

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

In the Matter of )  
 )  
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**

**Adopted: October 25, 2000**

**Released: October 26, 2000**

By the Deputy Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Order*, we deny the two petitions filed by Myers Keller Communications Law Group (“Myers”) and Hill & Welch (“Welch”) to declare a common fund.<sup>1</sup> The petitions each request a determination that these law firms are respectively entitled to attorney’s fees in connection with their participation in litigation involving licensees in both the 218-219 MHz service and regional narrowband Personal Communications Services (“Narrowband PCS”).<sup>2</sup> As explained fully below, petitioners base their claims upon 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. Reply comments were filed opposing these two petitions on behalf of several entities.<sup>3</sup> We conclude that the Commission lacks authority to apply the common fund doctrine to grant petitioners’ requests. Accordingly, we deny the petitions.

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<sup>1</sup> Myers Keller Communications Law Group (“Myers”) and Hill & Welch (“Welch”) (collectively, “petitioners”) filed both an “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”) on March 8, 2000.

<sup>2</sup> The 218-219 MHz Service was initially designated the “Interactive Video and Data Service” (“IVDS”).

<sup>3</sup> The Commission received four reply comments opposing these two petitions on behalf of IVDS Enterprises Joint Venture, Instapage Network LTD, Tel/Logic, Inc., In-Sync Interactive Corporation, Loli, Inc., KMC Interactive TV, Inc., Trans Pacific Interactive, Inc. and Whitehall Wireless Corporation. These pleadings are listed in the Appendix to this ruling. Additionally, although one comment was late filed, we accepted it as an ex parte filing. See 47 C.F.R. § 1.45(b).

## II. BACKGROUND

2. The 218-219 MHz Service allows one-way and two-way communications for both common carrier and private operations on a fixed or mobile basis.<sup>4</sup> Narrowband PCS includes a variety of services, such as advanced paging and messaging.<sup>5</sup> For past auctions of both 218-219 MHz service licenses and regional narrowband PCS licenses,<sup>6</sup> the Commission's rules included provisions to encourage participation by minority- and women-owned entities and small businesses in accordance with our mandate under Section 309(j) of the Communications Act of 1934, as amended ("the Communications Act").<sup>7</sup> At the conclusion of these auctions, the Commission announced winning bidders, which included recipients of bidding credits.<sup>8</sup>

3. Following the auction of 218-219 MHz licenses in 1994, the constitutionality of race- and gender-based bidding credits was called into question.<sup>9</sup> In order to avoid undue delay of future auctions

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<sup>4</sup> 47 C.F.R. § 95.803(a). See Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, GEN Docket No. 91-2, *Notice of Proposed Rule Making*, 6 FCC Rcd. 1368 (1991) ("Allocation Notice"); see also, Implementation of Section 309(j) of the Communications Act--Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd. 7245 (1994) (determining that 218-219 MHz Service licenses should be awarded through competitive bidding and prescribing certain general rules and procedures to be used for all auctionable services); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd. 2330 (1994) ("*Competitive Bidding Fourth Report and Order*"), on recon., *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 19341 (1996) ("*Competitive Bidding Sixth M.O.&O./Further Notice*") (establishing specific auction procedures for the 218-219 MHz Service).

<sup>5</sup> See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, *First Report and Order*, 8 FCC Rcd. 7162 (1993) ("*PCS First Report and Order*"), on recon., *Memorandum Opinion and Order*, 9 FCC Rcd. 1309 (1994) ("*PCS MO&O*").

<sup>6</sup> The auction for the 218-219 MHz Service was held on July 28 and 29, 1994 (Auction No. 2). The auction of regional narrowband PCS licenses began on October 26, 1994, and closed on November 8, 1994 (Auction No. 3).

<sup>7</sup> 47 U.S.C. § 309 (j)(4)(D); see also, 47 C.F.R. §§ 24.309, 95.816 (1994). *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd. 2330, at 2336, ¶ 36 (eligible IVDS bidders could use installment financing and bidding credits); see also, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Report and Order*, 9 FCC Rcd. 2941, at 2970, 2978, ¶ 72, 86 (adopting service-specific rules for competitive bidding on narrowband PCS licenses); Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS and Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, PP Docket No. 93-253, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd. 175, at 201, ¶ 58 (1994) (increasing the bidding credit for women- and minority-owned businesses in the upcoming regional narrowband auction from 25% to 40%).

