ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS

March 24, 1994

FILE NO. 94-002

COUNTIES:
Authority to Regulate the Location
of Distribution Equipment Used by
Telephone and Cellular Telephone Companies

Honorable Gary W. Pack
State's Attorney, McHenry County
2200 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Pack:

I have your letter wherein you inquire whether a non-home-rule county may exercise its zoning powers to regulate the placement, location and construction of equipment or structures owned or used by telephone and cellular telephone companies for the transmission or distribution of their signals. For the reasons hereinafter stated, it is my opinion that non-home-rule counties do not have the authority to regulate the type and location of distribution equipment owned or used by telephone companies or cellular telephone companies.

It is well established that non-home-rule counties may exercise only those powers which have been expressly granted to

them by the constitution or by statute, together with those powers which are necessarily implied therefrom to effectuate the powers which have been expressly granted. (Redmond v. Novak (1981), 86 Ill. 2d 374, 382; Heidenreich v. Ronske (1962), 26 Ill. 2d 360, 362.) Under Division 5-12 of the Counties Code (Ill. Rev. Stat. 1991, ch. 34, pars. 5-12001 through 5-12019; 55 ILCS 5/5-12001 through 5-12019 (West 1992)), counties have been granted the authority, through zoning ordinances, to regulate and to restrict the use of specified real property. Section 5-12001 of the Code (Ill. Rev. Stat. 1991, ch. 34, par. 5-12001; 55 ILCS 5/5-12001 (West 1992)) provides, in pertinent part:

> "Authority to regulate and restrict location and use of structures. For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county, lessening or avoiding congestion in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters, the county board or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures and land for trade, industry, residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses * * * to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, the intensity of such use (including height of buildings and structures and surrounding open space) and other classification as may be deemed best suited

> to carry out the purposes of this Division; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; * * *
>
> The powers by this Division given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted; * * * nor shall any such powers include the right to specify or regulate the type or location of any poles, towers, wires, cables, conduits, vaults, laterals or any other similar distributing equipment of a public utility as defined in The Public utilities [sic] Act, if the public utility is subject to The Messages Tax Act, The Gas Revenue Tax Act or The Public Utilities Revenue Act, or if such facilities or equipment are located on any rights of way and are used for railroad purposes. * * *
>
> * * * "

(Emphasis added.)

Section 3-105 of the Public Utilities Act (Ill. Rev. Stat. 1991, ch. 111 2/3, par. 3-105, as amended by Public Act 87-1106, effective January 1, 1993; 220 ILCS 5/3-105 (West 1992), as amended by Public Act 88-480, effective January 1, 1994) provides, in pertinent part:

> "'Public utility' means and includes, except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

a. the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes;

b. the disposal of sewerage; or

c. the conveyance of oil or gas by pipe line.

* * * "

Under the language of section 5-12001 of the Counties Code, it is unclear whether it was the intent of the General Assembly to preclude county zoning restrictions upon distribution equipment utilized by telephone companies. This ambiguity arises because, on the one hand, telephone companies do not currently fall within the definition of "public utility" as set forth in section 3-105 of the Public Utilities Act, and yet section 5-12001 provides that those "public utilities" which are subject to, inter alia, the Messages Tax Act (Ill. Rev. Stat. 1991, ch. 120, par. 467.1 et seq.; 35 ILCS 610/1 et seq. (West 1992), as amended by Public Act 88-480, effective January 1, 1994) are exempt from county zoning regulation. In reviewing the provisions of the Messages Tax Act and the statutes cited therein, it appears that the Messages Tax Act applies only to the business of transmitting messages and acting as a retailer of telecommunications (Ill. Rev. Stat. 1991, ch. 120, par. 467.2a.1; 35 ILCS 610/2a.1 (West 1992)), which includes, without limitation, the transmission of messages or information through telephone

services and cellular mobile telecommunication services, but which does not include any of the activities currently set forth in section 3-105 of the Public Utilities Act. (Ill. Rev. Stat. 1991, ch. 120, par. 2002; 35 ILCS 630/2 (West 1992), as amended by Public Act 88-480, effective January 1, 1994.) Thus, there cannot be a "public utility", as defined in section 3-105 of the Public Utilities Act, which is subject to the Messages Tax Act.

