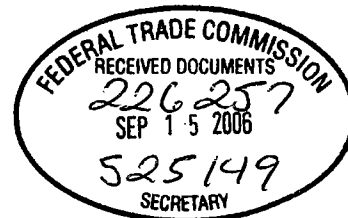


PUBLIC

UNITED STATES FEDERAL TRADE COMMISSION

ORIGINAL

Docket No. 9302



In the Matter of

RAMBUS INC.,

A CORPORATION

**AMICUS CURIAE BRIEF OF
JEDEC SOLID STATE TECHNOLOGY ASSOCIATION
IN SUPPORT OF COMPLAINT COUNSEL**

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This *amicus curiae* brief is submitted by the JEDEC Solid State Technology Association (“JEDEC”), in support of Complaint Counsel’s brief addressing the proper remedy in this proceeding.

INTEREST OF AMICUS CURIAE

JEDEC is at the epicenter of this case. The Commission has now found that Rambus Inc. (“Rambus”) breached JEDEC’s patent-disclosure policies and practices, and engaged in conduct that violated the antitrust laws and Section 5 of the Federal Trade Commission Act. JEDEC’s membership was a prime target of Rambus’s deceptive and anti-competitive conduct. Rambus abused JEDEC’s standard-setting process, and thereby undermined confidence in the collaborative principles that make JEDEC’s work possible.

JEDEC executives and members testified at the trial, and JEDEC’s patent policy and practices are a central focus of the Commission’s Decision issued on August 2, 2006. JEDEC also submitted an *amicus curiae* brief on April 16, 2004, in support of Complaint Counsel’s appeal from the Administrative Law Judge’s Initial Decision dated February 23, 2004.

JEDEC is a non-profit trade association which serves as the semiconductor and solid-state engineering standardization body of the Electronic Industries Alliance (“EIA”).¹ EIA is a trade association that represents all areas of the electronics industry. During the period in question, EIA conducted standard-setting activity through several divisions and units, including JEDEC.

JEDEC develops and maintains technical standards through its 50 committees. About 270 member companies and 2,700 individuals actively participate on these committees to develop and maintain standards to meet industry and user needs for semiconductor devices and

¹ JEDEC is an acronym standing for the Joint Electron Device Engineering Council.

integrated circuits. These member companies include both manufacturers and users of these products, and others allied to the field.

Since 1958, JEDEC has been one of the foremost standards development organizations for the semiconductor industry. JEDEC was a division of EIA until 2000, when it was separately incorporated as a non-profit, non-stock corporation.

JEDEC exists for the development of standards by all interested parties that are open for use by the entire industry. That is its mission and purpose. To achieve such open standards, JEDEC's policies seek to "[a]void requirements" in standards "that call for the exclusive use of a patented item or process." (EP-7-A, JX0054-001, at 009.) (*See* EP-3F, CX0203a-001, at 011.)

JEDEC's published patent policy also states that JEDEC will in no case issue a standard requiring use of a known patent or patent application "unless all the relevant technical information . . . is known to the formulating committee[,] subcommittee, or working group," and JEDEC receives "written assurance that a license will be made available to all applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination." (JEP-21-I, CX0208-019.)

JEDEC has a direct interest in this case, which involves the application of JEDEC's patent policy and Rambus's deceptive conduct at JEDEC committee meetings. According to the Commission's unanimous Decision of August 2, 2006, "JEDEC's policies (fairly read) and practices . . . provide a basis for the expectation that JEDEC's standard-setting activity would be conducted cooperatively and that members would not try to distort the process by acting deceptively with respect to the patents they possessed or expected to possess." (Decision, at 66.) The Commission went on to conclude that "Rambus's conduct was calculated

to mislead JEDEC members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced against JEDEC-compliant products.” (Decision, at 67.)

SUMMARY OF ARGUMENT

JEDEC explains in this *amicus* brief why the appropriate remedy for Rambus’s “deceptive course of conduct” (Decision, at 66) is an order enjoining Rambus from collecting future royalties on JEDEC-compliant devices that require use of Rambus’s patents. Such a remedy would be equivalent to a prospective, industry-wide, royalty-free license.

