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February 16, 1994

By Hand Delivery
Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

OUR FILE NO.
0992-102-60

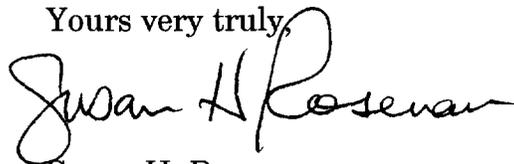
RE: MM Docket No. 93-42 / Calistoga, California

Dear Mr. Caton:

On behalf of Moonbeam, Inc., an applicant (File No. BPH-911115MG) for a New FM Station on Channel 265A in Calistoga, California, please find the original and six copies of its Reply to Findings and Conclusions of Gary E. Willson in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,

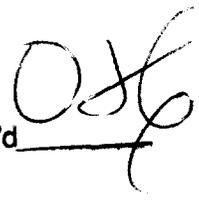


Susan H. Rosenau

Enclosures (6)

cc: Moonbeam, Inc.
Robert Zauner, Esquire
A. Wray Fitch, Esquire
Administrative Law Judge Edward Luton

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
Federal Communications Commission

Washington, D.C. 20554

In re Applications Of)	Docket No. MM 93-42
)	
MOONBEAM, INC.)	File No. BPH-911115MG
)	
GARY E. WILLSON)	File No. BPH-911115MO
)	
For a Construction Permit for a)	
New FM Station on Channel)	
265A in Calistoga, California)	

To: The Honorable Edward Luton
Administrative Law Judge

**Reply to Findings and Conclusions
of Gary E. Willson**

Lee W. Shubert
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February 16, 1994

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SUMMARY

Moonbeam, Inc. ("Moonbeam") is an applicant for a new FM station on Channel 265A at Calistoga, California. Moonbeam had designated against it issues of whether it falsely certified as to its financial qualifications in its original application and its amendment as of right, and whether it is presently financially qualified. In his proposed Findings and Conclusions, Gary E. Willson ("Willson") admits that Moonbeam took actions which constitute a serious and reasonable review of Mary Constant's financial resources. Further, Willson's arguments that Moonbeam has presented inadequate evidence of Mary Constant's financial ability to finance Moonbeam's proposed station are based on an erroneous reading of the authorities he cites. The cases Willson cites deal with evidence which has effectively been rebutted by more probative evidence. Moonbeam's evidence is essentially unrebutted.

No Commission precedent states that where, prior to filing, an applicant agreed to dismiss another application pursuant to a settlement, and merely awaits FCC approval of the settlement, the applicant must be able to finance both proposed facilities. No FCC policy would be served by such a rule.

Willson's attacks on Moonbeam's financial qualifications are speculative and unsupported by credible evidence in the record. Moonbeam never indicated an intent to construct a main studio or an auxiliary studio from the ground up. Further, there is no evidence that Ms. Constant's net tax liability will be higher than she anticipated in her balance sheet.

Finally, there is no evidence in the record that Ms. Constant lied on the witness stand. Willson attempts to transform tentative statements on legal issues and ambiguous testimony into perjury, which does not meet the legal standard for *sua sponte* designation of misrepresentation issues. Accordingly, the financial issues should be resolved in favor of Moonbeam, Inc.

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Federal Communications Commission

Washington, D.C. 20554

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265A in Calistoga, California)	

To: The Honorable Edward Luton
Administrative Law Judge

Reply to Findings And Conclusions of Gary E. Willson

Pursuant to Sections 1.263 and 1.264 of the Commission's Rules and the Presiding Officer's Order released November 22, 1993 (FCC 93M-719), Moonbeam, Inc. ("Moonbeam"), by its attorneys, respectfully submits its Reply to Findings and Conclusions of Gary E. Willson with respect to the qualifying issues heard November 15, 1993:

Preliminary Statement

1. In his Findings and Conclusions on the Moonbeam Financial Issues, filed January 24, 1994 ("Willson Find."), Willson continues his established pattern of exaggeration, and proliferation of unfounded conclusions. When these techniques are insufficient, Willson re-casts the law to fit the facts he has, and claims victory.

