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FEDERAL TRADE COMMISSION

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)
Rambus, Inc.) Docket No. 9302
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Wednesday, May 14, 2003
9:30 a.m.

TRIAL VOLUME 10
PART 1
PUBLIC RECORD

BEFORE THE HONORABLE STEPHEN J. McGUIRE
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Susanne Bergling, RMR

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1 PROCEEDINGS

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3 JUDGE McGUIRE: This hearing is now in order.
4 Counsel, how is everyone this morning?

5 MR. ROYALL: Fine, thank you.

6 MR. STONE: Fine, Your Honor.

7 JUDGE McGUIRE: Are there any housekeeping
8 chores we need to attend to before we commence hearing
9 today?

10 MR. ROYALL: Your Honor, in response to the
11 order that you issued yesterday afternoon, we did want
12 to raise one issue, and I have spoken with Mr. Stone on
13 this. I know he has things to say as well.

14 The issue that we have and we think the most
15 immediate issue is our desire to see that the materials
16 that are subject to this order, that would be subject
17 to production under the order, be produced to us
18 immediately so that this doesn't cause any delay in our
19 case in chief, and the only thing I would say in that
20 regard is that when Judge Timony first ruled on this
21 issue back in late February, we contacted respondent's
22 counsel immediately and asked for a date-certain by
23 which we would have production of the materials that
24 were covered by that order, and that was mooted by the
25 fact that they moved for reconsideration, and we didn't

1 go any further.

2 But given that they have had several months
3 notice now, we would hope that the materials are
4 prepared to be produced very swiftly and immediately so
5 that it doesn't cause any delay in our case. So,
6 that's what we would ask, is that it either be clear on
7 the record that they plan to do that or that they do so
8 by order.

9 JUDGE McGUIRE: Mr. Stone, would you like to
10 respond?

11 MR. STONE: I would like to respond, Your
12 Honor. I would like to start at a somewhat different
13 spot, but I will get to that question.

14 Yesterday's order does clearly raise more than
15 just housekeeping matters, and I want to share with you
16 some of the thoughts I have on the housekeeping matters
17 it raises. We will ask you -- we will file a motion
18 and ask you to clarify certain aspects of the order for
19 a couple of reasons.

20 One, I know it's very important -- this order
21 will be reviewed by other courts in other litigation
22 and will be reviewed ultimately from this Court, and we
23 want to make sure that we are clear and that the order
24 is clear as to the scope of any obligation to produce.

1 is just an example of one of the clarifications,
2 because I think I need to read it more carefully to be
3 certain --

4 JUDGE McGUIRE: It's not an easy order, I know
5 that.

6 MR. STONE: -- one of the issues is the date
7 you chose -- you picked a date on work product, and I
8 think maybe it was not a good job of briefing on our
9 part or maybe we didn't think the issue was framed as
10 to when the work product came into existence, but for
11 example, the Hitachi litigation -- and the Hitachi
12 litigation has not been a subject discussed here
13 because that litigation settled -- that was filed on
14 January 18th of 2000 and was preceded by a demand
15 letter to Hitachi in October of 1999. So, clearly
16 there had been litigation contemplated in connection
17 with the Hitachi litigation prior to the January 1 of
18 2000 date that was the date you chose for your order,
19 because you were looking at litigation involving
20 Infineon as being the earliest.

21 Normally under the rules I think we would be
22 allowed until Tuesday of next to file a motion for
23 reconsideration or clarification. We can certainly
24 meet that deadline, and we will certainly try to file
25 it on Monday, because we have no desire to see this

1 issue delay things.

2 At the same time -- and to some extent I know
3 you addressed a portion of this in your prior order on
4 reconsideration -- we will again ask that the
5 Commission have an opportunity to review this order,
6 because obviously an order that says we have to produce
7 privileged material is an order of some great moment,
8 and as you recognize in your order, we need to take all
9 appropriate steps to protect privileged material before
10 we run the risk of anyone finding that our conduct here
11 constitutes a waiver. So, we will again ask you to
12 certify that issue to the Commission.

13 And in addition, what we plan to do --

14 JUDGE McGUIRE: All right, let me ask you, Mr.
15 Stone, on that question -- and I have no idea what I
16 would do on that request -- but should that be upheld,
17 do you anticipate then having this entire hearing
18 postponed until they have a chance to offer their
19 opinion on that issue?

20 MR. STONE: And I think that -- I think most of
21 the hearing can go forward, but I do want to address
22 that it has an impact on at least a couple of witnesses
23 whose testimony I think should be postponed.

24 If the Commission hears it or if they don't,
25 our plan is in any event to file an appeal in the

1 Circuit Court. We think that this constitutes a
2 collateral order which we're entitled to appeal under
3 various case authority, including a recent case out of
4 the D.C. Circuit of United States vs. Phillip Morris,
5 and in addition, if we weren't entitled to appeal it as
6 a collateral order, which we think we are, we would ask
7 the Court for a writ of mandate with respect to this,
8 because I think again, meaning no disrespect by saying
9 that we disagree with the order, I think you recognize
10 as well that we need to do everything we can to pursue
11 our rights with respect to protecting these materials
12 so as not to run the risk of anyone in subsequent
13 litigation contending that we didn't fully exhaust our
14 remedies.

15 So, what we would ask you to do is to stay the
16 implementation of the order pending a decision from the
17 Court of Appeal, but we think the Commission should
18 have a chance to review it, if you and the Commission
19 desire them to have that chance, before we seek review
20 in the courts.

21 We will proceed -- to address the scheduling
22 issues, we will proceed to prepare all the documents
23 that we think would be required to be produced during
24 the period of time that this appeal is pending, and we
25 will ask the Court of Appeal for expedited treatment of

1 it and are not going to do anything to slow that
2 process down at all and will file there as promptly as
3 we can and as the order here is final.

4 With respect to the scheduling of the hearing
5 itself, it does have an impact -- and I raised this
6 with Mr. Royall earlier -- on two witnesses. Mr.
7 Diepenbrock, who's scheduled for Friday, and Mr.
8 Vincent, who's scheduled for Monday, are both lawyers.

9 JUDGE McGUIRE: Right.

10 MR. STONE: Mr. Diepenbrock was in-house at
11 Rambus. Mr. Vincent was the outside lawyer who
12 prosecuted many of the applications. They each have
13 documents that are on our current privilege log that
14 are written or received during the time period that is
15 covered by your order. Whether they're covered by your
16 order in terms of the subject matter, I'm not sure, but
17 let's assume I think for the sake of argument that at
18 least some of them are.

19 They each have several hundred documents on yeTof ap,
20 Fk f Rec earnc.ve
21 . Royahnt waolutee 17 er t woulutli sact pred wir.
22 7 Diepenbrnts or Friay, ar. Vincets or Mondaynriodes on yeTof a

1 can't do depositions or something else on Friday and
2 Monday so that those witnesses would only testify here
3 once after this issue is resolved.

4 The reason I think it's unfair to them is both,
5 A, the inconvenience -- they both live on the West

1 MR. STONE: I would -- my hope is we would file
2 it on Monday. I would like you to require us not to
3 file it before Tuesday, but I can assure you we will do
4 everything we can to have it on file on Monday. And my
5 plan is to excuse myself, if you don't mind, when we
6 finish this argument, go back and make sure all the
7 wheels are in motion for that to be filed, and then
8 I'll try to come back to court this afternoon if it's
9 okay with you that I be excused to go work on that,
10 because I do want to make sure that we've done
11 everything as promptly as we can.

12 It is not our desire, either Rambus' desire or
13 I can say counsel's personal desire, to see the
14 proceeding delayed unduly.

15 JUDGE McGUIRE: No, I don't want to see this
16 proceeding delayed.

17 Do you have any comments on all this, Mr.
18 Royall?

19 MR. ROYALL: Yes, Your Honor.

20 One thing I would say is that this issue, as
21 you know, has been briefed and rebriefed in some
22 detail, and we would hope given the potential for delay
23 that this could cause that respondent's counsel would
24 work as quickly as possible to get any motion for
25 reconsideration before Your Honor, and I would hope

1 that that can be done by the end of this week, but the
2 only thing I've heard about that -- granted, there may
3 be other things as they review it, but the only thing
4 I've heard about that they said that they would like
5 reconsideration on specifically is this issue about
6 when they anticipated litigation. So, we would like to
7 move as quickly as possible with that.

8 We obviously are concerned about delay. On the
9 question of whether these witnesses should go forward
10 even potentially before this is finally resolved, our
11 view on that is that it does make sense frankly -- and
12 we understand that there are issues of convenience for
13 witnesses, but we've already had an instance in which
14 the respondents have asked that one of our witnesses,
15 Mr. Rhoden, re-appear after he had left, and so there's
16 precedent for that happening in this case.

17 The other thing is, as Mr. Stone said, that he
18 doesn't know whether the ultimate ruling on this, if
19 documents need to be produced, will have an impact on
20 Mr. Diepenbrock or Mr. Vincent or the need to recall
21 them. I don't know that we know that either. It's
22 possible that it won't, but we'd like to go forward
23 with those witnesses and then have the ability to
24 recall them in our case in chief if it is warranted by
25 the production of these documents.

1 Obviously there is a potential that there might
2 be some later action. I just don't know.

3 JUDGE McGUIRE: Okay, I'll tell you what I'm
4 going to do. I'm going to give the respondent until I
5 think 5:00 on Tuesday to file its -- is this going to
6 be an application for an interlocutory appeal and/or a
7 motion for clarification or reconsideration?

8 MR. STONE: Yes, we will put all of that in one
9 pleading, Your Honor.

10 JUDGE McGUIRE: All right, I will give you
11 until Tuesday at 5:00 to file that.

12 How much time will complaint counsel need to
13 file its response to that application?

14 MR. ROYALL: Well, it's hard to know without
15 seeing it, but I would think if they're going to have
16 until --

17 JUDGE McGUIRE: If they have until Tuesday, I

1 Your Honor.

2 JUDGE McGUIRE: Five court days. I will give
3 you five court days. So, that will be Wednesday,
4 Thursday, Friday -- you can file it by 5:00 the Tuesday
5 after. How is that?

6 MR. ROYALL: And we may very well be able to do
7 it sooner.

8 JUDGE McGUIRE: Okay.

9 Now, on the issue of the proposed testimony of
10 the two attorneys, I think because the issues involved
11 here are such that they will have an impact on that
12 testimony, I'm going to ask that complaint counsel
13 postpone their appearance in this hearing until we get
14 this other issue resolved, and to the extent that may
15 cause some inconvenience, the Court offers its apology,
16 but I think this is an issue of great import, and so
17 I'm not going to impose on either them or the parties
18 the uncertainty of this inquiry until we have that
19 resolved.

20 Are you going to be able to substitute other
21 testimony for this coming week, Thursday, Friday --

22 MR. ROYALL: Your Honor, I frankly don't know.
23 Mr. Oliver --

24 JUDGE McGUIRE: If you are not able to, then we
25 will postpone the hearing until early next week.

1 MR. ROYALL: Mr. Oliver may be able to comment
2 on scheduling issues.

3 JUDGE McGUIRE: Okay, Mr. Oliver.

4 MR. OLIVER: Thank you, Your Honor.

5 We can try, but in all honesty, I suspect it's
6 unlikely. We've already had a lot of schedule
7 difficulties, and we generally find that unless we have
8 about three weeks lead time, it's very difficult to
9 schedule witnesses.

10 JUDGE McGUIRE: I know it's difficult, and --
11 but the Court wants to be fair on this issue to
12 everybody involved, including those that will be
13 appearing here for any testimony. So, I suggest that
14 you attempt to reschedule the appearances of your
15 witnesses and then advise the Court, you know, at a
16 point in time you're able to put someone else on.

17 I hope this does not cause an undue delay in
18 this proceeding, but to the extent it does, I think
19 we're just going to have to -- we're just going to have
20 to bear it.

21 So, is the plan then that we will not be in
22 hearing on Friday or will that also include Thursday,
23 tomorrow and Friday?

24 MR. OLIVER: These witnesses would affect only
25 Friday and next Monday, Your Honor.

1 JUDGE McGUIRE: Only Friday.

2 MR. OLIVER: But there is one other issue I
3 wanted to --

4 JUDGE McGUIRE: All right, go ahead.

5 MR. OLIVER: -- raise for you that frankly we
6 have not had a chance to think through ourselves, but
7 we had scheduled Mr. Diepenbrock and Mr. Vincent before
8 Mr. Richard Crisp so that certain foundation could be
9 laid with various documents that would probably be used
10 with Mr. Crisp, and I don't know what impact postponing
11 these two witnesses will have on our ability to go
12 forward with Mr. Crisp.

13 JUDGE McGUIRE: Well, then, we will just have
14 to take this up maybe on Thursday afternoon and see
15 where we stand at that time, and then we'll just do
16 what we have to do after that, and hopefully we'll get
17 someone else in the chair here by early next week, if
18 that --

19 MR. ROYALL: We certainly can update you
20 tomorrow afternoon --

21 JUDGE McGUIRE: Okay.

22 MR. ROYALL: -- where we stand. Again, as Mr.
23 Oliver has said, it's sometimes quite complicated to
24 reshuffle people --

25 JUDGE McGUIRE: And I appreciate that, I

1 appreciate that. I think under all of the
2 circumstances, I think that's how the Court chooses at
3 this point to proceed, so that's what we'll do.

4 Anything else on that?

5 MR. STONE: No. I'd appreciate it, Your Honor,
6 if I could be excused, and I will come back this
7 afternoon.

8 JUDGE McGUIRE: All right, Mr. Stone, you're
9 excused.

10 MR. ROYALL: The only other thing I would say
11 is I appreciate Mr. Stone indicating that he would be
12 preparing these documents in the event they need to be
13 produced, and I assume that will include unredacted
14 forms of documents that have been redacted relating to
15 these issues?

16 MR. STONE: I think anything that is ultimately
17 determined to be covered by your order, Your Honor, we
18 are going to put in process the steps we need to
19 produce those properly in the event that's the ultimate
20 ruling.

21 JUDGE McGUIRE: Okay. You're not asking me at
22 this point, are you, to advise the other side as to how
23 soon they have to produce these documents?

24 MR. ROYALL: Your Honor, I did raise that
25 earlier. I'll certainly take what's -- I'm happy to

1 take Mr. Stone's good faith representation that they're
2 working on that and to prepare that so in the event
3 when this is resolved, they will be able to produce
4 very quickly if that's required.

5 JUDGE McGUIRE: All right, good enough. Thank
6 you, Mr. Stone.

7 MR. STONE: I appreciate it, thank you, Your
8 Honor.

9 JUDGE McGUIRE: At this point, complaint
10 counsel can call its next witness.

11 MR. ROYALL: Before we do that, Your Honor,
12 there was one minor housekeeping matter Mr. Oliver was
13 going to comment on.

14 MR. OLIVER: I apologize, Your Honor, I was not
15 here yesterday at the time the issue with Dr. Oh was
16 raised. I just simply wanted to respond very briefly
17 to the objection on the grounds that he is unavailable.
18 We believe under the rules that we don't have to show
19 that. We simply have to show that he is outside the
20 country.

21 In any event, we are consulting with the other
22 side, and I believe we will be able to work that issue
23 out. If not, then at that point we would address that
24 issue with you.

25 JUDGE McGUIRE: Is he being offered as a -- I

1 assumed from what I read he was not being offered as an
2 expert in this proceeding. Is that correct?

3 MR. OLIVER: That's correct, Your Honor.

4 JUDGE McGUIRE: Okay.

5 Mr. Perry, did you want to comment?

6 MR. PERRY: I agree with Mr. Oliver. We're
7 trying to work it out on that issue.

8 JUDGE McGUIRE: Good, right. I figured that
9 was the whole extent of your agreement, so okay, at
10 this time, we will call your next witness.

11 MR. ROYALL: Yes, at this time, Your Honor,
12 complaint counsel calls as its next witness Mr. John
13 Kelly.

14 JUDGE McGUIRE: All right, Mr. Kelly, would you
15 please approach, and the court reporter will swear you
16 in.

17 Whereupon--

18 JOHN JAMES KELLY, JR.

19 a witness, called for examination, having been first
20 duly sworn, was examined and testified as follows:

21 JUDGE McGUIRE: All right, Mr. Kelly, have a
22 seat over there.

23 THE WITNESS: Thank you.

24 DIRECT EXAMINATION

25 BY MR. ROYALL:

1 Q. Good morning.

2 A. Good morning.

3 Q. Could I ask you to state your full name for the
4 record, please?

5 A. My name is John James Kelly, Junior.

6 Q. And where are you currently employed, Mr.
7 Kelly?

8 A. I am employed at the Electronic Industries
9 Alliance, also known as EIA.

10 Q. And what position do you hold with EIA?

11 A. I'm general counsel of EIA.

12 Q. How long have you held that position?

13 A. I have held that position since September --
14 early September 1990.

15 Q. And can you briefly explain what type of work
16 EIA does?

17 A. EIA is a broad-tgic? at ssociDtdhat pEIA does?

D 1 Q. Good morning.

1 correct?

2 A. I am also the president of the JEDEC Solid
3 State Technology Association, known as JEDEC, which is
4 part of the EIA Alliance -- Federation.

5 Q. And how long have you held that position?

6 A. I have held the position of president of JEDEC
7 since early 2000 -- early 2000 -- early 2000, roughly
8 February-March 2000.

9 Q. Mr. Kelly, how would you compare or contrast
10 the type of work that is done by JEDEC with the type of
11 work that is done by EIA?

12 A. Well, as I said, EIA is a broad-based
13 association. It represents a very diverse industry,
14 the electronics industry in the United States, and it
15 engages in a variety of different activities in support
16 of that industry ranging from government relations to
17 publications and meetings and conferences, market
18 research, trade shows and similar activities, whereas
19 JEDEC is focused on standard-setting in support of the
20 industry sector that it represents, which is
21 semiconductors and solid state products.

22 Q. Is JEDEC also headquartered in Arlington,
23 Virginia?

24 A. Yes, it's headquartered in the same building as
25 EIA.

1 Q. That must make it easy for you to wear your two
2 hats.

3 A. Shorter trips between floors, yes.

4 Q. Besides the fact that they operate in the same
5 building, are EIA and JEDEC formally affiliated with
6 one another?

7 A. Yes, they are. There is a contractual
8 affiliation currently between JEDEC and EIA, and prior
9 to that time, JEDEC was actually -- prior to 2000,
10 JEDEC was actually part of the EIA corporate structure,
11 part of the entity.

12 Q. Was JEDEC spun off then at some point into a
13 separate legal entity?

14 A. Yes, EIA went through a reorganization in late
15 1999, early 2000, in which it became a -- it became
16 legally structured as a federation.

17 In other words, the operating units within EIA
18 became separately incorporated, all of them did, and
19 one of those operating units was JEDEC. So, JEDEC
20 became separately incorporated in the first quarter of
21 2000, and that was also coincidentally the time when my
22 title changed to president of JEDEC.

23 Q. And do you have an understanding as to why EIA
24 chose to spin off JEDEC and these other operating units
25 into separate legal entities?

1 A. It was -- yes, the reason was that each of the
2 entities wanted to gain additional visibility
3 representing the industry sectors and have the
4 recognition of being associations that supported those
5 individual industry sectors, because in some cases the
6 industry sectors we're talking about are significant,
7 substantial.

8 Q. Is EIA sometimes today referred to as a
9 federation?

10 A. It is.

11 Q. Can you explain what is meant by that term?

12 A. Basically EIA is an umbrella organization that
13 provides government relations and communication
14 services to the electronics industry, and then each of
15 the -- what I referred to before as operating groups
16 within EIA represents one of the discrete industry
17 sectors within the electronics industry.

18 So, for example, telecommunications has its own
19 association within the federation; so does consumer
20 electronics; obviously solid state products and
21 semiconductors and so on.

22 Q. During the time that JEDEC was an
23 unincorporated division within EIA, did you in your
24 capacity as EIA general counsel have any
25 responsibilities relating to JEDEC?

1 A. Yes, actually, since I began as EIA general
2 counsel in 1990, I have been the legal counsel for all
3 of the operating units within EIA, including JEDEC and
4 all the others as well.

5 Q. And now that you're the president of JEDEC, who
6 serves as the in-house legal counsel for the
7 organization?

8 A. I still do. I am legal counsel for JEDEC as
9 well as legal counsel for each of the operating
10 entities within EIA still.

11 Q. Does your position as JEDEC's president entail
12 some managerial responsibilities beyond the legal
13 function that you serve?

14 A. Yes, it does.

15 Q. Can you very generally describe the nature of
16 those responsibilities?

17 A. Yes, basically I supervise a staff of nine
18 other individuals. I also have budgetary
19 responsibility for the JEDEC organization. And I'm
20 responsible for implementing policy directives of the
21 JEDEC board.

22 Q. And before becoming JEDEC's president in 2000,
23 had you already assumed any managerial responsibility
24 for the organization?

25 A. Prior to 2000, no. The chief of staff -- I'm

1 sorry, let me qualify that. I had no supervisory
2 responsibility over employees at that time. I still
3 had budgetary responsibility for the organization as
4 well as the duty to implement policy directives of the
5 board.

6 However, Ingrid Taylor of the JEDEC staff was
7 acting as the chief of staff prior to the time that I
8 became president of JEDEC in 2000 -- actually, it was
9 subsequent to that. It was March of 2001 that I took
10 over the responsibilities as chief of staff.

11 Q. And before you became president, did you have
12 some title associated with JEDEC other than as the EIA
13 general counsel?

14 A. Yes, since approximately March of 1997, I had
15 been the executive vice president of JEDEC, but again,
16 with no responsibilities for supervising employees, but
17 the other two managerial responsibilities that I
18 mentioned were there.

19 Q. Currently, which of your two jobs accounts for
20 a greater percentage of your time, your position as EIA
21 general counsel or your position as JEDEC's president?

22 A. My position as EIA general counsel by far.

23 Q. Let me take a moment, Mr. Kelly, to ask you a
24 few questions about yourself.

25 First of all, you live in the D.C. area. Is

1 that correct?

1 practice?

2 A. I did. I spent approximately 13 years in
3 private practice with three different firms, and I was
4 a partner at the last firm I worked with.

5 Q. Very generally, what was the nature of your
6 private practice?

7 A. It was primarily general civil litigation with
8 emphasis on trade association representation, including
9 antitrust and trade regulation matters.

10 Q. How is it that in 1990 you became employed by
11 EIA as the general counsel?

12 A. The law firm that I was working with at the
13 time, I had been there for eight years, was known as
14 Loomis, Owen, Fellman & Howe, and it was a boutique
15 practice that specialized in antitrust and trade
16 regulation and also representation of trade
17 associations, and the firm dissolved. I saw a
18 tombstone advertisement racleand tseThe fed by

1 ironically enough I represented a client that had
2 adverse interests to EIA, and I threatened litigation,
3 and fortunately we were able to resolve the matter on
4 an amicable basis.

5 Q. Let me take a moment now, if I could, Mr.
6 Kelly, to ask you about the organizational structure of
7 EIA and of JEDEC.

Er ture of

1 marked as page 27 of CX-3092, and just so you know, Mr.
2 Kelly, when I'm referring to pages of documents, they
3 will also be appearing on the screen by you if you'd
4 prefer to look at them on the screen or on the paper
5 copy, whichever you prefer.

6 A. We are literally on the same page, thank you.

7 Q. Okay. And do you see on that page, page 27 of
8 Exhibit CX-3092, the heading EIA Organization?

9 A. Yes, sir.

10 Q. And do you see an organization chart on that
11 page?

12 A. I do.

13 Q. Can you explain what that organization chart
14 depicts?

15 A. Yes, this is looking at the EIA Federation, if
16 you will, from a very high level. This is a depiction
17 of the governing structure within EIA and the sectors
18 and the corporate structure of EIA.

19 Q. Is this an accurate depiction of how EIA was
20 organized in 1990 when you became general counsel?

21 A. Yes, sir, it is.

22 Q. Is the general counsel's function or office
23 identified on this organization chart?

24 A. It is.

25 Q. Could you point out where you see that?

1 A. It's in the upper third of the page on the
2 right side, one tier below the president of EIA.

3 Q. And during this time period, did you report
4 directly to EIA's president?

5 A. I did. And I need to qualify my prior answer
6 in one respect.

7 Q. Please.

8 A. During this period of time, I also reported
9 directly to the EIA Executive Committee and to the EIA
10 Board of Governors.

11 Q. And is that true today as well?

12 A. Yes, sir.

13 Q. Now, immediately below the box that refers to
14 general counsel and secretary, there are quite a number
15 of other boxes on this organization chart. Do you see
16 where I'm referring to?

17 A. Yes, I do.

1 Telecommunications Industry Association is the box
2 furthest to the left, and TIA -- and this was unique to
3 EIA at the time -- TIA was separately incorporated in
4 1990 and thereafter.

5 Next in order is the Consumer Electronics --
6 I'm sorry, to go back, the Telecommunications Industry
7 Association, as the name implies, represents the
8 Telecommunications Industry Association -- I'm sorry,
9 represents the telecommunications industry, which
10 broadly speaking includes land wireless, land mobile
11 and cell phones.

12 The Consumer Electronics Group is the next box
13 in order reading from left to right, and that group
14 represents the consumer electronics industry.

15 Following from there to the right, the
16 Industrial Electronics Group, which existed at the time
17 and no longer exists as a separate sector of EIA,
18 represented the manufacturers of industrial electronic
19 parts, including assembly line equipment and robotics.

20 Next is the Components Group of EIA,
21 representing the manufacturers of passive components
22 and at this time also active components.

23 And then finally, the Government Division of
24 EIA, which represented the components that do business
25 with the U.S. Government as a customer.

1 Q. Okay, could I stop you there?

2 What you just walked through, that tier of
3 organizations below the general counsel's function,
4 which have been highlighted on the screen --

5 A. Yes, sir.

6 Q. -- are those the parts of EIA that you referred
7 to when you used the term "sector"?

8 A. Today we refer to those groups -- again, with
9 the exception of industrial electronics, which has gone
10 away -- as the sectors of EIA, that's correct.

11 Q. And except for the Government -- what's
12 referred to as the Government Division, each of these
13 other groups or sectors have lines going down
14 vertically to other boxes. Can you explain what those
15 boxes are below the groups or sectors?

16 A. The boxes at the next tier represent the then
17 extant divisions of each of these sectors of EIA. So,
18 for example, TIA has listed four -- Consumer
19 Electronics actually has four divisions plus the
20 consumer electronics shows and so on.

21 Q. Now, in the bottom left corner, do you see the
22 box that refers to operations?

23 A. I do.

24 Q. And then below that there are lines to other
25 boxes. Do you see that?

1 A. That is correct, and that entire block, if you
2 will, that is depicted in the lower left third of the
3 page are the corporate operating departments of EIA
4 other than the Office of General Counsel, and they are
5 shown as Operations, Public Affairs, Administration and
6 Finance, Engineering, Marketing Services, Government
7 Relations. Now, again, this is as of 1990. This has
8 changed somewhat today.

9 Q. Is JEDEC identified somewhere on this
10 organization chart?

11 A. Well, as I said, the organization chart is
12 looking at EIA from a very high level, from the
13 proverbial 5000 feet, if you will, and if you bore down
14 into any of these boxes, there is a lot more detail.

15 If you were to bore down into the box that's on
16 the lower right of the page under Components Group that

1 activities.

2 Q. In this time frame in the early 1990s, did the
3 Solid State Products Division of EIA encompass other
4 activities besides JEDEC?

5 A. Yes, the Solid State Products Division of EIA
6 also included government relations functions as of
7 1990.

8 Q. I believe that we have a demonstrative exhibit
9 that we wanted to show you, if we could pull that up on
10 the screen.

11 Do you see the demonstrative that's been
12 displayed on the screen, Mr. Kelly?

13 A. I do.

14 Q. Do you recognize the organization chart that's
15 reflected here?

16 A. This is a representation of the hierarchy
17 relating to the JEDEC organization during the period
18 1990 to 1998.

19 Q. And I'm sorry, do you --

20 You already have copies of these, Mr. Perry?

21 MR. PERRY: Yes.

22 MR. ROYALL: Okay.

23 BY MR. ROYALL:

24 Q. Is it -- as best as you can tell, is it an
25 accurate depiction of how JEDEC was organized during

1 the years reflected here, 1990 to '98?

2 A. Yes, with the -- with one qualification, and
3 that is that JEDEC moved at some point I believe during
4 these years out from under the Solid State Products
5 Division of EIA and into the engineering function, but
6 with that one exception, yes, this is accurate.

7 Q. Do you see at the top of this exhibit --

8 And by the way, Your Honor, I'm not sure, but I
9 think we may be at DX-22?

10 JUDGE McGUIRE: I think that's correct, DX-22.
11 Do you have any comment on that, Mr. Perry? Is that
12 your understanding or close to it?

13 MR. PERRY: I'm sorry, Your Honor, I'm --

14 JUDGE McGUIRE: You weren't here the other day,
15 were you? I think it is DX-22, unless we can confirm
16 that with the court reporter, and she wasn't here I
17 don't think on that day.

18 THE REPORTER: It would be on Monday's
19 transcript, if you have that handy.

20 JUDGE McGUIRE: We will currently mark that as
21 DX-22, because I do think that's correct.

22 MR. ROYALL: Thank you, Your Honor.

23 (DX Exhibit Number 22 was marked for
24 identification.)

25 BY MR. ROYALL:

1 Q. Referring now to what's now been identified,
2 Mr. Kelly, as DX-22, which is now on the screen, do you
3 see the column of boxes in the top half of the exhibit?

4 A. I do.

5 Q. And do those boxes accurately reflect the
6 reporting relationships that existed between JEDEC and
7 EIA in this general time period?

8 A. Yes, sir, they do.

9 Q. Could I ask you to take a moment to walk
10 through it briefly and explain the hierarchy of
11 relationships that's depicted in that column?

12 A. Okay, at the very top of the page, there is a
13 box that is identified as Electronic Industries
14 Association, EIA, and in fact, EIA was at this time the
15 parent umbrella organization for JEDEC, which is on the
16 lower part of the page.

17 Immediately under EIA is the Engineering
18 Department Executive Committee, also known as EDEC or
19 EDEC, and EDEC is the governing body for or was at
20 least at the time the governing body for all of the
21 engineering activities within the Electronic Industries
22 Alliance throughout all the sectors.

23 The next box is the EIA Solid State Products
24 Division, SSPD, which I have just described as the unit
25 within EIA at this time that represented solid state

1 products and semiconductor manufacturers and included
2 both the JEDEC engineering functions as well as
3 government relations functions.

4 The next box in order is the JEDEC Solid State

1 A. They generally depict the various committees of
2 JEDEC as they existed during this time frame.

3 Q. And what does the abbreviation JC refer to?

4 A. JC refers to JEDEC Committee, and then it's
5 followed by a number, and in the box beneath the number
6 on this chart you'll see a description of the areas of
7 technology that each committee operated within.

8 Q. Do you know whether in this time frame each of
9 the various JEDEC committees that's identified here had
10 separate subcommittees?

11 A. Not all, but many did, yes, and in fact,
12 several subcommittees of one of these committees,

1 within JEDEC as a whole?

2 A. I think the number was approximately 30 to 35
3 at that time, something on that order.

4 Q. I assume it may have varied throughout that
5 time period somewhat?

6 A. Yes. In fact, the number is larger now, so I
7 assume that there has been some variation throughout
8 the entire time period, but honestly, I wasn't tracking
9 the comings and goings of committees very closely, at
10 least within JEDEC, during that time frame.

11 Q. We have another demonstrative we would like to
12 show you, which I believe will be referred to as DX-23?

13 JUDGE McGUIRE: Correct.

14 (DX Exhibit Number 23 was marked for
15 identification.)

16 BY MR. ROYALL:

17 Q. Do you recognize this demonstrative that's been
18 displayed on the screen, Mr. Kelly?

19 A. Yes, sir, as -- as it is designated, it is the
20 structure of JEDEC within the EIA organization as it
21 currently exists.

22 Q. And the top box refers to the JEDEC board. Is
23 the JEDEC board today the sole governing body of JEDEC?

24 A. It is.

25 Q. Do you yourself sit on the JEDEC board?

1 A. No. I attend most but not all JEDEC board
2 meetings. I try to participate in all of them either
3 personally or by telephone, but I'm not a member of the
4 board. I don't vote on the board. The board is
5 comprised of representatives of member companies that
6 are active in the JEDEC organization.

7 Q. Who currently serves as the chairperson of the
8 JEDEC board?

9 A. The chairperson of the JEDEC board currently is
10 Desi Rhoden.

11 Q. Let's go back, if we could, to CX-3092 and to
12 page 27, which was the EIA organization chart.

13 A. Yes.

14 Q. Within the EIA structure as it existed in the
15 early 1990s, within the various groups and divisions
16 represented on this organization chart, were there
17 other working groups and subcommittees besides the
18 JEDEC committees that we've discussed?

