1 System. It's an acronym for a system that is used to
2 calculate the cost of doing certain things to a pole
3 line.
4 ADMIN. JUDGE SIPPEL: All right. Does h
5 e have that program? I mean is this a software
6 program? So does he have it?
7 MR. LANGLEY: I don't think he -- well, I
8 don't know. The cable operators may actually have
9 that program, because in the field, for example, when
10 we're putting together a make -ready estimate, it's
11 based on JETS. And so if we go out and inspect the
12 line, and if we have got to change -out three poles,
13 we got to rearrange four, we got to do this, that,
14 and the other, we input that data into JETS, and it
15 spits out the make -ready work order estim ate, which
16 is what the operators end up paying.
17 MR. SEIVER: Go ahead. I'll just -- I'll
18 save a lot of the stuff I want to say until after Mr.
19 Langley is done, but on grounds and arresters, those
20 already exist on existing poles, and I'm not sure
21 that JETS attaches any other costs to those grounds
22 and arresters. There is an account in FERC Form 1,

1 which the FCC, in looking at the cable formulas,
2 said, and this is where we disagree on what it means,
3 they said, this is not part of the cost, so it should
4 be attributable to the attachers, because it
5 benefits, you know, they're going to do it for their
6 electric plant anyway. They have to have the grounds
7 and arresters. And they're going to do that. And we
8 have an appurtenance deduction, too, that some of the
9 appurtenances don't benefit the attachers such as
10 cable operators that take for one foot. So we FCC
11 decisions on that plus the 11th Circuit's decision,
12 which I'll cover in a minute, but the grounds and
13 arresters in the field for make -ready, we don't eve r
14 see any details on that, but Gulf Power says, okay,
15 you want these poles ready, here's a bill for
16 $18,000.00, and if we pay it, it's done. If we
17 don't, it's not. And that's the way I understand the
18 words.
19 ADMIN. JUDGE SIPPEL: Do you mean from
20 the bill, you can't tell whether -- it's not itemized
21 in a way that you know what's being done or?
22 MR. SEIVER: Well, no. On a particular

1 pole, it's going to be a change -out or a
2 rearrangement, but grounds and arresters are not
3 something they charge us for, b ecause they already
4 exist, and if they have to reset a ground and
5 arrester, then perhaps it is part of the change -out
6 cost, which is reimbursable.
7 ADMIN. JUDGE SIPPEL: Okay.
8 MR. LANGLEY: There may be a way to
9 shortcut this, because there really isn't any dispute
10 as to what the costs are. The dispute is as to what
11 costs are appropriate to be recovered. I mean the
12 data is the data, and there's not really a factual
13 issue as to whether the data is accurate. It's just
14 what data do you use in the formula.
15 MR. SEIVER: And perhaps we have a
16 stipulation here. Maybe --
17 ADMIN. JUDGE SIPPEL: I think you would.
18 MR. SEIVER: -- you know, if Mr. Langley
19 will agree that all of the costs that are relevant
20 are booked in FERC Form 1 so that we don't have some
21 unknown costs somewhere else that'll come back to
22 bite us, we might be able to get there.

1 MR. LANGLEY: I think we can probably do
2 that, but one exception that I'm thinking of is
3 grounds and arresters, and for some reason, I don't
4 think that that is tracked as a line item in the FERC
5 Form 1, but that's probably something that I should
6 talk to Gulf about -- that John and I --
7 MR. SEIVER: Yes, that --
8 MR. LANGLEY: -- maybe could work out.
9 ADMIN. JUDGE SIPPEL: -- sounds like
10 that's worthwhile, very much worthwhile discussing,
11 because that can really shortcut -- it seems to me it
12 would.
13 MR. SEIVER: And our experts will deal
14 with that as well. And just --
15 ADMIN. JUDGE SIPPEL: Now --
16 MR. SEIVER: I'm sorry.
17 ADMIN. JUDGE SIPPEL: Okay. I 'm just --
18 that was something that I wanted to ask about that.
19 Okay. You got the FERC costs, and then you're going
20 to pull out these costs and arresters. The costs and
21 arresters --
22 MR. SEIVER: Grounds and arresters.

