Comments of United Launch Alliance

Responding to the Federal Trade Commission's Proposed Agreement Containing Final Consent Order

In re Northrop Grumman Corp.

File No. 181 0005

United Launch Alliance
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United Launch Alliance ("ULA") hereby submits the following comments in response to the proposed Agreement Containing Final Consent Order ("Consent Order") published by the Federal Trade Commission ("FTC") on June 5, 2018.

The FTC has concluded, after investigating Northrop Grumman Corporation's ("Northrop Grumman") proposed acquisition (the "Transaction") of Orbital, ATK, Inc. ("Orbital"), that the Transaction violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. *See In re Northrop Grumman Corp.*, C-4652, Decision and Order, at 1 (June 2018). ULA commends the FTC for imposing conditions on the Transaction, but respectfully submits that the Consent Order does not address or remedy all of the anticompetitive effects of the Transaction.

As set forth below, the Consent Order excludes launch vehicles from its scope and therefore does not address the harm to competition in launch services for U.S. government space programs. *See generally In re Northrop Grumman Corp.*, C-4652, Decision and Order (June 2018). Specifically, it does not mitigate Northrop Grumman's post-merger incentive and ability to favor Orbital's launch services over those of other launch services providers, to the detriment of competition and customers – in this case, principally the U.S. government. For example, it does not prevent Northrop Grumman from favoring its own launch services business and disadvantaging other launch services providers by withholding or delaying the provision of satellite interface information to providers that are competing to launch Northrop Grumman's satellites. It also does not prevent Northrop Grumman from freely sharing competitively sensitive data of other launch services providers with its own launch services business conducted by Orbital. Furthermore, as explained below, the Consent Order addresses input foreclosure issues relating to solid rocket motors ("SRMS') for Missile Systems, but it does not prevent the merged entity from withholding or increasing the price of SRMs for expendable launch vehicles ("ELVs").

ULA respectfully submits that the Consent Order should be revised to provide equivalent protections to safeguard competition in launch services for U.S. government missions.

I. The Transaction is Likely to Harm Competition Among Launch Services Providers

Orbital is an established supplier of launch services for a range of U.S. government missions. The FTC has determined that launch services to the U.S. government are a distinct market. *See In re Lockheed Martin Corp. et al.*, C-4188, Compl., at ¶¶ 15-17 (May 2007). Orbital's Pegasus, Minotaur, and Antares ELVs carry light to medium payloads for the U.S. government (e.g., on May 21, 2018, Orbital launched International Space Station supplies for NASA). *See* CRS-9 Post-Launch Press Conference (May 2018), *available at* https://blogs.nasa.gov/orbital/ (last visited June 25, 2018). Some of Orbital's ELVs directly compete with ULA and other launch services providers.

Orbital also has made significant investments to develop its "Next Generation Launch Vehicle," the OmegA, which will be capable of launching the heaviest U.S. government satellites. To date, Orbital and the USAF Space and Missile Systems Center have jointly invested $250 million in development and Orbital currently has five hundred employees dedicated to the project and expects this number will double over the next few years. *See* Sandra Erwin & Brian Berger, *Orbital ATK selects Aerojet Rocketdyne's RL10C for newly christened OmegA rocket*, (2018), http://spacenews.com/orbital-atk-selects-aerojet-rocketdynes-rl10c-for-newly-christened-omega-rocket/ (last visited Jun 25, 2018). Orbital has announced that it already has letters of intent for carrying payloads, *see id.*, and is in competition with other launch services providers for the United States Air Force's ("USAF") Launch Services Agreement

("LSA") program. The final down-select for ELV development funding is expected to occur in July, and flights are schedule to begin in 2021.

As a result of the Transaction, the merged entity will provide satellites to the U.S. government that Orbital did not provide as a standalone company and will provide launch services to the U.S. government that Northrop Grumman did not offer prior to the merger. Through this combination then, the merged company will have the incentive and the ability to favor Orbital's launch services business to launch Northrop Grumman's satellites, even if a third party's launch service is more competitive.

Specifically, absent revisions to the Consent Order, Northrop Grumman will have the incentive and ability to: (1) favor Orbital's launch services over other launch services providers; (2) withhold, or delay, giving technical satellite interface information to ULA and other launch services providers; (3) share ULA's competitively sensitive information with Orbital (or vice versa) at the expense of ULA, other launch services providers, and the U.S. government; and (4) withhold, or charge higher prices for, SRMs supplied to launch services providers.

