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Department of the Treasury
Washington, DC 20224

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CC:FIP:B03
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Date:
August 31, 2011

LEGEND

Taxpayer =

State X =

Company A =

Company B =

Company C =

LLC 1 =

LLC 2 =

LLC 3 =

LLC 4 =

LLC 5 =

LLC 6 =

LLC 7 =

LLC 8 =

a =

b =

c =

d =

e =

f =

g =

h =

i =

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k =

l =

m =

n =

o =

Dear :

This responds to a letter dated February 16, 2011, on behalf of Taxpayer. Taxpayer requests rulings regarding the treatment under § 856(c)(4)(A) of the Internal Revenue Code (Code) of easements over real property acquired subject to existing leases and the treatment under §§ 856(d) and 856(c)(3)(A) of rent accrued and paid pursuant to such existing leases.

FACTS

Taxpayer is a newly formed State X corporation that currently holds no assets, has no operations, and has not elected under subchapter M, part II, of the Code to be treated for federal income tax purposes as a real estate investment trust (REIT).

Taxpayer proposes to engage in the business of acquiring, owning, and leasing certain easements (Easements) in, to, under, and over certain real property (Properties) and to elect to be treated for federal income tax purposes as a REIT.

Company A, Company B, Company C, and "Management Group," a group of natural persons who are involved in the management of LLC 1, collectively, own a percent of LLC 1. The equity interest of Company A, Company B, Company C, and Management Group in LLC1 is b percent, c percent, d percent, and e percent, respectively.

Taxpayer is owned a percent by LLC 1. LLC 1 also owns a percent of the membership interests in LLC 2. LLC 2 owns a percent of the membership interests in LLC 3. LLC 3 owns a percent of the membership interests in LLC 5 and LLC 6.

LLC 1 also holds a percent of the membership interest in LLC 4. LLC 4 holds a percent of the membership interests in LLC 7 and LLC 8. In addition to owning the membership interests in LLC 7 and LLC 8, LLC 4 holds various other entity interests and investments.

LLC 5, LLC 6, LLC 7, and LLC 8 (collectively, the "Current Easement Holders") presently are engaged in the business of acquiring, owning, and leasing Easements over Properties. Taxpayer represents that the details of this business are as described below.

Before the Easement is created, the owner of the Property (Owner) enters into at least one lease agreement regarding the Property (Lease) with a wireless communication provider (Lessee). The Lessee enters into the Lease to install towers, antennas, buildings, fences, gates, and other equipment and facilities in connection with its wireless communication business (each, a "Cell Phone Tower"). Taxpayer represents the following is a summary of the principal terms of a typical Lease and that these terms are representative of the terms of all Leases:

Parties. The Owner and the Lessee.

Leased Site. The Owner leases to the Lessee a portion of the Property consisting of f square feet, including air space above such area and access to the nearest public road (the "Site").

Permitted Use. The Lessee is permitted to use the Site for the transmission and reception of communications signals and the installation, maintenance and operation, repair, and replacement of communications fixtures on a g foot monopole and related equipment, cables, accessories, and improvements, which may include a support structure, antennas,

equipment shelters or cabinets, fencing, and other items necessary to the successful use of the Site.

Term. The initial term of a Lease is h years, which will automatically renew for h additional periods of h years each unless the Lessee notifies the Owner in writing at least i days prior to the expiration of the current h-year period.

Rent. During the first year of the term of the Lease, the Lessee is required to pay $j per month in rent to the Owner. During the second and subsequent years, the amount of rent will increase by k percent over the amount of rent in the previous year. The Lessee has the right to sublet part of the Site for additional communications facilities, with the consent of the Owner. In the event of such a sublease, the Lessee will pay the Owner l percent of the rent received by the Lessee from the sublease as additional rent under the Lease.

Termination. The Lease may be terminated by either party on m days' written notice if the other party remains in default (see below) after the applicable cure periods.

Default. The Lessee will be deemed to be in default if (1) The Lessee fails to pay rent for more than n days after receipt of written notice from the Owner, or (2) The Lessee fails to perform any other term or condition of the Lease within m days after receipt of written notice by the Owner. However, no default will be deemed as long as the Lessee has commenced to cure the default within the specified period and provided that such efforts are prosecuted to completion with reasonable diligence.