JEDEC does not propose such a remedy as a “punitive” one, nor one based solely in equity. Instead, this remedy is the minimum necessary to restore the competitive outcome that would have existed if Rambus had disclosed its patents and patent applications to the JEDEC committee. The Commission’s own factual findings establish that JEDEC would not have adopted the Rambus technology into a JEDEC standard had Rambus timely disclosed its patent rights. In its Decision, the Commission expressly found that Rambus could not prove otherwise. (Decision, at 94.) Since JEDEC would have chosen some other technology had it known of Rambus’s claimed patent rights, Rambus would not have obtained any royalties at all from JEDEC-compliant devices. The Commission should therefore prohibit Rambus from collecting royalties in the future so that Rambus does not continue to profit from its deceptive and anti-competitive conduct.

Rambus’s contrary position that it should be permitted to charge some royalty is based on its speculation that, if it could turn back the clock and pretend that it did disclose its patents in a timely fashion to JEDEC, the JEDEC committee would have nonetheless adopted the Rambus technology subject to unspecified licensing terms. The Commission should not seriously consider this contention because (a) it rests on multiple, speculative assumptions, and

(b) the Commission expressly found that Rambus cannot prove its speculative hypothesis. As the wrongdoer, Rambus (and not the victims of its deception) should bear the consequences of any lingering uncertainty about the hypothetical world of *ex ante* disclosure by Rambus.

An order requiring prospective, royalty-free licenses would not be an “extreme” remedy under the circumstances of this case. The Supreme Court has recognized that such a license may be warranted to restore competition, and the Commission has imposed exactly this remedy in a prior case closely resembling this one.

Such a prospective, royalty-free remedy is especially appropriate because Rambus has enjoyed unreasonably high royalties for years. A prospective zero-royalty will only rectify some small part of the injury to competition caused by Rambus since the industry “locked-in” to its technology due to Rambus’s deceptive and anti-competitive conduct at JEDEC.

ARGUMENT

The Commission’s Decision sought the parties’ views “regarding possibilities for establishing reasonable royalty rates for JEDEC-compliant products affected by Rambus’s exclusionary conduct,” based “on the existing record.” (Decision, at 119.) JEDEC submits that, under the circumstances of this case, the Commission’s own findings, and basic remedial principles, the future “reasonable royalty rate” is a zero rate.

I. JEDEC’S POLICY IS TO AVOID STANDARDS THAT REQUIRE USE OF PATENTED TECHNOLOGY

The starting point for any remedy analysis should be JEDEC’s policies and practices. Those guided the conduct of JEDEC’s committees and members in the standard-setting process.

JEDEC’s goal is to promulgate open standards that can be used widely by the industry in order to promote interoperability and compatibility of semiconductor and memory

devices.

JEDEC has a strong aversion to the inclusion of royalty-bearing patents in JEDEC standards. This aversion is expressed in its publications. For example, the 1990 EIA Engineering Publication that governed standards issued by JEDEC (then one of EIA's units) stated that JEDEC should "[a]void requirements . . . that call for the exclusive use of a patented item or process." (EP-7-A, JX0054-009.)

While JEDEC had no absolute prohibition on adopting standards that required the use of patented technology, JEDEC cautions that such standards should be considered with "great care." (JEP-21-I, CX0208-019.) Even where such a standard is seriously considered, it may be adopted as a JEDEC standard only if the patentee has committed to license the technology on a royalty-free basis or on reasonable and non-discriminatory ("RAND") terms.

JEDEC's policy states, in pertinent part, as follows:

EIA and JEDEC standards . . . that require the use of patented items should be considered with great care. While there is no restriction against drafting a proposed standard in terms that include the use of a patented item** if technical reasons justify the inclusion, committees should ensure that no program of standardization shall refer to a product on which there is a known patent unless all the relevant technical information covered by the patent is known to the formulating committee subcommittee, or working group. If the committee determines that the standard requires use of patented items, then the committee chairperson must receive a written assurance from the organization holding rights to such patents that a license will be made available without compensation to applicants desiring to implement the standard, or written assurance that a license will be made available to all applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination. . . .

