

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

*In the Matter of*

**SES AMERICOM, INC.**

Application for Authority to Operate the  
SES-3 Satellite at 103° W.L.

IBFS File Nos. SAT-RPL-20121228-00227  
SAT-AMD-20131113-00132

**REPLY OF DIRECTV, LLC**

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## SUMMARY

As chronicled in DIRECTV's original Petition, SES initially bypassed the U.S. licensing process so that it could use the token 17/24 GHz BSS payload on the SES-3 satellite to undermine U.S. interests at two orbital locations before seeking the advantages of a U.S. license for its primary C-/Ku-band operations at 103° W.L. Were the Commission to grant SES's application, it would both reward SES for its strategic activities and encourage others to replicate them – to the detriment of the U.S. public interest.

In its defense, SES makes a number of spurious claims. For example, it claims that it launched SES-3 under a Luxembourg license because the satellite had a “Luxembourg mission.” In truth, the only such “mission” the satellite carried out was attempting to bring into use foreign 17/24 GHz BSS filings that conflict with licenses issued by the Commission. SES also claims this case is just like others in which the Commission has re-flagged satellites previously authorized by other countries. Yet it neglects to mention that in none of those other cases did the applicants undertake activities detrimental to U.S. interests *before* seeking the advantages of a U.S. authorization. SES also argues that the Commission must grant its application immediately or risk disrupting service to U.S. customers. This is a curious argument, given SES's prior representation to the Commission that the AMC-1 satellite currently operating at 103° W.L. has almost three years of “reliable service” remaining.

SES correctly notes that it was under no obligation to launch and begin operations of the SES-3 spacecraft under U.S. authority. By the same token, the Commission is under no obligation to grant an application for a satellite that has been used to undermine the U.S. interest prior to seeking all of the domestic and international regulatory advantages conveyed by a U.S. license. Rather than reward such conduct, the Commission should deny the application or, at a

minimum, hold it in abeyance until such time as spectrum coordination arrangements sufficient to ameliorate the effects of SES-3's past activities are concluded.

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**REPLY OF DIRECTV, LLC**

In its initial Petition, DIRECTV, LLC (“DIRECTV”) requested that the Commission deny or defer the above referenced application of SES Americom, Inc. (“SES”) for authority to operate the in-orbit SES-3 satellite at the 103° W.L. orbital location.<sup>1</sup> It based its opposition upon SES’s prior use of the satellite’s token 17/24 GHz Broadcasting Satellite Service (“BSS”) payload to undermine the U.S. public interest in general, and DIRECTV’s interest in particular. SES opposed that Petition on a variety of grounds.<sup>2</sup> As demonstrated below, none of them withstand scrutiny.

**DISCUSSION**

**1. SES’s “Luxembourg Mission” Consisted Principally of Activities That It Knew the Commission Would Not Allow**

In its Petition, DIRECTV documented the evidence showing that SES intentionally bypassed U.S. licensing for SES-3. DIRECTV explained that SES did so in order to use a token

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<sup>1</sup> See Petition to Deny or Defer of DIRECTV, LLC (filed Dec. 16, 2013) (“DIRECTV Petition”).

<sup>2</sup> See Opposition of SES Americom, Inc. (filed Dec. 24, 2013) (“SES Opposition”).

17/24 GHz BSS payload on the satellite<sup>3</sup> to gain international priority over a U.S. licensee preparing to launch an innovative new service, in contravention of the U.S. public interest. Because the Commission would never have authorized such maneuvers had SES requested it to do so, SES chose to launch and begin operations of SES-3 under Luxembourg authority.<sup>4</sup>

In an effort to justify its behavior, SES asserts that it launched SES-3 under Luxembourg authority because the spacecraft initially had a “Luxembourg mission.”<sup>5</sup> A review of the only three locations in which SES-3 has operated to date demonstrates that this assertion is nonsense.

