

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

December 18, 2006

RE: Application for Transfer of Control Filed by AT&T Inc. and BellSouth Corporation,
Memorandum Opinion and Order, WC Docket No. 06-74

Good afternoon. Thank you for coming.

Over the past few days, I have devoted a tremendous amount of time and energy deliberating my decision regarding my potential participation in the consideration of the AT&T/BellSouth merger. I have also tried hard to encourage some of my colleagues on the Commission to negotiate in good faith – sadly, to no avail. This state of affairs is personally disappointing to me. It appears that the lingering question of my involvement is being used as yet another excuse for delay and inaction. So, to remove that excuse from the equation, I am announcing my decision this evening. Given the vast speculation surrounding this issue, and in the spirit of transparency, I think it is important for me to publicly explain the reasons for my decision.

By way of background, on February 6, 2006, I was nominated by President Bush to serve as a commissioner on the Federal Communications Commission. At that time, I was employed as senior vice president and assistant general counsel of COMPTTEL, a trade association representing telecommunications entrepreneurs, with many competing against AT&T and BellSouth. As of that date, I no longer participated in the formulation of COMPTTEL policy, nor was I serving any longer as a policy advocate for COMPTTEL. Then, on March 5, 2006, AT&T announced its intention to merge with BellSouth.¹ The next day, COMPTTEL announced its opposition to the merger.²

Meanwhile, as part of the Senate confirmation process, the FCC's Office of General Counsel (OGC) reviewed my interests in order to ensure compliance with federal conflict of interest statutes³ and regulations.⁴ Upon completion of its review, OGC prepared on my behalf an Ethics Agreement, which states, "upon confirmation, Mr. McDowell will resign his position with COMPTTEL and will for one year following his resignation disqualify himself from participating in

¹ See AT&T, BellSouth To Merge, *Press Release* (rel. Mar. 5, 2006) (located at <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22140>).

² See COMPTTEL Blasts Proposed AT&T, BellSouth Merger, *Press Release* (rel. Mar. 6, 2006). Additionally, COMPTTEL has submitted about 38 filings in the instant docket. See WT Docket No. 06-74.

³ See 18 U.S.C. § 208 (setting forth acts affecting a personal financial interest); 47 U.S.C. § 154 (providing that no member of the Commission shall have a financial interest in any company or other entity engaged in the manufacture or sale of telecommunications equipment, the business of communication by wire or radio, or in the use of the electromagnetic spectrum).

⁴ See 5 C.F.R. § 2635.501 *et seq.* (containing provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of official duties). A copy of these regulations is attached at Exhibit A.

any particular matter involving specific parties in which COMPTTEL is a party, or represents a party.”⁵ The AT&T/BellSouth merger would be just such a matter.

Appropriately, the conflict of interest I would bring to the FCC in deciding the fate of the proposed merger was the primary topic of my March 9 confirmation hearing. In fact, Senator George Allen questioned me on this matter. In my answer, I pledged that, as a commissioner, I would operate under nothing less than the highest of ethical standards.⁶ Further, in referencing the FCC’s established system governing conflicts, I was aware of the need to consult with the FCC’s General Counsel, other authorities such as the Office of Government Ethics (OGE), the U.S. Code, the Code of Federal Regulations (CFR), my Ethics Agreement (which was in place at the time of my testimony), and the Virginia Rules of Professional Conduct, as needed, when making ethical and policy determinations at the FCC.

I was confirmed by the Senate on May 26, 2006. Pursuant to my Ethics Agreement, I resigned my position with COMPTTEL on May 31, 2006. Since being sworn in by Chairman Martin on June 1, 2006, I have not participated in the Commission’s consideration of particular matters involving specific parties in which COMPTTEL is a party⁷ because my Ethics Agreement, as well as the Code of Federal Regulations, expressly state I should not.⁸ In effect, from the beginning, I have had a “red light” prohibiting me from participating in particular matters involving specific parties – in this case, a merger proceeding involving two parties, AT&T and BellSouth – where COMPTTEL is a party. In light of this bar, I therefore have not participated in its substantive consideration.

Against this backdrop, on December 1, 2006, citing my four colleagues’ “inability to reach consensus on this matter,”⁹ Chairman Martin announced his decision to exercise his prerogative to direct the FCC’s General Counsel to “consider whether the Government’s interest would be served by” permitting me to participate.¹⁰

⁵ Letter from Patrick J. Carney, Alternate Designated Agency Ethics Official and Assistant General Counsel, FCC, to Marilyn L. Glynn, General Counsel, Office of Government Ethics (dated Feb. 9, 2006) (“Ethics Agreement”) at 1. A copy of my Ethics Agreement is attached at Exhibit B. OGC sent a copy of my Ethics Agreement to the Chairman of the Senate Committee on Commerce, Science, and Transportation, Senator Ted Stevens, on February 14, 2006. *See* Letter from Samuel L. Feder, General Counsel and Designated Agency Ethics Official, FCC, to The Honorable Ted Stevens, Chairman, Senate Committee on Commerce, Science, and Transportation (dated Feb. 14, 2006) (“Transmittal Letter”). A copy of the Transmittal Letter, which is substantively similar to the Ethics Agreement, is also attached at Exhibit B.

⁶ A copy of the transcript of this exchange is attached at Exhibit C.

⁷ *See* 47 CFR § 1.21(c).

⁸ *See* Ethics Agreement at 1 (“upon confirmation Mr. McDowell will resign his position with COMPTTEL and will for one year following his resignation disqualify himself from participating in any particular matter involving specific parties in which COMPTTEL is a party, or represents a party”); 5 C.F.R. § 2635.502(a) (“where an employee ... represents a party to [a particular matter involving specific parties], and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter”).

⁹ Letter from Kevin J. Martin, Chairman, FCC, to Congressional Leaders (dated Dec. 1, 2006). A copy of this letter is attached at Exhibit D.

