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United States Government Accountability Office
Washington, DC 20548

B-303413

November 8, 2004

The Honorable Frank R. Lautenberg
United States Senate

Subject: *Whether the Federal Communications Commission's Order on Improving Public Safety Communications in the 800 MHz Band Violates the Antideficiency Act or the Miscellaneous Receipts Statute*

Dear Senator Lautenberg:

This responds to your request of June 29, 2004, for our legal opinion on whether the Federal Communications Commission's plan for "Improving Public Safety Communications in the 800 MHz Band"¹ violates 31 U.S.C. § 1341(a)(1)(B), a provision of the Antideficiency Act, or 31 U.S.C. § 3302(b), commonly called the miscellaneous receipts statute. The Commission issued a *Report and Order* that, among other things, would provide Nextel Communications, Inc. (Nextel), with spectrum in the 1.9 GHz band in exchange for Nextel relinquishing spectrum holdings in the 800 MHz band and paying the relocation costs associated with 800 MHz band reconfiguration.² To the extent that the value of the spectrum rights Nextel

¹ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels; Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order (FCC 04-168, released Aug. 6, 2004), available at <http://wireless.fcc.gov/publicsafety/800MHz/bandinterference.html> (last visited Nov. 1, 2004)(hereafter *Report and Order*).

² The "800 MHz band" in the Commission proceeding refers to spectrum in the 800 MHz band from 806-824/851-869 MHz, which the Commission has licensed for public safety, commercial, and private wireless operators.

relinquishes plus the relocation costs Nextel incurs are less than \$4.86 billion, the value the Commission placed on the 1.9 GHz band spectrum rights Nextel will receive, the Commission will require Nextel to pay the shortfall to the U.S. Treasury. You ask whether providing Nextel with spectrum in the 1.9 GHz band in exchange for relinquishing other spectrum rights and paying certain costs, instead of auctioning the spectrum in the 1.9 GHz band to the highest bidder, violates 31 U.S.C. § 1341(a)(1)(B) or 31 U.S.C. § 3302(b).

Consistent with our customary practice, we sent a letter to the General Counsel of the Commission to further develop the issues you raised. Letter from Gary L. Kepplinger, Deputy General Counsel, Government Accountability Office, to John A. Rogovin, General Counsel, Federal Communications Commission, August 18, 2004. We received a response from the Commission on September 2, 2004. Letter from John A. Rogovin, General Counsel, Federal Communications Commission, to Gary L. Kepplinger, Deputy General Counsel, Government Accountability Office, September 2, 2004. We also met with representatives of Nextel, Verizon, and the Commission.³

As discussed below, in our opinion, the *Report and Order* does not violate 31 U.S.C. § 1341(a)(1)(B), the Antideficiency Act provision at issue. Section 1341(a)(1)(B) prohibits federal agencies from obligating or expending funds in excess or in advance of the amount Congress has appropriated. The *Report and Order* does not involve obligations or expenditures by the Commission, and there is no precedent for applying 31 U.S.C. § 1341(a)(1)(B) to this situation.

With respect to the miscellaneous receipts statute, 31 U.S.C. § 3302(b), it requires that money received for the use of the United States be deposited in the Treasury unless otherwise authorized by law. Court cases and decisions of this Office make clear that an agency cannot avoid the miscellaneous receipts statute simply by changing the form of its transactions to avoid the receipt of money otherwise owed to it. Therefore, the question before us with respect to the miscellaneous receipts statute is whether the Commission through the *Report and Order* has avoided the receipt of money otherwise due the United States by providing Nextel with spectrum in the 1.9 GHz band through a license modification. The answer to this question hinges on whether the Communications Act of 1934, as amended, (1) authorizes the Commission to provide the spectrum rights to Nextel through a license modification, in which case there is no money owed the government, or (2) requires the Commission to license the spectrum through auction, in which case the Commission would be required to deposit the proceeds from the auction into the Treasury.

The Communications Act does not directly address the precise question of the Commission's authority at issue here. Consistent with applicable court cases guiding the consideration of regulatory actions of the Commission, we defer to the

³ "Verizon" is Verizon Communications, Inc., and Verizon Wireless. "Representatives" include outside counsel.

Commission's interpretation of its authority to provide Nextel with spectrum through a license modification. Accordingly, we do not believe that the *Report and Order* violates the miscellaneous receipts statute by providing spectrum rights to Nextel through a license modification. Nor do we find that other aspects of the *Report and Order* violate the miscellaneous receipts statute.

Our opinion is limited to the specific legal questions presented in connection with the Antideficiency Act and miscellaneous receipts statute. It is not an endorsement of the Commission's resolution of the policy, economic, practical, procedural, or other considerations associated with the problem of interference with public safety communications in the 800 MHz band. In this regard, we are mindful that although we do not find that the *Report and Order* violates the Antideficiency Act or the miscellaneous receipts statute, and some of its elements can be found in prior Commission actions upheld by the courts, the *Report and Order* reflects an expanded use of the Commission's authority for which there is no exact precedent.

Further, we are sensitive to financial issues associated with the Commission's exercise of its authority under the Communications Act as reflected by the *Report and Order*. We do not take lightly concerns that the Commission's action will result in the government not receiving billions of dollars that otherwise might be realized if the Commission exercised its authority to auction the spectrum in the 1.9 GHz band.

We appreciate the importance of the public safety communications problems the Commission seeks to address, particularly in the post 9-11 world. We also recognize the Commission's determination that the *Report and Order* best addresses the financial, technological, and practical issues associated with band reconfiguration, not the least of which is the financial difficulty public safety organizations would have paying their own cost of relocation on a timely basis, if at all. Whether the Commission's exercise of its authority under the Communications Act, and the determinations it made, as reflected by the *Report and Order*, incorporate a proper balance of policies, powers, and constraints is a matter for Congress to consider.

BACKGROUND

On August 6, 2004, the Commission released a written order that adopts "technical and procedural measures designed to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band."⁴ The long-term component of the Commission's plan that is the subject of this opinion is a substantial reconfiguration of the 800 MHz band. To facilitate the reconfiguration, the Commission would require Nextel to relinquish spectrum in the 800 MHz band and pay certain relocation costs in exchange for receiving spectrum in the 1.9 GHz band through a license modification. The Commission issued its *Report and Order* at the end of a process, formal and informal, that has taken more than 4 years to complete.

⁴ *Report and Order* at ¶ 1.

The Commission's formal rulemaking proceeding began more than 2 years ago with a Notice of Proposed Rule Making (NPRM).⁵ The NPRM reflected the Commission's tentative conclusion that the interference problems with public safety communications were serious and needed resolution.⁶ The NPRM solicited proposals on how to remedy interference to 800 MHz public safety systems consistent with minimum disruption to the Commission's existing licensing structure and assurance of sufficient spectrum for critical public safety communications.⁷ The Commission's concern with the increasing incidents of interference to public safety communications did not begin with the NPRM. In April 2000, more than 2 years before the NPRM, the Commission convened a meeting of subject matter experts from the Association of Public Safety Officials, International, the Cellular Telecommunications and Internet Association, Motorola, Inc., Nextel, and the Public Safety Wireless Network to address the growing problem of interference to 800 MHz public safety systems. This group subsequently issued the *Best Practices Guide*,⁸ which documented the increasing interference to 800 MHz public safety communications from Personal Communications Services (PCS) and other cellular architecture systems. In December 2001, the Association of Public Safety Officials, International, provided detailed information on interference encountered in 24 states.⁹ Particularly after the attacks of September 11, 2001, public safety communication issues have become less localized and more complex, increasing concern that interference will increase in scope and frequency.¹⁰

⁵ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, Notice of Proposed Rule Making, 17 F.C.C.R. 4873 (2002) (FCC 02-81, WT Docket No. 02-55). In addition to the subject of this rulemaking, the *Report and Order*, as evidenced by its title, addresses additional docket and rulemaking matters. See *supra* note 1. These additional actions were needed to make the license changes covered by the *Report and Order*. See *Report and Order* at ¶ 5.

