

showing that it has been unable to obtain relevant documents and testimony from the agency unit without the use of compulsory process.¹

BACKGROUND

NASA and the DoD are important users of Nastran and several of their current or former employees will appear at trial for Complaint Counsel. Respondent's Counsel already has obtained substantial documentation respecting NASA and DoD in this proceeding.² Complaint Counsel turned over to Respondent in December documents obtained from NASA and the DoD in connection with Complaint Counsel's initial disclosures. We also turned over investigational hearing transcripts to Respondent in connection with the potential witnesses from NASA and DoD appearing on Complaint

¹ Respondent's motions are not supported by a Rule 3.22(f) statement documenting its efforts to resolve any disagreement with Complaint Counsel concerning the motion. Since receiving the motion, Complaint Counsel have urged Respondent's Counsel to pursue the documents and testimony through the agencies' voluntary cooperation.

² The relevance of these governmental agencies to this case has been known to Respondent for months. Complaint Counsel's December 17, 2001, preliminary witness list identified potential witnesses from the following NASA research centers: NASA Goddard Space Flight Center, NASA Johnson Space Center, NASA Marshall Space Flight Center. Complaint Counsel added witnesses from the NASA Jet Propulsion Laboratory to its February 14, 2002, revised witness list. Complaint Counsel also listed witnesses from the DoD High Performance Computing Modernization Program (which covers Wright Patterson Air Force Base and the Army Engineering Research Development Center at Vicksburg, Mississippi) and the Naval Surface Warfare Center in Carderock, Maryland, on its December 17, 2001, witness list. Complaint Counsel's most recent April 16, 2002, supplemental revised witness list pares down the number of Complaint Counsel's witnesses to witnesses from NASA Goddard, NASA Johnson, the DoD High Performance Computing Modernization Program, and the Naval Surface Warfare Center. Complaint Counsel also notified MSC on March 19, 2002, that it is also calling Dr. Vippera B. Venkayya as technical expert witness. Dr. Venkayya is a former scientist with Wright Patterson Air Force Base.

Counsel's December 17, 2001, witness lists. Complaint Counsel also turned over all additional documents received from these government agencies since the initial disclosures.

Moreover, several non-governmental sources have supplied documents relating to several of these NASA and DoD units and those documents have also been supplied to MSC. Both Respondent's Counsel and Complaint Counsel subpoenaed Computer Sciences Corporation ("CSC"), a contractor supplying computer software to NASA Marshall Space Flight Center, the Army Engineering Research Development Center at Vicksburg, Mississippi, and Wright Patterson Air Force Base. Additionally, Complaint Counsel subpoenaed documents from OAO Corporation relating to its procurement of engineering software on behalf of the NASA Johnson Space Center. During the investigation, the California Institute of Technology, the operator of the Jet Propulsion Laboratory for NASA, turned over documents relating to the NASA Jet Propulsion Laboratory.

MSC now seeks issuance of subpoenas to NASA and DoD, four months after first learning of most of Complaint Counsel's NASA and DoD witnesses. MSC requests that the Administrative Law Judge approve document subpoenas to the four NASA centers Complaint Counsel have identified on its witness lists, plus the Ames Research Center and John H. Glenn Research Center. MSC also seeks deposition subpoenas to seven NASA witnesses that appear on Complaint Counsel's December 17, 2001, and February 14, 2002, witness lists.³ MSC also seeks approval for document subpoenas to four sites within the Department of Defense ("DoD"), namely, the DoD High Performance Computing

³ Respondent's March 1, 2002, revised witness list identifies several NASA and DoD units as Respondent's prospective trial witnesses. MSC, however, has never identified any individuals as potential witnesses from any of these governmental units.

Modernization Program, the Naval Surface Warfare Center in Carderock Maryland, the Army Engineering Research Development Center at Vicksburg, Mississippi, and the Wright Patterson Air Force Base, and deposition subpoenas to four DoD witnesses. All the DoD witnesses Respondent seeks to depose appear on Complaint Counsel's December 17, 2001, preliminary witness list.

