

IN THE SUPREME COURT OF OHIO

Appeal from the Board of Tax Appeals

CARROLL E. NEWMAN,
Adams County Auditor,

Appellant,

v.

WILLIAM W. WILKINS,
TAX COMMISSIONER OF OHIO,

Appellant,

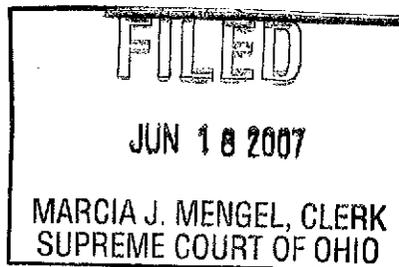
v.

ELECTRIC COMPANIES CINCINNATI GAS
& ELECTRIC COMPANY; THE DAYTON
POWER & LIGHT COMPANY; AND
COLUMBUS SOUTHERN POWER
COMPANY,

Appellee.

Case No. **07-1054**

Appeal from BTA Case
Nos. 2002-P-170, 171, 172



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NOTICE OF APPEAL OF TAX COMMISSIONER OF OHIO

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THE DAYTON POWER & LIGHT
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Appeal from BTA Case
Nos. 2002-P-170, 171, 172

NOTICE OF APPEAL OF TAX COMMISSIONER OF OHIO

Richard A. Levin, Tax Commissioner of Ohio, successor to William W. Wilkins, hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a decision and order of the Board of Tax Appeals ("BTA"), journalized on May 18, 2007, in Case Nos. 2002-M-170, 2002-M-171 and 2002-M-172. A true copy of the BTA decision and order being appealed is attached hereto and incorporated herein by reference.

The errors in the decision and order of the BTA of which the Tax Commissioner complains are as follows:

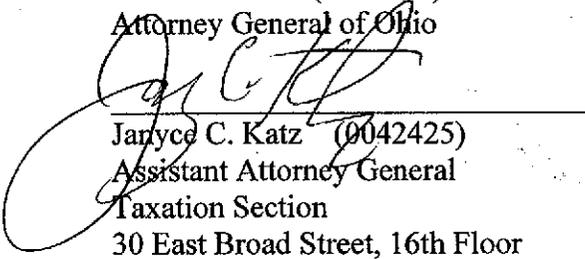
1. The BTA erred in finding replacement parts for an electric generating plant constructed and completed before 1974, the J. M. Stuart Electric Generating Station, (“Stuart”), qualifies for an exemption as a “thermal efficiency improvement facility” as defined in former R.C. 5709.45(D) when to so find the BTA ignored the clear requirement in R.C. 5709.46 that facilities upon which construction was completed on or before December 31, 1974 are excluded from consideration for the exemption.
2. The BTA erred when it found that replacement parts fit the definition of “thermal efficiency improvement” as defined in former R.C. 5709.45 (C) so that the replacement parts qualified as a thermal efficiency improvement facility for purposes of an exemption from taxation under R.C. 5709.45(D).
3. The BTA erred in finding that the thermal efficiency improvement facility efficiency facility consists of individual replacement parts rather than the parts taken as a whole.
4. The BTA erred in finding that it is possible to exempt replacement parts as a thermal efficiency improvement facility when the equipment being replaced was, itself, not exempted under the former R.C. 5709.45.
5. The BTA erred by failing to properly apply this Court’s ruling *Timken Co. v. Lindley* (1980), 64 Ohio St.2d 224 as to determining the primary purpose of the replacement parts of the electro generating plant in question was to replace parts that belonged to an already completed electro generating plant, constructed and completed prior to the existence of the law granting the exemption as evidenced by this Court’s decision in *The Cincinnati Gas & Electric Co. v. Kosydar* (1974), 38 Ohio St.2d 71, 76.
6. The BTA erred in finding that the definitions found within former R.C. 5709.45 and 5709.46 did not require replacement parts for parts installed after the completion of

the original plant be better or more efficient than the property replaced or, in the alternative, cause the completed plant to be better or more efficient in order to qualify the parts for an exemption as of a thermal efficiency improvement facility.

7. The BTA erred because the ultimate facts failed to furnish sufficient legal basis for its decision.
8. The Board erred when it exempted the replacement parts because in Ohio exemptions from taxation are the exception to the rule that all property is subject to taxation, and the BTA failed to strictly construe the statute. *National Tube Co. v. Glander* (1952), 157 Ohio St. 407; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199.

Respectfully Submitted

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OHIO BOARD OF TAX APPEALS

Carroll E. Newman,)
Adams County Auditor,)
) (THERMAL EFFICIENCY EXEMPTION)
Appellant,)
)
) DECISION AND ORDER
vs.)
)
William W. Wilkins,)
Tax Commissioner of Ohio, et al.,)
)
Appellees.)

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Entered May 18, 2007

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

These causes and matters come to be considered by the Board of Tax Appeals upon three notices of appeal filed herein on February 1, 2002. The three notices of appeal are essentially the same and emanate from three Thermal Efficiency Improvement Certificates issued by the appellee Tax Commissioner to Cincinnati Gas & Electric Company, Dayton Power & Light Company, and Columbus Southern Power Company (hereafter "appellee utilities") on December 7, 2001. The board previously denied consolidation of these appeals. We have reconsidered that ruling and now find consolidation warranted.

The Adams County Auditor (hereafter "auditor") seeks revocation of the thermal efficiency certificates issued by the Tax Commissioner. His exact specifications of error are as follows:

"1) The Tax Commissioner failed to provide the Auditor the notice and hearing required by ORC §5709.47 prior to the issuance of the certificate.

"2) The machinery, equipment and property were not designed, constructed and installed for the primary purpose of thermal efficiency improvement, but were in fact necessary for the operation of the power plant regardless of the thermal efficiency aspects, if any, of the machinery, equipment and property. In effect, the thermal efficiency was incidental and not primary.

"3) The machines, equipment and property are not used exclusively for thermal efficiency improvement, and therefore exemption is not appropriate.

"4) The certificate refers to machinery, equipment and property that were completed prior to December 31, 1974, and therefore not eligible under ORC §5709.46, and may refer to equipment completed at other dates that affect eligibility.

“5) The Tax Commissioner failed to apply the exemption most strongly against the applicant, in violation of Ohio law.

