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U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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December 5, 2006

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Mr. Sam Feder
General Counsel
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Dear Mr. Feder:

We have reviewed the December 1, 2006, letter of Federal Communications Commission ("the Commission") Chairman Kevin Martin seeking your determination of whether to unrecuse Commissioner Robert McDowell. Such action would permit the participation of Commissioner McDowell in the application to transfer licenses and authorizations held by BellSouth to AT&T notwithstanding Commissioner McDowell's prior decision to recuse himself. The basis on which you will make this critical decision of proper agency procedure is of interest to us.

To assist us in evaluating the many issues associated with that decision, please provide answers to the following questions by Monday, December 11, 2006:

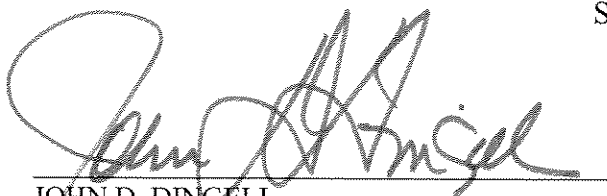
1. As the Commission's designated agency ethics official for this matter, in making your determination concerning whether to unrecuse Commissioner McDowell, what, in your view, are the proper authorities and ethical guidelines to be followed?
2. Chairman Martin cites authority under 5 C.F.R. § 2635.502, 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?
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.

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?
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?
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 agency 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 agency ethics official determined Chairman Kennard could participate in the proceeding? How does that period of time compare with Commissioner McDowell's involvement with his former employer?
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?
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?
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?
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?
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?

12. Please provide your analysis of the applicability of sections 309(d)(2) and (e) of the Communications Act, with respect to whether Chairman Martin's announcement of an impasse invokes a requirement to formally designate the application for hearing. In your view, are such provisions of law relevant to a decision to unrecuse a Commissioner?
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?
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?
15. In his letter, Chairman Martin speaks of the length of time already expended on the review of this proposed license transfer. Provide a list of the length of time for Commission review of proposed license transfers of major telecommunications and media companies since the passage of the Telecommunications Act of 1996, including all transactions involving Bell companies.

We are cognizant that license transfers of this magnitude can be difficult matters that may require significant personal involvement by the Commissioners with affected parties to assess whether the license transfers serve the public interest. But this matter can and should be concluded in a timely fashion without compromising the ethical standards of the independent agency or the individual Commissioners involved.

Sincerely,



JOHN D. DINGELL
RANKING MEMBER



EDWARD J. MARKBY
RANKING MEMBER
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET

Mr. Sam Feder

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cc: The Honorable Joe Barton, Chairman
Committee on Energy and Commerce

The Honorable Fred Upton, Chairman
Subcommittee on Telecommunications and the Internet