NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 13-5205

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALPINE PCS, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE FEDERAL COMMUNICATIONS COMMISSION

STUART F. DELERY
Assistant Attorney General

Of Counsel
JACOB M. LEWIS
HILLARY B. BURCHUK
Federal Communications Commission

LLOYD H. RANDOLPH
(D.C. Bar #376009)
Civil Division
U.S. Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, DC 20044
lloyd.randolph@usdoj.gov
Voice: (202) 307-0356
Fax: (202) 307-0494

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies that the following information is, to the best of his knowledge, true and correct:

A. Parties and Amici. Appellant Alpine PCS, Inc. ("Alpine") was the plaintiff in the district court. Appellee Federal Communications Commission ("FCC") was one of the defendants in the district court. Pioneer Credit Recovery, Inc. ("Pioneer") was also a defendant in the district court but Alpine has not challenged the district court's dismissal of Alpine's claims against Pioneer. There were no amici or intervenors in district court, and there are none in this Court.

B. **Rulings Under Review.** Appellant has appealed from the June 3, 2013 Order (Dkt# 17), JA 99 (unpublished), of United States District Judge Robert L. Wilkins, which incorporated by reference that court's reasons for its ruling as stated on the record of the June 3, 2013 hearing on the FCC's and Pioneer's respective motions to dismiss, as reflected in the hearing transcript (Dkt# 18), JA 57-98.

C. **Related Cases.** The following cases are related to this one:

- *Alpine PCS, Inc. v. FCC*, 404 F. App'x 508 (D.C. Cir. 2010) (affirming *In re Alpine PCS, Inc.*, 25 FCC Rcd. 469 (FCC 2010)), and
- *In re Alpine PCS, Inc.*, 404 F. App'x 504 (D.C. Cir. 2010) (affirming *In re Alpine PCS, Inc.*, No. JFM-08-2055 (D.D.C. July 15, 2009), for the reasons

stated in *In re Alpine PCS, Inc.*, No. 08-00543, 2008 WL 5076983 (Bankr. D.D.C. Oct. 10, 2008)).

/s/ Lloyd H. Randolph
Lloyd H. Randolph
Counsel for Appellee FCC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities chiefly relied upon are marked with an asterisk.

Statutes

Other Authorities

GLOSSARY

"Alpine": appellant Alpine PCS, Inc.

"Auction": FCC-conducted mechanism for assigning right to use electromagnetic spectrum formerly assigned to Alpine

"Automatic Cancellation Order": *In re Alpine PCS, Inc.*, 22 FCC Rcd. 1492 (WTB Jan. 29, 2007)

"Bureau": FCC's Wireless Telecommunications Bureau

"CFC": United States Court of Federal Claims

"Complaint" or "Compl.": Alpine's January 3, 2013 pleading

"Dismissal Order": district court's June 3, 2013 order dismissing the Complaint

"Dkt#": district court docket entry number

"FCC": appellee Federal Communications Commission

"FCC Order": *In re Alpine PCS, Inc.*, 25 FCC Rcd. 469 (FCC 2010)

"Forum Choice Clause": provision concerning jurisdiction and venue on page 5 of the Notes

"FTCA": Federal Tort Claims Act

"JA": Joint Appendix

"License": FCC's conditional authorization to use electromagnetic spectrum to offer wireless mobile phone and data services

"Note": Alpine's written promise to pay FCC for License

"Security Agreement": Alpine's written contract pledging its FCC licenses to FCC as security for its License-related debt to FCC

"Subsection 309(j)": 47 U.S.C. § 309(j)

"Subsection 402(a)": 47 U.S.C. § 402(a)

"Subsection 402(b)": 47 U.S.C. § 402(b)

"Tr.": transcript of June 3, 2013 hearing before district court

"WTB": FCC's Wireless Telecommunications Bureau

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ALPINE PCS, INC., **Appellant,** **v.** **FEDERAL COMMUNICATIONS COMMISSION, et al.** **Appellees.**	**No. 13-5205**

BRIEF OF APPELLEE FEDERAL COMMUNICATIONS COMMISSION

JURISDICTIONAL STATEMENT

Plaintiff-appellant Alpine PCS, Inc. ("Alpine") invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1332 and 1346(b)(1). JA 2 (Dkt# 1, Complaint ("Compl.") ¶¶ 4-6). As explained below, the district court correctly held that it lacked jurisdiction, dismissing Alpine's complaint in an order entered on June 3, 2013. JA 99 (Dkt# 17). Alpine filed a notice of appeal on July 1, 2013. JA 100 (Dkt# 19). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court correctly conclude that it lacked subject matter jurisdiction over Alpine's claims seeking to challenge the FCC's regulatory decisions.

