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June 30, 2004

BY HAND DELIVERY

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Proposed Nextel Transaction*

Dear Chairman Powell:

We have been asked by Verizon Communications to provide you with our analysis of the proposed sale of radio spectrum to Nextel Communications ("Nextel") in light of the requirements of the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341, and the Miscellaneous Receipts Statute ("MRS"), 31 U.S.C. § 3302. Although there may be a number of legal problems with the transaction as currently structured, *see* Memorandum from Charles J. Cooper et al. to Steven Zipperstein, June 28, 2004, we believe the clearest problem relates to Nextel's establishment of a reserve fund, for use by the FCC to cover transition and "clean up" costs associated with reallocating frequencies in the 800 MHz spectrum. For the reasons explained below, we believe the establishment of such a private reserve fund for the FCC's benefit would likely violate the ADA and MRS.

The Transaction

For purposes of this memorandum we need not elaborate all of the details of the proposed transaction. The following elements are material to our analysis:

- Nextel currently owns licenses to spectrum frequencies in the 800 MHz band that are interleaved with frequencies licensed to various public safety agencies. The interleaving causes interference with public safety agencies' communications, which the Commission wishes to alleviate.

- To achieve that result, Nextel would cede a portion of its 800 MHz band spectrum to the Commission and accept reallocation of the remainder. This would allow the Commission to reallocate spectrum to the public agencies to make it

contiguous, reducing or eliminating the undesirable interference. (We understand that the Commission believes that Nextel would lose approximately $500 million in value as a result of the loss and reallocation of its 800 MHz spectrum. We also understand that Verizon disagrees with this assessment. The question whether Nextel would suffer a loss as a result of its 800 MHz spectrum concession and reallocation is not relevant to our present analysis.)

- Nextel would also place between $850 million and $1.5 billion in a reserve fund, to be used to cover the transition costs associated with reallocating the public safety spectrum. (We understand the amount to be placed in the reserve may not yet be fixed; again, the precise amount is not relevant to our present analysis.)

- As compensation for Nextel's reserve fund payments (and its arguable loss in 800 MHz spectrum value), the Commission would convey to Nextel 10 MHz of spectrum in the 1.9 GHz band, at a discount price of between $2 billion and $4 billion. We understand this price to be a discount because Verizon has represented to the Commission that if the spectrum block were put up for auction, Verizon would open the bidding at $5 billion. The reserve fund payment made by Nextel for the 800 MHz band spectrum would apparently make up much or all of the difference between the discount price Nextel would pay for the 1.9 GHz spectrum and the price Verizon is offering to pay. (Nextel's concession and arguable loss in the 800 MHz spectrum could also be viewed as partly compensating for the 1.9 GHz band discount.)

ADA and MRS Concerns

Although perhaps designed for a laudable purpose, the establishment by Nextel of a private reserve fund to cover costs associated with the FCC's reallocation of the 800 MHz spectrum would likely violate the ADA and the MRS. These statutes operate in tandem to ensure that Government agencies rely exclusively on funds appropriated to them by the Congress. As currently structured, the Nextel transaction appears to transgress this core principle of the statutes.

The ADA and MRS are opposite sides of the same coin. The ADA essentially addresses outgoing funds. It provides, in pertinent part, that an "officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Conversely, the MRA essentially addresses incoming funds. It requires that any "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 any deduction for any charge or claim." 31 U.S.C. § 3302(b). Although nominally addressed to opposite aspects of transactions with the Government, the statutes in reality enforce a common principle: "[T]he executive shall remain wholly dependent upon appropriations." *To the Secretary, Smithsonian Inst.*, 42 Comp. Gen. 650, 652 (1963). When an agency accepts money for the use of the Government, but employs the money for some activity or program without remitting it to the

Treasury, the agency is effectively expending money that was not appropriated by Congress for that purpose – and the agency thereby simultaneously violates both the MRS and the ADA. *See In re: Sec. & Exch. Comm'n*, Comp. Gen. Dec. B-265727, at 2 (July 19, 1996) ("Unless otherwise authorized, agencies must deposit all funds received for the use of the United States in a general fund of the Treasury as miscellaneous receipts. Failure to do so constitutes an improper augmentation of the agency's appropriation."); *see also In re: Customs Service*, 59 Comp. Gen. 293, 294-96 (1980); *In re: Donor Payments to I.R.S.*, 55 Comp. Gen. 1293, 1293-94 (1976); *To the Administrator, G.S.A.*, 35 Comp. Gen. 113, 115 (1955); *To the Secretary of the Navy*, 10 Comp. Gen. 382, 383 (1931).

