

1 where the 11th Circuit will be sympathetic to Gulf
2 Power's position because Gulf Power, unlike Alabama
3 Power, has demonstrated a rivalrous condition on the
4 poles, and so you close that gap. That's what's being
5 lost in Complainant's analysis in this case.

6 Judge Tjoflat talked about rivalry for a
7 reason. It was what distinguished in his mind utility
8 poles from a plot of land. Well, we have answered
9 that distinction in this case. We've shown that we
10 have poles out there, many of them.

11 By Complainants' admission in this case,
12 one of their experts, about 87 percent if you look at
13 make ready as being the threshold issue, crowded of
14 the 100 exemplary poles we reviewed in this case.
15 We've got rivalry.

16 So where there's rivalry there's
17 congruence to land. Where there's congruence to land,
18 it is a fair market value analysis, and so how does
19 that work? How does the fair market value analysis
20 work?

21 Alabama Power v. FCC set forth takings
22 law, bedrock, foundational takings law. It's the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 willing buyer, willing seller standard and important
2 to note that that case says it is a hypothetical buyer
3 and a hypothetical seller. You don't have to go out
4 to the hypothetical wings and put your hands on John
5 Brown, this real seller, prop him up in the courtroom
6 with a negotiated rate and all of those things that
7 they want to require.

8 Hypothetical buyer and seller. Do you
9 have someone that would buy this piece of property?

10 Now, is there such a market in the context
11 of pole space? You have to watch for cut and paste
12 conclusions in this case. Complainants are bad about
13 it. Their 108 page proposed findings are replete with
14 "this has already been dealt with eight years ago."

15 Well, eight years is a long time,
16 especially in this context. Things change. Things
17 have changed in this context since the Alabama Power
18 decision four years ago.

19 How do we know that? We know there's a
20 market out there because there is an unregulated set
21 of utilities who own poles, and guess what. They're
22 selling their pole space to cable companies and CLECs,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 and they're doing it at a rate that averages in the
2 high teens, according to Mr. Spain. This testimony is
3 unrebutted.

4 Complainants essentially ignore it. The
5 only thing they attempt to do to address this market
6 is to say, "Well, that's apples and oranges because
7 Mr. Spain is comparing an unregulated market to a
8 regulated market."

9 And to that we say, you know, "No
10 kidding. Of course he is. That's the point." If
11 you're trying to buy a willing buyer, willing seller,
12 you have to get outside the context of the regulated
13 world because in the regulated world, we're not a
14 willing seller. We have a forced price on us. So if
15 you're going to look at what people's dealings at
16 arm's length will do, you've got to go outside the
17 regulated world and compare unregulated transactions.

18 And Mr. Spain finds average prices in the
19 high teens and trending up. What else do we have?

20 I'm sorry.

21 CHIEF JUDGE SIPPEL: I'm sorry. I just
22 have a question. It's a very interesting point you're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 making. My question is, however, Congress gave the
2 FCC or delegated the FCC the authorization to regulate
3 the use of utility poles in order to accommodate what
4 was then basically a new industry, cable industry.
5 That's really irrelevant, but to accommodate cable.

6 So the FCC gets this delegated power from
7 Congress and exercises that power in a ways that in
8 its discretion it is permitted to do.

9 So my question to you is if your argument
10 on the nonregulated versus the regulated has validity
11 from a legal standpoint, wouldn't the change have to
12 come from Congress?

13 MR. CAMPBELL: I don't think so because if
14 you look at the 11th Circuit case, there's an
15 important historical precedent here that's been set
16 since 1996, and that is there were other cases that
17 challenge whether the FCC in the face of a taking
18 could set just compensation, and we argued, Your
19 Honor, I argued that they couldn't do that; that
20 there's a separation of powers issue there; that
21 you've got to go to an Article 3 court to get just
22 compensation set, and there's a United States Supreme

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 Court case that says that.

