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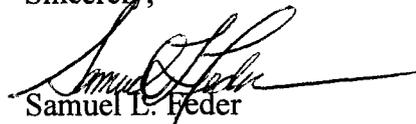
The Honorable John D. Dingell  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
2322 Rayburn House Office Building  
Washington, D.C. 20515

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  
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U.S. House of Representatives  
2415 Rayburn House Office Building  
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**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.