



Federal Communications Commission
Office of Legislative Affairs
Washington, D.C. 20554

December 11, 2006

The Honorable John D. Dingell
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
2322 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Edward J. Markey
Ranking Member
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Dingell and Congressman Markey:

In response to your letter dated December 5, attached please find my answers to your questions. Please contact me if I can be of any further assistance.

Sincerely,


Samuel L. Feder
General Counsel

Cc:

The Honorable Joe Barton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Fred Upton
Chairman
Subcommittee on Telecommunications
and the Internet
U.S. House of Representatives
2415 Rayburn House Office Building
Washington, D.C. 20515

**Responses of General Counsel Samuel Feder to Questions in December 5, 2006
Letter from Ranking Member Dingell and Ranking Member Markey**

- 1. As the Commission's designated agency ethics official for this matter, in making your determination concerning whether to unrecuse Commissioner McDowell, what, in your view, are the proper authorities and ethical guidelines to be followed?**

The proper authorities and guidelines to be followed are those set out by the Office of Government Ethics at 5 C.F.R. § 2635.502(d). Specifically:

the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:

- (1) The nature of the relationship involved;
 - (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
 - (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
 - (4) The sensitivity of the matter;
 - (5) The difficulty of reassigning the matter to another employee;
- and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

- 2. Chairman Martin cites authority under 5 C.F.R. § 2635.502(d), which requires a determination made "in light of all relevant circumstances" and enumerates certain factors. As a general matter, what is your analysis of the relevant circumstances, and interpretation and weight accorded to each of the factors?**

My analysis of the relevant circumstances, and interpretation and weight accorded to each of the factors is attached at Tab A.

3. **Given that a determination made under 5 C.F.R. § 2635.502(d) requires documentation in writing, provide all documentation concerning the resolution of prior potential conflicts under that section involving the participation of a Commissioner, including how the Commission's designated agency ethics official interpreted each factor.**

This documentation is attached at Tabs B (decisional material) and C (internal Office of General Counsel material). Among the materials being provided to you are non-public, confidential internal deliberative communications, documents containing highly personal information, and references to individuals other than FCC Commissioners. We respectfully request that you treat these materials confidentially.

4. **Other than the one instance cited in the Chairman's letter, to your knowledge has a designated agency ethics official at the Commission ever unrecused a Commissioner and required the Commissioner's participation in a proceeding?**

As I explain in my memorandum attached at Tab A, "authorizing [a Commissioner] to participate in [a] proceeding in no way compels [him or her] to do so. An FCC Commissioner nominated by the President and confirmed by the Senate is always free to abstain from participating in and voting on a proceeding."

In addition to the authorization issued on September 15, 2000, to then-Chairman Kennard cited in the Chairman's letter, to the best of my knowledge, the Commission has issued authorizations for Commissioners to participate in proceedings from which they might otherwise have been disqualified on several other occasions (the decisional documents are attached at Tab B):

On January 27, 1998, then-Commissioner Michael K. Powell was authorized to participate in a proceeding addressing spectrum allotments for broadcasters to provide Digital Television Service and the service rules under which they would operate. Commissioner Powell's wife owned approximately \$37,000 in stock in the General Electric Corporation through a stock reinvestment plan. General Electric owns NBC and was at that time a manufacturer of televisions.

On January 11, 2000, then-Commissioner Michael K. Powell was advised he could participate, without an authorization, in the Commission's proceeding concerning the AOL-Time Warner merger. Commissioner Powell's father sat on the Board of Directors of AOL. Previously, on October 13, 1998, Commissioner Powell had been advised to obtain authorization prior to participating in any adjudicatory-type proceeding in which AOL is a party, because of his father's board position.

On September 12, 2001, then-Commissioner Kevin Martin was authorized to participate in a Notice of Proposed Rulemaking (NPRM) on newspaper/broadcast cross-ownership. Commissioner Martin had participated in a different proceeding on newspaper/broadcast cross-ownership four years earlier, while a junior associate at a private law firm.

In June of this year, approximately a month after he left CompTel, Commissioner McDowell was authorized to participate in a forbearance proceeding in which CompTel had filed comments after the four participating Commissioners deadlocked 2-to-2. The petition for forbearance was withdrawn before a final vote was taken.

- 5. In your opinion as the Commission's designated agency ethics official, what limitations are there on a decision to unrecuse a Commissioner under 5 C.F.R. § 2635.502? Under what circumstances should a designated agency ethics official determine that a Commissioner should remain recused?**

Section 2635.502(c) provides that, "If the agency designee determines that the employee's impartiality is not likely to be questioned, he may advise the employee, including an employee who has reached a contrary conclusion . . . that the employee's participation in the matter would be proper." 5 C.F.R. § 2635.502(c). In addition, Section 2635.502(d) provides that where an employee's participation in a particular matter involving specific parties would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination that "the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). Finally, Section 2635(a) states that "[a]n employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter." 5 C.F.R. § 2635.502(a)(2). Thus, an agency designee should not authorize an employee to participate where (1) the employee's impartiality is likely to be questioned by a reasonable person *and* (2) the interest of the Government in the employee's participation is outweighed by the concern that a reasonable person may question the integrity of the agency's programs and operations.

