

35-foot pole, a 45-foot pole, or a 50-foot pole. Davis Cross, April 25, 2006 Tr., pp. 973-74.

102. However, Gulf Power's "Roll Forward Ledger" for 2004 shows that, at least for that year, only about 31 percent of a total of approximately 224,000 wood utility poles comprised of the four most common heights, 30, 35, 40, and 45-foot wood utility poles, or 70,000 poles, were 40-foot poles. Gulf Power Ex. 54, p. 1.
103. Gulf is seeking to apply its replacement cost rates for a 40-foot pole to cable attachers on all its poles no matter what height is of the poles to which Complainants are actually attached. Davis Cross, April 25, 2006 Tr., p. 974.
104. Ms. Davis was not aware, when she prepared her calculations, that the Commission has previously rejected an identical claim by Gulf Power's sister company, Alabama Power, that the average pole height should be considered to be 40 feet. Davis Cross, April 25, 2006 Tr., pp. 919-923; *Alabama Power Commission Order*, ¶ 59.
105. More generally, Ms. Davis did not follow the FCC cable rate formula when she developed Gulf Power's replacement cost calculations. Davis Cross, April 25, 2006 Tr., p. 930.
106. In fact, Ms. Davis testified that she is not familiar with the FCC decisions that decide which cost accounts go into the Commission's Cable Rate Formula and that she was instructed by Michael Dunn in 2000 to "start with a fresh slate" when she used the replacement cost methodology as opposed to following the FCC regulations. Davis Cross, April 25, 2006 Tr., p. 930-31.
107. Indeed, Ms. Davis testified that Gulf Power's replacement cost rate constitutes an "unregulated rate." Davis Cross, April 25, 2006 Tr., pp. 931-32.

11. Gulf's Replacement Cost Methodology Has Three Components

108. Gulf Power's replacement cost calculations are comprised of three parts: pole investment, carrying charge, and space allocation. Davis Cross, April 25, 2006 Tr., p. 956.
109. Gulf Power's replacement cost rates are several times higher than FCC pole attachment rates because of Gulf Power's treatment of the first factor, pole investment, and the third factor, space allocation. Davis Cross, April 25, 2006 Tr., p. 956.
110. The first component of Gulf Power's replacement cost methodology, pole investment, is based upon the average cost to Gulf Power of a brand new pole in the year prior to the year for which Gulf calculates its replacement cost rate. Davis Cross, April 25, 2006 Tr., pp. 934-35.
111. For the 2005 replacement cost calculation based upon 2004 data, Gulf uses an average cost for a new pole of \$601.03, which is based upon Gulf's purchase of 1,300 new 40-foot poles in the year 2004. Davis Cross, April 25, 2006 Tr., pp. 934-35.
112. Gulf Power uses the average cost of a brand new 40-foot pole in its pole investment part of its replacement cost calculations, even though Gulf actually purchased more 35-foot poles than the 1,300 40-foot poles that it purchased in the year 2004. Davis Cross, April 25, 2006 Tr., pp. 936-37; Gulf Power Ex. 54, p. 1.
113. Gulf Power's replacement cost methodology does not use the actual average unit cost of all of Gulf Power's distribution poles in 2004, a figure that would be \$267.24; instead, the figure of \$601.03 is based solely upon the 1,300 brand new poles that Gulf Power purchased in 2004. Davis Cross, April 25, 2006 Tr., p. 938.

114. Had Gulf Power used the \$267.24 average unit cost of all of its distribution poles in its calculations, all other factors being equal, its replacement cost rate for 2005 would be approximately one-half of the \$55 rate that Gulf Power seeks for 2005. Davis Cross, April 25, 2006 Tr., p. 940.
115. Significantly, Gulf Power does not know whether any of the four Complainant cable operators actually have attachments on any of the 1,300 new poles that Gulf Power used in its 2005 replacement cost rate calculations. Davis Cross, April 25, 2006 Tr., pp. 940-41.
116. Gulf Power considers it to be “immaterial” to its replacement cost calculations whether a cable operator was actually attached to any of the new poles upon which its replacement cost calculations are based. Davis Cross, April 25, 2006 Tr., p. 941.
117. Gulf Power’s calculations of pole investment, in its replacement cost methodology, do not include an adjustment for depreciation. Davis Cross, April 25, 2006 Tr., pp. 941-42.
118. If Gulf Power had included depreciation in the pole investment portion of its replacement cost methodology, all other things being equal, the annual pole attachment rate would be lower than the replacement cost rates being claimed by Gulf Power. Davis Cross, April 25, 2006 Tr., pp. 944-45.
119. If Gulf Power had used the average unit costs of all poles in its system and included an adjustment for depreciation, all other things being equal, then annual pole rental rates would be substantially less than half of what Gulf Power currently seeks as its “replacement costs.” Davis Cross, April 25, 2006 Tr., p. 945.
120. Gulf Power’s replacement cost calculations are independent of conditions on specific poles, because the calculations “change from year to year even if the actual poles that

cable attachers are attached to do not change from year to year.” Davis Cross, April 25, 2006 Tr., p. 945.

