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

OPPOSITION OF AMERICAN ELECTRIC POWER COMPANY, INC. TO MOTION TO STRIKE

American Electric Power Company, Inc. ("AEP") hereby opposes the motion of National Rural Electric Cooperative Association ("NRECA") and American Public Power Association ("APPA") (collectively, "Associations") to strike AEP Exhibit No. 10 and the related testimony of J. Craig Baker. The Associations' belated motion should be rejected as procedurally improper, without any consideration on the merits. Their motion comes a full three weeks after the hearing's conclusion, nearly two months since Exhibit No. 10 was first served on the hearing participants, and with the Associations never having objected to its admission. NRECA and APPA thus waived any right to object, and have no ability to complain now that the exhibit has already been made part of the official record. In any event, the Associations' motion is substantively meritless. Exhibit No. 10 is not hearsay and, even if it were, would still be entirely proper under the Commission's rules.

I. THE ASSOCIATIONS WAIVED ANY OBJECTION TO EXHIBIT NO. 10

Neither NRECA nor APPA objected to the admission of AEP Exhibit No. 10—or any of its related testimony—during the evidentiary hearing. By entirely failing to object, the Associations waived any right to bring a motion now. "It is axiomatic that 'a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver . . . of any

ground of complaint against its admission.'" *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1002 (D.C. Cir. 1996) (citations omitted).

This rule is dispositive of the Associations' motion. NRECA and APPA complain that "the . . . basis for [their objection] arose during cross-examination" after Exhibit No. 10 had already been "received in evidence" (Motion at 1), but this is not an excuse. The Associations did not just abstain from objecting when Exhibit No. 10 was initially offered, they never objected at any point thereafter—not when they allegedly discovered the "basis" of their objection, not during any portion of the hearing following Mr. Baker's cross-examination, and, indeed, not for three weeks after the hearing's conclusion. The Associations' delinquency in satisfying their evidentiary responsibility is not trivial. The Commission has repeatedly ruled that a party's failure to raise an objection at hearing precludes it from making the argument subsequently. *In re Faragalli*, Exchange Act Rel. No. 37991, 1996 SEC LEXIS 3263, at *40 n.42 (1996); *In re Arm*, Exchange Act Rel. No. 28418, 50 S.E.C. 338, 345 (1990); *see also, e.g., In re Harrison Securities, Inc.*, SEC I.D. Rel. No. 256, 2004 SEC LEXIS 2145, at *42-43 (2004) (failure to raise non-evidentiary objection at hearing is waiver); *In re Kenny*, Exchange Act Rel. No. 8234, 2003 SEC LEXIS 1170, at 74 (2003) (same); *In re Sierra Nevada Securities, Inc.*, Exchange Act Rel. No. 41330, 54 S.E.C. 112, 119-20 (1999) (same).

Nor may the Associations rely on the Your Honor's decision to reserve ruling on objections. *See* Motion at 1. Postponing evidentiary rulings until the initial decision is a common administrative practice that has no effect on the parties' duty to in fact make their objections in a timely fashion. Rather, by its terms, Your Honor's decision plainly applied only to objections that were actually made during the hearing, not to those that were never made but that a participant decided to lodge weeks after the hearing's end. *See* Tr. 92:16-24. Indeed, at

the hearing, counsel for the Associations characterized this ruling as applying to "objections on certain questions [made] *today*." Tr. 157:21-24 (emphasis added).

This risk of encouraging parties to revisit the evidentiary record after the hearing closes is why the SEC's Rules of Practice mandate that "[o]bjections to the admission or exclusion of evidence *must* be made *on the record*." 17 C.F.R. § 201.321 (2004) (emphasis added). If parties were permitted to remain silent during the course of the hearing, only to come in days, weeks, or months after the fact and selectively choose evidence they would like removed, the administrative process would be undermined. There would be no limit on when objections could be made, the evidentiary record would exist under a perpetual threat of flux, and the administrative law judge's task would be endless. This is not the law. The Commission has "made clear" that participants "should not 'suppress [their] misgivings while waiting anxiously to see whether the decision goes in [their] favor,'" and NRECA and APPA should be required to abide by this mandate here. *Sierra Nevada Securities*, 54 S.E.C. at 119 (citation omitted). Having failed to object to Exhibit No. 10 at any point during the hearing, their motion to strike should be rejected on its face as procedurally barred. *See In re Amsel*, Exchange Act Rel. No. 37092, 52 S.E.C. 761, 767 (1996); *In re Boadt*, Exchange Act Rel. No. 32905, 51 S.E.C. 683, 685 (1993); *accord DiPaola v. Riddle*, 581 F.2d 1111, 1113 (4th Cir. 1978) ("[A] party should not be permitted to stand silently by and later to contest the admissibility of crucial evidence . . . .").[1]

[1] *See also, e.g., United States v. Triestman*, 178 F.3d 624, 633 n.5 (2d Cir. 1999); *United States v. Collins*, 690 F.2d 670, 674 (8th Cir. 1982); *United States v. Kilburn*, 596 F.2d 928, 935 (10th Cir. 1979).

II. ADMISSION OF EXHIBIT NO. 10 WAS PROPER UNDER THE SEC's RULES

The Associations' motion is also baseless on its substance. The Associations argue that Exhibit No. 10 was not properly authenticated, and accordingly, that Exhibit No. 10 and "all testimony or exhibits referencing or relating to [it]" should be stricken as "inadmissible hearsay." Motion at 1. NRECA and APPA are wrong on both the facts and the controlling law. Not only was Exhibit No. 10 offered for an entirely permissible purpose—and authenticated as such—but hearsay is not even a proper objection before the Commission. Under SEC rules, any evidence that is "relevant," including hearsay, "may [be] receive[d]." 17 C.F.R. § 201.320. As the Commission has explained, hearsay "is admissible in our administrative proceedings and, 'in an appropriate case, may even form the sole basis for our findings of fact.'" *In re Alacan*, Securities Act Rel. No. 8436, 2004 SEC LEXIS 1422, at *23 (2004) (quoting *Mark James Hankoff*, 50 S.E.C. 1009, 1012 (1992)); *Del Mar Financial Servs., Inc.*, Securities Act Rel. No. 8314, 2003 LEXIS 2538, at *17 n.15 (2003).[2]

A. Exhibit No. 10 Is Not Hearsay

Exhibit No. 10 is not "inadmissible hearsay," because it was not offered to prove the truth of the matter asserted. Rather, Mr. Baker offered this exhibit for illustrative purposes, as an example of both his and AEP witness Paul B. Johnson's expert explanation that distance is no longer an impediment to utilities engaging in transmission transactions. Thus, it is immaterial whether Mr. Baker had first-hand knowledge of the specific transaction that Exhibit No. 10 represents. Mr. Baker did not offer Exhibit No. 10 to prove that the transaction actually occurred in the precise fashion indicated. He simply provided it as one illustration of how "RTOs

[2] The Commission's rule is consistent with a long line of appellate decisions reaching the same result. *See, e.g., Richardson v. Perales*, 402 U.S. 389, 410-411 (1971); *Bennett v. Nat'l Transp. Safety Bd.*, 66 F.3d 1130, 1137 (10th Cir. 1995); *Veg-Mix, Inc. v. United States Dep't of Agriculture*, 832 F.2d 601, 606 (D.C. Cir. 1987).

facilitate much longer power transactions than may have been readily available in the past," testimony to which the Associations did not object. AEP Exh. No. 5, at 35:14-15.

For the same reason, the Associations have no claim that Exhibit No. 10 was not properly authenticated. Mr. Baker offered this exhibit as a "presentation by SPP," and NRECA and APPA have never objected to its authentication in this capacity. Instead, the Associations allege that the data underlying the SPP's presentation is "unsubstantiated and unverifiable." Motion at 4. Such objections are irrelevant, given the Commission's blanket allowance of hearsay.

The Presiding Judge is fully capable of assigning this exhibit its proper weight. Indeed, all of the evidence points in favor of granting Exhibit No. 10 its full evidentiary value. The data included in Exhibit No. 10 bear all the hallmarks of an actual NERC e-tag. The tag includes the identifier "ERCO_CRGL1ANY02160_NYIS," showing that it is a unique transaction. It has a specific date and time duration (from 4 to 5 p.m. Central Time). It specifies precisely when it was originally generated (at 3:16 p.m. on February 16, 2004). And it lists the representatives for the utilities involved, giving not just their names but their phone and fax numbers as well. *See* AEP Exh. 10 at 4. Thus, despite its inclusion as part of an SPP presentation, each of these details is the kind of distinctive characteristic that demonstrates "the matter in question is what [it appears to be]." *See* Fed. R. Evid. 901(a). This is particularly true given that the SPP has no motive to alter the tag data.

B. Exhibit No. 10's Admission Was Not Prejudicial

In any event, even if Exhibit No. 10 had been offered as hearsay, its admission could not have prejudiced NRECA or APPA in any way. Under the Federal Rules of Evidence, it is settled law that "[e]xperts may rely on hearsay evidence in forming their opinions." *First Nat'l Bank v.*

Lustig, 96 F.3d 1554, 1576 (5th Cir. 1996); Fed. R. Evid. 703.[3] Here, Mr. Baker's reliance on Exhibit No. 10 to bolster his testimony that long-distance transmission transactions are occurring regularly between SPP and PJM was entirely reasonable. As Mr. Baker explained, Exhibit No. 10 was a professional presentation about transmission use from Texas to New York—a presentation that was made by the semi-public, federally-ordained organization that is charged with managing much of the area's transmission. Accordingly, even if it were necessary to strike Exhibit No. 10 itself, all of Mr. Baker's related testimony would still be properly left in the record.

The inadequacy of the Associations' arguments is made even more apparent in light of the overwhelming evidence in the record to which they have not objected. Both Mr. Baker and Mr. Johnson testified at length that AEP engages in transactions "every day, and sometimes every hour" involving the same kind of long distance transmission that Exhibit No. 10 represents. AEP Exh. No. 5, at 32:7. For instance:

- AEP witness Johnson testified that the interconnection of "all systems within the Eastern Interconnection . . . facilitates power exchanges between adjacent Control Areas as well as Control Areas that are at opposite ends of the Eastern Interconnection." AEP Exh. No. 2, at 17:11-14 (emphasis added).

- Discussing AEP's east and west zones in particular, Mr. Baker similarly explained: "They are interconnected using transmission service contracts to move electric power and energy across the system of Ameren Corporation . . . pursuant to [its] Open Access Transmission Tariff ("OATT"). AEP's rights under the OATT are sufficient to allow the system to be operated as a single interconnected and coordinated whole." AEP Exh. No. 5, at 9:13-17.

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[3] *See also, e.g., Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 97 (1st Cir. 1999) (expert's reliance on data of a public agency is appropriate); *Peabody Coal Co. v. Director, Office of Workers' Compensation Programs*, 165 F.3d 1126, 1129 (7th Cir. 1999) (because administrative law judges are specialists that need less evidentiary protection than juries, "it is even clearer that [experts] should be allowed to [rely on hearsay] in trials before administrative tribunals").

- Thus, Mr. Baker also noted that with regard to specific transactions, AEP, "on a monthly basis, transfers [energy] from AEP's east zone to its west zone as well as transfers from its west zone to its east zone"—a distance of several hundred miles. These are actual transactions that "from east to west ha[ve] averaged about 200,000 megawatt-hours." AEP Exh. No. 5, at 16:16-19.

- AEP witness Johnson likewise noted: "By the 1990s it was not unusual, if not typical, for large quantities of . . . electric power generated in the Midwest to be shipped across the Eastern Interconnection to serve loads on the Eastern seaboard or southern locations to displace relatively expensive oil or gas fired generation." AEP Exh. No. 2, at 23:9-13.

In the face of all this evidence, the Associations' motion founders. The rule is that if sufficient evidence already exists in the record to establish an issue of fact, it is not error for the tribunal to allow additional evidence corroborating the same point. *E.g.*, *United States v. Ramos-Caraballo*, 375 F.3d 797, 804 (8th Cir. 2004); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1472 (11th Cir. 1992); *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 581 n.10 (10th Cir. 1990); *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1554 (7th Cir. 1990). The Associations failed to object to any of the above testimony.

III. CONCLUSION

Accordingly, for all of the foregoing reasons, AEP respectfully urges the Presiding Judge to deny NRECA and APPA's untimely motion to strike.

Respectfully submitted,

John B Keane/by DR
John B. Keane
Jeffrey D. Cross
American Electric Power Company, Inc.
1 Riverside Plaza
Columbus, OH 43215
(614)223-1000
(614)223-1687 (fax)

J. A. Bouknight, Jr.
David B. Raskin
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000
(202) 429-3902 (fax)

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