



does not favor noncompete agreements. See Bureau Comments at n. 1. In Nirvana, the Review Board *approved* a covenant not to compete. One of the two mutually exclusive applicants for a new FM station in Christiansburg, Virginia agreed to dismiss its application in return for consideration which included a covenant not to compete in the amount of \$102,500. The term of the covenant not to compete -- five years -- was two years longer than the term contemplated by Willson and Moonbeam; and the geographic area, including Christiansburg and Blacksburg, Virginia is larger than contemplated by Willson and Moonbeam. The Bureau concluded that the agreement was acceptable because it was "reasonably limited in duration and geographic scope." Id. at 2779. Since the Willson/Moonbeam Noncompete Agreement is even less restricted, it follows that it too is reasonable. See also James U. Steel, 4 FCC Rcd. 4770, 4703 (1989)(settlement agreement providing for a covenant not to compete for a seven-year period and a geographic area extending 25 miles from St. Simon's Island approved).

Approval of the Willson/Moonbeam Settlement Agreement does not violate Rule 73.3525. The Bureau opposes the Agreement because "it would result in Willson receiving monetary consideration in excess of that permitted by Section 73.3525 of the Commission's rules." Comments at p. 4. The Bureau, however, misinterprets the rule. The rule excludes agreements from the limitation of ordinary and reasonable expenses if they have an independent value. The Report and Order adopting the rule, Settlement Agreements Among Applicants for Construction Permits, 6 FCC Rcd. 85 (1990), mod., 6 FCC Rcd. 2901 (1991) specifically allows settling applicants to submit ancillary agreements, "[S]ettling parties are required either to submit any ancillary agreements they have made, such as consulting agreements, or to certify that these do not exist." Id. at p. 87. The Commission clearly contemplates, and has approved, settlement agreements where the total

contemplated consideration is in excess of the reasonable and prudent expenses of the dismissing applicant. Its only concern is that there be a legitimate, independent basis for the consideration paid pursuant to an ancillary agreement such as a noncompete agreement or consulting agreement and that the agreement is not a ruse to elude the compensation limit. Texas Television, Inc., 91 FCC2d 1043 (Rev. Bd.), mod on recon, 91 FCC2d 1047 (1982); rev den., FCC83-95 (released March 9, 1983); Yenton Corp., 90 FCC2d 307 (1982).

Willson and Moonbeam have provided a reliable, independent basis for establishing the value of the Noncompete Agreement.<sup>1</sup> Mark Jorgenson, a media broker with Jorgenson Broadcast Brokerage with extensive experience in media valuations, values the fair market value of a three-year noncompete agreement involving Gary Willson in the Santa Rosa market between \$120,000 and \$180,000. Americom values the Noncompete Agreement at \$140,000. Both Mark Jorgenson and Americom have established their qualifications as experts and have detailed a methodology for arriving at their respective valuations. The Bureau, without any corroborating evidence, shoots down both appraisals as "based on speculation or bald assertions." Comments at 2. Ironically, the only basis for the Bureau's conclusions is pure speculation. The Bureau offers no expert opinion to disprove or undermine the two appraisals provided by Willson and Moonbeam.<sup>2</sup> The Bureau does not dispute either appraisers' qualifications or experience. The appraisers have explained their

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<sup>1</sup> Counsel for Willson and Moonbeam met informally with Bureau counsel before the Settlement Agreement was filed with the FCC. Bureau counsel suggested, and undersigned counsel agreed, to submit an appraisal of the Noncompete Agreement.

<sup>2</sup> Mr. Jorgenson's valuation is conservative. For example, he is projecting \$600,000 in annual revenues although two stations recently sold -- one a Class A and the other a B1 -- had estimated annual revenue of \$1.5 million each. Jorgenson appraisal at p. 5.

methodology as well as the valuations, are clearly qualified to provide an expert opinion. Their conclusions are entitled to full credit.<sup>3</sup>

In response to the Bureau's claim that the appraisals are not reliable to establish the value of the Noncompete Agreement, Willson and Moonbeam have obtained the letter opinion of William Redpath, CPA, ASA, CFA and Vice President of BIA Consulting, Inc. Mr. Redpath, who is an experienced broadcast appraiser, having valued many noncompete agreements, is in basic agreement with the methodology and conclusions of the appraisals submitted. See Exhibit 2. He concludes, based on a conservative analysis, that the value of the Noncompete Agreement is \$187,000.<sup>4</sup> He points out that 1994 gross revenues for two of the three Class A radio stations in the market are estimated at \$3 million and \$1.5 million. Mr. Redpath also notes that Mr. Willson's extensive broadcast experience and familiarity with the Santa Rosa market are particularly relevant to a smaller market like Santa Rosa where a greater percentage of the sales are based on personal relationships and contacts.

