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From the office of Miles F. Schumacher
e-mail address: mschumacher@lynnjackson.com

August 27, 2019

VIA ELECTRONIC FILING

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Re: Application to the SD PUC for a Facility Permit to Construct a 300.6 Megawatt Wind Facility; EL19-027

Dear Ms. Van Gerpen:

Please find attached herewith in this matter the following documents:

1. Brief on Confidentiality of Easement Agreement, with Attachments A, B, C, D and E. Please note that Attachment C is confidential.
2. Affidavit of Daryl Hart; and
3. Certificate of Service.

If you have any questions, please contact me.

Yours very truly,

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Miles F. Schumacher
Enclosures
MFS:kab

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF CROWNED RIDGE WIND II, LLC FOR A PERMIT OF A WIND ENERGY FACILITY IN DEUEL, GRANT AND CODINGTON COUNTIES	))))))	**EL-19-027** **BRIEF ON CONFIDENTIALITY OF EASEMENT AGREEMENT**

BRIEF OF CROWNED RIDGE WIND II, LLC

I. Introduction

On August 21, 2019, the South Dakota Public Utilities Commission ("Commission") directed Crowned Ridge Wind II, LLC ("CRW II") to file a brief on: (1) whether a non-filing party can request confidential treatment of information under the Commission's rules; and (2) if yes, should the CRW II form of easement agreement ("Easement Agreement") be protected as confidential. The briefing of these issues has been raised in the context of the Intervenors' attempt to file all or portions of an unexecuted copy the Easement Agreement as a public document, and CRW II's objection to public disclosure of the Easement Agreement.

A plain language reading of the Commission's rules allow a non-filing party, such as CRW II, to request confidential treatment of information submitted by another party. Further, the Easement Agreement used by CRW II and affiliated companies of CRW II[1] contains trade secrets, confidential and proprietary information, and, therefore, that information is properly protected from public disclosure under the Commission's rules and South Dakota statutes. Thus, the Commission should afford confidential treatment to the CRW II Easement Agreement as requested herein.

[1] There are numerous affiliated companies of CRW II, which are indirect wholly-owned subsidiaries of NextEra Energy Resources, LLC ("NEER") currently developing wind projects throughout the United States.

II. CRW II has a right to protect its confidential information

The Commission rules provide for the protection of confidential information. ARSD 20:10:01:39-44. More specifically, read together ARSD 20:10:10:41, and 20:10:10:42 expressly provide an opportunity to a "party" to request that information be treated as confidential treatment. ARSD 20:10:01:41 sets forth the material that must be submitted to support a request for confidential treatment, while ARSD 20:10:01:42 sets forth the burden of proof the party asserting the information is confidential must satisfy. Neither rule expressly limits which party (filing or non-filing) must provide the material to support a claim of confidentiality and meet the associated burden of proof. Further, ARSD 20:10:01:39 which sets forth the definition of what constitutes confidential information includes any such information in the possession of the Commission without regard to who filed the information. Accordingly, following a plain language reading of the Commission rules clearly allows CRW II to seek confidential treatment of information no matter whether it was the party filing the information or a party seeking to protect information filed by another party..

In fact, given the competitive harm that can result from the disclosure of confidential information in the wind energy business, it is not atypical for a non-filing party in an administrative proceeding to seek to protect its confidentiality information, particularly when that information is in the form of an agreement that both the filing and non-filing parties have in their possession. For example, in 2016, NEER, on behalf of certain indirect wholly-owned subsidiaries, intervened in a Colorado Public Service Commission (Colorado PSC) proceeding to protect confidential information from public disclosure. In that proceeding, like the present one, the non-filing party had the right to request confidential treatment of information. Therefore, NEER sought and was granted protection of its information as a trade secret, although it was not the party providing the information. A copy of the Colorado PSC order granting confidential treatment of the NEER affiliate information is provided as Attachment A.

Consequently, not only does a plain language reading of the Commission's rules afford non-filing party the right to request confidential treatment, when a similar situation occurred before the Colorado PSC the non-filing party was afforded the right to request and was granted confidential treatment of its information. Thus, CRW II should be provided that same right before this Commission, and, as shown next, the Easement Agreement does include trade secret, confidential, and propriety information that should be provided confidential treatment.

