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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of: )  
RAMBUS, INCORPORATED, ) Docket No. 9302  
a corporation. )  
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ORAL ARGUMENT

WEDNESDAY, NOVEMBER 15, 2006

2:00 P.M.

BEFORE COMMISSIONERS:

- DEBORAH PLATT MAJORAS, CHAIRMAN
- PAMELA JONES HARBOUR
- JON LEIBOWITZ
- WILLIAM E. KOVACIC
- J. THOMAS ROSCH

Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C.

Reported by: JOSETT F. WHALEN, RMR-CRR

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## 1 P R O C E E D I N G S

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3 CHAIRMAN MAJORAS: Good afternoon, everyone.

4 On August 2 of this year the commission issued  
5 an opinion in In the Matter of Rambus Incorporated,  
6 Docket Number 9302, in which it determined that  
7 respondent had violated Section 5 of the  
8 Federal Trade Commission Act and also issued an order  
9 directing supplemental briefing on the issues of  
10 remedy.

11 Supplemental briefs have now been filed, and the  
12 commission is meeting today in open session to hear oral  
13 argument relating to remedy.

14 The respondents are represented by  
15 Mr. Douglas Melamed, and counsel supporting the  
16 complaint are represented by Mr. Geoffrey Oliver.

17 During the proceeding, each side will have  
18 45 minutes to present their arguments.

19 Counsel supporting the complaint will make the  
20 first presentation and will be permitted to reserve up  
21 to ten minutes for rebuttal.

22 Counsel for the respondent will go second.

23 And then of course, Mr. Oliver, should you  
24 decide to reserve time for rebuttal, you'll finish up.

25 Now, before proceeding with the oral argument

1 today, I want to note that this will be  
2 Mr. Robert White's last oral argument as the Commission  
3 bailiff. Robert has been working at the Commission  
4 since 1971 and he has ably served as our bailiff for  
5 20 years. He will retire at the end of the December.  
6 He will be sorely missed, particularly by me.

7 And Robert, if you would stand up, I would like  
8 to recognize you.

9 (Applause)

10 Thank you all.

11 Mr. Oliver, do you wish to reserve time for  
12 rebuttal?

13 MR. OLIVER: Yes. I'd like to reserve ten  
14 minutes, please.

15 CHAIRMAN MAJORAS: Very well.

16 Then, Robert, if you would set the clock.

17 MR. WHITE: Yes, I will.

18 CHAIRMAN MAJORAS: Mr. Oliver, you may begin.

19 MR. OLIVER: Thank you.

20 Madam Chairman, Commissioners, good afternoon.

21 I am here today to explain why, as a matter of  
22 law and a matter of fact, the appropriate remedy in this  
23 case is an order enjoining Rambus from enforcing its  
24 pre-1996 patents against JEDEC-compliant products.

25 CHAIRMAN MAJORAS: Mr. Oliver, other than the GE

1 decision by a district court in 1953, do you have any  
2 cases you can cite in which courts have ordered  
3 royalty-free licensing perhaps sometime in mine and your  
4 lifetime?

5 MR. OLIVER: The General Electric case that you  
6 referred to, Madam Chairman, is of course the leading  
7 case on that point. However, a number of courts have  
8 recognized the authority to do that, starting with the  
9 Supreme Court in National Lead. And of course, the  
10 commission did so as well in American Cyanamid, which  
11 was approved by the Sixth Circuit on appeal.

12 But I also want to point out that this is not a  
13 case in which we are proposing that Rambus would not be  
14 able to receive any compensation for its patents.

15 This is in fact directly comparable to  
16 National Lead. In National Lead, of course, they  
17 received compensation by means of a limited royalty  
18 rate.

19 Here, we are proposing that Rambus be permitted  
20 to collect unlimited royalties with respect to all  
21 products other than JEDEC-compliant products and only  
22 the JEDEC-compliant products would be subject to an  
23 order enjoining enforcement.

24 COMMISSIONER ROSCH: But, Mr. Oliver, one of the  
25 things you're asking for is that JEDEC-compliant

1 products include DDR2; is that not correct?

2 MR. OLIVER: Yes, that's correct, Commissioner.

3 COMMISSIONER ROSCH: How do you square that with  
4 our liability decision where we seem to say that there  
5 was no causal connection or at least there wasn't  
6 sufficient evidence of a causal connection between the  
7 conduct that was wrongful and DDR2? How do you square  
8 that?

9 MR. OLIVER: I believe that the analysis with  
10 respect to the remedy issue is in some way the flip side  
11 of the liability issue. And let me explain that if I  
12 could.

13 With respect to liability, the commission  
14 started -- and by the way, if I have misunderstood the  
15 commission decision, please correct me as I go -- the  
16 commission started with a situation in which the SDRAM  
17 and DDR SDRAM standards incorporated the technologies  
18 claimed by Rambus and then asked why was it that with  
19 respect to DDR2, once the existence of the Rambus  
20 patents became known and the Rambus royalty rates were  
21 known, why did JEDEC members not switch to alternatives  
22 at that point.

23 Obviously the existence of the JEDEC patents was  
24 a force driving JEDEC members to consider alternatives,  
25 and they in fact did so.

1           Complaint counsel submitted evidence that  
2 substantive lock-in effects or switching costs were the  
3 force that drove JEDEC members to keep the same  
4 technologies in the standard.

5           The commission -- again, my understanding of the  
6 decision is that the commission recognized substantial  
7 evidence presented by complaint counsel that there were  
8 substantial switching costs that did affect the  
9 decision. However, the commission found that the  
10 complaint counsel narrowly failed to prevail on its  
11 burden of proof.

12           COMMISSIONER ROSCH: Narrowly or broadly, it  
13 found, did it not, that there was not that causal  
14 connection?

15           MR. OLIVER: The commission found that the  
16 switching costs did not outweigh the force of the  
17 patents that would cause them to switch, so yes, you're  
18 correct, they found there's no causal connection there.

19           However, with respect to the remedy phase, we  
20 now start with a situation in which the commission has  
21 found liability with respect to the SDRAM and DDR SDRAM  
22 standards, and the appropriate step for the commission  
23 is to determine what competitive conditions likely  
24 would have prevailed in the absence of Rambus'  
25 deception.

1           Here, the evidence indicates that the most  
2 likely situation would have been SDRAM and DDR SDRAM  
3 standards incorporating alternative technologies.

4           And then starting from that situation, in other  
5 words, not from the standards incorporating the Rambus  
6 technologies but, rather, starting with the standards  
7 incorporating alternatives, both the existence of the  
8 Rambus patents and the switching costs both would have  
9 driven JEDEC members to continue with those alternative  
10 technologies.

11           So once the alternative competitive conditions  
12 were established with respect to SDRAM and DDR SDRAM,  
13 the JEDEC members would have continued to use those  
14 alternative technologies with respect to DDR2 and with  
15 respect to the future generations.

16           It is for that reason we submit, in order to  
17 restore fully those competitive conditions that would  
18 have prevailed in the absence of Rambus' intentional  
19 deception, it is necessary to reconstruct competitive  
20 conditions not only for SDRAM and DDR SDRAM but also for  
21 the future generations where the technologies would  
22 have --

23           COMMISSIONER ROSCH: Why stop with DDR2? Why  
24 not go to DDR-3 and DDR-4?

25           MR. OLIVER: We believe it is appropriate to



1 include future generations to the extent that they are  
2 affected by the carryover of the same technologies.

3 CHAIRMAN MAJORAS: When does it end,  
4 Mr. Oliver?

5 I mean, should we regulate the commercial  
6 relationships between Rambus and other companies in the  
7 tech industry from now until whenever?

8 I mean, how is that even plausible?

9 MR. OLIVER: We submit that this is not  
10 regulating the relations between Rambus and other  
11 companies.

12 However, we do believe that where JEDEC was led  
13 to incorporate these technologies due to Rambus'  
14 intentional deception that it is appropriate that the  
15 remedy prevent Rambus from enforcing those patents.

16 CHAIRMAN MAJORAS: But that's not what we found  
17 as to DDR2. But let me ask you another question.

18 You had a premise in one of your responses to  
19 Commissioner Rosch, which was that the evidence clearly  
20 showed that in the but-for world, clearly the situation  
21 is that the JEDEC members would have incorporated  
22 different technology instead of Rambus technology.

23 So do you argue that -- I just want to make sure  
24 I'm clear on this -- that if faced with the choice of  
25 different technologies being incorporated into the

1 standard or giving RAND assurances, Rambus would have  
2 forgone any licensing royalties and instead would have  
3 said, Forget it, we don't like RAND terms, we'd rather  
4 not get any licensing at all, in relation to the JEDEC  
5 standard?

6 Is that what you argued?

7 MR. OLIVER: In part, yes.

8 I believe, first of all, that the evidence  
9 indicates that JEDEC would not have incorporated Rambus  
10 technologies in the standards even with the RAND  
11 assurance, but --

12 CHAIRMAN MAJORAS: Why?

13 COMMISSIONER LEIBOWITZ: Mr. Oliver, the Rambus  
14 technology must have had some value to JEDEC because,  
15 after all, JEDEC chose the Rambus technology, didn't  
16 it?

17 They did not know that there were royalties to  
18 be paid, but presumably they chose the technology for a  
19 reason, and the reason was that was the technology they  
20 wanted, right?

21 MR. OLIVER: But Dr. McAfee explained that,  
22 based on an extensive study of the JEDEC methodology,  
23 that JEDEC pursued a type of decision-making known as  
24 satisficing in which they did not necessarily try to  
25 identify the absolute best technology for each and

1 every use but, rather, tried to find a technology that  
2 would accomplish the general objectives that would  
3 achieve a consensus, they would use that and then move  
4 on.

5 COMMISSIONER LEIBOWITZ: Yes. But the  
6 technology they chose turned out to be Rambus'  
7 technology, so presumably there was some value in the  
8 technology they chose.

9 MR. OLIVER: Some members found that there was  
10 value to that. Other members thought that other  
11 alternatives had greater value.

12 Indeed, the commission itself, I believe in  
13 footnote 407, recognized that many JEDEC members  
14 preferred alternative technologies. And indeed, it was  
15 a very close call that these technologies were chosen.

16 Madam Chairman, going back to your question, in  
17 terms of the evidence is that JEDEC would have gone and  
18 selected alternatives, perhaps if we could pull up  
19 JX-53.

20 This is the EIA manual.

21 And if we could perhaps go to page 11, please.

22 CHAIRMAN MAJORAS: Well, I know what the manual  
23 says, but -- and no question it has some relevance.

24 But one of the things that we decided when we  
25 looked at this case and we were ruling on Rambus'

1 behavior was we had to look at the entire course of  
2 conduct, not only the manuals but also at the way the  
3 JEDEC members behaved and what was their course of  
4 conduct.

5 And I have identified at least three instances  
6 in which a technology -- that is, the JEDEC members  
7 learned that a certain technology was patented, asked  
8 for RAND assurances, got the RAND assurances and  
9 incorporated that technology into the standards.

10 So I understand that of course they would prefer  
11 not to have patented technology. Naturally. You'd  
12 rather have it free.

13 But -- and I am just short-circuiting this --  
14 forgive me, Mr. Oliver -- because I know my other  
15 colleagues have questions.

16 But what about those instances in which they  
17 actually did adopt patented technologies in the  
18 standard?

19 MR. OLIVER: Let me see if I can address your  
20 question in three points, and I'll try to run through  
21 this very quickly if I can.

22 First of all, I believe there is substantial  
23 evidence that JEDEC strongly preferred to avoid patented  
24 technologies whenever possible.

25 I refer you to JX-53 page 11, JX-54 page 9,

1 CX-208 page 19, JX-5 at page 4.

2 And of course the loop-back clock I think is the  
3 primary example here.

4 CHAIRMAN MAJORAS: And that was the one after  
5 Rambus had left JEDEC?

6 MR. OLIVER: That's correct.

7 CHAIRMAN MAJORAS: Okay.

8 MR. OLIVER: Second, I believe the evidence  
9 indicates that even if JEDEC were prepared to adopt a  
10 Rambus technology that Rambus would have refused a RAND  
11 commitment.

12 I refer here to CX-487, CX-490, CX-853, CX-855,  
13 CX-869. These reflect exchange of correspondence  
14 between the IEEE and Rambus.

15 I also refer to CX-873, CX-874 and CX-888, which  
16 refer --

17 COMMISSIONER ROSCH: Weren't they just  
18 bargaining, though? Weren't they just bargaining, at  
19 the end of the day, if the chairman is correct, that  
20 they would have preferred to have given RAND terms to  
21 not having anything at all adopted in the standard or  
22 they did nothing?

23 MR. OLIVER: All I can do is return to the  
24 evidence in the record.

25 The evidence in the record, starting with the

1 deposition testimony of the chairman of the board of  
2 directors, William Davidow, indicates that the Rambus  
3 strategy was not to do that. They wanted to be able to  
4 discriminate among potential users. They wanted to be  
5 able to deny licenses to users in order to limit  
6 strictly the number of licenses they granted.

