



SES S.A. (hereafter referred to as “SES”), appreciates the opportunity to provide Ofcom with its comments on the proposed changes to the Procedures and should be pleased to address any point noted in this Response in more detail at Ofcom’s request.

On behalf of its various UK interests including wholly-owned subsidiaries SES ASTRA UK, Ltd, SES Satellites (Gibraltar) Ltd. and SES Satellite Leasing Ltd., SES welcomes the opportunity to participate in this consultation. SES also holds an approximately 44 percent interest in O3b Limited, a satellite service provider located in Jersey, Channel Islands. In implementing these procedures, we very much recommend that Ofcom be mindful that the Procedures will need to “flow down” to and be implemented in some form by the regulators dealing with filings from operators established in the Overseas Territories, the Channel Islands and the Isle of Man.

SES is a provider of fixed satellite services in Europe, the Americas, Asia and Africa reaching more than 99 percent of the world’s population. Several SES satellites are located in UK<sup>1</sup> orbital positions, many are launched pursuant to UK<sup>2</sup> launch authority with the UK as the launching state, many have UK manufactured satellite components, and many are insured by UK entities. For more than a decade, SES has been an important provider of a wide variety of essential satellite services to customers in the UK including for direct-to-home services, satellite news gathering, private networks, broadband services, and more. In particular approximately sixteen (16) million UK households receive television services via SES spacecraft either directly through direct-to-home services or via feeds to cable head ends.

## **General Comments**

SES believes that Ofcom’s management of satellite filings should be unambiguous and limited to that which is essential to achieve the regulatory goals. Ofcom’s Procedures should protect existing UK satellite assets; attract investment; facilitate coordination of satellite networks; reduce the administrative burden on Ofcom and satellite operators and, where appropriate, deter ‘paper’ filings for the retention of ITU priority and rights to orbital resources.

SES is concerned that some of the proposals will have a detrimental effect on investment in the UK satellite industry, and will jeopardise the UK’s reputation for regulatory best practices. We address our concerns below and in some cases propose alternative language intended to better meet the stated Ofcom objectives.

Ofcom’s impact assessment indicates that the amended Procedures will provide clarity and certainty for operators and the changes will help Ofcom determine whether or not a project is on-track for the network or system to be brought into use. SES believes that the additional milestones and deadlines are unnecessary, overly burdensome and will not provide more certainty that a project is progressing than do the current Procedures. Ofcom’s regulatory activities are to be “targeted only at cases in

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<sup>1</sup> Including orbital positions filed with the ITU at the request of the Gibraltar Regulatory Authority on behalf of SES Satellites (Gibraltar) Ltd.

<sup>2</sup> Including launch and operational authority issued by Gibraltar pursuant to The Outer Space Act 1986 (Gibraltar) Order 1996 and under the authority of the UK Space Agency.

which action is needed”<sup>3</sup> and Ofcom has a duty to review their functions to ensure that regulation by Ofcom does not involve the “imposition of burdens which are unnecessary”<sup>4</sup>. The proposed changes to the Procedures meet neither of these duties and objectives. The satellite industry already has a level of self-regulation and the current Procedures already provide an effective mechanism to govern the management of filings. The level of detail and the extensive nature of the milestones, particularly those requiring commercial information which may only be available from operators’ customers, imposes unnecessary obligations on a UK operator. Much of this information is unnecessary for Ofcom to be able to meet its regulatory requirements. The implementation of these milestones will place UK operators on an unlevel playing field and will be contrary therefore to the current UK growth agenda.

### ***Timing of the Consultation.***

The timing of the Consultation immediately prior to the International Telecommunication Union (“ITU”) World Radio Conference-2015 (WRC-15) is inopportune and seems to encourage duplication of effort by, inefficiency and more administration for, both Ofcom and satellite operators. Rather than improving clarity and regulatory certainty as intended by Ofcom, the Consultation and any possible resulting rules create further regulatory uncertainty. This is particularly the case because many of the issues which this Consultation addresses are on the agenda for the upcoming WRC scheduled for November 2015.

