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October 27, 2003

Honorable Spencer Abraham  
Secretary  
United States Department of Energy  
Washington, D.C. 20585

Re: Cross-Sound Bulk Power Transmission Cable;  
Department of Energy Order No. 202-03-02

Dear Secretary Abraham:

By Order No. 202-03-03, issued September 26, 2003, the Secretary of Energy granted limited rehearing of Order No. 202-03-02, issued August 28, 2003, and invited comments on the operation and/or the effect of the earlier Order.

Attached please find the Comments of Eliot Spitzer, Attorney General of the State of New York, on Order No. 203-03-02.

Thank you for your attention and consideration.

Very truly yours,

Richard W. Golden  
Assistant Attorney General  
Telecommunications & Energy Bureau

**UNITED STATES OF AMERICA  
BEFORE THE  
SECRETARY OF ENERGY**

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In the Matter of Department of Energy )  
Order No. 202-03-02 for the Emergency Operation of )  
the Cross-Sound Bulk Power Transmission Cable )

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**COMMENTS OF  
ELIOT SPITZER  
ATTORNEY GENERAL OF THE STATE OF NEW YORK  
IN SUPPORT OF THE CONTINUED EMERGENCY OPERATION OF  
THE CROSS-SOUND BULK POWER TRANSMISSION CABLE**

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Dated: October 27, 2003



## II. BACKGROUND

On Thursday, August 14, 2003, the bulk power transmission grid for the Eastern United States and Canada<sup>3</sup> suffered high voltage line and generator failures that knocked out electric service in areas as far west as Michigan, as far east as Connecticut and as far north as Ontario.<sup>4</sup> By the time the last area blacked out at about 4:13 p.m., some 50 million people in New York, Ohio, Michigan, Ontario and bordering areas (including Southwestern Connecticut) were without power.<sup>5</sup> Indiana and states west, Pennsylvania and states south and Canadian provinces other than Ontario were essentially unaffected.<sup>6</sup>

On August 14, 2003, the Cross-Sound cable had been physically complete for over a year but was not in operation.<sup>7</sup> Connecticut had blocked operation until the cable is in full

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<sup>3</sup> The Eastern Interconnect meshes power generation from the Atlantic Ocean to the Rocky Mountains and from the Gulf of Mexico to the Arctic in a single bulk power transmission grid. *See, e.g., The Changing Structure of the Electric Power Industry 2000: An Update*, pp. 13 - 14 (Energy Information Administration, United States Department of Energy)(October 2000).

<sup>4</sup> *See generally, August 14, 2003 Outage Sequence of Events*, U.S./Canada Power Outage Task Force (September 12, 2003).

<sup>5</sup> *Id.* at p. 13; United States Department of Energy press release “Secretary of Energy Abraham, Canadian Minister of Natural Resources Dhaliwal to Co-chair Task Force on North American Power Outage” (August 15, 2003).

<sup>6</sup> *Id.*

<sup>7</sup> Construction of the Cross-Sound cable was essentially complete by June, 2002. *See, e.g., June 13, 2002 Cross-Sound Cable Company, LLC letter to the United States Corps of Engineers et al.*

compliance with its construction permits,<sup>8</sup> and at the same time had made it impossible for the cable's owner to obtain a remedial construction permit.<sup>9</sup>

Within hours of the August 2003 blackouts, the Honorable Spencer Abraham, United States Secretary of Energy, acting under §202 of the Federal Power Act, codified as 16 U.S.C.A. §824a(c), ordered the immediate activation of the Cross-Sound cable to alleviate the power supply emergency in both New York and Connecticut.<sup>10</sup> By its terms, the Secretary's order expired at the end of the day on August 31, 2003.<sup>11</sup>

By Sunday, August 17, 2003, power had been restored to essentially all areas blacked out three days earlier. However, the effort to identify the causes of the power failures and understand why they cascaded into wide-spread blackouts had barely begun.<sup>12</sup> Experts caution that gaining sufficient understanding of what happened on August 14 would take time and that permanent corrective measures will have to wait for that understanding.<sup>13</sup>

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<sup>8</sup> The Cross-Sound Cable Company, LLC, the cable's owner, indicates that because of rock resistant to the technology initially used to entrench the cable, seven sections under New Haven harbor are not buried the required 48 feet below mean low water. The noncomplying sections total 1,430 feet, some 7% of the cable's length in New Haven Harbor and 1% of the cable's full 24-mile length. The sections at issue miss compliance with the depth requirement by from 1 to 7 feet. *Id.* and attachments thereto. Taking into account the shortfall of each section and its length, the noncomplying sections miss the permit depth by a weighted average of 4.5 feet.

