BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services	)	**WT Docket No. 03-103**
	)	
Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules	)	

To: The Commission

REPLY COMMENTS OF
NEW YORK STATE ELECTRIC & GAS CORPORATION

By: Christine M. Gill
Kirk S. Burgee
Keith A. McCrickard
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

Attorneys for New York State Electric & Gas Corporation

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EXECUTIVE SUMMARY

New York State Electric & Gas Corporation ("NYSEG"), an electric and gas utility and winning bidder on a total of 138 Lower Paging Band licenses in Auction 48, supports the FCC's efforts to update and streamline the Part 22 Paging and Radiotelephone Service rules.

The proposed expansion of eligibility to all qualified entities has garnered support from a diverse group of commenters. These commenters note that the elimination of the term "common carrier" is entirely appropriate because the FCC already allows licensees to engage in non-common carrier operations on Part 22 spectrum. The proposed revision would also bring the Part 22 rules further into compliance with long-standing congressional and FCC policies promoting flexible spectrum use. The FCC has previously manifested its commitment to flexibility through the adoption of broad eligibility rules for other services and the relaxation of operational rules for Part 22 spectrum. But the FCC has not formally revised its rules to permit auction winners to use their substantial investments in spectrum for either commercial or private operations, even though such flexibility would permit the "highest and best use" of the spectrum.

The elimination of the eligibility requirement would also serve the public interest by making alternative spectrum available for critical private communications systems, increasing the overall use of these bands, and immunizing private system operators from the undue costs and administrative burdens of common carrier regulation. While a few common carrier paging providers worry that the expansion of eligibility could have adverse regulatory implications for their businesses, the proposed revision would not rescind their common carrier rights and responsibilities. The common carriage eligibility requirement is also not necessary to promote competition in the paging industry.

In addition to expanding eligibility, the FCC should also eliminate the restrictions on the provision of dispatch service on paging channels. Commenters unanimously agree that these

restrictions are obsolete in light of the FCC's flexible spectrum use policy, adoption of market-based licensing, and recent relaxation of regulatory requirements.

If certain Part 22 rule revisions require additional consideration, NYSEG urges the FCC to bifurcate the proceeding and expedite a Report and Order addressing non-controversial issues, including the proposed expansion of eligibility and elimination of the dispatch restrictions.

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New York State Electric & Gas Corporation ("NYSEG"), through its undersigned counsel, respectfully submits these Reply Comments in the above-captioned matter pursuant to Section 1.415 of the Federal Communications Commission's ("FCC") rules. NYSEG applauds the FCC's decision to update and streamline the Part 22 rules governing the Paging and Radiotelephone Service. The proposed revisions would eliminate or amend rules that no longer make sense in the context of recent market changes and increased competition. In addition, the revisions would conform the rules to long-standing congressional and FCC policies supporting the flexible use of radio spectrum. The revisions would also permit private system operators to use Paging and Radiotelephone Service frequencies for their critical communications, which would serve the public interest.

I. BACKGROUND

NYSEG is a subsidiary of Energy East Corporation, a super-regional energy services and delivery company in the Northeast United States. NYSEG serves 830,000 electricity customers and 250,000 natural gas customers across more than 40% of upstate New York. The electricity and natural gas provided through NYSEG's utility infrastructure is vital to all aspects of daily life throughout its service area.

In the FCC's recent auction of the Upper and Lower Paging Bands ("Auction 48"), NYSEG was the winning bidder on a total of 138 licenses for frequencies in the 35 MHz, 43 MHz, 152 and 158 MHz (paired and unpaired) bands of the Part 22 Public Mobile Services. NYSEG seeks to operate these licenses to provide vital real-time communications between its headquarters and field crews servicing the electric and gas infrastructure. The communications capacity afforded through the use of these frequencies will help to ensure that NYSEG carries out its operations as safely and effectively as possible, thus benefiting its employees and the public in general.

