

1 address that specifically in a moment, and that is the
2 easiest way for Your Honor to dispose of this case
3 and, indeed, of all of Gulf Power's claims, is they
4 are out no more money as the 11th Circuit used that
5 phrase. They've shown no missed opportunity.

6 But I'm jumping ahead.

7 CHIEF JUDGE SIPPEL: No, you --

8 MR. COOK: I didn't know if you had
9 further questions.

10 CHIEF JUDGE SIPPEL: No, you've answered
11 what I've asked.

12 MR. COOK: Your Honor, good morning, and
13 may it please the Court, as we set out in our trial
14 brief, under the 11th Circuit Alabama Power case, Gulf
15 Power had to show three things in this proceeding:

16 Number one, proof of individual poles at
17 full capacity;

18 Two, proof of a consequent loss or lost
19 opportunity in the form of (a) a buyer waiting in the
20 wings you could not be accommodated on a pole or (b)
21 a higher value use provable and quantifiable that it
22 lost out on, and third, it must show an appropriate

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1 methodology for calculating the loss.

2 Now, we're at the end of the hearing, and
3 it's clear Gulf hasn't proven any of those three
4 points, and I wanted to talk about each element, but
5 begin with the most important one and the one Your
6 Honor's question brought me to a moment ago is the
7 single most important word in this case is "loss."
8 Gulf had to prove a loss and it has not. Why is loss
9 so important? It's simple. This is a takings case.
10 This is not an issue of administrative law for first
11 impression or resolution. This is a case governed by
12 the rule of just compensation.

13 Mr. Campbell makes reference to trying to
14 reconcile Alabama Power with lots of prior precedent.
15 There's only one rule of precedent that applies and
16 governs here is we're here to measure just
17 compensation. That's measured by loss to the owner.
18 With no proof of loss, Gulf has failed to prove its
19 claim.

20 Now, at first we saw in Gulf's Petition
21 for Recon, which is the first thing attached in my
22 handout at Tab 49, page 11. Gulf said, "We want this

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1 proceeding, we want this hearing to come in because,
2 among other things, we have identifiable lost
3 opportunities."

4 Well we went and we asked in discovery
5 what are those lost opportunities. What have you
6 lost? And the next thing that we attach is from
7 Exhibit 56, answer to Interrogator 9. It says we have
8 no actual loss. Its only argument in that answer was
9 it's deprived of the opportunity to charge us what it
10 called a market value rate.

11 But APCO rejected that very argument when
12 it said, quote, it would make no sense for the power
13 companies to say that even though we're not out any
14 more money than we were before the taking, we're
15 missing out on the opportunity to sell at what we, the
16 pole owner, deemed the full market price of the pole,
17 and this is the heart of why market value is
18 inapplicable to this case, because a pole owner
19 already receives , as the 11th Circuit said, quote,
20 much more than its marginal cost, more than just
21 compensation from the combination of the make ready
22 payments plus the annual FCC pole cable rate, which

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1 includes a component for profit, by the way.

2 So just to reinforce that point, it's cost
3 and loss that has to be shown caused by or
4 attributable to the cable operator's attachment. What
5 Gulf charges others or what we are forced to pay
6 municipal co-ops who are governed by 224 is utterly
7 irrelevant to the Alabama Power test in this
8 proceeding. To get more in this case than the just
9 compensation they already receive, loss must be
10 proved, and we direct your attention, in particular,
11 to the Clay v. Humana case that's highlighted in our
12 proposed findings, which came after Alabama Power and
13 said -- it made the point that a party seeking damages
14 under a takings case must prove it has, quote,
15 suffered a loss and prove the amount of the loss. And
16 it even went so far as to say it's irrelevant that
17 such a party can continue to charge other parties who
18 are not alleged to have committed a taking a higher or
19 market rate.

20 What is relevant is has the person you say
21 is the taker caused you a loss. Well, at the hearing
22 Mr. Bowen said there are two kinds of loss. The first

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1 was the inability to charge what we want as market
2 price, but we can cross that off based on what I just
3 said about APCO's explicit language rejecting that.

