

## **FURTHER REQUEST FOR EXTENSION OF CONSOLIDATED CONSTRUCTION DEADLINES**

Pursuant to sections 1.925 and 90.155(g) of the Federal Communications Commission's ("FCC") rules,<sup>1</sup> New York State Electric & Gas Corporation ("NYSEG") respectfully requests a further extension of two years, until December 31, 2013, of the consolidated construction deadlines for its Part 22 Paging and Radiotelephone Service and Part 90 Private Land Mobile Radio Service ("PLMRS") licenses.

Because the new proposed construction date is beyond the expiration date of certain licenses, NYSEG is filing modification applications (purpose code MD) for those call signs to extend the construction deadline instead of filing requests for extension of time (purpose code EX).<sup>2</sup>

As discussed in greater detail below, NYSEG respectfully requests a further extension because the licensing process for the frequencies NYSEG has requested at sites above Line A is ongoing and NYSEG may seek additional testing or resubmission of certain frequencies that are part of NYSEG's frequency plan.

### **I. BACKGROUND**

#### **A. Licensing History of NYSEG's Radio Project**

The FCC previously granted NYSEG, a subsidiary of Iberdrola USA, Inc.,<sup>3</sup> a waiver to complete construction by December 31, 2011, of an integrated communications system covering significant portions of New York State. Although NYSEG's 150 MHz licenses collectively are intended to be used for a single integrated trunked radio system, each type of license is subject to different construction and implementation requirements. For the Part 22 Paging and Radiotelephone Service licenses, the FCC granted NYSEG a waiver until December 31, 2011, to meet the five-year deadline under Section 22.503(k)(2)-(3) to either provide coverage to two-thirds of the population in the paging

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<sup>1</sup> 47 C.F.R. §§ 1.925, 90.155(g) (2005).

<sup>2</sup> Call Signs WPVF294, WPVF309, WPVF310, WPVF312, WPVF314, WPVF790, WPVF791, WPVF792, WPXN900 and WPZP561. For these call signs, if the FCC grants the modification applications, NYSEG understands that the new construction date will be reflected as a special condition on the license or that the Universal Licensing System (ULS) records will be revised to show the new construction deadline.

<sup>3</sup> Iberdrola USA Inc. is a subsidiary of Iberdrola, S.A.

geographic areas or provide substantial service.<sup>4</sup> For the Part 90 PLMRS licenses, NYSEG must construct the licensed frequencies and place them into operation by December 31, 2011.<sup>5</sup>

Overall, NYSEG's system consists of forty-one Part 22 Paging and Radiotelephone Service licenses, of which the FCC previously accepted NYSEG's showings that it met the construction requirements for three licenses based on the rural safe harbor<sup>6</sup> and 12 licenses based on the substantial service standard.<sup>7</sup> As discussed in greater detail below, NYSEG seeks a further extension for 23 of NYSEG's Part 22 licenses. NYSEG's system also consists of 28 PLMRS licenses covering 142 base station and mobile frequencies, of which NYSEG has constructed 42 frequencies under eight licenses and seeks an extension for the remaining 100 frequencies under 20 licenses.

On January 31, 2007, the FCC granted NYSEG's Request for Extension and Consolidation of the construction deadlines for its Part 22 Paging and Radiotelephone Service and PLMRS licenses that are part of the proposed statewide, private, internal radio system.<sup>8</sup> The FCC found that "NYSEG has demonstrated that it faces unique

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<sup>4</sup> For the call signs referenced in Exhibit A, the FCC's Universal Licensing System ("ULS") includes a notation in the "Comments" section under the "Admin" tab stating that an "Extension of time to construct granted under December 31, 2011, consistent with the grant of a prior extension of time to construct. See DA 07-432." See *In re New York State Electric & Gas Corporation Request for Extension and Consolidation of Construction Deadlines*, WT Docket No. 06-173, *Order*, 22 FCC Rcd 1787 (2007); 47 C.F.R. § 22.503(k)(1)-(3).

<sup>5</sup> For the call signs referenced in Exhibit B, the FCC's ULS includes a notation in the "Comments" section under the "Admin" tab stating that an "Extension of time to construct granted under December 31, 2011, consistent with the grant of a prior extension of time to construct. See DA 07-432." *Order* ¶ 13; 47 C.F.R. § 90.155(a).

<sup>6</sup> FCC File Nos. 0004061115 (WPZW640), 0004061116 (WPZW642), and 0004061119 (WPVF298).

<sup>7</sup> FCC File Nos. 0004061114 (WPZW637), 0004061867 (WPZW639), 0004061870 (WPZW641), 0004061881 (WPVF278), 0004061888 (WPVF280), 0004061894 (WPVF285), 0004061896 (WPVF286), 0004061898 (WPWK676), 0004061903 (WPZW643), 0004061908 (WPVF292), 0004061916 (WPZP559) and 0004061917 (WPZP650). Three construction notifications based on the substantial service standard remain pending before the FCC under File Nos. 0004061899 (WPWK677), 0004061914 (WPVF293), and 0004061118 (WPVF284).

<sup>8</sup> *Order*.

circumstances, where application of the current construction benchmarks would be unduly burdensome and contrary to the public interest.”<sup>9</sup> The FCC also noted that an extension would be “consistent with the Commission’s public interest goals of promoting efficient utilization of spectrum.”<sup>10</sup> Thus, the FCC established an extended and consolidated construction deadline for these licenses of December 31, 2009.