** For the purpose of this policy, the word "patented" also includes items and processes for which a patent has been applied and may be pending.

(JEP-21-I, CX0208-019) (emphasis added.)

JEDEC's policies also prohibited committees from even considering technology

for inclusion in a standard unless all relevant information about relevant patents was known to the JEDEC committee. This policy was displayed in “viewgraphs” to be shown to JEDEC members at all JEDEC meetings:

Standards that call for use of a patented item or process may not be considered by a JEDEC committee unless all of the relevant technical information covered by the patent or pending patent is known to the committee, subcommittee or working group.

(CX0208-027) (emphasis added.) (*See* Decision at 53.)

These policies and practices set the foundation for addressing the remedy for what the Commission found was Rambus’s “deception under Section 5 of the FTC Act,” which led to Rambus’s acquisition of a “monopoly position” that substantially enhanced the value of its patents. (Decision, at 67, 73.)

II. THE ONLY MEANS FOR THE COMMISSION TO RESTORE COMPETITION TO THE MARKETPLACE IS BY ENJOINING RAMBUS FROM SEEKING ROYALTIES ON JEDEC-COMPLIANT PRODUCTS

The remedy to be selected by the Commission should restore competition to the state that would exist “but for” Rambus’s conduct that the Commission has now found to have been both deceptive and anti-competitive.²

The Commission’s own findings in this case are the most powerful evidence that JEDEC would not have adopted the Rambus technology into a JEDEC standard even if Rambus had made timely disclosure of its patents and patent applications. As a result, the “reasonable royalty” for Rambus’s patent, under the circumstances of this case, is a zero royalty on use in

² The relief in an antitrust case should, “so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.” U.S. v. U.S. Gypsum Co., 340 U.S. 76, 88 (1950). *See* International Salt Co. v. U.S., 332 U.S. 392, 401 (1947)(relief should “pry open to competition a market that has been closed by defendants’ illegal restraints”); Ecko Prods. Co., 65 F.T.C. 1163, 1216 (1964), *aff’d sub nom. Ecko Prods. Co.*, 347 F.2d 745 (7th Cir. 1965).

JEDEC-compliant memory devices.

Numerous findings of the Commission establish that Rambus's technology would not have been adopted into SDRAM or DDR SDRAM standard had Rambus timely disclosed its patents and patent applications.³ Most significantly, the Commission found that "Rambus has failed to meet its burden of demonstrating that JEDEC would have standardized Rambus's technologies even if Rambus had disclosed its patent position." (Decision, at 94) (emphasis added.)

This finding is virtually dispositive. It establishes that the best that Rambus could hope to establish through further proceedings is a ruling that the evidence is evenly balanced as to whether JEDEC would have adopted the Rambus technology even if full disclosure had been made. However, the Commission's many other findings – described next – decidedly tip the scale against such a fence-straddling outcome.

The Commission's Decision relied in significant part on JEDEC policy manuals. (Decision, at 52-53.) As noted above, those manuals stated JEDEC's position that standards requiring use of patented technology should be "avoided," and in all circumstances should be considered "with great care." (Decision, at 52-53; *see* Part I, *supra*.) The Commission recognized that JEDEC, as a matter of policy, had a strong aversion to standards requiring the use of patented technology in memory products.

This aversion was also demonstrated in practice. The Commission found that, in

³ There are compelling arguments that the Commission should choose a remedy that also bars Rambus from collecting royalties on DDR2 SDRAMs, even though the Commission did not find that JEDEC was "locked into" Rambus's patents for that generation of memory devices by Rambus misconduct while the DDR2 SDRAM standard was under consideration. These arguments rest on the evidence showing that Rambus's technology was the prime candidate for the DDR2 SDRAM standard only because of Rambus's prior misconduct at JEDEC when earlier standards for SDRAMs and DDR SDRAMs were being developed.

the one instance when JEDEC members did learn that Rambus had a patent that was likely to cover a different standard under consideration, “the members took deliberate steps to avoid standardizing the Rambus technology.” (Decision, at 74.)

