

NOTE

Broadcasting as Marketplace or Academy?: How the Federal Communications Commission Can Save College Radio

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ABSTRACT

In recent years a number of student-run radio stations have been sold to parties that have ended day-to-day student control of these stations. The Federal Communications Commission (“FCC”) has contributed to this practice by emphasizing the value of free speech in contributing to a “marketplace of ideas” while deemphasizing the free speech value of student-run media in creating an “academy” to develop young voices. Although the FCC recently began to correct this imbalance, this Note suggests a novel regulatory arrangement that would further promote the educational benefits of student-run radio.

First, this Note examines the current regulations affecting noncommercial radio stations and how those regulations encourage the sale of student-run stations. The Note then discusses the FCC’s historical emphasis on the “marketplace of ideas” value of free speech and its recent shift toward valuing the educational benefits of student-run radio. Finally, a more extensive regulatory regime is proposed under which student-run stations could reduce their financial liability for future violations of FCC regulations in exchange for a guarantee that the stations remain student-run. The proposed regulations would promote the “academy” value of student-run radio more effectively than either existing FCC policy or competing proposals.

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TABLE OF CONTENTS

INTRODUCTION	557
I. RADIO AS MARKETPLACE: CURRENT REGULATION OF FM LICENSEES	561
A. <i>Licensing of Noncommercial Educational Stations</i> ..	562
B. <i>Transfers of NCE Stations</i>	564
C. <i>Forfeitures</i>	567
II. THE DEATH OF COLLEGE RADIO?.....	569
III. AN ALTERNATIVE TO AUDIENCE FOCUSED REGULATION	571
A. <i>Radio as Academy: Considering the Educational Value of Free Speech</i>	571
B. <i>A Proposed Regulatory Scheme to Preserve Student- Run Radio</i>	574
1. <i>Designation of Student-Run Radio Stations</i>	574
2. <i>Reductions in Forfeitures</i>	578
3. <i>Limitations on Transferability</i>	581
IV. THE PROPOSED AMENDMENTS ARE THE BEST WAY TO RECONCILE THE EDUCATIONAL VALUE OF STUDENT- RUN RADIO WITH EXISTING FCC POLICY	583
CONCLUSION	587
APPENDIX: TEXT OF PROPOSED REGULATORY CHANGES	589

INTRODUCTION

On the afternoon of June 7, 2011, as the DJ played “You Can’t Put Your Arms Around a Memory” by Johnny Thunders, station engineers turned off the broadcast signal for Vanderbilt University’s FM radio station and the airwaves went silent.¹ The day before, *College Music Journal* had noted that the registered call letters of the station had been changed from WRVU to WFCL, indicating a change to the station’s broadcast license.² WRVU staff and listeners soon learned that in exchange for \$3.35 million, promises of internship opportunities, and the use of a digital subcarrier signal, Vanderbilt Student Communications had agreed to sell its student-run radio station to Nashville Public Radio.³ The students who had put time and energy

¹ Pete Wilson, *The DJ Who Signed WRVU Off the Public Airwaves Describes the End*, NASHVILLE SCENE (June 16, 2011), <http://www.nashvillescene.com/nashville/the-dj-who-signed-wrvu-off-the-public-airwaves-describes-the-end/Content?oid=2507090>.

² Kodi McKinney, *Update: WRVU in Jeopardy as License Quietly Changes*, CMJ (June 7, 2011), <http://www.cmj.com/news/wrvu-in-jeopardy-as-license-quietly-changes>.

³ Jim Ridley, *Breaking: WRVU 91 Rock Purchased by WPLN, Will Become Classical Sta-*

into making WRVU a major part of the Nashville radio marketplace would no longer gain the experience of managing an FM radio station and using it to communicate with the surrounding community. WRVU had grown from its founding as a pirate radio station run out of a dormitory in 1951⁴ into one of the nation's top college radio stations.⁵ Although the WRVU name remains attached to an online audio stream,⁶ WRVU vanished from the analog radio dial.⁷

The loss of WRVU was not an isolated incident. Earlier that same year, the University of San Francisco sold KUSF under very similar circumstances.⁸ Previous years witnessed the sales of a number of student-run stations, including Rice University's KTRU, Augustana College's KAUR, and Texas Tech University's KTXT, to buyers who ended day-to-day control by students.⁹ Licensees reaped substantial financial windfalls through these sales; Rice University, for instance, declared KTRU a "vastly underutilized resource" and sold the station for \$9.5 million.¹⁰

During this same period, Toccoa Falls College in Toccoa Falls, Georgia sought a routine renewal of the license for its student-run station WTXR.¹¹ In its application, Toccoa Falls College admitted that the students running the station had failed to properly maintain

tion, NASHVILLE SCENE (June 7, 2011, 2:16 PM), <http://www.nashvillescene.com/pitw/archives/2011/06/07/breaking-wrvu-purchased-by-wpln-will-become-classical-station>.

⁴ *History*, SAVE WRVU 91.1 FM, <http://savewrvuradio.wordpress.com/history> (last visited Jan. 21, 2014). "Pirate radio stations" are those that broadcast without necessary Federal Communications Commission ("FCC") authorization, which WRVU eventually obtained. See *Pirate Broadcast Stations*, FED. COMM. COMMISSION, <http://www.fcc.gov/encyclopedia/pirate-broadcast-stations> (last visited Mar. 2, 2014).

⁵ Brianne Galli, *WRVU Strikes Back Against License Sale*, CMJ (Feb. 24, 2011), <http://www.cmj.com/news/wrvu-strikes-back-against-license-sale>.

⁶ Ridley, *supra* note 3.

⁷ WRVU is still broadcast on HD radio. *About*, WRVU.ORG, <http://www.wrvu.org/about> (last visited Feb. 12, 2014). However, few radio listeners have the necessary hardware to listen to HD broadcasts, and the adoption of this technology remains very slow. Ben Mook, *Slow Growth for HD Radio*, CURRENT (Nov. 5, 2012), <http://www.current.org/2012/11/slow-growth-for-hd-radio>. For further discussion of how streaming audio and HD radio are not effective replacements for traditional radio, see *infra* Part IV.

⁸ Reyhan Harmanci, *KUSF Off the Air; Details Emerging*, BAY CITIZEN (Jan. 18, 2011, 12:32 PM), <http://www.baycitizen.org/blogs/pulse-of-the-bay/kusf-radio-air>.

⁹ John Vorwald, *Waning Support for College Radio Sets Off a Debate*, N.Y. TIMES, Dec. 6, 2010, at B4; see also Candace L.T. Walton, *Student Stations Sold/Transferred to Non-Student Operations*, C. BROADCASTERS, INC. (Apr. 25, 2011), <http://www.askcbi.org/?m=201104>.

¹⁰ Vorwald, *supra* note 9 (quoting David W. Leebron, President of Rice University).

¹¹ Toccoa Falls Coll., 27 FCC Rcd. 4905, 4905 (2012) (memorandum opinion and order and notice of apparent liability for forfeiture); see also *About*, EAGLE 89.7FM, <http://www.wtxr.com/listen/about> (last visited Jan. 21, 2014).

the station's public files.¹² For failing to properly document how the programming broadcast by the station served the public interest, the station was assessed a forfeiture of \$10,000.¹³ This forfeiture, along with those recently assessed against other college stations, is an example of the regulatory costs that may induce colleges to sell off their student-run stations.¹⁴

College radio stations operate within a regulatory environment governed by the Federal Communications Commission ("FCC"). The FCC is charged with managing the public airwaves in service of the "public convenience, interest, or necessity."¹⁵ For radio stations, the framework laid out by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*¹⁶ has focused the FCC's inquiry on the "right of the public to receive suitable access to . . . ideas and experiences" in a "marketplace of ideas."¹⁷ While the FCC can regulate licensees to increase access to the airwaves for "views and voices . . . which would otherwise, by necessity, be barred from the airwaves," the paramount concern has been the free speech rights of the consumers, rather than the producers, of a broadcast.¹⁸

The regulations the FCC developed to serve the "public convenience, interest, and necessity,"¹⁹ however, have had the perverse effect of reducing the views and voices that have access to the airwaves by focusing on the free speech interests of the listening audience while historically ignoring other free speech interests.²⁰ As a result, the FCC has incentivized the rapid disappearance of student-run college radio stations by placing potentially large financial liabilities on educational licensees while readily approving transfers of broadcast licenses to third parties with no student involvement in their day-to-day operations.²¹ This reduction in opportunities for students to obtain experience in radio broadcasting would be halted or slowed if regulations

¹² *Toccoa Falls Coll.*, 27 FCC Rcd. at 4905–06.

¹³ *Id.* at 4906–07 (declining to depart downward from the base forfeiture amount of \$10,000); see also *Toccoa Falls Coll.*, 27 FCC Rcd. 8365, 8367, 8369 (2012) (forfeiture order) (issuing the \$10,000 forfeiture and describing the harm to the public).

¹⁴ Peter Tannenwald, *Student-Run College Radio: A Species Endangered by FCC Fines?*, COMM-LAW-BLOG (July 27, 2012), <http://www.commlawblog.com/2012/07/articles/broadcast/studentrun-college-radio-a-species-endangered-by-fcc-fines/indexhtml>.

¹⁵ 47 U.S.C. §§ 303, 307 (2006).

¹⁶ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

¹⁷ *Id.* at 390.

¹⁸ *Id.* at 389–90.

¹⁹ 47 U.S.C. § 303.

²⁰ See *infra* Part II.