4 The only other kind of loss Mr. Bowen
5 identified was he said, "Well, any utility purpose is
6 higher value. It's our pole. Whatever we want to do
7 with it has a higher value than what you're going to
8 do with it."

9 But that mere opinion of a general
10 amorphous higher value doesn't come close to meeting
11 the APCO standard. As Your Honor concluded in the
12 third discovery order, which is excerpted as well,
13 Gulf can't identify specific needs for space, and
14 equally important, because attachers pay the cost of
15 make ready to maintain their attachments when Gulf has
16 to put in a new transformer bank or add some extra
17 wires, Gulf is never deprived of the opportunity to
18 use its poles to meet its needs. At least there's no
19 proof introduced in the record here.

20 So APCO's holding requires the utility to
21 prove one thing, a higher valued use for each pole, in
22 other words a specific provable, quantifiable higher

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1 valued use, otherwise the court's reference is to a
2 quote, unquote missed opportunity or foreclosed
3 opportunity make no sense, and Gulf never showed this.
4 There's no testimony at all in this hearing
5 identifying a particular higher valued use on any
6 pole, and indeed, Gulf's answers to Complainant's
7 Interrogatories 34 and 35 and their supplemental
8 answer showed that Gulf had no proof of higher valued
9 use either in the form of reservations of space on
10 particular poles or any other forum.

11 In fact, Ms. Davis admitted in her direct
12 testimony Gulf does not track its space needs or
13 costs on a pole-by-pole basis, but most important,
14 Gulf came into this proceeding with no proof of a lost
15 sale. Not one instance of a buyer waiting in the
16 wings who could not be accommodated, who came to Gulf,
17 who asked to be allowed to go on the poles.

18 Gulf said we can't, and oh, we've got a
19 loss as a result. This is exactly the sort of proof
20 that APCO contemplated when it used the term
21 foreclosed opportunity to lease to others, and in the
22 third discovery order at page 3, also excerpted, Gulf

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1 admitted, quote, no instances where it was unable to
2 accommodate an attacher.

3 What that means on both of the two prongs
4 on loss, no higher valued use, no buyer waiting in the
5 wings. That's the end of the case or should be right
6 there.

7 Now, Gulf's counsel suggested to Ms.
8 Kravtin that real proof of loss is unreasonable or
9 makes the APCO test meaningless, suggesting that this
10 is an unmeetable standard. You demand proof of a
11 signed contract.

12 Well, there are a couple of important
13 points in response to this. As the 11th Circuit made
14 clear, Gulf already gets much more than just
15 compensation unless it shows a loss, that it's out
16 more money. In other words, the test that brings us
17 here today is the exception. It's not the rule. So
18 it's not at all surprising that there are going to be
19 very limited circumstances and certainly none have
20 been identified by Gulf where it could get more than
21 its existing just compensation.

22 A second point is that Gulf came here with

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1 nothing, not a signed contract, not an unsigned
2 contract, not even the name of a potential buyer or
3 lessor of space that couldn't be accommodated.

4 Instead it relies only upon, in the words
5 of Mr. Spain, a hypothetical buyer. We all hears Mr.
6 Spain admit that he knows of no instances where a
7 potential buyer of space approached Gulf about an
8 opportunity to attach and where Gulf couldn't
9 accommodate.

10 Of course, this is not surprising because
11 as you just heard a moment ago from Mr. Campbell, they
12 want to use fair market value as a proxy they say for
13 all poles, and that's really important because Gulf
14 wants to charge its higher rates for all of its poles
15 containing Complainant's attachments. This only makes
16 crystal clear that Gulf doesn't believe that it should
17 have to prove any loss.

18 Indeed, Gulf pins its theory or claim of
19 entitlement in this case on a feeling that, well,
20 cable isn't paying its fair share. We see this in Ms.
21 Davis' use of a replacement cost methodology that
22 allocates over four times the space allocated to cable

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1 as that used by the FCC formula in her use of a brand
2 new pole in her calculations instead of an average
3 cost of an existing poll in Gulf's network.