121. Gulf Power includes a component for “grounds and arresters” in its replacement cost calculations because it contends Complainant cable operators “benefit from” being able to access such equipment. Davis Cross, April 25, 2006 Tr., p. 946. Gulf Power includes this component for grounds and arrestors even though the FCC has previously found that it is inappropriate to include such costs in the FCC Cable Rate Formula. Pole Fee Order, ¶¶ 38-40.
122. Indeed, Gulf Power has to install grounds and arresters for its own electric service, independent of whether its poles contain attachments by Complainant cable operators. Davis Cross, April 25, 2006 Tr., p. 946.
123. Gulf Power also includes a component for “general plant” in its replacement cost calculations, an allocation that is intended to “support the operation of the entire [Gulf Power] company.” Davis Cross, April 25, 2006 Tr., p. 947.
124. The “general plant” to which Gulf Power refers includes such things as office equipment, transportation equipment, and tools. Davis Cross, April 25, 2006 Tr., p. 948-51.
125. However, Gulf Power has not made any attempt to determine whether any of the “general plant” items are necessitated because of Complainant cable operators’ attachments. Davis Cross, April 25, 2006 Tr., p. 950.
126. In general, Gulf Power’s replacement cost methodology reflects its contention that there’s a “greater value to the cable operator” of attaching to a Gulf Power pole than is reflected in the FCC’s rate formula calculations. Davis Cross, April 25, 2006 Tr., p. 954-55.

127. *With respect to the second element of Gulf Power's replacement cost methodology, the carrying charge, Gulf incorporates a number of FERC cost accounts, such as account numbers 368, 580, 583, and 590, that the FCC has previously rejected as being inappropriate to include in the FCC Cable Rate Formula. Davis Cross, April 25, 2006 Tr., p. 957; Pole Fee Order, ¶¶ 37-40, 58-61.*
128. *In addition, Gulf Power includes a component in its carrying charge calculations for taxes "to support the entirety of Gulf's business," not just taxes related to distribution poles and lines. Davis Cross, April 25, 2006 Tr., p. 960-61.*
129. *With respect to the third element of Gulf Power's replacement cost methodology, space allocation, Gulf Power does not follow the FCC's space allocation, which allocates all of the space on the pole, usable and unusable space, based upon the percentage of usable space occupied by an attacher. Davis Cross, April 25, 2006 Tr., pp. 964-65.*
130. *Instead, Gulf Power's space allocation calculations for Complainant cable operators apply a figure of 11.5 feet for usable space and 28.5 feet for unusable space so as to reach a percentage space allocation in its replacement cost calculations of approximately 28 percent. Davis Cross, April 25, 2006 Tr., p. 964-72; Gulf Power Ex. 52, p. 7.*
131. *Gulf Power has not performed any similar space allocation calculations for attachments by ILEC (incumbent local exchange carrier) telecommunications attachers. Davis Cross, April 25, 2006 Tr., p. 967.*
132. *Gulf Power space allocation percentage of approximately 28 percent is about four times the space allocation of 7.5 percent used in the FCC Cable Rate Formula. Davis Cross, April 25, 2006 Tr., p. 972; Pole Fee Order, ¶ 19.*

133. Gulf Power's space allocation calculations are based upon the theory "that there's a greater value to the cable operator of attaching to a Gulf pole than the actual cost and usable space calculations ... provided under the FCC formula." Davis Cross, April 25, 2006 Tr., p. 971.
134. If Gulf Power had used a space allocation of 7.5 percent in its calculations, rather than approximately 28 percent, then, all other factors staying the same, Gulf Power's annual pole rental replacement cost rates would be approximately one-quarter of what Gulf Power currently seeks. This would be true even without taking account of other reductions that would occur in Gulf's calculations if it used the average unit cost of all poles in its system and included an adjustment for depreciation in its pole investment calculations. Davis Cross, April 25, 2006 Tr., p. 972.
135. Terry Davis' testimony describes the rates that Gulf Power has calculated pursuant to its replacement cost methodology as ranging from \$38.06 for the year 2000 up to \$64.98 for the year 2006. These proposed rates range from about six times the maximum pole rate currently being paid by Complainants up to about ten times the maximum pole rate currently being paid by Complainants. Davis Direct Testimony, p. 6; Davis Cross, April 25, 2006 Tr., pp. 992-93.
136. However, Ms. Davis testified at the hearing that, while Gulf Power is seeking a rate of \$38.06 for the year 2000, it is seeking the rate of \$40.60 for years 2001 through 2006, for all of Complainants' attachments to Gulf Power's poles. Davis Cross, April 25, 2006 Tr., pp. 977-979.

137. The rates being proposed by Gulf Power are based upon its view that cable operators should take on a greater share of the expenses associated with maintaining a pole. Davis Cross, April 25, 2006 Tr., p. 993.

138. Ms. Davis' calculations do not make any reference to poles at "full capacity" or to poles not at full capacity. Davis Cross, April 25, 2006 Tr., pp. 979.

12. Replacement Cost Is Unrelated To Any Lost Opportunity

139. Ms. Davis' calculations do not make any reference to any lost opportunity that Gulf has incurred on any specific poles. Davis Cross, April 25, 2006 Tr., pp. 977.

140. In fact, Gulf Power does not track costs for individual poles. Gulf Power Ex. E, Davis Direct Testimony, p. 14; Davis Cross, April 25, 2006 Tr., pp. 980.

141. Gulf Power's replacement cost calculations do not make any reference at all to specific poles in the field. Davis Cross, April 25, 2006 Tr., pp. 980.

