256. Mr. Spain also concluded that the income approach to valuation is impractical as an approach to valuing space on an electric company's poles. Spain Cross, April 26, 2006 Tr., p. 1232-33.

257. The replacement cost method that Mr. Spain endorsed was the same method used by Terry Davis in her calculations, a copy of which was given by Gulf Power's counsel to Mr. Spain when he was first retained by Gulf Power's counsel. Spain Cross, April 26, 2006 Tr., p. 1233.

258. Mr. Spain does not know whether the poles acquired by Gulf Power in any given year that are used in Gulf Power's replacement cost calculations actually contain Complainant cable operators' attachments. Spain Cross, April 26, 2006 Tr., pp. 1234-35.

259. Mr. Spain opined that even when an attacher has paid for the cost of replacing a specific pole (a pole changeout), the attacher should pay a "replacement cost" annual rate going forward because, in his view, "the attacher will continue to benefit from the existence of the pole in the network." Spain Cross, April 26, 2006 Tr., p. 1236.

260. Gulf Power does not include any adjustment for depreciation in the pole investment portion of its replacement cost calculations. Spain Cross, April 26, 2006 Tr., pp. 1237-38.

261. Mr. Spain testified that the replacement cost approach to valuation, when it is applied, usually and customarily incorporates an adjustment for depreciation. Spain Cross, April 26, 2006 Tr., p. 1238.

262. Mr. Spain testified that Gulf Power itself uses a depreciation rate in assessing its own poles. Spain Cross, April 26, 2006 Tr., p. 1239.

263. Mr. Spain testified that, in his opinion, Gulf could omit depreciation from its calculations because it bore the "risk of loss" of being a property owner. Spain Cross, April 26, 2006 Tr., p. 1237.

264. However, Mr. Spain explained that this is "the general risk of ownership" and that "there's nothing special, nothing specially unique to being a power company . . . ." Spain Cross, April 26, 2006 Tr., p. 1216.

265. Mr. Spain also explained that when he spoke of "risk of loss, [he was] not talking about any actual monetary loss suffered by the pole owner that's caused by a cable attachment" and was not talking about any "specific out-of-pocket loss caused by a cable attacher." Spain Cross, April 26, 2006 Tr., p. 1215. Indeed, Mr. Spain never identified any specific loss.

266. Mr. Spain agreed that Gulf Power has to maintain its poles at the standard set by the Florida PSC for its own operations, regardless of who is attached to its poles. Spain Cross, April 26, 2006 Tr., p. 1217.

267. Mr. Spain has not performed any calculation on the consequences of including a component for depreciation in the pole investment portion of Gulf Power's replacement cost calculations. Spain Cross, April 26, 2006 Tr., p. 1239.

268. With respect to the third element of Gulf Power's replacement cost calculations, space allocation, Mr. Spain never obtained an explanation from Gulf Power of why it is departing from the FCC rate regulations governing the allocation of space on utility poles. Spain Cross, April 26, 2006 Tr., pp. 1241-42.

269. Most significantly, Mr. Spain testified that it's not feasible for cable attachers to build or to duplicate Gulf Power's entire pole system. Spain Cross, April 26, 2006 Tr., p. 1252.

270. Mr. Spain further testified that cable attachers cannot reproduce what he calls the "elevated corridor." Spain Cross, April 26, 2006 Tr., p. 1253.

271. Yet, Mr. Spain concluded his testimony by admitting that Gulf Power's replacement cost methodology is based precisely upon the cost that Complainant cable attachers would pay to go out and try to reproduce Gulf Power's entire system by putting up poles themselves. Spain Cross, April 26, 2006 Tr., p. 1253.

## B. Complainants' Witnesses

### 1. Patricia Kravtin

272. Complainants tendered Ms. Patricia Kravtin as an expert witness. Ms. Kravtin is a consulting economist with specialized experience in telecommunications, cable television, and energy markets. Ms. Kravtin holds a B.A. in Economics and studied in the Ph.D. program in Economics under a National Science Foundation Fellowship at the Massachusetts Institute of Technology. Compls. Ex. A, Kravtin Testimony, p. 1.

273. Ms. Kravtin was a consultant and the economic research and consulting firm of Economics and Technology, Inc. for nearly twenty years. At ETI, she became a Senior Vice President/Senior Economist. Compls. Ex. A, Kravtin Testimony, p. 1.

274. Ms. Kravtin has authored or co-authored approximately three dozen reports and studies in the fields of economics and regulation of cable television and telecommunications. Compls. Ex. A, Kravtin Testimony, p. 2 and Attachment 1.

275. Ms. Kravtin has previously been qualified as an expert witness on telecommunications matters in proceedings before state and federal regulatory commissions, including the FCC, and in federal courts. Compls. Ex. A, Kravtin Testimony, p. 2 and Attachment 1.

276. In particular, Ms. Kravtin has testified as an expert on pole attachment and other related matters on numerous occasions. Compls. Ex. A, Kravtin Testimony, p. 2 and Attachment 1.