2. Stated succinctly, Willson's major points are as follows:

(a) Moonbeam has failed to prove that it did not falsely certify its financial qualifications because:

- (1) Mary Constant's balance sheet was inadequate;
- (2) Mary Constant's bank statements were incomplete;
- (3) Moonbeam's budget was not proved to be objectively reasonable;
- (4) Certain liabilities were omitted from Mary Constant's balance sheet; and
- (5) Despite its agreement to settle, Moonbeam didn't budget to pay for the Eagle, Idaho, facility it had earlier applied for and which it no longer intended to build.

(b) Moonbeam failed to prove it is currently financially qualified because:

- (1) Mary Constant's balance sheet is inadequate and not sufficiently current;
- (2) Moonbeam's legal fees have exceeded its estimate;
- (3) Mary Constant forgot to include certain liabilities on her balance sheet.

(c) The Presiding Officer should disqualify Moonbeam for lack of candor and misrepresentation because of certain inconsistencies between Ms. Constant's testimony and past testimony and/or pleadings.

3. Willson's myopic analysis -- which is clearly inconsistent both with Commission precedent and Willson's past arguments in this proceeding¹ -- must be rejected as lacking both substance and credibility. Accordingly, Moonbeam must be found to have carried its burden of proof and to be qualified to be a Commission licensee.

¹See generally, Opposition to Second Motion to Enlarge Issues Against Gary E. Willson, filed August 23, 1993) (no need for detailed financial documentation on hand at time of certification if applicant is familiar with his or her financial situation).

FINDINGS OF FACT

I. FALSE CERTIFICATION

4. ***Cost Estimates and Review of Assets.*** Willson concedes the most significant facts pertaining to this issue, i.e., that prior to certifying Moonbeam's financial qualifications, Ms. Constant prepared a business plan or "budget" containing cost estimates for construction and operation of the proposed station (Willson Find. at 2, 4, 5, 6) and that she discussed that budget with her engineering consultant, her communications attorney and her husband, an experienced broadcaster. Willson's findings fail to point out that, according to Ms. Constant, her communications counsel confirmed that the budget was reasonable. Tr. at 385-386. It is reasonable to infer that Mr. Constant expressed a similar view, since the budget was not significantly revised thereafter.

5. Willson also concedes that, prior to certifying, Ms. Constant reviewed her account statements, which reflected her current assets on account, and her current liabilities, and prepared a balance sheet based on the information therein (Willson Find. at 2, 7, 8). Further, Willson agrees that Ms. Constant testified that her financial condition did not change between the first and second certification. Willson Find. at 4.

6. Without any basis, however, Willson tries to attack the veracity of Ms. Constant's Alex, Brown & Sons statements, which he claims are "incomplete." Willson Find. at 8. Moonbeam offered these statements to show the actual account balances and the source of Ms. Constant's information for certification. Tr. at 298, 299, 304-305. Willson has never explained -- or even suggested -- what he believes to be missing or why the alleged "incompleteness" of the statements would

affect the accuracy of the account balances shown. In short, Willson has failed to rebut the veracity of Moonbeam's exhibit.

7. *Main and Auxiliary Studio Construction.* Contrary to Mr. Willson's proposed findings, Ms. Constant never testified that Moonbeam planned to construct an auxiliary studio, nor did she testify that a main studio building in Calistoga would have to be constructed from the ground up (Willson Find. at 5-6). Ms. Constant testified that Moonbeam *might* accept KFTY's offer of space for an auxiliary studio. Tr. at 84-87. No time frame was ever suggested for the theoretical construction of this hypothetical studio. Logic dictates that such construction will occur, if ever, after the initial three months of station operation.

8. Similarly, Willson's reliance on Ms. Constant's ambiguous comment that she would be in charge of "construction" of a main studio is misplaced. The testimony cited must be viewed in context. Mr. Gammon asked Ms. Constant how she would "supervise the station's construction." Tr. at 133. Based on his question, Willson apparently either assumed that Moonbeam planned construction of a new building, or hoped to trap a nervous witness into seeming to agree that construction would occur. Nonetheless, Ms. Constant clearly answered, "There will not be much construction." *Id.* Mr. Gammon then asked her whether there would be construction of the main studio building. *Ms. Constant then repeated his question. Id.* She testified thereafter that she would oversee any construction necessary. *Id.* at 133-134.

