

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RESPONDENT'S PROPOSED AGENDA FOR FINAL PREHEARING
CONFERENCE ON APRIL 28, 2003, AND STATEMENT OF POSITION
REGARDING CERTAIN PROPOSED AGENDA ITEMS**

On Friday afternoon, April 25, 2003, counsel for Respondent Rambus Inc. ("Rambus") and Complaint Counsel held a telephone conference in part to discuss possible agenda items for today's Final Prehearing Conference. Among the items discussed during that telephone conference that Rambus would like to place on the agenda for today's Conference, subject to the approval of Your Honor, are the following:

1. Agreement on the procedure to ensure that the exhibit list at the conclusion of the hearing is consistent with the records and understandings of counsel for the parties and Your Honor's staff.

2. The procedure Your Honor would like the parties to follow in handling lengthy exhibits during the course of the hearing, including whether you would like to be provided with hard copies of exhibits as they are used with witnesses.

3. Confirmation of the agreement of counsel regarding the advance disclosure of witnesses to be called to testify at the hearing.

4. The logistics of handling presentation of evidence within the applicable *in camera* rules.

5. How Your Honor would prefer to handle rulings on objections to designated deposition testimony and the most efficient method for presenting deposition testimony during the course of the hearing. On this issue, as well as to some extent on other issues, counsel for the respective parties have different points of view.

6. Whether Your Honor would allow and/or desire mini-summations at designated times during the case, such as after each witness or certain witnesses, with the mini-summations to be limited to no more than 3 to 5 minutes for each side. Such mini-summations would be intended to help place in context the testimony that preceded them and to highlight relevant issues from the perspective of each side. Again, there is a divergence of view among counsel as to the desirability of this procedure.

7. How Your Honor would prefer to handle one of the issues raised in Rambus's trial brief, namely, whether Complaint Counsel should be permitted to raise in opening, and to introduce evidence in support of, a theory of liability that does *not* depend on whether Rambus complied with applicable JEDEC disclosure policies. Again, this is a point on which counsel have different views.

8. There may, of course, be additional agenda items that Complaint Counsel feel should be added to this list. In addition, Rambus's counsel will endeavor to address any other agenda items that Your Honor wishes to discuss at this Conference.

Set forth below is a brief discussion of Rambus's position on some of these issues.

1. Preparation of Final Exhibit List

Rambus suggests that on a periodic basis, such as at the beginning or end of each day or at the beginning or end of each week, designated representatives of each side and a representative of Your Honor's staff meet to agree upon which exhibits have been offered during that day or week and, of those that were offered, which have been admitted and which have not. Such a procedure may minimize any disagreement at the conclusion of the hearing as to what evidence has been admitted.

2. Handling of Exhibits During the Hearing

Your Honor has expressed a desire not to have a complete set in hard copy of all of the parties' exhibits. Rambus seeks to inquire whether you would like to be provided with hard copies of exhibits as they are used with witnesses so that you may have the exhibit to review as the testimony proceeds, whether you would like to be provided with images of all of the exhibits on the parties' exhibit lists that can be retrieved electronically, or whether there is any other procedure that might be useful to assist you in accessing and reviewing the exhibits being discussed.

3. Advance Disclosure of Witnesses

Counsel for the parties have agreed that they will provide 72 hours notice of the witnesses to be called by them in their case-in-chief and/or their rebuttal case and that, for

purposes of computing the 72 hours notice, weekends are not to be counted. For example, notification of the identity of the witnesses to be called Wednesday will be provided by the prior Friday morning by 9:00 a.m. With respect to witnesses represented by counsel for the other party, notification of the date on which that witness is expected to be called will be given on the Monday of the preceding week.

4. In Camera Proceedings

Counsel understand that when either party seeks to introduce evidence that is subject to a pre-existing *in camera* order or that is ordered to be heard *in camera* during the course of the hearing, members of the public who are in attendance at the hearing will be asked to exit the courtroom. Complaint Counsel have advised Rambus's counsel that it is their further position that all representatives of Rambus, other than their outside counsel, also should be removed from the courtroom. Rambus is opposed to any effort to exclude its employees, officers, and representatives from this hearing and sets forth briefly below the basis for its opposition.

Complaint Counsel's desire to exclude all Rambus representatives from *in camera* hearings would violate Rule 3.45(a), is not authorized by Rule 4.10(f) (upon which Complaint Counsel apparently rely), and would violate Rambus's rights under the Due Process and Confrontation Clauses of the United States Constitution.

Rule 3.45 is the regulation on point that applies here. Rule 3.45, as its title makes clear, governs "[i]n [c]amera" proceedings. Rule 3.45 specifically provides that *respondents*, not just their outside counsel, have a right to be present for all portions of proceedings brought against them, including portions involving testimony or documents

submitted *in camera*. Rule 3.45 provides in pertinent part: “[R]espondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access [to *in camera* material]” 16 C.F.R. § 3.45(a) (emphasis added). Rule 3.45 thus specifically provides that both “respondents” *and* “their counsel” have a right to be present.

Rule 4.10(f), upon which Complaint Counsel rely, does not compel a different result. As a threshold matter, Rule 4.10 is not even part of the Commission’s Rules of Practice and Procedure for Adjudicative Hearings, but is part of the Commission’s “Miscellaneous Rules.” Most of Rule 4.10 relates to the disclosure of confidential information to the public pursuant to requests made under the Freedom of Information Act, 5 U.S.C. Rule 552 (“FOIA”). See Rules 4.10(a)-(b) (creating exemptions to FOIA’s disclosure requirements), Rule 4.10(c) (imposing criminal penalties on Commission personnel who “make public” confidential information), Rule 4.10(d) (relating to FOIA “requester[s]”). The balance of Rule 4.10 relates generally to “the taking of oral testimony” and “Commission administrative . . . proceedings,” including investigations, depositions, and the like. See 16 C.F.R. § 4.10(f), (g). Rule 4.10 is thus a general provision that does not control over the specific provisions of Rule 3.45 governing the *in camera* portions of adjudicative hearings. See Norwest Bank Minn. Nat. Ass’n v. FDIC, 312 F.3d 447, 451 (D.C. Cir. 2003) (“When both specific and general provisions cover the same subject, the specific provision will control”); Strawberry v. Albright, 111 F.3d 943, 947 (D.C. Cir. 1997) (“It is well established that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.”).

More fundamentally, even if Rule 4.10(f) somehow applied here, it would not authorize the exclusion of Rambus from the *in camera* portions of this proceeding; indeed, it could not do so without violating Rambus's due process rights. In Helminski v. Ayerst Laboratories, 766 F.2d 208 (6th Cir. 1985), the Sixth Circuit thoroughly canvassed existing case law on when a civil litigant may be excluded from the trial of its own case.

Observing that "a party's presence is important not only so that he may observe the proceedings but also so that he can aid his attorney in devising trial strategy," id. at 214, the court concluded:

[S]ince an attorney is merely the representative agent of the litigant and not the litigant's alter ego, a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment. . . . Consistent with due process, a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver.

Id. at 213-17 (emphasis added).

Helminski directly applies here. Rambus's outside counsel are not technical experts; they cannot be expected to comprehend and appreciate the full significance of the often technical data that will form a substantial part of the parties' *in camera* submissions. Rambus's counsel therefore need its client's representatives present at all portions of the proceeding to assist them with evaluating the evidence presented and with "devising trial strategy." Id. at 214.

Excluding Rambus from any portion of this proceeding would also violate its rights under the Confrontation Clause, particularly given that, as the Commission itself has recognized in its Operating Manual, an adjudicative proceeding such as this one is similar

in some respects to a “federal criminal prosecution,” thus justifying some of the same procedural protections that are applicable in criminal trials. See FTC Operating Manual, Ch. 10, Rule 13.6.4.6 (applying requirements of the Jencks Act, which applies in federal criminal proceedings, to the Commission’s “adjudicative proceedings”). As the Supreme Court has held, “[o]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.” Illinois v. Allen, 397 U.S. 337, 338 (1970) (emphasis added). See also Small v. Endicott, 998 F.2d 411, 415 (7th Cir. 1993) (“[A] defendant’s right to a fair trial requires his presence at all important steps in the criminal proceeding.”).

For all of these reasons, Rambus’s party representatives may not be excluded from any portions of this proceeding.

5. Handling of Objections to Designated Deposition Testimony;
Presentation of Deposition Testimony

Complaint Counsel have designated an extensive amount of deposition testimony for submission to Your Honor. Rambus estimates that when those designations are added to the more modest preliminary designations by Rambus and to its counter-designations to Complaint Counsel’s designations, the designated deposition testimony would stretch to 15-20 hours if read in open court. In order to simplify the submission of this testimony, Rambus believes that the parties should agree to certain procedures for the presentation of deposition testimony during the hearing.

Complaint Counsel have proposed that the deposition testimony that was not videotaped be “acted out” in the courtroom, with someone playing the role of the

questioner and someone else playing the role of the witness. Setting aside issues that might arise as a result of efforts to dramatize the testimony during such a presentation, two other issues of some note arise. First, it is often difficult for court reporters to accurately transcribe testimony that is being read, because persons ordinarily read at a faster pace than they would speak in normal conversation. Thus, an accurate transcript of deposition testimony that is presented is probably better provided in the form of the designated transcripts themselves being marked for the record rather than asking the court reporter to record all of the testimony that is being read. Second, it would seem to be a more efficient use of everyone's time if the transcripts were simply submitted to Your Honor to read outside of the presence of counsel and the parties.

After you have completed your reading, or at the conclusion of the hearing, you would be able to announce for the record which objections you had sustained. The other objections would be overruled, and the transcripts which have been marked to show the testimony being designated and the objections being made, then could be made part of the record. This would preserve the objections to the testimony and also would provide an accurate record of the testimony presented to Your Honor. Further, it would do so without involving the unnecessary process of lawyers playing questioner and witness and reading all of the testimony to Your Honor (a time-consuming and oft-criticized process usually reserved for jury trials). See generally Annotated Manual for Complex Litigation, Third (Thomson West 2003), ¶ 22.33 (“Because the reading of depositions at trial is boring for the jury and a poor way to communicate information, it should be avoided whenever possible. . . .”); id. at ¶ 22.333 (“In nonjury cases, relevant excerpts of depositions . . . can

be prepared as exhibits, usually without being read at trial and transcribed by the court reporter. The judge can later read these excerpts along with other exhibits. . . .”).

To the extent videotaped testimony is being offered, Rambus suggests a similar procedure. First, it is most useful, at least in the view of Rambus’s counsel, if Your Honor rules on objections to deposition testimony at least 24-36 hours before the testimony is presented. This is necessary in order to complete the sometimes complicated editing and review process. After Your Honor has ruled on objections to testimony that would be presented by videotape, Rambus suggests that the videotape then be provided to Your Honor in a format that can most easily be viewed by you. Again, this can occur outside the presence of counsel, since the transcript that was designated originally to indicate the testimony being offered and on which objections were noted, and your rulings on those objections, can be made part of the record. The video that is provided to Your Honor for viewing also can be made part of the record.

Rambus suggests that the easiest way to provide this videotaped testimony to Your Honor may be on a CD-ROM or DVD, since in most instances the testimony will have been digitized for editing purposes. Assuming that the equipment is available to enable Your Honor to review videotaped testimony in one of these two formats – and if it is not, such equipment can be provided – it seems as though it would be a more efficient use of everyone’s time for Your Honor to view this testimony without the need for counsel, the court reporter and other staff also being present.¹

¹ Alternately, Your Honor may simply wish to receive marked transcripts rather than videotape (a choice that would save many hours of paralegal and attorney time that would be spent on the video editing process in the next few weeks).

6. Mini-Summations

It has been the experience of Rambus's counsel, that in a trial of this length, it is useful to pause from time to time, sometimes as frequently as at the end of each witness's testimony, to allow each side to summarize (very briefly) its view of the significance of the testimony and evidence that has just been introduced. Such mini-summations (3-5 minutes by each side) have become quite common in some courts. Particularly in a non-jury case, there should be no concern that such mini-summations might result in any prejudice or "grandstanding." Rather, they should assist Your Honor in understanding how the testimony that has been elicited fits into each side's theory of the case, and they should simplify (and perhaps even shorten) the parties' closing arguments. Rambus suggests that mini-summations, on the order of 3 minutes per side, be scheduled at times that Your Honor feels would be most useful for your purposes. See id., ¶ 22.34 ("Some judges have found that in a lengthy trial it can be helpful to the trier of fact for counsel from time to time to summarize the evidence that has been presented. . . . [T]he purpose is to aid the trier of fact in understanding and remembering the evidence and not to argue the case.").

7. Scope of the Complaint

As Your Honor is aware, Rambus contends that Complaint Counsel have recently expanded the theories of liability in this matter by arguing, and presumably by seeking to introduce evidence, that a Section 5 violation may be made out in this proceeding *without* proving that Rambus breached any portion of the JEDEC patent policy. Complaint Counsel have stated that they do not intend to seek permission to amend the Complaint, as they feel that this theory of liability was adequately set out in the Complaint. For the

reasons set out at pp. 19-23 of Rambus's Trial Brief, Rambus seeks the opportunity to be heard on this issue at the Conference.

DATED: April 28, 2003

Respectfully submitted,

Gregory P. Stone
Steven M. Perry
Peter A. Detre
Sean P. Gates
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
(213) 683-9100;
(213) 687-3702 (facsimile)
(202) 663-6158;
(202) 457-4943 (facsimile)

A. Douglas Melamed
Jay Palansky
Kenneth A. Bamberger
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Sean C. Cunningham
John M. Guaragna
Gray, Cary, Ware & Freidenrich LLP
401 "B" Street, Suite 2000
San Diego, California 92101
(619) 699-2700

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Adam R. Wichman, hereby certify that on April 28, 2003, I caused a true and correct copy of *Respondent's Proposed Agenda for Final Prehearing Conference on April 28, 2003, and Statement of Position Regarding Certain Proposed Agenda Items* to be served on the following persons by hand delivery:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

M. Sean Royall, Esq.
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-372
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

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

Malcolm L. Catt, Esq.
Attorney
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Richard B. Dagen, Esq.
Assistant Director
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Adam R. Wichman

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)

RAMBUS INC.,)
a corporation,)
_____)

Docket No. 9302

CERTIFICATION

I, Adam R. Wichman, hereby certify that the electronic copy of *Respondent's Proposed Agenda for Final Prehearing Conference on April 28, 2003, and Statement of Position Regarding Certain Proposed Agenda Items* accompanying this certification is a true and correct copy of the paper version that is being filed with the Secretary of the Commission on April 28, 2003 by other means:

Adam R. Wichman
April 28, 2003