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

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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

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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).