1 record at 10:27 a.m.)

2 MS. LIEN: Your Honor, Mr. Shook was just

3 informing us that he believes, and as we've discussed,

4 we do believe that this is something where we're going

5 to have to work together to figure out what full

6 capacity is. It's a factual question, a legal

7 standard.

8 Again, the Commission does not appear to

9 have a lot of precedent and we cannot say to you well,

10 this is exactly what the Eleventh Circuit meant.

11 JUDGE SIPPEL: Okay.

12 MR. SHOOK: Your Honor, another way of

13 putting this is it appears right now that full

14 capacity is going to be a mixed question of fact and

15 law. Obviously both sides will probably have

16 different understandings as to what full capacity

17 means. And there will be some argument about that

18 before you.

19 You would get to set it in the first

20 instance based on the evidence presented with,

21 unfortunately, the possibility that the Commission

22 could second guess you. But in the first instance,

1 you get to make the call.

2 JUDGE SIPPEL: All right. Well, that

3 pretty much puts me back where I was but that's all

4 right, that's all right. What I don't want -- what

5 I'm trying to avoid is an inefficient way of

6 approaching this. If we should look for more guidance

7 from someplace else before moving forward.

8 To me, I'm obviously opposed to that

9 because all it is going to do is just slow things down

10 and I think that all the parties here plus myself have

11 been given a job to do. And the order, the

12 designation order is pretty clear.

13 And it wouldn't be the first time that a

14 case has been put down for hearing where there has

15 been uncertainty as to standards of proof. I mean

16 that's part of the reason for putting things into

17 hearings sometimes.

18 So I'm not -- I just again want to have

19 this aired out now rather than six months from now.

20 That's my point.

21 Now, you want to go -- let Mr. Langley go

22 first. Do you want to respond to anything that's been

1 said here?

2 MR. LANGLEY: I do actually --

3 JUDGE SIPPEL: Go ahead.

4 MR. LANGLEY: -- Your Honor --

5 JUDGE SIPPEL: You'll get your chance Mr.

6 Seiver.

7 MR. LANGLEY: -- I think that actually I

8 agree with what the Commission is saying. And that is

9 that you will not be in a position to make that

10 threshold determination of what a full pole means

11 until you see the evidence because we are going to

12 have sharp disputes about what the evidence actually

13 means.

14 Once our survey is completed, we may

15 designate -- say it's a 1,000 -- 10,000 poles that we

16 believe are crowded. They may disagree with 50

17 percent of that. They may disagree with all of it.

18 And that's where the interpretation of what is a full

19 pole comes into play. But that's not a determination

20 that can be decided as a legal matter without a record

21 to inform the analysis.

22 So I think it would be putting the cart

1 before the horse if anyone tried to decide today what
2 is a full pole.
3 The Complainants would argue that there is
4 no such thing as a full pole. That a pole is never
5 full. It can always be changed out. You can always
6 put cross-arms on it. You can always move things
7 around a little bit. You can always fudge on coating
8 issues perhaps.
9 We might argue that all poles are
10 inherently full because of the future needs of Gulf
11 Power in its core business purposes.
12 But at the end of the day when this survey
13 is complete, what I hope we have is some number of
14 poles, whatever it is, that we believe that we say
15 Complainants, these are the poles we contend are
16 crowded. They can then analyze the engineering data,
17 the photographic data, compare it to their facilities
18 maps, possibly even do their own inspections, and
19 develop their counter arguments in opposition to our
20 position on which poles are full.
21 And I think that that -- the adversary
22 nature of the parties' positions in the face of actual

