

1 see the ground on this, but what we do see is the top
2 of the clearance above ground.

3 The next space up, the blue space, is the
4 space that per our joint-use agreements with ILECs is
5 contracted to the ILECs. And on a 40-foot pole, that
6 is going to be three feet.

7 The top space, the red, is what we call
8 electric supply space. And under the joint use
9 agreement, that is 8-1/2 feet.

10 Well, if you do the math, and you
11 incorporate the communication workers' safety zone,
12 which is represented in this diagram by yellow, there
13 is no space on the pole. There is nothing left for
14 the cable company to take.

15 So what ends up happening is that when a
16 cable company gets on one of Gulf Power's poles, based
17 on the contracted space allocations with our joint
18 user, they are compressing Gulf Power's supply space.
19 And so what you see here, on this diagram, represented
20 by red, rather than the 8-1/2 feet that we've
21 contracted for with the phone company, it's 7-1/2
22 feet. Because the light blue on this monitor is where

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1 the cable company goes.

2 Now there are a lot of rules that relate
3 to how and when we can set space aside. But one fact
4 is beyond dispute, and that is, in our contracts with
5 the ILECs - by the way, this is an unregulated
6 relationship - in our contract with ILECs there is
7 contracted space. On a 40, we get 8-1/2, they get 3
8 feet. And of course you have to have the
9 communication workers' safety zone.

10 JUDGE SIPPEL:

11 Let me ask you this. The top - the red on the top,
12 the top lines are red, those are the utility lines; is
13 that right?

14 MR. LANGLEY: Those are, those are power
15 lines.

16 JUDGE SIPPEL: And what about the blue line
17 underneath that? Is that the telephone line?

18 MR. LANGLEY: The blue line is a neutral.

19 JUDGE SIPPEL: What does that mean?

20 MR. LANGLEY: A neutral is - there are
21 several different wires on an electric utility pole,
22 and Mike Dunn is going to explain this in more detail.

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1 But for example up here what we have is
2 three phases on the top, and then you have to have
3 this neutral down there for electric reasons. And
4 frankly, the electrical properties are a little bit
5 beyond me. But that's something that Mike Dunn is
6 going to discuss.

7 Mike Dunn is somebody who has 30 years
8 plus experience with Gulf Power working in joint use
9 and engineering.

10 JUDGE SIPPEL: Okay, okay, let's just pass
11 off on that then. Let's go.

12 MR. LANGLEY: Okay, to go ahead and build
13 the pole, we want to show you a little bit about how
14 this thing fills up. So we started out with our three
15 phase and our neutral. Then we pull some other lines
16 in. We put a guywire down for support. That's the
17 one heading down off the pole towards the ground.

18 And then next we put a transformers on
19 there. Transformers of course are how we step down
20 voltage to be able to serve our ratepayers.

21 And then the next thing that you see on
22 the pole, Your Honor, in the blue space, is the phone

1 company line. So the phone company gets on the pole,
2 and in this particular example, they're attaching in
3 the middle of their space, though they often attach at
4 the top to ensure that they maintain the proper mid-
5 span clearance.

6 JUDGE SIPPEL: That's the dark blue space?

7 MR. LANGLEY: That's correct, the dark blue
8 space.

9 And then in the next slide, what you have
10 is the cable company. So they are attached right at
11 the very top of the dark blue space, at the bottom of
12 the light blue space.

13 And then the next line is, the one that
14 angles in from the left side of the screen, attaches
15 to the pole in the light blue, and then comes back
16 out. And this particular example is KMC, which is a
17 telecom, a CLEC.

18 Next.

19 We've added another transformer. Here is
20 a street light. And all of a sudden, Your Honor, we
21 have a very full pole.

22 And this is not at all out of the norm.

1 This is a fairly standard arrangement. Do you still
2 have the rotation graphic?

3 What we're doing here, so you understand
4 that we're dealing with a finite piece of property
5 that is used up very quickly, we're showing you all
6 angles of the pole.

