

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

In the Matter of Applications of)	
)	
WARREN C. HAVENS)	
)	
to Provide Automated Maritime)	
Telecommunications System Stations at Various)	File Nos. 852997-853009
Locations in Texas, and)	
)	
at Chaffee, Aspen, Colorado Springs, Copper)	File Nos. 853010-853014
Mountain, and Leadville, Colorado)	

ORDER

Adopted: November 24, 2004

Released: November 29, 2004

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Order*, we address two petitions filed by Warren C. Havens (Havens) regarding the above-captioned Automated Maritime Telecommunications System (AMTS) applications. As discussed below, the applications were dismissed in 2000 for failure to comply with the coverage rules in effect at the time. On December 3, 2002, Havens filed a petition for Commission action under Section 1.41 of the Commission’s Rules,¹ requesting that the applications be processed under the licensing rules adopted in 2002 in the *Fifth Report and Order* in PR Docket No. 92-257.² On July 15, 2003, he filed a petition for forbearance from or, in the alternative, waiver of those coverage requirements as applied to the above-captioned applications.³ For the reasons that follow, we deny the petitions.

II. BACKGROUND

2. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels.⁴ Under former Section 80.475(a) of the Commission’s Rules in effect when the above-captioned applications were filed, AMTS applicants were required to serve a navigable inland waterway that is less than 150 miles in length in its

¹ 47 C.F.R. § 1.41.

² Petition for Commission Action under 47 C.F.R. § 1.41 For Processing of Pending Applications Under New Rules (filed Dec. 3, 2002) (December 3 Petition).

³ Petition for Forbearance, and in the Alternative, Request for Partial Waiver (In the Alternative to or in Lieu of Petitioner’s Previously Submitted Petition for Commission Action under 47 C.F.R. § 1.41 For Processing of Pending Applications Under New Rules) (filed July 15, 2003) (July 15 Petition). On July 25, 2003, Mobex Network Services, LLC filed an opposition.

⁴ 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).

entirety.⁵ Applicants proposing to serve a navigable inland waterway more than 150 miles in length were required to provide continuity of service along at least sixty percent of the waterway.⁶

3. *Colorado Applications.* Between February 1 and 10, 2000, Havens filed applications for five AMTS stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado.⁷ Havens proposed to provide AMTS 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. Havens proposed to cover 146 miles of the Arkansas Headwaters, or about ten percent of the 1,450-mile Arkansas River. Havens noted that the proposed 146-mile coverage represented 96.1 percent of the Arkansas Headwaters, which he argued should be considered a body of water distinct from the Arkansas River because there is a “break in navigability” after Pueblo Reservoir. Havens did not request a waiver of the AMTS coverage requirement.

4. On November 15, 2000, the Public Safety and Private Wireless Division (Division)⁸ dismissed the applications because Havens did not propose sixty percent coverage of the entire Arkansas River.⁹ On December 15, 2000, Havens filed a petition for reconsideration, which the Division denied on May 1, 2001.¹⁰ On May 31, 2001, Havens filed a petition for further reconsideration, which the Wireless Telecommunications Bureau (Bureau) denied on October 31, 2001.¹¹ On November 30, 2001, Havens filed an application for review, which the Commission denied on September 18, 2002.¹² On October 16, 2002, Havens appealed this latter decision to the United States Court of Appeals for the D.C. Circuit. That appeal remains pending.

5. *Texas Applications.* Also between February 1 and 10, 2000, Havens filed thirteen applications to serve three waterways in Texas, as follows: six applications for AMTS stations that would serve 236 miles, or 55.5 percent, of the 425-mile Trinity River;¹³ four applications for AMTS stations that would serve 87.5 miles, or 43.7 percent, of the 200-mile San Antonio River;¹⁴ and three applications for AMTS stations that would serve 120 miles, or 42 percent, of the 286-mile Lower Colorado River.¹⁵ While Havens conceded that he proposed to serve less than sixty percent of each waterway, he argued that the applications nonetheless satisfied the coverage requirement set forth in Section 80.475 of the Commission’s Rules because in each case he was proposing to serve one hundred percent of the waterway that could be served without causing interference to the previously licensed, co-channel AMTS stations of

⁵ 47 C.F.R. § 80.475(a) (1999).

⁶ *Id.*

⁷ File Nos. 853010-14. See Wireless Telecommunications Bureau Weekly Receipts and Disposals, Report No. 2081 (rel. Feb. 24, 2000).

⁸ The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ 2 (2003).

⁹ Warren C. Havens, *Order*, 15 FCC Rcd 22296 (WTB PSPWD 2000).

¹⁰ Warren C. Havens, *Order on Reconsideration*, 16 FCC Rcd 9337 (WTB PSPWD 2001).

¹¹ Warren C. Havens, *Order on Further Reconsideration*, 16 FCC Rcd 19240 (WTB 2001).

¹² Warren C. Havens, *Memorandum Opinion and Order*, 17 FCC Rcd 17527 (2002) (*Colorado MO&O*).

¹³ File Nos. 852997-853002. See Wireless Telecommunications Bureau Weekly Receipts and Disposals, Report No. 2081 (rel. Feb. 24, 2000) (*Public Notice Rep. No. 2081*).

¹⁴ File Nos. 853003-06. See *Public Notice Rep. No. 2081*.

¹⁵ File Nos. 853007-09. See *Public Notice Rep. No. 2081*.

Waterway Communications System, Inc. Havens did not request a waiver of the AMTS coverage requirement.

6. On January 31, 2001, the Division dismissed the applications because they failed to satisfy the sixty percent service coverage requirement of Section 80.475(a).¹⁶ On March 2, 2001, Havens filed a petition for reconsideration, which the Division denied on October 12, 2001.¹⁷ On November 13, 2001, Havens filed an application for review, which the Commission denied on September 18, 2002.¹⁸ On October 16, 2002, Havens appealed this latter decision to the United States Court of Appeals for the D.C. Circuit. That appeal remains pending.

7. *PR Docket No. 92-257*. On November 16, 2000, the Commission released a *Fourth Report and Order and Third Further Notice of Proposed Rule Making* in PR Docket No. 92-257, in which it proposed rules for geographic area licensing of AMTS coast stations, and sought comment on various related proposals.¹⁹ In light of the fundamental changes the Commission proposed for the AMTS licensing rules, it suspended acceptance and processing of applications for new licenses, applications to modify existing licenses, and amendments to applications for new licenses or modifications.²⁰ The Commission explained that the action was in the public interest because continued licensing under the site-based rules would impair the objectives of the rulemaking proceeding.²¹ The Commission stated that pending applications would held in abeyance until the conclusion of the proceeding, whereupon the Commission would determine, in accordance with such new rules as were adopted, whether to process or return any such applications.²²

8. On April 8, 2002, the Commission released the *Second Memorandum Opinion and Order and Fifth Report and Order* in PR Docket No. 92-257, in which it adopted a geographic licensing scheme for AMTS stations.²³ Accordingly, the Commission eliminated the service coverage requirements in Section 80.475(a), in order to permit AMTS geographic area licensees to place stations anywhere within their service area to serve vessels or units on land, so long as incumbent operations are protected, marine-originating traffic is given priority and certain major waterways are served.²⁴ The Commission also required geographic licensees to provide substantial service to their service areas.²⁵ The Commission believed that this requirement would ensure efficient use of AMTS spectrum, as well as expeditious

¹⁶ Warren C. Havens, *Order*, 16 FCC Rcd 2539 (WTB PSPWD 2001).

¹⁷ Warren C. Havens, *Order on Reconsideration*, 16 FCC Rcd 18046 (WTB PSPWD 2001).

¹⁸ Warren C. Havens, *Memorandum Opinion and Order*, 17 FCC Rcd 17588 (2002) (*Texas MO&O*).

¹⁹ Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 15 FCC Rcd 22585, 22587-88 ¶ 2 (2000).

²⁰ *Id.* at 22621 ¶ 76.

²¹ *Id.*

²² *Id.* at 22622 ¶ 78.

²³ 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, 6686 ¶ 2 (2002) (*Fifth Report and Order*).

²⁴ *Id.* at 6702-03 ¶ 37, 6737.

²⁵ *Id.* at 6707 ¶ 48; see 47 C.F.R. § 80.49(a)(3). The Commission provided the following "safe-harbor" examples of how to comply with the substantial service requirement: for service areas with major waterways, substantial service can be demonstrated by continuous coverage of two-thirds of those waterways; and for service areas without major waterways, substantial service can be demonstrated by coverage of two-thirds of the area's population. *Fifth Report and Order*, 17 FCC Rcd at 6707 ¶ 49.

provision of service to the public.²⁶ Finally, the Commission dismissed the pending applications the processing of which had been suspended pending the conclusion of the rulemaking proceeding, and continued the suspension of acceptance of new applications until such time as the Bureau began to accept applications for the AMTS auction.²⁷ The AMTS auction was completed on September 15, 2004.²⁸

III. DISCUSSION

9. In both of the instant petitions, Havens argues that we can take action on his applications because they are still pending, given that the dismissal of the applications has been subject to both administrative and judicial appeals.²⁹ We disagree. Havens relies on Section 1.65 of the Commission's Rules, which states that an application "is 'pending' before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court."³⁰ We note, however, that this definition of "pending" expressly applies only "[f]or the purposes of this section," which section deals only with the responsibility of an applicant to keep the information in its applications accurate in the event of substantial and significant changes.³¹ Section 1.65 does not obligate the Commission to treat dismissed applications as pending simply because their dismissal has been appealed.

10. Indeed, the Commission's Rules distinguish between applications that are "pending" and applications the dismissal of which is the subject of an ongoing judicial appeal.³² Moreover, deeming an application that is the subject of a judicial appeal to be "pending" and available for amendment and processing would render meaningless the prohibitions in the Commission's Rules against asserting on reconsideration facts not presented earlier,³³ because to do so would inconsistently interpret the rules as prohibiting the late assertion of issues in a petition for reconsideration or application for review, but permitting such issues subsequently to be addressed to the Commission after a judicial appeal is filed. Similarly, the rules clearly indicate that the filing of a petition for reconsideration or application for review does not stay or postpone the effectiveness of the dismissal of an application unless the designated authority or Commission, in its own discretion, grants a stay.³⁴ However, treating a dismissed application as pending because of the filing of a judicial appeal would have the effect of a stay, regardless of whether the Commission had granted one. Finally, we note that in PR Docket No. 92-257, neither the Commission nor any commenter proposed to treat AMTS site-based applications that had been denied or dismissed – but which remained before the Commission due to the filing of petitions for reconsideration

²⁶ *Fifth Report and Order*, 17 FCC Rcd at 6707 ¶ 48.

²⁷ *Id.* at 6720 ¶ 83. The Commission subsequently affirmed the dismissal of those applications. See Amendment of the Commission's Rules Concerning Maritime Communications, *Third Memorandum Opinion and Order*, PR Docket No. 92-257, 18 FCC Rcd 24391, 24398 ¶ 17 (2003).

²⁸ Automated Maritime Telecommunications System Spectrum Auction Closes, *Public Notice*, 19 FCC Rcd 18252, 18252 (WTB 2004).

²⁹ December 3 Petition at 2; July 15 Petition at 5.

³⁰ 47 C.F. R. § 1.65(a).

³¹ *Id.*

³² Compare 47 C.F.R. § 1.937(c) ("If an appeal has been taken from the action of the Commission denying a particular application, a like application for service of the same type to the same area . . . will not be considered until the final disposition of such appeal.") with 47 C.F.R. § 1.937(d) ("While an application is pending, any subsequent inconsistent or conflicting application . . . will not be accepted for filing.").

³³ See 47 C.F.R. §§ 1.106(c), (l), 1.115(g), (j).

³⁴ See 47 C.F. R. § 1.102(b), 1.106(n), 1.115(h)(2). See also, e.g., Sagir, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 15967, 15975 ¶ 19 (2003).

or applications for review – as pending applications to which the new rules would apply.³⁵ We thus conclude that the above-captioned dismissed applications are not currently in pending status, and, thus, cannot now be processed by the Commission.

11. Moreover, even if the applications were active, we would deny the petitions. In his December 3 Petition, Havens argues that the elimination of the Section 80.475(a) service coverage requirement cured the defect that was the basis for the dismissal of the above-captioned applications.³⁶ Therefore, he requests that the applications be processed and granted under the current regulatory regime.³⁷ We note, however, that if we were to process the applications under the new rules, they would be defective, because Havens has not demonstrated how the proposed operations would provide substantial service to the geographic service areas in which they are located.³⁸

12. In his July 15 Petition, Havens requests a waiver of the former Section 80.475(a) service coverage requirement because he argues that its application in the instant case has frustrated the underlying purpose of the Commission's AMTS licensing rules.³⁹ In the alternative, he argues that we should forbear from enforcing the former Section 80.475(a) service coverage requirement with respect to his applications, thereby enabling them to be granted.⁴⁰ We note that grant of either a waiver request⁴¹ or a forbearance request⁴² requires a finding that the requested action would be in the public interest, and Havens has submitted nothing that would support such a conclusion.

³⁵ Cf. Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, CC Docket No. 92-115, 9 FCC Rcd 6513, 6533-34 ¶¶ 95-98 (1994).

³⁶ December 15 Petition at 2.

³⁷ *Id.*

³⁸ Havens's reliance, *see id.* at Attachment at 1, on two Division decisions, Mobex Network Services, LLC, *Order*, 18 FCC Rcd 12305, 12306 n.6 (WTB PSPWD 2003), and Mobex Network Services, LLC, *Order*, 18 FCC Rcd 12309, 12311 ¶ 9 (WTB PSPWD 2003) (*Mobex Renewal Order*), for the proposition that pending site-based applications should be processed and granted without regard to the service coverage requirements in former Section 80.475(a) is unavailing, because, among other reasons, those decisions concerned applications to modify or renew previously-granted licenses, while the above-captioned applications seek new authorizations.

³⁹ July 15 Petition at 7-8. We note that the July 15 Petition repeats arguments that Havens made in his administrative appeals of the dismissal of the above-captioned applications, or in other proceedings. July 15 Petition at 9-21. These issues have been addressed elsewhere, and we will not repeat the analysis here. *See Fifth Report and Order*, 17 FCC Rcd at 6692-93 ¶ 18; *Colorado MO&O*, 17 FCC Rcd at 17529 ¶ 6, 17531-32 ¶¶ 10-11; *Texas MO&O*, 17 FCC Rcd at 17590 ¶ 5, 17592 ¶ 10; *Mobex Renewal Order*, 18 FCC Rcd at 12311 ¶¶ 7-9.

⁴⁰ July 15 Petition at 7-8.

⁴¹ *See* 47 C.F.R. § 1.925(b)(3) (the Commission may grant a request for waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative).

⁴² *See* 47 U.S.C. § 160(a) (the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest).

13. To reinstate and grant the above-captioned site-by-site applications either by forbearing from the former Section 80.475(a) service coverage requirement or by processing them under the current rules which include the modified Section 80.475, would undermine the Commission's decision in the *Fifth Report and Order* in PR Docket No. 92-257 to license AMTS spectrum via geographic area.⁴³ As noted above, the Commission concluded in the *Fifth Report and Order* that the public interest goals of Section 309(j)(3) of the Communications Act⁴⁴ would be furthered by licensing AMTS spectrum through geographic area licensing rather than site-by-site licensing.⁴⁵ Having made this determination, the Commission concluded that it would be contrary to the public interest to continue to process site-based applications.⁴⁶ The Commission specifically decided that previously-filed site-based applications should be dismissed, and no new site-based applications should be accepted. It affirmed this decision on reconsideration, explaining that accepting and processing such applications would conflict with its efforts to make meaningful regulatory changes, and would undermine its competitive bidding procedures.⁴⁷ In view of the Commission's expressed judgment on this matter, we find that Havens's petition to process the above-captioned site-based applications under the new rules, as well as his petition for forbearance of the former Section 80.475(a) requirements, and in the alternative, request for waiver, should be denied.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, that the petition for processing of applications under new rules filed by Warren C. Havens on December 3, 2002 IS DENIED.

15. IT IS FURTHER ORDERED pursuant to Sections 4(i), 160(c), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 160(c), 303(r), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the petition for forbearance, and in the alternative, request for partial waiver, filed by Warren C. Havens on July 15, 2003 IS DENIED.

16. 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

Michael J. Wilhelm
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau

⁴³ See *Fifth Report and Order*, 17 FCC Rcd at 6696 ¶ 24.

⁴⁴ 47 U.S.C. § 309(j)(3).

⁴⁵ See *Fifth Report and Order*, 17 FCC Rcd at 6694 ¶ 18.

⁴⁶ *Id.*

⁴⁷ *Id.* at 6692 ¶¶ 14-15.