

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Kuiper Systems LLC

Application for Modification of
Authorization for the Kuiper System

Call Sign S3051

File No. SAT-MOD-20210806-00095

REPLY TO COMMENTS OF SES AMERICOM, INC. AND O3B LIMITED

In the one comment filed in this docket, SES Americom, Inc. and O3b Limited (collectively, “SES”) “strongly agree[d] that the Commission [should] rationalize its approach to EPFD compliance” by being consistent in its treatment of similarly situated applicants.¹ As SES recognized, the condition that Kuiper Systems LLC, a wholly owned subsidiary of Amazon.com Services LLC (collectively, “Amazon”), seeks to remove from its license in this proceeding diverges from the conditions granted to other similarly situated applicants.² SES also seemed to recognize that “the Administrative Procedure Act [(“APA”)] and principles of reasoned decision-making require the Commission to be consistent in its treatment of similarly situated applicants.”³ Yet rather than concluding that the Commission should grant Amazon’s request⁴ to remove the

¹ Comments of SES Americom, Inc. and O3b Limited, File No. SAT-MOD-20210806-00095, Call Sign S3051, at 5 (filed Sept. 20, 2021) (“SES Comments”).

² *See id.* at 4.

³ *Id.* at 4-5.

⁴ Kuiper Systems LLC, Application for Modification of Authorization for the Kuiper System, Call Sign S3051, File No. SAT-MOD-20210806-00095 (filed Aug. 6, 2021) (“Modification Request”) (seeking alteration of the terms adopted in *Kuiper Systems LLC, Application for Authority to Deploy and Operate a Ka-band Non-Geostationary Satellite Orbit System*, Order and Authorization, 35 FCC Rcd 8324 (2020) (“*Kuiper System Authorization*”).

“joint effect” condition from its license,⁵ SES asks the Commission to impose a new condition on all NGSO operators that would allow SES and other third parties to “independently confirm” compliance with the ITU’s EPFD limits.⁶ Rather than fixing the problem with the current condition, SES’s proposal raises a host of fresh APA issues. It would also be contrary to the public interest, for reasons that the only other party to submit comments in this proceeding—SpaceX—has explained.⁷ That is why the Commission has rejected arguments that it should impose this condition—again,⁸ and again,⁹ and again.¹⁰ It should reject them yet again here, and grant Amazon’s request to remove Condition 60 from its license.

As others have recognized,¹¹ maintaining Condition 60 would be contrary to the APA. For the condition to be legally valid, the APA mandates that it be both reasonable and reasonably explained.¹² But in imposing the condition on Amazon, the Commission departed from license

⁵ More specifically, Amazon asked the Commission to “remove the requirement that Amazon’s ‘favorable’ or ‘qualified favorable’ finding from the ITU explicitly indicate that the ITU considered the joint effect of Kuiper’s ITU filings.” Modification Request at 3.

⁶ SES Comments at 5.

⁷ Response of Space Exploration Holdings, LLC, IBFS File Nos. SAT-MOD-20210806-00095, SAT-MOD-20200417-00037, at 4 (filed Sept. 30, 2021) (“SpaceX Reply Comments”).

⁸ See *Space Exploration Holdings, LLC Request for Modification of the Authorization for the SpaceX NGSO Satellite System*, 34 FCC Rcd 12307, ¶ 11 (IB 2019) (“*SpaceX MOD 2 Authorization*”) (rejecting this argument from SES).

⁹ See *Kuiper System Authorization*, ¶ 27 (rejecting this argument from SES).

¹⁰ See *Space Exploration Holdings, LLC, Request for Modification of the Authorization for the SpaceX NGSO Satellite System*, Order and Authorization and Order on Reconsideration, 36 FCC Rcd 7995, ¶ 34 (2021) (“*SpaceX MOD 3 Authorization*”) (rejecting this argument).

¹¹ See SES Comments at 4-5.

