

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

In the Matter of Applications of
WARREN C. HAVENS
for Automated Maritime Telecommunications
System Stations at Chaffee, Aspen, Colorado
Springs, Copper Mountain, and Leadville, Colorado
File Nos. 853010-853014

ORDER ON FURTHER RECONSIDERATION

Adopted: October 29, 2001

Released: October 31, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

1. Introduction. On May 31, 2001, Warren C. Havens (Havens) requested reconsideration of the Public Safety and Private Wireless Division (Division) Order on Reconsideration that affirmed the dismissal of his applications for authority to construct and operate Automated Maritime Telecommunications System (AMTS) stations along a segment of the Arkansas River, known as the Arkansas Headwaters. For the reasons discussed below, Havens's petition is denied.

2. Background. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels. Under Section 80.475(a) of the Commission's Rules, AMTS applicants who propose to serve a navigable inland waterway that is less than 150 miles in length must serve that waterway in its entirety. Alternatively, AMTS applicants who propose to serve a navigable inland waterway that is more than 150 miles in length must provide continuity of service for at least 60 percent of the waterway. AMTS applicants who propose to serve a portion of coastline must provide continuity of service to a "substantial navigational area."

3. On February 1 and 10, 2000, Havens filed the above-captioned applications for five AMTS stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado. The applications were placed on public notice on February 24, 2000. Havens proposed to provide AMTS

1 Applications of Warren C. Havens, Order on Reconsideration, 16 FCC Rcd 9337 (WTB PSPWD 2001) (Order on Recon), aff'g Applications of Warren C. Havens, Order, 15 FCC Rcd 22296 (WTB PSPWD 2000) (Order).

2 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. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991).

3 47 C.F.R. § 80.475(a).

4 Id.

5 Id.

6 Applications for Authority to Construct and Operate AMTS Stations, File Nos. 853010, 853011, 853012, 853014 (filed Feb. 1, 2000); Application for Authority to Construct and Operate AMTS Station, File No. 853013 (filed Feb. 10, 2000).

7 See Wireless Telecommunications Bureau Weekly Receipts and Disposals, Report No. 2081 (rel. Feb. 24, 2000).

service to a portion of the Arkansas River known as the Arkansas Headwaters, which begins in the Rocky Mountains, near Leadville, and runs 152 miles until it reaches the Pueblo Reservoir.<sup>8</sup> Havens proposed to cover 146 miles of the Arkansas Headwaters,<sup>9</sup> or about 10 percent of the approximately 1,450-mile Arkansas River.<sup>10</sup> He noted that the proposed 146-mile coverage represents 96.1 percent of the Arkansas Headwaters,<sup>11</sup> which he argued should be considered a distinct body of water because there is a “break in navigability” after the Pueblo Reservoir.<sup>12</sup> Havens did not request a waiver of the AMTS coverage requirement.

4. The Division dismissed the applications in an *Order* released on November 15, 2000. The Division stated that the Commission’s Part 80 rules are devoid of any provision allowing applicants to “subdivide” a waterway when that waterway is commonly mapped as a single geographic unit.<sup>13</sup> The Division also noted that when the Commission allocated spectrum for AMTS use on the Mississippi River in 1981, the rules specifically listed the Arkansas River as one of the “navigable waterways” comprising the Mississippi River system.<sup>14</sup> As a result, the Division found that as the term “navigable inland waterway” is used in the Commission’s Part 80 rules, the Arkansas Headwaters is part of the 1,450-mile Arkansas River and is not a distinct waterway.<sup>15</sup> Because Havens did not propose 60 percent coverage of the entire Arkansas River, the Division dismissed his applications as defective.<sup>16</sup>

5. On December 15, 2000, Havens filed a petition for reconsideration of the *Order*. On May 1, 2001, the Division denied the petition.<sup>17</sup> It rejected Havens’s contention that, for purposes of the AMTS coverage requirement, the Arkansas River should be deemed to be comprised of two corridors: the Arkansas Headwaters, and the segment that flows down river from Tulsa, Oklahoma, to the Mississippi River.<sup>18</sup> The Division also stated that Havens had not provided sufficient information in the applications or petition for reconsideration to substantiate his argument in the petition that the coverage requirement would have been met had Havens simply characterized his applications as providing AMTS service to the various tributaries of the Arkansas Headwaters, rather than the Arkansas Headwaters itself.<sup>19</sup> On May 31,

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<sup>8</sup> Supplemental Statement in Support of Applications Filed by Warren C. Havens to Serve the Arkansas Headwaters River (Arkansas Headwaters Recreation Area) with a Series of AMTS Radio Stations at 4 (filed Jan. 24, 2000) (Supplemental Statement).

<sup>9</sup> *Id.*

<sup>10</sup> See *Concise Columbia Electronic Encyclopedia*, Third Edition, Columbia University Press (1994).

<sup>11</sup> Supplemental Statement at 4.

<sup>12</sup> *Id.* at 1 n.11; Electronic Mail Message from Warren C. Havens to Kimberly Kleppinger and Scot Stone, Federal Communications Commission (dated Aug. 29, 2000).

