

**FEBRUARY 2019
GRANT COUNTY
BOARD OF ADJUSTMENT
STAFF REPORT (Amended 2/6/19)**

PERMIT HEARING DATE: MONDAY – FEBRUARY 11, 2019 – 4:00 p.m.

ITEM #1 CONDITIONAL USE PERMIT(S) EXTENSION

Applicant: Cattle Ridge Wind, LLC; Parent Company: NextEra Energy Resources, LLC

Property Description: Certain property in Osceola, Mazeppa, Madison, Twin Brooks, Stockholm and Vernon East/West Townships

Action Items: Amend condition(s) of approval of previously Granted conditional use permits CUP02082017A & CUP02082017B granted by the Board of Adjustment on March 13, 2017 (extending the permit expiration date).

Zoning Designation: A – Agricultural

Request: Cattle Ridge Wind, LLC; Parent Company: NextEra Energy Resources, LLC are requesting to change the expiration date of the permits issued by the Grant County Board of Adjustment to Cattle Ridge Wind, LLC from March 13, 2019 to March 13, 2020. The permits are scheduled to expire on March 13, 2019 due to inactivity from their original approval date.

History/Issue(s):

Specifics of Request:

1. Cattle Ridge, LLC was granted conditional use permits for a Wind Energy System and Transmission Line (feeder line) (CUP02082017A & CUP02082017B) on March 3, 2017.
2. Parent Company: NextEra Energy Resources, LLC acquired Cattle Ridge LLC and their conditional use permits on November 22, 2017 (Exhibit B).
3. Parent Company: NextEra Energy Resources, LLC states in their letter requesting permit extension that there were extenuating circumstances beyond their control which has impeded their ability to begin construction. See attached letter (Exhibit A – Red Line was done by Staff).
4. Applicant is not requesting a new WES permit or transmission line (Feeder) permit nor to change any other conditions or findings from previously issued permits.

Ordinance and Comprehensive Land Use Plan regarding this request

1. At the time of the issuance of the conditional use permit, Grant County's zoning regulations Section 504.6 and Section 1211.03.13 provided regulatory guidance regarding the life of conditional use permits. 504.6 states "A conditional use that is granted but not used within two (2) years shall be considered invalid unless an extension has been requested and approved by the Board of Adjustment." Section 1211.03.13 states "The permit shall become void if no substantial construction has been completed within two (2) years of issuance."

2. On December 28, 2018, Grant County amended its wind energy system ordinance. Regarding the expiration date for Wind Energy Systems, the new regulation is as follows:

15. Permit Expiration. The permit shall become void if no substantial construction has commenced within three (3) years of issuance; or if a State Permit from the South Dakota Public Utility Commission has not been issued within two (2) years of issuance of the permit.

Staff Summary and Recommendation:

- Since the existing conditional use permits have not expired. The only item for consideration and debate is whether to extend the expiration date.
- Based upon today's WES rules (Section 1211.03.15), a permittee would be guaranteed either a three-year permit to construct a WES or a two-year window to construct after issuance of the conditional use permit if the PUC has not approved the project. While today's rule provides for a three-year permit, after legal consultation, Staff advises the Board to apply the rules that were in effect at the time of original permit issuance.
- Section 504.6 provides for a "general rule" regarding the Board's ability to extend conditional use permits if an application to extend is made prior to the expiration of the permit. However, at the time of the original issuance of the permit (March 13, 2017) Section 1211.03.13, a "specific rule" regarding Wind Energy Systems, did not provide for an extension to Wind Energy System permits".
- The Board will need to determine whether a general rule relating to conditional use permits (504.6) takes precedence over a specific rule regarding Wind Energy System permits (Section 1211.03.13). After legal consultation, Staff is of the opinion that a "specific" rule generally supersedes a "general" rule.
- A vote to approve the extension of the permits allows the existing permits granted on March 13, 2017 to be extended by a time period established by the Board (Applicant is requesting a date of March 13, 2020). A vote to deny the request would result in the permit expiring on March 13, 2019. After which a new application may be made.

Staff recommends:

Extension of permits CUP02082017A & CUP02082017B - The Board may postpone the requests, deny the requests or approve the requests. If approved, staff recommends the following conditions be agreed to in a letter of assurance signed by the applicant(s):

1) Effective Date and Transferability:

- a. The Conditional Use Permits become effective upon issuance of permit by South Dakota Public Utilities Commission.
- b. This permit(s) shall expire either on March 13, 2020 if no substantial construction as described in the application has been completed; or on March 13, 2021 if a State Permit from the South Dakota Public Utility Commission has not been issued by that date.
- c. The applicant may apply for an extension of this permit if the requirements of 1.b above cannot be met.

2) Obligation to Meet Requirements: Applicant agrees to meet requirements of previously issued Conditional Use Permits **CUP02082017A & CUP02082017B**.