Following WRC-15, Ofcom will need to implement the decisions taken there including some that will almost certainly directly affect the outcomes of this Consultation. As a result, we recommend that Ofcom delay this Consultation in order to take into account any changes in the ITU Radio Regulations resulting from WRC-15. We further recommend that stakeholders should be consulted by Ofcom concerning the proposed changes to the Procedures after WRC-15. In the end, a single, consolidated consultation related to updated Procedures is more efficient, less burdensome and more transparent for all parties involved, particularly when the ITU Radio Regulations upon which many of the Procedures will be based may soon be amended.

### ***Proposed amendments.***

It is appreciated that, as Ofcom staff explained during the workshop on 10 June, Ofcom will implement the Procedures reasonably. However, nowhere in the proposed amendments to the Procedures is this concept stated. SES therefore proposes that a general statement be included in the Procedures that where reasonable Ofcom will take due account of the commercial and financial reality of the commercial satellite sector. SES would propose the following wording for Ofcom’s consideration:

*(to be inserted in to the Procedures between paragraphs 5.2 and 5.3)*

*“Ofcom shall implement the requirements set out in this Section 5 with due regard to its regulatory duties to ensure that its regulatory activities are*

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<sup>3</sup> Section 3(3)(a) Communications Act 2003.

<sup>4</sup> Section 6(1) Communications Act 2003.

*implemented in a manner that is transparent, accountable, proportionate, and targeted only at cases in which action is needed in accordance with its statutory duties set out in Section 3. Ofcom shall apply these due diligence requirements in accordance with these duties and taking into account the commercial, financial and technical feasibility of imposing a requirement while having regard to the purpose of these requirements set out in Section 5.1., and the intention of the ITU Radio Regulations. Ofcom shall also take into account technological developments which may allow milestones to be met in shorter periods than those specified in this section 5.”*

## **Legal status of the Procedures.**

The Procedures set out the criteria that must be followed by applicants seeking to submit an application through Ofcom for the management and processing of satellite filings. However, the legal status of the Procedures is not described.

In the event of a dispute, an applicant or operator will be assessed against its compliance with the requirements and obligations as set out in the Procedures. However, the Procedures are not clear concerning what is a recommendation versus what is a requirement. As a result, it would be difficult for operators to ascertain when this lack of clarity may lead to an enforcement action for noncompliance with all or certain of the Procedures. There are examples, including a Judicial Review<sup>5</sup> in which a court interpreted the Procedures as mandatory requirements rather than recommendations and an operator was assessed a penalty (including the suspension of a filing).

SES therefore recommends that Ofcom expressly clarifies the legal status of the Procedures and identifies the sections of the Procedures which have a legally binding nature or otherwise.

*Ensuring optimal use and efficient management of spectrum under the Communications Act 2003(Section 3(2)(a)) and the Wireless Telegraphy Act 2006 (Section 3(2)(a)) .*

SES appreciates that Ofcom has discretion to exercise judgment as to the optimal use of spectrum. To ensure that the best decisions are made concerning the optimal use and value of spectrum, SES urges Ofcom to consult fully with industry and other interested players (*e.g.*, the public value of spectrum). SES believes that this is of particular importance if Ofcom seeks to effect changes to the UK Table of Frequency Allocations.

## **Consultation Questions**

### **Question 1**

**Do you have any comments on our proposals to:**

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<sup>5</sup> ICO Satellite Ltd, R (on the application of) v The Office of Communications [2010] EWHC 2010 (Admin).

- **include additional milestones to provide evidence that the satellite project is on-going and that its frequency assignments will be brought into use within the seven year regulatory period;**
- **clarify what evidence we will accept to demonstrate milestones have been completed; and**
- **set specific deadlines for milestones?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

***Comments:***

It is understood that Ofcom seeks to minimise the reservation of orbital and spectrum resources where there is no actual intended use. However, the new milestones would impose burdensome reporting requirements that have no relevance to the satisfaction of ITU satellite filing requirements. As a result, these new milestones are unnecessary, do not add efficiency or clarity, do not enhance the existing Procedures and would therefore not serve the public interest. In short, SES believes that the existing milestones are sufficient.

