

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

ORDER ON RECONSIDERATION

Adopted: May 4, 2001

Released: May 4, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, we deny the Petition for Reconsideration filed by Hill & Welch and Myers Keller Communications Law Group on November 21, 2000. The Petitioners seek reconsideration of the Wireless Telecommunication Bureau ("Bureau") Common Fund Order that denied Petitioners' March 8, 2000 requests for declaration of a common fund. After reviewing Petitioners' submissions and the two oppositions filed herein, we conclude, for the reasons set forth below, that the Commission lacks the requisite authority to establish a common fund and, accordingly, deny the Reconsideration Petition.

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

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

4 Reconsideration Petition and the Reply to Oppositions to Petition for Reconsideration, filed by Hill & Welch and Myers Keller Communications Law Group on December 18, 2000 ("Reply").

5 On December 6, 2000, the Commission received two oppositions to the Petition for Reconsideration from: (1) IVDS Enterprises Joint Venture and Instapage Network, Ltd. ("IVDS/Instapage Opposition"); and (2) In-Sync Interactive Corporation ("In-Sync Opposition").

## II. BACKGROUND

2. Following the auction of 218-219 MHz Service (formerly Interactive Video Data Service (“IVDS”)) licenses in 1994 (“Auction No. 2”), the constitutionality of race- and gender-based bidding credits was called into question.<sup>6</sup> In order to avoid undue delay of future auctions in other services, the Commission eliminated the race- and gender-based provisions for those auctions and instead employed a similar provision for small businesses.<sup>7</sup> Similarly, in the *218-219 MHz Order*,<sup>8</sup> the Commission eliminated minority- and women-owned business bidding credits, previously afforded in Auction No. 2, in order to address questions raised concerning the constitutionality of those bidding credits. At the same time, to fulfill the Commission's statutory mandate of: (1) encouraging participation by small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (2) minimizing disruption to entities that had previously received a bidding credit, the Commission granted a retroactive 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 for that auction.”<sup>9</sup> In doing this, the Commission recognized that similar bidding credits had been provided to bidders in other services. The Commission did not address the issue of granting a similar retroactive credit to participants in the regional narrowband PCS auction (“Auction No. 3”) or the nationwide narrowband PCS auction (“Auction No. 1”).

3. On March 8, 2000, Petitioners filed two petitions that requested a determination that these law firms are respectively entitled to a common fund award in connection with their participation in litigation involving licenses in both the 218-219 MHz and the regional narrowband PCS services.<sup>10</sup> The Petitioners sought twenty-five percent of the refunds generated by the retroactive bidding credit granted in the *218-219 MHz Order*<sup>11</sup> and thirty percent of the refunds Petitioners anticipate will be granted in connection with the regional narrowband PCS auction. Petitioners based their claims upon the common

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<sup>6</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to federal programs that treat individuals unequally on the basis of race); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“*VMI*”) (requiring the government to demonstrate an “exceedingly persuasive justification” to successfully defend gender-based programs). In the wake of *Adarand* and *VMI*, the Commission determined that “the present record is insufficient to support our race-based IVDS auction rules under the strict scrutiny standard or our gender-based rules under the ‘exceedingly persuasive justification’ standard.” In the Matter of 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 found that the record was insufficient to meet the new evidentiary standard.

<sup>7</sup> See In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 19341, 19369, ¶ 67 (rules for the then-planned second IVDS auction); In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 11 FCC Rcd. 136, ¶ 1, 161, ¶ 47, and 167, ¶ 59 (C block rules); In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd. 10456, 10475, ¶ 37, and 10492, ¶ 84 (2000).

<sup>8</sup> In the Matter of 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 (1999) (“*218-219 MHz Order*”).

<sup>9</sup> *Id.* at 1533, ¶ 61.

<sup>10</sup> IVDS Petition and Regional Narrowband PCS Petition.

