

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
NORTHEAST UTILITIES SERVICE)	File No. 0003026497
COMPANY)	
To Modify License for Station WQEJ718)	
)	
PAGING SYSTEMS, INC.)	File No. 0003202834
To Modify License for Station WQA216)	

ORDER

Adopted: March 17, 2009

Released: March 20, 2009

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* On May 11, 2007, Northeast Utilities Service Company (“NUSCO”) filed an application to modify its Automated Maritime Telecommunications System (“AMTS”) geographic license, Call Sign WQEJ718, to add facilities at six locations in southwestern Connecticut (Southbury, Redding, Monroe, Bridgeport, Greenwich, and Norwalk).¹ Paging Systems, Inc. (“PSI”), licensee of site-based co-channel AMTS Station WQA216, New York, New York, filed a petition to dismiss or deny the NUSCO application, alleging that NUSCO’s proposal fails to provide Station WQA216 adequate interference protection.² On October 18, 2007, PSI filed an application to modify its license for Station WQA216 to change the location of the licensed transmitter from the North Tower of the World Trade Center (“WTC”) to Times Square.³ Petitions to deny the PSI application were filed by NUSCO and Skybridge Spectrum Foundation (“Skybridge”).⁴ For the reasons set forth below, we grant NUSCO’s and Skybridge’s petitions, and will dismiss PSI’s modification application. We also deny PSI’s petition, and will grant the NUSCO application with respect to the Greenwich and Norwalk sites, and dismiss it as

¹ FCC File No. 0003026497 (filed May 11, 2007) (“NUSCO Application”).

² See PSI, Petition to Dismiss or Deny (filed June 22, 2007) (PSI Petition). On July 16, 2007, NUSCO filed an opposition. NUSCO, Opposition to Petition to Dismiss or Deny (filed July 16, 2007) (“NUSCO Opposition”). PSI filed a reply on July 27, 2007. PSI, Reply to Opposition to Petition to Dismiss or Deny (filed July 27, 2007) (“PSI Reply”).

³ FCC File No. 0003202834 (filed October 18, 2007, amended December 5, 2007) (“PSI Application”).

⁴ NUSCO, Petition to Deny Modification (filed November 21, 2007) (“NUSCO Petition”); Skybridge, Petition to Deny Modification (filed November 23, 2007) (“Skybridge Petition”). (Because the PSI application appeared on public notice on October 24, 2007, see *Public Notice*, Rep. No. 3537 (released October 24, 2007), petitions to deny were due November 23, 2007. See 47 C.F.R. § 1.939(a)(2). On November 24, 2007, Skybridge submitted an Erratum and Amendment to its petition, which sought to supplement the petition by adding a declaration setting forth additional facts. Because the Erratum and Amendment was filed after the petition to deny was due, the additional information is untimely, and has not been considered. See, e.g., Amendment of the Commission’s Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391, 24397 ¶ 14 (2003), *recon. dismissed*, *Order on Further Reconsideration*, 23 FCC Rcd 329 (WTB MD 2008), *recon. pending*; Maritime Communications/Land Mobile, LLC, *Order*, 21 FCC Rcd 8794, 8795 n.15 (WTB PSCID 2006), *recon. denied*, *Order on Reconsideration*, 22 FCC Rcd 4780 (WTB MD 2007), *recon. and review pending*.) PSI filed an opposition to the petitions on December 5, 2007. PSI, Opposition to Petitions to Deny (filed December 5, 2007) (“PSI Opposition”). NUSCO filed a reply on December 17, 2007. NUSCO, Reply to Oppositions to Petitions to Deny (filed December 17, 2007) (“NUSCO Reply”).

moot with respect to the Southbury, Redding, Monroe, and Bridgeport sites.

2. *Background.* AMTS stations provide automated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels,⁵ and also may provide service to units on land.⁶ In 2002, the Commission adopted a geographic area licensing approach for AMTS stations.⁷ Under Section 80.385(b)(1) of the Commission's Rules, a geographic licensee that locates facilities within 120 kilometers of a co-channel site-based incumbent must provide at least 18 dB protection to the site-based licensee's 38 dBu signal level contour.⁸ Site-based licensees may operate fill-in transmitters without separate authorization, provided that the fill-in site's predicted interference contour is fully encompassed by the composite interference contour of the licensed transmitter(s),⁹ and may modify their licenses, provided that the modification does not extend the system's composite service area.¹⁰

