

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Cablevision Systems Corporation)	
)	NAL/Acct. No. 012CB0001
Apparent Liability for Forfeiture)	

FORFEITURE ORDER

Adopted: November 21, 2000

Released: November 28, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

I. Introduction

1. On February 16, 2000, the Commission initiated a forfeiture proceeding against CSC Holdings, Inc. (hereinafter “Cablevision”) with the release of a Notice of Apparent Liability (“NAL”) finding that the operator was apparently liable for a forfeiture in the amount of one hundred twenty-seven thousand five hundred dollars (\$127,500).¹ The NAL was issued in response to Cablevision’s failure to position WXTV on channel 41 in 17 of the 41 cable systems under Cablevision’s control in the New York television market, as mandated by Section 614 of the Communications Act, as amended,² and by the Commission’s implementing rules.³ Cablevision filed an Opposition to the NAL seeking to cancel the imposition of a forfeiture. WXTV filed a response to Cablevision’s Opposition, supporting the Commission’s findings and conclusion that a forfeiture was appropriate.⁴ For the reasons stated below, we find that Cablevision is liable for the full amount of the forfeiture, as proposed in the NAL.

II. Background

2. In the NAL, the Commission alleged that Cablevision had repeatedly refused to carry WXTV on cable channel 41 without justification, despite the television station’s repeated requests to do so since 1993.⁵ The

¹*Cablevision Systems Corporation—Apparent Liability for Forfeiture*, 15 FCC Rcd 3269 (Feb. 16, 2000).

²47 U.S.C. §534(b)(6).

³47 C.F.R. §76.57(a).

⁴ We note that there is no rule limiting the number of parties that may comment on the appropriateness of a forfeiture. Given this, and the fact that WXTV’s comments are relevant to this matter, we will consider the station’s pleading here.

⁵NAL, 15 FCC Rcd at 3270

Commission noted that, as a result, WXTV has been carried on at least 15 different cable channels on Cablevision systems market-wide.⁶ The Commission found that WXTV had attempted to negotiate a mutually satisfactory settlement with Cablevision concerning the channel positioning dispute, but the operator had continually refused to agree to any written terms proposed by the station.⁷

3. The Commission tentatively found Cablevision to be in violation of the Act and the Commission's rules on a repeated basis since at least February 16, 1999.⁸ In determining the amount of the forfeiture, the Commission was guided by *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*,⁹ which takes into consideration the standards set forth in §503(b)(2) of the Act. Under these standards, \$7,500 is the base forfeiture for violations of the cable broadcast signal carriage rules.¹⁰ The Commission applied the forfeiture base on a per system basis. The Commission concluded that 17 cable systems were at issue and the total amount of the fine was calculated to be \$127,500 (17 x \$7,500). The Commission noted that Cablevision's violations were particularly egregious with respect to those systems where no technical or significant cost issues precluded on-channel carriage in compliance with Section 614.¹¹

4. At the same time the Commission released the NAL, it also released a companion Memorandum Opinion and Order which addressed several issues Cablevision raised on reconsideration related to the carriage of WXTV on Channel 41.¹² In this Order on Reconsideration, the Commission modified the compliance timetable established by the Cable Services Bureau for Cablevision to commence on-channel carriage of WXTV. The modification was deemed appropriate in light of the unique technical circumstances surrounding particular systems.¹³ The Commission also addressed Cablevision's initial arguments that a forfeiture was not warranted. With regard to this matter, the Commission found that the record reflected the propriety of implementing a forfeiture due to Cablevision's clear lack of compliance

⁶*Id.*

⁷*Id.*

⁸*Id.* at 3270-71. Section 503 prohibits the Commission from imposing a forfeiture penalty for a violation that occurred more than one year prior to the issuance of the notice of apparent liability. 47 U.S.C. 503(6)(B). Nevertheless, we may take into account actions or facts that occurred more than a year ago when considering the amount of the forfeiture. *Roadrunner Transportation, Inc., Dynamex Operations East, Inc., City Courier, Inc., Eastside/Westside, Inc.*, 15 FCC Rcd 9669, 9671-72 (2000).

⁹12 FCC Rcd 17087 (1997).