1 ADMIN. JUDGE SIPPEL: Grounds and
2 arresters. No matter who is on what pole, the
3 grounds and arresters are going to be a cost factor
4 with respect to that pole. Is that correct? It's
5 kind of -- I mean you can't have a pole go up without
6 having grounds and arresters? Is that right?
7 MR. LANGLEY: That is true.
8 ADMIN. JUDGE SIPPEL: It's kind of like
9 putting a tent up without poles to hold it up or
10 something?
11 MR. LANGLEY: But not every pole requires
12 grounds and arresters. The National Electric Safety
13 Code has a guideline for how many need to be in a
14 pole line mile and, of course, a pole line mile
15 sometimes depends on where it is, but I mean that's
16 all -- there is a prescribed number that need to be
17 in --
18 ADMIN. JUDGE SIPPEL: So it's not -- so,
19 pardon?
20 MR. SEIVER: It's not ev ery pole as Mr.
21 Langley said. And we have to ground, too. I mean we
22 -- when we go on a pole, we have to ground, so.

1 ADMIN. JUDGE SIPPEL: That's a safety
2 feature, right --
3 MR. SEIVER: And that's one of the
4 reasons the FCC said, well, those cable operators
5 have to ground, so they've already grounded.
6 MR. LANGLEY: They get in our grounds
7 though.
8 ADMIN. JUDGE SIPPEL: One at a time, now.
9 Just be careful. Let me tell you where -- because I
10 think you really want to know what I'm thinking. It
11 sounds to me like this grounds and arresters category
12 is something that would be like a safety, like, you
13 know, fire standards that would be described for
14 purposes of operating a business or something. So, I
15 mean that's a cost that no matter how much you want
16 to charge and no matter how much you want to pay,
17 that's always going to be there. I mean there's no
18 way you can make that go away. Am I right? I mean
19 that's about a fixed a cost as you can get.
20 MR. LANGLEY: You are right, and if I can
21 be presumptuo us enough to know where you're going
22 with this, I assume they would say well, if they're

1 already going to be there, then why do we have to pay
2 for them, and our position on that is a free ride is
3 not a really good concept to intimate when we're
4 talking about constitutional just compensation. And
5 because they do benefit everyone on the pole. I mean
6 there's these grounds and arresters. What if then
7 everyone --
8 ADMIN. JUDGE SIPPEL: Well, you know,
9 maybe that's an issue that we could, as I say, if we
10 can carve that off. Look, let me start by saying if
11 you can stipulate to it, in or our or however, or
12 around, that's fine. That would be my druthers. If
13 you can't stipulate to it, though, but you can
14 stipulate as to the FERC costs as being, you know, 99
15 percent of the deal, and you got this grounds and
16 arresters, which is a small percentage that you just
17 can't agree to, you know, well, that can be an issue
18 for the, you know, for the litigation. And whether
19 or not I even have to bother getting evidence on -- I
20 mean that might just be an issue of law which --
21 MR. SEIVER: I think we can get to that -
22 -

1 MR. LANGLEY: We can probably get there.
2 ADMIN. JUDGE SIPPEL: With between
3 experts and these decisions that you're referring to,
4 I think we can figure it out and handle it, in
5 evidentiary way, figure it out and handle it that
6 way.
7 MR. SEIVER: And as I hope, your honor,
8 if I may just in -- respond to part of what Mr.
9 Langley said, I want to just put everything back in
10 perspective on the costs. The idea i s that we're
11 supposed to look at the costs on a particular pole
12 that's been identified as full capacity where there's
13 been a lost opportunity. I don't want to lose that
14 focus, because I think the Gulf Power's been saying
15 we want for ever pole, etcetera. And as far as the
16 accounts are concerned and the different methods of
17 valuation, we do have the 11th Circuit case where, at
18 least for the non full capacity, non lost opportunity
19 poles, and this would be on -- what would be -- let's
20 see -- this is 311 Fed.3 rd 1357 is the case, and I'm
21 trying to find what the pinpoint site is -- it's III
22 -- 1367 your honor. But I think this might help us

1 in cutting to the bottom of all this.