19 A. Yes, there were many operating committees
20 within this structure that's depicted here as the EIA
21 organization overall.

22 Q. Do you know roughly how many separate
23 committees and subcommittees were operating across EIA
24 in, let's say, the early to the mid-1990s?

25 A. This is an approximation, but it's pretty

1 close. I would say roughly 200 throughout the
2 organization, 200 engineering committees.

3 MR. ROYALL: Your Honor, at this time I'd like
4 to offer into evidence CX-3092, the 1990 EIA annual
5 report.

6 JUDGE McGUIRE: Mr. Perry?

7 MR. PERRY: No objection.

8 JUDGE McGUIRE: So entered.

9 (CX Exhibit Number 3092 was admitted into
10 evidence.)

11 BY MR. ROYALL:

12 Q. Mr. Kelly, I'd like to show you another
13 document.

14 May I approach, Your Honor?

15 JUDGE McGUIRE: Yes.

16 BY MR. ROYALL:

17 Q. Mr. Kelly, I've handed you what's been marked
18 for identification as CX-419. Do you recognize this
19 document?

20 A. Yes, sir.

21 Q. Can you explain what it is?

22 A. This document is a letter that I sent --
23 although I don't remember this specific letter -- I
24 would have sent to a membership prospect in the time
25 frame indicated on the letter, which was May 2000.

1 Q. And what was the purpose of the letter?

2 A. The purpose of the letter was to solicit the
3 participation of in this case Microwave Power Devices
4 to become a member of the JEDEC organization.

5 Q. Was this, in effect, a form letter that you
6 would send to candidates that were -- or prospective
7 members of JEDEC?

8 A. Yes, sir, at that time it was.

9 Q. I'd like to walk you through and ask you a few
10 questions about the statements in the letter, starting
11 with the first paragraph of CX-419. You state there: startin

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1 committees, subcommittees, working groups and task
2 groups. And the number of individual company
3 participants is roughly the same, about 1800.

4 Q. Do you know how these statistics would compare
5 to the makeup of JEDEC in the early to mid-1990s?

6 A. I would say they're approximately the same.
7 Member companies in the early nineties was probably
8 closer to the 250 mark again, but I think the other
9 statistics are approximately correct.

10 Q. You say here that as of the date of this
11 letter, May 2000, there were 300 member companies but
12 800 individual participants in JEDEC. Is it common for
13 companies in JEDEC to send multiple representatives to
14 JEDEC meetings?

15 A. Yes, sir, it is. Actually, the number of
16 individual company participants is 1800, not 800, but
17 it is not uncommon for companies to send multiple
18 representatives to JEDEC meetings overall, although
19 it's not the norm that there would be multiple company
20 representatives at any individual committee meeting.
21 Some companies do send different people to different
22 committee activities within JEDEC.

23 Q. You mention in this letter the number of
24 members of JEDEC. Roughly how many members does EIA
25 have today?

1 A. Today, approximately 2100 members.

2 Q. And has that number changed materially over the
3 past decade or so?

4 A. It's up fairly considerably. I think it --
5 when I joined EIA, it was about 1200 members
6 approximately.

7 Q. Going back to the letter, CX-419, in the next
8 sentence of the letter, you state in reference to
9 JEDEC, "75% of the top 250 semiconductor manufacturers
10 are members, representing 80% of semiconductor sales."

11 Do you see that?

12 A. I do.

13 Q. And do you understand those to be accurate
14 estimates or statistics?

15 A. I -- yes, sir, I certainly did as of May 2000,
16 yes.

17 Q. What about the next statement, "An estimated
18 90% of semiconductor standards in use are JEDEC
19 standards."

20 Do you see that?

21 A. I do.

22 Q. And do you understand that to be an accurate
23 statement?

24 A. I do.

25 Q. In the next paragraph you state, "JEDEC

1 standards are open (in terms of IP licensing)," and let
2 me stop there.

3 Do you see that language?

4 A. I do.

5 Q. Can I ask you to explain what you meant by that
6 statement?

7 A. Yes. JEDEC standards -- what I meant here
8 specifically was that JEDEC standards are open in the
9 sense that they are not subject to restrictive
10 intellectual property rights.

11 Q. And what do you mean by the term "restrictive
12 intellectual property rights"?

13 A. What I mean by "restrictive intellectual
14 property rights" is unlimited intellectual property
15 rights; that is, not -- we had a -- something that
16 we -- we have a rule that we follow in JEDEC that's
17 known as the RAND rule, reasonable and
18 nondiscriminatory. Let me explain what that means.

19 Companies that participate in the process that
20 have relevant IP are required to disclose the IP and
21 then give assurances limiting their unbridled
22 discretion to license that IP on any terms and
23 conditions that they elect, and that's what I'm
24 referring to here as the limitation on IP rights, so
25 that they are not restrictive.

1 Q. Does the term "open standard," as you define it
2 or as you use it here, refer to a standard that
3 includes no intellectual property whatsoever?

4 A. No. No, to the extent that intellectual
5 property is included in a standard, it must be subject
6 to the reasonable and nondiscriminatory assurances or
7 alternatively to an agreement to license without
8 charge, which is less common, but it sometimes happens.

9 Q. Are all JEDEC standards open standards in the
10 sense that you use that term here?

11 A. Yes, sir, those are the only kinds of standards
12 that JEDEC generates, and if I can go beyond that,
13 those are the only kinds of standards that EIA as a
14 whole generates.

15 Q. In your view, is it important for JEDEC
16 standards to remain open standards?

17 A. It's vital.

18 MR. PERRY: Your Honor, I don't know if he's
19 asking for him to give his view, but we would object to
20 the opinion testimony. He hasn't been designated as an
21 expert.

22 JUDGE McGUIRE: Any response, Mr. Royall?

23 MR. ROYALL: Well, I am asking for his view as
24 EIA general counsel and as JEDEC president, and I don't
25 think it's in the form of expert testimony. I don't

1 think it's any --

2 JUDGE McGUIRE: He can testify as to his own
3 observations and any perception but not opinion
4 testimony, if you want to restate the question.

5 MR. ROYALL: Well, I can restate the question,
6 but I think the question as stated was asking for his
7 own view, but I can restate it if you like.

8 JUDGE McGUIRE: Please do.

9 BY MR. ROYALL:

10 Q. In your view, Mr. Kelly, is it important for

1 his views on the interpretation of JEDEC rules or the
2 purposes of JEDEC --

1 on in JC-42 or his views of any of that, and we have
2 got that in his deposition. He says he has no idea
3 what was going on in JC-42 at the time. So, I just
4 worry that we're getting opinions and views about what
5 was going on back then when there's no foundation.

6 JUDGE McGUIRE: I will -- he's laid the
7 foundation at least to the time frame. That's
8 overruled. I'll let you go into that on cross
9 examination.

10 MR. PERRY: All right, thank you.

11 JUDGE McGUIRE: You may proceed, Mr. Royall.

12 MR. ROYALL: Thank you, Your Honor.

13 BY MR. ROYALL:

14 Q. Do you have the question in mind, Mr. Kelly?

15 A. I do. I can answer it a couple different ways.
16 Let me try to answer it straight on.

17 First of all, we have very basically open
18 standards, as I said before, are what we do. It's the
19 only kind of standard we generate at EIA or in JEDEC,
20 and it's important that we do that because openness
21 is -- it ensures that the end product of the standards
22 process won't be subject to unfair competition or
23 misuse by a particular company to enhance its market
24 power. It's designed to be open.

25 That's why there -- as I said before, we limit

1 the otherwise unbridled discretion of IP owners to
2 license on any terms that they see fit. Having the
3 technology included in the standard is a privilege, and
4 the condition for that -- for having that privilege is
5 to agree to a restriction on licensing. That in turn
6 allows the marketplace to know that they're dealing
7 with a standard that anyone can comply with on a -- on
8 a reasonable basis without -- without being, if you'll
9 excuse the expression, gouged in terms of IP licensing
10 royalties.

11 Q. Does JEDEC sometimes refer to itself as an open
12 standards organization?

13 A. Yes, it does.

14 Q. And by that term, is JEDEC simply referring to
15 the open nature of the standards as you described, or
16 is it referring to something else?

17 A. It's referring to the process by which the
18 standards are developed, which is an open process in
19 the sense that anyone with an interest in the subject
20 matter can participate and in the sense that the entire
21 process is conducted in good faith.

22 And then it also refers to the end product of
23 that process, which is what I'm identifying here, which
24 is an open standard not subject to restrictive
25 intellectual property.

1 Q. If I could focus you back on Exhibit CX-419,
2 and in fact, on the same sentence that we've been
3 discussing, you go on in that sentence to state that
4 JEDEC standards are "voluntary."

5 Do you see that?

6 A. Yes, sir.

7 Q. What do you mean in saying that JEDEC standards
8 are voluntary?

9 A. Voluntary in at least two senses. One is that
10 any company may voluntarily elect to participate or not
11 participate in the process by which standards are
12 developed, and voluntary in terms of whether a company,
13 after a standard is finally issued, elects to comply
14 with that standard or not. The whole -- the
15 development and the compliance with the standard are
16 both entirely voluntary.

17 Q. Does JEDEC sometimes refer to itself as a
18 voluntary standards organization?

19 A. Yes, sir.

20 Q. And what is meant by that term?

21 A. Basically what I've just said, that it's open
22 to anyone with an interest in the subject matter to
23 participate and that the end product of the process is
24 a standard that companies can follow or not follow in
25 their own discretion.

1 Q. I don't believe that the term is used in this
2 letter, but let me go ahead and ask you, does JEDEC
3 sometimes also refer to itself as a consensus standards
4 organization or a consensus standards developer?

5 A. Yes, sir.

6 Q. And what is meant by that term in reference to
7 JEDEC?

8 A. In every instance, our standards have to be
9 based upon a consensus of the formulating committee and
10 a consensus of the board -- of the -- now the JEDEC
11 board, formerly the JEDEC Council, indicating that they
12 agree with the content of the -- of the standard.

13 Q. For a JEDEC committee to approve a standard, is
14 it necessary that there be unanimous support for the
15 standard?

16 A. No, sir. By consensus, we mean something less
17 than unanimous support as a matter of just counting
18 votes. As a practical matter, however, we try whenever
19 possible to attain unanimity or come as close to
20 unanimity as we can, and there's -- through the voting
21 process, people who vote "no" on a standard have an
22 opportunity to express the basis for their "no" vote,
23 and the committee has an opportunity to consider that
24 objection and respond to it, and through that process,
25 hopefully most -- certainly the majority, most of the

1 members, hopefully a unanimous group of the members,
2 will agree that the standard is appropriate for
3 adoption.

4 Q. Once a JEDEC committee approves a standard,
5 does it automatically become final and published or is
6 there something else that has to happen?

7 A. Once the committee approves a standard, for
8 example, a JC-42 committee but it could be any of the
9 JEDEC committees, then that standard is -- the proposed
10 standard is sent by a ballot to the board of JEDEC,
11 which then has to again by a consensus approve the
12 ballot to adopt the standard.

13 Q. Does the JEDEC board pay any attention to the
14 level of support or opposition to a standards proposal
15 within the committee from which that proposal is
16 generated?

17 MR. PERRY: Your Honor, again, could we ask for
18 a time frame on these questions, because I don't think
19 he was on the board --

20 JUDGE McGUIRE: All right, Mr. Royall?

21 MR. ROYALL: During the -- I am happy to do
22 that.

23 BY MR. ROYALL:

24 Q. I believe you stated earlier, Mr. Kelly, that
25 you have -- although you don't sit on the board, you

1 have some involvement in JEDEC board activities?

2 A. That is correct.

3 Q. And when did that involvement commence?

4 A. I believe I attended my first JEDEC board
5 meeting in February -- January or February of 1997.

6 Q. And in your experience being involved with the
7 JEDEC board, do you know whether the board pays
8 attention to the level of support or opposition to a
9 standards proposal when that proposal is then presented
10 to the board for its approval?

11 A. Yes, sir.

12 Q. And if there was opposition to the standards
13 proposal, is that something that in your experience has
14 been an issue one way or the other with the JEDEC
15 board?

16 A. The board will always discuss the fact that
17 there are negative votes, particularly if there are
18 unresolved negative votes. It will be a subject of
19 discussion at board meetings, yes.

1 access to a JEDEC standard, what would they have to do
2 to gain access?

3 A. Go to our web page, which is indicated on this
4 exhibit, click on the download area, identify the
5 standard, and then download it, and they frequently do.

6 Q. In the same -- again, the same sentence or, I'm
7 sorry, the same paragraph that we've been focusing on

1 or among the members relating to JEDEC business as much
2 as possible. So, we are web-enabled and
3 internet-enabled to the extent that that is feasible.

4 Q. Based on your experience and involvement with
5 JEDEC over the -- roughly the past 13 years, is it your
6 understanding that it is important to JEDEC that its
7 standards process moves quickly?

8 A. When that's -- when that is the demand of the
9 industry, yes.

10 Q. And why is that important when it's the demand
11 of the industry?

12 A. Well, because companies that are interested in
13 developing standards have other options than open
14 standards. Open standards is an old, traditional
15 process, and a newer model, for example, would be
16 consortium -- consortia-developed standards, which
17 don't look anything like the end product of the JEDEC
18 process, but that process is at least believed to move
19 very quickly.

20 Q. Just to be clear, you mentioned the word
21 "consortia standards" or term "consortia standards."

22 Can you explain what you mean by that?

23 A. Yes, a consortia is a group of companies that
24 join together voluntarily, usually through a contract,
25 to develop a standard. The standard is ordinarily not

1 subject to any restriction on the ability of the IP
2 owners to license other than any restrictions that may
3 be agreed to as a matter of contract between the
4 participants. Frequently the participants have
5 agreements relating to IP licensing between themselves,
6 cross-licensing or something of that nature.

7 And that process moves very slowly because it's
8 closed. It's not open to the industry. It's only open
9 to the participants in the consortia.

10 Q. Let me ask you to focus on the next paragraph
11 of CX-419, the first sentence, which reads in part,
12 "What JEDEC standards mean to the industry is lower
13 price and wider supply," and I'll stop there.

14 Do you see that language?

15 A. Yes, sir.

16 Q. When you use the term "industry" here, what
17 industry are you referring to?

18 A. I am referring to actually the entire supply
19 chain, not just the semiconductor industry that
20 manufactures the products that JEDEC specs, but also
21 the industries that use those products, including
22 consumer electronics, IT, automotive, aeronautics and
23 so forth.

24 Q. And what do you mean when you say that JEDEC
25 standards mean lower price and wider supply to the

1 industry?

2 A. Let me take the latter first. Wider supply
3 basically means there are more suppliers. Because it
4 is an open standard, any company wishing to comply can
5 and can develop product to the standards, and that
6 tends to mean more sources of supply, and because
7 there's more competition in the manufacture of product,
8 it tends over time to drive the price down for the
9 benefit of the supply chain as well as OEMs and end
10 users and in many cases consumers.

11 Q. And you go on to say in the same sentence that
12 JEDEC standards mean consistent quality and
13 reliability.

14 Do you see that?

15 A. Yes, sir.

16 Q. Can you explain what you meant by that
17 statement?

18 A. Many but not all JEDEC standards include --
19 cover aspects of quality and reliability, and to the
20 extent that companies are following JEDEC standards,
21 there is a consistency in terms of quality and
22 reliability.

23 Q. And finally, let me ask you about the language
24 at the end of that same sentence where you say that
25 JEDEC standards mean "uniform terms and definitions,

1 common packages, interchangeability of logic, memory,
2 et cetera."

3 Do you see that?

4 A. Yes, sir.

5 Q. And can you explain what you mean by that
6 language?

7 A. Yes, sir. Again, this is an elaboration of the
8 benefits of open standard-setting in terms of getting
9 the entire industry on the same page, which is almost
10 where we started.

11 MR. ROYALL: Your Honor, at this time I would
12 like to offer in evidence CX-419.

13 MR. PERRY: No objection.

14 JUDGE McGUIRE: So entered.

15 (CX Exhibit Number 419 was admitted into
16 evidence.)

17 BY MR. ROYALL:

18 Q. Now, Mr. Kelly, you mentioned a moment ago that
19 JEDEC, if I understood your testimony, has on the order
20 of 1800 individual participants. Is that right?

21 A. Yes, sir.

22 Q. How many individuals are on JEDEC's staff?

23 A. Including myself, ten.

24 Q. And generally speaking, what role does JEDEC
25 staff play in the work of the organization?

1 A. We facilitate the meetings.

2 Q. Do JEDEC staff members ever chair substantive
3 committees within JEDEC?

4 A. No, sir.

5 Q. How is it determined who will chair a
6 substantive committee within JEDEC?

7 MR. PERRY: Again, Your Honor, could I ask for
8 a time frame for these questions?

9 JUDGE McGUIRE: Mr. Royall?

10 MR. ROYALL: Your involvement -- I can -- I
11 think I established that he's been involved with JEDEC
12 since 1990, but I can come back and do that.

13 JUDGE McGUIRE: All right, Mr. Perry, what's
14 your objection?

15 MR. PERRY: Your Honor, the testimony is very
16 clear from this gentleman that he has no idea what went
17 on within JC-42 in the time period we're focused on,
18 which is '91-'96, and I can voir dire him --

19 JUDGE McGUIRE: Was your question pertaining to
20 JC --

21 MR. ROYALL: No, it's not.

22 JUDGE McGUIRE: I didn't think it was either.
23 It's on the overall organization of JEDEC, if I
24 understand the question.

25 MR. ROYALL: Yeah, if I have a question about

1 JC-42, I will make that clear in the question, but this
2 is a question that's generic to JEDEC committees and
3 the role played by JEDEC staff.

4 MR. PERRY: Okay, that's fine, if we're not
5 talking about JC-42, I'm sorry, then --

6 JUDGE McGUIRE: Yes, I didn't understand him to
7 be asking about JEDEC 42. It was a broader question
8 than that.

9 MR. ROYALL: We might get to that soon.

10 JUDGE McGUIRE: All right, proceed, Mr. Royall.

11 BY MR. ROYALL:

12 Q. Mr. Kelly, generally speaking, how is it
13 determined who will serve as the leaders of JEDEC's
14 various committees and subcommittees?

15 A. The members of each committee and subcommittee
16 elect from their membership a chairman and a
17 vice-chairman. So, the -- so, the chairman and
18 vice-chairman are company representatives; they are not
19 staff.

20 Q. I'd like to show you another document.

21 May I approach, Your Honor?

22 JUDGE McGUIRE: Yes.

23 THE WITNESS: Thank you.

24 BY MR. ROYALL:

25 Q. Mr. Kelly, I've just handed you a one-page

1 document which has been marked for identification as
2 RX-2233. Do you recognize this document?

3 A. Yes, sir, this is an organizational chart
4 depicting the structure of the JEDEC staff.

5 Q. And is it an accurate depiction of the current
6 organization of JEDEC staff?

7 A. Yes, sir, it is.

8 Q. So, is it correct that, counting correctly,
9 your entire staff today consists of yourself and nine
10 other staff members?

11 A. That is correct.

12 Q. Do you know how w w w w w w w w w3hGpares wi

InTt1itearly anT A. That is correc6 of mid-1990 , staff. ne

1 A. Yes, sir, I'm sorry, to the EIA engineering
2 department, yes.

3 Q. Could I ask you very quickly to walk through
4 and identify the functions of the various staff that
5 report to you as reflected on this organization chart?

6 A. Okay, well, first of all, they are basically as
7 depicted here. I've already testified that what my
8 functions are, executive management and legal.

9 Again, at the next level of the org chart,
10 starting from the left, Julie Carlson is a manager.
11 She is responsible for committee support of JC-10,
12 JC-11 and JC-60. JC-60, by the way, at this point no
13 longer exists. They have ceased their functioning.
14 She is also responsible for the publication of
15 standards and other publications and for responding to
16 inquiries that we receive via our website.

17 Next in order is Lori Hurlbutt. She is a
18 manager. She is responsible secondarily to myself for
19 budgeting and finance of the organization. She also
20 supports the JC-13 committee. She's involved along
21 with Ingrid Taylor in activities of the IEC, which is
22 the International Electrotechnical Commission. She
23 also manages our awards program and is editor of our
24 newsletter.

25 Next is Arnaud Lebegue. He is the

1 administrator of our website, also now administers our
2 computer network and along with Julie Carlson responds
3 to website inquiries.

4 Next, Donna McEntire is the manager, now
5 director, of our meetings function. She is the
6 meetings planner. She is responsible for working with
7 hotel contracts and making other meeting arrangements,
8 and more recent -- and recently also in charge of our
9 events, of which we have several.

10 Mr. McGhee is next. He is a staff director,
11 and Mr. McGhee supports more committees I think than
12 any other member of the staff. He is responsible for
13 the support of JC-1 -- anp- anp- anp- anp- an 2E an5 anpra2np

1 Q. Okay.

2 A. Again, back to the third tier, Phileasher
3 Tanner is an administrative assistant. She also
4 supports the JC-22 committee. She is responsible for
5 maintaining something we call Publication 95, and she
6 also is responsible for miscellaneous billings, which
7 is an accounting-related function.

8 Angie Steigleman next is the senior coordinator
9 in charge of electronic balloting. That is the
10 balloting process by which all committee ballots are
11 processed. Also, marketing support. She is
12 responsible for assembling our newsletter and
13 statistical research, it indicates here, but I don't
14 know if she does any.

15 And then finally, Ingrid Taylor is a part-time
16 employee currently. She is responsible for the support
17 of the JC-14 committee. She is the -- she performs the
18 secretariat function for the IEC SC 47D committee, and
19 she is also liaison on behalf of JEDEC with several
20 other international organizations, including the
21 Japanese Electronic Information Technology Association,
22 JEITA, and several others.

23 Q. Thank you, Mr. Kelly.

24 Let me ask you this: To the extent that any of
25 these staff members are responsible for working with or

1 supporting the activities of particular JEDEC
2 committees, generally speaking, what types of
3 responsibilities does that entail?

4 A. It entails preparing or at least mailing out
5 notices of meetings and meeting agendas; physically
6 attending all of the meetings of all of the committees
7 and their subcommittees, which occur around the country
8 and sometimes around the world; taking minutes at those
9 meetings; preparing drafts of minutes for review by the
10 chairman and by myself; finalizing the minutes of the
11 meetings; and responding to inquiries from members on
12 business related to the committee's activities in the
13 interim between meetings.

14 Q. And I believe you mentioned in discussing Mr.
15 McGhee that, among other committees, he's responsible
16 currently for supporting the JC-42 committee. Is that
17 right?

18 A. That's correct.

19 Q. Does that include the subcommittees of JC-42?

20 A. Yes, sir.

21 Q. Do you know how long Mr. McGhee has been
22 working with the JC-42 committee and its subcommittees?

23 A. As long as I have been associated with JEDEC
24 and EIA. In other words, since early September of
25 1990.

1 Q. Is Mr. McGhee an engineer?

2 A. No, sir, he is not.

3 Q. Are any of the members of JEDEC's staff
4 engineers?

5 A. No, sir.

6 Q. How long has Mr. McGhee reported to you?

7 A. Mr. McGhee has reported to me since March 2001.
8 Prior to that time, he reported to Ingrid Taylor, who I
9 believe I said earlier was the chief of staff prior to
10 that time.

11 Q. You have mentioned in discussing one of the
12 JEDEC staff members I think Ms. -- is it Hurlbutt?

13 A. Hurlbutt, yes, sir.

14 Q. You mentioned budget, JEDEC's budget. How
15 large is JEDEC's budget?

16 A. Currently, it's approximately \$2 -- I think
17 \$2.2 million, but of that \$2.2 million, part represents
18 the standards activity and part represents the events
19 that I referred to earlier, which have tended to
20 increase our income and also our expenses.

21 Q. Do you know how much of that budget is
22 allocated to salaries?

23 A. The vast majority, half probably, close to half
24 anyway.

25 MR. ROYALL: Your Honor, at this time I would

1 like to offer into evidence this document, which has
2 been marked as RX-2233.

3 MR. PERRY: No objection.

4 JUDGE McGUIRE: Entered.

5 (RX Exhibit Number 2233 was admitted into
6 evidence.)

7 THE WITNESS: Can I qualify that? I should
8 have said half, not the vast majority. Half, it's
9 about half of the budget is salaries.

10 BY MR. ROYALL:

11 Q. Okay, thank you.

12 Now, let me ask you a few questions about
13 membership in JEDEC and in EIA. How does one become a
14 member of JEDEC?

15 A. One becomes a member of JEDEC by filling out a
16 membership application and paying dues.

17 Q. Is there a separate membership application for
18 EIA?

19 A. No, sir.

20 Q. By becoming a member of JEDEC, does one
21 automatically become a member of EIA?

22 A. Yes, sir.

23 Q. And has that always been true in your
24 experience since you joined EIA in 1990?

25 A. Since I've been with EIA, that has been true,

1 yes.

2 Q. Were JEDEC members, to your knowledge, informed
3 that by becoming a member of JEDEC, they were
4 considered to automatically have become members of EIA?

5 MR. PERRY: No foundation as to -- depending
6 upon the time period, Your Honor.

7 JUDGE McGUIRE: Well, he --

8 MR. ROYALL: What was the --

9 MR. PERRY: No foundation depending upon the
10 time period you're asking about.

11 JUDGE McGUIRE: -- he just -- his question, as
12 I understood it, took him back to since he's been
13 involved, since 1990.

14 MR. ROYALL: Yes.

15 JUDGE McGUIRE: That's my understanding of the
16 question.

17 MR. ROYALL: And I can restate that.

18 JUDGE McGUIRE: Just a second.

19 MR. PERRY: My objection would be there is no
20 foundation for the knowledge about what JEDEC members
21 were told.

22 JUDGE McGUIRE: Any comment on that, Mr.
23 Royall?

24 MR. ROYALL: I can -- I can lay a foundation if
25 you like.

1 JUDGE McGUIRE: All right, proceed.

2 BY MR. ROYALL:

3 Q. Mr. Kelly, do you have any knowledge as to
4 what, if anything, JEDEC members were informed of in
5 terms of whether their membership in JEDEC would
6 automatically result in them becoming members of EIA?

7 A. In terms of oral communications, no, sir. In
8 terms of other communications, yes.

9 Q. Can you explain?

10 A. Every member of EIA, up until -- I believe I
11 testified up until 1998 received a copy of the annual
12 report of EIA. During the -- that same time frame,
13 every member of EIA received a copy of the EIA Trade
14 Directory. And also, EIA members would routinely
15 receive communications from EIA, sometimes eliciting
16 complaints from members that they were getting too much
17 paper.

18 Q. You mentioned something called the Trade
19 Directory. Can you explain what that is?

20 A. Yes, sir -- oh, by the way, there is one
21 publication I left out. There was also a Standards
22 Index, which was a list of all of our published
23 standards, which was provided on an annual basis via
24 the mail to every EIA member.

25 Q. And on that subject, so would that include

1 non-JEDEC standards that were developed by other parts
2 of EIA?

3 A. Yes, sir, that was a comprehensive list of all
4 of the standards that were developed by all of the
5 sectors of EIA and all of their committees.

6 Q. And to your knowledge, was that document sent
7 to JEDEC members in the period starting with 19 --
8 September 1990 when you joined the organization?

9 A. Yes, sir, it was sent to all the EIA members,
10 including all JEDEC members.

11 Q. Now, going back, you mentioned something called
12 the EIA Trade Directory. Is that right?

13 A. The Trade Directory, yes.

14 Q. Can you explain what that is?

15 A. The Trade Directory is no longer. That ceased
16 publication around the same time as the annual reports,
17 so roughly 1998. The Trade Directory was a
18 comprehensive volume, about an inch thick, that listed
19 all EIA member companies, indicating the sector that
20 they belonged to, who their corporate leadership was,
21 and what types of products they manufactured, as well
22 as what trade names the companies elected to disclose
23 to us, and we'd list those as well, what trade names
24 the company operated under.

25 Q. Can -- and again, focusing on the time period

1 that you've been involved with both organizations,
2 since September 1990, can individuals join -- that is,
3 individuals -- join JEDEC and EIA or is membership
4 limited to companies?

5 A. Some sectors of EIA allow individual membership
6 currently. When I started in 1990, membership was
7 exclusively corporate. Today, it's a mix, but in
8 JEDEC, it is all corporate membership.

9 Q. And with respect to JEDEC, has that been true
10 since you joined EIA in 1990?

11 A. Yes, sir.

12 Q. What privileges or benefits, if you will, are
13 there to membership in JEDEC?

14 A. Currently?

15 Q. Based on -- if you can explain based on the
16 time period that you've been involved with EIA and
17 JEDEC since 1990.

18 A. Okay, let me try to -- I'll try to identify the
19 time frame when I identify the benefit.

20 First of all, members are permitted to attend
21 more -- to attend more than one meeting. Non-members
22 are limited to one meeting. So, members can attend any
23 meeting. They can receive meeting notices. They
24 receive copies of minutes of meetings. They have an
25 opportunity to vote on a one-company/one-vote basis.

1 They have the right to review -- the right to
2 receive copies obviously of standards and other
3 publications that are distributed generally by JEDEC to
4 members -- JEDEC to its members, and that would have
5 been true throughout the entire period. They're
6 entitled to participate obviously in EIA activities to
7 the extent they have an interest in EIA activities.

8 That's in essence it.

9 Q. Thank you.

10 Just to follow up on that, do you have to be a
11 member of JEDEC to make a presentation at a JEDEC
12 meeting?

13 A. No, sir.

14 Q. And I believe you said something about
15 non-members can attend one meeting? Is that what you
16 said?

17 A. Non-members can attend one meeting without
18 joining or without paying a non-member participation
19 fee. I frankly don't recall anyone ever paying a
20 non-member participation fee. I think they attend one
21 meeting, and they either decide to come back again and
22 become members or they don't come back again.

23 Q. Are members of JEDEC required to vote on
24 matters that come before JEDEC committees?

25 A. I'm sorry, could you repeat the question?

1 Q. Are members of JEDEC that participate in JEDEC
2 committees required to vote on matters that come before
3 the committee?

4 MR. PERRY: Your Honor, again, there's a

1 years, once having become a member of JEDEC, how would
2 a company go about withdrawing from the organization?

3 A. A company can withdraw from JEDEC by either
4 submitting a letter indicating their wish, their desire
5 to withdraw, or by not paying their annual dues.

6 Q. If a company were simply to be a few weeks late
7 in paying its annual dues, would it risk being dropped
8 as a member of JEDEC? Again, based on your experience
9 with the organization over the past 13 years.

10 A. No, sir.

11 Q. Under what circumstances, based on your
12 experience, could late payment or nonpayment of dues
13 cause one to be dropped as a member of JEDEC?

14 A. JEDEC generally issues their dues invoices in
15 the last quarter of the year preceding the dues year,
16 and sometimes it slides over later than that into
17 January of the dues year. Following that, there are
18 three sequential notices, past due notices that are
19 issued, one in the spring, usually around April; one in
20 the May-June time frame; and then another in late
21 summer.

22 We do not drop member companies for nonpayment
23 of dues until around September 1, and the reason for
24 that is that the nonpayment of dues is equivocal, and
25 if you understand this industry, sometimes it's driven

1 by economic considerations, and it's not at all unusual
2 for member companies to be six months late in paying
3 their dues. We don't ever drop them without knowing to
4 a reasonable degree of certainty that they don't intend
5 to pay their dues.

6 Q. Since you joined EIA as general counsel in
7 1990, has this always been true; that is, what you just
8 described in terms of the potential for a JEDEC member
9 to be dropped because of the nonpayment of dues?

10 A. This has been standardh9?be siIf the nonpayment of dues

1 continue to receive minutes, to your knowledge --

2 A. Yes, they do.

3 Q. -- from the JEDEC committees that they're
4 involved in?

5 A. Yes, I'm sorry. They are entitled to continue
6 receiving minutes and other committee-related
7 correspondence until the time that they're dropped as
8 members.

9 Q. Are there any benefits or privileges of JEDEC
10 membership that a member company that is late in paying
11 its dues would not be entitled to, that is, before
12 being dropped as a member?

13 A. No, sir, they receive the same benefits that
14 they would have received during the entire time they
15 were paying their dues.

16 Q. When you were hired as EIA's general counsel in
17 1990, how would you describe your basic job
18 responsibilities?

19 A. I was the chief legal officer for the entire
20 EIA organization, including all of the sectors of EIA,
21 except for the Telecommunications Industry Association,
22 which I indicated earlier was separately incorporated.
23 They had their own outside general counsel, and I
24 provided standards-related legal support to TIA, but
25 with respect to the remainder of the operation, I was

1 the legal counsel.

2 Q. You used the term "chief legal counsel" or
3 "chief legal officer." Can you elaborate on what that
4 job responsibility entailed?

