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4	WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
5	Kelly	2051	2069	2146	2171
6				2174	
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9	EXHIBITS		FOR ID	IN	EVID
10	CX				
11	Number 449			2	058
12	Number 3089			2	068
13	Number 348			2.	175
14					
15	RX				
16	Number 616			2	083
17	Number 691			2.	144
18	Number 2299			2	176
19	Number 2300			2.	176
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1	UNITED STATES OF AMERICA						
2	FEDERAL TRADE COMMISSION						
3							
4	In the Matter of: )						
5	Rambus, Inc. ) Docket No. 9302						
6	)						
7							
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9	Thursday, May 15, 2003						
10	9:30 a.m.						
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13	TRIAL VOLUME 11						
14	PART 1						
15	PUBLIC RECORD						
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17	BEFORE THE HONORABLE STEPHEN J. McGUIRE						
18	Chief Administrative Law Judge						
19	Federal Trade Commission						
20	600 Pennsylvania Avenue, N.W.						
21	Washington, D.C.						
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25	Reported by: Josett F. Hall, RMR-CRR						

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- 2 - -
- JUDGE McGUIRE: This hearing is now in order.
- 4 Before we start, anything that should come to
- 5 the court's attention this morning?
- 6 MR. OLIVER: Good morning, Your Honor.
- 7 JUDGE McGUIRE: Good morning.
- 8 MR. OLIVER: I wanted to report back to you
- 9 with respect to scheduling.
- 10 We have not been able to locate any other
- 11 witnesses who are able to testify either Friday or next
- 12 Monday.
- In addition, as I mentioned yesterday, we did
- have a very serious concern that by not going forward
- 15 with Mr. Diepenbrock and in particular with
- 16 Mr. Vincent, it called into question whether we could
- go forward with Mr. Crisp on the three days following
- 18 Memorial Day, and at this point we have also not been
- 19 able to locate any witnesses that will be able to fill
- those days.
- 21 Your Honor, what we have done instead is we
- 22 have proposed to the other side that we go forward with
- 23 Mr. Vincent as scheduled on Monday subject to the
- 24 understanding that we would not be entitled to call him
- 25 back, however, if documents were later produced that

1 were relevant to Mr. Vincent that we would then

- 2 entertain to depose him on those documents in
- 3 California and then both sides would be able to use the
- 4 appropriate portions of that deposition transcript
- 5 later in the hearing.
- 6 That would, it seems to us, eliminate any
- 7 inconvenience to Mr. Vincent.
- Furthermore, to the extent that we'd be
- 9 entitled to take a deposition in that case, this would
- 10 not involve any additional proceedings.
- 11 My understanding is the respondent's
- 12 position -- I'll allow them to speak for themselves,
- 13 but they have a concern -- actually I believe two
- 14 concerns. One is with respect to whether Mr. Vincent
- 15 would have to testify without having reviewed the
- documents that may subsequently be produced and,
- 17 second, that it's unfair for him to have to testify on
- 18 two different occasions.
- 19 With respect to the first, Your Honor, what we
- 20 anticipate doing here in the hearing is simply what has
- 21 been covered in his previous depositions. Now, he's
- 22 been deposed I believe seven times in connection with
- 23 the private litigation plus once in connection with
- 24 this litigation, so to the extent there are concerns
- about inconsistent testimony, that's already been

1 covered in his deposition. He already testified to

- 2 that. We're simply trying to get that evidence in the
- 3 record here to allow us then to go forward with
- 4 Mr. Crisp as scheduled.
- 5 And to the extent that there's a concern about
- 6 him having to testify twice, well, they actually
- 7 maintain that they think they're entitled to call
- 8 witnesses back to testify a second time. We believe
- 9 that it's inappropriate to bring witnesses back here a
- 10 second time if that can be avoided, but we believe our
- 11 proposal would avoid exactly that.
- 12 So therefore, we would submit, Your Honor, that
- 13 we should be entitled to proceed with Mr. Vincent as
- 14 scheduled on this coming Monday, subject to the
- 15 understanding that we could not bring him back but we
- 16 could depose him with respect to any later produced
- documents in California and both sides could then use
- 18 that deposition transcript.
- JUDGE McGUIRE: Now, tell me again who is
- 20 Mr. Vincent.
- 21 MR. OLIVER: Mr. Vincent was the outside patent
- 22 counsel on behalf of Rambus.
- JUDGE McGUIRE: Okay.
- 24 Does the other side want to be heard on this?
- MR. STONE: Thank you, Your Honor.

- 1 Mr. Vincent is a lawyer who works at a law
- 2 firm in Palo Alto and he has been deposed many times.
- 3 When he heard of the ruling yesterday and the proposal
- 4 that was made to us last evening by complaint counsel,
- 5 I think his response -- I didn't speak with him
- 6 directly, somebody else in the office did, but I
- 7 just -- when Mr. Oliver approached me this morning and
- 8 said they wanted to raise this with the court, I

- 1 of the privilege.
- With respect to the convenience of witnesses,
- 3 he also is somebody who has been significantly
- 4 inconvenienced by the litigation to date and this
- 5 would be a situation in which the inconvenience would
- 6 be multiplied. We have tried with every witness we
- 7 possibly can to ensure that they not be called back,
- 8 but in the instance where Mr. Oliver suggests we do
- 9 want them to be called back, it's a question of
- 10 wanting them to be called in our case. We have not
- 11 called them twice. What Mr. Oliver has proposed is
- 12 that they be able to put a witness on twice in their
- 13 case.
- 14 I think Mr. Vincent's concern is the same as
- 15 mine, is that he should be treated the same as the
- 16 complaint counsel treat the witnesses that they view as
- more cooperative, but his fundamental concern is the
- 18 ability to testify fully and honestly and fairly with
- 19 respect to issues as to which there may be documents
- 20 which he may subsequently be shown which may or may not
- 21 refresh his recollection, remind him of things, as we
- 22 heard in Mr. Kelly's testimony when he looks at a
- document and says, Oh, once I saw the document I
- 24 remembered my conversation with Mr. McGhee which I
- 25 didn't remember. It happens. It's happens in a way

- 1 that is innocent --
- 2 JUDGE McGUIRE: How about the offer by
- 3 complaint counsel that he be called in to testify on
- 4 Monday as proposed and that we have an understanding of
- 5 those areas that he'll be questioned on and then,
- 6 depending on the outcome of the court's upcoming order
- 7 on this issue of privilege, that he be allowed to be
- 8 deposed? But I guess what you're saying is that
- 9 doesn't avoid you having to call him back.
- 10 MR. STONE: I don't think that proposal is fair
- 11 to him because one concern is let's suppose that the
- order is affirmed and that the documents are produced
- and that those subsequent documents refresh his
- 14 recollection in some fashion as to matters that he is
- asked to testified here. Then he will have been put in
- 16 the situation where he may have testified
- inconsistently with the documents we're not able to
- show to him at this time, and I think he's entitled to
- 19 the chance to prepare himself as to whatever evidence
- 20 might be admissible in this case.
- 21 JUDGE McGUIRE: All right. Well, let me say
- 22 this then. What alternatives do the parties have, and
- 23 I guess at this point I ask complaint counsel, if I
- abide by the request here by respondent that he not be
- 25 called until after this issue has been resolved? What

1 options does that leave the government in terms of its

- 2 case in chief?
- MR. OLIVER: To be honest, Your Honor, we're
- 4 still trying to work that out. We're not exactly
- 5 certain. But as I say, my main concern is we're trying
- 6 to figure out how we could put on Mr. Crisp in any kind
- 7 of effective or understandable manner --
- 8 JUDGE McGUIRE: Can we go on to anyone else
- 9 down the line on your proposed witness list and then
- 10 try to put this whole triad of testimony off to some
- 11 point in time after I've issued an order on the
- 12 upcoming motion?
- 13 MR. OLIVER: There would be a couple of
- 14 issues.
- 15 First of all, with respect to timing, as I say,
- at this point I don't think we'll be able to fill those
- days and this would probably have the effect of
- delaying the proceeding by at least a week.
- 19 Second, if they're actually going to go to the
- 20 Court of Appeals on this, it sounds as though this
- 21 issue may not be resolved for a couple of months. We
- 22 may be in a position where we put on the rest of our
- 23 case and have yet not put on the core of the case, that
- is, the Rambus documents, the Rambus conduct that forms
- 25 the fundamental core of our case here, and frankly, I

- 1 Mr. Gordon Kelley of IBM.
- JUDGE McGUIRE: Well, here's what I want you
- 3 all to do. I want you all to confer on this. I want
- 4 you to come up with some kind of understanding.
- 5 That's not a charge, but it's certainly a probable, I
- 6 think, suggestion. I want to see an agreement on how
- 7 we can proceed and we'll convene again in hearing on
- 8 Monday.
- 9 If there's an agreement, I will hear whomever
- 10 you've agreed to put on on Monday and we'll take -- if
- 11 not, we'll take it up at that time and then proceed on
- 12 Tuesday and I'll issue an opinion at that time. I just
- don't think there's been enough involvement with
- 14 counsel on this issue. I understand you're at odds on
- 15 this, but I want to see something ironed out on this.
- 16 We've all got too much involved at this point in this
- 17 hearing to be postponing it.
- By the same token, I do want to ensure the
- 19 fairness of all involved, and until I get a little more
- 20 input from the parties, I'm going to hold this in
- 21 abeyance until Monday, and at that time I'm going to
- 22 issue a determination if the parties haven't come to an
- understanding between themselves and I'm going to be, I
- think, disappointed if we don't have an understanding
- on Monday. Okay?

1 MR. OLIVER: I thank you, Your Honor.

- 2 MR. STONE: Thank you, Your Honor.
- 3 JUDGE McGUIRE: And at this time we'll continue
- 4 with the questioning of John Kelly.
- 5 Mr. Royall?
- 6 MR. ROYALL: Thank you, Your Honor.
- 7 May I approach, Your Honor?
- JUDGE McGUIRE: Please.
- 9 - -
- 10 Whereupon --
- JOHN JAMES KELLY, JR.
- 12 a witness, called for examination, having been
- previously duly sworn, was examined and testified as
- 14 follows:
- 15 DIRECT EXAMINATION (continued)
- 16 BY MR. ROYALL:
- Q. Good morning, Mr. Kelly.
- 18 A. Good morning, Mr. Royall.
- 19 Q. I have just handed you what's been marked for
- identification as CX-449.
- 21 Do you recognize this document?
- 22 A. I do.
- Q. And can you explain to us what it is?
- 24 A. This is actually a -- the text of a
- 25 presentation that I gave at a JEDEC conference in March

of 2002 and it is identical to an article that I wrote

- for the JEDEC newsletter in November 2001.
- Q. The article that you mentioned was -- did you
- 4 say it was published in the JEDEC newsletter?
- 5 A. JEDEC newsletter, which is distributed
- 6 electronically to all JEDEC members and posted on the
- 7 JEDEC Web site.
- Q. And why is it that you wrote this article?
- 9 A. Because the -- a number of questions had been
- 10 raised at that point about the JEDEC patent policy and
- 11 to me it always seemed fairly simple and
- 12 straightforward, so I decided to sit down at one
- 13 sitting actually and just write out my understanding of
- 14 the patent policy so that it would be available for
- anyone who wanted to see it in writing.
- Q. And does this article, CX-449, accurately set
- forth your views on the basic nature and scope of the
- 18 JEDEC patent policy?
- 19 A. It absolutely does, yes, sir.
- 20 Q. Have you had a chance to review this article
- 21 recently?
- 22 A. Yes, I have.
- Q. Do the views expressed in this article differ
- in any way from the understanding of the JEDEC and EIA
- 25 patent policies that you developed in the initial

- 1 months after joining EIA in 1990?
- 2 A. This is exactly -- this sets forth exactly how
- 3 I understood the patent policy from 1990 on to the
- 4 present.
- 5 Q. My questions for you about the substance of the
- 6 article relate only to some language on the final page
- 7 I believe, page 4 of CX-449.
- 8 Do you see the paragraph at the bottom half of
- 9 the page beginning with the words "The patent"?
- 10 A. Yes, sir.
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1 written letter but also in terms of the spirit of the

- 2 patent policy, which, as I've said, is to encourage the
- 3 earliest possible disclosure and then to provide
- 4 written assurances if EIA is to move forward or JEDEC
- 5 is to move forward to standardize along the lines of a
- 6 patent application.
- 7 O. You say here that members or participants are
- 8 duty bound to abide by the spirit of the patent
- 9 policy.
- 10 Is there anything in JEDEC's or EIA's rules
- 11 that sets forth such a duty, as you understand those
- 12 rules in your role as EIA general counsel?
- 13 A. I go back to the basic rule, which is the duty
- 14 to act in good faith. Yes, sir.
- 15 Q. Now, continuing on with the same paragraph, you
- 16 state: "The rules are basic. They are grounded in
- 17 common sense and designed to promote openness, good
- 18 faith and fair dealing in the development of standards.
- 19 There are no intended loopholes in the patent policy.
- Those who seek to 'game' the rules act at their own
- 21 peril."
- 22 Do you see that?
- 23 A. Yes, sir, I do.
- Q. What did you mean when you said here, "There
- are no intended loopholes in the patent policy"?

1 A. Again, if you consider the patent policy

- 2 grounded on the duty of good faith and that the duty
- of good faith, at least in my opinion, means that
- 4 participants need to comply with the spirit of
- 5 openness and fairness and disclosure as well as the
- 6 literal but words of the rule, then clearly there are
- 7 no intended loopholes, just as there are no intended
- 8 loopholes in the principle of good faith, that I'm
- 9 aware of anyway.
- 10 Q. And finally, what did you mean by the last
- 11 sentence of the language I read: "Those who seek to
- 12 'game' the rules act at their own peril"?
- 13 A. What I'm saying is that those who seek to find
- 14 loopholes through technical reading of the patent
- 15 policy and then based upon their own private
- interpretation act on those rules do so at their own
- 17 peril.
- In other words, if they're wrong, they're
- 19 wrong. I don't believe that there's any defense here
- that someone interpreted the rules reasonably but
- 21 secretly and acted on that secret interpretation and
- 22 that that's appropriate. I think that the rules, as I
- 23 say, are based on bottom -- at bottom on good faith.
- Q. Now, in the last sentence of this article,
- you state, "Questions relating to the JEDEC patent

- 1 policy should be directed to the JEDEC legal
- 2 department."
- 3 Do you see that language on the bottom of the
- 4 fourth page of CX-449?
- 5 A. I do.
- 6 Q. When it refers to the JEDEC legal department
- 7 here, who specifically is being referred to?
- 8 A. That's me.
- 9 Q. And I believe you testified yesterday that in
- 10 the almost thirteen years that you've served as the
- 11 chief legal officer for EIA and JEDEC you have been
- 12 contacted at various times by JEDEC and EIA members
- relating to questions about the organization's rules;
- 14 is that correct?
- 15 A. That's correct.
- Q. When member companies have contacted you with
- 17 questions about the rules, have you ever offered views
- or interpretations of those rules different from what
- 19 you've testified about in the past day?
- 20 A. No, sir.
- 21 O. When JEDEC members or EIA members have
- 22 contacted you about the rules, have you always agreed
- with the member's own interpretation of those rules?
- A. No, sir. Occasionally there is disagreement.
- Q. If a member of EIA or JEDEC acts in a way that

1 is inconsistent with the manner in which you as the

- 2 general counsel interpret those rules but is
- 3 consistent with the member's own understanding of the
- 4 rules, in your understanding of the JEDEC and EIA
- 5 patent policy, could that be a violation of the
- 6 rules?
- 7 A. Well, first of all, let me say they act at
- 8 their own peril, which I said before, and if their
- 9 interpretation is inconsistent with my interpretation,
- 10 my interpretation governs, so given defense -- it very
- 11 well could be a violation of the EIA and JEDEC rules,
- 12 yes.
- Q. Mr. Kelly, do you have any understanding as
- 14 to when Rambus participated as a member of EIA and
- 15 JEDEC?
- 16 A. My understanding is that they joined sometime
- in 1991 and that they exited sometime in mid-1996.
- Q. During that time period, were you ever
- 19 contacted by Rambus with questions about either EIA's
- 20 or JEDEC's rules?
- A. Never.
- Q. During that time period, were you ever
- 23 contacted by Rambus with questions about anything?
- 24 A. No, sir.
- Q. Have you ever been contacted by Rambus at any

- 1 time about any issue?
- 2 A. I have been contacted by attorneys for Rambus
- 3 in connection with discovery in various pending cases;
- 4 otherwise, no, I have never been contacted by Rambus in
- 5 any respect.
- 6 MR. ROYALL: Your Honor, at this time I would
- 7 offer CX-449.
- 8 JUDGE McGUIRE: Any objection?
- 9 MR. PERRY: No objection, Your Honor.
- 10 JUDGE McGUIRE: So entered.
- 11 (CX Exhibit Number 449 was admitted into
- 12 evidence.)
- BY MR. ROYALL:
- 14 Q. Mr. Kelly, are you aware that separate and
- 15 apart from this FTC litigation Rambus is in litigation
- 16 with companies that manufacture DRAMs?
- 17 A. Indeed I am, yes.
- 18 Q. And am I right that you testified at the trial
- in one of those cases, the Rambus versus Infineon
- 20 case?
- 21 A. That is correct.
- Q. Have you followed that litigation as it has
- 23 proceeded through the courts after the trial?
- A. Not in great detail, but certainly I have
- 25 followed critical steps in the process, yes.

