**[PUBLIC RECORD VERSION]**

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

BY MAJORAS, *Chairman:*

Respondent, Rambus Inc., has petitioned the Commission, pursuant to 16 C.F.R. § 3.55,

(10th Cir. 1985) and *Southwest Sunsites Inc*.

Rambus Reply at 4-5.

*Fixed-Fee License Option*

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

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

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

*Availability of Judicial Remedies in Infringement Actions*

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

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these requests for modification of the Final Order are unnecessary.

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

The arguments of Complaint Counsel and Amici are not persuasivej/TT1existing1 1 Tf11.24 0 Ttci ar18

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

*Collection of Multiple Royalties on Systems*

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

*Proposed Limitations on Licensees' Rights to Seek Further Relief*

In addition to the foregoing requests, Rambus raises the possibility that a prospective licensee might both (1) avail itself of the MARR – by either accepting a license under Paragraph V. of the Final Order or by asserting rights in litigation under Paragraphs VI.-VI

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

*Definitions*

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

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

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

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

[13] 2010, when royalties fall to zero under Final Order, is 17 years after the [illegible]

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

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

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

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

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

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

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

Finally, Rambus asks the Commission to modify the definition of JEDEC-Compliant Non-DRAM Products. *See* Rambus Pet. at 14 n.11. As adopted by the Commission, the definition encompasses memory controllers or other non-memory-chip components that "comply with" specified JEDEC standards. *See* Final Order ¶ I.E. According to Rambus, the Commission's definition could force Rambus to license (under MARR terms) technologies that relate to some other portion of a component that interfaces with JEDEC-Compliant DRAM Products elsewhere, and have nothing to do with the JEDEC standards. Rambus contends that the definition should be modified to encompass me

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

*Liability for Conduct of Compliance Officer*

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

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

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

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Products.

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

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

## Conclusion

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

ISSUED: April 27, 2007