

RESOLUTION NO. 000629-71

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

The City Council approves execution of a five-year license agreement with **AT&T WIRELESS SERVICES** for a site located at 4905 ½ Convict Hill Road as described in the attached Exhibit A; and authorizes the City Manager to enter into the license agreement on such terms and conditions as may be reasonable, necessary, or required.

ADOPTED: June 29, 2000

ATTEST:



Shirley A. Brown
City Clerk

EXHIBIT A

LICENSE AGREEMENT BETWEEN THE CITY OF AUSTIN AND TEXAS CELLULAR TELEPHONE COMPANY L.P., A DELAWARE LIMITED PARTNERSHIP, d/b/a AT&T WIRELESS SERVICES

THIS LICENSE AGREEMENT (the "Agreement"), made and entered into as of the _____ day of _____, 2000 (the "Effective Date") by and between the City of Austin (the "City"), a Texas home rule municipal corporation, and Texas Cellular Telephone Company L.P., d/b/a AT&T Wireless Services ("LICENSEE"), a limited partnership organized under the laws of Delaware, for the purposes and consideration hereinafter stated,

For and in consideration of these premises and the mutual covenants herein contained, the City and LICENSEE agree as follows:

1. RECITALS

- 1.1 Licensor owns or otherwise controls a property with certain improvements (collectively, "Property") known as Lot 2, "Stonecreek" in Austin, Travis County, Texas as recorded in Volume 86, Page 6D-7A, of the Real Property Records of Travis County, Texas, and having the local address of 4905 ½ Convict Hill Road, Austin, Texas 78749.
- 1.2 Licensor is granting LICENSEE a non-exclusive License to install and operate a personal communication base station and related antenna(s), equipment and accessories ("Station") on the Licensed Area of Lot 2 "Stonecreek" outlined in Exhibit A.

2. DEFINITIONS

- 2.1 Station(s) shall refer to antennas, electronic equipment, self-contained equipment cabinets, equipment buildings which can be removed without demolition, supporting removable equipment, "power mounts", portable generators, and associated conduits, wiring and cables used by Licensee for the purpose of receiving or transmitting communications signals to provide wireless communications services, to its customers.
- 2.2 Licensed Area shall refer to approximately a 2500 square foot area contained in Lot 2 "Stonecreek," specifically described in Exhibit A, situated adjacent to the Austin Energy utility pole.
- 2.3 Days shall mean calendar days.
- 2.4 Emergency shall mean an unexpected or sudden occurrence that warrants urgent and immediate action to protect lives or property, or to promptly restore communications or utility services.

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- 2.5 Usage fee. Annual use and occupancy charges payable to the City for the use of the Licensed Area granted to LICENSEE hereunder.
- 2.6 City Representative. Shall mean the Director of Technology & Regulatory Affairs or designee charged with the administration of this Agreement.

3. PURPOSE

- 3.1 The City, for the term and upon the covenants, terms, and conditions hereinafter provided, grants LICENSEE a non-exclusive license and right to use the Licensed Area to place the LICENSEE's Station for the sole and exclusive purpose of providing wireless communications) service to its customers in the Austin, Texas area. The use of the Licensed Area for any purpose other than that expressly set forth in this section is prohibited and shall be a material default of the Agreement. Nothing herein is intended to be, nor shall be construed as, a grant or authorization to use the public streets or rights-of-way of the City of Austin for the delivery of other services.
- 3.2 LICENSEE shall comply with the provisions of Section 5 below prior to installing the Station in or on the Licensed Area. LICENSEE may not construct any new or additional building or structure on the Licensed Area not otherwise permitted herein. LICENSEE shall have exclusive use only of that portion of the Licensed Area set aside to hold its equipment. The City agrees not to interfere with the operations of LICENSEE as permitted under this Agreement, except in the event of an Emergency. Non-emergency interference shall be deemed a material breach of this Agreement by the interfering party, who shall, upon notice, be responsible for terminating said interference.
- 3.3 The City expressly disclaims all warranties, expressed or implied, of condition or fitness for any purpose, including without limitation warranties of merchantability, with respect to the Licensed Area for the proposed or actual use made thereof by LICENSEE. LICENSEE accepts the Licensed Area AS IS, WHERE IS, and WITH ALL FAULTS. LICENSEE represents that it has inspected the Licensed Area, and has found same to be acceptable for its purposes.
- 3.4 The City shall have the first priority in the use of the Property. In the event of any conflict between the use of the Property, including the Licensed Area, by the City and LICENSEE, the use of the Property, including the Licensed Area, by the City shall have priority over any use thereof by LICENSEE.
- 3.5 The Licensed Area shall remain the property of the City and no payment made by Licensee shall create in LICENSEE any ownership right, title, or interest in same.
- 3.6 Nothing contained in this Agreement shall be construed as in any way affecting the rights, privileges, or duties previously conferred and imposed by the City by Agreement, or otherwise, to and upon Third Parties or others not parties hereto. The City reserves the right to continue and extend such rights, privileges, or

