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Federal Communications Commission  
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August 24, 2006

**BY HAND DELIVERY**

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: *Ex Parte Presentation, File No. SAT-PDR-20020425-00071*

Dear Ms. Dortch:

In a companion proceeding, the Commission recently suggested that the above referenced petition filed by SES Americom, Inc. ("SES") in this proceeding – the very first market access application by a foreign-licensed, short-spaced or "tweener" DBS system – might be ripe for grant if it is complete.<sup>1</sup> The application is *not* complete, however. Until it is complete, the Commission should not grant it. If and when it is completed, moreover, the Commission and not the International Bureau must evaluate it.

SES seeks market access to provide DBS service into the United States from a short-spaced orbital location at 105.5° W.L. under a license issued by Gibraltar. The Commission recently issued a notice of proposed rulemaking seeking comment on rules for processing such applications, in which it indicated that it may process such "tweener" applications "provided that they are complete and consistent with the public interest, convenience, and necessity."<sup>2</sup> In this regard, the Commission cited two rules that bear directly on the technical showing that must be made by a tweener applicant to demonstrate its impact on other DBS systems.<sup>3</sup> As discussed below, SES has failed to

<sup>1</sup> *Amendment of the Commission's Policies and Rules for Processing Applications in the Direct Broadcast Satellite Service*, FCC 06-120, at ¶ 21 (rel. Aug. 18, 2006) ("*Tweener NPRM*")

<sup>2</sup> *Id.*

<sup>3</sup> *See id.* at ¶ 29 (citing 47 C.F.R. §§ 25.114(d)(13)(ii), and 25.148(f)). The Commission also discussed Section 25.114(d)(13)(i), which requires that an applicant whose DBS system parameters differ from the ITU's Region 2 Plan to provide a technical showing sufficient to demonstrate that "the proposed system could operate satisfactorily if all assignments in the [Region 2 Plan] were implemented." But

make the required showing, and therefore its application cannot be granted. Moreover, even if this were not the case, this petition raises novel matters of first impression and so could only be granted, if at all, by the full Commission.

***1. SES's Application is Incomplete.***

Section 25.114(b) of the Commission's rules provides that an application for satellite authorization "must constitute a concrete proposal for Commission evaluation."<sup>4</sup> Thus, each "tweener" proponent seeking market access has the burden to demonstrate that its system *as proposed* – not as it might be revised in the future as a result of coordination or to conform to rules subsequently adopted by the Commission – could operate harmoniously with DBS systems already in the Region 2 Plan.<sup>5</sup>

More specifically, Section 25.114(d)(13)(ii) of the Commission's rules requires "[a]nalysis of the proposed [DBS] system with respect to the limits of Annex 1 to Appendices 30 and 30A" of the ITU Radio Regulations. In the *Tweener NPRM*, the Commission recognized that this rule is "intended to demonstrate how the proposed system will affect operating DBS systems and those systems that are subject to pending Region 2 modification proposals."<sup>6</sup> Similarly, Section 25.148(f) requires that DBS operations must be in accordance with the sharing and technical characteristics of the Region 2 Plan, although variations may be permitted "with adequate technical showing" if a request for modification of the Plan has been filed.

As the Commission previously recognized in this proceeding, the modification proposed by SES "exceeds the threshold change in overall equivalent protection margin ('delta-OEPM') that triggers the agreement-seeking process under the ITU Appendix 30, Annex 1 for several affected satellite networks, including several operational U.S. DBS networks."<sup>7</sup> Although the Commission specifically noted this apparent conflict with the requirements of Section 25.148(f) and requested that SES indicate whether it had resolved interference concerns by reaching operating arrangements with adjacent satellite

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as the Commission explained in the *Tweener NPRM*, "[t]his showing is intended to demonstrate that the proposed system will meet its performance objectives given the Region 2 Plan assignments." *Id.*

<sup>4</sup> 47 C.F.R. § 25.114(b).

<sup>5</sup> Indeed, the Commission dismissed one "tweener" application as defective for failure to make this very showing. See Letter to Todd M. Stansbury from Fern J. Jarmulnek, 20 FCC Rcd. 3451 (rel. Feb. 17, 2005).

<sup>6</sup> *Tweener NPRM* at ¶ 29.

<sup>7</sup> See letter to Nancy J. Eskenazi from Fern J. Jarmulnek, File No. SAT-PDR-20020425-00071, at 3 (Dec. 21, 2005).

Marlene H. Dortch  
August 24, 2006  
Page 3 of 4

operators, SES provided neither an analysis to refute the Commission's conclusion nor evidence of operating arrangements in its responsive amendment.<sup>8</sup>

Without such evidence, SES's application does not constitute a "concrete proposal" that the Commission can evaluate. Accordingly, the application is neither complete nor consistent with the public interest, and therefore may not be granted.

## 2. *The Bureau Cannot Grant SES's Application.*

Setting aside the issue of completeness, the International Bureau lacks sufficient authority to grant SES's application, as it implicates novel issues of first impression that are appropriate only for resolution by the full Commission in the first instance. Pursuant to Section 0.5(c), the Commission has delegated authority to its staff "to act on matters which are minor or routine or settled in nature."<sup>9</sup> The first-ever grant of market access to foreign-licensed DBS systems operating at less than nine degrees from existing U.S. operators can hardly be characterized as minor or routine, and the very fact that a proceeding is underway to determine rules for processing such applications demonstrates that the surrounding issues are anything but settled. In fact, the Commission imposed a freeze on DBS applications due to uncertainty in the rules for processing such applications arising from the D.C. Circuit's decision vacating those rules.<sup>10</sup> The same policy underlying that freeze – *i.e.*, lack of processing rules – applies to processing SES's application as well, and deferral is therefore warranted for the same reasons.

Indeed, the *Tweener NPRM* appears to reach this same conclusion, stating that, where ITU coordination triggers have been exceeded but agreement has not been reached with all affected U.S. DBS operators, "the Commission could also proceed with public notice and review, although it could not take action on the application until agreements are reached."<sup>11</sup> Under these circumstances, and absent coordination with all affected U.S. DBS operators, the Bureau has no authority to grant the pending application.<sup>12</sup>

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<sup>8</sup> See File No. SAT-AMD-20060120-00006, Application Narrative at p. 3 (arguing that commencement of agreement seeking process is sufficient to justify grant).

<sup>9</sup> 47 C.F.R. § 0.5(c). See also *id.* at § 0.261(b) (authority delegated to Chief, International Bureau, does not include acting on any application that presents new or novel arguments not previously considered by the Commission or cannot be resolved under outstanding precedents and guidelines).

<sup>10</sup> See "Direct Broadcast Satellite (DBS) Service Auction Nullified," 20 FCC Rcd. 20618 (2005) (citing *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145 (D.C. Cir. 2005)).

<sup>11</sup> *Tweener NPRM* at ¶ 40.

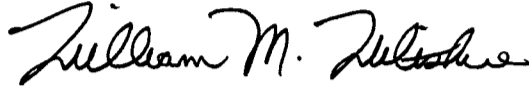
<sup>12</sup> To the extent SES contends that the Commission has granted market access subject to later coordination, its argument misapprehends the precedent. While the Commission has been willing to grant market access where *international* coordination has not yet been completed, it has consistently done so only where coordination *with all affected U.S. systems* was completed in advance. See, e.g.,

Marlene H. Dortch  
August 24, 2006  
Page 4 of 4

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Because SES has failed to submit all materials necessary to satisfy all applicable Commission rules, its petition for declaratory ruling cannot be granted at this time. Only after SES has remedied that (and any other) shortcoming can its petition be deemed complete and therefore ripe for consideration on the merits by the full Commission, which then would have all the information necessary to set the precedent for tweener market entry.

Sincerely yours,



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cc: Fred Campbell  
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*Horizons Satellite LLC*, 18 FCC Rcd. 24745, 24748-50 (Int'l Bur. 2003) (granting application where coordination complete with all affected U.S. systems, though international dispute would be left to ITU coordination procedures). Similarly here, in the absence of rules or Commission-level precedent specifying conditions for market access by "tweener" systems, such applications should not be granted unless and until coordination with all affected U.S. systems has been concluded.