<sup>11</sup> *218-219 MHz Order*, 15 FCC Rcd. at 1534, ¶ 62.

fund theory, which when applicable, allows a party whose work product benefits a class of persons, to claim a portion of the funds produced by their efforts as compensation for services.<sup>12</sup> In particular, Petitioners argued that representation of their clients, Graceba Total Communications, Inc. (“Graceba”)<sup>13</sup> and the Ad Hoc IVDS Coalition caused the Commission to authorize retroactive bidding credits in the 218-219 MHz Service.<sup>14</sup>

4. On October 26, 2000, we issued the *Common Fund Order*,<sup>15</sup> which denied the two petitions to declare a common fund. We found that: (1) the Commission lacked the requisite authority to establish a common fund; (2) the Petitioners failed to identify a fund over which a court has jurisdiction; and (3) the Petitioners failed to demonstrate that all parties in interest were adequately represented.<sup>16</sup> We noted that the retroactive bidding credits granted in the 218-219 MHz Service were not meant to remedy any alleged constitutional injury; rather, the credit accorded to small businesses resolved a multi-faceted and complex set of regulatory issues.<sup>17</sup> We also found that the Equal Access to Justice Act<sup>18</sup> does not

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<sup>12</sup> See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Natl. Bank*, 307 U.S. 161 (1939); *Trustee v. Greenough*, 105 U.S. 527 (1882).

<sup>13</sup> Graceba filed two petitions challenging Auction No. 2 methodology as artificially inflating prices and challenging the constitutionality of the bidding credits awarded in Auction No. 2. In December 1995, the Commission denied Graceba’s petitions along with those filed by other bidders seeking similar relief. See In the Matter of Interactive Video and Data Services (IVDS) Licenses, *Order*, 11 FCC Rcd. 1282 (1995). Upon appeal by Graceba, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) remanded the constitutional issue to the Commission in June of 1997 for further consideration. See *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997). In the course of Graceba’s appeal, other participants in the auction filed a petition to intervene in support of Graceba’s constitutional arguments. The Bureau subsequently dismissed the petition, stating that petitioners should have objected to the payment conditions related to their licenses when they had first been issued in January and February 1995. See In Re Community Teleplay, Inc., et al. Petition For Relief of Application of Bidding Credits in the Interactive Video and Data Service, *Order*, 13 FCC Rcd. 12426 (1998). On remand, the Commission addressed the constitutional issue by eliminating minority- and women-owned bidding credits and extending a twenty-five percent bidding credit winning bidders in the IVDS auction who met the small business qualifications for that auction. *218-219 MHz Order*, 15 FCC Rcd. 1497, 1532-33, ¶¶ 60-61. On December 5, 2000, the United States Court of Appeals for the District of Columbia Circuit denied Graceba’s Petition for Review of the *218-219 MHz Order*, and Graceba’s request for attorney’s fees based on the common fund theory. *Graceba Total Communications, Inc. v. FCC*, 2000 WL 1838282 (D.C.) (unpublished opinion) (“*Graceba*”).

<sup>14</sup> Petitioners sought a common fund award from the refunds they anticipate that the Commission will issue with respect to Auction No. 3. Regional Narrowband PCS Petition. We note that the Bureau has pending before it a request by Instapage Network, Ltd. (“Instapage”) for a 40 percent retroactive bidding credit relating to the license it won in the Auction No. 3. See Informal Request for Remedial Bidding Credit, filed by Instapage Network, Ltd. on November 12, 1999. We note however, that Petitioners are not listed as counsel on Instapage’s request.

<sup>15</sup> *Common Fund Order*, 15 FCC Rcd. 20432.

<sup>16</sup> *Id.* at 20432, ¶ 1 and 20435-39, ¶¶ 6-15.

<sup>17</sup> *Id.* at 20436, ¶ 7; *218-219 MHz Order*, 15 FCC Rcd. at 1532-33, ¶ 60-61; In the Matter of Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd. 25020, 25041, ¶ 44 (2000) (“*Second Reconsideration Order*”).

