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	)

SECOND MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2007 **Released: March 9, 2007**

By the Commission:

I. INTRODUCTION

1. In this Second Memorandum Opinion and Order, we dismiss in part and otherwise deny a Petition for Reconsideration filed by the law firm of Hill & Welch.[1] Hill & Welch seeks reconsideration of the Commission's denial of an Application for Review that it filed jointly with Myers Lazrus Technology Law Group.[2] In that Application for Review, the two law firms sought review of an order of the Wireless Telecommunications Bureau ("Bureau") that denied their request for a determination that they were entitled to attorney fees based on the common fund doctrine, which, when applicable, allows attorneys whose work product benefits a class of persons to claim a portion of the funds produced by the attorneys' efforts as compensation for services.[3] In denying the Application for Review, the Commission concluded that, as an administrative agency, it lacks the authority to establish a common fund, a conclusion that the Bureau had already reached twice.[4] In its Petition for Reconsideration, Hill & Welch requests a common fund award for the fourth time. For the reasons discussed below, we dismiss those parts of the Petition for Reconsideration that are repetitious or do not rely on new facts or changed

[1] Hill & Welch, Petition for Reconsideration, filed on May 1, 2003 ("Petition for Reconsideration").

[2] 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*, 18 FCC Rcd 6909 (2003) ("*MO&O*"). The Application for Review was filed under the names Hill & Welch and Myers Lazrus Technology Law Group. Hill & Welch and Myers Lazrus Technology Law Group, Application for Review, filed June 1, 2001 ("Application for Review"). Earlier pleadings in this case were filed under the names Hill & Welch and Myers Keller Communications Law Group.

[3] 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, *Order on Reconsideration*, 16 FCC Rcd 9485 (2001) *("Bureau Reconsideration Order")*.

[4] The *Bureau Reconsideration Order* denied the petitioning law firms' request for reconsideration of the Bureau's initial denial of a request to declare a common fund in Hill and 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 (2000) ("*Common Fund Order*").

circumstances. We deny the remaining portions of the Petition for Reconsideration, in which Hill & Welch claims that the Commission committed errors in the *MO&O*. We also affirm that the Commission is without authority to grant a common fund award.

II. BACKGROUND

2. In the Commission's auction of licenses in the 218-219 MHz Service (formerly the Interactive Video Data Service ("IVDS")) that was held in 1994 (Auction No. 2), a 25 percent bidding credit was made available to minority- and women-owned businesses.[5] Following the auction, the constitutionality of race- and gender-based bidding credits was called into question. In 1995, the Supreme Court held in *Adarand Constructors, Inc. v. Peña* that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.[6] The following year, in *United States v. Virginia*, the Supreme Court required parties who seek to defend gender-based government action to demonstrate an "exceedingly persuasive justification" for that action.[7] In 1996, in the wake of these decisions, the Commission determined that "the present record is insufficient to support either our race-based IVDS auction rules under the strict scrutiny standard or our gender-based rules under the 'exceedingly persuasive justification' standard of intermediate scrutiny."[8] The Commission revised Section 95.816(d) of its rules to make it race- and gender-neutral and to make bidding credits available to all qualified small businesses in the 218-219 MHz Service.[9] On September 10, 1999, the Commission eliminated the 25 percent bidding credit that had been made available to minority- and women-owned businesses in Auction No. 2 and granted a retroactive 25 percent bidding credit to all winning bidders that had qualified as small businesses in the auction.[10]

3. On March 8, 2000, Hill & Welch and Myers Keller Communications Law Group (collectively, "Petitioners") requested a determination that they were entitled to a common fund award in connection with their participation in the 218-219 MHz proceeding.[11] 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. The Petitioners sought 25 percent of the refunds generated by the retroactive bidding credit granted in the *218-219 MHz Order* and 30 percent of the refunds Petitioners anticipated would be granted in connection with the regional narrowband PCS auction.[12] Petitioners based their claims upon the

[5] 47 C.F.R. § 95.816(d)(1) (1994).

[6] 515 U.S. 200 (1995).

[7] 518 U.S. 515 (1996).

