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DOCKET FILE COPY ORIGINAL

March 23, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12 th Street, S.W., Room TW-B204F
Washington, D.C. 20554

Re: *GEN Docket No. 90-314*
ET Docket No. 92-100
PP Docket No. 92-253

Instapage Network, Ltd.
Request for Remedial Bidding Credit

Dear Ms. Salas:

Our client, Instapage Network Ltd. ("Instapage"), is prosecuting an Informal Request for Remedial Bidding Credit, by which it seeks a forty percent reduction in its $8,000,013 winning bid for the Narrowband PCS license for the South Region, Market No. R002 (frequency block 5). Instapage is requesting that relief to remedy the continuing effects of the Commission's action in the referenced proceeding extending bidding credits to businesses owned by minorities and/or women, which actions the Commission has recognized as being unconstitutional. A copy of Instapage's petition is enclosed hereto.

In the above-referenced rulemaking, the Commission is proposing to amend § 24.309 of its narrowband PCS auction rules to eliminate the race- and gender-based bidding credits. Although the proposed rule change will ensure Fifth Amendment equal protection going forward, it will provide no retrospective relief for narrowband licensees, such as Instapage, that are suffering the ill effects of the Commission's discriminatory bidding credits. Therefore, in addition to amending its auction rules, the Commission should provide remedial bidding credits to all small business winning bidders in its 1995 auction of PCS regional narrowband licenses. The Commission provided such relief to the winning bidders in its 1994 IVDS auction. *See, Amendment of Part 95 of the*

Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, 17 Communications Reg. (P&F) 222, 244-45 (1999).

Lastly, we provide herewith an Opposition to Petition For an Order to Declare a Common Fund, which we filed yesterday, wherein Instapage rebuffs an attempt to have thirty percent of the benefits from a remedial bidding credit siphoned off to other parties.

In the event that any questions arise with respect to this matter, please communicate directly with the undersigned.

Very truly yours,

Thomas Gutierrez
Counsel for Instapage Network, Ltd.

Enclosures
cc: A. Fitzgerald, Esq.
P. Tenhula, Esq.
B. Traymont, Esq.
A. Krinski, Esq.
M. Schneider, Esq.
T. Sugrue, Esq.
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November 12, 1999

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OFFICE OF THE SECRETARY

Steven P. Weingarten, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-C224
Washington, DC 20554

Dear Mr. Weingarten:

On behalf of Instapage Network, Ltd., ("Instapage") we transmit herewith an Informal Request for a Remedial Bidding Credit. As set forth in the informal request, we seek to have the Commission apply to Instapage, a narrowband PCS licensee operational in the Southeast region, the same type of remedial bidding credit that the Commission applied recently to IVDS licensees in order to provide a Constitutional remedy that reflects the Supreme Court's *Adarand* decision.

Although we understand that the Commission is undertaking some form of review of its narrowband PCS rules, we are unaware of any active consideration of this matter, to the extent that it would impact upon existing licensees, and we have thus not provided service to any pending rulemaking proceedings. In the event that you believe that such service would be appropriate, it would be effectuated immediately upon request.

Very truly yours,

Thomas Gutierrez

cc: Diane Connelly, Esquire
TG:jmm

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
INSTAPAGE NETWORK, LTD.	)	File No.
	)	
Informal Request for a Remedial Bidding Credit	)	
	)	

To: The Commission

INFORMAL REQUEST FOR REMEDIAL BIDDING CREDIT

Instapage Network Ltd. ("Instapage"), by its attorneys and pursuant to section 1.41 of the Commission's Rules, hereby requests a forty percent reduction in its $8,000,013 winning bid for the Narrowband PCS license for the South Region, Market No. R002 (frequency block 5). In support thereof, the following is respectfully submitted:

Instapage's predecessor in interest, Insta-Check Systems, Inc.("Insta-Check"), was a winning bidder in the Commission's 1995 auction of PCS regional narrowband licenses. In that auction, businesses owned by minorities and/or women were in certain instances granted bidding credits of up to forty percent. *See* 47 C.F.R. § 24.309(b)(2) (1995). Those credits were intended by the Commission to confer a "significant" advantage to minority and female-owned businesses. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 2941, 2970 (1994). Despite its status as a *bona fide* minority small business, Instapage received no bidding credit.

In June 1995, the Supreme Court decided *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), holding that all government racial classifications are unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests." Shortly thereafter, the

at 37 (released Sept. 10, 1999) ("*218-219 MHz Order*"). In effect, the Commission retroactively awarded discounts of "commensurate size" to all winning small business bidders in the 1994 IVDS auction. *Id.* Instapage seeks similar relief here.

In 1995, Insta-Check qualified both as a small business and a minority-owned business. Together with its affiliates, Insta-Check's average gross revenues in 1991, 1992 and 1993 was approximately $6.8 million. None of its officers, directors, shareholders or affiliates, viewed singularly or in composite, had a personal net worth of $40 million or more; all were Asian Americans. However, because it was the winning bidder for a regional Channel 16 authorization, Insta-Check was not granted any bidding credits. *See* 47 C.F.R. § 24.129(b)(2) (1995). As the result of a *pro forma* assignment approved by the Commission in1997, Instapage assumed Insta-Check's obligation to pay 100 percent of its winning bid. Thus, each installment payment made by Instapage reflects the discriminatory treatment that resulted from the presumptively unconstitutional auction preference rules.