277. Ms. Kravtin included a list of the materials she considered in preparation of her testimony as Attachment 2 to her testimony. These materials include publicly available documents, case pleadings and orders, and materials produced in the discovery of this case. Compls. Ex. A, Kravtin Testimony, Attachment 2.

278. Accordingly, Ms. Kravtin is qualified to render expert testimony in this matter in the fields of economic cost principles and their application to the cable, telephone, and electric utility industries. See Kravtin Testimony, pp. 1-3 and Attachment 1.

279. Ms. Kravtin was asked by Complainants to assess Gulf Power's claims under established economic and public policy principles, in the context of the Eleventh Circuit's *Alabama Power* decision. Compls. Ex. A, Kravtin Testimony, p. 3.

**a. Gulf Power Has Monopoly Power Over Its Poles**

280. Ms. Kravtin testified that utility poles are "an essential or bottleneck facility" and that utilities have monopoly control over access to such facilities. Compls. Ex. A, Kravtin Testimony, p. 8; *Alabama Power*, 311 F.3d at 1361-63.

281. As a practical reality, Ms. Kravtin explained, "attachers do not have the option of duplicating the pole networks constructed by the utility . . . ." Compls. Ex. A, Kravtin Testimony, p. 9; *Alabama Power Commission Order*, ¶ 69.

282. Because they have monopoly control over their poles, utilities have both the ability and the incentive to charge third party attachers excessive rates. Compls. Ex. A, Kravtin Testimony, p. 8-9.

### b. There Is No "Market" For Poles Or Pole Space

283. In terms of the practical realities of utility pole ownership and construction, there is no free "market" for poles or space on poles. Compls. Ex. A, Kravtin Testimony, p. 13.

284. Ms. Kravtin testified, "Unless the utility is subject to regulatory pricing standards based on well-established economic cost allocation principles, and held to operational standards consistent with industry best practices regarding pole utilization, the utility will be able to exploit is monopoly power" and "charge excessive, economically inefficient rates that are based on value to the attacher or some other inappropriate standard, rather than an economically appropriate cost." Compls. Ex. A, Kravtin Testimony, pp. 13-14.

### c. Gulf Power's Proposed Rate of $40.60 Is A Monopoly Rate

285. Ms. Kravtin testified that Gulf Power's ability to exploit its monopoly power over poles is evidenced by a comparison between the rate that it is seeking in this hearing of $40.60 per pole per year and the corresponding FCC Cable Formula Rate based on 2000 data of $4.61. Compls. Ex. A, Kravtin Testimony, p. 14.

286. In general, "[u]nder economically appropriate cost allocation principles, the recovery of the cost of a pole attachment is based upon the concept of cost causation (i.e., cost-causer pays). Such costs reflect costs that would not be borne but for the attacher, including a normal (reasonable) return to capital." Compls. Ex. A, Kravtin Testimony, p. 15.

287. Ms. Kravtin explained that the FCC Cable Rate Formula is consistent with economic cost causation principles, because it charges cable companies in proportion to their actual, direct use or occupancy requirements. In particular, the space allocation factor, one of three parts of the FCC Cable Rate Formula together with the net cost of a bare pole and

the carrying charge, is based upon the one foot of space on the pole that a cable *attachment actually uses. Compls. Ex. A, Kravtin Testimony, pp. 16-17.*

288. On a 40-foot utility pole, Gulf Power allocates approximately 8 feet of usable space to itself, as compared with a cable attacher's occupancy of 1 foot of usable space. Compls. Ex. A, Kravtin Testimony, p. 17.

289. However, under Gulf Power's proposed replacement cost methodology, Gulf Power applies a much higher space factor to cable companies, nearly 30 percent, than the presumptive space allocation of 7.41 percent that the FCC regulations incorporate. Compls. Ex. A, Kravtin Testimony, p. 18.

290. The FCC Cable Rate Formula also includes, through application of the carrying charge factor, allocation of indirect or overhead costs such as administrative and maintenance costs, in addition to capital costs (taxes, depreciation, and rate of return) associated with total pole plant (reflecting both usable and unusable space). Compls. Ex. A, Kravtin Testimony, p. 19.

291. The remaining element of the FCC Cable Rate Formula, the net cost of a bare pole, is based upon investment booked to FERC Account 364 ("Gross Pole Investment"), less accumulated depreciation and accumulated deferred income taxes, and less 15 percent for cross-arms and other non-pole-related items. Compls. Ex. A, Kravtin Testimony, p. 18.

292. Ms. Kravtin testified that, in addition to the annual, per pole, rental rate, a utility is allowed under the FCC Cable Rate Formula to charge cable attachers make-ready charges to recover one-time additional costs incurred in the provision of pole attachments. She explained that these costs are designed in principle to recover costs that the utility would not have incurred, but for the attachment request, and that, from the standpoint of

economic cost causation principles, they provide for an economically appropriate attribution of costs. Compls. Ex. A, Kravtin Testimony, p. 19.

