

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)	
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INTEL CORPORATION,)	DOCKET NO. 9341
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**MEMORANDUM IN SUPPORT OF INTEL CORPORATION’S MOTION UNDER
RULE 3.36 FOR LEAVE TO TAKE A DEPOSITION OF THE BUREAU OF LABOR
STATISTICS UNDER RULE 3.33(c)(1)**

Respondent, Intel Corporation, by its counsel, seeks leave under Rule 3.36 to take a Rule 3.33(c)(1) deposition of an official of the Bureau of Labor Statistics (“BLS”) on certain limited issues relating to the rapidly declining prices of microprocessors as shown by the official producer price index (“PPI”) data published by the BLS. Intel seeks only a limited deposition of two hours or less which does not require the BLS deponent to disclose any non-public proprietary data or the details of its methodology.

I. SUBSTANTIVE RELEVANCE OF THE TESTIMONY SOUGHT

In Dkt. No. 9341, the Commission (“FTC”) filed an administrative complaint alleging that Intel has monopolized the market for x86 microprocessors in violation of Section 5. Intel has denied that it has done so.

Central to an analysis of monopolization is the issue of “monopoly power.” “Monopoly power is the ability to control prices and exclude competition in a given market. If a firm can profitably raise prices without causing competing firms to expand output and drive down prices, the firm has monopoly power.” *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir.

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2007) (citation omitted). The microprocessor industry is, and has historically been, characterized by a trend of ever-increasing output and simultaneously decreasing prices.

To respond to the allegations that Intel has monopolized the x86 microprocessor market by suppressing output, restricting innovation, and raising the prices of x86 microprocessors, Intel, as set forth on the first page of its Answer to the Complaint (Exhibit 1 hereto), intends to introduce evidence to show that (1) Intel's and industry output have greatly expanded in the last decade, (2) price-competitive x86 microprocessors have captured substantial business from other types of non-x86 microprocessors (*e.g.*, PowerPC and RISC processors), (3) rapid innovation in process technology and microprocessor design have effectively reduced prices by vastly increasing the functionality and performance of x86 microprocessors, and (4) prices of x86 microprocessors, adjusted for improvements in quality and performance, have declined annually at a substantial rate. These facts are directly relevant to whether Intel has monopoly power and whether competition and consumers have been harmed.

To establish that x86 microprocessor prices, adjusted for performance improvements, have declined rapidly and continuously though the period it allegedly engaged in monopolistic practices (*i.e.*, since 1999), Intel relies, in part, on the public BLS PPI for microprocessors ("mpus"), series PCU33441333441312 (Exhibit 2 hereto), which series is weighted by revenue and includes x86 microprocessors. The Microprocessor PPI has also declined faster than any of the other 1200 products, including high technology products, for which the BLS issues a PPI price series, further indicating the x86 processor market is competitive. *See* Intel Answer, p. 1 (Exhibit 1).

The Microprocessor PPI includes both x86 microprocessors and non-x86 microprocessors designed for computer applications (“empus”) and embedded microprocessors designed for use in non-computer applications (“empus”), such as cellular phones and pagers.¹

Complaint Counsel have asserted that Intel cannot rely on the Microprocessor PPI data to show rapidly declining x86 microprocessor prices for two reasons. First, they argue that the Microprocessor PPI’s inclusion of non-x86 processor pricing data, including data for billions of embedded microprocessors, renders the BLS data overinclusive and meaningless. Second, they argue that the Microprocessor PPI does not include pricing data obtained directly from Intel (the leading x86 producer), and thus does not measure changes in x86 processor prices.²

BLS agency records make two points relevant to Complaint Counsel’s assertions. *See* M. Holdway, “*An Alternative Methodology: Valuing Quality Change for Microprocessors in the PPI*,” revised January 2001, available at <http://www.bea.gov/papers/pdf/mpuvqa.pdf> (Exhibit 3 hereto).³

First, even though empus account for billions of processor shipments, they account for less than 20% of processor revenue because of their much lower average selling prices relative to

1 Complaint Counsel have not been willing to admit that the Microprocessor PPI is based in part on x86 microprocessor data (*see* Complaint Counsel’s Answers and Objections to Respondent’s First Set of Requests for Admissions, filed May 5, 2010 (Response to RFA No. 1) (“After reasonable inquiry, Complaint Counsel does not have sufficient information or knowledge to admit or deny Request No. 1 to the extent it states that series PCU33441333441312 includes x86 microprocessors”). The proposed BLS deposition addresses this and other facts relating to the Microprocessor PPI that Complaint Counsel have been unwilling to admit.

