
IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BILTMORE FOREST BROADCASTING FM, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-316,
Senior Judge James F. Merow

BRIEF AND RULE 30(f) APPENDIX OF DEFENDANT-APPELLEE,
THE UNITED STATES

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TABLE OF CONTENTS

PAGE(S)

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE..... 2

 I. Nature Of The Case 2

 II. Statement Of The Facts And Course Of Proceedings Below..... 2

SUMMARY OF THE ARGUMENT..... 6

ARGUMENT..... 8

 I. Standard Of Review..... 8

 II. The Trial Court Correctly Ruled That It Lacked Jurisdiction
 To Entertain BFB’s Challenge To The FCC’s Award Of The
 Biltmore Forest License..... 9

 A. BFB Does Not Dispute That Folden Operates To Preclude Its
 Claims..... 9

 B. Even If Folden Were Being Reconsidered, It Was Correctly
 Decided..... 12

 C. BFB Fails To Cite Apposite Authority To Overturn Folden... 17

 III. An FCC Licensing Auction Createas No Contractual Or
 Or Property Rights In Each Unsuccessful Bidder..... 22

 A. The FCC Regulates The Public Spectrum; It Does Not Sell A
 Commercial Commodity To Licensees..... 23

 B. BFB Fails To Establish An Implied-In-Fact Contract..... 28

C. BFB Possesses No Compensable Property Right. 31

IV. The Trial Court Did Not Err In Stating That Assuming
Jurisdiction, BFB's Claims Were Barred By The
Doctrine Of Collateral Estoppel. 32

V. BFB Identifies No Error In The Trial Court's Determination
That, At Best, BFB Would Be Entitled To Only Its Bid
Preparation Costs..... 38

CONCLUSION..... 41

TABLE OF AUTHORITIES

CASES

	<u>PAGE(S)</u>
<u>Adarand Constr., Inc. v. Pena,</u> 515 U.S. 200 (1995).....	3
<u>Airadigm Comm'ns, Inc. v. FCC,</u> 519 F.3d 640 (7th Cir. 2008).....	24, 31
<u>Amerikohl Mining, Inc. v. United States,</u> 889 F.2d 1210 (Fed. Cir. 1990).....	16
<u>Arkla, Inc. v. United States,</u> 37 F.3d 621 (Fed. Cir. 1994).....	33
<u>Bankers Trust N.Y. Corp. v. United States,</u> 225 F.3d 1368 (Fed. Cir. 2000).....	11
<u>Barclay v. United States,</u> 333 F.2d 847 (Ct. Cl. 1964).....	40
<u>Bell Atlantic Tel. Co. v. FCC,</u> 24 F.3d 1441 (D.C. Cir. 1994).....	19, 20, 26, 27
<u>Berry v. United States,</u> 27 Fed. Cl. 96 (1992).....	30
<u>Biltmore Forest Broadcasting FM, Inc. v. FCC,</u> 321 F.3d 155 (D.C. Cir. 2003).....	4, 5, 35
<u>Biltmore Forest Broadcasting FM, Inc. v. FCC,</u> 540 U.S. 981 (2003).....	5
<u>Biltmore Forest Broadcasting FM, Inc. v. United States,</u> 80 Fed. Cl. 322 (2008).....	<i>passim</i>

<u>Bingaman v. Department of the Treasury,</u> 127 F.3d 1431 (Fed. Cir. 1986).	33
<u>Bowen v. Am. Hosp. Ass'n,</u> 476 U.S. 610.	37, 38
<u>Building Owners And Managers Ass'n Int'l v. FCC,</u> 254 F.3d 89 (D.C. Cir. 2001).....	27
<u>Castle v. United States,</u> 301 F.3d 1328 (Fed. Cir. 2002).	8
<u>City Line Joint Venture v. United States,</u> 503 F.3d 1319 (Fed. Cir. 2007).	32
<u>City of Rochester v. Bond,</u> 603 F.3d 927 (D.C. Cir. 1979).....	14, 15, 16
<u>City of Tacoma v. Taxpayers of Tacoma,</u> 357 U.S. 320 (1958).	15
<u>Coast Fed. Bank, FSB v. United States,</u> 323 F.3d 1035 (Fed. Cir. 2003).	8
<u>Cook v. United States,</u> 394 F.2d 84 (7th Cir. 1968).	13, 14
<u>Cottrell v. United States,</u> 42 Fed. Cl. 144 (1998).	30
<u>Erienet Inc. v. Velocity Net, Inc.,</u> 156 F.3d 513 (3d Cir. 1998).	16

<u>Everett Plywood and Door Corp. v. United States,</u> 419 F.2d 425 (Ct. Cl. 1969).....	40
<u>In re FCC,</u> 217 F.3d 125 (2d Cir. 2000).	14, 20
<u>FCC v. ITT World Comm'ns, Inc.,</u> 466 U.S. 463 (1984).....	17
<u>FCC v. Nextwave Personal Communications,</u> 537 U.S. 293 (2003).	20, 21
<u>FCC v. Sanders Bros. Radio Station,</u> 309 U.S. 470 (1940).	31
<u>Folden v. United States,</u> 56 Fed. Cl. 43 (2003).	28
<u>Folden v. United States,</u> 379 F.3d 1344 (Fed. Cir. 2004).	<i>passim</i>
<u>Folden v. United States,</u> 545 U.S. 1127 (2005).....	11
<u>General Fin. Corp. v. FTC,</u> 700 F.2d 366 (7th Cir. 1983).	17
<u>George E. Warren Corp. v. United States,</u> 341 F.3d 1348 (Fed. Cir. 2003).	11
<u>Hanlin v. United States,</u> 316 F.3d 1325 (Fed. Cir. 2003).	28, 29
<u>Impresa Construzioni Geom. Domenico Garufi v. United States,</u> 238 F.3d 1324 (Fed. Cir. 2001).	37, 38

<u>In re Jerre M. Freeman,</u> 30 F.3d 1459 (Fed. Cir. 1994).	33, 34, 37
<u>Kania v. United States,</u> 650 F.2d 264 (Ct. Cl.), <u>cert. denied</u> , 454 U.S. 895 (1981).	30
<u>La Voz Radio De La Comunidad v. FCC,</u> 223 F.3d 313 (6th Cir. 2000).	14
<u>Lion Raisins, Inc. v. United States,</u> 416 F.3d 1356 (Fed. Cir. 2005).	13
<u>Luz v. FCC,</u> 88 F.Supp. 2d 372 (E.D. Pa. 1999).	14
<u>Metro Broadcasting v. FCC,</u> 497 U.S. 547 (1990).	3
<u>Miller v. FCC,</u> 66 F.3d 1140 (11th Cir. 1995).	14
<u>Mobile Relay Associates v. FCC,</u> 457 F.3d 1 (D.D.C. 2006).	31
<u>Montana v. United States,</u> 124 F.3d 1269 (Fed. Cir. 1999).	9
<u>Montana v. United States,</u> 440 U.S. 147 (1979).	33
<u>Morgan v. Department of Energy,</u> 424 F.3d 1271 (Fed. Cir. 2005).	33
<u>National Ass'n of Broadcasters v. FCC,</u> 740 F.2d 1190 (D.C. Cir. 1984).	31

<u>In re Nextwave Pers. Commc'n, Inc.,</u> 200 F.3d 43 (2d Cir. 1999).	3, 24, 25
<u>Plaintiffs In Winstar-Related Cases v. United States,</u> 37 Fed. Cl. 174 (1997), <u>aff'd</u> 133 F.3d 874 (Fed. Cir.), <u>cert. denied</u> , 525 U.S. 823 (1998).	32
<u>Ontario Power Generation, Inc. v. United States,</u> 369 F.3d 1298 (Fed. Cir. 2004).	8
<u>Public Util Comm'r v. Bonneville Power Admin.,</u> 767 F.2d 622 (9th Cir. 1985).	16
<u>Rash v. United States,</u> 360 F.2d 940 (Ct. Cl. 1966).	40
<u>Red Lion Broadcasting Co. v. FCC,</u> 395 U.S. 367 (1969).	24
<u>Sony Elec. v. United States,</u> 382 F.3d 1337 (Fed. Cir. 2004).	11
<u>Steel Company v. Citizens for a Better Environment,</u> 523 U.S. 83 (1998).	32
<u>Strickland v. United States,</u> 423 F.3d 1335 (Fed. Cir. 2005).	11
<u>Thomas v. General Services Administration,</u> 794 F.2d 661 (Fed. Cir. 1986).	33
<u>Transamerica Access Policy Study Group v. FERC,</u> 225 F.3d 667 (D.C. Cir. 2000).	19
<u>Vereda, Ltd. V. United States,</u> 271 F.3d 1367 (Fed. Cir. 2001).	13