13. Replacement Cost Is Unrelated To "Marginal Costs" Of Attachments

142. Terry Davis, who prepared Gulf Power's replacement cost calculations, testified that she was not aware that the Supreme Court, in its 1987 *Florida Power* decision, noted that "marginal cost" in the context of pole attachments is the minimum measure under the FCC rate formula, in other words, the additional cost to the utility of providing pole attachments. Davis Cross, April 25, 2006 Tr., pp. 985-86.

143. In her testimony, Ms. Davis instead defines "marginal cost" as the cost to re-create today, using a brand new pole, the space occupied by a cable attacher. Gulf Power Ex. E, Davis Testimony, p. 5; Davis Cross, April 25, 2006 Tr., pp. 984-85.

144. Ms. Davis agreed that her definition of "marginal cost" is "different" from that defined by the United States Supreme Court. Davis Cross, April 25, 2006 Tr., pp. 986.

145. Since “marginal cost” is (as the Supreme Court stated) the additional, or incremental, cost that a utility incurs as a result of having a cable attachment on a pole that the utility would not incur if the cable attachment were not there, Gulf Power does “not know what the numbers would be under that definition” for the marginal costs of Complainants’ attachments. Davis Cross, April 25, 2006 Tr., pp. 986-87.

146. Gulf Power also has no knowledge of how much money it has received in recent years from the Complainant cable operators in make-ready payments for work performed for Complainants. Davis Cross, April 25, 2006 Tr., p. 987.

14. Gulf Power’s Replacement Costs Are Not Based Upon Any Actual Loss

147. Gulf Power’s proposed replacement cost rates are not based upon any actual loss of money or revenue caused by hosting Complainant cable operators’ attachments. Davis Cross, April 25, 2006 Tr., p. 994.

148. Instead, Ms. Davis agreed that Gulf’s replacement cost rates are premised upon the “big savings” to cable operator attachers because they do not have to build a duplicative set of utility pole lines. Compls. Ex. 88, Davis Dep. pp. 162-63.

15. The Osmose Survey And Its Deficiencies

149. Gulf Power designated for the hearing forty poles that had been surveyed by its consultant, Osmose Utilities Services. Gulf Power Ex. 42.

150. In providing definitions to Osmose, Gulf Power did not give Osmose any information about what constitutes a pole at “full capacity.” See Compls. Ex. 3, p. 5; [[Complainants also submit the following proffer: *see also* Compls. Ex. 89, Tessieri Dep., p. 51]].

151. Instead, Gulf Power only provided Osmose with a definition of a “crowded” pole. Compls. Ex. 3, p. 5; Gulf Power Ex. 40, p. 4.

152. Gulf Power has acknowledged a difference, even in its view, between a “crowded” pole and one at full capacity, with the former, a “crowded” pole being “a pole that is close to being at ‘full capacity’ – in other words, a pole with room for only one additional communications attachment,” and the latter, a pole at “full capacity” being “a pole that cannot host further communications attachments.” *See* Compl. Ex. 56, p. 2 (Response to Interrogatory No. 2).
153. The definition of a “crowded” pole that Gulf Power provided to Osmose was based solely upon whether the poles being reviewed contained one of several spacing violations of the NESC or of Gulf Power’s own specifications. Gulf Power Ex. 40, pp. 4, 16, 21-22.
154. Osmose only recorded violations of the NESC and/or Gulf Power specifications on the one day that its technicians visited. Gulf Power Ex. 42 (listing inspection dates); Compl. Ex. B, Harrelson Testimony, pp. 11-13; [[Complainants also submit the following proffer: Compl. Ex. 89, Tessieri Dep., p. 157]].
155. Osmose used a standard of requiring that there be a separation of more than 52 inches between the highest communications cable on the pole and the lowest electrical cable. Compl. Ex. 3, p. 5. The NESC requirement is for 40 inches of separation but the usage of 52 inches was to indicate whether another attacher could attach without any rearrangement or change out for that particular clearance. Bowen Cross, April 25, 2006 Tr., pp. 1014-15, 1024; Harrelson Testimony, pp. 10, 16. However, this was unrealistic, since when an attacher pays for an attachment and pays for make-ready, it only pays to maintain 40 inches of separation; the next attacher pays make-ready for an additional 12 inches to maintain the 40 inches between electric and communication cables. Dunn Cross, April 24, 2006 Tr., p. 802, 805-07. Accordingly, it is not surprising that the

majority of the poles surveyed by Osmose show less than 52 inches as that would be expected in the normal course, as in poles 11 and 7 (Gulf Exhibit 42, pp. 13, 21); Bowen Cross, April 25, 2006 Tr., pp. 1044-49; 1049 -50; 1050-51; 1051-53.