[8] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Tenth Report and Order*, 11 FCC Rcd 19974, 19976 ¶ 3 (1996). The Commission did not find that the auction program was unconstitutional, but rather that the record was insufficient to meet the relevant evidentiary standards.

[9] *Id.* at 19976, 19984 ¶¶ 3, 18.

[10] Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1533-34 ¶¶ 60-61 (1999) ("*218-219 MHz Order*").

[11] Hill & Welch and Myers Keller Communications Law Group, Emergency Motion for Expedited Consideration and Petition for an Order to Declare a Common Fund, filed March 8, 2000. On the same date Petitioners also filed a Petition for an Order to Declare a Common Fund, seeking a common fund award with respect to regional narrowband Personal Communications Services ("PCS").

[12] *See Common Fund Order,* 15 FCC Rcd at 20434-35 ¶ 4. Graceba challenged the constitutionality of the race- and gender-based bidding credits made available in Auction No. 2, and the U.S. Court of Appeals for the D.C. (continued….)

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.[13]

4. On October 26, 2000, the Bureau issued the *Common Fund Order*, which denied the two petitions to declare a common fund.[14] The Bureau first explained that, to establish entitlement to a common fund, a party must demonstrate all of 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.[15] The Bureau then concluded that Petitioners had failed to establish these elements.[16] The Bureau concluded that the Commission possessed neither the general equitable authority nor the statutory authority necessary to establish a common fund.[17] The Bureau also determined that Petitioners had failed to identify a fund over which a court has jurisdiction, noting that the Commission does not possess the broad jurisdictional authority of a court and that, although it has the authority to return funds to eligible entities, it does not follow that the Commission also possesses the authority to adjudicate claims of third parties to those funds.[18] Finally, the Bureau concluded that Petitioners had failed to demonstrate that all parties in interest were adequately represented, finding that there was no evidence to indicate that Petitioners had acted other than for their own clients.[19]

5. On November 21, 2000, Petitioners sought reconsideration of the Bureau's denial of their requests for declaration of a common fund.[20] On May 4, 2001, the Bureau denied the November 2000 Petition for Reconsideration.[21] In its order, the Bureau reiterated its holding in the *Common Fund Order*

(Continued from previous page)
Circuit remanded the constitutional claim for further consideration, in *Graceba Total Communications, Inc. v. FCC,* 115 F.3d 1038 (D.C. Cir. 1997). As the Bureau has noted, the chronology of events may suggest a causal relationship between the Commission's actions and the Petitioners' litigation position, but the retroactive bidding credits granted in the *218-219 MHz Order* were not meant as a remedy for any alleged constitutional injury and instead were granted to resolve a complex set of regulatory issues. *See Bureau Reconsideration Order,* 16 FCC Rcd 9492-93 ¶ 13.

[13] It is the general American rule that attorney fees are not ordinarily recoverable as costs, but there are exceptions to this rule, including the common fund doctrine. *See 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)).

[14] *See supra* notes 4, 11.

[15] *Common Fund Order*, 15 FCC Rcd at 20435-36 ¶ 7 (citing *Knight v. U.S.,* 982 F.2d 1573, 1582 (Fed. Cir. 1993)).

[16] *Common Fund Order*, 15 FCC Rcd at 2435-36 ¶ 7.

[17] *Id.* at 20436-38 ¶¶ 8-11 (citing *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975), and William E. Zimsky, *Declaratory Ruling*, 9 FCC Rcd 3239, 3241 ¶ 20 (1994) ("*Zimsky"*)).

[18] *Common Fund Order*, 15 FCC Rcd at 20438 ¶ 12 (citing *Knight,* 982 F.2d at 1580 (cited in *Zimsky,* 9 FCC Rcd at 3241 ¶ 24)).

[19] *Common Fund Order*, 15 FCC Rcd at 20438-39 ¶ 13.

[20] Hill & Welch and Myers Keller Communications Law Group, Petition for Reconsideration, filed November 21, 2000 ("November 2000 Petition for Reconsideration"). Petitioners also requested for the first time a common fund award from the refunds they anticipated would be granted in connection with Auction No. 1, an auction of nationwide narrowband PCS licenses. *Id.* at 8.