2 *See* Complaint Counsel’s Motion to Admit European Commission Decision (March 17, 2010) at 5. (“[T]he United States Bureau of Labor Statistics . . . data is irrelevant to this case. The BLS ‘microprocessor’ pricing data aggregates the prices of *any* product classified as a ‘microprocessor’ by a manufacturer participating in the survey – and includes, for example, the billions of embedded microprocessors used in cell phones, cars and televisions. The inclusion of these non-relevant products renders the BLS data meaningless here. That flaw is compounded by the fact that Intel has *never* submitted its pricing data to the BLS The data is both over-inclusive in that it includes the prices of billions of products that are not in the relevant market and under-inclusive in that it does not include Intel’s prices”).

3 According to the BLS, the “documents authored by Mr. Holdway were done on the behalf of BLS in [Mr. Holdway’s] former official capacity.” *See* Exhibit 4 at p. 3.

cmpus (such as x86 processors) used for computer applications. Since the PPI indices are revenue rather than unit weighted, the inclusion of cmpus in the index does not distort the results. Exhibit 3 at p. 2 and nn. 2-3.

Second, Mr. Holdway's paper prepared on behalf of BLS (Exhibit 3 hereto) shows that computer microprocessors (cmpus) – not embedded processors (empus) – were driving the price declines in the quality adjusted Microprocessor PPI. Mr. Holdway notes that “[b]ecause embedded designs are often application or customer specific, they tend to have longer life cycles relative to cmpus which reduce product substitutions and the corresponding need to value quality change” and that, “[i]n contrast, cmpus have exceptionally short life cycles which require the PPI to make almost continued estimations of quality change.” Exhibit 3 at pp. 2-3. It therefore follows, contrary to Complaint Counsel's position, that including empu data *reduces* the rate of price decline that would otherwise be reflected were the PPI index composed entirely of x86 microprocessors used in computer applications. See Exhibit 3 at p. 3 and Chart 1.

The BLS also has relevant information relating to Complaint Counsel's other reason for urging rejection of the use of the PPI Microprocessor Index, namely that Intel did not directly provide price and revenue data to the BLS for its use in determining the microprocessor PPI.⁴ Mr. Holdway's paper on behalf of BLS notes that (1) trade publications estimated that Intel's share of the cmpu market in 1999 was approximately 90% based on revenue; (2) *prior* to 1997, the PPI microprocessor series was driven largely by data for empus and small niche cmpu

⁴ Respondent's Answers and Objections to Complaint Counsel's First Set of Requests for Admissions, Nos. 8, 9 (March 1, 2010).

players “due in part to a significant non-response from a major segment of the cmpu market;”⁵ (3) this led to a disparity between the PPI sample and the real world microprocessor universe; and (4) this problem was overcome by BLS’s introduction of secondary source pricing data for cmpus into the Microprocessor PPI in January 1997 to function as a “supplemental sample designed to represent 85 percent of the cmpu market that was not available for direct repricing in the PPI.” Exhibit 3 at pp. 1-3.⁶ Mr. Holdway’s paper further indicates that BLS obtained this secondary source pricing data for the major x86 cmpus from *Microprocesor Report* and *Electronic News* and that BLS uses both publications “as a cross-check for accuracy.” Exhibit 3 at p. 3 n. 5. The dramatic effect of including the secondary source cmpu pricing data (which reflects Intel cmpu x86 prices) on the rate of decline in the PPI for microprocessors is shown in the Holdway paper. See Exhibit 3 at p. 3 and Chart 1.

II. INTEL’S EFFORT TO OBTAIN DEPOSITION TESTIMONY RELATING TO THE BLS PRICE INDICES FOR MICROPROCESSORS

In an effort to obtain information to rebut Complaint Counsel’s attacks on Intel’s use of the BLS Microprocessor PPI, Intel, on April 21, 2010, subpoenaed Michael Holdway, an employee of BLS, in his individual capacity to testify about two public papers he had authored

⁵ Intel has admitted in Dkt. No. 9341 that it did not directly provide price and revenue data to the BLS, but noted that BLS obtained Intel data indirectly through use of secondary source data (see Respondent’s Answers and Objections to Complaint Counsel’s First Set of Requests for Admissions, Nos. 8 and 9 (March 1, 2010), a part of Intel’s response Complaint Counsel has repeatedly ignored. See Complaint Counsel’s Answers and Objections to Respondent’s First Set of Requests for Admission, pp. 1-2, May 5, 2010).

⁶ See A. Aizcorbe, “Price Measures for Semiconductor Devices, January 2001 (revised January 2002), available at www.federalreserve.gov/Pubs/feds/2002/200213/200213pap.pdf. The Federal Reserve Board also obtained third party source data from MicroDesignResources (“MDR,” the publisher of *Microprocessor Report*) that included value of shipments data for Intel MPUs (i.e., microprocessors). MDR provided estimated price and quantities for 43 distinct microprocessors produced by Intel, and reported that Intel’s chips “represented about 80% of the total value of microprocessors produced in the world in 1999.” *Id.* at 12.

