

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of: )  
 )  
Diversified Communications ) CSR-3817  
(WCJB(TV)) )  
 )  
Application for Review )

MEMORANDUM OPINION AND ORDER

Adopted: February 18, 2000

Released: March 1, 2000

By the Commission:

I. INTRODUCTION

1. Diversified Communications, licensee of television broadcast station WCJB (ABC, Ch. 20), Gainesville, Florida ("WCJB"), filed an application for review of a decision of the Cable Services Bureau (the "Bureau") denying WCJB's petition for reconsideration of WCJB's request to be considered a "new" significantly viewed signal in certain Florida counties as a result of a technical upgrade of its facilities.<sup>1</sup> After examining the record, we affirm the Bureau's decision in *Diversified Communications* and deny the application for review filed by WCJB.

II. BACKGROUND

2. In 1972, the Commission adopted a comprehensive regulatory scheme for cable television.<sup>2</sup> As part of this regulatory scheme, the Commission limited the number of distant signals a cable system could import from outside of its market.<sup>3</sup> An exception to these limits, however, was made for significantly viewed signals.<sup>4</sup> In doing so, the Commission recognized that signals that could be received over-the-air should have the opportunity to be accorded status as a local station for must carry purposes. A signal is considered to be significantly viewed if it meets certain designated minimum viewership levels off-the-air in noncable

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<sup>1</sup>See *Diversified Communications*, Cable Television Actions Report No. 3516, Mimeo No. 50548 (released November 8, 1994). The Cable Services Bureau denied Diversified Communications' initial petition for special relief in *Diversified Communications*, Cable Television Actions Report No. 3488, Mimeo No. 42227 (released March 18, 1994).

<sup>2</sup>See *Cable Television Report and Order*, 36 FCC 2d 143, *recon.*, 36 FCC 2d 326 (1972).

<sup>3</sup>See *Cable Television Report and Order*, 36 FCC 2d 143, 173 (1972). A distant signal was defined, depending on the market, as any station a) located more than 35 miles from a cable system; b) which does not place a predicted Grade B contour over a cable system; or c) which is not considered to be significantly viewed in the county in which the cable system is located.

<sup>4</sup>*Id.* at 174.

households.<sup>5</sup> When the Commission deleted its distant signal carriage limitations in 1980, it continued to utilize the significantly viewed status of signals for various purposes, such as an exception from the Commission's network and syndicated program exclusivity rules.<sup>6</sup> The network and syndicated program exclusivity rules protect local stations' rights to network and syndicated programming within their home market areas against identical programming which may be brought into the market by distant stations carried by a cable operator. The cable operator is required to blackout any network or syndicated programming broadcast by a distant station for which the local market station has prior rights. The only exception to this requirement is in instances where the distant signal is considered to be significantly viewed in the community or county in which the cable system operates. In addition, the Copyright Office, in certain instances, has continued to utilize the significantly viewed status of television stations in determining whether a station is considered to be "local" or "distant" for determining royalty payment rates.<sup>7</sup>

3. In establishing the category of significantly viewed stations, the Commission published a nationwide list in 1972, county-by-county, of those stations initially deemed to be significantly viewed in each county.<sup>8</sup> A station on this list is deemed significantly viewed throughout the county and this determination is applicable to all communities within the county without regard to the station's actual viewership in any specific community in the county. A station that was on-the-air prior to 1972, but not included on the list, may request to be added by filing a petition for declaratory ruling with the Commission and submitting data to demonstrate that it meets the requisite viewership levels utilizing current community-specific data.<sup>9</sup> This relief is not available on a county-wide basis; rather, the broadcaster must demonstrate that it meets the "significantly viewed" criteria on a community-by-community basis. The initial list accorded stations "significantly viewed" status on a county-by-county basis (as opposed to community-by-community) as a matter of administrative convenience. The Commission's desire to expedite implementation of its rules led it to use county-wide data, which were already in existence, rather than await the creation of community-based data, which would have to be compiled. By contrast, once the initial list was established, subsequent changes would only be made on a community basis. A station that went on-the-air after 1972 may request to be added to the list through a petition for declaratory ruling utilizing county-wide data, provided that such data are from the station's first three years of operation.<sup>10</sup> These stations are permitted to use county-wide data, and obtain a county-wide determination, to put them on an equal footing with stations that were on-the-air when the 1972 list was established (and that were thus entitled to use county-wide data). In instances where a pre-1972 station has undertaken a technical upgrade and wishes to be added to the list, it may file a petition for waiver requesting that it be considered "new" as of the date of its upgrade in order that it may use county-wide data rather than community-specific data for significantly viewed purposes. For purposes of this rule, the Commission has extended "new" station status to stations shifting from subscription or noncommercial status

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<sup>5</sup>47 C.F.R. §76.54.