<sup>8</sup> See Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo No. 44160 (rel. Aug. 2, 1994), erratum, *Public Notice*, Mimeo No. 44265 (rel. Aug. 9, 1994); see also, Announcing the High Bidders in the Auction of 30 Regional Narrowband (PCS) Licenses, *Public Notice* (rel. November 9, 1994); Announcement of Bid Amounts, *Public Notice* - Mimeo No. 44160 (rel. Aug. 2, 1994) ("*Bid Amount Public Notice*"); FCC Announces the Receipt of Down Payments from the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses, *Public Notice* (rel. Nov. 29, 1994).

<sup>9</sup> Graceba Total Communications, Inc. (Graceba) filed two petitions challenging the 218-219 MHz Service auction methodology as artificially inflating prices and challenging the constitutionality of the bidding

in other services, the Commission decided to eliminate the race and gender based provisions for those auctions and instead employ a similar provision for small businesses.<sup>10</sup> In the *218-219 MHz Order*, in order to address questions raised concerning the constitutionality of race- and gender-based bidding credits,<sup>11</sup> the Commission eliminated the minority- and women-owned business bidding credit previously afforded licensees in the first 218-219 MHz auction.<sup>12</sup> At the same time, to fulfill the Commission's statutory mandate of encouraging participation by small businesses, rural telephone companies, and businesses owned by members of minority groups and women,<sup>13</sup> and minimize 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>14</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 extending similar credits to participants in the regional narrowband PCS auction.

4. In support of their instant motions, petitioners argue that their efforts on behalf of their clients, Graceba Total Communications, Inc. ("Graceba") and the Ad Hoc IVDS Coalition, caused the Commission to authorize the retroactive bidding credit and, therefore, the petitioners are entitled to compensation based upon the common fund doctrine.<sup>15</sup> Petitioners also argue that

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credits that were awarded in the auction. In December 1995, the Commission denied Graceba's petitions, along with those filed by other bidders in the 1994 auction seeking similar relief. See *In the Matter of Interactive Video and Data Service (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 Wireless Telecommunications 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. Amendment of Part 95 of the Commission's Rules to provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum and Opinion and Order*, 15 FCC Rcd. 1497 (1999) ("*218-219 MHz Order*").

<sup>10</sup> *Competitive Bidding Sixth M.O.&O.*, 11 FCC Rcd. at 19369 ¶ 67 (rules for the then planned second IVDS auction); *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd. 136, 161, 167, ¶¶ 1, 47, 59 (C Block rules); 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, 10492, ¶¶ 37, 84 (2000).

<sup>11</sup> *218-219 MHz Order*, 15 FCC Rcd. at 1532-33, ¶ 60-64 (provides further procedural history).

<sup>12</sup> Thus, all minority and women owned businesses lost the bidding credit they had previously received in the original auction in the 218-219 MHz Service conducted in 1994.

<sup>13</sup> 47 U.S.C. § 309 (j).

<sup>14</sup> *218-219 MHz Order*, 15 FCC Rcd. at 1533, ¶ 61.

<sup>15</sup> IVDS Petition at 7; Regional Narrowband PCS Petition at 12. *But see* comments listed in Appendix. (For example, Instapage argues that it is important to note that petitioners did not claim to represent any parties beyond their identified clients, and that they did not ask the D.C. Circuit court to grant any relief with respect to the regional narrowband auction, Instapage Opposition at 3.).

their efforts will cause the Commission to establish similar provisions with respect to Auction No. 3 (for regional narrowband PCS licenses), and that they should also be similarly compensated, again, based upon the common fund doctrine.<sup>16</sup> Based on this theory, petitioners seek an attorneys' fee award of twenty five percent from the refund generated by the retroactive bidding credit granted in the *218-219 MHz Order*, and a fee award of thirty percent from refunds they expect the Commission to grant in connection with the regional narrowband PCS auction.<sup>17</sup>

5. As previously noted, several commenters filed replies in opposition to the IVDS Petition and the Regional Narrowband PCS Petition. The commenters argue that the Commission lacks the authority to declare a common fund.<sup>18</sup> Additionally, the commenters argue that Commission's precedent bars award of a common fund in this instant matter.<sup>19</sup> Further, commenters argue that the petitioners' claims are exaggerated, and there is no equitable basis to award a common fund award.<sup>20</sup>

