

Interlocutory Orders, etc.

IN THE MATTER OF

RAMBUS INCORPORATED*Docket No. 9302 – Order: October 19, 2006***ORDER GRANTING MOTIONS FOR LEAVE TO FILE
BRIEFS AMICI CURIAE**

Five separate motions have been filed seeking leave to file *amicus* briefs related to remedy.¹ Rambus opposes the Nvidia Motion on the grounds that the brief is an attempt to reargue liability issues, and that its arguments are redundant with arguments made by Complaint Counsel. Rambus Opposition to Nvidia Motion at 1. Rambus also opposes the AAI Motion on the ground that it is untimely filed and prejudicial. Rambus Opposition to AAI Motion at 1. Neither Rambus nor Complaint Counsel has filed an opposition to the other three motions.

As the Commission previously has stated in this and other matters, the standard for determining whether to grant a motion for leave to file an *amicus* brief is whether “the public interest will benefit from Commission consideration of the perspectives enunciated in the . . . brief,”² and all five proffered *amicus* briefs

¹ Motion of JEDEC Solid State Technology Association for Leave to File *Amicus Curiae* Brief (September 15, 2006); Joint Motion of Broadcom Corp. and Freescale Semiconductor, Inc. for Leave to File *Amicus Curiae* Brief Under 16 C.F.R. 3.52(j) (September 15, 2006); Motion of Nvidia Corp., Micron Technology, Inc., Samsung Electronics Corp., Ltd., and Hynix Semiconductor, Inc. for Leave to File Brief as *Amici Curiae* (September 15, 2006) (“Nvidia Motion”), Motion of Gesmer Updegrove LLP and Andrew Updegrove for Leave to File *Amici Curiae* Brief on the Issue of the Appropriate Remedy for Rambus’s Violations of the FTC Act (September 18, 2006); and Motion of the American Antitrust Institute, Inc. for Leave to File Responding *Amicus Curiae* Brief on Issues of Remedy in Support of Neither Party (September 29, 2006) (“AAI Motion”).

² In the Matter of Telebrands Corp., *et al.*, Dkt. No. 9313, Order Granting Motion for Leave to File Brief *Amicus Curiae* and Revising Briefing Schedule (Dec. 1, 2004) at 2 (“Telebrands Order”); *accord*, In the Matter of Rambus, Dkt. No. 9302, Order Granting Motions for Leave to File Briefs *Amici*

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satisfy that standard. Thus, for example, while the brief filed by Nvidia suggests that the remedy could extend to additional technologies, that argument does not constitute a request to reopen the liability issue, contrary to Rambus's position. See Rambus Opposition to Nvidia Motion at 2.³ Rather, Nvidia's reliance on *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 472-74 (1952), appears to invoke the fencing-in relief doctrine to argue that the remedy the Commission adopts should be more expansive than needed to prevent a recurrence of Rambus's precise violations of the Federal Trade Commission Act. Nvidia Brief at 11. The Commission expresses no view on whether or not the doctrine of fencing-in relief could support the contours of the remedy the Nvidia Brief proposes. However, asking the Commission for fencing-in relief constitutes an appropriate issue for consideration by the Commission with respect to remedy. Further, granting the Nvidia motion will not prejudice Rambus because it has had the opportunity to outline in detail its opposition to Nvidia's arguments in its Opposition to that Motion.⁴

With respect to the AAI Motion, Rambus's reliance on Commission denial of a similar motion filed by the Voluntary Trade Council ("VTC") in *In the Matter of North Texas Specialty Physicians* is misplaced. In that instance, the Commission found that "numerous statements in both [VTC's] Motion and in its Brief indicate that the Brief in fact supports the position of Respondent 'as to affirmance or reversal'"⁵ The

Curiae (June 21, 2004), and Order Granting Motions for Leave to File Briefs *Amici Curiae* and Scheduling Oral Argument (April 30, 2004).

³ Likewise, Nvidia's argument that extending the remedy to DDR2 SDRAM is "needed to restore competitive conditions," Nvidia Brief at 9, does not constitute a request that the Commission change its finding that the causal link to DDR2 was not established by the record, contrary to Rambus's argument. See Rambus Opposition to Nvidia Motion at 4.

⁴ See *Telebrands Order* at 3.

⁵ In the Matter of North Texas Specialty Physicians, Dkt. No. 9312, Order Denying [VTC] Motion for Leave to File Brief *Amicus Curiae*, 2005 WL 1541535 (June 7, 2004) at 2.

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Commission therefore determined that the VTC brief should have been filed at the same time as the respondents' appeal brief. Instead, however, VTC filed the brief more than one month later.⁶ In this case, by contrast, the AAI Brief on its face appears only to raise two principles of remedy it claims should apply to the remedy issues, and the view that those principles were not adequately addressed by the parties in their initial remedy briefs. Moreover, the AAI Brief takes no position for or against either party. It is true that the principles of remedy AAI advocates may favor one party on some issues and the other party on other issues, as a function of the underlying facts. That circumstance, however, does not convert the AAI Brief into the sort of pretextual filing offered by VTC in the *North Texas* matter.⁷ Furthermore, the AAI Motion was filed on the same date responding briefs were to be filed under the Commission's briefing schedule in this matter.⁸ The briefing schedule for remedy contemplated simultaneous filing of initial briefs by Rambus and Complaint Counsel, and the Commission has now determined to permit Respondent and Complaint Counsel to file supplemental briefs addressing any arguments made in the AAI Brief, should they wish to do so.

Pursuant to Commission Rule 3.52(j), 16 C.F.R. § 3.52(j), the Commission has determined to grant the five motions for leave to file *amicus* briefs because the public interest will benefit from

⁶ *Id.*

⁷ On October 11, 2006, AAI filed a Reply Brief to Rambus's Opposition to the AAI Motion. Commission rules do not provide for such a reply, and AAI did not seek leave to file it.

That pleading does not appear to state anything that was not reasonably determinable from AAI's moving papers; accordingly, the Commission has not relied on that pleading for any purpose in resolving this issue.

⁸ AAI's Brief addresses the issues based on how the parties themselves framed the issues. AAI had to see the initial filings of the parties before it could formulate any position. The earliest date on which the initial briefs of the parties were available on the Commission's web site was September 19, 2006. Under these circumstances, we do not find the filing untimely.

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Commission consideration of the perspectives enunciated in the five accompanying briefs. Accordingly,

IT IS ORDERED THAT the Motion of JEDEC Solid State Technology Association for Leave to File *Amicus Curiae* Brief (September 15, 2006); the Joint Motion of Broadcom Corp. and Freescale Semiconductor, Inc. for Leave to File *Amicus Curiae* Brief Under 16 C.F.R. 3.52(j) (September 15, 2006); the Nvidia Motion; the Motion of Gesmer Updegrove LLP and Andrew Updegrove for Leave to File *Amici Curiae* Brief on the Issue of the Appropriate Remedy for Rambus's Violations of the FTC Act (September 18, 2006); and the AAI Motion be, and they hereby are, **GRANTED**; and

IT IS FURTHER ORDERED THAT Respondent and Complaint Counsel be, and they hereby are, **GRANTED** leave to file a supplemental brief, provided that each such brief shall not exceed 2,000 words; shall be limited to addressing arguments made in the AAI Brief; and shall be filed on or before October 30, 2006.

By the Commission.

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IN THE MATTER OF

MIREALSOURCE, INC.

Docket No. 9321 – Order: November 27, 2006

**ORDER WITHDRAWING MATTER FROM
ADJUDICATION FOR THE PURPOSE OF CONSIDERING
A PROPOSED CONSENT AGREEMENT**

Complaint Counsel and Respondent having jointly moved that this matter be withdrawn from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Respondent having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondent and by Complaint Counsel and approved by the Director of the Bureau of Competition which, if accepted by the Commission, would resolve this matter in its entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C.F.R. § 3.25(c) (2006), that this matter in its entirety is hereby withdrawn from adjudication, and all proceedings before the Administrative Law Judge are hereby stayed, pending a determination by the Commission with respect to the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C.F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.