<u>Winstar v. United States,</u> 518 U.S. 839 (1996).....	20
<u>Wisconsin Valley Improvement v. Federal Emergency Regulatory Commission,</u> 236 F.3d 738 (D.C. Cir. 2001).....	18, 27

STATUTES

28 U.S.C. § 1491(b)(1).....	39
47 U.S.C. § 301.....	3, 24, 26, 31
47 U.S.C. § 308(b).	25
47 U.S.C. § 309.....	4
47 U.S.C. § 309(j).....	3, 25
47 U.S.C. § 309(j)(7)(A).....	25
47 U.S.C. § 309(j)(7)(B).....	25
47 U.S.C. § 310.....	26
47 U.S.C. § 312.....	26
47 U.S.C. § 316.....	26
47 U.S.C. § 402(b).	<i>passim</i>
47 U.S.C. § 402(b)(1).....	14
47 U.S.C. § 402(c).....	15

MISCELLANEOUS

S. Rep. No. 44 (1952)..... 13
Fed. Cir. R. 35(a)(1)..... 11

STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that the United States Court of Appeals for the District of Columbia Circuit considered similar issues as those presented by plaintiff-appellant in this matter and arising from the same Federal Communications Commission licensing proceeding under review here in Biltmore Forest Broadcasting FM, Inc. v. FCC, 321 F.3d 155 (D.C. Cir. 2003), cert. denied, 540 U.S. 981 (2003). Respondent-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

2008-5055

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BILTMORE FOREST BROADCASTING FM, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-316,
Senior Judge James F. Merow.

BRIEF OF DEFENDANT-APPELLEE THE UNITED STATES

STATEMENT OF THE ISSUES¹

1. Whether the United States Court of Federal Claims correctly ruled, based upon the Communications Act of 1934 and this Court's decision in Folden v. United States, 379 F.3d 1344 (Fed. Cir. 2004), that it lacked subject matter

¹ We provide counter statements of the issues, the case, the facts and the standard of review because those of plaintiff-appellant are argumentative, or, in the case of the standard of review, absent from the opening brief.

jurisdiction to entertain the challenge of plaintiff-appellant Biltmore Forest Broadcasting FM, Inc.'s ("BFB") to a Federal Communications Commission ("FCC") award of a radio license.

2. Whether BFB's unsuccessful bid at a licensing auction created either a cognizable contract with the United States or a compensable property right.

3. Whether the trial court erred in stating that, assuming it possessed jurisdiction to entertain BFB's claims, they were barred by the doctrine of collateral estoppel.

4. Whether the trial court erred in stating that, assuming BFB's claims were not barred, BFB could recover only the costs associated with the preparation of its bid at auction.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiff-appellant, BFB, appeals from a judgment of the trial court that it lacked subject matter jurisdiction to entertain BFB's challenge to an FCC licensing decision, and, in the alternative, that BFB's claims were barred as a matter of law. Biltmore Forest Broadcasting FM, Inc. v. United States, 80 Fed. Cl. 322 (2008) ("Biltmore II").

II. Statement Of The Facts And Course Of Proceedings Below

This case arises from an administrative licensing proceeding in which the FCC made a selection from mutually exclusive applications for a license to construct a new FM radio broadcast station in Biltmore Forest, North Carolina. The FCC's authority to issue this license arose from its management of the electromagnetic spectrum over which radio broadcasts are transmitted; such licenses are to be granted "based upon public interest, convenience, or necessity." Metro Broadcasting v. FCC, 497 U.S. 547, 553 (1990), overruled on other grounds, Adarand Constr., Inc. v. Pena, 515 U.S. 200 (1995); see also 47 U.S.C. § 301. Section 309(j) of the Communications Act requires the FCC to grant most radio licenses through auction. 47 U.S.C. § 309(j); see also In re Nextwave Pers. Commc'n, Inc., 200 F.3d 43, 51 (2d Cir. 1999) (internal citations omitted).

BFB was one of the applicants for the Biltmore Forest license. SA 3, ¶1.² When BFB and other applicants initially filed their applications in 1987, the FCC's practice was to hold a comparative hearing to ascertain an applicant's basic qualifications to be awarded a broadcast license and to determine which applicants among the fully qualified applicants would best serve the public interest. See

² "SA ___" refers to a specific page of the supplemental appendix attached to this brief.

Biltmore Forest Broadcasting FM, Inc. v. FCC, 321 F.3d 155, 156 (D.C. Cir. 2003) (“Biltmore I”). In 1997, however, before this comparative hearing became final, intervening statutory changes led the FCC to adopt competitive bidding procedures, pursuant to 47 U.S.C. § 309, to resolve pending applications such as BFB’s. SA 3, ¶2; Biltmore I, 321 F.3d at 158.

An auction for the license was concluded in October 1999, and the license was awarded to the highest bidder, Liberty Productions, L.P. (“Liberty”). Id. BFB submitted the second-highest bid. Id. Following the auction, the FCC considered objections from the losing applicants to the grant of Liberty’s application, and found none of them to have merit. Id. at 159.

Pursuant to 47 U.S.C. § 402(b), BFB appealed the FCC’s decision to the United States Court of Appeals for the District of Columbia Circuit. On appeal, BFB argued, among other things, that the FCC should have dismissed Liberty’s application after Liberty failed to timely file a required certification regarding the media interests of immediate family members. Id. at 156. The District of Columbia Circuit, in Biltmore I, affirmed the FCC’s license award, holding that the agency did not act unreasonably in determining that its regulations did not require Liberty’s application to be dismissed for its failure to timely file that certification. Id. at 159-61. Specifically, the court ruled that the applicable

agency regulations permitted the FCC to allow Liberty an opportunity to cure its defective application by filing a family media certification after the deadline. Id. BFB subsequently filed, unsuccessfully, a petition for a writ of certiorari of the Biltmore I decision. Biltmore Forest Broadcasting FM, Inc. v. FCC, 540 U.S. 981 (2003).

In May 2007, BFB filed a complaint in the trial court, again challenging the FCC's decision not to disqualify Liberty from the Biltmore Forest auction based upon its failure to timely file a family media certification. SA 5-6, ¶¶11-17. In January 2008, the trial court granted the Government's combined motion to dismiss and for summary judgment. Biltmore II. Relying upon this Court's decision in Folden, the trial court held that because BFB's challenge to the FCC's award of the Biltmore Forest license was subject to §402(b) of the Communications Act, that challenge was subject to the exclusive jurisdiction of the District of Columbia Circuit. Biltmore II, 80 Fed. Cl. at 331. The trial court further held that even if it possessed subject matter jurisdiction to entertain BFB's claims, those claims had already been adjudicated on their merits in Biltmore I and were therefore barred, as a matter of law, by res judicata, collateral estoppel, and issue preclusion. Id. at 336.

This appeal followed. On April 30, 2008, BFB filed a petition for hearing

en banc, requesting this Court reconsider its decision in Folden. On June 4, 2008, per the Court's request, the Government filed a brief in opposition to BFB's petition. This Court denied BFB's petition on June 19, 2008.

SUMMARY OF THE ARGUMENT

The trial court's judgment that it lacked jurisdiction to consider BFB's challenge to the FCC's award of the Biltmore Forest license should be affirmed. BFB fails to establish any error in that decision.

First, based upon § 402(b) of the Communications Act and this Court's decision in Folden, the trial court correctly ruled that it lacked jurisdiction to consider BFB's challenge to the FCC's award of the Biltmore Forest license because such challenges are within the exclusive purview of the District of Columbia Circuit. Folden is binding, unless overruled by this Court en banc or by the Supreme Court. To the extent BFB asks this Court to overturn Folden, that decision does not "immunize" FCC licensing decision from judicial review, as BFB argues, but rather clearly explains that Congress has expressly designated the District of Columbia Circuit as the exclusive forum for review of the FCC's licensing decisions. Indeed, BFB has already challenged the FCC's award of the Biltmore Forest license in that forum. The District of Columbia Circuit denied BFB's claims on their merits. After having had its day in the forum specifically

selected by Congress, BFB may not now argue that Folden deprives it of any forum at all.

