

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

In the Matter of)	
)	
Amendment of Parts 2, 25, and 87 of the Commission's)	
Rules to Implement Decisions from the World)	ET Docket No. 02-305
Radiocommunication Conferences Concerning)	
Frequency Bands Between 28 MHz and 36 GHz and)	
to Otherwise Update the Rules in this Frequency Range)	
)	
Amendment of Parts 2 and 25 of the Commission's)	
Rules to Allocate Spectrum For Government and)	RM-10331
Non-Government Use in the Radionavigation-Satellite)	
Service)	

REPLY COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply comments in connection with the *Notice of Proposed Rulemaking* ("NPRM") commencing this proceeding. As will be discussed below, WCA vigorously opposes the audacious attempt by AirTV Limited ("AirTV") to misuse this proceeding to sneak through a reallocation of the Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") spectrum in the 2535-2655 MHz band without appropriate opportunity for public comment, or due consideration of the harmful interference AirTV's proposed system will cause to terrestrial operations.

The *NPRM* proposes "to delete limited allocations for the fixed-satellite service ("FSS") and the broadcasting-satellite service ("BSS") from the band 2500-2690 MHz in order to remove

allocations that are not compatible with two-way, point-to-multipoint fixed uses.”¹ The Commission recognizes in the *NPRM* both (i) that MDS/ITFS systems are being upgraded to provide, in addition to traditional video programming services, a variety of two-way point-to-multipoint fixed and mobile services (including broadband, high-speed internet access),² and (ii) that “FSS and BSS operations in the band 2500-2690 MHz could affect the reliability of point-to-multipoint channels and low-power consumer response channels.”³ Thus, the Commission proposes “to delete the unused and limited FSS and BSS allocations from the band 2500-2690 MHz in order to remove regulatory uncertainty from this spectrum.”⁴

There has been no opposition whatsoever to the Commission’s proposal to eliminate the FSS allocation from the 2500-2690 MHz band. Nor has there been any opposition to removing the BSS allocation in the 2500-2520/2670-2690 MHz band. That should come as no surprise, as twice over the past two years the Commission has considered proposals for satellite sharing of the 2500-2690 MHz band shared by MDS and ITFS, and has twice concluded that such sharing is neither possible nor necessary given the substantial availability of other spectrum allocated to satellite services.⁵

¹ See *Amendment of Parts 2, 25, and 87 of the Commission’s Rules to Implement Decisions from the World Radiocommunication Conferences Concerning Frequency Bands Between 28 MHz and 36 GHz and to Otherwise Update the Rules in this Frequency Range*, ET Docket No. 02-305, at ¶ 4 (rel. Oct. 7, 2002)(“*NPRM*”).

² See *id.* at ¶ 50.

³ *Id.* at ¶ 52.

⁴ *Id.*

⁵ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, 16 FCC Rcd 596, 624-625 (2001)(“Sharing between terrestrial and satellite systems would present substantial technical challenges in that band and MSS already has access to a significant amount of spectrum below 3 GHz to meet its needs in the foreseeable future.”); *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, 16 FCC Rcd 17222, 17241 (2001).

However, AirTV not only urges the Commission to preserve the BSS allocation for the 2520-2670 MHz band,⁶ but would have the Commission amend the Table of Allocations to substantially expand the nature of the services that can be provided via satellite in that band.⁷ In other words, AirTV is not seeking to maintain the *status quo*, but rather seeks to provide services that are currently prohibited in the 2520-2670 MHz band. For the reasons discussed below, adoption of AirTV's ill-timed filing would violate the Administrative Procedure Act and cause serious harm to the provision of MDS/ITFS services in the 2500-2690 MHz band.

At present, BSS operations in the 2520-2670 MHz band are quite restricted – footnote NG101 to the Table of Frequency Allocations mandates that “[t]he use of the band 2500-2690 MHz by the broadcasting-satellite eservice is limited to domestic and regional systems for community reception of educational television programming and public service information.”⁸ AirTV concedes that the services it contemplates offering – television programming, email and internet access to long-haul commercial airplanes – are not currently permitted within the United States and thus urges the Commission to repeal NG101.⁹

The procedural flaw in AirTV's proposal is evident – *the NPRM proposes eliminating BSS operations in the 2500-2690 MHz band, not expanding their scope*. Agencies must include in a notice of proposed rulemaking “either the terms or substance of the proposed rule or a

⁶ See Comments of AirTV Limited, ET Docket No. 02-305 (filed Feb. 10, 2003) (“AirTV Comments”). AirTV does not explain why it seeks preservation of the BSS allocation for the entire 2520-2690 MHz band when, by its own admission, it is only proposing to utilize the 2535-2655 MHz band for downlink transmissions. Compare AirTV Comments at 2 (conceding that it proposes to utilize only the 2535-2655 MHz band) with *id.* at 7 (requesting preservation of entire 2520-2670 MHz band).