III. Certain portions of CRW II's Easement Agreement should be afforded confidential treatment

Under the Commission's rule ARSD 20:10:01:41, a requester seeking confidential treatment shall: (A) identify the document or portion thereof that it seeks to be treated as confidential; (B) the length of time for which it seeks to maintain the confidentiality of the information; (C) the name, address, and phone number of the person associated with the confidential request; (D) the statute or common law grounds and administrative rules supporting the request for confidentiality; and (E) the factual basis that qualifies the information as confidential.

A. Identification of the portion of the Easement Agreement that is confidential

Attachment B (redacted public version) and Attachment C (confidential version, with confidential provisions highlighted in yellow) identifies the portions of the Easement Agreement that should be afforded confidential treatment. The portions of the Easement Agreement that CRW II is not seeking to protect as confidential are already public through publically recorded participation agreements or otherwise are not considered confidential information under South Dakota statutes and Commission rules.

B. Term of confidential treatment

CRW II is seeking a perpetual term for the confidential treatment, as there is no timeframe in which the disclosure of the Easement Agreement would not harm CRW II and its affiliated companies.

C. Sponsors of the confidential treatment

The attorneys for CRW II are requesting confidential treatment, and their contact information is set forth on the signature page of this brief.

D. and E. The legal basis and factual predicates supporting confidential treatment

The information identified in the Easement Agreement (Attachments B and C) should be protected from public disclosure pursuant to Commission rules ARSD 20:10:01:39(4)(6) and ARSD 20:10:01:42 as well as statutes SDCL 15-6-26(c)(7) and SDCL 37-29-1(4). Consistent with these rules and statutes, confidential treatment should be afforded to the Easement Agreement, because (1) the Agreement contains trade secrets, confidential, and proprietary commercial information; (2) CRW II and affiliated companies derive an independent economic value by maintaining the confidentiality of the Agreement and would suffer material harm to their competitive position if the information is publically disclosed; (3) competitors of CRW II and affiliated companies would obtain economic value from the public disclosure of the Agreement; and (4) CRW II has taken reasonable efforts, under the circumstances, to maintain the secrecy of the Easement Agreement. Accordingly, consistent with the aforementioned rules and statutes, the Easement Agreement should be protected from public disclosure.

Wind energy development is a highly competitive business involving many companies often seeking to develop wind generation facilities in the same area, and, therefore competing for the same landowners. Affidavit of Hart at ¶ 2. In the context of CRW II, the competitive nature of signing willing landowners is evidenced by the number of applications the Commission has received in recent years seeking a facility permit to construct wind projects located in Grant, Codington, and Deuel counties, which are the same counties associated with CRW II.[2] CRW II has been working for 10 years to develop its proposed wind facility in these counties, including securing sufficient landowners to solidify the project boundary and site a wind turbine array that meets sound, shadow-flicker and other set back requirements, while minimizing the impact on the environment. These development activities required the expenditure of millions of dollars and involved hundreds of hours of land agents working to secure willing landowners. *Id.*

Against this competitive milieu which is present for CRW II in South Dakota and for its affiliated companies throughout the United States, over the last 20 years CRW II's affiliates have developed the Easement Agreement at considerable expense, time, and commitment of resources. *Id.* at ¶ 3. The Easement Agreement includes trade secrets, confidential, and proprietary interrelated terms and conditions, including pricing and financial formulas, commitments to improvements, and terms on who bears certain risks. This information is precisely the type of information that a competitor would use to gain a competitive advantage, because the competitor could match or offer more attractive terms and conditions to secure potential landowner-participants. *Id.* at ¶ 5. Given that the securing of willing landowners is the foundation of developing the project boundary and the wind turbine array, publically disclosing the Easement Agreement would provide competitors of CRW II and its affiliated companies an

[2] EL19-026, wind facility in Deuel County; EL18-053, wind facility in Deuel County; EL18-046, wind facility in Deuel County; and EL18-003, wind project in Grant County and Codington County.

