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#94062

NO.
 STATE OF NEBRASKA
OFFICIAL
 AUG 11 1994
 DEPT. OF JUSTICE

L. STEVEN GRASZ
 SAM GRIMMINGER
 DEPUTY ATTORNEYS GENERAL

DATE: August 2, 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:

Electric transmission facilities and interconnections, defined; policy of state. 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 34,500 volts and higher. The process of using the transmission lines or facilities of utility B to get access generating capacity of generator A to customer C is often referred to as "wheeling."

The federal statutes relating to wheeling of electricity or interconnections is contained in 16 U.S.C. § 824(k). This provision is included within Subchapter II-Regulations of Electric Utility Companies Engaged in Interstate Commerce. Clearly both state and federal law address wheeling issues and as such the question of whether federal law preempts state law is important.

Congress has the power under the Supremacy Clause of Article IV of the Constitution of the United States to preempt state law. However, the Federal Power Act Subchapter II contains a specific exemption at 16 U.S.C. § 824(f) which states:

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Further, the United States Supreme Court has determined that the Federal Power Acts does not preempt state regulation or authority over electric utilities unless there is a specific provision of the Federal Power Act that mandates preemption of state law. See *Arkansas Electric Power Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 76 L.Ed.2d 1 (1983). No such provision exists in regard to wheeling of electricity.

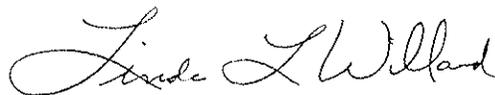
Nebraska is a public power state with virtually all generation and distribution of electrical power carried on by political subdivisions or corporations controlled by political subdivisions of the State. Since the State, political subdivisions of the State and corporations owned by the State or political subdivisions of the State have been exempted from the Federal Power Act under 16 U.S.C. § 824(f), there is no question of preemption for those areas contained in the subchapter which includes wheeling.

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Your question is whether there is a conflict between the state and federal law in the area of wheeling. The federal law specifically excludes public power districts owned by the state or political subdivisions of the state therefore there is no issue of conflict between these state and federal law. It is our conclusion that the current federal law is not in conflict with Nebraska law and that federal law, as currently written, would not preempt state law in the area of wheeling of electricity. Opinion #94036 is overruled to the extent it is inconsistent with this opinion.

Sincerely,

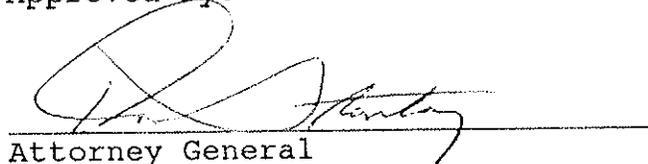
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cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved By:



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