

Congress of the United States

Washington, DC 20515

September 14, 2023

The Honorable Lloyd J. Austin III
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

The Honorable William A. LaPlante
Under Secretary of Defense for Acquisition
and Sustainment
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Austin and Under Secretary LaPlante:

We are writing in response to the news that the Federal Trade Commission (FTC) has allowed the \$4.7 billion merger between L3Harris Technologies (L3Harris) and Aerojet Rocketdyne (Aerojet) to close,¹ and our concerns about the U.S. Department of Defense's (DoD, the Department) role in the decision to allow the merger. I am specifically concerned about your letter dated July 21, 2023,² sent in response to our July 11, 2023³ letter seeking transparency on DoD's role. Regrettably, your response did not address several important questions. Now that the merger is complete, it is imperative that the public be informed about potential conditions of the deal, what enforcement and oversight mechanisms exist to enforce promises made by L3Harris about the deal, and what information the DoD provided to the Federal Trade Commission (FTC) regarding the deal.

On July 26, 2023, L3Harris told investors that "the FTC will not block [L3Harris's] acquisition of Aerojet Rocketdyne."⁴ This merger adds further urgency to the concerns DoD revealed in February 2022 when the Department released a report finding that the defense industrial base is "historically consolidated" due to excessive merger-and-acquisition activity, and that additional "consolidations that reduce required capability and capacity and the depth of competition would have serious consequences for national security."⁵ The report specifically noted "recent

¹ Wall Street Journal, "Defense Contractor L3Harris Plans to Buy Aerojet Rocketdyne for \$4.7 Billion," Doug Cameron, December 18, 2022, <https://www.wsj.com/articles/defense-contractor-l3harris-plans-to-buy-aerojetrocketdyne-for-4-7-billion-11671412218>.

² Letter from DoD Under Secretary of Defense for Acquisition and Sustainment LaPlante to Senator Warren, July 21, 2023, p. 1, [Letter on file with the Office of Sen. Warren].

³ Letter from Senator Warren to DoD Secretary Austin and Under Secretary of Defense for Acquisition and Sustainment LaPlante, July 9, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.07.09%20Letter%20to%20DoD%20on%20L3Harris-Aerojet%20Merger.pdf>.

⁴ L3Harris, "Investor Letter 2Q 2023," July 26, 2023, p. 2, https://www.l3harris.com/sites/default/files/2023-07/L3Harris%20Q22023%20Investor%20Letter_Final_WithLinks.pdf.

⁵ U.S. Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, "State of Competition within the Defense Industrial Base," February 2022, p. 1, <https://media.defense.gov/2022/Feb/15/2002939087/-1/-1/1/STATE-OF-COMPETITION-WITHIN-THEDEFENSE-INDUSTRIAL-BASE.PDF>.

consolidation in the solid rocket motors sector has resulted in only two domestic suppliers.”⁶ we are therefore concerned about the decision not to block the deal, and what role DoD played in informing this decision, given its assessment that promoting competition is a “critical Department priority.”⁷

We are particularly troubled by reports that “[t]he company did not negotiate or sign a consent agreement,” but instead L3Harris CEO Chris Kubasik gave the DoD “assurances” that the company would be a supplier of rocket motors and engines.⁸ It is entirely unclear what “assurances” were given or how they can be enforced absent a consent agreement.

In the case of the Northrop Grumman-Orbital ATK deal, the FTC, with input from the DoD, permitted the transaction subject to an enforceable⁹ behavioral remedy¹⁰ – including to “make its solid rocket motors and related services available on a non-discriminatory basis to all competitors for missile contracts.”¹¹ We have serious concerns about reliance on these behavioral remedies, which do not work to protect consumers and competitors from unfair and monopolistic post-merger actions,¹² and both the FTC and the U.S. Department of Justice have a stated preference for structural remedies.¹³ But these behavioral remedies are better than nothing – and it is inconceivable to us that DoD would not install any legally enforceable safeguards to protect national security from the risks of this merger.

We are also troubled by DoD’s lack of transparency about this decision, and the Department’s refusal to share with Congress or the public the information the Department relied on for its assessment of the deal and what it shared with the FTC, or any information about the national security risks from this merger, and how they will be mitigated post-merger. DoD shared with us that “the Department of Defense provides the FTC information and conducts its own assessment of the proposed transaction subject to the Hart-Scott-Rodino (HSR) Antitrust Improvements Act

⁶ *Id.*, p. 24.

⁷ *Id.*, p. 1.

⁸ Defense One, “L3Harris rejects fears it will deny Aerojet rockets to competitors,” Audrey Decker, July 27, 2023, <https://www.defenseone.com/business/2023/07/13harris-rejects-fears-it-will-deny-aerojet-rockets-competitors/388885/>.

⁹ Inside Defense, “Northrop says it has received ‘civil investigative demand’ from Federal Trade Commission,” Marjorie Censer, October 24, 2019, <https://insidedefense.com/insider/northrop-says-it-has-received-civilinvestigative-demand-federal-trade-commission>.