Instapage is paying the full amount bid while other minority- and female-owned auction winners paid only sixty percent of their winning bids. Moreover, Instapage is suffering a continuing injury, because the Commission's preferences, now recognized as being unconstitutional, had the collateral effect of skewing the results of the tainted auction. Like the non-preferred auction winners, Insta-Check had to pay more for its license, because the bidding credits allowed minority and women-owned small businesses to bid up the price for spectrum. As a consequence, Instapage is making installment payments based on 100 percent of the inflated price bid for its authorization. That violates the equal protection component of the Fifth Amendment's Due Process Clause.

As the Commission's remedial actions in the *218-219 MHz Order* reflect, the Commission

has a constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination. *See Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring). By that order, the Commission granted remedial bidding credits to all small business winning bidders despite its prior concern with regard to "principles of finality and retroactivity." *See Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1041 (D.C. Cir. 1997). It can and should provide the same constitutional remedy here, thereby fulfilling its obligation to treat similarly situated parties alike. *See, e.g., Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) and its progeny. Specifically, Instapage should be awarded a forty percent remedial bidding credit, thereby reducing its winning bid to $4,800,008.

For all the foregoing reasons, Instapage respectfully requests that it be granted a remedial bidding credit and that its installment payments be reduced accordingly.

Respectfully submitted,

INSTAPAGE NETWORK, LTD.

By: _____
Thomas Gutierrez

Its Attorney

Lukas, Nace, Gutierrez & Sachs, Chartered
1111 Nineteenth Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500

November 12, 1999

STAMP & RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Hill & Welch and the Myers Keller	)	
Communications Law Group	)	File No.
	)	
For Declaration of a Common Fund for	)	
Legal Services Rendered RNPCS Licensees	)	

To: The Commission

OPPOSITION TO PETITION FOR AN
ORDER TO DECLARE A COMMON FUND

Thomas Gutierrez
Lukas, Nace, Gutierrez & Sachs, Charted
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500

March 22, 2000

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Hill & Welch and the Myers Keller	)	
Communications Law Group	)	File No.
	)	
For Declaration of a Common Fund for	)	
Legal Services Rendered RNPCS Licensees	)	

To: The Commission

OPPOSITION TO PETITION FOR AN
ORDER TO DECLARE A COMMON FUND

Instapage Network Ltd. ("Instapage"), by its attorneys and pursuant to § 1.45(b) of the Commission's Rules, hereby opposes the Petition for an Order to Declare a Common Fund ("Pet.") filed by Hill & Welch ("Welch") and Myers Keller Communications Law Group ("Myers"). In opposition thereto, the following is respectfully submitted:

BACKGROUND

In July 1994, the Commission held that it was without authority to award attorney's fees under the common fund doctrine. *See William E. Zimsky*, 9 FCC Rcd 3239, 3241 (1994). It explained that "a common fund award can arise only in the context of litigation before an appropriate court exercising its equitable

powers." *Id.* It is against the backdrop of the *Zimsky* decision that the facts of this case should be viewed.

Five months after the *Zimsky* decision was released, Instapage's predecessor in interest, Insta-Check Systems, Inc. ("Insta-Check"), became a winning bidder in the Commission's auction of 30 regional narrowband PCS ("RNPCS") licenses. Insta-Check bid $8,000,013 for the RNPCS license for the South Region, Market No. R002 (frequency block 5).

In the 1994 auction, businesses owned by minorities and/or women were in certain instances granted bidding credits of up to 40%. *See* 47 C.F.R. § 24.309(b)(2) (1995). It was clear as early as March 1995 that the Commission's auction rules establishing minority and gender preferences were constitutionally suspect. *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 626-27 (D.C. Cir. 1996). And by June 1995, the Commission recognized that its race and gender preferences could not withstand strict constitutional scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 10 FCC Rcd 11872, 11877-78 (1995).

In July 1995, acting on behalf of Graceba Total Communications, Inc. ("Graceba"), Welch challenged the 1994 IVDS

auction under *Adarand*. *See* Pet. at 4. Five months later, Myers filed a similar challenge on behalf of a coalition of IVDS auction participants. *See id.* Neither Welch nor myers sought Adarand-based relief with respect to the 1994 RNPCS auction.

Welch and Myers took the matter to the D.C. Circuit Court of Appeals in January 1996. They advised the D.C. Circuit that they represented Graceba, Community Teleplay, Inc., and an association of eight participants in the IVDS auction (collectively the "Coalition").[1] They did not claim to represent any parties beyond their identified clients and they did not ask the Court to grant any relief with respect to the RNPCS auction.

The D. C. Circuit remanded the case to the Commission in June 1997 to further consider Graceba's constitutional challenge to the minority and gender preference rule employed in the IVDS auction. *See Graceba*, 115 F.3d at 1038. The Court expressed no opinion as to the merits of Graceba's claim and it granted no other relief. *See id.*

On April 30, 1998, ten months after the *Graceba* remand, Welch and Myers delivered a letter to counsel for Instapage informing him

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[1] *See* Joint Brief of Petitioner, Appellants and Intervenors at ii, *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997) ("Joint Brief").

about "certain" adjudicatory proceedings before the Commission that could lead to a refund of 40% of the amount of Instapage's winning bid for its RNPCS license.[2] They offered to prosecute a "refund action" for Instapage in return for 20% of any refund recovered.[3] They also stated that they "in any event will seek the 20% fee award under the common fund doctrine with respect to any non-client 1994 auction participant that recovers a refund."[4] Enclosed with the letter was a copy of a pleading showing that Graceba *already* had requested (on that same day) that the Commission issue either 25% or 40% refunds/credits to all "non-preferred" winning bidders in the 1994 IVDS and RNPCS auctions.[5]

Instapage chose not to retain Welch and Myers. Nevertheless, after the Wireless Telecommunications Bureau rejected the Coalition's request for a 25% reduction of their IVDS auction

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[2] *See* Letter from Richard S. Myers to Thomas Gutierrez 1 (Apr. 30, 1998) (copy attached as Exh. A).

