MR. AVERY: Okay. Thank you very much, Chairman Nober, Vice Chairman Buttrey and Commissioner Mulvey. I'm Donald Avery, with the law firm of Slover & Loftus, appearing on behalf of Dyno Nobel, Inc. Also with me here today, next to me is my partner, Mike Loftus, and also in the room sitting behind us is Robert Bingham, Vice President General Counsel of Dyno Nobel. Just for convenience, I'm going to refer to them rather than calling them Dyno, which sounds like a cartoon character, I'm going to refer to them as DNI. I apologize for any confusion that might cause between the different oral arguments.

Before I go on, I'd like to respond to one point that Mr. Tabor made, and he made very few in dealing with Dyno since he spent, of course, most of his time on the other case. He said that in their position -- it is their position that there is no contract. Well that's been their position in this case, that's no surprise. But then he went on to say the issue of whether there's a contract is not ripe for decision at this time, because we say there is one, they say there's not, so obviously we must need more evidence. Well I respectfully submit that is neither the position that his client has been taking in this proceeding before today, nor is it the standard for determining whether summary disposition, either affirments denial, summary judgment our favor, dismissal in their favor is appropriate.

The question is whether there are disputed issues of material fact, and in this case his own client said in its Motion to Dismiss that there are no disputed issues of material fact. They were aware of our contract claim. They were speaking again now only to Count I. Mr. Tabor is correct that Counts II and III of our complaint are not ripe for decision, they were stayed, held in advance, by stipulation of the parties back in 2003, pending a ruling on our cross-motions for disposition of Count I, the contract claim. Count II is a discrimination complaint and Count III is a constrained market pricing complaint. So long as the contract claim is upheld, there's no occasion to get to the other two. If the contract claim were denied, if Kaneb were to prevail, at that point, we would have to proceed with the

submission of evidence on the other two counts.

But with respect to the ripeness of the contract issue under Count I, it's Horn Book law that a party cannot rely on simple denials, when there has been evidence submitted on a material fact. The other party cannot rely on simply denying it in its answer, or in its statements before the court. It must submit contrary evidence, or challenge the interpretation of the evidence that's before you. Now both parties have also been in agreement that the question of whether there's a contract can be determined on the basis of the record as it stands. The record, as it stands, includes the documents that we contend are the contract that governs, gives us rate parody, is a supplement agreement entered into on October 25, 2000, shortly after the Board issued its prescription for CFI, and the testimony of our witness, Curtis Barton, all of that is in the record in this case. There is no contrary evidence from DNI, or from, excuse me, from Kaneb, although they've had ample opportunity to submit it.

All we have in the record is their arguments on the record that we submitted, and the denial that there's a contract. So I submit that the record is clear. I think that the Board has an ample record at this point, to resolve this matter on the cross-motions.

I'll just by very -- way of very quick summary, DNI is, as the Board is aware, an industrial user of anhydrous ammonia located at Louisiana, Missouri. A bit confusing, since most of the origins in this case are in Louisiana, the state of Louisiana. This is Louisiana, Missouri, and is frequently referred to as LoMo, and I'll probably use that term as I go along, also. As an industrial user, by the way, DNI has always been regarded as would other similarly situated industrial users, as a relatively attractive customer, because our usage is steady day in, day out, across the year. That's advantageous for the pipeline, results in lower overall cost of service, I might add, because we don't add to the need for seasonally excess capacity the way an uneven shipper would. And so this is good traffic for

a pipeline, be it a natural gas pipeline, an anhydrous ammonia pipeline, or any other kind of pipeline.

Now at issue today, as I said is Count I. I won't waste the Board's time by recounting the history of this issue, other than to note that we didn't, in 1996, when the Koch, the predecessor pipeline increased its rates, join CFI and Farmland in challenging the increase. The reason is as stated by our witness, Curtis Barton, for us the primary concern has always been rate parody with our competitors. There is a competitor of ours, a competing manufacturer of ammonium nitrate, a product which is manufactured from anhydrous ammonia, that's what we manufacture at LoMo. The competitor is also on the pipeline, well its rate went up along with ours. The rate was essentially across the board that was published by Koch in 1996. So while our transportation cost did go up, our competitive situation didn't really change, and since that's what we were most concerned about, we elected to refrain from litigating the issue.

