

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 SRB 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.