1 what constitutes a pole at full capacity, never had
2 discussion about pole capacity. The people -- the
3 person that he designated never read APCO. He hasn't
4 seen the permitting procedures.
5 I asked Mr. Tessieri, as the afformally
6 designated representative of Osmose to take me through
7 how they come up with their definition of crowded, to
8 take me through the time period that they did, to tell
9 me about the training that Osmose did, so Your Honor,
10 can know when you look at your Exhibit 42 how much
11 weight to give it, and how to evaluate. Did they just
12 throw a bunch of guys in the field? How did they
13 decide to just look at Pensacola and not at the other
14 areas? Did they do any statistical sampling? Did they
15 do any infield validation? Did they do any post-field
16 validation? Does he vouch? You saw in their final
17 report they proceed to draw extrapolations about
18 percentages. Did Osmose have a role in that? Did
19 they vouch for the statistical reliability and it --
20 I asked them about the decision to stop work. This is
21 something that we highlighted in our -- in our trial
22 brief, because we were rather upset that Your Honor

1 had suggested to Gulf Power to go out and hire these
2 Osmose folks and it turns out that after they started
3 in April, I have an admission from Mr. Tessieri that
4 Ben Bowen called him up in May and said, you know,
5 stop the work, don't do anymore.
6 And as far as your completion of the work
7 only go up to a certain amount of money. And here's
8 a substantive point that I just remembered, another
9 one about Osmose, which is Your Honor will sit down at
10 the end of the day and look at their Exhibit 42 and
11 say, you know, they've given me 40 poles or 37, we say
12 after Ben Bowen's admission, that they say are
13 crowded. What does that mean? What did Osmose do to
14 make that determination? Well I've got an explanation
15 in these Tessieri excerpts about the difference
16 between a first pass review and a second pass review.
17 It turns out that a first pass review is
18 just the guys going and visually only saying, yes,
19 that looks kind of crowded to me, let's come back and
20 get the hot stick out and make the measurements. A
21 second pass review entailed the measurements. And in
22 this we selected, by the way, we selected these groups

1 of 40 and 50 poles as kind of samples in here for this
2 hearing, but certainly we understand Gulf's position
3 that they are representative. That they represent
4 certain percentages of -- of crowding and it turns out
5 that on that status report, for example, the final one
6 he says, well 7,120 out of 9,663 poles are crowded.
7 So I asked Mr. Tessieri about that. Well does that
8 mean first pass only, where the guys eyeballed it or
9 does it mean second pass. I have testimony in these
10 excerpts saying, you know, I don't know it -- it might
11 have been first pass, second pass, or a combination of
12 the two.
13 And again this is the one person they
14 offered us, and it goes on, but I -- I would like to
15 address a couple of the other arguments that Mr.
16 Campbell made.
17 ADMIN. JUDGE SIPPEL: I want to hear what
18 Mr. Campbell has to say what you've said so far.
19 MR. COOK: Okay.
20 MR. CAMPBELL: I have a lot to say.
21 ADMIN. JUDGE SIPPEL: All right. Go ahead.
22 MR. CAMPBELL: First thing, I'll start with

1 the second to the last point, and this is an issue
2 that they keep bringing up. They brought it up in
3 their pre-trial briefs, they brought it up during the
4 document admission session and they want to sort of
5 layer in this cloud of uncertainty about why the
6 Osmose project stopped. And we've heard it over and
7 over we dealt with this issue at the document
8 admissions session, and Your Honor said, I am very,
9 very much concerned about opening this record to an
10 irrelevant and possibly frivolous inquiry that is
11 going to lose focus on the real issue in this case.
12 That's why they want to get this
13 deposition testimony in, and if it gets in then we're
14 going to request the opportunity to bring Mr.
15 Tessieri, Mr. Barker, Mr. McVearry, the other Osmose
16 representatives in, possibly other folks at Gulf Power
17 to explain exactly what happened with respect to that
18 decision and to show that the time line that he
19 established with a witness who did not have personal
20 knowledge of the decision in hearsay testimony
21 projected might have been the date to create this
22 negative inference. This is a sideshow. It is

1 improper and it should not come in.

2 *ADMIN. JUDGE SIPPEL: Am I to understand,*

3 Mr. Cook, that what you're objecting to is that using

4 -- using Mr. Tessieri to attack the -- the

5 professionalism in which this was done?