⁶ NPRM at ¶ 20.

⁷ NPRM at ¶ 3.

⁸ *Avoiding Interference Between Public Safety Wireless Communications Systems and Commercial Wireless Communications Systems at 800 MHz – A Best Practices Guide (Best Practices Guide)*, Dec. 2000. The Best Practices Guide is available on the Internet at <http://wireless.fcc.gov/publicsafety/800MHz/bandinterference.html> and is cited frequently in the NPRM and *Report and Order*.

⁹ NPRM at n.25 (citing *Project 36, Interference to Public Safety 800 MHz Radio Systems, Interim Report to the FCC*, Dec. 24, 2001).

¹⁰ NPRM at ¶ 18.

Proposals for restructuring the 800 MHz band predate the NPRM. In November 2001, Nextel submitted a proposal to the Commission.¹¹ Nextel proposed to create in the 800 MHz band a separate channel block for public safety systems, and another for digital specialized mobile radio (SMR) systems. The Nextel proposal would have provided approximately 10 MHz of additional spectrum for public safety licensees and required Nextel to pay up to \$500 million toward the cost of relocating public safety systems to the proposed public safety block.¹² Nextel also proposed that it receive 10 MHz of spectrum in the 2 GHz band as replacement spectrum for the spectrum it was vacating in the 800 MHz and other bands.¹³

In December 2001, the Commission received a proposal from the National Association of Manufacturers and MRFAC, Inc. (NAM Proposal).¹⁴ The NAM proposal provided for separate channel blocks in the 800 MHz band for (1) public safety, (2) SMR, business, and industrial/land transportation systems, and (3) cellular architecture systems. The NAM proposal provided public safety licensees with 0.5 MHz of additional spectrum without licensees having to relocate outside the 800 MHz band, thus making relocation cheaper and less disruptive.¹⁵

In the NPRM, the Commission requested comments on the Nextel and NAM proposals and other options offered by the Commission.¹⁶ In response, a coalition of commercial and public safety organizations,¹⁷ which includes Nextel and have become known as the Consensus Parties, submitted a proposal on August 7, 2002, that effectively superseded the Nextel proposal. Unlike the Nextel proposal, the Consensus Parties proposed to separate cellular and noncellular systems without displacing business, industrial/land transportation, and conventional SMR licensees

¹¹ NPRM at n.38 and ¶¶ 23-25 (citing and discussing *Promoting Public Safety Communications--Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio--Public Safety Interference and Allocate Additional Spectrum to Meet Critical Public Safety Needs* (Nextel Proposal), Nov. 21, 2001). This filing is sometimes referred to as the "White Paper."

¹² NPRM at ¶ 32.

¹³ NPRM at ¶ 57, n. 149.

¹⁴ NPRM at n.34 and ¶¶ 21-22 (citing Letter of Dec. 21, 2001, to Michael Powell, Chairman, FCC, from Jerry Jasinowski, National Association of Manufacturers, and Clyde Morrow, Sr., President, MRFAC, Inc.).

¹⁵ NPRM at ¶ 22.

¹⁶ *E.g.*, NPRM at ¶ 20. The Commission presented options and issues for comment throughout the NPRM and also encouraged additional proposals.

¹⁷ *Report and Order* at n.13.

from the 800 MHz band. The proposal provided for Nextel to receive 10 MHz of spectrum rights at 1.9 GHz rather than 2.1 GHz. After the Commission established a new comment period, the Consensus Parties filed supplemental comments on December 24, 2002, to provide implementation details for their proposal. The supplement contained a change in funding the Consensus Proposal—Nextel would fund up to \$850 million in relocation costs, rather than \$500 million, and this funding would be for all 800 MHz incumbents, not just public safety licensees.¹⁸

By the time the Commission completed its proceedings, the Commission had received more than 2200 filings that provided engineering, economic, legal, and policy analyses relating to how interference occurs in the 800 MHz band and possible solutions to the problem.¹⁹ The Commission adopted its order on July 8, 2004, and released its written order on August 6, 2004.²⁰ The Commission sought through its order to arrive at a solution that:

- abates unacceptable interference caused by Enhanced Specialized Mobile Radio and cellular systems to 800 MHz public safety systems;
- is both equitable and imposes minimum disruption to all 800 MHz band users, including public safety, noncellular SMR, and business, industrial, and land transportation systems;
- results in responsible spectrum management; and
- provides additional 800 MHz spectrum for public safety agencies.²¹

The Commission adopted a plan with short-term and long-term components. The Commission incorporated essential elements of the Consensus Parties' plan, but characterized its solution as a Commission-derived plan.²² As a short-term response, the Commission implemented technical standards defining what interference in the 800 MHz band is "unacceptable," procedures detailing who bears responsibility for abating the interference, and steps responsible parties must take.²³

¹⁸ *Id.* See Supplemental Comments of the Consensus Parties, *ex parte* filing dated Dec. 24, 2002.

¹⁹ Some of these *ex parte* and other filings are discussed in paragraph 61 and throughout the *Report and Order*.

²⁰ *Supra* note 1.

²¹ *Report and Order* at ¶ 2.

²² *Report and Order* at ¶¶ 3, 4.

²³ *Report and Order* at ¶¶ 3, 10, 19-20. The Order's detailed discussion of interference abatement is at ¶¶ 88-141.

For the long term, the Commission reconfigured the 800 MHz band to separate incompatible technologies.²⁴ The Commission designated 14 MHz in the upper portion of the 800 MHz band for Enhanced Specialized Mobile Radio systems and 18 MHz in the lower portion of the 800 MHz band for public safety and other noncellular systems, and established expansion and guard bands between them to complete the separation of the technologies. The Commission required Nextel to relinquish all its spectrum holdings in the 800 MHz band below the upper portion of the reconfigured band, resulting in an additional 4.5 MHz of 800 MHz band spectrum for public safety communications.²⁵ The Commission concluded that limiting Nextel's commitment to pay relocation costs only up to \$850 million, as proposed by the Consensus Parties, presented the risk of a balkanized 800 MHz band should relocation funds run out before nationwide band reconfiguration is completed.²⁶ Accordingly, the Commission assigned responsibility to Nextel for the full cost of relocating all 800 MHz band incumbents and ensuring that relocated licensees receive at least comparable facilities when they change channels. The *Report and Order* also provided a scheduling and implementation process designed to complete reconfiguration within 36 months.²⁷

The key elements of the *Report and Order* as it relates to the legal issue before us are as follows. In exchange for Nextel's relinquished spectrum and payment of costs to accomplish 800 MHz reconfiguration, the Commission will modify certain Nextel licenses to provide Nextel with nationwide authority to operate 10 MHz of spectrum in the 1.9 GHz band.²⁸ The Commission also requires Nextel to pay costs associated with clearing the portion of the 1.9 GHz band it will occupy, as well as the costs of relocating certain incumbent users of the 1.9 GHz band where Nextel's operations may cause harmful interference.²⁹ The Commission concluded "that it is in the public

²⁴ *Report and Order* at ¶¶ 4, 11, 21-28. The Order's detailed discussion of 800 MHz band reconfiguration is at ¶¶ 142-209.

²⁵ Nextel also will relinquish spectrum rights in the 700 MHz band. The Commission declined to make that spectrum available for public safety and will consider its ultimate disposition in the future. Because the Commission attached *de minimis* value to this spectrum, we will not discuss it further. *Report and Order* at ¶¶ 12, 207-209, 324. The Commission rejected Nextel's relinquishment of 900 MHz spectrum as proposed in the Consensus Plan. *Report and Order* at ¶¶ 12, 207.

