

Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582,  
03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951 & 03-4073

**In the  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

Respondents.

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On Petitions for Review of an  
Order of the Federal Communications Commission

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**REPLY BRIEF OF PETITIONERS TRIBUNE COMPANY  
AND MEDIA GENERAL, INC.**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Tribune Company and Media General, Inc. (“Newspaper Petitioners”) demonstrated in their initial brief that the FCC’s finding that the 1975 newspaper/broadcast cross-ownership rule (“1975 Rule”) was no longer necessary in the public interest was amply supported by record evidence. Further, Newspaper Petitioners established that elimination of all such cross-ownership restrictions was compelled by constitutional concerns and the evidence showing the public interest benefits created by cross-ownership – especially in smaller media markets. Finally, Newspaper Petitioners also demonstrated that the FCC’s new Cross-Media Limits (“CMLs”) violate the Constitution’s equal protection provisions and the First Amendment and are arbitrary and capricious. This is so particularly because they contradict the FCC’s well-supported conclusions regarding the benefits of cross-ownership and because the Diversity Index (“DI”) that underpins the CMLs is irretrievably flawed in its conception, construction, and application.

In its brief, the FCC embraces, as it must, Newspaper Petitioners’ central claim that the media universe has fundamentally changed in the past quarter century, but the FCC fails to acknowledge the regulatory consequences that flow from those changes. With respect to equal protection requirements, the FCC cannot deny that regulating a portion of the media (other than broadcast) triggers

heightened scrutiny and controlling law establishes that cross-ownership regulation violates equal protection principles unless all “major media” are equally restricted. Yet, the FCC fails to show how its decision to restrict the speech interests of newspaper owners, but not to regulate equally other owners of major non-broadcast media such as cable television or Internet sites or services, can possibly meet these constitutional equal protection requirements. And, while the FCC documented the explosion of new sources of information, it indefensibly failed at the same time to reexamine whether the “spectrum scarcity” rationale for extensive regulation of broadcast ownership retains any factual basis that can justify infringement of the First Amendment rights of newspaper owners.

The CMLs also must be set aside as arbitrary and capricious because they are unsupported by record evidence and lack any rational basis. The FCC did draw upon extensive record evidence to find that the 1975 Rule is no longer in the public interest and that cross-ownership increases diversity and provides other public interest benefits “in smaller markets in particular.” *Order* ¶¶350, 358 (JA0176, JA0180). Because this evidence and logic apply to all media markets, and particularly to the smaller markets restricted by the CMLs, the FCC could not use record evidence or its articulated policy rationales to justify its promulgation of the CMLs. Instead, it predicated the new rules on the DI which it applied in painstaking detail.

Now, when challenged to defend the CMLs, the FCC essentially concedes that the DI is invalid and instead attempts to avoid Newspaper Petitioners' extensive attacks on the rationality and record support for the DI by disavowing the central role the DI played in the FCC's *Order*. The FCC now asserts that the *Order*'s adoption of the CMLs was "[b]ased on a detailed analysis of the record," that was merely "informed by" the DI. FCC Br. 77-78. The *Order* does not, however, contain any such "detailed analysis of the record," nor does the FCC's brief cite to any such analysis or record evidence supporting the CMLs other than the DI. Petitioner Prometheus Radio Project *et al.* ("Prometheus") and Intervenor Office of Communication of the United Church of Christ, Inc. ("UCC") only confirm that the CMLs had no basis other than the DI and that the DI is inherently flawed. The total lack of support for the CMLs other than the flawed DI requires that the CMLs be vacated. The CMLs are unsupported, unsupportable – and bad public policy.

Finally, nothing in the arguments of Prometheus or UCC undermines the reasonableness of the FCC's determination that the 1975 Rule is no longer in the public interest, in light of the benefits for localism and diversity produced by cross-ownership. Prometheus and UCC can point to no record evidence that could justify a contrary conclusion to this deeply fact-based policy decision.