PERTINENT STATUTES AND REGULATIONS

This case concerns two sections of the Communications Act, 47 U.S.C. § 151 *et seq*., one of its implementing regulations, and various provisions of the Judicial Code, which are set forth in the addendum to this brief.

STATEMENT OF THE CASE

In the Complaint, Alpine asserted six distinct claims against the FCC: breach of contract, unjust enrichment, fraud in the inducement, declaratory judgment that Alpine has not defaulted, declaratory judgment that Alpine does not owe money to the FCC, and breach of fiduciary duty. The district court granted the FCC's motion to dismiss for lack of jurisdiction (JA 49 (Dkt# 8)) and explained the basis for that decision "on the record in open court." JA 99 (Dkt# 17); *see* JA 85-95 (Dkt# 18 at 29-39) (transcript, "Tr."). Alpine appeals from that decision. JA 100.

STATEMENT OF FACTS

In a 1996 auction, Alpine submitted the winning bids for two FCC licenses to use the electromagnetic spectrum reserved for Personal Communications Service - a means of offering wireless mobile phone and data services. JA 3 (Compl. ¶ 10). Alpine agreed to pay most of its winning bid for each license in installments with interest. To memorialize this debt, for each License, Alpine issued to the FCC a promissory note; to secure each such debt, via a security

agreement (each, a "Security Agreement"), Alpine pledged each License. JA 3-4, 13-30, 31-48 (Compl. ¶¶ 11-12, 16 and Exs. A, B (Notes) and C, D (Security Agreements)). The Notes (at 6), JA 19, 28, and Security Agreements (at ¶ 3), JA 34, 43, make clear that they are expressly subject to the FCC's rules.

In the Notes (at 3), Alpine "acknowledge[d]" that the licenses were "conditioned upon full and timely payment of financial obligations under the installment payment plan, as set forth in the then-applicable orders and regulations of the Commission . . . ." JA 16, 25. The Security Agreements (at ¶ 8(a)) also reiterated that, in the event of default, "the License[s] shall be automatically canceled pursuant to 47 C.F.R. § 1.2110." JA 36, 45.

The Notes (at 5) contain the following clause ("Forum Choice Clause"):

> Any legal action or proceeding relating to this note, the security agreement, or other documents evidencing or securing the debt transaction evidenced hereby may only be brought in the United States District Court for the District of Columbia . . . . The parties hereto hereby irrevocably waive any objection, including, without limitation, any objection to the laying of venue or based on the grounds of forum non conveniens, which any of them may now or hereafter have to the bringing of any such action or proceeding in the District of Columbia.

JA 18, 27 (capitalization altered). In the Forum Choice Clause (Notes at 5), Alpine also agreed to "accept[] for itself and in respect of its property generally and unconditionally, the jurisdiction of the aforesaid court." JA 18, 27 (capitalization altered). The Complaint does not allege that the FCC has sued or threatened suit

elsewhere.

In 2002, Alpine failed to make its required installment payments. *See* JA 5 (Compl. ¶¶ 23-24). Pursuant to then-applicable FCC regulations, Alpine automatically received two three-month grace periods terminating on July 31, 2002. *See* 47 C.F.R. § 1.2110(g)(4)(i) and (ii) (2002). When Alpine failed to pay its overdue installments by that date, the licenses canceled automatically pursuant to 47 C.F.R. § 1.2110(g)(4)(iv) (2002). *In re Alpine PCS, Inc.*, 22 FCC Rcd. 1492 (WTB Jan. 29, 2007) (the "Automatic Cancellation Order") ¶¶ 3-5, 7-8.

On January 16, 2004, the FCC notified Alpine that Alpine was in default under the Notes, JA 6 (Compl. ¶ 31); two weeks later, the FCC's Wireless Telecommunications Bureau ("Bureau" or "WTB") denied Alpine's request to waive the operation of the FCC's automatic cancellation regulation. Automatic Cancellation Order ¶ 24; *cf.* JA 6-7 (Compl. ¶¶ 32-33). The Bureau determined that granting a waiver to Alpine would be inconsistent with the underlying purpose of the automatic cancellation rule and auction program because Alpine admitted that it could not continue to meet its payment obligations and had no prospect of doing so in the future. Automatic Cancellation Order ¶¶ 13-17.

In response to an Alpine administrative appeal, the full FCC affirmed the Bureau's decision to deny Alpine's waiver request. *In re Alpine PCS, Inc.*, 25 FCC Rcd. 469 (FCC 2010) ("FCC Order"); *see* JA 7 (Compl. ¶ 36). The FCC held

that in the Automatic Cancellation Order, the Bureau correctly applied the FCC's precedents, noting that the FCC has "consistently refused to waive the automatic cancellation rule" where the licensee defaulted on its auction debt payments and failed to demonstrate its ability and willingness to pay its outstanding auction debt in accordance with the rules. FCC Order ¶ 28. The FCC also ruled that the Bureau correctly concluded that Alpine's claim of financial distress and lost financing did not justify a waiver of the automatic cancellation rule. *Id.* ¶¶ 25-33. Alpine appealed the FCC Order and this Court affirmed. *Alpine PCS, Inc. v. FCC*, 404 F. App'x 508 (D.C. Cir. 2010).