7 JUDGE SIPPEL: Well, that pole, by the time
8 you put the street light on it, is that pole crowded
9 under your definition and your approach?

10 MR. LANGLEY: That pole was crowded before
11 the street light went on, and in fact that pole is
12 actually under that setup would not only be crowded,
13 as in it can't host an additional attacher, but it's
14 in violation. There would need to be make-ready done
15 on this pole just to bring it into compliance with the
16 existing attachers.

17 That's a good segue into how we propose to
18 define crowding on a pole-by-pole basis if we are
19 required to do so.

20 JUDGE SIPPEL: But if I understand
21 correctly, if the make-ready is going to be done to
22 accommodate the cable hookup, then the cable company

1 has to pay for the make-ready.

2 MR. LANGLEY: That's correct.

3 So how we propose to define crowding on a
4 pole-by-pole basis is, any pole that would require
5 make-ready to host an additional attachment.

6 This is another way of saying that this
7 pole, if you have to make room for another attacher on
8 this pole, that pole is crowded. And we propose to
9 quantify that using the clearance requirements in the
10 National Electric Safety Code, which you will hear a
11 lot of people calling the NESC, and Gulf Power's
12 specs.

13 These are the criteria, the precise
14 criteria, that Osmose went out to collect in the
15 field. These are the criteria that we are proposing
16 the court employs to define crowding.

17 And we think this is the right way to do
18 it for a couple of reasons: It's simple; it's
19 practical; and the criteria are unobjectionable.
20 There's not a scenario out in the field where the
21 parties disagree as to whether make-ready has to
22 occur.

1 You are going to hear that from Ben Bowen.
2 You are going to hear that or read that in the
3 designations on the cable company's witnesses that we
4 have submitted.

5 There just isn't disagreement about
6 whether you have to do make ready.

7 Now, Mr. Harrelson, who is in this
8 courtroom right now, takes aim at some of Gulf Power's
9 specifications; says that they're outdated, these are
10 not specifications that other people in the industry
11 use.

12 But the complainant's own witnesses belie
13 this testimony.

14 Katy, pull up Mr. O'Ceallaigh's testimony.

15 I asked Mr. O'Ceallaigh, who is a
16 representative of Cox Cable, do you use Gulf
17 construction specs on other poles? On poles owned by
18 entities other than Gulf Power? Yes, this is the
19 bible for pole attachments.

20 And so Mr. Harrelson can say what he wants
21 about Gulf Power specs, but the complainants have
22 said, we use these. These are consistent with sound

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1 engineering practices.

2 Mr. O'Ceallaigh even went so far as to
3 call it the bible for pole attachments.

4 The complainants' proposed definition of
5 crowding on the other hand is not simple, and it's not
6 practical. What they say is, well, a pole is not
7 crowded until there is some physical limitation that
8 would prohibit make-ready. For example, if there was
9 subsurface rock that prevented you from setting a 60-
10 foot pole because of the required underground portion.

11 Or if there was a zoning ordinance that
12 prevented you from putting in a pole that was taller
13 than 50 feet, or if the pole also happened to house
14 transmission, and you couldn't go up any further.

15 But that would read out of the Alabama
16 Power case this whole concept of crowding. And you
17 can't read that part out.

18 They're also talking about some future
19 pole, some future condition - not the current
20 conditions or the current pole. And in at least
21 several places in the Alabama Power decision, the
22 court specifically uses the word, current.

1 Nowhere in the record did APCO allege that
2 its network of poles is currently crowded. So we're
3 talking about current conditions.

4 Mr. Harrelson also says of Gulf Power's
5 proposed definition that it is neither realistic nor
6 workable.

7 But Gulf's definition is practical; is
8 easy to apply; and it brings meaning to the case that
9 is controlling.

10 Complainants', on the other hand, reads
11 crowding out of the opinion.

12 Well, once we show that our poles are
13 crowded, which we agree that we have to do. We may
14 disagree on exactly what type of proof is required.
15 But once we get there, and we've shown crowding, which
16 the Alabama Power v. FCC court equated with rivalrous
17 property, then we have to talk about price.

