

# STATE OF NEBRASKA

## POWER REVIEW BOARD



**Dave Heineman**  
Governor

April 5, 2010

**Timothy J. Texel**  
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Dale Rector  
Director, Project Consulting  
Fellon-McCord & Associates, LLC  
9960 Corporate Campus Drive – Suite 2500  
Louisville, KY 40223

Dear Mr. Rector:

In a letter dated January 12 sent via e-mail, you requested an informal opinion on issues related to electric energy production and whether a particular corporate structure would constitute self-generation or if it would constitute the creation of a new power supplier serving a Nebraska electric customer in violation of the State's service area protections. You made the request on behalf of your firm's client, Abengoa Bioenergy.

Prior to receiving your letter, I discussed this situation with another member of your firm, who requested that the Nebraska Power Review Board (the Board) itself consider the issues involved, instead of a letter from the general counsel stating his opinion. I agreed to present your firm's request to the Board in order to provide you with an informal opinion. The Board reviewed your request at its public meeting held February 19, 2010. All four Board members participating in the discussion agreed that the structure you proposed would violate Nebraska's laws concerning service area protections. One member recused himself from the discussion due to business ties with your client. A copy of the February 19 minutes is enclosed for your review.

In your letter, you explain that an ethanol plant in Nebraska is incorporated as Abengoa Bioenergy of Nebraska, LLC. Abengoa Bioenergy of Nebraska, LLC is a wholly owned subsidiary of Abengoa Bioenergy US Holding, Inc. Abengoa Bioenergy US Holding, Inc. would like to explore the possibility of constructing a 100 megawatt biomass cogeneration facility to supply the electric power needs of the ethanol plant, and sell any excess generation on the wholesale market. Due to financing needs, your client proposes to create a new corporate entity, Abengoa Bioenergy Renewable Power of Nebraska, to construct and operate the cogeneration facility. The new corporation would be a separate corporate entity from the ethanol plant (Abengoa Bioenergy of Nebraska,

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LLC). The cogeneration facility would be a wholly owned subsidiary of Abengoa Bioenergy Renewable Power US, LLC. You point out that although the ethanol plant and the cogeneration facility would be legally separate entities, they would both ultimately be owned by the same non-utility parent company, Abengoa Bioenergy US Holding, Inc.

At the February 19 public meeting, each Board member was provided with a copy of your letter and your client's organizational chart that you provided to us. The organizational chart was very helpful when reviewing your client's corporate structure.

Under Nebraska law, unless there is an agreement between two electric power suppliers, no entity can supply electric service to a customer located inside an existing Nebraska power supplier's service area. Nebraska Revised Statute § 70-1011, in pertinent part, states the following:

Except by agreement of the suppliers involved, no supplier shall offer electric service to additional ultimate users outside its service area . . . without first applying to the [Power Review] board and receiving approval thereof, after due notice and hearing under rules and regulations of the board. Such approval shall be granted only if the board finds that the customer or customers proposed to be served cannot or will not be furnished electric service by the supplier in whose service area the customer is located, or that the provision thereof by such supplier would involve wasteful and unwarranted duplication of facilities.

Although Nebraska law assumes that the suppliers involved would be two consumer-owned utilities serving customers in adjacent service territories, the statute applies equally to other entities that would become power suppliers through the production and sale of electricity. Under the statutes applicable to the Power Review Board, an electric supplier is defined as "any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail." See Neb. Rev. Stat. § 70-1001.01(2). Although we are not certain where Abengoa Bioenergy's ethanol plant is located, it is our understanding that the plant is already operational and is currently being served by an existing Nebraska power supplier. The ethanol plant's location is probably not relevant to this discussion, since there is no part of the state that is not already included in some Nebraska power supplier's certified retail service area.

Given the above provisions of Nebraska law, the Board's belief is that under your client's proposed structure the cogeneration facility (Abengoa Bioenergy Renewable Power of Nebraska) would be a power supplier because it would be producing electricity and supplying it to the ethanol plant (Abengoa Bioenergy of Nebraska, LLC), as well as selling the excess electricity on the wholesale market. Under Nebraska law, the new generation facility would need to be approved by the Power Review Board, unless it qualified for certification by the Federal Energy Regulatory Commission under the Public

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Utility Regulatory Policies Act of 1978. Nebraska law allows customers to generate power for their own use, but it does not allow an entity to sell electricity to a customer located within an existing Nebraska power supplier's certified retail service area. The Board appreciates the fact that both facilities in question would ultimately be owned by the same holding company, but since the cogeneration facility will be a separate legal entity from the ethanol plant, the Board believes that the cogeneration facility would be selling electricity at retail to a customer inside a Nebraska power supplier's service area. Absent the consent of the utility holding the service area rights to the territory where the ethanol plant is located, the Board believes the sale of electricity as described in your letter would violate Nebraska's service area protections.

One of the concerns expressed by the Board members was that to allow a structure as described in your letter may encourage other corporations to form companies with subsidiaries in order to serve related electric loads at retail. The Board believes Nebraska's Legislature intended the exemptions to the service area protections to be limited, reserved for persons or corporate entities serving their own individual needs.

In 1996 the Nebraska Attorney General's office issued an opinion regarding the ability of a private party to produce electricity and supply the needs of a third party located in a utility's service area. See Nebraska Att'y Gen. Opinion 96073. The Attorney General's office concluded that Nebraska's statutes and caselaw indicate a private party is prohibited from supplying electricity to an existing customer located in a utility's service area without the utility's consent. Admittedly, the situation in the opinion was somewhat different than your client's, since it dealt with a scenario where the customer and the proposed generator were collaborating, but were not part of the same corporate structure. A copy of the Attorney General's opinion is enclosed.

The Board also recommends that Abengoa open discussions with the local retail electric supplier and the utility owning the bulk transmission assets in the area where the ethanol plant is located (probably the Nebraska Public Power District or Omaha Public Power District) to discuss the possibility of a wholesale power purchase agreement for the sale of power that might be available to move to the transmission grid.

Thank you for contacting the Power Review Board on these matters. If you have additional questions, please feel free to contact me.

Sincerely,



Timothy J. Texel  
Executive Director and General Counsel

Enclosures