

THIS CASE HAS BEEN NOT BEEN SCHEDULED FOR ORAL ARGUMENT

No. 07-1356

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION,

Petitioner,

v.

**FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,**

Respondents,

VERIZON,

Intervenor.

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

**BRIEF OF PETITIONER
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. The parties to this case are the National Cable & Telecommunications Association (Petitioner), the Federal Communications Commission (“FCC”) and the United States of America (Respondents), and Verizon (Intervenor). As set forth in Appendix B of the FCC’s order under review, the following entities participated in the agency proceeding:

Independent Multi-Family Communications Council

National Cable & Telecommunications Association

Real Access Alliance and the Community Association Institute

RCN Telecom Services, Inc.

Verizon

(B) Rulings Under Review. The order under review is the “Report and Order and Declaratory Ruling” of the Federal Communications Commission (“FCC”) in *Telecommunications Services Inside Wiring; Customer Premises Equipment* (CS Docket No. 95-184), *Implementation of the Cable Television Consumer Protection Act of 1992; Cable Home Wiring* (MM Docket No. 92-260), and Clarification of the Commission’s Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers’ Inside Wire Subloop (WC Docket No. 01-338), FCC 07-111, 72 Fed. Reg. 50074 (Aug. 30, 2007) (“Order”). Only the Report and Order in CS Docket No. 95-184 and MM Docket No. 92-260 (and

not the Declaratory Ruling in WC Docket No. 01-338) is the subject of the Petition for Review in this proceeding.¹

(C) Related Cases. A previous order of the FCC, which adopted the same rule as the rule at issue in this case, was reviewed by this Court in *National Cable & Telecommunications Association v. FCC*, No. 03-1140 (D.C. Cir. Feb. 17, 2004) (unpublished decision). The Court granted NCTA’s petition for review and remanded the case to the FCC “for further consideration consistent with this Judgment.” *Id.* The order under review is the result of that remand. No other related cases of which counsel are aware are currently pending before this Court or any other Court.

CORPORATE DISCLOSURE STATEMENT

The National Cable & Telecommunications Association (“NCTA”) is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of the nation’s cable television customers as well as more than 200 cable program networks. NCTA also represents equipment suppliers and others interested in or affiliated with the cable television industry.

¹ The listing above of “entities that participated in the agency proceeding” is limited to entities that participated in the rulemaking proceeding that resulted in the Report and Order that is the subject of the Petition for Review and does not include the entities that participated in the separate agency proceeding that resulted in the Declaratory Ruling.

NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 26.1.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

MDU : “A multiple dwelling unit building (*e.g.*, an apartment building, condominium building or cooperative).” 47 C.F.R. § 76.800(a).

MVPD: A multichannel video programming distributor, which means “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13).

Cable home wiring: “The internal wiring contained within the premises of a subscriber which begins at the demarcation point.” 47 C.F.R. § 76.5(l).

Home run wiring: “The wiring from the demarcation point to the point at which the MVPD’s wiring becomes devoted to an individual subscriber or individual loop.” 47 C.F.R. § 76.800(d).

Demarcation point: “[A] point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber’s dwelling unit.” 47 C.F.R. § 76.5(mm)(2).

JURISDICTIONAL STATEMENT

The Federal Communications Commission has jurisdiction pursuant to Section 624(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 544(i), to enact “rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.” NCTA seeks review of a final order of the Federal Communications Commission, which, in relevant part, amends such rules. *Report and Order and Declaratory Ruling*, 22 FCC Rcd 10640 (2007).

This Petition for Review is filed pursuant to Section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a). This Court has jurisdiction over the matters in this case pursuant to 28 U.S.C. §§ 2342(1) and 2344. Pursuant to the Commission’s Rules, 47 C.F.R § 1.4, the Order became final upon publication of Public Notice in the Federal Register on August 30, 2007, 72 Fed. Reg. 50074. The Petition for Review was filed on September 7, 2007.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The Federal Communications Commission determined, for the second time, that wiring located behind sheet rock in apartment buildings, condominiums and other “multiple dwelling unit” buildings (“MDUs”) is “physically inaccessible,” as that term is defined in the Commission’s own rules. The issue in this case is whether that determination was, once again, arbitrary and capricious.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This is the second time that the FCC has adopted the particular modification of its “cable home wiring” rules that is the subject of this petition for review. After the FCC first adopted the rule change in 2003, NCTA sought review in this Court. On February 17, 2004, this Court held that the FCC's Order “merely state[d] unsupported conclusions” and “offer[ed] no reasoned basis” for the rule change. *National Cable & Telecommunications Association v. FCC*, No. 03-1140 (D.C. Cir. Feb. 17, 2004) (unpublished decision). The Court granted NCTA’s petition for review and remanded the case to the FCC “for further consideration consistent with this Judgment.” *Id.* On remand, the Commission reaffirmed the rule that it had previously adopted.

The “Cable Home Wiring” Rules

In the Cable Consumer Protection and Competition Act of 1992, Congress added a new provision – Section 624(i) – to the Communications Act of 1934, as amended, 47 U.S.C. § 544(i). This provision requires the Commission to “prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises of such subscriber* (emphasis added)”²

² The pertinent statutes and regulations are set forth in an addendum to this brief.

The legislative history makes clear the type of rules that Congress had in mind: “The Committee believes that subscribers who terminate cable service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit.”³ It also makes clear that, with respect to wiring in apartment buildings, condominiums and other “multiple dwelling unit” buildings (“MDUs”), the provision limits “the right to acquire home wiring to the cable installed *within the interior premises of a subscriber’s dwelling unit.*”⁴

In 1993, the Commission conducted a rulemaking proceeding to implement the statutory mandate. It adopted rules (the “cable home wiring” rules) providing that if an MDU subscriber voluntarily terminated cable service, the cable operator could not remove that subscriber’s “cable home wiring” unless it gave the subscriber the opportunity to purchase the wiring *at replacement cost* and the subscriber declined.⁵

³ Report of the Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 118 (1992) (“House Report”).

⁴ *Id.* (emphasis added).

⁵ *Report and Order*, MM Docket No. 92-260, 8 FCC Rcd 1435 (1993). Should the cable company fail to either 1) inform the customer on the initial phone call in which the subscriber calls to voluntarily terminate cable service that he or she has the right to purchase the wire at replacement cost; or 2) remove the home wire within 7 days of the customer rejecting the offer to purchase it, the home wire is deemed to be abandoned and the incumbent cable customer can take no further steps to remove or restrict its use. Given these tight deadlines and, more importantly, the likelihood that at some time in the future some tenant of that individual unit will decide to come back to the cable company, incumbent

For purposes of these rules, the Commission defined “cable home wiring” as “[t]he internal wiring contained within the premises of a subscriber which begins at the demarcation point.”⁶ And, for purposes of MDUs, the “demarcation point” was defined as “a point at (or about) twelve inches outside of where the cable wire enters the subscriber’s dwelling unit.”⁷ “Replacement cost” is limited to “the value of the wire itself” and does not include “the cost of labor involved in the installation of the cabling.”⁸ Nor does it include lost opportunity costs from the inability of the cable operator to offer other services, such as high speed Internet connections or telephony, over that wiring.

The “Home Run Wiring” Rules

In a typical MDU cable wiring architecture, a “common” wire carrying all cable transmissions enters the MDU and then is “split” at one or more junction boxes (typically a single box in the basement of smaller MDUs or a separate box on each floor of larger MDUs), with a dedicated wire extending from the junction box all the way to each individual dwelling unit in the MDU. The dedicated wiring *outside* the subscriber’s unit and beyond the demarcation point – which is

MSOs rarely, if ever, exercise their right to remove home wires under Section 76.802(a)(2).

⁶ *Id.* at 1439.

