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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 01-105
Table of Allotments,)	RM-10104
FM Broadcast Stations.)	
(Shiner, Texas))	

To: Chief, Allocations Branch

REPLY COMMENTS OF ELGIN FM LIMITED PARTNERSHIP
AND CHARLES CRAWFORD

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List A B C D E

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Table of Authorities.....	ii
I. Summary.....	1
II. The instant proposal for Shiner, Texas is not cut-off by any prior filing.....	2
III. The JP Counterproposal should be dismissed as fatally defective.....	2
IV. Reallotments essential to the entire array of allotments in the counterproposal offend the public interest under 47 U.S.C. §307(b).....	4
A. The San Antonio market.....	6
B. The Austin market.....	9
C. The Dallas-Fort Worth market.....	10
V. Conclusion.....	13

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases and Decisions:</u>	
<u>Ada, Newcastle and Watonga, Oklahoma,</u> 11 FCC Rcd 16896 (Allocations Branch 1996).....	7
<u>Amendment of the Commission's Rules</u> <u>Regarding Modification of FM and TV</u> <u>Authorizations to Specify a New Community</u> <u>of License, 5 FCC Rcd 7094 (1990).....</u>	6,7
<u>Broken Arrow and Bixby, Oklahoma, and</u> <u>Coffeyville, Kansas, 3 FCC Rcd 6507</u> (Policy and Rules Division 1988).....	2
<u>Coolidge and Gilbert, Arizona,</u> 11 FCC Rcd 3610 (Allocations Branch 1996).....	8
<u>Farmersville, et al (Texas) and Ada, et al</u> (Oklahoma), 12 FCC Rcd 4099 (Allocations Branch 1997).....	4
<u>Headland, Alabama and Chattahoochee, Florida,</u> 10 FCC Rcd 10352 (Allocations Branch 1995).....	8
<u>Parker and Port St. Joe, Florida,</u> 11 FCC Rcd 1095 (Allocations Branch 1996).....	7
<u>Scotland Neck and Pinetops, North Carolina,</u> 10 FCC Rcd 11066 (Policy and Rules Division 1995).....	8
 <u>Statutes and Regulations:</u>	
47 U.S.C. §307(b).....	<u>passim</u>
47 C.F.R. §73.3555.....	3
 <u>Other:</u>	
<u>Broadcasting & Cable Yearbook 2000</u>	5

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To: Chief, Allocations Branch

REPLY COMMENTS OF ELGIN FM LIMITED PARTNERSHIP
AND CHARLES CRAWFORD

1. Elgin FM Limited Partnership and Charles Crawford reply to the comments filed by First Broadcasting Company, L.P., Next Media Licensing, Inc., Rawhide Radio, L.L.C., Capstar TX L.P. and Clear Channel Broadcast Licenses, Inc. (the "Joint Parties"). These comments and the counterproposal filed in another proceeding on which they are based are without merit.¹

I.
Summary

2. The JP Counterproposal does not have priority over the instant rulemaking proceeding by virtue of its earlier filing. The JP Counterproposal should be dismissed due to technical deficiencies. The essential components of the grid of allotments and reallocations in the JP Counterproposal are contrary to the public interest under Section 307(b) of the Communications Act and implementing Commission policies. The reallocation of Class C level frequencies to the Dallas-Fort Worth, San Antonio and Austin radio markets is based on indefensible claims of first

¹ The subject comments are referred to as the "JP Comments". The counterproposal, filed in MM Docket No. 00-148 with regard to a proposal to allot a new FM channel at Quanah, Texas, is referred to as the "JP Counterproposal".

local service for communities of infinitesimal size located within the relevant Urbanized Areas.

II.

The instant proposal for Shiner, Texas
is not cut-off by any prior filing

3. Without citation to authority, the JP Comments, at 2, state that the Shiner proceeding should be dismissed because it conflicts with a proposal for Flatonia, Texas, made in the JP Counterproposal that was filed earlier than the Shiner petition and hence purportedly cuts off consideration of the Shiner proposal.

4. Who are the Joint Parties kidding? The petition to allot a new FM channel at Shiner has been vetted by the Commission's staff, it has been found acceptable and put on notice for public comment, and the proposed FM channel at Shiner has been entered in the Commission's data base. The JP Counterproposal has not been vetted by the Commission's staff, it has not been found acceptable or put on notice for public comment, and the wild array of channel changes set forth in the JP Counterproposal has not been entered in the Commission's data base. See, e.g., JP Comments at 1.

