UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
INTEL CORPORATION, Respondent.	)	DOCKET NO. 9341

ORDER GRANTING RESPONDENT'S MOTION TO TAKE DEPOSITION PURSUANT TO COMMISSION RULE 3.36

I.

On May 27, 2010, Respondent Intel Corporation ("Respondent" or "Intel") submitted its Motion Under Rule 3.36 for Leave to Take a Deposition of the Bureau of Labor Statistics Under Rule 3.33(c)(1) ("Motion"). Complaint Counsel, on May 28, 2010, submitted its response to Respondent's Motion. By Order dated June 2, 2010, Respondent was directed to, and did, file a reply on June 3, 2010.

Having fully considered the motion, response, and reply, and for the reasons set forth below, the Motion is GRANTED.

II.

Respondent moves, pursuant to Rule 3.36, to take a Rule 3.33(c)(1) deposition of an official of the Bureau of Labor Statistics ("BLS"), a division of the Department of Labor ("DOL"), on certain limited issues relating to the prices of microprocessors as shown by the official producer price index, series PCU33441333441312, published by the BLS (the "PPI"). Specifically, Respondent seeks issuance of a subpoena to obtain testimony on the following six topics:

1. The use of secondary source data in the preparation of the Microprocessor PPI, Series PCU33441333441312, to represent x86 microprocessor price and shipment data not directly available to BLS.

2. The approximate percentages of shipments in Microprocessor PPI Series PCU33441333441312 accounted for by products other than x86 microprocessors.

3. Whether any products in Series PCU33441333441312 other than microprocessors used in computer applications (*i.e.*, server, desktop,

notebook and notebook products) are quality adjusted to reflect improvements in product performance.

4. Whether the secondary source price and shipments data used by BLS as a supplemental sample to represent data for microprocessors used in computer applications not directly available to BLS is viewed by BLS as reliable.

5. Whether the secondary source pricing and shipments data used by BLS in PPI Series PCU33441333441312 is also used by the Bureau of Economic Analysis of the U.S. Department of Commerce and the staff of the Federal Reserve Board.

6. Whether the rate of quality adjusted price decline for the microprocessors for which BLS uses a supplemental sample of secondary source pricing and shipment data is higher than the rate of price decline for other products contained in PPI series PCU33441333441312.

Motion Exhibit 6.[1] Respondent further states that it seeks a deposition of two hours or less and that the deposition will not require the BLS deponent to disclose any non-public proprietary data or the details of its methodology.

Respondent argues that, to defend against the allegations of the Complaint that Intel has monopolized the x86 microprocessor market, and that Intel's conduct has harmed consumers, Respondent intends to introduce evidence to show that: (1) Intel's and industry outputs have greatly expanded in the last decade; (2) price competitive x86 microprocessors have captured substantial business from other types of non-x86 microprocessors; (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. Respondent further states that, to establish that x86 microprocessor prices, adjusted for performance improvements, have declined rapidly and continuously through the period Intel is alleged to have engaged in monopolistic practices, Intel relies, in part, on certain PPI data published by BLS.

Respondent states that Complaint Counsel has taken the position that Respondent cannot rely on the BLS microprocessor PPI data to show declining x86 microprocessor prices for two reasons: (1) the microprocessor PPI data includes non-x86 processor pricing data, including data for billions of embedded microprocessors, and thus is over inclusive and meaningless; and (2) the microprocessor PPI does not include pricing data

[1] Respondent's request "for leave to take the deposition" of BLS appears to be a misstatement. It is clear from the body of the Motion that Intel requests issuance of a subpoena for the purpose of taking deposition testimony from BLS. *See* Motion at 8, and Exhibit 6 thereto. As shown *infra*, a motion for issuance of a subpoena by the Administrative Law Judge pursuant to Rule 3.36 is the appropriate procedure for seeking the deposition of an official of a government agency. 16 C.F.R. § 3.36.

obtained directly from Intel and, thus, does not measure changes in x86 processor prices. Respondent states that it seeks to depose an individual from the BLS to rebut these assertions of Complaint Counsel. Through testimony from a BLS representative regarding the PPI data, Respondent seeks to establish that: (1) the amount of non-x86 pricing data in the PPI is too small to affect the x86 price trends shown by the PPI; and (2) the PPI contains Intel data indirectly, through inclusion of reliable secondary source data.