Second, BFB's unsupported contention that, but for this Court's precedent in Folden, the Court of Federal Claims would possess jurisdiction to entertain its claims erroneously assumes that an FCC licensing auction creates contractual and property rights in each unsuccessful bidder. FCC licensing auctions are not commercial transactions resulting in a contractual relationship between the FCC and the license awardee; nor do these auctions convey any property rights to the license awardee, much less an unsuccessful applicant. BFB's arguments that it has both contractual and property rights arising out of its unsuccessful bid for the Biltmore Forest license is simply untenable.

The trial court did not err in stating that, assuming it had jurisdiction to consider BFB's claims, they were barred by the doctrine of collateral estoppel. Although BFB styled its complaint before the trial court as a breach of contract, the complaint at its core attacked the FCC's decision to not disqualify Liberty from the Biltmore Forest auction based upon its failure to timely file a family media certification. The District of Columbia Circuit in Biltmore I rejected that challenge on its merits. As such, BFB may not relitigate the issue in the Court of Federal Claims.

Finally, BFB fails to identify an error in the trial court's statements that even if it could consider BFB's challenge to the FCC's award of the Biltmore Forest license, it would be in the form of a bid protest, for which BFB would be entitled only to its bid preparation costs. Instead, BFB summarily argues that it already has a contract which the FCC arising out of its unsuccessful bid on the Biltmore Forest license, which is simply incorrect.

ARGUMENT

I. Standard Of Review

This Court reviews a judgment of the Court of Federal Claims to dismiss for lack of jurisdiction de novo. Ontario Power Generation, Inc. v. United States, 369 F.3d 1298, 1300 (Fed. Cir. 2004)

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Castle v. United States, 301 F.3d 1328, 1336 (Fed. Cir. 2002)(citing Fed. R. Civ. Pro. 56(c)). This Court reviews the trial court's application of this standard de novo. Id.; Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1037-38 (Fed. Cir. 2003). "This Court employs complete and independent review over an appeal of the propriety of summary judgment, construing the facts in a light most

favorable to the non-movant.” Montana v. United States, 124 F.3d 1269, 1273 (Fed. Cir. 1999).

II. The Trial Court Correctly Ruled That It Lacked Jurisdiction To Entertain BFB’s Challenge To The FCC’s Award Of The Biltmore Forest License

A. BFB Does Not Dispute That Folden Operates To Preclude Its Claims

The Communications Act of 1934 sets forth the procedures for judicial review of final orders of the FCC. Section 402(b) of the Act provides, in pertinent part, that:

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:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission .

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection .

47 U.S.C. § 402(b).

In Folden, this Court examined the statutory and regulatory regime of the Communications Act and determined that it was “clear that the D.C. Circuit’s jurisdiction over claims that fall within subsection 402(b) is exclusive.” 379 F.3d at 1356. In considering BFB’s challenge to the FCC’s award of the Biltmore

Forest license here, the trial court held that the Folden Court’s “application of the Communications Act and Congressional prerogative . . . is binding and dictates the outcome in this case” because BFB “directly contests the FCC’s decision to award the license to Liberty . . . thus squarely falling into section 402(b)[.]” Biltmore II, 80 Fed. Cl. at 329-331 (internal citations omitted). Accordingly, the trial court dismissed BFB’s complaint for lack of subject matter jurisdiction, as BFB’s challenge to the award of the Biltmore Forest license fell within the exclusive jurisdiction of the District of Columbia Circuit. Id.

BFB does not dispute that its lawsuit, which arises out of the FCC’s denial of its application for a permit to construct a radio station, falls within the scope of §402(b). Indeed, BFB concedes that it is the FCC’s “failure to award the license to the highest qualified bidder” that serves as the basis for its claims, Applt. Br. 8,³ and that in light of Biltmore I, the FCC’s decision has been deemed “lawful by the appropriate appellate courts.” Id. at 21.

Nor does BFB dispute that Folden operates to preclude its claims. Instead, BFB argues that Folden was erroneously decided because “there is not the slightest inkling that Congress intended to grant the FCC unique immunity from

³ “Applnt. Br.” refers to the “Corrected Combined Brief of Plaintiff-Appellant And Appendix,” filed by BFB with this Court on June 30, 2008.

two fundamental principles: the non-impairment of contracts, and compensation for the taking of private property.” Applnt. Br. 18. Accordingly, BFB argues that this Court should overturn Folden, id. at 10, and that the Court of Federal Claims may exercise concurrent jurisdiction with the District of Columbia Circuit to review FCC licensing decisions.

Folden, however, is binding precedent and may not be overruled by a single panel of this Court.⁴ See Fed. Cir. R. 35(a)(1); George E. Warren Corp. v. United States, 341 F.3d 1348, 1351 (Fed. Cir. 2003). “[A] circuit court decision, if applicable, controls until the circuit court overrules it en banc.” Strickland v. United States, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005) (citing Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1372 (Fed. Cir. 2000)). Because Folden is binding upon this Court and BFB makes no effort to distinguish that decision from the instant matter, the trial court’s ruling that it lacked subject

⁴ BFB appears to be requesting that the panel reviewing this appeal solicit the full court’s reconsideration of Folden. As previously noted, on June 19, 2008, this Court denied BFB’s initial petition for hearing en banc. Moreover on November 18, 2004, this Court denied petitioners’ combined petition for rehearing and rehearing en banc in Folden, and the Supreme Court subsequently denied a petition for writ of certiorari. Folden v. United States, 545 U.S. 1127 (2005). Prior denials of invitations for hearing en banc are relevant considerations when considering a renewed request. See Sony Elec. v. United States, 382 F.3d 1337, 1339 (Fed. Cir. 2004) (“We must be mindful that our full court has already thrice deemed this very issue not sufficiently important to merit en banc treatment.”).

matter jurisdiction to entertain BFB's claims must be affirmed.

B. Even If Folden Were Being Reconsidered, It Was Correctly Decided

Even assuming the Court were sitting en banc, BFB's arguments that the Court erred in deciding Folden would fail for two reasons. First, in Folden, this Court examined the purpose and legislative history behind §402(b), which clearly indicates Congress' intent to grant the District of Columbia Circuit exclusivity with regard challenges to FCC licensing decisions. Folden is consistent with numerous other circuit courts of appeal have considered the jurisdictional effect of §402(b), including the District of Columbia Circuit. Second, as demonstrated in Part III below, Folden does not prevent BFB from bringing either a breach of contract or a takings claim in the Court of Federal Claims, because BFB's unsuccessful bid at auction did not create a contract with the United States, nor did it convey to BFB a compensable property right.

Folden involved a challenge by applicants alleging a breach of an implied-in-fact contract by the FCC as a result of the FCC's failure to conduct a lottery for cellular licenses. 379 F.3d at 1352. The applicants alleged that the FCC's actions constituted, among other things, a breach of an implied-in-fact contract and a taking in violation of the 5th Amendment. Id. As with BFB here, the applicants in Folden argued that because they sought money damages, their claims could not

have been brought in the District of Columbia Circuit, and were appropriately before the Court of Federal Claims. Id. at 1355.

In Folden, the Court examined both the plain language and the legislative history of the Communications Act and noted that the relevant legislative history plainly directed that “[t]he language of [] subsection [402(b)], when considered in relation to that of subsection (a), also would make it clear that judicial review of all cases involving the exercise of the Commission’s radio licensing power is limited to [the District of Columbia Circuit].” 379 F.3d at 1356 (citing S.Rep. No. 44, at 10 (1952)) (emphasis supplied); see also Cook v. United States, 394 F.2d 84, 86 (7th Cir. 1968) (“the Senate Committee plainly stated that appeals from orders of the Commission in exercising its ‘licensing powers’ must be taken to the District of Columbia”) (internal citation omitted) (emphasis supplied). The Court held that § 402 created a comprehensive statutory scheme for review of FCC licensing decisions, and that “[w]hen such a ‘specific and comprehensive scheme for administrative and judicial review’ is provided for by Congress, the Court of Federal Claims’ Tucker Act jurisdiction over the subject matter is preempted.” Id. at 1357 (citing Vereda, Ltda v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001)); see also Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1372 (Fed. Cir. 2005). As such, the Court in Folden explicitly rejected the contention that the

Court of Federal Claims could exercise concurrent jurisdiction to entertain an FCC licensing decision within the purview of § 402(b). Id. at 1358.

