United States Court of Appeals for the Federal Circuit

ALPINE PCS, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2017-1029

Appeal from the United States Court of Federal Claims in No. 1:16-cv-00001-CFL, Judge Charles F. Lettow.

Decided: January 2, 2018

NORMAN PATTIS, The Pattis Law Firm, LLC, Bethany, CT, argued for plaintiff-appellant.

PATRICIA M. MCCARTHY, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR.

Before MOORE, REYNA, and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

In 1996, the Federal Communications Commission (FCC) awarded spectrum licenses to Alpine PCS, Inc., for use in the provision of wireless telecommunications services. Alpine's failure to make required payments for those licenses in 2002 triggered automatic cancellation of the licenses under FCC regulations. In addition to taking other steps in response, Alpine sought relief from the FCC and, on review under the Communications Act, 47 U.S.C. § 402(b)(5), from the United States Court of Appeals for the District of Columbia Circuit. Eventually, in 2016, Alpine filed this action against the United States under the Tucker Act, 28 U.S.C. § 1491(a)(1), in the United States Court of Federal Claims. Alpine alleged that the FCC breached contractual obligations in canceling the licenses and that the cancellation was a taking for which Alpine was entitled to just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution. The Court of Federal Claims dismissed both of Alpine's claims for lack of jurisdiction under the Tucker Act. We affirm, concluding that the Communications Act provides a comprehensive statutory scheme through which Alpine could raise its contract claims and could challenge the alleged taking and receive a remedy that could have provided just compensation in this case, foreclosing jurisdiction under the Tucker Act.

App. 3

I

A

In May 1996, Alpine submitted bids in an FCC spectrum-license auction and won two 10-year "personal communication services" licenses. Alpine bid approximately $8.9 million for one license and approximately $17.3 million for the other.

As a small business, Alpine was eligible to pay its bid amounts in installments over the term of the licenses. *See* 47 C.F.R. § 1.2110(e) (1995); 59 Fed. Reg. 44,272, 44,298-99 (Aug. 26, 1994), *amended by* 60 Fed. Reg. 52,865, 52,865 (Oct. 11, 1995). In September 1996, Alpine issued promissory notes to the FCC, providing for quarterly payments from December 1996 through September 2006. Alpine also executed security agreements designating the licenses as collateral to secure the payment obligation.

The notes contain two provisions highlighted by the parties. One describes the process of default:

> A default under this Note ("Event of Default") shall occur upon . . . non-payment by [Alpine] of any Principal or Interest on the due date as specified hereinabove if [Alpine] remains delinquent for more than 90 days and
>
> (1) [Alpine] has not submitted a request, in writing, for a grace period or extension of payments, if any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission; or

> (2) [Alpine] has submitted a request, in writing, for a grace period or extension of payments, if any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission, and following the expiration of the grant of such grace period or extension or upon denial of such a request for a grace period or extension, [Alpine] has not resumed payments . . . in accordance with the terms of this Note. . . .

J.A. 21-22; J.A. 29-30. A second provision states that the "Note[s] shall be governed by and construed in accordance with the Communications Act of 1934, as amended, the then-applicable orders and regulations of the Commission, and federal law . . . , and nothing in th[ese] Note[s] shall be deemed to release [Alpine] from compliance therewith." J.A. 25; J.A. 33.

The security agreements incorporate the notes' provisions regarding the process of default and identify automatic cancellation of the licenses as one of the FCC's remedies upon default. The security agreements also state that they "shall be governed by and construed in accordance with [the] Communications Act of 1934, as amended, then-applicable Commission orders and regulations, as amended, and federal law." J.A. 42; J.A. 50.

The regulations in effect in September 1996 provided that a licensee "making installment payments . . . shall be in default" if a payment "is more than ninety (90) days delinquent," but could "request that

the [FCC] permit a three to six month grace period, during which no installment payments need be made." 47 C.F.R. § 1.2110(e)(4)(i)-(ii) (1995). The FCC could "consider[] whether to grant a request for a grace period" or "approve[] a restructured payment schedule." *Id.* § 1.2110(e)(4)(ii). If the request was denied or the grace period expired without payment, the licenses would automatically cancel and the licensee would be subject to debt collection. *Id.* § 1.2110(e)(4)(iii).

The FCC then amended the regulations, the amendments taking effect in 1998. *See In re Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures*, 13 FCC Rcd. 374 (F.C.C. 1997); *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 586 (D.C. Cir. 2001). The 1998 regulations, instead of requiring a request for a grace period upon default, provided for a 90-day non-delinquency period and a subsequent 90-day grace period – effectively, two 3-month grace periods – as a matter of course. 47 C.F.R. § 1.2110(f)(4)(ii) (1998) ("If any licensee fails to make the required payment at the close of the 90-day period set forth in paragraph (i) of this section, the licensee will automatically be provided with a subsequent 90-day grace period," and "[l]icensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period."); *see also* 63 Fed. Reg. 2,315, 2,346 (Jan. 15, 1998), *corrected by* 63 Fed. Reg. 12,658, 12,659 (Mar. 16, 1998). But if the licensee did not pay the installment, plus late fees, after the second grace period, the licensee would be declared in default,

have its licenses "automatically cancel[ed]," and be subject to debt collection. 47 C.F.R. § 1.2110(f)(4)(iii)-(iv) (1998).

In January 2002, Alpine failed to make its quarterly payment. Under the regulations in effect at that time, Alpine received two 3-month grace periods as a matter of course, and its new payment deadline was July 31, 2002. *See* 47 C.F.R. § 1.2110(g)(4)(i)-(ii) (2000).[1] Unless Alpine paid the full amount, plus late fees, by that date, it would be declared in default, have its licenses "automatically cancel[ed]," and be subject to debt collection. *Id.* § 1.2110(g)(4)(iii)-(iv).

On July 24, 2002, a week before the deadline, Alpine asked the FCC to restructure the payment plan, invoking 31 C.F.R. § 902.2. The FCC acknowledged receipt of that request on July 30, 2002. On July 31, 2002 (the payment deadline), Alpine asked the FCC to waive the automatic cancellation provision of the regulations. *In re Alpine PCS, Inc.*, 22 FCC Rcd. 1492, 1495 (W.T.B. Jan. 29, 2007).