[21] *See supra* note 3.

that the Commission lacks the authority to grant a common fund award.[22] The Bureau also reiterated that Petitioners had failed to establish the second and third elements of a common fund claim.[23]

6. On June 1, 2001, Petitioners filed their Application for Review challenging the *Bureau Reconsideration Order*.[24] On March 27, 2003, the Commission issued the *MO&O*, which denied Petitioners' Application for Review.[25] Finding that the Bureau had thoroughly addressed each of Petitioners' arguments and correctly applied Commission precedent, the Commission found nothing in the Application for Review that would lead it to change the Bureau's decision or modify existing Commission precedent.[26] Thus, citing both of the Bureau's earlier orders, the Commission concluded that, 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. 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."[27] Hill & Welch filed its Petition for Reconsideration with the Commission on May 1, 2003.

III. DISCUSSION

7. Reconsideration of a ruling that denies an application for review is appropriate only when the petition for reconsideration either demonstrates a material error in the Commission's ruling, or relies on (1) facts that relate to events that have occurred or circumstances that have changed since the last opportunity to present such matters or (2) facts unknown to the petitioner until after the last opportunity to present such matters that could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.[28] A petition that merely repeats arguments previously considered and rejected will be denied or dismissed as repetitious.[29] As explained below, we find that Hill & Welch's Petition for Reconsideration fails to demonstrate any material errors in the *MO&O* or the existence of any new facts or changed circumstances since the filing of the Application for Review. Moreover, much of the petition merely reiterates arguments that have previously been considered and rejected by both the Bureau and the Commission without presenting any legitimate justification for this repetition.

8. Hill & Welch devotes much of its petition to the reiteration of its earlier argument that the

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[22] *Bureau Reconsideration Order,*16 FCC Rcd at 9485, 9493 ¶¶ 1, 14.

[23] *Id*.

[24] *See supra* note 2.

[25] *See supra* note 2.

[26] *MO&O,* 18 FCC Rcd at 6913 ¶ 7.

[27] *Id.* (citing *Zimsky*, 9 FCC Rcd at 3241 ¶ 20 (citing *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975)); *Common Fund Order,* 15 FCC Rcd at 20436 ¶ 9; *Bureau Reconsideration Order,* 16 FCC Rcd at 9489-90 ¶ 8).

[28] *See, e.g.,* Minority Television Project, Inc., *Memorandum Opinion and Order,* 20 FCC Rcd 16923, 16925 ¶ 5 (2005) (citing WWIZ, Inc., *Memorandum Opinion and Order,* 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)); 47 C.F.R. § 1.106(b)(2) & (b)(3); 47 C.F.R. § 1.115(g)(1) & (2).

[29] S&L Teen Hospital Shuttle, *Order on Reconsideration,* 17 FCC Rcd 7899, 7900 ¶ 3 (2002) (citing Mandeville Broadcasting Corp. and Infinity Broadcasting of Los Angeles, *Order,* 3 FCC Rcd 1667 ¶ 2 (1988); M&M Communications, Inc., *Memorandum Opinion and Order,* 2 FCC Rcd 5100 ¶ 7 (1987); WWIZ, Inc., 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC,* 351 F.2d 824 (D.C. Cir. 1965)).

Commission has the authority to establish a common fund, and that it is required to apply the common fund exception to the American rule in this case.[30] Hill & Welch attempts to justify this repetition by claiming that the Commission erred in stating that Petitioners had, in their November 2000 Petition for Reconsideration, abandoned prior arguments regarding the issue of the Commission's authority to establish a common fund.[31] According to Hill & Welch, reconsideration of the *MO&O* is warranted under 47 C.F.R. § 1.115(g) because the *MO&O* makes this statement "for the first time."[32] We reject the implication that the Commission's statement is a new fact or changed circumstance that justifies reopening an issue that has already been thoroughly considered and resolved. Hill & Welch's claim that federal law requires application of the common fund exception to the American rule, and its argument that the Commission's failure to apply this exception constitutes an error of law, are merely repetitions of the same arguments it has made before and are not based on any new fact or changed circumstance.