While Alpine's administrative appeal was pending, the FCC announced a new auction to assign spectrum, including spectrum previously assigned to Alpine. *Auction Of AWS-1 And Broadband PCS Licenses Scheduled For July 29, 2008; Comment Sought On Competitive Bidding Procedures For Auction 78*, 23 FCC Rcd. 5484 (WTB 2008); *see* JA 7 (Compl. ¶ 34). Alpine filed a request to stay the Auction, which the Bureau denied. *In re Alpine PCS, Inc.*, 23 FCC Rcd. 10485 (WTB 2008). The Bureau noted that any license granted at the Auction would remain subject to the final outcome of Alpine's administrative appeal. *Id.* ¶ 18.

On August 12, 2008 - the day before the scheduled start date for the Auction - Alpine commenced a Chapter 11 bankruptcy case. Alpine requested the bankruptcy court to enjoin the Auction pursuant to 11 U.S.C. § 105 on the ground

that the Auction constituted a "foreclosure" on property of the Alpine bankruptcy estate in violation of the Bankruptcy Code's automatic stay, 11 U.S.C. § 362. *See* JA 7 (Compl. ¶ 35). After emergency briefing and a hearing, the bankruptcy court announced its decision from the bench and later supplemented it with a written opinion. The bankruptcy court found that the Auction did not violate the automatic stay and denied the requested injunction, explaining that the Licenses were not property of the bankruptcy estate because they had canceled in 2002 when Alpine failed to pay installments due on the Notes. *In re Alpine PCS, Inc.*, No. 08-00543, 2008 WL 5076983, *2 (Bankr. D.D.C. Oct. 10, 2008). Following the district court's affirmance, this Court too rejected Alpine's arguments "for the reasons stated in the opinion of the bankruptcy court." *In re Alpine PCS, Inc.*, 404 F. App'x 504 (D.C. Cir. 2010).[1]

This further litigation commenced on January 3, 2013 when Alpine filed its Complaint. The FCC moved to dismiss the Alpine's claims against the FCC on the two grounds. First, the district lacked subject matter jurisdiction over the claims because Congress had not expressly waived sovereign immunity for the district court to hear them. Second, the claims against the FCC failed to state any claim on

[1] With Alpine's consent, its bankruptcy case was dismissed. *In re Alpine PCS, Inc.*, No. 08-00543, Order Dismissing Case (Bankr. D.D.C. Feb. 24, 2011). Meanwhile, on August 20, 2008, the Auction concluded. Winning bids were submitted on 53 of the 55 offered licenses, including for spectrum formerly covered by the Alpine licenses. *Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced For Auction 78*, 23 FCC Rcd. 12749 (2008).

which relief could be granted. On June 3, 2013, the district court granted the motion based on the first of these grounds. JA 87-95 (Tr. 31-39). The district court explained that "the vast majority of Alpine's claims are really nothing more than an appeal from the FCC's license cancellation decision" and so were claims within the exclusive jurisdiction of this Court, not the district court. JA 95 (Tr. 39). The district court dismissed the remaining claim for fraud in the inducement on the grounds that Alpine failed to exhaust its administrative remedies and that sovereign immunity has not been waived for misrepresentation claims. JA 90-91 (Tr. 34-35). Alpine appealed.

SUMMARY OF ARGUMENT

The district court lacks subject matter jurisdiction over Alpine's claims against the FCC, including Alpine's breach of contract claim -- the only claim whose dismissal Alpine challenges on this appeal. The United States' sovereign immunity cannot be waived by a choice of forum clause in a contract. Alpine's breach of contract claim (like its other non-tort claims against the FCC) merely challenges the FCC Order. As such, this Court, not the district court, properly has exclusive original jurisdiction to consider any challenge to the FCC Order (and in 2010 this Court rejected this challenge). If that were not so, the breach of contract claim would be subject to the exclusive subject matter jurisdiction of the United States Court of Federal Claims ("CFC"). Congress also has not waived sovereign

immunity for the district court to hear Alpine's other claims. For these reasons, the Dismissal Order should be affirmed.

