

ORIGINAL



STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION)
OF BIOENERGY POWER LLC FOR) CAUSE NO. 43882
THE COMMISSION TO DECLINE ITS)
JURISDICTION OVER PETITIONER'S)
ACTIVITIES AS A GENERATOR OF) APPROVED: OCT 20 2010
POWER)

BY THE COMMISSION
David E. Ziegner, Commissioner
Aaron A. Schmoll, Senior Administrative Law Judge

On April 13, 2010, Bioenergy Power, LLC ("Petitioner" or "Company") filed its Petition ("Petition") with the Indiana Utility Regulatory Commission ("Commission") in this Cause for certain determinations, declinations of jurisdiction and approvals relating to its proposed construction of an approximate 26 megawatt ("MW") woody biomass generating facility to be located in Clay County, Indiana ("Clay County Facility"), in accordance with Ind. Code § 8-1-2.5.

Pursuant to notice as provided by law, approval of which was incorporated into the record, an evidentiary hearing in this Cause was held in Room 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana at 9:30 a.m., on August 13, 2010. At the hearing, Petitioner presented its prefiled direct and rebuttal testimony. The Office of Utility Consumer Counselor ("OUCC") and Citizens Action Coalition of Indiana, Inc. ("CAC") participated in the hearing and presented prefiled testimony and exhibits. No other person appeared or otherwise participated.

Based on the evidence and being duly advised, the Commission now finds that:

1. **Notice and Jurisdiction.** Proper legal notice of the hearing in this Cause was given and published by the Commission as required as law. Petitioner is a "public utility" as that term is used in Ind. Code § 8-1-2-1(a) and an "energy utility" as that term is used in Ind. Code § 8-1-2.5-2. Petitioner is subject to the jurisdiction of this Commission in the manner and to the extent provided by the laws of the State of Indiana. The Commission has jurisdiction over Petitioner in the subject matter of this case.

2. **Petitioner's Characteristics.** Petitioner is a limited liability company duly organized and existing under the laws of the State of Indiana. Petitioner's principal place of business is 415 Columbia Street, Suite 3000, P.O. Box 280, Lafayette, Indiana 47902-0280. Petitioner's expertise includes the development, construction and operation of woody biomass electric generating facilities.

3. **Relief Requested.** Petitioner requests the Commission determine that the public interest allows it to decline to exercise its jurisdiction, pursuant to Ind. Code § 8-1-2.5-5, over Petitioner with respect to the construction, ownership and operation of, and any other activity in connection with, the Clay County Facility. Petitioner will be wholesale provider of electricity generated from woody biomass, a renewable energy resource, for sale in the wholesale power market.

The Clay County Facility will generate electricity using woody biomass as its fuel. The power output from the Clay County Facility will be sold exclusively to Hoosier Energy Electric Cooperative, Inc. (“Hoosier Energy”). Therefore, the wholesale rates for power will be subject to FERC jurisdiction.

4. **Petitioner’s Direct Evidence.** Petitioner presented testimony and exhibits of Robert C. Reiling, Jr., President of Petitioner. Mr. Reiling sponsored the Petition and requested that the Commission decline, pursuant to Ind. Code § 8-1-2.5-5, to exercise jurisdiction over Petitioner’s construction, ownership, operation and any other activity in connection with the Clay County Facility. He stated that the Company believed it met the definition of a “public utility” under Ind. Code §8-1-2-2. He also testified that in his opinion the certificate requirements of Ind. Code Chapter 8.5 do not apply to the Clay County Facility due to the exemption contained in Ind. Code § 8-1-8.5-7(2), and therefore there was no need for the Commission to decline jurisdiction under Chapter 8.5. However, Mr. Reiling stated that to the extent the Commission disagrees with Petitioner’s interpretation of Chapter 8.5, he respectfully requests that the Commission also decline jurisdiction under that Chapter.

Mr. Reiling testified the Clay County Facility is a 26 MW biomass electricity plant utilizing waste wood. The Clay County Facility will be located on an abandoned coal strip mine site approximately 0.5 miles south of Indiana Highway 42 on County Road 500W in Clay County, Indiana. The Clay County Facility is 9.5 miles away from I-70 at the easternmost exit of State Road 46. He said it was also located approximately four miles from the I-70 and State Road 59 interchange. Both roads provide reasonable access to the Clay County Facility. He said that Petitioner has executed two option agreements for approximately 81 acres for the Clay County Facility site.

Mr. Reiling stated that the site in Clay County is based upon the criteria of fuel supply, interconnection to the transmission system of Hoosier Energy, available water supply and minimal environmental impact. He said it was determined that a site selection be based on proximity to a fuel supply of woody biomass that would provide approximately 350 million tons of wood waste annually. He said the supplier will be Koetter and Smith (“K&S”) located in Borden, Indiana. He said the Clay County Facility site is within one mile of Hoosier Energy’s 69 kV transmission line that serves the northwest corner of Hoosier Energy’s service territory. He also said the site is a former coal mine which is over seven miles from the nearest town or city. The Clay County Facility is located directly across County Road 500 from the Headwaters Energy Plant that processes coal fines from various coal residue ponds in the area. The Clay County Facility site has an 11 acre pond up to 45 feet deep.

Mr. Reiling then described the Clay County Facility. He said it will utilize a two drum boiler with a condensing steam turbine generator system. The proposed unit will operate at a nominal outlet pressure of 900 psig at 920°F. The boiler maximum heat input is 400 million British thermal units per hour steam production with a nominal 24,000 pounds per hour corresponding to steam production. A single, multi-stage steam turbine-generator will produce a nominal gross output of 26 MW.

Mr. Reiling stated that all the woody biomass will be supplied by Hoosier Energy under the terms of a purchase power agreement (“PPA”) with Petitioner dated August 21, 2009. In turn, Hoosier Energy has entered into a long-term agreement with K&S for a fuel supply of woody biomass. He noted that K&S is one of the largest aggregators of wood waste in the Midwest. Mr. Reiling stated that the PPA with Hoosier Energy has a contract term of 20 years with three five-year options to renew that can be exercised by either party. Under the PPA, Petitioner is obligated to sell, and Hoosier Energy is obligated to purchase, all the electric output of the Clay County Facility. Hoosier Energy has the option to purchase the Clay County Facility at any time during the term of the PPA. According to Mr. Reiling, the rates to be charged Hoosier Energy were results of arm length negotiations. He said all renewable energy credits produced by the Clay County Facility will be owned by Hoosier Energy. He said as a result of the PPA, Bioenergy will not make any sales to retail customers in Indiana.

Mr. Reiling stated that the Company has no intention of using any fuel other than wood biomass. He said that even if it had such an intent, the Company could not do so without IDEM approval, per Petitioner’s PSD/New Construction and Part 70 Operating Permit issued March 16, 2010 for the Clay County Facility. He said that the permit shows that Bioenergy’s application limited the potential fuel source to wood waste and the IDEM approval is limited to wood waste. According to Mr. Reiling, Petitioner has limited itself to wood waste as the fuel due to the large quantities of wood waste available in Indiana and due to the closing of the International Paper facility in Terre Haute.

Mr. Reiling testified that the Company used a process completely consistent with IDEM procedures. The Company employed Environmental Resource Management (“ERM”) in preparing its application for the Title V air permit. The Company then submitted additional information requested by IDEM and had meetings with IDEM representatives. He noted that IDEM published a notice seeking public comment and input on the Company’s application but no public comments were received and in fact there was no opposition to the issuance of the permit. According to Mr. Reiling, the opposite has been true. He stated elected Clay County representatives, county commissioners, and members of the county council have encouraged the Company to locate, construct, and operate the Clay County Facility. Mr. Reiling stated that before construction, the Company will need to obtain a permit from the Clay County Drainage Board and may need to obtain a state building permit. He said that there may be other permits that are incidental or routine to the construction process ERM will need to investigate.

Mr. Reiling stated there are no local zoning requirements applicable to the Clay County Facility and that the Company, with Commission approval, intends to commence construction in the fall of 2010 with operation in the fall of 2011. Mr. Reiling then discussed the Company's managerial and operational expertise to construct and operate the Clay County Facility. The Company will enter into an Engineering, Procurement and Construction Management ("EPCM") agreement with Industrial Design Group ("IDG"), a wholly owned limited liability company of Dilling Mechanical Group of Logansport, Indiana. He sponsored an exhibit that set forth the construction functions to be performed by IDG and the renewable energy projects undertaken by Dilling Mechanical. During the final development stage of the project, IDG will work with Steam & Control System ("SCS"), an equipment repowering specialty contractor, under an agreement for the three major operating systems of the Clay County Facility: the boiler steam supply system, the steam turbine generator system, and the fuel handling system. He said the power equipment, boiler and steam turbine generator will be repowered and carry a warranty the same as all new equipment. He said that the person with the overall corporate responsibility for the operation of the Clay County Facility will be Kenneth Borneman, Vice President of Power Plant Operations. He said Mr. Borneman has over 30 years of experience in power construction industries and specifically in the biomass electric arena. Mr. Reiling sponsored Mr. Borneman's resume as an exhibit.