¹⁰ *See id.*

Most recently, on December 8, Mr. Feder delivered to me a memorandum of law that sets forth his conclusion that the government's interest in this matter outweighs the concern about the appearance of a conflict of interest.¹¹ Specifically, citing 5 C.F.R. § 2635.502(d),¹² the Authorization Memo concludes, "you should not be barred from participating in this proceeding if you choose to do so,"¹³ and notes that "[b]alancing these competing concerns here was difficult, and reasonable people looking at these facts could disagree about the appropriate result."¹⁴ I would like to go out of my way to thank Mr. Feder and his hard-working staff for their efforts in this endeavor.

In all candor, however, I had expected a memorandum making a strong and clear case for my participation. Instead, the Authorization Memo is hesitant, does not acknowledge crucial facts and analyses, and concludes by framing this matter as an ethical coin-toss frozen in mid-air. The document does not provide me with confidence or comfort. Nor does the December 11, 2006, letter responding to the questions posed by Representatives Dingell and Markey.¹⁵ I must emphasize that in no way should anyone interpret my observations as a criticism of Mr. Feder or his staff. As indicated in the Authorization Memo, reasonable minds can differ on this matter. Nonetheless, while I expected the legal equivalent of body armor, I was handed Swiss cheese.

First, the Authorization Memo is silent on the issue of my Ethics Agreement, which, as noted earlier, was described with specificity and transmitted to the Senate by Mr. Feder on February 14, 2006.¹⁶ In fact, the memo does not even mention the Ethics Agreement, which is separate and apart from other legal and ethical standards that may apply. The Ethics Agreement clearly states that I must disqualify myself "for one year ... from participating in any particular matter, involving specific parties, in which COMPTEL is a party, or represents a party,"¹⁷ and contains no exception to this mandate. Furthermore, the Ethics Agreement embodies representations that I made to the Senate. Senators relied on these representations when they confirmed me unanimously on May 26. Yet, the Authorization Memo offers no discussion of, let alone justification for, why or how the Ethics Agreement may be breached.¹⁸

¹¹ See Memorandum from Samuel L. Feder, General Counsel, FCC, to Commissioner Robert McDowell, regarding Authorization To Participate in the AT&T/BellSouth Merger Proceeding (dated Dec. 8, 2006) ("Authorization Memo"). A copy of the Authorization Memo is attached at Exhibit E.

¹² See Exhibit A.

¹³ Authorization Memo at 1.

¹⁴ *Id.*

¹⁵ See Letter from Samuel L. Feder, General Counsel, FCC, to The Honorable John D. Dingell, Ranking Member, Committee on Energy and Commerce, U.S. House of Representatives, and The Honorable Edward J. Markey, Ranking Member, Subcommittee on Telecommunications and the Internet, U.S. House of Representatives (dated Dec. 11, 2006) ("Dec. 11, 2006 Letter").

¹⁶ See *supra* n.5.

¹⁷ Ethics Agreement at 1; Transmittal Letter at 1.

¹⁸ With respect to the substance of the Authorization Memo, I must distinguish two scenarios upon which OGC relied in reaching its conclusion. First, regarding former FCC Chairman Kennard, I note that the Personal Attack and Political Editorial Rule proceeding was a rulemaking of general applicability, not an adjudicatory proceeding (or particular matter involving specific parties), which is at issue today. See 5 CFR § 2635.502(a)(2) (in applying this provision to rulemaking proceedings, it has been longstanding FCC policy

Second, I am concerned by the advice given to OGC by the Office of Government Ethics (OGE). OGE was chartered in 1989 by President George H. W. Bush to “establish fair and exacting standards of ethical conduct for all executive branch employees.”¹⁹ As the unbiased and dispassionate ethics counsel to federal agencies, OGE ensures “that every citizen can have complete confidence in the integrity of the Federal Government.”²⁰ In essence, OGE’s advice is the “gold standard” for the ethical conduct of federal employees and officials. The Authorization Memo reports that OGE Director Robert I. Cusik described the question of my participation as a “very, very close call,” and advised that “were the decision up to him, he would decide against authorization.”²¹ I find Mr. Cusik’s opinion significant and I afford it great weight in drawing my conclusion.

Finally, last week, I sought advice from my personal ethics counsel at the Virginia State Bar. And, while the substance of that discussion is privileged and confidential, suffice it to say that I was not encouraged by their assessment.

Throughout my brief tenure here at the FCC, I have tried to be as thoughtful, transparent and direct as possible in my decision making. With each decision I make, I endeavor to keep in mind why the FCC exists and what the mission of each commissioner should be; and that, of course, is to promote and protect the public interest. We must never lose sight of the fact that the ultimate shareholders in every endeavor we embark upon are the American people. In this vein, it is incumbent upon every public servant to do all that he or she can to earn the public’s trust in the integrity and impartiality of their government.

In light of these factors, I find that I have no choice but to abide by the terms of my Ethics Agreement, heed the independent advice of OGE and my personal ethics counsel, and, ultimately to follow my own personal sense of ethics.²² Accordingly, I disqualify myself from this matter.

that an employee who was personally and substantially involved in a particular rulemaking before coming to the Commission would, absent an authorization, confront a lifetime bar from participating in that rulemaking proceeding). In addition, prior to his authorization to participate as FCC Chairman in September 2000, Chairman Kennard had previously participated in that rulemaking proceeding almost twenty years earlier. *See* Statement of FCC Chairman William E. Kennard Concerning his Participation in the Personal Attack and Political Editorial Rule Proceeding, *FCC News Release* (rel. Sept. 18, 2000). Second, regarding my vote in June 2006 in support of the Universal Service Fund Contribution Methodology item, while it is true that COMPTEL is a party in that proceeding, here again, that proceeding is a rulemaking of general applicability rather than a particular matter involving specific parties. Moreover, like the instant merger proceeding, I had not personally participated in and was not involved in the Universal Service Fund Contribution Methodology proceeding while with COMPTEL. Thus, although OGC gave weight to these scenarios in reaching the conclusions set forth in the Authorization Memo, the comparisons are imprecise.

¹⁹ Exec. Order No. 12674, Principles of Ethical Conduct for Government Officers and Employees (rel. Apr. 12, 1989).

²⁰ *Id.*

²¹ Authorization Memo at 7.

