

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?

(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? Intel's compliance have ebbed in recent months, and there is less reason to think that

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

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