

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**

PROMETHEUS RADIO PROJECT, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

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

**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.