UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

December 3, 2018

Arjun Kampani
Aerojet Rocketdyne
222 N. Pacific Coast Highway, Suite 500
El Segundo, CA 90245

Re: *Northrop Grumman Corporation and Orbital ATK, Inc.*,
Docket No. C-4652

Dear Mr. Kampani:

Thank you for your comments on behalf of Aerojet Rocketdyne regarding the Decision and Order ("Order") accepted by the Federal Trade Commission for public comment in the above-captioned matter. The comments present Aerojet Rocketdyne's view that the Order encourages all Prime Contractors to choose solid rocket motors ("SRMs") from Northrop's new Orbital subsidiary and discourages them from conducting a competitive bidding process. The Commission has reviewed the comments in connection with its decision whether to modify the Order, and has also placed the comments on the public record.

Aerojet's comments focus on the Order's provisions prohibiting Northrop from discriminating against other Prime Contractors by offering its SRMs to these competitors at only disadvantageous terms. According to the comments, the Prime Contractors "will view the non-discriminatory requirements of the Order as requiring [Northrop] to provide SRMs at the vertically-integrated prices that Northrop will receive." However, the Order does not dictate that Northrop supply SRMs to other Prime Contractors at cost. The Order specifically states that "nothing in this Order shall be interpreted to preclude Northrop from charging a Third Party Prime Contractor a fee on the sale of SRMs and Related Services." *See* Order Paragraph I.J. The Order further specifies that "the determination of compliance or non-compliance with the non-discrimination provisions of this Order shall take into account that different Prime Contractors may choose to take different competitive approaches that may result in differences, individually and collectively, in the provision of SRMs and Related Services, including in terms of cost, schedule, design performance, . . . and that such differences do not reflect discrimination . . . ." *See* Order Paragraph I.J. The intent of these Order provisions is to preserve the incentive for Northrop to supply SRMs to other Prime Contractors and to maintain both price and innovation competition in the market for these critical missile components. In short, the Order should not change the incentives of missile prime contractors to solicit bids from Aerojet or other suppliers of SRMs or to make their selection decisions based on whichever SRM supplier can offer the most competitive product in terms of price and performance.

For these reasons, the Commission has determined that the public interest would be served best by not incorporating into the Decision and Order Aerojet's proposed modifications. A copy of the final Decision and Order incorporating certain modifications is enclosed for your information. Relevant materials also are available from the Commission's website at http://www.ftc.gov.

It helps the Commission's analysis to hear from a variety of sources in its work on antitrust and consumer protection issues, and we appreciate your interest in this matter.

By direction of the Commission, Commissioner Wilson not participating.

Julie A. Mack
Acting Secretary

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OFFICE OF THE SECRETARY

December 3, 2018

Michael H. Knight
Douglas E. Litvack
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Re: *Northrop Grumman Corporation and Orbital ATK, Inc.*,
Docket No. C-4652

Dear Messrs. Knight and Litvack:

Thank you for your comments on behalf of The Boeing Company regarding the Decision and Order ("Order") accepted by the Federal Trade Commission for public comment in the above-captioned matter. The comments focused on three sections of the Order: (1) the definitions of "Discriminatory," "Missile Competition," and "Missile Information"; (2) certain provisos in the section prohibiting Northrop from discriminating in any missile competition; and (3) the provisions pertaining to the Management Oversight Group's accessibility to Third Party Prime Contractors' Non-Public Missile Information and Non-Public SRM Information. The Commission has reviewed the comments in connection with its decision whether to modify the consent order, and has also placed the comments on the public record.

Boeing's comment on the definition of "Discriminatory" focuses on two provisos: (1) "that the determination of compliance or non-compliance with the non-discrimination provisions of this Order shall take into account that different Prime Contractors may choose to take different competitive approaches that may result in differences, individually and collectively, in the provision of SRMs and Related Services, including in terms of cost, schedule, design, performance, and the other parameters" identified and (2) that "nothing in the Order shall be interpreted to preclude Northrop from charging a Third Party Prime Contractor a fee on the sale of SRMs and Related Services." *See* Order Paragraph I.J. According to Boeing, Northrop could "exploit this language to Discriminate against Third Party Prime Contractors."[1] Boeing's position is that the Order prohibits Northrop from charging "a fee for SRMs and Related Services that it does not charge itself."[2] To ensure that Northrop does not charge disparate fees

[1] Letter from Michael H. Knight and Douglas E. Litvack to Donald S. Clark, July 5, 2018, p. 4, available at https://www.ftc.gov/policy/public-comments/2018/07/initiative-762.
[2] *Id.*

to Third Party Prime Contractors or fees that it does not charge itself, Boeing recommends that the Compliance Officer monitor and approve in advance all fees Northrop charges for SRMs.

