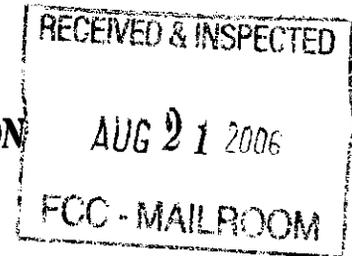


Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554



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FLORIDA CABLE  
TELECOMMUNICATIONS ASSOCIATION,  
INC., COX COMMUNICATIONS GULF  
COAST, L.L.C., et. al.

E.B. Docket No. 04-381

Complainants,

v.

GULF POWER COMPANY,

Respondent.

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To: Office of the Secretary

Attn.: The Honorable Richard L. Sippel  
Chief Administrative Law Judge

**GULF POWER'S REPLY TO COMPLAINANTS' PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Gulf Power Company files this Reply to Complainants' Proposed Findings of Fact and Conclusions of Law pursuant to the Presiding Judge's May 1, 2006 Order (FCC 06M-12), as amended by Order dated June 12, 2006 (FCC 06-M-18).

**I. Complainants' Proposed Findings Are Unreliable**

Complainants' Proposed Findings pyramid unreasonable inferences, recycle inapplicable precedent (falsely labeled as "recent")<sup>1</sup>, mischaracterize the evidence, and propose findings that are wholly irrelevant. In the end, Complainants' Proposed Findings and ultimate conclusions are unreliable, unworkable and at odds with the evidence.

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<sup>1</sup> See, e.g., Complainants' Proposed Findings ¶ 17 (calling a 2000 FCC Rulemaking "recent"). The rulemaking, two years prior to the Eleventh Circuit's decision and six years prior to this proceeding, is far from "recent."

## A. Complainants Make and Stack Unreasonable Inferences

1. Federal law permits a fact-finder to make inferences. *Fenner v. General Motors Corp.*, 657 F.2d 647, 650-51 (11<sup>th</sup> Cir. 1981). Federal law even permits an inference to be made upon an inference, *i.e.* “pyramiding” or “stacking” inferences. *Id.* Each “inference relied upon, however, must be reasonable.” *Id.* at 651. An inference is unreasonable “if it is only a guess or a possibility, for such an inference is not based on the evidence but is pure conjecture and speculation.” *Rodriguez v. Farrell*, 280 F.3d 1341, 1353 (11<sup>th</sup> Cir. 2002); *see also Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1326 (11<sup>th</sup> Cir. 1982) (“Such an inference is infirm because it is not based on the evidence.”).

2. Complainants’ Proposed Findings urge the Court to find (as a matter of fact) that Gulf Power has exercised coercion (and will continue to exercise coercion) in negotiation of each and every pole attachment agreement. *See, e.g.*, Compls. Proposed Findings, ¶¶ 85, 326, 357, 367, 451, 512-13. Complainants bait such a finding with a pyramid of unreasonable inferences, none of which stand on their own merit, much less collectively. *Id.*

3. Complainants begin the stacking of unreasonable inferences with an isolated sentence from their Exhibit 77, and state that Adelphia (one of the attachers who pays Gulf Power more than \$40 per attachment) previously wrote to Gulf Power and complained “that it is ‘not in a position to engage in an arm’s length negotiation [with] Gulf Power.’” Compls. Proposed Findings, ¶ 85. While Complainants accurately quote this isolated portion of Exhibit 77, what they extrapolate from there is wholly unreasonable, belied by the remainder of the exhibit, and contradicted by the remaining evidence.

4. First, relying on this excerpt, Complainants infer that Adelphia’s concern was the attachment rate. Compls. Proposed Findings, ¶ 357; *see also Kravtin Cross*, 4/26/06 Tr., p. 1427

(characterizing the letter as reflecting a “belief” that the rate was not “reasonable”). The inference does not square with the remainder of the multi-page exhibit, which establishes that Adelphia agreed to “the substantial portion” of the agreement including “many of the material terms.” Compl. Ex. 77. Rate is clearly a “material” term. Moreover, the remainder of Exhibit 77 actually reflects the provisions with which Adelphia took issue; the attachment rate was not one of them. *Id.*, p. 5. (listing the discussion items as relating to “indemnification, unauthorized attachment cost, modification upon change of law, and retroactive fee charges”). For her part, Kravtin finally admitted that her inference that Adelphia was complaining about the rate was wrong. Kravtin Cross, 4/26/06 Tr., pp. 1432-34 (“yeah, it appears like I did – I didn’t actually make the connection.”). Complainants charge on with this point nonetheless, as if it is fact.

5. None of Complainants’ witnesses had any first hand knowledge concerning the negotiations between Adelphia and Gulf Power. Kravtin Cross, 4/26/06 Tr., p. 1449-50. When Kravtin began to testify regarding her interpretation of Exhibit 77, the Court disallowed Gulf Power’s counsel the opportunity to pursue the issue further. Kravtin Cross, 4/26/06 Tr., pp. 1436-37. Further, Gulf Power’s witnesses - - the only witness in the case with first hand knowledge of the Adelphia negotiations - - testified that there was no compulsion or coercion. GP Ex. A (Dunn Direct), p. 32;<sup>2</sup> GP Ex. B (Bowen Direct), pp. 20-21. Complainants’ inferences regarding “coercion” are at war with the facts and must be rejected. *See Fenner*, 657 F.2d at 647, 650 (“An inference may be unreasonable if it is at war with uncontradicted or unimpeached facts.”).

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<sup>2</sup> Mr. Dunn also testified on re-direct:

Q: There was an allusion in the opening statement of this case that there was duress in the negotiations between you and Complainants. Was there Mr. Dunn?

A: Absolutely not .... It was strictly negotiations.”

Dunn Re-Direct, 4/24/06 Tr., p. 853.

6. Based on Exhibit 77 and the erroneous assumption that Adelphia's concern related to the rate, Kravtin stretches the point further opining that *any* agreement like the Adelphia agreement is subject to compulsion and, therefore, is not a fair market value agreement. Compls. Proposed Findings, ¶ 357. Complainants further stack unreasonable inferences in proposing that the Court hold that *all* of the pole attachment agreements identified by Gulf Power as examples of its ability to lease pole space to others at a market rate are "*in fact*" examples of where Gulf Power has used its control or leverage to extract monopoly rents. *Id.*, ¶ 451. Complainants make this leap without any evidence concerning the negotiations between any of these other attaching entities and Gulf Power.