This is not a contrived arrangement. Gary Willson is a highly experienced, capable and proven broadcaster with numerous business ties within the Calistoga station's service area. He has been involved in broadcasting for over 35 years. Mr. Willson has had extensive broadcast experience beginning in 1947. His experience includes the ownership, construction and operation of KIOY-FM, Hanford/Fresno, California from 1976 to 1981 which, within one and a half years, was

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<sup>3</sup> The Bureau faults the noncompete appraisals as subjective, unlike appraisals of stations. As noted by Jorgenson, however, "subjective judgment also plays a part in radio station appraisals, as there is no way to absolutely quantify various programming formats or the quality of performance of various operators managing the same assets." Jorgenson Appraisal at p. 5.

<sup>4</sup> Mr. Redpath values the Noncompete Agreement at \$187,000 but discounts it, based on present day value, to \$142,246. However, since the Noncompete Agreement calls for payment over three years, the nondiscounted value of \$187,000 is the more appropriate comparison.

rated number one in a 27-station market. Mr. Willson is also very familiar with the Calistoga-Santa Rosa market and has been for a number of years. He has owned businesses like Sparkle Plenty Auto Detail Shop, Speed-Dee Wash, and low income residential property in the Santa Rosa area from 1987 through the present. He is a member of the Santa Rosa and Hispanic Chamber of Commerce and has subscribed to the Santa Rosa Arbitron Rating Books since 1991. A more detailed description of Mr. Willson's familiarity and connection to the Santa Rosa market is attached as Exhibit 1. The Calistoga station is in his backyard. Mr. Willson represents a very real economic, competitive threat to the Calistoga station. The money paid pursuant a Noncompete Agreement is intended to eliminate the very real economic threat that a competing facility owned or operated by Gary Willson poses.

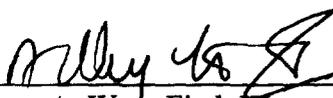
Settlement Agreements are favored and should be encouraged. See Texas Television, Inc. supra. at 426 ("[T]he Commission--and the law generally--firmly favor settlements.") It is respectfully requested that the Joint Petition for Approval of Settlement Agreement be approved.

Respectfully submitted,

**GARY E. WILLSON**

**GAMMON & GRANGE, P.C.**

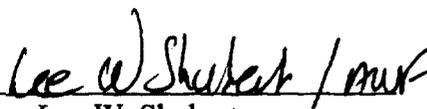
8280 Greensboro Drive  
Seventh Floor  
McLean, VA 22102-3807

By   
A. Wray Fitch III  
His Attorney

**MOONBEAM, INC.**

**HALEY BADER & POTTS**

4350 North Fairfax Drive, Suite 900  
Arlington, VA 22203-1633

By   
Lee W. Shubert  
Its Counsel

February 24, 1995

[K:\0068\REPLY.AWF]

# **EXHIBIT 1**

**GARY E. WILLSON**

**FAMILIARITY WITH THE CALISTOGA-SANTA ROSA CALIFORNIA MARKET COVERS A LONG PRIOD OF TIME**

Since 1981, Mr. Willson has had a first hand, working knowledge of the Calistoga-Santa Rosa market. He and his wife shop and dine in the area on a regular basis as it is like a suburb to the them. It is an easy freeway drive of 30-40 miles from the Willsons' home. Even prior to that time, from 1966 to 1976, as an account executive at KRON-TV, San Francisco, Mr. Willson had a day-to-day knowledge of the market. Santa Rosa-Sonoma County is part of the San Francisco 11-county ADI television market and was included in Mr. Willson's sales territory.

**OWNER-DEVELOPER OF 12-UNIT LOW INCOME RESIDENTIAL PROPERTY**

1992-Present In 1992, Mr. Willson purchased a low income development known as Sandy Point 4 on Dutton Avenue, Santa Rosa. He is involved with his Hispanic tenants, manager and handyman whom he meets with on a regular basis. He has spent a great deal of time at the project as he has been rebuilding and remodeling most of the homes. He was worked with the County and civic leaders and local bankers and mortgage lenders regarding future development of the property.

