

might threaten them with liability if there were misleading statements in advertisements for products that were the basis of a “compare and save” marketing claim, even though the chain had no knowledge of the falsity.

Id. NACDS states that its proposed brief “would not support either party in this appeal. . . .” but instead “request[s] that the Commission resolve [two specified] legal issues . . .” arising from the foregoing liability concerns.¹

On November 16, 2004, Complaint Counsel filed an Opposition to the NACDS Motion (“CC Opposition”), requesting that the Commission deny the NACDS Motion as untimely. Complaint Counsel argue that the proposed *amicus* brief “supports the position of the Appellants/Respondents in the above-entitled matter-*i.e.*, the reversal of the Initial Decision . . .,” and therefore, pursuant to Commission Rule 3.52(j), 16 C.F.R. § 3.52(j) (2004), should have been filed no later than the date by which Respondents had to file their Appeal Brief; that is, by November 3, 2004.² Complaint Counsel further argue that the filing of the *amicus* brief at this time is “unduly prejudicial to Complaint Counsel because, in its answering brief, Complaint Counsel must respond to Respondents’ brief *and* NACDS’ brief. . . .;” because “NACDS introduces a second question presented, not addressed in Respondents’ brief, . . .; and because the delay in filing the *amicus* brief gives Complaint Counsel one less week to respond to the issues raised by the brief. CC Opposition at 3 (emphasis in original). Complaint Counsel therefore ask the Commission -- if it grants the NACDS Motion -- to extend the deadline by which Complaint Counsel must file their Answering Brief to December 14, 2004, and to enlarge the word count limitation applicable to that brief by 1,000 words.

The Commission has determined to grant the NACDS Motion, because the public interest will benefit from Commission consideration of the perspectives enunciated in the accompanying brief.³ As Complaint Counsel point out, if the NACDS brief supports the Respondent’s position that the Initial Decision should be reversed, then it was not timely filed. NACDS states, however, that its brief does not support the position of either party. The Commission need not

¹ *Id.* NACDS also states that it “learned only recently of the pendency of this appeal and the legal issues it presents;” that it has “prepared and submitted [its brief] as expeditiously as possible. . . .;” and that it believes that the timing of the filing “will not prejudice either of the parties to this appeal.” *Id.* at 2-3.

² CC Opposition at 1-2. Complaint Counsel also argue that NACDS should have moved for an extension of the November 3, 2004 deadline prior to that date, and that -- pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b) -- it should not now be permitted to request such an extension unless it can establish that “the untimely filing was the result of excusable neglect.” *Id.* at 2.

³ *See, e.g.*, Order Granting Motions for Leave to File Briefs Amici Curiae and Scheduling Oral Argument (April 30, 2004), and Order Granting Motions for Leave to File Briefs Amici Curiae (June 21, 2004), in *In the Matter of Rambus Incorporated*, Docket No. 9302.

resolve this issue, because it can prevent any prejudice to the parties to this proceeding by extending the deadlines by which future briefs must be filed, and by enlarging the word limits respectively applicable to the Answering and Cross-Appeal Brief of Complaint Counsel, and to the Answering and Reply Brief of Respondent.⁴ Accordingly,

IT IS ORDERED THAT Complaint Counsel shall file their Answering and Cross-Appeal Brief on or before December 14, 2004, with said Brief not to exceed 27,250 words;

IT IS FURTHER ORDERED THAT Respondents shall file their Answering and Reply Brief on or before January 18, 2005, with said Brief not to exceed 19,750 words; and

IT IS FURTHER ORDERED THAT Complaint Counsel shall file their Rebuttal Brief on or before January 31, 2005.

By the Commission.

Donald S. Clark
Secretary

ISSUED: December 1, 2004

⁴ The Commission is satisfied that Complaint Counsel have made the “strong showing that undue prejudice would result from complying with the existing limit. . . .” required by Commission Rule 3.52(k), 16 C.F.R. § 3.52(k).