6 MR. COOK: No, Your Honor, not the

7 professionalism in which it was done, but whether they

8 took the steps that made the evaluation that they did

9 worth Your Honor's placing weight on, when you go to

10 Exhibit 42 and look at this -

11 ADMIN. JUDGE SIPPEL: Well, that's what I

12 pretty much mean when I say professionalism. I mean -

13 - other words if this is not a reliable product, if we

14 listen to what Mr. Tessieri is saying we're going to

15 conclude that this is just not a reliable product, so

16 you can take Osmose and just throw it out.

17 MR. COOK: Your Honor, part of our

18 argument, and it's a central part is if you look at

19 what Osmose did they went to crowding, and they did

20 not look at full capacity. We do challenge Osmose,

21 but I think the most important point is they are

22 offering Osmose into evidence as a matter of

1 fundamental fairness. Now they made the decision not
2 to bring Mr. Tessieri here to the trial, but when we
3 had the opportunity to submit these deposition
4 excerpts we designated Mr. Tessieri excerpts and they
5 cross designated Tessieri excerpts And we said, well
6 okay, if they're not going to bring him in then we
7 want the chance to challenge some of the problems and
8 make the court aware of what Osmose did.
9 Now they ultimately decided of their own
10 accord as we learned a week ago in their opposition
11 into admitting this into evidence to not formally
12 admit, and they say deliberately, their cross
13 designations. Now you're hearing Mr. Campbell get up
14 and say well, Your Honor, if you let this stuff in
15 we're going to want to reopen the trial, we're going
16 to bring Mr. Tessieri in. It's not going to be
17 handled just by cross designations I think that's
18 fundamentally unfair. The bottom line is if Osmose
19 materials come in Mr. Tessieri is our only chance to
20 challenge Osmose.
21 ADMIN. JUDGE SIPPEL: Osmose is already in.
22 The data is in, correct?

1 MR. COOK: That's right.

2 MR. CAMPBELL: And there's a fundamental

3 problem here. The reason we didn't pitch a fit before

4 was because they didn't do what we did and stand up

5 and say we are offering this into evidence and had

6 they done that, Your Honor, at that time you recall,

7 I said I've got to see how things unfold before I

8 pitch a fit about a rebuttal case. I've got to see

9 what they do. One thing they didn't do was offer this

10 into evidence. That's how we got to this fight today.

11 ADMIN. JUDGE SIPPEL: Well it seems to me--

12 MR. CAMPBELL: So -- so that whole point is

13 --

14 ADMIN. JUDGE SIPPEL: It just seems to me,

15 again, Mr. Campbell am I correct in assuming that Mr.

16 Tessieri is a salesmen, I mean, essentially that's

17 what he is?

18 MR. CAMPBELL: No. He is not just a

19 salesmen, Your Honor. If you look at these -- at

20 these excerpts and -

21 ADMIN. JUDGE SIPPEL: Well tell me, give me

22 the bottom line -- what is it? What are you

1 proffering him as?

2 *MR. CAMPBELL: He is -- well, he is the*

3 person who negotiated with Gulf Power to set the

4 turns. He sat in the room with Ben Bowen and went

5 back and forth --

6 ADMIN. JUDGE SIPPEL: But can you tell me

7 Mr. Cook what does the man do for a living? Is he a

8 salesman or is an engineer or is he an astronaut or

9 what the heck is he?

10 MR. COOK: He is not an engineer. He is -

11 - was proffered to us and we have to take their

12 representation as the person who negotiated the deal

13 with Osmose and then oversaw it. The person who

14 handled the communications with Gulf Power about what

15 Osmose was to do, the person who went with Mr. Langley

16 and Mr. Bowen into the field to examine what Osmose

17 was doing, to determine the -- the criteria.

18 ADMIN. JUDGE SIPPEL: And they came up then

19 with what -- a description of the work that they were

20 going to do right?

21 MR. COOK: That's right, but that wasn't

22 the end of his role. He continued to be involved in

1 the case. The point is as a matter of fundamental
2 fairness we're presented with this Osmose data and we
3 say who -- who are you going to give us as a chance to
4 challenge your data? They give us one person. We
5 took his deposition three months ago on March 31st.
6 We designated all of these things saying we want them
7 admitted into evidence. As Your Honor pointed out in
8 your written ruling a week ago that was clear for all
9 to see. There was no prejudice in terms of timing
10 they knew what was coming and we have, I think, at the
11 bottom of the day, if Osmose data is in as a 42, then
12 our right to challenge it through what Mr. Tessieri
13 said has also to be in as a matter of fundamental
14 fairness.
15 ADMIN. JUDGE SIPPEL: All right. Let me
16 hear from Mr. Campbell.
17 MR. CAMPBELL: Page 13, Line 17, they ask
18 him the question, "What is your position with Osmose?"
19 "I am currently a director of sales." That's what
20 kind of testimony we get from Mr. Tessieri. He sold
21 the project and had general communications about the
22 project. There is no dispute in this case, Your

