FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

OCT 2 5 1994

IN REPLY REFER TO:
1800B3-LR

Ms. Margarita Pelleya, President
Bascomb Memorial Broadcasting
Foundation
P.O. Box 558636
Miami, FL 33255

Mr. Howard F. Jaeckel
CBS Inc.
51 West 52 Street
New York, NY 10019

In re: WDNA(FM), Miami, FL
Bascomb Memorial Broadcasting
Foundation
BPED-930104IA

Dear Ms. Pelleya and Mr. Jaeckel:

The staff has under consideration: (1) the above-captioned major change application filed on behalf of Bascomb Memorial Broadcasting Foundation ("Bascomb") to change antenna location, increase effective radiated power (ERP) and decrease antenna height above average terrain (HAAT); and (2) the petition to deny filed on July 26, 1993 by CBS Inc. ("CBS"), licensee of TV Channel 6 station WCIX(TV), Miami, FL.[1] The application seeks to replace WDNA's licensed facility, which was destroyed by Hurricane Andrew in August 1992. For the reasons set forth below, we deny the petition and grant the application.

Petition to Deny. CBS claims that Bascomb improperly uses an ERP adjustment factor of 40 (16 dB), rather than 10 (10 dB), in making its TV Channel 6 interference calculation. CBS calculates that, based on an ERP adjustment factor of 10, the total population contained within the predicted TV Channel 6 interference area would be 11,000 persons, in violation of 47 C.F.R. § 73.525. CBS notes that the majority of the interference area is located in the Kendall Census Designated Place (CDP), which has a 1990 Census population of 87,271 persons. CBS states that WDNA

[1] On August 13, 1993, WDNA filed an opposition to CBS' petition to deny. On September 7, 1993, CBS filed a reply to WDNA's opposition.

incorrectly justifies the use of a factor of 40 by arguing that Kendall is not a "city" because it is not classified as an "incorporated" area. CBS believes that the Commission, in adopting the rule pertaining to the use of an adjustment factor, was concerned with the different interference characteristics which are present in urban and rural area, not the legal form of organization of the particular locality (i.e., city versus CDP). Specifically, CBS states that the Commission repeatedly recognized that the interference-reducing benefits of vertical polarization are diminished in urban settings. CBS cites the Second Further Notice of Proposed Rule Making in Docket 20735, Changes in the Rules Relating to NCE-FM, 47 Fed. Reg. 24144 (June 3, 1982), the Third Report and Order, 49 Fed. Reg. 45146 (November 15, 1984), and the final Memorandum Opinion and Order, 50 Fed. Reg. 27954 (July 9, 1985), to support this claim. CBS notes that the history of 47 C.F.R. § 73.525 does not contain language which suggests that any importance was associated with whether a particular urban area is incorporated and states that Kendall is the kind of area to which the Commission intended to apply the more restrictive adjustment factor. Moreover, CBS notes that WDNA has the option to return to its licensed transmitter site, which is collocated with WCIX.

Opposition. WDNA believes that CBS' objection to its use of an adjustment factor of 40 is without merit. WDNA states that 47 C.F.R. § 73.525, which allows for the use of a factor of 40 when the predicted interference area is located entirely outside a city with a population greater than 50,000, clearly indicates that the test was always intended to be whether the area is in a "city". WDNA adds that a CDP such as Kendall is clearly distinguished by the Census Bureau's definition from an incorporated place such as a city. WDNA states that, in adopting 47 C.F.R. § 73.525, the Commission was acutely aware of the difference between the two terms and separately refers to "incorporated places" and "Census Designated Places." Moreover, WDNA notes that CDPs were defined for the Census Bureau's record keeping purposes as a grouping of a fairly large number of Census Tracts. WDNA notes that CBS' reference to the Second Further Notice of Proposed Rulemaking in Docket No. 20735 is irrelevant since the approach the Commission was considering in that document was different from the one taken three years later when § 73.525 was adopted. WDNA states that CBS' arguments conflict with the compromise struck in 1985 in those proceedings. Finally, WDNA states that CBS' efforts to negotiate with WDNA for use of the new tower collocated with WCIX came only after the Commission granted WDNA's STA request. Moreover, WDNA indicates that CBS' proposal was unreasonable and would only benefit CBS, rather than WDNA. WDNA concludes that the Commission should reject CBS' petition and grant the application.