5 A. Right. Well, first of all, let me explain that
6 certain other of the operating units in EIA had and do
7 have their own in-house legal counsel, and I have a
8 dotted-line -- dotted-line relationship with those
9 individuals, so we're kind of a loosely configured
10 group within the organization that provides legal
11 support.

12 I, however, prior to the federation -- and that
13 lasted until the federation of EIA when everyone became
14 separately incorporated. I was the -- and I'm
15 referring to the early period now -- I was the chief
16 legal officer of the entire organization, so I -- all
17 of the other legal officers would consult with me, and
18 I would advise them, and we would operate, as I said,
19 as a group or as a team.

20 And my responsibilities in that capacity
21 included advising staff on legal issues that arise in
22 the context of the business of EIA, and EIA is -- or at
23 least at the time was approximately -- an approximately
24 \$200 million, 300-employee trade association with --
25 I've already indicated, with very diverse activities.

1 It's also a business, like any business, so we had
2 human relations issues that I'd be involved in and
3 contract review and advising governance boards
4 regarding EIA procedures.

5 I answered questions from members of EIA about
6 legal issues that would arise in the context of their
7 work with EIA, in particular with respect to the
8 engineering functions. I would review minutes of all
9 engineering committee meetings. I would answer
10 questions from the staff responsible for supporting
11 engineering committee activities, as well as from the
12 participating member companies and their individual
13 representatives on legal issues relating to their work
14 in committees.

15 I would review all standards proposals and all
16 standards that were issued in the engineering
17 activities. And basically anything else that came up
18 that was of a legal nature in the context of the
19 overall operations of EIA or specifically with regard
20 to standards, I provided advice as requested.

21 Q. And what you've just described, those were your
22 basic job responsibilities as EIA general counsel when
23 you started with the organization in late 1990. Is
24 that right?

25 A. That is correct.

1 Q. Have your basic responsibilities as EIA general
2 counsel changed over time in the roughly 13 years
3 you've been with the organization?

4 A. With the restructuring of the organization in
5 2000, there were certain changes in my relationships
6 with the various sectors of EIA, because they're now
7 all separate corporations, but generally speaking, I
8 still provide the same services to each of the sectors,
9 with the -- and I don't want to get into too much
10 detail right now, but there have also been some changes
11 in terms of TIA.

12 I don't review -- as of this year only, I don't
13 review their standards-related activities. I only work
14 with them on contract matters. But as far as the rest
15 of the organization is concerned, my functions are
16 essentially what they have been over time.
17 Relationships are a little bit different.

18 Q. And throughout the period of your employment
19 with EIA as general counsel, has one of your
20 responsibilities involved giving legal guidance
21 relating to standardization activities?

22 A. Yes, sir.

23 Q. And can you describe in general terms the types
24 of legal issues that are most often raised to your
25 level for guidance?

1 A. There are -- well, first of all, antitrust
2 issues come up occasionally, and they can relate to
3 anything from discussion of price in connection with a
4 standard-setting activity to whether a company's
5 motivation for a particular activity is proper or
6 improper under the antitrust laws; whether there's bias
7 involved, for example, company bias in terms of its own
8 competitive position and whether that affects the
9 out -- influences the process.

10 It could involve the question of whether or not
11 a particular subject of discussion is appropriate, like
12 whether it's appropriate to talk about capacity or
13 supply or international competition, things of that
14 nature. So, it's a whole range of things that come up
15 in the standards area from an antitrust standpoint.

16 Also, obviously, because I know why we're here,
17 a number of questions do arise from time to time about
18 the patent policy of EIA and JEDEC, because that is
19 part of -- and a very important part -- of the ground
20 rules for the engineering function.

21 Q. When you give legal guidance relating to the
22 types of issues that you've described, to whom are you
23 normally giving the guidance? Is it to EIA staff, to
24 committee leadership, to individual member companies?

25 A. All of the above.

1 Q. Do the member companies involved in EIA
2 standards-related activities have the ability to
3 consult directly with you on legal matters or
4 procedural matters, or do they have to go through the
5 staff first?

6 A. No, they not only have the ability; they're
7 encouraged to contact -- contact me if they have any
8 question. And the way they're encouraged is by the
9 staff person responsible for supporting the committee,
10 by the committee chairs, and by other members, frankly,
11 who have interacted with me over time.

12 And also, my identity is no secret. It's on
13 the web page. It's been in the annual reports and the
14 trade directories. My contact information is very
15 public as well.

16 Q. You mentioned as you were describing your
17 responsibilities and the areas in which you give legal
18 guidance that one of those areas is in relation to
19 antitrust issues. Is that correct?

20 A. That's correct.

21 Q. Do you regard giving advice on
22 antitrust-related issues to be an important part of
23 your job responsibilities?

24 A. Yes, sir, a very important part.

25 Q. And why is that?

1 ensure the integrity of the work that we do, and the
2 end product of that work is the standards, that is the
3 integrity of the standards. So, the procedure --
4 process procedure is critical to our work and to the
5 by-product, the end product of our work.

6 Q. As EIA's general counsel, and referring to the
7 entire time that you served in that position since
8 1990, have you been responsible for reviewing the
9 official minutes of meetings conducted by
10 EIA-affiliated organizations or committees?

11 A. Yes, sir, as I've just -- I think I just
12 testified earlier, with the exception of TIA this year
13 only, I have reviewed all the minutes for all of the
14 EIA activities for all of the time I have been with the
15 EIA, with very few exceptions, and that would be those
16 rare occasions where those minutes were reviewed by one
17 of the other attorneys in the team that I referred to
18 earlier, the legal team.

19 Q. Do you have any idea of roughly how many sets
20 of meeting minutes you review in a given year?

21 A. I was asked that question in deposition, and I
22 think I estimated a few hundred. I've actually gone
23 back and checked now, because I keep electronic logs of
24 the minutes I reviewed, and in the year 2000, for
25 example, it was 630 sets of minutes.

1 Q. Do you know whether that number has changed
2 materially over the past decade or so?

3 A. My perception is it hasn't, but I haven't
4 counted other years. I think that's fairly
5 representative.

6 Q. Of those roughly 600 sets of meeting minutes
7 that you review each year, do you know roughly how many
8 come from JEDEC meetings as opposed to some other part
9 of EIA?

1 find out what's going on there.

2 If there is any suggestion of a violation of
3 our procedures, for example, the lack of a quorum, I
4 would inquire further in that respect. If there's any
5 indication of any other improper activity, certainly I
6 would identify and flag that. Certainly if there's a
7 patent issue, I slow down and at least make sure I
8 understand as much as I can about the issue. And if
9 there are questions in any of those areas, frequently I
10 will follow up with the staff supporting committee and
11 sometimes with the committee chair and sometimes with
12 the member companies involved.

13 Q. In addition to reviewing the minutes of
14 committee meetings, have you in your capacity as EIA's
15 general counsel made it a point to personally attend
16 committee meetings within JEDEC or other EIA
17 organizations?

18 A. No, in particular, with regard to JEDEC, I
19 think prior to the time that I testified I first
20 attended a JEDEC board meeting, which was early 1997, I
21 never attended any JEDEC meeting. I have been
22 requested on occasion by committee chairs and by staff
23 and by sector executives to attend select committee
24 meetings when there was a specific issue that required
25 my attention or where my advice had been solicited.

1 Q. Just so this is clear, between 1990 when you
2 started as EIA's general counsel and 1997, how many
3 JEDEC meetings did you attend in that period?

4 A. Zero.

5 Q. And when was the first JEDEC meeting that you
6 attended?

7 A. The first JEDEC meeting would have been roughly
8 January-February 1997.

9 Q. And do you recall why you attended or why you
10 were asked to attend that meeting?

11 A. Yes, sir. At that time, in addition to being
12 EIA general counsel, I was also the executive vice
13 president of EIA, which meant that I was responsible --
14 I was second in command after the president, and there
15 was a budgetary issue involving JEDEC and EIA, and the
16 president of EIA at the time, Pete McCloskey, asked me
17 to go to Florida and attend a JEDEC board meeting to
18 discuss the budgetary issue.

19 Q. Now that you're the president of JEDEC, what
20 JEDEC-related meetings do you personally attend?

21 A. None other than, as I mentioned before, board
22 meetings, and not all of those. I try to participate
23 in all board meetings either in person or by telephone,
24 but I probably attend about two-thirds of the board
25 meetings personally and the other third by telephone.

1 Q. To go to an issue that's been raised already
2 today, have you ever attended a meeting of the JC-42
3 committee of JEDEC?

4 A. No, sir, never.

5 Q. Have you ever attended a meeting of any of the
6 subcommittees of JC-42?

7 A. I never have.

8 MR. ROYALL: Your Honor, I don't know what your
9 preference is. I'm at a breaking point if anyone
10 wanted to take a short break, or we can keep going.

11 JUDGE McGUIRE: Yeah, let's take a short break,
12 ten minutes.

13 MR. ROYALL: That's fine.

14 JUDGE McGUIRE: And then we will reconvene.

15 MR. ROYALL: Thank you.

16 (A brief recess was taken.)

17 JUDGE McGUIRE: On the record.

18 At this point, you can proceed with your
19 questioning, Mr. Royall.

20 MR. ROYALL: Thank you, Your Honor.

21 BY MR. ROYALL:

22 Q. Mr. Kelly, you mentioned earlier that one of
23 your responsibilities as EIA's general counsel involves
24 providing input and guidance concerning I believe you
25 said the interpretation and application of the

1 organization's rules. Is that right?

2 A. Yes, sir.

3 Q. Within EIA, who generally has the last word on

1 rules, and he and I talked. And I also spoke fairly
2 extensively during that period and then on an ongoing
3 basis with Mr. Kinn, who was the vice president of
4 engineering at the time, about the engineering-specific
5 rules of EIA.

6 And I'm sure I had conversations with other
7 people as well, but those were the three key people I
8 spoke with. And as I said, I reviewed all the manuals,
9 in some cases numerous times.

10 Q. If I could take them one by one, the
11 individuals you mentioned, I'd like to ask to your
12 knowledge how far back their experience with EIA went,
13 starting with Mr. McCloskey.

14 A. Mr. McCloskey was president of EIA since 1977
15 or '78. He is no longer. He was president until 1998.

16 Q. And he's one of the individuals that you
17 conferred with to gain an understanding of EIA's rules
18 when you joined the organization?

19 A. Yes, sir.

1 Q. And what about Mr. Kinn, who I believe you
2 mentioned?

3 A. I honestly don't know how long Jack Kinn had
4 been with EIA prior to my arrival, but for quite a long
5 time anyway.

6 Q. When you arrived at EIA in 1990, did the
7 organization have rules in place relating specifically
8 to standard-setting activities?

9 A. Yes, sir, they did or it did.

10 Q. Was there at that time one set of rules -- and
11 I'm referring in this question to written rules -- that
12 applied to all EIA standards-related activities, or did
13 the separate divisions and sectors within EIA have
14 their own standards-related rules?

15 A. There was one set of rules that EIA adopted for
16 guidance of the EIA's committees and all of the
17 sectoral activities within EIA, and then most of the
18 sectors had their own specific engineering manuals.
19 So, both.

20 Q. Were the basic rules, when it came to
21 governance of EIA-related standard-setting activities,
22 set forth in writing at the time that you joined the
23 organization in 1990?

24 A. Yes, sir.

25 Q. And where were they set forth in writing?

1 A. They were set forth in writing in basically
2 three documents. Two were engineering manuals, EP-3
3 and EP-7, and I can't recall the specific titles, but
4 EP-3 and EP-7, and then also in a document that was
5 published by my office called the EIA Legal Guides.

6 Q. I'd like to show you another document, Mr.
7 Kelly.

8 May I approach, Your Honor?

9 JUDGE McGUIRE: Please.

10 THE WITNESS: Thank you.

11 BY MR. ROYALL:

12 Q. Mr. Kelly, I've handed you what's been marked
13 for identification as CX-204. Do you recognize this
14 document?

15 A. Yes, sir, I do.

16 Q. And what is it?

17 A. This is a copy of the Legal Guides as they
18 existed in roughly the mid-1990s.

19 Q. And when you say the Legal Guides, you're
20 referring to the EIA Legal Guides?

21 A. EIA Legal Guides, yes, sir.

22 Q. And let me ask you to turn to what's marked as
23 page 3 of Exhibit 204, and on the left-hand side of
24 that page, you'll see one page from the Legal Guides
25 with the heading Forward. Do you see that?

1 A. I do.

2 Q. And under that I believe you'll see your name
3 listed?

4 A. I do.

5 Q. Does that indicate that this was a version of
6 the Legal Guides that was published sometime after you
7 joined EIA?

8 A. Yes, sir.

9 Q. Do you know roughly when this version of the
10 Legal Guides was published?

11 A. I do judging from the identity of the chairman
12 of the law committee, and back on the first page that
13 you showed on the computer -- on the computer monitor,
14 the address of the association. We moved to that
15 address in 1995 -- January of 1995, so this document
16 would have post-dated that, and I would -- I would
17 imagine it would have been in the 1995 to 1997 time
18 frame.

19 Q. Was it different -- a different version of the
20 EIA Legal Guides published at the time that you joined
21 EIA?

22 A. Not different in terms of substance. There
23 were certainly some differences, including the fact
24 that I wasn't identified as the general counsel.

25 MR. ROYALL: May I approach, Your Honor?

1 JUDGE McGUIRE: Yes.

2 BY MR. ROYALL:

3 Q. Mr. Kelly, I've just handed you another exhibit
4 that's been marked for identification as CX-202. Do
5 you recognize this document?

6 A. Yes, sir, this is the version of the Legal
7 Guides in effect when I joined EIA in September 1990.

8 Q. And was the prior exhibit, CX-204, the version
9 that superceded this version, CX-202?

10 A. Yes, I only remember this one revision which
11 has been identified as CX-0204 in that time frame. So,
12 there were just these two in that time frame, and this
13 is the first that I'm looking at right now, CX-0202.

14 Q. And when CX-202 was superceded with the version
15 of the EIA Legal Guides that's been marked as CX-204,
16 to your knowledge, were any changes made to the
17 substance of the Legal Guides?

18 A. No, sir.

19 Q. To your knowledge, during the 13 or so years
20 that you've served as EIA general counsel, have any
21 substantive changes been made to the EIA Legal Guides?

22 A. No, sir. As the -- as we went through various
23 reorganizations, particularly when the name of the

1 of the law committee, but no, no changes in terms of
2 the substance of the guides.

3 Q. Now, if I'm not mistaken, the EIA Legal Guides
4 are broken into several parts. Is that right?

5 A. They're divided into three parts, like Gaul.

6 Q. And if I could just ask you for purposes of
7 these questions, I guess we will just use this version
8 of the Legal Guides that you have in your hand, which
9 is CX-202.

10 A. Yes, sir.

11 Q. Based on that document, could I ask you to
12 briefly explain to us the different parts of the Legal
13 Guides?

14 A. Yes, sir, Part I are general guides that apply
15 across the board to all EIA activities. Part II of the
16 guides, which begins on page 7 of CX-202 -- I'm sorry,
17 page 5, page 7 of the copy, but it's page 5 of the
18 exhibit, are special guides that relate to engineering
19 standardization programs uniquely. And then Part III,
20 which begins on page 8 of the exhibit, are special
21 guides that apply to marketing data reporting programs,
22 which we now refer to as market research programs.

23 Q. And the part, what you just described as Part
24 III of the EIA Legal Guides, does that part of the
25 Legal Guides have any application to the work of JEDEC?

1 A. No, sir, not specifically.

2 Q. And has that been true throughout your tenure
3 with EIA?

4 A. Yes. And stated differently, JEDEC has never
5 engaged in market research activities, which is the
6 subject matter of Part III of the Legal Guides.

7 Q. What about Parts I and II of the Legal Guides,
8 do they have application to the work of JEDEC?

9 A. Absolutely, yes, sir.

10 Q. As used in this document, what does the term
11 "guide" or "guides" mean, to your understanding?

12 A. It means a rule -- I'm sorry, I interrupted
13 you. I apologize.

14 Q. That's all right.

15 A. It means a rule.

16 Q. Are the provisions of the EIA Legal Guides
17 considered within EIA to be the rules of the
18 organization?

19 A. Yes, sir, they are.

20 Q. Are EIA participants required to comply with
21 the rules and policies set forth in the EIA Legal
22 Guides?

23 A. Yes, sir, they are.

24 Q. Is that stated somewhere in the document, to
25 your knowledge?

1 A. I believe it is in the preamble to Part I on
2 page 4 of CX-202.

3 Q. And referring to the first paragraph under the
4 iayTdng t Q. a 4 .01 T 1 A. I be

1 Q. My next question, you may have just answered
2 it, but let me go ahead -- just to be clear go ahead
3 and ask it.

4 Are the EIA Legal Guides generally made
5 available to the EIA participants?

6 A. Yes.

7 Q. And was that true in the early to mid-1990s as
8 well?

9 A. Yes, sir.

10 Q. In that time period, the early to mid-1990s,
11 how would an EIA participant obtain a copy of the Legal
12 Guides?

13 A. In the early to mid-1990s, they -- as I
14 indicated earlier, they could either contact my office
15 to receive copies. Frequently copies were given to
16 committee chairs so they could disseminate them at the
17 meetings. Staff members responsible for committee
18 support had copies of the Legal Guides he Euides he Euides he

21 4 3 lso,hey --think --14 ind,rt had copies o Yes.
2 f nhe Legal Gopies 5 avaies rs soopieslisindi true i Yes.
2 ngsndardy -ndex,i true iPubl i quy -ndex,iuide they Yes.
2 st ordt ans tha no dislmittrgeminroughrue isgsndardy Yes.

Waldorf, Marylsndwell?

1 Q. Now, the language that you pointed out a moment
2 ago which was in the preamble of Part I of the Legal
3 Guides on page 4 of CX-202, turning to page 5 of
4 CX-202, and you'll see there Part II, the heading Part
5 II of the EIA Legal Guides. Was that portion of the
6 EIA Legal Guides, that is, the portion that relates to
7 special guides applicable to engineering
8 standardization programs, also required to be read and
9 complied with by EIA participants?

10 A. Yes, sir, and to me it's reasonably clear from
11 the preamble to that part as well that members are
12 required to follow these rules.

13 Q. Now, let me ask you to look back at the prior
14 page of CX-202, and focusing on the beginning of Part I
15 of the Legal Guides, at the top of the left-hand side
16 of the page, page 4 of Exhibit CX-202, do you see the
17 heading that refers to Section A, Improper Activities
18 and Programs?

19 A. Yes, sir, I do.

20 Q. Can you explain what that section of the Legal
21 Guides relates to?

22 A. This section relates to activities which, as it
23 indicates here, are improper and not permitted at EIA
24 activities or in EIA programs, and basically it is a
25 Hornbook or statement of some basic antitrust

1 principles that apply to trade association activities
2 in general, but specifically here brought down to
3 ground level in terms of EIA activities.

4 Q. Would it be a violation of EIA's rules for a
5 member to exchange or discuss information of the sort

1 information?

2 A. To prevent collusion among the members in those
3 areas that are enumerated in subsection 5.

4 Q. Let's turn back, if we could -- if you could
5 turn with me to the next page, page 5 of Exhibit
6 CX-202, and this is the beginning of Part II of the
7 Legal Guides.

8 A. Yes, sir.

9 Q. Now, I think as you explained earlier, this
10 section of the Legal Guides relates specifically to
11 standardization activities conducted within EIA. Is
12 that right?

13 A. Correct.

14 Q. And in the middle of that page, the first page
15 of Part II of the Legal Guides, could you see the
16 heading Section B, Statement of Policy?

17 A. Yes, sir.

18 Q. Can you explain what that section of the Legal
19 Guides concerns?

20 A. The first part talks about the purpose of the
21 EIA standards, and I indicated this earlier, was to
22 serve the public interest in the ways that
23 standardization typically does, by eliminating
24 misunderstandings and facilitating interchangeability
25 of products.

1 And also, I didn't mention before, but this is
2 an important purpose, assisting purchasers in selecting
3 and obtaining, with minimal delay, the proper product
4 for their particular needs.

5 And it goes on to state that the standards do
6 not preclude a member from manufacturing or selling
7 products not conforming to the standards, which is a
8 little bit different statement of the voluntariness
9 principle that I talked about earlier.

10 And then the last part is in essence a
11 disclaimer saying that EIA does not conduct patent
12 searches, and therefore, can't assume any liability if

1 Part II, Section B. I was referring to the second
2 paragraph within the indented and blocked text.

3 Q. Beginning with the word "Standards"?

4 A. Beginning with the word "Standards are
5 proposed," and ending with the words "adopting EIA
6 standards."

7 Q. And what did you mean when you said that, if I
8 understood you correctly, that that language is meant
9 to state a disclaimer of some sort?

10 A. Well, let me break it down. The first sentence
11 says, "Standards are proposed or adopted by EIA without
12 regard to whether their proposal or adoption may in any
13 way involve patents on articles, materials or
14 processes." Then it goes on to say, "By such action,
15 EIA does not assume any liability to the pending patent
16 owner or to the users of standards."

17 Q. And that's the language that you were referring
18 to when you mentioned the word "disclaimer"?

19 A. Yes.

20 Q. Can you explain why it is that in your
21 understanding EIA states a disclaimer of this sort in
22 connection with its standards?

23 A. As I just said, because we're now in a position
24 to conduct patent searches to determine as a matter of
25 fact whether any patents are involved in the standards

1 work that we perform. We rely on the participants in
2 the process to surface patent issues to our attention,
3 and when those are surfaced, then we identify them in
4 the standard, but if we don't know, we're not in a
5 position to go out and find out either through the U.S.
6 PTO or otherwise what intellectual property may be
7 there.

8 And that's because -- if you want to know why
9 that is, that's because we're dealing with, you know,
10 an enormous industry with a lot of intellectual
11 property and a lot of changes going on very rapidly,
12 and it would be physically impossible for us to perform
13 patent searches, and it would be prohibitively
14 expensive for us to try. And I might also add that the
15 results would in many cases, based upon my own
16 experience, be inconclusive even when you go down that
17 path.

18 Q. Is the language that you pointed out in the
19 policy statement of Part II of the EIA Legal Guides, is
20 that language meant to convey that EIA and its member
21 companies are indifferent as to whether EIA's standards
22 may be covered by patented intellectual property?

23 A. No, sir.

24 Q. Does EIA in any way seek to determine in
25 advance whether the standards that it creates are or

1 may be covered by patents?

2 A. Yes, sir, we do, through our patent policy.

3 Q. Can you elaborate on that?

4 A. One of the rules of EIA, which is in another
5 document, is the patent policy, and it basically
6 requires an early disclosure of intellectual property;
7 that is, patents or patent applications that are or may
8 be related to the work of a standard-setting committee.

9 And then once the disclosure -- the early
10 disclosure is made, if the patent owner is willing to
11 give reasonable assurances that I alluded to earlier,
12 that is, reasonable and nondiscriminatory licensing
13 terms or without charge, then the standard-setting
14 committee can -- then the standards activity can move
15 forward, and EIA can, if technical merit justifies
16 that, adopt a standard that includes IP subject to the
17 licensing restrictions. That by definition is an open
18 standard, which brings us full circle.

19 Q. Now, the first of the two sentences that you
20 focused us on a moment ago, starting at the bottom of
21 page 5 of CX-202, read -- reads as follows:

22 "Standards are proposed or adopted by EIA
23 without regard to whether their proposal or adoption
24 may in any way involve patents on articles, materials,
25 or processes."

1 Do you see that?

2 A. I do.

3 Q. In your view, is there any inconsistency
4 between that language in EIA's Legal Guides and the
5 commitment to open standards that you discussed
6 earlier?

7 A. No, sir, I think they're consistent.

8 Q. Can you elaborate on how you reconcile those
9 two provisions or two concepts?

10 A. Well, I think in part I just did, but let me
11 see if I can take it a little further to try to respond
12 to your question.

13 EIA obviously would prefer not to include a lot
14 of patented technology in standards. It's not our
15 preference, but frequently the best technological
16 approach to a particular issue is patented technology.
17 When that's the case, and that's what I meant before by
18 technological merit, when the best approach to a
19 technological problem is patented technology, then we,
20 of course, will adopt the patented technology as part
21 of the standard, provided that we receive the
22 assurances -- provided we have disclosure -- let me
23 start again -- provided there is disclosure of the
24 existence of the IP early in the process and provided
25 that we obtain the licensing assurances. That's really

1 what this language is directed to.

2 Q. Now, focusing on page 6 of CX-202, do you see
3 in the -- on the top right side the heading Section C,
4 Basic Rules for Conducting Programs?

5 A. Yes, sir.

6 Q. Can you explain to us what that section of the
7 EIA Legal Guides concerns?

8 A. These are fundamental rules that really
9 permeate the entire standard-setting process from
10 beginning to end, and they're kind of the ground work
11 for standard-setting within EIA and all of its sectors.

12 Q. Is compliance with these so-called basic rules
13 mandatory or optional for EIA participants?

14 A. There is no question in my mind that these are
15 mandatory.

16 Q. Let me ask you a few questions about the -- the
17 specific rules that come under that same heading,
18 starting with the first basic rule. Could I ask you to
19 read that?

20 A. Yeah, this is subsection 1 of Section C:

21 "They shall be carried on in good faith under
22 policies and procedures which will assure fairness and
23 unrestricted participation."

24 Q. Can you explain what you understand that
25 language to mean?

1 A. Well, as it says, that activities need to be
2 conducted by the participants acting in good faith, and
3 the procedures that EIA follows, which are
4 corresponding to members as well, are designed to
5 assure fairness and unrestricted participation.

6 Stating it a little bit differently, this
7 provision is required -- this provision is designed to
8 prevent companies from acting in bad faith in
9 connection with standard-setting activities.

10 Q. Do you --

11 A. So, just the converse of what it says, that's
12 the prohibition. This is taking the high road and
13 saying this is the goal, is to get everyone to
14 participate in good faith, and that's the rule. What
15 we're trying to prohibit is bad faith conduct.

16 Q. And do you have an understanding as to why
17 EIA's written rules seek to prohibit bad faith conduct
18 by participants in standard-setting activities?

19 A. Because bad faith undermines the entire
20 process. Again, looking at this from a high road
21 vantage point, what we're saying here is companies need
22 to participate in the process openly and honestly and
23 fairly and in good faith and not in bad faith, because
24 bad faith undermines the confidence of everyone in the
25 process. It can yield standards that are subject -- in

1 which the bad faith affects the outcome of the process,
2 and the standard is not open, and if the standard is
3 not open, then it can -- it can impact the entire
4 supply chain and the consumer and the public good.

5 So, I think that this is, as I said, this is
6 fundamental, and the absence of good faith in the
7 process undermines the entire process and the end
8 product of that process.

9 Q. Let me ask you to focus on a paragraph further
10 down on the same page, that is, page 6 of CX-202, and
11 I'm referring to the paragraph starting with the number
12 5.

13 Do you see that?

14 A. I do.

15 Q. Can I ask you to read that paragraph?

16 A. Number 5, "They shall not be proposed for or
17 indirectly result in effectuation of a price fixing
18 arrangement, facilitating price uniformity or
19 stabilization, restricting competition, giving a
20 competitive advantage to any manufacturer, excluding
21 competitors from the market, limiting or otherwise
22 curtailing production, or reducing product variations
23 except where required to meet one or more of the
24 objectives set forth in Section D of this Part II;"

25 Q. Thank you.

1 advantage over any other groups of companies, or to
2 engage in price fixing or to engage in any of the other
3 enumerated conduct in Subsection 5. That is not why
4 we're in business; that's not what we do.

5 Q. To the extent that your standards or your
6 standards-related activities were to result in an
7 anti-competitive effect in some marketplace, is that
8 really the concern of EIA directly as opposed to
9 whatever private parties may be affected by -- by that?

10 A. Both, both. It's EIA's concern because we are
11 a voluntary organization created by the industry to
12 serve the industry and to serve the consuming public,
13 and if we are producing standards that are tainted by,

1 basic rules set forth here in the EIA Legal Guides,
2 basic rule number 1, if you will, and what I'll call
3 basic rule number 5.

1 Q. If you could. If you could describe an example
2 in which this has actually arisen; that is, the conduct
3 within an EIA standard-setting activity has resulted in
4 either a violation of these two basic rules or an
5 allegation of such a violation.

6 MR. PERRY: Your Honor, if I could, I'm
7 sensitized to privilege and waiver issues. He's
8 general counsel. I just want to make sure we're not
9 asking him to describe either his work product or
10 his -- or advice he's given as general counsel. I
11 wouldn't want to blunder into a waiver on behalf of
12 JEDEC today.

13 JUDGE McGUIRE: Mr. Royall?

14 MR. ROYALL: Your Honor, I'm not asking that.
15 I think we have to leave it to Mr. Kelly, who is a
16 lawyer --

17 JUDGE McGUIRE: All right, just as long as he's
18 clear on this issue then. All right.

19 MR. ROYALL: And -- yes --

20 JUDGE McGUIRE: All right, Mr. Kelly, you
21 understand the objection and you're clear you're not
22 violating -- all right.

23 THE WITNESS: I understand, and as my judges
24 tell me, I will not comment on anything not on the
25 public record.

1 One example would be a situation in which there
2 was an allegation -- and this relates certainly to
3 everything we're talking about but also the patent
4 policy -- in which there was an allegation that a
5 company had IP relevant to a standard under development
6 and that that company retained a third party, a
7 consultant, to attend EIA standard-setting meetings
8 related to -- in which there was a relationship between
9 that IP and the standard, not disclosing to the
10 consultant the existence of the relevant IP.

11 Therefore, the consultant never disclosed the
12 IP, the standard was promulgated, and the company
13 claimed that it had patent rights that affected in this
14 case every television set sold in the United States.

1 arguably but not clearly violates our patent policy
2 under the current state of the law, but even though
3 it's not -- it is not certain that the patent policy
4 was violated, there is no question it calls into
5 question -- there is no doubt that it calls into
6 question the conduct of the company with respect to the
7 good faith obligation here in the Legal Guides, as well
8 as to the enumerated violations in subsection 5.

9 Q. If you can just elaborate so we understand what
10 you're referring to when you say that the conduct that
11 you described arguably violates or may not violate the
12 EIA patent policy.

13 A. Well, to -- the -- in essence, the
14 allegation -- the concern in that particular case was
15 that the company that had relevant IP was trying to do
16 an end run around the patent policy through a bad faith
17 activity; that is, retaining a consultant, deliberately
18 leaving that consultant ignorant of their patent
19 portfolio, and then gaining a benefit of information
20 that would ordinarily flow from participation in the
21 committee through the consultant, and then using that
22 information to enhance their -- the market power that
23 they had or to at least take advantage of the market
24 power that they had by virtue of their patent.

25 Q. And in this same episode that you've described,

1 was there any concern within EIA that that conduct or
2 alleged conduct might violate the other provision of
3 the basic rules that we focused on, provision number 5?

4 A. Yes.

5 Q. And can you explain why that -- there was that
6 concern relating to this conduct?

7 A. Because in that particular case, the company
8 involved, as I think I indicated earlier, was claiming
9 patent royalties that related to every television set
10 sold in the United States, and that number is in the
11 tens of millions of sets. So, yeah, it's a big
12 concern.

13 And it impacts consumers directly or it affects
14 the -- impacts the manufacturers of the sets, because
15 one way or the other, the cost is either going to get
16 passed on or absorbed into the margin of the set
17 manufacturer. So, it's a big concern.

18 Q. Now, just to be clear about this, does the EIA
19 patent policy expressly forbid the use of consultants
20 in the way in which allegedly that occurred in this
21 case?

22 A. No.

23 Q. Does that mean that this activity is therefore
24 permissible --

25 A. Absolutely --

1 Q. -- within EIA?

2 A. I'm sorry. Absolutely not.

3 Q. Now, what -- if you can say, what became of
4 this particular issue? How was it dealt with either
5 within EIA or external to EIA?

6 A. It is now pending in the federal courts.

7 Q. To the extent that the type of conduct that
8 you've described in this particular instance is not
9 expressly forbidden by EIA's patent policy, have you as
10 EIA's general counsel considered modifying the patent
11 policy to include an express prohibition of that
12 conduct?

13 A. No, sir.

14 Q. Is there a reason why you haven't done that?

15 A. Primarily because the matter is, as I said,
16 pending in the federal courts, and my view is that it's
17 the role of the courts to decide what the facts and
18 what the law are, and that process is being followed
19 right now. So, we're not going to do anything in terms
20 of our rules that would jeopardize either side's
21 position in pending litigation.

22 Q. You've given that example. Can you think of
23 any other specific examples in which the activities or
24 the conduct of an EIA participant has either violated
25 or allegedly violated one of these two provisions of

1 Q. And was there concern within EIA that that type
2 of line-drawing conduct, if that's a fair description
3 of what you're talking about, might violate basic rule
4 number 1, the good faith duty we discussed?