Folden is consistent with other circuit courts of appeals that have considered challenges to FCC licensing determinations under section 402(b). See, e.g., In re FCC, 217 F.3d 125, 140 (2d Cir. 2000) (“Cases that fall within §402(b) are appealable only in the Court of Appeals for the District of Columbia Circuit.”) (emphasis supplied); La Voz Radio De La Comunidad v. FCC, 223 F.3d 313, 318 (6th Cir. 2000) (FCC denial of broadcast license subject to review only in District of Columbia Circuit); Luz v. FCC, 88 F.Supp. 2d 372, 375 (E.D. Pa. 1999), aff’d, 213 F.3d 629 (3d Cir. 2000) (noting that any challenge to FCC licensing decisions “would have to be brought in the Court of Appeals for the District of Columbia in accordance with 47 U.S.C. § 402(b)(1)”); Miller v. FCC, 66 F.3d 1140, 1144 n.3 (11th Cir. 1995) (noting that FCC decisions involving licensing and permits must be appealed to the District of Columbia Circuit); Cook, 394 F.2d at 87.

In deciding its own jurisdiction, the District of Columbia Circuit has clearly held that FCC licensing decisions are within its exclusive jurisdiction. In City of

Rochester v. Bond,⁵ 603 F.3d 927 (D.C. Cir. 1979), the court considered an appeal from a district court dismissal of a challenge to an FCC licensing decision based upon a lack of subject matter jurisdiction in light of the language of § 402(b). The court noted that “Congress ‘may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had,’” and “has . . . prescribed the exclusive mode of judicial review of such controversies as this.” Id. (citing City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958)).

In rejecting petitioner’s claim that district courts could exercise concurrent jurisdiction over such claims, the court in City of Rochester examined the overall scheme of § 402 and found that “concurrent jurisdiction under some general jurisdictional mandate would completely undo [the] requirement of [§402 of] a timely petition for review.”⁶ The timeliness requirement reflects a deliberate congressional choice to impose a statutory finality on agency orders, a choice we may not second guess.” Id. at 935. The court further explained that “coherence

⁵ In reaching its decision in Folden, this Court relied in large part upon the District of Columbia Circuit’s opinion in City of Rochester.

⁶ 47 U.S.C. § 402(c) requires that an appeal from an adverse FCC license decision be filed “within thirty days from the date upon which public notice is given of the decision or order complained of.”

and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts . . . [t]he policy behind having a special review procedure in the first place similarly disfavors bifurcating jurisdiction over substantive grounds between district court and the court of appeals.” Id. at 936. The City of Rochester court concluded that concurrent jurisdiction “would seriously fragment judicial review, particularly of agencies like the FCC who are governed by open-ended public interest language liberally read to incorporate other statutory obligations.” Id. at 937 (internal quotations omitted).

That § 402(b) does not use the explicit label of exclusive jurisdiction is of no moment. In general, a forum specifically designated by Congress for review of agency decisions “is exclusive, and this result does not depend on the use of the word ‘exclusive’ in the statute providing a forum for judicial review.” Folden, 379 F.3d at 1357 n.9 (citing Amerikohl Mining, Inc. v. United States, 889 F.2d 1210, 1215 (Fed. Cir. 1990)); see also Erienet Inc. v. Velocity Net, Inc., 156 F.3d 513 (3d Cir. 1998) (“We have never before required Congress, when assigning jurisdiction to a court other than the district court, to state that the district court is without jurisdiction.”); Public Util Comm’r v. Bonneville Power Admin., 767 F.2d 622, 627 (9th Cir. 1985) (“Jurisdiction over a specific class of claims which Congress has committed to the court of appeals generally is exclusive, even in the

absence of an express statutory commend of exclusiveness”). The Supreme Court has explained that where a statute dictates that review of an FCC decision lay in the court of appeals, “[l]itigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency’s order.” FCC v. ITT World Comm’ns, Inc., 466 U.S. 463, 468 (1984); see also General Fin. Corp. v. FTC, 700 F.2d 366, 368 (7th Cir. 1983) (litigants “may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court . . . the specific statutory method, if adequate, is exclusive”). Indeed, BFB identifies nothing to indicate that Congress intended to grant the District of Columbia Circuit anything but exclusive jurisdiction to review FCC licensing decisions.

C. BFB Fails To Cite Apposite Authority To Overturn Folden

BFB identifies no errors in this Court’s decision in Folden. Instead, BFB simply points to a number of decisions from the District of Columbia Circuit that it argues “envision a perfectly reasonable paradigm of parallel but not overlapping jurisdictions that avoid the creation of a bizarre liability-free and Constitution-free zone” and allows for concurrent jurisdiction in the Court of Federal Claims over FCC licensing decisions. Applt Br. 20. This is simply incorrect. Both this Court in Folden and the District of Columbia Circuit in City of Rochester explicitly

rejected the possibility of concurrent jurisdiction to entertain FCC licensing decisions based upon a review of the legislative history of the Communications Act and in consideration of the effect of Congress' identification of a specific forum for judicial review of FCC licensing decisions. None of the decisions of the District of Columbia Circuit upon which BFB relies holds that a party challenging an FCC licensing decision may bring a concurrent claim in the Court of Federal Claims.⁷ Indeed, not only do none of BFB's cases even involve an FCC licensing challenge brought pursuant to §402, none involves a statute identifying a forum for judicial review of an agency decision. Therefore none of those cases conflicts with Folden. We address each case cited by BFB in turn.

In Wisconsin Valley Improvement v. Federal Energy Regulatory Commission, 236 F.3d 738 (D.C. Cir. 2001), the District of Columbia Circuit reviewed an order from the Federal Energy Regulatory Commission ("FERC") that imposed conditions upon the petitioner's renewal of its license for the continued operation of a hydropower power project. Id. at 740-41. Before upholding FERC's imposed conditions, the court noted that if the petitioner wished to pursue a takings claim, it would have to do so in the Court of Federal Claims. Id. at 743-

⁷ Nor do any of those cases indicate an intent to overrule City of Rochester.

44. Transamerica Access Policy Study Group v. Federal Energy Regulatory Commission, 225 F.3d 667 (D.C. Cir. 2000), involved a challenge to a FERC administrative order imposing requirements upon owners of electric transmission lines. Id. at 681-83. In response to the claims that FERC's orders resulted in a taking in violation of the Fifth Amendment, the court again noted that jurisdiction over such claims lay with the Court of Federal Claims. Id. at 690. Neither Wisconsin nor Transamerica discusses or suggests concurrent jurisdiction to consider FCC licensing determinations.

In Bell Atlantic Telephone Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), the court considered a challenge by local telephone companies to an FCC directive that required those companies to allow the co-location of competitor equipment onto their property. Id. at 1444-45. In examining the propriety of the FCC's co-location requirement, the court again held that to the extent that petitioners had individual takings claims, those claims had to be pursued in the Court of Federal Claims. Id. at 1441 n.1. BFB seizes upon language in the court's opinion stating that Claims Court jurisdiction is not precluded by the Communications Act, Applnt. Br. 20-21 (citing Bell Atlantic, 24 F.3d at 1445 n.2), but the court in Bell Atlantic did not consider a challenge to a FCC licensing decision pursuant to § 402(b). Therefore as to Biltmore's concurrent jurisdiction argument, Bell Atlantic

provides no support.

Nor is BFB's suggested approach of concurrent jurisdiction "fully consistent" with the Supreme Court's decision in FCC v. Nextwave Personal Communications, 537 U.S. 293 (2003). Applt. Br. 21. In Nextwave, the Court affirmed a ruling invalidating the FCC's cancellation of an auction winner's license after the awardee filed for Chapter 11 bankruptcy protection. 537 U.S. at 299-300. In so doing, the Court noted that the FCC's cancellation violated the United States Bankruptcy Code, and that the Court's responsibility to invalidate agency decisions not in accordance with law applied to any law, not just those the agency administered. Id. Nextwave, then, is inapposite to BFB's claims. BFB is not a license awardee arguing that the FCC violated Federal law. BFB is an unsuccessful bidder alleging the breach of an unestablished contract.

If anything, Nextwave's procedural history confirms that challenges to FCC licensing decisions belong in the District of Columbia Circuit. In that case, after a bankruptcy court granted the awardee's petition for relief and invalidated the FCC's cancellation of the awardee's license, the Second Circuit Court of Appeals reversed, noting that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals under 47 U.S.C. § 402[.]" Id. at 298-99 (citing In re FCC, 217 F.3d 131, 136 (2d Cir. 2000)) (emphasis supplied). The awardee

in Nextwave obtained its requested relief only after it appealed the FCC's license cancellation to the District of Columbia Circuit. Id. Nextwave, then, is consistent with Folden's holding that the District of Columbia Circuit is the exclusive forum for FCC licensing challenges.

