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FEDERAL TRADE COMMISSION
I N D E X (PUBLIC RECORD)

WITNESS: DIRECT CROSS REDIRECT RECROSS
Brown (via deposition)
Mailloux (via deposition)

EXHIBITS	FOR ID	IN EVID
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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)
Rambus, Inc.) Docket No. 9302
-----)

Monday, July 28, 2003
9:31 a.m.

TRIAL VOLUME 51
PART 1
PUBLIC RECORD

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

Reported by: Josett F. Hall, RMR-CRR

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

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P R O C E E D I N G S

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3 JUDGE McGUIRE: Well, I guess we're coming down
4 the home stretch here this week.

5 Any housekeeping tasks we need to take up this
6 morning?

7 MR. PERRY: Yes, Your Honor. We filed this
8 morning a motion with respect to the proper scope of
9 the rebuttal case. There's a courtesy copy up there.
10 We've provided a courtesy copy to complaint counsel
11 this morning.

12 JUDGE McGUIRE: Okay. Good.

13 MR. PERRY: A couple of other issues that I
14 just wanted to bring to Your Honor's attention about
15 posttrial briefing?

16 JUDGE McGUIRE: Yes.

17 MR. PERRY: And I know Your Honor issued an
18 order on that and we talked about a couple issues with
19 complaint counsel. Mr. Royall is not here and I'm not
20 expecting to argue it now. I just wanted to bring two
21 issues to your attention.

22 The first is whether there should be a page
23 limit on posttrial briefs. I think we're in agreement
24 with complaint counsel that there should be no page
25 limit on the proposed findings and conclusions.

1 JUDGE McGUIRE: Yes.

2 MR. PERRY: We've proposed certain page limits.
3 They've responded. We're very far apart. That might
4 be something we would like you to think about or
5 discuss with us perhaps tomorrow.

6 JUDGE McGUIRE: All right.

7 MR. PERRY: The second issue is whether there
8 should be a date at least scheduled --

9 JUDGE McGUIRE: I'm sorry?

10 MR. PERRY: The second issue is whether there
11 should be a date at least scheduled for closing
12 argument if Your Honor were to decide --

13 JUDGE McGUIRE: All right.

14 MR. PERRY: That's obviously up to you.

15 JUDGE McGUIRE: That is something I believe I
16 recall saying in maybe the prehearing conference in
17 this case or perhaps after opening statements in this
18 case were made. I've always felt that closing
19 statements were in essence incorporated in the
20 post-hearing briefs.

21 So as far as I'm concerned, closing statements

Waldorf, Marylandy?

1 closing statement because ultimately whatever you argue
2 in that closing statement is going to end up being in
3 your post-hearing briefs, so that's up to the parties
4 and whatever they want to do there.

5 MR. PERRY: What we would propose for
6 consideration is that there be a date set after the
7 close of briefing in case Your Honor has questions or
8 one of the parties thinks that they would like to have
9 a short closing and that the date go ahead and be
10 agreed upon so that everybody has it on their
11 calendars.

12 JUDGE McGUIRE: You mean a closing argument --
13 an oral argument?

14 MR. PERRY: Yes.

15 JUDGE McGUIRE: So this would occur sometime
16 after the filing of the post-hearing briefs.

17 MR. PERRY: Shortly after the last brief.

18 JUDGE McGUIRE: And we would anticipate this

1 JUDGE McGUIRE: Do you have any response to
2 that, Mr. Oliver?

3 MR. OLIVER: Your Honor, we don't believe that
4 closing argument is necessary. I guess we have no
5 objection to agreeing upon a date, so long as it was
6 understood that that would be used only if you had
7 questions and you wanted to hear closing argument. But
8 we, frankly, think that the findings and briefs
9 combined with reply findings and reply briefs is
10 sufficient.

11 JUDGE McGUIRE: I tend to agree with complaint
12 counsel on that, Mr. Perry. You know, I will give you
13 that argument post-hearing -- I'll give you an
14 opportunity to close the hearing to make a closing
15 argument if you wish, but it seems to me you're going
16 to have every opportunity afforded in your post-hearing
17 brief to make whatever arguments and then you're also
18 going to get to -- each side will get to reply to the
19 other's briefs, so it seems to me that to have oral
20 argument after that may be unnecessary.

21 MR. PERRY: We have no quarrel with that,
22 Your Honor.

23 JUDGE McGUIRE: Okay.

24 While we're on this -- and this is something
25 I'll contemplate in the next few days and try and make

1 a decision on by Friday -- how far apart are the
2 parties on the proposed page limitation for the actual
3 briefing part of the post-hearing briefs?

4 MR. PERRY: We had opened the bidding at
5 75 pages for the opening brief and 50 pages for the
6 reply for each side. We offered to raise that if we
7 could reach a compromise.

8 JUDGE McGUIRE: Mr. Oliver, any response at
9 all?

10 MR. OLIVER: Yes, Your Honor. We had suggested
11 225 pages for the opening brief and 125 pages for the
12 reply brief.

13 Again, our thinking was that in order to ensure
14 that we're able to give complete citations, including
15 quotations to appropriate documents and appropriate
16 transcripts, that pages of that sort would be
17 necessary, but again, we did think that having complete
18 briefs would be helpful to you.

1 the parties contemplate attaching those proposed
2 findings to their briefs?

3 MR. PERRY: I think we'll definitely do
4 independent findings and conclusions.

5 JUDGE McGUIRE: Okay. So this whole issue does
6 not involve then the proposed findings.

7 Well, let me think about this, and I would
8 encourage you all to continue your conversations in the
9 same vein, see if you can find some common ground.