III.

The JP Counterproposal should be
dismissed as fatally defective

5. The JP Counterproposal was filed on October 20, 2000. As of that date, the counterproposal must have been technically correct and subsequent attempts to correct the deficiencies will not be accepted. Broken Arrow and Bixby, Oklahoma, and

Coffeyville, Kansas, 3 FCC Rcd 6507, 6511 (Policy and Rules Division 1988). There were at least three deficiencies in the JP Counterproposal.

6. First, while the Joint Parties used up the two allowed realignments without the consent of the affected stations (at Archer City and Nolanville, Texas), JP Counterproposal at 3, the Joint Parties did not nail down a technical realignment required with respect to a conflicting Class C1 application to upgrade station KICM(FM) at Krum, Texas, relying on the "expectation" that this proposed improvement of the Krum facility would be dismissed. JP Counterproposal at 13. As of the JP Counterproposal filing date, the conflicting application had not been dismissed nor had the applicant party committed itself to secure such dismissal. To the contrary, KICM(FM) has recently demonstrated its continuing interest in the C1 application in filing a minor modification thereof on May 8, 2001.

7. Second, the Joint Parties relied on the notion that Capstar's Waco, Texas, station will be moved to Lakeway, Texas, within the Austin Urbanized area. JP Counterproposal at 19. This station is under common ownership with the party that was recently required to sell one of its Austin stations in order to come within the local multiple ownership limit under FCC regulations, 47 C.F.R. §73.3555. BAL-20000317AAW, granted August 15, 2000, Official Notice requested. Accordingly, the move of the Waco station into the Austin market required a commitment to make a further divestiture there. No such commitment was

provided in the JP Counterproposal.

8. Third, for the move from Waco to the Austin Urbanized Area, the JP Counterproposal relied on a defective transmitter site. Exhibit 1 shows the location of the site to be in the Colorado River.

IV.

Reallotments essential to the entire array of allotments in the counterproposal offend the public interest under 47 U.S.C. §307(b)

9. In obvious recognition that an enormous interrelated chain of allotments and reallotments has been proposed, the Joint Parties cited an example of Commission approval of an interrelated chain of allotments. JP Counterproposal at 3. The example is Farmersville, et al (Texas) and Ada, et al (Oklahoma), 12 FCC Rcd 4099 (Allocations Branch 1997). In that situation, the Commission allotted a number of new FM channels in relatively small communities in Texas and Oklahoma. The only instance of an allotment raising any question concerning the use of a smaller community to secure an allotment for a nearby larger community involved a community that was, respectively, one-fourth and one-seventh the size of two Urbanized Areas to which it would provide service but in which it was not located.

10. The Joint Parties want the Commission to believe that the subject counterproposal is similar. Well, not quite. The essence of the subject counterproposal is to reallot Class C-level FM facilities into the Dallas-Fort Worth market (the 6th largest in the nation with about 60 existing radio stations), the San Antonio market (the 32nd largest in the nation with about 40

existing radio stations) and the Austin market (the 49th largest in the nation with about 30 existing radio stations).²

11. In order to accomplish this remarkable objective, having an ultimate marketplace value somewhere in the range of A-Rod's compensation package with the Texas Rangers, the Joint Parties would remove a radio station from the Waco market (the 193rd market with about 10 existing stations), remove one of four existing stations from Durant, Oklahoma (not located within any Urbanized Area) and delete the only radio allotment for McQueeney, Texas (also not located within any Urbanized Area).

12. How would the Joint Parties do this? They want the Commission to believe that the public interest under Section 307(b) of the Communications Act would be served by establishing so-called first local outlets for three communities of infinitesimal size that are a tiny fraction of 1% of the some 4,500,000 people to be served by their new facilities in the nation's 6th, 32nd and 49th largest radio markets. If the facts and circumstances of these proposals comply with Section 307(b) of the Act, then the facts and circumstances of any infinitesimal small community in any major radio market would comply with Section 307(b) of the Act. This simply cannot be.

