

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.

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.

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

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

FRANCES A. KONCILJA

Commissioners