

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

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Lebowitz

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**RESPONSE BY RESPONDENT RAMBUS INC.
TO COMPLAINT COUNSEL'S PETITION TO
MODIFY THE SCHEDULE IN THE
COMMISSION'S JULY 20, 2005 ORDER**

REDACTED PUBLIC RECORD VERSION

Respondent Rambus Inc. (“Rambus”) does not oppose Complaint Counsel’s petition to modify the schedule set out in the Commission’s July 20, 2005 Order.

Rambus does *not*, however, agree with Complaint Counsel that a motion to reopen the record to admit some or all of the documents recently retrieved by Rambus from “backup media” would necessarily be proper. Rambus submits this brief in order to correct some of the misstatements and arguments made in Complaint Counsel’s petition with respect to the content and import of the recently produced documents.

Complaint Counsel’s petition makes several statements of fact and assumptions that are unsupported by the evidence. There is no evidence, for example, that all other copies of the documents that Rambus has recently produced had been “purged” in order to prevent their use in litigation, as Complaint Counsel suggest. For one thing, at least one of Complaint Counsel’s carefully selected exhibits was produced by Rambus *prior* to trial.¹

Even if each of these documents *were* being produced for the first time, there is no basis for assuming that all other copies were destroyed for improper reasons. Complaint Counsel apparently would have the Commission assume that because the nine documents they attach to the petition supposedly undermine Rambus’s position, they and the rest of the new documents were improperly “purged.” In fact, the newly produced documents as

¹ Rambus produced a copy of Attachment 9 to Complaint Counsel’s petition in January 2003, well before the trial. *See* exhibit 1 (RF 0685373-5). In addition, the only language cited by Complaint Counsel from another of their nine exhibits is virtually identical to that contained in an admitted trial exhibit, CX 724, produced by Rambus long before trial. *Compare* exhibit 2 hereto (R155836) with Attachment 8.

a whole, and the documents attached to Complaint Counsel's petition in particular, are either cumulative or are largely supportive of the conclusions drawn by Judge McGuire and the positions taken by Rambus. Complaint Counsel point, for example, to documents that show that Rambus intended in 1992 to try to modify its patent claims [

] Attachment 3 to

Petition. Complaint Counsel have pointed to similar documents in the past, including Rambus's June 1992 and September 1992 draft business plans, *see* Appeal Brief of Counsel Supporting the Complaint, filed April 16, 2004, p. 11, so this new document and similar documents are cumulative. More to the point, the cited documents do nothing to undermine the objective, undisputed fact that Rambus had no pending patent applications that covered SDRAM at the time that the JEDEC SDRAM standard was adopted. *See* Initial Decision, ¶ 959 and p. 274. These documents also do nothing to undermine Judge McGuire's conclusion that both the patent laws and JEDEC's policies permitted JEDEC members to amend their patent applications to protect their inventions from unlicensed use. *Id.*, pp. 282-286. Finally, these documents do nothing to undermine the Federal Circuit's holding (adopted by Judge McGuire) that Rambus was not required to disclose its patent applications even if it believed that its (unsuccessful) efforts to cover the SDRAM standard had in fact been successful:

“Complaint Counsel cannot salvage their case by relying on proof that Rambus might have believed (albeit wrongly) that claims in its applications, if issued, would have covered technologies being standardized by JEDEC. As the Federal Circuit observed:

‘The JEDEC policy, though vague, does not create a duty premised on subjective beliefs. JEDEC’s

disclosure duty erects an objective standard. It does not depend on a member's subjective belief that its patents do or do not read on the proposed standard. . . . [T]he JEDEC test in fact depends on whether claims reasonably might read on the standard. A member's subjective beliefs, hopes, and desires are irrelevant. Hence, Rambus's mistaken belief that it had pending claims covering the standard does not substitute for the proof required by the objective patent policy.'"

Initial Decision, p. 277, quoting *Infineon Technologies A.G. v. Rambus Inc.*, 318 F.3d 1081, 1104 (Fed. Cir. 2003) (emphasis added).

Complaint Counsel also point to several documents that show that Rambus management and employees had questions about whether JEDEC *required* disclosure of a member's relevant intellectual property or had merely *requested* such disclosure. Petition, p. 4, citing attachments 2 and 5. While the cited documents are merely cumulative of other record evidence, they also do not contain the *answer* to that question. That answer – as far as Rambus and many other JEDEC members were concerned – came at the March 1993 JEDEC meeting attended by Rambus engineer Billy Garrett. As Mr. Garrett's newly located trip report from that meeting shows, the Chairman of the JEDEC 42.3 committee, IBM engineer Gordon Kelley, announced at the March 1993 meeting that his company, IBM, would "NOT discuss patents in JEDEC." *See* Attachment 6 to Petition (capitalization in original). Mr. Garrett's trip report shows that Chairman Kelley also stated that:

"[IBM] will not discuss patents that they have, or are in process nor will they acknowledge anything about anyone else's patent. This is not against JEDEC rules. The rules ask members to make the committee aware of any patents th[at] may relate to standardization issues, and let everyone else

know about them. IT DOES NOT REQUIRE YOU TO DO SO. IBM chooses not to do so.”

Id. (capitalization in original). As Mr. Garrett’s use of capitalization indicates, this announcement by the JEDEC Committee Chairman was important confirmation for Rambus that disclosure at JEDEC meetings was *voluntary*, not required. *See generally* Initial Decision, p. 265 (finding by Judge McGuire that there is “overwhelming evidence from contemporaneous documents, the conduct of participants, and trial testimony that the disclosure of intellectual property interests was encouraged and voluntary, not required or mandatory”); *id.*, p. 267 (finding based on testimony and documents that Chairman Kelley had announced at JEDEC meetings that IBM would not disclose its intellectual property); *id.*, ¶ 961 (noting that the official JEDEC minutes of the March 1993 meeting had recorded IBM’s position that it would not disclose intellectual property). In sum, the fact that Complaint Counsel can now point to additional documents showing a question by Rambus about whether it was obligated to disclose its intellectual property is far outweighed in importance by the new evidence that Rambus heard and understood Chairman Kelley’s clear answer to that question.

Complaint Counsel’s petition also attacks Rambus’s assertion of the attorney-client privilege with respect to privileged documents located on the backup media that would have been produced in the *Infineon* case, pursuant to a privilege piercing order, if the documents had been located earlier. Petition, p. 7. As Complaint Counsel know very well, Rambus risks a finding of waiver if it voluntarily produces such documents. Indeed, Complaint Counsel themselves argued *in this case* that Rambus had

waived its privilege as to several broad subject matters by voluntarily producing privileged documents in a prior lawsuit that had been ordered produced in another lawsuit. Rambus has no choice but to assert the privilege in these circumstances.

Complaint Counsel also suggest that the newly logged privileged documents will support their position on the merits. They have no basis for making such an assumption, for, as Judge McGuire found, the privileged documents and testimony *already* in the record support the proposition that Rambus had followed the advice of its lawyers to keep its patent applications confidential for legitimate business justifications. *See* Initial Decision, ¶¶ 929-937 and pp. 288-289. There is no basis for Complaint Counsel to assert that the newly located privileged documents are different in kind.²

As stated above, Rambus does not oppose Complaint Counsel's request for an extension. Rambus agrees with Complaint Counsel that the short continuance contemplated by Complaint Counsel's petition will allow the parties to submit briefing and amended findings "that address, in a unified manner, all of the pertinent documents that Rambus has recently uncovered. . . ." Petition, p. 8. In that regard, Rambus has informed Complaint Counsel that it is preparing its own motion to reopen the record to admit evidence that should have been, but was not, produced by one or more trial

² Indeed, one of the newly located documents submitted by Complaint Counsel shows that a lawyer *invited by JEDEC* to make a presentation at a JEDEC meeting similarly advised JEDEC members *not* to disclose their patent applications at JEDEC meetings unless they were *required* to do so. *See* attachment 5. At the very next JEDEC meeting, Rambus learned from the Committee Chairman that disclosure was *not* required. *See* attachment 6.

witnesses or their employers. For example, Rambus has obtained [

] This evidence, which was unavailable to Rambus at the time of trial, seriously undermines the testimony offered by several of Complaint Counsel's witnesses and contradicts one of the central premises of Complaint Counsel's appeal – that the DRAM manufacturers had no reason to suspect that Rambus would have broad intellectual property coverage and had relied upon the JEDEC standardization process as giving [

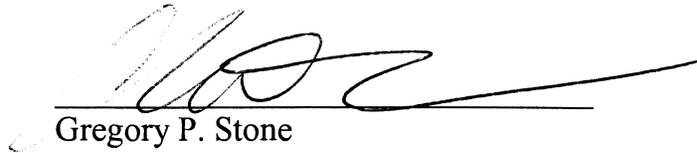
] *Id.*³

³ Rambus is mindful of the high standard applicable to motions to reopen the record, and while Dr. Gustavson's email on its face clearly belongs in the record, Rambus will in its forthcoming motion set out a fuller explanation of the impact of this withheld document, and a limited number of other documents, on Complaint Counsel's allegations.

For these and the other reasons stated herein, Rambus does not oppose
Complaint Counsel's request for additional time.

DATED: August 5, 2005

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Helena T. Doerr, hereby certify that on August 5, 2005, I caused a true and correct copy of the *Response By Respondent Rambus Inc. To Complaint Counsel's Petition To Modify The Schedule In The Commission's July 20, 2005 Order* to be served on the following persons by hand delivery:

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