In October 2002, a few months after the expiration of the grace periods, the FCC changed its public database to show that the licenses had reverted to the FCC. According to Alpine's allegations in this case, however, the FCC assured Alpine that the database change was

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[1] The relevant provisions of the regulations in effect in 2002 were substantially the same as those in effect in 1998, although appearing in slightly different form and moved from subsection (f) to subsection (g).

a clerical error, and the FCC continued to discuss possible payment restructuring with Alpine.

The FCC ultimately denied both the payment-restructuring and waiver-of-cancellation requests. On January 16, 2004, the FCC told Alpine that Alpine was in default and "advised Alpine that the Restructuring Request was being returned to Alpine 'without action.'" J.A. 14; *see also In re Alpine PCS, Inc.*, 25 FCC Rcd. 469, 474 (F.C.C. Jan. 5, 2010). Three years later, on January 29, 2007, the FCC's Wireless Telecommunications Bureau issued an order denying Alpine's waiver and restructuring requests. *In re Alpine*, 22 FCC Rcd. at 1503 & n.2. Alpine timely filed a petition for reconsideration of the Bureau's decision, which the FCC denied on January 5, 2010. *In re Alpine*, 25 FCC Rcd. at 509 (citing 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.106). Alpine appealed that decision to the D.C. Circuit under 47 U.S.C. § 402(b). The D.C. Circuit summarily affirmed the FCC's decision. *Alpine PCS, Inc. v. FCC*, 404 F. App'x 508 (D.C. Cir. 2010).

B

Several other events and proceedings are relevant here. On April 4, 2008, while Alpine's petition for reconsideration regarding waiver and restructuring was pending before the FCC, the FCC announced a new auction of the licenses, to be held on August 13, 2008. *In re Alpine PCS, Inc.*, 23 FCC Rcd. 10,485, 10,486 & n.1 (F.C.C. July 7, 2008). On April 18, 2008, Alpine asked the FCC to stay the auction until the FCC ruled

on the reconsideration petition, but the FCC refused. *Id.* at 10,486, 10,488-92.

In August 2008, Alpine filed for bankruptcy and moved for an automatic stay of the FCC auction. Debtor's Emergency Mot. to Enforce Automatic Stay, *In re Alpine PCS, Inc.*, No. 08-00543 (Bankr. D.D.C. Aug. 18, 2008). The bankruptcy court denied the stay motion, determining that the licenses were not part of the bankruptcy estate. *In re Alpine PCS, Inc.*, No. 08-00543, 2008 WL 5076983, at *4 (Bankr. D.D.C. Oct. 10, 2008), *aff'd*, 404 F. App'x 504 (D.C. Cir. 2010). The FCC re-auctioned the licenses in 2008.

In January 2013, Alpine sued the FCC in the U.S. District Court for the District of Columbia, alleging breach of contract, unjust enrichment, fraud in the inducement, and breach of fiduciary duty, and seeking declaratory judgments of no default and no debt. Compl., *Alpine PCS, Inc. v. FCC*, No. 1:13-cv-000006, at 8-11 (D.D.C. Jan. 3, 2013). Alpine argued that the case was properly before that court because the promissory notes include a forum-selection clause stating that "any legal action or proceeding relating to th[e] note[s], the security agreement[s], or other document[s] evidencing or securing the debt transaction evidenced hereby may only be brought in the United States District Court for the District of Columbia." J.A. 24; J.A. 32. The district court rejected Alpine's argument and dismissed the claim for lack of jurisdiction, concluding, among other things, that the contract claims were essentially an attack on an FCC licensing decision, review of which is committed by statute, 47 U.S.C.

§ 402(b), to the exclusive jurisdiction of the D.C. Circuit. The D.C. Circuit affirmed the district court's decision. *Alpine PCS, Inc. v. FCC*, 563 F. App'x 788, 788-89 (D.C. Cir. 2014).

C

On January 4, 2016, Alpine brought the present action against the United States in the Court of Federal Claims. Alpine alleged breach of oral and written contract, breach of contract implied in fact, and breach of the duty of good faith and fair dealing (the contract claims). According to Alpine, the FCC breached its contractual obligations under the notes and security agreements and breached its duty of good faith and fair dealing by automatically canceling Alpine's licenses after the two grace periods, as provided in the amended regulations (described above). Alpine also asserted a constitutional claim under the Fifth Amendment (the takings claim) based on the FCC's alleged regulatory taking of property in canceling the licenses under the amended regulations, for which Alpine was seeking just compensation.[2]

The government moved to dismiss the case for lack of jurisdiction: it argued that the claims, filed in 2016, were untimely under the six-year statute of limitations, 28 U.S.C. § 2501, which is a jurisdictional

[2] Alpine's complaint also alleged fraud in the inducement, which the Court of Federal Claims dismissed as a claim sounding in tort and outside its jurisdiction. Alpine does not challenge that ruling on appeal.

provision, *see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). The court dismissed for lack of jurisdiction. *Alpine PCS, Inc. v. United States*, 128 Fed. Cl. 303 (2016). The court dismissed the contract claims on the ground that Tucker Act coverage of those claims was displaced ("preempted") by the Communications Act, which directs an aggrieved "holder of any . . . station license which has been modified or revoked by the Commission" to the D.C. Circuit for judicial relief. *Id.* at 308 (quoting 47 U.S.C. § 402(b)(5)). The court determined that the takings claim was untimely, holding that claim to have accrued no later than 2008, when the licenses were re-auctioned, more than six years before 2016. *Id.* at 309.

This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II

A

We review de novo the court's dismissal of claims for lack of subject-matter jurisdiction under the Tucker Act. *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004).

As relevant here, the Tucker Act waives sovereign immunity for, and provides for Court of Federal Claims jurisdiction over, monetary claims against the United States "founded [] upon . . . the Constitution . . . or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). On its face, therefore,

the Tucker Act encompasses Alpine's contract claims and its takings claim.