²⁶ *Report and Order* at ¶ 179. The Commission also established safeguards, including Nextel providing an irrevocable letter of credit securing \$2.5 billion, to ensure availability of funds for the reconfiguration. *Report and Order* at ¶¶ 180-187.

²⁷ *Report and Order* at ¶¶ 188-206.

²⁸ *Report and Order* at ¶¶ 12, 33, 217-222.

²⁹ *Report and Order* at ¶¶ 239-276.

interest to compensate Nextel for the surrendered spectrum rights and costs it incurs as a result of band reconfiguration.”³⁰ The Commission valued the 1.9 GHz spectrum Nextel would receive at approximately \$4.8 billion³¹ and the 800 MHz spectrum Nextel would lose at \$1.607 billion.³² The *Report and Order* provides for a financial reconciliation process to account for Nextel’s costs in reconfiguring the 800 MHz band and clearing the 1.9 GHz band.³³ If these costs plus \$1.607 billion are less than the \$4.8 billion value of the 1.9 GHz spectrum, Nextel will pay the shortfall to the U.S. Treasury.³⁴

Verizon in *ex parte* filings asserted that the Commission plan violates the Antideficiency Act and the miscellaneous receipts statute by converting the economic value of the 1.9 GHz spectrum into cash payments from Nextel to public safety agencies, and thereby effectively expanding the Commission’s appropriations and depriving the Treasury of revenue.³⁵ Nextel responded, asserting there is no violation of the Antideficiency Act or the miscellaneous receipts statute because the Commission plan is within the authority provided by the Communications Act, and the Commission is neither receiving nor spending money.³⁶

The *Report and Order* addresses the Antideficiency Act, miscellaneous receipts statute, and other legal issues raised by Verizon and other filings of legal analysis.³⁷ The *Report and Order* explains the Commission’s conclusion that the Communications Act provides the necessary authority for its spectrum management

³⁰ *Report and Order* at ¶¶ 31, 211. *See also id.* at ¶¶ 277-278.

³¹ *Report and Order* at ¶¶ 279-297.

³² *Report and Order* at ¶¶ 307-323.

³³ *Report and Order* at ¶¶ 35, 329-332.

³⁴ *Id.*

³⁵ Letter from William P. Barr, Executive Vice President and General Counsel, Verizon, to Michael Powell, Chairman, Federal Communications Commission (June 28, 2004) (enclosing memorandum from Charles J. Cooper, Cooper & Kirk PLLC to Steven W. Zipperstein, Vice President-Legal & External Affairs and General Counsel, Verizon Wireless (June 28, 2004)). *See also* letter from Walter Dellinger and Jonathan D. Hacker, O’Melveny & Myers LLP to Michael Powell, Chairman, Federal Communications Commission (June 30, 2004).

³⁶ Letter from Dick Thornburgh, Kirkpatrick & Lockhart LLP to Michael Powell, Chairman, Federal Communications Commission (July 1, 2004).

³⁷ *Report and Order* at ¶¶ 61, 77, and related notes.

plan, including the elements most relevant to the questions before us.³⁸ The Commission further concluded that the *Report and Order* did not violate the Antideficiency Act and the miscellaneous receipts statute because they do not limit the Commission's authority to reallocate spectrum or to require a licensee to pay others' relocation costs in the manner provided in the Order.³⁹

DISCUSSION

I. Antideficiency Act

The first question is whether the Antideficiency Act prohibits the Commission from transferring something of value (spectrum in the 1.9 GHz band) to Nextel as part of a regulatory action in which Nextel pays relocation costs that the Commission is not authorized to make.⁴⁰ The specific provision of the Antideficiency Act that is the subject of your inquiry, 31 U.S.C. § 1341(a)(1)(B),⁴¹ provides:

“An officer or employee of the United States Government . . . may not—
... (B) involve [the U.S.] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”

The express language of 31 U.S.C. § 1341(a)(1)(B) prohibits involving the U.S. government in a contract or obligation for the payment of money before an appropriation is made unless Congress by law authorizes such action. The *Report and Order* does not obligate the government, by contract or otherwise, to pay any money from government funds that Congress has not appropriated. Further, even if one were to accept the statements offered by critics of the *Report and Order*, clearly

³⁸ *Report and Order* at ¶¶ 62-76. We discuss the Commission's construction of its authority under the Communications Act in Part IIC of this opinion.

³⁹ *Report and Order* at ¶¶ 81-85.

⁴⁰ Barr, *supra* note 35, at 4; *see also* Cooper, *supra* note 35, at 7, 14.

⁴¹ The Antideficiency Act is not the formal title of any statute but has become the common name given to a number of statutory provisions codified in title 31, U.S. Code, that limit an agency's obligation and expenditure of funds to the amount Congress has appropriated. *E.g.*, 31 U.S.C. §§ 1341, 1342, 1349-1351 (relating to limitations on obligations and expenditures); 1511-1519 (relating to apportionments and administrative divisions of funds). Older cases may refer to the Antideficiency Act as section 3679 of the Revised Statutes or cite to 31 U.S.C. § 665, the pre-codification classification of these provisions of the Antideficiency Act. Pub. L. No. 97-258, 96 Stat. 877 (Sept. 13, 1982)(codification of title 31 of the U.S. Code). In this opinion, we cite to the codified sections of title 31, U.S. Code.

this case does not commit the Commission to make, or the Congress to fund, any payments, the very evil that Congress addressed when enacting 31 U.S.C. § 1341(a)(1)(B).⁴² Stated differently, the *Report and Order* presents no risk that the Congress will be “coerced” into providing an appropriation, deficiency or otherwise, in response to the *Report and Order*.

There is no dispute that Congress has not provided the Commission with an appropriation to pay the costs private and public entities will incur to reconfigure the 800 MHz band in accordance with the *Report and Order*. We agree with those who would assert that the substance, and not just the form, of a transaction must be considered. However, no submission in this case cites a court case or decision of this Office that found a violation of 31 U.S.C. § 1341(a) (1)(B) in circumstances like the one here. Our independent research similarly found no such case.

We do not consider our decision at 42 Comp. Gen. 650 (1963) as such a case. That decision involved a proposed agreement between the Smithsonian Institution and a nonprofit organization. Under the proposed agreement, the nonprofit organization would receive a concession or privilege to install an audio-tour system at the National Zoo and, in return, would use proceeds received from visitor payments for use of the system for two zoo-related programs. We found the proposed arrangement would violate one of a number of possible statutes depending on how one looked at the agreement.⁴³ We did not, however, find a violation of 31 U.S.C. § 1341(a)(1)(B). Rather, we concluded that the arrangement would violate the Antideficiency Act prohibition against accepting voluntary services, 31 U.S.C. § 1342, if the zoo-related programs provided by the nonprofit organization were deemed voluntary rather than consideration for the concession.

Further, cases cited in the Commission proceedings that did report Antideficiency Act violations do not apply to the facts here. For example, our 2000 opinion that the District of Columbia Health and Hospitals Public Benefit Corporation violated the

⁴² The Antideficiency Act, including 31 U.S.C. § 1341(a)(1)(B), has its origin in the Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. The 1870 act reflected congressional frustration in the post-Civil War period with the all too frequent and longstanding executive branch practice of committing the United States to make payments in excess or in advance of appropriations and then submitting appropriation requests to Congress, which it then felt coerced into granting. 59 Comp. Gen. 369, 372 (1980).

⁴³ This included the miscellaneous receipts statute, 31 U.S.C. § 3302(b), to the extent that the Smithsonian granted the concession or privilege for a monetary consideration that was not deposited in the Treasury. 42 Comp. Gen. at 653. We subsequently modified this decision. We concluded that the miscellaneous receipts statute did not apply because the Smithsonian’s activities are supported by trust funds in addition to appropriated funds and the Smithsonian has gift authority. 51 Comp Gen. 506 (1972). We discuss the miscellaneous receipts statute in the next section.