2 And what the 11th Circuit told Gulf Power
3 and told me was that, no, that's okay. There is a
4 taking. There's no question about that. You are
5 right, Mr. Campbell. You are right, Gulf Power.
6 There's a taking. But it's okay for the FCC as an
7 administrative agency to attempt to set just
8 compensation even outside of the statutory framework,
9 and the 11th Circuit alludes to all of those different
10 proxies we've talked about, income method, replacement
11 costs, all of those things.

12 The FCC can do that, and they can be
13 guided by those things, and then if they get it wrong,
14 you can appeal to an Article 3 court, and we'll set
15 the record straight. So that's the protections that
16 are in place for us. That's the procedure that the
17 Complainants urged in the 11th Circuit and prevailed
18 on.

19 So, yes, there is a congressionally
20 mandated framework and rate for regulated situations,
21 but because there has been a taking here, there is
22 discretion, we believe, consistent with the 11th

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 Circuit precedent to deviate from those standards and
2 give us just compensation where we have satisfied the
3 11th Circuit's precondition in that issuing a
4 rivalrous condition on the poles.

5 And this plays into the next part of my
6 analysis. We don't think we're asking them to depart
7 from their methodologies very far at all. In fact, we
8 think we have proposed a methodology that is
9 consistent with their standards. We've just adjusted
10 them to reflect the realities of our situation and the
11 realities of fair market value analysis, and that's
12 something that even the Complainants in their proposed
13 findings admit that the Bureau, the FCC has the
14 discretion to do that, to adjust the presumptions and
15 assumptions that are in the cable rate, the telecom
16 rate, to reflect the realities of today.

17 They have that kind of discretion. So I
18 believe that addresses your request.

19 CHIEF JUDGE SIPPEL: It would seem to me
20 if the problem is an industry problem in the context
21 in which you presented it, that there would have been
22 some effort to get Congress to change the law, to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 amend the act.

2 MR. CAMPBELL: I think there have been
3 such efforts ongoing for quite some time, but politics
4 is a strange world, and lobbying dollars versus
5 lobbying dollars and that an analysis that's beyond my
6 expertise, but you know, I believe that's going on.
7 There's no question about it.

8 And you also see folks going back to their
9 states, to their state public utility commissions and
10 saying, "You know what? We're not getting a fair
11 shake at the federal level. Why don't you certify
12 this issue and you take jurisdiction because you can
13 do that under the act?"

14 And so you're seeing some of that as well
15 because what's happening at the state level we learned
16 from Mr. Spain. States are saying, "Do you know what?
17 There was one time when we thought the FCC was getting
18 this right, but it's just not right." Maine has
19 departed from it. Indiana has departed from it. Long
20 Island, we put in evidence about the municipality of
21 Long Island, and they're just saying, "Do you know
22 what? This just isn't right."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 And the rates are going up outside the
2 context of the FCC.

3 CHIEF JUDGE SIPPEL: But notwithstanding
4 all of that, the FCC continues to authorize the
5 charging of this fixed rate, and I don't think that
6 they've ever been told by a court or by Congress that
7 they can't do that.

8 MR. CAMPBELL: No, I think they've been
9 told by a court that they can until someone comes in
10 and satisfies the precondition that is set forth by
11 the 11th Circuit, and that's what this proceeding is
12 about. That's what we have done, and so now we're
13 into that next bucket, and it's going to be a case of
14 first impression for the FCC just like it has been for
15 you, Your Honor, just like it has been for Gulf Power
16 and for the Complainants.

17 You know, Alabama Power put this standard
18 out there. They didn't give us much guidance about
19 what it means or what it means after we satisfy it,
20 but we've satisfied it, and so now we've got to take
21 that next step, and the FCC absolutely is either going
22 to have to come with us that next step or they won't,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 and then it will go to a court of appeals. And that's
2 what has to happen.

3 CHIEF JUDGE SIPPEL: I didn't mean to cut
4 into your time. Go ahead.

5 MR. CAMPBELL: And I'll try to speed it up
6 to stay within the time constraints.

7 Continuing with is there a market, again,
8 they don't really do anything with this other than
9 that distinction. What about Complainants' own
10 agreements that they executed with a co-op down in
11 Florida at rates that are headed toward the 20s? High
12 teens themselves ramping up, and that's just one co-op
13 they entered into a contract with. We didn't get the
14 evidence in this case about all their other co-op
15 agreements. We don't know what those rates are.

