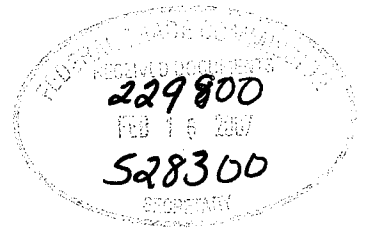


**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch



In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**MOTION OF RESPONDENT RAMBUS INC.
FOR STAY OF ORDER PENDING APPEAL**

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I. INTRODUCTION

Pursuant to 16 C.F.R. § 3.56, respondent Rambus Inc. (“Rambus”) seeks a stay of the February 2, 2007, Final Order (“Order”) of the Federal Trade Commission (“Commission”) until the final disposition of Rambus’s appeals in the federal courts. The Order was based upon the Commission’s opinions of July 31, 2006 (“Liability Op.”) and February 2, 2007 (“Remedy Op.”). Taken together, the Order and opinions (1) reverse the Initial Decision by Chief Administrative Law Judge McGuire, who, after hearing extensive live testimony and reviewing a voluminous record, concluded that Rambus had not violated Section 5 of the Federal Trade Commission Act; (2) conclude that Rambus engaged in exclusionary conduct in violation of Section 2 of the Sherman Act (and, therefore, Section 5) based on disputed facts and an unprecedented legal theory; and (3) require the extraordinary (indeed, virtually unprecedented in a contested FTC case) remedy of compulsory licensing of numerous patents at rates no higher than those established by the Commission—rates well below those Rambus currently charges.

Unless it is stayed, the Order will cause extraordinary and irreparable harm to Rambus even while Rambus pursues its appeal of the difficult issues of first impression raised in this case. As currently framed, the Order bars Rambus from (1) licensing its patents at royalty rates above specified Maximum Allowable Royalty (MAR) rates in numerous products manufactured in compliance with JEDEC Solid State Technology Association (“JEDEC”) standards; and (2) seeking anything more than MAR rates when enforcing its patent rights against those who decline to take a license from Rambus for

future use even on the low rates that the Order requires Rambus to offer.¹

The Commission has recognized that “[r]oyalties are the lifeblood of Rambus.” Remedy Op. 14 (alteration in original). The Commission’s Order, however, threatens irrevocably to cut off much of that lifeblood. Even if the Order is set aside or significantly modified on appeal, Rambus is unlikely ever to recover the substantial revenue it will forego during the pendency of the appeal. As written, the Order provides no express mechanism by which Rambus could recover that shortfall. Accordingly, this is *not* a case where money damages will later be available to redress losses incurred by Rambus during the pendency of the appeal because of the Order. Moreover, by effectively requiring termination and renegotiation of Rambus’s current licenses for pertinent technologies, the Order is likely to create significant market uncertainty, loss of goodwill, further litigation, and—depending on whether certain provisions in the Order are clarified and how they are construed in the future (*see* n.1, *supra*)—serious financial harm to Rambus that would compromise its ability to do business.

II. ARGUMENT

Under the Commission’s rules, “[a]ny party subject to a cease and desist order under section 5 of the FTC Act . . . may apply to the Commission for a stay of that order

¹ Companies adverse to Rambus may be inspired to read the Commission’s Order even more sweepingly—to require Rambus, for example, to allow all its current licensees to demand refunds of all royalties paid in the past, even though the licensees have already enjoyed the benefits of their licenses. Rambus’s concurrently filed Petition for Reconsideration explains why the Commission’s Order should be amended to make clear that Rambus is not required to allow unilateral “rescission” by existing licensees, and why the Commission’s Order should also be altered in other respects. The irreparable harm to Rambus would be even greater if the Commission were to reject Rambus’s arguments in that Petition. *See* Part II.B.4, *infra*.

pending judicial review.” 16 C.F.R. § 3.56(b). An applicant for a stay must address the following factors: (1) the likelihood of the applicant’s success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties likely to result from the requested stay; and (4) why the stay is in the public interest. *Id.* § 3.56(c). These requirements largely track the four-factor test set out in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977); *see also In re California Dental Ass’n*, No. 9259, 1996 FTC LEXIS 277, at *2-3 (May 22, 1996) (setting forth the above four factors prior to their codification in Rule 3.56 and citing *Holiday Tours*). All four factors support a stay of the Order pending the outcome of Rambus’s appeal.

A. Rambus Has Established The Necessary Likelihood Of Success.

The first factor enumerated in Rule 3.56, the likelihood of success on appeal, does not require a showing that “ultimate success by the movant is a mathematical probability.” *Holiday Tours*, 559 F.2d at 843 (rejecting the view that “50% plus probability is required”). As *Holiday Tours* explains, “[p]rior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision.” *Id.* at 844-845. A court or agency may therefore grant a stay “even though its own approach may be contrary to the movant’s view of the merits.” *Id.* at 843. The Commission takes the same approach. *See California Dental Ass’n*, 1996 FTC LEXIS 277, at *9 (“It can scarcely be maintained that the Commission must harbor doubt about its decision in order to grant the stay.”). Accordingly, a stay pending appeal is appropriate when a movant’s appeal

involves serious and substantial questions going to the merits of the decision and the movant will suffer irreparable harm absent a stay. *See Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993).

The Commission has held that the first stay factor can be substantially satisfied by showing that the Commission's decision was "based upon a complex factual record." *See In re Novartis Corp.*, No. 9279, 1999 FTC LEXIS 211, at *4-5 (Aug. 5, 1999) (granting partial stay even though the Commission was "confident of the correctness of its decision" and noting that "it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits"); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 697 (1998) (ordering partial stay and holding that "[t]he difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits").

If there was ever a case in which a stay is appropriate because of the complexity of the factual record, this is it. The administrative hearing in this case lasted 54 days and resulted in an evidentiary record that included live testimony from 44 witnesses, 1,770 admitted exhibits, and a trial transcript of nearly 12,000 pages. *See* Initial Decision 4-5. Because of the huge volume of evidence introduced at trial and the "complexity of the issues presented," the Initial Decision ran 334 pages and included 1,665 findings of fact. *See id.* Chief Judge McGuire meticulously examined all the evidence on the issues presented and determined that Complaint Counsel had not met their burden of proof. The Commission's two opinions to the contrary take up 150 pages of text, include more than

800 footnotes, and required more than two years to prepare. The Commission has acknowledged that the issues presented here are complex and difficult. *See, e.g.*, Remedy Op. 16 (observing that the construction of the ““but for world”” in this case is “no simple or certain task”).

The fact that the Commission’s factual findings on those complex issues conflict in many ways with Chief Judge McGuire’s findings also supports issuance of a stay of the Order pending appeal. The reviewing court will be required to consider the ALJ’s findings as well as the Commission’s own contrary findings to determine whether the Commission’s decision is supported by substantial evidence. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494-496 (1951); *see also Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062-1063 (11th Cir. 2005) (reviewing court “may examine the FTC’s findings more closely where they differ from those of the ALJ”); *Holo-Krome Co. v. NLRB*, 947 F.2d 588, 592 (2d Cir. 1991) (holding that the evidence relied upon by an agency “in cases where it does not accept the ALJ’s findings ‘must be stronger than . . . in cases where the findings are accepted’”).²

In addition to the many difficult legal and factual issues addressed in the Commission’s liability opinion, the Commission’s remedial Order raises significant legal

² Also relevant to the court of appeals’ decision will be the Federal Circuit’s determination that Rambus did not breach any duty of disclosure imposed by JEDEC; its conclusion that Rambus did not, while a JEDEC member, possess any pending patent claims that would have been infringed by any technology considered for standardization while Rambus was a JEDEC member; and its unanimous finding that JEDEC did not commence DDR standardization until after Rambus had withdrawn from membership. *See Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081 (Fed. Cir. 2003).

questions that must be addressed on appeal. For example, there is substantial room for debate as to whether the Commission has the statutory authority to set royalty rates as an antitrust remedy. The Order itself recognizes that “[t]he Supreme Court has not yet addressed the scope of the Commission’s remedial authority where, as here, the Commission has applied the legal standards of Section 2,” and acknowledges that “modern cases . . . have provided limited guidance” with respect to antitrust remedy issues. Remedy Op. at 2, 8. For the same reasons, the Commission’s authority to compel Rambus to license its patents is also questionable, especially because compulsory licensing of patents “is a rarity in our patent system.” *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980); *see also Hartford-Empire Co. v. United States*, 323 U.S. 386, 433 (1945) (noting that Congress has repeatedly refused to extend remedy of compulsory licensing).

Moreover, *royalty-free* compulsory licensing—which the Order explicitly imposes for all of the covered patents after three years (and effectively imposes for some of these patents immediately³)—is virtually unknown in our patent system. *See, e.g., United*

³ Rambus has more than a hundred United States patents (and over 50 foreign patents) that claim priority to dates before June 17, 1996 and, thus, fall within the Commission’s definition of “relevant” patents. *See* Anderson Decl. ¶ 3 (attached as Exhibit B). A number of these patents relate to technologies used in JEDEC-compliant SDRAM and DDR SDRAM, but that are not within the four technology markets that the Commission found were unlawfully monopolized. *Id.* ¶ 4.

Other Rambus patents covered by the Commission’s Order claim particular implementations of certain features that, while not required by the relevant standards, could be used in JEDEC-compliant parts. *Id.* ¶ 5. The Commission’s Order thus invites the DRAM manufacturers to use the technologies covered by these patents in their SDRAM and DDR SDRAM designs cost-free, despite the fact that they need not do so in order to comply with JEDEC standards.

States v. National Lead Co., 332 U.S. 319, 338-349 (1947) (rejecting imposition of royalty-free patent license as an antitrust remedy and suggesting that such a remedy is “inequitable” absent “special proof” to justify it); *Hartford-Empire*, 323 U.S. at 415 (observing that decree in antitrust case compelling royalty-free licensing of valid patents would amount to forfeiture of defendants’ property and that the decree should be modified to allow for reasonable royalties). Indeed, Complaint Counsel has not cited (and Respondent is not aware of) any case in which an appellate court has affirmed an order imposing a royalty-free licensing remedy in an antitrust action.⁴

In short, Rambus amply satisfies the requirement that it show a reasonable likelihood of success on appeal.

B. Rambus Will Suffer Irreparable Harm In The Absence Of A Stay.

If the Commission’s Order is not stayed pending appeal, Rambus will suffer four distinct forms of irreparable harm. First, even if the Order is reversed on appeal, it forces Rambus to forego permanently any royalties or damage awards that the company would otherwise have collected or recovered for use of its patents during the pendency of its appeal. This foregone revenue may amount to as much as [], assuming that the appeal takes three years to resolve. *See* DeLey Decl. ¶4 (non-public) (attached as Exhibit A). Second, the Order deprives Rambus of its statutory right to exclude others from use of its patented technologies; even if the Order is reversed, Rambus cannot ever recover the opportunity it will have lost to exercise its exclusionary right during the

⁴ The one ruling the Commission identifies as imposing a royalty-free licensing remedy—*United States v. General Elec. Co.*, 115 F. Supp. 835 (D.N.J. 1953)—is a district court decision.