[3] *Id.* at 2.

[4] *Id.*

[5] *See* Petition for Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration at 26-27 (Apr. 30, 1998).

bids,[6] Welch and Myers repeated their offer to Instapage's counsel.[7] They again threatened to seek a 20% fee award with respect to any refund obtained by Instapage.[8] And again Instapage declined to retain Welch and Myers.

In September 1999, the Commission provided a remedy for its presumptively unconstitutional minority- and women-owned business bidding credits applied in the 1994 IVDS auction. *See Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 Mhz Service*, 17 Communications Reg. (P&F) 222, 244-45 (1999) ("*Flexibility Order*"). However, the Commission found that Graceba lacked standing to seek a remedy with respect to the tainted RNPCS auction. *See id.* at 245. Therefore, it denied Graceba's request that refunds or credits be extended to the non-preferred RNPCS auction winners. *See id.*

Because it had been given no relief by the Commission, Instapage filed a request with the Commission in November 1999 seeking a 40% remedial bidding credit, grant of which would reduce

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[6] *See Community Teleplay, Inc.*, 13 FCC Rcd 12426, 12428-29 (Wire. Telecomms. Bur. 1998).

[7] *See* Letter from Richard S. Myers to Thomas Gutierrez 2 (June 30, 1998) (copy attached as Exh. B).

[8] *See infra* Exh. B at 2.

its winning bid by $3,200,005.[9] Instapage made that request through its own communications counsel and at its own expense.

The fact that Instapage was seeking its own relief did not deter Welch and Myers. They solicited Instapage for the third time on March 2,2000. This time they wrote directly to Instapage rather than its counsel. The express purpose of the letter was to propose that Instapage retain Welch and Myers to obtain a $3.2 million refund.[10] Claiming that Instapage had a "reasonably good chance" of obtaining a 40% refund, Welch and Myers upped their proposed fee to 25% of the refund they obtain for Instapage.[11] They also upped their threatened "common fund fee" to 30%.[12]

Six days after soliciting Instapage for the third time, Welch and Myers petitioned the Commission to establish a common fund regarding the refund of monies it will order in connection with the RNPSC auction. They claim that they should be awarded 30% of the monies refunded (40% of the winning bids) to the six non-preferred

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[9] *See* Informal Request for Remedial Bidding Credit at 1 (Nov. 12, 1999).

[10] *See* Letter from Richard S. Myers to Ozzie Jordan 1 (Mar. 2, 2000) (copy attached as Exh. C).

[11] *See infra* Exh. C at 2.

[12] *See id.*

winners of the narrowband PCS. *See* Pet. at 9 & n.21. Thus, Welch and Myers are seeking a common fund award estimated at $29,832,934.[13]

DISCUSSION

I. THE COMMISSION LACKS AUTHORITY TO AWARD ATTORNEY'S FEES OR ESTABLISH A COMMON FUND

"Congress, and not the Commission, can authorize an exception to the 'American Rule' that litigants bear the expense of their litigation." *Turner v. FCC*, 514 F.3d 1354, 1356 (D.C. Cir. 1975). Thus, the Commission (like all federal agencies) may not depart from the Rule without clear statutory authority. *See Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 806 (D.C. Cir. 1997). Except to the extent allowed by the Equal Access to Justice Act ("EAJA"), the Commission has long recognized that it lacked statutory authority to award attorney's fees in its proceedings. *Equal Access to Justice Act Rules*, 88 FCC 2d 1022, 1023 n.1 (1982). Through the years the Commission has consistently denied that it had fee-

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[13] The winning bids of Advanced Wireless Messaging, Inc., AirTouch Paging, Ameritech Mobile Services, Inc., MobileMedia PCS, Inc., PageMart II, Inc., and Insta-Check totaled $248,607,792. *See Announcing the High Bidders in the Auction of 30 Regional Narrowband (PCS) Licenses, Winning Bids Total $490,901,787*, at 2 (Nov.9, 1994).

shifting power.[14] For that reason, the Commission held in *Zimsky* that it was without authority to award attorney's fees under the common fund doctrine. *See* 9 FCC Rcd at 3241.

Welch and Myers seem to suggest that the Commission's "exclusive authority regarding bid amounts" gives it "authority" to establish a common fund. *See* Pet. at 12-13. Obviously, the Commission's authority over bid amounts does not empower it to recognize Welch and Myers' claim for 30% of the bid payments refundable to non-clients. Only a court can recognize that claim and only a court can establish a common fund. *See Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n*, 38 F.3d 603, 605 (D.C. Cir. 1994); *Knight v. United States*, 982 F.2d 1573, 1580-81 (Fed. Cir. 1993).