156. Osmose did not compile data on the period of time, or range of dates, when the poles it surveyed contained a violation of the NESC or of Gulf Power's own specifications. Bowen Cross, April 25, 2006 Tr., pp. 1061-62; see also Compls. Ex. 9.
157. No testimony was submitted by Gulf Power as to whether Osmose representatives have any knowledge of whether any changes have been made in the field to any of the poles it surveyed since its technicians took their photographs. *Compare* Compls. Ex. B, Harrelson Testimony, pp. 12-13; 24-26; [[Complainants also submit the following proffer: Compls. Ex. 89, Tessieri Dep., p. 370]].
158. No testimony was submitted by Gulf Power as to whether Osmose representatives have any knowledge of any current plans for Gulf Power's future use of the poles it surveyed. *Compare* Compls. Ex. B, Harrelson Testimony, pp. 12-13; 24-26; [[Complainants also submit the following proffer: Compls. Ex. 89, Tessieri Dep., p. 370]].
159. Since the dates in early 2005 when Osmose took its photographs, a number of the poles it reviewed have been changed out to taller poles or had extensions bolted to the top using splints to provide additional space. *See* Compls. Ex. 6, pp. 8-9 (pole #342 was changed out to a taller pole) and pp. 52-54 (pole 312-106 received a pole-top extension); *see also* Compls. Ex. B, Harrelson Testimony, p. 13.
160. Osmose did not consider at all whether it was possible to rearrange attachments or to change-out a pole to provide space for additional attachers. *See* Compls. Ex. B,

Harrelson Testimony, pp. 9-14; [[Complainants also submit the following proffer: Compls. Ex. 89, Tessieri Dep., pp. 315-17]].

161. No evidence was submitted by Gulf Power that Osmose representatives ever saw or were familiar with Gulf Power's CATV Permitting Procedure. *Compare* Compls. Ex. B, Harrelson testimony, pp. 9-10; [[Complainants also submit the following proffer: Compls. Ex. 89, Tessieri Dep., p. 66]].
162. Osmose did not make any determination as to which party caused the NESC or other violations that it recorded. Osmose labeled poles as "crowded" regardless of whether it was Gulf Power's own wiring practices or those caused by an attacher that caused the NESC or other violations it recorded. Compls. Ex. B, Harrelson Testimony, pp. 12-13; Bowen Cross, April 25, 2006 Tr., p. 1058 ("fault ... wasn't something that we were looking for"); [[Complainants also submit the following proffer: Compls. Ex. 89, Tessieri Dep., pp. 157-58]].
163. Gulf Power submitted no evidence at the hearing that Osmose measured the height above ground of the poles it surveyed (as opposed to the size of the pole, i.e., 35-foot, 40-foot, etc.). [[Complainants submit the following proffer: Compls. Ex. 89, Tessieri Dep., p. 213]].
164. Gulf Power submitted no evidence at the hearing that Osmose technicians performed any "in field validation" of the poles that they surveyed. [[Complainants submit the following proffer: Compls. Ex. 89, Tessieri Dep., p. 218]].
165. Gulf Power submitted no evidence at the hearing that Osmose technicians performed any "post-field validation" of its measurements. [[Complainants submit the following proffer: Compls. Ex. 89, Tessieri Dep., p. 223]].

166. When Osmose conducted a “first pass” review of poles, that consisted only of a visual inspection of the pole, without any measurements. Compare Gulf Power Ex. 41, p. 14 and 20 (first pass work stopped and distinguishing between first pass data collection and second pass collection), with Compls. Ex. 3, pp. 7, 13 (first pass as to whether pole is “crowded” collected before any QC, or quality control); [[Complainants submit the following proffer: Compls. Ex. 89, Tessieri Dep., p. 216-17]].
167. Only when Osmose technicians went to a pole for a “second pass” review did they take measurements of the attachments to the pole. See Gulf Power Ex. 41, p. 28 (“QC was completed on first pass only workpackets”); Gulf Power’s May 2005 Status Report on Pole Survey (May 31, 2005)(explaining that “fully delivered data” with QC includes second pass); [[Complainants submit the following proffer Compls. Ex. 89, Tessieri Dep., p. 216-17]].
168. Gulf Power initially asked Osmose to survey approximately 150,000 of its poles. Gulf Power Company’s June 2005 Status Report on Pole Survey, pp. 1-2.
169. However, after just two months of work, Gulf Power decided in May of 2005 to “stop the project” and simply continue existing measurements, up to a specified cost limit of \$100,000. Gulf Power Ex. 41, pp. 14, 28; Bowen Cross, April 25, 2006 Tr., p. 1030; [[Complainants submit the following proffer Compls. Ex. 89, Tessieri Dep., pp. 107-08, 272-74]].
170. Its July 25, 2005 “project status report” indicates only that “second pass collection [was to continue] until the \$100,000 value has been reached, which has now occurred.” Gulf Power Ex. 41, p. 26.

171. Mr. Bowen of Gulf Power testified that the \$100,000 level of expenditure on Osmose occurred as of June 25, 2005, before the filing of the June 30, 2005 Gulf Power Status Report. Bowen Cross, April 25, 2006 Tr., p. 1030.
172. Although Gulf Power claims to have budgeted up to \$1 million for the Osmose survey, it stopped work at \$100,000, not \$1 million. Bowen Cross, April 25, 2006 Tr., p. 1035.
173. Gulf Power's counsel was informed of this decision. Bowen Cross, April 25, 2006 Tr., pp. 1035-36.
174. Despite directing Osmose to stop work, Gulf Power reported to the Presiding Judge in its June 2005 Status Report that the "number of poles to be surveyed" remained at 150,000 and that "the full survey, with appropriate staffing, should be completed within the time frame reflected in the Statement of Work (target date of October 23, 2005)". Gulf Power Company's June 2005 Status Report on Pole Survey, pp. 1-2.
175. Similarly, in the July 2005 Status Report, Gulf Power continued to list the number of poles to be surveyed as 150,000. Gulf Power Company's July 2005 Status Report on Pole Survey.
176. Once again, in the August 2005 Status Report, Gulf Power reported that there was "no change" since its July report. Gulf Power Company's August 2005 Status Report on Pole Survey.
177. Ultimately, by October 2005, Gulf Power had conducted a preliminary visual, or "first pass" survey, of only 6.4 percent, or 9,663, of Gulf Power's approximately 150,000 joint use poles. Gulf Power Ex. 41, p. 28; [[Complainants submit the following proffer Compls. Ex. 89, Tessieri Dep. p. 287]].