The Current Easement Holders enter into agreements with Owners with respect to the Properties (Easement Agreements). Taxpayer represents that the Easement Agreements are representative of the agreements Taxpayer will use when it engages in the business of acquiring, owning, and leasing Easements. Pursuant to the terms of each Easement Agreement, the Owner grants the Easement Holder the Easement, which consists of the following:

(1) An exclusive easement over a portion of the Property that includes the Site and Cell Phone Tower (Exclusive Easement); and

(2) Non-exclusive easements over areas that are necessary for (a) ingress to and egress from the Exclusive Easement and a publicly dedicated roadway, (b) installation, repair, replacement, improvement, maintenance, and removal of utilities providing service to the Exclusive Easement and the Cell Phone Tower, and (c) for Sites located on building

rooftops, access to building risers, conduits, shafts, raceways, or other designated space to connect the Lessee's equipment to other locations in the building.

Additionally, the Owner transfers and assigns to the Current Easement Holder all right, title, and interest of the Owner in the Leases. Accordingly, the Current Easement Holder takes the Easements subject to the Leases, becoming the landlord under each Lease, assuming responsibility for all of the obligations and liabilities of the Owner, and receiving the Rent that the Lessee otherwise would have paid to the Owner. The only obligations of the Owner under the Lease that are not assigned to the Current Easement Holder are obligations relating to the ownership, operation, and use of the Property.

The Current Easement Holder has the unrestricted right to lease, license, transfer, or assign, in whole or in part to, or permit the use of the Easements and/or its rights under the Easement Agreement by, any third parties including communication service providers or tower owners or operators, including the Lessee. Often the Lessee will sublease the Site and Cell Phone Tower to a sublessee (Sublessee), and the Sublessee will need space in addition to the Site for the performance of its duties under the sublease. In these cases, the Sublessee may request that the Current Easement Holder lease it a portion of the Easement outside the Site.

Upon the expiration of Lease, the Current Easement Holder may enter into a new lease of its rights with respect to the Property with any third party. Even before the expiration of a Lease, the Current Easement Holder may enter into a new lease of a portion of its rights with respect to the Property to the extent it is not subject to a Lease.

Most Easement Agreements and Easements are perpetual in duration as long as the Easements remain in use, but the Easement Agreement will terminate and the Easements will expire if the Easements are abandoned for more than h years for reasons other than casualty, condemnation, or act of God. A small number of Easement Agreements and Easements are long-term but not perpetual in duration, generally about m to o years.

In consideration of the foregoing, the Current Easement Holder pays to the Owner a purchase price based on a fixed amount with some contingent elements.

Taxpayer anticipates that the Current Easement Holders will transfer the Easements to Taxpayer and that Taxpayer will thereafter engage in the business of acquiring, owning, and leasing the existing Easements received from the Current Easement Holders as well as new Easements and elect to be treated as a REIT for federal income tax purposes.

Law and Analysis

Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from, among other sources, rents from real property.

Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from, among other sources, rents from real property.

Section 856(d)(1) provides that rents from real property include (subject to exclusions provided in § 856(d)(2)): (A) rents from interests in real property; (B) charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated; and (C) rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to the personal property for the taxable year does not exceed 15 percent of the total rent for the tax year attributable to both the real and personal property leased under, or in connection with, the lease.

Section 856(c)(4)(A) provides that at the close of each quarter of its tax year, at least 75 percent the value of a REIT's total assets must be represented by real estate assets, cash, and cash items (including receivables), and Government securities.

Section 856(c)(5)(B) provides that the term "real estate assets," for purposes of section 856, means real property (including interests in real property and interests in mortgages on real property) and shares (or transferable certificates of beneficial interest) in other REITs that meet the requirements of sections 856 through 859.

Section 856(c)(5)(C) provides that the term "interests in real property" includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon, but does not include mineral, oil, or gas royalty interests.

Section 1.856-3(b) of the Income Tax Regulations provides, in part, that the term "real estate assets" means real property. Section 1.856-3(d) provides that "real property" includes land or improvements thereon, such as buildings or other inherently permanent structures thereon (including items which are structural components of such buildings or structures). In addition, the term "real property" includes interests in real property. Local law definitions will not be controlling for purposes of determining the meaning of "real property" for purposes of section 856 and the regulations thereunder. Under the regulations, "real property" includes, for example, the wiring in a building, plumbing systems, central heating or central air-conditioning machinery, pipes or ducts, elevators or escalators installed in a building, or other items which are structural components of a building or other permanent structure. The term does not include assets accessory to the operation of a business, such as machinery, printing press, transportation equipment which is not a structural component of the building, office

equipment, refrigerators, individual air-conditioning units, grocery counters, furnishings of a motel, hotel, or office building, etc. even though such items may be termed fixtures under local law.

Rev. Rul. 71-286, 1971-2 C.B. 263, considers whether air rights over real property are considered "interests in real property" and "real estate assets" within the meaning of section 856(c). The term "air rights" is defined as the long-term leasehold or fee simple ownership of the space above the ground that a landowner can occupy or use in connection with the land, plus necessary easements on the surface for support of structures erected in such air space. The revenue ruling holds that such air rights are considered "interests in real property" and "real estate assets" within the meaning of section 856(c).

Rev. Rul. 75-424, 1975-2 C.B. 269, concerns whether various components of a microwave transmission system are real estate assets for purposes of section 856. The system consists of transmitting and receiving towers built upon pilings or foundations, transmitting and receiving antennae affixed to the towers, a building, equipment within the building, and waveguides. The waveguides are transmission lines from the receivers or transmitters to the antennae, and are metal pipes permanently bolted or welded to the tower and never removed or replaced unless blown off by weather. The transmitting, multiplex, and receiving equipment is housed in the building. Prewired modular racks are installed in the building to support the equipment that is installed upon them. The racks are completely wired in the factory and then bolted to the floor and ceiling. They are self-supporting and do not depend upon the exterior walls for support. The equipment provides for transmission of audio or video signals through the waveguides to the antennae. Also installed in the building is a permanent heating and air conditioning system. The transmission site is surrounded by chain link fencing. The revenue ruling holds that the building, the heating and air conditioning system, the transmitting and receiving towers, and the fence are real estate assets. The ruling further holds that the antennae, waveguides, transmitting, receiving, and multiplex equipment, and the prewired modular racks are assets accessory to the operation of a business and therefore not real estate assets.

Rev. Rul. 68-291, 1968-1 C.B. 351, clarifying Rev. Rul. 59-121, 1959-1 C.B. 212, provides generally that the consideration received for the granting of an easement constitutes the proceeds from the sale of an interest in real property and should be applied as a reduction of the cost or other basis of the portion of the land subject to the easement. See also Rev. Rul. 54-575, 1954-2 C.B. 145.

As described above, the Taxpayer will acquire, own, and lease perpetual and long-term Easements that are either Exclusive Easements over a portion of the Property that includes the Site and Cell Phone Tower or non-exclusive easements over areas that are necessary for (a) ingress to and egress from the Exclusive Easement and a publicly dedicated roadway, (b) installation, repair, replacement, improvement, maintenance, and removal of utilities providing service to the Exclusive Easement and

the Cell Phone Tower, and (c) for Sites located on building rooftops, access to building risers, conduits, shafts, raceways, or other designated space to connect Lessee's equipment to other locations in the building. The Easements represent an interest in real property within the meaning of § 856(c)(5)(B) and § 856(c)(5)(C).

Additionally, the Taxpayer will hold the Easements subject to the Leases, becoming the landlord under each Lease, assuming responsibility for all of the obligations and liabilities of the Owner, and receiving the Rent that the Lessee otherwise would have paid to the Owner. The only obligations of the Owner under the Lease that will not be assigned to the Taxpayer are obligations relating to the ownership, operation, and use of the Property. Taxpayer will not provide any services to Lessees under the Easements. Thus, amounts paid by the Lessees to the Taxpayer will qualify as rents from real property under § 856(d)(1).

Conclusion

Based on the information submitted and representations made, we conclude that: (1) an Easement acquired by Taxpayer under an Easement Agreement is "an interest in real property" that qualifies, under § 856(c)(5)(B), as a "real estate asset," and (2) the amounts derived by the Taxpayer under the terms of Easement Agreements pursuant to the Leases are "rents from real property" within the meaning of § 856(d)(1).

This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as specifically ruled upon above, no opinion is expressed concerning any federal income tax consequences relating to the facts herein under any other provision of the Code. Specifically, we do not rule on the following: (1) whether Taxpayer otherwise qualifies as a REIT under part II of subchapter M of Chapter 1 of the Code, and (2) the federal tax consequences of the transaction or series of transactions by which the existing Easements will be transferred, contributed, assigned, or otherwise conveyed from the Current Easement Holders to the Taxpayer.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) 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 your authorized representatives.

Sincerely,

Alice M. Bennett
Chief, Branch 3
Office of Associate Chief Counsel
(Financial Institutions & Products)

Enclosures:
Copy of this letter
Copy for section 6110 purposes