1 hard evidence is going to ultimately be what allows
2 Your Honor to decide what is a full pole.
3 JUDGE SIPPEL: Okay. Mr. Seiver?
4 MR. SEIVER: Thank you, Your Honor.
5 This points up one of our biggest problems
6 both at the rehearing proceeding and why we were
7 filing originally for clarification and then in our
8 ultimate statement.
9 As an initial matter, what is a full pole
10 does seem to be a difficult issue of fact and law. As
11 I pointed out to you, Your Honor, if a wire that is
12 installed by Gulf Power drips too low, is that somehow
13 or other justification to say that there is a lost
14 opportunity which hasn't been identified or that there
15 is some other loss under the constitution to Gulf
16 Power that has not been remedied.
17 That's why we had proposed, and if the
18 Commission -- if the Bureau staff would go along with
19 it, that we would establish first a definition of what
20 is a full pole so we don't have to spend out time, if
21 there are going to be 10,000 poles, having 8,500 of
22 them in code situations where either a make ready or

1 a change-out could be done to put it in proper
2 situation.
3 And these are poles that the cable
4 operators are on already that I believe Mr. Langley is
5 going to want to say well, you've been there and
6 you've been paying rent.
7 And maybe even a few years ago you paid
8 for a change-out and a rearrangement but guess what,
9 even though you bought us a new pole and even though
10 you paid all this and we're not losing any money as a
11 result, in fact we're gaining money by renting out the
12 other space to Telecom people, now that these other
13 Telecom people are on it, guess what? It's full
14 again.
15 And that means you've got to pay some
16 other compensation rate. And it seemed to us a real
17 waste of administrative, judicial, and parties'
18 resources to go on this odyssey of doing a survey --
19 and I'll point out that it's only for one cable
20 operator they offered to do in five to seven months,
21 not four.
22 MR. LANGLEY: That's actually a

1 misunderstanding of our position. I'm not sure where
2 that came from. JUDGE SIPPEL: Well, let's hear
3 this out first and then we'll come back to the
4 schedule. Go ahead.
5 MR. SEIVER: We go through all of this and
6 then we're going to have -- and we will need an expert
7 on poles, not just an expert on economics, we would
8 need two experts, but one expert on poles to say what
9 is, you know, the remedy here.
10 And then what would guide Your Honor to
11 decide well, you know what? They could spend a couple
12 of bucks or perhaps in looking at what happened here,
13 and I'm going to look at a different one just as an
14 example, Your Honor, Plate C-4.
15 Here's a pole and I have no idea whether
16 all the evidence in the world, all the permits in the
17 world, all the discovery in the world would show this
18 but here's a pole with a neutral on top, three power
19 lines, and you see the 40-inch minimum --
20 JUDGE SIPPEL: Yes.
21 MR. SEIVER: -- between the bottom power
22 line --

1 JUDGE SIPPEL: I follow you, I'm following
2 you.
3 MR. SEIVER: -- and then the street light
4 has a 12-inch minimum. Well, what if they mounted the
5 street light six inches about the cable? Somebody
6 comes along, these installers they do it, it's not us,
7 it might not even be the power company, sticks a
8 street light on there that is six inches above.
9 We're out of compliance. There's a code
10 problem. The pole is full. But does that mean that
11 it is full under the terms of what Judge Tjoflat wrote
12 to say that we have to start writing bigger checks to
13 the power company when we were there and somebody else
14 put that street light there?
15 Or if it was put in wrong, that it could
16 be moved up six inches so that it would be back in
17 compliance yet we're going to have every one of these
18 poles subject -- and Your Honor is going to decide was
19 this wrong? Was this right? Is that really full
20 without any standard?
21 And the statute still requires that if
22 somebody new comes along -- that's not us -- that