293. Gulf Power sets make-ready costs at its sole discretion. Compls. Ex. A, Kravtin Testimony, p. 20.

294. Ms. Kravtin testified that, if Gulf Power believed that it was not recovering the full cost of make-ready, it would not be constrained from performing an evaluation, or "true-up," of make-ready costs and re-setting them in order to recover all such costs. Compls. Ex. A, Kravtin Testimony, p. 20; see also Compls. Ex. 85, Brooks Dep., p. 19.

295. Taken together, the combination of annual, per pole, rental rates, which cover a proportionate share of the operating costs based on the amount of space used by a cable attacher, and make-ready charges (which cover any non-recurring costs), enables the utility to recover much more than the actual marginal costs caused by an attachment. Compls. Ex. A, Kravtin Testimony, pp. 20-21; *Alabama Pow*er, 311 F.3d at 1369-70.

296. Ms. Kravtin testified that, because the combination of rental rates and make-ready charges recover much more than the incremental cost of attachment, Gulf Power is not providing a subsidy or cross-subsidy to Complainants. For a subsidy to occur, the pole owner must identify un-recovered costs that would not exist but for the attacher. Compls. Ex. A, Kravtin Testimony, pp. 21-22.

297. Where rates and make-ready charges cover the incremental costs of attachments, neither the pole owner nor any of the other parties sharing the pole will bear a higher cost as a result of the attachment (than they would absent the attachment). It thus cannot be said from an economic perspective that the pole owner would be better off without the attachment. Compls. Ex. A, Kravtin Testimony, p. 22.

298. Ms. Kravtin opined that the economic notion of cross-subsidy avoidance is consistent with the principle in takings law re-stated by the Eleventh Circuit that an aggrieved party *should be put in as good a position as he was in before the wrong, but not better.* Compls. Ex. A, Kravtin Testimony, p. 22; *Alabama Power*, 311 F.3d at 1369.

299. Ms. Kravtin noted that the criteria employed by the Eleventh Circuit in *Alabama Power* for seeking "just compensation" above marginal costs (over and above that already provided in the regulated rate) is tied to the economic concepts of "full capacity" and "lost opportunity." Compls. Ex. A, Kravtin Testimony, p. 23.

**d. Rivalrous Property And Economic "Full Capacity"**

300. The Eleventh Circuit equated the term "full capacity" with the economic term "zero sum." Compls. Ex. A, Kravtin Testimony, p. 25; 311 F.3d at 1370.

301. The term "zero sum" has a very specific meaning in economic literature. Compls. Ex. A, Kravtin Testimony, p. 25.

302. "To be a 'zero sum' situation to exist requires that for one entity to gain, another entity must lose. The 'pie' being shared is of fixed size. For someone's piece of the pie to bet bigger, someone else's piece must necessarily get smaller." Compls. Ex. A, Kravtin Testimony, p. 25.

303. Similarly, the term "rivalrous" has a specific meaning in economic literature. Compls. Ex. A, Kravtin Testimony, p. 25.

304. Where a resource is "rival" in consumption, one entity's use of a resource reduces the use by another entity. Conversely, when a resource is "nonrival," one entity's use of a resource does not diminish or preclude the use by another. Compls. Ex. A, Kravtin Testimony, p. 25.

305. Ms. Kravtin testified that, if a "nonrivalrous" or "non-zero sum" situation exists with respect to a pole, then that pole cannot be said to be at "full capacity." "Said more simply, if the addition of another attachment on the pole does not preclude the pole owner's ability to accommodate another attachment or another use, then, by definition, there is available or effective capacity on the pole." Compls. Ex. A, Kravtin Testimony, p. 25.

306. A facility, such as a utility pole, or an airport or parking lot, can be "crowded" or "congested" without being at "full capacity" in the economic sense. Compls. Ex. A, Kravtin Testimony, p. 26.

**e. "Full Capacity" Requires Actual Exclusion Of Others**

307. For a facility such as a utility pole to be at full capacity, there must be a situation where attacher would actually be excluded from the facility because of a true capacity constraint or scarcity with respect to the underlying infrastructure. Compls. Ex. A, Kravtin Testimony, pp. 26-27 and n.25; Kravtin Cross, April 26, 2006 Tr., pp. 1455-56.

308. Such a situation would be analogous to an elevator that had reached its maximum capacity, where, in order for another person to get on the elevator, someone would have to get off. Kravtin Cross, April 26, 2006 Tr., pp. 1456.

309. In contrast, crowding or congestion may have many other causes, including inefficient management practices or poor design. Compls. Ex. A, Kravtin Testimony, p. 26.

310. If a facility would be able to accommodate an additional user if it made certain operational changes or performed functions more efficiently, then, under the principles of economics, it would not be at full capacity. Compls. Ex. A, Kravtin Testimony, p. 26.

### f. *The Osmose Survey Did Not Assess "Full Capacity"*

311. Thus, as Ms. Kravtin explained, because the Osmose pole survey is based upon the concept of "crowding" and not true "full capacity," "the results of the Osmose survey are flawed." Compls. Ex. A, Kravtin Testimony, p. 27.

