UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

BUREAU OF COMPETITION
OFFICE OF THE DIRECTOR

Statement of Bureau of Competition Deputy Director Ian Conner on the Commission's Consent Order in the Acquisition of Orbital ATK, Inc. by Northrop Grumman Corp., File No. 181-0005

Today, the Commission voted to accept a consent agreement imposing remedies in the matter of Northrop Grumman Corporation's (Northrop) acquisition of Orbital ATK, Inc. (Orbital ATK). Without this remedy, the merger would have given Northrop the incentive and ability to discriminate against competitors for United States Department of Defense (DOD) missile systems and potentially dampened Northrop's incentive to provide DOD with the most sophisticated systems at a competitive price. At the same time, DOD expects substantial benefits from the merger, including increased competition for future programs and lower costs. To understand such potential competitive effects and any potential benefits, Commission staff worked closely with the DOD in this matter.[1] Such cooperation between the DOD and the Commission and the Antitrust Division of the Department of Justice (the antitrust agencies) is the hallmark of the agencies' defense industry reviews.[2]

The remedy approved by the Commission is a carefully tailored behavioral remedy that seeks to preserve the benefits of the transaction for DOD, while counteracting the incentive of Northrop/Orbital to engage in a vertical foreclosure strategy that would undermine its competitors and harm competition for present and future missile system programs. Significantly, DOD will appoint a Compliance Officer to ensure that the parties implement the required programs to prevent potential harms.

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[1] *See, e.g.*, Statement of Commissioner Kovacic, In the Matter of Lockheed Martin Corporation, The Boeing Company, and United Launch Alliance, L.L.C., FTC File No. 051 0165, Docket No. C-4188 (May 8, 2007) (citing William E. Kovacic, *Toward the Development of a Unified Trans-Atlantic Defense Procurement Market*, 2006 Fordham Comp. L. Inst. 179, 191–92 (B. Hawk ed. 2007)), available at https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165kovacicmajorasrosch.pdf (hereinafter "Kovacic Statement").

[2] *See* Joint Statement of U.S. Dep't of Justice & Federal Trade Comm'n on Preserving Competition in the Defense Industry (April 12, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/944493/160412doj-ftc-defense-statement.pdf ("The Agencies rely on DoD's expertise, often as the only purchaser, to evaluate the potential competitive impact of mergers, teaming agreements, and other joint business arrangements between firms in the defense industry.").

The Bureau of Competition typically disfavors behavioral remedies and will accept them only in rare cases based on special characteristics of an industry or particular transaction.[3] This settlement does not depart from that policy. The special characteristics of the defense industry play an important role in considering appropriate remedies in many transactions. For instance, the defense industry is characterized by a single buyer–DOD–whose procurement processes are often distinct from other industries. That is the case here. In addition, the DOD depends on sophisticated products, such as the solid rocket motors at issue in this case, that are part of complex systems subject to winner-take-all competition for programs that can last decades.

Transactions in the defense industry can also implicate national security concerns. As Commission Chairman Robert Pitofsky testified nearly twenty years ago, "The Commission is sensitive to considerations of national security and in particular that a merger will enable the Defense Department to achieve its national security objectives in a more effective manner. The Commission strongly believes, however, that competition produces the best goods at the lowest prices and is also most conducive to innovation."[4]

For these reasons, there is ample precedent for accepting appropriate behavioral remedies in the defense industry when they suffice to eliminate potential anticompetitive effects.[5] The Commission's order adapts the language and approach successfully used in the Commission's most recent vertical defense merger consent[6] and is consistent with prior consent decrees imposed by both of the antitrust agencies in defense mergers.[7]

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[3] *See* D. Bruce Hoffman, "Vertical Merger Enforcement at the FTC," Credit Suisse 2018 Washington Perspectives Conference (January 10, 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf ("First and foremost, it's important to remember that the FTC prefers structural remedies to structural problems, even with vertical mergers."); *see also* FTC Press Release, "FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp." (June 24, 2002), available at https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytyc-corps-acquisition-digene-corp.

[4] Mergers and Acquisitions in the Defense Industry: Hearing before the Subcommittee on Acquisition and Technology of the United States Senate Armed Services Committee (April 15, 1997) (statement of Robert Pitofsky, former Chairman, Federal Trade Comm'n), available at https://www.ftc.gov/es/public-statements/1997/04/mergers-and-acquisitions-defense-industry.

[5] *See id.*; *In re* Lockheed Martin Corp., Dkt. C-4188 (complaint filed Oct. 6, 2006); United States v. Northrop Grumman, No. 1:02CV02432 (D.D.C. Dec. 23, 2002).

[6] *In re* Lockheed Martin Corp., Dkt. C-4188 (complaint filed Oct. 6, 2006).

[7] *In re* Lockheed Martin Corp., Dkt. C-4188 (complaint filed Oct. 6, 2006); *see also* United States v. Northrop Grumman, No. 1:02CV02432 (D.D.C. Dec. 23, 2002); Kovacic Statement.

As in other industries, the lengths of consent decrees vary to account for the characteristics of the market in which the consent is occurring and the characteristics of the consent decree itself.[8] The Commission's order will remain in place for a twenty-year term, an appropriate duration to protect competition in light of the long duration of the particular defense programs and the bidding processes at issue, the potential effects for future unidentified missile programs, and the high barriers to entry in this industry.

As the Commission recognized two years ago: "Our mission, when reviewing defense industry mergers is to ensure that our military continues to receive the effective and innovative products at competitive prices over both the short- and long-term, thereby protecting both our troops and our nation's taxpayers."[9] The remedy in this case does that by protecting competition and preserving procompetitive benefits for our nation's critical missile systems for at least the next twenty years. Finally, the Commission retains jurisdiction in the event of a violation of its order and may modify the order to address such violations.

[8] *See, e.g.*, *In re* Enbridge, Inc., Dkt. C-4604 (complaint filed Mar. 24, 2017); *In re* PepsiCo, Inc., Dkt. C-4301 (complaint filed Feb. 26, 2010); *In re* The Coca-Cola Co., Dkt. C-4305 (complaint filed Sept. 27, 2010); *In re* Boeing/Rockwell, Dkt. C-3723 (complaint filed Mar. 7, 1997).

[9] Joint Statement of the U.S. Dep't of Justice & Federal Trade Comm'n on Preserving Competition in the Defense Industry (April 12, 2016), available at https://www.ftc.gov/system/files/documents/public_statements/944493/160412doj-ftc-defense-statement.pdf.