5 A. Yes, of course.

6 Q. And in what way might that type of conduct
7 violate the duty of good faith?

8 A. Well, you know, ostensibly it's a question of
9 line-drawing whenever you modify a definition, and
10 we -- it's very difficult to know what the competitive
11 motivations of companies are. If the company is
12 acting -- if a company or a group of companies were
13 acting in bad faith, clearly they violate the duty to
14 act in good faith under the Legal Guides. So, that in
15 and of itself is a concern.

16 And then beyond that, there's the concern that
17 depending upon where the lines are drawn, there could
18 be an impact on competition, which would then go to
19 subsection 5.

20 Q. And in this particular case, was there any
21 concern that the same conduct might also violate basic
22 rule number 5 that we discussed earlier?

23 A. Yes, as I just said, that the -- that the good
24 faith/bad faith aspect of it would go to subsection 1,
25 and then the competitive harm aspect where -- or a

1 company allegedly misusing the process to gain a
2 competitive advantage would go to subsection 5.

3 Now, again, if I could say on that particular
4 case, these are just allegations --

5 Q. Yes.

6 A. -- and, you know, it's not in litigation and
7 I'm not drawing conclusions. I'm just saying this is
8 the nature of the allegation, okay?

9 Q. Now, the two examples that you have given, and
10 we obviously understand the caveat that you're making
11 to your testimony, but the two examples you've given
12 are examples in which there was at least some concern
13 of possibly violating both provisions 1 and 5 that are
14 still displayed here on the screen.

15 Are there any examples that you can think of of
16 conduct that occurred within EIA that was raised to
17 your attention in which there was an allegation that an
18 EIA participant may have violated the good faith duty
19 but not also the basic rule number 5?

20 A. Yeah, not long after I started at EIA, probably
21 within the first year, I was involved in actually a
22 joint standard-setting activity. EIA is partnered with
23 the National Association of Broadcasters in something
24 called the National Radio Systems Committee, the NRSC,
25 and I was asked to attend an NRSC meeting in which the

1 A. Yes, sir.

2 Q. Do you recognize this document?

3 A. Yes, sir, I do.

4 Q. And what is it?

5 A. This is a xeroxed copy of the front and back of
6 what would have been a single sheet sign-in sheet that
7 was used I think approximately during the mid-1990s at
8 JEDEC, EDIF, EIDX and CDIF meetings.

9 Q. And the other acronyms other than JEDEC that
10 you referred to, are those other EIA-affiliated
11 entities or organizations?

12 A. They -- actually, they were at the time. They
13 were all under the -- if you remember the org chart,
14 all under the Components Group and/or the Industrial
15 Electronics Group at that time.

16 Q. And I'm not sure whether you made this clear in
17 your answer, but do you know in what time frame this
18 version of the meeting attendance roster or sign-in
19 sheet was in use?

20 A. I said mid-1990s. I would -- I think I can peg
21 that to probably 19 -- around 1995 to 1998, in that
22 time frame.

23 Q. And you --

24 A. 1997, because our logo changed in 1997, so it
25 would have been between '95 and '97.

1 Q. And do you know whether in that time frame this
2 version of the sign-in sheet was used within JEDEC
3 committees?

4 A. I know it was used. I don't know if it was
5 used in all, but I know it was used.

6 Q. Do you recall earlier when I asked you whether
7 EIA participants were told in the early to mid-1990s
8 that they had an obligation to read and comply with the
9 EIA Legal Guides?

10 A. Yes, sir, I do.

11 Q. Do you see anything in the language of this
12 sign-in sheet that relates to that?

13 A. Yes, I do. It's beneath the committee and
14 meeting identification information in the first block
15 of the grid, and it says in italics, "To all
16 participants," in full quotes, "Subject -- subjects
17 improper for consideration under the EIA 'Legal Guides'
18 shall not be discussed at this meeting or elsewhere.
19 See Part I, General Guides (reverse side). See Special
20 Guides in Parts II and III for engineering
21 standardization and marketing data programs,
22 respectively. Subjects involving patentable or
23 patented items shall conform to EIA Policy (reverse
24 side)."

25 Q. Now, could I stop you there?

1 A. Yes, sir.

2 Q. I believe you mentioned when you first looked
3 at this document that what is marked as page 2 of
4 CX-306 was in the actual document, the meeting
5 attendance roster, the reverse side of the sign-in
6 sheet. Is that correct?

7 A. That's correct.

8 Q. And so am I correct that what's reproduced on
9 page 2 of CX-306 or what would have been reproduced on
10 the actual reverse side of the actual document is the
11 language from Part I of the EIA Legal Guides?

12 A. That is correct, yes, sir.

13 Q. Do you have any understanding as to why the
14 language of Part II of the EIA Legal Guides was not
15 similarly reproduced on this sign-in sheet?

16 A. The only reason I can recall was space
17 limitations, because again, this subject did come up in
18 the context of my membership political -- not
19 political, in my membership process action team back in
20 the nineties, what information should be on the
21 reverse, and this was all we could fit.

22 Q. Do you recall when I asked you earlier who
23 generally has the last word in terms of interpreting
24 EIA rules?

25 A. Yes, sir.

1 Q. And I believe you said that you have the last
2 word?

3 A. I believe I do, yes, sir.

4 Q. Is that correct?

5 A. Yes, sir.

6 Q. Do you see any language on the sign-in sheet
7 that relates to that issue?

8 A. I think the next sentence, "Consult the EIA
9 General Counsel about any doubtful question."

10 Q. And what do you understand that language to
11 mean?

12 A. I think -- I understand that language to mean
13 that meeting attendees were advised that if they had
14 any doubt about the meaning of the Legal Guides or for
15 that matter any other rules relating to the conduct of
16 the meeting, they should consult the EIA general
17 counsel, which at this time was me.

18 Q. You mentioned earlier that EIA's rules relating
19 to standardization programs were also set forth in
20 certain I think you said EP or EIA engineering manuals.
21 Is that right?

22 A. Two EIA engineering manuals in addition to the
23 Legal Guides, EP-3 and EP-7.

24 MR. ROYALL: May I approach, Your Honor?

25 JUDGE McGUIRE: Yes.

1 THE WITNESS: Thank you.

2 BY MR. ROYALL:

3 Q. Mr. Kelly, I've just handed you an exhibit
4 that's been marked for identification as CX-203A.

5 A. Yes, sir.

6 Q. Do you recognize this document?

7 A. I do.

8 Q. Can you explain what it is?

9 A. This is the document I just referred to earlier
10 as EP-3, and in this case it's-F, which means the
11 revision letter -- indicates the revision, is dated
12 October 1981. EP stands for Engineering Publication,
13 by the way. The title is Manual for Committee,
14 Subcommittee, and Working Group Chairmen and
15 Secretaries, and it is published, as indicated on the
16 first page, by the Engineering Department of the
17 Electronic Industries Association. At the time it was
18 Association.

19 Q. And how was this document referred to
20 internally within EIA?

21 A. We referred to it as EP-3.

22 Q. Was this the version of the EP-3 manual that
23 was in effect when you joined EIA in September 1990?

24 A. This is, and I -- this is the only version of
25 the manual I'm familiar with. I don't think it ever

1 term to mean?

2 JUDGE McGUIRE: Go ahead.

3 BY MR. ROYALL:

4 Q. Do you have any understanding, Mr. Kelly, as to
5 whether this manual was in the early to mid-1990s
6 generally made available to EIA participants?

7 MR. PERRY: Well, that's the same question. I
8 have the same objection.

9 JUDGE McGUIRE: He said do you have an
10 understanding as to what that term means, so on that
11 grounds, I'll allow it.

12 MR. ROYALL: And then I can ask him to explain
13 his understanding and the basis for it.

14 MR. PERRY: That's fine, Your Honor, if that's
15 the way it's going to go. I'm sorry.

16 JUDGE McGUIRE: Right, that's my understanding
17 of the current question, is to ask him his
18 understanding of the term.

19 MR. ROYALL: Well, first I wanted to establish
20 whether he has an understanding as to whether it was
21 made available.

22 JUDGE McGUIRE: Right, lay that foundation.

23 BY MR. ROYALL:

24 Q. So, do you have an understanding, sir, as to
25 whether this was generally made available in the early

1 to mid-1990s to EIA participants?

2 A. I do.

3 Q. Can you explain what understanding you have,
4 and to the extent you have an understanding of the term
5 "generally made available," what do you understand that
6 term to mean?

7 A. I will. First of all, this document was
8 routinely made available to committee chairmen,
9 subcommittee chairmen, working group chairmen and
10 secretaries, as the title would suggest. It was made
11 available through the EIA Engineering Department when
12 they assumed those responsibilities, at that time.

13 Secondly, it was included in the list of
14 publications in the EIA Publications Index, and
15 therefore -- which was distributed to all of the
16 membership and therefore was available to the
17 membership on request. It was also available on
18 request through the EIA Engineering Department for
19 anyone who requested it. That's what I meant.

20 Q. And if I could ask you to turn to page 4 of
21 CX-203A.

22 A. Yes, sir.

23 Q. Do you see at the top of that page heading 1.0,
24 Responsibilities of Chairmen?

25 A. I do.

1 Q. And if I could focus your attention on
2 paragraph 1.2 under that heading, do you see that?

3 A. I do.

4 Q. Could I ask you to read the first sentence of
5 that paragraph?

1 Q. Can you explain what this appendix is or what
2 it relates to?

3 A. This appendix is a reproduction of Sections 1
4 and 2 -- Parts I and II, I'm sorry, of the EIA Legal
5 Guides that we were discussing earlier.

6 Q. And are those parts of the EIA Legal Guides
7 that relate to standard-setting activities?

8 A. Part I is the general guide. Part II is the
9 guide that specifically relates to standard-setting,
10 yes.

11 Q. As you read this manual or as you understand
12 what this manual requires, does it require EIA
13 committee chairs to conduct standardization programs in
14 compliance with Parts I and II of the EIA Legal Guides?

15 A. Very definitely, yes.

16 Q. Is that stated somewhere in the document, to
17 your knowledge?

18 A. I think it was in the section that we just
19 discussed, the responsibilities of committee chairmen
20 to conduct their -- their committee activities as
21 prescribed in the following sections of the manual,
22 including the appendices, and Appendices 1 through 5,
23 which is the reproduction of the Legal Guides, includes
24 the same language that we talked about earlier, which
25 is mandatory -- which are mandatory in their terms as

1 well.

2 Q. And the language you were just referring to was
3 from paragraph 1.2 at the top of page 4 of CX-203A. Is
4 that right?

5 A. That is correct.

6 Q. Does that language mean that the Legal Guides
7 are only binding upon EIA committee chairs as opposed
8 to EIA participants?

9 A. No. That does not mean that at all.

10 Q. Do you have an understanding as to whether the
11 EIA Legal Guides are binding upon EIA participants as
12 well?

13 A. Yes, they're -- it is binding on everyone who
14 participates in the process, from the committee chair
15 right down to the staff member who's responsible for
16 supporting the committee, and I believe that the
17 language of the Legal Guides makes that abundantly
18 clear, and I think it's also clear, at least in my
19 interpretation from the language of Section 2. --
20 sorry, 1.2, because it would be impossible for the
21 committee chair to conduct committee activities
22 consistent with the Legal Guides if the members were
23 violating the Legal Guides.

24 Q. Let me ask you to turn to page 11 of CX-203A,
25 and this is the page that at the top of the page has a

1 heading 8.0. It's --

2 A. We're on the same page, yes.

1 program of standardization shall refer to a product --"

2 Q. Let me --

3 A. I'm sorry, first sentence.

4 Q. -- if I could stop you there, just the first
5 sentence.

6 A. Okay.

7 Q. What do you understand the language of that
8 first sentence of this provision to mean?

9 A. That EIA --

10 MR. PERRY: Your Honor, can I just make clear
11 that we're not asking this gentleman to give us legal
12 opinions, that we're just asking for his understanding
13 as he's interpreted this in the course -- I don't think
14 he wrote it, and I don't think he's here as a legal
15 expert. Is that -- is that --

16 JUDGE McGUIRE: Is that the import of your line
17 of inquiry, Mr. Royall?

18 MR. ROYALL: Your Honor, just to be clear,
19 we're not asking for a legal expert opinion. On the
20 other hand, we've established a foundation that for 13
21 years he has had the final say within -- internally
22 within EIA as to how these rules are interpreted and
23 applied. So, it's in that context that I'm asking for
24 his understanding of the rules.

25 JUDGE McGUIRE: All right, then I'm going to

1 allow that in that context, Mr. Perry.

2 MR. PERRY: That's fine, Your Honor. I don't
3 think there's been a foundation for everybody's
4 understanding within EIA. I disagree with Mr. Royall
5 on that.

6 JUDGE McGUIRE: I understand that, and to that
7 extent your objection or your asking for clarification
8 is understood, and we'll go on that basis.

9 MR. ROYALL: Yes.

10 BY MR. ROYALL:

11 Q. Would you like me to restate the question?

12 A. No, I think I understand it.

13 What this first sentence is saying is that
14 EIA's preference, its first preference, is not to
15 include patented technology in standards.

16 Q. Is it the policy of EIA, as you understand it
17 and interpret it, to avoid developing standards that
18 call for the use of patented items?

19 A. No. If I understand your question, are you
20 telling me do we as a matter of policy avoid including
21 standards -- as a matter of preference, not as a matter
22 of policy. Do you want me to explain?

23 Q. Yes, if you could.

24 A. Okay. We do not seek patented technology for
25 inclusion in standards. As I said before, there are

1 times when patented technology may represent the best
2 technological solution, and in that case,
3 notwithstanding our preference not to include patents
4 or patent applications, as the case may be, in
5 standards, we will consider the inclusion of that
6 technology, provided there's early disclosure and
7 provided there are written assurances along the lines I
8 described before, either without charge or reasonable
9 and nondiscriminatory.

10 Q. And what you've just described as the policy at
11 EIA relating to that issue, was that, to your
12 understanding, the policy of the organization in the
13 early to mid-1990s?

14 A. Yes, sir.

15 Q. Could I ask you now to go to the second
16 sentence under heading 8.3?

17 A. Yes, sir.

18 Q. And could I ask you to read that?

19 A. "No program of standardization shall refer to a
20 product on which there is a known patent unless all the
21 technical information covered by the patent is known to
22 the Formulating committee, subcommittee or working
23 group."

24 Q. And could you explain what you as EIA's general
25 counsel understand that language to mean?

1 A. What it means is that standards activities
2 shall not refer to items on which there is a known
3 patent or patent application unless -- it says "all"
4 here, and I can elaborate on this -- unless all
5 relevant technical information relating to the patent
6 is known to the formulating committee. That's what it
7 says.

8 Now, what that means, if I can just go one step
9 further --

10 Q. Please.

11 A. -- is that the participants in the process need
12 to facilitate this -- this -- or to make this -- this
13 happen. They need to be disclosing on an early basis
14 known patents and patent applications that relate to
15 the work of the committee.

16 Q. And what do you mean specifically by the term
17 "known patent"?

18 A. It means known to the participant in the
19 committee activity. It does not mean known to the
20 company. Stated differently, the company is not under
21 an obligation to perform a patent search, but anything
22 that is known to the participant needs to -- that is
23 relevant to the work of the committee in terms of
24 patents or patent applications must be disclosed.

25 Q. And you said a moment ago that you might want

1 to elaborate on the language in the sentence that you
2 read, "all the technical information covered by the
3 patent."

4 A. Yeah, it's --

5 Q. Can you elaborate on what that means?

6 A. I'm sorry. It is stated more broadly than we
7 have ever applied it. This is a very broad statement,
8 and what we have said -- what I have said in many prior
9 cases, in fact, I think going back almost to day one,
10 is that as long as enough relevant -- as long as enough
11 information is provided to the committee that it
12 understands the nature of the technology and how it
13 applies to the standard, that's enough. It doesn't
14 have to be all technical information, just all relevant
15 technical information.

16 Q. And is it the policy of EIA that standards
17 developed by the organization may not incorporate known
18 patented technologies unless that sort of technical
19 information has been provided to the relevant
20 committee?

21 A. Yes, sir, that is absolutely correct.

22 Q. And was that also the policy of EIA in the
23 early to mid-1990s?

24 A. Yes, sir, it was, right from day one when I
25 started as general counsel, that's been my -- I can't

1 say from day one it's been my understanding, but
2 certainly from the first month it's been my
3 understanding.

4 Q. In instances in which EIA or an EIA committee
5 has received that type of technical information
6 relating to a known patent, is the committee then free
7 to develop a standard incorporating the patented
8 technology?

9 A. I'm sorry, could you repeat the question? I'm
10 not sure I was following that.

11 Q. That's fine. I'll be happy to restate it.

12 In instances in which an EIA committee has
13 received the technical information of the sort that you
14 described relating to a known patent, is the committee
15 then free to develop a standard incorporating the
16 patented technology?

17 A. No, because there's one important part of the
18 patent policy which in that example has not yet been
19 met, and that is the written assurance to license the
20 technology on reasonable and nondiscriminatory terms or
21 without charge. So, you need both.

22 Q. Let me ask you, if I could, could you read the
23 third sentence now in the same paragraph we've been
24 focusing on under heading 8.3, page 11 of CX-203A?

25 A. The next sentence reads, "The committee

1 chairman must have also received a written expression
2 from the patent holder that he is willing to license
3 applicants under reasonable terms and conditions that
4 are demonstrably free of any unfair discrimination."

5 Q. And when you said that there's another part of
6 the policy that must be satisfied before a known
7 patented technology can be incorporated, is this
8 generally what you were referring to, the substance of
9 what's contained in the sentence you just read?

10 A. Generally, although the language talking about
11 without charge, which is the alternative to the RAND
12 assurances, is not in this section. It's elsewhere.

13 JUDGE McGUIRE: Sir, let me inquire of you to
14 define from your understanding what the term "free of
15 any unfair discrimination" means.

16 THE WITNESS: Yes, sir, free -- first of all,
17 free of unfair discrimination means open to all comers.
18 It means that anyone who wishes to license the
19 technology, regardless of the identity of the company
20 or its history or its demography -- demographics, I'm
21 sorry, its country of origin, is the beneficiary of
22 that assurance, that there will be no discrimination
23 among licensees in any way.

24 JUDGE McGUIRE: All right, Mr. Royall.

25 BY MR. ROYALL:

1 Q. Is it EIA's policy that standards developed by
2 the organization may not incorporate a known patented
3 technology in circumstances in which that type of
4 assurance has not been provided in advance?

5 A. Yes, sir.

6 Q. And was that also EIA's policy in the early to
7 mid-1990s?

8 A. Yes, sir.

9 Q. Am I correct that the type of assurances that
10 are referred to in that third sentence under heading
11 8.3 that you read a moment ago are sometimes referred
12 to as RAND, R-A-N-D, assurances?

13 A. Yes, sir, that's the way I believe I was
14 referring to them in my earlier testimony as well.

15 Q. Are there any other types of licensing
16 assurances besides RAND assurances that would be
17 sufficient to comply with this aspect of EIA's rules?

18 A. Yes, sir, as I've -- as I think I've just
19 mentioned earlier, if a company were to agree to
20 license without charge on a nondiscriminatory basis,
21 that would be -- that would also comply with the patent
22 policy.

23 Q. And is that aspect of the policy discussed in
24 this provision in the EP-3 manual?

25 A. Not -- let me just see. No, not in this

1 section, no.

2 Q. Is it -- is that aspect of EIA policy discussed
3 in other EIA engineering manuals?

4 A. I believe that comes out pretty clearly in
5 EP-7, which is the other manual I referred to.

6 MR. ROYALL: Before we move to another
7 document, Your Honor, I'd like to offer the EP-3 manual
8 that we've been discussing, CX-203A, into evidence.

9 MR. PERRY: No objection.

10 JUDGE McGUIRE: So entered.

11 (CX Exhibit Number 203A was admitted into
12 evidence.)

13 JUDGE McGUIRE: Before we continue, let me
14 inquire of you, Mr. Royall, what -- it's 12:30, just
15 get an idea how you intend to proceed at this point.

16 MR. ROYALL: This is a good breaking point.
17 I'd be happy to break for lunch if that made sense now.
18 As I indicated to Mr. Perry in an email a few days ago,
19 I expect that the direct examination of Mr. Kelly will
20 consume most of the day today. So, if we break now --

21 JUDGE McGUIRE: Then he will be back tomorrow?

22 MR. ROYALL: Yes, he's available all day
23 tomorrow.

24 JUDGE McGUIRE: Well, let's take -- Mr. Perry,
25 go ahead.

1 MR. PERRY: I just want to assure everyone that
2 as long as we start tomorrow morning with the cross, we
3 can certainly finish with Mr. Kelly, at least that's --

4 JUDGE McGUIRE: That's certainly going to be
5 the idea here. I mean, is that everyone's
6 understanding, that we will conclude on Thursday?

7 MR. ROYALL: Yes, I will definitely be able to
8 conclude today, and so if I understand, Mr. Perry, that
9 means that we will be able to have Mr. Kelly's
10 testimony finish up tomorrow?

11 MR. PERRY: Yes, that's fine. He's also on our
12 witness list, lives locally. We may well call him in
13 our case.

14 JUDGE McGUIRE: O Rtm, thaenlea's fnw m2 fnw m 7 dY c
GEbsUlocally. We may wel for2odeely be able to

1 AFTERNOON SESSION

2 (1:45 p.m.)

3 JUDGE McGUIRE: This hearing is now in order.
4 Any other topics we need to take up before we
5 proceed with your inquiry, Mr. Royall?

6 MR. ROYALL: I don't believe so.

7 JUDGE McGUIRE: Okay, then you may proceed at
8 this time with the witness.

9 MR. ROYALL: Thank you, Your Honor.

10 BY MR. ROYALL:

11 Q. Mr. Kelly, during the break I took the liberty
12 of handing another exhibit up to your table and to
13 respondent's counsel. It's marked JX-54. Do you have
14 that?

15 A. Yes, sir, I do.

16 Q. And do you recognize this document?

17 A. This is the manual that I referred to earlier
18 as EP-7, and in this case it's Version A, so EP-7-A.

19 Q. Is this the version of the EP-7 manual that was
20 in effect when you joined EIA in 1990?

21 A. Yes, sir, and in fact, it was published a month
22 before I arrived. August of 1990 is the date on the
23 cover.

24 Q. How would you describe the purpose of the EP-7
25 manual?

1 A. It is entitled Style Manual for Standards and
2 Publications of EIA, TIA and JEDEC, and it generally
3 sets forth the policies and procedures that relate to
4 the publication -- the formatting and publication of
5 EIA standards and technical publications as well as TIA
6 and JEDEC standards and publications at that time.

7 Q. Do you recall that earlier, with reference to
8 the EP-3 manual, I asked you if during your tenure as
9 EIA general counsel that document was made generally
10 available to EIA members?

11 A. Yes, sir.

12 Q. Was this manual, the EP-7 manual, also made
13 generally available to EIA members in the way that
14 you've described?

15 A. In exactly the same way that I described with
16 respect to EP-3, yes, sir.

17 Q. Now, when we were discussing the EP-3 manual
18 earlier, you noted I believe that there was a
19 cross-reference in Section 3.4 of the EP-3 manual to --
20 I'm sorry, it was Section 8.3 of the EP-3 manual that
21 cross-referenced Section 3.4 of the EP-7 manual.

22 Do you recall that?

23 A. Actually, I don't recall reading that far into
24 8.3, but you are correct, it is the last sentence in
25 the first paragraph and also referred to again in the

1 parenthetical at the end of Section 8.3.

1 says, "a license shall be made available without charge
2 to applicants desiring to utilize the patent for the
3 purpose of implementing the standard."

4 Q. Whether the assurance is a RAND assurance or an
5 assurance of royalty-free licensing, under EIA's rules,
6 do licensing assurances of this sort have to be in
7 writing?

8 A. Yes, sir, they must be in writing.

9 Q. And why is that?

10 A. That's indicated in the language just preceding
11 the subparagraphs where it says that the committee
12 chairman has received a "written expression from patent
13 holder."

14 Q. And in this regard, why does EIA, to your
15 understanding, require a written licensing assurance?

16 A. Quite simply because we want a binding
17 commitment from the company as opposed to an expression
18 of willingness from the participant who may or may not
19 be in a position to bind the company.

20 Q. If an EIA participant were to stand up in an
21 EIA standard-setting meeting and express that his or
22 her company was willing to license its technology on
23 reasonable and nondiscriminatory terms, would an oral
24 statement to that effect satisfy this portion of EIA's
25 rules?

1 A. No, sir, it wouldn't. We would require in
2 addition a written expression of the company's
3 willingness to license on either of these terms; that
4 is, either subsection 1 or subsection 2 of 3.4, signed
5 by a person in a position of authority to bind the
6 company.

7 Q. What if the oral assurance of the sort that I
8 described were then recorded in the written official
9 minutes of that JEDEC or other EIA meeting, would that
10 satisfy the licensing assurance aspect of the rules?

11 A. No, sir, the same answer. We would need a
12 written expression on company letterhead signed by an
13 individual in a position of authority to bind the
14 company to lock them into this commitment, because this
15 is essential to our moving forward to standardize.

16 Q. From the standpoint of complying with EIA's
17 policy, does the particular wording of the written
18 licensing assurance matter?

19 A. Yes, it does. The wording needs to be in the
20 words that you see in Section 3.4 with no substantial
21 modifications or additions.

22 Q. Has an EIA participating company ever
23 submitted -- and when I say "ever," during your
24 experience as EIA's general counsel dating back to
25 1990 -- to your knowledge, in that time period, has an

1 EIA participant ever submitted a licensing assurance
2 letter that was deemed by EIA to be inadequate from the
3 standpoint of complying with this aspect of EIA's
4 rules?

5 A. Yes, sir. I wouldn't say it happens
6 frequently, but it certainly happens with some
7 regularity.

8 Q. And who within EIA determines whether licensing
9 assurance letters satisfy the organization's rules?

10 A. I do.

11 Q. And how long have you performed that
12 responsibility?

13 A. Since shortly after my arrival in 1990.

14 Q. Under EIA's rules, is it also your
15 responsibility to determine whether the terms on which
16 a patent holder seeks to license its technology are, in
17 fact, reasonable and nondiscriminatory?

18 A. No, sir, it is not.

19 Q. Do you ever get involved in such matters?

20 A. No, I do not.

21 Q. Is there a reason for that?

22 A. The reason is that it is up to the
23 marketplace -- that means a willing licensor and
24 licensee in the first instance -- to work out the
25 meaning of those terms in an arm's length negotiation,

1 and if they can't agree on what's reasonable and
2 nondiscriminatory, then they always have access to
3 other means of dispute resolution, most notably the
4 courts, and a judge or a jury can work out the meaning
5 of that language in a real context.

6 EIA, and I'm speaking now about me in
7 particular, we don't have the expertise to be able to
8 determine what's commercially reasonable in the context
9 of any industry, no less semiconductors, which is the
10 subject of today's hearing. That expertise resides in
11 the industry. So, that's why in the first instance we
12 leave it to the parties themselves to work out what's
13 reasonable.

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1 qualification.

2 Q. Regardless of whether they may be or may not be
3 a member of JEDEC or EIA?

4 A. Absolutely.

5 MR. ROYALL: Your Honor, I would like to offer
6 this document, JX-54, at this time.

7 MR. PERRY: No objection.

8 JUDGE McGUIRE: So entered.

9 (JX Exhibit Number 54 was admitted into
10 evidence.)

11 BY MR. ROYALL:

12 Q. Now, we've been discussing for a while now
13 after the lunch break and a bit prior to the lunch
14 break the provisions in EIA's rules that relate to the
15 subject of written licensing assurances. Is that
16 right?

17 A. Yes, sir.

18 Q. And if I'm not mistaken, you have stated that
19 in the absence of such licensing assurances in writing,
20 EIA committees are forbidden to adopt a known patented
21 technology into an EIA standard. Is that correct?

22 A. That is correct.

23 Q. Is the same true within JEDEC as well?

24 A. It is absolutely correct within JEDEC as well.
25 It is true.

1 Q. And has that been true since you joined EIA in
2 late 1990?

3 A. Yes, sir.

4 Q. Is this a firm rule within JEDEC, or is it more
5 in the nature of a recommended practice?

6 A. No, it is a firm, absolute requirement.

7 Q. And I mentioned JEDEC. I -- is the same true
8 for -- across all of EIA?

9 A. The same is true universally throughout EIA,
10 yes.

11 Q. And does this firm rule requiring written
12 licensing assurances relating to known patented
13 technologies govern the conduct of an EIA committee, or
14 does it govern the conduct of individual EIA
15 participants?

16 A. Both.

17 Q. Does that mean that whenever an EIA member is
18 known to have a patent that is relevant to an EIA
19 standardization process, that the member must provide a
20 written licensing assurance?

21 A. Oh, I'm sorry, no. The rule applies to members
22 and to committees. A patent owner is always free to
23 refuse to give the licensing or to give the licensing,
24 because frankly, you know, that's their prerogative.
25 That's their choice. If they want their technology

1 included in the standard, however, then they must give
2 the assurances. If they prefer not to have their
3 technology considered for inclusion in the standard,
4 then all they need do is refuse to give the assurances.
5 So, the patent owner always has the right to give or
6 refuse to give the assurances.

7 Q. Just to be clear, if an EIA member elects not
8 to provide the requisite licensing assurances, would
9 the relevant EIA committee be permitted to adopt a
10 standard incorporating the patented technology at
11 issue?

12 A. No, no. Just to clarify, the committee chair
13 must request the written assurances. The patent owner
14 has an option to give or not to give the assurances.
15 But if the patent owner does not give the assurances,
16 the committee is basically -- cannot move forward to
17 standardize along the lines of the patented technology.
18 That's an absolute requirement for moving forward in
19 the process.

20 Q. And do the rules that we've been discussing
21 both before the lunch break and now, after, relating to
22 the written licensing assurance requirements within EIA
23 and JEDEC, do those rules apply to patent applications
24 as well as to patents?

1 Q. Was that the case in the early to mid-1990s?

2 A. Yes, sir, it was.

3 Q. Let me ask you to take a look again at JX-54,
4 which is the EP-7 manual, and let me again ask you to
5 focus your attention on page 9 of JX-54, which is again
6 Section 3.4, the same section we were discussing
7 earlier.

8 Do you have that page?

9 A. I do.

10 Q. And in that section, which is again entitled
11 Patented Items or Processes, you'll see that there are
12 several references to patents and to patented items.

13 Do you see that language?

14 A. I do.

15 Q. Does the word "patent application" appear in
16 this section of the EP-7 manual?

17 A. No, sir, it does not.

18 Q. Is it your testimony that these provisions in
19 the EP-7 manual nevertheless do apply to patent
20 applications?

21 A. Yes, it is.

22 Q. And can you explain why it is that you
23 understand this provision to apply to patent
24 applications, even though the term "patent
25 applications" is not expressly stated?

1 A. I mentioned previously that when I started work
2 at EIA, that I reviewed the manuals and that I had a
3 number of discussions with individuals on staff at EIA,
4 including Mr. Shapiro, Mr. Kinn and Mr. McCloskey, and
5 in particular in my conversations with Mr. Kinn --

6 MR. PERRY: Your Honor, excuse me, I believe
7 this to be hearsay, and it's not appropriately offered
8 at this point. He's about to get into the contents of
9 what these folks said to him.

1 gained the understanding that had caused him to
2 interpret the rules in that way.

3 JUDGE McGUIRE: Okay, then I'll entertain the
4 question, overrule the objection.

5 MR. PERRY: Your Honor, if I could say --

6 JUDGE McGUIRE: Go ahead.

7 MR. PERRY: Your Honor, if I could say, I'm not
8 sure there has been a reason given for why his
9 particular state of mind is relevant here, and if we're
10 talking -- Mr. Royall seems to be indicating this is a
11 contract case, which I think he may be offering parol
12 evidence from this gentleman. I don't think it's
13 proper parol evidence, but I don't think that he's
14 established that he's entitled to offer parol evidence.

15 MR. ROYALL: Can I respond?

16 JUDGE McGUIRE: Mr. Royall, this is a brand new
17 objection that I'm entertaining now. I've already
18 ruled on the -- but let me hear what you have to say
19 about this, Mr. Royall.

20 MR. ROYALL: Well --

21 JUDGE McGUIRE: I want to be clear as to where
22 we're headed on this is where I'm going.

23 MR. ROYALL: Sure. Well, there are a number --
24 I think I responded to the earlier point about the
25 state of mind.

1 JUDGE McGUIRE: Right.

2 MR. ROYALL: He mentioned or Mr. Perry just
3 mentioned several things. First of all, he said he
4 doesn't know that there's any foundation as to why his
5 state of mind matters. Well, I think there is very
6 much a foundation. He has said now a couple of times
7 that throughout the duration of his role as EIA general
8 counsel, he is the person who has the last word on how
9 these rules are interpreted, and so what he understands
10 is quite relevant.