3. The six sites proposed in the NUSCO application are within 120 kilometers of the licensed location of Station WQA216. As required by Section 80.385(b)(1), NUSCO submitted a technical analysis indicating that the proposed operations would provide the required degree of interference protection.¹¹ NUSCO had to make certain assumptions regarding Station WQA216's technical parameters, given the destruction of the WTC on September 11, 2001.¹² In the alternative, NUSCO argued that PSI's license for Station WQA216 should be deemed to have canceled automatically pursuant to Section 80.49(a)(3) of the Commission's Rules¹³ because the station was never placed into operation,¹⁴ or, if the station was placed into operation, that the license should be deemed to have canceled automatically pursuant to Section 1.955(a)(3) of the Commission's Rules¹⁵ due to permanent discontinuance of operations in light of the destruction of the WTC.¹⁶

4. In support of its petition to dismiss or deny NUSCO's application, PSI submitted an

⁵ See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, GEN Docket No. 88-372, 6 FCC Rcd 437, 437 ¶ 3 (1991).

⁶ See MariTEL, Inc. and Mobex Network Services, LLC, *Report and Order*, WT Docket No. 04-257, 22 FCC Rcd 8971, 8974-78 ¶¶ 4-10 (2007), *recon. pending*.

⁷ See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6696 ¶ 24 (2002) ("*Public Coast Fifth Report and Order*").

⁸ 47 C.F.R. § 80.385(b)(1).

⁹ See 47 C.F.R. § 80.475(b).

¹⁰ See *Public Coast Fifth Report and Order*, 17 FCC Rcd at 6701 ¶ 34.

¹¹ See NUSCO Application, Exhibit "Southwest Connecticut Coast Station Location" ("NUSCO Location Exhibit"), Attachment 1 "Analysis of Interference Potential in the 217 MHz Band prepared by UTC Spectrum Services (March 23, 2007)" ("NUSCO Interference Analysis").

¹² See NUSCO Location Exhibit at 2; NUSCO Interference Analysis at 2-3. AMTS site-based incumbents are expected to cooperate with geographic licensees in order to avoid and resolve interference issues. *Cf. Public Coast Fifth Report and Order*, 17 FCC Rcd at 6704 ¶ 39. This includes, at a minimum, providing upon request sufficient information to enable geographic licensees to calculate the site-based station's protected contour.

¹³ 47 C.F.R. § 80.49(a)(3).

¹⁴ See NUSCO Location Exhibit at 2-5.

¹⁵ 47 C.F.R. § 1.955(a)(3).

¹⁶ See NUSCO Location Exhibit at 5-8.

engineering study (utilizing technical parameters for Station WQA216 different from NUSCO's assumptions, resulting in a larger predicted contour) indicating that NUSCO's proposed Greenwich and Norwalk sites would not afford Station WQA216 the required degree of interference protection.¹⁷ PSI also states that it timely constructed at the WTC¹⁸; and that the station's operations have not been permanently discontinued, as evidenced by PSI's construction of temporary fill-in sites and its efforts to secure space on Freedom Tower, which is being constructed on the WTC site.¹⁹

5. While the NUSCO application was pending, PSI sought to modify its license for Station WQA216 to change the location of the licensed transmitter to Times Square, where PSI currently operates a fill-in transmitter. PSI submitted an engineering study indicating that the proposed modification would not extend Station WQA216's service area.²⁰ In opposition to the PSI application, NUSCO reiterated the arguments it raised previously -- that PSI relies on incorrect parameters that overstate the contour of WTC site, and, alternatively, that PSI's license for Station WQA216 was already terminated for failure to construct or for permanent discontinuation of operation.²¹ The Skybridge petition references the arguments in the NUSCO petition.²²

6. On January 11, 2008, NUSCO filed a separate application to modify its license for

¹⁷ See PSI Petition at 2; *id.*, Exhibit 1 "Engineering Statement" at 1 ("PSI Engineering Statement").

¹⁸ See PSI Petition at 3-4.

