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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.

JOSETT F. WHALEN, RMR-CRR

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