¹² See 5 U.S.C. § 706(2)(A) (providing that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); see *ANR Storage Co. v. Fed. Energy Regul. Comm’n*, 904 F.3d 1020, 1025 (D.C. Cir. 2018) (requiring the FEC to “provide some reasonable justification for any adverse treatment relative to similarly situated competitors”); see also *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34 (1st Cir. 1989).

conditions placed on NGSO FSS operators both before¹³ and after¹⁴ the grant of Amazon’s license. It has never explained the reason for Amazon’s difference in treatment, nor has any party in this proceeding supplied one. To maintain this condition without explanation or reason would be arbitrary and capricious.¹⁵

Maintaining Condition 60 would also conflict with the Commission’s rules and precedent. As the Commission reiterated less than two weeks ago in a brief before the D.C. Circuit, echoing that Court’s precedents, “it is elementary that an agency must adhere to its own rules and regulations.”¹⁶ In rejecting a similar attempt to impose requirements beyond what its rules for measuring compliance with the ITU’s power limits require, the Commission explained:

Section 25.146 establishes a straightforward two-step process for establishing compliance with the ITU’s power limits: (1) a satellite operator certifies its compliance, *see* 47 C.F.R. § 25.146(a)(2); and (2) the operator subsequently confirms its compliance by obtaining a “favorable” or “qualified favorable” finding from the ITU Radiocommunication Bureau, *see id.* § 25.146(c). The Commission made clear that this process would *not* include any separate compliance review by the FCC or its staff. *See 2017 Order*, 32 FCC Rcd. at 7822, ¶ 41.¹⁷

Condition 60, however, goes beyond Section 25.146(c) by requiring Amazon to submit a “favorable” or “qualified favorable” ITU finding that *also* “explicitly indicate[s] that the joint effect of Kuiper’s ITU filings associated with its constellation was taken into account when

¹³ *See WorldVu Satellites Limited, Petition for a Declaratory Ruling Granting Access to the U.S. Market for the OneWeb NGSO FSS System*, Order and Declaratory Ruling, 32 FCC Rcd 5366, ¶ 24(d) (2017) (“*OneWeb Authorization*”); *O3b Limited, Request for Modification of U.S. Market Access for O3b Limited’s Non-Geostationary Satellite Orbit System in the Fixed-Satellite Service and in the Mobile-Satellite Service*, Order and Declaratory Ruling, 33 FCC Rcd 5508, ¶ 48 (2018) (“*O3b Authorization*”).

¹⁴ *SpaceX MOD 3 Authorization*, ¶ 97(p).

¹⁵ *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005).

¹⁶ Brief for Respondents at 47, *Viasat v. FCC*, No. 21-1123 (D.C. Cir. Sept. 21, 2021) (“FCC SpaceX Brief”) (citing *AT&T Corp. v. FCC*, 448 F.3d 426, 434 (D.C. Cir. 2006) (*quoting Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986))); *see also Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) (An agency “is bound by its own regulations.”).

¹⁷ FCC SpaceX Brief at 46.

verifying compliance with the applicable EPFD limits.”¹⁸ This condition ignores the fact that the ITU’s rules include no such requirement and, as SES acknowledges, “existing ITU procedures . . . do not comprehensively evaluate an NGSO system that relies on multiple ITU filings.”¹⁹ Presumably, if Amazon were to submit a “favorable” or “qualified favorable” finding from the ITU without an explicit “joint effect” statement from the ITU, the FCC would reject Amazon’s submittal. That rejection would be contrary to the FCC’s own rules, which contain no such requirement.

While SES acknowledges the APA issues with maintaining Condition 60, it proposes an alternative condition: that Amazon (and other NGSO applicants) supply interested parties with (1) “the data used as input to the ITU-approved validation software to demonstrate compliance with applicable [EPFD] limits”;²⁰ (2) “the EPFD results it obtained by running the ITU software”; and (3) “confirmation that the EPFD input data files and results reflect the operations of its complete system pursuant to all ITU filings associated with its NGSO satellite constellation.”²¹ SES states that its proposed condition “will ensure that both GSO operators and other NGSO operators can independently confirm whether an NGSO applicant’s representations of its system’s compliance with the ITU’s single-entry EPFD limits are accurate.”²² In other words, rather than simply allowing the ITU to apply and enforce its own EPFD rules, as the Commission intended in

¹⁸ *Kuiper System Authorization*, ¶ 26.