The FCC subsequently granted several requests by NYSEG to incorporate additional licenses under NYSEG’s comprehensive construction schedule extension for the Radio System Project. The requests were granted by the Commission on May 10, 2007, February 13, 2008, March 19, 2008, and January 9, 2009.<sup>11</sup>

On August 27, 2010, the FCC granted all 23 of NYSEG’s extension requests for its Part 22 Paging and Radiotelephone service licenses. On August 30, 2010, the FCC granted all 21 of NYSEG’s extension requests for its Part 90 PLMRS licenses. The FCC established an extended and consolidated construction deadline for these licenses of December 31, 2011. On February 1, 2011, the FCC granted a request by NYSEG to incorporate additional frequencies licensed under WQJT772 under NYSEG’s comprehensive construction schedule extension for the Radio System Project.<sup>12</sup>

## **B. NYSEG’s Utility Communications**

NYSEG is a subsidiary of Iberdrola USA, Inc., a super-regional energy services and delivery company in the northeastern United States. NYSEG serves approximately 872,000 electricity customers and 256,000 natural gas customers across more than forty percent of upstate New York.

NYSEG operates conventional private land mobile and various microwave communications systems throughout its widespread service territory. These wireless communications systems facilitate NYSEG’s internal communications used in support of vital public services; namely, the reliable provision of electric and natural gas delivery service to the public. NYSEG uses these systems for a wide variety of needs, including

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<sup>9</sup> *Id.* ¶ 11.

<sup>10</sup> *Id.* ¶ 12.

<sup>11</sup> Requests for Extension and Consolidation of Construction Deadlines of New York State Electric & Gas Corporation, FCC File Nos. 0002946361 & 0002946362 (filed Mar. 12, 2007); FCC File No. 0003319705 (filed Feb. 8, 2008); FCC File No. 0003355518 (filed Mar. 10, 2008); and FCC File Nos. 0003618262, 0003618265, 0003618269, 0003618273, 0003618277, and 0003618281 (filed Oct. 22, 2008).

<sup>12</sup> FCC File No. 0004590426.

mobile voice and dispatch, backhaul, electric and gas distribution system construction and operations, emergency response, customer service operations, training, and security management.

During power outages and natural disasters, NYSEG must respond quickly and efficiently to ensure continued service to its customers. Wireless communications are of the utmost importance in these situations, particularly given that severe weather can incapacitate wireline communications and the traffic on public cellular systems during emergency and disaster conditions can make those systems inaccessible. NYSEG's two-way and dispatch radio facilities provide essential communications for its crews during restoration of gas and electric service.

Even during routine operation of NYSEG's facilities, these wireless communications systems are indispensable. Utility employees need to engage in instantaneous, uninterrupted communications with each other and with NYSEG's headquarters to ensure that work is carried out promptly, safely, and efficiently. Effective and reliable radio communications are essential in light of the field crews' frequent work with high voltage electrical wires, natural gas lines with pressures up to 600 pounds per square inch, and other potentially hazardous features of the operational infrastructure. These private radio systems allow field crew employees to respond to customer needs and to communicate with each other while coordinating inherently hazardous work. NYSEG crews must cover a widely dispersed geographic territory, including large rural areas of upstate New York. Improved area-wide communication among NYSEG's work crews is an important objective of the new Radio System.

Wireless communications systems will continue to be fundamental to NYSEG's utility operations. NYSEG supplies the core resources – gas and electricity – that permit modern society to function. Because industrial, business, and domestic operations depend on the availability of electricity and natural gas, NYSEG's utility services impact the lives of virtually everyone within its service territory. In addition to these customers, NYSEG is responsible for providing electricity and natural gas to critical facilities, including hospitals and other emergency care providers that employ life support systems and emergency response equipment. Disruptions in communications increase the risks to lives and property. Simultaneously, NYSEG must ensure the safety of field crews maintaining its infrastructure and delivering electricity and natural gas safely and efficiently to customers. Wireless communications are essential to enable NYSEG to keep its systems functioning on a 24-hour-a-day, 7-day-a-week, 365-day-a-year basis to avoid power outages (and to quickly restore services in the event of an outage) that could deprive large areas and populations of electricity and natural gas services. It goes without saying that high reliability and rapid restoration of the power grid and natural gas delivery services in disaster situations is among our nation's highest priorities. NYSEG's new Radio System will help it achieve those goals.

### **C. NYSEG's Radio System Project**

NYSEG is well underway with an upgrade of its private land mobile radio system to meet the operational demands of its expanding customer base. NYSEG has replaced its existing VHF radio systems, which was comprised of a VHF digital simulcast system serving three company divisions and has also replaced a 48 MHz single-channel simplex system in six of ten other company divisions, with a single integrated, statewide Radio System that maximizes efficiency through trunking and frequency re-use. NYSEG continues with the intent of replacing its 48 MHz single-channel system in the remaining four company divisions once a viable channel plan can be finalized. The new Radio System will feature fifty-two sites, with three frequency pairs per site allowing communications among all system users regardless of their location.

The new Radio System will provide numerous advantages over the existing system. For example, by developing an integrated, trunked radio system spanning its entire service area, NYSEG will be much better equipped to respond to emergencies and to provide day-to-day maintenance of the electric and gas transmission and distribution systems. In addition, NYSEG will mitigate congestion currently experienced on its VHF conventional systems. The new Radio System will also provide state-of-the-art communications capabilities, greatly reduce communications and response times, and ensure effective communication among NYSEG employees in the field.

### **D. Status Update on Implementation of the Radio System**

The full Radio System has been designed, constructed, and completed in nine of NYSEG's thirteen company divisions. In these nine divisions the new Radio System has completely replaced the legacy system. Rollout of the new system in the remaining four operating divisions is dependant upon acquiring sufficient spectrum in those areas.

