

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

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

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SUMMARY OF ARGUMENT

The FCC's presumptive rule for classifying all wiring behind sheet rock as "physically inaccessible" in this case upends a Congressional distinction, and the FCC's own previous reasoned determinations, about the demarcation point separating cable home wiring from "home run" wiring. The FCC's Brief does not dispute that this is the effect of the rule, nor does it claim that its effect is limited because sheet rock is a rare, exceptional situation – which, of course, it is not. But the Report and Order's conflation of two legally distinct sets of wiring in MDUs is once again arbitrary, capricious, and not in accord with law – just as this Court found to be the case when the FCC previously tried to adopt the same rule.

First, even accepting the FCC's own assessment of the conflicting evidence in the record, the presumption it adopted is overbroad. *Second*, while it is the agency's task – and not the Court's – to weigh and balance conflicting evidence in the record, it is the Court's task to review the agency's *reasons* for its decisions to ensure that decision is rational and based on appropriate factual and policy considerations. In this case, the FCC's reasons do not survive such scrutiny.

I

It was arbitrary and capricious to adopt a presumptive rule that *all* wiring located behind sheet rock is "physically inaccessible" when even the Commission's own characterization of the evidence shows that, at most, such

wiring only *sometimes, in some circumstances*, meets the test of inaccessibility.

As NCTA showed in its initial brief, regulatory presumptions are generally warranted only if it is “so probable” that the presumed fact is true that it is “sensible and timesaving” to assume its truth rather than require it to be repeatedly demonstrated. This is especially the case where what is being presumed is that an *exception to a statutory* mandate applies.

The FCC’s efforts to avoid meeting this burden are unavailing. It claims, first, that the Commission is unconstrained, in determining when and whether the “physical inaccessibility” exception applies, by the statutory mandate that the cable home wiring rules should apply only to wiring *inside* residential units. It argues that since nobody appealed the rules placing the demarcation point 12 inches *outside* residential units or extending the demarcation point even further in cases of physical inaccessibility, it no longer need take into account the statutory limitation in interpreting and applying its exception. But both the 12-inch rule and the “physical inaccessibility” exception facilitated the statutory purpose of enabling access to wiring inside residential units. The FCC remains bound to construe those provisions narrowly to remain faithful to its statutory mandate. Here, it failed to do so.

The FCC also claims that any overbreadth in its presumptive rule was reasonable and permissible in order to avoid the chaos and confusion that would supposedly result if disputes regarding the physical accessibility of wiring behind sheet rock had to be resolved on a case-by-case basis. But there is no evidence – and the FCC’s Report and Order made no finding – that any such chaos and confusion has occurred or is likely to occur in the absence of a presumptive rule classifying all such wiring as inaccessible.

The FCC also argues that any overbreadth in its presumptive rule is cured because wiring behind sheet rock is only “likely” to be deemed inaccessible under the codified rule. Even if the FCC intended its decision to be qualified in this manner – and the language of the Report and Order is contrary to this post hoc claim – the availability of a “safety valve” provision that enables parties to overcome a factual presumption in particular cases cannot save an otherwise unreasonable presumption.

II

In assessing the conflicting evidence regarding the costs and difficulty of accessing wiring behind sheet rock, the Commission did not engage in “reasoned decision making.” As NCTA’s initial brief showed, the FCC’s reasons for crediting the assertions in some declarations and affidavits while rejecting the contrary assertions went beyond the bounds of logic, beyond what the evidence

supported, and beyond what its Congressional policy mandate permitted. The FCC's brief only confirms that this is the case.

The FCC's brief claims that the agency reasonably found that wiring behind sheet rock was comparable to wiring behind brick and cinder block because, in each case, cutting and repairing is required. But neither cutting nor repairing is a *relevant* similarity for purposes of the "physically inaccessible" exception. What is relevant under the rules at issue is whether the *costs* and *difficulty* of the cutting and repairing are similar – and there was no evidence or finding that they are.