¹⁹ See PSI Petition at 2; PSI Reply at 3-5, 8-9. On August 4, 2007, the Wireless Telecommunications Bureau, Mobility Division ("Division") directed PSI, pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), to provide additional information regarding its efforts to reconstruct Station WQA216 on Freedom Tower. See Letter dated August 2, 2007 from Scot Stone, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Susan Cooper, President, PSI. PSI responded on September 4, 2007, providing documentation of communications beginning in 2005 between PSI and the entity administering Freedom Tower antenna issues. See Letter dated September 4, 2007 from Audrey P. Rasmussen, Esq., Counsel for PSI, to Stana Kimball, Mobility Division, Wireless Telecommunications Bureau ("PSI Letter"). NUSCO filed a reply on September 11, 2007. On September 21, 2007, PSI filed a rebuttal. NUSCO filed a surrebuttal on October 4, 2007. Material in the reply, rebuttal, and surrebuttal going beyond the matters in the Mobility Division's letter has not been considered. Contrary to NUSCO's assertion, the Division's narrow inquiry letter did not "initiate[] a further round of pleadings related to the issues raised in the NUSCO application." See NUSCO Surrebuttal at 2.

²⁰ See "PSI Engineering Statement" at 1-2. The Division requested that PSI accordingly supplement its petition to deny NUSCO's modification application to indicate whether PSI believed that NUSCO's proposed operations met the co-channel interference requirements with respect to PSI's proposed Times Square location. See Electronic mail dated October 18, 2007 from Scot Stone to Audrey Rasmussen. On November 19, 2007, PSI filed a supplement, asserting that NUSCO's proposed operations would cause impermissible interference to PSI's proposed Times Square location. NUSCO filed an opposition on December 3, 2007. PSI filed a reply on December 13, 2007.

²¹ See NUSCO Petition at 2-6.

²² See Skybridge Petition at 1. Given that we must address the issues in the context of NUSCO petition, we need not address PSI's contention that Skybridge lacks standing. See PSI Opposition at 1 n.1. Skybridge also requests that the undersigned official not participate in the present matter, "due to his previous advising Paging Systems Inc. on matters relating to the [PSI] Application in violation of FCC ex parte rules, and common fairness." *Id.* The referenced communication (NUSCO Location Exhibit, Attachment 3, Exhibit 2), which predated the PSI application by more than two years, discussed a PSI fill-in site and did not address the construction or operational status of the WTC facility, and was promptly provided to Skybridge's principal. Nor does Skybridge explain how "common fairness" requires recusal. "The test for recusal in an adjudicatory proceeding on the ground of bias or the appearance of bias is whether 'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a case in advance of hearing it.'" *Liberty Productions, Order*, 16 FCC Rcd 18966, 18973 ¶ 6 (2001) (quoting *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1998)). Skybridge has made no such showing. Consequently, we deny its request that the undersigned official not participate in the present matter.

Station WQEJ718 to add only the Southbury, Redding, Monroe, and Bridgeport sites, *i.e.*, the four sites to which PSI did not object.²³ The application was granted on April 8, 2008.²⁴ Therefore, we will dismiss the above-captioned NUSCO application as moot with respect to those four sites, and consider it only with respect to the Greenwich and Norwalk sites.

7. *Discussion. Construction of Station WQA216.* PSI's original application and the license for Station WQA216 indicate that the antenna was located on the WTC antenna mast. In support of its assertion that the station was never placed into operation, NUSCO presents evidence that PSI did not have access to the WTC antenna mast.²⁵ PSI responds that the station was constructed on the WTC roof, rather than on the antenna mast.²⁶ NUSCO questions this assertion, because PSI presented only a declaration by its construction agent, and no documentary evidence.²⁷ NUSCO also argues that if the station was constructed other than as licensed, it should be deemed not to have been constructed.²⁸

8. Under the present circumstances, where documentary and other evidence that could more definitively establish the facility's construction *vel non* no longer exists due to circumstances beyond the licensee's control, we are reluctant to hold that an authorization automatically terminated at some point in the past and should therefore be deleted from our licensing database.²⁹ Therefore, while the evidence proffered by PSI is less than overwhelming, we conclude, based on the record before us, that PSI constructed a station on the WTC roof. We also agree with PSI³⁰ that such construction sufficiently conformed to the licensed parameters that the station should be deemed to have been constructed.³¹

9. *Permanent discontinuance of operation.* The WTC facility has not operated since September 11, 2001. NUSCO argues that, as a consequence, the license for Station WQA216 has terminated pursuant to Section 1.955(a)(3) due to permanent discontinuance of operation.³² As NUSCO notes,³³ Part 80, unlike some rule parts,³⁴ does not set forth a specific period of non-operation after which the operation will be deemed to have permanently discontinued. NUSCO nonetheless argues that regulatory parity requires that AMTS licensees not be permitted to discontinue operations for longer

²³ FCC File No. 0003282861 (filed January 11, 2008).