Everything changed, however, in 2000, when the Board prescribed a roll back of the rates to other shippers in the *CFI* case, other market dominant shippers because included in that roll back was the rate being paid by our competitor at El Dorado, Arkansas. All of a sudden, the parody we had long valued, was lost. So DNI, at that point, went to Koch and said me too, give us the same roll back. And Koch said sorry, we're not required to, we -- the prescription didn't apply to you. And besides, we're going to get it overturned in court so, you know we're going to get that one raised up in short order and you have nothing to worry about. Well that wasn't a sufficient answer from DNI's standpoint, as you might expect, again this is all in the Barton testimony.

So DNI investigated the possibility of filing its own complaint. It would have been a me too complaint, and looking back it would have been pretty much a lay down, because the only thing they -- that was required in the *CFI* case to participate in the rate reduction, was a showing of market dominance among the

movements considered. Given that the standard applied was a system-wide revenue adequacy standard, and not a rate by rate standard, or cost standard which would involve rate design issues, and so forth. None of that was present in the *CFI* case. Everyone got their rates rolled back. Everyone who was a customer of CFI, whose movements were included in that case, got their rates rolled back if they were market dominant. Well we knew, or my client, DNI knew that it could demonstrate market dominance, and prepared a complaint, went back to Koch and said, you know if we have to we'll -- we'll litigate this because we can show market dominance. We're every bit as market dominant as some of these rates which were found to be market dominance in that case, nearby points. This seemed to cause Koch to have some second thoughts. I don't suppose they wanted to face a second rate case, having just lost one and being busy in the Court of Appeals.

So to avoid the need for a follow-on rate case, the parties agreed on what is memorialized in the documents the court has before it. And since the meaning and duration and effect of these documents has been challenged, perhaps its best to get them before the Board. They're already in the record, of course, these are copies of -- of -- let me see. Okay, thank you. Whoops. Our computer man did this for me, I brought it out yesterday. Now we're not showing it yet, so let's try something here. There we go.

Okay. Okay. Now the first, I have three exhibits here. The last, by the way, replicated in this slide show. Again, they're all in the -- in the evidence, exhibits to the Barton testimony. I will not actually display the third, which is pages 14, 15 and 16, because that is an agreement which had a confidentiality clause. It was between us and Koch, the pipeline has not waived confidentiality, and I -- although certainly Koch, or excuse me, DNI is waiving confidentiality, but I'll just discuss it, since it's still arguably protected, unless the -- if the Board wants to have it displayed, of course we would be guided by the Board's decision in that regard. But let's

continue on with the ones I can clearly display.

The first one is the -- and I -- this highlighting, by the way, just reflects the clauses that I'd like to focus the Board's attention on in particular. This is the text of the October 25th letter agreement, settlement agreement. Let's -- Mr. Tabor's summary of his oral argument suggested that this was nothing but a tolling agreement, which expired when the appeal was over in 2001. Well there is indeed a tolling agreement in this document, it begins at the bottom of page one. This is where KPL agrees that if, and only if, it -- that KPL being Koch, of course, it's unsuccessful in its appeal, and as we all know it was unsuccessful in its appeal. The two year statute of limitations on reparations claims, on filing a complaint, but that's what it applies to. There's no statute of limitations on filing a complaint seeking perspective relief, it only applies to the -- to the -- to the reparations claim, the retrospective relief, from the date of filing the complaint, that two year statute would be tolled for the duration of October 25, 2000, all the way up to 60 days after the Court of Appeals affirmed. During that period, if -- pardon, I'm sorry, here let's blow this up as well. This -- this again is in the -- well actually this is also in the public submission of our Motion for Summary Disposition filed September 12, 2003. Again, there's reference to the two year limitation for the filing of complaint, and the two year limit again applies is relevant only to a claim for reparations. Under the previous page though we see that the document also includes quite a bit of other language. So let's enlarge that so we can read it on the screen.

First of all, let's note that the agreement -- subject to the agreement, and this is an agreement again that was sent to us by -- by Koch, it is regarding a rate reduction to Louisiana, Missouri. So it is an agreement regarding the rate reduction, it is not simply a tolling agreement. At Dyno Nobel's request, Koch has agreed to reduce its rates of delivery for anhydrous ammonia to the rates for such deliveries in effect immediately prior to the 1996 increase. Now here's -- this is important,

Dyno Nobel made this request to bring these rates into parity with other rates on the pipeline, recently reduced pursuant to a decision from the Surface Transportation Board, and that, of course, is the Koch prescription. Now in consideration for that it we agreed that if it did win its appeal, and it was able to recover retroactively the rate reductions that had been forced to accord CFI, it could also recover the rates it was "voluntarily," at least not prescribed, giving us for that same period. But it, because -- once again this is the rate parity that we were after, and that this agreement embodies, if -- when the -- when the rates went down for CFI, this agreement gave us a corresponding rate reduction back to the 1996 level.