The FCC's brief argues that the Commission reasonably concluded that the costs of accessing wiring behind sheet rock were at the high end of the estimates set forth in the declarations and affidavits because the lower estimates were "seriously incomplete" insofar as they did not include the costs of repainting and re-wallpapering walls after cutting and repairing the sheet rock. But the declarations and affidavits did not ignore or fail to take into account such costs. They specifically stated that, in most cases, there are no such costs because repainting and re-wallpapering are not required.

The FCC's brief contends that the FCC's finding that wiring behind sheet rock is "physically inaccessible" was also supported by fire and electrical standards, which deem such wiring inaccessible. But the FCC's own Report and

Order makes clear that while the fire and electrical standards indicate that cutting into sheet rock can cause damage to structural elements, that damage can be *repaired*. The FCC, again, found nothing in the standards regarding the cost or difficulty of making such repairs – the key element of physical inaccessibility as defined by the FCC’s rules and addressed by NCTA.

Finally, the FCC’s brief concedes that the Commission relied on policy considerations – specifically a policy of promoting competition – in deciding whether wiring behind sheet rock should be deemed “physically inaccessible,” and it contends that the Commission was fully entitled to do so. But, as NCTA showed in its initial brief, while an agency may rely on policy considerations that are consistent with its governing statute, it may not advance policy considerations that are flatly at odds with the legislative language, purposes or intent. The FCC’s brief makes no attempt to square the FCC’s “pro-competitive” basis for moving the demarcation point in all cases of wiring behind sheet rock with the Congress’s expressed intention that the cable home wiring rules apply *not* apply to MDU wiring outside the confines of residential units.

ARGUMENT

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

The FCC’s general rule implementing Section 624(i) of the Communications Act establishes the “demarcation point” for wiring covered by the cable home wiring rules as a point at or about 12 inches outside an MDU residential 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). In its brief, NCTA argued that, even accepting the Commission’s own characterization of the evidence it relied on, wiring behind sheet rock is only *sometimes, in certain circumstances*, difficult or costly to access. Since nothing in the statute or rules required the FCC to rule categorically that all wiring behind sheet rock either is or is not physically inaccessible, and since the existing rule allows parties to demonstrate that, in their particular circumstances, the “physically inaccessible” exception applies, we argued that the FCC should not have adopted such an all-encompassing rule.

NCTA argued that especially because the statute limits applicability of the cable home wiring provisions to wiring inside residential units, the “physically inaccessible” exception to the 12-inch rule should be construed narrowly. In particular, if the statutorily-based demarcation point is to mean anything, the FCC

cannot establish a presumption that this exception applies to an entire class of cases unless the evidence establishes a high probability that, in most cases, it *will* apply.

The FCC argues that it was free to establish a presumptive rule covering all wiring behind sheet rock even if it found only that such wiring is *sometimes* inaccessible. It denies that the statutory limitation has anything to do with the rule or with this case, and it even denies that the “physical inaccessibility” provision is an exception to the general 12-inch rule, much less that the exception should be narrowly construed. It argues that it was reasonable to establish an all-encompassing presumptive rule in order to avoid the chaos and confusion that would supposedly result from case-by-case resolution of disputes. And it contends that, in any event, the presumption is permissible because it only establishes that wiring behind sheet rock is “likely” to be deemed physically inaccessible and can be rebutted in particular circumstances. None of these contentions is supportable.

A. NCTA Is Not Foreclosed from Raising the Statutory Limitation.

The FCC contends that since NCTA did not challenge the Commission’s general rule establishing the demarcation point 12 inches *outside* of residential units, and then did not challenge the rule moving the point even further outside such units where the 12-inch point is physically inaccessible (as in obvious circumstances such as brick and cinder block), NCTA is now foreclosed from

arguing that the statutory limitation is in any way relevant to the interpretation and application of those rules. FCC Brief at 23.

But the Commission’s establishment of the demarcation point at a point 12 inches outside the residential unit was not a material departure from the statutory mandate to apply the rule only within residential units. To the contrary, it was a reasoned effort to *limit* the rule’s applicability to wiring inside the unit by placing it as close as possible to the unit while still ensuring that the wiring could be accessed without entering the unit.¹ The FCC’s subsequent decision to allow the demarcation point, only when physically inaccessible, to be moved to the nearest accessible point had the same reasonable purpose.

