

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN VIDEO DISPLAYS, COMPONENTS  
THEREOF, AND PRODUCTS CONTAINING  
THE SAME**

**Inv. No. 337-TA-687**

**ORDER NO. 17: DENYING RESPONDENT VIZIO, INC.'S MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS RESPONSIVE TO VIZIO'S  
DOCUMENT REQUEST NOS. 47-49, 51, 53-59, 61-64, 66-69 AND  
92-94**

(March 17, 2010)

On December 17, 2009, Respondent Vizio, Inc. ("Vizio") filed a motion to compel Complainant LG Electronics, Inc. ("LGE") to produce documents from non-party LG Display Co., Ltd. ("LGD") that are responsive to Vizio's requests for production ("RFP") of documents and things nos. 47-49, 51, 53-59, 61-64, 66-69 and 92-94. (Motion Docket No. 687-012.) Vizio argues that RFP Nos. 47-49, 51, 53-59 and 61-64 implicate documents directly relevant to its licensing defense, while RFP Nos. 66-69 and 92-94 implicate documents directly relevant to the technical prong of the domestic industry. (Mot. Mem. at 5.) In particular, Vizio asserts that RFP Nos. 57-59 and 61-64 seek "[d]ocuments evincing LGD's relationship with LGE, including ownership issues, the nature of the corporate relationship, overlapping officers and directors, and communications between these companies regarding Vizio, AmTRAN, Raken and other suppliers of Vizio's accused products." Vizio also asserts that RFP Nos. 53-56 seek "[c]ommunications between LGD and manufacturers/suppliers of Vizio's televisions (e.g., Raken and AmTRAN)." (*Id.*)

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Additionally, Vizio asserts that RFP Nos. 47-49 and 51 seek “[d]ocuments regarding the sale of televisions and related components by LGD to manufacturers/suppliers of Vizio’s televisions (e.g., Raken and AmTRAN).” (*Id.*) Further, Vizio asserts that FRP Nos. 66-69 and 92-94 seek “documents regarding the structure, function and operation of each product LGE intends to rely on for purposes of satisfying the technical prong of the domestic industry.” (*Id.*)

On December 28, 2010, LGE filed an opposition to the present motion to compel.

On December 28, 2010, the Commission Investigative Staff (“Staff”) filed its response in support of Vizio’s motion to compel.

On December 31, 2009, Vizio filed a motion seeking leave, which is hereby GRANTED, to file a reply in support of its motion. (Motion Docket No. 687-014.)

On January 6, 2010, LGE filed a motion seeking leave to file a reply to the Staff’s response. (Motion Docket No. 687-015.) For good cause shown, Motion Docket No. 687-015 is hereby GRANTED.

In general, a party in a Section 337 investigation may obtain discovery regarding any matter, not privileged, that is relevant to the following: a claim or defense of any party; the identity and location of persons having knowledge of any discoverable matter; the appropriate remedy for a violation of Section 337; or the appropriate bond. 19 C.F.R. § 210.27(b)(1)-(4). It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 19 C.F.R. § 210.27(b). Parties may obtain discovery by any number of methods including, deposition, written

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interrogatories, requests for production of documents and things, site inspections, and requests for admissions. 19 C.F.R. § 210.27(a). With regard to requests for production of documents and things, Commission Rule 210.30(a)(1) requires parties in a Section 337 investigation to produce all relevant responsive documents within their *possession, custody or control*. 19 C.F.R. § 210.30(a).<sup>1</sup>

Vizio does not argue that the documents it seeks are in the possession or custody of LGE. Rather, Vizio argues that the documents it seeks are in LGD's possession and within LGE's control. "It is a general and well-established principle that a party seeking production of documents bears the burden of establishing the opposing party's control over the documents." *Certain Voltage Regulators, Components Thereof & Products Containing Same*, Inv. No. 337-TA-564, Order No. 7 (Oct. 26, 2006) (citing *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991)); *Cochran Consulting*, 102 F. 3d at 1229 ("In the absence of control by a litigating corporation over documents in the physical possession of another corporation, the litigating corporation has no duty to produce.") (quoting *Gerling Intern. Ins. Co. v. C.I.R.*, 839 F.2d 131, 140 (3rd Cir. 1988)). Therefore, to prevail on its present motion to compel, Vizio must show that LGE has control over documents in LGD's possession that are responsive to Vizio's requests for production of documents and things nos. 47-49, 51, 53-59, 61-64, 66-69 and 92-94.