¹⁰47 C.F.R. §1.80(b)(4)(section 1).

¹¹NAL, 15 FCC Rcd at 3271.

¹²See *WXTV License Partnership, G.P., Order on Reconsideration*, FCC 00-48, 15 FCC Rcd 3308 (rel, Feb. 16, 2000) (Hereinafter "Order on Reconsideration"). This proceeding originated in 1998, when WXTV first filed a complaint concerning the on-channel carriage dispute with Cablevision. The Cable Services Bureau ("Bureau"), on delegated authority, issued an Order finding that Cablevision had no excuse for not complying with the channel positioning requirement with respect to 21 of the 38 systems involved. See *WXTV License Partnership*, CSR 5327-M, DA 99-733, 1999 WL 221813, (CSB—rel. April 16, 1999). According to the Bureau, on the other 17 systems, various technical and costs issues were raised which appeared sufficiently serious that Cablevision was afforded additional time to come into compliance (180 days in 16 cases and upon rebuild in one case). *Id.*

¹³*Order on Reconsideration*, 15 FCC Rcd at 3314.

with the channel positioning requirements on a number of occasions and across cable systems.¹⁴ Finally, the Commission declined Cablevision's invitation to declare that the Act's must carry provisions as unconstitutional under the Fifth Amendment's Takings Clause.¹⁵ In so doing, the Commission recognized that the Supreme Court has recently given administrative agencies greater discretion in determining the constitutionality of implementing statutes, but noted that agencies are under no obligation to do so.

III. Discussion

A. The Adequacy of the Record

5. In its claim that the Commission should not impose a forfeiture, Cablevision first argues that the Commission did not adequately appreciate the comprehensive nature of its negotiations with WXTV that were taking place throughout the time period at issue.¹⁶ Cablevision states that it spent significant time attempting to negotiate an alternative channel on which to carry WXTV uniformly across the New York market, as it had done successfully with other broadcasters.¹⁷ Cablevision states that these discussions took place as part of a larger business relationship that Cablevision had with WXTV's parent, Univision.¹⁸ It adds that many of the discussions between the parties occurred at a high level, and involved not only WXTV channel positioning requests, but also potential carriage of the cable programming of Galavision (Univision's cable programming arm) on Cablevision's cable systems. In this context, Cablevision states, WXTV's channel position was presented as one of a number of items on the table that could be negotiated.¹⁹

6. Cablevision argues that the record demonstrates that the parties discussed numerous alternative channel positions for WXTV at various times throughout the negotiations.²⁰ Cablevision claims that even WXTV's form letters to Cablevision in 1993 and 1996 electing carriage on channel 41 stated that carriage on alternate channel positions would also be acceptable.²¹ Cablevision posits that these letters served as "placeholders" to cover the broadcasters, and in many cases, also served to open discussions between Cablevision and the broadcaster over a mutually agreeable channel position.

7. Cablevision claims that WXTV's representatives, in their numerous conversations during the intervening years, never insisted that channel 41 was the only alternative, or sent any other correspondence beyond the standard form letters indicating that they desired carriage on channel 41 notwithstanding the parties' negotiations. Cablevision states that it was only when the parties could not agree on an acceptable

¹⁴*Id.*, 15 FCC Rcd at 3317.

¹⁵*Id.*, 15 FCC Rcd at 3318-19.

¹⁶Cablevision Opposition to NAL (hereinafter, Cablevision Opp.) at 4.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.* at 5.

²⁰*Id.*

²¹*See Id. citing* WXTV Petition for Special Relief at 3.

substitute uniform channel position that WXTV filed its complaint.²² Cablevision adds that, WXTV, and its parent, Univision, participated in extensive and lengthy discussions with Cablevision without ever stating a desire to be repositioned to channel 41 while negotiations were pending. Cablevision also asserts that had it moved WXTV to channel 41 on those 17 systems,²³ and successfully negotiated an alternative channel position on the other, high-cost systems, the result would have been a fragmented channel position for WXTV across the New York market, the very result that WXTV sought to avoid.