NCTA’s decision not to challenge those rules does not give the FCC carte blanche to interpret or apply them in any manner it chooses, without regard to their purpose and their statutory underpinnings. Each implementation – each exception – is separately reviewable for consistency with the underlying legislative language and purpose. *See, e.g., United States v. Haggard Apparel Co.*, 526 U.S. 380, 392 (1999) (“The analysis of a regulation’s application in any particular case, of course, may disclose an imprecise or imperfect implementation of the statute. ‘One can

¹ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435, 1437 (1993). The Commission offers no other explanation for its initial decision to establish such a demarcation point or for its subsequent decision not to move the demarcation point to encompass all home run wiring.

doubtless imagine questionable applications of the regulation that test the limits of the agency's authority.’ *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 714 (1995) (O'Connor, J., concurring). In the process of considering a regulation in relation to specific factual situations, a court may conclude the regulation is inconsistent with the statutory language or is an unreasonable implementation of it”).

B. “Physical Inaccessibility” Is an Exception to the General Rule Limiting the Cable Home Wiring Rules to Wiring Inside Residential Units and Should Be Narrowly Construed.

The FCC Brief claims that the “physical inaccessibility” provision is *not* an exception to the general 12-inch rule and therefore need not be construed narrowly. It contends that “the Commission’s ‘general rule’ is that cable home wiring extends beyond individual residential units in the MDU, and the Commission here simply interpreted that general rule (not any exception to it).” FCC Brief at 24. But this claim is at odds with the agency’s own characterization of its rules. The FCC, in its Report and Order, itself refers to the twelve-inch mark as the “*presumptive* demarcation point.” In other words, the 12-inch rule *is* the “general rule” – a rule that reflects and implements the Congressional mandate to limit the cable home wiring rules to wiring inside residential units. The physical inaccessibility provision is not an alternative, embedded in the “general rule.” It is

an *exception* to this rule – an exception, that, to be true to the purpose of the rule itself, must be narrowly construed.

C. There Is No Basis for Concluding – and the FCC Made No Finding – that a Broad Presumptive Rule Is Necessary To Prevent Chaos and Confusion.

The FCC’s brief argues that even overbroad presumptive rules are permissible, and that the Commission is not required to rely on continued case-by-case determinations. It argues, first, that “the Commission properly rejected such a chaotic approach, concluding instead that it was necessary to have clear guidance that would avoid confusion and speed competitive entry.” FCC Brief at 24. This is a post hoc rationalization of counsel. The FCC made *no* finding that the existing rule was causing chaos or confusion, or that an excessive number of requests for case-by-case adjudication had been or would be filed. Nor could it have; there was no evidence in the record of any such problems.

Indeed, the request for a declaratory ruling by RCN in 1999 that started this whole proceeding appears to have been the *sole* case in which any party has sought or required FCC resolution of a dispute under the cable home wiring rules. Not a single additional case has been identified. Indeed, in the absence of any flood of complaints, adjudication of any case-by-case complaints that might arise would enable the Commission to apply its rule in a more tailored and refined manner and

to provide more precise guidance than by declaring that every wall of sheet rock in every MDU is “physically inaccessible.”

Second, the FCC argues that “[t]here was no requirement that the Commission find that this conclusion [that wiring behind sheet rock is physically inaccessible] would apply in the particular circumstances of every single MDU,” FCC Brief at 24, citing *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975). That case, however, addressed only whether a particular statutory classification could pass *constitutional* muster under the due process and equal protection clauses of the Fifth and Fourteenth Amendments if the lines drawn by the classification were, in some particular cases, over- or under-inclusive. Its citation does not counter the decisions of this Court and the Supreme Court which hold that, as a matter of *administrative* law, agency presumptions must be “consisten[t] with their governing statutes,” and are appropriate only if the presumed fact is almost always – if not in every single circumstance – likely to be the case.²

² Verizon’s suggests that NCTA offered no case support for this proposition. But it fails even to mention, much less attempt to distinguish, NCTA’s citation of *Chemical Mfrs. Ass’n v. DOT*, 105 F.3d 702, 705 (D.C. Cir. 1997), which held that even a rebuttable presumption is 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’” (quoting *NLRB v. Curtin Matheson Scientific, Inc.* 494 U.S. 775, 788-89 (1990)). See also *Secretary of Labor v. Keystone Coal Mining*, 151 F.3d 1096, 1100-01 (D.C. Cir. 1998).