ARGUMENT

THE DISMISSAL ORDER SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION TO DECIDE ALPINE'S CLAIMS

A. This Court Reviews *De Novo* A District Court's Determination That Congress Has Not Waived Sovereign Immunity

"Sovereign immunity shields the United States from suit absent a consent to be sued that is 'unequivocally expressed.'" *United States v. Bormes*, 133 S.Ct. 12, 16 (2012) (quoted citation omitted). Any waiver of sovereign immunity "'must be unequivocally expressed *in statutory text*' and 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Gomez–Perez v. Potter*, 553 U.S. 474, 491 (2008) (emphasis added; quoted citation omitted). These principles apply to Alpine's suit against the FCC because it is an agency of the United States. *See FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 301 (2003).

This Court reviews *de novo* a district court's decision about whether sovereign immunity has been waived. *Albrecht v. Comm. on Employee Benefits of Fed. Reserve Employee Benefits Sys.*, 357 F.3d 62, 65 (D.C. Cir. 2004).

B. The Communications Act Does Not Waive Sovereign Immunity For The District Court To Hear Challenges To FCC Licensing Decisions

Alpine's contention that the district court had subject matter jurisdiction to

consider its claims rests primarily on its construction of 47 U.S.C. § 309(j) ("Subsection 309(j)"). As further explained below, Subsection 309(j) does not waive sovereign immunity. Instead, the Communications Act's waiver of sovereign immunity appears in 47 U.S.C. § 402, which gives courts of appeals, not the district court, authority to consider challenges to FCC decisions.

1. Communications Act Section 402 Waives Sovereign Immunity For Challenges To FCC Decisions But Only In Courts of Appeals

The Communications Act routes challenges to FCC decisions down one of two jurisdictional paths. "*Appeals* may be taken" from certain types of FCC decisions "to the United States Court of Appeals for the District of Columbia," 47 U.S.C. § 402(b) ("Subsection 402(b)") (emphasis added); otherwise, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of" the FCC "shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28," 47 U.S.C. § 402(a) ("Subsection 402(a)") (emphasis added), *i.e.*, in a regional court of appeals, pursuant to 28 U.S.C. § 2342(1).

Courts have recognized that "[e]xclusive jurisdiction for review of final FCC orders . . . lies by statute in the Court of Appeals." *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (citing 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a)). This "'exclusive jurisdiction of the courts of appeals cannot be evaded simply by labeling the proceeding as one other than a proceeding for judicial review.'" *United States v. Any and All Radio Station Transmission Equipment,*

207 F.3d 458, 463 (8th Cir. 2000) (quoted citation omitted). Moreover, Subsection 402(b) covers not only matters "fall[ing] within the literal language" of these sections, but also claims "within the scope of [FCC] licensing decisions . . . ancillary to those set forth in subsection 402(b)." *Folden v. United States*, 379 F.3d 1344, 1359 (Fed. Cir. 2004) (holding that FCC decision not to continue to allocate licensable spectrum by lottery was subject to review only in this Court as a question ancillary to the denial of a station license under 47 U.S.C. § 402(b)(1)).

Here, Alpine's contract claim and the rest of its non-tort claims fall within the range of issues covered by Subsection 402(b). Among the types of challenges expressly covered there are challenges "[b]y the holder of any . . . station license which has been . . . *revoked* by" the FCC, 47 U.S.C. § 402(b)(5) (emphasis added), and "[b]y any applicant for the renewal or *modification* of" an FCC license, 47 U.S.C. § 402(b)(2) (emphasis added). As previously explained, *supra* at 4-6, the Licenses terminated automatically because Alpine, prior to petitioning for bankruptcy, failed to make accrued installment payments by the end of the two three-month grace periods. All of the Complaint's non-tort claims are challenges to the FCC's decision to "revoke" the Licenses for non-payment, and thus all but the tort claim mount a veiled attack on the FCC Order. Alpine seeks damages for the FCC's revocation of the Licenses for Alpine's failure to meet an express License condition – full and timely installment payments under the Notes. Under

Subsection 402(b), this Court has exclusive jurisdiction for judicial review of such FCC decisions because Alpine's claims essentially seek to "modif[y]" the Licenses' terms so that they would not automatically cancel for failure to make timely installment payments. 47 U.S.C. § 402(b)(2). The district court found (JA 91-92 (Tr. 35-36)) that Alpine's failure to respond to these arguments conceded them, citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997) (holding district court did not abuse its discretion in refusing to consider untimely opposition to summary judgment motion). For this reason, and because the jurisdiction of this Court over challenges to FCC licensing decisions is exclusive, the district court correctly held that it lacked subject matter jurisdiction over Alpine's claims against the FCC.

