMISSIONER MORGAN: So I'll ask you then the question I asked one of the earlier witnesses and that is if you had to pick one issue that you would want us to particularly focus on as we look at ways to improve this process, what would you suggest that be?

MR. JENSEN: Well, unfortunately, and I don't come here for the purpose of not being as helpful as you would perhaps like, but as you might have heard me testify, I am not an expert in the intricacies of existing proceeding.

As in-house counsel, we look, we have in-house expertise at Vissell, and we have outside consultants that we must reach out to in these situations and for me to pick one thing in the existing guidelines would a misguided thing for me to do and I don't think I'm prepared to do that.

I would certainly offer to consult with those people and see if we couldn't provide some more detailed suggestion to the Board.

COMMISSIONER MORGAN: Certainly, the Chairman has suggested that parties do that, so -- Dr. Keith, you talked a little bit about the arbitration program that you have in place and of course, you and I worked closely to move the issue of private sector resolution forward.

Was there ever discussion of including rate cases in that process?

DR. KEITH: As I recall, we talked about it and decided that in the early stages

we should probably restrict it to other areas of compliance. It was -- it did not go very far in the discussions.

COMMISSIONER MORGAN: You talked a little bit about the use of SAC in these cases and the fact that if we were applying a SAC process here it would result in lower rates as essentially what I heard you say.

DR. KEITH: Yes.

COMMISSIONER MORGAN: Now how do you get to that conclusion?

DR. KEITH: Well, we're basing that on the publicly available data that suggests that the relief would probably start at a level no higher than 230 percent of variable costs and it could go up to 275 or 280 percent of variable cost and we just picked the 250 percent because we think it looks like a reasonable number.

And so given that as a basis, why should then the shipper that wants to pursue a simplified approach be required to demonstrate that it's not too costly to bring a SAC case. It seems like a illogical part of the rules to us.

COMMISSIONER MORGAN: Now would you also recommend rather than the guidelines that we have in place a simplified SAC approach to these cases?

DR. KEITH: I think we would favor exploring any alternatives that lower the bar to rate challenges. And I think the STB just needs to understand from the complaining shipper receiver's perspective they need to be able to analyze likely outcomes. They need -- the revenue, the potential benefit needs to be reasonably related to the cost and also the time frame for arguing a case, it just can't take forever.

There can be ill will created between the shipper and the carrier in these types of cases and that's another barrier. But certainly to limit the time frame that a dispute is on-going can reduce some of that friction.

COMMISSIONER MORGAN: Thank you.

CHAIRMAN NOBER: Well, let me again thank you all for your testimony and let me start with a general question for all of you which is -- because I think you all, the three of you present a fairly representative sampling of the different types of rail shippers that we face out there and I've heard loud and clear that one core concern that all of you have raised is that the threshold for determining whether
-- who is a small shipper and who would get to use these guidelines could be time consuming, could require a great deal of discovery and would be expensive and perhaps that's an unintended consequence of the current rules. And as we look at procedures, that's a sort of fundamental area that we can look at.

But then I would ask the three of you what do you think is the right test that would cover the gamut. I know NITL suggested tonnage. Our prior witness suggested a number of cars.

Would it be value? The statute looks to value. Do you have some suggestions for us on what we could look at, if we wanted -- if we agreed that your concerns are correct, help us with the standard that would provide some clarity.

MR. MORENO: As you recognize the NITL has taken a tonnage -- has recommended a tonnage test and also as to the factor about the feasibility of a SAC presentation. We'd like to see the Board simply accept $2 million as typical origin of destination pair cost of litigation and use that as a presumption which would further simplify the qualification standards.

DR. KEITH: We think that shifting the burden of proof on the stand-alone or for simplified approach is the simplest approach. We're willing to look at other things. We did in

1996 recommend a bright line approach and we'd be glad to submit those for the record.

We're willing to look at other things.

MR. JENSEN: We also would be looking to perhaps make some suggestions after the hearing, but as to the tonnage test that has been suggested on behalf of the NITL, it's something we would look at more closely, but our concern would be that while it may work from the origin to the bottleneck point, it may not work all the way through to the destination, so that's something that we'd want to look at very carefully before expressing an opinion in support of it.

CHAIRMAN NOBER: There are several different ways that you could sort of meld the different suggestions that we've had. One is to say take Dr. Keith's approach and say well, the shipper knows when it's too expensive to bring a SAC case and if they choose another one, then let the other side try to rebut that presumption, but create a presumption that the small case could be used at the election of the shipper and that certainly is an approach we could take.

