



Federal Communications Commission  
Washington, D.C. 20554

February 25, 2014

DA 14-253

Warren C. Havens  
2509 Stuart St.  
Berkeley, CA 94705

RE: Warren C. Havens' Request for Extension of the Ten-Year Construction Deadline  
for Call Sign WPXM576.

Dear Mr. Havens:

This letter addresses Warren C. Havens' (Havens) May 6, 2013, Request for Extension of the Ten-Year Construction Deadline (Extension Request) with respect to station WPXM576, VHF public coast (VPC) Station located in the inland VPC Service Area (VPCSA) 16, Western Oklahoma, OK.<sup>1</sup> For the reasons that follow, we deny the extension request and find that station WPXM576 was not constructed in a timely manner and that the license automatically terminated.

*Background.* VPC licensees must demonstrate that they are providing substantial service within five years of the initial license grant, and again within ten years of the initial license grant.<sup>2</sup> Substantial service is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. When the Commission established the VPC construction rules, it also established a "safe harbor" whereby maritime VPC licensees could satisfy the five-year construction requirement by demonstrating coverage to one-third of the major waterway(s) in the service area, and coverage to two-thirds of the major waterway(s) in the service area for the ten-year construction requirement.<sup>3</sup> For inland VPCSA's, the Commission has stated that the safe harbor for the five-year construction requirement can be satisfied by coverage to one-third of the population in the service area, and by coverage to two-thirds of the population in the service area for the ten-year construction requirement.<sup>4</sup>

Havens' license was granted on May 6, 2003, with a five-year construction deadline of May 6, 2008, and ten-year construction deadline of May 6, 2013. At the May 6, 2008 deadline, Havens sought a one year extension of the construction requirement to pursue TETRA or Digital Mobile Radio equipment that was not available for the VPC band.<sup>5</sup> On March 15, 2012, the Mobility Division (Division) granted until June 15, 2012 for Havens to meet the five-year construction requirements for station WPXM576.<sup>6</sup>

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<sup>1</sup> FCC File No. 0005768645 (filed May 6, 2013) (Extension Request).

<sup>2</sup> See 47 C.F.R. § 80.49(a)(1).

<sup>3</sup> Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd at 19870 ¶ 34 (1998) (*Third Report and Order*).

<sup>4</sup> *Id.* at 19871 ¶ 36.

<sup>5</sup> FCC File No. 0003430268 (filed May 6, 2008).

<sup>6</sup> See Letter from Thomas Derenge attached to FCC File No. 0003430268.

In the March 2012 extension grant, the Division dismissed several of Havens' arguments concerning the availability of TETRA equipment because such equipment was not compatible with applicable Part 80 rules and the choice of equipment was a business decision. Nevertheless, the Division granted a "minimal extension" to allow Havens to "provide service to the public in the near term."<sup>7</sup> Notably, the Division also stated that "[a]fter holding the authorization for nine years, . . . if the construction obligation for WPXM576 is not met, we do not anticipate additional extensions will be granted absent extraordinary circumstances."<sup>8</sup>

On June 29, 2012, Havens submitted a construction notification for station WPXM576 indicating that a transmitter was operational and providing coverage to 30.4% of the population for the licensing area.<sup>9</sup> The station is located in Elk City, OK at the tower site of his only customer, the Chesapeake Energy Corporation (Chesapeake). Havens asserted that his ability to cover more of the market population was limited due to the 5 dBu market boundary signal level limit, and that deploying additional transmitters would greatly increase the cost of service and make it impractical for the "not-for-profit" uses he offers.<sup>10</sup> Havens also asked that his construction notification serve to satisfy both the five-year and ten-year construction benchmarks and sought a waiver in the alternative if the Commission deemed the notification insufficient to meet the construction requirement.<sup>11</sup>