9. In short, Willson relies on Ms. Constant's repetition of his counsel's question "there will be construction of the studio building" as testimony that she had intended from the start to construct a main studio building from the ground up. There is at least as much support in the record for the opposite conclusion. Ms. Constant's testimony from

the same day indicates that Ms. Constant had not even decided where in Calistoga she would locate Moonbeam's main studio. Tr. at 86. Also, Moonbeam has maintained throughout this proceeding that Ms. Constant would relocate to Calistoga, which in fact she has, which gave Moonbeam the option of locating Moonbeam's studio at Mary Constant's future residence, making construction unnecessary.²

10. ***Eagle, Idaho, Application.*** Willson devotes a great deal of time to Moonbeam's "conflicting" application for Eagle, Idaho, but fails to describe the most important facts surrounding that application. These are:

- Several months *before* Moonbeam applied for the Calistoga, California permit, it had entered into a settlement agreement pursuant to which it would dismiss its application. Tr. at 285.
- Moonbeam explicitly notified the Commission of its intent to dismiss its Eagle application in Exhibit 1 to Moonbeam's Calistoga application, which states that Moonbeam "will dismiss" the Eagle application. See Exhibit 1. Moonbeam also amended its application to reflect the dismissal of the Eagle application. See Exhibit 2.
- Prior to the time Moonbeam filed the Calistoga, California application, Mary Constant had been advised by counsel that the FCC staff would approve the settlement. Tr. at 286, 387-388.

11. The sum of the facts unequivocally demonstrate that at the time of the filing of Moonbeam's Calistoga, California, application, Moonbeam had mentally, emotionally and actually abandoned and divorced itself from its Eagle, Idaho, application. All that remained were the nominal ministerial tasks of expunging the Moonbeam's Eagle

²Indeed, as Willson points out in his recent enlargement petition, another station -- KRSH(FM) -- already locates its main studio in an existing building on Mary Constant's property in Calistoga, which demonstrates the feasibility of such a plan.

application from the Commission's files and data bases. That ministerial process was fulfilled *prior* to the time Moonbeam's Calistoga application even was accepted for filing.

II. PRESENT FINANCIAL QUALIFICATIONS

12. As with his findings regarding the false certification issue, Willson spends much of his effort detailing the alleged deficiencies in Ms. Constant's account statement, business plan, and balance sheet.

13. In addition, Willson attempts to cast doubt on Ms. Constant's financial wherewithal by describing a \$13,000 tax lien, a \$2,300 dollar mechanic's lien, Mr. Constant's interest in some funds in Ms. Constant's account, a *secured* crop loan to be paid out of the sale of the crop, and the possibility of some amount of tax liability resulting from the fact that she bought her Calistoga home for less than the sale price of her Nicasio home. Willson Find. at 8, 9.

14. Once again, Willson fails to mention (or credibly rebut) a number of very relevant facts, including:

- Ms. Constant's testimony that the 1993 vineyard crop brought in several times the amount of the payments due on the crop loan (Tr. at 326, 384-385);
- Mr. Constant's consent to the use of community property to fund Moonbeam (Tr. at 313);
- Ms. Constant's testimony that the tax and mechanic's liens did not affect her ability to fully finance Moonbeam (Tr. at 314-315);
- the Alex, Brown & Sons statements which reflect several times the funds necessary to construct and operate Moonbeam's proposed station (Moonbeam Exhibits J, K, L).
- Ms. Constant's testimony that Moonbeam had \$95,000 - the full amount necessary to construct and operate its proposed station - on account at the time of the November 15, 1993 hearing (Tr. at 328).

15. Finally, Willson alleges that Moonbeam has failed to include among Mary Constant's liabilities the tax owed on "capital gains" from the sale of her Nicasio home. Willson Find. at 21-22. Willson has not introduced any reason to conclude that Ms. Constant's net tax liability will be significantly higher than she anticipated.

