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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
AMENDMENT OF PARTS 1,2, AND)
21 OF THE COMMISSION'S RULES)
GOVERNING USE OF THE FREQUENCIES)
IN THE 2.1 AND 2.5 GHZ BANDS)

PR DOCKET NO. 92-80

PETITION FOR RECONSIDERATION

USIMTA
(UNITED STATES INTERACTIVE and
MICROWAVE TELEVISION ASSOCIATION)

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SUMMARY

The Commission's decision to make its new ban on MDS settlements apply retroactively to pending applications is unfair to the thousands of members of the public who filed applications in reliance on the rule permitting settlements, it is contrary to the public interest, and it is contrary to law.

A settlement is a way for an applicant to reduce the odds against him or her in a lottery. If there are 40 applicants in a market each applicant has a one in 40 chance of winning the lottery. If thirty of the applicants enter a settlement each of the thirty has three chances in four of winning. The thirty applicants will share the license, but the chances of winning something rather than nothing are dramatically increased by entering a settlement.

The Commission told the public it could file MDS applications and enter into settlements before the lotteries. In reliance on the settlement rule thousands of members of the public filed applications. Now, after the applications have been filed, the Commission says the applicants cannot enter settlements but will have to take their chances individually in the lotteries. That is simply unfair. The Commission does not have

The reason for the new rule is to deter speculation in the filing of MDS applications. Supposedly the reason for applying the new rule to pending applications is to avoid rewarding speculators, but that is a non sequitur since these applications have already been filed. If there has been speculation in the filing of MDS applications in the past the fault lies with the Commission which makes the rules, not with the public which merely follows the rules laid down by the Commission. What the Commission is doing here is punishing the public for its own past mistakes.

Applying the new rule barring MDS settlements to pending applications is contrary to law because that is a retroactive application of the rule, which is prohibited by Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), since the Communications Act does not authorize retroactive rulemaking by the Commission. The two cases cited by the Commission in support of applying the new rule to pending applications do not even address that question, which was not at issue in either case. The Commission apparently thinks that simply saying that it is applying the rule "prospectively" to pending applications avoids the problem of retroactivity, but that is not so. It is well established in the case law under Bowen that applying a new rule to pending matters is a retroactive application of the rule.

The Commission should reconsider its decision to apply the new ban on MDS settlements to pending applications and make that ban applicable to new applications only.

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PETITION FOR RECONSIDERATION

The United States Interactive and Microwave Television Association (USIMTA), by its undersigned attorney, hereby petitions the Commission to reconsider the Report and Order (R&O) adopted in the above referenced rulemaking proceeding on January 14, 1993, released on February 12, 1993 (FCC 93-31), and published in

the thousands of members of the public who filed MDS applications in reliance on the rule permitting settlements, it is contrary to the public interest, and it is contrary to law.

1. THE RETROACTIVE APPLICATION OF THIS NEW RULE IS UNFAIR TO PENDING APPLICANTS.

Under the Commission's random selection (lottery) rules in

effect at the time all post-1992 MDS applications were filed

The right of MDS applicants to enter into settlements was expressly granted by the Commission, publicly announced, and made a part of the Commission's rules governing the MDS service. Section 21.33(b) was added to the Rules by the Commission in the MMDS Second Report and Order, __ FCC2d ____, 57 RR2d 943 (1985). In section VII, Miscellaneous Issues, under the heading "A. Settlements", after noting that several commenters had suggested that the Commission afford settling MMDS applicants cumulative chances, the Commission stated:

"The Commission recently adopted this proposal in the Cellular Lottery Order, 49 FR at 23,638, to allow settling parties their cumulative probability to reflect any partial settlements. We see no reason why we should not adopt the same policy here. Settlements are in the public interest, because they reduce or eliminate administrative burdens, delay and expense. In addition, they allow many different parties to contribute to and to participate in MMDS service. Affording settling parties their cumulative probability in a lottery serves the public interest especially where only two carriers can be licensed in each market." 57 RR 2d 943 at 955. (Footnote omitted.)