6. **Chairman Martin's letter cites one instance in which a recused Commissioner, then Chairman William E. Kennard, was cleared by the Commission's designated ethics official to participate in a specific proceeding. That proceeding concerned the retention of Commission rules governing broadcasters' responsibilities when a personal attack or political editorial was aired. How many years had passed between the time when Chairman Kennard represented the National Association of Broadcasters (NAB) in that proceeding and when the Commission's designated ethics official determined that Chairman Kennard could participate in the proceeding? How does that period of time compare with Commissioner McDowell's involvement with his former employer?**

In September 2000, the General Counsel of the Commission authorized then-Chairman Kennard to participate in the proceeding on the repeal or modification of the personal attack and political editorial rules despite the fact that Chairman Kennard had previously represented – and co-signed two pleadings on behalf of – the NAB in that proceeding. I am unsure when Commissioner Kennard stopped representing the NAB in that proceeding, but he signed the referenced pleadings approximately 17 years before the General Counsel made his decision. In contrast, Commissioner McDowell had no involvement whatsoever in the AT&T-BellSouth merger proceeding while at CompTel. He never represented CompTel with respect to that proceeding. Commissioner McDowell left the employ of CompTel approximately six months ago.

7. **Prior to Chairman Kennard's involvement, despite a two-to-two deadlock, had the Commission issued any orders or taken other official agency action, or had any individual Commissioners issued any statements indicating their votes, in the personal attack and political editorial proceeding? How does that compare with the current proceeding?**

Prior to Chairman Kennard's involvement in the personal attack and political editorial proceeding, the Commission had released three Public Notices indicating that a majority of the participating Commissioners had been unable to agree upon any resolution of the issues presented in the proceeding. *See* 12 FCC Rcd 11956 (1997); 13 FCC Rcd 11809 (1998); 13 FCC Rcd 21901 (1998). One of these Public Notices indicated that the Commission had voted 2-to-2 on the question of whether to repeal the personal attack and political editorial rules. *See* 13 FCC Rcd 21901. In addition, with respect to at least two of these Public Notices, Commissioners issued public statements explaining their views. *See* 13 FCC Rcd 21901, 21902-43 (June 22, 1998); 1997 WL 453174, 453176, 453178, 453183 (Aug. 11, 1997).

In this proceeding, the Commission has not issued any Public Notices. Nor have the Commissioners entered formal votes with respect to the AT&T/BellSouth merger applications. Consideration of the item was scheduled for three open agenda meetings, and each time the item was deleted from the agenda when it became apparent to all involved that the majority of participating Commissioners could not reach consensus. The Commissioners deliberated for several months, and these deliberations are now at a standstill. In addition, two of the participating Commissioners made clear that they oppose the draft of the item circulated by the Chairman. *See, e.g.*, David Hatch, "Justice Approves AT&T-BellSouth Merger, FCC Dems Object," *Congress Daily*, (Oct. 11, 2006).

- 8. Was the personal attack and political editorial proceeding for which Chairman Kennard was unrecused the subject of Federal court review? If so, how had courts ruled over the course of the proceeding? Prior to Chairman Kennard's unrecusal, did any court specifically require the Commission to take any actions? How does that compare with the current proceeding?**

At the time that Chairman Kennard was authorized to participate in the personal attack and political editorial proceeding, that matter had been subject to review by the United States Court of Appeals for the District of Columbia Circuit. Specifically, in response to a petition for a writ of mandamus filed by, among others, the Radio-Television News Directors Association (RTNDA) seeking Commission action on a Petition for Expedited Rulemaking, the D.C. Circuit required that the FCC submit to the court the final results of a formal vote on RTNDA's pending Petition for Expedited Rulemaking as well as "a statement of reasons from any Commissioner voting against repeal or modification of the Commission's rules." *In re Radio-Television News Directors Association*, 1998 WL 388796 (D.C. Cir. May 22, 1998). The four participating Commissioners then deadlocked 2-to-2, and the two Commissioners voting against repeal or modification of the personal attack and political editorial rules (Commissioners Ness and Tristani) issued a statement explaining their votes. The matter then returned to the D.C. Circuit, and the court ruled that the FCC's "present explanation of its decision to retain the rules [was] insufficient to permit judicial review" because it did not consider relevant factors and did not present an adequate justification for the rule's continued existence. *Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 885 (D.C. Cir. 1999) ("*RTNDA*"). Thus, the court remanded the case to the FCC to afford the Commission "an opportunity to provide an adequate justification for retaining the personal attack and political editorial rules." *Id.* at 889. It was at this point that the General Counsel of the Commission authorized Chairman Kennard to participate in the proceeding.

In this case, the AT&T/BellSouth merger proceeding has not been subject to a writ of mandamus. However, waiting until the Commission is ordered, by writ of mandamus, to take action on the merger proceeding would do great harm to the Commission and its

relationship with the courts. A court will issue such a writ only in extraordinary circumstances, where the Commission has failed in its legal duties. “Mandamus is an extraordinary remedy reserved for extraordinary circumstances. An administrative agency’s unreasonable delay presents such a circumstance because it signals the ‘breakdown of regulatory processes.’” *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (citations omitted). The Commission has an obligation to resolve this proceeding and not let such a breakdown occur. As the D.C. Circuit has stated, “[D]elay in the resolution of administrative proceedings can . . . deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires.” *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980). “The businessman who needs a loan, the broker who wants to sell stock, the manufacturer who bids on a contract, *the company that wants to merge*, these and thousands of others are entitled to have their claims acted upon promptly and fairly.” *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 341 n. 91 (D.C. Cir. 1980) (emphasis added) (quoting from Roger C. Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A.J. 937, 941 (1972)).