**OWNER-OPERATOR OF SPEED-DEE WASH**

1987-1994 Even though Speed-dee Wash was an unattended store, Mr. Willson was there at least two times a week servicing the store's needs and customers. He was very involved in the community and with advertising people.

**OWNER-OPERATOR OF SPARKLE PLENTY AUTO DETAIL SHOP**

1987-1988 Mr. Willson personally operated the company on a day-to-day basis, purchasing advertising from the Press Democrat and KZST-FM. He was very involved in the advertising community. During this time, he worked on a direct basis with most of the automobile dealers on Santa Rosa's auto row, which was across the street from the shop.

**MEMBER OF SANTA ROSA AND HISPANIC CHAMBER OF COMMERCE**

1992-Present Mr. Willson attends many meetings of chambers and has many acquaintances through their activities.

## PERSONAL KNOWLEDGE OF RADIO MARKET

1991-Present Subscriber to the Santa Rosa Arbitron Rating Book.

1985-Present Mr. Willson also reads the Press Democrat and Gazette published in Santa Rosa. Mr. Willson watches KFTV, Santa Rosa, as it is Marin and Sonoma Counties only TV station.

## BROADCAST EXPERIENCE

### ACCOUNT EXECUTIVE FOR ADVO SYSTEMS

1985-1986 Territory included all of Marin and Sonoma Counties for the nation's largest direct mail company. Mr. Willson made calls on various Santa Rosa advertising agencies and clients selling direct mail advertising. Stanley Steamer and Cattlemen's restaurants were two of Mr. Willson's biggest advertisers.

### BROADCAST BROKER AND CONSULTANT

1981-1985 Studied and visited the market on a regular basis and had many discussions with station owners in the Santa Rosa market about selling their properties.

### BROADCAST BROKER & CONSULTANT

1981-1985 Belvedere & San Rafael, California;  
As a broker, represented radio stations in California, Oregon, Idaho, Iowa, Hawaii and Texas. As a consultant, represented owner in construction of new AM station in San Luis Obispo. Advertised extensively in Broadcasting Magazine.

### PRESIDENT, GENERAL MANAGER & STATION OWNER

1976-1981 KIOY-FM, Hanford/Fresno, California;  
Planned, built, financed and operated from scratch, one of Fresno's most successful radio stations, KIOY became Number 1 rated, in a 27-station market, after being on the air only a year and a half. Personally directed a staff of 20 people. Developed creative, new format, programming and music sweep ideas that are still used in the market today.

### ACCOUNT EXECUTIVE

1964-1966 KXTV-TV, Sacramento, California;

1966-1976 KRON-TV, San Francisco, California;  
One of KRON-TV's most respected account executives. Serviced major account list, called on top advertising agencies like BBDO and J. Walter Thompson. Accounts included PG&E, Coca-Cola and Standard Oil.

ACCOUNT EXECUTIVE

1958-1962    KGMS, KXOA and KROY, Sacramento, California;  
One of the highest billing salesmen at KXOA and KROY.

SALES MANAGER

1958-1962    KROY, Sacramento, California;  
Full charge of five-man sales department at Number 1 radio station in market.

AIR PERSONALITY

1947-1958    WEXT, Royal Oak; WLDM, Detroit; WSDC, Marine City; WTTH, Port Huron;  
WTAC, Flint; WSGW, Saginaw; WKMF, Flint, Michigan.

## **EXHIBIT 2**

**BIA CONSULTING**P.O. BOX 11307, WASHINGTON, DC 20011  
PHONE 703-818-BIAS FAX 703-803-FAAX

February 24, 1995

A. Wray Fitch, III, Esq.  
Gannon & Grange, P.C.  
Attorneys at Law  
Seventh Floor  
8280 Greensboro Drive  
McLean, Virginia 22102-3807  
(703) 761-8000  
(703) 761-5023--Facsimile

Dear Mr. Fitch:

Pursuant to your request, I have reviewed the non-competition agreement valuations done by Americom Radio Brokers, Inc. and Mark Jorgenson relating to the proposed settlement agreement between Mr. Gary E. Wilson and Moonbeam, Inc., MM Docket No. 93-42.

