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JOINT REPORT AND APPLICATION § BEFORE THE STATE OFFICE  
OF ONCOR ELECTRIC DELIVERY §  
COMPANY LLC AND NEXTERA § OF  
ENERGY, INC. FOR REGULATORY §  
APPROVALS PURSUANT TO PURA § ADMINISTRATIVE HEARINGS  
§§ 14:101, 39.262 AND 39.915 §

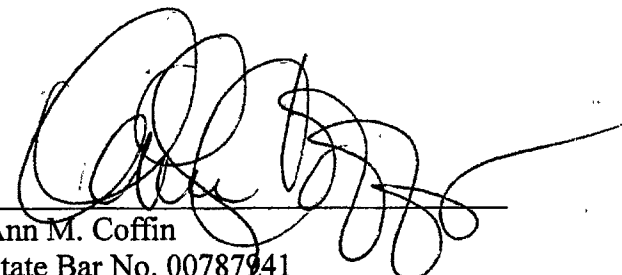
**NEXTERA ENERGY, INC.'S REQUEST FOR IN CAMERA REVIEW**

Pursuant to Commission Procedural Rule 22.144(g), NextEra Energy, Inc. ("NextEra Energy" or the "Company") requests in camera inspection of the long-range forecasting model addressed in the Company's Response to Texas Industrial Energy Consumers' ("TIEC") Motion to Compel regarding TIEC's Fourth Request for Information. This request is filed three working days after receipt of TIEC's Motion to Compel, which was received on December 22, 2016.

In its Response to TIEC's Motion to Compel, the Company explained that the forecasting model requested in TIEC RFI 4-5 is a privileged trade secret and should be protected from discovery pursuant to Texas Rule of Evidence 507. The Company's assertion of the trade secret privilege applies to the entirety of the forecasting model. A copy of this response, including the supporting affidavit of Company employee David Reinstein, is attached as Exhibit A to this pleading. The attached response and affidavit contain all of the factual and legal bases supporting the Company's assertion of the trade secret privilege. Pursuant to Rule 22.144(g), NextEra Energy will provide the documents separately under seal to the ALJs for review on December 29, 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on all parties of record in this proceeding via fax, hand delivery, overnight delivery, or U.S. first class mail on this the 28<sup>th</sup> day of December, 2016.



Ann M. Coffin

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NEXTERA ENERGY, INC.'S RESPONSE TO TEXAS INDUSTRIAL ENERGY  
CONSUMERS' MOTION TO COMPEL

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**NEXTERA ENERGY, INC.'S RESPONSE TO TEXAS INDUSTRIAL ENERGY  
CONSUMERS' MOTION TO COMPEL**

NextEra Energy, Inc. ("NextEra Energy") submits this response to Texas Industrial Energy Consumers' ("TIEC") Motion to Compel and would show as follows:

**I. INTRODUCTION**

TIEC seeks to compel NextEra Energy to produce a trade secret-protected, enterprise-wide, long-range forecasting model the Company relies on to prepare highly sensitive financial information, such as projected earnings per share ("EPS") and cash flows. This information is derived from *all* Company direct and indirect subsidiaries based on the Company's unregulated-regulated business mix. The Affidavit of Company employee and custodian of the model, Mr. David Reinstein – one of only *three* people who have access to the model -- establishes that the long-range forecasting model is a privileged trade secret that should be protected from disclosure due to the extreme competitive sensitivity associated with the trade secret-protected formulas, data compilations, and strategic variables and inputs contained in the model.<sup>1</sup> Consistent with this Commission's precedent, the Company seeks to protect its long-range forecasting model from discovery because it constitutes a privileged trade secret.<sup>2</sup>

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<sup>1</sup> See Exhibit A to this Response.

<sup>2</sup> See, e.g., *Application of the City of Garland to Amend a Certificate Of Convenience and Necessity for the Rusk to Panola Double-Circuit 345-kV Transmission Line in Rusk and Panola Counties*, Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016) (holding that information supporting economic forecasting model constitutes a trade secret that requesting party had failed to prove it had a need to review).