312. "An inherent economic characteristic of utility pole capacity is that, under normal operating conditions of production, it is not fixed in the short-run. Rather, it is dynamic in nature, and any economically meaningful definition of full capacity for poles will reflect this dynamic state-of-being inherent to poles." Compls. Ex. A, Kravtin Testimony, p. 27.

### g. Pole Capacity Requires Consideration Of Make-Ready

313. Ms. Kravtin testified that, according to Gulf's own statements, additional attachments can (and are) accommodated in the overwhelming majority of instances in the course of its customary operating practices, including pole rearrangements and change-outs. She explained that, in this economic sense, therefore, pole capacity is not static or finite in most cases. Compls. Ex. A, Kravtin Testimony, p. 28 (citing Gulf Response to Second Request No. 8; Kravtin Cross, April 27, 2006 Tr., p. 1521; Gulf Power's Motion to Reconsider Limited Portions of Second Discovery Order (Sept. 30, 2005), p. 1; and Compls. Ex. 87, Forbes Dep., pp. 133-36.

314. "[W]hat makes poles unique is their inherent ability to provide for greater effective capacity in the "shortest" of short-runs. Productive capacity on poles can be harnessed generally as fast as the paperwork can be processed, and a technician can be called down to rearrange attachments or a taller pole can be transferred from inventory." Compls. Ex.

A, Kravtin Testimony, *p. 28; see also Compls. Ex. 87, Forbes Dep., p.p. 106-07 (each* Gulf office has its own pole yard with different size poles).

315. For a resource to be at full capacity necessarily requires that capacity be fixed in a short run sense. Compls. Ex. A, Kravtin Testimony, p. 28.

316. Ms. Kravtin concludes that, to the extent Gulf Power is able through normal and customary business practices (i.e., make-ready, rearrangements and pole changeouts) to harness greater effective pole capacity in the present time frame, it make no sense from an economics perspective to say the pole is at full capacity. Gulf Power's routine practice of accommodating additional attachments of poles is "the antithesis of a 'zero sum' situation." Compls. Ex. A, Kravtin Testimony, pp. 28-29.

317. It is also Gulf Power's practice to require attachers to pay make-ready costs to cure clearance and/or safety violations on existing poles. Compls. Ex. 87, Forbes Dep., pp. 119-20.

**h. Make-Ready Means Attachers Are Not Excluded**

318. When Gulf Power performs routine make-ready work for a new attacher, it does not have to displace, or exclude, an existing attachment. Moreover, where a new attacher pays for a five-foot taller utility pole in a change-out, Gulf Power is then able to accommodate even more attachments after such work has been performed. Compls. Ex. A, Kravtin Testimony, p. 29.

319. Ms. Kravtin opined that it would be a "perverse economic result" under such circumstances to label such a pole as being at "full capacity" and, partly on that basis allow Gulf Power to charge not only the additional attacher but other pre-existing attachers such as Complainants a rate higher than the cable rate (which is already in

excess of marginal cost). "Such an outcome violates the cost-causation principles underlying [47 U.S.C.] Section 224, by requiring pre-existing attachers, who were not the cause agents in any principal respect [for the new attachment], to pay more than they were paying before the pole-change-out or rearrangement." Compls. Ex. A, Kravtin Testimony, p. 29.

**i. Instances Of "Full Capacity" May Exist, But Would Be Limited**

320. Ms. Kravtin addressed Gulf Power's contention that her views would make it impossible to demonstrate "full capacity." First, she testified that there are a number of situations where it will not be possible for the power company to harness greater effective capacity on a pole, such as when they are prevented from doing so for engineering reasons, by federal or local regulations, or by scarcity of resources. Second, Ms. Kravtin explained that, while these kinds of situations where pole change-outs cannot practically occur due to terrain, obstructions, or zoning restrictions may be limited in nature, they are the only true instances where poles can be characterized as zero sum or rivalrous, and thus are the only economically valid cases where a finding of "full capacity" is appropriate. Compls. Ex. A, Kravtin Testimony, p. 30.

321. Ms. Kravtin also rejects Gulf Power's contention that the need to perform make-ready is, in and of itself, proof of a pole's "full capacity." Compls. Ex. A, Kravtin Testimony, pp. 31-32.

322. Instead, Ms. Kravtin explains that "the ability to perform make-ready on a pole provides direct evidence of the nonrivalrous condition of the pole. The economic realities of make-ready and full capacity cannot rationally coexist. It would be logically absurd to have a pole that is able to accommodate additional attachments (through make-ready

work which the lessee is willing to pay for) classified for rate purposes as being at 'full capacity.'" "[T]he condition of full capacity requires a situation of exclusion. By contrast, the practice of make-ready expressly allows for the *inclusion* of additional attachments" (emphasis in original). Compls. Ex. A, Kravtin Testimony, p. 32.