178. *Of the 9,663, Gulf Power asserted that some 7,120 poles were “crowded.”* Compl. Ex. 36, p. 2.
179. But Gulf Power submitted no evidence at the hearing as to whether the 7,120 poles asserted to be “crowded” received anything more than a visual “first pass” review by Osmose technicians. See Gulf Power Ex. 41, p. 28; [[Complainants submit the following proffer: Compl. Ex. 89, Tessieri Dep., p. 289]].
180. Gulf Power’s final “project status report” indicates that QC, or quality control, “was completed on first-pass only.” Gulf Power Ex. 41, p. 28.
181. Gulf Power has not introduced into evidence any data or testimony that identifies how many poles overall Osmose considered to be “crowded” after a “second pass,” or actual measurements. Gulf Power Exs. 41 and 42.
182. Gulf Power did not introduce into evidence any data stating that Osmose used any sampling or statistical methods in connection with its pole survey. See Compl. Ex. 3; Gulf Power Ex. 42; [[Complainants submit the following proffer: Compl. Ex. 89, Tessieri Dep., pp. 172, 292]].
183. Gulf Power never intended the selection of poles to be surveyed by Osmose to be a statistical or random sampling of the poles. Bowen Cross, April 25, 2006 Tr., pp. 1032-34; Bowen Direct Testimony, p. 32, 17-18.
184. Osmose only surveyed poles located in the Pensacola, Florida area. Compl. Ex. B, Harrelson Testimony, p. 31; Gulf Power Ex. 43, p. 46; [[Complainants submit the following proffer: Compl. Ex. 89, Tessieri Dep., pp. 182-84]].

16. Specific Errors Among The 40 Osmose Poles

185. Ben Bowen of Gulf Power testified that one of the 40 Osmose poles designated by Gulf Power in this case and claimed to be an example of a “crowded” pole, number 18, was not in fact a Gulf Power-owned pole. Instead, it was owned by someone else. Bowen Cross, April 25, 2006 Tr., pp. 1001, 1013; *see also* Gulf Power Ex. 42, pp. 35-36.
186. Mr. Bowen also testified that another of the 40 Osmose poles designated by Gulf Power in this case and claimed to be an example of a “crowded” pole, number 35, is not in fact “crowded” even under Gulf Power’s own definition. Bowen Cross, April 25, 2006 Tr., p. 1013.
187. Ben Bowen testified that a third pole of the 40 Osmose poles designated by Gulf Power, number 9, also contained an “error,” in that, while it was classified by Osmose as being “crowded” solely because it had less than 52 inches between power attachments and communications attachments, the actual distance between such attachments recorded by Osmose was 53 inches. Bowen Cross, April 25, 2006 Tr., pp. 1015-18; Gulf Power Ex. 42, p. 17.
188. Mr. Bowen agreed that, based upon Osmose’s errors with regard to poles 9, 18, and 35, that it would be “fair” to remove those three poles from the group of 40 poles that Gulf Power designated as examples of “crowded” poles. Bowen Cross, April 25, 2006, Tr., p. 1019-1020.
189. Mr. Bowen also testified that he visited a particular pole (number 318-65, Gulf Pole 2) and concluded that “[t]his is an example of the lengths to which some companies will go to avoid make-ready and their contractual responsibilities on crowded poles. This pole has numerous crowding and/or safety clearance violations that must be fixed by changing the

pole out to a taller pole.” Gulf Ex. 42, p.2; Bowen Direct Testimony, pp. 36, 16-19; Bowen Cross, April 25, 2006, Tr., p. 1067. Mr. Bowen came to that conclusion and included it in his testimony although he had made no determination as to the actual order of attachment to the pole, and although he said that Gulf, then the ILEC, then cable then others likely attached in that order, did not know why Gulf would have granted a permit for such attachments that were unsafe and out of code, and if Gulf had granted a permit, such a grant would be a violation of Gulf policy. Mr. Bowen also testified that he did not look at any make-ready or permit documents for any of the 40 Osmose-reviewed poles to determine who attached at what time and under what conditions; that it was possible looking at shadings, riser shields and old bolt holes with washer indentations that Gulf moved its electric facilities out of the electric space and into the safety space and communications space itself causing the violations complained of; and that it would have been Gulf’s obligation to rearrange or change-out to bring it back into compliance.

Bowen Cross, April 25, 2006, Tr., pp. 1069-79.

