

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Comprehensive Review of Licensing and) IB Docket No. 12-267
Operating Rules for Satellite Services)

**PETITION FOR RECONSIDERATION OF SES AMERICOM, INC.
AND NEW SKIES SATELLITES B.V.**

Of Counsel
Karis A. Hastings
SatCom Law LLC
1317 F Street, N.W., Suite 400
Washington, D.C. 20004

Nancy J. Eskenazi
VP Legal Services, Global Regulatory
for SES Americom, Inc. and
New Skies Satellites B.V.
1129 20th Street, NW, Suite 1000
Washington, DC 20036

Dated: September 19, 2016

SUMMARY

SES strongly supports most of the policy and rule changes implemented in the Commission's Second Report and Order ("Order") in the Part 25 reform proceeding. However, consistent with its stated goal to facilitate expedited delivery of service to U.S. satellite customers, the Commission must reconsider its approach to handling U.S. market access requests that could conflict with a prior submission under the new two-step U.S. licensing process. The Commission must also correct or clarify two provisions in revised Section 25.140 of the rules.

The Commission's determination that it generally will defer processing of a U.S. market access request deemed mutually exclusive with a prior filing by a prospective U.S. licensee is contrary to the public interest and inconsistent with Commission precedent. The policy allows a U.S. filer to block a foreign satellite licensee from initiating service to U.S. customers for an extended period of time. Moreover, if the foreign licensee has ITU priority, the U.S. filer may not be able to provide service even if it receives a license. This is a lose-lose outcome for U.S. satellite service customers.

The approach in the Order will also hinder international coordination and create incentives for anticompetitive behavior and warehousing scarce spectrum and orbital resources. Because reaching a coordination agreement with a prospective U.S. applicant will allow a foreign satellite licensee's market access request to be considered, a U.S. filer has more to gain by blocking an agreement, regardless of the relative ITU priority of the U.S. and foreign filings. This opens the door for abuse of Commission processes to impede competition and allow valuable spectrum rights to go unused.

The decision to hold U.S. market access requests in abeyance pending resolution of the two-step process for U.S. licensing is all the more puzzling given the long-standing Commission precedent establishing that grant of a U.S. license does not preclude an award of market access to a foreign licensee with ITU priority. The Commission has repeatedly made clear that if the U.S. lacks

ITU priority, a U.S. license grant confers only temporary authority unless coordination is completed. Because such temporary authority does not preclude a later market access grant, there is no logical reason to await the outcome of a U.S. licensing procedure before considering a market access request.

In order to expedite service to customers and discourage spectrum hoarding, the Commission should instead consider U.S. market access requests as they are received, without regard to whether a potentially conflicting U.S. filing has been submitted. Such an approach is consistent with U.S. obligations as an ITU member to adhere to international coordination procedures. By facilitating grant of authority to a party with ITU priority, the Commission will promote service continuity and enhance customer welfare.

At a minimum, if it retains its policy of deferring consideration of U.S. market access requests once a prospective U.S. licensee has established a position in the processing queue, the Commission must make available a parallel process by which a foreign licensee can obtain queue priority. The Commission is obligated to treat foreign licensees from WTO member countries no less favorably than it treats U.S. applicants. As a result, if a U.S. filer can reserve access to spectrum for up to two years without submitting a full license application, the Commission must allow a foreign licensee to obtain comparable rights.

Finally, the Commission must clarify or correct Section 25.140. Specifically, the Commission must address an apparent inconsistency between the downlink EIRP density level for Ku-band digital operations found in the rule and discussion of the appropriate level in the text of the Order. In addition, the Commission should adjust the language in Section 25.140(a)(3)(iv) to ensure that it requires applicants to demonstrate that their proposed operations in spectrum subject to Appendix 30B are consistent with affected U.S. networks and affected foreign networks authorized to serve the U.S.