“6) The findings of the Tax Commissioner were clearly unreasonable and unlawful.

“7) The Tax Commissioner did not receive a formal opinion from the Director of Development, and therefore the law was not properly followed.

“8) The findings of the engineers used by the Tax Commissioner were in error.”

This matter is considered by the Board of Tax Appeals upon the notices of appeal, the statutory transcripts, the records of the hearings held before this board, and the legal arguments of the parties. The board notes the tortuous path these matters have taken to resolution. The hearings in these matters were convened and reconvened upon order of this board and continued for long hours on numerous days. At the conclusion of the hearing on the merits, the appellee utilities filed a motion to strike the testimony of the auditor's witness, Mr. George Sansoucy, P.E., and for additional sanctions. As a result of that motion, yet another hearing was convened.

Legal arguments to the merits and the various motions filed in this matter have been submitted to this board. At times since the submission of the merit arguments, the parties have sought to inform the board of assorted decisions emanating from this board, the Ohio Supreme Court, and other jurisdictions. Apparently the parties were concerned that this board would not make the same connection between the supplied cases and the present matters, because, in derogation of our rules, the supplementing party has found it necessary to explain the

submission(s). Some of those motions to supplement the record have been withdrawn. The others are denied.

At the outset, the board finds the testimony of all experts in this matter to be credible, subject to a board determination of the weight to be applied to such testimony. The appellee utilities attempted to discredit the testimony of the appellant's witness by exposing Mr. Sansoucy's undergraduate education courses and grades, his involvement in a lawsuit which resulted in a consent agreement, and cases in which courts have rejected his position. After a thorough review of the record, we deny appellee's motion to strike and for sanctions. It is the success of appellee utilities' legal arguments as to the merits of these appeals, and not their actions relative to Mr. Sansoucy's past, that has persuaded this board.

We begin by acknowledging the duties imposed upon the Board of Tax Appeals when reviewing a decision of the Tax Commissioner. The Tax Commissioner's findings are entitled to a presumption of correctness, and it is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St. 2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

As to the law relating to exceptions from taxation, exemption from tax is an exception to the rule that all property is subject to taxation, and therefore a statute granting such an exemption must be strictly constructed. *National Tube Co. v. Glander* (1952), 157 Ohio St. 407; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199.

The specific statutes under which the Tax Commissioner granted exemption were repealed in 2003 and reenacted as part of R.C. 5709.20 through 5709.27. Am.Sub. H.B. 95, eff. June 26, 2003. However, former R.C. 5709.45 through 5709.52 formed the basis of the exemption granted to the appellee utilities, and therefore will be considered by the board. R.C. 5709.46 permitted the Tax Commissioner to grant a thermal efficiency improvement certificate after application and review by the Director of Development. That section provided, in pertinent part:

“Application for a *** thermal efficiency improvement certificate shall be filed with the tax commissioner in such manner and in such form as he prescribes by rule. The application shall contain a narrative description of the proposed facility and descriptive list of all equipment and materials acquired or to be acquired by the applicant for the purposes of *** thermal efficiency improvement. In the case of a thermal efficiency improvement facility, the application shall include a descriptive statement identifying the estimated reductions in fuel or power usage or consumption that are likely to be realized through the construction of such thermal efficiency improvement facility ***. Prior to issuing a *** thermal efficiency improvement certificate, the tax commissioner shall obtain a written opinion regarding the application from the director of development. The director’s opinion shall include his determination of whether the estimated reductions in fuel or power usage or consumption, in the case of a thermal efficiency improvement facility *** are likely to be realized through the construction of the

facility named in the application. If the commissioner, after obtaining the opinion of the director of development, finds that the proposed facility was designed primarily for *** thermal efficiency improvement, is suitable and reasonably adequate for such purpose, and is intended for such purpose, he shall enter a finding to that effect and issue a certificate. The certificate shall permit tax exemption pursuant to section 5709.50¹ of the Revised Code only for that portion of such *** thermal efficiency improvement facility used exclusively for thermal efficiency improvement. The effective date of the certificate shall be the date of the making of the application for such certificate or the date of the construction of the facility, whichever is earlier, provided such application shall not relate to facilities upon which construction was completed on or before December 31, 1974.”

The definition for “thermal efficiency improvement” was found in R.C. 5709.45(C):

“Thermal efficiency improvement means the recovery and use of waste heat or waste steam produced incidental to electric power generation, industrial process heat generation, lighting, refrigeration, or space heating.”

“Thermal efficiency improvement facility” was defined in R.C. 5709.45(D) to mean:

“any property or equipment designed, constructed, or installed in a commercial building or site or in an industrial plant or site for the primary purpose of thermal efficiency improvement.”

The J.M Stuart & Killen Electric Generating Station (hereafter “Stuart”) is a thermal electric generating station with four 600,000-kilowatt boilers and a total capacity of 2,400,000 kilowatts. Stuart uses coal as its primary source of thermal energy. According to Mr. Chris Hergenrather, tax manager for Dayton Power & Light, the plant was placed in service in four phases. Portions of the plant went into

¹ Former R.C. 5709.50 exempted personalty covered by a thermal efficiency improvement certificate from sales and/or use tax, real property tax, if that personalty had become an improvement to land, personal property tax,

service in 1969. One production unit went into service each year beginning in 1971.
H.R. Volume I, at 40.

The process by which coal is converted to energy at Stuart was described by the Supreme Court² in *The Cincinnati Gas & Electric Co. v. Kosydar* (1974), 38 Ohio St.2d 71:

“The J.M. Stuart Station, when completed, will consist of four 600,000 kilowatt units for a total capacity of 2,400,000 kilowatts. J.M. Stuart Station is known as a thermal electric generating station and uses coal as the primary source of the thermal energy. Coal is received by barges on the Ohio River. The barges are delivered to the site and moored to structural piers. Tugboats move the barges to and from a coal barge unloader which unloads a barge in about 45 minutes. Each barge contains approximately 1,500 tons of coal. *** The coal is transported from the unloader by a conveyor to a stacker tower where the coal is stacked in a ready pile by the hoppers which are located around the stocker tower. *** Coal from the hoppers is moved by conveyors to the crusher tower where the coal is reduced to a maximum size of three quarter inches. Coal dust eliminating equipment is used to suppress dust along the conveyor transfer points to prevent explosions and for health reasons. The coal again is moved by conveyor, chutes and gates to surge bins and then into silos. ***

“There are six (6) silos for each unit and each silo feeds a coal pulverizer. The pulverizers grind the coal to the consistency of face powder. Each pulverizer grinds approximately 50 tons of coal per hour. From the pulverizer the coal is blown by means of the primary air fan through pipes to the furnace or boiler where the coal ignites. Fuel oil is also piped to the boiler for ignition fuel for start up and for use during unstable conditions in the furnace. ***

Footnote contd. _____
and as an asset for purposes of calculating value for franchise tax.