10 On the one hand, I feel the parties should have
11 a chance to explore all these issues and I know there's
12 a lot of issues in this case. On the other hand, to
13 leave it pretty much open-ended is going to invite
14 cumulative argument and citation and I think what we
15 really need to determine here are what are the issues
16 that are going to ultimately decide this case.

17 So perhaps it's not imperative that every issue
18 and subissue that has come up during these proceedings
19 inherently have to be briefed.

20 So let's keep that in mind and we'll try to
21 determine on this what we're going to do by the close
22 of the hearing on Friday. And again, it would be
23 helpful to the court if the two parties could come up
24 again with some understanding between themselves, and
25 if not, then I'll make that determination.

1 MR. PERRY: Thank you, Your Honor.

2 Two other issues. One is that they've proposed
3 that whatever this ultimate scope of the rebuttal case
4 is that we be dark on Wednesday, and we don't have an
5 objection to that.

6 JUDGE McGUIRE: Yes.

7 MR. PERRY: Finally, with respect to -- and I
8 don't know if Your Honor wants to say anything about
9 that or not, but that's up to you.

10 But with respect to this morning, we have two
11 third-party witnesses whose depositions will be read or
12 shown. And with complaint counsel's agreement, I'm
13 going to be the witness, Mr. Guaragna from the
14 Gray Cary firm, who has promised to be easy on me, is
15 going to be the examiner.

16 JUDGE McGUIRE: That would be fine, if not
17 interesting, so...

18 All right. Mr. Oliver.

19 MR. OLIVER: If I cnteresmlighomiiij9Grthess, Mr. Gua eie

1 Nevertheless, we would like to get a decision
2 on this as soon as possible since it does involve
3 witnesses who are based in Idaho and the question of
4 whether they should travel here.

5 JUDGE McGUIRE: So you haven't had a chance to
6 go through this yourself.

7 MR. OLIVER: No, I have not, Your Honor. But I
8 would be prepared to read this this morning.

9 JUDGE McGUIRE: I would, too. I haven't seen
10 it either and I'm prepared to go ahead and try to get
11 this resolved, you know, this morning and so complaint
12 counsel can determine what they have to do to put on
13 its case in rebuttal.

14 Do you want to do this right now?

15 MR. OLIVER: Your Honor, if I could, I would
16 suggest that perhaps I take a look at this and perhaps
17 also give you a chance to look at it during the break
18 and argue it at the end of the morning.

19 JUDGE McGUIRE: All right. Very good.

20 MR. PERRY: Your Honor -- and let me just say
21 we finished it at 8:00 a.m. this morning, so we didn't
22 delay getting it to anyone.

23 But if Your Honor would prefer to take a break
24 now before we read in the depositions or do that and
25 have the parties get a chance to look at this, we would

1 not object to that.

2 JUDGE McGUIRE: Do you have any problem with
3 that, Mr. Oliver? That may be a good idea.

4 MR. OLIVER: I have no problems with that.

5 JUDGE McGUIRE: How much time do you all want
6 to do that do you think?

7 MR. PERRY: How long is the videotape?

8 It will take us an hour and a half total to do
9 all the testimony we've got this morning, so --

10 JUDGE McGUIRE: Well, I'll leave that up to
11 you, Mr. Oliver. Perhaps I'll just go back to my
12 office. I can take a look at this. You can take the
13 time, you know, that you feel that you need to, and
14 then someone come by and advise me and I'll come back
15 up and we'll take this up, you know, first thing
16 actually.

17 MR. PERRY: Perhaps the fairest thing, if I
18 could make a suggestion, would be to take a break now
19 to have you folks read this and then we would schedule
20 a discussion at 1:30 of it perhaps, and that would give
21 them more time -- I don't want to throw this at them.
22 Then when we came back into session at 11:00 or
23 whatever we could finish up.

24 JUDGE McGUIRE: I'm agreeable. Since the onus
25 is pretty much on I guess complaint counsel at this

1 point, I'll agree to whatever you find, you know, for
2 your side that would be helpful, Mr. Oliver.

3 MR. OLIVER: Your Honor, I'm also fairly
4 flexible with this and I want to accommodate your
5 preferred schedule.

6 I guess I would suggest if we're here then
7 maybe we should go ahead with the depositions and then
8 take a break at that point and we can decide, depending
9 on when we finish the depositions, whether we need to
10 come back after lunch or whether we can resolve this
11 before lunch.

12 JUDGE MCGUIRE: That's fine.

13 MR. PERRY: That's fine.

14 JUDGE MCGUIRE: Let's go ahead with that.

15 MR. PERRY: May I approach?

16 JUDGE MCGUIRE: Have a seat, Mr. Perry. And I
17 caution you we're going to put you under oath.

18 MR. PERRY: I must say this is a different
19 perspective.

20 MR. GUARAGNA: Good morning, Your Honor.
21 John Guaragna from Rambus.

22 JUDGE MCGUIRE: Good morning.

23 MR. GUARAGNA: We have two witnesses to present
24 this morning by deposition.

25 The first is Mr. Reese Brown. Mr. Brown is a

1 retired engineer who had been a longtime JEDEC
2 consultant. And that testimony will be read in public
3 session.

4 The second witness is a Mr. Jeff Mailloux, and
5 that's spelled M-A-I-L-L-O-U-X, I believe.

6 Mr. Mailloux is a Micron employee who was, at the
7 pertinent time, in Micron's marketing department and
8 had the title of director of marketing for computing
9 and consumer group.