D. The Opportunity to Rebut a Presumption in Particular Circumstances Cannot Save an Otherwise Unreasonable Presumption.

Finally, the FCC’s brief points out that the rule that was adopted merely states that wiring behind sheet rock “would *likely* be physically inaccessible” – not that, in any given case or in all cases, it *is* physically inaccessible. FCC Brief at 24. While that is what the rule states, the FCC’s Report and Order went much further. Although the FCC’s brief emphasizes the term “likely” over and over, the Report and Order mentions it in this context only *once*, in the “Ordering Clause” at the very end, in which it orders that the rule be amended “to include sheet rock as an example of one of the materials that would likely be considered physically inaccessible. . . .” The Report and Order categorically states, at the very outset, that “we conclude that cable wiring located behind sheet rock qualifies as physically inaccessible under the Commission’s rules for purposes of determining the demarcation point between home wiring and home run wiring.” And the discussion that follows is replete with similarly unmitigated conclusions.

If the FCC now takes the view that its Report and Order is merely advisory and has no binding or precedential effect, then obviously there is nothing to appeal in this case. But even if the rule is merely intended to establish a *rebuttable* presumption that wiring behind sheet rock is inaccessible, there was still no basis for establishing this presumption. As this Court has made clear, the availability of

a “safety valve” provision that enables parties to overcome a factual presumption in particular cases cannot save an otherwise unreasonable presumption.³

II. THE FCC’S ASSESSMENT OF THE CONFLICTING EVIDENCE WAS ARBITRARY AND CAPRICIOUS.

Wholly apart from whether the FCC erred in adopting an all-encompassing presumptive rule when its own assessment of the conflicting evidence did not support such a rule, NCTA argued that the Commission’s assessment of that conflicting evidence was itself arbitrary and capricious. It is, of course, the FCC’s task, and not the Court’s, to weigh and assess the evidence in the record. But it is the Court’s task to assess the *reasons* given by the agency for its determination in order to ensure that the decision is rational and based on appropriate factual and policy considerations. *See, e.g., American Petroleum Institute v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) (“Where an industrial by-product may be characterized as

³ *See National Mining Association v. Babbitt*, 172 F.3d 906, 912 (D.C. Cir. 1999) (“The government’s response is anemic. It emphasizes that the regulation permits a state regulatory authority to petition the Department for a different angle if it can demonstrate that its proposed angle is more reasonable, and also permits a mining company to request a different site-specific angle if it too could demonstrate a more reasonable calculation. But the government does not claim – nor could it – that these safety valve provisions could save the regulatory presumption if we thought it unreasonable. As we have said repeatedly, an evidentiary presumption is ‘only permissible if there is a sound and rational connection between the proved and inferred facts, and 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.’” (*quoting Secretary of Labor v. Keystone Coal Mining*, 151 F.3d 1096, 1100-01 (D.C. Cir. 1998) (emphasis in original) (internal citations omitted)).

discarded or ‘in process’ material, EPA’s choice of characterization is entitled to deference. However, the record must reflect that EPA engaged in reasoned decision making to decide which characterization is appropriate.”) (Citation omitted.) The FCC’s brief only confirms that, in this case, the FCC has failed this test.