NYSEG has made significant progress in the construction and rollout of its new Radio System. The following statistics are accurate as of November 30, 2011:

#### Transmitter Sites

- 45 (88%) - Number of transmitter sites that have been constructed (*i.e.*, antenna structures and equipment buildings installed and ready for installation of transmitters)
- 6 (12%) – Remaining number of transmitter sites to be completed

#### Base Station Transmitters

- 109 (70%) - Number of base station transmitters currently installed and operating throughout the system.

- 47 (30%) – Remaining number of base station transmitters to be deployed (all of these installations are delayed waiting for additional frequency approvals from Industry Canada).

#### End-User Radios

- Mobiles: 988 (76%) – Number Deployed 317 – Remaining To Deploy
- Portables: 197 (63%) – Number Deployed 118 – Remaining To Deploy
- Desksets: 431 (88%) – Number Deployed 60 – Remaining To Deploy

#### Operating Area

- 9 (69%) – NYSEG Operating Area currently using the new system
- 4 – NYSEG Operating Areas waiting for frequencies in order to implement

#### Geographic Area

- 11,416 square miles (69.3%) - NYSEG Service Territory being served by the new system
- 5,053 square miles (30.7%) - NYSEG Service Territory waiting for frequencies in order to implement

## **II. OVERVIEW OF WAIVER REQUEST**

While significant progress has been made to construct the system, NYSEG respectfully submits that a further extension of the consolidated construction deadlines is necessary to permit NYSEG to complete construction of its 52-site statewide radio system (“Radio System”). NYSEG’s Radio System will provide a significant enhancement to its existing communications network. As a provider of natural gas and electric utility services for over a million customers in New York State, its communications network is critical to its ability to provide reliable services throughout the State.

Specifically, NYSEG, requests a further extension for: (1) twenty-three 152/158 MHz Basic Economic Area (“BEA”) licenses issued under Part 22; and (2) twenty 150-174 MHz site-specific Part 90 licenses covering 100 base and mobile frequencies. NYSEG may need to acquire additional licenses and asks that it be allowed to amend this request to incorporate subsequently acquired licenses which will be part of its statewide Radio System.

NYSEG is requesting until December 31, 2013, to demonstrate compliance with the construction requirements so that it can complete the frequency plan for those sites that are not yet fully deployed. As the remaining sites are completed, NYSEG envisions that it will demonstrate compliance with the population benchmark, rural safe harbor, or



substantial service standard for each Part 22 call sign and confirm deployment of the Part 90 frequencies on a rolling basis.

Below, NYSEG demonstrates good cause for a waiver of section 22.503(k) to extend the five-year construction deadline for the 152/158 MHz frequencies authorized under the call signs listed on Exhibit A because the application of the construction deadlines in this case would not serve the public interest and would impose inequitable and unduly burdensome obligations. NYSEG also requests an extension of time within which to construct and place into operation the 150-174 MHz Industrial/Business Pool licenses authorized under the call signs listed on Exhibit B. As discussed below, an extension is warranted because NYSEG will not have enough time to construct these licenses due to the complexity of the Radio System project and the fact that certain implementation requirements are beyond its control. An extension is also consistent with the FCC's treatment of similarly situated licensees.

The communications systems needed to support NYSEG's operations do not require contiguous operations over wide areas and may not provide the level of population coverage anticipated by the FCC's build-out requirements. Even though NYSEG's use of this spectrum does not cover a certain percentage of the population, it is nevertheless used in support of vital public services; namely, the reliable provision of electric and natural gas delivery service to the public. NYSEG's use of this spectrum to support its utility operations actually provides benefits to a greater percentage of the population than are actually "covered" by the radio signals themselves.

Although NYSEG has made significant progress towards the implementation of the new Radio System, it will need an additional two years, until December 31, 2013, to complete construction of its new Radio System. NYSEG respectfully requests a further extension because the licensing process for the frequencies NYSEG has requested at sites above Line A is ongoing and NYSEG may seek additional testing or resubmission of certain frequencies that are part of NYSEG's frequency plan. As a result of the need to coordinate frequencies at sites above Line A in order to avoid interference to Canadian stations, NYSEG is constrained in its ability to meet the Part 22 population benchmark by serving a greater percentage of the population or meet the rural safe harbor by providing coverage to additional rural areas.

NYSEG's inability to obtain Canadian clearance to deploy certain frequencies at various sites has forced NYSEG to re-evaluate its frequency plan because all of the sites are interrelated. NYSEG's radio system is an integrated system incorporating both Part 22 frequencies and Part 90 frequencies. Thus, the coordination and clearance process for NYSEG's sites above Line A affects the frequency plan for all sites, including those below Line A. Furthermore, NYSEG's inability to deploy certain Part 22 frequencies also affects the construction and operation of the Part 90 frequencies because of the need to redesign NYSEG's frequency plan.

All of the remaining base station transmitters to be put into operation in the Radio System are at sites located above Line A. NYSEG has been working diligently to obtain coordination from Industry Canada. This process has been complicated by the fact that while certain frequencies requested on a particular application have been cleared by Canada, other frequencies have not been cleared by Canada and may require further testing.