9. We also find that the Commission's statement that previous arguments had been abandoned was not material to its conclusion that it lacks the authority to establish a common fund or its decision to deny the Application for Review. The Commission considered Hill & Welch's argument that the FCC has the authority to establish a common fund. It acknowledged that the Petitioners had presented this argument in their initial petitions,[33] and it explained the Bureau's reasoning in rejecting the argument.[34] The Commission also summarized the Petitioners' November 2000 Petition for Reconsideration and explained the Bureau's reasons for again finding unpersuasive their argument that the Commission has the authority to grant a common fund award.[35] Having reviewed the Petitioners' pleadings before the Bureau and the Bureau's analysis of their arguments in both their original petitions and their November 2000 Petition for Reconsideration, the Commission concluded that the Bureau had "thoroughly addressed each of these arguments in its previous orders and correctly applied our precedent."[36] Furthermore, the Commission concluded that "[c]ontrary 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…. [I]t is well settled that the Commission, as an administrative agency, lacks the equitable jurisdiction to establish a common fund award."[37] In light of the Commission's thorough consideration of the record and its finding based on Commission precedent and case law that it lacked the authority to make a common fund award, we find that, even if its statement that previous arguments had been abandoned was inaccurate, and we do not conclude that it was, the statement was immaterial to its rejection of Hill & Welch's arguments asserting that the FCC may establish a common fund.

10. We also take this opportunity to affirm that we agree with the conclusion reached in the *MO&O* that the Commission, as an administrative agency, lacks the authority to make a common fund award. In *William E. Zimsky,* on which the Bureau and the Commission properly relied in the instant case, the Commission found that equitable jurisdiction in a court is essential to a common fund award and

[30] Petition for Reconsideration at 2-7.

[31] *Id.* at 1-3.

[32] *Id.* at 1.

[33] *MO&O,* 18 FCC Rcd at 6910-11 ¶ 3.

[34] *Id.* at 6911 ¶ 4.

[35] *Id.* at 6911-12 ¶¶ 5-6.

[36] *Id.* at 6913 ¶ 7.

[37] *Id.* (citing *Zimsky*, 9 FCC Rcd at 3241 ¶ 20 (citing *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C.Cir. 1975))).

that, because the agency does not possess the requisite equitable powers, it may not make such an award unless it is given explicit statutory authority to do so.[38] Moreover, judicial precedents support this position. Supreme Court opinions spanning more than a century make abundantly clear that the authority to grant a common fund award is a function of a court's equitable powers.[39] In *Knight v. U.S.,* a case in which a law firm claimed entitlement to a common fund award from the Department of the Interior, the U.S. Court of Appeals, Federal Circuit, concluded that the Department was "in no position" to recognize such a claim absent a court order.[40] In *Turner v. FCC,* the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission does not have the equitable authority to award attorney fees and must find such authority in its enabling statutes.[41] Given these precedents and the absence of any grant of statutory authority to the Commission to make the common fund award sought by Hill & Welch, we conclude that this agency is without authority to make such an award.[42]

11. Hill & Welch also claims that the Commission failed to address the argument presented in the Application for Review that the FCC is the exclusive jurisdiction from which one may seek relief concerning bid amounts.[43] This argument was one of five presented in the Application for Review as a basis for distinguishing the instant case from *Zimsky*.[44] According to the Application for Review, *Zimsky* is inapplicable to the instant case because, *inter alia, Zimsky* "did not concern the Commission's exclusive authority under the Communications Act to adjust bid amounts," *Zimsky* concerned application filing fees, and there is "no indication in *Zimsky* that the Commission was the sole venue for the relief sought."[45]

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[38] *Zimsky,* 9 FCC Rcd at 2341 ¶¶ 20-21.

[39] *See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 257-58 (1975) (describing common fund awards as among "assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress"); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 165 (1939) (stating that "[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts"); *Trustees v. Greenough*, 105 U.S. 527, 535-36 (1882) (finding that 1853 statute regulating legal fees and costs was not intended to regulate "the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require").