<sup>13</sup> *Order*, 15 FCC Rcd at 22297 ¶ 4.

<sup>14</sup> *Id.* (citing Amendment of Parts 2, 81 and 83 of the Commission’s Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) Along the Mississippi River and Connecting Waterways, *Report and Order*, GEN Docket No. 80-1, 84 FCC 2d 875, 876 ¶ 2, *on reconsideration*, *Memorandum Opinion and Order*, GEN Docket No. 80-1, 88 FCC 2d 678 (1981), *aff’d sub nom. WJG Tel. Co. v. FCC*, 675 F.2d 386 (D.C. Cir. 1982); 47 C.F.R. § 81.913(a) (1982)).

<sup>15</sup> *Order*, 15 FCC Rcd at 22297 ¶ 4.

<sup>16</sup> *Id.* at 22298 ¶ 5.

<sup>17</sup> *Order on Recon*, 16 FCC Rcd at 9337 ¶ 1.

<sup>18</sup> *Id.* at 9339 ¶ 5.

<sup>19</sup> *Id.* at 9340 ¶ 8.

2001, Havens requested further reconsideration. On June 12, 2001, Regionet Wireless Licensee LLC (Regionet) filed an opposition.<sup>20</sup> On June 21, 2001, Havens filed a reply.

6. *Discussion.* Havens continues to argue that the segment of the Arkansas River known as the Arkansas Headwaters should be treated as a separate navigable inland from the segment that flows from Tulsa to the Mississippi River for purposes of the AMTS coverage requirement.<sup>21</sup> Havens notes<sup>22</sup> that when spectrum was allocated for AMTS use on the Mississippi River in 1981,<sup>23</sup> the Commission referred to a U.S. Army Corps of Engineers Report “Waterways Commerce of the United States” (Report), which showed the commercial tonnage transported into the Mississippi River from connecting waterways, as a source to identify the waterways comprising the Mississippi River System.<sup>24</sup> That the Report addressed only those portions of the various waterways on which commercial tonnage is transported, however, does not imply that, for purposes of AMTS service coverage requirements, the Commission viewed the Arkansas River (or any other waterway in the Mississippi River System) as encompassing only those segments.<sup>25</sup> Further, when the Commission intended to segment a waterway for AMTS purposes, it did so expressly.<sup>26</sup> Other than these specific exceptions, the Commission has always treated inland bodies of water that are commonly referred to as one river, including the Arkansas River, as single waterways, even if they are not continuously navigable without interruption.

7. Havens also continues to argue that his applications should have been granted because they met the service coverage requirements with respect to the major tributaries of the Arkansas Headwaters.<sup>27</sup> In the *Order on Reconsideration*, the Division stated that Havens had not provided sufficient information to enable it to reach a conclusion on this issue.<sup>28</sup> In the instant petition, Havens adds only a general pronouncement that the proposed stations would provide a hundred percent coverage to the major

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<sup>20</sup> Regionet also opposed Havens’s petition for reconsideration of the *Order*. See *Order on Recon*, 16 FCC Rcd at 9338 ¶ 4.

<sup>21</sup> Petition for Review at 3-6.

<sup>22</sup> *Id.* at 10-12.

<sup>23</sup> See Amendment of Parts 2, 81 and 83 of the Commission’s Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) Along the Mississippi River and Connecting Waterways, *Report and Order*, GEN Docket No. 80-1, 84 FCC 2d 875, 876 ¶ 2 (*IWCS Report and Order*), on reconsideration, *Memorandum Opinion and Order*, GEN Docket No. 80-1, 88 FCC 2d 678 (1981), *aff’d sub nom. WJG Tel. Co. v. FCC*, 675 F.2d 386 (D.C. Cir. 1982).

<sup>24</sup> *IWCS Report and Order*, 84 FCC 2d at 876 n.1 (“As used here, the Mississippi River System is understood to include navigable waters encompassing the lower and upper Mississippi River and the waterways connecting thereto. (The U.S. Army Corps of Engineers report ‘Waterways Commerce of the United States’ shows tonnage moved into the Mississippi River from the following connecting waterways: Allegheny, Amite, Arkansas, Atachafalaya, Big Sandy, Black (Ark.), Black (Wisc.), Calcasieu, Cumberland, Green/Barren, Hiwassee, Illinois, Kanawha, Kaskaskia, Kentucky, L’Anguille, Little Kanawha, Mermentau, Minnesota, Missouri, Monongahela, Ohio, Ouachita, Red, St. Croix, St. Francis, Tennessee, White, Wolf, and Yazoo rivers. The canal project currently under construction to connect the Tennessee and Tombigbee Rivers will, upon completion, connect the Alabama, Black Warrior, Mobile and Tombigbee Rivers into the Mississippi River.”). This list of waterways comprising the Mississippi River System also was set out in the initial rules. See 47 C.F.R. § 81.913(a) (1982).

<sup>25</sup> See Petition for Review at 11.