16 But the point is there's a market right
17 there, their own agreements, and what is their
18 response to this? They don't even attempt to take a
19 glancing blow at this. Deafening silence on their
20 proposed findings. They say nothing about this.

21 What else is out there? Gulf Power's own
22 agreements. There's evidence in the case about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 regulated entities who have a right to lodge an FCC
2 complaint proceeding who have entered into agreements
3 with Gulf Power to pay something equivalent to our
4 replacement cost methodology at the time they entered
5 into the agreement, \$40, voluntarily. That is a
6 market. That is a willing buyer, willing seller.

7 Well, what do they do with this? And this
8 is an important point. I'll try to get through it
9 quickly, but this is an important point because you
10 see a lot of this in the 108 pages of the proposed
11 findings. And I call it painting with a broad brush.

12 What they do is they stack inferences that
13 are not supported by the evidence and are unreasonable
14 and are inaccurate, and I want to just give you this
15 one example before we move on. What they do is they
16 use Exhibit 77, which is a letter that one of these
17 entities that we entered into a contract with wrote to
18 Gulf Power with some boilerplate that says, "Do you
19 know what? We really don't agree with a substantial
20 portion of the provisions in this new contract.
21 Actually we do agree with a substantial portion,
22 including many of the material terms of the contract."

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 *Certainly rate is a material term of any*
2 contract. *Certainly if you think we're extracting*
3 *monopoly profits, you would say that is a material*
4 *term of the contract. Nowhere in this letter that*
5 *they proffered and used with their expert witness is*
6 *there any discussion of the rate.*

7 On cross examination, we attempted to go
8 beyond that and say, "Wait a minute. There's more in
9 that exhibit, Ms. Kravtin," and we went to an E-mail
10 that's also attached to the exhibit. And there was an
11 objection, and it was sustained because we were very
12 clearly attempting to establish one simple fact. Ms.
13 Kravtin knows nothing about the negotiations between
14 Adelphia and Gulf Power. Ms. Kravtin didn't represent
15 to the Court what appears at page 4 of that exhibit --
16 I believe it's page 4 -- which says it identifies the
17 concerns they had with this new agreement:
18 indemnification, unauthorized attachment costs,
19 modification based on change of law, and retroactive
20 fee changes.

21 Nowhere in that document does he say, "And
22 that rate is ridiculous." It has nothing to do with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 the rates, yet they take that and -- go to the
2 previous screen, would you, please? -- they take that
3 and in the proposed findings at Paragraph 85 they
4 reference this document and they say one of those
5 companies, not all of them, one of them, wrote this
6 letter and said, "You guys, you have leverage. This
7 is not an arm's length transaction."

8 They take that and they roll over to
9 Paragraph 357, and they say, well, Ms. Kravtin
10 testifies based on this document that any agreement
11 like this is subject to compulsion and so is not a
12 fair market value agreement.

13 Then they go further stacking the
14 inferences. One document, Paragraph 451. Now they go
15 so far as to say that the pole agreements that Gulf
16 Power has identified as examples of its ability to
17 lease pole space to others at what it calls market
18 value pole rent are, in fact, in fact, examples of
19 where Gulf Power has used its control or leverage over
20 poles to charge monopoly rents.

21 But they don't stop there. They go on in
22 Paragraph 513 and ask Your Honor to represent in your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 opinion that any time, any time Gulf Power enters into
2 an agreement with a communications service provider
3 that's covered by the regulated rate but who do not
4 formally challenge those rents, that they're exerting
5 leverage and monopoly rents, any time they enter into
6 an agreement.

7 So according to them we just can't ever do
8 this. So there is no market there.

9 Be careful in this proceeding about that
10 kind of inference stacking, that kind of inference
11 that there's evidence that doesn't exist in this case.
12 It's not there.