BFB's reliance upon Winstar v. United States, 518 U.S. 839 (1996), is simply misplaced. In Winstar, the Court considered whether the enactment of legislation by Congress that resulted in the breach by the United States of contracts it had previously entered into with various failing thrifts could subject the United States to liability for those breaches. Winstar is inapplicable here - the auction for the Biltmore Forest license did not involve the enactment of legislation, and BFB has neither an actual nor implied-in-fact contract with the FCC. Winstar certainly does not support the notion that the Court of Federal Claims may exercise concurrent jurisdiction to review FCC licensing decisions that fall within the purview of §402(b).

BFB has identified no errors in this Court's decision in Folden, or any case relating to the review of FCC licensing decisions with which Folden conflicts. Folden precludes BFB's claims here, and because that decision is binding upon this Court, the trial court's judgment that it lacked subject matter jurisdiction to consider them must be affirmed. To the extent BFB argues that Folden should be

overturned because it “immunizes” FCC licensing actions from judicial review, BFB does not dispute that it was able to challenge the FCC’s award of the Biltmore Forest license in Biltmore I, or that the District of Columbia Circuit reached a decision on the merits of that challenge. Thus BFB’s argument that the FCC is “immune” from challenges to its licensing decisions is entirely without merit. Folden need not be reconsidered en banc.

III. An FCC Licensing Auction Creates No Contractual Or Property Rights In Each Unsuccessful Bidder

Notwithstanding this Court’s clear instruction in Folden and the fact that none of the District of Columbia cases to which BFB cites support its claims of concurrent jurisdiction, BFB’s assertion that “federal agencies’ licensing decisions may be lawful while at the same time implicating claims against the Federal government for money damages,” Applnt. Br. 18-19, is generally unobjectionable. Nonetheless, it provides no support for BFB’s claims here. FCC radio licensing auctions are neither commercial transactions resulting in the creation of a contract between the license awardee and the United States, nor a type of transaction for which the United States intended to waive its sovereign immunity and subject itself to the Court of Federal Claims’ Tucker Act jurisdiction. Instead, FCC auctions are regulatory procedures that allow the FCC to distribute licenses for use

of the electromagnetic spectrum in a manner that serves the best interest of the public. Thus while an agency action may be found lawful but nonetheless deemed a breach of contract, such is not the case here, where BFB simply has no contract with the United States.

A. The FCC Regulates The Public Spectrum; It Does Not Sell A Commercial Commodity To Licensees

BFB argues that as a result of this Court's decision in Folden, it has no recourse for the FCC's supposed breach of an alleged contract that was established between BFB and the agency as a result of BFB's unsuccessful bid at auction.⁸ Applnt. Br. 18 (“[T]he necessary consequence of Folden is to immunize the FCC from paying the damages its breach would ordinarily warrant.”). BFB's entire argument, however, is based upon the untenable notion that an FCC licensing auction creates contractual and property rights with each unsuccessful bidder. BFB cites no authority to support this claim, nor can it. No court has recognized the creation of a contract between an unsuccessful bidder and the FCC as result of

⁸ BFB states that “the Folden panel held that an alleged breach of contract by the FCC in the course of licensing proceedings was not subject to the jurisdiction of the Court of Federal Claims.” Applnt. Br. 16. In fact, this Court in Folden made no comment on the existence of either an express or implied-in-fact contract arising out of an FCC bid at auction. As discussed below, the Court of Federal Claims in Folden rejected plaintiffs' arguments regarding the existence of an implied-in-fact contract.

a licensing auction. Therefore Folden does not prevent BFB from pursuing any contractual or takings claims against the FCC, because BFB has none.

At the outset, BFB's claims regarding the existence of a contract are based upon a wholesale misunderstanding of the purpose of FCC licensing auctions. BFB describes the Biltmore Forest license as a "commodity being sold." Applnt. Br. 12; see also id. at 31 ("[T]his case involves the enforcement of a contract itself, a contract for the sale of a license."). The Communications Act plainly states that licenses granted under the FCC's authority "provide for the use of [channels of the electromagnetic spectrum], but not the ownership thereof[.]" 47 U.S.C. § 301 (emphasis supplied); see also Airadigm Comm'ns, Inc. v. FCC, 519 F.3d 640, 651 (7th Cir. 2008). The FCC does not own the electromagnetic spectrum and thus cannot sell it as a commodity. See In re Nextwave, 200 F.3d at 52. Rather, the FCC regulates the use of the public's spectrum because "[w]ithout Government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 376-77 (1969).

Although radio licenses are required to be awarded by the FCC to the highest bidder, the auction process by which licenses are assigned is not a commercial transaction motivated by pecuniary interests. See In re Nextwave, 200

F.3d at 52. The purpose of § 309(j) of the Communications Act, which requires most radio licenses to be awarded via auction, was neither “to sell off the [electromagnetic] spectrum . . . in an effort to raise as much money as possible,” nor to encourage the FCC “to develop a free-market system to maximize revenue.” Id.; see also 47 U.S.C. §§ 309(j)(7)(A) (prohibiting FCC from making finding of public interest based upon expectation of auction revenue); 309(j)(7)(B) (restricting FCC from prescribing regulations pertaining to alternative payment schedules and methods of calculation “solely or predominantly” upon the expectation of auction revenues). Instead, Congress assumed that awarding licenses to high bidders would encourage technological innovation and efficiency while recouping some value for the use of the electromagnetic spectrum. Id. (internal citations omitted). Section 309(j) does not refer to a license as a contract, nor does it indicate that the auction process establishes any contractual obligations. Auctions, moreover, are merely administrative vehicles for the dissemination of licenses for use of the spectrum in a manner than best serves the public’s interest.

That radio licenses are not “commodities being sold” is further evidenced by the fact that the FCC may impose conditions upon them based upon the public good. In re Nextwave, 200 F.3d at 51 (citing 47 U.S.C. § 308(b)). The

Communications Act also prohibits the transfer of a license without the consent of the FCC, and that consent is based not upon commercial considerations, but upon a determination that a transfer would be in the public interest. 47 U.S.C. § 310. Moreover the Act specifically allows the FCC to revoke or modify licenses after award. See 47 U.S.C. §§ 312, 316. The Communications Act also states that the award of a license conveys no property rights to its holder. See 47 U.S.C. § 301. As such, BFB's argument that its unsuccessful bid on the Biltmore Forest license vested in it contractual or property rights is wholly without basis.

Nonetheless, BFB relies upon several cases to argue that “[t]he FCC regularly enters into contracts of many kinds in the course of its licensing activities” and “imposes obligations on its regulatees which on their face constitute takings of property by the Federal government which would normally be compensable under the 5th Amendment.” Applt. Br. 17. None of the cases BFB identifies, however, involves an FCC licensing decision or holds that an unsuccessful bidder in an FCC licensing auction has a valid contract or takings claim against the United States.

In Bell Atlantic, for example, petitioners challenged an FCC order that required them to allow competitors access to their property. 24 F.3d at 1444-45. Bell Atlantic did not concern a radio licensing auction, and does not hold that such

an auction creates a contract between the FCC and each unsuccessful bidder. In Wisconsin Valley, the petitioner's challenge to a FERC regulatory decision arose out of petitioner's application to renew a license of which it was already in possession. 236 F.3d at 740-41. That decision does not imply that an unsuccessful bidder for an FCC radio license could have either a cognizable contract or takings claim against the Government.

In Building Owners And Managers Association International v. FCC, 254 F.3d 89 (D.C. Cir. 2001), the District of Columbia Circuit rejected a claim from a group of property owners that an FCC rule prohibiting certain restrictions on over-the-air devices constituted a per se taking in violation of the Fifth Amendment by enlarging the rights of their tenants. Id. at 97. Though the court rejected that argument, it noted, without comment on the merits of any further action, that the petitioners were free to pursue takings claims for their individual buildings. Id. at 100. As with the District of Columbia Circuit's decision in Bell Atlantic, Building Owners and Managers does not support BFB's argument that, as an unsuccessful bidder, it has a cognizable breach of contract or takings claim against the Government.

B. BFB Fails To Establish An Implied-In-Fact Contract

BFB's arguments regarding the creation of an implied-in-fact contract are identical to those considered and rejected by the Court of Federal Claims in Folden v. United States, 56 Fed. Cl. 43 (2003). Before the trial court, the license applicants had argued that the FCC breached an implied-in-fact contract to award them cellular licenses by lottery. The Court of Federal Claims ruled that there was no mutuality of intent to contract where the lottery notices and FCC regulations in question did not indicate an intent to be contractually bound. Id. at 53-54. The trial court continued:

Plaintiffs use the pretext of contract review to seek redress from applicable FCC statutes and regulations . . . Courts should not give credence to plaintiffs' attempts to circumvent established agency and federal court procedures, particularly since not only was no contract formed, but contract was ever contemplated. Plaintiffs can offer the court no precedent to support their novel attempt to imply a contract under the facts presented.