Antideficiency Act involved obligations of appropriated funds in excess of the amount appropriated by Congress. B-285725, Sept. 29, 2000. Suffice it to say that this Antideficiency Act case involved the type of overobligation of appropriations that is at the heart of a traditional application of the Antideficiency Act and that it is neither factually nor conceptually applicable here. Similarly, reference to an Office of Legal Counsel (OLC) opinion⁴⁴ on indemnification agreements for support in finding a violation of 31 U.S.C. § 1341(a)(1)(B) is misplaced. The OLC opinion, citing several Comptroller General decisions, advised that to comply with the Antideficiency Act, an agency must limit an indemnification agreement to an amount covered by an available appropriation. The OLC opinion and the Comptroller General decisions cited protect the Treasury against agency actions creating uncontrolled and indeterminate liabilities that could trigger an obligation against an appropriation account in excess of the amount available. The *Report and Order* does not involve a fixed or contingent obligation or expenditure of appropriated funds.

Thus, even assuming that the *Report and Order* is outside the Commission's authority under the Communications Act,⁴⁵ concluding that the *Report and Order* violates 31 U.S.C. § 1341(a)(1)(B) would be a novel application of the statute. It requires viewing the FCC's licensing of spectrum in the 1.9 GHz as akin to the obligation and expenditure of government money that is the concern of 31 U.S.C. § 1341(a)(1)(B). This argument necessarily rests on the notion that since the Commission could, indeed must, convert this spectrum into public money, providing spectrum is akin to the obligation and expenditure of government funds without an appropriation. We have not previously engaged in such an application of 31 U.S.C. § 1341(a)(1)(B).

Even when agencies have provided something of value under an arrangement that deprived the government of money to which it was statutorily entitled, we have not treated the illegal action and associated deprivation of funds to the Treasury as a violation of 31 U.S.C. § 1341(a)(1)(B). For example, we have a line of cases applying what is now 40 U.S.C. § 1302, which requires that government buildings and property be leased for money consideration only, prohibits a lease from requiring improvements as consideration for the lease, and requires the money be deposited into the Treasury, except as otherwise provided by law.⁴⁶ In 41 Comp. Gen. 493 (1962), we viewed a National Park Service concession contract as a lease of government property and accordingly concluded that the contract requirement for the concessionaire to repair and improve government property as consideration for

⁴⁴ 8 Op. Off. Legal Counsel 94 (May 25, 1984).

⁴⁵ As discussed later in this opinion, we do not object to the Commission's use of section 316 to provide Nextel with spectrum through a license modification.

⁴⁶ Our cases cite this provision as 40 U.S.C. § 303b, its location prior to the recent codification of title 40 by Pub. L. No. 107-217, 116 Stat. 1062 (Aug. 21, 2002).

the concession violated 40 U.S.C. § 1302.⁴⁷ Similarly, a lease of government property that required the lessee to construct a facility on an unleased parcel violated 40 U.S.C. § 1302. B-205685, Dec. 22, 1981. Though these cases found that an agency forgoing money to the Treasury in exchange for a benefit violated the law, they did not treat the agency's improper action as constituting an obligation in excess or in advance of available appropriations proscribed by 31 U.S.C. § 1341(a)(1)(B).

An agency's unauthorized use of property to obtain something of value, rather than the sale of property with the concomitant deposit of the proceeds to the Treasury, similarly has not been treated as an obligation in excess or in advance of available appropriations in violation of 31 U.S.C. § 1341(a)(1)(B). In 41 Comp. Gen. 671 (1962), two agencies proposed to exchange medical supplies and equipment to better align their respective stockpiles to meet their current needs and, at periodic intervals, one agency would pay the other to equalize the value of the property exchanged. An agency would use any money received to replace previously exchanged stocks of supplies and equipment but not necessarily with the exact items exchanged. While one provision of the Economy Act⁴⁸ authorizes an agency to order goods from another agency and pay for the cost of the goods provided, another provision of the Economy Act⁴⁹ requires that when one agency provides at cost stock on hand to another agency, the providing agency either credits the payment to the appropriation available to replace the goods provided or deposits the payment in the Treasury as miscellaneous receipts if the goods are not to be replaced. We found the proposal to violate this latter provision of the Economy Act because the proposal necessarily would have allowed an agency to convert property that was excess at the time of the exchange to other property when needed. We did not, however, consider the unauthorized use to constitute an obligation in excess or in advance of available appropriations targeted by 31 U.S.C. § 1341(a)(1)(B).

II. Miscellaneous Receipts Statute and the Federal Communication Commission's Authority Under the Communications Act

The second question is whether the Commission will violate the miscellaneous receipts statute by providing Nextel with spectrum in the 1.9 GHz band as part of its regulatory action to reconfigure the 800 MHz band, rather than auctioning the spectrum and depositing the proceeds in the U.S. Treasury. To answer this question, we first discuss the miscellaneous receipts statute, 31 U.S.C. § 3302(b), and then examine the Commission's authority to modify Nextel's license as provided in the *Report and Order*.

⁴⁷ In response to our decision, Congress authorized the Secretary of the Interior to enter into such leases. Pub. L. No. 87-608, 76 Stat. 405 (Aug. 24, 1962)(now codified at 16 U.S.C. § 3b).

⁴⁸ Currently codified at 31 U.S.C. § 1535.

⁴⁹ Currently codified at 31 U.S.C. § 1536(b).

A. Miscellaneous receipts statute

Congress originally enacted what is commonly called the miscellaneous receipts statute by the Act of March 3, 1849, ch. 110, § 1, 9 Stat. 398. Essentially unchanged since its enactment, the miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that

“ . . . an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.”⁵⁰

The significance of the miscellaneous receipts statute is apparent—once money is deposited into the Treasury, Article I, section 9, of the Constitution requires an appropriation before the money can be spent.⁵¹ The miscellaneous receipts statute is a corollary to the Antideficiency Act in the statutory mosaic Congress has enacted to implement its constitutional power of the purse. While the Antideficiency Act is designed to stop agencies from obligating the government to spend more than Congress has appropriated and thereby effectively coercing Congress to appropriate more, the miscellaneous receipts statute controls agency spending by requiring that money received by the government be deposited into the Treasury, thereby making it unavailable for agency spending unless otherwise authorized by Congress.

We have characterized the miscellaneous receipts statute as a comprehensive and clear directive.⁵² It is of course easily applied when an agency takes possession of money owed to the government and no statute authorizes its disposition other than to the Treasury. Nevertheless, the statute has generated numerous decisions by this Office and the courts.

The heart of the matter in many miscellaneous receipts cases is whether money not received by a government agency nevertheless constitutes money owed to the government for its use that must be deposited into the Treasury. One circumstance

⁵⁰ The codification of title 31 of the United States Code changed money “for the use of the United States” to “for the Government.” The codification revised and restated existing laws in title 31 without substantive change. Pub. L. No. 97-258, §4(a).

⁵¹ Congress enacted the miscellaneous receipts statute in response to customs officers deducting various expenses, including their own salaries, from their collections and depositing the remainder in the Treasury, rather than depositing the entire collection and paying their expenses from funds appropriated for that purpose. *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1359-1360 (D.C. Cir. 1996).

⁵² *E.g.*, 10 Comp. Gen. 382, 384 (1931) (“It is difficult to see how a legislative prohibition could be more clearly expressed.”); 22 Com. Dec. 379, 381 (1916) (“It can hardly be made more comprehensive as to the moneys that are meant and these moneys are required to be paid ‘into the Treasury’.”)

in which this issue arises is when government leases property or awards a concession. If the government leases space in its buildings for a fee equal to a percentage of the lessee's earnings, and requires the lessee to deposit part of the fee in a bank for later use to repair or replace government equipment, it violates the miscellaneous receipts statute. *E.g.*, 35 Comp. Gen. 113 (1955). A Department of Defense contract requiring a contractor serving as an on-site travel agency to pay a concession fee to a morale, welfare, and recreation fund rather than to the Treasury similarly violates the miscellaneous receipts statute. *Scheduled Airlines Traffic Offices*, 87 F.3d at 1362-1363. See also *Motor Coach Industries, Inc. v. Dole*, 725 F. 2d 958 (4th Cir. 1984).

An agency cannot avoid the miscellaneous receipts statute simply by changing the form of the contractual arrangement to avoid having money owed to it. For example, the Securities and Exchange Commission (SEC) violated the miscellaneous receipts statute when it had a lessee of subleased space pay the landlord directly, and reduced its rent to the landlord by a like amount. This arrangement violated the miscellaneous receipts statute because it effectively reduced the SEC's obligation to an amount less than the lease it signed and had the same effect as if the SEC had received the sublease payments and credited them to its appropriation rather than depositing them in the Treasury. B-265727, July 19, 1996.

We also have found violations of the miscellaneous receipts statute when a government agency assesses a fine, penalty, fee, or similar monetary assessment and then, without statutory authority, provides for its payment to other than the government. For example, the Nuclear Regulatory Commission could not circumvent the miscellaneous receipts statute by allowing violators to fund nuclear safety research projects in lieu of paying civil penalties. 70 Comp. Gen. 17 (1990). Similarly the Commodity Futures Trading Commission (CFTC) lacked authority to accept a charged party's donation to an educational institution as part of a settlement agreement because the donation was a money penalty that the CFTC was required to collect and deposit into the Treasury under the miscellaneous receipts statute. B-210210, Sept. 14, 1983. While agreeing that CFTC settlements could provide for remedies beyond those specifically given the CFTC, we objected to a remedy that was unrelated to correcting the violation charged and circumvented receipt of a penalty to accomplish a separate objective. B-210210, at 2.

Occasionally a government agency will receive money that is not "money for the government" and therefore not subject to the miscellaneous receipts statute. This issue sometimes arises in the context of whether the government has received the money in trust for the benefit of another. Our application of the miscellaneous receipts statute in 60 Comp. Gen. 15 (1980) to a Department of Energy consent order with an oil company illustrates the difference between money for the government and money held in trust. Energy's consent order required the oil company to deposit \$25 million in an escrow account controlled by Energy to resolve violations of oil price and allocation regulations. Recognizing Energy's remedial authority to order violators to make refunds to overcharged customers, we concluded that Energy would not violate the miscellaneous receipts statute if Energy received the funds to

redistribute to overcharged customers. 60 Comp. Gen. at 26. However, we concluded that Energy was not holding the \$25 million in trust for overcharged customers because it planned to use the funds to benefit low-income individuals in states where the oil company did business. Because Energy's plan was directed at beneficiaries of Energy's choosing and not those injured by the oil company's actions, Energy's plan was not restitutionary. Thus, Energy was holding money not in trust, but for the use of the government, and the miscellaneous receipts statute required Energy to deposit the escrowed funds in the Treasury. 60 Comp. Gen. at 26-27.

Arguably, aspects of the *Report and Order* contain elements at least similar to those we and the courts have addressed in applying the miscellaneous receipts statute. The *Report and Order* certainly results in the government providing Nextel with something of value, a license for spectrum in the 1.9 GHz band, that, if auctioned, could yield, in the words of the miscellaneous receipts statute, "money for the government." Also, instead of obtaining money for the government, the *Report and Order* requires Nextel to spend its money for a purpose determined by the Commission, *i.e.*, payment of relocation costs, as part of a comprehensive plan of band reconfiguration. And, as the discussion above reveals, if money is owed to the government, the Commission could not circumvent the miscellaneous receipts statute simply by directing Nextel to spend money as the Commission requires instead of Nextel paying the money to the government.

However, as the discussion above suggests, application of the miscellaneous receipts statute to this aspect of the *Report and Order* turns on whether, under the circumstances present here, the Communications Act authorizes the Commission to provide spectrum in the 1.9 GHz band to Nextel through a license modification, in which no money is owed the government. Accordingly, we must consider the Commission's authority under the Communications Act.

B. Deference standard

The efficacy of the *Report and Order* hinges on the Commission's construction of several provisions of the Communications Act, the statute the Commission is charged to administer. We review the Commission's interpretation of its authority under the Communications Act under the standard set out in *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). The Supreme Court in *Chevron*, *id.*, at 842-843, established a two-pronged analysis for reviewing an agency's interpretation of a statute it administers:

"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

We do not understand anyone to argue that Congress, through the language of the Communications Act, has unambiguously addressed the scope of the authority the Commission relies on to support the *Report and Order*. At the heart of the *Report*

and Order, and challenges to it, is whether the Commission's authority in the Communications Act to modify licenses may encompass providing Nextel with spectrum in the 1.9 GHz band.

The Communications Act authorizes the Commission to grant or modify licenses if the public interest, convenience, and necessity will be served. 47 U.S.C. §§ 307, 309, 316. The Act does not define or otherwise delineate the scope of the Commission's modification authority or authority to act in the public interest.⁵³ The *Report and Order* reflects the extent to which the Commission and its challengers rely on interpretations of the Communications Act made in previous proceedings containing, at most, only some of the spectrum issues and regulatory actions proposed here.⁵⁴ Neither the Commission, nor any filing with the Commission, points to statutory provisions or their legislative history that explicitly addresses the application of the Communications Act to the legal issues presented by all the regulatory actions in the *Report and Order*.

This then is precisely the situation the Supreme Court addressed with the second prong of its *Chevron* analysis of agency interpretations.

“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”

Chevron, 467 U.S. at 843.

In determining whether the agency's construction of a statute is “permissible,” the agency's construction need not be the only one it could have arrived at, or even the one the court would have reached if the statutory construction question had first arisen in a judicial proceeding.⁵⁵ The courts “have long recognized that considerable weight should be accorded to an [agency's] construction of a statutory scheme it is entrusted to administer.” *Chevron*, 467 U.S. at 844.

In determining the degree of deference to give to an agency's interpretation of its own statute, the courts consider the agency's care, consistency, formality and relative

⁵³ “It is common ground that the Act does not define the term ‘public interest, convenience, and necessity’.” *FCC v. WNCN Listeners Guild et al.*, 450 U.S. 582, 593 (1981).

⁵⁴ See *Report and Order* at ¶¶ 62-76.

⁵⁵ *Chevron*, 467 U.S. at 843 n.11 (citing *e.g.*, *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

expertise, and the persuasiveness of the agency's position. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Administrative implementation of a particular statutory provision qualifies for *Chevron* deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead Corp.*, 533 U.S. at 226-227. The courts thus most frequently apply *Chevron* deference to agency actions involving notice-and-comment rulemaking or formal adjudication.⁵⁶

The Commission's construction of its authority under the Communications Act present here is precisely the type of issue raised in the context of a rulemaking proceeding to which the courts give *Chevron* deference. *E.g.*, *AT&T Corp. v. FCC*, 349 F. 3d 692, 698 (D.C. Cir. 2003); *Global Crossing Telecommunications, Inc. v. FCC*, 259 F. 3d 740, 744 n.6 (D.C. Cir. 2001). Also, deference to the Commission is particularly great where the issues involve a high level of technical expertise in an area of rapidly changing technological circumstances. *E.g.*, *Verizon Telephone Companies v. FCC*, 292 F. 3d 903, 909 (D.C. Cir. 2002). Finally, Supreme Court decisions "have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *WNCN Listeners Guild et al.*, 450 U.S. at 596.

