1 takings case is, will they prove the constitutional
2 case for more than marginal cost - not more than what
3 the FCC formula gives them, which is fully allocated,
4 or more than what they actually get, because before
5 2000, when they purported to kick us off their poles,
6 we negotiated a rate that was even higher than the FCC
7 formula.
8 Here the question is, in this proceeding,
9 can they show a constitutional basis to get more than
10 the minimum avoidable or marginal costs?
11 Now the second point is, even when there
12 is a showing of full capacity -
13 JUDGE SIPPEL: Now, I'm not sure I'm
14 following what you're saying there. What you're
15 paying, what the cable companies are paying, is the
16 formula rate set by the commission; is that right?
17 MR. COOK: We're paying more than that,
18 Your Honor.
19 JUDGE SIPPEL: Why is that?
20 MR. COOK: Because we negotiated with
21 reference to the rate, but there is still - before
22 this proceeding started back in 2000, there was still

1 a back and forth, a negotiation, between Gulf Power
2 and the complainants. But it was done with an eye to
3 the commission's rules and regulations.
4 So for example, this is all set forth by
5 the way in the complaint way back in July 10th, 2000.
6 I believe it is note 7, and Exhibit 16 to the
7 complaint, where it lays out the calculations, for
8 example, of what you get under the FCC formula.
9 JUDGE SIPPEL: I'm just trying to get your
10 - it's just a principle thing that I'm trying to get
11 clear, be sure that I'm following this in my mind.
12 You've got the formula. The commission
13 says this is what you can charge, and you can charge
14 no more, right?
15 MR. COOK: It says this is the maximum
16 allowable amount that you can charge under the
17 regulations, that's right.
18 JUDGE SIPPEL: I think that's what I said.
19 So you have sat down and negotiated
20 something over and above that maximum amount that the
21 commission has set?
22 MR. COOK: Years ago we agreed - and I

1 don't know the individual circumstances - but to pay
2 I think in the nature of $1.00 to $1.50 more per year
3 than what the calculation would come out under the
4 commission's maximum.
5 JUDGE SIPPEL: Well, what prompted the
6 cable companies to go along with that?
7 MR. COOK: I think it was simply - again,
8 I don't - I wasn't involved at the time. But I think
9 given all the pronouncements that you see in the law
10 about a non-monopoly market, and poles being essential
11 facilities, I think what happens is, there is a
12 certain amount of back and forth with the utility
13 saying, you know, if you really want to resolve this,
14 if you want to get in now versus our dragging this
15 out, we'd like you to cut us a break and give us a
16 little bit more here, and that sort of thing.
17 And I think there are some real-world
18 bargaining that unfortunately for the cable operators
19 was done under duress. But I can't speak from
20 personal knowledge of that.
21 But I do know that we're paying a little
22 more than the FCC formula.

1 JUDGE SIPPEL: Okay. But the cable
2 companies given the state of the - of where we are
3 today - the cable companies could live with the FCC
4 formula plus a little more on a negotiated basis?
5 MR. COOK: Well, we believe that - and what
6 we want to adhere to in this proceeding is - there are
7 three elements: there's the minimal marginal costs of
8 our attachments; there's the FCC formula which is much
9 higher - fully allocated costs plus a percent return
10 on profit; then there is - and we pay a little bit
11 over that.
12 In this proceeding the issue is can they
13 demonstrate a constitutional entitlement to more than
14 the lowest figure, the marginal cost. So it should
15 not be an issue of what cable can live with, it should
16 be an issue here of, have they established the
17 constitutional predicate to go beyond the bounds fo
18 APCO, since APCO has said, hey, you guys, you are
19 already getting much more than your marginal costs.
20 JUDGE SIPPEL: Okay, go ahead.
21 MR. COOK: Now I'd like to come really to
22 the most important point in this entire case, and this