In its most straightforward application, the principle enforced by the ADA and the MRS means that "public officials may not, without legislative permission, fund government activities through private funds or receipts from the conversion of government goods and services." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1372 (1988); *see Donor Payments*, 55 Comp. Gen. at 1293-94 ("Absent specific authorizing legislation, there is no authority for an official of the Government to accept on behalf of the United States voluntary donations or contributions of cash since this would constitute an augmentation of appropriations made by Congress to the agency. . . . Any such donations or contributions . . . must be deposited into miscellaneous receipts of the Treasury."). Applying that rule, the Comptroller General has rejected a proposal to allow the Customs Service to "use funds received from outside sources to provide for additional customs inspectors to perform clearance functions," because "the collection of funds for clearance services . . . on behalf of the general public would constitute an augmentation of the appropriations made by Congress for performing such services." *Customs Service*, 59 Comp. Gen. at 294, 296. Even more on point, the Comptroller General refused to allow Government food services contractors to pay a portion of their revenues into a special reserve fund that would be used to pay for the repair or replacement of certain Government equipment. *See Administrator*, 35 Comp. Gen. at 116 ("it must be held that the contract provisions for the establishment of the reserve for equipment and the payment of a portion of the gross revenues into such reserve are unauthorized"); *see also Jackson Lake Dam*, 30 Op. Att'y Gen. 398, 402 (1915) (money received from sales of timber by Forest Service cannot be committed to reserve fund for reclamation uses but must be submitted to Treasury).

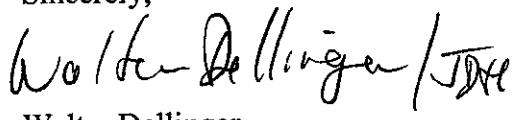
Because the proposed Nextel transaction, as we understand it, includes the establishment of a private reserve fund by Nextel, for the use of the FCC to cover costs associated with reallocation of the 800 MHz band, the transaction appears to us to violate the ADA/MRS prohibition on the unauthorized use of private money to fund Government activities. Nextel might argue otherwise on the ground that the FCC would not actually receive Nextel's funds, which would remain in private reserve, and thus the FCC would not violate the ADA or MRS because it would have no actual receipts to submit to the Treasury. That argument, we think, would be erroneous: as we understand the transaction, at some point the FCC would, in fact, receive money from Nextel to cover transition costs in the 800 MHz band. The FCC's failure to remit that money to the Treasury at that moment would likely violate the MRS and ADA. And given that the central purpose of the reserve fund is to make Nextel's money available for the FCC's near-future use, there would be a strong argument that the very establishment of the fund

itself violates the MRS and ADA. This argument is buttressed by the fact that the reserve fund would be created as an alternative to direct payment by Nextel for the full market value of the 1.9 GHz band spectrum block. That is, rather than pay at least $5 billion directly to the Government for the 1.9 GHz spectrum – as Verizon and perhaps others would if an auction were held – Nextel would pay a roughly (arguably) equivalent amount, partly in cash and partly through establishment of the reserve. Viewed that way, it is even clearer that the reserve fund would be, in reality, a payment of money to the FCC. Because the FCC would not remit that money to the Treasury, but would use it to reallocate 800 MHz band spectrum – with no appropriation from Congress for that purpose – we believe that such a transaction would be impermissible under the ADA and MRS.[1]

We conclude by noting that one of the undersigned was Assistant Attorney General for the Office of Legal Counsel. In his experience, Government agencies have not infrequently advanced proposals akin to this one, seeking to avoid the complications of the congressional appropriations process by assigning received funds directly to agency programs. Despite their (typically) good intentions, such proposals have been repeatedly rejected as inconsistent with our basic constitutional framework, which commits to Congress the exclusive power to decide how money received by the United States should be spent. The Nextel transaction appears to be yet another proposal along the same lines: perhaps well-intentioned, arguably laudable, but almost certainly irreconcilable with the laws that govern the use of money for the benefit of the United States.

We hope our analysis is of some assistance to the Commission in its consideration of whether to approve the proposed Nextel transaction.

Sincerely,



Walter Dellinger
Jonathan D. Hacker
of O'MELVENY & MYERS LLP

cc: The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
The Honorable Jonathan S. Adelstein

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[1] It bears emphasis that our view is not dependent on whether the 1.9 GHz spectrum is auctioned through competitive bidding or sold to Nextel at a pre-negotiated price. The main problem we have identified is Nextel's establishment of a private reserve fund for the FCC's use in reallocating 800 MHz spectrum. So long as that reserve fund is an element in this transaction (and congressional authorization is not obtained), the transaction will raise serious ADA and MRS concerns, regardless whether the 1.9 GHz block is put up for auction.