Exhibit A



January 10, 2019

Krista Atyeo-Gortmaker
Grant County Planning & Zoning
210 East 5th Avenue
Milbank, SD 57252-2499

2017

504.6 and
1211.03.13

Dear Mrs. Atyeo-Gortmaker:

Due to extenuating circumstances outside of our control relating to the Grant County WES ordinance discussions, adaptations, reviews, edits, and various delays, the Cattle Ridge Wind, LLC Conditional Use Permit, awarded March 13, 2016 is set to expire per the Grant County Zoning Ordinance, section 505.10, stating that unless the facility is substantially completed within two years from the date of such order it shall be declared invalid. Considerable time was needed to negotiate and consummate the transaction whereby the owner of Crowned Ridge Wind, LLC and Crowned Ridge Wind II, LLC acquired Cattle Ridge Wind, LLC from Geronimo. No application to PUC had been made by Cattle Ridge Wind, LLC prior to the acquisition.

Until the South Dakota Public Utilities Commission (PUC) is able to approve the project under the names of Crowned Ridge Wind, LLC & Crowned Ridge Wind II, now encompassing Cattle Ridge Wind, LLC., absolutely no construction can legally take place.

Procedurally, before a permit application can be submitted to the PUC, all structural and geographic details of the project need to be confirmed. There must also be assurance that said details have local government approvals to offset the risk of any modifications that are requested via conditions of the local governing bodies where the facility's location is proposed. Since the Crowned Ridge Wind, LLC & Crowned Ridge Wind II, LLC Conditional Use Permit wasn't approved until December 17, 2018, it has delayed the PUC application submittal. We are near completion of the application and once our application is submitted to the PUC, they have approximately a six-month process for deliberations before their final approval. Accordingly, we respectfully request an extension of the Cattle Ridge Wind, LLC Conditional Use Permit for an additional 1 year, shifting the permit's expiration date from March 13, 2019 to March 13, 2020. We are confident that construction can, and will begin soon after final PUC approval.

Respectfully,

Tyler Wilhelm
Project Developer

NextEra Energy Resources, LLC

700 Universe Boulevard, Juno Beach, FL 33408

Exhibit B

Execution Version

COMPANY ASSIGNMENT AGREEMENT

This Company Assignment Agreement (this "Agreement") is made and entered as of November 22, 2017 among Geronimo Energy, LLC, a Delaware limited liability company ("Assignor"), and Cattle Ridge Wind Holdings, LLC, a Delaware limited liability company ("Assignee"). Capitalized terms used but not defined herein shall have the meanings ascribed thereto in that certain Purchase and Sale Agreement, dated of even date herewith, between Assignor and Assignee (the "PSA").

WITNESSETH

WHEREAS, Assignor directly owns one hundred percent (100%) of the membership interests, represented by certificate number 1 for 100 units (collectively, the "Interests"), of Cattle Ridge Wind Farm, LLC, a Delaware limited liability company ("Project Company"); and

WHEREAS, pursuant to and in accordance with the PSA, on the date hereof Assignor desires to transfer and assign all of its right, title, and interest in and to the Interests, free and clear of all Liens (other than any restrictions on transfer arising under applicable securities Laws), to Assignee, and Assignee desires to accept such assignment and transfer.

NOW, THEREFORE, for good and value consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee hereby agree as follows:

1.1. Assignment and Acceptance. Assignor hereby sells, assigns, conveys, transfers, and delivers the Interests to Assignee, and Assignee hereby purchases and accepts the Interests from Assignor, free and clear of all Liens (other than any restrictions on transfer arising under applicable securities Laws).

1.2. Effect of Transfer. As of the date hereof, (a) Assignor will cease to be a member of the Project Company and (b) Assignee will be admitted as, and become, the sole member of the Project Company, and such termination and admission will be deemed to occur simultaneously.

1.3. Further Assurances. Each of Assignor and Assignee agrees to execute and deliver such additional instruments and other documents, and to take such other actions, as may be reasonably requested by the other party to further effectuate and confirm the transfer and assignment of the Interests as herein provided.

1.4. The PSA. This Agreement is being delivered pursuant to the PSA and will be construed consistently therewith. This Agreement is not intended to, and does not, in any manner enhance, diminish, or otherwise modify the rights and obligations of the parties under the PSA. To the extent that any provision of this Agreement conflicts or is inconsistent with the terms of the PSA, the terms of the PSA will govern.

1.5. Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED UNDER, THE LAWS OF THE STATE OF DELAWARE APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED IN SUCH STATE AND WITHOUT

GIVING EFFECT TO ANY CONFLICT OR CHOICE OF LAW PROVISION THAT WOULD RESULT IN THE APPLICATION OF ANOTHER STATE'S LAW.

1.6. Successors and Assigns. This Agreement and all of the provisions hereof will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

1.7. Counterparts. This Agreement may be executed in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. Any facsimile or portable document format (pdf) copies hereof or signature hereon will, for all purposes, be deemed originals.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

ASSIGNOR:

GERONIMO ENERGY, LLC

By: _____
Name: Blake E. Nixon
Title: President

ASSIGNEE:


CATTLE RIDGE WIND HOLDINGS, LLC

By:  _____
Name: John Di Donato
Title: Vice President

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

ASSIGNOR:

GERONIMO ENERGY, LLC

By:  _____
Name: Blake E. Nixon
Title: President

ASSIGNEE:

CATTLE RIDGE WIND HOLDINGS, LLC

By: _____
Name: _____
Title: _____