1 answered and interrogatoried to that effect. I think
2 there are as many as 60 different attaching entities
3 in the Gulf service territory.
4 ADMIN. JUDGE SIPPEL: All right. And
5 you're looking for the same information with respect
6 to all, assuming that 60 is the number then, but you
7 want it for all 60?
8 MR. COOK: No. See that's the confusion
9 here, your honor. We're being directed to a whole
10 series of files that have make-ready for all of these
11 entities and for ourselves with the explanation that
12 they gave in their September 30th supplemental
13 responses, you know, go look in our permit logs,
14 they're arranged chronologically. That doesn't tell
15 us what the question we're asking is. The question
16 we're asking is for the poles that you say are at
17 full capacity, not the universe of all of their
18 poles, or even the universe of all of the poles with
19 make-ready from our perspective, but for the poles
20 that you're saying are at full capacity, give us a
21 couple of pieces of information that will allow us
22 and our experts to challenge your assertions that

1 they're at full capacity. The pieces of information
2 are how many -- who else is on those poles besides
3 us, when did the other people's attachments commence,
4 were they before or after us, and where are those
5 third-party attachments located if you're making
6 contentions about improper clearance, and finally,
7 were you reimbursed, were you paid by those attaching
8 entities. And this is very important even in the
9 context of the newer contention that hey, all of our
10 poles that have make-ready are full, because we know
11 from the documents they have produce that with
12 respect to poles that we're on, lots of those poles
13 did not require make-ready, so what we've been trying
14 all along to do is to get some information from them
15 that say, okay, here complainants, here are the poles
16 that we contend that are full capacity for whatever
17 reason and here are the other people on those poles
18 so that we can sit down and take a look at it and say
19 we don't think that's at full capacity. Now for --
20 sitting here -- standing her today, the answer to us
21 still is go to our offices and look at all of our
22 files, make -ready and non make -ready, your

1 attachments and other people's attachments, and
2 that's why we're seeking some more precise
3 segregation, so that we can really reduce your honors
4 work as well as ours.
5 ADMIN. JUDGE SIPPEL: Well, thank you. I
6 think that it almost sounds like a chicken and egg
7 situation. They're going to have to need to know
8 which are, whatever your system may be, but which
9 poles you're going to be relying upon that you are
10 entitled to additional reimbursement for, i.e., those
11 which meet the category of full capacity. And once
12 those are identified, you know, then you can, between
13 the -- somehow or other, there the request can be
14 followed up just along the lines that Mr. Cook was
15 talking about. You know, who's on those poles. You
16 know, they're looking for justification as to who you
17 come up with the idea that, how you prove that these
18 are at full capacity, so that seems to be right at
19 the heart of the case. But I don't see how that they
20 can be directed just to these records, even if they
21 are kept in the normal course of bus iness if they
22 don't have the initial ingredient, which is, you

1 know, alleged full capacity.

2 MR. LANGLEY: Well, and that's one of the

3 fundamental differences in legal positions here,

4 because we are saying that any pole that required

5 make-ready was a full capacity pole. And our make -

6 ready work orders are only for poles that required

7 make-ready. Now the permit range may have poles that

8 did not require make ready, but that's why it's

9 important to tie the permit number to the

10 distribution service order. An d the distribution

11 service order will lay out, as the Knology documents

12 submitted in the proffer laid out, on a pole -by-pole

13 basis, who was on the pole. And for example, does

14 your honor have the proffer that we submitted on

15 October 17th?

16 ADMIN. JUDGE SIPPEL: I'm sure I do, but

17 not right at my fingertips. I think I know what

18 you're referring to. But while I'm looking -- let me

19 find what I have.

20 MR. LANGLEY: And I don't mean to make

21 this part of the hearing more complex than it needs

22 to be, and this m ay actually be something we can --

1 okay -- good.

2 MR. SEIVER: Excuse me, your honor, I

3 have an extra copy of it.

4 ADMIN. JUDGE SIPPEL: Do you. Thank you.

5 I think I -- okay, here we go. All right. I have

6 it in front of me.

7 MR. LANGLEY: Okay. A couple of examples

8 that I wanted to refer you to. First, if you would

9 turn to page K -42, which is within Exhibit 5 in the

10 proffer.