CHAIR NOBER: Can you highlight the second page, or the blue again?

MR. AVERY: Sure.

CHAIR NOBER: I forget what was told here.

MR. AVERY: And again, let me -- I'm sorry that it doesn't stay -- doesn't stay enlarged, but we will enlarge it again.

CHAIR NOBER: I don't have the hard copy.

MR. AVERY: What the heck. Sorry. I seem to be having a software glitch here. But, in any case -

CHAIR NOBER: Just out of curiosity, how can two parties, on their own, agree to toll a statutory -- a statutory -

MR. AVERY: By not -

CHAIR NOBER: -- statute of limitations?

MR. AVERY: By not pleading it, they're agreeing not -

CHAIR NOBER: I mean how's that -- how's that pleading it?

MR. AVERY: -- to plead it. This is a limitation on the award of reparations. They would have -- they would plead that presumably, and the Board would have to then honor that limitation, because it would be a limitation on its ability to award the reparations. But under this agreement, they wouldn't plead it. If the Board nonetheless -

CHAIR NOBER: This is the two year limitation for the

filing of the complaint under 49 USC 15905(C) for a violation of reasonableness –

MR. AVERY: Yes.

CHAIR NOBER: -- shall be tolled from the -- you can't toll statutory deadlines by agreement of parties.

MR. AVERY: Well that may be true.

CHAIR NOBER: You maybe think you can, but I don't think -- you can't.

MR. AVERY: That was nonetheless the intent and purpose of this clause. This was a tolling agreement, whether it was, this portion of it, this was a
tolling –

CHAIR NOBER: Private parties can't waive the statutory deadline.

MR. AVERY: That may be true. What that does mean, by the way is that Koch thereafter paid a –

CHAIR NOBER: I don't think. I mean, I'll ask my counsel.

MR. AVERY: -- substantial sum in 2002 for a -- a reparation's claim that was, notwithstanding this agreement, largely time barred. That was not an issue between the parties; the question of whether the tolling agreement could be enforced did not come up either in the negotiations or in the settlement, subsequent settlement of it.

CHAIR NOBER: Because this doesn't say it's about back reparations, it says that -- that the statutory deadline in 15905(C) is tolled for a period of time. I don't, I'll have to ask our -- I don't believe that private parties can do that. I mean you have to
get –

MR. AVERY: Yes.

CHAIR NOBER: -- the agency to agree to -- to toll it. I don't even think we could.

MR. AVERY: Well you may be right, Chairman Nober. I -- all I can tell you is since this was never implemented, we never had to come back.

CHAIR NOBER: Now, I don't -- but anyway, go ahead.

MR. AVERY: The -- the -- the key -- the key point here -- here is that rightly or wrongly, the parties thought they could toll it, and it is clear that tolled or not, the two year limitation is relevant only to reparations. It has nothing to do with perspective rates. So there -- because you can file a perspective rate case at any time.

CHAIR NOBER: Correct.

MR. AVERY: Now –

CHAIR NOBER: That's -- that's the effect. That's true.

MR. AVERY: Yes. Now this agreement does not -- this two page letter agreement does not, in and of itself, tell you exactly how long it's supposed to last. It tells you how long it lasts if the Court of Appeals vacates the prescription in the *CFI* case. It doesn't tell you, in and of itself, how long the prescription lasts if the Court of Appeals affirms, which it did. However the purpose of the agreement is a pretty good indication that the two are linked together, that this is linked to the survival and duration of the CFI prescription. And further confirmation of that is found in the tariff, which the implementing tariff, which is in fact referenced in this document in the, let's enlarge it again, on page 1. In consideration for their -- for KPL's
agreeing -- this is the lower paragraph -- in consideration for KPL agreeing to make this reduction, and its issuance of a corresponding rate sheet and so forth.

That corresponding rate sheet is also in evidence, it was Exhibit 3 to the Barton complaint, and let's go to that, if we may. This is it, other than the date, October 1, 2000, there's nothing
really -- this by the way, was also submitted as an exhibit in one of Kaneb's filing. There's no dispute as to its authenticity. First of all, you'll note that the rates to Louisiana, Missouri, are tagged. They have notes one and three. Note one is, at this point, particularly important, although you'll note also that the rate is marked as a decrease. That's

what the D stands for. Let's go on though, to the key provisions.