13 Now, so where does all of this leave us?
14 Next page. Where this leave us is, again, back to
15 this notion of fair market value because now we know
16 there is a market out there. There are multiple
17 markets out there. There are developing markets out
18 there. So where does it leave us?

19 One place it leaves us is you could say,
20 "Gulf Power, I don't like your replacement cost
21 methodology, but I think there's a market out there,
22 and I've seen contracts ranging from \$18 to \$20 to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 \$40, your own contracts."

2 And, Your Honor, certainly based on the
3 evidence in this case, you could just say, "I think
4 you guys ought to go negotiate a rate that's somewhere
5 between those numbers because there's a market. It's
6 somewhere between 20 and 40." That's one thing you
7 could do.

8 But we say, okay, we've put in some
9 evidence. There's evidence out there unregulated. Is
10 there enough of a market to really allow you to do
11 that?

12 One could question that. We think there
13 is, but we'll say, "Do you know what? Let's stick
14 closer to the FCC's real house. Let's stick closer to
15 their formulas, to their methodologies, and let's look
16 at whether we can come up with a methodology, a proxy
17 for fair market value that is fair and represents the
18 value of this space." And that's what I want to talk
19 about in just one second.

20 CHIEF JUDGE SIPPEL: I think we're pretty
21 close to the time.

22 MR. CAMPBELL: I'm working on it, Your

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 Honor. I'm trying to wind down. I didn't anticipate
2 questions.

3 CHIEF JUDGE SIPPEL: Well, okay.

4 MR. CAMPBELL: And the simple point I'll
5 make here is that let's not lose sight of the fact
6 that fair market value, when you use a proxy, you're
7 still looking at the proxy of the space.

8 All right. So what is our fair market
9 value analysis, replacement cost proxies? We
10 approximate fair market value is similar to the FCC
11 methodology. We think it's simple and expeditious.
12 It does employ averages and assumptions which Ms.
13 Kravtin criticizes and says you can't have an
14 appropriate analysis if you've got assumptions.

15 Well, guess what. The cable rate employs
16 assumptions. So if that's not appropriate for us to
17 use the replacement cost methodology, then the cable
18 rate certainly isn't an appropriate proxy for fair
19 market value. We think it is consistent with the just
20 compensation principles, and we've got to remember,
21 again, going back to the foundational precedent, this
22 is an art. It's not a science. We're not standing up

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 here saying our replacement cost methodology is
2 perfect.

3 Can they argue with components of it?
4 Sure. It's a proxy. It's the best we've got, and we
5 think it is appropriate.

6 We talked about some of the deviations
7 from the cable rate that are inherent in the
8 replacement cost methodology. This one is an
9 important one because it has been a battle that has
10 raged for years. We think it is now crystal clear in
11 this proceeding -- and I don't care about Alabama
12 Power Company's poles and I don't care about Georgia
13 Power Company's poles or any other power company's
14 poles, but in this case the evidence is unrebutted.
15 Our typical joint use pole is a 40 foot pole, and it's
16 not even close. Their witnesses admit it. Our
17 witnesses support it. The NESC mandates it. Our pole
18 addition evidence supports it, and the poles that were
19 the exemplary poles in this proceeding clearly
20 demonstrate it: 40 and 43 feet, unusable space.
21 We've talked about we'll rely on our proposed
22 findings. The Communications Workers' safety zone

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 will rely on the proposed findings.

2 I need five minutes, Your Honor, and I'll
3 into my rebuttal time, if necessary, to do it because
4 I've got to make two important points about their sort
5 of tax on our replacement cost methodology. And this
6 is an important one because this is what I call their
7 misdirection.

8 We have to keep our eye on the ball. The
9 ball is determining the value of the pole space.
10 Okay? What they want to do is they want to throw all
11 kinds of things at us. Well, you have make ready
12 costs and you're calculating value to the attacher,
13 and you're doing all of these things, you know, and
14 they mix it all up.

15 Let's keep them in their boxes. Okay?
16 I'll talk first about value to the attacher, benefit
17 to the attacher. If it's in the proposed findings
18 from them once, it's in there ten times. Okay?