1 wants to attach 224 high, which has not been declared
2 unconstitutional, says the new guy pays to get on the
3 pole.
4 Whereas now if somebody new wants to come
5 on the pole that's waiting in the wings, I guess we're
6 going to be asked to pay even though there might be
7 room on the pole and there is no decision and no
8 standard from the Bureau to guide Your Honor as to
9 saying well, what do I do? Did I say that that's
10 Seiver's client's fault or is that Langley's fault?
11 Or is this just a wash?
12 And that's why we wanted to have a
13 decision that would say -- and I know Mr. Langley
14 won't stipulate to this -- that any pole that can be
15 rearranged or changed out or that has been rearranged
16 or changed out in the past by us would not entitle
17 them to say oh, it's full or crowded so you cable guys
18 have to start writing bigger checks.
19 Now that dovetails with our second issue
20 as to how much we write. And I'm not trying to jump
21 ahead to that point but if we've paid make-ready and
22 we've paid for the change-out and the rearrangement,

1 since the constitutional standard is loss to the
2 owner, what are they out? They've not lost anything.
3 And we've done it. We've created the
4 space that is needed. And -- or whoever is the new
5 attacher has created the space or whoever caused the
6 problem and put the street light up in the wrong spot
7 or the transformer in the wrong spot, that can be
8 done. And we're back to a regular pole.
9 And so it's a situation that I felt
10 uncomfortable with us going into looking at -- I
11 forget if it is 138,000 poles total, to try and reduce
12 it to some maybe multiple thousand number where we're
13 going to pull everyone of these out and have an
14 expert.
15 And without any guidance ahead of time as
16 to whether the Court would consider it or anyone would
17 consider that to be a full pole. I feel as though
18 we're just shooting in the dark. And it's putting my
19 clients at a great risk that if they had known five or
20 six years ago that paying for a change-out and paying
21 for a rearrangement could still result in today -- Mr.
22 Langley's saying well, you know what? That was very

1 nice. And thank you for the new pole. But you've got
2 to give us some more rent than you've been paying
3 under the formula. We might not have done it.
4 It's a retroactivity kind of situation
5 that we felt given this case and given what happened
6 in Alabama Power that the Alabama Power Company
7 couldn't even come in with evidence to support it
8 because they never made that claim.
9 Mr. Langley had never said -- Mr.
10 Langley's client had never said because these poles
11 are full, we should pay more money.
12 That was never alleged and, in fact, they
13 did not like the standard and I think Mr. Langley said
14 on the record we don't like this standard. And we're
15 not sure it's really workable but if it is there,
16 we'll use it.
17 I see it as Ms. Lien said, as a
18 prospective issue. If he's got a problem with a pole
19 today and we've got this standard and we'd look at it,
20 then we'll know.
21 If he says you know what, John, it's full.
22 Sorry, you're going to have to pay the just

1 compensation rate, then we can make a decision. Well,
2 we'll get off the pole and go underground or go
3 somewhere else or put our own pole up or go wireless.
4 We could make some decision as opposed to
5 saying all right, you know, under the agreement, we're
6 supposed to pay for a new pole. Here is a check for
7 6,000 dollars. Here's your new pole. We'll move
8 everybody around.
9 And he says, you know what? I don't want
10 to be penalized for having let you do that. It was a
11 full pole before so now instead of your six dollar
12 rent, it's 38 or some other amount.
13 It puts us in such a bind that I thought
14 that if anything, our first order of business would be
15 to define pole capacity. And if the Bureau won't do
16 it, I would respectfully ask Your Honor to at least
17 let us brief that.
18 So when they go looking for their poles,
19 we know what we're dealing with as opposed to having
20 to then look at 1,000 poles or 2,000 or 200 poles not
21 knowing whether any of those issues that we talked
22 about, whether the transformer is in the wrong spot or

1 the street light will have an impact.

2 JUDGE SIPPEL: Well, I may have a

3 household solution to the question then. I've got,

4 according to my schedule that I carefully worked out,

5 tomorrow is the first day for getting interrogatories

6 out.

7 MR. SEIVER: Yes, Your Honor.

8 JUDGE SIPPEL: Why not just ask each other

9 the question? What do you mean by full capacity.

10 MR. LANGLEY: That was one of the

11 questions we intended to ask.

12 JUDGE SIPPEL: Well, there you go.

13 MR. SEIVER: I think that's our second

14 interrogatory, not our first.

