

ORIGINAL

PUBLIC

**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

**OPPOSITION BY RAMBUS INC. TO MOTION OF
AMERICAN ANTITRUST INSTITUTE, INC.
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

I. INTRODUCTION

Respondent Rambus Inc. (“Rambus”) respectfully submits this opposition to the motion by American Antitrust Institute, Inc. (hereinafter “the AAI”) for leave to file an amicus brief in connection with the remedy phase of this proceeding. The AAI’s motion and proposed brief are procedurally and substantively improper, and the motion for leave to file the brief should be denied.

II. AAI’S BRIEF IS UNTIMELY, AND ITS CONSIDERATION WOULD BE INAPPROPRIATE AND PREJUDICIAL

The Commission’s July 31, 2006 Order established a simultaneous briefing schedule relating to remedy issues, pursuant to which both parties filed principal briefs on September 15, 2006 and reply briefs on September 29, 2006. Although all of the other third parties who sought leave to file amicus briefs in this matter filed their motions for leave on September 15, 2006, when the parties’ principal briefs were due, the AAI chose to wait until September 29, 2006. In defending its delay, the AAI relies solely on Rule 29 of the Federal Rules of Appellate Procedure, which “permits *amicus curiae* briefs to be filed subsequent to the filing of the appellant’s or petitioner’s principal brief.” AAI Brief at 1.

The Commission recently rejected this precise argument. *See* Order Denying Motion for Leave to File Brief Amicus Curiae, *In Re North Texas Specialty Physicians*, 2005 WL 1541535 (June 7, 2005) (“*North Texas*”). In *North Texas*, the Voluntary Trade Council (“the VTC”) sought leave to file an amicus brief thirty days after the respondent had filed its opening brief on appeal. The Commission rejected the VTC’s argument that Rule 29 of the Federal Rules of Appellate Procedure, which allows amicus briefs to be filed after a party’s principal brief, supported its position. *Id.* The Commission held that

the Federal Rules “are not applicable to the Commission” and that “[e]ven if the Commission followed Rule 29, it would not aid VTC,” for Rule 29 would have required that the amicus brief be filed no later than seven days after the petitioner’s principal brief. *Id.* at n.3, *citing* Federal Rule of Appellate Procedure 29(e) (requiring all amicus briefs, even those claiming to be neutral, to be filed no later than seven days after appellant’s opening brief).¹

The Commission’s holding in *North Texas* is fully applicable here. Rule 29 does not apply here, and the rule that *does* apply, 16 C.F.R. § 3.52(j), required the AAI to file its motion on September 15, 2006, as the other *amici* did. Even if Rule 29 *did* apply, moreover, the AAI’s brief would still be untimely, since it was filed fourteen days (or ten business days) after the parties’ principal briefs were filed. *Id.*

The AAI’s decision to delay its filing involves more than just a technical failure to follow the rules. By waiting until the parties’ reply briefs were filed, the AAI robbed the parties of the ability to respond to the AAI’s arguments in their own briefs. The Commission’s consideration of the AAI’s untimely arguments would thus prejudice the parties. *See generally* Advisory Committee Notes to 1998 Amendment to Rule 29(e), *reprinted in* West’s Fed. Civ. Proc. and Rules (2006 Rev. Ed.), at p. 549 (explaining that the “7-day period” under Rule 29(e) for filing amicus briefs is intended to provide “sufficient time to review arguments made by the amicus and address them in the party’s

¹ In addition, if Rule 29 *were* applicable here, the AAI’s brief would likely violate that rule’s limits on the length of amicus briefs. See Fed. R. App. Proc. 29(d) (limiting amicus brief to half the length allowed to the parties). The AAI cannot pick and choose which parts of Rule 29 it wishes to import into the Commission’s procedures.

responsive pleading.”). Given the nature of the arguments made in the AAI’s brief, the bulk of that prejudice would be felt by Rambus.²

Moreover, while the Commission may be in a better position than Rambus to identify institutional concerns, it seems likely that an order allowing the AAI to file its untimely amicus brief in this case will encourage it and other amici in other future cases to file briefs after the parties’ principal briefs have been filed, leading to ancillary litigation regarding the nature of the amicus brief, as well as requests by the parties for further briefing and concomitant delay.

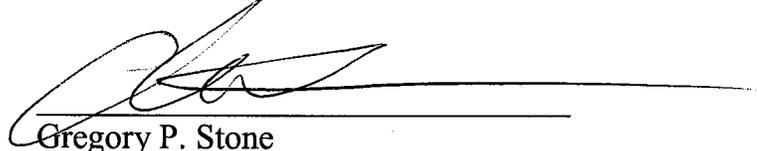
² The AAI claims that its brief is neutral and does not “support[] a particular outcome for or against either party.” AAI Brief at 1. In fact, the brief, which is based on an incomplete and misleading description of the record evidence, argues that the Commission should strive for “costless” standards that are not “undermined by the incentives to innovate created by patent policy.” Brief at 1-2. The AAI’s brief also suggests that the Commission place on Rambus the burden of showing by clear and convincing evidence that “but for the incorporation of Rambus’s technology into the JEDEC standards, there would have been materially less demand for JEDEC-compliant devices”. *Id.* at 7. Such arguments (which are not supported by the case law or the record) are clearly adverse to Rambus’s position, and the AAI’s protestations of neutrality should be ignored. *See North Texas*, 2005 WL 1541535 (refusing to accept VTC’s claim of neutrality and looking to VTC’s arguments to determine whether they would, if accepted, require affirmance or reversal of Initial Decision.).

III. CONCLUSION

For all of the foregoing reasons, the AAI's motion for leave to file an amicus brief should be denied.

DATED: October 5, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Helena T. Doerr, hereby certify that on October 5, 2006, I caused a true and correct copy of the *Opposition By Rambus Inc. To Motion Of American Antitrust Institute, Inc. For Leave To File Brief As Amicus Curiae* to be served on the following persons:

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A handwritten signature in cursive script, appearing to read "Helena T. Doerr". The signature is written in black ink and is positioned above a horizontal line.

Helena T. Doerr