DISCUSSION

I. Commission Procedures for Subpoenas to Other Government Agencies Require a Showing of Reasonableness, Relevancy, and the Lack of Other Means to Obtain the Documents and Testimony.

The Commission has established clear procedures for the issuance of subpoenas to other government agencies. Rule 3.36 of the Commission's Rules of Practice governs document and deposition subpoenas issued to other federal agencies. A party seeking issuance of such a subpoena must make a written application to the Administrative Law Judge and make a "specific showing" that:

- (1) the material sought is reasonable in scope;
- (2) if for purposes of discovery, the material falls within the limits of discovery under § 3.31(b)(1), or if for an adjudicative hearing, the material is reasonably relevant; and
- (3) the information or material sought cannot reasonably be obtained by other means.

Rule 3.34(c) reaffirms that subpoenas to other government agencies can be issued only pursuant to Rule 3.36.

Furthermore, *Exxon Corp.*, 95 F.T.C. 919 (1980), sets forth another procedural requirement for subpoenas issued to other government agencies. In that case, the Commission found that subpoenas should be issued to other government agencies "only in the most compelling circumstances." Consistent with that principle, *Exxon* requires that any demand for documents directed to another

agency proceed first under section 8 of the FTC Act, 15 U.S.C. § 48,⁴ rather than as an exercise of the Commission's compulsory process powers under section 9 of the FTC Act, 15 U.S.C. § 49. If the ALJ believes that a subpoena request satisfies the requirements of Rule 3.36, the ALJ must "certify his recommendation" to the Commission under section 8 of the FTC Act. The Commission will then decide whether to issue a request to the President under section 8 of the FTC Act for the documents or testimony sought by the subpoena. Only if such a request is unsuccessful can the Administrative Law Judge consider issuing a subpoena to the agency under section 9 of the FTC. *See Exxon*, 96 F.T.C. at 922, 924.

II. Respondent MSC Has Failed to Show that It Cannot Obtain the Documents and Testimony "By Any Other Means."

Your Honor should deny MSC's motions seeking the issuance of subpoenas for documents and testimony to NASA and the DoD because MSC has failed to make the showing required by Rule 3.36 that it cannot obtain the documents "by any other means." MSC has not established, for example, that it could not obtain the documents and testimony pursuant to each agency's own regulations adopted to provide parties with a procedure for gaining access to the agency's documents and to

⁴ Section 8 of the FTC Act provides:

The several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this subchapter, and shall detail from time to time such officials and employees to the Commission as he may direct.

obtain testimony from its employees.⁵ These government agencies maintain procedures for parties in federal litigation to seek documents and testimony from the agencies.⁶ While these agency procedures are triggered in response to subpoena requests, they also address non-subpoena requests. Because MSC has not pursued this means of obtaining the documents and testimony, it has not met the requirement of Rule 3.36(3) for issuance of subpoenas to other government agencies.

MSC's argument misses the mark when it claims that it has no other "source" for the information and testimony. Rule 3.36 requires a showing that there are no other "means" to obtain the information, not that there is no other source.⁷ Furthermore, "other means" includes the agency's voluntary release of the requested information. When the Commission amended Rule 3.36 in 2001, it made it clear that a party seeking a subpoena under Rule 3.36 needed to show that it was unable to obtain the information through "voluntary arrangements." In the *Federal Register* notice accompanying

⁵ Such regulations, known as *Touhy* regulations, are issued pursuant to *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In that matter, the Supreme Court recognized the obligation of an employee to follow the regulations of its agency regarding information and testimony sought in federal litigation.

⁶ For example, the *Touhy* regulations for the U.S. Department of Defense appear at 32 C.F.R. Part 97 ("Release of Official Information for Litigation Purposes and Testimony by DoD Personnel as Witnesses"); for the U.S. Navy's regulations at 32 C.F.R. Part 725 ("Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel"); and for NASA at 14 C.F.R. Part 1263 (Demand for Information or Testimony Served on Agency Employees).

⁷ As noted above, there are non-governmental sources for some information related to several of these NASA and DoD units. Computer Sciences Corporation is the contractor who procures engineering software for the DoD High Performance Computing Modernization Program at Wright Patterson Air Force Base in Dayton, Ohio and the Army Engineering Research Development Center in Vicksburg, Mississippi, and for NASA Marshall. Additionally, OAO is the contractor that procures engineering software for NASA Johnson, and the California Institute of Technology is the operator of NASA Jet Propulsion Laboratory.

the 2001 amendment, the Commission noted that the applicant must show that “other means of obtaining the information (such as domestic discovery or voluntary arrangements) have been exhausted or are not available.” (66 Fed. Reg. 17622, 17622-23 (April 3, 2001) (footnote omitted)).

Consistent with this language, Respondent here should first pursue the documents and testimony through a written request made under each agency’s regulations or otherwise seek “voluntary arrangements” with the agencies before seeking to invoke the Commission’s subpoena powers.

III. Respondent MSC’s Requests Are Not Reasonable In Scope.

MSC’s document subpoenas also fail to comply with Rule 3.36 because several of their specifications are overly broad or not relevant. For example, the document subpoenas to the DoD units, including the Wright Patterson Air Force Base (“WPAFB”), seek wide ranging documents requiring a very burdensome search relating to Dr. Vipperla B. Venkayya’s use of FEA solvers while at WPAFB. Dr. Venkayya is Complaint Counsel’s technical expert and recently retired from WPAFB.

MSC’s DoD requests ask for, among other documents, all documents relating to each type of solver used by Dr. Venkayya at WPAFB, the types of analysis performed by each solver (including the specific program, project, application or research for which the solver was used); and each instance in which Dr. Venkayya was involved in the selection or acquisition of any FEA solver while employed at WPAFB. Generally experts (or their employer) need only produce documents relied upon or prepared in connection with the expert testimony. *See North American Philips Corp.*, 1987 FTC Lexis 72 (1987). Dr. Venkayya worked at the Air Force Research Laboratory at WPAFB for 35 years prior to his retirement this year. He has substantial experience with MSC Nastran, UAI Nastran, and CSAR

Nastran as well as other FEA codes while at WPAFB. He also has published over 160 papers and articles relating to finite element analysis. He has been involved in hundreds if not thousands of programs, projects, applications or research in which an FEA solver was used. Thus, this specification is oppressive, and could produce a multitude of documents, some ancient, of no relevance to this litigation.

Denying MSC's motions and requiring MSC to approach the agencies to negotiate the scope and breadth of the requests – before invoking the Commission's subpoena power – will better ensure that Respondent's requests to the agencies are reasonable in scope and relevant. MSC has already offered to negotiate with the respective government agencies, if the subpoenas are issued, to narrow the scope of its requests. There is no reason that it cannot undertake those negotiations before seeking Commission subpoenas.

CONCLUSION

In *Exxon*, the Commission cautioned that subpoenas should be issued to other government agencies only in "the most compelling circumstances." MSC has not made the showing necessary for issuance of subpoenas under Rule 3.36 or otherwise established compelling circumstances for subpoenas in this matter. MSC should pursue its requests for documents and testimony directly with each agency unit and, if it is unsuccessful at any agency unit, it can refile a motion regarding that agency. If Your Honor nonetheless determines that the subpoenas should be issued, the proper procedure is for

Your Honor to certify Respondent's "demand" for documents and testimony to the Commission for authorization consistent with *Exxon*.



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Dated: April 24, 2002

CERTIFICATE OF SERVICE

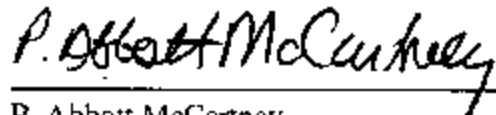
This is to certify that on April 24, 2002, I caused a copy of Complaint Counsel's Response to MSC's Motions for Subpoenas to the National Aeronautics and Space Administration and the Department of Defense to be served via facsimile transmission and followed by hand-delivery of a copy the following day to the following persons:

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and via hand-delivery on the following person:

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