

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

**RICHARD BLUMENTHAL
ATTORNEY GENERAL OF CONNECTICUT**

PETITION FOR REVIEW

and

**ARTHUR J. ROCQUE, JR.
COMMISSIONER OF DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

Petitioners

v.

**SPENCER ABRAHAM, SECRETARY
DEPARTMENT OF ENERGY**

and

**UNITED STATES DEPARTMENT OF
ENERGY**

Respondents

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. 825I, 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
NAME
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ADDRESS 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: _____ HEALTH & SAFETY _____ EMPLOYER
_____ COMMUNICATIONS _____ IMMIGRATION _____ UNION
_____ COMMERCE _____ TARIFFS
_____ OTHER: (SPECIFY) _____

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
9/22/03
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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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 22nd day of September, 2003 to:

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