In the event that any additional milestones are implemented, SES recommends that any additional milestones must be applied pragmatically, reasonably and transparently on a case-by-case basis taking into consideration the commercial, technical and financial realities of the satellite industry while at the same time meeting the intention of the Procedures and the ITU Radio Regulations. As noted in our general comments, SES above suggests for inclusion in the Procedures specific language addressing this point.

SES encourages implementation of flexibility within the Procedures which enables operators to meet the milestones by potentially more efficient or effective means not envisaged at the start of a project. For example, if a milestone sets out the timescale for the construction of a new satellite to bring a satellite network into use, there should be reasonable flexibility to allow for these plans to change and for the milestones to be met, for example, by the use of efficient fleet management to bring the network into use. This is particularly the case where there may be construction or launch delays that are beyond the control of the operator. A satellite operator should be permitted to use an available in-orbit satellite to commence use of spectrum. Such an action by an operator meets the objectives of the milestones and ensures the efficient use of in-orbit resources. Use of an existing satellite further allows operators to make efficient use of orbital resources enabling the early and more cost-effective development of a business case. SES believes that Ofcom should be less concerned about whether a new satellite is constructed and launched to the notified UK orbital position and more concerned that the orbital position is brought-into-use and can more promptly begin providing services to customers.

SES proposes that such flexibility, as described in the general comments, be drafted expressly into the Procedures.

The risks specific to the space industry should also be factored into Ofcom's discretion in relation to deadlines for milestones. In the event of a launch or construction delay through no fault of an operator which is unlikely to adversely affect the ultimate bringing-into-use of the satellite network, Ofcom should allow a milestone to be reasonably extended.

More particularly, we have the following comments:

## **Section 5.5**

### **Table 1 Due Diligence Requirements**

**Stage 1 -** Please see our comments in response to Question 7.

SES recommends that evidence of financial ability include evidence showing the ability to access finance by means of parental financing, a parental guarantee or other means generally accepted by the UK banking and financial investment community.

**Stage 2 -** The proposed wording requires the applicant to provide a “*list of those identified administrations and networks with which coordination will be required*”.

It is important that Ofcom’s rules and parameters are clear to those that must abide by them. Although it is possible for applicants to forecast what coordinations will be required for the CR/C, definitive requirements will only be known when the CR/C is published by the ITU-BR as additional networks may be published or others may be suppressed. The definitive requirements will, by default, be different from the forecasted requirements. Therefore SES requests Ofcom to elaborate on the intended use of such list and its planned approach where coordinations cannot be identified in advance.

It is also not clear what is meant in item 3. by “*with which coordination will be required*”. SES recommends that Ofcom specify its intent by establishing clear parameters to be considered by an applicant in relation to the requirement for coordination under the provisions of Article 9 of the ITU Radio Regulations. Would Ofcom, for example, consider that the generation of the coordination requirements using the Appendix 8 software (“GIBC”) is sufficient to meet this requirement? As such, further clarity is required from Ofcom.

**Stage 3.1 -** This requires certain information to be provided to Ofcom prior to the submission of the CR/C. Given the information required at Stage 3, SES believes that this Stage erroneously refers to “Complete before the submission of a request for coordination and not later than”, and believes it should read “Complete before the submission of a notification and not later than”. The comments below are made as if the text for Stage 3.1 would read “Complete before the submission of a notification and not later than”.

SES notes that the point in relation to reasonable delays applies to all the milestone requirements.

**Milestone 1** – *signed contract for the construction of the satellite, or letter of commitment that an in-orbit satellite will be placed in the relevant orbital*

*location - not later than 36 months before the end of the seven year regulatory period.*

It is important that any contract for the construction of a satellite be binding upon the operator.

