UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 9341
INTEL CORPORATION, a corporation	)	PUBLIC

INTEL CORPORATION'S REPLY TO COMPLAINT COUNSEL'S RESPONSE TO MOTION FOR LEAVE TO DEPOSE THE BUREAU OF LABOR STATISTICS

Intel intends to establish at trial that prices for x86 microprocessors – quality adjusted for performance improvements – have declined substantially and continuously during the period it allegedly engaged in monopolization. As pointed out in Intel's initial memorandum ("Intel Mem."), Intel intends to rely, in part, on official Producer Price Index ("PPI") data for Microprocessors, series PCU33441333441312. *See* Intel Mem. at 1-2, Exhibits 1 and 2. That series shows that Microprocessor prices – adjusted for performance improvements – have declined at an annual rate of 42% – faster than any of the other 1200 products for which BLS issues a PPI price series. The BLS data is important because it contains quality adjustments to prices that take into account improvements in performance, implemented by a disinterested third party, namely, the U.S. government. Intel seeks an order under Rule 3.36 to take a limited deposition of the BLS under Rule 3.33(c)(1) to address certain factual issues involving the Microprocessor PPI. The targeted information sought is "reasonably relevant" and "cannot reasonably be obtained by other means . . . ." Rule 3.36(b)(2)-(3).[1]

[1] Intel tried previously to obtain the information through a subpoena issued to Michael Holdway, which was limited in scope to articles he had written and other materials in the public domain. *See* Intel Mem. at 5-6. Although Mr. Holdway's article contains the standard disclaimer that the "views expressed represent those of the author and not those of BLS or any of its staff" (*see* Complaint Counsel Response, at 3), the Solicitor of the Department of Labor noted that the "documents he authored were done on the behalf of BLS in [Mr. Holdway's] former official capacity. *See* Intel Mem., Exhibit 4 at p. 3. Intel thus did not misrepresent that they were "prepared on behalf of BLS."

1. The Limited Information Sought Is Reasonably Relevant

Complaint Counsel asserts that the limited deposition sought "will not lead to admissible evidence" for two reasons. First, they assert that "monopoly power" may be inferred from market share and that pricing evidence is irrelevant. As Your Honor has noted, "monopoly power is defined as 'the power to control prices or exclude competition.'" *Polypore* Initial Decision at 303, citing *United States v. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). While monopoly power may in some circumstances be inferred from high market shares in the absence of direct evidence, rapidly declining prices are relevant to the issue of monopoly power, both from a legal and economic standpoint. *See, e.g.*, *United States v. Syufy Enterprises*, 903 F.2d 659, 669-70 (9th Cir. 1990) (evidence of competitive prices relevant to finding no monopolization); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980) ("blind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition."); Carlton and Perloff, *Modern Industrial Organization* 644 (4th ed. 2005) ("market shares are imperfect indicators of market power, so additional analysis of economic conditions is necessary before one can reach a conclusion about market power.") Moreover, BLS Microprocessor prices are clearly relevant to numerous allegations of adverse effects alleged in the Complaint, *e.g.*, Para. 94a ("Intel's conduct adversely affects competition and consumers by . . . causing higher prices of CPUs . . ."); Para. 95 ("the consequences [of Intel's conduct] have been . . . supracompetitive prices, reduced quality, and less innovation.").

Complaint Counsel also argues that the BLS Microprocessor price series is not relevant because it contains data on embedded processors and other devices and because Intel does not directly provide x86 prices to the BLS. That is Complaint Counsel's position. Intel seeks to

depose the BLS to establish that this revenue weighted price series is dominated by x86 processors, that the inclusion of embedded processors and related devices do not substantially affect the price trends, and that inclusion of embedded processors in fact reduces the rate of price decline from what it would have been if it only included x86 processors. *See* Intel Mem. at 3-5. Intel also seeks to establish that – contrary to Complaint Counsel's position (Response at 3) – the secondary pricing data relied on by BLS for Intel's and other microprocessor producers' prices is reliable. *See* Intel Mem. at Exhibit 3, p. 31 (Mr. Holdway noted that the PPI's use of secondary source prices "have been confirmed as representative of price change at the transaction level by computer OEMs that report to the PPI"). The deposition of BLS is clearly relevant to resolving the issues posed by Complaint Counsel.[2]

2. Your Honor's Decision To Not Admit The EC Decision

Complaint Counsel asserts (Response, p. 4) that "the BLS materials do not meet the standards articulated by this Court in its recent ruling on the admissibility of the European Commission Decision." That decision involved admissibility of evidence, not discoverability. It involved an attempt to put into evidence a foreign agency's decision regarding many of the key issues in contention in the present case, which presented the risk of creating a trial within a trial. As Your Honor found, "[a]dmitting the decision and factual findings of the EC risks converting this forum into another litigation of the EC case, which utilized different legal procedures than those used in Part III administrative litigation." Order at 6. By contrast, Intel seeks a deposition to examine a single witness about a narrow issue – the contents of U.S. government reports – which presents no risk of converting this case into the litigation of another disputed proceeding.

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[2] Complaint Counsel (Response pp. 3-4) takes issue with Intel counsel's use of the word "*ex parte*" to describe Complaint Counsel's contacts with the Solicitor's Office of the Department of Labor. As Intel previously has informed Complaint Counsel, Intel's description of those communications as "*ex parte*" refers only to the fact that they did not include Intel, and therefore that Intel did not have the opportunity to respond to Complaint Counsel's views concerning the relevance of the discovery sought.

And unlike the case with the EC decision, both parties will have the opportunity to examine the witness whose testimony is being sought and to vet the reliability of the reports for the purposes for which Intel proffers them. There will be no danger of unfair prejudice.

Accordingly, Intel requests this Court leave under Rule 3.36 to issue the limited Rule 3.33(c)(1) deposition subpoena to BLS.

Respectfully submitted,

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