8. Cablevision claims that WXTV was not clearly focused on obtaining channel 41 for its uniform channel position until late 1998. Cablevision asserts that, until that time, it willingly engaged in discussions concerning carriage on various alternative channel positions.²⁴ Cablevision argues that it was only when negotiations broke down over positioning WXTV's signal on any of channels 1-13 that WXTV filed its complaint for carriage on channel 41 as part of a larger effort to move its signal to channel 41 across the market.²⁵

9. Cablevision asserts that, far from "willfully" or "repeatedly" failing to comply with the must-carry rules, it made numerous good-faith attempts to achieve WXTV's objectives for a uniform channel position.²⁶ Cablevision cites, for example, that despite the tremendous costs associated with repositioning WXTV to channel 41 in the Hauppauge cable system -- over \$1 million dollars -- and despite the fact that in light of that significant cost, the Cable Services Bureau exempted Cablevision from compliance with the channel positioning requirements on that system until such time as the system was rebuilt, it nonetheless has determined that in order to achieve the parties' mutual desire for channel position uniformity, it planned on repositioning WXTV to channel 41 in April, 2000 in the Hauppauge system.

10. Cablevision argues that the Commission's conclusion to impose a forfeiture not only ignores these facts, but also ignores the provision in the must-carry rules that specifically allows a broadcast station and cable operator to mutually agree upon an alternate channel position from that specified in the rules.²⁷ According to the operator, the rules do not require that the cable operator place the broadcast signal on any particular channel while such negotiations are taking place. According to Cablevision, "it would be nonsensical to require numerous separate channel realignments while negotiations specifically allowed by the Commission's rules are taking place."²⁸

²²*Id.*

²³Cablevision notes that the Commission's conclusion assumes that it had the power to implement channel positioning changes in all of the systems at issue. Cablevision states that it had acquired several of the systems at issue from TCI during the period in which negotiations with WXTV were ongoing, and did not control those systems' line-ups prior to that time. *Id.* at 6. Since Cablevision assumed control of the systems while the channel positioning dispute was ongoing, but did not honor the station's positioning request as it should have, the forfeiture notice has included these former TCI systems in the penalty calculation.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at 7.

²⁷*Id.* citing 47 C.F.R. §76.57(c).

²⁸*Id.*

11. In response to Cablevision's opposition, WXTV asserts that the operator's pleading is repetitive of its prior "unpersuasive" filings in this matter and is designed merely to delay the issuance of a forfeiture order.²⁹ WXTV argues that the existence of negotiations is irrelevant to whether Cablevision met its statutory and regulatory obligations to commence carriage of the station on channel 41. WXTV also disagrees that Cablevision engaged in good faith channel positioning negotiations. In this regard, WXTV asserts that: (1) Cablevision refused to negotiate with the station for years until litigation was imminent; (2) Cablevision was reluctant in appointing a company official to discuss the channel positioning matter with the station; (3) Cablevision made it difficult to meet with station representatives; (4) Cablevision refused to discuss alternate terms or provide concrete proposals in writing; (5) Cablevision never explained its refusal to move the station to channel 41 on the systems where the operator would incur no costs; and (6) when the station and the operator reached a supposed verbal agreement concerning the repositioning of WXTV to channel 41, Cablevision refused to sign it.³⁰ In sum, the station states that it was not obligated to negotiate with the operator and Cablevision had no right to frustrate its channel positioning election by refusing to honor it year after year.³¹

12. We are not persuaded by Cablevision's arguments here. For the most part, the operator repeats the positions it stated in earlier pleadings. We had an opportunity to address such arguments in the Order on Reconsideration where we rejected them as baseless.³² We continue to believe that the existence of negotiations is irrelevant to whether Cablevision met its statutory and regulatory obligations to commence carriage of the station on channel 41. Once a television station makes an affirmative channel positioning election, it has a right to such carriage without further negotiation. Cablevision has therefore not met its burden, on this point, to rescind or reduce the proposed forfeiture.

B. Commission Precedent

13. Cablevision also argues that the imposition of a forfeiture in the circumstances presented by this case is entirely inconsistent with Commission precedent. It states that the Commission never before has imposed a forfeiture for violation of the must-carry rules. Further, the Commission offers no explanation for its departure from precedent. Thus, Cablevision claims, that the imposition of a forfeiture would be arbitrary and capricious.