Biltmore Forest Broadcasting FM, Inc., 555 F.3d 1375 (Fed. Cir. 2009), demonstrates the point. There, at an FCC auction for spectrum licenses, the high bidder had not filed a required disclosure before the auction's start but remedied this omission after the auction's conclusion. The bidder submitting the next highest bid challenged the award of the licenses to the high bidder, contending that the high bidder should have been disqualified for failing to make the required certification. *Id*. at 1377-78. On appeal under Subsection 402(b), this Court affirmed the FCC's rejection of this argument. *Biltmore Forest Broad. FM, Inc. v. FCC*, 321 F.3d 155, 160-61 (D.C. Cir. 2003). The unsuccessful bidder then sued

the FCC in the CFC for allegedly breaching an implied contract by awarding a license in violation of the auction's published terms. The CFC dismissed for lack of subject matter jurisdiction and the Federal Circuit affirmed. Even "assum[ing] . . . that an FCC license auction results in a contract between the FCC and the high bidder," 555 F.3d at 1381, the Federal Circuit held that the CFC lacked subject matter jurisdiction because "jurisdiction conferred by § 402(b) is exclusive," *id.* at 1384. "There is no jurisdiction in the CFC to initially adjudicate or to re-adjudicate the FCC's compliance with its rules and regulations in licensing proceedings. The District of Columbia Circuit's jurisdiction over those issues is exclusive." *Id.*

This Court likewise has recognized its exclusive jurisdiction over challenges to FCC licensing decisions. In *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979), a city had requested a district court to "set aside" the FAA's determination that construction of a radio tower did not pose a hazard to air traffic and the FCC's issuance of a construction permit for the tower. In affirming the district court's conclusion that it lacked subject matter jurisdiction over such a claim, this Court explained, "Congress, acting within its constitutional powers, may freely choose the court in which judicial review [of federal administrative agency action] may occur." *Id.* at 931. "If . . . there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive

means of obtaining judicial review in those cases to which it applies." *Id.* Excepting only "those instances in which the statutory review would be inadequate," this Court thus held that "in [section] 402 of the Communications Act . . . Congress . . . prescribed the exclusive mode of judicial review of such controversies as this . . . ." *Id.* at 934 (citing *Sykes v. Jenny Wren Co.*, 78 F.2d 729, 732 (D.C. Cir. 1935) (holding that Subsection 402(b) provided "the exclusive remedy . . . for the review of plaintiff's complaint" to enjoin the FCC from granting a license modification to a competing radio station, and so "the lower court was without jurisdiction" over plaintiff's claim)).

2. Subsection 309(j) Does Not Waive Sovereign Immunity

Alpine's contention (Br. 15, 17-19) that Subsection 309(j) waives sovereign immunity is mistaken. That provision merely directs the FCC to use wireless licensing to "promot[e] economic opportunity and competition," 47 U.S.C. § 309(j)(3)(B), and, in furtherance of these goals, to "consider alternative payment schedules" for licensees, 47 U.S.C. § 309(j)(4)(A). This language does not expressly waive the sovereign immunity of the United States "unequivocally . . . in statutory text." *Gomez–Perez*, 553 U.S. at 491. For example, a statute waiving sovereign immunity may make the waiver clear by referring to a court's jurisdiction over particular types of claims against the United States, *e.g.*, 28 U.S.C. §§ 1346(b)(1), 1491(a)(1), 2342, or by otherwise unambiguously

identifying that the government is subject to suit for particular claims, *e.g.*, 11 U.S.C. § 106(a). Subsection 309(j) does not contain either type of waiver. Indeed, it does not even hint at the possibility of suit against the government, and therefore cannot be said to waive sovereign immunity expressly and unequivocally. Unsurprisingly, Alpine does not cite any authority holding that Subsection 309(j) or any similar language qualifies as a waiver of sovereign immunity, and we are unaware of any such authority.

Alpine's reliance (Br. 20) on *Franchise Tax Bd. Of California v. United States Postal Service*, 467 U.S. 512 (1984), is misplaced. In that case, the Supreme Court held that Congress had waived the Postal Service's sovereign immunity by empowering it to sue and be sued in its own name, 39 U.S.C. § 401(1), and giving it broader settlement authority than federal agencies generally have, 39 U.S.C. § 401(8). *Franchise Tax Bd.*, 467 U.S. at 519. Neither type of provision appears in Section 309(j). Alpine has not identified any other statute empowering the FCC in either of these ways. Specifically, Congress has not authorized the FCC to sue or be sued in its own name. *Cf.* 47 U.S.C. § 614(h)(1) (empowering Telecommunications Development Fund, not FCC, "to sue and be sued"). Congress uses such "explicit language" "[w]hen . . . [it] authorizes one of its agencies to be sued *eo nomine*. . . ." *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952). And the FCC is subject to the same settlement constraints as federal

agencies generally. *See* 31 U.S.C. § 3711(a)(2) (generally reserving authority to compromise claims exceeding $100,000 to the Attorney General).