In reliance on this right to enter into settlements literally thousands of members of the public filed MMDS applications with the Commission. It now appears the Commission, in retrospect, has decided that its past policy of permitting applicants to enter into settlements was misguided, and that settlements are not in the public interest after all. because the

Instead of simply acknowledging that it made a mistake, changing the rule, and going on from there, however, the Commission apparently finds it necessary to blame someone. And who does the Commission blame for its mistake? The Commission blames the public, of course. The members of the public who filed MDS applications in reliance on the Commission's settlement rules

If there has been speculation in the filing of MDS applications the fault lies with the Commission, which makes the rules, not with the public which merely follows them.

2. APPLYING THE NEW RULE TO PENDING APPLICATIONS IS CONTRARY TO THE PUBLIC INTEREST.

In analyzing the Commission's decision to apply the new rule barring settlements to pending applications, it will be helpful to consider how the Commission applied the old rule permitting settlements. In footnote 33 at page 8 of the R&O the Commission states, without citation: "Our existing rules permit the formation of settlement groups only after an application has been placed on public notice designating it for lottery and prior to a prescribed ten-day deadline before the lottery." That is not what the existing rules provide. Sec. 21.33(b) of the Rules, 47 C.F.R. Sec. 21.33(b) states that applicants may enter into settlements "after filing" individual applications. Contrary to

is that the staff insists on processing 29 applications before permitting them to dismiss themselves. So much for "Settlements are in the public interest, because they reduce or eliminate administrative burdens, delay and expense." MMDS Second Report and Order, supra.

In its Comments in this proceeding USIMTA suggested that the Commission could best accomplish its purpose of reducing the MDS backlog by simply following its present rules and permitting settlements "after filing", instead of obstructing settlements among applicants, that there was no need for a ban on settlements, and that there was certainly no need to apply a ban on settlements retroactively to pending applicants. That is particularly so in the case of applications filed under the Same Day Rule, where almost without exception all the applications in a given market have been prepared by the same law firm or engineer or application preparer, the applicants expect to enter into a settlement, and there is a good chance of a full market settlement which will require the Commission to process only one application. It appears, however, that the Commission has somehow become convinced that it is more important to punish some amorphous SPECULATORS lurking somewhere out there, than it is to treat fairly members of the public whose only crime has been to file, in good faith and at considerably cost, an application with the FCC, most for the first time in their lives.

Had the Commission followed its own rules in the past most of the presently pending MDS applicants would long ago have entered settlements and would come within the "exception" carved out of the retroactive rule (in footnote 34 on page 8 of the R&O) for applicants already in settlement groups. It is ironic that the exception applies only to the 1983 applicants who filed before the right to enter settlements was granted by the Commission. They were real speculators, they did not file in reliance on the right to enter settlements, so they are permitted to do so. The later applicants, who did file in reliance on settlements, are deprived of that right by the Commission. With logic like this, is it any wonder MDS has been a major disaster area for the Commission?