duties, and to hereafter admit other and different Third Parties, irrespective of the character or degree of economic competition thereby created, so long as LICENSEE's rights and privileges granted herein are not adversely affected. The foregoing, however, acknowledges that the City, by virtue of entering into and subject to the limitations, terms, and provisions of this Agreement, has approved LICENSEE's use of the Licensed Area for the term and any subsequent renewal terms of this Agreement.

4. COMPLIANCE WITH LAWS

- 4.1 LICENSEE's use of the Licensed Area shall at all times conform to the directives of the City Representative, and all other applicable State, Federal and local laws, rules, and regulations, as such may exist from time to time, including rules governing the placement of equipment to provide wireless communications service.
- 4.2 LICENSEE shall be solely responsible to obtain all licenses, permits or other authorizations required to provide its services or to use, operate or maintain its Station. If LICENSEE is denied any required license, permit or authorization, LICENSEE may upon notice to the City terminate any permit granted hereunder which was predicated upon the grant of such license, permit or authorization. However no termination by LICENSEE under this section shall entitle LICENSEE to any refund of prepaid Usage Charges.
- 4.3 LICENSEE shall construct, install, use, operate and maintain its Station so as not to interfere, either physically or electronically, with the use of the Property by the City or other currently authorized Third Parties. If interference does occur, LICENSEE shall use its best efforts to promptly eliminate the interference, including as necessary the replacement, relocation or modification of its Station. If the interference cannot be eliminated within a reasonable time, then either party may terminate this Agreement upon thirty days' written notice without incurring any liability to the other party as a result of such premature termination. LICENSEE shall be entitled to a pro-rata refund of any prepaid but unearned Usage Fees in the event of a termination under this section. Subject to Section 6.5, any rights, privileges or duties hereafter extended by the City to other and different Third Parties shall not interfere, either physically or electronically, with the prior established use of, in and/or on the Property by Licensee.

5. ESTABLISHING USE

The construction, installation, use, operation and maintenance of LICENSEE's Station shall be performed by LICENSEE at LICENSEE's sole expense. Installations to be accomplished within the Licensed Area to make them suitable for LICENSEE's purposes are specified in the attached Exhibit A and shall be performed at LICENSEE's expense.