323. As long as make-ready is an option then a pole is not at full capacity. "[M]ake-ready is a common part of how Gulf Power operates. Gulf Power has been, by their own evidence, routinely performing make-ready to accommodate its own uses and that of others. It would have to have a policy of artificially changing the way it provisions poles if it is to satisfy or purport to satisfy full capacity. In an economic sense, the capacity isn't at full capacity or at peak conditions unless the provider is performing efficiently [,] producing that service or good in the most efficient way." Kravtin Cross, April 27, 2006 Tr., p. 1503.

324. "[A]s long as space could be made available through the routine and normal practice of make-ready that Gulf Power has been doing historically, voluntarily on its own to accommodate its own uses and those others, [then] the pole would not be considered to be at full capacity from an economic standpoint." Kravtin Cross, April 27, 2006 Tr., p. 1516.

**j. Gulf Power Uses Make-Ready To Harness Available Capacity**

325. "From an economic perspective, what is relevant is that such make-ready work has been and continues to be routinely performed by Gulf Power and that through this normal and customary process, pole capacity, as a general proposition, is readily available to accommodate an additional attachment on the pole. Whether Gulf Power remains willing to perform make-ready work on a non-discriminatory basis in response to a changing legal and/or regulatory incentive structure has nothing to do with the underlying economics of the situation and the fact that Gulf Power is able to perform make-ready as

a means of accessing readily available pole capacity." Compls. Ex. A, Kravtin Testimony, p. 33 (emphasis in original).

326. It seemed Gulf Power was more interested in using the change in the law providing for mandatory access to charge exorbitant rates although operationally it appeared nothing had changed and the FCC had found that the FCC Cable Formula provided more than adequate just compensation for whatever legal change the 1996 Act caused. Kravtin Cross, April 27, 2006 Tr., p. 1510-14.

327. Ms. Kravtin concludes that, "it would be decidedly perverse from an economics and public policy standpoint to reward Gulf Power for refusing to permit make-ready work performed in the normal course of business operations (and for which the lessee is willing to pay) for the express purpose of justifying a higher 'just compensation' rate to preexisting attachments." Compls. Ex. A, Kravtin Testimony, p. 33. Indeed, it would not be truly economic, and at the same time it would be discriminatory, to deny access by artificially restricting make-ready. Kravtin Cross, April 27, 2006 Tr., p. 1504. "If Gulf was in a position to not manage its pole plant or not perform these routine procedures for the sole purpose of justifying a higher rate, that would not make economic sense to me." *Id.*, p. 1518.

**k. "Lost Opportunity" Requires Actual Loss**

328. Ms. Kravtin also provided testimony relating to the second part of the Eleventh Circuit's *Alabama Power* test – the element of "lost opportunity" encompassed by either a showing of "another buyer of the space waiting in the wings" or an instance where the power company itself demonstrates a "higher-valued use" within its own operations. Compls. Ex. A, Kravtin Testimony, pp. 34-47.

329. *Ms. Kravtin explains that, to make economic sense, a "lost opportunity" must be real and* not "hypothetical." She testified, "[i]t makes no sense to talk in terms of a hypothetical bidder or uses of the pole. To prove 'lost opportunity' in an economically meaningful way, the power company must be able to show – in a quantifiable and verifiable manner – that it has suffered an actual loss in terms of foregone revenue or cost consequence as a result of the existence of full capacity on a pole. The power company must be able to demonstrate it is *financially worse off* as a consequence of a cable attacher paying for pole space under the FCC regime (i.e., combination of FCC formula rent plus make-ready)." Compls. Ex. A, Kravtin Testimony, p. 35 (emphasis in original); *see* Kravtin Cross, April 27, 2006 Tr., p. 1524.

330. "If all attachers or uses were in fact accommodated or capable of accommodation through normal business practices, and in accordance with the FCC rules, third party attachers pay Gulf Power for any costs it incurred to make that accommodation and [pay] rental fees on top of those make-ready costs, there simply is no tangible loss to consider." Compls. Ex. A, Kravtin Testimony, p. 35.

331. Thus, Ms. Kravtin explains that if Gulf can accommodate a potential buyer either immediately or through its make-ready procedures, then that buyer of space cannot be characterized as "waiting in the wings." Compls. Ex. A, Kravtin Testimony, pp. 35-36.

332. "Similarly, the demonstration of a higher-valued use must also be based on objective criteria and the demonstration of a bona fide higher-valued use that was precluded because there was no available pole capacity. Otherwise, it would be trivial for the utility to say it valued its own use or use by an affiliate (current or potential) higher than that of any other potential use by non-affiliated entities, since by simply declaring so would

result in the utility being able to charge *preexisting occupants [such as Complainants]* a higher pole rental rate on virtually any pole." Compls. Ex. A, Kravtin Testimony, p. 36.

### I. Gulf Power Presented No Proof Of Loss

333. Ms. Kravtin concludes, "In very real economic terms, there would be a tangible loss only in those instances where an actual attacher or use was precluded, and Gulf Power was thereby deprived of additional revenues it could otherwise have received had pole space been available to accommodate another attachment." Compls. Ex. A, Kravtin Testimony, p. 36.

