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McDowell Sticks to Recusal Commitment
Despite quasi-green light from GC,
Commissioner sits out AT&T/BellSouth vote

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Citing the Swiss-cheese nature of an ethical opinion letter prepared by the FCC's General Counsel, Commissioner McDowell, fifth in line at the FCC and the critical third Republican on the Commission, decided that the ethical considerations raised by the merger of BellSouth and AT&T prevented him from tendering his vote in the matter.

To fully understand how Commissioner McDowell was put into this situation, it is necessary to go back in time to February, 2006, when McDowell was nominated by George Bush to be the fifth FCC Commissioner. At that time, McDowell served as the Senior Vice President and Assistant General Counsel of COMPTTEL. Perhaps emboldened by the idea of three Republicans on the Commission, AT&T announced its plan to merge with BellSouth a mere 28 days later. Citing major concerns with the merger, McDowell's then-current employer immediately came out against the merger.

As part of his confirmation, McDowell was required to sign an Ethics Agreement, which prevents him from participating in any proceeding in which COMPTTEL is also participant, for one year. McDowell cited this Ethics Agreement when he went onto the Hill for his nomination hearing. Subsequent to taking office, McDowell recused himself from the AT&T-Bell South merger proceeding, as well as other proceedings in which COMPTTEL is a participant.

FCC action on the merger was delayed for months by the absence of tie-breaking vote on the merger, pitting the two Republican Commissioners against the two Democrat Commissioners. As a result, on December 1, 2006, Chairman Martin ordered the FCC's General Counsel to determine if the "Government's interests" would be served by McDowell's participation in the meeting.

In response, the Opinion Letter provided by the FCC's General Counsel stated that the balancing act was "difficult" and that reasonable people "could disagree", but that McDowell should not be barred from voting on the matter. Part of the balancing act was a determination whether a "reasonable person" would question McDowell's impartiality. The Opinion Letter focused on the need for an expeditious ruling on the merger between AT&T and BellSouth, and the fact that AT&T and BellSouth did not have a problem with McDowell voting on the merger (no surprise there!). Finally, the Opinion Letter noted the deadlocked nature of the proceeding, and that it was very similar to a past deadlocked

proceeding involving former Chairman Kennard and a review of the Commission's personal attack and political editorial rules.

In reviewing the Opinion Letter, McDowell indicated that he had expected that the Opinion Letter would have provided "strong and clear" support for his participation. He noted the hesitant nature of the Letter, and the fact that the Letter failed to even mention the Ethics Agreement, let alone resolve whether the Ethics Agreement prevented his participation. McDowell noted that he spoke with ethics counsel at the Virginia State Bar, and the fact that the Office of Government Ethics had indicated that it would recommend against McDowell participating in the merger proceeding. McDowell concluded by noting that the American people deserve officials who operate under the highest of ethical standards, and that his recusal will resolve any uncertainty that the four remaining Commissioners will need to work together. With McDowell's participation no longer in issue, AT&T and BellSouth came forward with concessions which they had previously refused to grant. The FCC was then able to unanimously approve the deal on the last day of 2006.