Reasonable flexibility is required here to ensure that any construction delays beyond the control of the satellite operator can be addressed pragmatically with Ofcom. A pragmatic approach is also required as commercial needs may require commencement of service more quickly than required by the milestones and sooner than construction of a new satellite allows. As a result, an operational, in-orbit satellite may be the best option for commencement of service and bringing into use of the frequencies. Such flexibility enables a satellite operator to commence important services thereby providing an important public service and consumer benefit.

In other circumstances, a shorter period than 36 months may be appropriate as the technological advances in satellite manufacturing could lead to shorter construction periods and different types of satellites have differing construction lead times. For example, some smaller, low Earth orbit satellites have shorter construction times than geostationary satellites. It would seem appropriate to set milestones suitable and adaptable to a particular technology and related technological advancements.

***Milestone 2*** – *A copy of (extracts from) the CDR documentation of the satellite being constructed or of the appropriate in-orbit satellite- 24 months before the end of the seven year regulatory period; or, in the case where an in-orbit satellite is to be used, no later than 12 months before notification of assignments of the network is made to the ITU.*

SES notes that often the CDR documentation is governed by applicable export control laws such as the U.S. International Traffic in Arms Regulations and the Export Administration Regulations. As a result, export may be limited or only permitted pursuant to a license from the relevant authority.

***Milestone 4*** – *Earth station contract signed - not later than 24 months before the end of the seven year regulatory period.*

It is not clear to SES whether this Milestone refers to telemetry, tracking and control (“TT&C”) or payload communications Earth stations. Regardless, it is important for Ofcom to note that contracts for specific Earth stations may not exist for various reasons. For example, in the case of TT&C uplink the Earth station may already be owned by the operator itself and no contract is needed. In the case of other services, the Earth Station would typically be part of the customer’s network and would not be something with which the satellite operator would be associated.

Importantly, it is further unclear to SES why Ofcom finds this Earth station requirement necessary. Typically, if a satellite operator can afford to construct and launch FSS or BSS satellites, the Earth station requirements are not something that will be ignored or that would typically cause a project to fail. Accordingly, SES recommends that there should be no such requirement for BSS and FSS satellites.

***Milestone 5 - Authorisations (e.g., a licence) for Earth station feeder-links and TT&C communications issued - not later than 12 months before the launch of the satellite network, or not later than 12 months before the end of the seven year regulatory period.***

It is unclear what specific authorisations are meant under this Milestone and why they are needed. Accordingly, we request that Ofcom clarify the purpose and specific requirements of this Milestone. Is Ofcom requesting the applicant to provide all authorisations from all national administrations within its footprint? In certain jurisdictions, the customer rather than the satellite operator would be the party responsible for obtaining such authorisations. Furthermore, given the complications and inherent difficulties of working with the national regulators, severe difficulties are foreseen with linking the Milestone with such national authorisations and the submission of the notification. In fact, regulations of other national administrations sometimes contain conflicting requirements (e.g., some administrations require published evidence of a published, notified network prior to accepting an application for an authorisation).

Importantly, this Milestone seems unduly burdensome and unnecessary to the general purpose of ensuring that a satellite is constructed and launched. Rather than imposing unnecessary requirements, we recommend that Ofcom take a more streamlined approach, under which Ofcom implements only those requirements that are essential to ensuring that the promised satellite plan is fully implemented. Milestone 5 does not seem to serve that purpose and creates only additional administrative burden and pressure for Ofcom and the applicants.

**Stage 3.3 -** The requirement for providing information on the satellite network operator's licence application to the administration and the transponder lease contracts are addressed in our response to *Question 6*.

## **Question 2**

**Do you have any comments on our proposals to clarify the information required when there is a change to the business plan?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

## **Comments:**

SES suggests that the meaning of the phrase “*material change*” when referring to the project plan or the operation of a satellite network is too ambiguous. What may be considered to be a reasonable commercial change to the project plan by an operator may be classified by Ofcom as a material change. In addition, in such scenario, what would be the consequence if such change is not notified to Ofcom “*immediately*”? There should be no issue if this is simply notified to Ofcom at the next yearly progress report; which would also minimise Ofcom’s administration costs.