### III. DISCUSSION

#### A. The Commission Lacks Authority to Establish a Common Fund

6. The common fund doctrine is an equitable doctrine that allows a court to establish a "common fund" to compensate an individual who recovers a monetary amount for the benefit of individuals other than himself or his client.<sup>21</sup> The common fund doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."<sup>22</sup> The compensation is limited to reasonable attorneys' fees from the common fund.<sup>23</sup> The common fund doctrine can only be applied where the court possesses jurisdiction over the fund involved in the litigation. Courts have explained that this limitation prevents inequity as attorney's fees are assessed against the entire fund, spreading the fees proportionately among those who are the actual beneficiaries of the litigation.<sup>24</sup>

7. In order to establish entitlement to a common fund, an applicant must demonstrate all

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<sup>16</sup> IVDS Petition at 10; Regional Narrowband PCS Petition at 9.

<sup>17</sup> IVDS Petition at 10; Regional Narrowband PCS Petition at 9.

<sup>18</sup> Enterprises Opposition at 9-11; Instapage Opposition at 7-9; In-Sync Opposition at 5.

<sup>19</sup> Enterprises Opposition at 11-13; Instapage Opposition at 9-11; In-Sync Opposition at 6-12.

<sup>20</sup> Tel/Logic Opposition at 2-4; Enterprises Opposition at 17-18; Instapage Opposition at 15-18; In-Sync Opposition at 13-17.

<sup>21</sup> See *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).

<sup>22</sup> *Mills*, 396 U.S. at 392; see also, *Boeing*, 444 U.S. at 478.

<sup>23</sup> See *Boeing Company v. Van Gumbert, et al.*, 444 U.S. 472, 478 (1980).

<sup>24</sup> *Mills*, 396 U.S. at 394; see also, *Boeing*, 444 U.S. at 478.

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 also must be adequate representation of all parties in interest.<sup>25</sup> Petitioners have failed to establish all three of these elements. First, the Commission lacks the “judicial equity power” to apply the common fund doctrine to determine whether the petitioners are entitled to attorney’s fees.<sup>26</sup> Second, the petitioners have failed to identify a fund over which a court has jurisdiction because the Commission is not a court with jurisdiction to entertain third party claims to funds at issue. Third, the facts do not demonstrate that the petitioners adequately represented all parties in interest. Additionally, contrary to petitioners’ argument, the grant of the retroactive bidding credits were not themselves meant as a remedy for any alleged constitutional injury.<sup>27</sup> Rather, the credit accorded small businesses solved a multi-faceted and complex set of regulatory issues.

8. Petitioners have failed to present authority, and we are aware of no precedent for the proposition that a federal agency has equitable jurisdiction to establish a common fund.<sup>28</sup> In *William E. Zimsky*, the Commission previously determined that it lacked the required equitable jurisdiction to establish a common fund.<sup>29</sup> The Commission’s lack of authority to recognize a claim for a common fund is controlling in the instant matter. As stated in *Zimsky*, “a common fund is a creature of a court’s inherent equitable power over funds under its control, . . . [it] does not crystallize at the moment a single plaintiff prevails on his claim [and it is] not created by the parties or their lawyers . . . [it] is established by a court.”<sup>30</sup> The petitioners, however, assert that *Zimsky* is not applicable here.<sup>31</sup> We disagree.

9. In *Zimsky*, an attorney asked the Commission to determine that he was entitled to a share of refunds, which he claimed to have created as a result of a petition he filed on behalf of certain applicants.<sup>32</sup> Similarly, petitioners here contend that they are entitled to a share of any refunds owed to eligible IVDS and regional narrowband PCS licensees. They argue that their numerous petitions, and legal efforts generally, resulted in the Commission granting the refunds in the 218-219 MHz service and will lead to the Commission granting refunds to regional narrowband PCS licensees.<sup>33</sup> However, as previously noted, in *Zimsky* the Commission held that a common fund award can arise *only* in the context of litigation before an appropriate court

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<sup>25</sup> *Knight v. U.S.*, 982 F.2d 1573, 1581 (1993).

<sup>26</sup> William E. Zimsky, *Declaratory Ruling*, 9 FCC Rcd. 3239 (1994) (“*Zimsky*”).

<sup>27</sup> IVDS Petition at 7.

<sup>28</sup> *Knight*, 982 F.2d at 1582 (cited in *Zimsky*, 9 FCC Rcd. at 3241, ¶ 23).