¹⁰ Letter from Senator Warren to FTC Chair Khan, July 16, 2021, [https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20\(Warren\).pdf](https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20(Warren).pdf); Inside Defense, “Northrop says it has received ‘civil investigative demand’ from Federal Trade Commission,” Marjorie Censer, October 24, 2019, <https://insidedefense.com/insider/northrop-says-it-has-received-civilinvestigative-demand-federal-trade-commission>.

¹¹ Federal Trade Commission, “FTC Imposes Conditions on Northrop Grumman’s Acquisition of Solid Rocket Motor Supplier Orbital ATK, Inc.,” June 5, 2018, <https://www.ftc.gov/news-events/news/press-releases/2018/06/ftc-imposes-conditions-northrop-grummans-acquisition-solid-rocket-motor-supplier-orbital-atk-inc>.

¹² Letter from Senator Warren to FTC Chair Khan, July 16, 2021, [https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20\(Warren\).pdf](https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20(Warren).pdf).

¹³ Letter from FTC Chair Khan to Senator Warren, August 6, 2021, https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf; 2 U.S. DEP’T OF JUST., MERGER REMEDIES MANUAL, 16 (Sept. 2020) (“Structural remedies are strongly preferred in horizontal and vertical merger cases because they are clean and certain, effective, and avoid ongoing government regulation of the market.”).

of 1976”¹⁴ without further explanation. This is unacceptable: this opaque answer and unwillingness to provide further details leaves Congress and the public without the ability to evaluate this decision and its long-term impacts.

To better understand DoD’s role and decision-making in the L3Harris-Aerojet transaction we request answers – in a non-classified format – to the following questions by September 28, 2023:

1. As we have previously noted,¹⁵ behavioral remedies are “difficult to craft” and “eas[y]... to circumvent,” and they also require “courts to expend resources on monitoring and enforcement,” in large part because behavioral remedies are designed to “require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives.”¹⁶ Did DoD recommend any structural or behavioral remedies in the L3Harris-Aerojet merger?
 - a. Please provide any correspondence between DoD, Aerojet, and L3Harris regarding potential conditions surrounding the deal.
 - b. How would conditions/remedies be implemented, enforced, and accessed?
2. Reports indicate that there is no consent agreement with behavioral remedies for the merged entity, and that instead the L3Harris CEO Chris Kubasik gave the DoD “assurances” that the company would be a supplier of rocket motors and engines.¹⁷
 - a. Are there reports accurate? Is there any enforceable consent agreement?
 - b. What were the specific assurances provided by L3Harris related to the merger? How will they be enforced?
3. Did DoD provide the FTC with information regarding national security concerns resulting from this merger and/or a recommendation regarding whether the merger should be approved? If so, please provide additional detail on the specific concerns and/or recommendations.
4. The DoD has committed over \$215 million in funding for “the expansion and modernization of Aerojet Rocketdyne operations.”¹⁸ What is the funding planned to be used for? Are their mechanisms in place for DoD oversight of this funding?
5. Which major defense programs does DoD anticipate will be impacted by L3Harris merging with Aerojet? Please describe the anticipated impact.
6. Has DoD performed any analysis of future program costs, or analysis of impacts on innovation, the defense supply chain, or other national security concerns related to the L3Harris-Aerojet merger? If so, what were the findings of these analyses?

¹⁴ Letter from DoD Under Secretary of Defense for Acquisition and Sustainment LaPlante to Senator Warren, July 21, 2023, p. 1, [Letter on file with the Office of Sen. Warren].

¹⁵ Letter from Senator Warren to FTC Chair Khan, July 16, 2021, [https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20\(Warren\).pdf](https://www.warren.senate.gov/imo/media/doc/FTC%20-%20DOD%20Letter%20re%20Behavioral%20Remedies%20-%207.16.21%20(Warren).pdf).

¹⁶ American Antitrust Institute, “Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement,” John Kwoka and Diana Moss, 2011, p. 5, 8, https://www.antitrustinstitute.org/wpcontent/uploads/2011/11/AAI_wp_behavioral-remedies_final.pdf.

¹⁷ Defense One, “L3Harris rejects fears it will deny Aerojet rockets to competitors,” Audrey Decker, July 27, 2023, <https://www.defenseone.com/business/2023/07/13harris-rejects-fears-it-will-deny-aerojet-rockets-competitors/388885/>.

¹⁸ U.S. Department of Defense, “DoD Strengthens Supply Chain for Solid Rocket Motors,” press release, April 14, 2023, <https://www.defense.gov/News/Releases/Release/Article/3362263/dod-strengthens-supply-chain-for-solid-rocket-motors/>.

7. What concerns has DoD received from DoD stakeholders regarding the impact of this merger? Did DoD incorporate these concerns into its assessment and any assurances or agreement sought regarding post-merger behavior by the merged companies?

Sincerely,



Elizabeth Warren
United States Senator



Mark Pocan
Member of Congress



John Garamendi
Member of Congress