



600 Peter Jefferson Parkway, Suite 300 • Charlottesville, Virginia 22911  
434.977.3716 • 434.979.2439 (f) • [easter@easterassociates.com](mailto:easter@easterassociates.com)

# Newsletter

Virginia Association of Broadcasters

August 2009

## Record Label Exec: Radio Is “Paramount” To Breaking Artists

RCA Records Senior Vice President of Pop Promotion Peter Gray became the latest record executive to single out radio airplay for its unparalleled role in helping promote the sale of music. Gray's remarks come as the Recording Industry Association of America continues a legislative push that would punish radio by requiring stations to pay an additional licensing fee amounting to hundreds of millions of dollars for music aired free to listeners. Gray's record label, RCA, is part of Japanese-based Sony Music Entertainment, an RIAA member company.

“[T]he primary function of a record label's promotion department is to secure radio airplay for its artists,” Gray said in an interview published in *OnMilwaukee.com*. “We rely on our relationships with music programmers at all contemporary radio formats, nationwide -- Top 40, Urban and Urban Adult, Hot AC and Mainstream Adult, Rhythm, Alternative, Active Rock, Rap, Dance, College radio, Smooth Jazz, etc. Our partnership with radio is paramount to breaking new acts, as well as keeping superstar artists in the eyes and ears of their fans and the music buying public.”

Detailing his daily duties, Gray explained, “The daily grind of promotion is really two-fold: First, you have to get the songs played on the radio. In some cases this is easy and in others a real chore. Second, you have to monitor your play constantly, which is a very competitive and strategic mathematical game.”

Gray went on to explain how radio airplay is monitored and aggregated into weekly charts published by *Billboard*, which he called “the report card.”

“I work closely with a staff of regional and national promotion executives to ensure that our songs reach the top of the charts, a space that commands a wide weekly audience,” he continued. “Most importantly, though, is a lot of time on the road listening to and visiting stations,

a lot of time on the phones persuading programmers to play my songs.”

Notably, Gray is not the first record label executive to stress the important role radio airplay plays in generating music sales revenue for the record label and artist. Both Gray's boss, RCA Music Group Executive Vice President of Promotion Richard Palmese and Clive Davis, the legendary music mogul described as Gray's mentor in the *OnMilwaukee.com* interview, have also recognized the promotional power of free radio airplay.

“I have yet to see the big reaction you want to see to a hit until it goes on the radio,” Palmese told *Radio & Records* in June 2007. “I'm a big, big fan of radio.”

“Radio is still the leading force of determining what songs and artists breakthrough,” Davis said in a June 2009 interview published in *USA Today*.

Commenting on Gray's statement, NAB Executive Vice President Dennis Wharton said, “Mr. Gray's unambiguous recognition of local radio airplay's promotional power stands in stark contrast to the cynical actions of RIAA, which

continues a campaign to financially cripple the very radio stations Gray relies on to generate increased music sales. If there was a platinum record awarded for hypocrisy, the record labels would surely be in contention.”

The RIAA -- backed by the four largest record labels in the world -- continues to urge Congress to pass legislation that would levy an additional fee or “performance tax” on local radio stations that air music free to listeners. While the legislation was passed by the House Judiciary Committee in a contentious 21-9 vote earlier this summer, there remain 246 House lawmakers and 23 Senators who are on record in opposition to the RIAA-led effort.

RIAA's campaign includes the funding of a 2007 study conducted by Stan Liebowitz, an economics professor at the University of Texas at Dallas, which falsely claims that radio airplay actually hurts record sales. In 2008, the musicFIRST Coalition, a group funded by the RIAA, called local radio “a form of piracy.” ❖





## VAB Newsletter

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600 Peter Jefferson Parkway, Suite 300  
Charlottesville, VA 22911  
434.977.3716 (p); 434.979.2439 (f)  
[www.vabonline.com](http://www.vabonline.com)

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## CONSULTANTS

**LABOR LAW EMPLOYMENT COUNSEL**  
John G. Kruchko, Paul M. Lusky  
Kruchko & Fries  
1750 Tysons Boulevard, Suite 560  
McLean, VA 22102  
(703) 734-0554

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**FCC/EEOC MATTERS**  
Wade Hargrove, Mark J. Prak,  
Marcus Trathen, Coe Ramsey  
Brooks, Pierce, McLendon,  
Humphrey & Leonard, L.L.P.  
P.O. Box 1800  
Raleigh, NC 27602  
(919) 839-0300; Fax: (919) 839-0304

## FCC Announces Filing Windows For LPTV And TV Translator Stations

The FCC has released a Public Notice ("Notice") announcing that the Commission will open two filing windows for LPTV and TV translator stations to apply for new digital-only LPTV and TV translator stations, for major changes to existing analog and digital LPTV and TV translator facilities, and for digital companion channels for existing analog stations. The Commission's action represents the latest step in facilitating the transition of LPTV and TV translator stations from analog to digital now that the full-power digital television transition has occurred.

Beginning August 25, 2009, the FCC will permit LPTV and TV translator stations in rural areas to apply for new digital-only LPTV and TV translator stations, for major changes to existing analog and digital LPTV and TV translator facilities, and for digital companion channels for existing analog stations. To be considered "rural," applicants must specify transmitting antenna site coordinates located more than 121 kilometers (75 miles) from the reference coordinates of the top 100 markets as listed in Appendix A at the following FCC website: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-1487A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1487A1.pdf). A reference copy of the list is attached to this Legal Memorandum.

Beginning January 25, 2010, the FCC will begin permitting all LPTV and TV translator stations, without geographic restriction, to file construction permit applications for new digital-only LPTV and TV translator stations, for major changes to existing analog and digital LPTV and TV translator facilities, and for digital companion channels for existing analog stations.

The FCC will not accept applications for new analog facilities during either filing window. Qualifying rural applications submitted between August 25, 2009, and January 25, 2010, will be processed on a first-come, first served basis and will be "cut off" daily. Likewise, applications submitted on or after January 25, 2010, will be processed first-come, first served with daily "cut offs."

The Notice reminds incumbent LPTV, TV translator, and Class A stations that they may continue to file applications for on-channel digital conversion or flash-cut at any time, regardless of

the new filing windows, and further advises such stations that have not already done so may wish to file their flash-cut applications before the filing window opens on August 25, 2009 (for rural applicants).

