

## OPINION NO. 74-072

## Syllabus:

The public utilities commission has authority to adopt rules for the conduct of its proceedings, and it may restrict the audio-visual recording of such proceedings so long as such restrictions are reasonable. The commission may, however, enact a rule, pursuant to R.C. 4901.13, permitting the use of audio-visual equipment, in its proceedings if it chooses.

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To: Edmund J. Turk, Chairman, Public Utilities Commission, Columbus, Ohio  
By: William J. Brown, Attorney General, August 29, 1974

I have before me your request for my opinion which reads as follows:

"1. Is the Public Utilities Commission of Ohio, during the conduct of one of its quasi-judicial hearings and in light of Section 121.22 R.C., required to allow the press and television media to either:

- (a) Take photographs; or
- (b) Record the testimony of witnesses; or
- (c) Film the proceedings for later viewing on television

in view of Canon 35 of the American Bar Association's 'Code of Professional Responsibility and Canons of Judicial Ethics' or any other similar guideline relating to the proper conduct of a court proceeding?

"2. If it is your opinion that the answer to question one above is in the affirmative, does it then become:

- (a) Necessary, and
- (b) Does the Ohio Public Utilities Commission have the power to promulgate a rule regulating such

activity during the course of one of its formal hearings under the provisions of Section 4901.13 R.C. or similar authority, statutory or otherwise?

"A recent judicial determination from New Hampshire involved similar circumstances. A digest of that decision is attached."

R.C. 121.22, which states that all meetings of governmental bodies shall be open to the public, provides in part as follows:

"All meetings of any board or commission of any state agency or authority and all meetings of any board, commission, agency or authority of any county, township, municipal corporation, school district or other political subdivision are declared to be public meetings open to the public at all times. No resolution, rule, regulation or formal action of any kind shall be adopted at any executive session of any such board, commission, agency, or authority." (Emphasis added.)

R.C. 4901.13, which authorizes the public utilities commission to adopt rules governing its proceedings, provides as follows:

"The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public." (Emphasis added.)

Thus, the public utilities commission is specifically authorized to promulgate rules governing its proceedings. All of its meetings at which official action is taken must be open to the public under the provisions of R.C. 121.22, but it has been held consistently that this does not forbid the holding of executive sessions. Beacon Journal Publishing Co. v. Akron, 3 Ohio St. 2d 191, 198-199 (1965); State ex rel. Humphrey v. Adkins, 18 Ohio App. 2d 101, 105 (1969); Dayton Newspaper, Inc. v. Dayton, 28 Ohio App. 2d 95 (1971).

The use of audio-visual equipment is, of course, generally prohibited during court proceedings. See, Canon 35 of the American Bar Association's "Code of Professional Responsibility and Canons of Judicial Ethics"; Superintendence Rule 11, "Rules of Superintendence Supreme Court of Ohio," 29 Ohio St. 2d p. 1 (1971).

It is clear, however, that these rules have no bearing upon hearings before the public utilities commission. The courts of this state have, on several occasions, discussed the differences between courts and administrative agencies such as the public utilities commission. Penn Central Transportation Co. v. Public Utilities Commission, 35 Ohio St. 2d 97 (1973), In Re Milton Hardware Co., 19 Ohio App. 2d 157 (1969). The commission is, therefore, not bound by either Canon 35 or Superintendence Rule 11. On the other hand, R.C. 121.22 and R.C. 4901.13 do not apply to commission hearings. The question is whether, in light of these provisions, the commission has authority to establish rules governing or prohibiting audio-visual coverage of its proceedings.

In 1953, the General Assembly enacted R.C. 121.22 (125 Ohio Laws 534, effective January 31, 1954) in order to grant the public access to the meetings of governmental bodies. Although this Section specifically compels commission meetings to be open to the public, it does not require that the media be permitted to photograph, record or film such meetings. Moreover, R.C. 4901.13 grants the commission the power to adopt rules to govern its proceedings and to regulate the mode and manner of all hearings. This broad rule-making authority, similar to authority granted the Supreme Court in Article IV of the Constitution, gives the commission the power to establish rules prohibiting or governing the use of audio-visual equipment for coverage of its proceedings. In discussing the power of the commission, the Supreme Court in New York Central Rd. Co. v. Public Utilities Commission, 115 Ohio St. 493, 499-500 (1926), said:

"\* \* \*The Commission is an arm of the Legislature and an administrative body, having only such powers as are specifically granted. Section 499-6, General Code now R.C. 4901.131 confers upon the commission authority to adopt and publish rules to govern its proceedings, and to regulate the mode and manner of investigations, but nowhere in the statute is any power delegated to the commission to make any general rules other than for the government of its own proceedings." (Emphasis added.)

This language was repeated in A & B Belt Rd. Co. v. Public Utilities Commission, 165 Ohio St. 316 (1956). The prohibition of such equipment during a hearing constitutes no limitation on the freedom of the press. It has been held repeatedly that the press does not have an "unrestrained right to gather information." Branzburg v. Hayes, 408 U.S. 665, 684 (1972); Sheppard v. Maxwell, 384 U.S. 333 (1966); Zemel v. Rusk, 381 U.S. 1 (1965); Estes v. Texas, 381 U.S. 532 (1965); State v. Clifford, 162 Ohio St. 370 (1954), cert. denied, 349 U.S. 929 (1955); Bridges v. Clifford, 314 U.S. 252 (1941).

Moreover, as you pointed out in your request letter, the Supreme Court of New Hampshire, interpreting similar statutes, recently held that the public utilities commission of that state has the power to prohibit private recordings of its hearings. That court, in 1590 Broadcasting Corporation v. Public Utilities Commission, 306 A. 2d 49, 50, 51 (1973), spoke as follows:

"The common meanings of the words 'to attend' and 'open to the public' refer to the presence of individuals at the hearings and have no bearing whatsoever on the recording of the hearings.

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"The commission did not prevent the gathering of news by the media, but merely regulated the method whereby the media gathered their information. The fact that

the media had at their disposal reasonable methods to report the entire public portion of the hearings satisfies the right of the public to be informed. See Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)."

The "reasonable methods" available to the media included taking shorthand transcriptions, and free access to the commission's official transcript.

Similarly, a Maryland Court of Appeals in the case of Sigma Delta Chi v. Speaker, Maryland House of Delegates, 310 A. 2d 156 (1973), recently held that the exclusion of recording devices from sessions of the state legislature does not constitute an abridgement of first amendment rights. In reaching this conclusion the court stated, at p. 159:

"It is not contended by appellants that they are denied admission to proceedings of the General Assembly. Nor is it alleged that these rules prevent them from gathering information or obtaining legislative documents; or from interviewing members of the legislature; or from prompt access to the telephone or other means of communication. \* \* \*

"In these circumstances, we perceive no curtailment of appellant's right to gather news. They merely claim that the use of tape recorders in each chamber will promote greater accuracy and speed in reporting. We are unwilling to include those purposes, however worthwhile they may be, within a constitutionally protected right to gather news. \* \* \*"

It is true that there is not complete agreement among the courts on the constitutionality of rules prohibiting the use of audio-visual equipment in public meetings. A California district court of appeals, in Nevens v. City of Chino, 233 Cal. App. 2d 775, 44 Cal. Rptr. 50 (1965), held that a city council resolution which prohibited the use of tape recorders in the council chambers during council proceedings deprived the plaintiff of freedom of the press (although he was not a reporter) because it was arbitrary, capricious, restrictive and unreasonable. That case, however, appears contrary to the clear weight of authority on this issue.

I conclude therefore, the public utilities commission has authority to adopt rules for the conduct of its proceedings, and it may restrict the audio-visual recording of such proceedings so long as such restrictions are reasonable.

Since the answer to your first question is in the negative, an answer to your second question is unnecessary.

In specific answer to your question it is my opinion, and you are so advised, that the public utilities commission has authority to adopt rules for the conduct of its proceedings, and it may restrict the audio-visual recording of such proceedings so long as such restrictions are reasonable. The commission may, however, enact a rule, pursuant to R.C. 4901.13, permitting the use of audio-visual equipment, in its proceedings if it chooses.