Complaint Counsel's response states that it does not oppose the Motion. Complaint Counsel does, however, appear to contend that the PPI would be irrelevant/and or inadmissible at the adjudicative hearing. Complaint Counsel asserts that Respondent has admitted that it had in excess of a 70% market share in the alleged relevant markets. Moreover, as indicated by Respondent in its Motion, Complaint Counsel argues that the PPI is meaningless because it includes non-x86 microprocessor prices and because Intel has admitted it does not contribute any pricing data directly to the BLS. Furthermore, to the extent that the PPI includes Intel's pricing data obtained from secondary sources, Complaint Counsel contends that the PPI constitutes hearsay.

III.

Commission Rule 3.36 applies to obtaining discovery from a government agency or official. Pursuant to Rule 3.36, an application for issuance of a subpoena for the appearance of an official or employee of another governmental agency requires a written motion filed in accordance with the provisions of § 3.22(a). 16 C.F.R. § 3.36(a). Commission Rule 3.36 further requires that "[t]he motion shall make a showing that:

> (1) The material sought is reasonable in scope;
>
> (2) If for purposes of discovery, the material falls within the limits of discovery under § 3.31(c)(1) . . . ; [and]
>
> (3) If for purposes of discovery, the information or material sought cannot reasonably be obtained by other means . . . ."

16 C.F.R. § 3.36(b).

Respondent previously – and, it acknowledges, erroneously – attempted to secure the deposition of a BLS official in this action by serving a subpoena issued under the authority of Commission Rule 3.34, which does not require advance judicial process or the heightened showing demanded by Rule 3.36.[2] By letter dated May 18, 2010, counsel for DOL notified Respondent that, pursuant to DOL regulations, the Deputy Solicitor of DOL would not allow the deposition and that Respondent could appeal that decision as

[2] Rule 3.34 provides that, subject to a motion to quash, "[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary, requiring a person to appear and give testimony . . ." and specifically does not apply to the issuance of subpoenas that are within the purview of Rule 3.36. 16 C.F.R. § 3.34(a).

the "final agency action" of DOL under the Administrative Procedure Act. *See* Motion Exhibit 4. *See generally United States v. Reynolds*, 345 U.S. 1, 9-10, 73 S. Ct. 528, 97 L. Ed. 727 (1953) (upholding executive agency right to prescribe by regulation, consistent with the law, the circumstances under which information will be released); *United States ex. Re. Touhy v. Ragen*, 340 U.S. 462 (1951) (same); 5 U.S.C. § 301 ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."). This Motion followed, seeking issuance under Rule 3.36 of a Rule 3.33(c)(1) subpoena on the six topics listed above. Pursuant to Rule 3.33(c)(1), a party may name as the deponent a governmental agency other than the Federal Trade Commission and the organization so named shall designate one or more persons who consent to testify on its behalf. 16 C.F.R. § 3.33(c)(1). As shown below, Respondent has met its burden and has made the showing required by Rule 3.36 for issuance of a 3.33(c)(1) subpoena to BLS.

Respondent has demonstrated that the requested discovery is reasonable in scope. Respondent requests a deposition of two hours or less, and the inquiry is limited to six narrow topics related to a single PPI series.[3] Thus, Respondent has satisfied the first prong of Rule 3.36(b). 16 C.F.R. § 3.36(b)(1).

The requested discovery is also well within the scope of discovery under Rule 3.31(c)(1). Pursuant to Rule 3.31(c)(1), "parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. . . . Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[4]

According to its Motion, Respondent seeks to defend against Complaint Counsel's allegations that Respondent engaged in monopolistic practices by showing, based in part on the PPI data, that x86 microprocessor prices, adjusted for performance improvements, have declined through the relevant period. Based on these

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[3] It is also noteworthy, in evaluating reasonableness, that the scope of the subpoena requested by the instant Motion is significantly narrower than the scope of the deposition Respondent sought pursuant to its Rule 3.34 subpoena, which was disapproved by the Deputy Solicitor of DOL. That subpoena sought deposition testimony on the much broader categories of "[d]ata contained in published producer price indices," as well as "[p]ublished articles and materials in the public domain authored by [BLS employee Michael] Holdway and others involving producer price indices for microprocessors, semiconductors, personal computers, portables and laptops, and computer storages devices." *Compare* Motion Exhibit 5, attachment 6, *with* Motion Exhibit 6, set forth above. Furthermore, regarding the previous subpoena to DOL, it appears that there was no limit on the length of the deposition.

[4] As Rule 3.31(c)(1) plainly indicates, it is not necessary to demonstrate that the requested information would in fact be admissible at the hearing. Accordingly, Complaint Counsel's assertions in this regard need not be addressed.

representations, the PPI data is clearly relevant to this defense. Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). "If a firm can profitably raise prices without causing competing firms to expand output or drive down prices, that firm has monopoly power." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) (citation omitted). Respondent's stated defense is that the microprocessor industry is, and has historically been, characterized by a trend of ever-increasing output and simultaneously decreasing prices. The requested information is relevant to that defense.

