

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

RICHARD BLUMENTHAL	:	PETITION FOR REVIEW
ATTORNEY GENERAL OF CONNECTICUT	:	
	:	
<i>and</i>	:	
	:	
ARTHUR J. ROCQUE, JR.	:	
COMMISSIONER OF DEPARTMENT OF	:	
ENVIRONMENTAL PROTECTION	:	
	:	
<i>Petitioners</i>	:	
	:	
v.	:	
	:	
SPENCER ABRAHAM, SECRETARY	:	
DEPARTMENT OF ENERGY	:	
	:	
<i>and</i>	:	
	:	
UNITED STATES DEPARTMENT OF	:	
ENERGY	:	
	:	
<i>Respondents</i>	:	September 22, 2003

**PETITION FOR REVIEW**

Richard Blumenthal, the Attorney General of Connecticut, and Arthur J. Rocque, Jr., Commissioner of the Connecticut Department of Environmental Protection, (hereinafter, the “Petitioners”), hereby petition the Court for review of the August 28, 2003 order (the “Order”) of Spencer Abraham, Secretary of the Department of Energy and the United States Department of Energy (“DOE,” together, the “Respondents”) which Order directs the commercial operation of

an improperly installed electric transmission line between Connecticut and Long Island the operation of which is in violation of state law. The Order in question, issued pursuant to the Secretary's emergency powers found at 16 U.S.C. 824a(c), is arbitrary and capricious and is in excess of the statutory authority of the Respondents and constitutes an abuse of discretion in that it violates the laws and regulations governing the DOE by invoking emergency powers when, as the Order itself acknowledges, no emergency exists. Further, this extreme Order violates the Tenth Amendment to the United States Constitution and tramples on state sovereign interests in that it requires the operation of a private transmission cable in violation of state law on state-owned, public trust land when the cable in question has failed to comply with minimum state permit requirements.

Pursuant to 16 U.S.C. 825*l*, Petitioners seek review in the Court of Appeals for the Second Circuit, where the utility that is the subject of the Order is located.

A copy of the Order is attached hereto.

Form C-A (for Agency Cases)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPLICATION FOR ENFORCEMENT

PETITION FOR REVIEW

PRE-ARGUMENT STATEMENT

SEE NOTICE ON REVERSE. PLEASE TYPE OR PRINT. ATTACH ADDITIONAL PAGES IF NECESSARY.

NAME OF AGENCY: United States Department of Energy AGENCY DOCKET NO.: 202-03-2

TITLE IN FULL:

Please see attachment.

ORDER NUMBER: 202-03-2 DATE ENTERED: 8/28/03
APPROXIMATE NO. OF PAGES IN RECORD: NO. OF EXHIBITS: one
JURISDICTION OF COURT OF APPEALS: yes USCA

HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? Yes No IF YES, STATE:
CASE NAME: CITATION: DOCKET NO.:

ATTORNEY(S) FOR PETITIONER(S): Robert D. Snook, Assistant Attorney General
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TELEPHONE:

ATTORNEYS FOR RESPONDENT(S): Please see attachment.
NAME: ADDRESS: TELEPHONE:

APPEAL TAKEN: AS OF RIGHT BY DISCRETION (SPECIFY STATUTES UNDER WHICH APPEAL IS TAKEN): 16 USCA 8251(b)
PETITIONER/APPLICANT IS AGENCY OTHER PARTY NON-PARTY. SPECIFY STANDING:

FACTS UPON WHICH VENUE IS BASED: Cross-Sound Cable Company and Long Island Power Authority
are located in the 2nd Circuit
NATURE OF ORDER ON WHICH REVIEW OR ENFORCEMENT IS SOUGHT:

ADMINISTRATIVE REGULATION/RULEMAKING BENEFITS REVIEW UNFAIR LABOR PRACTICE:
ROUTES: COMMUNICATIONS HEALTH & SAFETY EMPLOYER
COMMERCE IMMIGRATION UNION
OTHER: (SPECIFY) TARIFFS

CONCISE DESCRIPTION OF PROCEEDINGS BELOW AND ORDER TO BE REVIEWED OR ENFORCED (NOTE THOSE PARTS OF THE ORDER FROM WHICH RELIEF IS SOUGHT): Please see attachment.

ISSUES PROPOSED TO BE RAISE ON PETITION OR APPLICATION: Please see attachment.
RELIEF SOUGHT: Please see attachment.

