[PUBLIC RECORD VERSION]

**OPINION OF THE COMMISSION
ON RESPONDENT'S AND COMPLAINT COUNSEL'S PETITIONS
FOR RECONSIDERATION OF THE FINAL ORDER**

BY MAJORAS, *Chairman:*

Respondent, Rambus Inc., has petitioned the Commission, pursuant to 16 C.F.R. § 3.55, for reconsideration, modification, or clarification of certain provisions of the Final Order.[1] Rambus contends that its requests "will not undermine in any way the Commission's expressed objective of ensuring that Rambus charges no more than the specified maximum royalties, as set by the Commission, for the period in which the [Final] Order is in effect." Rambus Pet. at 1-2. Rather, Rambus asserts, the proposed modifications are designed to ensure that Rambus is not placed in a "worse position than it would have been in [in] the Commission's version of the 'but for' world." *Id*. at 1. Complaint Counsel oppose Rambus's requested modifications to the Final Order. They oppose "in particular" any modifications that, in their view, would deny the benefits of the Order to third parties and allow Rambus to collect multiple royalties on systems and to pursue treble damages and injunctive relief. Complaint Counsel's Response at 1. Amici – Micron Technology, Inc., Samsung Electronics Corp., and Hynix Semiconductor, Inc. – also oppose Rambus's requested modifications to the Final Order.[2]

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[1] On February 21, 2007, Rambus filed a motion asking the Commission for leave to correct typographical errors in its proposed order. In the accompanying order, we grant Rambus leave to correct its prior filing. We also grant Rambus's motion of March 7, 2007 for leave to file a reply.

[2] On March 1, 2007, Micron Technology, Inc., Samsung Electronics Corp., and Hynix Semiconductor, Inc. moved for leave to file a brief amicus curiae, principally in order to state their position regarding proper construction of the Final Order. Rambus contends that the Commission should reject the proposed brief. In the alternative, Rambus asks the Commission for leave to respond to it. As the Commission has stated previously, the standard governing whether the Commission should receive an amicus brief is whether "the public interest will benefit from Commission consideration of the perspectives enunciated in the . . . brief." Order Granting Motions for Leave to File Briefs *Amici Curiae* at 1 (Oct. 19, 2006). We find that the proffered amicus brief satisfies this standard. Additionally, we grant Rambus leave to file its proposed Response to the Amicus Brief.

Complaint Counsel also have petitioned for modification of the Final Order.[3] Specifically, they seek the deletion of text in Paragraph III.C. that they contend could be read to absolve Rambus from liability for the "misfeasance, gross negligence, willful or wanton acts, or bad faith" of its Compliance Officer. Complaint Counsel's Response at 9. According to Complaint Counsel, such a provision could create a "perverse situation" in which the deliberate acts of a Rambus employee to avoid the required disclosures would not be actionable. *Id.* at 9-10.

For the reasons stated below, Rambus's petition for modification of the Final Order is granted in part and is denied in part. Additionally, we grant Complaint Counsel's motion and amend Paragraph III.C. by eliminating the exceptions for the "misfeasance, gross negligence, willful or wanton acts, or bad faith" of Rambus's Compliance Officer.

Refunds and Collection of Past Due Royalties

Rambus's principal contention in support of reconsideration was raised and addressed already in connection with Rambus's Motion for Stay of Order Pending Appeal. Rambus objects in particular to the text of Paragraph IV.B., which requires Rambus, *inter alia*, to allow any party that previously agreed to pay royalties in excess of the Maximum Allowable Royalty Rate ("MARR") "to terminate or rescind [its] license agreement – at the option of the licensee – without penalty." Rambus Pet. 3. According to Rambus, the reference to "rescission" of patent licenses could be construed to require Rambus to return the royalties it previously collected for use of its invented technologies in SDRAM and DDR SDRAM, and to prevent it from collecting the royalties that are due for pre-Order use. *Id.* Rambus believes that the Commission did not intend such a result, but argues that the text should be modified to make this clear. *Id.* Complaint Counsel agree "in principle" with Rambus that the Order should not be read to require Rambus to refund royalties, but contend that the Order is clear in this respect. Complaint Counsel's Response at 1 n.1. With respect to the collection of royalties in excess of the MARR for use of Rambus technologies during past periods, Complaint Counsel agree with Rambus that there is a need to clarify the requirements of the Order. *Id.* at 2-4. According to Complaint Counsel, "[a]t issue is the potential ability of Rambus, through prospective enforcement efforts, to collect as much as a billion dollars in unlawful monopoly profits after the effective date of the Commission's Order." *Id.* at 4-5. Plainly, Complaint Counsel contend, "[t]he Commission has authority to order Rambus to cease and desist . . . prospective efforts to continue to collect the fruits of its unlawful conduct . . . ." *Id.* at 2 (*citing Amrep Corp. v. FTC*, 768 F.2d 1171, 1180