In sum, while in 1975 the effect of cross-ownership on diversity was untested, the Commission's current *Order* is based on record evidence showing that cross-ownership directly leads to increased news and public affairs programming, which provides platforms for diverse views. The record evidence – embraced by the FCC – shows that cross-ownership increases diversity and strengthens localism. By having this Court bar cross-ownership that leads to increased news and public affairs programming, based on the unsubstantiated fear that owners would skew its programming, Prometheus and UCC would have this Court preclude the realization of those very real public interest benefits. The FCC's repeal of the 1975 Rule should be upheld, and the CMLs should be vacated.

**I. THE CMLs VIOLATE EQUAL PROTECTION AND THE FIRST AMENDMENT.**

**A. The CMLs' Discrimination Between Newspapers and Other Major Non-Broadcast Media Triggers Heightened Scrutiny and Violates Equal Protection Principles.**

The CMLs violate the equal protection component of the Fifth Amendment for a simple reason: the CMLs single out newspapers (which are otherwise unregulated by the FCC) from all the various non-broadcast media for restrictions on protected speech. Newspaper Br. 20-26. Such "laws that single out the press, or certain elements thereof" are subject to "heightened scrutiny." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 640-41 (1994). The Supreme Court acknowledged this distinct basis for challenging ownership regulations but upheld

the 1975 Rule only because, in 1978, it applied to all “owners of the major media of mass communication.” *FCC v. NCCB*, 436 U.S. 775, 801 (1978). However, the CMLs do not apply to all such “major media,” and, therefore, cannot survive heightened scrutiny.

The FCC’s principal response is to pretend that nothing has changed since 1978 and that there are no new “major media.” FCC Br. 86 (“[t]hat same analysis remains valid today, and the Court’s ruling [in *NCCB*] controls here”). However, the FCC’s own extensive findings in the *Order* unequivocally establish the equal protection violation because new “major media of mass communication” have in fact arisen since 1978 and those media are not subject to the CMLs. For example, as the FCC found, there were 68.5 million cable subscribers in 2000; indeed, the substantial majority of Americans today watch TV delivered by cable and direct broadcast satellite systems, not through over-the-air reception.<sup>1</sup> Similarly, the FCC found that 42.5 million households subscribed to an Internet service provider in 2000, acquiring access to over 30 million websites in that year – totals which have only grown in the intervening period.<sup>2</sup>

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<sup>1</sup> See *Order* ¶120 (JA0080); Tribune Comments at 8-9 (JA2983-84).

<sup>2</sup> *Order* ¶¶117-20 (JA0079-80). For these reasons, the FCC’s suggestion that Newspaper Petitioners’ claim that major media have emerged since 1975 “is unsupported by any reference to the record” is as puzzling as it is wrong. See FCC Br. 87; see also UCC Br. 21-23. The *Order* itself cited and credited voluminous

Because the FCC's own analysis establishes the equal protection violation, the FCC attempts to avoid its own findings. The FCC argues that it may single out newspapers for special restrictions because newspapers, radio, and television "are the three media platforms that Americans turn to most often for local news and information." FCC Br. 86; *see also* UCC Br. 21-23. That argument is unavailing for at least three reasons.

*First*, the FCC is simply confirming that it is engaged in unequal treatment of similarly situated major media, in contravention of *NCCB*. The fact that, *e.g.*, cable television may be a less popular source of local news does not mean that it is not a "major media" within the meaning of *NCCB* or that the FCC may discriminate between cable and newspapers owners. Moreover, the FCC itself concedes that cable television and the Internet are, in fact, important sources of local news and information. For example, the FCC itself argues that any claim that cable does not contribute to viewpoint diversity on local issues "is inconsistent with the record" because "cable systems do provide local news and current affairs information through [public, educational and government] channels and, in some markets, local news channels," and "the Commission also identified at least 86

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record evidence to that effect, *see, e.g., Order* ¶365 (JA0184) (repealing the 1975 Rule in part because "competing media outlets abound in markets of all sizes"), and Newspaper Petitioners provided ample citations to this record evidence in their brief. *See* Newspaper Br. 41-45.

regional non-broadcast [cable] networks, including 31 sports channels and 32 regional and local news networks.” FCC Br. 73 (quoting *Order* ¶¶123, 408). Similarly, the FCC argues that the Internet is a significant source of local news because “[t]he record contained evidence of scores of *local* web sites that could be expected to provide a wide range of *local* news and information.” FCC Br. 73-74 (emphasis in original). Accordingly, local news and information content provides no grounds to distinguish newspapers from other non-broadcast media, even if the FCC could constitutionally single out newspapers based on their local content.

*Second*, the FCC cannot single out *non-broadcast* media based on such *content* distinctions – which the FCC’s argument concedes is the basis for its regulation. The equal protection test applied in *NCCB* looks only to the “major media of mass communication”; it does not permit the FCC to distinguish *among* the non-broadcast “major media” based on the extent to which their speech concerns “local news and information.” The purpose of heightened equal protection standards is to ferret out precisely such content-based distinctions, which is the essence of unconstitutional regulation. *See Turner*, 512 U.S. at 658 (citing *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).<sup>3</sup>

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<sup>3</sup> In *Turner*, the Court rejected strict scrutiny only because the must-carry rules at issue there furthered a content-neutral purpose – *i.e.*, they protected the broadcast industry from economic extinction without regard to its content. Here, the FCC

*Third*, the *Order*'s silence on why the FCC chose to regulate important non-broadcast media differently precludes any claim in this Court that a substantial interest justifies the discrimination between those media or that the difference in treatment, as required, is "narrowly tailored" to differences between newspapers and cable. *Turner*, 512 U.S. at 662. The FCC's brief provides no such rationale, and could not, in any event, substitute on appeal a rationale not included in the *Order* itself, which provides an additional ground for vacating the CMLs. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3<sup>rd</sup> Cir. 2001).

Nothing illustrates the equal protection violation in this case better than the FCC's diametrically opposed regulation of newspaper and cable owners. While cable television in 1975 was little more than a retransmission service for a very limited portion of the population, today, as the FCC describes in detail, cable television has evolved into a "major" media. *E.g.*, *Order* ¶120 (JA0080); FCC Br. 73. For these reasons, one of the *Order*'s most striking omissions is its utter failure to address why restrictions on newspaper-broadcast cross-ownership – but not cable-broadcast cross-ownership – are required in the public interest. Although the D.C. Circuit's decision in *Fox* permitted the FCC to reinstate cable-broadcast

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does not offer any content-neutral basis for singling out newspapers; to the contrary, it defends the CMLs *expressly* on the ground that newspapers offer preferred local content and other non-broadcast media do not. *See* FCC Br. 85; UCC Br. 21-23.

cross-ownership restrictions if it could justify them (*Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002)), the FCC's *Order* contains not one word on this central point. The FCC's failure to even attempt to justify this difference in treatment – over objections in the comments – effectively establishes the equal protection violation.

While the FCC does not contest that heightened scrutiny applies to Petitioners' equal protection claim, Intervenor UCC argues that rational basis review applies because the CMLs involve broadcast licensing. UCC claims that broadcast licensing is “unique” because of “spectrum scarcity” and this characteristic “mandates rational basis review.” UCC Br. 24. UCC is mistaken: the equal protection claim (as opposed to the First Amendment claim) has nothing to do with spectrum scarcity. Rather, the equal protection claim is focused on the FCC's discriminatory treatment of *non*-broadcast media, which by definition are not characterized by spectrum scarcity. The discrimination claim arises from the FCC's decision to restrict the speech opportunities of newspaper owners but not other similarly situated owners of non-broadcast media such as cable.<sup>4</sup>

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<sup>4</sup> For the same reasons, UCC's claim (UCC Br. 20-21) that newspaper owners are not “singled out” because the CMLs actually affect three media (newspaper, radio and television) is meritless. *See Turner*, 512 U.S. at 640-41. In addition, the CMLs restrict newspaper owners more extensively than owners of broadcast stations. *See Newspaper Br. 23*.

The Supreme Court in *NCCB* and *Turner* rejected just such an attempt to bootstrap review standards applicable to broadcast regulation into review of regulation of non-broadcast media. In *NCCB*, the Court rejected the equal protection claim not on the ground that broadcast licenses were affected, but on the independent ground that all major media were being treated equivalently. The Court made this even clearer in *Turner*, where it reviewed limitations on cable owners' speech rights arising from requirements that cable systems retransmit broadcast television stations' programming. The FCC argued that rational basis review applied to these "must carry" regulations because they involved regulation of broadcast stations. The Court rejected the argument and found that a heightened standard of review applied because the regulations "singled out" a subset of the non-broadcast press. *Turner*, 512 U.S. at 637-41. The protections afforded there to cable systems should apply at least as forcefully to regulation of newspapers, which have traditionally received the highest degree of constitutional protection.