When the language of a statute is susceptible of two interpretations, the language must be construed so as to ascertain and effectuate the intention of the General Assembly in its enactment. (American County Insurance Co. v. Wilcoxon (1989), 127 Ill. 2d 230, 238.) Where the language of the statute is ambiguous, as in the case here, resort may be had to extrinsic aids of construction. (Laue v. Leifheit (1984), 105 Ill. 2d 191, 196.) Thus, it has been held that consideration may be given to the history of the statute, the reasons for its enactment, the circumstances of its adoption and the end to be achieved. (In re Logston (1984), 103 Ill. 2d 266, 279.) Moreover, where an amendment is concerned, it is necessary to review the statutory language before the change, and then weigh the entire statute in light of these considerations. In re Logston, 103 Ill. 2d at 279.

Section 5-12001 of the Counties Code had its genesis in section 1 of "AN ACT in relation to county zoning" [hereinafter

referred to as the County Zoning Act] (see Laws 1935, p. 689; Ill. Rev. Stat. 1935, ch. 34, par. 152i). The County Zoning Act was the General Assembly's original grant of authority to the several counties to regulate and restrict the location of buildings and structures and the use of buildings, structures and lands located outside the limits of the various municipalities. In its initial grant of power, the General Assembly excluded from the counties' zoning authority the right to regulate by type or location the distributing equipment "* * * of a public utility as defined in an Act entitled 'An Act concerning Public Utilities'" [hereinafter the Public Utilities Act]. At that time, the term "public utility" was defined to include, inter alia, every corporation or company that owned, controlled, operated or managed "within the State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with the * * * transmission of telegraph or telephone messages between points within this State; * * *". (See Ill. Rev. Stat. 1935, ch. 111 2/3, par. 10.)

Although, during the ensuing years, the language of the County Zoning Act was amended on several occasions, no substantive revisions affecting the public utility exemption occurred until 1984, when the first and only substantive change affecting public utilities under the County Zoning Act was made. Public Act 83-1238, effective August 1, 1984, added language to the

County Zoning Act which limited the public utility exemption to only those public utilities which are subject to, inter alia, the Messages Tax Act. At the time of this amendment, the term "public utility", as defined in the Public Utilities Act, still included those companies and corporations engaged in "* * * the transmission of telegraph or telephone messages between points within this State * * *". (See Ill. Rev. Stat. 1983, ch. 111 2/3, par. 10.3.) Subsequent to the passage of Public Act 83-1238, the County Zoning Act was amended on several other occasions although none of the revisions dealt with the public utilities exemption.

From its inception, the exemption granted to public utilities has been tied to the definition of the term "public utility" as set forth in the Public Utilities Act. As previously noted, the definition of "public utility" has traditionally included those companies or corporations which are engaged in the transmission of telephone messages. In 1985, however, both the Public Utilities Act and the definition of public utility were completely rewritten. Pursuant to the changes dictated by the divestiture of American Telephone and Telegraph and the consent decree entered in United States v. American Telephone and Telegraph (1982), 552 F. Supp. 131, the General Assembly rewrote the Public Utilities Act to address the issues associated with the opening up of competition in the telecommunications industry.

Under the revised statutory scheme implemented by Public Acts 84-617, effective January 1, 1986, and 84-1063, effective January 1, 1986, the definition of the term "public utility" no longer includes companies and corporations which are engaged in the transmission of messages by telephone, and the Public Utilities Act is no longer generally applicable to telephone companies. Rather, the General Assembly has devoted a separate article in the Public Utilities Act to the regulation of the telecommunications industry. Article XIII of the Public Utilities Act, entitled the Universal Telephone Service Protection Law of 1985 (Ill. Rev. Stat. 1991, ch. 111 2/3, par. 13-100 et seq.; 220 ILCS 5/13-100 et seq. (West 1992)), was premised on the General Assembly's finding that increased competitiveness in the telecommunications industry necessitated a revision of the State's regulatory policy and practices (Ill. Rev. Stat. 1991, ch. 111 2/3, pars. 13-102(b), (c); 220 ILCS 5/13-102(b), (c) (West 1992)), and was enacted to protect the public's interest with regard to the various telecommunications services. (Ill. Rev. Stat. 1991, ch. 111 2/3, par. 13-102; 220 ILCS 5/13-102 (West 1992).) "Telecommunications service", as defined for purposes of the Law, refers to those instrumentalities, facilities, apparatus and services which transmit information electromagnetically. (Ill. Rev. Stat. 1991, ch. 111 2/3, par. 13-203; 220 ILCS 5/13-203 (West 1992).)