11 ADMIN. JUDGE SIPPEL: Oh, I see what you

12 -- this is -- yes, I think I do have -- let me see --

13 I have that tab in it. Where are you at?

14 MR. LANGLEY: K -42. What we did is just

15 for the sake of being able to refer to specific pages

16 in the proffer, we created new labels for these

17 pages. It's K-42.

18 ADMIN. JUDGE SIPPEL: Well, I got these

19 Exhibit numbers going 1 through 5.

20 MR. LANGLEY: Exhibit 5.

21 ADMIN. JUDGE SIPPEL: It's Exhibit 5.

22 Okay. I got it. Yes. K-42?

1 MR. LANGLEY: Page 17. There should be a
2 number under K-42.
3 ADMIN. JUDGE SIPPEL: Page 17. Got it.
4 MR. LANGLEY: All right. There's a map
5 number on there. And then for the poles in that map
6 that have been permitted that required make -ready,
7 there is an identification, pole number 91, and it
8 says Bell South had to lower, Comcast had to lower.
9 So we know Comcast, one of the complainants, was on
10 the poles. And on down for the next two pages,
11 there's even further detail provided beginning at
12 page 20 where there are pictures taken, and not all
13 of the work order packets have pictures, this one
14 just happened to. So there are pictures of some of
15 the specific poles that required make-ready.
16 ADMIN. JUDGE SIPPEL: I'm looking at this
17 pole on page 20. Just arbitrarily, would you
18 consider that pole to be at full capacity?
19 MR. LANGLEY: We would at the time the
20 make-ready occurred.
21 ADMIN. JUDGE SIPPEL: All right. The
22 make-ready occurs and then does it change a category

1 at some point? Does it under your definition of full
2 capacity, does it change?
3 MR. LANGLEY: One of our contentions, and
4 it has been our contention since we submitted the
5 description of ev idence, actually before then, I
6 think when we requested the hearing, has been that,
7 you know, our willingness to expand capacity cannot
8 be held against -- if we're going to have prove full
9 capacity to be entitled to just compensation, we
10 don't think that our willingness to work with cable
11 operators, telecom companies should be held against
12 us. And so what we --
13 ADMIN. JUDGE SIPPEL: I see.
14 MR. LANGLEY: -- what we would say is
15 that at the time this make -ready was performed, if
16 there had to be make read y performed on the pole for
17 an additional party to get on, and Comcast was on it,
18 that was a crowded pole.
19 ADMIN. JUDGE SIPPEL: Okay.
20 MR. LANGLEY: And not only was it a
21 crowded pole, but we have a telecom company out there
22 wanting to get on at a higher price.

1 ADMIN. JUDGE SIPPEL: Ad you'd be able to
2 line this up pole-by-pole?
3 MR. LANGLEY: Yes. For these make -ready
4 work orders.
5 ADMIN. JUDGE SIPPEL: Okay. Well, it
6 just seems to me that it's premature. It's premature
7 in terms of the depth. And certainly the depth of the
8 discovery that you're talking about, Mr. Cook, should
9 not be -- I mean it doesn't have to go the whole
10 universe according to what I'm hearing from Mr.
11 Langley. All you need is proof with respect to poles
12 that they're claiming are at full capacity.
13 MR. COOK: Right. We want to know -- and
14 that underlies a lot of the request, but certainly
15 central here to interrogatory eight is which poles
16 are at full capacity, and Mr. Langley has drawn the
17 court's attention to a couple of pages, like K-42-20,
18 and said, well, there's an example of one that's at
19 full capacity, that doesn't provide the, you know,
20 all of the information certainly that we're seeking.
21 And I would argue we're not trying to overdo it
22 here, your honor. We're simply trying to say who

1 else is on those poles and when did those attachments
2 take place. We don't know that, I think, from this.
3 We certainly don't know -- Mr. Langley alluded to
4 make ready. We don't know when, if there was make -
5 ready done here, it was done, I believe. And we
6 certainly don't know the last category, which we've
7 been trying to understand all along, which is in
8 connection with this pole, are you out -of-pocket.
9 Have you experienced some loss with respect to this
10 pole? And I think what your honor was saying a
11 moment ago, before Mr. Langley spoke, is the core of
12 what we're trying to get here, which is can we have
13 some segregation, and even if they're going to rely
14 only on this, because as your honor said many times,
15 it's their burden of proof, not ours. And they can
16 just say, well, this is all you're going to get. But
17 can we have something like this with respect to all
18 of the poles that they say are at full capacity, so
19 that we can do our best to challenge it?
20 ADMIN. JUDGE SIPPEL: Mr. Langley.
21 MR. LANGLEY: What they're asking for,
22 it's not like five of these.