⁷ *Id.*

⁸ *Id.* at 1438.

generally referred to as “home run” wiring – was not within the scope of Section 624(i) of the Act or the Commission’s rules.⁹

In 1996, the Commission adopted a Notice of Proposed Rulemaking seeking comment on whether it should change the home wiring demarcation point, so that the obligation to offer to sell would apply not only to wiring inside residential units but also to “home run” wiring located outside the subscriber’s unit.¹⁰ In response to that Notice, a number of companies that provide multichannel video service to MDUs in competition with incumbent franchised cable systems argued that it would be easier for alternative providers to compete for subscribers in MDUs if, instead of having to install a second “home run” wire to each new subscriber’s unit, they could simply acquire the incumbent’s home run wiring, pursuant to the home wiring rules. They argued that it was costly to install a second set of wiring, that the existing demarcation point was sometimes physically inaccessible, and that, even where it was physically possible to connect wiring at the demarcation

⁹ There is, thus, a critical nomenclature distinction between “home wiring” and “home *run* wiring.”

¹⁰ See *Notice of Proposed Rulemaking*, CS Docket No. 95-184, 11 FCC Rcd 2747 (1996).

point, MDU building owners often refused to allow the construction work necessary to do so.¹¹

After several rounds of comments, proposals and counter-proposals, the Commission decided *not* to move the demarcation point.¹² Instead, the Commission adopted a *separate* set of rules governing the disposition of home run wiring upon termination of service by a subscriber or by an entire MDU (the “home run” rules).¹³

As an initial matter, the home run rules do *not* apply where the incumbent has a continuing legal or contractual right to keep its wiring on the premises.¹⁴ Thus, the rules do not apply in states that have “mandatory access” statutes.¹⁵ Nor do they apply where the operator has contracted with the building owner to retain its home run wiring in the building even if residents choose an alternative provider. As a result, even when a resident chooses to switch video providers, the incumbent

¹¹ See *Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95-184, MM Docket No. 92-260, 13 FCC Rcd 3659, 3721-23 (1997).

¹² *Id.* at 3729.

¹³ See 47 C.F.R. § 76.804, set forth in the Addendum to this brief.

¹⁴ *Id.*

¹⁵ “Mandatory access” statutes typically give franchised cable operators the right to provide service to residents of MDUs and prohibit building owners from barring such cable operators from occupying the premises for such purposes. Seventeen states and the District of Columbia have some form of mandatory access law.

cable company can continue to provide other services, such as high speed Internet and phone services over its home run wires.

Even where the home run rules are applicable, their requirements, unlike the “cable home wiring” rules that apply to wiring inside subscribers’ premises, do not force operators to sell their wiring to residents or competitors. Upon termination of service, they give operators a choice – to remove the home run wiring, to abandon it, *or* to offer to sell the wiring to the MDU owner or the alternative provider. And if it chooses to sell, the rules do not require that the price be set at “replacement cost,” as is the case for inside wiring. Instead, the price is to be established by negotiation or in a binding arbitration proceeding.

What the home run rules require is only that the incumbent give the terminating subscriber or MDU owner advance notice of the option that it intends to pursue. This procedural requirement is meant to remove uncertainty that might deter competitive entry. Under these rules, incumbent cable operators cannot threaten to remove their home run wiring upon termination unless they really intend to do so.¹⁶

Although the Commission refused to move the demarcation point to encompass all home run wiring within the scope of the cable home wiring rules, it did make a significant change to the definition of the demarcation point.

¹⁶ *See id.*

Specifically, it provided that if the cable wiring was “physically inaccessible” at any point 12 inches outside the subscriber’s unit, the demarcation point would be “the closest practicable point thereto that does not require access to the individual subscriber’s dwelling unit.”¹⁷ But the Commission made clear that the mere fact that some repairable construction work might be required in order to connect to the demarcation point would not render the point “physically inaccessible.” Nor would a demarcation point become “physically inaccessible” simply because a landlord refused to *permit* alternative providers to do the necessary construction work.

Specifically, the Commission ruled that a location was “physically inaccessible” only if it “(i) would require *significant modification* of, or *significant damage* to, preexisting *structural elements*, and (ii) would add *significantly* to the *physical difficulty* and/or cost of accessing the subscriber’s home wiring.”¹⁸ The Commission added a “note” to the rules explaining that, “[f]or example, wiring embedded in *brick, metal conduit or cinder blocks* with limited or without access

¹⁷ 47 C.F.R. § 76.5(mm). *See Report and Order and Second Further Notice of Proposed Rulemaking, supra*, 13 FCC Rcd at 3729-30.

¹⁸ 47 C.F.R. § 76.5(mm). *See Report and Order and Second Further Notice of Proposed Rulemaking, supra*, 13 FCC Rcd at 3730 (emphasis added).

openings would likely be physically inaccessible; wiring simply enclosed within *hallway molding* would not.”¹⁹

RCN’s Request for Clarification

Although a number of parties petitioned for reconsideration of various aspects of the home run rules, nobody sought reconsideration of the Commission’s refusal to move the demarcation point. But two years later, while the petitions for reconsideration were still pending, RCN-BeCoCom, L.L.C. (“RCN”), an alternative provider of multichannel video service to MDUs, requested a “clarification” from the Commission “that wiring located behind ‘sheet rock’ is not accessible so that the demarcation point is located at the first accessible point”²⁰ – which, in the case of the particular buildings that RCN sought to serve, would be the “junction boxes” in each MDU.

RCN asserted in its request that “[s]ignificant modification and damage would be required to access wiring behind sheet rock,” and it “estimate[d] that the cost of making such modification would be substantial. . . .”²¹ But it submitted no affidavits or declarations describing the nature and extent of the “significant” modification and damage. Nor did it offer any more specific quantification of the

¹⁹ *Id.* (emphasis added).

²⁰ Request for Letter Ruling at 4 (J.A. ___).

²¹ *Id.*

“substantial” cost.²² In its view, these matters were “irrelevant since in any case MDU building owners simply will not permit such work to be carried out.”

According to RCN, “MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint the ceilings and walls in order to install new lines because it is disruptive and eventually could require the replacement of entire ceilings and walls.”²³

NCTA and several cable operators separately opposed RCN’s request. The oppositions challenged the notion that wiring behind sheet rock was in any way comparable, in terms of accessibility, to wiring “embedded in brick, metal conduit or cinder blocks.” And unlike RCN, some of the opposing parties *did* submit affidavits or declarations to support their position, showing how easy, inexpensive and non-disruptive it is to cut into sheet rock, access the wiring behind it, and restore the walls to their original condition.

For example, a declaration from the Vice-President/Engineering of Time Warner Cable’s Northeast Ohio division included the following statement:

In a single riser and hallway home run architectures, as is found in many high-rise apartment buildings, cooperatives, and condominium complexes, it is not difficult to access the demarcation point of each

²² The Commission’s rules require that facts relied upon in a written submission such as RCN’s request for clarification “must be supported by relevant documentation or affidavit.” 47 C.F.R. § 76.6(a)(3). *See also* 47 C.F.R. § 76.7(a).

²³ Request for Letter Ruling at 3 (J.A. ___).

unit through a 2” x 4” hole cut into the hallway sheet rock wall. After the cut in the sheet rock is made, the old MVPD’s wiring is tapped off, and the hole is repaired either by patching and painting over the hole or with an attractive wall plate that matches the interior decoration of the building. *This procedure is not difficult for an experienced MVPD service technician to perform, is relatively inexpensive (\$25.00) and should have no adverse impact on the structural elements or the structural integrity of the building.*²⁴

Similarly, Comcast Cable Communications, Inc. submitted an affidavit of its Vice President of Engineering, explaining that

[s]heet rock is a relatively soft and porous material which is widely used in modern interior construction. Cutting, drilling, opening, plugging, spackling, taping, sanding, painting, and repairing sheet rock are insignificant and commonplace procedures which cable television personnel perform during the installation of cable television inside and home run wiring in both single family and multi-family dwellings and *do not result in significant modification of or damage to a building’s structural elements*. Restoration of sheet rock subsequent to such installations is accomplished *easily and inexpensively*, and is standard operating procedure in the cable television industry.²⁵

In addition, the oppositions challenged the notion that a building owner’s refusal to allow access to wiring at a particular location was sufficient to render the wiring inaccessible for purposes of the rules, without regard to whether such access

²⁴ Declaration of Al Costanzi, ¶ 6 (J.A. ___).