advantage not only on securing landowners, but, also, developing the overall wind project. *Id.* Given the competitive value associated with the Easement Agreement in the process of developing wind projects, CRW II and its affiliated companies derive an independent economic value in maintaining it as confidential. As well, competitors would clearly obtain an economic value through the public disclosure of the Agreement, as they would obtain competitive business information at no cost, and would immediately be in a better competitive position to compete for willing landowners and the full development of wind projects. *Id.* Concurrently, the competitive position of CRW II and its affiliated companies would be materially harmed by the disclosure of the Easement Agreement. The harm would manifest itself in the loss of willing landowners to competitors, which, in turn, would result in the increased time and costs to develop wind project boundaries and turbine arrays, and potentially even the demise of some wind projects currently under development. *Id.* at ¶ 2. Accordingly, the Commission's rules and South Dakota statutes support the confidential treatment of the Easement Agreement, because it contains trade secrets, confidential, and proprietary commercial information; CRW II and affiliated companies derive an independent economic value from the Agreement by maintaining it as confidential, while competitors would obtain and economic value from its public disclosure; and the competitive position of CRW II and its affiliated companies would be materially harmed if it is publically disclosed.

Further, CRW II has taken reasonable steps to protect the confidentiality of the Easement Agreement. The Easement Agreement expresses identifies that it includes confidential and proprietary information, and, also, limits the copying and distribution of the Agreement. Section 17 of Attachment C. Consistent with this language, the land agents providing the Easement Agreement to potential participating landowners explain the confidential nature of the unexecuted Agreement. Affidavit of Daryl Hart at ¶ 2. In Docket No. 19-003, when the same Easement Agreement was provided in response to a Staff data request, Crowned Ridge Wind, LLC submitted it as confidential.[3] Therefore, CRW II and its affiliated companies have taken reasonable efforts under the circumstances to maintain the secrecy of the Easement Agreement.

Consequently, for the foregoing reasons, the Easement Agreement should be afforded confidential treatment as it satisfies all of the requirements Commission rules ARSD 20:10:01:39(4)(6) and ARSD 20:10:01:42 as well as statutes SDCL 15-6-26(c)(7) and SDCL 37-29-1(4).[4] *Bertelsen. Allstate Ins. Co.,* 2011 SD 13, ¶ 60, 796 N.W.2d 685, 705 (insurance company's statement of confidentiality in manuals identifying the information as containing trade secrets, confidential and propriety information coupled with company's efforts to maintain secrecy was sufficient to afford the information confidential treatment).

IV. Conclusion

The Commission should grant confidential treatment to CRW II's Easement Agreement as requested herein.

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[3] In fact, competitors have done the same. In Docket No. EL18-003, a competitor of CRW II filed two forms of easements as confidential: Exhibit A19 Wind Energy Lease and Wind Easement Agreement (filed 6/12/18) Exhibit A20 Wind Easement, Setback Waiver, and Good Neighbor Agreement (filed 6/13/18).

[4] Other state energy regulatory agencies have also protected information related to and actual easements from public disclosure due to the competitive harm that would result from public disclosure. *In Re: Hawkete Land Co., Rick Stickle and Cedar Lake Development Corporation v. ITC Holdings Corp.*, Docket No. FCU-2009-0006, Order Granting Request for Confidentiality (April 6, 2010) (granted confidential treatment to detailed descriptions of ITC's transmission easement negotiation procedures, pricing information, and negotiation strategies) (Attachment D); *Bangor Hydro-Electric Company Request for Approval of Affiliated Interest Transaction regarding Property Adjacent to Orrington Substation*, Docket Nos. 2000-667 and 2006-629, Protective Order No. 2 issued by Hearing Examiner (Nov. 16, 2006) (transmission easement agreement provided confidential treatment) (Attachment E).

Dated: August 27, 2019 /s/ Miles Schumacher

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Decision No. C16-0662-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 16A-0117E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF THE 600 MW RUSH CREEK WIND PROJECT PURSUANT TO RULE 3660(H), A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE RUSH CREEK WIND FARM, AND A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE 345 KV RUSH CREEK TO MISSILE SITE GENERATION TIE TRANSMISSION LINE AND ASSOCIATED FINDINGS OF NOISE AND MAGNETIC FIELD REASONABLENESS.