Mr. Reiling stated that while the expected cost of the Clay County Facility is confidential, he expected the repowering of the three major components of the Clay County Facility to produce significant savings. He stated the Company estimated a new biomass facility producing 25 MW would cost approximately \$80 million and that estimated costs of the Clay County Facility are well below that amount.

As to financing the Clay County Facility, Mr. Reiling stated that the Company had arranged senior debt for the entire cost of the Clay County Facility and that the Company will also apply for a U.S. Treasury Grant under the American Recovery and Reinvestment Act ("ARRA") of 2009 which provides for a direct payment of 30% of the construction costs in lieu of taking the investment tax credit for eligible products. He stated that in order to be eligible for this grant, one must be CCR certified and comply with the guidelines set forth in the U.S. Treasury July 2009 bulletin. The Company has engaged Crowe Horvath CPAs to assist in the certification process. He stated Crowe Horvath estimates that the grant should be between \$11.5 and \$12.5 million depending on certain asset allocations. He said that senior debt will then be reduced by the Treasury grant.

Mr. Reiling stated that since Petitioner secured options for 80 acres of land in Clay County, there is no need for and the Company does not request the power of eminent domain or an exemption from local zoning requirements. He also said that the Company will recover its costs and any return under the terms of the PPA with Hoosier Energy and that the Company is not asking the Commission to establish any rate structure.

Due to the encouragement by elected officials to have the Company locate the Clay County Facility in Clay County and because the Clay County Facility will provide 20 permanent jobs with an annual payroll of approximately \$1.1 million, Clay County has agreed

to provide the Company tax abatement of approximately \$576,000 per year for the facility for a ten-year period.

Mr. Reiling opined there is a need for the energy to be produced by the Clay County Facility. He said according to the most recent forecast of Indiana future electricity requirements, issued in December, 2009 by the State Utility Forecasting Group, over 1,300 MW of resource additions will be required by 2015. He also opined that not only is the energy needed, but the type of energy (e.g., biomass) is also needed. He said the Indiana DNR originally issued a report encouraging the use of wood waste in producing electricity. He testified the Clay County Facility is consistent with the policy and energy objectives of the State of Indiana and these types of renewable green energy projects should be encouraged in order to provide alternative sources of electricity for the State's ultimate, utility consumers.

According to Mr. Reiling, the construction and operation of the Clay County Facility, with a corresponding Commission declination of jurisdiction over it, are in the public interest. There is a clear need for electric output of the Clay County Facility. He stated it is his understanding that the Commission does not have jurisdiction over the rates and charges by Hoosier Energy. Instead, Hoosier Energy rates and charges are subject to approval by its Board of Directors. He said therefore there is no reason to exercise jurisdiction over the Company's rates under Ind. Code § 8-1-2-1, since the rates are negotiated by the parties and the Commission will have no jurisdiction over the rates charged to the ultimate consumer.

Furthermore, Mr. Reiling opined that Chapter 2.4 encourages facilities that offer alternative energy production such as the Clay County Facility. He said requiring the Company to comply with costly and time consuming requirements of Chapter 8.5 would be wasteful and would discourage the construction of these important alternate energy source facilities. In his opinion, declining jurisdiction would be beneficial to Indiana electric consumers and the Company. He also noted that Clay County is an economically depressed area. The Clay County Facility will provide a substantial capital investment and related property taxes and an annual payroll of over \$1 million. He said that for the Commission to exercise jurisdiction over Petitioner or declining to exercise jurisdiction over other alternate energy providers would place the Company at a competitive advantage. Finally, he stated the Clay County Facility represents non-coal energy production utilizing renewable green waste fuel and such waste would provide electricity for the benefit of Indiana electric consumers.

5. OUCG Direct Evidence. The OUCG presented the direct evidence of Mr. Ron Keen and Ms. Cynthia Armstrong. Mr. Keen is a Senior Analyst within the Resource Planning and Communications Division of the OUCG and presented direct testimony on the public interest factors typically considered by the Commission in a certificate proceeding under Ind. Code §8-1-8.5. He testified that Petitioner has arranged for senior debt to finance the facility itself and has also applied for a U.S. Treasury Grant under the ARRA which, if awarded, would provide a direct payment of up to 30% of construction costs. He noted that Bioenergy has signed a PPA with Hoosier Energy and under the terms of that agreement, Petitioner will not make any sales to retail customers in Indiana. Any direct RECs produced

by the facility will be owned by Hoosier Energy. He also stated that IDEM and the OUCC have received no negative comments regarding the Clay County Facility.

Mr. Keen then discussed the costs of the Clay County Facility. He first stated that the project will be used to generate electricity on a wholesale basis and ratepayers will not pay directly for the construction or operation of the facility. Furthermore, he utilized information contained in the U.S. Energy Information Administration's ("EIA") 2010 Annual Energy Outlook ("AEO"). He stated that the projected capital costs of the Clay County Facility are favorable when compared to other energy generation technology capital costs for constructing a new facility including typical biomass fuel energy generation.

Mr. Keen testified that in today's economic environment, access to inexpensive and abundant energy is essential to ensure the sustainability of a healthy, growing, vibrant economy. In his opinion, access provides energy security for the nation. The Clay County Facility will assist Hoosier Energy and the State in meeting existing and future energy requirements utilizing a local sustainable fuel resource. He said in its most recent projections, the SUFG forecasts energy usage to grow at a rate of 1.55% over the 20 year range for the 2009 forecast, with peak demand projected to grow at an average rate of 1.61% annually, resulting in an increase in peak demand per year of approximately 350 MW. He said in 2009, the existing approved capacity for generation of resources in the State was 23,417 MW, dropping in 2010 to 23,208 MW. According to Mr. Keen, the approved capacity through 2027 never rises above 23,918 MW and drops to 22,991 MW in 2027. He said the SUFG projects a deficit between existing resources and projected demands starting around 2012, which increases through 2027. He stated that the Clay County Facility has the potential to alleviate a portion of any increases in energy consumption requirements.

Mr. Keen stated that the OUCC does not have any environmental concerns regarding the Clay County Facility and cites that Ms. Armstrong's testimony regarding the investigation that the OUCC conducted with regard to environmental matters. Mr. Keen then discussed the water supply adequacy issues presented in this proceeding. He stated that the OUCC examined a number of water-related issues including production, fire protection, potable water, and wastewater. He said the Clay County Facility will use production water for the cooling tower, which requires slightly more than 300 gallons per minute or approximately 500,000 gallons per day. The water, according to Mr. Keen, will be pumped from a pond located on the property which covers approximately 11 acres and is up to 45 feet deep. He said the production water will require very little treatment and the pond is expected to be replenished with surface water from local streams, allowing the pond to handle ongoing demand.

He said water for fire protection will also be drawn from the pond and will be used to feed a sprinkler system protecting plant operations. A system of fire hydrants will also ring the area. The pumping arrangements should be capable of providing up to 60 pounds psi pressure at the hydrant nozzle. Mr. Keen testified because the normal work shift should require no more than four people, drinking water and water for sanitary purposes will be taken from wells to be drilled on site. Any treatment will depend on the condition of the water from

these wells. According to Mr. Keen, the Petitioner, in a telephone call with the OUCC, engaged ERM, an environmental firm, to perform water quality testing of the water in the pond and found no contamination which would potentially affect potable water. Finally he stated a high percentage of production water evaporates as a part of the cooling tower operations. Wastewater from sanitary facilities will be processed using a common septic system due to the expected low volumes.

Mr. Keen testified that he had no concerns regarding transmission adequacy. He noted the Clay County Facility will connect to the Hoosier Energy's 69kV line. He said that the Petitioner had discussions with Midwest ISO and were advised not to file until the facility was under construction and closer to the date it would be transmitting.

In Mr. Keen's opinion, there is an adequate supply of fuel for the Clay County Facility. He said that Hoosier Energy, pursuant to the PPA, will supply all the woody biomass fuel for the facility through an additional long-term agreement with K&S. He said the wood waste would most likely be a significant portion, if not all, of the 300,000 tons of wood waste no longer used by the now defunct International Paper plant located in Terre Haute. He noted that that facility used woody biomass residue from operations located within 60 miles of Terre Haute.

Mr. Keen also testified regarding contingency operations. He said the OUCC is satisfied that sufficient attention has been given to potential emergency and contingency situations and operations. He said facilities such as the Clay County Facility face their greatest potential risk fire and spontaneous combustion. He said that Petitioner is technically knowledgeable and prepared to effectively manage the fuel resources to minimize the potential for spontaneous combustion.

Mr. Keen then detailed a number of recommended reporting requirements for Petitioner which should be filed within 30 days of a Commission order as an initial quarterly report. These requirements are (1) project ownership and name of facility; (2) name, title, address and telephone number for primary contact person(s) for the Clay County Facility; (3) anticipated total output for the Clay County Facility; (4) manufacturer, model number and operational characteristics of the generator(s) to be installed; (5) connecting utility; (6) copies of all interconnection system impact studies prepared by Midwest ISO; (7) expected in-service (commercial operation) date; (8) estimate of the engineering/construction timeline with critical milestones detailed for the facilities; and (9) information called for in the subsequent Report.