13. In order for the scheme of the Joint Parties to succeed, each of the subject additions to the Dallas-Fort Worth, San Antonio and Austin markets must be acceptable. If any one of

² Exhibit 2 depicts city grade contours demonstrating the nature of the reallocations; market rankings and station counts are taken from Broadcasting and Cable Yearbook 2000, D-704/715.

them is not, the scheme fails. In point of fact, none is acceptable. Each will be discussed in turn.

A.

The San Antonio market

14. The Joint Parties want the Commission to accept the premise that allotting a Class C1 channel to the community of Converse, Texas (population 8,800), imbedded in the San Antonio Urbanized Area, under the guise that it would be the first local outlet for the community, is the predominantly meritorious 307(b) public interest use of the FM spectrum, even though to do so would delete an existing allotment as the first local station at McQueeney, Texas (population 2,200) that is located outside the San Antonio Urbanized Area, flying in the face of an absolute prohibition under Commission policy. Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7096 (1990).²

15. Moreover, allotting the Class C1 channel to Converse would create a gray area. But never mind. The gray area can be cured by allotting a Class A channel at Flatonia, Texas (population 1,295), although this would preclude allotting a first channel to Shiner, Texas (population 2,074) as proposed by

² The licensee of the radio station, KVCQ, which previously committed to activate the allotment in McQueeney, stated in support of the JP Counterproposal that it no longer intends to do so. JP Counterproposal at 30. Guess what? That licensee, Rawhide Radio, L.L.C., is the member of the Joint Petitioners who now would propose to own and operate the Converse/San Antonio station. Id.

the Commission in the instant rulemaking proceeding. Both Flatonia and Shiner are far removed from any Urbanized Area, and Shiner's population superiority prevails over Flatonia -- except in the Alice-in-Wonderland world of the Joint Parties in which they would create a gray area and then expect to receive extra credit for eliminating it.

16. The Commission's criteria, Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, supra, 5 FCC Rcd at 7095-96; e.g., Parker and Port St. Joe, Florida, 11 FCC Rcd 1095 (Allocations Branch 1996), do not remotely support a local service preference for Converse:

(a) The first cut is to determine if the signal covers the metropolitan area as well as the alleged community of license. Of course it does. The C1 facility will serve about one and a quarter million people in the San Antonio market. JP Counterproposal at 31.

(b) The second cut is to determine if Converse is within the San Antonio Urbanized Area and the relative size of the center city and the nearby small community. Converse lies within the Urbanized Area, creating a major hurdle to overcome under Commission policy. Moreover, Converse is less than 1% the size of San Antonio, a highly adverse comparison. JP Counterproposal at 31.³

³ The only case cited, JP Counterproposal at 6-7, for such a low percentage did not involve the critical factor of a community within the Urbanized Area of the metro community. Ada, Newcastle

(c) The third cut is to consider evidence of interdependence. While Converse has some community attributes, these are no more and no less than community attributes of any innercity incorporated area with as few as 8,800 residents. CP Counterproposal at 32-35. No convincing evidence is offered to circumvent the strongly adverse impact of cuts one and two above. To the contrary, the Joint Parties have offered no testimony by local residents or community leaders attesting to interdependence; some 89% of the local resident work force is employed outside the community, more than 60% in San Antonio itself⁴; the community is not of sufficient size or independent importance to support its own daily or weekly newspaper; and, it can be said without fear of rational contradiction, the advertising market -- for the proposed C1 facility serving a million and a quarter people -- is the nation's 32nd largest radio market, not the four square corners of Converse, Texas.

and Watonga, Oklahoma, 11 FCC Rcd 16896 (Allocations Branch 1996) (Newcastle/Oklahoma City). Another case which the Joint Parties cite, id, reflecting a percentage of 3%, also did not involve a community within the Urbanized Area of the metro community. Scotland Neck and Pinetops, North Carolina, 10 FCC Rcd 11066 (Policy and Rules Division 1995) (Pinetops/Rocky Mount). The third case cited, id, reflected a percentage of 6%, which the Joint Petitioners failed to mention, and likewise did not involve the factor of location within the Urbanized Area. Headland, Alabama, and Chattahoochee, Florida, 10 FCC Rcd 10352 (Allocations Branch 1995) (Headland/Dothan, Alabama).

