

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

Petition for Reconsideration
and/or Clarification of

Jones Eastern of the
Outer Banks, Inc.
Licensee, Radio Station WRSF(FM)
Columbia, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: September 3, 1992; Released: October 14, 1992

By the Commission:

1. The Commission has under consideration a "Petition for Reconsideration and/or Clarification," filed by Jones Eastern of the Outer Banks, Inc. ("Jones Eastern"), licensee of WRSF(FM), Columbia, North Carolina. Jones Eastern seeks reconsideration of the Commission's decision in *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), in which we found that the licensee was not in compliance with the main studio rule, 47 C.F.R. § 73.1125, because it had failed to maintain a "meaningful management and staff presence" at its main studio, as required by *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988). We ordered Jones Eastern to take steps to bring its main studio into compliance with the rule, and to inform us of those steps within 30 days of our decision. Jones Eastern submits this petition, but does not submit a progress report. For the reasons discussed herein, we deny reconsideration, but grant clarification.

2. In 1989, the Mass Media Bureau denied Jones Eastern's modification request to relocate its main studio outside its principal community contour and 51 miles away from its city of license, Columbia, (population 836), to the larger beachfront community of Nags Head, (permanent population 1,838, estimated seasonal population 32,000-35,000 for summer, 10-15,000 for fall),¹ the location of its auxiliary studio. The Bureau ruled that Jones Eastern had failed to show that granting a modification would serve the public interest better than adhering to the main studio rule. According to a subsequent complaint filed with the Bureau in 1989, Jones Eastern was apparently operating its "main studio" from Nags Head, despite the Bureau's denial of its modification request. Upon investigation, the Bureau discovered that the purported "main studio" in Columbia was staffed by only a full-time office worker who took telephone calls and conducted a telephone survey of Co-

lumbia residents. A business manager and the general manager spent four and two unspecified hours per week, respectively, at the studio. The Bureau found that this arrangement did not constitute a "main studio" and directed Jones Eastern to take steps to assure a "meaningful management and staff presence" and to submit a progress report.

3. Jones Eastern filed an application for review, challenging the Bureau's determination that its studio did not meet the staffing standard. In *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), we affirmed the Bureau, ruling that the occasional oversight of the managers did not constitute a meaningful presence. We stated that "a main studio must, at a minimum, maintain full-time managerial and full-time staff personnel." 6 FCC Rcd at 3616. We added that licensees need not have the same staff person and manager at the studio, as long as there is management and staff presence during normal business hours. *Id.* at n.2.

4. Jones Eastern now requests that the Commission reconsider its decision on the basis of Jones Eastern's new staffing proposal, which consists of: 1) a full-time office worker; and 2) a full-time chief engineer, who will also act as the station's news director during morning and afternoon drive time hours (5:30 a.m.-9:30 a.m. and 3:30 p.m.-6:30 p.m. Monday through Friday), the hours when news operations originate from Columbia.² According to Jones Eastern, various account executives and the station manager (who supervises the sales department) would also work at Columbia several days a week. In addition Jones Eastern requests clarification on the following two points:

a) What types of managerial personnel will serve to satisfy the required full-time "management presence," e.g., is a chief engineer considered management for purposes of the main studio rule?

b) Must the management and staff personnel be *physically present* at the main studio on a full-time basis, or may they simply report to work and be based at that studio?

Jones Eastern advocates an interpretation that would allow management or staff personnel that report to work at the main studio location to be absent from the office on station-related activities, such as meetings with community leaders, sales calls, newsgathering, and field work on the station transmitter.

5. The National Association of Broadcasters (NAB) filed comments in support of Jones Eastern's petition for reconsideration and/or request for clarification (but not addressing the specific enforcement proceeding against Jones Eastern).³ NAB supports Jones Eastern's new staffing proposal, and requests that the Commission reconsider the "two-person full-time" requirement and adopt a less rigid approach.⁴ NAB argues that requiring two people at the main studio on a full-time basis would create a hardship

¹ Permanent population figures are from the U.S. Census Bureau's 1990 statistics; Nags Head's estimated seasonal population figures are from Nags Head's Department of Planning and Development.

² Jones Eastern points out that the chief engineer would also act as a staff-level employee by answering telephones, receiving visitors, and/or operating technical equipment in the event of an emergency or a late-breaking news story.

³ Although our Rules do not contemplate such a petition, we will consider the NAB's suggestions to the extent that they may help clarify the issues.

⁴ We reiterate that the standard does not necessarily require two people at the main studio. Rather, it requires management and staff presence on a full-time basis, which may consist of more than two people working on part-time bases. See *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd at 3616 n.2.

for the large number of radio stations with four or fewer full-time employees, because it would restrict the number of employees who could be in the field selling advertising time, gathering local news or interacting with community leaders and local citizens. In this regard, NAB points out, the standard would not achieve the local service goals articulated in *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd at 5026. NAB also postulates that the standard would negate any cost savings from which stations in financial difficulty might otherwise benefit in reducing full-time staff.⁵

6. Specifically, NAB proposes that we adopt a standard requiring a management-level person to be based at the main studio, but not required to be present at that location at all times. NAB also proposes that we consider any person who qualifies to be listed in the "top four" job categories on the Annual Employment Report (FCC Form 395-B) as a management-level person for purposes of the main studio rule. NAB also urges the Commission to allow the staff-level person to engage in activities unrelated to the station operations, such as serving as a receptionist for another local business.

7. WOBR, Inc., licensee of radio stations WOBR(AM) and WOBR-FM, which compete directly with station WRSF, filed comments in opposition to WRSF's petition for reconsideration and/or clarification. WOBR argues that Jones Eastern's petition is an attempt to legitimize its illegal operation, which it has perpetuated since 1987. WOBR points out that WRSF is not some "Mom and Pop" station with only a few employees, but rather, a 20-employee⁶ station owned by a group operator.⁷ WOBR agrees with the NAB's position urging the Commission not to adopt a rigid approach to main studio interpretation. Rather, WOBR advocates an ad hoc approach, which would differentiate between 20-employee stations (with only two at the main studio) and extensively time-brokered stations (with only two employees overall). WOBR also urges the Commission to deny Jones Eastern's petition as it contains no newly discovered information.

8. WOBR also charges that Jones Eastern has made a misrepresentation regarding the residency of its managers. According to WOBR, WRSF's senior account executive, Roger Scheel, whom Jones Eastern represents in its petition as a Columbia resident, left WRSF in mid-May 1991, two months before Jones Eastern filed the instant petition. WOBR also raised this misrepresentation issue in a petition to deny an application to transfer control of WRSF (file no. BTCH-910808HF), filed by C.J. Jones on August 8, 1991. The staff has disposed of this allegation in its dismissal of the transfer of control application.⁸ See *Letter to Martin R. Leader and Mark J. Prak* (Chief, Audio Services

Division, April 30, 1992)(staff finding of no intentional misrepresentation or attempt to wilfully mislead the Commission by WRSF).

9. First, we find that Jones Eastern's current proposal would meet the requirements for a "meaningful management and staff presence" at its main studio. The Commission has considered chief engineers "managerial" in a number of different contexts. For example, in determining diversification of control in comparative hearings, chief engineers have been considered managerial when it is shown that they perform managerial functions. See, e.g., *Talleyrand Broadcasting*, 103 FCC 2d 476 (Rev. Bd. 1985)(chief engineer not attributable albeit managerial). This principle is equally applicable to integration of ownership and management proposals in such hearings. See, e.g., *Cleveland Television Corporation*, 91 FCC 2d 1148, 1164 (I.D. 1982)(chief engineer/program and operations manager is managerial for integration purposes), *aff'd*, 91 FCC 2d 1129 (Rev. Bd. 1982); *rev. denied*, FCC 83-235, *aff'd*, *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984). See also *Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1990 (Rev. Bd. 1987)(Review Board reference to chief engineer as "key managerial position"). For EEO reporting purposes, the Commission considers chief engineers in the "officials and managers" section of the Annual Employment Report (see Instructions to FCC Form 395-B, para 7(a)).