TABLE OF CONTENTS

SUMMARY.....i

I. THE COMMISSION MUST REVISE ITS PROCESSING POLICIES TO ENSURE EQUITABLE TREATMENT OF FOREIGN-LICENSED SATELLITES SEEKING U.S. MARKET ACCESS 2

A. Deferring Action on U.S. Market Access Requests Will Unnecessarily Delay or Deny Service to U.S. Satellite Customers 3

B. The Commission’s Approach Will Impede International Coordination and Encourage Anticompetitive Behavior and Warehousing 6

C. The Order Does Not Provide a Valid Rationale for Deferral..... 8

D. Considering U.S. Market Access Requests as They Are Filed Would Serve the Public Interest 12

E. At a Minimum, the Commission Must Adopt a Process for Foreign Licensees To Secure a Queue Position without Filing a Full Market Access Request 13

II. TWO PROVISIONS IN SECTION 25.140 REQUIRE CORRECTION OR CLARIFICATION 15

A. The Language of Section 25.140(a)(3)(ii) Conflicts with the Text of the Order 15

B. Section 25.140(a)(3)(iv) Should Be Revised 15

III. CONCLUSION 18

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Comprehensive Review of Licensing and) IB Docket No. 12-267
Operating Rules for Satellite Services)

To: The Commission

**PETITION FOR RECONSIDERATION OF SES AMERICOM, INC.
AND NEW SKIES SATELLITES B.V.**

SES Americom, Inc. and New Skies Satellites B.V. (collectively, “SES”), pursuant to Section 1.429 of the Commission’s rules, 47 C.F.R. § 1.429, submit this Petition for Reconsideration of the Commission’s Second Report and Order in the above-captioned proceeding.¹ SES has participated actively in this proceeding given the critical importance of the Commission’s efforts to overhaul the Part 25 framework in order to facilitate “more rapid and efficient deployment of satellite services to the public.”²

In most respects, the actions taken in the Order are consistent with that objective. However, the decision to defer processing of market access requests pending completion of the new two-step process for seeking U.S. satellite licenses will unnecessarily delay or deny service to customers and imposes an unfair disadvantage on foreign satellite licensees. The Commission must reconsider that determination in order to avoid significant public interest harms. In addition, the Commission should review two provisions of new Section 25.140 in which the rule’s language appears inconsistent with the Commission’s intent.

¹ *Comprehensive Review of Licensing and Operating Rules for Satellite Services*, Second Report and Order, FCC 15-167, 30 FCC Rcd 14713 (2015) (the “Order”).

² *Id.* at 14715, ¶ 1.

I. THE COMMISSION MUST REVISE ITS PROCESSING POLICIES TO ENSURE EQUITABLE TREATMENT OF FOREIGN-LICENSED SATELLITES SEEKING U.S. MARKET ACCESS

In its comments regarding the Commission’s Further Notice of Proposed Rulemaking in this proceeding, SES supported the proposal to allow parties to request that the Commission submit satellite network filings with the International Telecommunication Union (“ITU”) on a confidential basis prior to the submission of a full satellite license application.³ SES cautioned, however, that the Commission’s proposals did not adequately take into account how making such processing changes would affect the treatment of foreign-licensed satellites seeking U.S. market access.⁴ SES urged the Commission, consistent with its international obligations and express past precedent, to ensure that any new filing procedures for prospective U.S. licensees did not adversely affect the ability of foreign satellite licensees to provide beneficial service to U.S. customers.⁵

Instead, the Order takes an approach to these matters that contravenes the public interest and violates the Commission’s duty to treat foreign licensees fairly. Specifically, the Order states that once a prospective U.S. applicant initiates step one of the process for space station licensing by requesting that the Commission submit an ITU Coordination Request, that action establishes “queue priority.”⁶ If a foreign licensee later submits a market access request that is “deemed mutually exclusive” with the step-one filing, the Commission “generally will defer action on the market access request” pending either ultimate resolution of the U.S. space

³ See Joint Comments of SES Americom, Inc. and New Skies Satellites B.V., IB Docket No. 12-267 (filed Jan. 29, 2015) (“SES Comments”) at 10-13.

⁴ *Id.* at 18-19.

⁵ *Id.* at 19.

