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VIA ELECTRONIC SUBMISSION

July 5, 2018

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

Re: In the Matter of Northrop Grumman Corporation and Orbital ATK, Inc., File No. 181 0005

Dear Secretary Clark:

Raytheon Company (“Raytheon”) respectfully submits the following comments on the Decision and Order in *In the Matter of Northrop Grumman Corporation and Orbital ATK, Inc.*, File No. 181 0005 (hereinafter “Consent Decree”). Raytheon fully supports the Consent Decree’s intent to prevent discriminatory conduct and to preserve competition, and submits these comments to emphasize that any ambiguity in the terms of the Consent Decree should be interpreted consistently with that intent, in order to prevent Northrop Grumman’s (“Northrop”) ability to discriminate against and disadvantage its missile systems competitors. All of Northrop’s missile systems-related competitive activities should be proactively monitored by the Compliance Officer, and the provisions of the Consent Decree should be appropriately enforced, to preserve competition for missile systems as it existed prior to the acquisition, by ensuring non-discriminatory access to Northrop’s SRM Business.

I. The Non-Discrimination Principles of the Consent Decree Are Necessary to Preserve Competition

The non-discrimination principles of the Consent Decree are necessary to preserve competition for missile systems. As recognized in the Analysis of Agreement Containing Consent Order to Aid Public Comment, post-acquisition Northrop “will be one of only two viable suppliers of SRMs for U.S. Government missile systems,” and “[a]bsent the protections of the Consent Agreement, Northrop would have the ability to disadvantage competitors for future missile prime contracts by denying or limiting their access to Northrop’s SRM products and technologies, which would lessen the ability of Northrop’s missile system competitors to compete successfully for a given missile system prime contract.” The Consent Decree therefore rightfully requires

Northrop to “continue to act as a non-discriminatory merchant supplier of Orbital ATK’s solid rocket motors.” The Consent Decree’s non-discrimination provisions are “comprehensive and apply to any potential discriminatory conduct affecting price, schedule, quality, data, personnel, investment, technology, innovation, design, or risk.”

As a competitor to Northrop for missile systems that depends on supply of Orbital ATK’s solid rocket motors, Raytheon fully endorses the non-discriminatory intent of the Consent Decree as articulated in its Paragraph II.D.: “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 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[.]”

II. The Consent Decree’s Provisions Should Be Interpreted Consistently with its Non-Discrimination Principles

Consistent with Paragraph II.D., preventing discrimination and preserving competition are the principles upon which the Compliance Officer should monitor all of Northrop’s missile systems-related competitive activities and should enforce the provisions of the Consent Decree. Each of the specific non-discrimination provisions identified in Paragraphs II.A.1. through II.A.7. should be interpreted and enforced by the Compliance Officer consistently with the Consent Decree’s non-discriminatory purpose. Any ambiguities in these provisions, including in the exceptions to the provisions, should be interpreted consistently with the non-discriminatory principles.

We note that the list in Paragraph II.A. of prohibited discriminatory conduct is not intended to be exhaustive, but rather is illustrative, as made clear by the language introducing the seven specific examples of prohibited conduct: “By way of example, Respondents shall” Thus, Northrop’s non-discrimination obligations are not limited to the seven activities identified in Paragraph II.A. Rather, all of Northrop’s missile systems-related competitive activities should be proactively monitored by the Compliance Officer to ensure that Northrop is providing solid rocket motors to competitors “on a non-discriminatory basis and in the same manner and of the same performance level and quality as before the Acquisition.” Consistent with that imperative, the exceptions to the prohibited conduct in Paragraphs II.A.4. and II.A.5. should be viewed as examples of potentially permissible conduct that are similarly subject to the Consent Decree’s non-discriminatory principles—that is, the conduct identified in those exceptions is not intended to be inviolable and should be monitored to ensure compliance with the underlying intent of the Consent Decree.

III. The Exception in Paragraph II.A.5. is Potentially Ambiguous and Should Be Modified, and in any Case, Interpreted Consistently with the Consent Decree’s Non-Discrimination Principles

Paragraph II.A.5. of the Consent Decree specifically prohibits discrimination in making SRM technologies available for use by other missile system prime contractors. The provision provides an exception that protects against disclosure of the products or results of joint investment or

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development activity engaged in with a Prime Contractor, *including Northrop*. Therefore, as currently contemplated, this provision could be read to protect more broadly than intended the products or results of joint investment or development activity between the Northrop SRM Business (consisting of the historical Orbital ATK business as conducted by Northrop after the acquisition) and the Northrop Missile Business, which competes as a Prime Contractor. If interpreted inconsistently with the intent of the Consent Decree and its non-discrimination principles, this exception in Paragraph II.A.5. could become an unintended loophole susceptible to exploitation: Northrop could argue that new SRM technologies developed in part with Northrop Missile Business funding are protected against disclosure to other Prime Contractors, because the Northrop Missile Business acts a Prime Contractor for missile systems. To take advantage of this potential loophole, Northrop may purposefully structure its funding arrangements to maximize the investment and development activities of its SRM Business using funding from the Northrop Missile Business, even though historically such funding would have been provided by Orbital ATK. This result would undermine the overall purpose of the Consent Decree by enabling Northrop to withhold SRM technologies and innovations, without which Northrop's missile systems competitors could not viably compete for missile prime contracts.

Because of this potential loophole, the Consent Decree should be modified to make clear the precise circumstances under which the exception to Paragraph II.A.5. may apply. Specifically, the modification should clarify that the exception does not apply in every situation involving funding from the Northrop Missile Business. Short of a modification, Raytheon submits these comments to alert the Compliance Officer to the susceptibility of Paragraph II.A.5. to manipulation or circumvention, and to urge that this provision—along with the other non-discrimination provisions of Paragraph II.A. and Northrop's missile systems-related competitive activities—be proactively monitored to ensure compliance with the non-discriminatory purpose of the Consent Decree as clearly articulated in Paragraph II.D.

We thank the Commission for its consideration of these comments.

Respectfully submitted,



David A. Higbee