19 Let me be clear. There is value to them
20 to attach to our poles. If there wasn't, they
21 wouldn't be there. Okay? So we don't deny that, and
22 we don't deny that our witnesses talk about the value

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 that they get from attaching to our poles.

2 But the replacement cost methodology does
3 not calculate that at all. If it did, replacement
4 cost methodology would not be a recognized proxy in
5 any just compensation case, and of course, it is.

6 And I will tell you, Your Honor, we think
7 going through this for years with them alleging that
8 there is a value to the attacher, not once, and they
9 know what our formula is about. They had their
10 economist dissect it. It has components. It has
11 accounts. You can calculate it. There's a carrying
12 charge. There's an investment. There's all of those
13 components.

14 Not once have they stood up and said, "Do
15 you know what? Here's the math and here's the area
16 where you're including some benefit or special value
17 to the cable companies. Here's where you're adding
18 something in. Here's something that is not related to
19 your cost." Okay?

20 They can't do that. They haven't done
21 that. The reason is because there's a distinction
22 between those two things.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 Now, what they do is they say, "Okay.
2 Then what you're doing is you're calculating what it
3 would cost them to go out and build a substitute
4 network."

5 No. Mr. Spain said very clearly in his
6 testimony -- and this is what they cite in their
7 proposed findings -- in Mr. Spain's testimony they say
8 he admitted that it's a substitute facilities
9 doctrine, and you're trying to calculate that. He
10 said no. He answered the question right, but he said,
11 "What I'm trying to calculate is Gulf Power's costs to
12 build that one foot of space."

13 Now, if you want to stand up and say,
14 "Well, isn't that the same cost that it would be to
15 them to build a substitute network?" argue that. I
16 don't know, but what he's looking at are Gulf Power's
17 hard and fixed costs, by and large publicly available
18 numbers in a methodology that has been out here for
19 everyone to cross examine and they never once
20 identified the component which calculates some value
21 to the attachers. Now, it's there.

22 Now, the last thing I'll say about that,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 again, goes back to converging land and pole space.
2 Once you have that congruity that Judge Tjoflat talked
3 about in Alabama Power v. FCC, then you begin to see
4 some conflation between the sense of value to the
5 attacher and loss to the owner. Why? Because that's
6 what happens in land. You have a willing buyer
7 transaction with a willing seller transaction accounts
8 for both sides.

9 So as you move toward a rivalrous
10 condition, you're going to see that close link, but
11 that is not the case here.

12 Quickly, make ready costs, one of the
13 biggest misdirections in the case. This has nothing
14 to do with value of the space they occupy on a pole.
15 All this is is reimbursing the utility for the cost it
16 incurs to prepare the property to be taken. It would
17 be analogous to someone owning an office building and
18 having a vacant office suite and someone comes in and
19 takes that. The government takes it, and they say,
20 "We're going to occupy that ten-by-ten office, but do
21 you know what? We have special needs. We need
22 special outlets, special lighting, and special

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 drywall. Build to suit. Make it fit our needs, and
2 we'll reimburse you those costs."

3 But we haven't yet calculated what is the
4 value of the ten-by-ten square. So this is something
5 we really have to be careful with. Make ready has
6 nothing to do with the value of the space they occupy,
7 and make ready might happen on one pole. It might
8 happen on two poles, but what we're here about today
9 is trying to value the one foot of space as a proxy
10 that will be applied to any pole on a going forward
11 basis, and we have to remember that.

12 That's why I say keep our eye on the ball.
13 This is a proxy for all poles.

14 Now, my last "so what" point from their
15 proposed findings of fact and conclusions of law. I
16 don't know how many pages it is. I'm going to guess
17 20 they spend attacking things like, well, your
18 replacement cost methodology was calculated in the
19 year 2000, and the Alabama Power decision wasn't
20 decided until 2002, and your witnesses have admitted
21 that the replacement cost methodology has nothing to
22 do with the condition on any given pole.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005

1 And what else? You don't use any of the
2 language in your replacement cost methodology from the
3 Alabama Power decision. So I guess the inference is
4 somehow the replacement cost methodology doesn't work.

