

May 1, 2017

The Honorable Charles E. Coulson  
Lake County Prosecuting Attorney  
105 Main Street, P.O. Box 490  
Painesville, Ohio 44077

SYLLABUS:

2017-012

1. A company may construct a micro wireless facility, as defined in R.C. 4939.01(F), along or upon a county or township road in an unincorporated area of a township pursuant to R.C. 4931.03(A)(1), so long as the company is a “telephone company,” as defined in R.C. 4931.01, or a “company organized at any time to transact a telephone or communications business,” as described in R.C. 4931.05, and the micro wireless facility is used by the company as a means by which information of the user’s choosing is transmitted between or among points specified by the user, without change in the form or content of the information as sent and received.
2. A company that uses a micro wireless facility, as defined in R.C. 4939.01(F), exclusively for data and software updates and auto-pilot automotive technology is “engaged in the business of transmitting telephonic messages” within the meaning of R.C. 4905.03(A), so long as the company’s use of the micro wireless facility for these purposes means that the company is occupied or involved, or taking part in, the activity of sending out speech or computerized communications over distances by electromagnetic waves.
3. The provisions in R.C. Chapter 4939, as amended in Sub. S.B. 331, 131st Gen. A. (2016) (eff. Mar. 21, 2017), do not govern the use of public ways in unincorporated areas.



**MIKE DEWINE**

★ OHIO ATTORNEY GENERAL ★

Opinions Section  
Office 614-752-6417  
Fax 614-466-0013  
30 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215  
www.OhioAttorneyGeneral.gov

May 1, 2017

OPINION NO. 2017-012

The Honorable Charles E. Coulson  
Lake County Prosecuting Attorney  
105 Main Street, P.O. Box 490  
Painesville, Ohio 44077

Dear Prosecutor Coulson:

We have received your request for an opinion about the meaning and application of various provisions in R.C. Title 49 (public utilities). Specifically, you ask (1) whether a company may construct micro wireless facilities upon or along county or township roads in an unincorporated area of a township pursuant to R.C. 4931.03; (2) whether a company is engaged in the business of transmitting telephonic messages within the meaning of R.C. 4905.03(A) when it uses a micro wireless facility exclusively for data and software updates and auto-pilot automotive technology; and (3) whether the provisions in R.C. Chapter 4939 (municipal public way use), as amended in Sub. S.B. 331, 131st Gen. A. (2016) (eff. Mar. 21, 2017), apply to the use of public ways in unincorporated areas.

**A Telephone or Communications Company May Construct Telecommunications Facilities Upon or Along a Public Road in an Unincorporated Area of a Township**

Your first question asks whether a company may construct micro wireless facilities upon or along a county or township road in an unincorporated area of a township pursuant to R.C. 4931.03. R.C. 4931.03(A)(1) authorizes a “telephone company” to “[c]onstruct telecommunications ... facilities upon and along any of the public roads and highways” in the unincorporated area of a township.<sup>1</sup> “The public highways of the state” are “divided into three classes: state roads, county roads, and township roads.” R.C. 5535.01. Accordingly, R.C. 4931.03(A)(1) authorizes a telephone company to construct telecommunications facilities upon or along state, county, or township roads located in the unincorporated area of a township.

As used in R.C. 4931.03(A)(1), the term “telephone company” has the same meaning as in R.C. 4927.01. R.C. 4931.01. R.C. 4927.01(A)(14) defines “telephone company,” as used in R.C. Chapter 4927 (telecommunications), to mean “a company described in [R.C. 4905.03(A)]

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<sup>1</sup> Facilities constructed pursuant to R.C. 4931.03(A)(1) shall not be constructed so as “to incommode the public in the use of the roads or highways.”

that is a public utility under [R.C. 4905.02].” R.C. 4905.03(A) describes a “telephone company” as “any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation ... when engaged in the business of transmitting telephonic messages to, from, through, or in” the State of Ohio. A telephone company, as described in R.C. 4905.03(A), is a “public utility” under R.C. 4905.02, “except with respect to its provision” of particular services. R.C. 4905.02(A)(5). Those services include “[a]dvanced services as defined in 47 C.F.R. 51.5,”<sup>2</sup> R.C. 4905.02(A)(5)(a); broadband service as defined by the Federal Communications Commission,<sup>3</sup> R.C. 4905.02(A)(5)(b); “[i]nformation service as defined in the ‘Telecommunications Act of 1996,’ 110 Stat. 59, 47 U.S.C. 153(20),”<sup>4</sup> R.C. 4905.02(A)(5)(c); “internet protocol-enabled services as defined in [R.C. 4927.01],”<sup>5</sup> R.C. 4905.02(A)(5)(d); and “any telecommunications service as defined in [R.C. 4927.01]”<sup>6</sup> that was not commercially available on September 13, 2010 and that “employs technology that became available for

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<sup>2</sup> “The term ‘advanced services’ is defined as high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology.” 47 C.F.R. § 51.5 (2016).