²⁵ Affidavit of John Donahue, ¶ 4 (J.A. ___). Similar declarations were submitted by engineers at Suburban Cable TV Co., Adelphia Communications Corporation, and Cablevision Systems Corporation. *See* Declaration of Christopher P. Patterson (J.A. ___); Declaration of Jack Rockwell (J.A. ___); Affidavit of Kathleen Mayo (J.A. ___).

would, in fact, impose significant damage or costs. As NCTA pointed out to the Commission, under such an interpretation,

MDU owners and alternative providers could readily circumvent the Commission’s decision not to bring home run wiring within the scope of the [cable home] wiring rules by moving the demarcation point. If a landlord could make a demarcation point ‘physically inaccessible’ simply by refusing to allow ‘*any* disruption’ to its walls or ceilings, it could effectively force an incumbent to sell its home run wiring to an alternative provider at replacement cost where no such transfer would be required by the home run wiring rules. . . .²⁶

In its reply to the oppositions, RCN offered no declarations or affidavits disputing the showings that wiring behind sheet rock can be, and is, readily accessed without significant damage or expense. Nor did the reply itself seriously dispute those showings, conceding in a footnote “the obvious point that sheet rock hardly involves the kind of significant impact, costs or difficulties presented by the Commission examples of brick, metal conduit or cinder block do [sic].”²⁷ Instead, RCN maintained that “the costs and mechanics of sheet rock reconstruction *are irrelevant because MDU owners bar RCN from accessing the existing wiring or installing its own wiring.*”²⁸ One party – Ameritech New Media, Inc. – submitted reply comments in support of RCN’s request, but it provided no affidavits,

²⁶ Opposition of National Cable Television Association, CSR-5311, at 7-8 (J.A. ___).

²⁷ RCN Reply to Oppositions at 12 n.25 (J.A. ___).

²⁸ *Id.* at 12 (J.A. ___) (emphasis added).

declarations or assertions regarding the costs or damage associated with accessing wiring behind sheet rock.²⁹

The FCC's First Decision

More than four years later, on January 29, 2003, the Commission acted on the petitions for reconsideration of its home run wiring rules.³⁰ The Commission generally reaffirmed those rules, adopting only minor modifications. But the Commission also used the occasion to address – and grant – RCN's request for clarification:

We conclude that cable wiring behind sheet rock is “physically inaccessible,” as that term is used in Section 47 C.F.R. § 76.5(mm)(4) of the Commission's rules. As stated above, our rule defines “physically inaccessible” as “requir[ing] significant modification of, or significant damage to, preexisting structural elements.” We believe that the term “structural elements” encompasses sheet rock, otherwise known as wallboard. The “Note” appended to Section 76.5(mm)(4), which helps define “inaccessibility,” states that “wiring embedded in brick, metal conduit or cinder blocks with limited or without access openings would likely be physically inaccessible; wiring within hallway molding would not.” Sheet rock and other similar materials are not identified specifically. In our view, sheet rock is more like “brick or cinder block,” materials also commonly used to form ceilings and hallways, than molding, which is not.

The definition of “physically inaccessible” also requires that accessing the wiring at that point would “add significantly to the physical difficulty and/or cost” of connecting. *While we acknowledge that cutting a hole through and repairing sheet rock is neither as*

²⁹ See Reply Comments of Ameritech New Media, Inc. (J.A. ___).

³⁰ *First Order on Reconsideration and Second Report and Order*, 18 FCC Rcd 1342 (2003) (“Order”) (J.A. ___).

*physically difficult nor as costly as boring through brick, metal or cinder block, we are satisfied that it adds significantly to the physical difficulty and cost of wiring an MDU. For this reason we conclude that wiring that is hidden behind sheet rock in a MDU wall or ceiling is “physically inaccessible” as the term is used in the Commission’s rule. Accordingly, we will amend the “Note” appended to Section 76.5(mm)(4) to include sheet rock.*³¹

The practical effect of this ruling was that in apartment buildings where wiring is located behind sheet rock, a substantial portion of cable operators’ wiring was transformed, for regulatory purposes, from “*home run wiring*” to “*cable home wiring.*” When a resident switches to a new video service provider, the cable operator would have to offer to sell not only the wiring inside the residential unit but also home run wiring, often running hundreds of feet *outside* the unit, at replacement cost. The operator could not choose to remove the wiring, and could not retain ownership of the wiring (in order, for example, to offer residents non-video services, such as high-speed Internet and telephone service) even if it would otherwise have a legal or contractual right to do so.

The Court’s Remand of the FCC’s Decision

NCTA petitioned this Court for review of the FCC’s decision. After reviewing the briefs, the Court dispensed with oral argument and granted NCTA’s petition. In an unpublished decision, the Court found, first, that

nothing in the Commission’s Order explains why or how accessing wiring behind sheet rock requires “significant modification of, or

³¹ *Id.*, ¶¶ 52-53, 18 FCC Rcd at 1362 (J.A. ___) (emphasis added).

significant damage to” the sheet rock. The Order simply concludes that sheet rock is more like brick or cinder block than molding, because sheet rock, cinder block, and brick are purportedly used to form ceilings and hallways and molding is not. The FCC’s Order fails to explain the relative nature of the “damage” or “modification” related to accessing wiring behind sheet rock.³²

Second, with respect to the FCC’s decision that having to cut through and repair sheet rock would add significantly to the difficulty and cost of accessing wiring inside a customer’s unit, the Court found that

[h]ere again, the Commission offers no support for its conclusion. The Commission candidly acknowledges that cutting through sheet rock is easier than boring through brick, metal, or cinder block, and then offers no support whatsoever for the conclusion that the lesser physical difficulty and cost are “significant.”³³

Accordingly, because the FCC’s decision “merely state[d] unsupported conclusions,” and “offer[ed] no reasoned basis” for the amendment to the rules, the Court granted the petition for review and remanded the case to the FCC “for further consideration consistent with this Judgment.”

The FCC’s Decision on Remand

Seven months later, the FCC issued a Further Notice of Proposed Rulemaking seeking further comment and additional evidence as to whether wiring located behind sheet rock meets the tests of physical inaccessibility under the

³² *National Cable & Telecommunications Association v. FCC*, No. 03-1140 (D.C. Cir. Feb. 17, 2004) (unpublished decision) at 3.

³³ *Id.*

rules.³⁴ As described above, when the FCC first ruled that wiring behind sheet rock would be deemed “physically inaccessible,” virtually all the evidence in the record was to the contrary. Declarations submitted by NCTA and by cable operators attested that accessing such wiring was routinely done in a manner that resulted in no significant modification or damage to structural elements and without adding significantly to the physical difficulty and/or cost of accessing the subscriber’s home wiring.

In the FCC’s proceeding on remand, NCTA submitted additional declarations not only confirming these points but also showing that accessing wiring behind sheet rock was not significantly more costly or difficult than accessing wiring in molding. Several of those declarations, as in the earlier round of comments, were from persons contractors unaffiliated with cable operators who indicated that they had years of personal experience installing cable.³⁵

But this time several other parties submitted declarations asserting contrary views. None of these declarants indicated similar experience actually installing wiring in MDUs. But the declarations *did* assert that accessing wiring behind sheet

³⁴ *Further Notice of Proposed Rulemaking*, 20 FCC Rcd 1233 (2004) (J.A. ___).

³⁵ *See, e.g.*, Declaration of John Chamberlain, Declaration of Joseph Danno, Affidavit of John Kuhn, Affidavit of William J. Kelly (Attachment A to NCTA Comments) (J.A. ___).

rock *would* – at least sometimes – cause significant damage or impose significant costs and difficulties.