11 As to whether this is a contract case, I'm not
12 sure what he means by that. I certainly have not
13 suggested anything to that effect --

14 JUDGE McGUIRE: All right, to the extent that
15 it's not clear that it's -- you haven't proposed this
16 line of inquiry as under any contract terms. Is that
17 correct?

18 MR. ROYALL: No, I'm -- the purpose for this is
19 to elicit his understanding of the rules. He has
20 stated that and various documents have referred to him
21 being -- the general counsel being the authoritative
22 interpreter of the rules, and so I want to understand
23 what his understanding is, when he gained it, and to
24 the extent he can explain how he came to that
25 understanding.

1 JUDGE McGUIRE: Mr. Perry, one more time.

2 MR. PERRY: Yes, Your Honor, I understood from
3 the examination this morning that they were trying to
4 establish that we joined EIA and that the rules bound
5 us, and now we were about to hear what the rules
6 supposedly required as a result of conversations that
7 this gentleman had 13 years ago with Congressman
8 McCloskey and other people, and that sounds to me like
9 classic parol evidence.

10 That's what I understood to be the whole thrust
11 of the morning, was that we joined an organization by
12 paying our dues and were bound by certain rules as a
13 result of joining, signing that application. So, I --

14 JUDGE McGUIRE: It seems to me that you all are
15 talking about two different things here. I'm not on
16 the same page as the two arguments here. It seems to
17 me like to the extent we're talking about his
18 understanding as general counsel, then I'm going to
19 entertain that questioning. I'm not quite sure what
20 you're talking about at this point, Mr. Perry.

21 MR. PERRY: Well, I obviously haven't explained
22 it well enough, but I had understood --

23 JUDGE McGUIRE: Perhaps you have. I just don't
24 understand it.

25 MR. PERRY: -- I had understood the import of

1 the testimony to be that Rambus had agreed to be bound
2 by certain rules as a result of filling out an
3 application, and that was why we heard that --

4 JUDGE McGUIRE: As they are written. As they
5 are written, correct?

6 MR. PERRY: As they are written, right, and now
7 we are about to hear evidence about what the rules mean
8 as a result of these -- to him as a result of these
9 conversations, and that seemed to me to be parol
10 evidence about what the rules were.

11 JUDGE McGUIRE: Is that the import of your
12 question, Mr. Royall?

13 MR. ROYALL: No, I think what Mr. Perry is
14 explaining is his theory of the case as it relates to
15 these issues, not the nature of what I'm establishing.
16 What I'm -- what I'm seeking to establish based on what
17 has already -- the foundation that's already been laid
18 is that -- his understanding of the rules and that he
19 is the authority --

20 JUDGE McGUIRE: All right, his understanding of
21 the rules as they are -- as they were at that time
22 written, is that correct, or are you going back to try
23 to find out how someone else might have interpreted
24 them?

25 MR. ROYALL: I'm only focused on his

1 understanding and how it is that he ascertained that
2 understanding and when -- when he ascertained that
3 understanding.

4 JUDGE MCGUIRE: All right, I am going to
5 entertain the question, and Mr. Perry, if you have any
6 concerns in that area, I'll let you take it up on cross
7 examination.

8 MR. PERRY: All right, thank you.

9 BY MR. ROYALL:

10 Q. Mr. Kelly, when did you first come to
11 understand that these provisions -- and I'm referring
12 to Section 3.4 of the EP-7 manual -- when did you first
13 come to understand that these provisions of the EIA
14 EP-7 manual applied to patent applications as well as
15 to patents?

16 A. Shortly after I arrived at EIA.

17 Q. And how did you come to that understanding?

18 A. As I indicated, in conversations initially with
19 Mr. Kinn.

20 Q. And you explained earlier that Mr. Kinn at that
21 time --

22 A. Was the vice president of engineering at EIA.

23 Q. In the early 1990s when you first started at
24 EIA, did you perceive there to be any doubt within EIA
25 as to whether these policies applied to both patents

1 and patent applications?

2 MR. PERRY: Your Honor, there's no foundation
3 for him to testify about whether anybody else within
4 EIA had any doubt.

5 MR. ROYALL: The question, Your Honor, was to
6 his perception, his state of mind, and I think it's
7 highly relevant. He's testifying about his
8 understanding of the rules, how he gained it. If there
9 were doubt, that's something I think that would be
10 relevant to bring out, and he's entitled to answer that
11 question.

12 JUDGE McGUIRE: He can answer the question to
13 the extent of his understanding.

14 BY MR. ROYALL:

15 Q. Do you have the question in mind, Mr. Kelly?

16 A. I believe I do, and I think my answer is that I
17 never heard from anyone inside the EIA organization
18 that "patent" excluded patent applications. It was
19 always my understanding that it included patent
20 applications.

21 Q. Are you aware of any instance in which an EIA
22 or JEDEC participant has been asked to provide RAND
23 licensing assurances with respect to technologies
24 covered by pending applications -- pending patent
25 applications as opposed to issued patents?

1 A. Yes, sir. I can't name a specific instance for
2 you, but it has come up from time to time, yes.

3 Q. We've talked now about the basic nature of the
4 EIA licensing assurance requirements, and I'd like to
5 now ask you a few questions about the purposes
6 underlying those requirements.

7 Do you have an understanding based on your work
8 as EIA's general counsel since 1990 as to why EIA's
9 rules contain licensing assurance provisions of the
10 sort that we see in Section 3.4 of the EP-7 manual?

11 A. I think I understand your question. Let me try
12 to handle it.

13 Licensing assurances are designed to ensure
14 that the process is open and that the end product of
15 the process is open and that it will not -- that the
16 end product of the process, which is a standard or a
17 technical publication, will not include what I called
18 before restrictive IP, which is my shorthand for saying
19 without the RAND assurances, without the Section 3.4
20 assurances, if you will.

21 The reason why we request those is to make sure
22 that all of the provisions of the EIA rules relating to
23 intellectual property have been complied with and that
24 we're not producing something that will defeat the
25 basic purpose of the organization, which is to promote

1 competition, to promote -- to promote competition and
2 not to allow the subversion of the process.

3 Yes, this is basic to what we do. This is
4 basic to the development of open standards.

5 Q. And in your mind, absent requiring RAND
6 licensing assurances, would those purposes be
7 undermined?

8 A. Absolutely, because we would be unable to
9 produce an open standard unless we knew that there was
10 relevant IP that was included and obtained the
11 assurances so that the patent owner would not, in
12 effect, have the opportunity, which may be the case in
13 many instances, to have -- to develop additional market
14 power, perhaps even amounting to monopoly market power,
15 based upon the inclusion -- the unknown inclusion of
16 their technology in a standard without the assurances.

17 Q. Do you, Mr. Kelly, based on your experience as
18 EIA's general counsel, have an understanding as to why
19 EIA's policy relating to licensing assurances extends
20 to both patents and patent applications?

1 works with, and frequently patent applications move at
2 a measured pace through the patent application policy
3 to the issuance of final patents. So, if the work of
4 the committee was held up, in effect, by the condition
5 that only issued patents needed to be disclosed, then
6 the standard development process could reach a very
7 late stage or, in fact, already be concluded by the
8 time a patent finally issued and there was disclosure
9 that the patent was required to comply with the work by
10 the committee on the standard under development, and
11 that would produce exactly the same kind of
12 anti-competitive result that we're trying to prevent by
13 the disclosure.

14 So, logically, we need to know as much about
15 patent applications -- anything in the patent
16 application process, let me put it that way, as early
17 as we can, in sufficient detail, so we can identify the
18 technology and its relationship to the standard, and
19 that triggers in turn the obligation on the part of the
20 committee chairman to request the RAND assurances and
21 on the part of the members of the committee -- I'm
22 sorry, and on the part of the patent owner to either
23 provide those assurances or decline to provide the
24 assurances.

25 Q. And the understanding that you've just

1 described, how long have you held that understanding?

2 A. Since very early on in my tenure at EIA.

3 Q. In your understanding as EIA general counsel,
4 is there any connection between the so-called RAND
5 assurance requirements that we see in Section 3.4 of
6 the EP-7 manual and the commitment or the requirement
7 of good faith that we discussed earlier in connection
8 with the EIA Legal Guides?

9 A. I think there's a direct relationship.

10 Q. Can you explain?

11 A. Well, first of all, let me say to me it seems
12 fairly obvious, but I'll be happy to try to explain as
13 best I can.

14 The RAND assurances are designed in the
15 particular context of IP that is or may be relevant to
16 a standard to promote openness and disclosure so that
17 the committee understands what potential issues may lay
18 ahead in the standardization process, and the
19 disclosure of that information in turn is an exercise
20 of good faith by the patent owner to allow that process
21 to move forward intelligently, with adequate
22 information, so that at the end of the process -- and I
23 realize this is somewhat repetitive -- EIA does not
24 endorse a standard that contains hidden IP without any
25 assurance to the world at large that may be interested

1 in complying with the standard that they can do so
2 without having to pay unrestricted licensing royalties
3 or abide by other unreasonable licensing terms.

4 Q. Is the RAND assurance requirement, as you
5 understand it as EIA's general counsel, connected in
6 any way with what we referred to earlier as basic rule
7 number 5 from the EIA Legal Guides, which you see on
8 the screen here; that is, the rule that prohibits the
9 misuse of EIA processes for anti-competitive purposes?

10 A. There again, in the absence of disclosure and
11 the RAND assurances, there would be a distinct
12 possibility, at least in certain cases, that the
13 prohibitions in subsection 5 of Section C would be
14 violated or could be violated as well because of the
15 fact that a -- an IP owner would have undue market
16 power as a result of noncompliance with the disclosure
17 and the written assurance requirements.

18 Q. To be clear about one thing, when a member
19 company of EIA or JEDEC is known to possess a relevant
20 patent or patent application but declines to give a
21 RAND assurance, has such a company, by declining to
22 give that assurance, violated EIA or JEDEC policy?

23 MR. PERRY: Your Honor, there's been some
24 leading questions that I've let go, but this one's
25 getting too far over the line.

1 JUDGE McGUIRE: Sustained.

2 BY MR. ROYALL:

3 Q. You said earlier that the RAND assurance
4 requirement insofar as it seeks to request or requires
5 a request of a RAND assurance from a member company
6 does not require the member company to give that RAND
7 assurance. Is that correct?

8 A. I think that was my prior testimony, yes, sir.

9 Q. Now, in a situation in which a company has
10 declined to give a RAND assurance, can that company
11 continue to participate in JEDEC or EIA meetings,
12 notwithstanding the fact that they have declined to
13 give a RAND assurance?

14 A. They can, and in point of fact, that has
15 happened, and they do.

16 Q. Could such a company continue to make
17 presentations if they so desire at JEDEC or other EIA
18 meetings?

19 A. Absolutely, they can and do.

20 Q. What if the presentation that they wish to make
21 relates in some way to the patents or patent
22 applications on which they have declined to give RAND
23 assurances, would it be appropriate for such a company
24 to make a presentation within an EIA or JEDEC meeting?

25 A. Let me see if I understand your question. Are

1 you saying if a company indicates first that it will
2 not license on reasonable and nondiscriminatory terms,
3 should it be able to make a presentation on the basis
4 of that same technology?

5 Q. Yes.

1 Q. If the committee member in that situation were
2 told by the committee chair that it could not make a
3 presentation relating to this patented technology,
4 what, if anything, could the committee -- could the
5 committee member do about that?

1 the process will say basically, hey, there's a patent
2 relating to this aspect of the committee's work, and
3 either my company owns it or somebody else owns it.

4 Q. Is the same true in JEDEC?

5 A. The same is absolutely true in JEDEC.

6 Q. Do either EIA or JEDEC do anything else to
7 identify potentially relevant patents or patent
8 applications besides relying on disclosure by the
9 member companies?

10 A. No, it all depends on the -- on the willingness
11 of the members to be forthcoming.

12 Q. Is there anyone within --

13 A. Any of the participants, I should add, because
14 it's not always members. There are other participants
15 on occasion at committee meetings.

16 Q. Yes. Is there anyone within either EIA's or
17 JEDEC's staff whose job it is to conduct patent
18 searches?

19 A. No, I believe I testified to that earlier. It
20 would not be practical to do, and the end product of
21 the process, even if we had the resources to engage in

1 A. Well, let me put it this way: They are

1 MR. ROYALL: -- on this issue.

2 JUDGE McGUIRE: Go ahead, proceed.

3 MR. ROYALL: Can I have the question reread,
4 please?

5 (The record was read as follows:)

6 "QUESTION: At the point in time when you
7 joined EIA in 1990, did the organization's written
8 rules impose any duty upon participants in EIA's
9 standardization activities to disclose relevant patents
10 or patent applications?"

11 BY MR. ROYALL:

12 Q. You can answer.

13 A. The answer is yes.

14 Q. And where in EIA's written rules were such
15 obligations stated?

16 A. Stated in the provisions that we were just
17 reviewing of EP-7, EP-3 and by implication in the Legal
18 Guides.

19 Q. Well, let's focus on the last exhibit that we
20 were discussing, which is the EP-7 manual marked as and
21 now entered into evidence as JX-54. Are you referring
22 in that -- in that exhibit to Section 3.4 that we were
23 discussing earlier?

24 A. Yes, sir.

25 Q. Can you point out what part of Section 3.4

1 you're thinking of when you say that that provision set
2 forth an obligation to disclose relevant patents or
3 applications?

4 A. Yes, it's primarily the first two sentences
5 preceding the indented text. Avoid requirements in EIA
6 standards that call for the exclusive use of a patented
7 item or process. No program standardization shall
8 refer to a patented item or process unless all of the
9 technical information covered by the patent is known to
10 the formulating committee or working group and the
11 committee chairman has received the assurances. So,
12 the disclosure requirement is right through that --
13 through the words "working group."

14 Q. And what, if anything, do you understand that
15 language to mean or to require as it relates to the
16 subject of disclosure of relevant patents?

17 A. As I think I testified before, the entire
18 process depends upon the disclosure of relevant IP
19 information. Otherwise, the process will be tainted,
20 and it will produce a result other than the intended
21 result, which is an open standard. So, if members are
22 not under an obligation -- and I think they clearly are
23 pursuant to this language -- to make full and early
24 disclosure of relevant IP, then the entire process
25 breaks down.

1 Q. When we were discussing the rules relating to
2 written licensing assurances, I believe you said that
3 those rules did not impose mandatory obligations on EIA
4 participants. Is that right?

5 A. In terms -- I'm sorry, would you --

6 Q. In terms of the written licensing assurances.

7 A. The licensing assurances are -- yes, the patent
8 owner is free to give or not to give the assurances.
9 The patent owner is not free to give -- is not free to
10 make or not make disclosure.

11 Q. By that you mean --

12 JUDGE McGUIRE: Wait a minute, let's go over
13 that again. Could you restate that answer?

14 THE WITNESS: All right, yes, sir. I said the
15 patent owner is free to give or not to give the written
16 assurances. If the patent owner does not give the
17 written assurances, then the committee can take no
18 further action with respect to the patented technology.

19 On the other hand, every participant in the
20 process with knowledge of relevant IP has a continuing
21 duty to disclose that IP and relevant technical
22 information.

23 JUDGE McGUIRE: Okay.

24 BY MR. ROYALL:

25 Q. And is that how you interpreted this language

1 in Section 3.4 when you joined EIA as its general
2 counsel or sometime shortly thereafter?

3 A. Based upon my reading of the language and my --
4 and yes, what I was told about EIA's prior practice,
5 that is correct.

6 Q. From EIA's standpoint -- and again, I'm asking
7 for your view as EIA's general counsel -- is there any
8 value to knowing in advance what patents or patent
9 applications might relate to a given standards
10 proposal?

11 A. Yes, sir, as I think I testified before, it is
12 essential to the process. It's essential to know what
13 impediments there are to the process, what issues there
14 are going forward, and to know when it's necessary to
15 obtain the written assurances.

16 If there's no disclosure, there's no
17 opportunity to request the assurances. Therefore, the
18 end product of the process, if it -- assuming that, in
19 fact, there is relevant IP, the end product is not
20 going to be an open standard, and the entire process
21 has been thwarted.

22 Q. Are you aware of any standard-setting
23 organizations that do not require the disclosure of
24 patent applications or relevant patent applications?

25 A. Yes, there are.

1 Q. Is there anything in your mind about the nature
2 of JEDEC or EIA's work as compared to other standard
3 organizations that in your view makes disclosure of
4 patent applications important?

5 A. In other industries, particularly outside the
6 community in which we operate, which is the high
7 technology community, the standard-setting process may
8 move more slowly, and the patent application process
9 may move more slowly -- [answer stricken].

10 MR. PERRY: Your Honor, excuse me --

11 THE WITNESS: -- but there is no --

12 JUDGE McGUIRE: All right, let him finish, Mr.
13 Perry, then you can make your objection.

14 JUDGE McGUIRE: Are you finished, Mr. Kelly?

15 THE WITNESS: Yes, I am.

16 JUDGE McGUIRE: All right, Mr. Perry?

17 MR. PERRY: There was a motion in limine with
18 respect to --

19 JUDGE McGUIRE: You're exactly right,
20 sustained. I know what you're saying.

21 MR. PERRY: I would like to strike his
22 testimony --

23 JUDGE McGUIRE: It is stricken at this point,
24 because the Court is not interested in any other
25 industry standard organizations, and you're exactly

1 right on that order, and that is sustained, and I want
2 that last answer stricken from the record.

3 MR. ROYALL: Thank you, Your Honor, we
4 understand. I will -- I will say, just because it's
5 going to come up later, Mr. Perry has questioned Mr.
6 Kelly in deposition about how the ANSI policy or
7 guidelines may relate to EIA and JEDEC, and it was also
8 a subject he's been questioned about in prior
9 depositions, and that's something that we think is
10 relevant to understand the facts in this case and how
11 the rules were interpreted --

12 JUDGE McGUIRE: Well, if I don't entertain
13 other expert -- proposed expert testimony on this
14 issue, I don't feel inclined to entertain any kind of
15 testimony in this area.

16 MR. PERRY: Your Honor, with respect to ANSI,
17 we're in complete agreement, because EIA is accredited
18 by ANSI, so there's a relationship there. I had not
19 understood his questioning to be related to ANSI. I
20 thought he was going into VESA and all the other ones
21 that Mr. Kefauver had been opining about.

22 JUDGE McGUIRE: So, there is no objection, is
23 that what you're saying?

24 MR. PERRY: If that's -- if he wants to talk
25 about ANSI, we have no problem. We're going to ask him

1 about ANSI.

2 JUDGE McGUIRE: Well, okay.

3 Is that the context of your inquiry, Mr.
4 Royall?

5 MR. ROYALL: I can limit it. I'm happy to
6 limit it to ANSI.

7 JUDGE McGUIRE: All right, then let's keep it
8 for the time being confined to that, but my earlier
9 statement is still pretty -- I mean, we'll see how this
10 comes up again, but I'm not inclined to hear testimony
11 on how other outside organizations operate.

12 MR. ROYALL: Fully understood. Thank you.

13 JUDGE McGUIRE: All right, go ahead.

14 BY MR. ROYALL:

15 Q. Are you aware of other ANSI-affiliated
16 standards organizations that do not require the
17 disclosure of relevant patent applications?

18 A. I am aware that there are other organizations
19 that do not require the disclosure of patent
20 applications, including ANSI itself, but I can't
21 identify specifically who they are.

22 Q. And just so the record is clear when we come
23 back to the prior question, is there anything in your
24 mind about the nature of JEDEC's or EIA's work as
25 compared to other ANSI-affiliated standards

1 organizations that in your view makes disclosure of
2 patent applications more important?

3 A. The fact that we're in a very fast-moving,
4 fast-breaking technology development area means that to
5 wait until the patent process concludes before there is

1 may be particular sections of documents that we haven't
2 reviewed, but in general, yes, we've covered
3 everything.

4 Q. Do the various rules set forth in these EIA
5 manuals -- and by that I'm referring to the EP-3, EP-7
6 manuals and also the EIA Legal Guides which we
7 discussed -- do the rules set forth in those manuals
8 apply with any less force or effect to standardization
9 activities conducted by JEDEC as opposed to other parts
10 of EIA?

11 A. No. Again, as I think I've testified before,
12 the EIA rules apply throughout or at least at this time
13 applied throughout the EIA structure to all of the
14 sectors of EIA.

15 Q. As of the time that you joined EIA, did JEDEC
16 have any of its o-l pas?

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1 A. Yes, sir.

2 Q. Do you recognize this document?

3 A. Yes, sir, this is the JEDEC manual which was in
4 effect at the time that I became EIA general counsel in
5 September 1990.

6 Q. And was this an EIA publication?

7 A. This was, as indicated on the cover, published
8 by the Electronic Industries Association, Engineering
9 Department, yes.

10 Q. And did this manual apply uniquely to the
11 activities of JEDEC, or did it also apply to other
12 EIA-related activities --

13 A. No, this --

14 Q. -- as well?

15 A. -- this manual applied just to JEDEC-related
16 activities.

17 Q. And how would you describe the purpose of this
18 manual?

19 A. This manual was to provide sector-specific
20 guidance to JEDEC engineering committees, and it was
21 supplemental to the EIA manuals that we've been tal-specifiwp

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1 A. My understanding?

2 Q. Yes, your understanding.

3 A. My understanding is that this manual was made
4 available or that the then-current version was made
5 available to all new members at the time they became
6 members. It was also made available to committee
7 chairs when they assumed their responsibility as
8 committee chairs. It was also brought to meetings by
9 the staff people who were responsible for the
10 committees and available at the meeting if anyone cared
11 to review the document.

12 Q. You said earlier that you, as EIA's general
13 counsel, have the final word when it comes to
14 interpreting and applying the EIA's rules, correct?

15 A. That is correct.

16 Q. Who had the final word when it came to
17 interpreting and applying JEDEC's separate rules, such
18 as the rules set forth in CX-205?

19 A. I did, and as I think I testified before, the
20 reason for that was that until early 2000, JEDEC was
21 a, such

1 ultimately were controlling over JEDEC, JEDEC's own
2 separate rules or the broader rules established by EIA?

3 A. If there were a conflict, the broader rules of
4 EIA would govern; however, I'm not aware of any
5 conflicts between the JEDEC rules and the EIA rules.

6 Q. Just to be clear, are you aware of any conflict
7 that has existed between the JEDEC rules and the EIA rules?

1 incorporated herein by reference. EIA Legal Counsel
2 can advise the Council," C O U N C I L, "and Committees
3 from time to time concerning interpretation of Legal
4 Guides."

5 Q. Is it correct that the JEDEC manual -- this
6 version of the JEDEC manual, CX-205, incorporated by
7 reference into JEDEC's rules the EIA Legal Guides?

8 A. Sir, that's what it says.

9 Q. To your knowledge, has that remained true in
10 subsequent versions of the JEDEC manual?

11 A. It has remained true until recent editions of
12 the JEDEC manual within the last few years, but
13 certainly during the 1990s, this was true.

14 Q. And during the early to mid-1990s, did you from
15 time to time advise JEDEC concerning the interpretation
16 of the EIA Legal Guides?

17 A. Yes, I did.

18 Q. Did this version of the JEDEC manual, that is,
19 the 21-H version that was in effect when you joined EIA
20 in 1990, CX-205, did it refer expressly to the RAND
21 licensing assurance requirement that we discussed
22 earlier?

23 A. No, sir, that -- it did not.

24 Q. Did it or does it, since we have it here, refer

1 discussed earlier and that we saw reference to in the
2 EIA manuals?

3 A. No, it does not.

4 Q. Does that mean that JEDEC participants during
5 the time in which this JEDEC manual was in effect, that
6 is, CX-205, were not subject to those EIA policies?

7 A. No, it doesn't mean that at all. As I think I
8 testified, within the EIA structure, EIA --
9 hierarchically, EIA was at the top of the food chain
10 and JEDEC was further down, and therefore JEDEC members
11 were required to comply not only with the JEDEC manual
12 but also with the EIA manual, and the provisions you're
13 referring to were in the EIA manuals and the Legal
14 Guides, even though they weren't repeated here in the
15 JEDEC manual.

16 MR. ROYALL: Your Honor, before I go further,
17 I'd like to offer CX-205 at this time.

18 JUDGE McGUIRE: Objection?

19 MR. PERRY: No objection.

20 JUDGE McGUIRE: So entered.

21 (CX Exhibit Number 205 was admitted into
22 evidence.)

23 BY MR. ROYALL:

24 Q. Now, we have been discussing written rules and
25 the various provisions in the written rules, and just

1 joined EIA in September 1990?

2 A. No, sir, not in terms of its substance, no.

3 Q. Are you familiar with something called the
4 JEDEC patent policy?

5 A. I think that those terms were used
6 interchangeably, EIA patent policy and JEDEC patent
7 policy, again, during the relevant period of time,
8 which I'm thinking is the 1990s.

9 Q. And just to be clear, since you joined EIA in
10 1990, to your understanding, has the JEDEC patent
11 policy changed in any way?

12 A. No, not in any way, not substantively.
13 Sometimes the words have changed, but the substance has
14 not.

15 Q. Did there come a time in the early 1990s when
16 JEDEC developed its own statement in writing of the
17 JEDEC patent policy?

18 A. Yes, sir, at some point JEDEC did develop a
19 manual, I think it was published in around October
20 1993, which was a statement in its own words of the
21 patent policy.

22 MR. ROYALL: Your Honor, may I approach?

23 JUDGE McGUIRE: Go ahead.

24 THE WITNESS: Thank you.

25 BY MR. ROYALL:

1 Q. Mr. Kelly, I've just handed you what's been
2 marked for identification as CX-208. Do you recognize
3 this document?

4 A. Yes, sir, this is the document I was referring
5 to in response to your earlier question. It is
6 identified as JEP21-I, and it's dated October 1993.

7 Q. And did this version of the JEDEC manual, J --
8 I'm sorry, CX-208, did it supersede the prior version
9 of the JEDEC manual that we were discussing, the 21-H
10 version?

11 A. Yes, sir, it says in the subtext under the
12 identification number of the document that it's a
13 revision of JEP21-H, which is the document identified
14 as CX-205.

15 Q. Have you ever heard either this version of the
16 JEDEC manual or the prior version of the JEDEC manual
17 referred to as the chairman's manual?

18 A. No, sir.

19 Q. Do you know whether in the early to mid-1990s,
20 after it was adopted, this version of the JEDEC manual,
21 the 21-I version, was generally made available to JEDEC
22 members?

23 MR. PERRY: No foundation, Your Honor.

24 JUDGE McGUIRE: Sustained.

25 BY MR. ROYALL:

1 Q. If we could go back to the questions I asked
2 you earlier about the EIA manuals, do you recall that
3 you gave testimony that those manuals were generally
4 made available to EIA participants?

5 A. Yes, sir.

6 Q. In the manner in which you used that term or
7 understood and described that term, generally made
8 available, do you know whether this manual, the 21-I
9 manual, was generally made available to JEDEC
10 participants?

11 MR. PERRY: No foundation for what was
12 available to JEDEC participants, Your Honor.

13 MR. ROYALL: I'm asking whether he knows, and
14 then if he -- depending on the answer to that question,
15 we can explore the basis of that.

16 JUDGE McGUIRE: Well, I think that one I'll
17 have to entertain, because that's the whole point of
18 the question it seems to me, so overruled.

19 BY MR. ROYALL:

20 Q. Do you have in mind the question, Mr. Kelly?

21 A. Yes, I do. I think --

22 MR. PERRY: Your --

23 THE WITNESS: -- I was permitted to testify to
24 the earlier version of the same publication that was
25 disseminated --

1 MR. PERRY: Can we just get a yes or no please,
2 Your Honor?

3 THE WITNESS: I'm trying to say yes -- the same
4 way, the same way.

5 JUDGE McGUIRE: We can only talk in this
6 courtroom one person at a time, so I ask everybody
7 involved, and I try myself to avoid talking overlapping
8 with other people in talking, but I'm allowed to
9 interject.

10 So, let's start all over, and ask the question
11 again, and sir, if you will just answer the question,
12 and then if there is any opposition, we will entertain
13 that.

14 All right, Mr. Royall.

15 BY MR. ROYALL:

16 Q. And just to be clear, to respond to Mr. Perry's
17 question, if you can just give a yes or no answer to
18 that first, then we will go further depending on that.

19 Do you have an understanding as to whether this
20 version of the JEDEC manual, the 21-I manual marked as
21 CX-208, was generally made available to JEDEC members
22 in the same way that you've described the EIA manuals
23 earlier being generally made available to EIA
24 participants?

25 A. Yes.

1 Q. Can you explain the basis for that
2 understanding?

3 A. The basis for the understanding is the -- what
4 I had been told by staff in the course of my ongoing
5 work.

6 MR. PERRY: Your Honor, I would object if he
7 goes further and says what he was told by staff,
8 because that's hearsay being offered for the truth.

9 JUDGE McGUIRE: Overruled. It's his
10 understanding. I'll hear it.

11 BY MR. ROYALL:

12 Q. Can you elaborate on how it is that you
13 understand that this manual was generally available?
14 I'm just not sure that you were -- you had completed
15 your answer.

16 A. Because I periodically inquire and have
17 inquired of staff how the manuals are distributed, and
18 what I have been told forms the basis for my
19 understanding.

20 Q. Were you involved in the process of revising
21 the 21-H version of the JEDEC manual, which has been
22 marked as CX-205, to generate the subsequent 21-I
23 version of the JEDEC manual, which is marked as CX-208?

24 A. I was not directly involved in the sense of
25 being a draftsman of this document, no.

1 Q. Did you review and approve this document, the
2 21-I version of the JEDEC manual, before it was
3 finalized?

4 A. I'm sure that I did. It couldn't have been
5 published without my approval.

6 Q. Does this version of the JEDEC manual, CX-208,
7 contain a statement of the JEDEC patent policy?

8 A. Yes, sir, I believe it does.

9 Q. Let me ask you to turn to page 19 of CX-208.

10 A. I have.

11 Q. And focusing on Sections 9.3 and 9.3.1 on that
12 page, do you see that?

13 A. I do.

14 Q. Is this the language or a portion of the
15 language that you were referring to when you said that
16 this manual has a statement of the JEDEC patent policy?

17 A. It is or they are.

18 Q. When this language was first added to the JEDEC
19 manual in October 1993, as you understand the JEDEC
20 patent policy, did it have an effect of altering the
21 substance of the JEDEC patent policy in any way?

22 A. No, this was a restatement of the patent
23 policy, and it in no way varied the policy itself. It
24 changed some of the verbiage, which I think I testified
25 dermnarievrr

1 Q. By placing this language in its manual -- and
2 when I refer to "this language," again I am referring
3 to Sections 9.3 and 9.3.1 -- did JEDEC cause the
4 substance of its own patent policy to diverge in any
5 way from the broader EIA patent policy that you've
6 testified about?

7 A. No, sir, this is not different in any -- in any
8 respect from the EIA patent policy other than the
9 language used.

10 Q. Let me ask you to turn to page 23 of CX-208.

11 A. Yes, sir.

12 Q. I'm sorry, page 27 is what I meant.

13 Do you see on that page the heading EIA/JEDEC
14 Patent Policy Summary?

15 A. Yes, I do.

16 Q. Now, I'll give you a moment to review it if you
17 need it, but my question is, is the language under that
18 heading an accurate summary of the patent policies that
19 were applicable within both JEDEC and EIA in the time
20 period in which this manual was adopted in 1993?

21 A. Yes, sir, they are -- this language does
22 reflect the policy.

23 Q. And when you say that, it reflects both the
24 JEDEC and the EIA policy?

25 A. They were one in the same, but yes, it reflects

1 both if you would like to separate them, yes.

2 Q. And again, I'll give you time to review this if
3 you need it, but my next question is, does this
4 language accurately summarize the EIA and JEDEC patent
5 policies as they exist today?

6 A. Yes, this language does accurately summarize
7 the language of the EIA and JEDEC patent policies as
8 they exist today.

9 Q. Did the revisions that were made in this
10 version of the JEDEC manual adopted in October 1993
11 clarify or make more explicit any aspect of the
12 JEDEC/EIA patent policy?

13 A. This manual made more explicit the -- the
14 requirement to disclose both issued patents as well as
15 patent applications, yes.

16 Q. Let me ask you again to focus your attention on
17 page 27 of CX-208.

18 A. Yes, sir.

19 Q. Is there language in this -- on this page of
20 the document that you're referring to when you say that
21 it -- this version of the manual made more explicit the
22 application to the patent application?

23 A. Yes, sir, I think if you look at the third
24 line, you will see an explicit reference to "the patent
25 or pending patent."

1 Q. Yes. Yes, I do see that, but -- and just to be
2 clear, did the addition of this language conform with
3 the manner in which the EIA/JEDEC patent policy had
4 been interpreted and applied prior to this time?

5 A. Yes, sir, it did --

6 MR. PERRY: Objection, vague as to whether
7 we're talking about how he had interpreted and applied
8 it. The question was about everybody in the world.

9 JUDGE McGUIRE: Sustained.

10 MR. ROYALL: I can re-ask that.

11 BY MR. ROYALL:

12 Q. As you understood and -- as you understood the
13 JEDEC and EIA patent policies in your role as EIA's
14 general counsel, did the addition of this language
15 relating to pending patents conform with the manner in
16 which the EIA/JEDEC patent policy had been interpreted
17 and applied prior to this time?

18 A. Yes, it -- it did, in fact, conform.

19 Q. To your knowledge, have any other EIA-related
20 manuals been revised to include language similar to the
21 language contained in this version of the JEDEC manual?

22 A. In the latter part of the 1990s, EIA revised
23 its own manual to include similar language, that the
24 EIA patent policy applies to issued patents and patent
25 applications equally.

1 Q. You mentioned earlier that one of your
2 responsibilities as EIA general counsel involves
3 providing input and guidance concerning the proper
4 interpretation and application of the organization's
5 rules. Is that right?

6 A. Correct.

7 MR. ROYALL: Excuse me, Your Honor, I'm just
8 going to skip over something here.

9 JUDGE McGUIRE: I thought you just asked him a
10 question.

11 MR. ROYALL: Well, I asked him a question and
12 he answered.

13 JUDGE McGUIRE: Oh, he answered. I thought he
14 hadn't answered that.

15 (Pause in the proceedings.)

16 BY MR. ROYALL:

17 Q. Mr. Kelly, do you have an understanding --
18 again, in your capacity as EIA general counsel -- do
19 you have an understanding as to what motivated JEDEC to
20 make the revisions to the JEDEC manual that were made
21 in the 1993 version?

22 MR. PERRY: Your Honor, there's no foundation
23 for that. He can just ask him if he has an
24 understanding, but I would like a chance to voir dire,
25 because he has testified on this point quite squarely.

1 JUDGE McGUIRE: Do you want to do that now, Mr.
2 Perry, is that what you're saying?

3 MR. PERRY: If he says no, I don't have to.

4 JUDGE McGUIRE: Let's hear his answer -- all
5 right, let me look at the question.

6 MR. ROYALL: Well, he's said a couple things.
7 One he says I haven't laid a foundation, and that's the
8 purpose of the question. And as to voir dire on this
9 subject, Mr. Perry will have ample time to cross
10 examine Mr. Kelly on this or any other subject
11 tomorrow.

12 JUDGE McGUIRE: All right, I'm going to --
13 that's a proper inquiry for cross examination. At that
14 time, you can bring up any prior inconsistent
15 statements he might have made.

16 On the other point, I'm going to ask you to
17 please restate the question so I'm now aware of what is
18 being asked.

19 MR. ROYALL: Yes, Your Honor.

20 BY MR. ROYALL:

21 Q. At this point, Mr. Kelly, I'm only asking for
22 your understanding or what -- actually, whether you
23 have an understanding.

24 Do you have an understanding as to what
25 motivated the JEDEC organization to make the revisions

1 to the JEDEC manual that were made in the 1993 version
2 of the manual?

3 A. Yes.

4 Q. And can you explain what your understanding in
5 that regard is?

6 MR. PERRY: Your Honor, I think we ought to
7 hear from the people who had the motivations about what
8 their motivations were. I think this is improper
9 speculation and calling for hearsay.

10 MR. ROYALL: Your Honor, he has explained that
11 as EIA's general counsel, he's responsible for these
12 rules and --

13 JUDGE McGUIRE: Overruled. Go ahead and ask
14 the question.

15 BY MR. ROYALL:

16 Q. Do you have -- I had simply asked if you had --

17 JUDGE McGUIRE: You had asked it. You can
18 answer it if you still have the question in mind.

19 THE WITNESS: Thank you, Your Honor.

20 The answer is that in the early 1990s, there
21 was litigation that arose out of a JEDEC
22 standard-setting activity involving WANG Technologies
23 and several other companies in the industry, and the --
24 one of the defenses or allegations that WANG made in
25 that case was that they did not understand the patent

1 policy to apply to patent applications. This caused
2 immediate concern in the JEDEC organization, and there
3 was an initiative almost from that moment forward, when
4 that defense or allegation was first raised, to clarify
5 the patent policy so that it would be clear in the
6 future that "patent" meant patents and patent
7 applications, and there would never be a repetition of
8 the situation presented in the WANG case.

9 BY MR. ROYALL:

10 Q. And were you personally involved in any way in
11 the WANG litigation?

12 A. I represented JEDEC -- I represented JEDEC and
13 EIA in connection with the depositions of Mr. Jack Kinn
14 and Mr. Ken McGhee in the WANG -- in one of the WANG
15 cases. There were several.

16 Q. After the WANG litigation or perhaps during the
17 WANG litigation, was there, to your knowledge, concern
18 within EIA or JEDEC that perhaps the rules did not give
19 clear enough notice that the patent disclosure policy
20 extended to patent applications?

21 A. No, I think -- no, no, there was not a concern
22 that there wasn't sufficient clarity in the rules.
23 There was a desire to make it abundantly clear, to nail
24 this down absolutely, that the rules extended to
25 patents and patent applications. So, it wasn't an

1 didn't state it properly.

2 MR. ROYALL: Okay, all right.

3 JUDGE McGUIRE: I'll allow you that
4 opportunity.

5 MR. ROYALL: Okay, thank you.

6 BY MR. ROYALL:

7 Q. Do you, Mr. Kelly, have personal knowledge of
8 anything else that JEDEC did besides revising the JEDEC
9 manual to make more explicit in this time period the
10 organization's rules with respect to the disclosure of
11 patent applications?

12 A. I think I -- well, I know that the sign-in
13 sheet was modified around this time frame, and I
14 testified to this this morning, to make it clear that I
15 was to answer questions on the patent policy. I don't
16 know if that goes to your question.

17 Q. Well, maybe we could -- can we pull up the
18 sign-in sheet, which was CX-306, which I believe was
19 previously entered?

20 A. Right.

21 Q. If you want to look on the screen, I think it
22 should be on -- well, the language I'm sure is hard to
23 read. Do you have a copy in front of you?

24 A. I do.

25 Q. Okay. So, we're referring to the sign-in sheet

1 which you testified about earlier, CX-306.

2 A. Yes, sir.

3 Q. Is there -- strike that.

4 Did you say in your previous answer that you
5 understood that the language of this sign-in sheet had
6 been modified in some way to make more explicit the
7 requirement to disclose patent applications?

8 A. Well, I'm not -- rereading it, I think that
9 the -- that the language that I'm referring to is
10 "subjects involving patentability or patented items
11 shall conform to the EIA policy," and then the sentence
12 that I testified to this morning about referring to EIA
13 general counsel about any doubtful question. I think
14 that first appeared on the sign-in sheet in the early
15 1990s time frame, around the time of the WANG case.

16 Q. And as used in this document, CX-306 --

17 JUDGE McGUIRE: All right, let's go off the
18 record for just a moment. I can't even hear what's
19 happening.

20 (Pause in the proceedings.)

21 JUDGE McGUIRE: Okay, on the record.

22 BY MR. ROYALL:

23 Q. As used in this document, CX-306, how do you
24 understand the term "patentable items"? What do you
25 understand that term to refer to?

1 A. Patent applications.

2 Q. To your knowledge, Mr. Kelly, was there anyone
3 in particular within JEDEC who in the time period we're
4 focused on, in the early 1990s, spearheaded JEDEC's
5 efforts to make more explicit the organization's rules
6 in their application to patent applications?

7 A. Yes, to my own personal knowledge, that
8 gentleman was named Jim Townsend of Toshiba.

9 Q. And who was Mr. Townsend? What was his
10 connection to JEDEC?

11 A. Mr. -- I'm sorry. Mr. Townsend was a
12 participant in the JC-42 committee, I believe JC-42 --
13 the plenary committee as well as the JC-42.3, and he
14 was one of the corporate representatives to JEDEC from
15 a company known as Toshiba.

16 Q. And is Mr. Townsend deceased, is that right?

17 A. He is deceased, yes, sir.

18 Q. Do you have, based on your own personal
19 knowledge, any understanding as to why Jim Townsend
20 chose to get involved in the issues relating to --
21 these issues relating to the revisions of the language
22 of the JEDEC patent policy?

23 A. Yes, sir, I do.

24 Q. And what understanding do you have in that
25 regard?

1 A. He and I spoke on numerous occasions personally
2 and by telephone about the issues related to patents
3 and patent applications that we have been talking about
4 here today. His company was directly involved in the
5 WANG case as a defendant party, I believe, and he felt
6 very strongly that the --

7 MR. PERRY: Your Honor, excuse me, but if we
8 are going to get hearsay from Mr. Townsend outside of
9 cross examination, I would object to it. I don't know
10 why this witness' understanding of what Mr. Townsend
11 told him --

12 JUDGE McGUIRE: Sustained.

13 BY MR. ROYALL:

14 Q. Do you know, based on your own personal
15 knowledge, Mr. Kelly, whether Mr. Townsend was involved
16 in making the revisions to the JEDEC manual that we
17 discussed earlier?

18 A. He was involved in that process, yes, sir.

19 Q. I believe you said earlier that one of your
20 roles as EIA's general counsel is to provide guidance
21 on the proper interpretation and application of EIA's
22 and JEDEC's rules. Is that right?

23 A. That is correct.

24 Q. During your tenure as EIA general counsel, how
25 often have you received requests for guidance relating

1 to either EIA's or JEDEC's rules? Can you describe
2 generally how often that -- those types of requests
3 come to your attention?

4 A. If I could just -- if I may ask, you're
5 referring broadly to the rules of both organizations?

6 Q. Well, let's start there.

7 A. Okay. Often.

8 Q. How often do you get or have you gotten
9 questions relating to the EIA or JEDEC patent policy?

10 A. Less often. I would say occasionally. On an
11 order -- in terms of frequency, probably one every
12 other month over the entire time I've been at EIA.

13 Q. And with respect to requests for guidance or
14 input on the patent policy, what type of issues are
15 most often raised to your attention?

16 A. By far the most frequent relate to the same
17 subject His Honor inquired about, which is the meaning
18 of "reasonable" and the meaning of "nondiscriminatory"
19 and whether the addition of other terms and conditions
20 added to that language would be acceptable in my view
21 as EIA

1 A. Yes, sir, when the interpretation is not
2 doubtful, then the staff and the committee chair can
3 and do provide guidance as to the interpretation of the
4 rules.

5 Q. In your tenure as EIA's general counsel, has
6 there ever been an instance that you recall in which
7 the staff or the committee leadership have interpreted
8 EIA or JEDEC rules differently than you?

9 A. Yes, of course.

10 Q. And when that happens, that is, when either the
11 staff or the committee leadership interpret the rules
12 differently than you, whose interpretation controls?

13 A. Mine does.

14 Q. If an EIA or JEDEC member does not agree with
15 the manner in which the organization's rules are being
16 interpreted or applied at the committee level, what can
17 they do about it, if anything?

18 A. They can report their disagreement to the staff
19 person charged with responsibility for supporting the
20 committee, who will report the problem back to me.
21 They can express their concerns to the committee chair,
22 who in a doubtful case will report it back to me. Or
23 they can come to me directly and express their concern.

24 Q. Has there ever been an instance in which a
25 committee member, either EIA or JEDEC committee member,

1 has disagreed with the staff or the leadership of the
2 committee, and the issue has been presented to you for
3 resolution?

4 A. It certainly happens, yes, sir.

5 Q. Let me ask you to take a look at another
6 document.

7 May I approach, Your Honor?

8 JUDGE McGUIRE: Yes.

9 THE WITNESS: Thank you.

10 BY MR. ROYALL:

11 Q. Mr. Kelly, I've handed you what's been marked
12 for identification as CX-353. Do you recognize this
13 document?

14 A. It's a multipage exhibit. The first page is a
15 memorandum that I wrote to Mr. Ken McGhee of JEDEC on
16 March 29, 1994, and the remainder of the exhibit is
17 a -- it looks like a briefing paper, a white paper, by
18 Texas Instruments. If I recall correctly, this was
19 given to me by Mr. McGhee who came to me for guidance.

20 Q. And did this concern the activities of JEDEC's
21 JC-42.3 subcommittee?

22 A. Yes, sir, it did.

23 Q. And was Mr. McGhee at that time the EIA staff
24 member responsible for supporting that committee?

25 A. He was.

1 Q. To your knowledge, if you know, was your memo
2 to Ken McGhee forwarded to JC-42.3 subcommittee
3 members?

4 A. That was the intent -- that was my intent.

5 Q. Do you recall or can you explain -- and again,
6 if you need a moment to look at the document, take
7 whatever time you need -- but do you recall or can you
8 explain your understanding of the nature of the issue
9 that was raised by Texas Instruments in this instance?

10 A. Let me just take a moment to review the
11 document.

12 Q. Sure.

13 A. (Document review.) Yes, sir, I do.

14 Q. Can you explain your understanding of the issue
15 that Texas Instruments was raising relating to CX-353?

16 A. Yes, sir. There had been a disclosure that
17 Texas Instruments had a pending patent or patent
18 application, I can't recall which without reading their
19 memo, but certainly relevant IP to the work of the
20 JC-42.3 committee, and the question -- and TI had
21 took -- TI took the position that even though its IP
22 was relevant, it was not required to comply with the
23 work of the committee, and therefore, it needed not --
24 it need not give the patent assurances -- the licensing
25 assurances that I referred to earlier, not as a matter

1 of discretion, but just as a matter of fact.

2 They said, you know, our patent is not required
3 to comply with the standard; therefore, you can move
4 forward. We don't have to give the assurances. And
5 the specific issue that they raised was whether the
6 committee at that point had an obligation to make a
7 factual determination that there was a requirement
8 relationship between the patent and the standard under
9 development. And my response was, no, if the -- if the
10 use of the patent is or may be required to comply with
11 the standard, then the -- then the patent owner should
12 give what I referred to as a conditional assurance, and
13 that is if it turns out as a matter of fact that in
14 this case TI's technology was required to comply with
15 the standard, they would have already given the
16 assurances. That way, the process could move forward.

17 If they didn't do that, the process basically
18 would have stopped with a deadlock, because the

1 Did you understand in this instance that Texas
2 Instruments was setting forth its own interpretation of
3 what the JEDEC/EIA patent policy required relating to
4 licensing assurances?

5 A. Yes, sir, I think they do that in the
6 backgrounder, which is the three -- four-page document
7 that is attached to my memo.

8 Q. And did you agree with the interpretation of
9 the JEDEC/EIA patent policy that Texas Instruments was
10 advancing?

11 A. No, I disagreed.

12 Q. And did you set forth your interpretation on
13 this aspect of the JEDEC/EIA patent policy in your
14 March 29, 1994 memo to Mr. McGhee?

15 A. I did.

16 Q. And that is the first page of CX-353. Let's
17 take a look at what you said.

18 Focusing on the second paragraph of that March
19 29, 1994 memo, in that second paragraph you state,
20 "Written assurances must be provided by the patent
21 holder when it appears to the committee that the
22 candidate standard may require the use of a patented
23 invention," and the words "may require" are
24 underscored.

25 Do you see that language?

1 A. I do, yes, I do.

2 Q. Now, can you explain specifically what you
3 meant by that language?

4 A. Yes, sir. I think we were past the stage where
5 Texas Instruments hadn't decided whether or not it was
6 going to exercise its discretion as the patent owner to
7 give the assurance or not. The issue that was
8 presented here was whether there needs to be, in fact,
9 a shown requirement nexus between the IP and the
10 standard for them to give the assurances, and they took
11 the position that the committee needed to make a
12 factual determination that there was, in fact, a
13 requirement that the patent needed to be used to comply
14 with the standard.

15 I said, no, what needs to be determined is
16 whether or not there may be a requirement to use the
17 patent in order to comply with the standard, and once
18 that determination was made, then it would be
19 appropriate for TI under -- TI under the circumstances
20 to say if it later turns out that there's a
21 requirement, we've already given the assurances, let
22 the committee's work go forward.

23 Q. Now, in the sentence that I read from that
24 second paragraph of your memo, what did you mean by the
25 term "candidate standard"?

1 A. "Candidate standard" is actually a term that I
2 think ANSI had used in various documents in the past.
3 That was not something that I used for the first time
4 here. That was something that I -- that had been used
5 elsewhere.

6 Q. Does this -- as you understand EIA process and
7 the EIA patent policy as the general counsel of the
8 organization, does the standardization process have to
9 proceed beyond a certain stage before it would be
10 appropriate for the JEDEC committee to request
11 licensing assurances from a member company?

12 A. No, I -- if I understand your question
13 correctly, the -- there needs to be disclosure as early
14 as possible in the process, and once there has been
15 disclosure, if it appears that the technology is or may
16 be required to comply with the standard under
17 development, then the assurances should be given that the
Waldorf, Marylly ocess have to

1 referred to either one, whichever TI had.

2 Q. And finally, relating to that language, why did
3 you underline the words "may require" in that sentence?

4 A. Because again, the emphasis was here that there
5 needed to be a -- that if the work of the committee may
6 require the use of the patent, that was all that was
7 necessary to trigger the conditional assurance that I

1 standard. The -- rather, the test is "may require."

2 MR. ROYALL: Your Honor, I would offer this
3 document, CX-353, at this time.

4 MR. PERRY: No objection.

5 JUDGE McGUIRE: So entered.

6 (CX Exhibit Number 353 was admitted into
7 evidence.)

8 BY MR. ROYALL:

9 Q. Focusing on the same document, I do have one
10 last question, Mr. Kelly.

11 A. Yes.

12 Q. At the end of that second paragraph on the
13 first page, CX-353, you refer to something called the
14 ANSI Guidelines for Implementation of the ANSI Patent
15 Policy.

16 Do you see that?

17 A. Yes, sir. Actually, it says, "Guidelines for
18 Implementation of the ANSI Patent Policy," then certain
19 pages, yes, sir.

20 Q. Yes. You have made several references to ANSI.
21 I don't know that I've asked you to explain what ANSI
22 is, so could I ask you to do that now?

23 A. ANSI is -- first of all, ANSI stands for
24 American National Standards Institute, and ANSI is one
25 of several organizations in the United States that

1 accredits other organizations to develop standards.
2 ANSI also is a -- has the authority to adopt the
3 standards or certain of the standards that are
4 submitted to it by its qualified organizations for
5 adoption as American national standards; hence the
6 American National Standards Institute, the name.

7 Q. Do you personally have or have you had any
8 affiliation with ANSI?

9 A. EIA has been for a number of years, I think

1 A. The affiliation between ANSI and EIA is that
2 EIA was originally accredited by ANSI, I think the date
3 was in the late 1970s, '77-'78, and that EIA is a
4 dues-paying member of the American National Standards
5 Institute. And I should add again that EIA forwards
6 certain standards developed by EIA sectors to ANSI, or
7 at least did during this period of time, for adoption
8 as American national standards.

9 Q. Is JEDEC separately accredited by ANSI?

10 A. No, and again, during the period of the early
11 to mid-1990s, the only other sector of EIA -- the only
12 sector of EIA, I should say, that was separately
13 accredited was the Telecommunications Industry
14 Association. All of EIA's other sectors operated under
15 the EIA ANSI accreditation, including JEDEC.

16 Q. Does ANSI, to your knowledge, only accredit
17 standards organizations that like EIA and JEDEC deal
18 with high-tech industries?

19 A. No, sir.

20 Q. Now, going back to -- I'm sorry, excuse me,
21 Your Honor.

22 Going back to CX-353, again, your -- the first
23 page of which is your March 29, 1994 memo to Ken
24 McGhee, and as we pointed out on the second paragraph,
25 you refer there to the ANSI -- or rather, to the

1 guidelines for the implementation of the ANSI patent
2 policy.

3 What was your reason for referring to those
4 guidelines in this memo?

5 A. Because the EIA and JEDEC policies at the time
6 closely tracked the language of the ANSI policy. I had
7 been involved as a member of the ANSI patent policy
8 working group in developing the guidelines that are
9 referred to here, and I thought they provided insight
10 into the proper interpretation of the EIA and JEDEC
11 patent policy, which is why I referred to guidelines in
12 my memo.

13 Q. Were you personally involved in any way in the
14 process of developing or drafting the ANSI patent
15 policy guidelines?

16 A. Yes, sir, I was involved, not from the
17 beginning certainly. Mr. Shapiro, my predecessor, had
18 been involved in the working group before I came to EIA
19 and had been very heavily involved in drafting the
20 guidelines. I got involved at a relatively late stage
21 in the process, but I participated fairly actively in
22 the discussions and the deliberations that led up to
23 the final approval of the guidelines by the working
24 group.

25 And I have been also been involved in a number

1 of discussions over the ensuing ten years about the
2 guidelines and proposed amendments to the guidelines.

3 MR. ROYALL: May I approach, Your Honor?

4 JUDGE McGUIRE: Go ahead.

5 BY MR. ROYALL:

6 Q. Mr. Kelly, I've just handed you a document
7 that's been marked for identification as RX-1712.

8 A. Yes, sir.

9 Q. Do you recognize this document?

10 A. This appears -- well, first of all, I recognize
11 the email. This appears to be a printout of an
12 email -- I didn't print it out, someone else did -- an
13 email that I sent to a number of individuals associated
14 with the JEDEC board as a matter of fact.

15 Q. Do you recall sending this email in, as the
16 date indicates, October 2000?

17 A. Not clearly, but I know I did, yes.

18 Q. And in the first sentence of the email, you
19 mention the patent policy guidelines adopted by ANSI.

20 Do you see that?

21 A. I do.

22 Q. And are those the same guidelines that you
23 referred to in the prior exhibit, CX-353?

24 A. They are.

25 Q. And is a copy of the -- these ANSI patent

1 policy guidelines attached to your email, the first
2 page of RX-1712?

3 A. Actually, it appears that three copies are --
4 two copies -- I'm sorry, two copies are attached, one
5 in text and one in hypertext.

6 Q. What do you personally understand to be the
7 purpose of the ANSI patent policy guidelines?

8 A. The purpose of the ANSI patent policy
9 guidelines is to provide guidance to standard
10 development organizations and to the members of ANSI as
11 to the proper interpretation of the ANSI patent policy.

12 Q. Let me ask you to turn to page 6 of RX-1712,
13 and unlike the CXs, the confusion is that the page
14 number's on the left-hand side at the bottom of the
15 page as opposed to the right-hand side, but it's page 6
16 of 21.

17 A. Page 6 of -- I've got it, yes, sir.

18 Q. And do you see -- well, first of all, is this
19 the first page of the ANSI patent policy guidelines?
20 You said there were two copies, but of this particular
21 copy that's attached --

22 A. Yes, sir.

23 Q. -- this is the first page of the guidelines?

24 A. This is the first page.

25 Q. And do you see at the bottom of that page the

1 heading Purpose?

2 A. Yes, I do.

3 Q. And do you understand this to be a statement of
4 the purpose of the ANSI patent policy guidelines?

5 A. I do, and it's a little bit broader than my
6 last answer. It also is -- it says that the purpose is
7 to provide guidance to those that participate in the
8 standards development process as well as to voluntary
9 standards developers.

10 Q. Could I ask you to read the first two sentences
11 of that statement of purpose appearing on the bottom of
12 page 6 of RX-1712?

13 A. "These guidelines are intended to assist
14 voluntary standards developers, and those that
15 participate in the standards development process, in
16 understanding and implementing the ANSI Patent Policy
17 (the 'Patent Policy' see Exhibit A). Drafted by a task
18 force formed by ANSI for the purpose of studying the
19 Patent Policy, the Guidelines seek to encourage the
20 early disclosure and identification of patents that may
21 relate to standards under development, so as to thereby
22 promote greater efficiency in standards development
23 practices."

24 Q. Thank you.

25 Now, there was a reference in the language you

1 read to a task force. Was that the same task force
2 that you served on?

3 A. Yes, sir.

4 Q. In the language you read, it also refers to the
5 ANSI patent policy. Is that something distinct from
6 the ANSI patent policy guidelines?

7 A. It is.

8 Q. And is the patent policy itself attached in any
9 part of RX-1712?

10 A. Yes, sir, the ANSI patent policy itself begins
11 on page 10 of 21 of RX-1712.

12 Q. Do you understand there to be a difference
13 between the patent policy and the patent policy
14 guidelines?

15 A. The guide -- yes, the guidelines are, as the
16 name implies, they're guidelines to assist in
17 interpreting the policy, so they are distinct.

18 Q. In the first sentence of the Purpose statement
19 on page 6 of RX-1712, the first sentence that you read,
20 it says that the guidelines are intended to assist
21 voluntary standards developers.

22 Do you see that language?

23 A. I do, yes.

24 Q. What do you understand the term "voluntary
25 standards developers" to mean?

1 A. It means organizations like EIA and JEDEC and
2 the sectors of EIA that develop standards on a
3 voluntary basis, as I've testified before.

4 Q. The second sentence that you read under the
5 heading Purpose states that the ANSI guidelines seek to
6 encourage "the early disclosure and identification of
7 patents that may relate to standards under
8 development."

9 Do you -- let me stop there. Do you see that
10 language?

11 A. Yes, sir, I do.

12 Q. Does the EIA/JEDEC patent policy, as you
13 understand it, also seek to encourage the early
14 disclosure and identification of patents that may
15 relate to standards under development?

16 A. Yes.

17 Q. And in this respect, to your mind as EIA's
18 general counsel, is the EIA/JEDEC patent policy
19 consistent with the ANSI patent policy guidelines?

20 A. It's entirely consistent, yes.

21 Q. Now, the same sentence in -- under the heading
22 Purpose on page 6 of RX-1712 goes on to suggest that
23 encouraging early disclosure of patents promotes
24 "greater efficiency in standards development
25 practices."

1 Do you see that language?

2 A. Yes, sir.

3 Q. Do you agree with that statement?

4 A. Yes, I do.

5 Q. How does, to your mind, as EIA's general
6 counsel, how does encouraging early disclosure of
7 patents promote greater efficiency in standards
8 development practices?

9 A. Because by -- by encouraging early disclosure
10 of patents and obviously in EIA's case also patent
11 applications, we get as much information, as I said
12 before, as early in the process as possible to allow it
13 to move forward expeditiously and efficiently without
14 concern about unknown, undisclosed patents that may
15 impede the work of the committee.

16 Q. Let's go to the top of page 7 of RX-1712. Do
17 you see the paragraph beginning, "By definition"?

18 A. Yes, sir.

19 Q. Let me read those two sentences.

20 "By definition, guidelines are suggestions --
21 adherence is not essential for standards developers to
22 be found in compliance with ANSI's Patent Policy.
23 Rather, this is an effort to identify possible
24 procedures that a standards developer may wish to
25 adopt, either in whole or in part, for purposes of

1 effectively implementing the Patent Policy. Additional
2 or different steps may also be selected for such

1 A. No, sir, there is a material difference between
2 the ANSI policy and the EIA/JEDEC policy, and that is
3 that the EIA/JEDEC policy requires the disclosure of
4 patent applications as well as issued patents.

5 Q. And do you --

6 A. ANSI does not -- I'm sorry, ANSI does not make
7 that requirement; that is, ANSI does not require as a
8 matter of policy the disclosure of patent applications.

9 Q. And do you refer to that distinction in your
10 email, your October 2000 email that is reprinted on the
11 first page of RX-1712?

12 A. Yes, sir, in the second paragraph.

13 Q. Can you -- can you read the language that
14 you're referring to?

15 A. "Please keep in mind that while the ANSI and
16 JEDEC patent policies are in most respects the same,
17 there are a few differences. One of --" it should be
18 the -- "major differences is that the ANSI policy does
19 not apply to pending patent applications, while the
20 JEDEC policy does."

21 Q. And how long has it been your understanding --
22 strike that.

23 How long have you understood that this
24 difference between the JEDEC patent policy and the ANSI
25 patent policy has existed?

1 A. Certainly since I started working on the ANSI
2 patent policy working group in -- probably in late
3 1990.

4 Q. Do you personally, as EIA general counsel, have
5 any understanding as to why, unlike the JEDEC/EIA
6 policy, the ANSI policy does not extend to patent
7 applications?

8 A. Well, I think I testified before why the
9 EIA/JEDEC policy does. It's because we're in a high
10 technology, fast-moving, fast-paced industry in terms
11 of product development and intellectual property, but
12 ANSI deals with a number of different industries,
13 and -- that's my answer.

14 Q. In your mind, is it inconsistent with the ANSI
15 patent policy guidelines for JEDEC and EIA to require
16 the disclosure of relevant patent applications?

17 A. No, based upon the language that I just read,
18 and there's also another provision later in the
19 guidelines that specifically carves out the possibility
20 that a standards development organization may wish to
21 at least consider including patent applications as well
22 as patents in their patent disclosure policy.

23 Q. Let me ask you to turn to page 8 of 21 of
24 RX-1712.

25 A. Yes, sir.

1 Q. Do you see the heading at the top of the page,
2 III, Possible Procedures for Implementing the Policy?

3 A. Yes, sir, I do.

4 Q. And do you see under that the heading A, Early
5 Disclosure of Patent Rights?

6 A. I do.

1 A. That's the most significant difference. I
2 can't offhand think of any other major differences.

3 Q. Has your understanding of the ANSI patent
4 policy or your understanding of how ANSI itself
5 interprets its patent policy changed in any way in the
6 time that you've been EIA general counsel?

7 A. Sometime in the last 12 months, yes, sir.

8 Q. Can you explain how your understanding of the
9 ANSI policy has changed?

10 A. In proposed testimony that I saw as a result of
11 being a member of the working group, I saw ANSI take a
12 position that the word "encourage" as used in the ANSI
13 patent policy and patent policy guidelines basically
14 means that a patent owner is not required to make
15 disclosure of its intellectual property, that
16 "encourage" is basically optional as opposed to
17 mandatory, and the first -- that is the first time I've
18 ever heard that opinion expressed.

19 Q. And again, where did you first see that opinion
20 expressed?

21 A. The proposed testimony related to hearings that
22 were held last year, joint hearings by the U.S.
23 Department of Justice and the Federal Trade Commission
24 on the -- I believe it was the intersection of the
25 convergence of intellectual property and antitrust.

1 Q. And how is it that you came to see that
2 proposed testimony?

3 A. As a member of the ANSI patent policy working
4 group, a draft was emailed to me, and I reviewed it,
5 and I noted the interpretation.

6 Q. Who was the author of that proposed testimony?

7 A. I'm sure there were several authors. The
8 testimony was to have been delivered or was R anteaanteby

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1 group.

2 Q. Forgive me if I mentioned this already, but who
3 is Ms. Marasco?

4 A. Ms. Marasco is the general counsel of the
5 American National Standards Institute.

6 Q. And what, if anything, do you recall saying to
7 Ms. Marasco about this issue when you spoke with her?

8 A. Well, I had -- I had one or two other points,
9 but on this particular issue, I said basically, Amy, I
10 don't --

11 MR. PERRY: Your Honor, I'm a little late, but
12 I object on the grounds of hearsay.

13 JUDGE McGUIRE: You object on the grounds of?

14 MR. PERRY: Hearsay, and I'm sorry I'm late.

15 MR. ROYALL: Your Honor, I'm not asking for
16 what Ms. Marasco said to him; I'm asking what he said
17 to Ms. Marasco.

18 JUDGE McGUIRE: Sustained on that basis, but I
19 don't want him getting into what she referred to him,
20 which is the point of your objection, I assume.

1 writing. I'm asking what his recollection -- present
2 recollection is of what --

3 JUDGE MCGUIRE: To the extent that he can -- he
4 will be allowed to testify as to his understanding of
5 what he had indicated to -- to this individual. I'll
6 hear the -- I'll hear the question and the answer.

7 MR. ROYALL: Thank you, Your Honor.

8 BY MR. ROYALL:

9 Q. What do you recall, if anything, saying to Ms.
10 Marasco on this issue; that is, if you have a personal
11 recollection of that?

12 A. Yes, sir, I do have a personal recollection,
13 and I can tell you just my side of the conversation.

14 I told her that I had never heard the
15 interpretation that was expressed in the draft
16 testimony before. I told her that it conveyed a false
17 impression that that was also the way ANSI-accredited
18 SDOs interpreted their own policies. And that was
19 basically what I had to say on that subject.

20 Q. Do you have any personal knowledge one way or
21 the other as to whether that aspect of Ms. Marasco's
22 proposed testimony was clarified?