²² Further, I will not risk jeopardizing the legal sustainability of the Commission’s decision in this matter should a party seek appeal. AT&T and BellSouth reportedly have “no objection” to my participation. *See* Edie Herman, *McDowell Authorized to Vote on AT&T-BellSouth Merger*, COMMUNICATIONS DAILY, Dec.

I have not reached my decision lightly. The American people expect their public servants to make tough decisions, and I have not hesitated from doing so in my brief tenure here at the Commission. The American people also demand that public servants operate under the highest of ethical standards. All too often, especially recently, they have been disappointed by those who hold public office. I hope that this is one instance where they are not disappointed.

In the meantime, I am hopeful that in the holiday spirit of making sacrifices, my four colleagues -- and all the interested parties -- will come back to the negotiating table in good faith to offer meaningful concessions. Because I am an incurable optimist, I am confident that this merger can be resolved with the same speed and unanimity as the SBC/AT&T and Verizon/MCI mergers of last year.

Now, my four colleagues have exclusive and unambiguous ownership of this important merger. Having only four Commissioners participate really should not be an impediment to progress.²³ There have been many stretches of time in recent history when only four Commissioners sat on the FCC. In fact, since 1990, the Commission has had fewer than five Commissioners for a combined period of over five years. During these periods, contentious and difficult mergers were successfully considered. And, the two Bell mergers reviewed just last year were approved unanimously by a four-member Commission. This transaction should be no different. I urge all of them to resolve their differences as soon as possible.

Sadly, I fear that my recusal from this matter has been used as a pawn by some to forgo meaningful and sincere negotiations. Now that I am removing that chess piece from the board, I hope that the twin pillars of sound negotiations are restored: good faith and sacrifice. The shareholders, employees and customers of the affected companies deserve speedy resolution of this matter. More importantly, so do the American people.

Finally, I thank you again for coming today. And, I thank my staff for their incredibly hard work, long hours and support throughout this difficult episode. I wish each of you the happiest of holidays.

11, 2006, at 2. I am unaware, however, as to whether other parties to the proceeding have taken similar positions.

²³ See, e.g., Dec. 11, 2006 Letter at Tab D, which includes a number of major transactions handled on delegated authority rather than by the full Commission.

Exhibit A

5 C.F.R. § 2635.501 *et seq.*

§ 2635.501

(e) *Eligibility for special tax treatment.* An employee required to sell or otherwise divest a financial interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter.

[57 FR 35042, Aug. 7, 1992, as amended at 59 FR 4780, Feb. 2, 1994; 60 FR 6391, Feb. 2, 1995; 60 FR 66858, Dec. 27, 1995; 61 FR 40951, Aug. 7, 1996; 62 FR 48748, Sept. 17, 1996]

Subpart E—Impartiality in Performing Official Duties

§ 2635.501 Overview.

(a) This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under § 2635.502, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in § 2635.502 to determine whether he should or should not participate in a particular matter.

(b) Under § 2635.503, an employee who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party.

NOTE: Questions regarding impartiality necessarily arise when an employee's official duties impact upon the employee's own financial interests or those of certain other persons, such as the employee's spouse or minor child. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he, his spouse, general partner or minor child has a financial

5 CFR Ch. XVI (1–1–06 Edition)

interest, if the particular matter will have a direct and predictable effect on that interest. The statutory prohibition also extends to an employee's participation in a particular matter in which, to his knowledge, an organization in which the employee is serving as officer, director, trustee, general partner or employee, or with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest. Where the employee's participation in a particular matter would affect any one of these financial interests, the standards set forth in subparts D or F of this part apply and only a statutory waiver or exemption, as described in §§ 2635.402(d) and 2635.605(a), will enable the employee to participate in that matter. The authorization procedures in § 2635.502(d) may not be used to authorize an employee's participation in any such matter. Where the employee complies with all terms of the waiver, the granting of a statutory waiver will be deemed to constitute 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 agency programs and operations. Similarly, where the employee meets all prerequisites for the application of one of the exemptions set forth in subpart B of part 2640 of this chapter, that also constitutes 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 agency programs and operations.

[57 FR 35042, Aug. 7, 1992, as amended at 62 FR 48748, Sept. 17, 1997]

§ 2635.502 Personal and business relationships.

(a) *Consideration of appearances by the employee.* Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person

to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An 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.

(b) *Definitions.* For purposes of this section:

(1) An employee has a *covered relationship* with:

(i) A person, other than a prospective employer described in §2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;

NOTE: An employee who is seeking employment within the meaning of §2635.603 shall comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not,

in itself, constitute active participation.

NOTE: Nothing in this section shall be construed to suggest that an employee should not participate in a matter because of his political, religious or moral views.

(2) *Direct and predictable effect* has the meaning set forth in §2635.402(b)(1).

(3) *Particular matter involving specific parties* has the meaning set forth in §2637.102(a)(7) of this chapter.

Example 1: An employee of the General Services Administration has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for lease of office space. Under the circumstances, she would be correct in concluding that a reasonable person would be likely to question her impartiality if she were to participate in evaluating that developer's or its competitor's lease proposal.

Example 2: An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of five or more persons. His wife is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that his wife's employment with an affected corporation would raise a question concerning his impartiality.

Example 3: An employee of the Defense Logistics Agency who has responsibilities for testing avionics being produced by an Air Force contractor has just learned that his sister-in-law has accepted employment as an engineer with the contractor's parent corporation. Where the parent corporation is a conglomerate, the employee could reasonably conclude that, under the circumstances, a reasonable person would not be likely to question his impartiality if he were to continue to perform his test and evaluation responsibilities.

Example 4: An engineer has just resigned from her position as vice president of an electronics company in order to accept employment with the Federal Aviation Administration in a position involving procurement responsibilities. Although the employee did not receive an extraordinary payment in connection with her resignation and has severed all financial ties with the firm, under the circumstances she would be correct in concluding that her former service as an officer of the company would be likely to cause a reasonable person to question her impartiality if she were to participate in the

administration of a DOT contract for which the firm is a first-tier subcontractor.