4 In fact, she testified that she didn't
5 even know if Complainants were on these brand new
6 poles that she used, and in her use of an allocation
7 for things that Gulf needs for its own electric
8 business, like grounds and arresters, what do these
9 allocations show? That Gulf is trying to exact from
10 Complainants in the name of its takings claim the
11 benefit or value that it thinks cable is getting from
12 attaching to its poles by seeking to charge attachers
13 a greater proportion of its overhead.

14 And as we point out in our legal brief,
15 this is specifically not sanctioned under case law.
16 APCO quotes the Second Circuit case in Metropolitan
17 Transportation Authority v. ICC, where it said if the
18 Fifth Amendment required a sharing of the overhead
19 cost of ownership, then the petitioners there, the
20 Amtrak who wanted to use the MTA's lines, the MTA
21 would be put in a better position by Amtrak's
22 appearance on the scene.

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1 True Amtrak benefits, but if we know one
2 immutable principle in the law of just compensation,
3 it's that value to the taker is not to be considered
4 only loss to the owner.

5 But what Ms. Davis' testimony makes clear
6 is that Gulf is trying to be put in a better position
7 than it would be absent cable's attachment, not get
8 compensated for loss, but say, "Hey, cable. You're
9 benefitting. Therefore, we should benefit and we
10 should get more." And it wants to have compensation
11 that exceeds the FCC's compensation by up to ten
12 times, 1,000 percent, and as I mentioned a minute ago,
13 Gulf wants to charge for all poles, not just poles for
14 which it has shown a buyer waiting in the wings for a
15 higher valued use.

16 And this brings us back to my concluding
17 point on this first of three prongs, which is the
18 single most important point in this litigation is Gulf
19 has proved no loss. Now I want to turn and address
20 what Mr. Campbell spent the bulk of his argument on.
21 Gulf has also failed to identify specific poles at
22 full capacity.

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1 Here the standard is full capacity. That
2 was the phrase used in the Alabama Power case at page
3 1370 and in your April 15th, 2005 status order where
4 you said the term pole crowding is ambiguous, and the
5 11th Circuit has held there's no right to consider
6 more than marginal costs unless a pole is at full
7 capacity.

8 What is full capacity? It's simple. We
9 heard from Patricia Craft in full capacity means
10 someone has to be excluded. Your question during the
11 hearing, Your Honor, about the analogy of an elevator
12 is illustrative. There can be a difference between
13 crowding, where rearrangement can lead to more people
14 coming on and full capacity, where one more person
15 coming on means someone has to get off.

16 Exclusion is the heart of rivalry and full
17 capacity, not whether a pole requires rearrangement or
18 make ready. It is have they shown they've had to
19 chuck someone out. That is the only thing that would
20 establish full capacity.

21 Now, Gulf has admitted in this case its
22 historical practice of accommodating attachers through

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1 make ready. You took note of that in one of your
2 orders, and this is an integral part of the permitting
3 process. Gulf has failed to show that it had to
4 exclude anyone, let alone tying an instance of
5 exclusion with proximate cause to our client's
6 attachments.

7 CHIEF JUDGE SIPPEL: Has the 11th Circuit
8 said anything about that, defined anything that
9 specifically, that is, that in order to prove full
10 capacity you have to show that somebody was actually
11 thrown off of the pole to accommodate the next one?

12 MR. COOK: We think not other than in the
13 APCO case that I'm aware of, but to answer your
14 question directly, we believe that the references in
15 APCO to a missed opportunity and a foreclosed
16 opportunity means there has to have been an exclusion
17 and a resulting loss. That's the only thing that can
18 mean, is that your poles are so full that you missed
19 out.

20 Now, if you have an historical, decades
21 old practice that's ongoing, as Mr. Bowen says, of
22 using make ready to make sure that nobody is excluded

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1 and to accommodate all comers, then you haven't
2 reached exclusion and you haven't reached full
3 capacity.

4 Now, we direct your attention in those
5 handouts, again, to our Exhibit 2, page 5, which says
6 the purpose of make ready is to, quote, provide space
7 for a licensee. Mr. Bowen admitted Gulf voluntarily
8 does make ready, voluntarily allows people on its
9 poles, has historically done make ready, continues to
10 do so, does so for itself, does so for others.

