

OPINION NO. 89-038**Syllabus:**

Mobile telephone service is a utility for purposes of R.C. 3709.34, the cost of which must be paid for by the board of county commissioners, if the board reasonably determines that such mobile telephone service is necessary for the general health district to discharge its statutory duties.

To: P. Randall Knece, Pickaway County Prosecuting Attorney, Circleville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 8, 1989

I have before me your request for my opinion as to whether mobile telephone service provided a general health district is considered a utility, such that the cost of the mobile telephone service must be paid by a board of county commissioners, pursuant to R.C. 3709.34. In your letter you state that the general health district has classified the mobile telephone service as a utility and requested the board of county commissioners for payment.

R.C. 3709.34, which provides for the furnishing of quarters for any board of health or health department, states: "[t]he board of county commissioners or the legislative authority of any city may furnish suitable quarters for any board of health or health department having jurisdiction over all or a major part of such county or city." A general health district has jurisdiction over all townships and villages within the county, R.C. 3709.01, and thus falls within the purview of R.C. 3709.34. See 1986 Op. Att'y Gen. No. 86-037; 1985 Op. Att'y Gen. No. 85-003; 1980 Op. Att'y Gen. No. 80-086. Furthermore, "[d]espite the use of the term 'may,' R.C. 3709.34 consistently has been interpreted as imposing a mandatory duty upon a board of county commissioners to furnish suitable quarters for a general health district."¹ Op. No. 85-003 at 2-7; see also Op. No. 86-037; Op. No. 80-086; 1972 Op. Att'y Gen. No. 72-098; 1949 Op. Att'y Gen. No. 1085, p. 737.

¹ I note, however, that

[w]hen a general health district is formed by the union of a general health district and a city health district pursuant to R.C. 3709.07, either the legislative authority of the city or the board of county commissioners *may furnish* offices to the health district, *although neither is required to do so*, or the expense of renting quarters may be treated as an operating expense and

My immediate predecessor concluded that the duty imposed upon a board of county commissioners by R.C. 3709.34 to provide suitable quarters includes the obligation to pay for the utilities used by a general health district. Op. No. 80-086. Thus, a board of county commissioners, in order to meet its mandatory duty to furnish a general health district with suitable quarters, must pay for the use of those utilities necessary for the general health district to discharge its statutory duties.

I, therefore, must determine whether mobile telephone service provided to a general health district is a utility for purposes of R.C. 3709.34. First, I note that I concluded in Op. No. 86-037 that telephone service is a utility. In reaching that conclusion I relied upon the traditional test for determining whether a particular facility or service constitutes a public utility:

To constitute a "public utility," the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.

Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246, 143 N.E. 700 (1924) (syllabus, paragraph two); *see also Columbus ex rel. Willits v. Cremean*, 27 Ohio App. 2d 137, 143, 273 N.E.2d 324, 328 (Franklin County 1971) (a public utility "suggests the devotion to public use of the owner's product or service, that the product or service is available to the public generally and indiscriminately, and that the producer of the product or service stands ready to serve an indefinite public which has a legal right to receive the product or service furnished").

Generally, mobile telephone service, provided by mobile telephone companies, is used and made available, without distinction, to the public. Thus, such mobile telephone service, and the mobile telephone companies furnishing that service, may be classified as public utilities. Furthermore, the definition of telephone company for purposes of the public utilities act, R.C. Chapter 4905, encompasses mobile telephone companies. The term "public utility" embodies every corporation or company defined in R.C. 4905.03, which includes a "telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state...." R.C. 4905.03(A)(2). Clearly, a mobile telephone company is in the business of transmitting telephonic messages and as such is a telephone company as defined by R.C. 4905.03(A)(2).

Therefore, I conclude, that mobile telephone service furnished to a general health district is a utility for purposes of R.C. 3709.34. There remains, however, the question whether mobile telephone service is necessary for the general health district to discharge its statutory duties.

The determination that a particular utility is necessary for the general health district to discharge its statutory duties is a factual one which is within the discretion of the board of county commissioners. Op. No. 85-003 (syllabus, paragraph two) ("[p]ursuant to R.C. 3709.34, it is within the discretion of a board of county commissioners to determine if the quarters furnished for a general health district are suitable; however, such quarters must, at a minimum, enable the general health district to discharge its duties mandated by Ohio law"). I have no authority to exercise on behalf of another officer or entity of government discretion that has been bestowed upon that officer or governmental entity. *See* 1988 Op. Att'y Gen. No. 88-007; 1985 Op. Att'y Gen. No. 85-007. Therefore, I am unable, in this opinion to make the determination as to whether mobile telephone service is necessary for the general health district to discharge its statutory duties. The exercise of any judgment which may be required in making that determination remains with the

apportioned in the same manner as other operating expenses are apportioned under the contract creating the combined general health district. *See* 1983 Op. Att'y Gen. No. 83-081; 1954 Op. Att'y Gen. No. 3499, p. 47. (Emphasis added.)

1985 Op. Att'y Gen. No. 85-003 at 2-8 n.1.

board of county commissioners. Such exercise of discretion, however, must be reasonable. *See generally* Op. No. 85-003.

It is, therefore my opinion, and you are hereby advised, that mobile telephone service is a utility for purposes of R.C. 3709.34, the cost of which must be paid for by the board of county commissioners, if the board reasonably determines that such mobile telephone service is necessary for the general health district to discharge its statutory duties.