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**Identifying and Resolving Communications Issues in
U.S. Acquisitions and Transactions**

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Communications services are the lifeblood of the modern business. In any acquisition of a business or commercial real estate transaction today, communications-related issues are likely to arise. These issues need to be identified early in the due diligence process and dealt with expeditiously. Otherwise, they may delay, or in an extreme case, derail a transaction.

In the United States, authorizations, licenses and permits for communications-related facilities and services (collectively, "Licenses") are issued at the national level by the Federal Communications Commission (FCC) and the state level by state public utilities or public service commissions (PSCs). Depending on the statutory scheme, licenses can cover either services (such as voice telephony services or fleet dispatch radio) or specific facilities (such as satellite uplink stations, microwave towers, or undersea cables). In addition, providers of cable television services are also required to obtain franchises from local jurisdictions, usually a city or county.

Due Diligence In Communications Issues

In these transactions it is important that counsel for the buyer identify all relevant Licenses at the initial due diligence stage in any corporate acquisition, *whether or not the acquired firm is a telecommunications or cable company*. Early identification of Licenses is crucial because most of these Licenses cannot be transferred to the control of an unaffiliated entity without the prior approval of the licensing agency, and often obtaining that approval involves a lengthy public notice and comment period. The due diligence involved is neither extensive nor expensive. In most cases, it involves obtaining a complete corporate organization chart, reviewing corporate records and FCC licensing databases, and asking questions of a few key corporate employees. Often, the most important step is simply recognizing the need to make the inquiries.

Specific Examples Of Non-Communications Companies Holding Licenses

Obviously, there will be a focus on communications issues when the transaction involves a communications entity, such as a cable television system, or a firm inherently dependent on communications, such as a webhosting firm, a call center or a travel agency. But corporate counsel need to keep in mind that it is not just communications companies that hold Licenses.

Three recent transactions in which the author was involved vividly illustrate this fact. In the first, the seller of a brickmaking facility had leased space for a cellular telephone antenna on a particularly tall smokestack, effectively turning the smokestack into an FCC-licensed cellular tower. Because the issue was identified early, it was easily resolved. In the second transaction, a client was buying two small specialty plastics manufacturing plants from a large national firm. In the third, a client was buying a thriving regional bakery and the associated fleet of trucks that delivered the bakery's goods to retail outlets. In both cases, neither the buyer nor its corporate counsel realized until the closing was approaching that the firm being purchased held Licenses issued by the FCC. The bakery held a number of business radio licenses that enabled real-time private communications between the plant and delivery truck drivers; the entity owning the manufacturing plants held microwave and very small aperture satellite (VSAT) licenses for facilities that linked the plants to the corporation's wide area network. The plastics plants' situation was rather common - - many multi-location businesses, ranging from Wal-Mart to banks, hold such licenses. In both transactions, communications counsel was immediately brought in once the Licenses were discovered. Unfortunately, the need to obtain FCC approval for transfer of the Licenses on an expedited basis substantially increased the cost of obtaining the approvals, and in one case the late discovery of the License forced a costly postponement of the closing date.

Even if early due diligence confirms that there are no Licenses involved, further inquiry is necessary to ensure that other communications-related issues are identified and either resolved or taken into account in the economics of the transaction. Some communications issues can go directly to the calculation of the purchase price. For example, in transactions involving buildings with commercial tenants - - whether a stand-alone real estate transaction or part of a corporate acquisition - - a buyer should determine whether the building owner has entered into an exclusive arrangement with a communications carrier to provide communications services to the building and all the tenants. If so, the buyer may want to discount or ignore the cash flow from that contract in calculating the purchase price for the building. The payments would be at great risk because such contracts are not enforceable. The FCC has held that competing carriers cannot be prevented from gaining access to a commercial building, and it has prohibited carriers from entering into exclusive contracts with commercial building owners (although carriers often do so anyway). So if a competing carrier were to demand access to the building, the new owner would have to negotiate to grant the access and the carrier with the exclusivity would probably stop making the payments. (On the other hand, the FCC has yet to extend that prohibition to residential multi-tenant buildings.)

Other communications issues may alter the economics of a deal on an ongoing basis. Determining whether this is the case involves, at a minimum, careful review of a variety of potentially applicable contracts for voice and data services, including contracts for mobile, internet access, ATM, frame relay and WANs. For example, in the plastics transaction discussed above, certain communications services were provided under the selling firm's nationwide "take or pay" contract that could arguably have continued to apply to the plants after the acquisition, which would have resulted in duplicative communications expenses for the buyer. Once the issue was identified, the seller agreed to be responsible for resolving it with the carrier and to indemnify the buyer for any expenses arising from that contract. Corresponding amendments to the asset purchase agreement had to be made. In other situations, where ongoing savings from consolidation of communications services are part of the buyer's calculation, review by communications counsel will be necessary to determine whether budgeted savings can in fact be achieved. This typically involves analysis of the specific language of three types of clauses commonly found in communications services contracts - - the minimum revenue commitment clause, the substitution of services clause and the business downturn/sale of the business clause. The interplay of these three clauses can be crucial for data intensive industries, such as banking, finance and information technology.

Conclusion

In the 21st century, as communications services become increasingly critical to business in the United States and around the world, communications-related issues will move to the forefront in commercial real estate transactions and business acquisitions. Prudent counsel must be aware of such issues and must perform due diligence in the early stages of the deal to effectively identify and resolve them. Failure to do so could not only result in unwarranted expense to the client, but may delay or, in some cases, even derail the transaction altogether.

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