1 is the question of loss. This is something that APO
2 said when it quoted, I think, the John J. Felin case,
3 it said, the utility has the burden to prove a loss
4 and the amount of the loss. But you will constantly
5 hear Alabama Power ignoring this requirement, or as it
6 did in its February 10th filing, conflating it with a
7 finding of capacity saying, we don't have to prove
8 loss; we just have to prove, hey, things are pretty
9 crowded out there, and all of a sudden we get to, now
10 let's talk about how much you're going to pay us.
11 We'd like Your Honor, very respectfully,
12 to focus on the element of loss. So even where there
13 is a showing of full capacity, however we define it,
14 the cable formula provides more than just compensation
15 in all but one circumstance, where as a result of the
16 presence of the cable operator on the pole, the pole
17 owner is deprived of a higher value opportunity.
18 And here is where we come to the language
19 you just asked Mr. Langley about. The opportunity to
20 rent the space to someone else for more money, the
21 buyers waiting in the wings, or to put that space to
22 a provable and quantifiable higher value use, for

1 itself on a particular pole, as long as the utility
2 can keep renting the space to call comers, whoever
3 approaches them, then there is nothing lost, and no
4 entitlement to anything more than marginal cost.
5 And as I say, this point is the most
6 important in the whole case: Just compensation as
7 measured by loss to the owner. Not value, not
8 benefit, not cost saving, not gain to the taker.
9 You will hear lots of testimony from Gulf
10 Power witnesses about how cable attachers aren't
11 paying their fair share. But if you listen closely,
12 what they're asking for is for cable to pay much more
13 than any share that can be attributed fairly to
14 cable's attachments.
15 Now we asked in Interrogatory No. 9
16 identify your actual losses. What is the basis of
17 your proof here? And of course Mr. Langley adverted
18 to not needing to show loss, and Mr. Spain, his
19 expert, will say, all that's really necessary is a
20 hypothetical loss.
21 But the Alabama Power Eleventh Circuit
22 case didn't say that. It made clear, it said, there's

1 got to be a missed opportunity, a foreclosed
2 opportunity, to lease space to somebody else on the
3 pole.
4 It actually addressed Mr. Langley's exact
5 argument that, hey, our loss is the difference between
6 what we get and what we want. And it did so on page
7 1370 of its opinion. It said, no, no, no it wouldn't
8 make sense for the power company to say, even though
9 we're not out more money, our loss is the opportunity
10 to exclude cable, and to rent to simply anyone, an
11 ethereal entity, what we deem as the market value.
12 Well, APCO rejected that, and in
13 Interrogatory No. 9 Gulf says, we have no actual loss.
14 So this comes to one of the most revealing
15 things about this case, and that is, you will not hear
16 any testimony over this week and if we run into next
17 about any instance where someone approached Gulf and
18 said, hey Gulf Power, we're a new entity. We'd like
19 to get on your poles. And Gulf says, well, I'm sorry,
20 they're crowded, or they're full. And the entity
21 comes back and says, well, how much are they paying
22 you, those guys that are already on the poles? I'm

1 willing to pay you double or triple or five or ten
2 times. And Gulf says, well, I'm sorry, that doesn't
3 really matter, you see. There is this mandatory right
4 of access in cable and telecom; they're already on; I
5 can't let you on.
6 You won't hear any testimony like that.
7 Now if Gulf had any proof of an instance like that, it
8 could have tried to assemble a case here, showing that
9 there really was a lessor of pole space who couldn't
10 be accommodated, who was a viable entity, who offered
11 to pay more money over a defined period of time, and
12 then using a net present value analysis that Gulf was,
13 in the language of the Eleventh Circuit, out more
14 money as a result of losing this opportunity.
15 And as Ms. Patricia Kravtin, one of
16 complainant's expert witnesses will explain, this is
17 exactly the sort of proof that Gulf would have to
18 produce to show an economic loss.
19 Now Gulf wants to argue, and you heard Mr.
20 Langley say - I'm sorry?
21 JUDGE SIPPEL: No, that's okay, never mind.
22 MR. COOK: Gulf wants to argue -- and you