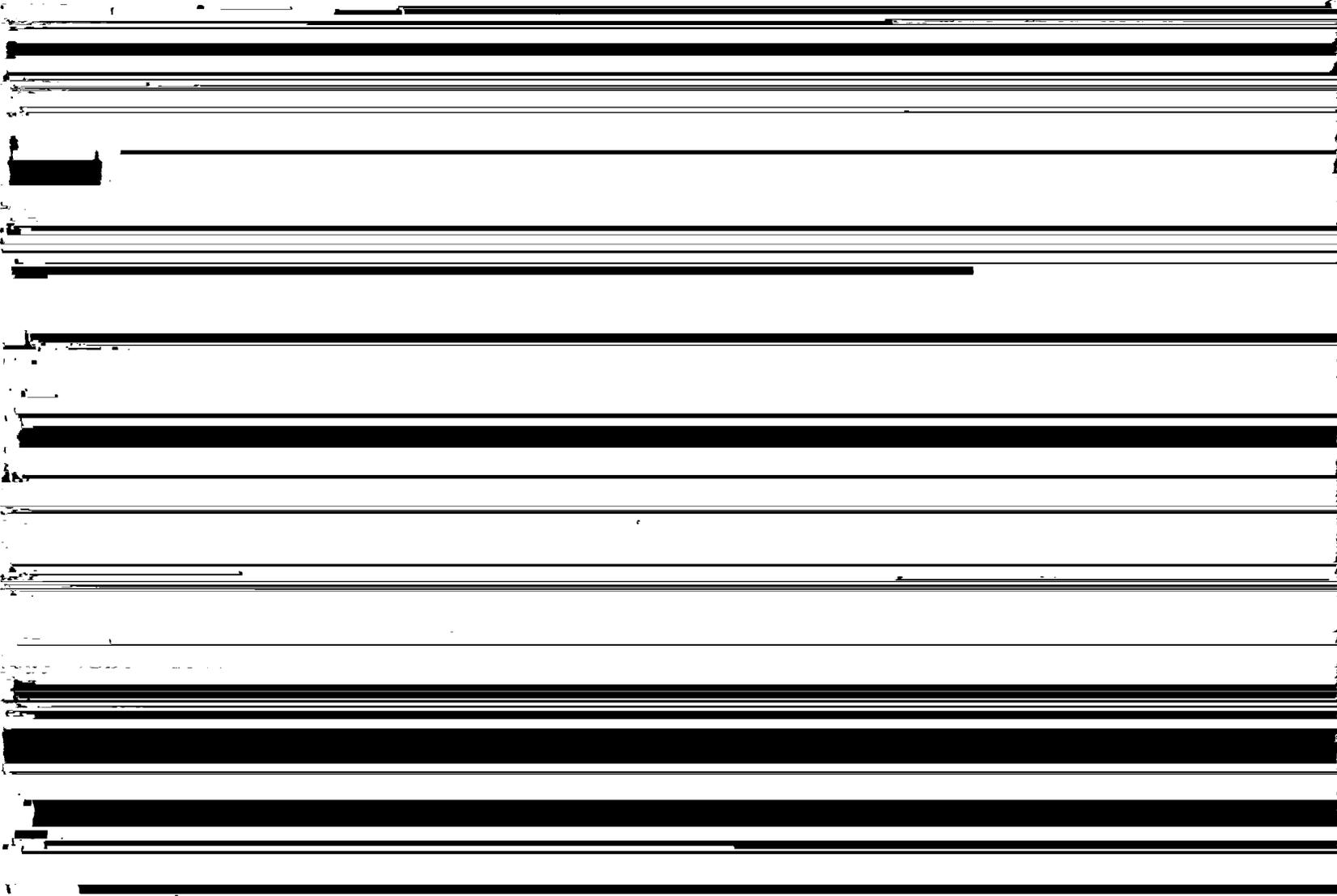
All this aside, the bottom line is that, as the Commission acknowledges, making the ban on settlements retroactive will not deter speculation. That being the case, it is contrary to the public interest for the Commission to apply the ban to pending applications which were filed in reliance on the right to enter settlements.

3. APPLYING THE NEW RULE TO PENDING APPLICATIONS IS CONTRARY TO LAW.

In the R&O the Commission cites two cases in support of its decision to apply the new bar against settlements to pending applications, United States v. Storer Broadcasting Co., 351 U.S.

192 (1956), and Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989). Neither of those cases supports what the Commission is doing here.