<sup>18</sup> The Equal Access to Justice Act (“EAJA”) is a recitation of express authority conferred upon the Commission to award attorney’s fees. 28 U.S.C. § 2412. We note that the Petitioners have abandoned their argument that EAJA provided authority to grant a common fund award.

provide the Commission with jurisdiction to grant a common fund award.<sup>19</sup>

5. On November 21, 2000, Petitioners sought reconsideration<sup>20</sup> of our denial of their requests<sup>21</sup> for declaration of a common fund. In their Reconsideration Petition, Petitioners for the first time request thirty percent of the refunds they anticipate will be granted in connection with their efforts before the Commission to obtain remedial bidding credits and refunds for the nationwide narrowband PCS licensees.<sup>22</sup> Two oppositions to the Reconsideration Petition were filed.<sup>23</sup> The Petitioners filed a Reply to the oppositions.<sup>24</sup>

### III. DISCUSSION

6. The *Common Fund Order* concluded that the Commission lacked the authority to establish a common fund.<sup>25</sup> The common fund doctrine 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.<sup>26</sup> The common fund doctrine “rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant’s expense.”<sup>27</sup> In order to establish entitlement to a common fund, the Petitioners 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.<sup>28</sup> We found that Petitioners failed to satisfy all three of these elements.<sup>29</sup>

7. In their Reconsideration Petition,<sup>30</sup> Petitioners raise arguments similar to those that we

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<sup>19</sup> *Common Fund Order*, 15 FCC Rcd. at 20439-41, ¶¶ 16-19.

<sup>20</sup> Reconsideration Petition.

<sup>21</sup> IVDS Petition and Regional Narrowband PCS Petition.

<sup>22</sup> The Bureau recently released an order denying the request of Weblink Wireless Inc., for a 25 percent retroactive bidding credit for licenses that it won in the nationwide narrowband PCS Service and a 40 percent bidding credit for each of the five licenses that it won in the regional narrowband PCS Service. In the Matter of Weblink Wireless, Inc. Request for Remedial Bidding Credit and Refund, *Order*, DA 01-1143 (rel. May 3, 2001) (“*Weblink Order*”).

<sup>23</sup> IVDS/Instapage Opposition and In-Sync Opposition.

<sup>24</sup> Reply.

<sup>25</sup> *Id.*

<sup>26</sup> *See Mills*, 396 U.S. 375; *Sprague*, 307 U.S. 161; *Greenough*, 105 U.S. 527.

<sup>27</sup> *Boeing Co. v. Van Gumbert, et al.*, 444 U.S. 472, 478 (1980); *see also, Mills*, 396 U.S. at 392.

<sup>28</sup> *Common Fund Order*, 15 FCC Rcd. at 2435-36, ¶ 7; *Knight v. U.S.*, 982 F.2d 1573, 1581 (1993).

<sup>29</sup> *Common Fund Order*, 15 FCC Rcd. at 20435-37, ¶¶ 6-10.

<sup>30</sup> Pursuant to Section 1.106 of the Commission’s rules, the petition for reconsideration shall state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed. The petition shall state specifically the form of relief sought and, subject to this requirement, may contain alternative requests. 47 C.F.R. § 1.106(d)(1). The petition for reconsideration shall also, where appropriate, cite the findings of fact and/or conclusions of law which petitioners believes to be erroneous, (continued....)

rejected previously. The Petitioners' first argument is that the Commission has equitable authority to create a common fund.<sup>31</sup> According to Petitioners, Section 154(i)<sup>32</sup> of the Communications Act permits the Commission to establish a common fund. In the alternative, Petitioners contend that in the absence of express authority in the Communications Act to authorize such a refund, the Commission's practice of awarding refunds to licensees demonstrates that the Commission has the equitable powers that would allow it to establish a common fund. To further support their jurisdictional argument, the Petitioners contend that we misconstrued legal precedent when we denied the Petitioners' original requests for a common fund.<sup>33</sup> The Petitioners' second argument is that they are entitled to a portion of the common fund by virtue of their work in litigating the repeal of race- and gender-based bidding credits in Auction No. 2 (and the refunds that the Petitioners anticipate the Commission will issue in Auction Nos. 1 and 3).<sup>34</sup> After reviewing the Petitioners' arguments raised in the Reconsideration Petition and the Reply, we affirm the *Common Fund Order* that concluded that the Commission lacks the equitable authority to establish a common fund.<sup>35</sup>