For example, NCTA submitted a number of declarations from persons with substantial experience in wiring MDUs attesting to the fact that the cost and difficulty associated with accessing wiring behind sheet rock was not significantly different from the costs and difficulty of accessing wiring behind molding – which, under the Commission’s rule, is generally *not* deemed to be physically inaccessible. According to the FCC’s brief, the Commission rejected this evidence and concluded that “accessing wiring behind sheet rock is more like accessing wiring behind ‘brick or cinder block’” – which *is* deemed physically inaccessible – “because it is necessary to cut into the sheet rock and repair it once the wiring has been accessed.” FCC Brief at 20.

But the fact that both sheet rock and brick or cinder block require cutting and repairing is not a *relevant* similarity, any more than the fact that sheet rock and cinder block are both chalk-colored. What matters, under the FCC’s own definition, is whether the *cost and difficulty* of accessing wiring behind sheet rock (including any necessary cutting and repairing) is comparable to the cost and

difficulty of accessing wiring behind molding or of accessing wiring behind brick or cinder block. *See* 47 C.F.R. § 76.5(mm)(4). The FCC's brief does no better job than the Report and Order in explaining why the Commission rejected the substantial expert evidence that the cost and difficulty is, in fact, often insignificant and no greater than that associated with molding.

Thus, the FCC's brief notes that while "the record included a wide range of per-unit cost estimates (from \$25.00 to \$1000)" for accessing wiring behind sheet rock, it contends that the FCC rejected estimates at the lower end of the range "because it was clear that the estimates at its lower end were seriously incomplete" and "did not take into account cost elements such as the repair and restoration work (including repainting and re-wallpapering) typically demanded by MDU owners and managers." FCC Brief at 22.

The low-cost estimates in the nine declarations submitted by cable installers did *not*, however, ignore the costs of repainting and re-wallpapering and were not "seriously incomplete," as the FCC contends. FCC Brief at 22. To the contrary, the declarants made clear that in their experience, such repainting and re-wallpapering was not generally necessary and was not, as the FCC's brief asserts, "typically demanded by MDU owners and managers." As the declarations indicated, all that is required to repair and restore the sheet rock in most instances is to paint over the patch in a manner that matches the paint on the walls or to

install an “attractive” or “innocuous” wall plate that “matches the interior decoration of the building.” *See* Declaration of Al Costanzi, ¶ 6 (J.A. ___); Declaration of Joseph Danno, ¶ 6 (J.A. ___). *See also* Affidavit of John Kuhn, ¶ 4 (J.A. ___); Affidavit of William J. Kelly, ¶ 4 (J.A. ___); Declaration of Christopher Patterson, ¶ 4 (J.A. ___); Declaration of Jack Rockwell, ¶ 4 (J.A. ___).

Indeed, even the FCC’s own Report and Order stated only that “as Verizon and other commenters note, the cost of repairing sheet rock *can* often include repainting and re-wallpapering entire walls or ceilings.” Report and Order, 22 FCC Rcd 10640, 10660 (emphasis added) (J.A. ___). Whatever discretion the FCC may have to decide that the costs of such repainting and re-wallpapering are significant in some circumstances (although no actual case has ever been presented to the agency), it had no basis to conclude that such costs are *generally* incurred in the process of installing wiring behind sheet rock – and that the estimates of low-cost submitted by cable industry experts simply neglected to include such costs in their calculations.

The FCC’s brief also cites guidelines from the National Fire Protection Association and the National Electric Code as support for the FCC’s findings that wiring behind sheet rock should be deemed physically inaccessible. FCC Brief at 26 n.30. But, as the Report and Order and the brief itself make clear, those determinations support, at most, a finding that accessing such wiring may cause

modification and damage to structural elements – “albeit modification and damage that may be repairable.” 22 FCC Rcd at 10653 (J.A. ___). They do not suggest that the costs or difficulty of repairing any such damage would, as in the case of brick or cinder block, be so significant as to render the wiring physically inaccessible.