Moreover, it is important to point out that Chairman Kennard’s participation in the personal attack and political editorial proceeding was not in response to the writ of mandamus. Indeed, the Commission responded to the writ of mandamus without Chairman Kennard’s participation. Nor was Chairman Kennard’s participation necessary to respond to the D.C. Circuit’s remand order. To comply with that order, Commissioners Ness and Tristani were instructed to issue a new statement that responded to the D.C. Circuit’s concerns with their prior attempt to justify retention of the relevant rules. *See Radio-Television News Directors Association v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000) (“The court instructed the Commission’s two-member majority to explain its support of the personal attack and political editorial rules in light of the Commission’s conclusion in 1985 that the fairness doctrine was not in the public interest and its decision in 1987 not to enforce the fairness doctrine”). However, instead of following the court’s instruction, the Commission chose another path. The General Counsel authorized Chairman Kennard’s participation in the proceeding, and the Commission voted by a 3-2 margin: (1) to suspend the personal attack and political editorial rules for 60 days; (2) to request broadcasters and others to report on their actions during the suspension period; and (3) to request that broadcasters and others provide, within 60 days of the reinstatement of the rules, evidence to assist the Commission in reviewing the rules. Responding to the Commission’s action, the D.C. Circuit held that it “was not responsive to the court’s remand” because the Commission had still failed to provide an adequate justification for the personal attack and political editorial rules that would be reinstated within 60 days. *Id.* at 271. As a result, the D.C. Circuit ordered the Commission “immediately to repeal the personal attack and political editorial rules.” *Id.* at 272.

Significantly, while there was a way for the Commission to move forward in the personal attack and political editorial proceeding absent Chairman Kennard’s participation, in this case, the Commission has reached an impasse, and Commissioner McDowell’s

participation is necessary for the Commission to take any action whatsoever with respect to the merger.

- 9. Chairman Kennard's representation of NAB formed the basis of his initial recusal. Did the parties opposing the position taken by NAB agree to Chairman Kennard's participation in that proceeding? How does that compare to the current proceeding?**

The parties opposing the position taken by NAB did agree to Chairman Kennard's participation, and Chairman Kennard relied on that fact as a basis for his participation: "In addition, the parties opposing the broadcasters, who would be the parties most likely to question my impartiality since the issue arises because I previously worked for the NAB, have made clear that they believe I should participate." *Statement of FCC Chairman William E. Kennard Concerning his Participation in the Personal Attack and Political Editorial Rule Proceeding* (Sep. 18, 2000). The current proceeding is in exactly the same posture: "AT&T and BellSouth have no objection to the participation of Commissioner McDowell in this proceeding. Given Commissioner McDowell's prior employment by CompTel, which has filed comments opposing this merger, AT&T and BellSouth are clearly the parties most likely to be impacted adversely by any perceived bias or lack of impartiality on the part of Commissioner McDowell." Letter from Robert W. Quinn, Jr., Senior Vice President-Federal Regulatory, AT&T Services, Inc., and Jonathan Banks, Vice President-Federal Regulatory, BellSouth D.C. (Dec. 7, 2006).

- 10. In his letter, Chairman Martin states his belief that the Commission has reached an impasse. As the Commission's designated agency ethics official, what is the proper criteria on which to determine whether a proceeding has reached an impasse? Is it possible for an impasse to be reached if no formal vote or action has been taken by the Commission?**

In determining whether a proceeding has reached an impasse, one must evaluate whether there is a realistic possibility that a majority of Commissioners will be able to agree on a particular outcome in the foreseeable future. In making this determination, one must look at a variety of factors, including: (1) whether progress is continuing to be made in any ongoing negotiations among the Commissioners; (2) whether action on an item has been postponed in light of the failure of a majority of the Commissioners to reach agreement; (3) the Commissioners' own assessment of the situation; and (4) a comparison with the timing and events of similar negotiations.

It is possible for an impasse to be reached if no formal vote or action has been taken by the Commission. If, for example, an item is pulled from open meeting agendas three times because it is apparent to all involved in negotiations that there would be a 2-to-2 vote on that item, I do not believe that it is necessary to go ahead and hold a formal vote to demonstrate that the Commission is split 2-to-2 on the item.

Moreover, a formal vote is of limited probative value in determining whether an impasse has been reached, as the vote indicates the Commissioners' positions only with respect to a specific item put forward for consideration. For most items, there are a range of possible outcomes, and a 2-to-2 vote on one particular proposed outcome says little about the likelihood the Commissioners could come to agreement on another proposed outcome. For example, a proposal to reject a merger outright might garner a 2-to-2 vote, even though the Commissioners might be able to agree unanimously on approving the merger with the right set of conditions. Thus, whether or not there has been a formal vote, one must necessarily look at other factors to make a determination that the Commission is at an impasse.

- 11. In a license transfer proceeding under Section 214 and 310 of the Communications Act, do the parties to the transaction have the burden to prove that the proposed license transfer serves the public interest, convenience and necessity?**

Yes.