Chevron deference does not apply to an agency's interpretation of a statutory provision that is not part of its enabling legislation or is a statute of general applicability. *E.g.*, *Adams v. SEC*, 287 F.3d 183 (D.C. Cir. 2002); *Contractor's Sand & Gravel v. Federal Mine Safety & Health Review Comm.*, 199 F.3d 1335 (D.C. Cir. 2000). Similarly, we need not and, in fact do not, afford deference to the Commission in analyzing the meaning and scope of the Antideficiency Act and the miscellaneous receipts statute. These are fiscal law statutes of general application that this Office has interpreted and applied since its creation. In contrast, the Commission's construction of its regulatory authority under the Communications Act is entitled to the highest deference. This is consistent with the deference we have afforded other agencies when interpreting the statutes they are charged to administer. *E.g.*, B-300912, Feb. 6, 2004 (providing deference to the Department of the Interior's novel interpretation of the Federal Land Policy and Management Act). Of course, this is not to say that we will defer to an agency's interpretation that is unreasonable. *E.g.*, B-286661, Jan. 19, 2001 (concluding that the Department of Energy's interpretation was inconsistent with the plain language of the statute and its legislative history).

Thus, recognizing the deference to which the Commission is entitled, we turn to whether the Commission's interpretation of its authority under the Communications Act to modify licenses rather than conducting auctions in support of the *Report and Order* is reasonable.

⁵⁶ An extensive list of Supreme Court cases according *Chevron* deference in agency rulemaking or adjudication is found in *Mead Corp.*, 533 U.S. at 230 n.12.

C. Commission's authority to modify licenses

The Communications Act has long authorized the Commission to grant and modify licenses. More recent amendments to the Communications Act provide for the Commission to auction licenses, which result in “money for the government” for deposit to the U.S. Treasury. The provision for auctions applies to the Commission's grant of licenses under certain circumstances, but not to its modification of licenses.

Section 309(j)(1) of the Communications Act, 47 U.S.C. § 309(j)(1), authorizes the Commission to grant licenses or construction permits through a system of competitive bidding, or auctions, if mutually exclusive applications for the license or permit is accepted. When Congress first authorized auctions in 1993,⁵⁷ it established rules of construction to make clear that the authority to conduct auctions did not, among other things, diminish the Commission's authority to regulate spectrum licenses, 47 U.S.C. § 309(j)(6)(C), or relieve the Commission of the obligation in the public interest to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings, 47 U.S.C. § 309(j)(6)(E). Auctions were not to be used when the Commission modifies a license under section 316.⁵⁸ When the Congress extended and expanded the Commission's authority to conduct auctions in the 1997,⁵⁹ Congress emphasized that the Commission must make mutual exclusivity decisions consistent with its obligations under section 309(j)(6)(E).⁶⁰

The starting point for the Commission's determination that its *Report and Order* is within the authority provided by the Communications Act is its assertion that Nextel's receipt of spectrum in the 1.9 GHz band will be a modification of Nextel's current license pursuant to section 316(a)(1) of the Communications Act. There is little question that the Commission has the authority to modify licenses. 47 U.S.C. § 316(a)(1). Specifically, section 316(a)(1) provides that “[a]ny station license or construction permit may be modified by the Commission . . . if in the judgment of the Commission such action will promote the public interest, convenience, and necessity.” *Id.*

⁵⁷ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, title VI, § 6002(a), 107 Stat. 312, 387 (1993).

⁵⁸ H.R. Rep. No. 103-111, at 253 (1993).

⁵⁹ Balanced Budget Act of 1997, Pub. L. No. 105-33, title III, § 3002, 111 Stat. 251, 258-262 (1997). The Act made no substantive change to the Commission's general auction authority. As amended, paragraph (2) of section 309(j) contains exemptions from the auction requirement. No one suggests that these exemptions may apply here.

⁶⁰ H.R. Conf. Rep. No. 105-217, at 572 (1997).

One obvious issue with the Commission's determination is whether providing Nextel with spectrum in the 1.9 GHz band may be considered a modification of Nextel's existing licenses. Nextel will be receiving spectrum in the 1.9 GHz band that is not licensed to any of the parties directly involved in the public safety communication problems that gave rise to the Commission proceeding. Also, there is little doubt that the 1.9 GHz band spectrum Nextel will be receiving is more valuable than the 800 MHz band spectrum Nextel will be relinquishing.⁶¹ Finally, Nextel will be receiving 10 MHz of spectrum at 1.9 GHz while relinquishing on a nationwide average basis 4.5 MHz of spectrum at 800 MHz.⁶²

We do not find anything in the statute, its legislative history, or applicable case law that necessarily disqualifies a Commission action from being a section 316 modification simply because a licensee, after the modification, will end up with spectrum that had not previously been licensed to a party to the Commission action. To the contrary, in at least one case, the court of appeals approved Commission's use of section 316 to modify licenses even though the licensees received additional spectrum. In *Community Television, Inc., v. FCC*, 216 F.3d 1133 (D.C. Cir. 2000), some broadcasters challenged Commission rules under which broadcasters would migrate from analog to digital technology. The rules provided for issuing digital licenses as modifications of existing analog permits or licenses under the Commission's section 316(a)(1) modification authority. *Community Television* at 1139. The challengers were not eligible for the digital licenses if issued as a modification under section 316(a)(1) but would be eligible if issued under another provision of the Communications Act. They asserted that the digital licenses were new licenses that could not be said to modify a broadcaster's existing analog license. *Community Television* at 1140-1141. The court upheld the Commission, observing that notwithstanding the addition of a digital license to an analog license, the "FCC has not wrought a fundamental change to the terms of those [analog] permits and licenses. Broadcasters will begin and end the transition period broadcasting television programming to the public under very similar terms." *Id.* at 1141. The

⁶¹ The Commission concluded that Verizon's estimate of \$1.82 per MHz per person (MHz-pop) or \$5.3 billion overstated, and Nextel's estimate of \$1.25 per MHz-pop or \$3.5 billion understated, the value of the 10 MHz of spectrum at 1.9 GHz. The Commission valued the 1.9 GHz spectrum at \$1.70 per MHz-pop or \$4.86 billion. *Report and Order* at ¶¶ 279-297. The Commission valued the spectrum Nextel would relinquish at \$1.607 billion. *Report and Order* at ¶¶ 307-323.

⁶² *Report and Order* at ¶ 323. The Commission found that Nextel would be giving up 4.96 MHz in its top markets but used 4.5 MHz for valuation purposes. The Commission concludes that while Nextel is relinquishing 45 percent of the bandwidth it is receiving, the Commission valued the relinquished bandwidth at about one third the value of the acquired bandwidth.

court reached this conclusion even though the broadcasters would have some flexibility to provide ancillary services as well. *Id.*⁶³

Nor do we find anything in the statute, its legislative history, or applicable case law that necessarily disqualifies a Commission action from being a section 316 modification simply because a licensee, after the modification, will end up with more valuable spectrum than the licensee possessed before the Commission action. Rather, the courts have articulated the standard for distinguishing a section 309 initial license and a section 316 modification this way: whether the license “differ[s] in some significant way from the license it displaces” and “is first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee.” *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000), citing *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999). These cases upheld the Commission’s decision to conduct an auction of an initial license under section 309 rather than to modify a license under section 316, the opposite of what we have here.⁶⁴

Not surprisingly, the Commission’s proceeding discloses two opposite views of the application of *Fresno* and *Benkelman* to the *Report and Order*. *Fresno* and *Benkelman* involved new geographic licenses. Nextel distinguishes these cases because Nextel’s replacement licenses would give it rights and duties similar to those it has under existing licenses and it will be licensed to provide service nationwide at 1.9 GHz as it is now under other frequency bands.⁶⁵ By contrast, challengers to the *Report and Order* state that the 1.9 GHz spectrum will provide Nextel with rights and benefits so significantly better than its current holdings that the Commission cannot provide Nextel with 1.9 GHz spectrum as a license modification under *Fresno*.⁶⁶

⁶³ Also, the *Report and Order* cites examples in which section 316(a)(1) modifications involved relocating licensees to unassigned spectrum. *Report and Order* at ¶¶ 65, 67.