The Commission also found that a key member of the JEDEC committee – Sun Microsystems – “would have strongly opposed the use of royalty-bearing elements” for this type of device. (Decision, at 75.) This finding is especially important because JEDEC seeks as broad a consensus as possible in selecting standards.

The Commission also found that JEDEC’s adoption of patent-laden standards was rare: “Payment of royalties on memory interfaces has been very much the exception, rather than the rule, in the computer industry.” (Decision, at 96-97.) Given this industry practice, it falls upon Rambus to overcome the presumption that JEDEC would have acted consistently with general practice – and rejected a royalty-bearing standard – if Rambus had made timely patent disclosures. As noted above, the Commission has already concluded that Rambus cannot sustain this burden. (Decision, at 94.)

The Commission also found that “[a]lternative technologies were available when JEDEC chose the Rambus technologies, and could have been substituted for the Rambus technologies had Rambus disclosed its patent position.”⁴ (Decision, at 76.) Significantly, the Commission found that “[s]ome of the major firms in the industry found these alternatives viable, and even preferable.” (Decision, at 76)(emphasis added).

The JEDEC committee’s selection of the chosen technology, over alternatives, was a close call even when the committee had no reason to believe that the Rambus technology

⁴ The Commission also found “that the evidence does not establish that Rambus’s technologies were superior [to available, unpatented alternatives] on a cost/performance basis.” (Decision, at 82.)

posed any risk of future royalty demands. As the Commission found: “JEDEC members – the principal buyers of the relevant technologies – gave these alternatives serious, searching consideration; in fact, the technologies as to which Rambus subsequently revealed patent claims sometimes were chosen only after prolonged debate.” (Decision, at 76.) If the Rambus technology was barely selected as a standard when JEDEC believed that it was royalty-free, there is no reason to believe that the JEDEC committee – which the Commission found was “highly sensitive to cost” (Decision, at 74) – would have selected the Rambus technology if it had known that the Rambus technology would be encumbered by royalties.

Taken together, these findings show, by a substantial preponderance of the evidence, that JEDEC would not have adopted Rambus’s technology into a JEDEC standard if Rambus had disclosed its patent rights.

III. ANY UNCERTAINTY ABOUT JEDEC’S RESPONSE TO THE HYPOTHETICAL DISCLOSURE BY RAMBUS OF ITS PATENTS MUST BE BORNE BY RAMBUS

After reviewing Rambus’s expert witnesses’ testimony which it found “fraught with uncertainty and potential error,” the Commission noted in its Decision that the Rambus technology may have enjoyed a slight cost advantage over the least costly alternative (if royalty payments are ignored). (Decision, at 94-95.) Therefore, Rambus may argue that a “reasonable royalty rate” should correspond to the small cost advantage that the Commission might discern, based on the *post hoc* expert testimony presented in this proceeding (2002-2004) but unavailable to the JEDEC committee in the 1990’s, when standardization decisions were made.

This approach has factual and legal defects. As a factual matter, it ignores all the findings of the Commission set forth in Part II above. Moreover, it ignores the actual dynamics of JEDEC meetings in three key respects.

First, in those cases where JEDEC committees decided that they would consider

patented technology if RAND assurances were given, JEDEC and its committees did not themselves engage in *ex ante* royalty negotiations about the level of a “reasonable” royalty.⁵ (See John Kelly Trial Tr. 1882-83, 2072-74.) In those instances where a JEDEC committee learned of a patent covering a proposed standard (see Decision, at 57-59), there is no evidence that the committee secured a RAND commitment to a specific royalty rate.

Second, while the JEDEC committee was extremely sensitive to costs, it did not have expert economists available to attempt to compute minute differences in the costs of different alternatives. JEDEC committee members had to vote “up” or “down” on alternatives based on their own assessments, taking into account JEDEC’s preference for avoiding the use of patents in JEDEC standards.

Third, as noted above, some key JEDEC members (such as Sun Microsystems) would have “strongly opposed” this proposed standard had it required the use of patented technology. (Decision, at 75.) Since JEDEC committees place great emphasis upon reaching consensus in standard-setting, the strong opposition of key members renders implausible the hypothesis that the committee would ever have knowingly adopted Rambus’s patent-laden technology as a JEDEC standard.

Basic legal principles also dictate against the resort to multiple assumptions and hypotheses to guess retrospectively about what level of royalty payments would have been acceptable to the JEDEC committee if it had known of Rambus’s patents. Such an exercise is far

⁵ Chairman Majoras, in a recent speech, acknowledged that standard-setting organizations have historically been reluctant to engage in *ex ante* negotiations with patent holders out of fear that they could be charged with a *per se* violation of the Sherman Act. D. Majoras, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, at 6 (Sept. 23, 2005), available at <http://www.ftc.gov/speeches/majoras/050923stanford.pdf>. See J. Kelly & D. Prywes, *A Safety Zone for the Ex Ante Communication of Licensing Terms at Standard-Setting Organizations*, Antitrust Source (March 2006), available at www.abanet.org/antitrust/at-source/06/03/03-06.html.

too speculative: the Commission would need to postulate (a) whether the JEDEC committee would have sought a RAND commitment from Rambus if it learned of its patents, instead of peremptorily rejecting the Rambus technology; (b) whether Rambus would have committed to RAND licensing at “reasonable” rates, which is suspect in light of the Commission’s rejection of Rambus’s claim that its current royalties are reasonable (Decision, at 114); (c) what level of royalties would Rambus have demanded in light of the available alternatives; (d) how the JEDEC committee (rather than some *post hoc* analysis by a Rambus-paid expert) would have valued the incremental cost advantage, if any, of Rambus’s technology over alternatives; (e) how JEDEC would have resolved the opposition of some influential members to any standard in this area encumbered by royalty demands; and (f) whether the JEDEC committee would have been able to engineer around Rambus’s patents depending on the magnitude of Rambus’ royalty demands. Cumulatively, the odds are slim that Rambus could have overcome all of these obstacles, if it had disclosed its patents, to persuade JEDEC to adopt its technology into a standard.

The Commission should not turn down this path into compound speculation. If it were to do so, the Commission would effectively place the burden of resolving the hypothetical outcome of these multiple uncertainties on the wronged parties, rather than on the wrongdoer. This is inappropriate under fundamental remedial principles. It is well settled that “when damages are hard to estimate, the burden of imprecision does not fall on the innocent party.” LaSalle Talman Bank, F.S.B. v. United States, 317 F.3d 1363, 1374 (Fed. Cir. 2003). See Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977) (“the burden of uncertainty as to the amount of damage is upon the wrongdoer”); 3 Restatement of the Law Contracts 2d, § 352, comment a (1981) (“Doubts are generally resolved against the party in breach”).

This principle applies here because the Commission has already concluded that damage to the industry, and to the public, has occurred as a result of Rambus's anti-competitive conduct and deception. According to the Commission, there is "[s]ubstantial record evidence" showing "that Rambus's royalty rates are not reasonable," and those rates were achieved through deceptive and anti-competitive conduct. (Decision, at 114-15; *see id.* at 67-68)(emphasis in original). Moreover, the Commission has already found that Rambus cannot prove that "JEDEC would have standardized Rambus's technologies even if Rambus had disclosed its patent position." (Decision, at 94.)

IV. UNDER THE FACTS OF A PARTICULAR CASE, A REASONABLE ROYALTY RATE FOR PROSPECTIVE USE OF A PATENT MAY BE ZERO

The Commission's Decision portrayed Complaint Counsel's earlier recommendation of a zero royalty rate as "extreme," citing United States v. National Lead Co., 332 U.S. 319 (1947). (Decision, at 119.) In the cited passage, however, the Supreme Court merely found that royalty-free licenses were not necessary "[o]n the facts before us" to "effectively enforce the Antitrust Act." 332 U.S. at 349. (Decision, at 119.) The Court went on to expressly recognize that, in some circumstances, "it may well be that uniform, reasonable royalties computed on some patents will be found to be but nominal in value," such that "royalties might be set at zero or at a nominal rate." 332 U.S. at 349 (emphasis added). This is such a case.

The Commission can hardly portray a zero royalty rate as "extreme" in light of its own precedent in In re Dell Computer Corp., 121 F.T.C. 616 (1996). In that case, the Commission issued a consent decree against a company that, like Rambus, failed to disclose

patents to a standard-setting group. As in this case,⁶ the Commission found that “had [the standards group] known of the [undisclosed] patent, it could have chosen an equally effective, non-proprietary standard.” 121 F.T.C. at 624 n. 2. The Commission enjoined the patentee from enforcing its patent, which equates in practice to a zero royalty rate. This choice of remedy was not an afterthought, since the Commission stated that its remedy was “carefully circumscribed.” 121 F.T.C. at 624. The Commission felt no need to guess what the formulating committee would have done if the respondent had made a full and timely disclosure of its patents and applications to the standard-setting group. In Dell Computer, the Commission also noted that its remedy “is consistent with those cases, decided under the concept of equitable estoppel, in which courts precluded patent-holders from enforcing patents when they failed properly to disclose the existence of those patents.” 121 F.T.C. at 624-25. In short, the Commission’s own precedent confirms that a zero royalty rate may be imposed in a case like this.

The Commission should also take note that this case differs from most others where it has faced the question whether to impose a royalty-free license on patents. Typically, as in In re Xerox Corp., 86 F.T.C. 364 (1975), the Commission has confronted the question whether to impose a royalty-free license on patents used by a firm to solidify its market power for another product (such as officer copiers). Here, Rambus does not produce any products. The purpose of its anti-competitive conduct was to increase the value of its intellectual property *per se*. In these circumstances, it is more vital for the Commission’s remedy to address forcefully the inflated value of the patent. Any reservations respecting the imposition of royalty-free licenses in the

⁶ In this case, the Commission found that “[a]lternative technologies were available when JEDEC chose the Rambus technologies, and could have been substituted for the Rambus technologies had Rambus disclosed its patent position. Some of the major firms in the industry found these alternatives viable, and even preferable.” (Decision, at 76)(footnotes omitted). See Part II, *supra*.

typical case, where the Commission is concerned about competition in a product market, do not apply here.

V. **A ZERO ROYALTY RATE IS ALSO CONSISTENT WITH THE COMMISSION’S REMEDIAL PRINCIPLES**

A zero-royalty order will be consistent with the principle of proportionality. As Commissioner (then Professor) Kovacic previously wrote, “[r]emedies should be proportional in the sense that they reflect the dangers of the conduct by which a firm has achieved or sustained a position of dominance.” W. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 Conn. L. Rev. 1285, 1312-13 (Summer 1999). He explained that “[t]his consideration requires enforcement agencies and the courts to focus on whether the conduct at issue is unambiguously harmful.” *Id.* at 1313. He added that “more drastic remedial measures [can be justifiably imposed] where the behavior at issue is wholly or largely lacking in redeeming procompetitive traits.” *Id.* See United States v. U.S. Gypsum Co., 340 U.S. 76, 89-90 (1950) (those in utter disregard of the law “call for repression by sterner measures than where the steps could reasonably have been thought permissible”).

These principles, applied to this case, support the “more drastic” remedy of a royalty-free license because Rambus’s conduct was wholly lacking in redeeming, procompetitive traits. Once again, this is apparent from the Commission’s own findings. The Commission specifically noted that “[d]eceptive conduct is extraordinarily difficult to justify,” and it went on to find that “Rambus engaged in a deliberate course of deceptive conduct that included selective omissions and outright misrepresentations relating to its intellectual property.” (Decision, at 69.) The Commission also soundly rejected each of Rambus’s claims that its conduct had some redeeming, pro-competitive effect. (Decision, at 68-71.)