First of all, here we have the references, the identification of the -- of the notes. One is a cross reference. This is our Cain (phonetic spelling) tariff language, and I apologize, but it's what is here. One is a reference to see at 142, note 142, and three is a note 195. Well 142, which we'll see in the next sheet, is where the special industrial rates, as Kaneb has called them, were set up. That the, you know were -- were specified. These are the rates that were actually in effect prior to 1996, in the sense that these are the rates that -- that DNI was actually paying prior to 1996. These are the rates that, once again, it began paying pursuant to this settlement agreement, pending the litigation. But this rate, the bottom rate, by the way, because that's where their volumes are, is consistently the rate that they were paying up until the rate increase at issue in this proceeding.

I appreciate that my time is running out, so let me just very quickly turn to note 195, which it -- which that is subject to, and here's where the key durational language is corroborated. This confirms that the, you know Kaneb's, excuse me, Koch's view that the movement is not covered by the prescription, but that they are nonetheless reducing it pending the outcome of the appeal, and any subsequent proceedings. Now the live characterization of this agreement as ending when the appeal ending -- ended totally ignores that language, the reference to subsequent proceedings. And as we have explained in our filings, the subsequent proceedings, if the appeal didn't vacate it, where could they go to get the prescription lifted, they had to come back here. What other subsequent proceedings, other than Petition for Cert or something, could they have in mind. That's really part of the appeal.

So subsequent proceedings had to be whatever other proceedings they needed to take to get the prescription lifted, otherwise it's a meaningless phrase, and that is consistent with the whole notion of parity. If they get the -- the whole purpose

of the agreement, if they get the CFI prescription lifted, ours goes away too. By the way, that is one thing that Mr. Tabor said, that I would concur in. If the Board lifts the CFI prescription in this case, prospectively, vacates it completely, our rate also is free from this agreement. We do not dispute that.

Now there is further –

CHAIR NOBER: Time out? Okay. Are -- are you -- you wrapping up?

MR. HERTZ: Yes.

CHAIR NOBER: Okay.

MR. HERTZ: I'll be very quick about this. There is further confirmation that this was the intent of the parties from the subsequent conduct of the parties, and even though the agreement should be clear on their face -- and let me close this down now because we don't want to be discussing this one. So we don't want to be showing that. The Koch, although under Kaneb's interpretation of the situation, was free to raise our rate in 2001, never did so. It kept it at the lower level until it sold the pipeline. It was Kaneb, when Kaneb came in and bought the pipeline that the rate went up. Why on earth would Koch have kept it at the low reduced level, when it didn't want to put it down there in the first place if it didn't think it had to?

Further evidence is found in the subsequent agreement April, or excuse me, February 28, 2002, settlement agreement, between the parties, which again, I won't display, but which resolved the dispute over the past charges. The charges prior to October 25, 2000. It was a final resolution of those amounts, and for that resolution Kaneb paid a, excuse me, Koch paid a substantial sum. And it's –

CHAIR NOBER: Okay. Are you -- are you wrapping up?

MR. AVERY: Yes, I am, Your Honor. And neither party would have done this, would have signed an agreement that resolved the past, if they still had to fight a rate case over the future. The fact that they made no mention of the future rates in this carefully written up settlement agreement, is

further corroboration that neither believed future rates remained at issue,that both believed they were controlled by the parity agreement, settlement agreement that established or re-established parity with CFI's other customers.

CHAIR NOBER: Okay. Any questions Vice Chairman Buttrey?

VICE CHAIRMAN BUTTREY: So if the Board elects to, or decides to vacate the rate –

MR. AVERY: Yes.

VICE CHAIRMAN BUTTREY: -- what would your rate go to?

MR. AVERY: Whatever they file. Actually we would go to the rate we've been having to pay during the litigation, since we didn't have a prescription, we had an agreement and we have to come here to enforce it. We've been paying the as filed rate, which is, as I said, 68%. You -- you can do the math, it's -- it's basically around $20.00, depending on origin. So -- so if the Board were to vacate the prescription now, but agree with us that we had a contract that governed -- that should have governed our rate prior to that vacation, the proper answer would be to award us reparations by prescribing -- by finding that the rate for the past was established by the agreement, but the agreement disappears once you lift the prescription, and, therefore, it's -- the maximum rate for the future remains to be determined under other standards.

Now, of course, we concur with CFI that there's no basis been shown for lifting the prescription, but that is the answer to your question. Yes, if the prescription is nonetheless lifted, ours goes away as well.

Now I have not addressed the rate making policy questions that your Order asked us to comment on. I'm prepared to do that certainly if the Board wishes.