1 Q. Is there a reason why you have followed the

- 2 case after the trial?
- 3 A. Because my understanding is that one of the
- 4 positions that Rambus has taken in that litigation
- 5 calls in -- brings or -- brings into issue the JEDEC
- 6 patent policy which directly affects what JEDEC does
- 7 and directly affects what I do as chief legal officer
- 8 of JEDEC and EIA.
- 9 Q. Are you aware that the Federal Circuit Court of
- 10 Appeals has rendered a decision on an appeal in that
- 11 litigation?
- 12 A. I am.
- 13 O. When that decision was released, did you review
- 14 the Federal Circuit's decision?
- 15 A. I -- actually I've reviewed it several times
- 16 since it was issued. Yes, sir.
- Q. Did that decision as you read it provide any
- 18 interpretation of your organization's rules, that is,
- 19 EIA and JEDEC's rules and policies?
- 20 MR. PERRY: Your Honor, I think the opinion
- 21 speaks for itself.
- JUDGE McGUIRE: Sustained.
- MR. ROYALL: Your Honor, if I could respond?
- JUDGE McGUIRE: Go ahead.
- MR. ROYALL: Mr. Kelly has been questioned

1 about the Federal Circuit decision in deposition. It

- 2 is a fact issue as to how the organization's rules are
- 3 interpreted and applied.
- 4 Rambus has put in issue the Federal Circuit
- 5 decision as an issue of fact in their briefs in
- 6 summary decision and in the trial brief not as a legal
- 7 issue, as they acknowledge it has no binding effect,
- 8 but as a fact, and they've questioned this witness in
- 9 deposition about his views as to the interpretation
- 10 that was applied by the Federal Circuit and whether
- 11 he agrees or disagrees and why, and so I'm only
- inquiring into this as a matter of fact relating to
- 13 his views in the same way that they previously have
- done given that they have put the Federal Circuit
- 15 decision in issue.
- 16 It seems to me very unfair for Rambus' lawyers
- 17 to put that in issue as a matter of fact for you to
- 18 consider, for the commission ultimately to consider,
- 19 without having the general counsel's views on whether
- 20 he agrees or disagrees and why with what the
- 21 Federal Circuit has said also in the record.
- JUDGE McGUIRE: Mr. Perry?
- MR. PERRY: I wasn't planning on having any
- trial testimony from this gentleman or eliciting any
- 25 trial testimony about his opinions with respect to the

1 Federal Circuit decision. The depositions are not

- 2 evidence and they're not going to be offered. The
- 3 opinion says what it says, and while, yes, we quote the
- 4 opinion, that doesn't mean that witness' opinions about
- 5 the opinion are relevant.
- 6 JUDGE McGUIRE: Well, I sustain that motion on
- 7 the -- that objection on the basis that that opinion
- 8 does speak for itself, Mr. Royall.
- 9 Are you trying to go behind the opinion now to
- 10 determine what his interpretation is as to those
- 11 pertinent facts that the court --
- MR. ROYALL: No, Your Honor, I'm not asking for
- 13 him to interpret the opinion. The opinion speaks for
- itself and I'm perfectly happy with that.
- 15 On the other hand, as Mr. Perry elicited in
- deposition, there are concerns within this organization
- about the effect that that decision potentially could
- 18 have and about the nature and the way this
- 19 organization's rules were interpreted, and I'm not
- 20 trying to undermine or seek his interpretation of the
- 21 decision.
- I'm trying to understand what, if any, reaction
- 23 he, as EIA's general counsel, has to that decision and
- 24 what, if any, effect it could have on his role within
- 25 the organization and on the organization's ability to

- 1 continue to function in the way that it has in the
- 2 past, which is, I submit, highly relevant, and again
- 3 that given that they have put the Federal Circuit
- 4 decision in issue, that they have presented it to you
- 5 and offered it to you as something that you should look
- to to rely on in how this organization's rules should
- 7 be interpreted, I don't want to undermine that or have
- 8 him interpret it, but I do think that his views should
- 9 be in the record.
- 10 JUDGE McGUIRE: Mr. Perry, one last time.
- 11 MR. PERRY: Your Honor, the standard of
- 12 relevance in a deposition is much broader. We're here
- 13 at trial. The question is what's going to be offered
- 14 at trial, and if I go near that area, he can do it on
- 15 redirect, but his views about a court opinion are
- 16 irrelevant here.
- MR. ROYALL: Again, Your Honor, putting aside
- 18 what happened in a deposition, the question is this is
- 19 a -- it's a factual issue how these rules are
- interpreted and it's also a factual question what
- 21 effect, if any, that decision could have on his
- 22 organization, on the way in which the rules are applied
- or on the manner in which they conduct their affairs in
- 24 the future.
- 25 JUDGE McGUIRE: Then on that basis I'll

1 entertain the question and inquiry. I don't want to

- 2 spend a whole lot of time on this, Mr. Royall.
- MR. ROYALL: Yes, Your Honor. This is the
- 4 final thing I have to go into on this thing and then
- 5 I'll be finished.
- 6 JUDGE McGUIRE: Go ahead.
- 7 BY MR. ROYALL:
- 8 Q. You said, Mr. Kelly, that you reviewed the
- 9 Federal Circuit's decision when it was released, and I
- don't know if I got an answer to this question, but
- 11 did you understand, in your own personal
- 12 understanding, did you understand the Federal Circuit
- to be providing an interpretation of EIA and JEDEC
- 14 policy?
- 15 A. The two-judge majority in that case did
- interpret policy as did the dissent.
- 17 Q. And very quickly, did you agree with that
- interpretation set forth in that decision?
- 19 A. With the dissent, yes; with the majority, no.
- 20 I'm afraid the majority as a matter of fact got it
- 21 wrong.
- Q. What, if anything, did you do in your capacity
- 23 as EIA general counsel in response to the issuance of
- 24 the Federal Circuit decision?
- 25 A. We retained outside counsel and working with

1 outside counsel prepared an amicus curiae brief which

- 2 was filed on the petition for rehearing en banc in the
- 3 Federal Circuit.
- 4 Q. Did you have any role in the drafting of that
- 5 brief?
- 6 A. Yes, sir, I did. I didn't prepare the first
- 7 draft, but I commented on it, and I was involved in a
- 8 substantial rewrite of the brief before it was filed.
- 9 O. And what was the purpose of JEDEC submitting
- 10 that brief? Why did JEDEC submit that brief in the
- 11 Federal Circuit proceeding?
- 12 A. To put our views on record before the court as
- 13 the full court considered the possibility of granting a
- 14 rehearing because we had really not been given that
- 15 opportunity previously.
- Q. And could you summarize briefly essentially
- 17 what views you sought to present in your brief to the
- 18 Federal Circuit.
- 19 A. There were two aspects of the majority's
- 20 opinion that we found very troubling and indeed could
- 21 materially affect our ability to set voluntary open
- 22 standards going forward.
- One was that the majority tried to pinpoint an
- 24 exact moment in time when disclosure might be/was
- 25 required, and I believe the majority said that that

- 1 moment in time was when a formal ballot was presented
- for a vote in JEDEC, and that, as I've tried to testify
- 3 over the last day, is absolutely not the case. The
- 4 rule is as early as possible in the process and there
- 5 is no procedural point, identifiable point, at which
- 6 disclosure is required.
- 7 MR. PERRY: Your Honor, if I could remake my
- 8 objection that to have him take a passage or what he
- 9 thinks is a holding in that opinion and then repeat
- 10 what he said yesterday is cumulative and it's
- 11 unnecessary. If they want to argue this, they can put
- 12 the appeal opinion up against what he said and
- 13 Your Honor can make that decision. But I just think
- 14 it's irrelevant.
- 15 JUDGE McGUIRE: I think I've already ruled on
- 16 this. Overruled. You can take it up on
- 17 cross-examination or you can make it in argument in
- 18 your post-hearing brief, Mr. Perry.
- 19 MR. ROYALL: Thank you, Your Honor.
- 20 And I only have a few other questions. I would
- 21 like to present you the brief in --
- 22 THE WITNESS: And the second thing, to finish
- 23 my answer, was that the court, at least as I read the
- opinion, appeared to say that the only intellectual
- 25 property that needed to be required was that which in

1 fact -- or needed to be disclosed was that which in

- 2 fact is required to meet or to comply with the final
- 3 issued standard, and the concern we have there is that
- 4 it basically requires participants in the process to
- 5 make an on-the-spot infringement analysis of what the
- 6 final standard will look like and whether or not the
- 7 patent or patent application, if it's an application
- 8 situation, when that patent application finally
- 9 issues, what that will look like and then determine
- whether or not there's a correspondence between the
- 11 two before they're required to disclose in a situation
- 12 that could be months or years earlier than the actual
- issuance of the patent and the issuance of the final
- 14 standard.
- 15 So it basically put JEDEC in an untenable
- 16 situation, it puts the members of JEDEC in an untenable
- 17 situation, and we're very concerned that if that
- opinion stands it will affect our ability to do
- 19 business going forward.
- 20 BY MR. ROYALL:
- 21 Q. And the final question before I present you
- 22 with this document is: In what way is -- in your
- 23 position as EIA general counsel and JEDEC presently, in
- 24 what way are you concerned that that decision if it
- 25 stands could affect your organization as it goes

- 1 forward?
- 2 A. It's going to -- well, first of all, it's -- as
- 3 I think the brief sets forth, to state that there is a
- 4 moment in time, a procedural moment in time where
- 5 there's a duty to disclose, not before and -- not
- 6 before that time, basically provides a blueprint to
- 7 companies participating in the process as to when they
- 8 can drop their membership without having the duty to
- 9 disclose, and that destabilizes the whole system. If
- 10 you understand that the purpose is early disclosure and
- 11 good faith and openness, it invites -- it invites
- 12 abuse, very frankly. It invites abuse.
- 13 And secondly, by requiring an on-the-spot
- infringement analysis months or years before the fact,
- 15 it deters open disclosure rather than encouraging open
- 16 disclosure.
- 17 So stated very simply, our concern is that the

- 1 marked for identification as CX-3089.
- 2 A. Yes, sir.
- 3 Q. Do you recognize this?
- 4 A. Yes, sir. This is the amicus brief that was
- 5 filed on petition for rehearing en banc in the
- 6 Federal Circuit in the case of Rambus versus Infineon.
- 7 O. And does this brief set forth accurately your
- 8 views as EIA's general counsel in response to the
- 9 Federal Circuit interpretation of your organization's
- 10 rules?
- 11 A. It certainly does.
- MR. ROYALL: Your Honor, that's my last
- 13 question for Mr. Kelly. I would, however, at this time
- 14 like to offer CX-3089.
- JUDGE McGUIRE: Mr. Perry?
- MR. ROYALL: No.
- 17 MR. PERRY: No objection, Your Honor. I don't
- think it's at all relevant, but we can argue that.
- 19 JUDGE McGUIRE: So entered.
- 20 (CX Exhibit Number 3089 was admitted into
- 21 evidence.)
- 22 JUDGE McGUIRE: All right. At this time you
- 23 may conduct your cross-examination.
- MR. PERRY: Thank you, Your Honor.
- I would like to provide the witness with his

1 prior deposition transcripts in case we have cause to

- 2 refer to them. May I?
- JUDGE McGUIRE: Yes.
- 4 CROSS-EXAMINATION
- 5 BY MR. PERRY:
- 6 Q. Mr. Kelly, good morning.
- 7 A. Good morning, Mr. Perry.
- 8 Q. Do you still have the overview of the JEDEC
- 9 patent policy that Mr. Royall was just talking to you
- 10 about?
- 11 A. If you're referring to the speech, yes, I do.
- 12 Q. Yes. Exhibit 449, CX-449. Do you see that?
- 13 A. I do.
- Q. You just called it a speech. Did you deliver
- 15 this as an address?
- 16 A. Yes.
- 17 O. When was that?
- 18 A. March 26, 2002, in Santa Clara, California.
- 19 Q. Now, when you prepared it, you were aware of an
- 20 ongoing litigation between Rambus and Infineon;
- 21 correct?
- 22 A. I prepared this originally as a newsletter for
- 23 the JEDEC -- I'm sorry -- as an article for the JEDEC
- 24 newsletter in November 2001. I believe at that time I
- 25 was, yes, aware of the Rambus litigation.