SES suggests that Ofcom clearly define the phrase “*material change*”. We recommend that a suitable definition would be: “any anomalies or factors which cause a change to the date of bringing-into-use or a change to the date of the commencement of services”.

Finally, SES reminds Ofcom that business plans frequently change during the seven (7) year period as technology and consumer needs also develop and change. As a result, applicants may from time to time adjust their business plans to reflect the changing market and commercial demand. These changes do not necessarily indicate misbehaviour by the applicant but rather an effort by an applicant to establish a viable business.

## **Question 3**

**Do you have any comments on our proposed changes to the reporting requirements illustrated in paragraphs 4.18 - 4.25 above?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

## **Comments:**

SES supports Ofcom’s revised requirement for consolidated yearly reports and reminders, as needed, sent by Ofcom offering a further thirty (30) days for the applicant to submit the report. We reiterate the point made in our general comments above that these Procedures must be flowed down to the regulators dealing with filings from applicants established in Overseas Territories, the Channel Islands and the Isle of Man.

We also reiterate our response to Question 2 above concerning the need to define “*material change*.”

In relation to paragraph 4.23 and the information to be included in the first yearly report after a satellite network has been brought into use:

- Much of the information to be provided is the same or similar to information to be provided to the UK Space Agency if it is to be the “Launching State” for the satellite; the Procedures should clarify what if any information is shared between the UK Space Agency and Ofcom and how it will be used;



- It is important that the requirement as to “*what operational or testing activities have been undertaken to show that the satellite is capable of operating on the frequencies notified or brought into use*” should be amended to reflect the wording in the ITU Radio Regulations as follows: that the satellite is:

*“capable of transmitting or receiving that frequency assignment that has been deployed and maintained at the notified orbital position.”*

In relation to paragraph 4.24 and what information is to be provided for every yearly report (including the first report after a filing has been brought-into-use):

- Ofcom requires information, among others, as to:
  - o An assessment of the operational health and status of the spacecraft;
  - o The services being offered on each transponder and explaining any activity changes;
  - o The frequency bands used by each satellite beam and its geographical coverage; and
  - o Information related to the ground segment.

SES questions the need for annual reporting of such extensive information. This information seems unnecessary and represents a disproportionate level of detail to what Ofcom requires to meet its regulatory requirements to ensure that the system continues to operate in accordance with the underlying ITU filings. SES suggests that the existing Procedures are more than sufficient to satisfy this requirement and urges Ofcom to streamline the requirements to the minimum needed to achieve the required regulatory oversight. The services provided on each transponder for example are at the commercial and financial discretion of the applicant/operator. The ground segment is dependent on customer requirements rather than the operator. It is unclear what public benefit would be gained by the detailed reporting required under this provision.

Ofcom specifically states that the:

*“purpose of these due diligence requirements is to ensure that filings are only submitted to the ITU where there is a reasonable prospect that the proposed network will be brought into operation within the relevant time period. It also serves to address the problem of reservation of orbit and spectrum capacity without actual use”.*

What Ofcom is proposing is onerous and inconsistent with what other national regulators require to achieve a similar purpose. SES suggests that a declaration indicating whether and which transponders are operational should be sufficient to achieve Ofcom’s regulatory goal. Information concerning health of the spacecraft, services, ground segment and footprints are unnecessary for Ofcom to confirm whether the purpose of the due diligence requirements is met.

## Question 4

**Do you have any comments on our proposal that a request for notification under No. 11.41 must be supported by evidence of efforts to coordinate with the other operators(s)/administrations(s)?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

***Comments:***

We believe that this is a reasonable approach as long as the “*relevant information*” and “*evidence*” “*as Ofcom may require*” is reasonably required relative to what Ofcom seeks to show and achieve.