<sup>6</sup>See *Cable Television Syndicated Program Exclusivity Rules, Report and Order in Dockets 20988 and 21284*, 79 FCC 2d 663 (1980). See also 47 C.F.R. §§76.92(f), 76.156(a).

<sup>7</sup>The Copyright Office does not require royalty payment rates for an otherwise 'distant' station with significantly viewed status.

<sup>8</sup>See *Cable Television Report, Order on Reconsideration*, 36 FCC 2d at 378-463 app. B.

<sup>9</sup>47 C.F.R. §76.54(b).

<sup>10</sup>47 C.F.R. §76.54(d).

to commercial status after the initial survey period,<sup>11</sup> as well as stations that have experienced a major technical upgrade of their facilities.<sup>12</sup>

4. WCJB began operation on April 17, 1971 as an ABC affiliate. Subsequently, on October 13, 1982, WCJB modified its facilities which resulted in a 36.7% increase in the station's predicted Grade B contour.<sup>13</sup> In view of this technical upgrade, WCJB requested that it be considered a "new" station for purposes of determining its status as significantly viewed pursuant to Section 76.54 of the Commission's rules.<sup>14</sup> This request was denied, not only because WCJB's percentage increase fell short of the 41% minimum increase accepted for Station WDCA-TV (Ind., Ch. 20), Washington, D.C. in *CALTEC*, but because no other factors were deemed sufficient to override this failing and justify a grant.<sup>15</sup> In its petition for reconsideration, WCJB argued that the denial of its request was arbitrary and that the Bureau's reliance on a 41% minimum is clearly against the intent of *CALTEC*, which maintained that each request would be judged on a case-by-case basis.<sup>16</sup> Further, WCJB averred that the Bureau's decision failed to articulate why WCJB's technical improvement was not extensive, particularly in light of other relevant factors such as a 50% increase in population served.<sup>17</sup> In its subsequent denial of WCJB's petition for reconsideration, the Bureau stated that while in *CALTEC*, the Commission declined to establish a formal minimum percentage increase to establish "new" station status, sixteen years of such decisions have given sufficient guidance in this area to establish reliable parameters. Moreover, the Bureau's order on reconsideration stated that, while it continues to examine each request individually, and to take note of all of the factors relevant to a station's technical upgrade, the main factor in such instances was, and continues to be, the increase in the station's Grade B coverage.<sup>18</sup> Since the relative change between WCJB's increase in Grade B coverage area and that found in the *CALTEC* case (36.7% v. 41%) constitutes over a 10% smaller increase in coverage, and no other special factors were found to override this, the Bureau continued to believe that denial of WCJB's request was appropriate.<sup>19</sup>

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<sup>11</sup>See, e.g., *H.R. Broadcasting of Milwaukee, Inc. (WCGV-TV)*, Cable Television Actions, Report No. 3212 (released April 10, 1989)(STV); *Golden West Broadcasters of Oklahoma, Inc. (KAUT)*, Cable Television Actions Report No. 3110 (released September 8, 1987)(STV); *Blair Broadcasting of Oklahoma, Inc. (KOKH-TV)*, Cable Television Actions Report No. 2800 (released October 14, 1983)(noncommercial).

<sup>12</sup>See *Calvert Telecommunications Corp. d/b/a CALTEC*, 63 FCC 2d 1022 (1977) ("*CALTEC*"); *Alabama Telecasting, Inc.*, Cable Television Report No. 3253, Mimeo No. 852 (released December 7, 1989); and *KVHP TV Partners*, Cable Television Report No. 3315, Mimeo No. 11205 (released January 4, 1991).

<sup>13</sup>See *Diversified Communications*, Cable Television Report No. 3488, Mimeo No. 42227 (released March 18, 1994) at ¶ 2.

<sup>14</sup>*Id.* at ¶ 1; 47 C.F.R. §76.54.

<sup>15</sup>See *Diversified Communications*, Cable Television Actions Report No. 3488, Mimeo No. 42227 (released March 18, 1994). See also *CALTEC*, 63 FCC 2d at 1025.