### A. Filing Procedures

The filing procedures for qualifying construction permits during the rural and nationwide windows are as follows:

- **In-Core Channel Requirement.** Applications for new digital LPTV and TV translator stations and for replacement digital translators may only be filed for in-core channels 2-51.

- **Additional Digital Companion Channels Available As Needed; Notification to Potentially Affected Licensees.** Applicants proposing digital companion channels on channels 52-59 must certify in their application that a "suitable in-core channel" (i.e., a channel between 2 and 51 that would enable the station to produce a digital service area comparable to its analog service area) is unavailable. Such applications are subject to notification requirements detailed at the following FCC website: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-1487A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1487A1.pdf).

- **Mutually Exclusive Applications.** All conflicting (or "mutually exclusive") applications filed on the same day will be resolved by FCC auction.

- **Filing Fees.** All applications for new digital-only LPTV and TV translator stations or for major changes to existing digital or analog LPTV and TV translator stations are subject to a \$705 filing fee. Flash-cut, digital companion channel, and replacement digital translator applications are not subject to the fee as these applications are minor changes.

- **Electronic Filing.** Applicants must file their applications electronically using FCC Form 346. The FCC will not accept paper applications.

### B. Additional Rules and Policies

The Notice details additional rules and policies that apply during the filing process:

- Only existing low power station licensees and permittees are allowed to

file for a digital companion channel.

- Applicants for digital companion channels will be required to identify their associated analog station and must propose to serve the community of license of their associated analog facility.

- A station with a construction permit, license, or pending application for a digital companion channel may not file for a second digital companion channel. Likewise, a station with a construction permit, license, or pending application for on-channel digital conversion ("flash-cut") is not allowed to file for a companion digital channel for the same station.

- Stations seeking digital operation must choose between flash-cut conversion of their analog station or operation of a digital companion channel station.

- Any station that receives a digital companion channel will be required to return to the Commission either their analog channel or companion channel on a date to be determined in the future.

- All digital companion channels, including those issued to Class A stations, will be licensed as LPTV channels on a secondary, non-interference basis.

- Adjustments to facilities and assigned channels for full-power television stations may occur in the wake of the full-power digital transition. According to the Notice, these adjustments "could have an adverse impact, including displacement," on LPTV and TV translator applications filed during the upcoming filing windows.

LPTV and TV translator stations may wish to contact their communications counsel for assistance in preparing their qualifying license applications to be filed during the windows beginning August 25, 2009 (for rural applicants), and January 25, 2010 (for all other applicants). ❖

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## Live Television Broadcasting Comes To The iPhone Via Livestation

Livestation, a UK-based global provider of online broadcast content, has launched its streaming application which allows live television broadcasts to be sent to the Apple iPhone using Akamai Media Delivery. The Livestation technology puts broadcasters in direct contact with the users and generates revenue for them when the application is purchased from the iPhone App Store.

Livestation went live with its application in June 2009, with BBC World News as the first broadcaster pushing live content to viewers in 16 European countries. The Livestation service being used by BBC World News offers two quality streams; 96Kbps on 3G/Edge and 300Kbps on WiFi. The service is being promoted by the BBC online and with a series of adverts on its European satellite feed.

Matteo Berlucchi, CEO of Livestation, said; "When we developed our application to deliver live streaming of broadcast content to the iPhone, we needed a delivery platform that could support the global demand we anticipated it would generate and that could scale easily as demand for the services increased. We needed more than just a Content Delivery Network (CDN). We needed a solution that could deliver live content to 40 million iPhones globally as the use of our application grew."

"We believe that the current take-up of our application is just the tip of the iceberg," continued Berlucchi. "Once other broadcasters see the immediate business benefits of the revenue model we are offering, whereby they receive payment when an iPhone user purchases our application for their service, we expect usage to increase. In the future, paid-for content is also a possibility, further strengthening the business benefits of broadcasters using Livestation and Akamai is a key part of the strengths."

Alex Gibbons, Director, Digital Media Europe, at Akamai, said; "Livestation has developed an exciting delivery proposition for the mobile and broadcast industries. The need for a global delivery platform aided in their choice of Akamai. We are delighted to be able to support this initiative and look forward to helping Livestation as they sign-up new broadcasters and extend the number of users using the service globally."

Running on Akamai's globally-distributed, highly-scalable network of more than 48,000 deployed servers in over 900 networks across 70 countries, Akamai Media Delivery offers a complete solution for companies to build successful digital media businesses by helping media providers deliver and monetize media assets quickly and effectively. It does this by enabling them to bypass traditional server and bandwidth limitations, handle peak traffic conditions and large file sizes with ease—all without requiring additional infrastructure. Akamai Media Delivery also supports the secure delivery of innovative rich media experiences—from video sharing to high-definition video online—quickly and flawlessly.

Livestation is the online destination for global TV and radio news, offering international channels from Al Jazeera, Al Arabiya, BBC, C-SPAN, Deutsche Welle, euronews, ITN, France 24, Press TV and Russia Today. The Livestation service can be accessed via a browser



or via a desktop player which integrates with the latest and most popular social networking trends, offering users the ability to share, chat, and take control of their viewing experience. Livestation is also making some of its partner channels available on the iPhone. [www.livestation.com](http://www.livestation.com). ❖

## FCC Commission Appointments Update

As of this month, the FCC Commission has been fully reconstituted with a 3-2 Democrat-to-Republican majority.

As previously reported, the Senate confirmed Julius Genachowski as FCC Chairman on June 25, 2009, and he served his first day in office on June 29.

Commissioner Robert McDowell's re-appointment to the FCC was also approved by the Senate on June 25, 2009. Mr. McDowell, a Republican, is now serving his first full term on the Commission. (He was previously appointed to fill an incomplete term.)

Commissioners Mignon Clyburn, a Democrat, and Meredith Attwell Baker, a Republican, were confirmed by the Senate on July 24, 2009, and sworn in on August 3 and July 31, respectively. Ms. Clyburn served as a Commissioner on the Public Service Commission of South Carolina, while Ms. Baker was the former head of the National Telecommunications and Information Administration.

Commissioner Michael Copps, a Democrat, holds the fifth and final seat

on the Commission. Mr. Copps's term continues through June 30, 2010.

It is too early to tell how the FCC's priorities may be affected now that Chairman Genachowski is at the helm of the Democratically controlled Commission. Thus far, it appears that broadband issues are at the forefront of the Chairman's agenda. However, as we recently reported, the Chairman has indicated during Congressional testimony that the Commission may soon initiate a rulemaking concerning children's television programming and advanced blocking technologies. ❖

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# COMPLIANCE TIP: Compliance Is A Lot Like Golf

by Harrison Pittman

After 10 years of compliance and many years of playing golf, I couldn't help but notice the similarities of the two. The most obvious one being, you have to do both on a regular basis to do them well.

The other is Course Management. Before hitting their tee shot, good golfers (not me, just what I've observed) take a short and long look at the layout of the hole. This will determine their plan.

In the short look, what hazards must the golf ball carry so it lands in the fairway? Using EEO as the compliance

example, what tasks related to current job openings need to be accomplished for the upcoming week or month to stay in the compliance fairway? Do EEO recruitment sources need to be notified, are your job descriptions up to date, are you asking and recording the referral sources for all candidates interviewed?

In the long look, where do you desire your tee shot to land? Is your driver your best option or would a shorter club insure a better result or maybe a better option given where the hole is cut on the green. Which shot are you most likely to hit successfully. Like EEO Outreach Initiatives, what 2 or 4 (depending on

your market size) activities do you feel comfortable conducting over the next two years? Do you go for the career shot with the driver? Do you pick an Outreach Initiative that you'd love to do but being able to do it well due to the cost (money, time and staff) is very unlikely? Choosing the correct club and Outreach Initiative could determine whether you hit the green and the EEO rules in regulation. ❖

*(This tip provided by Harrison Pittman of On-Time Online Broadcast Compliance. [www.OnTimeOnlinebc.com](http://www.OnTimeOnlinebc.com), 757.848.3743, [hpittman@ontimeonlinebc.com](mailto:hpittman@ontimeonlinebc.com).)*

## LUC Window For General Election Opens September 4

by Stephen Hartzell  
Brooks, Pierce, McLendon,  
Humphrey & Leonard, L.L.P.

As you know, 2009 is an election year for the Governor of Virginia. In addition, all 100 seats in the Virginia House of Delegates. In addition, a number of city and county posts are also up for election this year, including school boards, boards of supervisors, and others. The general election is scheduled for November 3, which means that the "lowest unit charge" ("LUC") window will open on September 4.

Under the LUC requirement, during the 45-day period preceding the date of a primary or primary run-off election and during the 60-day period preceding the date of a general or special election, the charges made for the "use" of a broadcast station by a "legally qualified" candidate may not exceed the LUC of the station for the same class and amount of time for the same time period.

When determining the LUC, stations must remember that, generally, all spots, including bonus spots, must be allocated some value in a package arrangement. To minimize any adverse impact on your station's LUC during the political windows, stations should have allocated, in good faith, some value to bonus spots included in package arrangements through a separate writing at the time the contract was signed.

Candidates may complain if they

suspect a station has not provided them with the LUC. Such a complaint may be informal (a phone call to the station or FCC, written demand, etc.) or it may involve a formal written complaint to the FCC. In order to invoke the FCC's enforcement procedure, the candidate must do more than merely accuse the station of overcharging—but not much more. In order to avoid the waste of time, money, and energy that accompanies a formal FCC complaint, stations may wish to follow these guidelines:

- If a station receives a candidate's letter demanding the rebate of alleged overcharges the station should immediately consult with its own communications counsel and consider how best to respond. (Failure to respond promptly to such a letter may provoke the candidate into filing a formal complaint with the FCC.)

- In order to respond to a written inquiry or complaint concerning overcharges, evaluate the specific allegations made by the candidate. Determine if the station actually did overcharge the candidate—if so, refund the overage immediately with an explanation of how the mistake occurred.

- An ongoing review of rates charged political advertisers should be conducted by stations throughout the election period. The FCC has suggested that a weekly review would be sufficient. Such ongoing reviews will enable the station to determine if an overcharge has

occurred and refund all overcharges in a timely fashion.

- In other circumstances, usually in response to a formal complaint, a station may opt to conduct an internal audit. This should not be done without advance consultation with the station's own communications counsel. Full internal audits can be time consuming and expensive. They involve a review of all advertising sold to the particular candidate and other advertisers in the time periods, and an evaluation of whether the price charged the candidate was the "lowest unit charge."

In preparation for the commencement of this political window, stations may wish to review their political disclosure statement and ensure that it is up-to-date. For detailed information on the LUC and other political broadcasting requirements, please contact the Association for the latest version of the publication Nuts 'n Bolts of Political Broadcasting. ❖

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## **CAUTIONARY TALE: FCC Deletes Call Letters, Dismisses Applications, And Initiates Character Investigation for Misrepresentations In Filings**

The FCC recently released a Report and Order ("Order") in which it took significant action against two commonly controlled broadcast companies for various statutory and regulatory violations in the operation of five noncommercial educational FM radio stations and six FM translator stations. After reviewing various applications filed by the commonly controlled stations, including false certifications in FCC filings made by the officer in control of the stations, the Commission determined that the construction permits for four of the FM stations and two of the FM translators had expired because the stations had not been built out at their authorized sites before the permits expired.

Additionally, two of the FM translator stations' licenses automatically expired because they remained silent for more than one year. The Commission deleted the call signs and dismissed all pending applications for these eight stations—the broadcast spectrum was essentially taken away from these stations and made available for other applicants. The FCC also initiated a separate show-cause hearing to determine various other issues, including whether or not the companies' other FCC authorizations should be revoked for character disqualifications.

The FCC Order concerning these stations is instructive because it demonstrates the consequences of false certifications to the Commission and the scope of the Commission's investigations if a false certification is suspected. Additionally, the Order highlights the critical importance of adhering to construction deadlines and ensuring the accuracy of other details (including site coordinates) contained in FCC construction permits. Finally, the Order illustrates that the license for a station that remains silent for a period of 365 days automatically expires at the end of that one-year period—the Commission may, but is not required to, extend or reinstate the license.

False Certifications and Misrepresentations. The Order first addresses an application for license to cover a previously granted construction permit. The construction permit was issued on July 11, 2005, and, by its terms, expired

on July 11, 2008; therefore, in keeping with Commission rules, the station had three years to build out the station as authorized by the permit. Several days before the permit was set to expire, the licensee's consulting engineer filed a license application and certified that the station was operating pursuant to automatic program test authority and that all terms, conditions, and obligations set forth in the construction permit had been fully met. (This is a standard certification for this kind of application.)

The Enforcement Bureau investigated the truthfulness and accuracy of the certifications made in the license application because of prior inaccurate filings made by other commonly owned stations (discussed below). FCC field inspectors first traveled to the site where the station was authorized to operate (i.e., the site specified in the construction permit) and detected no operations from that location. The FCC later sent a letter to the corporate officer in control of the station, stating that the license application was deficient because it was required to be signed by an officer of the company, not merely by its consulting engineer. Thereafter, an amendment was filed in which the officer certified that the station was on the air with its authorized facilities.

Days after the amendment was filed, the Enforcement Bureau issued a Letter of Inquiry requesting an explanation for the certification in light of the field inspectors' finding that the station was not operating as authorized in its construction permit. The officer who made the certification filed a response in which he claimed the application and the amendment were both filed by mistake. Along with the response, the licensee submitted a sworn statement from the consulting engineer stating that he (the engineer) had prepared the application in the Commission's database but did not intend for it to be filed; he also claimed that the officer, not himself, submitted the amendment with the officer's certification. However, the Commission summarily dismissed this argument—FCC staff reviewed the FCC filing database logs and found that the IP address from which the application

and amendment were prepared and submitted was registered to the consulting engineer. In other words, the FCC dug back behind the station's response to determine whether the response was true based on the technical data available from the FCC's database.

Ultimately, the Order declared that the station was not constructed as authorized, that the officer and consulting engineer submitted an application that falsely certified the station had been constructed, that the two reaffirmed the false certification through the amendment, and that both individuals falsely claimed that the application and amendment had been filed by mistake. The penalty was harsh: The construction permit was automatically forfeited by operation of the FCC's construction permit rule (discussed below). With the construction permit expired, the FCC deleted the station's call letters and dismissed its license application, rendering the spectrum vacant for other uses. Additionally, the Order stated that the licensee's character qualifications would be addressed in a subsequent show-cause hearing in which the Commission will consider whether to revoke all the company's remaining authorizations pursuant to the Communications Act. Finally, the FCC referred the matter to the U.S. Attorney's office for potential criminal prosecution.

**Additional Violations.** In addition to the penalties issued for the station above, the Order recounted numerous additional violations by ten other stations ultimately controlled by the same corporate officer.

The Order found that each of the ten other stations committed some or all of the following violations:

- Failed to construct facilities at the location authorized in the construction permit. According to the Order, several stations were constructed at the wrong coordinates (as many as 3.5 kilometers off), at the wrong height, using the wrong antenna, and/or operated at the wrong power level;
- Submitted applications that falsely certified that the stations had been con-

*(continued on next page)*



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structed at their authorized sites;

- Attempted to obtain after-the-fact approval to operate from a different site by filing an application for minor change to a construction permit;

- Falsely claimed that certain stations had operated from their authorized sites for certain periods of time;

- Ceased operations without obtaining authority from the Commission; and

- Apparently committed multiple unrelated rule violations. FCC staff inspecting certain of the stations found various FCC rule violations, including, in one case, lack of a main studio, absence of management or staff presence, incomplete public inspection file, lack of operational EAS equipment, lack of required monthly EAS tests, lack of personnel or remote control equipment to control the transmitter, failure to post the station's license, failure to designate a chief operator, and failure to have equipment performance measurements available.

The stations disciplined in the Order engaged in particularly egregious conduct. However, the Order is an important reminder of the following Commission rules:

- Construction permits for television, LPTV, TV booster, AM, FM, FM translator, and FM booster stations generally provide a three-year deadline by which time the station must have completed construction as authorized and filed a license application. The FCC's rules generally do not allow extensions of time to construct facilities unless there is a natural disaster (e.g., flood, tornado, hurricane, or earthquake), the permit is the subject of administrative or judicial review, or construction is delayed by some other court action (e.g., due to zoning or environmental litigation). A construction permit will automatically expire without any further affirmative action by the Commission if a station does not complete construction and file a license application before the deadline. Furthermore, construction of facilities at some unauthorized site or otherwise at variance from the permit does not satisfy the terms and conditions of the construction permit.

- License applications to cover built-out construction permits must be

accurately and truthfully certified to preserve the station's authorization to operate.

- Anytime a station goes silent for more than 10 days, a notification to the FCC is required, and silence for more than 30 days requires Commission approval in the form of Special Temporary Authority. Upon resumption of programming service, the station should immediately notify the FCC.

- The license for a station that remains silent for a period of 365 days automatically expires at the end of that one-year period. Unauthorized operation does not stop the one-year period from running. The Commission may, but is not required to, extend or reinstate the license under certain circumstances. (For additional information on the automatic expiration, please refer to our Legal Memorandum issued on May 21, 2009.)

- False certifications subject a licensee to administrative penalties from the FCC in the form of expired construc-

tion permits, dismissed applications, and possible license revocations. Additionally, making a willful, false statement to the Commission may result in criminal investigation and potential penalties.

- The FCC has the statutory authority, after notice and an opportunity to be heard on the matter, to revoke a station's license or construction permit for certain "character" reasons. For example, the FCC may revoke an authorization for false statements knowingly made in an application filed with the Commission and willful or repeated failure to operate substantially as set forth in a station's license. ♦

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## GM Ad Purchases: A Government Contract?

The federal government's announcement that it will own 60% of General Motors stock after the company emerges from bankruptcy raises the question whether advertising time bought by General Motors counts as a government advertising purchase under Executive Order 11246 (the "Order"). The Order, as enforced by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), generally prohibits all entities contracting with the federal government for amounts over \$10,000 in one year from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. A federal service or supply contractor with 50 or more employees and \$50,000 or more in government contracts is required to develop and implement a written affirmative action program. Both categories of contractors are subject to significant compliance and reporting requirements.

Typically, once a broadcaster triggers OFCCP requirements, an entire station group may be affected. The OFCCP generally considers separate divisions or businesses to be a "single

entity" if their ownership, management, and operations are closely related. Thus, one station's contract could trigger compliance requirements for a different station if the stations share common ownership, management, and control.

As the Order and OFCCP regulations currently stand, existing or future General Motors ad purchases do not trigger OFCCP requirements. The Order generally applies to contracts entered into by any department, agency, establishment, or instrumentality in the executive branch of the government, including any wholly owned government corporation. Additionally, according to Obama Administration announcements (for example, see [www.ustreas.gov/press/releases/tg179.htm](http://www.ustreas.gov/press/releases/tg179.htm)), the Treasury's ownership stake will be managed in a "hands-off, commercial manner," and the government will not "interfere with or exert control over day-to-day company operations." As General Motors will not be wholly owned or even directly controlled by the government, ad contracts with the company will not trigger OFCCP obligations. ♦



# Even Electronic Communication Can Still Create Nightmares For Human Resources

By John G. Kruchko  
and Kathleen A. Talty\*

Electronic communication systems are an integral part of the workplace. The inclusion of these systems has facilitated and stream-lined both internal and external communication networks. However, the improper utilization of these communication systems continues to pose substantial difficulties for human resource personnel.

The majority of employers have personnel policies dealing with employee use of the company's electronic communication systems. Those policies usually contain broad prohibitions on such matters as the transmission of racist or sexist jokes or pictures and include specific notice to employees that disciplinary action, including termination, will result for violations. Despite these prohibitions, situations still arise where an employee's casual use of the company's e-mail system can result in situations where an employer's defenses to employment discrimination claims can be greatly minimized, if not completely lost. A recent federal court case illustrates the consequences when

an e-mail was inadvertently sent to an unintended recipient, i.e., the rejected job applicant, and the contents of the e-mail included inappropriate comments that were found to be evidence of age discrimination.

In the recent court case, *Wold v. El Centro Fin., Inc.*, the Plaintiff, Kenneth Wold, applied for a position as an Operations Manager with Defendant's company. In the course of the internal processing of Mr. Wold's application for the Manager position, his resume was e-mailed to the company's Chief Executive Officer for consideration. The CEO's review of Mr. Wold's resume included the following comments: "He [Mr. Wold] must be old....and just looking for something to do." Mr. Wold probably would never have learned about the CEO's comments except for the fact that the CEO did not look at the e-mail addresses, which included Mr. Wold's, before he hit the reply button. Because of the CEO's action, Mr. Wold became the unintended recipient of the CEO's e-mail which contained the above-noted comments.

When Mr. Wold did not hear anything from the company about

his application, other than the e-mail from the CEO, he filed an employment discrimination charge with the state fair employment practice agency and alleged age discrimination. In presenting its case to the state agency, the company, apparently unaware that Mr. Wold had received the e-mail from the company's CEO, argued that Mr. Wold was not hired because his application showed "aggressiveness", because he was unqualified for the position, because there were more qualified applicants and because Mr. Wold's past security and military work led the company to believe that his interest in the position was "odd."

After the state agency issued a right to sue letter and the matter progressed into federal court, the existence of Mr. Wold's receipt of the CEO's e-mail became known to the company. At that point, the company sought to distance itself from the earlier reasons that had been proffered for its non-selection of Mr. Wold. Instead, during the court proceeding, the company argued that Mr. Wold was never rejected for employment because his application was never

*(continued on next page)*

\* John G. Kruchko is a Partner with the Management Labor & Employment Law Firm of Kruchko & Fries in McLean, Virginia; Kathleen Talty is a Partner with the Firm. For more information, please contact Mr. Kruchko at (703) 734-0554 or jkruchko@kruchkoandfries.com, or Ms. Talty at (410) 321-7310 or ktalty@kruchkoandfries.com. This article is published for general information purposes, and does not constitute legal advice.



(continued from previous page)

forwarded internally to the person in charge of the hiring process. According to the company, when the CEO mistakenly "returned" the application to Mr. Wold via the e-mail, rather than to the hiring official, Mr. Wold was accidentally omitted from the selection process. The accidental omission from the hiring process, according to the company, was not evidence of age discrimination.

The court was not persuaded by the company's argument on that point. Nor was the court persuaded when the company argued that the comments about the Plaintiff in the CEO's e-mail that "he must be old.....and just looking for something to do" represented mere colloquialisms that failed to give rise to an inference of discrimination.

The Wold court noted that some courts have found that where certain comments were made in an off-handed manner and not in respect to a particular individual or are colloquialisms, the comments were not evidence of discrimi-

nation. Conversely, courts have found that when the comments in question specifically reference the plaintiff, the comments can constitute evidence of discrimination.

The comments in the Wold case were, according to the court, neither off-hand remarks nor colloquialisms. Rather, the comments referred directly to the Plaintiff, Mr. Wold. The court further noted that the "just looking for something to do" comment particularly indicated discriminatory animus because it ran afoul of prohibited stereotypes. Namely, that older employees are likely to be looking for work to just keep themselves busy, rather than looking for work with the more desirable motivation of working hard and advancing their careers. According to the Wold court, such "broad, negative characterization of older employees is precisely the type of prohibited stereotype the ADEA seeks to remedy and gives rise to an inference of discrimination."

The court also found that the company's shifting and directly contradictory

explanations for Mr. Wold's non-selection were not worthy of any credibility. Before the state agency, the company had stated that Mr. Wold's non-selection was the result of a careful analysis of his resume and then a determination, based on several factors, that he was not the most qualified candidate. At the court level, the company completely rejected that line of argument. Instead, the company claimed that it never rejected Mr. Wold for employment because his resume was never forwarded internally to the actual firing official. The court found the company's contradictory positions were not valid defenses.

The Wold case highlights the need for care when writing e-mails that involve personnel or related matters. Comments that may be considered to be glib or funny at the time of writing the e-mail will not necessarily be viewed in the same light by a fair employment practice agency or a federal court. ♦

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## Yahoo Wins U.S. Court Ruling Over Webcasting Fees

A federal appeals court in New York has ruled that a Yahoo Inc Internet radio service is not required to pay fees to copyright holders of songs it plays.

In a case closely watched by the recording industry, the U.S. Second Circuit Court of Appeals upheld a 2007 jury verdict that Launchcast, a webcasting service run by Yahoo's Launch Media Inc unit, did not give listeners enough control to be an "interactive service" that would require the fees.

The three-judge panel said the service is required only to pay licensing fees set by SoundExchange, a nonprofit that collects royalties on sound recordings. It was the first federal appeals court to decide the issue.

Friday's ruling is a setback for record producers that have struggled with slumping sales as customers increasingly obtain music online or through other means.

"It's an immediate loss for the recording industry," said Rey Sanchez, chairman of the department of music, media and industry at the University of Miami and a voting member of the

National Academy of Recording Arts and Sciences.

"If the service had been deemed interactive, Yahoo would have to negotiate fees with every record label to use their songs. Instead, it only has to pay licensing fees."

Yahoo spokeswoman Kim Rubey said the Sunnyvale, California-based company is pleased with the ruling and looks forward to providing "the best on-line music experiences" to customers.

Other recording companies involved in the case included Capitol Records Inc, Motown Records Co and Virgin Records

America Inc, among others, court papers show.

In his 42-page opinion for the appeals court, Judge Richard Wesley found that Launchcast "does not provide sufficient control" to convince listeners to choose to listen to music on the Internet, instead of buying music.

"The user has control over the genre of songs to be played for 5,000 songs," the judge wrote, "but this degree of control is no different from a traditional radio listener expressing a preference for a country music station over a classic rock station." ♦

# AUGUST JOB BANK

## SUBMIT JOBS

### Submit to VAB Newsletter:

- Please email the listing directly to [derek.breen@easterassociates.com](mailto:derek.breen@easterassociates.com).
- Be sure to include your station ID or company name, information on how the applicant can apply and where to send the applications materials.

### Submit to the Online Job Bank:

- Go to [www.vabonline.com](http://www.vabonline.com)
- Click on "Member Area" (top right menu)
- Log in. (If you do not know your login or password, please email [christina.meyer@easterassociates.com](mailto:christina.meyer@easterassociates.com))
- Upon login, you will see a menu at left. Select "Your Jobs." From here you can enter new jobs, edit jobs or delete job postings that have been filled.
- Don't forget, members can also view resumes by clicking on the "Resume Bank!"

### MORNING REPORTER

WRIC-TV8 is looking for an energetic Morning Reporter. The ideal candidate will have strong live reporting skills and be able to generate content for all newscasts. You must be able to think on your feet and be willing to go unscripted. Two or more years reporting experience preferred. Please send non-returnable DVD and resume to: WRIC-TV8 Personnel Department, 301 Arboretum Place, Richmond, VA 23236-3464, or fax your resume to (804) 330-8881, or email your resume to [personnel@wric.com](mailto:personnel@wric.com). NO phone calls please. EOE.

### ANCHOR/REPORTER

WRIC-TV8 is looking for an energetic Anchor/Reporter. The ideal candidate will be an outstanding communicator with strong live reporting skills and excellent computer knowledge. You must be able to think on your feet and be willing to go unscripted. You will be a key contributor to our successful morning news. Two or more years reporting experience preferred. Please send non-returnable DVD and resume to: WRIC-TV8 Personnel Department, 301 Arboretum Place, Richmond, VA 23236-3464, or fax your resume to (804) 330-8881, or email your resume to [personnel@wric.com](mailto:personnel@wric.com). NO phone calls please. EOE.

### ACCOUNT EXECUTIVE

Account Executive position in Sales Department. Advertising sales background helpful. Send resume to: WRIC TV8 Personnel Department, 301 Arboretum Place, Richmond, VA 23236-3464, or fax your resume to (804) 330-8881, or email your resume to [personnel@wric.com](mailto:personnel@wric.com). NO phone calls please. EOE.

### ACCOUNT EXECUTIVES

WWDE-FM, WPTE, WNVZ-FM AND WVKL-FM have full-time positions available for account executives. The qualified candidates will be responsible for selling and servicing direct clients, agencies, developing new business accounts, coordinate production of commercial spots with production manager and client, and create and present ideas to clients to achieve their advertising

goals. The candidates will also be responsible for collection of invoices from accounts. Must be organized, idea-oriented and possess strong communication and presentation skills. Entercom Norfolk is an Equal Opportunity Employer and offers a competitive compensation package. Email resume to [cmorelli@entercom.com](mailto:cmorelli@entercom.com). EOE.

### ON AIR PERSONALITIES

Entercom Norfolk is looking for future air personalities both full and part time. 3 to 5 years experience is necessary for full time positions and some experience is necessary for part time positions. Full time air personalities will also be expected to be proficient in public appearances, voice work and commercial production. Entercom Norfolk is an Equal Opportunity Employer and offers a competitive compensation package. Send demo tapes or CD's, thoughtful cover letters and resumes to: Entercom Norfolk, Don London, Operations Manager, 236 Clearfield Ave., #206, Virginia Beach, VA 23462.

### PART TIME PROMOTIONS ASSISTANT

WWDE-FM, WPTE-FM, WVKL-FM and WNVZ-FM have part time positions available for promotions. The qualified candidates will be responsible for setting up remote broadcasts, driving station vehicles, interacting with account executives, listeners and clients, handling heavy equipment, and maintaining promotional equipment. The qualified candidates MUST BE 21 YEARS OR OLDER, have a flawless driving record, be outgoing, organized, possess strong communication skills, available nights and weekends and able to handle heavy equipment without problems. Email resume to [cwilson@entercom.com](mailto:cwilson@entercom.com). EOE.

### DIGITAL SALES ACCOUNT EXECUTIVE

Entercom Norfolk is looking for a Digital Sales pro to sell our portfolio of digital assets and help oversee the executive of these transactions. The ideal candidate has experience in the media/internet industry and can step in and drive the company's revenue generation with online assets. They will have the ability to pitch and close business. They will be able to communicate in communication about the latest online technology including streaming audio and video/viral search/rich media/mobile and SMS marketing technologies, methods and best practices. Prior experience with an online ad network is a plus, and having an entrepreneurial personality is a must. You should be able to express yourself well in email, Power point, Excel and in person. RESPONSIBILITIES: Prospecting and presenting to new and existing brands/agencies in order to exceed sales quota. Creating cross-media packages. Internal energizing and coaching of sales team: training station salespeople and co-pitching target clients/agencies. Involvement in digital sales execution from start to finish, including successful communication with all sales reps, station web masters, third party and network. Manager digital media inventory for the market. Entercom Norfolk is an Equal Opportunity Employer and offers a competitive compensation package. Email resume to [hcleveenger@entercom.com](mailto:hcleveenger@entercom.com). EOE.

### RADIO MORNING SHOW CO-HOST

FM99 WNOR is looking for a co-host for our morning show. The ideal candidate will be able to entertain and inform on the air, online and in person. Previous morning show experience preferred. Send resume and audio files to [vamorningshow@fm99.com](mailto:vamorningshow@fm99.com). No Calls. EOE.

### TV - MASTER CONTROL OPERATOR

WRLH FOX Richmond & MyTV Richmond has a great opportunity for you! We are seeking a highly detail oriented operator with good communication skills and a quick learner. Duties include on-air switching, operating video tape recorders and satellite receivers. You must be computer literate, and self-motivated. Good attendance is essential. Ability to work well independently as well as with others is key. You must be flexible and be able to work evenings, weekends and holidays. All interested applicants must apply online at [www.sbg.net](http://www.sbg.net). Equal Opportunity Employer.

### SALES ACCOUNT EXECUTIVE

WTVZ, in Norfolk, has an awesome opportunity for an enthusiastic, highly motivated Sales Account Executive to sell commercial advertising time to local businesses and advertising agencies. Your responsibilities will include: handle outside sales calls, prospect customers and lead generation, attract and close advertisers to sell products and services via TV, provide input on sales promotion ideas to sales management, retain current business and develop new business contacts, present marketing/advertising ideas to area businesses, sell commercial advertising time and other station products to local advertisers, attain budgeted revenue goals through effective solicitations, promotion and services, and understand the business objectives and advertising strategies of clients and find ways to help them achieve their objectives through effective advertising. Qualifications: strong organizational, written and presentation skills, competitive, energetic and self-starter, ability to overcome objections, outside media sales experience preferred, but not required, enjoy a fast-paced environment with a desire to win, professional appearance a must. Candidates must apply online to be considered, [www.sbg.net](http://www.sbg.net).

### ADMINISTRATIVE ASSISTANT - SALES DEPT

WDBJ Television is currently accepting applications for an Administrative Assistant - Sales Department. This position requires a well-organized person who is capable of multitasking under tight deadlines. Responsibilities include providing support for sales managers and account executives, creating sales proposals and presentations, tracking sales progress and other general office duties. Ideal candidate must be a quick learner with the ability to positively interact with the sales staff, clients, and station departments. Qualifications include excellent communication skills, strong knowledge in Microsoft Word, Excel, and PowerPoint. Background and pre-employment drug screen required. Send cover letter and resume to: Human Resources Manager Attn: Administrative Assistant - Sales WDBJ Television, Inc. P.O. Box 7 Roanoke, VA 24022 Or email: [jobs@wdbj7.com](mailto:jobs@wdbj7.com) WDBJ Television is an Equal Opportunity Employer.

### RADIO DIRECTOR OF SALES

A four station, family-owned radio group in Fredericksburg, VA has a terrific sales management career opportunity. Our top performing radio stations come with all the research tools and resources to succeed. We are looking for a sales leader that can train, lead, and motivate our sales/marketing team. The ideal candidate must understand and institute a strong yield management system and be excellent at generating local direct business and establishing and maintaining strong client relationships. We offer an excellent compensation and benefits package. Please forward success stories,

**To view the latest listings visit [www.vabonline.com](http://www.vabonline.com) and click "Careers."**



# AUGUST JOB BANK

résumé, and sales management philosophy to: jobs@freelancestar.com An Equal Opportunity Employer

## PRODUCTION ASSISTANT PT (PM HOURS)

Primarily responsible for in-studio production assistance, including the operation of Camera, Audio, character generator, or etc. as assigned by shift supervisor. Also responsible for field technician assistance for Creative Services as needed. Knowledge of television production or willingness to learn. Knowledgeable in the operation of personal computers. Basic understanding of audio-visual components. Some knowledge of electronics preferred, but not necessary. Available to work irregular hours and holidays. Also available for long hours during special circumstances. Please apply in writing to Director of Human Resources, WSET-TV, P. O. Box 11588, Lynchburg, VA 24506-1588, or apply in person at WSET-TV, 2320 Langhorne Road, Lynchburg, VA 24501 from 8:30 a.m. to 5:30 p.m., Monday through Friday. No phone calls please! EEO/M/F. WSET-TV is an Equal Opportunity Employer. No qualified person shall be discriminated against in employment because of race, color, creed, religion, sex, national origin, age, or any other reason prohibited by federal, state, or local law.

## DIRECTOR FT

Directing news programs, promotional announcements, commercials, public service announcements, public affairs programs, or other special projects as assigned. Operating other production equipment as needed. Assist in training and supervision of Production Assistants in the operation and maintenance of studio, graphics, and control room equipment. Assist with field productions as needed in any position necessary to complete the production properly. College degree in communications field or commensurate experience. One year of Studio Directing/technical directing or training in directing/technical directing. Background in production crew functions. Familiarity with field production and equipment. Production experience in audio, character generator, camera, graphics, and lighting – studio and field. Supervisory abilities and skills required. Available to work irregular hours, weekends, and holidays. Knowledge of carpentry and set construction is helpful. Please apply in writing to Director of Human Resources, WSET-TV, P. O. Box 11588, Lynchburg, VA 24506-1588, or apply in person at WSET-TV, 2320 Langhorne Road, Lynchburg, VA 24501 from 8:30 a.m. to 5:30 p.m., Monday through Friday. No phone calls please! EEO/M/F. WSET-TV is an Equal Opportunity Employer. No qualified person shall be discriminated against in employment because of race, color, creed, religion, sex, national origin, age, or any other reason prohibited by federal, state, or local law.

## NEWS PHOTOJOURNALIST

We are looking for a creative and self-motivated NEWS PHOTOJOURNALIST. Successful candidate must have experience with Panasonic P2 cameras, non-linear Grass Valley editors, and microwave and SNG trucks. Interviewing and writing skills preferred. Must have a valid driver's license with a good driving record. Background and pre-employment drug screen required. Send cover letter, résumé, and non-returnable tape to: Chief Photographer Attn: News Photojournalist Position WDBJ Television 2807 Hersherberger Road Roanoke, VA 24017 Email: jobs@wdbj7.com WDBJ is an Equal Opportunity Employer.

## FULL TIME BOARD OPERATOR

Position available at WAVA Radio Applicant must have current knowledge of digital broadcast studio operations and be computer proficient. Good verbal and written communications skills required. Experience in similar format preferred. Women and minorities encouraged to apply. Fax resume to 703.807.2248 or mail resume to: WAVA Radio Attn: Bob Jones 1901 North Moore Street, Suite 200 Arlington, VA 22209 WAVA Radio is an Equal Opportunity Employer.