2 ADMIN. JUDGE SIPPEL: Thirteen sixty -

3 seven?

4 MR. SEIVER: Is -- if it's one of the

5 Lexis type printouts, it would be on page seven of

6 the Lexis printout.

7 ADMIN. JUDGE SIPPEL: I probably -- I

8 have the Westlaw printout.

9 MR. SEIVER: Or Westlaw. It's a III, and

10 then A is the heading.

11 ADMIN. JUDGE SIPPEL: All right. I got

12 II. Hold on just a second, III. Yes. I got III.

13 MR. SEIVER: And then A. It starts right

14 at the first -- after III, it goes right to A. It

15 says, "The petitioner up to ten."

16 ADMIN. JUDGE SIPPEL: Yes. I have that.

17 MR. SEIVER: And there are three items.

18 The first one, they talk about the cable rate fails

19 to allocate the attaching cable companies a pro rata

20 share of unusable space. That was one of the

21 contentions. Further down, there's a second

22 contention that it uses -- the cable rate uses

1 historical costs. And third, the cable does not
2 allow the recovery of various expenditures that are
3 attributable, which I think included their argument
4 about grounds and arresters and some of the accounts
5 that have been litigated in a very thick order which
6 we will present to your honor at the appropriate time
7 to discuss this. And the way Gulf Power -- I mean
8 Alabama Power case came out which, of course, is the
9 genesis of all this is that the judge said, well, you
10 know what, that's all very good, but your margina 1
11 costs are recovered, and we don't see the cable rate
12 as doing anything except giving you your marginal
13 costs, in fact much more than marginal costs. So
14 that the arguments that Mr. Langley has as to
15 unusable space for these particular accounts or
16 embedded costs at least are irrelevant to any pole
17 that's not full. We know that the cable rate under
18 this decision more than compensates them for marginal
19 costs for the non full poles that have no lost
20 opportunity. And if we go one step further and say
21 well, what do we do with the full poles, well, if
22 they don't have a lost opportunity, we still don't

1 get to looking for more than marginal costs. But if
2 we do have a full pole, and there's some lost
3 opportunity, then what he court said, which is the
4 reason, I guess, we're all here today, is what above
5 marginal costs do we need to give back. And so if
6 Mr. Langley's evidence is going to tie somehow or
7 other these costs that he's mentioned that he wants
8 to pursue to the standard of a full capacity pole and
9 a lost opportunity, I'm okay with that. I don't want
10 to have some stipulation about all these other costs
11 that somehow or other will go above and beyond what
12 the 11th Circuit standard was on a full pole with
13 lost opportunity. I still need, I think, and he
14 would need to do, a pole analysis on a here's a
15 particular pole, here's a lost opportunity, what's
16 the cost that is lost on this pole whether it's these
17 three items or some of the other items.
18 MR. LANGLEY: I actually agree with most
19 of what he said until the very end, but to be clear,
20 I think in the stipulation and what we're saying
21 about costs, we're not asking them to waive the legal
22 arguments about how those costs are imported on a

1 micro level or whether it even should be imported on
2 a micro level, which is one of our arguments. But
3 there really isn't any fundamental dispute about the
4 costs that are at issue. It's just a matter of which
5 ones we use.
6 ADMIN. JUDGE SIPPEL: Well, you know,
7 that says a lot. Let me just give you this
8 observation. Then we can pass on, because as long as
9 this thing is under serious negotiation for
10 stipulation and the heart of the matter is going to
11 be with the FERC costs, which we have established,
12 then I'm satisfied that the work that I'm worried
13 about is being done. But let me just make this one
14 observation. Seems to me that if you start out in a
15 business, and you're going to run electric wires all
16 over the State of Florida. And you have to build
17 these poles up. And you have to put these grounding
18 wires on it or something for safety purposes. And
19 you got all of this stuff -- all of this electricity
20 has been running around Florida on your poles since,
21 you know, 1920 or whenever, and then along comes this
22 new technology, cable. And the government says you