For example, NYSEG has recently been working with the FCC staff to delete frequencies from applications that remain pending before the FCC if the frequencies have not been cleared by Canada. This has enabled the FCC to process the applications and grant the remaining frequencies that have been cleared by Canada. Per the FCC staff's instructions, NYSEG also recently filed ten applications to separate out the specific frequencies that have been cleared by Canada and license them, while the underlying applications requesting the other frequencies that have not been cleared remain pending.<sup>13</sup> However, the process takes a considerable amount of time. NYSEG and Industry Canada have conducted several on-air tests. Scheduling and conducting the on-air tests have been difficult and additional on-air testing will be necessary.

As of the date of this filing, for the twenty-three Part 22 call signs covered by this extension request there are currently 34 applications pending with the FCC requesting Canadian clearance to operate base stations or mobiles at 14 sites above Line A. Overall, there are 60 applications pending with the FCC requesting Canadian clearance at 17 sites within NYSEG's service territory.

For the twenty-three Part 22 call signs covered by this extension request, over the last two years, the FCC has granted three applications filed by NYSEG requesting Canadian clearance at three sites above Line A.<sup>14</sup> All of these applications were granted during the third quarter of 2011, so NYSEG has not had a significant amount of time to deploy these frequencies. NYSEG has also had to withdraw three applications where none of the frequencies it requested at sites above Line A were cleared by Canada, thus

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<sup>13</sup> File Nos. 0004996861 (WPVI602), 0004996867 (WPVF298), 0004996871 (WPZW642), 0004996873 (WPVI598), 0004996875 (WPVF312), 0004996879 (WPZW633), 0004996883 (WPZW634), 0004996884 (WPVI607), 0004996886 (WPVF310) and 0004997017 (WPVF790).

<sup>14</sup> File Nos. 0002605863 (WPZW635), 0002605864 (WPZW636), and 0002809550 (WPFV309). For File No. 0002605864, NYSEG withdrew its request for all of the frequencies at Ellenburg Center, NY and withdrew its request for three frequencies at Peru, NY because of Canadian concerns of interference, once again demonstrating that NYSEG is constrained in its ability to serve a greater percentage of the population due to coordination with Industry Canada.



demonstrating that NYSEG is constrained in its ability to serve a greater percentage of the population because of the need to avoid interference to Canadian stations.<sup>15</sup> NYSEG's inability to obtain Canadian clearance at various sites has forced NYSEG to re-evaluate its frequency plan because all of the sites are interrelated.

NYSEG believes it has acquired sufficient spectrum to implement its Radio System. However, with regard to spectrum to be used at sites above Line A, NYSEG is still unsure whether sufficient spectrum will be approved for use by Industry Canada. Therefore, NYSEG may need to acquire additional frequencies to cover its expansive service territory above and along Line A.

Thus, based on these circumstances, NYSEG requires a two year extension until December 31, 2013, of the consolidated construction deadlines previously granted by the FCC in order to complete this complex private land mobile Radio System in an orderly, efficient manner.

### **III. WAIVER OF CONSTRUCTION DEADLINES FOR PART 22 LICENSES**

The FCC may grant a waiver of its rules when (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>16</sup> NYSEG meets these standards because a grant of its waiver request would further the FCC's policy objectives, not harm competition in the paging industry, and would support critical utility operations.

NYSEG requests a waiver of the construction deadlines in section 22.503(k) of the FCC's rules. Specifically, NYSEG seeks a two year extension from December 31, 2011, to December 31, 2013, to demonstrate compliance with the two-thirds population benchmark or compliance with the substantial service standard for the twenty-one 152/158 MHz BEA licenses listed on Exhibit A.

While NYSEG has made substantial progress towards completion of its new Radio System, it is still in the process of upgrading its private land mobile system in the remaining four company operating divisions. Because the new Radio System is not fully deployed and the frequency assignment plan has not been finalized at numerous sites,

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<sup>15</sup> File Nos. 0002760849 (WPZW635), 0003276978 (WPVF791), and 0002804496 (WPVF792).

<sup>16</sup> 47 C.F.R. § 1.925.

NYSEG requests additional time to demonstrate compliance with the population coverage or substantial service standard for its Paging and Radiotelephone Service licenses where the frequency assignment plan is still in flux. As discussed below, NYSEG has demonstrated good cause for a waiver because application of the construction deadlines would not promote the timely use of this spectrum, would not serve the public interest, and would impose inequitable and unduly burdensome obligations.

**A. Application of the Construction Deadlines Would Not Serve the Underlying Purpose of the Rule**

A grant of the requested waiver would promote the underlying purpose of the construction deadlines. Although the FCC adopted the construction deadline to promote spectrum efficiency and to prevent spectrum warehousing, an extension of these deadlines would actually increase the overall use of the Paging and Radiotelephone Service spectrum in the 152/158 MHz band, further the FCC's policy objectives, and not harm competition in the paging industry.

A waiver would increase the overall use of the Paging and Radiotelephone Service spectrum. When the FCC initially auctioned the Paging and Radiotelephone Service frequencies in 2001, thousands of licenses remained unsold. Even when the FCC re-auctioned the spectrum in Auction No. 48, NYSEG was often the only bidder for the frequencies in its service area. Because of the underutilization of these frequencies, especially in rural areas, a waiver of NYSEG's construction deadlines would guarantee that this spectrum does not lay fallow indefinitely.

Furthermore, a waiver would help to fulfill the FCC's other spectrum policy objectives. For example, if the FCC were to extend the construction deadlines for these licenses, it would encourage growth and rapid deployment of innovative and efficient communications technologies. The FCC would also ensure that the spectrum is put to its highest and best use.