23 A. No, it -- it remained unchanged from the draft
24 that I saw.

25 Q. When you spoke with Ms. Marasco on that

1 issue -- and again, I'm not asking you what she said --
2 were you speaking to her in your capacity as JEDEC's
3 president or as EIA's general counsel?

4 A. Well, primarily I was speaking to her in the
5 capacity in which she had contacted me, which is as a
6 member of the ANSI patent policy working group. I was
7 a member of the ANSI patent policy working group
8 because I was EIA general counsel.

9 Q. And in contacting her about this issue, did you
10 have some concern in mind? Did you have any particular
11 concern in mind about that -- the interpretation of
12 that language?

13 A. The one I just stated. I -- my position was to
14 her that ANSI can interpret the patent policy in any
15 way that ANSI and she sees fit. She is the ANSI
16 general counsel. But as far as it -- as her testimony
17 suggested that standard development organizations like
18 EIA agreed with that interpretation, I thought that a
19 clarification was necessary. She apparently didn't
20 agree, because her testimony remained unchanged.

21 Q. In describing JEDEC's and EIA's own policies,
22 to your knowledge, to your personal knowledge, have
23 either of those organizations ever referred to words
24 like "encourage" in describing their own policies?

25 A. Yes, we have.

1 Q. And by using the term "encourage," to your
2 knowledge, do EIA or JEDEC mean to convey that
3 compliance with the organization's policies is
4 optional?

5 A. No. As I think I testified earlier, compliance
6 with the policy is mandatory. It's not optional. The
7 entire process is voluntary, and as a voluntary
8 standards development organization, we really don't
9 have the power to -- to impose sanctions against
10 members who don't comply with the policy --

11 JUDGE McGUIRE: All right, he's answered that
12 question. I don't need to go back into that again. answered t

1 committee.

2 Q. Do the rules of either JEDEC or EIA require
3 members to search for relevant patents?

4 A. No.

5 Q. To your knowledge, have EIA or JEDEC ever
6 imposed a duty to search on member companies?

7 A. No.

8 Q. Do you have any understanding in your personal
9 knowledge as to why JEDEC and EIA do not impose a duty
10 to search on their members?

11 A. Because it would impose a very heavy burden on
12 the participating companies who have individual
13 participants at meetings to return after a meeting and
14 search their entire company portfolio to determine
15 whether or not the company, that is, not the
16 individual, whether the company has actual or imputed
17 knowledge of anything that may relate to the work of
18 the committee. That would -- in the case of a company
19 with a large patent portfolio, that would have a
20 devastating effect.

21 Q. To your mind, is the approach of not imposing a
22 duty to search consistent with the ANSI patent policy
23 guidelines?

24 A. Yes, sir.

25 Q. Do you recall whether there is language in

1 those guidelines that relates to this issue?

2 A. I'm sure there is.

3 Q. Let me ask you to look at page 8 of 21 of
4 RX-1712.

5 A. Yes, sir.

6 Q. Again, under the heading Early Disclosure of
7 Patent Rights, do you see that?

8 A. I do.

9 Q. Do you see the paragraph beginning with the
10 words, "This is not"?

11 A. Yes.

12 Q. Could I ask you to read that paragraph?

13 A. "This is not to suggest that a standards
14 developer should require any participant in the
15 development process to undertake a patent search of its
16 own portfolio or of any other."

17 Shall I continue?

18 Q. If you could read the next sentence.

19 A. "The objective is to obtain early disclosure
20 concerning the existence of patents, where known."

21 Q. And is this the language in the patent policy
22 guidelines that you were referring to just a moment ago
23 in response to my question?

24 A. Yes, sir.

25 Q. And what do you understand this language to

1 mean?

2 A. What I just said, but certainly also it
3 makes -- this language makes the point that it would
4 impose a great burden on the participant and process as
5 well to know all of the patents that may be back at the
6 home office, and that -- excuse me, would in turn
7 discourage rather than promote the early disclosure of
8 patents. That's why the requirement of disclosure --
9 the knowledge that's required to trigger the disclosure
10 duty is the knowledge of the participant sitting at the
11 meeting rather than what may be known back in the IP
12 office at company headquarters.

13 MR. ROYALL: Your Honor, at this time, before
14 moving on, I would offer this document, RX-1712.

15 MR. PERRY: No objection.

16 JUDGE McGUIRE: So entered.

17 (RX Exhibit Number 1712 was admitted into
18 evidence.)

19 BY MR. ROYALL:

20 Q. Mr. Kelly, under the JEDEC/EIA patent policy,
21 which member companies have a duty to disclose relevant
22 patents?

23 A. All participants in the work of the committee
24 have a shared responsibility to disclose any
25 information of which they have personal knowledge of

1 intellectual property that may relate to the working
2 committee. It's not limited to members, it's not
3 limited to the IP owner. It's across the board.

4 Q. Is the duty to disclose relevant patents and
5 patent applications limited to those companies that
6 sponsor presentations within JEDEC or EIA?

7 A. No, sir.

8 Q. Has it ever been limited in that way?

9 A. It has not.

10 Q. Is the duty to disclose relevant patents and
11 patent applications limited to companies that
12 participate in the voting at EIA or JEDEC meetings?

13 A. No, sir.

14 Q. Has -- to your knowledge, has it ever been
15 limited in that way?

16 A. It has never been limited in that way.

17 Q. Is the duty to disclose relevant patent and
18 patent applications limited to companies whose own
19 patents or patent applications may relate to the
20 standardization work being done by JEDEC or EIA?

21 A. No, it's the same answer, sir. It's never been
22 limited just to the patent owner. It applies across
23 the board to all participants with actual knowledge.

24 Q. And by that, do you mean that it would apply in
25 a case in which a company had knowledge of some other

1 company's relevant patent or patent application?

2 A. Not exactly. What my testimony would be, that
3 if a participant -- not a company, if a participant had
4 actual knowledge of another company's patents or patent
5 applications that might be required to comply with the
6 work undergoing at committee, then that participant
7 would be under a duty to disclose.

8 Q. In construing your rules in this way, to
9 require disclosure by all participants under these
10 circumstances, to your mind, are EIA and JEDEC
11 departing from the ANSI patent policy guidelines?

12 A. Not at all, no, sir.

13 Q. Do you recall whether the ANSI patent policy
14 guidelines contain language relating to this issue?

15 A. Again, I'm sure they do. I haven't read it
16 today, so I can't tell you whether or not it -- where
17 it is, but it is -- I believe it is there, yes.

18 Q. Let's go back to page 8 of RX-1712. Again,
19 under the heading Early Disclosure of Patent Rights, do
20 you see the paragraph beginning with the words, "A
21 standard developer may also"?

22 A. Yes, sir.

23 Q. Could I ask you to read the first sentence of
24 that paragraph?

25 A. "A standards developer may also consider taking

1 participant would need to disclose the patent number
2 and to make a proffer of how the issued patent or the
3 patented technology relates to the work of the
4 committee.

5 Q. When it's a patent application that's subject
6 to disclosure within an EIA or JEDEC committee, does
7 the member with the disclosure duty have to produce an
8 actual copy of the patent application itself?

9 A. Absolutely not, no.

10 Q. When it's a patent application that's subject
11 to disclosure, does the member have to disclose the
12 precise wording of the claims in the patent
13 application?

14 A. No.

15 Q. In construing JEDEC's and EIA's rules in that
16 way, to your mind, are EIA or JEDEC departing from the
17 ANSI patent policy guidelines?

18 A. No, sir.

19 Q. Do you recall whether the guidelines speak --
20 that is, the ANSI patent policy guidelines -- speak to
21 that issue?

22 A. Again, I believe that they do, but I haven't
23 looked at these recently in detail.

24 Q. If I could focus your attention again on the
25 same page, page 8 of RX-1712, again under the heading

1 Early Disclosure of Patent Rights, do you see the
2 paragraph with the words -- beginning with the word
3 "Similarly"?

4 A. Yes, sir.

5 Q. Could I ask you to read the first two sentences
6 of that paragraph?

7 A. "Similarly, a standards developer may wish to
8 encourage participants to disclose the existence of
9 pending U.S. patent applications relating to a standard
10 under development. Of course, in such a situation the
11 extent of any disclosure may be more circumscribed due
12 to the possible need for confidentiality and
13 uncertainty as to whether an application will mature
14 into a patent and what its claimed scope will
15 ultimately be."

16 Q. And is that the language of the ANSI patent
17 policy guidelines that you were thinking of?

18 A. Yes, particularly that second sentence. I know
19 I read the first one earlier but not the second. The
20 second sentence does capture it, yes, sir.

21 Q. Now, what about the suggestion here that
22 disclosure relating to patent applications might need
23 to be more circumscribed due to the "uncertainty of
24 whether an application will mature into a patent and
25 what its claimed scope will ultimately be."

1 Do you see that language?

2 A. Yes, sir.

3 Q. Under the JEDEC/EIA patent policy, where such
4 uncertainties exist, is a member permitted not to
5 disclose an otherwise relevant patent application?

6 A. No, sir. They are required to disclose, as I
7 said before, as much as they can as early as they can.

8 Q. Let's talk for a moment about how precisely the
9 duty of disclosure works within the JEDEC and EIA
10 patent policies, and let me ask you first, when it
11 comes to the basic duty to disclose relevant patents
12 and applications, is there -- is there any difference
13 in the wording of the JEDEC and the EIA patent
14 policies?

15 A. The duty to disclose patents and patent
16 applications today? Would you mind repeating the
17 question? I'm sorry.

18 Q. Let me try to focus you in on the period of
19 time.

20 In the early to mid-1990s, let's say --

21 A. Okay.

22 Q. -- when it came to the issue of the duty to
23 disclose relevant patents and patent applications, was
24 there in that time period of

1 MR. PERRY: Your Honor, I think this is
2 cumulative. The documents speak for themselves, and we
3 went through them.

4 JUDGE McGUIRE: Sustained.

5 BY MR. ROYALL:

6 Q. Let me go back to the issue of potential
7 uncertainty relating to whether a patent application
8 will issue as a patent and what claims may ultimately
9 be approved by the patent office.

10 Where such uncertainties may exist, is it
11 possible that the "may be required" language in the EIA
12 policies and the "might be involved in" standard that
13 we saw in the JEDEC policy would be applied
14 differently?

15 A. I think when you read those language -- when we
16 read that language, that is, the language of the EIA
17 policy, "may be required," and the language of the
18 JEDEC manual, "might be involved," consistent with the
19 overall duty of good faith, the result is the same,
20 although admittedly the language that JEDEC uses is
21 somewhat broader in its scope than the EIA language,
22 "might be involved" as opposed to "may be required."

23 Q. And you said earlier, I believe, that you
24 didn't believe during your tenure as EIA general
25 counsel that there had ever been a conflict between the

1 EIA and JEDEC policies. Does the difference in the
2 language relating to the duty to disclose not in your
3 mind create any conflict between the EIA and JEDEC
4 patent policies?

5 A. No, as I just said, I think it's slightly
6 different verbiage. Bottom line, same result.

7 Q. Now, in construing the rules in this way
8 relating to the duty to disclose, that is, in
9 construing those rules in a way that would require
10 disclosure in instances in which a patent or patent
11 application might be involved in or may be required by
12 standard or standards-related work, to your mind, are
13 EIA or JEDEC departing from the ANSI patent policy
14 guidelines?

15 A. No, sir.

16 Q. Let me -- do you recall whether the guidelines
17 speak to that issue?

18 A. Honestly, there, not offhand. I don't know.

19 Q. Let me ask you again to refer to the same page,
20 page 8 of RX-1712.

21 A. Okay.

22 Q. Under the heading, again, Early Disclosure of
23 Patent Rights, do you see the paragraph beginning with
24 the words, "A standards developer"?

25 A. Yes, sir.

1 Q. And I can read it, the first sentence of that
2 paragraph.

3 "A standards developer may also consider taking
4 steps to make it clear that any participant in the
5 process -- not just patent holder -- is permitted to
6 identify or disclose patents that may be required for
7 implementation of standard."

8 Do you see that language?

9 A. I do.

10 Q. Do you have any understanding personally as to
11 whether either EIA or JEDEC policy, to the extent that
12 those policies also refer to the "may be required"
13 standard, derive from or develop based on ANSI's own
14 policies?

15 A. The "may be required" language that we use in
16 connection with the EIA policy clearly derives from
17 this. The "might be involved" again has some different
18 source that I'm not familiar with. I was not involved
19 in drafting that language, but again, bottom line, the
20 result is the same.

21 Q. Under the EIA/JEDEC patent policy, are there
22 some circumstances in which disclosure of relevant
23 patents or patent applications is absolutely required
24 and other instances in which disclosure of relevant
25 patents and patent applications is a more judgmental

1 matter?

2 A. I know what you're driving at, and this came up
3 in a number of my depositions --

4 JUDGE McGUIRE: Well, I'm not sure I do.

5 MR. ROYALL: I can restate it if you like.

6 JUDGE McGUIRE: Yes, could you restate that?

7 MR. PERRY: Your Honor, as long as he's
8 restating it, could we make clear it's his
9 understanding we're talking about?

10 MR. ROYALL: Sure.

11 BY MR. ROYALL:

12 Q. Mr. Kelly, in your understanding of the EIA and
13 JEDEC patent policies, in instances in which a company
14 participating has a relevant patent or patent
15 application, are they absolutely required to disclose
16 in all instances, or are there -- is there some -- only
17 some subset of instances in which they would be
18 required or absolutely required to disclose the
19 relevant patent or patent applications?

20 A. If I understand your question, any time a
21 participant has knowledge of relevant intellectual
22 property, patent or patent application, that is or may
23 be required to comply with the work underway, then that
24 participant has an absolute duty to disclose it.

25 JUDGE McGUIRE: Okay, Mr. Royall, it seems to

1 A. Yes, the participant needs to exercise some
2 judgment certainly given the fact that the goal is
3 early disclosure. It may not be -- you know, there's a
4 gray area there where, to put it this way, the standard
5 is evolving, their IP may be evolving, and the question
6 is, is there a sufficient relationship between the
7 IP -- if this is what you're driving at -- the IP and
8 the work of the committee to trigger that duty to
9 disclose?

10 So, there's a -- there's an area of judgment,
11 and the area of judgment is probably more apparent
12 earlier in the process and less apparent later in the
13 process, and in theory -- again, if this is what you're
14 driving at, and I thought it was where you were
15 going -- at some point when there's an issued patent
16 and the work of the committee is complete, the
17 judgmental area becomes much narrower, and there may,
18 in fact, be very little judgment involved by the
19 participant in whether they have sufficient knowledge
20 to trigger the duty to disclose.

21 But again, the emphasis is on getting as much
22 information out as early as possible, and very frankly,
23 I don't -- you know, I think that's a -- that's for the
24 good of everyone concerned, so I can't see the
25 objection to doing that.

1 Q. When you say that judgment is involved in
2 complying with the JEDEC/EIA patent policy, by that do
3 you mean that members or participants are free not to
4 disclose even in instances in which they subjectively
5 know or believe that their patents or patent
6 applications relate to the committee's work?

7 A. No, because again, as I testified to -- this is
8 somewhat cumulative -- earlier, that overriding this
9 whole process is a duty to act in good faith. So,
10 regardless of their subjective beliefs, if those
11 beliefs are not held in good faith, then they're in
12 violation of the good faith portion of the Legal Guides
13 and the overriding principles that govern our
14 activities.

15 If the -- in good faith, if they cannot say
16 that they have enough information to be able to say
17 that their technology is or may be required to comply
18 with the ongoing work of the committee, then clearly
19 they haven't reached that point yet where there's a
20 duty to disclose. If, on the other hand, in good faith
21 they have reached that point where they can say, yeah,
22 I can see that there's enough relationship here that I
23 should be disclosing something, then clearly they ought
24 to be disclosing.

25 Q. In the manner in which you understand the

1 EIA/JEDEC patent policies to apply, to the extent
2 knowledge and belief comes into play, whose knowledge
3 or belief is it that matters, the member company or the
4 individual participant in the process?

1 application?

2 A. You mean formal activity in the sense that
3 there is a pending proposal or a pending suggestion for
4 standardization?

5 Q. Well, let's -- let's start there.

6 A. Okay, no. If there is any suggestion that the
7 committee's work should move in a certain direction or
8 any information that's presented with that as the -- as
9 the intent, then the duty to disclose arises. It's not
10 tied to a formal step in the process if that's what
11 you're driving at.

12 Q. Okay, just to be clear, for a duty to disclose
13 to arise, is it necessary that the standardization
14 process has reached the stage of a final ballot?

15 A. Absolutely not.

16 Q. For a duty to disclose to arise under JEDEC's
17 or EIA's rules, is it necessary that any kind of
18 standards-related vote has occurred or has been
19 scheduled to occur?

20 A. No, sir.

21 Q. Are you familiar with the terms "first
22 presentation" or "first showing" as they are sometimes
23 used in reference to JEDEC's process?

24 A. I am aware that JC-42 follows a process that
25 includes those procedural steps, yes. I don't know in

1 detail what those steps involve, but I know that there
2 are steps.

3 Q. Well, as you understand the JEDEC/EIA patent
4 policy as applied to the activities of that portion of
5 JEDEC, for a duty to disclose relevant patents or
6 patent applications to arise, does the standards work
7 have to have reached the stage of a first presentation
8 or first showing?

9 A. No, sir, it's a -- again, it's as early as
10 possible. It's not tied to any procedural formality in
11 the process at all.

12 Q. Under JEDEC's and EIA's rules, once a standard
13 has been finalized and adopted, do members have a
14 continuing duty to disclose patents or patent
15 applications relevant to the final standards?

16 A. Yes, they do.

17 Q. What if the member doesn't learn of the patent

1 A. The same information as they would be if they
 2 were sitting in the room and this was just a general
 3 suggestion that perhaps the committee should move in
 4 the direction of a technology early on in the process.
 5 It's to disclose as much information as possible as
 6 early as possible. And I won't repeat my prior
 7 testimony, but that's basically it.

8 Q. And do you -- do you have knowledge as to
 9 whether either EIA's or JEDEC's rules expressly refer
 10 to this duty to disclose as it relates to already
 11 adopted standards?

12 A. I believe they do, yes.

13 Q. If I could ask you to take a look at -- and we

go back backwards?)TjA. I bes basically it.

25

I'm sorru, i. A ita Q. Anot lofirggebulle e infor3.03on as they would b

1 point.

2 A. I think it's the third bullet.

3 Q. The third bullet point, I'm sorry.

4 Is that the language you had in mind?

5 A. Yes, sir.

6 Q. And does that portion of JEDEC's rules to your
7 understanding as EIA's general counsel relate to both
8 patents and patent applications, or is it limited only
9 to patents?

10 A. It's patents and patent applications, and I
11 think, in fact, earlier in the policy it refers to
12 patents -- maybe it doesn't. No, it certainly does
13 apply in this context to both of them.

14 Q. Now, again, focusing --

15 A. I'm sorry, it does. In the first bullet
16 there's a reference to "pending or existing patents."
17 I'm sorry.

18 Q. And under the --

19 A. I'm skipping bullets.

20 Q. Yes, in the third bullet point, the one that we
21 were focusing on, does it refer to patent applications?

22 A. It doesn't specifically, but again, I think
23 that's just simply because it doesn't roll off the
24 tongue to say "patent and patent applications" every
25 time you mention patents.

1 Q. Now, referring again to this same Appendix F,
2 now let me ask you to focus on the first bullet point,
3 and I'll -- I'll read that one sentence.

4 "Committee discussion of pending or existing
5 patents is a permissible activity and is encouraged
6 when the committee feels that the patented item or
7 process represents the best technical basis for a
8 standard."

9 Do you see that?

10 A. I do.

11 Q. And what do you understand that language to
12 mean?

13 A. Again, I think I testified this morning that
14 that is the basis on which the committee can consider
15 pending or existing patents. Although it may not be

1 A. Yes, sir.

2 Q. And that discussion of future plans as
3 described in the EIA Legal Guides was prohibited, was
4 it not?

5 A. Yes, sir.

6 Q. Do you see any tension between this provision
7 in Appendix F of the 21-I manual, CX-208, and the
8 prohibition of discussion of future plans in the EIA
9 Legal Guides?

10 A. No, the future plans, if you want to go back
11 and look at those, the future plans that were referred
12 to in the EIA Legal Guides are discussions that could
13 result in conduct prohibited by the antitrust laws.
14 What we're talking about here is a standardization
15 activity, and I think since the 1920s and perhaps
16 earlier the U.S. Supreme Court has said that properly
17 conducted standards activities benefit the consumer --
18 benefit the public and the public interest, and I don't
19 see that there's any tension there at all. I think
20 they happen to be very consistent.

21 MR. ROYALL: Your Honor, we have been going for
22 a while. I do have more material to cover, but if you
23 would like to take a break, maybe this would be a time
24 to take a break.

25 JUDGE McGUIRE: Let's take a five-minute break,

1 and while we're on the topic, how much more time do you
2 think you're going to have to complete your examination
3 on direct?

4 MR. ROYALL: I would expect to be finished by
5 6:00, no later than 6:00, or I could come back and
6 finish up in the morning with a few more questions.

7 JUDGE McGUIRE: Well, I want to be sure that
8 we're going to conclude with him by the end of the day
9 on Thursday. Now, if counsel can give me their
10 assurance that that's going to happen, we could go for
11 another, you know, hour or so and then cut off for the
12 day, as long as -- I don't want to be here at this time
13 tomorrow and still have three or four more hours ahead
14 of us, so --

15 MR. PERRY: Your Honor, if he will give me the
16 witness at 10:30 or earlier, we'll be done tomorrow.

17 JUDGE McGUIRE: All right, Mr. Royall, can we
18 have that assurance?

19 MR. ROYALL: I think that will be fine. I --
20 if we start at 9:30 tomorrow --

21 JUDGE McGUIRE: Yeah, we will start in the
22 morning at the same time, 9:30. If we go today until
23 5:00, will that give you time today and then an hour in
24 the morning? Or 5:30 if 6today and (thee)T 15 by

1 could go potentially to 5:20, 5:30, depending when a
2 good stopping point comes, sure.

3 JUDGE McGUIRE: Okay, let's try to be out of
4 here by 20 after 5:00 today so that some of us who have
5 to catch our own rides back home can do so, and --

6 MR. ROYALL: Okay.

7 JUDGE McGUIRE: -- then tomorrow we'll start
8 again with you, and then we will -- with the
9 expectation that you'll conclude by 10:30 in the
10 morning.

11 MR. ROYALL: Yes, Your Honor.

12 The one thing I would say, just to -- so I can
13 make this clear, Mr. Perry said right before the lunch
14 break that -- made a reference to possibly calling Mr.
15 Kelly back in their case. One thing I would say about
16 that is we generally had hoped to avoid having
17 witnesses recalled, and in Mr. Kelly's case in
18 particular, my understanding is with his work schedule
19 and travel schedule in July, he may or may not be
20 available.

21 So, all I would say is that to the extent
22 that -- given obviously the broad nature of my direct,
23 given the extent that Mr. Perry can cover whatever
24 questions they have of Mr. Kelly in cross examination
25 to avoid recalling him, we would certainly appreciate

1 your capacity as EIA's general counsel, but in that
2 capacity and based on your own understanding, when a
3 member company within EIA or JEDEC has a duty to
4 disclose relevant patents or patent applications under
5 the rules, can a member avoid the duty to disclose by
6 simply withdrawing from the organization?

7 A. No, sir. If I understand your question, you're
8 asking me if there's an existing duty to disclose, can
9 you leave the organization and thereby avoid that duty?
10 No.

11 Q. If a member in that situation were to withdraw
12 without disclosing a relevant patent or patent
13 application, would it be a violation of the JEDEC/EIA
14 patent policy, as you understand the policy?

15 A. Well, actually, the violation would occur at
16 that time there was knowledge that triggered the duty
17 to disclose, and that would have been in your example
18 before the withdrawal. So, that was when the violation
19 occurred. When there was that combination of knowledge
20 coupled with a duty, that's when the disclosure should
21 have happened. The withdrawal itself, if it was
22 motivated by bad faith, would certainly violate the
23 Legal Guides.

24 Q. And what portion of the Legal Guides are you
25 referring to?

1 A. I think it was that section that said you have
2 an obligation to act in good faith, that our
3 proceedings need to be conducted in good faith.

4 Q. If a member that had a duty to disclose a
5 relevant patent or patent application were to make
6 patent-related disclosures at the time of withdrawing,
7 what information, if any, would the member need to
8 disclose in order to comply with the rules?

9 A. The same as if they disclosed prior to that
10 time. It's -- the duty would be the same, so it would
11 be to disclose enough information to identify the
12 technology, either the patent application or the
13 patent, and its relationship to the standard, to the
14 work of the committee under development.

15 Q. Under the JEDEC/EIA patent policy, if a member
16 company intends to amend a patent application in a way
17 that relates to JEDEC's or EIA's work, would the member
18 in that situation have a duty to disclose the future
19 intention or future plan to amend as you, as the
20 general counsel, would interpret the rules?

21 MR. Pon to E. C. Yes? n ov T* Honor t popt w

1 MR. ROYALL: Your Honor, Mr. Kelly has
2 explained that he provides the authoritative
3 interpretations of the rules and has been posed
4 questions by JEDEC members and staff members and
5 others, and I'm simply trying to explore his
6 understanding of the rules.

7 JUDGE McGUIRE: Overruled. Proceed.

8 BY MR. ROYALL:

9 Q. Mr. Kelly, let me restate the question.

10 In your capacity as EIA general counsel and as
11 you understand the EIA/JEDEC patent policies, if a
12 member company intended to amend a patent application
13 in a way that relates to JEDEC's or EIA's work, would
14 the member have a duty to disclose its future intention
15 or future plan to amend?

16 A. Not the future plan, as such, but if their
17 present interpretation of their patent was broad enough
18 to support future amendments, that -- and the patent
19 itself was broad enough to relate to the work of the
20 committee, then that triggers the obligation to

1 A. The same answer, at the time there was
2 knowledge of the relevant IP and its relationship to
3 the work of the committee.

4 Q. As you understand and apply the rules as EIA's
5 general counsel, does the JEDEC/EIA patent policy
6 prohibit member companies from amending their pending
7 patent applications based on information that they gain
8 through attendance of JEDEC or EIA meetings?

9 A. No, not absolutely, no.

10 Q. Has that issue ever been raised to your
11 attention?

12 A. It has come up within the last few years, yes.

13 MR. ROYALL: May I approach, Your Honor?

14 JUDGE McGUIRE: Go ahead.

15 BY MR. ROYALL:

16 Q. Mr. Kelly, I have just handed you what's been
17 marked for identification as CX-2608. Do you recognize
18 this document?

19 A. Yes, sir, this is a three-page letter that was
20 sent to me in February 2001 by Bob Goodman, who was and
21 is the chief executive officer of a company called
22 Kentron Technologies.

23 Q. Do you see the handwriting at the top right
24 corner of the first page of CX-2608?

25 A. Yes, sir.

1 Q. Do you recognize that handwriting?

2 A. I do not.

3 Q. Does that relate to the issue I asked you about
4 a moment ago; that is, the question of whether the
5 JEDEC/EIA patent policy prohibits member companies from
6 amending their pending patent applications based on
7 information gained through attendance of JEDEC or EIA
8 meetings?

9 A. This is the situation I was referring to that
10 came up at the last few years, yes, sir.

11 Q. Can you explain very generally what you recall
12 about this incident or the nature of the incident?

13 A. As I understand it, Kentron Technologies
14 disclosed that they had relevant intellectual property
15 in connection with the work of the JC-42.5 committee on
16 memory modules, and one of the members of that
17 committee, who I believe was Desi Rhoden -- we have
18 mentioned him before -- asked Kentron to commit that
19 they would not amend their patent application, I
20 suppose, based upon any information that they learned
21 at the committee, and apparently even went further and
22 basically asked the company to freeze its pending
23 patent so as to -- so as not to amend it in any way
24 going forward.

25 Q. And after receiving this letter from Mr.

1 Goodman, did you speak with Mr. Goodman?

2 A. I did, by telephone, yes.

3 Q. And do you recall what you told him?

4 A. First of all, I told him that it was
5 inappropriate for Mr. Rhoden to put the company on the
6 spot at a meeting in that fashion, and I also said I
7 disagreed that it was appropriate for Mr. Rhoden to
8 assume by his questions that Kentron had engaged in any
9 kind of improper or untoward activity.

10 Q. Let me ask you to focus on the second page of
11 CX-2608.

12 A. Certainly.

13 Q. And in particular, the fourth bullet point at
14 the bottom of the page.

15 A. Yes, sir.

16 Q. It states -- it states there, "Kentron believes
17 that it was clearly not professional, perhaps not
18 ethical, and possibly in violation of the United States
19 Patent Law and the JEDEC guidelines for JEDEC senior
20 management to attempt to force a member company, in
21 front of the rest of the members, to release its claims
22 of a yet to be issued patent and to force a member
23 company to freeze its claims from any," underscored,
24 "future modification."

25 Do you see that language?

1 A. Yes, sir, I do.

2 Q. First of all, is this your understanding of
3 what, in fact, happened in this case?

4 A. No, I -- again, based upon my telephone
5 conversation with Mr. Goodman and my conversation
6 subsequent to receiving this letter with Mr. Rhoden, it
7 was unclear what happened factually. What was clear
8 was what I indicated to Mr. Goodman in my conversation,
9 that Mr. Rhoden should not have put him on the spot or
10 assumed by his questions that Kentron had done anything
11 improper.

12 Q. Did Kentron confirm, to your knowledge, that
13 they would not amend their patent applications based on
14 information learned at JEDEC meetings?

15 MR. PERRY: Objection, hearsay.

16 THE WITNESS: The letter speaks to that -- I'm
17 sorry.

18 JUDGE McGUIRE: Just a second.

19 Sustained.

20 BY MR. ROYALL:

21 Q. Not referring to the language in the letter,
22 Mr. Kelly, but based on what you understand Mr. Goodman
23 to have conveyed to you in your phone conversation, do
24 you recall one way or the other whether he confirmed
25 that Kentron did not intend to amend its patent

1 applications based on information learned at JEDEC
2 meetings?

3 MR. PERRY: Objection, Your Honor, hearsay.
4 The hearsay rule prohibits you from saying here's what
5 the other fellow said, even if you preface it with what
6 you understand he said during that phone call. I
7 just --

8 JUDGE McGUIRE: Sustained, Mr. Royall.

9 MR. ROYALL: I'm asking -- just to be clear,
10 I'm asking for his state of mind and his understanding,
11 Your Honor. I'm not submitting that what he
12 understands reflects the truth. Mr. Kentron (sic) will
13 be a witness later in our case and he can testify as to
14 that.

15 JUDGE McGUIRE: Well, I have ruled on the
16 objection. It's sustained. Now, if you can phrase it
17 some other way, you can have that chance.

18 MR. ROYALL: Okay, thank you, Your Honor.

19 BY MR. ROYALL:

20 Q. Let me ask you, Mr. Kelly, to focus on the
21 first bullet point on the same page, page 2 of CX-2608.
22 Do you see that?

23 A. Yes, sir.

24 Q. And that language states, "Kentron firmly
25 believes that taking information learned after the fact

1 from any association's activities and incorporating
2 that information into existing claims of a pending
3 patent is not only unethical but also illegal. Kentron
4 has not done this and will not do this." The last
5 sentence beginning with "Kentron" is underscored.

6 Do you see that language?

7 A. Yes, I do.

8 Q. Do you recall whether when you spoke with Mr.
9 Goodman after receiving this letter whether you -- I'm
10 not asking for what he said -- but whether you
11 commented on that language in his letter?

12 A. At that time, not specifically, I do not recall
13 if I commented about it. Again, I was -- I was more
14 focused on the propriety of Mr. Rhoden's behavior than
15 on Kentron's position.

16 Q. After receiving Mr. Goodman's letter, do you
17 recall whether you responded in writing to his letter?

18 A. I know I did, yes.

19 MR. ROYALL: Your Honor, may I approach?

20 JUDGE McGUIRE: Yes.

21 THE WITNESS: Thank you.

22 BY MR. ROYALL:

23 Q. I've just handed you, Mr. Kelly, what's been
24 marked for identification as CX-2610.

25 A. Yes, sir.

1 Q. Do you recognize this document?

2 A. This is the letter I referred to just a moment
3 ago that I wrote in response to my conversation with
4 Mr. Goodman and his letter.

5 Q. And if I could focus your attention on -- to
6 the language at the bottom of the second paragraph of
7 the letter, do you see the sentence beginning "Nor"?

8 A. Yes, sir.

9 Q. And that sentence reads, "Nor does JEDEC have
10 any reason to believe that Kentron has violated JEDEC's
11 rules and procedures or otherwise acted improperly in
12 connection with its participation in the JC-42.5
13 Committee."