NYSEG supports the proposed revisions to the rules governing the Part 22 Paging and Radiotelephone Service. In particular, NYSEG recommends that the FCC expand eligibility for this spectrum to all qualified entities, including non-commercial entities, and eliminate the restrictions on dispatch services. These revisions reflect recent market changes, are consistent with congressional and FCC policies, and serve the public interest by allowing NYSEG and other entities to use paging spectrum in support of their critical communications.

II. THE FCC SHOULD EXPAND ELIGIBILITY FOR PAGING LICENSES TO ALL QUALIFIED ENTITIES

The FCC should eliminate the common carriage requirement for Part 22 Paging and Radiotelephone Service spectrum. NYSEG agrees with the FCC and commenters that Part 22

contains several outdated terms that are no longer relevant in the current regulatory environment. In addition, congressional and FCC policies on flexible spectrum use support the expansion of eligibility for paging licenses to include private system operators. An expansion of eligibility would also serve the public interest by granting energy companies, which are considered part of the Critical Infrastructure Industries, and Public Safety entities access to additional spectrum for their vital communications. Finally, while the imposition of common carrier obligations on private system operators would create undue costs and burdens, the expansion of eligibility would not adversely affect common carrier paging providers.

A. The FCC Should Eliminate the Term "Common Carrier" from the Part 22 Rules

NYSEG agrees with commenters that advocate the deletion of obsolete terms in the Part 22 rules.[1] In particular, NYSEG supports the FCC's proposal to replace all references to "common carrier" in Part 22 with the term "licensee."[2] The elimination of the term "common carrier" is appropriate because it no longer accurately describes the universe of operations on Part 22 spectrum. For example, Cingular Wireless notes that "[i]n many cases, Part 22 licensees act as information service providers rather than as common carriers."[3] The FCC has also granted

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[1] Comments of Blooston, Mordkofsky, Dickens, Duffy & Prendergast 2-3, 8 (Sept. 23, 2003) [hereinafter *BloostonLaw Comments*]; Comments of Cingular Wireless LLC 18 (Sept. 23, 2003) [hereinafter *Cingular Wireless Comments*].

[2] In re Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of Parts 1, 22, and 90 of the Commission's Rules, WT Docket No. 03-103, *Notice of Proposed Rulemaking*, 18 FCC Rcd 8380, 8391, 8392-93, 8394, 8396, 8409 ¶ 24, 28, 29, 30, 36, 77 (2003) [hereinafter *Part 22 NPRM*]. NYSEG also endorses the elimination of the additional channel policies in sections 22.539 and 22.569 and the definitions of "Radio Common Carrier" and "Wireline Common Carrier" in section 22.99. *BloostonLaw Comments* at 8; Comments of American Mobile Telecommunications Association, Inc. 6 (Sept. 23, 2003) [hereinafter *AMTA Comments*].

[3] *Cingular Wireless Comments* at 18.

non-common carrier status to auction winners through "its procedures, application forms, and practices."[4]

In conjunction with the elimination of this term from the Part 22 rules, the FCC must amend section 20.9(a)(6).[5] This section states that the FCC will treat Part 22 Paging and Radiotelephone Service licensees as common carriers and will regulate them as Commercial Mobile Radio Service ("CMRS") providers. To protect paging providers that wish to retain their common carrier status and obligations,[6] while offering flexibility for private system operators, the FCC should revise section 20.9(a)(6) to provide that the Paging and Radiotelephone Service can be either CMRS or Private Mobile Radio Service ("PMRS"). This revision should cover all actual and potential operations on these frequencies because the definition of "PMRS" encompasses private carriers and private, internal licensees.[7]

B. Congressional and FCC Policies Support Broad Eligibility

The eligibility restriction is also unnecessary because Congress and the FCC have pursued a consistent course of deregulation of wireless operations for the past decade to allocate that spectrum in accordance with its highest and best use.[8] The supervening changes in the

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[4] *BloostonLaw Comments* at 1.

[5] 47 C.F.R. § 20.9(a)(6) (2002).

