

April 14, 1976

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: Declaratory Ruling as to Issuance of a Tax Certificate under  
Section 1071 of the Internal Revenue Code

It is somewhat ironic that the Commission chose on April 14th to further expand its already questionable policy of granting tax certificates in cases of voluntary divestiture. Perhaps the imminence of the date of reckoning prompted this selectively sympathetic treatment of fellow taxpayers. It is clear to me, however, that we have exceeded our authority. Instead of providing equitable relief, we are now to provide tax advantage.

A review of the legislative history of Section 1071 shows that, as originally drafted and approved in the Senate, it provided that:

The sale or exchange of property required by the Federal Communications Commission by order or as a condition of the granting of any application... shall, if the taxpayer elects... be treated as an involuntary conversion of such property...  
H. R. 3687, 78th Cong., 2d Sess., 116(1943). See S. Rep. No. 627, 7th Cong., 2d Sess., at p. 53(1943). (emphasis added)

There was no comparable provision in the House bill.

In explaining the changed language in the final bill, the conference committee said:

In view of the fact that the Commission does not order or require any particular sale or exchange, it has been deemed more appropriate to provide that the election, subject to the other conditions imposed, shall be available upon certification by the Commission that the sale is necessary or appropriate to effectuate the policies of the Commission with respect to the ownership or control of radio broadcasting stations.  
H. R. Rep. No. 1079, 78th Cong., 2d Sess., p. 50 (1944).

It is clear from a fair reading of the conference report that the committee was merely attempting to include the proposal in the Senate bill with a necessary technical correction in recognition of Commission functions. There is no indication that the committee intended to alter the substance of the proposal.

Prior to 1970, the Commission interpreted Section 1071 to give authority to grant tax certificates only in cases of involuntary divestiture "upon the granting of applications for consent to assignment of licenses... filed for the purpose of effecting compliance with the Commission policy in the multiple ownership rule..." Public Notice Mimeo No. 74627 (April 4, 1944).

When this interpretation was threatened by the Jefferson Standard (WBTV) ruling, 305 F. Supp. 744 (W. N. D. C. 1969), the Commission first appealed that lower court ruling and then reversed itself in a new statement of policy which, in effect, conformed with the court decision and mooted the appeal. I believe the appeal should have been pursued.

Now, the majority has further broadened its interpretation of Section 1071 going beyond the findings in Jefferson Standard. In that case, the court was to some degree persuaded by allegations of economic hardship. In the instant ruling, the Commission ignored any equitable consideration. It is clear that the Congress intended Section 1071 to be a form of equitable relief from divestiture and not an instrument for encouraging compliance with the Commission's rules and policies.

The majority argues that tax certificates encourage those multiple owners with "grandfathered" status to voluntarily divest and, thereby, the multiple ownership policy is served. In formulating that policy, however, the Commission found that, except in a few "egregious" cases, divestiture was not appropriate to effectuate that policy. Through its overbroad interpretation of Section 1071, the Commission is now saying that it is appropriate so long as it is voluntary on the part of the licensee. In short, if the licensee believes it is appropriate to effectuate our policy by voluntary divestiture, even though the Commission did not find divestiture appropriate in the first instance, then the licensee's view should prevail.

While I am intrigued by the novelty of that approach to public policy, I remain unconvinced that it should replace the more traditional approach.

Therefore, I dissent.