Example 5: An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impartiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

(c) *Determination by agency designee.* Where he has information concerning a potential appearance problem arising from the financial interest of a member of the employee's household in a particular matter involving specific parties, or from the role in such matter of a person with whom the employee has a covered relationship, the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section. However, at any time, including after the employee has disqualified himself from participation in a matter pursuant to paragraph (e) of this section, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

(1) If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

(2) 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 under paragraph (a) of this section,

that the employee's participation in the matter would be proper.

(d) Authorization by agency designee.

Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but 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, 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.

Authorization by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

Example 1: The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises his supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which his partner has applied. If selected,

the partner would receive a substantial increase in salary. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section since the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is his general partner. See § 2635.402.

Example 2: A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the brokerage house where she had recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government for the employee to pass on a routine filing by the particular brokerage house.

Example 3: An Internal Revenue Service employee involved in a long and complex tax audit is advised by her son that he has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

(e) *Disqualification.* Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter.

(1) *Notification.* An employee who becomes aware of the need to disqualify himself from participation in a particular matter involving specific parties to which he has been assigned should notify the person responsible for

his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a particular matter involving specific parties from which he is disqualified.

(2) *Documentation.* An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

(f) *Relevant considerations.* An employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.

§ 2635.503 Extraordinary payments from former employers.

(a) *Disqualification requirement.* Except as provided in paragraph (c) of this section, an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

Example 1: Following his confirmation hearings and one month before his scheduled swearing in, a nominee to the position of Assistant Secretary of a department received an extraordinary payment from his employer. For one year and 11 months after his swearing in, the Assistant Secretary may not participate in any particular matter to which his former employer is a party.

Exhibit B

Transmittal Letter and Ethics Agreement



Federal Communications Commission
Washington, D.C. 20554

February 14, 2006

Honorable Ted Stevens
Chairman
Senate Committee on Commerce, Science,
and Transportation
SR-254
Washington, D.C. 20510

Attention: Jane Swensen

Dear Mr. Chairman:

At the request of the Committee, we have reviewed the financial and other interests of Robert M. McDowell, the President's nominee for Commissioner of the Federal Communications Commission, that are identified in his Public Financial Disclosure Report (SF-278) and his responses to your BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF DEPARTMENT /AGENCY NOMINEES.

As set forth in our letter dated February 9, 2006 to Marilyn L. Glynn, General Counsel, Office of Government Ethics, regarding our review of the nominee's SF-278, Mr. McDowell has agreed that within ninety days of Senate confirmation of his nomination for this position, he will divest his interest in General Electric Company and Southwestern Bell, now AT&T, in order to come into compliance with conflict of interest laws and Commission regulations and avoid even the appearance of a possible conflict. Further, so as to ensure that no conflict of interest should occur in the interim, Mr. McDowell will not participate personally and substantially in any particular matter that will have a direct and predictable effect on these entities, until the appropriate divestiture or other actions have been completed, unless he first obtains a written waiver or qualifies for a regulatory exemption.

Additionally, upon confirmation Mr. McDowell will resign his position with the COMPTEL and will for one year following resignation disqualify himself from participating in any particular matter, involving specific parties, in which COMPTEL is a party, or represents a party. Furthermore, we concur in the White House Counsel's Office determination that Mr. McDowell can continue his position as a member of the Board of Directors of the McLean Project for the Arts, a nonprofit educational service organization with the understanding that no fundraising is permitted, either in his personal or professional/official capacity. Mr. McDowell has agreed to be guided by the advice of the Commission's General Counsel and Designated Agency Ethics Official on any matters that may pose a potential conflict of interest or appearance thereof and to execute any necessary recusals relating to such matters.

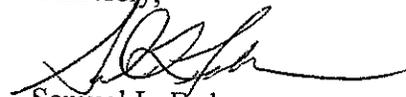
We are of the opinion that if these steps are followed, there will not be any conflict under section 4(b) of the Communications Act, 18 U.S.C. § 208, or the Standards of Ethical Conduct for

Senator Ted Stevens

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Executive Branch Employees. Based on the forgoing considerations and our review of the documents provided, we find that no conflict of interest or appearance thereof should occur with respect to the nominee's service as a Commissioner, Federal Communications Commission. A copy of our letter to Ms. Glynn is enclosed for the Committee's reference.

Sincerely,



Samuel L. Feder
General Counsel and Designated
Agency Ethics Official

Enclosure

cc: Robert M. McDowell



Federal Communications Commission
Washington, D.C. 20554

February 9, 2006

Marilyn L. Glynn
General Counsel
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, D.C. 20005-3917

Dear Ms. Glynn:

Pursuant to 5 C.F.R. § 2634.605(c)(2), I am transmitting the Public Financial Disclosure Report (SF-278), dated January 17, 2006 filed by Robert M. McDowell, who has been nominated by the President to be a Commissioner, Federal Communications Commission.

We have reviewed the financial and other interests of Mr. McDowell as identified in his SF-278. In order to ensure compliance with Federal conflict of interest statutes and regulations, in particular 18 U.S.C. § 208, and to avoid even the appearance of any conflict between his financial interests and his official duties as a member of the Federal Communications Commission, Mr. McDowell has agreed that within ninety days of Senate confirmation of his nomination for this position he will dispose of his interests in the following entities held through the Martha Louise Shea McDowell Revocable Trust:

- General Electric Co.
- Southwestern Bell (SBC).

However, as long as he retains these financial interests he will be disqualified from participating personally and substantially in any Federal Communications Commission proceeding or other particular matter that will have a direct and predictable effect on these entities, unless covered by a regulatory exemption or individual waiver issued pursuant to 18 U.S.C. § 208 (b)(1). Additionally, upon confirmation Mr. McDowell will resign his position with COMPTEL and will for one year following his resignation disqualify himself from participating in any particular matter involving specific parties in which COMPTEL is a party, or represents a party. Furthermore, Mr. McDowell has agreed to be guided by the advice of the Commission's General Counsel (DAEO) on any other matters that may pose a potential conflict of interest or appearance thereof and to execute any necessary recusals relating to such matters.