[6] Comments of Arch Wireless Operating Company, Inc., Allied National Paging Association, American Association of Paging Carriers, Metrocall Holdings, Inc., and Weblink Wireless, I, L.P. 5-8 [hereinafter *Paging Joint Commenters*]; Comments of Able Communications 4 (Sept. 23, 2003) [hereinafter *Able Communications Comments*].

[7] 47 C.F.R. § 20.3 ("Private mobile radio service includes . . . [n]ot-for-profit land mobile radio and paging services that serve the licensee's internal communications needs [and] . . . mobile radio service offered to restricted classes of eligible users.").

[8] Federal Communications Commission, *Strategic Plan FY 2003-FY 2008* at 5 (2002).

governing statute and related rules since the initial promulgation of the restriction support the expansion of eligibility to non-common carriers, including private system operators.

1. Congress Mandates Flexible Spectrum Use for Auctioned Spectrum

In the Omnibus Budget Reconciliation Act of 1993, Congress embarked on a new regulatory regime through the adoption of a flexible spectrum use policy. Specifically, Congress added section 309(j) to the Communications Act, providing the FCC with the express authority to use competitive bidding to choose among mutually exclusive applications for initial licenses.[9]

The FCC has interpreted the competitive bidding requirement as "promoting economic growth and enhancing access to telecommunications service offerings for consumers, producers, and new entrants" and adopted corresponding rules to allow the rapid implementation of new and innovative services, encourage efficient spectrum use, and foster economic growth.[10] The purpose of this statutory requirement is to create economic incentives to ensure that the spectrum naturally flows to its "highest and best use."

2. Recent FCC Policies Support Flexible Use of Part 22 Paging and Radiotelephone Spectrum

In response to this congressional mandate, the FCC has adopted several orders and modified countless rules to increase flexibility in traditional CMRS spectrum bands. NYSEG

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[9] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 387-396 (1993). Congress subsequently amended this competitive bidding provision to require the FCC to use the auction process. Balanced Budget Act of 1997, Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

[10] In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PR Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2349 ¶ 3-7 (1994).

supports comments that ask the FCC to continue its decade-long trend towards flexible spectrum use by expanding eligibility to non-common carriers under Part 22.[11]

The FCC has advocated flexible spectrum use in multiple policy pronouncements. BloostonLaw traces the development of this flexible spectrum use policy in the *Spectrum Policy Statements* of 1999 and 2000, noting that the FCC has concluded that "[l]icensees/users should have flexibility in determining the services to be provided and the technology used for operation consistent with other policies and rules governing the service."[12] These policy statements illustrate the FCC's plan to adopt more flexible service rules and eligibility criteria as a means of ensuring the "highest and best use" of the spectrum.

In addition to general policy pronouncements, the FCC's commitment to increased flexibility has manifested itself in the adoption of broad eligibility rules for several newly allocated services. In the *Part 22 NPRM*, the FCC cites the generous eligibility standards for the Personal Communications Services, Miscellaneous Wireless Services, and Wireless Communications Services, which provide that "[a]ny entity . . . is eligible to hold a license under this part," subject to foreign ownership restrictions.[13]

Other commenters identify additional examples of expansive eligibility for various wireless services,[14] including the (1) Lower 700 MHz Band (648-746 MHz);[15] (2) Upper 700

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[11] *BloostonLaw Comments* at 3-7; Joint Comments of Emergency Radio Service, Inc., Saia Communications, Inc., KTI, Inc., and Texas License Consultants 3-4 (Sept. 23, 2003) [hereinafter *Dispatch Joint Commenters*]; *AMTA Comments* at 6.

[12] *BloostonLaw Comments* at 5 (quoting Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, 15 FCC Rcd 24178 (2000)).

[13] *Part 22 NPRM*, 15 FCC Rcd at 8392-93 ¶ 28; *see* 47 C.F.R. §§ 24.12, 27.12.

[14] *BloostonLaw Comments* at 5-6.

