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Via Electronic Submission

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Suite CC-5610 (Annex D)
Washington, DC 20580

Re: Proposed Consent Order, FTC File No. 1810005
*In the Matter of Northrop Grumman Corp. and Orbital ATK, Inc.*

Dear Secretary Clark:

On behalf of The Boeing Company ("Boeing"), we submit the following comments to the Commission's June 5, 2018, Consent Order (the "Order") concerning Northrop Grumman Corporation's ("Northrop") acquisition of Orbital ATK, Inc. ("Orbital") (collectively, the "Respondents" and their "Transaction").

Boeing recognizes and appreciates the Commission's efforts through the Order to address the significant anticompetitive harm to the Nation's most critical defense programs that this Transaction threatens to create. While Boeing continues to have concerns that there are anticompetitive impacts of the Transaction on Missile System Competitions that have not been, and cannot be, remedied by the Commission's regulatory restrictions on post-Transaction conduct, the comments submitted herein are focused on assuring appropriate enforcement of the Order's fundamental tenets of anti-discrimination and firewalling competitive teams with respect to the Northrop SRM Business. Vigorous enforcement of these principles is essential to the Commission's stated objective of assuring "that the Northrop SRM Business continues to provide its [Solid Rocket Motors and Related Services] to Third Party Prime Contractors in any Missile Competition after the Acquisition on a non-discriminatory basis and in the same manner and of the same performance level and quality as before the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint." *See* Order at II.D.[1]

[1] All capitalized terms have the same meaning as defined in the Order unless otherwise defined herein.

*Anti-Discrimination Requirements*

**Paragraph I.J.** The Order currently defines "Discriminate" or "Discriminating" to include any and all behavior that would "advantage Northrop relative to a Third Party Prime Contractor or . . . disadvantage a Third Party Prime Contractor relative to Northrop for any reason or in any way that is likely to or would limit, impair, hinder, delay, reduce or degrade, directly or indirectly, a Third Party Prime Contractor's proposal or performance, where the Third Party Prime Contractor and Northrop are competitors with respect to a specific Missile Competition."

Paragraph II.A then applies this definition to prohibit Northrop and Orbital from "Discriminat[ing] in any Missile Competition where Northrop: (i) is currently competing to be the Prime Contractor; or (ii) has the ability to compete and has taken the steps identified in Paragraph IV and continues to take steps to compete as a Prime Contractor." And Paragraph II.D explains that the ultimate "purpose of the provisions of Paragraph II of this Order is to assure that the Northrop SRM Business continues to provide its services to Third Party Prime Contractors in any Missile Competition after the Acquisition on a non-discriminatory basis . . . to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint."

Taken as a whole, the Order's definition of "Discriminate" and the restrictions of Paragraph II preclude Respondents from advantaging Northrop or disadvantaging Third Party Prime Contractors "in any way . . . directly or indirectly" in Missile Competitions as a result of the Transaction and in the provision of SRMs and Related Services.

This anti-discrimination mandate represents the core of the Order. It is therefore critical that the Commission, and the Compliance Officer, ensure that it is effectively implemented and adhered to by Respondents. Among other things, Respondents should not be permitted to circumvent or evade this fundamental anti-discrimination requirement, through overly broad applications of a few narrowly tailored limiting provisions of the Order, including in particular those discussed below.

Paragraph I.J states that the determination of whether behavior is Discriminatory

> 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 listed above, and that such differences do not reflect discrimination.