A. Risk of Discrimination in the Launch Services Segment

Following the acquisition, Northrop Grumman will be financially incentivized to choose Orbital over other launch services providers. The DIO procurement context provides a ready example. For DIO procurements, the satellite provider, rather than the U.S. government, procures the launch services directly. So when the merged entity acts as satellite provider, it will have the ability and incentive to choose Orbital over other launch services providers because it will be more profitable to keep this business in-house rather than divert it to a third party. And Northrop Grumman will still be able to competitively disadvantage third party providers in favor of Orbital's launch services in the non-DIO procurement context by: (1) withholding (or delaying) the provision of technical interface information that ULA and other launch services providers require; or (2) increasing costs or reducing support to integrate ELVs with its satellites. Satellites and ELVs require significant integration to achieve a successful launch into space and thus, absent protections, ULA and other competitors will be disadvantaged. Moreover, as the FTC has recognized, "to withhold such satellite interface information . . . could potentially disadvantage or raise costs of other launch vehicle suppliers that are competing . . . to launch satellites, and ultimately to customers." *See* Analysis of Proposed Consent Order, *In re The Boeing Company*, C-3992, at 3 (Sept. 2000); *see also In re Lockheed Martin Corp. et al.*, C-4188, Compl. at ¶ 20 (Oct. 2006) ("ULA, as a supplier of MTH Launch Services, may . . . raise the costs of [satellite] suppliers that compete against Respondents' [satellite] businesses by withholding support and information relating to a Launch Vehicle . . . ."). Northrop Grumman is a leading supplier of U.S. government satellites—one of three firms that account for the majority of sales. Northrop Grumman's incentive to favor Orbital's launch services is therefore likely to have substantial anticompetitive effects.

The risk that Northrop Grumman will favor Orbital for U.S. government launch services can be mitigated by requiring that, when choosing a launch services provider for U.S. government missions, Northrop Grumman will not discriminate in favor of Orbital—or to the detriment of other launch services providers. Similar safeguards have been imposed in comparable transactions. *See, e.g., In re Lockheed Martin Corp. et al.*, C-4188, at III.A (Oct. 2006) (providing a nondiscrimination provision where "LM or Boeing ha[d] the responsibility to select a provider of Launch Services"). Likewise, the risk that Northrop Grumman may withhold satellite interface information, or delay providing such information, can be mitigated by requiring Northrop Grumman to make all necessary satellite interface information, and support, available to other launch services providers at the same time as Orbital. *Cf. In re The Boeing Company, C-3992*, at VI (Dec. 2000) (requiring Boeing to "notify all Launch Vehicle Suppliers . . . that Satellite Interface information relating to any Boeing Satellite, bus, model, or product line is available upon request . . . .").

B. Risk of Competitively Sensitive Information Being Shared Within the Combined Entity

Second, absent a firewall mandated by the Consent Order, there will be no order preventing Northrop Grumman from sharing competitively sensitive information of other launch services providers with Orbital to benefit its own launch services business. ULA and other launch services providers regularly provide pricing, technical and other competitively sensitive information in response to Northrop Grumman's "requests for information." Without being incorporated into the Consent Order, there is no governmentally enforceable restriction preventing Orbital and Northrop Grumman from sharing competitively sensitive information to the detriment of ULA, other launch services providers, and ultimately U.S. government customers. If such information were shared, it could enable Orbital to bid less aggressively in upcoming procurements because Orbital's bids would be influenced by its access to competitively sensitive information. *See In re Lockheed Martin Corp. et al.*, C-4188, Compl. at ¶ 20 (Oct. 2006); *see also* Analysis of Proposed Consent Order to Aid Public Comment, *In re The Boeing Company*, C-3992 (Dec. 1996) ("Boeing would be both the provider of SETA services and a competing contractor for this classified program . . . . With access to [competitively sensitive information], Boeing may be able to raise prices for the classified program by bidding less aggressively than it otherwise would."); Analysis of Proposed Consent Order, *In re Boeing Company*, 971-0006 (Dec. 1996) ("If DoD selects the Boeing and McDonnell Douglas teams as the finalists for the EELV competition, Boeing's launch vehicle division could gain access to the proprietary information that McDonnell Douglas has provided to Rockwell's launch vehicle propulsion business, which could affect the prices and services that Boeing would offer.").

The risk that Northrop Grumman and Orbital will share competitively sensitive information to the detriment of competitors can be allayed by including within the Consent Order provisions that: (1) prevent Northrop Grumman from disclosing any non-public information of other launch services providers to Orbital (or vice versa); and (2) require Northrop Grumman and Orbital to maintain separate communications networks, information systems, and facilities. Again, similar protections have been implemented in the past. *See, e.g., In re Lockheed Martin Corp. et al.*, C-4188, at V.A (Oct. 2006) (providing that "Boeing and LM . . . shall not, absent the prior written consent of the proprietor of Non-Public Launch Services Information, provide, disclose, or . . . make available to ULA any Non-Public Launch Services Information . . . ."); *see also In re Lockheed Martin Corp. et al.*, C-4188, at VI.A (Oct. 2006) (providing that "ULA shall have separate communications networks and management information systems from the networks and systems of Boeing and LM, with appropriate firewalls and confidentiality protections in place"); *In re Lockheed Martin Corp. et al.*, C-4188, at VI.A (Oct. 2006); *In re The Boeing Company*, C-3992, at VIII (Dec. 29, 2000); *In re Broadcom Limited et al.*, C-4622 (Aug. 2017); *In re PepsiCo, Inc.*, C-4301, at D (Sept. 2010). The FTC has endorsed the use of firewalls and non-discrimination clauses as remedies in anticompetitive vertical mergers and the European Commission has also required similar commitments to prevent the flow of competitively sensitive information. *See* ASL/Arianespace, M.7724 (Nov. 2017).[1]

[1] . See Bruce D Hoffman, Vertical Merger Enforcement at the FTC (2018), *available at* www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

C. The Transaction also Creates the Risk of Input Foreclosure or Higher Prices To Competing Launch Vehicle Suppliers

Orbital is a key supplier of SRMs to launch services providers. With respect to ULA, for example, Orbital is the sole source of SRMs for ULA's Atlas, as well as ULA's future ELV, the Vulcan. The Vulcan alone, will require two 2-6 Gem 63 XL SRMs per mission. SRMs account for a significant portion of overall launch services costs.

The FTC's complaint alleges that Northrop Grumman's proposed acquisition of Orbital would have reduced competition in the market for Missile Systems purchased by the U.S. government, resulting in less innovation and higher prices for taxpayers. *See In re Northrop Grumman Corp.*, C-4652, Compl., ¶ 11 (June 2018). According to the Complaint, the acquisition would provide Northrop Grumman with the incentive and ability to harm competition for Missile Systems contracts by either withholding access to its SRMs or increasing SRM prices to competitors. *See id*. As a result, competitors would be forced to raise the prices of their Missile Systems, invest less aggressively to win Missile Systems programs, or decide not to compete at all, which, in turn, would decrease competitive pressure on Northrop Grumman.

By ensuring that other Missile Systems suppliers can continue to purchase SRMs on a non-discriminatory basis, the Consent Order addresses these potential anticompetitive harms. *See generally In re Northrop Grumman Corp.*, C-4652, Decision and Order, at 7 (June 2018). But the Transaction will have similar effects in the market for launch services as well. Orbital is now the only domestic supplier of SRMs for ELVs since Aerojet Rocketdyne exited this business. Launch services providers depend on this key input for their ELVs and, absent adequate safeguards, their ability to compete and serve the U.S. government will be harmed. As a result of the Transaction, the combined entity will have the incentive and ability to discriminate against Orbital's competitors, which will enable it to capture market share in launch services while increasing margins in SRMs. Prior to the merger, Orbital's business model was to serve as a merchant supplier to the industry. Orbital depended on SRMs as a significant business line, and needed to supply SRMs to third parties because such sales made up a substantial amount of its revenue. Northrop Grumman, as a prime contractor, is not in the business of being a merchant supplier to competing defense contractors and can afford to eliminate sales of SRMs to third parties. Because SRMs will not constitute a substantial part of Northrop Grumman's revenue post-merger, it will have the ability to withhold the supply of SRMs without impacting its overall business and will be incentivized to favor internal business over third party competitors. Furthermore, as SRMs are a small line of business, Northrop Grumman can generate more revenues by launching its satellites with Orbital's launch vehicles than by supplying inputs to a competing launch services provider. *Cf*. Analysis of Proposed Consent Order, *In re Boeing Company*, 971-0006 (Dec. 1996) ("Because the proposed acquisition would cause Boeing to be a member of the only two competing HAE UAV teams, Boeing would be in a position to raise price and/or reduce quality on one or both teams. Boeing would not only have the opportunity to diminish competition, but would also have the incentive to cause the Tier II Plus team to become noncompetitive because Boeing stands to earn significantly more revenue from its participation in the Tier III Minus program than it would earn as a supplier of wings to the Tier II Plus team.").

The risk that Northrop could withhold SRMs, or charge competing launch services providers higher prices for them, could be prevented by extending the non-discrimination provisions of the proposed Consent Order to the supply of SRMs to launch services providers. It is not unusual for similar protections to be imposed when competing suppliers rely on key components supplied by the merged entity. *See U.S. v. Northrop Grumman Corp.*, 1:02-CV-

02432, at 4(B)(1)(a) (June 2003) (requiring Northrop to supply prime contractors its "payload in a manner that does not discriminate in favor of its in-house proposal team against any other Prime Contractor, on any basis, including but not limited to, price, schedule, quality, data, personnel, investment . . . .").

For these reasons, ULA respectfully requests that the FTC revise the Consent Order in order to address the foregoing concerns.