Welch and Myers cite *Commonwealth of Puerto Rico v. Heckler*, 745 F.2d 709, 711 (D.C. Cir. 1984) for the proposition that the D.C. Circuit "recognizes common fund awards involving Federal agencies unless expressly prohibited by statute." Pet. at 13. In *Heckler*, the D.C. Circuit held that common fund awards may be made

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[14] *See ACC Long Distance Corp. v. Allnet Communication Servs., Inc.*, 9 FCC Rcd 1659, 1666 (1994); *Comark Cable Fund III v. Northwestern Indiana Tel. Co., Inc.*, 100 FCC 2d 1244, 1257 n. 51 (1985); *Radio Station WSNT, Inc.*, 45 FCC 2d 377, 382-83 (1974).

against a federal agency *by a court* under the EAJA "unless 'expressly prohibited by statute.'" 745 F.2d at 712. The Court recognized only that the common fund exception to the American Rule "permits court-awarded fees." *Id.* at 711. It has never held that, in the absence of a court order, a Federal agency may make a common fund award of attorney's fees "unless expressly prohibited by statute." To the contrary, the D.C. Circuit decided that a Federal agency must apply the American Rule unless Congress clearly authorized the agency to shift responsibility for attorney's fees in its proceedings. *See Unbelievable, Inc.*, 118 F.3d at 806.

The Commission correctly decided in *Zimsky* that the "equitable jurisdiction in a court is essential to a common fund award." 9 FCC Rcd at 3241. That decision has not been reversed, overruled or even criticized. It must be followed here. The Commission should hold that it is not empowered to establish a common fund, especially one that will force non-clients to pay attorney's fees for unwanted services.

II. THE EAJA DOES NOT AUTHORIZE THE COMMISSION TO AWARD ATTORNEY'S FEES TO WELCH AND MYERS

Welch and Myers' argue frivolously that 28 U.S.C. §§ 2412(b) and 2412(d)(1)(A) constitute "express statutory authorization for the FCC to award attorney's fees." Pet. at 14. Those provisions

of the EAJA expressly authorize a *court* to award attorney's fees to the prevailing party in any civil action or adversary adjudication brought by or against the United States, when the government's position is not considered substantially justified. *See Cooper v. U.S. R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 6.23, at 354-55 (2d ed. 1997). Nothing in § 2412 of the EAJA authorizes the Commission to award attorney's fees. Indeed, the EAJA provides absolutely no statutory support for Welch and Myers' common fund theory.

Welch and Myers cannot be awarded fees under § 2412 of the EAJA. Only prevailing parties can assert EAJA claims, not their attorneys. *Knight*, 982 F.2d at 1584. And the EAJA would not allow Welch and Myers to be awarded legal fees from monies refunded to RNPCS auction winners.

The common fund doctrine deals with liability for attorney's fees of a *fund* over which a court has jurisdiction, and not with the liability of a losing party for the attorney's fees of the winning party. Under the doctrine, attorney's fees would be paid from a fund in which the prevailing party and others have an ownership interest. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d

1261, 1265 (D.C. Cir. 1993). In contrast, the EAJA deals with the liability of the United States as a *party* for the attorney's fees of the prevailing party. *See Holbrook v. Pitt*, 748 F.2d 1168, 1175 (7th Cir. 1984). Attorney's fees would be payable by the government under § 2412 of the EAJA either on a settlement with the General Accounting Office under 28 U.S.C. § 2414[15] or "from funds made available to the agency by appropriation or otherwise."[16] Thus, under the EAJA, attorney's fees would be paid ultimately from the public Treasury, not from a common fund established by a court.

Finally, Welch and Myers cannot legitimately claim 30% of the refunded monies - - as much as $960,000 from Instapage alone - - under the EAJA. The statute generally limits attorney's fees to $125 per hour. *See* 28 U.S.C. § 2412(D)(2)(A). Although they claim to have "devoted hundreds of hours to the case over five years,"[17] Welch and Myers would have had to work 238,663 hours to justify a $29,832,934 claim under the EAJA against the six non-preferred RNPCS auction winners. The EAJA allows a court to award reasonable

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[15] *See* 28 U.S.C. §§ 2412(c)(2), 2414.

[16] *See id.* § 2412(d)(4).

[17] Pet. at 15.

attorney's fees, not the outrageous windfall sought by Welch and Myers.

III. THERE IS NO EQUITABLE BASIS TO SUBJECT RNPCS LICENSEES TO A COMMON FUND AWARD

A common fund award is appropriate only "when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980). In this case, Instapage is not among the class on whose behalf Welch and Myers purportedly litigated.

Welch and Myers claim their crusade began on July 1995 when Graceba sought relief from the use of race- and gender-based bidding preferences in the 1994 IVDS auction. *See* Pet. at 4. For nearly three years, Welch and Myers disclosed only that they were representing individual IVDS auction participants. On April 30, 1998 -- nearly a year after the *Graceba* remand -- Welch first claimed to be acting on behalf of RNPCS licensees. *See supra* p. 3. It seems that Myers waited until December 3, 1999 -- after the *Flexibility Order* was released -- to ask for relief for RNPCS licensees. And it did so in a footnote to the Coalition's petition

for reconsideration of the *Flexibility Order*.[18] Thus, the facts do not support Welch and Myers' contention that their "common fund claim concerns efforts which long ago were aimed toward seeking relief for whole classes of licensees." Pet. at 15. Their efforts were to obtain relief for their IVDS clients. They tagged RNPCS licensees on as an apparent afterthought.

Welch and Myers certainly did not ask the D.C. Circuit to provide any relief for RNPCS licensees.[19] Consequently, the Court did not require the Commission to consider the rights of all parties injured by the tainted auction process "even those who were not party to the appeal process." Pet. at 7.[20] The Court merely explained that it elected to remand the case because it raised "questions about the finality of FCC licenses, fairness to auction participants not represented here, and other fact-specific, policy-laden concerns," the resolution of which the Court felt "would

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[18] *See* Petition for Reconsideration, WT Docket No. 98-169, at 8 n.12 (Dec. 3, 1999).

