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FEDERAL TRADE COMMISSION  
I N D E X (PUBLIC RECORD)

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
Kelly	2051	2069	2146	2171
			2174	

EXHIBITS	FOR ID	IN EVID
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CX

Number 449		2058
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Number 3089		2068
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Number 348		2175
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RX

Number 616		2083
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Number 691		2144
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Number 2299		2176
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UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of: )  
Rambus, Inc. ) Docket No. 9302  
-----)

Thursday, May 15, 2003  
9:30 a.m.

TRIAL VOLUME 11  
PART 1  
PUBLIC RECORD

BEFORE THE HONORABLE STEPHEN J. McGUIRE  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C.

Reported by: Josett F. Hall, RMR-CRR

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 M. SEAN ROYALL, Attorney

5 MICHAEL FRANCHAK, Attorney

6 GEOFFREY OLIVER, Attorney

7 JOHN C. WEBER, Attorney

8 Federal Trade Commission

9 601 New Jersey Avenue, N.W.

10 Washington, D.C. 20580-0000

11 (202) 326-3663

12

13 ON BEHALF OF THE RESPONDENT:

14 GREGORY P. STONE, Attorney

15 STEVEN M. PERRY, Attorney

16 PETER A. DETRE, Attorney

17 SEAN GATES, Attorney

18 Munger, Tolles & Olson LLP

19 355 South Grand Avenue, 35th Floor

20 Los Angeles, California 90071-1560

21 (213) 683-9255

22

23

24

25

For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

1 APPEARANCES:

2

3 ON BEHALF OF THE RESPONDENT:

4 A. DOUGLAS MELAMED, Attorney  
5 Wilmer, Cutler & Pickering  
6 2445 M Street, N.W.  
7 Washington, D.C. 20037-1420  
8 (202) 663-6090

9

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11

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For The Record, Inc.  
Waldorf, Maryland  
(301) 870-8025

## P R O C E E D I N G S

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3 JUDGE McGUIRE: This hearing is now in order.  
4 Before we start, anything that should come to  
5 the court's attention this morning?

6 MR. OLIVER: Good morning, Your Honor.

7 JUDGE McGUIRE: Good morning.

8 MR. OLIVER: I wanted to report back to you  
9 with respect to scheduling.

10 We have not been able to locate any other  
11 witnesses who are able to testify either Friday or next  
12 Monday.

13 In addition, as I mentioned yesterday, we did  
14 have a very serious concern that by not going forward  
15 with Mr. Diepenbrock and in particular with  
16 Mr. Vincent, it called into question whether we could  
17 go forward with Mr. Crisp on the three days following  
18 Memorial Day, and at this point we have also not been  
19 able to locate any witnesses that will be able to fill  
20 those days.

21 Your Honor, what we have done instead is we  
22 have proposed to the other side that we go forward with  
23 Mr. Vincent as scheduled on Monday subject to the  
24 understanding that we would not be entitled to call him  
25 back, however, if documents were later produced that

1 were relevant to Mr. Vincent that we would then  
2 entertain to depose him on those documents in  
3 California and then both sides would be able to use the  
4 appropriate portions of that deposition transcript  
5 later in the hearing.

6 That would, it seems to us, eliminate any  
7 inconvenience to Mr. Vincent.

8 Furthermore, to the extent that we'd be  
9 entitled to take a deposition in that case, this would  
10 not involve any additional proceedings.

11 My understanding is the respondent's  
12 position -- I'll allow them to speak for themselves,  
13 but they have a concern -- actually I believe two  
14 concerns. One is with respect to whether Mr. Vincent  
15 would have to testify without having reviewed the  
16 documents that may subsequently be produced and,  
17 second, that it's unfair for him to have to testify on  
18 two different occasions.

19 With respect to the first, Your Honor, what we  
20 anticipate doing here in the hearing is simply what has  
21 been covered in his previous depositions. Now, he's  
22 been deposed I believe seven times in connection with  
23 the private litigation plus once in connection with  
24 this litigation, so to the extent there are concerns  
25 about inconsistent testimony, that's already been

1 covered in his deposition. He already testified to  
2 that. We're simply trying to get that evidence in the  
3 record here to allow us then to go forward with  
4 Mr. Crisp as scheduled.

5 And to the extent that there's a concern about  
6 him having to testify twice, well, they actually  
7 maintain that they think they're entitled to call  
8 witnesses back to testify a second time. We believe  
9 that it's inappropriate to bring witnesses back here a  
10 second time if that can be avoided, but we believe our  
11 proposal would avoid exactly that.

12 So therefore, we would submit, Your Honor, that  
13 we should be entitled to proceed with Mr. Vincent as  
14 scheduled on this coming Monday, subject to the  
15 understanding that we could not bring him back but we  
16 could depose him with respect to any later produced  
17 documents in California and both sides could then use  
18 that deposition transcript.

19 JUDGE McGUIRE: Now, tell me again who is  
20 Mr. Vincent.

21 MR. OLIVER: Mr. Vincent was the outside patent  
22 counsel on behalf of Rambus.

23 JUDGE McGUIRE: Okay.

24 Does the other side want to be heard on this?

25 MR. STONE: Thank you, Your Honor.

1           Mr. Vincent is a lawyer who works at a law  
2 firm in Palo Alto and he has been deposed many times.  
3 When he heard of the ruling yesterday and the proposal  
4 that was made to us last evening by complaint counsel,  
5 I think his response -- I didn't speak with him  
6 directly, somebody else in the office did, but I  
7 just -- when Mr. Oliver approached me this morning and  
8 said they wanted to raise this with the court, I  
9 wanted to get a sense of what Mr. Vincent said, and  
10 his reaction to the proposal was the same as mine,  
11 which is, A, it's unfair to him to at this point put  
12 him through another day of testimony and at a time  
13 when documents may subsequently be produced that would  
14 bear on the testimony without him having had a chance  
15 to review those documents, and as I explained to  
16 Mr. Oliver, he can't review those documents in  
17 preparation for testimony here without running the  
18 risk that his review of the documents might refresh  
19 his recollection and result in a waiver of the  
20 privilege of those documents.

21           And he feels, as I feel, that it's unfair to  
22 put him at the risk of being deposed twice at a point  
23 in time when some of those things about which he might  
24 be asked are not yet something he can see and are still  
25 subject to a dispute with respect to the applicability



1 of the privilege.

2 With respect to the convenience of witnesses,  
3 he also is somebody who has been significantly  
4 inconvenienced by the litigation to date and this  
5 would be a situation in which the inconvenience would  
6 be multiplied. We have tried with every witness we  
7 possibly can to ensure that they not be called back,  
8 but in the instance where Mr. Oliver suggests we do  
9 want them to be called back, it's a question of  
10 wanting them to be called in our case. We have not  
11 called them twice. What Mr. Oliver has proposed is  
12 that they be able to put a witness on twice in their  
13 case.

14 I think Mr. Vincent's concern is the same as  
15 mine, is that he should be treated the same as the  
16 complaint counsel treat the witnesses that they view as  
17 more cooperative, but his fundamental concern is the  
18 ability to testify fully and honestly and fairly with  
19 respect to issues as to which there may be documents  
20 which he may subsequently be shown which may or may not  
21 refresh his recollection, remind him of things, as we  
22 heard in Mr. Kelly's testimony when he looks at a  
23 document and says, Oh, once I saw the document I  
24 remembered my conversation with Mr. McGhee which I  
25 didn't remember. It happens. It's happens in a way

1 that is innocent --

2 JUDGE McGUIRE: How about the offer by  
3 complaint counsel that he be called in to testify on  
4 Monday as proposed and that we have an understanding of  
5 those areas that he'll be questioned on and then,  
6 depending on the outcome of the court's upcoming order  
7 on this issue of privilege, that he be allowed to be  
8 deposed? But I guess what you're saying is that  
9 doesn't avoid you having to call him back.

10 MR. STONE: I don't think that proposal is fair  
11 to him because one concern is let's suppose that the  
12 order is affirmed and that the documents are produced  
13 and that those subsequent documents refresh his  
14 recollection in some fashion as to matters that he is  
15 asked to testified here. Then he will have been put in  
16 the situation where he may have testified  
17 inconsistently with the documents we're not able to  
18 show to him at this time, and I think he's entitled to  
19 the chance to prepare himself as to whatever evidence  
20 might be admissible in this case.

21 JUDGE McGUIRE: All right. Well, let me say  
22 this then. What alternatives do the parties have, and  
23 I guess at this point I ask complaint counsel, if I  
24 abide by the request here by respondent that he not be  
25 called until after this issue has been resolved? What

1 options does that leave the government in terms of its  
2 case in chief?

3 MR. OLIVER: To be honest, Your Honor, we're  
4 still trying to work that out. We're not exactly  
5 certain. But as I say, my main concern is we're trying  
6 to figure out how we could put on Mr. Crisp in any kind  
7 of effective or understandable manner --

8 JUDGE McGUIRE: Can we go on to anyone else  
9 down the line on your proposed witness list and then  
10 try to put this whole triad of testimony off to some  
11 point in time after I've issued an order on the  
12 upcoming motion?

13 MR. OLIVER: There would be a couple of  
14 issues.

15 First of all, with respect to timing, as I say,  
16 at this point I don't think we'll be able to fill those  
17 days and this would probably have the effect of  
18 delaying the proceeding by at least a week.

19 Second, if they're actually going to go to the  
20 Court of Appeals on this, it sounds as though this  
21 issue may not be resolved for a couple of months. We  
22 may be in a position where we put on the rest of our  
23 case and have yet not put on the core of the case, that  
24 is, the Rambus documents, the Rambus conduct that forms  
25 the fundamental core of our case here, and frankly, I

1 believe it's very unfair to us to expect us to go  
2 forward with our case but not be able to put on what is  
3 truly the fundamental core of the case.

4 JUDGE McGUIRE: Well, I'd like to see some  
5 understanding reached by the parties on this. Now,  
6 we're not going to be in hearing on Friday. Would it  
7 be helpful to the parties to spend some more time on  
8 this Friday and maybe the next few days and then maybe  
9 we'll talk about this on Monday?

10 MR. STONE: I'm happy to try to do that,  
11 Your Honor.

12 JUDGE McGUIRE: Because I'm trying to keep  
13 things in balance here. I want to be I think fair to  
14 everyone who's going to be testifying, but by the same  
15 hand, I'm charged with seeing that this case is  
16 prosecuted and without any undue delay, so at this  
17 particular point I'm a little hesitant to indicate how  
18 we should proceed until I get some further input  
19 through the parties.

20 Who would you plan on calling for next, I  
21 think, Tuesday if in fact we did not call, I think,  
22 Mr. Vincent on Monday?

23 MR. OLIVER: In either case, Your Honor, we  
24 would plan to call Ms. Jackie Gross, formerly of  
25 Compaq, now with Hewlett-Packard, as well as

1 Mr. Gordon Kelley of IBM.

2 JUDGE McGUIRE: Well, here's what I want you  
3 all to do. I want you all to confer on this. I want  
4 you to come up with some kind of understanding.  
5 That's not a charge, but it's certainly a probable, I  
6 think, suggestion. I want to see an agreement on how  
7 we can proceed and we'll convene again in hearing on  
8 Monday.

9 If there's an agreement, I will hear whomever  
10 you've agreed to put on on Monday and we'll take -- if  
11 not, we'll take it up at that time and then proceed on  
12 Tuesday and I'll issue an opinion at that time. I just  
13 don't think there's been enough involvement with  
14 counsel on this issue. I understand you're at odds on  
15 this, but I want to see something ironed out on this.  
16 We've all got too much involved at this point in this  
17 hearing to be postponing it.

18 By the same token, I do want to ensure the  
19 fairness of all involved, and until I get a little more  
20 input from the parties, I'm going to hold this in  
21 abeyance until Monday, and at that time I'm going to  
22 issue a determination if the parties haven't come to an  
23 understanding between themselves and I'm going to be, I  
24 think, disappointed if we don't have an understanding  
25 on Monday. Okay?

1 MR. OLIVER: I thank you, Your Honor.

2 MR. STONE: Thank you, Your Honor.

3 JUDGE McGUIRE: And at this time we'll continue  
4 with the questioning of John Kelly.

5 Mr. Royall?

6 MR. ROYALL: Thank you, Your Honor.

7 May I approach, Your Honor?

8 JUDGE McGUIRE: Please.

9 - - - - -

10 Whereupon --

11 JOHN JAMES KELLY, JR.

12 a witness, called for examination, having been  
13 previously duly sworn, was examined and testified as  
14 follows:

15 DIRECT EXAMINATION (continued)

16 BY MR. ROYALL:

17 Q. Good morning, Mr. Kelly.

18 A. Good morning, Mr. Royall.

19 Q. I have just handed you what's been marked for  
20 identification as CX-449.

21 Do you recognize this document?

22 A. I do.

23 Q. And can you explain to us what it is?

24 A. This is actually a -- the text of a  
25 presentation that I gave at a JEDEC conference in March

1 of 2002 and it is identical to an article that I wrote  
2 for the JEDEC newsletter in November 2001.

3 Q. The article that you mentioned was -- did you  
4 say it was published in the JEDEC newsletter?

5 A. JEDEC newsletter, which is distributed  
6 electronically to all JEDEC members and posted on the  
7 JEDEC Web site.

8 Q. And why is it that you wrote this article?

9 A. Because the -- a number of questions had been  
10 raised at that point about the JEDEC patent policy and  
11 to me it always seemed fairly simple and  
12 straightforward, so I decided to sit down at one  
13 sitting actually and just write out my understanding of  
14 the patent policy so that it would be available for  
15 anyone who wanted to see it in writing.

16 Q. And does this article, CX-449, accurately set  
17 forth your views on the basic nature and scope of the  
18 JEDEC patent policy?

19 A. It absolutely does, yes, sir.

20 Q. Have you had a chance to review this article  
21 recently?

22 A. Yes, I have.

23 Q. Do the views expressed in this article differ  
24 in any way from the understanding of the JEDEC and EIA  
25 patent policies that you developed in the initial

1 months after joining EIA in 1990?

2 A. This is exactly -- this sets forth exactly how  
3 I understood the patent policy from 1990 on to the  
4 present.

5 Q. My questions for you about the substance of the  
6 article relate only to some language on the final page  
7 I believe, page 4 of CX-449.

8 Do you see the paragraph at the bottom half of  
9 the page beginning with the words "The patent"?

10 A. Yes, sir.

11 Q. In the next sentence, the second sentence of  
12 that same paragraph, you state, "Everyone who  
13 participates or who plans to participate in standards  
14 development is duty bound to familiarize themselves  
15 with and abide by the letter and the spirit of patent  
16 policy."

17 Do you see that?

18 A. Yes, sir.

19 Q. When you say here that members are duty bound  
20 to abide by the spirit of the patent policy, can you  
21 explain what you mean by that?

22 A. I mean that given the fact that all  
23 participants are under a duty under the EIA legal  
24 guides to act in good faith that the patent policy is  
25 supposed to be complied with not just in terms of its



1 written letter but also in terms of the spirit of the  
2 patent policy, which, as I've said, is to encourage the  
3 earliest possible disclosure and then to provide  
4 written assurances if EIA is to move forward or JEDEC  
5 is to move forward to standardize along the lines of a  
6 patent application.

7 Q. You say here that members or participants are  
8 duty bound to abide by the spirit of the patent  
9 policy.

10 Is there anything in JEDEC's or EIA's rules  
11 that sets forth such a duty, as you understand those  
12 rules in your role as EIA general counsel?

13 A. I go back to the basic rule, which is the duty  
14 to act in good faith. Yes, sir.

15 Q. Now, continuing on with the same paragraph, you  
16 state: "The rules are basic. They are grounded in  
17 common sense and designed to promote openness, good  
18 faith and fair dealing in the development of standards.  
19 There are no intended loopholes in the patent policy.  
20 Those who seek to 'game' the rules act at their own  
21 peril."

22 Do you see that?

23 A. Yes, sir, I do.

24 Q. What did you mean when you said here, "There  
25 are no intended loopholes in the patent policy"?

1           A. Again, if you consider the patent policy  
2 grounded on the duty of good faith and that the duty  
3 of good faith, at least in my opinion, means that  
4 participants need to comply with the spirit of  
5 openness and fairness and disclosure as well as the  
6 literal but words of the rule, then clearly there are  
7 no intended loopholes, just as there are no intended  
8 loopholes in the principle of good faith, that I'm  
9 aware of anyway.

10           Q. And finally, what did you mean by the last  
11 sentence of the language I read: "Those who seek to  
12 'game' the rules act at their own peril"?

13           A. What I'm saying is that those who seek to find  
14 loopholes through technical reading of the patent  
15 policy and then based upon their own private  
16 interpretation act on those rules do so at their own  
17 peril.

18                   In other words, if they're wrong, they're  
19 wrong. I don't believe that there's any defense here  
20 that someone interpreted the rules reasonably but  
21 secretly and acted on that secret interpretation and  
22 that that's appropriate. I think that the rules, as I  
23 say, are based on bottom -- at bottom on good faith.

24           Q. Now, in the last sentence of this article,  
25 you state, "Questions relating to the JEDEC patent

1 policy should be directed to the JEDEC legal  
2 department."

3 Do you see that language on the bottom of the  
4 fourth page of CX-449?

5 A. I do.

6 Q. When it refers to the JEDEC legal department  
7 here, who specifically is being referred to?

8 A. That's me.

9 Q. And I believe you testified yesterday that in  
10 the almost thirteen years that you've served as the  
11 chief legal officer for EIA and JEDEC you have been  
12 contacted at various times by JEDEC and EIA members  
13 relating to questions about the organization's rules;  
14 is that correct?

15 A. That's correct.

16 Q. When member companies have contacted you with  
17 questions about the rules, have you ever offered views  
18 or interpretations of those rules different from what  
19 you've testified about in the past day?

20 A. No, sir.

21 Q. When JEDEC members or EIA members have  
22 contacted you about the rules, have you always agreed  
23 with the member's own interpretation of those rules?

24 A. No, sir. Occasionally there is disagreement.

25 Q. If a member of EIA or JEDEC acts in a way that

1 is inconsistent with the manner in which you as the  
2 general counsel interpret those rules but is  
3 consistent with the member's own understanding of the  
4 rules, in your understanding of the JEDEC and EIA  
5 patent policy, could that be a violation of the  
6 rules?

7 A. Well, first of all, let me say they act at  
8 their own peril, which I said before, and if their  
9 interpretation is inconsistent with my interpretation,  
10 my interpretation governs, so given defense -- it very  
11 well could be a violation of the EIA and JEDEC rules,  
12 yes.

13 Q. Mr. Kelly, do you have any understanding as  
14 to when Rambus participated as a member of EIA and  
15 JEDEC?

16 A. My understanding is that they joined sometime  
17 in 1991 and that they exited sometime in mid-1996.

18 Q. During that time period, were you ever  
19 contacted by Rambus with questions about either EIA's  
20 or JEDEC's rules?

21 A. Never.

22 Q. During that time period, were you ever  
23 contacted by Rambus with questions about anything?

24 A. No, sir.

25 Q. Have you ever been contacted by Rambus at any

1 time about any issue?

2 A. I have been contacted by attorneys for Rambus  
3 in connection with discovery in various pending cases;  
4 otherwise, no, I have never been contacted by Rambus in  
5 any respect.

6 MR. ROYALL: Your Honor, at this time I would  
7 offer CX-449.

8 JUDGE McGUIRE: Any objection?

9 MR. PERRY: No objection, Your Honor.

10 JUDGE McGUIRE: So entered.

11 (CX Exhibit Number 449 was admitted into  
12 evidence.)

13 BY MR. ROYALL:

14 Q. Mr. Kelly, are you aware that separate and  
15 apart from this FTC litigation Rambus is in litigation  
16 with companies that manufacture DRAMs?

17 A. Indeed I am, yes.

18 Q. And am I right that you testified at the trial  
19 in one of those cases, the Rambus versus Infineon  
20 case?

21 A. That is correct.

22 Q. Have you followed that litigation as it has  
23 proceeded through the courts after the trial?

24 A. Not in great detail, but certainly I have  
25 followed critical steps in the process, yes.

1 Q. Is there a reason why you have followed the  
2 case after the trial?

3 A. Because my understanding is that one of the  
4 positions that Rambus has taken in that litigation  
5 calls in -- brings or -- brings into issue the JEDEC  
6 patent policy which directly affects what JEDEC does  
7 and directly affects what I do as chief legal officer  
8 of JEDEC and EIA.

9 Q. Are you aware that the Federal Circuit Court of  
10 Appeals has rendered a decision on an appeal in that  
11 litigation?

12 A. I am.

13 Q. When that decision was released, did you review  
14 the Federal Circuit's decision?

15 A. I -- actually I've reviewed it several times  
16 since it was issued. Yes, sir.

17 Q. Did that decision as you read it provide any  
18 interpretation of your organization's rules, that is,  
19 EIA and JEDEC's rules and policies?

20 MR. PERRY: Your Honor, I think the opinion  
21 speaks for itself.

22 JUDGE McGUIRE: Sustained.

23 MR. ROYALL: Your Honor, if I could respond?

24 JUDGE McGUIRE: Go ahead.

25 MR. ROYALL: Mr. Kelly has been questioned

1 about the Federal Circuit decision in deposition. It  
2 is a fact issue as to how the organization's rules are  
3 interpreted and applied.

4 Rambus has put in issue the Federal Circuit  
5 decision as an issue of fact in their briefs in  
6 summary decision and in the trial brief not as a legal  
7 issue, as they acknowledge it has no binding effect,  
8 but as a fact, and they've questioned this witness in  
9 deposition about his views as to the interpretation  
10 that was applied by the Federal Circuit and whether  
11 he agrees or disagrees and why, and so I'm only  
12 inquiring into this as a matter of fact relating to  
13 his views in the same way that they previously have  
14 done given that they have put the Federal Circuit  
15 decision in issue.

16 It seems to me very unfair for Rambus' lawyers  
17 to put that in issue as a matter of fact for you to  
18 consider, for the commission ultimately to consider,  
19 without having the general counsel's views on whether  
20 he agrees or disagrees and why with what the  
21 Federal Circuit has said also in the record.

22 JUDGE McGUIRE: Mr. Perry?

23 MR. PERRY: I wasn't planning on having any  
24 trial testimony from this gentleman or eliciting any  
25 trial testimony about his opinions with respect to the

1 Federal Circuit decision. The depositions are not  
2 evidence and they're not going to be offered. The  
3 opinion says what it says, and while, yes, we quote the  
4 opinion, that doesn't mean that witness' opinions about  
5 the opinion are relevant.

6 JUDGE McGUIRE: Well, I sustain that motion on  
7 the -- that objection on the basis that that opinion  
8 does speak for itself, Mr. Royall.

9 Are you trying to go behind the opinion now to  
10 determine what his interpretation is as to those  
11 pertinent facts that the court --

12 MR. ROYALL: No, Your Honor, I'm not asking for  
13 him to interpret the opinion. The opinion speaks for  
14 itself and I'm perfectly happy with that.

15 On the other hand, as Mr. Perry elicited in  
16 deposition, there are concerns within this organization  
17 about the effect that that decision potentially could  
18 have and about the nature and the way this  
19 organization's rules were interpreted, and I'm not  
20 trying to undermine or seek his interpretation of the  
21 decision.

22 I'm trying to understand what, if any, reaction  
23 he, as EIA's general counsel, has to that decision and  
24 what, if any, effect it could have on his role within  
25 the organization and on the organization's ability to



1 continue to function in the way that it has in the  
2 past, which is, I submit, highly relevant, and again  
3 that given that they have put the Federal Circuit  
4 decision in issue, that they have presented it to you  
5 and offered it to you as something that you should look  
6 to to rely on in how this organization's rules should  
7 be interpreted, I don't want to undermine that or have  
8 him interpret it, but I do think that his views should  
9 be in the record.

10 JUDGE McGUIRE: Mr. Perry, one last time.

11 MR. PERRY: Your Honor, the standard of  
12 relevance in a deposition is much broader. We're here  
13 at trial. The question is what's going to be offered  
14 at trial, and if I go near that area, he can do it on  
15 redirect, but his views about a court opinion are  
16 irrelevant here.

17 MR. ROYALL: Again, Your Honor, putting aside  
18 what happened in a deposition, the question is this is  
19 a -- it's a factual issue how these rules are  
20 interpreted and it's also a factual question what  
21 effect, if any, that decision could have on his  
22 organization, on the way in which the rules are applied  
23 or on the manner in which they conduct their affairs in  
24 the future.

25 JUDGE McGUIRE: Then on that basis I'll

1 entertain the question and inquiry. I don't want to  
2 spend a whole lot of time on this, Mr. Royall.

3 MR. ROYALL: Yes, Your Honor. This is the  
4 final thing I have to go into on this thing and then  
5 I'll be finished.

6 JUDGE McGUIRE: Go ahead.

7 BY MR. ROYALL:

8 Q. You said, Mr. Kelly, that you reviewed the  
9 Federal Circuit's decision when it was released, and I  
10 don't know if I got an answer to this question, but  
11 did you understand, in your own personal  
12 understanding, did you understand the Federal Circuit  
13 to be providing an interpretation of EIA and JEDEC  
14 policy?

15 A. The two-judge majority in that case did  
16 interpret policy as did the dissent.

17 Q. And very quickly, did you agree with that  
18 interpretation set forth in that decision?

19 A. With the dissent, yes; with the majority, no.  
20 I'm afraid the majority as a matter of fact got it  
21 wrong.

22 Q. What, if anything, did you do in your capacity  
23 as EIA general counsel in response to the issuance of  
24 the Federal Circuit decision?

25 A. We retained outside counsel and working with

1 outside counsel prepared an amicus curiae brief which  
2 was filed on the petition for rehearing en banc in the  
3 Federal Circuit.

4 Q. Did you have any role in the drafting of that  
5 brief?

6 A. Yes, sir, I did. I didn't prepare the first  
7 draft, but I commented on it, and I was involved in a  
8 substantial rewrite of the brief before it was filed.

9 Q. And what was the purpose of JEDEC submitting  
10 that brief? Why did JEDEC submit that brief in the  
11 Federal Circuit proceeding?

12 A. To put our views on record before the court as  
13 the full court considered the possibility of granting a  
14 rehearing because we had really not been given that  
15 opportunity previously.

16 Q. And could you summarize briefly essentially  
17 what views you sought to present in your brief to the  
18 Federal Circuit.

19 A. There were two aspects of the majority's  
20 opinion that we found very troubling and indeed could  
21 materially affect our ability to set voluntary open  
22 standards going forward.

23 One was that the majority tried to pinpoint an  
24 exact moment in time when disclosure might be/was  
25 required, and I believe the majority said that that

1 moment in time was when a formal ballot was presented  
2 for a vote in JEDEC, and that, as I've tried to testify  
3 over the last day, is absolutely not the case. The  
4 rule is as early as possible in the process and there  
5 is no procedural point, identifiable point, at which  
6 disclosure is required.

7 MR. PERRY: Your Honor, if I could remake my  
8 objection that to have him take a passage or what he  
9 thinks is a holding in that opinion and then repeat  
10 what he said yesterday is cumulative and it's  
11 unnecessary. If they want to argue this, they can put  
12 the appeal opinion up against what he said and  
13 Your Honor can make that decision. But I just think  
14 it's irrelevant.

15 JUDGE MCGUIRE: I think I've already ruled on  
16 this. Overruled. You can take it up on  
17 cross-examination or you can make it in argument in  
18 your post-hearing brief, Mr. Perry.

19 MR. ROYALL: Thank you, Your Honor.

20 And I only have a few other questions. I would  
21 like to present you the brief in --

22 THE WITNESS: And the second thing, to finish  
23 my answer, was that the court, at least as I read the  
24 opinion, appeared to say that the only intellectual  
25 property that needed to be required was that which in

1 fact -- or needed to be disclosed was that which in  
2 fact is required to meet or to comply with the final  
3 issued standard, and the concern we have there is that  
4 it basically requires participants in the process to  
5 make an on-the-spot infringement analysis of what the  
6 final standard will look like and whether or not the  
7 patent or patent application, if it's an application  
8 situation, when that patent application finally  
9 issues, what that will look like and then determine  
10 whether or not there's a correspondence between the  
11 two before they're required to disclose in a situation  
12 that could be months or years earlier than the actual  
13 issuance of the patent and the issuance of the final  
14 standard.

15 So it basically put JEDEC in an untenable  
16 situation, it puts the members of JEDEC in an untenable  
17 situation, and we're very concerned that if that  
18 opinion stands it will affect our ability to do  
19 business going forward.

20 BY MR. ROYALL:

21 Q. And the final question before I present you  
22 with this document is: In what way is -- in your  
23 position as EIA general counsel and JEDEC presently, in  
24 what way are you concerned that that decision if it  
25 stands could affect your organization as it goes

1 forward?

2 A. It's going to -- well, first of all, it's -- as  
3 I think the brief sets forth, to state that there is a  
4 moment in time, a procedural moment in time where  
5 there's a duty to disclose, not before and -- not  
6 before that time, basically provides a blueprint to  
7 companies participating in the process as to when they  
8 can drop their membership without having the duty to  
9 disclose, and that destabilizes the whole system. If  
10 you understand that the purpose is early disclosure and  
11 good faith and openness, it invites -- it invites  
12 abuse, very frankly. It invites abuse.

13 And secondly, by requiring an on-the-spot  
14 infringement analysis months or years before the fact,  
15 it deters open disclosure rather than encouraging open  
16 disclosure.

17 So stated very simply, our concern is that the  
18 Court of Appeals, the majority's opinion, converts what  
19 is intended to be a disclosure principle into a  
20 nondisclosure principle and it basically turns the  
21 whole process on its head.

22 MR. ROYALL: May I approach, Your Honor?

23 JUDGE McGUIRE: Go ahead.

24 BY MR. ROYALL:

25 Q. Mr. Kelly, I've just handed you what's been

1 marked for identification as CX-3089.

2 A. Yes, sir.

3 Q. Do you recognize this?

4 A. Yes, sir. This is the amicus brief that was  
5 filed on petition for rehearing en banc in the  
6 Federal Circuit in the case of Rambus versus Infineon.

7 Q. And does this brief set forth accurately your  
8 views as EIA's general counsel in response to the  
9 Federal Circuit interpretation of your organization's  
10 rules?

11 A. It certainly does.

12 MR. ROYALL: Your Honor, that's my last  
13 question for Mr. Kelly. I would, however, at this time  
14 like to offer CX-3089.

15 JUDGE McGUIRE: Mr. Perry?

16 MR. ROYALL: No.

17 MR. PERRY: No objection, Your Honor. I don't  
18 think it's at all relevant, but we can argue that.

19 JUDGE McGUIRE: So entered.

20 (CX Exhibit Number 3089 was admitted into  
21 evidence.)

22 JUDGE McGUIRE: All right. At this time you  
23 may conduct your cross-examination.

24 MR. PERRY: Thank you, Your Honor.

25 I would like to provide the witness with his

1 prior deposition transcripts in case we have cause to  
2 refer to them. May I?

3 JUDGE McGUIRE: Yes.

4 CROSS-EXAMINATION

5 BY MR. PERRY:

6 Q. Mr. Kelly, good morning.

7 A. Good morning, Mr. Perry.

8 Q. Do you still have the overview of the JEDEC  
9 patent policy that Mr. Royall was just talking to you  
10 about?

11 A. If you're referring to the speech, yes, I do.

12 Q. Yes. Exhibit 449, CX-449. Do you see that?

13 A. I do.

14 Q. You just called it a speech. Did you deliver  
15 this as an address?

16 A. Yes.

17 Q. When was that?

18 A. March 26, 2002, in Santa Clara, California.

19 Q. Now, when you prepared it, you were aware of an  
20 ongoing litigation between Rambus and Infineon;  
21 correct?

22 A. I prepared this originally as a newsletter for  
23 the JEDEC -- I'm sorry -- as an article for the JEDEC  
24 newsletter in November 2001. I believe at that time I  
25 was, yes, aware of the Rambus litigation.



1 Q. And you know, don't you, from your years as  
2 EIA general counsel and your service on the ANSI task  
3 force that different standard-setting organizations  
4 have taken different approaches on whether or not  
5 patent applications should be part of the patent  
6 policy?

7 A. I do know that, yes, sir.

8 Q. And you don't think that the people in the  
9 organizations that feel that patent applications  
10 shouldn't be required to be disclosed under an  
11 organization's patent policy are acting in bad faith,  
12 do you?

13 A. No, sir. I think --

14 Q. There are policy arguments on both sides;  
15 right?

16 A. It depends on the industry and it depends on  
17 the circumstances, yes, sir, it does.

18 Q. And you don't think those standard  
19 organizations that interpret the term "patents" to mean  
20 patents and not, quote, patents and patent  
21 applications, close quote, are acting in bad faith, do  
22 you?

23 A. No, sir. As I just said, it depends on the  
24 circumstances.

25 Q. And those people aren't trying to game the

1 system, are they?

2 A. No.

3 Q. Let's look back if we could on page 1 of your  
4 2002 overview of the patent policy.

5 In paragraph 1 you say that JEDEC's core  
6 business is the development of open standards; right?

7 JUDGE MCGUIRE: Okay, Mr. Perry. Just so I'm  
8 clear, could you describe what record that or what  
9 exhibit -- is that an exhibit you're talking about or  
10 what is that?

11 MR. PERRY: Yes. It's the one we just finished  
12 with with Mr. Royall. It's CX-449.

13 JUDGE MCGUIRE: Okay. Very good. Thank you.

14 BY MR. PERRY:

15 Q. And it's the first sentence of the document is:  
16 "JEDEC's core business is the development of open  
17 standards."

18 Do you see that?

19 A. I do.

20 Q. And then you talked about open standards  
21 yesterday; right?

22 A. I did.

23 Q. And then the second sentence, are you  
24 attempting to define open standards there?

25 A. I am -- I'm attempting to state for the

1 purposes of this article what open standards mean,  
2 yes.

3 Q. And you say, "Open standards by definition are  
4 free of restrictive intellectual property or IP  
5 rights"; correct?

6 A. Yes, sir.

7 Q. And by "restricted" you mean that there's no  
8 objection to having features and standards that are  
9 protected by valid patents as long as they're available  
10 to all comers on reasonable and nondiscriminatory  
11 terms?

12 A. Yes, sir.

13 Q. Now -- and I think you told us this yesterday,  
14 but let's get it clear.

15 Does JEDEC or EIA -- in your twelve years of  
16 experience, have they ever offered opinions on whether  
17 a particular royalty rate is reasonable?

18 A. Have we offered opinions on whether a royalty  
19 rate is reasonable.

20 No, sir. No.

21 I know it's been alleged in litigation in one  
22 particular case that a member of the Consumer  
23 Electronics Association staff expressed an opinion on  
24 that subject, but no, I -- and there was alleged in  
25 another case -- or actually let me back up.

1           There was that one allegation certainly and  
2 there was an occasion when our outside counsel reviewed  
3 a patent license -- this was a number of years ago --  
4 to determine whether or not the licensing terms were  
5 reasonable. That was a very early stage, as I say, and  
6 it was at that particular time the American National  
7 Standards Institute endorsed that practice of reviewing  
8 patent licenses and so did EIA, and we abandoned, both  
9 ANSI and EIA abandoned, that practice I'd say roughly  
10 eight or nine years ago.

11           But those are the only two exceptions I'm aware  
12 of.

13           Q. And with those two exceptions, put those two  
14 aside, EIA doesn't take a formal position on whether a  
15 particular license rate is reasonable; that's right?

16           A. That's correct. We don't get into the  
17 definition, the further definition of reasonable and  
18 nondiscriminatory at all. We leave that to the parties  
19 to work out or the courts.

20           Q. Now, is it one of the goals of EIA or JEDEC to  
21 get the lowest possible royalty rate if there's  
22 intellectual property in the standards?

23           A. To get -- no. I think -- no. The answer to  
24 that is no.

25           JEDEC, however, is concerned and I said before

1 that JEDEC and EIA do not have a preference for  
2 including intellectual property in standards because  
3 of the fact that there may be a royalty that may  
4 increase the cost. The goal is always to try to  
5 produce a standard which is going to gain marketplace  
6 acceptance, and if the cost of the product is going  
7 to -- is likely to be increased by intellectual  
8 property, that's a general concern. That doesn't go  
9 to the licensing terms, however. That goes to the  
10 basic question of whether to include the IP at all or  
11 not.

12 Q. For licensing terms you let the marketplace  
13 decide or the courts?

14 A. Yes, sir.

15 Q. Now, you told us yesterday about ANSI, the  
16 American National Standards Institute, A-N-S-I; right?

17 A. I did.

18 Q. And you talked about that ANSI had a patent  
19 policy and you were shown some guidelines and asked  
20 some questions about the guidelines. Do you remember  
21 that?

22 A. I do.

23 Q. And EIA in the '90s was accredited by ANSI;  
24 correct?

25 A. It was in the '90s and it still is, yes, sir.

1 Q. And of course between '91 and '96, at least,  
2 focusing on that time period, JEDEC was an activity  
3 within the EIA engineering department?

4 A. Yes.

5 Q. And it didn't enter into its own contracts on  
6 its own; right, during that time period?

7 A. No, it did not.

8 Q. Okay. And you told us that you understood  
9 throughout the 1990s that the ANSI patent policy did  
10 not require the disclosure of patent applications;  
11 right?

12 A. Yes, I did. And I believe the guidelines so  
13 state.

14 Q. And you had those guidelines back in 1994;  
15 correct?

16 A. Yes. I worked on them even earlier than that,  
17 yes, sir.

18 Q. And you sent a copy of them to Ken McGhee in  
19 1994, didn't you?

20 A. I'm sure I provided copies to Mr. McGhee  
21 throughout that period '94 to '96, if that's the scope  
22 of your question, yes.

23 Q. Well, let's look at one particular instance,  
24 RX-494.

25 May I?

1 JUDGE McGUIRE: Yes.

2 THE WITNESS: Thank you.

3 BY MR. PERRY:

4 Q. This was a document shown to you at your  
5 deposition a few months ago.

6 A. Uh-huh.

7 Q. And the first page, does that appear to you to  
8 be a memo from Ken McGhee to JC-42 committee members?

9 A. It certainly does, yes, sir.

10 Q. And Mr. McGhee says that there was a meeting in  
11 Orlando where Texas Instruments had requested a  
12 clarification of the ANSI/JEDEC patent policy and that  
13 had been referred to you; correct?

14 A. Yes, sir, that's what it says.

15 Q. And the next page is a memo that I think you  
16 saw yesterday from you to Mr. McGhee talking about  
17 Texas Instruments' request for clarification; right?

18 A. Yes, sir.

19 Q. And then Mr. McGhee's, to go back to the first  
20 page -- sorry -- Mr. McGhee's cover memo says that your  
21 response is attached along with a copy of the ANSI  
22 guidelines for implementation of the ANSI patent  
23 policy. Do you see that?

24 A. I do.

25 Q. And these guidelines that are attached were

1 one basis for your view at that time that the ANSI  
2 policy did not require disclosure of patent  
3 applications?

4 A. I don't believe that was the issue that TI  
5 raised.

6 Q. That wasn't my question.

7 A. Sorry.

8 Q. And I appreciate your answer, but let me, if I  
9 could, ask my question again.

10 The guidelines for implementation of the ANSI  
11 patent policy that are attached to this exhibit, to  
12 this memo from Mr. McGhee to the 42 committee, these  
13 guidelines were one basis for your view in 1994 that  
14 the ANSI policy did not require disclosure of patent  
15 applications; right?

16 A. That is correct.

17 Q. And you intended for Mr. McGhee to send it on  
18 to the 42 committee; right?

19 A. I don't recall at this point, but I have no  
20 reason to doubt that I did.

21 Q. Now, the EIA patent policy in this time period,  
22 1994, the wording was essentially identical to the ANSI  
23 patent policy; right?

24 A. Very close, yes.

25 Q. Can you agree with the words "essentially



1 identical"?

2 A. Essentially identical, I will accept your  
3 phraseology, yes, sir.

4 Q. And didn't EIA take the position in its  
5 official published manuals that it had adopted the ANSI  
6 patent policy?

7 A. In toto, no, sir.

8 Q. Well, you told us several times yesterday you  
9 were the last word on the interpretation and  
10 application of the EIA patent policy; correct?

11 A. Correct.

12 Q. Who's the last word on what the words are of  
13 the policy themselves, what the policy actually says?

14 A. The words of the policy are the words of the  
15 policy. If the words require interpretation, that's my  
16 role.

17 Q. And it's EDEC that has the final word on what  
18 the words are in the policy; right?

19 A. No, sir.

20 Q. Who has the final word?

21 A. No, sir. EDEC drafts the policy. Those  
22 policies can't be approved unless the general counsel  
23 of EIA signs off on them.

24 So they draft; the general counsel approves.

25 Q. Okay. So if EDEC drafts something and approves

1 it and it's a manual and it gets published, that means  
2 you approved it; right?

3 A. Me or one of my predecessors, yes, sir.

4 Q. Now, one of the manuals you talked about  
5 yesterday was EP-7-A; correct?

6 A. Yes, sir.

7 Q. That's JX-54. It was moved into evidence. We  
8 can bring that up.

9 Mr. Kelly, you can either look at the screen or  
10 you can -- or I'll wait for you to try to find it,  
11 but --

12 A. It's probably better for me to review the hard  
13 copy.

14 Q. That's fine. Either way.

15 A. Okay. I have it.

16 Q. And you talked about this August 1990 policy  
17 yesterday; right?

18 A. Yes, I did.

19 Q. And this came into being right about the time  
20 that you first joined EIA; correct?

21 A. I believe, yes, the month before.

22 Q. And so this is one that you've studied when you  
23 first came on board; right?

24 A. I'm sure it is, yes, sir.

25 Q. Now, if you look at page 3 of the exhibit --

1 and we can pull up that whole thing -- do you have  
2 that?

3 A. Yeah. The page numbers are cut off on my copy,  
4 but I'm on the same page that you have. Yes.

5 Q. Well, it says -- the heading is Style Manual  
6 and then it says "Preface"?

7 A. We're together on this. Yes.

8 Q. Okay. And if you look at the last paragraph?

9 A. Yes, sir.

10 Q. It says: "The material contained in this  
11 publication was formulated under the cognizance of  
12 JEDEC JC-10 committee on terms and definitions and  
13 approved by the Engineering Department Executive  
14 Committee (EDEC)."

15 Do you see that?

16 A. I do.

17 Q. And in the notice that appears at the front of  
18 7-A, just the prior page -- if you'll pull up the  
19 second paragraph -- that paragraph says: "Recommended  
20 standards and publications are adopted by EIA without  
21 regard to whether their adoption may involve patents on  
22 articles, materials or processes."

23 Do you see that?

24 A. I do.

25 Q. And as you understood the proper interpretation

1 of 7-A at the time, the word "patents" there includes  
2 patent applications?

3 A. Yes.

4 Q. Well, you know that EDEC -- I'm sorry.

5 You know that EIA revised this manual in  
6 1995 and published a new one, don't you?

7 A. I'm not sure I do know that. I frankly don't  
8 remember.

9 Q. There's an EP-7-B. Let me show it to you.  
10 This is Exhibit RX-616.

11 May I?

12 JUDGE MCGUIRE: Please.

13 BY MR. PERRY:

14 Q. And you can see from the cover that it says  
15 "EP-7-B Revision of EP-7-A." Do you see that?

16 A. I do.

17 Q. It says "October 1995"?

18 A. Yes, sir.

19 Q. Look at page 3, if you could, of the exhibit.

20 A. Yes, sir.

21 Q. No. I think I meant page 9. I'm sorry.

22 Again, this says "Foreword"; right?

23 A. Correct.

24 Q. Would you pull up the last paragraph, please.

25 It says, "The material contained in this

1 publication was formulated under the cognizance of  
2 JEDEC JC-10 committee on terms and definitions and  
3 approved by the Engineering Department Executive  
4 Committee."

5 Do you see that?

6 A. Yes, I do.

7 Q. Now, this manual was generally available to the  
8 JEDEC members and EIA members in the same way that you  
9 described the other manuals that you talked about  
10 yesterday?

11 A. Yes, sir. It would have been, yes.

12 Q. Now, look on the second page of the exhibit,  
13 RX-616. Let's look at the second paragraph.

14 Do you see that it says, "Standards and  
15 publications are adopted by EIA in accordance with the  
16 American National Standards Institute (ANSI) patent  
17 policy"? Do you see that?

18 A. Yes, sir, I do.

19 Q. So does that refresh your recollection that EIA  
20 in its official manuals said that it had adopted the  
21 ANSI patent policy?

22 A. It does here certainly, and obviously I didn't  
23 catch this when I reviewed this document and I, with  
24 the qualification I gave you before, the language is --  
25 I think your term was "substantially identical" and I

1 adopted that. That's -- this statement is true to that  
2 extent, yes.

3 Q. And you knew at the time in October 1995 that  
4 the ANSI patent policy did not require the disclosure  
5 of patent applications; correct?

6 A. That is correct.

7 Q. Now, when you were reviewing the minutes of  
8 JEDEC meetings, did you sometimes see that in JC-42  
9 minutes there was a discussion of patents?

10 Let me make it more clear. There was a section  
11 on patents that included various provisions from policy  
12 manuals?

13 A. I'm not quite sure I know what you're referring  
14 to. Maybe you could help me.

15 Q. Let me show you.

16 A. Please.

17 Q. This will be -- oh, by the way, I should move  
18 into evidence RX-616.

19 JUDGE McGUIRE: Any objection?

20 MR. ROYALL: No objection.

21 JUDGE McGUIRE: Entered.

22 (RX Exhibit Number 616 was admitted into  
23 evidence.)

24 BY MR. PERRY:

25 Q. Let me show you now RX-691.

1           May I?

2           JUDGE McGUIRE:   Yes.

3           BY MR. PERRY:

4           Q.   These appear to be the March 18, 1996 minutes  
5 of a JC-42 meeting.

6                   In March '96, was it one of your job  
7 responsibilities to review minutes of JC-42 meetings?

8           A.   Yes, sir.

9           Q.   I just want to point you to something on page 7  
10 of the exhibit.

11          A.   Okay.

12          Q.   Do you see up at the top it says "Patent  
13 Tracking"?

14          A.   Yes, sir.

15          Q.   And then it says, "Show JEDEC patent policy at  
16 each task group and committee meeting"?

17          A.   Yes, sir.

18          Q.   Do you see down at the bottom there's a  
19 reference to EIA policy?

20          A.   I'm not -- all right.  We're together.  Yes,  
21 sir.

22          Q.   And that has a quote from 7-B; correct, the  
23 October 1995 style manual?

24          A.   Yes, sir, it does.

25          Q.   So it appears to you that in fact 7-B was made

1 available at least to Mr. Townsend; right?

2 A. Evidently it was, yes.

3 Q. Now, you talked yesterday about the sign-in  
4 sheet as well, and the one that you were looking at was  
5 CX-306.

6 Can we pull that up? And if you can find the  
7 sign-in sheet that's in front of you, that would be  
8 helpful.

9 A. I have it here, sir.

10 Q. And you said you had had some involvement as a  
11 result of some task force you were on in changing the  
12 sign-in sheet to add some language; is that correct?

13 A. No.

14 MR. ROYALL: I believe that may misstate the  
15 witness' prior testimony.

16 JUDGE MCGUIRE: Restate.

17 BY MR. PERRY:

18 Q. Let me ask it this way.

19 Did you have any involvement in preparing any  
20 of the language on this two-page sign-in sheet?

21 A. No, sir.

22 Q. And you're looking at CX-306?

23 A. I'm looking at CX-306.

24 Q. You did talk about a particular sentence on the  
25 front that says, "Subjects involving patentable or



1 patented items shall conform to EIA policy."

2 Do you see that?

3 A. I do.

4 Q. And did you testify about when you thought this  
5 was used at JEDEC meetings?

6 A. I believe I said it would have been in the  
7 mid-1990s based on the logos that appear at the top of  
8 the sign-in sheet. Yes.

9 Q. That's right.

10 And on page 2, there's -- well, page 1 tells  
11 us to look on the reverse side for the EIA policy;  
12 right?

13 A. Yes, sir.

14 Q. And then on page 2, which I think was the back  
15 of the sign-in sheet --

16 A. Correct.

17 Q. -- the portion of the -- that talks on the  
18 lower right -- I'm sorry -- that says "reference to  
19 patented products in EIA standards," do you see that?

20 A. I do.

21 Q. Do you recognize that to be a quote from EP-3?

22 A. I can barely read it either on the screen or  
23 here, but let me try. It's from EP-3 or EP-7. I'm not  
24 sure which.

25 Q. Well, it references EP-7, doesn't it?

1           A. Again, it's very difficult to read on my copy.  
2 If you can highlight it, I will -- yes, that's what it  
3 says.

4           Q. Well, I think EP-3 will speak for itself. But  
5 let's look at the language if we could.

6                     The first sentence says, "Requirements in EIA  
7 standards that call for the use of patented items  
8 should be considered with great care."

9                     Do you see that?

10          A. I do.

11          Q. And then in the next sentence there's a phrase  
12 that says, "Committee chairmen should ensure that no  
13 program of standardization shall refer to a product,"  
14 and then it goes on from there.

15                     Do you see that?

16          A. I do.

17          Q. Now, when you saw the use of the word "should"  
18 in EIA manuals, did you understand that to mean must?

19          A. I think in other places in the manuals they use  
20 stronger language, but "should" certainly imposes a  
21 duty, yes. "Should" does not mean must but "should"  
22 suggests that there is a duty, yes.

23          Q. Well, would you -- you do see that on this  
24 sign-in sheet there are two references to EP-7;  
25 correct?

1 A. Yes, there are.

2 Q. Well, I'd like you to look at EP-7-A, which was  
3 JX-54.

4 A. Okay. I have it.

5 Q. And I'll ask you to look at -- this is the one  
6 where the page numbers are a little bit cut off --  
7 page 25 of the exhibit.

8 Would you pull up the last section under 7.2.1.

9 Do you see that the EP-7-A that the sign-in  
10 sheet points people to says, "The word 'shall'  
11 expresses requirement, 'should' expresses  
12 recommendation"? Do you see that?

13 A. I do.

14 Q. And that's, as you understand it, the meaning  
15 of "should" in official EIA publications; correct?

16 A. No. That's what 7-A says in that particular  
17 section. You asked me my particular interpretation,  
18 not what 7-A said. That's what 7-A says about --

19 Q. Isn't this sign-in sheet an EIA publication?

20 A. No.

21 Q. It's an official EIA form?

22 A. It's an official EIA form. And EP-7 is  
23 directed to EIA engineering publications; it's not  
24 directed to forms. And again, going back to what I  
25 said before, not to be argumentative, I thought you

1 asked me my -- how I understood the word "should," not  
2 how a JEDEC manual or an EIA manual defines the word  
3 "should."

4 Q. Now, you talked some about the Dell case. Do  
5 you remember that testimony from yesterday?

6 A. Yes, I do.

7 Q. And you understood that was a case -- well,  
8 what did you understand that the FTC had alleged in  
9 that case that Dell had done?

10 A. That Dell had failed to disclose relevant IP  
11 and obviously because they failed to disclose it also  
12 failed to license it on reasonable terms.

13 Q. Did you understand that a Dell representative  
14 had allegedly certified in writing twice that Dell had  
15 no intellectual property that he was aware of?

16 A. I didn't know it was twice, but I think I  
17 referred yesterday in my testimony to the fact that  
18 there was a written certification of some kind, yes.

19 Q. And Dell and the FTC entered into a consent  
20 decree, you understand that?

21 A. I do.

22 Q. There was no trial?

23 A. I do.

24 Q. And the FTC asked for comments about the  
25 consent decree from interested parties; correct?

1           A.    Correct.

2           Q.    And then you and Mr. Bart, you on behalf of EIA  
3 and Mr. Bart on behalf of TIA, coauthored a letter to  
4 the FTC providing comments; correct?

5           MR. ROYALL:   Your Honor, I believe that  
6 misstates the witness' prior testimony.

7           JUDGE MCGUIRE:   Then how does it misstate it?

8           MR. ROYALL:   I don't want to put words in his  
9 mouth, but he testified yesterday as to who the author  
10 was.

11          MR. PERRY:   Your Honor, this is not a proper  
12 objection at trial.

13          JUDGE MCGUIRE:   Well, now, why is it not a  
14 proper objection if he's claiming that the question  
15 misstates the testimony?

16          MR. PERRY:   Because the witness is supposed to  
17 answer the question yes or no, not Mr. Royall.

18          JUDGE MCGUIRE:   Well, he's making an objection,  
19 Mr. Perry. He's entitled to object. Now, the basis is  
20 whether your question provides testimony that was  
21 improperly misstated.

22          MR. ROYALL:   I believe it does clearly.

23          MR. PERRY:   Let me go without referring to  
24 testimony. I didn't realize I had referred to  
25 testimony.

1 JUDGE McGUIRE: At this point I'm not sure  
2 exactly what you referred to, but I want to address his  
3 objection, so why don't we go back and restate the  
4 question and then we'll see where we stand.

5 BY MR. PERRY:

6 Q. Did you on behalf of EIA and Mr. Bart on behalf  
7 of TIA coauthor a letter to the FTC providing comments  
8 on the Dell consent decree?

9 A. No.

10 Q. All right. Would you please look at the  
11 Infineon deposition transcript that's dated January 9,  
12 2001 at page 139.

13 A. I'm sorry. Would you mind repeating which  
14 volume of these volumes I'm supposed to be looking at.

15 Q. January 9, 2001 in the Infineon case.

16 A. Yes, sir.

17 Q. At page 139.

18 A. Okay.

19 Q. And I'll give you a chance to read the portion  
20 that begins at line 8 to line 15.

21 JUDGE McGUIRE: What page was that, Mr. Perry?

22 MR. PERRY: 139, Your Honor.

23 THE WITNESS: Yes, sir. In this particular  
24 portion --

25 JUDGE McGUIRE: No. He hasn't asked a question

1 yet.

2 THE WITNESS: I'm looking at that line.

3 MR. PERRY: Let's let His Honor look at that.

4 JUDGE McGUIRE: He has not asked a question.

5 Go ahead, Mr. Perry.

6 BY MR. PERRY:

7 Q. Did you testify in the Infineon deposition,  
8 where you had been sworn to tell the truth, that you  
9 believe you had coauthored with Dan Bart comments on  
10 the Dell case?

11 A. I did.

12 Q. And was that a true statement?

13 A. I think if you look elsewhere in my deposition,  
14 when I'm shown the document, I clarified what my role  
15 in authorship was.

16 So I mean, if you're asking me if this one line  
17 read out of context is an accurate statement, that was  
18 my best recollection at that time, not knowing what  
19 document -- not having seen the document, and I might  
20 mention incidentally not knowing when I took this  
21 deposition even what the subject matter of the  
22 deposition was.

23 Q. You knew when you -- when the letter was  
24 submitted to the FTC in January '96 that your name was  
25 on the signature block?

1 A. Yes.

2 Q. And you approved the letter as written;  
3 correct?

4 A. I did.

5 Q. Did you provide any input into the letter?

6 A. No. I offered comments on the draft, and I  
7 think this was my testimony earlier and in deposition,  
8 I offered comments on a draft that was prepared by  
9 Mr. Paul Vishny and provided to me by Mr. Bart.

10 Q. So you did provide input into the letter?

11 A. Right.

12 Q. Okay.

13 A. And to that extent, I don't disagree with the  
14 statement coauthored; I'm clarifying what my role was  
15 in response to your question.

16 Q. Did some of your comments get into the letter?

17 A. I don't recall specifically which ones, if any,  
18 did, but again, I don't disagree with the substance of  
19 the letter.

20 Q. Well, let's look at the letter. It's RX-669.

21 A. I have it. Yes, sir.

22 Q. Now, the letter on its first page refers to  
23 various JEDEC standards; correct? The first full  
24 paragraph under Statement of Interest, if you'll look  
25 down to the bottom of that paragraph, do you see



1 references to JEDEC standards?

2 A. Yes. There is a reference to all JEDEC  
3 solid-state standards for the semiconductor industry,  
4 yes, among others, yes, sir.

5 Q. And at the time, January '96, JEDEC was an  
6 activity within the EIA engineering department;  
7 correct?

8 A. I believe that's correct at that time, yes.

9 Q. And this letter was written in part on behalf  
10 of JEDEC; correct?

11 A. As part of the EIA organization, yes, of  
12 course.

13 Q. Now, if you'll look on the next page, page 2 of  
14 the letter, there's a heading I think you spoke to  
15 yesterday called "Allowing patented technology in  
16 standards is pro-competitive."

17 Do you see that?

18 A. Yes, sir, I do see that.

19 Q. And you agreed with that at the time; correct?

20 A. Yes. Subject to the statements I made, the  
21 additional statements I made yesterday, yes, I do, I  
22 did.

23 Q. And if you'll look on page 4 of the letter --  
24 let's pull up the very last paragraph, and it says:  
25 "Standards in these high-tech industries must be based

1 on the leading-edge technologies. Consumers will not  
2 buy second-best products that are based only on  
3 publicly available information. They demand and  
4 deserve the best technology these industries can  
5 offer."

6 Do you see that?

7 A. I do.

8 Q. And you agreed with that at the time as well?

9 A. I do -- I did and do, yes.

10 Q. And you agreed then that consumers would not be  
11 well-served if a high-tech standard-setting  
12 organization insisted on having standards that were  
13 patent-free, that had no IP in them?

14 A. As a general principle, yes. There are  
15 certainly exceptions to that, but as a general  
16 principle, yes.

17 Q. And the important issue is the license  
18 availability to all parties on a reasonable,  
19 nondiscriminatory basis; correct?

20 A. In part. It's also the issue of whether or not  
21 the patented technology is likely to increase the cost  
22 of the item to the point where the standard is one that  
23 will not gain market acceptance, so there's that  
24 aspect, too.

25 In other words -- if I can explain? Or may I?

1 It's your question.

2 MR. ROYALL: Your Honor, I'm going to ask that  
3 he not be --

4 MR. PERRY: I was going to say yes, Mr. Royall.

5 JUDGE MCGUIRE: Just a second, Mr. Royall.

6 MR. PERRY: I was going to say fine.

7 JUDGE MCGUIRE: Now, do you have a statement  
8 that you want to make, Mr. Royall?

9 MR. ROYALL: No. I just simply want to make  
10 sure he can give his full statement.

11 JUDGE MCGUIRE: He's getting full and fair  
12 treatment.

13 BY MR. PERRY:

14 Q. Go ahead. Explain your answer.

15 A. If there is a patented and a nonpatented  
16 alternative and there's roughly equivalency in terms  
17 of technical merit, it may be appropriate for a  
18 committee to look hard at the nonpatented  
19 alternative.

20 Q. Are you done?

21 A. I'm done.

22 Q. Would you look at the sentence that comes just  
23 above the one that we were looking at.

24 So pull it all up.

25 No, no. Just the sentence just above the last

1 paragraph, please, and the last paragraph. The  
2 sentence just above the last paragraph. That's the  
3 one. Thank you.

4 The sentence just before the last paragraph on  
5 page 3 says: "Even if knowledge of a patent comes  
6 later in time due to the pending status of the patent  
7 while the standard was being created, the important  
8 issue is the license availability to all parties on  
9 reasonable, nondiscriminatory terms."

10 Do you see that?

11 A. Yes, sir.

12 Q. And you agreed with that at the time the letter  
13 was sent; correct?

14 A. Yes, sir.

15 Q. Now, at the time the letter was sent, you  
16 understood that TIA's patent policy did not require the  
17 disclosure of patent applications; right?

18 A. That's correct. TIA adopted a patent policy in  
19 about 1991 that did not apply, yes.

20 Q. Now, you also know that JEDEC has been aware  
21 since 2000 of patents issued to Rambus that Rambus has  
22 asserted against manufacturers of JEDEC-compliant  
23 DDR SDRAM and SDRAM devices; correct?

24 A. That's correct.

25 Q. Has JEDEC ever asked Rambus if it would agree

1 to license those patents to all comers on reasonable  
2 and nondiscriminatory terms?

3 A. No. Actually when I think we first learned  
4 about the Rambus patents there was at least one and  
5 perhaps several cases in litigation so, as I had  
6 testified yesterday, we stayed out because those  
7 matters were before the courts.

8 Q. When you say you stayed out, you've been filing  
9 amicus briefs, haven't you?

10 A. Yeah. We did not contact Rambus, to answer  
11 your question, and ask for any licensing assurances or  
12 any other information because all these matters were  
13 before the courts.

14 Q. Now --

15 MR. ROYALL: Your Honor, sorry for the late  
16 objection. I would just ask for clarification.

17 When questions are asked about JEDEC, as  
18 Mr. Perry on numerous occasions yesterday pointed out,  
19 this witness was not involved in JC-42, so I would ask  
20 for clarification when he says "JEDEC" whether he's  
21 talking about JEDEC at large or the JC-42 committee.

22 MR. PERRY: Let me ask that question.

23 JUDGE McGUIRE: Go ahead.

24 BY MR. PERRY:

25 Q. How long have you been president of JEDEC?

1 A. Since early 2000 -- early 2000.

2 Q. And since about the time you became president  
3 of JEDEC, you've been aware that Rambus had issued  
4 patents that it had asserted against manufacturers of  
5 JEDEC-compliant DDR SDRAM and SDRAM devices?

6 A. I believe that's true, yes.

7 Q. And you've considered whether or not to ask  
8 Rambus for an assurance that it will make those patents  
9 available to all comers on reasonable terms, haven't  
10 you?

11 A. No, sir, I have not. I believe that's directly  
12 contradictory to what I just said.

13 Q. Well, I'm sorry, but what you just said was  
14 there was a reason why you hadn't and now I'm asking,  
15 if there is a reason why you hadn't, did you think  
16 about doing it?

17 A. No.

18 Q. So it never entered your mind until just now to  
19 ask Rambus for assurances of reasonable and  
20 nondiscriminatory licensing?

21 MR. ROYALL: Again, Your Honor, if I could  
22 object, I think there's confusion here because the  
23 earlier questions that he's referring back to didn't  
24 specify whether he was talking about JEDEC at large,  
25 which is what this witness knows about, or the JC-42

1 committee, which he may or may not know.

2 JUDGE McGUIRE: All right. So noted.

3 You can ask your question, Mr. Perry.

4 If you can answer them, you can answer them.

5 But in that context. Let's be clear. And Mr. Kelly,

6 is that clear to you the context in which these

7 questions are now being asked?

8 THE WITNESS: Your Honor, the only thing that's

9 unclear in Mr. Perry's questions is he continues to

10 refer to "you," which I interpret to mean me as opposed

11 to JEDEC as an organization or JC-42.

12 JUDGE McGUIRE: I understood when he said that

13 that he was talking about you personally.

14 THE WITNESS: About me personally.

15 JUDGE McGUIRE: Then let's proceed.

16 BY MR. PERRY:

17 Q. When I say "you," Mr. Kelly, I'm talking about

18 you, Mr. Kelly.

19 A. All right.

20 Q. So until this -- until today, did you ever

21 consider the possibility of asking Rambus for

22 reasonable assurances that it will license -- for

23 assurances that it will license its patents -- excuse

24 me.

25 MR. ROYALL: I thought you were finished.

1 BY MR. PERRY:

2 Q. Let me restate my question. And please give  
3 Mr. Royall time to object.

4 Until today, have you, Mr. Kelly, ever  
5 considered whether or not to ask Rambus for assurances  
6 that it will license its patents with respect to  
7 DDR SDRAM and SDRAM devices to all comers on reasonable  
8 terms?

9 MR. ROYALL: Your Honor, I object for lack of  
10 foundation that this witness has any involvement  
11 personally in the requesting of Rambus assurances, and  
12 that's the confusion I'm concerned about.

13 JUDGE McGUIRE: Overruled. And go ahead and --

14 THE WITNESS: No, up to today that has never  
15 occurred to me. It has never occurred to me even to  
16 this moment.

17 BY MR. PERRY:

18 Q. Has anyone ever asked your advice on whether  
19 such a request should be made?

20 A. Not to my knowledge, no.

21 Q. Isn't it the case that under JEDEC manuals such  
22 a request is required when patents that read on  
23 standards come to the attention of a JEDEC committee?

24 A. Not when matters are in litigation, sir, no.

25 Q. Is there something in the manuals that say



1 that?

2 A. No. That's the interpretation of the general  
3 counsel who interprets the manuals.

4 Q. Well, have you provided that interpretation to  
5 any JEDEC committee in the past two years with respect  
6 to the Rambus patents?

7 A. I think I just answered your question, that  
8 issue to my knowledge has never arisen.

9 Q. And you think the committee chairman of JC-42  
10 knows of this litigation exception to the requirement  
11 in the JEDEC manuals that the request for assurances be  
12 made when the committee learns of patents that read on  
13 standards?

14 A. I have expressed my opinion about taking action  
15 given the pendency of litigation in other contexts. I  
16 can't tell you what's in the mind of JC-42 members or  
17 chairman.

18 Q. Well, if it's true -- strike that.

19 So JEDEC does -- I'm sorry.

20 So you don't know at this point whether or not  
21 the terms that Rambus would offer in response to such a  
22 request would be considered reasonable by licensees or  
23 the courts or by you; is that right?

24 MR. ROYALL: Objection. Lack of foundation,  
25 Your Honor.

1 JUDGE McGUIRE: Overruled.

2 THE WITNESS: I have no idea whether Rambus  
3 would offer assurances or what those assurances would  
4 contain, no.

5 BY MR. PERRY:

6 Q. You talked about in the Dell case that you had  
7 assumed that part of it was that Dell had refused to  
8 license all comers on a reasonable basis. Do you  
9 remember that?

10 A. I -- yes. Or have not given the licenses. I'm  
11 not quite sure what the testimony was, but I said I  
12 understood that they did not disclose and therefore  
13 didn't license.

14 Q. Well, let's look at 21-I. You talked about  
15 JEDEC manual 21-I; correct? That's CX-208 and I'll  
16 give you a chance to find it.

17 A. Thank you.

18 I have it.

19 Q. And could you please look on page 19 of the  
20 exhibit.

21 A. I have page 19, yes.

22 Q. And by the way, we were talking about the word  
23 "should." Do you see down at the bottom the reference  
24 to the word "should" is to be understood as advisory?

25 A. I do.

1 Q. Well, looking back up to the top to  
2 paragraph 9.3, that's entitled Reference to Patented  
3 Products in EIA Standards. Do you see that?

4 A. I do.

5 Q. Would you look at the third sentence. It  
6 starts with the word "if."

7 Can we pull that up? Pull that up.

8 "If the committee determines that the standard  
9 requires the use of patented items, then the committee  
10 chairperson must receive a written assurance from the  
11 organization holding rights to such patents that a  
12 license will be made available without compensation  
13 to," it goes on and then it says "or written assurance  
14 that a license will be made available to all applicants  
15 under reasonable terms and conditions that are  
16 demonstrably free of any unfair discrimination."

17 Do you see that?

18 A. I do.

19 Q. And you previously testified that you  
20 understand that the JEDEC committee has determined that  
21 the standard, the SDRAM standard, does not require the  
22 use of Rambus patented items?

23 A. No. I don't think I said that.

24 Q. Now, while we're talking about 21-I, this JEDEC  
25 manual, you agree that it needed the final stamp of

1 approval from EDEC; correct?

2 A. I'm sorry. Could you repeat the question.

3 Q. The JEDEC manual 21-I, it needed a final stamp  
4 of approval from EDEC; correct?

5 A. I believe at this time that was correct, yes,  
6 sir, in 1993.

7 Q. And are you aware that 21-I was never even  
8 submitted to EDEC?

9 A. No.

10 Q. Have you looked at any EDEC minutes to see if  
11 21-I was ever given that final stamp of approval?

12 A. I never have.

13 Q. Do you know one way or the other whether the  
14 manual 21-I was ever given the final stamp of approval  
15 by EDEC?

16 A. In fact, no. I know what should have been  
17 done. I don't know if it was done.

18 Q. So you weren't intending to testify yesterday  
19 that 21-I was formally approved by EDEC, were you?

20 A. In point of fact, no. I -- I would have no way  
21 of knowing that in point of fact.

22 Q. The EDEC minutes are available to you, aren't  
23 they?

24 A. Right.

25 Q. And this was raised in your Infineon

1 deposition, wasn't it?

2 A. It may have been.

3 Q. Let's look back at the letter again that was  
4 sent to the FTC on behalf of EIA and TIA in January  
5 of '96. That's RX-669.

6 And if you'll look on page 3 -- we'll pull up  
7 the first full paragraph, and I think this is  
8 something you talked about yesterday, but let me ask  
9 this.

10 Do you see the first sentence, it says, "Both  
11 EIA and TIA encourage the early, voluntary disclosure  
12 of patents that relate to the standards in work"? Do  
13 you see that?

14 A. I do.

15 Q. Now, you've told us I believe that you  
16 understood the word "encourage" in that sentence as it  
17 applied to EIA to mean require; is that right?

18 A. No. I don't believe that was my testimony. I  
19 think what I said is that "encourage" -- we use the  
20 word "encourage" because the entire process is  
21 involuntary and we can't impose sanctions against a  
22 company that does not comply, so in that sense we use  
23 the term "encourage."

24 There is a requirement, I believe I also  
25 testified, for early disclosure, so just so the record

1 is clear on that, "encourage" in this context means we  
2 can't impose sanctions, the process is voluntary,  
3 therefore we encourage.

4 Q. And the word "voluntary," do you think that's  
5 appropriately used in this sentence to describe EIA's  
6 patent policy?

7 A. I think, since you referred to my depositions,  
8 I think we went over this at length in my depositions.  
9 I probably would have chosen a different word to use  
10 particularly given all the scrutiny that that one word  
11 has received in connection with this litigation. I'm  
12 not sure I would have chosen the same word in  
13 retrospect, no.

14 Q. TIA's policy at the time didn't require the  
15 disclosure of anything, did it?

16 A. That's the way TIA interprets their policy of  
17 late, yes.

18 Q. And you knew that in 1996; right?

19 A. No, I didn't know that in 1996.

20 Q. You knew in 1996 that the TIA policy didn't  
21 require disclosure of patent applications; right?

22 A. No, I did not know that.

23 Q. When did you first learn that the TIA policy  
24 was interpreted by TIA not to require the disclosure of  
25 patent applications?

1           A. My best recollection is that Mr. Bart raised  
2 that when he and I spoke in connection with the  
3 Amy Marasco proposed testimony that I referred to  
4 yesterday. And I think he said basically we interpret  
5 the TIA policy the way Amy interprets her policy. And  
6 my response was, you know, that's your prerogative,  
7 that is not the way EIA interprets the policy, and he  
8 said, Yes, I know.

9           Q. Mr. --

10          A. Mr. Bart.

11          Q. Mr. Bart was Mr. Ken McGhee's boss for some  
12 period of time, wasn't he?

13          A. At some point in time he was, yes.

14          Q. You know there was a response to this letter  
15 from the Federal Trade Commission; correct?

16          A. I do.

17          Q. Let's look at that. That's yesterday and the  
18 version you were shown was RX-741. It's dated July 10,  
19 1996.

20          A. Yes, sir.

21          Q. If we could look for a minute at the  
22 handwriting in the upper right corner, is that your  
23 handwriting?

24          A. It is not.

25          Q. Do you recognize it?

1 A. No, not offhand.

2 Q. You do remember getting a copy of this, don't  
3 you; you were listed as a cc?

4 A. Yes, sir, I did. Not with the handwritten  
5 notations, though. It was a clean copy.

6 Q. Okay. The third paragraph of the FTC  
7 secretary's letter states, "EIA and TIA, following ANSI  
8 procedures, encourage the early, voluntary disclosure  
9 of patents but do not require a certification by  
10 participating companies regarding potentially  
11 conflicting patent interests."

12 Do you see that?

13 A. Yes, sir.

14 Q. And then it says, "Later discovered patents  
15 essential to the standard can remain as part of a  
16 standard if licenses for the underlying patents are  
17 available either on a royalty-free basis or on  
18 reasonable terms and conditions that are demonstrably  
19 free of unfair discrimination."

20 Do you see that?

21 A. I do.

22 Q. Was that statement a correct interpretation of  
23 the EIA patent policy as of July 1996?

24 A. Well, first -- can I respond? This is  
25 Mr. Clark speaking to Mr. Bart and to myself and to



1 Mr. Vishny. This is not me speaking to him.

2 Q. I understand that, but can I get a yes or a no,  
3 and then I'll let you explain?

4 A. The answer is no. May I explain?

5 Q. Yes.

6 A. Okay. What I just said plus the fact that this  
7 is not a complete statement, it is accurate as far as  
8 it goes, but it is not complete.

9 And if I can finish, what it presupposes is  
10 that the committee wants to include the technology  
11 that's subject to a patent or patent application in the  
12 standard and if that's not -- and that wouldn't  
13 necessarily be the case if there had not been  
14 disclosure.

15 Q. Now, the first sentence I read has the word  
16 "voluntary" in it again. Do you see that?

17 A. Yes, sir.

18 Q. Paragraph 3 of that July 10 letter by the FTC's  
19 secretary.

20 A. Yes, sir.

21 Q. And you thought that the use of the word  
22 "voluntary" there was inappropriate, at least as with  
23 respect to EIA; correct?

24 A. No. I don't believe that's what I said at all.  
25 I said in retrospect in the Bart letter I might have

1 used a different word than "voluntary." Mr. Clark is  
2 repeating what was said in the Bart letter. I think  
3 because of all the emphasis that's been placed on the  
4 word "voluntary" out of context in this litigation that  
5 I might have chose a different wording in retrospect.  
6 I believe that was my testimony.

7 Q. Did you make any effort to explain to  
8 Mr. Clark at the time what you thought "voluntary"  
9 meant?

10 A. No.

11 Q. Now, if you'll look at RX-742 -- may I?

12 JUDGE McGUIRE: Please.

13 THE WITNESS: I'm not sure I have RX-742.

14 BY MR. PERRY:

15 Q. Sorry.

16 A. I do now. Thank you.

17 Q. And do you see that this is a July 10,  
18 1996 memo from Ken McGhee to Jim Townsend?

19 A. Yes, sir.

20 Q. And it says it's also to all JEDEC council  
21 members and alternates?

22 A. I do.

23 Q. And it starts with Mr. Bart up at the top,  
24 Mr. Bart -- there you go -- "Mr. Bart, VP engineering  
25 department of EIA, asked that you be informed of the

1 attached information about the Dell case."

2 Now, at the time in July 1996 was Mr. Bart  
3 Mr. Ken McGhee's boss?

4 A. Evidently he was at that particular time, yes.  
5 I know during a certain period of time he was.

6 Q. Mr. Bart at that time held a position within  
7 EIA; correct?

8 A. He did.

9 Q. He was vice president of the engineering  
10 department of EIA; correct?

11 A. And also TIA, yes, sir.

12 Q. And in the second paragraph under the heading  
13 FTC Enters Consent Order on Dell, in the second  
14 paragraph under the heading, do you see that the last  
15 line says, "ANSI and EIA do, however, encourage early,  
16 voluntary disclosure of any known essential patents"?

17 A. I do.

18 Q. Did anyone at that time in response to this  
19 memo, any JEDEC council member or alternate or  
20 Mr. Townsend or Mr. McGhee, question you about whether  
21 or not this statement was an accurate description of  
22 the EIA patent policy?

23 MR. ROYALL: Your Honor, I object. He's laid  
24 no foundation that Mr. Kelly has ever seen this memo  
25 before or has any knowledge or recollection of the time

1 that it was sent.

2 JUDGE McGUIRE: Sustained.

3 MR. PERRY: Your Honor, my question was simply  
4 whether anyone who had received this memo had  
5 approached him with a question about it, if I could  
6 restate the question.

7 JUDGE McGUIRE: All right. Go ahead.

8 BY MR. PERRY:

9 Q. In or around July 1996 at about the time this  
10 memo was sent to JEDEC council members and alternates  
11 by Mr. McGhee, did any JEDEC council member or  
12 alternate or Mr. Townsend or Mr. McGhee come to you  
13 with any questions about the statement that EIA  
14 encourages early, voluntary disclosure of known  
15 essential patents?

16 A. No. No one has ever mentioned this memo to me  
17 prior to today when you handed it to me. I've never  
18 seen it.

19 Q. Well, you saw it at your deposition in this  
20 case?

21 A. If I did, I certainly don't recall seeing it at  
22 my deposition, I didn't see it at the time, and to  
23 answer your question again, I had no conversations with  
24 any JEDEC member regarding this memo.

25 Q. And you think that the use of the word

1 "voluntary" in this memo is inappropriate, don't you?

2 A. For all the reasons I've indicated previously,  
3 yes.

4 Q. And you think it could be misleading, don't  
5 you?

6 A. In retrospect, given the litigation, yes.

7 Q. Now, it's part of your job to review JC-42  
8 minutes; right?

9 A. And all the other minutes that emanate from  
10 EIA, yes, sir.

11 Q. Did you ever see any signs of the minutes of  
12 the JC-42 meetings that members of the JC-42 leadership  
13 were treating the patent disclosure obligation as  
14 voluntary, not as an obligation but as something that  
15 was voluntary?

16 A. I don't ever recall seeing that, no, sir.

17 Q. And if you had seen that, would that have  
18 raised a red flag?

19 A. It certainly should have, yes.

20 Q. Let me show you one set of minutes. I won't  
21 spend a lot of time on the minutes.

22 If we could pull up JX-18.

23 May I?

24 JUDGE McGUIRE: Go ahead.

25 THE WITNESS: Thank you.

1 BY MR. PERRY:

2 Q. If we could pull up the heading at the top,  
3 please.

4 Now, these are not particularly legible, but I  
5 think the parties have agreed that these are minutes of  
6 the JC-42.3 meeting in December 1993 in San Diego.

7 In the ordinary course of your job, if these  
8 are minutes of that meeting, would you have reviewed  
9 them?

10 A. I would have, yes.

11 Q. If you'll look on page 8, if you'll look to the  
12 third paragraph from the bottom, and it says: "As a  
13 side issue, IBM noted that in the future they will not  
14 come to the committee with a list of applicable patents  
15 on standards proposals. It is up to the user of the  
16 standard to discover which patents apply."

17 Did you, back in 1993 or early 1994 when  
18 reviewing these minutes, see that passage where IBM had  
19 said that they would not come to the committee with a  
20 list of applicable patents?

21 A. I'm sure I did.

22 Q. Did it raise a red flag with you?

23 A. I'm not sure. And I think, again, I was asked  
24 this question during deposition. I'm not sure. I may  
25 have spoken with Mr. McGhee about this, but in any

1 event, either I didn't interpret it in a way that  
2 suggested that there was an issue under the patent  
3 policy or Mr. McGhee clarified for me what IBM's --  
4 what the situation was.

5 In any event, no, to answer your question,  
6 after whatever due diligence I undertook -- and it's  
7 been a long time, so I can't tell you specifically what  
8 that was -- I was satisfied that there was no problem  
9 or I didn't see a problem.

10 Q. Let me show you -- how long would that due  
11 diligence process take, do you think?

12 A. I have no idea. You're asking me to recall  
13 something that -- this was one of 600, perhaps, sets of  
14 minutes ten years ago, so 6,000 sets of minutes ago.

15 Q. So you don't specifically remember talking to  
16 anyone about this passage?

17 A. No. But if I had -- if I had seen it to be a  
18 red flag, I would have spoken with Mr. McGhee. That's  
19 my routine practice.

20 Q. Did you or did you not -- can you tell us  
21 today, did you or did you not see this and follow up on  
22 it?

23 A. My answer -- the honest answer is I have no  
24 recollection today one way or the other. It's a long  
25 time ago.

1 Q. Let me show you another document in that same  
2 time period, CX-348.

3 That's your handwriting on the front, isn't  
4 it?

5 A. It is.

6 Q. It's dated 12-16-93?

7 A. It is.

8 Q. Right?

9 A. It is.

10 Q. And you say, "Ken, the draft minutes are fine"?  
11 Do you see that?

12 A. I do.

13 Q. And if you'll look at the second page, it's a  
14 memo from Mr. McGhee to you dated December 15, 1993?

15 A. Correct.

16 Q. And he attaches a couple of pages. Do you see  
17 that?

18 A. I do.

19 Q. And look at the -- on page 3, look at the last  
20 paragraph.

21 It says: "As a side issue, IBM noted that in  
22 the future they will not come to the committee with a  
23 list of applicable patents on standards proposals. It  
24 is up to the user of the standard to discover which  
25 patents apply."



1           Do you recognize that language to be the same  
2 language we just saw in the minutes of that meeting?

3           A. I do.

4           Q. So does it appear to you that he sent you the  
5 draft minutes and that you sent them back to him the  
6 next day and said they were fine?

7           A. Yeah. There was an issue, as my cover note  
8 indicates, involving TI and that was what I was focused  
9 on. Again, I don't think there's any -- I don't recall  
10 specifically discussing with him the language related  
11 to IBM. I don't know one way or the other whether we  
12 did.

13          Q. Look back at the January 22, 1996 letter to the  
14 FTC, please. That is RX-669. I'm going to focus on a  
15 slightly different issue in that letter. And I'll  
16 point you to page 2.

17          A. You're slightly ahead of me now. Just indulge  
18 me for a minute.

19          Q. I'll wait. I have another copy if you'd  
20 like.

21          A. No. I'm sure it's here.

22               MR. PERRY: May I?

23               JUDGE McGUIRE: Go ahead.

24               THE WITNESS: No. I have it now. I have it  
25 now.

1 BY MR. PERRY:

2 Q. Page 2.

3 A. Page 2.

4 Q. Yes.

5 In the second full paragraph, there's a  
6 reference to -- well, it says, "Since EIA and TIA are  
7 both ANSI accredited, they endorse and follow the ANSI  
8 intellectual property rights (IPR) policy as it relates  
9 to essential patents."

10 Do you see that part?

11 A. I do.

12 Q. Now, "essential" to you means required patents;  
13 correct?

14 A. No. "Essential" is a term that TIA uses in  
15 its manual. EIA has always interpreted the "required"  
16 to mean is or may be required, as long as I've been  
17 there.

18 Q. As used in this letter, "essential" to you  
19 meant required; correct?

20 A. No. Actually as used in this letter when I  
21 reviewed it, that was TIA's term and I was comfortable  
22 using it.

23 Q. Would you look at page 54 of your January 10,  
24 2001 deposition. January 10, page 54.

25 A. January 10 and what page?

1 Q. Page 54.

2 A. Page 54.

3 Q. You might want to start on page 52 where this  
4 same letter is introduced.

5 A. Yes, sir.

6 Q. Do you see that on page 52 this same letter was  
7 shown to you, this January 22, 1996 letter?

8 A. I do.

9 Q. All right. If you would look on page 54,  
10 please, at line 14.

11 A. Page 54, line 14, yes, sir.

12 Q. Well, if you'll see up at line 1, you'll see  
13 that counsel read to you the same line I just read from  
14 that letter, and do you see on line 14 you were asked,  
15 "Now, when you talk about essential patents, do you  
16 know what you meant by 'essential patents'?"

17 Do you see that?

18 A. Right.

19 Q. And your answer was: "'Essential' is  
20 equivalent to required patents."

21 Do you see that?

22 A. I do.

23 Q. And then the question is: "That is, if  
24 somebody is going to make a part according to the  
25 standard, they would be required to use that patent?"

1           "ANSWER: That is correct."

2           A. Right.

3           Q. Now, when the letter that we're talking about,  
4           RX-669, used the words "essential patents," that meant  
5           required patents; correct?

6           A. That's what I said here, and the only  
7           qualification I would make is that "required" means is  
8           or may be required in the context of disclosure.

9           Q. I'm sorry. When you -- you think when the  
10          January 22, 1996 letter was written, the word  
11          "essential" meant required or required plus?

12          A. No. I -- in the context of the letter I'm  
13          comfortable with "required." I don't think you could  
14          take that word and apply it in other contexts with the  
15          same meaning. The meaning depends on the context.

16          Q. Wasn't it your understanding in 1996 that the  
17          EIA patent policy was not triggered until and unless  
18          conformance to a standard required the use of patented  
19          technology?

20          A. No, sir.

21          Q. Didn't you take that very position in writing  
22          in the Echelon case?

23          A. Not that I recall, but you may be able to  
24          refresh my recollection.

25          Q. Well, let's talk about that case. You talked

1 about it in your deposition.

2 That case involved a standard for portions of  
3 the consumer electronic bus, called CEBus; right?

4 A. Right.

5 Q. C-E-B-U-S; right?

6 A. Consumer electronic bus, that's correct.

7 Q. And that was one of the divisions of the EIA?

8 A. Which was?

9 Q. The consumer electronic -- whatever --

10 A. Yes. Consumer Electronics Association.

11 Q. Was where the standard was being developed?

12 A. Correct.

13 Q. And they were operating under the EIA patent  
14 policy at the time; right?

15 A. That's correct.

16 Q. And an EIA member called Echelon had voted  
17 against some portion of the standard; right?

18 A. That's correct.

19 Q. And they had a competing technology that they  
20 wanted included in the standard; right?

21 A. Yes, sir.

22 Q. And one of the reasons Echelon gave for its  
23 "no" vote was it said that it had a patent that might  
24 affect compliance with the standard; right?

25 A. So far I'm with you. Go ahead. I think that's

1 right.

2 Q. And they gave the patent number to EIA; right?

3 A. You're going way back in time again, but  
4 I'll -- I -- you're just about exhausting my  
5 recollection on that, but let's keep going. I think  
6 so.

7 Q. And what Echelon said in part was that its  
8 disclosure to EIA of its patent and its statement that  
9 it might be required to comply with the standard  
10 triggered the patent policy and meant that EIA had to  
11 ask Echelon for an agreement that it would license on  
12 RAND terms?

13 A. Again, you've kind of exhausted my  
14 recollection, but I don't have any reason to doubt what  
15 you're saying.

16 Q. Do you remember that the patent holder said,  
17 Wait, you might be incorporating our patented  
18 technology, you have to ask me for a RAND letter?

19 A. Not specifically, no. But if you have  
20 documents that will refresh my recollection, I'll be  
21 happy to look at them.

22 Q. Let me show you the response that you wrote.

23 A. Thank you.

24 MR. ROYALL: Your Honor, might I suggest at  
25 some point that we take a break, not necessarily now,

1 but --

2 MR. PERRY: I'm almost done, Your Honor. This  
3 is my last subject matter.

4 MR. ROYALL: Oh.

5 JUDGE McGUIRE: Go ahead.

6 BY MR. PERRY:

7 Q. We've designated this as RX-2299 produced to us  
8 by the EIA in this case, a letter dated August 14,  
9 1995.

10 May I?

11 JUDGE McGUIRE: Go ahead.

12 THE WITNESS: Thank you very much.

13 BY MR. PERRY:

14 Q. Now, Mr. Kelly, this is a two-and-a-half-page  
15 letter; only a portion of it deals with intellectual  
16 property.

17 A. Okay.

18 Q. In fairness to you, you can read the entire  
19 thing, but I was only going to ask you about the  
20 portion on the middle of page 2 that deals with  
21 intellectual property, so I'd like your permission to  
22 go forward as expeditiously as possible. You're okay  
23 with that?

24 A. You have it.

25 Q. If in answering my questions you need to look

1 at more, look at more.

2 You wrote this; right?

3 A. Actually this was written by the law firm of  
4 Squire, Sanders & Dempsey at our request, yes.

5 Q. You signed it, didn't you?

6 A. I signed it and I reviewed it.

7 Q. You approved it?

8 A. I did.

9 Q. Before you signed it?

10 A. Correct. I was just trying to answer your  
11 question of who wrote it.

12 Q. And this was the positions you were taking as  
13 vice president, secretary and general counsel of EIA;  
14 correct?

15 A. Correct.

16 Q. And in that third paragraph on the second page  
17 of this letter you tell Echelon that they had  
18 misinterpreted the ANSI and EIA patent policy. Do you  
19 see that?

20 A. Let's see. Allow me to --

21 Q. Read that paragraph to yourself.

22 A. Thank you.

23 (Pause in the proceedings.)

24 Yes, sir.

25 Q. You told Echelon that they had misinterpreted



1 the ANSI and EIA patent policy; right?

2 A. Yes, sir.

3 Q. And you said in that paragraph, "This policy  
4 requires an SDO to secure a commitment to license a  
5 patented item or process from a patent holder when a  
6 standard refers to a patented technology or, as a  
7 practical matter, conformance to a standard requires  
8 use of the patented technology."

9 Do you see that?

10 A. I do.

11 MR. PERRY: I'll wait for counsel.

12 MR. ROYALL: My only question, I was told that  
13 this may not be on the exhibit list.

14 MR. PERRY: It's not. This is being offered  
15 for impeachment and to refresh.

16 MR. ROYALL: Impeachment? I'm not sure that a  
17 foundation has been laid for impeachment yet.

18 MR. PERRY: Clearly.

19 MR. ROYALL: The witness prior to getting into  
20 this had said that he lacked recollection of details  
21 and asked if he could have his recollection refreshed  
22 with documents, but there was no foundation for  
23 impeachment. We've never seen this before. It's not  
24 on the exhibit list.

25 JUDGE McGUIRE: All right. Mr. Perry?

1           MR. PERRY: He specifically stated that he had  
2 not taken the position in writing that this letter  
3 shows he did and I'm entitled to impeach under the  
4 terms of the order that we stipulated to and agreed to  
5 in September which says that exhibits can be used for  
6 impeachment at trial.

7           JUDGE McGUIRE: Overruled. I will allow you to  
8 go into this.

9           Thank you, Mr. Royall.

10          BY MR. PERRY:

11          Q. Now, does this refresh your recollection that  
12 you did in fact take the position in writing that the  
13 EIA patent policy was not triggered until there was an  
14 assertion and determination that the patented  
15 technology was required to be used for the standard to  
16 be used?

17          A. Until there is an assertion that the patent is  
18 or may be required. Again, I didn't use all those  
19 words in this letter, and if you'd like, I can explain  
20 the context in which this statement was made, which I  
21 think will make it clear to you why it is that this  
22 statement is correct in context.

23          Q. Wasn't it the case that Echelon had said that  
24 their patent, patented technology, might be required to  
25 be used and you were responding to that?

1 A. No. No. That is incorrect.

2 Q. Can I show you what Echelon said, please?

3 A. You can show me what Echelon said and I can  
4 tell you what Echelon said if you'd like.

5 Q. That would be fine, but let's get this --

6 A. By all means.

7 MR. PERRY: This is RX-2300.

8 MR. ROYALL: Is this on the exhibit list?

9 MR. PERRY: No, sir.

10 MR. ROYALL: Again, this is not impeachment.  
11 He hasn't said anything that contradicted this letter.

12 JUDGE MCGUIRE: Well, I'm allowing him to yet  
13 continue in that vein and you'll be able to take it up  
14 again, Mr. Royall, on your redirect. Or you can read  
15 counter-portions if necessary. You'll have that  
16 opportunity, but I'm going to allow him to go into this  
17 inquiry.

18 MR. ROYALL: Okay. Thank you.

19 BY MR. PERRY:

20 Q. Would you look on page 4 -- do you recognize  
21 this to be Echelon's response to the ballot and its  
22 explanation of its "no" vote? Do you see that?

23 A. Yes, sir.

24 Q. And if you'll look on page 4 -- and I'll give  
25 you the time to read the discussion under the heading

1 EIA Will Need to Comply With the ANSI Patent Policy.

2 A. Okay.

3 (Pause in the proceedings.)

4 Right. I'm with you.

5 Q. Now, there's a reference to Intellon  
6 Corporation as saying that it held patents.

7 Do you remember what Intellon, I-N-T-E-L-L-O-N,  
8 was?

9 A. Uh-huh. I remember that they had -- they also  
10 planned to have relevant patents, yes.

11 Q. Right.

12 And the letter from Echelon says that whether  
13 or not the Intellon licenses meet the standard, fair,  
14 reasonable and nondiscriminatory, EIA needs to comply  
15 with the ANSI patent policy.

16 Do you see that?

17 A. I do.

18 Q. And then it says, "That policy requires that an  
19 SDO take certain steps if it is notified that  
20 compliance with a standard may require" --  
21 quote-unquote, may require -- "use of a patented  
22 invention."

23 Does that refresh your recollection that  
24 Echelon had taken the position that the EIA patent  
25 policy was triggered when a company said that its

1 patent -- that compliance with a standard may require  
2 the use of a patented invention?

3 A. Does it refresh my recollection about this,  
4 this case? I don't understand your question.

5 Q. My question to you earlier was hadn't Echelon  
6 taken the position that the patent policy is triggered  
7 when a patent might be required, may be required, to be  
8 used in order to build the standard and that you in  
9 your letter were responding to that comment.

10 Does this refresh your recollection that  
11 Echelon was in fact saying that the policy requires  
12 that an SDO take certain steps if it is notified that  
13 compliance with a standard may require the use of a  
14 patented invention?

15 A. That is what Echelon says in writing in this  
16 document.

17 Now, I thought you said you were going to allow  
18 me to explain.

19 Q. You said you wanted to explain what Echelon  
20 said in the document.

21 A. No. What Echelon said that this was about  
22 rather than what this document says. If you're just  
23 limited to the document, I'm happy to answer that  
24 question, but at some point I'd like to tell you what  
25 this was about.

1 Q. Let me get through with my questions and then  
2 I'll give you an opportunity to explain whatever it is  
3 you want to explain.

4 A. Thank you.

5 Q. But first let me put what I'm focused on in the  
6 record.

7 A. Thank you.

8 Q. When you wrote your August 14, 1995 letter  
9 that is RX-2299, you were responding to this discussion  
10 on page 4 of Echelon's comments on this standard;  
11 right?

12 A. Yes, sir. It appears that that was what  
13 prompted this paragraph, yes.

14 Q. And you told Echelon that there was no need for  
15 EIA to secure a commitment from Echelon to license its  
16 technology; correct?

17 A. Correct.

18 Q. And in fact, the standard was passed without  
19 ever asking Echelon for a RAND letter; correct?

20 A. Correct.

21 Q. And Echelon appealed that decision to the  
22 Board of Standards Review within ANSI; correct?

23 A. Correct.

24 Q. And the Board of Standards Review within ANSI  
25 is what?

1           A. It is the appellate body within ANSI that  
2 reviews proposed American National Standards to  
3 determine if there is an issue to determine whether or  
4 not they should be approved as an American National  
5 Standard.

6           Q. And as far as you know, that's the only time  
7 there's been an appeal involving the EIA patent policy  
8 that's gone that far?

9           A. I don't know of any other EIA case that went up  
10 before that body, yes.

11          Q. And that body issued an opinion and provided it  
12 to you?

13          A. Yes, sir.

14          Q. Now, were you involved in preparing the briefs  
15 on appeal to that body?

16          A. I reviewed the briefs on appeal. I attended  
17 the hearing with outside counsel.

18          Q. With outside counsel?

19          A. With outside counsel from -- Mr. David Noll  
20 from Squire, Sanders & Dempsey and I and other members  
21 of the staff attended that hearing in New York City.

22          Q. And you remember that the Board of Standards  
23 Review held that the EIA patent policy was not  
24 triggered unless the company's patented technology was  
25 essential and that someone who wanted to build a device

1 to comply with the standard had to use the patented  
2 technology?

3 A. I don't remember the EIA patent policy being at  
4 issue. I thought it was the ANSI patent policy, but  
5 you may be right.

6 Q. And you remember that the Board of Standards  
7 Review held that if the EIA patent policy were applied  
8 to a technology that was only related to a standard but  
9 not essential, it would create substantial confusion as  
10 to where the cutoff was in terms of which technologies  
11 would be subject to the EIA patent policy? Do you  
12 remember that?

13 A. Again, my recollection is that ANSI's decision  
14 was directed to its patent policy. But again, I allow  
15 for the fact that I may be wrong. I don't have any  
16 documents before me to indicate what the opinion was.

17 Q. Wasn't the appeal about the EIA patent policy  
18 or was it about the ANSI patent policy?

19 A. I believe it was about the ANSI patent policy  
20 because the matter was before the ANSI board based  
21 upon a request by the Consumer Electronics I think it  
22 was Manufacturers Association at the time to have the  
23 CEBus standard approved as an American National  
24 Standard.

25 Q. Did EIA in its briefs to the board talk about



1 its own patent policy and talk about how it should be  
2 interpreted in this area?

3 A. It may have. I don't recall.

4 Q. When you received the opinion of the Board of  
5 Standards Review, did you seek to appeal it further?

6 A. I'm not sure that we ever had that discussion  
7 or that I thought of that, no.

8 Q. Well, your letter that you wrote in  
9 August 1995, that was about the EIA patent policy,  
10 wasn't it?

11 A. I believe at that time it was, yes, sir.

12 MR. PERRY: I have nothing further,  
13 Your Honor.

14 THE WITNESS: May I have my opportunity to  
15 explain?

16 BY MR. PERRY:

17 Q. I'm sorry. I forgot.

18 A. It happens.

19 Q. You're very correct, Mr. Kelly, and I do  
20 apologize. I do want to give -- now, I may have some  
21 follow-up questions.

22 A. By all means. I think you're entitled.

23 JUDGE MCGUIRE: Go ahead, Mr. Kelly.

24 BY MR. PERRY:

25 Q. Go ahead.

1           A. The Echelon case involved a situation very  
2 simply in which a company that was interested in the  
3 standard, Echelon, proffered a document which, as I  
4 recall correctly, was approximately the size of one of  
5 these stacks of documents on my table, and I'm  
6 referring to roughly a six-inch stack of documents  
7 (indicating).

8           They handed us a patent and they said, Here,  
9 you figure -- this may relate to the work you're doing  
10 in the CEBus committee, why don't you figure it out.  
11 And that was the context in which this case went to the  
12 ANSI Board of Patent Appeals.

13           There was no proffer of relevance. There was  
14 no indication that the patent was or might be required  
15 for anything. They just simply said, Here, this may be  
16 of interest to you, it may relate to something you're  
17 working on. That was the context in which this  
18 discussion occurred, just so the record is clear.

19           Much later in the process, Echelon said may be  
20 required and again it appeared to us at the time and I  
21 think this comes through in the letter that Echelon was  
22 deliberately trying to impede the process, to stall it  
23 out for its own purposes, in violation of the duty of  
24 good faith, and that was the context in which this  
25 arose and that was the issue.

1 Q. And you -- and are you done?

2 A. I'm done.

3 Q. And you understand that a rule that allows  
4 assertions that a patent application may have been  
5 filed that might cover or that might relate to some  
6 part of some standard might be used inappropriately to  
7 delay the standardization process; correct?

8 A. That's exactly what, in my opinion, what was  
9 happening here.

10 Q. And is that one of the policy reasons that  
11 you've heard that's been given for not requiring  
12 disclosure of patent applications?

13 A. No, sir. This is an abuse of process.

14 Q. Have you heard that danger described as one of  
15 the policy reasons given for why the standard should  
16 not be that IP needs to be disclosed whenever it  
17 relates to a standard on consideration as opposed to  
18 covering or reading on or requiring conformance?

19 A. Have I ever seen that argument made? I guess I  
20 have seen that argument made, in fact I've seen it made  
21 in the press of late in connection with this case, but  
22 I think it's again based on a complete misconception,  
23 misunderstanding of what's required in terms of  
24 disclosure of a patent. It's not the whole patent  
25 application. It's not the document. It's enough

1 information so that the committee can understand the  
2 terrain and the area in which they're standardizing and  
3 not be surprised by ticking time bombs that may lay in  
4 their path. That's the whole purpose.

5 Q. To get back to what you said Echelon had  
6 informed you, could you look please again at page -- at  
7 RX-2300 at page 4.

8 A. RX-2300 is, yes, is their comments on the  
9 ballots.

10 Q. Comments by Echelon at page 4.

11 And if you'll look at the third paragraph, and  
12 it says -- it says, "As Echelon alerted" -- are you  
13 with me, the third sentence?

14 A. Yes.

15 Q. "As Echelon alerted EIA on March 16, 1995,  
16 Echelon holds a patent for power line spread spectrum  
17 communications that may affect compliance with the  
18 CEBus power line specification. A copy of this patent  
19 has been supplied to counsel for EIA and is available  
20 on request to other interested parties."

21 A. Yes, sir.

22 Q. Then it goes on to say, "Although Echelon  
23 cannot at this time determine whether use of its  
24 intellectual property is required by firms building  
25 CEBus-compatible power line devices, it might be the

1 case that CEBus power line transceivers would fall  
2 within the scope of the Echelon patent."

3 Do you see that?

4 A. I do.

5 Q. Was it your position at the time that if that  
6 was the true statement of Echelon's state of mind, that  
7 it could not determine whether use of its intellectual  
8 property was required to comply with the standard but  
9 it might be the case, was it your position at the time  
10 that that was not enough to trigger the EIA patent  
11 policy?

12 A. No, sir.

13 Q. Was that your -- was it your position at the  
14 time that that was not enough to trigger a requirement  
15 that the EIA seek a RAND letter?

16 A. No, sir, it was not my position then, it's not  
17 my position now, as I just tried to testify.

18 Echelon took a position in bad faith to delay  
19 and impede the process and we were responding to the  
20 reality, the fact, not the rhetoric in this letter or  
21 in these comments but the reality, and it's referred  
22 to here a copy of this patent has been supplied to  
23 counsel for EIA, which was me, and at the time of the  
24 proffer we said, What is the proffer of relevance?  
25 And they said: We don't know. This may be related to

1 something you're working on. And if you've reviewed  
2 the entire record, as I assume you have, in the ANSI  
3 proceeding you will find that this was a material issue  
4 of fact.

5 So what I'm trying to say, if you'll allow me  
6 to complete my statement, is you are asking me in  
7 essence to relitigate something that was already  
8 litigated before. This was an attempt by Echelon to in  
9 bad faith impede the process, and after they had made  
10 their proffer, there was a lot of rhetoric that they  
11 introduced into the record, such as this, to try to  
12 substantiate a position that they would later take  
13 before ANSI. This is bogus.

14 Q. Are you done?

15 A. I'm done.

16 Q. If Echelon in good faith believed that it could  
17 not determine whether use of its IP was required to  
18 comply with the standard but it thought it might be the  
19 case that it did, was it your position at the time that  
20 a RAND letter was required?

21 A. No. It was my position at the time that they  
22 should have made that disclosure, which they never  
23 did.

24 Q. So they needed to say more than just, as you  
25 understood the application of the EIA patent policy at

1 the time, they needed to tell EIA more than just we  
2 can't tell whether use of our IP is required to conform  
3 with the standard but it might be the case and here's  
4 the patent?

5 A. No. May I answer?

6 Q. Yeah.

7 A. Okay. The answer is no. Again, you asked me  
8 to assume that they were acting in good faith, and I  
9 said if they were acting in good faith that and they  
10 believed what they said in these comments then they  
11 should have made the disclosure and the proffer of  
12 relevance that I talk about in my testimony.

13 In point of fact, this statement -- these  
14 statements were made in bad faith for the purposes of  
15 delaying and impeding the process. And if I may  
16 volunteer this, by the way, this is the very incident  
17 that I alluded to yesterday in my testimony. I didn't  
18 complete the statement.

19 This was the other issue that I had with  
20 Amy Marasco's testimony before the joint hearings. She  
21 said that there had never been a case in which the --  
22 there had been an allegation of patent abuse in  
23 connection with the ANSI process, and I said yes, there  
24 has and I referred her to the Echelon CEBus case. This  
25 is a case, sir, of patent abuse.

1 Q. And you talked about your conversation with  
2 Ms. Marasco just now. She was the general counsel of  
3 ANSI?

4 A. She still is as far as I know. Yes, sir.

5 Q. And you were talking to her about her use of  
6 the word "encourage" and her interpretation of it and  
7 your interpretation of that word; correct?

8 A. No, sir. If you're referring to this specific,  
9 in this specific I was referring to a footnote in which  
10 she said there were no litigated cases involving an  
11 abuse of the ANSI patent policy.

12 Q. I was trying to introduce as -- it's part of  
13 that same conversation?

14 A. Part of that same conversation.

15 Q. You talked with her about her use of the word  
16 "encourage" in some draft of some testimony?

17 A. Correct.

18 Q. And her interpretation?

19 A. I'm not sure if it was "encourage" or  
20 "voluntary." It was one of the other words we talked  
21 about.

22 Q. And you also talked about this Echelon case  
23 back then?

24 A. Correct. Those were my two issues.

25 Q. And that was last year, 2002?



1           A. It was either 2002 or the end of 2001. I can't  
2 recall specifically.

3           Q. And part of that conversation with her and with  
4 others on these issues went on by e-mail; right?

5           A. I recall -- she may have written to me -- I  
6 don't recall an e-mail to her. I might have written an  
7 e-mail to her. I distinctly recall telephone  
8 conversations with Amy Marasco, Richard Taffet and  
9 Dan Bart.

10          Q. When I took your deposition, you said you  
11 believe you did communicate by e-mail. Do you believe  
12 that to be correct?

13          A. As I said, I might have. I just don't, at this  
14 moment, don't remember.

15          Q. And JEDEC at the end of 2002 went to a  
16 different e-mail system; correct?

17          A. Correct.

18          Q. And all the e-mails that were on the old server  
19 were lost?

20          A. No. I believe I said we didn't keep copies and  
21 that statement at the time was incomplete and because  
22 we keep weekly backups or at least we had kept weekly  
23 backups of everything that was on our e-mail system,  
24 so it's there someplace. If you want to go looking  
25 for it, I'm sure it's -- we can make that available to

1 you.

2 Q. The backup tapes?

3 A. The backup tapes which would include  
4 everything on the network for that entire period of  
5 time.

6 Q. When you had the opportunity to correct your  
7 deposition transcript which you now say was inaccurate  
8 and in error, did you take that opportunity to tell us  
9 about the --

10 A. You mean on the errata?

11 Q. Yes.

12 A. No. This is not errata. My understanding of  
13 an errata sheet is to correct transcription errors, not  
14 to change the substance of my testimony. I'm  
15 supplementing my testimony today under oath by now  
16 telling you that I recall backup tapes of our database,  
17 as I'm sure there are backup copies of information of  
18 virtually all databases, including yours.

19 Q. Thank you, Mr. Kelly.

20 A. Thank you, sir.

21 MR. PERRY: I'd like to move in, Your Honor,  
22 RX-2299 and 2300.

23 JUDGE McGUIRE: Any objection?

24 MR. ROYALL: Your Honor, again, we've never  
25 seen these before today. They were not on the exhibit

1 list. We did not have notice of them. We'd like to  
2 have at least an opportunity before we --

3 JUDGE McGUIRE: Go ahead and take that  
4 opportunity over the break.

5 Now, that was in terms of RX --

6 MR. PERRY: 2299 and 2300.

7 JUDGE McGUIRE: How about the other one?

8 MR. PERRY: I'd like to move in RX-691.

9 JUDGE McGUIRE: Any objection?

10 MR. ROYALL: I'm not sure what that is.

11 JUDGE McGUIRE: Do you want to show him a copy  
12 of that, Mr. Perry?

13 MR. PERRY: I'll find it and show it to you.

14 We'll do this at the break, Your Honor.

15 JUDGE McGUIRE: All right. Thank you.

16 MR. PERRY: It's minutes of a meeting, Sean.  
17 They're on the screen.

18 MR. ROYALL: No objection.

19 JUDGE McGUIRE: All right. Entered.

20 (RX Exhibit Number 691 was admitted into  
21 evidence.)

22 JUDGE McGUIRE: I want to do a couple things  
23 here.

24 First off, I assume you want to do a follow-up  
25 with this witness?

1           MR. ROYALL: Not at any length, but I do have a  
2 few questions.

3           JUDGE McGUIRE: What I want to do -- it's  
4 twenty to twelve -- we're going to take off for lunch  
5 until one o'clock, but during this time I also want to  
6 confer with counsel in closed session, and so the  
7 audience at this point can go and break and we'll be  
8 back at one o'clock, and that's true as well for both  
9 Mr. Kelly and the court reporter, and she's excused at  
10 this time, and then I will speak to trial counsel.

11           (Whereupon, at 11:36 a.m., a lunch recess was  
12 taken.)

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1 A F T E R N O O N S E S S I O N

2 (1:05 p.m.)

3 JUDGE McGUIRE: Mr. Kelly, will you have a  
4 seat.

5 We're on the record.

6 You may continue with complaint counsel's  
7 redirect at this time, Mr. Royall.

8 MR. ROYALL: Thank you, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. ROYALL:

11 Q. Mr. Kelly, could I ask you to pull out, if you  
12 have it in front of you, the EP-7-B manual that  
13 Mr. Perry asked you about. I think it's marked as  
14 RX-616.

15 A. Yes, sir.

16 I'm attempting to locate it. I have it.

17 Q. And I'd like to go back to the second page of  
18 the document, which I believe is the page or one of  
19 the pages that Mr. Perry asked you about. It's page 2  
20 of 72 with the heading Notice at the top of the page.

21 A. Yes, sir.

22 Q. And I believe that Mr. Perry asked you about  
23 the second paragraph and in particular the first  
24 sentence of the second paragraph, which states,  
25 "Standards and publications are adopted by EIA in

1 accordance with the American National Standards  
2 Institute (ANSI) patent policy."

3 Do you see that?

4 A. I do.

5 Q. And I don't recall your exact words in  
6 commenting on that language, but do you recall that you  
7 said something to indicate that you may have missed  
8 something or that you may on reflection think there's  
9 something incorrect about that sentence?

10 A. Yeah. I think I said on direct examination  
11 that I missed this or should have caught this or  
12 something like -- something to that effect.

13 Q. And can you explain what, if anything, about  
14 that language you disagree with or think is incorrect  
15 or needed clarification?

16 A. The language is incomplete and may be  
17 misleading because it is incomplete. When we refer to  
18 ANSI in conjunction with EIA or JEDEC or TIA or any  
19 other part of the EIA organization and with reference  
20 to patent policies or procedures, the reference is  
21 always to EIA/ANSI, TIA/ANSI.

22 This, because of the omission of any reference  
23 to EIA, suggests that EIA follows the ANSI patent  
24 policy and that therefore the patent policy of EIA is  
25 the ANSI patent policy, and that is an incorrect

1 inference resulting from this incomplete language.

2 Q. And do you recall we discussed at some length  
3 yesterday the relationship or lack thereof between the  
4 EIA patent policy and the ANSI patent policy? Do you  
5 recall that generally?

6 A. I do, yes.

7 Q. Is the EIA patent policy identical to the ANSI  
8 patent policy?

9 A. No, it's not identical. There are differences  
10 in phraseology. There are differences in substance.

11 Q. And as you understand the two policies, both as  
12 EIA's general counsel and as a member -- former member  
13 of the ANSI working group you've testified about, do  
14 you understand the EIA patent policy to be consistent  
15 with the ANSI patent policy?

16 MR. PERRY: Your Honor, could we just get a  
17 time frame on this question, please.

18 JUDGE McGUIRE: Mr. Royall?

19 BY MR. ROYALL:

20 Q. And for that question I would refer to the  
21 entire time period that you've been involved with EIA  
22 since September 1990.

23 A. No. The patent policy is consistent with the  
24 ANSI patent policy, and my basis for saying that is  
25 that EIA has been audited by ANSI in general in terms

1 of the record retention and also in terms of its  
2 written policies and never been found not to be in  
3 compliance with the ANSI patent policy.

4 And also, if we were not in compliance with  
5 the ANSI patent policy and other ANSI rules, ANSI  
6 would not accept any EIA-generated standards as  
7 American National Standards. That's one of the  
8 requirements to be an American National Standard, to  
9 be consistent with the ANSI rules, and ANSI also  
10 believes we are consistent, but we are not identical,  
11 we are not the same.

12 Q. Do you recall in depositions that you've given  
13 relating to Rambus-related litigation testifying about  
14 this issue before as to whether the ANSI policy was  
15 consistent with the EIA policy?

16 A. I have been asked dozens of questions over a  
17 period of two and a half days I think on this issue  
18 and I've tried always to be consistent in my answer.  
19 Yes.

20 Q. And just to be clear, the two and a half days  
21 you're referring to, is that the combined amount of  
22 time that you spent in deposition in this case and the  
23 prior Infineon and Rambus case?

24 A. Yes. And that doesn't include trial time;  
25 that's just depositions.



1 Q. Now, when Mr. Perry was questioning you  
2 earlier, he asked you some questions about a page in  
3 your -- in the transcript from your January 10,  
4 2001 deposition in the Infineon matter. Do you recall  
5 that?

6 A. I do.

7 Q. I'd like to pull up the page that Mr. Perry  
8 questioned you about in that deposition, and if you  
9 have it in front of you, the actual, it may be easier  
10 for you to see than on the screen.

11 A. Okay.

12 Q. I'm referring to page --

13 A. I'm sorry. Which date was this?

14 Q. It's the January 10.

15 A. January 10?

16 Q. And it's page 54.

17 A. Okay.

18 Okay. Yes.

19 Q. I believe you'll recall that Mr. Perry asked  
20 you about some questions and answers on this page, and  
21 my question is: Do you see in the testimony that you  
22 gave on this page the -- the line numbers aren't on my  
23 copy, but it at least starts on line 4 --

24 MR. PERRY: Your Honor, if I could, please, I  
25 only used this page to impeach him on the essential

1 patent issues that are separate and distinct from  
2 what's the subject matter of the current testimony.  
3 It's an improper use of deposition testimony.

4 JUDGE McGUIRE: Do you have a comment,  
5 Mr. Royall?

6 MR. ROYALL: Well, he was asked about this very  
7 page in the patent policy and I'm simply --

8 JUDGE McGUIRE: Well, it's not the page. It's  
9 the issue. You know, you've got to confine your  
10 examination to the scope of the cross. So how is this  
11 within the scope of the cross-examination?

12 MR. PERRY: My objection was not that it's  
13 beyond the scope of the cross. It was that he can't  
14 use his deposition testimony in this way when I hadn't  
15 pointed him to this deposition testimony at all. He  
16 can't just say did you testify like this before to  
17 support his testimony today. That's not a proper use  
18 of deposition.

19 JUDGE McGUIRE: You brought up a supposed prior  
20 inconsistent statement; is that correct?

21 MR. PERRY: Not on this issue in this  
22 deposition. That's my only point. I used this page to  
23 talk about whether "essential" means required in his  
24 mind.

25 JUDGE McGUIRE: Okay. Mr. Royall, any

1 follow-up to the further objection?

2 MR. ROYALL: Your Honor, if respondent's  
3 counsel has any problem with me pointing him to this  
4 prior deposition testimony, that's fine. I'm happy  
5 to move on. I've got other ways to make the same  
6 point.

7 JUDGE MCGUIRE: All right. Thank you.

8 BY MR. ROYALL:

9 Q. Do you recall, Mr. Kelly, that yesterday I  
10 asked you some questions about something called the  
11 ANSI -- or the patent policy guidelines of ANSI?

12 A. Yes, sir.

13 Q. And if I could ask you -- again, I don't know  
14 if you have it handy in front of you, but I believe the  
15 exhibit that I questioned you about yesterday was  
16 RX-1712. Is that correct?

17 A. I'm sure it's here, but it's not handy. Let me  
18 find it.

19 Q. Is it 1712?

20 A. Yes, sir, I have it.

21 Q. This is an October 2000 e-mail that attaches  
22 various ANSI-related documents that we discussed  
23 yesterday. Do you recall that?

24 A. Yes, sir.

25 Q. And let me ask you to turn to -- my copy is

1 not -- doesn't have page numbers on it, but it's the  
2 page 1 of the guidelines for implementation of the ANSI  
3 patent policy, which is -- I think you testified  
4 yesterday that there were two copies of that document,  
5 and I'm referring to the second, more legible of the  
6 two copies.

7 A. Yes, sir. That begins on page 6 of 21 of  
8 RX-1712.

9 Q. Yes.

10 And do you see at the bottom of that page the  
11 heading Purpose?

12 A. Yes, sir.

13 Q. And you'll recall yesterday that we discussed  
14 some of the language under that heading.

15 Let me ask you to turn to the next page, which  
16 I take it would be page 7 of RX-1712.

17 A. Yes, sir.

18 Q. And do you see the paragraph beginning "By  
19 definition"?

20 A. I do.

21 Q. Could I ask you to read those two sentences --  
22 or I think actually it's three sentences.

23 A. "By definition, guidelines are suggestions --  
24 adherence is not essential for standards developers to  
25 be found in compliance with ANSI's patent policy.

1 Rather, this is an effort to identify possible  
2 procedures that a standards developer may wish to  
3 adopt, either in whole or in part, for purposes of  
4 effectively implementing the patent policy. Additional  
5 or different steps may also be selected for such  
6 purposes."

7 Q. And in terms of what ANSI requires in order  
8 for an ANSI affiliated organization to be in  
9 compliance with the ANSI patent policy, how do you  
10 understand -- what do you understand this language to  
11 mean?

12 A. That there are options that individual standard  
13 developer organizations can adopt that are not  
14 identical to the ANSI policy to address specific  
15 issues, and later an example that we specifically give  
16 in these guidelines is that standard developers may  
17 elect to require the disclosure of patent applications  
18 as well as issued patents.

19 Q. And has EIA in fact chosen to adopt policies  
20 that go beyond what is specifically required by the  
21 ANSI patent policy?

22 A. EIA has, yes.

23 Q. And by doing so, do you understand that EIA is  
24 not in compliance with the ANSI patent policy?

25 A. No, sir. As I've just said before, it is -- my

1 understanding is we are in compliance with the policy  
2 and have been.

3 Q. You were asked a number of questions by  
4 Mr. Perry relating to issues involving I believe it was  
5 the CEBus standard and --

6 A. Yes, sir.

7 Q. -- in particular disclosures that may have  
8 been made by a company named Echelon. Do you recall  
9 that?

10 A. I do.

11 Q. And did this incident involve in any way the  
12 activities of JEDEC?

13 A. No, sir. It involved the consumer sector of  
14 EIA which I believe at the time was named the Consumer  
15 Electronic Manufacturers Association and it's now known  
16 as the Consumer Electronics Association.

17 Q. And was there a particular committee within  
18 that association that was involved in this incident?

19 A. There actually was a committee, and I'm not  
20 sure what the number was, but I'm sure there was a  
21 number assigned to it. It was known as the CEBus  
22 committee within the Consumer Electronic Association's  
23 engineering department.

24 Q. And do you have an understanding of what CEBus  
25 is or what it refers to?

1           A. CEBus is an abbreviation that refers to  
2 consumer electronic bus and CEBus was a multipart  
3 standard that was developed over a period of probably  
4 seven or eight years in different segments, in other  
5 words, not just one standard. There are pieces of the  
6 standard that collectively are referred to as CEBus.  
7 And it was developed by the CEBus committee and  
8 approved by the Consumer Electronic Manufacturers  
9 Association and EIA and ultimately by ANSI.

10           Q. Now, Mr. Perry marked a document -- gave you a  
11 document that's marked RX-2299, which appears to be a  
12 letter that you signed in August of 1995 and sent to a  
13 Mr. Stanfield of Echelon.

14                   Do you have that in front of you?

15           A. Yes, I do. Yes.

16           Q. Prior to this letter, had you had any other  
17 interaction with either Mr. Stanfield or anyone else  
18 from Echelon?

19           A. Yes. Substantial interaction prior to this  
20 letter.

21           Q. Could I ask you then to go back in time, prior  
22 to August 1995, and, if you could, identify the  
23 earliest encounter that you recall ever having with  
24 anyone from Echelon.

25           A. In late 1993 or early 1994, the president of

1 Echelon requested a meeting with the president of the  
2 Electronic Industries Alliance -- Association, who at  
3 the time was Pete McCloskey, and as the meeting was in  
4 progress, or when the meeting was in progress,  
5 Mr. McCloskey called Mr. Gary Shapiro, who was the  
6 president of the Consumer Electronic Manufacturers  
7 Association, and made -- it was Consumer Electronic  
8 Manufacturers Association and/or it may have been  
9 called Consumer Electronics Group at that time -- and  
10 also called for me to come to his office for a portion,  
11 for the last portion of the meeting with the president  
12 of Echelon.

13 Q. And was there such a meeting?

14 A. There was such a meeting, and during the  
15 portion that I attended, the president of Echelon said  
16 that --

17 MR. PERRY: Your Honor, I believe it's hearsay.  
18 The question was: Was there a meeting?

19 THE WITNESS: Oh, there was a meeting. I'm  
20 sorry. There was a meeting.

21 JUDGE McGUIRE: Sustained.

22 BY MR. ROYALL:

23 Q. And do you have a recollection of what occurred  
24 at that meeting?

25 A. Yes, sir.



1 Q. Can you explain your understanding or  
2 recollection of what occurred at that meeting?

3 MR. PERRY: Your Honor, if he's going to tell  
4 us what other people said, we object on hearsay  
5 grounds.

6 MR. ROYALL: Your Honor, I'm only asking for  
7 his understanding. I'm not asking for him to --

8 JUDGE McGUIRE: As long as it goes to his  
9 understanding, as long as he doesn't describe in  
10 testimony what was said by other individuals, I'll  
11 entertain it. Otherwise, it's hearsay.

12 BY MR. ROYALL:

13 Q. Can you explain your understanding or  
14 recollection of what transpired at that meeting, sir?

15 MR. PERRY: Your Honor, can we take  
16 "recollection" out of the question since it's supposed  
17 to be limited to understanding?

18 JUDGE McGUIRE: Yes, we can. Leave it to  
19 understanding.

20 MR. ROYALL: I only put "recollection" in  
21 because I assumed that he can only testify if he  
22 recalls it, but that's fine.

23 BY MR. ROYALL:

24 Q. Can you explain your understanding of what  
25 transpired at the meeting that you've referred to?

1           A.  What transpired at the meeting that I attended  
2           was that Echelon's president expressed his  
3           dissatisfaction with the ongoing CEBus standards  
4           activity and indicated that his company was prepared to  
5           spend a million dollars or more to block the standard  
6           and EIA and CEA should withdraw from the  
7           standard-setting activity.

8           Q.  And did you respond in any way to that  
9           statement?

10          A.  No.  We -- no.  I was surprised.

11          Q.  Was there -- at that point in time -- can you  
12          place this in time when this occurred?

13          A.  Late 1993 or early 1994.

14          Q.  Was Echelon a member of EIA at that time?

15          A.  No, sir.

16          Q.  To your knowledge, to your personal knowledge,  
17          did Echelon do anything subsequent to that that  
18          involved any effort to challenge the CEBus standard?

19          A.  Yes, sir.

20          Q.  Can you explain to your personal knowledge what  
21          you're aware of that Echelon did in that regard?

22          A.  They hired an attorney in Washington who  
23          contacted me on several occasions and indicated that if  
24          the standard-setting went forward that they would  
25          litigate in every forum available to them, and he also

1 lobbied on Capitol Hill for legislation to block the  
2 standard-setting activity.

3 Q. Now, did there come a time after that that the  
4 company Echelon did become a member of EIA?

5 A. Yes, sir.

6 Q. Do you recall when that was?

7 A. It was probably a year after that, roughly  
8 1994-1995 time frame, early.

9 Q. After the meeting that you just testified to  
10 that occurred in the 1994 time frame, did you ever have  
11 any subsequent in-person meetings with any  
12 representative of Echelon?

13 A. On several occasions, yes. I met with -- not  
14 with the CEO but with the CFO, whose name was  
15 Chris Stanfield.

16 Q. And can you explain what understanding,  
17 personal understanding, you have as to what transpired  
18 at that meeting?

19 A. Chris pretty consistently indicated that the  
20 corporate position of Echelon was to block the CEBus  
21 standard, and at one meeting in particular he -- and I  
22 think I testified to this earlier -- proffered to me a  
23 copy, which was about six inches thick, maybe four  
24 inches thick, but it was a substantial document, which  
25 was an issued U.S. patent and he said, Here, this may

1 be relevant to something you're working on, take it for  
2 what it's worth, we just want to be covered.

3 Q. And I'm sorry. What was this gentleman's  
4 name?

5 A. Chris, Chris Stanfield.

6 Q. Did Mr. Stanfield at that time give you an  
7 explanation as to how the patent material that he had  
8 provided to you may or may not relate to EIA's work?

9 MR. PERRY: Your Honor, if this is being  
10 offered for the truth of what was said, it's hearsay.  
11 It doesn't connect.

12 MR. ROYALL: That's fundamental -- that's the  
13 fundamental point. It's not being offered for the  
14 truth of what it's -- what Mr. Stanfield said. It's  
15 being offered for his state of mind or understanding at  
16 the time, which is a foundation to explaining what he  
17 later did.

18 JUDGE McGUIRE: Sustained.

19 BY MR. ROYALL:

20 Q. Did you have any understanding at the time of  
21 this meeting, sir, the one that you've testified about,  
22 as to how, if at all, the patent material that was  
23 provided to you related to EIA's work?

24 A. No, sir. There was no proffer then and there  
25 was no proffer later, and we repeatedly requested a

1 proffer and we never received one.

2 Q. And to be clear, when you say you repeatedly  
3 requested a proffer, what specifically do you mean by  
4 that?

5 A. Identification of how that document that was  
6 presented to us in any way related to any particular  
7 standard that we were working on.

8 Q. And were you given an answer to the proffer  
9 that the -- the repeated proffers that you made in that  
10 regard?

11 A. We were told either "we don't know" or  
12 nothing.

13 MR. PERRY: Your Honor, that was a yes or no  
14 answer.

15 THE WITNESS: I'm sorry.

16 MR. PERRY: It's why I didn't object. He's now  
17 gone forward and given out the hearsay and I will  
18 object on hearsay grounds.

19 JUDGE McGUIRE: And that last answer will be  
20 stricken.

21 Court reporter, please strike that last answer  
22 and I'll -- I will sustain that objection.

23 BY MR. ROYALL:

24 Q. Mr. Kelly, let me ask you another question, and  
25 I'm simply looking for a yes or no answer, if you can

1 give a yes or no answer.

2           You mentioned that there were repeated proffers  
3 or requests for a proffer on the part of EIA to Echelon  
4 with the purpose of gaining some knowledge of what  
5 these patent -- what this patent information may relate  
6 to.

7           To your understanding, were you ever given  
8 answers to the repeated proffer -- repeated requests  
9 for proffer that were made to Echelon?

10          A. No, we were never given a response.

11          Q. Was the standard that was at issue here, the  
12 standard that Echelon had drawn attention to, at some  
13 point later brought up for balloting within the  
14 relevant EIA committee?

15          A. It was, but there's one additional step that I  
16 haven't mentioned. If you want me to mention it, I  
17 will.

18          Q. Please do.

19          A. I took the physical document that was delivered  
20 to me by Mr. Stanfield and gave it to the  
21 vice president of engineering of CEA and I asked him  
22 to meet with the CEBus committee and determine whether  
23 there was any relationship that they could see between  
24 the patent and any of the CEBus standards that they  
25 were working on, and they did and reported back to me

1 that they could see no relevance whatsoever between  
2 the patent and any ongoing work of the CEBus  
3 committee.

4 Q. And what, if anything, did you do with that  
5 information?

6 A. I notified the president of EIA and I notified  
7 our outside counsel.

8 Q. And what, if anything, was your outside counsel  
9 doing for EIA in regard to this whole incident? Did  
10 they have instructions or had you requested them to do  
11 something?

12 MR. PERRY: Your Honor, if he's going to talk  
13 about instructions with his outside counsel, I think  
14 we're going to have a waiver situation and we will  
15 pursue that in discovery.

16 MR. ROYALL: And as we stated yesterday,  
17 Mr. Kelly understands, obviously having been a lawyer  
18 for twenty-some-odd years, he should protect his  
19 privilege and I'm not asking him to reveal anything  
20 with regard to his privilege.

21 JUDGE MCGUIRE: You may proceed.

22 THE WITNESS: I'm sorry. Would you repeat the  
23 question. There was a long colloquy here.

24 BY MR. ROYALL:

25 Q. You mentioned outside counsel and I just wanted

1 you to, if you could say so without disclosing anything  
2 that you would regard as privileged, say anything as to  
3 what your outside counsel was asked to do or what  
4 purpose their -- what was the purpose of their  
5 involvement in this incident?

6 A. I can tell you without revealing any  
7 attorney-client privileged material whatsoever.

8 We had counsel involved in this matter from the  
9 very first because there was a pending threat of  
10 litigation and because there was lobbying going on to  
11 block the standard-setting activity, and as I think I  
12 referred, I said this morning, this entire process or  
13 this entire effort by Echelon was designed to stop the  
14 process, block the process, by their own admission,  
15 either through litigation or through legislation or  
16 otherwise.

17 Q. Did you have -- did you personally have any  
18 understanding as to the basis for any threats of  
19 litigation on the part of Echelon?

20 A. None whatsoever. Just that they were  
21 dissatisfied with the standard-setting activity and  
22 stop it.

23 Q. Now, you referred a little while ago to  
24 ballot.

25 Did this come before the relevant committee for



1 a vote or a ballot at some point?

2 A. It did.

3 Q. And do you recall what, if anything, happened  
4 at that stage?

5 A. We talked about this this morning in my  
6 cross-examination. There was a ballot -- members of  
7 the CEBus committee, including Echelon, were given an  
8 opportunity to respond to a ballot. Echelon did, and  
9 we looked at that document this morning, and they  
10 raised an objection to the approval of the standard on  
11 the basis that they claimed they had indicated that  
12 their patent was or may be relevant to the CEBus  
13 standard, and I responded in a letter that I identified  
14 as having been drafted by our outside counsel for my  
15 signature, and that letter was RX-2299.

16 Q. Now, before we go to the letter, let me ask you  
17 this. I believe you said this morning that it was your  
18 personal view that Echelon in making disclosures to EIA  
19 in connection with this standard was acting in bad  
20 faith. Do you recall that?

21 A. Yes, sir.

22 Q. What basis did you have for reaching a  
23 conclusion that in your own view as EIA general counsel  
24 Echelon by making these patent disclosures was acting  
25 in bad faith?

1           A. By disclosing a patent that had no relevance on  
2 its face to any ongoing work of the committee and then  
3 by subsequently insisting that we obtain licensing  
4 assurances with respect to that, that standard, and it  
5 was reasonably clear to us we weren't going to get  
6 those licensing assurances, it appeared to me and to  
7 others that this was the fulfillment of the threat that  
8 was made in our very first meeting with Echelon where  
9 they said: We will stop you. If it takes a million  
10 dollars, we'll stop you.

11           Q. Now, as you understand -- let's focus on the  
12 time period.

13                   As you understood the EIA patent policy or the  
14 EIA rules at that time, was the organization required  
15 to request assurances in situations in which the  
16 organization itself believed that the patent  
17 disclosures that were made were made in bad faith?

18           A. No. No. Again, this was a special kind of  
19 situation in which there was an announced, in advance,  
20 an announced strategy to block the process and in a way  
21 that to me and to many others indicated bad faith. And  
22 that was why we dealt with the situation specially and  
23 that was really what I wanted to bring out this morning  
24 and may not have fully done so.

25           Q. And does EIA care one way or another whether

1 patent disclosures that are made within the  
2 organization's standard-setting activities are made in  
3 bad faith?

4 A. Absolutely.

5 Q. Why?

6 A. Because if disclosures are made in bad faith,  
7 they have the potential to do what appeared to be the  
8 strategy in this case, which is to stop the process, to  
9 prevent the issuance of an open standard for reasons  
10 that may be anticompetitive, in this case might well  
11 have been anticompetitive.

12 Q. And how would you summarize very succinctly  
13 why specifically was it your view that the disclosures  
14 that were being made by Echelon here were in bad  
15 faith?

16 A. Because the -- according to the experts in the  
17 industry who sat on the CEBus committee, the patent had  
18 no relationship, on its face, to any ongoing work, even  
19 though it was proffered as if it did, and there was no  
20 explanation by Echelon, despite repeated requests, as  
21 to what the relevance of the patent was to the work of  
22 the committee.

23 Q. Now, if I could ask you to refer to the letter  
24 that you sent to Echelon in August 1995, which has been  
25 marked RX-2299, could I ask you if you could identify

1 any language if there is any language in this letter in  
2 which you make reference to the concerns that you had  
3 that caused you to conclude in this time period that  
4 Echelon was acting in bad faith.

5 A. It's in the third paragraph, page 2, middle of  
6 the paragraph: "In the past, when specifically asked,  
7 Echelon has been unable to explain or document how the  
8 CEBus standard refers to or requires use of any of  
9 Echelon's patented technology. Thus, there is no need  
10 for EIA to secure a commitment from Echelon to license  
11 its technology. If such a need does arise, I would  
12 hope and expect that Echelon would promptly make such a  
13 commitment and not interpose an objection that would  
14 delay adoption of the CEBus standard for Echelon's  
15 competitive advantage."

16 And I might have been a little heavy-handed in  
17 the last sentence, but I think you get the point.

18 Q. Now, you recall yesterday that we talked about  
19 an incident also in the mid-1990s in which  
20 Texas Instruments had taken the position that it was  
21 not appropriate for JEDEC to request licensing  
22 assurances in instances in which the patents, their  
23 patents in this case, at issue were not shown to be  
24 essential to the or required by the standards in  
25 issue?

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1           A. Yes, sir.

2           Q. And do you recall that we discussed a memo that  
3 you wrote to Ken McGhee in which you took the position  
4 that it is appropriate for the committee to seek  
5 assurances even in instances in which it's not clear  
6 that the patents are required but even when they may be  
7 required?

8           A. That is correct.

9           Q. Can you reconcile that position which we've  
10 discussed now at some length in your questioning over  
11 the past day with the position that you took in RX-2299  
12 and specifically the paragraph that you just referred  
13 to?

14          A. Yes, sir. Very simply, there's no indication  
15 in the case of Texas Instruments of any bad faith  
16 whatsoever, and it appeared that there was or might be  
17 a requirement to comply with the patent and the issue  
18 was should the committee obtain the assurances given  
19 that possible -- that possibility that -- of a  
20 requirement, and the answer was get a conditional  
21 assurance and move forward with the standard-setting.  
22 No bad faith.

23                 In this case, in the Echelon case, there was  
24 clear indication of bad faith and there was also a  
25 patent that had no relevance, no apparent relevance to

1 the work of the committee, and the only reason we could  
2 see that it was proffered was to fulfill the threat  
3 that was made during that first meeting to bring the  
4 process to a halt.

5 Q. Mr. Kelly, in your view as EIA's general  
6 counsel, was the manner in which you dealt with this  
7 Echelon incident involving the CEBus standard in any  
8 way inconsistent with the manner in which you have  
9 testified now over the past day that you have  
10 interpreted the EIA patent policy throughout your  
11 tenure as the company's or the organization's general  
12 counsel?

13 A. No, sir.

14 MR. ROYALL: No further questions.

15 JUDGE MCGUIRE: Thank you, Mr. Royall.

16 Mr. Perry, recross?

17 MR. PERRY: Just a little bit on this Echelon  
18 issue, Your Honor.

19 RECCROSS-EXAMINATION

20 BY MR. PERRY:

21 Q. I take it, Mr. Kelly, you would agree with me  
22 that EIA doesn't want -- you'd agree with me that EIA  
23 doesn't want people giving false information in patent  
24 disclosures?

25 A. Absolutely.

1 Q. And they want the information that comes in to  
2 be true and accurate?

3 A. And open and honest and good faith, yes.

4 Q. And that's one of the reasons that you've  
5 talked before about actual knowledge on the part of the  
6 representative?

7 A. That's correct.

8 Q. And that the representative needs to have that  
9 actual knowledge so that they can make a truthful and  
10 accurate disclosure of IP to the committee?

11 A. That is correct.

12 Q. Now, when you were writing this letter,  
13 RX-2299, you thought that there was some reason to  
14 believe Echelon had acted in bad faith?

15 A. I felt -- yes, I think there was pretty  
16 compelling evidence that they had.

17 Q. But even though you felt that way, when you  
18 were describing the EIA patent policy, you didn't  
19 describe it in a different way than if you felt the  
20 company was acting in good faith, did you? The policy  
21 was the policy.

22 MR. ROYALL: Can I ask for clarification? He  
23 said when you described it. When he described it when  
24 or where?

25 MR. PERRY: That's a good point.

1 BY MR. PERRY:

2 Q. In RX-2299 -- let's pull it up -- on page 2,  
3 the same paragraph Mr. Royall was pointing you to --  
4 this is your letter to Echelon; correct?

5 A. Correct.

6 Q. In August of 1995?

7 A. Correct.

8 Q. When you describe the EIA patent policy in  
9 various places in that paragraph, did the fact that you  
10 believed that there was some evidence of Echelon's bad  
11 faith lead you to describe the patent policy in some  
12 different way than you would have described it in other  
13 circumstances?

14 A. No, sir. In the context of the ballot  
15 response and this letter, I think that there's an  
16 accurate description of the patent policy and it's not  
17 different than I would have given under any other  
18 circumstances.

19 Q. And what you were asking Echelon and what you  
20 say you asked from them before in the fourth sentence  
21 is to explain or document how the CEBus standard refers  
22 to or requires use of any of Echelon's patented  
23 technology. Did I read that right?

24 A. You did read it right.

25 MR. PERRY: I have nothing further,



1 Your Honor.

2 JUDGE McGUIRE: All right. One last round.  
3 This is it.

4 MR. ROYALL: Yes, Your Honor. Just a couple  
5 questions.

6 REDIRECT EXAMINATION

7 BY MR. ROYALL:

8 Q. Do you recall, Mr. Kelly, whether Mr. Stanfield  
9 replied in writing to your letter?

10 A. No, I don't. But as I tried to indicate in my  
11 response to Mr. Perry, in the context of their comments  
12 in the ballot and this letter, those statements are  
13 accurate, and if you'd like me to, I can point to what  
14 in the ballot I'm referring to.

15 Q. I don't have the exhibit number, but that's  
16 fine.

17 A. Exhibit Number RX-2300 --

18 MR. PERRY: Do you want us to put that up on  
19 the screen?

20 MR. ROYALL: If you don't mind, sure.

21 BY MR. ROYALL:

22 Q. And what page of RX-2300?

23 A. It is -- it's difficult to tell the page number  
24 on this document. I'm not sure there is one. It is --  
25 of the original document, it is page 4.

1 MR. PERRY: Page 5 in the exhibit.

2 BY MR. ROYALL:

3 Q. This is under the heading B?

4 A. C.

5 MR. PERRY: It's on the screen.

6 BY MR. ROYALL:

7 Q. Okay. I think we're with you.

8 A. And if you notice on the third line of the  
9 second paragraph, Echelon itself acknowledges that they  
10 understand that "require" includes may require, so it  
11 didn't appear to us to be necessary to repeat that in  
12 my letter.

13 MR. ROYALL: Your Honor, I have no further  
14 questions.

15 JUDGE McGUIRE: Mr. Perry?

16 MR. PERRY: Nothing, Your Honor.

17 I would like to move in CX-348.

18 JUDGE McGUIRE: Objection?

19 MR. ROYALL: No objection.

20 JUDGE McGUIRE: So entered.

21 (CX Exhibit Number 348 was admitted into  
22 evidence.)

23 MR. PERRY: As well as RX-2299 and RX-2300.

24 MR. ROYALL: No objection, Your Honor.

25 JUDGE McGUIRE: All right. So entered to both

1 of those.

2 (RX Exhibit Numbers 2299 and 2300 were admitted  
3 into evidence.)

4 JUDGE McGUIRE: Thank you for your testimony,  
5 Mr. Kelly. You're excused in this proceeding.

6 Do the parties need some time to confer on some  
7 of the points we've made in closed session?

8 MR. ROYALL: I think we do, Your Honor.  
9 Mr. Oliver is an important person to consult with and  
10 we haven't been able to talk with him, but we can do so  
11 immediately.

12 JUDGE McGUIRE: Okay.

13 MR. ROYALL: And however you prefer to proceed,  
14 we can take a relatively short break and come back and  
15 address this issue.

16 JUDGE McGUIRE: I'll be in my office. You all  
17 can call down there when you're prepared to offer  
18 whatever discussion. That ought to resolve it.

19 MR. STONE: That's fine.

20 JUDGE McGUIRE: Then this hearing for today is  
21 adjourned as far as the public goes and I will continue  
22 any further closed sessions at the time I'm contacted  
23 by counsel.

24 MR. ROYALL: Thank you, Your Honor.

25 MR. STONE: Thank you, Your Honor.

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MR. PERRY: Thank you, Your Honor.  
JUDGE McGUIRE: Thank you very much.  
(Time noted: 1:43 p.m.)

## 1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET NUMBER: 9302

3 CASE TITLE: RAMBUS, INC.

4 DATE: May 15, 2003

5

6 I HEREBY CERTIFY that the transcript contained  
7 herein is a full and accurate transcript of the notes  
8 taken by me at the hearing on the above cause before  
9 the FEDERAL TRADE COMMISSION to the best of my  
10 knowledge and belief.

11

12 DATED: MAY 15, 2003

13

14

15

16 JOSETT F. HALL, RMR-CRR

17

## 18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the  
21 transcript for accuracy in spelling, hyphenation,  
22 punctuation and format.

23

24

25 DIANE QUADE

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