190. Mr. Bowen did not inspect all of the 40 Osmose poles and does not know whether Osmose made other mistakes on any of the other poles. Bowen Cross, April 25, 2006 Tr., pp. 1009-1010.
191. Gulf Power did not make any determination with respect to any of the 40 poles contained in Gulf Power Ex. 42 that there was another attacher “waiting in the wings” that was seeking to attach to any of those poles. Bowen Cross, April 25, 2006 Tr., p. 1028.
192. The poles that Osmose surveyed, including the 40 designated by Gulf Power in its Exhibit 42, contain attachments of only one of the four Complainants in this case, Cox Communications. Compls. Ex. 9; Gulf Power Ex. 42.

17. The Ten Poles With “Knology” Attachments

193. Gulf Power also designated ten poles in this proceeding that contained attachments by a company called “Knology.” Gulf Power Ex. 43, pp. 48-49.
194. On each of the ten Knology poles designated by Gulf Power, make-ready was in fact performed to accommodate Knology’s attachments. Compls. Ex. B, Harrelson Testimony, pp. 13-14.
195. Knology was billed in full for make-ready costs, and the “total net cost” or “total cost of the job” to Gulf Power was zero. Gulf Power Ex. 43, pp. 89, 101, 162, 170; Bowen Cross, April 25, 2006 Tr., p. 1085-87.
196. In fact, Gulf Power billed Knology not only all of the make-ready costs of Knology’s attachments but also for an additional 30 percent charge for overhead. Compls. Ex. 87, Forbes Dep. p. 89; Bowen Cross, April 25, 2006 Tr., pp. 1094-95.
197. If the estimating program underestimated the cost, Knology was billed the actual higher amounts. Compls. Ex. 87, Forbes Dep. p. 71.
198. Knology paid Gulf Power all the bills for make-ready work for the project in Panama City, including the 30 percent premium for overhead for third-party invoices. Compls. Ex. 87, Forbes Dep. pp. 41, 70-72, 89.
199. Knology is paying Gulf Power approximately the same pole attachment rate as Complainants are currently paying Gulf Power. Bowen Cross, April 25, 2006 Tr., pp. 1095-96.
200. Gulf Power has not offered any testimony in this proceeding that any of the ten poles containing Knology attachments currently lack the capacity for one or more additional attachments. Compls. Ex. B, Harrelson Testimony, pp. 13-14.

201. *Gulf Power continues to provide attachers the opportunity to perform make-ready work, even after the 1996 Act. Bowen Cross, April 25, 2006 Tr., pp. 1106-07; Bowen Re-direct, April 25, 2006 Tr., p. 1118.*
202. *Gulf Power is seeking to apply its “replacement cost” annual rates to “all poles” to which Complainants are attached, not just poles alleged to be at full capacity. Compls. Ex. 84, Bowen Dep. Tr., p. 246; Dunn Cross, April 24, 2006 Tr., pp. 736, 738-39, 740-44; Davis Cross, April 25, 2006 Tr., pp. 908-09, 916.*

18. Gulf’s Expert Roger Spain, His Experience, And His Assumptions

203. *At the hearing in this case, Gulf Power offered testimony of Roger A. Spain. Mr. Spain was presented as an expert witness regarding the “valuation” of property. Gulf Power Ex. F, Spain Testimony, pp. 1-2.³*
204. *Mr. Spain was not retained by Gulf Power until January of 2006. Spain Cross, April 25, 2006 Tr., p. 1142.*
205. *Mr. Spain testified that he is a Certified Valuation Analyst (“CVA”). Gulf Power Ex. F, Spain Testimony, pp. 1-2.*
206. *Mr. Spain’s CVA designation was obtained after a one-week course that he took in 2003. Spain Cross, April 25, 2006 Tr., p. 1133; Gulf Power Ex. F, Spain Testimony, p.2.*
207. *Mr. Spain has no prior experience providing a valuation of property in a takings case. Spain Cross, April 25, 2006 Tr., pp. 1130-31.*
208. *Mr. Spain has never given any testimony previously in any case involving utility pole attachments. Spain Cross, April 25, 2006 Tr., p. 1137.*

³ In Complainants’ Trial Brief (filed April 18, 2006), pp. 64-71, Complainants moved to exclude the testimony of Roger Spain on the grounds that it does not meet the standards for expert testimony, and, in particular, on the grounds that Mr. Spain rejects, instead of applies, the standards of the *Alabama Power* opinion that govern this proceeding. Accordingly, exclusion of Mr. Spain’s testimony is warranted for the reasons set forth in detail herein and in Complainants’ Trial Brief.

209. Mr. Spain is not an appraiser. Spain Cross, April 25, 2006 Tr., pp. 1132-33.
210. Mr. Spain has no experience working on a valuation project where the purpose was to place a value on part of a physical asset that is only one component of a larger property. Spain Cross, April 25, 2006 Tr., p. 1140.
211. As of the time of his deposition, two weeks *after* his March 3, 2006 expert summary report, Mr. Spain could not identify any FCC decision or rulings that involved utility poles. Spain Cross, April 25, 2006 Tr., p. 1138.
212. Mr. Spain has never worked on any previous projects where he applied the valuation methodology of “replacement costs” to utility poles. Spain Cross, April 25, 2006 Tr., p. 1140.
213. In this case, Mr. Spain did not prepare any independent Gulf Power pole attachment fee or rate calculations and he did not speak with anyone at Gulf Power to verify the inputs to Gulf Power’s calculations. Spain Cross, April 25, 2006 Tr., p. 1141.
214. In fact, prior to his deposition on March 17, 2005, which was two weeks after his expert summary report of March 3, 2005, Mr. Spain never spoke with anyone at Gulf Power. Spain Cross, April 25, 2006 Tr., p. 1142.
215. Prior to Mr. Spain’s deposition, he never reviewed any of the interrogatory answers in this case and only reviewed one deposition transcript – that of Terry Davis. Spain Cross, April 25, 2006 Tr., pp. 1153-54.
216. Mr. Spain was simply instructed by Gulf Power’s counsel at the outset of his work to “assume” that Gulf is entitled to “fair market value” of the “elevated communications corridor” that is comprised of Gulf Power’s entire pole network. Spain Testimony, p. 5; Spain Cross April 25, 2006, Tr., pp. 1142-43.