[19] *See* Joint Brief, *supra* note 1, at 31-35.

[20] In their last solicitation letter, Welch and Myers claimed that the D.C. Circuit "instructed" the Commission to consider their "constitutional claims for relief from the race/gender bidding preference used in the 1994 auction, accounting for the rights of all parties affected by use of the preference." *See infra* Exh. C at 2. No such instruction was given. *See Graceba*, 115 F.3d at 1041-42.

benefit from the agency's expertise." *Graceba*, 115 F.3d at 1042. There is no reason to believe that the Court was referring to auction participants other than the IVDS auction participants.

As of this date, Instapage has received no tangible benefit from Welch and Myers' efforts on behalf of their IVDS clients. There is no judgment that the Commission acted unconstitutionally in the IVDS auction, much less the RNPCS auction. The D.C. Circuit expressed no opinion on the merits of Graceba's constitutional claims. *See id.* at 1041. Furthermore, as Judge Silberman noted, the Commission's subsequent *Flexibility Order* "neatly avoids" resolving those claims. *Graceba Total Communications, Inc.*, No. 99-1003, 1999 WL 1006334, at *2 (D.C. Cir. Oct. 6, 1999).

The only ascertrainable class of licensees that have received any benefit arguably traceable to the efforts of Welch and Myers consist entirely of IVDS licensees. Welch and Myers have accomplished nothing for RNPCS licensees. The Commission denied Graceba's request of relief for those licensees. *See Flexibility Order*, 17 Communications Reg. (P&F) at 245. To date, the Commission has not decided that refunds will be awarded to RNPSC licensees. Thus, Welch and Myers have not managed to produce a "fund" for the benefit of Instapage. Without an identifiable fund

from which attorney's fees can be paid, the common fund doctrine cannot be applied. *See Holbrook*, 748 F.2d at 1175-76.

Instapage presents no "free rider problem." *Lichhtenstein v. Consolidated Services Group, Inc.*, 173 F.3d 17, 24 (1st Cir. 1999). It retained its own counsel to pursue a remedial bidding credit in November 1999 (before Myers first took up the banner of RNPCS licenses). Consequently, there is no danger that Instapage will be unjustly enriched by the "labor of another's counsel." *Id.*

None of the usual policy considerations motivating invocation of the common fund doctrine are at work here. Welch and Myers did not work for Instapage, and Instapage has not benefitted from their legal work. To the contrary, by asserting the clearly unwarranted common fund claim, Welch and Myers will only complicate and impede Instapage's own efforts to obtain Fifth Amendment relief. Under these circumstances, there is no legal or equitable basis for the Commission to break with precedent and establish a common fund for the sole benefit of Welch and Myers.

IV. A COMMON FUND AWARD TO WELCH AND MYERS WOULD BE UNWARRANTED AND INEQUITABLE

Welch and Myers attempt to distinguish *Zimsky* by focusing on the Commission's discussion of the equities in that case. *See* Pet. at 14-16. However, that discussion in *Zimsky* amounted to *dicta*.

The Commission's lack of authority was dispositive in *Zimsky,* as it will be here. Nevertheless, we will respond to Welch and Myers' equitable (and self-aggrandizing) contentions.

First of all, the *Flexibility Order* does not acknowledge the "value" of Welch and Myers' legal work in obtaining relief for IVDS licensees, as Petitioners claim. *See* Pet. at 7. Nor is it "inconceivable" that any party would have received a refund without Welch and Myers "extensive efforts." *Id.* at 12 n.26. Several parties have been arguing for constitutional relief since early 1995, and it is presumptuous of Welch and Myers to claim sole credit for the Commission's decision to grant remedial bidding credits to various IVDS licensees.

Welch and Myers attempt to portray themselves as courageously "litigating against the FCC's affirmative action program," when "no members of the communications bar pursued similar claims." *See id.* That is not quite so. In early 1995, the law firm of Arter & Hadden brought a pre-*Aderand* constitutional challenge to the Commission's race- and gender-based rules on behalf of Telephone Electronics Corporation. Arter & Hadden's constitutional arguments persuaded the D.C. Circuit to stay the Commission's "C block"

auction in March 1995.[21] Welch and Myers did not appear on the scene until after the Supreme Court released its decision in *Adarand* in June 1995.

The constitutional issue litigated by Welch and Myers was not as "novel, complex, and difficult" as they appear to claim. *See id.* at 11. As the Bureau recognized, the Fifth Amendment equal protection arguments Arter & Hadden made in 1995 could have been made by Welch and Myers in 1994. *See Community Teleplay*, 13 FCC Rcd at 12428. After all, there had been no change in the Due Process Clause. By the time Welch and Myers joined the fray, the Supreme Court had teed the Fifth Amendment issue up for them.

When weighing the equities, the Commission should consider that Instapage was not given reasonable notice that Welch and Myers would be acting on its behalf. *See Zimsky*, 9 FCC Rcd at 3243. Welch and Myers first notified Instapage of their efforts *after* the D.C. Circuit had sent their IVDS case back to the Commission and *after* Graceba had asked the Commission to refund monies to RNPCS licensees. Thus, Instapage was given no prior notice that it was "required to pay legal fees" to Welch and Myers. Pet. at 16.