- First, SES-3 went to 99° W.L., where its short-term operations were the basis for an assertion that a 17/24 GHz BSS filing by Luxembourg had been brought into use.<sup>6</sup> The United States also has a 17/24 GHz BSS filing at this location, under which DIRECTV has been licensed to operate. As SES confirms,<sup>7</sup> the Luxembourg claim of bringing the network into use was later rejected by the ITU.<sup>8</sup> In other words, the failure to bring the Luxembourg filing into use was not for lack of trying on SES’s part.
- Second, the spacecraft went to 108.2 E.L. in order to meet “anticipated U.S. government demand for Ku-band capacity in the Middle East.”<sup>9</sup> It is hard to see how service to U.S. government entities would be part of a uniquely “Luxembourg mission.” Indeed, it would seem that this mission was more appropriate for a U.S.-licensed satellite.
- Third, the spacecraft went to 103° W.L., where it was used to bring into use a 17/24 GHz BSS filing by Canada that conflicts with the U.S. filing at this same slot, under which DIRECTV has been licensed to operate.

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<sup>3</sup> This payload has a simple low gain wide beam transmit/receive horn antenna, a single 500 MHz wideband transponder supported by a single TWTA, and a maximum transmit EIRP capability of 31.6 dBW, which the link budgets included with the application demonstrate are capable of supporting a single 5.5 MHz carrier, at best. *See* Application of SES Americom, Inc., IBFS File No. SAT-RPL-20121228-00227, Technical Appendix at 14 (filed Dec. 28, 2013) (“SES-3 Application”).

<sup>4</sup> *See* DIRECTV Petition at 8-9.

<sup>5</sup> SES Opposition at 5, 10.

<sup>6</sup> *See* DIRECTV Petition at 9 n.28.

<sup>7</sup> *See* SES Opposition at 15 n.41.

<sup>8</sup> *See* BR IFIC 2725 (published Aug. 7, 2012).

<sup>9</sup> SES-3 Application at 4.

From this, it is clear that to the extent SES-3 had what SES euphemistically characterizes as a “Luxembourg mission,” it was nothing more than bringing into use 17/24 GHz BSS filings of other Administrations that directly conflict with U.S. licenses.

As SES points out, it was free to choose to have Luxembourg authorize the launch and initial operations of SES-3.<sup>10</sup> But such a choice must have consequences when it is part of a plan to circumvent U.S. authority and undermine U.S. interests. SES’s effort to recharacterize these activities as a “Luxembourg mission” does not change that analysis or the appropriate response by the Commission.

## **2. The Commission Has Never Granted an Application in Circumstances Similar to Those Presented in This Proceeding**

SES argues that its application “raises no novel issues,” since the Commission has on numerous occasions both approved dual-licensed satellites and granted U.S. authorizations to satellites launched initially under authority of another Administration.<sup>11</sup> Yet SES’s argument ignores a critical fact. In none of the cases it cites was the Commission asked to take responsibility for a satellite that had been used to subvert the U.S. public interest while licensed by another Administration. This is the first case in which an applicant’s prior activities have been placed squarely at issue, and thus other cases in which the Commission found no reason to deny applications are completely inapposite.

SES would particularly like to analogize the instant case to an application DIRECTV filed in 2009 for DIRECTV RB-2A, a 17/24 GHz BSS payload to be operated at the same 103° W.L. orbital location at issue here.<sup>12</sup> SES argues that, because the Commission licensed a 17/24 GHz

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<sup>10</sup> SES Opposition at 5.

<sup>11</sup> *See id.* at 4-5.

<sup>12</sup> *See id.* at 11-12.

BSS payload with limited capabilities for DIRECTV, DIRECTV has no basis to complain about operation of the token payload on SES-3. Yet both the circumstances surrounding the payloads and the consequences resulting from them could not be more different.

DIRECTV contracted for and built its RB-2A payload at the very dawn of the reverse band era, before it even had any authority to operate in the 17/24 GHz BSS band.<sup>13</sup> As SES points out, that payload had limited capability, composed of four downlink spot beams that did not meet the Commission's geographic service requirements.<sup>14</sup> It is worth noting, however, that the four downlink spot beams on RB-2A support multiple 36 MHz carriers over the entire 400 MHz of licensed spectrum, and have the capability for maximum satellite EIRP of 55.6 dBW to 61.6 dBW.<sup>15</sup> This contrasts sharply with the capability of the SES-3 17/24 GHz BSS payload, which can only support a single 5.5 MHz carrier operating at a maximum EIRP of 31.6 dBW.<sup>16</sup>