TO YOUR KNOWLEDGE, IS THERE ANY CASE NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT OR ANY OTHER COURT OR ADMINISTRATIVE AGENCY WHICH:

- (A) ARISES FROM SUBSTANTIALLY THE SAME CASE OR CONTROVERSY AS THIS APPEAL? YES NO
(B) INVOLVES AN ISSUE SUBSTANTIALLY THE SAME, SIMILAR, OR RELATED TO AN ISSUE IN THIS APPEAL? YES NO
(IF YES, STATE WHETHER "A" OR "B" OR BOTH AND PROVIDE:

DOCKET: CASE NAME:

COURT OR AGENCY: CITATION: NUMBER:

FOR PETITIONER OR APPLICANT: Richard Blumenthal and Arthur J. Rocque Robert D. Snook 860 808-5020
(PRINT) NAME OF PETITIONER NAME OF COUNSEL OF RECORD TELEPHONE

DATE

SIGNATURE OF COUNSEL OF RECORD

**ATTACHMENT TO SECOND CIRCUIT FORM C-A**

TITLE IN FULL

Richard Blumenthal, Attorney General of Connecticut  
and Arthur J. Rocque, Jr., Commissioner of the Department  
of Environmental Protection,

Petitioners

v.

Spencer Abraham, Secretary of the Department of Energy  
and the Department of Energy,

Respondents

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## SPECIFY STANDING

Petitioner Attorney General of Connecticut is obligated by statute to represent the legal interests of the State; Petitioner Commissioner of DEP is the issuing authority for the environmental permit which was overridden by the Order.

Statutory - 16 U.S.C § 8251; 5 U.S.C. § 706.

## CONCISE DESCRIPTION OF PROCEEDINGS BELOW AND ORDER TO BE REVIEWED

On August 28, 2003, the respondent Secretary issued an order (the "Order") which directs the "regular commercial transmission of electric energy" over the Cross-Sound cable and adds that such transmission is "not conditioned on whether particular outages have been identified as being threatened or imminent. . . ." On August 29, 2003, the petitioners requested a rehearing regarding the Order, seeking either that the respondents terminate the order or stay its effect pending a determination of the authority of the Secretary to issue it.

## ISSUES PROPOSED TO BE RAISED ON PETITION OR APPLICATION:

I. The Secretary's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, privilege or immunity, in excess of statutory jurisdiction, authority, or limitations, or without observance of procedure required by law in that the Secretary used his emergency powers to authorize the commercial operation of a cable when no emergency exists or, in the words of the Order is, "threatened or imminent," all in violation of the Federal Power Act, 16 U.S.C. § 791, *et seq.* ("FPA"). The FPA only grants authority to issue emergency orders "[d]uring the continuance of any war" or when "an emergency exists by reason of a sudden increase in the demand for electric energy . . . ." 16 U.S.C. § 824a(c). Under the Defendants' regulations, 10 C.F.R. § 205.371, an "emergency" is defined as: "**Actions under this authority are envisioned as meeting a specific inadequate power supply situation.**" (Emphasis added). The Order acknowledges that "electric service has been restored in the area affected by the August 14 blackout . . . ." Therefore, no "specific inadequate power supply situation" exists and thus no legal justification for the Order remains. Once the emergency had ended, the Respondent Secretary was without authority to maintain the Order under 16 U.S.C. § 824a(c) and maintenance of the Order is void and without effect. *Doolan v. Carr*, 125 U.S. 618, 8 S.Ct. 1228, 1232 (1887).

II. The Secretary's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to constitutional right, privilege or immunity, in excess of

statutory jurisdiction, authority, or limitations, or without observance of procedure required by law in that the Secretary used his emergency powers to authorize the commercial operation of a cable when no emergency exists or, in the words of the Order is, "threatened or imminent," all in violation of the FPA. On August 28, 2003, the respondent issued the Order which grants Cross-Sound the authority to operate its electric transmission cable commercially, without compliance with the terms of its state permits, through land owned by the State of Connecticut. In order to operate the cable, Cross-Sound must continue to violate the terms of its state permits lawfully issued pursuant to state laws under authority retained by the state according to the terms of the Tenth Amendment to the United States Constitution. The Order, by its terms, acts to abrogate state law and, at least to the extent the Order is unlawfully maintained in the absence of a statutory emergency, the Order violates the Tenth Amendment.

## RELIEF SOUGHT

1. That this Court vacate the Order because the respondents lacked statutory authority to issue and maintain the Order in the absence of an identified or imminent emergency as defined in the defendant DOE's regulations.
2. That this Court vacate the Order because the Order is unconstitutional to the extent it permits Cross-Sound to operate its cable without compliance with its state permits on lands held by the State of Connecticut in public trust.
3. That this Court grant such other and further relief as is just and equitable to effectuate the purposes of this action.