While TIEC argues that this forecasting model is necessary in order to create a pre-Oncor acquisition baseline to “...determine whether the proposed transaction creates synergy savings or any other benefits,”<sup>3</sup> TIEC’s argument ignores the fact that NextEra Energy has already provided the requested financial metrics as part of a financial model analyzing the proposed transactions. This highly sensitive transaction-specific model was produced in response to Cities RFI 2-3.<sup>4</sup> This detailed, accurate and fully operational model already produced to TIEC represents the entire picture of what NextEra Energy looks like both before and after the proposed acquisition. In other words, what has been produced to TIEC includes the full financial assessment of the transaction in the form of “with” and “without” Oncor scenarios:

Consequently, TIEC has already received the information needed for its stated purpose of creating a pre-Oncor acquisition baseline, and there is no need to require the production of NextEra Energy’s trade secret protected long-range forecasting model, which constitutes the detailed financial information of all 1,150 indirect and direct NextEra Energy subsidiaries containing a level or degree of granularity that no one else, including the market, has ever received..

Texas Rule of Evidence 507 provides that a person has a privilege to refuse to disclose a trade secret unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice. As the requesting party, TIEC has the burden to show that disclosure of the trade secret is necessary or essential—and not merely useful—to a fair adjudication of this proceeding.<sup>5</sup> In seeking to compel the production of trade secret-protected material, TIEC fails to explain why its existing access to information that is responsive to its alleged needs is not sufficient. TIEC also

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<sup>3</sup> TIEC Motion to Compel at 1-2 (Dec. 22, 2016).

<sup>4</sup> NextEra Energy’s Supplemental Response to Cities RFI 2-3, Highly Sensitive Attachment 2 (Dec. 19, 2016).

<sup>5</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733–34 (Tex. 2003); *In re XTO Res. I, LP*, 248 S.W.3d 898, 904 (Tex. App.—Fort Worth 2008, no pet.); *In re Waste Mgmt. of Tex., Inc.*, 286 S.W.3d 615, 618 (Tex. App.—Texarkana 2009); *In re Leviton Mfg. Co.*, 1 S.W.3d 898, 902–03 (Tex. App.—Waco 1999, no pet.); *Continental Tire*, 74 S.W.3d at 886; *In re Frost*, 998 S.W.2d 938, 939 (Tex. App.—Waco 1999, no pet.).

fails to meet its burden to show that the production of a trade secret-protected long-range forecasting model is essential for a fair adjudication of this proceeding. Thus, the requisite legal standard to compel trade secret disclosure has not been met. TIEC's Motion to Compel should be denied.

## II. BACKGROUND

NextEra has responded to approximately 550 requests thus far in this proceeding, including subparts, and has produced over 10,000 pages of documents many of which are highly sensitive materials. In responding to discovery, NextEra Energy has worked diligently to resolve any disputes and to ensure full and complete disclosure. The Company's objection to TIEC RFI 4-5 is the only objection that the Company has filed to date. This objection was filed to protect the extreme competitive sensitivity of NextEra Energy's long-range forecasting model, which is a trade secret that has *never* been disclosed (even pursuant to a protective order) to an agency, judge, or party in any regulatory or other legal proceeding.

By way of background, TIEC RFI 4-5 references Attachment 1 to NextEra Energy's response to Cities RFI 2-2, which is a highly sensitive presentation made by the Company to its Board of Directors on May 19, 2016. Page 14 of this attachment contains NextEra Energy's projected standalone EPS and projected regulated-unregulated business mix *based on data that assumes NextEra Energy's proposed acquisition of Oncor Electric Delivery Company LLC ("Oncor") is not approved*. TIEC now seeks the long-range forecasting model used by the Company to generate the EPS and business-mix information. The requested model is a NextEra Energy enterprise-wide, long-range financial forecasting model used to evaluate financial inputs associated with *all* of NextEra Energy's indirect and direct subsidiaries in order to provide a consolidated range of earnings to investors based on the Company's current business profile. The

model includes highly sensitive financial information about the Company and many non-jurisdictional subsidiaries, but—most importantly—it consists of trade secret-protected formulas, data compilations, and strategic inputs that offer a composite analysis of the financial information of all 1,150 indirect and direct NextEra Energy subsidiaries and meets the requisite standard for designation as a trade secret-protected from disclosure.

### **III. RESPONSE TO MOTION TO COMPEL**

- A. The Company has already produced the information that TIEC seeks in a highly sensitive model format. TIEC's desire to access NextEra Energy's trade secret-protected long-range forecasting model to obtain this same information should be denied.**

TIEC argues that it must have NextEra Energy's enterprise-wide long-range forecasting model to evaluate the Company apart from the proposed transactions so that it has a baseline from which to evaluate the synergy savings and benefits of the transactions. What TIEC fails to disclose is that it already possesses this information.