CONCLUSIONS OF LAW

I. FALSE CERTIFICATION

16. ***Financial Documentation/Qualifications.*** The Commission requires that an applicant make "serious and reasonable" efforts to determine whether it has sufficient current, liquid assets in excess of current liabilities to construct and operate the proposed station for three months without income. *Northhampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989), *aff'd on other grounds*, 941 F.2d 1214 (D.C. Cir. 1991); *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3859 (1989)(Revision Order). In his Findings and Conclusions, Willson attempts to recast the Commission's financial qualification and certification standards. Willson's version of the law would require a self-financed applicant,³ prior to certification, to have a detailed financial statement prepared by an accountant in accordance with generally accepted accounting principles, review his or her own income tax returns for the past two years, and prepare a business plan which, based on actual estimates from suppliers, predicts every parameter of the proposed station to the utmost detail.

³Willson's attempt to describe Moonbeam in any other way is absurd. Moonbeam is being financed by its sole shareholder. No precedent requires Mary Constant to pretend she has no prior knowledge of her own finances in certifying on Moonbeam's behalf; she is as justified in relying on her knowledge as any self-financed individual applicant.

17. Simply stated, no such legal requirements exist. The cases Willson cites, viewed as a group and in the context of other cases, show that the type and degree of proof required to prove an applicant's financial qualifications varies with the circumstances. For example, when an applicant is relying on a bank loan to finance his proposal, the applicant must show that the bank examined his financial status before issuing a commitment letter, that the bank's procedures were followed, and that the bank's letter represents an actual commitment to loan money to the applicant. *See, e.g., A.P. Walter, Jr.*, 6 FCC Rcd 875 (Rev. Bd. 1991). The formula changes slightly where the applicant (or a principal of the applicant) and the bank have a long-standing business relationship. *Id.*

18. When an applicant relies on a loan from a source other than a financial institution, the applicant is generally expected to closely examine the lender's financial ability to make the loan, and must show an actual commitment to loan the money. The applicant must review the lender's balance sheet or financial statement, and if appropriate, other financial documents which affect the lender's financial ability. *See, e.g., Sunbelt Limited Partnership*, 7 FCC Rcd 4394 (Rev. Bd. 1992). If the applicant has a long-standing relationship with the non-institutional lender, as in *Northhampton*, such that the applicant would already have a great degree of familiarity with the lender's financial resources, and the lender is involved with the application process itself, those requirements are further relaxed, and the applicant's knowledge of its own and/or the lender's resources may be sufficient.

19. When an applicant's financial certification and/or qualifications are challenged, the applicant must adduce probative evidence that it has met the legal standard. The cases cited by Willson,

however, include circumstances not present in Moonbeam's case, and which required the applicant to meet a more challenging standard of proof. For example, in *Central Florida Communications Group, Inc.*, 8 FCC Rcd 4128 (Rev. Bd. 1993), the applicants relied on a financial statement which bore an accountant's disclaimer which stated that matters had been omitted which "might influence" the reader's opinion of the applicant's financial condition. *Central Florida* does not say that applicants must submit as proof of their financial qualifications a detailed financial statement prepared according to generally accepted accounting principles. *Central Florida* stands for no more than the proposition that, when the financial statement bears a huge red flag stating that it may be unreliable, the Presiding Officer may decline to rely upon it.

20. Similarly, in *Aspen FM, Inc.*, 6 FCC Rcd. 1602 (1991), the Commission upheld the Presiding Officer's decision to rely on contemporaneous documentary evidence which indicated that a line of credit could *not* be used to build the applicant's station, despite post-hoc testimony from a bank official that the bank would have lifted the restriction on request. In short, these cases do not state that an applicant may not meet its burden of proof by its own testimony and informal documentation; they stand only for the proposition that, when testimony and informal documentation are placed in serious doubt by credible evidence, the applicant must produce *additional* evidence to rebut such evidence and prove its case.

21. Moonbeam's evidence is virtually unchallenged. Mary Constant, who was relying on her own finances to certify on Moonbeam's behalf, obtained a detailed cost estimate from a reliable engineer and confirmed it with her experienced communications attorney. She

confirmed that she had a substantial amount of unencumbered money in the bank and minimal current liabilities which left a sufficient amount to meet her budget, and then some. In short, Moonbeam was financially qualified when Mary Constant certified, and Mary Constant knew it.