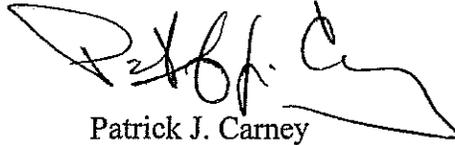
We are of the opinion that divestiture of the above financial interests by the nominee is either required or reasonably necessary so as to avoid violating federal laws and regulations or even the appearance thereof. So long as these steps are followed, we do not believe that there will be any conflict under 18 U.S.C. § 208, or the Standards of Ethical Conduct for Executive Branch Employees.

Marilyn L. Glynn

Page 2

Based on the forgoing considerations and our review of the documents provided, we find that no conflict of interest or appearance thereof should occur with respect to Mr. McDowell's services as a member of the Federal Communications Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "P. J. Carney", written over a horizontal line.

Patrick J. Carney
Alternate Designated Agency Ethics Official
and Assistant General Counsel

Enclosure

cc: Robert M. McDowell

Exhibit C

Senate Transcript

CONGRESSIONAL TRANSCRIPTS
Congressional Hearings
March 9, 2006

Senate Commerce, Science, and Transportation Committee Holds Hearing on Coast Guard Commandant Confirmation

List of Speakers

SENATOR TED STEVENS (R-AK)
CHAIRMAN

SENATOR DANIEL K. INOUE (D-HI)
CO-CHAIRMAN

SENATOR JOHN MCCAIN (R-AZ)

SENATOR JOHN D. ROCKEFELLER
IV (D-WV)

SENATOR CONRAD BURNS (R-MT)

SENATOR JOHN F. KERRY (D-MA)

SENATOR TRENT LOTT (R-MS)

SENATOR BYRON L. DORGAN (D-ND)

SENATOR KAY BAILEY
HUTCHISON (R-TX)

SENATOR BARBARA BOXER (D-CA)

SENATOR OLYMPIA J. SNOWE (R-ME)

SENATOR BILL NELSON (D-FL)

SENATOR GORDON SMITH (R-OR)

SENATOR MARIA CANTWELL (D-WA)

SENATOR JOHN ENSIGN (R-NV)

SENATOR FRANK R.
LAUTENBERG (D-NJ)

SENATOR GEORGE ALLEN (R-VA)

SENATOR JOHN E. SUNUNU (R-NH)

SENATOR BEN NELSON (D-NE)

SENATOR JIM DEMINT (R-SC)

SENATOR MARK PRYOR (D-AR)

SENATOR DAVID VITTER (R-LA)

WITNESSES:

ROBERT MCDOWELL, NOMINEE TO BE A COMMISSIONER AT THE
FEDERAL COMMUNICATIONS COMMISSIONS

VICE ADMIRAL THAD ALLEN, NOMINEE TO BE THE COMMANDANT OF
THE U.S. COAST GUARD

STEVENS:

Good afternoon.

BILL NELSON:

If the senator would notice, the admiral has answered the question with the regard to the Coast Guard decision of the repatriating of the 15 rafters in early January. He has stated that was a Coast Guard decision after the consultation with their legal counsel.

Now that that issue has been brought to full fruition in a federal court, where the court has said that the law was not followed, it's certainly worth bringing up that issue on those kinds of interpretations within the Coast Guard itself.

G. ALLEN: Admiral Allen, you can just watch as a referee.

STEVENS:

Thank you very much, Admiral.

Anyone have any further questions to the admiral?

We appreciate your courtesy, Admiral. We will have an executive session on Thursday, March 16th. We'll do our best to see if we can get your nomination before that executive session.

Thank you very much.

T. ALLEN: Thank you, Mr. Chairman.

-----[Begin Robert McDowell]-----

STEVENS:

Our next nominee is Robert McDowell, nominated to be a commissioner of the Federal Communications Commission and to be introduced by Senator Allen.

G. ALLEN: Thank you, Rob. If you'd have a seat there.

Mr. Chairman and colleagues on the committee, it is my pleasure this afternoon to introduce to our committee Robert M. McDowell.

Rob and his bride, Jennifer, are long-time friends of mine and my wife, Susan. Rob is a native of Virginia. He and his bride, Jennifer, are raising their two children, Griffin (ph) and Mary Shea (ph), who are here with us -- well-behaved little pups -- and they're raising on what's left of the farm in Northern Virginia that Rob grew up on.

I'm delighted that President Bush has nominated Rob to serve as commissioner on the Federal Communications Commission. I'm confident he'll do an outstanding job there.

I'm going to put a whole statement in the record, but let me highlight why I think he's extraordinarily qualified to serve on the FCC.

Rob brings with him approximately 16 years of private sector experience in the communications industry. I think that experience alone makes him a tremendous asset to the commission from the perspective that he has had.

He has long been a passionate individual about public service. When I was serving as governor of Virginia, I actually appointed Rob to not one but two different boards and commissions: one dealing with combating drugs in Virginia and the other as a consumer perspective on the Board of Contractors.

He served on both of these boards with great distinction and integrity. And he spent really the last three decades serving his commonwealth, his community in a variety of different civic and charitable ways. He is currently chairman of the McLean Project for the Arts.

He does have a stellar academic and professional background. He went to Duke University, an undergraduate school; went to law school at the College of William and Mary, where Mr. Jefferson, Thomas Jefferson, studied law. He seems to have similar philosophy as Mr. Jefferson.

After law school he began practicing telecommunications law. He served as outside counsel to numerous technology and telecom companies and trade associations.

He is admitted to the Virginia state bar. He's admitted to practice before the Supreme Court of the United States of America, the Supreme Court of Virginia, the U.S. Court of Appeals for the District of Columbia Circuit, the 1st Circuit, 4th Circuit and 5th Circuit and the U.S. District Court for the Eastern District of Virginia; a very competent lawyer.

I can personally attest to his high, exemplary character. And I think he's going to execute his duties as commissioner with great ethics, with objectivity and the utmost of professionalism.