11 Well, with these points established, it
12 can't come in here and credibly try to turn the use of
13 make ready around on its head and say make ready is
14 proof of full capacity.

15 As Your Honor noted in a question to Mr.
16 Campbell, Gulf admitted a distinction between crowding
17 and full capacity, but in this case there's been no
18 showing of full capacity on any pole, only of NESC
19 clearance violations that are not only readily
20 correctable with Gulf's own make ready practices, but
21 which as you heard Mr. Haroldson say, have to be
22 corrected to comply with the NESC and which, when

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1 corrected, affect full capacity.

2 Now, we didn't hear much from Gulf's
3 witnesses about the Osmose pole survey and with good
4 reason. Osmose was only instructed to look at pole
5 crowding and not at full capacity. There are no
6 criteria on full capacity. Osmose didn't consider
7 make ready at all, and this is really important.
8 Gulf's own witness, Mr. Dunn, said, "If you can
9 rearrange attachments through make ready, that can
10 lead to a pole's not being at full capacity."

11 That admission, Your Honor, is devastating
12 to Gulf's case because Osmose didn't look for any of
13 its poles as to whether you could rearrange. So,
14 again, you have Mr. Dunn saying, "Yes, rearrangement,
15 if you can rearrange to clear up NESC issues, that
16 will mean the pole is not at full capacity."

17 And yet its own surveyor didn't measure
18 that. Now, Mr. Campbell I can already anticipate is
19 prepared to jump and say, "Well, even if he said that,
20 rearrangement is different from a changeout. A
21 changeout is changing the structure of the pole."

22 That's not what their other key witness,

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1 Mr. Bowen, said at page 27 of his testimony, where he
2 said it's impractical to distinguish between
3 rearrangements and a changeout. Well, if that's
4 impractical and if rearrangement can lead to no fully
5 capacity and their own surveyor didn't consider
6 whether it's possible to rearrange and use make ready,
7 then Osmose has no probative value in this proceeding.
8 Their admission undercuts their entire position.

9 Now, Osmose didn't also look at the order
10 of attachment on the poles. Yet Mr. Bowen admitted
11 that if Gulf or other parties caused the safety
12 clearance issues, they had the obligation to take
13 steps to fix those issues.

14 Another problem with Osmose's work, they
15 just looked at the poles at one time, and even under
16 Gulf's view where an NESC clearance issue equates to
17 crowding, there's no proof in this record about when
18 the safety clearance issue arose, how long it lasted,
19 whether it was fixed, or how long they existed.

20 Since Gulf is seeking annual pole rental
21 increases in this case for six years or seven years,
22 2000 through 2006, it has got to have come forward

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1 with some proof of full capacity during each of those
2 years, and yet all it did was one spot check in the
3 spring of 2005 because, as Your Honor took note, they
4 had no proof at all of any capacity issues before
5 that.

6 And Osmose's accuracy is a real issue
7 here. We started off Mr. Bowen's cross on the stand
8 with the removal of two of the 40 poles. Cross
9 examination then showed that at least one more, and
10 probably two more, did not meet Osmose's own criteria
11 and Mr. Bowen says there were a few occasions where
12 wrong criteria were identified by Osmose.

13 So Osmose touts its work as having 97
14 percent accuracy. Well, the 40 poles here didn't even
15 make that cut. There are three or four or more poles
16 had to be removed from their own classification.

17 And a final problem with Osmose --

18 CHIEF JUDGE SIPPEL: Let me ask you this.

19 MR. COOK: Yes.

20 CHIEF JUDGE SIPPEL: The Osmose surveys,
21 that constitutes considerable more evidence than was
22 submitted in the 11th Circuit, doesn't it?

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1 MR. COOK: It might constitute work that
2 was done, but what is the legal significance of that
3 work? Have they come forward and shown any instance
4 of where someone has been excluded?

5 CHIEF JUDGE SIPPEL: That's true. The
6 legal significance is important. What I'm simply
7 saying is that the 11th Circuit had nothing comparable
8 to the Osmore study in its analysis.