PROCEEDING NO. 16V-0314E

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE COMPANY OF COLORADO FOR A VARIANCE OF THE CONSTRUCTION SCHEDULE FOR THE PAWNEE TO DANIELS PARK 345 KV TRANSMISSION PROJECT.

INTERIM DECISION GRANTING PUBLIC SERVICE MOTION FOR EXTRAORDINARY PROTECTION; GRANTING NEXTERA MOTION FOR LIMITED INTERVENTION; GRANTING MOTION TO APPEAR *PRO HAC VICE*; GRANTING NEXTERA MOTION FOR PROTECTIVE ORDER; SHORTENING RESPONSE TIME TO CERTAIN MOTIONS AND PLEADINGS; AND REFERRING CERTAIN MOTIONS AND PLEADINGS TO AN ADMINISTRATIVE LAW JUDGE

Mailed Date: July 15, 2016
Adopted Date: July 13, 2016

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I. BY THE COMMISSION

A. Statement

1. This Decision grants the Second Motion for Extraordinary Protection filed by Public Service Company of Colorado (Public Service or Company) on June 27, 2016. We also grant the Motion for Leave to Intervene Out of Time and the Motion for Protective Order filed by NextEra Energy Resources, LLC (NextEra) on July 5, 2016. We waive additional response time and grant the Motion to Appear Pro Hac Vice of Ms. Anne Callenbach as counsel for NextEra that was also filed July 5, 2016.

2. Consistent with the discussion below, we shorten response time to certain motions to three business days and refer such motions for protective orders and other specific pleadings to an Administrative Law Judge (ALJ). **Response time to motions for protective orders, motions requesting intervention in support of motion for protective orders, motions to compel, and other pleadings related to discovery is three business days.**

B. Public Service Motion for Extraordinary Protection

3. On June 27, 2016, Public Service filed a Second Motion for Extraordinary Protection, requesting highly confidential protection for gas forecasts that the Company states are proprietary commercial products. Public Service claims that inadvertent disclosure of the

information would destroy the commercial value of the gas price forecast information. In addition, any party who is or may become a bidder responding to a future Electric Resource Plan would have a financial interest in obtaining this proprietary gas price forecast without having to pay for the information.

4. Public Service requests the same highly confidential treatment for such gas forecast information that it was granted in Decision No. C16-0548-I.[1]

5. At the time the motion was filed, the Company had requested clarification on whether disclosure of information to certain parties pursuant to Decision No. C16-0548-I, which required protections consistent with Rule 4 *Code of Colorado Regulations* (CCR) 723-3-3614 of the Commission's Rules Regulating Electric Utilities, prohibited that party from participating as a competitor in a future resource bid solicitation.

6. Through Decision No. C16-0614-I, issued July 1, 2016, we clarified that, any party may have individual representatives sign appropriate non-disclosure agreements to access information, and that having a representative access information does not preclude a party from participation in future bid solicitations pursuant to Rule 4 CCR 723-3-3614.[2] Individuals accessing the protected information must comply with the approved non-disclosure agreement (NDA), including that they may not use the information for commercial purposes, or disclose the information to any unauthorized person, including those within the intervening organization, for any reason.

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[1] Decision No. C16-0548-I, issued June 17, 2016, Proceeding Nos. 16A-0117E and 16V-0314E.

[2] Decision No. C16-0614-I, issued July 1, 2016, Proceeding Nos. 16A-0117E and 16V-0314E.

7. After this clarifying decision was issued, Public Service did not amend or revise the motion filed on June 27, 2016. No party responded to the motion, and we consider it unopposed.

8. We grant the motion and afford the gas price forecasting information extraordinary protection, consistent with highly confidential treatment allowed in Decision No. C16-0548-I and clarified through Decision No. C16-0614-I.

C. NextEra Motion for Limited Intervention

9. NextEra requests late-filed intervention because it claims that, through discovery requests, Staff of the Colorado Public Utilities Commission (Staff) and the Colorado Office of Consumer Counsel (OCC) have asked for information NextEra claims as proprietary, commercially sensitive, and competitively sensitive information.

10. NextEra states that it has a substantial and unique interest in ensuring that this information is afforded extraordinary protection and requests intervenor status in this proceeding for the limited purpose of seeking extraordinary protection for the information.

11. NextEra argues that ensuring the protection of its highly confidential information substantially affects its pecuniary or tangible interests, especially if such disclosure is to its competitors. NextEra adds that there is no other party that can adequately protect these interests, as it would be the only party able to identify what information is proprietary, commercially sensitive, and competitively sensitive.

12. Rule 4 CCR 723-1-1401(c) of the Commission's Rules of Practice and Procedure states in relevant part:

> A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. … The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene.

13. In addition, 4 CCR 723-1-1401(a) provides that, for good cause shown, the Commission may allow late intervention, subject to reasonable procedural requirements.

14. Pursuant to Rule 4 CCR 723-1-1500, the person seeking leave to intervene by permission bears the burden of proof with respect to the relief sought.

15. Through Decision No. C16-0632-I, the Commission granted NextEra's request to shorten response time to the Motion to Intervene.[3] No party responded to NextEra's request for limited intervention.

16. We find good cause to allow late intervention in this instance and grant NextEra's motion to intervene. It is only after discovery requests implicated NextEra's information that NextEra became aware it may have a limited interest in this proceeding. NextEra demonstrates that its pecuniary or tangible interests may be affected by this proceeding. NextEra also demonstrates that its limited interests would not otherwise be adequately represented. NextEra may participate in this proceeding for the limited purpose of requesting and ensuring appropriate treatment of the information claimed to be highly confidential.

[3] Decision No. C16-0632-I, issued July 6, 2016, Proceeding Nos. 16A-0117E and 16V-0314E.

D. Motion to Appear *Pro Hac Vice*

17. On July 5, 2016, Ms. Anne Callenbach filed a motion to appear *pro hac vice* as counsel for NextEra. Within her filing, Ms. Callenbach represents she is in good standing in both Missouri and Kansas state bars. She states that Mr. Richard Murray, of the Denver firm Polsielli PC, will be her associating attorney in this proceeding. Notice was filed July 8, 2016, that Ms. Callenbach has filed with the Colorado Attorney Registration Office, paid her filing fee, and that the office found no adverse information.

18. We find that no party will be prejudiced by waiver of additional response time to Ms. Callenbach's motion. On our own motion, we waive additional response time to the motion. Ms. Callenbach meets the requirements of Colorado Rule of Civil Procedure 205.4. We grant Ms. Callenbach's request to represent NextEra *pro hac vice*.

E. NextEra Motion for Protective Order

19. In its Motion for Protective Order, NextEra argues that the information requested by Staff and the OCC is trade secret information that is among the most proprietary, commercially sensitive, and competitively sensitive data associated with respect to NextEra's four wind generation facilities in Colorado. NextEra argues that the information provides the competitive energy pricing of each wind plant as well as additional information that would allow competitors to understand the "proprietary building blocks" of how the plants were bid and priced, including how associated tax incentives were considered. NextEra claims that the requested data includes operational data that would provide competitors with an understanding of its proprietary operation and maintenance plans.

20. NextEra does not object to providing the highly confidential information to Staff and the OCC, subject to the protections adopted by the Commission in Decision No. C16-0548-I.

Subject to those same conditions, NextEra also does not object to granting access to the majority of intervenors within the proceeding. However, NextEra objects to the following parties having access to the information it claims to be highly confidential: Sustainable Power Group, Inc. (sPower); the Colorado Independent Energy Association (CIEA); Southwest Generation Operating Company, LLC (SWGen); Interwest Energy Alliance (Interwest); and Tri-State Generation and Transmission Association, Inc. (Tri-State).

21. NextEra argues that providing these intervenors with the information it claims to be highly confidential would be detrimental, because it would provide competitors with extensive information valuable to them in making their own competitive decisions, without the competitors expending the time and money necessary to gather and develop the information.[4]

22. If NextEra's request to deny the competitor intervenor access to the information claimed to be highly confidential is denied, NextEra alternatively requests that the Commission allow only one outside counsel and one outside subject matter expert access to the information. Such access would be *in camera* at Public Service's offices. In addition, NextEra requests that the Commission direct Public Service "to mask and make generic" all of NextEra's highly confidential information.[5]

23. Through Decision No. C16-0632-I, the Commission granted NextEra's request to shorten response time to the Motion for Protective Order. No party responded to NextEra's request.