<sup>29</sup> *Zimsky*, 9 FCC Rcd. at 3241, ¶ 20

<sup>30</sup> *Id.* (citing to *Sprague*, 307 U.S. at 166-67, *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 257-8, (1975); *Boeing*, 444 U.S. 472, 478)).

<sup>31</sup> IVDS Petition at 12. *But see* Enterprises Opposition at 13; In-Sync Opposition at 10.

<sup>32</sup> *Zimsky*, 9 FCC Rcd. 3239, at 3239-3240, ¶¶ 1, 8, 10.

<sup>33</sup> IVDS Petition at 7.

exercising its equitable powers, and the same holds true here.<sup>34</sup>

10. In *Zimsky*, the Commission relied upon *Turner v. FCC*, where an appellate court held that the Commission, as an administrative agency, lacked authority to order the reimbursement of legal expenses in the absence of a clear statutory authority granted by Congress.<sup>35</sup> Petitioners attempt to distinguish *Zimsky* by arguing that *Zimsky* could seek relief in alternative forums, while they are precluded from doing so here.<sup>36</sup> Petitioners base this argument on the recent *NextWave* decision, in which the Court of Appeals for the Second Circuit held that “[t]he FCC’s exclusive jurisdiction extends not only to the granting of licenses, but to the conditions that may be placed on their use . . . .”<sup>37</sup> Although the appellate court 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 Commission is still subject to other jurisdictional limitations.<sup>38</sup> Further, nothing would prohibit petitioners from seeking compensation from the individual recipients of any refunds granted in a court of competent jurisdiction to the extent allowed by applicable law.<sup>39</sup> Thus, they are not without a forum in which to pursue their claims.

11. The petitioners ignore the fact that their position finds no support, either explicitly or implicitly, in the plain language of the Communications Act, as amended (“the Act”).<sup>40</sup> There is no language in Section 309(j) of the Act, or any other legal authority, including the *NextWave* decision, which gives the Commission the equitable authority to determine that the petitioners are entitled to a common fund.<sup>41</sup> The petitioners’ analysis of the language in *NextWave* inaccurately represents the Second Circuit’s decision as being so expansive that it extends the Commission’s regulatory jurisdiction to encompass the inherent equitable powers of a court. Unlike the courts, administrative agencies, like the Commission, do not possess such powers.<sup>42</sup> As *Zimsky* explains, the Commission lacks the equitable power to declare that petitioners are entitled to a common fund. This fact was not altered by the appellate court’s decision in

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<sup>34</sup> *Turner v. FCC*, 514 F.2d 1354, 1355 (D.C.Cir. 1975) (cited in *Zimsky*, 9 FCC Rcd. at 3241, ¶ 20); see also, Enterprises Opposition at 11; In-Sync Opposition at 6.

<sup>35</sup> *Zimsky*, 9 FCC Rcd. at 3241, ¶ 20.

<sup>36</sup> IVDS Petition at 11 (citing *NextWave Personal Communications, Inc. v. FCC*, 200 F.3d 43 (2<sup>nd</sup> Cir. 1999) (“*NextWave*”), *aff’d* 2000 WL 828282 (2<sup>nd</sup> Cir., May 25, 2000)); see also “Reply to Opposition to Petition for an order to declare a Common Fund” (“Reply to Enterprises Opposition”), filed by Myers and Welch, dated April 3, 2000, at 7. *But see*, In-Sync Opposition at 9-10.

<sup>37</sup> *NextWave*, 200 F.3d 43, 54.

<sup>38</sup> *Id.*; see also *Turner*, 514 F.2d 1354 (explicitly holding that the FCC lacks the authority to award attorney’s fees without statutory authorization.).

<sup>39</sup> We make no comment on the merits of any such claim.

<sup>40</sup> 47 U.S.C. § 309.

<sup>41</sup> *Id.*

<sup>42</sup> *Turner*, 514 F.2d at 1355 (cited in *Zimsky*, 9 FCC Rcd. at 3242, ¶ 29).

*NextWave* or any other post-*Zimsky* decision, which means that the first element required for creating a common fund is not present here. For this reason alone, it would be appropriate to deny petitioners' motion.