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6. STATION CHANGES AFTER INITIAL INSTALLATION

- 6.1** Except as provided in Section 6.2, LICENSEE shall not change the type, nature, or location of its Station or alter its use of the Licensed Area without prior written City consent. Nor may any LICENSEE install or construct any other or additional equipment except as authorized by permit granted by the City. Any equipment which is changed or added in violation of this section shall be deemed to be unauthorized, for which the City shall have the rights and remedies set forth in this Agreement. The City may condition its agreement to the installation of additional equipment which occupy a greater amount of space on the Licensed Area upon a renegotiated Usage Charge.
- 6.2** The prior consent of the City shall not be required for the following changes in the Station, but LICENSEE shall provide the City Representative with written notice identifying all such changes within ten (10) days after making the change.
- (a.)** Changes incident to routine maintenance and repair of its facilities,
 - (b.)** Changes necessitated by an Emergency,
 - (c.)** Changes required by the City,
 - (d.)** Removal of its Station from the Licensed Area.
- 6.3** Upon written notice by the City Representative, LICENSEE at LICENSEE's expense and risk, shall change, alter, improve, or move its Station(s) as the City may reasonable direct, to avoid interference (either physical or electronic) with the equipment of the City or to accommodate changes in the Licensed Area. However, in the case of an Emergency, as determined by the City, written notice shall not be required and the City may remove or alter LICENSEE's Station without incurring liability to LICENSEE or to any other person.
- 6.4** Other than in case of an Emergency, if LICENSEE fails or refuses to change, alter, improve, or move its Station within thirty (30) days after receipt of the City's written notice (or as otherwise provided in such notice), the City shall have the right (but not the obligation) to perform such work at LICENSEE's sole risk and expense. LICENSEE shall pay the City upon receipt of invoice for the City's full cost for performing such work including overhead and general and administrative expense.
- 6.5** The City may require LICENSEE to change, alter, improve, or move any of its Station to avoid interference (either physical or electronic) with the facilities of subsequent Third Party Licensees if such change can be made without materially impairing LICENSEE's use and operation of its Station or the quality of its wireless communications service to its customers. The cost to implement such changes shall be borne by the Third Parties for whose benefit the changes are being made, unless otherwise agreed by the parties.

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- 6.6 The City may use, change, operate, and maintain the Property, including the Licensed Area, as it sees fit for its intended purpose and shall not be liable to LICENSEE for any damage to or interference with the use, maintenance or operation of LICENSEE's Station resulting from the City's use, operation, and maintenance of the Property. In the event that City operation of the Property, including the Licensed Area, has a materially adverse effect on the operation or use of LICENSEE's facilities, LICENSEE shall the right to terminate this Agreement upon written notice to the City without incurring any liability to the City as a result of such premature termination, and to receive a pro-rata refund of unearned Usage Fees.
- 6.7 In the event that LICENSEE's authorization to use Austin Energy Utility infrastructure adjacent to the Licensed Area is terminated, LICENSEE shall have the right to terminate this Agreement upon written notice to the City without incurring any liability to the City as a result of such premature termination, and to receive a pro-rata refund of unearned Usage Fees.

7. LICENSEE OPERATIONS

- 7.1 All work performed by and on behalf of LICENSEE on the Licensed Area shall be done in a good and thoroughly workmanlike manner, consistent with the best industry practices and all applicable Federal, State and local laws, rules and regulations. In the performance of any work at the Licensed Area, LICENSEE and its contractors shall employ only orderly and competent workers. LICENSEE and its contractors shall comply with all City safety practices and procedures. Workers may not possess any weapon, or use, possess or be under the influence of any alcoholic or other intoxicating beverage, illegal drug or controlled substance while on the Licensed Area. If the City finds any LICENSEE worker to be incompetent, disorderly, or in possession of any weapon, in the possession of or under the influence of alcohol or drugs, LICENSEE shall promptly remove such worker from all work at the Licensed Area and may not again employ such worker at the Licensed Area.
- 7.2 LICENSEE shall have the right of ingress and egress to the Licensed Area at all times during the term of this Agreement upon notice to the City. The City, in coordination with LICENSEE may designate an access route to the Licensed Area.
- 7.3 LICENSEE shall pay all taxes and assessments lawfully levied on its Station on the Licensed Area and any tax, assessments, fee, or charge levied on City's Property solely because of their use by LICENSEE. In no event shall LICENSEE permit any lien to be filed or exist upon the Licensed Area as a result of any claim against LICENSEE. LICENSEE shall promptly pay upon receipt of written notice from the City all such liens together with all fees and costs necessary to discharge same.

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- 7.4 The City shall establish electrical service to the Licensed Area sufficient to operate the LICENSEE Station. LICENSEE shall be solely responsible for all fees, costs, and charges to establish, maintain and receive electrical and other utility services attributable to LICENSEE's Station.
- 7.5 Upon completion of any work at the Licensed Area, LICENSEE shall clean up and remove all construction and other debris, and leave the Licensed Area in the same clean condition it was prior to the performance of the work. If LICENSEE fails to clean the Licensed Area to the City Representative's satisfaction, the City may perform the clean-up and removal work, and LICENSEE shall reimburse the City for its full cost to do so upon receipt of invoice.