1 got to stick these guys on your pole, because there's
2 no other -- well, for whatever reason, whether it's a
3 taking or whether it's, you know, a public interest
4 determination, whatever. My point being is that
5 you've already got these poles established with
6 respect to certa in ingredients. I mean you got the
7 wooden pole up. It's in the ground. The cost of
8 actually putting it in the ground is probably long
9 gone. Maybe if it's a newer pole, it's not long
10 gone. My point is is that you're going to have to go
11 through those basic costs, fixed costs, in order to
12 run your business to provide electric power. So these
13 -- then you're giving this additional burden to put
14 these additional attachments on that has nothing to
15 do with your business. Now, conceptually, for me,
16 seems to me that you are certainly entitled to -- and
17 let's assume that there is no -- and let's assume for
18 complete purposes here, that there is no formula,
19 that the FCC has really come up and just said, you
20 know, you go with the rate, whatever you can charge,
21 whatever you can work out, we'll let you do it. It
22 seems to me that, aside from your position as a, you

1 know, that you control the poles, so that gives you
2 monopoly power in a sense, but aside from that, seems
3 to me if you just look at in a logical way, what
4 you're going to charge them for is what it's going to
5 cost you extra to put them on. And they, you know,
6 they certainly are going to understand that. They're
7 going to pay you that. And then there might be a
8 certain, I don't know where you'd come up with the
9 standard for it, but some kind of an additional
10 charge, a rental fee, if you will. So you got cost
11 plus a reasonable rental fee. But all of these fixed
12 costs for getting the pole up that you would
13 otherwise have to absorb for purposes of running your
14 electric business, it's difficult for me conceptually
15 to see why that should be passed on to this new guy
16 on the block that just came along. I mean you
17 certainly should be compensated for what you're doing
18 for them. And, you know, that's what this case is all
19 about. But I mean maybe you'll have a way of
20 convincing me otherwise. Certainly I'm not closed
21 minded on the subject. But I'm just taking these
22 questions as they come up and trying to do it in a

1 common sense way. And maybe you can educate me a
2 little bit on that.
3 MR. LANGLEY: Well, do you want me to
4 address that now?
5 ADMIN. JUDGE SIPPEL: If you want to.
6 MR. LANGLEY: I tell you. What I'll say
7 is I recognize the logical issue there and I'm
8 sensitive to how you're thinking about that. I do
9 believe that there's an important distinction between
10 where we are now and where we would have been had
11 there ever been a truly negotiated pole attachment
12 rental, but we believe that come hearing time, we can
13 change your mind on that.
14 ADMIN. JUDGE SIPPEL : Okay. All right.
15 Let's move on to request numbers four, five, six, and
16 seven. And these were direct complaints to
17 responsive documents. They're impasses. Are these
18 documents being worked out? I know that there were
19 four categories.
20 MR. COOK: May I address this, please?
21 ADMIN. JUDGE SIPPEL: Yes. Please do,
22 Mr. Cook, yes.

1 MR. COOK: These requests come from the
2 description of evidence that Gulf Power filed that
3 led to the hearing designation order where we saw
4 reference to lots of the change-outs. Mr. Seiver has
5 referred to the Knology build -out, which was the
6 addition of a new attacher after we were on the
7 poles. And so looking at that description of
8 evidence, we filed our first discovery request, I
9 guess it was back in February, and we got answers in
10 April and the answer was well, go look in our files
11 with no specificity. Look at our make -ready work
12 orders.
13 And what we're trying to do here I should
14 say is, again, we're trying to figure out with the
15 constitutional standard for a take, w hich is loss to
16 the owner as applied by Alabama Power full capacity
17 and missed opportunity to get higher value, we're
18 trying to figure out where have they lost money.
19 Where has some new person, whether it's Knology or
20 somebody else, come along and said we want to get on
21 your poles, and Gulf says, you know, they're full.
22 We can't do what we usually do all the time, and

1 charge you make-ready and have you pay us for a new
2 bigger pole and put you on. Where have they lost an
3 opportunity to do that and where t hey have done it?
4 Were they have told Knology, sure we can -- we'll do
5 what we usually do? We'll charge you make-ready, you
6 get on a larger pole. Where have they not been paid
7 for those extra costs, because there was reference in
8 paragraphs four through six, if I remember correctly,
9 in the description of evidence to unreimbursed costs.
10 So that's what we're trying to figure is. Where are
11 they out of pocket such that it will meet the Alabama
12 Power lost opportunity for higher value or something
13 that they've incurred a loss on with a constitutional
14 standard?
15 Now on your August 5th discovery order on
16 our first set of document requests, you had said,
17 well, complainants, this is really a bit broad
18 because you have asked for this sort of information
19 as to your own attachments, as to other cable
20 attachments, and as to really telecom attachments,
21 not cable television in its purest sense, but
22 telecommunications, telephone attachments. And so in

1 ruling on our interrogatories 20 through 24 in the
2 August 5th orde r, you said, you know, this is too
3 broad. I'm going to narrow this. I'm going to
4 preclude the complainants from asking about change -
5 out and make -ready for instances like Knology and
6 telecom attachments and confine them to asking about
7 CATV attachments.
8 So with those instructions, we went back
9 and issued our second request for documents and
10 interrogatories, and that's what these four are. And
11 I tried to break them down so that it would help us
12 understand in what categories are there these
13 unreimbursed costs. So I said for four, give us the
14 documents for the poles. And again, informed by the
15 burden of showing poles that are at full capacity,
16 where are the documents for your unreimbursed costs
17 essentially for poles at full capacity where it's
18 been caused by complainant's attachments?
19 Number five, where are those documents,
20 including the ones referring to compensation, that
21 reflect complainant's make -ready other than change -
22 outs?

1 Number six, back to change -outs but for
2 CATV attachers other that complainant's.
3 And number seven, make -ready non change -
4 out for other CATV attachers. And what we're trying
5 to do, again, is figure out which poles they're
6 claiming unreimbursed costs for. That's what all of
7 these questions are here for. Now, in the early
8 answers to these and other requests, we were very
9 much led to believe that there is some such
10 information. For example, in the description of
11 evidence that I just mentioned, there was explicit
12 reference to unreimbursed costs relating to make -
13 ready and change outs. So, you know, we had -- your
14 honor said to Gulf Power, well, go do the Osmose
15 report. Let's get a sense of what poles. And you
16 used the phrase again pin down one-by-one which poles
17 are you going to claim these sorts of costs and
18 expenses for. So they said back to us, well, you
19 know when we said which poles are you relying on, for
20 example, in response to our interrogatory number
21 three, they said after -- we'll supplement this
22 response to identify those poles meeting the

1 definition of crowded as used the Osmose statement of
2 work. So we're still thinking when we're asking
3 these requests in the summertime, what individual
4 poles do you have these unreimbursed expenses for.
5 More recently, we've come to learn that
6 they're taking the position that it's the universe of
7 all poles that have experience make -ready or change -
8 outs which also include our attachments that they're
9 going to claim are at full capacity. I think for
10 purposes here, what we're trying to do, and maybe
11 this is another area that could lead to an admission
12 or a statement on the record by Gulf Power, are there
13 specific poles that they claim are at full capacity
14 for which they've had unreimbursed costs. Because
15 we're trying to nail those down.
16 And when you issued your -- when we filed
17 our third motion to compel, we pointed out, you know,
18 look, once again, we're trying to get to those
19 specific poles. They've referred us back to their
20 engineering and construction offices to unspecified,
21 presumably file cabinets, organized chronolo gically
22 by year. And as you know, the requests are trying to

1 tie it to us, complainants, and other CATV attachers.
2 And that's why we filed the third motion to compel
3 is we want to know what specific poles are they
4 claiming pursuant -- tying it all the way back to
5 their description of evidence, unreimbursed costs
6 for. Now if the answer today before your honor is,
7 you know, none really, our case is not about make -
8 ready and change -out costs that we say we weren't
9 reimbursed for, but it rather comes all the way back
10 to these old allegations of, you know, there are
11 various FERC 1 accounts and other things that
12 incidentally, as Mr. Seiver alluded to, have already
13 been rejected in a full Commission ruling a few years
14 ago, then we can argue about that before your honor
15 at the hearing in connection with the AFPCO standard.
16 But we're still trying to figure out are there
17 specific poles for which their out -of-pocket under
18 the AFPCO and constitutional loss to the owner
19 standard.
20 MR. LANGLEY: And your honor, this -- did
21 you have a question?
22 ADMIN. JUDGE SIPPEL: No. That's fine.