22. ***Eagle, Idaho, Application.*** Willson's entire discussion regarding the brief simultaneous pendency of the Eagle, Idaho and Calistoga, California, applications is wholly irrelevant. The settlement agreement was signed and filed with the Commission months before Moonbeam filed the Calistoga application, and provided for the dismissal of Moonbeam's Eagle, Idaho application. Tr. at 285. Ms. Constant was advised that the agreement would be approved by the Commission. Tr. at 286, 387-388. Moonbeam's Calistoga application clearly stated that the Eagle application would be dismissed. Exhibit 1. Ms. Constant testified that after entering into the Eagle, Idaho settlement, she had no further intent to proceed with the Eagle application. Tr. at 285. Thus, it is clear that when Ms. Constant signed the financial certification for Moonbeam's Calistoga application, she believed that Moonbeam had no further financial obligation under the Eagle application. *See Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992) (No false certification without conscious intent to deceive).

23. Assuming *arguendo* that the Eagle application is nevertheless relevant to the false certification issue regardless of Ms. Constant's mental state, the result is unchanged. In his conclusions, Willson cites several cases in which applicants with multiple applications pending were disqualified because they were unable to finance all of the facilities applied for, Willson Find. at 14-16. None of these cases bear any factual similarity to Moonbeam's circumstances. None involve a

settlement *prior* to the filing of the second application, which provided for dismissal of the application. None involve a statement in the second application that the earlier application will be dismissed. One case cited involved a much longer period of simultaneous pendency, *see, e.g., Welch Communications, Inc.*, 7 FCC Rcd 4542 (Rev. Bd. 1992) (over one year); another involved the simultaneous pendency of dozens of applications, with the intent to later “pick and choose” which facilities to build, *see Breeze Broadcasting Co., Ltd.*, 8 FCC Rcd 1835 (Rev. Bd. 1993); yet another involved an applicant which hoped to construct both facilities, *Playa Del Sol Broadcasters*, 8 FCC Rcd 7027 (Rev. Bd. 1993); *see also Welch, supra.*

24. These distinctions go to the heart of the rationale for the Commission’s general policy that an applicant for multiple facilities must be financially qualified to construct all. The Commission lacks the resources to waste on applicants who are not able and committed to constructing the facilities applied for. Also, the public interest is poorly served if an applicant is, after a lengthy proceeding, awarded a permit it does not intend to use. *Neither concern is implicated here.* Ms. Constant’s intent to dismiss Moonbeam’s Eagle application was long-standing, on-record, and made manifest to the Commission. Accordingly, there is no reason the cases cited by Willson should be construed to state that an applicant who has requested permission to dismiss pursuant to a settlement may not file a second application unless he can finance both proposals.⁴

25. **Business Plan.** Willson’s attacks on Moonbeam’s business plan are equally deficient. The Commission and the Review Board have

⁴Viewed another way, it was in the exclusive power of the Commission to trigger the only contingency which might revive Moonbeam’s Eagle commitment, i.e. rejection of the settlement.

held that reliance on estimates from professionals such as a consulting engineer, a communications attorney and experienced broadcasters is reasonable. *A.P. Walter, Jr.*, 6 FCC Rcd 875. Willson's alleged "showing" that Ms. Constant failed to include funds to construct a main studio and an auxiliary studio lacks substantial basis on the record. *See infra* at ¶¶ 7-8. He did not even attempt to support his allegations regarding the number of employees and payment of a part-time engineer with references to the record. Willson Find. at 5-6, 17.

26. Willson also assumes, without suggesting even the shadow of a basis, that the changes reflected in Moonbeam's March 2, 1992 amendment would *increase* projected costs. Willson argues -- without legal or factual support -- that Moonbeam had to create a new business plan and re-certify its financial qualifications because it was changing sites. No such rule exists. Moreover, there is no evidence that the costs changed at all -- up or down. The Commission has *never* ruled that a site change *per se* requires a new business plan and new certification. Accordingly, Moonbeam's business plan and site change are irrelevant to the question of whether Moonbeam's certifications were genuine.

27. **Legal Fees.** Moonbeam initially estimated its legal expenses for this proceeding, based on the advice of experienced communications counsel, at \$30,000. As set forth above, Ms. Constant's reliance on this estimate when certifying was reasonable. *A.P. Walter, supra*. The fact that prosecution expenses have in fact exceeded this estimate -- a fact largely due to Gary Willson -- has no bearing on Ms. Constant's intent on the dates she certified.

28. **Summary.** There exists no legal or factual foundation for Willson's conclusion that Ms. Constant ever falsely certified as to

Moonbeam's financial qualifications. The overwhelming evidence indicates that Ms. Constant made "reasonable and serious" efforts to estimate costs and identify her available assets, and that Moonbeam was financially qualified. As a result, the false certification issue must be resolved in favor of Moonbeam.

II. CURRENT FINANCIAL QUALIFICATIONS

29. **General.** Willson makes the same attacks on Moonbeam's proof of its current qualifications as he made with respect to Moonbeam's original certification, and again, Willson's attack lacks a basis in law. Moonbeam's proof is sufficient in light of the source of its funding, its manner of operation, and the lack of rebuttal evidence or other indicia of unreliability.

30. Further, it does not matter if one of Moonbeam's balance sheets included some money later transferred to Mr. Constant as "his share" of the sale price on the Nicasio house. Moonbeam may rely, in whole or in part, on community property, because Mr. Constant has consented to its use. Ms. Constant has tallied her current liabilities, omitting liabilities which are self-liquidating (such as the crop loan) -- *and omitting the assets/income to be used to pay such liabilities off as well.* The tax lien, which was paid off in April, 1993, is not large enough to be relevant. The mechanic's lien -- all of \$2,341 -- is so small as to be immaterial. In light of the simplicity of Mary Constant's financial situation, the evidence Moonbeam presented is sufficient to prove these facts.

31. Further, the amorphous "capital gains" question Willson raises (Willson Find. at 22) is just too speculative to be considered. It cannot be determined from the record whether Ms. Constant, will in fact,

have any net tax liability for 1993. Ms. Constant's net tax liability for 1993 could not, in any case, have been determined at the time of the hearing; as set forth in Exhibit 3 hereto, she has determined with her accountant that her share of the Constant's 1993 tax liabilities -- which are not, in any event, due until April 15, 1994 at the earliest -- will not materially affect her ability to fund Moonbeam's proposed station.

32. **Legal Fees.** Gary Willson has sought countless added issues (most of which have been rejected) and has otherwise done everything within his power to prolong and complicate this proceeding. Willson now attacks Moonbeam's estimate of legal costs as insufficient because Moonbeam's bills have, in fact, exceeded the estimate.⁵ Willson Find. at 18. The irony is clear. In any event, Moonbeam has been paying legal expenses on an ongoing basis. As the record reflects, on those occasions when Moonbeam carried a balance, the balance did not exceed the amount budgeted for legal fees in Moonbeam's business plan. Accordingly, the reserved amount is adequate.

33. **Summary.** Willson's hyper-technical, legalistic analysis of the standard of proof should not be permitted to railroad applicants whose financial plans do not warrant an army of accountants and reams of documentation. Mary Constant and Moonbeam have the money. Ms. Constant deposited \$90,000.00 into Moonbeam's account immediately prior to the hearing, and testified that Moonbeam had additional moneys on account. The money for Moonbeam's station is *there*. Application of any other standard in this case would be an affront to justice.

⁵An old definition of "*chutzpah*" describes the young man accused of murdering his parents, who throws himself on the mercy of the court -- because he is an orphan.

III. LACK OF CANDOR/MISREPRESENTATION

34. As his parting shot, Willson includes yet another attempt to elevate ambiguous or inadvertent statements into intentional misrepresentation warranting addition of issues against Moonbeam. The alleged offending statements include:

(a) Ms. Constant's testimony that she believed "capital gains" on the proceeds of her Nicasio home were due within three years;

(b) Ms. Constant's inclusion of joint assets on her June, 1993 balance sheet, and failure to list the crop loan as a current liability; and

(c) Ms. Constant's testimony that the crop loan payments would be made out of the crop proceeds;

(d) Ms. Constant's testimony that the money in her Alex, Brown & Sons accounts was not separate property; and

(e) Ms. Constant's statements in various pleadings that she was paying legal fees on an ongoing basis, when allegedly she was in arrears. Willson Find. at 22-25.