10 Mr. Mailloux's testimony was presented in
11 deposition. It was designated confidential.
12 Therefore, we intend to present that testimony
13 in camera provisionally and have informed Micron of the
14 testimony that will be presented and have -- will allow
15 them to provide us with any final designation of
16 in camera treatment.

17 JUDGE MCGUIRE: So up to the current time then
18 I haven't issued an order on that evidence as being
19 in camera; you're asking me just today to treat it as
20 provisional in camera?

21 MR. GUARAGNA: That's correct, Your Honor. It
22 may turn out that Micron doesn't object to the
23 information being presented in public session.

24 JUDGE MCGUIRE: All right.

25 MR. GUARAGNA: So we'll start with Mr. Brown's

1 deposition.

2 If I may approach, Your Honor?

3 JUDGE McGUIRE: Yes.

4 MR. GUARAGNA: Your Honor, the first
5 designation is from Mr. Brown's April 5, 2001
6 deposition, and we'll be reading one excerpt starting
7 at page 80, line 17. And it will go from page 80,
8 line 17 to page 81, line 14.

9 (Whereupon, the transcript cites were read into
10 the record in open court.)

11 MR. GUARAGNA: Your Honor, that concludes the
12 designations from Mr. Brown's April 5, 2001
13 deposition.

14 JUDGE McGUIRE: All right.

15 MR. GUARAGNA: The next group of designations
16 will be from Mr. Brown's January 22, 2003 deposition
17 given in this matter.

18 The first designation will be page 5, lines 9
19 through 18.

20 (Whereupon, the transcript cites were read into
21 the record in open court.)

22 MR. GUARAGNA: The next designation will be on
23 page 10 starting on line 17 through page 11, line 9.

24 (Whereupon, the transcript cites were read into
25 the record in open court.)

1 MR. GUARAGNA: The next designation continues
2 at the bottom of page 11, line 24 through page 12,
3 line 2.

4 (Whereupon, the transcript cites were read into
5 the record in open court.)

6 MR. GUARAGNA: The next designation will be on
7 page 48, lines 17 through 23.

8 (Whereupon, the transcript cites were read into
9 the record in open court.)

10 MR. GUARAGNA: Moving over to page 56, lines 7
11 through 24.

12 (Whereupon, the transcript cites were read into
13 the record in open court.)

14 MR. GUARAGNA: The next designation is on
15 page 63, lines 16 through 20.

16 (Whereupon, the transcript cites were read into
17 the record in open court.)

18 MR. GUARAGNA: And for the record, that was
19 page 63, lines 22 to 23.

20 The next designation will be at page 63,
21 line 25 through 64, line 3.

22 (Whereupon, the transcript cites were read into
23 the record in open court.)

24 MR. GUARAGNA: Your Honor, that concludes the
25 designations for Mr. Reese Brown.

1 If I could have just a moment to confer with
2 opposing counsel?

3 JUDGE McGUIRE: Sure.

4 (Pause in the proceedings.)

5 MR. GUARAGNA: May I approach, Your Honor?

6 JUDGE McGUIRE: Yes.

7 MR. GUARAGNA: Your Honor, what I've handed up
8 are copies of Mr. Mailloux's April 5, 2001 deposition
9 and April 6, 2001 deposition.

10 I've also handed up a binder which contains
11 several exhibits that were referred to in
12 Mr. Mailloux's depositions. Those exhibits are tabbed
13 by the deposition exhibit number and they also have the
14 trial exhibit number. All of those exhibits that are
15 in the binder have been admitted in this matter.

16 JUDGE McGUIRE: All right. Thank you.

17 MR. GUARAGNA: And before we begin,
18 Your Honor, this portion will be provisionally
19 in camera.

20 JUDGE McGUIRE: Okay. Is there anyone other
21 than the two individuals who are now vacating that --
22 how about you, ma'am?

23 Okay. We'll advise you when we're back in the
24 public session.

25 To the court reporter then we are now in

1 in camera session.

2 (The in camera testimony continued in
3 Volume 51, Part 2, Pages 10891 through 10909, then
4 resumed as follows.)

5 JUDGE McGUIRE: Also talking earlier about the
6 post-hearing briefs on the issue regarding the page
7 limitations, if you don't feel you can reach an
8 accommodation between yourselves, I'll go ahead and at
9 this time after the break determine, you know, the page
10 limit. But you know, I'll give you one more shot to
11 try and come up with something that you both can agree
12 on.

13 All right. We'll take a ten-minute break.

14 (Recess)

15 JUDGE McGUIRE: Mr. Perry?

16 MR. PERRY: On the page limit issue we got
17 closer, but we have not closed the gap.

18 JUDGE McGUIRE: All right. Let me tell you
19 then what I'm going to do on this.

20 I'm sorry. Did you want to be heard on that,
21 Mr. Royall?

22 MR. ROYALL: I'd just like Your Honor to have

1 initial view was that unless Your Honor had indicated
2 to us before we said anything, we didn't know whether
3 there should be page limits. Then subsequently to
4 that we suggested a number north of 200 for the
5 initial briefs and slightly north of 100 for the
6 rebuttals, not that we would need it, but we didn't
7 want to get into an extreme size concern. Where we
8 have come down after conferring is 150 is what we have
9 proposed for the opening briefs and 100 for the
10 rebuttal.

11 JUDGE McGUIRE: Now, that's your proposal.

12 MR. ROYALL: That's now where we're -- we're
13 substantially lower than we were before. Understanding
14 both your concerns and also just in seeking to reach an
15 agreement, that's what we've proposed.