⁶ Order, 30 FCC Rcd at 14732, ¶ 42.

station application or completion of coordination between the parties.⁷ The Commission indicates that this sequencing will apply regardless of whether the foreign-licensed satellite holds superior ITU priority, even though the Order acknowledges that a lower priority U.S. licensee “may not be able to operate its system” if it does not successfully complete coordination.⁸

Holding a market access request in abeyance until a U.S. applicant completes the two-step process – which could be significantly more than two years – will impede the prompt delivery of service to customers, thwart efficient use of spectrum, hinder international coordination, and encourage spectrum warehousing and anticompetitive abuses. Moreover, the approach cannot be reconciled with long-standing Commission precedent or with U.S. commitments under international law. These flaws clearly warrant reconsideration of this aspect of the Order. At the very least, the Commission must make available to foreign satellite licensees a method for obtaining queue priority without filing a full market access request that is comparable to step one of the new U.S. licensing process.

A. Deferring Action on U.S. Market Access Requests Will Unnecessarily Delay or Deny Service to U.S. Satellite Customers

The Order makes clear that the Commission’s primary objective is to streamline its procedures in a way that will enable more expedited delivery of satellite service to customers,⁹ but deferring action on U.S. market access requests once a prospective U.S. licensee has requested submission of ITU materials will have the opposite effect. The Commission’s action will ensure that even if a foreign-licensed satellite is ready and able to commence U.S.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 14715, ¶ 1.

services, customers will not be able to access those services if a prior step-one filing by a prospective U.S. applicant is deemed mutually exclusive with the market access request.

The period in which service would be unavailable could be quite lengthy. Under the Commission's two-step process, an application for a satellite license need not be filed until two years after the process is initiated.¹⁰ The Commission has recognized that by deferring "action on any complete application filed by another party if the application is considered mutually exclusive with earlier-filed Coordination Request materials," it is allowing a first-step filer to effectively "tie up" resources for a two-year period.¹¹ In fact, however, the spectrum could be tied up for much longer. At the two-year point a full application must be filed, but then the Commission must review the application for completeness and sufficiency with applicable requirements, invite comment on the application, and resolve any issues raised. This process could be expected to add six months or more to the period during which the Commission will not even consider whether to grant customers access to a foreign satellite licensee's services.

Moreover, a substantial delay in the commencement of U.S. service could occur even if there is no actual conflict between the U.S. ITU filing and the foreign market access request. The Commission expressly recognizes that the information supplied in a Coordination Request at the first stage of the two-step process is "is not sufficiently detailed to enable the Commission to determine mutual exclusivity with other space station applications."¹² Conceding that it will lack adequate information for a reliable determination of mutual exclusivity, the Commission states that it will "presume that a full application is mutually exclusive with a Coordination Request for co-frequency space station operation within two

¹⁰ *Id.* at 14717, ¶ 10.

¹¹ *Id.* at 14728, ¶ 31.

¹² *Id.* at 14723, ¶ 22.

degrees of orbital separation.”¹³ The Commission goes on to say that a “[f]inal determination on mutual exclusivity will be done after the full application associated with the Coordination Request is received by the Commission.”¹⁴ In other words, the Commission may end up deferring action on a foreign market access request for more than two years even if the request is ultimately determined not to be mutually exclusive with a prior Coordination Request.

Furthermore, even the eventual grant of a license does not guarantee that the U.S. licensee will be able to provide service to customers. As the Commission acknowledges, if the U.S. does not have ITU priority for the relevant spectrum and orbital resources, “the U.S. licensee may not be able to operate its system if the [international] coordination cannot be appropriately completed.”¹⁵ Under these circumstances, the end result may be that no satellite operator is in a position to provide service to U.S. customers using the frequencies and orbital position at issue. The Commission’s process would have blocked any foreign licensee, including a licensee with ITU priority, from receiving market access. Meanwhile, the effect of the ITU priority system and the U.S. licensee’s failure to coordinate could prevent it from providing service.

Such an outcome is a clear “lose-lose” situation for U.S. consumers. The Commission’s decision to refuse to consider market access requests during the period after the two-step U.S. licensing process is initiated cannot be reconciled with the Commission’s public interest obligations and stated commitment to expediting service to users.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 14732, ¶ 42, citing *Amendment of the Commission’s Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10760 (2003) (“Space Station Licensing Reform Order”) at 10800, ¶ 96.

B. The Commission’s Approach Will Impede International Coordination and Encourage Anticompetitive Behavior and Warehousing

Deferring action on U.S. market access requests, even those filed by licensees who have ITU priority, will also remove any incentive for prospective U.S. applicants to timely pursue good faith coordination with other administrations. Instead, parties seeking U.S. authority can use their queue position to thwart potential competitors for years at a time, even if the U.S. filers never make productive use of the spectrum and orbital resources they have requested. This result would violate U.S. international commitments, harm competition in the U.S. market, and fly in the face of established Commission policies.

The Order makes clear that while the two-step process for seeking a U.S. satellite license is pending, the Commission will not consider a competing U.S. market access request unless any potential mutual exclusivity has been resolved by coordination.¹⁶ As a result, the prospective U.S. licensee is granted effective veto power over a foreign licensee’s ability to serve U.S. customers, even if the foreign licensee has ITU priority. Simply by refusing to coordinate – in good faith or at all – the U.S. filer can ensure that the foreign operator remains frozen out of the U.S. market.

This result directly conflicts with U.S. duties under international law. As a signatory to the World Trade Organization (“WTO”) Agreement on Basic Telecommunications Services (“WTO Telecom Agreement”), the U.S. has recognized the public interest benefits of opening its satellite services market. Specifically, the Commission has held that “[p]roviding opportunities for non-U.S.-licensed satellites to deliver services in the United States brings U.S. consumers the benefits of enhanced competition.”¹⁷

¹⁶ Order, 30 FCC Rcd at 14732, ¶ 42.

¹⁷ Space Station License Reform Order, 18 FCC Rcd at 10867, ¶ 285.

Moreover, the “United States is under a treaty obligation, in connection with its membership in the ITU, to adhere to the ITU procedures regarding coordination and notification of satellite networks licensed by the United States.”¹⁸ Under the ITU’s Radio Regulations, “it is the responsibility of Administrations with lower ITU priority to coordinate their networks with the networks of Administrations with higher priority.”¹⁹ The Commission has emphasized that under its first come, first served satellite licensing procedure, the U.S. applicant chooses its requested orbital location and therefore bears the risk that international coordination will not succeed.²⁰ Yet the Commission’s decision in the Order effectively shifts that risk away from the prospective U.S. licensee by ensuring that its failure to achieve coordination will have no adverse consequences.

This creates a recipe for spectrum warehousing as defined in the Order:

retention of preemptive rights to use spectrum and orbital resources by an entity that does not intend to bear the cost and risk of constructing, launching, and operating an authorized space station or is not fully committed to doing so.²¹

In particular, it invites U.S. filers without a concrete intention of building a satellite to strategically request the submission of Coordination Request filings to the ITU in order to see if they can “wait out” a foreign operator who may hold ITU priority. If such an effort succeeds, the U.S. filer will have gained access to valuable spectrum and orbital resources. Even if the effort

¹⁸ *The Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band*, Second Order on Reconsideration, 25 FCC Rcd 15718 (2010) (“17/24 GHz Reconsideration Order”) at 15722, ¶ 8.

¹⁹ *Id.* at 15724, ¶ 10, quoting Space Station License Reform Order, 18 FCC Rcd at 10870, ¶ 296.

²⁰ Space Station License Reform Order, 18 FCC Rcd at 10800, ¶ 96.

²¹ Order, 30 FCC Rcd at 14724-25, n.65.

ultimately fails, a rival service provider's ability to initiate U.S. service will have been substantially delayed. In either case, the upside to the U.S. filer may more than outweigh the potential loss of the \$500,000 bond imposed by the Commission at the ITU filing stage.²²

As a matter of long-standing policy and consistent with U.S. treaty obligations pursuant to the ITU framework, the Commission has made clear that it expects U.S. licensees to coordinate in good faith with other satellite networks.²³ The policy adopted by the Commission here, however, creates the opposite incentives, rewarding parties who stymie coordination efforts, and creating a clear path for anticompetitive speculation or hoarding of scarce spectrum and orbital resources.

C. The Order Does Not Provide a Valid Rationale for Deferral

In contrast to these clear public interest harms, the Order provides no countervailing benefits supporting the decision to defer consideration of a foreign licensee's request for U.S. market access submitted after a U.S. filer has initiated the two-step process. Moreover, the case law relied on in the Order conclusively demonstrates that the deferral approach adopted here is unjustified.

