



[Previous Case](#)   [Top Of Index](#)   [This Point in Index](#)   [Citationize](#)   [Next Case](#)   [Print Only](#)

## Question Submitted by: Mr. Jack Boyd, Director, Oklahoma Health Planning Commission

1981 OK AG 142

Decided: 11/30/1981

Oklahoma Attorney General

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Cite as: 1981 OK AG 142, \_\_ \_\_

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¶0 The Attorney General has received your request for an official opinion wherein you ask, in effect:

**May the Health Planning Commission utilize an electronically amplified telephone for the questioning of an applicant for a certificate of need at a meeting of the Commission held for the purpose of determining whether to issue a certificate of need to such applicant?**

¶1 Under the provisions of 63 O.S. 2651 et seq. (1980), the Health Planning Commission is charged with the duty of overseeing the offering and development of institutional health services throughout the State of Oklahoma. A certificate of need issued by the Commission is required as a condition precedent to the offering or development of institutional health services. 63 O.S. 2655 (1980). "Institutional health service" is defined at 63 O.S. 2651.2(2) (1980). The statutory definition is quite lengthy and would not aid the analysis in this opinion.

¶2 An applicant for a certificate of need makes application to the Commission upon a form prescribed by the Commission. 63 O.S. 2652 (1980). The application is required to contain such information as the Commission prescribes. *Id.* Once an application is received and found complete, the Commission initiates an investigation under the provisions of 63 O.S. 2652.1 (1980). Generally, the purpose of the investigation is to determine the need for the proposed institutional health service. An applicant for a certificate of need is not entitled to a hearing upon his application, unless the application is denied or the applicant for some other reason desires reconsideration of the Commission's decision, and then only upon timely request (within thirty (30) calendar days following issuance of the order). 63 O.S. 2653(E) (1980).

¶3 The Commission must make its decision in an open meeting conducted in accordance with the Open Meeting Act. 25 O.S. 301 et seq. (1977). See *Barry v. Board of Registered Dentists*, Okl., 611 P.2d 628 (1980). 25 O.S. 306 of the Open Meeting Act prohibits telephonic communications among the members of a public body for the purpose of discussing agency business in connection with decision making on any action or the taking of any vote. However, where, as you have posed in your question, the members of the public body (Commission) are all present in an open, public meeting and simply communicating by amplified telephone with a person not a member of the public body, there is no violation of the Open Meeting Act.

¶4 Care must be taken, however, to distinguish a meeting of the Commission for the purpose of furthering its investigation of an application for a certificate of need and possibly deciding thereon, from a "hearing" conducted by the Commission under 63 O.S. 2653(E) (1980) for reconsideration of a Commission order concerning a certificate of need. Under 75 O.S. 301(3)

and 75 O.S. 301(4) (1980) of the Administrative Procedures Act, such a hearing would meet the definitional requirements for a licensing proceeding, which would invoke 75 O.S. 314 of the Act.

¶5 75 O.S. 314 provides that the Administrative Procedures Act's provisions for "individual proceedings" apply where the "grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing." Parties are guaranteed the right of cross-examination in individual proceedings under the Administrative Procedures Act. 75 O.S. 310(3) (1971). The right of cross-examination would be substantially impaired if the person being cross-examined were not personally present. See *Flo-Bend, Inc. v. Pullam*, Okl., 570 P.2d 1165 (1977); *Frierson v. Hines*, Okl., 426 P.2d 362 (1967). His demeanor could not be observed either by the cross-examiner or by the Commission. Moreover, the person being cross-examined could be "coached" during the examination without the knowledge of the Commission or the cross-examiner.

¶6 It is, therefore, the official opinion of the Attorney General that:

1. The use of an electronically amplified telephone for the questioning of an applicant for certificate of need, during a meeting of the Health Planning Commission conducted for the purpose of investigating the application for such certificate of need pursuant to 63 O.S. 2652.1 (1980), is not lawful.
2. The Commission may not use an electronically amplified telephone for the purpose of allowing a witness to testify during a hearing conducted under 63 O.S. 2653(E) (1980) for reconsideration of an order of the Health Planning Commission concerning a certificate of need.

JAN ERIC CARTWRIGHT  
ATTORNEY GENERAL OF OKLAHOMA  
FLOYD W. TAYLOR  
FIRST ASSISTANT ATTORNEY GENERAL

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#### **Cite Name Level**

None Found.

### **Citationizer: Table of Authority**

<b>Cite Name</b>	<b>Level</b>	
<b>Oklahoma Supreme Court Cases</b>		
Cite	Name	Level
<u>1967 OK 60, 426 P.2d 362,</u>	<u>FRIERSON v. HINES</u>	Cited
<u>1980 OK 45, 611 P.2d 628,</u>	<u>Berry v. Board of Governors of Registered Dentists of Oklahoma</u>	Cited
<u>1977 OK 199, 570 P.2d 1165,</u>	<u>FLO-BEND, INC. v. PULLAM</u>	Cited
<b>Title 25. Definitions and General Provisions</b>		
Cite	Name	Level
<u>25 O.S. 301,</u>	<u>Short Title</u>	Cited
<u>25 O.S. 306,</u>	<u>Vote By Electronic or Telephonic Communications</u>	Cited

#### **Title 63. Public Health and Safety**

Cite	Name	Level
<u>63 O.S. 2651,</u>	<u>Repealed</u>	Cited
<u>63 O.S. 2651.2,</u>	<u>Repealed</u>	Cited
<u>63 O.S. 2652,</u>	<u>Repealed</u>	Cited
<u>63 O.S. 2652.1,</u>	<u>Repealed</u>	Discussed
<u>63 O.S. 2653,</u>	<u>Repealed</u>	Discussed at Length
<u>63 O.S. 2655,</u>	<u>Repealed</u>	Cited

**Title 75. Statutes and Reports**

Cite	Name	Level
<u>75 O.S. 301,</u>	<u>Renumbered as 75 O.S. § 250.3 by Laws 1987, HB 1493, c. 207, § 27</u>	Discussed
<u>75 O.S. 310,</u>	<u>Procedures Before Agency</u>	Cited
<u>75 O.S. 314,</u>	<u>Issuance or Denial of New License - Revocation, Suspension, Annulment, Withdrawal or Nonrenewal of Existing License</u>	Discussed