35. In addition, Willson attempts to resurrect past enlargement requests which were denied⁶, i.e., the California tax lien, and adds to that the \$2,341 mechanic's lien. Willson Find. at 25.

36. Willson's efforts to paint Mary Constant as a liar and a perjurer are absurd. The case he cites, *Marie M. Ochoa*, (FCC 93-526) 8 FCC Rcd ___ (released December 28, 1993), does not stand for the proposition that, at the end of the hearing, opponents can add 11th hour requests for misrepresentation issues based on inconsistent testimony or

⁶Is it any wonder that Moonbeam's legal fees have exceeded the initial estimate, when it must argue the same matters over, and over, and over, and over again? Willson has tried this ploy before, *see, e.g.*, Willson's third enlargement petition, which attempts to resurrect issues from his first enlargement petition! Further, Willson has since filed another enlargement petition, which raises issues from his third petition.

misstatements. *Marie M. Ochoa* involved blatant, admitted perjury at the hearing itself. The “misrepresentations” Willson cites include significant questions of law regarding which Ms. Constant is not claimed to be expert. Ms. Constant cannot be branded a perjurer for her ignorance of tax law and community property law, or, for that matter, for her confusion regarding the terms of a specialized business loan. She testified as she believed. Being wrong does not make her a liar.

37. Further, in several of the instances cited Ms. Constant was not, in fact, wrong. The crop loan *is* self-liquidating, whether paid monthly or at harvest. The \$140,000 purchase price for the crop pays the annual loan payments almost three times over, and was not included among Ms. Constant’s assets. Further, Ms. Constant was able to include joint assets on her balance sheet because Mr. Constant gave her permission to use them (Tr. at 313). Finally, Ms. Constant did not testify that Moonbeam’s legal bills were current, only that she was paying them on an ongoing basis -- which she has been.

38. Even if, *arguendo*, these items rise to the level of “misrepresentations,” Willson is unfairly bypassing the proper procedure for raising the issue. If Willson wanted to file an enlargement petition based on the hearing testimony, he had 15 days from receiving the transcript to do so. 47 C.F.R. 1.229. He should not be permitted to tack it on the tail end of his findings.

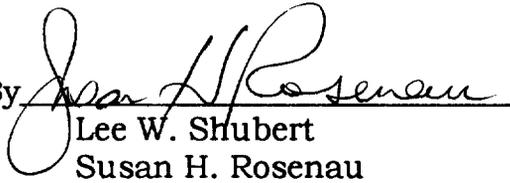
CONCLUSION

Willson’s findings cannot change the issues requested and designated, or the Commission’s law regarding those issues. Based on the record, both designated issues must be resolved in Moonbeam’s

favor. Accordingly, the financial issues specified against Moonbeam should be dismissed, and Moonbeam found qualified to be a Commission licensee.

Respectfully submitted,

MOONBEAM, INC.

By 
Lee W. Shubert
Susan H. Rosenau

Its Attorneys

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February 16, 1994

EXHIBIT 1

Moonbeam, Inc.
Exhibit 1
Section II, 7(a)
Pending Application

In May, 1991 Moonbeam, Inc. filed an Application for Construction Permit for a new Commercial Radio Station on FM Channel 265 in Eagle, Idaho.

A settlement agreement has been filed with the Federal Communications Commission whereby Moonbeam, Inc. will dismiss its pending application.

EXHIBIT 2

MOONBEAM, INC.
OTHER APPLICATIONS

In May, 1991, Moonbeam, Inc., filed an application (FCC Form 301) for authority to construct a new FM Broadcast station on FM Channel 265 at Eagle, Idaho. Several other mutually exclusive applicants also filed for the Eagle, Idaho, facility. A settlement among the various applicants was achieved and approved by the Federal Communications Commission. As a result and function of that settlement, the application of Moonbeam, Inc., for Eagle, Idaho, has been dismissed. (See FCC Public Notice dated February 2, 1992.)

Mary F. Constant, President and sole shareholder of Moonbeam, Inc., was sole shareholder and an officer of Sagebrush Communications Company, an applicant for a new commercial FM broadcast station at Bend, Oregon (File No. BPH-0820825AG). A settlement was approved in that proceeding and the Sagebrush application was dismissed by letter on September 1, 1983.