

**OPINION NO. 83-079****Syllabus:**

A county that has contracted with a public utility for telephone service must pay such public utility in accordance with the schedule of rates applicable to such service on file with the Public Utilities Commission, notwithstanding the fact that such rates may include excise tax expenses incurred by the public utility.

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**To: Ronald L. Collins, Tuscarawas County Prosecuting Attorney, New Philadelphia, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, December 2, 1983**

I have before me your request for my opinion concerning whether county government is required to pay the state excise tax surcharge on telephone service used by the county.

An excise tax has been defined as a tax "imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." Rapa v. Haines, 101 N.E.2d 733, 735 (C.P. Montgomery County 1951). In the situation set out by your opinion request, the tax was levied pursuant to R.C. 5727.38 and uncodified section 6, Am. Sub. H.B. 100, 115th Gen. A. (1983) (eff. Feb. 24, 1983).<sup>1</sup> R.C. 5727.38, as most recently amended by Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983), states in part:

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<sup>1</sup> Uncodified section 6, Am. Sub. H.B. 100 (amending inter alia, Section 188 of Am. Sub. H.B. 694 of the 114th Gen. A. (1981) (eff. Nov. 21, 1981) as amended by Section 4 of Am. Sub. S.B. 530 of the 114th Gen. A. (1983) (eff. June 25, 1982)) included a temporary increase of one half of one percent of the state excise tax levied on public utilities and provided that this increase could not be passed on to consumers. A utility company is presently challenging the constitutionality of these actions, stating that the utility is being harmed by not being allowed to pass on the increase to its consumers, and that the tax increase is a retroactive tax because it is a tax on prior earnings of the utility. East Ohio Gas Company v. Limbach, et al., Case No. 33 CV-05-2590 (C.P. Franklin County 1983). I note, however, that if the lawsuit is successful, it would affect the amount of tax involved, but not the principles discussed in this opinion.

I also note that Section 188 of Am. Sub. H.B. 694 of the 114th Gen. A. as amended by Section 4 of Am. S.B. 530 of the 114th Gen. A. and as amended by Section 6 of Am. Sub. H.B. 100 of the 115th Gen. A. was repealed in Section 4(B), Am. Sub. H.B. 291.

On or before the third Monday of November, annually, the auditor of state shall charge for collection from each public utility company other than freight lines, equipment, and railroad companies, a sum in the nature of an excise tax for the privilege of carrying on its intrastate business, to be computed on the amount fixed and reported by the tax commissioner as the gross receipts of such company on its intrastate business for the year covered by its annual statement to the commissioner, as required by division (A) of section 5727.31 of the Revised Code, by taking six and three-fourths per cent of all such gross receipts in the case of pipeline companies and four and three-fourths per cent of all such gross receipts in the case of all other companies. . . .

It is, therefore, a tax on a telephone company for the privilege of carrying on its intrastate business.

The basis for the tax being passed on to consumers is contained in R.C. 4909.151 and R.C. 4909.161. R.C. 4909.151 states, in part:

In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission may consider the costs attributable to such service. . . . As used in this section, "costs" includes [include] operation and maintenance expense, depreciation expense, tax expense, and return on investment as actually incurred by the utility.

R.C. 4909.161 states:

Notwithstanding the provisions of Chapters 4905. and 4909. of the Revised Code, the payment of any type of increased excise tax levy shall be considered to be a normal expense incurred by a public utility in the course of rendering service to the public, and may be recovered as such in accordance with an order of the public utilities commission. Any public utility required to pay any such increased excise tax levy may file with the public utilities commission revised rate schedules which will permit full recovery on an interim or permanent basis in its rates, of the amount of any resultant increased tax payments and the commission shall promptly act to approve such schedules.

Pursuant<sup>2</sup> to R.C. 4905.02, all telephone companies are classified as public utilities. This definition is made applicable to R.C. 4909 by R.C. 4909.01.<sup>3</sup>

Accordingly, it appears that if there is not a statutory exemption or other basis exempting county government, a telephone company may, in accordance with an order of the public utilities commission, pass an excise tax on to all its consumers, including a county, as part of its cost of rendering service. See also R.C. 9.30 (a county is authorized to "acquire the service, product, or commodity of a public utility at the schedule of rates and charges applicable to such service, product, or commodity on file with the public utilities commission); cf. Pfau v. City of Cincinnati, 142 Ohio St. 101, 50 N.E.2d 172 (1943) (when one accepts the services of a public utility, one impliedly agrees to the terms of the ordinance establishing

<sup>2</sup> R.C. 4905.02 states in part: "As used in sections 4905.01 to 4905.69 of the Revised Code, 'public utility' includes every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies. . . ."

<sup>3</sup> R.C. 4909.01 states in part: "As used in sections 4909.01 to 4909.41 of the Revised Code: (A) 'Public utility' has the meaning set forth in section 4905.02 of the Revised Code."

the rates for the service); 1981 Op. Att'y Gen. No. 81-084 at 2-331 ("So long as the penalty charges in question are set out in the ordinances, the board of county commissioners, by accepting services from the municipal utility, has implicitly agreed to pay for the services at the established rates, and, thus, to pay late charges on overdue payments"). I am aware of no such exemption for counties. But see note 1, supra (Am. Sub. H.B. 100, 115th Gen. A. (1983) (eff. Feb. 24, 1983), Section 29 states: "Notwithstanding section 4909.161 of the Revised Code, the increased excise tax levy imposed by the amendments made by section 6 of this act shall not be recoverable by a public utility in its rates"). Therefore, if a contract, either expressed or implied, is established whereby a county receives telephone service from a public utility, the county, as any other consumer, is liable for the payment of the charges applicable to such service, even though such charges include the recovery of excise taxes paid by the public utility.

Therefore, it is my opinion, and you are hereby advised, that a county that has contracted with a public utility for telephone service must pay such public utility in accordance with the schedule of rates applicable to such service on file with the Public Utilities Commission, notwithstanding the fact that such rates may include excise tax expenses incurred by the public utility.