1 heard Mr. Langley say this - that because it's managed
2 to extract a higher annual pole rent from some
3 attachers than what complainants pay, that this is
4 evidence of a market for pole attachments, an emerging
5 market, and that it is entitled to fair market value.
6 It even says this court should look to
7 rates paid by attachers to electric cooperatives who
8 are obviously not subject to 47 USC Section 224, the
9 pole attachment act.
10 But as I mentioned earlier today, both the
11 commission and the Eleventh Circuit, in reiterating
12 it, said, there is no non-monopoly in market for pole
13 attachments.
14 And one of the most interesting cases that
15 we ask Your Honor respectfully to take great note of,
16 and we discuss this in our trial brief, that came
17 after the Eleventh Circuit Alabama Power is this
18 Eleventh Circuit case of Klay v. Humana. There some
19 health organizations served a subpoena on the AMA and
20 said, we want your studies and your records, American
21 Medical Association.
22 And the Eleventh Circuit analogized the

1 subpoena to a taking of property, and then it went
2 ahead and discussed Alabama Power, and said, this is
3 very similar. And it said - it went on to hold the
4 AMA had not suffered any loss, and it had not shown
5 that it had lost any opportunity, so that in the
6 takings context, the only compensation it got was its
7 cost of production, basically the photocopying and
8 what have you.
9 Now a side point in the Klay case applies
10 here to all of the evidence that Gulf Power is going
11 to want to put on before you about complainaints pay
12 XYZ to somebody else, and that is, the Eleventh
13 Circuit said, even where a property owner whose
14 property has been taken can sell identical property to
15 others at what may be termed market prices, that does
16 not mean that in a takings case the owner gets
17 anything other than what is lost due to the taking.
18 So that is the central touchstone of this
19 case.
20 Now we've discussed what Gulf Power gets
21 under the cable formula; what they get in reality. We
22 have discussed loss.

1 I'd like to turn now to replacement costs.
2 This Alabama Power put to bed any notion that
3 replacement costs, or the value to a third party
4 attacher resulting from being able to attach to the
5 poles and have the benefit of access to a network of
6 communication poles should be charged as just
7 compensation.
8 It did so in paragraph 57 of the
9 commission order. And the Eleventh Circuit left that
10 ruling undisturbed. Although Gulf re-argues
11 replacement costs in this hearing, any notion of using
12 replacement costs is simply foregone.
13 This hearing has gone on for 18 months,
14 not including the years of the underlying complaint
15 proceeding. While Gulf has argued that its poles are
16 full, it had no specific pole-by-pole evidence - in
17 fact, Your Honor, in the April 15th, 2005 status
18 report on the first page it says, Gulf has no evidence
19 of full capacity. So you allowed them the opportunity
20 to go out and conduct a survey to survey its poles.
21 Well, the survey stopped after two months
22 and stalled, looking at fewer than seven percent of

1 *Gulf's poles all in one area, the downtown Pensacola*
2 area.
3 Gulf's evidence of crowding is claimed to
4 be that any pole that was, or will need to be changed
5 out at some point, is at full capacity. But this
6 ignores the APCO test that if Gulf had accommodated an
7 attacher, Gulf had no opportunity to lose, and has no
8 entitlement to something more than marginal costs, and
9 certainly no entitlement to something more than the
10 cable rate.
11 Now in any case Gulf's static view of
12 capacity also ignores Gulf's own procedures. You will
13 see in our Exhibit 2, Your Honor, one of the most
14 important documents in this case, their CATV
15 permitting procedure.
16 It states right in there that make-ready
17 is a routine measure. And if you look at the permit
18 application form, it says, here's what happens,
19 attacher. Pay us the money - just as you asked a
20 question of Mr. Langley a moment ago - pay us the
21 money, and then you get on.
22 And the phrasing used by the permit is,