In addition, the OUCC recommended that Petitioner file subsequent quarterly reports within 30 days following the end of each calendar quarter reflecting change in the information listed above. He stated these quarterly reports should continue until the quarter which occurs after commercial operation has been achieved and which immediately precedes the annual report filing date. He said that the information changes to the initial report which would drive a requirement for a new quarterly report could include, but not be limited to, (1) any changes in the information provided in the initial report; (2) any reports of interconnection system impact studies not previously submitted; (3) notice of the establishment of an independent

financial instrument; (4) achievement of construction milestones and the procurement of major equipment and receipt of permits material to the construction and operation of the facility; (5) when commercial operation is achieved, the nameplate existing for utility sales, contingency plans detailing emergency response plans as required by the State and/or local government, and the project certified dependable capacity rating. Finally Mr. Keen recommended that Petitioner: seek prior approval from the Commission if Petitioner intends to materially increase or decrease the project's capacity or operations; and notify the Commission if the project has been modified or suspended and Petitioner does not reinstate work within 3 years following commencement of such suspension.

Ms. Armstrong, a Utility Analyst in the Electric Division of the OUCC, presented testimony regarding various environmental statutes and relations that apply or may apply in the future to the Clay County Facility. She said there are four main provisions of the Clean Air Act ("CAA") that must be discussed in terms of constructing a new plant. These include New Source Performance Standards ("NSPS"), New Source Review ("NSR"), National Emission Standards for Hazardous Air Pollutants ("NESHAPs") and Title V Operating Permits. Ms. Armstrong stated that NSPS are standards that represent the best emission reduction technologies and practices for any new source of pollution within a designated area. She said that the Clay County Facility is a new, affected source under EPA regulations and must comply with emission rate and monitoring standards which apply under that rule.

She testified that the NSR is a preconstruction review and permitting program for all new or modified major stationary sources in Prevention of Significant Deterioration ("PSD") and non-attainment areas. She said whether the Clay County Facility is subject to the PSD provisions of the Clean Air Act is also dependent upon whether the facility is designated as a major emitting facility. She stated that since the Clay County Facility is such a major source, the Company was required to conduct an analysis and install the Best Available Control Technology ("BACT") for every pollutant in which it was deemed a major source. She said that the Company's BACT analysis has resulted in adoption of several technology modifications and establishment of best practices for the facility. For particulate emission, Petitioner is required to install and operate an electrostatic precipitator at all times except under emergency conditions. For CO emissions, the Company must utilize an over-fire air system and good combustion practices. Petitioner must use selective, non-catalytic reduction for NO_x. She stated that Petitioner will control SO₂ emissions through fuel specifications and control VOC emission through good combustion practices. She testified that Petitioner also has further emission limitations on smaller sources of particulate NO_x, CO and BOC emissions.

Ms. Armstrong then testified with regard to the NESHAPs and how they apply to the Clay County Facility. With regard to the Title V Operating Permit, she stated the Clay County Facility triggers the provisions on several fronts. First, the Clay County Facility is a major source under PSD. Second, Petitioner is an area source for HAPS. Finally, Petitioner meets the definition of a major source under Section 302(j) of the CAA. She noted that Petitioner filed for its Title V Operating Permit and PSD Major Source Permit on June 19, 2009, with EPA and IDEM issuing a final air permit to Petitioner on March 16, 2010. She

said that since the Clay County Facility will only burn woody biomass and will supply less than 25 MW of electricity to the grid, it is not required to obtain a Title IV Acid Rain Permit for SO₂ emissions, nor a Title V Clean Air Interstate Rule prior to the operation of the plant.

She stated that EPA's newly proposed NESHAP for industrial, commercial and institutional boilers potential carbon regulations and potential renewable portfolio standards may affect the future operation of the plant. She said on June 4, 2010, EPA released a proposed rule which outlined the NESHAP for area sources of industrial, commercial and institution boilers. Since the Clay County Facility meets the definition of an area source, it will be required to meet the Maximum Achievable Control Technology ("MACT") standards set for polycyclic organic matter ("POM") and the Generally Available Control Technology ("GACT") standards for mercury and other hazardous air pollutants ("HAPS"). She also said that on October 30, 2009, EPA published its final Mandatory Reporting of Greenhouse Gases which will apply to the Clay County Facility if it emits more than 25,000 metric tons of CO₂ annually.

Ms. Armstrong said that EPA issued a final PSD Title V Greenhouse Gas Tailoring Rule on May 13, 2010, which will become effective on January 2, 2011. She noted that since Petitioner has already secured its permit, by the time the rule takes effect, it will likely not apply to the Clay County Facility in the near future. However, she also said that if the plant undergoes a significant modification that increases CO₂ emissions after January 2, 2011, the rule may apply. She noted that there are currently 234 bills pending in Congress relating to climate change which could possibly apply to the Clay County Facility. Finally, Ms. Armstrong discussed renewable portfolio standards contained in various legislative proposals. Based upon her review of those standards, she said that the Clay County Facility could serve as a renewable resource for Indiana in order to meet Renewable Portfolio Standards ("RPS").

She said that the Clay County Facility has the ability to change its fuel but it would not be permitted to do so under its current air permit. She noted that IDEM has written very specific definitions of the fuel that Petitioner is permitted to use at the Clay County Facility. Therefore, any change in fuel by Petitioner at that facility will require a modification to Petitioner's air permit.

Ms. Armstrong then discussed the disposal of ash from the Clay County Facility. She said that Petitioner currently plans to work with local farmers and fertilizer companies that have an interest in the ash for land application. She said that the ability to use the ash is heavily dependent upon the makeup of the biomass being used. She recommended that Petitioner report its annual ash management practices to the both the OUCC and the Commission over the next three years.

Ms. Armstrong proposed five environmentally-related reporting requirements for Petitioner: (1) in conjunction with the initial quarterly report, Petitioner should report on the status of the new NESHAP area source rules that could possibly be applicable to the Clay County Facility. She said the report should include an explanation of how Petitioner intends to comply with the rule and that it be submitted to the Commission and OUCC within 30 days of the issuance of the rule; (2) on an as required basis, Petitioner should report to the

Commission and the OUCC any environmental regulations which may affect the facility and provide information regarding the Company's plans to comply with the new regulations. She said this report should be submitted bi-annually until the facility is constructed and annually for 3 years upon the facility being placed in service; (3) as part of its annual report, Ms. Armstrong recommends that Petitioner report the amount of fly and bottom ash generated by the Clay County Facility and information on how that ash was disposed; (4) Ms. Armstrong recommends Petitioner be required to notify the Commission and the OUCC when the Company submits a compliance report to IDEM or the EPA as required under its air permit; and, (5) in addition to the requirement to file or seek Commission approval should Petitioner intend to materially increase or decrease the project's capacity or operations, the Company should also include a report of modifications that would require the Company to obtain a new air permit.

Ms. Armstrong recognized that the OUCC has not received any comments regarding the Clay County Facility but she noted that the OUCC has received several consumer comments regarding other biomass facilities in the state. She said the comments were heavily focused on consumer's concerns for the potential environmental impact of the proposed biomass facilities. She acknowledged that combusting wood to generate electricity is not new technology nationally but notes Indiana has not had a biomass plant built for the sole purpose of generating electricity. She said requiring Petitioner to comply with these reporting requirements would assist the Commission, the OUCC, and consumers in understanding the environmental impact of the biomass electric generating facilities.

6. CAC Testimony. CAC presented the testimony of Zachary Elliot. Mr. Elliot testified that biomass to energy facilities are emerging as a technology preferred by some utilities to comply with various states' or entities RPS. Mr. Elliot stated that the size and type of Petitioner's proposed facility does not exist in Indiana and therefore implications are poorly understood. Mr. Elliot testified that although biomass is defined at both the state and federal levels as a renewable resource on the assumption, but not a scientific finding, that burning biomass is carbon neutral, there is still considerable dispute. Mr. Elliot explained why burning biomass should not be considered equal to other renewable resources such as wind and solar with regard to carbon impact. He testified there is a timing problem in burning biomass because biomass releases carbon instantly, which results in a net carbon emission into the atmosphere. He noted that if an area is logged and then developed, trees will not be regrown to complete the necessary sequestration to produce a net carbon dividend. He also cited two studies which concluded that the current classification for biomass as carbon neutral is the result of an "accounting flaw" in how carbon is measured.

He testified further that research shows that in many instances biomass to energy facilities have switched to hazardous feed stock such as tire-derived fuel and municipal solid waste when clean feed stocks become less economically viable or depleted. He concluded that based on current technology and research, biomass energy facilities should not be defended as renewable energy applications like wind, solar, and geothermal, and that the pros and cons of these projects should be reviewed on a case by case basis.

Mr. Elliot testified that due to the economic constraints in woody biomass sourcing, it is imperative that woody biomass facilities be sited appropriately, according to resource availability and long-term regional sustainability. He testified it was necessary for the Commission to understand fuel sourcing implications, because in approving or denying the PPA specific to this case, the Commission will also be approving or denying the embedded fuel supply agreement.