12. Furthermore, petitioners also fail to identify a fund over which a court has jurisdiction, the second element required to establish a common fund. Although the Commission does possess 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.<sup>43</sup> The Commission is not a court and does not possess the broad jurisdictional authority of a court. Absent a court order recognizing the validity of an attorney's claim, the government is not obligated to pay fees out of refunds.<sup>44</sup> Further, if the Commission were to grant petitioners' request, it may violate due process, as the petitioners did not establish a fee arrangement with all entities eligible for refunds.<sup>45</sup>

13. Finally, petitioners fail to demonstrate that all parties in interest were adequately represented, the third element required to establish a common fund. Although commenters submitted copies to show that petitioners solicited support for their legal services to eligible licensees, there is no evidence to indicate that the solicited licensees did in fact support or accept the petitioners' legal efforts as being on their behalf.<sup>46</sup> As the commenters argue, it is not even apparent that petitioners' intention was to seek refunds for all licensees in both services, particularly regional narrowband PCS licensees.<sup>47</sup> Accordingly, the facts do not support petitioners claim that this "common fund claim concerns efforts which long ago were aimed toward seeking relief for whole classes of licensees."<sup>48</sup> The petitioners' arguments cannot overcome the fact that nothing before us shows that they were acting other than for their own clients. Contrary to the petitioners' contentions, the Commission clearly stated in *Zimsky* that, "in the absence of formal representation, a common fund award would be appropriate *only* when the relationship between the litigant and the beneficiaries raises strong equities for treating the litigant as acting for the benefit of others . . . ."<sup>49</sup> Furthermore, case law is clear in stating that the common fund doctrine allows only a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation

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<sup>43</sup> *Knight*, 982 F.2d at 1580 (cited in *Zimsky*, 9 FCC Rcd. at 3241, ¶ 24).

<sup>44</sup> *Knight*, 982 F.2d at 1580 (In *Knight*, the Court stated that only a court order, not an attorney's demand, could impose a duty to create a common fund. With respect to the back pay due to the attorney's clients in *Knight*, the Court clearly stated that "[t]he government could not unilaterally surrender their rights . . .").

<sup>45</sup> *National Council of Community Health Centers v. Mathews*, 546 F.2d 1003, 1008-1009 (D.C. Cir. 1976) (denying common fund recovery on that ground).

<sup>46</sup> Enterprise Opposition at 15-18.

<sup>47</sup> Instapage Opposition at 3.

<sup>48</sup> Regional Narrowband PCS Petition at 15.

<sup>49</sup> *Zimsky*, 9 FCC Rcd. at 3242, ¶ 38 (emphasis added); *see also* In-Sync Opposition at 14-15; Tel/Logic Opposition at 4.

expenses incurred, including counsel fees.<sup>50</sup> Additionally, as we indicated in *Zimsky*, courts have found it relevant that class members support the reasonableness of a fee determination.<sup>51</sup> A review of the comments filed clearly shows opposition to the fee award sought by the petitioners.<sup>52</sup> Rather, commenters argue that the proposed fee would so substantially benefit the petitioners as to be neither reasonable nor equitable, and thus, would undermine a basic element of the common fund doctrine.<sup>53</sup>

14. The petitioners' attempt to argue that the Commission acknowledged the value of their work in obtaining relief for the IVDS licensees in the *218-219 MHz Order* also lacks merit. Rather petitioners mischaracterize the straightforward language in the *218-219 MHz Order* to advance their own self-created standard for the authority required to establish a common fund. In the *218-219 MHz Order*, the Commission simply stated that petitioners in that proceeding raised certain issues to which the Commission would provide a responsive remedy.<sup>54</sup> The strong policy arguments against extending the common fund doctrine to administrative rulemakings have not changed since our decision in *Zimsky*. In *Zimsky*, we rejected the contention that legal efforts created certain refunds and should be characterized as an adjudication distinct from our rulemaking.<sup>55</sup> The fundamental principle remains that the common fund doctrine does not apply to our rulemakings.

15. Finally, petitioners argue that the discussion of both jurisdiction and the merits in *Zimsky* indicated that the Commission either did not believe or was uncertain as to whether it lacked jurisdiction to declare a common fund.<sup>56</sup> In *Zimsky*, the Commission clearly indicated that it lacked jurisdiction. Thus, *Zimsky's* discussion of the merits was dicta and does not vest the Commission with jurisdiction to review petitioners' claim.<sup>57</sup>

## **B. EAJA Does Not Provide the Commission with A Statutory Exception.**

16. We also reject petitioners' arguments that the Equal Access to Justice Act ("EAJA"),

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<sup>50</sup> *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1265 (D.C.Cir. 1993); *see also*, In-Sync Opposition at 13 (indicating that some licensees received demands for payment of legal fees without reasonable notice); Enterprise Opposition at 15-18 (arguing that it is unreasonable for petitioners to expect that non-clients "be required to help foot the legal bills.").