[40] *Knight,* 982 F.2d at 1580. In *Knight,* a law firm representing four employees of the Department of the Interior successfully petitioned the Department and the Office of Personnel Management to revise the computation of cost of living allowances for federal employees who were removed from their positions; the law firm then sought a common fund award of 25 percent of any back pay disbursement made pursuant to the change in policy. The Court of Appeals stated: "Recovery under the common fund doctrine stems from the equitable power of a court to create the obligation for attorney fees against benefits some received as a result of the advocacy of another. The obligation of the party holding the common fund to pay the attorneys flows from the *court order* not from the common fund *theory*…. [A] 'common fund' is the creature of a *court's* inherent equitable power over funds under its control…. Although the United States may, under certain circumstances, be obligated to honor a 'common fund', such obligation can only arise from litigation before a court … and exercise of the *judicial* equity power to impose liability on the fund…." *Id.* at 1580-82 (emphasis in original).

[41] *Turner,* 514 FCC Rcd at 1355.

[42] As the Court of Appeals noted in *Turner,* Section 206 of the Communications Act provides that common carriers that violate the Act shall be liable for a reasonable attorney fee, to be fixed by the court, to the persons injured by the violation. 47 U.S.C. § 206. Congress has not, however, authorized the Commission to award attorney fees in circumstances such as those present here.

[43] Petition for Reconsideration at 6-7.

[44] Application for Review at 15-17 (discussing *Zimsky*, 9 FCC Rcd 3239).

[45] Application for Review at 15.

12. Hill & Welch had argued previously that *Zimsky* is not applicable to the instant case, and the Bureau had rejected that argument in the *Common Fund Order*.[46] The Bureau had also found in its *Order on Reconsideration* that *Zimsky* is controlling in this matter.[47] In the *MO&O,* the Commission, in discussing the Bureau's determination that the FCC does not possess the general equitable authority necessary to establish a common fund, noted the Bureau's reliance on *Zimsky*. In addition, the Commission reiterated *Zimsky*'s holding that a common fund award can arise only in the context of litigation before an appropriate court exercising its equitable powers.[48] Thus, the Commission has repeatedly considered the applicability of *Zimsky* to the case at hand. Given the Commission's thorough consideration of the record in this matter, we find that the *MO&O* was not defective merely because it did not discuss a particular assertion in the Application for Review regarding *Zimsky* and that Hill & Welch has not demonstrated Commission error on this point.

13. We also affirm that *Zimsky* is controlling in this matter. In *Zimsky* an attorney asked the Commission to award him a percentage of refunds of license application filing fees, based on his claim that the Commission decided to grant the refunds as a result of a petition he had filed on behalf of certain applicants.[49] As explained above, the Commission denied Zimsky's request, finding that it lacked the authority to apply the common fund doctrine to determine that he was entitled to attorney fees.[50] The Bureau rejected at the beginning of this proceeding Hill & Welch's argument that *Zimsky* is distinguishable from its own case because Zimsky could have sought relief in forums other than the Commission but the Commission is the sole jurisdiction in which it may seek an adjustment of bid amounts. In rejecting this argument, the Bureau found, *inter alia,* that Hill & Welch had misread the opinion of the U.S. Court of Appeals for the Second Circuit in *In re NextWave Personal Communications, Inc.,* which it cited for the proposition that the Commission possesses the exclusive authority to grant relief concerning bid amounts. The Bureau explained that although the Second Circuit in *NextWave* recognized that the Commission possesses the exclusive authority to regulate the allocation of spectrum licenses, which includes matters relating to bid amounts for the licenses, the court's decision was not so expansive that it extended the Commission's regulatory jurisdiction to encompass the inherent equitable powers of a court.[51]

14. We agree with the Bureau that nothing in the Second Circuit's *NextWave* decision conferred on the Commission the equitable power of a court to establish common fund awards. The *NextWave* court's recognition of the Commission's exclusive authority to regulate the allocation of spectrum licenses, and to place conditions on the use of such licenses, is a matter entirely separate from the question of whether the Commission may award attorney fees or establish a common fund award.[52] Furthermore, Hill & Welch's claim is not a request for the adjustment of a bid amount; it is, as was Zimsky's, a request for attorney fees. The fact that Hill & Welch is seeking a percentage of retroactive bidding credits that the Commission granted pursuant to its authority to regulate the assignment of spectrum licenses, rather than a percentage of refunds of filing fees that the Commission granted pursuant

[46] *Common Fund Order,* 15 FCC Rcd at 20436-38 ¶¶ 8-11.

