

PUBLIC

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

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of

RAMBUS INC.,

a corporation.

Docket No. 9302

**REPLY OF RESPONDENT RAMBUS INC. IN SUPPORT OF ITS PETITION
FOR RECONSIDERATION OF THE COMMISSION'S FINAL ORDER**

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INTRODUCTION

On February 16, 2007, Respondent Rambus Inc. (“Rambus”) filed a Petition for Reconsideration of the Commission’s Final Order and, separately, a Motion for Stay of the same Order. Complaint Counsel’s responses to Rambus’s filings show that Complaint Counsel agree in principle with Rambus on several of the issues raised in Rambus’s reconsideration petition. On other issues, Complaint Counsel fail to address Rambus’s arguments, misconstrue them, or offer inadequate responses.

A. The Commission Should Confirm That The Order Does Not Require Rambus To Refund Royalties Already Collected Or To Forgo Royalties Already Due Under Existing Licenses.

1. Complaint Counsel Agree That Refunds Are Inappropriate.

Rambus’s Petition for Reconsideration (“Rambus PFR”) asks the Commission to modify its Order to clarify that Paragraph IV.B does not require Rambus to refund royalties that it has already collected. Rambus PFR 2-5. Complaint Counsel “agree in principle with Rambus that Rambus should not be required to refund any royalties it has already collected.” Response to Rambus’s Petition for Reconsideration (“CC Response”) 1 n.1; *see also Heater v. FTC*, 503 F.2d 321, 322 (9th Cir. 1974) (holding that Commission may not order restitutionary relief or refunds in a cease-and-desist order). But Complaint Counsel are wrong to suggest that there is no reason to modify the Order to reflect this understanding. At least one DRAM manufacturer has already asserted in

private litigation that the Order requires such refunds.¹ See *Hynix v. Rambus*, No. CV 00-20905-RMW, Hearing Tr. 23 (Feb. 16, 2007) (“we think that’s what the Commission meant when it talks about rescission”) (attached as Ex. 2 to Brief of Amici Curiae in Opposition to Rambus’s Motion to Reconsider the Commission’s Remedy Order in the Matter of Rambus Inc.). The Commission should therefore clarify its Order to prevent unnecessary litigation; the simplest way to do so is to amend the Order to delete the word “rescind,” as suggested in the Proposed Order.

2. Prohibiting Rambus From Seeking Royalties For Pre-Order Use Of Its Technologies Would Depart From The Order’s Text And Its Intended Prospective Operation, Exceed The Commission’s Remedial Authority, And Create Anomalous Results.

Rambus’s petition also asks the Commission to clarify that the Order does not forbid Rambus from collecting or seeking royalties and damages based on use of Rambus’s technologies occurring *before* the effective date of the Order. Rambus PFR 2-5. The Commission’s Order is expressly intended to provide relief that is “prospective only” (Opinion of the Commission on Remedy (“Remedy Op.”) 7) and that will restore, on a forward-looking basis, conditions that would have existed in the but-for world (Remedy Op. 27). In other words, the intended and proper purpose of the Order is to restore the but-for world that would have existed *after* the effective date of the Order. The Commission gave no indication in its Order or its Remedy Opinion that it intended to

¹ That same DRAM manufacturer (Hynix) has taken the opposite position in a proposed amicus brief to the Commission. See Brief of Amici Curiae in Opposition to Rambus’s Motion to Reconsider the Commission’s Remedy Order in the Matter of Rambus Inc. 12 (“The Commission’s Order, standing alone, does not compel Rambus to return the hundreds of millions of dollars in unlawful monopoly profits it already has collected as of the effective date of the Order.”). It is not clear whether the position in the amicus brief reflects a change of view by Hynix, or whether Hynix has simply adopted a different position for a different proceeding. Rambus will be filing shortly a separate motion for leave to file a response to amici’s motion and brief.

undo or rearrange private parties' rights and obligations vis-à-vis one another *before* that date. Whether such pre-Order rights and obligations are enforceable may be the province of private litigation and judicial proceedings, which infringers of Rambus's patents have not been shy about pursuing.

It is not entirely clear what position, if any, Complaint Counsel take on the proper interpretation of the Order. The only thing clear is that Complaint Counsel agree that the Commission should clarify its Order on this point. CC Response 4 n.5.

In any event, Complaint Counsel provide no good reason for reading the Order to restrict Rambus's ability to recover royalties or damages for the use of its patented technologies before the effective date of the Order. First, Complaint Counsel acknowledge that the text of the Order supports Rambus's reading. *Id.* at 4 n.3.²

Second, reading or extending the Order to apply to past use of Rambus's technologies would be inconsistent with the Order's focus on relief that is "prospective only" (Remedy Op. 7) and would likely exceed the Commission's authority. It has been a fundamental principle for nearly two centuries that a law that creates or impairs obligations or duties "in respect to transactions or considerations already past, must be deemed retrospective." *Society for the Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H 1814) (No. 13,156) (Story, J.) (citing cases). Reading the Order to dramatically impair Rambus's ability to collect debts and enforce obligations that accrued

² Perhaps realizing that the text of Paragraph IV.A forecloses a contrary reading, Complaint Counsel suggest in a footnote that alternatively "Paragraph V could be read to require Rambus to offer companies a license with respect to past as well as future infringement, subject to the Maximum Allowable Royalty caps." CC Response 4 n.4. But Complaint Counsel do not appear to point to any language in Paragraph V that would support that reading.

prior to the effective date of the Commission's Order would effectively turn the Order into a retrospective remedy.

The cases cited by Complaint Counsel provide no basis for such a remedy in this case. Complaint Counsel's citation to consent orders is misplaced. CC Response 3 n.2. Because parties to a consent order *agree* to submit to the negotiated remedy, consent orders cannot be used as precedent. *See, e.g., Kelley v. FERC*, 96 F.3d 1482, 1490 (D.C. Cir. 1996). And the three consumer protection cases cited in a footnote by Complaint Counsel are inapposite.³

Third, an Order that is retrospective in this respect would create an anomaly in which licensees who paid on a timely basis are worse off than infringers (and licensees

³ In *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985), the Commission ordered respondent not to enforce an illegal forfeiture clause in a form contract. The order was designed to prohibit, in the future, the very conduct that was the gravamen of the offense on which the case was based. Unlike the Order in this case, the remedy in *Amrep* was not an attempt to replicate a but-for world in order to avoid the consequences of illegal conduct in the past.

The Commission's order in *In re Orkin Exterminating Co.*, 108 F.T.C. 263, 382 (1986), supports Rambus's requested reconsideration. In that case, the Commission prohibited the respondent from charging, in the future, a higher renewal fee than the amount specified in its contracts. Although the Commission described its order as requiring the respondent to "roll back" its annual renewal fee on contracts previously entered into, the order required only that respondent charge the rolled-back, lower fee for renewals of those contracts *in the future*. Complaint Counsel had not sought refunds or other retrospective relief. Moreover, it appears that respondent did not appeal the scope of the remedial order, so it was never subject to judicial review. *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354 (11th Cir. 1988) (discussing only liability issues).

The provision from the Commission's Order in *In re Southwest Sunsites Inc.*, 105 F.T.C. 7, 176, 185 (1985), cited by Complaint Counsel barred the respondent from seeking to recover from purchasers who had defaulted under fraudulently-obtained land purchase agreements. That is very different from the remedy at issue here because, among other things, the order there enabled purchasers to undo the contracts and surrender the consideration obtained by them (*i.e.*, the right to purchase land in the future), whereas a retrospective remedy here would reduce the price manufacturers would have to pay for consideration (use of Rambus's patented technologies) consumed by them in the past. And that provision was apparently never appealed. *See Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1439 (9th Cir. 1986) (discussing only the order's disclosure obligations).

who have reneged on their contractual obligations) for pre-effective date use of Rambus's patented technologies. Infringers would be free to invoke the benefits of the Order (*i.e.*, the MAR cap) for past infringement—benefits concededly unavailable to licensees who have already paid royalties to Rambus for use during that very same period. It would certainly not be in the public interest for the Commission to make those who honored their agreements worse off than willful infringers.

B. The Commission Should Modify The Order To Preserve Rambus's Ability To Recoup Forgone Royalties And Damages For The Period Pending Appeal Should The Commission's Order Be Reversed.

Rambus's Petition for Reconsideration asks the Commission to make specific modifications to the Order that would allow Rambus to recoup forgone royalties and damages for the period pending appeal in the event that the Commission's Order is reversed.⁴ Rambus PFR 5-8. Complaint Counsel appear to agree in principle that the Order should not interfere with Rambus's ability to collect royalties and damages in that event. *See* Complaint Counsel's Opposition to Rambus's Motion for Stay 5-8 (proposing procedure pursuant to which licensees and infringers would pay royalties and damages in excess of MAR amounts into escrow pending the outcome of Rambus's appeal).⁵

Complaint Counsel did not respond to Rambus's specific proposals for modifying the

⁴ Rambus's Petition also sought clarification of Part IV.B. of the Commission's Order, which directs Rambus to "release" its current licensees "from any further payments pursuant to [their] license agreements that are in excess of [MAR] rates." Rambus requested that the Commission make clear that Rambus would not be required to release licensees from future obligations to pay royalties above MAR rates should the Order be overturned. Rambus PFR 6-7. Complaint Counsel do not appear to oppose that clarification.

⁵ Complaint Counsel's proposed escrow procedure would not adequately mitigate the danger of irretrievably lost monies. For example, an escrow arrangement would not necessarily bar former licensees that refuse to pay either royalties or damages into escrow while the Order is in effect from arguing that the "release" provided by the Order precludes Rambus from collecting more than MAR rates for that period.

Order to achieve this result. The Commission's Order should be modified as explained in Rambus's Petition for Reconsideration.

C. The Commission Should Modify Its Order To Avoid Giving Potential Licensees An Incentive To Infringe Rambus's Patents, By Making Clear That Rambus May Seek The Full Range Of Judicial Remedies Traditionally Available In Infringement Actions.

In its Petition for Reconsideration, Rambus asked the Commission to modify Paragraph VII of the Final Order to clarify that Rambus is not foreclosed from seeking the infringement remedies to which it is entitled by statute (other than compensatory damages that would exceed royalties at above-MAR rates). This modification is appropriate for two reasons. First, depriving Rambus of such remedies would create new incentives for opportunistic manufacturers to refuse to take a license from Rambus at MAR rates and instead to infringe its patents. Second, such remedies would have been available to Rambus in the but-for world. Rambus PFR 9-11. Complaint Counsel respond to the first point by asserting that the "marketplace has moved on" anyway—an assertion that is unsubstantiated (especially for the controller market, for which Complaint Counsel have presented no evidence), incorrect (given the roughly \$7B revenue for SDRAM and DDR SDRAM represented in the chart attached to Complaint Counsel's Opposition to Rambus's Motion for a Stay Pending Appeal), and irrelevant. Complaint Counsel do not respond at all to the second point.

Instead, Complaint Counsel argue that the availability of traditional judicial remedies is "inconsistent with the fundamental purpose of JEDEC" and that the availability of such remedies would create a deterrent to challenging Rambus's patents. CC Response 6. That argument is incorrect for a number of reasons. In the but-for world, JEDEC's rules provided a mechanism by which manufacturers could have

obtained a license from Rambus on RAND terms; but the “fundamental purpose” of JEDEC (even as described by Complaint Counsel) offers no shelter to those who prefer to infringe Rambus’s patents rather than take a license on RAND terms. Against such infringing entities, Rambus would have been able to seek the full panoply of Patent Act remedies; in turn, the infringers would have been entirely free to argue that Rambus’s patents were invalid. Complaint Counsel’s position is not faithful to the Commission’s expressed purpose to recreate, to the extent possible, the conditions of the but-for world on a prospective basis.

D. The Commission Should Modify Its Order To Ensure That Rambus Is Not Made Worse Off Than It Would Have Been In The But-For World By Making Clear That Rambus Is Not Limited To MAR Rates When Litigants Allege Deception At JEDEC.

Rambus explained that the Commission should amend its Order to make clear that a prospective licensee cannot *both* avail itself of the MAR rate (either by accepting a license pursuant to Paragraph V of the Order or by asserting rights in litigation under Paragraphs VI-VII of the Order) *and* contest Rambus’s right to enforce its patents against infringing activities occurring *after* the effective date of the Order by raising defenses (or affirmative claims) based on alleged deception at JEDEC. Rambus PFR 11-13.

Otherwise, Rambus would be worse off (and licensees better off) than they would have been in the but-for world (*i.e.*, a world assuming no JEDEC deception), contrary to the Commission’s expressed remedial goal. Remedy Op. 7. Complaint Counsel resort to empty rhetoric rather than identify a flaw in Rambus’s analysis. *See, e.g.*, CC Response 6-7 (labeling Rambus’s request as “truly ironic” in light of Rambus’s pursuit of price-fixing claims, without acknowledging that those claims reach only pre-Order conduct, would have been available to Rambus in the but-for world, and have nothing to do with

the present issue).⁶ Complaint Counsel's assertions are no substitute for analysis and therefore should be rejected.

E. The Commission Should Clarify That Rambus May Collect Multiple Royalties On Systems That Incorporate Multiple JEDEC-Compliant Products.

In its Petition for Reconsideration, Rambus explained that the Commission should revise its Order to make clear that Rambus would be able to collect one royalty for each infringing memory chip and one royalty for each infringing component (such as a controller) that is included in a system. Rambus PFR 13-15. Complaint Counsel do not appear to oppose this uncontroversial request. Instead, Complaint Counsel address a different issue—on which Rambus did *not* seek reconsideration—relating to the collection of a separate system level royalty that uses Rambus's system level patent claims, *in addition to* royalties for each JEDEC-Compliant DRAM and each JEDEC-Compliant controller in a system. CC Response 7-8. Rambus requested *only* that the Commission clarify the availability of the separate royalties for each DRAM and each controller, not system royalties. The Order says nothing about system royalties, and so Rambus had no occasion to request reconsideration on that point.

⁶ Complaint Counsel also appear to misunderstand the scope of Rambus's request. CC Response 7 n.7 (calling Rambus's position "especially outrageous" if the Order only applies to post-Order use). Under Rambus's position, a DRAM manufacturer would *not* be barred from raising a claim based on alleged JEDEC deception for use during the period *before* the Order becomes effective, regardless whether it accepts a post-Order license at MAR rates. The restriction would apply only to such claims directed at infringing activities during the *post*-Order period for which MAR rates are in effect, on the assumption that there was no deception at JEDEC. Nor would Rambus's position preclude DRAM manufacturers from raising other defenses that would have been available to them in the but-for world, such as arguing that Rambus's patents are invalid.

F. The Commission Should Clarify That Licensees Have The Option Of Entering Into Fixed-Fee Licenses If They So Prefer And The Parties Agree.

Rambus's Petition for Reconsideration asks the Commission to allow licensees to negotiate with Rambus for fixed-fee licenses instead of payment of running royalties on a per-unit basis. Rambus PFR 15-16. Complaint Counsel "agree that licensees should have the option of negotiating a fixed fee arrangement if they choose to do so," but add the caveat "so long as the fixed fee amounts are equivalent to or less than the Maximum Allowable Royalty amounts." CC Response 1 n.1. That caveat would disserve the interests of licensees, could be unfair to Rambus, and is unnecessary in any event.

Licensees request fixed-fee arrangements when they do not have and cannot readily obtain the information necessary to calculate a per-unit royalty payment. Rambus PFR 15. If such information (such as the sales price or the likely quantity of covered items) is not readily available, the licensee is in the best and perhaps only position to determine whether a fixed-fee license or a MAR license is better suited to its own purposes, taking into account both cost and uncertainty. In such a situation, it would be unfair to expose Rambus to liability for violation of the Order if, after a fixed-fee royalty agreement is reached, the Commission somehow determines the total unit sales and concludes that the resulting per-unit payment to Rambus exceeded MAR rates. The prospect of such liability could deter Rambus from agreeing to fixed-fee arrangements that would benefit licensees.

There is in any event no need for a requirement that fixed-fee license payments be "equivalent to or less than" MAR amounts. If a licensee does not believe that a fixed-fee license would be preferable, it is free under the Order to opt for the standard running-royalty license at MAR-capped rates instead. So long as the licensee is fully informed of

the alternatives available to it, the Commission should not in an antitrust case deny it the opportunity to choose the alternative it prefers.

G. The Commission Misconstrued The Samsung RDRAM License In Dropping Royalty Rates To Zero.

In its Petition for Reconsideration, Rambus argued that the Commission mistakenly relied on the Samsung RDRAM license in ordering MAR rates reduced to zero after three years. That license did not in fact provide for a final zero royalty but rather reverted to a higher rate for each new generation. Rambus PFR 16-17. Complaint Counsel make no attempt to rebut that argument. Instead, in a footnote, Complaint Counsel assert that “the practical effect of this provision [of Rambus’s proposed modification] is unclear” because “most of Rambus’s relevant patents are set to expire” only 18 days after the expiration of the First Royalty Period. CC Response 9 n.9. Complaint Counsel also argue that the Samsung license agreement “is merely one piece of evidence.” *Id.* Neither of those arguments has merit.

Complaint Counsel’s uncertainty about the “practical effect” of the royalty-rate drop has nothing to do with whether it is properly based on the record and is, moreover, wrong. The Order affects several other patent families, many of which expire as many as five or six years after the end of the First Royalty Period (2010), although there is no evidence about these patents in the record. *See* Rambus Motion for Stay 6 n.3.

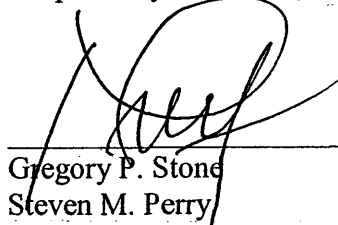
In any event, the Samsung license is the *sole* piece of evidence that the Commission cited in dropping rates to zero. Remedy Op. 21. Rambus knows of no other evidence that could be cited in support of that remedy. Complaint Counsel’s failure to defend the Commission’s understanding of the Samsung license or to cite to any other evidence

providing for a zero rate surely suggests their recognition that there is no basis in the record for that portion of the Order.

CONCLUSION

For the foregoing reasons and those stated in Rambus's Petition for Reconsideration, Rambus requests that the Commission grant its Petition for Reconsideration and issue an amended order consistent with Rambus's previously-submitted Proposed Order.

Respectfully submitted,



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