Mr. Elliot stated that with current federal subsidies in place, in addition to the available Renewable Energy Credit (REC) certifications, there is a demand to build similarly purposed biomass facilities. He said that despite the demand to construct biomass facilities in Indiana, there is no other regional siting authority which can take into consideration all of the implications and issues related to woody biomass electricity generation before considering it a public benefit. Therefore, Mr. Elliot recommended that the Commission play that role with regard to facilities such as the Clay County Facility.

He stated that there are no local zoning requirements that would apply to the Clay County Facility, which creates a regulatory gap for siting the plant, and said that this hampers the ability of local authorities to ensure that the Clay County Facility is sited in harmony with the long-term comprehensive plan and county zoning ordinance. He therefore recommended that the Commission consider the zoning requirement as established in Ind. Code § 8-36-7-4, including but not limited to the effect the proposed facility will have on adjacent property values, health, safety and general welfare of the citizens of Clay County.

According to Mr. Elliot, the Commission needs to consider the health risks that may be posed by the Clay County Facility, and noted the difference between legal thresholds imposed by IDEM and safe thresholds for citizens' health. He testified regarding evidence showing there is an apparent linear dose response for particulate matter exposure.

In addition, he stated that fire risk poses a significant concern to public safety. He said spontaneous wood pile fires are common at woody biomass facilities, due to the chemical and physical nature of the organic material being stored in large quantities. To avoid spontaneous combustion, Mr. Elliot stated that there must be a comprehensive, site specific plan on how to store, process, rotate, and manage the supply of woody biomass. He said that a strict Commission-approved fuel management plan should precede the in-service date and provided evidence that shows spontaneous combustion occurs regularly without these fuel management in place. He said that in addition to a comprehensive fuel management plan, an assessment of whether or not the Clay County fire department has adequate equipment and training necessary to extinguish such a fire should be known prior to operating the facilities. He also said that odor, noise and light should be considered in determining whether the Clay County Facility poses a public nuisance or risk.

Mr. Elliot then discussed the transportation of the woody biomass. He said that looking at the requirements of the Clay County Facility, 50-60 truckloads per day would be arriving on-site in order to supply the needed fuel, and noted the pragmatic difficulty in transporting and handling loose chip materials. He stated that a viable road infrastructure is already in place due to the site's prior use as a coal strip mine but asserted the volume of

traffic required to supply the Clay County Facility will impact the public roadways negatively over time. Mr. Elliot also concluded that transportation of woody biomass is cost prohibitive beyond a 50-75 mile radius of the facility and cited several sources. He said that since the Company is planning to acquire its woody biomass within a 100 mile radius, he questioned the economic viability of using woody biomass as the fuel for the Clay County Facility. He also said that there are three proposed facilities in the State of Indiana and that these three facilities will be competing within a common area for woody biomass which, in his opinion, calls into question the regional sustainability of supporting such facilities.

Mr. Elliot further discussed woody biomass fuel availability in Indiana. He said the Indiana DNR Report presents the following estimate of available feedstocks: 1.3 million tons of harvest residue, 474.4 million tons of above ground live biomass, 10.4 million tons of standing dead biomass, 160,000 tons of construction and demolition debris. He emphasized there is a difference between what is considered grossly available, as reported, versus what is ultimately available for the purpose of electricity generation. He said that the nature of woody biomass facilities requires an understanding of local resource availability. He further testified that to site and permit biomass facilities without an intimate understanding of the uncertainty surrounding the fuel supply will yield unintended results.

Mr. Elliot recommended that the Commission have a full understanding of these fuel sourcing implications prior to approval of the PPA, due to the fact that the fuel supply agreement between Bioenergy and Hoosier Energy, as well as the fuel supply agreement between Hoosier Energy and Koetter and Smith, is contained within the terms of the PPA.

According to Mr. Elliot, it is unclear what the 24 hour water volume requirement will be for the Clay County Facility, and whether it can be fully sourced from the 11 acre onsite pond. He also said that the wastewater will be discharged back into the pond. A portion of this wastewater discharge will be from ash handling and the loadout conditioning system, with a processed rate of 1.14 tons per hour. He said that it is unclear to him whether any contaminated wastewater will be treated prior to re-introduction into the onsite pond. He also said it is unclear as to whether or not the pond will be able to provide the entire volume of water required for the facility.

In conclusion, Mr. Elliot recommended: (1) a comprehensive fuel procurement plan that assures sustainability and prevents and/or mitigates long-term environmental impacts or fuel switching. He said this plan becomes increasingly important with each successive woody biomass facility that comes before the Commission; (2) a comprehensive Commission-approved onsite fuel management plan; (3) a Commission finding that the facility complies with local zoning requirements or, in the case where no such requirements exist, a finding by the Commission that the facility complies with the standards set forth in Ind. Code § 36-7-4; (4) adequate waste management, water management, and protection plans; (5) a finding that the public infrastructure will not be negatively impacted; and (6) assurance that if the plant changes hands or is transferred, the previously listed requirements will apply to the new owners or operators.

7. **Petitioner's Rebuttal.** Petitioner presented the rebuttal testimony and exhibits of Mr. Reiling, Mr. Robert Swain, and Mr. Kenneth Borneman. Mr. Reiling disagreed with Mr. Elliot's recommendation there be a comprehensive fuel procurement plan for the entire state before any biomass facility is approved. With respect to Ms. Armstrong's testimony, Mr. Reiling noted that she recommends that the Clay County Facility submit periodic reports to the Commission and the OUCC on matters that clearly fall within the purview of IDEM, not the Commission. In Mr. Reiling's opinion, these proposals expand the Commission's jurisdiction and he does not see how such an expansion is consistent with the Commission's determination that it decline jurisdiction on the basis that it is unnecessary or wasteful.

As to Mr. Elliot's recommendation that the Commission consider the zoning requirements established by Ind. Code §36-7-4, Mr. Reiling stated that this recommendation is ill-advised for several reasons. First, Chapter 4 has over 1,400 sections applicable to local zoning requirements. He recognized that many of these sections have no applicability to Mr. Elliot's recommendation but he noted that one must still thoroughly review each of the sections to determine applicability. Second, Mr. Reiling stated that if the Commission were to adopt Mr. Elliot's recommendation, it would appear to him that it must do it on a state-wide basis so that all future generators could accurately determine the standards they must satisfy before the Commission would approve the siting of the facility. Mr. Reiling noted, however, it is clear that Chapter 4 concentrates on local governmental units (counties and municipalities) so that local needs of the community be directly addressed in any ordinance that is adopted. In his opinion, this focus on local needs would be lost in a generic standard adopted by the Commission. Third, he opined that Chapter 4 gives the Commission no authority to consider the zoning standards of that chapter. Fourth, he described Mr. Elliot's request as one asking the Commission to take a paternalistic approach and substitute its judgment for local, elected officials as to the need for county-wide zoning requirements. In Mr. Reiling's opinion, such a request is at odds with efficient local government.

Finally, according to Mr. Reiling, Mr. Elliot does not consider or take advantage of the offer of cooperation made by Petitioner during the course of this proceeding. He explained that in addition to the technical conference held in this proceeding, Bioenergy Energy representatives met separately with the OUCC and CAC. In these meetings, not only did the Company provide extensive information, but also urged the technical representatives to directly contact Petitioner's representatives with any questions. Mr. Reiling said the OUCC took advantage of this opportunity, but the CAC did not, and the results are shown in the difference between the testimony of Mr. Keen and Mr. Elliot. For instance, Mr. Reiling pointed to Mr. Elliot's testimony concerning fire risks. In contrast to Mr. Elliot's testimony, Mr. Keen's testimony directly addresses fire risks and finds that the Company's plans are adequate to mitigate such risks. In addition, according to Mr. Reiling, Mr. Elliot expressed concern for potential health risks and pollutants that will be emitted by the Clay County Facility. Mr. Keen addressed health risks and, along with the testimony of Ms. Armstrong, found that such risks do not exist because they have been addressed by the IDEM air permit.

As to Mr. Elliot's assertion that the Commission should consider odor, noise, and light, Mr. Reiling says his recommendation ignores the location of the Clay County Facility

on an abandoned coal strip mine in an isolated, rural part of Clay County. Mr. Reiling stated the Company had conversations with adjoining property owners and none objected to the location. He said there are no cities or towns within ten miles of the facility. In his opinion, noise, odor, and light are not issues in this proceeding.

