

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Hill & Welch and
Myers Keller Communications Law Group
Request for Attorney Fees in Connection with the
218-219 MHz Service, Regional Narrowband PCS
Service, and Nationwide Narrowband PCS
Service

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 2003

Released: April 1, 2003

By the Commission:

I. INTRODUCTION

1. In this Order, we deny an Application for Review filed by Hill & Welch and Myers Keller Communications Law Group. The Petitioners challenge a decision by the Wireless Telecommunications Bureau ("Bureau") affirming the Bureau's denial of their request for a declaration of a common fund. Specifically, Petitioners request that a determination be made that their law firms are entitled to a common fund award in connection with the 218-219 MHz service, the regional narrowband Personal Communications Service ("PCS") service, and the nationwide narrowband PCS service. A reply comment opposing this Application for Review was filed on behalf of two entities.

1 Application for Review, filed by Hill & Welch and Myers Keller Communications Law Group ("Petitioners") on June 1, 2001 ("Application for Review").

2 Hill & Welch and Myers Keller Communications Law Group, Request for Attorney Fees in Connection with 218-219 MHz Service, Regional Narrowband PCS Service, and Nationwide Narrowband PCS Service, Order on Reconsideration, DA 01-1161, 16 FCC Rcd. 9485 (WTB 2001) ("Reconsideration Order"); see also Hill & Welch and Myers Keller Communications Law Group Request for Attorney Fees in Connection with 218-219 MHz Service Proceeding and Regional Narrowband PCS Service, Order, 15 FCC Rcd. 20432 (WTB 2000) ("Common Fund Order").

3 Application for Review at 21-23; Emergency Motion for Expedited Consideration and Petition for an Order to Declare a Common Fund filed by Hill & Welch and Myers Keller Communications Law Group on March 8, 2000 ("IVDS Petition"); and Petition for an Order to Declare a Common Fund filed by Hill & Welch and Myers Keller Communications Law Group on March 8, 2000 ("Regional Narrowband PCS Petition").

4 On June 18, 2001, the Commission received an opposition comment to the Application for Review filed jointly by IVDS Enterprises Joint Venture and TV Active, LLC ("Joint Opposition").

II. BACKGROUND

2. On September 10, 1999, the Commission granted a retroactive twenty-five percent bidding credit in the 218-219 MHz Service to a limited set of entities.⁵ The Commission has not granted retroactive bidding credits in any other service. The Bureau, however, has recently dismissed two requests for retroactive bidding credits for licenses won in the nationwide narrowband PCS Service (“Auction No. 1”) and the regional narrowband PCS service (“Auction No. 3”).⁶

3. On March 8, 2000, Petitioners filed two petitions that requested a determination that they are entitled to a common fund award in connection with their participation in the 218-219 MHz proceeding. Specifically, Petitioners argued that their representation of two clients, Graceba Total Communications, Inc. (“Graceba”) and the Ad Hoc IVDS Coalition, caused the Commission to authorize retroactive bidding credits in the 218-219 MHz Service.⁷ Additionally, Petitioners requested a determination that they are entitled to a common fund award in connection with their speculation that similar retroactive bidding credits will be adopted in the regional narrowband PCS service.⁸ The Petitioners sought twenty-five percent of the refunds generated by the retroactive bidding credit granted in the *218-219 MHz Order* and thirty percent of the refunds Petitioners anticipate will be granted in connection with the regional narrowband PCS auction.⁹ Petitioners based their claims upon the common fund doctrine which is an equitable doctrine that allows a court to establish a “common fund” to compensate a litigant or a lawyer who recovers a monetary amount for the benefit of individuals other than himself or his client.¹⁰ Petitioners further argued that the Commission possessed sufficient equitable authority to grant a common

⁵ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum and Opinion and Order*, 15 FCC Rcd 1497, 1533 ¶¶61 (1999) (“*218-219 MHz Order*”)(The Commission applied a twenty-five percent bidding credit to the accounts of every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications at the time of that auction.). The 218-219 MHz *Third Order on Reconsideration* provides a detailed factual history of the orders in this docket. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 17 FCC Rcd 8520, 8521-8526, ¶¶ 2-13 (2002)(“*Third Order on Reconsideration*”).