Invoking the National Fire Protection Association and the National Electric Code may conjure up the notion that, costs aside, cutting through sheet rock to access cable wiring creates serious issues of safety that warrant a tilt of the analysis towards a finding of inaccessibility. But with a moment’s pause, it is obvious that this is not the case. If it were prohibitively dangerous to cut and repair sheet rock, how would the existing cable operator’s original wiring have been installed in the first place? While it is sometimes the case that wiring is installed in *new* MDUs before the sheet rock walls are put in place, evidence in the record makes clear that cable wiring is also commonly installed for the first time behind sheet rock “where the sheet rock or drywall is preexisting.” Declaration of Christopher Patterson, ¶ 3 (J.A. ___). Indeed, while the FCC suggests that building owners often do not permit new entrants to access such wiring because of the damage and disruption would supposedly result, one cable engineer pointed out that his company had installed new wiring behind sheet rock “in countless installations” specifically because “the customer or landlord will not allow it to use other methods to install wiring within the building.” *Id.*

Therefore, it may be, as Verizon and others argued, that landlords sometimes prohibit new entrants from accessing wiring behind sheet rock because of “messiness, inconvenience and disruption.” *See* NCTA Brief at 32-33. It could even be the case that they do so, as the FCC’s brief now suggests, because accessing such wiring “involves a significant modification to the affected surfaces.” FCC Brief at 28. But none of these reasons are sufficient to support the presumption that the wiring cannot safely be accessed – or that any damage to the walls cannot be easily and inexpensively repaired.

Finally, the FCC’s brief takes issue with NCTA’s contention that the Commission’s decision was impermissibly based on a *policy* preference that was at odds with the policy balance struck by Congress. The FCC’s brief concedes that the Commission “took account of Congress’s and the Commission’s policy interest in extending the benefits of video competition to the residents of MDUs.” FCC Brief at 29. And it cites cases affirming an agency’s right to advance “its view of the underlying regulatory purpose and of good policy.” *Id.*

Obvious to all, an agency is permitted, in establishing rules, to take into account a policy goal that is consistent with its enabling statute, whether that be competition, technical innovation, or another worthwhile goal. But as NCTA showed in its initial brief, the Commission may not seek to advance a regulatory policy in a manner that Congress has specifically rejected. And it showed that

when Congress directed the FCC to adopt rules governing the disposition of cable home wiring, whatever policy preference it may have had for promoting competition was accompanied by a determination that the FCC's rules should be confined to wiring "within the interior premises of a subscriber's dwelling unit."⁴

Unlike the decision here, the FCC's previous decisions recognized this limitation. The Commission established the demarcation point just outside the residential unit. It refused to move it to encompass "home run" wiring outside the unit and throughout the building, even though doing so might have made it easier for new competitors to provide service. And it established an exception only when the wiring inside the unit was "physically inaccessible" at the demarcation point – not whenever moving the demarcation point might make it easier or less expensive for a new competitor to compete.

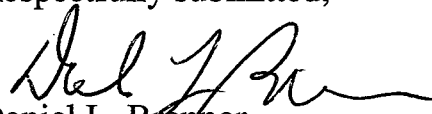
⁴ See, e.g., *Board of Governors of Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.")

The FCC's brief tellingly fails to address or rebut these points. It ignores the cases cited by NCTA, and it ignores the argument that Congress's policy was that cable home wiring rules *not* be extended beyond the confines of residential units. To the extent that it took into account policy considerations in assessing the conflicting factual evidence – as it concedes it did – the FCC should have recognized that the underlying policy choice made by Congress here favors *not* moving the demarcation point. Instead, the agency put its policy thumb on the wrong side of the scales.

CONCLUSION

The FCC had no legitimate basis for extending the cable home wiring rules to encompass wiring far beyond the confines of residential units whenever MDU wiring is located behind sheet rock. It was arbitrary and capricious to establish a presumptive rule governing such wiring in all circumstances when even the Commission acknowledged that wiring behind sheet rock only sometimes meets the tests of physical inaccessibility. Moreover, the FCC's findings regarding the costs and difficulty of cutting and repairing sheet rock were not based on reasoned decision making. The decision should once 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 4,840 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

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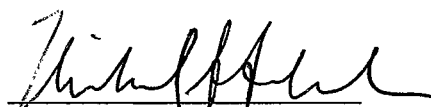
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 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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