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Person to Contact:

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March 5, 2003

LEGEND:

District =

Provider =

State =

County =

a =

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This is in response to your request for a ruling that the distribution of the District cable television programming by the Provider, under the facts and terms described below, does not constitute private business use under § 141(b)(1) of the Internal Revenue Code of 1986 (the "Code") of facilities used to produce that programming.

FACTS AND REPRESENTATIONS

The District makes the following representations. The District is a political subdivision of State established by the residents of County under State law. The

District's boundaries are coterminous with the boundaries of County, which encompass several cities and towns. The District's purpose is to deliver higher educational opportunities within County. The District furthers that purpose by offering various credit and non-credit courses, some using evolving methods such as television, radio, and the internet.

The District has begun using digital cable television to deliver educational programming (the "Programming") and plans to include credit and noncredit classes in its Programming. Students will not be required to subscribe to digital cable television to obtain course credit; the District provides alternative methods for students to obtain the information (e.g., internet, video tape, and free on-campus access to the channel that provides the Programming).

The District purchases or receives free from third parties a significant portion of the Programming. Other Programming will be produced by the District at the District's facilities. Some of these facilities were financed with bonds that were sold as tax-exempt obligations (the "Facilities").

The Provider is a for-profit corporation in the area of cable programming, telecommunications, and technology. The Provider's cable systems offer its customers basic, expanded, and premium packages of cable programming. The Provider is the only significant provider of digital cable television in County.

As part of the Provider's franchise agreement with various cities within the County, the Provider must make cable access available to educational institutions. The franchise agreements do not require the Provider to create or provide the educational programming and do not specify which education institution must be given access.

The Provider and the District have entered into an agreement (the "Agreement") that allocates one digital cable channel (the "Channel") to the District to distribute the Programming within the County. The Provider will distribute the Programming at no cost to the District.

Subscribers to any of the Provider's digital cable subscription packages will receive the Programming at no additional cost, but the Provider will retain all subscriber fees. The District represents that it and the Provider do not anticipate that the Provider will have more than an insignificant amount of additional subscribers solely because of the Programming. Apart from the subscription fees, the Provider will receive no income from the Channel or the Programming.

The Programming will transfer to the Provider through equipment owned by the Provider that is located at a studio owned by the District (the "Studio"). The Studio was not financed with tax-exempt bonds.

The Programming gets to the end user directly in "real time" with only technical processing of the signal by the Provider. The Provider does not control or manipulate the content of the Programming; the subscribers see the Programming as produced

and created by the District. The District may acknowledge on the Channel that the Provider is providing the Channel to the District.

More specific provisions under the Agreement include as follows:

1. The District will be responsible for the Programming, including editorial control, scheduling, and making the Programming available to the Provider at the Studio. The District will provide at least a hours of Programming per day, b days per week. This minimum program requirement satisfies some of Provider's obligations under at least one of the franchise agreements.

2. The Provider will establish and maintain a fiber connection from its network to the Studio and digitally compress the District's Programming signal; distribute the Programming over its network; build, rebuild and maintain its cable television network within the Provider's digital service area; and provide advice to the District but without any ability to control or change the Programming and without any staff at the Facilities or Studio.

3. Each party will be responsible for its own costs incurred in connection with the distribution of the Programming through the Provider's cable television network.

4. The District and the Provider will design a distinct Programming identity and logos to market and promote the Programming. The Provider received a non-exclusive worldwide license to use any Programming marks, logos, or identity solely for the benefit of the Programming and in furtherance of the Provider's obligations under the Agreement. The District represents that it and the Provider believe that the license will have no monetary or non-monetary value to the Provider. Typical use of the logo will be on the Provider's program schedules or to advertise the Channel on other Provider channels.

5. The term of the Agreement is one year, renewable automatically. The Agreement may be terminated by either party, without penalty, by providing the other party with c-months prior notice.

6. The Provider will have no exclusive distribution rights to any Programming. The District can distribute the Programming through other cable companies or broadcasters.

The Provider has no ownership interest in, and bears no risk of loss with respect to, any of the Facilities or to the Programming produced at the Facilities. None of the bond-financed facilities are treated as depreciable by the Provider or any other non-governmental person.

LAW AND ANALYSIS

Section 103(a) of the Code provides that gross income does not include interest on any state or local bond. Section 103(b)(1) provides that § 103(a) does not apply to a

private activity bond, unless it is a qualified bond under § 141.

Section 141(a) provides that a private activity bond is any bond issued as part of an issue that meets either 1) the private business use test of § 141(b)(1) and the private security or payment test of § 141(b)(2), or 2) the private loan financing test of § 141(c).

Section 141(b)(1) provides that generally a bond issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Section 141(b)(6)(A) generally provides that the term "private business use" means use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. For purposes of § 141(b)(6)(A), use as a member of the general public shall not be taken into account. Section 141(b)(6)(B) provides that, for purposes of § 141(b)(6)(A), any activity carried on by a person other than a natural person shall be treated as a trade or business.

Section 1.141-3(a)(1) provides that the private business use test relates to the use of the proceeds of an issue, and, for this purpose, the use of financed property is treated as the direct use of proceeds. Section 1.141-3(a)(2) provides that in determining whether an issue meets the private business use test, it is necessary to look to both the indirect and direct uses of proceeds.

Section 1.141-3(b)(1) generally provides that both actual and beneficial use by a nongovernmental person may be treated as private business use. Section 1.141-3(b)(1) further provides that, in most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer. Section 1.141-3(b)(1) also provides that, in general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of ownership; actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract. Arrangements that convey special legal entitlements for beneficial use of bond proceeds or of financed property that are comparable to the arrangements in the prior sentence also result in private business use. § 1.141-3(b)(7)(i). For example, an arrangement that conveys priority rights to the use or capacity of a facility generally results in private business use.