And I think he'll be striving -- and you'll read his statement, you'll hear it -- but I think he'll be striving to make sure that all people in this country have the opportunity to benefit from the digital revolution.

I think he'll be devoted and a very pragmatic commissioner in the finest and fairest caliber with his knowledge and his experience.

I'm speaking for myself, but I know I'm also speaking on behalf of my colleagues from Virginia Senator John Warner, Congressman Tom Davis, Congressman Wolf and other members of the Virginia delegation in enthusiastically supporting the confirmation of President Bush's nomination of Rob McDowell on the Federal Communications Commission.

I'd like to put this as part of the record. And if I could, may I ask the first question of the witness, Mr. Chairman, because I was supposed to have left 10 minutes ago, but if I could ask a question, the first question if it please the court to ask the first question of the witness?

(LAUGHTER)

STEVENS:

If we say "no" will you stay?

(LAUGHTER)

G. ALLEN: No, I'd have to go.

STEVENS:

OK. Go ahead.

G. ALLEN: Thank you.

Rob, this is something I think that needs to be addressed. In my statement, all the experience you've had in the last 16 years, you have been an advocate for telecom entrepreneurs, for technology entrepreneurs and you have substantive experience in the private sector. And I think that's going to be extremely valuable to the FCC to have that perspective. And you may have more experience than any other of the commissioners as well in these areas.

But I do think it's fair to ask you how you think you'll be able to adjudicate matters objectively and fairly given your background. And I think it's very important that you address this point.

MCDOWELL:

Thank you, Senator Allen.

And thank you, Mr. Chairman.

G. ALLEN: You're going to have to give your statement. This I know fouls everything up, but...

MCDOWELL:

Should I answer the question first?

STEVENS:

Yes.

MCDOWELL:

OK. Excellent.

It is a very sobering experience to have the president of the United States extend his hand and ask you to serve your country.

The president is asking me to be a fair, judicious, impartial, thorough and thoughtful adjudicator, arbiter and policymaker. And if confirmed, that is what I would strive with every fiber to be.

The role of an FCC commissioner, of course, is very different from the role I've had throughout my career except for when I worked in the Virginia House of Delegates for your colleague Bob Andrews.

I've been an advocate and I've been an advocate on behalf of clients and I'd like to think I've been an effective advocate. And perhaps some of my former opponents should be quizzed as to how effective I may have been at times.

But many of the major issues I've worked on have been resolved. And more importantly, it would be my duty as a commissioner to wipe the slate clean, to start from scratch and examine each issue de novo. I will prejudge nothing and I ask that my ability to be impartial not be prejudged.

At the same time, on top of all that, the FCC has a system in place that governs conflicts and recusals. Throughout this nomination process, I've been in consultation with the White House Counsel's Office, the Office of Government Ethics and, of course, the FCC's General Counsel's Office.

And there are standards in place. This is nothing new. This is not a case of first impression.

In fact, we recently had a commissioner serve on the commission who came straight from a regulated company, a specific company, just representing an industry in general, who served with great distinction. And I believe that commissioner, when all was said and done, was only recused from two different proceedings.

So throughout my tenure at the FCC, if confirmed, I will rely on the advice and counsel and opinions of the FCC's Office of General Counsel and we will use the system and the process that's already in place.

G. ALLEN: Thank you, Mr. Chairman.

STEVENS:

Thank you, sir. Have a nice weekend.

(LAUGHTER)

Mr. McDowell, we'd be pleased if you'd proceed with your statement. It will print in full in the record, but if you wish to summarize it you may.

MCDOWELL:

Thank you, Mr. Chairman, and members of the committee. It is a great privilege to be able to appear before you here today.

I would, if I could indulge the chairman, like to introduce some family members.

STEVENS:

I thought the senator did that. Please do, though.

MCDOWELL:

Absolutely.

First, the wind in my sails, my beautiful bride, Jennifer. And I could not get to this point without her love and support and I appreciate everything she's done.

Next to her is my beautiful daughter who wants you to know that today she is 4 years and 5 months old today...

(LAUGHTER)

... Mary Shea Virginia McDowell (ph).

Next to her is Griffin Malcolm McDowell (ph), who is 6 years and 8 months almost.

Next to him is my beautiful sister, Tina, who does not want me to reveal her age because she's a brown belt in karate; my father, Bart McDowell, whose age I will also not reveal, who, by the way, was raised on a ranch on the Tex-Mex border, I'd like to note, without phone service and went on to be a naval officer in World War II, then onto a distinguished career as a senior editor of National Geographic Magazine.

We are without my mom today, who just passed away last July and, of course, is unable to witness this day at least from an earthly perspective.

I have two brothers. My oldest brother, Kelly McDowell, is the mayor of El Segundo, California. And if you've ever flown into Los Angeles Airport, you've flown into my brother's town. And my other brother, Josh, who's on the staff of Texas A&M on the Corpus Christi campus.

I'd also like to thank Commissioner Jonathan Adelstein for appearing today.

And it's terrific to have you here.

I got to know him a bit when he was with Senator Daschle. And I appreciate the bipartisan support and hopefully we can reciprocate.

I'm deeply honored by President Bush's decision to nominate me to serve as a commissioner of the Federal Communications Commission. Over the past few weeks, I've had the pleasure of meeting with many members of the committee. And I thank all of you for taking the time out of your busy schedules to share your thoughts about communications policy and the FCC with me. And if confirmed, I look forward to continuing our dialogue.

But this coming October 19th in Virginia, we will commemorate the 225th anniversary of the American's victory over the British at Yorktown. And this battle effectively ended the war where a ragtag band of freedom fighters defeated the largest superpower in the world.

On that crisp, autumn day, as the vanquished British troops withdrew from the battlefield, they marched to the tune of "The World Turned Upside Down." And for the British, the old world had been turned upside down. But for freedom and democracy, the new world had been turned right side up.

George Washington and his fellow patriots won largely because of their belief that the dissemination of self-evident truths could shatter the walls of tyranny. They laid the foundation of a new nation built upon the twin cornerstones of free markets and free ideas for all.