² The court quoted the board's description found in *The Cincinnati Gas & Electric Company, et al. v. Kosydar* (Oct. 1, 1973), BTA No. A 286, unreported, at 40-42.

“The air that is introduced into the boiler to support combustion passes through the boiler air pre-heaters which are a part of the boiler. This process takes waste heat from the hot gases exhausted from the combustion process and puts the heat back into the combustion process by means of the warm air. Without the use of the pre-heaters more coal would be needed in the burning process.

“Steam is produced in the boiler and is piped to drive the turbine. The mechanical energy of the turning turbine is transferred to the generator and electrical energy from the generator goes out over transmission lines to the customers.

“After energy is removed from the steam, the exhaust steam from the turbine must be condensed to water to continue the closed cycle process. This is done by circulating vast quantities of water (cooling water) from the river through thousands of tubes in the condenser where the steam gives up its heat to the water circulating tubes. The cooling water is then discharged back into the river.” Id. at 72-73.

A similar general description was provided at hearing by Mr. Thomas Coleman, P.E., an expert presented by the appellee utilities. H.R., Vol. II, at 12.

The appellee utilities divided their initial applications into two general groups, the Steam Generator Section and the Condensing Section. Under the Steam Generator Section, the equipment sought for exemption was further divided into three distinct systems; the economizer, the air preheater, and the reheater and reheater piping. The Condensing Section was, similarly, subdivided into the Main Condenser and the Circulating Water Systems. It is the appellee utilities' position that all equipment described qualifies as thermal efficiency improvements, as all the equipment is utilized to recapture waste heat from waste gases or liquids that would

otherwise be lost in the process of generating electricity. BTA No. 2002-M-170, S.T. at 15.

In explaining the mechanics of electricity production, Mr. Coleman also described the purpose that each of the various pieces of equipment in issue in the present appeals serves. Essentially, the production of energy begins in the boiler,³ or furnace, which heats water flowing through tubes. The boiler creates heated gas which reacts against tubes filled with water and creates steam.⁴ Once the hot flue gases are depleted of energy necessary to create the steam, the gases rise and are directed out of the boiler. These flue gases are not completely depleted of all energy, however, and the designers of power plants planned for the use of additional equipment to capture the energy that remains.

Reheaters, preheaters, and economizers utilize the energy remaining in the hot gases as those gases move through the system on their way to eventual expulsion through the chimney. The reheater reheats the same gases previously heated. Some of the reheated gases provide additional steam energy which is then sent to a low-pressure turbine. H.R., Vol. III at 20. The preheater heats fresh air as it travels into the furnace. The preheating of fresh air allows for less energy to be used in bringing the fresh air to combustion temperature, while still providing the oxygen

³ Mr. Coleman also explained the three mechanisms for heat transfer: radiation, convection, and conduction. Radiation is energy emitted by a single source. Convection heat is the transfer from a liquid or vapor fluid to a solid. Conductive heat is energy which passes through a solid by virtue of the nature of the materials itself. H.R., Vol. III, at 31.

⁴ The exhibits presented at hearing and used for descriptive purposes included a "steam drum." Mr. Coleman explained that Stuart, as a supercritical unit, did not employ a drum. "Essentially, it is a continuum flow as opposed to a boiler with recirculation." H.R., Vol. III at 10.

necessary for the combustion process. The economizer also is located near the reheater and preheater, but works on recirculated water from the steam system.

Steam is the force that generates electricity at Stuart. Steam is the source of power for the turbines, which are the source of power for the generator. When the steam is dissipated, a portion is reheated and pushed through a second turbine, and then collected in a condenser. At the condenser, the steam is returned to a liquid state. Eventually, the water is drained from the heaters to the main boiler feed pump. The water is then repressurized and passed through the economizer for continued heating. H.R., Vol. III at 22. The economizer is a piece of equipment that is heated by the flue gases and, in turn, heats the spent steam after that steam runs through the turbines before it is directed back into the system. H.R., Vol. III at 22.

Also in issue is a circulating water system. This system works as an adjunct to the main condenser to aid the condensation of waste steam exhausted from the turbines. H.R., Vol. III at 79.

R.C. 5709.45 defines "thermal efficiency improvement" as "the recovery and use of waste heat or waste steam produced incidental to electric power." While the Tax Commissioner granted exemption for the items here in issue, the appellant auditor initially argues that the exemption was improper because the equipment in issue does not recover or use waste heat or waste steam produced incidental to electric power production.

The main focus of the auditor's claim relates to the equipment described in the "Steam Generator" section of appellee utilities' applications. It is the auditor's

position that the energy contained by the flue gases that is captured by the heat exchangers, i.e., the air preheaters, the economizers, and the reheaters, after such energy is exhausted from the furnace fireball, is not "waste" heat. The auditor agrees that the flue gases are utilized a second time after combustion and as the gases move through the various pieces of equipment under consideration. However, the auditor argues the pieces of equipment listed on appellee utilities' applications were part of the original plant design and that original design was intended to capture the additional heat in the flue gases. It is the auditor's position that a highly efficient generating facility, like Stuart, is designed to capture as much heat from combustion as possible. Some of the heat is used immediately; some is used "downstream" by the various pieces of equipment in issue. As Stuart's original design was conceived with the intent to use the maximum amount of heat or energy existing in the heated flue gases, according to the auditor, the only heat that is "wasted" is that heat that escapes from the plant's chimney. The auditor argues that to capture "waste" heat, equipment must be placed in a plant's chimney and rerouted at that point. As much of the equipment under consideration in these appeals is located within the furnace system and none is in the chimney, the auditor argues that none of the equipment captures "waste heat" as is necessary to meet the definition of "thermal efficiency improvement." Thus, argues the auditor, no exemption certificates should have been issued.

