

Buyer and Seller Beware: Does Your Purchase/Sale of a Business Include a Public Utility?

The buyer of a business obviously must do its due diligence. Part of this due diligence is identifying any permits, licenses, or certificates that must be transferred to the buyer (or otherwise obtained by the buyer) at or before closing. Similarly, to avoid potential liability, the seller must be sure to transfer any permits, licenses, or certificates to the buyer (or, if necessary, obtain any necessary governmental approval to stop providing the service for which it had a permit, license, or certificate).

Recently, several cases have come before the Pennsylvania Public Utility Commission (PUC) in which a business was bought and sold, but the parties failed to obtain the necessary certificates of public convenience (certificates) from the PUC. Some of these cases involved transportation utilities, others involved a water or wastewater system. In many of these cases, the utility was a small part of a larger transaction that, on its surface, did not involve a public utility. The oversight may be understandable, but it can be costly; the PUC's prosecutor, the Bureau of Investigation and Enforcement, is particularly anxious to address instances of public utilities operating without a certificate.

The Pennsylvania Public Utility Code (code) generally requires a person or business¹ to obtain a certificate before beginning to offer public utility service to the public for compensation. Similarly, the code requires an existing public utility to obtain a certificate before abandoning public utility service to the public for compensation. Additionally, the code generally requires a person or business² to obtain a certificate before buying or selling — by any means, including a stock transfer — property used or useful in the public service.

Penalties for failing to obtain the necessary certificates include a civil penalty of up to \$1,000 per day per violation for the buyer and/or the seller. The buyer could be ordered to refund amounts collected from customers in rates because the buyer would not have a certificate or PUC-approved tariff. The seller could become entangled in complaints, investigations, and other PUC proceedings after closing, if the buyer fails to comply with the code in other respects (e.g., by failing to provide reasonable and adequate service). The failure to address these regulatory issues properly could also lead to costly civil litigation between the buyer and seller as they deal with the consequences of the oversight.

As part of its due diligence, a buyer should ask the seller for a list of all permits, licenses, and certificates that it currently possesses, but should not rely entirely on that information. If the buyer knows that the transaction includes public utility equipment or service, the buyer also should review the PUC's website to determine if the seller currently has a certificate.

The PUC's website would also show whether complaints have been filed against the seller. A brief review of such complaints could reveal helpful information. For example, the PUC might have dismissed a complaint against the seller on the grounds that the seller is a *bona fide* cooperative association, which does not need a certificate. If the buyer would not be a *bona fide* cooperative association, it might need to obtain a certificate from the PUC to purchase the system — even though the seller does not need to obtain a certificate from the PUC to sell the system.

In some cases, the need for a certificate is subject to some uncertainty. In such a situation, the buyer and/or seller may wish to file a petition for declaratory order with the PUC in advance of closing, in order to obtain a ruling on whether they must obtain a certificate to buy/sell the utility equipment or system. A PUC declaratory order could be made a condition precedent in the purchase agreement or other transaction document in order to provide assurance to the buyer that



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it is not stepping into a regulatory morass. Unless the petition for declaratory order is protested, an order can typically be obtained in three to six months.

A buyer or seller who realizes that it has closed on a transaction, but failed to obtain the necessary certificates of public convenience prior to closing, should promptly file an application *nunc pro tunc* for the appropriate certificates. Generally, the buyer and seller file a joint application requesting that the PUC issue the necessary certificates. The PUC, for example, would be reluctant to grant a certificate to abandon water service to the public in a given area in the absence of a corresponding application to provide water service to the public in that same area; the PUC does not want to leave consumers without public water service. If an abandonment application is not accompanied by an application to provide service, the applicant should demonstrate to the PUC that customers will still receive necessary service, whether it be from a provider that is not subject to PUC jurisdiction (such as a municipal authority) or by converting customers to an alternative service (such as private wells). Buyers and sellers that inadvertently neglect to obtain the necessary certificates before closing are urged to come into compliance with the code as quickly as possible.

¹ In addition, a municipality is generally required to obtain a certificate before providing public utility service to the public for compensation beyond the municipality's boundaries.

² As discussed above, this requirement may also apply to a municipality.