Although the Universal Telephone Service Protection Law of 1985 regulates several areas of the telecommunications industry, the Act is not pervasive. Under the provisions of the Law, telecommunications services are classified as either competitive or noncompetitive. (Ill. Rev. Stat. 1991, ch. 111 2/3, par. 13-502; 220 ILCS 5/13-502 (West 1992).) Relying upon this distinction, section 13-101 of the Law (Ill. Rev. Stat. 1991, ch. 111 2/3, par. 13-101; 220 ILCS 5/13-101 (West 1992)) indicates that those sections of the Public Utilities Act:

> "* * * pertaining to public utilities, public utility rates and services, and the regulation thereof, are fully and equally applicable to noncompetitive telecommunications rates and services, and the regulation thereof, except where the context clearly renders such provisions inapplicable. Except to the extent modified or supplemented by the specific provisions of this Article, Articles I through V, Sections 9-221, 9-222, 9-222.1, 9-222.2 and 9-250, Articles X and XI of this Act are fully and equally applicable to competitive telecommunications rates and services, and the regulation thereof".

From this historical review, it is clear that under the General Assembly's original grant of authority to counties, telephone companies were "public utilities" which were exempt from county zoning regulations regarding the type and location of distribution equipment. It is equally apparent that as recently as 1984, when the public utility exemption was amended to apply only to those utilities which were subject to the specified tax Acts, distributing equipment of telephone companies was not

subject to county zoning regulation. Subsequently, however, the General Assembly enacted a comprehensive regulatory framework to address the increased competition in the telecommunications industry. Although the new statutory scheme has created a separate article in the Public Utilities Act to regulate telecommunications or telephone services, the General Assembly has expressly provided that all sections of the Public Utilities Act pertaining to public utilities, public utility rates and services and public utility regulations are applicable to noncompetitive telecommunications services. Similarly, the General Assembly has provided that a majority of the provisions of the Public Utilities Act are to be applicable to competitive telecommunications services, as well.

Although the definition of the term "public utility" in section 3-105 of the Public Utilities Act, standing alone, could be construed to exclude telecommunications or telephone services from its scope, the intent and meaning of a statute are to be determined from the entire statute. All sections of the statute are to be construed together in light of a general purpose and plan. (In re Petition to Annex Certain Territory to Village of North Barrington (1991), 144 Ill. 2d 353, 362.) When the provisions of the Public Utilities Act are read collectively, the intent of the General Assembly is clearly to treat telecommunication services as public utilities. Moreover, the history and

spirit of sections 5-12001 of the Counties Code, 3-105 of the Public Utilities Act and 13-101 of the Universal Telephone Service Protection Law of 1985 do not indicate that the General Assembly intended to require telephone companies to satisfy county zoning regulations regarding the type and location of their distribution equipment. Rather, the removal of telephone companies and corporations from the definition of "public utility" in section 3-105 of the Public Utilities Act demonstrates only the General Assembly's recognition that a newly competitive telecommunications industry had been created and that additional regulatory provisions were necessary. Therefore, instead of amending the several sections of the Public Utilities Act to except competitive telecommunications services from those provisions which only apply to traditional public utilities, the General Assembly created a separate article in the Public Utilities Act to regulate those areas which are unique to telecommunications services, and then incorporated the additional articles of the Public Utilities Act to be applicable respectively to competitive and noncompetitive telecommunications services as public utilities. In making these changes, there is no indication that the General Assembly considered telecommunications services to be anything other than public utilities, or that it was the intent of the General Assembly by its amendments to subject telecommunications services to county zoning regulation.

Based upon the foregoing, it is my opinion that telephone companies and cellular telephone companies must be considered public utilities, for purposes of county zoning regulation, as if they were expressly defined as such in section 3-105 of the Public Utilities Act. Therefore, under the language of section 5-12001 of the Counties Code, it is my opinion that the distribution equipment of telephone and cellular telephone companies is exempt from county zoning regulation.

Respectfully yours,

ROLAND W. BURRIS
ATTORNEY GENERAL