The only explanation the Commission provides for deferring consideration of market access requests is the statement that it employs "this queue procedure today when considering a request for access to the U.S. market vis-à-vis an earlier space station license application."²⁴ The Commission does not provide any examples of past situations in which it held a market access request in abeyance pending resolution of a U.S. license application.

²² *Id.* at 14717, ¶ 10.

²³ Space Station License Reform Order, 18 FCC Rcd at 10800, ¶ 96.

²⁴ Order, 30 FCC Rcd at 14732, ¶ 42, *citing* Space Station License Reform Order, 18 FCC Rcd at 10869-70, ¶¶ 294-95.

Instead, the Commission simply cites the Space Station License Order in which the first-come, first-served licensing procedure was adopted. The cited paragraphs from that decision, however, provide only a general description of the requirements for submitting market access requests under the first-come, first-served procedure and do not mention any deferral requirement.²⁵

Of course, even if the Commission's current practice is to hold a U.S. market access request in abeyance pending resolution of a prior U.S. license application, it does not follow that the same approach is warranted given the fundamental changes to the current process adopted in the Order. In particular, the Order adds two years to the timeline for obtaining a U.S. satellite license. This significantly changes the balance of interests by dramatically extending the time during which U.S. customers could be deprived of service from a foreign-licensed satellite.

More fundamentally, there is no logical reason to put off processing of a market access request during the lengthy time a two-step U.S. application could be pending because the outcome of the U.S. licensing proceeding is not relevant to consideration of a market access request. To the contrary, Commission precedent makes clear that the existence of a prior U.S. license does not bar grant of a U.S. market access request for the same spectrum at or near the licensed orbital location, at least with respect to a foreign satellite licensee relying on a filing whose ITU priority is superior to that of the U.S. filing.

In fact, the same passage from the Space Station License Reform Order that the Commission cites here explicitly states that in such cases any grant of a U.S. license is only temporary:

ITU date priority does not preclude us from licensing the operator of a U.S.-licensed GSO satellite *on a temporary basis pending launch and operation of a satellite with higher priority* in cases where the non-U.S.-licensed

²⁵ See Space Station License Reform Order, 18 FCC Rcd at 10869-70, ¶¶ 294-95.

satellite has not been launched yet. When we have authorized a U.S. licensee to operate at an orbit location at which another Administration has ITU priority, we have issued the license subject to the outcome of the international coordination process, and emphasized that the Commission is not responsible for the success or failure of the required international coordination.²⁶

As an example, the Commission cites a case in which as part of the second Ka-band processing round KaStarCom was assigned an orbital location that was a fraction of a degree away from a location at which Canada held ITU priority in the Ka-band.²⁷ In granting the KaStarCom application, the International Bureau emphasized that KaStarCom would take its license “subject to the outcome of the international coordination process.”²⁸

When Telesat Canada subsequently sought U.S. market access for operations of the Anik F2 satellite in the Ka-band at 111.1° W.L., only a tenth of a degree away from the 111.0° W.L. position licensed to KaStarCom, the International Bureau explicitly held that the U.S. license grant did not preclude awarding market access to Anik F2:

Canada’s Ka-band International Telecommunication Union (“ITU”) filing at 111.1° W.L. has date priority relative to the U.S. Ka-band ITU filing at 111.0° W.L. Under the ITU’s international Radio Regulations, any U.S. Ka-band satellite at 111.0° W.L. must be coordinated with Telesat’s planned satellite at 111.1° W.L. Consequently, we conditioned KaStarCom’s license on coordination with any non-U.S. satellite within two degrees of the KaStarCom satellite having filing date priority at the ITU. We also reminded KaStarCom that it takes its license subject to the outcome of the international coordination process, and that

²⁶ Space Station License Reform Order, 18 FCC Rcd at 10870, ¶ 295 (footnotes omitted, emphasis added).

²⁷ *Id.* at 10870, n.704, citing *KaStarCom World Satellite, LLC, Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service*, Order and Authorization, 16 FCC Rcd 14322, at 14330, ¶ 25 (IB 2001) (the “KaStarCom Authorization Order”).