1 make-ready is, quote, to provide space for licensee's
2 attachments.
3 And this is not unusual. As complainant's
4 expert, Mickey Harrselon, testifies, and will explain
5 further on the stand, make-ready is the way that poles
6 work in the world.
7 Now Mr. Langley says that APCO talks about
8 current capacity, but in fact if you look at APCO very
9 carefully, it says, it talks about make-ready being
10 paid, but then it goes on and says, utility poles may
11 be for practical purposes nonrivalrous. And that's
12 what we will show you through the testimony of Mr.
13 Harrelson, through cross-examination of their
14 witnesses, and through discussion of the permitting
15 procedure, which is practically - the capacity issue
16 has to come down to practicality - how do things work
17 in the field? If they just work so that things were
18 static, and there was just capacity at one point in
19 time, that would be one thing.
20 But that's not the way it works. And one
21 of the most interesting pieces of evidence that you
22 will find in Mr. Harrelson's testimony, and that I'm

1 sure the other side will ask him about is that even
2 since Osmose went out and looked at the poles, the 40
3 poles that they've proffered in this case, some of
4 those poles have actually been changed out. Not at
5 our request. Gulf has gone and moved them from 40 to
6 50 foot poles. There is another pole with a five-foot
7 splint added to the top. And of course car accidents
8 and hurricanes happen all the time. So you have to
9 consider capacity as it truly is, a dynamic variable
10 thing.
11 And Gulf will say, well, but that reads
12 out any real consideration of the APO test. It
13 doesn't read it out. It just, unfortunately, leaves
14 it with a result that Gulf doesn't like, which is that
15 only when there is a true lack of capacity, only when
16 there is a municipal regulation that limits height,
17 only when there is an aesthetic regulation, only when
18 there is an engineering situation or something like
19 that, where poles cannot be adjusted from their
20 regular inventory is there really a lack of capacity.
21 And in one of the most important
22 admissions their witnesses make, and I think Your

1 Honor should take note that he will not be presented
2 by Gulf Power in this proceeding, Mr. Rex Brooks said
3 - and I believe it's around page 45, 46, maybe page 85
4 of his deposition, he said, you know, when Mr. Seiver
5 asked, are there instances where you've denied for
6 lack of capacity? And he said, no, not really. Only
7 - we really only deny for engineering reasons, and
8 only in situations where we can't change the height of
9 the pole would we deny access.
10 So we ask you to keep Mr. Brooks'
11 statement that make-ready essentially renders a pole
12 to have additional readily available capacity in mind
13 as you review that issue.
14 JUDGE SIPPEL: Was the Eleventh Circuit -
15 what kind of - it sounds like you're talking about the
16 elasticity concept or something, that a pole is kind
17 of eternally elastic because you can always juggle it
18 around somewhat.
19 Now what -- was the Eleventh Circuit
20 focused on that at all?
21 MR. COOK: I don't think the Eleventh
22 Circuit reached the question of how to determine full

1 capacity. What it did say is, it said, capacity on
2 distribution poles may be for practical purposes
3 nonrivalrous.
4 So we ask you in deciding the evidence in
5 this case to keep that in mind: what is the way poles
6 work practically in the field when you determine in
7 your judgment what full capacity really means in this
8 case.
9 But that's as far as the Eleventh Circuit
10 went.
11 JUDGE SIPPEL: Well, that's pretty much
12 what Gulf Power is saying, isn't it? That you have to
13 take a practical application of this? It's just that
14 you obviously come out to different conclusions.
15 MR. COOK: Yes, except that their
16 application is not practical. Their application is,
17 hey, we sent our team one year ago in April out to
18 look at 40 Osmose poles, and by gosh, there are some
19 NESC safety clearance issues; they're crowded;
20 therefore that's full.
21 But what about the day before? What about
22 the day after? What about now? What about when Mr.