1 ADMIN. JUDGE SIPPEL: I understand.

2 MR. LANGLEY: We're talking about

3 documents that range the entire system. And I can't

4 tell you how high it would be, but it would be a high

5 stack of documents if we were to do that for each of

6 these, which is why we have invited them, asked them,

7 and given them detailed instructions on how they

8 themselves can look at the documents as they are kept

9 in the usual course of business and pull this same

10 information.

11 MR. COOK: But never geared to the poles

12 that you say are at full capacity. That's the

13 problem.

14 ADMIN. JUDGE SIPPEL: All right. Wait a

15 minute. Let's not get carried away here. You know,

16 you're all making excellent points. But let me just

17 -- it would seem to me the way to get at this would

18 be to take some kind of a sampling of what is

19 representative of the types of poles that Mr. Langley

20 is and Gulf Power is taking the position are at full

21 capacity. I mean he's just laid out an awful more

22 than I'd ever heard before. Take -- you know, he can

1 give you -- let me take a number. He can give you 20
2 of these poles detailed with all of this that's like
3 in this proffer, and you pick out 10 that you want to
4 audit. I mean I'm throwing these nu mbers out. But
5 if you pick out ten, and then you say that, okay, I
6 want to see all of this discovery with respect to
7 these 10 poles and somehow or other you can come to
8 an -- or Gulf Power will come to an agreement that
9 these are representative of the universe of the poles
10 in terms of, you know, the proof that they're relying
11 on. Then why would it then be necessary to get all
12 that detailed proof with respect to every single
13 pole, because of they're wrong, you know, if you're
14 right and they're wrong, or th ey're right and your
15 wrong, I mean in terms of in this hearing, that would
16 be the end of the need for the evidence seems at this
17 stage.
18 MR. COOK: Your honor, they might jump at
19 the chance that you've just offered to take a sample,
20 but we are very much focused on the Alabama Power's
21 exact language which said to prove with respect to
22 each pole that it is at full capacity. I understand

1 in the role of the arbitrator, the court is here to
2 make sure no party imposes an unreasonable burden on
3 the other, but from our perspective, there are a very
4 limited finite number of poles that could truly be
5 said to be at full capacity given the way the
6 industry works and we are entitled, under Alabama
7 Power, legally to a showing as to which of those
8 poles, for each of those poles, are at full capacity
9 and why. Now if they want to rely on a sample, we'll
10 do our best to audit that and challenge that, but it
11 is -- providing them the fig leaf, if you will, of a
12 sample does not come up to the standard of what both
13 the hearing d esignation order and y our honor's
14 reference to pinning poles down one -by-one and APCO
15 all said.
16 ADMIN. JUDGE SIPPEL: Well, let me
17 deposit this, too. Before any of the complainants
18 would be required to pay the bill that they submit on
19 all the full capacity poles, the parities would be
20 entitled to a full -blown evidentiary hearing with
21 respect to each pole that you're being charged
22 additional monies for. All right? However, if it

1 turns out in the first instance that based on some
2 kind of a representativ e sampling, they're unable to
3 meet the standard of full capacity as a matter of
4 law, as a legal matter, if -- well, I don't want to
5 go beyond that kind of a statement - but there is a
6 record determination of a reasonable sampling of
7 poles to be able to say yes or nay -- you can't say
8 it in the abstract. You can't make a determination
9 on the abstract. Even if they say well, all of our
10 poles are at full capacity because they've had a
11 make-ready order, they've had this, they've had that
12 and the other thing, well, you know, saying that is
13 one thing, but actually getting it on the record in
14 an evidentiary form and then having some degree of
15 expertise address the question, it seems to me that
16 if the sampling were significant enough, that it
17 wouldn't be necessary to go down and get all the
18 nitty proof of every one of these poles, at this
19 stage. Now, of course, if it turns out that they are
20 entitled as a matter of law to charge you all of
21 then, you know, then they might have to be -- then
22 either at some level of t he case, either at -- or if