²¹ See *infra* Part II.

were put in place to reduce the financial pressures on student-run stations. Indeed, in recent months the FCC has begun to acknowledge that student-run radio stations have unique educational benefits that are threatened by the forfeiture burdens placed on these stations.²² As a result, the FCC has created a consent decree scheme to grant relief to student-run stations that commit certain violations.²³

Although this is a laudable first step, this Note advocates for a broader reduction in forfeiture liabilities for student-run stations in exchange for a reduction of the financial windfalls educational licensees can reap for selling their stations. This will ensure that rather than merely serving as salable assets for licensees, student-run stations will continue to serve the public interest through the educational experiences they provide. This Note argues that the FCC's historic interpretation of free speech wholly in terms of the audience's access to a marketplace of ideas fails to serve the public interest by ignoring the important educational benefits of giving students access to the airwaves. To protect those benefits, this Note proposes a set of regulatory changes that will reduce the regulatory burdens on student-run radio stations while simultaneously reducing the incentives to shift to non-student-run formats. To that end, Part I discusses the current regulations governing the licensing of noncommercial educational stations, transfers of broadcast licenses, and the mechanisms for enforcement of license terms and regulations.²⁴ Part II discusses the destructive effects that these regulations have had on student-run radio stations and briefly examines the recent policy changes the FCC has made to start protecting these stations. Part III argues that the FCC's primary definition of free speech rights in terms of audience access to a marketplace of ideas has not given adequate weight to the educational free speech values of student-run radio and proposes a set of regulatory changes that would address this imbalance by reducing regulatory costs on student-run stations while removing incentives to transfer licenses. This proposal differs in several key ways from the FCC's recent efforts to protect student-run radio. Finally, Part IV examines why other student channels for speech are insufficient replacements for student-run analog broadcasting, why other proposals would not adequately address the problems faced by these stations,

²² William Penn Univ., 28 FCC Rcd. 6932, 6932–33, 6934 (2013) (policy statement and order).

²³ *Id.* at 6933–34, 6937–38.

²⁴ The technical characteristics of the AM radio spectrum have led to some unique regulatory and engineering requirements for the AM service. For the sake of simplicity, this Note will focus solely on the regulation of the FM radio service.

and why content-based regulation to preserve college radio would be an unnecessary break from established FCC policy.

I. RADIO AS MARKETPLACE: CURRENT REGULATION OF FM LICENSEES

Any government regulation of speech must be viewed in light of the basic protection of free speech enshrined in the First Amendment.²⁵ Radio broadcasting carries First Amendment protections.²⁶ If anyone interested in broadcasting were able to broadcast free of any regulation, however, the potential jumble of overlapping signals could prevent any decipherable communication; the useful range of frequencies is insufficient for all speakers to have unfettered use of the broadcast airwaves while also preserving the usefulness of those airwaves.²⁷ The Supreme Court recognized the First Amendment implications of government regulation of broadcast media in *Red Lion Broadcasting v. FCC*, but held that the inherent scarcity of available broadcast spectrum allows the government to limit who can broadcast.²⁸ Although the constitutional authority to regulate the airwaves is grounded in the need to keep voices from being crowded out of the radio broadcasting marketplace by radio signal interference,²⁹ “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”³⁰ By finding that the public’s right of “suitable access to social, political, esthetic, moral, and other ideas and experiences” is paramount, the Court found the core of the First Amendment to be the preservation of “an uninhibited marketplace of ideas in which truth will ultimately prevail.”³¹

It is on this constitutional foundation that the FCC can decide who may receive a license to broadcast and regulate the actions of licensees as “public interest” and “necessity” may dictate.³² The statutory principle under which the FCC has regulated the airwaves has been its charge to serve the “public convenience, interest, or necessity.”³³ The FCC has sought to promote these interests through its

²⁵ See U.S. CONST. amend. I.

²⁶ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).

²⁷ See *id.* at 387–89.

²⁸ *Id.* at 390.

²⁹ See *id.* at 387–88.

³⁰ *Id.* at 390.

³¹ *Id.*

³² *Id.* at 389.

³³ 47 U.S.C. § 303 (2006).

authority to issue broadcast licenses,³⁴ as well as, to a lesser degree, through its power to control the transfer of licenses.³⁵ In addition, the FCC has the authority to assess forfeitures (which are essentially fines) for violations of the terms of a broadcast license.³⁶ Student-run stations are currently required to operate within the basic system of licensure, license transfers, and forfeitures that the FCC has established for noncommercial and educational stations.³⁷

A. *Licensing of Noncommercial Educational Stations*

The FCC is charged with using its licensing authority to ensure that there is a “fair, efficient, and equitable” distribution of radio stations among states and communities.³⁸ For FM stations, the primary means of creating this fair distribution has been to create a master list of the frequencies and locations that are available for broadcast licenses and linking license opportunities to the communities the stations would serve.³⁹ The FCC accepts applications for new licenses within designated filing windows.⁴⁰ Where the FCC determines that applications for broadcast licenses propose facilities that would interfere with each other, a procedure is needed to determine which of these mutually exclusive (“MX”) applications to grant.⁴¹

Historically, such a determination required a hearing before an administrative law judge.⁴² This changed after the D.C. Circuit rejected one of the key criteria the FCC used to choose between MX applicants in these hearings as arbitrary and capricious,⁴³ and the FCC sought a new method for choosing between MX applicants.⁴⁴ The pri-

³⁴ See *id.* § 307.

³⁵ See *id.* § 310(d).

³⁶ *Id.* § 503.

³⁷ See *Toccoa Falls Coll.*, 27 FCC Rcd. 8365, 8367, 8368 (2012) (forfeiture order) (“The Bureau likewise has no precedent for exempting a station from liability by virtue of being student run.”).

³⁸ *Id.* § 307(b).

³⁹ 47 C.F.R. § 73.202 (2013).

⁴⁰ *Id.* § 73.3573.

⁴¹ *Id.* Where two or more stations are broadcasting at the same or similar frequencies, and are in such physical proximity that the areas that their signals reach overlap, the signals will interfere in the overlapping areas. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 328 (1945).

⁴² See *Ashbacker Radio Corp.*, 326 U.S. at 333.

⁴³ *Bechtel v. FCC*, 10 F.3d 875, 887 (D.C. Cir. 1993) (rejecting an “integration” factor that favored applications where the licensee would personally take an active role in the daily operations of the station for, among other reasons, failing to ensure that the licensee would continue to satisfy this criterion).

⁴⁴ K.C. Halm, *Bechtel v. FCC: The Beginning of the End of the FCC’s Comparative Hearing Process*, 50 ADMIN. L. REV. 491, 505–06 (1998).

mary method chosen was to auction the available frequency among the MX applicants.⁴⁵

While auctions might be appropriate for commercial broadcasters, different allocation methods are necessary for noncommercial applicants because a pure auction system would effectively price nonprofit organizations out of the broadcast marketplace.⁴⁶ Thus, the FCC specifically reserves a block of frequencies for noncommercial or educational (“NCE”) licensees.⁴⁷

For NCE applicants, the FCC determines which applicants would best serve the public convenience, interest, or necessity through a point system.⁴⁸ In this system, each MX applicant is awarded points based on its certification that it meets certain criteria, with the license awarded to the applicant with the highest point total.⁴⁹ For instance, the FCC awards points to an applicant for being established in the community served by a proposed station for at least two years and for covering substantially more potential listeners than the other applicants.⁵⁰ Furthermore, the FCC awards a point to applicants that have no interest in any stations that would overlap with the coverage area of the proposed station.⁵¹ For applicants that would not be able to claim credit for this “diversity of ownership” criterion, two points are available to applicants whose programming would serve the curriculum needs of a network of accredited educational facilities.⁵²

In recent years, the FCC has developed regulations for low power FM (“LPFM”) NCE stations that operate with very low power and thus only broadcast to a population in the immediate vicinity of the antenna.⁵³ These LPFM stations broadcast at a power of no more than 100 watts, and thus could potentially fit in gaps between full-power stations without creating undue interference.⁵⁴

⁴⁵ 47 C.F.R. §§ 73.3573, 73.5002 (2013).

⁴⁶ See *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 227–29 (D.C. Cir. 2001).

⁴⁷ *Id.* at 227–28; 47 C.F.R. § 73.202 (2013) (marking with an asterisk the channels reserved for NCE use); 47 C.F.R. § 73.7000 (defining “reserved channels”).

⁴⁸ 47 C.F.R. § 73.7001.

⁴⁹ *Id.* § 73.7003.

⁵⁰ *Id.* § 73.7003(b)(1), (4).

⁵¹ *Id.* § 73.7003(b)(2).

⁵² *Id.* § 73.7003(b)(3).

⁵³ See Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2011) (codified at 47 U.S.C. § 303 note (Supp. V 2012) (Local Community Radio)) (directing FCC to change regulations regarding LPFM stations).

⁵⁴ See 47 C.F.R. § 73.811. While not all full-power stations broadcast at the maximum wattage allowed by their license, the limits for full-power stations can be up to one thousand times more powerful than the LPFM limit, which allows for much larger potential coverage areas. See *FM Broadcast Station Classes and Service Contours*, FED. COMM. COMMISSION, <http://>

The FCC places several restrictions on LPFM licenses to maximize diversity of ownership⁵⁵ while preventing interference with full-power stations.⁵⁶ Specifically, an applicant cannot be awarded a license for an LPFM station if it already owns a full-power station unless (1) it is an educational institution; (2) all full-power stations it operates are not student-run; and (3) the new LPFM station would be “managed and operated on a day-to-day basis by students of the accredited educational institution.”⁵⁷ Thus, the new LPFM rules opened the door to different handling of licensees who operate student-run stations.

B. *Transfers of NCE Stations*

Besides governing the issuance of broadcast licenses, the FCC also regulates radio broadcasting through its control of transfers of broadcast licenses. Licenses can only be transferred or assigned with the prior consent of the FCC.⁵⁸ This rule is based on the understanding that broadcasters only have a license to use a specific piece of the radio spectrum rather than ownership of the frequencies they use.⁵⁹ Indeed, granting any license is contingent upon the applicant waiving any ownership claim to the frequency they hope to use.⁶⁰

The consent of the FCC is required for both de facto and de jure changes in control.⁶¹ Determining de facto control is a fact-sensitive inquiry that often turns on who controls a station’s financing, staffing, and programming.⁶² The FCC has approved of arrangements in which the intended buyer has been retained as a consultant by the seller, as well as where the buyer leases airtime until the deal is approved.⁶³ The FCC has found premature transfer of de facto control to be improper, however, when, for instance, an intended buyer assumes managerial responsibilities such as control of personnel and programming

www.fcc.gov/encyclopedia/fm-broadcast-station-classes-and-service-contours (last visited Jan. 21, 2014).

⁵⁵ 47 C.F.R. § 73.860.

⁵⁶ *Id.* § 73.809.