However, such preauthorization by the Compliance Officer is not necessary. The Commission and the Compliance Officer will work together to ensure that Northrop complies with all of the provisions of the Order. The Compliance Officer, appointed by the Under Secretary of Defense for Acquisition and Sustainment, will have the authority under the Order to "require Respondents to provide access to documents, data, and other information, relating to any matters contained in [the] Order." *See* Order Paragraph V.B.5. Consequently, if the Compliance Officer determines that reviewing documents pertaining to Northrop's Missile Competition proposal or its SRM offers is necessary, the Compliance Officer will have the authority to demand that information from Northrop. Regarding requiring Northrop to charge itself the same fees it charges other Third Party Prime Contractors, instituting such a mandate would potentially eliminate some of the efficiencies the transaction creates. Moreover, the Department of Defense's regulations and contracts may prohibit vertically integrated contractors in certain circumstances from charging the same fee on internally procured components that it charges Third Party Prime Contractors for the same components. The Order is not intended to override any relevant DOD rules, regulations, or contracts, or to cause Northrop to violate or breach any such provisions.

Boeing also suggests expanding the definition of "Missile Competition" and "Missile Information" to include maintenance and sustainment contracts for already completed and delivered fielded Missile Systems. But expanding the definition of "Missile Competition" and "Missile Information" to include "sustainment" is not necessary. The contract for sustaining the selected missile system is usually awarded via a sole source contract to the company winning the bid to produce the missile system being maintained. To the extent that companies compete for the sustainment of missile systems through a request for proposal process, it is a separate competition in which a choice of SRMs is not likely to be a relevant differentiator and therefore one not likely to be affected by the Northrop-Orbital transaction.

Boeing also recommends modifications to the section of the Order prohibiting Northrop from Discriminating in any Missile Competition. Specifically, Boeing would like the proviso in Paragraph II.A.4. removed and the proviso in II.A.5. interpreted as not applying to SRM products resulting from joint investment or development of Northrop's SRM Business and Northrop's Missile Business. Regarding the II.A.4. proviso, according to Boeing, during the proposal stage (which is the stage at which Northrop might need to have different SRM Customer Teams), the expense of supporting different SRM Customer Teams is not unreasonable. This is a factual determination, however, that can only be made at the time after assessing the relevant circumstances. The Compliance Officer and Commission have the ability to gather the relevant information and make an assessment regarding whether or not it would be commercially reasonable for Northrop to support multiple proposals for the relevant missile system competition. Such assessment will take into account the stated purpose of the Order to prevent discrimination against other missile suppliers and to maintain competition in the relevant market.

Regarding narrowing the scope of the II.A.5. proviso, removing from its scope SRM development resulting from joint work of Northrop's SRM Business and Northrop's Missile Business could potentially reduce Northrop's incentive to invest in developing technological advancements. Moreover, because the proviso applies only to competitors in the "applicable Missile Competition," any SRM development made during a Missile Competition will be available to those competitors in future Missile Competitions.

Boeing is also concerned about the access the Management Oversight Group will have to non-public Third Party Missile Information and SRM Information. Boeing recommends that the Commission consider "taking additional steps to ensure that members of the Management Oversight Group [be] firewalled from and have no ability to influence the terms of the Northrop Prime Contract proposal."[3] Boeing also recommends requiring that before any communication containing a Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information be made available to the Management Oversight Group, it first be made available to the Compliance Officer. Furthermore, to the extent the Compliance Officer has concerns regarding the information being disclosed, Boeing recommends that the Compliance Officer consult with counsel for the Third Party Contractor whose information is being disclosed.

These steps are not necessary. The Order specifies that to the extent that the Management Oversight Group obtains a Third Party Prime Contractor's Non-Public Missile Information, it "shall not use the information in any way, directly or indirectly, in support of Respondents' efforts to participate as a Prime Contractor in the Missile Competition." *See* Order Paragraph III.A.5.d. The Order further specifically states that "under no circumstances" shall the Management Oversight Group be given information relating to a Third Party Prime Contractor's "overall bid price or bid strategy" or information unrelated to the provision of SRMs. Regarding the Compliance Officer reviewing all non-public information before disclosing it, the Order already requires that Northrop's chief legal officer review all non-public information and verify that disclosure to the Management Oversight Group is in compliance of the Order and that all non-public information be made available for review by the Compliance Officer. *See* Order Paragraph III.A.5.b.ii. and iii. Moreover, as stated above, the Commission and the Compliance Officer will work together to ensure that Northrop adheres to all of the provisions of the Order. These safeguards should prevent misuse of Third Party Non-Public Information but, at the same time, not create burdensome and unnecessary scrutiny.

Boeing also recommends that the Compliance Officer be required to review all of Northrop's Missile Competition proposals prior to their being submitted to the prospective customer. A balance must be struck between effective compliance oversight of the Order and the imposition of requirements that could potentially delay or increase the cost of procuring products that are critically important to the national defense. After close consultation with the U.S. Department of Defense, the Commission concluded that prior approval of proposals would not be necessary or appropriate in these circumstances.

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[3] Letter from Michael H. Knight and Douglas E. Litvack to Donald S. Clark, July 5, 2018, p. 8, available at https://www.ftc.gov/policy/public-comments/2018/07/initiative-762.

For the reasons provided, the Commission has determined that the public interest would best be served by not incorporating into the Decision and Order Boeing's proposed modifications. A copy of the final Decision and Order incorporating certain modifications is enclosed for your information. Relevant materials also are available from the Commission's website at http://www.ftc.gov.

It helps the Commission's analysis to hear from a variety of sources in its work on antitrust and consumer protection issues, and we appreciate your interest in this matter.

By direction of the Commission, Commissioner Wilson not participating.

Julie A. Mack
Acting Secretary

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OFFICE OF THE SECRETARY

December 3, 2018

David A. Higbee
Shearman & Sterling LLP
401 9th Street, NW
Washington, DC 20004-2128

Re: *Northrop Grumman Corporation and Orbital ATK, Inc.*,
Docket No. C-4652

Dear Mr. Higbee:

Thank you for your comments on behalf of Raytheon Company regarding the Decision and Order ("Order") accepted by the Federal Trade Commission for public comment in the above-captioned matter. The comments present Raytheon's view that the proviso in Order Paragraph II.A.5. is too broad and could enable Northrop to limit which SRM developments it makes available to Third Party Prime Contractor competitors. The Commission has reviewed the comments in connection with its decision whether to modify the Order, and has also placed the comments on the public record.

Raytheon's comments focus on the proviso in Order Paragraph II.A.5. and the potential for Northrop to use it to argue that new SRM technologies developed in part with Northrop Missile Business funding are protected against disclosure to other Prime Contractors. Raytheon recommends modifying the Order to make clear the precise circumstances under which the exception to Paragraph II.A.5. may apply. The relevant proviso is necessary to clarify that the Order's non-discriminatory provisions are intended to preserve innovation competition and not to interfere with any missile Prime Competitor's (including Northrop's) ability to develop differentiated technologies to offer to the U.S. government in a particular missile competition. Because of the difficulty of identifying in advance all possible circumstances under which the proviso may or may not apply, the Commission adopted more general language that it will interpret in accordance with the intent of the Order to prohibit discrimination that would disadvantage any competing suppliers of future missile systems. Moreover, because the proviso applies only to competitors in the "applicable Missile Competition," any SRM technology of general applicability developed during a Missile Competition as a result of an investment by Northrop's Missile Business will be available to other missile system suppliers in future Missile Competitions. To ensure Northrop does not abuse the proviso in Paragraph II.A.5., or any other provisions in the Order, the Commission and the Compliance Officer will closely monitor Northrop's Missile and SRM Businesses and their collaborations and will interpret those provisions consistently with the purpose of the Order.

For these reasons, the Commission has determined that the public interest would best be served by not incorporating into the Decision and Order Raytheon's proposed modifications. A copy of the final Decision and Order incorporating certain modifications is enclosed for your information. Relevant materials also are available from the Commission's website at http://www.ftc.gov.

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By direction of the Commission, Commissioner Wilson not participating.

Julie A. Mack
Acting Secretary

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OFFICE OF THE SECRETARY

December 3, 2018

Karrie Bem
Assistant General Counsel
United Launch Alliance
9950 E. Easter Ave., Unit A
Centennial, CO 80112

Re: *Northrop Grumman Corporation and Orbital ATK, Inc.*,
Docket No. C-4652

Dear Ms. Bem:

Thank you for your comments on behalf of United Launch Alliance ("ULA") regarding the Decision and Order ("Order") accepted by the Federal Trade Commission for public comment in the above-captioned matter. The comments you submitted present ULA's view that the Order does not address the potential harm to competition the transaction could cause in the market for launch services for U.S. government space programs. The Commission has reviewed the comments in connection with its decision whether to modify the Order, and has also placed the comments on the public record.

ULA's comments focus on the market for launch services for U.S. government space programs. According to the comments, ULA believes that the Order is insufficient because it excludes this market from the scope of its non-discrimination and firewall provisions. However, the market for launch services for U.S. government space programs is unlikely to be affected by the Northrop-Orbital transaction. The 2006 case cited in the comments as the primary precedent for the additional provisions ULA proposes for the Order involved the only two launch service providers at the time, Lockheed Martin Corporation ("Lockheed") and The Boeing Company ("Boeing").[1] As a result of their joint venture forming ULA, Boeing and Lockheed created a monopoly in the launch services market.[2] To resolve the matter, they entered a consent order with the Federal Trade Commission prohibiting them from discriminating against other space

[1] Both companies were also the leading suppliers of defense and national security spacecraft to the U.S. government.
[2] *See* Analysis of Agreement Containing Consent Order to Aid Public Comment, p. 3, *In re Lockheed Martin Corp., et al.*, C-4188, October 3, 2006, available at https://www.ftc.gov/enforcement/cases-proceedings/0510165/lockheed-martin-corporation-boeing-company-united-launch.

vehicle providers and requiring them to implement firewalls to protect third parties' competitively sensitive information.[3]

Today, unlike in 2006, the market has two competitors: ULA and SpaceX. Two other firms, Blue Origin and Orbital (now Northrop), have been awarded contracts to develop vehicles to compete potentially for U.S. government launch services contracts. Similarly, multiple firms supply spacecraft to the U.S. government for national security and civil applications. The increased competitiveness of these markets has decreased concerns that space vehicle providers (such as Boeing, Lockheed, and Northrop) with internal launch service businesses will favor their own launch service business and, thereby, potentially prevent a nascent launch service provider from entering the industry, a concern raised in the 2006 matter.[4]

ULA's comments also present the view that the merger will result in input foreclosure because Orbital (now Northrop) is a key supplier of SRMs to launch service providers, such as ULA. However, Orbital was already a supplier of SRMs to ULA and a competitor to ULA in the launch services market. Northrop, furthermore, did not compete in the launch services market prior to the transaction. The transaction therefore did not significantly change these pre-existing marketplace dynamics. Thus, the transaction will have no significant adverse competitive impact on the market for SRMs for U.S. government launch services.

For these reasons, the Commission has determined that the public interest would best be served by not incorporating into the Decision and Order ULA's proposed modifications. A copy of the final Decision and Order incorporating certain modifications is enclosed for your information. Relevant materials also are available from the Commission's website at http://www.ftc.gov.

It helps the Commission's analysis to hear from a variety of sources in its work on antitrust and consumer protection issues, and we appreciate your interest in this matter.

By direction of the Commission, Commissioner Wilson not participating.

Julie A. Mack
Acting Secretary

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[3] *See* Decision and Order, Paragraphs II and V, *In re Lockheed Martin Corp., et al.*, C-4188, October 3, 2006, available at https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165do.pdf.

[4] *See* Analysis of Agreement Containing Consent Order to Aid Public Comment, p. 5, *In re Lockheed Martin Corp., et al.*, C-4188, October 3, 2006, available at https://www.ftc.gov/enforcement/cases-proceedings/0510165/lockheed-martin-corporation-boeing-company-united-launch.