7 CHAIRMAN MAJORAS: Well, who wouldn't? Of  
8 course that's what you'd prefer. But if the choice --  
9 look, Mr. Oliver, I totally understand, and we're trying  
10 to stick to the record. But on the other hand, I don't  
11 think we're also required to ignore behavioral patterns  
12 and rational behavior. Our economists would never  
13 forgive us if we did that.

14 So I am still waiting to see if you'll answer  
15 more directly.

16 The choice -- if the choice is -- you're saying  
17 that they would have made the choice to get no royalties  
18 within the context of the JEDEC standards and that that  
19 would -- that you think on this record we can decide  
20 that that would have been their decision.

21 MR. OLIVER: That is what definitely the record  
22 indicates. Yes.

23 Again, bear in mind that at this time that  
24 Rambus was still promoting RDRAM technology. Its  
25 primary goal was to see the RDRAM technology succeed.

1 It did not want the JEDEC standards to succeed.  
2 Frankly, at this time it was not expecting to collect  
3 royalties because it thought that it would succeed with  
4 the RDRAM.

5 CHAIRMAN MAJORAS: Well, then why was it so  
6 desperate to make sure that its technology would be  
7 securely within the JEDEC bundle? It was my thought so  
8 that it could collect royalties.

9 MR. OLIVER: Well, this is the plan B, as we  
10 explained from the outset, that they had plan A and  
11 plan B. They still hoped that the RDRAM would be  
12 successful, but the plan B in case it wasn't was to have  
13 the patents covered in the standards.

14 But again, I come back to the evidence, so  
15 starting with the Davidow testimony, including the  
16 testimony of Lester Vincent at the transcript CX-3129,  
17 CX pages 163-164, and then in the documentary evidence  
18 that I have cited, indicates that both with respect to  
19 the IEEE -- when the IEEE requested a RAND assurance, as  
20 well as to JEDEC, when Rambus left JEDEC, that Rambus  
21 stated that, no, it was not going to offer RAND  
22 assurances.

23 And again, we could speculate as to what might  
24 happen. Of course, because of Rambus' intentional  
25 conduct, we will never know for certain what would have

1 happened. But I submit that the best evidence that we  
2 have at this point is what Rambus actually did at the  
3 time, as documented by the documentary evidence and the  
4 testimony that I have referred to.

5 But I think the third point here is also  
6 critical. And that is, you have referred to three  
7 instances in which JEDEC did use patented technologies  
8 subject to a RAND commitment. But please bear in mind  
9 that not all RAND commitments were equal.

10 JEDEC members were particularly concerned about  
11 companies that made their money by licensing patents as  
12 opposed to manufacturing companies. And the reason  
13 being, manufacturing companies might be willing to give  
14 up the patent rights. They frequently had or were  
15 offering free-cost licenses.

16 The bottom line is that with a manufacturing  
17 company, the industry often has free access to the  
18 patents. The technology licensing company, though, was  
19 fundamentally different.

20 And again, with Rambus this was a heightened  
21 concern. And again I refer to Exhibit CX-913,  
22 Exhibit CX-488, CX-1041, all of which demonstrate the  
23 particular concern that JEDEC members had with respect  
24 to Rambus and Rambus patents.

25 And I submit again, the best example we have is



1 the loop-back clock, a classic instance in which JEDEC  
2 members at one time, they recognized that a Rambus  
3 patent might apply, they immediately looked for  
4 alternative technologies.

5 CHAIRMAN MAJORAS: But JEDEC wasn't a member  
6 then, and they couldn't seek RAND assurances from them  
7 as a result. I mean, they might have on an individual  
8 basis, but they couldn't within the standard-setting.

9 So I understand that that is a piece of  
10 evidence, but I think it is somewhat limited because  
11 Rambus wasn't a member anymore.

12 MR. OLIVER: One other piece of evidence that  
13 might be worth considering in this context is the  
14 testimony of Sam Chen -- he's a representative of  
15 Mitsubishi -- in the deposition transcript CX-3135. I  
16 think the deposition pages are 103 through 105, I think  
17 the CX page 27. And unfortunately, Mr. Chen's native  
18 language is not English, so it's a little bit difficult  
19 to understand.

20 But he sets forth a very interesting  
21 explanation of the policy from Mitsubishi's  
22 perspective. He said that, yeah, we at Mitsubishi  
23 often had patented technologies that we thought were  
24 superior. We always had the option to bring them into  
25 JEDEC and to present them, to explain there's a patent

1 on it and to try to persuade JEDEC to accept them. We  
2 knew that they usually wouldn't, that they always had a  
3 preference for nonpatented technologies. And the  
4 majority of times when we brought our technologies in,  
5 they weren't accepted. But we always had this option.

6 And he implies that there were instances in  
7 which they were successful.

8 But again, this is Mitsubishi, a manufacturing  
9 company, that was not out to make cash payments -- or to  
10 extract cash payments based on its patents.

11 Again, to emphasize the importance to the  
12 industry of avoiding the cash payments, if we could, for  
13 example, perhaps pull up document CX-2726.

14 This is a Micron document from 1998 after the --  
15 right at the time that the DDR SDRAM standard was  
16 adopted.

17 If we could go to page 7 of this document.

18 And you'll see why DDR is cost-effective, the  
19 very first point, no royalties, the critical concern of  
20 JEDEC members.

21 So we introduced a number of different  
22 documents of this type to indicate throughout this time  
23 that a critical concern for JEDEC members was not just  
24 avoiding patents, which they hoped to do, but in  
25 particular avoiding royalties, because that's what

1 really drove up costs, and they felt they'd achieved  
2 that. That was their objective and they felt that  
3 they'd achieved that.

4 And we believe that that is an appropriate  
5 consideration in setting remedies here, that the  
6 commission should set a remedy that realizes the goal  
7 that JEDEC was trying to accomplish.

8 COMMISSIONER KOVACIC: Could I draw your  
9 attention back to the question of the legal foundation  
10 for the commission's remedial authority just for a  
11 moment.

12 Could you mention to me, Mr. Oliver, what you  
13 regard as being the most supportive case from  
14 complaint counsel's point of view decided by the  
15 Supreme Court defining the scope of the FTC's remedial  
16 authority in a Section 2 monopolization-like claim.

17 MR. OLIVER: I think from the Supreme Court I  
18 believe that the leading precedent would be FTC versus  
19 National Lead.

20 COMMISSIONER KOVACIC: Was that a Section 2  
21 case?

22 MR. OLIVER: I don't believe it was strictly  
23 Section 2, but it had similar types of conduct, if you  
24 will. My recollection is that National Lead was using  
25 delivery zone pricing practices and that the thrust of

1 the remedy went to those practices.

2 COMMISSIONER KOVACIC: And if you were to  
3 single out the two or three best Court of Appeals  
4 decisions interpreting the FTC's authority in a  
5 monopolization case on remedies, which would you point  
6 to again?

7 MR. OLIVER: Section 2 authority is difficult  
8 because I think that the key authority is outside the  
9 Section 2 area. If I could be permitted to refer to the  
10 cases that I think are nonetheless relevant.

11 COMMISSIONER KOVACIC: Please.

12 MR. OLIVER: I refer to American Cyanamid.

13 I refer to Adolph Coors.

14 Detroit Auto Dealers.

15 I believe it is also worth looking at  
16 Warner-Lambert, a consumer protection case from 1977  
17 here in the DC circuit, but that case cited back to  
18 American Cyanamid.

19 COMMISSIONER KOVACIC: Could I take you back to  
20 Cyanamid for a moment.

21 As you know, Cyanamid moved up and down between  
22 the Court of Appeals and the commission several times.  
23 And I am thinking of the 1968 opinion which was styled  
24 Charles Pfizer & Co. versus FTC. I believe this is the  
25 last Court of Appeals entry into the matter.

1           And at the close of the opinion, in discussing  
2 the commission's remedial authority, I just want to  
3 highlight for you the court's own summary of what it  
4 believed it had done earlier on remedy.

5           And the court said, I quote: In our former  
6 opinion -- that was the earlier Cyanamid opinion -- the  
7 court held that assuming the facts found by the  
8 commission to be supported by substantial evidence, the  
9 commission had the jurisdiction to require as a remedy  
10 the compulsory licensing of the tetracycline and  
11 aureomycin patents on a reasonable royalty basis.

12           The court there doesn't seem to be talking  
13 about licensing on a basis other than some reasonable  
14 royalty.

15           Is that a correct interpretation of what the  
16 Sixth Circuit did here?

17           MR. OLIVER: I would respectfully disagree with  
18 that interpretation. I believe that the Sixth Circuit  
19 did not need to address specifically whether the  
20 commission had authority to order royalty-free licensing  
21 or enjoin enforcement of a patent because of the remedy  
22 that the commission had adopted below.

23           But I believe, for example, looking at  
24 United States versus National Lead, the Supreme Court  
25 there made clear that that is in fact an appropriate

1 remedy that is available and again one that was in fact  
2 implemented in United States versus General Electric.

3 I do want to also emphasize that in this case,  
4 though, we are not seeking an order that would enjoin  
5 enforcement of Rambus' patents without any compensation,  
6 that we are in fact suggesting a remedy that would  
7 provide reasonable compensation for the Rambus patents.  
8 The compensation would come in the form of unlimited  
9 royalties on all applications other than the JEDEC  
10 standards. We believe that that is fully consistent  
11 with the remedies actually adopted in, for example,  
12 United States versus National Lead and  
13 American Cyanamid.

14 COMMISSIONER ROSCH: Is our authority unlimited  
15 in that respect, that is to say, to order royalty-free  
16 licensing? Or are there some limiting principles; and  
17 if so, what are those limiting principles?

18 MR. OLIVER: I think that there are limiting  
19 principles and I think the limiting principles are  
20 whether such a remedy is necessary to fully restore  
21 competitive conditions in a marketplace.

22 But I think that if it is necessary to fully  
23 restore competitive conditions that, yes, the commission  
24 does have that authority. I think that is precisely  
25 what the Supreme Court said in the United States versus

1 National Lead.

2 CHAIRMAN MAJORAS: Well, they also said in  
3 National Lead that to order such a remedy one needs  
4 special proof.

5 Do you have -- can you point us to the special  
6 proof in this case since you're relying on  
7 National Lead?

8 MR. OLIVER: Again, let me answer that in two  
9 parts.

10 I think that the special proof is proof of what  
11 competitive conditions would have existed in the  
12 absence of Rambus' intentional deception, and I refer  
13 back to the number of documents and the testimony that  
14 I had referred to earlier, indicating that JEDEC would  
15 have adopted nonpatented technology, nonpatented  
16 alternatives for its standard, and that Rambus would  
17 not have granted the RAND commitment necessary such  
18 that JEDEC would have been compelled to adopt  
19 alternative technologies.

20 CHAIRMAN MAJORAS: That is all the court meant  
21 by "special proof"?

22 MR. OLIVER: It means that the proof of the  
23 competitive conditions would have existed absent the  
24 conduct in question that would not have resulted in any  
25 enforcement of the patent.

1           So for example, if a patent holder holds a  
2 patent, then engages in some conduct that allows it to  
3 charge higher royalties than it otherwise would have  
4 charged, restoring competitive conditions would be  
5 restoring the royalty rate that it otherwise would have  
6 charged. The special proof is proof that, absent the  
7 conduct, the patent holder would not have been in a  
8 position to charge royalties at all.

9           And again, I submit that with respect to the  
10 JEDEC standards, that is precisely what this record  
11 establishes.

12           Again, we are not seeking to enjoin enforcement  
13 of the Rambus patents without any compensation at all.  
14 We believe that reasonable compensation in this case is  
15 unlimited royalties with respect to all other  
16 applications, but with respect to JEDEC standards where  
17 Rambus otherwise would not have had the power to enforce  
18 its patents --

19           COMMISSIONER HARBOUR: Mr. Oliver, may I narrow  
20 your focus a little and talk about the commission's  
21 fencing-in authority.

22           Now, we know that the record has not established  
23 a causal link between Rambus' exclusionary conduct and  
24 JEDEC's adoption of DDR2.

25           And notwithstanding that finding, can the



1 commission extend its remedy to DDR2 under its  
2 fencing-in authority?

3 MR. OLIVER: I think that the commission could  
4 extend its remedy to DDR2 under either of two theories.

5 One is simply restoring the competitive  
6 conditions, as I explained earlier.

7 Or second, independent of that, I believe that  
8 the commission could also extend the remedy to DDR2 by  
9 means of fencing-in relief.

10 COMMISSIONER HARBOUR: Well, what does the  
11 reasonable relation remedial test for fencing in  
12 actually require?