1 it comes back to me, yes, there'd be some kind of an
2 auditing with respect to each of those poles, but the
3 standard would be set. So it wouldn't be, you know,
4 it doesn't require -- well, obviously I'm staggering
5 the proof with respect to your recovery.
6 MR. COOK: I think the problem that we
7 would have with that, and I'd defer to my senior
8 colleague, Mr. Seiver, here is that this is a
9 constitutional claim. This is not a claim that is an
10 administrative one or one of first impre ssion or of
11 what's fair. And in order for them to get past the
12 liability phase, as it were, of this evidentiary
13 hearing to all their valuation and how they're going
14 to claim that they're not getting various FERC Form 1
15 accounts, they have got to show, with respect to each
16 pole, those two elements that they Alabama Power
17 court said were integral to a Fifth Amendment takings
18 claim, which is the only legal theory that they're
19 going under here, and that those are that each pole
20 be a full capacity, and that the re be a demonstrated
21 foreclosed higher value use. In other words, that
22 they were, in the vernacular phrase of the Alabama

1 Power, out more money. In other worse, they've got
2 to show that before you get to valuation. So if we
3 were to have a sample and say, well, let's look at
4 these, and maybe they'll pick their 20 strongest
5 poles, poles, for example, that, I'm not saying we
6 would do this, but that are limited by FAA height
7 regulations or aesthetic regulations of a
8 municipality that really and truly are at full
9 capacity. If you were to make a determination about
10 our liability based on those poles, and then say,
11 okay, now let's proceed to valuation, they get $20.00
12 more per pole, what have you, and now, oh, by the
13 way, before you actually have to pay, you can go back
14 and have a full blown hearing on all of the detailed
15 poles. That's, I would argue very respectfully,
16 taking the cart before the horse.
17 ADMIN. JUDGE SIPPEL: All right. Well,
18 let me try one more time. The sampling could be done
19 based on -- I mean you wait until the Osmose report
20 comes in. They're going to come in with these pre -
21 Osmose report maps where you're going to have circled
22 full capacity poles. They pick out ten. You pick

1 out ten. And, you know, from that universe, do we --
2 I'm asking the question, you know, at this stage
3 rhetorically, you know, is there a sufficient basis
4 upon which to come up with a determination as to
5 whether or not it's possible. Is it possible to
6 prove that you do have a fully -- you do have a pole
7 at full capa city recognizing the fact that we have
8 already got a concession on the record that there
9 isn't too many poles that you're going to have that
10 you can't somehow or other increase it to accommodate
11 somebody else or some other need? I mean it's kind
12 of a -- well, I'm just posing this question as,
13 again, as a rhetorical hypothetical.
14 MR. SEIVER: Your honor, I got to tell
15 you. I'm thinking that maybe we're on to something
16 here. Because this could be -- and I wasn't sure --
17 I was trying to take notes as you were talking -- if
18 --
19 ADMIN. JUDGE SIPPEL: Don't get too
20 excited. Mr. Langley will maybe pull back --
21 MR. SEIVER: Right. He might say, no,
22 John, that's not the way I understand it. Go ahead.

1 And if I like it -- what is the old Marx Brothers
2 thing? Whatever it is you want, you know, whatever
3 it is, I'm against it. So --. What your honor was
4 talking about is somehow or other having, I don't
5 want to call it a mini -proceeding or a mini -hearing
6 but almost like a preliminary analysis of okay, Mr.
7 Langley, you take your best shot. Give me your best
8 poles that you think, with all the backup data,
9 everything, you know, make-ready, who's on it, all of
10 that for maybe 10 or 20 poles. And then say, all
11 right, and you, complainants, can take those same,
12 look at those, and propose your own 10 or 20 poles
13 and limit it to just discussing those and, as your
14 point that you made, that if they couldn't make it as
15 a matter of law on those, then you say, well, the
16 hearing is done. They took their best shot on what
17 they thought were their best poles and didn't make
18 it, fine. And if you say -- maybe your honor would
19 say, you know what, that pole number 196 -37 is in a
20 strange location because there's a railroad track or
21 an FAA or something and it can't be changed -out, any
22 pole that's like that, Mr. Langley, that you can find

