CONCURRING STATEMENT OF COMMISSIONER PAMELA JONES HARBOUR

The Boeing Company / Lockheed Martin Corp.
Commission File No. 051-0165, Docket No. C-4188

I concur in the Commission's decision to approve final issuance of the consent order in this matter.

When the Commission accepted the proposed consent agreement for public comment in October 2006, I issued a concurring statement that elaborated on the reasoning behind my vote. The Commission received two public comments, and neither comment has changed my views.

My prior statement is available on the Commission's website at http://www.ftc.gov/os/caselist/0510165/0510165concurringstatementcommharbour.pdf.

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The Boeing Company / Lockheed Martin Corp.
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I concur in the Commission's decision to accept a proposed consent agreement and allow the formation of United Launch Alliance (ULA), a joint venture of The Boeing Company (Boeing) and Lockheed Martin Corporation (Lockheed). I write separately to elaborate on the reasoning behind my vote.

The Analysis to Aid Public Comment (AAPC) states, and I agree, that "significant anticompetitive effects, including the loss of non-price competition and the loss of potential future price competition, are likely to occur if the proposed transaction is consummated." If the proposed ULA joint venture could be scrutinized solely through a competition lens, I would have no choice but to vote for a Commission challenge.

It is impossible, however, to ignore the views of the U.S. Department of Defense (DoD). DoD unequivocally has communicated its position to the Commission: the creation of ULA is critical to protect national security interests, and enabling these unique national security benefits to flow is more important to the public interest than preventing the loss of direct competition between Boeing and Lockheed.

It is my understanding that the Commission and DoD share a long history of cooperation in their review of defense industry transactions, with each agency contributing its specialized expertise and insights. In this case, pursuant to established protocol, staff from the two agencies have worked together for many months to analyze the proposed joint venture.

Moreover, DoD is the primary purchaser of government medium to heavy launch services and government space vehicles. In merger cases outside of the defense context, the Commission and its staff typically rely on customer testimony (among other sources of information) to learn about markets, define the scope of potential competitive harm, and evaluate whether the Commission should take enforcement action.[1] As a matter of legal principle and sound

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[1] *See, e.g.*, Interview with Commissioner Pamela Jones Harbour, ANTITRUST SOURCE (March 2006), at 9, *available at* http://www.abanet.org/antitrust/at-source/06/03/Mar06-HarbourIntrvw3=22f.pdf (discussing role of customer testimony) (citing, *inter alia*, Deborah Platt Majoras, *Recent Actions at the Federal Trade Commission*, Remarks Before the Dallas Bar Association's Antitrust and Trade Regulation Section (Jan. 18, 2005), *available at* http://www.ftc.gov/speeches/majoras/050126recentactions.pdf.; Chicago Bridge & Iron Co. N.V., *et al.*, FTC Dkt. No. 9300, Opinion of the Commission (2004), *available at* http://www.ftc.gov/os/adjpro/d9300/050106opionpublicrecordversion9300.pdf.; Arch Coal, FTC

enforcement policy, the views of DoD as a major customer are entitled to no less respect in this case.

From a purely practical perspective, I must consider the potential role of DoD testimony if the Commission were to seek a preliminary injunction over DoD's objections. As a Commissioner, I am responsible for evaluating litigation risk before sending Commission staff into court. Customer testimony, standing alone, certainly would not (and should not) be dispositive, in this or any other merger case. I expect, however, that DoD's conclusions would influence a judge's decision whether to grant a preliminary injunction – especially in light of the national security overlay and DoD's expertise.

The proposed consent order addresses three competitive concerns that, in DoD's view, are not "intrinsically linked" to ULA's putative national security advantages. The AAPC acknowledges that the proposed consent agreement "does not attempt to remedy the loss of direct competition" and is, instead, intended to "address ancillary competitive harms that DoD has identified as not inextricably tied to the national security benefits associated with the creation of ULA."

While I have voted in favor of accepting the proposed consent agreement, I note a few troublesome aspects. The proposed consent agreement departs radically from traditional Commission consent orders in merger cases. Structural remedies are, by far, the preferred way to resolve competitive problems in the horizontal merger context. Conduct restrictions, standing alone, generally are viewed as insufficient to address the underlying market mechanisms from which competitive harm may arise. Here, in lieu of market-based competition, the monopolist ULA will be subjected to an elaborate and highly regulatory system of oversight by a "compliance officer" appointed by the Secretary of Defense. Ordinarily, such a system would not be considered an effective remedy for the anticompetitive effects alleged in the Commission's complaint.

I continue to believe that preserving a competitive market structure is the preferred "fix" for an anticompetitive horizontal merger. Also, I am somewhat unsettled by the notion that the Commission – an independent, bipartisan federal agency – is, in effect, delegating away too much of its oversight authority to an executive branch agency. I recognize, however, that staff from the Commission and DoD have attempted to craft a workable remedy that will strike an appropriate balance between competition and broader national security interests.

In the end, I am faced with a Hobson's choice: accept a complex and regulatory consent that will prevent some competitive harm; or do nothing, and allow the joint venture to proceed unrestricted. I lack the technical expertise to second-guess DoD's conclusion that allowing the formation of ULA is the best way to preserve national security and protect the public interest. In

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Dkt. No. 9316, Statement of the Commission (June 13, 2005), *available at* http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf; *id.*, Dissenting Statement of Commissioner Pamela Jones Harbour, *available at* http://www.ftc.gov/os/adjpro/d9316/050613harbourstatement.pdf).

light of our agencies' established protocol for concurrent review of defense industry transactions, I reluctantly agree that the Commission must give DoD the benefit of the doubt. I therefore vote to accept the proposed consent agreement.