⁵⁷ *Id.* § 73.860(d).

⁵⁸ 47 U.S.C. § 310(d) (2006).

⁵⁹ *Id.* § 301.

⁶⁰ *Id.* § 304.

⁶¹ Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 *FED. COMM. L.J.* 277, 295–96 (1991).

⁶² *Id.* at 296–97.

⁶³ Erwin G. Krasnow, John M. Pelkey & John Wells King, *Considerations Unique to the Purchase and Sale of Broadcast Stations*, 19 *MEDIA L. & POL’Y* 149, 172–73 (2010).

decisions before the transaction has been approved by the FCC.⁶⁴ Even in cases where the FCC found that such activities constituted an improper premature transfer of control, the FCC has not always found it sufficient to block closing of the sale.⁶⁵

The FCC only exercises its authority to block transfer of a license under specific circumstances. Though it cannot, for instance, block a transaction merely because it finds that the public interest would be better served by the license being held by a party other than the intended buyer,⁶⁶ the FCC will not approve a transfer if the seller has retained a reversionary interest or retained rights to use the facility after the close of the transaction.⁶⁷ Additionally, the FCC may withhold approval for a transaction where it finds that the public interest would not be served by allowing the intended buyer to take control of a station.⁶⁸ Similarly, the FCC may withhold approval of a transaction if it determines that the seller is not qualified or should not be allowed to benefit from the transfer of the license.⁶⁹ However, this situation would take the form of a revocation of the seller's license rather than a consideration of the transaction itself,⁷⁰ and is exceedingly rare.⁷¹

Although the FCC, as a final step in approving a transaction, performs a basic examination of whether the transaction would serve the public interest,⁷² most decisions not to approve a transaction are based on either formal⁷³ or informal⁷⁴ petitions to deny the transaction.⁷⁵ The transaction will likely be approved unless petitioners can make a *prima facie* case that there is a material and substantial question of fact, that a party is not technically, legally, or financially qualified, or that a party is in violation of the law or of FCC rules or policies.⁷⁶ If petitioners satisfy this requirement, the transaction will be designated

⁶⁴ See *Fine Arts Broad., Inc.*, 57 F.C.C.2d 108, 111 (1975).

⁶⁵ See *id.*

⁶⁶ 47 U.S.C. § 310(d) (2006).

⁶⁷ 47 C.F.R. § 73.1150 (2013).

⁶⁸ See Sewell, *supra* note 61, at 291–92.

⁶⁹ See *id.* at 293.

⁷⁰ See 47 U.S.C. § 312.

⁷¹ Sewell, *supra* note 61, at 293.

⁷² *Id.* at 292.

⁷³ 47 C.F.R. § 73.3584 (2013).

⁷⁴ *Id.* § 73.3587.

⁷⁵ See, e.g., Petition to Deny of Friends of KUSF, Univ. of S.F., 27 FCC Rcd. 5674 (2012) (No. BALED-20110125ACE), available at <http://www.media-alliance.org/downloads/KUSF%20Petition%20to%20Deny%20finalpdf>.

⁷⁶ See 47 C.F.R. § 73.3591.

for a hearing to resolve the allegations or the unresolved material questions of fact.⁷⁷

An additional special circumstance can merit blocking the transfer of a license. Where an NCE applicant is awarded a license based on representations it made to merit points in an MX inquiry, the license is subject to a four-year “holding period.”⁷⁸ During this period, an NCE transferor must show that the transferee would have qualified for at least as many points as did the transferor when it obtained the license and that the consideration paid for the license does not exceed the transferor’s legitimate and prudent expenses in obtaining and constructing the station.⁷⁹ This rule is an offshoot of previous policies designed to prevent trafficking in licenses by applicants given special preference by the FCC in the comparative MX inquiry.⁸⁰

Where the holding period for NCE transfers does not apply, the KUSF transaction provides an illustration of how hesitant the FCC can be to block a proposed license transfer.⁸¹ There, the FCC found that the parties to the transaction had engaged in improper payments and made inaccurate assertions that those payments in fact complied with FCC regulations.⁸² Nevertheless, the FCC declared that although the parties had submitted inaccurate claims, they had not “made misrepresentations or lacked candor.”⁸³ Therefore, the FCC did not find that there was any material and substantial question of fact regarding whether either party had the basic qualifications to hold a broadcast license, and so did not block the transaction.⁸⁴ Instead, it terminated its investigation, contingent upon the parties making a “voluntary contribution” of \$50,000 to the Treasury.⁸⁵ Even where the FCC found that the parties to a transaction had acted improperly, the flaws in the

⁷⁷ *Id.* § 73.3593.

⁷⁸ *Id.* § 73.7005.

⁷⁹ *Id.*

⁸⁰ See Reexamination of Comparative Standards for Noncommercial Educational Applicants, 65 Fed. Reg. 36,375 (June 8, 2000) (codified as amended in scattered sections of 47 C.F.R. pts. 73 & 74); Reexamination of the Policy Statement on Comparative Broadcast Hearings, 58 Fed. Reg. 44,484 (proposed Aug. 23, 1993).

⁸¹ See *supra* note 8 and accompanying text (discussing the KUSF transaction). See generally *Univ. of S.F.*, 27 FCC Rcd. 5674 (2012) (adopting consent decree regarding contested license transfer).

⁸² *Univ. of S.F.*, 27 FCC Rcd. at 5676–78; see also 47 C.F.R. § 1.17 (2012) (truthfulness requirement); 47 C.F.R. § 73.503 (2013) (NCE license requirements that the parties violated by exchanging payments beyond what was permitted under § 75.503(c)).

⁸³ *Univ. of S.F.*, 27 FCC Rcd. at 5678.

⁸⁴ *Id.* at 5679.

⁸⁵ *Id.* at 5674.

transaction were resolved not by blocking the sale but by imposing financial penalties on the participants.

C. Forfeitures

While the FCC has generally been hesitant to revoke licenses,⁸⁶ it frequently utilizes another key sanction: the ability to assess financial forfeitures on licensees.⁸⁷ Unless a hearing is already being held for a reason other than a forfeiture, assessment of a forfeiture is generally a paper process.⁸⁸ First, a licensee will be sent a notice of apparent liability (“NAL”) indicating what rules, statutes, or license terms the licensee appears to have violated, the facts upon which the assessment is based, and the amount of the apparent forfeiture.⁸⁹ The licensee then has a reasonable period of time in which to pay the forfeiture or show in writing, with appropriate documentation, why the forfeiture should be reduced or eliminated.⁹⁰

If the licensee does not pay the entire forfeiture, the FCC can, based on the facts and documentation available to it, cancel the forfeiture, issue a forfeiture order for the entire proposed sum, or issue a forfeiture order for a reduced amount.⁹¹ If the forfeiture is not paid in accord with the forfeiture order, the balance can be referred to the Department of Justice for collection proceedings.⁹² The FCC has determined base forfeiture rates for an array of violations within boundaries set by statute.⁹³ For example, the base rate for a single violation of the prohibition against transmitting indecent or obscene material is \$7000,⁹⁴ but the FCC is authorized by statute to assess up to \$325,000 for each violation.⁹⁵ Given the gaps between the base forfeitures for various violations and the forfeitures authorized by statute, the FCC has also established criteria for assessing forfeitures above or below the base rates.⁹⁶

⁸⁶ See Sewell, *supra* note 61, at 341.

⁸⁷ 47 U.S.C. § 503 (2006). For a discussion of the history of civil forfeiture proceedings and the ability to appeal FCC forfeiture orders, see generally Garrett R. Rose, Comment, *Who's Allowed to Kill the Radio Star? Forfeiture Jurisdiction Under the Communications Act*, 79 U. CHI. L. REV. 1553 (2012).

⁸⁸ 47 C.F.R. § 1.80 (2012).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; 47 U.S.C. § 503 (2006).

⁹⁴ 47 C.F.R. § 1.80.

⁹⁵ 47 U.S.C. § 503(b)(2)(C)(ii).

⁹⁶ 47 C.F.R. § 1.80.

The FCC uses forfeiture proceedings to ensure that licensees are using their licenses in furtherance of the public interest. To satisfy this public interest examination, NCE licensees are required to maintain a public file making information about the station available to the public upon request.⁹⁷ This file must include the station's current license, recent applications to the FCC, technical and ownership information, a record of any broadcasts by candidates for public office, an Equal Employment Opportunity file, and a station manual.⁹⁸ Furthermore, it must include quarterly statements describing the significant community issues that the station addressed in its programming and which programs addressed these issues.⁹⁹

Failure to maintain this public file leads to a base forfeiture of \$10,000.¹⁰⁰ The FCC can adjust the forfeiture up to the statutory maximum of \$25,000 for each violation where: (1) the violation is egregious, intentional, repeated, or continuous; (2) the licensee has caused substantial public harm or stands to reap substantial gain from the violation; (3) there is a history of violations; or (4) the base forfeiture would not provide an adequate disincentive.¹⁰¹ Alternatively, where the violation is relatively minor, the licensee has shown good faith or voluntarily revealed the violation, there is an overall history of compliance, or the licensee can document an inability to pay, the forfeiture can be reduced or eliminated.¹⁰²

The forfeiture action against WTXR shows how these rules were traditionally applied against student-run stations. Toccoa Falls College, when prompted in its application for renewal of its license for station WTXR, revealed that it was missing seventeen consecutive issues/programs lists from its public inspection file.¹⁰³ The college was thus issued an NAL in the amount of \$10,000.¹⁰⁴ The FCC determined that the violation of the public inspection file requirement was intrinsically a serious violation and that the violation was "willful or repeated" based on the number of missing files.¹⁰⁵ Rejecting the licensee's arguments in favor of reducing the forfeiture, the FCC

⁹⁷ 47 C.F.R. § 73.3527 (2013).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 47 C.F.R. § 1.80 (2012).

¹⁰¹ *Id.*; *see also* 47 U.S.C. § 503 (2006).

¹⁰² 47 C.F.R. § 1.80.

¹⁰³ Toccoa Falls Coll., 27 FCC Rcd. 8365, 8365–66 (2012) (forfeiture order).

¹⁰⁴ *Id.* at 8365.