1 of your 150,000 poles, I will consider that in
2 another hearing for purposes of awarding just
3 compensation. And if your honor gave a parameter
4 such as that, then I do see a real streamlining of
5 this entire case. Instead of having to come in for
6 150,000 poles or I think Mr. Langley wanted to do
7 what, 78 percent of every pole on a sampling,
8 instead, look at the samples of, you know, like the
9 three-pole proffer. Take the best ones. These are
10 the ones. Give all the backup with make-ready, who's
11 on it and whatnot, and let us duke it out at a
12 hearing as to whether or not that is a full pole and
13 what the unreimbursed costs were for that pole, if
14 there are any, and what should be the way to value
15 it. And your honor then said, okay, I've looked at
16 these 20 poles. No, no, no, no, no, yes, no, no, no,
17 yes. And say let's say there's 2 of those 20 that
18 you truly believe are defined as full capacity poles
19 that maybe can't be expanded except our approach or
20 that you say really are full under Mr. Langley's
21 approach, and poles that meet that definition
22 throughout the service area, then give Mr. Langley

1 the opportunity to go back, dig out whatever you need
2 for those poles, however many you think there are in
3 your service area that meet that standard, meet that
4 analysis, put them up there, and then we'll to trial
5 on those.
6 ADMIN. JUDGE SIPPEL: Well, something
7 like that.
8 MR. SEIVER: That's -- kind of what I was
9 listening to you say, and I do think, and one of the
10 reasons we were doing the clarification and the
11 alternative cost methodology, and even our motion to
12 dismiss, your honor, was to try and say let's figure
13 out legally whether a pole that's had make -ready in
14 its life at any time is deemed full in its life at
15 any time, 2000, 2001, 2002, because maybe it was
16 made-ready in 2001 and it had an extra three feet of
17 space, so it's not at full capacity. Or maybe it was
18 made-ready in 2004 but actually in 2000, it did have
19 space. Instead of trying to do that for every single
20 pole in their entire inventory, maybe we do take a
21 sampling that Mr. Langley's free to pick whichever
22 ones he wants, do all the backup data, and say here's

1 our best shot. We think all of these poles are full
2 and anything that's like them. And w e say no, we
3 don't think any of them are. And your honor says
4 yep, yep, nope, nope, yep, whatever it might be. And
5 then once we come up with a definition, then Mr.
6 Langley could go pull everything that's needed, and I
7 think that would -- then we don't need to see -- we
8 don't need to go digging through 12 offices through
9 file cabinets to find out if this make-ready document
10 is going to be something that's going to be relevant
11 to determining whether a particular is full or not.
12 We don't know which ones the y're claiming are really
13 full, and it'd be the kind of thing well, okay,
14 here's a make -ready document on this pole, I don't
15 know if he's going to claim that pole is full.
16 ADMIN. JUDGE SIPPEL: Okay. I've heard
17 enough on that. But that's essentially the scenario
18 that I was contemplating as I'm seeing what's
19 involved here. I mean what's prompting me to say
20 this is because when I'm seeing the scope of the
21 discovery that, you know, that this could conceivably
22 lead to, and as I said before, what I would

1 contemplate would be that, as you put it, Mr. Seiver,
2 that Mr. Langley say 10 poles which give -- which are
3 the strongest to his case. But you would have a
4 universe beyond those 10 poles from which to
5 arbitrarily or however way you would want to select
6 10 others let's say that you would want to examine
7 for the same purpose. And then you would have your
8 respective experts, you know, analyze the full field
9 of the poles. And, you know, the parties would have
10 to be -- you'd have to somehow or other be in
11 agreement that whatever was resolved with respect to
12 that scope of the evidence would control the outcome
13 of the case without, of course, waiving your rights
14 to appeal. You can go up, obviously, as I expect if
15 there is a loser, a loser will go up, so. But --
16 well, you know where I'm going, and you know why I'm
17 going there. But let me ask the Bureau. Would,
18 within the broad framework of what I'm outlining
19 here, Mr. Shook or Ms. Griffin or whoever, would the
20 Bureau have a position on this, or would you want to
21 consider this? Is this too quick and early or?
22 MS. GRIFFIN: I think we'd have to go