In sum, the district court correctly dismissed the Complaint for lack of subject matter jurisdiction because Alpine's non-tort claims effectively seek review or annulment of the FCC Order affirming the Automatic Cancellation Order, and only this Court may hear such challenges. Alpine's claims are particularly misplaced because this Court, in *Alpine PCS, Inc. v. FCC*, 404 F. App'x 508, has already heard -- and rejected -- Alpine's challenge. *See infra* at 21, n.4.

C. The Forum Choice Clause Does Not Waive Sovereign Immunity

Alpine's argument that the Forum Choice Clause can overcome the fundamental limitations on a district court's jurisdiction lacks merit. "Sovereign immunity may not be waived by federal agencies." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1105 (D.C. Cir. 2005). Without citing any authority even in tension with *Settles*, Alpine argues that the FCC has some "Congressionally-granted discretion" (Br. 10) to waive sovereign immunity by choosing the forum for litigation in which it may be named as a defendant. This argument flatly contradicts not only *Settles*, but the Supreme Court's repeated emphasis that a waiver of sovereign immunity can only be found in a clear statement in the text of a statute. *Supra* at 8.

Alpine's argument is also inconsistent with the basic principle that only

Congress, not the parties to litigation, can define a federal court's subject matter jurisdiction. *Weinberger v. Bentex Pharms., Inc.*, 412 U.S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only Congress can do so."); *accord Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction.") (citing U.S. Const., Art. III, § 1); *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) ("because subject-matter jurisdiction is 'an Art. III as well as a statutory requirement . . . no action of the parties can confer subject-matter jurisdiction upon a federal court.'") (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

Alpine's contrary argument, resting primarily on *City of Arlington v FCC*, 133 S. Ct. 1863 (2013) (cited Br. 18-19), lacks merit. The Supreme Court there held that under *Chevron, U.S.A., Inc. v Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), courts owed deference to the FCC's interpretation of its own authority to promulgate regulations. By contrast, a court does not owe deference to an agency's view concerning a district court's jurisdiction. "It is well established that '[i]nterpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.'" *Murphy Exploration and Production Co. v. U.S. Dept. of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001) (quoting *Ramey v. Bowsher*, 9 F.3d 133, 136 n. 7 (D.C. Cir. 1993)), *modified on denial of petition for*

reh'g on other grounds, 270 F.3d 957 (D.C. Cir. 2001). For that reason, "*Chevron* does not apply to statutes that . . . confer jurisdiction on the federal courts." *Murphy Exploration*, 252 F.3d at 478-79 (explaining that "courts pay agencies no deference on jurisdiction-conferring statutes" because "such statutes do not grant powers to agencies" and "administrative agencies have no particular expertise in determining the scope of an Article III court's jurisdiction"). *City of Arlington* does not call this settled principle into question because it had nothing to do with sovereign immunity waivers.

City of Arlington also is inapposite because the FCC has not promulgated any regulation purporting to give district courts jurisdiction over challenges by the maker of notes favoring the FCC. The FCC lacks any reason to promulgate such a regulation because Congress has expressly and clearly provided that any appeals from FCC licensing decisions must be heard by this Court. 47 U.S.C. § 402(b). The regulation to which Alpine (Br. 16) points, 47 C.F.R. § 1.2110(g)(3) (2002), requires small businesses obtaining FCC license financing to "execute a promissory note and security agreement," but does not detail where any action arising from breach of a note or security agreement should be brought or require any waiver of objections to venue or the exercise of personal juridiction. Unlike *City of Arlington*, this case does not concern the FCC's regulatory jurisdiction or *Chevron* deference to the FCC's interpretation of the Communications Act.

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (cited Br. 16), likewise does not support Alpine's argument that the Forum Choice Clause waives sovereign immunity. That case merely held that federal district courts "sitting in admiralty" should enforce forum-selection clauses "unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id*. at 10.

The Forum Choice Clause is merely Alpine's waiver of its potential objections to jurisdiction over its *person* or to venue for a Note-related action in the district court, a forum convenient to the FCC.[2] These waivers are legally permissible because a forum selection clause is merely one of a "variety of legal arrangements" by which a litigant may give "express or implied consent to the *personal* jurisdiction of the court." *Ins. Corp. of Ireland*, 456 U.S. at 703 (emphasis added). Moreover, the FCC did not make representations in the Forum Choice Clause because the Notes were neither signed by, nor contain a signature line for, the FCC.[3] Put simply, Alpine's waivers of objections to the district court's jurisdiction over its person or to venue did not give Alpine any meaningful

[2] JA 18, 27 (Notes at 5) ("Maker hereby accepts for itself and in respect of its property generally and unconditionally, the jurisdiction of" "the United States District Court for the District of Columbia" and "waives any objection, including, without limitation, any objection to the laying of venue or based on the grounds of forum non conveniens . . . to the bringing of any such action or proceeding in the District of Columbia.") (emphasis added; capitalization in original removed).