On May 31, 2007, almost three years after issuing its Further Notice, the FCC issued its Report and Order reaffirming its prior decision.³⁶ On all counts, the FCC chose to accept the views of those who contended that wiring behind sheet rock should be deemed physically inaccessible and rejected the factual assertions set forth in the declarations submitted by NCTA. The FCC did not specifically find that, as a factual matter, accessing wiring behind sheet rock is *always* so costly and difficult as to meet the definition of “physically inaccessible.” Indeed, it conceded that “there may be cases in which the cost of accessing wiring behind sheet rock may be comparable to removable molding”³⁷ – which is not, according to the rules, “physically inaccessible.”

But, citing a variety of factors that *could* in some circumstances, increase the cost and difficulty, the FCC concluded that “the cost for sheet rock generally will be higher, and *often* significantly so.”³⁸ It nevertheless adopted a rule generally moving the demarcation point for *all* wiring located behind sheet rock. It determined that to do so would further the “pro-competitive, deregulatory goals of the 1996 Act” – even though Congress, in that very Act, specifically intended that

³⁶ *Report and Order and Declaratory Ruling*, 22 FCC Rcd 10640 (2007) (J.A. ___).

³⁷ *Id.* at 10661 (J.A. ___).

³⁸ *Id.* at 10641 (J.A. ___).

the cable home wiring rules be limited to wiring inside residential units and not extend to home run wiring outside such units.

SUMMARY OF ARGUMENT

The FCC – again – had no basis for ruling that wiring located behind sheet rock is “physically inaccessible” for purposes of the cable home wiring rules. Last time, the Commission had *no* evidence that such a determination would be valid in *any* circumstances. This time, the sharply conflicting evidence, as described by the FCC, indicates *at most* that wiring behind sheet rock may *sometimes*, in certain circumstances, be physically inaccessible. But as a general matter, it is arbitrary and capricious to establish a presumptive rule covering a broad category of cases unless the evidence indicates that, in *almost all* cases, the presumption is likely to be valid.

This is especially controlling here because the FCC’s presumption broadens an agency-created exception to a statutory mandate. Such exceptions are to be narrowly construed. Congress directed that the cable home wiring rules apply only to wiring within residential units in an MDU, and the FCC’s rules implement that mandate except in those circumstances where such wiring is physically inaccessible. Even if the FCC were justified in crediting the submissions of those parties who argued that wiring behind sheet rock was inaccessible while rejecting the affidavits and declarations to the contrary submitted by cable operators, it

would have been arbitrary, capricious and not in accordance with law for the FCC to create an overbroad presumption that sweeps within the exception *all* wiring located behind sheet rock.

But the FCC was *not* justified in its assessment of the conflicting evidence, and its reasons for concluding that wiring behind sheet rock is physically inaccessible were themselves arbitrary and capricious. *First*, it erroneously asserted, at every point, that the volume of the evidence – specifically, the number of parties on each side – overwhelmingly favored findings of significant damage, cost and difficulty, when it clearly did not. Simply counting the number of parties on each side of an issue hardly constitutes reasoned decision making – particularly in this case, where the affidavits submitted by NCTA contending that wiring behind sheet rock can easily be accessed without imposing significant costs or inflicting damage included statements from persons actually involved in installing such wiring, while the declarations on the other side did not. And, in any event, NCTA submitted multiple affidavits and declarations from several of its cable operator members, all of whom could, of course, have filed separately – in which case, their filings and their declarations and affidavits would have outnumbered those on the other side.

Second, the FCC relied on assertions in the record that building owners are reluctant to allow new providers of cable service to access existing wiring located

behind sheet rock. But such reluctance, if it exists, is not evidence that cutting and repairing sheet rock is so costly, difficult and damaging as to render wiring behind it physically inaccessible. The evidence submitted makes clear that building owners have reasons for not allowing such access that fall far short of the definition of physical inaccessibility – such as that cutting and repairing sheet rock is “messy” and causes “inconvenience” and “disruption.”

Third, the FCC as much as admitted that its resolution of the conflicting evidence in the record was based on unwarranted policy considerations. The FCC claimed that its decision was meant to remove a “regulatory technicality” in order to promote the “pro-competitive goals of the 1996 Act.” But establishment of the demarcation point at a point no more than 12” outside a residential unit was no mere “technicality.” Congress itself determined that the cable home wiring rules mandated by that Act should apply only within the premises of MDU customers and should not generally be extended to cover home run wiring outside the residential unit. Instead of construing its own “physical inaccessibility” exception narrowly to fulfill that legislative determination, the Commission construed it broadly to promote a contrary objective. That, too, was arbitrary and capricious in light of the statutory directive.

STANDING

Petitioner NCTA is the principal trade association of the cable television industry. Its members include companies that own and operate cable television systems in the United States. Such companies are aggrieved by the Order under review and would have standing in their own right. NCTA therefore has representational standing to challenge the Order. *See Library Ass’n v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005).

ARGUMENT

I. IT WAS ARBITRARY AND CAPRICIOUS FOR THE FCC TO RULE THAT WIRING LOCATED BEHIND SHEET ROCK IS ALWAYS “PHYSICALLY INACCESSIBLE.”

The Commission adopted a rule that wiring behind sheet rock, like wiring behind brick or cinder block, is *always* presumed to be physically inaccessible. The FCC was not required to decide the issue on such an across-the-board basis, and its decision to do so was unwarranted.

The issue of “physical inaccessibility” concerns an *exception* to the FCC’s general rule that, pursuant to the language and legislative history of Section 624(i), the “cable home wiring” rules are generally limited to wiring *within the interior premises of a subscriber’s dwelling unit*.³⁹ It may be that there are certain generic classes of cases that will virtually *always* meet the tests of physical inaccessibility

³⁹ House Report, *supra*, at 118 (emphasis added).

– such as wiring behind brick or cinder block walls. And it may be that other classes of cases will virtually never meet the test – such as wiring encased in molding.

But it does not follow that the FCC must or should rule one way or the other for every generic class of construction material. Sometimes, whether wiring behind a particular material is or is not accessible will depend on the circumstances. Unless the FCC can reasonably conclude that almost all cases within a specific class are physically inaccessible, there is no basis for expanding the exception to cover all cases within that class. This is especially true where, as here, the general rule establishing the demarcation point at the entrance to the residential unit reflects a Congressional determination that only wiring inside the actual dwelling unit (as opposed to all wiring within the entire MDU building) should be covered by the cable home wiring rules.

As this Court has recognized, “a court has a duty to review agency presumptions for consistency with their governing statutes, and for rationality.” *Chemical Mfrs. Ass’n v. DOT*, 105 F.3d 702, 705 (D.C. Cir. 1997), *citing NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 786 (1979). *See also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501, (1978). With respect to rationality, even a *rebuttable* presumption, much less a presumptive rule, is normally appropriate only when “proof of one fact renders the existence of another fact ‘so probable that it is

sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it.” *Id.*, quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-89, (1990) (quoting E. Cleary, *McCormick on Evidence* § 343, at 969 (3d ed. 1984)).

And with respect to consistency with governing statutes, where, as here, the rule at issue is an *exception* to a general rule – especially a general rule based on a *statutory* mandate limiting applicability of the rules to wiring *inside* residential units – a generic presumption that the exception applies must meet an even higher burden. As the Supreme Court has held, “In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.” *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (U.S. 1989).

That burden has not come close to being met in this case. On virtually every issue, the Commission generally chose to credit the declarations and assertions of those who argued that wiring behind sheet rock should be deemed inaccessible while rejecting the declarations and affidavits to the contrary supplied by NCTA and cable operators. But even accepting the Commission’s own characterization of the evidence it relied on, that evidence shows, at most, that wiring behind sheet rock is *sometimes* difficult to access – even though in most circumstances it is not.

