Comments of Space Exploration Technologies Corp.

Responding to the Federal Trade Commission's Proposed

Agreement Containing Consent Order

In the Matter of Lockheed Martin Corporation, The Boeing Company,

and United Launch Alliance

File No. 051-0165

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October 31, 2006

Space Exploration Technologies Corp. ("SpaceX") hereby submits the following comments in response to the proposed Agreement Containing Consent Order ("Consent Agreement") published by the Federal Trade Commission ("FTC" or "Commission") on October 2, 2006.

As proposed and preliminarily approved by the FTC, the United Launch Alliance ("ULA") will combine Boeing and Lockheed's Evolved Expendable Launch Vehicle ("EELV") businesses into a single entity, which will end any chance of competition between The Boeing Company ("Boeing") and the Lockheed Martin Corporation ("Lockheed Martin"). In turn, this will enhance the ULA's ability to refuse to deal with the U.S. Government except on exclusionary terms and likewise will enhance the ULA's ability to strong-arm customers into excluding competitors such as SpaceX. In tandem with the massive subsidies received under the EELV Program in the form of "launch capability" contracts and the long-term allocations of launches exclusively to the ULA, the end result of the ULA approval serves only to quash competition, which will drive up prices and cost more from the U.S. taxpayer.

The anticompetitive effects of the ULA have been noted by numerous interested parties. For instance, the non-profit organization Citizens Against Government Waste has stated that the ULA "slams the door on any possible competition. The ULA locks up all contracts, ensuring high costs for taxpayers and stifling innovation."[1] Likewise, the FTC itself expresses deep-seated concerns about the anticompetitive effects of the ULA in the papers accompanying (though ultimately supporting) the proposed Consent Agreement. Nonetheless, nebulous claims regarding national security appear to trump

[1] Press Release, Citizens Against Government Waste (Oct. 20, 2005) (available at http://www.cagw.org/site/News2?page=NewsArticle&id=9358).

concerns about the effects on competition – even though competition is critical to promoting innovation, which is critical to protecting national security on a continuing basis. And, most critically, the FTC remedies focus myopically on the government satellite defense market while largely ignoring the harms that will be done to competition in the broader U.S. launch services industry if this proposed merger-to-monopoly proceeds.

A. <u>The ULA merger violates the United States antitrust laws</u>.

It appears universally accepted that the ULA violates the antitrust laws and that the original rationale for the ULA – that is, cost savings for the U.S. taxpayer – are unlikely to come to pass or, if they did, would not outweigh the harm to competition. As acknowledged by the FTC in its Complaint against the parties, "the proposed joint venture would violate Section 7 of the Clayton Act and Section 5 of the FTC Act, as amended, by substantially lessening competition in the U.S. markets for government MTH [medium-to-heavy] launch services and government space vehicles."[2] Even the Department of Defense ("DoD"), which has been characterized as a proponent of the merger, "acknowledges that the most negative view of the creation of ULA is that it will almost certainly have an adverse effect on competition, including higher prices over the long term, as well as a diminution in innovation and responsiveness."[3]

Furthermore, the Commission appears to understand that any promised cost savings that may conceivably result from the merger are insufficient to support the loss of

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[2] FTC News Release, "FTC Intervenes in Formation of ULA Joint Venture by Boeing and Lockheed Martin," Oct. 3, 2006.

[3] Letter From Under Secretary Krieg, Department of Defense, to Chairman Majoras, Federal Trade Commission, Aug. 15, 2006, at 1 ("Krieg Letter").

competition. This sentiment was succinctly summarized by the FTC's Assistant Director for Competition, who wrote:

> In short, the joint venture unambiguously will create a monopoly in the market for medium and heavy launch services for the U.S. government. Monopolies almost always lead to higher prices, lower quality and inferior service. Here, the competition that would be lost is significant, and the economic benefits that may materialize are unlikely to trump the transaction's harm to competition."[4]

Based on this assessment and the overall thrust of the FTC statements and guidance accompanying the Consent Agreement, it is appears to be accepted (and apparently acceptable to the FTC) that the ULA will lead to "higher prices, lower quality, and inferior service" as the result of diminished competition.

B. National security is not an effective defense against an otherwise illegal merger.

Mergers that confer monopoly power are uniformly condemned under United States antitrust laws. Mergers and joint ventures that confer monopoly power in the defense industry are no different and provide no exception to this rule. Indeed, it is well-established, as a matter of both Commission practice and precedent, that "the application of the antitrust laws to defense industry mergers [is] squarely in the public interest."[5]

Despite apparent consensus that the ULA violates U.S. antitrust laws and is likely to have serious detrimental effects to the industry, the FTC is apparently willing to ignore all of this solely on the basis of the DoD's unsubstantiated assertion that "the national security benefits flowing from ULA would exceed any anticompetitive harm caused by

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[4] Letter from Assistant Director Moiseyev, Bureau of Competition, to Deputy General Counsel Larsen, Department of Defense, July 6, 2006, at 2 ("Moiseyev Letter").

[5] Prepared Statement of the Federal Trade Commission Before the United States Senate Armed Services Committee, Subcommittee on Acquisition and Technology (April 17, 1997) (explaining application of Merger Guidelines to defense industry mergers) ("FTC Statement to Congress").

the proposed transaction."[6] But an attempt to justify conduct that lessens competition "on the basis of the potential threat that competition poses to the public safety... is nothing less than a frontal assault on the Sherman Act."[7] Moreover, "all elements of a bargain -- quality, service, safety and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[8]

The Commission's Horizontal Merger Guidelines explain that efficiencies can only permit a merger if those efficiencies "would be sufficient to reverse the merger's potential to harm consumers in the relevant market."[9] As the Commission has explained:

> The Commission is sensitive to considerations of national security and in particular that a merger will enable the Defense Department to achieve its national security objectives in a more effective manner. The Commission strongly believes, however, that competition produces the best goods at the lowest prices and is also most conducive to innovation. We believe that there is generally no conflict between antitrust enforcement and national security.[10]

Thus, despite "sensitivity" to national security claims, it is not a trump card. As stated in the Defense Science Board Task Force Report on Antitrust Aspects of Defense Industry Consolidation, "no otherwise illegal defense industry merger reviewed by the courts has survived a preliminary injunction motion, or otherwise resulted in dismissal of a

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[6] Analysis of Agreement Containing Consent Order to Aid Public Comment at 4 ("AACP").

[7] *National Society of Professional Engineers, 435 U.S. 679, 695 (1978). Accord FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 424 (1990).

[8] *Id.*

[9] FTC Horizontal Merger Guidelines § 4; see also FTC Statement to Congress.

[10] *Id.*; *see also* FTC Statement to Congress ("Antitrust policy, including the policy of opposing consolidations that increase the potential for abuse of market power, is designed to apply to all industries. By promoting a competitive economy, the antitrust laws ensure that consumers will receive the best quality, highest performance goods and services at the lowest prices. As the major consumer of defense industry products, the Defense Department seeks the same goals. Vigorous enforcement of the antitrust laws is thus entirely consistent with the goal of preserving a strong national defense.")

government charge, on a determination that public equities like national security outweighed anticompetitive effects."[11]

C. At a minimum, the FTC must adopt remedies that will comprehensively address the adverse effects on competition in the EELV market.

The Consent Agreement wholly ignores any concerns about the creation of a horizontal monopoly in the EELV market. Rather, it addresses only the issues that DoD indicated were not "intrinsically linked to ULA's national security benefits." Apparently, these exclude concerns about competition in the U.S. launch services industry for EELVs.

As noted in the Concurring Statement of Commissioner Harbour, the Analysis to Aid Public Comment ("AAPC") acknowledges that the proposed consent agreement "does not attempt to remedy the loss of direct competition" and instead intends to "address ancillary competitive harms that DoD has identified as not inextricably tied to the national security benefits associated with the creation of ULA."[12] In doing so, "the proposed consent agreement departs radically from traditional Commission consent orders in merger cases."[13] Conduct restrictions such as those proposed in the FTC's Consent Order, are generally accepted as insufficient and "would not be considered an effective remedy for the anticompetitive effects alleged in the Commission's complaint."[14]

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[11] Report of the Defense Science Board Task Force on Antitrust Aspects of Defense Industry Consolidation, April 1994, at 32.

[12] Concurring Statement of Commissioner Pamela Jones Harbour, *In the Matter of the Boeing Company / Lockheed Martin Corp.* Commission File No. 051-0165, at 2.

[13] *Id.*

[14] *Id.* at 2-3.

Short of blocking the merger, neither the FTC nor the DoD attempt to explain how taking steps to remedy the loss of direct competition is "intrinsically linked" or would be counterproductive to the ULA's national security benefits. This is particularly surprising given that SpaceX and other interested entities offered the Commission numerous alternatives in the form of structural remedies that would help mitigate the loss of competition. Those alternatives are discussed below.

i. Prevent the ULA from using its monopoly power and government subsidies to distort competition outside of the defense market by requiring "total cost-disclosure" and reimbursement.

Boeing and Lockheed's EELV business have received, and the ULA will continue to receive, hundreds of millions of dollars in taxpayer subsidies from the U.S. Government that are not available to other competitors. As acknowledged in the AACP, "DoD believes that Boeing and Lockheed may utilize their positions in the space vehicle market to raise barriers to entry in the government MTH (medium to heavy) launch services market."[15] The primary way that the ULA will be able to do this is by utilizing their subsidies and long-term, cost-plus EELV contracts to cross-subsidize its non-Air Force business (whether with civil agencies or commercial customers), thereby undermining competition.

If the Commission was unwilling to stop the ULA, then it should require the ULA to give up its subsidies. At a minimum, the Commission should require the ULA to compete on a "total-cost disclosure" basis when it sells EELVs to civil agencies or private commercial customers. This could be accomplished by requiring the ULA to provide the Air Force an offset for all costs directly or indirectly related to the launches

[15] AACP at 5.

that are reimbursable under its cost-plus "infrastructure" contract with the Air Force. Such a remedy would protect taxpayers from footing the bill for the costs of ULA's commercial projects, and would also permit competition on the merits in the commercial launch sector.

ii. Eliminate multi-year launch allocations

The exclusive allocation of EELV launches to Boeing and Lockheed Martin (and hence, the ULA) from 2006 through 2011 is another monopolistic advantage that the ULA will enjoy, but that could easily be eliminated to help mitigate the loss of competition that will occur if the ULA is approved. The current multi-year launch allocations create a skewed playing field because Boeing and Lockheed Martin, together with the companies and agencies responsible for the satellite payloads to be launched, will invest significant time and financial resources to design and develop the relevant satellites in reliance on the Air Force EELV allocations. As such, Boeing and Lockheed Martin (and hence, the ULA) will have an unfair advantage over SpaceX (or any other competitor) in any future "competition" for those launches.

To date, the Air Force has represented that these allocations are purely "notional" in nature. If, indeed, the allocations are purely notional – as the Air Force, Boeing and Lockheed Martin still maintain – then neither the Air Force nor the parties should object to eliminating allocations for launches that are not currently subject to awarded contracts.

Overall, the DoD claims to have "sought the Commission's assistance in creating a consent order to limit [the] adverse effects of the transaction that do not have any corresponding national security advantages."[16] Clearly, there are additional remedies,

[16] Krieg Letter at 2.

described above, that could be adopted to help remedy the loss of competition, but without interfering with the purported national security advantages of the transaction. If these steps are not taken, "the anticipated result of this anticompetitive consolidation [will] be to reduce the rate of innovation and other non-price benefits and increase the prices that the government, including the Air Force, NASA and other government agencies, would pay for these services."[17]

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Sound merger enforcement is an essential component of our free enterprise system benefiting the competitiveness of American firms and the welfare of American consumers. The Federal Trade Commission should not allow the ULA, an anti-competitive venture, to proceed. If the Commission does permit the ULA joint venture to proceed, it must take further steps to limit the ULA's monopoly power by conditioning its approval on Boeing's and Lockheed Martin's acceptance of a consent decree in which they accept the foregoing remedial provisions. Such a decree would restore and protect competition by enabling SpaceX (and any other rival that may emerge) to compete for launches on the basis of quality and the true cost of the service – and thereby allow the free market to determine the competitive outcome. Competition will lead to more innovation and superior products, and ultimately is the best method of protecting national security.

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[17] Moiseyev Letter at 1.