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## Department of Energy

Washington, DC 20585

### Order No. 202-03-2

Pursuant to the authority vested in me by section 202(c) of the Federal Power Act, 16 U.S.C. 824a(c), and section 301(b) of the Department of Energy Organization Act, 42 U.S.C. 7151(b), and for the reasons set forth below, I hereby determine that an emergency continues to exist in the Northeast United States due to a shortage of electric energy, a shortage of facilities for the generation of electric energy, a shortage of facilities for the transmission of electric energy and other causes, and that issuance of this order will serve to alleviate the emergency and serve the public interest. This emergency also affects the reliability of electric service in Canada, which in turn affects, and is affected by, the reliability of electric service in the United States.

On August 14, 2003, the Northeast and Upper Midwest areas in the United States, as well as portions of Canada, experienced the largest electric transmission grid failure and electric service outage ever to occur in North America. Tens of millions of people were affected by this outage, and it presented profound risks to the public health and safety throughout the affected areas. Only hours after the outage occurred, and after considering the unanimous recommendation of the North American Electric Reliability Council, the New York Independent System Operator (NYISO), ISO New England, Inc. (NEISO), and electric utilities in both New York and Connecticut in support of the issuance of an emergency order, I issued an order directing the NYISO and NEISO to require the Cross-Sound Cable Company, LLC (CSC) to operate the Cross-Sound Cable and related facilities as necessary to alleviate the disruptions in electric transmission service. The Cable was energized a short time thereafter. Within hours, it was delivering 300 MW of energy from Connecticut to Long Island and also providing valuable voltage support and stabilization services for the electric transmission systems in both New England and New York. It has been reported that operation of the Cable prevented rolling blackouts from occurring in New York in the hours immediately after electric service was restored.

The emergency to which the August 14 order was directed was not one confined to interruptions on Long Island; it was directed to addressing the emergency confronted by the entire region that experienced the blackout. At the current time, it has not yet been authoritatively determined what happened on August 14 to cause the transmission system to fail resulting in the power outage, or why the system was not able to stop the spread of the outage. Because these questions have not yet been authoritatively answered, all of the appropriate actions that should be taken in response to prevent future power outages have not yet been discerned and thus have not yet been taken. For these reasons, and even though electric service has been restored in the area affected by the August 14 blackout, it is my judgment that an emergency continues to exist such that an order under Federal Power Act section 202(c) continues to be necessary and should be issued.

The order I am issuing today will alleviate the emergency because it will allow energy to be delivered to and from Connecticut and Long Island as is deemed necessary by the



professionals who manage the grid, and because operation of the Cable will provide voltage support and stabilization services to the transmission system in the Northeast United States. In my judgment, continued operation of the Cross-Sound Cable (that is, its continuing to be energized and its regular commercial transmission of electric energy) is necessary and desirable to address effectively the situation that exists in the Northeast United States.

Based on my determination set forth above, I hereby order:

From 12:01 a.m. Eastern Daylight Time, September 1, 2003, until such time as the emergency identified in this order ceases to exist as I shall specify in a subsequent order, CSC is directed to operate, in accordance with system operating criteria, the Cross-Sound Cable and related facilities connecting substations in New Haven, Connecticut and Shoreham, Long Island, New York, to transmit and deliver electric capacity and/or energy when, as and in such amounts as may be scheduled and purchased, to provide voltage support and stabilization services to the transmission system, and to take such actions as are necessary in order to enable it to do so, including but not limited to energizing and continuing to energize its facilities to transmit and deliver electric capacity and/or energy from Long Island to Connecticut or from Connecticut to Long Island, and operating its voltage support and stabilization facilities, all in accordance with the usual operating and scheduling protocols of the NYISO and NEISO, and not conditioned on whether particular outages have been identified as being threatened or imminent in New York or Connecticut. If necessary, just and reasonable terms for the transmission and delivery of electric capacity and/or energy pursuant to this order, including the compensation therefor, shall be established by a supplemental order issued pursuant to Federal Power Act section 202(c).

This order shall be effective upon its issuance.

Issued in Washington, D.C. at 2 PM this 28<sup>th</sup> day of August, 2003.

Spencer Abraham  
Secretary of Energy

**CERTIFICATION**

I hereby certify that a copy of the foregoing was mailed in accordance with Rule 25 of the Federal Rules of Appellate Procedure on this 22<sup>nd</sup> day of September, 2003 to:

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