Id. at 59.

Similarly here, BFB appears to be using its breach of contract claims to seek redress from the FCC's award of the Biltmore Forest license to Liberty. Indeed, other than summarily asserting its existence, BFB makes no effort to satisfy the elements necessary to establish an implied-in-fact contract. See Hanlin v. United

States, 316 F.3d 1325, 1328 (Fed. Cir. 2003) (implied-in-fact contract with Government requires proof of 1) mutuality of intent; 2) consideration; 3) unambiguous offer and acceptance; and 4) “actual authority” on part of Government representative to bind Government). Its ostensible contract challenge, then, appears to be little more than an attempt to circumvent the Communications Act’s expressly stated procedures for review of FCC licensing decisions, and should not be considered by this Court.

BFB’s own brief undermines its argument regarding the existence of a contract between itself and the FCC, as it repeatedly states that any obligations that could be deemed “contractual” are imposed only upon the winner of an FCC licensing auction. See, e.g., Applnt. Br. 8 (stating that at the “fall of the hammer,” the FCC demands “the high price from the winning bidder”) (emphasis supplied); id. at 14 (noting that the FCC “pursu[es] winning bidders relentlessly for the debt created by making the winning bid”) (emphasis supplied); id. at 14-15 (stating that the close of auction “imposes obligations on the FCC as well as the winning bidder”)(emphasis supplied). BFB, of course, was not the winning bidder on the Biltmore Forest license. Thus any obligations generally imposed upon the winning bidder at auction have no bearing on BFB’s alleged contractual claims against the FCC.

Even assuming its failed bid at auction did create a contract, BFB still would not have a compensable claim in the Court of Federal Claims under the Tucker Act. The Tucker Act “does not extent to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or a meeting of minds.” Kania v. United States, 650 F.2d 264, 268 (Ct. Cl. 1981).

Rather, Congress intended to waive sovereign immunity only as to those transactions in which the Government acts in a commercial capacity:

The Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchases and sale of foods, lands, and parties, individuals, or corporations also engage in themselves.

Id.; see also Cottrell v. United States, 42 Fed. Cl. 144, 150 (1998); Berry v. United States, 27 Fed. Cl. 96, 100 (1992).

The alleged contract to which BFB continually refers in its brief, arising out of its unsuccessful bid at auction, is not a commercial transaction for purposes of Tucker Act jurisdiction. The alleged contract provides the FCC with no goods or services, nor anything else from which the FCC could benefit. Thus BFB’s argument that Folden prevents the Court of Federal Claims from “assuming jurisdiction to adjudicate what would under every ordinary principle of law be a compensable claim,” Applnt. Br. 17, is baseless.

C. BFB Possesses No Compensable Property Right

As to BFB's argument that its unsuccessful bid for the Biltmore Forest license established a property right for which it may bring a Fifth Amendment Takings claim, that argument is wholly without merit. The Communications Act plainly states that a license award grants no property rights to its holder. See 47 U.S.C. § 301 (“[N]o such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”); see also FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) (“No person is to have anything in the nature of a property right as the result of the granting of a license.”); Airadigm Comm’n, Inc., 519 F.3d at 651; National Ass’n of Broadcasters v. FCC, 740 F.2d 1190, 1211 (D.C. Cir. 1984); Mobile Relay Associates v. FCC, 457 F.3d 1, 12 (D.D.C. 2006) (noting that “licenses . . . confer the right to use the [electromagnetic] spectrum for a duration expressly limited by statute subject to the [FCC’s] considerable regulatory power and authority. This right does not constitute a property interest protected by the Fifth Amendment”). BFB has identified no authority suggesting that its unsuccessful bid at auction vested it with any compensable property right. Its arguments regarding a “takings” by the FCC

as a result of the Biltmore Forest license award should be rejected.⁹

IV. The Trial Court Did Not Err In Stating That, Assuming Jurisdiction, BFB's Claims Were Barred By The Doctrine Of Collateral Estoppel

The trial court also stated that, assuming it possessed jurisdiction over BFB's lawsuit here, it was nonetheless barred by the doctrine of collateral estoppel because the District of Columbia Circuit had already decided on the merits those issues that serve as the basis for BFB's claims.¹⁰ Biltmore II, 80 Fed. Cl. at 334-36.

Pursuant to the doctrine of issue preclusion, also known as collateral

⁹ BFB's allegations that the FCC's award of the Biltmore Forest to Liberty constituted both a breach of contract and a takings in violation of the Fifth Amendment are incompatible. Assuming that BFB could establish a contract with the FCC, any rights that it might have would be compensable under a breach of contract claim, not a takings claim. See City Line Joint Venture v. United States, 503 F.3d 1319, 1323 (Fed. Cir. 2007) (“[W]e should not commingle takings compensation and contract damages.”); see also Plaintiffs In Winstar-Related Cases v. United States, 37 Fed. Cl. 174, 187 n.9 (1997), aff'd 133 F.3d 874 (Fed. Cir.), cert. denied, 525 U.S. 823 (1998) (where plaintiffs can establish a contractual basis for Government liability, they “are conceptually foreclosed from shifting the ground of analysis to the takings context”).

¹⁰ Because the trial court correctly determined that it lacked subject matter jurisdiction to consider BFB's claims, its assumption of jurisdiction for purposes of ruling upon the contested issues of law raised in the Government's motion for summary judgment is an exercise of hypothetical jurisdiction, which the Supreme Court has held to be improper. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101 (1998) (“Hypothetical jurisdiction produces nothing more than a hypothetical judgment - which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.”) (internal citations omitted). Nonetheless, because BFB challenges the trial court's statements made in assuming jurisdiction, we address its arguments in this brief.

estoppel, “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” Morgan v. Department of Energy, 424 F.3d 1271, 1274 (Fed. Cir. 2005) (citing Montana v. United States, 440 U.S. 147, 153 (1979)) (emphasis supplied); see also Bingaman v. Department of the Treasury, 127 F.3d 1431, 1436-37 (Fed. Cir. 1986).

Collateral estoppel “protects litigants from the burden of relitigating an identical issue and promotes judicial economy by preventing needless litigation.” Id. (citing Arkla, Inc. v. United States, 37 F.3d 621, 624 (Fed. Cir. 1994)). The doctrine applies where: “(i) the issue previously adjudicated is identical with that now presented, (ii) that issue was actually litigated in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action.” Id. at 1274-75 (citing Thomas v. General Services Administration, 794 F.2d 661, 664 (Fed. Cir. 1986)). Collateral estoppel “does not include any requirement that the claim (or cause of action) in the first and second suits be the same.” In re Jerre M. Freeman, 30 F.3d 1459, 1465 (Fed. Cir. 1994). “Rather, application of issue preclusion centers around whether an issue of law or fact has previously been litigated.” Id. (citation omitted). “The underlying rationale of the doctrine of

issue preclusion is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again.” Id.

BFB argues that collateral estoppel does not preclude its contract claims here because those claims “have not previously been raised or considered in any other forum,” and “[n]one of the factual issues relative [to the existence of a contract with the FCC] have been vetted or resolved, nor have any of the legal issues.” *Applnt. Br. 25.* Though styled as a breach of contract, BFB’s complaint, at bottom, challenges the FCC’s award of the Biltmore Forest license to Liberty. Because the relevant consideration in applying the doctrine of collateral estoppel is not whether the identified cause of action has previously been adjudicated, but whether the issues underlying that cause of action have been ruled upon, the doctrine applies to preclude BFB’s claims here.

BFB concedes that the FCC’s “failure to award the license to the highest qualified bidder” serves as the basis for its monetary claims. Id. at 8; see also SA 5, ¶11 (“One of the other prospective auction participants, [Liberty], failed to submit the required family media certification.”). BFB’s belief that it was the highest eligible bidder for the Biltmore Forest license, however, is based upon its argument that “Liberty Productions did not submit that [family certification] and therefore it was not [] eligible[.]” Id. at 15. But whether Liberty was an eligible

bidder based upon its failure to timely submit the requisite family certification was one of the issues that BFB raised before and decided by the District of Columbia Circuit in Biltmore I, 321 F.3d at 159 (“[BFB] argues that both the July 9 Notice and the Commission’s regulations require that Liberty’s application be dismissed for failure to file the required family certification.”); see also Biltmore II, 80 Fed. Cl. at 325 (“[BFB] argued to the D.C. Circuit, as it does here, that the family media certification was required and because it was not timely filed, Liberty’s license application should not have been granted. The difference between the cases is the remedy sought.”).