To support his claim that no equipment exists which utilizes waste heat, the auditor presented the testimony and written report of George E. Sansoucy,

P.E. Mr. Sansoucy researched the plant's engineering drawings and the general equipment layouts of the plant, and reviewed the contracts for the purchase of the boiler and the various pieces of equipment in issue in these appeals. Mr. Sansoucy testified that he made the inquiries in order to understand the original design of the plant and the purpose of the equipment in issue.

After performing his research, Mr. Sansoucy concluded that the equipment under consideration in these appeals was not originally installed with the intent to utilize waste heat or waste steam. H.R., Vol. V at 34. Mr. Sansoucy concluded instead that it was the appellee utilities' intention to use all heat and steam available for the production of electricity. It is Mr. Sansoucy's opinion that when an electric generating facility is originally designed to utilize the maximum amount of heat and steam generated in the production of its product, none of the heat or steam utilized can then be defined as "waste."

When explaining how electricity is produced, Mr. Sansoucy described the furnace, or boiler, as containing two "heat transfer" regions: the main furnace where heat is transferred through radiation, and the convection pass where heat remaining in the hot gases after combustion "[is] controlled and retained." Appellant's Ex. 1, at 4. It is Mr. Sansoucy's position that both heat transfer regions are integral to the production of electricity and therefore equipment located in either the radiation section or convection section of the boiler cannot be defined as thermal efficiency improvement equipment. The emphasis in the foregoing sentence is on the word "improvement." It is Mr. Sansoucy's position that the design utilized by the

original planners of the Stuart plant was so accepted by the power industry that it is impossible to consider portions of the system without considering the system as a whole.

When considered as a whole, (i.e., two heat transfer regions), Mr. Sansoucy opines that all equipment used is critical to the production of electricity. It makes no difference to Mr. Sansoucy whether gases produced can or cannot be completely consumed in the making of steam or that the gases are redirected so that more energy can be captured. If the original designers intended for that additional energy to be used, then, according to Mr. Sansoucy, the energy is not superfluous or incidental to the production of electricity.

Mr. Sansoucy admitted that other industries, such as cement, paper, and mining, use extra heat left over when the processing of a particular product is completed. He gave the example of a paper mill:

“[I]n paper making you’ve got a big boiler, and you fire and make steam. And in order to do that efficiently you normally generate some electricity first from the steam and then you take it off the bottom of a very different turbine called an extraction turbine which the steam goes right through, take a little electricity off and then put the steam in those big dryers, and you heat the dryers so that you heat the paper roll and boil the water off the paper so you end up at the end of the roll with dry paper.

“Coming out of those dryers is a tremendous amount of waste steam, for example, that can’t be recaptured and there is [sic] waste heat recovery devices throughout paper mills, as an example, throughout refineries and these sorts of things, and it goes to the intent of the design and the construction of the boiler or the heat device.” H.R. Vol. V, at 74.

In contrast to the appellant auditor's position, where the emphasis is on the word "improvement," the appellee utilities place emphasis on the word "efficiency." Their claim is that electricity is produced by radiant heat – a boiler heats water, which produces steam, which operates a turbine. Under the appellee utilities' scheme, all energy not used in the initial run-through meets the definition of "waste heat." Thus, any equipment which captures that additional energy can be classified as thermal efficiency improvement equipment.

The equipment described in the applications in issue that is housed in the convection portion of the boiler all employs flue gases which pass through this area only after combustion takes place and the flue gases are exhausted from the furnace fireball. In essence, Mr. Coleman, the appellee utilities' expert, posits that all the equipment which forms the convection section of the furnace qualifies as thermal efficiency improvements, because all recover and use heat not used in the combustion section of the furnace, making such heat satisfy the definition of "waste heat."

The first issue which this board must decide is what is "waste heat." Is waste heat only that energy remaining after all energy originally intended to be captured? Or is waste heat all the energy that remains after initial combustion, even if that heat was intended to be used in Stuart to create electricity?

The parties have directed us to two of our own cases analyzing former R.C. 5709.45 and 5709.46 and the requirements which needed to be met in order to qualify for a thermal efficiency exemption certificate. In *Ford Motor Co. v Limbach* (Oct. 5, 1990), BTA No. 1988-B-105, unreported, the taxpayer applied for a thermal

efficiency certificate of exemption for equipment comprising an “energy management system.” The system centralized the control and monitoring of building heat and ventilation. The taxpayer argued that its system qualified under former R.C. 5709.45(C) as the system prevented the waste of heat or steam because it was designed to use less natural resources.

This board held that former R.C. 5709.45(C) defined a “thermal efficiency improvement” to be “one which recovers for further use what would otherwise be unused, superfluous heat or steam discharged as an incidental product of normal business operations.” The board continued, “[i]n accordance with Revised Code section 5709.46, the specified further use to which the recovered waste heat or waste steam must be put is the reduction of fuel or power usage or consumption.” *Id.* at 87.

This board then relied on a then-recent Supreme Court case concerning a similar type of exemption to affirm the Tax Commissioner’s denial of the thermal efficiency exemption. In *Cleveland Trinidad Paving Co. v. Limbach* (1990), 52 Ohio St.3d 101, the taxpayer applied for a solid waste energy conversion certificate for certain equipment used to extract petroleum from used asphalt. At the time, R.C. 5709.45(F) defined “solid waste energy conversion” as “[the] conversion of solid waste into energy and the utilization of such energy for some useful purpose.” The court found that the taxpayer converted used asphalt into a manufacturing component and not into energy. The board mirrored the court’s language in *Cleveland Trinidad*, finding that a thermal efficiency improvement is one that actually recovers waste heat

or steam and uses or consumes the waste heat or steam as an energy source. The result was to deny exemption for the building heating system, as there existed no recovery of heat, merely a lowered use of natural resources necessary to create heat.