13 And what I mean by that is, can the commission  
14 order one remedy as to SDRAM and DDR standards where the  
15 causal link has been proven but yet a different remedy  
16 as to DDR2 where the causal link has neither been proved  
17 nor ruled out, according to the opinion at page 114,  
18 footnote 621?

19 MR. OLIVER: I believe the commission could  
20 issue different relief with respect to SDRAM and DDR  
21 and with respect to DDR2. I believe that in terms of  
22 the special link, if you will, I think again that there  
23 are two possible ways to -- there are two possible  
24 lines of reason, if you will, that could get one there.

25 One again is in terms of reestablishing

1 competitive conditions that otherwise would have  
2 prevailed. The evidence indicates that with SDRAM and  
3 DDR SDRAM containing alternative technologies, those  
4 would have been carried forward in DDR2. Restoring  
5 those competitive conditions would justify relief.

6 Alternatively, if the commission were to find  
7 that absent relief with respect to DDR2 that Rambus  
8 would be able to follow a different path in order to  
9 achieve the same results that fencing-in relief would  
10 permit the commission to take appropriate remedial steps  
11 to prevent that from happening as well.

12 COMMISSIONER KOVACIC: Would you agree with me  
13 that in looking at National Lead that the Supreme Court  
14 has said perhaps that compulsory licensing for certain  
15 patents for certain uses at no royalty would be  
16 conceptually acceptable but that the court has yet in a  
17 specific case to endorse the remedy as decided by the  
18 lower court?

19 MR. OLIVER: I think that's right, yes. I would  
20 agree with that.

21 COMMISSIONER KOVACIC: Is it further  
22 appropriate to say in this instance that were this  
23 matter to be appealed or were a matter to come  
24 ultimately before the Supreme Court that to endorse  
25 such a remedy in the context of a monopolization

1 exclusionary conduct case would be a first of a kind  
2 for the court?

3 MR. OLIVER: For the Supreme Court?

4 COMMISSIONER KOVACIC: Yes.

5 MR. OLIVER: Yes. As far as I know, I think it  
6 would be first of a kind.

7 However, again, I do submit that I believe that  
8 the remedy we are proposing is distinct from the type of  
9 compensation-free licensing that I believe that the  
10 Supreme Court was referring to in National Lead because  
11 the remedy we are proposing would permit compensation  
12 for these patents; and therefore, I would submit that a  
13 reasonable royalty here is a royalty on all other  
14 products.

15 And I believe that is fully consistent with the  
16 relief actually granted in National Lead.

17 COMMISSIONER KOVACIC: Just, if I may, one other  
18 question along this line.

19 If we were look at the foundation of authority  
20 again in the Courts of Appeals, am I accurate in saying  
21 that it is difficult to point to an instance in which  
22 the Courts of Appeals have endorsed, again, with your  
23 important qualification, an instance in which a decree  
24 by the lower court supporting the licensing of the  
25 intellectual property right on a royalty-free basis has

1       been sustained?

2                   MR. OLIVER:   I would agree that such cases are  
3       rare.

4                   COMMISSIONER HARBOUR:   I want to talk about  
5       deterrence for a second.

6                   Is deterrence a legitimate remedial objective of  
7       the commission?

8                   MR. OLIVER:   I believe that it is,  
9       Commissioner.

10                   I believe that the primary objective of the  
11       commission should be to fully restore competitive  
12       conditions that otherwise might have prevailed.   But I  
13       believe that in terms of exercising its discretion in  
14       this area that deterrence is a factor that can be  
15       considered, particularly in terms of ensuring that full  
16       relief is granted and that full competitive conditions  
17       are restored.

18                   COMMISSIONER ROSCH:   What is your authority for  
19       that?

20                   MR. OLIVER:   For the proposition --

21                   COMMISSIONER ROSCH:   For the proposition that  
22       deterrence is appropriate for us to take into account in  
23       fashioning a remedy, an antitrust remedy.

24                   MR. OLIVER:   I believe the best discussion of  
25       that does appear in Areeda & Hovenkamp.

1           COMMISSIONER ROSCH: Is there any case  
2 authority?

3           MR. OLIVER: I would have to look back at the  
4 precedent to see if there is case authority for that.

5           Again, though, I do want to emphasize, I am not  
6 proposing that the commission go any further in its  
7 relief than it otherwise would based solely on  
8 principles of deterrence. I am simply submitting that  
9 the commission consider deterrence within the scope of  
10 the relief that it otherwise would grant.

11           COMMISSIONER HARBOUR: And following up on that,  
12 based on public projections for the year 2007, Rambus'  
13 DDR2 sales are projected to be at 70 percent of the  
14 market and its DDR2 royalties in 2007 are projected to  
15 be roughly \$290 million.

16           Would a remedy that does not apply to DDR2, in  
17 your opinion, be an effective deterrent for future  
18 conduct?

19           MR. OLIVER: I believe that it would not because  
20 a remedy that did not include DDR2 would not fully  
21 restore competitive conditions.

22           And again, as I think a number of the amicus  
23 briefs pointed out, there is grave danger here that if  
24 the commission does not fully restore competitive  
25 conditions that other members of standard-setting

1 organizations might see a positive incentive in trying  
2 to engage in similar conduct of this type, particularly  
3 if they could expect they would be able to collect  
4 royalties for some sort of period of time until the  
5 commission takes action and then potentially would be  
6 able to collect the royalties again after some future  
7 point in time.

8 COMMISSIONER LEIBOWITZ: Mr. Oliver, let me ask  
9 you about this.

10 You suggest in your brief -- I think it is at  
11 page 2 -- that Rambus should be able to keep its  
12 unlawfully acquired monopoly profits, but if the  
13 commission finds liability, as we we did, and issues a  
14 remedy decision on a going-forward basis, isn't it  
15 permitted -- isn't it almost obligated to bring -- a  
16 13(b) action for the disgorgement of unlawfully acquired  
17 profits?

18 MR. OLIVER: I don't believe that the  
19 commission would be obligated, but I believe that it  
20 might be an appropriate topic for the commission to  
21 consider.

22 COMMISSIONER LEIBOWITZ: In a subsequent  
23 action.

24 MR. OLIVER: In a subsequent action, exactly.

25 COMMISSIONER ROSCH: Let me ask you this,

1 Mr. Oliver.

2 Do you agree that complaint counsel has the  
3 burden of proof with respect to the appropriate remedy  
4 and more specifically with respect to what the but-for  
5 world would have looked like?

6 MR. OLIVER: I believe that now that the  
7 commission has found liability that any remaining relief  
8 should result against Rambus.

9 COMMISSIONER ROSCH: Doesn't that kind of turn  
10 Microsoft, for example, on its head? Didn't it suggest  
11 that when you were talking about a remedy, particularly  
12 a remedy as severe as one the you are seeking here, that  
13 actually the standard is higher with respect to proving  
14 but-for cause for the prosecution?

15 MR. OLIVER: I respectfully disagree.

16 I believe that with respect to Microsoft, the  
17 issue there was that the appropriate causal connection  
18 between the conduct that was approved on appeal and the  
19 remedy that was being sought had not been established.  
20 And I submit that in the commission's liability decision  
21 that that causally has been established.

22 But I think in particular, I think that the  
23 court had special concerns in Microsoft because it was a  
24 lawfully acquired monopoly. It involved monopoly  
25 maintenance. And the court rightfully was not concerned

1 about not depriving Microsoft of lawfully acquired  
2 monopoly power.

3           Furthermore, there is an additional concern in  
4 that the court wanted to be very careful it was not  
5 going to -- I think I should step back and say that the  
6 court noted that Microsoft was engaged in ongoing  
7 updates of the Windows operating system, and the court  
8 wanted to be particularly careful not to interfere with  
9 that ongoing innovation.

10           But I think that the Microsoft decision stands  
11 for the proposition that when you have a lawfully  
12 acquired monopoly followed by conduct engaged in  
13 monopoly maintenance and in particular of where, upon  
14 appeal, only a portion of that conduct were --  
15 excuse me -- portions of liability findings were  
16 affirmed, one has to be very careful to ensure that the  
17 remedy being proposed matches the conduct that was  
18 proven and that the monopolist not be deprived of lawful  
19 monopoly power. And I submit that is very different  
20 from the factual posture of the case here.

21           CHAIRMAN MAJORAS: It may be different from the  
22 factual posture, but the court was relying at that point  
23 in the opinion on Areeda & Hovenkamp, where they state  
24 that structural remedies require stronger causal  
25 connections. That is then what the DC circuit said.



1 I looked back and I didn't see in  
2 Areeda & Hovenkamp any limitation on that to a monopoly  
3 maintenance case versus a monopoly acquisition case.

4 MR. OLIVER: I think that when one reads the  
5 discussion in paragraph 653, particularly the  
6 2005 edition, Areeda & Hovenkamp walked through a number  
7 of different examples. And the examples where they are  
8 concerned about an extra level of proof, if you will,  
9 are precisely those examples where there has been lawful  
10 acquisition of monopoly power.

11 And I think that the subsequent examples that  
12 follow are in fact, you know, frankly, still more  
13 egregious than -- they are less egregious --  
14 excuse me -- than in this case, and yet in those  
15 examples, Areeda & Hovenkamp note that indeed it is  
16 appropriate to resolve reasonable doubts against the  
17 wrongdoer.

18 Again, I think we laid this out hopefully fairly  
19 clearly in our remedy reply brief at I believe it's  
20 pages 4 through 6 of that brief.

21 COMMISSIONER ROSCH: But we can all agree, can't  
22 we, counsel, that National Lead, when they spoke in  
23 terms of the need for special proof for the kind of  
24 relief that you're asking for here, did not draw any  
25 such distinction?

1           MR. OLIVER: National Lead did not draw such a  
2 distinction, that's correct.

3           And again, I believe that the proof that  
4 National Lead was looking for was evidence that, in the  
5 absence of the conduct in question, the patent holder  
6 would not have had a position to collect with respect to  
7 the royalties. And I submit that, again, referring to  
8 back to the evidence that I referred to earlier in my  
9 discussion, that that is in fact what the record in this  
10 case shows.

11           CHAIRMAN MAJORAS: And I'll look at that more  
12 closely, but I have the quote right here. Microsoft  
13 quotes it from Areeda & Hovenkamp: Structural relief  
14 requires a clear indication of a significant causal  
15 connection between the conduct and creation or  
16 maintenance of the market power.

17           But I'll look at the examples more closely.

18           Thank you.

19           Anything else?

20           COMMISSIONER HARBOUR: I did have one question.

21           There was something in your brief. You said  
22 that the commission could not adopt a remedy permitting  
23 Rambus to collect royalties without first deciding the  
24 issue of spoliation of evidence.

25           What did you mean by that?

1           MR. OLIVER: By that I meant that the issue of  
2 Rambus' spoliation of evidence also affects the issues  
3 that are in front of the commission now.

4           For example, the question of would Rambus have  
5 granted a RAND commitment, what royalty rates would  
6 Rambus have been seeking, did Rambus prefer to pursue  
7 its RDRAM strategy instead, indeed whether Rambus  
8 perceptions with respect to alternatives and likelihood  
9 of JEDEC adopting alternatives, all of these are issues  
10 that could have been discussed in Rambus documents, but  
11 we will never know.

12           And as a result, I respectfully submit that the  
13 commission was fully correct that it did not have to  
14 reach the question of spoliation for purposes of  
15 liability, nor would it have to reach the question of  
16 spoliation of evidence with respect to the remedy that  
17 complaint counsel has proposed, but I would submit that  
18 the commission should address the question of spoliation  
19 of evidence before issuing an order that would permit  
20 Rambus to collect any royalties with respect to the  
21 JEDEC-compliant products.

22           COMMISSIONER HARBOUR: Thank you.

23           MR. OLIVER: Thank you.

24           CHAIRMAN MAJORAS: Thank you, Mr. Oliver.

25           Mr. Melamed?

1           COMMISSIONER ROSCH: Mr. Melamed, let me ask you  
2 sort of a lead-off question if I may.

3           MR. MELAMED: Okay. If I could get forty  
4 minutes instead of four, I would appreciate that.

5           COMMISSIONER ROSCH: That's up to the chairman.

6           (Laughter)

7           CHAIRMAN MAJORAS: You may have 45 minutes.  
8 Have we reset the clock?

9           MR. MELAMED: Okay. We're all set.

10          COMMISSIONER ROSCH: It goes something like  
11 this.

12           As I read your brief, you take the position that  
13 really the only authority that we have is to issue a  
14 cease and desist order against further deception.

15           Am I correct in interpreting your brief?

16          MR. MELAMED: Yes.

17          COMMISSIONER ROSCH: Okay. So we just don't  
18 have the authority to order anybody to do something. We  
19 have the authority to order people to stop doing it, but  
20 not to do something, like, for example, to license their  
21 patents on the basis of some royalty stream or to  
22 license them royalty-free.

23           That is your position; is that right?

24          MR. MELAMED: Well, I would rephrase it  
25 slightly, but essentially that is correct. Here is the

1 rephrasing.

2 Our position is not that the commission's  
3 authority is limited only to prohibitory injunctions.  
4 There can be a mandatory injunction. Our position is  
5 that it is limited to preventing future violations of  
6 the law. And that can be construed very broadly by the  
7 fencing-in remedy because you want to steer clear of  
8 possible future violations.

9 But the authority under Section 5, which is very  
10 explicit in its statutory language about cease and  
11 desist the problematic conduct, does not extend to a  
12 remedy that would restore competition or achieve some of  
13 the other objectives that we are accustomed to in  
14 federal court remedies.

15 COMMISSIONER ROSCH: Let me just follow up on  
16 that for a second.

17 How do you reconcile that position with the  
18 corrective advertising cases that counsel cited,  
19 Warner-Lambert and Novartis later and for that matter  
20 with Detroit Auto Dealers where they actually ordered  
21 the auto dealers to stay open on Saturdays in the  
22 future?

23 MR. MELAMED: Well, I think Detroit Auto Dealers  
24 was a form of cease and desist or fencing in in the  
25 sense that there had been an agreement, an

1     anticompetitive agreement to close on the weekend days,  
2     and the commission said, in effect, not only can you  
3     not enforce the agreement, but in order to make sure  
4     that you won't continue this anticompetitive conduct,  
5     we will require you to engage in conduct that would --  
6     that if you agreed not to do it would be  
7     anticompetitive.

8             As to the corrective advertising cases, I agree  
9     they cloud the picture a little bit, but I think that if  
10    you look at Warner-Lambert in particular and the other  
11    cases as well, the language of those cases talks about  
12    the need for corrective advertising because they say, if  
13    we do not have corrective advertising, people will  
14    continue to make purchasing decisions and continue to be  
15    duped by these statements in the past.

16            In that sense, they are preventing a continuing  
17    wrongdoing, as you will, if you will, from the past  
18    conduct.

19            COMMISSIONER ROSCH:   Isn't that what is  
20    happening here?

21            I mean, here you have what is allegedly an  
22    illegally acquired monopoly and you have continuing  
23    exploitation of that monopoly.

24            Is that not a continuing violation of  
25    Section 2?

1 MR. MELAMED: I think not. No.

2 I think if you look at, for example, by  
3 contrast, look at Walker Process.

4 In Walker Process, the Supreme Court said it is  
5 anticompetitive to enforce a patent obtained by fraud on  
6 the patent office, with the various conditions around  
7 that.

8 We don't ordinarily, however, say that it is  
9 anticompetitive to charge a monopoly price. The  
10 anticompetitive vice outside the Walker Process content  
11 in Section 2 is conduct that excludes a rival or  
12 otherwise anticompetitive conduct that preserves or  
13 creates monopoly power. It is not the exercise of  
14 monopoly power. That is not an illegal act.

15 COMMISSIONER ROSCH: But it is not an exercise  
16 of monopoly power when the monopoly has been acquired  
17 lawfully, but can you cite me a case in which it has  
18 been held that the exploitation of monopoly power which  
19 has been acquired illegally is not a continuing  
20 violation or a violation at all?

21 MR. MELAMED: I don't know of a case that has  
22 held that, but I guess it is because I don't know of a  
23 case, which would have probably arisen only before the  
24 Federal Trade Commission where you face the statutory  
25 limitation on remedial authority, where the commission

1 has said, in effect, because of your past violation, I  
2 am not going to let you charge monopoly prices.

3 The issue, to my knowledge, has never been  
4 decided by any case.

5 COMMISSIONER LEIBOWITZ: Mr. Melamed, you  
6 mentioned the plain language of Section 5.

7 Why can't the plain language of "cease and  
8 desist" under Section 5 mean make Rambus cease and  
9 desist from continuing to collect royalties that are  
10 attributable to its unlawful activities? Why isn't that  
11 the plain meaning of "cease and desist" in this context?

12 MR. MELAMED: Well, because it says "cease and  
13 desist from using such act or practice."

14 And as I understood it, the commission's  
15 decision and the theory of the case from day one has  
16 been that the act or practice complained of here is  
17 engaging in deceptive conduct that the commission found  
18 violated Section 2. The act or practice is not charging  
19 royalties.

20 That may be an ill-gotten gain I suppose, but it  
21 is not an illegal act.

22 Look, Commissioner Leibowitz, contrast the  
23 language of Section 5 of the Federal Trade  
24 Commission Act referring to unfair trade practice,  
25 contrast it with the remedy provided by statute under



1 sections 513, 14, and 19 for false advertising or  
2 deceptive practices. Contrast it with the remedial  
3 provisions in Section 13(b) which authorize courts to  
4 provide broad remedies. Contrast it with 11(b) which  
5 authorizes the commission to enforce the Clayton Act.

6 Congress used that language for a reason, and it  
7 didn't use it elsewhere when it wanted to have broader  
8 remedial authority.

9 COMMISSIONER HARBOUR: Well, how do you  
10 reconcile your analysis with respect to merger consent  
11 orders, which often require royalty-free licensing as a  
12 remedy?

13 MR. MELAMED: I think the answer there is that  
14 the commission enforces the Clayton Act directly and has  
15 broader remedial authority under Section 11(b).

16 COMMISSIONER HARBOUR: What about cases such as  
17 Dow and Unocal where --

18 MR. MELAMED: But those are consent decrees.  
19 Those are consent decrees.

20 COMMISSIONER KOVACIC: May I ask, Mr. Melamed,  
21 is your argument about the interpretation of the  
22 commission's remedial scope based entirely on the  
23 analysis of the facts?

24 MR. MELAMED: No. It is based, in addition to  
25 that, on our reading, although I can't cite you a lot of

1 chapter and verse, we did cite some in our papers -- our  
2 reading of two strands or two kinds of legislative  
3 history.

4 The early history of the founding of the  
5 commission where there was a vision that the commission  
6 would be making new conduct standards that went beyond  
7 the then extant antitrust standards and thought, if  
8 we're really going to be changing the rules, we ought to  
9 limit their remedial authority.

10 And then we know in more modern times, when  
11 Commissioner Elman -- and I think there was another  
12 commissioner; the name escapes me -- anyway, they both  
13 went to Congress and said: We don't have enough  
14 remedial authority. Please broaden our remedial  
15 authority.

16 COMMISSIONER KOVACIC: May I ask, do you recall  
17 if they were speaking on behalf of the commission or in  
18 their own individual capacity?

19 MR. MELAMED: I do not know.

20 COMMISSIONER KOVACIC: So if I can remind you, I  
21 looked at the text of Commissioner Elman's testimony,  
22 and he seems to be speaking for himself.

23 MR. MELAMED: Okay.

24 COMMISSIONER KOVACIC: He is certainly a very  
25 impressive voice, but with the caveat that you have

1 heard to the point of distress over time, if I may, he  
2 seems to be speaking solely for himself.

3 MR. MELAMED: Very well. But he was a  
4 distinguished commissioner. He had an understanding of  
5 the remedial limitation. He suggested that Congress  
6 should broaden their power.

7 Around this time, there were, as I think,  
8 Commissioner Kovacic, you probably know as well anyone,  
9 there were a lot of other concerns about the  
10 institutional structure of the commission, about its  
11 not having Article 3 type fact-finding, about its  
12 not -- about the merging of the prosecutor and  
13 judiciary functions, about the political relationships,  
14 and so on.

15 Perhaps they account for the fact that when  
16 Congress was faced with requests, albeit on behalf of  
17 individual commissioners, it did not change Section 5  
18 but, rather, added Section 13(b), saying, if you want  
19 broader remedies, go to court.

20 COMMISSIONER KOVACIC: The word "divestiture"  
21 does not appear in the Sherman or Clayton Acts, does  
22 it?

23 MR. MELAMED: Not to my knowledge.

24 COMMISSIONER KOVACIC: How is it that the  
25 Department of Justice in a Sherman Act Section 2 case

1 may go to a District Court and request divestiture?

2 MR. MELAMED: Well, divestiture is regarded as  
3 one of the broad arsenal of general equitable powers  
4 available to a court.

5 COMMISSIONER KOVACIC: Do you recall when the  
6 Supreme Court concluded that was so?

7 MR. MELAMED: I could guess, but actually I  
8 think that I was practicing law at the time. But I  
9 don't want to guess.

10 COMMISSIONER KOVACIC: Am I incorrect in saying  
11 that it was an open issue before the Supreme Court until  
12 the late 1940s and early 1950s whether or not the power  
13 to issue divestiture applied only to assets that were  
14 accumulated improperly through a course of consolidation  
15 and that the defendants, through cases such as  
16 Schine Theaters, Paramount, Crescent, were making the  
17 argument that the court lacked the ability to mandate  
18 divestitures that went beyond the spinning off of the  
19 assets that had been acquired as part of the combination  
20 that produced monopoly power?

21 MR. MELAMED: I wouldn't be surprised if they  
22 were made. But that isn't our discussion about the  
23 breadth of federal courts' equitable powers. It is not  
24 a discussion about the meaning of the statutory  
25 limitation under Section 5.

1           COMMISSIONER KOVACIC: Then how do you interpret  
2 cases from the Supreme Court such as Dean Foods in the  
3 mid-1960s and predecessor cases such as ConAgra that  
4 interpreted the reach of administrative agencies'  
5 equitable authority?

6           MR. MELAMED: Well, ConAgra I think made a  
7 decision about the reach of the authority based on the  
8 CAB's comprehensive supervision of the aviation  
9 industry, and it did it on the basis of very different  
10 facts.

11           It would be like contrasting the  
12 Federal Trade Commission Act with the  
13 Interstate Commerce Act on which this commission was  
14 largely modeled, and yet, if you look at the remedial  
15 provisions, they are very different.

16           COMMISSIONER KOVACIC: Am I wrong in saying  
17 that when the court came back in Dean Foods in the  
18 mid-1960s to talk about the commission specifically, it  
19 seemed to speak in a way that said that the line of  
20 reasoning that it applied in ConAgra also applied to  
21 the commission, perhaps not in the exact terms  
22 expressly, but would you concede that it is suggestive  
23 that the court meant to apply the same line of  
24 reasoning to the commission?

25           MR. MELAMED: Well, there was some language to

1 that effect. I don't believe the court was focusing on  
2 the specific issue that we are focused on today, but  
3 there was some language to that effect.

4 COMMISSIONER KOVACIC: Would it be fair to say  
5 that at least in the same time as Commissioner Elman is  
6 speaking there is the assessment on the part of the  
7 court about precisely what the downreach of the  
8 authority of administrative bodies, including the  
9 commission, was?

10 MR. MELAMED: I'm not sure precisely, but there  
11 clearly was some language in the Dean Foods case.

12 COMMISSIONER KOVACIC: I am meaning to suggest  
13 that perhaps with respect to the interpretation of the  
14 Sherman Act as well as with respect to the  
15 interpretation of the Federal Trade Commission Act  
16 there has been indeed a conversation between the  
17 agencies and the courts about exactly what that  
18 authority means, and perhaps it is authority that has  
19 evolved.

20 MR. MELAMED: Well, it may have evolved to some  
21 extent, but it is interesting when you say a  
22 conversation with the courts.

23 You asked Mr. Oliver earlier I believe what  
24 cases he could point to that would shed light on this  
25 question. And with the exception of American Cyanamid,

1       there were no cases, it seems to me, that only only go  
2       to the issue of compulsory licenses -- well, I guess  
3       National Lead does as well -- but there are no cases  
4       that crossed the line that we are talking about here.

5                COMMISSIONER KOVACIC:    Would you include  
6       Balfour, which was the --

7                MR. MELAMED:    Balfour is --

8                COMMISSIONER KOVACIC:    I believe it was a  
9       monopolization case.

10               MR. MELAMED:    Balfour involved anticompetitive  
11       agreements and acquisitions.

12               COMMISSIONER KOVACIC:    And acquisitions.

13               MR. MELAMED:    And the remedy said undo that.

14               And of course, we know after DuPont and its  
15       progeny that continuing to own assets acquired in an  
16       illegal acquisition is a continuing violation of the  
17       antitrust laws.

18               So I think you could read Balfour as a  
19       cease-and-desist order, a sin-no-more order, in the  
20       sense we've been using the term.

21               And of course, Balfour came before  
22       Hospital corporation of America in the Seventh Circuit,  
23       in which Judge Posner said, albeit in dicta, that he  
24       understood that the commission had a very broad  
25       authority to prohibit anticompetitive conduct.    And he

1 did not suggest that the commission had authority to  
2 prohibit the exercise of market power in ways that were  
3 not --

4 COMMISSIONER KOVACIC: Of course, Hospital Corp.  
5 was not a remedial relief market case.

6 MR. MELAMED: I'm sorry. That's why I said  
7 "in dicta."

8 COMMISSIONER LEIBOWITZ: And Balfour was a  
9 Section 5 case, not a Section 7 case, right? Is that  
10 correct?

11 It wasn't a Clayton Act case.

12 MR. MELAMED: I don't believe it was Section 7.  
13 That's correct.

14 CHAIRMAN MAJORAS: And did the Sixth Circuit  
15 just get it wrong in American Cyanamid? And I could ask  
16 the same question about the Supreme Court in  
17 National Lead.

18 MR. MELAMED: Well, the Supreme Court in  
19 National Lead -- you mean U.S. v. National Lead or  
20 FTC v. National Lead?

21 CHAIRMAN MAJORAS: Let me think.

22 FTC v. National Lead.

23 MR. MELAMED: That was a fencing-in  
24 cease-and-desist type remedy there. I think that was  
25 either the price discrimination case or the basic DuPont



1 case, and the remedy was don't do it again and we're  
2 defining it broadly. It did not go to the question  
3 we're speaking of here.

4 As to American Cyanamid, of course, it was a  
5 Sixth Circuit decision 40 years ago. I don't think the  
6 issue was squarely joined in terms of they talked about  
7 the jurisdiction of the commission to enter a remedy of  
8 that type. They didn't talk about whether the statute  
9 would authorize where it was not in the nature of a  
10 cease-and-desist order.

11 But more importantly, the commission, on remand  
12 from the first Sixth Circuit decision, characterized  
13 its earlier decision as a Walker Process-type  
14 violation, because in the interim between the first and  
15 the second commission decision, Walker Process was  
16 decided.

17 So thus the intuition I think that drove  
18 American Cyanamid was the same intuition to arise in  
19 Walker Process; namely, if you had committed fraud and  
20 you are not entitled to have a valid patent, then the  
21 act of enforcing the patent could be considered an  
22 illegal act and could be properly be remedied  
23 cease-and-desist order --

24 COMMISSIONER ROSCH: That's precisely the point  
25 I was trying to make a little bit earlier.

1           Can I take you back to 13(b) for just one  
2 moment?

3           MR. MELAMED: Yes. Of course.

4           COMMISSIONER ROSCH: You mentioned the context  
5 in which 13(b) was enacted, but one of the things you  
6 did not mention was the lack of any pre-Section 5  
7 enforcement authority with respect to mergers that  
8 existed at that time.

9           Wasn't the primary reason that 13(b) was enacted  
10 was to enable the commission to obtain preliminary  
11 injunctive relief that it did not have because the  
12 statute, Section 5 standing alone, provided that it  
13 could only grant relief after notice and hearing, which  
14 meant that it could not get -- it couldn't itself order  
15 preliminary injunctive relief?

16           Isn't that the primary reason that 13(b) was  
17 enacted?

18           MR. MELAMED: It may well be. It certainly was  
19 central to the whole 13(b) story. Absolutely.

20           COMMISSIONER KOVACIC: Could I ask one other  
21 comment about the age of American Cyanamid.

22           Is the fact that it is 40 years old, nearly  
23 40 years old, an indication of its staleness perhaps?

24           MR. MELAMED: I think that, coupled with the  
25 fact that there are no subsequent judicial decisions

1 authorizing the commission to provide the kind of  
2 restorative remedy in a nonmerger case, suggests that it  
3 is stale. Yes.

4 COMMISSIONER KOVACIC: I was trying to recall  
5 for myself the number of instances in which a public  
6 agency has been before the appellate federal courts and  
7 the Courts of Appeals or before the Supreme Court since  
8 Brunell in the mid-1960s in which those tribunals have  
9 weighed in on the adequacy or inadequacy of remedies  
10 sought by any of the public authorities, and I am having  
11 a difficult time coming to mind of any.

12 MR. MELAMED: Well, maybe the matter hasn't come  
13 up in part because the commission hasn't pushed the  
14 authority this way.

15 I am struck by the fact, just this morning I  
16 noticed, in Toys "R" Us, here is a case where a firm was  
17 found to have exercised and then aggrandized market  
18 power by orchestrating a horizontal cartel, and the  
19 commission did not seek a restorative remedy. The  
20 commission simply said, Sin no more.

21 So perhaps it is because the commission has not  
22 sought to exercise this kind of authority, parties  
23 haven't had to bring it to the courts.

24 COMMISSIONER KOVACIC: What I was thinking is  
25 that the other public agencies have not frequently been

1 before the courts either just to suggest that the fact  
2 that the authority is old perhaps suggests how unusual  
3 it has been for the public agencies to be before the  
4 Courts of Appeals trying to enforce remedies.

5 MR. MELAMED: Perhaps it is. I'm not sure what  
6 lesson one draws from that.

7 CHAIRMAN MAJORAS: Mr. Melamed, you go on then  
8 after you make the argument that you think that the  
9 Commission doesn't have authority to order any kind of  
10 licensing and you make arguments to be offensive, and I  
11 wanted to ask you, I wanted to zero in now on those  
12 arguments.

13 You argue, of course, that in the but-for world  
14 Rambus would have set RAND terms, and so in your  
15 arguments, though, if we set a royalty, we should set it  
16 at 2.5 percent I believe is what you argued.

17 I'm sorry. I'm getting -- I'm asking you two  
18 different questions at once. Let me ask it a different  
19 way.

20 How can we accept that the but-for world would  
21 have included Rambus setting RAND terms for JEDEC or  
22 assuring JEDEC that it would when Rambus is on record as  
23 saying -- and I know that some of those times that  
24 Rambus said it was when it was leaving the  
25 organization -- but Rambus said: That is not our

1 business practice. We do not adhere to RAND terms,  
2 period.

3 So how can you now tell us that that is in fact  
4 what would have happened and how can we find that that  
5 is what the but-for world would have looked like?

6 MR. MELAMED: Let me answer that directly if I  
7 may make one more sentence about American Cyanamid just  
8 to put that to rest.

9 It is noteworthy that despite it being a  
10 Walker Process-type case, even in American Cyanamid the  
11 commission did not seek a zero royalty remedy.

12 Now, as to your question, I think the answer is  
13 this.

14 Rambus -- the complaint counsel say, Well,  
15 Rambus was all about royalties. It was not a  
16 manufacturing company. It just wanted to make  
17 royalties.

18 That is precisely the reason that Rambus would  
19 have given a RAND assurance in the but-for world.

20 Professor Teece testified in some detail about  
21 how in the but-for world, unlike the real world, Rambus  
22 would have been faced with a choice between saying no  
23 RAND commitment, in which case its technologies, the  
24 commission's opinion and complaint counsel suggest,  
25 would not have been included in the standards, and the

1 commission found that the JEDEC standards were likely to  
2 drive the market, so Rambus would have said, It's either  
3 nothing or it's RAND, and we have no other strategy, but  
4 we're not like a manufacturing firm that might say  
5 that's okay, we'll manufacture our own product, go out  
6 to the market, walking further on the gate, so they were  
7 talking about walking away from the market if they  
8 didn't give a RAND commitment. And a rational Rambus,  
9 precisely because it is royalty focused, would give a  
10 RAND commitment.

11 Interestingly, after Professor Teece testified  
12 this way, Professor McAfee was asked about that, and he  
13 had no opinion about the matter. Frankly, I think we  
14 all know that is what economists do when they don't say  
15 what their lawyers want them to say. He did not  
16 contradict Professor Teece's analysis.

17 COMMISSIONER HARBOUR: But isn't it all about  
18 timing, though?

19 I mean, isn't it likely that had Rambus  
20 disclosed its patent applications early in the  
21 standard-setting process, before deception and lock-in  
22 had distorted the standard-setting process, that those  
23 technologies would not have been chosen by JEDEC at that  
24 early point and that alternatives would have been  
25 chosen, therefore there would be zero royalties?

1           Isn't it all about the timing?

2           If the timing is later in the process after  
3 lock-in and deception, then it probably would be more  
4 likely that there would be a RAND commitment.

5           But if you start this process at the point of  
6 the true but-for world, before the deception took place,  
7 isn't it likely that JEDEC would have chosen alternative  
8 technologies?

9           MR. MELAMED: I think not, Commissioner Harbour.  
10 And here's why.

11           There are -- and by the way, I just want to  
12 reiterate a point that was in colloquy with Mr. Oliver.

13           There was a heavy burden on complaint counsel in  
14 proving that the but-for world and the real world  
15 diverge. It comes out of the Microsoft case. It comes  
16 out of Areeda & Hovenkamp.

17           COMMISSIONER HARBOUR: But Rambus' own  
18 documents --

19           MR. MELAMED: I understand. I'm going to go to  
20 the facts here.

21           COMMISSIONER HARBOUR: Okay.

22           MR. MELAMED: There are three facts, it seems to  
23 me, that are uncontroverted and that demonstrate I think  
24 conclusively that that is an extremely unlikely  
25 scenario.

1           First, it is clear that JEDEC preferred the  
2 Rambus technologies. They chose them after careful  
3 consideration of alternatives and they chose them,  
4 again, without lock-in, in DDR2. And the JEDEC members  
5 have also chosen them for other non-JEDEC standards like  
6 in RLDRAM, which is a bit of a proprietary -- not  
7 proprietary but non-JEDEC standard that was developed by  
8 Sun and Infineon.

9           So the market has shown a real preference to  
10 these -- Professor Teece's --

11           COMMISSIONER HARBOUR: I just have to address  
12 that.

13           The market showed a real preference after  
14 lock-in.

15           What about Rambus' documents that said that  
16 these -- that it could easily be worked around?

17           Your own documents acknowledge that in the JEDEC  
18 standard-setting process.

19           MR. MELAMED: Well, I am not sure the documents  
20 acknowledge that all four of these technologies could  
21 easily be worked around. I don't think the JEDEC -- the  
22 Rambus engineers knew that or were that focused.

23           Recall, at that time Rambus not only didn't have  
24 any issued patents, it didn't have any patent  
25 applications that are now at issue. The applications



1 that led to the patents that are now being enforced by  
2 Rambus were filed beginning in 1998, years after Rambus  
3 left JEDEC.

4 So at this early stage we were dealing with very  
5 imprecise understandings of what the patent interest  
6 might be and what the standards might be.

7 We do know -- we do know, whatever the timing --  
8 now, let's get into point one -- whatever the timing,  
9 after careful consideration of the alternatives, JEDEC  
10 said this is the best.

11 Now, Mr. Oliver would like to the commission to  
12 believe that it was a close call. There is nothing in  
13 the record to suggest it was close. It was well thought  
14 through, not close.

15 Now, that is point one.

16 COMMISSIONER HARBOUR: Let me respond to that  
17 and propose that in viewing the totality of the  
18 circumstances, the JEDEC guides, the expectations of the  
19 members of JEDEC, the EIA guides and the other  
20 guidelines. These documents talked about patents,  
21 patent applications and intentions to file patents.

22 So again I go back to the timing.

23 Had Rambus not engaged in deception and had  
24 signaled its intentions to the JEDEC members at that  
25 time, JEDEC easily could have worked around those

1 patents or those intentions to file patent applications  
2 which Rambus' documents state.

3 MR. MELAMED: To my knowledge, the commission  
4 did not put a date on the earliest time that Rambus  
5 should have disclosed or say what it should have  
6 disclosed at that time.

7 And whatever that date was, there is, to my  
8 knowledge, no evidence in the record that the careful  
9 consideration of alternatives from which came the  
10 careful considered preference for Rambus technologies  
11 was after that as opposed to before that.

12 COMMISSIONER HARBOUR: But we're talking about  
13 the but-for world, a world that is --

14 MR. MELAMED: I understand that.

15 Excuse me.

16 But suppose it were -- and I don't think the  
17 record is to the contrary -- but suppose it were that  
18 JEDEC considered twenty technologies and the last one  
19 they considered was Rambus. And at that point Rambus  
20 should stand up and say, depending on what they knew  
21 about their patent interests at the time, We might have  
22 a patent covering that. At that point the consideration  
23 would have already have taken place.

24 The burden is on complaint counsel, and I don't  
25 think there is any evidence in the record that would

1 suggest the kind of hypothesis you imagine, which is  
2 that all of this consideration of alternatives took  
3 place after some breach of a duty to disclose.

4 COMMISSIONER HARBOUR: Well, the evidence  
5 appears to be Rambus' documents itself. The  
6 documents --

7 CHAIRMAN MAJORAS: I need you to come back to my  
8 question and respond to my question if you could.

9 MR. MELAMED: On why would they have accepted a  
10 RAND commitment?

11 Well, so you had the expert testimony -- we had  
12 the expert testimony from Teece, which is not  
13 contradicted.

14 Now, on the other side of that, as I understand  
15 it, complaint counsel made essentially two points.

16 First, they say, well, in the real world,  
17 Rambus withdrew from JEDEC and said we're withdrawing  
18 in part because your patent policy and ours aren't the  
19 same.

20 Commissioner Majoras, I think they have drawn  
21 exactly the wrong inference from that testimony.

22 If Rambus had thought that it could stay in  
23 JEDEC and then make a disclosure and then say, We're not  
24 going to give you RAND, if they had thought that were a  
25 rational course, they would never have withdrawn from

1 JEDEC.

2           They withdrew from JEDEC precisely because they  
3 knew that if they were ever in a position where they had  
4 to give a RAND commitment or have those technologies out  
5 of the standard, they would have to give a RAND  
6 commitment.

7           The letter proves, it seems to me, that they  
8 knew that in the but-for world in which had they made a  
9 disclosure and were faced with that choice, they would  
10 have to give up their right to keep --

11           COMMISSIONER ROSCH: Well, let me ask you about  
12 that, Mr. Melamed.

13           Did you introduce -- and I don't mean you  
14 personally, but did Rambus introduce any evidence  
15 whatever to explain that those letters did not mean what  
16 they said, namely that Rambus was in fact willing to  
17 give a RAND commitment?

18           Is there any evidence from Rambus, either a  
19 percipient Rambus witness or any documents which  
20 undercut those letters --

21           MR. MELAMED: The only -- no, not a percipient  
22 witness.

23           COMMISSIONER ROSCH: -- or explain them in the  
24 way that Professor Teece, who I admire greatly, you say  
25 explained them or that you've just explained?

1           MR. MELAMED: This would have been hypothetical  
2 testimony. If you had been asked and if you had made a  
3 disclosure, would you have given a commitment?

4           There is testimony answering that hypothetical.  
5 It was Teece's testimony. To my knowledge --

6           COMMISSIONER ROSCH: But he is not a percipient  
7 witness.

8           MR. MELAMED: No. I said not a percipient  
9 witness.

10           But to my knowledge, Rambus had not formed a  
11 view about that because it never experienced that in the  
12 real world. In the real world it was advising that if  
13 it gets out of Rambus (sic), it doesn't have to face  
14 that situation.

15           Now, the other thing that complaint counsel rely  
16 on is the IEEE request in the real world for a RAND  
17 commitment.

18           It is not clear what Rambus did there. Rambus  
19 wrote back and said, We're going to continue to license  
20 as we've licensed in the past.

21           Draft letters said that we're going to reserve  
22 the right to change that, and they didn't send that  
23 draft.

24           It is not at all clear that they denied what  
25 they understood to be a RAND commitment or what IEEE

1 understand to be a RAND commitment.

2 But the more important point about that episode  
3 is that that had to do with RamLink. RamLink was a  
4 generic interface, not suitable for DRAMs.

5 So it did not present Rambus with the choice it  
6 would have faced in the but-for world, namely, give a  
7 RAND commitment or lose all your rights.

8 And when faced with that, it seems to me, as  
9 Chairman Majoras' questions earlier today suggest,  
10 Professor Teece is clearly right, and he is of course  
11 uncontradicted, a rational Rambus would have said, Yes,  
12 we'll give a RAND commitment.

13 CHAIRMAN MAJORAS: Mr. Melamed, I think I may  
14 have interrupted you when you were about to give numbers  
15 two and three in response to Commissioner Harbour, and I  
16 wanted to hear them, too, so if you wouldn't mind  
17 returning to that, please.

18 MR. MELAMED: Well number one was it was  
19 preferred after careful consideration.

20 Number two -- could we have slide number 3,  
21 please.

22 The JEDEC rules explicitly did not prohibit  
23 inclusion of patented technologies.

24 The EIA manuals explicitly say that it's okay if  
25 you could get a RAND commitment.

1           The JEDEC manual says there's no restriction on  
2 inclusion of a patented item with RAND assurance.

3           Interestingly -- let me try slide 7, if I  
4 remember correctly.

5           Yeah.

6           Even the testimony about what did "open  
7 standards" mean -- one of the amicus briefs made a big  
8 deal about open standards. It is not clear I suppose  
9 what it means. There is conflicting testimony.

10           But look at what the JEDEC chairman,  
11 Desi Rhoden, said.

12           He said: Everyone can participate. That's what  
13 it means. It means it's open as a procedural matter or  
14 maybe he meant nondiscriminatory of licensing available  
15 to everyone.

16           John Kelly, the general counsel of EI -- AI,  
17 said that patented features can be included with RAND  
18 assurance.

19           And there were several other witnesses that said  
20 essentially the same thing.

21           So it is clear that JEDEC did not prohibit  
22 patented technologies with a RAND assurance.

23           And then finally, the most important thing --  
24 Chairman Majoras, you referred to this earlier in your  
25 colloquy with Mr. Oliver.

1           Let's have slide 4 if we can.

2           There were several instances -- I think you said  
3 three. We count more than that, five. Maybe one of us  
4 has misunderstood part of the record -- but at least  
5 several instances in which patented technologies were  
6 knowingly included in the JEDEC standards.

7           In three of these there were the RAND  
8 commitment. In one there was something more specific, a  
9 royalty rate commitment. As to the bottom one, it is  
10 not clear there was any commitment at all.

11           In some of them -- the Mosaic patent, very like  
12 our case, 1995, it's a DRAM patent. There was colloquy  
13 back and forth between the patent holder and JEDEC about  
14 what does RAND mean, and ultimately they said, We'll  
15 give you a RAND commitment, and JEDEC proceeded.

16           QuadCast. Complaint counsel has made a lot of  
17 that because initially everyone said, Wait a minute,  
18 stop, we can't do QuadCast, it's patented. Ultimately,  
19 they gave a RAND commitment and proceeded with QuadCast  
20 in the standard.

21           Could we have slide 5, please.

22           In addition to those, there are other examples  
23 in the record where patent concerns were raised.

24           Someone would say, Wait a minute, I think so-and-so  
25 might have a patent on this. The record is a little



1       unclear about what exactly transpired. But we do know  
2       that in these six instances the technology with a patent  
3       cloud over it was included in the JEDEC standard.

4               In some ways slide 5 is closer to our story than  
5       your slide 4, because recall we had no issued patents,  
6       we had no pending applications that have ultimately led  
7       to the patents on the technologies that are at issue  
8       here, so all we could have possibly have said is we  
9       might have -- we might have a patent on this, on these  
10      technologies. And the question then is would JEDEC have  
11      simply thrown up its hands and walked away in the face  
12      of this.

13             And that takes me to Mr. Oliver's argument about  
14      JEDEC is a satisficer. I don't know that it's a  
15      satisficer. That's a nice economic theory.

16             But let's play with their logic for a minute.  
17      Let's imagine that JEDEC is a satisficer. Imagine  
18      you're a satisficer who knows and prefer this technology  
19      after careful study and now some uncertain patent cloud  
20      has been raised over it. Maybe you take it seriously,  
21      but maybe you're a little worried you're being gamed  
22      kind of by the Echelon matter where somebody comes in  
23      and says, I have a patent, you can't do it (inaudible)  
24      in the marketplace. Whatever. You have some concern.

25             If you're a satisficer and you have a record of

1 accepting RAND commitments, do you simply say, I won't  
2 take my preferred technology in the face of this  
3 uncertainty, or do you say, especially because it's a  
4 not a certain patent cloud, a RAND commitment, and  
5 because it's a considered preference, a RAND commitment  
6 is all I require here?

7 Let me put it differently.

8 COMMISSIONER ROSCH: Let me ask you, just  
9 following up on that, are you suggesting then that in  
10 the but-for world that JEDEC would have accepted the  
11 Rambus technology even without a RAND commitment?

12 MR. MELAMED: I think that's a possibility.

13 COMMISSIONER ROSCH: Well, is that what you're  
14 asking us to find? Because that would be revisiting our  
15 liability decision, would it not?

16 MR. MELAMED: We have argued that. There are  
17 many other possibilities. No. All we're asking you to  
18 find today, which we believe is the more likely  
19 scenario, is that they would have insisted on RAND and  
20 would have given a RAND.

21 COMMISSIONER ROSCH: Is there any evidence in  
22 the record, Mr. Melamed, that anybody at JEDEC took  
23 those letters to mean something less than they said, in  
24 other words, to undercut their view of those letters?

25 MR. MELAMED: I'm sorry. The letters?

1           COMMISSIONER ROSCH:  The letters in which Rambus  
2 said that they would not make a RAND commitment.

3           Is there any evidence --

4           MR. MELAMED:  But there is no such letter.

5           There is a letter in which Rambus withdrew from  
6 JEDEC and said, in one sentence, your patent policy and  
7 ours is inconsistent.

8           There's nothing that said we would not give a  
9 RAND commitment.

10          COMMISSIONER ROSCH:  Correct.

11          MR. MELAMED:  And I assume they took that  
12 letter, if anybody saw that letter, at face value.  But  
13 that doesn't mean what they would do if faced with a  
14 Hobson's choice that they possibly would have been faced  
15 with in the but-for world.

16          COMMISSIONER ROSCH:  But to cut to the chase on  
17 this particular aspect, there is no evidence in the  
18 record either with respect to JEDEC's understanding or  
19 with respect to Rambus' understanding that would  
20 undercut the face of those -- of the letter; correct?

21          MR. MELAMED:  Well, again, it depends what you  
22 mean by "the face of the letter."  But there is nobody  
23 saying this letter doesn't mean what it says.

24          But there is evidence that goes to this issue.  
25 There is evidence from a number of JEDEC members who

1 said, in various contexts, We don't really think Rambus  
2 is going to have valid patents on these technologies.  
3 For one thing, we think there's a lot of prior art.

4 So that may be one of the reasons that this  
5 issue wasn't vetted more at length.

6 CHAIRMAN MAJORAS: If I may, Mr. Melamed, as the  
7 Microsoft court recognized, one of the difficulties that  
8 we have is that of course we don't know what the but-for  
9 world would look like precisely. None of us does.  
10 That's impossible.

11 And what that court has said, I think other  
12 courts have said as well, is that, Look, I mean, that's  
13 why you have to resolve reasonable doubts against the  
14 wrongdoer because otherwise, you know, it's obviously  
15 not fair to consumers and others who might be injured  
16 to have to ask them to run around in some impossible  
17 way and create precisely what the but-for world would  
18 be.

19 So why isn't that something that we need to take  
20 into account?

21 And if we do, then, you know, on this record,  
22 then why isn't Mr. Oliver right that we should -- while  
23 there may be evidence on both sides of what the but-for  
24 world would look like, why not say, Well, all right,  
25 then we'll resolve these doubts against Rambus and we'll

1 find what Mr. Oliver is asking us to find and say, I'm  
2 sorry, no royalty?

3 MR. MELAMED: I think you should take that  
4 language seriously but understand it for what it means.

5 The language that doubt should be resolved  
6 against the defendant is pertinent to the liability  
7 question, as it was in the first Microsoft decision and  
8 I think as it was, as you understood it, in your  
9 decision. Because if I understand your decision, you've  
10 basically said this is conduct reasonably capable of  
11 excluding and with no counterweighting justification  
12 that's enough for liability.

13 There is language elsewhere to the same effect  
14 as you paraphrased that goes to what I call remedial  
15 efficacy, will the remedy solve the problem. And in  
16 that there's a lot of language that says in that  
17 situation resolve it against the defendant.

18 The question we face is a different one. It is  
19 a threshold question, which is, is there sufficient  
20 proof of a problem to warrant a remedy that goes beyond  
21 sin no more, that has to do with diminishing one's  
22 market power or reducing one's prices, diminishing one's  
23 revenues, changing market structure. Those are more  
24 intrusive equitable remedies.

25 And in that context, although there's not a lot

1 of cases, all the cases and the leading treatises are  
2 unanimous, as I understand it.

3 In -- could we have slide 2.

4 This is language that you referred to me and  
5 Chairman Majoras just quoted.

6 The Areeda & Hovenkamp treatise says that  
7 equitable remedies that go beyond an injunction against  
8 unlawful conduct require a clearer indication of causal  
9 connection between the conduct and creation or  
10 maintenance of market power.

11 That language was quoted twice in the first  
12 Microsoft case, in the second time in italics, the  
13 keywords. And in the second Microsoft case, I think  
14 the case that, Chairman, you're very familiar with,  
15 Massachusetts versus Microsoft, it was quoted again,  
16 that time affirming the refusal of the District Court  
17 to order a compulsory licensing of intellectual  
18 property.

19 COMMISSIONER KOVACIC: Do you have a sense of  
20 what they mean by "clearer" here?

21 Clearer than what?

22 MR. MELAMED: Well, I think clearer than is  
23 necessary simply to find liability and authorize a  
24 sin-no-more order.

25 Elsewhere in the treatise they talk a little bit

1 about a sort of sliding scale, but the more intrusive  
2 the remedy, the higher proof bar must be.

3 COMMISSIONER KOVACIC: Do they give any  
4 operational criteria for telling us when we are  
5 clearer?

6 MR. MELAMED: No. I don't think they really do.  
7 But I think they clearly say the burden is on the  
8 plaintiff. The IP and the intellectual property  
9 treatise is clear about -- could we have slide 1,  
10 please.

11 It is clear the plaintiff has the burden.

12 This treatise calls it a causation requirement  
13 that the plaintiff show that the standard-setting body  
14 would not have adopted the standard, not that it might  
15 not have, not that it's more likely, that it would not  
16 have adopted the standard.

17 And then Areeda & Hovenkamp and the Microsoft  
18 cases say that you need more proof than you need for  
19 liability.

20 Now, the principal argument against this, as I  
21 understand it from Mr. Oliver, is to say, Well, that was  
22 a maintenance case.

23 Now, one problem with the argument, as  
24 Chairman Majoras pointed out, is that the language  
25 doesn't say that.

1           The first thing in -- put up slide 2.

2           The first thing in the Areeda & Hovenkamp quote  
3 is creation, not maintenance.

4           But there is another more fundamental problem  
5 with their argument.

6           If the Microsoft court had been faced with a  
7 requested remedy to eliminate Microsoft's market power,  
8 let's say put the operating system Windows in the  
9 public domain, then it would be -- there would be a  
10 logic to say, wait a minute, isn't there a greater cost  
11 or a greater risk of a false positive if we take away  
12 market power that at least initially was lawfully  
13 obtained.

14           But that's not what was issued in Microsoft. In  
15 neither case was anybody saying take away Microsoft's  
16 market power. Both of the remedies were intended to  
17 really -- about entry barriers and to restore the  
18 precise harm that the plaintiffs alleged had taken  
19 place.

20           COMMISSIONER KOVACIC: Wasn't the theory of the  
21 remedy, though, to take measures that would in fact  
22 dissolve the market power?

23           MR. MELAMED: No. It was to reduce the entry  
24 barriers that it was thought Microsoft had artificially  
25 created.



1           COMMISSIONER KOVACIC:  Wouldn't the natural  
2 consequence of that have been, though, to reduce the  
3 market power?

4           MR. MELAMED:  It depends whether entry barriers  
5 rather than skill, foresight and industry were the  
6 source of Microsoft sustaining market position.  That  
7 was the market test the case was intended to bring  
8 about.

9           But the point is that it was a much more modest  
10 remedy, and so in Microsoft, as in our case, the  
11 question is, is there a problem to solve.  And then you  
12 hopefully can calibrate the remedy appropriately for the  
13 problem.

14           And that question is identical whether it's a  
15 maintenance case and you're talking about adjusting  
16 entry barriers or a creation case and you're talking  
17 about directly assaulting the market power.  In either  
18 case, the question is, is there a market power problem  
19 to be addressed by somehow, you know, fixing the  
20 problem.

21           And Areeda & Hovenkamp and the Microsoft courts  
22 twice in that decision said, if you're going to go that  
23 far, you have to have pretty darn good proof, a lot more  
24 proof than you need simply to find a violation or simply  
25 to issue a cease-and-desist order.

1           CHAIRMAN MAJORAS: But you argue that in the  
2 but-for world, when presented with a choice, Rambus  
3 would have given RAND terms.

4           MR. MELAMED: Absolutely. Yes.

5           CHAIRMAN MAJORAS: So then the job for us then,  
6 as you would argue, it becomes deciding whether --  
7 deciding what RAND would be --

8           MR. MELAMED: Yes.

9           CHAIRMAN MAJORAS: -- or would have been?

10          MR. MELAMED: Well, yes. Yes. Yes, that is the  
11 question, what would that mean if we had -- if we had  
12 played out this but-for world and the standards were  
13 exactly as they are today and Rambus had made a RAND  
14 commitment.

15                 Now, the issue is what would RAND have meant in  
16 the mid-'90s. Back in the mid-'90s, RAND meant perhaps  
17 only that Rambus must avoid, in the words of the JEDEC  
18 rules, "unfair discrimination" and that, as suggested by  
19 the Justice Department's October 30 business review  
20 letter, royalties must be low enough to "permit the use  
21 of the patents in commercially viable products." Maybe  
22 not a lot more teeth than that.

23                 That's what Professor Teece with teeth testified  
24 to.

25                 And that's what the colloquy between JEDEC and

1 Mosaic leading to Mosaic RAND commitments and JEDEC's  
2 inclusion of its technology in the standard would  
3 suggest everybody then understood "RAND" to mean.

4 So what does that mean the commission should  
5 do.

6 One possibility is the commission could simply  
7 say license on RAND terms. After all, the real  
8 competitive concern in the RAND area -- there are two I  
9 can assure. Rates are a part of it, but the most  
10 important part is nondiscrimination.

11 CHAIRMAN MAJORAS: And aren't we just buying  
12 ourselves a whole lot of trouble going forward if we  
13 say okay, fine, go off and license on RAND terms?  
14 Because naturally, whatever you say the RAND term is by  
15 definition, others are going to say it's not  
16 reasonable, and the next thing you know, they're going  
17 to be back here and we're going to be deciding it.

18 So I mean, I don't know what that gets us.

19 MR. MELAMED: I understand. You're quite right.  
20 And I think the parties may well, you know, in effect  
21 resolve that, not want to come back, but that's a real  
22 risk.

23 And the commission may even, apart from  
24 considerations of expediency, want to assess what RAND  
25 is because of what is imagined that if a court would

1 have been called upon in the real world potentially to  
2 make that very same decision, then why not just cut to  
3 the chase.

4 So then the question becomes what in the record  
5 will shed light on what RAND might be.

6 Let me turn to slide 10.

7 The record contains a fair amount of information  
8 about this.

9 Complaint counsel, interestingly, accuse us of  
10 relying on, quote, a handpicked selection of a limited  
11 number of license agreements.

12 COMMISSIONER HARBOUR: Mr. Melamed, let me stop  
13 you for a moment. I want to talk about the  
14 administrability of RAND and get your thoughts on that.

15 If rates are set, how long, in your opinion,  
16 will those rates or would those rates be valid?

17 MR. MELAMED: Probably -- excuse me one second.

18 (Pause in the proceedings.)

19 Well, I mean, one possibility is until the  
20 patents expire, at least the patents Rambus has  
21 presently been suing on.

22 COMMISSIONER HARBOUR: Okay. And will the  
23 rates need to be modified or updated as time goes on,  
24 or would Rambus anticipate that there would be one rate  
25 set?

1           MR. MELAMED: I think they anticipated it would  
2 be one rate set. But we -- look, there's no question,  
3 this is a thorny area. That's why now Justice Breyer  
4 said in Town of Concord that we should avoid  
5 ratemaking.

6           But it doesn't follow that the commission should  
7 do something inappropriate, like a zero royalty. If  
8 administration is the problem, stick to cease and  
9 desist, just say, all right, there are other ways to  
10 solve the administration problem. And perhaps on this  
11 one, if you want to go and set a rate, set a rate, and  
12 if parties have to come back and petition for  
13 modification because of changed circumstances, well,  
14 that happens from time to time under commission's  
15 orders.

16           COMMISSIONER LEIBOWITZ: Mr. Melamed, I agree  
17 with you that we can't just say that because of the  
18 complications of setting RAND rates that we should go to  
19 zero royalty.

20           But let me ask you this.

21           Do you really think for chip manufacturers or  
22 for makers of end-user products or controllers we should  
23 set one rate? Wouldn't we have to monitor negotiations?  
24 Wouldn't we have to decide between two parties that  
25 can't come to an agreement?

1 I mean, it really does make us a ratemaking  
2 agency at some level -- or it might.

3 MR. MELAMED: Well, I think you could set one  
4 rate, let's say one rate, for example, 2.5 percent, and  
5 say this has got to be the weighted-average rate for all  
6 JEDEC-compliant products in the four -- of the four  
7 technologies and let the market decide specifically how  
8 this shakes out.

9 COMMISSIONER LEIBOWITZ: So you would set a  
10 presumptive rate and allow negotiations around that rate  
11 depending on other factors? Is that what you're talking  
12 about?

13 I just want to flesh this out.

14 MR. MELAMED: I would say one possibility -- and  
15 by the way, maybe this is something that if there's a  
16 mechanism to do it could be hammered out in a more  
17 informal setting about the details.

18 But one possibility would be to say Rambus  
19 cannot receive weighted-average revenues in its licenses  
20 in excess of X percent and let the market decide  
21 specifically how that may break down among different  
22 types of licensees. That might be a less bit regulatory  
23 way than setting a specific rate applicable to a  
24 specific kind of license.

25 COMMISSIONER KOVACIC: So I understand, are you

1 saying that from our earlier conversation that an order  
2 that mandated RAND itself would be illegitimate because  
3 the commission lacks the power to impose it?

4 MR. MELAMED: We have argued that it goes beyond  
5 the cease-and-desist power, and now we're saying, if the  
6 commission is going to enter such an order, here are  
7 some other ways --

8 COMMISSIONER KOVACIC: But initial discretion  
9 you would say -- if you saw an order of this kind, your  
10 response to it would be, hypothetically, in the  
11 appellate process, that in itself is illegitimate?

12 MR. MELAMED: That would be a possibility.

13 COMMISSIONER HARBOUR: Let me ask you this.

14 How would the commission handle all of Rambus'  
15 existing contracts? Would those existing contracts have  
16 to be voided?

17 MR. MELAMED: I would -- that's a good question.  
18 I hadn't thought about that.

19 I would think that with respect to the  
20 appropriate products, which are the four technologies  
21 for SDRAM and DDR, that you could say, if we get past  
22 the authority problem, that Rambus cannot enforce  
23 existing contracts in the future for future infringement  
24 beyond whatever rates you set.

25 I would like, if I could, to have a minute on

1 DDR2. I know I'm over my time.

2 COMMISSIONER ROSCH: Actually, just before you  
3 get to that minute, can I ask you, what do you propose  
4 as a royalty rate?

5 Just cut to the chase.

6 MR. MELAMED: Something north of 2.5 percent.  
7 The absolute minimum is 2.5 percent.

8 COMMISSIONER ROSCH: And 2.5 percent is the  
9 based on this best contract -- that's your best  
10 benchmark.

11 MR. MELAMED: That's the best benchmark.

12 But if you look at the set of evidence referred  
13 to here, you really go quite a bit farther north.  
14 Actually, as you know, we've argued 3.5 is reasonable.  
15 I know the commission has heard some testimony about  
16 that.

17 May I do DDR2, please?

18 The commission found no causal link. The  
19 plaintiff has the burden of proving causal link. There  
20 is no anticompetitive -- there is, therefore, in the  
21 commission's finding -- liability decision no finding of  
22 harm to competition in the markets in which these  
23 technologies are licensed for use in DDR2. That should  
24 be the end of the matter.

25 Now, complaint counsel make two arguments.



1           One, they say, well, the world might have been  
2 different. If you reconstruct some hypothetical  
3 decision path, maybe we would wind up with different  
4 technologies in DDR2 today.

5           I think there is no reason for that of course if  
6 we believe that we would have given RAND, and so forth.  
7 But even apart of from that, that's, number one,  
8 immaterial.

9           It is immaterial because the issue before the  
10 commission is not to rewrite the course of history. It  
11 is at most, again, leaving aside the authority point, to  
12 correct competitive harm in those markets in which harm  
13 has been found. And there has been no harm found with  
14 respect to the licensing -- no anticompetitive harm  
15 found with respect to the licensing of DDR2.

16           Point two, complaint counsel say there is no  
17 evidence to prove it would be -- that these technologies  
18 would be in DDR2. I think that is wrong, which I'll get  
19 to in a moment. But of course, that puts the burden of  
20 proof on the wrong party. They have to prove that it  
21 wouldn't be.

22           And if you look at the proof, the proof is it  
23 would be because it is in DDR2, it's going to be in  
24 DDR-3, it's in RLDRAM, it's in the other standards  
25 because it's the revealed preference of JEDEC.

1           COMMISSIONER HARBOUR: But isn't the objective  
2 of the remedy to address the real-world effects of  
3 Rambus' unlawful conduct?

4           If the commission does not extend its remedy to  
5 DDR2, wouldn't Rambus unjustly realize the fruits of its  
6 unlawful conduct?

7           For example, as I was saying to complaint  
8 counsel, DDR2 is projected to be 70 percent of sales in  
9 2007 and roughly \$290 million in royalties.

10           So based upon the commission's fencing-in  
11 authority, shouldn't the remedy address these real-world  
12 effects?

13           MR. MELAMED: I'm glad you mentioned fencing in  
14 because I wanted to get to that as a second argument.

15           The straight answer to your question is that  
16 these effects are not caused by a violation of law.  
17 That is what the commission found when it said no causal  
18 link has been established.

19           Now, I know there is a footnote that said the  
20 contrary hasn't been proven, but the plaintiff has to  
21 prove a causal link.

22           Now, fencing in is not a shortcut to get around  
23 that. "Fencing in" means tell the party that he cannot  
24 engage in unlawful conduct, and you can define it  
25 broadly.

1           For example, you could say to Rambus not just  
2 don't deceive JEDEC about SDRAM and DDR, don't engage in  
3 misleading conduct with respect to any standard-setting  
4 body in the future, or you could say, more broadly,  
5 geographically or whatever.

6           But what you can't use fencing in for -- no case  
7 suggests you can use fencing in for this -- is to say  
8 here is conduct that was not illegal conduct, but we  
9 don't like it and we're going to stop it. Because at  
10 most, the violations here had to do with deception, not  
11 with enforcing patents.

12           COMMISSIONER HARBOUR: But isn't the test for  
13 fencing in whether the commission can articulate a  
14 reasonable relation between the anticompetitive conduct,  
15 between Rambus' deception, and the prohibited  
16 activities, which is the collection of royalties?

17           MR. MELAMED: No.

18           COMMISSIONER HARBOUR: The test for fencing in is  
19 not the same standard for causation and lock-in.

20           MR. MELAMED: I think that is incorrect,  
21 Commissioner.

22           I think that "reasonable relation" means that  
23 you couldn't say to us that because of deception at  
24 JEDEC, oh, and by the way, you know, you can't sell  
25 airplanes next month. It has to bear a reasonable

1 relationship to the kind of wrongful conduct that we  
2 engaged in in the past and that one might fear we will  
3 engage in in the future.

4 COMMISSIONER HARBOUR: Well, you'll have to look  
5 at that because my understanding is that DDR2 does not  
6 have to be linked by causation and lock-in to be  
7 reachable under the fencing-in authority.

8 MR. MELAMED: I don't read the cases that way.  
9 But consider the "reasonable relation" language.  
10 That language would encompass a remedy that would say to  
11 Microsoft, Give up your copyright in Windows, because  
12 that copyright, after all, is reasonably related to the  
13 whole scheme that they were found to have violated.

14 That's not a proper use of "reasonably related"  
15 or a proper way to analyze remedies, it seems to me,  
16 Commissioner Harbour.

17 CHAIRMAN MAJORAS: Okay. Thank you very much,  
18 Mr. Melamed.

19 Mr. Oliver, rebuttal?

20 MR. OLIVER: Yes. Thank you.

21 COMMISSIONER LEIBOWITZ: Mr. Oliver, just one  
22 quick question following up on what Mr. Melamed stated.

23 Is he wrong about a reasonable relationship in  
24 the context of fencing in? And if so, could you explain  
25 why.

1           MR. OLIVER: I believe that there would be a  
2 reasonable relationship here if the commission chose to  
3 follow this path.

4           I believe that it is appropriate for fencing-in  
5 relief under certain circumstances to prohibit what  
6 otherwise would be lawful conduct that is related to or  
7 associated with the unlawful conduct. I believe that is  
8 what Federal Trade Commission versus National Lead stood  
9 for.

10           And I believe that under the circumstances here,  
11 where the relationship between the SDRAM and DDR SDRAM  
12 standards is closely established with DDR2 because the  
13 technologies were carried through --

14           COMMISSIONER LEIBOWITZ: But again, it's not  
15 supposing a causal connection, so in some way it might  
16 very well be punitive to reach DDR2.

17           Why am I wrong about that, that it might be  
18 punitive to reach DDR2? Why is reaching DDR2  
19 necessary?

20           MR. OLIVER: I believe reaching DDR2 is  
21 necessary in order to restore fully --

22           COMMISSIONER LEIBOWITZ: Why?

23           MR. OLIVER: Because the competitive conditions  
24 that would have prevailed in the absence of this conduct  
25 would have been either standards with alternative

1 technologies would have been carried through.

2 Or even -- even under Mr. Melamed's  
3 hypothetical -- I believe the evidence is against this,  
4 but even if the JEDEC were to incorporate the Rambus  
5 technologies and JEDEC members were to negotiate in  
6 advance for license agreements, they would negotiate for  
7 license agreements for the duration of the patent at  
8 whatever rate that they negotiated.

9 And I submit that under the economics here that  
10 they would have driven the royalty rates down very close  
11 to zero, but those rates would have applied for the life  
12 of the patent and therefore would have applied with  
13 respect to the future standards as well.

14 CHAIRMAN MAJORAS: But aren't you rearguing  
15 liability when you say that?

16 I mean, isn't that all code for there was a  
17 causal connection here, which what we found was there  
18 might have been, but there wasn't enough evidence in  
19 this record to prove it and the burden of proof wasn't  
20 met?

21 MR. OLIVER: I don't believe so,  
22 Madam Chairman.

23 I believe the reason is that I want to start  
24 coming from a different place.

25 But with respect to liability, one properly

1 started with the SDRAM and DDR standards as they are  
2 today and asked why was it that the JEDEC members  
3 carried these technologies forward into DDR2, was it a  
4 result of Rambus' deception or was it the result of  
5 other factors, including, for example, the situation  
6 that as of 2002, when the DDR2 standard was finalized,  
7 the Infineon District Court decision had been issued and  
8 the JEDEC members may have discounted, if you will, the  
9 likely validity of the Rambus patents.

10 But the result was, in trying to determine,  
11 okay, well, why was -- why did these technologies end up  
12 in the DDR2 standard, there was substantial evidence of  
13 lock-in and carryover, but there is also some evidence  
14 that JEDEC members being aware of the Rambus patents  
15 perhaps at that time did not take full or proper  
16 consideration of the patents and perhaps were partially  
17 at fault that they carried them over.

18 However, if one looks at the competitive  
19 conditions that would have prevailed in the absence of  
20 Rambus' deception, one ends up with a different world.  
21 One ends up with either most likely a set of SDRAM and  
22 DDR SDRAM standards with different technologies, and  
23 given that both the pressures of lock-in, which would  
24 have carried over to those technologies, as well of  
25 course as the pressure to avoid the Rambus patents, all

1 of those incentives would have been to -- once the --  
2 once JEDEC started with the alternative technologies, to  
3 continue those into future generations.

4 And I submit that that is the appropriate  
5 competitive world that the commission should seek to  
6 recreate.

7 Even in the alternative, as I say, under  
8 Mr. Melamed's hypothetical, that even if they were to  
9 negotiate for license agreements in advance, whatever  
10 rate they established would have governed for the  
11 lifetime of the patent for the uses that they were put  
12 and that would protect the company with respect to the  
13 future generations as well.

14 So either way, in the absence of Rambus'  
15 deception, the world would look very different today not  
16 just with respect to SDRAM and DDR SDRAM standards but  
17 with respect to DDR SDRAM standards, the DDR2 SDRAM  
18 standard and the future standards.

19 CHAIRMAN MAJORAS: I have no doubt, Mr. Oliver,  
20 that the world would look different. I don't think  
21 there's any question about that. I just am not sure  
22 about any of us having such great confidence that the  
23 further out we get from the conduct, we absolutely know  
24 what that world would look like, and that's what I'm  
25 trying to --



1           COMMISSIONER ROSCH: And actually, just to  
2 follow up on that, assume for a moment, if you will,  
3 that because of the kind of relief that you're seeking  
4 here, you are required to adduce special proof of that  
5 causal connection.

6           Would your answer be the same as it has just  
7 been with respect to DDR2?

8           MR. OLIVER: Yes, it would.

9           COMMISSIONER ROSCH: And what specifically would  
10 you cite as the special proof of that causal connection  
11 with DDR2?

12          MR. OLIVER: Well, I believe that the special  
13 proof of the causal connection to DDR2 would be the very  
14 same evidence that we have submitted previously with  
15 respect to the lock-in.

16          However, again, the lock-in situation would have  
17 functioned very differently in the world absent Rambus'  
18 deception, that once the standards started on a  
19 different track, the lock-in effect as well as the  
20 desire to avoid Rambus patents would have continued  
21 indirectly in that course.

22          I think that there is no evidence in the record  
23 that JEDEC would have started with alternatives, for  
24 example, using -- let's say using pins to set  
25 CAS latency and burst length in the SDRAM standard, that

1 it would have carried on to use pins in the DDR SDRAM  
2 standard in order to avoid Rambus patents.

3 And then the DDR2 standard suddenly incurred  
4 both switching costs and Rambus patent costs in order to  
5 switch from the use of pins to using Rambus  
6 technologies. There is absolutely no evidence in the  
7 record that they would have done that.

8 All of the evidence with respect to avoiding  
9 Rambus patents and all of the evidence with respect to  
10 lock-in, both would establish that once they started  
11 down the alternative path, they would have continued  
12 down that alternative path.

13 COMMISSIONER HARBOUR: Mr. Oliver, you had  
14 argued in the alternative in your brief that a  
15 reasonable royalty perhaps would be no greater  
16 than .25 percent.

17 You also stated that the commission could not  
18 effectively cap Rambus' royalties unless it determined  
19 how to apply that cap to computers, handheld devices you  
20 said, telephones and automobiles.

21 Would you explain that argument, please.

22 MR. OLIVER: Yes.

23 Our understanding is that Rambus, in addition  
24 to having device patents, for example, on semiconductor  
25 devices that would apply to both memory chips and the

1 controllers, also has patents that can cover computer  
2 systems. This would include basically any type of a  
3 system that includes any of these devices.

4 COMMISSIONER HARBOUR: So it is your opinion  
5 then that were the commission to set a reasonable  
6 royalty rate that it would have to set that rate for  
7 handheld devices, automobiles, telephones?

8 MR. OLIVER: We understand, for example, that  
9 Rambus has at least stated that it intends to assert  
10 patents with respect to computers. And again, that  
11 would imply that there would be a royalty rate attached  
12 to the selling price of a computer.

13 I have no idea how the commission would cap an  
14 appropriate royalty rate for the selling price of a  
15 computer. But carrying that one step further, one finds  
16 JEDEC-compliant semiconductor devices in thousands of  
17 other products.

18 Just for an example, my understanding is that  
19 automobiles today can contain anywhere up to 70 chips.  
20 And again, if a Rambus patent were to cover a computer  
21 device that were to be broad enough to cover something  
22 such as an automobile, I have no idea how one would  
23 properly cap a royalty rate with respect to --

24 COMMISSIONER LEIBOWITZ: But you don't think the  
25 complexity of the compliance alone should be the basis

1 for rejecting RAND, do you?

2 In other words, the fact that we might be  
3 involved in reviewing decisions, that shouldn't be a  
4 reason on alone for rejecting imposition of RAND rates?

5 MR. OLIVER: Not a reason alone, but I do  
6 believe it is a fact that should be considered. I  
7 believe the commission -- it is appropriate for the  
8 commission to --

9 CHAIRMAN MAJORAS: But of course we would have  
10 to make it administrable, Mr. Oliver. But I am not  
11 aware of a single court that has ever said it is going  
12 to be really hard to administer this royalty, so we're  
13 going to make it zero.

14 I am, however, aware of antitrust courts that  
15 have said it's really hard to administer this, so we're  
16 not ordering compulsory licensing at all.

17 So you might want to be careful with that one.

18 MR. OLIVER: Well, I appreciate that.

19 And my argument here is very similar to my  
20 earlier argument on deterrence. In the same way that I  
21 do not believe the commission should base a remedy on  
22 deterrence, I also do not believe the commission to base  
23 an order on administrability.

24 However, I do believe that these are facts that  
25 the commission should bear in mind when it sets the

1 appropriate remedy in this case.

2 CHAIRMAN MAJORAS: Understood.

3 MR. OLIVER: And I do submit that in this case  
4 the remedy that has been proposed by complaint counsel  
5 here is, in my opinion, the only remedy that is fully  
6 consistent with the law, with the facts of the case,  
7 with the commission's liability decision, with  
8 principles of administrability, that would fully achieve  
9 the objectives of JEDEC in trying to set an open series  
10 of standards in the marketplace that would fully comply  
11 with the expectations of JEDEC members and the industry  
12 at the time and would fully protect consumers.

13 That is precisely the reason that from the very  
14 outset of this case, this is the remedy we have  
15 proposed, this is the remedy we have continued to pursue  
16 following trial on appeal and continuing today. This is  
17 the appropriate remedy in this case.

18 Thank you.

19 CHAIRMAN MAJORAS: Thank you.

20 I have one last question.

21 Since the liability opinion was issued in  
22 August, have you had any discussions with Rambus about  
23 settling?

24 MR. OLIVER: Can you hold on just a minute,  
25 please?

1 (Pause in the proceedings while counsel confer.)

2 CHAIRMAN MAJORAS: Are you having a discussion  
3 about settling right now?

4 (Laughter)

5 MR. OLIVER: It would have been a very short  
6 discussion.

7 The answer to your question is no.

8 CHAIRMAN MAJORAS: All right.

9 Thank you very much.

10 (Time noted: 3:47 p.m.)

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## 1 CERTIFICATE OF REPORTER

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I, JOSETT F. WHALEN, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

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JOSETT F. WHALEN, RMR-CRR

Court Reporter