In response to Cities RFI 2-3, NextEra Energy produced the transaction-specific model used to assess the financial metrics associated with the proposed transactions. This fully executable model contains the information that TIEC claims it seeks. In particular, the transaction-specific model contains baseline standalone metrics for NextEra Energy. Additionally, the transaction-specific model includes both pre-acquisition and post-acquisition financial statements, balance sheets, cash flow statement forecasts, and EPS information, as well as detailed credit metric calculations from S&P and Moody's.<sup>6</sup> This information represents the entire picture of what NextEra Energy looks like both before and after the proposed acquisition of Oncor. The model's electronic format also allows TIEC to compare NextEra Energy's projections of the impacts of the transactions against the "status quo" and to manipulate the model inputs in order to

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<sup>6</sup> NextEra Energy's Supplemental Response to Cities RFI 2-3, Highly Sensitive Attachment 2 (Dec. 19, 2016).



evaluate and verify the Company's projections; as well as any risks and benefits of the proposed acquisition. In short, TIEC already possesses the information it claims to need in order to evaluate "what the Company would look like with the proposed transaction as a baseline for comparison,"<sup>7</sup> and there is no need to compel the production of trade secret-protected forecasting model so that TIEC may obtain the same information from a different, but much more highly sensitive model source.

**B. The long-range forecasting model is a privileged trade secret that is not subject to disclosure, and TIEC has not met its burden to establish that access to this model is essential.**

As stated in NextEra Energy's objection and discussed in detail below, the requested long-range forecasting model constitutes privileged trade secret information<sup>8</sup> that is of such a highly competitively sensitive nature that it cannot be adequately protected under the terms of the Protective Order.<sup>9</sup> Texas Rule of Evidence 507 provides that a person has a privilege to refuse to disclose a trade secret unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice. When a trade secret privilege is asserted, the presiding officer must decide (1) whether the requested material constitutes a trade secret and (2) whether the requesting party has shown that disclosure of the trade secret is necessary or essential—and not merely useful—to a fair adjudication of this proceeding.<sup>10</sup>

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<sup>7</sup> TIEC Motion to Compel at 2.

<sup>8</sup> *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (defining a "trade secret" as "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." (quoting *Computer Associates International v. Altai*, 918 S.W.2d 453, 455 (Tex.1994))).

<sup>9</sup> See *In re Union Pacific Railroad Company*, 294 S.W.3d (Tex. 2009) (regarding the protection of trade secrets from discovery).

<sup>10</sup> See, e.g., *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 733-34 (Tex. 2003); *In re XTO Res. I, LP*, 248 S.W.3d 898, 904 (Tex. App.—Fort Worth 2008, no pet.); *In re Waste Mgmt. of Tex., Inc.*, 286 S.W.3d 615, 618 (Tex. App.—Texarkana 2009); *In re Leviton Mfg. Co.*, 1 S.W.3d 898, 902-03 (Tex. App.—Waco 1999, no pet.); *Continental Tire*, 74 S.W.3d at 886; *In re Frost*, 998 S.W.2d 938, 939 (Tex. App.—Waco 1999, no pet.).

**1. Protecting NextEra Energy's long-range forecasting model from disclosure is consistent with this Commission's prior treatment of similar trade secret information.**

The Company's designation of its long-range forecasting model as protected trade secret is consistent with Commission precedent.<sup>11</sup> The Commission has, in past cases, denied motions to compel production of similar financial forecasting models.<sup>12</sup> For instance, in Docket No. 45624, TIEC similarly sought specific information supporting an economic model used by Southern Cross. In response, Southern Company asserted the trade secret privilege because disclosure would reveal competitively sensitive project status details, negotiations, and pricing information that could not be adequately protected under the Protective Order.<sup>13</sup> The ALJ upheld the privilege explaining that production would provide TIEC's expert with valuable information about Southern Cross's pricing strategies that could be used in other engagements against Southern Cross and that TIEC had failed to present evidence to support its need for the information.<sup>14</sup>

Likewise, in Docket No. 13444, the Commission concluded that a computer model used to develop forecasts included in the utility's notice-of-intent application was exempt from discovery because the requested model was a trade secret, production was not necessary to reach a final decision, and the requesting party could perform its own forecasting to support its position.<sup>15</sup>

Similar circumstances apply here. As explained below and in the affidavit of Mr. Reinstein, the requested long-range forecasting model meets the requisite criteria for trade secret

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<sup>11</sup> See, e.g., Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016) (holding that information supporting economic forecasting model constitutes a trade secret that requesting party had failed to prove it had a need to review); *Application of Golden Spread Electric Cooperative, Inc. for Approval of Notice of Intent*, Docket No. 13444, Order No. 4, 20 P.U.C. Bull. 903 (Nov. 17, 1994) (finding that computer model used to develop forecasts included in utility's notice-of-intent application constitutes trade secret exempt from discovery); *Application of Gulf States Utilities Company to Reconcile Fuel Costs*, Docket No. 13170, Order No. 12 at 4-5 (Nov. 19, 1994) and Order Granting Appeal of Order No. 12 (Dec. 19, 1994) (finding that fuel cost projections constitute trade secrets).