The Supreme Court, however, has described the Tucker Act as serving a "gap-filling role" by allowing "for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable." *United States v. Bormes*, 568 U.S. 6, 12-13 (2012) (footnote omitted). In accordance with that characterization, the Court has held that the Tucker Act does not apply in various circumstances in which Congress has provided "a precisely drawn, detailed statute" that "contains its own judicial remedies." *Id.* at 12 (internal quotation marks omitted). Where it has found those circumstances, the Court has held that the "specific remedial scheme establishes the exclusive framework for the liability Congress created under the statute" and "displace[s]" the Tucker Act. *Id.*

The Court has found such circumstances in a number of cases. *See, e.g.*, *Horne v. Dep't of Agriculture*, 569 U.S. 513, 526-28 (2013) (holding that Agricultural Marketing Agreement Act of 1937 displaces Tucker Act); *United States v. Fausto*, 484 U.S. 439, 454-55 (1988) (holding that the Civil Service Reform Act, which "established a comprehensive system for reviewing personnel action taken against federal employees" and which "deliberate[ly] exclu[ded] employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here," displaces Tucker Act jurisdiction over claims based on such personnel actions under the Back Pay Act); *United States v. Erika, Inc.*, 456 U.S.

201, 208 (1982) (holding that Tucker Act jurisdiction over certain claims involving Medicare Part B payment decisions was displaced by "precisely drawn provisions" of the Medicare statute); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834-35 & n.10 (1976) ("precisely drawn, detailed statute" of Section 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of racial discrimination against the government, withdrawing jurisdiction under Tucker Act).

This court has drawn the same conclusion in several cases, recognizing that "[w]hen such a 'specific and comprehensive scheme for administrative and judicial review' is provided by Congress, the Court of Federal Claims' Tucker Act jurisdiction over the subject matter covered by the scheme is preempted." *Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001) (quoting *St. Vincent's Med. Ctr. v. United States*, 32 F.3d 548, 549-50 (Fed. Cir. 1994)); *see, e.g.*, *Tex. Peanut Farmers v. United States*, 409 F.3d 1370, 1373-74 (Fed. Cir. 2005) (district courts' exclusive jurisdiction over claims against Federal Crop Insurance Corp. in 7 U.S.C. §§ 1506(d), 1508(j), withdrew Tucker Act jurisdiction over claims for breach of crop insurance contract); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1349 (Fed. Cir. 2005) (noting precedent that, as to certain claims arising under the Medicare Act, Tucker Act jurisdiction is displaced by the comprehensive "specialized administrative and judicial review process" for those claims, but holding that the particular claims at issue, for which that process was unavailable, did not arise

under the Medicare Act and hence remained within Tucker Act).

B

The Court of Federal Claims concluded that Tucker Act jurisdiction over Alpine's contract claims is displaced by the comprehensive scheme for review provided in the Communications Act of 1934. We agree.

"To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must 'examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes.'" *Horne*, 569 U.S. at 527 (quoting *Fausto*, 484 U.S. at 444). In *Horne*, the Court determined that the Agricultural Marketing Agreement Act of 1937 provided mechanisms by which handlers could file a petition directly "challeng[ing] the content, applicability, and enforcement of marketing orders . . . , including constitutional challenges, in administrative proceedings." *Id.* (citing 7 U.S.C. § 608c(15)(A)-(B)). After receiving an administrative ruling by the Secretary of Agriculture, the handler aggrieved by the order could request review by a district court, sitting in equity. *Id.* (citing 7 U.S.C. § 608c(15)(B)). The Supreme Court concluded that those statutory provisions, 7 U.S.C. § 608c(15)(A)-(B), "afford handlers a ready avenue to bring takings claim[s] against the [United States Department of Agriculture]" and displace Tucker Act jurisdiction. *Id.* at 527-28.

In *Folden*, we examined in detail the Communication Act's "comprehensive statutory and regulatory regime governing orders of the [FCC]," including the remedial scheme of administrative review under 47 U.S.C. § 155 and judicial enforcement and review under §§ 401-02. 379 F.3d at 1355-58. We held that the comprehensive scheme displaces Tucker Act jurisdiction for, *inter alia*, FCC decisions and orders falling within 47 U.S.C. § 402(b). *Id.* at 1358.

Here, the key question is whether Alpine's contract claims fall within § 402(b). That subsection provides for appeals to the D.C. Circuit of FCC "decisions and orders" "[b]y the holder of any . . . station license which has been . . . revoked by the [FCC]." § 402(b)(5). Alpine's contract claims, which challenge the validity of the FCC's cancellation and revocation of its station licenses, fall squarely within that provision.

The D.C. Circuit came to the same conclusion in 2014. That court affirmed a district court order dismissing for lack of jurisdiction the same contract claims we now have before us. The D.C. Circuit explained: "Although camouflaged as a contractual dispute, Alpine's suit really challenges the FCC's decision to 'revoke' the licenses for non-payment and thus falls squarely within subsection 402(b)'s bull's-eye." *Alpine*, 563 F. App'x at 789.

Alpine contends that it is not challenging the revocation of its licenses, but rather "the breach of a contract that *resulted* in forfeiture of [the] licenses." Alpine Reply Br. 9. That distinction is an empty one.

Subsection 402(b)(5) is not limited to review of the act of revocation but rather allows for judicial review of the FCC's underlying revocation decision. In particular, § 402(b)(5) provided Alpine the opportunity to argue that the FCC's decision was contrary to the terms of the contract. *See Biltmore Forest Broad. FM, Inc. v. United States*, 555 F.3d 1375, 1382 (Fed. Cir. 2009) (affirming dismissal of a contract claim brought in the Court of Federal Claims because "the District of Columbia Circuit not only has exclusive jurisdiction to review the grant or denial of FCC licenses [under § 402(b)], but also has exclusive jurisdiction to adjudicate the underlying issue of FCC rules compliance necessary to the licensing decision" – the "exact issue [decided] in *Folden*").

Alpine also argues that its contract claims are not within the scope of § 402(b) because the D.C. Circuit is an appellate forum "ill-equipped" to handle matters that require "discovery, trial, and other relevant procedures." Alpine Br. 19-20. That contention is unpersuasive. In addition to its powers to order supplemental briefing on any relevant issue, that court has the authority to remand the case to the FCC for any additional record development that is necessary. *See F.C.C. v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984) (appellate court may "fairly [] evaluate" even a claim of ultra vires agency action on direct review under the Administrative Procedure Act because, if the court "finds that the administrative record is inadequate, it may remand to the agency" for further proceedings); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593-94

(1980) (direct review of agency action by court of appeals under Administrative Procedure Act, even for agency action without formal adjudication, is not irrational because "an appellate court may always remand a case to the agency for further consideration").