10. Here, Jones Eastern envisions its chief engineer doubling as the station's news director during certain dayparts. This proposal is consistent with our overall view that a chief engineer with managerial duties is "managerial." We have, however, recognized previously that chief engineers, though considered "key employees" for cross-interest purposes, generally do not make decisions regarding the policy, programming, or business planning of a licensee. *Reexamination of the Commission's Cross-Interest Policy (Further Notice of Inquiry/Notice of Proposed Rulemaking)*, 4 FCC Rcd 2035 n.4 (1989). See also *Reexamination of the Commission's Cross-Interest Policy (Notice of Inquiry)*, 2 FCC Rcd 3699 (1987). Thus, if Jones Eastern's proposal had not included the additional news director duties, we would have required the licensee to show that the chief engineer is authorized to make typical managerial decisions pertaining to facilities, equipment, programming, sales, and emergency procedures.

11. With respect to the specific questions posed by both Jones Eastern and the NAB, we believe that the following categories of positions would constitute a "meaningful managerial presence" at the main studio: President or other corporate officer, general manager, station manager, program director, sales manager, chief engineer with managerial duties, news director, personnel manager, facili-

⁵ NAB also requests that the Commission stay its enforcement of the standard pending the completion of this reconsideration proceeding, on the basis that the standard is too stringent. In light of our action herein, NAB's request is dismissed as moot.

⁶ WOBR took this figure from WRSF's 1990 Annual Employment Report. WRSF's 1991 Annual Employment Report shows 18 employees (14 full-time, four part-time).

⁷ Commission records show that, in addition to WRSF, Jones Eastern's principal, C.J. Jones, owns a controlling interest in the following radio stations: WVBS(AM) and WVBS-FM, Burgaw, North Carolina; WUJM(AM) and WUJM-FM, Goose Creek, South Carolina; and WYAK(AM) and WYAK-FM, Surfside Beach, South Carolina.

⁸ WOBR also points out that the location of WRSF's Emergency Broadcast System (EBS) equipment at its auxiliary, rather than main, studio wreaked havoc when Hurricane Bob caused the Nags Head personnel to evacuate and relocate to Columbia. As a result, WOBR states, WRSF could not broadcast EBS activations intended to warn residents, nor could other monitoring stations pick up those warnings from the station. The EBS rules, however, do not prohibit stations from locating their EBS equipment at auxiliary studios. See 47 C.F.R. § 73.901 *et. seq.*

ties manager, operations manager, production manager, promotion director, research director, controller, and chief accountant.⁹ These categories incorporate both the EEO "officials and managers"¹⁰ and cross-interest "key employees" concepts. 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."¹¹ 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.

12. Although we now accept Jones Eastern's new staffing proposal, its petition for reconsideration does not "rel[y] on facts which have occurred or circumstances which have changed" since the denial of its application for review under § 1.106(b)(2)(i). Petitioner's decision to assign a management person to the main studio represents neither a "newly discovered fact" nor a "changed circumstance," but is merely a new proposal. See *Practice and Procedure*, 46 RR 2d 524, 526 n.5 (1979). For this reason, we are granting the petition for clarification and denying the petition for reconsideration. Moreover, Jones Eastern's filing of this petition does not, nor has Jones Eastern shown good cause as to why it should, stay the effectiveness of the Commission's order. See § 1.106(n). Jones Eastern's exercise of available administrative remedies upon the Mass Media Bureau's 1989 directive does not ameliorate the two-year period that WRSF remained in violation of the main studio rule. Accordingly, we are adopting a Notice of Apparent Liability for WRSF's continuing main studio violation.

13. Accordingly, IT IS ORDERED that, pursuant to Section 1.106(j), of the Commission's Rules, the Petition for Reconsideration and/or Clarification is denied in part and granted in part. Jones Eastern is hereby ordered to implement its staffing proposal within thirty (30) days of the date of this opinion.

14. IT IS FURTHER ORDERED that the NAB's request for stay is dismissed as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

⁹ In this regard, we have stated that our emphasis is on job duties, rather than job titles. See *Arkansas Educational Television Commission*, 3 FCC Rcd 1923, 1924 (1988).

¹⁰ We reject as overbroad NAB's suggestion that we use the "top four" EEO categories to define managers for this purpose, as those categories include non-managerial employees.

¹¹ We are fully aware, as NAB demonstrates, that a significant body of stations have only a limited number of employees. For example, 5.8% (approximately 640) of all radio stations are said

to have two or fewer employees, while 18.7% (approximately 2060) have four or fewer. Unlike WRSF, stations of this size will generally not have more than one studio. In such circumstances, where the employees report to the main studio, we have no intention of limiting their ability to leave the studio to conduct station business.