

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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**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 meaning of ‘control’ in most courts of appeals remains the ‘legal right to obtain the documents.’” Opening Br. at 6. In support of this assertion, Mitsubishi cites a string of court of appeals decisions. *Id.* at 2. What Mitsubishi fails to mention is that *none* of the cases it relies upon involves the question of “control” in the context of a subsidiary-parent relationship. Rather, each of the cases relied upon by Mitsubishi involves the question of whether a respondent to a discovery request has “control” over documents in the possession of an unrelated third party or an instance in which the responding party could not produce documents without violating foreign law. Not surprisingly, these cases focus on the “legal right” test. But even these cases recognize that the “legal right” test is not the definitive.

For example, *Searock v. Stripling*, 736 F.2d 650 (11th Cir. 1984), involved a request to a ship owner to produce invoices for repairs done to the vessel. The owner’s copies of the invoices were destroyed when its vessel caught fire and sank, but the owner nonetheless sought to obtain the invoices from the repair shops that worked on the vessel. *Id.* at 651. When some of the repair shops failed to honor the owner’s request, the district court imposed sanctions against the owner for failure to produce the invoices. While recognizing that the owner did not have the “legal right” to demand the documents from the repair shops, the Eleventh Circuit “did not completely rest [its] holding on this factor.” *Id.* at 654. Instead, the court found “that the primary dispositive issue is whether [the owner] made a good faith effort to obtain the

documents . . . and whether after making such a good faith effort he was unable to obtain and thus produce them.” *Id.*

Similarly, the court in *Cochran Consulting, Inc. v. Uwatec, USA, Inc.*, 102 F.3d 1224 (Fed. Cir. 1996), found it important that the responding party made good faith efforts to obtain the requested documents. In that case, the responding party went so far as to bring suit in Switzerland against the owner of certain computer code in order to allow the responding party to produce the code. The Swiss court ruled against the responding party, and the Court of Appeal held that the responding party did not have “control” of the code as the Swiss court held that production of the code would be a criminal violation under Swiss law. *Id.* at 1230.

Likewise, *In re Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), sheds little light on the situation involving a subsidiary and its parent. That case involved distinct entities with no corporate relationship. The responding party was a U.S. based accounting firm, and the documents were held by a Swiss based firm. Although both firms were members of an accounting firm association, each was “autonomous,” did “not share profits or losses, nor do they have any management, authority, or control over” each other, and did not have “any economic or legal interest” in each other. *Id.* at 1106. Moreover, the evidence showed that the responding party had no “practical ability to obtain the documents” from the Swiss firm.<sup>1</sup> *Id.* at 1108.

Given that each of these cases deals with a situation in which responsive documents are in the possession of an entity with no corporate relationship to the responding party, it is unsurprising that the courts’ analyses focused on whether the responding party had the legal right to demand the documents. In contrast, the relationship between a subsidiary and its parent is far different from that of a company and an unrelated third party. As recognized in one of the cases relied on by Mitsubishi, *Gerling Int’l Ins. Co. v. Commissioner of Internal Revenue*, 839 F.2d

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<sup>1</sup> *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993), also involved a situation where the responsive documents were in the possession of an entity without any corporate relationship to the responding party. *See id.* at 1423, 1426 (chromatograms held by soil testing company hired by responding party’s contractor).

131 (3d Cir. 1988), “Where the relationship is thus such that the agent-subsi-dary can secure documents of the principal-parent to meet its own business needs . . . the courts will not permit the agent-subsi-dary to deny control for purposes of discovery by an opposing party.” *Id.* at 141 (citing, *inter alia*, *Cooper Industries, Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984)).<sup>2</sup>

In line with *Gehrlin*, the courts that have actually dealt with the issue of whether a subsidiary has “control” over documents in the possession of its foreign parent have uniformly held that the “legal right” test is not the appropriate standard. “The test to determine whether a corporation has custody and control over documents located with an overseas affiliate is not limited to whether the corporation has the legal right to those documents. Rather, the test focuses on whether the corporation has ‘access to the documents’ and ‘ability to obtain the documents.’” *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 U.S. Dist. LEXIS 101 at \*9 (S.D.N.Y. Jan. 11, 1999) (citations omitted); *see also Dietrich v. Bauer*, 198 F.R.D. 397, 401-02 (S.D.N.Y. 2001) (recognizing “practical ability to obtain documents” test in parent-subsi-dary context); *Uniden America Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998) (articulating factors); *DeSmeth v. Samsung America, Inc.*, 1998 WL 74297 at \*10 (S.D.N.Y., Feb. 20, 1998) (“In parent/subsi-dary situations, the determination of control turns upon whether the intracorporate relationship establishes some legal right, authority *or ability to obtain requested documents*”); *Alcan Int’l Ltd. v. S.A. Day Mfg. Co.*, 176 F.R.D. 75, 79 (W.D.N.Y. 1996) (finding that domestic distributor of foreign parent’s product had control of foreign parent’s documents); *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 464, 467 (D. Mass. 1993) (finding that domestic subsidiary served as an agent for its foreign parent with respect to participation in an industry standard-setting body despite having its own “officers, directors, employees, budget and physical facilities”); *Camden Iron & Metal, Inc. v. Marubeni*

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<sup>2</sup> Thus, Mitsubishi’s complaint that it could not “locate a single case in which a court of appeal adopted the holdings of cases” such as “*Camden*, *Cooper*, or *M.L.C.*,” Opening Br. at 5-6, is answered by one of the very cases Mitsubishi cites.

*America Corp.*, 138 F.R.D. 438, 441-42 (D.N.J. 1991) (finding control where both foreign parent company and U.S. subsidiary were involved in negotiations with party issuing subpoena); *Soletanche and Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269 (N.D. Ill. 1983) (ordering production of documents held by French parent corporation because of the identity of interests between the subsidiary and the parent with respect to the litigation).

**B. Applying This Settled Definition of “Control” Does Not “Circumvent” Rule 3.36.**

Mitsubishi also argue that to require a subsidiary to produce documents held by its foreign parent that the subsidiary has “access to” or the “ability to obtain” would eviscerate Rule 3.36, which sets forth certain requirements for subpoenas served on foreign entities. In support, Mitsubishi cites *Laker Airways Ltd. v. Pan American World Airways*, 607 F. Supp. 324, 326 (S.D.N.Y. 1985), which found that the service of a subpoena on U.S. branch offices in that case was a “transparent attempt” to circumvent the Hague Evidence Convention. In that case, however, the U.S. offices in that case “had no involvement whatsoever with” the plaintiff, the offices opened *after* the alleged conduct occurred, and there were no responsive documents or person with relevant knowledge at those offices. *Id.* at 326. The situation here is wholly different. Moreover, Mitsubishi fails to mention that two years after *Laker Airways* was decided, the Supreme Court held that the Hague Evidence Convention is not the exclusive means for U.S. litigants to obtain discovery abroad and that foreign discovery may be had under the Federal Rules of Civil Procedure. *See Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 539-541 (1987). What is more, not a single federal court, including *Laker Airways*, has found or even suggested that the relevant test for “control” by a subsidiary of documents held by its foreign parent is bounded by the fact that foreign discovery is generally subject to international treaties.

Applying the definition of “control” developed by the federal courts in the subsidiary-parent context does not “circumvent” Rule 3.36. To the contrary, it prevents U.S. subsidiaries of

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, *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462 (D. Mass. 1993), specifically found that the same test for "control" for a party subsidiary applies when the responding party is a non-party. *Id.* at 468. In fact, the Addamax court explicitly recognized that the Federal Rules had been amended to "provide greater protection to non-parties from whom discovery is sought." *Id.* These protections, however, do not affect the definition of "control"; rather, these protections are intended to prevent undue burden on a non-party. *Id.* This goal is to be accomplished through other means. *Id.*

Second, contrary to Mitsubishi's assertion, the federal Courts of Appeal have gone beyond the "legal right" standard in the context of a affiliated entities where the responding party is a non-party. In *First National City Bank of New York v. IRS*, 271 F.2d 616 (2d Cir. 1959), the IRS served a subpoena on First National City Bank seeking records related to Atlanta Corp. Ltd., which was under investigation by the IRS. First National refused to produce certain documents, claiming that they were physically located at a branch bank in Panama and therefore outside of its "control." The Second Circuit held that documents were within First National's control because if any "officer or agent of the corporation who has power to cause the branch records to be sent from a branch to the home office for any corporate purpose, [First National] surely has sufficient control to cause them to be sent on when desired for a governmental purpose properly implemented by a subpoena." *Id.* at 618. In other words, the relevant test was whether First National had "practical" control over the documents. *Id.*

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. No. 9080, 1976 FTC LEXIS 68 at \*4 (Nov. 12, 1976). In addition, while the federal rules explicitly allow for reimbursement for compliance with a subpoena, *see Fed. R. Civ. P. 45(c)*, reimbursement of costs in FTC adjudicative proceedings is only appropriate where the subpoenaed party has demonstrated that the cost of compliance would be "unreasonable" or "extraordinary." *See In re International Tel. & Tel. Corp.*, 97 FTC 202, 1981 LEXIS 75 at \*3 (March 13, 1981); *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268 at \*1 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena"). This is due to the public interest nature of FTC adjudicative proceedings. *See Kaiser Aluminum*, 1976 FTC LEXIS 68 at \*20-21 ("Where the public interest is involved, however, and where the nonparty is in the industry in which alleged acts occurred, the nonparty has an interest in the litigation and would be affected by the judgment. There, only the cost of copying need be reimbursed.").

In sum, Mitsubishi offers no compelling reason for the application of a limited definition of "control" to non-parties.



**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  
Jay 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 "B" Street, Suite 2000  
San Diego, California 92101  
(619) 699-2700

Counsel for Respondent Rambus Inc

November 25, 2002

\* 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

M. Sean Royall  
Deputy Director, Bureau of Competition  
Federal Trade Commission  
Room H-378  
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

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

Geoffrey D. Oliver  
Deputy Assistant Director  
Bureau of Competition  
Federal Trade Commission  
601 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

\_\_\_\_\_  
Jacqueline M. Haberer