[3] *See* 20 Am. Jur. 2d *Covenants, Etc*. § 1 (database updated 2013) ("In general usage, a covenant is a solemn or formal obligation binding on the covenantor, but not necessarily binding on others").

assurance that the district court would have *subject matter* jurisdiction over any Note-related suit against the FCC.

D. The District Court Also Lacks Subject Matter Jurisdiction Over Alpine's Express and Disguised Breach of Contract Claims Because They Seek More Than $10,000

Generally, the CFC "has exclusive jurisdiction" to hear a "'claim against the United States founded . . . upon an[ ] express or implied contract with the United States'" when the claim seeks "over $10,000 in damages." *Greenhill v. Spellings*, 482 F.3d 569, 576 (D.C. Cir. 2007) (quoting the Tucker Act, 28 U.S.C. § 1491). "'[J]urisdiction under the Tucker Act cannot be avoided by . . . disguising a money claim' as a claim requesting a form of equitable relief." *Kidwell v. Dep't of the Army*, 56 F.3d 279, 284 (D.C. Cir. 1995). The district court has subject matter jurisdiction over a claim arising from the government's alleged breach of a contract only when the amount of the claim does not exceed $10,000. 28 U.S.C. § 1346(a)(2). Here, Alpine's claim that the FCC "breached its contractual obligations, including those embodied in the Licenses, Notes, and the Security Agreements" seeks damages exceeding twenty million dollars. JA 8-9 (Compl. ¶¶ 43, 45). Most of its other claims are disguised claims for breach of contract over which, outside the context of an FCC licensing decision, the CFC would have exclusive jurisdiction. *See Bliss v. England*, 208 F. Supp. 2d 2, 7 (D.D.C. 2002) (dismissing military officer's claim for declaratory and injunctive relief to correct

allegedly erroneous retirement rank for lack of subject matter jurisdiction "[b]ecause his complaint specifically mentions monetary relief"). Thus, if Alpine's claims are not properly characterized as a challenge to an FCC licensing decision, the Dismissal Order should be affirmed on the ground that subject matter jurisdiction over most of them rests with the CFC, not the district court.

E. The District Court Lacks Subject Matter Jurisdiction Over The Complaint's Other Claims

In this Court, Alpine does not challenge the district court's conclusion that it lacked subject matter jurisdiction over the Complaint's non-contract claims, and for good reason. Alpine has not exhausted its administrative remedies for any tort claims, JA 90-91 (Tr. 34-35), a prerequisite under 28 U.S.C. § 2675(a) to the waiver of sovereign immunity for such claims under Federal Tort Claims Act ("FTCA"). *See McNeil v. United States*, 508 U.S. 106, 112-13 (1993). Moreover, the district court correctly concluded (JA 90-91 (Tr. 34-35)) that it lacked subject matter jurisdiction over Alpine's claim for fraud in the inducement because the FTCA does not waive sovereign immunity for claims based on an alleged misrepresentation. 28 U.S.C. § 2680(h); *see United States v. Neustadt*, 366 U.S. 696, 702 (1961) (noting this section "comprehends claims arising out of negligent, as well as willful, misrepresentation."). Sovereign immunity also has not been waived for Alpine's breach of contract claim disguised as a breach of fiduciary claim. *See Albrecht*, 357 F.3d at 68. Moreover, the district court correctly held

(JA 90-91 (Tr. 34-35)) that Alpine waived any contrary argument by failing to respond to these points, citing *FDIC v. Bender*, 127 F.3d at 67-68, and Alpine has again waived any contrary argument by failing to include any mention of the issue in its opening brief. *See Verizon Telephone Companies v. FCC*, 292 F.3d 903, 911-12 (D.C. Cir. 2002) (arguments not made in the opening brief are waived).

In short, the Dismissal Order should be affirmed because the district court lacked subject matter jurisdiction over each Alpine claim against the FCC.[4]