A waiver would not harm competition in the paging industry. In the years since the establishment of the Paging and Radiotelephone Service, the paging industry has witnessed the emergence of new competitors and services. The FCC recently observed that numerous mobile voice providers offer mobile data service, such as paging and text messaging, "using the same spectrum, network facilities, and customer equipment."<sup>17</sup> Although the FCC estimated that the number of paging subscribers had fallen to 5.85

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<sup>17</sup> In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 08-27, *Thirteenth Report*, 24 FCC Rcd 6185, 6197 ¶ 7 (2009).

million paging units as of the end of 2007,<sup>18</sup> it reported that “[t]he percentage of U.S. mobile telephone subscribers that uses their mobile phone for data services continued to rise in the past year.”<sup>19</sup> The FCC further noted that “providers exhibit competitive rivalry with respect to mobile data services by introducing new mobile data offerings, responding to such innovations with rival offerings and differentiating their mobile data offerings from those of their rivals”<sup>20</sup> Because of the ubiquitous nature of mobile data services, the grant of this waiver request would not materially impact the market for these services. Finally, by granting NYSEG Part 22 licenses that can be used for a private land mobile system, the FCC has already found it is in the public interest for this spectrum to be used for a service other than commercial paging. The FCC also allows this flexibility to other applicants.<sup>21</sup> Accordingly, the question of whether the extension will harm competition in the paging service is not material in these circumstances.

**B. An Extension of the Construction Deadlines Would Be in the Public Interest**

A waiver of section 22.503(k) would also serve the public interest by permitting NYSEG to use the Paging and Radiotelephone Service frequencies in support of its utility operations. These proposed operations would have a direct beneficial impact on the public because they would assist NYSEG in maintaining the safety and reliability of the electric grid and natural gas delivery infrastructure. As mentioned above, a waiver would also increase the overall use of the Paging and Radiotelephone Service spectrum in the 152/158 MHz band, fulfill the FCC’s spectrum policy objectives, and not result in any competitive harm.

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<sup>18</sup> *Id.* at 6283, ¶ 207.

<sup>19</sup> *Id.* at 6281, ¶ 201.

<sup>20</sup> *Id.* at 6264, ¶ 164.

<sup>21</sup> In re Amendment of Part 22 of the Commission’s Rules to Benefit the Consumers of Air-Ground Telecommunications Services, WT Docket No. 03-103, *Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 4403, 4446 ¶ 101, 4447 ¶ 103, 4450 ¶ 113-114, 4464 ¶ 168. When the FCC proposed this amendment to the Part 22 rules, it reasoned that the common carrier requirement had “become obsolete as a result of meaningful economic competition among providers of wireless services.” In re Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 of the Commission’s Rules, WT Docket No. 03-103, *Notice of Proposed Rule Making*, 18 FCC Rcd 8380, 8383 ¶ 5 (2003). The FCC further noted that this requirement was inconsistent with the open eligibility for other wireless services and, thus, conflicted with the regulatory parity policies for such services. *Id.* at 8392-94 ¶ 28-30.

**C. The Application of the Construction Deadlines Would Be Inequitable, Unduly Burdensome and Contrary to the Public Interest**

The application of the construction deadlines to NYSEG would be inequitable, unduly burdensome, and contrary to the public interest because of the unique nature of NYSEG's proposed Radio System. As discussed above, the proposed Radio System is unique because of its enormous size and complexity.

The proposed Radio System provides coverage to widely dispersed areas and some of the most rural parts of New York. Because the proposed Radio System operates in upstate New York, NYSEG must coordinate its operations with U.S. licensees and with Industry Canada. The proposed Radio System is also unique because it incorporates Part 22 and Part 90 frequencies, which are subject to different technical, operational, and construction requirements. Finally, if the FCC were to decline to grant an extension of the construction deadlines for these licenses, it would cause significant harm because NYSEG is already well underway in the process of converting to a new Radio System and has already invested just over Fifty Six Million (\$56,000,000) Dollars toward implementation of its new system.

**IV. EXTENSION OF CONSTRUCTION DEADLINES FOR PART 90 LICENSES**

The FCC may grant an extension of time to commence service on 150 MHz frequencies licensed under Part 90 of its rules. Section 90.155(g) permits licensees to request an extension of time to commence service on 150 MHz Industrial/Business licenses. The FCC will grant an extension "if the licensee shows that the failure to commence service is due to causes beyond its control."<sup>22</sup>

NYSEG has constructed 42 Part 90 base and mobile frequencies at 31 sites licensed under eight call signs. NYSEG requires an extension to construct and place in operation the remaining 100 base and mobile MHz frequencies licensed under 20 call signs that are regulated under Part 90. In particular, NYSEG requests an extension of the consolidated construction deadline of December 31, 2011, for the remaining frequencies until December 31, 2013. An extension is warranted because NYSEG will not have enough time to construct these licenses due to events beyond its control even though it has made substantial progress toward completing construction.

An extension is appropriate because even though NYSEG has made substantial progress, NYSEG needs additional time to construct these licenses due to events beyond

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<sup>22</sup> 47 C.F.R. § 90.155(g).

its control. As discussed above, the frequency coordination process with Industry Canada for sites above Line A has been extremely complicated and lengthy. NYSEG also must account for severe winter weather conditions that preclude construction during several months of the year.

An extension is also consistent with the FCC's treatment of similarly situated licensees. The FCC authorizes systems of similar design and complexity with construction periods up to five years in the land mobile bands above 800 MHz.<sup>23</sup> Similarly, the FCC authorizes Public Safety eligibles to construct land mobile systems on frequencies in the 150-174 MHz band within five years under the same conditions as apply to systems above 800 MHz.<sup>24</sup> In amending this extended implementation rule specifically for the benefit of Public Safety eligibles, the FCC did not suggest that non-Public Safety eligibles could not also qualify for construction periods of up to five years. The FCC proposed and adopted this rule without any discussion of why it applied only to Public Safety eligibles.