[4] NextEra Motion for Extraordinary Protection, at 9 (stating the information would provide competitors "a free ride, no-costs blueprint on how to compete against [NextEra].")

[5] *Id.*, at 12.

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24. We agree that the information NextEra seeks to protect, which includes capacity factors, generation patterns, tax benefits, and "free curtailments" for projects under contract with Public Service, should be protected as proprietary, commercially sensitive, and competitively sensitive information.

25. Commission confidentiality rules provide effective protections for sensitive information, including prohibition of the kind of commercial use NextEra finds concerning. Nevertheless, there are limited instances when the Commission will deviate from protections permitted in applicable rules.

26. In this case, we recognize that NextEra is not a rate-regulated utility and that the approvals sought by Public Service in this Proceeding do not relate to NextEra's facilities in Colorado. Heightened protections of competitor information, particularly when this information may not be necessary for the proceeding at issue, may assist in avoiding a perception among project developers that trade secrets could be disclosed within our regulatory proceedings. We grant NextEra's motion and prohibit access of the information to sPower, CIEA, SWGen, Interwest, and Tri-State. All other intervenors may be granted access to the information consistent with the protections included in Rule 4 CCR 723-3-3614 as applied in this proceeding pursuant to Decision Nos. C16-0548-I and C16-0614-I.

27. Our departure from general Commission confidentiality protections is narrow and permitted in this instance where no party, including those parties that would be prohibited from receiving the information, objects to NextEra's motion. NextEra requests both direct competitors and trade associations representing competitors be precluded from accessing information. We note that trade associations are not similarly situated to direct competitors. Commission rules permitted representatives from all parties that sign appropriate non-disclosure agreements

access to competitively sensitive information. *See* Rule 4 CCR 723-3-3614. Consistent with our rules, we prefer broad access to information provided in the proceeding, if possible. Trade associations that represent competitors are not necessarily precluded from receiving commercially sensitive information in a proceeding, even if the information is inaccessible to competitive intervenors.

28. However, in this instance, neither CIEA nor Interwest objects to the requested protections requested by NextEra. For the non-regulated utility information at issue, particularly when no objections or responses were filed, we grant NextEra's preferred request and do not permit access to these trade associations or the competitive intervenors.[6]

29. Most parties will be permitted to have individuals access the information, consistent with Rule 4 CCR 723-3-3614. Access to the information by Staff, the OCC, and all of the other intervening parties will help ensure that relevant information and analysis will be made available to the Commission.

F. Shortening Response Time to Discovery-Related Pleadings and Referring Certain Discovery Matters to An ALJ

30. This Proceeding is on an expedited schedule.[7] Prompt resolution of discovery disputes and timely filings on discovery-related issues are imperative for the Commission to maintain the decision deadline requested by Public Service.

[6] Through Decision No. C16-0548-I issued in this proceeding, we granted, in part, Public Service's First Motion for Protective order upon consideration of different circumstances than presented by NextEra's motion. CIEA objected to Public Service's request that CIEA be precluded entirely from having access to the subject information, arguing that access to the information pursuant to NDAs signed by eligible individuals should be allowed. We agreed and found that allowing access to the "core" contract information at issue in this application, subject to protections, would provide the Commission with better information and argument with respect to whether the Rush Creek Wind Project "can be constructed at reasonable cost compared to the cost of similar eligible energy resources available in the market." Decision No. C16-0548-I, ¶¶ 101-02.

[7] *See* Decision No. C16-0423-I, issued May 19, 2016, Proceeding No. 16A-0117E and Decision No. C16-0548-I.

31. For administrative efficiencies and in the interest in maintaining the expedited procedural schedule, we shorten response time to certain discovery-related pleadings filed in this Proceeding. Responses to motions to compel, in addition to motions for limited intervention and for protective orders for information requested through discovery, shall be filed no later than three business days after the pleading is filed with the Commission. In addition, we also refer motions to compel, in addition to motions for limited intervention and for protective orders for information requested through discovery to an ALJ for prompt resolution.

II. ORDER

A. It Is Ordered That:

1. The Second Motion for Extraordinary Protection filed by Public Service Company of Colorado on June 27, 2016, is granted, consistent with the discussion above.