---

[4]Alpine cannot prevail on the merits of its claims against the FCC for numerous additional reasons. All of Alpine's claims are barred by claim preclusion, as Counts One and Five and both counts labeled "Four" have already been litigated through two appeals to this Court, *supra* at 4-6, and Alpine's remaining claims against the FCC arise from the same nucleus of operative fact. *See Natural Res. Def. Council v. EPA*, 513 F.3d 257, 260-61 (D.C. Cir. 2008). Moreover, all of Alpine's claims against the FCC are time-barred under 28 U.S.C. § 2401 because its tort claims first accrued at least two years prior to January 3, 2013 (when Alpine filed the Complaint), and its other claims accrued at least six years before that date. For example, Alpine's contractual breach claims had expired by 2013 because they accrued in 2004. *See* JA 5-6, 8-9 (Compl. ¶¶ 24-32, 43). And even if Alpine's claims were not barred, they should be dismissed as not facially viable. Alpine's breach of contract and declaratory judgment claims (Count One and both counts labeled "Four") are meritless because Alpine breached its contracts with the FCC by failing to make timely installment payments due under the Notes. *See supra* at 2-6. Alpine lacks an unjust enrichment claim (Count Two) because the FCC's receipts were governed by express contracts. Alpine's fraud claim (Count Three) fails because it rests on a mistaken construction of the Notes, *see supra* at 18, and even under Alpine's construction, the supposed representations merely mis-stated applicable law, not any fact. Count Five lacks facial validity because the FCC does not have fiduciary duties to Alpine, as no statute or regulation imposes any such duty on the FCC, and its lending relationship to Alpine did not create one. The FCC extensively briefed and orally argued these points below. *See* JA 60, 66-76 (Tr. 4, 10-20). The district court relied on them in denying Alpine's request to transfer the case to the CFC. JA 93-94 (Tr. 37-38).

CONCLUSION

For the foregoing reasons, the Dismissal Order should be affirmed.

Dated: November 25, 2013

Respectfully submitted

STUART F. DELERY
Assistant Attorney General

Of Counsel
JACOB M. LEWIS
HILLARY B. BURCHUK
Federal Communications Commission

/s/ Lloyd H. Randolph
LLOYD H. RANDOLPH
(D.C. Bar #376009)
Civil Division
U.S. Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, DC 20044
lloyd.randolph@usdoj.gov
Voice: (202) 307-0356
Fax: (202) 307-0494

Attorneys for the United States on behalf of the Federal Communications Commission

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5382 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Lloyd H. Randolph
Lloyd H. Randolph

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013 I electronically filed the foregoing Brief Of Appellee Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause the original and eight paper copies of this brief to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Lloyd H. Randolph
Lloyd H. Randolph

ADDENDUM SETTING FORTH PERTINENT STATUTES AND REGULATIONS

Table of Contents

Excerpted Text of Pertinent Statutes And Regulations

47 U.S.C. § 402 provides in part:

> (b) Right to appeal
> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
> . . . .
> (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
> . . . .
> (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

47 U.S.C. § 309(j) provides in part:

> (3) Design of systems of competitive bidding
> For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. . . . [I]n designing the methodologies for use under this subsection, the Commission . . . shall seek to promote the purposes specified in section 151 of this title and the following objectives:
> . . .
> (B) promoting economic opportunity and competition and ensuring

> that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses. . . .
>
> (4) Contents of regulations
> In prescribing regulations pursuant to paragraph (3), the Commission shall--
> (A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods; . . . .

47 C.F.R. § 1.2110(g) (2002) provides in part:

> (3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:
> (i) Impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;
> (ii) Allow installment payments for the full license term;
> (iii) Begin with interest-only payments for the first two years; and
> (iv) Amortize principal and interest over the remaining term of the license.
>
> (4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.
> (i) Any licensee that fails to submit its quarterly payment on an installment payment obligation (the “Required Installment Payment”) may submit such payment on or before the last day of the next quarter (the “first additional quarter”) without being considered delinquent. Any licensee making its Required Installment Payment during this period (the “first additional quarter grace period”) will be assessed a late payment fee equal to five percent (5%) of the amount of the past due Required Installment Payment. The late payment fee applies to

the total Required Installment Payment regardless of whether the licensee submitted a portion of its Required Installment Payment in a timely manner.

(ii) If any licensee fails to make the Required Installment Payment on or before the last day of the first additional quarter set forth in paragraph (g)(4)(i) of this section, the licensee may submit its Required Installment Payment on or before the last day of the next quarter (the "second additional quarter"), except that no such additional time will be provided for the July 31, 1998 suspension interest and installment payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, 13 FCC Rcd 8345 (1998). Any licensee making the Required Installment Payment during the second additional quarter (the "second additional quarter grace period") will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due Required Installment Payment. Licensees shall not be required to submit any form of request in order to take advantage of the first and second additional quarter grace periods.

(iii) All licensees that avail themselves of these grace periods must pay the associated late payment fee(s) and the Required Installment Payment prior to the conclusion of the applicable additional quarter grace period(s). Payments made at the close of any grace period(s) will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement," with the remainder of such payments applied in the following order: late payment fees, interest charges, installment payments for the most back-due quarterly installment payment.

(iv) If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late payment fees associated with the Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures. A licensee in the PCS C or F blocks shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures, if the payment due on the payment resumption date, referenced in paragraph

(g)(4)(ii) of this section, is more than ninety (90) days delinquent.

28 U.S.C. § 1346 provides in part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
> . . .
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .
>
> (b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1491 provides in part:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 2675 provides in part:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

> office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2680 provides in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . . .
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .