Testimony of

The Honorable Orrin Hatch

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Mr. Chairman, as you know, we conducted a series of hearings in this Committee in 1997 and 1998 to examine the policy implications of the competitive landscape of the then burgeoning high-tech industry, which was about to explode with the advent of the Internet. Those hearings focused on competition in the industry, in general, and, more specifically, complaints that Microsoft had been engaged in anti-competitive behavior that threatened competition and innovation to the detriment of consumers. Our goal was, and I believe today is, to determine how best to preserve competition and foster innovation in the high-technology industry.

Although the Committee, and I, as its Chairman, was criticized by some, I strongly believed then, and continue to believe now, that in a robust economy involving new technologies, effective antitrust enforcement today would prevent the need for heavy-handed government regulation of business tomorrow. My interest in the competitive marketplace in the high-technology industry was animated by my strong opposition to regulation of the industry, whether by the government, or by one or few companies. As we may remember, the hearings before the Judiciary Committee developed an extensive record of Microsoft's conduct, and evidenced various efforts by the company to maintain and extend its operating system monopoly. Those findings, I would note, were reaffirmed by a unanimous, and ideologically diverse Court of Appeals. The Microsoft case - and its ultimate resolution - present one of the most important developments in antitrust law in recent memory.

As I have emphasized before, having a monopoly is not illegal under our laws. In fact, in a successful capitalist system, striving to be one should be encouraged. However, anticompetitive conduct intended to maintain or extend this monopoly would harm competition and could violate our laws. I believe no one would disagree that the D.C. Circuit's decision reaffirmed the fundamental principle that a monopolist - - even a monopolist in a high-tech industry like software - - must compete on the merits to maintain its monopoly.

Which brings us to today's hearing. We are here to examine the policy implications of the proposed settlement in the government's antitrust litigation against Microsoft.

Mr. Chairman, rather than closing the book on the Microsoft inquiry, the proposed settlement appears to be only the end of the latest chapter. The settling parties are currently in the middle of the so-called Tunney Act process before the court. And, the non-settling parties have chosen to further litigate this matter and last week filed their own proposed settlement. This has been a complex case with significant consequences for Microsoft, high-tech entrepreneurs and the American public. The proposed settlement between Microsoft and the Justice Department and nine of the plaintiff State attorneys general is highly technical. We have all been studying it, and its impact, with great interest. Each of us has heard from some, including some of our witnesses here today, that the agreement contains much that is very good. Not surprisingly, we have also

heard and read much criticism of the settlement. These are complex issues, and I would hope today's hearing will illuminate the many questions we have.

I should note that about two weeks ago, I sent a set of detailed and extensive questions about the scope, interpretation, and intended effects of the proposed settlement to the Justice Department, seeking further information. First, I want to commend the Department for getting the responses to me promptly. We received them yesterday. I think the questions, which were made public, and the Department's responses could be helpful to each member in forming an independent and fair analysis of the proposed settlement. To that end, and for the benefit of the Committee, Mr. Chairman, I would like to make both the questions and the Department's answers part of the record for this hearing, if you wouldn't have any objections.

As I noted in my November 29 letter to the Department, I have kept an open mind regarding this settlement, and continue to do so. I have had questions regarding the practical enforceability of the proposed settlement and whether it will effectively remedy the unlawful practices identified by the D.C. Circuit, and restore competition in the software market.

I am also cognizant of both the limitation of the claims contained in the original Justice Department complaint by the D.C. Circuit, as well as the standards for enforcement under settled antitrust law. I believe that further information regarding precisely how the proposed settlement will be interpreted, given D.C. Circuit case law, is necessary to any full and objective analysis of the remedies proposed therein. I hope that this hearing will result in the development of such information, that would supplement the questions I put forth to the Department.

Mr. Chairman, one important and critical policy issue that I would hope we can address today, and that I would like all of our witness to consider as they wait to be empaneled so that they can discuss, is the difficult issue of the temporal relation of antitrust enforcement in new high-technology markets. It cannot be overemphasized that timing is a critical issue in examining conduct in the so-called "new economy." Indeed, the most significant lesson the Microsoft case has taught us is this fact. The D.C. Circuit found this issue noteworthy enough to discuss in the first few pages of its opinion. And I will quote from the unanimous court:

"[w]hat is somewhat problematic . . . is that just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry. By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions . . . . [I]nnovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless)."

This issue is one that is relevant for this Committee to consider as a larger policy matter, as well as how it relates to this case and the proposed settlement we are examining today.

Again, I want to thank you Mr. Chairman for continuing the Committee's important role in high-technology policy matters, and I look forward to hearing from our witnesses today.

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