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[21] *See Telephone Electronics Corp. v. FCC*, No 95-1015 (D.C. Cir. Mar. 15, 1995). *See also Implementation of Section 309(j)*, 10 FCC Rcd at 11876 n.16.

Attorneys cannot litigate for their clients for nearly two years and then notify non-clients, non-parties that they are required to help foot the legal bills.

If Welch and Myers are entitled to a common fund award, it would be from the IVDS licensees that make up the class represented by Welch and Myers' actual clients. Indeed, Welch and Myers are pursuing a 25% common fund claim against IVDS licensees (as opposed to the *30% claim* they make against RNPSC auction winners). *See* Pet. at 9 n. 21.[22] If they honestly believed that they created a common fund for the benefit of IVDS and RNPCS licensees, why did Welch and Myers find it necessary to file separate claims demanding different percentage-of-the-fund awards? It seems clear to us that Welch and Myers made their $30 million claim against the RNPCS winners in the hopes either that one of them would fall for the stunt, or that the claim would be ammunition for greenmail. The common fund doctrine is an equitable doctrine, obviously not intended for such purposes.

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[22] Obviously, if Welch and Myers created a common fund for the benefit of IVDS and RNPCS licensees,which they did not, their legal fees should be assessed against the fund as a whole. Welch and Myers would not be permitted to claim two funds, and seek a 25% award from one and 30% from the other.

Finally, Welch and Myers belated and dogged attempt to garner $30 million from parties they do not represent reflects an unseemly interest in obtaining legal fees at the expense of justice and basic fairness. To afford extended consideration to their request would invite others to make similar unwarranted claims engendering more litigation. To grant the request would be unthinkable.

For all the foregoing reasons, Instapage respectfully requests that the Commission dismiss Welch and Myers' petition for want of jurisdiction.

Respectfully submitted,

INSTAPAGE NETWORK LTD.

Thomas Gutierrez
Its Attorney

Lukas, Nace, Gutierrez & Sachs, Charted
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(202) 857-3500

March 22, 2000

Exhibit A

MYERS KELLER
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Richard S. Myers
Jay N. Lazrus+

+ Admitted to Maryland only

James J. Keller*
Abdoul K. Traore*

*Communications engineer
(Non-lawyer)

April 30, 1998

VIA COURIER
Mr. Thomas Gutierrez
Lukas, McGowan, Nace & Gutierrez
Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036

Dear Mr. Gutierrez:

The purpose of this letter is to inform you about certain Federal Communications Commission adjudicatory proceedings that could lead to a refund of 40% of the amount of the winning bid your client paid for its regional Narrowband Personal Communications Service ("NPCS") license awarded in a 1994 auction.

For the last several years, clients of the Washington, D.C. communications law firms of Hill & Welch ("H&W") and Myers Keller Communications Law Group ("MKCLG") have litigated cases before the FCC and the Court of Appeals seeking partial refunds of winning bids submitted by participants in the 1994 auction held for Interactive Video and Data Service ("IVDS") licenses. The theory of these cases is that: (i) the minority/gender bidding preference used in the 1994 auctions was unconstitutional based on the Supreme Court's decisions in Adarand Constructors v. Pena and United States v. Commonwealth of Virginia ("VMI"); (ii) the FCC's rules of administrative finality present no bar to the retroactive application of those decisions to previously-conducted spectrum auctions; and (iii) winning bidders in the non-preferred category of auction participants therefore are entitled to a partial refund. In the IVDS cases, where the unconstitutional bidding preference equaled 25% of a winning bid submitted by the designated entity qualifying for the preference, the refund to the non-preferred entities, i.e., those winning bidders that did not receive the preference, would equal 25% of their winning bids. In the regional NPCS auction, the partial refund would equal 40% of the winning bid submitted by a participant that did not receive the unconstitutional preference.

The key to the legal theory advanced by H&W and MKCLG in the FCC proceedings is that due process under the Constitution requires the agency to provide a reasonable "pre-deprivation" or "post-deprivation" procedure for parties to recoup monies unconstitutionally taken by the government. The FCC's rules of administrative finality -- which it argues made the bidding preference rules "final" as to 1994 auction participants -- do not satisfy these due process requirements. Furthermore, we see no finality-related concerns that would bar retroactive application of Adarand and VMI to 1994 auction participants since the remedy sought -- partial refunds of winning bids submitted by the non-preferred auction participants -- does not require any re-auction or undoing of license grants. In this regard, our cases are similar to cases where the government has levied a tax later determined to be unconstitutional. The remedy in such cases is a refund of monies unlawfully taken.

Enclosed is a set of the following documents:

- The final joint brief submitted by H&W's and MKCLG's clients in the cases heard by the U.S. Court of Appeals For The District of Columbia last year
- The brief submitted to the court by the FCC in these cases
- The final joint reply brief submitted by H&W and MKCLG in these cases
- The court's decision in these cases which remanded the matter to the FCC for further review and adjudication
- The 1995 petition and 1998 supplement filed by MKCLG at the FCC
- The petition for action on remand and motion for leave filed by H&W at the FCC

H&W and MKCLG will prosecute a refund action on behalf of any 1994 auction winner that did not receive the unconstitutional bidding preference, including NPCS auction winners, on a contingency basis whereby these law firms would receive 20% of any refund recovered. H&W and MKCLG also are amenable to discussing co-counsel arrangements with other firms and attorneys on a mutually agreeable basis taking into account the significant time and effort H&W and MKCLG have already devoted to the case for nearly four years. H&W and MKCLG in any event will seek the 20% fee award under the common fund doctrine with respect to any non-client 1994 auction participant that receives a refund.

MKCLG and H&W will hold a dial-in conference call starting at 10 a.m. East Coast time on Wednesday, May 20 to discuss the matters described in this letter and respond to questions. To participate in this conference call, please contact MKCLG at (202) 371-9478 by Monday, May 18 to receive dial-in instructions.

Sincerely,

Richard S. Myers
Myers Keller Communications Law Group

Timothy E. Welch
Hill & Welch

Enclosures

Exhibit B

MYERS KELLER
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Jay N. Lazrus+
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James J. Keller*
Abdoul K. Traore*

*Communications engineer
(Non lawyer)

June 30, 1998

Mr. Thomas Gutierrez, Esquire
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington, DC 20036

Dear Mr. Gutierrez:

In a letter dated April 30, 1998, the Washington, D.C. communications law firms of Hill & Welch ("H&W") and Myers Keller Communications Law Group ("MKCLG") informed you about certain Federal Communication Commission adjudicatory proceedings that could lead to a refund of 40% of the amount of the winning bid your client paid for its Narrowband Personal Communications Service ("NPCS") license awarded in a 1994 auction.

On May 18, 1998, H&W and MKCLG conducted a conference call with attorneys representing several NPCS licensees, responding to questions regarding case strategy and the merits of the arguments H&W and MKCLG are advancing to support refund claims on behalf of similarly situated parties that obtained Interactive Video and Data Service ("IVDS") licenses in a 1994 auction.

Generally stated, the issue in these cases is whether it is "too late" for parties to seek partial refunds of winning auction bids based on the argument that the race-gender bidding preference used in the auction was unconstitutional. The FCC's position, most recently expressed in an order (copy enclosed) released by the Wireless Telecommunications Bureau, is that the "doctrine of waiver" bars parties from seeking such refunds. The WTB's order thus dismissed an IVDS refund request on procedural grounds, ignoring the merits of the constitutional argument.

Enclosed is a copy of MKCLG's Application For Review of the WTB's order. MKCLG shows in that filing why the WTB's position is utterly meritless. Here we have an agency acknowledging that the bidding preference rule was unconstitutional *at the time of the auction* (because the rule lacked a factual record meeting constitutional standards of "strict scrutiny") and, therefore, that monies were improperly taken from non-preferred entities *at the time of the auction*. Yet the agency maintains that it may retain these improperly taken monies because of the finality of an admittedly invalid rule. The principle on which the WTB relies, the so-called "doctrine of waiver," finds no support in the cases cited in its order.

We are confident that the courts will reject the FCC's position and, as in *National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976),* order the agency to refund the monies improperly taken based on the retroactive application of a Supreme Court decision. In the case of non-preferred NPCS auction winners, the refund would amount to 40% of the amount they bid in the 1994 auction.

H&W and MKCLG intend to take further action in these cases in the near future, possibly seeking court intervention in the FCC proceedings where the decision-maker is retaining improperly taken monies and has no interest in expediently resolving a case that has already lasted nearly four years.

H&W and MKCLG continue to offer to prosecute, on a contingency basis, a refund action on behalf of any NPCS auction winner that did not receive the unconstitutional bidding preference. Under the contingency arrangement, these law firms would receive 20% of any refund recovered. H&W and MKCLG also are amenable to discussing co-counsel arrangements with other firms and attorneys on a mutually agreeable basis taking into account the significant time and effort H&W and MKCLG have already devoted to the case for nearly four years. H&W and MKCLG in any event will seek the 20% fee award under the common fund doctrine with respect to any non-client NPCS auction participant that receives a refund.

If you are interested in having your NPCS client take action on this matter, please contact MKCLG at (202) 371-9478 to schedule a conference call with H&W and MKCLG.

Sincerely,

Richard S. Myers
Myers Keller Communications Law Group

Timothy E. Welch
Hill & Welch

Enclosures

Exhibit C

MYERS KELLER
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Richard S. Myers
Jay N. Lazrus*

James J. Keller +

* Also admitted to Maryland

+ Communications engineer
(Non-lawyer)

Thursday, March 02, 2000

VIA UPS

Mr. Ozzie Jordan
Instapage Network, Ltd.
1691 NW 107th Avenue
Miami, FL 33172

Dear Mr. Jordan:

The purpose of this letter is to propose that Instapage Network, Ltd. ("Instapage") retain our law firm, Myers Keller Communications Law Group, and the law firm of Hill & Welch (located at 1330 New Hampshire Avenue, NW, #113, Washington, D.C. 20036; Phone: (202) 775-0070) (collectively, "Law Firms") to obtain a refund in the approximate amount of $3.2 million of the total approximately $8 million paid by Instapage in the 1994 auction conducted by the Federal Communications Commission ("FCC") for a Southern Region 50 KHz/12.5 KHz paired Narrowband Personal Communications Service ("NPCS") license.

The FCC began holding spectrum auctions in 1994. Nationwide and regional licenses for NPCS and licenses for the 218-219 MHz Service (formerly "IVDS") were the first types of licenses auctioned by the agency. Race/gender bidding credits were used in these early auctions to help ensure that licenses were obtained by companies owned or controlled by minorities and females. In the IVDS auction, the race/gender bidding credit was 25%, meaning that a minority or female-owned winning bidder received a 25% reduction of the amount of its winning bidder. The race/gender bidding credit was 40% in the regional NPCS auction in which Instapage won its license.