In *The Lubrizol Corporation v. Limbach* (June 30, 1992), BTA Nos. 1988-J-907, et seq., unreported, the board considered the denial of exemption for purchases related to the replacement of a steam trap system and a waste heat recovery boiler. The taxpayer produced specialty chemicals. The steam trap system was installed to work in conjunction with a heating system which surrounded the processing pipes carrying the taxpayer's products. Heated steam was carried through a network of steam tubes. As the heat was used, the steam cooled and reformulated into water condensate. The newly installed traps were designed to collect the condensate and reintroduce the condensate to the boiler.

In reversing the Tax Commissioner's denial of exemption, the board distinguished *Ford Motor*, supra. The board concluded that the system installed by Lubrizol "physically collect[ed] and reuse[d] waste heat produced incidental to industrial heat generation." Id. at 10. The board concluded:

"Lubrizol's system actually accomplishes what the statute contemplates. It recovers waste heat (from the collected condensate) and then uses what would otherwise be superfluous heat discharged as an incidental product of normal industrial operations. When the collected condensate (at a temperature of approximately 20 degrees Fahrenheit) is reintroduced into the boiler system it requires less energy expenditure to create steam than does the heating of water introduced at a temperature of 60 degrees Fahrenheit." Id. at 11.

Finding that Lubrizol's system actually recovered waste heat or steam and used or consumed it as an energy source (the definition of "thermal efficiency improvement" derived from a reading of *Cleveland Trinidad*, supra), the board concluded that the thermal efficiency exemption certificate should be issued.

No definition of "waste heat" is found in the cited case law. Nevertheless, the Ohio Supreme Court has discussed the process by which the Stuart facility generates electricity. In that discussion, the court used the term "waste heat" when describing gases exhausted from the combustion process. The court then explained that the "waste heat" (which at this juncture is referred to only as "heat") is returned to the combustion process by means of the warm air. *Cincinnati Gas & Elec.* supra, quoted in full, supra. The language used by the court would suggest that it does not read R.C. 5709.45 in the same narrow fashion, i.e., defining "waste heat" as only that heat which is never intended to be used, as suggested by the auditor.

While "waste heat" is a term generally used by industry professionals in both scholarly and marketing material, the term is rarely defined. Appellee utilities offered the McGraw-Hill Dictionary of Scientific and Technical Terms, Second Ed., (1978), which defines "waste heat" as "sensible heat in gases not subject to combustion and used for processes downstream in a system." In *Lubrizol*, the board effectively defined "waste heat" as "what would otherwise be superfluous heat discharged as an incidental product of normal industrial operations." *Id.* at 11. Applying these definitions to the present matter, it is clear that "waste heat" encompasses all heat not utilized initially in the production of electricity.

This definition will allow far more equipment to qualify for exemption than suggested by the auditor. Moreover, the auditor's witness admitted that much of the same equipment under consideration in the present appeals could, in other plants and under other placements, qualify as equipment used in waste heat recovery. Mr. Sansoucy placed emphasis on the intent of the designers of a particular plant, suggesting that if the original design had discussed "waste heat" or "waste steam" he may have suggested a different outcome. H.R. Vol. VI, at 69. However, the board does not find "intent" of the designers to be a required element of exemption. Certainly, thermal efficiency equipment must be used primarily for waste heat or waste steam recovery. However, even if the original design of the plant used heat transfer equipment so accepted by the utility industry that the designers utilized the equipment without discussion of such equipment as "thermal efficiency improvements," (indeed the statute was not yet written when the original design of the plant was envisioned), the equipment installed does employ heat produced by combustion but which cannot all be used to produce electricity through radiation. It is the board's conclusion that the production of electricity creates waste heat. Thus, equipment that recovers waste heat and reuses it in the further production of electricity meets the definition of "thermal efficiency improvement," whether built into the original design or conceived as an add-on after the plant is placed into service.

We also do not agree with the appellant's claim that the amount of recaptured waste heat and the additional energy produced by the recaptured waste

heat are so significant to the production goals at Stewart that this board must find that the heat use is essential to the production of electricity. R.C. 5709.45 requires the production of waste heat to be "incidental to" the production of electricity. We read that language to require the heat to be produced as a natural consequence of producing electricity. We reject the auditor's position that the language prohibits the exemption of any equipment operating on waste heat if the amount of additional heat produced is significant.

Having made this finding, the board must now consider other impediments to exemption. Initially, appellant asserts as one of his specifications of error that the certificate(s) refer to machinery, equipment, and property that were completed prior to December 31, 1974. The date is critical, as R.C. 5709.46 provides:

"The effective date of the certificate shall be the date of the making of the application for such certificate or the date of the construction of the facility, whichever is earlier, provided such application shall not relate to facilities upon which construction was completed on or before December 31, 1974."

We first note that the parties agree that any piece of equipment installed prior to 1974 should not have been included on the original application nor on the exemption certificate eventually granted.⁵ R.C. 5709.46 excludes facilities upon which construction was completed on or before December 31, 1974. The appellee utilities

⁵ We would also note that two of the certificates in issue in the present appeal are made effective as of January 1, 1970. The effective date of the certificate does not, however, control what is actually entitled to exemption. Instead, the application controls, as is confirmed by the next sentence of the statute, to wit, "the application shall not relate to facilities upon which construction was completed on or before December 31, 1974." As a review of the application reveals only two items which were placed into service prior to December 31, 1974, the board finds that removal of the items prior to that date will satisfy R.C. 5709.46.

acknowledged at hearing that the original applications included capital costs related to equipment installed prior to December 31, 1974. Those items must be removed from exemption.

The Tax Commissioner has raised a complementary argument by way of brief. The Tax Commissioner now asserts that the exemption was granted under the assumption that the application covered facilities constructed post-December 31, 1974. Had he known that the facilities for which exemption was sought were not post-December 31, 1974 facilities, the Tax Commissioner claims he would not have granted exemption for the equipment unless the appellee utilities could show some increase in efficiency arising from the newly installed equipment. As the equipment before this board is replacement equipment and as the Stuart plant was designed to operate at such a high efficiency, the Tax Commissioner now believes that the equipment cannot show an improvement to efficiency. Therefore, the Tax Commissioner now argues, the equipment should not have been granted exemption.

The Tax Commissioner's new position has precipitated both a request to remand the matter for a new determination (sought by the auditor) and a motion to strike the brief by which the position was taken (sought by the appellee utilities). The board denies both motions.