8. INDEMNITY AND LIMITATION OF LIABILITY

- 8.1 Licensee shall defend (at the option of the City), indemnify, and hold the City, its successors, assigns, officers, elected and non-elected officials and employees harmless from and against any and all claims, demands, suits, causes of action, judgments and liability of every character type or description, including all expenses of litigation, court costs and attorney's fees (collectively "Indemnified Liability") arising out of or concerning this Agreement, or the installation, use, operation, maintenance, transfer, rearrangement or removal of Licensee's Stations, including, but not limited to Indemnified Liability for:
- (a) damage to or loss of the Utility Structures and all lines, facilities and Attachments thereon, whether the property of the City, Licensee or any third party;
 - (b) damage to any other property of any person (including, but not limited to Licensee, the City and their respective contractors), and
 - (c) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person (including, but not limited to employees of Licensee, the City and their respective contractors),

arising out of, or caused, by the negligence, gross negligence, willful misconduct or strict liability (collectively "Fault") of Licensee or its agents, employees or contractors. It is the expressed intent of the parties that the foregoing indemnity applies only to the negligent acts and not the intentional acts of the City, its successors, assigns, officers, elected and non-elected officials and employees.

- 8.2 If any contractor performs any work or services for Licensee under this Agreement, such contractor shall be required to indemnify the City in writing to the same extent as provided above as a condition of being granted access to the Licensed Area.

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8.3 Neither party to this Agreement shall be liable to the other for consequential, incidental, punitive or special damages arising out of any claim for damage to the other's equipment and facilities . As used in this section, consequential damages shall include, without limitation, loss of profits or revenues, loss of use of equipment or property, cost of capital, and claims of the other party's customers.

9. INSURANCE

9.1 During the term of this Agreement LICENSEE shall at all times carry insurance approved by the City (which such approval shall not be reasonably withheld) to protect LICENSEE and the City against any and all claims, demands, actions, judgments, costs, expenses, or liabilities of every kind which may arise, directly or indirectly, from or by reason of losses, injuries, or damages described in this Agreement.

9.2 At a minimum, LICENSEE shall carry and maintain the following coverages and shall furnish the City Risk Manager Certificates of Insurance as evidence thereof:

- Commercial General Liability coverage in the minimum amount of \$1,000,000 per occurrence;
- Worker's Compensation coverage with statutory benefits as set forth in the Texas Worker's Compensation Act and Employer's Liability coverage of not less than \$250,000 bodily injury per accident, \$500,000 bodily injury per disease and \$250,000 per disease per employee,
- Business Automobile Liability Insurance for all owned, non-owned and hired vehicles with a minimum combined single limit of \$1,000,000.

9.3 The Commercial General Liability and Automobile Liability Policies shall name the City of Austin as an additional named insured as its interest may appear in this agreement. Each policy shall require the insurer to notify the City Risk Manager at least thirty (30) days before any non-renewal, cancellation or material change in coverage. The "other insurance" clause shall not apply to the City; to the extent the City is an additional insured under Licensee's policies. The Worker's Compensation policy shall contain a waiver of all rights of recovery or subrogation against the City, its officers, agents, employees, and elected officials, except for injury caused by the City, its successors, assigns, officers, elected and non-elected officials and employees.

9.4 If any contractor performs any work or services for LICENSEE at the Licensed Area, such contractor shall be required to carry insurance to the same extent as provided above as a condition of being granted access to the Licensed Area.

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10. USAGE CHARGES AND PAYMENT

10.1 LICENSEE shall pay to the City Usage Charges for each year in the initial term of the Agreement, as follows:

For Licensed Area: \$ 4,000.00 per year

If the term of this Agreement is extended pursuant to Section 11, the annual Usage Charges for each extended term shall be increased in the following manner: The fee payment of \$4,000.00 shall be increased by 4 percent. Pro-rated annual Usage Charges for the period from the Effective Date through December 31, 2000 shall be due upon execution of this agreement.

10.2 On or about January 1st of each calendar year, the City shall send LICENSEE an invoice for that calendar year's Usage Charge. The annual Usage Charge in effect for the Initial Term shall be escalated each year throughout the term of this Agreement, including any renewals, by an amount equal to four percent (4%) each year of the Usage Charge in effect for the previous year.