1 Harrelson went out a month later and saw that several
2 of those poles had been changed to 50-foot poles
3 instead of 40-foot poles.
4 In fact even in their static view of
5 capacity, Your Honor, we argue they would have to
6 prove full capacity by a bound of time, from one point
7 to another. Because if they're going to collect
8 additional compensation based on a taking, they've got
9 to do it for a period of time. They're talking about
10 an annual rate. Well, how many years? How many
11 months was it at full capacity?
12 You can't just take a look once in the
13 field and say, oh, I'm going to forget about your pole
14 inventory, your permitting procedure, the fact that
15 you change out poles for your own business everyday.
16 Now, I went out, I found some pretty
17 crowded looking poles. And that's it, Your Honor,
18 we've proved full capacity. Now let's get right to
19 how much extra we get. It doesn't work that way.
20 JUDGE SIPPEL: The Eleventh Circuit,
21 though, was saying - I'm paraphrasing here quite a bit
22 now of course - but they're saying that if you want to

1 recover anything over and above marginal costs, you're
2 going to have to show that a pole was at full
3 capacity, cite full capacity as equated with crowded
4 for purposes of this discussion.
5 Didn't the Eleventh Circuit have in mind
6 the fact that you could do all these things with these
7 poles, that you can accommodate? Because didn't they
8 talk about things like change-outs and whatnot? I
9 mean change-outs can be done. The only reason to do
10 a change-out is so you can change - you can put
11 something on that's not there. Whether you want to
12 call that capacity or whatever.
13 Isn't that a real world consideration that
14 the Eleventh Circuit had in mind when they came up
15 with these holdings?
16 MR. COOK: I think the Eleventh Circuit had
17 in mind that make-ready works. If you look at page 13
18 - I think it's 69 of its opinion it talks about how
19 the compensation paid to the utility owner is not only
20 the SEC - again, the high end, the full allocated
21 cost, plus percentage of profit - but also make-ready.
22 And then it drops a footnote and says, in this case

1 the record shows that APCO received more than a
2 million dollars, and I don't remember the period of
3 time.
4 And then what you have a few paragraphs
5 later is a discussion of the nature of rivalrous
6 property. And it says - it goes on and actually talks
7 about a hypothetical. And it says, suppose there is
8 a network of poles that extends a million feet high or
9 what have you that is nonrivalrous. Well, what APCO
10 never got to was looking at the process of make-ready,
11 and the permitting procedure, and seeing, well, is
12 there something out of the ordinary? Because if it
13 was something that was perhaps out of the ordinary, or
14 not a usual part of the business, then Gulf Power
15 might have a stronger argument to say, well, we have
16 to do make-ready. We almost never do make-ready.
17 That's not part of our business plan. Our poles are
18 fixed; they're at full capacity.
19 But the situation is the opposite, as
20 you'll see from testimony from both sides. The
21 situation is that when somebody new comes along, if
22 there is no space on a pole at that moment consistent

1 with NESC clearance violations, what happens is Gulf
2 engineers write up a make-ready estimate, they give it
3 to the new person, the person pays the amount. And
4 then per the language of the pole application, space
5 is provided for the new attachment.
6 Our point is, this is part of an integral
7 part, an everyday part of Gulf's operations and its
8 utility functions. In fact it's a part of the
9 industry standard.
10 JUDGE SIPPEL: Okay, you're going way
11 beyond where I was.
12 MR. COOK: Okay, I just have a little more
13 to wrap up, Your Honor.
14 JUDGE SIPPEL: How much more?
15 MR. COOK: Just a couple of sentences.
16 JUDGE SIPPEL: All right, let's have a
17 couple of sentences.
18 MR. COOK: Okay.
19 Now Gulf admits that it's always
20 accommodated attachers. It says it has no evidence of
21 denying an attacher the ability to attach as long as
22 make-ready is paid, and also, has never identified any

1 lost opportunity, claiming instead that it deserves
2 more compensation because it has merely lost the
3 ability to exclude cable operators or make them pay a
4 rate higher than the cable formula.
5 But APCO disposed of that argument, and
6 that leaves us with a naked claim but no proof.
7 In sum, because just compensation is
8 measured only by loss to the owner, and because APCO
9 has said in black and white we have no actual loss,
10 and the sole purpose of this hearing was to allow Gulf
11 to submit its proof that it said it would bring
12 forward to satisfy the APCO test, not challenge the
13 standard, as you heard Mr. Langley say they're still
14 doing, there's really nothing left to do here but find
15 that Gulf failed in its showing, and it's not entitled
16 to any more from the complainants than it gets under
17 the FCC formula.
18 Thank you.
19 JUDGE SIPPEL: Thank you.
20 Thank you very much.
21 All right, we're set to go. I want to
22 just say that as - it's 10:30, if you want to take a