(and other public materials) that were related to Complaint Counsel's critiques of Intel's use of the BLS Microprocessor PPI.⁷

Intel, in compliance with the Department of Labor ("DOL") regulations, sent to the Solicitor's Office of the DOL on May 3, 2010, a written explanation of why the testimony of Mr. Holdway in his individual capacity about materials in the public record was relevant to the allegations in Docket No. 9341. This submission (Exhibit 5 hereto) paralleled the relevance discussion set forth in Part I above. The Solicitor's Office responded on May 18, 2010, declining to produce Mr. Holdway. In declining to produce Mr. Holdway, the Solicitor's Office noted (Exhibit 4 at p. 3):

In this matter, DOL has consulted with the FTC counsel and has determined that Mr. Holdway's testimony would not be in the interest of the Government because this information [sought by Intel] is irrelevant and misleading to the issues before the FTC.⁸

Intel's counsel is unaware of what was said in these *ex parte* communications between Complaint Counsel and the Solicitor's Office. If, as the Holdway paper prepared on behalf of the BLS makes clear, the inclusion of embedded processors did not have a material effect on price declines reflected in the revenue-weighted Microprocessor PPI – and, in fact, inclusion of embedded processors may have suppressed the rate of price decline had the Microprocessor PPI

7 Intel -- perhaps erroneously -- did not file a motion under Rule 3.36 of the Rules of Practice because it sought to depose Mr. Holdway only in his individual capacity on matters in the public domain, and did not seek his testimony as an employee of BLS or to inquire about non-public BLS information. Appendix A to the Holdway subpoena (Attachment 6 to Exhibit 5 hereto) limited the areas of Mr. Holdway's proposed deposition. It stated that Intel would not inquire about the following subjects: (a) disclosure of any non-public material contained in the files of the Department of Labor (including the Bureau of Labor Statistics) or acquired by the Department of Labor in performing the official duties of the Department; and (b) any matter involving Mr. Holdway's official status or the performance of his or others' official duties at the Department of Labor. Intel observed that this limitation was intended to eliminate many of the traditional concerns of the Department.

8 Messrs. Robertson and Brock were copied on the letter Intel's counsel received from the Solicitor's Office. See Exhibit 4 at p. 4.

been limited to x86 processors used in computer applications – then the Microprocessor PPI is hardly irrelevant. Similarly, if the BLS was able to obtain data on Intel x86 microprocessors from secondary sources which were viewed as sufficiently reliable to use in promulgating the official government producer price index for microprocessors,⁹ then this fact is also relevant to rebut Complaint Counsel’s critique that the Microprocessor PPI should be disregarded because Intel did not provide data directly to the BLS.

For these reasons, Intel seeks from Your Honor a determination that the limited information it seeks is relevant to the issues in Docket No. 9341.

III. THE LIMITED RULE 3.33(c)(1) SUBPOENA TO THE BUREAU OF LABOR STATISTICS SHOULD BE AUTHORIZED

In addition to a specific finding that the subject matter of the sought-after information is relevant to the issues in Docket No. 9341, Intel seeks authorization for the limited Rule 3.33(c)(1) deposition of the BLS. It seeks a Rule 3.33(c)(1) deposition because the Solicitor has indicated Mr. Holdway left the position in which he authored the two articles about which Intel sought to examine him in 2001. *See* Exhibit 4 at p. 3. Intel, seeks to depose the BLS witness for only two hours or less.¹⁰ The witness would not be asked to disclose any specific proprietary material (such as an individual company’s prices or revenue). The deposition would seek factual information pertaining to whether BLS obtained and used secondary source pricing and shipment volume data for Intel x86 processors since January 1997, as BLS has already acknowledged was its practice as of 2001 in the Holdway paper discussed above. Other subjects of the deposition

⁹ The PPI’s use of secondary sources for Intel’s and other microprocessor producers’ prices, according to Mr. Holdway, “have been confirmed as representative of price change at the transaction level by computer OEMs that report to the PPI.” *See* Exhibit 3 at p. 31.

¹⁰ Such a limited appearance would only be a brief diversion from the BLS employee’s duties and would not be a major drain on BLS’s resources.

would be (1) whether the aggregate shipment volume for microprocessors not used for computer applications (*i.e.*, in server, desktop, notebook and netbook products) contained in the revenue-weighted Microprocessor PPI was a small percentage of overall microprocessor shipments revenue during the period since January 1, 1997; (2) whether the prices for embedded processors were quality adjusted to take into account improvements in performance at any time period since January 1999; and (3) whether the rate of price decline for embedded processors exceeded that of microprocessors used in servers, desktops, notebooks and netbook products. These subjects are all directly relevant to the effect of including non-x86 microprocessors in the microprocessor PPI.

Accordingly, Intel respectfully urges Your Honor to authorize the issuance of a Rule 3.33(c)(1) subpoena to BLS on the topics of examination listed in Exhibit 6 hereto.¹¹ A proposed order is appended.

¹¹ As with certain other depositions of third parties, it may be necessary to schedule the deposition after June 15 to accommodate BLS.

Respectfully submitted,


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