9 MR. COOK: I think that's true, but one of
10 the things to keep in mind there is the 11th Circuit,
11 when it was doing the lead-up in discussion of takings
12 law, said, "You know, there's a known fact and unknown
13 fact and a legal principle that essentially bring
14 Alabama Power's case down. The unknown fact is the
15 crowding or the full capacity." It used the term
16 "full capacity" in its text. The known fact was the
17 payment of make ready, and the legal principle was
18 just compensation is only measured by loss to the
19 owner.

20 What you hear Gulf talking about this
21 morning is, well, we met the unknown fact now, just as
22 Your Honor suggested. We have more evidence. We have

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1 evidence of crowding.

2 But they completely ignore the other two
3 things that the 11th Circuit took account of, the most
4 important of which is loss, loss to the owner.

5 But a last word on Osmose. One of its
6 central definitions of crowding was having less than
7 52 inches between electric and communications space.
8 This points up the artificial nature of this
9 definition because the way pole attachments work is
10 any attacher comes in, pays make ready if needed to
11 get on, and makes sure that there's a 40 inch safety
12 space between communications and electric, but you
13 don't pay for the next guy to come on, too, because
14 it's the next attacher's job, consistent with Gulf's
15 permit which says you pay us the cost and we'll
16 provide the space, to pay for make ready so that that
17 40 inches is maintained.

18 So by using its central definition that
19 says, well, there's crowding if there's less than 52
20 inches, Gulf has artificially set up or defined its
21 definition to lead to these outlandish claims really
22 of 70 and 80 percent of its poles meeting full

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1 capacity.

2 Now, the knowledge --

3 CHIEF JUDGE SIPPEL: Say that again.
4 Seventy or 80 percent?

5 MR. COOK: Right. You saw in the October
6 31st final report on Osmose that they say through
7 extrapolation 70 to 80 percent of our poles are
8 crowded.

9 CHIEF JUDGE SIPPEL: But has that been
10 rebutted?

11 MR. COOK: Well, it has been rebutted in
12 the sense that we have challenged that in multiple
13 ways. One of the chief ways that we point out is that
14 is not based on actual measurements, and in fact,
15 Osmose only looked at the attachments in the
16 Pensacola area of the Cox company, did not look at
17 attachments of any of the other three issues, and
18 there are numerous problems with the Osmose survey
19 that render its reliability -- essentially vitiates
20 its reliability.

21 So, yes, it has been rebutted, absolutely,
22 and rebutted directly actually by the testimony of

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1 Patricia Kravtin where she talks about why the
2 statistical extrapolation that Gulf employed in that
3 final report is unreliable. Yes, Your Honor.

4 CHIEF JUDGE SIPPEL: But it's not out of
5 order or it's not unacceptable methodology to use an
6 extrapolation process as long as it's considered to be
7 an appropriate extrapolation process or one that is,
8 say, professionally acceptable; is that right?

9 MR. COOK: In this case, that's not
10 correct, Your Honor, respectfully.

11 CHIEF JUDGE SIPPEL: You can use no
12 extrapolations?

13 MR. COOK: Because Alabama Power standards
14 said before a power company can seek compensation
15 above marginal cost, it must show with regard to each
16 pole that the pole is at full capacity and another
17 buyer of space is waiting in the wings for the higher
18 valued use without such proof.

19 Again, each pole, and that's why we
20 focused on this way back in early 2005, and your order
21 adopted that same language; without such proof, any
22 implementation of the cable rate which provides for

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1 much more than marginal cost necessarily provides just
2 compensation.

3 CHIEF JUDGE SIPPEL: Do you think that the
4 11th Circuit sort of had a tongue-in-cheek approach
5 there to say that, you know, if you can get somebody
6 to climb up every single pole and you can prove beyond
7 a shadow of a doubt that you've got full capacity,
8 then you're not going to succeed in your claim.

9 MR. COOK: No, I think there was no
10 tongue-in-cheek approach because you have to remember,
11 Your Honor, they already get just compensation.
12 Unless they can identify, go out in the field and
13 identify a specific pole or run of poles where they
14 suffered a loss, can they show a loss, because this is
15 a constitutional standard and the 11th Circuit said
16 you have the burden of showing loss and the burden of
17 showing the amount of the loss. They have to come in
18 with that proof and tie it to a specific pole, set of
19 poles, community of poles. They have to be specific.