7. Complainants ask the Court to go even further and to decide, as a matter of law, that *anytime* Gulf Power enters into a pole attachment with a rate higher than the regulated rate, it is extorting monopoly rents. *Id.*, ¶ 513. Complainants' stacking of progressively more unreasonable inferences is impermissible as a matter of law, and cannot be accepted by this Court. *See, e.g., Daniels*, 692 F.2d at 1323 (stating that an inference based on a guess or possibility is nothing more than pure conjecture and speculation and is improper).

**B. Complainants Rely on Dated and Inapplicable Precedent**

8. By way of example, Complainants state that in 2000, "[t]he Bureau also found 'no merit in Gulf Power's objections to specific aspects of the Cable Formula,' including Gulf's claim that the average pole height of poles being replaced is 40 feet." Compls. Proposed Findings, ¶ 35. Complainants then state, "Ms. Davis was not aware, when she prepared her calculations, that the Commission has previously rejected an identical claim by Gulf Power's sister company, Alabama Power, that the average pole height should be considered to be 40 feet." *Id.*, ¶ 104. These cut and paste conclusions do not square with evidence in this case. First, some 5 years have passed since the FCC considered Alabama Power's claim. Second,

*Alabama Power's poles are not Gulf Power's poles. Finally, the FCC's pole height input is a rebuttable presumption. Here, Gulf Power rebutted the presumption with uncontradicted evidence. See GP Proposed Findings, ¶¶ 19, 34-35. Other than citing to the dated precedent concerning Alabama Power's poles, Complainants did nothing to rebut Gulf Power's evidence that its average joint use pole is at least 40 feet tall.*

9. In paragraphs 243 and 355 (among other places), Complainants rest on the Commission's 2001 Order in *Alabama Power* and the statement in the Eleventh Circuit's 2002 decision in *Alabama Power v. FCC* suggesting that there is no free market for pole attachments. *See, e.g.,* Compl. Proposed Findings, ¶ 283. The actual findings in *Alabama Power* was that, in 2002, there was no "active unregulated market." 311 F. 3d at 1368. In any event, those decisions repeat historical observations that, in 2006, are just that – history. The evidence *in this case* is undisputed: (a) Gulf Power negotiated voluntary agreements with attachers at rates in excess of the Cable and Telecom Rates; (b) Complainants themselves freely enter into agreements at rates more three times the Cable Rate; (c) unregulated pole owners freely negotiate rates as high as twenty dollars; (d) (according to Complainants' own economist) a "market" can consist of just one buyer and one seller; and (e) Mr. Spain found evidence of a free market. *See* GP Proposed Findings, ¶¶ 42-88; Spain Cross 4/26/06 Tr., pp. 1206-12 (p. 1206: A: "... I do think there's a market for transactions or for pole attachment transactions...." p. 1207 (following objections) Court: "I heard this witness very clearly say that there is or may be a market and it has to do with unregulated.").

10. In paragraphs 508-525, Complainants state that the Commission already has rejected the use of a Replacement Cost Methodology ("RCM"). But the FCC's rationale was rejected by the Eleventh Circuit in *Alabama Power Co. v. FCC*, 311 F. 3d at 1367 ("The FCC

inappropriately focused on ratemaking cases . . . . When a physical taking is at issue, however, a different analytical hat must be worn.”). Gulf Power has proven rivalry and it is time for a “different analytical hat” on the appropriateness of its RCM. See GP Proposed Findings, ¶¶ 72-73.

**C. Complainants Make Irrelevant Arguments**

**1. The Replacement Cost Methodology**

11. Complainants argue that the RCM is flawed because it is unrelated to specific poles, and “calculated without regard to capacity on a particular pole.” Compls. Proposed Findings, ¶¶ 73-85. But the RCM is a *proxy* for the fair market value of space occupied on *any* pole. A “proxy” is “something serving to replace or substitute for another thing.” Webster’s Third New International Dictionary 1828 (3<sup>rd</sup> ed. 1993). Further, the RCM is triggered only after Gulf Power establishes rivalry. Once the analysis proceeds to step two (determining just compensation), the capacity analysis has necessarily been resolved in Gulf Power’s favor. 311 F. 3d at 1371 (“[A] power company where poles are in fact, full can seek just compensation.”).

12. Complainants also make much of the fact that the RCM was developed in 2000, before the *Alabama Power v. FCC* decision. See, e.g., Compls. Proposed Findings, ¶¶ 86-107. This point could not be more irrelevant. *Alabama Power v. FCC* set forth a condition precedent for recovering just compensation. 311 F. 3d at 1320 (“In short, before a power company can seek compensation above marginal cost, it must show...”). The Eleventh Circuit did not dictate a specific methodology for the calculation of just compensation nor did it reject notions of fair market value applied to rivalrous pole space. In fact, the Court recited the traditional notions of just compensation law underpinning Alabama Power’s RCM and noted that it would “ordinarily be sympathetic” to Alabama Power’s arguments in that case. *Id.* at 1368.

2. Osmose Data

13. Complainants spend over 10 pages and over 53 paragraphs attacking the data gathered by Osmose. As the Court already has recognized, this case is not about Osmose. 6/15/06 Tr., p. 2019. Osmose was retained to collect objective data. GP Ex. B (Bowen Direct), pp. 28-30. The fact that Osmose was not given “any information about ‘what constitutes a pole at full capacity’” (Compls. Proposed Findings, ¶ 150) demonstrates nothing more than Gulf Power’s effort to keep Osmose focused on objective data and not on legal word games.<sup>3</sup>

14. Complainants’ other attacks on Osmose are equally unavailing and, in fact contradicted by their own engineering expert:

(a) Complainants attack Osmose’s reliance on NESC separation requirements (Compls. Proposed Findings, ¶¶ 153-155), but their own expert engineer admits to using the same basic measurements. Harrelson Cross, 4/2706 Tr., pp. 1610-1613 (Q: “[A]m I accurate that many of the NESC measurements that you refer to in this document [GP Ex. 76 drafted by Harrelson] are some of the measurements that were taken by Osmose, as well, in this case?” A: “**Osmose took such measurements as I have described here. Yes.**”) (emphasis added).

