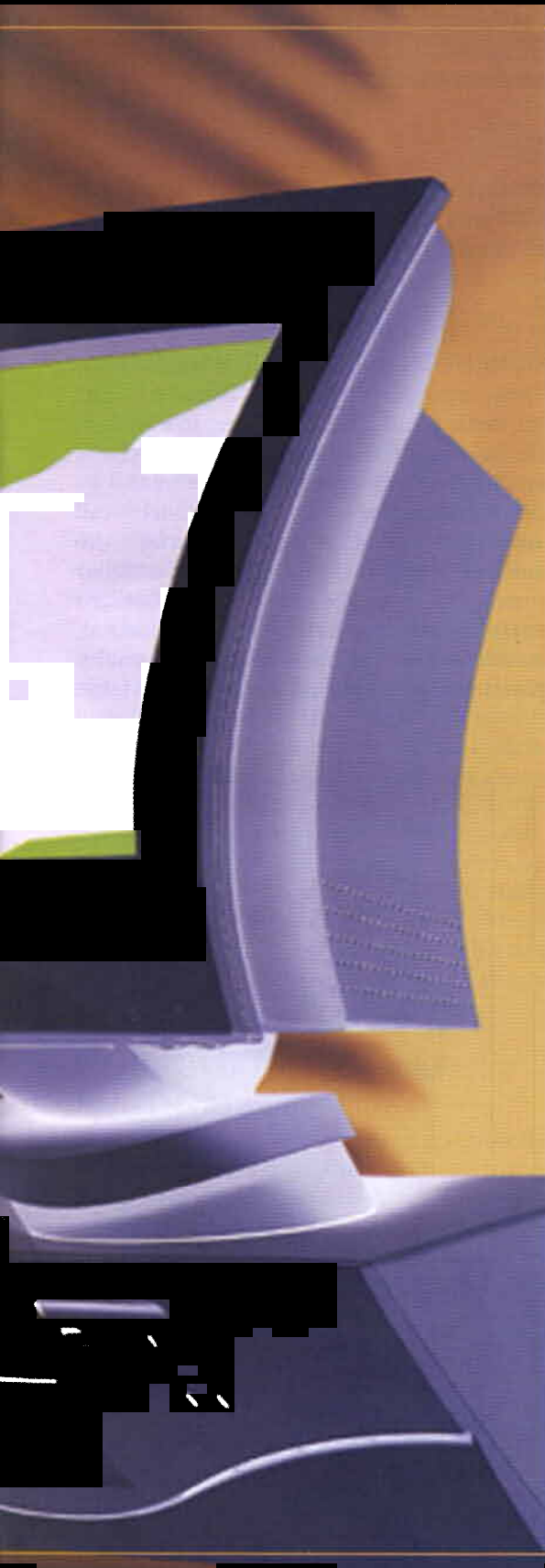




# THE LAW OF TELECOM

BY MARK C. DEL BIANCO  
AND J. DANIEL HULL

IDENTIFYING  
AND RESOLVING  
TELECOM ISSUES  
IN ACQUISITIONS  
AND TRANSACTIONS



**F**or lawyers and the clients they serve, communications services are the lifeblood of modern business. Today, communications issues will arise in virtually any acquisition of a business or in any commercial real estate transaction. They must be identified early in the due-diligence process and dealt with expeditiously. Otherwise, such issues may very well delay or, in an extreme case, derail a transaction.

In the United States, the Federal Communications Commission (FCC) issues authorizations, licenses and permits for communications-related facilities and services at the federal level. State public utility or public service commissions issue licenses at the state level. Licenses can cover services such as voice telephony or fleet dispatch radio. They can also cover specific facilities such as satellite uplink stations, microwave towers and undersea cables. Providers of cable television services are also required to obtain franchises from local jurisdictions, usually a city or county.