217. Mr. Spain did not do any analysis of any other standard of value, other than “fair market value.” Spain Cross, April 25, 2006 Tr., p. 1144.
218. Mr. Spain did not attempt to quantify any “value” that attachers receive from being part of such a communications “corridor” or network. Spain Cross, April 26, 2006 Tr., p. 1212-13.
219. Indeed, Mr. Spain testified that he is “not rendering an independent analysis or calculation” about Gulf Power’s pole attachment rates, and that his task “was only to analyze the appropriate method for calculating fair market value.” Spain Cross, April 25, 2006 Tr., p. 1189; Compls. Ex. 90, Spain Dep. Tr., p. 85; Spain Cross, April 26, 2006 Tr., p. 1241.
220. At approximately the same time that Mr. Spain was asked to adopt a standard of “fair market value,” Mr. Spain was supplied by Gulf Power’s counsel with a three-page calculation showing a “replacement cost” annual pole attachment rate of \$54.00. Spain Cross, April 25, 2006 Tr., p. 1146, 1151-52.
221. Mr. Spain testified that he read the Eleventh Circuit’s *Alabama Power* decision only *after* he was instructed by Gulf Power counsel to use “fair market value” as a valuation standard for pole attachments and *after* he received the three-page Gulf Power replacement cost calculation. Spain Cross, April 25, 2006 Tr., p. 1154.

19. Mr. Spain’s Disagreement With *Alabama Power*’s Standards

222. Mr. Spain disagrees with the Eleventh Circuit’s *Alabama Power* decision, testifying that some of those requirements were “difficult for [him] to reconcile” with his assumption of the standard of “fair market value” and generic business valuation concepts. Spain Cross, April 25, 2006 Tr., p. 1155. Notably, *Alabama Power* explicitly stated that, since

“[t]here is not an active, unregulated market for the use of ‘elevated communications corridors’ . . . an *alternative* to fair market value must be used.” *Alabama Power*, 311 F.3d at 1368 (emphasis added).

223. Mr. Spain testified that he understands the Eleventh Circuit’s *Alabama Power* opinion to contain a two-pronged test, requiring proof of poles at “full capacity” and a showing either of a buyer waiting in the wings or a higher valued use by Gulf Power. Spain Cross, April 25, 2006 Tr., pp. 1155-56.
224. Mr. Spain has not studied the capacity of Gulf Power’s poles. Spain Cross, April 25, 2006 Tr., p. 1156.
225. Yet, Mr. Spain takes issue with *Alabama Power*’s requirement that full capacity be demonstrated for specific poles before a pole owner can charge any annual pole attachment rate above the marginal costs of placing attachments on such poles. Spain Cross, April 25, 2006 Tr., p. 1162.
226. Mr. Spain was also not asked to study the question of whether Gulf Power had experienced any lost opportunity on its poles. Spain Cross, April 25, 2006 Tr., pp. 1162-63; Compls. Ex. 90, Spain Dep. Tr., p. 209.
227. Mr. Spain has not examined whether attachments by any of the four cable operator Complainants in this case have prevented Gulf Power from leasing pole space to a third party. Spain Cross, April 25, 2006 Tr., p. 1167.
228. Mr. Spain has not seen any evidence that Gulf Power incurred any actual loss caused by Complainants’ attachments. Spain Cross, April 25, 2006 Tr., p. 1167; Spain Cross, April 26, 2006 Tr., p. 1215.

229. The only “lost opportunity” that Mr. Spain claimed to exist was Gulf Power’s inability to charge a “market” rate as opposed to a rate regulated under 47 U.S.C. § 224. Spain Cross, April 26, 2006 Tr., p. 1279.
230. Mr. Spain is not aware of any instance where an actual buyer of pole space approached Gulf Power about an opportunity to attach to its poles and where Gulf was unable to accommodate such a request. Spain Cross, April 25, 2006 Tr., p. 1176.
231. In fact, the scope of Mr. Spain’s work in this case did not involve trying to determine whether Complainants’ cable attachments in fact caused Gulf Power to lose money. Spain Cross, April 25, 2006 Tr., pp. 1167-68.
232. Nevertheless, Mr. Spain also took issue with the Eleventh Circuit’s use of the phrase “buyer waiting in the wings,” claiming that any interpretation of this phrase which actually requires such a buyer would be inconsistent with the principles of a “fair market value” standard. Spain Cross, April 25, 2006 Tr., p. 1170; Compls. Ex. 90, Spain Dep. Tr., pp. 210-11.
233. Instead, Mr. Spain opined that the phrase “buyer waiting in the wings” must refer to a “hypothetical” buyer. Spain Cross, April 25, 2006 Tr., p. 1168.
234. Mr. Spain explained that his interpretation involving a “hypothetical” buyer is dependent upon his assumption, at counsel’s direction, of a “fair market value” standard. Spain Cross, April 25, 2006 Tr., p. 117-72.
235. Mr. Spain also took issue with *Alabama Power*’s requirement that Gulf Power prove a “higher valued use” for the pole space occupied by Complainants’ attachments. Spain Cross, April 25, 2006 Tr., p. 1176; Compls. Ex. 90, Spain Dep. Tr., p. 216.