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[3] Complaint Counsel's petition for reconsideration was timely because, pursuant to the Commission's rules for computation of time, the 14-day period for submitting any petitions for reconsideration to the Commission did not start to run until the first business day *after* service of the Commission's Final Order – *i.e.*, February 12, 2007 – and not on the date on which service was complete. *See* 16 C.F.R. § 4.3(a). On March 15, 2007, after "further examination" of Rule 4.3(a), Rambus filed a notice withdrawing its contention that Complaint Counsel's Petition for Reconsideration was untimely.

(10th Cir. 1985) and *Southwest Sunsites Inc.*, 105 F.T.C. 7, 176, 185 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986)).

In granting a partial stay of the Final Order, we reaffirmed our preference for a "forward-looking remedy" that would "prospectively terminat[e] the ill effects of unlawful conduct." Remedy Op. at 2, 4; *see also id*. at 7 ("prospective only"), 27 ("future related conduct"). Thus, as we have explained, the Final Order does not require Rambus to make refunds, or prohibit it from collecting royalties in excess of the MARR that accrue up to the date on which the Commission's Order becomes final – *i.e.*, April 12, 2007. *See* Stay Op. at 4. The Commission's intent in this regard is reflected clearly in the terms of the Final Order. *See* Final Order ¶ IV. (prohibiting Rambus from collecting royalties in excess of the MARR with respect to "the manufacture, sale, or use of any JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product *after the date* [*the*] Order *becomes final*") (emphasis added).

Nonetheless, we recognize that continuing confusion about these requirements could lead to unnecessary and costly litigation and the loss of goodwill. Accordingly, we grant Rambus's request to amend Paragraph IV.B. of our Order by deleting the word "rescind." However, we do not agree that it is necessary to add text (*see* Rambus Pet. at 3 n.4) to clarify that Rambus may collect accrued royalties from terminating licensees. In our view, the existing text is adequate to convey our intent in this regard.[4]

The parties raised the question of whether the Commission has authority to prohibit a respondent from collecting excess consideration for the use of patented technologies prior to the effective date of our order.[5] In the present case, we believe that competition can be restored without such prohibitions, and therefore we need not reach that question. The relief granted has the further benefit of putting on an equal footing all persons who use the technologies during the relevant period, regardless of whether or not they have already made payments to Rambus.[6] *See*

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4 Another proposed change that appears to be directed to the same issue is the proposed addition of the text "for periods after this Order becomes final" in the second numbered clause in Paragraph VIII.A. of the Final Order. Rambus does not offer an explanation for this proposal, and we conclude that the proposed text is not necessary.

5 *See* Rambus Pet. at 4; Complaint Counsel's Response at 2-3; Rambus Reply at 3.

6 As to royalties that accrue during the pendency of its appeal, Rambus asks the Commission to clarify that it may recoup excess consideration in the event it prevails on the merits. Consistent with this request, Rambus proposes modifying Paragraph VI. of the Final Order to clarify that Rambus may use contingency clauses in its licenses and receive contingent damage awards. *See* Rambus Pet. at 7-9; Rambus Reply at 5-6. On March 16, 2007, we entered an order staying Rambus's obligation to comply with Paragraphs IV., V.A., VI., and VII. of our Final Order on the condition that any excess consideration be held by an approved escrow agent pending the outcome of Rambus's appeal. In light of the relief provided by the partial stay order,

Rambus Reply at 4-5.

