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DISSENTING STATEMENT BY
COMMISSIONER JAMES H. QUELLO
IN THE MATTER OF
CONTINENTAL TELEPHONE CORPORATION - TAX CERTIFICATE

The granting of a tax certificate for the twenty-two cable television systems outside Continental's telephone operating areas is, I believe, an over-broad interpretation of Section 1071(a) of the Internal Revenue Code. The Commission's decision to grant the certificates turned on its interpretation of the Code's requirement that divestiture of the twenty-two "outside" systems was "appropriate" and found that "If we had not adopted Section 64.601 of the Rules, Continental would not have sold the non-telephone area systems."

Section 1071(a) of the Internal Revenue Code provides in pertinent part that:

> "If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission..." (emphasis added)

While sale of the "outside" systems might well have been appropriate in pursuit of maximum benefit to the corporation, it had nothing whatever to do with effectuating a change in policy of the Commission. That change in policy merely required divestiture of cable television systems within the telephone operating areas. The "appropriateness" of divestiture of the outside systems redounded to the business judgment of Continental as to whether it was economic or uneconomic to retain the "outside" systems given the changing circumstances. That judgment, presumably, was controlled by a perfectly reasonable desire to maximize benefit to the corporation. On the contrary, it appears obvious that the provisions of Section 1071(a) were designed to mitigate harm resulting from changing policies. I suggest that the two are easily distinguishable.

It must be remembered that Continental's decision to sell all of its systems or just those systems within its telephone operating areas is not at issue here. That judgment is unquestionably one to be made solely by Continental. The issue is simply whether special tax benefits should accrue from the sale of those systems outside the telephone operating areas. For the Commission to interject itself into the role of the ordinarily prudent businessman in determining this issue would seem to invite abuse of the statute since an ordinarily prudent businessman must concern himself with maximizing benefits and not merely mitigating harm.

To the extent that reconsideration and reversal of this decision was prompted by concern over current economic conditions, while I might join in applauding the result I believe the means of achieving it were well beyond a reasonable interpretation of the statute.

Therefore, I dissent.

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