Q. And you know, don't you, from your years as

- 2 EIA general counsel and your service on the ANSI task
- 3 force that different standard-setting organizations
- 4 have taken different approaches on whether or not
- 5 patent applications should be part of the patent
- 6 policy?
- 7 A. I do know that, yes, sir.
- 8 Q. And you don't think that the people in the
- 9 organizations that feel that patent applications
- shouldn't be required to be disclosed under an
- organization's patent policy are acting in bad faith,
- 12 do you?
- 13 A. No, sir. I think --
- Q. There are policy arguments on both sides;
- 15 right?
- 16 A. It depends on the industry and it depends on
- 17 the circumstances, yes, sir, it does.
- 18 Q. And you don't think those standard
- organizations that interpret the term "patents" to mean
- 20 patents and not, quote, patents and patent
- 21 applications, close quote, are acting in bad faith, do
- 22 you?
- 23 A. No, sir. As I just said, it depends on the
- 24 circumstances.
- Q. And those people aren't trying to game the

- 1 system, are they?
- 2 A. No.
- Q. Let's look back if we could on page 1 of your
- 4 2002 overview of the patent policy.
- In paragraph 1 you say that JEDEC's core
- 6 business is the development of open standards; right?
- JUDGE McGUIRE: Okay, Mr. Perry. Just so I'm
- 8 clear, could you describe what record that or what
- 9 exhibit -- is that an exhibit you're talking about or
- 10 what is that?
- MR. PERRY: Yes. It's the one we just finished
- 12 with with Mr. Royall. It's CX-449.
- JUDGE McGUIRE: Okay. Very good. Thank you.
- 14 BY MR. PERRY:
- Q. And it's the first sentence of the document is:
- 16 "JEDEC's core business is the development of open
- 17 standards."
- 18 Do you see that?
- 19 A. I do.
- Q. And then you talked about open standards
- 21 yesterday; right?
- 22 A. I did.
- Q. And then the second sentence, are you
- 24 attempting to define open standards there?
- 25 A. I am -- I'm attempting to state for the

- 1 purposes of this article what open standards mean,
- 2 yes.
- Q. And you say, "Open standards by definition are
- 4 free of restrictive intellectual property or IP
- 5 rights"; correct?
- 6 A. Yes, sir.
- 7 Q. And by "restricted" you mean that there's no
- 8 objection to having features and standards that are
- 9 protected by valid patents as long as they're available
- to all comers on reasonable and nondiscriminatory
- 11 terms?
- 12 A. Yes, sir.
- 13 Q. Now -- and I think you told us this yesterday,
- 14 but let's get it clear.
- Does JEDEC or EIA -- in your twelve years of
- 16 experience, have they ever offered opinions on whether
- 17 a particular royalty rate is reasonable?
- 18 A. Have we offered opinions on whether a royalty

1 There was that one allegation certainly and

- 2 there was an occasion when our outside counsel reviewed
- 3 a patent license -- this was a number of years ago --
- 4 to determine whether or not the licensing terms were
- 5 reasonable. That was a very early stage, as I say, and
- 6 it was at that particular time the American National
- 7 Standards Institute endorsed that practice of reviewing
- 8 patent licenses and so did EIA, and we abandoned, both
- 9 ANSI and EIA abandoned, that practice I'd say roughly
- 10 eight or nine years ago.
- But those are the only two exceptions I'm aware
- 12 of.
- Q. And with those two exceptions, put those two
- 14 aside, EIA doesn't take a formal position on whether a
- 15 particular license rate is reasonable; that's right?
- 16 A. That's correct. We don't get into the
- 17 definition, the further definition of reasonable and
- 18 nondiscriminatory at all. We leave that to the parties
- 19 to work out or the courts.
- Q. Now, is it one of the goals of EIA or JEDEC to
- 21 get the lowest possible royalty rate if there's
- 22 intellectual property in the standards?
- 23 A. To get -- no. I think -- no. The answer to
- 24 that is no.
- JEDEC, however, is concerned and I said before

- 1 that JEDEC and EIA do not have a preference for
- 2 including intellectual property in standards because
- 3 of the fact that there may be a royalty that may
- 4 increase the cost. The goal is always to try to
- 5 produce a standard which is going to gain marketplace
- 6 acceptance, and if the cost of the product is going
- 7 to -- is likely to be increased by intellectual
- 8 property, that's a general concern. That doesn't go
- 9 to the licensing terms, however. That goes to the
- 10 basic question of whether to include the IP at all or
- 11 not.
- 12 Q. For licensing terms you let the marketplace
- 13 decide or the courts?
- 14 A. Yes, sir.
- 15 Q. Now, you told us yesterday about ANSI, the
- 16 American National Standards Institute, A-N-S-I; right?
- 17 A. I did.
- Q. And you talked about that ANSI had a patent
- 19 policy and you were shown some guidelines and asked
- 20 some questions about the guidelines. Do you remember
- 21 that?
- 22 A. I do.
- Q. And EIA in the '90s was accredited by ANSI;
- 24 correct?
- 25 A. It was in the '90s and it still is, yes, sir.

Q. And of course between '91 and '96, at least,

- 2 focusing on that time period, JEDEC was an activity
- 3 within the EIA engineering department?
- 4 A. Yes.
- 5 Q. And it didn't enter into its own contracts on
- 6 its own; right, during that time period?
- 7 A. No, it did not.
- 8 Q. Okay. And you told us that you understood
- 9 throughout the 1990s that the ANSI patent policy did
- 10 not require the disclosure of patent applications;
- 11 right?
- 12 A. Yes, I did. And I believe the guidelines so
- 13 state.
- 14 Q. And you had those guidelines back in 1994;
- 15 correct?
- 16 A. Yes. I worked on them even earlier than that,
- 17 yes, sir.
- 18 Q. And you sent a copy of them to Ken McGhee in
- 19 1994, didn't you?
- 20 A. I'm sure I provided copies to Mr. McGhee
- 21 throughout that period '94 to '96, if that's the scope
- of your question, yes.
- Q. Well, let's look at one particular instance,
- 24 RX-494.
- 25 May I?

- JUDGE McGUIRE: Yes.
- THE WITNESS: Thank you.
- 3 BY MR. PERRY:
- 4 Q. This was a document shown to you at your
- 5 deposition a few months ago.
- 6 A. Uh-huh.
- 7 Q. And the first page, does that appear to you to
- 8 be a memo from Ken McGhee to JC-42 committee members?
- 9 A. It certainly does, yes, sir.
- 10 Q. And Mr. McGhee says that there was a meeting in
- 11 Orlando where Texas Instruments had requested a
- 12 clarification of the ANSI/JEDEC patent policy and that
- had been referred to you; correct?
- 14 A. Yes, sir, that's what it says.
- 15 Q. And the next page is a memo that I think you
- saw yesterday from you to Mr. McGhee talking about
- 17 Texas Instruments' request for clarification; right?
- 18 A. Yes, sir.
- 19 Q. And then Mr. McGhee's, to go back to the first
- 20 page -- sorry -- Mr. McGhee's cover memo says that your
- 21 response is attached along with a copy of the ANSI
- 22 guidelines for implementation of the ANSI patent
- 23 policy. Do you see that?
- 24 A. I do.
- Q. And these guidelines that are attached were

one basis for your view at that time that the ANSI

- 2 policy did not require disclosure of patent
- 3 applications?
- 4 A. I don't believe that was the issue that TI
- 5 raised.
- Q. That wasn't my question.
- 7 A. Sorry.
- Q. And I appreciate your answer, but let me, if I
- 9 could, ask my question again.
- 10 The guidelines for implementation of the ANSI
- 11 patent policy that are attached to this exhibit, to
- 12 this memo from Mr. McGhee to the 42 committee, these
- 13 quidelines were one basis for your view in 1994 that
- 14 the ANSI policy did not require disclosure of patent
- 15 applications; right?
- 16 A. That is correct.
- Q. And you intended for Mr. McGhee to send it on
- 18 to the 42 committee; right?
- 19 A. I don't recall at this point, but I have no
- 20 reason to doubt that I did.
- 21 Q. Now, the EIA patent policy in this time period,
- 22 1994, the wording was essentially identical to the ANSI
- 23 patent policy; right?
- A. Very close, yes.
- Q. Can you agree with the words "essentially

- 1 identical"?
- 2 A. Essentially identical, I will accept your
- 3 phraseology, yes, sir.
- 4 Q. And didn't EIA take the position in its
- official published manuals that it had adopted the ANSI
- 6 patent policy?
- 7 A. In toto, no, sir.
- Q. Well, you told us several times yesterday you
- 9 were the last word on the interpretation and
- 10 application of the EIA patent policy; correct?
- 11 A. Correct.
- Q. Who's the last word on what the words are of
- the policy themselves, what the policy actually says?
- 14 A. The words of the policy are the words of the licy Ci5nIhel owords of the

- it and it's a manual and it gets published, that means
- 2 you approved it; right?
- A. Me or one of my predecessors, yes, sir.
- 4 Q. Now, one of the manuals you talked about
- 5 yesterday was EP-7-A; correct?
- 6 A. Yes, sir.
- 7 O. That's JX-54. It was moved into evidence. We
- 8 can bring that up.
- 9 Mr. Kelly, you can either look at the screen or
- 10 you can -- or I'll wait for you to try to find it,
- 11 but --
- 12 A. It's probably better for me to review the hard
- 13 copy.
- Q. That's fine. Either way.
- 15 A. Okay. I have it.
- Q. And you talked about this August 1990 policy
- 17 yesterday; right?
- 18 A. Yes, I did.
- 19 Q. And this came into being right about the time
- 20 that you first joined EIA; correct?
- 21 A. I believe, yes, the month before.
- 22 Q. And so this is one that you've studied when you
- 23 first came on board; right?
- A. I'm sure it is, yes, sir.
- Q. Now, if you look at page 3 of the exhibit --

of 7-A at the time, the word "patents" there includes

- patent applications?
- 3 A. Yes.
- Q. Well, you know that EDEC -- I'm sorry.
- 5 You know that EIA revised this manual in
- 6 1995 and published a new one, don't you?
- 7 A. I'm not sure I do know that. I frankly don't
- 8 remember.
- 9 Q. There's an EP-7-B. Let me show it to you.
- 10 This is Exhibit RX-616.
- 11 May I?
- 12 JUDGE McGUIRE: Please.
- BY MR. PERRY:
- 14 Q. And you can see from the cover that it says
- 15 "EP-7-B Revision of EP-7-A." Do you see that?
- 16 A. I do.
- 17 Q. It says "October 1995"?
- 18 A. Yes, sir.
- 19 Q. Look at page 3, if you could, of the exhibit.
- 20 A. Yes, sir.
- 21 Q. No. I think I meant page 9. I'm sorry.
- 22 Again, this says "Foreword"; right?
- 23 A. Correct.
- Q. Would you pull up the last paragraph, please.
- 25 It says, "The material contained in this

1 publication was formulated under the cognizance of

- 2 JEDEC JC-10 committee on terms and definitions and
- 3 approved by the Engineering Department Executive
- 4 Committee."
- 5 Do you see that?
- 6 A. Yes, I do.
- 7 O. Now, this manual was generally available to the
- 8 JEDEC members and EIA members in the same way that you
- 9 described the other manuals that you talked about
- 10 yesterday?
- 11 A. Yes, sir. It would have been, yes.
- 12 Q. Now, look on the second page of the exhibit,
- 13 RX-616. Let's look at the second paragraph.
- Do you see that it says, "Standards and
- 15 publications are adopted by EIA in accordance with the
- 16 American National Standards Institute (ANSI) patent
- 17 policy"? Do you see that?
- 18 A. Yes, sir, I do.
- 19 O. So does that refresh your recollection that EIA
- 20 in its official manuals said that it had adopted the
- 21 ANSI patent policy?
- 22 A. It does here certainly, and obviously I didn't
- 23 catch this when I reviewed this document and I, with
- 24 the qualification I gave you before, the language is --
- 25 I think your term was "substantially identical" and I

1 adopted that. That's -- this statement is true to that

- 2 extent, yes.
- 3 Q. And you knew at the time in October 1995 that
- 4 the ANSI patent policy did not require the disclosure
- of patent applications; correct?
- 6 A. That is correct.
- 7 Q. Now, when you were reviewing the minutes of
- 8 JEDEC meetings, did you sometimes see that in JC-42
- 9 minutes there was a discussion of patents?
- 10 Let me make it more clear. There was a section
- on patents that included various provisions from policy
- 12 manuals?
- 13 A. I'm not quite sure I know what you're referring
- 14 to. Maybe you could help me.
- 15 Q. Let me show you.
- 16 A. Please.
- 17 Q. This will be -- oh, by the way, I should move
- 18 into evidence RX-616.
- 19 JUDGE McGUIRE: Any objection?
- MR. ROYALL: No objection.
- JUDGE McGUIRE: Entered.
- 22 (RX Exhibit Number 616 was admitted into
- evidence.)
- 24 BY MR. PERRY:
- Q. Let me show you now RX-691.

ESmitted into

- 1 May I?
- JUDGE McGUIRE: Yes.
- 3 BY MR. PERRY:
- Q. These appear to be the March 18, 1996 minutes
- of a JC-42 meeting.
- In March '96, was it one of your job
- 7 responsibilities to review minutes of JC-42 meetings?
- 8 A. Yes, sir.
- 9 Q. I just want to point you to something on page 7
- 10 of the exhibit.
- 11 A. Okay.
- 12 Q. Do you see up at the top it says "Patent
- 13 Tracking"?
- 14 A. Yes, sir.
- 15 Q. And then it says, "Show JEDEC patent policy at
- 16 each task group and committee meeting"?
- 17 A. Yes, sir.
- 18 Q. Do you see down at the bottom there's a
- 19 reference to EIA policy?
- 20 A. I'm not -- all right. We're together. Yes,
- 21 sir.
- 22 Q. And that has a quote from 7-B; correct, the
- October 1995 style manual?
- A. Yes, sir, it does.
- Q. So it appears to you that in fact 7-B was made

- 1 available at least to Mr. Townsend; right?
- 2 A. Evidently it was, yes.
- 3 O. Now, you talked yesterday about the sign-in
- 4 sheet as well, and the one that you were looking at was
- 5 CX-306.
- 6 Can we pull that up? And if you can find the
- 7 sign-in sheet that's in front of you, that would be
- 8 helpful.
- 9 A. I have it here, sir.
- 10 Q. And you said you had had some involvement as a
- 11 result of some task force you were on in changing the
- sign-in sheet to add some language; is that correct?
- 13 A. No.
- MR. ROYALL: I believe that may misstate the
- 15 witness' prior testimony.
- JUDGE McGUIRE: Restate.
- BY MR. PERRY:
- 18 Q. Let me ask it this way.
- 19 Did you have any involvement in preparing any
- of the language on this two-page sign-in sheet?
- 21 A. No, sir.
- Q. And you're looking at CX-306?
- A. I'm looking at CX-306.
- Q. You did talk about a particular sentence on the
- 25 front that says, "Subjects involving patentable or

- 1 patented items shall conform to EIA policy."
- 2 Do you see that?
- 3 A. I do.
- Q. And did you testify about when you thought this
- 5 was used at JEDEC meetings?
- 6 A. I believe I said it would have been in the
- 7 mid-1990s based on the logos that appear at the top of
- 8 the sign-in sheet. Yes.
- 9 Q. That's right.
- 10 And on page 2, there's -- well, page 1 tells
- 11 us to look on the reverse side for the EIA policy;
- 12 right?
- 13 A. Yes, sir.
- Q. And then on page 2, which I think was the back
- of the sign-in sheet --
- 16 A. Correct.
- 17 Q. -- the portion of the -- that talks on the
- 18 lower right -- I'm sorry -- that says "reference to
- 19 patented products in EIA standards," do you see that?
- 20 A. I do.
- 21 Q. Do you recognize that to be a quote from EP-3?
- 22 A. I can barely read it either on the screen or
- 23 here, but let me try. It's from EP-3 or EP-7. I'm not
- 24 sure which.
- Q. Well, it references EP-7, doesn't it?