16 JUDGE McGUIRE: And then, Mr. Perry, where are
17 you on this now?

18 MR. PERRY: As our last and best offer we were
19 at 125 and 75. It doesn't seem like we're very far
20 apart. Sometimes people get stuck.

21 JUDGE McGUIRE: Then what we're going to do is
22 just split the difference. Let's make it 140 on
23 opening and 85 on reply. Okay?

24 MR. ROYALL: Thank you, Your Honor.

25 JUDGE McGUIRE: Let me take up one more thing

1 on this post-hearing issue, and I guess this is a good
2 time.

3 You all have had a chance I assume to go
4 through the order that I issued a couple weeks ago on
5 the post-hearing briefing, actually more than that,
6 about four, three or four. Are there any other issues
7 involved in that order that either side cares to take
8 up at this time?

9 MR. PERRY: Your Honor, there aren't any others
10 that I can recall that we talked about with complaint
11 counsel. I looked at it this weekend, and while
12 there's some issues that I think we would just need to
13 make sure we both have the same understanding on, minor
14 technical issues as to what we are doing, I didn't
15 think those were anything we needed to bring to your
16 attention.

17 JUDGE MCGUIRE: Okay. If something comes up
18 between now and Friday on that, I'll give you a chance
19 to discuss it.

20 MR. PERRY: There was one example which was it
21 wasn't clear whether Your Honor needed our exhibits
22 that we cite in our opening briefs before briefing is
23 completed.

24 In other words, did you want, to the extent
25 possible, a nonduplicate set at the close of all

1 briefing and then not have to have exhibits coming in
2 piecemeal or --

3 JUDGE McGUIRE: I would rather they all come in

1 arguments in opening briefs so I can get a head start

1 weeks?

2 MR. PERRY: Three weeks.

1 And I'm sure that was something both sides were
2 going to go into in any event, but it would certainly
3 help the court to see some argument on those issues
4 either way.

5 Any inquiries on that? Anything else on that?

6 Okay. Let's move on then to the current
7 motion regarding the complaint counsel's rebuttal
8 case.

9 How do you want to take those up? You know,
10 it's your motion, Mr. Perry.

11 MR. PERRY: I guess if Your Honor has had a
12 chance to read it --

13 JUDGE MCGUIRE: I've gone over it.

14 MR. PERRY: -- I could take 30 seconds to
15 summarize.

16 JUDGE MCGUIRE: Okay. Go ahead.

17 MR. PERRY: And for me, the key issue is that
18 when we received complaint counsel's list of the
19 particular testimony that they wanted to respond to, we
20 spent the time to find in the transcript the places
21 where complaint counsel had in fact addressed those
22 issues.

23 For example, they asked Terry Lee if the
24 alternatives of fixed burst and fixed latency were
25 acceptable from a cost perspective, and they raised

1 that the court in exercising its judgment in these
2 matters, apparently the standard that they seem to
3 follow is that such determinations should not be unduly
4 restrictive.

5 So that's one standard that I want to consider
6 on these issues.

7 And then I go back and I look at basically what
8 is the law in this area, and it basically from my
9 research says that it's evidence given to explain,
10 repel, counteract or disprove facts given in evidence
11 by the opposing party. And that's from Black's Law
12 Dictionary.

13 Then I've looked at some of the treatises on
14 evidence, and Wigmore indicates that these are facts
15 that are made and necessary to meet new facts put in by
16 the opponent or to I think discredit witnesses.

17 And it's my understanding as well that this
18 should also be confined to evidence that, as you've
19 just indicated, Mr. Perry, that is an attempt to merely
20 add testimony or evidence which could have been
21 included in the case in chief.

22 So those are sort of the tests that I'm going
23 to try to apply here today when we determine how to
24 rule on the pending motion.

25 So what I'd like to do is maybe we could

1 start -- as I have gone through the motion, it appears
2 there is proposed testimony by complaint counsel from
3 four individuals, and I'd like to start off with
4 Kevin Ryan and I'll give complaint counsel an
5 opportunity to argue in response to the arguments that
6 have come forward as to his testimony on rebuttal by
7 the other side.

8 If you -- whoever wants to do that.
9 Mr. Oliver?

10 MR. OLIVER: Yes. Thank you, Your Honor.

11 I guess I should start by pointing out that we
12 had proposed Kevin Ryan only for a very limited purpose
13 and may not be necessary at all, solely because of
14 certain objections that respondent had raised earlier
15 to the testimony of Mr. Terry Lee with respect to
16 DDR-II.

17 You recall that DDR-II is an issue that
18 Dr. Soderman raised in his examination as a basis for
19 certain assumptions. We are seeking to rebut that. We
20 would propose to do that with the testimony of
21 Mr. Terry Lee, but if they object to that -- and we
22 be htal by

nl

1 But in order to put this in context,
2 Your Honor, I could explain more generally what it is
3 we're trying to do in our rebuttal case, why we believe
4 it falls squarely within the precedent that you have
5 outlined.

6 JUDGE McGUIRE: Okay. Then -- well, obviously
7 they've opposed the proposed testimony by both
8 Kevin Ryan and Terry Lee, so I guess at this point
9 let's take up first then Terry Lee and you can address
10 in response your arguments on their motion against
11 Terry Lee.

12 MR. OLIVER: Your Honor, if I could put it in
13 perspective, first perhaps by just making a couple of
14 general statements about the rebuttal case.

15 And I do want to point out that in our rebuttal
16 case we do expect to be rebutting evidence that we
17 could not have anticipated as well as evidence that was

1 sheets that he examined. That apparently was work that
2 was done after his deposition. That's the first that
3 we heard of it, at the time of his testimony.