15 JUDGE SIPPEL: Well, all right. I'm not

16 suggesting that that is going to be the solution but

17 that's going to get the process started. And if

18 parties start taking positions at this stage as to

19 what they mean by full capacity, we get discovery,

20 you're going to have a survey.

21 You start, you know, melding -- melding

22 those definitions in with what we're getting in terms

1 of evidence. And then you get opinions on top of
2 that. And who knows, I mean you may actually, you
3 know, ask six months down the road to adjust your
4 answers.
5 I don't know. I'm just trying to get this
6 -- I told you before up front, I don't want this to be
7 a moving target any longer than it has got to be. And
8 right now it is one.
9 But I think that good solid discovery, you
10 know, good evidence, solid assistance from experts,
11 and you parties are going to be working -- you
12 parties' attorneys are going to be working with
13 definitions. We'll get there, you know, it might take
14 us a while but we'll get there.
15 And then again, as Mr. Shook says, the
16 Commission may not like anything that we do but
17 that's, you know, par -- that's the way things go.
18 Right? I mean that's the way the process works.
19 But you're making excellent points. Most
20 of the points -- Mr. Seiver, I'm talking to you now --
21 the points are that you seem to be arguing more with
22 the proof -- all these proffers of proof that have

1 been going on and on and on and pointing out
2 weaknesses and weaknesses and weaknesses and
3 weaknesses. But that is not what this case is about.
4 They've got a burden of proof. Down the
5 road they're going to have to say okay, here's our
6 case. And then you are going to file in opposition to
7 that. And they've either made the case or they
8 haven't made the case.
9 So, unfortunately, there is not a short
10 way out of this. There just isn't. And I'm, you
11 know, trying as hard as you all are.
12 Where can we go from here? I've got a
13 schedule. There's no reason why you can't get
14 interrogatories out, it seems to me, tomorrow.
15 MR. SEIVER: We will, Your Honor, and
16 document requests. We'll have everything out
17 tomorrow.
18 JUDGE SIPPEL: There we go. There's a
19 start.
20 MR. LANGLEY: We can do that also. We do
21 not intend to use our full 50 on either of those.
22 JUDGE SIPPEL: I'm sorry? Your full 50?

1 Well, that's all right. You can start. This is a
2 start. This is a start.
3 Now, you know, we can talk about this
4 almost ad infinitum. There is a footnote, a
5 fascinating footnote in Mr. Seiver's opposition to
6 Gulf Power's motion to strike. That came in back in
7 November.
8 And the footnote says that linear issues
9 identified by Complainants include -- and I guess this
10 would be yours?
11 MR. SEIVER: Yes, Your Honor.
12 JUDGE SIPPEL: I'm looking at footnote 8
13 on page 2. And then it goes on to go, you know, to go
14 into this in great detail. Definition and
15 interpretation of the ambiguous term "insufficient
16 capacity", application of precedent determining
17 insufficient capacity. I mean it sounds like to me
18 you've got an awful lot to work with there.
19 And application of the Commission's
20 requirement for a reasonable and specific bonafide
21 development plan, determination of the relevance of
22 prior voluntary contractual pole change-outs, finding

1 of the extent to which cable formula already provides
2 Gulf Power with adequate compensation.
3 And, you know, exactly how this proof is
4 going to be used, as I say as to whether or not we
5 can get into extrapolations from a certain amount of
6 objective evidence or whether we're just going to have
7 to go sheer pole by pole by -- literally pole by pole
8 by pole by pole. We're just not going to know until
9 we get the process started.
10 So you are going to get your day in court.
11 That's my only point. I'm just trying to make that
12 clear. You're going to get your day in court.
13 Now what do we need for time? What do we
14 need for time? Where do we stand as far as the first
15 documents? You turned over 6,000 documents or
16 something? Somebody turned over 6,000?
17 MR. SEIVER: Yes, Your Honor. We gave
18 them boxes of the pole documents that we had,
19 everything on permits, make ready, maps to Gulf Power
20 for our four complainants.
21 JUDGE SIPPEL: Okay. And what have you
22 done? Have you given them --