1 Honor, about what Osmose did or didn't do. They
2 stipulated as to the authenticity of the data. Their
3 own expert sat on the stand and said, I generally rely
4 on the data, I think they did a good job, it's fairly
5 accurate, sure there are some errors, but you're going
6 to get some errors, I have errors when I go out and
7 measure.
8 That's what their expert said. He didn't
9 have a problem interpreting the data, but instead what
10 they want to get into is asking him questions outside
11 of his area of expertise, have him say I don't know as
12 many times as he can and then use that as a basis to
13 challenge the accuracy of objective measurements. One
14 more thing I might add about this, is that they didn't
15 ask for anyone other than Mr. Tessieri after they took
16 his deposition where he said, I don't know, I don't
17 know, I don't know. They never asked for another
18 witness, because the issue was how are you going to
19 authenticate the data.
20 They got comfortable with it. They
21 stipulated to it. As a result we withdrew written
22 pre-filed direct testimony that we tendered by two

1 other Osmose representatives that would have been
2 critical to this.
3 ADMIN. JUDGE SIPPEL: Why, when they ask
4 for a representative from Osmose, why was Mr. Tessieri
5 selected to go?
6 MR. CAMPBELL: Mr. Tessieri was and this --
7 would again go if they're going to attack that then
8 we're going to go back to Osmose and tell you why and
9 here's the proffer I will make, Osmose was a third
10 party contractor for Gulf Power. It is not an agent
11 of Gulf Power's we asked for a witness after having
12 paid them money to -- to go out and collect this data
13 and they didn't want to provide it with us. We had --
14 we had to negotiate with Osmose to get a witness they
15 tendered Mr. Tessieri as the witness who was
16 knowledgeable about all components and would be a good
17 witness, okay. He was represented at the deposition
18 by Osmose counsel, not by me. And so this is not
19 exactly a situation where --
20 ADMIN. JUDGE SIPPEL: You were there. I
21 saw your name. You -- you were there weren't you?
22 MR. CAMPBELL: I was at the deposition, but

1 he was represented by his own council, not Balch
2 Bingham lawyers, not Gulf Power lawyers, Osmose
3 lawyers. The point is that he was tendered to us as
4 a witness. And when -- when we're trying to prepare
5 for the trial and decide what testimony we needed with
6 respect to the authenticity of the computer data it
7 was pulling IT to try to get additional witnesses out
8 of Osmose. So it's not Gulf Power's fault that Mr.
9 Tessieri testified as he did.
10 ADMIN. JUDGE SIPPEL: All right. I take it
11 that you did not ask for any additional
12 representatives from Osmose to come and testify or you
13 don't want -- you didn't ask me for a subpoena
14 certainly.
15 MR. COOK: No. No, Your Honor, this -- if
16 you look at the data of this deposition, the discovery
17 closed in the end of February. I believe it was the
18 28th or 29th. This is the last day when they -- when
19 they produced this fellow to us and a matter of, what
20 was it, a week later we had to get in our -- our
21 expert summary reports. I think that, in this case it
22 comes down to, you know, fundamental fairness, but

1 also is it going to help you as the try or affect? It
2 is, because otherwise how are you going to know when
3 you look at Osmose's information in 42 what is there,
4 what it means, what they have done to get that.
5 You didn't hear Mr. Bowen talk about what
6 Osmose did, in fact, I think what Mr. Campbell may
7 have hoped is by stipulating to authenticity only that
8 somehow Osmose would be in and that's it. And there'd
9 be no challenge, but if you're going to look at 42 and
10 really understand, for example the issue, for example
11 of first pass or second pass, what do these
12 measurements mean, what did Osmose do in this field,
13 and I would say finally as a matter of fairness, this
14 is to the extent that affirmative direct case is made
15 in writing, the deposition of any witness whether or
16 not a party may be used by any purpose and they cross
17 designated. And they could have brought them in, they
18 chose not to. To understand Osmose and to make a fair
19 decision given that he was the one guy that we got, it
20 should be let in.
21 ADMIN. JUDGE SIPPEL: All right. I'm going
22 to -- listen -- I -- I am not going to let this case