- 12. Please provide your analysis of the applicability of sections 309(d)(2) and (e) of the Communications Act, with respect to the Chairman Martin's announcement of an impasse invokes a requirement to formally designate the applications for hearing. In your review, are such provisions of law relevant to a decision to unrecuse a Commissioner?**

These statutory provisions, which provide for designating a license transfer application for hearing, are relevant, because designating the matter for hearing is one way to resolve this proceeding. However, a majority vote is required to "formally designate the application for hearing . . . , specifying with particularity the matters and things in issue." 47 U.S.C. § 309(e); *see e.g., EchoStar/DirecTV Merger HDO*, 17 FCC Rcd 20559 (2000). I specifically discussed with each of the four participating Commissioners his or her views on designating the matter for a hearing. Those discussions made clear to me that there are not sufficient votes to approve a hearing designation order. Indeed, there was little, if any, support among Commissioners for this option.

- 13. Do Commission rules or the Commission's authorizing statute prevent the Chairman from putting a license transfer proceeding to a vote despite a perceived two-to-two deadlock? If two Commissioners voted for and two Commissioners voted against a license transfer, would that vote constitute a valid and binding decision by the Commission that the parties to the transaction had not met their burden of proof?**

Neither the Commission's rules nor the Commission's authorizing statute prevent the Chairman from putting a license transfer proceeding to a vote if there is a perceived two-to-two deadlock. If two Commissioners voted for and two Commissioners voted against a license transfer, that would not constitute a decision by the Commission as to whether the parties to the transaction had met their burden of proof. Rather, if a tie vote occurs, no action is taken, leaving the issue on the table for another day.

- 14. Under Chairman Martin's tenure, has the Commission formally acted on any matters where the vote was two for and two against? During the same time period, were there occasions in which the Commission was able to reach a majority opinion despite an initial apparent two-to-two deadlock on matters, including prior license transfers involving major telecommunications companies?**

The Commission under Chairman Martin has not formally acted on any matters where the vote was 2-to-2. However, Commission inaction because of a 2-to-2 deadlock did lead to grant of a forbearance petition by operation of law. Specifically, in March 2006, there was deadlock on a forbearance petition filed by Verizon pursuant to section 10 of the Communications Act requesting that the Commission refrain from applying common carrier regulations and the *Computer Inquiry* requirements to its high capacity broadband services. The Commission voted 2-to-2 on the item. Because a majority of the Commission did "not deny the petition for failure to meet the requirements for forbearance" under section 10(a) of the Act, Verizon's petition was "deemed granted" by operation of law. See 47 U.S.C. § 160(c).

I am unaware of any instances under Chairman Martin's tenure where the Commission was able to reach a majority opinion after reaching a "two-to-two deadlock." There are two instances of which I am aware that came close to this situation. First, in June of this year, Commissioner McDowell was authorized to participate in a forbearance proceeding in which CompTel had filed comments after the four participating Commissioners deadlocked 2-to-2. The petition for forbearance was withdrawn before a final vote was taken. Second, there was the Commission's decision in September 2006 to deny a forbearance petition filed by Fones4All Corporation. Fones4All had asked the Commission to expand incumbent local exchange carriers' unbundling obligations by forbearing from specific aspects of the FCC's unbundling rules, and the Commission

determined that granting forbearance would not give Fones4All the relief it sought. The Commission came to agreement on this decision on the eve of the statutory deadline for action.

- 15. In his letter, Chairman Martin speaks of the length of time already expended in the review of this proposed license transfer. Provide a list of the length of time for Commission review of the proposed license transfers of major telecommunications and media companies since the passage of the Telecommunications Act of 1996, including all transactions involving Bell Companies.**

Attached at Tab D is a list of the major transactions that the Commission processed since the passage of the Telecommunications Act of 1996 and the length of time for Commission review of each transaction.



UNITED STATES GOVERNMENT

Memorandum

OFFICE OF THE GENERAL COUNSEL

DATE: December 8, 2006

TO: Commissioner Robert McDowell

FROM: Samuel L. Feder 
General Counsel

SUBJECT: Authorization To Participate in the AT&T/BellSouth Merger Proceeding

In accordance with the provisions of 5 C.F.R. § 2635.502(d), you are hereby authorized to participate in the Commission's decision on the AT&T/BellSouth merger proceeding described below. To date, you have not participated in this proceeding because you were, until May 31, 2006, employed by the Competitive Telecommunications Association (CompTel), which is one of a number of parties that have opposed the merger. You are now free to participate if you choose to do so.

Section 2635.502(d) provides that where an employee's participation in a particular matter involving specific parties would raise a question in the mind of a reasonable person about his impartiality, the agency designee (in this case, the General Counsel of the FCC)¹ may authorize the employee to participate in the matter based on a determination that "the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d).

Balancing these competing concerns here was difficult, and reasonable people looking at these facts could disagree about the appropriate result. However, on balance, as explained below, I find that you should not be barred from participating in this proceeding if you choose to do so. My decision is guided by FCC precedent, in which then-Chairman Kennard was authorized to take part in a proceeding addressing the repeal or modification of the personal attack and political editorial rules, despite the fact that he had previously represented a party in that same proceeding. I find any appearance concerns in that case to be greater than the potential appearance concerns here: Chairman Kennard previously participated as an advocate in the very same proceeding, while you never participated in any way in this proceeding on behalf of

¹ See 47 C.F.R. § 0.251(a).