8. We disagree with the Petitioners' contention that Section 154(i)<sup>36</sup> of the Communications Act and the Commission's prior exercise of its authority allows it to establish a common fund.<sup>37</sup> As previously noted, it is well settled that the Commission lacks the authority to establish a common fund and Petitioners have failed to present authority for the proposition that a federal agency has equitable jurisdiction to establish a common fund.<sup>38</sup> In *Zimsky*, the Commission previously determined that it lacked the required equitable jurisdiction to establish a common fund<sup>39</sup> and that case is controlling in this matter. As noted in *Zimsky*, "a common fund is a creature of a *court's* inherent equitable powers over funds under its control. . . . [it] does not crystallize at the moment a single plaintiff prevails over his claim [and it is] not created by the parties or their lawyers . . . [it] is established by a *court*."<sup>40</sup> Indeed, the Commission, as an administrative agency, lacks authority to order the reimbursement of legal expenses in the

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and shall state with particularity the respects in which he believes such findings and conclusions should be changed. The petition may request that additional findings of fact and conclusions of law be made. 47 C.F.R. § 1.106(d)(2).

<sup>31</sup> Reconsideration Petition at ¶ 7; Reply at ¶ 3.

<sup>32</sup> 47 U.S.C § 154(i) ("the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.")

<sup>33</sup> Reconsideration Petition at ¶¶ 1-2, 4-6, 10-11; Reply at ¶ 3.

<sup>34</sup> Reconsideration Petition at ¶¶ 3, 8-9, 12-14; Reply at ¶¶ 4-7.

<sup>35</sup> *Common Fund Order*, 15 FCC Rcd. at 20435-37, ¶¶ 6-10.

<sup>36</sup> 47 U.S.C § 154(i).

<sup>37</sup> Reconsideration Petition at ¶ 7 (citing *In the Matter of William E. Zimsky Request for Attorney's Fees in Connection with the Interactive Video and Data Service Proceeding, Declaratory Ruling*, 9 FCC Rcd. 3239 (1994) ("*Zimsky*").

<sup>38</sup> *Common Fund Order*, 15 FCC Rcd. at 20435-37, ¶¶ 6-10.

<sup>39</sup> *Zimsky*, 9 FCC Rcd. 3239.

<sup>40</sup> *Id.*, at 3241, ¶ 23; *Knight*, 982 F.3d at 1581 (citing *Sprague*, 307 U.S. at 166-67; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. at 257-8; *Boeing*, 444 U.S. at 478) (emphasis added).

absence of a clear statutory authority granted by Congress.<sup>41</sup>

9. Petitioners' reliance on the Commission's general authority under Section 154(i), which allows it to take action not inconsistent with the Communications Act, is misplaced because, as we have stated, absent express statutory authority, the Commission has no authority to order reimbursement of legal expenses.<sup>42</sup> In addition, Petitioners' argument that the Commission's ability to grant waivers and refunds allows it to establish a common fund is erroneous. The Commission's ability to grant waivers<sup>43</sup> and refunds<sup>44</sup> implicates the Commission's public interest authority.<sup>45</sup> In contrast, the payment of attorney fees to litigants does not involve the public interest but implicates the rights of private parties.<sup>46</sup> Consequently, we are not persuaded by Petitioners' arguments and find that the Commission does not have equitable authority to establish a common fund.

10. We are also not persuaded by Petitioners' argument that the *Common Fund Order* misconstrued the judicial precedent relating to the common fund doctrine.<sup>47</sup> As we previously noted, 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.<sup>48</sup> Petitioners' reliance on *Bebchick v. WMATA*,<sup>49</sup> for the

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<sup>41</sup> *Zimsky*, 9 FCC Rcd. 3239; *Common Fund Order*, 15 FCC Rcd. at 20437, ¶ 10.