18 And not surprisingly, the parties have
19 very different views as to how this works. Gulf Power
20 proposes something that is largely consistent with the
21 bureaus and the commissions' existing practice,
22 something that is simple, expeditious and consistent

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1 with takings jurisprudence.

2 Now we would argue that the commission's
3 current formula is not consistent with takings
4 jurisprudence, but we agree that it is simple and
5 expeditious, and we want to keep those things. We
6 just wanted to make a couple of adjustments in the
7 basic formula, and arrive at a result that is more
8 consistent with takings law.

9 When we're talking about takings, we're
10 talking about fair market value. That is the
11 benchmark.

12 The top quote that I've just pulled up on
13 the screen for the court and the parties - we're
14 having a minor technical difficulty - is from the
15 recent U.S. Supreme Court case, the Palazzolo case,
16 which says when a taking has occurred under accepted
17 condemnation principles, the owners' damages will be
18 based on the property's fair market value.

19 The APCO court said fair market value is
20 established by determining what a willing buyer - in
21 this case, the cable companies - would pay in cash to
22 a willing seller -

1 MR. SEIVER: I'm sorry, the APCO court said
2 that?

3 MR. LANGLEY: Yes. I'm talking about the
4 bottom quote right here. And I've given the cite
5 here.

6 What a willing buyer would pay in cash to
7 a willing seller at the time of the taking.

8 Well, the first place you go is the
9 market. What are the other transactions out there?
10 And we intend during the course of this proceeding to
11 prove to Your Honor that there is in fact an
12 unregulated market.

13 We're not going to stand up and say, hey,
14 it's a vibrant market with all sorts of transactions
15 out there. But we're going to show you that there are
16 a healthy number of unregulated transactions out there
17 which bear on the market value of the attachments that
18 complainants make to our poles, including
19 complainants' own agreements with an unregulated
20 electric cooperative.

21 Cooperatives are a little different than
22 investor-owned utilities like Gulf Power. They are

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1 not subject to the pole attachment act, so the cable
2 companies actually have to negotiate with the coops.
3 And when they do, they arrive at rates that are a good
4 bit higher than the cable rate.

5 For example right now the complainant
6 cable companies are paying Choctawhatchee Electric
7 Cooperative, which we'll call CHELCO, \$17.50 per pole.
8 In 2008 they roll into paying them \$20 a pole. Yet
9 what they've been paying us is something in the range
10 of \$6 a pole for the same exact attachment in the same
11 exact space.

12 We also have agreements that we have with
13 unregulated entities that show this unregulated
14 market. We have attachers who are paying in excess of
15 \$40 a pole who own substantial numbers of attachments.

16 But the complainants say, to the fair
17 market standard - no, that's not the standard. It's
18 loss to the owner, as if loss to the owner is somehow
19 inconsistent with fair market value.

20 But if you are going to talk about the
21 loss to the owner standard, and I think we should -
22 we're more than willing to do that - the first

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1 question we have to ask is, what has Gulf Power lost?

2 And the answer to that question is pole
3 space - something you can touch, something you can put
4 your hand on - that space, once the cable company
5 attaches, is gone.

6 We've identified what Gulf Power has lost.
7 So how do you put a price tag on that? And then we
8 get back to fair market value. We get back to
9 evidence of the unregulated market. And we get back
10 to fair market value proxies. Because if they don't
11 like our sales comps, if our - if the unregulated
12 market is not vibrant enough to support a fair market
13 value, then you look at something else. In this case,
14 Roger Spain, an accountant, a certified valuation
15 analyst, will testify that because of the nature of
16 this property, if you're looking at a fair market
17 value proxy, the best one to use is a replacement cost
18 methodology. And that's exactly what we're proposing
19 here.

20 The replacement cost methodology follows
21 the same basic formula as the cable formula:
22 investment times carrying charge times space

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1 allocation factor equal rents.

2 Now we think the inputs should be
3 different, and we will explain during this hearing
4 where it should be different, and why it should be
5 different, and what those amounts are.

6 One of the other arguments that the
7 complainants will make in opposition to our proposed
8 replacement cost formula is that it accounts for the
9 value to the attacher.

10 In their trial brief they must have used
11 the words, value to the attacher, 50 times. I didn't
12 count them, because I quit counting them. But this
13 neglects the whole basis of fair market value.

14 Fair market value is determined based on
15 what a willing buyer would pay to a willing seller.
16 It accounts for both sides of the transaction.

17 So for the complainants to argue that,
18 hey, somehow you can't account for value to the
19 attacher, that's not even in play in a just
20 compensation determination, is a complete misreading
21 of the law.

22 Fair market value, or value generally,

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1 considers both sides of the transaction, and we make
2 no apologies for the fact that that is exactly what
3 our replacement cost methodology does.

4 But moreover, this is offered as a proxy.
5 We're not here saying, this is the precise charge that
6 it must be. What we're saying is, hey, if you don't
7 like our evidence in the unregulated market, and you
8 don't even like the agreements that you've reached
9 with unregulated electric utilities, then let's go to
10 a proxy. And that's what this is. It's a proxy. And
11 while there's science and math in the formula, it
12 really should serve as a guide for where this thing
13 needs to land.

14 Mike Dunn, Ben Bowen, Terry Davis will all
15 explain the basis behind the replacement cost formula;
16 the inputs into that formula; and Terry Davis in
17 particular will talk about the math behind the formula
18 and some of the accounting.

19 Importantly what we're proposing to do
20 here is not based on any math that is subject to
21 question. This is actual previous-used data, so they
22 have access to it. It's something we have to follow

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1 at FERC. There are ways that they can verify this.

2 So this is not something that is subject
3 to a whole lot of disagreement in terms of what is
4 being put into the formula.

5 This agreement, of course, is on whether
6 the formula should apply.

7 Further, and this is perhaps the most
8 alarming part of the argument made by the
9 complainants, they say, well, the replacement cost
10 methodology doesn't matter; fair market value doesn't
11 matter; we interpret Alabama Power v. FCC to require
12 you, Gulf Power, to show us, the buyer, that you
13 excluded - they want it on this particular pole to
14 which we're attached, show us the buyer. Point to him
15 waiting in the wings, wherever those wings are. Point
16 to him, but not just point to him, tell me what he was
17 going to pay you, how long he was going to pay you
18 that amount for; and also show us that this person
19 waiting in the wings has the financial wherewithal to
20 meet the obligations of the contract that they didn't
21 sign - completely unworkable, completely unrealistic.

22 This would be akin to, for example, the

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1 government coming and taking my house. They wanted to
2 do something different with it; they thought it should
3 be a government-run bed and breakfast. And they say,
4 Mr. Langley, we will pay you for your house what you
5 paid five years ago to buy it, unless - and we'll pay
6 your cost of moving - unless you can show us in some
7 limited period of time that there is someone else who
8 wants to pay a higher price for your property.

9 But you can't just show us this person
10 that was willing to pay a higher price - you also have
11 to show that they were approved for the loan to buy
12 the house that they couldn't buy because we're taking
13 it. And that just cannot be the law, Your Honor. But
14 that's exactly what the complainants and their hired
15 experts are proposing in this case.

16 JUDGE SIPPEL: Well, what about getting
17 back to the Eleventh Circuit. The Eleventh Circuit
18 did talk about this evidence of this wings buyer,
19 didn't they?

20 MR. LANGLEY: They did.

21 JUDGE SIPPEL: What did they mean by it?
22 Did they mean it differently than the way you're

1 articulating it?