Mr. Reiling stated that Petitioner does not object to the reporting requirements listed on pages 14-16 of Mr. Keen's testimony. He went on to state that Ms. Armstrong's reporting recommendations present a different issue. He stated that Petitioner could not agree with all of her recommendations and gave a response to each one of her recommendations. First, as to the report regarding the status of proposed NESHAPs, Mr. Reiling stated the rules were proposed on June 10, 2010 and one could only speculate when a final rule will be issued by the EPA or the form it will take. He noted that Petitioner's future compliance with any such new rules were subject to IDEM jurisdiction and he did not see a reason for an additional agency review of such environmental matters. Second, as to the report regarding new environmental regulations, he said again this clear environmental matter would be subject to the scrutiny at IDEM. He also noted that any reports by Petitioner with IDEM are publicly posted on IDEM's website for all interested parties to review. Third, regarding the amount of fly and bottom ash generated by the Clay County Facility, Mr. Reiling stated that Ms. Armstrong's own testimony recognizes this is an IDEM matter which should be restricted to IDEM jurisdiction. Fourth, as to filing compliance reports with the OUCC and the Commission, Mr. Reiling is of the opinion that these reports would also be available on IDEM's website. Furthermore, he questioned the impact of any negative compliance report on a Commission declination of jurisdiction. Finally, with regard to the modifications of the facility that would require a new air permit, Petitioner does not disagree with this reporting requirement. Mr. Reiling stated Petitioner intends to burn only woody biomass and the parties made it clear that this was an important issue. Therefore, Mr. Reiling agreed it is appropriate to report a permit modification request to the extent that Petitioner seeks to modify the Clay County Facility air permit.

Mr. Reiling disagreed with Ms. Armstrong's recommendations on the basis of comments received in other proceedings. Mr. Reiling said Petitioner's representative worked very hard in determining a facility site that would have minimum impact on the environment and would be supported by the local community. He said his Exhibit 4 clearly demonstrates local community support for the project. In his opinion, it is not appropriate to penalize Petitioner with unnecessary reporting requirements based on the activities in other Commission proceedings, especially when such requirements are greater than requirements for large, investor-owned utilities.

Mr. Reiling proposed an alternative to Ms. Armstrong's first four requirements. He proposed that the information in those four requirements be taken out of a formal reporting context and instead develop an informal forum for the information to be provided to the OUCC. He said that Petitioner would propose that it informally meet with OUCC representatives within 30 days of construction completion and provide the information detailed in Ms. Armstrong's first four reporting requirements. He said at that time, the Company's plans and future EPA regulations will be more concrete and the parties will not

have to engage in needless speculation. He also said that Petitioner would have no objection to the Commission's technical staff attending those informal gatherings.

Mr. Robert Swain presented rebuttal testimony in response to Mr. Elliot's conclusions on availability of wood biomass for the generating facility to be located in Clay County. In his opinion, Mr. Elliot has not properly framed the issue with regard to the availability of woody biomass. Mr. Elliot, according to Mr. Swain, has fashioned an issue of whether availability of woody biomass will sustain multiple generation facilities in Indiana. In Mr. Swain's opinion, the issue is really whether there is available woody biomass within Indiana to sustain the operation of the Clay County Facility. He reviewed the same Indiana DNR report cited by Mr. Elliot and opined that sufficient supply does exist.

Mr. Swain said that Mr. Elliot correctly points out that the Indiana DNR estimated the following available feedstocks: 1.3 million tons of harvest residue, 474.4 million tons of aboveground biomass, 10.4 million tons of standing dead biomass and 160,000 tons of construction/demolition debris. However, Mr. Swain said that Mr. Elliot ignored an important additional source of woody biomass cited in the report, which estimates that sawmill residues average 1.2 million green tons annually. He also said that Mr. Elliot did not put the DNR report in the context of the Clay County Facility. Mr. Swain pointed out that the Clay County Facility will utilize 280,000-300,000 tons of woody biomass annually or possibly 23-25% of the sawmill residues alone. In short, according to Mr. Swain, the DNR report estimates there will be over 300 million tons of woody biomass available in the State of Indiana to serve the 200-300,000 ton biomass requirement of the Clay County Facility.

Mr. Swain also stated that Mr. Elliot ignored the conclusions contained in the Indiana DNR report as to whether there is sufficient supply of woody biomass. That report also states that the Indiana DNR supports the expansion/use of woody biomass as an energy resource. In Mr. Swain's opinion, the conclusions of the Indiana DNR are correct and the available Indiana woody biomass would support 4-5 facilities the same size as the Clay County Facility. He noted, as did Mr. Reiling, that in determining the location of the Clay County Facility, the Company considered a number of factors, including the fact that a paper mill operated by International Paper in West Terre Haute closed during the 4th quarter of 2007. Mr. Swain testified that he had become aware of this closure of the West Terre Haute facility by reading a report by two professors in the Department of Forestry and Natural Resources of Purdue University. This report focused on the closure of the International Paper, Terre Haute facility which used 150,000-170,000 green tons of woody biomass and the opportunity of the development of additional woody biomass facilities. Mr. Swain said the study determined that 70% of the woody biomass utilized by International Paper came from within a 50 mile radius of the Terre Haute facility and the Clay County Facility is only 20 miles from the Terre Haute facility. He noted a report regarding the unfortunate closure of the International Paper facility, which presented a bioenergy opportunity that would offset the impact of the supply chain in the local commerce affected by the mill closure. Mr. Swain stated that the May, 2008 report caused Petitioner to concentrate its site location efforts in west central Indiana in order to fill the economic void left by the International Paper plant closure. Mr. Swain concluded his testimony by noting that the Clay County Facility would be the first biomass

generation facility to be considered by the Commission and in his opinion this should be treated on a standalone basis.

Petitioner's witness Kenneth U. Borneman, Vice President of Power Plant Operations, submitted rebuttal testimony in response to the testimony of Ms. Armstrong and Mr. Elliot. With regard to Ms. Armstrong's testimony, he stated that he found her description of the various applicable environmental statutes and regulations to be thorough and reasonable. He said he had some minor technical differences with her testimony but overall agreed with her presentation of the various environmental regulations applicable to the Clay County Facility. He noted that her testimony addresses issues that have been aired before IDEM and he questioned the relevance of such testimony to the issues in this proceeding. He also stated he agrees with Mr. Reiling that Ms. Armstrong's first four recommendations regarding environmental reporting requirements should be rejected.

Mr. Borneman noted that Mr. Elliot has done research on biomass energy facilities but did not apply his general observations to the specifics of the Clay County Facility. In his opinion, Mr. Elliot is attempting to circumvent the IDEM permitting process by raising issues that should have been raised during the IDEM permitting process and is urging the Commission to substitute its judgment for the decisions that IDEM has already made.

Mr. Borneman stated that some of Mr. Elliot's observations were based on inapplicable studies. One study Mr. Borneman took exception to was the Manomet Study for the Massachusetts Department of Energy Resources regarding the use of biomass for power generation within the State of Massachusetts. Mr. Borneman sponsored as Petitioner's Exhibit 14, a June 21, 2010 press release that in his opinion clearly demonstrates that the Manomet Study has no applicability to the Clay County Facility. He said three of the clarifications contained in that press release have direct relevance to this proceeding. First, the study considered only the carbon cycle implications of biomass harvested from actively managed natural forests. He noted the study did not analyze woody biomass from other sources which will be the fuel source for the Clay County Facility. Second, the study did not analyze the impact of non-GHG pollutants emitted from generation facilities (particulate matter, NO_x, SO₂, or other hazardous pollutants such as mercury). Third, the study is limited to the forest and energy situation in Massachusetts and the author specifically admitted that the specific results of the carbon cycle analysis cannot be readily applied to states whose forest management and energy practices differ significantly from Massachusetts.

Mr. Borneman stated Mr. Elliot was incorrect when he said that biomass to energy facilities, by the nature of their capacity, are generally permitted under the large source classification and exempt from installing best available control technologies ("BACT"). Mr. Borneman said that under 326 IAC 2-2-3, biomass boilers are also required to go through BACT for any/all pollutants above the significant emission threshold for that pollutant. Mr. Borneman testified Petitioner went through the BACT determinations for all pollutants above the significant threshold during the permitting process.

Mr. Borneman testified that Mr. Elliot's discussion of the EPA Greenhouse Gas Tailoring Rule was wrong and Mr. Elliot was engaged in speculation. He noted that the rule

cannot become effective prior to January 2, 2011. Therefore, he observed that Indiana has no state law and corresponding regulations in place to determine the manner by which to regulate GHGs. Mr. Borneman testified that since IDEM has no such authority, it appears reasonable to argue that the Commission likewise has no authority.

Mr. Borneman agreed with Mr. Elliot that the public health impacts of the Clay County Facility should be considered. But he disagreed that the issue be considered in the case before the Commission, because they have already been considered by IDEM in the air permitting process. Mr. Borneman stated that Petitioner provided all the required modeling to show the impact of the Clay County Facility on the surrounding environment and IDEM approved this modeling in issuing its air permit. Due to the required modeling, Mr. Borneman disagreed with Mr. Elliot's statement that there is an apparent linear dose response between PM and adverse health effects. Mr. Borneman stated that the modeling approved by IDEM during the permitting process demonstrated that the increased emissions from the Clay County Facility showed no adverse impact on the public health.

As to the water requirements of the Clay County Facility, Mr. Borneman said Mr. Keen is correct. He said the pond will provide all the water requirements for utilization by the facility. Most of the water drawn from the pond will be used for the production process, with very little wastewater being generated. Potable water will be provided from wells drilled on the property. The small amount of sanitary wastewater that will be generated will be directed to a septic system. Mr. Borneman said no sanitary wastewater will be injected into the pond.