⁶ Weblink Wireless, Inc. Request for Remedial Bidding Credit and Refund, *Order*, 16 FCC Rcd 9420 (2001)(dismissing a request for retroactive bidding credit in the nationwide narrowband PCS Service and the regional narrowband PCS Service), *aff'd.*, *Memorandum Opinion and Order*, DA 02-3377 (WTB Dec. 6, 2002); Instapage Network Ltd. Request for a Remedial Bidding Credit, Letter from Kathleen O'Brien Ham, Deputy Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., 17 FCC Rcd 13289 (2002) (dismissing a request for a retroactive bidding credit for a license won in the regional narrowband PCS service), *recon pending*.

⁷ IVDS Petition at 7; and Regional Narrowband PCS Petition at 7.

⁸ See IVDS Petition and Regional Narrowband PCS Petition.

⁹ IVDS Petition at 10, and Regional Narrowband PCS Petition at 9.

¹⁰ In the *Common Fund Order*, the Bureau provided a discussion of the common fund doctrine. *Common Fund Order*, 15 FCC Rcd. at 20434, ¶6 (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Trustees v. Greenough*, 105 U.S. 527 (1882)).

fund award.¹¹ Thus, Petitioners concluded they were entitled to a common fund award.¹²

4. On October 26, 2000, the Bureau issued an order which denied the two petitions to declare a common fund. In its order, the Bureau explained that to establish entitlement to a common fund, a party must demonstrate the following elements: (1) the claim must involve litigation before a court with “judicial equity power” to impose liability on a fund; (2) the claim must identify a fund over which the court has jurisdiction; and (3) there must be adequate representation of all parties in interest.¹³ In denying the petition, the Bureau determined that the Commission neither possessed the general equitable authority necessary to establish a common fund, nor the requisite statutory authority to grant a common fund, and thus, the first element of the common fund doctrine was not met.¹⁴ With respect to the second and third elements of the common fund doctrine, the Bureau noted that the Petitioners had failed to identify a fund over which a court has jurisdiction and that the Petitioners failed to demonstrate that all parties in interest were adequately represented.¹⁵

5. On November 21, 2000, Petitioners sought reconsideration of the Bureau’s denial of their requests for declaration of a common fund.¹⁶ In seeking reconsideration, the Petitioners abandoned their prior arguments regarding the Commission’s authority to establish a common fund and instead relied upon the Commission’s general authority under Section 4(i) of the Communications Act, which allows it to take action necessary in the execution of its functions not inconsistent with the Communications Act, and the Commission’s general authority to grant waivers and refunds.¹⁷ Additionally, Petitioners requested for the first time a common fund recovery from the refunds they anticipate would be granted in the nationwide narrowband PCS service.¹⁸ The Commission received two oppositions to the Petition for Reconsideration.¹⁹

¹¹ IVDS Petition at 11 and Regional Narrowband PCS Petition at 12 (relying upon the Equal Access to Justice Act, 28 U.S.C. § 2412; § 5 U.S.C. 504, and the Commission’s exclusive jurisdiction to grant licenses and place conditions on their use.)

¹² IVDS Petition at 11; and Regional Narrowband PCS Petition at 13.

¹³ *Common Fund Order*, 15 FCC Rcd. at 2435-36, ¶ 7; *Knight v. U.S.*, 982 F.2d 1573, 1581 (1993).

¹⁴ *Common Fund Order*, 15 FCC Rcd at 20437-8 ¶8 (citing William E. Zimsky, *Declaratory Ruling*, 9 FCC Rcd. 3239, 3241, ¶20 (1994)(“*Zimsky*”). The Commission in *Zimsky* held that a common fund award can arise only in the context of litigation before an appropriate court exercising its equitable powers. *Zimsky*, 9 FCC Rcd at 3239, 3241, ¶20 (citing *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir.1975)).