⁶⁴ These cases are instructive for several reasons in addition to the standard they articulate. First, the courts observed that section 309(j) leaves some ambiguity in determining what is an initial license and a modification. Second, the courts applied the second prong of the *Chevron* standard, *i.e.*, whether the Commission’s resolution of the ambiguity was reasonable. Third, the courts accepted the Commission’s determination that the differences between the existing licenses and the licenses to be provided were significant enough to authorize section 309(j) auctions.

⁶⁵ Letter from Regina M. Keeney, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 16, 2003) (WT Docket No. 02-55, *ex parte* presentation).

⁶⁶ Letter from Diane Cornell, Cellular Telecommunications & Internet Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 4, 2003) (WT Docket No. 02-55, *ex parte* presentation).

The *Report and Order* resolves this disagreement in favor of Nextel. The Commission recognized *Fresno* and pointed to the language of a prior Commission order in which it stated:

“Where a modification would be so major as to dwarf the licensee’s currently authorized facilities and the application is mutually exclusive with other major modifications or initial applications, the Commission will consider whether these applications are in substance more akin to initial applications and treat them accordingly for purposes of competitive bidding.”⁶⁷

The Commission asserted that it considered the nature of the proposed modification exactly as called for.⁶⁸ It concluded that Nextel’s rights and responsibilities after band restructuring will not “differ significantly enough” from Nextel’s current rights and responsibilities to warrant an initial license under section 309 rather than a license modification under section 316.⁶⁹

The Commission also determined that providing Nextel with 1.9 GHz spectrum through a license modification as part of its band reconfiguration plan is in the public interest.⁷⁰ In so doing, the Commission points to its obligation in section 309(j)(6)(E) to avoid mutual exclusivity in application and licensing proceedings.⁷¹ Without mutual exclusivity, there is no competitive bidding or auction requirement. 47 U.S.C. § 309(j)(1). This determination is one part of the Commission’s overall conclusion that the totality of the actions called for in the *Report and Order* “are based on unique and compelling public interest considerations . . . regarding the serious and continuing public safety problems” and the need “to take the most effective actions, in the shortterm and longterm, to promote robust and reliable public safety communications.”⁷²

Finally, the Commission refers to section 4(i) of the Communications Act, 47 U.S.C. § 154(i), as support for its authority to modify Nextel’s license and take other actions to effectuate its spectrum management plan, including Nextel paying relocation costs

⁶⁷ *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, PP Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 2348, 2355 (1994). Nextel and opponents of the *Report and Order* also have quoted this language.

⁶⁸ *Report and Order* at ¶ 72.

⁶⁹ *Id.* at n.236.

⁷⁰ *Report and Order* at ¶¶ 213-216.

⁷¹ *E.g.*, *Report and Order* at ¶ 73.

⁷² *Report and Order* at ¶ 7.

and potentially the Treasury.⁷³ Section 4(i) authorizes the Commission to “perform any and all acts, . . . and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its function.” The courts have called section 4(i) “a necessary and proper clause” that “empowers the Commission to deal with the unforeseen—even if it means straying a little way beyond the apparent boundaries of the Act.” *North American Telecommunications Ass’n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985). While the Commission’s section 4(i) authority is not unlimited and cannot be used to contravene a provision of the Communications Act, it may be used where the Act is silent. *Id.* Thus, the courts have upheld the Commission’s use of section 4(i) to support a ratemaking action not expressly authorized by the Act because the Commission enjoys significant discretion to choose among a range of reasonable remedies. *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107-1108 (D.C. Cir. 1987).

Resolving the question of whether the Commission may provide Nextel with spectrum in the 1.9 GHz band as provided in the *Report and Order* involves questions of policy and facts. The Supreme Court has “repeatedly emphasized that the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.” *WNCN Listeners Guild et al.*, 450 U.S. at 596. The Commission needed to resolve conflicting arguments about the relative benefits and rights Nextel will receive from the 1.9 GHz band spectrum compared to its present licenses, and to weigh various options for improving public safety communications. This necessarily involved consideration of technology and economics, and the costs and benefits of applying an admittedly innovative approach to using its section 316 modification authority and the 1.9 GHz band spectrum to facilitate a more dramatic, far-reaching resolution to problems with public safety communications.⁷⁴ These are the type of considerations associated with spectrum management that the courts afford the highest deference.⁷⁵ This is true even when complete factual support in the record is not available to the court. *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 411 (1991), citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

Accordingly, we defer to the Commission’s judgment that the nature of Nextel’s existing licenses, the proposed modification that will provide Nextel with spectrum in the 1.9 GHz band, and other aspects of the *Report and Order* are such that the section 316 modification authority is available to the Commission. Consistent with

⁷³ *Report and Order* at ¶¶ 64, 75.

⁷⁴ *Id.* (stating that the *Report and Order* does not signal any change in its policy for using competitive bidding in other contexts.)

⁷⁵ *Teledesic LLC v. FCC*, 275 F. 3d 75, 84 (D.C. Cir. 2001), citing *Telocator Network of Am. v. FCC*, 691 F. 2d 525, 538 (D.C. Cir. 1982)(finding that when it is fostering innovative methods of exploiting the spectrum, the Commission “functions as a policymaker and, inevitably, a seer—roles in which it will be accorded the greatest deference by a reviewing court”).

applicable court decisions guiding the consideration of the Commission's construction of its authority, we do not object to the Commission's use of its section 316 modification authority. Accordingly, we do not believe that the Commission has circumvented the requirements of the miscellaneous receipts statute by not auctioning the spectrum in the 1.9 GHz band and obtaining and depositing the proceeds into the Treasury.

III. Relationship of Other Aspects of the *Report and Order* to the Miscellaneous Receipts Statute

For the reasons discussed previously, we believe the issue of the *Report and Order's* compliance with the miscellaneous receipts statute rests on whether the Commission is authorized to provide Nextel with spectrum in the 1.9 GHz band through a license modification as part of its regulatory action to reconfigure the 800 MHz band. Stated simply, if the Commission neither receives money nor is owed money as a result of providing spectrum to Nextel as part of a band reconfiguration plan within the scope of the Communications Act, then there is no money "for the Government" subject to the requirements of the miscellaneous receipts statute.

Arguments that the *Report and Order* violates the miscellaneous receipts statute, however, point to aspects of the Commission's plan apart from Nextel's receipt of spectrum in the 1.9 GHz band through a license modification. Three of these aspects are (1) crediting Nextel with relocation costs against the value of the spectrum provided rather than paying that amount to the Commission for deposit into the Treasury, (2) requiring Nextel to make a payment to the Treasury if the combined value of spectrum rights Nextel relinquishes and the relocation costs Nextel incurs is less than the value of the 1.9 GHz band spectrum rights Nextel receives, and (3) requiring Nextel to have a letter of credit to secure its financial obligations, including a potential payment to the Treasury. Because of the extent to which these aspects of the *Report and Order* are interwoven with the Commission's modification of Nextel's license, we briefly discuss them below.

