

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 ENGINEER-
ING PRACTICE CONCERNING FM BROAD-
CAST STATIONS TO PERMIT FM BROAD-
CAST STATIONS TO ENGAGE IN SPECIFIED
NON-BROADCAST ACTIVITIES ON A SIM-
PLEX AND/OR MULTIPLEX BASIS.

Docket No. 10832

REPORT AND ORDER

BY THE COMMISSION: COMMISSIONERS WEBSTER AND DOERFER
DISSENTING AND ISSUING STATEMENTS; COMMISSIONER HEN-
NOCK NOT PARTICIPATING

1. On December 31, 1953, the Commission issued its notice of proposed rule making in the subject proceeding. In that Notice, the Commission set forth its views that the functional music operations¹ are not broadcasting within the meaning of section 3(o) of the Act but should be authorized as "an adjunct to the FM broadcast operation" so that the latter may draw financial sustenance from them. To that end, the Commission proposed to relax the required minimum hours of operation of FM broadcast stations from 42 hours to 36 hours a week during the hours of 6:00 a.m. to midnight; to remove requirements as to the segment of the broadcast day in which the minimum hours apply and to permit FM licensees to obtain Subsidiary Communications Authorizations (SCA) to engage in certain types of activities, typified by the functional music operations, on a simplex basis during the time not devoted to the required minimum of 36 hours of FM broadcasting or on a multiplex basis at any time. Comments of interested parties with respect to the proposals were invited. We turn now to consideration of the comments received.

2. Since the touchstone of the rule changes proposed by the Commission is the determination that the functional music operations are predominately nonbroadcast in nature (par. 9 of the notice), we believe it desirable to take up this aspect first. Although the Commission explicitly invited comments directed to the views expressed in par. 9 of the notice, only 6 of the 33 parties

¹ The nature of these operations is described in par. 2-5 of the notice.

commenting addressed themselves to this issue.² One party—WGHF, Inc.—stated that “the Commission’s determination that the various functional music activities are not of themselves broadcast activities within the meaning of the Act [is] eminently reasonable.” The other 5—King Broadcasting Co. (KING-EM), Santa Clara Broadcasting Co. (KSJG-FM), Richard G. Evans, William Penn Broadcasting Co. (WPEN-FM), and Capitol Broadcasting Co. (WWDC-FM)—contend that the functional music operation does constitute broadcasting within the Act. In support thereof, it is argued by these parties that the functional music programs are intended and are in fact received and enjoyed by substantial segments of the general public; that since this is so, the Commission should not attach undue weight to the use of the supersonic tone; that there is no need for a balanced program format in a community having many broadcast services, and as with the “good music” format, the functional music one is designed to reach a specialized audience; that the transit audience is “virtually the same” as the home audience; and that the fact that specialized audiences are being reached by the transiting and storecasting operations is irrelevant since “where people happen to be listening” has nothing to do with whether “broadcasting” is taking place.

3. We have considered these arguments, but adhere to the conclusion set out in par. 9 of the notice. We there recognized that the functional music operator has no objection to and indeed probably desires the reception of his transmissions by the general public in addition to the special places primarily involved. But as demonstrated by the format adopted and apparent by the station’s source of revenues, the service directed to the special points or subscribers would clearly appear to be the key to the over-all operation. A background music or storecast operation employing telephone wires is concededly providing an industrial point-to-point service; we cannot conclude that the essential nature of such an operation is changed because of the use of radio transmissions. It is our view that the operation—in so far as the programming is directed to the special interests of the industrial, mercantile, transportation, or other subscribers and is not primarily intended for reception by the general public—must be characterized as *predominantly* non-broadcast in nature. The fact that a large portion of these transmissions—including most of the program material—may be received by the general public on home receivers as an incidental by-product of the primary intent of the transmissions does not change this rationale. The argument that these are specialized services similar to a “good music” service does not withstand scrutiny. For to sustain this, a showing would have to be made in each case that the functional music station

² Because of the nature of their comments, for example, the requests of several parties to lift the ban against functional music operation during the 36-hour period required to be devoted to FM broadcasting, a majority of the other parties would appear to acquiesce in the Commission’s determination of the essentially non-broadcast character of the functional music services.

was meeting some specific local demand in a community having several broadcast services. We have noted, however, that prior to the advent of the services in question, no FM licensee employed the functional music format; it was only upon the decision to engage in functional music operations that this singular programing was adopted. Further, in the same area, more than one FM station can frequently be found engaging in these services. Thus, in an initial survey of these operations, it was learned that in one metropolitan area, four FM stations were engaged in functional music operations, inundating that area with essentially the same service. In summary, the main effort of these services is directed not to the general public but to listeners at particular points or places. It is because of their predominantly non-broadcast nature that these operations run afoul of so many basic broadcast provisions and policies (e.g. 310(b), 317, 318, maintenance of positive control over programing, 3.287-3.289 of the rules, etc.).