Another one would be to just take a bright line dollar figure and say any value over this we'll treat one way and any value under this will automatically be considered to be a small case. That's another way to go. The statute seems to suggest that.

We could merge the two and say under a certain value automatically use the small procedures between a certain -- above a certain value, have a presumption in the shipper's favor, but when that's rebuttable.

So there's a lot of complexity and different ways that we could take a look at this. So I would ask all of you if you could think about that and submit something to us, we would be appreciative of that because again, in reading your testimony, one could accept that a lot of your concerns about the time and burden of making the case from the beginning, if it's true, help us with the test that you think would be more effective.

The second sort of set of questions I would have and this is going to be preceded with a comment, so I apologize for that in advance, is what we can do and what we can't do.

We are an administrative agency and we can look at -- we are charged with determining when a rate is reasonable and what determines a reasonable rate is a question I'll ask you in a minute, but we can, in this proceeding, say no small shipper has ever challenged a rate as being unreasonable or at least not in a generation and are there specific parts of our procedures that prevent that from happening and people have raised several suggestions as to why that is.

What we can't do is fundamentally remake economic relationships or fundamentally remake business relationships. Mr. Jensen, you said that Vissell didn't bring a case because it was concerned about the business relationship it would have with its railroads going forward.

Now is there any set of procedures that we could come up with that would make -- that would alter the calculation that your company would make that if we bring a challenge, any challenge against a supplier we rely on just in time delivery and we can't interrupt that. That strikes me as kind of a business concern, rather than an administrative concern. What would we do in our procedures that would alter that calculation that you made.

MR. JENSEN: Let me just clarify something perhaps I misspoke a bit in my testimony.

The concern about the relationship was one with our customer and the one with our supplier had already deteriorated to the point that there was frankly little concern about that.

It's a shame, but that's sadly the reality. The concern Vissell faced was its customer relationships in a competitive market and that's something that I cannot put a value on, as I'm sure you understand. The prospective loss of the slightest amount of business in a

competitive market is, of course, very disconcerting to those in the business. So just to clarify, Mr. Chairman, I just want you to understand where the concern lies.

In terms of what you can do and what you cannot do, let me do my best to answer without offering you specifics, but to suggest that what the Board or what Vissell an the ACC would like to see the Board do would be to create a remedy that at some level prevents us from having to come to you.

We would like to see a remedy that develops to the point where perhaps some initial cases are brought. People get a feel for how they work and some certainty is brought to the process and some confidence is brought to the process, meaning that some reasonableness on both sides of the table of a dispute will begin to arise naturally.

And if I can impression anything upon the Board it's that and to take, as I've mentioned, consideration of the realities of today's marketplace which moves very, very quickly. But having said that, let me also stress that what we are not after is simply to lose faster.

We need to be confident that the results will be fair and will be generated from a level playing field.

CHAIRMAN NOBER: Let me ask a question about that then of all three of you which is -- I've heard a good deal of discussion today about the three part test the Board adopted back in 1996 and as Commissioner Morgan alluded to, that was a test that was adopted after looking at our statutory charges and looking at the standards under which our reviewing courts would hold us to and that's what the Board came up with.

Now -- and I asked the prior panel this and I'll ask you this, do you all agree that that's the right test or do you think that we should adopt a different one?

MR. MORENO: We would -- if you keep the current tests, we think they need the application and the weight given to those standards needs to be clarified and you need to eliminate the uncertainty that's been created by stating these tests are merely a starting point.

It's really the predictability and certainty that is needed most here. Now the League has advocated that they'd like to see more of a direct rate comparison test as either an addition or an alternative.

CHAIRMAN NOBER: Do you think a direct rate comparison test would be acceptable to the Court of Appeals? You've read the case, I presume, and know what we're operating under.

MR. MORENO: A direct comparison test would be looking at what other competitive shippers are receiving at this point. Perhaps some combination of that direct competitive test -- perhaps in lieu of the revenue to variable cost comparison standard. The direct -- a direct test would be more specifically tailored to the traffic at issue and then perhaps that in combination with the other two standards would work, but it's hard to say whether they would be acceptable to a Board on a stand-alone basis or not.

CHAIRMAN NOBER: Well, I would ask the three of you and your organizations to take a look at our test and if the same charge I gave to the first panel which is if you think there's a -- I mean, we think, the Board thought it was its best effort to come up with a test that was fair that could be easily applied and could be done that would survive the strictures and the response -- the requirements that have been placed on us by the Courts of Appeal.