<sup>16</sup>See *Diversified Communications*, Cable Television Actions Report No. 3516, Mimeo No. 50548 (released November 8, 1994) at ¶ 2.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* Our heavy reliance on Grade B coverage reflects the underlying increases in ERP and antenna height, factors which are inherent in achieving a larger predicted Grade B contour.

<sup>19</sup>*Id.* at ¶ 5.

### III. THE PLEADINGS

5. In its application for review, WCJB argues that the two Bureau decisions denying its request were flawed and incorrectly applied Commission precedent. WCJB argues that while its petition was clear and adequately supported, it believes that it was not given the "hard look" required by the Commission's rules.<sup>20</sup> WCJB asserts that the Bureau's denial of its original request was devoid of analysis of the facts and circumstances of its case and was simply "written off" as failing to meet the 41 percent minimum.<sup>21</sup> In addition, WCJB argues that the review of its petition for reconsideration merely "went through the motions," falling far short of the "hard look" to which WCJB's request was entitled.<sup>22</sup> Moreover, neither decision took note of the 50.6% increase in population served that occurred as a result of the facilities upgrade, a fact which WCJB states is not only relevant but crucial.<sup>23</sup> WCJB avers that the Bureau is applying *CALTEC* and its progeny as if they were rulemakings, thus elevating the 41 percent threshold from one waiver criterion to the definition of a "new" station. It maintains that if the Bureau sought a 40 percent minimum, it should have done so through a rulemaking proceeding, otherwise it cannot be utilized as an immutable standard.<sup>24</sup> In addition, WCJB argues that the Bureau places undue reliance on a station's increase in Grade B coverage area to the exclusion of all the other factors. It maintains that this reliance runs contrary to the spirit and letter of *CALTEC* and the "hard look" mandate, particularly when the Commission expressly stated in *CALTEC* that it was not "attempting to establish the criteria we would deem determinative in similar cases" and emphasized that "we are not establishing in this case criteria determining what constitutes the necessary technical improvements to establish a new station."<sup>25</sup> Further, WCJB notes that in *FCVS Communications* the Commission stated: "We have consistently based such determinations on more than minimal signal coverage increases and possibilities of improved reception."<sup>26</sup> WCJB argues that a careful analysis of the technical improvements proffered in such cases must be made and that while the Commission treats a 40% increase as sufficient to justify "new" station status, it does not consider it an absolute threshold.<sup>27</sup> According to WCJB, both *CALTEC* and *FCVS* articulate that "new" status may be accorded where technical improvements and the surrounding circumstances result in "more than minimal signal coverage increases."<sup>28</sup> WCJB concludes that

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<sup>20</sup>WCJB Application at 4, citing *WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969).

<sup>21</sup>WCJB Application at 5.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* WCJB points out that as a result of the upgrade, 173,385 more people were reached by its Grade B. *Id.*

<sup>24</sup>WCJB acknowledges that in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), the United States Supreme Court stated that "The choice between proceeding by general rule or by *ad hoc* decisions is one that lies primarily in the informed discretion of the administrative agency." However, it points out that in *Ford Motor Co. v. FTC*, 673 F 2d 1008, (9th Cir. 1981), *cert. denied*, 459 U.S. 999 1982 (9th Cir. 1982) the United States Court of Appeals for the Ninth Circuit implied that there may be instances where an agency's reliance on adjudication could amount to abuse of its discretion.

<sup>25</sup>CALTEC , 63 FCC 2d at 1026.

<sup>26</sup>8 FCC Rcd 1279 (1993).

<sup>27</sup>WCJB Application at 7.

<sup>28</sup>WCJB Application, citing *CALTEC*, 63 FCC 2d 1022, 1025 (1977); *FCVS Communications*, 8 FCC Rcd

the upgrade of its signal resulting in a 36.7 percent increase in Grade B coverage and a 50.6 percent increase in population served cannot fail to be characterized as vast and extensive.<sup>29</sup>

6. WJKS, another ABC affiliate in the area, opposes WCJB's petition insofar as it applies to Columbia County, Florida.<sup>30</sup> It argues that the Bureau's two previous decisions with regard to WCJB's upgrade were fully consistent with *CALTEC* and Commission precedent. *CALTEC*'s 40.8 percent increase is the coverage area test used in all technical improvement cases such as this one, according to WJKS. WJKS states that no precedent exists where "new" station status was granted for an upgrade below 40 percent or where the Commission has given determinative consideration to a station's Grade B population increase.<sup>31</sup> Further, WJKS maintains that the Bureau has taken the "hard look" WCJB claims is required. WJKS points out that the Bureau's letter specifically mentions the increase in population in the recitation of the facts and in conclusion stated that it "took note of all the factors relative to WCJB's upgrade."<sup>32</sup>