5 To all of that we say, "Do you know what?
6 You got us on those points, but it doesn't matter.
7 You're missing the point altogether. The replacement
8 cost methodology does not apply to the condition on
9 any pole, no more than the cable rate does. It is a
10 proxy for the value of one foot of space on this pole,
11 this pole, and this pole on down the line."

12 And so that is a complete obfuscation of
13 what we are attempting to do with the second issue in
14 this case, valuing pole space across the poles.

15 Now, the FCC will always allow that if
16 they feel that a condition on a pole doesn't justify
17 that rate to come in and file a complaint proceeding.
18 They know how to do it. They've done it before, and
19 I'm sure they'll do it again.

20 CHIEF JUDGE SIPPEL: I think you're --

21 MR. CAMPBELL: I'll wind down, yeah. I'll
22 stop there and reserve the remaining time for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 rebuttal.

2 CHIEF JUDGE SIPPEL: You have only got
3 about five minutes left.

4 MR. CAMPBELL: That will be fine. Thank
5 you, Your Honor.

6 CHIEF JUDGE SIPPEL: Who is going to
7 proceed?

8 I just want to take it just not a recess,
9 but just one minute off the record, please.

10 (Whereupon, the foregoing matter went off
11 the record at 9:53 a.m. and went back on
12 the record at 9:53 a.m.)

13 CHIEF JUDGE SIPPEL: We're back on the
14 record.

15 Who's going to proceed now for the
16 Complainant? So it will be Mr. Cook or Mr. Seiver?

17 MR. COOK: Your Honor, I will.

18 Let me ask a prefatory question. I do not
19 have blow-ups, but I have excerpts of things that are
20 in the record. May I hand convenience copies to the
21 Court and the parties?

22 CHIEF JUDGE SIPPEL: If there's no

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 objection. Yes, there would be no objection.
2 Everybody else is getting the same thing I'm getting.

3 MR. COOK: Yes, Your Honor.

4 CHIEF JUDGE SIPPEL: There shouldn't be
5 any problem.

6 MR. COOK: Thank you.

7 And these just contain things that I'll be
8 referring to in my argument.

9 CHIEF JUDGE SIPPEL: All right. Before
10 you begin.

11 MR. COOK: Yes.

12 CHIEF JUDGE SIPPEL: Just one minute now.
13 I'm just making a note here. And what is the time on
14 that clock? It's 9:50? Do I have that right?

15 PARTICIPANTS: Yes.

16 MR. COOK: I think we began at 9:10.

17 CHIEF JUDGE SIPPEL: Yeah, I think that's
18 right.

19 Okay. Now, you've heard the points that
20 I presented to Mr. Campbell. Let me see if I can
21 summarize, and, again, this is for purposes of I want
22 to be sure that -- I'm trying to do the best I can to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20005

1 put myself in the right perspective in terms of the
2 relevancy arguments.

3 But the Complainants, I understand, that
4 Gulf Power must prove that to charge above fixed rates
5 there must be an actual measurable loss involving
6 specific poles either from a missed sale to a third
7 party or from a foreclosed opportunity to employ a
8 particular higher valued use.

9 And I believe that, again, it's difficult
10 to just take, you know, one set of rubrics out of the
11 Gulf Power case, but I believe that if that's not a
12 quote it's a close paraphrase to what had been set in
13 the Gulf Power decision, 311 F.3d at pages 1370 to 71.

14 Now, again, I'm not asking you to agree
15 whether or not to create what was mentioned in the
16 court. I'm trying to say -- what I'm trying to get at
17 does that represent pretty much of the guts of what
18 you're argument is in terms of this case?

19 MR. COOK: Yes, Your Honor. The one
20 overriding principle is that they have to show a loss
21 or a cost caused by our attachments, and as Your Honor
22 has already noted, they have shown no loss, and I'll

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVENUE, N.W.

WASHINGTON, D.C. 20005