Alpine itself, between 2002 and 2010, took advantage of the Communications Act's administrative and judicial remedies and raised its contract claims before the FCC and the D.C. Circuit. When the applicable regulations threatened cancellation of the licenses in the summer of 2002, Alpine filed administrative requests for waiver of those regulations and restructuring of the payment plan. After the Wireless Communications Bureau denied those requests, Alpine filed a petition for reconsideration by the FCC, arguing, among other things, that the FCC "breached fiduciary duties owed to Alpine," including "a duty of candor and good faith." *In re Alpine*, 25 FCC Rcd. at 506-07. The FCC denied the petition, and Alpine proceeded to the next step in the remedial scheme – review by the D.C. Circuit. There, Alpine argued that the FCC breached its contractual obligations under the notes and that "the FCC violated the implied covenant of good faith [and fair dealing]." Final Br. of Appellant Alpine PCS, Inc., *Alpine PCS, Inc. v. FCC*, No. 10-20, 2010 WL 3253656, at *32, *35 (D.C. Cir. June 3, 2010). Alpine asserted that the D.C. Circuit had "jurisdiction to hear Alpine's appeal pursuant to 28 U.S.C. § 2342(1), and[ ] 47 U.S.C. §§ 402(a) and 402(b)(5)." *Id.* at *1. The D.C. Circuit summarily affirmed the FCC's decision. *Alpine*, 404 F. App'x 508.

We hold that Alpine's contract claims fall within the exclusive jurisdiction of the D.C. Circuit under 47 U.S.C. § 402(b)(5) and therefore fall outside the Tucker Act jurisdiction of the Court of Federal Claims.

C

We also hold that the same conclusion applies to Alpine's takings claim: Tucker Act jurisdiction over the claim is displaced by the Communications Act. The Court of Federal Claims did not dismiss the takings claim on this basis, and the government does not argue for lack of jurisdiction on this particular ground. But we are independently obliged to consider defects in the trial court's jurisdiction, even when not raised by the parties. *See, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."); *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). And the Supreme Court has confirmed that federal courts have discretion to choose which among several possible jurisdictional (or even certain non-jurisdictional threshold) issues to decide. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999); *see also*, *e.g.*, *Law Offices of David Efron v. Matthews & Fullmer Law Firm*, 782 F.3d 46, 51 (1st Cir. 2015). In this case, reaching the displacement issue is particularly justified for at least two reasons taken together: first, the displacement issue is more straightforward than the timeliness issue, especially given that we have already

analyzed the issue for the contract claims; second, the government's brief argument in support of the timeliness ground relies centrally on a decision, *Soriano v. United States*, 352 U.S. 270 (1957), that itself leads to the inquiry into whether another statutory regime displaces the Tucker Act. *Id.* at 274-75 (holding that accrual of takings claim was not postponed by the availability of an Army Claims Service remedy where Congress "ha[d] not so restricted the jurisdiction of the Court of Claims").

Alpine's takings theory is that the licenses are property for purposes of the Takings Clause and that the FCC's cancellation of the licenses resulted, at some point, in a taking for which Alpine was due just compensation. In this court, the judgment on appeal is a dismissal for lack of jurisdiction, not on the merits. And the government, in its brief as appellee, has not contested Alpine's premise, which the Court of Federal Claims endorsed, that the licenses are property protected by the Takings Clause. *Alpine PCS*, 128 Fed. Cl. at 308-09. We take the premise as a given (without deciding whether it is correct) for purposes of assessing the jurisdictional issue.

What the parties have contested in their briefs is when any taking at issue occurred and gave rise to a claim for just compensation under the Tucker Act. The government contends that the claim accrued before January 4, 2010 – making the complaint in this case, filed on January 4, 2016, out-of-time under the six-year statute of limitations. In particular, the government contends that the alleged taking occurred at one or

more of the following times: when the FCC canceled the licenses in 2002; when the FCC informed Alpine that Alpine was in default and that no action would be taken on the restructuring request in 2004; when the FCC Wireless Telecommunications Bureau denied Alpine's waiver and restructuring requests in 2007; or when the FCC re-auctioned the licenses in 2008. The Court of Federal Claims agreed that the taking, if there was one, occurred no later than 2008. *Alpine PCS*, 128 Fed. Cl. at 309.

Alpine, on the other hand, contends that the alleged taking did not occur, and the claim did not accrue, until January 5, 2010, when the FCC reached a final decision not to waive the automatic cancellation provision of the amended regulations. Alpine relies on Supreme Court decisions that have articulated two "ripeness" requirements applicable to certain regulatory takings claims (against state or local government entities): a sufficiently definitive decision about the injury to the complainant's property from the government entity alleged to have committed the taking; and a sufficiently definitive denial of just compensation for such a taking. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-26 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 194 (1985). The Court has also discussed the *Williamson County*-based ripeness requirements in *Horne*, 569 U.S. at 525-26, a case involving the federal government. The parties here dispute the scope of those decisions and whether and how

they apply in this case to identifying the accrual date of a claim for Tucker Act compensation, notwithstanding the availability of relief from the FCC and the FCC's final denial of such relief on January 5, 2010.

The government relies for its pre-2010-accrual argument on the Supreme Court's decision in *Soriano* – which the cited *Williamson County* line of cases does not discuss. The Court in *Soriano* held that a Tucker Act claim for just compensation accrued at the time of a war-time requisition of material from the plaintiff (by Philippine Army units assertedly acting under the authority of the U.S. Army), whether or not the plaintiff had yet sought compensation from another government entity, the Army Claims Service. 352 U.S. at 274-75. The Court stated as its ultimately decisive rationale that Congress "has not so restricted the jurisdiction of the Court of Claims" to hear a just-compensation claim for a completed taking based on the availability of a potential other avenue of relief. *Id.*

Soriano thus suggests that, even to decide the timeliness issue in the way the government has argued it, we would have to examine whether the Communications Act remedy displaces Tucker Act jurisdiction for the governmental action challenged as a taking here. In any event, an examination of that question leads to a conclusion of no jurisdiction in this case without routing that conclusion through a determination regarding timeliness. Just as we concluded that the Communications Act displaces Tucker Act jurisdiction over Alpine's contract claims, we conclude that, as relevant to Alpine's quest for relief under the Takings

Clause, the Communications Act provides "a ready avenue to bring [a] takings claim" and "withdraws Tucker Act jurisdiction." *Horne*, 569 U.S. at 527-28. Finding such displacement of Tucker Act jurisdiction, we need not further explore the timeliness issue.