We recommend that the Commission consider taking steps to ensure that the Respondents do not attempt to misuse this provision to engage in Discriminatory behavior that would otherwise be prohibited by the Order under Paragraph I.J and Paragraph II generally, or to undermine the Order's stated purpose in Paragraph II.D. Specifically, the Commission and the Compliance Officer should take care to ensure that any identified "different competitive approaches" that Northrop may rely upon to justify disparate Northrop SRM Business offerings to competing Prime Contractors are both *bona fide* and required (whether related to cost, schedule, design, performance, etc.). Although a Prime Contractor's competitive approach will invariably shape its business arrangements with the Northrop SRM Business, the Order does not permit the Northrop SRM Business to Discriminate against Third Party Prime Contractors in ways that are not directly required by the Third Party Prime Contractor's competitive approach. This means, for example, that differences in competitive approach could not justify Northrop's use of financial accounting measures to shift costs artificially away from its own Prime Contractor proposal and to the Northrop SRM Business, thereby increasing the costs borne by Third Party Prime Contractors as a result of the Transaction. The Discrimination in that situation would have nothing to do with the variation in competitive approach between Prime Contractors and therefore would be precluded by the Order. Similarly, a difference in competitive approach or technical requirements should not be permitted to justify Discrimination in the fee or margin that the Northrop SRM Business seeks to recover as compensation for its work. Although the Order already includes these and similar prohibitions, we recommend that the Commission take steps to ensure that Respondents do not attempt to engage in such anticompetitive behavior.

As stated below in comments on Paragraphs VII.A-B, in any instance in which Northrop seeks to justify disparate terms to competing Prime Contractors on the basis of asserted "different competitive approaches," the Commission should consider requiring Northrop to provide the Compliance Officer with the Northrop SRM Business' proposed offers to all competitive Prime Contractors (including Northrop's Prime contractor proposal), in advance of their distribution to the competing Prime Contractors, for a determination that the Northrop SRM offers treat all Prime Contractors equally and do not Discriminate against any Third Party Prime Contractor or in favor of the Northrop Prime Offering. In determining whether to require this review, the Commission should consider that the firewall provisions of Paragraph III limit the Respondents' ability themselves to access the information necessary to ensure that Northrop is abiding by the Order's non-discrimination terms. Firewalled SRM Customer Teams are prohibited from receiving information about the other offers that the Northrop SRM Business is making to competing Prime Contractors; they, therefore, *cannot know* whether the terms that they are proposing are equivalent to what is being offered to other Prime Contractors (including Northrop) or, alternatively, Discriminatory. The Compliance Officer, by contrast, is uniquely positioned to make this assessment and could do so without great inconvenience to the operation of the Northrop SRM Business.

Relatedly, Paragraph I.J also provides:

> [N]othing 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.

While it is customary for suppliers to include a fee on the sale of SRMs, the Commission should ensure that the Respondents do not exploit this language to Discriminate against Third Party Prime Contractors. Any fee charged to a Third Party Prime Contractor must be consistent with the Order's broad prohibition on Discrimination. Thus, the Order prohibits Northrop from charging Third Party Prime Contractors a fee for SRMs and Related Services that it does not charge itself, or otherwise equalize in terms of the total cost and/or price of its Missile System Prime Contractor proposal as related, directly or indirectly, to the Transaction and SRMs and Related Services. For illustration, it would be Discriminatory under the Order for Northrop to charge a Third Party Prime Contractor a 5 percent fee for SRMs and Related Services and not price into its own Prime Contractor proposal the equivalent of that 5 percent fee, because Northrop would be making SRMs available to Northrop's Prime Offer at a price that is lower than would be available to a Third Party Prime Contractor. *See* Order at I.J and II.D. Further, it would be Discriminatory for Northrop to raise artificially the fee that it charges on SRM sales to itself and its Prime Contractor rivals, while reducing the fee that it applies to SRMs as a Prime Contractor in its proposal on the overall Missile System contract. Such gamesmanship in pricing would serve to undermine the Order's fundamental objective to prevent Northrop from using its ownership of the Northrop SRM Business to gain an unfair competitive advantage in Missile Competitions.

To uphold this fundamental principle, Boeing recommends that the Commission consider additional measures to ensure that Respondents do not attempt to use their ability to charge a Third Party Contractor a fee as a means to engage in anticompetitive behavior. In addition, Boeing recommends that the Compliance Officer be required to monitor and approve the fees charged to Third Party Prime Contractors to ensure that they are equivalent to the fee or equivalent price component that is included on sales to Northrop's Prime Offer. Even where the fee assessed is nominally equal among all Prime Contractors, the Compliance Officer should carefully evaluate any circumstance where it appears that the Northrop SRM Business is proposing to charge higher than customary fees, to ensure that Northrop is not structuring its dealings with competing Prime Contractors in order to gain an inappropriate advantage in Missile Competitions.