**Question 5**

**Do you have any comments on our proposal to clarify the Procedures to set out that we may, at our discretion, allow UK satellite networks with junior filings to be notified to the ITU without requiring completion of all frequency coordination with UK networks having senior filings, and the conditions on which we would proceed with notification in such cases?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

***Comments:***

This seems to be a reasonable proposal, because it aims to align the UK domestic procedure with the ITU international procedure under No. 11.41 of the ITU Radio Regulations. As long as the rule is implemented in accordance with the standards set out in the ITU Radio Regulations, SES supports this proposal.

**Question 6**

**Do you have any comments on our proposal to change the text of the Procedures to clarify that, in order to make the declaration of bringing into use for GSO networks, we may require a range of information from the operator, including that set out in CR/343?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

***Comments:***

The range and type of information required by Ofcom is onerous for operators, particularly considering that ITU Circular Letter CR/343 of January 2013 has met with much industry

criticism. Ofcom requires all the information noted in CR/343 to be provided and requests additional information.

It is appreciated that Ofcom has some discretion as a specialist regulator but it is unclear as to what purpose Ofcom requires:

- The satellite network operator's licence application to the administration; and
- the transponder lease contracts.

It is further unclear as to what is meant by the "*satellite network operator's licence application*". For example, does this refer to the landing rights or the launch and operations licence (from the UK Space Agency or other UK regulatory body such as the Gibraltar Regulatory Authority or other body)? We recommend that this be clarified. Obtaining such licences is clearly the responsibility of the operator and should have no relationship to the bringing-into-use of the spectrum except to the extent that the satellite does not timely arrive at the notified orbital position.

Ofcom should also be mindful that in some jurisdictions there is no licensing requirement or licensing is only done after the UK licenses are completed and as such may very well not be in place. Certain concessions also contain confidential information and may not be able to be shared with Ofcom without the express permission of the relevant authority.

The transponder lease contracts are the commercial responsibility of the operator. It is unclear as to why Ofcom requires this information, particularly in addition to all the other detailed information provided to it. We recommend that Ofcom explain the purpose of such information and why it would support the satisfaction of the CR/343 requirements. Instead, this requirement seems unduly administratively burdensome and would require Ofcom involvement where there is no obvious purpose or benefit.

More specifically, SES wishes to express concern that:

- Providing Ofcom with copies of such contracts may breach customer confidentiality agreements due to the commercially sensitive nature of such contracts;
- disclosure may inadvertently disclose competitively sensitive information to the public;
- such contracts may not be in place until the operator has obtained market access and requiring copies of such contracts at this stage may actually, for a non-ITU reason, after substantial investment and planning, hinder an operator from legitimately bringing-a-network into use and protecting a UK authorised orbital position; and
- this requirement is unnecessary and disproportionate to what Ofcom is seeking to achieve (please see our comments under Question 3).

## Question 7

**Do you have any comments on our proposals that, for non-GSO systems, operators are asked to indicate, at CR/C stage, the minimum number of satellites needed to be deployed in order to provide the intended service to at least the declared**

**minimum quality of service, and that this information (i.e. the minimum number of launched satellites) is used to verify that the system has been brought into use?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

***Comments:***

This proposal needs to be implemented with some flexibility as the plans and specifications for satellite systems may change as a project develops. Moreover, an applicant may have use or coverage changes. Providing this information at the submission of the API may not be feasible as the network architecture design may not be available at this stage, at least until after the signing of the contract for the construction of the satellite network (Stage 3). The ongoing communications with Ofcom are vital, with Ofcom taking a reasonable and pragmatic stance in relation to the commercial objectives of the applicant.

**Question 8**

**Do you have any comments on our proposal to include provisions in the Procedures for the transfer of an application at API stage, subject to certain conditions being met?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

***Comments:***

SES finds this proposal to be reasonable as it is important to be able to transfer an application at API stage.

**Question 9**

**Do you have any comments on our proposals to set out the requirements on operators and the consequent actions that we may take in cases where assignments are no longer in use?**

**Do you have any comments on how these changes are worded in the proposed revised Procedures?**

***Comments:***

SES finds these proposals reasonable if implemented by Ofcom in an equitable, flexible and reasonable manner as discussed previously in our comments above.