10.3 All monetary payments under this Agreement shall be due and payable within thirty (30) days after receipt of invoice. If payment is not timely made, interest shall accrue on the unpaid balance at the lesser of the maximum lawful rate or the prime rate of interest charged by the Chase Bank of Texas, N.A. from the due date until paid. Failure to pay any monetary obligation in full shall be a material default of this Agreement.

11. TERM

11.1 The initial term of this Agreement ("Initial Term") shall be five (5) years commencing on the Effective Date, unless terminated earlier in accordance with Section 12 below.

11.2 If Licensee is not then in default hereunder, Licensee shall have the right to renew the term of this Agreement for up to four additional terms of five (5) years each ("Renewal Term(s)") Renewal shall be upon the same terms and conditions, except that Usage Charges shall be increased as provided in Section 10.2 above.

12. DEFAULT AND TERMINATION

12.1 Right of Suspension. If Licensee shall fail to either make any payment required under this Agreement, within ten (10) days after the date payment is due or timely perform any material obligation under this Agreement, and such failure of performance continues for thirty (30) days after receipt of written notice from the City of Austin, then, in addition to any other available right or remedy, the City of Austin may, upon written notice to Licensee, immediately suspend all rights under this License until such time as the failure of performance is cured, or payment,

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including accrued interest, has been received. During a period of suspension of this license Licensee may operate and maintain its then permitted stations, but may not add to, modify, remove, or alter any of its existing Facilities, or install or construct any new Facilities, and the City of Austin shall suspend all review or approval of pending permit applications by Licensee. The payment under protest of a disputed amount in order to avoid, or lift, suspension of this license shall not prejudice the rights of the City of Austin to contest the payment dispute.

12.2 Events of Default. Each of the following shall be an Event of Default under this Agreement:

- a) the failure of a party to make any payment when due, and such nonpayment continues for thirty days after written notice from the other party;
- b) the failure of a party to comply with the terms of a permit granted under this Agreement, and such failure has not been cured within thirty days after written notice from the other party;
- c) the failure of a party to substantially perform its material obligations under this Agreement, and such failure default has not been cured within three months from its receipt of written notice from the other party;
- d) the expiration, revocation, or termination of Licensee's license from the FCC, and such license has not been restored or renewed within sixty days after written notice from the City of Austin;
- e) the making of an assignment for the benefit of a party's creditors, the appointment of a receiver over the assets of a party, the filing by a party of a petition for relief under the Bankruptcy laws of the United States, or the filing of an involuntary Bankruptcy petition against a party which is not dismissed within thirty days from the date of original filing.

12.3 Termination.

- (a). Upon the occurrence of an Event of Default, the party not in default may immediately terminate this Agreement upon written notice to the party in default.
- (b). In the event that LICENSEE's authorization to use Austin Energy Utility infrastructure adjacent to the Licensed Area is terminated, the City shall have the right to terminate this Agreement upon written notice to LICENSEE.

12.4 Destruction of Facilities. If the Licensed Area are substantially destroyed by fire, storm, or other catastrophe, the City of Austin shall be under no obligation to rebuild or restore same, but may elect to terminate this Agreement upon written notice to LICENSEE without incurring any liability to LICENSEE as a result of such premature termination. LICENSEE shall be entitled to a pro-rata refund of any pre-paid but unearned Usage Charges in the event of a termination under this section.

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- 12.5 Until such time as all of LICENSEE's Station is removed, LICENSEE shall continue to comply with all the terms of this Agreement and perform all of its duties and obligations hereunder, including, but not limited to, the obligation to pay Usage Charges for its Station. Such payment by LICENSEE or acceptance by the City of Usage Charges shall not act to cure the default which triggered termination or restore LICENSEE's rights to use the Licensed Area hereunder.
- 12.6 If LICENSEE has not removed all its Station from the Licensed Area within the applicable period of time specified above, or such additional period of time granted by the City in writing, then:
- (a) The City may remove and return LICENSEE's Station from the Licensed Area at LICENSEE's sole expense and risk; and
 - (b) LICENSEE shall pay to the City as liquidated expenses, and not as a penalty, for the use and occupancy of said Licensed Area a sum equal to one and a half times the monthly Usage Charge for each month (or part thereof) that the LICENSEE's Station continues to occupy the Licensed Area until all such Station has been removed.
- 12.7 Any termination by the City is subject to appeal to City Council by LICENSEE. The periods of time in which LICENSEE's Station is required to be removed from the Licensed Area under this section shall be suspended during the pendency of a proper appeal of termination. However, LICENSEE may not install any new or additional equipment or make any changes to existing equipment (except for removal) during the pendency of any appeal.