Section 1.141-3(b)(7)(ii) provides that, in the case of financed property that is not available for use by the general public (within the meaning of § 1.141-3(c)), private business use may be established solely on the basis of a special economic benefit to one or more nongovernmental persons, even if those nongovernmental persons have no special legal entitlements to the use of the property. In determining whether special economic benefit gives rise to private business use, it is necessary to consider all of the facts and circumstances, including one or more of the following factors–

(A) Whether the financed property is functionally related or physically proximate to property used in a trade or business of a nongovernmental person;

(B) Whether only a small number of nongovernmental persons receive the

special economic benefit; and

(C) Whether the cost of the financed property is treated as depreciable by any nongovernmental person.

Section 1.141-3(c)(1) provides that use of financed property by nongovernmental persons in their trades or businesses is treated as general public use only if the property is intended to be available and in fact is reasonably available for use on the same basis by natural persons not engaged in a trade or business.

Section 1.141-3(f), Example 6, provides an example of other actual or beneficial use. J, a political subdivision, owns and operates a hydroelectric generation plant and related facilities. Pursuant to a take or pay contract, J sells 15 percent of the output of the plant to Corporation K, an investor-owned utility. K is treated as a private business user of the plant. Under the license issued to J for operation of the plant, J is required by federal regulations to construct and operate various facilities for the preservation of fish and for public recreation. J issues its obligations to finance the fish preservation and public recreation facilities. K has no special legal entitlements for beneficial use of the financed facilities. The fish preservation facilities are functionally related to the operation of the plant. The recreation facilities are available to natural persons on a short-term basis according to generally applicable and uniformly applied rates. Under § 1.141-3(c), the recreation facilities are treated as used by the general public. Under § 1.141-3(b)(7), K's use is not treated as private business use of the recreation facilities because K has no special legal entitlements for beneficial use of the recreation facilities. The fish preservation facilities are not of a type reasonably available for use on the same basis by natural persons not engaged in a trade or business. Under all of the facts and circumstances (including the functional relationship of the fish preservation facilities to property used in K's trade or business) under § 1.141-3(b)(7), K derives a special economic benefit from the fish preservation facilities. Therefore, K's private business use may be established solely on the basis of that special economic benefit, and K's use of the fish preservation facilities is treated as private business use.

The issue presented is whether the Provider, by transmitting the Programming, including Programming produced at the Facilities, will be a private business user of the Facilities.

The Provider has no legal entitlement to use the Facilities or the Programming that is produced at the Facilities. While the District must deliver to the Provider a hours of Programming b days per week, the District can meet that obligation with Programming not produced at the Facilities. Also, the Provider has no right to control or change the Programming or to have personnel at the Facilities.

Section 1.141-3(b)(7)(ii) provides a test for financed property that is not available for use by the general public. Under this test, private business use may be established solely on the basis of special economic benefit. *See* § 1.141-3(f), Example 6. The Programming is available for viewing by natural persons not engaged in a trade or business who are located in the Provider's service area and who subscribe to one of

the Provider's digital packages. The Provider, however, is distributing the Programming; a use that differs from the subscribers' use. Thus, there is a question about whether the test set forth in § 1.141-3(b)(7)(ii) applies in this case. Without concluding that the test applies in the instant case, under all the facts and circumstances, including those listed below, we would conclude, if we were to apply that test, that the Provider does not have special economic benefits (within the meaning of § 1.141-3(b)(7)(ii)) to the financed property.

1. The cost of the Facilities is not depreciated by any nongovernmental entity.

2. We do not know whether any of the Facilities are located close to the Provider's property. For purposes of this ruling, we assume that at least some of the Facilities will be proximate to the Provider's property.

3. The District is not obligated to use the Provider to distribute its Programming and may terminate the Agreement with c-months notice. This factor is offset by the fact that the Provider is the only significant provider of digital cable television in County.

4. The Provider has no right to Programming from the Facilities. While the District must provide a minimum amount of Programming to the Provider, the District can and does satisfy its obligation with Programming not produced at the Facilities.

5. The Provider will distribute the Programming to any subscriber to its digital service without additional fees.

6. It is not clear whether the Provider will experience an increase in its subscribers because of the Programming. Students of the District will not be required to use digital cable television to get class credit or to obtain class materials - alternative methods of delivery of class material will be available.

7. The District does not pay the Provider for use of the Channel and Provider is not receiving any revenue in connection with the Channel or the Programming, apart from the subscription fees.

8. The Provider has a nonexclusive right or license to use the District, Channel, or Programming identity, marks, or logos, but may use such identity, marks, or logos solely for the benefit of the District, to promote the Programming, and to perform its obligations under the Agreement.

9. The District may acknowledge on the Channel that the Provider is providing the Channel to the District.

Further, the fact that the Provider by distributing the Programming may satisfy its legal obligations under the franchise agreements to provide access to educational facilities does not itself create private business use. The arrangement under the Agreement is distinguishable from the arrangement in § 1.141-3(f), Example 6. In that

case, federal law required that, to operate the output facility, the fish preservation facilities be built. Here the Provider does not have to use the Facilities or the Programming from the Facilities to satisfy its obligation under the franchise agreements.

CONCLUSION

The Provider will not be a private business user under § 141(b)(1) of the Facilities because it distributes the Programming under the terms described above.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed or implied with respect to any other contract, agreement, service, or arrangement between the District and the Provider.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely yours,

Assistant Chief Counsel
(Exempt Organizations/Employment Tax/
Government Entities)

By:_____
Rebecca L. Harrigal
Chief, Tax Exempt Bonds Branch