There is no disagreement between the parties about the proposition that the FCC had the power to grant Alpine adequate relief, by eliminating the taking, providing compensation, or some combination. Thus, Alpine insists that the FCC could have done the following:

> forgiven any amounts still owing on the licenses, concluded that Alpine was entitled to a refund of some or all the amounts it had already paid, provided equivalent spectrum or other compensation to the holder of the spectrum [after re-auction] and awarded the [original] spectrum to Alpine, awarded Alpine licenses of equivalent value, provided Alpine with a voucher representing the amount to which Alpine was entitled and permitting the value of the voucher to be used or assigned to third parties in future spectrum auctions to acquire alternative spectrum, or taken any number of other remedial steps had it concluded that the [Wireless Telecommunications] Bureau decision was erroneous.

Alpine Br. 24. The government, for its part, has not denied that the FCC could have provided Alpine

adequate relief.[3] Significantly, compensation in a form other than monetary damages can be constitutionally adequate. *See Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 150-51 (1984) ("No decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes."). The displacement question before us therefore is limited to a situation in which the parties do not dispute the adequacy of the non-Tucker Act remedial regime both to adjudicate the takings claim and, if a taking is found, to provide the constitutionally required relief (by curing the taking, providing just compensation, or some combination).

The Communications Act, including 47 U.S.C. § 402(b), readily supports the conclusion that, as relevant to Alpine's grievance, there is a comprehensive statutory scheme through which Alpine could present, and is directed to present, its takings claim, to the exclusion of the Tucker Act under the *Horne* analysis. As for relief at the agency level, there was no procedural impediment to Alpine's presenting a takings claim to the FCC. The FCC did not suggest that it lacked the authority to review the license cancellation and take steps to provide compensation. *See generally In re Alpine*, 25 FCC Rcd. 469 (FCC review of Alpine's requests to waive the automatic cancellation rule and to

[3] *See also* Oral Argument at 28:40-29:00, http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2017-1029.mp3 (during oral argument government counsel stated, regarding Alpine's list of compensation options, that, "Yes, then that would be the case. . . . I cannot say that there's nothing that the FCC could have done to provide them any sort of remedy.").

restructure the payment plan); *see also In re Alpine*, 22 FCC Rcd. 1492 (Wireless Telecommunications Bureau review of Alpine's requests). Nor would Alpine's takings claim have been futile in agency proceedings; for example, Alpine's claim would not have required the FCC to question the constitutionality of a statute. *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (noting general rule against agency authority to deem statutes unconstitutional). And the FCC is generally under an obligation not to take action contrary to the Constitution and to hear properly presented constitutional claims. *See* 5 U.S.C. § 706(2)(A), (B) (providing for reviewing court to set aside agency action that is contrary to law, including Constitution); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1041-42 (D.C. Cir. 1997) ("The Commission has an obligation to address properly presented constitutional claims which, like this one, do not challenge agency actions mandated by Congress.").

In any event, the judicial review scheme under the Communications Act squarely covers Alpine's grievance. Alpine's takings claim (like its contract claims) is based on the FCC's cancellation of the station licenses, a decision that falls squarely within the judicial-review provision, 47 U.S.C. § 402(b)(5). The very purpose of the provision is to provide a remedy for licensees, like Alpine, that have suffered an injury from an FCC licensing decision. Such parties are the "one[s] likely to be financially injured by the issue [or revocation] of a license" and "the only [ones] having a sufficient interest

to bring to the attention of the appellate court errors of law in the action of the [FCC] in granting [or revoking] the license." *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940); *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394 n.8 (1987) (noting that § 402(b) "grant[s] an explicit right of review to all persons adversely affected or aggrieved by particular . . . licensing actions by the [FCC]"). That remedial scheme provides for judicial review of constitutional challenges to the license cancellation. *See Alvin Lou Media, Inc. v. F.C.C.*, 571 F.3d 1, 8 (D.C. Cir. 2009) ("This court 'permit[s] both constitutional and statutory challenges to an agency's application . . . of a previously promulgated rule, even if the period for review of the initial rule has expired.'") (quoting *Graceba*, 115 F.3d at 1040)). And upon review of Alpine's takings claim, the D.C. Circuit was capable of ordering any appropriate relief, whether on appeal or on remand to the agency. *See, e.g.*, *QUALCOMM Inc. v. F.C.C.*, 181 F.3d 1370, 1381 (D.C. Cir. 1999) (ordering FCC "to take prompt action to identify a suitable spectrum and award QUALCOMM the license for it").

Under the comprehensive statutory scheme, then, Alpine could have raised a constitutional takings claim; the FCC had the authority to grant relief; and the D.C. Circuit had jurisdiction to review whether a taking occurred and, if so, whether the FCC decision "yield[ed] just compensation." *Williamson Cty.*, 473 U.S. at 194. The statutory scheme thus affords Alpine "a ready avenue" to bring its takings claim and displaces Tucker Act jurisdiction over that claim. *Horne*, 569 U.S. at

527-28. This conclusion, though statute-specific, accords with similar conclusions we have reached under other statutes. *E.g.*, *Innovair Aviation Ltd. v. United States*, 632 F.3d 1336, 1342-43 (Fed. Cir. 2011) (holding that Tucker Act jurisdiction over takings claim based on forfeiture of property seized pursuant to 21 U.S.C. § 881 was displaced by the Controlled Substances Act's scheme for administrative and judicial review) (citing *Vereda*, 271 F.3d at 1375 (same)); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370, 1372-73 (Fed. Cir. 2005) (affirming dismissal of takings claim for lack of jurisdiction under the Tucker Act because the "administrative and judicial review procedures available under 7 U.S.C. § 608c(15)(A) provide a remedy to recover the value of the rights alleged to be taken").

III

For the foregoing reasons, we affirm the judgment of the Court of Federal Claims.