1 MR. LANGLEY: We gave them, pursuant to
2 Your Honor's order after the last pre-hearing
3 conference our existing planning documents which
4 include our forward-looking distribution studies for
5 our -- I believe it's our six major service -- our
6 only six service districts --
7 JUDGE SIPPEL: All right, okay.
8 MR. LANGLEY: -- which is about 750, 800
9 pages of documents.
10 JUDGE SIPPEL: Okay.
11 MR. SEIVER: And, Your Honor, as far as
12 planning, a lot of those -- I mean I'm jumping ahead
13 about the relevancy -- had to do with substations and
14 did not talk about any issue that had to do with
15 crowding on the pole or that we need to have this pole
16 changed out because there's not enough room to put our
17 new electrical conductors up there for our electric
18 service.
19 But what we were concerned about also is
20 that these look like they're not complete. I mean
21 they were -- I think we put it in our agenda --
22 JUDGE SIPPEL: You did, you did.

1 MR. SEIVER: -- that they weren't complete
2 and our concern is that we, again, are going to be
3 asking for something more complete in our discovery.
4 But we clearly -- the two issues that I
5 think we wanted to addresses for sure today are the
6 confidentiality agreement, which we attached, because
7 I think they're going to want protection for a lot of
8 that material as do our clients.
9 And you had provided for one expert, Your
10 Honor. I ask that you reconsider and allow us to have
11 two experts so I can have one on pole design and pole
12 engineering and safety codes and then the other expert
13 would handle the issue about compensation. What's the
14 loss to the owner, marginal costs, what the rental is,
15 and how the formula works.
16 I think that the only way we could, you
17 know, present this case, unless Your Honor wanted to
18 bifurcate it and just do the full capacity first and
19 then do the marginal costs and the entitlement later,
20 is to have two experts.
21 MR. LANGLEY: Your Honor, we actually join
22 in that request to allow two experts.

1 JUDGE SIPPEL: Okay. Would the Bureau
2 have any problem with that?
3 MS. LIEN: We do no, Your Honor.
4 JUDGE SIPPEL: Okay. Two experts it will
5 be.
6 MR. SEIVER: And then one other thing. I
7 believe the rules, Your Honor, excuse me --
8 JUDGE SIPPEL: Go ahead.
9 MR. SEIVER: -- provided for a 14-day
10 response time on interrogatories and document
11 requests. I think that might be a difficult one for
12 everyone to meet since we have four complainants and
13 we'll have to go to each one of them and collect. So
14 I was hoping that we could have 30 at least.
15 JUDGE SIPPEL: Thirty days on the
16 interrogs? And 30 days on the documents?
17 MR. SEIVER: Documents, yes, Your Honor.
18 And we'll do the same for, you know, Gulf Power for
19 their responses to ours.
20 JUDGE SIPPEL: Any objection to that?
21 MR. LANGLEY: No objection, Your Honor.
22 JUDGE SIPPEL: Bureau?

1 MS. LIEN: No objection.

2 JUDGE SIPPEL: You have 30 days.

3 Now, 30 days for interrogs and docs.

4 Okay. First wave.

5 Now, yes, confidentiality agreement. You

6 submitted an order. Is there agreement to the order

7 that Mr. Seiver submitted? Or do you want to work

8 that out some more?

9 MR. LANGLEY: Your Honor, I do want to

10 work it out.

11 And on this point, I just have to concede

12 that it is my own scheduling conflicts that have

13 prevented me from getting back with them about that.

14 But I will commit to doing that this week if that's

15 acceptable with the Complainants.

16 MR. SEIVER: Well, that's fine, Your

17 Honor. I don't want to put anybody in an untoward

18 situation. I wasn't aware that that was the problem.