4. We turn to the Commission's proposals, summarized briefly in par. 1 of this report and more fully detailed in the notice. More than 1/2 the comments received support the substance and purpose of the proposals: these comments are generally along the line that the proposals represent "a sound and major step toward the solution many of the problems now facing [FM]." In substance, these comments, supported by the operating experience of the stations, assert that permitting the FM licensee to engage in these specialized non-broadcast services is necessary because of FM's financial status, and will promote FM broadcasting. Accordingly, we have determined that the basic idea behind the outstanding proposal is sound and should be adopted.

5. In reaching this conclusion, we reject the contentions made by the National Committee for Utilities Radio, Central Committee on Radio Facilities of the American Petroleum Institute, the United States Independent Telephone Association, and Storer Broadcasting Co. These parties contend that the proposals in effect constitute a reallocation of the FM band to non-broadcast services; that in allocating frequencies among services, the Commission has consistently evaluated the necessity for utilizing radio to provide the new service and the needs of other services for the spectrum space involved; and that these allocation procedures should be followed here. These objections, however, fail to take cognizance of our basic purposes of the subject proposals which were set forth in the notice. In par. 11 of the notice we stated: "It should be emphasized, however, that our aim in this proceeding is not the conversion of the FM broadcast band to some new specialized non-broadcast service or services: on the contrary, authorization of such new ventures must be only as an adjunct to the FM broadcast operation a subsidiary service so that the main undertaking—the broadcast service to the public—can draw financial sustenance from it. The rules applicable to the SCA, set out in the attached Appendix and described herein, and the provision that the SCA operation must be conducted on a multiplex basis at

the end of a one-year period, all demonstrate the subsidiary or secondary nature of the specialized non-broadcast activity.³

6. While the comments generally support the proposals, revisions or objections to particular features were put forth. We turn now to these objections or revisions.

7. Four parties—The American Civil Liberties Union (ACLU), the Congress of Industrial Organizations (CIO), the Transit Riders Association, and Messrs. Pollak and Martin—urge that transiting not be authorized by the Commission. These parties contend that transiting is undesirable as a matter of public policy because the resultant “forced listening” is abhorrent to our democratic way of life. Two parties—the CIO and Messrs. Pollak and Martin—argue that transiting raises constitutional questions of the right of free speech under the First Amendment and the right to liberty under the Fifth Amendment; the ACLU, on the other hand, concedes that it is “foreclosed from arguing that forced listening is a violation of the U.S. Constitution” in view of the Supreme Court’s Decision in *Pollak v. P.U.C.*, 343 U.S. 451 but contends, with respect to the standard of the public interest, that “transiting violates the spirit of the Constitution, decreases diversification of communication, and provides no public service program.” The Transit Riders Association makes the further arguments that transiting is injurious to the health of the Association’s members “in that it will result in nervous disturbances and mental anguish;” that it distracts the motorman and thus increases the hazards of travel; and that transiting is a business activity completely unrelated to the carriage passengers for hire.

8. The last noted arguments of the Transit Riders Association need not be considered: they should be addressed to the local regulatory body having jurisdiction over the Transit Company and no this Commission.⁴ And we agree with the ACLU that the Supreme Court’s decision in the Pollak case forecloses the issue of infringement of constitutional rights.⁵ The contentions based on programing are misplaced since the essence of the subject proposals is that the services are non-broadcast and therefore need not meet broadcast criteria. We are thus left with the policy question concerning “forced listening.”

9. The forced listening here involved stems from the necessity of the public to patronize monopolistic transportation facilities.

³ Storer’s comments also expressed the fear that these proposals “could be the opening wedge for conversion of all broadcast bands to non-broadcast uses,” such as subscription radio or TV. The rules here finalized do not contemplate subscription broadcast operations to the extent that such operations involve transmission of entirely scrambled or coded programs which can only become intelligible through utilization of special unscrambling or decoding devices at the receiver. The nature and advisability of such operations—as contrasted with operations in which a minor portion of the program is specially “beeped” in or out—is expressly reserved for further consideration in connection with the pending proceeding to authorize such subscription program services.

⁴ We note that in this case they have been presented to such an agency and have been rejected. 81 P.U.R. (N.S.) District of Columbia, 122.

⁵ Messrs. Pollak and Martin express concern that the transiting operation will not result in “fair presentation” of controversial issues. But we see no reason why the policies laid down in the Editorializing opinion (part 3, 1 Pike and Fischer, p. 91:201) and in decisions under section 315 cannot be carried out equally well by the transit operator; the discussion of the rules in par. 28, *infra*, and the rules set out in the Appendix, make clear the responsibility of the holder of the SCA in this respect.

In every situation, therefore, there is either a regulatory body established to supervise the activities of the transportation company or the latter is municipally owned and regulated directly by the community legislative council. We believe such regulatory agencies are in closer contact with the situation and, therefore, can better decide the policy questions involved. Thus, it is conceivable in a small community to have a survey or referendum vote which reveals overwhelming or total support of a transitcasting operation: In such a situation, it is difficult to see how a broad rule of this Commission proscribing such an operation could be justified. Accordingly, we conclude that this aspect of the transitcasting operation may be adequately safeguarded by the regulatory agency which is more closely attuned to the local situation than this Commission.

10. We shall now take up the comments directed to the requirement of 36 hours of FM broadcasting per week. First, a few parties are apparently laboring under the mistaken belief that the proposal would permit the FM licensee to engage in functional music operations only on a multiplex basis. To allay such confusion, we repeat that, during the first year, FM broadcast stations would be permitted to engage in the specialized non-broadcast activities on a simplex basis during all times not devoted to the 36 hours required for FM broadcasting, and on a multiplex basis at all times without restriction.

11. Five parties—Atlantic Broadcasting Co., Inc., Field Enterprises, Inc., Capitol Broadcasting Co., Santa Clara Broadcasting Co., and King Broadcasting Co.—urge the Commission to reconsider its 36-hour requirement and to permit full-time functional music operations on a simplex basis. The argument put forth by several of these parties is that to be successful, a background music service must commence operation approximately at 8:00 a.m. each day and terminate at approximately 3:00 a.m. the following day; that an FM licensee could not devote the 36 hours a week required by the proposed rule for FM broadcasting and at the same time provide on a simplex basis specialized services for the number of hours required for an economically sound operation; that it is therefore essential that the FM licensee be able to turn to multiplexing and have available at reasonable costs multiplex receiving and transmitting equipment; and that there is presently insufficient data to indicate whether such equipment will be available. Because of this lack of knowledge concerning multiplex equipment, it is urged that the Commission permit full-time functional music operations on a simplex basis until such time as full data has been obtained with respect to the technical and economic feasibility of multiplexing—or at least for a period one year, with review by the Commission at the end of the year.

12. On the other extreme stand 4 other parties—The Good Music Station, Inc., James Broadcasting Co., Inc., Music Craftsmen of Los Angeles, and Robert P. Adams, licensee of station KUTE. These parties point out that the principal objective of the

proposal is furtherance of the FM broadcast service, and that they are, therefore, opposed to that part of the proposal which will reduce the minimum broadcast period to 36 hours per week. In the language of the comment submitted by KUTE, a background music station in Los Angeles: "This will tend to relegate FM broadcast service in general to a subordinate position in the broadcast field." KUTE notes that a station could broadcast 36 hours between 6:00 a.m. and midnight on Saturday and Sunday, utilizing the 5 week days for the non-broadcast specialized services and that since some professional offices, manufacturing plants and wholesales houses use background music only 5 days a week, this is not an impossible situation. Further, it points out that the "station might broadcast only from 6:00 a.m. to 12:00 noon and still meet the minimum broadcast hours while engaging in functional music broadcast service for the rest of the time." The same objection to allowing the licensee such freedom in the spacing of the required hours is made by The Good Music Station.

13. In between these extremes are Great South Bay Broadcasting Co., Inc., McClatchy Broadcasting Co., Pittsburgh Radio Supply House, Inc., and WGHF, Inc. All these parties express blanket approval of the Commission's proposals. Thus, Great South Bay Broadcasting Co., Inc., states that "reduction of the number of hours required for minimum operations each week will be of great economic advantage to FM stations and will permit flexibility of operation." The comments of WGHF are even more explicit: "The requirement of a 36-hour per week minimum period of broadcast operation appears to be a reasonable method of balancing [competing] equities, since it allows a licensee ample periods of time within which to strengthen his station financially through functional music activities. At the same time, it is a sufficiently substantial period as to be a constant reminder to the licensee that his station was authorized primarily for the public interest."

14. The argument that the Commission's proposal rests upon the technical and economic feasibility of multiplexing misconceives the situation and the Commission's goal. There are here two competing or conflicting interests. On the one hand, we have determined that the functional music operations are of a non-broadcast nature on the other, that limited authorization of such operations will be of aid to the FM broadcaster. But it is fundamental that such authorization be limited along the lines of the proposal since no conversion or reallocation of the FM band is contemplated. Here we stress that if the multiplex technique were not fully developed and had to be totally discounted at this time⁶, we should still issue the subject proposal with its hours limitation. For the only alternative to such a proposal, in view of our determination that the operations are non-broadcast in nature and that no reallocation of the FM band should be effected, would

⁶ In this connection, we point out that while we believe the contrary to be more likely (see par. 20), we recognize that there is a possibility of some short delay with respect to the availability of multiplex equipment.

be the cessation of such operation. It is for this reason that we believe the effectiveness of the proposal should not be postponed until positive assurance can be obtained on the availability of multiplex equipment.

15. We believe the 36 hour figure coupled with some requirements as to the spacing of these hours, represents the minimal restriction possible from the standpoint of the basic objectives involved and that under it, the FM licensee, without too great diminution of revenues, will be enabled to engage in the background music operation. We have decided to provide that the 36 hours of minimum FM broadcasting must be broken up over the week, with at least 5 hours daily. We recognize that in view of the number of hours required and the freedom of spacing accorded with respect to such hours, there is a danger that FM broadcasting may be too severely contained—that the licensee, having secured profitable non-broadcast arrangements outside of the 36-hour period, may restrict its business commitment to this minimum. It is our view, however, that such minimal restrictions are in order at the present time because of FM's financial condition, and we have determined upon a revision which will give assurance against the noted undesirable situation coming to pass. In line with the findings of the succeeding paragraphs on the feasibility of multiplexing, we have decided to limit the permission to engage in these specialized non-broadcast activities on a simplex basis to a period of one year from the effective date of this report and order; following this period, all such operation must be conducted on a multiplex basis. We believe that the 1-year period will permit the immediate undertaking of functional music or other specialized operations on a simplex basis will allow licensees who have invested in special equipment to get back some return on their investment; and will insure an adequate period for the development and manufacture at reasonable prices of multiplex equipment.

16. We come now to the multiplex aspects of the proposal. The comments of Multiplex Development Corp. and Crosby Laboratories, Inc. are particularly pertinent here since they include reports on laboratory and field tests of multiplex operation. These tests, conducted over a 6-year period, include measurement of transmitter performance under a normal simplex operation and under multiplex operation, and provide comprehensive data on transmission characteristics of the main channel and the subchannels. The signals were observed on a variety of FM receivers of the type ordinarily used in home reception; Multiplex Development Corp. states that in all cases, no trace of the multiplex signals could be detected under any tuning conditions of the receivers. Indeed, the Corp asserts that in all its tests commencing in 1948 on multiplex facsimile transmission, no interference with the main channel has ever been observed, and that this has been true even when 2 or 3 subchannels are multiplexed. Thus, tests of a 3-channel multiplex system in the summer of 1953 at FM Station WTOP—FM, Washington, D.C. demonstrated that multiplex signals from multiple-channel teletype, facsimile, and voice

communication circuits impressed, respectively, on three subchannels could be superimposed on the main carrier of WTOP-FM without interfering with main-channel broadcast transmission, and could be received successfully at a number of receiving stations within 60 miles of Wash. The public broadcast transmissions of the station retained their normal high fidelity transmission capabilities within the audio program range to 15,000 cycles, in accordance with the existing engineering standards of the Commission relating to FM broadcast stations. Laboratory measurements show that with 90 percent modulation on the main channel and 10 percent on the subchannel, a signal to noise ratio of 50 db may be realized in the sub channel of 2-channel systems within the 1 mv./m. contour and 26 db within the 50 uv./m. contour, while the main channel signal programs continued to meet all Commission requirements. In all tests, the subcarriers were between 20 and 75 kc and frequency modulated.

17. Station WGHF conducted field tests using a frequency modulated subcarrier of 45 kc., modulating the main channel at various values between 20 and 40 percent. The subchannel frequency swing was up to ± 15 kc. No deterioration of the main channel performance and no cross modulation was observed by measurement.

18. We have studied the reports of these parties. It is our conclusion, based on these reports and our knowledge of the multiplex facsimile operation, that multiplex operation by FM broadcast stations is feasible. Feasibility depends on satisfaction of 2 criteria: that the subchannel operation not interfere with the main channel signal and that the subchannel signal be of usable quality. The tests which have been made give assurance that no degradation of the main channel system need result and that the subchannel operation can be successfully carried on. In this connection, it is important to note that multiplex operation will be authorized with appropriate conditions to insure the maintenance of the present quality of the main channel signal (see par. 30, *infra*.)

19. The question remains as to the availability of multiplex transmitting and receiving equipment. The Multiplex Development Corp. has assured the Commission that its research and development program "has been directed to encouraged wide commercial use of low level multiplex techniques within the broadcast and radio communications industry" and that it is its intention "to make the results of its developmental program available on reasonable and equal terms to all licensees of the Commission and other responsible organizations." It comments indicate the "availability of multiplex broadcast transmitting receiving equipment at reasonable prices within a short period after approval of use of multiplex methods by the Commission."

Crosby Laboratories, Inc. has also submitted prints which indicate the particular pieces of equipment which "it is prepared to supply to users of FM multiplexing." The equipment thus availa-

ble includes essential transmitting and receiving mechanisms needed to engage in multiplexing.

Field Enterprises, Inc. has also undertaken studies to determine the technical and economic feasibility of multiplex operation. It asserts that these initial investigations "indicate substantial promise that, eventually, [multiplex] operation * * * will prove to be feasible," but that "it appears that equipment capable of operating on a multiplex basis will not be available generally for another year." It is not clear, however, upon what factors or considerations the latter conclusion is based.

20. The Commission believes that multiplex transmitting and receiving equipment will be available to the broadcaster and public within a relatively brief period after authorization of the multiplex operation. As noted, the functional music operation can be carried on a simplex basis above the 36-hour broadcast requirement for the 1-year period following the effective date of the rules. We believe, in view of the comments filed in this proceeding with respect to the present state of the art, that the 1-year change-over date assures adequate time for the development and quantity manufacture of such equipment.

21. The Commission's proposal would confine the subsidiary or secondary authorization to limited types of non-broadcast services. The notice described these services as involving specialized programming consisting of news, music, time, weather, etc., and cited as an example of such service the functional music operation. Four parties—Cerritos Broadcasting Co., Nicholas M. Brazy (KFMU), Music Craftmen of Los Angeles, and Joseph Brenner—have requested that the Commission remove this restriction on the uses of the SCA. They argue that in most communities two, or at most three, functional music operations will be all that will be economically feasible and that, therefore, it would be more desirable to impose no restriction upon the type of secondary service which an FM station can render in any given community; instead, the rules should provide that the Commission will determine on a case-to-case basis and as demand is made and need shown, the particular subsidiary communications service that should be authorized. As an example, the need for additional 2-way mobile communication services or taxi dispatching services is pointed to.

22. We have considered these arguments but believe the limitation of the notice should be adhered to at this time. The revisions here adopted are novel ones: we feel it best to proceed slowly. As presently set up, the SCA is limited to transmissions similar to those conducted under present functional music operations. We believe it desirable at the inception of this service that the character of the specialized operation not run completely counter to that of a broadcast operation. In reaching this result we want to make it clear that should the need be shown, we may permit wider use of the SCA at some later date—perhaps on a multiplex basis or only after the passage of the 1-year period. For the present, however, we adhere to the limitation set out in the notice.

23. We do not in this discussion or in the attached rules attempt to spell out every operation which comes within that limitation: to do so would be impossible. Fringe or close cases will accordingly be decided as they arise. A broadcast licensee must, in its application for an SCA, set out in full the purpose or purposes for which it will be employed. If granted, the licensee will be limited to those purposes or uses and must apply for and obtain a modification if additional uses are desired.

24. Several parties—KUTE, Cerritos Broadcasting Co., and Joseph Brenner—have expressed concern about the statement in the notice that “The FM broadcast licensee would be required to provide the material transmitted under this special authorization and could not delegate or ‘lease’ the authorization conferred by the SCA.” It is feared that this would prevent the station from entering into contractual commitments whereby the sales, installation and operational services required would be rendered by outside functional music operators instead of the station. It is pointed out that many stations cannot meet the substantial outlays for the purchase, installation and maintenance of the special equipment needed in the functional music operation.

25. The statement in question was not meant in any way to proscribe agreements between licensees and functional music operators whereby the latter install and maintain the equipment, engage in sales promotion, and even supply a record library of suitable music. What is intended is that the licensee maintain continuous control over all the material transmitted. We have inserted language in the attached rules to make clear this responsibility: all contracts involving these specialized services must have a provision that the licensee is to have complete control over and pass on all material to be transmitted, and can, on a simplex transmission, substitute a broadcast program at any time when it deems it in the public interest to do so.⁷

26. WGHF, Inc., urges the Commission to make clear that section 605⁸ of the Act applies to signals issued pursuant to an SCA. It points out that many industrial and business concerns presently make use of the functional music signal without authorization, and that if FM stations are to derive substantial financial support from these services, this practice must stop. It asserts that the methods presently available for dealing with this problem (private actions for injunction or damages on the basis of vi-

⁷ The latter provision is suggested by the comments of WGHF, Inc. That party also suggests that the Commission prohibit a licensee from entering into any exclusive agency functional music agreement. It argues that there is a disparity in the bargaining position of the FM broadcaster and the functional music company and that this proscription of exclusive agency agreements is needed in order to insure that the functional music licensee will derive sufficient revenue from his operation and will be in control of its economic destiny.

The matter would appear to us to be one best left to the negotiation of the parties. It could be argued with equal force that the Commission should prescribe minimum rates per subscriber because of the alleged disparity in the parties' bargaining positions. Such interference with normal station operation through the erection of artificial, governmentally imposed standards is clearly inappropriate.

⁸ The pertinent portion of section 605 reads as follows:

“* * * no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto * * * Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.”

olation of copyrights) do not appear to be satisfactory. It argues that since the Commission has determined the functional music operation to be non-broadcast, they come within the protection of section 605, and that a Commission declaration to this effect would be a considerable aid inasmuch as what is "needed here is not a remedy but a deterrent."

27. Although we have considered the application of section 605 in this matter, we wish to note that the question of the applicability of this Section will, in all probability, be determined by court actions. However, it is our opinion that section 605 would be contravened by the unauthorized reception of the FM signal only when such signal is being transmitted only for reception by the special interests of the industrial, mercantile, transportation or other subscribers without any *intention* of reception by the general public. This would be the case with all transmissions on a multiplex basis. However, as we have pointed out in par. 3, supra, the functional music operation when conducted, as it now is, on a simplex basis, transmits a signal capable of being received by the ordinary FM receiver. The circumstances of such operation are such that it must be held that these simplex transmissions are intended to be received at least incidentally by the general public. It cannot be considered, therefore, that the reception of such simplex transmissions would constitute an unauthorized reception within the meaning of section 605, and we do not believe that the reception of such transmissions is violative of this provision. The supersonic tone frequently employed in the functional music operation to "mute" the subscriber's specially equipped receiver is not intended in any way for reception by the general public; its unauthorized use would therefore contravene section 605.

28. We have decided to adopt rules along lines indicated by the foregoing discussion: these rules are set out in the attached Appendix. In summary, we wish to emphasize the subsidiary or secondary nature of the SCA. The FM broadcast license or permit is completely independent of the SCA.⁹ Its initial grant or renewal cannot be promoted by the SCA operation: the licensee must establish that its broadcast operation is in the public interest, wholly apart from the SCA. On the other hand, the SCA cannot exist apart from the FM broadcast license or permit. No transfer or assignment can be made separate from the license nor can the license be transferred with the former licensee retaining the SCA. The SCA's renewal period will be geared to that of the FM broadcast license, the failure to renew the latter automatically terminates the SCA.

29. The attached rules spell out the many conclusions reached in the prior discussion. As stated, the application for the SCA must set out in full the purpose or purposes for which it is to be employed; if the application is found to be within the limited category noted in par. 21 and granted, the holder will be restricted

⁹ Violation of rules applicable to the SCA would, of course, reflect on the licensee's qualifications to hold its broadcast license or permit.

to the requested uses, a modification being necessary for any additional use. The necessary control over the material transmitted and the right of substitution of broadcast programs on a simplex basis—described in par. 25—must be contracted for. The Commission's policies on fairness with respect to controversial issues and on Section 315 situations (political broadcasts) must be observed by the SCA operator; however, the latter when operating on a multiplex basis, need not meet the requirements of sections 3.288 (announcement of mechanical records), and 3.289 (sponsorship). On a simplex basis, the announcements must be made¹⁰ but can, of course, be "beeped" out by use of the supersonic signal.

30. On the multiplex aspect of the rules, we first repeat our basic findings derived from the engineering data submitted in these proceedings: That multiplex programming is possible without degrading the existing performance requirements for main channel transmission, and that while sub-channel performance varies with the operating parameters, it is useful for subsidiary purposes. In deciding upon appropriate modifications of the rules concerning technical operation to provide for multiplexing, we have considered the engineering data and/or recommendations of Multiplex Development Corp., station WGHF, Inc., Crosby Laboratories, and Mercantile Broadcasting Co. We have concluded that the present operating and performance requirements for the main channel should not be changed except to permit a reduction of approximately 3 db in the program level.

31. It is also concluded that operating parameters for sub-channels should not be rigidly specified. The limitations we have decided upon are as follows:

- (a) Frequency modulation of subcarrier shall be used.
- (b) The instantaneous frequency of the subcarriers shall at all times lie within the range 20 to 75 kilocycles.
- (c) The arithmetic sum of the modulation of the main carrier by the subcarriers shall not exceed 30 percent.
- (d) The total modulation of the main carrier, including the subcarriers, shall meet the requirements of section 3.268.
- (e) Frequency modulation of the main carrier caused by the subcarrier operation shall, in the frequency range 50 to 15,000 cycles, be at least 60 db below 100 percent modulation.

32. As stated in our notice, April 8, 1950, Raymond M. Wilmotte filed a petition seeking Commission authorization "to permit FM broadcast stations to use any means available to transmit an additional service without affecting the listeners of the present broadcast service." Mr. Wilmotte filed no comment in the subject proceeding. His petition contains insufficient technical data and information to make a determination as to whether the parameters adopted herein are broad enough to include the multiplex systems contemplated by him. In the event they do not, Mr. Wilmotte and others may at some future date petition for amendment of the standards here adopted to incorporate any new methods of

¹⁰ The functional music operator may meet the requirements of section 3.289 by announcing that the programming is being transmitted for a fee to commercial subscribers.

multiplexing. And the Commission will, of course, entertain any requests for experimental authorizations along these lines for the development and testing of such systems.

33. Authority for the adoption of the attached rules is contained in sections 301 and 303(b), (g), and (r) of the Communications Act of 1934, as amended.

34. *It is ordered*, This 16th day of March, 1955, that, effective May 2, 1955, the Commission's rules are amended to read as set forth in the attached Appendix.

Released March 22, 1955.

PARTIAL DISSENT OF COMMISSIONER F. M. WEBSTER

I have long been troubled by the fact that FM radio as a national broadcasting service has failed to develop to the extent that the service merits. And I have unhesitatingly exhibited this concern in public addresses and private conversations. Because I have openly stated that I would not be adverse to reallocating the broadcast FM frequencies if more efficient use thereof is not made in the near future, I feel that I owe it to myself to point out that some time ago, in an effort to stimulate the growth of FM broadcasting in this country, I went so far as to prepare and present to the Commission for consideration a proposal which, if adopted, would have permitted FM broadcast stations to substantially reduce their power, coverage and operating time so as to reduce operating costs to a minimum, thereby, I hoped, enabling existing stations to continue to operate and inducing newcomers to the field. This proposal was not adopted by the Commission and it may well be that my plan was not the solution to the problem. But it does serve to demonstrate that I am anxious to breathe life into FM broadcasting if there is a feasible way of doing so.

And it is because of my keen interest in FM broadcasting and my sincere desire to see it achieve the acceptance the service merits that I concurred in the Commission decision to issue a notice of proposed rule making looking toward the amendment of Commission rules which would permit FM broadcast stations to engage in specific nonbroadcast activities on simplex and/or multiplex basis.

After considering the facts at hand as well as the comments and arguments of interested parties participating in this proceeding I agree with the Commission's report and order to the extent that it requires FM broadcasters to ultimately utilize multiplexing rather than simplexing when they desire to engage in nonbroadcast activities. However, I fear that the Commission's rules, as amended here, fail to accomplish their purpose, namely, to stimulate the growth of FM as a broadcast service. For, these rules do not require the FM broadcast stations to increase the number of broadcast hours beyond the minimum of 36 required thereunder. And in my opinion nonbroadcast operations over FM channels on a multiplex basis will foster the growth of FM broadcasting only if the licensees are required to broadcast simulta-

neously with their nonbroadcast activities from 6 a.m. to 12 midnight, retaining the 36-hour minimum requirement.

Since it is logical to assume that the vast majority of FM broadcasters would not voluntarily increase their broadcasting day when it would possibly add nothing but expense to their operations, we may find the stations engaging in nonbroadcast activities 18 to 24 hours per day and broadcasting 6 hours, thereby placing the greater emphasis on their nonbroadcast operations. In fact, it is probable that we will soon awaken to the fact that we have authorized a reallocation of frequencies without first providing the general public with the opportunity of appearing and testifying as to whether it would have been in the public interest to allocate these frequencies for some other service or services.

Accordingly, I must dissent from the report and order to the extent that it fails to require simultaneous broadcasting and non-broadcasting operations.

PARTIAL DISSENT OF COMMISSIONER JOHN C. DOERFER

I feel constrained to dissent from the majority opinion because the premise upon which it is founded is, in my opinion, erroneous.

In reaching its conclusion, the majority has applied too literal an interpretation upon that portion of the Act defining broadcasting. The Commission's finding that functional music programming is not *intended* for general public reception ignores the fact that such programs are receivable by the public and, in fact, large segments thereof listen to the programs with receivers on which the supersonic tone has no effect because they prefer the program content. I submit that the mere fact that a station employs a supersonic tone effective only to a small percentage of listener-customers who wish it and pay for it or does not mean that the programs are not intended for public reception. Actually the broadcaster intends all of the public to receive all of his programs. He merely has found a small portion of the public actually receiving such programs (the subscribers), such as stores, hotels, restaurants, factories, etc., willing to have equipment installed which will "beep out," by a supersonic tone, certain announcements.

It is inconceivable to me that 43,000 persons who listened at least once during an average week to the programs of WWDC-FM in the Washington, D.C. area do not constitute "the public intended to be reached." Broadcasting intended for the public does not mean broadcasting acceptable to every single member of the public but must of necessity recognize that the public is made up of many people with different tastes and moods at different times of the day and different days of the week whose needs cannot be met by any standardization of a program format. Obviously, a portion of the public with a difference in taste and mood is and should be recognized as a legitimate classification within the meaning of the statutory definition of broadcasting. To provide for flexibility and ingenuity in broadcasting is not inconsistent with the intent of the Communications Act. The produc-

tion of programs designed to meet different needs should be permitted and encouraged. Substantial segments of the public, the functional music broadcasters, and the functional music purchasers have no objection to the manner in which those programs of background music are transmitted. It appears to me that only an apparent imminent danger to our overall concept of broadcasting should compel the Commission to conclude that functional music broadcasting is a non-broadcasting service. I see no signs of such danger.

I am, therefore, of the opinion that functional music operations are broadcasting; that the deletion of announcements by supersonic signals does not convert functional music transmission into a non-broadcasting service, and that the other criteria applicable to programing in the public interest can be tailored to comply with the basic requirements of a broadcast licensee's responsibilities.

The effect of the Commission's decision is to compel all operators concerned with this operation to rely on the Commission's renewing this method of transmission on a year-to-year basis with no certain grounds upon which to make definite commitments of capital or equipment in the future. I appreciate the Commission's hope that its action will create an incentive for the quick development of multiplexing. However, there will be time enough for this when the art of multiplexing becomes a practical reality. But, whatever the notice, broadcasting should not be construed as narrowly as was here done.

ORDER STAYING EFFECTIVENESS OF NEW RULES

1. The Commission has before it for consideration the petition of WWDC, Inc., filed on April 22, 1955, requesting the Commission to (1) stay the effective date of the Commission's new rules promulgated in the above-entitled proceeding and which are scheduled to become effective on May 2, 1955, or (2) to waive the rules, pending consideration and decision on a petition for reconsideration and modification to be filed by petitioner in this proceeding. On April 26, 1955, William Penn Broadcasting Co., Inc., licensee of station WPEN-FM, Philadelphia, Penn., filed a petition supporting the above request of WWDC, Inc.

2. On March 22, 1955, the Commission issued a report and order (FCC 55-340) in the above-entitled proceeding amending its rules and regulations with respect to functional music operations of FM broadcast stations. The new rules are scheduled to become effective on May 2, 1955. By its report and order, the Commission amended its rules to permit FM broadcast stations to conduct functional music operations on a multiplex basis without limitation as to time, and to permit FM broadcast stations to engage in functional music operations on a simplex basis during all hours not devoted to the 36 hours per week (at least 5 hours per day) specified for regular FM broadcasting.

3. WWDC, Inc., licensee of station WWDC-FM, Washington,

D.C., filed the subject petition on April 22, 1955, advising that it will file a petition for reconsideration and modification of the Commission's new rules by May 2, 1955, and requesting the Commission (1) to stay the effectiveness of the new rules or (2) to waive them, pending consideration and decision on its forthcoming petition for reconsideration and modification. WWDC, Inc. is presently engaged in widespread functional music activities. In this connection, petitioner notes that in order to meet the requirements of the Commission's new rules, it must either multiplex the programs of station WWDC-FM or, because of its present commitments with subscribers for background music and drugcasting services, must reduce the number of hours of its functional music operations. WWDC, Inc. submits that multiplexing is not possible at this time because of the unavailability of equipment. And with respect to simplexing, petitioner states that to operate in such manner, it would have to eliminate 27 hours of functional music operations from its current weekly schedule to meet the 36-hour minimum weekly requirement for regular broadcast operation. It is urged that elimination of these 27 hours will increase the station's operating losses and might thereby force the station to leave the air or to change its format to a mere duplication of the programs of its AM station. WWDC, Inc. submits, therefore, that failure to stay the effectiveness of the new rules or to waive them pending consideration of its petition for reconsideration and modification would cause irreparable injury.

4. William Penn Broadcasting Co., Inc. states that it is presently engaging in a functional music operation. station WPEN-FM operates on a full schedule with background music furnished various business establishments throughout the entire day. William Penn Broadcasting Co. states that it has been unable to secure any firm quotations or firm delivery dates for multiplexing equipment and therefore would be unable to continue its functional music operations on a multiplex basis. And it is stated that it will be unable to continue its present operations on a simplex basis without interrupting the service it is now furnishing subscribers. William Penn therefore urges that the Commission's new rules would cause irreparable damage to WPEN-FM and may necessitate the discontinuance of its background music service. Petitioner states that it is also preparing a petition for reconsideration, and requests that the Commission stay the effectiveness of its action pending consideration and decision upon its petition for reconsideration.

5. The Commission is aware that certain FM broadcasters are presently engaging in functional music operations and have various contractual arrangements with respect to such operations. The Commission believes, therefore, that the public interest would be served by staying the effectiveness of its new functional music rules pending a final determination in this proceeding. We have, therefore, decided to stay the effectiveness of our new rules for a period of 30 days.

6. In view of the foregoing, *It is ordered*, That the effective

date of the amendments to the Commission's rule and regulations issued pursuant to its report and order (FCC 55-340) in the above-entitled proceeding on March 22, 1955, and which are presently scheduled to become effective on May 2, 1955, is hereby extended to June 1, 1955.

Adopted April 27, 1955.

Released April 29, 1955.