CompTel. And I find the Government's interest in your participation here to be at least as strong as the Government's interest in Chairman Kennard's case.

Regardless of this precedent, however, you are free as an FCC Commissioner to abstain from participating in and voting on any proceeding. This authorization thus allows you to make your own decision. If you feel appearance concerns outweigh the Government's interest here or you have any other reason to abstain from participating, you are free to do so.

Background

On March 31, 2006, AT&T and BellSouth, in order to effectuate the merger between the two companies, filed applications for transfer of control with the Commission pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, and Section 2 of the Cable Landing License Act. On April 19, 2006, the Commission issued a Public Notice seeking comment on these applications. The comment period closed on June 20, 2006. Numerous parties have participated in this proceeding, either supporting the applications, opposing them, or seeking conditions on their approval. CompTel has opposed the applications and/or sought conditions on their approval. Although you served as Senior Vice President and Assistant General Counsel of CompTel before you joined the Commission on June 1, 2006, during your tenure at CompTel, you did not have responsibility for this proceeding and did not participate in the matter.

Generally, the Commission attempts to rule on mergers within 180 days from the time the merger application is placed on public notice. However, this merger has now been pending before the Commission for nearly eight months. The Department of Justice approved the transaction with no conditions on October 11, 2006, and all relevant state regulators have approved the transaction.

Last year, the Commission ruled on two large wireline mergers, the AT&T/SBC and Verizon/MCI transactions, within 200 days. In an attempt to rule on the AT&T/BellSouth transaction in a similar fashion, a draft order was circulated on September 21, 2006, among the four Commissioners currently participating in this proceeding – several weeks in advance of the Commission's 180-day target. The Commission was originally scheduled to vote on the merger item at its open agenda meeting scheduled for October 12, 2006. The day before that meeting, the item was removed from the agenda to give Commissioners additional time to reach a consensus, and a new meeting to consider the merger was scheduled for October 13, 2006. On the morning of October 13, 2006, however, two Commissioners requested additional time to consider the transaction and asked that there be another round of public comment on proposals that had been made for achieving consensus. In response, the scheduled October 13 meeting was cancelled, and a new comment period was opened.

At the conclusion of this second public comment period, a vote on the merger item

was scheduled for the Commission's November 3, 2006, open agenda meeting. However, when it became clear on the eve of that meeting that the Commissioners were still unable to reach consensus, this item was deleted from the Commission's agenda, thus delaying action on the merger for the third time. Since early November, the merger has remained on circulation for consideration by the Commission but no action has been taken. Based on the facts available to me, it is now apparent that the Commission has reached an impasse in its consideration of the merger. The four Commissioners currently participating in the proceeding have reached a deadlock, and there are not sufficient votes at this point to take any action whatsoever with respect to the merger.

Discussion

Section 2635.502 provides that, absent authorization by the General Counsel, an employee generally should not participate in a particular matter involving specific parties if the employee worked for a party to the proceeding within the last year and the circumstances would raise a question in the mind of a reasonable person about the employee's impartiality. *See* 5 C.F.R. § 2635.502(a). Where applicable, this provision "does not constitute a 'bar.'" Office of Government Ethics Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 35006, 35027 (Aug. 7, 1992). Rather, Section 2635.502(d) provides that I may authorize participation in the matter based on a determination that "the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." This regulation "was intended to provide agencies with a 'flexible standard' and 'broad discretion,' rather than an inflexible prohibition that might unreasonably interfere with agency operations." OGE Informal Advisory Letter 01 x 5, at 2 (citing 56 Fed. Reg. 33778, 33786 (July 23, 1991)).

As noted above, CompTel is one of a number of parties that have opposed the merger and/or sought conditions on its approval. For purposes of this authorization, I therefore assume, in light of your prior employment at CompTel, that your participation in this matter might raise some concerns about your impartiality.

At the same time, however, the Government has a significant interest in reaching a decision on the license transfers at issue here. The FCC has the responsibility under Sections 214 and 310 of the Communications Act to review whether the transfers of licenses in connection with a merger are in the public interest. *See* 47 U.S.C. §§ 214, 310. Moreover, the Commission has the obligation to issue a written decision after completing its review, so that aggrieved parties may seek judicial review of the Commission's actions. *See Getty v. Federal Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986).

It is also the Commission's policy to complete its review process as expeditiously as possible consistent with the Commission's regulatory responsibilities. Since 2000, the Commission has generally attempted to rule on license transfers incident to

