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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 23, 2001

EX PARTE

Magalie R. Salas, Secretary
Federal Communications Commission
The Portals Building
445 12th Street, SW TW-A325
Washington, D.C. 20554

Re: Itron, Inc.
ET Docket No. 00-221

Dear Ms. Salas:

Itron, Inc. ("Itron"), by its attorneys, is filing this letter in response to a question that arose recently in meetings with the staff of the Office of Engineering and Technology ("OET"). In particular, Itron was asked whether the Commission could, consistent with the proposals in the Notice of Proposed Rulemaking ("NPRM") in this proceeding, make an allocation in the 1427-1432 MHz band to non-medical telemetry operations that is limited to utility telemetry. For the reasons set forth below, an allocation limited to utility telemetry would be consistent with the history of this proceeding, the text of the NPRM, the rule changes proposed in Appendix A of the NPRM, and the "logical outgrowth" doctrine.

I. Background

The 1427-1432 MHz band has been used for automatic meter reading ("AMR") and other utility telemetry on a secondary basis since 1993 and, as discussed in Itron's petition, has helped to reduce energy costs, improve customer service, and promote responsible environmental management. In a Petition for Rulemaking filed last year,

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Itron requested that the Commission reallocate the 1427-1432 MHz band on a primary basis for utility telemetry operations.¹

While Itron's petition was pending, the Commission made a primary allocation in the 1429-1432 MHz band for medical telemetry purposes. In addition, with its November 20, 2000, *NPRM*, the Commission responded to the request of Itron and others making proposals for the reallocation of various portions of the 1.4 GHz band.

In the *NPRM*, the Commission offered three "options" for the reallocation of the 1.4 GHz band. Each of the options includes a proposal to allocate all or a portion of the 1427-1432 MHz band on a primary basis to non-medical telemetry. In its filings, Itron supported a modified version of Option 2, and provided the Commission with a plan developed by Itron and an American Hospital Association task force that would enable medical telemetry and utility telemetry users to share 1427-1432 MHz on a co-primary basis.

II. Discussion

A. Procedural History and Text of the *NPRM*

From the outset, the focus for upgrading the non-medical telemetry allocation in the 1427-1432 MHz band from secondary to primary has been on utility telemetry. Itron's *Petition for Rulemaking* was limited to utility telemetry. Numerous parties commented on Itron's petition, but none proposed an upgrade for non-utility telemetry. And the Commission, in its *NPRM*, recognized that the purpose of Itron's request was to "enhance the status of utility telemetry." See *NPRM* at ¶5.

The text of the *NPRM* is consistent with this procedural history. Although the chart summarizing the three proposed options refers generically to "telemetry," the Commission's discussion of those options makes clear that what the Commission envisioned was an upgrade to primary status for utility telemetry, not all telemetry. It proposed in Option 1 to "elevate the status of utility telemetry." *NPRM* ¶ 31. In connection with Option 2, it spoke of "allow[ing] utility telemetry operations to share the 1429-1432 MHz band on a co-primary basis" and "sharing between utility and medical telemetry operations in the 1429-1432 MHz band on a co-primary basis." *Id.* ¶ 32. Similarly, its Option 3 proposal was to "elevate the secondary allocation for utility telemetry in the 1427-1430 MHz band to primary status." *Id.* ¶ 34. In all three cases, the focus is on utility telemetry.

B. The Rule Changes Proposed in Appendix A of the *NPRM*

¹ See Itron's *Petition for Rule Making*, RM-9854 (filed Feb. 29, 2000).

It was suggested to Itron in the meetings with OET that if the Commission had intended an upgrade for utility telemetry alone, as opposed to telemetry generally, it would have had to identify proposed changes to that effect in Section 90.259 of the FCC's rules. Itron respectfully disagrees.

There are two rule provisions - Sections 90.259 and 2.106 - that, at present, address the status of telemetry operations in the 1427-1432 MHz band. Section 90.259 states that all telemetry operations in the 1427-1432 MHz band - utility or otherwise - are secondary to government operations. Section 2.106, the frequency allocation table, shows a secondary allocation for "telemetry" and "telecommand." For this provision as well, there is no distinction drawn between utility telemetry and other telemetry.

For reasons that are not discussed in the *NPRM*, the revised version of Section 2.106 appearing in Appendix A of the *NPRM*, unlike the current version, does not identify the status of telemetry operations - utility or otherwise - in the 1427-1432 MHz band. Similarly, Appendix A leaves Section 90.259 of the rules untouched.

Appendix A cannot be read to reflect a desire on the part of the Commission to upgrade all telemetry operations, rather than just utility telemetry operations, to primary status. It is true that the rule changes proposed in Appendix A do not call forth an upgrade limited to utility telemetry. But it is equally true that they do not speak of an upgrade for telemetry generally.

It may be that the Commission believed it needed to settle upon one of the three options proposed in the *NPRM* before it could revise the wording of Sections 2.106 and 90.259 to address the status of telemetry operations. In any event, and as discussed above, it is clear from the text of the *NPRM* that an upgrade for utility telemetry alone is what the Commission had in mind.

C. Logical Outgrowth

Making a primary allocation for non-medical telemetry that is limited to utility telemetry would be consistent with the "logical outgrowth" doctrine. It is well established that "an agency may issue rules that do not exactly coincide with the proposed rule so long as the final rule is the 'logical outgrowth' of the proposed rule." *E.g., The Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

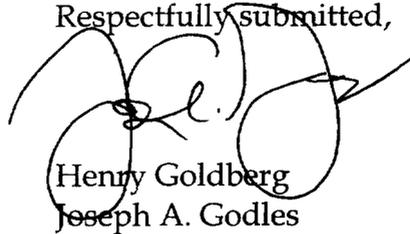
The test for compliance with "logical outgrowth" is whether "a new round of notice and comment would ... provide commenters with their first occasion to offer new and different criticisms which the agency might find convincing." *Id.* Even if the

NPRM could be read as proposing an upgrade to primary for telemetry generally, as opposed to for utility telemetry alone, the stated goal was to get primary protection for utility telemetry. The *NPRM*, therefore, placed parties on notice that the Commission was considering such an allocation. The parties had ample opportunity to, and did, comment on the issue of a primary allocation for utility telemetry. Subject to one limited exception,² they did not propose an upgrade to primary status for non-utility telemetry. The "first occasion" for comment, therefore, already has occurred.

III. Conclusion

For the reasons stated herein, the Commission should limit any primary allocation for non-medical telemetry in the 1427-1432 MHz band to utility telemetry.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Goldberg", is written over the typed name "Henry Goldberg".

Henry Goldberg
Joseph A. Godles

Attorneys for Itron, Inc.

² The American Petroleum Institute ("API") proposed that, in addition to utility telemetry operations, 1.4 GHz frequencies be made available for point-to-multipoint petroleum and natural gas SCADA applications. See API Comments, filed March 8, 2001, at 6-7.