## STATION SUPERVISOR

Emory & Henry College is seeking a fulltime, Station Supervisor for WEHC-FM with radio experience for one year beginning as soon as the position can be filled. The successful candidate will be able to operate and train others in use of an audio console, radio automation system, and Adobe Audition editing software. Position requires neatness, organization, and good management skills. Quality broadcasting presentation and familiarity with web page management are a plus. Applications received by August 21, 2009 will receive highest consideration. Emory & Henry is an Equal Opportunity Employer. Applicants should send a cover letter and resume to Teresa Keller, General Manager, WEHC, Emory & Henry College, PO Box 947, Emory, VA 24327.

## RADIO GROUP WEBMASTER/ CREATIVE SERVICES COORDINATOR

The Star Radio Group in Fredericksburg, VA is looking for someone who can conceptualize and execute the visual elements of the stations via the websites, social networks, and listener clubs. Graphic design experience is crucial, with proficiency in Adobe CS3, Photoshop, Illustrator and Flash in a Mac OS environment. This requires a person who meets deadlines, is meticulously organized, takes huge pride in creating visual excitement, and is one step ahead of tech advances. Qualified candidates should send résumé with salary requirements to: WFLS/WWUZ/WWVB Radio Attention: Human Resources 616 Amelia Street Fredericksburg, VA 22401 Email: jobs@freelancestar.com An Equal Opportunity Employer.

## DIRECTOR/PRODUCTION OPERATOR

WAVY-TV has an immediate full-time opening for a Director/Production Operator. This position is a multi-purposed job including directing morning weekend newscasts, weekday studio control room operations, field shooting, and editing for various station needs. Strong candidates will have one year directing/TD and operational skills for robotic cameras, DEKO CG, and audio operation for newscasts. Send Tape, resume and salary requirements to: Dave Whitener, Production Manager WAVY-TV 300 WAVY Street Portsmouth, VA 23704 EOE. No Phone Calls Please.

## MID DAY HOST

Full-Time Position Available, Monday through Friday, 10 a.m. to 4 p.m. WAVA Radio in Washington, DC is looking for a host for the Mid Day program line up on WAVA, 105.1FM. Candidate should have minimum 3-5 years experience. Will voice and record live commercials. Position may require public appearances. Women and Minorities encouraged to apply. Mail cover letter, resume and air check (CD) to: WAVA Radio Attn: Bob Jones 1901 North Moore Street, Suite 200 Arlington, VA 22209 or E-mail cover letter, resume and air check (MP3) to: bobj@wava.com WAVA Radio is an Equal Opportunity Employer.

## SUNDAY GOSPEL MUSIC ANNOUNCER

Part-Time Position Available, Sunday Afternoons on WAVA, 105.1FM WAVA Radio in Washington, DC is looking for a Contemporary Gospel Music Announcer. Candidate will host Contemporary Gospel Music Show Sunday afternoons on WAVA, 105.1FM. Candidate should have minimum 3-5 years experience. Will voice and record live commercials. Position may require public appearances. Women and Minorities encouraged to apply. Mail cover letter, resume and air check (CD) to: WAVA Radio Attn: Bob Jones 1901 North Moore Street, Suite 200 Arlington, VA 22209 or E-mail cover letter, resume and air check (MP3) to: bobj@wava.com WAVA Radio is an Equal Opportunity Employer.

## NEWS PHOTOJOURNALIST

Richmond, VA WTVR-CBS 6 is seeking a FT News Photojournalist. Must have 1 - 2 years experience in a television newsroom shooting, editing and operating ENG trucks. Experience preferred with non-linear editing. Must be able to work in a fast pace team environment with or without a reporter. Must help create story ideas, have good journalism skills and help produce high quality work. Please send a DVD copy of your latest and greatest work along with a cover letter and resume to: Bob Hogsensen, Director Of Photography, WTVR-CBS 6, 3301 W. Broad Street, Richmond, VA 23230. EOE.

## EXECUTIVE PRODUCER FT

Will direct and oversee producers, news reporters, photographers, and editors, and be responsible for ensuring that high quality news programs are consistently aired and that standards of quality for all aspects of the show are maintained. Will personally supervise and/or produce assigned newscasts and have complete control over how news shows are produced and will ensure that all reporter, photographers, and editors handle their responsibilities for format, organization with other departments, news writing, and distribution of final scripts. Advanced education in the field of Broadcast Journalism, or equivalent broadcasting work experience. Demonstration of skills by performance in audition or aircheck, supported by references and pre-employment interviews. Valid Virginia Driver's license within 30 days of employment, acceptable driving record maintained. Available to travel overnight to off-site locations, including foreign destinations, for extended periods of time, if needed. Please apply in writing to Director of Human Resources, WSET-TV, P. O. Box 11588, Lynchburg, VA 24506-1588, or apply in person at WSET-TV, 2320 Langhorne Road, Lynchburg, VA 24501. No phone calls please! EEO/M/F. ATTENTION NEWS APPLICANTS: Applicants for positions in the News Department should submit a non-returnable VHS resume tape or DVD with letter, resume, and references. WSET-TV is an Equal Opportunity Employer.

## NEWS PRODUCER

NBC12, Richmond's No. 1 news organization has immediate opening for creative, dynamic news producer. Successful candidate must be strong writer, energetic, self-motivated and strong leader. No show stackers...just experienced leader with vision and skills to develop content. Send cover letter w/ salary requirements, resume and non-returnable demo tape to Frank Jones, Assistant News Director, NBC12, P. O. Box 12, Richmond, VA 23218. EOE M/F/H/V Drug Screen.



MAR  
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2009

# Performance Tax HOT 100

Radio is where listeners discover new music and new artists. It's where the artists you love got their big breaks. But the record labels are pushing a bill that would levy a fee, or "performance tax," on the music local radio plays. That means radio stations will inevitably play less music and stop taking chances on unknown artists. The performance tax – bad for radio, bad for music.

THIS WEEK	LAST WEEK	WEEKS ON	TITLE PRODUCER, RECORD LABEL	THIS WEEK	LAST WEEK	WEEKS ON
1	1	52		1	1	52
2	2	52		2	2	52
3	3	52		3	3	52
4	4	52		4	4	52
5	5	52		5	5	52
6	6	52		6	6	52
7	7	52		7	7	52
8	8	52		8	8	52
9	9	52		9	9	52
10	10	52		10	10	52
11	11	52		11	11	52
12	12	52		12	12	52
13	13	52		13	13	52
14	14	52		14	14	52
15	15	52		15	15	52
16	16	52		16	16	52

WHAT THE WEEKLY HOT 100 LIST MIGHT LOOK LIKE IF THERE WAS A PERFORMANCE TAX ON RADIO.