I have been employed by BIA Consulting, Inc. (formerly Broadcast Investment Analysts, Inc.) since August 1985 and have performed hundreds of fair market valuations and tax appraisals, also known as purchase price allocations, of radio and television stations. During this work, I have valued many non-competition agreements between seller and buyers of broadcasting properties. They are common attachments to purchase agreements in radio and television transactions and a portion of the purchase price, or a separate amount in addition to the purchase price for the other assets being sold, is allocated to them. My qualifications are attached to this letter.

I think there are elements of both appraisals that are accurate and well thought out, but would like to add an additional perspective on the matter of the valuation of this non-competition agreement. It is my understanding that the non-competition agreement compels Mr. Wilson to not own or operate a radio station in the Santa Rosa radio market for a period of three (3) years after Moonbeam, Inc. starts the operation of this Class A FM radio station in Calistoga.

Santa Rosa, California is a small to medium size radio market, consisting of only Sonoma County, California. The market is currently ranked 112th largest of 263 Arbitron-rated radio markets and has a population of 418,500, according to BIA Publications' Investing in Radio 1995, First Edition, a commonly used reference book in the broadcasting industry. Also according to that publication, projected gross radio revenues in the market for 1995 is \$10.4 million.

A. Wray Fitch, III, Esq.  
February 24, 1995  
Page 2

Investing in Radio 1995, First Edition, also estimates 1994 gross revenues for KRSH(FM), licensed to Middletown, California, at \$600,000. This station recently signed on-the-air and its first Arbitron share was 2.6% of all 12+ (twelve years of age and older), which converts to a 3.2% share of listening to local commercial radio stations after listening to non-commercial stations and out-of-market commercial stations are removed from the analysis.

While Calistoga is about 15 miles northeast of Santa Rosa, Middletown is 17 miles north of Calistoga. This means that a Calistoga-licensed Class A station will almost certainly will cast a better signal over the Santa Rosa radio market than will KRSH(FM). I think it is reasonable to project revenues for this Calistoga Class A FM station at \$500,000 in its first year of operation, with an increase to \$750,000 in its second year, and to \$950,000 in its third year of operation. Investing in Radio 1995, First Edition, has estimated 1994 gross revenues of \$3,000,000 and \$1,500,000 for the other two Class A radio stations in the market, so I think these revenues projections are realistic and, perhaps, conservative.

The ability of and the opportunity for Mr. Wilson to compete in the Santa Rosa radio market is not an empty threat. He began his career in broadcasting in 1947, has held many different management and sales positions in the industry, including taking a new radio station in Fresno to the top audience share in the market within eighteen (18) months of the station signing on-the-air in the mid-1970's. He also possesses great knowledge of the Santa Rosa radio market. There is currently a Docket 80-90 allocation for 93.7 megahertz (MHz) for a new Class A station to be licensed to Sebastopol. Mr. Wilson could acquire the construction permit of that station and put it on-the-air or buy another station in the market, without the non-competition agreement.

He would also likely be an effective competitor, given his professional presence in the Santa Rosa area for the last thirteen (13) years and in northern California for the past 35 or more years. Smaller radio markets tend to have time sales completed more on the basis of personal relationships, with relatively less emphasis on stations' audience shares than in the largest radio markets. That would benefit Mr. Wilson and make him a more effective competitor.

Because of the intangible nature of non-competition agreements, the valuation of them is inherently subjective in nature. The value of the agreement should be the present value of the estimated incremental cash flow that will accrue to Moonbeam, Inc. by Mr. Wilson's exclusion from the Santa Rosa radio market for the first three years of this new station's operation. I think the 10% of gross revenues estimate made by Mr. Jorgenson is very reasonable. That means that \$50,000, \$75,000 and \$95,000 in

A. Wray Fitch, III, Esq.  
February 24, 1995  
Page 3

gross revenue for the new FM station would be attributable to the non-competition agreement with Mr. Wilson. Radio station operation is largely a fixed cost business, therefore the incremental operating expense should be restricted to advertising agency and sales commissions. I have estimated the incremental sales expenses at 15% of gross revenue, which leaves \$42,500, \$68,750 and \$60,750 of incremental operating profit in the first three years of operation due to the non-competition agreement. When those figures are present valued to the beginning day of the non-competition agreement, they sum to \$142,246, which is very close to the value of \$149,000 for the non-competition agreement to which Mr. Wilson and Moonbeam, Inc. have agreed. Based on this analysis, the \$149,000 non-competition agreement value appears reasonable.