¹⁹ SES Comments at 6.

²⁰ We note that this element of SES’s proposed condition is particularly unnecessary. Amazon’s license already requires that it “make available to any requesting party the data used as input to the ITU approved validation software to demonstrate compliance with applicable EPFD limits.” *Kuiper System Authorization*, ¶ 61. Further, the ITU typically makes this information publicly available. *EPFD Data and EPFD Examination Results*, ITU, <https://www.itu.int/en/ITU-R/space/Pages/epfdData.aspx> (last visited Oct. 5, 2021) (publishing the inputs and results of the ITU’s EPFD analysis).

²¹ SES Comments at 6.

²² *Id.*

establishing Section 25.146, SES's proposal would add the unnecessary and burdensome step of requiring Amazon and other NGSO operators to justify and defend their compliance with the ITU's EPFD limits whenever a third party seeks to challenge them.

This proposal would exacerbate the APA problems, not cure them. *First*, imposing the new condition on Amazon alone—without reason or explanation for the difference in treatment—would raise the same issues of arbitrary and capricious decision-making that Condition 60 does.²³

Second, while SES asks the Commission to impose this condition on all NGSO system operators—including itself—it fails to explain how the Commission could impose such a condition on those licensees in this proceeding. Whatever the merits of SES's proposal, this adjudicatory proceeding is not a proper forum for the Commission to adopt it as a rule that would apply both retroactively and to parties not participating in this proceeding.

Third, SES's condition would be contrary to the Commission's "own rules and regulations."²⁴ Just as Section 25.146(c) does not allow the Commission to second-guess the ITU's EPFD findings, it does not allow anyone else to do so, either. Thus, SES's proposed condition, which would deputize third parties "to mandate their own version of EPFD analysis and require not only that NGSO operators comply, but that they provide confirming evidence for analysis by GSO operators,"²⁵ is entirely inconsistent with the Commission's rules.

Simply adhering to the Commission's rules is sound policy. SES's proposed condition would place the public interest in the hands of private companies, who should not act as gatekeepers of their potential competitors' regulatory compliance. Indeed, the FCC has already

²³ See 5 U.S.C. § 706(2)(A); *ANR Storage Co.*, 904 F.3d at 1025; see also *Motor Vehicle Mfrs.*, 463 U.S. at 43; *Shaw's Supermarkets, Inc.*, 884 F.2d at 34.

²⁴ FCC SpaceX Brief at 47; see also *Erie Boulevard Hydropower, LP*, 878 F.3d at 269.

²⁵ SpaceX Reply Comments at 4.

explicitly rejected a similar request from SES. In response to Amazon’s application for its NGSO satellite constellation, SES requested that it “be allowed to view and verify [EPFD input data] prior to the initiation of Kuiper service.”²⁶ The Commission declined to impose such a condition, affirming that “there is no legal requirement that third parties evaluate the sufficiency of EPFD data inputs prior to the deployment of an NGSO system, and we believe that such a requirement would unfairly prejudice Kuiper’s timely implementation of its new system.”²⁷ The same remains true today, and SES has provided no new information that should cause the Commission to reconsider that prior decision. As the Commission has repeatedly held, “the ITU is in the best position to determine whether [an operator has] appropriately relied on multiple ITU filings in its analysis.”²⁸

For the foregoing reasons, Amazon respectfully requests that the Commission reject SES’s proposed alternative condition and modify Condition 60 of the *Kuiper System Authorization* to conform with the FCC’s implementing rule and license conditions applied to similarly situated operators.

Respectfully submitted,

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²⁶ *Kuiper System Authorization*, ¶ 27.

²⁷ *Id.* See also *SpaceX MOD 2 Authorization*, ¶ 11.

²⁸ *SpaceX MOD 3 Authorization*, ¶ 34.

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th of October, 2021, a copy of the foregoing pleading was served by first-class mail upon:

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