13. ASSIGNMENT

- 13.1 Licensee may not assign, sublet, or otherwise transfer this Agreement, in whole or in part, without the prior written consent of the City of Austin, except that Licensee may, without such consent:
- a) mortgage, pledge, hypothecate, or grant a security interest in, any or all of its property, rights, privileges and franchises, including its interest in this Agreement or any permits granted hereunder, to any financing entity or agent on behalf of any financing entity to whom Licensee (i) has obligations for borrowed money or in respect of guaranties thereof, (ii) has obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof;
 - b) assign its interest to its parent company, any wholly-owned subsidiary or affiliate of it or its parent company.

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- c) Within ten days of the effective date of an authorized assignment to a financing entity, affiliate, or parent company, Licensee shall notify The City of Austin in writing.

13.2 A purported assignment or transfer made in violation of the provisions of this section shall not be binding upon The City of Austin, but shall be deemed to be a material default of this Agreement by Licensee.

14. NOTICES

All notices, requests, demands and communications hereunder will be given by first class certified or registered mail, return receipt requested, or by a recognized overnight courier, postage prepaid, to be effective when properly sent and received, refused or returned undelivered. Routine communications may be sent by first class mail, telefax, or other commercially acceptable means. Notice will be addressed to the parties at the address set forth below:

CITY OF AUSTIN
Technology & Regulatory Affairs
P.O. Box 1088
Austin, Texas 78767
ATTN: Director
(512) 499-2999
FAX: (512) 499-2416

LICENSEE
AT&T Wireless Services
4544 South Lamar Blvd, Suite 600
Austin, Texas 78745
ATTN: Real Estate Manager
(512) 436-7700
FAX: (512) 436-7709

with copy to:
AT&T Wireless Services
10000 Goethe Rd., First Floor
Sacramento, CA 95827
Attn: Senior Counsel

15. MISCELLANEOUS

15.1 Integration. This Agreement constitutes the entire understanding of the parties relating to the use of the Licensed Area hereunder; and there shall be no notification or waiver hereof except by writing, signed by the party asserted to be bound thereby.

15.2 No Waiver. The failure of either party to enforce or insist upon compliance with any of the terms and conditions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but the same shall be and remain at all times in duly force and effect.

15.3 Headings. The descriptive headings of the provision of this Agreement are formulated and are intended to be used only for the convenience of the parties, and shall not be deemed to affect the meaning or construction of any provision hereof.

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- 15.4 No Third Party Beneficiary. There is no third party beneficiary to this Agreement, and the provisions of this Agreement shall not impart any rights enforceable by any person, firm, corporation or organization not a party hereto or a successor or assign of a party hereto.
- 15.5 Applicable Law. The parties hereto agree and intend that disputes which may arise from, out of, under or respecting the terms and conditions of this Agreement, or concerning the rights or obligations of the parties hereunder, or respecting any performance or failure or performance by either party hereunder, shall be governed by the laws of the State of Texas. The parties further agree and intend that venue shall be proper and shall lie exclusively in Travis County, Texas.
- 15.6 Future Amendment. Either party may propose Agreement amendments intended to address any substantially changed or unforeseen circumstances relevant to the performance of the Agreement or the use, maintenance or operation of the Station. Neither party, however, shall ever be obligated to propose, consider or accept any amendment.

IN WITNESS WHEREOF, the undersigned have executed this agreement at Austin, Travis County, Texas through their duly authorized representative.

THE CITY OF AUSTIN

CITY MANAGER

Texas Cellular Telephone Company
L.P., a Delaware limited partnership,
d/b/a AT&T Wireless Services

By: AT&T Wireless Services of San
Antonio, Inc., its general partner

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____, 2000

Date: _____, 2000

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