MHz Band (747-762 MHz and 777-792 MHz);[16] and (3) Cable Television Relay Service.[17] Commenters also observe that the FCC has "permit[ted] applicants to self-select their regulatory status without significant limitation[] and even change their regulatory status without prior FCC approval" in the 24 GHz band.[18] The FCC has also adopted expansive eligibility rules for third generation broadband and advanced wireless services in the 1.7 GHz and 2.1 GHz bands.[19] NYSEG agrees with these commenters that the FCC should incorporate the same type of broad eligibility provision into its Part 22 rules.

The FCC has also modified its Part 22 rules on several occasions to promote flexible spectrum use. For example, NYSEG notes that the FCC completely revised its Public Mobile Service rules in a 1994 *Report and Order* to afford licensees greater flexibility in providing service to the public.[20] The FCC revised its Part 22 rules to permit (1) the concurrent use and licensing of facilities for both common carrier and non-common carrier services, (2) the use of multi-channel transmitters, and (3) the addition of "internal" transmitters to existing systems

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[15] In re Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Notice of Proposed Rulemaking*, 16 FCC Rcd 7278 (2001).

[16] In re Service Rules for 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476 (2000).

[17] In re Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service, *Report and Order*, 17 FCC Rcd 9930 (2002).

[18] *Dispatch Joint Commenters* at 4 (citing In re Amendments to Parts 1, 2, 87, and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16946-16948 ¶ 25-29 (2000)).

[19] FCC Adopts Third Generation ("3G") Rules Making 90 MHz of Spectrum Available for Broadband and Advanced Wireless Services, News Release (Oct. 16, 2003).

[20] In re Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-116, *Report and Order*, 9 FCC Rcd 6513 (1994).

without notification to the FCC.[21] In 1995, the FCC further relaxed its rules by repealing its prohibition on the provision of non-interconnected dispatch service by Part 22 licensees, as long as interconnected service is available.[22] The FCC revised its Part 22 rules again in 1996 to allow CMRS paging providers to offer exclusively fixed wireless services on a co-primary basis with mobile services.[23] In 2002, the FCC removed the restrictions on the provision of incidental services by Part 22 licensees, including rules on rates and the quality and availability of the primary service.[24] The next logical step toward flexible spectrum use would be to eliminate the Part 22 prohibition on non-common carrier eligibility.

This flexibility should also extend to the Part 22 eligibility rule because it governs auctioned spectrum. While AMTA endorses a flexible regulatory structure for auctioned services, "[g]iven the interest in this spectrum from PMRS telecommunications carriers and private internal operators in the recent Auctions 40 and 48,"[25] BloostonLaw asserts that the FCC already permits the use of auctioned spectrum for commercial and private operations.[26] As a winning bidder in Auction 48, NYSEG agrees that auctioned licensees should have the flexibility

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[21] *Id.* at 6519, 6527-28, ¶ 25, 67-70.

[22] In re Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, *Report and Order*, FCC 95-98, 18 ¶ 29 n.96 (1995), *aff'd*, *Memorandum Opinion and Order*, FCC 97-213 ¶ 12 (1997).

[23] In re Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965, 8977 ¶ 24 (1996).

[24] In re Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, WT Docket No. 01-108, *Report and Order*, 17 FCC Rcd 18401 ¶ 67-68 (2002).

[25] *AMTA Comments* at 6.

[26] *BloostonLaw Comments* at 2.

to use their often substantial investments in spectrum for either commercial or private operations. NYSEG further believes that restricting the permissible operations on auctioned spectrum is directly at odds with congressional and FCC policies to advance spectrum efficiency, technological innovation, and the "highest and best use" of this spectrum.

C. The Expansion of Eligibility Would Serve the Public Interest

NYSEG agrees with commenters that the proposed elimination of the eligibility restriction would serve the public interest. BloostonLaw accurately asserts that "[p]ublic safety systems and specialized private users face increasing spectrum requirements, and there are often not enough available Part 90 channels to satisfy this demand."[27] NYSEG believes that Part 22 Paging and Radiotelephone Service spectrum could alleviate this demand by providing alternative frequencies for Critical Infrastructure Industry and Public Safety dispatch operations, while increasing the overall use of these bands.