As a preliminary matter it should be noted that the question at issue, whether a new rule applies to a pending matter, is not an unusual one. It can arise every time an agency changes a regulation or a legislative body amends a statute, and it is addressed frequently by the courts. Thus it is significant that, while they address many legal questions, neither of the cases relied upon by the Commission directly addresses the question at issue here - whether a new regulation should apply to a pending application. The cases relied upon by the Commission do not ad-



"In assessing the character of Storer's grievance, we must put aside the Commission's order, made simultaneously with its promulgation of the challenged regulations, which denied a pending application by Storer for a sixth television license. That order was reviewable only by a direct appeal within 30 days under 47 U.S.C. [Section] 402(b), (c), (citation omitted) and became final and conclusive upon Storer's failure to appeal from it. Since that order cannot be reviewed, and no relief from it may be granted in this proceeding, it is only of the prospective effect of the regulations, not their past application, that Storer may complain." 351 U.S. 192, 208.

Thus, while there was a disagreement on whether Storer had standing, the question of applying the new rule to a pending application was not before the Court, which may well account for the fact that the Court did not address that matter. Storer does stand for the proposition that the an applicant is only entitled to an Ash-backer hearing when a substantial and material question of fact is presented or the Commission is unable to make the necessary public interest finding, but it has no relevance in the context of the lottery procedures governing MDS, which are themselves a statutory alternative to hearings.

In Hispanic Inf. & Telecommunications Network v. F.C.C., 865 F.2d 1289 (D.C. Cir. 1989), which involved ITFS (Instructional Fixed Television Service), the Commission changed its rules to favor local educational entities over nonlocal, and provided that pending local applicants would be preferred over pending nonlocal applicants in comparative hearings. On reconsideration, however, the Commission, in the words of the court:

"provided that all nonlocal entities whose applications were pending when the local priority period began would be given ninety days to amend their applications to include a local entity within their ownership structures. Applicants who successfully accomplished such amendments would be considered local applicants and could thus compete against other local parties under the comparative criteria." (865 F.2d at 1292)

Far from being a precedent for the Commission's supposed unlimited authority to change its rules to deprive pending applicants of pre-existing rights, Hispanic would seem to be a precedent for the Commission's recognizing on reconsideration that it cannot ride roughshod over pending applicants, but must make reasonable accommodations for the rights of such parties.

In Hispanic HITN, a pending nonlocal applicant, was unaware of a mutually exclusive local applicant, did not amend to qualify as a local applicant, and thus without a hearing had its application denied in favor of the local applicant. In spite of this scenario, which would seem to raise the question of applying the new rule to a pending application, the validity of the Commission's application of its new rules to HITN was not at issue in the case. The court stated:

"HITN could have sought judicial review of the rules themselves, as announced in the Reconsideration, but chose not to do so. The appellant's counsel conceded at oral argument that HITN is therefore precluded from contesting the validity of the regulations in this proceeding; the appellant's challenge is solely to the FCC's interpretation of its own rules." (865 F.2d at 1293, fn. 7)

Thus in neither of the cases cited in the R&O was the question of applying a new rule retroactively to pending applications before the court, nor was that issue addressed. The same cannot be said of Bowen v Georgetown University Hospital, 488 U.S. 204 (1988), where the Court did directly address the question of retroactivity in rulemaking, stating:

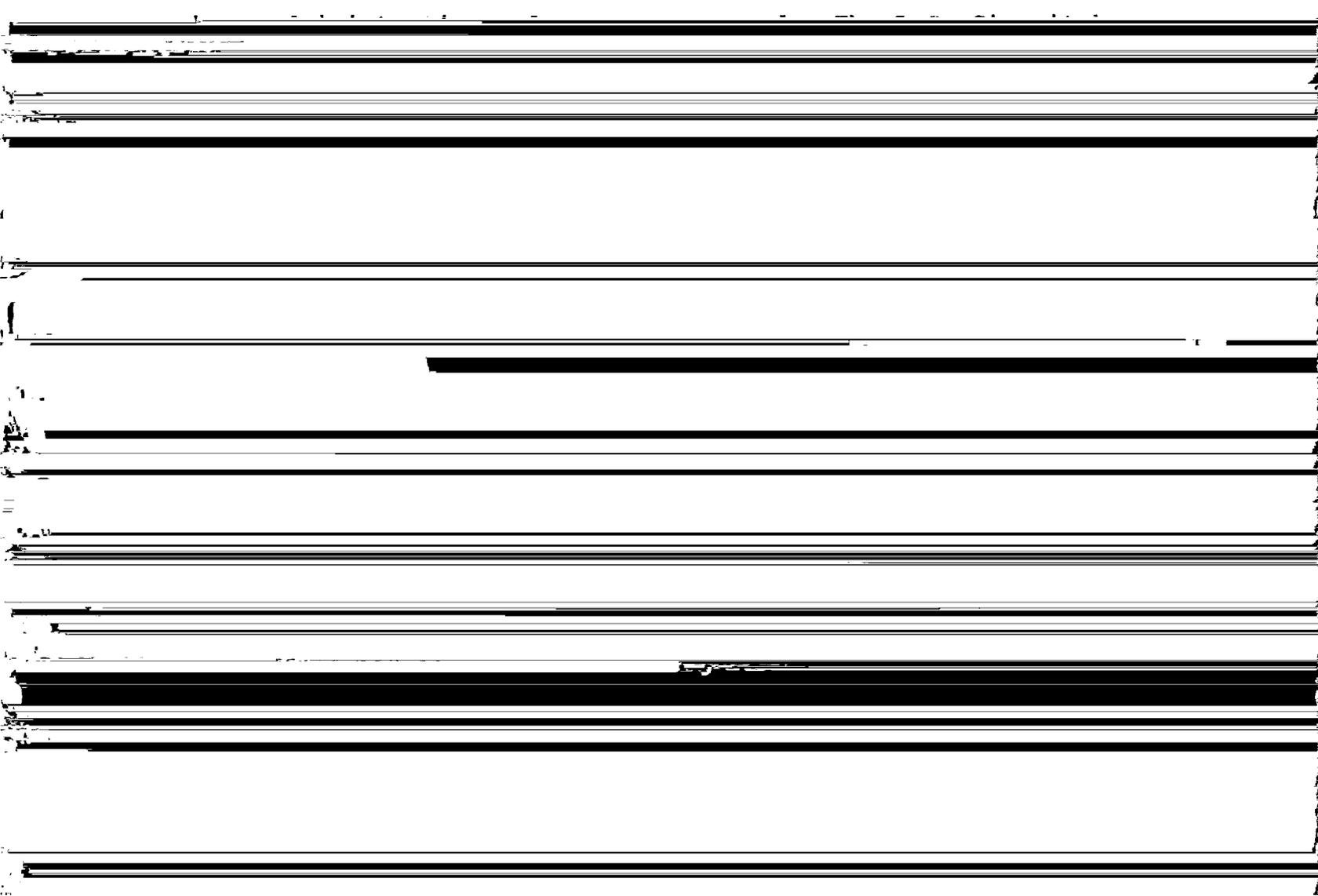
"Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. (Citations omitted.) By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. (Citations omitted.) Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."
488 U.S. 204, 208.

Paragraph 20 of the R&O (p. 14) states that the new regulations are issued by the Commission pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303(r). Neither of these statutory grants of rulemaking authority conveys the power to promulgate retroactive rules. That being the case, under Bowen the Commission does not have the authority to apply this new rule retroactively.

There is no question that applying a new rule to pending applications is a retroactive application of the rule. By definition in the Administrative Procedure Act, 5 U.S.C. Section 551(4),

a rule "means the whole or part of an agency statement of general or partial applicability and future effect...". As products of a notice and comment rulemaking proceeding under the APA, the new settlement rules cannot be applied to applications filed before their adoption. See the Bowen case in the D.C. Circuit, Georgetown University Hospital v. Bowen, 821 F. 2d 750, 756 (D.C. Cir. 1987), and the extended discussion of retroactivity in the concurring opinion of Justice Scalia in the Supreme Court decision, 488 U.S. 204, 216.

The D.C. Circuit Court of Appeals has had several occasions to interpret Bowen and there is no doubt as to its meaning



appellant's retroactivity objection. Here the Commission can hardly contend that its new settlement rule is not a change in its practice. Thus, under Chaves, applying the new settlement rule to pending applications is "impermissably retroactive".

In Motion Picture Ass'n of America, Inc. v. Oman, 969 F.2d 1154 (D.C. Cir. 1992) the Court stated:

"The Motion Picture Association of America (MPAA) asked the Copyright Office to engage in a retroactive rulemaking. The Office promulgated the requested regulation, but refused to apply it retroactively. On MPAA's complaint, the district court found in favor of the Office for a very basic reason. In adjudication, retroactivity is the norm; in legislation it is the exception. In rulemaking, the administrative analogue to legislation, exceptions are fewer still. Agency power is derived from statutes. If Congress has not conferred retroactive rulemaking power on an agency, the agency has none to exercise. (Citing Bowen v. Georgetown Univ. Hosp.) The Copyright Office has no such power and we therefore affirm." (969 F.2d at 1155.)

The Commission has no such power either, and applying the new ban on settlements to pending applications is unlawful.

Bowen v. Georgetown Univ. Hosp., supra, dealt specifically with administrative regulations of the HHS, but the strong language used by the Supreme Court in disapproving retroactivity was broader and applied to statutory enactments as well.

("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at 208.) With respect to statutory amendments this language has caused some confusion, since there is a line of Supreme

Court precedent to the effect that, absent express congressional direction to the contrary, a court should apply the statutory law in effect at the time it renders its decision. (See Bradley v. Richmond School Board, 416 U.S. 696, 716 (1974)). There is an extended discussion of this matter by Judge, now Justice, Thomas in the D.C. Circuit opinion in Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, n.6 at 963 (D.C. Cir. 1990). The Supreme Court has recognized the "apparent tension" between these two lines of authority in Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 110 S.Ct. 1570, 1577, 108 L.Ed.2d. 842 (1990) but has not yet resolved it.

While the question of the retroactive application of statutory changes may be clouded, there is no dispute among the courts with respect to the retroactivity of administrative rules. As the 8th Circuit said in Simmons v. Lockhart, 931 F.2d 1226, 1230 (8 Cir. 1991): "Our Court recently rejected the Bradley line of cases with respect to the retroactive application of an administrative regulation. Criger," [v. Becton, 902 F.2d 1348, 1353-55 (8 Cir. 1990)].

It is also established that applying a new statute to a pending case constitutes a retroactive application of the statute. For example, the 5th Circuit said in Johnson v. Uncle

"In distinguishing Bennett from Bradley, the Supreme Court noted that the rule in Bradley was limited by 'another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.' (965 F.2d at 1374.)

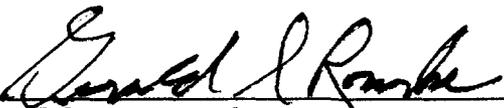
Thus, even if Bradley somehow applied here, under Bennett the Commission's new bar on settlements could not be applied to pending applications because to do so would deprive pending applicants of their antecedent substantive right to reduce the odds

plications in a market are accepted for filing. First the Commission delayed settlements contrary to its own rule, and now it is forbidding them altogether.

Under the governing law, Bowen v Georgetown University Hospital, 488 U.S. 204 (1988), making the new ban on settlements applicable to pending applications is unlawful because it is a retroactive rulemaking which is not authorized by the Communications Act of 1934, as amended. USIMTA respectfully submits that the Commission should reconsider its decision to make the ban on MDS settlements applicable to pending applications and reverse that decision, so that the new rule will apply to applications filed after its adoption only.

Respectfully submitted,

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