mergers within 180 days from the time the application is placed on public notice. Then-Chairman Kennard explained in initiating this policy: "The goal will be to complete even the most difficult transactions within 180 days after the parties have filed all the necessary information and public notice of the petitions has been issued." Statement of Chairman William E. Kennard Before the U.S. Senate Committee on Commerce, Science, and Transportation On Mergers in the Telecommunications Industry (Nov. 8, 1999); *see also* FCC News Release, *FCC Implements Predictable, Transparent and Streamlined Merger Review Process* (Jan. 12, 2000). This policy is part of an effort to "ensure that the process of reviewing applications and requests associated with all transactions, including mergers, is predictable, transparent, and swift." Public Notice, *Public Forum, Streamlining FCC Review of Applications Relating to Mergers* (Feb. 18, 2000). Regardless whether a merger is ultimately approved or rejected, taking predictable, transparent, and swift action on mergers is important to minimize regulatory uncertainty, which limits investment and impedes deployment of infrastructure for broadband and other new services. For large transactions such as this one, a delay in making a decision can have a significant impact throughout the industry. *See, e.g.*, Letter from Jeffrey A. Campbell, Director, Technology and Trade Policy, Cisco Systems, Inc. (Dec. 8, 2006) ("Although Cisco has not participated in this proceeding to date, we wish to draw the Commission's attention to the negative impact on network investment that the lengthy delay in the Commission's process has caused."); "AT&T, BellSouth merger wait vexes vendors," *TELEPHONYonline* (Nov. 27, 2006) ("[T]he wait is generating anxiety among equipment vendors that supply the two carriers. . . . [P]urchasing decisions could be delayed, and a general uncertainty over future network plans leaves vendors in the dark."). To be clear, the relevant interest of the Government is not in reaching any *particular* result with respect to the merger, but in promptly reaching a decision either way. Here, all other relevant government agencies – the Department of Justice and the appropriate state regulators – have already done so.

In balancing the Government's interest against the concern that a reasonable person may question the integrity of the agency's programs and operations, Section 2635.502(d) sets forth factors which "may be taken into consideration." 5 C.F.R. § 2635.502(d). These factors include, but are not limited to: (1) the nature of the relationship involved; (2) the effect that resolution of the matter would have upon the financial interests of the person involved in the relationship; (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter; (4) the sensitivity of the matter; (5) the difficulty of reassigning the matter to another employee; and (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

After carefully examining these factors as well as other relevant factors, I have determined for the reasons set forth below that you should be allowed to participate in this merger proceeding.

The most important factor here is the difficulty of reassigning this matter to another employee. In this case, because a Commissioner may not delegate his or her vote to anyone else, it would be impossible to reassign the matter to another employee. For the same reason, there are no “adjustments that may be made” to your duties that would alter the analysis here. Therefore, you are the only person available to break the impasse that has been reached in this proceeding.

In addition, while, as stated above, CompTel’s participation in this proceeding might raise some concerns about your impartiality, those concerns are mitigated here for several reasons. To begin with, looking at the nature of the relationship involved and at the effect that resolution of the matter would have upon the financial interests of the person involved in the relationship, you did not participate in this matter in any way while working at CompTel. You also have no continuing relationship with your former employer. Moreover, neither of the parties to this proposed merger, AT&T and BellSouth, is a member of CompTel, and CompTel does not itself have a direct financial stake in the Commission’s decision. In addition, the Commission’s decision will have no impact whatsoever on your financial interests as you have divested all financial interests in entities regulated by the Commission pursuant to Section 4(b)(2) of the Communications Act, 47 U.S.C. § 154(b)(2). Furthermore, no member of your immediate family has any financial interest in entities regulated by the Commission.

Other relevant factors here are the nature and importance of your role in this matter, as well as the sensitivity of the matter. Applying those factors, your role as a decision-maker in this proceeding would be extremely important, you would be called upon to exercise discretion in that role, and it is safe to assume that this matter is sensitive. To be sure, each of these factors could reasonably be seen as heightening concerns about your participation in this proceeding. However, more significantly, these factors also amplify the Government’s interest in your participation. As reviewed above, as a Commissioner, your decision-making role cannot be delegated to any other employee of the Commission. Moreover, given the impasse reached in this proceeding, the Government has a strong interest in having you participate.²

Importantly, authorizing your participation here is guided by precedent. In September 2000, the General Counsel of the Commission determined that it would be permissible for then-Chairman Kennard to participate in the proceeding on the repeal or modification of the personal attack and political editorial rules despite the fact that Chairman Kennard had previously represented – and co-signed two pleadings on

² It is worth emphasizing that the question addressed in this authorization could not be avoided simply by waiting to vote on the merger until one year elapses from your prior employment at CompTel. Given the circumstances of this particular merger, I do not believe that any appearance concerns here would change materially in six months. And Section 2635.502 requires an authorization for an employee to participate at any time where circumstances might “raise a question regarding his impartiality.” See 5 C.F.R. § 2635.502(a)(2). Meanwhile, as discussed above, the Government has a significant interest in resolving this proceeding in a prompt manner.

behalf of – the National Association of Broadcasters (NAB) in that proceeding. *See also, e.g., Barker v. Secretary of State's Office of Missouri*, 752 S.W. 2d 437 (Mo. App. W.D. 1988) (holding that the third member of the Missouri Labor and Industrial Relations Commission could vote and break a 1-1 deadlock on a worker's compensation claim even though she had previously served as counsel for the employer and the insurer in the same proceeding).