<sup>3</sup> On its website, the Federal Communications Commission (“FCC”) states that “[t]he term broadband commonly refers to high-speed Internet access that is always on and faster than the traditional dial-up access.” FCC Website, *Types of Broadband Connections*, available at <https://www.fcc.gov/general/types-broadband-connections> (last visited Apr. 20, 2017). The FCC lists several “high-speed transmission technologies” considered to be “broadband.” *Id.*

<sup>4</sup> “The term ‘information service’ means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” including “electronic publishing.” 47 U.S.C.A. § 153(24) (Thomson Reuters 2017). Information service “does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” *Id.*

<sup>5</sup> R.C. 4927.01(A)(6) defines “[i]nternet protocol-enabled services,” as used in R.C. Chapter 4927 (telecommunications), to mean

any services, capabilities, functionalities, or applications that are provided using internet protocol or a successor protocol to enable an end user to send or receive communications in internet protocol format or a successor format, regardless of how any particular such service is classified by the [FCC], and includes voice over internet protocol service.

<sup>6</sup> R.C. 4927.01(A)(13) states: “‘Telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

commercial use only after September 13, 2010,” R.C. 4905.02(A)(5)(e)(i)-(ii).<sup>7</sup> Accordingly, a company is a “telephone company” within the meaning of R.C. 4931.03(A)(1) when engaged in the business of transmitting telephonic messages to, from, through, or in the State of Ohio, except with respect to its provision of any of the services delineated in R.C. 4905.02(A)(5)(a)-(e).

A company need not be a “telephone company,” however, to avail itself of the authority granted under R.C. 4931.03(A)(1). R.C. 4931.05 confers the powers “prescribed in [R.C. 4931.02-.04] for telephone companies” upon “[a]ny company organized at any time to transact a telephone or communications business.” R.C. 4931.05 provides:

Any company organized at any time to transact a telephone or communications business may construct, reconstruct, own, use, lease, operate, maintain, and improve communications systems for the transmission of voices, sounds, writings, signs, signals, pictures, visions, images, or other forms of

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<sup>7</sup> The inclusion of “internet protocol-enabled services” and “telecommunications service” in R.C. 4905.02(A)(5)(d) and (e) is “[s]ubject to [R.C. 4927.03(A)].” R.C. 4905.02(A)(5)(d), (e). R.C. 4927.03(A) provides:

Except as provided in [R.C. 4927.04(A) and (B)] and except to the extent required to exercise authority under federal law, the public utilities commission has no authority over any interconnected voice over internet protocol-enabled service or any telecommunications service that is not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010, unless the commission, upon a finding that the exercise of the commission’s authority is necessary for the protection, welfare, and safety of the public, adopts rules specifying the necessary regulation. A consumer purchase of a service that is not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010, shall constitute a consumer transaction for purposes of [R.C. 1345.01-.13 (consumer sales practices)], notwithstanding any provision of those sections to the contrary, unless the commission exercises jurisdiction over the service in accordance with this division. Notwithstanding any contrary provision of [R.C. Chapter 4911 (consumers’ counsel)], to the extent that the commission adopts rules under division (A) of this section regarding any interconnected voice over internet protocol enabled service provided to residential customers or regarding any telecommunications service that is provided to residential customers, that is not commercially available on September 13, 2010, and that employs technology that became available for commercial use only after September 13, 2010, the office of the consumers’ counsel shall have authority to assist and represent residential customers in the implementation and enforcement of those rules.

intelligence, as public utility services, by means of wire, cable, radio, radio relay, or other telecommunications facilities, methods, or media. Any such company has the powers and is subject to the restrictions prescribed in sections 4931.02 to 4931.04 of the Revised Code for telephone companies.

