

claims with prejudice² and dismissing Infineon's monopolization claims as moot.³ On March 21, 2005, all parties to the *Infineon* litigation entered into and filed a Stipulation of Dismissal with Prejudice regarding "all claims and counterclaims alleged by either Rambus or Infineon in this action at any time (including any claims and counterclaims previously dismissed either voluntarily or involuntarily)." Stipulation at 1.⁴ That Stipulation appears to terminate the *Infineon* litigation for all purposes.

In light of these developments, the Supplemental Memo asks the Commission to "compel Rambus to produce the remaining Spoliation Documents, and reopen the record in this case to admit all Spoliation Documents used by Rambus or Infineon in open court and now in the possession of Complaint Counsel (including those documents attached [to the Supplemental Memo]), as well as all additional Spoliation Documents yet to be produced by Rambus." Supplemental Memo at 26. Rambus has neither filed nor sought leave to file a response to the Supplemental Memo.

Reopening the record to admit supplemental evidence at this stage of the proceeding should only be done in compelling circumstances. Use of the Commission's power under 16 C.F.R. § 3.54(a) to reopen the record to admit supplemental evidence after oral argument should only be countenanced where (1) the party offering the evidence has acted with due diligence; (2) the supplemental evidence is relevant, probative and non-cumulative; and (3) the supplemental evidence can be admitted without undue prejudice to the other party. *Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 362-63 (D.C. Cir. 1977); *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248, n.38 (1998). The application of this standard to the instant motion weighs strongly in favor of reopening this record to admit evidence from the record of the evidentiary hearing.

² At the conclusion of the March 1, 2005 arguments, Judge Payne ruled as follows:

I conclude, on the basis of the record and the law, that Infineon has proved, by clear and convincing evidence, that Rambus is guilty of and liable for unclean hands that bar its access to this court. And I have concluded that [Infineon] has proved, by clear and convincing evidence, a spoliation that warrants dismissal of this action as the only appropriate sanction after having – of the patent infringement case after having considered the alternatives. An opinion will issue in due course with findings of facts and conclusions of law. . . .

Infineon, Transcript of March 1, 2005 at 1138-39 (Attachment 1 to the Supplemental Memo).

³ *Id.* at 1145.

⁴ A filed copy of the Stipulation of Dismissal with Prejudice may be found at <http://investor.rambus.com/downloads/2005-03-21%20Stipulation%20of%20Dismissal%20With%20Prejudice.pdf>.

Materials supporting the Motion to Compel raise potentially disturbing issues regarding the adequacy, completeness and reliability of the record in this matter. *Compare* Initial Decision at 244 (“[T]here is no indication that any documents, relevant and material to the disposition of the issues in this case, were destroyed.”) *with Infineon* Order of May 18, 2004 at 18 (Attch. B to Motion to Compel) (“Those [privileged] documents contradict the assertions made by Rambus in the FTC proceeding and here that its document retention program was conceived, adopted, and implemented for benign and legitimate purposes.”). We must, therefore, take measures to insure the integrity of this proceeding.

The two issues that could weigh against reopening the record, privilege and prejudice, do not appear likely to be significant issues here. The materials that will be admitted to the record by this Order were all produced in open court during the evidentiary hearing. Counsel for Rambus participated fully in both the taking of the discovery preceding that hearing and in the hearing itself. Rambus had a complete opportunity to marshal and present its own evidence during the evidentiary hearing. Finally, the Stipulation of Dismissal filed on March 21, 2005 eliminates any possible appeals of Judge Payne’s spoliation orders. In light of these facts, there does not appear to be any credible argument either that the record presented during the evidentiary hearing contains privileged materials or that the use of that record, as permitted by this Order, will be unduly prejudicial to Rambus.⁵

Complaint Counsel’s pursuit of spoliation in this matter has been diligent. Much of the evidence at issue in this Motion either did not exist when the record closed in this matter or was denied to Complaint Counsel by claims of privilege that no longer apply. The materials supporting this Motion show that the evidence that will be added to the record is both probative and relevant to issues in this matter. In addition to being relevant to spoliation of evidence, the evidence that will be added to this record includes, for example, evidence indicating from which Rambus patent files materials were removed (DTX 5376, Attch. 14 to Supplemental Memo) and evidence that Rambus destroyed records of its participation within JEDEC in anticipation of litigation (DTX 4068, Attch. 11 to Supplemental Memo). Further, because some of these materials likely contradict evidence and positions taken in this matter previously, any claim that these materials will be cumulative does not appear likely to possess substantial merit. The Commission hereby expressly finds that good cause exists to grant in part Complaint Counsel’s Motion to Compel. Accordingly,

IT IS ORDERED THAT, insofar as Complaint Counsel’s Motion to Compel requests reopening this record to admit the record of the evidentiary hearing, such Motion shall be, and it hereby is, **GRANTED**; insofar as Complaint Counsel’s Motion to Compel requests an order

⁵ The motion papers did not provide the Commission with any guidance regarding the nature of the additional information Complaint Counsel was seeking to add to the record of this matter when they used the phrase “all additional Spoliation Documents” in their request for an order. Supplemental Memo at 26. The Commission is not in a position to assess any issues of privilege or other problems that might arise if such additional documents were included in this Order. Thus, this Motion must be denied in part.

compelling production by Rambus of “Spoliation Documents” outside of the record of the evidentiary hearing in the *Infineon* litigation, such Motion shall be, and it hereby is, **DENIED** without prejudice; and

IT IS FURTHER ORDERED THAT:

1. On or before June 14, 2005, Complaint Counsel and Rambus may each file such parts of the record of the evidentiary hearing in the *Infineon* litigation as each party may deem relevant to any issue in this matter; provided, however, that the filing of such materials shall be accompanied by a schedule of exhibits which includes both exhibit numbers for each exhibit and a brief description of each exhibit; and
2. On or before June 24, 2005, either party may file any objections to the exhibits filed by the other party, stating with particularity each exhibit to which each objection is made and the nature of and legal basis for the objection; and
3. On or before July 5, 2005, Rambus and Complaint Counsel shall file their responses, if any, to the filings required or permitted by 2., above;⁶ and

IT IS FURTHER ORDERED THAT the March 21, 2005 Unopposed Motion of Respondent Rambus Inc. for Release of Certain Testimony Cited in the Initial Decision into the Public Record, made with the consent of both Complaint Counsel and Intel Corp., shall be, and it hereby is, **GRANTED**.

By the Commission.

Donald S. Clark
Secretary

ISSUED: May 13, 2005

⁶ If significant additional evidence remains in the record after the Commission rules on any objections filed pursuant to Paragraph 2, above, the parties should anticipate being ordered to file, and respond to each other’s filing of, amended proposed findings of fact and conclusions of law cross-referenced to previously filed proposed findings and to the related provisions in the Initial Decision. Such order will also likely request the identification of any prior misstatements or misrepresentations of fact by any person in this matter which can now be identified by reason of the admission of any supplemental evidence and the filing of any motions seeking additional relief or inferences arising by reason of any alleged spoliation of evidence.