The Commission's authority to require licensees to pay relocation costs of other licensees under certain circumstances seems unassailable. This principle is well-established in both court cases and Commission orders. *E.g., Teledesic LLC v. FCC*, 275 F.3d 75 (D.C. Cir. 2001). Thus, a challenge based on the miscellaneous receipts statute goes not to Nextel's payment of relocation costs, but to crediting Nextel's payment of relocation costs against the value of the spectrum Nextel will receive. The objection to the *Report and Order* on this point is that by requiring Nextel to pay relocation costs with money that is due the government and crediting Nextel for those payments, the Commission is indirectly providing for the payment of relocation costs and, thus, doing indirectly what it cannot do directly.⁷⁶ The issue is not, as some

⁷⁶ See letter from William P. Barr, Executive Vice President and General Counsel, Verizon, to Michael Powell, Chairman, Federal Communications Commission (June 28, 2004) (enclosing memorandum from Charles J. Cooper, Cooper & Kirk

would frame it, whether the Commission may do indirectly what it cannot do directly. Rather, the issue is whether the Commission's "indirect" action is authorized by law.

As previously discussed, we defer to the Commission's interpretation of its authority to provide the spectrum to Nextel through a license modification. The modification itself generates no funds due the government. Therefore, the challenge to crediting Nextel's payment of relocation costs against the value of the spectrum Nextel will receive must rest on the foundation that the Commission's monetization of the 1.9 GHz spectrum Nextel will receive equates to "money for the government" against which Nextel's relocation costs are being credited. Challengers to the *Report and Order* point to the requirement for Nextel to make a payment to the Treasury should Nextel's credits be less than the value the Commission placed on the 1.9 GHz band spectrum rights Nextel will receive. They argue that this requirement proves the point that the government is entitled to the full value of the spectrum.

This argument essentially restates the argument over whether the Commission is authorized to provide 1.9 GHz band spectrum rights to Nextel as part of a regulatory reconfiguration of the 800 MHz band. In this regard, the court of appeals has allowed the Commission to require a payment from a licensee and then reduce the amount due by certain costs the licensee would incur. *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996)(*Mtel*). In *Mtel*, the Commission relied on its general authority under section 4(i) of the Communications Act⁷⁷ to require an applicant to pay for a license that it previously could have received for free. The Commission determined the payment by looking at the lowest winning bid for other licenses and then deducted \$3 million for the licensee's anticipated costs in fulfilling certain Commission license requirements. *Application of Nationwide Wireless Network Corp.*, Memorandum and Order, 9 F.C.C.R. 3635 (1994). What is instructive about the *Mtel* case is not only the court's support of the Commission's power to require the payment under its general authority, but that it did so by deferring to the Commission's judgment of the public interest. *Mtel*, 77 F.3d at 227.

We decline to find that the possibility of a future payment to the Treasury presents an issue with the miscellaneous receipts statute.⁷⁸ The miscellaneous receipts statute applies to "money received for the government." Providing for a possible future payment to the Treasury should certain circumstances arise does not amount to there

PLLC to Steven W. Zipperstein, Vice President – Legal & External Affairs and General Counsel, Verizon Wireless (June 28, 2004)).

⁷⁷ Section 154(i) of title 47 of the U.S. Code, which authorizes the Commission to "perform any and all acts, . . . and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its function."

⁷⁸ The Commission has stated that any payment Nextel must make will be to the Treasury, which the miscellaneous receipts statute requires. *E.g., Report and Order* at ¶¶ 75, 329-330.

presently being “money for the government” that should be deposited to the Treasury. To assert that it does implies that eliminating the anti-windfall payment to the Treasury, which the Commission requires to protect the public interest,⁷⁹ would help alleviate a concern with the miscellaneous receipts statute.

Finally, we see no objection from a miscellaneous receipts statute standpoint or otherwise with the Commission requiring Nextel to have a letter of credit to support its financial commitments under the *Report and Order*. The Commission requirement for a letter of credit is simply a regulatory mechanism to ensure that the *Report and Order* is implemented. We see no valid argument that this regulatory mechanism is beyond the Commission’s authority under the Communications Act. From the viewpoint of the miscellaneous receipts statute, the letter of credit, in the same manner as the contingency payment to the Treasury, does not reflect money that has been received by or is currently for the government. Rather, the letter of credit represents Nextel’s money in a form that the Commission has determined best ensures compliance with its *Report and Order*.

CONCLUSION

The *Report and Order* does not violate 31 U.S.C. § 1341(a)(1)(B), a provision of the Antideficiency Act. With respect to the miscellaneous receipts statute, 31 U.S.C. § 3302(b), based on the language of the statute and its application in court cases and our decisions, the threshold question is whether the Communications Act of 1934, as amended, (1) authorizes the Commission to provide spectrum rights to Nextel through a license modification, in which case no money is owed the government, or (2) requires the Commission to license the spectrum through auction, in which case the Commission would be required to deposit the proceeds from the auction into the Treasury. Consistent with court decisions guiding the consideration of the Commission’s regulatory actions, we defer to the Commission’s interpretation of its authority to provide Nextel with spectrum through a license modification. Accordingly, we do not believe that the *Report and Order* violates the miscellaneous receipts statute by Nextel not paying to the government the value of the 1.9 GHz it will receive. Nor do we find that other aspects of the *Report and Order* violate the miscellaneous receipts statute.

Our response does not reflect an endorsement of the Commission’s resolution of the policy, economic, practical, procedural, or other considerations associated with resolving the problem of interference with public safety communications in the 800 MHz band. In this regard, we are mindful that the *Report and Order* reflects an expanded use of the Commission’s authority under the Communications Act for which there is no exact precedent. Also, we do not take lightly concerns that the

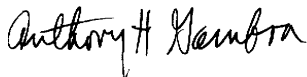
⁷⁹ *E.g., Report and Order* at ¶ 75, n.240.

Commission's action results in the government not receiving billions of dollars that otherwise may be realized from auctioning the spectrum in the 1.9 GHz band.

We appreciate the importance of the public safety communications problems the Commission seeks to address, particularly in the post 9-11 world. We recognize the Commission's determination that the *Report and Order* best addresses the potential financial, technological, and practical issues associated with band reconfiguration, not the least of which is the financial difficulty public safety organizations would have paying their own costs of relocation on a timely basis, if at all. Whether the Commission's view of its authority under the Communications Act and the determinations it made, as reflected by the *Report and Order*, are a proper balance of policies, powers, and constraints from a policy standpoint is a matter for Congress to consider.

I trust this responds to your request. Should you have any questions regarding this opinion, please contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667 or Jeffrey A. Jacobson, Assistant General Counsel, at (202) 512-8261.

Sincerely yours,

A handwritten signature in black ink that reads "Anthony H. Gamboa". The signature is written in a cursive style with a large initial "A".

Anthony H. Gamboa
General Counsel

DIGEST

1. FCC *Report and Order* on improving public safety communications in the 800 MHz band, which would provide Nextel with spectrum in exchange for Nextel relinquishing other spectrum and paying costs associated with 800 MHz band reconfiguration, does not violate 31 U.S.C. § 1341(a)(1)(B), a provision of the Antideficiency Act, because the *Report and Order* does not involve FCC obligations or expenditures.
2. FCC *Report and Order* on improving public safety communications in the 800 MHz band would provide Nextel with spectrum through a license modification in exchange for Nextel relinquishing other spectrum and paying costs associated with 800 MHz band reconfiguration. The license modification results in no money owed the government. The miscellaneous receipts statute, 31 U.S.C. § 3302(b), requires that money received for the United States be deposited in the Treasury and an agency cannot avoid the statute by changing the form of its transaction to avoid receiving money that would otherwise be owed to it unless so authorized by law. Because GAO defers to the FCC's interpretation of its authority under the Communications Act of 1934 to provide Nextel with spectrum through a license modification, GAO believes that the FCC *Report and Order* does not violate the miscellaneous receipts statute.
3. GAO defers to the FCC's interpretation of its authority under the Communications Act of 1934 consistent with the standard guiding the consideration of the FCC's regulatory actions established in *Chevron* and other court cases.