Accordingly, a company may construct telecommunications facilities upon or along a county or township road in an unincorporated area of a township pursuant to R.C. 4931.03(A)(1) provided that the company is either a “telephone company,” as that term is defined in R.C. 4931.01, or a “company organized at any time to transact a telephone or communications business,” as described in R.C. 4931.05. Your letter describes the company at issue in this instance as a “telephone company.” Therefore, for the purpose of answering your question, we shall presume that the company is a “telephone company,” as defined in R.C. 4931.01, or a “company organized at any time to transact a telephone or communications business,” as described in R.C. 4931.05.

You ask whether a company may use the authority granted under R.C. 4931.03(A)(1) to construct micro wireless facilities upon or along county or township roads in an unincorporated area of a township. R.C. 4931.03(A)(1) authorizes a “telephone company,” as defined in R.C. 4931.01, or a “company organized at any time to transact a telephone or communications business,” as described in R.C. 4931.05, to “[c]onstruct telecommunications ... facilities upon and along” public roads or highways in unincorporated areas of a township. Accordingly, the answer to your question depends upon whether a micro wireless facility is a “telecommunications facility” within the meaning of R.C. 4931.03(A)(1).

The term “telecommunications facility” is not defined for the purpose of R.C. 4931.03 or more generally for purposes of R.C. Chapter 4931 (telephone companies). The term “telecommunications,” however, is defined in R.C. Chapter 4927 (telecommunications) as well as in the Telecommunications Act of 1996, 110 Stat. 59, 47 U.S.C.A. § 153(50) (Thomson Reuters 2017). R.C. 4927.01(A)(11) and 47 U.S.C.A. § 153(50) define the term “telecommunications” to mean “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” Although neither of these statutes defines “telecommunications” for the purpose of R.C. Chapter 4931, the definitions set forth in 47 U.S.C.A. § 153(50) and R.C. 4927.01(A)(11) are indicative of what the General Assembly likely intended in using the term “telecommunications” in R.C. 4931.03(A)(1). The Ohio Supreme Court has recognized that in the absence of a statutory definition, it is reasonable to derive the meaning of a term from a statute defining that term for purposes of another division or chapter of the Revised Code. *See Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St. 3d 541, 545, 639 N.E.2d 1154 (1994) (recognizing that even though the scope of a statute defining a term is expressly limited to that division or chapter, “its language is illustrative of the General Assembly’s use of language when describing” that particular term). Accordingly, when used in R.C. 4931.03, the term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

Unlike the term “telecommunications,” the term “facility” is not defined elsewhere in federal or state law. Accordingly, we accord the term its common meaning. *See* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”). *Webster’s New World College Dictionary* 519 (5th ed. 2014) defines “facility” to mean “the means by which something can be done.” Accordingly, a “telecommunications facility,” as that term is used in R.C. 4931.03(A)(1), is the means by which information of the user’s choosing is transmitted between or among points specified by the user, without change in the form or content of the information as sent and received.

R.C. Chapter 4931 does not use or define the term, “micro wireless facility.” However, “micro wireless facility” is defined in R.C. 4939.01(F) for the purposes of R.C. 4939.01-.08. Accordingly, we shall answer your question by addressing whether a micro wireless facility, as that term is defined in R.C. 4939.01(F), is a means by which information of the user’s choosing is transmitted between or among points specified by the user, without change in the form or content of the information as sent and received.

R.C. 4939.01(F) states that a “[m]icro wireless facility” includes both a distributed antenna system and a small cell facility, and the related wireless facilities.” R.C. 4939.01(D) defines a “[d]istributed antenna system” as “a network or facility” that “distributes radio frequency signals to provide wireless service” and meets the height, size, and other technical criteria set forth in R.C. 4939.01(D)(2)-(4).<sup>8</sup> R.C. 4939.01(N) defines a “[s]mall cell facility” as “a wireless facility that meets” the specifications set forth in R.C. 4939.01(N)(1) and (2).<sup>9</sup> *See*

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<sup>8</sup> Pursuant to R.C. 4939.01(D)(2)-(4), a distributed antenna system must “meet[] the height and size characteristics of a small cell facility,” R.C. 4939.01(D)(2), R.C. 4939.01(D)(4); and consist of “[r]emote antenna nodes deployed throughout a desired coverage area,” R.C. 4939.01(D)(3)(a); “[a] high-capacity signal transport medium connected to a central hub site,” R.C. 4939.01(D)(3)(b); and “[e]quipment located at the hub site to process or control the radio frequency signals through the antennas,” R.C. 4939.01(D)(3)(c).

<sup>9</sup> Pursuant to R.C. 4939.01(N)(1)-(2), a wireless facility is a small cell facility if it meets the following requirements:

(1)(a) Each antenna is located inside an enclosure of not more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an enclosure of not more than six cubic feet in volume.

(b) All other wireless equipment associated with the facility is cumulatively not more than twenty-eight cubic feet in volume. The calculation of equipment volume shall not include electric meters, concealment elements, telecommunications demarcation boxes, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power and other services.

R.C. 4939.01(P) (defining “[w]ireless facility” to mean “an antenna, accessory equipment, or other wireless device or equipment used to provide wireless service”); *see also* R.C. 4939.01(A) (“[a]ccessory equipment’ means any equipment used in conjunction with a wireless facility or wireless support structure ... includ[ing] utility or transmission equipment, power storage, generation or control equipment, cables, wiring, and equipment cabinets”); R.C. 4939.01(B) (“[a]ntenna’ means communications equipment that transmits or receives radio frequency signals in the provision of wireless service, including associated accessory equipment”). Whether in the form of a distributed antenna system or a small cell facility, a micro wireless facility, as defined in R.C. 4939.01(F), is a facility used to provide wireless service. Pursuant to R.C. 4939.01(Q), “[w]ireless service’ means any services using licensed or unlicensed wireless spectrum, whether at a fixed location or mobile, provided using wireless facilities.” Therefore, a micro wireless facility is a facility that meets the specifications set forth in R.C. 4939.01(D) or R.C. 4939.01(N) that is used to provide services using licensed or unlicensed wireless spectrum, whether at a fixed location or mobile.<sup>10</sup>

The definitions in R.C. 4939.01 do not specify the types of services a company may provide using licensed or unlicensed wireless spectrum. Absent information about the particular type of services being provided by means of a micro wireless facility, we are unable to determine whether, as a general matter, a micro wireless facility, as defined in R.C. 4939.01(F), is a “telecommunications facility” within the meaning of R.C. 4931.03(A)(1). Nevertheless, we are able to conclude that a micro wireless facility, as defined in R.C. 4939.01(F), is a

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(2) If the wireless facility were placed on a wireless support structure, the increased height would be not more than ten feet or the overall resulting height would be not more than fifty feet.

<sup>10</sup> “Wireless spectrum” refers to the portion of the radio spectrum allocated to wireless communications. *See* National Aeronautics & Space Admin. (“NASA”) Website, *Electromagnetic Spectrum Regulation*, available at [https://www.nasa.gov/directorates/heo/scan/spectrum/txt\\_accordion3.html](https://www.nasa.gov/directorates/heo/scan/spectrum/txt_accordion3.html) (last visited Apr. 20, 2017). “The radio spectrum is the radio frequency (RF) portion of the electromagnetic spectrum” over which wireless communications signals travel. FCC Website, *Radio Spectrum Allocation*, available at <https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation> (last visited April 20, 2017); *see also* Marguerite Reardon, *Wireless Spectrum: What it is, & Why You Should Care*, available at <https://www.cnet.com/news/wireless-spectrum-what-it-is-and-why-you-should-care/> (last visited Apr. 20, 2017). Wireless communications services that use the wireless spectrum include television and radio broadcasting, global positioning system devices, and cellular telephones. *See* NASA Website, *Electromagnetic Spectrum Regulation*, available at [https://www.nasa.gov/directorates/heo/scan/spectrum/txt\\_accordion3.html](https://www.nasa.gov/directorates/heo/scan/spectrum/txt_accordion3.html) (last visited Apr. 20, 2017).

“telecommunications facility” within the meaning of R.C. 4931.03(A)(1),<sup>11</sup> when the micro wireless facility is used as a means by which information of the user’s choosing is transmitted between or among points specified by the user, without change in the form or content of the information as sent and received.

Accordingly, we conclude that a company may construct a micro wireless facility, as defined in R.C. 4939.01(F), along or upon a county or township road in an unincorporated area of a township pursuant to R.C. 4931.03(A)(1), so long as the company is a “telephone company,” as defined in R.C. 4931.01,<sup>12</sup> or a “company organized at any time to transact a telephone or communications business,” as described in R.C. 4931.05, and the micro wireless facility is used by the company as a means by which information of the user’s choosing is transmitted between or among points specified by the user, without change in the form or content of the information as sent and received.<sup>13</sup>

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<sup>11</sup> Whether a micro wireless facility, as defined in R.C. 4939.01(F), is a “telecommunications facility” within the meaning of R.C. 4931.03(A)(1) has no bearing on whether a company desiring to construct a micro wireless facility pursuant to R.C. 4931.03(A)(1) is a “telephone company,” as defined in R.C. 4931.01.

<sup>12</sup> The type of telecommunications facility that a company uses to provide telecommunications services does not determine whether the company is a “telephone company,” as defined in R.C. 4931.01. Rather, it is the type of *services* that a company provides that determines, at least in part, whether a company is a “telephone company” under the statute. A company is a “telephone company,” as defined in R.C. 4931.01, if it is “engaged in the business of transmitting telephonic messages to, from, through, or in” the State of Ohio and is a “public utility” under R.C. 4905.02. *See* R.C. 4931.01 (“‘telephone company’ has the same meaning as in [R.C. 4927.01]”); *see also* R.C. 4927.01(A)(14) (“‘[t]elephone company’ means a company described in [R.C. 4905.03(A)] that is a public utility under [R.C. 4905.02]”); R.C. 4905.03(A) (“any company ... is ... [a] telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state”). A company engaged in the business of transmitting telephonic messages to, from, through, or in the State of Ohio, is a public utility under R.C. 4905.02 *except* with respect to its provision of the services listed in R.C. 4905.02(A)(5)(a)-(e). Therefore, a company is not a “public utility” under R.C. 4905.02 and therefore not a “telephone company,” as defined in R.C. 4931.01, with respect to its provision of any of the services listed in R.C. 4905.02(A)(5)(a)-(e). A company that uses a micro wireless facility to provide any of the services listed in R.C. 4905.02(A)(5)(a)-(e) is therefore not a “telephone company,” as defined in R.C. 4931.01, with respect to its provision of such services. *See generally* R.C. 4927.03(B) (limiting the authority of the Public Utilities Commission of Ohio to regulate wireless service and wireless service providers).

<sup>13</sup> Pursuant to R.C. 4931.03(B)(2), “[c]onstruction under [R.C. 4931.03] is subject to [R.C. 5571.16], as applicable, and any other applicable law, including, but not limited to, any law

**The Meaning of “Engaged in the Business of Transmitting Telephonic Messages” in R.C. 4905.03(A)**

Your second question asks whether a company is engaged in the business of transmitting telephonic messages within the meaning of R.C. 4905.03(A) when it uses a micro wireless facility exclusively for data and software updates and auto-pilot automotive technology. R.C. 4905.03(A) describes a “telephone company” as “any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation ... when engaged in the business of transmitting telephonic messages to, from, through, or in” the State of Ohio. The answer to your question depends upon the meaning of two phrases: (1) “engaged in the business of” and (2) “transmitting telephonic messages.” For ease of discussion, we shall begin by addressing the meaning of the phrase, “transmitting telephonic messages.”

Neither the phrase “transmitting telephonic messages” nor any of its component parts is defined for the purpose of R.C. 4905.03. Accordingly, we shall assign the phrase its common meaning. See R.C. 1.42. *Webster’s New World College Dictionary* 1540 defines “transmit” to mean “to send out (radio or television broadcasts, etc.) by electromagnetic waves.” The term “telephonic” is the adjectival form of “telephone.” *In the Matter of the Complaint of Anserphone, Inc., 280 N. Park Ave., Warren, Ohio 44482*, Ohio Pub. Utils. Comm’n, Attorney Examiner’s Report, Case No. 73-425-T, 1979 WL 446030, at \*7 (Mar. 26, 1979); *Webster’s New World College Dictionary* 1490. *Webster’s New World College Dictionary* 1490 defines “telephone” to mean “a system for transmitting speech or computerized information over distances, usually by converting sounds into electric impulses that are sent through a network of wires and cables: some systems transmit by means of radio waves.” *Webster’s New World College Dictionary* 917 defines “message” to mean “a communication passed or sent by speech, in writing, by signals, etc.” Accordingly, “transmitting telephonic messages,” for the purpose of