**B. The CMLs Separately Violate the First Amendment By Impermissibly Restricting Newspaper Owners' Speech Opportunities.**

As Newspaper Petitioners demonstrated (Newspaper Br. 26-30), the CMLs violate the First Amendment in two ways. First, the CMLs cannot be justified even under *NCCB* (and the "spectrum scarcity" rationale underlying it), because the CMLs have the effect of limiting, rather than enhancing, information available

to the public. Second, the Supreme Court has acknowledged that expansion of media outlets could require an end to the “scarcity” rationale and the lower level of constitutional review it entails, and the *Order* documented just such an expansion of media outlets and information sources. The FCC’s failure to consider the effect of these changes on the applicable constitutional standard was, at a minimum, arbitrary and capricious, and this Court should now conclude, based on the FCC’s factual findings that the CMLs are unconstitutional.

As to Newspapers Petitioners’ first argument – that the CMLs actually reduce speech on local issues in small markets and thus are not reasonable within the framework of *NCCB* – the FCC and UCC have different and contradictory rejoinders. The FCC admits Newspaper Petitioners’ central point: as the *Order* concluded, “newspaper/broadcast combinations may produce tangible public benefits in smaller markets in particular,” especially through increasing the quantity and diversity of local news, opinion, and information. *See, e.g.*, FCC Br. 79 n.40; *Order* ¶350 (JA0176).<sup>5</sup> Thus, the FCC does not and cannot establish that cross-ownership in fact restricts information and viewpoint diversity in small markets, *see infra* pp. 16-20, and, as a result, has no basis to rely on “spectrum scarcity” to justify the CMLs.

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<sup>5</sup> The FCC’s contention that waivers in particular cases could correct this deficiency is incorrect. *See infra*, p. 21-22 n.14.

In contrast, UCC simply ignores the *Order*'s conclusions that cross-ownership typically enhances the quantity, quality, and diversity of local information. Instead, it reflexively relies on the *NCCB* Court's deference to the FCC's 1975 predictive judgments (which were not based on any record evidence, *see NCCB*, 436 U.S. at 786). UCC Br. 25-26. The *Order* expressly repudiates UCC's simplistic equation that *cross-ownership* equals reduced viewpoint diversity (*see Order* ¶¶358-67 (JA0180-85)), and the FCC's 1975 predictive judgments therefore cannot establish a factual basis for UCC's current claims. *See also infra*, pp. 25-26 (refuting UCC factual claims).

As for whether "spectrum scarcity" continues to justify expansive restrictions on speech interests related to broadcast ownership, the FCC and UCC simply claim that *NCCB* addressed and resolved the issue. *See Order* ¶14 (JA0043); FCC Br. 88-89; UCC Br. 5-19. But *NCCB* did not, and could not have, addressed whether broadcast ownership remains uniquely important in any coherent sense that justifies the "spectrum scarcity" rationale *today*. As the Supreme Court has clearly indicated, the legal conclusion regarding the permissible scope of broadcast regulation rests on a *factual* predicate that the FCC and Congress are best positioned to address. *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). If the media landscape has changed – and the FCC's *Order* confirms that it has changed dramatically, with broadcasting no

longer playing the uniquely important role it once did – the legal conclusion must change, too. *See Order ¶¶ 86-128 (JA0065-85)*.<sup>6</sup>

In that regard, UCC incorrectly assumes that the scarcity rationale applies as long as the spectrum cannot accommodate everyone who wishes to use the airwaves. UCC Br. 6-19. Under UCC’s theory, the scarcity rationale would never become obsolete, contrary to the Supreme Court’s clear statements in *League of Women Voters*. As the courts have recognized, numerous non-broadcast alternatives will satisfy the public’s “paramount” interest in a diversity of outlets. *See Newspaper Br. 28-30 & n.18 (collecting cases)*.

Although the *Order* described in detail how that factual predicate had changed, it failed to address the legal implications of those changed facts for “spectrum scarcity.” The FCC simply invoked a 25-year-old judicial decision that relied on “facts” that the *Order* demonstrated to be long superseded. As the D.C. Circuit has indicated, “it would be arbitrary and capricious if [the FCC] refused to reconsider [the newspaper cross-ownership rule] in light of persuasive evidence that the scarcity rationale is no longer tenable.” *Tribune Co. v. FCC*, 133 F.3d 61,

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<sup>6</sup> Contrary to the FCC’s suggestion (FCC Br. 88), Congress clearly intended the FCC to revisit the scarcity rationale. Congress indisputably included the 1975 Rule among the regulations that the FCC was directed to reexamine in light of current competitive conditions. § 202(h). And that resulting review led the FCC to find that the media landscape has been so altered that the 1975 Rule is no longer

68 (D.C. Cir. 1998).<sup>7</sup> The FCC’s own findings in the *Order* establish just such “persuasive evidence,” and this Court can – and should – draw the only possible legal conclusion from those facts: the “spectrum scarcity” rationale can no longer be sustained, and the CMLs are unconstitutional.<sup>8</sup>

**II. THE FCC’S AMPLY SUPPORTED FACTUAL FINDINGS OF THE BENEFITS PRODUCED BY CROSS-OWNERSHIP AND THE IRRATIONALITY OF THE DIVERSITY INDEX REQUIRE THAT ALL CROSS-MEDIA LIMITS BE ELIMINATED.**

**A. The First Amendment and Section 202(h) Require Especially Stringent Review of Ownership Restrictions, Which the FCC Failed To Undertake.**

As the Newspaper Petitioners demonstrated (Newspaper Br. 31-33), the First Amendment and section 202(h) require a rule of construction disfavoring cross-ownership restrictions. Prometheus’s contentions (Prom. Reply 5-10) that the FCC in its brief has now “abandoned” a “presumption” embodied in the *Order* in favor of deregulation and that the presumption in any event was improper are flatly wrong. *First*, there was no inconsistency: in the *Order* the FCC defined the

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in the public interest.

<sup>7</sup> The suggestion that the courts have reconsidered the underpinnings of the scarcity rationale in recent years and reaffirmed the doctrine, *see* UCC Br. 12; FCC Br. 88, is incorrect. In particular, the Court in *Turner* went out of its way to *criticize* the scarcity rationale as it applied to broadcasters, even though the continuing validity of the rationale was not at issue. *See Turner*, 512 U.S. at 638 & n.5 (collecting judicial and academic criticism of the scarcity rationale).

<sup>8</sup> Finally, the CMLs cannot survive even rational basis review, for many of the same reasons that the rules are arbitrary and capricious. Newspaper Br. 26-27

section 202(h) presumption as “appear[ing]” to alter the requirement for “an affirmative justification for the modification or elimination of a rule.” *Order* ¶11 (JA0041). That is precisely how the FCC defined the presumption in its brief (FCC Br. 26). Moreover, because the FCC did provide a detailed, “affirmative justification” for repealing the 1975 Rule based on a wealth of substantial evidence, any such inconsistency would not affect the FCC’s treatment of the 1975 Rule.

*Second*, section 202(h) clearly does reflect that Congress presumed that the FCC would modify its cross-ownership rules in response to changed conditions in the media marketplace. *See* Newspaper Br. 32-33. Indeed, section 202(h) reflects Congress’s judgment that the enormous increase in media outlets that has occurred affirmatively *justifies* a significant elimination of ownership restrictions. Even if that were wrong, no error would infect the FCC’s treatment of the 1975 Rule. In the section discussing that rule (in contrast to other rules), the FCC never even mentioned a presumption.<sup>9</sup> Indeed, the FCC adopted the CMLs notwithstanding its affirmative findings, based on substantial evidence, that newspaper/broadcast cross-ownership provided unique public interest benefits, especially in smaller

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<sup>9</sup> With respect to the 1975 Rule, the passages Prometheus quotes simply confirm that the FCC found no evidence to support Prometheus’s view, not that the FCC was applying any sort of presumption. *See* Prom. Reply 5 n.1 (quoting JA0183, JA0186).