⁷ See *id.* at 8.

⁸ 47 C.F.R. § 2.106, NG101.

⁹ See AirTV Comments at 8.

description of the subjects and issues involved.”¹⁰ Plainly, AirTV’s request that the Commission do precisely the opposite of what it has proposed in the *NPRM* (*i.e.*, expand the scope of the BSS allocation, rather than eliminate it altogether) cannot be deemed a “logical outgrowth” of the Commission’s proposed rule, and must be dismissed for that reason alone.¹¹ While a final rule need not absolutely match the rule proposed (if the record justifies such a change), the Commission cannot shift course if it has not alerted interested parties to the possibility that it might do so.¹²

More importantly, AirTV’s proposal should be rejected because of the substantial harm its implementation could cause to MDS/ITFS operations in the 2520-2670 MHz band. While AirTV claims to have “demonstrated through favorable findings of the ITU-R that it can operate its services over the United States without unacceptable interference to any current or planned terrestrial service,”¹³ it fails to provide any of those studies. Quite frankly, WCA seriously doubts that AirTV has conducted any studies that consider the adverse impact its proposal would have on the services and technologies that are currently being deployed across the United States

¹⁰ 5 U.S.C. § 553(b)(3).

¹¹ *See, e.g., Koritzsky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)(“*Koritzsky*”); *Amendment of the Commission’s Rules Concerning Maritime Communications*, 17 FCC Rcd 6685, 6697 (2002) (declaring request that Commission defer auction of AMTS spectrum and consolidate AMTS and other bands into one service to be beyond the scope of rulemaking on licensing of AMTS stations); *Revision and Update of the Public Mobile Radio Service Rules*, 95 FCC 2d 769, 828 (1983) (“Air-ground radiotelephone service, Section 22.521. We proposed to combine all sections dealing with [the air-ground radiotelephone service] into [Section 22.521]. Flight Inc. and Wulfsberg filed comments requesting that a rulemaking petition filed on January 22, 1980 by Wulfsberg be considered in this proceeding. Wulfsberg requests that frequency 459.675 MHz be assigned as an automated signaling channel in communications by and with airborne stations. We will not adopt the commenter’s proposal. The request is beyond the scope of this proceeding since it entails the reallocation of the frequency for the requested purpose.”)

¹² *See Koritzsky*, 17 F.3d at 1513

¹³ AirTV Comments at 7.

to provide a variety of broadband services over MDS/ITFS spectrum.¹⁴ In any event, the burden is on AirTV to establish that it will not cause interference to MDS/ITFS deployments, and it has presented the Commission with nothing to demonstrate that it can carry that burden other than citations to generic ITU coordination limits that were adopted without any regard to today's MDS/ITFS technology.

WCA is hardly alone in expressing its concern. While AirTV contends that “[t]he 2535-2655 MHz S-Band frequencies have been essentially coordinated with the U.S. Administration,” the facts are to the contrary. Understandably, AirTV fails to disclose that, in connection with Canada's effort to coordinate the Larksat system, the United States has advised Industry Canada and the International Telecommunications Union Radiocommunication Bureau (“ITU-R”) that it anticipates harmful interference to existing and planned terrestrial networks within the United States. As a result, Industry Canada and the ITU-R were advised that the United States does not agree to the inclusion of the band 2500-2690 MHz for the provision of broadcasting-satellite services within its territory and possessions, and thus has requested that the United States and its possessions not be included in the Larksat authorized service area.

¹⁴ See, e.g., Barthold, “W.A.T.C.H. Out!” *Telephony* (Aug. 27, 2001) (deployment of MDS/ITFS broadband service in Western Ohio); “NextNet and Evertex Expand Plug-and-Play Broadband Wireless System to Five New Markets, Covering Over 19,000 Subscribers,” *Business Wire* (Nov. 11, 2002) (MDS/ITFS broadband service in various markets in Iowa); “NextNet and Grand Forks Wireless Deliver Broadband Wireless Access to Yuma, Arizona,” *Business Wire* (June 25, 2002) (MDS/ITFS broadband service to residential and business subscribers in Yuma, AZ); “Rioplex Wireless Deploying World's Largest Next-Generation Wireless Broadband Network,” *PR Newswire* (Jan. 8, 2003) (announcement by Navini Networks and Rioplex Wireless of plans to deploy a non-line-of-sight MDS/ITFS-based wireless broadband network to serve customers in South Texas); Mansell, “IPWireless Gaining Customers,” *Kagan Broadband Fixed Wireless*, at 6 (May 6, 2002) (launch of MDS/ITFS-based 3G wireless broadband service in Missoula, Montana). The MDS/ITFS industry continues to conduct trials of MDS/ITFS broadband service in various markets, which in turn will pave the way for additional deployments across the country. See, e.g., *id.* (“Sprint . . . along with [MDS/ITFS operator] Nucentrix, are now trialing a new generation of [MDS/ITFS broadband equipment] suppliers led by the likes of Navini, IPWireless, Vyyo, Iospan, BeamReach and NextNet.”).

Finally, AirTV presents the Commission with no compelling public interest reasons for the Commission to throw the MDS/ITFS services into regulatory uncertainty (again) solely to accommodate AirTV's desire to deliver a video/broadband service to airline passengers using the 2523-2655 MHz band. Indeed, the television and internet access services that AirTV is proposing to offer to airline passengers can be obtained from other satellite services – satellite services that do not jeopardize the provision of terrestrial MDS and ITFS services across the country. For example, JetBlue Airlines has been using DirecTV's satellite network to deliver a service known as LiveTV -- twenty-four channels of video programming delivered to “seat-back” television screens -- for over two years.¹⁵ Recently, Frontier Airlines announced that it would be adding the Live TV/DirecTV service to its aircraft.¹⁶ Delta Air Line's new low-fare Song subsidiary has gone one step further, offering premium services such as digital MP3 audio, pay-per-view movies, interactive games, interactive maps and on-board shopping, with on-board Internet access under consideration.¹⁷ And, of course, the Commission is well aware of Boeing's Connexion system for two-way broadband service to passengers and crew aboard aircraft.¹⁸

In sum, the Commission should adopt the *NPRM's* proposal to eliminate the BSS and FSS allocation in the 2500-2690 MHz band. The record developed in this proceeding makes clear that no one – not even AirTV – is proposing to offer any of the satellite services that are currently permitted in that band. AirTV concedes that its proposed television and internet access

¹⁵ See, e.g., Hao, “Business Picks Up for Melbourne's LiveTV,” *Florida Today*, Business/Money at 1 (June 6, 2002).

¹⁶ Caulk, “The Jet Set: Frontier Adds TVs,” *Rocky Mountain News*, at 3C (Nov. 2, 2002).

¹⁷ See, e.g., Woodyard, “New Low-Fare Song Wants To Entertain Fliers,” *USA Today*, at 3B (Jan. 30, 2003).

¹⁸ See Comments of The Boeing Company, ET Docket No. 02-305, at 2 (filed Feb. 10, 2003); *The Boeing Company – Application for Blanket Authority to Operate Up to Eight Hundred Technically Identical Transmit and Receive Mobile Earth Stations Aboard Aircraft in the 14.0-14.5 GHz and 11.7-12.2 GHz Frequency Bands*, 16 FCC Rcd 22645 (Int. Bur. 2001).

service is not permitted under footnote NG101 and thus an amendment to the Table of Frequency Allocations to eliminate that footnote is required before AirTV's service can be authorized in the United States. As such, there is no reason to preserve the BSS and FSS allocation at this time. If AirTV can in the future meet its burden of demonstrating that its service will cause no harmful interference to current and planned MDS/ITFS uses of the 2535-2655 MHz band and will otherwise serve the public interest, it will be free to petition the Commission to amend the Table of Frequency Allocations to restore a BSS allocation to that band. Until then, however, there is no reason for maintaining that allocation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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