19 I didn't know why there was no response on our

20 proposal. But if it's this week, I think we can have

21 it.

22 JUDGE SIPPEL: Well, okay. Let me --

1 where is my calendar? Let me get the date certain on
2 this. We know what today is. It's the 31st.
3 Okay. I'm going to just put a deadline of
4 -- I'm sure I'm going to get it before this -- but
5 February the 11th, which is a Friday, okay? That's
6 the confidentiality order for signature submitted to
7 me, okay?
8 Now wasn't there another requirement that
9 I gave this morning? And now I forgot what it was --
10 to give me something --
11 MR. LANGLEY: You had asked that we
12 determine between ourselves whether or not Adelphia
13 was actually connected to our poles --
14 JUDGE SIPPEL: Yes.
15 MR. LANGLEY: -- is that what you're
16 referring to?
17 JUDGE SIPPEL: What period of time -- I
18 gave you 30 days on that didn't I?
19 MR. LANGLEY: I don't know that you gave
20 us a time period but I'm sure we can do it within 30
21 if not sooner.
22 JUDGE SIPPEL: All right. We'll say that

1 then by February 28th. What I want is some kind of
2 assurance on the record from counsel that all the
3 parties have been identified for purposes of the
4 relief required in this case. Okay.
5 Now does that cover everybody's shopping
6 list so far?
7 MR. SEIVER: I only had one other item,
8 Your Honor. And I know that as far as the legal
9 issues and the relevancy, we'll be arguing that. I
10 just want to make sure that by agreeing to this and my
11 sitting here and with the survey, that I'm not
12 agreeing that what is currently going to be produced
13 in that survey necessarily proves a condition in 2000
14 or 2001.
15 JUDGE SIPPEL: You don't have that burden.
16 MR. SEIVER: Okay.
17 JUDGE SIPPEL: They have the burden of
18 proof. Certainly it's going to facilitate the
19 proceeding. It's going to facilitate the work of the
20 Commission the more cooperation that can come into
21 play on this.
22 And I'm not talking about the bottom line.

1 I'm talking about the mechanics, scheduling, you know,
2 don't try and undercut what his efforts are, try and
3 help him where his efforts are. But you don't have to
4 concede anything in the process.
5 But as I said first thing this morning,
6 any time you want to come in on a stipulation on full
7 capacity, I'll be listening. My ears will be wide
8 open.
9 Okay. Now does that -- I'm sorry, Mr.
10 Langley, does that basically cover everything up to
11 date --
12 MR. LANGLEY: Yes, sir.
13 JUDGE SIPPEL: -- that you wanted to
14 cover? Now I know you've got a question about the
15 time. And I'm trying to be both firm and reasonable
16 on that. But so far you haven't -- all you've
17 indicated to me is that you've got a survey that might
18 take a little bit longer than I had hoped it would
19 take.
20 I'm just going to ask you to get to
21 whoever it is that you sign off with to get maybe
22 extra people on it to move this thing along. I'm not

1 looking for speed but I'm looking about keeping
2 generally within the confines of this schedule.
3 As I said, now if I have to move it out a
4 little bit, I'm not going to do anything with it
5 today. You know I'm willing to negotiate with you up
6 to the 30-day periods.
7 But, you know, I'm not too happy about
8 even that because I just feel that this -- you know,
9 sometime or other there's a lot of information out
10 there to work with. But, you know, I'm open -- I'm
11 open to hearing what you have to say. That's all I'm
12 saying right now.
13 MR. LANGLEY: Your Honor, I will say that
14 consultants, unlike building contractors, like to
15 overestimate just so they don't hurt themselves. But
16 I am hoping that we'll be able to do it in less time
17 than they have estimated.
18 And certainly the length of time that is
19 required will be a function of what front-end
20 determinations we make based on the documentation
21 available as to which poles are even worth going out
22 to do an engineering work up on. So --