The policy reasons for this extended implementation rule apply equally to critical infrastructure entities, such as NYSEG, operating in the 150 MHz band:

APCO argues that the distinction between systems operating above and below 800 MHz is about to change because the rules adopted in the *Refarming Proceeding* will lead to the availability of new narrowband equipment and the possibility of using trunked equipment. This will, in turn, lead to larger, more complex public safety systems, and applicants for these systems are unlikely to be able to secure approvals and funding prior to when they would ordinarily seek licenses from the Commission. Thus, APCO suggests that these systems should be treated in a similar fashion to the 800 MHz systems eligible for "slow growth" consideration under Section 90.629.

We concur with APCO that eligible applicants for new public safety radio systems that require extensive planning, approval, funding, equipment acquisition, and construction, should be subject to the same regulatory requirements, regardless of the operating frequenc(ies). . . . This rule change would account for recent changes in the Commission's rules below

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<sup>23</sup> 47 C.F.R. § 90.629.

<sup>24</sup> 47 C.F.R. § 90.155(b); In re 1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Radio Services, WT Docket No. 98-182, *Report and Order and Further Notice of Proposed Rule Making*, 15 FCC Rcd 16673, 16678-79 ¶¶ 11-12, 16702 (2000).

800 MHz that create a new environment that fosters use of narrowband and trunked equipment. Further, the proposed rules will promote consistency in procedural treatment of systems in the new environment below 800 MHz with treatment of systems that have been, and continue to be, in a similar environment above 800 MHz.<sup>25</sup>

The FCC amended section 90.155(b) without further discussion or explanation. Thus, the FCC evidently adopted the amendment for the very reasons given in the *Notice of Proposed Rulemaking*.

The same policy considerations support an extension of the construction deadline for NYSEG. NYSEG has licensed a trunked, narrowband system designed to meet the efficiency standards established in the FCC's refarming proceeding. The proposed system is also more complex than land mobile systems typically licensed in the 150 MHz band because of the extremely wide area involved, the incorporation of frequencies from Part 22 and Part 90, the requirement of frequency coordination with Industry Canada, and the use of trunking technology.<sup>26</sup> In addition, because of its status as a regulated utility providing essential public services, NYSEG's planning, approval, funding, equipment acquisition, and construction are comparable to that of a public safety agency.<sup>27</sup>

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<sup>25</sup> In re 1998 Biennial Regulatory Review – 47 C.F.R. Part 90 – Private Land Mobile Radio Services, WT Docket No. 98-182, *Notice of Proposed Rulemaking*, 13 FCC Rcd 21133, 21138 ¶ 12-13 (1998).

<sup>26</sup> Because of the use of trunking technology, NYSEG's radio system must be licensed on exclusive frequency assignments. *Cf.* In re Southern California Gas Company, *Memorandum Opinion and Order*, 14 FCC Rcd 17259, 17261 ¶ 7 (1999) (denying slow-growth status for a six-site conventional land mobile system, noting that the frequencies for conventional systems in the 150-174 MHz band are shared so the licensee could reapply for its requested channels at such time as it had the necessary funding to construct the stations).

<sup>27</sup> In a number of rulemaking proceedings, the FCC has recognized that utilities are part of the nation's critical infrastructure and that they need reliable communications facilities to fulfill their public service obligations. *E.g.*, Comment Sought on the Implementation of Smart Grid Technology, NBP Public Notice #2, GN Docket Nos. 09-47, 09-51, 09-137, *Public Notice*, DA 09-2017 (rel. Sept. 4, 2009) (stating that utility "[s]mart grid technology has been identified as a promising way to use broadband and other advanced communications to promote energy efficiency, reduce greenhouse gas emissions, and encourage energy independence.");

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## V. REQUEST FOR TOLLING

NYSEG also requests that the FCC toll the construction deadlines for its licenses during the pendency of the Extension Request, pursuant to section 1.946(e) of the FCC's rules.

The FCC has substantial precedent to support the tolling of construction deadlines during the pendency of extension requests. As discussed below, support for the tolling of construction deadlines appears in the FCC's rules, the orders disposing of similar extension requests, and the automated license termination procedures.

- Section 1.946(e) of the FCC's rules states that "[t]he filing of an extension request does not automatically extend the construction or coverage period unless the request is based on . . . circumstances beyond the licensee's control, in which case *the construction period is automatically extended pending disposition of the extension request.*"<sup>28</sup> To qualify for the automatic tolling of a construction deadline, a licensee

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12-23, (June 12, 2006) (noting that “[e]lectric utility networks (including utility-owned commercial wireless networks) appeared to have a high rate of survivability following Katrina” and that utility “communications systems did not have a significant rate of failure . . . .”); In re Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969, 14974 ¶ 4 n.11 (2004) (concluding that “the very nature of services provided by . . . [utilities] involves potential hazard to life and property” and that utilities “often work hand-in-hand with Public Safety officials at the scene or an incident” and that reliable [utility] radio communications have long proven essential in speeding recovery from natural or man-made disasters”); In re The 4.9 GHz Band Transferred from Federal Use, WT Docket No. 00-32, *Second Report and Order and Further Notice of Proposed Rule Making*, 17 FCC Rcd 3955, 3971 ¶ 33 (2002) (“The very nature of the services provided by [utilities] involve potential hazards, or responding to emergency circumstances. Furthermore, such entities need reliable communications in order to prevent or respond to disasters or crises affecting their service to the public. We also recognize that in the course of their duties, these entities will need to interact with the traditional public safety service providers, and the inability to do so may affect the ability of both groups of public safety entities to fulfill their missions.”).