The District of Columbia Circuit determined that the FCC did not act unreasonably by allowing to Liberty to correct its application to include the required certification, and that therefore Liberty was an eligible bidder for the license. Biltmore I, 321 F.3d at 160-61. That determination of eligibility was essential to the District of Columbia Circuit’s ultimate affirmance of the FCC’s award of the Biltmore Forest license. Id. at 165. The issue of Liberty’s eligibility, then, meets each of the four requirements for preclusion under the doctrine of collateral estoppel: i) the issue is identical to that considered in Biltmore I; ii) the issue was actually litigated in Biltmore I; iii) resolution of the issue was an essential factor in the District of Columbia Circuit’s determination that the FCC

did not err in not disqualifying Liberty; and iv) BFB was afforded a full and fair opportunity to litigate the issue before the District of Columbia Circuit (despite its contentions to the contrary, discussed below). As such, BFB may not now relitigate the issue before the Court of Federal Claims, simply by bringing it under the guise of a breach of contract.

BFB further argues that the doctrine of collateral estoppel is inapplicable based upon its conclusory and unsupported arguments regarding the existence of a contract with the FCC.¹¹ See, e.g., AppInt. Br. 28 (arguing that the decision in Biltmore I was not determinative for purposes of collateral estoppel because “the question before the Court of Claims was . . . what were the terms of the contract [between BFB and the FCC]?”); id. (arguing that whereas the District of Columbia Circuit was required to give deference to the FCC’s determination regarding Liberty’s certification submission, the Court of Federal Claims owed no such

¹¹ BFB also argues that its alleged contract with the FCC is subject to a “different standard of review” than that applied by the District of Columbia Circuit in Biltmore I, which was required to defer to the FCC’s reasonable determination of its rules. AppInt. Br. 28. As the trial court explained, however, to the extent it could consider BFB’s claims, it would, at best, be as a bid protest, for which it would consider whether the FCC’s license award was arbitrary or capricious. Biltmore II, 80 Fed. Cl. at 333. Because the Biltmore I court ruled that the FCC’s licensing decision was neither arbitrary nor capricious, the trial court found that BFB’s claims had already been adjudicated under “the applicable standard.” Id. at 335.

deference to the FCC because “[w]hat we have here . . . is two equal parties to a contract”). As has already been established, however, BFB has no contract with the FCC arising out of its unsuccessful bid for the Biltmore Forest license, and thus its arguments opposing the application of collateral estoppel based upon such a contract are untenable.

BFB also argues that it could not “have had a ‘full and fair’ opportunity to litigate its contract claims against the FCC when the FCC was itself the primary adjudicator in the license proceedings” because the FCC has an “unavoidable bias [that] necessarily colors its ability to impartially adjudge the terms of any contract it is a party to.” Applnt. Br. 30. The requirement that a party had a “full and fair opportunity to litigate” is satisfied if there is no reason to “doubt the quality, extensiveness, or fairness of the procedure followed in the prior litigation.” In re Jerre M. Freeman, 30 F.3d at 1467 (internal citations omitted). Putting aside BFB’s erroneous assumptions regarding the existence of a contract, BFB’s suggestion that the FCC was “biased” when considering objections to its award of the Biltmore Forest license is baseless.

It is well-established that agency decisions are entitled to a presumption of regularity. See Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1338 (Fed. Cir. 2001) (citing Bowen v. Am. Hosp. Ass’n, 476 U.S.

610, 626-27). Absent a showing of record evidence suggesting that the decision was either arbitrary or capricious, that presumption should not be disturbed. See id. “The litigant challenging that presumption necessarily bears a heavy burden.” Id. Thus notwithstanding BFB’s assertion that “[t]he FCC is like everyone else: it prefers to get more money rather than less for the licenses it sells,” Applnt. Br. 30, BFB has presented no record evidence to suggest that the FCC’s decision not to disqualify Liberty was in any way improper. Nor has BFB provided any basis to “doubt the quality, extensiveness, or fairness of the procedure followed” prior to the District of Columbia Circuit’s ruling in Biltmore I. Absent such a showing, its contention that it did not have a fair opportunity to present its claims is simply without merit.

V. BFB Identifies No Error In The Trial Court’s Determination That, At Best, BFB Would Be Entitled To Only Its Bid Preparation Costs

Finally, BFB challenges the trial court’s determination that to the extent it possessed jurisdiction to entertain BFB’s claims, at best, BFB could recover its bid preparation costs for the Biltmore Forest auction.¹² See Biltmore II, 80 Fed. Cl. at

¹² In making this finding, the trial court impliedly rejected BFB’s argument regarding the possibility of an implied-in-fact contract between BFB and the FCC arising out of BFB’s unsuccessful bid on the Biltmore Forest license. The trial court did not, as BFB asserts, “accept that a contract was involved here[.]” Applnt. Br. 16 n.2.

33 1-32 (noting that BFB had “pled a garden variety bid protest” and therefore 28 U.S.C. § 1491(b)(1) “comprises the correct source for any jurisdiction which would exist to grant relief with respect to the claim pleaded”). Though the Government does not agree that BFB’s claims could entitle it to even bid preparation costs in the Court of Federal Claims, the trial court’s statement appears to be a logical extension of the indisputable fact that BFB had no contract with the United States arising out of BFB’s unsuccessful bid in the Biltmore Forest auction.

BFB identifies no error in the trial court’s statements, other than to summarily contend that “BFB is not seeking to obtain a contract with the United States; it already has one.” Applnt. Br. 31. BFB also restates its fundamental misunderstanding of the FCC licensing process, stating that its contract with the FCC is “for the sale of a license.” Id. As we have established above, a radio licensing auction is not a commercial transaction and the conclusion of the auction does not result in that license’s “sale.” Therefore, the notion that BFB “already has” a contract arising out of its unsuccessful bid is untenable.

BFB cites to a number of cases to support its argument that Government auctions are contractual, and therefore its claims were appropriately before the Court of Federal Claims pursuant to § 1491(a)(1). See Applnt. Br. 31-32 (citing

Barclay v. United States, 333 F.2d 847 (Ct. Cl. 1964); Everett Plywood and Door Corp. v. United States, 419 F.2d 425 (Ct. Cl. 1969); Rash v. United States, 360 F.2d 940 (Ct. Cl. 1966)). To the extent BFB's cited cases have any relevance here, they involve plaintiffs who were winning bidders at Government auctions and contracts that were created upon the auctions' completion. Regardless, none of those cases involved an FCC licensing decision or §402(b) of the Communications Act. Therefore none supports BFB's arguments regarding the existence of a contract with the FCC here. BFB has identified no error in the trial court's determination that to the extent the its lawsuit was not barred, BFB would be entitled only to the cost of preparing its bid for the Biltmore Forest license auction.

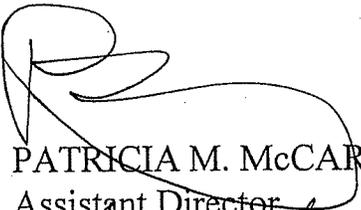
CONCLUSION

For these reasons, the United States respectfully requests that this Court affirm the judgment below.

Respectfully Submitted,

GREGORY G. KATSAS
Assistant Attorney General

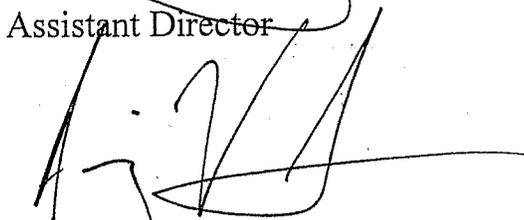
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August 6, 2008

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SUPPLEMENTAL APPENDIX

INDEX TO RULE 30(f) APPENDIX

Document

Page

Biltmore Forest Broadcasting FM, Inc.'s Complaint in the
United States Court of Federal Claims,
Dated May 21, 20071

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED MAY 24 2007

BILTMORE FOREST BROADCASTING FM, INC.)

v.)

THE UNITED STATES)

No. 07-316 C

COMPLAINT

May 21, 2007

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BILTMORE FOREST BROADCASTING FM, INC.)

v.)

THE UNITED STATES)

No. _____

COMPLAINT

Jurisdiction

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 2071(a), (c); 2503(b); and 2521(1). The statute that mandates the payment of money for acts or omissions alleged herein is 28 U.S.C. § 1491(a)(1).

