**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br>U.S. Department of Justice<br>Antitrust Division<br>1401 H Street, NW<br>Suite 3000<br>Washington, DC 20530-2199,<br><br>*Plaintiff,*<br><br>v.<br><br>NORTHROP GRUMMAN CORPORATION,<br>1840 Century Park East<br>Los Angeles, CA 90067,<br><br>and<br><br>TRW INC.,<br>1900 Richmond Rd.<br>Cleveland, OH 44124-2760,<br>*Defendants.* | Case No. 1:02CV02432<br><br>JUDGE: Gladys Kessler<br><br>DECK TYPE: ANTITRUST<br><br>DATE: 12/23/2002 |

## COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

### I. NATURE AND PURPOSE OF THE PROCEEDING

On December 11, 2002, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Northrop Grumman Corporation ("Northrop") of TRW Inc. ("TRW") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges

that Northrop is one of two companies that can supply certain payloads used in reconnaissance satellite systems sold to the U.S. Government, and that TRW is one of only a few companies with the capability to act as a prime contractor on U.S. reconnaissance satellite programs that use these payloads. The payloads at issue include radar sensors, which detect objects through radio waves, and electro-optical/infrared ("EO/IR") sensors, which detect radiation emitted or reflected from objects within the electromagnetic spectrum from far infrared through far ultraviolet. The Complaint alleges that Northrop's acquisition of TRW will give Northrop the incentive and ability to lessen competition by favoring its in-house payload and/or prime contractor capabilities to the detriment or foreclosure of its competitors, and/or by refusing to sell, or selling only at disadvantageous terms, its in-house capabilities to its competitors. It further alleges that the acquisition will harm the U.S. Government because it will pose an immediate danger to competition in two current or future programs, the Space Based Radar and the Space Based InfraRed System-Low programs.

The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, and (2) a permanent injunction preventing any contract, agreement, understanding, or plan the effect of which would be to combine Northrop and TRW.

When the Complaint was filed, the United States also filed a proposed settlement that would permit Northrop to complete its acquisition of TRW, but require that Northrop submit to strict oversight by the U. S. Department of Defense ("DoD") to ensure that Northrop does not use its position as a combined reconnaissance satellite system prime contractor and reconnaissance satellite payload provider to harm competition for or in reconnaissance satellite system programs.

The proposed Final Judgment requires that, when Northrop: (1) is the prime contractor for a U. S. Government satellite program; (2) has the responsibility to select a radar or EO/IR payload; and (3) has the opportunity to select its own payload, Northrop will select the payload on a competitive and non-discriminatory basis. It also requires that Northrop act in a non-discriminatory manner in providing information to its own in-house team and to its payload competitors, and in making personnel, resource allocation, and satellite system design decisions. These non-discrimination provisions would apply, for example, to Northrop's post-merger selection of a payload provider for the SBIRS-Low program, for which TRW has already been selected as the prime contractor. To ensure that these provisions of the Final Judgment are enforced, the decree requires that the Secretary of Defense appoint a Compliance Officer to oversee Northrop's selection process, and provides for the Secretary of the Air Force to resolve any disputes.

The proposed Final Judgment also requires that, when Northrop is a competitor or a potential competitor to be the prime contractor on a U.S. Government reconnaissance satellite system program in which Northrop has the opportunity to select its own radar or EO/IR payload, Northrop will supply other prime contractors with the Northrop payload in a manner that does not favor Northrop's in-house team. It further requires that Northrop negotiate and enter into non-exclusive teaming agreements with other prime contractors that desire to use the Northrop payloads, which agreements may not favor Northrop's in-house team. To ensure that these goals are achieved, the proposed Final Judgment provides for direct oversight of Northrop's teaming decisions by the Compliance Officer and ultimately by the Secretary of the Air Force.

The proposed Final Judgment further requires that Northrop maintain its payload and satellite prime businesses as separate entities, establish firewalls, and take other actions to

protect the information provided by other payload providers or prime contractors. Northrop's actions in this regard again would be subject to review by the Compliance Officer.

In addition to the continuing oversight of the Compliance Officer and DoD generally, the parties to the proposed Final Judgment shall be subject to the continuing supervisory jurisdiction of the Court over the Final Judgment and the independent authority of the Antitrust Division to ensure compliance with, and seek enforcement of, all provisions of the Judgment. The Antitrust Division is authorized to seek from Northrop a civil penalty of up to $10 million for each violation of the proposed Final Judgment.

The plaintiff and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

### A. The Defendants and the Proposed Transaction

Northrop is a Delaware corporation with its principal place of business in Los Angeles, California. Northrop is one of two leading suppliers of radar and EO/IR payloads for reconnaissance satellite systems. Northrop's primary radar and EO/IR operations are in its Electronic Systems Sector facilities in Baltimore, Maryland and Azusa, California. In 2001, Northrop reported net sales of approximately $13.6 billion, including $4.7 billion in sales by its Electronic Systems Sector.

TRW is an Ohio corporation with its principal place of business in Cleveland, Ohio. The company's offices are located in California, Ohio, Georgia, and Florida. Its Space & Electronics and Systems divisions produce sophisticated satellite systems. In fact, TRW is one of the few

companies with the ability to serve as a prime contractor for reconnaissance satellite systems. In 2001, TRW had sales of roughly $16.4 billion, including $5.2 billion from the Space & Electronics and Systems divisions.

On June 30, 2002, Northrop and TRW entered into an agreement pursuant to which Northrop would acquire TRW in a transaction valued at approximately $7.8 billion. The parties closed the transaction on December 11, 2002.

B. The Relevant Markets

Reconnaissance systems are electronic systems that gather and transmit information that may be useful to the United States' military and intelligence forces. These systems may be located on a number of types of platforms, including aircraft and, most relevant for the purposes of this case, satellites. Reconnaissance systems may gather information using various types of sensors, but the most relevant types for purposes of this proceeding are radar and EO/IR.

Reconnaissance satellite systems have advantages, and face challenges, that are not applicable to airborne or other types of reconnaissance systems. Reconnaissance satellite systems can gather information about a given geographic area for a much longer time than any other system, and can provide surveillance over geographic areas that aircraft or other platforms cannot reach. Because they operate at such great distances from their targets, however, space-based systems also require much more capable and sophisticated sensors than do other kinds of reconnaissance systems. Furthermore, because space-based systems cannot be maintained or repaired once they are launched, the components of the system must be designed and manufactured to withstand the rigors of constant use, over many years, without requiring any refurbishment or repair. Finally, components of reconnaissance satellite systems must be

hardened against radiation, able to withstand the harsh environment of space, and capable of operating in substantial temperature ranges.

A reconnaissance satellite system consists of one or more satellites and associated ground facilities for support and data processing. A reconnaissance satellite has two primary components--the unmanned spacecraft itself, generally known as the "bus," and one or more assemblies of sensors and other components, usually referred to as the "payload." The payload enables the satellite to perform a specific reconnaissance mission. While the bus and the payload are separate products, the system and its payload have to be jointly developed because their performance is interdependent. The lead ("prime") contractor for a reconnaissance satellite system has overall responsibility for the design, development, production, and integration of the system components. The prime contractor typically produces the spacecraft, and either produces or procures the ground facility components. The prime contractor may also produce or acquire launch vehicles or services for the satellites. The prime contractor typically acquires the payload from another manufacturer, and the U.S. Government relies on prime contractors to select payloads based on their competitive merits so as to optimize overall system performance.

TRW is one of the few companies that has the capability to be the prime contractor on a U.S. reconnaissance satellite system. Northrop is one of only two companies that has the capability to be the radar or EO/IR payload provider on U.S. reconnaissance satellite systems.

Radar Reconnaissance Satellite Systems

Radar is the process of sending out radio waves and listening for the echoes that result when they strike and bounce off an object. The United States deploys many types of radars using distinctive signal processing technologies. Imaging radars, for example, can create photograph-

like images and identify and track moving targets. Because radars can see through clouds, operate at night, and function independently of the energy emitted by a target, radar reconnaissance satellite systems will be able to gather information of a type and under conditions that cannot be duplicated by other types of reconnaissance satellite systems.

The Space-Based Radar ("SBR") program is a DoD program intended to develop and produce an operational radar reconnaissance satellite system. The Request for Proposal for SBR is expected to be issued in early 2003, and the first SBR satellite launch is scheduled for 2010. TRW is one of a few companies with the capability to be the prime contractor for the SBR program. The only companies with the capability to supply the advanced radar sensors for the SBR program are Northrop and one other company, both of which have been developing their radar capabilities, and receiving funds and evaluations from the U.S. Government, in anticipation of the SBR program. It is expected that the potential prime contractors and radar reconnaissance satellite payload providers will have to form teams for the SBR competition no later than 2003.

The Complaint alleges that the development, production, and sale of radar reconnaissance satellite systems is a product market. As described above, the mission and performance characteristics of such systems are sufficiently different from the mission and performance characteristics of non-radar reconnaissance satellite systems, and from non-space-based radar reconnaissance systems, that a small but significant increase in prices for radar reconnaissance satellite systems would not cause the only customer, the U.S. Government, to switch to other types of systems so as to make such a price increase unprofitable and unsustainable.

The Complaint also alleges that the development, production and sale of radar reconnaissance satellite payloads is a product market. As described above, the mission and

performance characteristics of such payloads are sufficiently different from the mission and performance characteristics of non-radar reconnaissance satellite payloads, and from non-space-based radar reconnaissance payloads, that a small but significant increase in prices for radar reconnaissance satellite payloads would not cause the only customer, the U.S. Government, or prime contractors competing to provide reconnaissance systems to the U.S. Government, to switch to other types of systems or other types of payloads, so as to make such a price increase unprofitable and unsustainable.

EO/IR Reconnaissance Satellite Systems

EO/IR systems detect electromagnetic radiation emitted or reflected from objects within the spectrum from far infrared to far ultraviolet. These components are used to detect, locate, identify, or track a target. EO/IR Early Warning ("EW") systems are used in missile defense programs to detect the hot plumes of a missile launch. EO/IR sensors may be found on a number of different platforms, including aircraft and satellites, and are already used as part of the Defense Support Program ("DSP") satellite system to provide early missile warning.

The current programs designed to provide space-based EO/IR reconnaissance capabilities are called the Space-Based InfraRed System ("SBIRS") High and SBIRS-Low. SBIRS-High will provide a system of satellites orbiting thousands of miles above the earth, scanning large sections of the planet for signs of a missile launch, and warning of that event if it occurs. One of TRW's competitors will serve as the prime contractor for SBIRS-High, and Northrop will supply the EO/IR payload. SBIRS-High will serve to provide essentially the same mission as the current DSP program, but will employ higher-performance instrumentation. SBIRS-Low is a planned system of satellites in lower-earth orbit that will "acquire" a missile and track it so that it may be intercepted. The acquisition function proposed for SBIRS-Low is similar to the work

being done by DSP and planned for SBIRS-High; in contrast, the tracking function planned for SBIRS-Low is a different and much more technically difficult one.

The Missile Defense Agency ("MDA"), which controls the SBIRS program, established a "national team" for SBIRS-Low in April 2002, naming TRW as the prime contractor. The MDA plan calls for a continuing competition between the only two potential payload suppliers, Northrop and another company, throughout the SBIRS-Low program. The competition between the two SBIRS-Low payload suppliers is to be run by TRW as the prime contractor. TRW, with nominal oversight from the United States, will choose the winner of the payload competition.

The Complaint alleges that the development, production, and sale of EO/IR reconnaissance satellite systems is a product market. Space-based EO/IR systems can provide coverage of geographic areas that cannot be reached by other EO/IR systems and can provide persistent coverage of specific geographic areas. Further, EO/IR systems can detect missile launches and track missiles better than other types of reconnaissance systems. A small but significant increase in prices for space-based EO/IR systems would not cause the only customer, the U.S. Government, to switch to other types of systems so as to make such a price increase unprofitable and unsustainable.

The Complaint also alleges that the development, production and sale of EO/IR reconnaissance satellite payloads is a product market. Space-based EO/IR payloads are specially designed to work in a space-based EO/IR reconnaissance satellite system; other space-based payloads cannot perform the same missions or be used in EO/IR reconnaissance satellite systems. A small but significant increase in prices for EO/IR reconnaissance satellite payloads would not cause the only customer, the U.S. Government, or prime contractors competing to provide reconnaissance systems to the U.S. Government, to switch to other types of systems or

other types of payloads, so as to make such a prime increase unprofitable and unsustainable.

### C. Harm to Competition as a Consequence of the Acquisition

If Northrop purchases TRW, it will own one of the few companies capable of competing as a prime contractor for radar or EO/IR reconnaissance satellite systems. TRW has demonstrated its technical, financial, and organizational ability to bid for, win, and perform on complex U.S. Government space systems by competing for and winning a number of such programs. Similarly, Northrop is one of only two companies with the capability to produce the payloads to be used on radar and EO/IR reconnaissance satellite systems.

Absent the protections afforded by the proposed consent decree, Northrop would have the incentive and ability post-merger to deny its competitors access to either its prime contractor or payload capabilities. If Northrop has already been chosen to be a prime, it will have the incentive and ability to choose its own payload, lessening the incentive of competitors to compete for the program, and harming the U.S. Government by diminishing innovation and increasing program costs.

A further effect of the merger is the threat that it poses to proprietary information of rival primes and payload suppliers that enter into teaming agreements with Northrop. Absent the protections afforded by the proposed Final Judgment, a reconnaissance satellite system prime contractor that teams with Northrop risks the loss of its proprietary information to the former TRW's satellite system business, and a radar or EO/IR supplier that teams with the former TRW satellite system business risks the loss of its proprietary information to Northrop.

Effect of the Merger on the SBR Program

If Northrop owns TRW, it will have the incentive to deny access to the Northrop payloads if it believes that doing so will lessen the ability of its competitors to compete successfully for the specific reconnaissance satellite system program. This incentive will be strongest when Northrop believes that the presence on a team of either the Northrop payload or the TRW prime contractor capabilities provides the greatest chance of deciding the competition in that team's favor.

The SBR program is an immediate example of how the merged firm would have the ability and incentive to deny its competitors access to a Northrop payload. TRW plans to compete to be the prime contractor for the SBR program, and is a likely bidder on future space-based radar programs as well. Northrop is one of only two companies with the ability to provide payloads for radar reconnaissance satellite system programs, including the SBR program. The prime contractors and radar payload providers must work together at an early stage to develop an integrated system that can perform the mission required by the SBR program. The competition for the SBR program will be between teams, each with a potential prime contractor and potential payload provider. The U.S. Government will choose the team that offers the best value. No prime contractor/radar payload teams have yet been formed.

An important factor in competing for the SBR program is the performance of the radar payload. The purpose of any space-based radar program is to gather and transmit information with the use of radar technology, and the team with the best-performing radar will have an advantage in the competition. The U.S. Government is likely to prefer Northrop to supply the SBR payload, and so is more likely to award the prime contract to a team including a Northrop payload. The prime contractors and Northrop are aware of this.

After the proposed acquisition, Northrop will thus have the ability and incentive to foreclose SBR prime contractor competitors by denying them the Northrop payload or by making personnel, investment, design, and other payload-related decisions that disadvantage those competitors. Northrop's incentive to do so is straightforward -- by winning both the SBR prime contractor competition and the SBR payload competition, it will make more money than if it wins only the SBR payload competition under existing DoD regulations. Northrop could not earn the same profit by simply raising its payload price because DoD has the ability to audit defense subcontractor costs and prevent overcharging through various pressures and the threat of lost future business. In economic terms, Northrop is not able to extract all of the economic rents at the payload level. The ability to obtain additional, otherwise unobtainable, profits by being both the prime contractor and the payload supplier gives Northrop the incentive to foreclose competitors.

Absent the protections afforded by the proposed consent decree, the United States would be harmed because innovation in the SBR program and similar future programs would be lessened, and the United States would be less likely to obtain a radar reconnaissance satellite system that includes both the best prime contractor and the best radar payload provider.

Effect of the Merger on the SBIRS-Low Program

If the post-merger Northrop has already been chosen to be the prime contractor on an EO/IR reconnaissance satellite system program, it will have the incentive and ability to choose its own payload for that system and program on a basis other than the competitive merits. If Northrop should choose its own payload under these circumstances, it would lessen the ability and incentive of competitors to compete for the payload, and thus harm the United States by diminishing innovation and increasing program costs.

Prior to the merger, TRW was selected as the prime contractor for SBIRS-Low, and has the authority to choose the EO/IR payload that will be used on the satellite, subject to the approval of the U.S. Government. Before that selection is made, the government's SBIRS-Low acquisition strategy calls for a continuing competition between Northrop and the only other supplier to provide the payload. Under an agreement with the U.S. Government, TRW was given broad authority to run that competition and determine the winner. This authority has passed to, and may be exercised by, Northrop through its purchase of TRW.

Northrop will benefit after the acquisition if the Northrop EO/IR payload is chosen for SBIRS-Low. Northrop will receive the additional profit generated by the EO/IR payload contract, and will be in an improved position to win future EO/IR payload contracts because of the experience gained through SBIRS-Low. Northrop thus has the incentive to influence the competition to increase the chances that its payload will be chosen.

Even though the U.S. Government has the authority to approve the SBIRS-Low payload choice made by a post-merger Northrop, Northrop as the prime contractor will still have the ability to influence the competition. Northrop would be able to effect design changes to the SBIRS-Low satellite or the system as a whole that would favor the Northrop payload or increase the costs to competitors of designing and producing a winning payload.

Northrop's post-merger ability to influence the selection of itself as the supplier for the SBIRS-Low payload will substantially lessen competition by reducing the ability of its competitor to win the award even if its payload is a better value for the United States. The United States will be harmed by its inability to obtain the best-quality SBIRS-Low payload at the lowest cost.

Entry

Successful entry into the complex, high technology markets for radar reconnaissance satellite systems, radar reconnaissance satellite payloads, EO/IR reconnaissance satellite systems, and EO/IR reconnaissance satellite payloads would not be timely, likely, or sufficient to deter any unilateral or coordinated exercise of market power as a result of the transaction. It would be extremely difficult for a new entrant to establish the technological expertise required to compete successfully in any of these markets. Competitions are intermittent and infrequent, and require a substantial initial investment.

Potential Harm

The Complaint summarizes the potential harm to competition resulting from the proposed merger. It alleges that the transaction will likely have the following anticompetitive effects, among others: competition generally in the development, production, and sale of radar reconnaissance satellite systems, radar reconnaissance satellite payloads, EO/IR reconnaissance satellite systems, and EO/IR reconnaissance satellite payloads would be substantially lessened; prices for radar reconnaissance satellite systems, radar reconnaissance satellite payloads, EO/IR reconnaissance satellite systems, and EO/IR reconnaissance satellite payloads would likely increase; and quality and innovation in each of these markets would decline.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The vertical combination of Northrop and TRW offers benefits to the United States that could not be obtained if structural relief were imposed. *See* Section VI, *infra*. The United States, therefore, has consented in the unique circumstances of this case to the strict behavioral remedies described below. The proposed Final Judgment preserves competition in the relevant radar or EO/IR reconnaissance satellite system and payload markets by requiring specific non-discriminatory conduct from Northrop to prevent the foreclosure from these markets of

competing prime contractors and payload providers. Section IV.A of the proposed Final Judgment sets out requirements to ensure that Northrop will select the payload on a non-discriminatory basis when Northrop has already been selected as the prime contractor for a given reconnaissance satellite system program. This section addresses immediate competitive concerns related to Northrop's post-merger conduct in the SBIRS-Low program, as well as conduct in future reconnaissance satellite system programs where Northrop is selected as the prime contractor.

Section IV.B ensures that, after the merger, Northrop will make its payloads available on a non-discriminatory basis to other prime contractor competitors in those reconnaissance satellite system programs for which Northrop has not yet been selected as the prime contractor or the payload provider. It addresses immediate competitive concerns related to Northrop's post-merger conduct in the SBR program, as well as conduct in future reconnaissance satellite system programs for which Northrop is a prime contract competitor and has the opportunity to select its own radar or EO/IR payload. Section IV.F establishes firewall provisions designed to protect the confidential business information of Northrop's satellite prime competitors and radar and EO/IR payload competitors. Four final Sections of the proposed Final Judgment ensure compliance with its terms. Section V provides for the appointment of a Compliance Officer and defines his or her powers and responsibilities; Section VI reserves important investigatory and enforcement powers for the Antitrust Division of the United States Department of Justice; Section VII permits the Court to impose substantial civil penalties for violations of the Final Judgment; and Section VIII confirms the Court's continuing jurisdiction to modify and enforce the proposed Final Judgment.

Non-Discrimination

Section IV.A of the proposed Final Judgment establishes that when Northrop is the prime contractor for a reconnaissance satellite system program, is responsible for selecting the payload, and has the opportunity to select its own payload, Northrop must select the payload on a competitive and non-discriminatory basis. To ensure that it makes an impartial payload selection, Northrop must propose and obtain approval of payload source selection criteria from the Compliance Officer and communicate the criteria to all competing payload suppliers. Should the Compliance Officer not approve the criteria, the Secretary of the Air Force shall have the sole discretion to approve, alter, or set the selection criteria. Under these circumstances, Northrop shall also provide information regarding its reconnaissance satellite systems to its in-house proposal teams and bona fide payload competitors, and make all personnel, resource allocation, and satellite system design decisions on a non-discriminatory basis. If Northrop selects its own payload, it must fully explain the basis for that selection to and seek the prior approval of the Compliance Officer. Where, however, Northrop notifies the Compliance Officer that it has elected not to use or supply its payload to itself as prime contractor, it need not comply with the above requirements.

Section IV.B requires that when Northrop is either a competitor or potential competitor for a prime contractor position on a reconnaissance satellite system program in which it has the opportunity to select its own payload, it must supply its payload on a non-discriminatory basis to all prime contractors that have expressed to Northrop a potential desire to utilize it. To that end, Northrop is required to supply its payload and related information to all such prime contractors in a manner that does not favor its in-house proposal team. For the purpose of bidding on satellite competitions and similar activities, it must also negotiate in good faith with such prime contractors to enter into commercially reasonable nonexclusive teaming agreements and

contracts that do not discriminate in favor of its in-house proposal team. These teaming agreements will be subject to the approval of the Compliance Officer and the Secretary of the Air Force. Northrop also must, on a non-discriminatory basis, make all personnel, resource allocation, and design decisions concerning its payload and provide information regarding its payload to contractors with which it has teamed. If the Compliance Officer concludes that Northrop has failed to comply with these requirements, the Secretary of the Air Force has the sole discretion to decide with whom, and on what terms, Northrop enters into such teaming relationships.

The non-discrimination rules of Sections IV.A and IV.B are the central provisions of this proposed Final Judgment and apply to a wide variety of conduct: the provision of information to competitors and in-house teams, payload selection criteria, payload selection, entering into contracts or teaming agreements, and numerous other decisions affecting such matters as personnel, design and investment. The term "discriminate" is defined in Section II.N of the proposed Final Judgment as meaning "to choose or advantage Northrop or to reject or disadvantage a Northrop prime or payload competitor for any reason other than the competitive merits; provided, however, that the determination of compliance or non-compliance with the non-discrimination provisions of this Final Judgment shall take into account that different firms will take different competitive approaches that may result in differences, individually or collectively . . . ." in a number of factors.

What this means in practice is that the United States will require Northrop to be equally aggressive in supporting all competing teams. While different firms will follow different competitive and technical approaches when competing for reconnaissance satellite systems and payloads, differences in treatment must be merit-driven. Northrop will not be permitted to favor

its in-house approach and undermine competing teams and their innovation approaches. The proposed Final Judgment recognizes that discrimination may result from either a single event, such as an important design decision, or from a series of smaller actions.

Sections IV.A and IV.B of the Final Judgment preserve competition by providing other payload and prime contract competitors the opportunity to provide meaningful competition in their respective markets and by ensuring that Northrop makes payload selections in the best interests of the U.S. Government. Absent these requirements, Northrop could deny other payload competitors access to its reconnaissance satellite systems information or make discriminatory selections regarding its satellite systems, thereby precluding competitors from competing to provide the payload. Likewise, Northrop could deny access to its payloads and thereby deny its prime contractor competitors the opportunity to provide meaningful competition, and deny the U.S. Government the benefits of that competition. These provisions ensure that DoD has the maximum possible number of potential teaming possibilities in response to a request for proposals and that the highest-value payload and reconnaissance satellite system are selected. Absent these provisions, foreclosure by Northrop would reduce incentives to innovate and reduce the number of innovation approaches, thus harming the U.S. Government.

Firewalls

Section IV.F of the proposed Final Judgment requires that Northrop maintain its payload business separate and apart from its satellite prime business.[1] These provisions prevent the flow of information between the two businesses by requiring Northrop to establish separate

[1] The proposed Final Judgment describes this business as the "current TRW Space & Electronics Satellite Systems business." This unit, which conducts TRW's satellite system prime contracting business, will conduct that business for the combined company, and the proposed Final Judgment will apply to any future reorganization.

communication networks, maintain separate locations, and use reasonable efforts to avoid transferring employees between the businesses. These firewall provisions further prevent Northrop's payload business from making available to its satellite prime business any non-public information provided by a prime contract competitor to Northrop as the payload provider. This will preserve competition by assuring other prime contract competitors that their confidential reconnaissance satellite system information will not be shared with Northrop's satellite prime business, thereby encouraging them to team their satellite systems with Northrop's payloads, providing DoD with the maximum number of teaming possibilities, and preserving the greatest number of innovation paths. Similar provisions assure other payload competitors that their confidential payload information will not be shared with Northrop's payload business.

Enforcement

To assure compliance with the Final Judgment, Section V requires the Secretary of Defense to appoint a Compliance Officer who, by the terms of the Final Judgment, has all necessary investigative and enforcement powers. The Compliance Officer, an employee of the U.S. Government, is authorized to hire, at the expense of Northrop, a team of contractors and other technical personnel to assist him or her in monitoring and ensuring compliance with the proposed Final Judgment. The team is limited to ten hired consultants, absent the approval of the Secretary of the Air Force to increase that number. Northrop may not object to the Compliance Officer selected by the Secretary of Defense, must use its best efforts to assist the Compliance Officer, and may take no action to interfere with or impede his or her duties. In practice, it is expected that the Compliance Officer will be proactive and will intercede early on to address and remedy any issues informally.

The consequences of a violation of the proposed Final Judgment, apart from the significant civil penalties discussed below, are severe and substantial. Under Section IV.A of the proposed Final Judgment, if the Compliance Officer concludes that Northrop discriminated in its own favor in either its payload selection or the selection process, the Secretary of the Air Force is given "the sole discretion to choose the [p]ayload supplier" and to dismiss Northrop's selection. Under Section IV.B of the proposed Final Judgment, if the Compliance Officer concludes that Northrop discriminated in favor of its in-house team, or failed to negotiate in good faith or enter into a commercially reasonable teaming agreement or contract, the Secretary of the Air Force is given "the sole discretion to decide with whom, and on what terms, Northrop enters into such teaming relationships . . . ." In effect, if the Compliance Officer determines that Northrop has discriminated in its own favor in a manner prohibited by the proposed Final Judgment, the Secretary of the Air Force is authorized to reverse any decision made by Northrop and to determine whether and on what terms Northrop will participate in the bid under consideration. These provisions collectively ensure that the U.S. Government, after the merger, will be able to detect discriminatory conduct prohibited by the proposed Final Judgment and to remedy quickly any selection or agreement that violates the proposed Final Judgment.

Sections VI, VII and VIII of the proposed Final Judgment confirm the significant investigative and enforcement authority of the Antitrust Division of the U. S. Department of Justice in this matter and the continuing supervisory jurisdiction of the Court in implementing the Judgment. The Antitrust Division, among other things, will be permitted to inspect and copy Northrop's documents; interview Northrop's officers, employees, or agents; and request reports from Northrop. The Antitrust Division will also have the discretion to seek enforcement of the proposed Final Judgment from the Court, which may order Northrop to pay civil penalties of up

to $10 million for each violation of the Final Judgment. It is anticipated that the Antitrust Division and the General Counsel of the DoD will work closely together in enforcing the terms of the Final Judgment, and the Antitrust Division may take enforcement actions either on the recommendation of the General Counsel of the DoD or on its own initiative.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C.§ 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. §16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the defendants.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, if the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest. 15 U.S.C. § 16(e).

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. 15 U.S.C. § 16(b). Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the

comments. All comments will be given due consideration by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the United States' responses will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court will retain jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Northrop and TRW. The United States could have brought suit and sought preliminary and permanent injunctions against Northrop's acquisition of TRW.

When the United States determines that a horizontal or vertical merger would result in a substantial lessening of competition, it generally seeks to block the merger or obtain structural relief. However, when a merger offers significant efficiencies, which cannot be obtained absent the merger or if a structural remedy is imposed, the United States will consider behavioral remedies.

With respect to this transaction, DoD, the only customer for the highly complex reconnaissance satellite systems affected by the transaction, determined that, with an appropriate decree resolving the vertical integration problems identified, the proposed acquisition offers the

possibility of increased competition for DoD space requirements generally and of significant competitive benefits to DoD that would not be realized if the merger did not occur. Following a thorough review of the transaction, DoD concluded that entry of the proposed Final Judgment would remedy its potential anticompetitive effects, while permitting the potential achievement of significant benefits. Given the DoD's conclusion that the United States would benefit from the transaction if the competitive problems could be remedied, and given the importance of a vertically integrated firm structure to the achievement of those benefits, the Department of Justice determined that the proposed Final Judgment, containing strict behavioral prohibitions and significant potential sanctions, is the best available means of satisfying the public interest in competition. Neither the Department of Justice nor the DoD considers this proposed Final Judgment to be a general approval of behavioral remedies for all vertical or horizontal mergers, but rather consider it appropriate here under the unique circumstances of this case.

## VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider —

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft Corp., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the [C]ourt is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[2] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[3]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS Inc., 858 F.2d 456, 462 (9th Cir. 1988), (quoting United States v. Bechtel Corp.,

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[2] 119 Cong. Rec. 24598 (1973). See also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

[3] United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

648 F.2d 660, 666 (9th Cir. 1981)); see also, Microsoft, 56 F.3d 1458 (D.C. Cir.1995).

Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is 'within the reaches of the public interest.' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on

its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest'."[5]

## VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that the United States considered in formulating the proposed Final Judgment.

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[4] United States v. Bechtel, 648 F.2d at 666 (internal citations omitted)(emphasis added); accord United States v. BNS Inc., 858 F.2d at 463; United States v. Nat'l Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 715. See also United States v. Am. Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

[5] United States v. Am. Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983)(quoting United States v. Gillette Co., 406 F. Supp. at 716); see also United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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Dated: December 23, 2002