<sup>28</sup> 47 C.F.R. § 1.946(e)(4) (emphasis added).

must file the extension request "before the expiration of the construction or coverage period."<sup>29</sup>

- In several *Orders*, the FCC has established a policy of not terminating licenses for which the licensee filed an extension request prior to the applicable construction deadlines.<sup>30</sup> If the FCC denies the extension request, it typically concludes that the subject licenses terminated as of the construction deadline.<sup>31</sup> As long as the extension request is pending, however, those licenses remain in the possession of the licensee for months, and sometimes years, after the expiration of the construction deadlines.<sup>32</sup>
- The FCC also follows this policy as part of the "Auto-Term" feature of the Universal Licensing System. The Auto-Term feature identifies and automatically terminates licenses, locations, and frequencies for which the licensee has not filed a construction notification *or a request for an extension of the construction period* by the applicable deadline.<sup>33</sup>

Thus, these materials demonstrate that the FCC will either toll the construction deadlines, or at least not terminate the licenses, during the pendency of a timely filed extension request.

NYSEG requests that the FCC toll the construction deadlines during the pendency of the Extension Request. NYSEG also asks that in the event the FCC denies NYSEG's Extension Request, the FCC toll all construction deadlines for an additional six months from the date of the FCC's denial so that NYSEG can rely upon any construction activity between December 31, 2011, and six months from whenever the FCC issues a denial toward meeting the relevant construction requirement. This would provide NYSEG with

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<sup>29</sup> *Id.* § 1.946(e)(1).

<sup>30</sup> *E.g.*, In re Minnesota PCS Limited Partnership, File No. 0000594478, *Order*, 17 FCC Rcd 17234, 17234 ¶ 1 (2002) (denying a request for an extension of time to comply with the coverage requirements for a broadband PCS license and concluding that the license terminated over one year previously upon the expiration of the construction period).

<sup>31</sup> *E.g.*, *id.*

<sup>32</sup> *E.g.*, *id.*

<sup>33</sup> Wireless Telecommunications Bureau Announces Deployment of "Auto-Term," the Automated Feature in its Universal Licensing System That Identifies Unconstructed Stations Resulting in Automatic Termination of Licenses, *Public Notice*, 21 FCC Rcd 163, 163 (2006).

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a brief grace period during which it could complete additional construction of its system upon which NYSEG would be able to rely.

This tolling should apply to any construction periods that expired prior to the release of the order, as well as to any construction periods that will expire prior to the end of the grace period. A brief grace period would enable NYSEG to explore its options to avoid the termination of the affected licenses.

## **VI. CONCLUSION**

NYSEG respectfully requests a two year extension from December 31, 2011, to December 31, 2013, of the consolidated construction deadlines for its Part 22 and Part 90 licenses. As discussed above, the grant of a waiver of section 22.503(k), and an extension under section 90.155(g), would provide NYSEG with the necessary time to complete the construction of its proposed statewide system, permit the use of the spectrum in support of utility operations, and advance the FCC's policy objective of encouraging growth and rapid deployment of innovative and efficient communications technologies. The consolidation would also eliminate the burdens of managing different construction deadlines for different types of licenses. In the event that the FCC does not act on NYSEG's request by the December 31, 2011, construction deadline, NYSEG respectfully requests an additional six months, until June 30, 2012, to demonstrate compliance with the construction requirements for its Part 22 and Part 90 licenses.

**EXHIBIT A**  
**Part 22 Paging and Radiotelephone Service**  
**Licenses For Which a Further Extension of the Construction Deadlines is Required**

<b>BEA</b>	<b>Market Name</b>	<b>Channel Block</b>	<b>Call Sign</b>	<b>Frequencies (MHz)</b>	<b>Current Construction Deadline</b>
004	Burlington, VT-NY	FB	WPVF790	152.06/158.52	12/31/2011
004	Burlington, VT-NY	FC	WPZW633	152.09/158.55	12/31/2011
004	Burlington, VT-NY	FG	WPZW634	152.21/158.67	12/31/2011
004	Burlington, VT-NY	FH	WPZW635	152.51/157.77	12/31/2011
004	Burlington, VT-NY	FI	WPVF791	152.54/157.8	12/31/2011
004	Burlington, VT-NY	FL	WPZW636	152.63/157.89	12/31/2011
004	Burlington, VT-NY	FO	WPVF792	152.72/157.98	12/31/2011
005	Albany-Schenectady-Troy, NY	FC	WPZW638	152.09/158.55	12/31/2011
006	Syracuse, NY-PA	EC	WPZW644	158.1	12/31/2011
006	Syracuse, NY-PA	ED	WPZW645	158.7	12/31/2011
007	Rochester, NY-PA	EA	WPZW646	152.24	12/31/2011
007	Rochester, NY-PA	EC	WPZW647	158.1	12/31/2011
007	Rochester, NY-PA	ED	WPZW648	158.7	12/31/2011
007	Rochester, NY-PA	FL	WPVF294	152.63/157.89	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	EA	WPZW649	152.24	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	EC	WPZW650	158.1	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	ED	WPZW651	158.7	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	FL	WPVF309	152.63/157.89	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	FM	WPXN900	152.66/157.92	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	FN	WPVF310	152.69/157.95	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	FP	WPVF312	152.75/158.01	12/31/2011
008	Buffalo-Niagara Falls, NY-PA	FR	WPVF314	152.81/158.07	12/31/2011