334. Ms. Kravtin testified that from her review of sources in this case, Gulf Power had "not presented any evidence to suggest it has not been able to accommodate all entities seeking to attach to its poles because of the presence of a cable company . . . ." Compls. Ex. A, Kravtin Testimony, p. 42.

335. Ms. Kravtin describes Gulf Power's arguments regarding the demonstration of lost opportunity as being based upon "the notion that the utility has been precluded from extracting additional 'value' from cable companies and the additional revenues Gulf Power has foregone by not being able to charge the cable companies more money for pole space." Compls. Ex. A, Kravtin Testimony, p. 38.

336. Ms. Kravtin rejects Gulf Power's claim that it has suffered a "lost opportunity" by not being able to charge what it calls a "free market" annual pole rate. She testifies that, "[T]he economic criteria for determining existence of a subsidy is the relationship between the rate charged and the underlying economic cost. It is not, as Gulf Power witness [Ben] Bowen incorrectly asserts, the difference between the regulated rate and a higher alternative rate the power company believes it could charge absent regulation.

Market rates can serve as proxies to costs only when conditions of effective competition exist, and market forces can be relied on to bring rates down to levels approximating marginal costs. Where competitive market conditions do not exist (as is the case with pole space), there will be no such competitive pressures. Under such conditions, the 'free market' rate degenerates into an unregulated monopoly rate and will tend to incorporate supra-normal monopoly profit." Compls. Ex. A, Kravtin Testimony, pp. 38-39.

337. "[T]he definition of lost opportunity for purposes of satisfying the [Eleventh Circuit's] APCo test is not appropriately based on what amounts to a monopolist's perceived inadequacy of the regulated rate in satiating its desire to charge a higher price (and one that is in excess of a competitive market rate)." Compls. Ex. A, Kravtin Testimony, p. 40.

338. Ms. Kravtin concludes, "In the absence of competitive market conditions, the FCC method of charging cable companies for pole attachments (i.e., make-ready fees designed to cover the marginal costs of the pole attachment and a rental fee calculated from an allocation of ongoing direct costs based on the cable company's use of the pole) most closely approximates a truly competitive market rate and one that is consistent with the cost causation principles codified in Section 224." Compls. Ex. A, Kravtin Testimony, p. 41.

339. Ms. Kravtin testifies that the concepts of full capacity and lost opportunity must be "based on objective, verifiable, and non-discriminatory standards." Compls. Ex. A, Kravtin Testimony, p. 44.

340. Under principles of economic cost causation, "[t]he power company should be precluded from benefiting financially from visually observed 'full' poles caused by code violations,

inefficiencies, and/or other inferior pole practices that are inherently correctable, and whose correction results in available capacity for additional attachments." Compls. Ex. A, Kravtin Testimony, pp. 44-45.

341. More generally, explains Ms. Kravtin, "[i]f there are changes that can be made to the way that [a] provider is provisioning the service or running its operations, then from an economic sense, you can't say that it's really full, because there are these ordinary changes that can be made that could make more productive use of that infrastructure without actually altering the fundamental condition of supply." Kravtin Cross, April 27, 2006 Tr., p. 1503.

342. In sum, to show "full capacity," "all available pole capacity, including that normally accessible through routine maintenance, rearrangements, pole change-outs, and implementation of other efficient utilization 'best practices,' is appropriately taken into account." Compls. Ex. A, Kravtin Testimony, p. 45.

343. To show "lost opportunity," "Gulf Power should be required to identify an actual buyer or use that has been excluded from the pole, for each pole for which Gulf Power seeks additional compensation, and to provide the kind of valid economic analyses described below in support of its claim." Compls. Ex. A, Kravtin Testimony, p. 45.

344. Ms. Kravtin explains that Gulf Power could satisfy these showings in situations in which it "demonstrate both (1) make-ready or pole change-out is not possible for a given pole (again due to terrain, obstructions, or zoning restrictions) based on valid engineering considerations and adherence to industry best practices of pole utilization; and (2) that the utility has experienced a tangible lost opportunity as a result, in the form of actual

foregone revenues or actual foreclosed opportunity for that pole based on valid economic analysis." Compls. Ex. A, Kravtin Testimony, pp. 45-46.

**m. Proof Of Loss Would Require Gulf To Provide Specific Evidence**

345. If Gulf Power were to mount an effort to present such proof, it would have to submit "the kind of net present value analysis common in business case planning and the government franchise application review process. The required analysis would provide quantifiable and verifiable estimation of the differential between the revenues Gulf Power would have received from the presently attached cable company (who would necessarily have to be replaced by the new attachment to satisfy the full capacity prong of the APCo test) including rental rates and make-ready charges, as compared with the revenues Gulf Power could reasonably expect to receive over some reasonable planning period (properly discounted to a present value basis) either from the new attacher or from a higher value use of its own. To be valid, the economic analysis demonstrating lost opportunity cannot be based on hypothetical assumptions. Rather, it must be based on real world factors and considerations that realistically compare the net revenue streams Gulf Power could reasonably expect to receive from the new attacher vis-à-vis the existing cable operator." Compls. Ex. A, Kravtin Testimony, p. 46.