²⁸ KaStarCom Authorization Order, 16 FCC Rcd at 14330, ¶ 25.

the Commission is not responsible for the success or failure of the required international coordination.

In light of the fact that Canada has ITU priority at this location, we find that granting Telesat access to the U.S. market in the Ka-band from the 111.1° W.L. location is consistent with the Commission's spectrum management policies.²⁹

Less than six months after the decision regarding Anik F2 was issued, the Commission adopted the Space Station License Reform Order and once again emphasized that U.S. licenses do not guarantee operational authority if the U.S. lacks ITU priority and coordination is not completed.³⁰ Moreover, the Commission observed that the rationale for putting the coordination burden on a U.S. licensee applies with even more force under first-come, first-served processing:

Indeed, with the first-come, first-served approach, we assign applicants to the orbit location that is requested. Consequently, the applicant assumed the coordination risk when choosing that particular orbit location at the time it submitted its application.³¹

In short, Commission case law establishes that in a situation where the U.S. does not have ITU priority, any grant of a U.S. satellite authorization confers only temporary authority. Such a license does not preclude processing or grant of a subsequent request for U.S. market access for the same spectrum at the same or a nearby orbital location. In light of this precedent, there is no rationale for the decision in the Order to defer consideration of a U.S.

²⁹ *Telesat Canada Petition for Declaratory Ruling For Inclusion of Anik F2 on the Permitted Space Station List and Petition for Declaratory Ruling to Serve the U.S. Market Using Ka-band Capacity on Anik F2*, 17 FCC Rcd 25287 (IB 2002) ("Anik F2 Order") at 25295-96, ¶¶ 25-26 (footnotes omitted).

³⁰ Space Station License Reform Order, 18 FCC Rcd at 10870, ¶ 295.

³¹ *Id.* at 10800, ¶ 96.

market access request that has been deemed mutually exclusive with a prior step-one filing from a prospective U.S. licensee.

D. Considering U.S. Market Access Requests as They Are Filed Would Serve the Public Interest

For the foregoing reasons, the Commission's decision to defer action on requests for foreign market access during the period after a prospective U.S. applicant initiates the two-step process will significantly delay or deny service to U.S. customers and encourage anticompetitive abuses without providing any countervailing public interest benefits. Moreover, because long-established Commission precedent makes clear that even a granted U.S. license does not preclude a later U.S. market access request, there is no reason to await the outcome of the U.S. process before evaluating a U.S. market access filing.

Instead, the Commission should consider and act on U.S. market access requests as they are filed, without regard to whether a request for submission of a Coordination Request has been submitted to the Commission for the relevant spectrum at or near the orbital location specified in the market access request. By revising the process set forth in the Order, the Commission can fulfill its treaty obligations as an ITU member and discourage attempts to use Commission processes to subvert the ITU regulatory framework relating to international coordination of satellite networks.

Most importantly, changing the policy adopted in the Order will promote U.S. customer and consumer interests. Accepting and processing market access requests as they are filed will ensure that foreign licensees whose superior ITU priority puts them in the best position to provide protected, continuous service to users are given the opportunity to provide capacity to U.S. customers. At the same time, the change will discourage speculative filings by entities that are not committed to building and launching a satellite, but are more interested in misusing the

Commission's processes to thwart entry by potential competitors. By increasing the likelihood that authority to serve U.S. customers is awarded to satellite operators that are willing and able to provide such service, revising the Commission's policy regarding consideration of U.S. market access requests will serve the Order's objective of facilitating "more rapid and efficient deployment of satellite services to the public."³²

E. At a Minimum, the Commission Must Adopt a Process for Foreign Licensees To Secure a Queue Position Without Filing a Full Market Access Request

If it does not modify its policies to consider market access requests as they are filed, the Commission must at least ensure that foreign-licensed satellites who intend to seek U.S. market access can obtain a position in the queue in the same manner as a prospective U.S. applicant. Specifically, the Commission should adopt a procedure comparable to the new two-step procedure for U.S. satellite licensing that allows foreign satellite licensees to initiate the process for seeking authority to serve U.S. customers without being required to file a complete market access request. This change is needed to ensure fair treatment of foreign satellite operators.