²⁴ See Letter dated April 4, 2008 from Scot Stone, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Audrey P. Rasmussen, Counsel for PSI (denying PSI's objection).

²⁵ See NUSCO Location Exhibit, Attachments 9 (Educational Broadcasting Corporation ("EBC") petition to deny PSI application, stating that EBC's master lease for the WTC antenna mast permitted use only by broadcasters, and that PSI was thus precluded from installing an antenna there), 11 (affidavit of Frank Graybill, chief engineer for the broadcaster responsible for the WTC antenna mast, stating that PSI never constructed on the WTC antenna mast).

²⁶ See PSI Petition at 3-4; *id.*, Exhibit 3 (Declaration of David Kling).

²⁷ See NUSCO Opposition at 12-13. NUSCO also notes that the construction agent is a PSI affiliate. *Id.* at 13.

²⁸ *Id.* at 12.

²⁹ See, e.g., Cumulus Communications Corporation, *Order*, 18 FCC Rcd 11449, 11450 ¶¶ 6-7 (WTB PSPWD 2003), *aff'd*, *Memorandum Opinion and Order*, 19 FCC Rcd 15631 (WTB PSCID 2004).

³⁰ See PSI Reply at 4, 6.

³¹ See, e.g., Bay Ventures, *Order*, 17 FCC Rcd 8766, 8771-72 ¶ 19 (WTB CWD PRB 2002) (fifteen to thirty-five percent discrepancy in antenna height is not sufficient to warrant license termination for failure to construct). PSI nonetheless remains responsible for promptly correcting the technical information in the Commission's licensing database.

³² See NUSCO Location Exhibit at 5-8; NUSCO Opposition at 12-16.

³³ See NUSCO Location Exhibit at 5, 8.

³⁴ See, e.g., 47 C.F.R. §§ 90.157, 101.65(b).

periods than licensees in other services.³⁵ NUSCO also contends that PSI's failure to attempt to relocate the licensed location until 2007 reflects an abandonment of the license, and that PSI cannot claim to intend to resume operation at the same location due to continuing uncertainty regarding the site.³⁶ We are not persuaded by NUSCO's arguments.

10. Instead, we agree with PSI³⁷ that it would be inappropriate to, retroactively and without notice, apply to Part 80 stations the definition of permanent discontinuance set forth in other rule parts. While we agree with NUSCO that Part 80 licensees may not cease operations indefinitely without the license terminating for permanent discontinuance,³⁸ we conclude that the lack of a Part 80 definition requires us to evaluate claims of permanent discontinuance on a case-by-case basis. That PSI did not immediately seek to modify its authorization to relocate the licensed site can be explained by the fact that the rules permit AMTS licensees to operate fill-in stations.³⁹ In addition, the record demonstrates that PSI has exercised due diligence in its efforts to secure space on Freedom Tower.⁴⁰ We conclude that the evidence before us sufficiently demonstrates that the discontinuance of operation is not yet permanent.

11. Station WQA216 contour. As noted above, an AMTS geographic licensee that locates facilities within 120 kilometers of a co-channel site-based incumbent must provide at least 18 dB protection to the site-based licensee's 38 dBu signal level contour,⁴¹ and site-based licensees may modify their licenses only if the modification does not extend the system's composite service area in any direction.⁴² Thus, we must consider the WTC facility's contour in order to determine whether NUSCO's proposed sites afford adequate protection to Station WQA216, and whether PSI's proposed relocation expands the station's service area. That consideration has been complicated in this matter by the fact that the facility no longer exists and cannot be replicated.

12. NUSCO and PSI disagree about the WTC facility's technical parameters, as set forth in the following table:

³⁵ See NUSCO Location Exhibit at 6-7.

³⁶ *Id.* at 7; NUSCO Opposition at 14-15.

³⁷ See PSI Petition at 4; PSI Reply at 8.

³⁸ See NUSCO Location Exhibit at 6.

³⁹ See PSI Petition at 4; PSI Letter at 2. We clarify, however, that whether a station is in operation is determined with respect to the licensed facility; operation of fill-in sites does not render operative an inactive licensed transmitter. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, WT Docket No. 96-18, 14 FCC Rcd 10030, 10055 ¶ 35 (1999).

⁴⁰ See PSI Letter, Exhibits B and C (demonstrating ongoing negotiations with the Freedom Tower property management company regarding the site availability).

⁴¹ See 47 C.F.R. § 80.385(b)(1).