It is my experience that non-competition agreements, when they exist, are usually allocated between 10% and 25% of a station's value in a purchase price allocation. I have also seen an analysis of non-competition agreements that appeared in Paul Kagan Associates, Inc.'s Broadcast State, October 31, 1993, that with the exception of one year in which the percentage was higher, the average non-competition agreement allocation percentage ranged between 11% and 20% from 1985 through 1992 in radio station transactions. Given the valuation of this new radio station in both the Americom and Jorgenson appraisals, the value of \$149,000 for the non-competition agreement between Mr. Wilson and Moonbeam, Inc. is quite reasonable.

Sincerely,



William Redpath, CPA, ASA, CFA  
Vice President

**TABLE 1****Analysis of Gary E. Wilson  
Non-Competition Agreement with Moonbeam, Inc.**

<b>Year</b>	<b>Projected Gross Revenues</b>	<b>Incremental Revenues Due to Agreement</b>	<b>Incremental Revenues After Sales Expenses</b>	<b>Present Value @ 18%</b>
1	\$500,000	\$50,000	\$42,500	\$39,124
2	750,000	75,000	63,750	49,734
3	950,000	95,000	80,750	53,387
				<hr/> \$142,246



**BIA CONSULTING** P O BOX 17307, WASHINGTON, DC 20041  
PHONE 703-818-BIA5 FAX 703-803-FAXX

**QUALIFICATIONS  
OF  
WILLIAM REDPATH, CPA, ASA, CFA**

**William Redpath is Vice President for BIA Consulting (BIA), formerly Broadcast Investment Analysts, Inc. and Frazier, Gross & Kadlec (FGK), a financial consulting and valuation firm with an expertise in the appraisal of broadcasting, cable, and related properties and preparation of financial presentations for communications clients. In addition to the communications work, BIA Consulting provides Machinery and Equipment appraisals as well as General Business appraisals. Prior to joining BIA in 1985, Mr. Redpath was a Senior Financial Analyst with NBC in New York.**

**He has a varied background in broadcasting, having worked as an air personality at WFIN(AM)/WHIMQ(FM), Findlay, Ohio, and WGTC(AM)/WTTS(FM), Bloomington, Indiana. He was also employed as a part-time engineer at WFIU(FM), Bloomington, Indiana.**

**After completing his formal education, Mr. Redpath was a staff auditor in the Cincinnati office of Arthur Andersen & Co. from 1980 to 1982. Subsequent to that, he was Assistant Financial Manager of WISH-TV, Indianapolis, for one year. After that, he joined the Internal Audit Department at ABC, where he worked on numerous audits, including those of WXYZ(AM) (now WXYT), WRIF(FM) and WXYZ(TV), Detroit. In 1984, he took the position with NBC.**

**Mr. Redpath has been involved in several matters of litigation involving valuation issues and has defended intangible asset valuations before the Internal Revenue Service. He has authored articles for the BCFM Journal and other professional journals on intangible asset valuation. He has also testified in state courts and United States Bankruptcy Court on valuation matters.**

**Mr. Redpath earned his B.A. degree in Economics and Political Science from Indiana University and his M.B.A. from The University of Chicago. He is a Certified Public Accountant, State of Indiana, 1988, and the Commonwealth of Virginia, 1991. He is a member of the American Institute of Certified Public Accountants and the Virginia Society of CPA's, is an Accredited Senior Appraiser (ASA) in Business Valuation with the American Society of Appraisers, and is a Chartered Financial Analyst (CFA).**

**CERTIFICATE OF SERVICE**

I, Janet Shih, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent this 24th day of February 1995, by first-class, postage prepaid, U.S. Mail, copies of the foregoing JOINT REPLY TO MASS MEDIA BUREAU'S COMMENTS ON JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT to the following:

\* The Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 225  
Washington, D.C. 20554

Robert A. Zauner, Esq.  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7212  
Washington, D.C. 20554

Lee W. Shubert, Esq.  
Haley Bader & Potts  
4350 North Fairfax Drive  
Suite 900  
Arlington, VA 22203-1633  
(Counsel for Moonbeam, Inc.)

  
\_\_\_\_\_  
Janet Shih

\* By Hand