More importantly, what SES fails to acknowledge is the very different regulatory implications of the two payloads. DIRECTV did not contend that the RB-2A payload would satisfy any milestone requirements contained in its authorization to launch and operate a fully capable 17/24 GHz BSS satellite at 103° W.L., and its authorization to operate included an explicit condition to that effect.<sup>17</sup> Similarly, DIRECTV did not contend that its operation of that payload brought into use the U.S. network filing for 17/24 GHz BSS operations at 103° W.L. Indeed, its authorization included a condition requiring termination of RB-2A's operations once a 17/24 GHz BSS satellite authorized to serve the United States through the Commission's first-come, first-

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<sup>13</sup> See IBFS File No. SAT-LOA-20090807-00085, Application at 3 ("RB-2A Application").

<sup>14</sup> SES Opposition at 11.

<sup>15</sup> See RB-2A Application at 7.

<sup>16</sup> See SES-3 Application, Technical Appendix at 14.

<sup>17</sup> See Grant Stamp, IBFS File No. SAT-LOA-20090807-00085 at 2, Condition 3 (Jan. 8, 2010).



served processing framework commences operations at 103° W.L.<sup>18</sup> By contrast, the payload on SES-3 has been used to satisfy a milestone that was part of the Canadian authorization issued to SES's affiliate, Ciel Satellite Limited Partnership ("Ciel"), and was at least part of the justification for extending those milestones (initially by two years and ultimately by almost six years).<sup>19</sup> As has been well documented in this proceeding, that payload was also used to bring the Canadian filing at 103° W.L. into use.

Thus, the Commission's authorization of RB-2A actually supports DIRECTV's position, not that of SES. As DIRECTV noted in its Petition, the Commission has denied space station applications that would have enabled operators using satellites with limited capabilities to block other operators with state-of-the-art technology.<sup>20</sup> By authorizing RB-2A only on the condition that its *operations be terminated* upon the arrival of a fully capable satellite, the Commission furthered this policy. If the authorization for the 17/24 GHz BSS payload on SES-3 had similarly included a condition requiring cessation of operations upon the launch of a fully capable satellite duly authorized to serve the United States from 103° W.L., and had it not been used to bring into use a Canadian filing, this would be a very different case. As it is, however, SES's comparison of the instant application to the Commission's action with respect to RB-2A is completely erroneous.

### **3. The Commission Need Not Ignore Facts Inconvenient to SES's Arguments**

SES urges the Commission to ignore several facts inconvenient to the arguments it has made in support of the SES-3 application. It would prefer the Commission to focus on technical issues, such as standing, and to treat this application as if all that were at stake is a narrow question

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<sup>18</sup> *Id.* at 1-2, Condition 2.

<sup>19</sup> See DIRECTV Petition at 8 (discussing Ciel's licensing history at 103° W.L.).

<sup>20</sup> See DIRECTV Petition at 12-13 (citing *PanAmSat Licensee Corp.*, 19 FCC Rcd. 2012, ¶¶ 9-10 (Int'l Bur. 2004); *EchoStar Corp.*, 26 FCC Rcd. 10442, ¶ 8 (Int'l Bur. 2011); and *Star One, S.A.*, 25 FCC Rcd. 14338, ¶ 8 (Int'l Bur. 2010)).

of replacement C-/Ku-band capacity. The Commission has never taken such a cramped view of its public interest mandate, and it should not do so in this case.

The Supreme Court has characterized the public-interest standard as “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”<sup>21</sup> As such, this standard gives the Commission authority to consider all facts and circumstances relevant to a given application. It need not, as SES suggests, grant the application based on facial consistency with the Commission’s satellite licensing rules and conformity to the Commission’s technical rules.<sup>22</sup> Indeed, focusing solely on an applicant’s compliance with service rules to the exclusion of larger public policy considerations would not satisfy the public interest mandate. “The Commission’s licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license.”<sup>23</sup> Rather, the Commission should consider the full panoply of factors presented before determining which of them bear upon its analysis. “[C]ase law strongly supports the broad exercise of FCC discretion both to define the public interest and to determine what procedures best assure protection of that interest.”<sup>24</sup> Focusing solely on the replacement of C-/Ku-band capacity at this particular orbital location would ignore the larger and more important precedent that approval of SES’s tactics of evasion would establish. The Commission cannot turn a blind eye to the full implications of its decision, no matter how fervently SES may wish that it would do so.