We first consider the auditor's motion to remand.⁶ The auditor argues that when the Tax Commissioner later learns, through hearing or otherwise, that

⁶ The motion under consideration is actually the auditor's second request for remand. The first request was denied October 5, 2002. Through the first request, the auditor sought remand and vacation of the certificate of

information upon which he relied in making a determination was erroneous, the Board of Tax Appeals should remand the matter to the commissioner so that he may issue a new determination based upon correct factual information.

The auditor refers to R.C. 5717.03. That statute provides:

“(F) The orders of the board may affirm, reverse, vacate, modify, or remand the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals determined by the board, and the board’s decision shall become final and conclusive for the current year unless reversed, vacated or modified as provided in section 5717.04 of the Revised Code. ***

“(G) If the board finds that issues not raised on the appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination and the issuance of a new tax assessment, valuation, determination, finding, computation, or order, unless the parties stipulate to the determination of such other issues without remand.¹”

The board first notes that the Tax Commissioner has not suggested that this matter should be remanded to him for a new determination. Instead, the commissioner has suggested that factual information in the record now compels a different result. We agree with the Tax Commissioner that the record before this board is sufficient for us to consider his claim. Therefore, remand is not warranted.

We now consider the appellee utilities’ motion to strike.⁷ The appellee utilities make a number of arguments to prevent consideration of the Tax

Footnote contd. _____
exemption, claiming, inter alia, that some of the items for which exemption was granted were constructed and installed prior to December 31, 1974. This board denied the motion as premature.

⁷ We indicated earlier in this decision that any motion to supplement the record that had not been withdrawn was now denied. We take this opportunity to specifically address the submission by the appellee utilities on May 10, 2007. Appellee utilities suggest that the Ohio Supreme Court’s ruling in *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1941, is relevant to their claim

Commissioner's analysis. However, we must find that the Supreme Court's pronouncement in *Key Services, Corp. v. Zaino* (2002), 95 Ohio St.3d 11, refutes the appellee utilities' position.

Key Services concerned a refund action. The Tax Commissioner denied an application for refund, basing his denial on a single finding. However, when the taxpayer challenged the refund denial, the Tax Commissioner sought information through discovery which would have allowed him to dispute the refund request on grounds other than the narrow one upon which he originally relied. This board prohibited the Tax Commissioner from obtaining through discovery factual information which could possibly have led to additional grounds upon which to deny the taxpayer's refund request. The Supreme Court held that this board's actions were taken in error:

"There is no statutory procedure for the Tax Commissioner to file any answer or cross-appeal to the taxpayer's notice of appeal. *Likewise, there is no statutory limitation on what the commissioner may contest.* The only statutory constraints are imposed upon the appellant's appeal to the BTA.

"The BTA hearing is de novo. *Higbee Co. v. Evatt* (1942), 140 Ohio St. 325, 332 ***. The BTA is statutorily authorized

Footnote contd. _____
that the Tax Commissioner's position regarding reversal of the exemption cannot be considered by this board. We do not agree. The court's ruling related to the ability of an aggrieved party to challenge a finding before the court through its notice of appeal and specified error. The court held that only an aggrieved party may challenge a determination made by this board. As the particular finding identified by the appellant in that matter worked to its favor, the court found that it would not have been the proper party to raise the potential error.

The court's holding is relevant to any appeal from this board's determination. Should the Tax Commissioner deem this board's determination in error, he would have the right to appeal. The court's holding makes it clear that the Tax Commissioner could not depend upon a non-aggrieved party to protect his interests. However, the court's holding does not address the concerns the Tax Commissioner may raise before this board. That issue is fully discussed in *Key Services*.

to conduct full administrative appeals in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner. *Bloch v. Glander* (1949), 151 Ohio St. 381, 387 ***. The BTA may investigate to ascertain further facts and make its own findings independent of those of the Tax Commissioner. *Nestle Co., Inc. v. Porterfield* (1971), 28 Ohio St.2d 190, 193 ***. R.C. 5717.03 authorizes the BTA to modify orders based upon its independent findings. *Id.*” *Id.* at 13. (Emphasis added and parallel citations omitted.)

While the appellee utilities argue that the holding in *Key Services* should be limited to those appeals in which the Tax Commissioner is attempting to support his initial determination, rather than appeals in which the Tax Commissioner is arguing against his initial determination, we can find no language in the decision that supports that position. Instead, the language used by the court is all encompassing. If there are no statutory limits, then the Tax Commissioner must be permitted to review the evidence presented and argue for the position he believes the facts warrant.

As to the substance of the Tax Commissioner’s claim, he now suggests that equipment for which he granted exemption was installed in a “facility” that was designed, constructed, and installed prior to December 1974. The commissioner is correct when he states that R.C. 5709.46 excludes facilities upon which construction was completed on or before December 31, 1974. The board does not, however, agree with the commissioner’s claim that the equipment now under consideration was installed in a “facility” which was completed prior to 1975. The definition of a “thermal efficiency improvement facility” is found in R.C. 5709.45(D); thus the board

must define the word "facility" as used in R.C. 5709.46 in harmonization with R.C. 5709.45(D).

R.C. 5709.45(D) defines "thermal efficiency improvement facility" as "any property or equipment designed, constructed, or installed in a commercial building or site *** for the primary purpose of thermal efficiency improvement." (Emphasis added.) R.C. 5709.45(D) does not define a "thermal efficiency improvement facility" as one "originally" designed, constructed, or installed in a building or site. Instead, the statute leaves open the possibility that property or equipment may be replaced or improved during the life of the commercial or industrial (or electric generating) site. Thus, we agree with the appellee utilities that the term "facility" must be read to refer to the actual equipment and not the plant.

The Tax Commissioner next argues that equipment placed into service after December 31, 1974 can only be granted exemption if the equipment somehow improves the thermal efficiency of the plant as a whole. The appellee Tax Commissioner states in his brief "the exemption is not for replacement parts and equipment for the pre December 1974 facility that do not [sic] increase the efficiency of the plant." Appellee Tax Commissioner's brief at 40.