The ability of energy utilities, such as NYSEG, to have spectrum available for their private system operations would have a direct beneficial impact on the public by assisting utilities in maintaining the safety and reliability of the electric grid and natural gas delivery infrastructure. Furthermore, providing companies like NYSEG with flexibility to use Part 22 spectrum in a private mode would increase the use of the paging bands. Although the FCC initially auctioned the Lower Paging Band frequencies in 2001, thousands of licenses remained unsold. Because of the underutilization of these frequencies, the elimination of the eligibility requirement is necessary to put this auctioned spectrum to its "highest and best use." Thus, the expansion of eligibility to private system operators would help to fulfill the FCC's objective of vigorous spectrum use.

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[27] *Id.* at 7.

D. The Continued Application of the Eligibility Restriction Would Be Inequitable and Unduly Burdensome

NYSEG further supports comments stating that "[c]ommon carrier obligations are administratively burdensome and impose unnecessary costs upon [Public Mobile Service] providers that choose to establish non-interconnected and/or internal or other private use operations."[28] As discussed in greater detail above, the FCC has already permitted licensees to use Lower Paging Band facilities and a variety of other wireless services for common carrier and non-common carrier services, including non-interconnected dispatch service and private, internal operations. Given these circumstances, NYSEG submits that withholding operational flexibility enjoyed by licensees in other similar services would be arbitrary and unsupportable by any legitimate policy consideration.

E. The Elimination of the Eligibility Restriction Would Not Harm Common Carrier Paging Providers

NYSEG also agrees with commenters who note that expanding eligibility to include private users would not adversely affect common carrier paging licensees.[29] A common carrier licensee, and an association that represents common carriers, also request the elimination of the eligibility requirement, implicitly affirming the absence of any harmful effects to such licensees.[30]

The common carriage requirement for the Part 22 Paging and Radiotelephone Service is a vestige of a prior regulatory environment and is no longer necessary to promote competition in the paging industry. Although Able Communications expressed concern about the effect of

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[28] *Id.*

[29] *Id.* at 7-8.

[30] *Cingular Wireless Comments* at 17-18; *AMTA Comments* at 6.

broad eligibility on competition in the paging industry,[31] the common carriage requirement has "become obsolete as a result of meaningful economic competition among providers of wireless services."[32]

The years since the establishment of the Paging and Radiotelephone Services have witnessed the emergence of a wide variety of wireless providers and numerous alternatives for the public to obtain paging service. In the *Seventh Annual CMRS Competition Report*, the FCC observed that "competition within the mobile data sector is developing successfully, as evidenced by the multitude of dynamic services, service packages, and pricing plans available to customers from a variety of providers."[33] In the paging mobile data subsector, the FCC estimated that 18 million paging units were in service as of mid-2001 and that hundreds of paging operators compete for business.[34] In addition to these traditional paging providers, other CMRS providers have recently expanded their businesses to include advanced mobile data services.[35] Because of the substantial number of paging providers in operation, and the ubiquity of this service, it is not necessary at this juncture to restrict the uses for this spectrum.

In addition to no longer serving its original purpose, the eligibility restriction is not necessary to protect the rights and responsibilities of paging providers. While Able Communications and the Paging Joint Commenters worry that any expansion of eligibility would

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[31] *Able Communications Comments* at 4.

[32] *Part 22 NPRM*, 15 FCC Rcd at 8383 ¶ 5.

[33] In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, *Seventh Report*, 17 FCC Rcd 12985, 13039 (2002).

[34] *Id.* at 13049-50.