#### **DUE DILIGENCE IN TELECOM ISSUES**

In transactions involving any of these facilities and services, counsel for the buyer must identify the seller's licenses and communications-related contracts at the initial due-diligence stage of an acquisition, whether or not the acquired firm is a telecommunications or cable company. Early identification of licenses is particularly crucial because most licenses cannot be transferred to an unaffiliated entity without the prior approval of the licensing agency. Obtaining such approval involves a lengthy public notice and comment period. Moreover, the FCC currently is in the process of reconfiguring licenses that many businesses use to operate their



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COMMUNICATIONS ISSUES WILL ARISE IN VIRTUALLY ANY ACQUISITION OF A BUSINESS OR IN ANY COMMERCIAL REAL ESTATE TRANSACTION AND MUST BE IDENTIFIED EARLY IN THE DUE-DILIGENCE PROCESS.

internal radio systems, and there is a limited timetable during which businesses must act to comply with the new rules.

Importantly, 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. In fact, the most important step is simply recognizing the need to make the inquiries.

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 Web-hosting firm, a call center

or a travel agency. But counsel must keep in mind that it is not just communications companies that hold licenses.

### ISSUES FACED BY NON-TELECOM COMPANIES HOLDING LICENSES

Three recent transactions illustrate the importance of due diligence. In the first transaction, the seller of a brick-making 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, a client was buying two small specialty plastics manufacturing plants from a large



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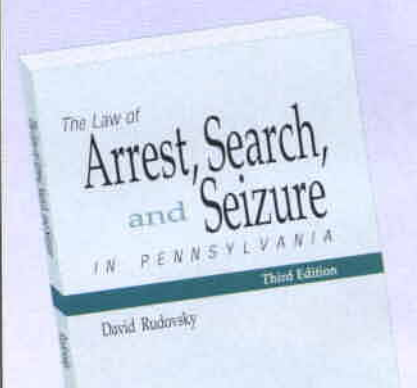
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EARLY IDENTIFICATION OF COMMUNICATIONS LICENSES IS  
PARTICULARLY CRUCIAL BECAUSE MOST LICENSES CANNOT  
BE TRANSFERRED WITHOUT THE PRIOR APPROVAL  
OF THE LICENSING AGENCY

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national firm. The entity owning the plants held microwave and very small aperture satellite (VSAT) licenses for facilities that linked the plants to the corporation's computer network. (Many multi-location businesses, ranging from Wal-Mart to banks, hold such licenses.) In the third transaction, a client was buying a thriving regional bakery and the associated fleet of trucks that delivered the bakery's goods to retail outlets. The bakery held a number of business radio licenses that enabled real-time private communications between the plant and delivery truck drivers.

In the second and third transactions, neither the buyer nor its corporate counsel realized until the closing was approaching that the firm being purchased held licenses issued by the FCC. In both transactions, communications counsel was immediately brought in when 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.

### CONTRACTUAL ISSUES FACED BY NON-TELECOM COMPANIES

Some communications issues 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 payments by the carrier under 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.

Other communications issues may alter the economics of a deal after it has closed. At a minimum, buyers must carefully review potentially applicable contracts for voice and data services, including contracts for mobile, Internet access, asynchronous transfer mode, frame relay and wide area networks. For example, in the transaction discussed above involving the two plastics manufacturing plants, certain communications services were provided under the selling firm's nationwide "take or pay" contract (an agreement in which the buyer will still pay some amount even if the product or service is not provided) that arguably could have continued to apply to the plants after the acquisition, which would have resulted in duplicate 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



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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 price 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:

- (1) the minimum revenue commitment clause,
- (2) the substitution of services clause and
- (3) 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. And they affect virtually all businesses. Every business lawyer, from antitrust and intellectual property lawyers to tax lawyers, must be aware of such issues and must perform due diligence in the early stages of the deal to identify and resolve them. Failure to do so is not only expensive but could delay or in some cases even derail the transaction altogether. ☼

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