7. WJKS argues that the population figures which were supplied by WCJB are irrelevant since they were based on 1990 Census figures and the station's facility changes were made in 1982.<sup>33</sup> WCJB's population figures cannot be considered reliable, avers WJKS, because changes in population inevitably occur over time, making this factor an inherently unstable basis on which to base a decision.<sup>34</sup> To do as WCJB suggests, states WJKS, could lead to an anomalous situation in the future should the population decline. Additionally, WJKS argues that WCJB cites no authority for its contention that the Bureau erred in adopting "new" station standards by means of *ad hoc* decision rather than rulemaking.<sup>35</sup> According to WJKS, the Commission's decisions in establishing the standards for "new" stations, pursuant to Section 76.54 of the Commission's rules, merely clarify the term "television broadcast stations not encompassed by the surveys . . . used in establishing appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable*

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1279 (1993).

<sup>29</sup>WCJB Application at 9.

<sup>30</sup>WJKS Opposition at 2. Should the Commission at some point grant WCJB's request, WJKS opposes grant of "new" status for WCJB in Columbia County since as a result of WCJB's tower relocation at the same time as its upgrade, WCJB lost considerable Grade B coverage in Columbia County. *Id.* at 3. While WJKS concedes that in *WGNO, Inc.*, 5 FCC Rcd 5767 (1990), the Commission apparently ruled that lack of Grade B coverage is irrelevant, WJKS submits that this case was wrongly decided. Therefore, if the Commission reaches the merits of the issue herein, WJKS suggests that the decision in *WGNO* should be overturned. *Id.* at 16.

<sup>31</sup>WJKS Opposition at 5.

<sup>32</sup>WJKS Opposition at 7, citing *Diversified Communications, Cable Television Actions Report No. 3516*, Mimeo No. 50548 (released November 8, 1994) at 1.

<sup>33</sup>WJKS Opposition at 9. According to the engineering report of Donald G. Everist of Cohen, Dippell & Everist, submitted with WCJB's original petition, the population figures were determined "by employing a computer program using the 1990 Census. To accomplish this population count, the program overlaid the Grade B contours over the land area in Florida and population was determined within the Grade B contour of overlap area by including the populated centroids for pertinent contour or overlap area." *Id.* at Attachment 1.

<sup>34</sup>WJKS Opposition at 7.

<sup>35</sup>WJKS Opposition at 11.

*Television Report and Order*. . .<sup>36</sup> Therefore, according to WJKS, the Commission can properly adopt its standard for "new" stations through adjudication rather than rulemaking.<sup>37</sup>

8. In reply, WCJB states that WJKS' arguments are without merit and that WJKS misstates the analyses used by the Bureau in these cases.<sup>38</sup> WCJB asserts that WJKS' premise that the Commission's intent is to rely solely upon Grade B increases is contrary to the Commission's *CALTEC* decision. Moreover, WCJB argues that WJKS' contention that population data are "unreliable" is wholly speculative.<sup>39</sup> In any event, states WCJB, neither possible future population changes nor further facilities changes alters the fact that the Bureau erred in its initial decision and reconsideration decision when it concluded that WCJB did not qualify as a "new" broadcast station following its 1982 facilities upgrade.<sup>40</sup> Further, WCJB maintains that WJKS' argument that the information supplied on the population coverage increase was not proper can also be dismissed. The population comparison was calculated by comparing 1990 data to 1990 data relative to the old and new Grade B contours; therefore, the magnitude of the improvement is valid and should be given appropriate consideration.<sup>41</sup>

#### IV. DISCUSSION

9. WCJB has alleged that the Bureau did not adequately consider the facts presented by WCJB in its previous attempt to achieve significantly viewed status as the result of a technical upgrade of its facilities. Based on our review of the record, we affirm the Bureau's underlying decisions. Section 76.54(d) of the Commission's rules requires that only stations that went on-the-air after 1972 are eligible to rely on county-wide viewership data in seeking significantly viewed status.<sup>42</sup> Stations, such as WCJB, that seek a waiver of this requirement based on a technical upgrade of the station's facilities, must submit engineering data to justify such a request. Specifically, a petitioner is required to submit the station's original license, its license as of the date of the upgrade, and Grade B contour maps detailing the station's current and previous predicted coverage areas. Bureau engineering staff then reviews the information presented, focusing primarily on such details as Effective Radiated Power ("ERP"), Height Above Average Terrain ("HAAT"), and Grade B coverage. A comparison of this data will yield the percentage of increase in coverage area.