14 Do you see that language?

15 A. I do, yes, sir.

16 Q. Now, when you made that statement in this April
17 27, 2001 letter to Mr. Goodman, was that statement
18 predicated on any understanding in your own mind as to
19 whether Kentron intended to amend patent applications
20 based on information learned at JEDEC meetings?

21 A. My understanding was that they were committed
22 not to make amendments based upon any information first
23 learned at JEDEC meetings.

24 Q. If Kentron had been doing that, that is, if it
25 had been attending JEDEC meetings and amending its

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- 1 patent applications based on information first learned
- 2 at JEDEC meetiYharned

1 right?

2 A. That's correct.

3 Q. Is JEDEC equally insistent upon written
4 communications when it comes to the disclosure aspect
5 of JEDEC's patent policy as opposed to the licensing
6 assurances part of the policy?

7 A. No, the disclosure can be made live, in real
8 time, on the spot and should be, wherever possible.

9 Q. So, if a company has a patent or patent
10 application that is subject to disclosure, as you
11 understand the policy as EIA's general counsel, can
12 that company fully comply with its disclosure
13 obligation by providing an oral explanation to the
14 relevant EIA or JEDEC committee?

15 A. If the explanation includes identification of
16 the technology and how it relates to the work of
17 committee, yes.

18 Q. And again, as you understand the policies, why
19 is it that JEDEC and EIA, by contrast to the licensing
20 assurances which are required to be in writing, does
21 not insist upon written communication when it comes to
22 patent-related disclosures?

23 A. Well, there are a couple of reasons, if I can.
24 The first is we're doing everything we can in our
25 process to encourage early disclosure, early. That

1 means at that moment, if the participant knows that
2 they have relevant technology and are comfortable
3 revealing it at that moment, they should pop up at that
4 moment and say, we have something that may relate to
5 the work of the committee.

6 We don't want to discourage that by forcing
7 them to go back to company headquarters and clearing
8 the disclosure. They can make the disclosure on the
9 spot and should if it's at all possible.

10 As far as the -- as far as the licensing
11 assurances go, we want the company -- the commitment of
12 the company, not the commitment of the participant, and
13 that of necessity requires that there be something in
14 writing on company letterhead signed by an official
15 with the authority to bind the company.

16 Q. In a case in which a member company or their
17 participant in an EIA or JEDEC committee orally
18 discloses a patent or patent application that is
19 relevant to the committee's work and then follows up by
20 sending a letter making disclosures in writing, would
21 the company or participant in that situation be going
22 beyond what JEDEC's and EIA's rules actually require as
23 you understand them?

24 A. Yes, that would be an extra step.

25 Q. And to your knowledge, has that ever happened

1 before?

2 A. It happens frequently, and ordinarily the
3 context in which that happens is there will be an oral
4 disclosure at a meeting, followed by a licensing
5 assurance letter, which will repeat the disclosure and
6 then also include the assurances.

7 Q. To be clear, does it often happen that after
8 giving an oral disclosure about relevant patents or
9 patent applications, that there then is subsequently a
10 letter, a written letter giving only that same
11 information relative to the disclosure of the patent or
12 patent application?

13 A. No, the answer to that question is no, there
14 would not ordinarily be a repetition of the disclosure
15 alone in -- in writing. It would be the disclosure
16 plus the assurances.

17 Q. In instances in which JEDEC's rules or EIA's
18 rules have been violated due to late disclosure or
19 nondisclosure of relevant patents or applications,
20 what, if any, actions can JEDEC or EIA take to address
21 the problem?

22 A. We can and I can speak with the company
23 involved or the company representative. I could I
24 suppose send a letter to the company indicating our
25 displeasure that they failed to abide by the rules.

1 This all, again, assumes that we detect a violation of
2 the rules and the facts are sufficiently clear to
3 identify it as such, but assuming those facts, I
4 could -- we could write to the company and say we're
5 very disappointed in your behavior.

6 What we couldn't do is to impose sanctions
7 against the company, because -- and I think this is
8 probably true throughout EIA, but certainly in JEDEC --
9 participation in a JEDEC standard-setting activity
10 confers a significant competitive advantage on the
11 participants, and were we to act in a way that would
12 deny them that competitive advantage, EIA and JEDEC
13 would be subject to lawsuits for violation of the
14 antitrust laws ourselves.

15 So, as a practical matter, there is very little
16 we can do other than a slap on the wrist to enforce
17 these rules, which again goes to the -- what I've been
18 talking about previously, the voluntary nature of the
19 whole process.

20 Q. In an instance in which relevant patents or
21 patent applications have not been disclosed and you do
22 learn about it and it is sufficiently clear that there
23 is a violation of the rules, could JEDEC or EIA respond
24 by rescinding the standard that's at issue if, in fact,
25 it's been finally adopted?

1 A. Yes, of course. I was referring earlier to
2 what we could do with respect to the nondisclosure by
3 the participant or by the company.

4 In terms of withdrawing the rule -- withdrawing
5 the standard, of course we could withdraw the standard.

6 Q. And to your knowledge, has that ever happened
7 before during your tenure with EIA or JEDEC?

8 A. Yes, sir, it has.

9 Q. And to be clear, when you say it has happened,
10 do you mean that a standard that's been finally adopted
11 has been rescinded or that there's been some vote to
12 do -- to do that?

13 A. I'm trying to remember the exact facts, and I
14 can't recall if the issue was disclosure or the
15 assurances, but a fact came to light after the issuance
16 of a standard relating to noncompliance with the patent
17 policy, and it may have been the assurance requirement,
18 and the standard was withdrawn, yes.

19 Q. Was that within JEDEC or some other part of
20 EIA?

21 A. I believe it was within JEDEC, and I'm trying
22 to remember the company. I think it was Micron
23 Electronics, and at this moment, I can't remember the
24 name of the -- the nature of the standard, but I think
25 the company was Micron Electronics.

1 Q. Are there circumstances in which rescission of
2 a standard in your view as EIA's general counsel would
3 not be a practicable method for dealing with this type
4 of situation?

5 A. Yes.

6 MR. PERRY: No foundation. I think he's about
7 to launch into some engineering stuff, and he's a
8 lawyer. I don't think there's any foundation for this.
9 If I'm wrong, I apologize.

10 JUDGE McGUIRE: Well, if you're wrong, I'll let
11 you know.

12 MR. ROYALL: I had no intention of asking any
13 engineering-related questions of the witness.

14 JUDGE McGUIRE: All right, just a second.
15 Overruled.

16 BY MR. ROYALL:

17 Q. Do you have the question in mind, Mr. Kelly?

18 A. Yes, I do, and the issue has come up at least a
19 few times of late, within the last two or three years.
20 I can recall two specific instances relating to package
21 outlines where after the outline was issued, there was
22 disclosure that there was relevant IP, and we had to
23 consider whether or not we could withdraw the package
24 outline, because the industry had already tooled to and
25 started manufacturing in accordance with the in this

1 case package outline, and it would have caused enormous
2 disruption in the industry to have withdrawn an
3 existing outline.

4 Q. And what, if anything, was the result in that
5 instance?

6 A. Let me think, it's been a while.

7 In the first case, notwithstanding the
8 disruption, we withdrew the outline, and we gave -- I'm
9 trying to remember exactly the details of it, and I
10 can't frankly, because I haven't really thought about
11 it since until this moment.

12 The next case is still under review, and there
13 the facts are less than clear, because there's a debate
14 between the patent owner and another company as to
15 whether or not the patent is, in fact, related to the
16 outline.

17 Q. And as JEDEC is currently constituted, would
18 decisions of that sort be made by the JEDEC board or
19 some other committee?

20 A. The technical determinations would be made by
21 the committee itself, and the legal determination,
22 assuming we ever get that far, is made by me.

23 Q. In your view as EIA's general counsel, do
24 either JEDEC or EIA have an interest in punishing or
25 deterring violations of their patent disclosure rules?

1 MR. PERRY: Objection, compound.

2 MR. ROYALL: I can break it down if you'd like.

3 JUDGE McGUIRE: Sustained. Go ahead.

4 BY MR. ROYALL:

5 Q. Mr. Kelly, in your position as EIA general
6 counsel, do either JEDEC or EIA have an interest in
7 deterring violations of the organization's patent
8 disclosure rules?

9 A. Well, as I said before, other than reprimanding
10 the company involved, there's very little we can do
11 ourselves to deter violations of the rules. If the
12 question is broader than I think -- and I think it is,
13 that's the way I understand your question -- we
14 definitely have an interest in making sure that
15 violations of the rules, when they're detected and
16 proved, are dealt with in a way that ensures the
17 ongoing integrity of our process, yes.

18 Q. And from EIA's or JEDEC's standpoint, is the --
19 in your view as EIA general counsel, is the potential
20 to rescind a standard an adequate means of deterring
21 violations of the organization's disclosure rules when
22 they occur?

23 MR. PERRY: Hypothetical, Your Honor,
24 objection.

25 MR. ROYALL: Can I respond?

1 JUDGE McGUIRE: Yes.

2 MR. ROYALL: I -- it's -- I don't regard it as
3 a hypothetical. I'm asking for his views as EIA's
4 general counsel, and again, under Rule 701, he should
5 be entitled to elaborate on his views given his
6 position.

7 JUDGE McGUIRE: Well, I know he can testify to
8 his personal knowledge, but again, I think you are
9 asking him a hypothetical, so sustained.

10 BY MR. ROYALL:

11 Q. You mentioned earlier, Mr. Kelly, that there's
12 a limit to how much JEDEC or EIA can do to punish
13 violations of their patent policies. Given that that's
14 the case in the manner that you've described, how are
15 the organization's rules and the patent laws in
16 particular enforced?

17 A. Obviously they're enforced through honest, good
18 faith, voluntary compliance by the members, which is
19 more often -- and the participants, which is more often
20 than not the case. And failing in that, then they're
21 enforced through civil litigation between the affected
22 parties, which has happened more than I would like.
23 And finally, they can be enforced by federal regulatory
24 agencies like the Federal Trade Commission as well as
25 state agencies.

1 Q. And do you as EIA's general counsel have any
2 views regarding the appropriateness of government
3 agencies like the FTC pursuing claims based in part on
4 allegations that members of your organization have
5 violated your organization's rules?

6 MR. PERRY: Objection, irrelevant, calls for
7 opinion, calls for speculation.

8 JUDGE McGUIRE: Sustained.

9 MR. ROYALL: May I approach, Your Honor?

10 JUDGE McGUIRE: Yes.

11 BY MR. ROYALL:

12 Q. Mr. Kelly, I've just handed you what's been
13 marked for identification as RX-669. Do you recognize
14 this document?

15 A. Yes, sir.

16 Q. And can you explain what it is?

17 A. This is a document that was prepared by Dan
18 Bart and the outside counsel for the Telecommunications
19 Industry Association, Mr. Paul Vishny, which I also
20 reviewed, and my name appears along with theirs on the
21 last page. It -- these are comments which we filed
22 with the Federal Trade Commission in 1996 on the
23 proposed consent decree in the Dell Computer case.

24 Q. Did you write this letter?

25 A. No, sir. I may -- I may have made minor --

1 very minor changes in it, but I did not compose it, no.

2 Q. And what did you understand to be the purpose
3 of this letter?

4 A. The purpose of this letter was to express the
5 support of the Electronic Industries Association, for
6 which I was responsible, and the Telecommunications
7 Industry Association, for which Mr. Bart and Mr. Vishny
8 were responsible, with respect to the proposed consent
9 decree in Dell.

10 Q. Was this letter written specifically on behalf
11 of JEDEC?

12 A. No, it was not. It was written on behalf of --
13 again, by Mr. Bart on behalf of EIA and TIA and
14 reviewed by me on behalf of EIA.

1 A. Yes, sir.

2 Q. Now, in that sentence, how do you understand or
3 could you explain how you understand the term
4 "essential patents" or what you understand that to
5 refer to?

6 A. Yes, "essential patents" is a term that is used
7 in the TIA intellectual property rules, and the way I
8 interpret it, since this is a letter from both
9 organizations, which are both separately incorporated,
10 separately accredited, is the way I've testified
11 earlier; that is, patents that are -- patents or patent
12 applications that are or may be required.

13 Q. And in the same sentence, what do you
14 understand the term "voluntary consensus standards" to
15 mean?

16 A. Again, without being overly repetitious,
17 voluntary means voluntary in terms of the participation
18 of companies in the process and their compliance with
19 the standard that issues at the end of the process.
20 Consensus means that the standards are based upon an
21 industry consensus to move forward with the
22 promulgation of the standard.

23 Q. Just below that sentence, do you see the
24 heading Allowing Patented Technology and Standards is
25 Pro-Competitive?

1 A. Yes, sir.

2 Q. What do you understand this statement to mean
3 in the context in which this January 1996 letter used
4 those words?

5 A. Under the conditions that I addressed earlier,
6 that is, when the patented technology is disclosed,
7 it's disclosed early, and the licensing assurances have
8 been provided, and it represents the best technological
9 approach to EIA, including patented technology in
10 standards or allowing inclusion can be pro-competitive.

11 Q. And does that mean that EIA and TIA have a bias
12 in favor of using patented technologies as opposed to
13 nonpatented technologies?

14 A. Only under the conditions I mentioned earlier,
15 when it's the best technological approach subject to
16 compliance with the patent policy.

17 Q. Turning to the next page of the letter, page 3
18 of 5 of RX-669, do you see the first full paragraph
19 beginning with the word "Both"?

20 A. Yes, sir.

21 Q. And the first sentence of that paragraph
22 states, "Both EIA and TIA encourage the early,
23 voluntary disclosure of patents that relate to the
24 standards in work."

25 Do you see that?

1 A. Yes, sir.

2 Q. And can you explain what you mean by that
3 language, and in particular, if you could explain how
4 you understand the term "voluntary" as used in that
5 sentence?

6 A. Voluntary disclosure, as I think I testified
7 this morning, refers to the disclosure in the context
8 of a process that is from first to last voluntary. It
9 does not mean optional or elective. It means that in
10 the context of a voluntary standard-setting activity,
11 the disclosure is in this context voluntary.

12 Q. Below that, do you see the heading The Dell
13 Proposed Consent Decree?

14 A. Yes, sir.

15 Q. And in the second sentence below that heading,
16 the letter states, "EIA and TIA strongly agree that the
17 FTC must limit application of the Dell rule to cases
18 involving actual knowledge of the existence of a patent
19 and intentional failure to disclose the patent
20 interest."

21 Do you see that sentence?

22 A. Yes.

23 Q. Did you personally agree with that statement
24 when this letter was written in 1996?

25 A. Yes.

1 Q. Do you continue to agree with that position
2 today?

3 A. Yes, I do, with the one qualification that the
4 patent in my mind in the EIA's rules meant patents and
5 patent applications.

6 Q. The next sentence in the same paragraph states,
7 "Extending Dell to situations involving negligent
8 failure to disclose or imputed knowledge ('should have
9 known') of the existence of a patent interest would
10 have a profound chilling effect on companies that
11 participate in the process of voluntary standards
12 development."

13 Do you see that?

14 A. Yes, sir.

15 Q. Did you personally agree with that statement
16 when this letter was written in 1996?

17 A. I personally agreed with the part relating to
18 negligent failure. I was a little less convinced that
19 imputed knowledge should be written out of the
20 equation, and -- let me answer it that way.

21 Q. So, you had some disagreement with this
22 language at the time it was written?

23 A. I had some reservation about imputed knowledge,
24 and I may have discussed that with Mr. Bart at the
25 time, but again, we were writing on behalf of two

1 organizations with slightly different phraseology,
2 slightly different views, so I went along with the
3 statement on imputed knowledge, and frankly, up until
4 that point, I'm not sure that there ever had been a
5 case in which imputed knowledge was an issue.

6 Q. Finally, let me ask you to turn to page 5 of
7 RX-669 under the heading Conclusion.

8 A. Yes, sir.

9 Q. Do you see the language under the heading
10 Conclusion?

11 A. I do.

12 Q. The letter states there, "In finalizing the
13 proposed Consent Decree, the FTC should indicate that
14 the rule of Dell as set forth in the proposed Decree
15 will be limited to fact situations such as Dell where
16 there is evidence to demonstrate an intent to
17 misrepresent. In the standards arena this is referred
18 to as the 'snake in the grass' case. FTC policy
19 direction should be limited to only such cases."

20 Do you see that?

21 A. Yes, sir.

22 Q. Did you agree with that language when it was
23 written in this letter in 1996?

24 A. Very strongly, yes.

25 Q. Do you continue to agree with that position

1 today?

2 A. I very strongly do, yes.

3 Q. And what do you understand the term "snake in
4 the grass" to refer to as used in that language in this
5 letter?

6 A. It refers back to the situation that is alluded
7 to in the earlier sentence where there is nondisclosure
8 of relevant IP with an intent to misrepresent, and then
9 the patent owner at some subsequent date, once the
10 technology is included in the standard, decides to
11 disclose previously undisclosed claims, hence the
12 "snake in the grass" scenario.

13 Q. And why in your view should FTC limit its
14 enforcement actions in this area to snake in the grass
15 type cases?

16 MR. PERRY: Your Honor, again, we are getting
17 into his current opinions about policy issues.

18 JUDGE McGUIRE: Sustained.

19 MR. ROYALL: May I respond?

20 My only response, Your Honor, is that he was
21 asked about these very questions in his deposition by
22 Mr. Perry, and I suspect the reason he hasn't objected
23 to this document already is that he plans to go into it
24 in cross examination.

25 JUDGE McGUIRE: I don't think he's qualified to

1 talk about FTC policy, so sustained again.

2 MR. ROYALL: Okay.

3 May I approach, Your Honor?

4 JUDGE McGUIRE: Go ahead.

5 BY MR. ROYALL:

6 Q. Mr. Kelly, I've just handed you what's been
7 marked for identification as RX-741. Do you recognize
8 this document?

9 A. I do.

10 Q. Can you explain what it is?

11 A. This is a copy of a letter that was sent to Mr.
12 Bart with a copy to me and Mr. Vishny responding to the
13 comments that we filed in January 1996, which I
14 previously identified and which has been marked as
15 RX-669.

16 Q. And were you copied on this letter, RX-741?

17 A. Yes, as I indicated before, I was, yes.

18 Q. Do you recall receiving this in or around July
19 1996?

20 A. Not specifically, no.

21 Q. Do you recall reading it at any time?

22 A. I'm sure I did. I wouldn't have ignored this,
23 but I certainly -- I don't have a specific recollection
24 today of having reviewed it.

25 Q. Have you had a chance to read it more recently?

1 A. Yes, I have.

2 Q. Do you understand this letter to say anything
3 inconsistent with Mr. Bart's letter to the FTC that
4 your name appeared on, RX-669?

5 A. No, I think, as the letter indicates, it's
6 basically thanking us for our comments on the proposed
7 consent agreement in Dell and repeating essentially the
8 same language of the comments that we had sent to the
9 FTC and saying thank you very much for sharing your
10 views with us.

11 Q. Mr. Kelly, do you know which standards
12 organization was involved in the Dell matter?

13 A. I know it was -- I believe the name was VESA or
14 VESA, something like that.

15 MR. ROYALL: For the reporter, I believe it's
16 spelled V-E-S-A.

17 THE REPORTER: Thank you.

18 BY MR. ROYALL:

19 Q. Do you know anything about that organization?

20 A. Only from what I recall from having read the
21 Dell consent decree.

22 Q. Do you know based on that limited information
23 if the organization, VESA, follows rules and procedures
24 which differ from EIA's and JEDEC's own rules?

25 A. I think they're -- yes, they're different at

1 least in one respect, but I only ascertained that from
2 the order.

3 Q. In what respect is that?

4 A. That the VESA organization required
5 participating companies to sign some kind of a
6 disclosure or an assurance in advance in order to be
7 able to participate in any activity of their
8 standards-setting activity.

9 Q. To your knowledge, has JEDEC ever considered
10 adopting -- JEDEC or EIA ever considered adopting a
11 similar policy?

12 A. Frankly, I -- you know, until recently,
13 reviewing documents in this case, I had no recollection
14 of that, but I understand that there was such an
15 occasion where a suggestion of that nature was made
16 orally to a staff member. I responded orally to the
17 staff member in 1994, and somehow it got recorded.

18 MR. ROYALL: May I approach, Your Honor?

19 JUDGE McGUIRE: Go ahead.

20 BY MR. ROYALL:

21 Q. Mr. Kelly, I've just handed you what's been
22 marked for identification as RX-486.

23 A. Yes, sir.

24 Q. Do you recognize this document?

25 A. This is the record that I was referring to

1 earlier of my oral response to an oral inquiry to
2 another member of the staff, Mr. McGhee, by the
3 gentleman I referred to this morning in my testimony,
4 Jim Townsend.

5 Q. And when -- if I could focus your attention on
6 the first sentence of the letter, RX-486, and this is a
7 March 29, 1994 letter, do you see the reference to "our
8 legal counsel" in that sentence?

9 A. Yes, I do.

10 Q. And who do you understand that to be a
11 reference to?

12 A. That was me.

13 Q. So, in this time period, did you have a
14 discussion with Mr. McGhee relating to the subject
15 matter of this memo?

16 A. I'm sure I did, but again, until I reviewed
17 this document, I had no recollection of the
18 conversation.

19 Q. And again, what was the nature of the proposal
20 that was being presented for your consideration at this
21 time? What do you recall?

22 A. As best I can now recall, my memory having been
23 refreshed, it is that Mr. Townsend proposed that JEDEC
24 obtain in advance from participating companies some
25 type of written assurance that if the company had

1 relevant intellectual property, it would agree to
2 license in advance on reasonable and nondiscriminatory
3 terms, and I responded that that wasn't a very good
4 idea.

5 Q. And does this memo, this March 29, 1994 memo
6 marked as RX-486, accurately reflect the reasons that
7 you explained to Mr. McGhee why you didn't think that
8 was a good idea?

9 A. Some of them are close to what I said and some
10 of them are not so close to what I said, but the
11 general spirit of the comments is correct, yes.

12 Q. Well, let me walk through the four numbered
13 items quickly with you.

14 The first one says, "It would have a chilling
15 effect at future meetings."

16 Do you see that?

17 A. Yes, sir.

18 Q. And was that, indeed, your view, that imposing
19 a written verification requirement of the sort that
20 we've been discussing would have a chilling effect?

21 A. Yes, sir, to ask a company to pledge in advance
22 that it will license potentially its entire
23 intellectual property portfolio in order -- as a
24 precondition to participating in a standards activity
25 would very definitely thin the crowd out in the

1 standard-setting very quickly.

2 Q. And the second item states, "A general
3 assurance wouldn't," and it looks like it's written in
4 in handwriting be, B-E, "worth that much anyway."

5 Do you see that?

6 A. Yes.

7 Q. And did you express that view as well as to Mr.
8 McGhee in explaining why you didn't think a
9 verification requirement of this sort would be a good
10 idea?

11 A. I might have. I can't specifically recall
12 that. The only thing I can think is that I might have
13 said that anything that broad would probably not be
14 honored by the company anyway, but that -- that would
15 be the extent to which I would have commented on that
16 subject.

17 Q. The third item states, "It needs to come from a
18 VP or higher within the company -- engineers can't sign
19 such documents."

20 Do you see that?

21 A. Yes, sir.

22 Q. Do you recall -- do you recall whether you said
23 something along those lines to Mr. McGhee in discussing
24 this issue?

25 A. This is close. I think I said to him that in

1 order for a licensing assurance to be binding on the
2 company, even in advance, it needed to be a commitment
3 by the company, which meant that senior management --
4 someone in senior management would have to agree to the
5 assurance, and it certainly wouldn't be in most cases
6 the person -- the engineer participating in a technical
7 committee meeting.

8 Q. And finally, the last item, number 4, reads,
9 "It would need to be done at each meeting slowing down
10 the business at hand."

11 Do you see that?

12 A. Yes, sir.

13 Q. Did you say something along those lines to Mr.
14 McGhee in this time period in explaining why you didn't
15 think a written assurance requirement or an assurance
16 requirement of this sort would be a good idea?

17 A. I honestly can't recall number 4 at all, no.

18 Q. Now, we've discussed today two different
19 versions of a JEDEC manual. I believe one, the 21-H
20 version, is CX-205, and the 21-I version is CX-208, and
21 the latter is the version of the JEDEC manual that I
22 believe you testified was adopted in 1993.

23 To your knowledge, have there been further
24 versions of the JEDEC manual that have been adopted
25 since that 21-I manual?

1 A. There have been a number, yes, sir.

2 Q. Have the revisions that have been made to the
3 JEDEC manual changed the substance of the patent policy
4 in any way, to your knowledge?

5 A. No, sir. In fact, after October 1993, I'm
6 not -- I don't believe the phraseology changed either,
7 the substance or the phraseology.

8 MR. ROYALL: May I approach, Your Honor?

9 JUDGE McGUIRE: Go ahead.

10 BY MR. ROYALL:

11 Q. Mr. Kelly, I've just handed you what's been
12 marked for identification as RX-2071. Do you recognize
13 this document?

14 A. This is the most recent revision of the JEDEC
15 manual, which is Revision 21-K. This one is designated
16 21-L, and the issuance date is July 2002.

17 Q. So, is this the version that is currently in
18 effect?

19 A. Yes, sir, it is.

20 Q. Let me ask you to turn to page 17, 17 of 27 I
21 believe, of RX-2071. This is the page with the heading
22 number 5 entitled Voting.

23 Do you see that?

24 A. I do.

25 Q. And do you see the bottom paragraph under that

1 heading that begins with the words, "In order to
2 maintain"?

3 A. I do.

4 Q. The second sentence of that paragraph reads,
5 "If a chairperson has a specific company position on a
6 topic being discussed, then control of the meeting
7 should be turned over to the vice chairperson or other
8 less biased member."

9 Do you see that language?

10 A. Yes, I do.

11 Q. To your knowledge, has a rule of this sort
12 always existed within JEDEC and EIA, that -- by that I
13 mean during your tenure as EIA's general counsel?

14 A. I'm not sure if it's been stated in this detail
15 or stated this explicitly, but again, this really goes
16 back to the Legal Guides, the requirements for acting
17 in good faith and acting in such a way so as to not
18 violate the antitrust laws. This is directed at
19 removing bias from the process, particularly at least
20 the chairman.

21 Q. Are you aware of any instance in which this
22 type of conflict of interest or bias situation has come
23 up within either JEDEC or EIA?

24 A. I'm aware of allegations such as this that are
25 made from time to time, not limited to, you know,

1 recently, but over a period of years there have been a
2 series of allegations. I don't remember any allegation
3 ever being established as being true, but I've heard
4 the allegation before, yes. And not just in JEDEC,
5 across the entire Electronic Industries Association and
6 then subsequently the Alliance.

7 Q. Has an issue of that sort ever been raised to
8 your attention, to your specific attention?

9 A. Yes, sir, that's what I've just identified. On
10 a number of different occasions allegations of this
11 nature have been addressed to my attention.

12 Q. And if a member company did have a concern
13 about this type of situation, who would they go to to
14 complain or to discuss the issue?

15 A. Ultimately, they always come to me, and I don't
16 recall any of these issues being nipped in the bud at
17 lower levels. They almost invariably get elevated to
18 my level.

19 MR. ROYALL: Your Honor, I would like to offer
20 RX-2071 at this time.

21 MR. PERRY: No objection.

22 JUDGE McGUIRE: So entered.

23 (RX Exhibit Number 2071 was admitted into
24 evidence.)

25 MR. ROYALL: And I'm happy to stop in the next

1 ten minutes, is that --

2 JUDGE McGUIRE: That would be fine.

3 MR. ROYALL: Or perhaps less.

4 BY MR. ROYALL:

5 Q. This version of the JEDEC manual that we've
6 been discussing, RX-2071 -- well, I think I've already
7 asked you whether this is the current version, so let
8 me withdraw that.

9 To your knowledge, is there presently any plan
10 or effort to revise the JEDEC manual again?

11 A. At present, no. No, there is no plan. Again,
12 over time, it probably will change, but there is no
13 present plan to change it.

14 Q. Has there been any discussion within JEDEC
15 about making changes to the organization's
16 standard-related rules or the patent disclosure rules
17 in particular?

18 A. No, sir.

19 Q. Let me go back, if I could, to an exhibit that
20 we discussed earlier, RX-1712, and do you know if you
21 have a copy of that in front of you or we can just pull
22 it up on the screen. This is the October 2000 email
23 that attached the ANSI guidelines.

24 A. Yes, sir.

25 Q. In the first paragraph of that email, you

1 state, "Attached for your review are the patent policy
2 guidelines adopted by the American National Standards
3 Institute (ANSI). The guidelines are a good starting
4 point for our work on developing -- work of developing
5 similar guidelines for JEDEC's use."

6 Do you see that?

7 A. Yes, I do.

8 Q. Did this relate to some work being done in this
9 time period to revise JEDEC's patent policy?

10 A. No, at this particular time, a suggestion had
11 been made I think in connection with a strategic
12 planning meeting that was going to be held at the JEDEC
13 board meeting that year in Hawaii that we consider
14 adopting interpretive guidelines similar to the ones
15 that ANSI had adopted, not to change the patent policy,
16 but to adopt interpretive guidelines.

17 Q. The last sentence of that email, which is the
18 first page of RX-177N 17that email, which igtsItive guic l

1 outcome, and we didn't.

2 MR. ROYALL: May I approach, Your Honor?

3 JUDGE McGUIRE: Go ahead.

4 THE WITNESS: Thank you.

5 BY MR. ROYALL:

6 Q. Mr. Kelly, I've just handed you another
7 document that's been marked for identification as
8 RX-1717.

9 A. Yes, sir.

10 Q. Do you recognize this document?

11 A. I do.

12 Q. Can you explain what it is?

13 A. These are minutes or notes -- minutes
14 probably -- of the strategic planning meeting that I
15 referred to that took place in Maui, Hawaii on November
16 6, 2000. Yes, sir.

17 Q. Were you present for this meeting?

18 A. I was present for part of the meeting, the
19 first part.

20 Q. Did you approve these minutes, RX-1717?

21 A. I'm sure I did, because that would have been
22 standard operating procedure.

23 Q. On the second page of the exhibit, do you see
24 at the top of the page heading 2 entitled Set Agenda?

25 A. Um-hum, I do.

1 Q. And below that, there's a reference to new
2 items. Do you see that?

3 A. Yes, sir.

4 Q. And then below that, the second item states,
5 "Strengthen IP position on submarine patents as they
6 relate to standards, et cetera."

7 Do you see that?

8 A. Yes, sir.

9 Q. Do you have an understanding of what that
10 relates to?

11 A. I vaguely recall that someone at the meeting --
12 I mean physically at the meeting had suggested that
13 that was a subject that we should consider in
14 connection with strategic planning, but if you continue
15 on, you'll see it was never discussed. It was just
16 proposed as a subject for discussion.

17 Q. And in case I haven't asked you this already,
18 is there any current effort to amend either EIA or
19 JEDEC patent policies in any way?

20 A. No, and let me try to give you a complete
21 answer on this.

22 There have been discussions It cmequnt p oj It woiewS

1 Q. In your personal opinion -- well, strike that.

2 You mentioned an appellate ruling. Are you
3 referring to the Federal Circuit's ruling in the Rambus
4 vs. Infineon case or something else?

5 A. No, that's the one I'm referring to.

6 Q. In your personal opinion as EIA's general
7 counsel, do you believe in light of that ruling that
8 there is any reason why EIA or JEDEC should amend their
9 organization's patent policies in the future?

10 A. While these matters are pending before the
11 courts, no, and I think that's consistent with what
12 I've said earlier. We do not want to do anything that
13 will bias or prejudice the process for or against
14 anyone. So, as far as I'm concerned, while matters are
15 before the courts and before an independent federal
16 regulatory agency where they belong, we will take no
17 action.

18 MR. ROYALL: Your Honor, I'm at a convenient
19 breaking point. I have very little to go, maybe on the
20 order of 30 to 45 minutes, but I'd be happy to do it --
21 to start up in the morning and then turn it over to Mr.
22 Perry, if that's all right.

23 JUDGE MCGUIRE: Do you have a preference one
24 way or the other, Mr. Perry? I am going to suggest
25 that we go ahead and at this time take a break for the

1 evening. It's been a pretty long day for everybody,
2 and I'm sure certainly for Mr. Kelly. So, why don't we
3 take a break, then we'll convene tomorrow at 9:30, and
4 then you will be done by 10:30, and hopefully by the
5 end of the day tomorrow we'll be out of here and we'll
6 be done with this witness to the extent that he's been
7 called here at this point in time, okay?

8 MR. ROYALL: Yes, thank you very much, Your
9 Honor.

10 JUDGE McGUIRE: All right, hearing adjourned.
11 We'll see you in the morning.

12 MR. STONE: Have a good evening, Your Honor.

13 JUDGE McGUIRE: Thank you.

14 (Whereupon, at 5:20 p.m., the hearing was
15 adjourned.)

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