<sup>12</sup> *Id.*

<sup>13</sup> Docket No. 45624, Southern Cross Supplemental Response to TIEC's Motion to Compel at Attachment A (Apr. 25, 2016).

<sup>14</sup> Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016).

<sup>15</sup> Docket No. 13444, Order No. 4, 20 P.U.C. Bull. 903, 1994 WL 932510 at \*2-3 (Nov. 17, 1994),

designation. Production of the long-range forecasting model would reveal to parties, such as TIEC, competitively sensitive financial details of the Company's approximately 1,150 subsidiaries, many of which are unregulated and provide those parties with valuable information that TIEC could use against NextEra Energy in future regulatory proceedings involving its regulated businesses or in connection with business negotiations. Further, TIEC has not demonstrated its need for access to the long-range forecasting model since the information TIEC seeks to obtain from this model has already been made available as part of the transaction-specific model produced in response to Cities RFI 2-3. Consistent with its past precedent, the Commission should deny TIEC's Motion to Compel access to the Company's long-range forecasting model.

**2. The requested information is a privileged trade secret.**

A trade secret is "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it."<sup>16</sup> It includes "a process or device for continuous use in the operation of the business"<sup>17</sup> and can exist in "a combination of characteristics and components each of which, by itself, is in the public domain, but the unified process, design, and operation of which in unique combination, affords a competitive advantage and is a protectable secret."<sup>18</sup> As discussed above, this Commission has specifically recognized complex modeling and forecasting analyses as trade secrets entitled to protection from disclosure.<sup>19</sup>

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<sup>16</sup> Bass, 113 S.W.3d 735, 739 (Tex. 2003) (quoting *Computer Associates*, 918 S.W.2d 453, 455 (Tex. 1994)).

<sup>17</sup> Docket No. 13444, Order No. 4, 20 P.U.C. Bull. 903, 1994 WL 932510 at \*2 (Nov. 17, 1994) (citing *Hyde Corporation v. Muffins*, 314 S.W.2d 63 (1958)).

<sup>18</sup> *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1202 (5th Cir. 1986).

<sup>19</sup> Docket No. 13444, Order No. 4, 20 P.U.C. Bull. 903, 1994 WL 932510 at \*2-3 (Nov. 17, 1994) (finding that computer model used to develop power supply pricing forecasts constitutes trade secret exempt from discovery); Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016) (holding that load forecasting model constitutes a trade secret that requesting party had failed to prove it had a need to review).

While TIEC attempts to dismiss NextEra Energy's affirmations that the long-range forecasting model is a trade secret, TIEC acknowledges that formulas constitute trade secrets.<sup>20</sup> As Mr. Reinstein explains, the long-range forecasting model itself is distinctly a trade secret because it constitutes a unique compilation of highly sensitive, trade secret-protected formulas, data compilations, strategic inputs, and inherent analyses used to evaluate all of NextEra Energy's indirect and direct subsidiaries.<sup>21</sup> Thus, while specific pieces of information contained in the model or output by the model, in isolation, might constitute highly sensitive information, the value of the model is in the compilation of that data and in the formulas and inputs inherent in the model that allow the Company to manipulate data based on changing projections, market conditions, or other variables.

**3. NextEra Energy's long-range forecasting model qualifies as a privileged trade secret based on the Restatement of Torts criteria.**

To determine whether a trade secret exists, the presiding officer weighs six factors set forth in the Restatement of Torts in the context of the surrounding circumstances:

(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>22</sup>

Importantly, a party is not required to meet all six factors of the test; rather, the presiding officer must weigh each of the factors based on the facts and circumstances of the case.<sup>23</sup> As established by Mr. Reinstein and shown below, NextEra Energy's long-range forecasting model satisfies the requisite criteria for trade secret protection.

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<sup>20</sup> TIEC Motion to Compel at 3 (identifying fried chicken and soft drink "formulas" as trade secrets).

<sup>21</sup> *Bass*, 113 S.W.3d at 739.

