

**Dissenting Statement of
Commissioner James H. Quello**

**Liability of Jones Eastern of the Outer Banks, Inc.
Licensee of Station WRSF(FM), Columbia, North Carolina
For a Forfeiture**

In my more than 20 years as an FCC Commissioner, I have always endeavored to bring to the job a sense of pragmatism born of my 30 years as a businessman, as well as a sense of fairness resulting from my 80 years as a citizen of these United States. Both of these instincts are offended by the forfeiture imposed in this case. I do not disagree with the finding that, in a technical legal sense, there was a violation of the main studio staffing requirement in this case. However, I do disagree with the imposition of a \$12,000 forfeiture in light of the circumstances that led to the issuance of a Notice of Apparent Liability. In particular, I fail to see how a stiff fine is justified where the very rule that the licensee is charged with violating was twice clarified at various stages of this case. The old adage, "a moving target is harder to hit," should not apply to government regulation. Unluckily, Jones Eastern has learned the hard way that the vagaries of imprecision apply to many things in life, including in this case the main studio rule. For these reasons, I am compelled to respectfully dissent once again in this case. See Notice of Apparent Liability to Jones Eastern of the Outer Banks, Inc., Licensee, WRSF(FM), 7 FCC Rcd 7309 (1992) (Commissioner Quello dissenting).

The evolution of the current main studio staffing requirement and the evolution of this case are, not coincidentally, closely intertwined. The main studio rule requires that "(e)ach AM, FM and TV broadcast station . . . maintain a main studio within the station's principal community contour . . ." 47 C.F.R. Section 73.1125. In 1988, the Commission clarified what constitutes a main studio:

A station must maintain a main studio which has the capability adequately to meet its function . . . of serving the needs and interests of the residents of the station's community of license. To fulfill this function, a station must equip the main studio with production and transmission facilities that meet applicable standards, maintain continuous program transmission capability, and **maintain a meaningful management and staff presence.**

Main Studio and Program Origination Rules (Clarification), 3 FCC Rcd 5024, 5026 (1988) (emphasis added) ("Main Studio Clarification").

In January 1989, shortly after the main studio staffing requirement was established, the Mass Media Bureau denied a request by Jones Eastern to relocate the WRSF main studio from Columbia, its city of license, to Nags Head, North Carolina,

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outside the station's principal community contour. Seven months later, in response to a confidential complaint, the Bureau issued a letter of inquiry to Jones Eastern requesting information concerning the equipment and staffing at its main studio.

Jones Eastern advised the Bureau that the staff of its Columbia facility in 1989 included: (1) a full-time office manager (the Bureau subsequently determined that this employee was a receptionist and not a manager), who worked at the Columbia facility 8:00 a.m. to 5:00 p.m. Monday through Friday; (2) a business manager, who spent approximately four hours per week at the studio; (3) the station's general manager, who spent approximately two hours per week at the studio; and (4) a senior account executive, whose schedule at the studio was not provided. The business manager and the account executive were both residents of Columbia and, in addition to time spent in the studio, spent time in the community talking with Columbia residents and community leaders and participating in local civic activities. The full-time office worker helped conduct a survey of 125 of Columbia's 836 residents to obtain information for the production of a public affairs program. Jones Eastern submitted samples of WRSF's 1989 quarterly issues/programs list to show that these ascertainment efforts achieved the Commission's community service objectives.

On October 27, 1989, the Bureau found that, although WRSF's equipment was in compliance with Section 73.1125, its staffing was inadequate under the "meaningful management and staff presence" requirement set forth in the Main Studio Clarification. The Bureau ordered WRSF to take steps necessary to comply with the rule and to submit a progress report within 30 days. No clarification of what level of staffing constitutes a "meaningful management and staff presence" was provided in the Bureau's decision that could have provided Jones Eastern with specific direction in modifying its staffing at the Columbia studio. The only language that could be viewed even remotely as "guidance" was the following statement: "It appears that on a full time basis the studio has either a manager with no staff or a staff person with no management." Ref. 8310-TD.

In an apparent desire for a ruling by the Commission on the Bureau's interpretation of the vague requirement of a "meaningful management and staff presence," and left with continuing uncertainty about just what level of staffing would be deemed adequate, Jones Eastern filed an application for review of the Bureau's October 1989 decision. In it, Jones Eastern argued that the staffing at the Columbia facility was adequate under the 1988 requirement. Jones Eastern further urged that, should the Commission deem its current staff inadequate, it issue a declaratory ruling outlining the precise number of staff persons and work hours that constitute a meaningful presence.

On June 19, 1991, a year and a half later, the Commission denied Jones Eastern's application for review, ruling that the occasional oversight of the managers at the Columbia facility did not constitute a meaningful presence. However, the Commission at the same time recognized that the main studio staffing requirement was in need of clarification, and therefore established for the first time that a main studio staff should consist of "full-time managerial and full-time staff personnel." The Commission also indicated that:

This is not to say that the same staff person and manager must be assigned full-time to the main studio. Rather, there must be management and staff presence on a full-time basis during normal business hours to be considered "meaningful."

6 FCC Rcd. 3615, 3616 (1991).

Armed with its first concrete indication from the Commission as to what specifically constitutes a "meaningful management and staff presence," Jones Eastern that same month implemented a new staffing proposal. The new main studio staff consisted of: (1) a full-time office worker; (2) a full-time chief engineer who also acted as the station's news director during morning and afternoon drive time; and (3) various account executives and the station manager who worked at the Columbia facility several days a week. Jones Eastern filed a petition which sought Commission reconsideration of its June 1991 decision in light of its new staffing, and further clarification of the staffing requirement.

This petition for reconsideration was denied in an October 14, 1992 Commission order. However, Jones Eastern's new staffing levels were determined to be adequate, and clarification of the persistently vague main studio staffing requirement was once again deemed necessary. In response to specific questions posed by Jones Eastern and the National Association of Broadcasters (which filed comments in support of Jones Eastern's request for clarification), the Commission clarified what categories of positions would constitute a "meaningful managerial presence" at the main studio. The Commission also clarified that:

Because some of these positions may require the persons occupying them to conduct significant business outside the office, we would not, of course, require management personnel to remain "chained to their desks" during normal business hours. Rather, we require that management personnel report to work at the main studio on a daily basis, spend a substantial amount of time there and, unlike Jones Eastern's "ghost management," use the studio as a "home base." Ultimately, that management presence must remain responsible for whatever station operations occur from that studio. To the extent that the staff person may

fully perform its station functions with time to spare, and coverage of the main studio permits, that person may also take on responsibilities for another business, as long as the main studio remains attended during normal business hours.

7 FCC Rcd 6800, 6802 (1992). For the first time since the 1988 main studio staffing requirement was adopted, broadcasters were provided with a complete picture of what the Commission meant by a "meaningful management and staff presence."

Despite the previous ambiguity surrounding the main studio staffing requirement, the Commission (minus this Commissioner's vote) just one month later issued a \$20,000 Notice of Apparent Liability for Forfeiture ("NAL") to Jones Eastern. 7 FCC Rcd 7309 (1992). The Memorandum Opinion and Order ("MO&O") adopted today (again minus this Commissioner's vote) affirms the imposition of a forfeiture but adjusts the amount downward to \$12,000 in light of the fact that the United States Court of Appeals set aside the forfeiture standards on which the Jones Eastern decision was based, and in recognition of the fact that Jones Eastern implemented its new staffing proposal in June of 1991. The \$12,000 forfeiture is therefore based on the approximately 18-month period between October 27, 1989, when the Bureau first notified Jones Eastern that its staffing was inadequate, and June 1991, when the Commission first ruled on the adequacy of Jones Eastern's staffing, and provided the first of two clarifications of the vague "meaningful management and staff presence" requirement.

The Commission noted in the NAL and in the instant MO&O that Jones Eastern did not seek to have enforcement of the main studio staffing requirement stayed during this period in which it was awaiting Commission guidance.

And so we arrive at the end of this tortured saga and learn that, had Jones Eastern filed with its application for review a motion for stay and maintained its 1989 staffing levels until the Commission clarified the main studio staffing requirement in 1991, presumably it would have avoided the imposition of a forfeiture. Instead, Jones Eastern filed an application for review without a motion for stay, maintained its 1989 staffing levels, and waited for a much-needed Commission ruling on its application for review and request for clarification. For the cardinal sin of not filing a motion for stay, Jones Eastern is directed to pay \$12,000 into the Federal Treasury.

Where does this leave us? I think we can all agree that the main studio staffing requirement was in need of clarification: hence, two decisions clarifying the requirement. I think we can also agree that Jones Eastern's 1989 staffing levels were not consistent with the spirit of the main studio rule. (However,

from my years in business, I do not view Jones Eastern's interpretation as entirely unreasonable.) Finally, we should all be able to agree that Jones Eastern sought clarification from the Commission of the rule it was charged with violating.

I part company with my colleagues, however, in their conclusion that a \$12,000 forfeiture should be imposed for Jones Eastern's failure to formally file a motion for stay of enforcement of this admittedly vague rule pending clarification. Once Jones Eastern was notified by the Bureau that its main studio staffing was inadequate, it appealed that decision but also requested clarification of the subject rule in the event its appeal was denied. In short, it is readily apparent that Jones Eastern intended to comply with the Commission's ultimate determination regarding the WRSF main studio staffing as soon as it pursued its statutory right to appeal the Bureau's decision, and as soon as it figured out what, exactly, our rules required.

Are we so rigid that we could not, during the eighteen months in which it took the Commission to rule on the application for review and request for clarification of the main studio staffing requirement, excuse Jones Eastern from a large forfeiture for failing to formally request that enforcement be stayed? Could we not have inferred in the filing of an application for review an inherent request for stay? Could we not, instead, have strongly admonished Jones Eastern, even issued a minimal forfeiture, for failing to comply adequately with the spirit of the main studio staffing requirement and allowed them to go on, appropriately chastened, with the business of broadcasting? It is with the Commission's failure in this case to dispense pragmatically fair justice with which I am compelled to respectfully dissent.

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