1 back and think about and talk amongst ourselves,
2 people upstairs.
3 ADMIN. JUDGE SIPPEL: Yes.
4 MS. GRIFFIN: It sounds -- I mean it
5 sounds, your honor, like there are very large
6 discovery issues here, and it seems to me just
7 hearing this that it might make sense to have some
8 sort of sampling to streamline things and get a
9 handle around some of the legal issues here.
10 ADMIN. JUDGE SIPPEL: Yes.
11 MS. GRIFFIN: But I' d have to just talk
12 back upstairs with the Board.
13 ADMIN. JUDGE SIPPEL: Thank you. Thank
14 you. That's about as best as I can leave it right
15 now. But I think that he reason that this case got
16 set into hearing was because there was no way that
17 there could be a determination of, based on
18 substantial evidence, as to, you know, what would be
19 a full capacity pole. If we have substantial
20 reliable evidence, even though it's not the whole
21 universe, as to what constitutes a pole, what does to
22 does not constitute a pole that's at full capacity,

1 that, you known, that might considerably move it
2 along.
3 MR. SEIVER: And, your honor, just as a
4 follow-up to that, I think if we have, for example,
5 just 20 poles, then our discovery request would be
6 much easier because of we know --
7 ADMIN. JUDGE SIPPEL: Well, the night
8 follows the day on all of this.
9 MR. SEIVER: Okay.
10 ADMIN. JUDGE SIPPEL: Yes. All right.
11 Where does that leave us. I've got -- this takes me
12 to interrogatory 20, 34, 35, and 46. I think -- it
13 seems to me that -- is there any particular one of
14 these interrogatories where there's really a sticking
15 point? Mr. Cook?
16 MR. COOK: Just taking a moment as I go
17 through it and listening to your exchange with Mr.
18 Seiver, I think number 20 is certainly one that comes
19 back to the difficulty we've had where we're again
20 saying which of the poles are full, because the focus
21 this one was which ones have you changed -out to
22 accommodate complainants. And we pointed out in our

1 reply brief filed a week or so ago, you know, our
2 clients, in many cases, have been on these poles for
3 decades. You say that you've had new people come
4 along and that you've done change -outs for them.
5 Have you done any change -outs to accommodate us? Or
6 are you contending that change -outs done for new
7 people, which the new people have paid for, also
8 accommodate us in such a way that we should be
9 required to pay more money? And so I think here,
10 what we said in our third motion to compel, is
11 they've come back to us and said, all poles which
12 required make-ready before complainants could attach
13 were at full capacity. So that's why I've said
14 several times today, we've come to understand now
15 that they're not going to identify individual poles
16 absent some sort of procedural mechanism like the one
17 that you and Mr. Seiver were talking about. And
18 they're just going to say all poles that required
19 make-ready. So then interpreting this interrogatory,
20 we would say, well, are you now saying then that
21 you're claiming all poles that required make-ready at
22 full capacity? Which are those poles that we are on,

1 because it would have to be poles that we are on for
2 them to charge us more, required make -ready? But I
3 think -- I'm not sure. I have to be honest, I'm not
4 sure where to go with this discussion given that
5 there may be some more substantial procedural
6 modification in terms of what you and Mr. Seiver have
7 talked about. I mean certainly here, your second
8 discovery order said to Gulf Power again, you know,
9 you guys have got to comply, you've got to give some
10 more specifics. And their September 30th
11 supplemental responses said the documents from which
12 the response to this interrogatory could be derived
13 or ascertained are in the make -ready work orders.
14 So, we're back to the same square that I've discussed
15 in relation to other document requests this morning,
16 which is okay, please tell us which poles you're
17 claiming are at full capacity.
18 ADMIN. JUDGE SIPPEL: Well, I think we've
19 passed that hurdle at this point. Obviously, in
20 order to put you to the burden of going and looking
21 at their records hat are kept in the ordinary course
22 of business, you're entitled to know which poles that