<sup>22</sup> *Union Pacific*, 294 S.W.3d at 591 (citing *Bass*, 113 S.W.3d at 739).

<sup>23</sup> *Bass*, 113 S.W.3d at 740-41.

With regard to the first, second, and third elements of the trade secret test, NextEra Energy has at all times maintained the confidentiality of the financial model so that it is not known to or accessible by any person outside of NextEra Energy. Within the Company itself, access to the model is limited to only *three* employees and the model is kept on a secured server accessible only by employees with designated access. The Company takes all necessary measures to guard the secrecy of the long-range forecasting model, including employing policies and procedures to preclude its distribution or disclosure both within the Company and outside the Company. Importantly, the long-range forecasting model has *never* been provided (even pursuant to a protective order) to an agency, judge, or party in any regulatory or other legal proceeding.

Furthermore, the value of the long-range forecasting model to NextEra Energy's competitors and other stakeholders with an interest in NextEra Energy's business is significant; the model is used to project earnings and cash flows for NextEra Energy as a whole, taking into account all of NextEra Energy's many businesses and operations. These projections are then used to inform NextEra Energy's investors. Access to the long-range forecasting model would not only provide competitors and parties, such as TIEC, with intimate knowledge of the Company's enterprise-wide finances, but also allow them to model Company finances in order to predict earnings or cash flows, which could then be used by competitors to anticipate and compete for financing the Company may seek in capital markets. The long-range forecasting model's value turns on the Company's ability to compete on a fair playing field for available capital. That value is undermined if parties to this proceeding are allowed to review the model and gain knowledge that enables them to predict the Company's financing needs or negotiating position.

Finally, the long-range forecasting model cannot be easily acquired or duplicated by others. The Company has built, maintained, and protected this model over several decades as a unique

and strategically vital tool for conducting its business in highly competitive energy and financial markets. In short, disclosure of the long-range forecasting model would provide access to financial data for the various businesses operating under NextEra Energy at a level or degree of granularity that no one else, including the market, has ever received.

In its Motion to Compel, TIEC fails to respond to the strong factual bases provided in NextEra Energy's objection establishing that the long-range forecasting model constitutes a trade secret under Texas law. As in this response, NextEra Energy's objection clearly recited the factors supporting trade secret designation—it described the nature of the model, its uses and purposes, the sensitivities surrounding the model, the protections NextEra Energy has afforded the model and efforts taken to protect it, and the value of the model. TIEC has chosen to ignore the substance of the Company's justifications for trade secret privilege, asserting instead that the model "appears to be"<sup>24</sup> highly sensitive information, not a trade secret. The facts provided in the Affidavit of David Reinstein and summarized herein show otherwise. The long-range forecasting model is a privileged trade secret and should be protected from disclosure. TIEC's Motion to Compel should be denied.

- 4. Contrary to TIEC's assertions, the long-range forecasting model is not mere highly sensitive information for which the protections afforded under the Protective Order are sufficient.**

While NextEra Energy has already provided an extensive amount of competitively sensitive financial information in this proceeding, the long-range forecasting model is of such a sensitive nature that disclosure to any party, including TIEC and its expert witnesses, would represent a tremendous competitive risk and disadvantage to the Company. There is no dispute that the long-range forecasting model contains and generates highly sensitive information. This is

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<sup>24</sup> TIEC Motion to Compel at 4.

evidenced by the fact that the Company has produced the same information that TIEC seeks from the model as highly sensitive as part of discovery in this case.

It is the model itself that represents a distinct trade secret because it constitutes a unique compilation of formulas, data compilations, strategic inputs, and inherent analyses that meets the trade secret criteria addressed above.<sup>25</sup> Importantly, NextEra Energy's long-range forecasting model is not comprised solely of pricing information, market research, lists of customers, or contract renewal dates. Nor does the long-range forecasting model consist merely of financial projections. To be clear, the formulas, data compilations, strategic inputs, and inherent analyses contained in the long-range forecasting model are clearly distinct from the outputs generated by the model. As such, the model constitutes more than highly sensitive information; it satisfies the definition of a trade secret relied on by this Commission and the Texas Supreme Court and should be protected from disclosure in the same manner that the Commission has protected similar forecasting models in past cases.<sup>26</sup>

The precedent cited by TIEC to challenge the protection of the model is not compelling: The TIEC-cited precedent refers to historical pricing information, market research, lists of customers, or contract renewal dates that are routinely produced as highly sensitive information pursuant to the terms of a protective order- not trade secrets. For example, the information at issue in Docket No. 16705 related to *historical* pricing information, which the ALJ determined did not

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<sup>25</sup> Bass, 113 S.W.3d at 739.

