

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of
Amendment of Parts 2, 3, and 4 of the
Commission's Rules and Regulations and
the Standards of Good Engineering Prac-
tice Concerning FM Broadcast Stations
to Permit FM Broadcast Stations to En-
gage in Specified Nonbroadcast Activities
on a Simplex and/or Multiplex Basis. } Docket No. 10832

MEMORANDUM OPINION AND ORDER

BY THE COMMISSION: (COMMISSIONER HENNOCK NOT PARTICIPATING; COMMISSIONER DOERFER DISSENTING.)

1. The Commission has before it for consideration the following pleadings filed in the above-entitled proceeding: Statement and Request for Waiver of the Commission's rules relating to functional music operations by FM broadcast stations, filed on May 26, 1955, by Silver City Crystal Company, Inc. (WMMW-FM), Meriden, Conn.; Statement filed on May 31, 1955, by Functional Music, Inc. (WFMF), Chicago, Ill., supporting the petition of WWDC, Inc. for reconsideration and modification of the Commission's Report and Order in this proceeding¹; petition for reconsideration Modification filed on May 31, 1955, by Wm. Penn Broadcasting Company, Inc. (WPEN-FM), Philadelphia, Penn.; and Petition for Reconsideration filed on May 31, 1955, by North Shore Broadcasting Company, Inc. (WEAW-FM), Evanston, Ill.

2. On March 22, 1955, the Commission issued its report and order in this proceeding promulgating new rules relating to functional music operations of FM broadcast stations. On May 2, 1955, WWDC, Inc. filed a petition for reconsideration and modification of the new rules. On June 1, 1955, the Commission denied the WWDC petition and extended the effective date of the rules to July 1, 1955. The petitioners listed above are all FM broadcast stations engaging in functional music operations and also request reconsideration or waiver of the new rules.

3. Silver City Crystal Co Inc., is the licensee of station WMMW-FM, Meriden, Conn. and has been presenting a background music and storecasting service for several years. Silver City submits that the revenues derived from its functional music operations have enabled it to provide a diversified program ser-

¹ Pursuant to the request filed by Functional Music, Inc., on June 3, 1955, we are considering its Statement in Support of the WWDC Petition as a separate and independent petition for reconsideration and modification of our Report and Order in this proceeding.

vice for its listeners and that if such revenue is not available to it, the public will lose a valuable service. Silver City contends that multiplex equipment is not presently available and that compliance with the 36-hour requirement of regular FM broadcasting would result in a drastic curtailment of service, with a consequent serious loss of revenue. Silver City requests the Commission to waive the new rules until such time as multiplexing equipment becomes available.

4. Functional Music, Inc., is the licensee of station WFMF in Chicago, Ill. Petitioner argues that functional music operations are broadcasting within the meaning of the Communications Act and that such operations comply with all statutory requirements. It is submitted that the multiplex equipment currently available has not proved technically feasible and that the 36-hour requirement of regular FM broadcasting specified by the new rules for simplex operations should be eliminated. Functional Music, Inc., submits that station WFMF intends and desires the widest possible coverage for its programs; and that the use of electronic devices to delete vocal matter from specialized receivers in no way controverts this intention; that the income of station WFMF is derived, in considerable part, from advertisers; and that the program service provided by its station serves a very important local need. Petitioner states that because of the varied types of establishments included among its subscribers, effectuation of the 36-hour requirement prior to conversion to multiplex operation would involve additional operating costs for specialized programs and would threaten a disruption of its revenue; and that there is considerable doubt whether multiplex equipment currently available is capable of satisfactory performance. Petitioner requests that the Commission reconsider its report and order; or, alternatively, that the rules be waived to permit station WFMF to continue to present its functional music programs on a simplex basis without limitation as to the number of hours until multiplex equipment becomes available.

5. William Penn Broadcasting Co., Inc., is the licensee of station WPEN-FM in Philadelphia, Penn. WPEN asserts that multiplex equipment is not now available; that to require it to disrupt its present service by interrupting its musical programs during 36 hours a week is unreasonable and might cause a discontinuance of its present background music broadcasts. WPEN states that a substantial portion of its income is received from advertisers; that there is a specific local demand within its service area for the unique instrumental service offered by its station; that compliance with the 36-hour minimum requirement would mean a loss of approximately one-half of its background music accounts, with a resulting loss of revenue; and that the 36-hour requirement would place WPEN at a serious disadvantage with respect to competition from wire lines. WPEN asserts that the general public in the Philadelphia area can choose from among many stations for a wealth and variety of programs, and argues that there does not appear to be any necessity for haste in putting the Com-

mission's policy with respect to functional music operations into effect. WPEN request that the Commission dispense with the 36-hour requirement of regular FM operation during the 1st year after the effective date of the new rules and merely require that background music operations conform to the multiplex requirement within 1 year after the effect date of the new rules, at which time it is expected that satisfactory equipment for multiplexing would be generally available.

6. North Shore Broadcasting Co., Inc., is the licensee of stations WEAW and WEAW-FM in Evanston, Ill. North Shore asserts that it broadcasts a general, diversified program service consisting of entertainment, religion, news, sports, and talks, with extensive time devoted to local community organizations. Petitioner explains that from 9:00 a.m. to 6:00 p.m., Monday through Saturday, its programs are received in approximately 500 grocery stores on receivers owned by the grocery chains or the individual stores; and that the same programs are received in the stores as on home receivers, except that certain commercial announcements advertising products not carried in particular stores are deleted by means of a supersonic tone. North Shore states that there are no subscribers to its service since the stores do not pay a fee for the privilege of receiving the programs of WEAW-FM. North Shore argues that the notice of proposed rule making issued in this proceeding did not propose to require licensees to engage in multiplex operations for the presentation of specialized services, but rather that FM broadcast stations "would be permitted to engage in specialized nonbroadcast activities on a multiplex basis during all regularly authorized broadcast hours." North Shore states that it would be unable to convert economically to multiplex operation and to continue to present its service; and that enforcement of the new rules would require it to discontinue service to one of the grocery chains which it now serves, thus resulting in a substantial loss of revenue without in any way affecting the program service presented. North Shore requests that the Commission reconsider its new rules and determine that its operation may be continued on a simplex basis.

7. We have carefully reviewed the arguments and contentions advanced in the instant petitions for reconsideration and for waiver of the new functional music rules. We find that, in large part, the contentions and arguments now submitted are substantially the same as those previously considered and disposed of in our report and order promulgating the rules, and in our *Memo-randum Opinion and Order* of June 1, 1955, denying the petition for reconsideration of WWDC, Inc. We have, however, re-examined and reconsidered our prior actions in the light of the arguments and contentions now urged. Nevertheless, we are not persuaded that our prior decision in this matter is incorrect.

8. The Commission issued its report and order in this proceeding last March promulgating new rules governing the functional music operations of FM broadcast stations. These rules were adopted following careful consideration of the extensive and de-

tailed comments submitted by many parties in the proceeding. We concluded that functional music is predominantly nonbroadcast in nature. Nevertheless, we were of the view that the public interest would be served by permitting FM broadcast stations to engage in some functional music activities as "an adjunct to the FM broadcast operation" so that the broadcast station might draw financial sustenance from them. We therefore adopted rules authorizing FM broadcast stations to conduct functional music programs in accordance with certain specified provisions. In permitting this type of operation, we emphasized that functional music must be conducted only as an *adjunct to the regular broadcast service*, a subsidiary operation in order to assist the main undertaking—the broadcast service to the public. Thus, we provided that during the 1st year after the effective date of the new rules, FM broadcast stations may engage in functional music activities on a multiplex basis at any time, and may engage in such operations on a simplex basis with at least 36 hours per week devoted to regular FM broadcasting. After the 1st year, the rules provide that all functional music operations must be multiplexed.

9. The instant petitioners again contend that functional music is broadcasting. However, we made clear in our report and order and in the *Memorandum Opinion and Order* of June 1, 1955, why we believe that functional music operations are not broadcasting within the meaning of the Communications Act. We need not repeat our reasons here. We also detailed our reasons for determining that at least 36 hours a week of regular FM broadcast programs must be conducted by stations engaging in functional music operations. We emphasized in our decision adopting the new functional music rules that the result reached did not rest upon the technical and economic feasibility of multiplexing. We stated our view that authorizations for functional music must be limited along the lines of the new rules since no conversion or reallocation of the FM broadcast band was contemplated; and we made clear that even though the multiplex techniques were not fully developed and had to be totally discounted, we would still adhere to the new rules. The only alternative, we noted, would be a complete cessation of functional music operations. In the light of these considerations, we see no merit to the contentions and arguments now advanced by the subject petitioners urging that we waive the 36-hour requirement. In our view, the 36 hours represent a *minimum* of regular FM broadcast service that should be afforded to the public by FM broadcast stations. In reaching this determination, we are not unmindful of the representations advanced by the petitioners with respect to the financial loss that may result from adherence to the 36-hour requirement. Nevertheless, we believe that the public interest considerations in ensuring that the FM broadcast frequencies are utilized primarily to afford a broadcast service are paramount. The 36-hour requirement, in our view, represents a reasonable minimum to be adhered to by the FM broadcast stations.

10. North Shore attempts to distinguish its store casting opera-

tion from the general functional music activities covered by the new rules. It asserts that its revenue is received entirely from advertisers whose products are publicized over the air rather than from subscribers. But North Shore concedes that the grocery chains have agreed that in the event revenue from advertisers does not reach an agreed figure the difference would be underwritten by the stores. Petitioner urges that its advertising is not restricted to products sold in the stores, but that local and national advertising is carried as well and is heard on all receivers, both at home and in the stores. The only material deleted is announcements for grocery products not carried by the particular chain. Public service and station identification announcements are carried by the station and are not beeped out. Upon the basis of the showing made in the North Shore petition, we do not believe that North Shore's storecasting operation can be distinguished from the regular functional music activities contemplated by our new rules. We believe that North Shore's operations, in the main part, still constitute a point-to-point service, with its programs directed primarily at specific locations. The fact that these programs are also intended to be received by general home listeners does not alter our conclusion that North Shore's activities come within the purview of our new functional music rules.

11. *It is ordered*, That the request for waiver of rules filed May 26, 1955, by Silver City Crystal Co., Inc.; the petition for reconsideration filed on May 31, 1955, by Functional Music, Inc.; the petition for reconsideration and modification filed on May 31, 1955, by William Penn Broadcasting Co., Inc., and the Petition for Reconsideration filed on May 31, 1955, by North Shore Broadcasting Co., Inc., *Are denied*.

Adopted June 29, 1955.

Released July 1, 1955.