AFFIRMED

In the United States Court of Federal Claims
No. 16-1C

(Filed: September 14, 2016)

****

ALPINE PCS, INC., Plaintiff, v. UNITED STATES, Defendant.	Claimed breach of agreements with the FCC related to spectrum licenses purchased at auction by plaintiff; displacement of jurisdiction founded on the Tucker Act by the remedial scheme provided by federal communication laws; application of *United States v. Bormes*; takings claim precluded by the pertinent statute of limitations, 28 U.S.C. § 2501

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Norman A. Pattis, New Haven, CT, for plaintiff.

Peter A. Gwynne, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, and Robert E. Kirschman, Director, and Steven J. Gillingham, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Judge.

Plaintiff Alpine PCS seeks damages against the United States for breach of contract, breach of the duty of good faith and fair dealing, fraud in the inducement, and taking of property without just compensation. Plaintiff's claims stem from cancellation by the Federal Communications Commission ("FCC" or "Commission") of two Personal Communications Service ("PCS") spectrum licenses purchased by Alpine in an auction held in 1996. Compl. ¶ 1.[1] Alpine held these licenses attendant to promissory notes and security agreements that permitted it to pay the FCC in installments. Alpine defaulted on its obligations to pay in 2002, and the FCC denied its requests for debt restructuring and waiver of payment in 2007. The licenses were resold in 2008.

Alpine filed this suit on January 4, 2016. Pending before the court is the government's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), ECF No. 8. A hearing was held on August 22, 2016.

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[1] "Personal Communications Service" denotes a form of wireless telecommunications service.

BACKGROUND

A. Alpine's Purchase of Spectrum Licenses and Its Default

Alpine PCS was in the business of providing wireless telecommunications services. Compl. ¶ 3. In May 1996, Alpine was the winning bidder in an FCC auction for two ten-year wireless spectrum licenses in the San Luis Obispo and Santa Barbara, California markets. *See In re Alpine PCS*, 22 FCC Rcd. 1492, 1494-95, 2007 WL 256166 (2007); Compl. ¶ 4.

In September 1996, Alpine and the FCC entered into an installment payment plan for Alpine to pay its winning bid amounts for the licenses in quarterly installments. Compl. ¶¶ 5-6. Contractually, the payment plan was memorialized in two installment payment plan notes and security agreements, under which the FCC was a secured creditor. Compl. ¶¶ 6, 8. Under the promissory notes, Alpine would be deemed in default of its obligations if it was delinquent in its payments to the FCC for more than 90 days and either failed to apply for a grace period or applied for such grace period and failed to resume payments after its expiration. Compl. App. 1 (Installment Payment Plan Note), at 2-3. A grace period would only be available if "provided for in the then-applicable orders and regulations of the Commission." *Id.*

In January 2002, Alpine failed to make the requisite installment payments owed to the FCC on its licenses. Compl. ¶¶ 22-23; *see In re Alpine PCS*, No. 08-00543, 2008 WL 5076983, at *2 (Bankr. D.D.C., Oct. 10,

2008), *aff'd*, 404 Fed. Appx. 504 (D.C. Cir. 2010). At that time, relevant FCC regulations provided for two automatic 90-day grace periods for licensees on installment payment plans. *See* 47 C.F.R. § 1.2110(g)(4)(i)-(ii). If a licensee failed to make payment within the two grace periods, it would be deemed in default and subject to debt collection. 47 C.F.R. § 1.2110(g)(4)(iv). The relevant licenses would also be "automatically cancel[led]." *Id.*

The grace periods on Alpine's notes expired on July 31, 2002. *In re Alpine PCS*, 2008 WL 5076983, at *2. A week before the expiration, on July 24, 2002, Alpine submitted a Request for Debt Restructuring to the FCC. Compl. ¶ 28. On July 31, 2002, Alpine coupled this request with a further request to the FCC for waiver of the deferred installment payment due on that date. Compl. ¶ 30. Alpine made no payments before the expiration of the grace period, and the licenses were automatically cancelled on August 1, 2002. *In re Alpine PCS*, 2008 WL 5076983, at *2. On January 16, 2004, the FCC notified Alpine that it was in default of its obligations under the notes and security agreements. Compl. ¶ 37.

B. Prior Administrative and Judicial Proceedings

On January 29, 2007, the Chief of the FCC's Wireless Telecommunications Bureau denied Alpine's requests for debt restructuring and waiver. *In re Alpine PCS*, 22 FCC Rcd. 1492, 2007 WL 256166 (2007); Compl. ¶ 40. Alpine sought administrative review by

the FCC of that decision pursuant to 47 C.F.R. § 1.115. Compl. ¶ 40.

In April 2008, the FCC announced a new auction for the spectrum licenses previously held by Alpine. Compl. ¶ 41. Alpine filed requests with the FCC and the Bankruptcy Court for the District of Columbia to stay the auction pending review of the 2007 decision, but both were denied. *In re Alpine PCS*, 23 FCC Rcd. 10485, 2008 WL 2668760 (2008); *In re Alpine PCS*, 2008 WL 5076983. The FCC ultimately resold the licenses for a combined total of $5,548,000. Compl. ¶ 42.

On January 5, 2010, the FCC denied Alpine's request for reversal of the 2007 staff-level decision. *In re Alpine PCS*, 25 FCC Rcd. 469, 2010 WL 25778 (2010); Compl. ¶ 43. Alpine appealed this order to the United States Court of Appeals for the District of Columbia Circuit, which affirmed the FCC's decision. *Alpine PCS, Inc. v. FCC*, 404 Fed. Appx. 508 (D.C. Cir. 2010). Thereafter, in 2012, Alpine filed a breach of contract claim against the FCC in the United States District Court for the District of Columbia pursuant to a forum selection clause in the original notes and security agreements. Compl. ¶ 47; *see* Compl. App. 1 (Installment Payment Plan Note), at 5.[2] The district court

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[2] The forum selection clause provided:

> 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, and, by execution and delivery of this Note and Security Agreement, the maker hereby

dismissed this suit for lack of jurisdiction, holding that the forum selection clause was invalid because it contravened statutory provisions regulating the jurisdiction of federal courts and that the FCC's administrative scheme gave exclusive jurisdiction for judicial review of spectrum licensing decisions to the D.C. Circuit (as originally pursued by Alpine in 2010). Tr. of Mot. Hr'g, *Alpine PCS v. FCC*, No. 13-06 (D.D.C. June 3, 2013), ECF No. 18. The Court of Appeals affirmed. *Alpine PCS, Inc. v. FCC*, 563 Fed. Appx. 788 (D.C. Cir. 2014); Compl. ¶ 48.