On October 25, 2012, the Division sent a letter to Mr. Havens indicating that it accepted the June 2012 construction notification in satisfaction of the five-year construction requirement for station WPXM576, but declined to find that Havens met the ten-year construction requirement.<sup>12</sup> While the single transmitter deployed under station WPXM576 failed to cover the 33% population coverage safe harbor, the Division made a finding of substantial service because the operations provide service in a number of rural counties, and it would be unduly burdensome to Havens and Chesapeake (using the frequencies to facilitate energy production in rural areas) to terminate the license when they missed the safe harbor by less than 3% of the market population.<sup>13</sup> However, the Division also found several of Havens' arguments to be unpersuasive in demonstrating substantial service including his equipment choice, portable nature of his transmitter and the flexible nature of the equipment to provide other types of service.<sup>14</sup> Further, the Division found other Havens arguments unsupportive of a finding of substantial service, including: 1) that he could move his single transmitter to other locations to cover additional population, 2) that it was cost prohibitive to deploy additional transmitters, 3) that the 5 dBu signal level at the market boundary warrants special consideration in limiting his ability to cover more population, and 4) his assertion of making the station available for fire fighters absent a demonstration that such operations actually occur.<sup>15</sup> Finally, in dismissing Havens' contention that his operations satisfied the ten-year construction requirement, the Division stated that the "Commission by doubling the safe-harbor example clearly intended that ten-year coverage requirements, including a substantial service standard,

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<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> FCC File No. 0005290483, Notification of Construction and Substantial Service Showing at 5 (filed June 29, 2012).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 2, 6.

<sup>12</sup> See Letter dated October 25, 2012 from Thomas Derenge attached to FCC File No. 0005290483.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

encourage greater provision of service.”<sup>16</sup> The Division concluded that it expected “full compliance with the construction requirement before the second benchmark deadline and will evaluate Havens’ service for WPXM576 at the end of the license term to determine whether the ten-year construction requirement is met.”<sup>17</sup>

On the license expiration date (May 6, 2013), Havens filed the instant Extension Request, seeking a 4 month extension of the ten-year construction deadline for station WPXM576 until September 6, 2013. On the same day, Havens also filed a renewal application<sup>18</sup> and included a waiver and an application to split WPXM576 and assign an area inside of a circular contour to Skybridge, a Havens affiliate.<sup>19</sup> In his Extension Request, Havens indicates that Chesapeake unexpectedly sold most of its western Oklahoma operations and is no longer a customer.<sup>20</sup> Havens contends that while the “antenna site facility is still available and in use,” he “will be seeking a different antenna site facility owned by, or that is best for service to, one or more new primary users, such as a state or county government VHF station.”<sup>21</sup> Havens intends to seek new users for the license to provide non-profit service beyond the partition area assigned to Skybridge, such as state and county governments including fire, emergency response, transportation and other governmental departments or services.<sup>22</sup> Additionally, Havens proposes to use improved radio technology that will allow governmental entities to cost effectively take advantage of their old 25 kHz-wide channel equipment while transitioning to new narrowband equipment.<sup>23</sup> Havens believes this is consistent with Commission policy to encourage the provision of new technologies and service to the public.<sup>24</sup>

*Extension Request.* Section 1.946 of the Commission's rules allows for an extension of time to meet construction requirements where a licensee demonstrates that failure to meet the construction deadline is due to circumstances beyond its control, but it also outlines reasons that would not justify an extension, such as a failure to obtain financing, or to obtain antenna sites or equipment.<sup>25</sup> However, the extension standards must be applied in consideration of section 309(j) of the Communications Act, as amended, which states that the Commission shall include performance requirements to ensure prompt delivery of services, to prevent stockpiling and warehousing of spectrum by licensees, and to promote investment and deployment of new technologies and services.<sup>26</sup>

We find that grant of an extension of the ten-year construction benchmark for station WPXM576 is not warranted in this instance. First, we note that when the Division granted Havens an extension of

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<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Id.*

<sup>18</sup> FCC File No. 0005768648 (filed May 6, 2013).

<sup>19</sup> The assignment request was attached to the renewal application because Commission’s Universal Licensing System erroneously blocked the assignment application because it was being filed on the expiration date of the license. The Mobility Division subsequently allowed Havens to submit the assignment application which was accepted. *See* FCC File No. 0005846610 (filed July 18, 2013).

<sup>20</sup> Extension Request at 1.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* citing 47 U.S.C.A. § 157.

<sup>25</sup> 47 C.F.R. § 1.946(e).

<sup>26</sup> *See* 47 U.S.C. §309(j)(4)(B).

the five-year construction deadline, it warned Havens that he should not anticipate an additional extension for this license absent extraordinary circumstances.<sup>27</sup> We do not find extraordinary circumstances in this instance. Instead we find that after holding the license since May 6, 2003, Havens has failed to achieve a viable service offering to the public and now seeks to shift technology and attempt to find a use for the spectrum. Specifically, on the license expiration date, Havens requested a 4 month extension of the ten-year construction requirement stating that he intends to 1) replace the existing transmitter with one or more base station antenna sites; 2) make radio services available to various governmental agencies on a non-profit basis; and 3) use advanced radio technology to provide radio service improvements. None of the arguments advanced by Havens warrants an extension.

We find that Havens' request demonstrates that after holding the license for ten years, he is pursuing preliminary steps towards utilizing the spectrum to provide a service. Further, his offer of making service available to users such as state or county government for fire, emergency response, transportation, or other government services does not warrant an extension, especially given the lack of evidence that such entities have used or seek to use the license for such purposes. Additionally, Havens' decision to use a different technology is a business decision and does not warrant an extension. Havens also fails to demonstrate or provide material evidence that further regulatory relief will result in its licenses being put to use in the near term. Allowing an extension beyond the license term to explore options or in hopes that a particular business model comes to fruition is not in the public interest. We therefore deny the Extension Request.

*Ten-year Construction Requirement.* Having denied the Extension Request, we now consider whether Havens satisfied the construction requirement for station WPXM576. We find that Havens has not demonstrated that substantial service for the ten-year construction requirement period. We note that Havens does not demonstrate that Station WPXM576 serves the 2/3<sup>rd</sup> population coverage safe harbor established in the *Third Report and Order* for VPC licenses at the ten-year construction deadline. With the loss of Chesapeake as a customer, and Havens seeking potential new uses in the market area, it appears that there is no service being provided by Station WPXM576. For this reason we find the coverage to be insufficient to meet the ten-year construction requirement.

We note that Havens did not meet the five-year construction benchmark for WPXM576 until the ninth year of the license term. The Division in accepting the five year construction notification warned that it expected coverage under WPXM576 to be significantly more robust before the second construction deadline. The Division also warned Havens that making station WPXM576 available for fire fighting, and other uses, does not warrant a finding of substantial service without a demonstration of the extent to which such operations occur. If these facilities are deployed and operated in a meaningful fashion for public safety applications, then these operations can be applied towards his demonstration that the construction requirements have been met, but not otherwise.

Additionally, we find Havens' arguments that his equipment choice, new technology to allow wide band high speed data over long range links and a cost effective means of transitioning to narrowband technology to be unpersuasive in demonstrating substantial service. The type of equipment a licensee chooses and how it is implemented are business decisions made by the licensee. What is relevant to the demonstration of compliance with construction requirements is what the licensee actually constructs and provides service during the construction benchmark period. Therefore, Havens' argument that these advanced technologies offer more functions and features and are ideal for the spectrum, industry and government functions in the market is irrelevant to what is actually being done.

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<sup>27</sup> See Letter from Thomas Derenge attached to FCC File No. 0003430268.

For these reasons, we find Havens failed to meet the ten-year construction requirement for Station WPXM576 and his arguments for demonstrating substantial service are unpersuasive. Further, because we deny Havens' Extension Request, the license for Station WPXM576 automatically terminated, pursuant to sections 1.946(c), 1.955(a)(2), and 80.49(a)(1) of the Commission's rules,<sup>28</sup> as of the construction deadline, May 6, 2013. We dismiss, as moot, the Renewal Application for WPXM576.

Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 303(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(i), and Sections 0.331, 1.946(c), 1.946(e), 1.955(a)(2), and 80.49(a)(1) and of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.946(c), 1.946(e), 1.955(a)(2), and 80.49(a)(1), the Havens Request for Extension of the Ten-Year Construction Deadline (Substantial Service Demonstration) and Notification of Construction and Substantial Service Showing for the Ten-Year Construction Requirement for Call Sign WPXM576, FCC File No. 0005768645, filed on May 6, 2013, IS HEREBY DENIED.

IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 1.946(c), 1.955(a)(2), and 80.49(a)(1) of the Commission's Rules, 47 C.F.R. §§ 1.946(c), 1.955(a)(2), and 80.49(a)(1), that the Universal Licensing System SHALL BE UPDATED to reflect that the license issued to Warren C. Havens for VHF Public Coast Station WPXM576 TERMINATED as of May 6, 2013.

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

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Thomas Derenge  
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<sup>28</sup> 47 C.F.R. §§ 1.946(c) 1.946(e), 1.955(a)(2) and 80.49(a)(1).