¹⁰⁵ *Id.* at 8366–67.

found no reason to depart from the established base forfeiture for the violation and issued a forfeiture order for the full \$10,000.¹⁰⁶

II. THE DEATH OF COLLEGE RADIO?

The action against Toccoa Falls College demonstrates the regulatory pressures on college radio stations that may help to explain why so many have been closed or sold in recent years.¹⁰⁷ Toccoa Falls College claimed that because WTXR is a student-run station, the forfeiture should be reduced.¹⁰⁸ The FCC, however, found no precedent for reducing a forfeiture on those grounds.¹⁰⁹ Indeed, the FCC had previously established that student-run stations were not exempted from the responsibility to maintain a complete public inspection file or the standard penalties for failing to comply.¹¹⁰ Furthermore, claims of hardship would only merit reduction of forfeitures where the licensee could document that the forfeiture would be unusually large relative to the licensee's gross revenues.¹¹¹

Examination of the finances of student-run stations, however, shows that the gross revenues of the licensee (often the parent university) is a poor measure of what forfeitures the stations themselves can afford to pay.¹¹² The majority of student-run stations had budgets below \$40,000, with most budgets clustered in the neighborhood of \$20,000.¹¹³ For such stations, regardless of the school's gross revenues, a forfeiture of \$10,000 like the one assessed against WTXR could represent a substantial portion of the station's yearly budget. Furthermore, the potential forfeiture of up to \$325,000 for a single instance of broadcasting indecent or obscene material (assuming the offense met the criteria for a forfeiture above the base rate) would likely far exceed the yearly budget of even the best-funded student-run station.¹¹⁴

In contrast, an urban noncommercial licensee like Nashville Public Radio (the NPR affiliate that bought the license for WRVU from Vanderbilt University) can have a yearly budget in excess of \$4 mil-

¹⁰⁶ *Id.* at 8369.

¹⁰⁷ Tannenwald, *supra* note 14; *see also, e.g.*, Walton, *supra* note 9.

¹⁰⁸ *Toccoa Falls Coll.*, 27 FCC Rcd. at 8368.

¹⁰⁹ *Id.*

¹¹⁰ *See* Univ. of Mont.-W., 24 FCC Rcd. 3127, 3130–31 (2009).

¹¹¹ *Id.* at 3131.

¹¹² *See* Lucas McCallister, *Analyzing College Radio in 2012—A Study of Different Station Structures*, RADIO SURVIVOR (July 6, 2012), <http://www.radiosurvivor.com/2012/07/06/analyzing-college-radio-in-2012-a-study-of-different-station-structures/>.

¹¹³ *Id.*

¹¹⁴ *See id.*

lion.¹¹⁵ The financial effect of a \$10,000 forfeiture on a student-run station with a \$20,000 budget would be far more severe than the same forfeiture assessed against a station with a budget in the millions of dollars. Likewise, a \$325,000 obscenity forfeiture would be many times the yearly budget of a common student-run station,¹¹⁶ while the same forfeiture would be merely a fraction of the yearly budget of a major public radio licensee like Nashville Public Radio.¹¹⁷

It is against the backdrop of potentially crippling financial liabilities that an educational licensee might be enticed by the prospect of trading a financially risky student-run station for a quick infusion of cash from a sale of their license to a prosperous noncommercial licensee like Nashville Public Radio. Colleges considering selling off their student-run stations cite as justification the stations' relatively small audiences¹¹⁸ and pressures on the schools' budgets.¹¹⁹ Thus, to the extent that the FCC's historic regulation of college radio created financial incentives for schools to sell their student-run stations, the FCC has hastened the demise of student-run radio.

The FCC noted the rise in the number of student-run stations being sold in a new forfeiture policy for student-run stations released in May of 2013.¹²⁰ Under this policy, the first time a student-run station commits certain violations (primarily public file violations) it will be eligible to enter into a consent decree with the FCC, in which it will create a plan to ensure future compliance with all FCC regulations and in which it will agree to make a "voluntary payment" in lieu of the apparent forfeiture liability.¹²¹ These "voluntary payments," while still significant relative to a student-run station's annual budget, would be calculated based on the station's budget rather than that of the educational institution that holds the license and would, in any case, be substantially less than the forfeiture the station would otherwise face.¹²²

¹¹⁵ NASHVILLE PUB. RADIO, FINANCIAL STATEMENTS, SUPPLEMENTARY INFORMATION AND INDEPENDENT AUDITORS' REPORTS: JUNE 30, 2012 AND 2011, at 30 (2012), available at http://nashvillepublicradio.org/reports/fy2012_financials.pdf.

¹¹⁶ See McCallister, *supra* note 112.

¹¹⁷ See NASHVILLE PUB. RADIO, *supra* note 115.

¹¹⁸ See Courtney Subramanian, *Could Budget Cuts Kill the College Radio Station?*, TIME NEWSFEED (Oct. 12, 2011), <http://newsfeed.time.com/2011/10/12/could-budget-cuts-kill-the-college-radio-station>.

¹¹⁹ *Id.*; Mary Beth Marklein, *Cuts May Silence College Stations*, USA TODAY, Oct. 11, 2011, at 3A.

¹²⁰ William Penn Univ., 28 FCC Rcd. 6932, 6934 (2013).

¹²¹ *Id.* at 6936–38.

¹²² *Id.* at 6938.

In embracing this policy shift, the FCC remained true to its tradition of audience-focused regulation by noting that the loss of student-run stations would have the effect of “depriving listeners of important local voices.”¹²³ It also noted, however, the “high turnover rate of student volunteers” and the fact that “limited resources for training and oversight are endemic” at these stations.¹²⁴ Finally, in a break from precedent, the FCC explicitly based the new policy in part on the educational benefits student-run stations have for the students themselves.¹²⁵ As the remainder of this Note suggests, the FCC should build on this break with precedent by clearly recognizing that the educational value of student-run stations is an example of an important and historically underprotected dimension of free speech, and by taking further action to more effectively protect student-run radio stations.

III. AN ALTERNATIVE TO AUDIENCE-FOCUSED REGULATION

Whether or not the current regulation of radio based on the “marketplace” model of free speech adequately creates a robust marketplace of ideas, this model does not exhaust all of the potential value that speech may have. Rather, it should be supplemented by an “academy” model that recognizes that speech in certain contexts has a value in educating the speakers, regardless of its effect on the listeners. Student-run radio provides a prime example of media where the “marketplace” value of the speech broadcast is substantially complemented by the “academy” value of encouraging growth in the students given access to the airwaves. Therefore, as a demonstration of how the FCC could do more to foster the “academy” dimension of speech, this Note proposes that the FCC build on its recent policy changes recognizing the educational value of student-run stations with a series of regulatory amendments to further preserve student-run stations.

A. *Radio as Academy: Considering the Educational Value of Free Speech*

To prevent the continued loss of student-run stations, the FCC needs to embrace a broader model of what constitutes free speech

¹²³ *Id.*

¹²⁴ *Id.* at 6935–36.

¹²⁵ *Compare id.* at 6938–39 (taking into account the “unique benefits these stations provide, both to their student staffs and their communities of license”), with *Toccoa Falls Coll.*, 27 FCC Rcd. 8365, 8368 (2012) (“[W]e find no support for the claim that student-run [NCE] stations should be assessed reduced forfeitures relative to other licensees”).

than it has traditionally employed. Regulation of radio broadcasting has been based on a model of free speech that focuses on the promotion of a marketplace of ideas for the benefit of the listening audience.¹²⁶ Justice Holmes laid out this marketplace model of free speech—in which the right is focused on protecting public discourse (especially relating to the political process) for the good of society—in his dissent in *Abrams v. United States*.¹²⁷ The model was further developed and popularized throughout the first half of the twentieth century by the influential free speech advocate Alexander Meiklejohn.¹²⁸ The Meiklejohn framework has been endorsed to some degree by thinkers as ideologically diverse as Judge Bork¹²⁹ and Justice Brennan.¹³⁰ As the Supreme Court stated in *Garrison v. Louisiana*¹³¹ in endorsing the Meiklejohn theory of free speech, “speech concerning public affairs is more than self-expression; it is the essence of self-government.”¹³²

However, this marketplace model of the First Amendment is not without its critics.¹³³ As a comprehensive model of free speech, the marketplace of ideas may represent an impossible ideal, not just because of the potential for government interference but also because of social and economic power disparities among the market participants.¹³⁴

Furthermore, while the Supreme Court has declared speech to be more than self-expression, at least some of the value of free speech is the benefit for the speaker.¹³⁵ Along with the value of free speech for “the discovery and spread of truth” as valued in the marketplace model of free speech, speech is also valued for its ability to help “make men free to develop their faculties.”¹³⁶ Overemphasis of the marketplace of ideas model of free speech impoverishes a right that

¹²⁶ See *supra* notes 26–32 and accompanying text (discussing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969)).

¹²⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹²⁸ See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 45–46 (1948).

¹²⁹ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26 (1971).

¹³⁰ William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 *HARV. L. REV.* 1, 1 (1965).

¹³¹ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

¹³² *Id.* at 74–75.

¹³³ See, e.g., Jonathan Weinberg, *Broadcasting and Speech*, 81 *CAL. L. REV.* 1101, 1204–06 (1993).

¹³⁴ See *id.* at 1142–44.

¹³⁵ Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 593 (1982).

¹³⁶ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

classically has been at least as grounded in the potential to spur individual development as it has been in the potential to help the broader community develop optimal policies or discover ultimate truths.¹³⁷

The potential for college radio to help the individual development of its participants can be substantial, as the history of WRVU illustrates. Station founder Ken Berryhill went on to have a long career in radio and television, returning to do a show at WRVU after his retirement.¹³⁸ A number of other alumni of the station went on to careers in broadcasting.¹³⁹ For instance, Fred Buc went from working while a student to increase the wattage of WRVU to managing a powerful Nashville commercial station, WRLT.¹⁴⁰ Others, like Eothen “Egon” Alapatt, manager of the influential hip-hop label Stones Throw Records, leveraged their experience at WRVU to gain a foothold in the recording industry.¹⁴¹ Alumni who have been vocal about the positive effect that their time working at WRVU had on their lives include CNN anchor Richard Quest and Facebook Vice President of Technology Jeff Rothschild.¹⁴² College radio has served as an important training ground for future generations of communications professionals and has encouraged a broad array of voices to enter the communications marketplace.¹⁴³ Indeed, in its recently revised forfeiture policy for student-run stations, the FCC noted that these stations have a “unique role” as both “incubators for talent as well as media outlets.”¹⁴⁴

The free speech values of encouraging individual development and promoting an open marketplace of ideas can complement each other.¹⁴⁵ In developing the faculties of speakers, college radio can indirectly improve the speech available in the marketplace.¹⁴⁶ One former college radio news editor noted that what he had learned in

¹³⁷ See Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288 (1966).

¹³⁸ Skip Anderson, “Father of WRVU” Continues Legacy Begun 50 Years Ago in Cole Hall, VAND. REG. (Feb. 19, 2001), http://www.vanderbilt.edu/News/register/Feb19_01/story10html.

¹³⁹ Brad Maybe, *Happy Birthday to WRVU: The Student Voice of Vanderbilt University Turns 50*, CMJ NEW MUSIC REP., Apr. 7, 2003, at 10, 11.

¹⁴⁰ *Id.* at 11–12.

¹⁴¹ *Id.* at 12.

¹⁴² McKinney, *supra* note 2.

¹⁴³ See Tannenwald, *supra* note 14.

¹⁴⁴ William Penn Univ., 28 FCC Rcd. 6932, 6932–33 (2013).

¹⁴⁵ See Redish, *supra* note 135, at 593–94.

¹⁴⁶ See generally William Thomas, *When “Student Empowerment” Works Too Well: Adventures in Publishing by a Former High School Newspaper Sponsor*, ENG. J., Nov. 1995, at 58 (1995).

broadcasting could be applied to his work as a teacher and high school newspaper advisor.¹⁴⁷ His radio experience helped him develop his students' communication skills, which in turn promoted a more open marketplace of ideas within the school. Thus, the twin aims of developing the individual speakers and improving the exchange of ideas within the community were mutually advanced.¹⁴⁸

The prevailing "marketplace" model of free speech emphasizes the benefits stations provide for their audiences.¹⁴⁹ This undervalues the core free speech value of individual development, such as the benefit to the public of the direct educational opportunities radio stations can provide. As student-run educational stations further the public interest by providing student participants with opportunities for individual growth and development, a series of regulatory changes would help preserve these opportunities by reducing the economic pressures on schools to divest themselves of their licenses.

B. A Proposed Regulatory Scheme to Preserve Student-Run Radio

To preserve the educational benefits of college radio, the FCC should go beyond its recent policy statement regarding student-run stations and promulgate rules that would give weight to the individual development value of college radio and encourage licensees to keep operating student-run stations.¹⁵⁰ Licensees should be able to certify when obtaining or renewing their broadcast license that the station will be run by students. Stations that do so should receive substantial reductions in the potential forfeiture liabilities they might face for a violation of their license terms or FCC rules, but only in exchange for giving up their right to transfer or assign their license to a party that would not continue to let students control the station.

1. Designation of Student-Run Radio Stations

The FCC should define "student-run" radio stations by amending 47 C.F.R. § 73.503, which establishes license requirements for NCE stations,¹⁵¹ to add the following clause:

- (f) A party may designate a station as a student-run educational station, either when applying for a construction permit

¹⁴⁷ *Id.* at 58.

¹⁴⁸ *Id.*

¹⁴⁹ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹⁵⁰ See *infra* Appendix for a complete list of the proposed changes. For the more limited policy changes the Commission has recently made to protect student-run stations, see *William Penn University*, 28 FCC Red. 6932, 6937–38 (2013).

¹⁵¹ 47 C.F.R. § 73.503 (2013).

or for a license renewal, by certifying that the following conditions are met:

- (1) the party is an accredited educational institution;
- (2) the station will be managed and operated on a day-to-day basis by students of the accredited educational institution; and
- (3) these conditions will continue to be met for the duration of the license sought, as established in accord with § 73.1020.

This additional language would allow qualifying applicants for either a new license¹⁵² or a license renewal to designate a station as a student-run educational station, subject to a certification that certain conditions are met. The voluntary nature of such certifications is similar to the existing system for point certifications during MX inquiries.¹⁵³ The potential to obtain a broadcast license in a crowded market is enough of an incentive to persuade applicants for new NCE licenses to voluntarily submit to restrictions on their licenses.¹⁵⁴ In the same way, with a sufficient incentive, applicants interested in having a student-run station could be induced to voluntarily submit to this designation, despite any restrictions placed on student-run stations.¹⁵⁵

Unlike point certifications, which are made only during the initial license application,¹⁵⁶ the applicants could adopt the proposed student-run station designation either during initial license applications or during applications for license renewals. This difference between the point certification and the voluntary designation proposed here is grounded in the distinct purposes of the two rules. Point certifications are designed to let the FCC choose between MX applications for a license where there is no existing station.¹⁵⁷ The purpose of the proposed designation, on the other hand, would be to provide special treatment not only to new student-run stations, but also to existing licensees that would meet the essential criteria.

¹⁵² A grant of a new license takes the form of a construction permit, stating the terms under which a new licensee can construct broadcast facilities for the proposed station. See FCC, YOUR INITIAL CONSTRUCTION PERMIT FOR A NEW BROADCAST RADIO STATION (2002), available at <http://transition.fcc.gov/mb/audio/bickel/initialCPhtml>.

¹⁵³ See 47 C.F.R. § 73.7003.

¹⁵⁴ See, e.g., *id.* § 73.7005 (defining the holding period placed on licenses awarded based on point certifications).

¹⁵⁵ See *infra* Part III.B.2 for a discussion of the incentives encouraging an applicant to designate a station as student-run and *infra* Part III.B.3 for a discussion of the restrictions placed on student-run stations.

¹⁵⁶ 47 C.F.R. § 73.7003.

¹⁵⁷ See *id.*

The criteria for which applicants would qualify for this designation is included in the proposed addition to § 73.503. Only applicants that are accredited educational institutions and that certify that the station will be “managed and operated on a day-to-day basis by students of the accredited educational institution” will be able to designate their stations as student-run.¹⁵⁸ These criteria are drawn from the existing rules distinguishing student-run stations for purposes of LPFM cross-ownership to allow for ease of administration.¹⁵⁹ Likewise, so that there is consistent treatment for student-run stations, the cross-ownership benefits for student-run LPFM stations should be restricted to only those stations that are designated as student-run according to the proposed language for § 73.503.

Notably, the FCC already distinguishes between certain educational stations and other noncommercial stations.¹⁶⁰ As part of the MX process, applicants for a new license can be awarded two points for being a part of (or serving) a statewide network of accredited educational institutions and regularly providing programming to their educational facilities to further their academic curriculum.¹⁶¹ However, this criterion focuses on the benefit to the audience, as it is based on whether the content of the programming serves the educational needs of the institutions¹⁶² rather than on the direct educational benefits of student involvement in broadcasting. Indeed, there is no requirement that there be any student involvement in the broadcast programming; students are considered solely as an audience for the programming.¹⁶³ Therefore, by not singling out student-run stations, this special treatment for educational stations does not give sufficient weight to the potential educational benefits of such stations.

The modified definition of student-run stations proposed in this Note is also designed to reflect the diversity of student-run stations. Some college radio stations are part of a structured academic pro-

¹⁵⁸ See Proposed Regulation, *infra* App. § 73.516.

¹⁵⁹ See 47 C.F.R. § 73.860. As the language is drawn from the regulations for LPFM stations, the exact boundaries of what will constitute a sufficient level of student operation will develop as the FCC processes applications submitted during the recent LPFM licensing window, held during October and November of 2013. See *Low Power FM Broadcast Radio Stations (LPFM)*, FED. COMM. COMMISSION, <http://www.fcc.gov/encyclopedia/low-power-fm-broadcast-radio-stations-lpfm#WINDOWS> (last visited Jan. 15, 2014).

¹⁶⁰ See 47 C.F.R. § 73.7003.

¹⁶¹ *Id.*

¹⁶² See *id.*

¹⁶³ See *id.* (speaking only of programming directed “to schools” and “to campuses” rather than programming originating from those schools and campuses or controlled by the students there).

gram, where participation is largely a hands-on component of coursework in media or broadcasting.¹⁶⁴ Others are run as student organizations, with an emphasis on providing an outlet for student voices rather than promoting specific academic goals.¹⁶⁵ The proposed definition is broad enough to cover both extremes, as well as the array of stations that fall somewhere in between, as long as day-to-day operation of the station is primarily done by students.

This is in stark contrast to the eligibility requirements for the regulatory relief the FCC has recently made available to some student-run stations.¹⁶⁶ To be eligible, avoid steep forfeiture liabilities, and enter into a consent decree under the newly announced FCC policy, a station must be staffed entirely by students, with the possible exception of a single faculty advisor.¹⁶⁷ Therefore, under the current policy, a station where students perform all programming and production duties but that has multiple paid employees (beyond students receiving work-study stipends in exchange for working at the station) would not be able to receive any relief from forfeiture liability.¹⁶⁸

The FCC recognized that faculty advisors might have very little time to spend working with the students running a station.¹⁶⁹ By requiring that student-run stations have only a single faculty advisor to be eligible for relief, the FCC has defined these stations in terms of their limited budgets rather than their educational value. This devalues the educational benefits students could derive from having multiple faculty advisors (or community volunteers), each of whom might be able to devote a few hours per week to training the student staff of the station.¹⁷⁰ In contrast, the regulatory amendments proposed by this Note, by focusing on student involvement rather than on the precise structure of faculty oversight, would allow stations the flexibility to maximize their educational benefits without jeopardizing access to the forfeiture relief proposed below.

Finally, the suggested additions to § 73.503 require that the applicant certify that the station will continue to be held by an accredited educational institution and will continue to be managed and operated

¹⁶⁴ See McCallister, *supra* note 112.

¹⁶⁵ *Id.*

¹⁶⁶ See William Penn Univ., 28 FCC Rcd. 6932, 6937–38 (2013).

¹⁶⁷ *Id.* at 6932 n.2.