To support his claim that only parts which increase efficiency are entitled to exemption, the Tax Commissioner first cites the deposition of the engineer reviewing the original application on behalf of the Ohio Director of Development. Pursuant to R.C. 5709.46, all thermal efficiency applications must be reviewed by the Director of Development who must provide a written opinion to the Tax

Commissioner. The statute requires the director's opinion to include a determination of whether the estimated reductions in fuel or power usage or consumption are "likely to be realized" through the construction named in the application. The Director of Development delegated the review of appellee utilities' applications to Dr. Abdur Rahim, Ph.D., P.E., who provided an opinion that the estimated reductions included in the application were probable.

At his deposition, Dr. Rahim did state that replacement parts were handled differently from new parts. As cited by the Tax Commissioner, Dr. Rahim stated "In other words, you don't get credit for replacing." Rahim Deposition at 50.

In full context, however, the statement takes on a different meaning. It appears that Dr. Rahim was attempting to distinguish parts for which exemption had been previously granted from parts for which no exemption had been previously allowed. Dr. Rahim clearly stated that it was the tax department itself which was responsible for assuring that property was not credited twice. In full context, the questioning proceeded:

"Q. If you were to assume that virtually every asset on these pages was simply a replacement of an existing pipe or existing piece of equipment or a repair –

"A. Yeah.

"Q. – or a maintenance item, would that impact or effect [sic] your opinion as to whether or not this equipment qualifies as a thermal efficiency facility?

"A. Yeah, it does, because what I do in that case I write down in the page on my findings I say that this particular equipment has been replaced and is supposed to have a

previous tax exemption for like maybe four million and then they are not claiming two more million. What they do is they go back and deduct from that old one. *In other words, you don't get credit for replacing.*

“Q. What if you have an exemption on a facility and pipe needs to be replaced every ten years and they replace the pipe. Do you know how that works? Are they given full credit for the pipe, the new pipe?

“A. See, this is close to what they call replacement parts, and, again, I don't work with this one. Department of Taxation decides this. At one time they decided, no, replacement parts cannot be given.” Rahim Deposition at 50-51. (Emphasis added.)

Dr. Rahim's statements lend little support to the Tax Commissioner's claim that replacement parts should not be granted exemption. Dr. Rahim appears to understand the concept that a taxpayer may not obtain an additional exemption for property replaced if any exemption for the replaced property remains. Stated more clearly, an exemption ultimately relates to an exclusion of value and if the replaced part is not fully removed from total value, then there is the potential for a “double deduction.” Dr. Rahim does suggest that the tax department did not allow a “double exemption.” Nothing within this exchange, however, supports the Tax Commissioner's claim that replacement property for equipment never before exempted cannot receive exemption.

By way of memorandum contra to appellee utilities' motion to strike, the Tax Commissioner argues that *Timken Co. v. Lindley* (1980), 64 Ohio St.2d 224, lends support for his position that equipment installed after the date upon which a statute grants exemption but which replaces equipment installed prior to the date upon

which a statute grants exemption is not entitled to the exemption granted by that statute. *Timken* considered the availability of pollution control exempt status to two replacement boilers. The court, in construing the pollution control exemption statute, concluded that the replacement boilers were not entitled to exempt status. R.C. 5709.20(B) at the time defined an "air pollution control facility" as "**** any property designed, constructed, or installed *for the primary purpose* of eliminating or reducing the emission of, or ground level concentration of, air contaminants which renders air harmful or inimical to the public health or to property within this state." The court concluded that the purpose of the newly installed boilers was to aid in the manufacturing process. Thus, the construction of the boilers was not primarily for pollution control.

The court, however, was careful to permit exemption for monitoring devices, as those devices met the definition of pollution control as expressed in the statutes. The court denied exemption to property which did not meet the definition of pollution control.

Timken instructs this board to look to the definitions found within R.C. 5709.45 and 5709.46 to determine exempt status. Within those sections, there is no requirement that thermal efficiency equipment installed after the completion of the original plant must somehow be better or more efficient than the property replaced. Thus, we can find no support for the Tax Commissioner's claim that replacement property must create more efficiency.

The final task for the board is to consider the individual components and to determine whether the components themselves qualify for exemption. We find that all components listed in appellee utilities' original applications meet the definition of thermal efficiency improvements except for those included with the circulating water system.

The original applications indicate that the condensate system, the condensate cleanup system, the condensate makeup system, and the circulating water system are all systems which support the condensers. The application acknowledges "All of these supporting systems,⁸ however, do not constitute thermal efficiency improvements and are therefore, only included in this narrative to give a better general understanding of condenser system and processes." BTA 2002-M-170, S.T. at 23.

This acknowledgement is further supported by Mr. Michael Harrell's deposition, which was read into the record on the first day of hearing. Mr. Harrell explained that the purpose of the circulating water system was to send cold water to the condenser, and begin the process by which steam returns to a liquid state. H.R. I, at 94. The system is a series of pipes and a condenser that extracts water from the river or from the cooling tower and takes the water through the condenser and releases

⁸ In his deposition, Mr. Harrell states that the statement in the application referred only to the condensate system, the condensate cleanup system and the makeup system, not the circulating water system. However, the board finds that the circulating water system does not recover and use waste heat. We also note that the condenser is separately listed on the cost sheets. The condenser is separate from the circulating water system and acts upon waste steam. H.R. IV at 28-32.

it back into the river or cooling tower. H.R. I, at 96. The condensate cleanup system consists of demineralizers and polishers that are used to remove impurities in the river water before the water enters the boiler cycle. H.R. I, at 95. The condensate makeup system is a series of pumps and piping that takes water from deep wells and brings the water to the system. H.R. I, at 96.

Appellee utilities' applications for exemption do not identify any estimated fuel reductions that are likely to be realized through the use of the circulating water system and attendant components; thus this section of equipment does not meet the requirements of R.C. 5709.46. Appellee utilities' expert, Dr. Thomas Coleman, also admitted that there is no recapture of waste heat and waste steam in the demineralization process. H.R. IV, at 35. As the circulating water system does not recover or use waste steam, the system does not qualify as a thermal efficiency improvement.⁹

The applications submitted include five pages identifying equipment claimed to be exempt. There are costs associated with a "circulating water system." Those costs must be removed from the exemption.