14. Cablevision states that the Commission has been presented with instances of violations of the must-carry rules, but has declined to impose a forfeiture each time.³³ Cablevision also states that the Commission has not imposed a forfeiture penalty in more recent channel positioning complaints.³⁴

²⁹WXTV Response at 1.

³⁰*Id.* at 8-9.

³¹*Id.* at 3.

³²*Order on Reconsideration*, 15 FCC Rcd at 3317.

³³Cablevision Opp. at 8. Cablevision cites, for example, *Johnson Broadcasting, Inc. v. Prime Cable of Fort Bend, L.P. and Prime Cable Income Partners, L.P.* 9 FCC Rcd 3574 (1994). According to Cablevision, the cable operator in question admitted that it had refused to carry a qualified broadcaster in violation of the must-carry rules because it had believed the Supreme Court would strike down the rules soon, yet no forfeiture was issued.

³⁴*Id.* Cablevision cites *Paxson Hawaii License, Inc., Must-Carry Complaint Concerning Carriage of Television Station KPXO(TV), Kaneohe, Hawaii on Cable Systems Served by Oceanic Cable* 14 FCC Rcd 9105 (1999), as an

Cablevision further posits, that even where the cable operator has failed to respond at all to a broadcaster's request for carriage or failed to respond to the filing of a complaint at the Commission, the Commission has not imposed any forfeiture penalties.³⁵

15. Cablevision asserts that it is a basic principle of administrative law that in order to avoid acting in an arbitrary and capricious manner, the Commission should, at a minimum, seek to treat comparably situated entities similarly and according to established precedent, or at least provide a rational explanation for its differing treatment.³⁶ According to Cablevision, the Commission's decisions should provide cable operators with a reasonable and predictable warning of the standards that will be applied to parallel situations. Cablevision argues that in neither the NAL or Order on Reconsideration does the Commission explain its determination to impose a forfeiture on Cablevision when it has never before taken such action, even when confronted with analogous factual situations, or how this situation is deemed to deserve a financial penalty when no prior case did.³⁷

16. WXTV disputes Cablevision's characterization of the Commission's forfeiture action as arbitrary and capricious. The station argues that the facts presented in this proceeding are far more egregious than those presented in other cases the Commission has decided.³⁸ WXTV also states that none of the cases Cablevision points to involved the protracted history of noncompliance and bad faith negotiations as evidenced in this particular instance. In addition, it asserts that there is nothing improper in an administrative agency enforcing its regulations, implemented pursuant to its authorizing statute, where there has been no judicial determination that the regulations or statute are unconstitutional.³⁹ WXTV states that Cablevision was on notice, pursuant to Section 1.80 of the Commission's rules, that forfeitures are an appropriate sanction for violations of the must-carry rules.⁴⁰

17. We reject Cablevision's arguments on this point as well. Cablevision's arbitrary and

example. According to Cablevision, the cable operator argued that the broadcaster's channel positioning request could not be accommodated due to technical difficulties until the system was rebuilt, yet the Commission did not seek to impose any forfeiture penalty.

³⁵*Id.* at 9. Cablevision cites *Complaint of WXTV License Partnership, G.P. v. Cable TV Tri-State, Inc. for Carriage of WXTV(TV), Paterson, New Jersey*, 14 FCC Rcd 7221 (1999). According to Cablevision, the Commission did not impose any forfeiture penalty on Cable TV Tri-State, even though it involved the same broadcaster -- WXTV -- and even though Cable TV Tri-State had failed to acknowledge WXTV's carriage rights at all.

³⁶*Id.* at 10, citing *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (reminding the Commission of "the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment"). See also *Cotton Petroleum Corp. v. United States Dept. of Interior*, 870 F.2d 1515, 1526 (10th Cir. 1989) ("An administrative agency must explain its departure from prior norms"); *Graphic Communications Int'l Union v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988) ("Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious").

³⁷*Id.*

³⁸WXTV Response at 10.