8. Discussion and Findings. Consistent with prior determinations, if the Commission finds from the record evidence that Petitioner is a public utility for purposes of Indiana's utility power plant construction act (Ind. Code § 8-1-8.5, i.e., the "Power Plant Act"), then the Petitioner would be an "energy utility" as defined by Ind. Code § 8-1-2.5-2. The Commission may decline to exercise its jurisdiction pursuant to Ind. Code § 8-1-2.5, including the Commission's jurisdiction under Ind. Code § 8-1-8.5 to issue certificates of public convenience and necessity for the construction of a facility. In order for the Commission to decline to exercise jurisdiction over Petitioner pursuant to Ind. Code § 8-1-2.5, the Commission must assert jurisdiction over Petitioner.

The Power Plant Act defines "public utility" to mean: a "(1) public, municipally owned or cooperatively owned utility; or (2) a joint agency created under IC 8-1-2.2." Ind. Code § 8-1-8.5 1. Petitioner is a limited liability company that will generate electricity, some of which will ultimately be consumed by Indiana's residents. The Commission has previously asserted jurisdiction over investor-owned public utilities pursuant to Ind. Code § 8-1-8.5. *See, e.g., Indianapolis Power & Light Company*, Cause No. 43235 (June 12, 2007). Additionally, Petitioner's property "is used in a business that is public in nature and not one that is private." *Foltz v. City of Indianapolis*, 130 N.E.2d 650, 659 (Ind. 1955). Accordingly, Petitioner's business is "impressed with a public interest" and renders service "of a public character and of public consequence and concern", which leads us to determine that Petitioner is a "public utility" within the meaning of § 8-1-8.5-1. *Id.* (quoting 73 C.J.S., Public Utilities, § 2, p. 991).

The Commission must also determine that Petitioner satisfies the definition of "public

utility” found in Ind. Code § 8-1-2-1. The evidence establishes that Petitioner’s ownership, development, financing, construction and operation of the Clay County Facility is for the purpose of sale of the power generated by that plant in the wholesale market to a public utility. The Commission has found in prior cases that a business that only generates electricity and then sells that electricity directly to public utilities is itself a public utility. *See, e.g., Benton County Wind Farm, LLC*, Cause No. 43068 (Dec. 6, 2006). In *Benton County*, the Commission specifically found that it had jurisdiction over a wind energy generator with wholesale operations such as Petitioner. Consequently, for purposes of the ownership, development, financing, construction and operation of the Clay County Facility, we find that Petitioner is a public utility within the meaning of Ind. Code § 8-1-2-1 and Ind. Code § 8-1-8.5 and an “energy utility” within the meaning of Ind. Code § 8-1-2.5-2.

Although the Commission concludes that Petitioner will be a “public utility” as defined in the Public Service Commission Act and in the Power Plant Act, the Commission may decline to exercise, in whole or in part, its jurisdiction over an “energy utility” if certain conditions are satisfied. In particular, the Indiana Code provides that “the Commission may enter an order, after notice and hearing, that the public interest requires the Commission to commence an orderly process to decline to exercise, in whole or in part, its jurisdiction over ... the energy utility ...” Ind. Code § 8-1-2.5-5. Further, Ind. Code § 8-1-8.5-7(2) provides that the requirements of Chapter 8.5 do not apply to persons who “[c]onstruct an alternate energy production facility . . . that complies with the limitations set forth in I.C. 8-1-2.4-5.” Ind. Code § 8-1-2.4-2(b)(1) defines, in pertinent part, “alternate energy production facility” as “a solar, wind turbine, waste management, resource recovery, refuse-derived fuel or *wood burning facility* . . .” (emphasis supplied).

In determining whether the public interest will be served by declination of jurisdiction, the Commission shall consider the following:

- (1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the Commission unnecessary or wasteful.
- (2) Whether the Commission’s declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility’s customers, or the state.
- (3) Whether the Commission’s declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.
- (4) Whether the exercise of Commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.

Ind. Code § 8-1-2.5-5

The evidence in this Cause demonstrates that Petitioner does not intend, nor does it request, authority to sell the electricity generated by the Clay County Facility to the

general public or to any retail customer. Instead, the power will be generated solely for resale subject to the jurisdiction of FERC, under the terms of a PPA with Hoosier Energy. Petitioner indicated that it will operate the Clay County Facility in a manner consistent with good utility practice. The Petitioner also indicated that it is not seeking authority to exercise certain of the rights, powers, or privileges of an Indiana public utility in the construction and operation of the Clay County Facility, including the power of eminent domain, and the exemption from zoning and land use regulation. Further, the costs of the Facility will not be recovered through a rate base/rate of return or other process typically associated with public utility rates.

The record reflects that Petitioner has chosen the location of the Clay County Facility based upon the criteria of fuel supply, interconnection to the transmission system of Hoosier Energy, available water supply and minimal environmental impact. The site has reasonable proximity to a fuel supply of woody biomass that would provide approximately 350 thousand tons of wood waste annually, and that will be supplied by K&S pursuant to the terms of a 20 year PPA with Hoosier Energy. The OUCC's witness, Ronald L. Keen, testified in support of Petitioner's construction of the Clay County Facility and request for relief. Mr. Keen recommended that the Commission's order declining jurisdiction include various conditions consistent with prior Commission orders. As noted by Mr. Elliot, Petitioner's project is the first of its kind in Indiana.

With respect to the requirements under Chapter 8.5, Clay County Facility qualifies as an "alternate energy production facility." Under Ind. Code § 8-1-8.5-7(2), such facilities do not need to comply with the certification requirements under Chapter 8.5 if the facility meets the following requirements in Indiana Code Section 8-1-2.4-5: (1) the facility cannot have a capacity greater than 80 megawatts, (2) the facility produces electricity for industrial, commercial or residential purposes and (3) the facility is owned by a person or corporation that is not primarily engaged in the business of selling electricity other than selling electricity solely from the alternate energy production facility. The expected output of the Clay County Facility is 26 MW. Petitioner will sell the entire output to Hoosier Energy. Therefore, the electricity will be utilized for industrial, commercial or residential purposes. Finally, the Clay County Facility will be the only source of electricity to be sold by Petitioner. Accordingly Petitioner does meet the criteria Ind. Code § 8-1-2.4-5 and is therefore exempt from the certification requirements of Chapter 8.5.

With respect to, and as part of the Commission's public interest analysis regarding any proposed declination of jurisdiction, the Commission must evaluate facilities such as the Petitioner's based on a number of factors, including the following:

(a) **Location.** Although Petitioner has declared it will comply with local land use, zoning and planning rules and regulations there is no local zoning authority in Clay County. In deciding whether to decline jurisdiction, the Commission has the authority to consider whether the public interest will be served by the Clay County Facility being in its planned location. In making such determination, the Commission must consider the potential for adverse effects on Indiana "electricity suppliers" (as that term is used in Ind. Code § 8-1-2.3), their customers, or a local community. Determining whether or not the location of a proposed facility is compatible with the surrounding land uses is part of the consideration of the

potential adverse effects on a local community. In determining compatibility, the Commission may evaluate and consider any evidence of compliance with local zoning and land use requirements.

Indiana statutes regarding surface and groundwater rights and obligations, including those establishing the authority of the Indiana Natural Resources Commission (Ind. Code § 14-25-7-15) do not limit the Commission's jurisdiction to make such determinations under the public interest standard of Ind. Code § 8-1-2.5 or the public convenience and necessity standard of Ind. Code § 8-1-8.5-5(b)(3) or pursuant to Ind. Code § 8-1-2-115. If a proposed new generating facility will significantly and negatively impact an electricity supplier, its consumers, or a local community, the Commission may refuse to decline jurisdiction under Ind. Code § 8-1-2.5 and Ind. Code § 8-1-8.5.

Petitioner submitted evidence that the Clay County Facility has support from local elected officials, has or will obtain all local construction-related permits and will not rely on the public utility exemption for local zoning regulations. According to Mr. Reiling, before construction the Company will obtain a permit from the Clay County Drainage Board and probably a state building permit. He also said other permits may be incidental or routine to the construction process and that he has instructed ERM to verify this fact. Petitioner has secured an option for 80 acres of land in Clay County and has engaged in arms-length negotiations with adjoining property owners. The site is a former coal mine which is over 7 miles from the nearest town or city and is not in nearby proximity to a school, hospital, or other critical facility. There is no evidence in this record that any adjoining landowner has objected to the location of the Clay County Facility due to noise or aesthetics. The Clay County Facility is located directly across County Road 500 from the Headwaters Energy Plant that processes coal fines from various coal residue ponds in the area. Essentially it is the redevelopment of a brownfield site. The Clay County Facility will add 20 jobs to the local community.

With respect to noise and aesthetics, the Clay County Facility will be located on an abandoned coal strip mine in Rural Clay County. The evidence shows that the nearest residential area is over seven miles away. There is no evidence in this record that any adjoining landowner has objected to the location of the Clay County Facility due to noise or aesthetics.

In the absence of local zoning requirements, Mr. Elliott urged the Commission to look to the statutory provisions that guide such ordinances. As noted above, Clay County elected officials, for whatever reason, have not adopted local zoning requirements. However, local officials and property owners clearly support the Clay County Facility. In addition, as noted above, Petitioner has taken adequate steps through design and location choice to minimize any potential negative impact on the local community.

