SPLC
STUDENT PRESS LAW CENTER

May 15, 2014

Georgia State University
President Mark P. Becker
P.O. Box 3999
Atlanta, GA 30302-3999

Dear President Becker,

I write with profound alarm and disappointment at the University's mishandling of the recently announced transaction that will result in Georgia Public Broadcasting programming airing during daytime hours over Georgia State's formerly student-programmed WRAS-FM.

The Student Press Law Center supports the autonomy of students to use campus media to express opinions and share information. We are concerned much less with the ultimate merits of the agreement to turn over half of the WRAS programming day to GPB-provided content than we are with the purposefully opaque process that both agencies employed to arrive at an agreement you have described as irrevocable and non-negotiable. The illegitimacy of the process casts grave doubt on the legitimacy of the result.

Your remarks as quoted in the *Atlanta Journal-Constitution* on May 7 are, quite frankly, contemptuous and tone-deaf. Your assertion that "anything with this level of complexity and this level of benefit really is not the kind of thing you can play out in a public forum" is exactly, 100 percent wrong. Things that are "beneficial" will be understood and welcomed by the people they are intended to benefit, unless you hold those people – your students – in such low regard that you believe they are incapable of being reasoned with.

I want you to imagine being on the receiving end of a surprise announcement from a powerful government agency with control over your professional future: "Guess what? We've made a decision in your best interests that is *so beneficial to you*, we've already signed an irrevocable contract without asking your opinion. You're welcome!" If you set out *intentionally* to create distrust, you could not have accomplished it more expertly. The public well understands that government agencies do not typically take steps to conceal, and secretly lock themselves irrevocably into, decisions that are publicly beneficial. Your students are smarter than you think.

You told the *Journal-Constitution* that the public outcry on social media after belatedly learning of the contract was itself validation of the decision to proceed in secrecy. ("But what's happened in the past 24 hours is it's gone on social media and there's been a lot of misconceptions.") People do not need to engage in speculation on social media when they are given truthful, complete information. *Facts* dispel

misconceptions. Your unwarranted insistence on secrecy is the sole and exclusive cause of the social-media backlash that you, Georgia State and Georgia Public Broadcasting are reaping.

To say that you did not consult the campus community before making the decision because you knew that the community would react badly is the approach of a 16-year-old sneaking out the window of his family's house after curfew. "It's easier to get forgiveness than permission" rarely works out well for teenagers, and it is not working out well for Georgia State, either. If you genuinely believe that this transaction is publicly beneficial but that its public benefits are too subtle or complex to explain easily, that is *all the more reason* for a go-slow approach.

Georgia State has an established and (until now) well-functioning mechanism for airing big-picture policy decisions about student media, the Committee on Student Communications. The Committee is tasked by its bylaws (Sec. V.A) "to review operations and advise all campus media," and in service to that objective "supports the authority of each media head to set and enforce operational policies, editorial policies and procedures for the disbursement of allocated funds for each particular student media." The Committee is a diverse body representative of the makeup of the University with substantial subject-matter expertise in broadcasting. A decision so drastically affecting student media should – as a matter of good governance and basic professional courtesy – have been presented for the Committee's consideration.

Beyond exhibiting disregard for the value of student input, your comments evidence no recognition of the function of an over-the-air college radio station as part of the fabric of a campus community. All of the University's comments have focused on the (still-theoretical) benefits of future learning opportunities for *participants* in student media, ignoring the detrimental impact on the *listening audience* of losing ready access to student-programmed radio designed for a student listening audience (for example, during automobile commuting hours, for which Atlanta is legendary). Of all places, Georgia State – which has made such strides in transition from a "commuter school" to a "destination school" with a growing sense of community – should appreciate what is lost when locally produced media with a unique local voice gives way to nationally syndicated programming produced in Chicago and Minneapolis.

Finally, your comments exhibit no recognition of the significant First Amendment considerations that attach when making decisions about the content of student media. Students at state institutions have the constitutionally protected right to choose what they publish or broadcast, free from institutional censorship.[1] The decision to substitute administrator-chosen programming for student-chosen programming during half of each day, including the most desirable "drive-time" slots, implicates the constitutional rights of the student managers to whom the University formerly afforded discretion to choose WRAS editorial content.

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[1] *See, e.g., Rosenberger v. Rectors & Visitors, Univ. of Va.*, 515 U.S. 819 (1995); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001)(*en banc*).

Your position boils down to an assertion that online broadcasting is "just as good" an experience for students as over-the-air broadcasting. In the first place, the same could equally be said to fans of the American Public Media or Public Radio International programs that will now air over WRAS-FM. Since APM and PRI programming are readily available on the Internet, why isn't online listening "just as good" for those audience members? Indeed, if making programming available online is "just as good" as broadcasting it over the airwaves, why would Georgia Public Broadcasting squander $150,000 of its donors' valuable dollars to purchase time on Georgia State's airwaves? Wouldn't such wasteful spending constitute a breach of fiduciary duty on the part of GPB's board and staff?

Of course, the two experiences are not comparable, as you must necessarily understand. You don't teach Theater, Music or Dance by having students perform in front of empty rooms, and you're not about to spend $300 million on a football complex so your athletes can compete in front of empty seats. When you take away a large segment of the audience, you diminish the educational experience. To insist otherwise raises real questions about whether Georgia State University is worthy of holding an educational broadcasting license at all.

There is a reason that the Federal Communications Commission rations the FM spectrum and reserves space on the FM band for noncommercial educational broadcasters who, in exchange for the use of this scarce public resource, commit to acting in the community's best interests. By treating the over-the-air signal as disposable – and by telling WRAS' core constituents that their opinion does not matter – you have exhibited poor stewardship of an irreplaceable public asset.

In recent years, student broadcasters at places like Vanderbilt University and Rice University have become accustomed to watching their institutions "sell their stations out from under them" without notice or consultation. Those decisions were mishandled in their own way, but at least in those instances, the secrecy could be rationalized because the parties were *private* universities negotiating for the sale of market-sensitive assets in profit-motivated transactions. That is not the case here. This was a decision made, in secret, between two public agencies legally required to conduct their business in public, and – as you yourself have insisted – the transaction was programmatic and *not* primarily about money. Government agencies cannot and should not formulate educational policy behind closed doors.

If secrecy breeds shortsighted government decisions, haste breeds disastrous ones. This decision was both secretive and hasty. The rushed nature of the transaction is obvious from the failure to reach agreement on material contract terms – including the term (use of the GPTV television studios) that you have described as the primary inducement for the transaction. What you have exacted from Georgia Public Broadcasting in exchange for rental of the WRAS-FM signal amounts, at its core, to an "agreement to agree." Indeed, there is good reason to believe that the Intergovernmental Digital Television Subchannel Programming Agreement (hereinafter "the Subchannel Agreement") is not even legally enforceable, because it commits Georgia State to do nothing. It is an agreement by GPB to make available a conduit for which Georgia State

is obligated to provide zero hours of programming and zero financial compensation.[2] Since you have stated that the availability of the GPB television station was the key inducement – in legal terms, the "consideration" – for Georgia State's willingness to enter into the Intergovernmental Programming Agreement that alters the WRAS programming schedule, the doubtful validity of the Subchannel Agreement casts serious question on the enforceability of the Programming Agreement for which it provides the consideration.

Absent an emergency situation, no competent attorney would ever sign off on such an amorphous agreement. University Attorney Kerry Heyward was quoted May 12 stating that the parties "were literally negotiating terms of the contract even through the weekend," up until the Monday (May 5) that the agreement was signed and made known to GSU insiders. The question is: Why? Why was this opportunity – to secure a television programming conduit that Georgia State does not contemplate using until mid-2015 at the earliest – treated as a time-urgent matter foreclosing careful consultation with those most affected?

It is imperative that you and your counterparts at Georgia Public Broadcasting call a "time out" to this hasty and inadequately considered arrangement. Notwithstanding your public insistence that the agreement cannot be undone, we are not dealing with an arms-length commercial transaction, but rather with the decision of two agencies of state government. They have full legal capability to agree to a

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[2] "If a contract fails to establish an essential term, and leaves the settling of that term to be agreed upon later by the parties to the contract, the contract is deemed an unenforceable 'agreement to agree.'" *Harmon v. Innomed Tech., Inc.*, 309 Ga.App. 265, 266-67, 709 S.E.2d 888 (Ga.App. 2011). *See also Cherokee Falls Invest., Inc. v. Smith*, 213 Ga. App. 603, 445 S.E.2d 572 (Ga.App. 1994) (holding that an "agreement to agree" was unenforceable because the document lacked "any statement with reasonable certainty as to what the parties were obligating themselves to do to effect what they envisioned, or as to what they envisioned"). Under Georgia contract law, mutuality of obligation is an essential element for the formation of a legally binding agreement. The Subchannel Agreement lacks mutuality in that it requires Georgia State to do nothing, except that *if programming is provided*, Georgia State must fulfill certain regulatory obligations and must give notice of its intent to schedule such programming. The Georgia courts have been quite clear that promises contingent upon one party's unilateral decision – here, the unilateral decision whether to provide programming – are insufficiently definite to form the consideration required for a binding contract. *See Stone Mtn. Properties, Ltd. V. Helmer*, 139 Ga.App. 865, 867, 229 S.E.2d 779 (Ga. App. 1976) ("It is well settled that contracts conditioned upon discretionary contingencies lack mutuality."). The Subchannel Agreement is a classic unenforceable unilateral contract because it obligates GPB to hold open a digital multicast channel stream for 12 hours a day, every day – foregoing other programming opportunities – for Georgia State to use or not use at its sole discretion. *See Waco Fire & Cas. Ins. Co. v. Plant*, 150 Ga. App. 888, 890, 259 S.E.2d 95 (Ga. App. 1979) (holding that a contract obligating one party to make services available but not obligating the counter-party to actually use the services was "unenforceable for want of mutuality").

modification that forestalls implementation of an arrangement as to which the public has legitimate unanswered questions.

It is equally imperative that you sincerely apologize to the campus community and evidence contrition for having treated the stakeholders in WRAS-FM so disrespectfully. This is a pivotal moment for your credibility as a leader of this institution, and you can still turn it to your advantage by showing that you "get it." You must say – and mean – that you understand that the decision was mishandled, that closed-door government breeds understandable distrust, and that you will never again make such a critical programmatic decision deeply affecting your students without consulting them.

While it is possible at the end of the day that the proposed GPB relationship will prove to be advantageous to the University and its students, that is a decision that should only be made after a full public airing of the true motivations for the decision and after meaningful input from the most-affected stakeholders. The Supreme Court has reminded us, again and again, that college campuses are "uniquely the marketplace for ideas," places where even the most meritorious arguments are made stronger by inquisitive testing. If the WRAS decision serves the public interest, then its merits will be vindicated in the marketplace.

I hope that Georgia State and Georgia Public Broadcasting choose the prudent course and avoid the need for this agreement and its underlying circumstances to be examined by the courts. Nevertheless, in the event that an amicable resolution cannot be reached, I ask that you instruct your staff not to destroy any documents relating to WRAS, GPB or any matter touching or concerning the Subchannel and Programming Agreements, including any documents they may have stored on personal email accounts or personal electronic devices.

Respectfully,

Frank D. LoMonte, Esq.
Executive Director
Student Press Law Center