2. The Motion for Leave to Intervene Out of Time filed by NextEra Energy Resources, LLC (NextEra) on July 5, 2016, is granted, consistent with the discussion above.

3. The Motion to Appear *Pro Hac Vice* as Counsel for NextEra Energy Resources, LLC of Anne Callenbach filed July 5, 2016, is granted and additional response time is waived.

4. The Motion for Protective Order filed by NextEra on July 5, 2016, is granted, consistent with the discussion above.

5. Response time to motions related to discovery is shortened to three business days, consistent with the discussion above.

6. Motions to compel, in addition to motions for limited intervention and for protective orders for information requested through discovery, are referred to an Administrative Law Judge.

7. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING July 13, 2016.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

FRANCES A. KONCILJA

Commissioners

WIND FARM LEASE AND EASEMENT AGREEMENT

1. **Parties**. This Wind Farm Lease and Easement Agreement ("**Agreement**") is made and entered as of the ____ day of ____________, 2017 ("**Effective Date**"), by and between [*NAME AND MARITAL STATUS*] (collectively, the "**Owner**"), and Crowned Ridge Wind II, LLC, a Delaware limited liability company, ("**Operator**") an affiliate of NextEra Energy Resources, LLC, a Delaware limited liability company. Owner and Operator are sometimes individually referred to as a "**Party**" and collectively as the "**Parties**."

[redacted]

3. **Option**. Owner grants to Operator an exclusive option ("**Option**") to acquire the Leases and Easements referenced in Sections 4 and 5 in accordance with the following terms and conditions. Operator shall be entitled to acquire the Lease and the Easements in their entirety or in part, as Operator deems appropriate.

3.1 **Option Term**. The initial period during which Operator may exercise the Option shall be for a term of thirty-six (36) months, commencing on the Effective Date and expiring on the date immediately preceding the third (3^{rd}) anniversary of the Effective Date ("**Initial Option Term**"). Operator shall have a single election to extend the Initial Option Term for an additional twenty-four (24) months ("**Extended Option Term**") by written notice to Owner at any time prior to the third (3^{rd}) anniversary of the Effective Date, which notice shall be accompanied by the Option Extension Payment (as defined in **Exhibit D**). References herein to the Option Term shall mean the Initial Option Term and, to the extent exercised by Operator, also the Extended Option Term, unless expressly stated otherwise.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] **Exercise of Option**. Operator may exercise the Option by giving written notice to Owner ("**Option Notice**") at any time during the Option Term. [redacted]

[redacted]

4. [redacted]. Effective upon the exercise of the Option by Operator, Owner grants to Operator, and Operator then accepts from Owner, for the Term referenced in Section 6.1, the following leases over and across the Owner's Property in accordance with the terms and conditions of this Agreement. [redacted]

4.1 **Construction Right**. [redacted]

[redacted]

[redacted]

4.2 **Access Right**. [redacted] . [redacted]

4.3 **Turbine Site Lease**. [redacted]

4.4 **Collection Lease**. [redacted]

4.5 **Telecommunication Facilities Lease**. [redacted]

4.6 **Overhang Right**. [redacted]

4.7 **Met Tower Lease**. [redacted]

5. **Easements**. Upon the exercise of the Option by Operator, Owner grants to Operator, and Operator accepts from Owner, for the Lease and Easement Term referenced in Section 6.1, the following easements over and across the Owner's Property in accordance with the terms and

conditions of this Agreement. The following easements are for the benefit of Operator and Operator's agents, contractors and employees, are located on the Owner's Property and are collectively referred to as the "**Easements.**"

[redacted] **Wind Non-Obstruction Easement**. (a) Owner grants Operator an irrevocable, exclusive easement for the right and privilege to use, maintain and capture the free and unobstructed flow of wind currents over and across the Owner's Property ("**Wind Non-Obstruction Easement**"). Along with the Option Notice, Operator shall deliver to Owner the following legal descriptions which shall become **Exhibit A-2** of this Agreement: (a) a description of the Wind Non-Obstruction Easement property subject to this Agreement; (b) a description of the Wind Non-Obstruction Easement in vertical and horizontal angles; and (c) a description of real property benefiting from the Wind Non-Obstruction Easement. Owner shall not engage in any activity on Owner's Property that might interfere with wind speed or wind direction over any portion of any Turbine or Met Tower Easement Properties, whether located on or off the Owner's Property; cause a decrease in the output or efficiency of any Turbine or accuracy of any meteorological equipment; or otherwise interfere with Operator's operation of the Wind Farm or exercise of any rights or the Leases granted in this Agreement ("**Interference**"). [redacted]