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requiring approval of the legislative authority, the county engineer, or the director of transportation.” Under R.C. 5571.16, a board of township trustees may require a “person to obtain a permit before ... making any excavation in a township highway or highway right-of-way within its jurisdiction, except an excavation to repair, rehabilitate, or replace a pole already installed for the purpose of providing electric or telecommunications service.” As used in R.C. 5571.16, “[p]erson’ includes an individual, corporation, business trust, estate, trust, partnership, and association.” R.C. 1.59(C); R.C. 5571.16 (“[a]s used in this section, ‘person’ has the same meaning as in [R.C. 1.59]”). Other laws to which construction under R.C. 4931.03 may be subject include, but are not limited to, R.C. 5547.04, which prohibits a corporation from erecting an obstruction “within the bounds of any highway,” except for roads and highways on the state highway system “without first obtaining the approval of the board” of county commissioners; and R.C. 5515.01, which authorizes the Director of Transportation to grant a permit to a corporation to use or occupy a state road “as will not incommode the traveling public.” See generally *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St. 3d 215, 2008-Ohio-2010, 887 N.E.2d 1158, at ¶7 (“before erecting poles or other fixtures on a public right-of-way, a utility company is generally required to obtain the approval of the public entity that owns the right-of-way”).

R.C. 4905.03(A), means sending out speech or computerized communications over distances by electromagnetic waves.<sup>14</sup>

Next, we shall address the meaning of “engaged in the business of,” as that phrase is used in R.C. 4905.03(A). This phrase also is not defined for the purpose of R.C. 4905.03(A). *Webster’s New World College Dictionary* 481 defines “engage” to mean, among other things, “to occupy or involve oneself; take part; be active.” *Webster’s New World College Dictionary* 202 defines “business” to mean “a matter, affair, activity, etc.” Therefore, a company is “engaged in the business of transmitting telephonic messages” when the company is occupied or involved, or taking part in, the activity of sending out speech or computerized communications over distances by electromagnetic waves.

The determination of whether a company is “engaged in the business of transmitting telephonic messages” is dependent upon the facts of a particular case. As explained by the Public Utilities Commission of Ohio:

Crucial to [the] determination of whether an entity is engaged in the business of transmitting telephonic messages is the relationship the involved entity has with its customers. For example, portraying or holding oneself out to the end user as the entity responsible for establishing service, addressing consumer concerns and complaints, and receiving remuneration for services rendered are all indicia of engaging in the business of transmitting telephonic messages.

*In the Matter of the Comm’n Investigation Relative to the Establishment of Local Exch. Competition & Other Competitive Issues*, Ohio Pub. Utils. Comm’n, Finding & Order, Case No. 95-845-TP-COI, 1996 WL 33689044, at \*17 (Jun. 12, 1996). Questions of fact are not appropriate for determination by a formal opinion of the Attorney General. 2009 Op. Att’y Gen. No. 2009-002, at 2-12. Nevertheless, we are able to advise you that a company is engaged in the business of transmitting telephonic messages within the meaning of R.C. 4905.03(A) when the company is occupied or involved, or taking part in, the activity of sending out speech or computerized communications over distances by electromagnetic waves.

Accordingly, a company that uses a micro wireless facility, as defined in R.C. 4939.01(F), exclusively for data and software updates and auto-pilot automotive technology is engaged in the business of transmitting telephonic messages within the meaning of R.C.

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<sup>14</sup> The Public Utilities Commission of Ohio also has relied upon dictionary definitions of “transmit,” “telephonic,” and “message” to determine whether a company is transmitting a telephonic message within the meaning of R.C. 4905.03(A). *See, e.g., In the Matter of the Complaint of Anserphone, Inc., 280 N. Park Ave., Warren, Ohio 44482*, Ohio Pub. Utils. Comm’n, Attorney Examiner’s Report, Case No. 73-425-T, 1979 WL 446030, at \*\*6-7 (Mar. 26, 1979).

4905.03(A), so long as the company's use of the micro wireless facility for these purposes means that the company is occupied or involved, or taking part in, the activity of sending out speech or computerized communications over distances by electromagnetic waves.

### **The Application of R.C. Chapter 4939 to Public Ways in Unincorporated Areas**

Your third question asks whether the provisions in R.C. Chapter 4939, as amended in Sub. S.B. 331, 131st Gen. A. (2016) (eff. Mar. 21, 2017), govern the use of public ways in unincorporated areas. R.C. Chapter 4939 governs the use of “public ways.” R.C. 4939.01(L) defines “[p]ublic way” to mean “the surface of, and the space within, through, on, across, above, or below, any public street,” highway, and other way designated for public use, “*which, on or after July 2, 2002, is owned or controlled by a municipal corporation.*”<sup>15</sup> (Emphasis added.)

Substitute S.B. 331 amends the provisions in R.C. Chapter 4939 to “establish[] a regulatory scheme that may be applied to the construction and attachment of micro wireless facilities in the public way of a municipal corporation.” Ohio Legislative Serv. Comm’n, Final Bill Analysis (Sub. S.B. 331, eff. Mar. 21, 2017). The amendments in Sub. S.B. 331 do not substantively alter the definition of “public way” in R.C. 4939.01 or otherwise subject public ways outside of a municipal corporation to the provisions in R.C. Chapter 4939. Accordingly, based upon the plain language of R.C. 4939.01(L), we conclude that the provisions in R.C.

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<sup>15</sup> When R.C. Chapter 4939 was first enacted by the General Assembly in 1999-2000 Ohio Laws, Part II, 2339 (Am. Sub. H.B. 283, eff., in part, Jun. 30, 1999), R.C. 4939.01 defined “[p]ublic way” to mean “any public street, road, highway, public easement, or public waterway,” including “the entire width of any right of way associated with any public way.” *See also City of Dublin v. State*, 118 Ohio Misc. 2d 18, 2002-Ohio-2431, 769 N.E.2d 436, at ¶1 (as enacted in Am. Sub. H.B. 283, R.C. Chapter 4939’s provisions “limit[ed] the extent to which any political subdivision,” not just a municipal corporation, could “control the use of its ... public ways by ‘utility service providers’ and ‘cable operators’”). The General Assembly repealed these provisions in 2001-2002 Ohio Laws, Part II, 2398 (Am. Sub. S.B. 255, eff. July 2, 2002), and enacted new provisions that governed “the authority of ... public utilities to use the public ways of a *municipal corporation.*” Ohio Legislative Serv. Comm’n, Final Bill Analysis (Sub. H.B. 97, eff. Oct. 21, 2003) (emphasis in original). As enacted in Am. Sub. S.B. 255, R.C. 4939.01(E) defined “[p]ublic way” to mean “any public street, public road, public highway, ... and any other land dedicated or otherwise designated for a compatible use, *which, on or after the effective date of this section, is owned or controlled by a municipal corporation.*” (Emphasis added.) The definition of “public way” in R.C. 4939.01 has remained substantively unchanged since Am. Sub. S.B. 255.

Chapter 4939, as amended in Sub. S.B. 331, 131st Gen. A. (2016) (eff. Mar. 21, 2017), do not govern the use of public ways in unincorporated areas.<sup>16</sup>

### **Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A company may construct a micro wireless facility, as defined in R.C. 4939.01(F), along or upon a county or township road in an unincorporated area of a township pursuant to R.C. 4931.03(A)(1), so long as the company is a “telephone company,” as defined in R.C. 4931.01, or a “company organized at any time to transact a telephone or communications business,” as described in R.C. 4931.05, and the micro wireless facility is used by the company as a means by which information of the user’s choosing is transmitted between or among points specified by the user, without change in the form or content of the information as sent and received.
2. A company that uses a micro wireless facility, as defined in R.C. 4939.01(F), exclusively for data and software updates and auto-pilot automotive technology is “engaged in the business of transmitting telephonic messages” within the meaning of R.C. 4905.03(A), so long as the company’s use of the micro wireless facility for these purposes means that the company is occupied or involved, or taking part in, the activity of sending out speech or computerized communications over distances by electromagnetic waves.

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<sup>16</sup> The General Assembly enacted R.C. Chapter 4931 in 2003-2004 Ohio Laws, Part II, 2701 (Sub. H.B. 97, eff. Oct. 21, 2003). The provisions in R.C. Chapter 4931 authorize particular companies to construct utility lines and facilities along public roads and highways in unincorporated areas. *See* Ohio Legislative Serv. Comm’n, Final Bill Analysis (Sub. H.B. 97, eff. Oct. 21, 2003) (“[Substitute H.B. 97] restores the telegraph company authority that was repealed by Am. Sub. H.B. 283, specifically, the authority of a telegraph company to locate lines within public ways in the unincorporated territory of a township. It also expressly extends to a ‘telephone company’ the same authority it extends to telegraph companies, although continuing law ... already confers the authority of a telegraph company on any telephone or other communications business”).

3. The provisions in R.C. Chapter 4939, as amended in Sub. S.B. 331, 131st Gen. A. (2016) (eff. Mar. 21, 2017), do not govern the use of public ways in unincorporated areas.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General