

ORIGINAL

PUBLIC

UNITED STATES FEDERAL TRADE COMMISSION

Docket No. 9302



In the Matter of

RAMBUS INC.,

A CORPORATION

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

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October 11, 2006

I. Introduction

The American Antitrust Institute, Inc. (“AAI”) replies herewith to the “Opposition by Rambus, Inc. to the Motion of AAI for Leave to File Brief as *Amicus Curiae*” on the issue of remedies dated October 5, 2006 (“Opposition”).¹

On May 12, 2004 the AAI filed a motion to participate in this proceeding as *amicus curiae*. The motion was granted by the Commission in an Order dated June 21, 2004. Subsequently, on July 31, 2006, the Commission established a supplementary briefing schedule on the issue of remedy. Pursuant to the schedule the parties were directed to file simultaneous briefs by September 15, 2006 and simultaneous responding briefs by September 29, 2006.

On September 29, 2006 AAI filed a motion for leave to file a responding brief as *amicus curiae*. AAI also conditionally filed its responding brief pursuant to the Commission’s Rule 3.52(j), 16 C.F.R. §3.52(j). AAI’s responding brief set forth two principles which did not appear to be sufficiently addressed in the initial briefs of the parties or other *amici*.

Rambus, Inc. opposes AAI’s responding brief on the grounds that AAI’s filing was “untimely” and unfairly “robbed the parties of the ability to respond.” Opposition at 2. Rambus further claims that “the bulk of that prejudice would be felt by Rambus” because

¹A “reply” under these circumstances is not expressly contemplated by the Commission’s Rules (*See* Rule 3.22(c), 16 C.F.R. §3.22(c), allowing only for an “Answer” to a motion presented to an Administrative Law Judge or the Commission). However, in analogous circumstances before federal appellate tribunals Rule 27(a)(4) of the Federal Rules of Appellate Procedure contemplates a reply to a response to a motion directed only to matters raised in the response. Although the Commission is not bound by Rule 27 (or any other procedural rule applicable to the federal courts), AAI respectfully submits that a reply in such circumstances is appropriate where the opposing party raises arguments that were not, and could not have been, anticipated in the original motion.

AAI's brief is "clearly adverse to Rambus's position" despite AAI's "protestations of neutrality." *Id.* at 3.

II. The AAI's Responding Brief is Not Untimely and Any Potential Prejudice Easily Can Be Cured by Permitting the Parties to File a Brief Responding to the AAI

The Commission's Rule 3.52(j), 16 C.F.R. §3.52(j) states that "an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support." Because the Commission's Order directed both parties to file simultaneous initial briefs and responding briefs, AAI's responding brief was timely, even if, *arguendo*, the AAI's brief could be construed to support a particular party.

Moreover, although AAI filed a motion for leave to file a responding *amicus* brief on remedies, it is not at all clear that it was required to do so because it had already been granted leave to file an *amicus* brief in connection with the principal briefing schedule. AAI renewed its motion in an abundance of caution.

If the Commission nonetheless determines that the filing of the AAI responding brief could cause a party to be prejudiced, the AAI respectfully suggests that all parties should be afforded an opportunity to file a supplemental responding brief. The cure for such prejudice proposed by Rambus is to silence the viewpoint expressed in the AAI's brief. AAI respectfully submits that a full airing of the principles at issue with respect to the remedy in this proceeding is far preferable to silencing the principles recommended for the Commission's consideration set forth in AAI's submission.²

²It is noteworthy that Rambus, Inc. does not itself seek leave to file a supplementary brief in response to the principles put forward by AAI. Rambus focuses instead on speculating that allowing AAI to file its responding brief "will encourage it and other amici in other future cases to file briefs after the parties' principal briefs have been filed." Opposition at 3. However, no support is presented for the proposition that granting AAI leave to file its brief would create such a deleterious precedent. Moreover, the briefing schedule established by the
(continued...)

III. The AAI's Brief Does Not Advocate For or Against Either Party

Contrary to the averments in the Rambus Opposition, the AAI's responding brief does not necessarily support either party. The brief presents two straightforward principles, *i.e.*, that the royalty rate Rambus should be entitled to collect from practitioners of the relevant JEDEC standards should be calibrated to the degree of openness intended for the standard before it was adopted, and that Rambus ought not be permitted to reap a reward for market demand for the JEDEC standard, as opposed for market demand for Rambus' particular technology.

Both principles require the Commission to determine factual matters that are outside of AAI's knowledge. AAI supports neither side because it can take no position on how open, *in fact*, the JEDEC standard was supposed to be or on, *in fact*, how much market demand for JEDEC-compliant devices covered by Rambus' patents should be attributed to demand for the standard as opposed to demand for Rambus' patented technology.

The AAI submits that Rambus' perception that its responding brief is "clearly adverse to Rambus' position" indicates that these principles, when applied to facts better known to Rambus than to AAI, suggest an outcome on the issue of remedies that is unfavorable to Rambus.

²(...continued)

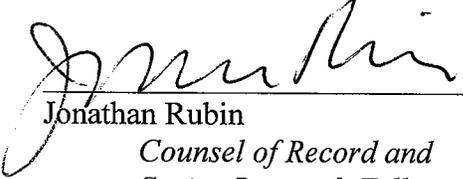
Commission in this matter is procedurally unique and unlikely to become in any sense routine. In any event, insuring that relevant antitrust and economic principles are fully briefed and considered would seem to be at least as important an "institutional concern" as any speculative effect which the procedures followed in this case may have on cases in the future.

IV. Conclusion

BASED ON THE FOREGOING, the AAI respectfully requests an Order granting it leave to file its brief *amicus curiae* on the issue of remedies.

Respectfully submitted,

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Dated: October 11, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 11, 2006, I caused true and correct copies of the Reply to the Opposition by Rambus, Inc. to Motion of the American Antitrust Institute for Leave to File Brief as *Amicus Curiae* to be served as described below.

Service by hand delivery of paper copies, including an original, signed version, and 12 photocopies, and by electronic mail, was provided to:

Donald S. Clark
Secretary
Federal Trade Commission
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Washington, D.C. 20580

Service of two copies by hand delivery was provided to:

Counsel Supporting the Complaint:

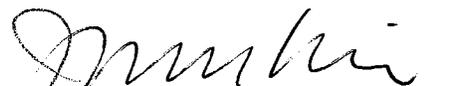
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