<sup>9</sup> Legislation passed by Connecticut in 2002 and renewed in 2003 prohibits administrative consideration of an application for the type of permit needed to complete excavation of the Cross-Sound cable or otherwise. *See, e.g.*, Connecticut Public Act No. 03-148 (passed June 26, 2003).

<sup>10</sup> Department of Energy Order No. 202-03-01.

<sup>11</sup> *Id.*

<sup>12</sup> North American Electric Reliability Council press release "Electric System Update: Sunday August 17, 2003, 5:00 p.m."

<sup>13</sup> Near Term Actions To Assure Reliable Operations, October 15, 2003 letter distributed by the North American Electric Reliability Council.

On Thursday, August 28, 2003, the Secretary of Energy again invoked his authority to respond to power emergencies and issued Order 202-03-02 directing that the Cross-Sound cable continue operating until the Secretary makes a formal determination that the current emergency has passed.<sup>14</sup> Order 202-03-02 stated that the bases for the Secretary of Energy's decision were that a power emergency continues to exist in the Northeast United States and in Canada, that the activation of the Cross-Sound cable on August 14, 2003 had alleviated existing power disruptions and prevented others, that the Cross-Sound cable activation was intended to assist all areas affected by the August 14 blackout; that the causes of the August 14 power failures and the reasons for the extent of the blackouts were not yet authoritatively determined; and that, until there is adequate information, all the actions appropriate for preventing similar power failures cannot be taken.<sup>15</sup>

On Friday, August 29, 2003, the Attorney General of the State of Connecticut ("Connecticut AG") and the Connecticut Commissioner of the Department of Environmental Protection ("Connecticut DEP") jointly petitioned the Secretary of Energy for "immediate rehearing, reconsideration and termination" of Order 202-03-02.<sup>16</sup> The August 29 joint petition asserted that Order 202-03-02 should be terminated because there was no power emergency, and that without an emergency the Secretary had no authority to order operation of the cable.<sup>17</sup>

On Friday, September 26, 2003, the Secretary of Energy issued a procedural ruling that, in pertinent part, granted rehearing of Order 202-03-02 for the "limited purpose of further

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<sup>14</sup> Order 202-03-02.

<sup>15</sup> *Id.*

<sup>16</sup> Petition in the form of a letter dated August 29, 2003 to Honorable Spencer Abraham from the Connecticut AG and Connecticut DEP, p. 1.

<sup>17</sup> *Id.*

consideration” and invited the submission of “comments, information and analysis on the operation of and/or effect of Order 202-03-02” by close of business Monday, October 27, 2003.<sup>18</sup>

#### IV. COMMENTS

The Eastern United States and Canada continue to be vulnerable to a repeat of the power failures that occurred on August 14, 2003.<sup>19</sup> This continuing vulnerability constitutes a genuine emergency that justifies invoking the Federal Power Act to take every reasonable precaution to protect our power supply. Operating the Cross-Sound cable is just such a precaution, and the Secretary of Energy has the authority to put that precaution in place.

##### **A. The Secretary of Energy has Authority Pursuant to the Federal Power Act to Order the Operation of the Cross-Sound Cable to Address the Emergency Electric Power Needs of the Northeast.**

The continuing vulnerability of the Northeast’s bulk power transmission grid to power disruptions and even blackouts is an emergency that the Secretary of Energy may address using Federal Power Act authority. Assertions that the Secretary may not take emergency action to prevent a repetition of August 14, 2003 are based on a misinterpretation of the relevant law.

The Secretary of Energy has authority under §202(c) of the Federal Power Act, codified as 16 U.S.C.A. §824a(c), and §301(b) of the Department of Energy Organization Act, codified as 42 U.S.C.A. §7151(b), to act to safeguard our power supply. Section 301(b) transferred to the Secretary the authority previously vested in the Federal Power [now Federal Energy Regulatory]

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<sup>18</sup> Department of Energy Order No. 202-03-03.

<sup>19</sup> See, e.g., *August 14, 2003 Outage Sequence of Events*, U.S./Canada Power Outage Task Force (September 12, 2003); Near Term Actions To Assure Reliable Operations, October 15, 2003 letter distributed by the North American Electric Reliability Council.

Commission by §824a(c), which provides in pertinent part:

[W]henver the Commission determines that an emergency exists by reason of a sudden increase for the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority... to require by order such temporary connection of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest.

Section 824a(c) thus authorizes the Secretary of Energy to act to protect the power supply during an emergency threatening or disrupting its adequate operation and enumerates illustrative emergencies. It does not, however, limit the Secretary's authority to act to just the enumerated emergencies. The Secretary's authority to act to protect our power supply is triggered by an emergency resulting from any enumerated cause "or other causes."

The petitioners incorrectly read §824a(c) as providing the Secretary of Energy authority to act in response to a very limited set of emergencies. The petitioners first assert that the Secretary of Energy may invoke §824a(c) only during "a genuine disaster, such as an act of war or major blackout."<sup>20</sup> Were that the case, the Secretary would have no authority to use §824a(c) to prevent another blackout, but would have to wait until the power fails again. This interpretation of §824a(c) is inconsistent with the plain language of the statute, which authorizes the Secretary to act before there are blackouts and to use §824a(c) to "serve the public interest." The Secretary can, of course, act once there is a blackout, but the public is far better served by preemptive action to prevent blackouts than by remedial orders after the damage is done.

The petitioners next quote a portion of §824a(c) and acknowledge that the Secretary of Energy may address power supply emergencies caused by "a sudden increase in the demand for

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<sup>20</sup> August 29, 2003 joint petition, p. 1.

electric energy.”<sup>21</sup> The petitioners do not indicate whether or not they would require the Secretary to wait until the increased demand causes a blackout. This description of the Secretary’s authority is accurate as far as it goes - but is not complete. Statutory language the petitioners do not quote provides that causes other than those enumerated may create a power emergency that triggers the Secretary’s authority to act.

Finally, the petitioners describe two additional circumstances that they believe permit the Secretary of Energy to invoke §824a(c) - when there are “brownouts,” *i.e.*, voltage so low that lighting and electric appliances cannot function normally, or “imminent service interruptions.”<sup>22</sup> This interpretation is again accurate as far as it goes but incomplete. The Secretary may use §824a(c) to respond to blackouts, brownouts and imminent power disruptions. The Secretary may also address any other emergency threatening the power supply, including the current threat to the Northeast that the operation of the Cross-Sound cable is intended to alleviate.

**B. The Continuing Vulnerability of the Bulk Power Transmission Grid Serving the Northeast to Failures Like Those that Produced Massive Blackouts on August 14, 2003 Is an Emergency Authorizing Action by the Secretary of Energy.**

The petitioners’ second line of attack on the Secretary of Energy’s order to continue operation of the Cross-Sound cable is to challenge the existence of a power emergency. Their argument is that even, if the Secretary has authority to apply 16 U.S.C. A. §824a(c) in broader circumstances than they accept, such broader circumstances are not present. Petitioners assert that there is no immediate power supply emergency today and that the Secretary can use §824a(c) only for immediate power supply problems. This analysis is incorrect. The Secretary may address both immediate and extended power supply emergencies.

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<sup>21</sup> *Id.* at p. 3.

<sup>22</sup> *Id.* at p. 5.

Power supply emergencies for the purposes of §824a(c) are not, as petitioners assert, limited to “sudden” or “urgent” circumstances.<sup>23</sup> The regulation the petitioners cite for a definition of such emergencies, 10 C.F.R. §205.371, provides in pertinent part:

“Emergency,” as used herein, is defined as an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power. Such events may be the result of weather conditions, Acts of God, or unforeseen occurrences not reasonably within the power of the affected “entity” to prevent. An emergency also can result from a sudden increase in customer demand, an inability to obtain adequate amounts of the necessary fuels to generate electricity, or a regulatory action which prohibits the use of certain electric power supply facilities. Actions under this authority are envisioned as meeting a specific inadequate power supply situation. Extended periods of insufficient power supply as a result of inadequate planning or the failure to construct necessary facilities can result in an emergency as contemplated in these regulations.”

Rather than the single limited definition the petitioners assert, the regulation sets out several definitions of “emergency,” among them “extended periods of insufficient power supply.” The Secretary of Energy therefore has authority to apply §824a(c) to extended problems as well as immediate ones.

Until the causes of the August 14 blackouts are identified and remedied, the bulk power transmission grid is as vulnerable to another such crisis as it was on the day of the outages. This vulnerability constitutes an emergency from which the grid will not be relieved until the causes are rectified.

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<sup>23</sup> August 29, 2003 joint petition, p. 3.

## V. CONCLUSION

For the reasons set forth above, the Cross-Sound cable should remain in operation until the causes initiating and permitting the spread of the massive August 14, 2003 electric power disruptions and blackout in the Northeastern United States and Ontario are identified and corrected. The continued existence of the causes of the events of August 14 is an emergency that the Secretary of Energy should and can address with the authority provided by law, including the authority set out in 16 U.S.C.A. §824a(c).

Respectfully submitted,

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Dated: October 27, 2003

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that prior to close of business this day I have served these comments by United States mail, postage paid, on:

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Dated: October 27, 2002

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