(b) Fuel Source. Petitioner claims that, utilizing its experience in developing other projects, it has determined that the woody biomass resource within a reasonable proximity of

the project site is sufficient for the development of an economically viable project. Mr. Reiling and Mr. Swain discussed the impact of the closing of the International Paper West Terre Haute facility and the woody biomass that became available within 70 miles of the Clay County Facility as the result of its shutdown. Mr. Swain also presented evidence that shows that the available Indiana woody biomass is more than sufficient to sustain the long-term operation of this facility. Mr. Swain also demonstrated that the Indiana DNR supports the use of woody biomass for electric generation. We find merit in Mr. Elliot's recommendation to consider available woody biomass in the context of the number of facilities that are being proposed within the State of Indiana. Petitioner has addressed many of the fuel supply concerns, however, by incorporating in its PPA a fuel supply agreement with Hoosier Energy and K&S. Such an agreement offers Petitioner protection from the economic risk posed by its fuel supply. However, over the longer term it will serve the public interest that the Petitioner include in its annual report after the Clay County Facility becomes operational: 1) the woody biomass supplier; 2) the annual average woody biomass usage; 3) average daily woody biomass usage; 4) peak output woody biomass usage; and 5) notice to the Commission and the OUCC of any intention to fuel-switch or substantially modify the type and/or amount of feedstock.

With respect to the fire risks associated with woody biomass, Mr. Elliot testified that in order to avoid spontaneous combustion, a strict, site-specific fuel management plan for storing, processing, and rotating fuels must be adopted prior to the placed in service date of the facility. Mr. Reiling refers to the testimony of Mr. Keen who in his testimony states that Petitioner has adequately addressed fire risk. However, as admitted by both Mr. Reiling and Mr. Keen, Petitioner has not yet developed a formal, written fuel management and fire-protection plan. Due to the potential dangers inherent in managing an onsite fuel supply such as woody biomass, having a formal written fuel management and fire prevention plan is prudent and a sound management practice. We agree with Mr. Elliot's recommendation that a formal written plan approved by local and/or county fire protection authorities be developed and submitted to the Commission prior to placing the plant online. This is consistent with the Commission's practice to require all permits and other regulations be complied with. We also encourage Petitioner to consult with the other parties in developing its fuel management and fire prevention plans.

(c) **Water Use and Supply.** Mr. Reiling, Mr. Borneman, Mr. Keen and Mr. Elliot testified regarding water supply issues. The facility will use production water pumped from a pond located on the property which covers approximately 11 acres and is up to 45 feet deep. The production water will require very little treatment and the pond is expected to be replenished with surface water from local streams, allowing the pond to handle ongoing demand. Water for fire protection will also be drawn from the pond. As to potable water, work shifts should require no more than 4 people and their minimal potable water needs will be drawn from wells to be drilled onsite. A high percentage of the production water evaporates as part of the cooling tower operations. Wastewater from sanitary facilities will be processed using a common septic system. The evidence demonstrates that the area water use and supplies will not be adversely affected by the facility.

(d) **Transmission Interconnection.** The Clay County Facility is expected to interconnect with the 69 kV line of Hoosier Energy that is located one mile away from the proposed site and serves the northwestern corner of Hoosier Energy's service territory. Mr. Keen stated that the OUCC had no concerns about the transmission adequacy to serve the Clay County Facility. He also testified that Petitioner was informed by Midwest ISO to submit information to Midwest ISO once the facility is under construction and closer to the date that it would be transmitting. As one of his recommendations, Mr. Keen proposed that any impact studies completed by Midwest ISO be submitted to the Commission and the OUCC as part of either the initial or subsequent quarterly reports. We find this recommendation to be reasonable and direct Petitioner to include such studies when it files its initial or subsequent reports.

Further, we find Petitioner should have limited use of the public right-of-way, and grant a conditional and limited right to use public rights-of-way for the transmission of energy from the Clay County Facility to the proposed Hoosier Energy interconnection.

(e) **Additional Permitting and Environmental Issues.** IDEM has issued the air permit for the Clay County Facility. Mr. Reiling testified that no adverse comments were received during the IDEM permitting process and Mr. Borneman testified that the modeling submitted by Petitioner to IDEM demonstrated that it would be compliant with all applicable environmental regulations. Mr. Elliot stated that biomass to energy facilities by the nature of their feasible capacity scale are generally permitted under the large source classification and exempt from installing BACT. Mr. Borneman said that under 326 IAC 2-2-3, biomass boilers are also required to go through BACT for any/all pollutants above the significant emission threshold for that pollutant.

Ms. Armstrong testified further that the Company's BACT analysis has resulted in several technology installations and establishment of best practices for the facility. For particulate emission, Petitioner is required to install and operate an electrostatic precipitator at all times except under emergency conditions. For CO emissions, the Company must utilize an overfire air system and good combustion practices. Petitioner must use selective, non-catalytic reduction for NO_x. She stated that Petitioner will control SO₂ emissions through fuel specifications and control VOC emission through good combustion practices. She testified that Petitioner also has further emission limitations on smaller sources of particulate, NO_x, CO, and VOC emissions.

Mr. Keen testified that for the reasons set forth in Ms. Armstrong's testimony, the OUCC did not have any concerns on environmental issues. Mr. Elliot raised issues on the potential changes in environmental regulations that might impact the Clay County Facility but admitted that IDEM had considered the environmental standards and issued an air permit. We find no reason to engage in speculation as to what future environmental regulations could be applied to Petitioner's facility. Because carbon regulations have not yet been implemented, and due to the relatively small size of the facility, we do not find it necessary to resolve the issue in this proceeding. However, Petitioner is directed to timely notify the Commission and

the OUCC of any changes in carbon regulation that apply to its Clay County Facility.

Ms. Armstrong made five recommendations regarding environmental matters. Her first two requirements involve reports by Petitioner regarding environmental regulations that “could” apply to the Clay County Facility. We do not find it useful to require Petitioner to file reports on regulations not yet implemented by IDEM. We do find Ms. Armstrong’s remaining three reporting requirements (i.e., fly and bottom ash, air permit compliance reports, and plant modifications requiring a new air permit) would provide helpful information. However, we will require Petitioner in this regard to file only the reports filed with IDEM or the Indiana DNR. We find no reason to require Petitioner to develop new reports on these environmental matters for this Commission, which are not required for other agencies. Petitioner shall also notify the Commission, the OUCC, and the other Parties if it files for modification of its air permit for the purpose of changing fuels from its intended woody biomass fuel at the time it files such a request with IDEM.

(f) **Need.** In determining the public interest, the Commission will determine if the development of additional generating capacity is necessary and serves the public interest. To demonstrate need, entities must provide evidence that a proposed facility will meet the demands of the market. A mere assertion that the wholesale market is competitive is insufficient to meet this standard. As set forth below, the Commission finds the evidence presented demonstrates sufficient need for the Clay County Facility and it will serve the public interest.

In the present proceeding, Mr. Reiling testified that according to the most recent forecast of Indiana’s future electricity requirements issued in December 2000 by the State Utility Forecasting Group at Purdue University for the Commission, *Indiana Electricity Projections: The 2009 Forecast* (“Report”) the electricity that will be generated by Petitioner is very much needed. The Report projects future electricity requirements for the period 2008-2027. The Report projects that by 2015, Indiana will need an additional 1300 megawatts in electric resources. Mr. Keen testified that the Report demonstrates that the power to be produced is needed. There is no evidence to the contrary.

(g) **Financing and Management.** To ensure that Indiana consumers are not adversely affected by the proposed development of generation plants in Indiana, developers must demonstrate to the Commission that the financial structure of a proposed project will not jeopardize retail electric supply. In assessing a developer’s financing to ensure the viability of a proposed project, the Commission may consider the developer’s ability to finance, construct, lease, own, and operate generating facilities in a commercially responsible manner. As necessary, the Commission may also consider the specific method proposed to finance a particular project.

Mr. Reiling and Mr. Keen testified regarding the financing of the Clay County Facility and they agreed that Petitioner has arranged for long-term debt financing of the facility. He also agreed that Petitioner will attempt to qualify for U.S. Treasury ARRA Grants that could provide up to 30% of construction costs. Mr. Reiling presented extensive, uncontradicted

evidence regarding Petitioner's ability to construct, own and operate the Clay County Facility. Based on the evidence presented, the Commission finds that Petitioner has the ability to finance, construct and manage the facility.

(h) Affiliate Transactions. In addition to determining whether the public interest would be served if the Commission declines jurisdiction, the Commission also must consider what actions it must take to ensure that the public interest is served throughout the commercial life of the project. Specifically, the Commission must determine the extent to which it must reserve its authority over the Petitioner's activities involving affiliate transactions and transfers of ownership. To ensure that the Commission's declination of jurisdiction over an "energy utility" is in the public interest, the Commission must be assured that adequate consumer protections are in place. Petitioner is not an affiliate of any public utility subject to the Commission's jurisdiction. Therefore, at this time there is no need to implement affiliate guidelines.

Based on the evidence presented, we find that the declination of jurisdiction of Petitioner is in the public interest. Petitioner shall obtain prior Commission approval with respect to the sale of any electricity to any other regulated Indiana retail electric utility. The Commission notes that it retains certain authority under Section 201 of the Federal Power Act to examine the Petitioner's books, accounts, memoranda, contracts, and records consistent with the limitations contained therein. 16 U.S.C. § 824 (2005).

(i) Transfers of Ownership. The Commission reserves its jurisdiction under Ind. Code § 8-1-2-83, and requires the Petitioner to obtain prior Commission approval of any transfer of Petitioner's franchise, works or system. Mr. Reiling testified that Hoosier Energy has the option to purchase the Clay County Facility at any time during the term of the PPA. Before Petitioner sells the Clay County Facility to either Hoosier Energy or any other entity, it must seek prior Commission approval.

Additionally, consistent with prior Commission orders, Petitioner shall not be required to seek prior approval, but shall provide written notice to the Commission and the OUCC, of any transfers of ownership of Clay County Facility assets or ownership interests in the Petitioner involving: (1) the grant of a security interest to a bank or other lender or collateral agent, administrative agent or other security representative, or a trustee on behalf of bondholders in connection with any financing or refinancing (including any lease financing); (2) a debtor in possession; or (3) a foreclosure (or deed in lieu of foreclosure) on the property owned by Petitioner or ownership interests in Petitioner.

(j) Reporting Requirements. In addition to the foregoing requirements, it shall be a condition of this Order and our continued declination of jurisdiction over Petitioner that Annual Reports are filed with the Commission as provided in Ind. Code § 8-1-2-49, and provide such other information as the Commission may from time to time request. These reporting requirements are intended to ensure that the Commission obtains reliable, up-to-date information in a timely manner. A responsible officer of Petitioner shall verify all reports. The Petitioner shall provide two (2) paper copies and one (1) electronic copy under this

Cause, within the timeframes prescribed herein.

The following reports (“Reporting Requirements”) shall be prepared and filed by Petitioner.

(1) **Initial Report.** Petitioner’s initial quarterly report due within 30 days after this Order shall provide, to the extent such information is known and available, the following:

- a. Project ownership and name(s) of the Clay County Facility;
- b. Name, title, address, and phone number(s) for primary contact person(s) for the Clay County Facility;
- c. The location of the Clay County Facility;
- d. Anticipated total output of the Clay County Facility;
- e. Manufacturer, model number and operational characteristics of boilers;
- f. Connecting utility(s);
- g. Copy of any Interconnection System Impact Studies prepared by the Midwest ISO;
- h. Expected in-service (commercial operation) date;
- i. An estimate of the engineering/construction timeline and critical milestones for the Clay County Facility;
- j. The status of the Large Generator Interconnection Agreement (LGIA) with the Midwest ISO, and

(2) **Subsequent Reports.** Petitioner’s subsequent reports shall be filed within 30 days of the end of each calendar quarter until the quarter that occurs after commercial operation is achieved and that immediately precedes the Annual Report filing date. Thereafter, subsequent reports should be filed as an addendum to Petitioner’s Annual Report.

- a. Any changes of the information provided in the Initial Report;
- b. Any reports of Interconnection System Impact Studies not previously submitted to the Commission;
- c. Copy of the LGIA as filed with FERC;
- d. Notice of the establishment of an independent financial instrument, including its form and amount;
- e. Achievement of construction milestones described in the LGIA and such events as the procurement of major equipment, the receipt of major permits material to the construction and operation of the Clay County Facility, construction startup, initial energization and commercial operation; and
- f. When commercial operation is achieved, the nameplate capacity, term and identity of a purchaser for any contracts then existing for utility sales, contingency plans (if any) detailing response plans to emergency conditions *as* required by state or local units of government, the

interconnecting transmission owner and/or the Midwest ISO, and the Clay County Facility's certified (or accredited) dependable capacity rating.

(3) **Fuel management and fire prevention report.** As found above, Petitioner shall develop a written and comprehensive fuel management and fire risk prevention plan and shall provide it to the Parties and the Commission prior to placing the facility online. Petitioner should consult with the other parties in developing its fuel management and fire prevention plans.

(k) **Additional Requirements.** In the event that Petitioner intends to materially increase or decrease or otherwise materially change the Clay County Facility's capacity or operation, the owner must obtain the Commission's prior approval. A material change includes but is not limited to the following: an increase or decrease of greater than five (5) MW in the Facility's capacity; changes in operating entities; changes in fuel supply; transfers of assets; and changes identified in case law as a material change.

Petitioner shall notify the Commission in the event that it modifies or suspends the project under the terms of the LGIA and does not reinstitute work within three (3) years following commencement of such suspension. If the Commission determines that the Petitioner has (a) failed to enter into an agreement pursuant to the Midwest ISO generator interconnection procedures; (b) suspended the project under the terms of the LGIA and has not reinstated work within three (3) years following commencement of such suspension; or c) has otherwise suspended its efforts to complete the project within three (3) years of this Order, the Commission may, following notice to the Petitioner, proceed to issue an Order terminating the declination of jurisdiction set forth herein. Petitioner shall also make the reports proposed by Ms. Armstrong as discussed above and relating to additional permitting and environmental issues.

9. **Conclusion.** Pursuant to the provisions set forth in Ind. Code § 8-1-2.5-5, and in consideration of the factors listed above, the Commission finds that declining to exercise its jurisdiction over Petitioner and the Clay County Facility will facilitate the immediate construction of the proposed project and add needed generation capacity in Indiana. This should be beneficial for those public utilities that may indirectly have access to the power produced, and to the State of Indiana. We further conclude that the Commission's declining to exercise jurisdiction over Petitioner will promote energy utility efficiency. Moreover, the evidence has demonstrated that Petitioner has the technical, financial and managerial capability to construct and operate the proposed Clay County Facility. It has also shown that the wholesale market for electricity in Indiana will benefit from the addition of the generating capacity and therefore that its market entry is reasonable.

Accordingly, based on the above findings and the additional requirements contained in this Order, the Commission believes that a declination of jurisdiction over Petitioner as an energy utility, except over the areas discussed above as to which we are reserving our jurisdiction, is in the public interest. Petitioner is not granted authority to offer its power for

sale to the general public. Therefore, any revenue that it derives from the sale of electricity for resale by the purchaser is not subject to the public utility fee.

Petitioner shall advise the Commission, under this Cause, of any change of ownership of the Clay County Facility, and all reporting requirements referenced in this Order. Should the information submitted to the Commission by Petitioner subsequently change, Petitioner is obligated to provide the Commission with updated information.

If the Commission determines that the Petitioner either (1) has failed to commence construction of the Facility within the timeframe provided under this Order; (2) is no longer diligently pursuing the commencement of construction of the Clay County Facility; or (3) has not completed construction of the Clay County Facility under the terms of the LGIA, then the Commission may, following notice to the Petitioner, proceed to issue an Order terminating the declination of jurisdiction set forth herein. The Petitioner agrees to file with the Commission, and the OUCC, status reports on the Clay County Facility after commencement of construction through commercial operation and, prior to commercial operation of the Clay County Facility, and will satisfy the reporting requirements outlined in the above findings. The Petitioner shall also file with the Commission any annual report required to be filed with FERC, and provide the Commission such other information as the Commission may from time to time require from other Indiana public utilities.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. Petitioner is hereby determined to be a “public utility” within the meaning of Ind. Code § 8-1-8.5-1 and Ind. Code § 8-1-2-1 and an “energy utility” within the meaning of Ind. Code § 8-1-2.5-2.

2. The Clay County Facility is hereby determined to be a “utility” within the meaning of Ind. Code § 8-1-2-1.

3. The Commission declines to exercise its jurisdiction over Petitioner and its construction, operation and financing of the Clay County Facility, except as specifically stated within this Order.

4. Petitioner shall not exercise an Indiana public utility’s rights, powers, and privileges of eminent domain and of exemption from local zoning and land use ordinances in the operation and construction of the Clay County Facility. Petitioner retains the rights, powers, and privileges of a public utility to use the public right-of-way as noted in Para. 8(d).

5. Petitioner shall not sell at retail in the State of Indiana any of the electricity generated by the Clay County Facility without further order of the Commission. The gross revenues generated by sales for resale of the electricity generated by the Clay County Facility are hereby adjudged to be exempt from the public utility fee prescribed by Ind. Code § 8-1-6.

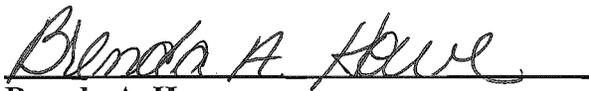
6. Petitioner shall comply fully with the terms of this Order and submit to the Commission all information required by the terms of this Order.

7. This Order shall be effective on and after the date of its approval.

ATTERHOLT, LANDIS AND ZIEGNER CONCUR; MAYS ABSENT:

APPROVED: OCT 20 2010

**I hereby certify that the above is a true
and correct copy of the Order as approved.**



**Brenda A. Howe
Secretary to the Commission**