As stated below in comments on Paragraphs VII.A-B, the Commission should consider requiring the Compliance Officer to review Respondents' Missile Competition proposals before

submission to the Missile Competition contracting agency to ensure these critical anti-discrimination requirements are being properly enforced.

**Paragraph I.P-Q.** Paragraphs I.P and I.Q define the terms "Missile Competition" and "Missile Information," respectively, to cover the period of procurement "by a Government Customer from the initiation of the DoD procurement and acquisition process through the award of the applicable full-rate production contract . . . ." Boeing recommends that the Commission make clear that these definitions also encompass maintenance and sustainment contracts for fielded Missile Systems after they are designed, developed, produced, and delivered to the Government Customer. Northrop currently competes with Third Party Prime Contractors for prime Missile System sustainment contracts, such as the Future ICBM Sustainment Acquisition Construct for ground systems (i.e., Minuteman III), and as the Commission has recognized, Orbital is a dominant supplier of SRM maintenance services, an essential input to the contracts.

Boeing accordingly recommends that the Commission consider measures to ensure that the Respondents comply with the Order in the context of competitions for Missile System sustainment and maintenance contracts. If the Commission believes this goal is best accomplished by modifying the Order, the Commission can do so by adding the word "sustainment" to Paragraphs I.P-Q—e.g., "full rate production <u>or sustainment</u> contract" and "research, development, manufacture, delivery, <u>and sustainment</u> . . . ."

**Paragraph II.A.4.** Paragraph II.A.4 prohibits Northrop from Discriminating in any covered Missile Competition "in the negotiation of" or "in making any Offers to, or entering into Collaborative Agreements or other similar arrangements with, any Third Party Prime Contractor."

Paragraph II.A.4 also provides that "no provision of this Order shall require Respondents to provide products, services or technologies, including SRMs and Related Services, to any Third Party without commercially reasonable terms or if it is commercially unreasonable because . . . (ii) the Northrop SRM Business does not have the capacity (and it is not commercially reasonable to expand its capacity) to provide SRMs or a Firewalled SRM Customer Team to one or more Prime Contractors that have requested such services or team because the number or burden of Prime Contractors seeking the benefit of Paragraph II.A of this Order becomes unreasonably large, so long as Respondents are providing SRMs and Related Services to at least one Third Party Prime Contractor."

By their terms, these limited qualifications would not enable Respondents to avoid the broad anti-discrimination obligations in Paragraph II.A. Nevertheless, the Commission should take steps to ensure that the Respondents do not attempt to undermine the Order's anti-discrimination provisions by, for example, unjustifiably or prematurely declaring that the terms

of a proposed Collaborative Agreement are "commercially unreasonable." The Commission should consider requiring that any claim by Respondents that a proposed Collaborative Agreement is not "commercially reasonable" be subject to prompt scrutiny by the Compliance Officer and/or the Commission, with the Respondents bearing the burden of supporting the exception.

In addition, we submit that it is unnecessary to include the exception in Paragraph II.A.4(i)-(ii) for a circumstance in which the Northrop SRM Business does not have the capacity to provide SRMs or a Firewalled SRM Customer Team to more than one Third Party Prime Contractor. As a practical matter, it is unlikely that the Northrop SRM Business will be required to provide production phase SRMs to more than one Prime Contractor, because Missile Competitions typically end with the selection of a single-source prime contractor, well before actual SRM production begins. Therefore, the primary significance of this provision will be during the proposal period, when the Northrop SRM Business is requested to provide proposals to more than one Third Party Prime Contractor. The expense of supporting an additional Firewalled SRM Customer Team should neither be unreasonable nor outweigh the benefit of a level competitive playing field in a Missile Competition.

To enforce the Order's stated purpose in Paragraph II.D, the Commission should consider taking steps to ensure that the Respondents are held at all times to provide SRMs and Related Services "on a non-discriminatory basis and in the same manner" as before the Transaction. In addition, the Commission should ensure that Northrop continues to support *all* Third Party Prime Contractors to avoid diminished competition from the Transaction.