I find any potential appearance concerns here to be less than those at issue in Chairman Kennard's case. Chairman Kennard had personally participated as an advocate in the relevant proceeding prior to coming to the Commission, whereas you never participated in this merger proceeding on behalf of CompTel. Although Chairman Kennard had left NAB some years before voting on the proceeding at the FCC, in the end he was voting on pleadings he had participated in and signed. "Virtually all states and the federal government . . . require a judge's disqualification if he or she has acted as a lawyer in the *same* lawsuit or controversy." *Mustafoski v. State*, 867 P.2d 824, 832 (Alaska Ct. App. 1994) (emphasis in original). However, "the prevalent American rule of disqualification is limited to instances in which the judge participated as a lawyer in an earlier stage of the same case." *Id.*

In addition, another important factor that mitigated appearance concerns in Chairman Kennard's case is equally present here. Specifically, the parties opposed to the position of Chairman Kennard's former employer supported his involvement in the proceeding, and Chairman Kennard relied on that fact as a basis for his participation: "In addition, the parties opposing the broadcasters, who would be the parties most likely to question my impartiality since the issue arises because I previously worked for the NAB, have made clear that they believe I should participate." *Statement of FCC Chairman William E. Kennard Concerning his Participation in the Personal Attack and Political Editorial Rule Proceeding* (Sept. 18, 2000). The current proceeding is in exactly the same posture. AT&T and BellSouth have made clear that they believe you should participate in the proceeding despite your prior employment by CompTel, which has opposed their merger.

At the same time, the Government's interest in your participation here is at least as strong as, if not stronger than, the Government's interest in Chairman Kennard's participation in the proceeding on the repeal of the personal attack and political editorial rules. In that case, at the time the General Counsel issued his authorization, Chairman Kennard's participation was not necessary for the proceeding to move forward. At that point, the case had been remanded to the Commission by the D.C. Circuit, *see Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 885, 889 (D.C. Cir. 1999), and the Court had "instructed" the two members of the Commission opposing repeal of the rules "to explain [their] support of the personal attack and political editorial rules in light of the Commission's conclusion in 1985 that the fairness doctrine was not in the public interest and its decision in 1987 not to enforce the fairness doctrine." *Radio-Television News Directors Association v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000). However, rather than provide the justification requested by the D.C. Circuit, the Commission on remand voted by a 3-2 margin,

with Chairman Kennard's participation, to suspend the personal attack and political editorial rules for 60 days and to request parties to provide evidence to assist the Commission in reviewing the rules within 60 days of their reinstatement. Responding to the Commission's action, the D.C. Circuit held that it "[c]learly . . . [was] not responsive to the court's remand" because the Commission had still failed to provide an adequate justification for the rules. *Id.* at 271. As a result, the D.C. Circuit ordered the Commission "immediately to repeal the personal attack and political editorial rules." *Id.* at 272.

To be sure, this discussion is not intended to imply that the Government lacked a strong interest in Chairman Kennard's participation in the personal attack and political editorial proceeding. Clearly, his recusal significantly restricted the Commission's flexibility in moving forward in that proceeding. Nevertheless, the fact remains that the Commission could have responded to the court's remand in that proceeding by having the two Commissioners opposed to the repeal of the rules (Commissioners Ness and Tristani) provide the explanation of their position requested by the court.

In this case, by contrast, there is currently no way to move forward here absent your participation because a three-member majority is necessary for the Commission to take any action whatsoever on the merger. The Commission must either vote to grant the application (47 U.S.C. § 309(a)), or it must vote to "formally designate the application for hearing . . . , specifying with particularity the matters and things in issue" (47 U.S.C. § 309(e)). Thus, while the deadlock in Chairman Kennard's case persisted for a longer period of time than has the deadlock in this proceeding, the need for a Commissioner to break the deadlock is demonstrably greater here. And here the Government has a policy of completing its review process as expeditiously as possible consistent with its statutory responsibilities. Accordingly, I find that the Government interest here is at least as strong as that in Chairman Kennard's case, if not stronger.

I acknowledge that the decision as to whether to grant this authorization is a difficult one, and reasonable people looking at these facts could disagree about the appropriate result. In making this decision, I therefore consulted with senior officials at the Office of Government Ethics (OGE), including Director Robert I. Cusick. After discussion of the issues, Director Cusick agreed that the ultimate decision on the granting of an authorization was totally within the FCC's discretion, that, in his view, the decision was a "very, very close call" on which reasonable persons could differ, and that he would not criticize anyone for coming down on the side of an authorization. While he indicated that, were the decision up to him, he would decide against authorization, he agreed that the FCC could reasonably come out the other way. As OGE has stated, "the determinations contemplated by § 2635.502(d) necessarily call for the agency designee's exercise of judgment and not the application of precise standards from which only one correct conclusion can be reached." Office of Government Ethics Standards of Ethical Conduct for Employees of the Executive Branch; 57 Fed. Reg. 35006, 35027 (Aug. 7, 1992). As the agency

designee, I have direct experience with the Government's interest here, the current status of the Commission's consideration of the merger, the appearance concerns in the context of this particular merger proceeding, and the agency's precedent in these matters. I also recognize that as an FCC Commissioner, you are often called upon to make decisions in rulemakings involving telecommunications issues that directly impact many of the same parties participating in this merger proceeding. For example, in June, you voted in the Universal Service Fund Contribution Methodology proceeding, in which CompTel, AT&T, and BellSouth each filed comments. And it is in light of this experience, for the reasons set forth above, that I have determined that you should not be prohibited from participating here.

Finally, particularly given the difficult nature of this decision, I wish to make clear that my authorizing you to participate in the merger proceeding in no way compels you to do so. An FCC Commissioner nominated by the President and confirmed by the Senate is always free to abstain from participating in and voting on a proceeding, and there is no impediment to your exercising that prerogative here. This authorization thus allows you to make your own decision.

Conclusion

In sum, the factors set forth in 5 C.F.R. 2635.502(d) as well as other relevant factors weigh in favor of allowing you to participate in the merger proceeding if you so choose. You are, therefore, authorized to participate under 5 C.F.R. 2635.502(d).