⁴ With regard to this factor, the only case cited by the Joint Parties, Coolidge and Gilbert, Arizona, 11 FCC Rcd 3610 (Allocations Branch 1996), JP Counterproposal at 8, involved 87% of the work force employed outside the subject community; however, 60% were employed within a 10 mile radius of that community and only 25% were employed in the central city.

17. The 307(b) choice here is between adding the approximately 41st radio station to San Antonio or maintaining an existing first local allotment at McQueeney, establishing a new first local allotment at Shiner and avoiding the creation of a gray area.

B.
The Austin market

18. The Joint Parties want the Commission to accept the premise that allotting a Class C1 channel to the community of Lakeway, Texas (population 4,044), imbedded in the Austin Urbanized Area, under the guise that it would be the first local outlet for the community, would be a valid and meritorious 307(b) public interest use of the FM spectrum. The Commission's criteria do not remotely support a local service allotment status for Lakeway:

(a) The first cut is to determine if the signal covers the metropolitan area as well as the alleged community of license. Of course it does. The C1 facility will serve more than a half million persons in the Austin market. JP Counterproposal at 20.

(b) The second cut is to determine if Lakeway is within the Austin Urbanized Area and the relative size of the center city and the nearby small community. Lakeway lies within the Urbanized Area, creating a major hurdle to overcome under Commission policy. Moreover, the population of Lakeway is less than 1% of the population of Austin, a highly adverse comparison. JP Counterproposal at 20.

(c) The third cut is to consider evidence of interdependence. While Lakeway has some community attributes, these are no more and no less than community attributes of any innercity incorporated area with as few as 4,044 residents. CP Counterproposal at 20-24. No convincing evidence is offered to circumvent the strongly adverse impact of cuts one and two above. To the contrary, the Joint Parties have offered no testimony by local residents or community leaders attesting to interdependence; some 88% of the local resident work force is employed outside the community; the community is not of sufficient size or independent importance to support its own daily or weekly newspaper; and, it can be said without fear of rational contradiction, the advertising market -- for the proposed Class C1 facility serving more than a half million people -- is the nation's 49th largest radio market, not the four square corners of tiny Lakeway, Texas.

19. The 307(b) attributes consist of adding the approximately 31st radio station in the nation's 49th largest radio market while taking away one of approximately 10 stations in the nation's 193rd radio market. Viewed most favorably to the Joint Parties, this does not trigger any policy or valid reason to warrant upsetting the existing allotment structure and disturbing established expectancies of the public in reliance on that structure.

C.
The Dallas-Fort Worth market

20. The Joint Parties want the Commission to accept the

premise that allotting a full Class C channel to the community of Keller, Texas (population 13,683), located in the Dallas-Fort Worth Urbanized Area, under the guise that it would be the first local outlet for the community, would be a valid and meritorious 307(b) use of the FM spectrum. The Commission's criteria do not remotely support a local service allotment status for Keller:

(a) The first cut is to determine if the signal covers the metropolitan area as well as the alleged community of license. Of course it does. The full Class C facility will serve nearly three million persons. JP Counterproposal at 7.

(b) The second cut is to determine if Keller is within the Dallas-Fort Worth Urbanized Area and the relative size of the center city and the nearby small community. Keller lies within the Urbanized Area, creating a major hurdle to overcome under Commission policy. Moreover, the population of Keller is approximately 1% of the population of Dallas and 3% of the population of Fort Worth, the former a highly adverse comparison, the latter also an adverse comparison, in contrast with cases cited by the Joint Parties, none of which involved subject communities located within the Urbanized area. JP Counterproposal at 6; ¶16, n. 3, supra.

(c) The third cut is to consider evidence of interdependence. While Keller has some community attributes, these are no more and no less than community attributes of any incorporated area having as few residents as 13,683 people within a metropolitan area having millions of residents. CP

Counterproposal at 7-13. No convincing evidence is offered to circumvent the strongly adverse impact of cuts one and two above. To the contrary, the Joint Parties have offered no testimony by local residents or community leaders attesting to interdependence; some 87% of the local resident work force is employed outside the community; the community's size and independent importance supports only a weekly newspaper; and, it can be said without fear of rational contradiction, the advertising market -- for the proposed full Class C facility serving more nearly three million people -- is the nation's 6th largest radio market, not the four square corners of Keller, Texas.