Further, any claim by Respondent that it "does not have the capacity (and it is not commercially reasonable to expand its capacity)" to provide SRMs or a Firewalled SRM Customer Team to more than one other Prime Contractor that has requested such services or team should be subject to scrutiny by the Compliance Officer and the Commission, with the Respondents bearing the burden of supporting the application of the exception.

**Paragraph II.A.5.** This Paragraph requires that Northrop "[n]ot Discriminate in making available for use in Missile Competitions any technologies for SRMs and Related Services developed by the Northrop SRM Business under independent research and development funding, government-funded research and development activities or other funds expended by the Northrop SRM Business."

Paragraph II.A.5 also states that Northrop "shall be under no obligation to disclose or offer the products or other results of any joint investment or development activity engaged in with one Prime Contractor (including Northrop) to any other Prime Contractor in the applicable Missile Competition."

Read as a whole, and in the context of the Order's broad definition of Discrimination in Paragraph I.J, this Paragraph precludes the Northrop SRM Business from providing less than equal investment to a Third Party Prime Contractor's SRMs and Related Services "in any way…directly or indirectly" in terms of "price, schedule, quality, data, personnel, investment, technology, innovation, design, and risk."

However, the Commission should consider taking steps to ensure that Respondents do not use "joint" investment or development activity to Discriminate in the availability of SRMs or Related Services. Specifically, because Northrop will have control over the allocation of investment or development funds to the Northrop SRM Business, the Commission and the Compliance Officer must ensure that Northrop not be permitted to use this control to channel R&D or other investment funds away from the Northrop SRM Business and to itself as a Prime Contractor for the purpose of supporting a "joint" investment in technologies related to SRMs or Related Services that are then made available *only* to Northrop as a Prime Contractor. Such activity would not be true "joint investment or development activity" and would not be consistent with the Order's overarching prohibition against Discrimination in the availability of SRM technology.

If the Commission believes that a modification of the Order would better serve this goal, it should consider clarifying this Paragraph to make clear that: (a) the qualification to the non-discriminatory investment requirement for technologies relating to SRMs and Related Services is limited to joint investments or developments made between the Northrop SRM Business and a Third Party Prime Contractor, and/or (b) any limitation on disclosure of technologies or services developed as a result of any investment or joint development between Northrop and the Northrop SRM Business is limited to non-SRM technologies and services.[2]

*Firewall Requirements*

The Order requires Respondents to "take all actions as are reasonably necessary and appropriate to prevent access to, or the disclosure or use of, any Non-Public Missile Information

[2] Similarly, Boeing wishes to call to the Commission's attention the statement that "the Order does not require Northrop to invest its own funds in support of a Third Party Prime Contractor (other than costs normally incurred by Northrop to prepare a proposal or otherwise respond to a Request for Information, Request for Proposal or similar request)." This statement must not override Respondents' obligation to avoid Discriminating against a Third Party Prime Contractor, "in any way…directly or indirectly" in terms of "investment," *see* Order at I.J, or otherwise pursuant to Paragraph II.A.5. To the extent that the Northrop SRM Business does not invest funds in the support of a Third Party Prime Contractor proposal, it must not be permitted to provide greater support to the Northrop Prime Contractor proposal, because doing so would constitute Discrimination under the Order.

or Non-Public SRM Information . . . pursuant to the terms of [the] Order" and "implement procedures and requirements to protect such Non-Public Information" and comply with the Order, including the maintenance of strict Firewalled SRM Teams. The purpose of these requirements "is to assure that the Northrop SRM Business maintains the confidentiality of all Non-Public Missile Information and [that] the Northrop Missile Business maintains the confidentiality of all Non-Public SRM Information in a Missile Competition where Northrop is competing as a Prime Contractor and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint." Order at III and III.F. Boeing agrees with the Commission that active maintenance of firewalls between Northrop SRM Customer Teams supporting the Northrop Prime offer and Third Party offers is an essential element of ensuring that the non-discrimination principles of the Order are effectively implemented. Boeing offers the following comment for the Commission's consideration consistent with the Order's stated purpose in Paragraph III.F.

**Paragraph III.A.5.** This Paragraph precludes the sharing of "Non-Public Missile Information of a Third Party Prime Contractor" with the Northrop Management Oversight Group "unless and solely to the extent necessary . . . to perform the functions described in Paragraph I.N of this Order and permitted under any applicable confidentiality agreement between Respondents and the Third Party Prime Contractor." Among other things, it states that the Management Oversight Group "shall under no circumstances have access to Non-Public Missile Information of the Prime Contractor's overall bid price or bid strategy or to Non-Public Missile Information unrelated to the SRMs and Related Services."

It is imperative that any Third Party information shared with the Management Oversight Group, however limited, not provide Northrop with an anticompetitive advantage in Missile Competitions. The Management Oversight Group has the ability to influence the Northrop Prime Missile System proposal or interfere with procurement integrity to the detriment of Third Party Prime Contractors' ability to compete on the merits. It may be difficult for outsiders, like Boeing or the Compliance Officer, to know when a member of the Management Oversight Group may have used Non-Public Missile Information or Non-Public SRM Information to influence the Northrop team's efforts in a Missile Competition.

In addition to the separate and unique requirements of any confidentiality agreements between Respondents and Third Party Prime Contractors, the Commission should consider taking additional steps to ensure that members of the Management Oversight Group shall be firewalled from and have no ability to influence the terms of the Northrop Prime Contract proposal on any Missile Competition in which they have received a Third Party Prime Contractor's Non-Public Missile Information.

The Commission should also consider clarifying Paragraph III.A.5(b)(iii) to require that any "communication to the Management Oversight Group containing a Third Party Prime Contractor's Non-Public Missile Information or Non-Public SRM Information" be made available to the Compliance Officer *before* the information is provided to the Management Oversight Group. To the extent the Compliance Officer has concerns with the nature of the information to be disclosed, we further recommend that the Compliance Officer have the authority to provide such information to legal counsel for the Third Party Contractor, on an *in camera* basis, for concurrence that the disclosure of such information is consistent with the law and any non-disclosure agreements that may be in effect.

*Compliance Oversight*

**Paragraph VII.A-B.** The Order requires Northrop to submit regular certified compliance reports detailing its compliance with the Order. While such reports may aid the Commission's and the Compliance Officer's enforcement efforts, in order to avoid anticompetitive harm, Discriminatory conduct by its nature must be identified and addressed *before* it occurs. As discussed above, numerous requirements of the Order, including those identified herein in Paragraphs I.J and II.A.4-5, warrant the Compliance Officer's prior review of the Respondents' proposals to ensure that any qualifications included in the Order are not used to undermine its overarching anti-discrimination intent and purpose. Therefore, the Commission should consider requiring Northrop to submit Missile Competition proposals for review and clearance as non-discriminatory, in advance of their submission to the Missile Competition governing agency. This pre-clearance requirement would help to ensure that the Commission has the necessary information to prevent a violation of the Order before irreversible anticompetitive harm occurs.

As explained previously, requiring this level of clearance in advance may be especially appropriate because the firewall provisions of Paragraph III limit the Respondents' ability to make a determination themselves that any actions with respect to a Third Party Prime Contractor are not Discriminatory. The Order (appropriately) prohibits Firewalled SRM Customer Teams from receiving information about offers that the Northrop SRM business is making to other Prime Contractors, including the Northrop Prime Contractor proposal. As a result, the Firewalled SRM Customer Teams will have no insight into whether the terms that they are proposing are equivalent to what is being offered to other Prime Contractors (including Northrop) or, alternatively, Discriminatory. It is not apparent in the Order that any other entity within Northrop is responsible for ensuring compliance with the non-discrimination prohibition in offers to Prime Contractors, nor is it apparent that it would be appropriate for this judgment to be made by an internal Northrop entity, particularly one that shares the interests of Northrop, acting as a Prime Contractor. The Compliance Officer, by contrast, is uniquely positioned to make this assessment impartially and to solicit appropriate input from Third Party Prime

Contractors about their competitive approach to the Missile Competition. Moreover, given the Compliance Officer's close engagement with Northrop in overseeing the Order, he or she could perform this function without great inconvenience to the operation of the Northrop SRM Business.

We respectfully thank the Commission for its consideration of these comments.

Sincerely,

Michael H. Knight
Douglas E. Litvack