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010	New York-North New Jersey-Long Island, NY-NJ-CT- PA-MA-VT	FN	WPZP561	152.69/157.95	12/31/2011
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**EXHIBIT B**  
**Part 90 Private Land Mobile Radio Service**  
**Licenses For Which a Further Extension of the Construction Deadlines is Required**

<b>Radio Service</b>	<b>Call Sign</b>	<b>Location</b>	<b>Frequencies (MHz)</b>	<b>Current Construction Deadline</b>
YG	WQDZ733	Barton (Locations 1 & 3)	153.4100	12/31/2011
			153.5075	12/31/2011
			158.4375	12/31/2011
			159.9300	12/31/2011
YG	WQEG663	Hancock (Locations 1 & 6)	153.1325	12/31/2011
			159.8550	12/31/2011
		Cobleskill (Locations 2 & 7)	153.5000	12/31/2011
			153.7100	12/31/2011
			158.2125	12/31/2011
			158.3250	12/31/2011
		Shandaken (Locations 4 & 9)	151.7900	12/31/2011
			151.9700	12/31/2011
			158.1825	12/31/2011
			159.8250	12/31/2011
		Stamford (Locations 5 & 10)	158.2500	12/31/2011
			159.8325	12/31/2011
			159.8625	12/31/2011
YG	WQEI789	Clifton Park (Locations 1 & 2)	153.3200	12/31/2011
			153.3950	12/31/2011
			158.2500	12/31/2011
			160.1250	12/31/2011
YG	WQEQ261	Binghamton	153.6950	12/31/2011



		(Locations 1 & 5)		
			160.0200	12/31/2011
		Newfield (Locations 3 & 7)	153.7100	12/31/2011
			158.2500	12/31/2011
		Dryden (Locations 4 & 8)	158.2950	12/31/2011
YG	WQEQ270	Hoosick (Locations 1 & 3)	153.0575	12/31/2011
			158.2500	12/31/2011
		Granville (Locations 2 & 4)	151.7300	12/31/2011
			153.2525	12/31/2011
			153.4700	12/31/2011
			158.2500	12/31/2011
			158.3550	12/31/2011
			159.9600	12/31/2011
YG	WQEQ425	Limestone (Locations 1 & 4)	153.5300	12/31/2011
			153.5900	12/31/2011
			153.6200	12/31/2011
			158.1900	12/31/2011
			160.0800	12/31/2011
			160.1850	12/31/2011
		Olean (Locations 2 & 5)	151.6700	12/31/2011
			153.5600	12/31/2011
			153.7250	12/31/2011
			158.3400	12/31/2011
			160.0950	12/31/2011
			160.2000	12/31/2011
		Jasper (Locations 3 & 6)	153.2000	12/31/2011
			153.6500	12/31/2011

			153.6950	12/31/2011
			158.1600	12/31/2011
			159.9150	12/31/2011
			160.1400	12/31/2011
YG	WQEQ426	Marshall (Locations 2 & 4)	153.6500	12/31/2011
			159.9900	12/31/2011
YG	WQER995	Italy Hill (Locations 2 & 6)	153.0500	12/31/2011
			158.4375	12/31/2011
		Scipio (Locations 4 & 8)	151.8500	12/31/2011
			158.3550	12/31/2011
YG	WQES833	Lockport (Locations 2 & 6)	153.6350	12/31/2011
			159.7800	12/31/2011
		Lancaster (Locations 3 & 7)	153.6800	12/31/2011
			159.9450	12/31/2011
YG	WQET480	Willsboro (Locations 1 & 6)	153.1100	12/31/2011
			159.6600	12/31/2011
		Peru (Locations 2 & 7)	153.1175	12/31/2011
			158.2650	12/31/2011
		Altamont (Locations 4 & 9)	152.9600	12/31/2011
			153.3350	12/31/2011
			158.3925	12/31/2011
			159.8700	12/31/2011
		Lowville (Locations 5 & 10)	153.2150	12/31/2011

			159.9900	12/31/2011
YG	WQFE309	Colden (Locations 1 & 2)	153.2150	12/31/2011
			158.2050	12/31/2011
YG	WQFM860	Colden (Location 1)	153.6500	12/31/2011
YG	WQGC233	Indian Lake (Locations 1 & 2)	151.5950	12/31/2011
			151.9700	12/31/2011
			153.5900	12/31/2011
			158.2500	12/31/2011
			159.6600	12/31/2011
YG	WQHE619	Bristol (Location 1)	153.5600	12/31/2011
			153.6500	12/31/2011
YG	WQIK669	Albion (Locations 1 & 2)	153.6500	12/31/2011
			158.3175	12/31/2011
			159.5700	12/31/2011
YG	WQIU903	Stamford (Locations 1 & 2)	160.1475	12/31/2011
YG	WQIU904	Barton (Locations 1 & 2)	153.1475	12/31/2011
			158.1375	12/31/2011
YG	WQJH627	Lewis (Locations 1 & 2)	153.1100	12/31/2011
			153.2300	12/31/2011
			159.6600	12/31/2011
YG	WQJH629	Woodstock (Locations 1 & 2)	153.4550	12/31/2011
			153.7250	12/31/2011

			158.2800	12/31/2011
			159.8700	12/31/2011
YG	WQJT772	Lockport (Locations 1 & 2)	153.2750	12/31/2011
			153.3950	12/31/2011
			153.6800	12/31/2011
			158.4150	12/31/2011
			159.9450	12/31/2011