WASHINGTON
LEGISLATIVE OFFICE


April 1, 2008

The Honorable Daniel Inouye
Chairman, Senate Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

The Honorable Ted Stevens
Vice Chairman, Senate Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

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**Re: The ACLU Supports S. J. Res 28, Disapproving of the Rule Submitted by the Federal Communications Commission with Respect to Broadcast Media Ownership**

Dear Chairman Inouye and Vice Chairman Stevens,

On behalf of the American Civil Liberties Union, a non-partisan organization with over half a million activists and members and 53 affiliates nationwide, we urge you to support S. J. Res 28, disapproving the rule submitted by the Federal Communications Commission (FCC) with respect to media broadcast ownership. In addition to the ACLU, millions of Americans have come forward over the last few years expressing deep concern that greater media consolidation comes at the expense of diversity of opinion and of media ownership, as the ability of minorities to enter the marketplace would be further weakened. Ultimately, ever increasing consolidation will lead to a less informed citizenry existing in a very homogenous world of news and entertainment.

Specifically, the newly adopted rules on newspaper/broadcast cross-ownership permit additional consolidation in the top 20 media markets in this country. In addition, the new rules allow the Commission to grant waivers on a case by case basis even in smaller markets . The new rules ultimately provide an escape hatch from compliance with the underlying rules that would normally prohibit such consolidation in both large and small markets in the first place. [1]

[1]FCC Releases Order on Revision to Newspaper/Broadcast Cross-Ownership Rule (02/04/05) http://www.fcc.gov/ownership/actions.html

Currently, six major companies already control most of the media in our country, including the most predominant sites on the internet. Three media giants own all of the cable news networks; Comcast, AOL and Time Warner serve 40% of cable households; and one company alone owns more that 1,200 of this country's radio stations. [2] Allowing even greater concentration and cross-ownership of media, as the new rules do, would have a profound impact on Americans' access to a wide range of news, information, programming and political commentary. Even so, the new rules presume that further consolidation would be permissible in all of the top 20 markets, but not in all smaller markets.[3] However, the new waiver process provides for so many vague exceptions to the rules, it is unclear where the line would be in any market. [4]

Despite tremendous advances in telecommunications, including the internet, even the FCC agrees that Americans get most of their information from television, radio and newspapers. For the relatively small percentage of Americans who turn to the Internet for their news, television-affiliated websites remain dominant.[5] The mass media therefore provides the information Americans need to fully participate in our democratic society.

In 2003, the FCC voted to change the rules and allow one company to own up to three television stations, the local newspaper, the cable system and up to eight radio stations in one media market. Millions of Americans, including the ACLU, spoke out and the courts responded, remanding most of the 2003 revisions to the FCC. This left the previous ownership rules, including the previously existing newspaper/broadcast cross-ownership prohibition, radio/television cross-ownership rule and local television ownership rule in effect.

At the time of the 2003 revisions, the ACLU argued that any rule adopted by the Commission should permit a factual determination as to whether a particular media combination would adversely affect the diversity of expression and independence of editorial comment, or result in the substantial diminution of competition. Unfortunately, all testimony and comments to that effect were ignored by the majority of FCC commissioners.

In a joint statement issued on February 4, 2008, regarding the new media ownership rules, FCC Commissioners Michael Copps and Jonathan Adelstein addressed this very issue noting that:

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[2] Facts on Media in America.
http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=2127045

[3] FCC Releases Order on Revision to Newspaper/Broadcast Cross-Ownership Rule (02/04/05)
http://www.fcc.gov/ownership/actions.html (page 10)

[4] FCC Releases Order on Revision to Newspaper/Broadcast Cross-Ownership Rule (02/04/05)
http://www.fcc.gov/ownership/actions.html (page 13 and page 31)

[5] FCC Releases Order on Revision to Newspaper/Broadcast Cross-Ownership Rule (02/04/05)
http://www.fcc.gov/ownership/actions.html (page 7)

> "The most telling---and troubling---aspect of the majority's analysis is the absence of any discussion of the "twin principles" of diversity and competition underlying the cross-ownership ban."

One of the biggest concerns with the 2003 rulemaking was that the FCC had allowed no real public comment on the proposed changes.[6] At the time, the ACLU argued that any changes to the rules should be made in the open, with a full and fair opportunity for all interested parties to comment. Unfortunately, that did not occur.

Although the FCC held six hearings across the country during 2006 and 2007, there is extensive evidence that the hearings were mere window-dressing and that many of the comments provided were ignored by the majority of FCC Commissioners. A comprehensive analysis of the hearing process on the media ownership rules recently released by Penn State's Institute for Information Policy and authored by Jonathan A. Obar and Amit M. Schejter found that:

> "…the FCC consistently hindered public participation; hearing notice was often provided last-minute, the hearings were held at inconvenient times for working people to attend and the structure of the hearings subordinated public comment by providing preferential treatment to experts, stakeholders and dignitaries. Two hearings actually devoted more time to non-public comment than to public testimony. In addition, a quarter of the members of the public registered to speak left before testifying likely due to the structure and length of the hearings. Of the 732 that did speak, 52.6 percent were against media consolidation and/or deregulation, while only 1.4 percent were in support. The final Report & Order reflects the same subordination as hardly any reference is made to public comment from the hearings, even though the hearings themselves are highlighted in the report as a groundbreaking element in the rulemaking process." [7]

The agency's indifference to public opinion and to the public interest is unacceptable and this flawed rule should be thrown out on this basis alone.

If procedural flaws weren't enough to warrant the pending resolution, the impact of the rule change certainly is. The massive consolidation that has occurred under pre-December rules already poses a great threat to the First Amendment rights of all Americans, hinders vigorous public debate and limits the marketplace of ideas. This principle was summed up quite eloquently by the Supreme Court in the landmark 1969 case of Red Lion v. FCC:

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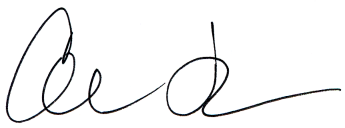
[6] See Prometheus Radio Project, et al. v. FCC, No. 03-3388 (3d Cir. Sept. 3, 2004) ("Prometheus Rehearing Order").

[7] Obar, Jonathan A and Schejter, Amit M., "Inclusion or Illusion? An Analysis of the FCC's Public Hearings on Media Ownership 2006-2007" (March 4, 2008). Available at SSRN: http://ssrn.com/abstract=1102764)

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."

An informed citizenry is the backbone of any democracy. But where all the media voices speak as one, there is little diversity of opinion and the citizenry is deprived of varying viewpoints. While S. J. Res. 28 will only return us to the pre-December rules, it at least prevents further consolidation, further erosion of minority ownership and diversity, and further narrowing of the spectrum of opinions expressed in the media. We urge you to support S. J. Res 28.

Sincerely,



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cc: Senate Committee on Commerce, Science and Transportation Members