Statement of Commissioner Orson Swindle

in the Matter of Intel Corporation

Docket No. 9288

Shortly after the Commission accepted the consent agreement in this matter, I released a statement outlining my concerns about the case and asking for public comments addressing certain issues.[(1)] My statement invited views and information on three basic questions. Unfortunately, the handful of public comments on the proposed settlement did not address these queries in any meaningful way.

In a nutshell, my previous statement posed these questions:

> (1) Notwithstanding its extremely large share of an alleged market for general-purpose microprocessor sales, does Intel genuinely possess monopoly power in that market?
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> (2) Even if one were to assume that Intel has the monopoly power claimed by the complaint, does the information available provide reason to believe that Intel's alleged abuse of that power[(2)] entrenched Intel's monopoly position in current-generation microprocessors and diminished the incentives of firms commercially dependent on Intel to develop innovations relating to microprocessor technology? Is the result of this likely to be a reduction in "competition to develop new microprocessor technology and future generations of microprocessor products"?[(3)]
>
> (3) Will the proposed order against Intel present the Commission with significant noncompliance and enforcement problems because the order's prohibitions turn on whether Intel takes certain actions "for reasons related to" or "base[d] . . . upon the existence of" an intellectual property dispute -- criteria that, as I pointed out, could "enmesh the Commission in expensive, and perhaps intractable, enforcement proceedings"?

I am unable to vote in favor of the consent order because I continue to lack reason to believe that Intel's actions against Digital, Intergraph, and Compaq would have adversely affected competition and innovation in the ways charged in the complaint.

My concerns with regard to the first and third issues listed above have diminished to some extent. As to the allegation of monopoly power, some of the factors that once appeared to threaten Intel's hegemony have ebbed in recent months, and there is less reason to think that Intel's large market share overstates its power in general-purpose microprocessors.[(4)]

Nor would I choose to dissent if my only remaining concern were the enforceability of an order whose key terms rely too much on ascertainment and proof of the respondent's state of mind. Because the order does not appear to chill any procompetitive activity on Intel's part, and because of my faith in the ability of our staff to detect genuine instances of noncompliance, I could put aside my reservations about the order's "for reasons related to" and "base[d] . . . upon"

language if I were in agreement with the complaint's underlying theory of violation -- *viz*., that Intel's conduct is likely to cause a reduction in "competition to develop new microprocessor technology and future generations of microprocessor products."

It is upon the plausibility of that theory, however, that I part ways with the majority. As I said in April, even if one concedes that Intel has monopoly power, I cannot comfortably translate its actions vis-�-vis three customers into the threat to microprocessor innovation depicted in the complaint. Indeed, even if one were to characterize Intel's alleged conduct as aggression against customers rather than self-defense,[(5)] it seems a considerable stretch to expand that conduct into a case about chilling innovation and otherwise reducing technological competition. I am not aware of any substantial evidentiary support for the theory that Intel's customers or others in the industry canceled development projects, cut research and development, or otherwise reduced innovation in response to Intel's conduct.

I therefore remain unpersuaded that the conduct at issue in this case demonstrably threatened to harm the consuming public. Whatever injury Intel might have visited on Digital, Intergraph, and Compaq, I cannot accept that it could appreciably affect -- much less stem -- the immense tide of invention and improvement that continuously drives this industry.[(6)]

Accordingly, because I still lack reason to believe that Intel's alleged conduct constituted a violation of Section 5 of the Federal Trade Commission Act, I dissent.

Endnotes:

1. My statement can be found on the Commission's website at < www.ftc.gov/os/1999/9904/swindle.htm >.

2. The complaint charges that this abuse took the form of a curtailment of the supply of technical information and prototypes to Digital, Intergraph, and Compaq.

3. Complaint, ¶¶ 14, 39. My questions with regard to this issue also included whether the complaint spelled out a coherent theory of harm to consumers. In other words, even if one were to grant that Intel took actions that harmed *Digital, Intergraph, and Compaq* as alleged by the Commission, would the evidence in hand have shown that the particular injury to those three firms was reasonably likely to translate into harm to consumers overall?

4. The inroads made by Intel's microprocessor competitors into the sub-$1000 personal computer segment seemed to pose a threat to Intel as recently as six months ago. After what first appeared to be gains in market share, however, those competitors' aggressive marketing efforts have yielded mixed results. (Of course, one can legitimately ask whether the competitors failed to sustain those gains because of Intel's dominance or, as appears at least as likely, because of their own management and strategic shortcomings.)

My increased comfort with asserting that Intel possesses monopoly power is also tempered by the breathtaking pace of cost reductions and major technology improvements in the microprocessor business, which I would not normally associate with an industry in the clutches of a firm wielding monopoly power. One could almost as easily characterize Intel as a firm that had the enormous good fortune to have caught a wave early and learned to ride it better than anyone else.

5. In my April statement, I noted that the Commission's pursuit of this action could send the message that, in the FTC's view, a monopolist embroiled in commercial disputes with its customers "cannot resort to 'self-help' . . . but must instead hire lawyers and take its disputes through lengthy and expensive litigation . . ."

6. In their responsive statement, my colleagues assert that there is neither a legal nor a practical basis for "requiring 'demonstrable' harm to competition after pretrial settlement," since "[s]ettlement of the case necessarily prevents [the Commission] from making any final judgment about the actual evidence of harm to competition from Intel's conduct." Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson. I acknowledge, of course, that pretrial settlement cuts short the accumulation and evaluation of evidence that a complete trial would have permitted -- although we should keep in mind that *this* case was settled after extensive pretrial discovery. In any event, in questioning whether Intel's conduct demonstrably *threatened* to harm consumers, I merely meant to express my doubts about whether Section 5's "reason to believe" threshold has been crossed.