Plaintiff acknowledges that this court has ruled in *Folden v. United States*, 56 Fed. Cl. 43 (2003), *aff'd*, 379 F. 3d 1344 (Fed. Cir. 2004), *cert. den.* 545 U.S. 1127, 125 S. Ct. 2935, 162 L. Ed. 2d 865 (2005), that certain claims in connection with licenses issued by the Federal Communications Commission ("FCC") are not subject to the jurisdiction of this court but are instead subject to the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit. Plaintiff duly pursued an appeal of the FCC's licensing decision with respect to the license at issue with the D.C. Circuit and later the Supreme Court. *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F. 3d 155 (DC Cir. 2003), *cert. den.* 540 U.S. 981, 124 S. Ct. 463, 157 L. Ed. 2d 371 (2003). Those proceedings are now final and Plaintiff could not and does not seek an award from this Court of the license at issue there. Plaintiff's complaint before this Court is limited to the FCC's breach of its contract with Plaintiff and the attendant monetary damages, a matter over which the D.C. Circuit has no jurisdiction, for which the D.C. Circuit could afford no remedy, and for which the standard of review is entirely different. Because the

D.C. Circuit Court could not consider a contract claim or award monetary damages, there is no other court but this one to which Plaintiff can turn for relief. Thus, either *Folden* is distinguishable from the instant case on its facts, or Plaintiff will respectfully seek *en banc* review of *Folden* by the United States Court of Appeals for the Federal Circuit. The alternative would be to leave a jurisdictional vacuum where a federal agency can enter into and breach contracts involving licenses with no judicial recourse or remedy by the injured party.

Facts

1. Biltmore Forest Broadcasting FM, Inc. ("BFBFM"), a North Carolina corporation, was an applicant before the Federal Communications Commission ("FCC" or "Commission") for a license to own and operate an FM broadcast radio station in Biltmore Forest, NC. Its application was mutually exclusive with several other applicants.
2. The FCC decided during the pendency of the applications that it would issue the Biltmore Forest license by a process of "competitive bidding" or auction. This method of issuing broadcast licenses when there are multiple applicants had been authorized by Congress in 1997.
3. The FCC conducts license auctions pursuant to a hierarchy of rules that go from general rules applicable to all auctions to specific rules applicable to individual auctions. The general rules that apply to all auctions are found in 47 C.F.R. § 2101, *et seq.*, with rules specific to particular radio services found in the rules for those services. The FCC's broadcast auction rules (pertinent here) are set forth in 47 C.F.R. § 73.5001, *et seq.* In addition to those rules, the FCC issues public notices prior to each auction which set out the specific requirements for participation in that particular auction (*e.g.*, the amount of upfront payments, bidding rules, the deadline for filing applications; permissible amendments to the applications, and the elements

which must be included in applications.) The rule applicable to broadcast auctions expressly makes compliance with the requirements set forth in such pre-auction public notices mandatory:

To participate in broadcast service or ITFS auctions, all applicants *must* timely submit short-form applications (FCC Form 175) along with all required certifications, information and exhibits pursuant to the provisions of Section 1.2105(a) and any Commission public notices.

47 CFR 73.5002(b).

Accordingly, the terms establishing eligibility to participate in this auction were, by operation of the FCC's regulations, found in the *Public Notice* which the FCC issued for this auction.

4. In that *Public Notice* the FCC specified the essential information, exhibits and certifications which were required in order to participate in the auction at issue here. (See Attachment A to this Complaint). The FCC regulations (47 C.F.R. § 1.2105(a)(2)(B)) required applicants to supply seven different certifications which were automatically included in the electronically printed form submitted by prospective auction bidders.

5. In addition, for this auction only, the FCC required the submission of a special certification which was designed to verify whether prospective bidders were in compliance with the FCC's policy attributing to applicants the media interests held by family members under certain circumstances.

6. The *Public Notice* stated in boldfaced type:

Accordingly, whether or not a New Entrant Bidding Credit is being sought, all applicants must provide the information set forth in this section. The following information is required:

Bidders or attributable interest holders in bidders must certify under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members. See Policy Statement, Clarification of the Commission's Policies Regarding Spousal Attribution, 7 F.C.C. Rcd. 1920 (1992).

(Bold face and italics in original.)

7. This requirement was reiterated elsewhere in the *Public Notice*: "Bidders must certify in (in Exhibit A) compliance with the Commission's policies relating to media interests of immediate family members." *Id.* p.10. The *Public Notice* thus explicitly made the submission of this family media certification mandatory.

8. The *Public Notice* also established the consequence of failure to supply this required information by the specified deadline:

Failure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction.

(Emph. in original.) *Id.* at p. 2.

9. When a government agency issues rights by auction, the terms are binding alike upon the United States and the bidders. The stated terms set out in the Public Notice and the pertinent rules established an express or implied-in-fact contract between the bidders and the FCC governing the acquisition of the license.

10. BFBFM submitted the requisite upfront payment and all certifications necessary to participate in the auction.

11. One of the other prospective auction participants, Liberty Productions, L.P. ("Liberty"), failed to submit the required family media certification. The original deadline for filing applications was August 20, 1999, and the "resubmission date" - the deadline for filing any corrective amendments - was September 14, 1999. Liberty did not submit the certification by that date or any date until long after the auction was over.

12. The FCC's rules precluded any pre-auction challenges to other applications, so no other bidder could raise this issue prior to the conclusion of the auction. The FCC appeared to be unaware that the requisite certification had not been supplied.

13. Despite its failure to submit the qualifying certification, Liberty proceeded to participate in the auction, which was conducted electronically. By the last stages of the auction, the two remaining bidders were BFBFM and Liberty. Because BFBFM had recognized that Liberty was ineligible to participate under the stated terms of the auction, it stopped bidding at that point. By continuing to bid against Liberty, BFBFM would have been bidding up the price against a competing bidder who was ineligible to participate.

14. Liberty placed the highest bid and was tentatively declared the winner on the basis of its last high bid.

15. Within the prescribed time permitted by the FCC, BFBFM and the other losing bidders challenged Liberty's qualifications on various grounds, including the failure to submit the required certification and therefore Liberty either should not have been permitted to participate in the auction at all or should have been determined to be a disqualified bidder.

16. After considering the challenges, the FCC ruled on May 25, 2001, that the requirements set forth in the auction terms were not requirements but "general admonishments." The FCC permitted Liberty to amend its Form 175 post auction and confirmed Liberty as the auction winner. (Attachment B to this Complaint.)

17. Since BFBFM was the highest bidder eligible to participate under the terms of the auction contract, the FCC was obligated to issue BFBFM the license (assuming it was otherwise qualified). The FCC's failure to comply with the stated terms of the auction was a breach of the auction contract, be it express or implied-in-fact. This unfounded position resulted in the plaintiff being wrongly denied a valuable license despite following the procedures scrupulously.

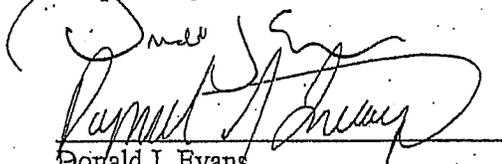
18. BFBFM recognizes the FCC's right as a regulatory authority to issue the license to another party despite its breach of the contract with the other bidders. BFBFM does not seek

to have the license rescinded or reissued or amended in any way but instead elects to pursue its remedy for damages caused by the FCC's breach.

Remedy Requested

WHEREFORE, Plaintiff, prays this Court to find the FCC breached its contract with BFBFM and as a result, BFBFM has suffered monetary damages equal to Eight Million Dollars (\$8,000,000) (the difference between the current value of the license and the price BFBFM would have paid as the high bidder against all other qualified bidders) or such other amount as the evidence may show, and for such other relief as the Court may deem appropriate.

Respectfully submitted,



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May 21, 2007

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 6, 2008, I caused to be mailed (first class, postage prepaid) two copies of the "BRIEF AND RULE 30(f) APPENDIX OF DEFENDANT-APPELLEE, THE UNITED STATES" as follows:

Donald J. Evans, Esq.
Fletcher, Heald & Hildreth PLC
1300 North 17th Street, 11th Floor
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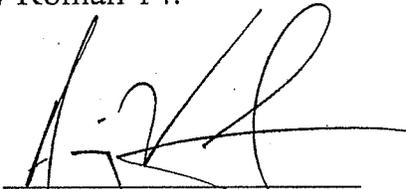
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

The brief contains 9,179 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

The brief has been prepared in a proportionally spaced typeface using WordPerfect12 in Times New Roman 14.



Anuj Vohra
August 6, 2008