1 break now, we can do that and then start with the
2 witness, or we can put her on right now and keep
3 going.
4 Is he up for doing it?
5 MR. CAMPBELL: If we could take a five-
6 minute break.
7 JUDGE SIPPEL: All right, take a five-
8 minute break.
9 I wanted to alert you to another thing too
10 - this is administratively or logistically - we do
11 have some changes. We have some specific instructions
12 with respect to the numbering of these exhibits that
13 is going to have to be dealt with sometime before we
14 close the record here.
15 And I think I'm going to have my legal
16 tech bring them down sometime before lunch today and
17 show you what we came up with.
18 We came up with, my notes, plus what was
19 in the transcript, and we find a variation with
20 respect to what was in both the court reporter's
21 rendition of it, and I think one - I'm not sure if it
22 was the complainant's side, it doesn't really make any

1 difference.

2 The point is that we've got to get

3 everything back right on the same track again. So

4 it's a ministerial thing, but it's fairly important,

5 and I don't want to lose track of it.

6 That close says almost 10:30. Let's come

7 back at twenty of. We're in recess. Thank you.

8 (Whereupon at 10:24 a.m. the

9 hearing in the above-entitled

10 matter went off the record to

11 return on the record at 10:41)

12 JUDGE SIPPEL: Back on the record.

13 We're going to take the testimony of Mr.

14 Dunn. Going to start that in just a minute.

15 But before I do I want to ask the bureau,

16 does the bureau have anything that they want to

17 comment on at this time?

18 MS. GRIFFIN: No, I don't think so, Your

19 Honor.

20 JUDGE SIPPEL: Ms. Griffin?

21 MS. GRIFFIN: At this point, yes, nothing

22 to add.

1 JUDGE SIPPEL: Thank you.

2 Mr. Dunn - Mr. Campbell, you're witness.

3 MR. CAMPBELL: We'd like to call Mr. Dunn

4 to the stand, Your Honor.

5 JUDGE SIPPEL: Sure. Would you please come

6 forward.

7 MR. CAMPBELL: Before we swear the witness

8 in, we do have one preliminary witness issue that we

9 need to deal with.

10 Gulf Power would like to invoke the rule

11 with respect to witness presence in the courtroom,

12 Rule 615 under the Federal Rules of Evidence which

13 provides that other witnesses in a proceeding who are

14 going to testify -

15 JUDGE SIPPEL: You want to sequester them?

16 MR. CAMPBELL: Yes, sir.

17 JUDGE SIPPEL: All right, this is your

18 testimony. So is your other witness out of the

19 courtroom?

20 MR. CAMPBELL: We have our witnesses out of

21 the courtroom, with the exception of our party

22 representative, which is an exception to Federal Rule

1 of Evidence 615.

2 JUDGE SIPPEL: Right, what's his name?

3 MR. CAMPBELL: Mr. Ben Bow.

4 JUDGE SIPPEL: All right.

5 MR. CAMPBELL: Mr. Harrelson, however, is

6 not a party witness, and we would ask for him to be

7 excluded so he cannot hear the testimony of the other

8 witnesses.

9 MR. SEIVER: Your Honor, he's an expert.

10 That's the routine exception to the sequestering rule

11 that experts are allowed to be present. He is not a

12 fact witness testifying. Fact witnesses are the ones

13 that are sequestered, and we have no fact witness

14 sitting in the room on our side.

15 JUDGE SIPPEL: I don't see an exception for

16 experts in Rule 615. I've got the rule in front of

17 me.

18 MR. SEIVER: I have the interpretations of

19 the rule, and I'll be willing to share all those with

20 Mr. Campbell if you like.

21 JUDGE SIPPEL: I don't - if you want to

22 have your - I mean it can work both ways. Of course