[47] *Bureau Order on Reconsideration,* 16 FCC Rcd at 9489-90 ¶ 8.

[48] *MO&O,* 18 FCC Rcd at 6911 ¶ 4 n.14.

[49] *Zimsky,* 9 FCC Rcd at 3239, 3240, ¶¶ 1, 8, 1012.

[50] *Id.* at 3239 ¶ 1.

[51] *Common Fund Order,* 15 FCC Rcd at ¶¶ 10-11 (discussing *In re NextWave Personal Communications, Inc.,* 200 F.3d 43 (2nd Cir. 1999) *("Nextwave")).*

[52] *See NextWave*, 200 F.3d at 54.

to the same authority, does not render *Zimsky* inapplicable here, nor does it mean that the Commission has the equitable power of a court to grant Hill & Welch's request. We therefore reject Hill & Welch's argument that *Zimsky* is inapplicable to the instant case, as well as its assertion that the Commission has exclusive authority, or indeed any authority, to grant the relief it seeks.

15. Hill & Welch also argues that reconsideration or clarification of the *MO&O* is required because the *MO&O* reaches an erroneous conclusion regarding a procedural point and because its discussion of this procedural issue is confusing.[53] The *MO&O* notes that the Bureau indicated in a footnote that Petitioners' request for a common fund award as it relates to the 218-219 MHz Service "may be barred" by claim preclusion because Graceba could not establish entitlement to a common fund.[54] The *MO&O* then indicates that Petitioners request that their Application for Review be construed as a Petition for Reconsideration of the *Bureau Reconsideration Order* on the issue of claim preclusion because the Bureau did not affirmatively rule on the issue.[55] In a footnote, the *MO&O* states that Petitioners failed to file a Petition for Reconsideration with the Bureau on this point; that their request to have their Application for Review treated as a petition for reconsideration on the issue of claim preclusion is an attempt to marry two separate pleadings in one document that is inappropriate under 47 C.F.R. § 1.44; and that because the Bureau was not afforded an opportunity to address this point, it would not be appropriate under 47 C.F.R. § 1.115(c) for the Commission to consider it.[56] The *MO&O* also concludes that because the Bureau's statement regarding claim preclusion amounted to dictum, it is unnecessary for the Commission to address it.[57]

16. Hill & Welch asserts that it did not attempt to marry two pleadings in one document. It states that it instead requested that, if the Commission found that the Bureau should be given an opportunity to rule formally on the issue of claim preclusion, its entire Application for Review should be treated as a petition for reconsideration. According to Hill & Welch, the Commission therefore erred in finding that because the Bureau was not afforded an opportunity to address this point, it would not be appropriate for the Commission to do so.[58] Hill & Welch also argues that reconsideration or clarification of the *MO&O* is required "[b]ecause it is unclear what purpose is served by the Commissioners' discussion of this procedural issue under these circumstances…."[59]

17. We find that the Commission correctly concluded that the Bureau's statement regarding claim preclusion amounted to dictum and that it was therefore unnecessary for the *MO&O* to address this issue. We need not decide whether the Commission incorrectly stated that Petitioners attempted in their Application for Review to combine two separate pleadings in one document, or whether the Commission erred in indicating that the Bureau had not been afforded an opportunity to address Petitioners' argument regarding claim preclusion. Even if the Commission's statements on these matters were incorrect, and we do not conclude that they were, they were immaterial to the Commission's conclusion that it lacked the authority to establish a common fund and to its decision to deny the Application for Review. As Hill &

[53] Petition for Reconsideration at 3-4 n.2.