21. The 307(b) choice is between adding the approximately 61st radio station in the nation's 6th largest radio market while taking away one of four existing stations in Durant, Oklahoma. While Durant's population is approximately the same as Keller's population, Durant is a stand-alone community which does not bear the contamination of the attempt to use Keller to manipulate the allotment processes. Viewed most favorably to the Joint Parties, this 307(b) comparison does not trigger any policy or valid reason to warrant upsetting the existing allotment structure and disturbing established expectancies of the public in reliance on that structure.⁵

⁵ The complex grid of reallocations in order to secure a full Class C allotment for Dallas-Fort Worth would modify channels and facilities at Archer City, Texas, Seymour, Texas, Lawton, Oklahoma, Elk City, Oklahoma, Healdton, Oklahoma and Ardmore, Oklahoma, purportedly resulting in a new Class A channel for

V.
Conclusion

22. For these reasons, the Commission should grant the instant rulemaking petition and allot channel 232A to Shiner, Texas.

Respectfully submitted



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July 3, 2001

Purcell, Oklahoma (population 4,784). However, that grid was tied to dismissal of the Krum application, which the Joint Parties failed to establish, warranting dismissal of the JP Counterproposal as shown in ¶6, supra.

EXHIBIT 1

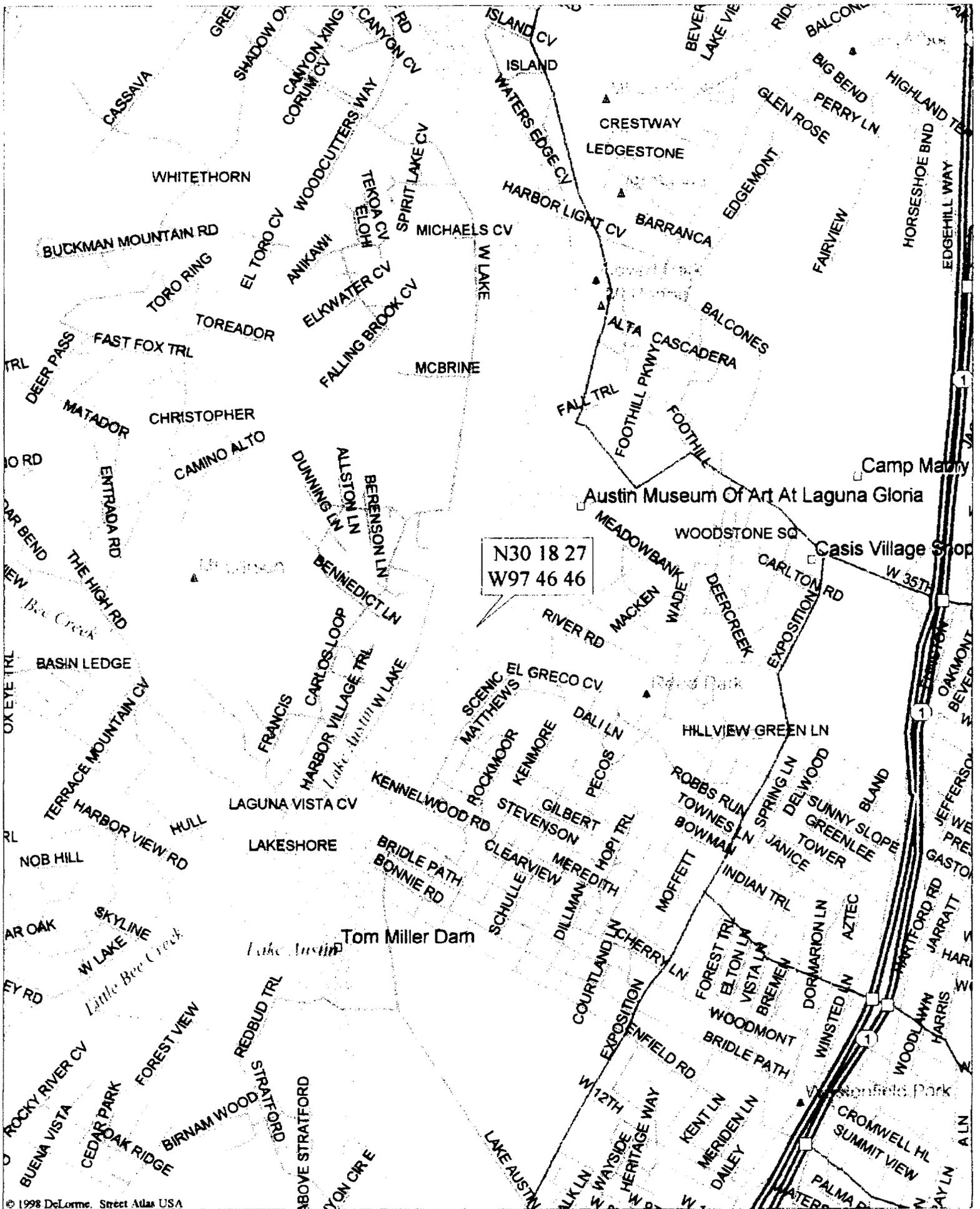
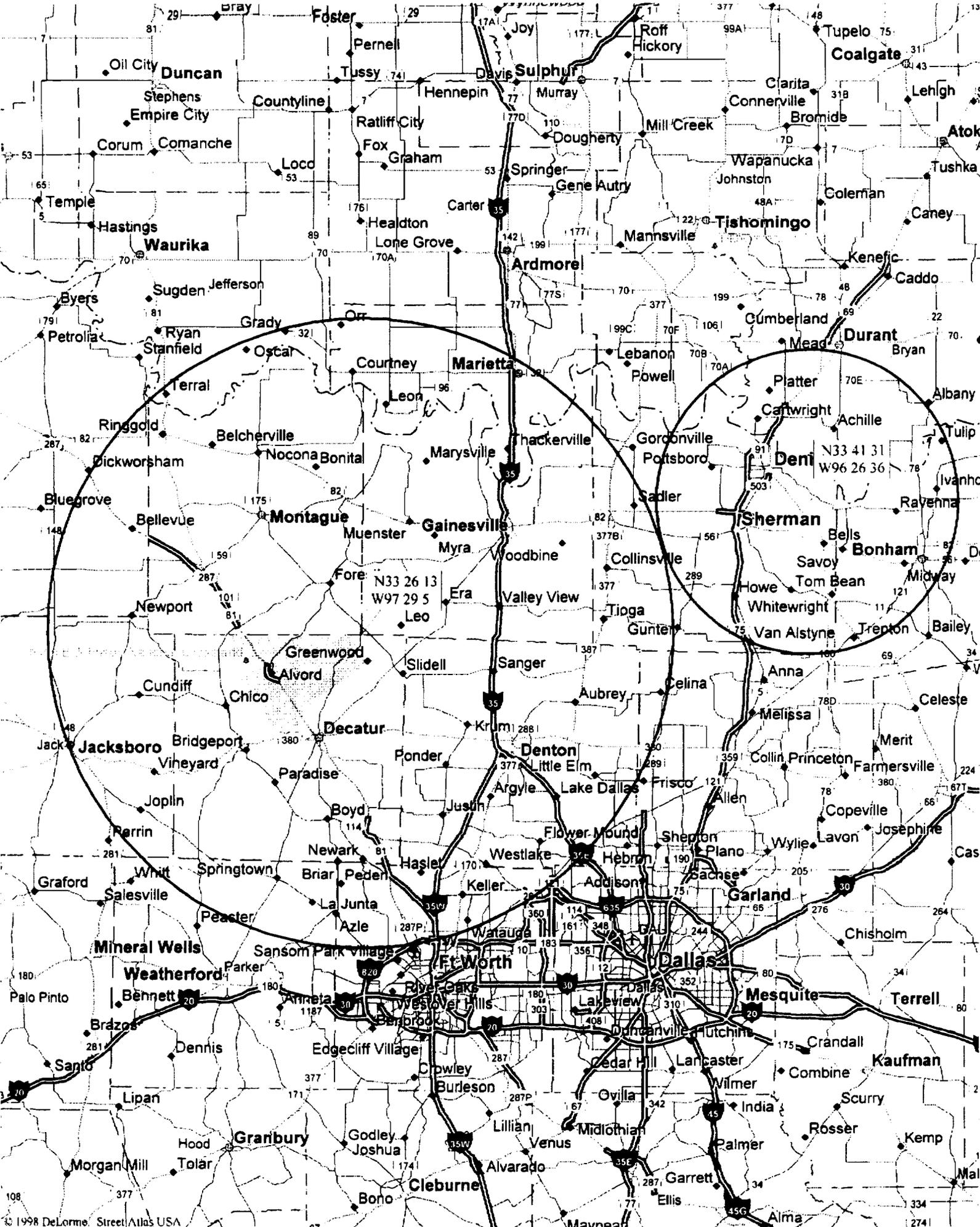
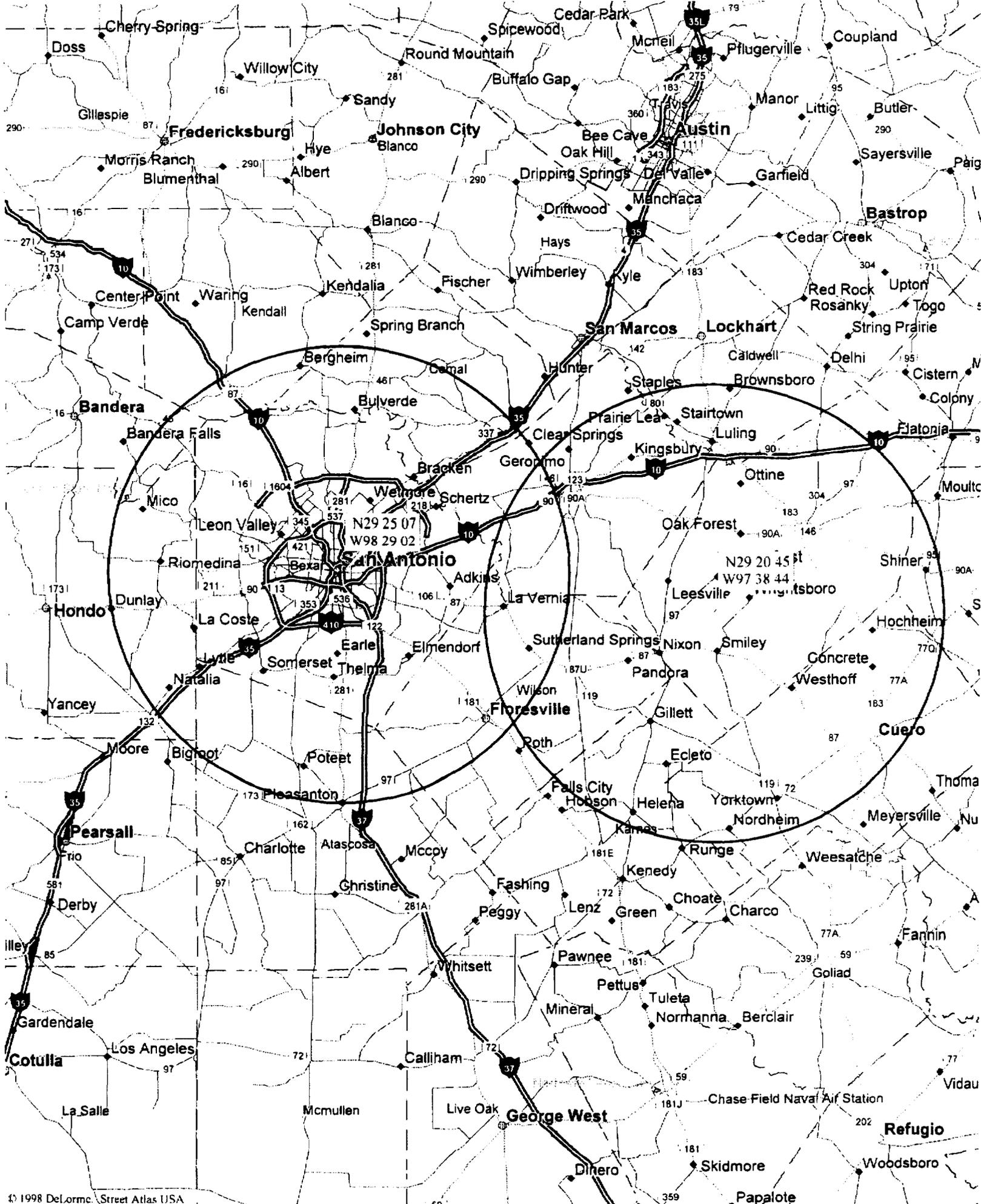
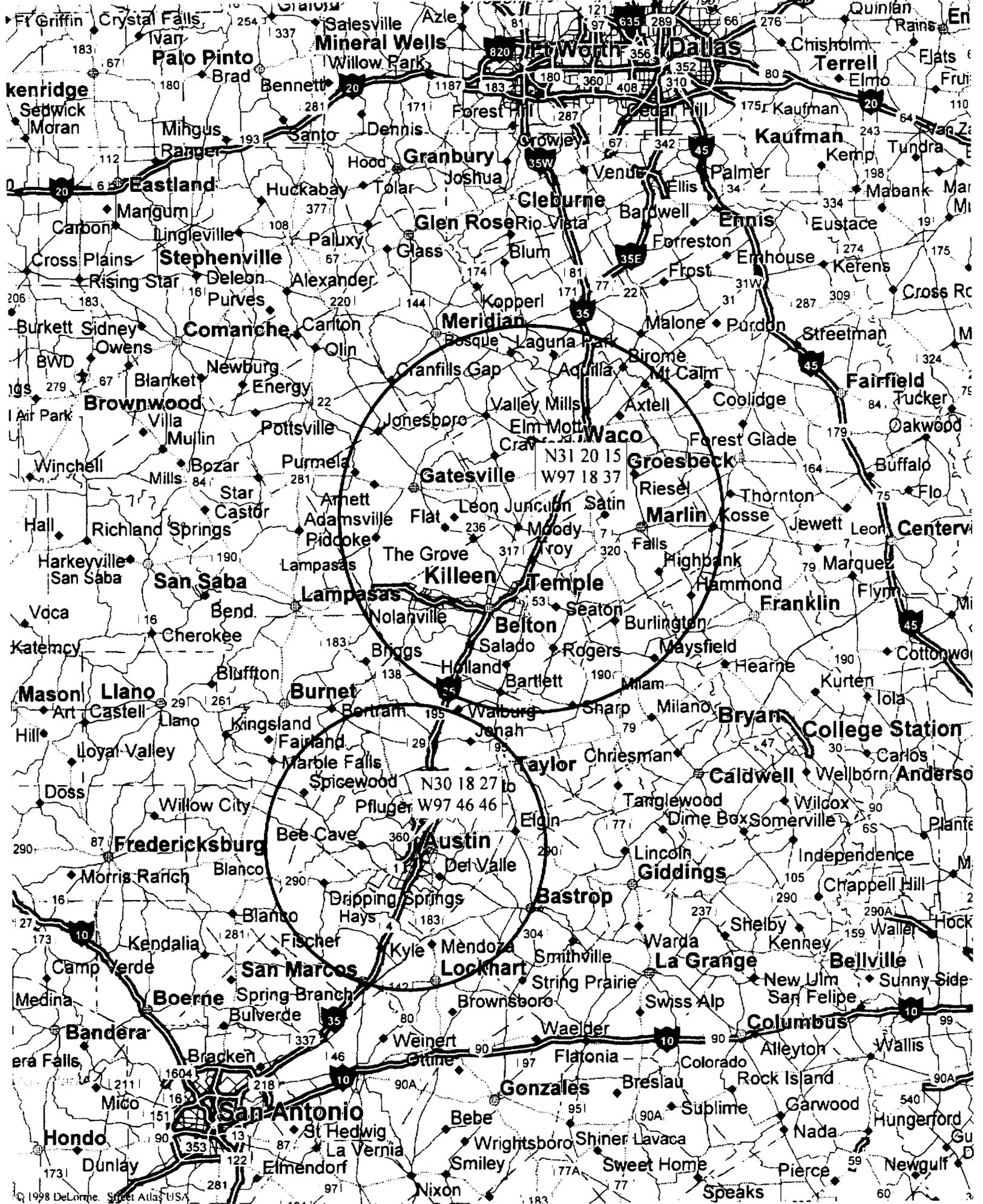


EXHIBIT 2







CERTIFICATE OF SERVICE

I certify that on this 3rd day of July, 2001, I have caused copies of the foregoing REPLY COMMENTS OF ELGIN FM LIMITED PARTNERSHIP to be placed in the United States mails, first class, postage prepaid, addressed to:

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