⁴² See *Public Coast Fifth Report and Order*, 17 FCC Rcd at 6701 ¶ 34. We reject PSI's suggestion that a license modification may shift the service contour, so long as the total area of coverage does not increase. See PSI Opposition at 5-6. We agree with NUSCO that a site-based AMTS incumbent may not relocate its service area beyond its existing contour. See NUSCO Reply at 2. The purpose of restricting the site-based incumbent to its licensed contour is to prohibit any modifications that impair the rights of the geographic licensee. See *Public Coast Fifth Report and Order*, 17 FCC Rcd at 6701 ¶ 34. Permitting a site-based AMTS incumbent to exchange a covered area for a previously uncovered area would have such an effect.

Parameter	NUSCO ⁴³	PSI ⁴⁴
Antenna height above ground	527.6 meters	419.41 meters
Transmission line loss	3.9 dB	1.44 dB
Antenna gain	5.9 dB	8 dB
Combiner and filter loss	8.5 dB	1.31 dB
Effective radiated power (ERP)	5.6 watts	165.57 watts

The differences in antenna height above ground and transmission line loss reflects that NUSCO's analysis assumes that the station was located on the WTC antenna mast, while, as discussed above, we conclude that it was located on the WTC roof.⁴⁵ With respect to the other parameters, however, verification is difficult because PSI did not identify the equipment make and model numbers. In particular, PSI's claimed insertion losses for the combiner and filter of 1.31 dB appears to be unrealistically low, yielding an unreasonably high ERP. We believe that NUSCO's estimated insertion loss of 8.5 dB is reasonable. Consequently, we have recalculated PSI's predicted contour for Station WQA216 utilizing the higher insertion loss. This results in a contour smaller than that claimed by PSI, but larger than that suggested by NUSCO.

13. PSI modification application. By PSI's own admission, the predicted contour for its proposed Times Square site just barely avoids exceeding its proffered WTC contour.⁴⁶ When the WTC contour is recalculated as discussed above, the predicted Times Square contour exceeds it. Consequently, we will dismiss PSI's modification application, because it impermissibly seeks to extend the system's service area.⁴⁷

14. NUSCO modification application. Similarly, by PSI's calculations, the predicted interference contour for NUSCO's proposed Greenwich and Norwalk sites impermissibly overlap the WTC contour only in small portions of Westchester, Nassau, and Suffolk Counties.⁴⁸ When the WTC contour is recalculated as discussed above, the predicted Norwalk contour clearly meets the interference protection criteria of Section 80.385(b)(1), and any overlap of the Greenwich contour appears to be *de minimis*. Consequently, we will grant NUSCO's application with respect to the Greenwich and Norwalk sites.

15. Conclusion. We conclude that PSI's proposed Times Square site would expand the

⁴³ See NUSCO Technical Analysis at 2.

⁴⁴ See PSI Engineering Statement at 1.

⁴⁵ See NUSCO Opposition, Exhibit 1; PSI Reply, Exhibit 1.

⁴⁶ See PSI Application, Attachment "Updated 4 Times Square Contour."

⁴⁷ It follows from this conclusion that if the Times Square fill-in transmitter currently operates with the technical parameters set forth in the PSI modification application, its interference contour exceeds the predicted interference contour of the WTC site. Therefore, PSI must promptly modify its Times Square operations in order to comply with Section 80.475(b).

⁴⁸ See PSI Engineering Statement, Appendix A, Figure 1.

service area of Station WQA216. Consequently, we grant the petitions of NUSCO and Skybridge, and will dismiss PSI's modification application. We also conclude that NUSCO's proposed Greenwich and Norwalk sites substantially meet the interference protection criteria of Section 80.385(b)(1). We therefore deny in part PSI's petition, and will grant NUSCO's modification application.

16. *Ordering Clauses.* Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, that the petitions to dismiss or deny filed by Northeast Utilities Service Company and Skybridge Spectrum Foundation on November 21, 2007 and November 23, 2007, respectively, ARE GRANTED, and application FCC File No. 0003202834 SHALL BE DISMISSED.

17. IT IS FURTHER ORDERED that the petition to dismiss or deny filed by Paging Systems, Inc. on June 22, 2007 IS DENIED, and application FCC File No. 0003026497 SHALL BE GRANTED with respect to locations 29 (Greenwich) and 31 (Norwalk), and DISMISSED AS MOOT with respect to locations 27 (Southbury), 28 (Redding), 30 (Monroe), and 32 (Bridgeport), consistent with this *Order* and the Commission's Rules.

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau