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Real Estate Development Projects and the PUC

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The nature of a particular utility service as private or public is an issue that comes up from time to time in the context of certain development projects. The distinction is important because the implication when falling on the public side of the line is that public utilities are subject to regulation by the Pennsylvania Public Utility Commission, whereas private utility services are not. Examples of where this issue may deserve some scrutiny include (1) privately constructed power-generating sources that are operated and maintained by the developer or another third party, which provide power to one or multiple buildings in a business or industrial park, and (2) privately constructed wastewater treatment plants that provide wastewater treatment services to development(s) in an area where a local sewer connection may not exist. The governing analysis has been shaped by a number of cases over the years, but when applied to a particular set of facts, the analysis does not always lead to a clear-cut result. This article discusses the pertinent regulatory and analytical framework when evaluating the nature of a utility service as private or public.

SUMMARY OF REGULATORY FRAMEWORK

Pennsylvania's Public Utility Code, 66 Pa. Cons. Stat. Ann. §§101–3316, defines a "public utility" to include "any person or corporations ... owning or operating equipment or facilities for," inter alia, "producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity or steam for the production of light, heat or power to or for the public for compensation," "diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation," "sewage collection, treatment or disposal for the public for compensation." Statutory exceptions include, inter alia, "any person or corporation, not otherwise a public utility, who or which furnishes service only to himself or itself," and "any building or facility owner/operators who hold ownership over and manage the internal distribution system serving such building or facility and who supply electric power and other related electric power services to occupants of the building or facility." As highlighted above, the meaning of the phrase "to or for the public," which notably is not defined in the code, is key to resolving this issue in a given circumstance.

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A benchmark decision on this point was *Drexelbrook Associates v. Pennsylvania PUC,* 212 A.2d 237, 241 (Pa. 1965). In this case, PECO and Philadelphia Suburban Water Co. (PSW) sought PUC approval for the transfer of certain on-site utility assets to Drexelbrook Associates, an entity that owned and managed a garden-type apartment village containing 90 buildings, 1,223 residential units, nine retail stores and various other areas. Following the transfers, Drexelbrook Associates would purchase gas, electricity and water from PECO and PSW at designated metering points. Drexelbrook Associates would in turn assume the obligation and sole responsibility for furnishing and distributing the services to its tenants for a fee, and for servicing and maintaining the transferred facilities. The PUC denied PECO and PSW's applications on the basis that such transfers would require Drexelbrook Associates to obtain PUC authorization to furnish these services; i.e., the transfers and planned service would render Drexelbrook Associates a public utility, which Drexelbrook Associates disputed.

Basing its decision on cases decided some 30 years earlier by the state Superior Court, the Pennsylvania Supreme Court in *Drexelbrook* ultimately concluded that the proposed services that Drexelbrook Associates would render to its tenants would not constitute service "to or for the public." As described by the court, "in the present case the only persons who would be entitled to and who would receive service are those who have entered into or will enter into a landlord-tenant relationship with appellant ... those to be serviced consist only of a special class of persons — those to be selected as tenants — and not a class open to the indefinite public. Such persons clearly constitute a defined, privileged and limited group and the proposed service to them would be private in nature."

Drexelbrook's theme of "control" over the people to be served by the utility

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continued to be echoed and refined in subsequent cases. In a 1980 Supreme Court case, C.E. Dunmire Gas Co. challenged a determination of an administrative law judge, as affirmed by the Commonwealth Court, that the company's services crossed the public line. Historically, the gas company only provided gas at the wholesale level to two commercial customers; however, over time, the company's customer base grew to include a number of residential retail customers. In affirming the decisions below, the court noted "the private or public character of a business does not depend upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it." (See *C.E. Dunmire Gas v. Pennsylvania PUC*, 413 A.2d 473, 474 (Pa. 1980).) Viewing the gas company's availability of supply as the only restriction the company put on whom it served, the court went on to conclude that the company's gas service was not limited to a specific privileged class, but that the company provided gas service, to the extent of its capacity, to an indefinitely open class of customers.

In *Warwick Water Works v. Pennsylvania PUC*, 699 A.2d 770, 773 (Pa. Commw. Ct. 1997), Warwick supplied water and wastewater service to certain units it owned in a development known as St. Peter's Village, as well as to the St. Peter's Condominium Association, which was composed of a number of other property owners at St. Peter's Village. On appeal of the PUC's finding that Warwick was a de facto public utility, Warwick argued it was not a public utility because its services were provided to only two customers — tenants in the units that it owned in St. Peter's Village and to the association — which constituted a limited and defined group, not the public. Distinguishing the service provided by Warwick to the association members from that in *Drexelbrook*, the Commonwealth Court noted there was "no special class of persons that [Warwick], as the provider, chooses to service ... no relationship other than service provider and customer existed between Warwick and the association members, who are billed and who made payments individually." The Commonwealth Court further found that "the association members, while limited to a definite number, are an open class of persons, who may sell or lease their property without regard to Warwick," and accordingly upheld the PUC's determination that Warwick was a public utility.

To provide further guidance and to reduce continued uncertainty in the regulated community regarding the criteria that the PUC will use to evaluate the jurisdictional status of a utility project or service, the PUC in 2007 issued a policy statement on this topic, which was adopted as 52 Pa. Code §69.1401. The policy is based on established legal precedent and is applicable to all utility projects and services. Pursuant to the policy, the PUC will consider the jurisdictional status of a utility project or service based on the specific facts of the project or service according to the following criteria that, if satisfied, would likely lead to a determination that the utility project or service in question was not public in nature: (1) the service being provided by the utility project is merely incidental to nonutility business with the customers, which creates a nexus between the provider and customer; (2) the facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project; and (3) the service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service, and resale of the service is prohibited, subject to one exception.

The policy also includes a procedure whereby a project developer may request an informal opinion from the PUC's chief counsel regarding the jurisdictional status of a utility project or service. While such an opinion would not represent the PUC's final position in a given matter, the opinion could provide additional comfort and allow business planning to proceed, and also provide evidence of good faith in an enforcement context if necessary.

TODAY'S MARKET

In today's real estate market, the existence or addition of a utility service to a development project may provide the developer a competitive edge, or the provision of such a service may simply be a necessary component of the overall project given its geographic location. Project developers typically do not want to be viewed as a "public utility," and it is important to be sensitive to this issue when working with clients on certain types of development projects. Aspects of the existing or planned utility service to consider include the nonutility relationships that may exist between the utility service provider and its customers, the degree of control the provider may have over current and future customers, cost and billing arrangements, and whether the provider solicits additional customers. The required analysis is fact-intensive, nuanced at the margins and may change over time. •