1 A. Again, it's very difficult to read on my copy.

- 2 If you can highlight it, I will -- yes, that's what it
- 3 says.
- Q. Well, I think EP-3 will speak for itself. But
- 5 let's look at the language if we could.
- 6 The first sentence says, "Requirements in EIA
- 7 standards that call for the use of patented items
- 8 should be considered with great care."
- 9 Do you see that?
- 10 A. I do.
- 11 Q. And then in the next sentence there's a phrase
- that says, "Committee chairmen should ensure that no
- program of standardization shall refer to a product,"
- 14 and then it goes on from there.
- 15 Do you see that?
- 16 A. I do.
- 17 Q. Now, when you saw the use of the word "should"
- in EIA manuals, did you understand that to mean must?
- 19 A. I think in other places in the manuals they use
- 20 stronger language, but "should" certainly imposes a
- 21 duty, yes. "Should" does not mean must but "should"
- 22 suggests that there is a duty, yes.
- Q. Well, would you -- you do see that on this
- sign-in sheet there are two references to EP-7;
- 25 correct?

- 1 A. Yes, there are.
- Q. Well, I'd like you to look at EP-7-A, which was
- 3 JX 54.
- 4 A. Okay. I have it.
- 5 Q. And I'll ask you to look at -- this is the one
- 6 where the page numbers are a little bit cut off --
- 7 page 25 of the exhibit.
- 8 Would you pull up the last section under 7.2.1.
- 9 Do you see that the EP-7-A that the sign-in
- sheet points people to says, "The word 'shall'
- 11 expresses requirement, 'should' expresses
- 12 recommendation"? Do you see that?
- 13 A. I do.
- Q. And that's, as you understand it, the meaning
- 15 of "should" in official EIA publications; correct?
- 16 A. No. That's what 7-A says in that particular
- 17 section. You asked me my particular interpretation,
- 18 not what 7-A said. That's what 7-A says about --
- 19 O. Isn't this sign-in sheet an EIA publication?
- 20 A. No.
- 21 O. It's an official EIA form?
- 22 A. It's an official EIA form. And EP-7 is
- directed to EIA engineering publications; it's not
- 24 directed to forms. And again, going back to what I
- 25 said before, not to be argumentative, I thought you

1 asked me my -- how I understood the word "should," not

- 2 how a JEDEC manual or an EIA manual defines the word
- 3 "should."
- 4 O. Now, you talked some about the Dell case. Do
- 5 you remember that testimony from yesterday?
- 6 A. Yes, I do.
- 7 O. And you understood that was a case -- well,
- 8 what did you understand that the FTC had alleged in
- 9 that case that Dell had done?
- 10 A. That Dell had failed to disclose relevant IP
- and obviously because they failed to disclose it also
- 12 failed to license it on reasonable terms.
- 0. Did you understand that a Dell representative
- 14 had allegedly certified in writing twice that Dell had
- 15 no intellectual property that he was aware of?
- 16 A. I didn't know it was twice, but I think I
- 17 referred yesterday in my testimony to the fact that
- 18 there was a written certification of some kind, yes.
- 19 O. And Dell and the FTC entered into a consent
- 20 decree, you understand that?
- 21 A. I do.
- Q. There was no trial?
- 23 A. I do.
- O. And the FTC asked for comments about the
- consent decree from interested parties; correct?

- 1 A. Correct.
- Q. And then you and Mr. Bart, you on behalf of EIA
- and Mr. Bart on behalf of TIA, coauthored a letter to
- 4 the FTC providing comments; correct?
- 5 MR. ROYALL: Your Honor, I believe that
- 6 misstates the witness' prior testimony.
- 7 JUDGE McGUIRE: Then how does it misstate it?
- 8 MR. ROYALL: I don't want to put words in his
- 9 mouth, but he testified yesterday as to who the author
- 10 was.
- MR. PERRY: Your Honor, this is not a proper
- 12 objection at trial.
- JUDGE McGUIRE: Well, now, why is it not a
- 14 proper objection if he's claiming that the question
- misstates the testimony?
- MR. PERRY: Because the witness is supposed to
- answer the question yes or no, not Mr. Royall.
- JUDGE McGUIRE: Well, he's making an objection,
- 19 Mr. Perry. He's entitled to object. Now, the basis is
- 20 whether your question provides testimony that was
- 21 improperly misstated.
- 22 MR. ROYALL: I believe it does clearly.
- MR. PERRY: Let me go without referring to
- 24 testimony. I didn't realize I had referred to
- 25 testimony.

JUDGE McGUIRE: At this point I'm not sure

- 2 exactly what you referred to, but I want to address his
- 3 objection, so why don't we go back and restate the
- 4 question and then we'll see where we stand.
- 5 BY MR. PERRY:
- Q. Did you on behalf of EIA and Mr. Bart on behalf
- 7 of TIA coauthor a letter to the FTC providing comments
- 8 on the Dell consent decree?
- 9 A. No.
- 10 Q. All right. Would you please look at the
- 11 Infineon deposition transcript that's dated January 9,
- 12 2001 at page 139.
- 13 A. I'm sorry. Would you mind repeating which
- volume of these volumes I'm supposed to be looking at.
- 15 Q. January 9, 2001 in the Infineon case.
- 16 A. Yes, sir.
- 17 Q. At page 139.
- 18 A. Okay.
- 19 Q. And I'll give you a chance to read the portion
- that begins at line 8 to line 15.
- JUDGE McGUIRE: What page was that, Mr. Perry?
- MR. PERRY: 139, Your Honor.
- 23 THE WITNESS: Yes, sir. In this particular
- 24 portion --
- JUDGE McGUIRE: No. He hasn't asked a question

- 1 yet.
- THE WITNESS: I'm looking at that line.
- 3 MR. PERRY: Let's let His Honor look at that.
- 4 JUDGE McGUIRE: He has not asked a question.
- Go ahead, Mr. Perry.
- 6 BY MR. PERRY:
- 7 Q. Did you testify in the Infineon deposition,
- 8 where you had been sworn to tell the truth, that you
- 9 believe you had coauthored with Dan Bart comments on
- 10 the Dell case?
- 11 A. I did.
- 12 Q. And was that a true statement?
- 13 A. I think if you look elsewhere in my deposition,
- 14 when I'm shown the document, I clarified what my role
- in authorship was.
- So I mean, if you're asking me if this one line
- 17 read out of context is an accurate statement, that was
- 18 my best recollection at that time, not knowing what
- 19 document -- not having seen the document, and I might
- 20 mention incidentally not knowing when I took this
- 21 deposition even what the subject matter of the
- deposition was.

- 1 A. Yes.
- 2 Q. And you approved the letter as written;
- 3 correct?
- 4 A. I did.
- 5 Q. Did you provide any input into the letter?
- A. No. I offered comments on the draft, and I
- 7 think this was my testimony earlier and in deposition,
- 8 I offered comments on a draft that was prepared by
- 9 Mr. Paul Vishny and provided to me by Mr. Bart.
- 10 Q. So you did provide input into the letter?
- 11 A. Right.
- 12 Q. Okay.
- 13 A. And to that extent, I don't disagree with the
- 14 statement coauthored; I'm clarifying what my role was
- in response to your question.
- Q. Did some of your comments get into the letter?
- 17 A. I don't recall specifically which ones, if any,
- 18 did, but again, I don't disagree with the substance of
- 19 the letter.
- 20 O. Well, let's look at the letter. It's RX-669.
- 21 A. I have it. Yes, sir.
- Q. Now, the letter on its first page refers to
- various JEDEC standards; correct? The first full
- 24 paragraph under Statement of Interest, if you'll look
- down to the bottom of that paragraph, do you see

- 1 references to JEDEC standards?
- 2 A. Yes. There is a reference to all JEDEC
- 3 solid-state standards for the semiconductor industry,
- 4 yes, among others, yes, sir.
- Q. And at the time, January '96, JEDEC was an
- 6 activity within the EIA engineering department;
- 7 correct?
- 8 A. I believe that's correct at that time, yes.
- 9 Q. And this letter was written in part on behalf
- 10 of JEDEC; correct?
- 11 A. As part of the EIA organization, yes, of
- 12 course.
- Q. Now, if you'll look on the next page, page 2 of
- 14 the letter, there's a heading I think you spoke to
- 15 yesterday called "Allowing patented technology in
- 16 standards is pro-competitive."
- 17 Do you see that?
- 18 A. Yes, sir, I do see that.
- 19 O. And you agreed with that at the time; correct?
- 20 A. Yes. Subject to the statements I made, the
- 21 additional statements I made yesterday, yes, I do, I
- 22 did.
- Q. And if you'll look on page 4 of the letter --
- let's pull up the very last paragraph, and it says:
- 25 "Standards in these high-tech industries must be based

on the leading-edge technologies. Consumers will not

- 2 buy second-best products that are based only on
- 3 publicly available information. They demand and
- 4 deserve the best technology these industries can
- 5 offer."
- 6 Do you see that?
- 7 A. I do.
- Q. And you agreed with that at the time as well?
- 9 A. I do -- I did and do, yes.
- 10 Q. And you agreed then that consumers would not be
- 11 well-served if a high-tech standard-setting
- organization insisted on having standards that were
- patent-free, that had no IP in them?
- 14 A. As a general principle, yes. There are
- 15 certainly exceptions to that, but as a general
- 16 principle, yes.
- 17 Q. And the important issue is the license
- 18 availability to all parties on a reasonable,
- 19 nondiscriminatory basis; correct?
- 20 A. In part. It's also the issue of whether or not
- 21 the patented technology is likely to increase the cost
- 22 of the item to the point where the standard is one that
- will not gain market acceptance, so there's that
- 24 aspect, too.
- In other words -- if I can explain? Or may I?

- 1 It's your question.
- MR. ROYALL: Your Honor, I'm going to ask that
- 3 he not be --
- 4 MR. PERRY: I was going to say yes, Mr. Royall.
- JUDGE McGUIRE: Just a second, Mr. Royall.
- 6 MR. PERRY: I was going to say fine.
- 7 JUDGE McGUIRE: Now, do you have a statement
- 8 that you want to make, Mr. Royall?
- 9 MR. ROYALL: No. I just simply want to make
- 10 sure he can give his full statement.
- 11 JUDGE McGUIRE: He's getting full and fair
- 12 treatment.
- BY MR. PERRY:
- Q. Go ahead. Explain your answer.
- 15 A. If there is a patented and a nonpatented
- 16 alternative and there's roughly equivalency in terms
- of technical merit, it may be appropriate for a
- 18 committee to look hard at the nonpatented
- 19 alternative.
- Q. Are you done?
- 21 A. I'm done.
- Q. Would you look at the sentence that comes just
- above the one that we were looking at.
- So pull it all up.
- No, no. Just the sentence just above the last

- 1 paragraph, please, and the last paragraph. The
- 2 sentence just above the last paragraph. That's the
- 3 one. Thank you.
- 4 The sentence just before the last paragraph on
- 5 page 3 says: "Even if knowledge of a patent comes
- 6 later in time due to the pending status of the patent
- 7 while the standard was being created, the important
- 8 issue is the license availability to all parties on
- 9 reasonable, nondiscriminatory terms."
- 10 Do you see that?
- 11 A. Yes, sir.
- 12 Q. And you agreed with that at the time the letter
- 13 was sent; correct?
- 14 A. Yes, sir.
- 15 Q. Now, at the time the letter was sent, you
- 16 understood that TIA's patent policy did not require the
- 17 disclosure of patent applications; right?
- 18 A. That's correct. TIA adopted a patent policy in
- 19 about 1991 that did not apply, yes.
- Q. Now, you also know that JEDEC has been aware
- 21 since 2000 of patents issued to Rambus that Rambus has
- 22 asserted against manufacturers of JEDEC-compliant
- DDR SDRAM and SDRAM devices; correct?
- 24 A. That's correct.
- Q. Has JEDEC ever asked Rambus if it would agree

1 to license those patents to all comers on reasonable

- 2 and nondiscriminatory terms?
- A. No. Actually when I think we first learned
- 4 about the Rambus patents there was at least one and
- 5 perhaps several cases in litigation so, as I had
- 6 testified yesterday, we stayed out because those
- 7 matters were before the courts.
- 8 Q. When you say you stayed out, you've been filing
- 9 amicus briefs, haven't you?
- 10 A. Yeah. We did not contact Rambus, to answer
- 11 your question, and ask for any licensing assurances or
- 12 any other information because all these matters were
- 13 before the courts.
- 14 O. Now --
- 15 MR. ROYALL: Your Honor, sorry for the late
- 16 objection. I would just ask for clarification.
- 17 When questions are asked about JEDEC, as
- 18 Mr. Perry on numerous occasions yesterday pointed out,
- 19 this witness was not involved in JC-42, so I would ask
- for clarification when he says "JEDEC" whether he's
- 21 talking about JEDEC at large or the JC-42 committee.
- MR. PERRY: Let me ask that question.
- JUDGE McGUIRE: Go ahead.
- 24 BY MR. PERRY:
- Q. How long have you been president of JEDEC?

- 1 A. Since early 2000 -- early 2000.
- 2 Q. And since about the time you became president
- 3 of JEDEC, you've been aware that Rambus had issued
- 4 patents that it had asserted against manufacturers of
- 5 JEDEC-compliant DDR SDRAM and SDRAM devices?
- 6 A. I believe that's true, yes.
- 7 O. And you've considered whether or not to ask
- 8 Rambus for an assurance that it will make those patents
- 9 available to all comers on reasonable terms, haven't
- 10 you?
- 11 A. No, sir, I have not. I believe that's directly
- 12 contradictory to what I just said.
- 13 Q. Well, I'm sorry, but what you just said was
- there was a reason why you hadn't and now I'm asking,
- if there is a reason why you hadn't, did you think
- 16 about doing it?
- 17 A. No.
- Q. So it never entered your mind until just now to
- 19 ask Rambus for assurances of reasonable and
- 20 nondiscriminatory licensing?
- 21 MR. ROYALL: Again, Your Honor, if I could
- 22 object, I think there's confusion here because the
- 23 earlier questions that he's referring back to didn't
- 24 specify whether he was talking about JEDEC at large,
- which is what this witness knows about, or the JC-42

- 1 committee, which he may or may not know.
- JUDGE McGUIRE: All right. So noted.
- 3 You can ask your question, Mr. Perry.
- 4 If you can answer them, you can answer them.
- 5 But in that context. Let's be clear. And Mr. Kelly,
- 6 is that clear to you the context in which these
- 7 questions are now being asked?
- 8 THE WITNESS: Your Honor, the only thing that's
- 9 unclear in Mr. Perry's questions is he continues to
- 10 refer to "you," which I interpret to mean me as opposed
- 11 to JEDEC as an organization or JC-42.
- 12 JUDGE McGUIRE: I understood when he said that
- 13 that he was talking about you personally.
- 14 THE WITNESS: About me personally.
- 15 JUDGE McGUIRE: Then let's proceed.
- BY MR. PERRY:
- 17 Q. When I say "you," Mr. Kelly, I'm talking about
- 18 you, Mr. Kelly.
- 19 A. All right.
- 20 Q. So until this -- until today, did you ever
- 21 consider the possibility of asking Rambus for
- 22 reasonable assurances that it will license -- for
- 23 assurances that it will license its patents -- excuse
- 24 me.
- MR. ROYALL: I thought you were finished.

