

OPINION NO. 86-037**Syllabus:**

A board of county commissioners, pursuant to R.C. 3709.34, must provide and pay for telephone service used by the general health district of the county.

To: C. Keith Plummer, Guernsey County Prosecuting Attorney, Cambridge, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 28, 1986

You have requested my opinion whether telephone service provided a general health district is considered a "utility," such that the cost of the telephone service must be paid by a board of county commissioners pursuant to R.C. 3709.34. You note that your question has arisen in light of 1980 Op. Att'y Gen. No. 80-086, which states that a board of county commissioners must provide and pay for utilities used by the general health district of the county, pursuant to R.C. 3709.34.

In 1985 Op. Att'y Gen. No. 85-003 I had occasion to address R.C. 3709.34 and the mandatory duty it imposes upon a board of

county commissioners to furnish suitable quarters to a board of health of a general health district. In this regard Op. No. 85-003 states at 2-7 to 2-8:

The powers and duties of a general health district are set forth within R.C. Chapters 3707 and 3709. R.C. 3709.34 states: "The 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 would fall within the scope of R.C. 3709.34. See 1980 Op. Att'y Gen. No. 80-086. Despite the use of the term "may," R.C. 3709.34 has been consistently interpreted as imposing a mandatory duty upon a board of county commissioners to furnish suitable quarters for a general health district. The word "may" is generally regarded as imperative when it appears in a statute conferring authority to perform an act which the public interest demands. See, e.g., Pennsylvania Railroad Co. v. Porterfield, 25 Ohio St. 2d 223, 267 N.E.2d 792 (1971). See also 1983 Op. Att'y Gen. No. 83-081. It has been concluded that the public interest requires that a board of health of a general health district function, and that facilities be furnished to the board to enable it to carry out its statutory duties; thus, it has been concluded that R.C. 3709.34 imposes a mandatory duty upon a board of county commissioners to furnish suitable quarters for a general health district. See Op. No. 80-086; 1972 Op. Att'y Gen. No. 72-098; 1949 Op. Att'y Gen. No. 1085, p. 737; 1932 Op. Att'y Gen. No. 3989, vol. 1, p. 106. (Footnote omitted.)

In Op. No. 80-086 my predecessor concluded that the obligation imposed upon a board of county commissioners by R.C. 3709.34 to provide suitable quarters includes the responsibility to pay for utilities used by the general health district. Thus, you wish to know whether telephone service provided a general health district is a "utility," the cost of which must be assumed by a board of county commissioners pursuant to R.C. 3709.34.

The traditional test relied upon for determining whether a particular facility or service constitutes a public utility is that which appears 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.

See also Columbus ex rel. Willits v. Cremean, 27 Ohio App. 2d 137, 143, 273 N.E.2d 324, 328 (Franklin County 1971)("public utility" is a generic term suggesting the devotion to public use of the owner's product or service, that the product or service is available to the public generally, 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).

It is my understanding that, as a general rule, telephone service provided by telephone operating companies is made available, without distinction, to the public generally. See, e.g., Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 6 Ohio St. 2d 49, 215 N.E.2d 584 (1966); Celina & Mercer County Telephone Co. v. Union-Center Mutual Telephone Association, 102 Ohio St. 487, 133 N.E. 540 (1921). Thus, such telephone service, and the telephone companies furnishing that service, may be properly characterized as public utilities. In this regard the General Assembly has defined telephone companies as public utilities for purposes of the public utilities act, see R.C. 4905.02 (providing, in part, that "public utility," as used in R.C. Chapter 4905, includes all telephone companies), and for purposes of taxation, see R.C. 5727.01(A) (providing, in part, that "public utility," as used in R.C. 5727.01-.62, includes each telephone company). Cf. In Re Cincinnati Radiotelephone Systems, Inc., 45 Ohio St. 2d 121, 341 N.E.2d 826 (1976) (a company engaged in the business of providing a one-way radio paging service to its subscribers is not a "telephone company" within the meaning of R.C. 4905.03(A)(2), nor is it a "public utility" within the meaning of R.C. 4905.02).

Thus, even as electric, heating, and water service furnished a general health district may be considered utilities for purposes of R.C. 3709.34, see Op. No. 80-086 at 2-339, telephone service furnished a general health district may similarly be considered a utility for purposes of that section. A board of county commissioners, therefore, must provide and pay for all such telephone service utilized by a general health district pursuant to its obligation under R.C. 3709.34 to provide a board of health with suitable quarters.

Accordingly, it is my opinion, and you are advised that a board of county commissioners, pursuant to R.C. 3709.34, must provide and pay for telephone service used by the general health district of the county.