STANDARDS FOR DECISION

Defendant's motion to dismiss Alpine's complaint constitutes a factual attack on this court's jurisdiction under RCFC 12(b)(1). "[W]hen a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court . . . has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts." 2 James Wm. Moore, *Moore's Federal Practice* § 12.30[4], at 12-45 (3d ed. 2012); *see Land v. Dollar*,

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> accepts for itself and in respect of its property generally and unconditionally, the jurisdiction of the aforesaid court. 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.

Compl. App. 1 (Installment Payment Plan Note), at 5 (capitals omitted).

330 U.S. 731, 735 & n.4 (1994); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991); *Rollock Co. v. United States*, 115 Fed. Cl. 317, 324 (2014); *see also Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1169-70 (11th Cir. 2011); *Montez v. Department of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004). Unchallenged jurisdictional facts in the complaint are construed in favor of the plaintiff, while contested jurisdictional facts must be proven by a preponderance of the evidence. *Rollock*, 115 Fed. Cl. at 324.

ANALYSIS

A. This Court Lacks Jurisdiction over Alpine's Claims for Breach of Contract and Breach of Duty of Good Faith and Fair Dealing Because the Federal Communications Laws and Associated Regulations Provide a Specific Remedial Scheme for Such Claims

The Tucker Act, 28 U.S.C. § 1491(a), grants this court jurisdiction over disputes arising under contracts with the federal government. In pertinent part, the Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). The government acknowledges that the Tucker Act is pertinent, but it contests jurisdiction of the court on the ground that Alpine's breach of contract claims are barred by the statute of limitations.

"Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. This time limit is strictly construed and is jurisdictional. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008). The government argues that Alpine's breach of contract claims accrued in 2007, when the Chief of the Wireless Telecommunications Bureau denied Alpine's requests for waiver and debt restructuring. Nonetheless, before seeking a judicial remedy regarding decisions made pursuant to delegated authority (such as the authority delegated to the Chief of the Wireless Telecommunications Bureau to adjudicate Alpine's claims), parties are required to file an application for review by the full Commission. 47 C.F.R. § 1.115(k). The full commission did not deny Alpine's application for review until January 5, 2010. *In re Alpine PCS*, 25 FCC Rcd. 469, 2010 WL 25778 (2010). The Tucker Act requires exhaustion of mandatory administrative remedies before bringing suit in this court. *Martinez v. United States*, 333 F.3d 1295, 1304 (Fed. Cir. 2003) (en banc); *Rollock*, 115 Fed. Cl. at 330-31. Because the request for review of the staff-level decision was mandatory, Alpine's breach of contract claims did not accrue until January 5, 2010. Alpine filed this case on January 4, 2016, one day within the six-year statute of limitations. The breach of contract and breach of duty claims are thus timely filed and not jurisdictionally barred on the basis of the statute of limitations.

Even so, a different, critical jurisdictional hurdle arises respecting Alpine's suit. "[T]he Tucker Act is displaced . . . when a law assertedly imposing monetary liability on the United States contains its own judicial remedies." *United States v. Bormes*, __ U.S. __, __, 133 S. Ct. 12, 18 (2012). In essence, the general avenue for relief provided by the Tucker Act is not available when the applicable regulatory scheme provides a specific remedial framework. *Id.* at 18-19; *see also Folden v. United States*, 379 F.3d 1344, 1357 ("When . . . a specific and comprehensive scheme for administrative and judicial review is provided by Congress, the Court of Federal Claims' Tucker Act jurisdiction over the subject matter covered by the scheme is preempted.") (citing *Vereda, Ltda v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001)); *Tulsa Airports Improvements Trust v. United States*, 120 Fed. Cl. 254, 259 (2015) (applying *Bormes* in ruling that jurisdiction under the Tucker Act was displaced for a claim for reimbursement of payments for noise abatement work under grants from the Federal Aviation Administration, by statutory provisions calling for review in federal courts of appeals).

The federal communications laws, along with associated regulations issued by the FCC, provide a remedial scheme for administrative and judicial review of agency decisions related to waiver of installment payments and cancellation of spectrum licenses. First, a party seeking waiver of the Commission's rules regarding spectrum licenses (here, automatic cancellation due to nonpayment of a license installment plan) must petition the Chief of the Telecommunications

Bureau of the FCC. 47 C.F.R. § 1.925. An adverse decision must be appealed to the full Commission before the party seeks judicial review. 47 C.F.R. § 1.115. If the full Commission affirms the staff-level decision on appeal, only then can the party seek judicial review. 47 U.S.C. § 402(b); *see Alpine PCS*, 563 Fed. Appx. at 789.

In the case of a cancellation of a spectrum license for nonpayment, the FCC's decisions are exclusively appealable to the United States Court of Appeals for the District of Columbia Circuit. 47 U.S.C. § 402(b)(5) provides that appeals of FCC decisions may be taken to the D.C. Circuit "[b]y the holder of any . . . station license which has been modified or revoked by the Commission." The D.C. Circuit's jurisdiction over claims that fall within this subsection is exclusive. *Folden*, 379 F.3d at 1356; *see also Alpine PCS*, 563 Fed. Appx. at 789.

Alpine's claims fall within the purview of 47 U.S.C. § 402(b)(5). PCS spectrum licenses, such as those held by Alpine, have been deemed to be "station licenses" within the context of the communications laws. *Folden*, 379 F.3d at 1353; *NextWave Personal Commc'ns, Inc. v. FCC*, 254 F.3d 130, 140 (D.C. Cir. 2001). Furthermore, the FCC's cancellation and reselling of Alpine's licenses constitute revocation under § 402(b)(5). *See NextWave*, 254 F.3d at 140 ("Even if the Commission did not formally 'revoke' NextWave's licenses, that is certainly the effect of the license cancellation: the licenses once assigned to NextWave are now being reauctioned to other bidders."). Alpine's claims thus fall within the comprehensive administrative and judicial

remedial scheme set forth by the FCC to resolve disputes over the cancellation of spectrum licenses. Alpine fully exercised its rights under this scheme by appealing the staff-level decision to the full Commission and subsequently seeking judicial review in the D.C. Circuit. In these circumstances, the preemption doctrine of *Bormes* and *Folden* applies, and the availability of the remedial scheme provided by the communications laws displaces this court's jurisdiction over Alpine's contractual claims under the Tucker Act.