<sup>26</sup> See, e.g., Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016); *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 43695, SOAH Order No. 7 at 4 (Mar. 10, 2015) (finding that proprietary electronic cost of service model was a trade secret); see also *Application of Golden Spread Electric Cooperative, Inc. for Approval of Notice of Intent*, Docket No. 13444, Order No. 4, 20 P.U.C. Bull. 903 (Nov. 17, 1994) (finding that computer model used to develop forecasts included in utility's notice-of-intent application constitutes trade secret exempt from discovery).

merit protection because it was “stale.”<sup>27</sup> In contrast, the long-range forecasting model at issue here involves *projected* financial modeling involving all of NextEra Energy’s direct and indirect subsidiaries. TIEC also cites Docket No. 23063.<sup>28</sup> In Docket No. 23063, the information sought was contractual pricing information that the ALJ found was, in large part, publicly available.<sup>29</sup> In comparison, the long-range forecasting model TIEC seeks to compel in this case has *never* been disclosed (even pursuant to a protective order) to an agency, judge, or party in any regulatory or other legal proceeding. Finally, TIEC cites Docket No. 14965.<sup>30</sup> In Docket No. 14965, the information for which protection was sought appears to have involved project-specific technical and financial specifications—not an enterprise-wide financial forecasting model.<sup>31</sup> Finally, contrary to TIEC’s assertions, this Commission has specifically ruled that highly sensitive information, such as forecasted pricing information, load forecasts, or board discussions of acquisition financings may constitute a privileged trade secret protected from discovery.<sup>32</sup>

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<sup>27</sup> *Application of Entergy Gulf States, Inc. for Approval of Its Transition to Competition Plan and the Tariffs Implementing the Plan, and for the Authority to Reconcile Fuel Costs, to Set Revised Fuel Factors, and to Recover a Surcharge For Underrecovered Fuel Costs*, Docket No. 16705, Order No. 95 at 31 (June 25, 1997).

<sup>28</sup> *Complaint of AT&T Communications of Texas, L.P. Against Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. dba Southwestern Bell Long Distance*, Docket No. 23063 (Jun. 1, 2006).

<sup>29</sup> Docket No. 23063, Order No. 18 at 7 (May 11, 2001).

<sup>30</sup> *Application of Central Power and Light Company for Authority to Change Rates*, Docket No. 14965, Order No. 12, 1996 WL 33404837 (Jan. 12, 1996). While TIEC in its motion to compel (at n. 17) cites to Order No. 16 from this docket, NextEra Energy assumes TIEC intended to cite to Order No. 12, which contains the language quoted by TIEC. Order No. 16 does not. The Westlaw citation provided by TIEC for this order was also incorrect.

<sup>31</sup> *Id.*

<sup>32</sup> See *Application of Gulf States Utilities Company to Reconcile Fuel Costs*, Docket No. 13170, Order No. 12 at 4-5 (Nov. 19, 1994) and Order Granting Appeal of Order No. 12 (Dec. 19, 1994) (finding that fuel cost projections constitute trade secrets); Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016) (holding that pricing information and other information supporting economic forecasting results constitutes a trade secret); Docket No. 16705, Order No. 43, 1997 WL 33477747 (Mar 14, 1997).



**5. TIEC has failed to meet its burden to show that the long-range forecasting model is essential to the fair adjudication of this proceeding.**

A trade secret should be disclosed only if doing so is necessary or essential to a fair adjudication of the proceeding.<sup>33</sup> Necessity depends on whether the trade secret's production is "material and necessary to the litigation."<sup>34</sup> A party seeking such information "cannot merely assert unfairness, but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat."<sup>35</sup> Furthermore, it is not enough to show that the information would be useful to the party's expert; the party must show that it is necessary.<sup>36</sup>

TIEC fails to meet its burden to establish that production of the long-range forecasting model is essential to the adjudication of the matters to be decided in this proceeding. NextEra Energy has shown that the long-range forecasting model meets the criteria necessary for trade secret designation. NextEra Energy has also shown that the information TIEC claims to seek has already been produced in this proceeding through the production of the transaction-related financial model. TIEC offers no claim or support for a finding that protecting the long-range forecasting model from disclosure will "impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat."<sup>37</sup> TIEC's failure to meet its burden in this respect demands that its Motion to Compel be denied, just as the Commission

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<sup>33</sup> *Bridgestone/Firestone, Inc.*, 106 S.W.3d at 732; Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016); see *Automatic Drilling Machines, Inc. v. Miller*, 515 S.W.2d 256 (Tex. 1974) ("A public disclosure of trade secrets should not be required, however, except 'in such cases and to such extent as may appear to be indispensable for the ascertainment of truth.'").

<sup>34</sup> *Bass*, 113 S.W.3d at 743 (quoting *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998)).

<sup>35</sup> Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016) (quoting *Bridgestone/Firestone, Inc.*, 106 S.W.3d at 733).

<sup>36</sup> *In re XTO Res. I, LP*, 248 S.W.3d 898, 904 (Tex. App.—Fort Worth 2008, no pet.)

<sup>37</sup> *Bridgestone/Firestone, Inc.*, 106 S.W.3d at 733.

has similarly denied other TIEC requests for trade secret-privileged information when it failed to meet its burden.<sup>38</sup>

**6. Trade secret protections are necessary because TIEC and its consultants regularly represent clients against NextEra Energy and its subsidiaries in business and litigation.**

Trade secret privilege protection is particularly important in this proceeding because TIEC, and its consultant, are prolific participants in utility-related transactions, litigation, and regulation. For example, TIEC routinely intervenes in regulatory proceedings involving Lone Star Transmission, LLC<sup>39</sup> and Oncor.<sup>40</sup> This Commission has specifically recognized the need to enforce trade secret privilege protections in order to protect information from parties that represent competitive interests or otherwise participate in litigation against a party seeking protection. As noted above, in Docket No. 45624, the Commission denied a similar request from TIEC for trade secret-privileged information from Southern Cross. In its order denying TIEC's motion to compel, it identified Southern Cross's specific concerns:<sup>41</sup>

TIEC's expert cannot, in essence, forget what he sees. Moreover, that circumstance will provide the expert with valuable information he can exploit in other engagements with other clients who would be at a competitive advantage vis-a-vis Southern Cross because they would understand the basis of Southern Cross's pricing strategy.

Similar circumstances apply here. The value of the long-range forecasting model is in its ability to allow NextEra Energy to use the information to compete for a level-playing field with its competitors. Allowing TIEC and its consultant to review this information cannot be un-done

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<sup>38</sup> Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016).

<sup>39</sup> See, e.g., *Application of Lone Star Transmission, LLC For Authority to Establish Interim and Final Rates and Tariffs*, Docket No. 40020 (Feb. 12, 2013); *Application of Lone Star Transmission, LLC for Authority to Change Rates*, Docket No. 42469 (Sept. 11, 2014).

<sup>40</sup> See, e.g., *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 38929 (Aug. 26, 2011); *Application of Oncor Electric Delivery Company LLC for Authority to Change Rates*, Docket No. 35717 (Nov. 30, 2009).

<sup>41</sup> Docket No. 45624, SOAH Order No. 7 at 2-3 (May 19, 2016) (citing *Union Pacific Railroad Company*, 294 S.W.3d 589 (Tex. 2009)).

at the conclusion of this case. For the exact same reason that TIEC's motion to compel was denied in Docket No. 45624, the presiding officer should deny TIEC's motion to compel here.

#### IV. CONCLUSION

For the reasons discussed herein, NextEra Energy respectfully requests that TIEC's Motion to Compel be denied and that the Company be granted such other relief to which it has shown itself entitled.

By: 

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**ATTORNEYS FOR NEXTERA ENERGY,  
INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on all parties of record in this proceeding via hand delivery, overnight delivery, or U.S. first class mail on this the 27th day of December, 2016.

  
Ann M. Coffin

STATE OF FLORIDA           §  
   §  
COUNTY OF PALM BEACH   §

**AFFIDAVIT OF DAVID REINSTEIN**

BEFORE ME, the undersigned authority, on this day personally appeared David Reinstein, who having been placed under oath by me did depose as follows:

1. "My name is David Reinstein. I am of sound mind and capable of making this affidavit. The facts stated herein are true and correct based on my personal knowledge. My current position is Senior Director of Finance at NextEra Energy, Inc. ("NextEra Energy"). As part of my duties in my role at NextEra Energy, I am responsible for forecasting at NextEra Energy.
2. I have reviewed Texas Industrial Energy Consumers ("TIEC") Request for Information ("RFI") 4-5 and TIEC's motion to compel responses to this information. TIEC seeks to compel NextEra Energy to produce NextEra Energy's long-range forecasting model.
3. NextEra Energy's long-range forecasting model includes highly sensitive financial information about the Company and many non-jurisdictional subsidiaries, but—most importantly—it consists of trade secret-protected formulas, data compilations, and strategic inputs that offer a composite analysis of the financial information of all 1,150 indirect and direct NextEra Energy subsidiaries that is used to provide a consolidated range of earnings to investors based on the Company's current business profile.
4. It is my understanding, that TIEC seeks access to this model in order to evaluate NextEra Energy apart from the proposed transactions so that TIEC can develop a baseline from which to evaluate the synergy savings and benefits of the transactions.
5. The information that TIEC seeks from the long-range forecasting model was provided as part of the transaction-specific financial model produced in NextEra Energy's highly sensitive supplemental response to Cities RFI 2-3.
6. The transaction-specific model was produced to TIEC in fully executable format and contains standalone metrics for NextEra Energy that exclude the impacts of the proposed transactions, including a standalone financial statement, balance sheets, cash flow statement forecasts, and Earnings Per Share ("EPS") information, as well as detailed credit metric calculations from S&P and Moody's.
7. The transaction-specific model also includes financial metrics associated with the proposed transactions, including projected post-acquisition EPS and cash flows and other post-acquisition aspects of NextEra Energy's financial health.
8. The transaction-specific model was produced to TIEC in fully executable format, which allows TIEC to compare NextEra Energy's projections of the impacts of the proposed

transactions against the “status quo” and to manipulate the model inputs in order to evaluate and verify the Company’s projections, as well as any risks and benefits of the proposed acquisition.

9. The information outlined in Paragraphs 6 and 7 of this Affidavit and already produced to TIEC represents the entire picture of what NextEra Energy looks like both before and after the proposed acquisition of Oncor and has already been produced in discovery responses in this proceeding. In other words, what has been produced to TIEC includes the full financial assessment of the transaction in the form of “with” and “without” Oncor scenarios.
10. NextEra Energy considers its long-range forecasting model to be a protected trade secret because it constitutes a unique compilation of highly sensitive formulas, data compilations, strategic inputs, and analyses used to evaluate all of NextEra Energy’s indirect and direct subsidiaries.
11. At all times, NextEra Energy maintains the confidentiality of the long-range forecasting model so that it is not known to or accessible by any person outside of NextEra Energy. Within the Company itself, access to the model is limited to only *three* employees.
12. The Company takes all necessary measures to guard the secrecy of the long-range forecasting model and policies and procedures are in place to preclude its distribution or disclosure both within the Company and outside the Company.
13. The long-range forecasting model is kept on a secured server accessible only by employees with designated access.
14. As a matter of practice, NextEra Energy excludes any and all proposed transactions from the long-range forecasting model in order to safeguard the model from disclosure.
15. To my knowledge, the long-range forecasting model has never been provided to a regulatory agency, judge, or party in any regulatory or other legal proceeding.
16. The value of the long-range forecasting model to NextEra Energy’s competitors is significant. The model is used to project earnings and cash flows for NextEra Energy as a whole, taking into account all of NextEra Energy’s many businesses and operations. These projections are then used to inform NextEra Energy’s investors.
17. Access to the long-range forecasting model would not only provide parties to this proceeding with intimate knowledge of the Company’s enterprise-wide finances, but will also allow parties to model Company finances in order to predict earnings or cash flows, which could then be used by these parties to anticipate and compete for financing the Company may seek in capital markets,
18. The long-range forecasting model’s value turns on the Company’s ability to compete on a fair playing field for available capital.

EXHIBIT A

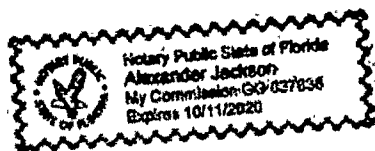
19. The value of the long-range forecasting model will be undermined if parties to this proceeding are allowed to review the model and gain knowledge that enables them to predict the Company's financing needs or negotiating position.
20. The Company has built, maintained, and protected the long-range forecasting model over several decades as a unique and strategically vital tool for conducting its business in highly competitive energy and financial markets. In short, disclosure of the long-range forecasting model would provide access to financial data for the various businesses operating under NextEra Energy at a level or degree of granularity that no one else, including the market, has ever received.

Further affiant sayeth not:



David Reinstein

SUBSCRIBED AND SWORN TO BEFORE ME by the said David Reinstein on this  
27 day of December, 2016.

  
Notary Public, State of Florida

My commission expires: 10/11/2020