

ONE HUNDRED SIXTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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October 9, 2020

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Mr. Dodaro:

We write to request that the Government Accountability Office (“GAO”) evaluate whether the Department of Defense (“DoD”) has the legal authority to construct, operate, or maintain a commercial communications network or lease its assigned electromagnetic spectrum (“spectrum”) to private entities to provide commercial communications service. We believe DoD has limited or no legal authority to do so.

The Communications Act provides the Federal Communications Commission (“FCC”) with the authority, however, to allocate and assign spectrum for non-federal use,¹ and the President has the authority to assign spectrum to Federal entities; an authority that has been explicitly delegated to the National Telecommunications and Information Administration (“NTIA”).²

It is our understanding that, by law, the NTIA is tasked with managing federal spectrum uses,³ but may not permit anyone to use government spectrum for a non-government purpose

¹ 47 USC §§ 303, 305.

² National Telecommunications and Information Administration Organization Act, PL 102–538, Oct. 27, 1992, as amended by PL 115–141, Mar. 23, 2018 (47 USC § 901 et seq.); *see also*, National Telecommunications and Information Administration, *Spectrum Management*, (www.ntia.doc.gov/category/spectrum-management) (accessed Oct. 1, 2020); *see also*, 47 USC §§ 305, 902.

³ *Id.*

unless that use has been authorized by the FCC.⁴ And while the law permits the NTIA to allow non-federal licensees to use federal spectrum in certain special circumstances, the FCC is still required to make all “allocation and licensing decisions.”⁵ In addition, in instances in which there may be mutually exclusive applications for spectrum licenses, the FCC is required by law to conduct a spectrum auction.⁶

Aside from the Communications Act, the Anti-Deficiency Act may bear on some of these issues as well. By our reading, under the Anti-Deficiency Act, agencies may only spend money for specific purposes and in specific amounts dictated explicitly by Congress. The Anti-Deficiency Act states that no government official or employee may “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,” or “involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”⁷

The Miscellaneous Receipts Act may also be relevant. The law states that, unless otherwise allowed by law, any government official “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.”⁸ Without other intervening law, it appears that the DoD may not be able to receive compensation for commercial leases (or anything else) unless authorized to do so by Congress.

In light of the issues described above, we respectfully request that GAO provide complete legal analyses in response to the following questions:

1. Does the Anti-Deficiency Act prohibit, or otherwise limit, the DoD’s ability to construct, operate, or maintain a commercial communications network or lease the spectrum assigned to the DoD to private entities to provide commercial communications service or for any other purpose?
2. Does the Miscellaneous Receipts Act prohibit, or otherwise limit, the DoD’s ability to receive money or in-kind services as payment for constructing, operating, or maintaining a commercial communications network or for leasing the spectrum

⁴ 47 USC § 903(e)(1)(A) (“no person or entity (other than an agency or instrumentality of the United States) shall be permitted, after 1 year after August 10, 1993, to operate a radio station utilizing a frequency that is authorized for the use of government stations pursuant to section 902(b)(2)(A) of this title for any non-government application unless such person or entity has submitted to the NTIA proof, in a form prescribed by [the NTIA Manual of Regulations and Procedures for Federal Radio Frequency Management], that such person or entity has obtained a license from the [FCC]”).

⁵ 47 USC §§ 927(a) and (b).

⁶ 47 USC § 309(j).

⁷ 31 USC § 1341.

⁸ 31 USC § 3302(b).

assigned to the DoD to private entities to provide commercial communications service?

3. Under the Communications Act and the NTIA Reorganization Act, is the NTIA permitted to allow DoD to construct, operate, or maintain a commercial communications network or lease the spectrum assigned to the DoD to private entities to provide commercial communications services without being granted an authorization by the FCC? Would a spectrum auction potentially be required?
4. Are there any other legal authorities not listed here that would permit, prohibit, or otherwise limit DoD's ability to construct, operate, or maintain a commercial communications network or lease the spectrum assigned to the DoD to private entities to provide commercial service?
5. What changes in law would be required to allow DoD to construct, operate, or maintain a commercial communications network or lease the spectrum assigned to the DoD to private entities to provide commercial service if those activities are not permitted under current law?

Thank you for your attention to this important matter. If you have additional questions, please contact A.J. Brown of the Majority Committee Staff at (202) 225-2927.

Sincerely,



Frank Pallone, Jr.
Chairman



Mike Doyle
Chairman
Subcommittee on Communications
and Technology