(b) Complainants assert that Osmose made errors (Compls. Proposed Findings, ¶¶ 185-192), but their own expert engineer admitted that the process is never exact, that Osmose acted in good faith, and that he believes it to be accurate within a percent range of “90% or higher.” Harrelson Cross, 4/27/06 Tr., pp. 1630-33; GP Ex. 70A (Harrelson Depo.), p. 273.

(c) Complainants criticize Osmose for not determining which entity caused separation violations (Compls. Proposed Findings, ¶¶ 156, 162), but admitted such an analysis would be difficult and “in some cases impossible.” Harrelson Cross, 5/1/06 Tr., pp. 1800-02; GP Ex. 70A ( Harrelson Depo.), p. 634 (“[A] lot of poles have violation [] on them, and no one, in my opinion can be certain which company created those violations so it’s reasonable to assume that both companies created some of them. Nobody is completely without creating some violations along the way.”)

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<sup>3</sup> Complainants’ experts, on the other hand, were part-in-parcel of the legal word games played by Complainants. See ¶¶ 30, 32, *infra*; GP Proposed Findings, ¶¶ 23-29.

(d) Complainants criticize Osmose for not measuring the height of any pole above the ground (Compls. Proposed Findings, ¶ 163), but neither did their own expert. See Compls. Exs. 6-7.

(e) Complainants criticize Osmose's failure to perform any "in field validation" or "post-field validation" (whatever these terms mean). Compls. Proposed Findings, ¶¶ 164-165. But neither did Mr. Harrelson. See Harrelson Direct; Compls. Exs. 6-7.

#### **D. Complainants Misrepresent The Evidence**

##### **1. Make-Ready Cost Recovery Has Nothing To Do With Value**

15. Complainants continue to argue that Gulf Power's make-ready cost recovery somehow relates to the value of the space occupied. Compls. Proposed Findings, ¶ 292, 295-297. Complainants are wrong; make-ready does nothing more than reimburse the utility for the costs associated with *preparing the property to be taken*. In Complainants' own words, it is "done 'to provide space for Licensee's attachments.'" Compls. Proposed Findings, ¶ 51. Make-ready is analogous to improvements made to allow a tenant to occupy available office space (e.g., certain fixtures, partitions, etc.). Such improvements have nothing to do with the actual office space being occupied; a rent must still be negotiated. Here, one-time make-ready cost recovery has nothing to do with the value of the space occupied by Complainants year after year.

16. The evidence confirms the distinction between make-ready costs and the value of the space occupied. Complainants negotiate agreements with unregulated pole owners, such as CHELCO, an electric cooperative. GP Proposed Findings, ¶¶ 85-88. Complainants' pay the make-ready charges separate from the nearly \$20 rate they voluntarily agreed to pay CHELCO in a free market transaction for attachments "identical" to those made on Gulf Power poles. GP Exs. 57, 58 & 59. Similarly, Gulf Power's arm's-length negotiations with telecommunications entities seeking attachment also require payment of make-ready charges in addition to an annual rental for pole space. See, e.g., GP Ex. 34 (GTC Agreement), p. 7, 10-11.

## 2. Gulf Power's RCM Does Not Calculate Any "Value" to the Attacher

17. Complainants attempt to cast Gulf Power's RCM as calculating some benefit or value to the attacher. Compls. Proposed Findings, ¶¶ 81-85. Complainants repeatedly asked Gulf Power witnesses to recognize that there is "value" to the Complainants in attaching. *Id.* Gulf Power witnesses candidly admit that there is. *Id.* If there were no benefit to Complainants, given their available construction alternatives, they would not attach to Gulf Power's poles. Where Complainants go wrong is attempting to stretch that common sense recognition of this benefit into an admission that the RCM *calculates* that benefit. As explained by Gulf Power's valuation expert, Mr. Spain, the RCM calculates *only* the value of pole space. Spain Cross, 4/26/06 Tr., pp. 1213 ("I looked at the calculation prepared by Gulf and it does value a component of the corridor, that being pole space.").

18. Mr. Spain, a professional valuation analyst, explained the appropriateness of the RCM as a just compensation proxy. Ms. Davis testified as to the Gulf Power cost accounts that comprise the RCM. Ms. Davis is not a valuation expert and did not purport to opine as such. The fact that she sees value to the attachers is wholly irrelevant. As Mr. Dunn testified on direct, "The [RCM] was developed to serve as a proxy for 'fair market value' ... It was developed to adhere as much as possible to the FCC's experience in cost based formulas ..." GP Ex. A (Dunn Direct) p. 27. The fact that former employees, Mr. Rex Brooks and Mr. Mike Dunn also see benefit to attachers is irrelevant. The cost-based RCM has nothing to do with *calculating* benefit to the attacher. Instead, it has everything to do with calculating -- as a proxy for fair market value -- the *value of the space* taken by Complainants.

## 3. Complainants Twist Witness Testimony

Complainants' worst demonstration of word twisting is their proposed finding that: "One of Gulf Power's witnesses, Michael Dunn, testified that the number of Gulf Power poles

requiring change-outs or other make-ready 'are a small percentage' of the total of its distribution poles." Compls. Proposed Findings, ¶ 59. There are two major problems with this proposed finding.

19. First, Complainants exploited a confusing line of questions to obtain errant testimony that a rearrangeable pole would not be at "full capacity." Dunn Direct, 4/24/06 Tr., pp. 725-727. What Complainants omit is that on re-direct, recognizing the confusion, Mr. Dunn testified very clearly as follows:

Q: Were you including in your answer there concerning the percentage of poles that are already at full capacity poles that would have to be rearranged or have some other form of make-ready performed in order to accommodate an additional attachment?

A: Yes.

\* \* \* \*

Q: ...In Mr. Seiver's cross, I think you said at one point that if a pole could be rearranged, that it was not crowded; did I hear you correctly?

A: If a pole requires make-ready it is crowded.

Q: And what do you mean by the term make-ready?

A: It is **rearrangement** or replacement.

Dunn Re-Direct, 4/24/06 Tr., pp. 849-850 (emphasis added).<sup>4</sup>

20. Second, the notion that only a "small percentage" of Gulf Power poles would require change-out or "other make-ready" (as Complainants urge the Court to conclude in ¶ 59 of their proposed findings) is belied by the exemplar pole data. Complainants' own expert opines

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<sup>4</sup> Mr. Dunn's re-direct is also consistent with Mr. Bowen's testimony. GP Ex. B (Bowen Direct), pp. 15, 25-28 (p. 27: "a 'crowded' pole [is] any pole that would required make-ready (rearrangement or change-out) to host an additional communications attacher").

that a very large percentage -- 88% -- of the eighty-eight exemplar poles would in fact require make-ready of some type in order to accommodate an additional attacher.<sup>5</sup> A correct finding may well be that a small percentage of poles require change-out (as opposed to rearrangement), but that is not what Complainants' ask the Court conclude.

## II. The Testimony From Complainants' Experts Is Unpersuasive

### A. Patricia Kravtin

21. Paragraphs 272-369 of Complainants' Proposed Findings are essentially a summary of Kravtin's pre-filed written direct testimony, which in many instances neglect the weaknesses and errors exposed during cross-examination. For many reasons, Kravtin's testimony is unreliable, and should not form the basis of any findings in this case.

22. Many of Kravtin's opinions are not based on case-specific research and analysis, but instead on recycled conclusions cut and pasted from FCC precedent based on different records (or, in many cases, virtually no record at all). A prime example is her testimony that poles are an "essential facility" to cable operators. Complainants ask the Court to find that "utilities" have "monopoly control" over essential facilities. Compl. Proposed Findings, ¶¶ 280-82. Notably, Complainants do not ask the Court to find that *Gulf Power* has monopoly control over an essential facility to the specific cable operators *in this case*. Nor could they; there are no facts in the record to support such a finding. Complainants, instead, are content to suggest a finding relating to non-specific "utilities" and non-specific "third party attachers." See GP Proposed Findings, ¶¶ 64-70.

23. Kravtin did nothing to determine whether Gulf Power's pole network is an essential facility to the Complainants. Kravtin Cross, 4/26/06 Tr., pp. 1348-51. She did no

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<sup>5</sup> The total number of poles excludes the two poles withdrawn by Gulf Power and the ten Knology poles that provided examples of where make-ready was necessary and performed to accommodate an additional attacher.

*research, and even conceded in cross-examination that she had not read the Complainants' depositions in this case, did not know the extent to which they were constructing underground versus overhead, and had no idea what it costs to construct underground. Kravtin Cross, 4/26/06 Tr., pp. 1352-53; 1418-19. Her generic conclusion that poles are essential facilities cannot be accepted in this case. See also GP Proposed Findings, ¶¶ 64-70 (debunking the essential facilities myth).*

24. Kravtin also proffered unfounded and conclusory opinions that Gulf Power always extracts monopoly rents. As set forth above (*see* ¶¶ 4-5), Complainants ask the Court to find, in essence, that any rate based on Gulf Power's RCM is a "monopoly rate" obtained under "compulsion" and cannot be relied upon as evidence of fair market value. Yet, Kravtin did absolutely no research to support such opinions.

25. At trial, Kravtin could not recall the identity of the three attaching entities (KMC, Adelphia, and Southern Light) who pay Gulf Power a free market attachment rate based on the RCM. Kravtin Cross, 4/26/06 Tr., p. 1427. Even when refreshed, Kravtin could not recall how many attachments each entity had. *Id.*, pp. 1438-39. Concerning her speculation that there was "compulsion," Kravtin alluded to an excerpt from Adelphia letter that she characterized as "saying that its signature to that [agreement] didn't involve its actual willingness to – or a belief that was a reasonable rate." *Id.*, p. 1427. On cross-examination, Kravtin conceded that the letter made no specific reference to the rates.<sup>6</sup> *Id.*, pp. 1429-36; Compl. Ex. 77; *see also* ¶¶ 1-7 above (regarding Complainants' pyramiding of unreasonable inferences).

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<sup>6</sup> Before conceding, Kravtin attempted to escape via the following answer:

Q: Is there anywhere in that letter where Adelphia takes issue with the rate they are being charged?

\* \* \* \*

26. Kravtin also never researched Complainants' own attachment agreements with other utilities. Kravtin Cross, 4/26/06 Tr., p. 1441. When confronted with Complainants' voluntary payments to an electric cooperative ranging from \$17.50 to \$20 per attachment (for the same attachments they make to Gulf Power poles), Kravtin testified that such transactions were irrelevant "because those cooperatives are not subject to the section 224 and the cable rate formula." Kravtin Cross, 4/26/06 Tr., pp. 1441-42. Obviously, Kravtin has missed the boat on this issue. Voluntary contracts negotiated without compulsion are the standard bearers for fair market value. *See Alabama Power Company v. FCC*, 311 F. 3d at 1368.

27. Kravtin's misunderstanding concerning the fair market value standard may be a result of her professional limitations. She is not a valuation expert and holds no certifications in valuation or appraisal. Kravtin Cross, 4/26/06 Tr., pp. 1342-43; 1439-40. Kravtin is an economist, whose work focuses (almost exclusively) on the telecommunications industry (on one side of the issues). She has never testified on behalf of an electric utility and could not recall testifying for a telephone utility. *Id.*, p. 1360. In pole attachment cases, in particular, *all* of Kravtin's testimony has been on behalf of cable companies. *Id.*, pp. 1358-60. She has testified at least ten times at the behest of the law firm representing Complainants and has even testified

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A: [W]hen I look at the additional communications, there is one memo that I think follows up on that that specifically does reference unauthorized attachment costs.

\* \* \* \*

Q: Ms. Kravtin, you know what an unauthorized attachment is, don't you?

A: Yes.

Q: It's an attachment that has been made to a pole without a permit?

A: Yes, that's correct.

Q: And so when it says unauthorized attachment costs, that has nothing to do with the rate, does it? [objection overruled]

A: **Yeah, it appears like I did – I didn't actually make the connection. . . .**

Kravtin Cross, 4/26/06 Tr., pp. 1432-34 (emphasis added).

jointly as an expert with one of its partners in a Canadian pole attachment proceeding (where the bulk of their recommendations were rejected). *Id.*, pp. 1362-63.

28. There are other factors bearing on the weight to be afforded Kravtin's testimony, including the over-reaching positions she took at trial as well as her unresponsive and evasive demeanor. Her testimony during cross-examination about the concept of rivalry is exemplary of her penchant to over-reach. Kravtin testified that examples of highly rivalrous goods are food, elevators and land and that national defense, parks, open-air concerts, and landing strips are examples of highly nonrivalrous goods. Kravtin Cross, 4/27/06 Tr., pp. 1491-92; 1496-97. When asked whether Gulf Power's poles are "more like parks, open-air concerts, the national defense and landing strips than an elevator or food item," Kravtin – perhaps fearing the consequences of a rational answer – testified that Gulf Power's poles were more like parks, open-air concerts, and the national defense. *Id.*, pp. 1498-99.

29. An example of Kravtin's unresponsiveness and evasiveness can be found in her cross-examination testimony regarding Telecom Formula. Though she testified that the Telecom Formula reflected "economically appropriate cost allocation principles," she more or less refused to answer questions about a key component of the formula – the space allocation factor. *Id.*, pp. 1399-1405. One of Gulf Power's principal criticisms of the Cable Rate is that it fails to appropriately allocate the unusable space on a pole. The Telecom Rate, on the other hand, comes closer to an equal allocation of the unusable space. Seeing this point unfold, Kravtin refused to answer the simple question of whether the space allocation factor, itself, reflects "economically appropriate cost allocation principles." The obvious answer, given her overall conclusion, *had* to be "yes." Yet, Kravtin engaged in what can *best* be described as ducking and weaving:

The way you are asking me the question, I am not able to answer it *because I don't view the telecommunications formula as allocating unusable space different in terms of – the space factor allocation is different, but both the cable formula and telecom formula allocate the cost of the total pole, including usable and unusable space.*

*Id.*, p. 1401.

30. Kravtin also: (1) reached a conclusion in this case well before any discovery had commenced; and (2) altered her opinion regarding the distinction (or lack thereof) between “crowding” and “full capacity” at the suggestion of counsel. Gulf Power Ex. 73 is a copy of a draft outline of Kravtin’s testimony she prepared in March 2005 (well before any discovery). Kravtin Cross, 4/26/06, Tr., pp. 1465-66. In that draft, Kravtin already had reached a number of conclusions, including but not limited to: (a) “The utilities have not presented credible evidence to support crowding claims”; and (b) “crowding” and “full capacity,” were synonymous concepts. GP Ex. 73. At trial, however, Kravtin testified that there was an “important distinction” between the two terms. Kravtin Cross, 4/26/06 Tr., pp. 1449-50. She further testified that this had *always* been her position in the context of this case. *Id.* Why the change in tune? The answer appears to lie in a memo written by counsel for Complainants and sent to Kravtin shortly after she circulated her draft outline:

I suggest that we limit our use of the term “crowding” or “crowded” when describing capacity on poles. While the *APCo v. FCC* court mentioned “crowding” in passing, it made clear that its test was “full capacity.” To the extent possible, we will want to consistently refer to “full” poles to emphasize Gulf Power’s burden.

GP Ex. 74.

31. For the reasons set forth herein, Kravtin’s opinions are generally unreliable, not helpful to the resolution of the factual issues and should be afforded limited, if any, weight.

**B. Michael Harrelson**

32. Complainants rely heavily on expert engineering testimony tendered by Michael Harrelson. *See, e.g.*, Compls. Proposed Findings, ¶¶ 370-423. Harrelson is an engineer who logged approximately 100 hours or more analyzing Gulf Power poles<sup>7</sup>, and submitted voluminous documentary and photographic analysis. *See* Harrelson Direct; Compls. Exs. 6-7. In the end, though, Harrelson's opinions rest on two principle points that require absolutely no measurements or engineering analysis: (1) there are two definitions of a "pole" for purposes of the holding in *Alabama Power v. FCC* and (2) under the newly created definition of a "pole," a "pole" is never at "full capacity" (rivalrous) unless there is some physical or legal impediment to expanding pole capacity.<sup>8</sup>

33. Beginning in 2004, Harrelson has offered expert testimony in six instances on joint use issues similar to those presented in this case. Harrelson Cross, 5/1/06 Tr., pp. 1760-64. Similar to Kravtin, all have been on behalf of cable entities against investor owned utilities. *Id.*, pp. 1760-62. All have been in association with attorneys with (or in one instance, formerly with) the law firm representing Complainants. *Id.*, pp. 1761-62. Like Kravtin, Harrelson has become more of an advocate of a position than an expert providing information helpful to the trier of fact.

34. Harrelson was retained by the Complainants just prior to February 2005. Harrelson Cross, 4/27/06 Tr., pp. 1610-21. Without ever visiting Gulf Power's poles, Harrelson was able to pen two pages concerning "Sources of Crowding" and shortly thereafter was able to pre-judge the issues and render opinions that: (a) the definition of a pole must be expanded to be something other than an actual pole in the ground (GP Ex. 77, p. 2); and (b) and "the percentage of total poles which reasonably fit [the definition of full capacity] is *very small*." (*Id.*, p. 3). As a

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<sup>7</sup> Harrelson Cross, 4/27/06 Tr., pp. 1629-30.

<sup>8</sup> Complainants' expert economist deemed herself qualified to render the same opinions. *See, e.g.*, GP Ex. 73.

result, Harrelson's pole review was apparently designed more to capture instances that support his pre-conceived conclusions than to employ a meaningful rivalry analysis. *See* GP Proposed Findings, ¶¶ 43-54.

35. Complainants also ask the Court to characterize Gulf Power's specifications as dated and its pole attachment policies as "lax." Compl. Proposed Finding, ¶¶ 408-412. Gulf Power addressed Mr. Harrelson's testimony concerning its construction specifications in its Proposed Findings, and demonstrated that the entire debate was a sideshow. *See* GP Proposed Findings, ¶¶ 55-61. Gulf Power did not, however, link its specifications to the NESC and the Southern Company Manual that Harrelson embraced.

36. The evidence demonstrates that the vast majority of Gulf Power's specifications appear in the current version of the NESC (*see* Table 1 attached hereto), appear in the specifications of other utilities (*see* GP Exs. 79, 82, 85), and even appear in Complainants' own construction specifications. *See* GP Ex. 78; Harrelson Cross, 4/27/06 Tr., p. 1671.<sup>9</sup> The Gulf Power specification of which Harrelson was most critical concerned separation between guys anchors (testifying that it was "unreasonable," "arbitrary" and he had "not seen it in other places"). Harrelson Cross, 4/27/06 Tr., pp. 1693-94. Harrelson did no research in preparing his opinion on this point. *Id.*, p. 1695. In fact, he failed to look on his own shelf for the RUS specification which contain a similar if not more restrictive specification. GP Ex. 81. Exemplar specifications from manufacturers and other utilities demonstrate that the norm appears to be a minimum of three feet separation, with five feet being recommended. *See* Harrelson Cross, 4/27/06 Tr., pp. 1692-1707; GP Exs. 82-85. Gulf Power's specification is right in the middle. Harrelson Cross, 4/27/06 Tr., p. 1704.

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<sup>9</sup> One of the Complainants' own witnesses called Gulf Power's specifications "the bible for pole attachments." GP Ex. 67 (O'Cealleigh Depo.), pp. 54-55.

37. Harrelson also compared Gulf Power's specifications to the Southern Company Manual and concluded that the latter were "more reasonable and up-to-date." Harrelson Direct, p. 45. However, with few exceptions, Gulf Power's specifications can be matched up with specifications in the Southern Company Manual. *See* Table 2 hereto.

38. In February 2006, counsel for Complainants sent an e-mail to Harrelson with commentary on his draft pre-filed direct testimony. GP Ex. 90; Harrelson Cross, 5/1/06 Tr., pp. 1811-1815. In that e-mail, counsel requested that Harrelson explain that his testimony concerning the "significant number of violations of the NESC being built by new attachers" be followed by the explanation that "this means parties other than CATV." GP Ex. 90; Harrelson Cross, 5/1/06 Tr., pp. 1813-1815. Harrelson obliged and the language appeared in his pre-filed written sworn testimony. Harrelson Direct, p. 49.

39. The problem for Harrelson is that this statement conflicts with: (a) his admission that he did not do a fault analysis; (b) his testimony that violations typically occur due to the fault of all attachers – including cable; (c) his express sworn testimony identifying cable violations; and (d) his sworn deposition testimony that Complainants "certainly have some low cables in some places" and that "no one, in [his] opinion can be certain which company created those violations so it's reasonable to assume that both companies created some of them.". Harrelson Cross, 5/1/06 Tr., pp. 1798-1806; GP Ex. 70A (Harrelson Depo.) pp. 632-34. This evidence reflects poorly on Harrelson's credibility. Notwithstanding these problems, Complainants ask this Court to conclude (based on Harrelson's testimony) that "Gulf Power itself, and third parties (entities other than Complainants), are demonstrably responsible for many of the alleged violations ..." Compls. Proposed Findings, ¶ 412.

40. Harrelson also contradicted himself significantly in his testimony regarding the ten “Knology” poles submitted by Gulf Power. In his pre-filed written direct testimony, Harrelson states with respect to one particular pole: “Not enough information is provided to do an individual analysis of this pole’s present or future capacity.” Compl. Ex. 6, Knology Pole # 1. Nonetheless, Harrelson was able to testify: “the pole is not at full capacity because it can accept a new attachment even if make-ready is required.” *Id.*; see also Harrelson Cross, 4/27/06 Tr., pp. 1636-37. During cross-examination at trial, Harrelson conceded that he was not able “as an expert to render an opinion as to whether a pole is at full capacity without looking at the pole,” but that he had “rendered an opinion in this case about poles and concluded that they were not at full capacity without ever looking at the pole.” Harrelson Cross, 4/27/06 Tr., p. 1136. These two positions are irreconcilable.

### **III. Complainants’ Efforts to Discredit the Testimony of Mr. Roger Spain Are Unavailing**

41. Complainants devote no less than 10 pages of their proposed findings to attacking Mr. Spain. See, e.g., Compl. Proposed Findings at 39-49. Mr. Spain is an unbiased witness who is qualified to testify as to the value of the space taken on Gulf Power’s poles. He is a CPA and CVA with 15 years total experience. GP Ex. F, pp. at 1-4. Mr. Spain has worked in a wide variety of contexts, including engagements for both power and cable companies. *Id.* Mr. Spain also is the *only* expert witness in this case to offer true valuation testimony – the relevant consideration once Gulf Power’s poles are found to be rivalrous.

42. Complainants’ Proposed Findings manipulate Mr. Spain’s testimony to fit their script. Three examples demonstrate this point:

- Paragraph 206: Complainants propose a finding that Mr. Spain’s CVA designation “was obtained after a one-week course that he took in 2003.” (citing Tr. 1133). As Mr. Spain explained numerous times (including on the exact page

of cross examination that Complainants cite), obtaining the CVA required him to “complete at least 40 hours of course work regarding the principles and application of business valuation provided by the National Association of Certified Valuation Analysts, pass an examination administered by that same organization, and submit an accepted case study on the valuation of a privately held business.” GP Ex. F (Spain Direct), p. 2; Spain Cross, 4/25/06 Tr., p. 1133; Spain Depo., pp. 79-80.

- Paragraph 219: Complainants imply that Mr. Spain did not perform an “independent analysis” in this case, twisting Mr. Spain’s testimony that he did not independently perform *mathematical* calculations utilizing RCM into the supposed “fact” that he did no “independent analysis” in this case. Mr. Spain testified very clearly that he did an independent analysis – just not independent math. Spain Re-Direct, 4/26/06 Tr., pp. 1280-82.
- Paragraph 271: Complainants assert that Mr. Spain “admitted” that Gulf Power’s RCM was based “precisely upon the cost that Complainant cable attachers would pay to go out and try to reproduce Gulf Power’s entire system” of poles. Mr. Spain actually explained that the RCM calculates the cost of erecting a single pole “within Gulf Power’s cost structure.” Spain Cross, 4/26/06 Tr., p. 1253-54.<sup>10</sup> Mr. Spain is also clear that it is a per pole valuation that does not take into consideration any network or assemblage value.

43. Complainants attack Mr. Spain for being new to the pole attachment testifying game. Instead of testifying for a living, Mr. Spain operates as a general CPA and CVA, utilizing his experience and expertise while working in a variety of fields. And while he does not make his living testifying in pole attachment cases, Mr. Spain has testified as an expert witness in state courts and administrative hearings. Spain Cross, 4/25/06 Tr., p. 1135.

44. Unlike Complainants’ experts, Mr. Spain conducted extensive independent research to determine the appropriate method for valuing the space taken on Gulf Power’s poles. *See, e.g.*, Spain Re-direct, 4/26/06 Tr., p. 1271 (“I am required to – expected to and required to do independent research ... and I feel that I have done that); Spain Cross, 4/26/06 Tr., pp. 1280-82. Mr. Spain conducted that research without any predisposition for the results. *Id.* Unlike Complainants’ experts, Mr. Spain left interpretation of legal precedent to the lawyers. Mr. Spain

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<sup>10</sup> As discussed more fully in Gulf Power’s Trial Brief and in its Proposed Findings, replacement cost is an accepted proxy in takings jurisprudence and focuses on the cost to replace the property being valued.

did the work necessary to determine, among other things, that a free market does indeed exist for pole attachments and that the market rates being charged approach \$20 per attachment. GP Ex. F (Spain Direct), pp. 19-24, *see also* Spain Cross, 4/26/06 Tr., pp. 1206-1214.<sup>11</sup> Mr. Spain also did the work necessary to conclude that, at this time, a RCM is the most appropriate proxy for the fair market value of the space taken on Gulf Power's poles. *Id.*, pp. 7-18.

## V. Conclusion

45. In the end, there are two components to this case: (1) the physical condition of the poles occupied by Complainants; and (2) the value of the pole space taken by Complainants. Complainants' Proposed Findings, in essence, ignore the first component by arguing that the current physical condition *does not matter* so long as the pole can be changed out or rearranged to accommodate a new attacher. This argument is at odds with *Alabama Power v. FCC*, which clearly contemplates the current conditions. 311 F. 3d at 1370 (“[N]owhere in the record did APCo allege that APCo’s network of poles is *currently* crowded.”). Moreover, Complainants proposed findings render *Alabama Power v. FCC* virtually meaningless. Complainants’ experts agreed that very few poles in Gulf Power’s system would meet Complainants’ proposed definition of “full capacity.” This could not have been the intent of *Alabama Power v. FCC*. The Eleventh Circuit specifically anticipated that certain poles would meet the announced standard, by referencing § 224(f) (containing the “insufficient capacity” exception to mandatory access) and its previous decision in *Southern Company* (finding that utilities were not required to perform make-ready to accommodate attachers). 311 F.3d at 1363; 1370.

46. Complainants’ Proposed Findings also completely misplace the concept of “value” in this case. Complainants go to great lengths to tie Gulf Power’s proposed fair market

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<sup>11</sup> Gulf Power again proffers GP Ex. 61 (APPA Workbook) as relevant and admissible to support Mr. Spain’s conclusions that there is a free market and Gulf Power’s position that the Cable Rate does not provide just compensation.

value proxies to an attempt to extract “value to the attacher,” which they argue is constitutionally impermissible. (*See infra*, ¶¶ 17-18). As a result of this fixation (or perhaps through deliberate neglect), Complainants ignore the fact that “value” is a driving concept in this case. But nowhere do Complainants offer (let alone did they prove) an alternative approach to valuing Gulf Power’s pole space. Instead, Complainants ask, “Where are the dollars that left your pocket?” This question could be asked in *any* physical takings case, and the answer would be the same - - there are none. That is why valuation becomes important, whether it is land or, in this case, pole space. The fact that the Eleventh Circuit has put something of an odd condition precedent (demonstration of rivalry) on this analysis is not for this Court to adjust. Once Gulf Power demonstrates that its pole space is rivalrous, the analysis turns to valuation. 311 F. 3d at 1371 (“[A] power company whose poles are in fact, full can seek just compensation”).

47. Complainants summarily state that Gulf Power has to specifically exclude an identifiable entity in order to show a lost opportunity. But, as noted by the Court in Complainants’ closing argument, the Eleventh Circuit has never imposed this requirement – not even in *Alabama Power*. 7/6/06 Tr., p. 2083. Gulf Power has satisfied the holding in *Alabama Power* by demonstrating both lost opportunities and higher valued uses in the following respects: (a) the opportunity to use its pole for the intended purpose; (b) the opportunity to rent the space occupied to a third party at a negotiated rate,<sup>12</sup> and (c) to exclude the attachers for competitive purposes.<sup>13</sup>

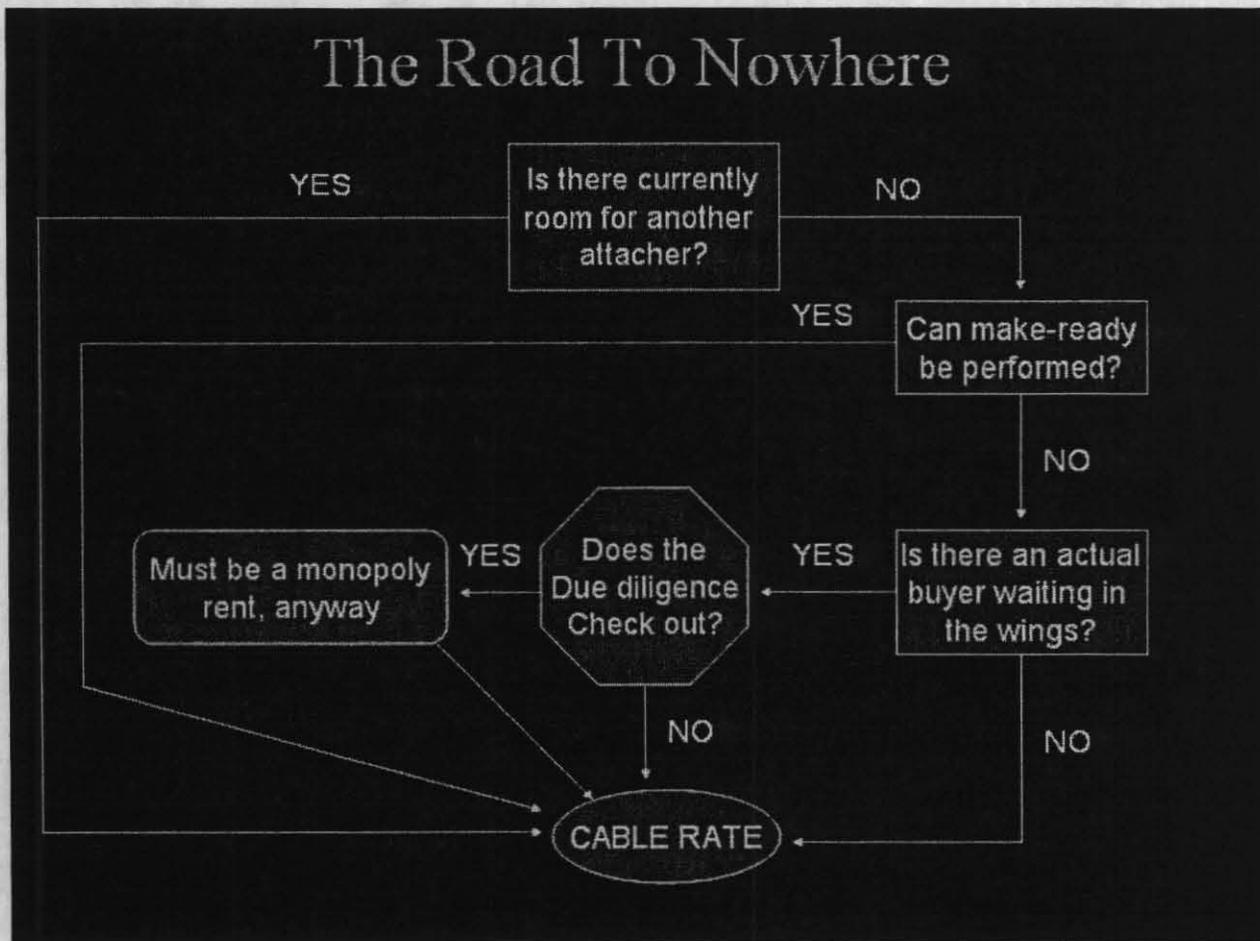
48. As Gulf Power argued in opening statements and closing arguments, this is truly a tale of two cases. Ultimately, this Court must decide whose case is right, whose case makes

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<sup>12</sup> This is vastly different than the last opportunity that Alabama Power identified and the Eleventh Circuit rejected because the opportunity concerns a third party – not the same “cable company.” 311 F. 3d at 1369.

<sup>13</sup> Complainants admit in their Proposed Findings that utilities have the right and incentive to compete. Compls. Proposed Findings, ¶¶ 19-20. That right is a self-defining higher valued use.

sense, and whose case brings life to *Alabama Power v. FCC*. Based on the record evidence in this case, the arguments and proposed findings submitted by the parties, the Court's own analysis of the applicable authority, and totality of circumstances, the Court should find: (1) that Gulf Power's case is right, (2) that Gulf Power's case makes sense, and (3) that Gulf Power's case brings life to *Alabama Power v. FCC*. Complainants' case, on the other hand, puts Gulf Power (and other utilities) on the "Road to Nowhere" (reflected on the Chart below used in Gulf Power's closing argument).





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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply to Complainants Proposed Findings of Fact and Conclusions of Law has been served upon the following by United States mail and E-mail on this the 16th day of August, 2006:

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OF COUNSEL

# TAB 1

## Table 1

<b>GULF POWER SPEC PLATE (GP Ex. 12)</b>	<b>NESC REFERENCE (Compls. Ex. 11)</b>
C1	A) Table 238-1, 238-B B) 235 C1 (exception 3) C) “ “ D) 235H (2002) E) Table 232-1 F) 234 C3
C2	A) Table 238-1, 238-B B) 235H C) 235H
C3	40" – 238-B; Table 238-1 12" – 235H
C4	40" – 238-B Light – 238D (exception N/A – no conduit) 12" – 235H 6" – 235H2
C5	40" – 238-B, Table 238-1 Grounding – 215 C3
C6	236-E, Table 236-1
C7	40" – 235-G (GPC exceeds); Guy Spacing – no NESC provision
C8	238-B, Table 238-1
C9	NESC 238-B, Table 238-1
C10	
C11	

# TAB 2

## Table 2

GULF POWER SPEC PLATE (GP Ex. 12)	SO. CO. REFERENCE (GP Ex. 11)
C1	<p>A) SOH-09.001 (p. 302); SOA-13.001 (p. 37); OAZ-22 (p. 413) OAZ-29 (p. 420); SOH-03.001 (p.297)</p> <p>B) SOH-09.001 (p. 302)</p> <p>C) “ “</p> <p>D) SOH-03.001 (p. 297); OAZ-29 (p. 420); SOH-07.001 (p.300)</p> <p>E) SOA-05.001 (p. 13)</p> <p>F) SOA-12.001 (p.36)</p>
C2	SOH-03.001 (p. 297); SOH-09.001 (p. 302); SOA-13.001 (p. 37)
C3	OAZ-29 (p. 420); SOH-04.001 (p. 298); SOH-05.001 (p. 299)
C4	SOH-04.001 (p. 298); SOH-05.001 (p. 299); SOH-07.001 (p. 300); OAZ-22 (p. 413)
C5	SOH-03.001 (p. 297); SOB-37.001 (p. 101);SOH-05.001 (p. 299)(re bonding)
C6	SOH-08.001 (p. 301)
C7	SOB-36.001 (p. 94) (3" MIN.); SOH-03.001 (p. 297, n.1)
C8	<b>[underground N/A]</b>
C9	SOH-07.001 (p. 300)
C10	<b>[underground N/A]</b>
C11	