PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	Docket No. 9302
RAMBUS INCORPORATED, a corporation.	)	

RAMBUS INC.'S ANSWER TO NON-PARTY MITSUBISHI ELECTRIC & ELECTRONICS USA, INC.'S INTERLOCUTORY APPEAL OF ORDER DENYING MOTION TO QUASH SUBPOENA OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER

I. SUMMARY OF ARGUMENT

"The Commission generally looks with disfavor on interlocutory appeals, particularly those seeking review of discovery rulings of an administrative law judge." *In re Automotive Breakthrough Sciences, Inc.*, Dkt. No. 9275, 1996 FTC LEXIS 367 *5 (Aug. 16, 1996) (citing *The Gillette Co.*, 98 F.T.C. 875 (1981)). Such appeals "merit a particularly skeptical reception," *In re Bristol-Myers Co.*, 90 F.T.C. 273, 1977 FTC LEXIS 83 at *1 (Oct. 7, 1977), because discovery matters are "particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay." *Id.* Here, Mitsubishi Electric & Electronics USA, Inc. ("Mitsubishi") seeks an interlocutory appeal of just such a ruling; *viz.*, Your Honor's finding that Mitsubishi has "control" over documents held by its foreign parent company, Mitsubishi Electric Company ("MELCO"), that are responsive to the subpoena served on Mitsubishi by Rambus, Inc. ("Rambus"). According to Mitsubishi, the relevant standard for "control" by a subsidiary of documents held by its foreign parent is a "controlling question of

law or policy as to which there is substantial ground for difference of opinion." Opening Br. at 2.

While admitting that there is authority that "is on point regarding the issue of whether a non-party must produce documents from its foreign parent under a *subpoena duces tecum*" when that non-party has "access to" or the "ability to obtain the documents," Opening Br. at 3, Mitsubishi insists that an interlocutory appeal is nonetheless appropriate because there is supposedly a conflict in the courts regarding this issue. Mitsubishi claims that the relevant test is whether a subsidiary has the "legal right" to obtain documents from its parent. In support of this assertion, however, Mitsubishi fails to cite a single authority involving a subsidiary-parent relationship that applies the "legal right" test. In contrast, the plethora of courts that have considered the issue of "control" in the context of a subsidiary-parent relationship have held that the relevant test for whether a subsidiary has "control" of documents held by its foreign parent is the test adopted by Your Honor. Moreover, the courts have applied this same test to situations involving non-parties, and Mitsubishi offers no compelling reason to apply a different test for non-parties. Accordingly, there is no "substantial ground for a difference of opinion" on this issue, and Mitsubishi's request should be denied.

II.
ARGUMENT

The Commission's Rule of Practice allow for an interlocutory appeal where the Administrative Law Judge determines that there is a "controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). A "controlling question of law or policy" is one that "'may contribute to the determination, at an early stage, of a wide spectrum of cases.'" *In re The Times Mirror Co.*, Dkt. No. 9103, 1978 FTC LEXIS 12 at *2 (Dec. 20, 1978) (quoting *Lehigh Portland Cement Co.*, 78 F.T.C. 1556, 1557 (1971)). This requirement "forecloses interlocutory appeals in situations in which the law is well settled and the dispute arises in the

application of the facts at hand to that law." *In re International Assoc. of Conf. Interpreters*, Dkt. No. 9270, 1995 FTC LEXIS 452 at *4 (Feb. 15, 1995). A "'substantial ground for difference of opinion' requires a finding that the question presents a novel or difficult legal issue" and the "party seeking certification must make a showing of likelihood of success on the merits." *Id.* at *5. Mitsubishi has failed to meet these standards.

A. It is Well-Settled That the Test for "Control" in the Subsidiary-Parent Context is Not Limited to the "Legal Right" Standard.

According to Mitsubishi, there is a conflict in the federal courts as to the test for "control" over documents held by a foreign parent and the "prevailing meanb

131 (3d Cir. 1988), "Where the relationship is thus such that the agent-subsidiary can secure documents of the principal-parent to meet its own business needs . . . the courts will not permit the agent-subsidiary to deny control for purposes of discovery by an opposing party." *Id.* at 141 (citing, *inter alia*,

America Corp.

foreign corporations from using documents for their own business purposes while shielding those documents from discovery by warehousing them overseas.

C. Mitsubishi's Status as a "Non-Party" Does Not Merit an Interlocutory Appeal

The fact that Mitsubishi is a "non-party" does not change the analysis. Mitsubishi cites the general federal rule that discovery directed at non-parties may be more limited than that directed at parties. But this general rule does not (and should not) affect the definition of "control." First, as Mitsubishi itself recognizes,

Third, of necessity, the Commission's Rules of Practice tolerate more imposition on third parties because Commission proceedings are brought in the public interest. For instance, unlike Rule 45, the Commission's Rules of Practice do not require a subpoenaing party to show a "substantial need" to obtain confidential information from a non-party: "a showing of general relevance is sufficient to justify production of documents containing confidential business information and no further showing of 'need' is necessary." *In re Coca-Cola Bottling Co.*, Dkt. No. 8992, 1976 FTC LEXIS 33 at *10-11 (Dec. 7, 1976); *see also In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96 at * 8 (Mar. 19, 1982) (same). Similarly, whereas the federal courts tend to require a greater showing of relevancy with regard to third parties to avoid burden on such parties, *see, e.g.*, *Echostar Communications Corp. v. The News Corp. Ltd.*, 180 F.R.D. 391, 394 (D. Col. 1998), the Rules of Practice only require that the information sought by a subpoena on a non-party be "generally relevant to the issues raised by the pleadings" – the same standard as for parties. *In re Kaiser Aluminum & Chemical Corp.*, Dkt. 7 w (D - 0 . 0 6 1 5

III.
CONCLUSION

The case law is settled; Mitsubishi's request does not present a novel or difficult issue of law; nor has Mitsubishi demonstrated a likelihood of success. Accordingly, its request for an interlocutory appeal should be denied. *See In re International Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452 at *4; *In re Jose F. Calimlim, M.D.*, Dkt. No. 9199, 1987 FTC LEXIS 71 at *1 (May 20, 1987) (denying interlocutory appeal where there was no showing of a split between circuit courts, Commission decisions, or even commentators).

Respectfully submitted,

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Gregory P. Stone
Steven M. Perry
Sean P. Gates
Peter A. Detre
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100

A. Douglas Melamed
IJay Palansky
Kenneth A. Bamberger*
Jacqueline M. Haberer
WILMER, CUTLER & PICKERING
2445 M Street, NW
Washington, DC 20037-1402
(202) 663-6000

Sean C. Cunningham
John M. Guaragna
GRAY, CARY, WARE & FREIDENRICH LLP
401 "BH5 Tc 0iTouite 2000
San Diego, California 92101
(619) 699-2700

Counsel for Respondent Rambus Inc

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* Admitted in MA and NY only

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CERTIFICATE OF SERVICE

I, Jacqueline M. Haberer, hereby certify that on November 25, 2002, I caused a true and correct copy of *Rambus Inc.'s Answer to Non-Party Mitsubishi Electric & Electronics USA, Inc.'s Appeal of Order Denying Motion to Quash Subpoena or in the Alternative for Protective Order* to be served by facsimile, to be followed by overnight delivery, to Bingham McCutchen LLP, counsel for Mitsubishi Electric & Electronics USA, Inc., at 1900 University Avenue, East Palo Alto, California 94303, and the following persons by hand delivery:

Hon. James P. Timony
Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Joseph J. Simons
Director, Bureau of Competition
Federal Trade Commission
Room H-372
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Malcolm L. Catt
Attorney
Federal Trade Commissions
Room 3035
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

M. Sean Royall
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-378
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Richard B. Dagen
Assistant Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Room 6223
Washington, D.C. 20580

Geoffrey D. Oliver
Deputy Assistant Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Jacqueline M. Haberer