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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **RAMBUS INC.,** **a corporation.**	**Docket No. 9302**

SUPPLEMENTAL BRIEF OF RESPONDENT RAMBUS INC. IN RESPONSE TO *AMICUS CURIAE* BRIEF FOR AMERICAN ANTITRUST INSTITUTE, INC.

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INTRODUCTION

The proper remedy for the violation that the Commission has found in this case depends in large part on the answers to two fundamental questions: (1) whether the Commission has authority to order a market-altering remedy, and (2) if the Commission has such authority, how (if at all) the markets for the four relevant technologies used in SDRAM and DDR SDRAM would have differed in the but-for world (a point on which Complaint Counsel bear the burden of proof). The American Antitrust Institute (AAI) does not address either issue in its *amicus curiae* submission. Instead, it articulates two abstract principles that it argues should guide the Commission. AAI makes no attempt, however, to square its argument or either of the principles it asserts with any legal authority or with the record in this case.

I. AAI's "Open Standards" Submission Provides No Useful Guidance For The Commission And Is Factually Erroneous.

AAI's first principle is that "the purposes of an 'open standard' are inherently inconsistent with ... patent policy." (AAI Br. at iv). AAI further argues that JEDEC's "overriding mission was to create open standards to the greatest extent possible" (AAI Br. at 2), and that the Commission, in fashioning a remedy, should mimic JEDEC's alleged preference and deny Rambus any royalties for its inventions. This argument fails for several reasons.

A. JEDEC did not value openness above all else.

First, it is not the case that JEDEC was committed to the kind of "open standard" contemplated by AAI, which defines an open standard as one that is "free for all to implement, with no royalty or fee." AAI Br. at 1 n.1. In fact, the record shows that JEDEC members and officials did not even agree on the meaning of the term "open standards." *See, e.g.,* D. Rhoden, Tr. 301 (JEDEC Chairman stating that "open standards inside of JEDEC" meant a process

"where everyone can participate that wants to, and in the end the end product is available to everybody"); J. Kelly, Tr. 2072 ("open standards" include those with patented features as long as they are available on reasonable and nondiscriminatory terms).

AAI cites selective quotations suggesting that JEDEC members were very cost-sensitive and that "some" JEDEC members opposed the use of "royalty-bearing elements" in standards. AAI recognizes, however, that minimizing costs was not the only concern of JEDEC members. AAI acknowledges that manufacturers differ in the extent to which they are willing to forego technologically superior approaches in an attempt to minimize licensing costs (AAI Br. at 1),[1] and it ultimately concedes, as it must, that JEDEC does not "prohibit patented specifications" (*id.* at 4). *See also* ALJ Op. at ¶605 (quoting letter from EIA to Commission explaining the "positive and pro-competitive benefit to incorporating intellectual property in standards"). Accordingly, JEDEC repeatedly included patented technologies in its standards, sometimes with—but sometimes without—a RAND commitment. *See, e.g.*, *id.* at ¶¶1414-1434 (discussing instances in which JEDEC selected patented technologies). In fact, even after disclosure of Rambus's patent position, JEDEC chose to retain Rambus's royalty-bearing technologies in the DDR2 SDRAM standard, despite the fact that there was no lock-in. Plainly, therefore, it was *not* "JEDEC's overriding mission . . . to create open standards." AAI Br. at 2.

Further, although AAI appears to suggest that the Commission should imagine "a hypothetical *ex ante* negotiation" (AAI Br. at 3), the record makes clear that JEDEC did not engage in ex ante negotiations to secure low-cost access to patented technologies. Indeed, it is

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[1] Licensing costs are just one part of the cost of incorporating a given technology into a standard. A royalty-free technology may actually increase costs if it offers inferior performance or requires increased manufacturing costs or more costly complements.

undisputed that JEDEC and its committees "did *not* themselves engage in ex ante royalty negotiations about the level of a 'reasonable' royalty," *Amicus Curiae Brief of JEDEC Solid State Technology Association* (Sept. 15, 2006) at 9-10 (emphasis added), and "there is no evidence that the [JEDEC] Committee secured a RAND commitment to a specific royalty rate." *Id.* (emphasis in original). *See also* J. Kelly, Tr. 1882-83 (testimony by JEDEC President that JEDEC does not have expertise to determine "reasonable royalties"). There is therefore no reason to believe that, if JEDEC had known of Rambus's patent positions while it was developing the SDRAM and DDR standards, it would have tried to negotiate an ex ante royalty rate with Rambus, much less "royalty-free" rates. AAI Br. at 4-5.

In any event, AAI's contentions about the value JEDEC placed on openness give no guidance to the Commission because AAI makes no attempt to explain how the Commission should reconcile the conflict AAI posits between open standards and patent law. As AAI puts it, "patent law ... clashes with the aspirations of an open standard" and creates incentives for innovation that may conflict with the goals of a truly "open" standard. AAI Br. at 1-2. The implication, evidently, is that the Commission should disregard patent law. But that notion cannot guide the Commission because "[t]he patent laws are *in pari materia* with the antitrust laws and modify them pro tanto." *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964). Indeed, as the Commission has previously noted, "because patent rights are an important means of promoting innovation," forced licensing on unfavorable terms "harms competition by reducing innovation." Analysis of Proposed Consent Order to Aid Public Comment, *In re Intel Corp.* at 2, 1999 WL 164046 (F.T.C. 1999).

In addition, the Commission should reject AAI's implication that JEDEC would have avoided Rambus's technologies solely because they were patented, not only because it is

factually wrong, but also because such a stance by JEDEC would have amounted to a group boycott in violation of the antitrust laws. *See American Soc'y of Sanitary Eng'g*, 106 F.T.C. 324 (1985) (prohibiting an SSO from excluding equally-performing technologies solely because they were patented). In short, although AAI appears to argue that an SSO's preference for open standards should prevail over patent claims, neither antitrust law nor patent law supports its position.

B. AAI's suggestion that the Commission should try to restore competition to the "market for an open standard" is irrelevant and wrong even on its own terms.

AAI suggests that the Commission should strive to restore competition in the "market for the standard" (AAI Br. at iv), rather than the markets in which the relevant technologies are offered for use in SDRAM and DDR SDRAM. That is not a useful suggestion.

First, it is not clear that there ever was a "market" for the pertinent SDRAM and DDR SDRAM standards. The SDRAM and DDR SDRAM standards were chosen by a vote of JEDEC members, not as a result of a de facto standards battle in the marketplace. They were established, not as a cumulative product of the kind of independent and self-interested commercial transactions that characterize ordinary markets, but rather by the collective decision of essentially all of the market participants. *See generally* Comm'n Op. at 33 (stating that "standard setting displaces the normal process of selection through market-based competition").

Moreover, the Commission has never made a finding that there was any such "market" for DRAM standards. Instead, the Commission has found that the four "relevant product markets" in this case are the markets for latency technology, burst length technology, data acceleration technology, and clock synchronization technology. Comm'n Op. at 9. Rambus and Complaint Counsel have focused their briefing on the appropriate remedy for anticompetitive

conduct affecting *those markets*, and the Commission's decision on remedy should follow the same path.

In any event, even if the JEDEC process could be deemed to be a market, the Commission cannot as a practical matter restore competition to that market. Nobody—not even the DRAM manufacturers who seek to curtail Rambus's patent rights—has suggested that the Commission should require JEDEC to promulgate new SDRAM and DDR SDRAM standards through some process by which hypothetical alternative technologies would compete for JEDEC's favor.

II. AAI's Argument About Rambus's "Reward" From Its Patents Is Analytically Flawed And Unrelated To The Issues In This Case.

AAI's second principle is that the "reward" to which Rambus is "entitle[d]" from its patents should reflect only the economic benefit of the technology, and not any independent or additional benefit attributable to the fact that that technology was adopted as a standard. This argument is wrong as a matter of law and unworkable as a factual matter.

As to the law, it is not the Commission's role to calculate "the economic value of the standard" (AAI Br. at 6) and then determine the shares of that value to which various entities are "entitled." That might be a proper function for a rate-making agency, but the Commission has never adopted such a role. If the Commission has and decides to exercise authority to go beyond a cease and desist order, its role in selecting a remedy in this case would entail determining the maximum royalties that licensees would have agreed to pay in the but-for world. AAI's argument sheds no light on that.

Moreover, AAI offers no hint as to how the Commission might undertake the factual task AAI would like it to perform. Instead, AAI acknowledge that "[d]isentangling commercial demand attributable to the patent from the demand attributable to the standard may not always be easy." AAI Br. at 6. That is a significant understatement. There is nothing in the record that suggests a method or a basis for measuring "commercial demand" for the DDR or SDRAM standards, let alone how one might measure what AAI assumes to be the separate value of the *components* of that demand. *Cf., Fromson v. Western Litho Plate and Supply Co.*, 853 F.2d 1568, 1578 (Fed. Cir. 1988) ("when calculating reasonable royalties for damages purposes, courts should treat the infringing product as a unified whole rather than attempt to allocate value to component parts). And AAI ignores the record evidence that is most relevant to its argument—evidence showing that Hyundai agreed to pay a 2.5% royalty for use of Rambus's technologies in DRAMs even before those technologies were incorporated into JEDEC standards. *See* Rambus Opening Remedy Br. at 17-18; Rambus Reply Remedy Br. at 8 n.11.

AAI attempts to avoid the practical and factual difficulties inherent in its approach by asserting that *Rambus* should be required to prove—by clear and convincing evidence—how much its patented technologies "contribute to the commercial demand for compliance with the standard." AAI Br. at 7. If AAI's approach proves to be unworkable, the implication for the assertion would be that DRAM manufacturers should be allowed by default to use Rambus's technologies for nothing. AAI cites no authority to support this outlandish argument. To the contrary, as Rambus has explained in previous briefing, it is Complaint Counsel, not Rambus, that bear the burden of proof to justify a competition-restoring remedy. *See* Rambus Opening Remedy Br. at 7; Rambus Reply Remedy Br. at 6-8.

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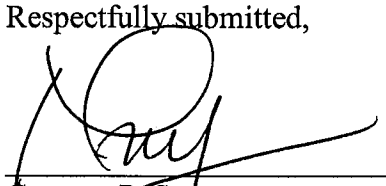
As a matter of law, the Commission should set a remedy that prevents unlawful conduct in the future and—if the Commission has authority to go beyond that objective—restores the markets that the Commission found Rambus to have monopolized to their but-for state. The former objective focuses on possible deception by Rambus in the future; the latter turns on what would have happened in the but-for world. Whereas Rambus and Complaint Counsel agree that those are the central remedy issues in this case (see Complaint Counsel Opening Remedy Br. at 18), AAI's brief addresses neither and thus fails to offer the Commission helpful guidance.

DATED: October 30, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Sambhav Sankar, hereby certify that on October 30, 2006, I caused a true and correct copy of the *Supplemental Brief of Respondent Rambus Inc. in Response to Amicus Curiae Brief for American Antitrust Institute, Inc.* to be served on the following persons by hand delivery:

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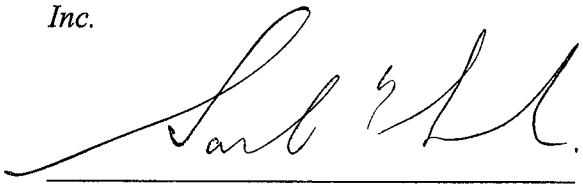

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