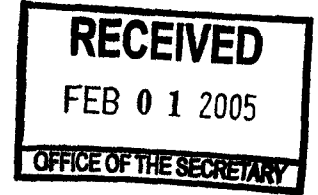


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of

AMERICAN ELECTRIC POWER COMPANY, INC.

Administrative Proceeding
File No. 3-11616

**MOTION TO STRIKE OF
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
AND THE AMERICAN PUBLIC POWER ASSOCIATION**

The National Rural Electric Cooperative Association (NRECA) and the American Public Power Association (APPA) move to strike American Electric Power Company, Inc.'s (AEP) Exhibit No. 10 (Southwest Power Pool presentation), the portion of the Prepared Direct Testimony of J. Craig Baker (AEP Exhibit No. 5) related to Exhibit No. 10 (page 36, lines 7-10), and the January 10, 2005, oral testimony of Mr. Baker related to Exhibit 10 (Tr. 110, line 20 to 113, line 15). For the following reasons, AEP has failed to satisfy its burden of establishing that its witness has personal knowledge of the information contained within Exhibit No. 10. The information in the exhibit and all testimony or exhibits referencing or relating to the exhibit are therefore speculative, immaterial, irrelevant, and inadmissible hearsay. This motion is timely since the presiding judge has not yet ruled on pending evidentiary objections from that hearing and the basis for excluding this exhibit from evidence arose during cross-examination after the exhibit was formally received in evidence. Accordingly, NRECA and APPA

respectfully request that the presiding judge strike Exhibit No. 10 and all related testimony.

I. Background

On December 7, 2004, AEP filed its prepared direct testimony in this matter. Among the filed exhibits was AEP Exhibit No. 10, which purports to be an eight-page Southwest Power Pool PowerPoint presentation. In his Prepared Direct Testimony, Mr. Baker states “AEP Exhibit No. 10 is a copy of a presentation by SPP containing actual OASIS ‘tag’ data showing a power transaction from Texas to New York.”¹ At the January 10, 2005 hearing, Exhibit No. 10 was identified and received in evidence before Mr. Baker was cross-examined.² AEP provided no other foundation for the admission of Exhibit No. 10 in evidence.

During the Division of Investment Management’s cross-examination, Mr. Baker implied that Exhibit No. 10 represents an actual transaction between Texas and New York.³ Apparently accepting that representation, the Division asked several further questions about Exhibit No. 10, but it did not, however, cross-examine Mr. Baker to ascertain whether he had personal knowledge about the contents of Exhibit No. 10 so as to establish the proper foundation to admit Exhibit No. 10 and permit him to testify about its contents — either in his prepared direct testimony (Exhibit No. 5) or on cross-examination.

On NRECA and APPA’s counsel’s cross-examination of Mr. Baker, however, it became clear that Mr. Baker cannot establish the authenticity of Exhibit No. 10 because

¹ AEP Exhibit No. 5, page 36, lines 9-10.

² Tr. 8, lines 3-4; Tr. 9, lines 11-13.

³ Tr. 111, lines 16-20; Tr. 112, lines 2-22.

he does not have personal knowledge about the accuracy or truthfulness of Exhibit No.

10:

Q: I have a question about Exhibit 10. You were just asked about the tag display exhibit.

This appears to be a powerpoint presentation. It says on Page 1, it says "SPP presentation." Is this a presentation you made?

A: No, this was a presentation that someone at the SPP made that I got access to.

Q: All right. Now the tag display on Pages 4 through 6, do you know whether that's a hypothetical or an actual transaction?

A: I believe this was an actual, and it was intended to show the long distances that power is now being shipped across.

Q: But you don't know for a fact whether this is an actual or just an example of how it would be represented if such a transaction were to occur?

A: I don't know, but looking at it, it would be my expectation that it is actual.

Q: But you don't know?

A: I answered that I don't know for sure.⁴

II. *Argument*

While not binding on these proceedings, the Federal Rules of Evidence provide persuasive authority.⁵ Under Rule 602, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."⁶ Furthermore, Rule 901 states that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by

⁴ Tr. 117, line 12, to 118, line 6, (Jan. 10, 2005).

⁵ *In re Lorsin, Inc.*, 2004 SEC LEXIS 961, at *3 (May 11, 2004) (Judge Robert G. Mahony) (Although the Federal Rules of Evidence do not govern these proceedings, they do provide guidance); *In re Bacardi Corp.*, 1989 SEC LEXIS 5123, at *1 (June 21, 1989) (Judge Max O. Regensteiner) ("Although the Federal Rules of Evidence do not govern these proceedings, I use them as guidance on questions such as the one raised by the motion.").

⁶ Fed. R. Evid. 602 (2004).

evidence sufficient to support a finding that the matter in question is what its proponent claims.”⁷

Mr. Baker’s testimony during cross-examination shows that he does not claim to have any personal knowledge regarding the accuracy or validity of Exhibit 10 and that he cannot authenticate Exhibit No. 10. First, Mr. Baker testifies that Exhibit No. 10 is not a presentation he made but is “a presentation that someone at SPP made that I got access to.”⁸ Mr. Baker further testified that he does “not know” whether the transaction depicted in Exhibit No. 10 was actual or hypothetical.⁹ Instead, his testimony shows that he solely relies on his expectation that the document is factually accurate.¹⁰ Mr. Baker’s expectation, however, is nothing more than mere speculation, since during cross-examination Mr. Baker confessed that he based his expectation that Exhibit 10 represents an actual transaction just “by looking at it[.]”¹¹ Beyond Mr. Baker’s expectation, the record does not contain any alternative substantive evidence or affirmation to validate the accuracy of Exhibit 10.

Thus, AEP has not provided a sufficient foundation for Mr. Baker to testify about Exhibit No. 10. Mr. Baker’s testimony also fails to authenticate Exhibit No. 10. Moreover, because the information contained in Exhibit No. 10 is speculative, unsubstantiated and unverifiable, this information cannot assist the presiding judge in these proceedings, and is therefore irrelevant and immaterial.

Furthermore, since Mr. Baker’s prepared direct testimony and his oral testimony at the January 10, 2005 hearing goes towards the truthfulness of Exhibit 10 — which is

⁷ Fed R. Evid. 901(a) (2004).

⁸ Tr. 117, lines 17-18.

⁹ Tr. 117, line 25 to 118, line 6.

¹⁰ Tr. 118, line 4.

¹¹ Tr. 118, lines 3-4.

the creation of an unknown, third party — Exhibit 10 and all related testimony are hearsay. In determining whether to admit or rely on hearsay evidence the Commission has stated:

it is necessary to evaluate its probative value and reliability, and the fairness of its use. The factors to consider include the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated.¹²

Under these criteria, the presiding judge should not allow Exhibit No. 10 into the record. The PowerPoint presentation is an anonymous, unsworn document. This type of document is easily made with little or no formal training or expertise. There has been no showing or corroborating evidence supporting the factual accuracy of Exhibit No. 10. Furthermore, AEP has failed to call as a witness the creator of the presentation or offer into evidence any reasons for why the creator of the presentation would not be available to testify and be cross-examined.

The Commission and the parties cannot gauge the legitimacy of the underlying data and the testimony related to Exhibit 10. Indeed, if Exhibit 10 and all related testimony adduced by AEP and the Division were accepted into the record, the Commission and the parties would be left to speculate on potentially inaccurate evidence and testimony. The exhibit and related testimony are therefore immaterial and irrelevant to the current proceedings since neither the presiding judge nor any party to the proceeding can afford any weight to Exhibit 10 in their arguments or decisions.

¹² *In re Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992) (internal citations omitted).

III. Conclusion

AEP bears the legal burden of showing that the AEP/CSW merger satisfies PUHCA. AEP may not attempt to meet this burden by submitting unsubstantiated, possibly hypothetical "facts."

Accordingly, since Mr. Baker's testimony with respect to Exhibit No. 10 was not made on personal knowledge, did not set forth facts that would be admissible in evidence, and did not show that Mr. Baker is competent to testify to the contents or accuracy of Exhibit No. 10, APPA and NRECA request that the presiding judge strike Exhibit No. 10, the portions of the Prepared Direct Testimony of J. Craig Baker (Exhibit No. 5) related to Exhibit No. 10 (page 36, lines 7-10), and all oral testimony of Mr. Baker related to Exhibit No. 10 (Tr. 110, line 20, to 113, line 15).

Respectfully submitted,



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January 31, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by first-class mail upon the persons and at the addresses listed below.

Dated at Washington, D.C., this 31st day of January 2005.



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