4 Well, Your Honor, he was looking in the wrong
5 place, and this is an example of one of the things that
6 we want to be able to present some evidence to explain
7 where the evidence actually resides, of where you find
8 evidence.

9 JUDGE MCGUIRE: And it's your proposal then to
10 accomplish that through the testimony of Terry Lee?

11 MR. OLIVER: Yes, Your Honor.

12 JUDGE MCGUIRE: And others or just Terry Lee?

13 MR. OLIVER: Just Terry Lee, Your Honor.

14 JUDGE MCGUIRE: Let's just try to keep this to
15 the testimony of Terry Lee.

16 MR. OLIVER: Okay, Your Honor.

17 JUDGE MCGUIRE: Mr. Perry, let's just -- as we
18 go through these arguments, maybe I could hear at this
19 point if you have any response to that as to why you
20 don't agree with the proposition that this evidence
21 would address facts that complaint counsel could not
22 have known or anticipated prior to its case in chief
23 concluding.

24 MR. PERRY: Mr. Soderman testified at his
25 deposition that he was not aware of any company that

1 was going to be coming in and saying he's looking at
2 data sheets, which is the wrong place to look, and you
3 know, again, we're not blaming Dr. Soderman. He's not
4 involved in this. But we do want the opportunity to
5 explain where it is that he should have been looking.

6 But, Your Honor, perhaps if I could take a step
7 back and just approach this somewhat more generally,
8 because I think, frankly, if we get an argument piece
9 by piece, question by question about whether it was
10 taken up before, we'll spend more time arguing than we
11 will hearing the testimony.

12 If I could just have a moment to explain why we
13 believe that a rebuttal case for efficiency reasons
14 should not be limited only to questions that could not
15 have been anticipated.

16 Your Honor, first of all, there are many
17 issues in a case that can be anticipated that don't
18 come up.

19 For example, they had a Professor Janis on
20 their witness list. We could have anticipated his
21 testimony. We could have spent a couple days putting
22 in evidence to rebut his anticipated testimony. Of
23 course it would have been worthless.

24 Dr. Soderman had an entire argument in his
25 report that he did not testify about.

1 Respondents had a number of patents that they
2 had discussed previously that they did not raise.

3 They also did make certain other arguments
4 that, you know, after hearing them we think we don't
5 need to put in any rebuttal evidence.

6 Frankly, Your Honor, if complaint counsel is
7 forced to anticipate every possible argument in their
8 case in chief and put on rebuttal evidence beforehand,
9 that's going to --

10 JUDGE MCGUIRE: And you're not required to do
11 that. But I think there's FTC case precedent that says
12 you're not required to maintain clairvoyance in that
13 area, and I understand that in that framework.

14 MR. OLIVER: So Your Honor, what we do plan to
15 do in our rebuttal case is, after having heard their
16 evidence and after being able to focus much more
17 specifically on the items that they have in fact
18 advanced, then we believe there should be rebuttal
19 evidence.

20 JUDGE MCGUIRE: How much time do you intend to
21 spend on Terry Lee in your rebuttal?

22 MR. OLIVER: We expect that we can complete
23 Terry Lee in half a day. We expect we can complete
24 Professor Jacob in about half a day. In fact, we
25 expect to do both on Thursday. If the -- and then I'll

1 defer to Mr. Royall with respect to Professor McAfee,
2 who we expect to finish him on Friday.

3 JUDGE McGUIRE: Okay. Then if I entertain the
4 testimony of Terry Lee, then you're saying that you
5 aren't going to then offer testimony by Kevin Ryan; is
6 that correct?

7 MR. OLIVER: Your Honor, that depends upon
8 whether respondent objects to certain testimony with
9 respect to the DDR-II standard.

10 Again, we believe that Terry Lee has adequate
11 foundation and basis to testify, but if his testimony
12 should be precluded, we do want the opportunity to be
13 able to offer testimony by Mr. Kevin Ryan.

14 JUDGE McGUIRE: Mr. Perry, do you want to
15 comment?

16 It seems to me, though, that the grounds of the
17 respondent's motion regarding Kevin Ryan is that, you
18 know, this individual was never put on your witness
19 list and they really had no notice that he could

1 And the reason that he was not on our witness
2 list is because we do believe that Terry Lee has a
3 perfectly adequate basis and foundation to testify on
4 technology including DDR-II. It was unanticipated that
5 they would raise the objections they did earlier.

6 In any event, though, Your Honor, there's no
7 prejudice to respondents on this. They had -- they did
8 in fact depose Mr. Ryan in this proceeding. Rambus
9 also deposed Mr. Ryan in the private litigations.
10 They've actually had two depositions of Mr. Ryan.

11 And in order to call him on one specific
12 narrow topic, Your Honor, we believe causes them no
13 prejudice.

14 JUDGE MCGUIRE: All right. Mr. Perry, one more
15 opportunity.

16 MR. PERRY: We have no way of knowing what this
17 specific narrow topic is that they're concerned Mr. Lee
18 doesn't know enough about to testify. I suspect we
19 didn't go into it in deposition. If it's something
20 about DDR-II, it's probably something that happened
21 after the depositions occurred, and it is not
22 appropriate to bring in brand-new witnesses in rebuttal
23 that haven't been on the witness list.

24 JUDGE MCGUIRE: I'm not going to hear the
25 testimony of Kevin Ryan.

1 I will hear, however, the testimony of
2 Terry Lee. And again, it's going to be confined to the
3 areas that you've laid out by page number and line
4 number and those issues that deal with the prior
5 testimony of respondent. Okay?