These amounts, along with any cost for equipment installed prior to 1975, must be removed from the exemption. Except for these items, the exemption

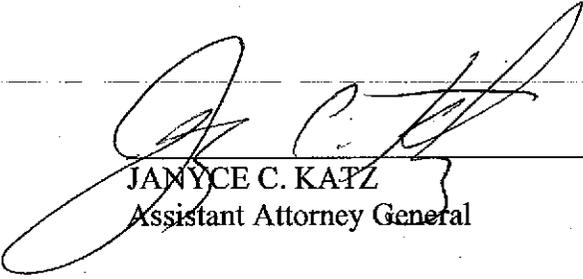
⁹ At hearing the appellee utilities' witness indicated that the condenser was a part of both the condensate system and the circulating water system. H.R. IV at 84. The condenser itself is entitled to exemption. However, the circulating water system consists of separate pieces of equipment that are not in and of themselves thermal efficiency improvements.

granted by the Tax Commissioner is affirmed. Any motions that have not been individually addressed are denied.

ohiosearchkeybta

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Appeal was sent by certified U.S. mail to David C. DiMuzio, 1900 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202, attorney for appellant and to Anthony L. Ehler and Jeffrey Allen Miller, Vorys, Sater, Seymour & Pease LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, attorneys for Appellee Utilities, on this 18th day of June, 2007.



JANYCE C. KATZ
Assistant Attorney General

In The Supreme Court of Ohio
Case Information Statement

Case Name: Carroll E. Newman v. Wilkins	Case No.: _____
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I. Has this case previously been decided or remanded by this Court? Yes No

If so, please provide the Case Name: _____
Case No.: _____
Any Citation: _____

II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes No

If so, please provide the Case Name and Citation: *The Cincinnati Gas & Electric Co. v. Kosydar* (1974), 38 Ohio St.2d 71; *Cleveland Trinidad Paving Co. v. Limbach* (1990), 52 Ohio St.3d 101; *Timken Co. v. Lindley* (1980), 64 Ohio St.2d 224; *Sun Oil Co. v. Lindley* (1978), 56 Ohio St.2d 313, 317 *National Tube Co. v. Glander* (1952), 157 Ohio St. 407; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199. **Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court?** Yes No If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

U.S. Constitution: Article _____, Section _____ **Ohio Revised Code:** former R.C. 5709.45, R.C. 5709.46; R.C. 5709.47; R.C. 5709.48; R.C. 5709.49; R.C. 5709.50 **Ohio Constitution:** Article _____, Section _____

Court Rule: _____

United States Code: Title _____, Section _____ **Ohio Admin. Code:** O.A.C _____ (former) 5703-1-09

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):

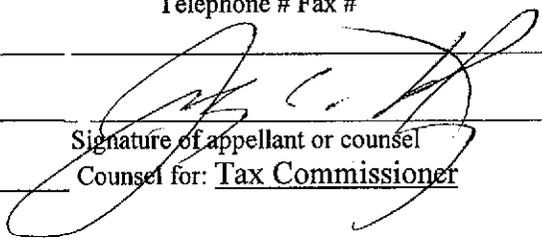
1) thermal
2) Exemption

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes No

If so, please identify the Case Name: _____
Case No.: _____
Court where Currently Pending: _____
Issue: _____

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City	State Zip Code	Counsel for: Tax Commissioner



IN THE SUPREME COURT OF OHIO

Appeal from the Board of Tax Appeals

CARROLL E. NEWMAN,
Adams County Auditor,

Appellant,

v.

WILLIAM W. WILKINS,
TAX COMMISSIONER OF OHIO,

Appellant,

Case No. _____

Appeal from BTA Case
Nos. 2002-P-170, 171, 172

v.

ELECTRIC COMPANIES CINCINNATI GAS
& ELECTRIC COMPANY; THE DAYTON
POWER & LIGHT COMPANY; AND
COLUMBUS SOUTHERN POWER
COMPANY,

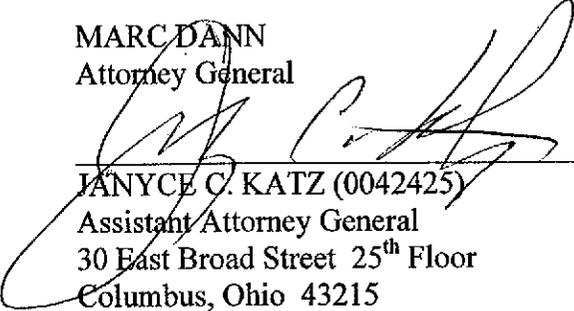
Appellees.

PRAECIPE

Demand is hereby made that the Ohio Board of Tax Appeals prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the record of the proceedings of the Board pertaining to its decision and order in the above-styled matter, including in the certified transcript its journal entry, the original papers in the case or a transcript thereof and all evidence with originals or copies of all exhibits as adduced in the proceedings considered by the Board in making its decision and order.

Respectfully submitted,

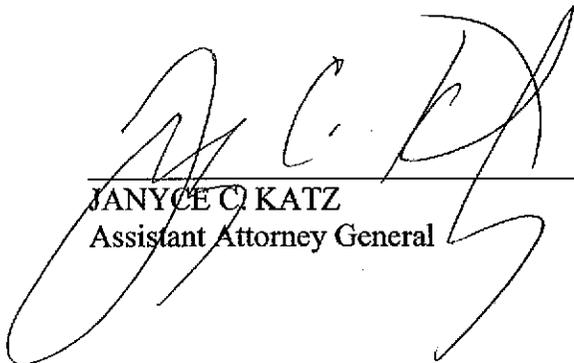
MARC DANN
Attorney General



JANYCE C. KATZ (0042425)
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Telephone: (614) 466-5967

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Praecipe was sent by certified U.S. mail to a true copy of the Notice of Appeal was sent by certified U.S. mail to David C. DiMuzio, 1900 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202, attorney for appellant and to Anthony L. Ehler and Jeffrey Allen Miller, Vorys, Sater, Seymour & Pease LLP, 52 East Gay Street, P. O. Box 1008, Columbus, Ohio 43216-1008, attorneys for Appellee Utilities, on this 18th day of June, 2007.



JANYCE C. KATZ
Assistant Attorney General