At the heart of the ideals of the fledging United States was a profound commitment to the freedom of speech, the freedom to communicate. No agency has more of an effect on the preservation and promotion of this freedom than the Federal Communications Commission.

If confirmed, I solemnly pledge to be true to those founding principles, to work tirelessly to promote free markets and the free expression of ideas.

With the advent of new technologies, the old world of communications has been turned upside down. But these advances have turned the new world right side up for freedom, democracy and capitalism.

Long ago, Thomas Jefferson envisioned the benefits brought forth by the free flow of information when he wrote, quote, "Enlighten the people, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day," end quote.

Jefferson's words were nearly prophetic in predicting the digital revolution. Today, American consumers are more empowered with information than ever before, thanks to brave and brilliant entrepreneurs, increased competition and less government regulation. But there is more to do.

If confirmed, I will commit myself to promoting competition and investments in all markets, clearing the cumbersome underbrush of unnecessary government regulation, encouraging private-sector solutions to many of the challenges facing the communications industry and removing barriers to entry.

All Americans should be able to benefit from the digital revolution and the FCC should strive to help American consumers realize that goal.

If confirmed, as Senator Allen pointed out, I will bring to the Commission nearly 16 years of private-sector experience in the communications industry and, with your approval, I will also bring with me a strong passion for bipartisan public service.

In my career, in addition to counseling technology entrepreneurs, I have served as a legislative aide to a member of the Virginia General Assembly, actively worked on bipartisan statutory boards as appointed by two Virginia governors, and led efforts to make my community a better place to live, work and raise a family.

If confirmed, I will use this experience to help me approach each issue that comes before the commission with energy, impartiality and thoughtfulness. I will endeavor to keep the spirit of Yorktown alive by working every day toward enhancing the lives and liberty of all Americans.

So let me just take a quick second to state my opinion about the four current commissioners of the FCC.

STEVENS:

Mr. McDowell, I think that the senator has to leave. If you don't mind, he wants to ask you a question.

MCDOWELL:

Fire away, Senator.

DORGAN:

I'd be content for him to finish.

I didn't want to have to leave at 4 o'clock without saying that I support Robert McDowell's nomination. I think the president has sent us a nomination that is a solid nomination of someone well qualified.

But I wanted to say I had a chance to meet with Mr. McDowell.

Mr. Chairman, I think this commission now with a full complement of commissioners will be making decisions that will have a profound impact on what the American people see, hear and read in the coming years, because they're going to be confronted with this issue of ownership limits. And there's not much important in my judgment in our government than getting this right.

The commission has sunk its teeth into it before, been thwarted by the courts and thwarted by the Congress. And many of us have a profound concern about what might or might not happen here.

I'm not going to ask specific questions about it because we had a long talk in my office about that. But concentration in ownership of the media, including television, radio and the proposals for the cross-ownerships of newspapers -- it's a very serious issue, because it will have a significant impact on what people in this democracy can see, hear and read, what information they get. And the foundation for democratic self-government is basic information to the American people.

So I did come because I wanted to say that I had a long conversation with Mr. McDowell. I think the president has made a good choice. And I'm really especially pleased: We're finally going to have an FCC with all five members seated, present and willing to debate and vote on issues. That's very important for this country.

So, Mr. McDowell, thank you. I wish you well. I look forward to working with you.

Mr. Chairman, thank you for the courtesy.

STEVENS:

Thank you, Senator.

MCDOWELL:

Thank you, Senator.

STEVENS:

Finish your statement; we'll put it in the record so you complete it without any interruption.

MCDOWELL:

Yes, sir. We're almost done.

But I just wanted to say that the four current commissioners, as led by Chairman Martin, are, in my opinion, among the most talented and thoughtful people to have ever served in the FCC. And if confirmed, I'd be honored and humbled to join them.

And that concludes my brief statement. I'm looking forward to any questions you might have.

STEVENS:

Well, thank you very much.

I was going to note the presence of Commissioner Adelstein. He does attend these hearings. And we welcome his participation, silently, however.

(LAUGHTER)

We held some hearings, Mr. McDowell, that were targeted about universal service and we've been working on general rural telecommunications issues. Do you have any statements you'd like to make about your vision concerning how the FCC can keep rural America connected to this digital revolution?

MCDOWELL:

Senator Stevens, that will be a major priority for me.

My father, as I mentioned before, was raised on a ranch on the Tex-Mex border. And he used to tell stories and still does about how my grandfather would take the car battery out of the car every night, because not only did they not have phone service, they did not have electricity, which was not unusual in that time, and to stay connected to the rest of the world, they would hook the car battery up to the radio inside the house.

Despite that, he went on to become a senior editor of National Geographic, but other folks didn't have the same opportunities perhaps that he had.

So keeping rural America connected is very real, very front and center for the McDowells.

What we have to, of course, focus on is the shrinking pool to the contribution mechanism and work on shoring that up and moving forward to strengthen that system, and making sure that folks who live on tribal lands or in rural America or in high-cost areas, poor inner cities, et cetera, have the same opportunity to access the information offered by others in more fortunate areas.

So as the commission examines universal service, I will be making that a priority.

STEVENS:

Thank you very much.

Senator Smith was not able to be here, but he sent a question and asked me to put it to you. His question is this: "For those of us in Oregon have been trying to attract a baseball team for years, we're envious of the spans (ph) in cities that actually have a team.

"I am, however, becoming more concerned about a tactic that cable companies are using to limit viewership of local sports programming. First Cablevision stopped broadcasting of Yankee games until they got a deal they wanted and then Comcast did the same did with the Philadelphia Phillies and in Washington, D.C., with the Nationals."

This is Senator Smith's question, "I understand the business negotiations can be tough, but blocking game broadcasts raise real concerns. How would you address situations like this from your position in the FCC?"

MCDOWELL:

Well, Senator, that's an important issue and it's a personal one to us. We'd like to see some National games here locally. We're certainly supporters of our local team.

Coming from the private sector, I will first look to private- sector solutions to resolve issues such as that and I would prefer to see voluntary agreements between the parties at hand.