- 1 that?
- 2 A. No. That's the interpretation of the general
- 3 counsel who interprets the manuals.
- 4 O. Well, have you provided that interpretation to
- 5 any JEDEC committee in the past two years with respect
- 6 to the Rambus patents?
- 7 A. I think I just answered your question, that
- 8 issue to my knowledge has never arisen.
- 9 Q. And you think the committee chairman of JC-42
- 10 knows of this litigation exception to the requirement
- in the JEDEC manuals that the request for assurances be
- made when the committee learns of patents that read on
- 13 standards?
- 14 A. I have expressed my opinion about taking action
- 15 given the pendency of litigation in other contexts. I
- 16 can't tell you what's in the mind of JC-42 members or
- 17 chairman.
- 18 Q. Well, if it's true -- strike that.
- 19 So JEDEC does -- I'm sorry.
- 20 So you don't know at this point whether or not
- 21 the terms that Rambus would offer in response to such a
- 22 request would be considered reasonable by licensees or
- 23 the courts or by you; is that right?
- 24 MR. ROYALL: Objection. Lack of foundation,
- 25 Your Honor.

- 1 JUDGE McGUIRE: Overruled.
- 2 THE WITNESS: I have no idea whether Rambus
- 3 would offer assurances or what those assurances would
- 4 contain, no.

- 1 Q. Well, looking back up to the top to
- 2 paragraph 9.3, that's entitled Reference to Patented
- 3 Products in EIA Standards. Do you see that?
- 4 A. I do.
- 5 Q. Would you look at the third sentence. It
- 6 starts with the word "if."
- 7 Can we pull that up? Pull that up.
- 8 "If the committee determines that the standard
- 9 requires the use of patented items, then the committee
- 10 chairperson must receive a written assurance from the
- organization holding rights to such patents that a
- 12 license will be made available without compensation
- to," it goes on and then it says "or written assurance
- that a license will be made available to all applicants
- 15 under reasonable terms and conditions that are
- demonstrably free of any unfair discrimination."
- 17 Do you see that?
- 18 A. I do.
- 19 O. And you previously testified that you
- 20 understand that the JEDEC committee has determined that
- 21 the standard, the SDRAM standard, does not require the
- 22 use of Rambus patented items?
- 23 A. No. I don't think I said that.
- Q. Now, while we're talking about 21-I, this JEDEC
- 25 manual, you agree that it needed the final stamp of

- 1 approval from EDEC; correct?
- 2 A. I'm sorry. Could you repeat the question.
- 3 Q. The JEDEC manual 21-I, it needed a final stamp
- 4 of approval from EDEC; correct?
- 5 A. I believe at this time that was correct, yes,
- 6 sir, in 1993.
- 7 O. And are you aware that 21-I was never even
- 8 submitted to EDEC?
- 9 A. No.
- 10 Q. Have you looked at any EDEC minutes to see if
- 11 21-I was ever given that final stamp of approval?
- 12 A. I never have.
- Q. Do you know one way or the other whether the
- 14 manual 21-I was ever given the final stamp of approval
- 15 by EDEC?
- 16 A. In fact, no. I know what should have been
- 17 done. I don't know if it was done.
- 18 Q. So you weren't intending to testify yesterday
- 19 that 21-I was formally approved by EDEC, were you?
- 20 A. In point of fact, no. I -- I would have no way
- of knowing that in point of fact.
- 22 Q. The EDEC minutes are available to you, aren't
- 23 they?
- 24 A. Right.
- Q. And this was raised in your Infineon

- deposition, wasn't it?
- 2 A. It may have been.
- Q. Let's look back at the letter again that was
- 4 sent to the FTC on behalf of EIA and TIA in Januar6
- A ofif you'llQ. Le thpage -- we'llQpullQupave been.

is clear on that, "encourage" in this context means we

- 2 can't impose sanctions, the process is voluntary,
- 3 therefore we encourage.
- 4 Q. And the word "voluntary," do you think that's
- 5 appropriately used in this sentence to describe EIA's
- 6 patent policy?
- 7 A. I think, since you referred to my depositions,
- 8 I think we went over this at length in my depositions.
- 9 I probably would have chosen a different word to use
- 10 particularly given all the scrutiny that that one word
- 11 has received in connection with this litigation. I'm
- 12 not sure I would have chosen the same word in
- 13 retrospect, no.
- Q. TIA's policy at the time didn't require the
- disclosure of anything, did it?
- 16 A. That's the way TIA interprets their policy of
- 17 late, yes.
- 18 O. And you knew that in 1996; right?
- 19 A. No, I didn't know that in 1996.
- Q. You knew in 1996 that the TIA policy didn't
- 21 require disclosure of patent applications; right?
- 22 A. No, I did not know that.
- Q. When did you first learn that the TIA policy
- 24 was interpreted by TIA not to require the disclosure of
- 25 patent applications?

- 1 A. My best recollection is that Mr. Bart raised
- 2 that when he and I spoke in connection with the
- 3 Amy Marasco proposed testimony that I referred to
- 4 yesterday. And I think he said basically we interpret
- 5 the TIA policy the way Amy interprets her policy. And
- 6 my response was, you know, that's your prerogative,
- 7 that is not the way EIA interprets the policy, and he
- 8 said, Yes, I know.
- 9 Q. Mr. --
- 10 A. Mr. Bart.
- 11 O. Mr. Bart was Mr. Ken McGhee's boss for some
- 12 period of time, wasn't he?
- 13 A. At some point in time he was, yes.
- Q. You know there was a response to this letter
- from the Federal Trade Commission; correct?
- 16 A. I do.
- 17 Q. Let's look at that. That's yesterday and the
- 18 version you were shown was RX-741. It's dated July 10,
- 19 1996.
- 20 A. Yes, sir.
- 21 O. If we could look for a minute at the
- 22 handwriting in the upper right corner, is that your
- 23 handwriting?
- 24 A. It is not.
- Q. Do you recognize it?

- 1 A. No, not offhand.
- 2 Q. You do remember getting a copy of this, don't
- 3 you; you were listed as a cc?
- 4 A. Yes, sir, I did. Not with the handwritten
- 5 notations, though. It was a clean copy.
- 6 Q. Okay. The third paragraph of the FTC
- 7 secretary's letter states, "EIA and TIA, following ANSI
- 8 procedures, encourage the early, voluntary disclosure
- 9 of patents but do not require a certification by
- 10 participating companies regarding potentially
- 11 conflicting patent interests."
- 12 Do you see that?
- 13 A. Yes, sir.
- Q. And then it says, "Later discovered patents
- 15 essential to the standard can remain as part of a
- 16 standard if licenses for the underlying patents are
- 17 available either on a royalty-free basis or on
- 18 reasonable terms and conditions that are demonstrably
- 19 free of unfair discrimination."
- 20 Do you see that?
- 21 A. I do.
- 22 Q. Was that statement a correct interpretation of
- the EIA patent policy as of July 1996?
- A. Well, first -- can I respond? This is
- 25 Mr. Clark speaking to Mr. Bart and to myself and to

- 1 Mr. Vishny. This is not me speaking to him.
- Q. I understand that, but can I get a yes or a no,
- 3 and then I'll let you explain?
- 4 A. The answer is no. May I explain?
- Q. Yes.
- 6 A. Okay. What I just said plus the fact that this
- 7 is not a complete statement, it is accurate as far as
- 8 it goes, but it is not complete.
- 9 And if I can finish, what it presupposes is
- 10 that the committee wants to include the technology
- 11 that's subject to a patent or patent application in the
- 12 standard and if that's not -- and that wouldn't
- 13 necessarily be the case if there had not been
- 14 disclosure.
- 15 Q. Now, the first sentence I read has the word
- 16 "voluntary" in it again. Do you see that?
- 17 A. Yes, sir.
- 18 Q. Paragraph 3 of that July 10 letter by the FTC's
- 19 secretary.
- 20 A. Yes, sir.
- 21 Q. And you thought that the use of the word
- 22 "voluntary" there was inappropriate, at least as with
- 23 respect to EIA; correct?
- 24 A. No. I don't believe that's what I said at all.
- I said in retrospect in the Bart letter I might have

- 1 used a different word than "voluntary." Mr. Clark is
- 2 repeating what was said in the Bart letter. I think
- 3 because of all the emphasis that's been placed on the
- 4 word "voluntary" out of context in this litigation that
- 5 I might have chose a different wording in retrospect.
- 6 I believe that was my testimony.
- 7 Q. Did you make any effort to explain to
- 8 Mr. Clark at the time what you thought "voluntary"
- 9 meant?
- 10 A. No.
- 11 Q. Now, if you'll look at RX-742 -- may I?
- 12 JUDGE McGUIRE: Please.
- 13 THE WITNESS: I'm not sure I have RX-742.
- 14 BY MR. PERRY:
- Q. Sorry.
- 16 A. I do now. Thank youTHE WITNESS: I'm .ease.

sThanDhank "vosemy testtion on a JulyA., I'm .ease. sThanDhiv sThanDhive \*ts withat th. I upe what yoop, I'm .ease.) TjT24rk at th.

- 1 attached information about the Dell case."
- Now, at the time in July 1996 was Mr. Bart
- 3 Mr. Ken McGhee's boss?
- 4 A. Evidently he was at that particular time, yes.
- 5 I know during a certain period of time he was.
- 6 Q. Mr. Bart at that time held a position within
- 7 EIA; correct?
- 8 A. He did.
- 9 Q. He was vice president of the engineering
- department of EIA; correct?
- 11 A. And also TIA, yes, sir.
- 12 Q. And in the second paragraph under the heading

1 that it was sent.

1 "voluntary" in this memo is inappropriate, don't you?

- 2 A. For all the reasons I've indicated previously,
- 3 yes.
- 4 O. And you think it could be misleading, don't
- 5 you?
- A. In retrospect, given the litigation, yes.
- 7 Q. Now, it's part of your job to review JC-42
- 8 minutes; right?
- 9 A. And all the other minutes that emanate from
- 10 EIA, yes, sir.
- 11 Q. Did you ever see any signs of the minutes of
- the JC-42 meetings that members of the JC-42 leadership
- were treating the patent disclosure obligation as
- 14 voluntary, not as an obligation but as something that
- 15 was voluntary?
- 16 A. I don't ever recall seeing that, no, sir.
- Q. And if you had seen that, would that have
- 18 raised a red flag?
- 19 A. It certainly should have, yes.
- Q. Let me show you one set of minutes. I won't
- 21 spend a lot of time on the minutes.
- If we could pull up JX-18.
- 23 May I?
- JUDGE McGUIRE: Go ahead.
- 25 THE WITNESS: Thank you.

- 1 BY MR. PERRY:
- Q. If we could pull up the heading at the top,
- 3 please.
- 4 Now, these are not particularly legible, but I
- 5 think the parties have agreed that these are minutes of
- 6 the JC-42.3 meeting in December 1993 in San Diego.
- 7 In the ordinary course of your job, if these
- 8 are minutes of that meeting, would you have reviewed
- 9 them?
- 10 A. I would have, yes.
- 11 Q. If you'll look on page 8, if you'll look to the
- third paragraph from the bottom, and it says: "As a
- 13 side issue, IBM noted that in the future they will not
- come to the committee with a list of applicable patents
- 15 on standards proposals. It is up to the user of the
- 16 standard to discover which patents apply."
- Did you, back in 1993 or early 1994 when
- 18 reviewing these minutes, see that passage where IBM had
- 19 said that they would not come to the committee with a
- 20 list of applicable patents?
- 21 A. I'm sure I did.
- Q. Did it raise a red flag with you?
- 23 A. I'm not sure. And I think, again, I was asked
- 24 this question during deposition. I'm not sure. I may
- 25 have spoken with Mr. McGhee about this, but in any

- 1 event, either I didn't interpret it in a way that
- 2 suggested that there was an issue under the patent
- 3 policy or Mr. McGhee clarified for me what IBM's --
- 4 what the situation was.
- In any event, no, to answer your question,
- 6 after whatever due diligence I undertook -- and it's
- 7 been a long time, so I can't tell you specifically what
- 8 that was -- I was satisfied that there was no problem
- 9 or I didn't see a problem.
- 10 Q. Let me show you -- how long would that due
- 11 diligence process take, do you think?
- 12 A. I have no idea. You're asking me to recall
- 13 something that -- this was one of 600, perhaps, sets of
- minutes ten years ago, so 6,000 sets of minutes ago.
- 15 Q. So you don't specifically remember talking to
- 16 anyone about this passage?
- 17 A. No. But if I had -- if I had seen it to be a
- 18 red flag, I would have spoken with Mr. McGhee. That's
- 19 my routine practice.
- Q. Did you or did you not -- can wouldlly7fs
- 21 today, did you , didn wie you or did you na2i I baciim uldec ι

1 Q. Let me show you another document in that same

1 Do you recognize that language to be the same

- 2 language we just saw in the minutes of that meeting?
- 3 A. I do.
- 4 Q. So does it appear to you that he sent you the
- 5 draft minutes and that you sent them back to him the
- 6 next day and said they were fine?
- 7 A. Yeah. There was an issue, as my cover note
- 8 indicates, involving TI and that was what I was focused
- 9 on. Again, I don't think there's any -- I don't recall
- 10 specifically discussing with him the language related
- 11 to IBM. I don't know one way or the other whether we
- 12 did.
- 13 Q. Look back at the January 22, 1996 letter to the
- 14 FTC, please. That is RX-669. I'm going to focus on a
- 15 slightly different issue in that letter. And I'll
- 16 point you to page 2.
- 17 A. You're slightly ahead of me now. Just indulge
- 18 me for a minute.
- 19 O. I'll wait. I have another copy if you'd
- 20 like.
- A. No. I'm sure it's here.
- MR. PERRY: May I?
- JUDGE McGUIRE: Go ahead.
- 24 THE WITNESS: No. I have it now. I have it
- 25 now.

- 1 BY MR. PERRY:
- 2 Q. Page 2.
- 3 A. Page 2.
- 4 O. Yes.
- In the second full paragraph, there's a
- 6 reference to -- well, it says, "Since EIA and TIA are
- 7 both ANSI accredited, they endorse and follow the ANSI
- 8 intellectual property rights (IPR) policy as it relates
- 9 to essential patents."
- 10 Do you see that part?
- 11 A. I do.
- Q. Now, "essential" to you means required patents;
- 13 correct?
- 14 A. No. "Essential" is a term that TIA uses in
- 15 its manual. EIA has always interpreted the "required"
- to mean is or may be required, as long as I've been
- 17 there.
- Q. As used in this letter, "essential" to you
- 19 meant required; correct?
- 20 A. No. Actually as used in this letter when I
- 21 reviewed it, that was TIA's term and I was comfortable
- 22 using it.
- Q. Would you look at page 54 of your January 10,
- 24 2001 deposition. January 10, page 54.
- A. January 10 and what page?

- 1 O. Page 54.
- 2 A. Page 54.
- 3 Q. You might want to start on page 52 where this
- 4 same letter is introduced.
- 5 A. Yes, sir.
- Q. Do you see that on page 52 this same letter was
- 7 shown to you, this January 22, 1996 letter?
- 8 A. I do.
- 9 Q. All right. If you would look on page 54,
- 10 please, at line 14.
- 11 A. Page 54, line 14, yes, sir.
- 12 Q. Well, if you'll see up at line 1, you'll see
- that counsel read to you the same line I just read from
- 14 that letter, and do you see on line 14 you were asked,
- 15 "Now, when you talk about essential patents, do you
- know what you meant by 'essential patents'?"
- 17 Do you see that?
- 18 A. Right.
- 19 O. And your answer was: "'Essential' is
- 20 equivalent to required patents."
- 21 Do you see that?
- 22 A. I do.
- Q. And then the question is: "That is, if
- 24 somebody is going to make a part according to the
- standard, they would be required to use that patent?

1 "ANSWER: That is correct."

2 A. Right.

- 1 about it in your deposition.
- 2 That case involved a standard for portions of
- 3 the consumer electronic bus, called CEBus; right?
- 4 A. Right.
- 5 Q. C-E-B-U-S; right?
- 6 A. Consumer electronic bus, that's correct.
- 7 O. And that was one of the divisions of the EIA?
- 8 A. Which was?
- 9 Q. The consumer electronic -- whatever --
- 10 A. Yes. Consumer Electronics Association.
- 11 Q. Was where the standard was being developed?
- 12 A. Correct.
- 13 Q. And they were operating under the EIA patent
- 14 policy at the time; right?
- 15 A. That's correct.
- 16 Q. And an EIA member called Echelon had voted
- 17 against some portion of the standard; right?
- 18 A. That's correct.
- 19 Q. And they had a competing technology that they
- 20 wanted included in the standard; right?
- 21 A. Yes, sir.
- 22 Q. And one of the reasons Echelon gave for its
- 23 "no" vote was it said that it had a patent that might
- 24 affect compliance with the standard; right?

- 1 right.
- Q. And they gave the patent number to EIA; right?
- A. You're going way back in time again, but
- 4 I'll -- I -- you're just about exhausting my
- 5 recollection on that, but let's keep going. I think
- 6 so.
- 7 O. And what Echelon said in part was that its
- 8 disclosure to EIA of its patent and its statement that
- 9 it might be required to comply with the standard
- 10 triggered the patent policy and meant that EIA had to
- 11 ask Echelon for an agreement that it would license on
- 12 RAND terms?
- 13 A. Again, you've kind of exhausted my
- 14 recollection, but I don't have any reason to doubt what
- 15 you're saying.
- 16 Q. Do you remember that the patent holder said,
- 17 Wait, you might be incorporating our patented
- 18 technology, you have to ask me for a RAND letter?
- 19 A. Not specifically, no. But if you have
- documents that will refresh my recollection, I'll be
- 21 happy to look at them.
- 22 Q. Let me show you the response that you wrote.
- 23 A. Thank you.
- MR. ROYALL: Your Honor, might I suggest at
- some point that we take a break, not necessarily now,

- 1 but --
- 2 MR. PERRY: I'm almost done, Your Honor. This
- 3 is my last subject matter.
- 4 MR. ROYALL: Oh.
- 5 JUDGE McGUIRE: Go ahead.
- 6 BY MR. PERRY:
- 7 Q. We've designated this as RX-2299 produced to us
- 8 by the EIA in this case, a letter dated August 14,
- 9 1995.
- 10 May I?
- JUDGE McGUIRE: Go ahead.
- 12 THE WITNESS: Thank you very much.
- BY MR. PERRY:
- Q. Now, Mr. Kelly, this is a two-and-a-half-page
- 15 letter; only a portion of it deals with intellectual
- 16 property.
- 17 A. Okay.
- 18 Q. In fairness to you, you can read the entire
- 19 thing, but I was only going to ask you about the
- 20 portion on the middle of page 2 that deals with
- 21 intellectual property, so I'd like your permission to
- go forward as expeditiously as possible. You're okay
- 23 with that?
- 24 A. You have it.
- Q. If in answering my questions you need to look

- 1 at more, look at more.
- 2 You wrote this; right?
- 3 A. Actually this was written by the law firm of
- 4 Squire, Sanders & Dempsey at our request, yes.
- Q. You signed it, didn't you?
- 6 A. I signed it and I reviewed it.
- 7 Q. You approved it?
- 8 A. I did.
- 9 Q. Before you signed it?
- 10 A. Correct. I was just trying to answer your
- 11 question of who wrote it.
- 12 Q. And this was the positions you were taking as
- vice president, secretary and general counsel of EIA;
- 14 correct?
- 15 A. Correct.
- 16 Q. And in that third paragraph on the second page
- of this letter you tell Echelon that they had
- 18 misinterpreted the ANSI and EIA patent policy. Do you
- 19 see that?
- 20 A. Let's see. Allow me to --
- Q. Read that paragraph to yourself.
- 22 A. Thank you.
- 23 (Pause in the proceedings.)
- 24 Yes, sir.
- Q. You told Echelon that they had misinterpreted

the ANSI and EIA patent policy; right?

- MR. PERRY: He specifically stated that he had
- 2 not taken the position in writing that this letter
- 3 shows he did and I'm entitled to impeach under the
- 4 terms of the order that we stipulated to and agreed to

- 1 A. No. No. That is incorrect.
- 2 O. Can I show you what Echelon said, please?
- 3 A. You can show me what Echelon said and I can
- 4 tell you what Echelon said if you'd like.
- 5 Q. That would be fine, but let's get this --
- 6 A. By all means.
- 7 MR. PERRY: This is RX-2300.
- 8 MR. ROYALL: Is this on the exhibit list?
- 9 MR. PERRY: No, sir.
- MR. ROYALL: Again, this is not impeachment.
- 11 He hasn't said anything that contradicted this letter.
- JUDGE McGUIRE: Well, I'm allowing him to yet
- 13 continue in that vein and you'll be able to take it up
- 14 again, Mr. Royall, on your redirect. Or you can read
- 15 counter-portions if necessary. You'll have that
- opportunity, but I'm going to allow him to go into this
- 17 inquiry.
- MR. ROYALL: Okay. Thank you.
- BY MR. PERRY:
- Q. Would you look on page 4 -- do you recognize
- 21 this to be Echelon's response to the ballot and its
- 22 explanation of its "no" vote? Do you see that?
- 23 A. Yes, sir.
- Q. And if you'll look on page 4 -- and I'll give
- 25 you the time to read the discussion under the heading

1 EIA Will Need to Comply With the ANSI Patent Policy.

- 2 A. Okay.
- 3 (Pause in the proceedings.)
- 4 Right. I'm with you.
- 5 Q. Now, there's a reference to Intellon
- 6 Corporation as saying that it held patents.
- 7 Do you remember what Intellon, I-N-T-E-L-L-O-N,
- 8 was?
- 9 A. Uh-huh. I remember that they had -- they also
- 10 planned to have relevant patents, yes.
- 11 Q. Right.
- 12 And the letter from Echelon says that whether
- or not the Intellon licenses meet the standard, fair,
- 14 reasonable and nondiscriminatory, EIA needs to comply
- 15 with the ANSI patent policy.
- 16 Do you see that?
- 17 A. I do.
- Q. And then it says, "That policy requires that an
- 19 SDO take certain steps if it is notified that
- 20 compliance with a standard may require" --
- 21 quote-unquote, may require -- "use of a patented
- 22 invention."
- Does that refresh your recollection that
- 24 Echelon had taken the position that the EIA patent
- 25 policy was triggered when a company said that its

- patent -- that compliance with a standard may require
- 2 the use of a patented invention?
- A. Does it refresh my recollection about this,
- 4 this case? I don't understand your question.
- 5 Q. My question to you earlier was hadn't Echelon
- 6 taken the position that the patent policy is triggered
- 7 when a patent might be required, may be required, to be
- 8 used in order to build the standard and that you in
- 9 your letter were responding to that comment.
- 10 Does this refresh your recollection that
- 11 Echelon was in fact saying that the policy requires
- 12 that an SDO take certain steps if it is notified that

- 1 Q. Let me get through with my questions and then
- 2 I'll give you an opportunity to explain whatever it is
- 3 you want to explain.
- 4 A. Thank you.
- 5 Q. But first let me put what I'm focused on in the
- 6 record.
- 7 A. Thank you.
- Q. When you wrote your August 14, 1995 letter
- 9 that is RX-2299, you were responding to this discussion
- on page 4 of Echelon's comments on this standard;
- 11 right?
- 12 A. Yes, sir. It appears that that was what
- 13 prompted this paragraph, yes.
- Q. And you told Echelon that there was no need for
- 15 EIA to secure a commitment from Echelon to license its
- 16 technology; correct?
- 17 A. Correct.
- 18 Q. And in fact, the standard was passed without

1 A. It is the appellate body within ANSI that

- 2 reviews proposed American National Standards to
- determine if there is an issue to determine whether or
- 4 not they should be approved as an American National
- 5 Standard.
- Q. And as far as you know, that's the only time
- 7 there's been an appeal involving the EIA patent policy
- 8 that's gone that far?
- 9 A. I don't know of any other EIA case that went up
- 10 before that body, yes.
- 11 Q. And that body issued an opinion and provided it
- 12 to you?
- 13 A. Yes, sir.
- Q. Now, were you involved in preparing the briefs
- on appeal to that body?
- 16 A. I reviewed the briefs on appeal. I attended
- the hearing with outside counsel.
- 18 O. With outside counsel?
- 19 A. With outside counsel from -- Mr. David Noll
- 20 from Squire, Sanders & Dempsey and I and other members
- 21 of the staff attended that hearing in New York City.
- Q. And you remember that the Board of Standards
- 23 Review held that the EIA patent policy was not
- triggered unless the company's patented technology was
- 25 essential and that someone who wanted to build a device

1 its own patent policy and talk about how it should be

- 2 interpreted in this area?
- A. It may have. I don't recall.
- 4 Q. When you received the opinion of the Board of
- 5 Standards Review, did you seek to appeal it further?
- A. I'm not sure that we ever had that discussion
- 7 or that I thought of that, no.
- 8 Q. Well, your letter that you wrote in
- 9 August 1995, that was about the EIA patent policy,
- 10 wasn't it?
- 11 A. I believe at that time it was, yes, sir.
- 12 MR. PERRY: I have nothing further,
- 13 Your Honor.
- 14 THE WITNESS: May I have my opportunity to
- 15 explain?
- BY MR. PERRY:
- 17 Q. I'm sorry. I forgot.
- 18 A. It happens.
- 19 Q. You're very correct, Mr. Kelly, and I do
- 20 apologize. I do want to give -- now, I may have some
- 21 follow-up questions.
- 22 A. By all means. I think you're entitled.
- JUDGE McGUIRE: Go ahead, Mr. Kelly.
- 24 BY MR. PERRY:
- 25 O. Go ahead.

1 A. The Echelon case involved a situation very

- 1 Q. And you -- and are you done?
- 2 A. I'm done.
- Q. And you understand that a rule that allows
- 4 assertions that a patent application may have been
- 5 filed that might cover or that might relate to some
- 6 part of some standard might be used inappropriately to
- 7 delay the standardization process; correct?
- 8 A. That's exactly what, in my opinion, what was
- 9 happening here.
- 10 Q. And is that one of the policy reasons that
- 11 you've heard that's been given for not requiring
- 12 disclosure of patent applications?
- 13 A. No, sir. This is an abuse of process.
- 14 Q. Have you heard that danger described as one of
- 15 the policy reasons given for why the standard should
- not be that IP needs to be disclosed whenever it
- 17 relates to a standard on consideration as opposed to
- 18 covering or reading on or requiring conformance?
- 19 A. Have I ever seen that argument made? I guess I
- 20 have seen that argument made, in fact I've seen it made
- 21 in the press of late in connection with this case, but
- 22 I think it's again based on a complete misconstruction,
- 23 misunderstanding of what's required in terms of
- 24 disclosure of a patent. It's not the whole patent
- 25 application. It's not the document. It's enough

1 information so that the committee can understand the

- 2 terrain and the area in which they're standardizing and
- 3 not be surprised by ticking time bombs that may lay in
- 4 their path. That's the whole purpose.
- 5 Q. To get back to what you said Echelon had
- 6 informed you, could you look please again at page -- at
- 7 RX-2300 at page 4.
- 8 A. RX-2300 is, yes, is their comments on the
- 9 ballots.
- 10 Q. Comments by Echelon at page 4.
- 11 And if you'll look at the third paragraph, and
- 12 it says -- it says, "As Echelon alerted" -- are you
- with me, the third sentence?
- 14 A. Yes.
- 15 Q. "As Echelon alerted EIA on March 16, 1995,
- 16 Echelon holds a patent for power line spread spectrum
- 17 communications that may affect compliance with the
- 18 CEBus power line specification. A copy of this patent
- 19 has been supplied to counsel for EIA and is available
- on request to other interested parties."
- 21 A. Yes, sir.
- Q. Then it goes on to say, "Although Echelon
- 23 cannot at this time determine whether use of its
- intellectual property is required by firms building
- 25 CEBus-compatible power line devices, it might be the

1 something you're working on. And if you've reviewed

- the entire record, as I assume you have, in the ANSI
- 3 proceeding you will find that this was a material issue
- 4 of fact.
- 5 So what I'm trying to say, if you'll allow me
- 6 to complete my statement, is you are asking me in
- 7 essence to relitigate something that was already
- 8 litigated before. This was an attempt by Echelon to in
- 9 bad faith impede the process, and after they had made
- 10 their proffer, there was a lot of rhetoric that they
- 11 introduced into the record, such as this, to try to
- 12 substantiate a position that they would later take
- 13 before ANSI. This is bogus.
- 14 O. Are you done?
- 15 A. I'm done.
- Q. If Echelon in good faith believed that it could
- 17 not determine whether use of its IP was required to
- 18 comply with the standard but it thought it might be the
- 19 case that it did, was it your position at the time that
- 20 a RAND letter was required?
- 21 A. No. It was my position at the time that they
- 22 should have made that disclosure, which they never
- 23 did.
- Q. So they needed to say more than just, as you
- 25 understood the application of the EIA patent policy at

- 1 the time, they needed to tell EIA more than just we
- 2 can't tell whether use of our IP is required to conform
- 3 with the standard but it might be the case and here's
- 4 the patent?
- 5 A. No. May I answer?
- 6 Q. Yeah.
- 7 A. Okay. The answer is no. Again, you asked me
- 8 to assume that they were acting in good faith, and I
- 9 said if they were acting in good faith that and they
- 10 believed what they said in these comments then they
- 11 should have made the disclosure and the proffer of
- 12 relevance that I talk about in my testimony.
- In point of fact, this statement -- these
- 14 statements were made in bad faith for the purposes of
- delaying and impeding the process. And if I may
- volunteer this, by the way, this is the very incident
- 17 that I alluded to yesterday in my testimony. I didn't
- 18 complete the statement.
- 19 This was the other issue that I had with
- 20 Amy Marasco's testimony before the joint hearings. She
- 21 said that there had never been a case in which the --
- there had been an allegation of patent abuse in
- connection with the ANSI process, and I said yes, there
- 24 has and I referred her to the Echelon CEBus case. This
- is a case, sir, of patent abuse.

- 1 O. And you talked about your conversation with
- 2 Ms. Marasco just now. She was the general counsel of
- 3 ANSI?
- 4 A. She still is as far as I know. Yes, sir.
- 5 Q. And you were talking to her about her use of
- 6 the word "encourage" and her interpretation of it and
- 7 your interpretation of that word; correct?
- 8 A. No, sir. If you're referring to this specific,
- 9 in this specific I was referring to a footnote in which
- 10 she said there were no litigated cases involving an
- 11 abuse of the ANSI patent policy.
- 12 Q. I was trying to introduce as -- it's part of
- 13 that same conversation?
- 14 A. Part of that same conversation.
- 15 Q. You talked with her about her use of the word
- "encourage" in some draft of some testimony?
- 17 A. Correct.
- 18 Q. And her interpretation?

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1 A. It was either 2002 or the end of 2001. I can't

- 2 recall specifically.
- 3 O. And part of that conversation with her and with
- 4 others on these issues went on by e-mail; right?
- 5 A. I recall -- she may have written to me -- I
- 6 don't recall an e-mail to her. I might have written an
- 7 e-mail to her. I distinctly recall telephone
- 8 conversations with Amy Marasco, Richard Taffet and
- 9 Dan Bart.
- 10 Q. When I took your deposition, you said you
- 11 believe you did communicate by e-mail. Do you believe
- 12 that to be correct?
- 13 A. As I said, I might have. I just don't, at this
- moment, don't remember.
- 15 O. And JEDEC at the end of 2002 went to a
- 16 different e-mail system; correct?
- 17 A. Correct.
- 18 O. And all the e-mails that were on the old server
- 19 were lost?
- 20 A. No. I believe I said we didn't keep copies and
- 21 that statement at the time was incomplete and because
- 22 we keep weekly backups or at least we had kept weekly
- 23 backups of everything that was on our e-mail system,
- 24 so it's there someplace. If you want to go looking
- 25 for it, I'm sure it's -- we can make that available to

- 1 you.
- 2 Q. The backup tapes?
- 3 A. The backup tapes which would include
- 4 everything on the network for that entire period of
- 5 time.
- 6 Q. When you had the opportunity to correct your
- 7 deposition transcript which you now say was inaccurate
- 8 and in error, did you take that opportunity to tell us
- 9 about the --
- 10 A. You mean on the errata?
- 11 O. Yes.
- 12 A. No. This is not errata. My understanding of
- an errata sheet is to correct transcription errors, not
- to change the substance of my testimony. I'm
- 15 supplementing my testimony today under oath by now
- 16 telling you that I recall backup tapes of our database,
- 17 as I'm sure there are backup copies of information of
- 18 virtually all databases, including yours.
- 19 O. Thank you, Mr. Kelly.
- 20 A. Thank you, sir.
- 21 MR. PERRY: I'd like to move in, Your Honor,
- 22 RX-2299 and 2300.
- JUDGE McGUIRE: Any objection?
- MR. ROYALL: Your Honor, again, we've never
- 25 seen these before today. They were not on the exhibit

- 1 list. We did not have notice of them. We'd like to
- 2 have at least an opportunity before we --
- JUDGE McGUIRE: Go ahead and take that
- 4 opportunity over the break.
- 5 Now, that was in terms of RX --
- 6 MR. PERRY: 2299 and 2300.
- 7 JUDGE McGUIRE: How about the other one?
- 8 MR. PERRY: I'd like to move in RX-691.

1 MR. ROYALL: Not at any length, but I do have a

- JUDGE McGUIRE: What I want to do -- it's
- 4 twenty to twelve -- we're going to take off for lunch
- 5 until one o'clock, but during this time I also want to
- 6 confer with counsel in closed session, and so the
- 7 audience at this point can go and break and we'll be
- 8 back at one o'clock, and that's true as well for both
- 9 Mr. Kelly and the court reporter, and she's excused at
- 10 this time, and then I will speak to trial counsel.
- 11 (Whereupon, at 11:36 a.m., a lunch recess was
- 12 taken.)

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few questions.

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1 AFTERNOON SESSION

- 2 (1:05 p.m.)
- JUDGE McGUIRE: Mr. Kelly, will you have a
- 4 seat.
- We're on the record.
- 6 You may continue with complaint counsel's
- 7 redirect at this time, Mr. Royall.
- 8 MR. ROYALL: Thank you, Your Honor.
- 9 REDIRECT EXAMINATION
- 10 BY MR. ROYALL:
- 11 Q. Mr. Kelly, could I ask you to pull out, if you
- have it in front of you, the EP-7-B manual that
- 13 Mr. Perry asked you about. I think it's marked as
- 14 RX-616.
- 15 A. Yes, sir.
- I'm attempting to locate it. I have it.
- 17 Q. And I'd like to go back to the second page of
- the document, which I believe is the page or one of
- 19 the pages that Mr. Perry asked you about. It's page 2
- of 72 with the heading Notice at the top of the page.
- 21 A. Yes, sir.
- Q. And I believe that Mr. Perry asked you about
- 23 the second paragraph and in particular the first
- sentence of the second paragraph, which states,
- 25 "Standards and publications are adopted by EIA in

1 accordance with the American National Standards

- 2 Institute (ANSI) patent policy."
- 3 Do you see that?
- 4 A. I do.
- 5 Q. And I don't recall your exact words in
- 6 commenting on that language, but do you recall that you
- 7 said something to indicate that you may have missed
- 8 something or that you may on reflection think there's
- 9 something incorrect about that sentence?
- 10 A. Yeah. I think I said on direct examination
- 11 that I missed this or should have caught this or
- 12 something like -- something to that effect.
- Q. And can you explain what, if anything, about
- that language you disagree with or think is incorrect
- 15 or needed clarification?
- 16 A. The language is incomplete and may be
- 17 misleading because it is incomplete. When we refer to
- 18 ANSI in conjunction with EIA or JEDEC or TIA or any
- 19 other part of the EIA organization and with reference
- 20 to patent policies or procedures, the reference is
- 21 always to EIA/ANSI, TIA/ANSI.
- This, because of the omission of any reference
- 23 to EIA, suggests that EIA follows the ANSI patent
- 24 policy and that therefore the patent policy of EIA is
- 25 the ANSI patent policy, and that is an incorrect

- 1 inference resulting from this incomplete language.
- Q. And do you recall we discussed at some length
- 3 yesterday the relationship or lack thereof between the
- 4 EIA patent policy and the ANSI patent policy? Do you
- 5 recall that generally?
- 6 A. I do, yes.
- 7 Q. Is the EIA patent policy identical to the ANSI
- 8 patent policy?
- 9 A. No, it's not identical. There are differences
- in phraseology. There are differences in substance.
- 11 Q. And as you understand the two policies, both as
- 12 EIA's general counsel and as a member -- former member
- of the ANSI working group you've testified about, do
- 14 you understand the EIA patent policy to be consistent
- with the ANSI patent policy?
- MR. PERRY: Your Honor, could we just get a
- time frame on this question, please.
- JUDGE McGUIRE: Mr. Royall?
- 19 BY MR. ROYALL:
- 20 Q. And for that question I would refer to the
- 21 entire time period that you've been involved with EIA
- since September 1990.
- 23 A. No. The patent policy is consistent with the
- 24 ANSI patent policy, and my basis for saying that is
- 25 that EIA has been audited by ANSI in general in terms

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of the record retention and also in terms of its

1 O. Now, when Mr. Perry was questioning you

- 2 earlier, he asked you some questions about a page in
- 3 your -- in the transcript from your January 10,
- 4 2001 deposition in the Infineon matter. Do you recall
- 5 that?
- 6 A. I do.
- 7 Q. I'd like to pull up the page that Mr. Perry
- 8 questioned you about in that deposition, and if you
- 9 have it in front of you, the actual, it may be easier
- 10 for you to see than on the screen.
- 11 A. Okay.
- 12 Q. I'm referring to page --
- 13 A. I'm sorry. Which date was this?
- 14 Q. It's the January 10.
- 15 A. January 10?
- 16 Q. And it's page 54.
- 17 A. Okay.
- Okay. Yes.
- 19 O. I believe you'll recall that Mr. Perry asked
- 20 you about some questions and answers on this page, and
- 21 my question is: Do you see in the testimony that you
- 22 gave on this page the -- the line numbers aren't on my
- 23 copy, but it at least starts on line 4 --
- MR. PERRY: Your Honor, if I could, please, I
- only used this page to impeach him on the essential

1 patent issues that are separate and distinct from

- what's the subject matter of the current testimony.
- 3 It's an improper use of deposition testimony.
- 4 JUDGE McGUIRE: Do you have a comment,
- 5 Mr. Royall?
- 6 MR. ROYALL: Well, he was asked about this very
- 7 page in the patent policy and I'm simply --
- JUDGE McGUIRE: Well, it's not the page. It's
- 9 the issue. You know, you've got to confine your
- 10 examination to the scope of the cross. So how is this
- 11 within the scope of the cross-examination?
- MR. PERRY: My objection was not that it's
- 13 beyond the scope of the cross. It was that he can't
- 14 use his deposition testimony in this way when I hadn't
- 15 pointed him to this deposition testimony at all. He
- 16 can't just say did you testify like this before to
- 17 support his testimony today. That's not a proper use
- 18 of deposition.
- 19 JUDGE McGUIRE: You brought up a supposed prior
- inconsistent statement; is that correct?
- 21 MR. PERRY: Not on this issue in this
- 22 deposition. That's my only point. I used this page to
- talk about whether "essential" means required in his
- 24 mind.
- JUDGE McGUIRE: Okay. Mr. Royall, any

- 1 follow-up to the further objection?
- 2 MR. ROYALL: Your Honor, if respondent's
- 3 counsel has any problem with me pointing him to this
- 4 prior deposition testimony, that's fine. I'm happy
- 5 to move on. I've got other ways to make the same
- 6 point.
- 7 JUDGE McGUIRE: All right. Thank you.
- 8 BY MR. ROYALL:
- 9 Q. Do you recall, Mr. Kelly, that yesterday I
- 10 asked you some questions about something called the
- 11 ANSI -- or the patent policy guidelines of ANSI?
- 12 A. Yes, sir.
- Q. And if I could ask you -- again, I don't know
- if you have it handy in front of you, but I believe the
- 15 exhibit that I questioned you about yesterday was
- 16 RX-1712. Is that correct?
- 17 A. I'm sure it's here, but it's not handy. Let me
- 18 find it.
- 19 O. Is it 1712?
- 20 A. Yes, sir, I have it.
- 21 O. This is an October 2000 e-mail that attaches
- 22 various ANSI-related documents that we discussed
- 23 yesterday. Do you recall that?
- 24 A. Yes, sir.
- Q. And let me ask you to turn to -- my copy is

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- 1 not -- doesn't have page numbers on it, but it's the
- 2 page 1 of the guidelines for implementation of the ANSI
- 3 patent policy, which is -- I think you testified
- 4 yesterday that there were two copies of that document,
- 5 and I'm referring to the second, more legible of the
- 6 two copies.
- 7 A. Yes, sir. That begins on page 6 of 21 of
- 8 RX-1712.
- 9 Q. Yes.
- 10 And do you see at the bottom of that page the
- 11 heading Purpose?
- 12 A. Yes, sir.
- Q. And you'll recall yesterday that we discussed
- 14 some of the language under that heading.
- 15 Let me ask you to turn to the next page, which
- 16 I take it would be page 7 of RX-1712.
- 17 A. Yes, sir.
- 18 Q. And do you see the paragraph beginning "By
- 19 definition"?
- 20 A. I do.
- 21 Q. Could I ask you to read those two sentences --
- or I think actually it's three sentences.
- 23 A. "By definition, guidelines are suggestions --
- 24 adherence is not essential for standards developers to
- 25 be found in compliance with ANSI's patent policy.

- 1 Rather, this is an effort to identify possible
- 2 procedures that a standards developer may wish to
- adopt, either in whole or in part, for purposes of
- 4 effectively implementing the patent policy. Additional
- 5 or different steps may also be selected for such
- 6 purposes."
- 7 O. And in terms of what ANSI requires in order
- 8 for an ANSI affiliated organization to be in
- 9 compliance with the ANSI patent policy, how do you
- 10 understand -- what do you understand this language to
- 11 mean?
- 12 A. That there are options that individual standard
- developer organizations can adopt that are not
- 14 identical to the ANSI policy to address specific
- issues, and later an example that we specifically give
- in these guidelines is that standard developers may
- 17 elect to require the disclosure of patent applications
- 18 as well as issued patents.
- 19 O. And has EIA in fact chosen to adopt policies
- 20 that go beyond what is specifically required by the
- 21 ANSI patent policy?
- 22 A. EIA has, yes.
- Q. And by doing so, do you understand that EIA is
- 24 not in compliance with the ANSI patent policy?
- 25 A. No, sir. As I've just said before, it is -- my

1 understanding is we are in compliance with the policy

- 2 and have been.
- 3 Q. You were asked a number of questions by
- 4 Mr. Perry relating to issues involving I believe it was
- 5 the CEBus standard and --
- 6 A. Yes, sir.
- 7 Q. -- in particular disclosures that may have
- 8 been made by a company named Echelon. Do you recall
- 9 that?
- 10 A. I do.
- 11 Q. And did this incident involve in any way the
- 12 activities of JEDEC?
- 13 A. No, sir. It involved the consumer sector of
- 14 EIA which I believe at the time was named the Consumer
- 15 Electronic Manufacturers Association and it's now known
- 16 as the Consumer Electronics Association.
- 17 Q. And was there a particular committee within
- 18 that association that was involved in this incident?
- 19 A. There actually was a committee, and I'm not
- 20 sure what the number was, but I'm sure there was a
- 21 number assigned to it. It was known as the CEBus
- 22 committee within the Consumer Electronic Association's
- 23 engineering department.
- Q. And do you have an understanding of what CEBus
- is or what it refers to?

- 1 A. CEBus is an abbreviation that refers to
- 2 consumer electronic bus and CEBus was a multipart
- 3 standard that was developed over a period of probably

- 1 Echelon requested a meeting with the president of the
- 2 Electronic Industries Alliance -- Association, who at
- 3 the time was Pete McCloskey, and as the meeting was in
- 4 progress, or when the meeting was in progress,
- 5 Mr. McCloskey called Mr. Gary Shapiro, who was the
- 6 president of the Consumer Electronic Manufacturers
- 7 Association, and made -- it was Consumer Electronic
- 8 Manufacturers Association and/or it may have been
- 9 called Consumer Electronics Group at that time -- and
- 10 also called for me to come to his office for a portion,
- 11 for the last portion of the meeting with the president
- 12 of Echelon.
- Q. And was there such a meeting?
- 14 A. There was such a meeting, and during the
- 15 portion that I attended, the president of Echelon said
- 16 that --
- 17 MR. PERRY: Your Honor, I believe it's hearsay.
- 18 The question was: Was there a meeting?
- 19 THE WITNESS: Oh, there was a meeting. I'm
- 20 sorry. There was a meeting.
- JUDGE McGUIRE: Sustained.
- BY MR. ROYALL:
- Q. And do you have a recollection of what occurred
- 24 at that meeting?
- 25 A. Yes, sir.

- 1 A. What transpired at the meeting that I attended
- was that Echelon's president expressed his
- dissatisfaction with the ongoing CEBus standards
- 4 activity and indicated that his company was prepared to
- 5 spend a million dollars or more to block the standard
- 6 and EIA and CEA should withdraw from the
- 7 standard-setting activity.
- Q. And did you respond in any way to that
- 9 statement?
- 10 A. No. We -- no. I was surprised.
- 11 Q. Was there -- at that point in time -- can you
- 12 place this in time when this occurred?
- 13 A. Late 1993 or early 1994.

- 1 lobbied on Capitol Hill for legislation to block the
- 2 standard-setting activity.
- Q. Now, did there come a time after that that the
- 4 company Echelon did become a member of EIA?
- 5 A. Yes, sir.
- Q. Do you recall when that was?
- 7 A. It was probably a year after that, roughly
- 8 1994-1995 time frame, early.
- 9 Q. After the meeting that you just testified to
- 10 that occurred in the 1994 time frame, 0 OHyou ever have

1 be relevant to something you're working on, take it for

- what it's worth, we just want to be covered.
- Q. And I'm sorry. What was this gentleman's
- 4 name?
- 5 A. Chris, Chris Stanfield.
- 6 Q. Did Mr. Stanfield at that time give you an
- 7 explanation as to how the patent material that he had
- 8 provided to you may or may not relate to EIA's work?
- 9 MR. PERRY: Your Honor, if this is being
- offered for the truth of what was said, it's hearsay.
- 11 It doesn't connect.
- 12 MR. ROYALL: That's fundamental -- that's the
- 13 fundamental point. It's not being offered for the
- 14 truth of what it's -- what Mr. Stanfield said. It's
- 15 being offered for his state of mind or understanding at
- the time, which is a foundation to explaining what he
- 17 later did.
- 18 JUDGE McGUIRE: Sustained.
- 19 BY MR. ROYALL:
- 20 Q. Did you have any understanding at the time of
- 21 this meeting, sir, the one that you've testified about,
- 22 as to how, if at all, the patent material that was
- 23 provided to you related to EIA's work?
- A. No, sir. There was no proffer then and there
- was no proffer later, and we repeatedly requested a

- 1 proffer and we never received one.
- Q. And to be clear, when you say you repeatedly
- 3 requested a proffer, what specifically do you mean by
- 4 that?
- 5 A. Identification of how that document that was
- 6 presented to us in any way related to any particular
- 7 standard that we were working on.
- 8 Q. And were you given an answer to the proffer
- 9 that the -- the repeated proffers that you made in that
- 10 regard?
- 11 A. We were told either "we don't know" or
- 12 nothing.
- MR. PERRY: Your Honor, that was a yes or no
- 14 answer.
- THE WITNESS: I'm sorry.
- 16 MR. PERRY: It's why I didn't object. He's now
- gone forward and given out the hearsay and I will
- 18 object on hearsay grounds.
- 19 JUDGE McGUIRE: And that last answer will be
- 20 stricken.
- 21 Court reporter, please strike that last answer
- 22 and I'll -- I will sustain that objection.
- BY MR. ROYALL:
- Q. Mr. Kelly, let me ask you another question, and
- 25 I'm simply looking for a yes or no answer, if you can

- 1 give a yes or no answer.
- 2 You mentioned that there were repeated proffers
- 3 or requests for a proffer on the part of EIA to Echelon
- 4 with the purpose of gaining some knowledge of what
- 5 these patent -- what this patent information may relate
- 6 to.
- 7 To your understanding, were you ever given
- 8 answers to the repeated proffer -- repeated requests
- 9 for proffer that were made to Echelon?
- 10 A. No, we were never given a response.
- 11 Q. Was the standard that was at issue here, the
- 12 standard that Echelon had drawn attention to, at some
- point later brought up for balloting within the
- 14 relevant EIA committee?
- 15 A. It was, but there's one additional step that I
- 16 haven't mentioned. If you want me to mention it, I
- 17 will.
- 18 O. Please do.
- 19 A. I took the physical document that was delivered
- 20 to me by Mr. Stanfield and gave it to the
- 21 vice president of engineering of CEA and I asked him
- 22 to meet with the CEBus committee and determine whether
- 23 there was any relationship that they could see between
- 24 the patent and any of the CEBus standards that they
- were working on, and they did and reported back to me

1 you to, if you could say so without disclosing anything

- 2 that you would regard as privileged, say anything as to
- 3 what your outside counsel was asked to do or what
- 4 purpose their -- what was the purpose of their
- 5 involvement in this incident?
- 6 A. I can tell you without revealing any
- 7 attorney-client privileged material whatsoever.
- 8 We had counsel involved in this matter from the
- 9 very first because there was a pending threat of
- 10 litigation and because there was lobbying going on to
- 11 block the standard-setting activity, and as I think I
- referred, I said this morning, this entire process or
- this entire effort by Echelon was designed to stop the
- 14 process, block the process, by their own admission,
- 15 either through litigation or through legislation or
- 16 otherwise.
- 17 Q. Did you have -- did you personally have any
- 18 understanding as to the basis for any threats of
- 19 litigation on the part of Echelon?
- 20 A. None whatsoever. Just that they were
- 21 dissatisfied with the standard-setting activity and
- 22 stop it.
- Q. Now, you referred a little while ago to
- 24 ballot.
- 25 Did this come before the relevant committee for

- 1 a vote or a ballot at some point?
- 2 A. It did.
- Q. And do you recall what, if anything, happened
- 4 at that stage?
- 5 A. We talked about this this morning in my
- 6 cross-examination. There was a ballot -- members of
- 7 the CEBus committee, including Echelon, were given an
- 8 opportunity to respond to a ballot. Echelon did, and
- 9 we looked at that document this morning, and they
- 10 raised an objection to the approval of the standard on
- 11 the basis that they claimed they had indicated that
- their patent was or may be relevant to the CEBus
- 13 standard, and I responded in a letter that I identified
- 14 as having been drafted by our outside counsel for my
- 15 signature, and that letter was RX-2299.
- Q. Now, before we go to the letter, let me ask you
- 17 this. I believe you said this morning that it was your
- 18 personal view that Echelon in making disclosures to EIA
- in connection with this standard was acting in bad
- 20 faith. Do you recall that?
- 21 A. Yes, sir.
- 22 Q. What basis did you have for reaching a
- 23 conclusion that in your own view as EIA general counsel
- 24 Echelon by making these patent disclosures was acting
- 25 in bad faith?

1 A. By disclosing a patent that had no relevance on

- 2 its face to any ongoing work of the committee and then
- 3 by subsequently insisting that we obtain licensing
- 4 assurances with respect to that, that standard, and it
- 5 was reasonably clear to us we weren't going to get
- 6 those licensing assurances, it appeared to me and to
- 7 others that this was the fulfillment of the threat that
- 8 was made in our very first meeting with Echelon where
- 9 they said: We will stop you. If it takes a million
- 10 dollars, we'll stop you.
- 11 Q. Now, as you understand -- let's focus on the
- 12 time period.
- 13 As you understood the EIA patent policy or the
- 14 EIA rules at that time, was the organization required
- 15 to request assurances in situations in which the
- organization itself believed that the patent
- 17 disclosures that were made were made in bad faith?
- 18 A. No. No. Again, this was a special kind of
- 19 situation in which there was an announced, in advance,
- 20 an announced strategy to block the process and in a way
- 21 that to me and to many others indicated bad faith. And
- 22 that was why we dealt with the situation specially and
- that was really what I wanted to bring out this morning
- and may not have fully done so.
- Q. And does EIA care one way or another whether

- 1 patent disclosures that are made within the
- 2 organization's standard-setting activities are made in
- 3 bad faith?
- 4 A. Absolutely.
- 5 Q. Why?
- 6 A. Because if disclosures are made in bad faith,
- 7 they have the potential to do what appeared to be the
- 8 strategy in this case, which is to stop the process, to
- 9 prevent the issuance of an open standard for reasons
- 10 that may be anticompetitive, in this case might well
- 11 have been anticompetitive.
- 12 Q. And how would you summarize very succinctly
- why specifically was it your view that the disclosures
- 14 that were being made by Echelon here were in bad
- 15 faith?
- 16 A. Because the -- according to the experts in the
- industry who sat on the CEBus committee, the patent had
- 18 no relationship, on its face, to any ongoing work, even
- 19 though it was proffered as if it did, and there was no
- 20 explanation by Echelon, despite repeated requests, as
- 21 to what the relevance of the patent was to the work of
- 22 the committee.
- O. Now, if I could ask you to refer to the letter
- that you sent to Echelon in August 1995, which has been
- 25 marked RX-2299, could I ask you if you could identify

1 any language if there is any language in this letter in

- which you make reference to the concerns that you had
- 3 that caused you to conclude in this time period that
- 4 Echelon was acting in bad faith.
- 5 A. It's in the third paragraph, page 2, middle of
- 6 the paragraph: "In the past, when specifically asked,
- 7 Echelon has been unable to explain or document how the
- 8 CEBus standard refers to or requires use of any of
- 9 Echelon's patented technology. Thus, there is no need
- 10 for EIA to secure a commitment from Echelon to license
- 11 its technology. If such a need does arise, I would
- 12 hope and expect that Echelon would promptly make such a
- 13 commitment and not interpose an objection that would
- 14 delay adoption of the CEBus standard for Echelon's
- 15 competitive advantage."
- And I might have been a little heavy-handed in
- 17 the last sentence, but I think you get the point.
- 18 Q. Now, you recall yesterday that we talked about
- 19 an incident also in the mid-1990s in which
- 20 Texas Instruments had taken the position that it was
- 21 not appropriate for JEDEC to request licensing
- 22 assurances in instances in which the patents, their
- patents in this case, at issue were not shown to be
- essential to the or required by the standards in
- 25 issue?

- 1 A. Yes, sir.
- Q. And do you recall that we discussed a memo that
- 3 you wrote to Ken McGhee in which you took the position
- 4 that it is appropriate for the committee to seek
- 5 assurances even in instances in which it's not clear
- 6 that the patents are required but even when they may be
- 7 required?
- 8 A. That is correct.
- 9 Q. Can you reconcile that position which we've
- 10 discussed now at some length in your questioning over
- 11 the past day with the position that you took in RX-2299
- and specifically the paragraph that you just referred
- 13 to?
- 14 A. Yes, sir. Very simply, there's no indication
- 15 in the case of Texas Instruments of any bad faith
- 16 whatsoever, and it appeared that there was or might be
- 17 a requirement to comply with the patent and the issue
- 18 was should the committee obtain the assurances given
- 19 that possible -- that possibility that -- of a
- 20 requirement, and the answer was get a conditional
- 21 assurance and move forward with the standard-setting.
- 22 No bad faith.
- In this case, in the Echelon case, there was
- 24 clear indication of bad faith and there was also a
- 25 patent that had no relevance, no apparent relevance to

Q. And they want the information that comes in to

- 2 be true and accurate?
- A. And open and honest and good faith, yes.
- 4 O. And that's one of the reasons that you've
- 5 talked before about actual knowledge on the part of the
- 6 representative?
- 7 A. That's correct.
- 8 Q. And that the representative needs to have that
- 9 actual knowledge so that they can make a truthful and
- 10 accurate disclosure of IP to the committee?
- 11 A. That is correct.
- 12 Q. Now, when you were writing this letter,
- 13 RX-2299, you thought that there was some reason to
- 14 believe Echelon had acted in bad faith?
- 15 A. I felt -- yes, I think there was pretty
- 16 compelling evidence that they had.
- 17 Q. But even though you felt that way, when you
- 18 were describing the EIA patent policy, you didn't
- 19 describe it in a different way than if you felt the
- 20 company was acting in good faith, did you? The policy
- 21 was the policy.
- MR. ROYALL: Can I ask for clarification? He
- 23 said when you described it. When he described it when
- 24 or where?
- MR. PERRY: That's a good point.

- 1 BY MR. PERRY:
- 2 Q. In RX-2299 -- let's pull it up -- on page 2,
- 3 the same paragraph Mr. Royall was pointing you to --
- 4 this is your letter to Echelon; correct?
- 5 A. Correct.
- 6 Q. In August of 1995?
- 7 A. Correct.
- 8 Q. When you describe the EIA patent policy in
- 9 various places in that paragraph, did the fact that you
- 10 believed that there was some evidence of Echelon's bad
- 11 faith lead you to describe the patent policy in some
- 12 different way than you would have described it in other
- 13 circumstances?
- 14 A. No, sir. In the context of the ballot
- 15 response and this letter, I think that there's an
- 16 accurate description of the patent policy and it's not
- different than I would have given under any other
- 18 circumstances.
- 19 O. And what you were asking Echelon and what you
- 20 say you asked from them before in the fourth sentence
- 21 is to explain or document how the CEBus standard refers
- 22 to or requires use of any of Echelon's patented
- 23 technology. Did I read that right?
- 24 A. You did read it right.
- MR. PERRY: I have nothing further,

- 1 Your Honor.
- JUDGE McGUIRE: All right. One last round.
- 3 This is it.
- 4 MR. ROYALL: Yes, Your Honor. Just a couple
- 5 questions.
- 6 REDIRECT EXAMINATION
- 7 BY MR. ROYALL:
- Q. Do you recall, Mr. Kelly, whether Mr. Stanfield
- 9 replied in writing to your letter?
- 10 A. No, I don't. But as I tried to indicate in my
- 11 response to Mr. Perry, in the context of their comments
- in the ballot and this letter, those statements are
- accurate, and if you'd like me to, I can point to what
- in the ballot I'm referring to.
- Q. I don't have the exhibit number, but that's
- 16 fine.
- 17 A. Exhibit Number RX-2300 --
- 18 MR. PERRY: Do you want us to put that up on
- 19 the screen?
- MR. ROYALL: If you don't mind, sure.
- 21 BY MR. ROYALL:
- 22 Q. And what page of RX-2300?
- 23 A. It is -- it's difficult to tell the page number
- 24 on this document. I'm not sure there is one. It is --
- of the original document, it is page 4.

1 MR. PERRY: Page 5 in the exhibit.

- 2 BY MR. ROYALL:
- Q. This is under the heading B?
- 4 A. C.
- 5 MR. PERRY: It's on the screen.
- 6 BY MR. ROYALL:
- 7 Q. Okay. I think we're with you.
- 8 A. And if you notice on the third line of the
- 9 second paragraph, Echelon itself acknowledges that they
- 10 understand that "require" includes may require, so it
- 11 didn't appear to us to be necessary to repeat that in
- my letter.
- 13 MR. ROYALL: Your Honor, I have no further
- 14 questions.
- JUDGE McGUIRE: Mr. Perry?
- MR. PERRY: Nothing, Your Honor.
- I would like to move in CX-348.
- 18 JUDGE McGUIRE: Objection?
- 19 MR. ROYALL: No objection.
- JUDGE McGUIRE: So entered.
- 21 (CX Exhibit Number 348 was admitted into
- evidence.)
- MR. PERRY: As well as RX-2299 and RX-2300.
- MR. ROYALL: No objection, Your Honor.
- JUDGE McGUIRE: All right. So entered to both

- 1 of those.
- 2 (RX Exhibit Numbers 2299 and 2300 were admitted
- 3 into evidence.)
- 4 JUDGE McGUIRE: Thank you for your testimony,
- 5 Mr. Kelly. You're excused in this proceeding.
- Do the parties need some time to confer on some
- 7 of the points we've made in closed session?
- 8 MR. ROYALL: I think we do, Your Honor.
- 9 Mr. Oliver is an important person to consult with and
- we haven't been able to talk with him, but we can do so
- immediately.
- 12 JUDGE McGUIRE: Okay.
- MR. ROYALL: And however you prefer to proceed,
- 14 we can take a relatively short break and come back and
- 15 address this issue.
- JUDGE McGUIRE: I'll be in my office. You all
- 17 can call down there when you're prepared to offer
- 18 whatever discussion. That ought to resolve it.
- 19 MR. STONE: That's fine.
- JUDGE McGUIRE: Then this hearing for today is
- 21 adjourned as far as the public goes and I will continue
- 22 any further closed sessions at the time I'm contacted
- 23 by counsel.
- MR. ROYALL: Thank you, Your Honor.
- MR. STONE: Thank you, Your Honor.

1	MR.	PERRY:	Than	ık you	, You	ır Hor	or.
2	JUDG	E McGUI	RE:	Thank	you	very	much
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