[35] *Id.*

somehow rescind their status as common carriers,[36] the proposed rule revision would merely permit Part 22 licensees to choose common carrier or non-common carrier status. NYSEG agrees with BloostonLaw that "it is equally important to confirm that those licensees choosing CMRS status will retain their rights as 'common carriers' for purposes of interconnection rights and others under Title II of the Communications Act."[37] As explained above, the FCC could reword its Part 20 rules to protect these rights, while expanding eligibility. The eligibility restriction is also not necessary because regulation as a common carrier or non-common carrier is exclusively a function of how the carrier holds itself out to the public.[38] Thus, allowing additional classifications of user to license the spectrum would not foreclose the availability of common carrier status for paging providers.

III. THE FCC SHOULD ELIMINATE RESTRICTIONS ON THE PROVISION OF DISPATCH SERVICE ON PAGING CHANNELS

Commenters unanimously support the FCC's proposal to eliminate the restrictions on the provision of dispatch services on paging channels under sections 22.577 and 22.565(g), including the notification requirement, output power and effective radiated power limitations, and functionality restriction on dispatch transmitters.[39]

NYSEG agrees with these commenters that the dispatch restrictions "are the residue of a long-abandoned regulatory scheme" and "serve no useful technical, operational or competitive

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[36] *Able Communications Comments* at 4; *Paging Joint Commenters* at 6.

[37] *BloostonLaw Comments* at 7.

[38] *National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). An entity that holds itself out indiscriminately to serve the public, for example, by advertising via mass media and providing standardized service at non-negotiable rates, is likely to face regulation as a common carrier. *Id.*

[39] *BloostonLaw Comments* at 8-9, *AMTA Comments* at 6-7, *Dispatch Joint Commenters* at 5-6.

purpose."[40] In addition, NYSEG endorses BloostonLaw's belief that these requirements are no longer necessary "in light of the Commission's flexible spectrum use policy, its migration toward market area licensing on the Part 22 channels, and relaxation over the years of its regulatory requirements."[41]

IV. THE FCC SHOULD EXPEDITE ITS DECISION ON NON-CONTROVERSIAL ISSUES

The FCC has requested comment on a wide range of issues in this proceeding. While commenters have addressed a few contentious issues, the vast majority of the FCC's proposals received unanimous support, specious resistance, or no comment at all. For example, the proposed rules on air-ground communications generated a substantial response and, as a result, may take some time to resolve. In contrast, commenters overwhelmingly favor the elimination of the restrictions on dispatch service and generally approve of an expansion of eligibility. If the FCC finds that it will require additional time to resolve issues regarding air-ground communications or other aspects of the *Part 22 NPRM*, NYSEG urges the FCC to bifurcate the proceeding and expedite a Report and Order addressing issues that are not in controversy.

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[40] *AMTA Comments* at 6-7; *see Dispatch Joint Commenters* at 5; *BloostonLaw Comments* at 8.

[41] *BloostonLaw Comments* at 8; *see Dispatch Joint Commenters* at 5.

WHEREFORE, THE PREMISES CONSIDERED, NYSEG respectfully requests that the FCC expand eligibility for paging spectrum licenses to include all qualified entities, including non-commercial entities, and eliminate the restrictions on dispatch services. As discussed in greater detail above, these rule revisions are consistent with recent market changes. In addition, they would conform to the congressional and FCC policies of encouraging growth and rapid deployment of innovative and efficient communications technologies. In contrast, the eligibility and dispatch restrictions represent an outdated and unnecessarily limited means of administering spectrum and are not in the public interest.

Respectfully submitted,

NEW YORK STATE ELECTRIC & GAS

By: /s/ Christine M. Gill

Christine M. Gill
Kirk S. Burgee
Keith A. McCrickard
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
(202) 756-8000

Dated: October 23, 2003

CERTIFICATE OF SERVICE

I, Jennifer Medile, hereby certify that on October 23, 2003, the foregoing "Reply Comments" were served as indicated on each of the following:

Filed Electronically

Marlene H. Dortch , Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-325
Washington, DC 20554

U.S. Mail

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John Muleta
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Richard Arsenault
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

/s/ Jennifer Medile

Jennifer Medile