

basis, section 4(i) automatically confers the right to apply that power across the board. If this reading were correct, it would completely eviscerate the power of Congress to determine the scope of the statutes it passes. As this court has held, “it is beyond cavil that ‘an agency’s power is no greater than that delegated to it by Congress,’” *id.* (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986)), and “[t]he *duty* to act under certain carefully defined circumstances does not subsume the *discretion* to act under other, wholly different, circumstances, unless the statute bears such a reading,” *id.* at 671.

Even if I were to assume the fallacious premise that section 4(i) could bestow upon the FCC the authority to charge Mtel for its license, there is *no* indication that the charge is “necessary” to the FCC’s functions. The Commission’s justification for the charge is that granting Mtel a free license could harm the public interest by jeopardizing competition in the communications industry. This justification is belied by the fact that the FCC is presently awarding licenses to *competitors* of Mtel with no such fee attached.¹⁴

Further, Mtel and other pioneer’s preference applicants made large investments in research and development of new products in reliance on the pioneer’s preference framework as it existed before the FCC’s auction authority. Mtel asserts that it continued to invest in improving the capabilities of its system after the pioneer’s preference was granted.¹⁵ Only an extraordinarily naive person could believe that the FCC’s repeated promises that Mtel would not be charged an auction-based license fee did not affect Mtel’s allocation of its resources to this endeavor.

¹⁴ As the majority concedes, Mtel has submitted information indicating that the FCC has recently issued paging licenses without subjecting the recipients to auction-based fees.

¹⁵ *See, e.g.*, Letter from R. Michael Senkowski & Eric W. DeSilva, counsel for Mtel to William Caton, Acting Secretary, FCC 3 (Apr. 26, 1994), *reprinted in* J.A. 879 (“Mtel has kept its commitments to the Commission by strengthening its financing and improving the service’s technological capabilities since the award was made.”)

At oral argument, counsel for the FCC was disinclined to address the agency's various guarantees that Mtel would not be charged an auction-based fee.¹⁶ There was nothing of substance for him to offer by way of explanation, so counsel's reluctance was savvy. Nonetheless, counsel's inability to respond in no way obscures the obvious: in addition to being lawless, the FCC's action in this case borders on outrageous. I dissent.

¹⁶ Transcript of Oral Argument at 28.