STATEMENT OF
COMMISSIONER BRENDAN CARR, DISSENTING

Re: *Cunningham Broadcast Corporation, et al.*, Forfeiture Order (August 14, 2024)

The forfeiture assessed in this Order may not seem large in the grand scheme. But it illustrates broader problems with the FCC's approach to enforcement. If we do not fix them, the courts will.

In this case, Sinclair aired a 30-minute children's program titled *Team Hot Wheels*. As the name suggests, this is a children's TV show based around Mattel's Hot Wheels line of toys. Standing alone, *Team Hot Wheels* constitutes qualifying children's programming under federal law and, as a general matter, broadcasting that program does not constitute a violation of any rules. Sinclair also aired a commercial advertisement for Hot Wheels toys. Again, standing alone, there is no general FCC prohibition on broadcasting those types of commercials. The problem—and the violation in this case—arose because Sinclair combined the two. It aired the Hot Wheels commercial during the *Team Hot Wheels* TV show. By operation of federal law, the airing of that particular commercial (an ad for a product that is associated with the children's program) during the children's program itself converts the entire 30-minute *Team Hot Wheels* TV show from a program that qualifies as children's programming to one that does not. Because all 30 minutes are treated as commercial programming in this scenario, the broadcasters in this case exceeded the allowable number of commercial minutes during children's programming.

At bottom, there is no question in this case that Sinclair exceeded the FCC's limits on commercial material in children's programming. A technical error at its central facility caused the broadcaster to insert those ads for Hot Wheels toys during the kids' show *Team Hot Wheels*. This happened 11 times over a single month in 2018. After discovering this, Sinclair fixed the error and disclosed it to the Media Bureau.

Ordinarily, the parties would have entered a consent decree and the licensee would have agreed to a penalty. After all, nobody disputes that a violation took place. But that is not what happened here. Rather than settle what everyone understood to be a short-lived error, the FCC decided to throw the book and impose a forfeiture of $2,652,000.[1]

Let's put that amount in context. When a broadband provider charged customers for equipment they did not order, the FCC settled that violation for $2.3 million.[2] When an individual transmitted false distress calls and sent unauthorized radio signals that maliciously interfered with NYPD officers' communications, the FCC proposed a $404,166 forfeiture.[3] For a 911 outage spanning ten states and affecting thousands of calls, the FCC entered settlements between $470,000 and $3.8 million.[4]

So, perhaps unsurprisingly, today's $2.652 million penalty is not how any of this should work under the law. Under the Communications Act and the FCC's rules, most forfeitures against broadcasters are limited to $61,238 per violation and capped at $612,395 for any single act. A violation of the children's programming rules results in a base forfeiture of $8,000, and an upward adjustment is typically not much greater than that. While a higher forfeiture may be warranted in egregious circumstances, in

[1] In this Order, the FCC also fined other broadcasters that reran the programming with fines as high as $140,000.

[2] *Comcast Corporation*, Order, 31 FCC Rcd 11431 (2016).

[3] *Jay Peralta*, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 3246, 3246-47, paras. 2-4 (2017).

[4] Press Release, *Four Communications Providers Settle FCC Investigations Into Compliance With 911 Rules*, https://docs.fcc.gov/public/attachments/DOC-378732A1.pdf.

other cases a company will get away with a mere warning.

To evade these authorities and precedents, today's Order justifies its $2.65 million penalty through a series of moves that do not withstand scrutiny. The FCC treats a single error at Sinclair's central facility as 83 separate rule violations, one for each station that broadcast the material. Then, after dinging the company for the same conduct 83 times over, the FCC dings Sinclair again by increasing the penalty based on the violation's "geographic reach" across 83 markets. The FCC calls the violation "willful" even as it acknowledges elsewhere that it was "inadvertent." It tars the company as a repeat offender even though the most recent incident happened nearly 20 years ago. The FCC characterizes Sinclair's compliance program as "ineffective" because, as the Order tells it, the violations demonstrated that the compliance program could not possibly have been effective. Under this circular logic, no set of internal controls could get credit in an enforcement action. And finally the FCC increases the forfeiture for Sinclair's deep pockets.

Our enforcement practices are at a fork in the road after the Supreme Court's latest string of administrative law decisions. The FCC is not safe anymore to disregard clear limits on its statutory authority after *Loper Bright*. Nor can this agency get away with arbitrary and capricious decision-making by ignoring obvious counterarguments and considerations, as *Ohio v. EPA* makes clear. And after *Jarkesy*, the FCC is on thinning ice when it decides the legality of its own enforcement actions involving forfeitures.

As I've said before, it is time for the FCC to start the process of fundamentally reforming our enforcement practices—lest the courts step in, including in cases where bad actors deserve accountability. I think the days are numbered for FCC enforcement decisions that rest on stacked penalties, creative math, surprise standards, and extraneous behavioral conditions.

I dissent.