B. Alpine's Takings Claim is Barred by the Statute of Limitations in 28 U.S.C. § 2501

As a preliminary matter, this court will treat Alpine's PCS spectrum licenses as property that could be subject to a taking. The FCC issues PCS spectrum licenses pursuant to 47 U.S.C. § 301, which provides for the licensing and use of radio frequencies and other spectra.[3] The statute further states that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." *Id.* In its administrative decisions regarding PCS spectrum licenses, the FCC has relied on *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), for the proposition that "no person is to have anything in the nature

[3] The FCC has construed the "channels for radio transmission" described in 47 U.S.C. § 301 to include PCS spectra. *See, e.g.*, *In re Reauction of Defaulted PCS C Block Licenses*, 12 FCC Rcd. 17688, 17691, 1997 WL 667887 (1997) (applying the terms of 47 U.S.C. § 301 to auctions for PCS spectrum licenses).

of a property right as a result of the granting of a license [under 47 U.S.C. § 301]."[4]

Even so, "[t]he Communications Act itself seems to . . . impl[y] the creation of rights akin to those created by a property interest limited only by the 'terms, conditions and periods of the license.'" *In re Atlantic Bus. and Cmty. Dev. Corp.*, 994 F.2d 1069, 1074 (3d Cir. 1993). Here, Alpine's licenses conferred a right to use particular wireless spectrums for a period of ten years, subject to the terms and conditions of the licenses. These terms included the requirement of timely installment payments and the cancellation of the licenses for nonpayment. In addressing Alpine's resort to the Bankruptcy Court for relief in bankruptcy proceedings in 2008, that court treated Alpine's licenses as a limited property right. *See In re Alpine PCS*, 2008 WL 5076983 at *5-6 (explaining that the cancellation of Alpine's licenses constituted the "lawful extinction of a property right"). This court concurs with the Bankruptcy Court's treatment of Alpine's licenses as a property interest, and will assess its takings claim in accord with that premise.

A takings claim will accrue for statute of limitations purposes when "governmental action deprives

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[4] *See, e.g.*, *In re Promoting Expanded Opportunities for Radio Experimentation & Mkt. Trials*, 28 F.C.C. Rcd. 758, 781 n.116, 2013 WL 393212 at *22 n.116 (2013); *In re Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Commc'ns Servs. in the 2.3 Ghz Band*, 25 F.C.C. Rcd. 11710, 11775-76, 2010 WL 2020824 at *53 (2010); *Reauction of Defaulted PCS C Block Licenses*, 12 FCC Rcd. at 17691.

the owner of all or most of its property interest." *Northwest La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1289 (Fed. Cir. 2006). Alpine was deprived of any right to use its purchased spectrum upon automatic cancellation of its licenses in 2002, thus extinguishing its property interest. The takings claim therefore accrued as early as 2002.

Alpine asserts that it had no knowledge of the cancellation in 2002 because it "relied on [the] FCC's representation at that point in time that the Licenses had not been cancelled or reverted to [the] FCC." Compl. ¶ 35. Accrual of a claim against the United States is suspended under the applicable statute of limitations, 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed. *Martinez*, 333 F.3d at 1319. A claim will not accrue if the plaintiff can show either that "defendant has concealed its acts [that led to plaintiff's claim] with the result that plaintiff was unaware of their existence or . . . that its injury was 'inherently unknowable' at the accrual date." *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985). Even if Alpine did not know of its takings claim in 2002 because of alleged misrepresentations by the FCC and because of its continued use of the spectrum thereafter, Hr'g Tr. 16:7-22 (Aug. 22, 2016), it definitely had knowledge of its claim when the FCC re-auctioned Alpine's licenses in 2008 when it actively sought a stay of the auction. Thus, Alpine's takings claim accrued no later than when the licenses were resold in 2008. As the claim was filed in this court on January 4, 2016, it falls outside the six-year statute of limitations

specified in Section 2501 and must be dismissed for lack of jurisdiction.

C. Alpine's Fraud in the Inducement Claim is a Tort Claim Outside the Jurisdiction of the Tucker Act

The Tucker Act specifically excludes tort cases from the jurisdiction of the Court of Federal Claims. 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States . . . for liquidated or unliquidated damages in cases not sounding in tort."). Apart from its breach of contract and takings claims, Alpine alleges that the FCC fraudulently induced the company to forfeit remedies that would have allowed it to avoid cancellation of its spectrum licenses. Compl. ¶ 60. Fraud in the inducement claims which do not arise from the violation of an existing contract are outside this court's jurisdiction. *Phang v. United States*, 87 Fed. Cl. 321, 326 (2009), *aff'd sub nom. Phu Mang Phang v. United States*, 388 Fed. Appx. 961 (Fed. Cir. 2010). The government's alleged fraud stems not from its alleged breach of the notes and security agreements, but rather concerns the government's representations to Alpine regarding the restructuring and waiver requests. This separate tort claim therefore falls outside of the jurisdiction of this court.

CONCLUSION

For the reasons stated above, the government's motion to dismiss plaintiff's complaint pursuant to

RCFC 12(b)(1) is GRANTED. The clerk will enter judgment in accord with this disposition.

No costs.

IT IS SO ORDERED.

s/ Charles F. Lettow
Charles F. Lettow
Judge

In the United States Court of Federal Claims

No. 16-1 C

ALPINE PCS, INC.

v. **JUDGMENT**

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed September 14, 2016, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed. No costs.

Lisa L. Reyes
Acting Clerk of Court

September 16, 2016 By: s/ Debra L. Samler
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, renumber of copies and listing of *all plaintiffs*. Filing fee is $505.00.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALPINE PCS, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2017-1029

Appeal from the United States Court of Federal Claims in No. 1:16-cv-00001-CFL, Judge Charles F. Lettow.

ON PETITION FOR PANEL REHEARING

Before MOORE, REYNA, and TARANTO, *Circuit Judges*.

PER CURIAM.

ORDER

(Filed Feb. 1, 2018)

Appellant Alpine PCS, Inc. filed a petition for panel rehearing.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The mandate of the court will issue on February 23, 2018.

FOR THE COURT

February 1, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court