The following words of Commissioner Kovacic are particularly apt here: “Using powerful remedies in these circumstances provides greater protection against repetition of clearly damaging behavior, justifiably dismantles market positions achieved through efficiency-suppressing means, and deters efforts by other firms to employ similar tactics.” 31 Conn. L. Rev. at 1313 (emphasis added).

As a standard-setting organization, JEDEC is particularly concerned with these three goals: (a) avoiding a repetition of Rambus-like conduct at JEDEC; (b) dismantling the monopoly power obtained by Rambus through its deception in JEDEC’s own meetings, which has already allowed Rambus to collect unreasonably high royalties for many years; and (c) deterrence of future abuses of the JEDEC standard setting process.

The importance of deterrence cannot be overstated. There will be no real disincentive to future Rambus-like conduct if the worst remedy that can be expected is a rollback of royalties to some inherently speculative level that might have been set if complete and accurate disclosure had been made in the first instance. This concern is especially great where, as here, the Commission specifically found that Rambus could not prove that JEDEC would have adopted the Rambus technology under unspecified RAND terms if there had been disclosure. (Decision, at 94.) If there is no significant deterrent to Rambus-like behavior, participation in standard setting at JEDEC and elsewhere will be chilled, as participants fear that they are being set up by other participants through deceptive conduct. The pro-competitive benefits of standard setting – whose achievement is the ultimate purpose of this proceeding – will be frustrated. As the Chairman of JEDEC’s DRAM Task Group (IBM’s Gordon Kelley) wrote regarding patent non-disclosures, “this issue can destroy the work of JEDEC.” (Decision, at 59.)

An order requiring royalty-free licensing by Rambus would also not raise any of the problems that Commissioner Kovacic identified as sometimes accompanying compulsory-

licensing remedies. Because such an order in this case would not seek to create structural changes among competitors for memory-device technology or products, there is no need for the Commission to regulate matters such as the amount of “know-how” to be transferred, whether personnel should also be transferred, or other mechanics. 31 Conn. L. Rev. 1285, at 1305. The Commission’s order should be simple to administer, with no need for “extensive continuing oversight.” *Id.* at 1317.

VI. THE COMMISSION ITSELF SHOULD DECIDE THE REMEDY BASED ON ITS FINDINGS AND THE APPLICABLE LAW

The Commission requested the parties’ views on “alternative mechanisms and procedures for determining reasonable royalty rates, such as an independent arbitrator, a special master, or an ALJ.” (Decision, at 120.)

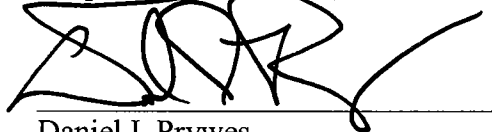
JEDEC submits that the findings already made by the Commission dictate the choice of remedy. Therefore, there is no need for any decision-maker (such as an arbitrator or ALJ) other than the Commission. No one can apply the Commission’s findings better than the Commission itself. Congress has named the Commission – not a special master or arbitrator – as “the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed.” Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 612-13 (1946).

The Commission should also act as the decision-maker because it is already intimately familiar with the substantial record in this case. The Commission indicated that it plans to determine “reasonable royalty rates” based on “the existing record” (Decision, at 120), obviating the need for additional evidentiary proceedings. By acting itself, the Commission will also expedite the final resolution of this case, which is especially important as time passes and SDRAMs and DDR SDRAMs are overtaken in the marketplace by next-generation technology.

CONCLUSION

For the foregoing reasons, the Commission should itself determine, on the existing record and its own findings, that Rambus should be enjoined from charging any royalties on its patents for JEDEC-compliant memory devices.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Prywes', written over a horizontal line.

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Dated: September 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on September 15, 2006, I caused two copies of the *Amicus Curiae* Brief of JEDEC Solid State Technology Association in Support of Complaint Counsel to be served by first-class mail, postage prepaid, on the following:

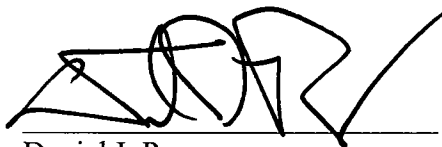
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