As the Commission has emphasized, under the WTO Basic Telecom Agreement, "WTO signatories are required to treat service providers from other signatories no less favorably than their own service providers."³³ Accordingly, the U.S. has a duty to place foreign satellite operators from WTO member countries on the same footing as prospective U.S. satellite licensees. Yet the Order implements a new procedure that is available by its terms only to filers seeking U.S. satellite licenses, giving such filers the opportunity to establish priority in the Commission's queue well before they are required to specify the full details of their planned

³² Order, 30 FCC Rcd at 14715, ¶ 1.

³³ Space Station License Reform Order, 18 FCC Rcd at 10800, ¶ 98.

satellite network. Fairness demands that the Commission establish a parallel process for non-U.S. satellite licensees.

In particular, the Commission should allow a foreign licensee to submit a simplified Form 312 and attachment that identifies the spectrum and orbital location for which the operator plans to seek market access. Because the operator will not be requesting that the U.S. submit any ITU materials, it should not be required to make any commitment regarding payment of ITU cost recovery amounts. Consistent with the process for a prospective U.S. licensee, the submission date of the simplified Form 312 should establish the foreign licensee's position in the Commission's processing queue. The Commission should then issue a public notice regarding the Form 312 submission and set a 30-day deadline for posting the appropriate \$500,000 bond. As is the case for prospective U.S. licensees, the foreign-licensed operator should have up to two years to submit a full request for U.S. market access containing the legal and technical information required by the Commission's rules.

For the reasons discussed above, SES does not believe that submission of a simplified Form 312 indicating an intention to file a U.S. market access request under the process proposed here should bar consideration of a later filed market access request or U.S. license application, at least if the later applicant seeks to operate under an ITU filing with priority superior to that of the initial filer. However, if the Commission maintains its deferral policy as outlined in paragraph 42 of the Order, it would need to consider how to achieve parity for foreign licensees consistent with U.S. obligations under the WTO Basic Telecom Agreement. Equitable treatment could require the Commission to forego processing of later filings by prospective U.S. licensees or market access requests by foreign licensees if they are deemed to be mutually exclusive with a foreign licensee's earlier submission. The Commission cannot

implement a process that is biased in favor of potential U.S. satellite licensees. Instead, it must ensure that the queue priority rights conferred on prospective U.S. licensees and on foreign licensees intending to seek U.S. market access are equivalent.

II. TWO PROVISIONS IN SECTION 25.140 REQUIRE CORRECTION OR CLARIFICATION

The Commission must also review Section 25.140. The text of two provisions of the updated rule appears to be inconsistent with the Commission's underlying intent.

A. The Language of Section 25.140(a)(3)(ii) Conflicts with the Text of the Order

Section 25.140(a)(3)(ii) includes the default two-degree spacing parameters for operation in the conventional and extended Ku-band spectrum. SES has noticed, however, a discrepancy between the discussion of this matter in the narrative of the Order and the rule language as adopted. Specifically, in the text of the Order, the Commission states its intention to adopt the SES proposal for an increase in the default downlink EIRP density level for digital operations in the conventional and extended Ku-band spectrum to 13 dBW/4kHz.³⁴ However, the rule language instead states that the default downlink EIRP density for Ku-band digital operations is 14 dBW/4kHz. The Commission should resolve this conflict and make clear what downlink EIRP density level it intends to apply for routine Ku-band operations in the two-degree spacing environment.

B. Section 25.140(a)(3)(iv) Should Be Revised

The Commission should also revisit the language of Section 25.140(a)(3)(iv), which specifies the requirements for making a showing that proposed operations using spectrum

³⁴ Order, 30 FCC Rcd at 14754, ¶ 112 (“based on a review of the operating parameters of current space stations, SES recommends increasing the downlink EIRP density limit for digital transmission in both the conventional and extended Ku-bands from 10 dBW/4kHz to 13 dBW/4kHz); *id.* at 14755, ¶ 115 (“we adopt SES’s suggested increases for the proposed limits on digital transmissions in . . . the conventional and extended Ku-bands”).