¹⁵ *Id.* at 20435-39, ¶¶ 7-15.

¹⁶ Petition for Reconsideration, filed by Hill & Welch and Myers Keller Communications Law Group on November 21, 2000 at 1(“Reconsideration Petition”).

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 8.

¹⁹ On December 6, 2000, the Commission received two oppositions to the Petition for Reconsideration from: (1) IVDS Enterprises Joint Venture and Instapage Network, Ltd. on Dec. 6, 2000 (“IVDS/Instapage Opposition”); and (2) In-Sync Interactive Corporation on Dec. 6, 2000 (“In-Sync Opposition”). The Petitioners filed a Reply. Reply to Oppositions to Petition for Reconsideration, filed by Hill & Welch and Myers Keller Communications Law Group on December 18, 2000.

6. On May 4, 2001, the Bureau issued the *Order on Reconsideration*, which denied the Petition.²⁰ In that order, the Bureau noted that the Petitioners' reliance upon Section 154(i) was misplaced because absent express statutory authority, the Commission has no authority to order reimbursement of legal expenses.²¹ In addition, the Bureau found Petitioners' reliance upon the Commission's authority to grant waivers and refunds misplaced and not indicative of the existence of equitable authority to grant a common fund award.²² The Bureau reasoned that the Commission's ability to grant waivers²³ and refunds²⁴ implicates the Commission's public interest authority.²⁵ In contrast, the Bureau noted that the payment of attorney fees out of refunds generated by the Commission does not involve the public interest but implicates the rights of private parties, *i.e.*, the rights of the recipients of the refund versus the rights of Petitioners who seek a portion of each refund generated.²⁶ Accordingly, the Bureau affirmed the *Common Fund Order*²⁷ based upon a lack of jurisdiction to grant a common fund award. The Bureau also reiterated that Petitioners had failed to establish the second and third elements of a common fund claim.²⁸ In its Application for Review, Petitioners argue that the Bureau's decision relies upon precedent that is inapplicable or should be overturned.²⁹

²⁰ *Reconsideration Order*, 16 FCC Rcd. 9485.

²¹ *Reconsideration Order*, 16 FCC Rcd. at 9490, ¶9 (citing *Zimsky*, 9 FCC Rcd. at 3239-41; *Common Fund Order*, 15 FCC Rcd. at 20437, ¶10).

²² *Reconsideration Order*, 16 FCC Rcd. at 9490, ¶9.

²³ 47 C.F.R. § 1.3 (Providing the Commission with the authority to grant waivers "if good cause therefore is shown."); 47 C.F.R. § 1.925 ("The Commission may grant a waiver request if: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest or, (ii) in view of the unique circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.") The waiver process allows the Commission to "maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility." *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). In deciding whether or not to grant specific waiver requests, we must "take into account considerations of hardship, equity, or more effective implementation of overall policy" in our broader quest for regulation in the "public interest." *Id.*

²⁴ The Commission noted that refunds were granted in *Zimsky* because the call sign filing requirement was an "unnecessary burden on IVDS applicants." Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services and Reinstatement of Dismissed Interactive Video Data Services License Applications, *Second Memorandum Opinion and Order*, 8 FCC Rcd. 2787, 2788, ¶ 10 (1993). In addition, administrative agencies have broad discretion in fashioning remedies especially when an agency is responding to judicial remand. *E.g.*, *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("we observe that the breadth of agency discretion is, if anything, at zenith when . . . fashioning . . . remedies").

²⁵ *See supra*, n. 25-26.

²⁶ *Reconsideration Order*, 16 FCC Rcd. at 9490, ¶9.

²⁷ *Common Fund Order*, 15 FCC Rcd. 20432.

²⁸ *Common Fund Order*, 15 FCC Rcd. at 20436, ¶7 (citing *Knight v. U.S.*, 982 F.2d 1573, 1581 (1993)).

²⁹ Application for Review at 14-15 (citing 47 C.F.R. § 1.115(b)(2)).