<sup>26</sup> See 47 C.F.R. § 81.913(a) (1982) (dividing Mississippi River into upper and lower sections); 47 C.F.R. § 81.913(a) (1985) (dividing Gulf of Mexico into eastern and western sections).

<sup>27</sup> Petition for Review at 6-7.

<sup>28</sup> *Order on Recon*, 16 FCC Rcd at 9340 ¶ 8.

tributaries.<sup>29</sup> This does not adequately address the Division's previous concerns. Havens still has not identified all the waterways he would purport to serve, or whether each is eligible for AMTS service.<sup>30</sup>

8. In addition, Havens contends that certain Regionet AMTS station applications that did not comply with the service coverage requirements and for which waivers were not requested were nonetheless granted, and argues that he should receive similar treatment.<sup>31</sup> Havens refers to particular Regionet applications, which, in the view of Commission staff, did not require waivers. Although the applications did not meet the AMTS coverage requirement with respect to the waterways Regionet proposed to serve, we find that it was reasonable for the staff to conclude that they nonetheless appeared to be grantable as extensions of Regionet's existing West Coast system.<sup>32</sup> As Havens suggests, these grants have also allowed Regionet to provide coverage to inland waterways;<sup>33</sup> however, we nonetheless note that the Commission's rules expressly permit service to vessels operating beyond the served waterway.<sup>34</sup> We also note that the grants of these Regionet applications are now final and not subject to reconsideration in this proceeding. Finally, even if we were to learn of licensing actions which were inconsistent with the Commission's Rules or its stated policies, the appropriate course of action would be to consider whether we should take some action with respect to the affected license or licensee rather than to continue misapplication of such Commission Rules and/or policy.<sup>35</sup>

9. Finally, we note that reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.<sup>36</sup> A petition that simply reiterates arguments previously considered and rejected will be denied.<sup>37</sup> In the instant petition, Havens repeats several arguments that the Division already considered and rejected in the *Order on Reconsideration*. For example, Havens repeats his arguments that the Arkansas Headwaters is a distinct navigable inland waterway,<sup>38</sup> and that the service coverage requirements were met with respect to the Arkansas Headwaters' major tributaries.<sup>39</sup> Havens newly argues that the grant of certain Regionet applications that did not include waiver requests demonstrates unequal treatment, but he fails to explain why this argument, which relies on pre-existing facts, was not raised earlier in the proceeding.<sup>40</sup> After reviewing the instant petition, we believe that Havens has failed to demonstrate that the *Order on Reconsideration*

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<sup>29</sup> Petition for Review at 6.

<sup>30</sup> Waterways that can be covered by a single station are ineligible for AMTS service. See Fred Daniel d/b/a Orion Telecom, *Memorandum Opinion and Order*, 14 FCC Rcd 19912, 19916-17 ¶ 10 (1999).

<sup>31</sup> Petition for Review at 7.

<sup>32</sup> Regarding one of the Regionet applications, FCC File No. 851659, Bakersfield, California, Havens refers to a contour map from an April 19, 2001 *ex parte* filing by Regionet's parent company, which was presented to support an argument not related to the AMTS coverage requirement, rather than to the application, which was granted years earlier. See Petition for Review at Exhibit 2a.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> 47 C.F.R. § 80.477(c).

<sup>35</sup> See Nextel Communications, Inc., *Order*, 14 FCC Rcd 11678, 11693 ¶ 34 (WTB 1999).

<sup>36</sup> See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c).

<sup>37</sup> *Id.*; see also Gaines, Bennett Gilbert, *Memorandum Opinion and Order*, 8 FCC Rcd 3986 (Rev. Bd. 1993).

<sup>38</sup> *Order on Recon*, 16 FCC Rcd at 9338-39 ¶ 5.

<sup>39</sup> *Id.* at 9340 ¶ 8.

<sup>40</sup> 47 C.F.R. § 1.106(c).

contains a material error or did not fully and fairly consider the arguments raised therein. Havens also failed to present additional facts not known or not existing until after his last opportunity to present such matters. We therefore deny Havens's petition.

10. *Conclusion.* In view of the foregoing, we affirm the Division's conclusion that as the term "navigable inland waterway" is used in the Commission's Part 80 rules, the Arkansas Headwaters is part of the 1,450-mile Arkansas River and is not a distinct waterway.<sup>41</sup> Because the Arkansas River is greater than 150 miles in length, an AMTS application that proposes to serve it can be granted only if the proposed system will provide continuity of service to at least 60 percent of the river.<sup>42</sup> In this case, Havens proposed to serve only 146 miles, or approximately 10 percent, of the Arkansas River. Therefore, we conclude that Havens's applications were properly dismissed as defective.

11. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for review filed by Warren C. Havens on May 31, 2001 IS DENIED.

12. 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

Kathleen O'Brien Ham  
Deputy Chief, Wireless Telecommunications Bureau

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<sup>41</sup> 47 C.F.R. § 80.475(a).

<sup>42</sup> *Id.*