subject to Appendix 30B are compatible with other networks. The Commission determined that given the special requirements affecting these bands, it would not extend default two-degree spacing limits to the Appendix 30B spectrum or allow certification of compliance with two-degree limits in lieu of an interference analysis.³⁵ Instead, this provision specifies that an applicant for Appendix 30B spectrum must commit to complying with the Appendix 30B requirements and make a showing of compatibility with other filings.³⁶

In evaluating an application seeking authorization in Appendix 30B spectrum, the Commission must be able to determine whether the proposed operations will cause harmful interference to adjacent satellite networks covered by prior ITU filings in the relevant band that have been authorized to communicate with U.S.-licensed earth stations. The explicit language regarding the compatibility showing, however, only references making a compatibility demonstration with respect to “other U.S. ITU filings under Appendix 30B.”³⁷

This phrasing is potentially problematic because it neither incorporates the relevance of ITU priority nor expressly references non-U.S. filings. Both these elements should be included in the rule language. Under the first-in-time priority system established by the ITU Radio Regulations, no showing of compatibility should be required with respect to U.S. or other ITU filings submitted later than those relied on by the applicant. However, such a compatibility demonstration is needed to show that the proposed system can coexist with satellite networks

³⁵ *Id.* at 14755-56, ¶¶ 115-116.

³⁶ *Id.* at 14844-45, Section 25.140(a)(3)(iv) (applicant seeking authority for Appendix 30B spectrum must submit “a statement that the proposed operation will take into account the applicable requirements of Appendix 30B of the ITU’s Radio Regulations and a demonstration that it is compatible with other U.S. ITU filings under Appendix 30B”).

³⁷ *Id.*

that have superior ITU priority rights and are authorized to communicate with U.S.-licensed earth stations, whether those networks are U.S.- or foreign-licensed.³⁸

To address these matters, SES recommends the following alternative formulation of Section 25.140(a)(3)(iv):

With respect to proposed operation in the 4500-4800 MHz (space-to-Earth), 6725-7025 MHz (Earth-to-space), 10.70-10.95 GHz (space-to-Earth), 11.20-11.45 GHz (space-to-Earth), and/or 12.75-13.25 GHz (Earth-to-space) bands, a statement that the proposed operation will take into account the applicable requirements of Appendix 30B of the ITU's Radio Regulations and a demonstration that it is compatible with ~~affected other U.S.~~ ITU filings under Appendix 30B.

The Commission should adopt this modified language to ensure that the compatibility showing required by the rule covers all prior ITU filings that would be deemed affected under the terms of Appendix 30B.

³⁸ In this respect, the regulatory requirement under Section 25.140 differs from the standard set forth in Section 25.110, which specifies the information that must be filed before the Commission will submit a new U.S. filing with the ITU for Appendix 30B spectrum. The Commission found that the protection rights under existing U.S. filings in the Appendix 30B bands could be undermined if the Commission submitted a potentially conflicting filing to the ITU. *See id.* at 14733, ¶ 47. To avoid this situation, the Commission stated that before submitting any proposed new ITU filings in these bands it would perform a review to determine compatibility with prior U.S. filings in that spectrum. *Id.* To facilitate such a review, Section 25.110 requires that an operator requesting submission of new U.S. filings to the ITU in Appendix 30B spectrum demonstrate that no existing U.S. filing would be deemed affected by the new submission unless the affected licensee has consented to the proposed operations contemplated by the new filing. *Id.* at 14831, Section 25.110(b)(3)(ii).

III. CONCLUSION

For the foregoing reasons, the Commission should modify its policies with respect to processing of requests for U.S. market access following initiation of the new two-step process for satellite licensing and revisit the language of Section 25.140.

Respectfully submitted,

**SES Americom, Inc. and
New Skies Satellites B.V.**

By: /s/ Nancy J. Eskenazi

Of Counsel

Karis A. Hastings
SatCom Law LLC
1317 F Street, N.W., Suite 400
Washington, D.C. 20004

Nancy J. Eskenazi
VP Legal Services, Global Regulatory
for SES Americom, Inc. and
New Skies Satellites B.V.
1129 20th Street, NW, Suite 1000
Washington, DC 20036

Dated: September 19, 2016