[redacted]

5.2 **Effects Easement**. Owner grants to Operator a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the Wind Farm or activity located on the Owner's Property or on adjacent properties over and across the Owner's Property ("**Effects Easement**").

6. **Term of Agreement**. The term of this Agreement ("**Term**") includes the Option Term referenced in Section 3.1; and the Easement Term referenced in Section 6.1.

6.1 **Lease & Easement Term**.

6.1.1 **Lease & Easement Term**. The Term of the Leases and Easements and the effective date thereof shall commence on the date specified by Operator in the Option Notice ("**Commencement Date**"). The Term shall end fifty (50) years after the Commencement Date, unless terminated as provided in this Agreement.

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19. **Notice**.

19.1 **Writing**. All notices given or permitted to be given hereunder shall be in writing.

19.2 **Delivery**. Notice is considered given either (i) when delivered in person to the recipient named below, (ii) three days after deposit in the United States mail in a sealed envelope or container, postage and postal charges prepaid, return receipt requested or certified mail, addressed by name and address to the party or person intended, or (iii) twenty-four (24) hours from proper and timely delivery to an overnight courier service addressed by name and address to the party or person intended as follows:

Notice to Owner:	[*NAME AND ADDRESS*] Telephone:
Notice to Operator:	Crowned Ridge Wind II, LLC 700 Universe Boulevard Juno Beach, FL 33408-2657 Attention: Land Services Phone: (855) 552-9872

19.3 **Change of Recipient or Address**. Either party may, by notice given at any time or from time to time, require subsequent notices to be given to another individual person, whether a party or an officer or representative, or to a different address, or both. Notices given before actual receipt or notice of change shall not be invalidated by the change.

20. **Miscellaneous Provisions**.

20.1 **Successors & Assigns**. The terms and provisions of this Agreement shall run with the land and be binding on and inure to the benefit of the heirs, successors, assigns and personal representatives of the Parties. [redacted]

20.2 **Memorandum**. Simultaneously with the execution of this Agreement, Owner and Operator agree to execute and acknowledge a memorandum of this Agreement satisfactory in form and substance to Operator and Owner. Owner consents to the recordation of the memorandum in the public records of the county where the Owner's Property is located.

20.3 **Entire Agreement**. This Agreement and the attached Exhibits shall constitute the entire agreement between the Parties and supersedes all other prior writings and understandings.

20.4 **Amendments**. This Agreement shall not be amended or modified in any way except by an instrument signed by Owner and Operator and consented to by any Operator Mortgagee. The Parties hereto shall at all times hereafter execute any documents and do any further acts which may be necessary or desirable to carry out the purposes of this Agreement and to give full force and effect to each and all of the provisions hereof.

[redacted]

20.6 **Severability**. If any term or provision of this Agreement, or the application thereof to any person or circumstance shall, to any extent, be determined by judicial order or decision to be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held to be invalid, shall be enforced to the fullest extent permitted by law. In the event it was determined by Operator that the rights of the parties hereto under this Agreement were to become unenforceable due to the effect of Article XVII, Sections 21-24 of the South Dakota Constitution, the parties agree to amend this Agreement or modify the rights granted herein in order to comply with all applicable laws and to grant to Operator the rights to the extent necessary to construct, operate and maintain the Improvements as contemplated herein.

[redacted]

20.8 **Approvals**. Whenever in this Agreement the approval or consent of either Party is required or contemplated, unless otherwise specified, such approval or consent shall not be unreasonably withheld or delayed.

20.9 **Counterparts**. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute a single instrument.

20.10 **Option to Convert**. During the Term of the Leases and Easements granted herein, Owner grants to Operator the option to convert the Leases herein contained to easements, or the Easements to leases, as determined by Operator in its sole discretion. [redacted]

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