Moreover, the Commission need not simply accept SES’s factual assertions at face value, especially where they conflict with SES’s past representations to the Commission. For example,

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<sup>21</sup> *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

<sup>22</sup> See SES Opposition at 4.

<sup>23</sup> *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

<sup>24</sup> *Black Citizens for Fair Media v. FCC*, 719 F.2d 407, 413 (D.C. Cir. 1983).

SES argues that the Commission must grant its application expeditiously in order to ensure continuity of service to its customers who currently receive C-/Ku-band services from the AMC-1 satellite.<sup>25</sup> Yet the Commission recently extended that satellite's authority to operate until October 2016, based on the remaining useful life of the satellite as determined by SES.<sup>26</sup> In particular, SES assured the Commission that the spacecraft would be able to "continue providing reliable service during the requested extended license term."<sup>27</sup> Thus, there will be no risk of service loss for nearly three years. Even if the Commission took another year or more to consider this application, SES would have more than sufficient time for an orderly transition, including any time necessary to accommodate technical complications cited by SES.<sup>28</sup> Given its prior assurances about the period during which AMC-1 will provide reliable service, SES should not now be heard to argue that its customers are at risk if the Commission does not grant this application immediately.

The interplay between international coordination and domestic licensing is another area in which SES cannot square its current and former positions. In its Opposition, SES argues that DIRECTV's U.S. 17/24 GHz BSS license at 103° W.L., issued as a result of the Commission's first-come, first-served process, must yield to a foreign-licensed satellite with ITU date priority, as doing otherwise would "subvert the ITU system of date priorities under which all countries operate."<sup>29</sup>

Yet this position is directly contrary to the representations SES made in its application for authority to operate SES-2. In that application, SES disclosed that the satellite would have a 17/24

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<sup>25</sup> See, e.g., SES Opposition at 2-4.

<sup>26</sup> See Grant Stamp, IBFS File No. SAT-MOD-20110718-00130 (Oct. 13, 2011).

<sup>27</sup> IBFS File No. SAT-MOD-20110718-00130, Application at 2.

<sup>28</sup> See SES Opposition at 3.

<sup>29</sup> *Id.* at 13.

GHz BSS payload, but did not seek authority to operate it.<sup>30</sup> SES assured the Commission that “[b]ecause [SES] is not seeking an operating license in the 17/24 GHz BSS band, the authorization for SES-2 will have no preclusive effect on deployment of 17/24 GHz BSS networks by other prospective operators.”<sup>31</sup> Yet as SES has now confirmed,<sup>32</sup> the 17/24 GHz BSS payload on SES-2 was used to bring into use the Canadian ITU filing at 86.5° W.L. (which is licensed to SES’s affiliate, Ciel). Under SES’s current argument, the Canadian filing would clearly have a “preclusive effect” on Commission licensing of other prospective operators at that slot – which would make SES’s prior representation to the Commission misleading at best. Given SES’s apparent willingness to take whichever side of this issue suits its immediate needs in a given proceeding, the Commission should severely discount its current contentions, if not ignore them completely.

SES also asserts that DIRECTV lacks standing to seek denial of the SES-3 application because a grant would not cause DIRECTV to suffer a direct injury.<sup>33</sup> As a practical matter, this argument is of little moment, as the Commission would consider DIRECTV’s arguments as an informal objection even if it concluded that DIRECTV lacked standing to file a formal petition to deny.<sup>34</sup> More importantly, SES’s argument is wrong on the merits as well. Because SES intentionally bypassed the Commission’s licensing process for its launch and initial operations, DIRECTV had no opportunity to raise, and the Commission had no opportunity to consider, the public interest implications of the satellite’s operation at 99° W.L. and 103° W.L.

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<sup>30</sup> See IBFS File No. SAT-RPL-20110429-00082, Application at 3 n.6, 5.