<sup>42</sup> *Id.*

<sup>43</sup> 47 C.F.R. § 1.3 (Section 1.3 of the Commission's Rules provides the Commission with the authority to grant waivers "if good cause therefor 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.*

<sup>44</sup> The Commission noted that refunds were granted in *Zimsky* because the call sign filing requirement was an "unnecessary burden on IVDS applicants." In the Matter of 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.")

<sup>45</sup> *See supra*, n. 43-44.

<sup>46</sup> *See e.g., Burka v. United States Dep't of Health and Human Servs.*, 142 F.3d 1286, 1291 (D.C. Cir. 1998) (*pro se* litigants are eligible to claim fees so long as their outside counsel "enjoyed a genuine attorney-client relationship . . . were situated to offer 'independent' legal advice and assistance, and were presumably paid for their services"); *Kooritzky v. Herman*, 178 F.3d 1315, 1324 (D.C. Cir. 1999) (a *pro se* attorney-litigant may not recover attorney fees under the EAJA for the work of his co-counsel where the attorney and his colleagues lack a genuine attorney-client relationship).

<sup>47</sup> The Petitioners contend that the cases cited in the *Common Fund Order*: (1) arose in the context of litigation, and (2) merely state the "unremarkable proposition" that courts have the equitable authority to establish common funds. Reconsideration Petition at ¶ 1.

<sup>48</sup> *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C. Cir. 1975) (cited in *Zimsky*, 9 FCC Rcd. at 3241, ¶ 20).

proposition that administrative agencies are able to address common fund claims, and on *Swedish Hospital Corp. v. Shalala*,<sup>50</sup> for the proposition that administrative rulemakings do not prohibit the award of a common fund fee, is misplaced. In those cases, substantial litigation attacking agency policy had occurred before the courts reached the issue of the common fund claim.<sup>51</sup> Moreover, in *Bebchick* and *Swedish Hospital Corp.*,<sup>52</sup> courts and not the agencies, possessed the judicial equitable authority to create a common fund.<sup>53</sup>

11. To bolster their argument that the Commission has the authority to establish a common fund, Petitioners contend that the *Common Fund Order* misconstrued *Knight v. U.S.*,<sup>54</sup> *Turner v. FCC*<sup>55</sup> and *National Council of Community Mental Health Centers v. Matthews*.<sup>56</sup> We disagree. *Knight*, contrary to Petitioners' claim, did not recognize that common fund fees could stem from administrative proceedings. Rather, *Knight* explicitly states that "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."<sup>57</sup> We also disagree with Petitioners' contention that because *Turner* requires the Commission to follow the American Rule, the Commission is, by extension, required to follow the exceptions to the American Rule.<sup>58</sup> *Turner* affirmed a Commission order that found that "the Commission has no such equitable authority [to award attorney's fees in certain classes of cases not covered by statute. Therefore,] the Commission must find its authority in its enabling statutes."<sup>59</sup> Finally, we do not find that the *Common Fund Order* misread *Matthews* by stating a concern for due process

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<sup>49</sup> *Bebchick v. WMATA*, 805 F.2d 396 (D.C. Cir. 1986).

<sup>50</sup> *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993).

<sup>51</sup> In *Bebchick*, the Court directed the Commission to determine an appropriate award of attorney's fees for plaintiff's counsel. *Bebchick*, 805 F.3d at 401. In *Swedish Hospital Corp.*, the court determined what portion of the settlement agreement entered into by the agency and plaintiffs and approved by the District Court should go to plaintiff's lawyers. *Swedish Hosp. Corp.*, 1 F.3d at 1263.

<sup>52</sup> *Bebchick*, 805 F.2d 396; *Swedish Hosp. Corp.*, 1 F.3d 1261.

<sup>53</sup> *Common Fund Order*, 15 FCC Rcd. at 20436-37, ¶¶ 8-10. Petitioners' reliance on *Koppel v. Wein*, 743 F.3d 129 (1994), for the proposition that an award of fees is appropriate even where no judgment or consent decree is entered and the complaint was dismissed as moot, is also misplaced because courts and not agencies possess the judicial equitable authority to create a common fund.