20 And the point is we haven't heard that
21 evidence of loss as to any poles. That is also true,
22 Your Honor, for the ten Knology poles. There's only

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1 one page of testimony by Gulf about these, page 37 of
2 Mr. Bowen's testimony. All it says was that they had
3 done make ready. There was no showing that the poles
4 were or are at full capacity.

5 When Gulf's counsel questioned Mr.
6 Haroldson about these poles, Mr. Haroldson explained
7 up front in his testimony, well, Gulf had not provided
8 enough information about these poles to gauge their
9 current condition. Mr. Haroldson could say from his
10 experience and the photographs and the data they did
11 provide that there was no reason that they
12 affirmatively come forward and shown in light of
13 Gulf's make ready practices that those poles could not
14 hold more attachments.

15 CHIEF JUDGE SIPPEL: That took 25 minutes.
16 Do you want to go five more like Mr. Campbell did or
17 do you want to stop?

18 MR. COOK: Yeah, he had gone 40 from 9:10
19 to ten of. So if I could --

20 CHIEF JUDGE SIPPEL: Where are you?
21 You're at 25. You're a little over 25.

22 MR. COOK: Right. If I can be allotted

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1 the same 40, I would use not all of it, but a little
2 bit more.

3 CHIEF JUDGE SIPPEL: You can go down to
4 when the big hand hits the five down there.

5 MR. COOK: Okay.

6 (Laughter.)

7 MR. COOK: Very good, Your Honor.

8 So let me finish up the second prong,
9 which is in addition to failing to show an actual
10 loss. Gulf failed to show poles on which it had been
11 required to exclude others, let alone due to the
12 presence of Complainants' attachments, and therefore,
13 did not establish full capacity.

14 The third element of my presentation this
15 morning is that Gulf's methodology does not meet the
16 governing legal standards for damages. The
17 replacement cost methodology is not consistent with
18 the standard of loss to the owner. Mr. Dunn's
19 admission on page 28 of his testimony, replacement
20 cost is used as an alternative to taking Gulf's
21 property because an alternative for the taking is for
22 an attacher to construct an independent system of

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1 poles.

2 Now, you heard Mr. Campbell say, well,
3 you're misrepresenting it. It's not true at all. The
4 value to the attacher.

5 Well, he's not talking about a little bit
6 of value. Mr. Dunn is saying a lot of value, and our
7 method of damages is based on what you guys would have
8 to go and pay to go out and attach the poles.

9 Now, Mr. Spain said this is not feasible
10 for cable attachers to duplicate Gulf's pole network.
11 In his final answer to cross examination, page 1253,
12 he admitted Gulf's methodology is based precisely upon
13 the cost cable attachers would pay to go out and try
14 to reproduce Gulf's entire system. That is a standard
15 of benefit or value to the taker, not loss to the
16 owner.

17 The second point under replacement value
18 methodology, it is unrelated to the APCO standards of
19 either full capacity or lost opportunity. We saw that
20 in Terri Davis' testimony. She used the same
21 methodology Mr. Dunn told her to use in 2000 before
22 the APCO decision and after, and that methodology is

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1 based on the particular number of poles Gulf bought in
2 the prior year, poles which did not even necessarily
3 have Complainants' attachments on them

4 And here is a really important quote. She
5 said she was looking at replacement costs to avoid
6 actual field conditions that a cable operator might be
7 experiencing with attachments to a particular pole.
8 Mr. Dunn then went on and said Gulf's proposed rate
9 has, quote, nothing to do with a particular pole or
10 its condition.

11 Mr. Spain said there is no connection
12 between capacity on poles and the rate of \$40.60.
13 That one statement right there says it all. They come
14 in. They want a rate of \$40.60. They've got an
15 expert. He says, "Oh, I don't know of any connection
16 between the rate that they want and the capacity on
17 the poles."

18 Well, that also sinks their case right
19 there. There is no connection between Gulf's
20 methodology and the rate it derives from that
21 methodology, and either the capacity of the poles
22 containing Complainant's attachments or any loss.

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