1 I was just going to say, that's a pretty thorough
2 explanation of what we're after.
3 MR. LANGLEY: Yes. It ties very closely
4 back into the issue we discussed earlier about the
5 differences in opinion on what is unreimbursed. They
6 want to limit it to make -ready. They want to say,
7 well, if you've been paid all your make -ready, then
8 what are you out. And our position is well, what
9 we're out is a fair allocation of the actual cost of
10 the pole. But going back to the make -ready, because
11 that's what this discovery request was really about.
12 They wanted our make ready documents, and I think
13 Geoff has said twice that they just recently learned
14 that we were taking the position that poles that
15 required make-ready or that required any expansion of
16 capacity were in fact crowded, but that was part of
17 our description of evidence on which the Bureau
18 relied in referring this to your honor for a hearing.
19 So that's not new. May I say a bit about how the
20 documents have been produced?
21 ADMIN. JUDGE SIPPEL: Well, yes, but let
22 me see if -- you were going down a road that I'm very

1 much interested in. Doesn't this really dovetail
2 with that earlier deposition on request number two we
3 were talking about -- again, we're, just, you know,
4 what is this -- what is a -- what is the easiest way
5 by what is readily available in your business records
6 to reflect what are costs, what actual costs, how you
7 book your costs, and the issue remaining would be
8 whether or not these, let me just generally term them
9 as fixed costs in the origination of the pole, can be
10 chargeable in some if, again, all of this presupposes
11 that you can somehow or other identify which are the
12 full capacity poles that you're entitled to get
13 additional compensation for. And then you go from
14 there and say, well, in addition to, look it, we have
15 the costs here that are attributable to what the CATV
16 -- to what the complainants on these poles, however
17 you get to that number. But in addition to that, we
18 should be compensated for these fixed costs. And
19 then, you know, there's an issue of law involved. I
20 mean I don't know how precise does that really have
21 to be. If I say you do get a portion of those fixed
22 costs, and it goes up on appeal and everybody says,

1 no, you're not going to get them, then that's
2 resolved one way. If it's the other way and it says,
3 yes, you are, and it's a question of resolving the
4 finite dollar amount it becomes, I would think if it
5 came to that, and you were both -- had exhausted your
6 legal rights with respect to appeals, that you'd
7 somehow or other sit down and figure out what those
8 costs are, that it wouldn't have to come back for
9 further litigation.
10 MR. LANGLEY: You might be surprised.
11 ADMIN. JUDGE SIPPEL: I might be
12 surprised. That's -- I never say never. But in any
13 event, my point being is can this -- how narrow do we
14 need to go with this discovery.
15 MR. LANGLEY: I think this probably can
16 be resolved by a stipulation. I heard Geoff say that
17 what they really wanted to k now is, and this is my
18 phrase, not his, are there truly any unreimbursed
19 make-ready costs attributable to the complainants.
20 And while we believe that there are, I don't know if
21 we're going to be able to quantify that, and so we
22 may be willing to stipulate that that will not be

1 part of our evidentiary presentation. But that is an
2 issue I will need to discuss with Gulf, and if we can
3 do that, I think it would recommit any need to
4 resolve further discovery on request four through
5 seven.
6 MR. SEIVER: That w ould be a terrific
7 stipulation that would probably eliminate a lot of
8 our factual battles if we had that. Let's negotiate
9 that.
10 ADMIN. JUDGE SIPPEL: Okay. Well, I can
11 tell you that the interest of the Commission in that
12 is from serious to intense, because that can, as I
13 see it from here, that can very much -- it's going to
14 effect, you know, the length of the proceedings and
15 the lengths of a lot of sub issues that perhaps just,
16 you know, we shouldn't be taking that much time with
17 here. Okay. All right , then. Let me move on with
18 my checklist, because we got more to do. Request
19 number eight. There's negotiations on this, right?
20 Upgrades, modernize, replacement? That again goes
21 back, I guess, to the original point that there
22 really aren't many situations, if any, that come up