<sup>54</sup> *Knight*, 982 F.2d 1573.

<sup>55</sup> *Turner*, 514 F.2d 1354.

<sup>56</sup> *Natl. Council of Cmty. Mental Health Ctrs. v. Matthews*, 546 F.2d 1003 (D.C. Cir. 1976).

<sup>57</sup> *Knight*, 982 F.2d at 1580 (emphasis added). We disagree with Petitioners' contention that the *Knight* court acknowledged that common funds could result from administrative actions when it stated that a common fund award was inappropriate because "there was neither a civil action, nor an administrative adjudication, nor an adversary adjudication." *Knight*, 982 F.2d at 1576. This discussion referred to EAJA and not the common fund.

<sup>58</sup> *Turner*, 514 F.2d at 1355 ("the reasoning of the Supreme Court in *Alyeska Pipeline Co. v. Wilderness Society* is fully applicable to litigation before the Federal Communications Commission.")

<sup>59</sup> *Turner*, 514 F.2d at 1355 (citing In Re Application of Radio Station WSNT, Inc., Sandersville, GA for Renewal of License of Station WSNT, Sandersville, GA Request of Richard Turner et. al. for Reimbursement of Expenses, *Memorandum Opinion and Order*, 45 F.C.C.2d 377, 381-82 (1974)).

rights of entities eligible for refunds.<sup>60</sup> *Matthews* underscores the fact that adequate class representation is a fundamental element of due process.<sup>61</sup>

12. In the same vein, adequate representation is a fundamental element of a common fund claim.<sup>62</sup> The Court of Appeals for the District of Columbia, in denying Graceba's request for a common fund, cited *Matthews* when it recognized the importance of adequate representation in a common fund claim. The appellate court stated that "Graceba did not initially ask for a common fund to be established and *did not get approval of other bidders to represent them*. Accordingly, it waived that claim."<sup>63</sup> In this case, we find that Petitioners have failed to demonstrate that all parties were adequately represented.<sup>64</sup>

13. Petitioners' also argue that their efforts on behalf of their client Graceba resulted in the grant of retroactive credit in the 218-219 MHz service and that such efforts will also cause similar credits to be issued in the nationwide narrowband PCS and regional narrowband PCS services.<sup>65</sup> We note, however, that subsequent to the filing of the Reconsideration Petition, the Bureau denied Weblink Wireless Inc.'s request for a 25 percent retroactive bidding credit for licenses that it won in the nationwide narrowband PCS Service and a 40 percent bidding credit for each of the five licenses that it won in the regional narrowband PCS Service auction.<sup>66</sup> In support of their claim, Petitioners highlight the fact that the Commission did not order refunds until after *Graceba* was remanded to the Commission in 1997.<sup>67</sup> While the chronology of events may imply a causal relationship between the Commission's actions and the Petitioners' litigation position,<sup>68</sup> the retroactive bidding credits were not themselves meant as a remedy for any alleged constitutional injury.<sup>69</sup> As noted previously in the *Common Fund Order*, retroactive bidding credits were accorded to small businesses to resolve a multi-faceted and complex set of regulatory issues.<sup>70</sup> Petitioners mischaracterize the straightforward language in the *218-219 MHz Order* to advance

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<sup>60</sup> *Petition* at ¶ 10-11.

<sup>61</sup> *Matthews* noted this concern for adequate class representation in the context of class action suits filed pursuant to Rule 23 of the Federal Rules of Civil Procedure. *Matthews*, 546 F.2d at 1008.

<sup>62</sup> *Knight v. U.S.*, 982 F.2d 1573, 1581 (1993).

<sup>63</sup> *Graceba*, 2000 WL 1838282 (D.C.) (unpublished opinion) (citing *Matthews*, 546 F.2d at 1008) (emphasis added).