If you all think that there's a better one, submit it to us and we'll take a look at it. I'm happy to look at or consider any better idea than the one we have.

I have sent our own staff out to go talk to other administrative agencies to look at what they do in small rates cases. So we have no, I have no pride of authorship in any

individual test that we have. So if you all think that there's a better substantive test, submit it. Sixty days is enough time. Try to get it to us within that time and I would be happy to take a look at it.

if there's a clearer way -- now in terms of clarify of application, I'll throw another question back to you. How do we say in advance how we would apply a test to a case? How can we do that? How would you suggest that we do that?

DR. KEITH: We suggested that you have the staff assemble some data and do a hypothetical case. It is a problem in terms of clarity as to how these benchmarks would be applied and it creates quite a bit of uncertainty.

Also, the first one that brings the simplified rate case faces the very likely prospect of litigation after the case is decided. I mean it's almost a given. And so the barriers to getting the process started under current rules is huge.

CHAIRMAN NOBER: As I said, if we accept that, we can try to reduce the barriers, but some parts of it and we can't force the other party to not -- I mean there's a limit to what we can do as an administrative agency. That's just a practical reality.

DR. KEITH: Recognizing that all cases are going to be just a little bit different, some demonstrations, some example of how these things would be applied would be helpful.

MR. MORENO: Chairman Nober, if I may, you've raised a lot of complex questions and issues which I think we all agree are brought about by this proceeding, none of which are very easy to answer and are hard to apply in a regulatory context which is why we think a more pro-competitive environment provides the better solution to allowing shippers and carriers to work out their rate issues on a business basis.

And that is why the League would believe that it would be a better fix to address the terminal access rule than the bottleneck decision and perhaps bypass many of these complex issues that you've raised.

CHAIRMAN NOBER: Well, that's certainly an approach that I recognize you've advocated and have done that in legislation and we wish you well in that approach.

As I said, I feel somewhat constrained by what the Board can and cannot do and we can look at our administrative procedures. We can look at the barriers and the hurdles and the things that we have put out in our proceedings and see if they have, if they are the reasons why these kinds of cases aren't brought and that's what the purpose of this proceeding is and what we're hoping to do.

In large rate cases, I feel very good that we were able to identify specific problems, address specific solutions and hopefully going forward, they will make those cases cheaper to litigate and better to adjudicated and faster to come out.

Mr. Moreno, there's one part of your testimony I just wanted to ask you about if I could, which is you raised the prospect of in a small case while it may be going from one origin, the shipments are going to many destinations and then on page 4 and 5 you suggest, you talk about the bottleneck segment being the problem and how -- is what you would want to be able to do to challenge faster, all of those shipments from the origin to the destination points or just to challenge the reasonableness of a bottleneck rate?

MR. MORENO: We would like to be able to challenge the reasonableness of the bottleneck rate and that's why we're urging the Board to revisit the bottleneck decisions and that's an area where we do not feel a statutory change is necessary.

COMMISSIONER MORGAN: I just wanted to follow up on something that the Chairman was pursuing and this is more of a comment, I think, or a musing, than it is a question.

As we look to refine this process, I think it's important to not reopen and relitigate a lot of what has gone on in the past. So I think as we collectively try to figure out how do we refine this process, I think we need to make sure that suggestions are made that hopefully will stick if they're taken to court, that suggestions are made that do not entail a reopening of a record because I think all that's going to do is again delay what I think we're trying to speed up which is a process that works that people feel that they can avail themselves of.

So I think there just needs to be, I think, a little bit of a balance as we move forward.

I think the other comment I would make is that while we want to make it as certain a process as we can, we cannot guarantee a particular result and so at some point we need to make our refinements, but knowing that as you said so well, Dr. Keith, you know, the first case in is going to be tested and certainly we've seen in the larger rate cases that we've had a lot of testing going on, but we are beginning to get a good body of law in that area and it probably will take some time in the small rate area to do that, if we can make the process a little clearer, perhaps, that would be a good thing. But we can't guarantee a result and it will take a little time. And if anybody has any response to any of that, please feel free. It's just that I thought those were important points to make as we collectively move forward.

MR. JENSEN: Let me just suggest actually that the bottleneck in challenging the rate reasonableness of the bottleneck segment itself is just one piece of the bigger picture and that we need to make sure that all pieces of the picture are addressed and put in place or you may find us back here at a later panel.

DR. KEITH: I think we're most concerned about getting a better understanding of just how the process of a small rate case would work. I don't think anyone is interested in guarantees or it will be 220 percent or whatever. That's not really the goal. It's more to get a feel and we're suggesting a hypothetical case. And if that were to take place, it might be that we don't need alternative tests. Certainly, the STB has issued the decision on what it thinks would work, given the Court findings. So we think we need to understand the process that you have in mind.

COMMISSIONER MORGAN: We appreciate that.

CHAIRMAN NOBER: Again, I want to thank you all for some of the specific suggestions that you've made which we ought to weigh very seriously, trying to set a time limit for the discovery phase and the amount of time for gathering evidence in a small rate case. I don't know, you suggested four months. Four months is certainly a quick time frame and there's nothing wrong with doing it fast and if it's feasible to do it in four months or three months or six months, we should look at that.

Secondly, you all have suggested and the panel before you suggested looking at better use of Administrative Law Judges and having an initial proceeding before them with a deferential standard. Now that in some ways could be very similar to arbitration if we had Administrative Law Judge in a very tight time frame for resolving a case, with a deferential standard, that's while not exactly private party arbitration, it's in the family and perhaps -- something like that, do you all think would be productive? It's sort of a distillation of several of the suggestions made this morning.

MR. MORENO: I think it's definitely consideration worthy of considering and fleshing out.

CHAIRMAN NOBER: And in terms of the establishing some clearer guidelines

for the threshold and who can use small cases, you've all made several suggestions. I urge you to go back and if you have any refinements on those, submit them to us, but people have given, I think, many of the witnesses have given us some real things to look at that might help and identify some of the hurdles to going forward that you all have thought about. So I think that's very productive as well.

And finally, on the test as to what constitutes a reasonable rate in a small case, I recognize that's the most difficult issue of all. And I urge any of you who think that you all have a better test or a fairer test to submit it to us and we'll consider it and otherwise -- and I recognize that the current test has some ambiguity in its application. That's part, I think in part a factor of the fact that it's an ambiguous test, in part a reflection of some of the legal restrictions that have been placed on the Board. And in large measure, a reflection of the fact that no cases have ever been brought under it.

You can argue SAC is a very ambiguous test as well until you've seen 20 years of application of it and you have a better idea of how it goes.

So I would urge you all to take up our challenge or let us take a look at the various ways that we can improve the test and we'd be happy to look at any suggestions anyone has.

Finally, some suggestions were made this morning for an Office of Consumer Protection or a Consumer Advocate at the Board. Do you have any comments or thoughts on that? I think that would be helpful.

No thoughts? Take up resources from other important things?

DR. KEITH: How do you respond to complaints? There's been some criticism of the current process for the Office of -- not his performance, but the way it simply creates a dialogue that's not all that helpful. So.

MR. HARMON: My name is Pat Harmon. I've been very quiet through this whole proceeding. As you bring up this Office of Complaints, we sell to a lot of very small shippers, like the example in North Dakota, these shippers are on one railroad. They're quite far from any other alternative and whether it's an Office of Complaint or whether it's the railroad or whoever they talk to, or this whole process, their concern is that they have nowhere to go to solve problems.

Simplifying this process, shortening the time frame, whatever it takes, many of these people other than an entered number to a customer service, don't have anyone in the railroad to talk to. Economic decisions are made far away from them as it is to their rates and all they want is some way to be able to get into a process where their problems can be solved.

And I think if this whole process can fix that, particularly in the fertilizer business, a year is a fall season and a spring season. If it takes a whole year to solve something, the entire universe changes. And why even try? Okay. So think if you look at it in the perspective of like the example of the people in North Dakota and in many other cases where these customers are only on one railroad. It's the only alternative they have to get their product and all they want to do is serve their customer and do it as competitively as they can, then this whole process can be improved for their benefit.

CHAIRMAN NOBER: Well, that's very helpful, thank you. We recognize that the world moves somewhat faster than the administrative agency does at times.

Commissioner Morgan, anything further?

COMMISSIONER MORGAN: No, I just want to thank the panel, all the good testimony and good suggestions. Thank you for your time.

CHAIRMAN NOBER: Thank you all. If we might just take a very brief five minute break before hearing the last panel.

We will reconvene at 10 of sharp.

(Off the record.)

CHAIRMAN NOBER: I said we'd start sharply at 10 of, but we're a mere 5 minutes away from that.