6 MR. OLIVER: Thank you, Your Honor.

7 JUDGE McGUIRE: Now, we've got two more to deal
8 with here, Professor Jacob and Professor McAfee.

9 So did you have the same opposition to their
10 testimony, Mr. Perry, that you had on the prior two
11 witnesses?

12 MR. PERRY: Yes, Your Honor.

13 We identified particular areas where they did
14 offer, when Dr. Jacob was on the stand, testimony in
15 anticipation of what they knew our experts were going
16 to say.

17 It is not our position that they have to be
18 clairvoyant. It is our position that where they do
19 anticipate the issue and do put material in in their
20 case in chief that it's not time in rebuttal to come
21 back and say let's add some more on when our experts
22 have given exactly what they said they were going to
23 give, because, as Your Honor knows, you've said
24 several times, I'm just going to hear what's in their
25 reports.

1 JUDGE MCGUIRE: Right. That's fair. And I
2 certainly agree with that concept.

3 The issue is as to whether this proposed
4 testimony should have been anticipated in the case in
5 chief, so why don't we talk about that first with
6 respect to Professor Jacob.

7 MR. OLIVER: Yes, Your Honor.

8 We're caught in somewhat of a quandary here, to
9 be honest. The scheduling order specifically
10 contemplated a report from us, a report from them, and
11 then a rebuttal report in the end from us.

12 So we've contemplated from the outset that our
13 experts would be testifying in exactly the same manner
14 that our experts would testify in response to what they
15 heard from them.

16 As you know, Your Honor, expert testimony is
17 limited to what's in the scope of the report. It is
18 virtually a null set to say that an expert can only
19 testify in rebuttal to what's in the report but it's
20 not anticipated. I just don't know how that works,
21 Your Honor.

22 Again, Your Honor, in the interest of
23 efficiency, rather than having us -- and again looking
24 forward to precedent in other cases, rather than having
25 complaint counsel put on their experts to rebut every

1 possible argument that could be made, again, to rebut,
2 you know, Professor Janis who never even appeared, to
3 rebut the argument of Dr. Soderman that he never made,
4 to rebut patents they never raised, it would be grossly
5 inefficient to force complaint counsel to try to rebut
6 everything that they anticipate in advance might come
7 up.

8 Instead, Your Honor, what we expect to do here
9 is to rebut the specific propositions that they
10 haven't made, and again, if I can just give one
11 example.

12 Mr. Geilhufe offered certain opinions with
13 respect to fixed burst length. Again, it's the issue
14 that Mr. Perry raised. He testified that upon looking
15 in the specifications and the data sheets he saw that
16 there were three bits of information contained in the
17 mode register and he made the assumption based on what
18 was in the mode register that therefore a certain
19 number of bits would be required in every alternative.

20 Now, that is precisely the type of focused
21 testimony that we would like to use experts such as
22 Professor Jacob to rebut. And again, what we submit is
23 both more efficient this way and appropriately perfect
24 to do --

25 JUDGE McGUIRE: Let me ask -- I believe when we

1 issued them, the fact that I wanted complaint counsel
2 to cite the page number and the line number regarding
3 any proposed rebuttal testimony, I think there was sort
4 of an understanding that would be hard to do for an
5 expert witness but that those rules would apply to the
6 fact witnesses.

7 So to the extent that I assumed that hasn't
8 been done for your two experts -- well, I know that --

1 rule.

2 So it may behoove complaint counsel to try to
3 tighten up the areas that they wish to inquire into on
4 these two witnesses.

5 MR. ROYALL: Thank you, Your Honor.

6 Could I just add one thing to what Mr. Oliver
7 said. I'm working with Professor McAfee, and certainly
8 the work that's been done so far is to focus on what's
9 in the rebuttal report. And then looking at what was
10 raised at trial, there are some examples of things that
11 were not in the rebuttal report because we couldn't
12 have anticipated them and they were raised for the
13 first time in trial.

14 An example would be Professor Teece's reliance
15 on the Echelon example. That's something that I think
16 is very clear in the record came up for the first time
17 at trial, and so that's something that we would want to
18 be able to respond to. But other -- it would be very
19 limited obviously to the rebuttal reports --

20 JUDGE MCGUIRE: Well, I need to have complaint
21 counsel -- I'm going to grant you the opportunity to
22 put on these witnesses, but I'm also going to be very
23 cognizant of the scope of this inquiry on rebuttal, so
24 there might well be areas if you go too far, then I'm
25 going to certainly entertain opposition by their side

1 on that.

2 And I hope we don't have to do that question by
3 question, so it would certainly help complaint counsel
4 to plan to tighten up their inquiries on each of these
5 two witnesses.

6 MR. ROYALL: We will certainly do that,
7 Your Honor.

8 JUDGE McGUIRE: Okay. Mr. Perry.

9 MR. PERRY: Your Honor, I wasn't going to
10 continue arguing if you ruled.

11 JUDGE McGUIRE: I have ruled. But you can be
12 heard.

13 MR. PERRY: You know, we are not saying that if
14 they didn't have witnesses talk about these issues they
15 couldn't come in with rebuttal witnesses. What we're
16 saying is where the record is not as good as they'd
17 like on the common use of fuses or whatever, it's not
18 time to come in and bulk it up.