346. Such real world factors would include "whether the new attacher has been awarded a franchise to provide service, and if so, the length of its franchise as compared with the existing cable attacher; whether the new attacher has the technical, managerial, and financial resources to remain a viable going concern capable of paying applicable rental fees and maintaining its attachments up to code levels as compared with the existing cable attacher; and whether the new attacher would pay make-ready charges at the level

of the existing cable company." Compls. Ex. A, Kravtin Testimony, p. 47; Kravtin Cross, April 27, 2006 Tr., pp. 1525-26.

**n. Gulf Power Presented No Such Specific Evidence Of Loss**

347. Ms. Kravtin testifies that, from her review of the testimony and documents in this case, Gulf Power has not presented the sort of evidentiary showings needed for a comparative economic analysis. In particular, her testimony is that Gulf Power has not shown that "there was an actual buyer waiting the wings or higher-valued use of its own [that was] excluded from a pole due to lack of available space . . . ." Compls. Ex. A, Kravtin Testimony, p. 50; Kravtin Re-direct, April 27, 2006 Tr., p. 1531.

348. Ms. Kravtin also explained that a cable operator's ability in some cases to build new additions to its system underground is not relevant to a showing that Gulf Power has met the economic conditions of full capacity and lost opportunity "[b]ecause the cost of undergrounding is a cost to the cable operator. It's not a cost or foregone opportunity for the power company . . . ." Kravtin Re-direct, April 27, 2006 Tr., pp. 1540-41.

**o. Gulf Power's Extrapolations Are Unfounded**

349. In addition, in Ms. Kravtin's opinion, Gulf Power's reliance upon general assertions and extrapolations are not "sufficient to satisfy the 'economic reality' standard[s] of full capacity and lost opportunity." Compls. Ex. A, Kravtin Testimony, p. 50.

350. In response to Gulf Power's questioning that Gulf Power has lost an "opportunity" to rent the space actually occupied by a cable operator Complainant to another, Ms. Kravtin clarified that Gulf has not lost anything because the poles are dynamic (Kravtin Cross, April 27, 2006 Tr., pp. 1521-22) and then clarified that "Gulf is being compensated for that space through the regulated rate." Kravtin Re-direct, April 27, 2006 Tr., pp. 1529-30.

Moreover, Ms. Kravtin made clear that she had "not seen any evidence that Gulf had not *been able to accommodate any other user or use due to the presence of a cable operator.*" Kravtin Re-direct, April 27, 2006 Tr., pp. 1531.

351. Further, Ms. Kravtin testified that Gulf Power's attempt to extrapolate from the findings of its Osmose pole survey were not valid, because its claims "do not substantively address the statistical validity of Gulf Power's sampling methodology and/or the likelihood that the result of that sampling accurately represent the entire population of attachers across those serving areas with a level of precision that would satisfy the APCo test. Gulf Power's sweeping extrapolation and generalizations fail to acknowledge the highly-localized differences in terrain, obstructions, zoning, and attaching entities across Gulf Power's various service areas." Compls. Ex. A, Kravtin Testimony, p. 54. Accord: Bowen Cross, April 25, 2006 Tr., pp. 1032-34; Bowen Direct Testimony, p. 32.

352. Ms. Kravtin concludes that Gulf Power's claim that nearly 74 percent of its poles are "crowded" is not accurate or pertinent, both because of the limited sample and the fact that Osmose classified poles as crowded without taking account of make-ready and did not actually attempt to identify poles that could, consistent with economic principles, be said to be at "full capacity." Compls. Ex. A, Kravtin Testimony, p. 55-56.

**p. "Replacement Cost" Is Inappropriate For Calculating Pole Rates**

353. Ms. Kravtin also explained that Gulf Power's "replacement cost" methodology for calculating its annual pole attachment rates is faulty. Compls. Ex. A, Kravtin Testimony, pp. 57-67.

354. First, Ms. Kravtin concluded that Gulf Power's expert, Roger Spain, incorrectly assumes *that there is a "free market value" for space on utility poles.* Compls. Ex. A, Kravtin Testimony, p. 59.

355. Ms. Kravtin points out that the Commission has previously concluded that it is inappropriate to use "replacement costs" to reach a "market value" for pole attachments and that, indeed, that "[t]here are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments." Compls. Ex. A, Kravtin Testimony, pp. 59-60 (*citing Alabama Power Commission Order*, ¶¶ 53, 55).

356. In Ms. Kravtin's expert opinion, "fair market value" is unsuitable for valuing pole attachments because "cable operators and utilities are not in an equal position to 'bargain' over rents. Utilities are owners, whereas cable operators are mere lessees and lack rights of ownership, planning, and control. Plain and simply, there is no 'free market' for pole space. Conditions required for open or fair market valuations do not therefore exist." Compls. Ex. A, Kravtin Testimony, pp. 59-60.

357. With respect to Gulf Power's contention that a few entities that attach to its facilities pay the rate of $40.60, see Gulf Power Ex. 60, Ms. Kravtin explained that such payments are obtained under "compulsion." She testified that "such rates are not valid proxies for free market value." It is not at all unusual for firms early in their life cycles to accept high rates for access to essential facilities, even though those rates may not be sustainable in the long run, in order to gain entry and establish a foothold in a market. However, such transactions, which are consummated 'under compulsion to buy,' cannot be relied on as representative free market benchmarks." Compls. Ex. A, Kravtin Testimony, p. 60.

358. In addition, "the higher rental rates embodied in various joint owner agreements between electric and telephone utilities are not representative of 'free market' benchmarks either, because of the variable and non-replicable terms and conditions surrounding ownership rights, planning and control oversight, and emphasis on parity." Ms. Kravtin states that, in fact, from her examination of Gulf Power's agreements with BellSouth and Sprint, the rates paid by those telecommunications carriers actually provide for lower rates after normalization for the greater space requirements of the telecom provider than the replacement cost rates sought by Gulf Power from the Complainants. Compls. Ex. A, Kravtin Testimony, pp. 60-61.

359. Ms. Kravtin testified that Gulf Power's "replacement" cost has no relation to the actual costs of Gulf Power poles to which cable companies are attached. Compls. Ex. A, Kravtin Testimony, pp. 18-19.

360. Allowing a utility to base its pole rental charges on the hypothetical cost of replacing all the poles to which attachers are attached, or on the costs avoided by an attacher of not having to build a stand-alone pole network, would permit the utility to exploit its monopoly ownership of the poles and to extract "value" from the attacher well in excess of the actual cost of a pole attachment. Compls. Ex. A, Kravtin Testimony, p. 10.

361. As owner of the pole, the utility has many discretionary powers. A cable company has to apply to use each pole, and cannot install its facilities until its permits are approved. Compls. Ex. A, Kravtin Testimony, p. 11.

362. In cases where rearrangements or a pole change-out are required to accommodate a new attachment, the attacher must agree to pay all make-ready costs (as determined

unilaterally by the utility) before the permit is issued. Compls. Ex. A, Kravtin Testimony, p. 11.

363. A utility decides when and where to build out its pole system, and an attacher, such as a cable company, must adjust its plans accordingly. Compls. Ex. A, Kravtin Testimony, p. 11.

364. Ms. Kravtin testified that, contrary to the assertions of Roger Spain, a pole attachment does not convey to attacher an entire "elevated corridor." Any such "corridor" is retained by the utility as owner of the pole network. Compls. Ex. A, Kravtin Testimony, pp. 11-12.

365. Ms. Kravtin also testified that, contrary to the assertions of Roger Spain, ownership of its poles does not present a significant "risk of loss," because the number of new pole additions each year is small relative to the entire existing base of poles; because Gulf Power benefits from reciprocal ownership arrangements with telephone companies; because Gulf Power's cost of ownership and maintenance of poles has been built into its rate base as approved by the state utility commission; and because any costs incurred by Gulf Power that are caused by attachers that would not otherwise be incurred by the utility are directly reimbursed through make-ready charges. Compls. Ex. A, Kravtin Testimony, p. 13.

366. Ms. Kravtin testified that "replacement cost" methodology is not appropriate for valuing poles either from the perspective of the utility network as a whole or of an individual pole. Because entire pole systems cannot be reproduced due to zoning, environmental, financial, and other constraints, "[i]t therefore makes little economic sense to use replacement costs as a proxy for an attacher's hypothetical stand-alone network since

such a network practically cannot get built." And, at the level of the individual poles, because "the majority of poles are not being replaced in any given year and enjoy long economic lives," replacement costs "are not relevant." Ms. Kravtin concludes, "For the relatively small percentage of poles that are replaced" and "that would not be replaced but for third party attachers, the costs are recoverable through make-ready charges, set unilaterally by the utility." Compls. Ex. A, Kravtin Testimony, pp. 62-64.

367. More generally, Ms. Kravtin's testimony makes clear that Gulf Power's proposed replacement costs have "no relevant economic connection to the fundamental conditions of supply present on an individual pole." Instead, Gulf Power's replacement cost methodology is based upon its desire, for every pole attachment of Complainants, to "extract more value from cable attachers" – whether it is described as "the value of the hypothetical stand-alone construction of a pole network or the avoided cost of going underground, the value of exclusion, the value of the elevated corridor, and the 'fair market value' . . . ." Compls. Ex. A, Kravtin Testimony, pp. 65, 66.

368. Ms. Kravtin testified that, in order to meet the economic conditions of both "full capacity" and "lost opportunity," Gulf Power would have to have identified poles containing Complainants' attachments "that would not have been replaced but for an additional attachment and as to which Gulf Power had not already been reimbursed through make-ready charges or rental rates paid by the additional attacher."

369. From her review of Gulf Power's methodology, Ms. Kravtin concludes, "Gulf Power's replacement cost analysis contains no calculations" of the sort required to satisfy the *Alabama Power* test. Compls. Ex. A, Kravtin Testimony, p. 66.