236. Mr. Spain was not asked to analyze the marginal costs to Gulf Power of Complainants' attachments. Spain Cross, April 25, 2006 Tr., p. 1180-81.
237. Mr. Spain testified that he was not aware that the Eleventh Circuit specifically referenced the definition of marginal costs in the *Alabama Power* case. Spain Cross, April 25, 2006 Tr., p. 227.
238. Mr. Spain has no idea what Gulf Power's marginal costs actually are for the four cable operator Complainants. Spain Cross, April 25, 2006 Tr., p. 1181.
239. As of the time of his deposition, Mr. Spain had never read the Hearing Designation Order in this case. Spain Cross, April 25, 2006 Tr., p. 225.
240. As of the time of his deposition, Mr. Spain had never read or even seen the Commission's Alabama Power Order of May 2001. Spain Cross, April 25, 2006 Tr., p. 1185.
241. When Mr. Spain wrote his expert summary report on March 3, 2005 discussing replacement cost, he was unaware that the Commission, in paragraph 53 of its *Alabama Power Commission Order*, had concluded that the standards for determining fair market value, including the replacement cost method, are "particularly unsuited for valuing pole attachments." Spain Cross, April 25, 2006 Tr., p. 1185; *Alabama Power Commission Order*, ¶ 53.
242. When Mr. Spain wrote his expert summary report on March 3, 2005 referring to a "fair market value" being based upon willing buyers and sellers, he was unaware that the Commission, in paragraph 55 of its *Alabama Power Commission Order*, had previously concluded that "there are no arms lengths transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments." Spain Cross, April 25, 2006 Tr., p. 1186; *Alabama Power Commission Order*, ¶ 55.

243. When Mr. Spain wrote his expert summary report on March 3, 2005 referring to a “market” for utility pole attachments, he was unaware that the Commission, in paragraph 55 of its *Alabama Power Commission Order*, had concluded that “there is no non-monopoly market in pole attachments.” Spain Cross, April 25, 2006 Tr., p. 1186; *Alabama Power Commission Order*, ¶ 55.
244. As of the time of his deposition, Mr. Spain had not performed any survey to assess whether there is a “market” for utility pole attachments. Spain Cross, April 26, 2006 Tr., p. 1196.
245. Indeed, Mr. Spain testified that the “market” that he believes exists pertains only to “unregulated” transactions – pole attachment agreements with municipally owned systems or electric cooperatives that, unlike Gulf Power, are not subject to the Pole Attachment Act or to FCC regulation. Spain Cross, April 26, 2006 Tr., pp. 1206-09.
246. Mr. Spain agreed that, when he compared annual pole attachment rates charged by municipally owned pole systems and electric cooperatives to those paid by Complainants, he was “comparing unregulated rates to regulated rates.” Spain Cross, April 26, 2006 Tr., pp. 1229-30.
247. For example, Mr. Spain testified that he understands that pole rates charged to attachers, including Complainants, by electric cooperatives and municipally owned electric power companies are not subject to 47 U.S.C. § 224. Spain Cross, April 26, 2006 Tr., p. 1228.
248. Mr. Spain testified that he has no personal knowledge of whether Gulf Power and its attachers ever engaged in negotiation at arm’s length. Spain Cross, April 26, 2006 Tr., p. 1210.

249. In fact, Mr. Spain did not speak with any Gulf Power personnel regarding the negotiation of Gulf Power's pole attachment agreements. Spain Cross, April 26, 2006 Tr., pp. 1205-06.
250. Mr. Spain in fact conceded that, because there is often only one potential provider of pole space available for attachment, any attacher who wants to attach to a pole is compelled to deal with that one pole owner. Spain Cross, April 26, 2006 Tr., pp. 1211-12.
251. Mr. Spain has not attempted to quantify any alleged benefit to the Complainants from being able to attach to any particular Gulf Power poles. Spain Cross, April 26, 2006 Tr., p. 1218.
252. Mr. Spain testified that Gulf Power's replacement cost calculations represent "an overall value of an elevated corridor." Spain Cross, April 26, 2006 Tr., p. 1219.
253. Mr. Spain testified that Gulf Power's replacement cost calculations were to be applied to all the poles in Gulf Power's pole network, not just poles for which the full capacity and higher valued use tests have been met. Spain Cross, April 26, 2006 Tr., p. 1220 (replacement costs to be applied "per pole").
254. Mr. Spain does not know of any connection between the \$40.60 pole rate charged by Gulf Power to some attachers and the availability of pole space on, or capacity of, the poles occupied by such attachers. Spain Cross, April 26, 2006 Tr., p. 1223.
255. In examining the "sales comparison method" of valuation, Mr. Spain could not find any examples of utility plant transactions that might be applicable to this case. Spain Cross, April 26, 2006 Tr., p. 1230.