Fixed-Fee License Option

Rambus also proposes modifying Paragraph V.A. of the Final Order to clarify that Rambus may enter into fixed-fee licenses, at the licensees' option. Rambus Pet. at 15-16. According to Rambus, it can be expensive and burdensome for some licensees to collect the information that is necessary to calculate royalties on a per-unit basis. In such cases, Rambus states that it will agree on fixed payments rather than running royalties that are charged on a per-unit basis. *Id*. at 15 & Exh. B ¶ 7. To allow it to continue this practice, Rambus proposes adding new text, which would specify that any license under Paragraph V.A. may include "a clause providing that the licensee pay Rambus a flat license fee in lieu of running royalties . . . ." Rambus Pet., Amended Final Order at 9. Complaint Counsel agree that licensees should have the option to negotiate fixed-fee licenses, but only with the caveat that the "fixed fee amounts are equivalent to or less than the Maximum Allowable Royalty amounts." Complaint Counsel's Response at 1 n.1.

We grant Rambus's request, and amend Paragraph V.A. accordingly. Although the existing text does not expressly preclude Rambus from entering into fixed-fee arrangements with its licensees, it may well have the practical effect of foreclosing such arrangements in those circumstances in which they would benefit licensees. As Complaint Counsel note, the existing language would permit a fixed-fee arrangement only if it results in royalties "equivalent to or less than" the MARR. Complaint Counsel's Response at 1 n.1. But in those circumstances in which licensees prefer a fixed-fee arrangement because it is impracticable for them to calculate the cost of a per-unit license, presumably neither they nor Rambus can know, at the time they enter into such an arrangement, whether the fixed fee will ultimately be more or less than the MARR. Any fixed-fee arrangement would thus pose the risk of an after-the-fact determination that the MARR had been exceeded.

In granting this relief, we rely on Rambus's representation that all licensees will remain free to terminate any existing flat-fee licenses and insist on a license limited to MARRs as provided for in the Final Order. Rambus Pet. at 15-16. Any attempt by Rambus to use this provision to circumvent the Order by pressuring licensees to accept flat-fee licenses would constitute a serious violation of the Order, subjecting it to further relief, including civil penalties. *See* 15 U.S.C. § 45(*l*).

Availability of Judicial Remedies in Infringement Actions

Rambus further contends that the Final Order must be modified to clarify that Rambus may seek the full range of judicial remedies – injunctive relief, treble damages for willful infringement, and attorney's fees – that traditionally may be available in infringement actions.

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these requests for modification of the Final Order are unnecessary.

Rambus Pet. at 9. According to Rambus, the existing text could be read to foreclose Rambus from pursuing those remedies to the extent they result in payments in excess of the MARR. Rambus contends that the Commission intended only to limit the compensatory damages that it could seek for post-Order infringement. Accordingly, Rambus asserts, the existing text must be modified to ensure that the Commission's Order does not create incentives for manufacturers to infringe instead of taking a license. *Id*. at 9-10. Rambus argues that its proposed text permits Rambus to seek the full range of remedies that would have been available to a patentee in a "but for" world, but limits any compensatory damages to the MARR. *Id*. at 10. Complaint Counsel and Amici oppose changes in the existing text. *See* Complaint Counsel's Response at 5-7; Amicus Brief at 18. They argue that treble damages and injunctive relief are inconsistent with the fundamental purpose of JEDEC, and fear in particular that allowing Rambus to pursue its statutory remedies would both deter third parties from challenging Rambus's patents and render the rate relief meaningless. *Id*.

The arguments of Complaint Counsel and Amici are not persuasive. As the Commission found, in a "but-for" world Rambus would have been required to offer licenses to the relevant technology on reasonable and nondiscriminatory ("RAND") terms. *See* Remedy Op. at 17. At the same time, however, Rambus would have been able to seek injunctions against those who infringed without seeking licenses, and to collect compensatory damages, and possibly even treble damages against willful infringers. *See* 35 U.S.C. § § 283-84. In issuing our Final Order, we intended – to the extent possible – to restore competition that would be present in the "but-for" world. Thus, although the Order limits Rambus to MARRs for uses after the effective date of the Order, it is not our intent to leave Rambus without access to any remedies for infringement that would have been available to it under applicable law.

For the foregoing reasons, we modify our Order to clarify that Rambus may pursue applicable statutory remedies for post-Order uses of the relevant technologies.[7] Of course, for the same reasons that the MARR must cap what Rambus can collect as royalties (*see* Remedy Op. at 16-18), the MARR must cap what Rambus can collect as single damages in an infringement suit. Similarly, while our remedy does not foreclose Rambus from pursuing increased damages (*see* 35 U.S.C. § 284), it limits Rambus to no more than three times the MARR. Accordingly, we add the following proviso at the end of Paragraphs VI. and VII.:

> *Provided, however*, that Rambus may seek and collect up to three times the Maximum Allowable Royalty Rate, in satisfaction of a judgment in which a court has specifically allowed increased damages pursuant to 35 U.S.C. § 284 on the ground of willful infringement, and may seek and collect attorney fees as allowed by a court pursuant to 35 U.S.C. § 285.

[7] As explained above, the Order does not govern royalties for uses prior to the effective date of the Final Order – *i.e.*, April 12, 2007.

As for Rambus's request that we amend the Final Order to specifically permit Rambus to seek injunctive relief against infringers, nothing in the existing text precludes Rambus from seeking such relief. Accordingly, we see no need to modify the text to grant Rambus permission to seek it.

Collection of Multiple Royalties on Systems

Rambus contends that the Order must be modified to clarify that Rambus may collect multiple royalties on systems that incorporate multiple JEDEC-Compliant DRAM or Non-DRAM Products. Specifically, Rambus asks for clarification that it may collect "one royalty for each infringing memory chip and one royalty for each infringing component that interfaces with those memory chips that is included in the system . . . ." Rambus Pet. at 15. Nothing in the existing text of the Order prevents this.[8] Paragraph IV of the Order sets MARR terms for the "manufacture, sale, or use" of *each* JEDEC-Compliant DRAM Product and JEDEC-Compliant Non-DRAM Product. As applied to a system incorporating multiple covered products, the existing text permits collection of the MARR for each such component.

Although we find no need to adopt Rambus's proposed multi-part addition to the MARR (*see* Rambus Pet. Blackline Proposed Order at 3), Rambus's proposal highlights the need to modify the current text with respect to the collection of royalties from producers of systems. The current text provides a means for calculating the "Net Sales" against which MARR percentages must be applied when a producer or seller sells a JEDEC-Compliant DRAM Product or a JEDEC-Compliant Non-DRAM Product both individually and as part of a system.[9] However, it does not prescribe a mechanism for calculating the Net Sales of a producer or seller that sells systems only. Rambus proposes calculating Net Sales in such cases on the basis of average prices that are reported by all its licensees, and we modify our Order accordingly by the addition of new text in Paragraph I.K. To guard against the release of sales data in disaggregated form, we further modify our Order to prohibit Rambus from releasing information regarding its licensees' net sales other than to independent auditors and in accordance with a confidentiality agreement that precludes disclosure of any individual firm's pricing information.

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[8] Of course, Rambus's ability to collect royalties on systems that incorporate DRAMs and other components is subject to any principles of patent law that might prohibit Rambus from collecting such royalties. The Commission's Order does not create a right to collect system royalties that otherwise would not exist.

[9] Pursuant to Paragraph I.K. of the Final Order, the Net Sales of products that are sold at a single price for an entire system are calculated on the basis of the licensee's average gross selling price in the calendar quarter for the relevant JEDEC-Compliant DRAM Product or JEDEC-Compliant Non-DRAM Product alone.

Proposed Limitations on Licensees' Rights to Seek Further Relief

In addition to the foregoing requests, Rambus raises the possibility that a prospective licensee might both (1) avail itself of the MARR – by either accepting a license under Paragraph V. of the Final Order or by asserting rights in litigation under Paragraphs VI.-VII. – and (2) contest Rambus's rights to enforce its patents with respect to the period post-Order when MAR rates are in effect. Rambus Pet. at 11-13.

This is not an appropriate forum for limiting the ability of licensees to pursue any strictly private rights they may have against Rambus. In this proceeding, the Commission vindicates public rights.[10] Hence, an FTC order to cease and desist cannot be used or construed to limit the purely private rights of action of Rambus licensees, who, in any event, are not before the Commission.

Reduction to Zero Royalty Rates

Rambus also asks the Commission to modify the Order by deleting provisions in the Final Order that reduce the MARR to zero in 2010 – three years from the date on which the Order issued. *See* Rambus Pet. at 16-17. If adopted by the Commission, the proposed text would allow Rambus to recover MARRs for the subsequent duration of its patents. Complaint Counsel oppose this request.[11]

In support of its request, Rambus contends that the Commission's decision to reduce the MARR to zero after three years was premised on an erroneous finding that royalty rates under Samsung's RDRAM license "ultimately declined all the way to zero." Rambus Pet. at 16 (*quoting* Remedy Op. at 21). According to Rambus, the rates declined to zero only for RDRAM chips of a specific density-generation, but then reverted to higher rates for the subsequent RDRAM density-generation. Rambus Pet. at 16. Although Rambus's contentions add detail, they provide no basis for modifying the Order. The Samsung license followed the overall pattern described in the Commission's decision: royalty rates for *each* RDRAM density-generation declined to zero five years after shipment of the 500,000th unit (assuming shipment of a

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[10] The Federal Trade Commission may bring an action only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." 15 U.S.C. § 45(b).

[11] Complaint Counsel note that the zero rate will take effect on April 12, 2010 – just 18 days before most of the relevant patents are set to expire. *See* Complaint Counsel's Response at 9 n.9. In actuality, because the Order specifies that the Second Royalty Period – in which the MARR falls to zero – commences three years after the date on which the Order issued, the zero rate will take effect on February 3, 2010, not April 12, 2010, as calculated by Complaint Counsel. *See* Final Order ¶ I.D.

specified volume of chips).[12] Even assuming, *arguendo*, that we were to focus on individual density-generations, Rambus makes no claim that at the present time – at the tail end of SDRAM and DDR SDRAM life cycles – any new density-generations of those products are continuing to emerge.[13] In any event, Rambus does not dispute the more fundamental point – namely, that its RDRAM licenses typically provided substantial royalty reductions – falling to rates as low as zero – for high volumes and out-years.[14] Consequently, we find no basis for modifying the Final Order with regard to long-term royalty rates.

Definitions

Rambus raises a number of issues regarding the definitional provisions of the Final Order.

First, Rambus asks the Commission to clarify the definition of "JEDEC-Compliant SDRAM" and "JEDEC-Compliant DDR SDRAM." Rambus Pet. at 14 n.10. As defined in the Final Order, these terms include DRAMs that "compl[y] with" specified JEDEC standards "as revised." Final Order ¶ I.H. & I. Rambus contends that the Commission should clarify (1) whether these definitions include any revisions in the standards that are adopted after the date of the Final Order (*i.e.*, July 31, 2006); and (2) when a product can be said to "comply" with a standard. *Id*.

Rambus proposes rewording the definitions to include only those DRAMs that comply with the standards "as revised on or before July 31, 2006." Rambus Pet. at 14 n.10. According to Rambus, this would eliminate the possibility that Rambus would become subject to an entirely new set of obligations by virtue of any future revisions to JEDEC standards. *Id*. We do not intend such a result. However, Rambus's proposed clarifying language introduces unnecessary

[12] *See* CX 1592 at 18 (providing zero-royalty terms for both "Current Rambus DRAM" and the next-generation "Extended Rambus DRAM"). In fact, the Computation Notebook of Rambus Vice President for Intellectual Property Joel Karp makes the Commission's point. **[Redacted]** CX1751 at 2 (*in camera*).

[13] 2010, when royalties fall to zero under Final Order, is 17 years after publication of the SDRAM standard and 11 years after publication of the DDR SDRAM standard. *See* Liability Op. at 41, 47-48.

[14] *See* CX 1592 at 18 (Samsung royalties falling with time and volume); CX 1600 at 12 (Hyundai royalties falling with time and volume); CX 1612 at 5 (same); CX 1609 at 11 (Mitsubishi royalties falling with time); CX 1617 at 12 (Siemens royalties falling at high volumes).

ambiguities.[15] The existing text, when properly read in context, is adequate and is not reasonably subject to the misinterpretations described by Rambus in its Petition.[16]

As for the meaning of the term "comply," Rambus's professed need for clarification is unpersuasive.[17] Indeed, Rambus urges that the Commission adopt constructions that could dramatically subvert the remedial purposes of the Final Order. Thus, Rambus first suggests that DRAMs be deemed to comply with the specified JEDEC standards when they "contain[] all the features specified in the relevant portion of" the standards "with the possible exception of features expressly designated as optional." Rambus Pet. at 14 n.10. An option to delete a feature that is needed by almost all DRAM customers – but unnecessary for a small and specialized group – should not and does not eliminate Rambus's obligation to offer a license.

Rambus also suggests that "a product will comply with a standard as long as it includes those features [that are] required to make the product interoperable." *Id*. Rambus, however, has already presented arguments that make this formulation an open invitation to mischief. For example, on-chip PLL/DLL technology is a feature that is necessary for a product to comply with JEDEC's DDR SDRAM standard, even though DLLs can be disabled (*i.e.*, turned off) in DDR SDRAM. *See* Liability Op. at 94 n.525 (noting that on-chip DLLs are needed for normal DDR operation). Rambus's proposed construction, however, would leave it room to argue that the ability to disable on-chip PLL/DLL means that on-chip PLL/DLL is not "*required* to make the product interoperable" and therefore not a feature necessary to comply with JEDEC's DDR SDRAM. Indeed, counsel for Rambus already has asserted, "With respect to a DLL, there are no interoperability requirements at all." Oral Arg. Tr. at 76 (Sept. 21, 2004); *see also id.* at 77 ("with respect to the DLL, there are no interoperability considerations at all"). Any construction

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[15] For example, if a relevant standard were revised after July 21, 2006, in a manner that has nothing to do with Rambus technologies, a DRAM that complies with the revised standard could fall outside Rambus's proposed definition (because it would *not* comply with a pre-July 31, 2006 version of the standard). This result would be improper in cases where the relevant Rambus technologies are included in the standard both before and after the revision. Exempting such a DRAM from the Commission's remedy would defeat the intent of our Order.

[16] Rambus also proposes adding the word "chip" after "JEDEC-Compliant SDRAM" and JEDEC-Compliant DDR SDRAM." See Final Order ¶ ¶ I.F. & J. Rambus has not explained the need to modify the text in this manner. Accordingly, we deny its request. *See* 16 C.F.R. § 3.55.

[17] In its appeal brief before the Commission, Rambus repeatedly referenced "JEDEC-Compliant" devices without qualification and without any suggestion it was uncertain or confused as to the meaning of the term. *See* Brief of Appellee and Cross-Appellant Rambus Inc. at 7, 26-28, 31, 54, 115, 129, 130 (June 2, 2004).

that treats on-chip PLL/DLL as a feature that falls outside the coverage of the Order's licensing requirements would be improper.[18]

Finally, Rambus asks the Commission to modify the definition of JEDEC-Compliant Non-DRAM Products. *See* Rambus Pet. at 14 n.11. As adopted by the Commission, the definition encompasses memory controllers or other non-memory-chip components that "comply with" specified JEDEC standards. *See* Final Order ¶ I.E. According to Rambus, the Commission's definition could force Rambus to license (under MARR terms) technologies that relate to some other portion of a component that interfaces with JEDEC-Compliant DRAM Products elsewhere, and have nothing to do with the JEDEC standards. Rambus contends that the definition should be modified to encompass memory controllers or other non-memory-chip components that are "designed to interface with" JEDEC-Compliant DRAM Products. Rambus Pet. at 14 n.11. The Commission does not intend to require MARR licensing of technologies that are wholly unrelated to the specified JEDEC standards and to interfaces with those standards. Rambus, however, has not demonstrated a need for modifying the existing text. It has not identified any technologies that might be affected by the Commission's language in the manner that Rambus suggests, and the alternative wording that it has proposed is not workable.[19]

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18 Rambus's proposed construction – focusing on whether a feature is "required to make the product interoperable" – similarly could invite arguments that the other technologies addressed by the Commission's decision are not captured by the Order's definition of JEDEC-Compliant DRAM Products. Rambus has pointedly avoided conceding that the technologies at issue satisfy its proposed test. For example, Rambus's counsel argued before the Commission as follows:

> [I]t is *desirable in terms of interoperability*, that each different manufacturer's version of the same product will utilize these three technologies [programmable CAS latency, burst length, and dual-edge clocking] in the same way. *It doesn't have to be that way* and it's not always that way, but we certainly concede that it is desirable that it will be that way most of the time.

Oral Arg. Tr. at 74 (Sept. 21, 2004) (emphasis added). A construction that treats programmable CAS latency, programmable burst length, and dual-edge clocking as merely "desirable" but not "required" for purposes of interoperability, and therefore as features outside the Order's licensing requirements, is improper and would undermine the remedial objectives of the Final Order.

19 Rambus's proposed modification – to cover only non-memory-chip components "designed to interface" with JEDEC-Compliant DRAM Products – is (i) unnecessary to exempt from the Order's licensing requirement components unrelated to the relevant JEDEC standards and interfaces with those standards and (ii) inadequate to exempt a technology in a component that interfaces with a relevant JEDEC standard but that is unrelated to the interface. Moreover, Rambus's proposal seems to introduce unnecessary considerations of intent, in determining whether or not a component was "designed to" interface with JEDEC-Compliant DRAM

We conclude that the issues that Rambus has raised are best resolved on a case-by-case basis in the context of a specific set of facts.

Liability for Conduct of Compliance Officer

Complaint Counsel ask the Commission to modify Paragraph III.C. by deleting text that absolves Rambus from liability for the "misfeasance, gross negligence, willful or wanton acts, or bad faith" of its Compliance Officer. Complaint Counsel's Response at 9. According to Complaint Counsel, the cited language could create a "perverse situation" in which the deliberate acts of a Rambus employee to avoid making the required disclosures would not be actionable. *Id*. at 9-10.

Rambus contends that these concerns are "overstated and misplaced" for three reasons. Rambus Answer at 2. First, Rambus argues, the Commission approves the selection of the Compliance Officer, and can remove him if he fails to act. Second, with only one exception, the Order imposes no substantive obligations on the Compliance Officer that are not also imposed on Rambus. According to Rambus, it should not be responsible for grossly negligent or bad faith violations by the Compliance Officer. Finally, Rambus has an incentive to ensure that the Compliance Officer complies fully with the Order because any violation by a Rambus employee would subject Rambus to civil penalties. *Id*. at 2-4.

Given the deceptive nature of the underlying conduct, we do not agree with Rambus that Complaint Counsel's concerns are either "overstated" or "misplaced." The Compliance Officer is a Rambus employee. Therefore, there is no reason why the standards governing Rambus's liability for misconduct by its Compliance Officer should differ from those that apply generally to other Rambus employees. A corporation can act only through its authorized employees and agents. Therefore, a corporation is bound by and responsible for the misconduct of an employee that occurs within the scope of that employee's employment. *See, e.g.*, *Goodman v. FTC*, 244 F.2d 584, 592-93 (9th Cir. 1957); *Parke, Austin & Lipscomb, Inc. v. FTC*, 142 F.2d 437, 440 (2d Cir. 1944); *FTC v. Hoboken White Lead & Color Works, Inc.*, 67 F.2d 551, 553 (2d Cir. 1933). Furthermore, Rambus is in a far better position than the Commission to monitor the Compliance Officer's performance.[20] While Rambus's selection of an employee to fill the office is subject to Commission approval (*see* Rambus Answer at 2), Rambus is responsible for appointing him, or designating a current employee to fulfill that role. *See* Final Order ¶ III.A. Indeed, nothing in

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Products.

[20] Rambus contends that it should not be held responsible if the Compliance Officer fails to make "confidential" reports to the Commission "because, by definition, [it] cannot ensure that he is making such reports." Rambus Answer at 3. We agree that it is not feasible for Rambus to oversee such a requirement. Accordingly, we modify Paragraph III.E. of the Final Order by eliminating the requirement that any supplements to the Compliance Officer's periodic reports remain "confidential."

the Order prohibits Rambus from terminating the Compliance Officer (subject to Commission approval of a replacement) if his conduct is not satisfactory. In sum, we agree with Complaint Counsel that there is no basis for exempting Rambus from liability for its Compliance Officer's "misfeasance, gross negligence, willful or wanton acts, or bad faith." Accordingly, we grant Complaint Counsel's request for deletion of the specified text in Paragraph III.C.

Conclusion

For all the foregoing reasons, Respondent's Petition for Reconsideration of the Final Order is granted in part, and denied in part. Complaint Counsel's Petition for Reconsideration of Paragraph III.C. is granted.

ISSUED: April 27, 2007