19 JUDGE McGUIRE: Well, I understand that concept
20 and that truly goes against all case precedent
21 regarding evidence proposed for rebuttal and that's
22 why, Mr. Perry, I'm going to give you and your
23 colleagues an opportunity should it get to that point
24 during the inquiries made by complaint counsel on
25 rebuttal -- I can't possibly at this point determine,

1 go back over the course of this entire trial and
2 determine the scope of inquiries made for everyone
3 that's been on the stand and testified.

4 And you know, I've read through your motion and
5 the other side's proposed testimony, so in the sake of
6 trying to comply with the FTC standard of not being
7 unduly restrictive, I'm going to allow them the
8 opportunity to go into this material. And I certainly
9 don't intend to tie your hands at that point, and
10 perhaps then it would be placed in the context that I
11 can more properly appreciate and determine at that time
12 the scope of this inquiry and as to whether it could
13 have been pursued before the completion of their case
14 in chief.

15 MR. PERRY: Thank you, Your Honor.

16 On the issue of the FTC's standard, I know that
17 there are some cases that are 50 years old in this
18 area. I would just suggest that the hearings in those
19 days might not have been quite as long.

20 JUDGE MCGUIRE: Well, I'm sure they weren't.

21 MR. PERRY: And I think I've seen a 1954 case
22 and maybe a 1967 case, but I'm not sure --

23 JUDGE MCGUIRE: Well, the cases I'm referring
24 to I believe were cited back in the '80s. These are
25 not archived case results that I had to find in the

1 microfiche room. These are fairly current cases.

2 MR. PERRY: I didn't find those, Your Honor.

3 JUDGE McGUIRE: You didn't.

4 MR. PERRY: So your research is better than
5 mine.

6 JUDGE McGUIRE: Well, I don't know about that,
7 Mr. Perry, but let me see if I can find them.

8 MR. PERRY: Your Honor, I'm not --

9 JUDGE McGUIRE: Well, actually, Mr. Perry, you
10 are correct on some of those areas. You are exactly
11 correct. These are cases cited back in the '50s, but
12 even still I think the standard holds; we have to just
13 apply them to current circumstance.

14 So I assume unless the FTC has come out since
15 then and indicated that those are not the proper
16 standards, even though the cases today I'm sure are
17 far more complicated than they were 30 years ago,
18 40 years ago, but I'm still going to hold to that
19 standard.

20 But in doing so, I'm going to again give a
21 caveat to complaint counsel that I'm going to prepare
22 to rule should inquiry go beyond what I think and what
23 I'm authorizing you to do as would constitute proper
24 rebuttal.

25 So just be prepared for that, and again, it

1 behoooves you to keep your inquiries tight and cogent
2 and so we don't see him popping up often.

3 MR. PERRY: Thank you, Your Honor.

4 There's one other issue, if we're done with
5 that one, that I do want to bring up and it has to do
6 with the discussion we had this morning of closing
7 statement or closing argument.

8 JUDGE McGUIRE: Yes.

9 MR. PERRY: And you mentioned that you might
10 entertain some kind of brief argument before you closed
11 the record, which I'd assume would happen --

12 JUDGE McGUIRE: Well, let me tell you something
13 about that, too.

14 The FTC, you know, Part 3 rules seemingly
15 require me to issue an order closing the record upon
16 the conclusion of the hearing.

17 And let's go off the record for a moment.

18 (Discussion off the record.)

19 MR. PERRY: Well, with that understanding, I
20 think what I was suggesting was that if you were going
21 to enter that order closing the record this Friday
22 afternoon that we might take 45 minutes per side to do
23 a very short closing.

21 1 1.03 keep your inquuuuuuuuuuuuuuuuuuuuuuuuuuuuuF rd tn8 minut

1 MR. PERRY: And I'm assuming that Mr. McAfee is
2 not going to take the whole day.

3 JUDGE McGUIRE: Well, like I said earlier, it's
4 up to the parties. And if either side chooses to make
5 a short closing argument, then they will have that
6 opportunity on Friday.

7 MR. PERRY: I think we'd like to do that, but
8 very short, 45 minutes to an hour.

9 JUDGE McGUIRE: That's fine. And again, I'm
10 not going to require it, but if complaint counsel --
11 now that you've heard that they're going to give one,
12 you'll probably want to give one, too, but that's
13 certainly up to complaint counsel.

14 So I'll keep time to do that Friday afternoon.

15 MR. PERRY: Thank you.

16 MR. ROYALL: Your Honor, I guess our only --
17 upon hearing this, our only concern is obviously we
18 have focused on the rebuttal case. We didn't -- I was
19 told -- I don't think I was in court when this
20 happened, but I was told this had come up before and
21 I --

22 JUDGE McGUIRE: I'm sorry. What came up
23 before?

24 MR. ROYALL: The subject I believe of closing
25 arguments had come up before and you commented on the

1 record -- someone showed me the written record -- that
2 you weren't sure it would be helpful, so we haven't
3 made any plans to do anything like this, and we
4 obviously have a rebuttal case to prepare for and not
5 much time between now and Friday, and meanwhile the
6 other side has time to --

7 JUDGE McGUIRE: Well, I explained to the
8 parties back some time ago that to do a closing
9 argument was purely at the option of the parties, so
10 you should have anticipated at least their side may in
11 fact choose to enter a closing argument, and so this
12 isn't, you know, a surprise as to what, you know,
13 they've opted to engage in.

14 MR. ROYALL: Would it be -- would you consider
15 postponing the arguments until a later time,
16 understanding what you said about closing the record
17 Friday obviously holds, but would you consider having
18 these closing arguments occur in a couple of weeks or
19 at some later point?

20 JUDGE McGUIRE: Well, that's what Mr. Perry had
21 proposed earlier this morning, if I understood what he
22 was saying.

23 MR. PERRY: I proposed after briefing,
24 Your Honor.

25 JUDGE McGUIRE: Yeah, after briefing.

1 MR. PERRY: We really would not want to do it
2 in the midst of briefing given that we're going to be,

1 at the hearing.

2 So it's merely an opportunity for the parties
3 to offer the court a short summation of what has
4 occurred in this proceeding, but I'm not going to hold
5 you to any assertions that you might make and arguments
6 you might make.

7 To me, your case is going to be completely
8 incorporated into your post-hearing briefs, and that's
9 the instrument that I'm going to give close scrutiny
10 to, and this is merely a pro forma exercise as far as
11 I'm concerned.

12 MR. ROYALL: Well, with that additional input,
13 what I -- if I -- I wasn't here when Mr. Perry this
14 morning may have recommended or suggested arguments
15 after briefing, but is that something that Your Honor
16 would consider?

17 Because I do think that whatever we can offer
18 in terms of perspective on the record is probably
19 likely to be more helpful once we get a chance to --

20 JUDGE MCGUIRE: Well, let me ask you this
21 question, the two of you. What would you offer to the
22 court in an oral argument that you have not already
23 hopefully included in your post-hearing briefing?

24 MR. PERRY: Well, Your Honor, this morning
25 what I was focused on was whether you would have

1 questions. There are going to be some sharp

1 any way prejudiced by that, we won't do it. It's not
2 worth it at the end of this to do 30 minutes of here's
3 our key arguments and have them feel like they've just
4 been through their rebuttal case and -- it's just not
5 worth it. So I withdraw the suggestion.

6 MR. ROYALL: Well, but the other suggestion, I
7 was going to comment -- obviously we can wait for
8 Your Honor's -- whatever input you have on that, but
9 certainly the other suggestion about us at some point
10 being available to answer questions after you read the
11 briefs I think is a fine suggestion, and from our
12 standpoint --

13 JUDGE McGUIRE: The only concern I have about
14 that is some of the questions, depending on how they're
15 answered, could involve argument that's not even part
16 of the evidence incomp of here's

1 record and what is mere argument that pertains to
2 evidence that might well be outside of this record.

3 In answering an inquiry, an attorney might
4 offer evidence that has not been entered into the
5 record. Even though it's in those volumes, I haven't
6 considered it and I won't consider it. It's not part
7 of this record.

8 So that's what concerns me.

9 MR. PERRY: Your Honor, in my heart of hearts
10 if you told me I never had to be in Washington
11 again --

12 JUDGE MCGUIRE: You've had your share.

13 MR. PERRY: -- I'm okay with that.

14 JUDGE MCGUIRE: So the way I'm going to keep it
15 is we're going to stand on the dates that I proposed to
16 file your post-hearing briefs.

17 Should I determine at some point after that
18 that there are key questions I might have understanding
19 issues in dispute or if there's apparently a conflict
20 in testimony, what I might do, instead of having oral
21 argument, I might, if I have the time, offer these in
22 an order for further briefing. And that way both sides
23 will have the opportunity to at least go back into the
24 evidence, and instead of this being something
25 spontaneous off the bench that you really haven't had a

1 chance to prepare for, then you can go back into the
2 record and address whatever concerns I might have, you
3 know, on these issues.

4 To me, that's a much cleaner way to deal with
5 any inquiries I might have. And then you can -- each
6 side will get a copy, and you know, we'll give you ten
7 days or something to file your responses, and we'll do
8 it at the same time so there's -- okay? I think that's
9 a little better way to approach some of this.

10 So let's keep it at that.

11 So there's no further comments regarding any
12 aspect of the post-hearing briefing in this case?

13 MR. ROYALL: I don't believe so, Your Honor.

14 JUDGE McGUIRE: Okay. If something comes up
15 between now and Friday.

16 So let's see. Tomorrow we're going to be
17 involved with whom, Mr. Perry?

18 MR. PERRY: Tomorrow we have
19 Mr. Alan Grossmeier, a third-party representative from
20 Cray who was a JEDEC representative.

21 And I guess Wednesday will be dark.

22 JUDGE McGUIRE: Right. Wednesday is dark;
23 correct?

24 Do we have some idea as to what time we're
25 going to, I guess, conclude on Friday?

1 MR. OLIVER: Before we address that,
2 Your Honor, I just did want to confirm Wednesday will
3 be dark. And I also wanted to let you know that
4 apparently Mr. Terry Lee has some scheduling
5 constraints on Thursday and we may request, if
6 possible, to start early Thursday morning.

7 JUDGE McGUIRE: That's fine.

8 MR. OLIVER: I will try to get details today
9 and report to you tomorrow.

10 JUDGE McGUIRE: That's fine. No problems.

11 MR. ROYALL: And was -- Your Honor was also
12 asking about Friday, how long we'll go Friday?

13 JUDGE McGUIRE: I was just going to get some
14 idea of how long we might go Friday.

15 MR. ROYALL: I think the -- I believe the only
16 thing will be Professor McAfee. I don't know exactly
17 how long the direct will be or the cross, but I have no
18 doubt that we'll be able to finish him up without
19 having to go later than a normal day.

20 JUDGE McGUIRE: Okay.

21 MR. ROYALL: And I wouldn't anticipate a need
22 to start earlier than 9:30.

23 JUDGE McGUIRE: Okay. Very good. Then we'll
24 see you in the morning Tuesday morning at 9:30.

25 This hearing is in recess.

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MR. ROYALL: Thank you.
(Time noted: 12:16 p.m.)