<sup>51</sup> *Swedish Hospital*, 1 F.3d at 1272 (cited in *Zimsky*, note 15).

<sup>52</sup> Enterprises Opposition at 13-17; Tel/Logic Opposition at 2-4; Instapage Opposition at 12-18.

<sup>53</sup> In-Sync Opposition at 14-15.

<sup>54</sup> *218-219 MHz Order*, 15 FCC Rcd. at 1533, ¶ 60.

<sup>55</sup> *Zimsky*, 9 FCC Rcd. at 3242, ¶ 31; *see also*, Enterprises Opposition at 11-12; In-Sync Opposition at 11-12.

<sup>56</sup> Petitioners' claim that "The FCC's discussion of equities [in *Zimsky*], at a minimum, demonstrates uncertainty regarding its legal determination that it could declare a common fund." IVDS Petition at 12

<sup>57</sup> *Bokunewicz v. Purolator Products, Inc.*, 907 F.2d 1396, 1399 (3rd Cir. 1990) (holding that "everything after denial of jurisdiction" is "dicta, pure and simple.").



as set forth in 28 U.S.C. § 2412, serves as a basis for the Commission to recognize a common fund. EAJA is a federal statute designed to provide private litigants a means of recovering their attorney fees in actions brought by and against federal agencies in certain limited circumstances.<sup>58</sup> The EAJA statute serves as a statutory exception to the “American Rule,” which stands for the proposition that in the absence of an express statutory authorization, each party is responsible for payment of his own attorney's fees and other expenses incurred during litigation.<sup>59</sup> EAJA deals with the liability of the United States as a party for attorney's fees while the common fund doctrine deals with the liability of a fund for attorneys' fees.<sup>60</sup> These two concepts are distinct.

17. Although the EAJA covers both judicial and administrative proceedings,<sup>61</sup> neither portion of the statute provides the Commission with jurisdiction for a fee award against a non-governmental party. Clearly, the portion of the statute that empowers federal courts to award attorneys' fees does not provide jurisdiction for the Commission to award attorney's fees from a common fund. With respect to the portion of the EAJA that provides for fee awards in administrative proceedings, such authority is limited to fee amounts against the government in "adversary adjudications."<sup>62</sup> As previously discussed, the Commission's decision to grant a retroactive twenty-five percent bidding credit was made in the context of rulemaking.<sup>63</sup> Further, petitioners do not seek a fee award against the government. Therefore, petitioners' reliance on EAJA is misplaced.

18. In a further attempt to bolster their jurisdictional argument, petitioners cite to *Commonwealth of Puerto Rico v. Heckler*.<sup>64</sup> In *Heckler*, the Court of Appeals for the DC Circuit recognized that unless expressly prohibited by statute, courts can make common fund awards against federal agencies under the EAJA.<sup>65</sup> Petitioners claim that while *Zimsky* did not involve

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<sup>58</sup> EAJA authorizes only a limited waiver of sovereign immunity. Waivers of sovereign immunity must be strictly construed in favor of the United States. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 590 (1991); *Manko v. United States*, 830 F.2d 831, 838 (8th Cir. 1987); *see also, FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

<sup>59</sup> *See In re Perry, et al.*, 882 F.2d 534 (5<sup>th</sup> Cir. 1989).

<sup>60</sup> *Holbrook v. Pitt*, 748 F.2d 1168, 1174 (7<sup>th</sup> Cir. 1984); Enterprises Opposition at 12.

<sup>61</sup> EAJA is applicable to courts through 28 U.S.C. § 2412 and to administrative agencies through 5 U.S.C. § 504.

<sup>62</sup> 5 U.S.C. § 504(a)(1); 554; 47 C.F.R. § 1.1526; *see In re Perry, et al.*, 882 F.2d 534, 540 (5<sup>th</sup> Cir., 1989) (discussing Congress's intent to “disallow fee awards for administrative proceedings in which the government is an adjudicator rather than an adversary); *see also, H.R.Rep. No. 1418, supra*, 1980 U.S. Code Cong. & Admin. News at 4992 (“Section 2412(d) authorizes an award of reasonable fees and expenses in judicial proceedings analogous to the awards authorized in adversary adjudications under [5 U.S.C. § 504].”).

