

Testimony of

# **The Honorable Orrin Hatch**

September 19, 2002

Thank you Mr. Chairman. I commend you and Senator DeWine for all your work on this committee and for holding this hearing. This is a very important hearing. As I have noted numerous times, effective antitrust enforcement by the Antitrust Division and the Federal Trade Commission is critical in order to ensure that our markets are operating efficiently and that consumers share in the competitive benefits of our free-market system. As I have also stated previously, I feel that swift and efficient antitrust enforcement is absolutely vital to the protection of competition and innovation in our economy.

Before moving on to more substantive issues, I would like to extend a warm welcome to our distinguished witnesses, Assistant Attorney General James and Chairman Muris, and note a few of their efforts to improve the efficiency of antitrust enforcement in general - and merger review in particular. For example, following statutory reforms to the Hart-Scott-Rodino filing and merger review process, the Antitrust Division and Federal Trade Commission adopted further streamlining measures intended to appropriately tailor merger investigations and eliminate unnecessary burdens to the parties. Also, in January of this year, Assistant Attorney General James reorganized the Antitrust Division to eliminate duplication of responsibilities among various sections and task forces, and to create a structure that would better address a variety of new and emerging trends in the economy. Finally, it is my understanding that the Antitrust Division and Federal Trade Commission have been working with antitrust officials in the European Union and are close to reaching a best practices agreement between the United States federal antitrust agencies and the Commission of the European Union when simultaneously reviewing the same merger transaction. I commend you both for your efforts in these areas.

I would like to focus on a couple of specific areas of antitrust enforcement.

The first of these involves antitrust enforcement in what has come to be referred to as the "new economy." I believe that the need for effective and timely antitrust action and enforcement in the quickly-evolving, high-tech industries that make up the new economy will be one of the most important antitrust policy issues of this decade, and perhaps even of this century. It cannot be overemphasized that timing is a critical issue in examining conduct in high-tech industries. As summarized by Judge Richard Posner, "[t]he mismatch between law time and new-economy real time is troubling" in large part because "an antitrust case involving a new-economy firm may drag on for so long relative to the changing conditions of the industry as to become irrelevant [and] ineffectual." Numerous academics, as well as the D.C. Circuit, have recognized and commented on the importance of this issue.

Now, by raising this, I in no way intend to criticize either the Antitrust Division or the FTC. I am aware that one of the goals of the restructuring undertaken by Assistant Attorney General James was to organize the Antitrust Division in order to better address "new industries, network

competition, and other emerging trends in the economy." And Chairman Muris also has taken steps to increase the capabilities of the FTC to respond to antitrust issues in the high-tech arena. However, I would be interested in hearing from both witnesses about their respective efforts to ensure that potential anticompetitive behavior in high-tech sectors receives the attention and resources necessary to ensure an appropriate level of enforcement in both merger and non-merger contexts.

The second area that I would like to raise relates to the proposed satellite TV merger, which would reduce the number of direct broadcast satellite distributors from 2 to 1. For many subscription television viewers and broadband Internet subscribers, the merger would result in a real loss of choice, from two choices to one in many rural areas, such as in Utah, and from three to two in many cities. This is a considerable loss of consumer choice, and of the robust competition that has driven DBS costs down. In such a situation, alleged countervailing efficiencies need to be reviewed very carefully. The merger has been under review by the Antitrust Division and the Federal Communications Commission pending for some time, and I am sure that is because the Division and the FCC are giving the merger the attention it deserves. Nevertheless, I am hopeful that the review will be completed soon.

I am also increasingly concerned about a growing chorus of allegations of abuse by certain media companies that own both radio stations and concert venues. I have heard claims from artists and their labels that they have been required to pay for advertising on radio stations or to book affiliated concert venues to get radio air-play. I have even heard that an artist or record company must pay the radio station, through intermediaries, for air-play. These allegations are disturbing to me, and I hope that - to the extent they indicate possible antitrust violations - these allegations will receive appropriate attention.

The final area that I would like to address is that of antitrust enforcement and health care. The specific issues in this area are two numerous to mention, so I will focus on just a couple. The first involves Group Purchasing Organizations or "GPOs." I think that this is an exceptionally important issue, and I commend Senators Kohl and DeWine for their efforts on GPOs. It is my hope that the problems and perceived problems with GPOs can be solved through voluntary actions by the GPOs rather than legislative or regulatory intervention.

Finally, I would note the FTC's activity in the area of prescription drugs and, in particular, both the FTC's enforcement and analytical efforts regarding competition issues in the application of what has become known as the Hatch-Waxman Act.

Again, I thank you Mr. Chairman and Senator DeWine for holding this important hearing. I look forward to discussing these issues with our two witnesses.

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