In contending that the PPI data is irrelevant and inadmissible, Complaint Counsel refers principally to whether the evidence is relevant to proving the allegations of the Complaint, as opposed to whether the evidence may be relevant to proving the defenses of Respondent. Similarly, counsel for the DOL asserted in the May 18 letter that, based upon "consult[ation] with FTC counsel" it was determined that the information sought by Respondent was "irrelevant and misleading to the issues before the FTC." Motion at Exhibit 4, p. 3. What is relevant in this proceeding, especially when it relates to a defense that may be asserted by a Respondent, is not determined by counsel for DOL in consultation with the FTC counsel.[5] Relevance is determined by the judicial tribunal, and furthermore, that determination must consider the Respondent's defenses, as well as Complaint Counsel's claims. 16 C.F.R. § 3.31(c)(1); *In re Union Oil Co.*, No. 9306, 2003 FTC LEXIS 94, at *10-11 (June 30, 2003) (denying motion to limit subpoena where requested documents appeared relevant to claims or defenses); *see also In re Aspen Technology, Inc.*, No. 9310, 2004 FTC LEXIS 28, at *7 n.1 (Jan. 27, 2004) (granting certification to Commission for determination whether to seek court enforcement of subpoena on foreign corporation, where evidence from non-U.S. customers was relevant to both Complaint Counsel's claim and to Respondent's defense).

Respondent is entitled to seek evidence in support of its defense and to rebut Complaint Counsel's contentions that, because Intel did not directly provide pricing data and because the PPI contains some non-x86 data, the PPI data is not relevant or meaningful for Respondent's purposes. The topics that Respondent has designated for the BLS deposition relate directly to these contentions. According to the Motion, the deposition may elicit evidence to rebut Complaint Counsel's contentions regarding the probative value of the PPI data and thereby may buttress Respondent's defense. The data underlying the PPI should not be exempt from the limited examination encompassed by

[5] Relevance is also not determined by the standard applied in the Order Denying Complaint Counsel's Motion to Admit European Commission Decision, May 6, 2010 ("Order"), as asserted by Complaint Counsel. Response at 4. The decision against Respondent by the European Commission (the "EC Decision") was ruled inadmissible in this action pursuant to the balancing test required under Commission Rule 3.43(b). The Order stated that "even if the EC Decision is relevant, . . . its probative value is substantially outweighed by the danger of unfair prejudice, undue delay, waste of time, and needless presentation of cumulative evidence." Order at 3. There is a significant and dispositive distinction between permitting Respondent to seek discovery of information that may tend to prove its defenses in this action and precluding, pursuant to a Rule 3.43(b) balancing test, admission in this forum of a decision litigated in a foreign forum that did not apply or follow United States law. Accordingly, Complaint Counsel's argument that the PPI data should be deemed irrelevant because the EC Decision has been ruled inadmissible in this action is without merit.

the designated topics.

For the foregoing reasons, Respondent has demonstrated that the requested discovery is relevant and permissible under Rule 3.31(c)(1) and, thus, has satisfied the second prong of Rule 3.36(b). 16 C.F.R. § 3.36(b)(2).

Respondent has further shown that the information sought cannot be obtained through other means. While the PPI itself may be widely available to the public, the underlying facts and data at which the deposition is directed – such as the percentage of non-x86 microprocessor data in the PPI, whether the prices were quality adjusted, and the use of secondary source data – appear to be available only from BLS. BLS publishes the PPI and it would belie reason to suggest that Respondent could go to another source to discover the underlying facts or data used to compile that PPI. Accordingly, Respondent has shown that the information requested cannot be obtained through other means and has satisfied the third prong of Rule 3.36(b). 16 C.F.R. § 3.36(b)(3).

IV.

Respondent has met the criteria for issuance of a subpoena under Commission Rule 3.36. Accordingly, Respondent's motion for the issuance of a Rule 3.33(c)(1) subpoena *ad testificandum* directed to the BLS, limited to the six topics described herein and also limited to a duration of two hours, is GRANTED. Pursuant to Commission Rule 3.36(c), Respondent may forward to the Secretary a request for the authorized subpoena, with a copy of this authorizing order attached. The subpoena shall be signed by the Secretary; shall have attached to it a copy of this authorizing order; and shall be served by Respondent in conjunction with a copy of this authorizing order. 16 C.F.R. § 3.36(c).

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 9, 2010