³⁹*Id.*

⁴⁰*Id.* at 11.

capricious argument amounts to a selective prosecution claim, which we believe, lacks merit. The Commission is a regulatory agency with broad prosecutorial discretion in enforcement proceedings.⁴¹ The Commission has the discretion to enforce its rules through a forfeiture proceeding as long as the violation is substantiated and due process is observed.⁴² To establish that the Commission has abused its prosecutorial discretion, Cablevision would have to show that the Commission has engaged in “outrageous conduct that offends fundamental fairness and shocks the universal sense of justice,” or that prosecution is based on impermissible factors, such as race or religion.⁴³ Cablevision’s argument that the Commission has declined to impose forfeitures in other matters involving a violation of the must carry rules fails to meet the heavy burden required to sustain a charge of selective prosecution. Indeed, in this case, we found Cablevision’s behavior of continuous and willful non-compliance so clear as to trigger an enforcement proceeding. The record evidence supports such a conclusion.

18. The cases Cablevision cites in support of its “arbitrary and capricious” argument likewise do not require cancellation of Cablevision’s forfeiture. The operators’ patterns of behavior in those cases were not as egregious as Cablevision’s were here. In the *Prime Cable*, *Cable TV Tri-State*, and *Oceanic Cable* proceedings, the cable operators did not tie-up the broadcast station’s must carry rights in supposed negotiations over a lengthy period of time or otherwise procrastinate in fulfilling its regulatory obligations.⁴⁴ Given the protracted history of noncompliance and unfulfilled promises, the timely issuance of a notice of apparent liability for forfeiture, and the fact that Cablevision has been on notice of the Commission’s must carry rules since 1993, we decline to cancel the forfeiture in this instance.

C. The Fifth Amendment

19. The operator also argues that the Commission's decision to impose a forfeiture penalty pursuant to an unconstitutional rule is a clear abuse of discretion. Cablevision states that it presented its constitutional challenge to the must-carry rules fully in its prior pleadings, both facially and as applied to the individual circumstances that were before the Bureau; the arguments set forth in those pleadings should

⁴¹See *Emery Telephone*, 15 FCC Rcd 7181, 7186 (1999) (para. 10 and n. 45) (rejecting petitioner’s argument that Commission’s refusal to cancel forfeiture constituted selective prosecution and was arbitrary and capricious). See also, *Heckler v. Chaney*, 470 U.S. 821 (1985) (“an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”)

⁴²See *In re Liability of Sonic Cable TV*, 96 FCC 2d 629 (1983) (rejecting the argument that the Commission’s failure to prosecute other cable systems for the same violation constituted selective prosecution and stating, “Although the Commission’s limited resources may result in violators going unpunished, this does not mean we cannot impose sanctions against those we find violating our rules.”) The requirements for a selective prosecution claim draw on ordinary equal protection standards where the claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. See, eg., *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974) (a defense of selective prosecution requires a showing that a subject has been singled out in bad faith because of such impermissible considerations as race, religion or desire to prevent an exercise of a constitutional right.)

⁴³See *Emery Telephone* at 7186 (para. 10 and n. 47) (quoting, *James A. Kay, Jr.*, 13 FCC Rcd 16369, 16373-74 (1998).

⁴⁴We note, however, that our exercise of enforcement discretion in these cases does not mean that we will never take enforcement action in similar circumstances.

be incorporated by reference.⁴⁵ In summary fashion, Cablevision explains that the must-carry rules force cable operators to give up the use of valuable channel capacity to unaffiliated broadcasters without compensation in return; that whether viewed as a *per se* physical taking of private property, or a *per se* regulatory taking that deprives property owners of all viable use of their property, the must-carry regulations violate the Fifth Amendment to the Constitution; and that where government regulations compel property owners to suffer a physical “invasion” of their property, “no matter how minute the intrusion, and no matter how weighty the public purpose behind it,” such a regulation is a *per se* taking in the absence of just compensation.⁴⁶

20. Cablevision re-asserts that under applicable Supreme Court precedent, the takings claim it presented is of the type suitable for agency decisionmaking, since it had presented a challenge to the must-carry rules both facially and as applied to its individual circumstances, and since a decision by the Commission is fully reviewable in federal court.⁴⁷ Cablevision adds, however, the Commission found that although it “recognize[d] that the decision in *Thunder Basin* may provide administrative agencies an opportunity to consider the constitutionality of implementing statutes under certain circumstances,” it would decline to exercise its authority to rule on the must-carry rules’ constitutionality.⁴⁸

21. Cablevision states that the Commission’s Order does not clearly state its reasons for declining to rule on Cablevision’s constitutional claim, but suggests that its refusal may be due to the fact that “Cablevision ... did not raise its Fifth Amendment claim until 1999 and has not provided any legitimate reason for its delay.”⁴⁹ Cablevision argues that it is an abuse of discretion for the Commission to refuse to rule on this basis.

22. According to Cablevision, it did not “delay” in raising its constitutional arguments.⁵⁰ Rather than immediately challenge the must-carry rules on takings grounds upon their passage in 1992, Cablevision states that it attempted to comply with the obligations imposed by Congress. Cablevision asserts it raised its claims, appropriately, in this instance where its rights were being violated not only facially, but by the particular circumstances presented -- a case in which compliance with the rules has and will cost Cablevision over four million dollars.⁵¹ In accordance with the principles of conserving scarce judicial and agency resources, Cablevision believes its restraint in challenging the rules should be commended, not criticized. Cablevision further argues that the constitutionality of a statute can be raised at any time, regardless of the parties’ “settled expectations”⁵² in a particular area. According to the operator,

⁴⁵Cablevision Opp. at 11 *citing* Cablevision’s Opposition to Petition for Special Relief (filed Jan. 7, 1999) at 14-24; Petition for Reconsideration (filed May 17, 1999) at 7-9; Reply to WXTV Opposition to Petition for Reconsideration (filed June 9, 1999) at 3-4.

⁴⁶*Id. citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *see also Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

⁴⁷*Id.* at 12 *citing Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 n.20 (1994).

⁴⁸*Id. citing Order on Reconsideration*, 15 FCC Red at 3318.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

a refusal to rule on Cablevision's constitutional claim based on an argument that Cablevision should not have "delayed" in raising it would have no basis in law and constitutes a clear abuse of discretion.⁵³

23. Assuming *arguendo*, that the Commission properly refused to decline ruling on the constitutional claims, Cablevision posits that it was equally incumbent upon the Commission to decline to impose a forfeiture pursuant to those questionable rules.⁵⁴ According to Cablevision, the only Commissioner to speak on the issue -- Commissioner Furchtgott-Roth in his concurring statement -- argued that "the agency's decision to avoid any substantive discussion of Cablevision's Takings claim pays silent tribute to the strength of that claim," that the Takings claim was "well grounded in record fact and precedent," and that "when a broadcast station's signal is mandatorily carried over a cable system, that carriage constitutes a permanent, physical occupation of the cable operator's private property -- and thus a *per se* taking of that property."⁵⁵ Given the questionable constitutional status of the rules at issue, Cablevision argues that the Commission should not impose a fine for their violation without discussing and ruling on the merits of Cablevision's defense.

24. With regard to Cablevision's constitutional claim, WXTV asserts that the Commission should proceed to enforce its authorizing statute and the regulations promulgated thereunder. The station argues that Cablevision was obligated to affirmatively seek relief from the application of the channel positioning requirements rather than merely wait for WXTV to press its case; had it done so, it could have raised its constitutional issue with clean hands and in a more timely manner.⁵⁶ WXTV also argues that it could have sought judicial review of the Commission's interpretation of its constitutional claim before reaching the enforcement stage.⁵⁷

25. We disagree with Cablevision. The operator is essentially attempting to use this proceeding as a forum to have the Commission reconsider its decision in *WXTV License Partnership, G.P.*,⁵⁸ where the Commission declined to review the constitutionality of the underlying statutory requirement. For the reasons previously stated, we continue to believe that the statute should be enforced and we therefore reject Cablevision's argument.⁵⁹

IV. Ordering Clauses

26. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, **CABLEVISION SYSTEMS CORPORATION IS LIABLE FOR A FORFEITURE** in the amount of one hundred and twenty-seven thousand five hundred dollars (\$127,500) for its willful and repeated violation of Section 614 of the

⁵³*Id.* at 13.

⁵⁴*Id.*

⁵⁵*Id.* citing the Concurring Statement of Comm. Harold Furchtgott-Roth.

⁵⁶WXTV Response at 11.

⁵⁷*Id.*

⁵⁸*See Order on Reconsideration*, 15 FCC Rcd at 3318.

⁵⁹*Id.* at 3318-19.

Communications Act, 47 U.S.C. §534(b)(6), and Section 76.57(a) of the Commission's Rules, 47 C.F.R. §76.57(a).

27. **IT IS FURTHER ORDERED, PURSUANT TO** Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. §1.80(f)(4), that Cablevision Systems Corporation **SHALL HAVE** thirty (30) days from the release of this Order to **PAY THE FORFEITURE**. Payment may be made by credit card through the Commission's Credit and Debt Management Center, (202) 418-1995, or by mailing a check or similar instrument payable to the order of the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should be marked "NAL Acct. No. 012CB0001."

28. **IT IS FURTHER ORDERED** that two copies of this Order **SHALL BE SENT TO CABLEVISION SYSTEMS CORPORATION** by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

ATTACHMENT

IMPORTANT - READ INSTRUCTIONS AND RETURN ATTACHED FORM

The document you have received is a Forfeiture Order. You must pay the full amount of the forfeiture within 30 days of the date of the Order. You must complete the appropriate sections of the attached form and send it along with a check or similar instrument for the amount specified, made payable to the Federal Communications Commission. To assure that your payment is properly recorded, please enter on your check the control number appearing in the upper left hand corner of the attached form and return the extra copy of the Forfeiture Order that is enclosed, together with the check, to:

Federal Communications Commission
Post Office Box 73482
Chicago, IL. 60673-7482

If you have any questions concerning this forfeiture proceeding, please communicate them in writing to:

Federal Communications Commission
Cable Services Bureau
Washington, D.C. 20554

Alternatively, contact Commission staff personnel by telephone at (202) 418-7111 or by FAX at (202) 418-1069.

FEDERAL COMMUNICATIONS COMMISSION

Washington D. C. 20554

FORFEITURE CONTROL NO: 012CB0001

In response to an Order for a monetary forfeiture under the provisions of Section 503(b) of the Communication Act of 1934, as amended:

(CHECK APPROPRIATE BOX)

- I am returning a copy of the Forfeiture Order and enclosing a check or similar instrument, drawn to the order of the Federal Communications Commission, in full payment of the forfeiture amount as indicated in the Order. I have entered the control number appearing in the upper left-hand corner of this page on my check and am submitting it to:

Federal Communications Commission
Post Office Box 73482
Chicago, IL. 60673-7482

Cablevision Systems Corporation
Entity

Bethpage, Ny
City, State

Signature of authorized official

Date:

\$127,500

Amount of forfeiture as indicated by the Order

**CONCURRING STATEMENT
OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH**

In the Matter of Cablevision Systems Corporation
Forfeiture Order, NAL/Acct. No. 012CB0001

As I did in the original order in this case, I concur in today's result because Cablevision has a basic obligation under the must-carry statute to provide carriage on its systems to WXTV. *See* Concurring Statement of Commissioner Harold W. Furchtgott-Roth, *Cablevision Systems Corporation – Apparent Liability for Forfeiture*, 15 FCC Rcd. 3269 (Feb. 16, 2000). At the same time, as I have also noted, Cablevision's argument that such carriage, particularly as implemented by the Commission's rules, constitutes an uncompensated and unconstitutional taking of its property is not without force. *See id.*

Although the Commission clearly lacks authority to adjudicate constitutional questions or to declare a statute unconstitutional in the way that Article III courts do, we surely may consider constitutional issues in deciding how to apply our own discretionary rules in particular cases. *See Graceba Total Communications, Inc., v. FCC*, 115 F.3d 1038, 1041-1042 (D.C.Cir. 1997) ("The Commission has an obligation to address properly presented constitutional claims which. . . do not challenge agency actions mandated by Congress."). In this proceeding, I believe that we should have considered Cablevision's arguments more fully, as they may have provided a basis for minimizing the burdens not clearly mandated by the statute that our regulatory scheme places on Cablevision.