<sup>31</sup> *Id.* at 6. SES reiterated this assurance in support of a waiver request, asserting that “[b]ecause [SES] is not seeking an operating license for the SES-2 17/24 GHz BSS payload, grant of a waiver here will not block deployment of compliant 17/24 GHz BSS spacecraft.” *Id.* at 7.

<sup>32</sup> See SES Opposition at 15 n.41.

<sup>33</sup> *Id.* at 15-16.

<sup>34</sup> See 47 C.F.R. § 25.154(b).

In addition, SES's strategy deprived the Commission of the right under ITU procedures to object to the use of SES-3 to bring into use the network filings of other Administrations.<sup>35</sup> As a direct result, SES was able to bring into use a Canadian network filing (and attempted to bring into use a Luxembourg filing) that conflicts with a U.S. license issued to DIRECTV. If SES is successful here, it will have established a pattern for future satellite licensing that is capable of repetition yet would evade review if affected parties (including DIRECTV) are unable to challenge such conduct when the operator finally does come to the Commission to apply for a license. In such circumstances, the perpetrator's evasive conduct does not render the matter moot or divest affected parties of standing to raise a challenge.<sup>36</sup>

#### **4. The Commission Should, At a Minimum, Wait Until Coordination Negotiations Have Reached a Conclusion**

The license SES seeks in this proceeding is very valuable. It confers not only the right to serve the lucrative U.S. market, but also the right to operate under the international protection of the U.S.'s ITU filings at 103° W.L. Had SES sought this license for SES-3 prior to launch, the Commission would have determined where the satellite was allowed to operate and what international consequences those operations would have. By choosing instead to launch and operate under authority of Luxembourg, SES denied the Commission the opportunity to make those public interest determinations. If it wishes to avoid rewarding this behavior – and encouraging others to replicate it – the Commission cannot simply grant SES a license to enjoy the

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<sup>35</sup> See WRC-12 decisions included in the Minutes of Plenary meeting relating to space services procedures in ITU-R circular letter CR/333.

<sup>36</sup> See, e.g., *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462-63 (2007). In addition, unlike modifications to the regional plans for the Broadcasting-Satellite Service, a network that is brought into use in a non-planned band will be suppressed if it is not used for a period of three years. See ITU Radio Reg. No. 11.49. Thus, if SES's application is denied and it decided to relocate SES-3, the 17/24 GHz BSS rights at 103° W.L. could become available again.

benefits of the Administration whose licensing process it tried to circumvent and whose public interest has been undermined.

Fortunately, the years of “reliable service” left on AMC-1 afford sufficient time for new developments to affect the public interest analysis in this proceeding. One factor that could change the current situation would be a satisfactory arrangement under which both the U.S. and Canadian 17/24 GHz BSS systems could operate at 103° W.L. DIRECTV and Ciel have engaged in coordination discussions, but no agreement has yet been reached. Although DIRECTV remains hopeful, the Commission cannot merely assume that the parties will arrive at a solution that can sufficiently ameliorate SES’s prior use of the satellite such that granting this application would serve the U.S. public interest.

Accordingly, if the Commission does not deny the application outright, it should hold it in abeyance until the coordination process has reached its conclusion. At that point, the Commission will be in a position to make its public interest determination informed by any mitigating circumstances arising from that process.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in its original Petition, DIRECTV respectfully requests that the Commission deny SES's application, or at a minimum hold it in abeyance until such time as the United States and Canada complete a satisfactory arrangement for coordination of their respective 17/24 GHz BSS operations at 103° W.L.

Respectfully submitted,

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January 3, 2014

## ENGINEERING CERTIFICATION

The undersigned hereby certifies to the Federal Communications Commission as follows:

- (i) I am the technically qualified person responsible for the engineering information contained in the foregoing Reply,
- (ii) I am familiar with Part 25 of the Commission's Rules, and
- (iii) I have either prepared or reviewed the engineering information contained in the foregoing Reply, and it is complete and accurate to the best of my knowledge and belief.

Signed:

/s/

\_\_\_\_\_  
Jack Wengryniuk

January 3, 2014

Date



## CERTIFICATE OF SERVICE

I hereby certify that, on this 3<sup>rd</sup> day of January, 2014, a copy of the foregoing Reply was served by electronic mail upon:

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