Reply. CBS indicates that, regardless of the adjustment factor of 10 or 40, the use of more detailed population data (using 1990 Census enumeration blocks) reveals that the population count within the predicted TV Channel 6 interference area exceeds the 3,000 person limit. Specifically, CBS calculates the population within the interference areas, using adjustment factors of 10 and 40, to be 7,870 and 17,500 persons, respectively. As a separate issue, CBS believes WDNA's depiction of the interference area is flawed since it is shown as a circle. In the remainder of the pleading, CBS reiterates previous arguments and clarifications.

Discussion. 47 C.F.R. § 73.525(c) requires an applicant for a new noncommercial FM station to comply with the restrictions and adjustments to population set forth in 47 C.F.R. § 73.525(e). These provisions were adopted as a carefully crafted compromise between Channel 6 TV interests and noncommercial educational stations as a means of limiting interference from FM educational stations to Channel 6 operations. See Memorandum Opinion and Order, supra. CBS argues that WDNA's proposal must utilize an ERP adjustment factor of 10 to calculate the TV Channel 6 interference area because of the large population in the Kendall Census Designated Place, which is characteristic of a city. Section 73.525(e)(4)(i) states that:

> [i]f an applicant chooses to use vertically polarized transmissions only, the maximum permissible vertically polarized ERP will be the maximum horizontally polarized ERP permissible at the same proposed antenna height...multiplied by either: 40 if the predicted interference area lies entirely outside the limits of a **city** of 50,000 persons or more; or 10 if it does not. (emphasis added)

This rule refers to the term "city" to distinguish between the use of an ERP adjustment factor of 10 or 40. A city in the United States is defined as "an incorporated municipality whose boundaries and powers of self-government are defined by a charter from the State in which it is located." See Webster's New World Dictionary, Third College Edition, p. 256 (1988). The Kendall area is designated as a Census Designated Place. As outlined by the U.S. Department of Commerce in the 1990 Census of Population and Housing, issued August 1991,

> [c]ensus designated places (CDP's) are delineated for the decennial census as the statistical counterparts of incorporated places. CDP's comprise densely settled concentrations of population that are identifiable by name, but are not legally incorporated places. Their boundaries, which usually coincide with visible features or the boundary of an adjacent incorporated place, have no legal status, nor do these places have officials elected to serve traditional municipal functions. CDP boundaries may change with changes in the settlement pattern.

Therefore, by definition, there exists distinct differences between a "city" and " a "CDP". Because the proceedings which established the TV Channel 6 interference rules in Docket 20735 did not provide a distinct definition of the term "city," the strict interpretation of this rule will be applied. Any other interpretation could fundamentally change the existing relationship between educational FM stations and Channel 6 stations and must therefore be considered only in the context of a rulemaking proceeding specifically addressing the issue. Since Kendall is not classified as a "city," WDNA is correct in its use of an ERP adjustment factor of 40 in calculating the predicted TV Channel 6 interference area.

CBS also alleges that the population within the predicted TV Channel 6 interference area would exceed the 3,000 person limit regardless of the adjustment factor utilized by WDNA. CBS bases its population counts on the use of 1990 Census enumeration blocks with 1,100 individual blocks comprising the population of Kendall CDP. However, CBS does not accompany this claim with any substantial data or maps.[2] Therefore, the staff cannot verify the accuracy of this method. The burden of proof lies on the petitioner to establish that Bascomb's tabulation of persons within the TV Channel 6 interference area is, in fact, less accurate than that calculated by CBS. Having failed to do so, CBS' petition will be denied.

Ordering Clause. The petition to deny filed on July 26, 1993 by CBS Inc. IS HEREBY DENIED. This action is taken pursuant to 47 C.F.R. § 0.283. Further, application BPED-930104IA IS HEREBY GRANTED. The authorization will follow under separate cover.

Sincerely,

Linda B. Blair by JR

for Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Haley, Bader & Potts
Raymond M. Ball, Jr.

[2] In the engineering statement of CBS' reply, CBS noted that a map showing the enumeration blocks within Kendall CDP has been ordered and will be filed with the Commission as soon as possible. However, as of this date, no showing of this nature has been received by the Commission.