1 or let this kind of thing distract from what this case
2 is all about. This case is not about Osmose. Osmose
3 was just a -- a -- a technique, if you will, to try
4 and reach for information that is relevant to what the
5 Eleventh Circuit was asking us to do. This is not the
6 case. Osmose is not the case. And this kind of
7 testimony, this is exactly what this does to the case
8 that I'm trying to avoid. Osmose is -- is -- is
9 proffered by - the purpose for which Osmose is being
10 used was proffered by Gulf Power.
11 Gulf Power has the burden of proof and to
12 the extent that there are weaknesses with Osmose, such
13 as the fact that it had never been completed and
14 whatever other weaknesses that have come out in terms
15 of the test -- your testimony from Mr. Harrelson and
16 what not.
17 That's going to be the standard on which
18 I'm going to apply. I'm not going to get into this
19 kind of -- this -- this kind of evidence. It would be
20 litigating the Osmose -- the Osmose report. I'm not
21 going to do that. I don't think the Commission wants
22 to do it. And I think it's just a waste of time.

1 So I'm going to grant the motion to strike
2 the David Tessieri testimony in its entirety. You can
3 take exception to that, you can proffer it in your
4 proposed findings as to what it would have shown and
5 I'll --- I'll address it, but --
6 MR. COOK: Your Honor, when you say we may
7 proffer it, we may proffer proposed findings with the
8 citations?
9 ADMIN. JUDGE SIPPEL: You may proffer, you
10 may take exception to what I -- this ruling and you
11 can say -- you can proffer what he would testify to if
12 I had -- if I had received the evidence and for what
13 purpose. And why you think that you were deprived of
14 -- you know -- of a significant hearing right.
15 MR. CAMPBELL: Okay. And just for the
16 record only.
17 ADMIN. JUDGE SIPPEL: And they will reply.
18 MR. CAMPBELL: We do note the exception.
19 Thank you.
20 MR. SEIVER: Is there a Tab 90?
21 MR. CAMPBELL: Yes.
22 MR. SEIVER: What is that?

1 MR. CAMPBELL: Roger Spain.

2 *ADMIN. JUDGE SIPPEL: Mr. Spain.*

3 MR. CAMPBELL: We have no objections to Mr.
4 Spain's testimony. We will cross designate, but we
5 have no objections.

6 ADMIN. JUDGE SIPPEL: Okay. That's it.
7 Good work. We got through a lot in a relatively short
8 period of time. Very -- the complexities have got
9 nothing to do with the -- the -- the legal arguments,
10 they just had to do with logistics.

11 Okay. We know what the rest of the
12 schedule is. I'll probably be asking at oral argument
13 very briefly to give just a very brief overview of
14 where -- where you stand on putting this evidence
15 together, on all of these issues, the questions of the
16 confidentiality, the questions of -- of formulating
17 this as -- as -- this will be -- I -- my suggestion
18 and I -- I really think you should do this, since
19 we've - I've got rulings out - earlier order out
20 designating this stuff as Tab 84 through 90, I mean,
21 there's an identification process that's already been
22 utilized in this case, why not stick with it.

1 We'll end up having these things stamped
2 and received into evidence as exhibits, whatever the
3 number is. Exhibit Number 89, which is going to be
4 Tessieri is going to be rejected. I mean that's going
5 to be the ruling, so I mean, my sense -- I'm not
6 asking you to agree with me. I'm simply saying that
7 for purposes of -- of control, keeping control of the
8 record that will work. And then, you know, we just
9 take it from there, the add ons, you'll have the add
10 ons, and you're absolutely right we'll -- we'll come
11 in for an hour or two and -- and sometime this summer
12 and we'll have it stamped and received into evidence
13 and we'll be in good shape. Okay.
14 MR. CAMPBELL: Thank you, Your Honor.
15 ADMIN. JUDGE SIPPEL: That's it then.
16 We're in recess until -- we're in recess until July
17 6th unless something else comes up. Thank you very
18 much.
19 MR. SEIVER: Thank you.
20 ADMIN. JUDGE SIPPEL: Have a good day.
21 (Whereupon, at 11:50 a.m., the taking of arbitration
22 in the above-entitled matter was concluded)

CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, ET AL.

Name of Hearing

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Docket No. (if applicable)

445 12th STREET, S.W., WASHINGTON, D.C.

Place of Hearing

JUNE 15, 2006

Date of Hearing

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