III. DISCUSSION

7. In their Application for Review, Petitioners proffer the same arguments that they advanced in prior pleadings before the Bureau with one exception that we will address below.³⁰ The Bureau thoroughly addressed each of these arguments in its previous orders and correctly applied our precedent. We find nothing in the arguments that Petitioners have made in their Application for Review that would lead us to change the Bureau's decision or modify our existing precedent.³¹ Contrary to Petitioners' assertions, Commission precedent and case law amply demonstrate that a common fund award can arise only in the context of litigation before an appropriate court exercising its equitable powers.³² As previously noted in both the *Common Fund Order* and *Reconsideration Order*, it is well settled that the Commission, as an administrative agency, lacks the equitable jurisdiction to establish a common fund award.³³

8. With respect to their new argument, Petitioners take issue with the Bureau's use of *Graceba Total Communications, Inc. v. FCC*, in which the Court of Appeals for the D.C. Circuit denied Graceba's claim for a common fund award in the 218-219 MHz Service.³⁴ In the *Reconsideration Order*, the Bureau stated that Petitioners' claim was further weakened by the fact that Graceba, the party on whose behalf Petitioners' efforts were expended, could not establish entitlement to a common fund.³⁵ The Bureau went on to note, in a footnote, that in light of the appellate court's holding in *Graceba*, Petitioners' request as it relates to the 218-219 MHz service "may be barred" by claim preclusion.³⁶ In their Application for Review, Petitioners challenge the Bureau's statement, arguing that *Graceba* is inapplicable because Petitioners were not given a "a full and fair opportunity to litigate the [common fund] claims" in the 218-219 MHz service.³⁷ They further state that because the *Reconsideration Order* only stated that their claim "may be barred" by claim preclusion, the Bureau order did not affirmatively rule on the issue. Accordingly, Petitioners request that their Application for Review be construed as a Petition for Reconsideration of the Bureau order on this point.³⁸ Because the Bureau's statement

³⁰ Application for Review at 20.

³¹ 47 C.F.R. § 1.115.

³² *Zimsky*, 9 FCC Rcd. at 3241, ¶ 20 (citing *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C.Cir. 1975)); see also *Common Fund Order* at 15 FCC Rcd at 20436, ¶ 9.

³³ *Common Fund Order* at 15 FCC Rcd at 20436, ¶ 9; *Reconsideration Order*, 16 FCC Rcd. at 9489-90, ¶ 8.

³⁴ *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. 1997); *Graceba Total Communications, Inc. v. FCC*, 2000 WL 1838282 (D.C.) (unpublished opinion).

³⁵ *Reconsideration Order*, 16 FCC Rcd. 9485, 9491, ¶ 13.

³⁶ *Reconsideration Order* at n 73.

³⁷ Application for Review at 20.

³⁸ Application for Review at Footnote 35.

regarding claim preclusion amounts to dicta, we find it unnecessary to address it here.³⁹

9. Accordingly, we find that the Bureau correctly concluded that in the absence of clear statutory authority granted by Congress, the Commission, as an administrative agency, lacks the authority to order reimbursement of legal expenses under the common fund doctrine.⁴⁰ We, therefore, deny Petitioners' Application for Review and affirm the Bureau's order for the reasons stated therein.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(g) of the Commission's rules, 47 U.S.C. § 1.115(g), the Application for Review filed by Hill & Welch and Myers Keller Communications Law Group in the above-captioned proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁹ Additionally, we note that Petitioners failed to file a Petition for Reconsideration with the Bureau on this point, and their attempt to marry two separate pleadings in one document here is inappropriate. 47 C.F.R. § 1.44 (Requests requiring action by the Commission shall not be combined in a pleading with requests for action by an administrative law judge or by any person or persons acting pursuant to delegated authority). Thus, because the Bureau was not afforded an opportunity to address this point, consideration of this point here would not be appropriate. 47 C.F.R. § 1.115(c).

⁴⁰ *Reconsideration Order* at ¶ 9; *Common Fund Order*, 15 FCC Rcd. 20437; *see also* Joint Opposition at 2-3.