¹⁶⁸ *Id.* (citing S. Adventist Univ., 26 FCC Rcd. 11254 (2011) (forfeiture order), as an example of just such a station that would be able to use the new policy); *id.* at 6933 n.3 (noting that students receiving work-study stipends would not impact eligibility for relief).

¹⁶⁹ *Id.* at 6933.

¹⁷⁰ See *id.* at 6932 n.2.

by students of the institution for the duration of the license sought.¹⁷¹ This will prevent applicants from attempting to reap the regulatory benefits of the designation without continuing to provide the desired educational benefits to students. Likewise, the proposed amendments change the public file requirements¹⁷² to require that any licensee that designates a station as student-run must include in their public file a brief description of the specific roles students have played in the day-to-day operations of the station during the current license term to allow for verification that the licensee is fulfilling its educational obligations.¹⁷³

2. *Reductions in Forfeitures*

The incentive for licensees to designate their stations as student-run should be a substantial discount on the forfeiture liability for designated student-run stations. The substantial fines currently faced by student-run stations, like WTXR at Toccoa Falls College, pose a serious risk of encouraging licensees to close or sell their stations.¹⁷⁴ The educational benefits of student-run stations should be recognized by a reduction in forfeitures for violations of certain FCC regulations and license terms. While the FCC should be applauded for its recent decision to grant relief to student-run stations found liable for first time violations of a few rules, an effective policy will need to grant more predictable relief to a broader array of potential violations.

Even though the day-to-day operations are controlled by students, most student-run stations have professional engineering support, so a station's ability to comply with the FCC's engineering and safety requirements should be unaffected by the licensee's decision to let students run a station.¹⁷⁵ Student control of a station, however, could materially increase the risk of several types of violations that could give rise to forfeiture liability,¹⁷⁶ and for these violations the

¹⁷¹ See Proposed Regulation, *infra* App. § 73.503.

¹⁷² See 47 C.F.R. § 73.3527 (2013).

¹⁷³ See Proposed Regulation, *infra* App. § 73.3527.

¹⁷⁴ Tannenwald, *supra* note 14.

¹⁷⁵ See McCallister, *supra* note 112. Note that the recent Policy Statement granting forfeiture relief to student-run stations conditions that relief on stations having no more than one professional employee. This may create a perverse incentive by encouraging student-run stations not to seek professional engineering assistance and thus lead to increased station downtime and more violations of technical requirements. See *William Penn Univ.*, 28 F.C.C. Rcd. at 6937–38.

¹⁷⁶ See 47 C.F.R. § 1.80 (2012) (establishing forfeiture proceedings and providing base rates for forfeitures). For a discussion of the increased risk of operational mistakes at student-run stations, see Tannenwald, *supra* note 14.

base forfeiture rates should be drastically reduced for student-run stations.

The FCC has established base rates for violations in its regulations within limits set by statute, while retaining discretion to depart from these base rates where appropriate.¹⁷⁷ A new table of base rates should be established for violations of rules regarding the content of the broadcasts or communications with the public or the FCC.¹⁷⁸ These base rates should be set at ten percent of the base rate for other licensees to create a substantial incentive for licensees to designate their stations as student-run, preserve some disincentive for violations, and reduce the incentive for schools to sell or close student-run stations.¹⁷⁹ Furthermore, the maximum penalty for obscenity violations for student-run stations should be set at \$35,000 per violation,¹⁸⁰ as the substantial potential liability of the current \$350,000 per violation maximum can have a chilling effect on poorly funded college stations.¹⁸¹

With these adjusted rates in place, a student-run station like WTXR that violated its public file requirements¹⁸² would face a forfeiture of \$1000, rather than \$10,000.¹⁸³ For the large cohort of student-run stations with annual budgets of approximately \$20,000,¹⁸⁴ this would represent a substantial expense without being so great as to force the station to shut down or be sold. Most student-run stations have budgets at or below \$40,000 per year,¹⁸⁵ whereas in a major radio market even a noncommercial licensee can have a yearly budget of over \$4 million.¹⁸⁶ This hundredfold difference in yearly budgets is not precisely mirrored in the proposed rules, because although a

¹⁷⁷ 47 C.F.R. § 1.80.

¹⁷⁸ See Proposed Regulation, *infra* App. § 1.80.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See Brief Amicus Curiae of the Student Press Law Center and College Broadcasters, Inc., in Support of Respondents at 37–38, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293) (noting how indecency liabilities have led directly to the closure of at least one college station).

¹⁸² See *Toccoa Falls Coll.*, 27 FCC Rcd. 8365, 8365 (2012). See also *supra* Part II for discussion of the forfeiture action against WTXR at Toccoa Falls College.

¹⁸³ The public file requirement for student-run stations would be slightly increased, however, because such stations would have to include a description of the extent of student involvement to allow verification that the station is, in fact, operated by students. See Proposed Regulation, *infra* App. § 73.3527.

¹⁸⁴ See McCallister, *supra* note 112 (discussing the distribution of yearly operating budgets for student-run stations).

¹⁸⁵ *Id.*

¹⁸⁶ See *NASHVILLE PUB. RADIO*, *supra* note 115, at 30.

\$1000 forfeiture would be a substantial burden on student-run stations, a \$100 forfeiture for the same offense might not have a sufficient deterrent effect on even a poorly funded station. At the same time, although a \$1000 forfeiture would be a substantial fraction of a student-run station's budget, it is less likely to be fatal than forfeitures under the current rates, which can equal up to a quarter or one half of a student-run station's budget.¹⁸⁷

Student-run stations often have limited funding, obtained mostly through the diligent fundraising efforts of the students who operate the station.¹⁸⁸ The reduced forfeitures proposed here should ensure that penalties for infractions will have sufficient bite to teach the value of complying with FCC regulations without being so draconian that they reduce future educational opportunities at student-run stations.

The FCC has finally recognized that student-run stations have extremely limited budgets, and that the budget of the parent licensee is not an adequate indication of what penalties a station can afford.¹⁸⁹ However, licensees cannot accurately predict their potential forfeiture liabilities under the new policy, because the FCC would only calculate the reductions based on the "totality of the circumstances" during enforcement.¹⁹⁰ By contrast, since the reduced forfeitures proposed by this Note would be known to licensees in advance of any violations, licensees would be better able to assess their potential liability. Therefore, although the FCC's new policy may help those student-run stations that have not already committed a first-time violation,¹⁹¹ the policy proposed here would go further in reducing the fiscal anxiety of licensees concerned about their potential future exposure.

Furthermore, although the FCC notes the high rate of staff turnover at student-run stations, the new forfeiture relief policy only applies to first-time violations.¹⁹² A station that enters into a consent decree under this policy would lose access to further forfeiture relief even long after the students who had committed the original violations had graduated.¹⁹³ The institutional memory of student-run stations would be further limited by refusing relief to stations that employed more

¹⁸⁷ See McCallister, *supra* note 112.

¹⁸⁸ William Penn Univ., 28 FCC Rcd. 6932, 6933 (2013); see also McCallister, *supra* note 112; Eric Moore, *College Radio Fights for Recognition, Funding*, DAILY IOWAN (Oct. 11, 2011, 7:20 AM), <http://www.dailyiowan.com/2011/10/11/Metro/25358html>.

¹⁸⁹ See *William Penn Univ.*, 28 FCC Rcd. at 6938–39.

¹⁹⁰ *Id.* at 6932, 6938.

¹⁹¹ *Id.* at 6936.

¹⁹² *Id.* at 6936–37.

¹⁹³ See *id.* at 6937–38.

than a single (usually part-time) faculty advisor to help ensure that each generation of students might learn from the mistakes of their predecessors.¹⁹⁴ In contrast, the relief proposed here would better account for the high turnover intrinsic to student-run stations by allowing student-run stations to continue to face reduced forfeiture liabilities so long as they remain dedicated to providing educational benefits to successive generations of student staffs.

Lastly, the relief proposed here would cover substantially more potential violations than the relief granted in the FCC's recent policy order.¹⁹⁵ The FCC has so far limited this new policy to certain reporting, public file, and public notice violations.¹⁹⁶ Although these may be common violations committed by student-run stations,¹⁹⁷ other violations specifically excluded by the new policy, though less commonly committed, are the very ones that would give rise to truly catastrophic forfeiture penalties.¹⁹⁸ For licensees to decide that the financial risks of owning a student-run station do not outweigh the educational benefits, the forfeitures for these potential violations, such as underwriting or indecent content violations, must be reduced as well.

3. *Limitations on Transferability*

In exchange for the reduced forfeiture liabilities for student-run stations, licensees of these stations will have to give up some of their ability to transfer these stations to third parties. Thus, this Note proposes the following new rule (identified as 47 C.F.R. § 73.516):

(a) NCE stations designated as student-run shall not be transferred to a party that will not continue to operate the station as student-run. For the term of its broadcast license, any station designated as student-run in accordance with § 73.503(f) shall not be assigned or transferred unless the proposed seller can demonstrate:

(1) the proposed buyer is an accredited educational institution;

¹⁹⁴ See *id.* at 6936–38.

¹⁹⁵ Compare *infra* Appendix, with *William Penn Univ.*, 28 FCC Rcd. at 6936.

¹⁹⁶ *William Penn Univ.*, 28 FCC Rcd. at 6936–37.

¹⁹⁷ See *id.* at 6936 (“The policy is narrowly tailored to address the particular subset of Rule violations that we have observed to commonly occur at student-run NCE stations.”); *FCC Actions*, C. BROADCASTERS, INC., http://www.askcbi.org/?page_id=3857 (last visited Jan. 15, 2014).

¹⁹⁸ See *William Penn Univ.*, 28 FCC Rcd. at 6937. For instance, the Commission excludes from relief forfeitures for broadcasting indecent obscene or profane material, which leaves stations exposed to a potential \$350,000 forfeiture. See 47 C.F.R. § 1.80 (2012); *William Penn Univ.*, 28 FCC Rcd. at 6937.

- (2) the station will be managed and operated on a day-to-day basis by students of the accredited educational institution;
 - (3) the conditions in subclauses (1) and (2) will continue to be met for the remaining duration of the license being transferred, as established in accordance with 47 C.F.R. § 73.1020; and
 - (4) consideration received and/or promised does not exceed the assignor's or transferor's legitimate and prudent expenses.
- (b) For purposes of this section, legitimate and prudent expenses are those expenses reasonably incurred by the assignor or transferor in obtaining and constructing the station (e.g., expenses in preparing an application, in obtaining and installing broadcast equipment to be assigned or transferred, etc.). Costs incurred in operating the station are not recoverable (e.g., rent, salaries, utilities, music licensing fees, etc.).
- (c) Any successive applicants proposing to assign or transfer the construction permit or license prior to the end of the aforementioned license period will be required to make the same demonstrations.

The mechanism for this limitation on transferability would be similar to the existing "holding period" requirement for NCE licenses awarded based on points granted during an MX inquiry.¹⁹⁹ For student-run stations, the proposed rule creates a similar limitation: stations designated as student-run cannot be transferred unless the proposed buyer can meet the criteria for a student-run station and submits to the student-run classification.²⁰⁰ The other antitrafficking criteria from the holding period rule would also be applicable to student-run stations: buyers should not be able to receive consideration beyond their reasonable and prudent expenses and all successive purchasers during the term of the existing license should be subject to the same restrictions.²⁰¹

Such restrictions would reduce the incidence of cases like the disputed transfer of KUSF.²⁰² These rules would place an added check on transfers of student-run stations by prohibiting the student-run designation from being terminated by a transfer during the license

¹⁹⁹ See 47 C.F.R. § 73.7005 (2013). For further discussion of the holding period requirement, see *supra* Part I.B.

²⁰⁰ See Proposed Regulation, *infra* App. § 73.516.

²⁰¹ See Proposed Regulation, *infra* App. § 73.516.

²⁰² For a discussion of the KUSF transfer, see *supra* Part II.B.

term.²⁰³ However, the restriction on the licensee would not be unlimited. If the licensee finds these restrictions on transferability to be too restrictive, they can let the student-run designation lapse at the end of the license term and renew their license with both the added forfeiture liability and increased transferability that such a decision would entail.²⁰⁴

The new policy that the FCC has adopted towards student-run stations fails to take into account the license transfer side of the problem.²⁰⁵ While the FCC has taken note of the accelerating trend of student-run stations being sold, the solution adopted so far only addresses the enforcement policies that have put pressure on licensees to sell.²⁰⁶ A comprehensive solution, such as the one proposed in this Note, will have to address not only the enforcement burden on stations but also the financial incentives to sell their licenses. By preventing a licensee of a participating student-run station from selling its license to a party that would not maintain the station's student-run character, the policy proposed here should address more directly the accelerating sales of student-run stations than would the more limited policy changes the FCC has already made.

IV. THE PROPOSED AMENDMENTS ARE THE BEST WAY TO RECONCILE THE EDUCATIONAL VALUE OF STUDENT-RUN RADIO WITH EXISTING FCC POLICY

The small listening audience for many college stations has led some in the industry to doubt whether college radio is worth special protections.²⁰⁷ However, this view is premised solely on the value of the broadcast to the listening community rather than the value to the students of gaining on-air experience.²⁰⁸ That is not to say that the size of the listening audience is irrelevant to a discussion of the value of college radio. FM radio still gives students the experience of reaching larger audiences than other media can provide: an urban student-run station like WRVU could have a weekly audience of over 30,000 listeners,²⁰⁹ whereas an unusually successful HD radio station might

²⁰³ See Proposed Regulation, *infra* App. § 73.516.

²⁰⁴ This is an effect of the combination of the restriction of proposed § 73.516 to the current license term with the voluntary nature of the designation in the proposed additions to § 73.508.

²⁰⁵ See generally William Penn Univ., 28 FCC Rcd. 6932 (2012).

²⁰⁶ *Id.* at 6938–39.

²⁰⁷ See, e.g., Vorwald, *supra* note 9.

²⁰⁸ See *id.*

²⁰⁹ *Id.*

reach fewer than 1000 listeners.²¹⁰ Although online channels are growing, they still lag substantially behind analog terrestrial FM radio in audience reach.²¹¹ Where much of the experiential value of college radio is in the power to reach a broad audience, a wholesale shift to digital outlets (as in the WRVU sale) will diminish the educational value of student broadcasting.²¹²

Even proposals that recognize the educational value of student broadcasting can fail to effectively protect that speech. One advocate for student-run broadcasting proposed, in response to the forfeiture levied against WTXR at Toccoa Falls College, that forfeitures for student-run stations be removed entirely and replaced with student-written papers discussing the problems and how they can be solved.²¹³ That solution, however, is incomplete in several ways.

First, determining whether a licensee had complied with such a punishment would be more administratively burdensome than under a forfeiture system. Under the proposed system, rather than seeing if a licensee who has been assessed a forfeiture has sent payment to the Treasury, FCC staff would be effectively responsible for grading student papers to verify compliance.²¹⁴ This would increase the uncertainty on the part of both the licensee and the FCC because the terms of the punishment would be inherently subjective.

Second, eliminating forfeitures would also eliminate their deterrent effect. Although there may be benefits to shifting the costs of noncompliance from the licensee to the students in charge of a station's day-to-day operations,²¹⁵ licensees themselves must be held responsible for the actions of the individuals they put in charge of the station.²¹⁶ The high turnover at student-run stations does not void this

²¹⁰ Mook, *supra* note 7. HD radio is a technology that allows a station to broadcast one or more digital audio streams on the same channel it uses for its analog FM transmissions. However, listeners must have special decoding hardware to hear this digital audio. See *IBOC Digital Radio Broadcasting for AM and FM Radio Broadcast Stations*, FED. COMM. COMMISSION, <http://www.fcc.gov/encyclopedia/iboc-digital-radio-broadcasting-am-and-fm-radio-broadcast-stations> (last visited Jan. 25, 2014).

²¹¹ Mook, *supra* note 7.

²¹² Heidi Smith, *College Radio Is on the Decline, But Listeners Have the Power to Keep Them Alive*, BREEZE (Dec. 7, 2011, 8:12 PM), http://www.breezejmu.org/opinion/article_1a7687ea-213a-11e1-8f90-0019bb30f31a.html (describing experience of participating in student broadcasting and the unique power of radio to reach the general public). For the terms of the WRVU transaction, see Ridley, *supra* note 3.

²¹³ See Tannenwald, *supra* note 14.

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See Toccoa Falls Coll., 27 FCC Rcd. 8365, 8368 (2012).

responsibility on the part of the licensee.²¹⁷ At the same time, the high turnover at student-run stations could mean that by the time a violation is discovered, the person directly responsible will have already left and will be unavailable to write the sort of essay proposed as an alternative to forfeitures.²¹⁸

The FCC's initial policy effort to reduce the forfeiture burden on student-run stations in some ways strikes a good balance between the punitive and educational goals of forfeitures by linking reduced penalties to the creation of a compliance plan.²¹⁹ Unlike the proposal to replace forfeitures with punitive essays, the FCC's new policy retains some of the financial deterrence of forfeitures while focusing students' attention on improving future compliance rather than writing essays on past failings.²²⁰

A proposal that focuses solely on reducing forfeitures, however, fails to account for the financial incentives for licensees of student-run stations to sell their licenses to other noncommercial entities. Student-run stations are being threatened on both sides and an effective solution will need to take into account not only why a licensee may not want to keep their student-run stations but also the potential windfall a licensee could get by transferring its license. A solution that merely eliminates forfeitures for student-run stations may reduce the pressure on licensees but has less to offer on the transfer windfall side of the problem.

Some advocates for student-run radio go even further, proposing that the FCC wade into the marketplace of ideas to preserve student-run stations by regulating stations based on the content that they broadcast.²²¹ Content-based regulation of broadcasting is not per se unconstitutional²²² and is subjected to a "relaxed" level of constitutional scrutiny.²²³ Indeed, the *Red Lion* Court upheld the fairness doctrine, which mandated that, when a station broadcasts certain personal attacks, it give the person attacked airtime to reply, even while

²¹⁷ See *S. Adventist Univ.*, 26 FCC Rcd. 11254, 11256 (2011); see also Tannenwald, *supra* note 14.

²¹⁸ See Tannenwald, *supra* note 14.

²¹⁹ See *William Penn Univ.*, 28 FCC Rcd. 6932, 6938 (2013).

²²⁰ *Id.*

²²¹ See generally Application for Review of Friends of KUSF, Univ. of S.F., 27 FCC Rcd. 5674 (2012) (No. BALED-20110125ACE).

²²² *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396 (1969).

²²³ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638–39 (1994).

acknowledging that other types of content-based restrictions would run afoul of the First Amendment.²²⁴

However, the FCC has largely stepped back from such content-based regulation.²²⁵ For instance, the FCC has repealed the very fairness-doctrine mandate approved in *Red Lion*.²²⁶ Among its reasons for doing so were concerns that mandating that stations broadcast all sides of controversial issues could not only undermine the marketplace of ideas but would also undermine the First Amendment interest in personal self-expression.²²⁷

The FCC's hesitance to impose content-based restrictions on what licensees can broadcast extends to control of the station formats that licensees choose. While there was a time when the FCC felt obligated to base licensing and transfer decisions at least in part on a station's format,²²⁸ in recent years the FCC has abandoned this sort of content-based regulation of FM broadcasters.²²⁹

It is true that the FCC continues to influence the content of broadcasts to some extent, such as by requiring that licensees document in their public files what they have broadcast on issues of local interest.²³⁰ Furthermore, advocates of giving college stations preferential treatment on the basis of format emphasize that the established policies against format-based regulation focus on "entertainment" formats.²³¹ Basing preferential treatment on whether the broadcast content was primarily entertainment or informational would be too narrow, however, failing to protect college stations whose broadcasts could be deemed too entertainment-oriented to merit protection. This would also force the FCC into the awkward position of determining what would merit the "informational" classification, creating "administratively a fearful and comprehensive nightmare."²³²

The regulatory solution proposed in this Note avoids this administrative nightmare. It does so by focusing not on whether a college

²²⁴ *Red Lion*, 395 U.S. at 396.

²²⁵ See, e.g., *Syracuse Peace Council v. Television Station WTVH Syracuse, N.Y.*, 2 FCC Red. 5043, 5057 (1987).

²²⁶ *Id.* at 5057–58.

²²⁷ See *id.* at 5046, 5051.

²²⁸ See, e.g., *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 268 (D.C. Cir. 1973) (holding that some intervention to preserve certain formats was necessary and in the public interest).

²²⁹ *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 865–66 (1976).

²³⁰ 47 C.F.R. § 73.3527(a)(2), (e)(8) (2013).

²³¹ Application for Review of Friends of KUSF, *supra* note 221, at 16.

²³² *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d at 865.

station has a format that adds enough to the marketplace of ideas to make it worth protecting, but on the educational benefits student-run stations can have for the students to whom they provide access to the airwaves. The solution preserves a unique educational use of the public airwaves in a way that addresses the pressures on licensees both from regulatory costs and the potential for a windfall from selling a license. It also preserves the deterrent effect of forfeitures without making student-run stations cost-prohibitive. Finally, the solution does so without forcing the FCC to wade into the constitutionally fraught realm of format-based and content-based regulation.

In recent months, the FCC has begun to recognize the educational value of student-run radio and taken preliminary steps to reduce the regulatory burden on student-run radio stations. The FCC should build on this recognition and affirm the importance of the educational “academy” dimension of free speech by establishing a more comprehensive regulatory mechanism that would not only reduce the forfeiture burdens on student-run stations but would also directly limit the trend of these stations being sold.

CONCLUSION

Traditionally, regulation of broadcasting has focused on the value to the audience of having a robust and open marketplace of ideas. When taken to an extreme, however, this model undervalues the intrinsic benefit of speech for the speaker. A prime example of focusing solely on the “marketplace” value of speech has been the regulation of college radio stations. By focusing on the value of speech from the perspective of the audience, the FCC undervalued the educational value of participation in student-run broadcasting. Regulations thus created incentives for licensees to transfer student-run stations to other nonprofit formats.

The FCC should broaden its understanding of First Amendment interests to give proper weight not only to the “marketplace” value of speech but also to the complementary “academy” value of speech—that is, to the direct benefits speech can have on the growth and development of the speaker. Recent policy changes by the FCC have begun to recognize the importance of the educational opportunities created by student-run radio stations, but more can be done to affirm that the educational value of participating in expression is a vital dimension of free speech.

This more balanced treatment of free speech values would be reflected in a more comprehensive regulatory scheme to protect stu-

dent-run radio that builds on the steps the FCC has already taken to protect these stations. A licensee that designates its station as student-run should be given reduced financial liability for regulatory violations in exchange for limitations on license transfers to preserve the station's student-run status. This revised regulatory structure will stem the tide of station sales that have already claimed college radio powerhouses like WRVU and KUSF and will preserve the educational value of college radio for future generations of students.

APPENDIX: TEXT OF PROPOSED REGULATORY CHANGES

[Suggested additions are shown in **bold type** and suggested deletions are ~~struck through~~. Unless noted, where entire paragraphs have been deleted the remaining paragraphs are relabeled as necessary.]

§ 1.80 Forfeiture Proceedings²³³

* * *

(b) *Limits on the amount of forfeiture assessed.*

(1) If the violator is a broadcast station licensee or permittee, a cable television operator, or an applicant for any broadcast or cable television operator license, permit, certificate, or other instrument of authorization issued by the Commission, except as otherwise noted in this paragraph, the forfeiture penalty under this section shall not exceed \$37,500 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$400,000 for any single act or failure to act described in paragraph (a) of this section. There is no limit on forfeiture assessments for EEO violations by cable operators that occur after notification by the Commission of a potential violation. See section 634(f)(2) of the Communications Act. Notwithstanding the foregoing in this section, if the violator is a broadcast station licensee or permittee or an applicant for any broadcast license, permit, certificate, or other instrument of authorization issued by the Commission, and if the violator is determined by the Commission to have broadcast obscene, indecent, or profane material, the forfeiture penalty under this section shall not exceed \$350,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,300,000 for any single act or failure to act described in paragraph (a) of this section. **If the violator is a broadcast station licensee designated as a student-run station in accordance with § 73.503 and is determined by the Commission to have broadcast obscene, indecent, or profane material, the forfeiture penalty under this section shall not exceed \$35,000.**

* * *

(8) *Factors considered in determining the amount of the forfeiture penalty.* In determining the amount of the forfeiture penalty, the Commission or its designee will take into account the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability

²³³ For complete original text, see 47 C.F.R. § 1.80 (2012).

to pay, **designation as a student-run station**, and such other matters as justice may require.

NOTE TO PARAGRAPH (b)(8): *Guidelines for Assessing Forfeitures*. The Commission and its staff may use these guidelines in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute. The forfeiture ceilings per violation or per day for a continuing violation stated in section 503 of the Communications Act and the Commission's rules are described in § 1.80(b)(5)(iii). These statutory maxima became effective September 2, 2008. Forfeitures issued under other sections of the Act are dealt with separately in section III of this note.

* * *

SECTION II. ADJUSTMENT CRITERIA FOR SECTION 503 FORFEITURES

* * *

Downward Adjustment Criteria

- (1) Minor violation.
- (2) Good faith or voluntary disclosure.
- (3) History of overall compliance.
- (4) Inability to pay.

(5) Designation as a student-run station, in accordance with § 73.503.

* * *

SECTION IV. REDUCED BASE AMOUNTS FOR SECTION 503 FORFEITURES FOR STUDENT-RUN STATIONS

For NCE stations designated as student-run in accordance with § 73.503, the base forfeiture amounts described in section I shall be as follows:

Forfeitures	Violation Amount
Violation of public file rules	1000
Violation of political rules: reasonable access, lowest unit charge, equal opportunity, and discrimination	900
Violation of children's television commercialization or programming requirements	800
False distress communications	800
Failure to permit inspection	700
Transmission of indecent/obscene materials	700
Fraud by wire, radio or television	500
Unauthorized discontinuance of service	500
Failure to respond to Commission communications	400
Violation of sponsorship ID requirements	400
Violation of requirements pertaining to broadcasting of lotteries or contests	400
Failure to file required forms or information	300
Failure to provide station ID	100
Failure to maintain required records	100

§ 73.503 Licensing requirements and service.²³⁴

* * *

(f) A party may designate a station as a student-run educational station, either when applying for a construction permit or for a license renewal, by certifying that the following conditions are met:

- (1) the party is an accredited educational institution;**
- (2) the station will be managed and operated on a day to-day-basis by students of the accredited educational institution; and**
- (3) these conditions will continue to be met for the duration of the license sought, as established in accord with § 73.1020.**

* * *

§ 73.516 Limitations on transfer of student-run stations.²³⁵

(a) NCE stations designated as student-run shall not be transferred to a party that will not continue to operate the station as student-run. For the term of its broadcast license, any station designated as student-run in accord with § 73.503(f) shall not be assigned or transferred unless the proposed seller can demonstrate:

- (1) the proposed buyer is an accredited educational institution;**

²³⁴ For complete original text, see 47 C.F.R. § 73.503 (2013).

²³⁵ This entire section comprises a new rule. For a discussion of the basis for this rule, see *supra* Part III.B.3.

(2) the station will be managed and operated on a day-to-day basis by students of the accredited educational institution;

(3) the conditions in subclauses (1) and (2) will continue to be met for the remaining duration of the license being transferred, as established in accord with 47 C.F.R. § 73.1020; and

(4) consideration received and/or promised does not exceed the assignor's or transferor's legitimate and prudent expenses.

(b) For purposes of this section, legitimate and prudent expenses are those expenses reasonably incurred by the assignor or transferor in obtaining and constructing the station (e.g., expenses in preparing an application, in obtaining and installing broadcast equipment to be assigned or transferred, etc.). Costs incurred in operating the station are not recoverable (e.g., rent, salaries, utilities, music licensing fees, etc.).

(c) Any successive applicants proposing to assign or transfer the construction permit or license prior to the end of the aforementioned license period will be required to make the same demonstrations.

§ 73.860 Cross-ownership.²³⁶

* * *

(d) Unless such interest is permissible under paragraphs (b) or (c) of this section, a party with an attributable interest in a broadcast radio station must divest such interest prior to the commencement of operations of an LPFM station in which the party also holds an interest. However, a party need not divest such an attributable interest if the party is a college or university that can certify that the existing broadcast radio station is not student run. This exception applies only to parties that:

(1) ~~Are accredited educational institutions.~~ Apply for an authorization for an LPFM station designated as student run in accordance with § 73.503; and

(2) Own an attributable interest in non-student run broadcast stations; and

(3) ~~Apply for an authorization for an LPFM station that will be managed and operated on a day to day basis by students of the accredited educational institution.~~

§ 73.3527 Local public inspection file of noncommercial educational stations.²³⁷

²³⁶ For complete original text, see 47 C.F.R. § 73.860.

²³⁷ For complete original text, see 47 C.F.R. § 73.3527.

(a) *Responsibility to maintain a file.* The following shall maintain for public inspection a file containing the material set forth in this section.

* * *

(2) Every permittee or licensee of an AM, FM, or TV station in the noncommercial educational broadcast services shall maintain a public inspection file containing the material, relating to that station, described in paragraphs (e)(1) through (e)(11) of this section. In addition, every permittee or licensee of a noncommercial educational TV station shall maintain for public inspection a file containing material, relating to that station, described in paragraphs (e)(12) of this section. **Every permittee or licensee in the noncommercial educational broadcast services that designates its licensed station as student run in accordance with § 73.503(f) shall maintain for public inspection a file, relating to that station, described in paragraph (e)(14) of this section.** A separate file shall be maintained for each station for which an authorization is outstanding, and the file shall be maintained so long as an authorization to operate the station is outstanding.

* * *

(e) *Contents of the file.* The material to be retained in the public inspection file is as follows:

* * *

(14) *Documentation of student-run operation.* A station designated as student run in accordance with § 73.503(f) shall include in its public file a brief description of the specific roles students have in the day-to-day operations of the station. This description shall be supplemented as necessary (and at least once per calendar year) to reflect any substantial changes in student involvement.

