

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

In the Matter of
CALIFORNIA DEPARTMENT OF
TRANSPORTATION
Request for Waiver of Section 90.242(a)(7) of
the Commission's Rules

ORDER

Adopted: January 30, 2007

Released: January 31, 2007

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. We have before us a request for a waiver of Section 90.242(a)(7) of the Commission's rules filed by the State of California, Department of Transportation ("CalTrans"), which seeks to use its statewide license, Call Sign KNEC996, and all associated Travelers Information Stations ("TISs") to broadcast messages encouraging the public to reduce power consumption during power emergencies. For the reasons stated herein, we deny the Waiver Request.

II. BACKGROUND

2. The Commission established rules for TIS in 1977 to provide an efficient means of communicating certain kinds of information to travelers over low power transmitters licensed to local government entities. Under Section 90.242(a)(7) of the Commission's rules ("the TIS rule"), an entity eligible in the Public Safety Pool may use a TIS to broadcast only noncommercial voice information pertaining to traffic and road conditions, traffic hazard and travel advisories, directions, availability of lodging, rest stops and service stations, and descriptions of local points of interest. Motorists can receive

1 47 C.F.R. § 90.242(a)(7).

2 See Request for Waiver by the State of California (filed July 26, 2006) (Waiver Request).

3 Specifically, Stations KNCN250, KNEC996, KNEU564, KNIG427, KNNN866, KNNN867, KNNN868, KNNN869, KNNN870, KNNT676, WNDQ665, WNJR464, WNQS653, WNSB415, WNVQ787, WNXX966, WPBW721, WPBW809, WPBW813, WPSC305, WPDU922, WPEA446, WPEI433, WPEI434, WPET708, WPET709, WPET710, WPFK505, WPFK506, WPFK507, WPFK508, WPFM428, WPGR273, WPGR279, WPGR283, WPGR287, WPGR291, WPHJ953, WPHJ962, WPIJ667, WPIN400, WPIN401, WPIS369, WPKF567, WPMU210, WPMW407, WPPD491, WPQK812, WPQY890, WPQZ230, WPRO265, WPSE479, WPSG912, WPSH292, WPTJ432, WPUH752, WPVP652, WPVP711, WPVP765, WPVQ733, WPVQ736, WPVQ738, WPVQ742, WPVQ743, WPVQ900, WPWG225, WPWI606, WPXB744, WPXB746, WPXB970, WPXX879, WQED842, WQEG408, WQEU877, and WQFI529.

4 Amendment of Parts 2 and 89 of the Rules to Provide for the Use of Frequencies 530, 1606, and 1612 kHz by Stations in the Local Government Radio Services for the Transmission of Certain Kinds of Information to the Traveling Public, Docket No. 20509, Report and Order, 67 F.C.C.2d 917, 917 ¶ 1 (1977) (TIS Report and Order).

5 See 47 C.F.R. § 90.20(a).

6 47 C.F.R. § 90.242(a)(7).

TIS transmissions with any consumer AM radio. CalTrans operates seventy-five TISs in the AM band, between frequencies 530 kHz and 1700 kHz.⁷

3. CalTrans requests a waiver of the TIS rule because it proposes to broadcast announcements via TIS informing the public of the need to reduce power consumption.⁸ CalTrans states that the power alerts would be broadcast approximately every five minutes during periods designated by the State of California as a Stage II or Stage III electrical power emergency.⁹ According to CalTrans, a typical message would contain information such as the following:

“The California ISO [Independent System Operator] has declared a stage [II or III] power emergency.

(2) Stage II Emergency - Voluntary interruption of service is possible to avoid more serious conditions.

(3) Stage III Emergency - Consumers are advised that involuntary interruptions of service have begun and will continue until the emergency has passed.

Conserve Energy - Flex your Power

Turn off unneeded lights, computers and appliances.

Set your thermostat at 78 degrees or higher, as health conditions permit. Or turn it off when you're away.

Use major appliances after 7 pm.”¹⁰

4. On August 1, 2006, the Wireless Telecommunications Bureau placed CalTrans’s waiver request on public notice.¹¹ We received one comment opposing the Waiver Request, which was filed by the American Association of State Highway and Transportation Officials (AASHTO),¹² and we received one reply comment, which was filed by CalTrans.¹³ AASHTO states that the types of messages that CalTrans seeks to broadcast over TIS concerns electric power consumption, rather than road and traffic conditions, traffic hazards, travel advisories, directions, or descriptions of local points of interest, and is therefore outside the scope of the TIS rule.¹⁴ While CalTrans does not dispute AASHTO’s observation,¹⁵ it nevertheless contends that emergency power alerts are essential information to motorists and that such

⁷ Waiver Request at 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Wireless Telecommunications Bureau Seeks Comment on State of California Request for Waiver for AM Travelers’ Information Stations to Broadcast Announcements Encouraging Energy Conservation, *Public Notice*, DA 06-1560 (rel. Aug. 1, 2006). Pursuant to Commission reorganization effective September 25, 2006, the relevant duties of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunication Bureau were assumed by the Policy Division of the Public Safety and Homeland Security Bureau. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

¹² Comments of the American Association of State Highway and Transportation Officials, received August 22, 2006 (AASHTO Comments).

¹³ Reply Comments of the California Department of Transportation, received September 1, 2006 (CalTrans Reply Comments).

¹⁴ AASHTO Comments at 2.

¹⁵ See CalTrans Reply Comments at 2.

alerts may be useful to advise motorists of inoperable traffic signals, or allow them to revise their travel plans to avoid life threatening conditions resulting from the absence of power.¹⁶

III. DISCUSSION

5. To obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the waiver would be in the public interest;¹⁷ 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.¹⁸ An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹⁹ Based on the information before us, we are not persuaded that CalTrans has demonstrated that a waiver of Section 90.242(a)(7) is warranted.

6. We do not believe that CalTrans has demonstrated that the underlying purpose of the TIS rule would not be served or would be frustrated by application to the present situation. In reaching this decision, we note that the purpose of TIS is to provide “specific information pertinent *only* to travelers within a very limited reception area.”²⁰ Specifically, the Commission stated that the kinds of information contemplated for TIS applications “will principally serve the traveling public” or “the traveler in the immediate vicinity of the station.”²¹ To ensure that only relevant information to the traveler was broadcast, the Commission adopted rules to restrict the transmitting sites of each TIS to a location within an area that would be “mainly frequented by travelers.”²²

7. CalTrans’s request is not consistent with the underlying purpose of the TIS rule because it would provide information about power conservation alerts that is not pertinent to only traveling motorists.²³ We agree with AASHTO that the purpose of the TIS rule is “to provide essential information to motorists traveling along the highways and roads that directly affects them”²⁴ and applies only to them.²⁵ The energy conservation information CalTrans proposes to broadcast via TIS is more applicable to a broader target group, such as persons at home or places of business rather than traveling motorists, and therefore we are not persuaded that CalTran’s proposed deviation from the intended purpose of the TIS rule would serve the public interest.

¹⁶ *See id.* at 3.

¹⁷ 47 C.F.R. § 1.925(b)(3)(i).

¹⁸ 47 C.F.R. § 1.925(b)(3)(ii).

¹⁹ *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*), *aff’d*, 459 F.2d 1203 (1973), *cert. denied*, 409 U.S. 1027 (1972) (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broad. Corp., Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 (2003).

²⁰ *TIS Report and Order*, 67 F.C.C. 2d at 919 ¶ 6 (1977) (emphasis added).

²¹ *Id.* at 923 ¶ 23.

²² *Id.*; *see* 47 C.F.R. § 90.242(a)(5).

²³ In adopting the TIS service rules, the Commission stated that it did not want TIS to “evolve into a ‘quasi broadcasting’ service.” *See TIS Report and Order*, 67 F.C.C. 2d at 923-4 ¶ 23.

²⁴ AASHTO Comments at 2.

²⁵ *See TIS Report and Order*, 67 F.C.C. 2d at 919 ¶ 6 (1977).

8. In reply comments, CalTrans states that emergency power alerts via TIS could also provide essential information to motorists of inoperable traffic signals.²⁶ We do not find this argument persuasive because the TIS rule already contemplates broadcasting information concerning inoperable traffic signals to the extent the information pertains to “traffic conditions” or “traffic hazards” pertinent to the motorist.²⁷ CalTrans also states that the proposed power alerts via TIS could “allow [motorists] to plan their destination to avoid life threatening conditions resulting from no power being available such as lack of emergency home health aids or [h]eating, [v]entilation and [a]ir [c]onditioning systems.”²⁸ Given that the purpose of the TIS rule is to provide traveling motorists with pertinent information “in the immediate vicinity of the station,”²⁹ we do not believe that the ability to broadcast information regarding the operational status of home health aids comports with the underlying purpose of the TIS rule.

9. While Section 90.925(b)(3)(ii) provides for a waiver upon a showing that, because of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative,³⁰ CalTrans’s Waiver Request is silent on the issue. In this connection, CalTrans does not demonstrate how its current inability to broadcast energy conservation messages over TIS is inequitable, unduly burdensome, or contrary to the public interest. Moreover, CalTrans does not plead that there are no reasonable alternatives. For example, no where in the Waiver Request does CalTrans address whether the Emergency Alert System (EAS),³¹ which also provides for emergency broadcasts over car radios, would alternatively satisfy at least some if not all of the objectives it proposes to achieve via TIS.

IV. CONCLUSION

10. In consideration of the facts before us, we deny the Waiver Request because CalTrans has failed to demonstrate that a waiver of Section 90.242(a)(7) is warranted pursuant to the criteria set forth under Section 1.925 of the Commission’s rules.

V. ORDERING CLAUSE

11. 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 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, that the request for waiver filed by the California Department of Transportation on July 26, 2006 IS DENIED.

²⁶ CalTrans Reply Comments at 3.

²⁷ See 47 C.F.R. § 90.242(a)(7).

²⁸ CalTrans Reply Comments at 3.

²⁹ *TIS Report and Order*, 67 F.C.C. 2d at 923 ¶ 23.

³⁰ 47 C.F.R. § 1.925(b)(3)(ii).

³¹ The rules and regulations providing for an Emergency Alert System are codified in 47 C.F.R. Part 11.

12. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

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