For example, the Commission’s conclusion that accessing wiring behind sheet rock entails “significant physical difficulty” is based on its findings that “the repair is *not always* limited to the hole(s) cut; it *can* include repainting and/or re-wallpapering to restore the premises,” and that “[t]hose tasks *can* add significantly to the physical difficulty involved in accessing wiring, certainly as compared to accessing wiring behind hallway molding. . . .”⁴⁰

Similarly, in concluding that “the cost of accessing wiring behind sheet rock is significant” – even though multiple declarations and affidavits submitted by NCTA and cable operators attested that it was not – the Commission found that “costs estimates *could* include factors such as how difficult it may be to satisfy the MDU owner and manager with repair work and *whether a single unit or many units are worked on in one time period.*” It pointed out that “as Verizon and other commenters note, the cost of repairing sheet rock *can often* include repainting and re-wallpapering entire walls or ceilings,” and that “[a]lthough we do not have specific quotes for restoration work, it *seems likely* that repainting and/or re-wallpapering entire ceilings and walls can, at a minimum, run into hundreds of dollars, *particularly for more high-end MDUs that use more expensive surface finishes.*”

⁴⁰ *Report and Order*, 22 FCC Rcd at 10657 (J.A. ___).

Finally, multiple affidavits and declarations submitted by NCTA specifically stated that the cost of accessing wiring behind sheet rock is not only insignificant but not even substantially different from the cost of accessing wiring behind molding – which, under the Commission’s rules, is specifically deemed accessible. The Commission concluded that “While *there may be cases in which the cost of accessing wiring behind sheet rock may be comparable to removable molding* the record demonstrates that the cost for sheet rock generally will be higher, and *often significantly so.*”

These “findings” – not-fully-substantiated predictions, really – are not sufficient to support a presumption that eviscerates, in every case involving sheet rock, the general rule (and statutory limitation) that only wiring inside residential units is covered by the “cable home wiring” requirements. For example, even if repainting and re-wallpapering sometimes add significantly to the costs of accessing such wiring, why should the exception apply where this is *not* the case? If the significance of the costs depends on whether wiring for a single unit or many units has to be accessed at one time, why is the wiring deemed inaccessible in all cases? Even if the costs are likely to be particularly significant in “high-end buildings” that use more expensive surface finishes, why should it apply in buildings that use inexpensive surface finishes?

In particular, if there are cases where accessing wiring behind sheet rock is, in fact, comparable in cost and difficulty to accessing wiring behind molding, why are those cases nevertheless swallowed by the exception? The FCC's rule itself provides that wiring located behind molding is *not* physically inaccessible.

Submissions by NCTA and its cable operator members provided substantial evidence that the damage, difficulty and costs associated with accessing wiring behind sheet rock were generally *not* significant and, specifically, were *not* significantly different from those associated with accessing wiring behind molding. Even if the Commission had ample reason for rejecting that evidence – and, as we discuss in the next section, it did not – its own findings are insufficient to support a rule that wiring behind sheet rock is *always* physically inaccessible.

II. THE COMMISSION'S DECISION TO CREDIT THE EVIDENCE THAT WIRING BEHIND SHEET ROCK IS PHYSICALLY INACCESSIBLE WHILE REJECTING THE EVIDENCE THAT IT IS NOT WAS ARBITRARY AND CAPRICIOUS.

Faced with sharply conflicting assertions, declarations and affidavits regarding the structural damage caused by accessing wiring behind sheet rock and the cost and difficulty of accessing such wiring, the Commission chose to accept the assertions that the damage, costs and difficulty are significant while rejecting the evidence that they are insignificant.

Where there is contradictory evidence in the record, courts do, of course, give considerable deference to an expert agency's assessment and balancing of that

evidence – but only if the agency’s assessment is based on its expertise, and only if its stated reasons for accepting and rejecting certain evidence are reasonable.

“While agency expertise deserves deference, it deserves deference only when it is exercised; no deference is due when the agency has stopped shy of carefully considering the disputed facts.” *Carlisle & Neola v. FERC*, 741 F.2d 429, 433 (D.C. Cir. 1984). *See also Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986) (“While we acknowledge our deference to the agency's expertise in most cases, we cannot defer when the agency simply has not exercised its expertise.”); *Ayala-Chavez v. United States INS*, 945 F.2d 288, 294 (9th Cir. 1991) (“[A] reviewing court should defer to an administrative agency only in those areas where that agency has particular expertise.”)

There is no indication that the Commission used (or even has) any internal technical expertise to conclude that the multiple affidavits and declarations submitted by cable installers attesting that accessing wiring behind sheet rock is routinely done without significant damage, cost or difficulty were factually erroneous. Nor is there any indication that the Commission consulted or relied upon any outside experts to evaluate the conflicting evidence.

Instead, it appears that the Commission decided to credit one set of evidence and reject the other for reasons that had little to do with the underlying factual issues. It suggested that the weight of the evidence overwhelmingly favored

findings of significant damage, cost and difficulty when it clearly did not. It inappropriately relied on the supposed reluctance of MDU owners to allow new entrants to access wiring behind sheet rock as evidence that the resulting damage, cost and difficulty would be significant – when, in fact, such reluctance would show no such thing. And, finally, the Commission made clear that, in evaluating the evidence, it tilted decisively in favor of a ruling that would eliminate “regulatory technicalities” that made it more difficult for new entrants to gain access to MDUs – even though, in this case, the “regulatory technicality” was a general rule that reflected policies adopted by Congress and the Commission regarding the appropriate scope of the cable home wiring rules and the location of the demarcation point.

A. The Commission’s Repeated Suggestions That It Relied on the Weight of the Evidence Are Clearly Inaccurate.

The Commission goes out of its way to suggest that, on virtually every issue, the factual allegations that wiring behind sheet rock is inaccessible are supported by “most commenters” or “the majority of commenters,” while only one party – NCTA – has made allegations and submitted evidence to the contrary.⁴¹ Simply counting the number of parties aligned on each side of an issue hardly constitutes the exercise of agency “expertise.” *See, e.g., Natural Resources Defense Council,*

⁴¹ *See, e.g., Report and Order*, ¶¶ 17, 19, 23, 30, 32, 37, 41, 22 FCC Rcd at 10647-10658 (J.A. ___).

Inc. v. EPA, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987) (“The substantial-evidence standard has never been taken to mean that an agency rulemaking is a democratic process by which the majority of commenters prevail by sheer weight of numbers. Regardless of majority sentiment within the community of commenters, the issue is whether the rules are supported by substantial evidence in the record. The number and length of comments, without more, is not germane....”)

But, in any event, the FCC’s characterization is a transparent misrepresentation of the weight of the evidence in the record. It masks the fact that multiple cable operators filed comments and declarations from experts in cable installation in response to RCN’s initial request for a declaratory ruling and that NCTA resubmitted those declarations in the FCC’s proceeding on remand, along with several others provided by various cable operators.

Each of those companies could, of course, have submitted their own comments, declarations and affidavits again in the remand proceeding instead of allowing NCTA to represent their views and attach their evidence. In that case, the number of commenting parties alleging that wiring behind sheet rock was physically inaccessible would have been outbalanced by the number alleging that it was not. In any event, the number of affidavits and declarations submitted by NCTA and other cable operators *does* outnumber the number of affidavits and

declarations submitted by other parties, however spurious counting the filings may be.

More to the point, cable interests submitted declarations and affidavits from nine experts with over 80 years of collective experience installing cable wire behind sheet rock. Many of these experts are employed by installation companies *unaffiliated* with any cable operators. These declarations and affidavits demonstrate that accessing cable wiring behind sheet rock is common, simple, quick, inexpensive, and can be and is routinely accomplished without structural or esthetic damage.

In contrast to the affidavits and declarations from the nine cable installation experts, none of the declarations submitted by the other parties in the proceeding were from persons *unaffiliated* with the commenting parties, and none recited any first-hand experience in cable installation.

In these circumstances, one might have expected the Commission to give particular weight to the statements of the independent entities with actual experience in installing wiring in MDUs. Instead, it gave them none. Rather than comparing the credibility and expertise of the affidavits and the affiants, the Commission simply compared the number of parties on each side of the issue. That was arbitrary and capricious.