With regard to the control issue, Vizio and the Staff argue that non-party LGD is a subsidiary of complainant LGE and that LGE exercises sufficient control over LGD to justify an order compelling LGE to turn over responsive documents that are in the possession of LGD. (Mot.

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<sup>1</sup> See also *Cochran Consulting, Inc. v. Uwatec USA, Inc.*, 102 F.3d 1224, 1229 (Fed. Cir. 1996) (A party must "have ownership, custody, or control of a demanded document before a sanction may properly be

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Mem. at 12-13; Staff at 6-7.) Vizio argues that public documents prove that LGE controls LGD. In particular, Vizio argues that: (1) LGE is a controlling party of LGD; (2) LGE is the largest shareholder of LGD; (3) LGE formed the company that would become LGD; (4) LGD's current CEO held numerous positions at LGE prior to joining LGD, including President and CEO; (5) three of LGD's five directors came from LGE and were officers and/or managers of LGE; and (6) LGE nominated an unidentified LGD non-outside director. (Mot. Mem. at 3.) In support, Vizio relies on LGD's July 2009 Securities And Exchange Commission Form 6-K.<sup>2</sup> (*See id.*, Ex. 4.) Vizio also argues that documents produced by LGE establishing the existence of numerous agreements between LGE and LGD regarding LGD's licenses to and ownership in LGE intellectual property further show the close relationship between LGE and LGD.<sup>3</sup> (*Id.* at 3-4.) Additionally, Vizio argues that LGE has produced documents marked "LGE-(LG DISPLAY) CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER," that evince LGE's ability to obtain cooperation from LGD. (*Id.* at 12.) Further, the Staff argues that because "LGE is a major purchaser of LGD video displays it appears that LGE would have access to such information from LGD in the normal course of business." (Staff Resp. at 8.)

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imposed for failure to produce the document.")

<sup>2</sup> LGD's Form 6-K is approximately sixty pages in length. Although Vizio relies almost exclusively on the Form 6-K to support its argument that LGE has control over LGD, Vizio fails to provide any pinpoint citations to the information it believes supports the six factors it alleges shows LGE's control over LGD. Vizio only cites generally to Exhibit 4. (*See* Mot. Mem. at 3, 12.) Fortunately, the Staff corrects this deficiency by providing the needed pinpoint citations in its response.

<sup>3</sup> Vizio relies on a single agreement between LGE and LGD dated July 2004 in support of its argument. LGE and LGD entered into the July 2004 agreement incident to the dissolution of the joint venture between LGE and Philips that created LGD. Notably, the agreement does not transfer any rights to the patents-in-suit. (*See* Opp., Ex. 12.)

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LGE argues that it has agreed to produce, and has in fact produced, documents that are in its possession, and the possession of its wholly-owned subsidiaries, that are responsive to Vizio's requests for production of documents and things nos. 47-49, 51, 53-59, 61-64, 66-69 and 92-94, including those documents in LGE's possession that relate to non-party LGD. (Opp. at 7, 12.) LGE admits, however, that it has not produced any responsive documents that are in non-party LGD's possession. (*Id.*) LGE argues that it cannot produce responsive documents that are in non-party LGD's possession, because LGD is a separate corporation over which LGE has no control.<sup>4</sup> (*Id.* at 10-11.) LGE also argues that in light of the nature of the documents sought by Vizio, any responsive documents that LGD might have in its possession would be duplicative of documents in the possession of LGE that have already been produced. (*Id.* at 12-14.)

"Control" is defined as the legal right, authority, or ability to obtain documents upon demand. *United States Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254 (D.C. Cir. 2005) (quoting *Camden Iron*, 138 F.R.D. 438, 441 (D.N.J., 1991)).

Where the litigating corporation is the parent of the corporation possessing the records, courts have found the requisite control where "a subsidiary corporation acts as a direct instrumentality of and in direct cooperation with its parent corporation, and where the properties and affairs of the two [were] ... inextricably confused as to a particular transaction[.]"

*Gerling*, 839 F.2d at 140 (quoting *Acme Precision Products, Inc. v. American Alloys Corp.*, 422 F.2d 1395, 1398 (8th Cir. 1970)) (emphasis added). Thus, the determination of control turns upon

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<sup>4</sup> LGE notes that it did ask LGD if it would voluntarily participate in discovery in this Investigation, but that LGD has refused. (*See* Opp., Ex. 17 (2009-12-17 Ltr. To McCrum from Phillips) at 1.) LGD's refusal provides additional support for the Administrative Law Judge's conclusion herein that LGE has no legal right, authority or ability to obtain documents upon demand from LGD. *See Pitney Bowes, Inc. v. Kern Int'l*,

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whether the intra-corporate relationship between LGE and LGD gives LGE the legal right, authority, or ability to obtain on demand the requested documents from LGD. The determination of control between related corporations is a “very fact specific” inquiry. *Pitney Bowes, Inc. v. Kern Intern., Inc.*, 239 F.R.D. 62, 66 (D.Conn., 2006); 8A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 2210. Evidence considered by the courts in making such a determination includes the degree of ownership and control exercised by the litigant corporation over the nonparty corporation, a showing that the two entities operate as one with respect to the transaction giving rise to the litigation,<sup>5</sup> and demonstrated access to documents in the ordinary course of business. *See Camden Iron*, 138 F.R.D. at 442; *see also Gerling*, 839 F.2d at 140. “The location of the documents, whether within the territorial jurisdiction of the court or not, is irrelevant.” *Gerling*, 839 F.2d at 140 (*citing Marc Rich & Co., A.G. v. United States*, 707 F.2d 663, 667 (2d Cir.1983), *cert. denied* 463 U.S. 1215 (1983); *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1144 (N.D.Ill., 1979).

For the reasons discussed in detail below, the Administrative Law Judge finds that Vizio and the Staff have failed to establish that LGE has the requisite control over LGD to justify an order compelling LGE to produce the sought after documents.

LGE is a maker of consumer electronics, with five core product families: home entertainment, mobile communications, home appliance, air conditioning, and business solutions.

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*Inc.*, 239 F.R.D. 62, 68-69 (D. Conn., 2006).

<sup>5</sup> In the present Investigation, LGE accuses Vizio of importing, selling for importation and/or selling within the United States after importation televisions that infringe its patents. Because the relationship between LGE and LGD has nothing to do with the actions giving rise to this Investigation, this basis for finding

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(Mot. Mem., Ex.1, 2.) LGE's global operations include 114 LGE subsidiaries, including in the United States, wholly-owned sales subsidiary LG Electronics U.S.A., Inc. and wholly-owned service subsidiary LG Electronics Alabama, Inc. (*Id.*, Ex. 4, 16.) LGE's stock is publicly traded on the London Stock Exchange and the Korean Exchange.

LGD is a maker of liquid crystal display panels, which are a component of LCD TVs and monitors. (*Id.*, Ex. 6 at 22.) LGD also has a business unit directed to organic light emitting diode panels. (*Id.*) LGD has twelve facilities at six locations in Korea, China, and Poland. (*Id.*, Ex. 6 at 62, Ex. 7.) In the United States, LGD has its own sales subsidiary, LG Display America, Inc. (*Id.*, Ex. 6 at F-20, Ex. 8.) LGD is a publicly traded company, with its stock available on the New York Stock Exchange and the Korean Exchange.

### **The degree of ownership and control exercised by LGE over LGD**

While it is clear from the record that LGE and LGD were once parent and subsidiary,<sup>6</sup> Vizio and the Staff have not established that LGE is still a parent corporation exercising sufficient control over its non-party subsidiary such that it would be obligated to collect and produce documents from LGD. The record does not support a finding that LGE wholly controls LGD, which it now only partially owns, such that it has control over documents in LGD's physical possession. *Camden Iron*, 138 F.R.D. at 441. The only evidence Vizio and the Staff point to that would arguably support a finding that LGE and LGD have a wholly controlled parent-subsidary relationship is the descriptions of LGE as "immediate parent" and "controlling party" in LGD's

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control is inapplicable.

<sup>6</sup> LGD was originally formed as LG Soft, Ltd., a subsidiary of LGE, and went through several name changes

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July 2009 Securities and Exchange Form 6-k.<sup>7</sup> These bare descriptions, however, are belied by the fact that LGE owns only 37.9 percent of LGD's stock.<sup>8</sup> (Mot. Mem., Ex. 4 at 15831 TX 32-33.) Moreover, according to LGD's Securities and Exchange Commission Form 20-F, LGE's voting rights are no different from those of LGD's other shareholders. (Opp., Ex. 6 at 63.) Therefore, as a 37.9 percent owner of LGD, LGE does not have the ability to control the makeup of LGD's board of directors.<sup>9</sup> In fact, LGD's Articles of Incorporation require a majority of the seven directors on LGD's board of directors to be "outside directors" and all directors to be elected by the shareholders. (Opp., Ex. 14, Arts. 26-27.)

The evidence also shows that LGD is not reflected as part of LGE's organization or global operations. (Opp., Exs. 2-4.) Similarly, LGE is not reflected anywhere in LGD's organization. (*Id.*, Exs. 6, 8.) Additionally, LGE and LGD keep separate books and records and have

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and forms before becoming LGD in 2008. (Opp., Ex. 6 at LGE-ITC 0073831-33.)

<sup>7</sup> These two terms are used only a few times with no explanation as to their intended meaning.

<sup>8</sup> (*See* Opp., Ex. 6 at LGE-ITC 0073883.) While the explanation for LGE's reduced holdings in LGD is not entirely clear from the parties' submissions, there were at least two events where LGE appears to have relinquished portions of its control. First, LGE and LG Semicon "transferred their respective TFT-LCD-related businesses to LG Soft, Ltd." in 1998 and renamed the company LG LCD Co., Ltd. (*Id.* at LGE-ITC 0073831.) It is unclear how much interest LGE and LG Semicon each had in LG LCD Co., Ltd. at that time. Second, in 1999 LGE relinquished 50 percent of its interest in LG LCD Co., Ltd. to Philips Electronics as part of a joint venture agreement. (*Id.*) At that point LG LCD Co., Ltd. became LG Philips LCD Co., Ltd. (*Id.*) In July 2004, LGE and Philips Electronics terminated the joint venture agreement and conducted an initial public offering for LG Philips LCD Co., Ltd. which resulted in the present day, publicly traded LGD. (*Id.*) Philips Electronics gradually reduced its equity interest until finally selling all of it in 2009, *see id.* at LGE-ITC 0073882-83, and LGE claims that LGD is now an "independent" corporation. (LGE Opp. to Staff Resp., Ex. 1 at 2.)

<sup>9</sup> *Gerling*, 839 F.2d. at 140 ("[S]ome courts have found the requisite control based on the fact that the parent had the power to elect a majority of the board of directors of the subsidiary. *E.g., In re Uranium Antitrust Litigation*, *supra* at 1152 (corporate parent Noranda held responsible for producing documents of wholly-owned subsidiaries but not documents of 43.8%-owned subsidiary which conducted its corporate affairs separately[.]").

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non-exclusive business dealings. (Opp. at 10; LGE Opp. to Staff Resp., Ex. 1 at 4 (noting no integrated sales systems or shared accounting systems).) The evidence further shows that the boards of directors of LGE and LGD are distinct from each other with a single “non-outside” LGD director who is also President of LGE’s home entertainment division. (*Id.*, Ex. 6 at 58.) While Vizio and the Staff correctly note that LGD’s President and CEO was President and CFO of LGE and that LGD’s CFO was Executive VP and CFO of LGE, neither of those individuals are currently employed with LGE or hold positions on LGE’s board of directors. (LGE Opp. to Staff Resp., Ex. 1 at 4.) Therefore, contrary to Vizio and the Staff’s argument, the Administrative Law Judge finds that the fact that these two board members used to be on the board at LGE does not evince any present control of LGE over LGD’s board. “Control must be firmly placed in reality.” *United States v. Intern. Union of Petro. & Indus. Wkrs.*, 870 F.2d 1450, 1454 (9th Cir. 1989).

Overall there is no evidence that LGE asserts much, if any, corporate control over LGD, let alone the significant degree of ownership and control that would be necessary to find LGD an “alter ego” of LGE and to disregard LGE and LGD’s separate corporate identities.

### **Demonstrated access to documents in the ordinary course of business**

If the relationship between LGE and LGD is such that LGE can secure the sought after documents from LGD in the ordinary course of business, LGE should not be permitted to deny control for purposes of discovery. *See e.g., First National City Bank v. Internal Revenue Service*, 271 F.2d 616, 618 (2d Cir.1959) (where there is access to the documents when the need arises in the ordinary course of business, there is sufficient control when the need arises because of

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governmental requirements); *Cooper Industries v. British Aerospace Corporation*, 102 F.R.D. 918, 919 (S.D.N.Y.1984) (where wholly-owned defendant subsidiary was the marketer and servicer of parent's aircraft in the United States, it was found “inconceivable” that subsidiary could not obtain aircraft manuals and related documents”); *Choice-Intersil Microsystems, Inc. v. Agere Sys., Inc.*, 224 F.R.D. 471, 473 (N.D. Cal. 2004) (if the subsidiary “had the apparent ability to obtain high level documents relating to the marketing of the product, it could also obtain documents relating to the technical development of the product if it chose to request them.”). However, there must be a nexus between the sought after documents and LGE’s relationship with LGD, taking into account, among other things, LGD’s business responsibilities. *ASAT, Inc.*, 411 F.3d at 255. Additionally, Vizio must show “demonstrated access” to the sought-after documents in the ordinary course of business. *Camden Iron*, 138 F.R.D. at 442. As previously noted, “[c]ontrol must be firmly placed in reality.” *United States v. Intern. Union of Petro. & Indus. Wkrs.*, 870 F.2d 1450, 1454 (9th Cir. 1989).

With regard to the RFPs related to Vizio’s licensing defense, *i.e.*, RFP Nos. 47-49, 51, 53-59 and 61-64, neither Vizio nor the Staff argues that LGE would normally be able to obtain responsive documents from LGD in the ordinary course of business.<sup>10</sup> Therefore, with regard to these RFPs, there is no basis for the Administrative Law Judge to find control under this theory.

With regard to the RFPs seeking technical information (*e.g.*, user manuals, service manuals,

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<sup>10</sup> The only argument Vizio and the Staff make is that LGE should be compelled to produce documents related to Vizio’s licensing-defenses that are in the possession of LGD because of the close relationship between LGE and LGD. (*See* Mot. Mem. at 10-12; Staff Resp. at 6.) However, as discussed in detail, *supra*, the Administrative Law Judge has already found herein that the evidence does not support a finding that

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engineering drawings, schematics drawings, source code, etc.) about LGE's products, *i.e.*, RFP Nos. 66-69 and 92-94, the Staff argues that "[i]nsofar as LGE is a major purchaser of LGD video displays it appears that LGE would have access to such information from LGD in the normal course of business."<sup>11</sup> (Staff Resp. at 6, 8.)

Contrary to the Staff's argument, LGE asserts that it does not purchase finished video displays from LGD. Rather, LGE asserts that it contracts with LGD to purchase video panels, which LGE integrates into some of its products, namely televisions. The video panels that LGD sells to LGE at "arm's length" are a single component part of LGE's products. (*See* Opp. at 3-4, 6, Ex. 6 at 8, 23 ("the terms of our sales to LG Electronics are conducted on an arm's-length basis and are substantially the same as those of our sales to non-affiliated end brand customers."); *see also* Mot. Mem, Ex. 6.) Because the panels are merely a single component in LGE's products, it is entirely unclear why Vizio and the Staff believe LGD would have information in its possession regarding LGE's products, beyond information relating to the panels it sells LGE.

The Staff suggests in its argument that LGE would have access to technical documents from LGD in the ordinary course of business because "LGE is a major purchaser of LGD video displays."<sup>12</sup> (*See* Staff Resp. at 8.) However, the mere fact that LGE's video panel purchases account for 21.2 percent of LGD's total sales, *see* LGE Opp. to Staff Resp., Ex. 1 at 2, does not prove that LGE has the ability to obtain on demand in the ordinary course of business all of LGD's

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LGD is the "alter ego" of LGE or justify disregarding LGE and LGD's corporate separateness.

11 The Staff provides no further support for this argument.

12 It is unclear what the Staff means by "major purchaser." While LGE is LGD's single largest purchaser of video panels, LGE's purchases only account for 21.2 percent of LGD total sales.

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technical documents related to the panels it sells. To the contrary, it would seem to the Administrative Law Judge that some of the technical documents Vizio seeks may implicate confidential information that LGD does not wish to share with its purchasers. Certainly, neither Vizio nor the Staff has put forth any evidence that would indicate otherwise. Moreover, the Staff's argument comes very close to deeming all purchasers of component parts as controlling the documents of the sellers of those parts. Such a result would be completely impracticable.

The evidence does show that LGD provides LGE with some technical documents regarding the panels it sells, including a document titled, "Specifications for Approval," which LGE has already produced in this Investigation. (Opp. at 17; *see* Mot. Mem., Ex. 6.) However, the fact that LGD may share some documents with LGE during the ordinary course of business is insufficient to show that LGE has demonstrated control over all relevant technical documents in LGD's possession. *See Pitney Bowes, Inc. v. Kern Intern., Inc.*, 239 F.R.D. 62, 68 (D.Conn. 2006) ("the fact that KAG may share some documents during the ordinary course of business is insufficient to deem [defendant] as having control over the documents underlying the patents at issue.") (internal quotations omitted). Also, the Administrative Law Judge is unpersuaded by Vizio's argument that because LGE has produced a number of documents marked "LGE-(LG DISPLAY) CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER" that LGE somehow has the ability to obtain cooperation from LGD. Far from an acknowledgement of control over all technical documents in LGD's possession, the fact that LGE has chosen to designate some documents as indicated above may simply reflect that these are confidential

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documents exchanged between LGE and LGD. The Administrative Law Judge finds that Vizio and the Staff have failed to show that LGE would have access to the technical documents sought in RFP Nos. 66-69 and 92-94 in the ordinary course of business.

Accordingly, for the reasons espoused above, the Administrative Law Judge finds that Vizio has failed to prove that LGE has “control” over the documents it now seeks. Vizio’s motion to compel (Motion Docket No. 687-012) is DENIED. However, the Administrative Law Judge notes that LGE has offered a corporate witness for deposition on the issue of control, *see* LGE Opp. to Staff Resp. at 2, and Vizio will not be precluded from renewing its request in a well-supported motion (no later than April 30, 2010) should new, material facts come to light.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties’ submissions may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties’ submissions concerning the public version of this document need not be filed with the Commission Secretary.

**SO ORDERED.**

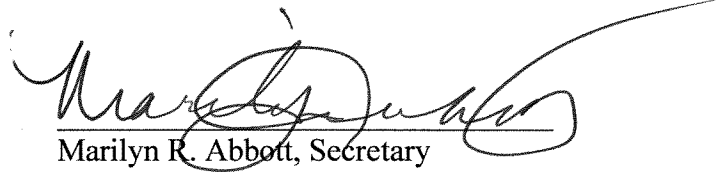
  
E. James Gildea  
Administrative Law Judge

**IN THE MATTER OF CERTAIN VIDEO  
DISPLAYS, COMPONENTS THEREOF,  
AND PRODUCTS CONTAINING SAME**

337-TA-687

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** has been served by hand upon, the Commission Investigative Attorney, **Jeffrey T. Hsu, Esq.**, and the following parties as indicated on **April 5, 2010.**



Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
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**FOR COMPLAINANTS LG ELECTRONICS, INC. AND LG TWIN TOWERS**

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**IN THE MATTER OF CERTAIN VIDEO  
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**337-TA-687**

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