2 MR. LANGLEY: Yes, they meant it
3 differently, Your Honor. They could not have meant
4 the actual buyer waiting in the wings. That is an
5 interpretation of the test which would render it moot.
6 Because Gulf Power can't go out there and show you on
7 a pole-by-pole basis, hey, here is someone for this
8 particular pole at Barrancas and Pace Boulevard that
9 wanted to pay us \$50 to get on this pole, and they
10 would have signed this contract, and they would have
11 paid this amount, and here is the due diligence we've
12 done on it. That's can't be the case. The commission
13 can't work with that.

14 JUDGE SIPPEL: Okay, but your point is not
15 that the Eleventh Circuit was wrong in using this
16 standard of a winged buyer, you're saying that the
17 interpretation of that holding that the complainants
18 are putting on the Eleventh Circuit decision is wrong?

19 MR. LANGLEY: I'm saying a little bit of
20 both. Definitely the second. We do contend that the
21 standard is bad, and if there is a hereafter in this
22 case, that is certainly an issue we will raise.

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1 But in this case we are arguing exactly
2 the second point that you made, which is the spin that
3 the complainants are putting on Alabama Power v. FCC
4 test, or case, is not what the Eleventh Circuit meant.

5 Importantly, the Eleventh Circuit's
6 decision was based on a hypothetical

7 JUDGE SIPPEL: Well, it sounds like what
8 you're saying is, the Eleventh Circuit had it wrong,
9 but even worse, in the context in which they had it
10 wrong, that the complainants have it even more wrong.

11 MR. LANGLEY: We're saying if - if the
12 Eleventh Circuit had it right, the complainants have
13 the interpretation wrong.

14 JUDGE SIPPEL: If they had it right.

15 MR. LANGLEY: If they had it right.

16 JUDGE SIPPEL: But you're really saying
17 that they had it wrong.

18 MR. LANGLEY: We are, but we are not going
19 to argue that in this proceeding, Your Honor.

20 I said in the beginning that this was the
21 tale of two cases, and it really is. Gulf Power is
22 trying the case based on real facts, real poles, and

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1 a meaningful application of the law - something that
2 will read a valid purpose into the case; something
3 that the commission and the bureau can work with.

4 The complainants, on the other hand, are
5 basing their case on hired witnesses, contrived
6 positions, and an interpretation of the law which
7 renders it completely meaningless.

8 The hearing designation order, which
9 kicked off this whole hearing proceeding, set as the
10 question to guide the proceeding whether Gulf Power is
11 entitled to receive compensation above marginal cost
12 for any attachments to its poles belonging to the
13 cable operator, and if so, the amount of such
14 compensation. Really two questions embedded there:
15 one, are we entitled to more; second, what is the
16 amount.

17 And through the evidence that we intend to
18 put on we will show that the answer to the first
19 question is, yes, we are entitled to more, and that
20 the answer to the second question is that the amount
21 should be guided by fair market value or a
22 recognizable proxy.

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1 Thank you.

2 JUDGE SIPPEL: Okay. You're going to wait
3 until you put your case on, Mr. Seiver, for your
4 opening statement, correct?

5 MR. SEIVER: No, Your Honor, we were going
6 to just do a short opening now.

7 JUDGE SIPPEL: Want to do it now?

8 MR. SEIVER: If you want us to wait.

9 JUDGE SIPPEL: It's up to you.

10 MR. SEIVER: Mr. Cook is prepared to go.
11 I think it would help to have the counterpoint at this
12 point, Your Honor.

13 JUDGE SIPPEL: Okay. I don't want you to
14 cut too much into Gulf Power's time, that's all.

15 Go ahead, please.

16 OPENING STATEMENT ON BEHALF OF COMPLAINANTS

17 MR. COOK: Good morning, and may it please
18 the court:

19 Despite the reams of paper, exhibits,
20 deposition testimony and experts, this is a fairly
21 simple case.

22 There is a standard that was the basis for

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1 the hearing designation order in this case that
2 started this proceeding, and it was the decision by
3 the Eleventh Circuit in the Alabama Power case as it
4 dismissed the petition for review from the May 2001
5 ruling of the commission.

6 Now I want to get right into what Alabama
7 Power said, but first I have to correct a
8 misimpression that Mr. Langley just left you with,
9 which is that the rationale or reasoning of the
10 commission's ruling, which is Tab 48 of our exhibits,
11 was somehow rejected.

12 What happened in the commission's ruling
13 was that the commission had two different parts of its
14 ruling.

15 First, it said, you know even under the
16 Florida Power analysis that the Supreme Court used in
17 1987 of regulatory ratemaking, the - your case,
18 Alabama Power, as based on replacement costs, as based
19 on fair market value, as based on something called the
20 income method, just doesn't cut the mustard, because
21 you more than recover all your cost plus a percentage
22 for profit under the FCC rules.

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1 But then it went on and said, okay,
2 Alabama Power, I understand your argument. You're
3 saying that once there is a physical taking, a
4 mandatory access under Section 224(f), you have to
5 employ a different legal analysis, and you have to
6 look at the three standard appraisal methods.

7 And it went ahead and it looked at those
8 methods, and what the commission proceeded to find was
9 - and I'll just read the most relevant sentence -
10 because of the unusual nature of pole attachments, and
11 the nature of the property interest conveyed, the
12 three standard appraisal techniques for determining
13 market value - that is the very same fair market value
14 that Gulf wants you to find as the touchstone in this
15 case - the appraisal techniques for determining market
16 value - comparable sales, income capitalization, and
17 replacement cost less depreciation - are particularly
18 unsuited for valuing pole attachments.

19 Now that is the last sentence of paragraph
20 53 in Tab 48 of complainants' exhibits. And I would
21 note that is a valid, legally binding opinion. When
22 the Eleventh Circuit dismissed APCO's position for

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1 review - and I'll refer to Alabama Power sometimes as
2 APCO - that meant the Commission's ruling remained in
3 force.

4 Now if that weren't enough, the Eleventh
5 Circuit itself, in a sentence that Mr. Langley did not
6 show you on the blowup - and I hope you'll forgive me;
7 I'm less technically inclined than Gulf Power is - but
8 in the sentence that followed the general definition
9 of fair market value, the Eleventh Circuit said, there
10 is not an active unregulated market for the use of
11 elevated communication corridors, and so an
12 alternative to fair market value must be found.

13 And the Eleventh Circuit didn't go on
14 itself at that point and look at the alternatives,
15 thereby leaving the Commission's rejection of the
16 alternatives, one of which they are going forward with
17 in this proceeding - replacement cost - as very much
18 in force.

19 Now let's go back in brief to what did the
20 Alabama Power decision say in the Eleventh Circuit.
21 First, when there is no showing that specific poles
22 are at full capacity, the cable formula provides more

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1 than just compensation to the pole owner. While the
2 parties may dispute when and how to determine whether
3 a pole is at full capacity, it's undisputed that the
4 cable formula is more than adequate when there is no
5 showing of full capacity.

6 We know the cable formula reimburses the
7 utility for its marginal cost of complainants'
8 attachments, through make-ready, the cost to the
9 utility of getting the pole ready, plus a return on
10 investment, and a share of the utility's fully
11 allocated operating cost.

12 So for a taking of the sort at issue here,
13 reimbursing a utility's marginal cost is sufficient,
14 the Eleventh Circuit said. In fact, taking account of
15 the amounts paid in make-ready, as Alabama Power did,
16 noticing that in that case it was \$1 million, plus the
17 fully allocated cost, Alabama Power said on page 1371
18 of the decision that the cable formula actually
19 reimbursed quote unquote much more than the marginal
20 costs.

21 And that's interesting, because the issue
22 set by the hearing designation order is, in this

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