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NO.
STATE OF NEBRASKA
OFFICIAL
MAY 20 1994
DEPT. OF JUSTICE

DATE: May 11, 1994

SUBJECT: Federal Energy Policy Act and Wholesale Wheeling of Electricity

REQUESTED BY: Senator George Coordsen
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have asked whether Neb. Rev. Stat. § 70-625.02 (1990) conflicts with the Federal Energy Policy Act of 1992 and, if it does, whether the Nebraska statute is preempted by the Federal Energy Policy Act.

Section 70-625.02 provides:

> It is declared to be the policy of the State of Nebraska that electric transmission facilities and interconnections which are defined as being electric lines having a rating of thirty-four thousand five hundred volts and higher will be provided and made available to all power agencies so as to result in the lowest possible cost for the transmission and delivery of electric energy over the transmission and interconnected facilities of any public power district, public power and irrigation district, individual municipality, group of municipalities registered with the Nebraska Power Review Board, governmental subdivision, or nonprofit electric cooperative corporation.

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Section 70-625.02 declares a policy of the state to mandate wheeling of electricity for lines of thirty-four thousand five hundred volts and higher. The process of using the transmission lines or facilities of utility B to get excess generating capacity of generator A to customer C is often referred to as "wheeling."

The State statutes regulating public power were originally enacted in 1933 when many power suppliers were local entities. Section 70-625.02, addressed to interconnections was passed in 1967, a time when power suppliers had grown to consist primarily of state-wide and inter-state suppliers. However, the state law retained an exemption for small suppliers utilizing electrical lines having a rating of less than thirty-four thousand five hundred volts.

The federal law in this area through amendment and judicial interpretation has increased in scope. The federal law is broader than state law since it does not contain any limitation on capacity. Also, since case law has developed a broad definition of interstate commerce in electrical generation and supply, few suppliers would be exempt from the federal law.

The Federal Energy Power Act was amended by the Energy Policy Act of 1992 (P.L. 102-486). The Federal Energy Policy Act grants broad authority to the Federal Energy Regulatory Commission to mandate wheeling when it is for the purpose of conservation, efficiency, promoting wholesale competition, enhancing protection of the environment, and remedying practices which are discriminatory or inconsistent with the antitrust law. 10A U.S. Cong. News 92, p. 2017. Congress limited the Federal Energy Regulatory Commission's authority to order wheeling of services only as to transmission directly to an ultimate consumer and transmission to a sham wholesaler. 16 U.S.C. § 824K(h)(1), (2). There are no limitations based on capacity. Further, the courts have determined that virtually all energy flowing over interconnected transmission systems is in interstate commerce. ***See FPC v. Florida Power & Light Co.***, 404 U.S. 453 (1972); ***Wisconsin Michigan Power Co. v. FPC***, 197 F.2d 472, 477 (7th Cir. 1952), ***cert. denied***, 345 U.S. 934 (1953). The United States Supreme Court has also indicated that federal regulation of intrastate power transmissions may be proper because of the interstate nature of the generation and supply of electrical power. ***Federal Energy Regulatory Commission v. Mississippi***, 456 U.S. 742, 755, 102 S.Ct. 2126, 2135 (1982).

In the ***Mississippi*** case, which involved § 210 of the Federal Power Act, the Court specifically addressed the issue of preemption of state law by holding:

> [I]nsofar as § 210 authorizes FERC to exempt qualified power facilities from "State laws and regulations," it does nothing more than pre-empt conflicting state enactments in the traditional way. Clearly, Congress can pre-empt the States completely in the regulation of retail sales by electricity and gas utilities and in the regulation of transactions between such utilities and cogenerators. . . . [T]he Federal Government may displace state regulation even though this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."

(Citations omitted.) 456 U.S. at 759, 102 S.Ct. at 2137.

Further, in ***Mississippi Power & Light Co. v. Mississippi ex rel. Moore***, 487 U.S. 354, 108 S.Ct. 2428 (1988), the U.S. Supreme Court reaffirmed the well-established principle that if the Federal Energy Regulatory Commission has jurisdiction over a subject, states cannot have jurisdiction over it.

Because the state and federal laws overlap, the question of preemption is important.

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. (Citations omitted.)

N.W. Cent. Pipeline v. State Corp. Com'n of Kansas, 109 S. Ct. 1262, 1273, 489 U.S. 493, 509 (1989).]

The Energy Power Act, as amended by the Energy Policy Act, does not contain explicit statutory language preempting state law. Nor does the language of § 70-625.02 conflict with or stand as an obstacle to the accomplishment and execution of the federal law. However, it does appear that Congress has legislated so comprehensively in this area that federal law occupies the entire field of regulation. Clearly, the field of federal regulation is broader than state regulation. It is our determination that while the language of the state law does not conflict with federal law,

because of the comprehensive language of the federal acts cited, federal regulation preempts state regulation in the area of wheeling of electrical power.

Sincerely,

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28-13-14.op

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:

Don Stenberg

Attorney General