<sup>63</sup> IVDS Petition at 13; Reply to Enterprises Opposition at 8-9.

<sup>64</sup> *Commonwealth of Puerto Rico v. Heckler*, 745 F.2d 709, 711, 713 (D.C. Cir. 1984). *But see, Enterprises Opposition* at 10-11; *In-Sync Opposition* at 5.

<sup>65</sup> *Heckler*, 745 F.2d at 711; *see also, 28 U.S.C. §§ 2412(b), 2412(d)(1)(A)*. Section 2412(d)(1)(A) provides in pertinent part:

an applicable statutory exception for the Commission to award attorneys fees, the instant facts are similar to that in *Heckler*. Petitioners' erroneously argue that *Heckler* supports the proposition that EAJA empowers the Commission to create a common fund in their case. We do not agree. While a federal court in cases involving federal agencies may grant a common fund award, the language from *Heckler* does not provide the Commission with authority to grant a common fund award.

19. Furthermore, petitioners fail to demonstrate that they meet any of the other elements required for EAJA to be applicable in an administrative context.<sup>66</sup> First, petitioners were not a party in litigation against the government. Thus, they do not qualify as a prevailing party.<sup>67</sup> Second, EAJA only provides for the award of attorney fees and expenses actually incurred.<sup>68</sup> Petitioners have failed to establish that they actually incurred fees and expenses equal to twenty five percent of potential or actual refunds.<sup>69</sup> Thus, petitioners have failed to establish any legal or factual support for the proposition that EAJA provides the requisite statutory authority that would permit the application of the common fund doctrine in this instance.

#### IV. CONCLUSION

20. We conclude that the Commission lacks the necessary legal authority to apply the

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Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

<sup>66</sup> 5 U.S.C. § 504(a)(1).

<sup>67</sup> 28 U.S.C. § 2412 (d)(1)(A) (provides that only "a prevailing party" in litigation against the United States or an agency of the United States is entitled to an award of reasonable attorneys fees); *see also Money v. OPM*, 816 F.2d 665 (Fed. Cir., 1987); *Yarbrough v. Cuomo*, 209 F.3d 700, 703 (8<sup>th</sup> Cir., 2000); 47 C.F.R. § 1.1501, *et seq.* (which implements the EAJA, provides for the award of attorney's fees and other expenses to an eligible party "when it prevails over the Commission, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust."); *Enterprises Opposition* at 12; *In-Sync Opposition* at 10-11. Petitioners seek this award for themselves and make no attempt to characterize it as a claim asserted on behalf of their clients.

<sup>68</sup> 5 U.S.C. § 504(a)(1). EAJA plainly states in Section 504(a)(1), that:

"An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."

<sup>69</sup> 5 U.S.C. § 554; 5 U.S.C. § 504(b)(1)(C); *see also*, Thomas L. Root, Esq., Request for Compensation Under the Equal Access to Justice Act, GEN Docket No. 90-297, *Memorandum Opinion and Order*, 6 FCC Rcd. 2491 (1991) (Compensation under EAJA, is limited to fees and costs incurred in "adversary adjudications," which are defined as adjudications under Section 554 of the Administrative Procedures Act ("APA"), and which applies only to "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing.").

common fund doctrine in this case. We find no jurisdictional basis upon which to grant the relief the petitioners are requesting.

#### V. ORDER

21. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), that the Emergency Motion for Expedited Consideration and Petition for an Order to Declare a Common Fund and the Petition for an Order to Declare a Common Fund, both filed on March 8, 2000 by Myers Keller Communications Law Group and Hill & Welch, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan  
Deputy Chief, Wireless Telecommunications Bureau

**APPENDIX**

The following opposition comments were received:

1. IVDS Enterprises Joint Venture, filed on March 22, 2000 (“Enterprises Opposition”).
2. Instapage Network LTD, filed on March 22, 2000 (“Instapage Opposition”).
3. Tel/Logic, Inc., filed on April 6, 2000 (“Tel/Logic Opposition”).
4. In-Sync Interactive Corporation, Loli, Inc., KMC Interactive TV, Inc., Trans Pacific Interactive, Inc. and Whitehall Wireless Corporation, filed on May 17, 2000 (“In-Sync Opposition”) (ex parte filing).