VICE CHAIRMAN BUTTREY: I'll observe that I'm a little new here, but I would -- it's my understanding that the Board does not jump in the middle of contract disputes between litigants, and that we simply rule on those matters over which we have jurisdiction, and that we leave those contract matters to

state courts, or other -- other tribunals someplace else. So we don't jump in the middle of those cases, I mean isn't that the case?

MR. AVERY: It is the case.

VICE CHAIRMAN BUTTREY: I mean we abstain from dealing with the contract issues at all, and just simply deal with the vacation of the rate.

MR. AVERY: No, that's not the case in this instance because this is not a contract, I would say unfortunately, which was transferred -- its enforcement was transferred to the court. Unlike rail contracts, which are now enforceable in the courts, this like rail contracts, prior to 1980, will be enforced, if at all, by this Board. And as the ICC, prior to 1980, enforced rate agreements by prescribing absent Sierra mobile-type exigent circumstances justifying rejecting the agreement, the Board under it's contract rate policy, excuse me, the ICC under its contract rate policy prescribed rates
at -- within it so long as it was within its jurisdiction, at the agreed level that became the maximum rate, even though its then applicable rate standards might otherwise justify a higher or lower rate, worked both ways.

That's what this Board can now do for the same reasons, under the same policy. There is no jurisdictional threshold here, unlike in the rail case. There is no court jurisdiction, unlike in the rail case. This case is like the pre-staggers rail contracts, and we have only this Board for relief. Now bear in mind that this was a settlement agreement, it's not just a garden variety rate contract. It is also a rate contract that was entered into, and tolling agreement that was entered into, to avoid immediate further litigation. This Board has long espoused and championed, private resolutions of disputes. That's exactly what this was. It avoided another rate case coming on the heels of the *CFI* case, another pipeline case, and even though it would have been in our view, a lay down, it was still another case that the Board would have had to wrestle with.

If the Board means what it says, when it encourages

private resolutions, it has to be prepared to enforce those if the parties later -- one of the parties decides to depart from it. There were settlement negotiations in -- between CFI and Kaneb, and one has to wonder how those settlement negotiations could have proceeded when Kaneb was taking the position, as it has in this case, that contracts can be ignored, contracts are not enforceable before the Board. I submit, that's not a position this Board could legitimately reach.

CHAIR NOBER: Commissioner Mulvey?

COMMISSIONER MULVEY: Just briefly, so the heart of this issue is whether or not there is a contract currently, between Kaneb and DNI; is that right? That Kaneb basically says that you don't really have a contract. That this two page letter does not constitute a contract, or if it did constitute a contract, the contract is now expired. You're saying this contract should still be enforced. Is that correct?

MR. AVERY: That is correct. At various times in the litigation, earlier on I should say, Kaneb also took the position that the contract just bound Koch, that it wasn't a party to the contract, and it didn't assume it. I think we've demonstrated in the filings that, a, they did assume it, whether they knew it or not because that's the essential nature of their agreement with Koch. This falls in the category that they did assume, even if they didn't know of its existence. And, b, as the successor operator of the pipeline, they have to be deemed to have assumed it.

COMMISSIONER MULVEY: Yes.

MR. AVERY: Just as they became subject to the Board's rate prescription, like it or not, when they bought the pipeline and with the successor operator, the prescription ran with the land, it ran with the pipeline, it wasn't unique to Koch. The same is true for the agreements that set rates relating to the pipeline, relating solely to the pipeline. This agreement had nothing to do with anything but the transportation of anhydrous ammonia by the pipeline, whoever might be operating it.

COMMISSIONER MULVEY: If I could turn to Mr. Tabor for a

second, do you agree that, if indeed this contract is enforced, you did take it on when you took over Koch? When you bought Koch? You did not buy Koch absent certain contracts, you only bought part of it, you bought the entire thing, including this contract, if this contract is still enforced?

MR. TABOR: Commissioner Mulvey, the previous counsel in this case have taken the position that even if there were a contract, it is a Koch contract, and it was not passed on to Kaneb. I really haven't studied that question. I have studied the question of whether there is a contract, or not, and I am prepared to discuss that, and show that there are genuine issues of material fact that say there is not a contract, per se. If, on the other hand, there -- you find that there was a genuine contract between Koch and -- and Dyno, DNI as Mr. Avery prefers, I would still want the -- to reserve the right to look at, and consider the position as to whether that ran with the land, as Mr. Avery said, or not. And I just don't have a position on that today, and I apologize.

COMMISSIONER MULVEY: Thank you. Although we're not considering Counts II and III, am I correct in assuming that your issue, your primary issue here, is parity? That you really don't care, I, but too much as to how much you're paying for transportation, as long as you and the CFI served competitors are paying the same price?

MR. AVERY: Well the same relative prices.

COMMISSIONER MULVEY: Relative prices.

MR. AVERY: Yes. Yes. We were paying -- we've always paid more than our competitor, but the -- the relationship, again as the evidence displays, the relationship was one we had adjusted to.

COMMISSIONER MULVEY: Yes.

MR. AVERY: The -- the new relationship has put us in a severe competitive disadvantage.

COMMISSIONER MULVEY: May I ask what percentage of your total costs of production are incurred by transportation costs? Pipeline transport costs?

MR. AVERY: I don't have the precise figure for you, Commissioner Mulvey. I can tell you that it's a relatively small percentage of the total cost of production. It is, however, the part that distinguishes, that differs. We all pay the same, basically, for the anhydrous ammonia because natural gas prices are what they are, so when our cost of the raw material, the product goes up, so does our competitors. What's different is that our transportation costs have shot way up, and at this point, theirs haven't shot up at all because –

COMMISSIONER MULVEY: Yes.

MR. AVERY: -- they're subject to the prescription.

COMMISSIONER MULVEY: All right. Thank you.

CHAIR NOBER: Let me just follow up on a -- on a point asked to you by the Vice Chairman. Is your -- your view is that a contract dispute regarding pipeline transportation can only be resolved by the Board here?

MR. AVERY: That is correct. In your capacity and your authority to establish maximum rates, the Congress, in its wisdom, did not see fit to separate out pipeline contracts, as it did rail contracts.

CHAIR NOBER: Correct, there is no provision like that.

MR. AVERY: Yes. And the alternative is either that they are not worth the paper they were written on, and can be violated with impunity, or that this Board will enforce them.

CHAIR NOBER: One question, does the statute even permit contracts for rates for pipelines?

MR. AVERY: It doesn't preclude them, anymore than the Interstate Commerce Act precluded rail contracts prior to 1980. There was a real question as to their enforceability, if the ICC allowed the pipe -- the railroad in that case to file an inconsistent tariff. That tariff under *Armor*, a 1908 Supreme Court case, then displaced the agreement, but the Board also, and particularly, late in the game, shortly before the Staggers Act was passed, had come to the point of recognizing the importance of transportation contracts. And not only applauding their existence, but making it unmistakably clear that they would be

enforced through the maximum rate jurisdiction of the ICC, in all but the most unusual circumstances. That again, that policy just 25 years old now, but it's in the record here. It was the ICC's last word on the subject prior to the Staggers Act.

CHAIR NOBER: The -- the tolling agreement part of this.

MR. AVERY: Yes.

CHAIR NOBER: It says in consideration of the mutual promises made. Who was that for the benefit of? That was for the benefit of -

MR. AVERY: The tolling agreement?

CHAIR NOBER: Yes.

MR. AVERY: It was for our benefit because we were not resolving. We had a reparations claim related back two years. I mean we'd been paying the higher rates for four years because we hadn't jumped into the case, hindsight's wonderful, because we hadn't jumped into the case, the revenues from the first two years were gone.

CHAIR NOBER: What if we find that you can't waive that, that that provision is invalid? Is that a binding contract then?

MR. AVERY: It's -- it's -- you mean the -

CHAIR NOBER: If the premise upon which the consideration was made is invalid, can -

MR. AVERY: That's only part of the consideration, clearly.

CHAIR NOBER: Okay. So other -- other things that would keep the contract binding -

MR. AVERY: And there's no -- there's no provision in here of certainly, we for whom that
was -- that was for our benefit. It preserved our ability, we thought, to get something on our reparation's claim, which they were unwilling to include up front.

CHAIR NOBER: The statute says a person must file a complaint to the Board to recover damages within two years after the claim accrues, then it provides for extensions if a civil action is filed. It doesn't give any party the right to waive the statute, anywhere. So assuming that, for the moment, that

maybe, I don't know how everybody else would find, but that that -- if that provision weren't valid, would this agreement still be valid, still be binding?

MR. AVERY: Well the -- the rest of the agreement would certainly be valid. What that means is that by signing this agreement we gave up more than we thought. We thought we gained parity, we did gain that. We re-gained parity, prospectively. We also thought we kept our options open for the past, even though we were deferring filing a case. We didn't file one on October 25th or before that date, in reliance on this agreement. If our reliance was misplaced, perhaps we are owed something in place of this, but certainly the pipeline doesn't get off Scott free.

CHAIR NOBER: So you would say that -- that the rest of the agreement is still --?

MR. AVERY: Certainly the rest of the agreement should be enforceable by the party for whom the voided provision was in place.

CHAIR NOBER: Okay. All right. Well I have no further questions.

VICE CHAIRMAN BUTTREY: I have a question. I remember making fairly good grades in contracts.
I'm puzzled by your conclusion that you say you reach about whether we have jurisdiction or don't have jurisdiction over the contract. It seems to me there's a fundamental question here: is this a contract or is this not a contract.

MR. AVERY: I don't think there's a dispute as to whether it's a contract.

VICE CHAIRMAN BUTTREY: My reading of the documents there's a clear dispute about whether this is a contract or not. Mr. Tabor's shaking his head yes. That's correct, there is a dispute about whether this is a contract. There's a difference between whether this is a contract or not, and whether the rates or whether the provisions of the contract are under the jurisdiction of the Board. MR. AVERY: With respect until today, the question as to whether this constituted a contract,

has never been challenged. The argument against its enforcement in the present case, in 42081, has been, a, that Kaneb never assumed it, it was an agreement with Koch, b, that it expired. Now even --

MR. AVERY: -- in the summary of argument Mr. -- that was filed a week ago, Mr. Tabor characterized it as a tolling agreement, and whether the tolling aspect of it could have been enforced had it come to enforcement or not, it was an agreement. It was clear that the parties intended to be bound by it, by its terms. Until today, no one has ever contended that this was not a reflection or a memorandum of the essential terms of an agreement, a contract between the parties. Whether it can be enforced before this Board or not, it was a contract, and refusing to enforce it, you know would deprive the disappointed party, us, of our bargain.

COMMISSIONER MULVEY: Just briefly, for clarification, I am the non-lawyer in this group, perhaps in this room –

CHAIR NOBER: That's probably a plus right now.

COMMISSIONER MULVEY: That's probably a plus. It seems that way. Is there a difference, the Chairman has raised the issue of you're basically waiving a law, which you don't have the authority to do so, but can you waive your rights under the law? Can you agree that you'll not take each other to court, even though you have that right? You're not really waiving the law, but you're mutually agreeing to waiving your right under the law. Is that what's at issue here? Or are you waiving the law itself?

MR. AVERY: Not on the tolling agreement. The tolling agreement –

COMMISSIONER MULVEY: Yes.

MR. AVERY: If it were honored.

COMMISSIONER MULVEY: Yes.

MR. AVERY: If it had come to litigation and it was honored through a settlement agreement, of course.

COMMISSIONER MULVEY: Right.

MR. AVERY: And they paid a substantial sum on a claim which if the Chairman is correct, would have been largely time

barred. So there was a mistake of law, I suppose, by both parties if that's correct. But it never came to litigation. So whether they could or couldn't waive, was never brought up until today. And I'm sorry, I think I may have lost the train of your question now.

COMMISSIONER MULVEY: I think the train has left the station. We'll discuss it further. Thank you.

CHAIR NOBER: Is there an adjudicated decision someplace that says that you're a captive shipper, or captive customer?

MR. AVERY: No. Now –

CHAIR NOBER: You claim to be a captive customer.

MR. AVERY: And we have evidence --

CHAIR NOBER: But has there been an adjudication that you are indeed a captive customer, or was it you on a rail line, or are you close to highways and that sort of thing?

MR. AVERY: No. This is all thoroughly discussed in our evidence. Kaneb has denied to its prior counsel that market dominance is relevant to the contract question. Well we agree that as a matter of policy the Board should enforce -- there's no market dominance jurisdictional standard as the Chairman is aware, in the statute relating to pipelines. It's been a policy decision of the Board that it would not interfere where competition is present. So we contend, and we argue in our filings that you really should apply, you know enforce contracts, hold parties to their bargains whether there's market dominance or not. But assuming that the Board, nonetheless, concluded that market dominance would have to be shown before enforcement of our agreement would be granted, we've shown that. There is no contrary evidence. It's relevance has been contested in argument, but there's no contrary evidence and we submit that the evidence is pretty compelling. So if the Board needs that finding to grant us relief, the evidence is there.

VICE CHAIRMAN BUTTREY: Well as I understand it, the purpose of an oral argument is to find out things we don't otherwise know. Are you on a rail line?

MR. AVERY: Do we own -- are we on a rail line?

VICE CHAIRMAN BUTTREY: Yes.

MR. AVERY: No, Your Honor, we're not.

VICE CHAIRMAN BUTTREY: How close is the nearest rail line to you?

MR. AVERY: It -- again this is addressed in the evidence in terms of the cost of bringing in rail. Rail has never been I -- I the short answer to your question is without searching the files, I couldn't give you the answer to that at this moment. We can certainly supply that. I believe it's in the record, but the -- the point is, rail transportation over these distances is not a competitive alternative, even at the higher rates we're paying now, it is not an effective constraint on pricing by Kaneb.

VICE CHAIRMAN BUTTREY: But if the pipeline weren't there, what would be your alternative, would it not be truck?

MR AVERY: It might be, unless in fact we could somehow resurrect, you know somehow obtain the property rights to get access to the river again. That is what we had before we shipped it to pipeline, but as again the record establishes we cut, you know burned our bridges behind us, if you will, in reliance on the superior service and reliability offered by pipeline deliveries. So we are now effectively captive. We are really totally captive. Water transportation is a possible option, but again it would be at a prohibited expense to restore it. All of this is documented. Rail is not a competitive alternative. It would be technically feasible, I believe, but the cost, even with the infrastructure in place, which would be substantial, would -- just the cost of the transportation would be prohibitive. The realistic -- the only realistic alternative to using the pipeline is to shut the business down. That would be if -- if the pipeline becomes too expensive to continue operating, we don't go to another mode. We shut the plant down.

COMMISSIONER MULVEY: Well I want to follow up on that a little bit. What is the alternative to pipeline for transporting anhydrous ammonia, generally? You're right, rail is an option, but it tends to have higher costs. When you say that you burned

your bridges behind you on that, what does that mean exactly, with regard -- I mean the waterways are still there. The operators are still there, and since you're different from the agricultural use which tends to be more peaked in its demand and, you're more of a continuous use, it would strike me-- that water transport would be more an option for you than it would be for the agricultural users.

MR. AVERY: Actually it's less because of the seasonality of water transport on the Mississippi River.

COMMISSIONER MULVEY: Where are your facilities located?

MR. AVERY: In mid-Missouri. We're just really a little bit north of the split of the pipeline. We're on the west leg of the pipeline, north of the split.

COMMISSIONER MULVEY: And how -- how often is the waterways out of service because of -- because of weather conditions, either flooding or freeze?

MR. AVERY: It's -- it is a -- it is a fairly regular occurrence. I mean this is, you know this can be found in the weather reports, of course.

COMMISSIONER MULVEY: Yes. Yes.

MR. AVERY: It was -- back when they relied on barge transport, in order to deal with barge delays, barge blockages due to ice, problems with the waterways, they had to have in place substantial, huge storage tanks, to hold enough to get by until barge deliveries could be resumed. The expense of maintaining these facilities was substantial. When they switched to pipeline transportation, those -- those tanks were no longer necessary. One was torn down. I believe one may still be there, but it could not economically be brought back up to code. It would have to be torn down now, and replaced if they were to resume barge. Even to resume barge, even if that were an economic option despite the cost of restoring the tanks though, we have the problem of access to the river. We don't own access to the river, although we're close -- relatively close to the river. They had a right-of-way for a transfer pipe to docks on the river.

When they switched to the pipeline, again this is in the Barton testimony, they relinquished their leases to the -- to the -- to the dock, which is now in the hands of a third party, gave up their easement for the pipeline, which is against -- over third party property, and since they don't have the power of eminent domain, unlike a public utility or a railroad, they have no assurance that they could get that back. And since they would clearly be in an inferior position, bargaining vis-in-vis other users of the property, they would be -- they'd have to pay whatever those property owners demanded as the price for relocating their own operations. They simply don't have any guarantee that they could get that, but they do know that the cost of resurrecting, restoring what they gave up when they switched to pipeline delivery would be enormous. This is again documented in the Barton testimony.

COMMISSIONER MULVEY: Thank you.

CHAIR NOBER: Thank you. Any further questions? Well again, I want to thank you all for your patience in answering all of our questions, and I think people have raised some very good and thoughtful -- thoughtful looking issues here. I know Mr. Tabor, we said we'd try to get this resolved quickly, and you may or may not believe that this is pretty quick for our agency.

MR. TABOR: As a long time practitioner at FERC, I understand that.

CHAIR NOBER: So, you know while I recognize nine months may seem long, in the -- in the regulatory world we're actually moving pretty quickly, or we're trying to anyway. So we will -- we will -- we understand the parties need a resolution of this issue, and I think we will work hard to try to give you one, and -- and I know you've given us all a lot to think about. So with that, thank you very much for your time and effort, and the argument stands adjourned.

(Whereupon, the proceedings went off the record at 12:29 p.m.)