There may be ongoing proceedings or future proceedings at the commission that could examine this. I'm not exactly sure of the commission's authority in those areas under Title VI, Section 628, for instance. I'd have to take a closer look at that.

But the first line of defense, I think, should be a private-sector solution. If the commission can encourage a private-sector solution, I would look for such an avenue.

STEVENS:

As I mentioned, we welcome Commissioner Adelstein to be with us today, but if you are already confirmed you both couldn't be here.

Are you familiar with some of the rules that have been adopted in the past concerning the activities of the commission? Are you familiar with that rule, particularly about how many commissioners can be present at any one time at a public gathering?

MCDOWELL:

I'm roughly familiar with that. I think the answer might be two of us, but I can double-check that.

STEVENS:

Some of us are very disturbed about that too. I think we need some opinions on the commission about what should be done to modernize your procedures so that you can function as a modern body.

There was a time in the past when Senator Goldwater and I decided that there were too many commissioners and we asked the Congress to delete two. Did you know that? That was the problem we had to get an agreement among the seven.

You said you will be bipartisan. Can you tell us a little bit more about that, about your attitude about bipartisanship?

MCDOWELL:

Well, Senator, throughout my career I've learned that these issues are not necessarily, for the most part, partisan issues.

I have worked in a bipartisan manner as an advocate, and would continue to take that spirit to the commission with me if confirmed.

I've served on statutory boards appointed by two governors of Virginia that were bipartisan and worked well with folks of the other party, again, on issues that are historically not necessarily been partisan issues, for the most part.

So I am looking forward to that. There's not a partisan gigabyte. There's not a partisan megahertz. So I don't anticipate looking at those issues through a partisan lens.

STEVENS:

You've had a substantial relationship with some of the communications interests and I note in your statement that you indicate that you do intend to very jealously apply the

conflict of interest concepts and will disqualify yourself in any matter than you've had connection with before or any entity you've had before.

Can you elaborate on that a little bit?

MCDOWELL:

Well, I will certainly rely on the opinion of the Office of the General Counsel of the FCC and they do have a system in place and rules in place.

Conflicts at the FCC are not necessarily anything new. We have a commissioner recently who came from the private sector, from a regulated company, who ended up only being recused from two particular matters, as I recall.

So I will consult with the Office of General Counsel on any matter where Comptel may have been a party or where Comptel's members may have been a party to make sure that there's not even the appearance of a conflict of interest.

STEVENS:

Have you made an appearance before the FCC as an advocate?

MCDOWELL:

Not in several years, Mr. Chairman.

My primary bailiwick at Comptel for the past six or seven years has been the legislative and executive branch. We have other folks at Comptel who worked the FCC for the most part. And my name has not appeared on a pleading in several years, nor have I been formulating or writing pleadings or been substantially involved in any pleadings before the commission.

STEVENS:

Well, I don't know whether other members have questions they wish to submit. If they do, I would urge you to respond to them as rapidly as possible because we will also try to get this nomination on the executive session agenda for March 16th.

Thank you very much and we thank your family for coming to join us.

MCDOWELL:

Thank you, Mr. Chairman.

CQ Transcriptions, March 9, 2006

Source: **CQ Transcriptions**

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Exhibit D

Martin Letter to Congressional Leaders



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 1, 2006

The Honorable Ted Stevens
Chairman
Committee on Commerce,
Science and Transportation
United States Senate
254 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Daniel K. Inouye
Co-Chairman
Committee on Commerce,
Science and Transportation
United States Senate
510 Dirksen Senate Office Building
Washington, D.C. 20510

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 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 Fred Upton
Chairman
Subcommittee on Telecommunications
and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
2415 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 Sirs:

As you know, in March of this year, AT&T and BellSouth 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. Generally, the Commission attempts to rule on mergers within 180 days. This merger filing has now been pending before the Commission for over 8 months. Last year the Commission ruled on two large wireline mergers, the AT&T/SBC and Verizon/MCI transaction, by day 199 of the Commission's calendar. In an attempt to rule on the AT&T/BellSouth transaction in a similar fashion, I circulated a draft order to my colleagues on September 21, 2006 – several weeks in advance of the Commission's 180-day mark.

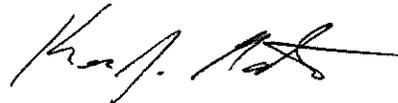
We were originally scheduled to vote on this merger item at the Commission's open agenda meeting scheduled for October 12th. We then rescheduled this meeting for the next day, October 13th to give my colleagues additional time. On the morning of October 13th, Commissioners Copps and Adelstein, in a written letter, requested additional time to consider the

transaction. Specifically, they requested that there be another round of public comment. I agreed to this request and deleted the items from consideration from the October 12th meeting and opened up a new comment period. At the conclusion of this comment period, I once again scheduled a vote on the merger order at the Commission's November 3rd open agenda meeting. Unfortunately, it became clear on the eve of that meeting that there was still no consensus. I again deleted this item from the Commission's agenda. Since that time, the merger has remained on circulation for consideration by the Commission and I have continued to work with my colleagues in an effort to address the concerns they have expressed about the transaction.

It now appears that, despite working for months to reach consensus with my colleagues, three attempts over the past six weeks to have this item considered at an open meeting, and countless hours of internal deliberations, the Commission has reached an impasse. Although Commissioner McDowell is currently not participating in this proceeding, the FCC's general counsel "may authorize [him] 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." 5 C.F.R. § 2635.502(d). The General Counsel has, in the past, used this authority to authorize Commissioners to participate in matters in which they would otherwise be recused. For example, in September 2000, the General Counsel authorized then-Chairman Kennard to break a two-two deadlock in a proceeding addressing the repeal or modification of the personal attack and political editorial rules, despite the fact that Chairman Kennard had previously represented NAB in that proceeding. Given the Commission's inability to reach consensus on this matter, I have asked the General Counsel to consider whether the Government's interest would be served by permitting Commissioner McDowell - who has not participated in this proceeding thus far - to participate.

Please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. Martin", with a stylized flourish at the end.

Kevin J. Martin
Chairman

Exhibit E

Authorization Memo



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).