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<sup>36</sup>36 FCC 2d 326 (1972).

<sup>37</sup>WJKS Opposition at 12, citing *British Caledonian Airways, Limited v. Civil Aeronautics Board*, 584 F. 2d 982 (D.C. Cir. 1978) (an agency's decision to act via *ad hoc* adjudication rather than rulemaking is entitled to wide latitude and courts will not "second-guess" an agency's decision unless it finds that the agency has abused its discretion); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S. Ct. 1957 (1974). WJKS also asserts that WCJB's reliance on *Ford v. FTC* is misplaced because that case involved an industry-wide range of regulations, while the issue of "new" station status is relevant only to a discrete number of TV broadcasters.

<sup>38</sup>WCJB Reply at 1.

<sup>39</sup>WCJB Reply at 6.

<sup>40</sup>*Id.*

<sup>41</sup>WCJB Reply at 7.

<sup>42</sup>47 C.F.R. §76.54(d).

10. We disagree with WCJB's assumption that the Bureau has established a formal percentage minimum relative to stations seeking "new" status due to a technical upgrade.<sup>43</sup> We continue to believe, as we stated in *CALTEC*, that each petition seeking such waiver should be reviewed on a case-by-case basis. In this regard, we note that, while the Commission has an obligation to take a hard look at the evidence submitted for waiver, petitioners must meet a high burden of proof to obtain a waiver of our rules.<sup>44</sup> However, in line with *SEC v. Chenery Corp.*, the Commission has proceeded in this area by *ad hoc* decisions and, in reviewing more than 70 such petitions since the decision in *CALTEC*, has established appropriate criteria for determining "new" station status.<sup>45</sup>

11. As a result of these cumulative decisions, the Commission has determined that the most important factor is the station's percentage of increase in Grade B coverage as a result of technical improvements. We believe this factor provides the most obvious evidence of the effect of the technical upgrade on the station. Associated with the percentage increase is the actual increase in Grade B coverage area which provides a means to determine the specific area affected by the increase.<sup>46</sup> Finally, we consider the increase in the population served. Despite WCJB's arguments to the contrary, this is not a factor which the Bureau ignores in making this determination. Increase in population covered is, in general, an inherent part of any technical upgrade resulting in an increase in Grade B coverage and only in rare instances would a station's increase in Grade B area not result in an accompanying increase in population served. The fact that population has not been mentioned separately in previous evaluations is a reflection of its status as an adjunct in the station's overall change. However, the fact that population can fluctuate within a station's Grade B contour, even where no upgrade has taken place, makes it difficult to rely on population as a completely separate factor.

12. We are not persuaded that the Cable Services Bureau erred in its determination that WCJB's technical improvements were not of sufficient magnitude to warrant treating WCJB as a "new" station for purposes of Section 76.54 of the Commission's rules. Nor do we believe, as WCJB alleges, that the Bureau failed to give WCJB's petition a "hard look."<sup>47</sup> To the contrary, the initial decision specifically references WCJB's power increase, its increase in HAAT, and its 50.6 percent increase in population. All of these factors, in combination, were carefully scrutinized by the Bureau's engineering staff and found insufficient to merit "new" station status. For instance, in its original decision, the Bureau found that the increase in WCJB's HAAT from 208 meters to 287 meters and the station's increase in ERP from 500 kw to 2820 kw resulted in a

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<sup>43</sup>Indeed, we have granted a waiver for a station whose upgrade was determined to be 40 percent, 1 percent below the 41 percent in *CALTEC*. See, *WDSI Limited Partnership*, Cable Television Actions Report No. 3408, Mimeo No. 24270 (released August 5, 1992).

<sup>44</sup>See, e.g., *Notice of Proposed Rulemaking in Docket No. 20371*, 51 FCC 2d 445 (1975); *Report and Order in Docket No. 20371*, 56 FCC 2d 265, 268 (1975).

<sup>45</sup>See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

<sup>46</sup>Increase in Grade B coverage refers to the increase in the predicted signal strength contour of a station as defined by Part 73 of the Commission's rules. Increase in Grade B coverage area refers to the actual increase in mileage of a station's service area.

<sup>47</sup>*WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969) requires us to take a "hard look" at all the factors raised by the parties in a proceeding to determine whether a waiver is appropriate. We believe that the petitioner herein has failed to carry its burden in this regard.

36.7 percent increase in WCJB's predicted Grade B contour. As a basis for comparison, the Bureau identified the corresponding increase of WDCA-TV in *CALTEC* where that station's ERP went from 1.1 million watts to 4 million watts, resulting in a 41 percent increase in Grade B contour. In its reconsideration, the Bureau noted that the relative change between these two stations' Grade B coverage areas constituted a 10 percent smaller change for WCJB.<sup>48</sup> We note that in reviewing cases involving technical upgrades, the Bureau's analysis compares the differential between the additional coverage area a station obtains as a result of an upgrade to the same coverage area achieved in other similar decisions rather than total overall coverage area. This gives a true picture of the actual amount of increase.

13. In the interests of accuracy, we have calculated the difference in actual increase in Grade B coverage area between WDCA-TV and WCJB by comparing the actual square mileage involved. WDCA-TV's Grade B coverage area in *CALTEC* increased from 9,160 square miles to 12,900 square miles -- a difference of 3,740 square miles.<sup>49</sup> The figures for WCJB's Grade B coverage area increase were given in square kilometers and ranged from 10,685 to 14,611 -- a difference of 3926 square kilometers. This converts to a 1,509 square mile increase in Grade B coverage area for WCJB. The increase in WDCA-TV's Grade B coverage area is nearly two and one-half times greater than that experienced by WCJB. Indeed, we note that despite the increase in square miles achieved, WCJB lost considerable Grade B coverage in Columbia County due to the relocation of its transmitter site.<sup>50</sup>

14. With regard to the population increases experienced by WCJB, several factors make it difficult for us to rely on this element or to give it preeminence over the technical parameters discussed above. First, the population estimates cited by WCJB were based on 1990 Census figures, some eight years after WCJB's technical upgrade took place. Given the fluctuating nature of populations, it would have been more appropriate for WCJB to use population data compiled closer to the time of the actual event. In this instance, 1980 Census data would appear to be a more appropriate population statistic resource.<sup>51</sup> Secondly, WCJB provides no information for us to determine how much of its increase in population can be attributed purely to its technical upgrade, normal population growth, or the relocation of its transmitter tower 20 miles to the south. Technical upgrades of stations usually do not include both an increase in power and HAAT coupled with a transmitter relocation. Therefore, in this instance, it is impossible to determine how much of an impact WCJB's transmitter relocation had on population levels without such an analysis. In this regard, WCJB simply failed to carry its burden of proof. In *American Valley Broadcasting Company*, the Commission denied a request for "new" status which resulted in a 33% upgrade. In that decision, the Grade B area increase was 1,951 square miles and the population increase covered 148,375 people.<sup>52</sup> The corresponding figures for

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<sup>48</sup>See *Diversified Communications*, Cable Television Actions Report No. 3516, Mimeo No. 50548 (released November 8, 1994) at 2.

<sup>49</sup>See *CALTEC*, 63 FCC 2d 1022, 1026 (1977).

<sup>50</sup>See *Diversified Communications*, Cable Television Actions Report No. 3488, Mimeo No. 42227 (released March 18, 1994) at 2.

<sup>51</sup>We deem the 1980 data more relevant than the more current data submitted by the petitioner because, consistent with our rules and precedent, we base our decision in cases such as this one on the import of the technical upgrade at or about the time it was completed. This "snapshot" approach applies only where the broadcasters seek to be newly-designated as "significantly viewed" on a county-wide basis. See para. 3, *supra*. More current data would be appropriate where the broadcaster is seeking that designation on a community-wide basis. *Id.*

<sup>52</sup>Cable Television Actions Report No. 3253, Mimeo No. 852 (released December 7, 1989).

WCJB are 1,509 square miles and 173,385 people. In view of the date discrepancies noted in the population figures presented by WCJB and the questionable reliability of population data in general, we find that this factor does not overcome the deficiencies found in the other relevant factors.

15. Given the importance of a station's percentage of increase in Grade B coverage area, the inconclusive nature of the population information relied upon by WCJB herein, and the fact the 10 percent smaller change for WCJB cannot be considered a de minimis amount, we cannot find WCJB's 36.7 percent increase sufficient to overcome the parameters relied on by the Bureau in *CALTEC* and subsequent decisions. Therefore, based on the totality of the evidence before us, we do not believe this is a situation which warrants a waiver.

#### V. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the Application for Review filed by Diversified Communications, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary