



Paul E. Patton
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and Environmental Protection Cabinet

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Secretary, Kentucky Economic
Development Cabinet

September 17, 2003

Mr. Jim Price
P.O. Box 903
Gatlinburg, TN 37738

Dear Mr. Price:

This is in response to your request for a legal opinion as to whether the Smithland Hydroelectric Partners, Ltd. requires a certificate from the Kentucky State Board on Electric Generation and Transmission Siting (the "Board") before beginning construction of a hydroelectric plant at the existing Smithland Locks and Dam in the Ohio River about two miles upstream from Smithland, Kentucky (the "Smithland Project"). For the reasons explained below, I conclude that it does not.

The Smithland Project received, in 1988, a license from the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act ("FPA"). All generating facilities will be located on federal property. The U.S. Army Corps of Engineers manages the locks and dam for Ohio River navigation.

The FPA, at 16 U.S.C. 802, describes the process to be followed by an applicant wishing to construct a hydroelectric plant. The applicant must, among other things, provide FERC with maps, plans, and cost estimates. *Id.* at (a)(1). He must also comply with certain notice requirements. *Id.* at (b)(1) and (2). Finally, he is required by Subsection (a)(2) to furnish evidence that he has complied with the "requirements of the laws of the State or States within which the proposed project is to be located" with regard to "bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing,



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transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.” You state in your letter that the applicant complied with Kentucky laws that were in effect at the time the application was under consideration at FERC.

Kentucky’s siting law, KRS 278.700 *et seq.*, was enacted in 2002, fourteen years after FERC licensed the Smithland Project. The law requires a siting certificate for a generating facility that is not regulated by the Kentucky Public Service Commission if construction has not “commence[d]” on the project. KRS 278.704. As construction on the Smithland Project has not yet “commenced,” see KRS 278.700(4) (defining “commence to construct” as “physical on-site placement, assembly, or installation”) a certificate from the Board would thus be required under Kentucky law even though the FERC procedures have been completed.

However, Kentucky law purporting to approve or disapprove a hydroelectric power project subject to FERC jurisdiction is clearly preempted. In 1946, the United States Supreme Court, in *First Iowa Hydro-Electric Coop. v. Federal Power Comm’n*, 328 U.S. 152 (1946), concluded that the FPA’s requirement that an applicant demonstrate compliance with state laws did not require compliance with a state law that could block the federal license. The Court held that states were preempted from ruling on the ultimate question as to whether the project could be built, for giving a state agency a “veto power over the federal project... could destroy the effectiveness of the federal act.” *First Iowa*, 328 U.S. at 912. The Court went on to explain that, “[w]here the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority,” and that the FPA places responsibility for approving a hydroelectric project “squarely on federal officials.” *Id.* at 168. The Court concluded that “there is no doubt that the United States possesses the power to control the erection of structures in navigable waters,” *id.* at 182, and that, in taking jurisdiction of the waters under the FPA, the federal government “has not by statute or regulation added the state requirements to its federal requirements.” *Id.* at 170. *See also Town of Springfield, Vermont v. McCarren*, 549 F. Supp. 1134 (D. Vt. 1982) *aff’d.*, 722 F.2d 728 (2d Cir. 1983), *cert. denied*, 464 U.S. 942 (1983) (granting summary judgment on ground that Vermont Public Service Board had no jurisdiction over licensing of hydroelectric project on navigable river; finding that FERC’s jurisdiction was exclusive; and concluding that the Supreme Court has not overruled *First Iowa* by implication).



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If you have questions in regard to this opinion, please do not hesitate to contact me at (502) 564-3940, extension 255.

Sincerely yours,



Deborah T. Eversole
Board Counsel



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