B. The Reluctance of Building Owners To Allow New Entrants To Access Wiring Behind Sheet Rock Is Not Evidence of the Damage, Costs or Difficulty of Accessing Such Wiring.

The Commission’s determination that accessing wiring behind sheet rock would cause significant modification or damage to existing structural elements – one element of the “physical inaccessibility” test – was based at least in part on assertions in the record that building owners do not allow such access:

Although the Commission’s rule defining physical inaccessibility does not specifically take into account the willingness of MDU owners and managers to allow new service providers to cut and repair sheet rock, the refusal by building owners to permit competitive providers to cut into building walls, even sheet rock walls, suggests that the consequences of doing so are significant to the building owners. This fact supports the proposition that accessing wiring behind sheet rock exposes the walls to significant modification or damage.⁴²

In fact, as the affidavits cited by the FCC makes clear, the reluctance of building owners to permit new entrants to cut into sheet rock does not show that such a process would result in significant modification or damage to any structural elements. It may show, as Verizon argued, that “MDU owners and residents consider cutting and repairing sheet rock a significant *inconvenience*.”⁴³ Or it may show, as the Real Access Alliance and Community Association Institute claimed,

⁴² *Id.* at 10654-55 (footnote omitted) (J.A. ___).

⁴³ *Id.* at 10654 (emphasis added) (J.A. ___).

“that cutting and repairing drywall is a *messy* process and is the kind of *disruption* that residents want to avoid whenever possible.”⁴⁴

But inconvenience, messiness and disruption are not tantamount to – and, are a far cry from – “significant modification of, or significant damage to” a building’s structural elements. It was arbitrary and capricious for the Commission to rely on building owners’ reluctance to allow access to wiring behind sheet rock as evidence of “significant damage” when the record, even as described by the Commission itself, shows that it has nothing to do with any damage at all.

C. The Commission’s Evaluation of the Evidence Was Based on Policy Considerations That Are At Odds With the Rule and Statute.

The Commission made clear in its Report and Order that there was a *policy* basis for its determination that wiring behind sheet rock is “physically inaccessible.” Thus, according to the Commission, its decision “takes important steps to ensure that the pro-competitive, deregulatory goals of the 1996 Act are realized.”⁴⁵ In its view,

[n]ew entrants to the video services and telephony markets should not be foreclosed from competing for consumers in multi-unit buildings based on *regulatory technicalities* or costly and inefficient industry practices. By removing these obstacles, we further the opportunities

⁴⁴ *Id.* (emphasis added). RCN similarly maintained that building owners and managers sometimes refuse to allow it to cut and repair sheet rock because it is “disruptive.” *Id.*

⁴⁵ *Id.* at 10641 (J.A. ___).

for consumers living in multi-unit buildings to enjoy the social and economic benefits of communication services competition.⁴⁶

But the demarcation point between wiring that is and is not subject to the cable inside wiring rules is not a mere “regulatory technicality” that can be vaulted over by incanting the benefits of competition in MDUs. Video competition is surely a general policy goal. But in this particular context, Congress has enacted a more specific policy mandate, which was reaffirmed in an FCC rulemaking proceeding. That clear statutory mandate is that the cable home wiring rules should not extend to the talking of privately-owned wiring outside a residential unit, and the FCC’s policy determination was that the demarcation point should not be moved beyond 12 inches outside a residential unit unless it is inaccessible at that point. Whether or not extending the inside wiring rules to cover home run wiring might further facilitate competitive entry, such a step was considered and *rejected*. Congress said “this much” wiring is subject to the rules – and no more.

In these circumstances, applying the “physically inaccessible” exception to this general determination in a manner that seeks to promote competitive entry and the “pro-competitive . . . goals of the 1996 Act” by facilitating confiscation of home run wiring by new entrants was impermissible. It was, in fact, inconsistent with the specific statutory and administrative decision *against* extending the cable home wiring requirements to wiring outside residential units.

⁴⁶ *Id.* (emphasis added).

As the Supreme Court and this Court have recognized, “[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam), *quoted in National Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (2001). *See also PBGC v. LTV Corp.*, 496 U. S. 633, 646–647 (1990); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986); *Holloway v. United States*, 526 U.S. 1, 18 (1999) (Scalia, J., dissenting) (emphasis added) (“But every statute intends not only to achieve certain policy objectives, but to achieve them by the means specified. *Limitations upon the means employed to achieve the policy goal are no less a ‘purpose’ of the statute than the policy goal itself.* *See Director, Office of Workers’ Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995)”).

It was arbitrary and capricious for the Commission to treat the demarcation point as a “regulatory technicality,” and to construe the “physically inaccessible” exception broadly and loosely in order to circumvent the legislature’s considered limitation on the takings to be effectuated by the 1996 Act. Its task should have been simply to determine whether the evidence was sufficiently compelling to

justify a rule that wiring behind sheet rock is in *all* circumstances physically inaccessible, or whether the question of whether the exception applies should be addressed on a case-by-case basis. Its misconceived policy objectives tainted that analysis.

CONCLUSION

For the foregoing reasons, the Commission's decision was once again arbitrary and capricious. The evidence in the record did not justify the rule adopted by the Commission, and its reasons for adopting it were arbitrary and capricious. Accordingly, the decision should again be set aside, and it should be vacated.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,065 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2008, I served two copies of the foregoing Brief of Petitioner National Cable & Telecommunications Association on the following parties by First-class Mail, postage-prepaid:

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ADDENDUM
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47 U.S.C. § 544(i):

Within 120 days after the date of enactment of this subsection, the Commission shall prescribe rules concerning the disposition after a subscriber to a cable system terminates service, of any cable installed by the operator within the premises of such subscriber.

47 C.F.R. 76.5 Definitions

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(ll) Cable home wiring. The internal wiring contained within the premises of a subscriber which begins at the demarcation point. Cable home wiring includes passive splitters on the subscriber's side of the demarcation point, but does not include any active elements such as amplifiers, converter or decoder boxes, or remote control units.

(mm) Demarcation point. (1) For new and existing single unit installations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises.

(2) For new and existing multiple dwelling unit installations with non-loop-through wiring configurations, the demarcation point shall be a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point thereto that does not require access to the individual subscriber's dwelling unit.

(3) For new and existing multiple dwelling unit installations with loop-through wiring configurations, the demarcation points shall be at (or about) twelve inches outside of where the cable wire enters or exits the first and last individual dwelling units on the loop, or, where the wire is physically inaccessible at such point(s), the closest practicable point thereto that does not require access to an individual subscriber's dwelling unit.

(4) As used in this paragraph (mm)(3), the term "physically inaccessible" describes a location that:

(i) Would require significant modification of, or significant damage to, preexisting structural elements, and

(ii) Would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.

Note to paragraph (mm)(4):

For example, wiring embedded in brick, metal conduit, cinder Blocks, or sheet rock with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not.

47 C.F.R Part 76, Subpart M – Cable Inside Wiring

Sec. 76.800 Definitions.

(a) MDU. A multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative).

(b) MDU owner. The entity that owns or controls the common areas of a multiple dwelling unit building.

(c) MVPD. A multichannel video programming distributor, as that term is defined in Section 602(13) of the Communications Act, 47 U.S.C. 522(13).

(d) Home run wiring. The wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop.

Sec. 76.801 Scope.

The provisions of this subpart set forth rules and regulations for the disposition, after a subscriber voluntarily terminates cable service, of that cable home wiring installed by the cable system operator or its contractor within the premises of the subscriber. The provisions do not apply where the cable home wiring belongs to the subscriber, such as where the operator has transferred ownership to the

subscriber, the operator has been treating the wiring as belonging to the subscriber for tax purposes, or the wiring is considered to be a fixture by state or local law in the subscriber's jurisdiction. Nothing in this subpart shall affect the cable system operator's rights and responsibilities under Sec. 76.617 to prevent excessive signal leakage while providing cable service, or the cable operator's right to access the subscriber's property or premises.

Sec. 76.802 Disposition of cable home wiring.

