OPINION NO. 85-079

Syllabus:

An individual who operates a satellite dish for his personal use solely as a means of improving television reception within his home or business is not a public utility for purposes of R.C. 519.21.

To: John J. Plough, Portage County Prosecuting Attorney, Ravenna, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 26, 1985

I have before me your request for my opinion regarding the authority of township trustees to regulate and control satellite dishes pursuant to R.C. Chapter 519, which governs township zoning. The board of township trustees wishes to restrict the location of satellite dishes through setback requirements and other similar measures. The question has arisen, however, whether a satellite dish is exempt from township zoning as a public utility pursuant to R.C. 519.21.

In order to respond to your question, it is first necessary to examine the general authority of a township to impose zoning restrictions. A township, as a creature of statute, has only those powers expressly conferred by statute or necessarily implied therefrom. See State ex rel. Schramm v. Ayres, 158 Ohio St. 30, 106 N.E.2d 630 (1952); 1980 Op. Att'y Gen. No. 80-028. Specifically concerning a township's authority to adopt zoning measures, the court in Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957), stated: "Whatever police or zoning power townships of Ohio have is that delegated by the General Assembly, and it follows that such power is limited to that which is expressly delegated to them by statute."

R.C. Chapter 519 authorizes a board of township trustees to regulate, among other things, the location, height, and size of buildings and structures and the uses of land within the unincorporated territory of the township. See R.C. 519.02. However, R.C. 519.21 imposes a limitation on the zoning authority of township trustees, stating, in pertinent part:

> Such sections [R.C. 519.02-.25] confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business.

Thus, if the owner of a satellite dish is a public utility, then a board of township trustees has no authority to regulate under its zoning powers the location, construction, or use of the satellite dish.

A member of your staff has informed me that the township trustees are concerned with zoning restrictions as applied to individual landowners. It has been held that, "[t]he determination of whether a concern is a public utility is a mixed question of law and fact." Motor Cargo, Inc. v. Board of Township Trustees, 52 Ohio Op. 257, 258, 117 N.E.2d 224, 225 (C.P. Summit County 1953). See also Board of Township Trustees v. WDBN, Inc., 10 Ohio App. 3d 284, 461 N.E.2d 1345 (Medina County 1983). Accordingly, it is "difficult to construct a definition of a public utility which would fit every conceivable case." Motor Cargo, Inc. v. Board of Township Trustees, 52 Ohio Op. at 258, 117 N.E.2d at 225. This opinion will address only the question whether an individual, who, for the purpose of obtaining improved television reception within his home or business, purchases or leases a satellite dish, erects the apparatus and aims it in order to track satellites which transmit television signals, is a public utility in operating the satellite dish, and thus exempt from township zoning requirements.

On prior occasions, my predecessors considered whether certain facilities are public utilities within the meaning of R.C. 519.21. See, e.g., 1982 Op. Att'y Gen. No. 82-052 (a privately owned and operated landfill which makes its services available to all the residents of the township where it is located is a public utility, and is not subject to a township zoning plan); 1973 Op. Att'y Gen. No. 73-002 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-077) (a cablevision corporation which provides service to the public generally and indiscriminately is a public utility); 1971 Op. Att'y Gen. No. 71-029 (a nonprofit corporation organized for the purpose of providing for the construction, maintenance, and operation of a water system to serve its membership is an exempt public utility within the purview of R.C. 519.21). The test used for defining a "public utility" for purposes of these opinions was that delineated in Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246, 143 N.E. 700 (1924) (syllabus, paragraph two):

> 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.

It is my understanding that, as a general rule, individuals who operate satellite dishes in order to improve television reception within their homes or businesses have neither accepted public franchises nor called to their aid the state's police power. Therefore, whether individuals are public utilities in the operation of their satellite dishes depends upon whether the services of the satellite dishes are available generally and indiscriminately to the public, so that the satellite dishes have been devoted to public use.

The factual circumstances presented herein do not imply a devotion to public use. As was stated in Motor Cargo, Inc. v. Board of Township Trustees:

> [T]he principal determinative characteristic of a public utility is that of service to, or readiness to serve an indefinite public (or portion of the public as such), which has a legal right to demand and receive its services or commodities.
>
> The term ["public utility"] precludes the idea of

> service which is private in nature and is not to be obtained by the public.

52 Ohio Op. at 258, 117 N.E.2d at 226. Accord, Hissem v. Guran, 112 Ohio St. 59, 146 N.E. 808 (1925). See also Industrial Gas Co. v. Public Utilities Commission, 135 Ohio St. 408, 21 N.E.2d 166 (1939).

Clearly, there is no devotion of a satellite dish to the public service by a landowner's personal use of a satellite dish. The typical landowner has no public purpose in mind when he purchases or uses such a device, and he does not intend to devote it to public use. The product is not made available to the public generally and indiscriminately, and the public has no legal right to demand and receive the services of the satellite dish. Rather, a satellite dish is purchased for private use in order to improve television reception. Unlike a cablevision corporation which provides its services to numerous subscribers, the landowner utilizes a satellite dish for improved reception within his private dwelling or business. Thus, I conclude that an individual who operates a satellite dish solely as a means of improving the television reception within his home or business is not a public utility. Cf. Jonas v. Swetland Co., 119 Ohio St. 12, 162 N.E. 45 (1928) (realty company which provided electric current to its tenants and employees had not dedicated its property to the public service and had not been willing to sell current to the public, and thus was not a public utility). See also Dettmar v. County Board of Zoning Appeals, 28 Ohio Misc. 35, 273 N.E.2d 921 (C.P. Hamilton County 1971) (applying zoning regulations to sixty-four foot antenna incidental to a resident owner's activities as an amateur radio operator).

In conclusion, it is my opinion, and you are advised, that an individual who operates a satellite dish for his personal use solely as a means of improving television reception within his home or business is not a public utility for purposes of R.C. 519.21.