

Feb. 11, 1982

Separate Statement of
FCC Commissioner James H. Quello

In which Chairman Fowler, Commissioners Washburn, Jones
and Dawson Join.

In re: Petitions by Kansas State Network, Inc., for issuance
of tax certificates.

Established Commission precedent supports this decision, and therefore the result reached in this case is appropriate. It appears unnecessary, however, for the Commission to continue engaging in this type of inquiry into the relationship between a seller's cross-owned cable properties and other associated cable properties so as to determine whether the seller should receive tax certificates for sale of the associated properties. In order to conserve extremely limited Commission resources, the Commission should consider adopting a more limited tax certificate policy which would eliminate the need for such inquiries.

In previous cases, I have suggested that the Commission should grant a tax certificate for the sale of property only when that sale directly effectuates a revised Commission policy. See Continental Telephone Corp., 51 FCC 2d 284 (1975) (dissenting opinion); General Telephone & Electronics Co., 51 FCC 2d 502 (1975) (dissenting opinion). If only part of the sale actually effects the policy, then the Commission would grant a certificate only for that "effectuating" part. Such a limited tax certificate policy appears to me to provide the most reasonable approach to implementing Section 1071 of the Internal Revenue Code because the Commission thus would accord special tax treatment to sales which directly accomplish its policies, while denying special treatment to those sales which are only associated with such "effectuating" sales.

Importantly, under this limited certification policy, the decision to grant a tax certificate would generally be reduced to a ministerial act. In contrast, past Commission decisions have suffered from an inconsistent interpretation of the appropriate legal standard and have required a detailed factual inquiry.

Today's decision seeks to clarify the applicable legal standard for distinguishing when a tax certificate may be obtained for the sale of an associated property by specifying that a tax certificate for such sales will only be issued if the sale of the cross-owned property could not be completed without sale of the associated property. Even under this clear standard, extremely difficult factual determinations will remain necessary. The Commission will be required to

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resolve whether an associated sale was in fact essential to completion of the effectuating sale or was merely economically prudent. This determination must be made from a very distant perspective and, in most cases, it will be based solely on the interested party's version of the relevant facts. It is possible that the seller itself will be unaware of whether associated sales met the required standard because its inquiries may have been limited to those sales opportunities which were economically prudent. Finally, the Commission has no special expertise which will assist it in making these individual marketplace decisions.

The Commission currently is seeking every means to reduce the strain on its severely restricted resources. This is an appropriate time to reconsider whether Commission examination of these difficult fact situations is warranted.