(a)(1) Upon voluntary termination of cable service by a subscriber in a single unit installation, a cable operator shall not remove the cable home wiring unless it gives the subscriber the opportunity to purchase the wiring at the replacement cost, and the subscriber declines. If the subscriber declines to purchase the cable home wiring, the cable system operator must then remove the cable home wiring within seven days of the subscriber's decision, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use.

(2) Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: it gives the subscriber the opportunity to purchase the wiring at the replacement cost; the subscriber declines, and neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided reasonable advance notice to the incumbent provider that it would purchase the cable home wiring pursuant to this section if and when a subscriber declines. If the cable system operator is entitled to remove the cable home wiring, it must then remove the wiring within seven days of the subscriber's decision, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use.

(3) The cost of the cable home wiring is to be based on the replacement cost per foot of the wiring on the subscriber's side of the demarcation point multiplied by the length in feet of such wiring, and the replacement cost of any passive splitters located on the subscriber's side of the demarcation point.

(b) During the initial telephone call in which a subscriber contacts a cable operator to voluntarily terminate cable service, the cable operator--if it owns and intends to remove the home wiring--must inform the subscriber:

(1) That the cable operator owns the home wiring;

(2) That the cable operator intends to remove the home wiring;

(3) That the subscriber has the right to purchase the home wiring; and

(4) What the per-foot replacement cost and total charge for the wiring would be (the total charge may be based on either the actual length of cable wiring and the actual number of passive splitters on the customer's side of the demarcation point, or a reasonable approximation thereof; in either event, the information necessary for calculating the total charge must be available for use during the initial phone call).

(c) If the subscriber voluntarily terminates cable service in person, the procedures set forth in paragraph (b) of this section apply.

(d) If the subscriber requests termination of cable service in writing, it is the operator's responsibility--if it wishes to remove the wiring--to make reasonable efforts to contact the subscriber prior to the date of service termination and follow the procedures set forth in paragraph (b) of this section.

(e) If the cable operator fails to adhere to the procedures described in paragraph (b) of this section, it will be deemed to have relinquished immediately any and all ownership interests in the home wiring; thus, the operator will not be entitled to compensation for the wiring and shall make no subsequent attempt to remove it or restrict its use.

(f) If the cable operator adheres to the procedures described in paragraph (b) of this section, and, at that point, the subscriber agrees to purchase the wiring, constructive ownership over the home wiring will transfer to the subscriber immediately, and the subscriber will be permitted to authorize a competing service provider to connect with and use the home wiring.

(g) If the cable operator adheres to the procedures described in paragraph (b) of this section, and the subscriber asks for more time to make a decision regarding whether to purchase the home wiring, the seven (7) day period described in paragraph (b) of this section will not begin running until the subscriber declines to purchase the wiring; in addition, the subscriber may not use the wiring to connect to an alternative service provider until the subscriber notifies the operator whether or not the subscriber wishes to purchase the wiring.

(h) If an alternative video programming service provider connects its wiring to the home wiring before the incumbent cable operator has terminated service and has capped off its line to prevent signal leakage, the alternative video programming service provider shall be responsible for ensuring that the incumbent's wiring is properly capped off in accordance with the Commission's signal leakage requirements. See Subpart K (technical standards) of the Commission's Cable Television Service rules (47 CFR 76.605(a)(13) and 76.610 through 76.617).

(i) Where the subscriber terminates cable service but will not be using the home wiring to receive another alternative video programming service, the cable operator shall properly cap off its own line in accordance with the Commission's signal leakage requirements. See Subpart K (technical standards) of the Commission's Cable Television Service rules (47 CFR 76.605(a)(13) and 76.610 through 76.617).

(j) Cable operators are prohibited from using any ownership interests they may have in property located on the subscriber's side of the demarcation point, such as molding or conduit, to prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service. In addition, incumbent cable operators must take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point. Cable operators and alternative multichannel video programming delivery service providers are required to minimize the potential for signal leakage in accordance with the guidelines set forth in 47 CFR 76.605(a)(13) and 76.610 through 76.617, theft of service and unnecessary disruption of the consumer's premises.

(k) Definitions--Normal operating conditions--The term "normal operating conditions" shall have the same meaning as at 47 CFR 76.309(c)(4)(ii).

(l) The provisions of Sec. 76.802 shall apply to all MVPDs in the same manner that they apply to cable operators.

Sec. 76.804 Disposition of home run wiring.

(a) *Building-by-building disposition of home run wiring.* (1) Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the MDU owner, the MDU owner may give the MVPD a

minimum of 90 days' written notice that its access to the entire building will be terminated to invoke the procedures in this section. The MVPD will then have 30 days to notify the MDU owner in writing of its election for all the home run wiring inside the MDU building: to remove the wiring and restore the MDU building consistent with state law within 30 days of the end of the 90-day notice period or within 30 days of actual service termination, whichever occurs first; to abandon and not disable the wiring at the end of the 90-day notice period; or to sell the wiring to the MDU building owner. If the incumbent provider elects to remove or abandon the wiring, and it intends to terminate service before the end of the 90-day notice period, the incumbent provider shall notify the MDU owner at the time of this election of the date on which it intends to terminate service. If the incumbent provider elects to remove its wiring and restore the building consistent with state law, it must do so within 30 days of the end of the 90-day notice period or within 30 days of actual service termination, which ever occurs first. For purposes of abandonment, passive devices, including splitters, shall be considered part of the home run wiring. The incumbent provider that has elected to abandon its home run wiring may remove its amplifiers or other active devices used in the wiring if an equivalent replacement can easily be reattached. In addition, an incumbent provider removing any active elements shall comply with the notice requirements and other rules regarding the removal of home run wiring. If the MDU owner declines to purchase the home run wiring, the MDU owner may permit an alternative provider that has been authorized to provide service to the MDU to negotiate to purchase the wiring.

(2) If the incumbent provider elects to sell the home run wiring under paragraph (a)(1) of this section, the incumbent and the MDU owner or alternative provider shall have 30 days from the date of election to negotiate a price. If the parties are unable to agree on a price within that 30-day time period, the incumbent must elect: to abandon without disabling the wiring; to remove the wiring and restore the MDU consistent with state law; or to submit the price determination to binding arbitration by an independent expert. If the incumbent provider chooses to abandon or remove its wiring, it must notify the MDU owner at the time of this election if and when it intends to terminate service before the end of the 90-day notice period. If the incumbent service provider elects to abandon its wiring at this point, the abandonment shall become effective at the end of the 90-day notice period or upon service termination, whichever occurs first. If the incumbent elects at this point to remove its wiring and restore the building consistent with state law, it must do so within 30 days of the end of the 90-day notice period or within 30 days of actual service termination, which ever occurs first.

(3) If the incumbent elects to submit to binding arbitration, the parties shall have seven days to agree on an independent expert or to each designate an expert who will pick a third expert within an additional seven days. The independent expert chosen will be required to assess a reasonable price for the home run wiring by the end of the 90-day notice period. If the incumbent elects to submit the matter to binding arbitration and the MDU owner (or the alternative provider) refuses to participate, the incumbent shall have no further obligations under the Commission's home run wiring disposition procedures. If the incumbent fails to comply with any of the deadlines established herein, it shall be deemed to have elected to abandon its home run wiring at the end of the 90-day notice period.

(4) The MDU owner shall be permitted to exercise the rights of individual subscribers under this subsection for purposes of the disposition of the cable home wiring under Sec. 76.802. When an MDU owner notifies an incumbent provider under this section that the incumbent provider's access to the entire building will be terminated and that the MDU owner seeks to use the home run wiring for another service, the incumbent provider shall, in accordance with our current home wiring rules: offer to sell to the MDU owner any home wiring within the individual dwelling units that the incumbent provider owns and intends to remove; and provide the MDU owner with the total per-foot replacement cost of such home wiring. This information must be provided to the MDU owner within 30 days of the initial notice that the incumbent's access to the building will be terminated. If the MDU owner declines to purchase the cable home wiring, the MDU owner may allow the alternative provider to purchase the home wiring upon service termination under the terms and conditions of Sec. 76.802. If the MDU owner or the alternative provider elects to purchase the home wiring under these rules, it must so notify the incumbent MVPD provider not later than 30 days before the incumbent's termination of access to the building will become effective. If the MDU owner and the alternative provider fail to elect to purchase the home wiring, the incumbent provider must then remove the cable home wiring, under normal operating conditions, within 30 days of actual service termination, or make no subsequent attempt to remove it or to restrict its use.

(5) The parties shall cooperate to avoid disruption in service to subscribers to the extent possible.

(b) *Unit-by-unit disposition of home run wiring:*

(1) Where an MVPD owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to

maintain any particular home run wire dedicated to a particular unit on the premises against the MDU owner's wishes, the MDU owner may permit multiple MVPDs to compete for the right to use the individual home run wires dedicated to each unit in the MDU. The MDU owner must provide at least 60 days' written notice to the incumbent MVPD of the MDU owner's intention to invoke this procedure. The incumbent MVPD will then have 30 days to provide a single written election to the MDU owner as to whether, for each and every one of its home run wires dedicated to a subscriber who chooses an alternative provider's service, the incumbent MVPD will: remove the wiring and restore the MDU building consistent with state law; abandon the wiring without disabling it; or sell the wiring to the MDU owner. If the MDU owner refuses to purchase the home run wiring, the MDU owner may permit the alternative provider to purchase it. If the alternative provider is permitted to purchase the wiring, it will be required to make a similar election within this 30-day period for each home run wire solely dedicated to a subscriber who switches back from the alternative provider to the incumbent MVPD.

(2) If the incumbent provider elects to sell the home run wiring under paragraph (b)(1), the incumbent and the MDU owner or alternative provider shall have 30 days from the date of election to negotiate a price. During this 30-day negotiation period, the parties may arrange for an up-front lump sum payment in lieu of a unit-by-unit payment. If the parties are unable to agree on a price during this 30-day time period, the incumbent must elect: to abandon without disabling the wiring; to remove the wiring and restore the MDU consistent with state law; or to submit the price determination to binding arbitration by an independent expert. If the incumbent elects to submit to binding arbitration, the parties shall have seven days to agree on an independent expert or to each designate an expert who will pick a third expert within an additional seven days. The independent expert chosen will be required to assess a reasonable price for the home run wiring within 14 days. If subscribers wish to switch service providers after the expiration of the 60-day notice period but before the expert issues its price determination, the procedures set forth in paragraph (b)(3) of this section shall be followed, subject to the price established by the arbitrator. If the incumbent elects to submit the matter to binding arbitration and the MDU owner (or the alternative provider) refuses to participate, the incumbent shall have no further obligations under the Commission's home run wiring disposition procedures.

(3) When an MVPD that is currently providing service to a subscriber is notified either orally or in writing that that subscriber wishes to terminate service and that another service provider intends to use the existing home run wire to provide

service to that particular subscriber, a provider that has elected to remove its home run wiring pursuant to paragraph (b)(1) or (b)(2) of this section will have seven days to remove its home run wiring and restore the building consistent with state law. If the subscriber has requested service termination more than seven days in the future, the seven-day removal period shall begin on the date of actual service termination (and, in any event, shall end no later than seven days after the requested date of termination). If the provider has elected to abandon or sell the wiring pursuant to paragraph (b)(1) or (b)(2) of this section, the abandonment or sale will become effective upon actual service termination or upon the requested date of termination, whichever occurs first. For purposes of abandonment, passive devices, including splitters, shall be considered part of the home run wiring. The incumbent provider may remove its amplifiers or other active devices used in the wiring if an equivalent replacement can easily be reattached. In addition, an incumbent provider removing any active elements shall comply with the notice requirements and other rules regarding the removal of home run wiring. If the incumbent provider intends to terminate service prior to the end of the seven-day period, the incumbent shall inform the party requesting service termination, at the time of such request, of the date on which service will be terminated. The incumbent provider shall make the home run wiring accessible to the alternative provider within the 24-hour period prior to actual service termination.

(4) If the incumbent provider fails to comply with any of the deadlines established herein, the home run wiring shall be considered abandoned, and the incumbent may not prevent the alternative provider from using the home run wiring immediately to provide service. The alternative provider or the MDU owner may act as the subscriber's agent in providing notice of a subscriber's desire to change services, consistent with state law. If a subscriber's service is terminated without notification that another service provider intends to use the existing home run wiring to provide service to that particular subscriber, the incumbent provider will not be required to carry out its election to sell, remove or abandon the home run wiring; the incumbent provider will be required to carry out its election, however, if and when it receives notice that a subscriber wishes to use the home run wiring to receive an alternative service. Section 76.802 of the Commission's rules regarding the disposition of cable home wiring will apply where a subscriber's service is terminated without notifying the incumbent provider that the subscriber wishes to use the home run wiring to receive an alternative service.

(5) The parties shall cooperate to avoid disruption in service to subscribers to the extent possible.

(6) Section 76.802 of the Commission's rules regarding the disposition of cable home wiring will continue to apply to the wiring on the subscriber's side of the cable demarcation point.

(c) The procedures set forth in paragraphs (a) and (b) of this section shall apply unless and until the incumbent provider obtains a court ruling or an injunction within forty-five (45) days following the initial notice enjoining its displacement.

(d) After the effective date of this rule, MVPDs shall include a provision in all service contracts entered into with MDU owners setting forth the disposition of any home run wiring in the MDU upon the termination of the contract.

(e) Incumbents are prohibited from using any ownership interest they may have in property located on or near the home run wiring, such as molding or conduit, to prevent, impede, or in any way interfere with, the ability of an alternative MVPD to use the home run wiring pursuant to this section.

(f) Section 76.804 shall apply to all MVPDs.

Sec. 76.805 Access to molding.

(a) An MVPD shall be permitted to install one or more home run wires within the existing molding of an MDU where the MDU owner finds that there is sufficient space to permit the installation of the additional wiring without interfering with the ability of an existing MVPD to provide service, and gives its affirmative consent to such installation.

This paragraph shall not apply where the incumbent provider has an exclusive contractual right to occupy the molding.

(b) If an MDU owner finds that there is insufficient space in existing molding to permit the installation of the new wiring without interfering with the ability of an existing MVPD to provide service, but gives its affirmative consent to the installation of larger molding and additional wiring, the MDU owner (with or without the assistance of the incumbent and/or the alternative provider) shall be permitted to remove the existing molding, return such molding to the incumbent, if appropriate, and install additional wiring and larger molding in order to contain the additional wiring. This paragraph shall not apply where the incumbent provider possesses a contractual right to maintain its molding on the premises without alteration by the MDU owner.

(c) The alternative provider shall be required to pay any and all installation costs associated with the implementation of paragraphs (a) or (b) of this section, including the costs of restoring the MDU owner's property to its original condition, and the costs of repairing any damage to the incumbent provider's wiring or other property.

Sec. 76.806 Pre-termination access to cable home wiring.

(a) Prior to termination of service, a customer may: install or provide for the installation of their own cable home wiring; or connect additional home wiring, splitters or other equipment within their premises to the wiring owned by the cable operator, so long as no electronic or physical harm is caused to the cable system and the physical integrity of the cable operator's wiring remains intact.

(b) Cable operators may require that home wiring (including passive splitters, connectors and other equipment used in the installation of home wiring) meets reasonable technical specifications, not to exceed the technical specifications of such equipment installed by the cable operator; provided however, that if electronic or physical harm is caused to the cable system, the cable operator may impose additional technical specifications to eliminate such harm. To the extent a customer's installations or rearrangements of wiring degrade the signal quality of or interfere with other customers' signals, or cause electronic or physical harm to the cable system, the cable operator may discontinue service to that subscriber until the degradation or interference is resolved.

(c) Customers shall not physically cut, substantially alter, improperly terminate or otherwise destroy cable operator-owned home wiring.

(d) Section 76.806 shall apply to all MVPDs.