<sup>64</sup> *Common Fund Order*, 15 FCC Rcd. 20348, ¶ 13. Petitioners argue that there is no clear opposition to the common fund award. Reconsideration Petition at ¶ 8. However as noted by the two oppositions filed in the instant matter, there were oppositions to the Petitioners claim for common fund awards. Reply at ¶ 5; IVDS/Instapage Opposition at 2-3; In-Sync Opposition at 10-11.

<sup>65</sup> Specifically, Petitioners highlight the language in the *218-219 MHz Order* where the Commission noted that "we believe that in this case the conversion of race and gender-based bidding credits to small business resolves the issue presented by Graceba." 15 FCC Rcd. at 1534, ¶ 62

<sup>66</sup> *Weblink Order*, DA 01-1143.

<sup>67</sup> *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. 1997).

<sup>68</sup> *United Handicapped Fed'n v. Andre*, 622 F.2d 342, 347 (8<sup>th</sup> Cir. 1980).

<sup>69</sup> *Common Fund Order*, 15 FCC Rcd. at 20436, ¶ 7 and 20439 ¶ 14.

<sup>70</sup> *Common Fund Order*, 15 FCC Rcd. at 20436, ¶ 7; *Second Reconsideration Order*, 15 FCC Rcd. at 25041, ¶ 44; *Weblink Order*, DA 01-1143, ¶ 9.

their own self-created standard for the authority to establish a common fund. In the *218-219 MHz Order*, the Commission simply stated that Graceba and other petitioners raised certain issues in their petitions to which the Commission would provide a responsive remedy.<sup>71</sup> We also note that the appellate court, which possesses judicial equitable authority, denied a common fund claim brought by Graceba, Petitioners' client.<sup>72</sup> The fact that the party on whose behalf Petitioners' efforts were expended, could not establish entitlement to a common fund, further weakens the Petitioners' claim.<sup>73</sup>

14. Petitioners have failed to establish the requisite elements to demonstrate entitlement to a common fund award. Ultimately, Petitioners' arguments fail for the simple reason that the Commission does not have equitable authority to establish a common fund absent express statutory authority.<sup>74</sup> Therefore, we affirm the *Common Fund Order*<sup>75</sup> and reiterate that we find no jurisdictional basis upon which to grant the relief that Petitioners are requesting.

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<sup>71</sup> *218-219 MHz Order*, 15 FCC Rcd. at 1533, ¶ 60; *Second Reconsideration Order*, 15 FCC Rcd. at 25041, ¶ 44.

<sup>72</sup> *Graceba*, 2000 WL 1838282 (D.C.) (unpublished opinion).

<sup>73</sup> In light of the appellate court's holding with respect to Graceba's request for a common fund award, Petitioners' request as it relates to the 218-219 MHz service may be barred by claim preclusion. Claim preclusion, or res judicata, requires that a final judgment on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476 (1998). A judgment is entitled to preclusive effect if (1) the parties in the subsequent action are identical or in privity; (2) the events underlying the claims are substantially related; and (3) the nonmoving party had a full and fair opportunity to litigate the claims. *Nevada v. United States*, 463 U.S. 110, 129-30 (1982).

<sup>74</sup> *Zimsky*, 9 FCC Rcd. at 3241, ¶ 20 (citing *Sprague*, 307 U.S. at 166-67; *Alyeska Pipeline*, 421 U.S. at 257-8; *Boeing*, 444 U.S. at 478); *Common Fund Order*, 15 FCC Rcd. at 20437, ¶ 10.

<sup>75</sup> *Common Fund Order*, 15 FCC Rcd. 20432.

**IV. ORDERING CLAUSE**

15. Accordingly, for the reasons set forth above and pursuant to Sections 1, 4(i), 303(r) of the Communications Act of 1934, 47 U.S.C. § 151, 154(i), 303(r) and 47 C.F.R. § 1.106, the Reconsideration Petition filed by Hill & Welch and Myers Keller Communications Law Group on November 21, 2000 is **DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham  
Deputy Chief  
Wireless Telecommunications Bureau