LENGTH OF TIME TO PROCESS MAJOR TRANSACTIONS

Transaction	Date Public Notice Issued	Date of Adoption	Length of Review/ Time on Informal Clock¹	Time from Public Notice (including time during which clock is stopped)
SBC-PacTel	6/7/1996	1/31/1997	238	n/a
Bell Atlantic-NYNEX	8/14/1996	8/14/1997	365	n/a
WorldCom - MCI	11/21/1997 ²	9/14/1998	297	n/a
AT&T - Teleport	2/25/1998	7/21/1998	146	n/a
SBC-Southern New England Telephone	2/27/1998	10/23/1998	238	n/a
SBC-Ameritech	7/30/1998	10/6/1999	433	n/a
AT&T - TCI	9/29/1998	2/17/1999	141	n/a
Bell Atlantic-GTE	10/8/1998	6/16/2000	617	n/a
AT&T-British Telecom Joint Venture	11/27/1998	10/29/1999	336	n/a
ATT-MediaOne	7/23/1999	6/5/2000	318	n/a
VoiceStream-Omnipoint	8/16/1999	2/15/2000	183	n/a
US West-Qwest	9/1/1999	3/10/2000	191	n/a
Viacom-CBS	12/3/1999	5/3/2000	152	n/a
ClearChannel-AMFM	12/9/1999	9/1/2000	267	n/a
Arch-Paging Network	12/30/1999	4/25/2000	117	n/a
MCI-Sprint ³	1/19/2000	8/4/2000	75	198
LockheedMartin-Comsat	4/4/2000	7/31/2000	118	n/a
AOL-TimeWarner	3/27/2000	1/11/2001	179	290
SBC-BellSouth (Cingular joint venture)	5/19/2000	9/29/2000	133	133
Tritel-TeleCorp	7/17/2000	10/27/2000	102	102
Verizon-NorthPoint ³	9/1/2000	4/24/2001	92	235
Global Crossing-Citizens Communications	9/6/2000	4/16/2001	180	222
Verizon-OnePoint	9/22/2000	12/8/2000	78	78
Fox-ChrisCraft	9/27/2000	7/25/2001	261	301
DeutscheTel-VoiceStream	10/11/2000	4/24/2001	196	196
Nextel-Motorola	10/19/2000	4/16/2001	180	180
VoiceStream-Cook Inlet	10/24/2000	12/13/2000	50	50
Nextel-Arch Wireless	2/26/2001	5/25/2001	89	89
TDS-Chorus	3/20/2001	8/10/2001	144	144
New Iridium	4/4/2001	2/8/2002	230	310
SES-GE Americom	4/20/2001	10/2/2001	166	166
Comsat-Telenor	5/25/2001	12/18/2001	208	208
Nextel-Pacific Wireless	8/14/2001	11/16/2001	94	94
Nextel-Chadmoore	8/17/2001	11/30/2001	105	105
Orbcomm	9/10/2001	3/8/2002	143	179
NBC-Telemundo	11/6/2001	4/10/2002	156	156
EchoStar-DirecTV ⁴	12/21/2001	10/9/2002	156	292
XO Communications	3/11/2002	10/3/2002	172	206
Comcast-AT&T	3/29/2002	11/13/2002	188	229
ALLTEL-CenturyTel	4/23/2002	6/12/2002	51	51
Univision-Hispanic Broadcasting	8/2/2002	9/22/2003	258	416
Bell Atlantic New Zealand (BANZHI) - Pacific Telecom	5/9/2003	11/6/2003	182	182
News Corp. - DirecTV	5/16/2003	12/19/2003	182	217
Cingular-NextWave	10/6/2003	2/11/2004	129	129
Cingular-ATT Wireless	4/2/2004	10/26/2004	208	208
Arch-Metrocall	5/10/2004	11/8/2004	182	182
Intelsat	9/21/2004	12/22/2004	93	93
Verizon-NextWave	12/10/2004	2/25/2005	77	77
ALLTEL-Western Wireless	2/7/2005	7/11/2005	154	154
Sprint-Nextel	2/28/2005	8/3/2005	157	157
SBC-AT&T	3/11/2005	10/31/2005	199	235
Verizon-MCI	3/24/2005	10/31/2005	199	222
Comcast/TimeWarner-Adelphia	6/2/2005	7/13/2006	406	406
Intelsat-PanAmSat	10/14/2005	6/19/2006	248	248
ALLTEL-Midwest Wireless	12/30/2005	10/2/2006	276	276
DoCoMo-Guam Cellular	5/10/2006	11/9/2006	187	187
Citadel Broadcasting-Disney	3/7/2006	pending ⁵	279	279
AT&T-BellSouth	4/19/2006	pending ⁵	236	236
America Movil-Telecomunicaciones de Puerto Rico	6/14/2006	pending ⁵	180	180
Univision	7/24/2006	pending ⁵	140	140

¹ Length of Review reflects the period of Commission consideration and does not include time periods when the informal 180-day clock is stopped because the Commission is unable to continue its review (e.g., it is awaiting needed information from the applicants).

² Date on which amended applications were filed.

³ Applications withdrawn.

⁴ Applications designated for hearing and later withdrawn.

⁵ Pending transaction data as of December 11, 2006.