[54] *MO&O,* 18 FCC Rcd at 6913 ¶ 8 (citing *Reconsideration Order* at n.73). The U.S. Court of Appeals for the D.C. Circuit denied Graceba's claim for a common fund award in the 218-219 MHz Service. *Graceba Total Communications, Inc. v. FCC*, 2000 WL 1838282 (D.C.) (unpublished opinion).

[55] *MO&O,* 18 FCC Rcd at 6913 ¶ 8 (citing Application for Review at n.35).

[56] *MO&O,* 18 FCC Rcd at 6914 n.39.

[57] *Id.* at 6913 ¶ 8.

[58] Petition for Reconsideration at 3-4 n.2.

[59] *Id.*

Welch acknowledges, "the procedural note does not have any impact on the Commission's decision."[60] The Commission's footnote on procedure stated a reason for not addressing the issue of claim preclusion that was in addition to its finding that the Bureau's statement regarding claim preclusion was dictum. To the extent that this footnote may have been confusing or in error, we find that it was harmless error.

18. Finally, according to Hill & Welch, the Commission's distribution of refunds to licensees and former licensees in the 218-219 MHz Service is a "new circumstance" that has arisen since the filing of the Application for Review.[61] We disagree. In the *218-219 MHz Order,* which was released in 1999, the Commission granted retroactive bidding credits of 25 percent to all winning bidders that had qualified as small businesses in Auction No. 2.[62] Given that it was required by the *218-219 MHz Order,* we find that the disbursement of these refunds does not constitute a new fact or changed circumstance, even if it occurred after the filing of the Application for Review. Accordingly, we do not consider Hill & Welch's argument that the Commission may not deny its request for a common fund award on the basis that the monies have been disbursed.[63]

IV. CONCLUSION

19. We conclude that none of the arguments in the Petition for Reconsideration relies on facts that relate to events that have occurred or circumstances that have changed since the filing of the Application for Review, or on facts unknown to Hill & Welch until after this filing that Hill & Welch could not, through the exercise of ordinary diligence, have learned before then.[64] We also conclude that Hill & Welch's attempts to demonstrate that the Commission made material errors in the *MO&O* are without merit. To the extent that any of the Commission's statements may have been inaccurate, they were not material to its decision to deny the Application for Review. We therefore dismiss those parts of the Petition for Reconsideration that repeat previous arguments or rely on erroneous claims of new facts or changed circumstances, and we deny those portions of the Petition for Reconsideration that assert Commission error. Finally, we affirm the conclusion reached in the *MO&O* that the Commission lacks the authority to make a common fund award.

[60] *Id.*

[61] *Id.* at 7.

[62] *218-219 MHz Order,* 15 FCC Rcd at 1533-34 ¶ 61.

[63] We also do not consider Hill & Welch's reiteration of its argument that it is entitled to a common fund award based on refunds that it claims will in the future be paid to winners of nationwide and regional narrowband PCS licenses in Auction No. 1 and Auction No. 3, an argument that has been dealt with previously and whose repetition is not justified by any new facts or changed circumstances. As the Commission noted in the *MO&O,* retroactive bidding credits have not been awarded to winners of nationwide and regional narrowband PCS licenses. *MO&O,* 18 FCC Rcd at 6910 ¶ 2 (citing Weblink Wireless, Inc., Request for Remedial Bidding Credit and Refund, *Order,* 16 FCC Rcd 9420 (WTB 2001) (dismissing request for nationwide narrowband PCS and regional narrowband PCS retroactive bidding credits), *aff'd., Memorandum Opinion and Order*, 17 FCC Rcd 24642 (WTB 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 request for a retroactive bidding credit for a license won in the regional narrowband PCS auction), *recon dismissed,* Instapage Network Ltd.'s Informal Request for a Retroactive Bidding Credits, *Order on Reconsideration,* 19 FCC Rcd 20356 (WTB 2004)).

[64] 47 C.F.R. § 1.115(g)(1) & (2).

V. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED that, pursuant to 47 U.S.C. § 405 and Sections 1.106 and 1.115(g) of the Commission's rules, 47 C.F.R. §§ 1.106 and 1.115(g), the Petition for Reconsideration filed by Hill & Welch on May 1, 2003, is DISMISSED IN PART AND OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary