

**Henry E. Crawford**

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ATTORNEY AT LAW

1150 CONNECTICUT AVENUE, N.W.  
SUITE 900  
WASHINGTON, D.C. 20036-4192

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March 5, 1998

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**BY HAND DELIVERY**

Ms. Magalie R. Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re:

In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses File Nos.: MM Docket No. 97-234; GC Docket No. 92-52; GEN Docket No. 90-264
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Dear Ms. Salas:

Transmitted herewith on behalf of Roy E. Henderson are an original and eleven (11) copies of his "Comments" as directed to the Commission.

Should any additional information be required, please contact this office.

Very truly yours,



Henry E. Crawford  
Counsel for  
Roy E. Henderson

cc: The Commission  
Roy E. Henderson

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
WASHINGTON, D.C.

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OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)  
of the Communications Act --  
Competitive Bidding for Commercial  
Broadcast and Instructional Television  
Fixed Service Licenses

MM Docket No. 97-234

Reexamination of the Policy Statement  
on Comparative Broadcast Hearings

GC Docket No. 92-52

Proposals to Reform the Commission's  
Comparative Hearing Process to  
Expedite the Resolution of Cases

GEN Docket No. 90-264

To: The Commission

**COMMENTS OF ROY E. HENDERSON**

Henry E. Crawford

Law Offices of  
Henry E. Crawford  
1150 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036-4192  
(202) 862-4395

Counsel for  
Roy E. Henderson

March 5, 1998

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## **SUMMARY**

Roy E. Henderson ("Henderson") is a broadcaster with over 25 years of experience as an owner and developer of new radio and television facilities. In his Comments, Henderson requests that the Commission create a pioneer's preference in the form of a 25% auction bidding credit for individuals and entities who undertake the legal and technical showings that are required in rulemakings to change the Commission's FM Table of Allotments. This preference will compensate broadcast pioneers for their legal and technical contributions. It will also enhance diversity and competition by creating incentives to establish new FM facilities in communities across the country. Finally, a pioneer's preference for amending the FM Table of Allotments will promote local broadcasting by giving a leg-up to broadcasters with interests in specific communities.

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To: The Commission

**COMMENTS OF ROY E. HENDERSON**

Roy E. Henderson ("Henderson"), by counsel, respectfully submits his *Comments of Roy E. Henderson* in response to the Commission's Notice of Proposed Rulemaking (NPRM) released in the above-captioned matter on November 26, 1997.<sup>1</sup> In support thereof, the following is stated:

**I. INTRODUCTION**

1. On November 26, 1997, the Commission issued the above-captioned NPRM. In the NPRM the Commission proposed that the traditional means of selecting FM licensees through comparative hearings be replaced by an auction system. In this connection the Commission specifically sought

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<sup>1</sup> The deadline for comments was January 26, 1997. These comments are being late filed as outlined in the accompanying Motion to File Late Comments.

comment on whether it should adopt “bidding credits or other measures to promote diversification of ownership.” NPRM, ¶92.<sup>2</sup> In the present case Henderson submits that a bidding credit in an amount of 25% for those who champion changes in the FM Table of Allotments will promote competition and diversity by rewarding broadcasters whose interests are tailored to local communities. A bidding credit will also level the auction playing field by compensating FM entrepreneurs for the costs involved in amending the FM Table of Allotments.

## **II. ARGUMENT**

2. As recognized by the Commission in the NPRM, unlike other broadcast services, “...an applicant for a new FM station must request an unused channel identified in the Commission's FM Table of Allotments.” NPRM, ¶60. According to this allocation scheme a party must first seek to modify the FM Table of Allotments through a formal rulemaking procedure.

3. The rulemaking procedure involves the careful balancing of several frequently conflicting policy goals. The FM Table is intended to allow the Commission to meet its obligation under Section 307(b) of the Communications Act to provide a “fair, efficient and equitable distribution of radio service” to the various states and the communities within them. These objectives are recognized as:

- Provision of some service of satisfactory signal strength to all areas of the country;

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<sup>2</sup> The Commission further noted that “diversification of ownership is one of the two primary objectives of our current licensing system.” NPRM, ¶92.

- Provision of as many program choices to as many listeners as possible; and
- Service of local origin to as many communities as possible.

Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 89 (1982).

Satisfying these criteria usually involves making a factual and legal analysis to determine whether a particular allotment actually represents a geographically identifiable population grouping. This in turn requires that the proponent proffer objective indications of community status including the existence of political, social, economic, commercial, cultural or religious organizations and services in the community. In this regard, the proponent usually submits census data and other information showing various aspects of community life.

4. A rulemaking proponent must also present supporting engineering data to show that the proposed allotment will comport technically with the rest of the Table of Allotments. Generally, this requires the submission of a statement by an appropriately qualified broadcast engineer. This analysis usually involves several technical studies requiring costly computer software and engineering expertise.

5. It is clear from the above that the legal and technical showings required by proponents seeking to modify the FM Table of Allotments are substantial and costly. These proceedings are also contested. Once the Commission has issued the Notice of Proposed Rulemaking, other commentators may submit pleadings in opposition to the proposal. Still other parties may submit counterproposals. In this litigious environment, the rulemaking proponent must be prepared to consume additional legal and technical resources.

6. Without a bidding credit for performing this necessary ground breaking work, auction applicants could seize the fruits of the proponent's efforts without ever demonstrating an interest in the specific community involved. National filers could sit on the sidelines conserving their resources for use during the auction. The proponent would be at a significant financial disadvantage for having prosecuted the rulemaking. Therefore, in an auction setting without a bidding credit, the interests of local and diverse parties will be significantly impaired in comparison to nationally based application filers.

7. Henderson submits that without a bidding credit for successful rulemaking proponents, the economics of the auction system will be inherently skewed against diverse and local concerns. Consequently, Henderson proposes that successful rulemaking proponents receive a 25% bidding credit to be taken as a discount off of the final auction price. To be fair, this credit should be available on top of whatever other bidding credits an applicant may be entitled to. The purpose, after all, is to stimulate diversity and create a level playing field so that the rulemaking proponent is not unduly handicapped by the costs of having prosecuted the rulemaking.

8. The Commission has long believed that a pioneer's preference has merit in allocating new broadcast facilities. Reexamination of the Policy Statement on Comparative Broadcast Hearings (GC Docket No. 92-52), 7 FCC Rcd 2664 (1992) at ¶29. The rationale for a pioneer's preference has been seen as analogous to that of similar preferences awarded to those seeking the

development of new communications services and technologies.<sup>3</sup> In the past several parties have sought pioneer's preferences for changing the FM Table of Allotments. See, *Iron River, Wisconsin*, 8 FCC Rcd 345, n. 1 (1993); *Walhalla, North Dakota*, 8 FCC Rcd 363 (1993), n. 2; *Wynnewood, Oklahoma*, 11 FCC Rcd 8657 (1996), n. 1; *Thomaston, Alabama*, 11 FCC Rcd 9904 (1996), n. 1; *Greensboro, Alabama Greensboro, Alabama*, 11 FCC Rcd 10021 (1996), n. 1. The Commission and these petitioners have understood the value of promoting innovation. They have also understood the need to provide incentives for those who carry the burden of introducing new radio services.

9. A pioneer's preference will conserve the resources of the Commission since private parties will perform the initial technical and legal showings. Additionally, a pioneer's preference will promote efficient spectrum management. Unlike the wireless services that have been auctioned to date by the Commission, the FM radio service has been in operation for decades and most of the major markets have been fully allocated. Providing a pioneer's preference will entice entrepreneurs to seek out those communities that most need new or additional service. Thus, by creating a pioneer's preference the Commission will be further insuring that the channels that are most desired are the ones allocated.

### **III. CONCLUSION**

10. A 25% bidding credit to be awarded to individuals or entities responsible for amending the FM Table of Allotments is a just and reasonable

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<sup>3</sup> *Id., citing, Establishment of Procedures*, 6 FCC Rcd 3488 (1991).

way of compensating these parties for the burden of pioneering new FM services. Without a pioneer's bidding credit, parties with no community investment at all will be given an unfair advantage at auction.

11. The Commission's longstanding goal of diversity will be furthered by rewarding broadcasters possessing demonstrated local interests and concerns. A bidding credit will also promote spectrum efficiency since a premium will be awarded to parties for finding and prosecuting the most desirable channels. Moreover, the Commission's resources will be conserved through the work of private parties. Therefore, Henderson requests that the Commission establish a 25% bidding credit for proponents who are successful in adding new channels to the FM Table of Allotments.

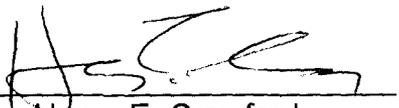
**WHEREFORE**, Roy E. Henderson respectfully requests that his Comments be adopted by the Commission in the instant proceeding.

March 5, 1998

Law Offices of  
Henry E. Crawford, Esq.  
1150 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036-4192  
(202) 862-4395  
E-Mail: [crawlaw@wizard.net](mailto:crawlaw@wizard.net)  
Web: <http://www.wizard.net/~crawlaw>

Respectfully Submitted,

Roy E. Henderson

By:   
Henry E. Crawford  
His Attorney