Approximately one year after the 1994 auctions were held, the Supreme Court decided Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), banning most race-based preferences. The Court banned most gender-based preferences in a subsequently issued decision, U.S. v. Commonwealth of Virginia (VMI), 116 S. Ct. 2264 (1996). Following the release of the Adarand decision, the Law Firms initiated claims at the FCC seeking relief from the use of the race/gender bidding credit in the IVDS auction. The FCC denied such relief in December, 1995. By January, 1996, the Law Firms were seeking review of the FCC's refusal to provide relief before the Court of Appeals for the District of Columbia Circuit. The Court heard oral argument on the case and, in Graceba Total Communications, Inc. v. FCC, 115 F.3d 1038 (D.C. Cir. 1997), instructed the FCC to consider the Law Firms' constitutional claims for relief from the race/gender bidding preference used in the 1994 auction, accounting for the rights of all parties affected by use of the preference.

In early 1999, following further inaction by the FCC in the face of the Court's remand, the Law Firms went back to the Court and petitioned it to order the FCC to reach a decision. The Court scheduled another oral argument. On September 7, 1999, shortly before the oral argument was to take place, the FCC adopted an order which "converted" the 1994 bidding preference to a "small business" bidding preference, thus providing a measure of relief for the unconstitutional preference based on race and gender. The FCC's order was released on September 10, an excerpt of which is enclosed with this letter. The relief will be provided in the form of a 25% credit to certain members of the originally non-preferred class of IVDS auction participants who did not receive the bidding preference in the 1994 auction.

Currently, to qualify for the 25% credit, the auction winner must be classified as a "small business." In the case litigated since 1995, the Law Firms claim that all winning bidders in the non-preferred class that did not receive the race/gender bidding credit in the 1994 auctions for the NPCS and 218-219 MHz Service are entitled to refunds. Our firms continue to litigate the case at the FCC and the Court of Appeals for the D.C. Circuit, arguing that the remedy must be given to all parties in the non-preferred class and constitutionally cannot be limited to small businesses.

This case presented novel issues with respect to the legal principle that new rules of federal law announced by the Supreme Court (in our case, rules announced in the Adarand Constructors, Inc. v. Pena and U.S. v. Commonwealth of Virginia (VMI) decisions banning most race/gender preferences) must be applied retroactively notwithstanding the "finality" of an agency's rule making process (in our case, the adoption of the race/gender bidding credits used in the 1994 auctions) where no procedure exists that provides a remedy to injured parties (in our case, for example, a procedure for obtaining refund of amounts paid by non-preferred winning bidders). Given the novelty of the issues involved, many 1994 auction bidders in the non-preferred class understandably could have assumed it was "too late" to seek refunds. Although it is not too late for NPCS bidders like Instapage to seek a refund, we advise that it would be imprudent to delay initiating actions to secure the refund. In Instapage's case, it would be entitled to an approximately $3.2 million refund, plus interest that could raise the total refund to $4 million. Delaying action to secure such a refund may play into potential FCC arguments that "laches" or the "doctrine of waiver" (used unsuccessfully against 218-219 MHz refund claimants) bar a remedy for Instapage.

Instapage paid the full amount of its winning bid because the two available race/gender bidding credits had already been allocated to other auction winners of Southern Region licenses. However, the Law Firms consider that Instapage has a reasonably good chance of obtaining a 40% refund of its winning bid because Instapage, designated as a "small business" at the time of the 1994 auction, should be entitled to the same remedy already adopted by the FCC with respect to IVDS auction winner in the non-preferred class, i.e., a "remedial" small business credit equal to the amount of the race/gender bidding credit which, in the case of Instapage, is 40% of its total winning bid of approximately $8 million, meaning it should receive a refund in the approximate amount of $3.2 million, not including interest. The Law Firms are offering their services to Instapage to secure the refund on a contingency basis, with the Law Firms receiving and sharing equally a total of 25% of the refund obtained for Instapage, payable at the time Instapage receives the refund. The contingency fee would not include out-of-pocket expenses incurred by the Law Firms. Such expenses are anticipated to be nominal.

Should Instapage otherwise receive a refund without retaining the Law Firms, the Law Firms will seek a fee under the common fund doctrine. The common fund doctrine is an equitable legal principle which entitles attorneys who recover a common fund for the benefit of persons other than their clients to collect a reasonable attorneys' fee from the whole. The Law Firms

sought relief from the unconstitutional bidding preference used in the 1994 IVDS auction during more than four years of litigation before the FCC and the Court of Appeals before finally obtaining such relief for all small business IVDS licensees in the form of a 25% remedial credit. Accordingly, the Law Firms will seek a fee under the common fund doctrine from all auction winners, including NPCS licensees, who receive a remedial credit. The common fund fee that will be sought by the Law Firms will equal 30% of the refund amount resulting from the remedial credit. We believe timing is important, and that now is the time to proceed with securing the refund for Instapage.

We are available at your earliest convenience to discuss this proposal.

Very truly yours,

Richard S. Myers

Enclosure

cc (w/encl): Thomas Gutierrez, Esq.

CERTIFICATE OF SERVICE

I, Jennifer McCord, do hereby certify that on this 22nd day of March, 2000, I caused copies of the foregoing "OPPOSITION TO PETITION FOR AN ORDER TO DECLARE A COMMON FUND" to be served via First Class U.S. Mail upon the following:

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U.S. Department of Justice
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Washington, DC 20530-0001

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Federal Communications Commission
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Amy Zoslov, Chief
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